

DOCKET NO. 097-SE-1123

STUDENT b/n/f PARENT, Petitioners	§	BEFORE A SPECIAL EDUCATION
	§	
	§	
v.	§	HEARING OFFICER FOR
	§	
NEW CANEY INDEPENDENT SCHOOL DISTRICT, Respondent	§	THE STATE OF TEXAS
	§	
	§	

DECISION OF THE HEARING OFFICER

I. Statement of the Case

This matter concerns an expedited claim brought by Petitioner pursuant to the Individual with Disabilities Education Act [hereinafter IDEA] and its implementing state and federal regulations, for violations of the Act. In particular, the issue in this case is whether the District violated the IDEA by failing to: comply with its Child Find obligations; develop an Individual Education Plan (IEP) including the provision of related services; failure to conduct a Manifestation Determination Review (MDR) as to disciplinary placement; and comply with procedural obligations under the IDEA and related laws. Petitioner also filed this case against the Texas Education Agency (TEA) and Mike Morath, both of whom were dismissed in accordance with their Motion to Dismiss.

The hearing officer finds that the Respondent District complied with all Child Find obligations, that there was no obligation to conduct an MDR pursuant to IDEA, and that the District did not commit a procedural violation of IDEA.

II. Procedural History

Petitioners, Student, b/n/f Parent (collectively, Petitioner), filed a request for an expedited impartial due process hearing (the Complaint) pursuant to the Individuals with Disabilities Education Act (IDEA).

The Complaint was received by the Texas Education Agency (TEA or Agency) on the 27th day of November 2023, and the Notice of Filing of Request for a Special Education Due Process Hearing was issued by TEA on November 28, 2023. The Respondents to the Complaint were the New Caney Independent School District (hereinafter District or Respondent); the Texas Education Agency (TEA) and Mike Morath. The Agency assigned the matter to this Hearing Officer, who

then issued the Initial Expedited Procedural Scheduling Order on November 29, 2023. A detailed procedural history is set forth below in Section D, noting all of the preliminary matters addressed by the parties and the hearing officer.

The case proceeded on the expedited schedule, and the parties timely made their respective disclosures. Upon the conclusion of the hearing, on December 22, 2023, Order No. 6 was then issued and set forth the schedule for post-hearing briefs and the decision due date, that being January 15, 2024 and January 23, 2024, respectively.

A. Representatives

Petitioner was represented throughout the case by counsel, Ms. Janelle Davis, of Janelle L. Davis Law, PLLC. The Respondent District was represented by Erik Nichols and Matthew Acosta of Spalding Nichols, Lamp & Langlois.

B. Mediation and Resolution

The parties participated in a Resolution Session on December 5, 2023, and no agreement or resolution was reached at that time. The parties declined to participate in mediation.

C. Continuances

As this matter was filed as an expedited matter, it proceeded as scheduled, as there were no continuances requested or granted.

D. Preliminary Matters

After the issuance of the Initial Expedited Scheduling Order, Petitioner, on December 5, 2023, filed a Motion to Compel. On December 6, 2023, the Respondent District filed its Response to the Complaint and to the Motion to Compel. The Response also included a Plea to the Jurisdiction and Motion to Dismiss the expedited case. On December 7, 2023, Respondents TEA and Morath filed their Response, Plea to the Jurisdiction and Motion to Dismiss. The Pre-hearing Conference (PHC) was held on December 8, 2023, at which time the parties agreed to collaboratively resolve the Motion to Compel. During the PHC, the issues raised by the District were considered by the hearing officer, and those matters outside of the hearing officer's jurisdiction were dismissed in the Order No.2, issued on December 12, 2023. Also, during the PHC Petitioner requested an opportunity to respond to the Motion to Dismiss lodged by Respondents TEA and Morath. Petitioner's Response was duly filed on December 9, 2023. On December 13, 2023, Order No. 3 dismissing Respondents TEA and Morath was issued.

Thereafter, the parties made their respective disclosures on December 12, 2023 in accordance with the Scheduling Order. On December 18, 2023, Respondent filed objections to a number of the Petitioner's exhibits. Several of those exhibits objected to were not offered, as they were relevant only to the dismissed Respondents. Thus, of those remaining Petitioner's Exhibits, all were admitted into evidence except for P.1. Parts of P.1 were then admitted into evidence during the hearing. All of the Respondent's Exhibits were admitted, as no objections had been filed. Finally, all of the fourteen Joint Exhibits were admitted into evidence.

Further, the Petitioner, on December 19, 2023, filed a Motion to Compel the attendance at the hearing of a previously identified witness. The Respondent District filed a Response, and eventually the parties agreed to a date and time for his appearance. Order No. 4, enforcing the agreement and ordering the Witness to appear at the hearing on December 21, 2023 was then issued on December 20, 2023.

It was also noted by the parties and the hearing officer that a due process hearing was held on May 22 & 23, 2023, which involved the same parties and many of the same or similar issues. The decision in that matter was issued on July 6, 2023. Therefore, only those issues arising after May 23, 2023 are the subject of this due process proceeding as set forth in Order No. 5 issued December 20, 2023.

