

DOCKET NO. 098-SE-0117

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

DECISION AND ORDER

*** (Student), b/n/f *** (collectively, Petitioner), filed a request for an impartial due process hearing (the Complaint) pursuant to the Individuals with Disabilities Education Improvement Act (IDEA).¹ North East Independent School District (Respondent/the District) is the respondent to the Complaint. Petitioner alleges the District denied Student a free appropriate public education (FAPE) when it failed to timely identify Student as a student with a disability in need of special education services, failed to provide timely and appropriate evaluations in all areas of Student’s suspected disabilities, failed to provide an appropriate individualized education program (IEP), and failed to develop or implement a data-based behavior intervention plan (BIP) that provided Student with positive supports. Petitioner maintains Petitioner is entitled to reimbursement for Student’s placement in a private school.

The District denies the allegations and asserts it had no reason to suspect Student was in need of special education and related services and that Petitioner failed to give the District proper notice of Student’s transfer to a private school for the District’s consideration. The District further maintains that it is ready and able to provide Student with FAPE if Student returns to a District school.

¹ 20 U.S.C. § 1400 *et seq.*

Based on the evidence and the applicable law, the hearing officer finds that Petitioner failed to meet Petitioner's burden of proving that the District should have suspected that Student was in need of special education and related services. Therefore, Petitioner's requested relief is denied.

I. PROCEDURAL HISTORY, RESOLUTION SESSION, AND STATUTE OF LIMITATIONS

A. Procedural History

Petitioner filed a request for a due process hearing on January 11, 2017, that was amended on January 13, 2017 (the Complaint). On January 20, 2017, the District filed a response to the Complaint and a partial motion to dismiss Petitioner's claims for attorney fees and costs. On February 1, 2017, the hearing officer convened the first telephonic prehearing conference with both parties in attendance through their respective counsels. During the prehearing conference, the parties identified the disputed issues, the relief requested, the District's defenses, and addressed the partial motion to dismiss. The parties also requested that the due process hearing and the decision due date be reset so the parties could participate in mediation.

As discussed further in Order No. 3, the jurisdiction of a special education hearing officer in Texas is limited to those issues arising under the IDEA, including the identification, evaluation, or educational placement of a student or the provision of FAPE.² The hearing officer has no authority to make an award of attorneys' fees and costs under IDEA. Therefore, Petitioner's claims for attorney fees and costs were **dismissed**. In addition, the hearing officer found good cause to grant the parties' joint request to continue the due process hearing until **April 17-19, 2017**, and to extend the decision due date to **June 30, 2017**.

On April 3, 2017, the hearing officer convened the final telephonic prehearing conference with both parties in attendance. The parties confirmed that they had participated in mediation, but

² 34 C.F.R. § 300.507(a); 19 Tex. Admin. Code §§ 89.1151(a), .1170.

were unable to reach an agreement. Consequently, the legal issues set out in Order No. 3 remained in dispute.

The hearing convened on April 17-18, 2017, before Catherine Egan, hearing officer, at the District's Administration Building, 8961 Tesoro Drive, San Antonio, Texas. Attorneys Karen Seal and Courtenay Euton represented Petitioner. Student's mother appeared on Student's behalf. Attorneys Ricardo Lopez and Allen Keller represented the District. ***, the District's Director of Special Education, appeared as the District's party representative.

As preliminary matters, the hearing officer denied the District's motion to strike Petitioner's disclosures, but reserved ruling on Petitioner's Ex. C until it was offered. Petitioner's Ex. C included monetary charges from 2011 through 2015, outside the one-year statute of limitations. During the hearing, Petitioner offered only certain pages from Petitioner's Exhibit C, specifically, pages 144-148, that were admitted into evidence and withdrew the remaining pages of the exhibit.³

At the close of the due process hearing, the parties agreed to keep the post-hearing schedule set out in Order No. 3 with the hearing transcript due May 2, 2017, the briefs due May 30, 2017, and the decision due June 30, 2017. The decision was timely issued.

B. Resolution Session

The parties agreed to participate in mediation in lieu of a Resolution Session. The mediation was unsuccessful.⁴

C. Statute of Limitations

³ Tr. at 547-548.

⁴ Order No. 4.

The parties agreed the one-year statute of limitation applies to this case.⁵ The accrual date for this proceeding is January 13, 2016.

II. ISSUES, REQUESTED RELIEF, AND BURDEN OF PROOF

The disputed issues and relief requested set out in Order No. 3, and confirmed at the beginning of the due process hearing, are listed below.

A. Issues⁶

The disputed issues are:

1. Whether the District failed to identify Student as a student with disabilities warranting special education services.
2. Whether the District failed to provide Student a FAPE by:
 - a. failing to provide timely and appropriate evaluations in all areas of Student's suspected disabilities;
 - b. failing to provide an appropriate IEP reasonably calculated for Student to receive educational benefits by not developing goals and objectives that were clear and measurable and were individualized to meet Student's need; and
 - c. failing to develop/implement a data-based BIP that provided Student with positive support.
3. Whether Petitioner is entitled to reimbursement for evaluations and compensation for the expenses related to Student's placement at ***, a private school, for school year 2016-2017.
4. Whether the Complaint was prematurely filed and whether Petitioner failed to request the District to consider Student's placement in a private school at the District's expense (as asserted by the District).