The due process hearing (DPH) was then conducted on December 20 and 21, 2023 on the Zoom platform. The Petitioner continued to be represented by Ms. Janelle Davis. Also attending the hearing were Ms. Debra Liva, who is the non-attorney advocate for the family, and the Student's parent, ***. The Respondent District continued to be represented by its legal counsel, Mr. Erik Nichols and Mr. Matt Acosta. Ms. ***, Director of Special Education for the District was present as District Representative. Mr. ***, the Lead Licensed Specialist in School Psychology (LSSP) for the District, was also present during the hearing, and was identified as the District's Expert Witness, although he was never called to testify.

During the Due Process Hearing, the Petitioner offered the testimony of Ms. ***, who testified about the request for an evaluation; Ms. ***, Ms. ***, and Mr. ***, the three evaluators who testified about the evaluation; and ***, the Student's Parent, who testified about Parent's requests to the District and Parent's understanding of the evaluation and findings. Respondent called no witnesses, and it rested upon conclusion of the presentation of Petitioner's case.

E. Post Hearing Matters

Upon the conclusion of the presentation of evidence, but prior to closure of the hearing, the parties discussed the requisite time for receipt of the transcript, filing closing briefs, and the final decision. As the final decision date cannot be modified, and it was agreed that the transcript of the hearing would be received no later than December 31, 2023, and that Petitioner's and Respondent's Closing Briefs were due no later than January 15, 2024. The Decision is due no later than January 23, 2024, and Order No. 6 establishing these deadlines was then issued on December 22, 2023. The decision is now being issued in compliance with the due date.

III. Issues

A. Petitioner's Issues

Petitioner alleges that the District has denied Student a free, appropriate public education (FAPE) by its failure to comply with its Child Find obligations.

The allegation of a denial of FAPE consists of both substantive violations of IDEA as well as procedural violations. More specifically, Petitioner's claim consists of the following components, and issues for hearing:

- Whether the District violated its Child Find obligations in failing to timely evaluate Student in all areas of suspected disability or need, including Autism;
- Whether the District violated the IDEA by failing to develop an Individual Education Plan (IEP), including the provision of educational and related services;
- Whether the District violated Child Find in failing to timely complete a Functional Behavior Assessment (FBA) for the Student;
- Whether the District violated IDEA by failing to develop a Behavior Intervention Plan (BIP) for the Student;
- Whether the District violated the IDEA by failing to conduct a Manifestation Determination Review (MDR) for the Student prior to Student's placement at the Disciplinary Alternative Education Program (DAEP); and
- Whether the District failed to comply with procedural obligations under the IDEA and related laws.

B. Petitioner's Requested Relief

While Petitioner requested a number of remedies in the Petition, many were outside of the hearing officer's jurisdiction, and therefore cannot be considered in this due process hearing. As the two other Respondents were dismissed prior to the due process hearing, the requested relief pertaining to them is not included here. The following were requested:

- Find that the Petitioner’s rights under Child Find have been violated;
- Find that the Student’s right to FAPE has been violated;
- Find that the recommended Disciplinary Alternative Education Program (DAEP) placement is not the least restrictive environment with appropriate supports to meet the Student’s needs;
- Order that the Student ‘stay put’ is this current placement rather than the DAEP;
- Order an Independent Educational Evaluation (IEE) to be performed by the Petitioners’ provider of choice in the areas of cognitive ability and achievement for all suspected or known disabilities including autism, ADD, ADHD, occupational therapy to include sensory and/or handwriting, speech therapy, and a functional behavior and physical evaluation to determine needs at District expense with no limitations;
- Order the District to develop an FBA in consultation with a Board Certified Behavior Analyst (BCBA);
- Order an ARD to occur after completion of an IEE and FBA to review evaluation and establish specific and measurable goals to address Student’s unique needs;
- Any and all other remedies that Petitioners may be entitled to under the law including attorneys’ fees.

C. Respondent’s Issues and Legal Position

In addition to a general denial, Respondent District specifically pointed out that it did evaluate the Student and that the conclusion was that the Student did not qualify (DNQ) for special education, as the evaluation found no IDEA eligibility criteria. The District further contends that, as a result, the Student is not entitled to the manifestation determination protections under the IDEA, as the Student is not eligible for special education. In addition, the District also points out that the IDEA provision that the District ‘should have suspected or is deemed to have suspected’ is nullified once an evaluation has determined that the Student does not qualify as a Child with a disability under the IDEA. As the Student did not qualify, no obligation to provide such under the IDEA existed. Likewise, the Respondent contends that since the Student did not qualify for special education, then the obligation to provide FAPE does not exist, as Student is not a student with a disability, who, by reason of that disability, needs special education.

IV. Findings of Fact*

1. The Student resides with Student's Parent within the boundaries of the New Caney Independent School District [hereinafter NCISD or District]. Student is *** years old, and, at the time of the issues in question in this case was in the ***grade at *** within the District.¹
2. On May ***, 2023 the Student's parent requested a special education evaluation, specifically a Full and Individual Initial Evaluation (FIIE). After considerable correspondence concerning the evaluation, some of which included the parties' attorneys, the consent was signed and returned to the District on July ***, 2023. The request requested the evaluation to include: Autism, Speech, Occupation Therapy (OT), and a Functional Behavioral Analysis (FBA).²
3. The FIIE was done during the months of September and October, 2023, and the areas of suspected disability were specific learning disability in reading and math as well as speech, psychological and emotional disturbance. A total of three evaluators conducted various portions of the evaluation. The FIIE was completed on October ***, 2023.³
4. The three evaluators, a multi-disciplinary team, were Ms. ***, Ms. ***, and Mr. ***. Each of the evaluators completed portions of the evaluation, collaborated and on October ***, 2023, discussed the results with the Student's parent.⁴
5. Ms. ***, an educational diagnostician for the District was assigned to the *** Campus on August 2023. She conducted and completed the portion on cognitive achievement testing as well as adaptive behavior.⁵
6. The evidence showed that Ms. *** conducted a number of assessments in the areas of cognitive achievement, including auditory processing, fluid reasoning, short-term memory, long-term retrieval, crystallized intelligence, processing speed and adaptive behavior. She also used a variety of instruments for the evaluation.⁶

*References to the Due Process Hearing Record throughout this section are as follows: Citations to Petitioner's Exhibits and Respondent's Exhibits are designated with a notation of "P" or "R" respectively, followed by the exhibit number or letter and page number. Citations to Joint Exhibits are designated with a notation of "J" and followed by the exhibit number and page number. Citations to the transcript are designated with a notation of "T" followed by the page number.

¹ J.3, J.4.

² T.23. 26; J.1. P.1:69-79, 88.

³ J.4:029-030.

⁴ T.82; J:13; P.1:6.

⁵ T. 43; 45-46; J.4:29-30.

⁶ T.46-51; J.4:029-030, 053-068.

7. Ms. *** testified that the Student's scores were low to very low in a number of areas, including intellectual functioning, crystallized intelligence, fluid reasoning, short-term memory and auditory processing.⁷
8. She also testified that these findings can impact a student's decoding, spelling, reading comprehension, solving word problems, and cause difficulty with multi-step directions.⁸
9. The Kaufman Text of Educational Achievement demonstrated that the Student had a deficit in basic reading skills, low writing performance, and had a deficit in math.⁹
10. The Student's overall Intelligence Quotient (IQ) was noted to be in the lower range, and thus Ms.*** also did another assessment with regard to adaptive behavior, as a determination of intellectual functioning and adaptive behavior are both necessary in the IDEA definition of Intellectual Disability. The results demonstrated that the Student did not qualify as a child with an Intellectual Disability (ID).¹⁰
11. With regard to adaptive behavior, the scores were comprised on rating scales completed by the Student's teacher as well as Student's Parent.¹¹
12. The scale that was completed by the Student's Parent showed no concerns with Student's adaptive behavior, although the teacher's scale appeared to show some deficit. When considered together, the overall result failed to demonstrate ID.
13. In her testimony, Ms. *** explained that the results indicate that the Student did not qualify as a Student with a disability since Student did not meet the criteria for an Intellectual Disability. She also noted that Student did not meet the criteria for a Specific Learning Disability.¹²
14. Evidence also showed that when Student was administered the cognitive testing, the Student often declined to respond. While this did not invalidate the score, such conduct may have contributed to the low scores.¹³
15. Ms. ***, a speech language pathologist with the District, conducted the speech portion of the evaluation. Several aspects of the assessment were done including pragmatic, receptive and expressive language, and articulation.¹⁴

⁷ T.46-48; J4: 053-058, 065.

⁸ T.48.

⁹ T. 55; J.4:061, 065-066.

¹⁰ T.68-75; J.4:

¹¹ T.46; J.4.060.

¹² T.57-60; J.4:071; J.13.

¹³ T.43 ; J.4:053.

¹⁴ T.97; J.4:030-035.

16. In one of the components of the speech evaluation, the Student had an extremely low score, which caused Ms. *** to then follow up with additional two assessments. Based upon the entirety of this testing, it was found that no disability existed within speech and language.¹⁵
17. Ms. *** explained that the student did not present as a student with a language disorder, impairment, or disability. Thus, the Student did not meet any disability criteria in the area of speech.¹⁶
18. ***, the third evaluator who conducted several sections of the Student's evaluation, is a Licensed Specialist in School Psychology (LSSP), and is an independent contractor with the District. He noted that his contract with the District started in September 2023, and that during that month he was requested to conduct an evaluation of the Student by Mr. ***, the District's lead LSSP. He was specifically to complete the behavioral, psychological, and emotional components of the evaluation.¹⁷
19. Mr. *** noted that once he is assigned to conduct the evaluation, he determines the scope of the evaluation based upon the stated concerns. He also noted, however, that the process is a fluid one, and the scope can evolve.¹⁸
20. Mr. *** also noted that he had a checklist of sorts when he did the evaluation, and that it included the types of evaluations along with notations for documenting his activity as he conducted the evaluation. The evidence demonstrated that Mr. ***'s checklist for the Student included autism, emotional disturbance and specific learning disability.¹⁹
21. The documentary evidence showed the dates, times and places of the observations Mr. *** made of the Student, and included thirty minutes in the classroom on September ***, 2023; fifteen minutes of *** on September ***, 2023; an attempt to observe in the classroom on September ***, 2023, but the Student had already gone home; and a twenty minute classroom observation on September ***, 2023. The evidence also showed that Mr. *** conducted interviews with both the Student and the Student's Parent.²⁰
22. Mr. *** also testified that the Student had difficulty with regulating Student's behavior, was impulsive, showed *** and hyperactivity. The Student also reported some ***, and the Student's Parent noted some ***. Thus the *** was administered, and it was found that the Student's self-reporting scale to be average for ***.²¹

¹⁵ T.109-111; J.13.