B. Relief Requested

Petitioner requested the following relief:

⁵ 19 Tex. Admin. Code § 89.1151(c); Tr. at 15.

⁶ Order No. 3; Tr. at 14-15.

1. That the District be required to reimburse Petitioner for the assessments Petitioner paid for to identify Student as being entitled to special education services;
2. That the District pay for the services at *** for the 2016-2017 school year to address the District's failure to identify and evaluate Student as a student entitled to special education services and to implement an appropriate IEP; and
3. Any further relief within the scope of the IDEA that the hearing officer deems just and proper in law or equity.

C. Burden of Proof

The IDEA creates a presumption that a school district's decisions made pursuant to the IDEA are appropriate and the party challenging the decisions bears the burden of proof at all times.⁷ The standard of proof in IDEA proceedings is a preponderance of the evidence. To prevail, Petitioner must first establish that the District failed to identify Student as a student with a disability, and had reason to suspect that because of that disability, was in need of special education and related services under the IDEA.⁸ Petitioner need not prove that Student had a disability under 34 Code of Federal Regulation (C.F.R.) § 300.111(c)(1), only that the District had reason to suspect that Student had a disability, and had reason to suspect that by reason of that disability, Student was in need of special education and related services, even if advancing from grade to grade, in violation of its Child Find obligations.

III. FINDINGS OF FACT

Background

⁷ *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 537, 163 L. Ed.2d 387 (2005); *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993).

⁸ *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 Fed. Appx. 887 (5th Cir. 2012); *Alvin Indep. Sch. Dist. v. A.D. ex rel Patricia F.* 503 F3d 378 (5th Cir. 2007).

1. The District is a political subdivision of the State of Texas and a duly incorporated Independent School District.⁹
2. Student, a ***-year-old, primarily resides with Student's mother in San Antonio, Texas, and through the end of the 2015-2016 school year was enrolled in a District *** school. The District is the resident school district for Student.
3. In 2010, when Student was *** Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), combined type. Student's Psychologist did not evaluate Student's cognitive strengths and weaknesses or prepare a written report.¹⁰
4. Children with ADHD typically have poor self-control; poor control over impulses, and tend to often get into trouble.¹¹ Typically, a *** grader with ADHD would have behavioral issues evidenced by frequent referrals to the principal's office or frequent calls to the parents to pick up the student from school.¹²
5. Student's Psychologist did not see Student again until 2012 when Student's mother requested that the Behavioral Assessment System for Children, the Parent Rating Scales, and the Teacher Rating Scales be redone.¹³
6. While Student was in *** grade, Student ***.¹⁴ Because of this incident, a Response to Intervention (RTI) meeting was held on January ***, 2012.¹⁵ The principal and counselor requested Student's mother provide a letter from Student's physician with Student's ADHD diagnosis so Student could ***.¹⁶
7. After *** grade, Student was rezoned to attend a new District *** school where Student remained through *** grade.¹⁷ The new *** school requested that Petitioner obtain a current evaluation regarding Student's ADHD diagnosis from Student's physician.¹⁸ ***.¹⁹

⁹ 20 U.S.C. §§ 1400 *et seq.*; 34 C.F.R. §§ 300.1 *et seq.*

¹⁰ Tr. at 460, 467, 474.

¹¹ Tr. at 461.

¹² Tr. at 482.

¹³ Tr. at 467.

¹⁴ Tr. at 25.

¹⁵ Pet. Ex. B at 7.

¹⁶ Tr. at 25-26.

¹⁷ Tr. at 27.

¹⁸ Tr. at 28.

¹⁹ Tr. at 74; Res. Ex. 1 at 16, 30.

2015-2016 School Year

8. In *** grade, Student was taught all core subjects in Student's *** class by Student's *** teacher, except for *** of ***. The District began preparing *** grade students for ***.
9. The District school was aware Student was diagnosed for ADHD and that Student ***, but never received an ADHD assessment from Student's Psychologist.²⁰
10. At the beginning of the 2015-2016 school year, the District asked Petitioner to participate in a Section 504 meeting to determine Student's needs as a student with an ADHD diagnosis. Student's mother declined.²¹
11. The 504 Coordinator asked Student's teachers to have Student's mother sign the Section 504 form during the fall parent-teacher conference indicating whether she wanted or did not want a Section 504 plan. On November ***, 2015, the *** teacher sent Student's mother the Section 504 paperwork that needed to be signed and returned.²²
12. Student's mother did not return the Section 504 form, and told Student's *** teacher that she did not want her *** to have a Section 504 plan.²³ The District had previously offered to evaluate Student for Section 504 accommodations, but Student's mother consistently refused to give permission for such an evaluation until March 2016.²⁴
13. The 504 Coordinator was not asked by Student's mother, Student's teachers, or the District personnel to have Student evaluated for special education services, and found Student to be a great student.²⁵
14. The last week in September or first week in October 2015, notices were sent home to Student's mother offering after-school tutoring to Student. Student's mother did not return a signed permission slip authorizing the school to keep Student after school so Student could attend the tutoring.²⁶

***** Grade *****

15. In *** grade ***, Student was an average student who sometimes had trouble with organization, turning in Student's homework, and getting Student's school work done on

²⁰ Tr. at 351, 362-363.