¹⁶ T.109-111; J.4:034; J.13:21:05-21:30.

¹⁷ T.186-188.

¹⁸ T.189, 221-222.

¹⁹ T.190-193; P.1:41.

²⁰ T.192-193; J.4:041-044.

²¹ T.195-196, 228; J.4:029, 050-051.

23. Testimony and evidence was clear that the Student's behaviors often impeded Student's learning as well as the learning of others.²²
24. The evidence also showed that a Functional Behavioral Analysis (FBA) was completed by Mr. ***, and that the Student's behaviors were primarily those of ***.²³ More specifically, it was noted that the Student would ***.²⁴
25. At the time of his observations, Mr. *** noted that the behaviors that he personally observed were not as severe as some of those reported to him, although he did observe the Student ***.²⁵
26. The conclusions in the FBA demonstrated that the primarily problematic behaviors to be ***, hyperactivity, impulsivity, and ***.²⁶
27. The FBA portion of the evaluation also included recommendations for a Behavior Intervention Plan (BIP) for the Student, and included specific suggestions of teaching the Student replacement behaviors for the suspected functions of the behaviors including ***, avoiding a non-preferred activity, and seeking attention.²⁷
28. One recommendation was social skill instruction, as it was Mr. ***'s opinion that appropriate social skills would serve as replacement behaviors for the Student's target behaviors, which may likely be due to seeking attention.²⁸
29. The evaluation also demonstrated that the Student did not have characteristics of an emotional disturbance (ED) and thus did not meet any IDEA criteria of a student with ED.²⁹
30. The testimony established that Mr. *** did not suspect autism and therefore did not complete any autism specific follow-up testing. He also indicated that if there had been any suspicion, that he would have done additional testing, just as he had done on the *** issue.³⁰
31. The evidence also demonstrated that Mr. *** did not complete a counseling evaluation for the Student.³¹

²² T.197; J.4:052.

²³ T.200; J.4:052-053.

²⁴ T.201.

²⁵ T.201-202; J.4:046.

²⁶ J.4:052-053.

²⁷ T.201-203; J.4:052-053.

²⁸ T.205; J.4:

²⁹ J.4:070-071;

³⁰ T.226-229.

³¹ T.225.

32. The evidence showed that the Student has no difficulty with fine motor skills or with gross motor skills.³²
33. The evidence clearly demonstrates that each of the evaluators utilized a variety of assessment tools and strategies to gather information about the Student. Interviews were done with teachers, administrators, the Student's Parent and the Student. Evidence also shows that no one single criterion or factor was used in making decisions.³³
34. The Student's Parent was then invited to a meeting with the three evaluators to go over the evaluation and results. The meeting was scheduled for October ***, 2023, one week after the completion of the evaluation.³⁴
35. At the October ***, 2023 meeting when the evaluators reviewed the results with the Student's Parent, Mr. *** provided an overall conclusion that the Student did not meet an educational disability condition. The evidence established that the Student's Parent did not indicate any concern or disagreement with the evaluation, or its conclusions.³⁵
36. The evidence also clearly established that the Student's Parent was given several opportunities throughout the evaluation review meeting to ask questions, request clarification, and provide input and comments.³⁶
37. When discussing and reviewing the evaluation, Mr. *** noted that he also had a discussion with the Student's Parent regarding the likelihood of Attention Deficit Hyperactivity Disorder (ADHD), and that a medical diagnosis was necessary for that IDEA eligibility. Mr. ***'s overall conclusion was that the Student exhibited characteristics of ADHD.³⁷
38. The evidence demonstrated that at various times during communication between the District and the Student's Parent that the District suggested that the students Parent obtain a diagnosis of ADHD in order to qualify for special education under OHI. The Student's Parent testified that Parent, in fact, felt pressured to get a diagnosis of ADHD. At another time, the district explained to the parent that they could not offer additional supports without a diagnosis of ADHD.³⁸
39. The evaluation itself noted that the Student demonstrated behaviors consistent with ADHD.³⁹ Further, during the meeting where the evaluation was discussed with the

³² J.4:036-037.

³³ T.214-215; J.4.

³⁴ T.101-102, 105-106, 119; P.1:6, 38-39.

³⁵ T.206, 217-218; J.13; J.14.

³⁶ J.13: 21:33-21:45; 24:15; 26:09; 36:00-36:55;42:11; 53:15.

³⁷ T.217-218; J.13: 29:55-30:05; 34:48-36:55.

³⁸ T.136-137; J.13; J.14.

³⁹ J.4:070.

Student's Parent, Mr. *** explained several times what needed to be done in order for the Student to meet the Other Health Impairment (OHI) criteria so Student would qualify as a student with an IDEA disability. He also explained why a medical diagnosis was necessary.⁴⁰

40. Mr. ***, during the evaluation review meeting, also went over some suggestions that he had for helping the student, such as frequent breaks, chunking assignments, and teaching replacement behaviors.⁴¹
41. Email correspondence from the Student's Parent to the District on November ***, 2023 referenced that the Student would be evaluated by the doctor for an ADHD diagnosis the very next day.⁴²
42. No evidence was presented that demonstrated that the District provided the Student's Parent an OHI form.⁴³
43. The evidence showed that the Student had not, at the time of hearing, obtained a medical diagnosis of Attention Deficit Hyperactivity Disorder (ADHD).⁴⁴
44. No evidence was offered as to why no diagnosis of ADHD was obtained for the Student.
45. No evidence was presented that the Student's Parent disagreed with the evaluation. In addition, there was no evidence that the Student's Parent, or anyone on Petitioner's behalf, requested an Independent Educational Evaluation (IEE) from the District.⁴⁵
46. Near the conclusion of the evaluation review meeting, the District inquired as to whether the Student's Parent would have Parent's advocate or attorney present at the ARD meeting. The Student's Parent declined to have either attend the ADR meeting.⁴⁶
47. Notice was provided to the Student's Parent of the ARD Committee meeting to review the evaluation results and make a determination as to the Student's qualification for special education.⁴⁷
48. At the beginning of the ARD, the Student's Parent was asked if Parent had any questions about the evaluation. The evidence also demonstrated that the Student's Parent did not

⁴⁰ T.216; J.13:34:48-36:55, 41:33-41:51, 55:10-56:12.

⁴¹ T.205; J.4: J.13:1:20-1:25; J.14:18:26-18:35.

⁴² J.12:185.

⁴³ T.135.

⁴⁴ T.169.

⁴⁵ T. 156-158, 217-218.

⁴⁶ T. 41, 150-151; P.1:56-57; J.13.

⁴⁷ T.100, 144; J.3.

voice disagreement with the evaluation or the DNQ (Does not Qualify) decision at the ARD.⁴⁸ The Student's Parent also noted during the ARD meeting that Parent had observed characteristics of ADHD. While the evidence established that the Student's Parent was aware that one of the next steps in determining a special education OHI eligibility was to obtain a diagnosis from the Student's primary care physician,⁴⁹ no evidence was presented that the Student's Parent requested an OHI form from the District.

49. During the ARD meeting, the Student's Parent noted that schools apply ADHD to every situation, and then inquired as to whether the Student's behavior could be due to anything other than ADHD.⁵⁰
50. During the ARD meeting, the Student's Parent was told that the Student would be served through Section 504, and 504 supports and accommodations were explained to Parent in detail. There was also an explanation that should a diagnosis of ADHD be obtained, that the ARD committee could reconvene and consider the OHI eligibility for special education.⁵¹
51. The evidence demonstrated that the Student's Parent agreed with the ARD determination. After Parent had an opportunity to review the ARD paperwork, Parent signed it and marked agree on the form and returned it the same day of the meeting.⁵² Testimony also established that Parent did not consult with Parent's attorney or advocate prior to signing the November ***, 2023 ARD document.⁵³
52. From the time of the ARD meeting on November ***, 2023, no evidence was presented indicating a complaint about the evaluation results or eligibility until the filing of the Petition in this matter on November ***, 2023.
53. On November ***, 2023 a meeting was held with the Student's Parent and the Assistant Principal, Ms. *** and the Principal, Ms. *** to discuss a behavior contract for the Student. The zoom or telephonic meeting was in the morning, and was partially a result of the Student ***, ***. As a result Student was ***, which were apparently a session to work on strategies for social skills.⁵⁴
54. Later that same day, November ***, 2023, an incident occurred *** that resulted in the Student being placed at ***, the District's DAEP, due to a violation of the Student Code of Conduct.⁵⁵ The incident included ***. Student also ***.⁵⁶

⁴⁸ T.217-218; J.14

⁴⁹ J.13:29:55-30:05; 1:15;20.; J.14:4:10-4:30.

⁵⁰ J.14:1:10-1:42.

⁵¹ J.14: 5:10-9:58; 10:05-10:57.

⁵² T.92-93; J.5.

⁵³ T.151.

⁵⁴ T.129-131; P.1:32-33; P.6.

⁵⁵ T.167; P.1:115.

⁵⁶ J.6; J.12:184

55. Through email correspondence, the Student's Parent, on November ***, 2023, informed the District that the Student was to be evaluated by Student's doctor for an ADHD diagnosis the next day, November ***, 2023, as the matter was urgent.⁵⁷
56. The evidence established that the Student's Parent, on November ***, 2023, was sent notice of the MDR meeting with two optional dates for the meeting from Ms. ***, the assistant principal. An additional notice, setting the MDR for November ***, 2023, was sent to the Student's Parent by Ms. ***. Ms. *** sent another notice to the Student's Parent with a date of November ***, 2023 for the MDR.⁵⁸
57. On November ***, 2023, Ms. Debra Liva, the parent's advocate, sent correspondence to Ms. *** pointing out that the dates did not work, and proposed December ***, 2023 or the *** week. She also requested any recordings, as well as reports and other documents.⁵⁹
58. No evidence was presented of any further communication or even if this MDR was held.
59. On November ***, 2023, Ms. ***, a Section 504 Coordinator for the District at ***, reached out to the Student's Parent by phone and email. The email correspondence stated that she needed additional information in order to begin 504 services for the Student. The correspondence also stated that a Section 504 MDR was scheduled for Monday, December ***, 2023. Notice as well as procedural rights were also sent to the Student's Parent through the portal.⁶⁰ The Parent's testimony, however, stated that Parent had not received notice of the meeting.⁶¹
60. The evidence demonstrates that the Section 504 MDR was held, although it was noted that the Student had not received the formal qualification for 504 services. At the meeting, the District's 504 committee considered the presumed impairment of ADHD, and determined that the conduct in question was not a manifestation of the Student's disability.⁶²
61. The Student's last day attending school in the District was November ***, 2023.⁶³

⁵⁷ J.12:185; P.1:36.

⁵⁸ P.1:7, 104; P.5.

⁵⁹ P.1:103.

⁶⁰ T.138-139; P.1:67.

⁶¹ T.140-141.

⁶² J.12:184-185.

⁶³ T.131, 154.

V. Discussion

The following discussion reviews the legal standards that govern the considerations and issues brought forward in this case.

A. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. In essence, the burden of persuasion or proof falls upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F. 2d 127, 131 (5th Cir. 1993). No distinction has been established between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n.4 (5th Cir. 2009).

In terms of application of this approach, the Fifth Circuit went on to establish that a presumption exists “in favor of a school system’s educational plan, placing the burden of proof on the party challenging it”. *White ex Rel. White v. Ascension Parish Sch. Bd.* 343 F.3d 373, 377 (5th Cir. 2003); *Teague* at 132. Accordingly, Petitioner bears the burden of demonstrating that the District violated its Child Find obligation and failed to provide the Student FAPE.

B. Duty to Provide FAPE

A primary purpose of the IDEA is to ensure that all children with disabilities have available a free, appropriate public education (FAPE) as well as related services. Further, it is essential that the educational and related services are designed to meet the unique needs of that particular student. 34 C.F.R. § 300.39 (b)(3). Under the IDEA, school districts have a duty to provide a FAPE to all children with disabilities between the ages of three and twenty-one who reside within the jurisdictional boundaries of the district. 34 C.F.R. §300.101(a).

Additionally, the United States Supreme Court has provided guidance as to the determination of whether a school district provided FAPE to a student, with both substantive and procedural considerations. Specifically, the district must: comply with the procedural requirements of IDEA; and, design and implement a program that is reasonably calculated to enable the student to receive an educational benefit. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). Further, ‘educational benefit’ has been defined as that which is meaningful and provides a basic floor of opportunity or access to specialized instruction and related services individually designed to provide educational benefit. *Id.*

Only certain students, however, are eligible for special education, and hence FAPE under the IDEA. In order to fall within the scope of the IDEA, or qualify for services, a student must have

both a qualifying disability, and also, by reason of that disability, be in need of special education and related services. *Alvin Indep. v. A.D. ex rel*, 503 F.3d 378, 382 (5th Cir. 2007).

C. Child Find and Evaluation

Child Find under the IDEA is an affirmative obligation on the part of school districts to have policies and procedures in place in order to locate, and timely evaluate, children with suspected disabilities in its jurisdiction. The Child Find duty is then triggered when a school district has reason to suspect a disability, along with reason to suspect that there is a need for special education and related services.

Thus, it is clear that school districts are required to evaluate all children where a suspected disability exists. Further, if a parent requests an evaluation, then the District is obligated to respond within fifteen school days as to their agreement to complete the evaluation or conversely deny the request. See 19 TEX. ADMIN. CODE §89.1011(b). Additionally, when conducting an evaluation, a school district must comply with the procedures set forth in 34 C.F.R. §§ 300.304-300.311. Once the evaluation is complete, the Admission, Review and Dismissal (ARD) committee has the responsibility to make determinations of eligibility, and if the student is found eligible, then design and implement educational as well as related services for the student. Even if a disability condition is identified, the second part of the eligibility determination requires that a need for specially designed instruction, or educational services, as a result of the disability exists. Consequently, a student who meets eligibility criteria but who does not show a need for special education services, has not met the definition of a student with a disability under the IDEA. See 34 C.F.R. §300.8.

This section provides further clarification in saying that

“...if it is determined, through an appropriate evaluation under §§ 300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.”

34 C.F.R. §300.8(2)(i).

Courts are clear that the Child Find obligation is “triggered when the local educational agency has reason to suspect a disability coupled with reason to suspect that special education services may be needed to address that disability.” *El Paso Indep. Sch. Dist. v. Richard R.R.*, 567 F. Supp. 2d 918, 950 (W.D. Tex. 2008). Thus, it is clear that the suspicion must be of both the disability and the need for special education services.

Once an evaluation has begun, or consent from the parent received, then the timeline must be considered. The FIIE and its corresponding written report must be completed no later

than 45 school days from the date the school district obtains written consent. Tex. Educ. Code § 29.004(a)(1).

In terms of the actual evaluation under the IDEA, the school district must (1) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's IEP; (2) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and (3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 34 C.F.R. § 300.304(b). The student must also be assessed in all areas of suspected disability. 34 C.F.R. § 300.304(c)(4).

D. Appeal of a Disciplinary Placement and the Manifestation Determination Review

Under the IDEA, a change in placement to an alternative educational setting must afford a student with a disability who receives special education certain procedural and substantive rights and protections. While school districts have the authority to discipline students with disabilities, in doing so, a school district must follow its code of student conduct and impose only discipline consistent with that imposed upon students without disabilities. 34 C.F.R. §300.530.

Therefore, the MDR is an important discipline procedure under the IDEA. It is an evaluation of a student's misconduct to determine whether that conduct is a manifestation of the student's disabilities. It must be performed within ten (10) school days of the change in placement that stemmed from an IDEA-eligible student's violation of a code of conduct. 34 C.F.R. §300.530(e). In such a case, the district must first determine if the alleged conduct that violated the code of student conduct was a manifestation of the student's disability; and if the placement is made, provide special educational services in the alternative placement. 34 C.F.R. §300.530.

Additionally, the IDEA provides that the parent of a child with a disability may appeal a disciplinary placement or manifestation determination decision through the due process hearing procedures. 34 C.F.R. §300.532 (a). The statute further provides that the due process hearing be an expedited one, as is the case in this matter.

In some cases, even if a student has not been found to be eligible for special education services, Student may be entitled to the protections of IDEA, and thus, these MDR provision. In such cases, the primary question as to applicability is whether the district is "deemed to have knowledge" that a student has a disability prior to the occurrence of the conduct in question. 34 C.F.R. 300.534(b).

The "deemed to have knowledge" is statutorily defined as follows:

- the parent of the child has expressed concern *in writing* to supervisory or administrative personnel of the district, or a teacher of the child, that the child is in need of special education and related services;
- the parent of the child actually requested an evaluation of the child for purposes of determining eligibility; or
- the teacher of the child, or other district personnel, has expressed specific concerns about a pattern of behavior demonstrated by the child directly to the district's director of special education or to other supervisory personnel.

Additionally, there are exceptions, and IDEA also provide statutory definitions for those instances when the district is deemed to not have such knowledge. 34 C.F.R. 300.534(b).

These include the following:

- the parent has been offered, but not allowed an evaluation under IDEA;
- the parent has refused services under IDEA; or
- the child has been evaluated under IDEA and determined to not qualify.

In these cases, where there is no legally based knowledge on the part of a district, then the student is not entitled to have a MDR prior to a disciplinary referral or placement, as the student is not entitled to IDEA protections.

E. Procedural Considerations

With regard to issues of the failure to provide FAPE as a result of procedural violations of the IDEA, the law holds that a hearing officer may find that a child did not receive FAPE in limited circumstances. Specifically, if the procedural violations rise to the level of impeding a child's access to FAPE, significantly denying parents the opportunity or ability to participate in the child's education, or causing a deprivation of educational benefit, then those violations could be considered a denial of FAPE. 34 C.F.R. §300.513(a)(2); *Rowley*.

VI. Analysis

In this case, Petitioner brings forth issues alleging a violation of Child Find and an incomplete evaluation as procedural violations of the IDEA as well as the failure to conduct a MDR pursuant to IDEA. The following discussion examines these issues, considering the exhibits in evidence, testimony of the witnesses, and issues presented.

A. Child Find: Identification and Evaluation

In this case, Petitioner has claimed that the District failed its Child Find duties in failing to completely evaluate the student for special education. More specifically, the claim is that the District failed to evaluate in all areas of possible disability that the Student's Parent requested. The law, however, requires only that the evaluation be complete in all areas of suspected disability. 34 C.F.R. § 300.304(c)(4). That section specifically holds that a child should be "assessed in all areas of suspected disability, including if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities".

The evidence demonstrated that the Student in this case was evaluated in all areas of suspected disability. After the consent was received, the evaluation and report were completed within the statutory timelines. It appears that the areas of concern or of interest to the parent were autism, occupational therapy (OT), and a counseling evaluation. The evidence shows that the autism evaluation was done to the extent that there was no suspicion of such, and the evaluator was clear that had there been any indication of autism that additional follow-up evaluations would have been completed. With regard to the OT evaluation, the results were clear that the Student had no difficulty or deficiency in either gross or fine motor skills. Lastly, although the counseling evaluation was not completed, the evaluator did conduct *** assessment, and found no emotional disability. Furthermore, Petitioner presented no evidence of the existence of any disability in any of these areas. As a result, nothing in the evaluation gives rise to an IDEA procedural violation that could rise to the level of a denial of FAPE. The Petitioner failed to establish that the District failed to comply with any requirements for an IDEA evaluation.

With regard to the issue of qualifying for special education, the statute also clearly set forth the possible areas of disability. 34 C.F.R. § 300.8 provides the definition:

Child with a disability means a child evaluated in accordance with §§ 300.304 through 300.311 as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

In this case, the Student did not qualify as a student with a disability in the areas evaluated. However, the record is full of references to the likelihood of ADHD, coming under the OHI qualification. As noted by the District on several occasions, a physician's diagnosis is necessary, which was not, at least at the time of the hearing, obtained.

B. Entitlement to IDEA Protection on a Disciplinary Change of Placement

As the Student was not found eligible for special education, the direct protections under IDEA for disciplinary removals are not applicable. The next question, then, falls on whether, even

though not under IDEA directly, whether this situation falls under the district is “deemed to have knowledge” provision of C.F.R. § 300.534. In this instance, the issue turns on not whether the District is deemed to have knowledge, but rather on the statutory definition of when a district is considered to not have knowledge that a Student has a disability. In particular, the part of the definition at issue here is the third instance listed, that being that once an evaluation has been completed and the student does not qualify, then any protection under IDEA for an MDR is nullified. Therefore, as a result, the Student is not entitled to IDEA protection for the disciplinary removal, and therefore the District had no obligation to hold an IDEA MDR.

Another issue raised by the Petitioner concerns the MDR that was apparently held for the Student. Petitioner has asserted procedural violations for holding what apparently was a Section 504 MDR without the Student’s Parent present, although the record is clear that the District did send Parent a notice of the meeting. While the Student had not had a formal 504 committee meeting, they convened for the MDR. In any case, it is well established that a special education hearing officer under the IDEA is limited to determinations relating to the identification, evaluation or educational placement of a child with a disability or the provision of a free, appropriate public education (FAPE) to the child. Therefore, the jurisdiction and authority for consideration of any Section 504 related matters do not exist. As no jurisdiction exists, the issues cannot be considered herein.

C. Claim for Denial of FAPE

In this case as noted, the burden is on Petitioner to demonstrate that the Student had a qualifying disability and, by reason of that disability, needed specially designed instruction and related services. As the District found that the Student did not have a qualifying eligibility, and as no evidence of a diagnosis of ADHD was provided, the record fails to demonstrate that the Student has a qualifying disability or is eligible for special education under IDEA. As the first prong is not met, the analysis does not move to the second, that being, that by reason of that disability, is in need of special education and related services. In such an instance, a school district does not deny FAPE as the Student did not qualify under IDEA. As IDEA eligibility was not established, the District did not deny the Student FAPE.

D. Procedural Considerations

Petitioner also claims that Respondent committed additional procedural violations of IDEA, in addition to the Child Find claim. In order for a procedural violation to rise to the level of a denial of FAPE, such violation must impede the Student’s right to FAPE; impede parental participation; or cause educational deprivation. 34 C.F.R. § 300.513 (a)(2). Petitioner claims a number of procedural violations. The evidence fails to support Petitioner’s claims that the Student’s parent was not involved collaboratively with the District or that the parent was in any way deprived of meaningful participation in the Student’s education. In fact, the record

demonstrated numerous instances where the District asked the Student's Parent for input or comments or if Parent had questions. The evidence demonstrated that the Student's Parent knew that it was Parent's decision as to the ADHD diagnosis so that the Student may qualify for special education under the IDEA criteria OHI. 34 C.F.R. § 300.8(c)(9). Finally, as the Student is not legally entitled to the protections of IDEA, the claim for a denial of FAPE does not exist.

With regard to the Petitioner's assertion that the Petitioner is entitled to an IEE at District expense, no evidence was submitted to demonstrate that Petitioner requested an IEE. While it is claimed in the closing brief that an IEE was requested as part of Petitioner's pleading or complaint initiating this due process proceeding, the pleading was never entered into evidence. Pleadings alone are not evidence. As no evidence was presented on this issue, no ruling will be made.

In essence, in this case, no violations of IDEA were established, and the evidence clearly demonstrated that the District did not violate its Child Find obligation, as the Student was evaluated and found that Student did not qualify. In summary, the Petitioner did not meet Petitioner's burden of proving the school district violated student or parental substantive or procedural rights under the IDEA.

VII. Conclusions of Law

1. The New Caney Independent School District (NCISD) is responsible for properly identifying, evaluating, and serving students under the provisions of IDEA, 20 U.S.C. §§1412 and 1414; 34 C.F.R. §300.301, and 19 TEX. ADMIN. CODE §89.1011.
2. Petitioner failed to carry the burden of proof to establish a violation of IDEA or a denial of FAPE. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984).
3. Petitioner did not meet the burden of proof on the claims asserted against the District in this case, as the burden is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005).
4. Petitioner failed to prove that the District violated its Child Find duties. 34 C.F.R. §300.111.
5. Petitioner did not meet the burden of proving the Student is a child with a disability who is eligible for special education and related services under the IDEA. 34 C.F.R. §300.8.
6. Petitioner did not prove the District failed to work collaboratively with the Student's Parent. *Schaffer*, 546 U.S. at 62; 34 C.F.R. §300.501(b)(c); 34 C.F.R. §300.322.

ORDERS

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that all relief requested by Petitioner is DENIED and all claims of Petitioner are DISMISSED WITH PREJUDICE.

All other relief not specifically stated herein is DENIED.

Signed this 22th day of January, 2024.

Kimberlee Kovach

Special Education Hearing Officer for the
State of Texas

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); Tex. Gov't Code, § 2001.144(a)-(b)(g).