²¹ Tr. at 38.

²² Tr. at 391-392; Res. Ex. 3 at 43.

²³ Tr. at 363.

²⁴ Tr. at 381.

²⁵ Tr. at 354, 363.

²⁶ Res. Ex. 3 at 44; Tr. at 249-251.

- time. Student was only in *** class for an hour each day.²⁷ Student's behavior in *** class was consistent with the other *** *** in class.²⁸
16. On November ***, 2015, Student received an in-school suspension for engaging in inappropriate behavior. ***.”²⁹
 17. On the November 2015 benchmark test for *** grade, Student received a 57 in *** and a 54 in ***, both of which were passing grades. The benchmarks are set by the District in late October or early November, but typically a passing grade ranged from a 50 to a 52.³⁰
 18. Student worked in small groups on *** and *** during the week of November *** through December ***, 2015. Student did well overall, but had a tendency to rush through the work causing Student to make careless mistakes. On Student's weekly assessment, Student got 7 out of 8 with a score of 88 when the group average was 82.³¹
 19. From January *** through ***, 2016, Student made a 100% on Student's *** in *** class when the group average was 69%.³²
 20. Throughout the 2015-2016 school year, Student occasionally did poorly on a quiz, but Student did not consistently do poorly. Student did not earn lower than a 70 as a grade.³³ Student's performance was consistent with the performance of other students in *** class.³⁴ Student passed *** grade *** and passed the *** grade *** State of Texas Assessment of Academic Readiness (STAAR) assessment.³⁵
 21. The *** teacher had Student ***, allowed Student on occasion to ***, had the class ***, implemented partner activities, and provided positive reinforcements to Student. If Student became distracted, Student was easily redirected with *** to get back on task. Student was very polite in *** class and Student's behavior did not warrant a behavior plan.³⁶

²⁷ Tr. at 248.

²⁸ Tr. at 249.

²⁹ Pet. Ex. F at 213.

³⁰ Tr. at 254-255.

³¹ Res. Ex. 3 at 45.

³² Res. Ex. 3 at 45.

³³ Tr. at 271-272.

³⁴ Tr. at 273.

³⁵ Tr. at 263, 273.

³⁶ Tr. at 259, 261.

22. On April ***, 2016, Student had a rough day in *** class because Student ***. Student also took the *** STAAR test that day ***.³⁷
23. Student's mother never asked the *** teacher to have Student evaluated for special education. Student did not exhibit any indicators in *** class to suggest Student required such an evaluation and Student's academic work did not indicate a need for special education evaluation.
24. On March ***, 2016, Student's mother requested that the District allow Student to attend after-school tutoring for *** and the District arranged for Student to do so.³⁸

***** Class**

25. During the 2015-2016 school year, Student's classroom performance was on grade level in all subjects taught by Student's *** teacher.³⁹ Student was capable of doing *** grade work, made academic progress, and passed all Student's state assessments without any accommodations.⁴⁰
26. Before Student's ***, Student had some problems with focusing, attention, and fidgeting, much of which was typical for *** graders. Some days Student's grades were great, but other days the grades dipped.⁴¹ Student was able to *** in class and at grade level so the *** teacher had no suspicion that Student have dyslexia or that Student required special education or related services.⁴²
27. The *** teacher did not refer Student to the office for discipline,⁴³ and saw no behavioral issues that caused her to suspect Student was in need of special education and related services. Student's mother did not ask the *** teacher to have Student evaluated for special education services.⁴⁴
28. In *** grade, a student's "****" grade not only included ***, but also organization, and the timely submission of homework and ***—the daily choices necessary to be a successful

³⁷ Pet. Ex. B at 76-77; Tr. at 408-409.

³⁸ Res. Ex. 3 at 44; Tr. at 249-250.

³⁹ *** is the only subject that the *** teacher did not teach Student.

⁴⁰ Tr. at 382.

⁴¹ Tr. at 380.

⁴² Tr. at 395.

⁴³ Tr. at 389.

⁴⁴ Tr. at 391.

- student in *** grade.⁴⁵ Student was within the normal spectrum of *** graders seen by the *** teacher each year as she ***, despite Student's "unsatisfactory" *** grade all year.⁴⁶
29. *** is a program offered to *** grade students who are on *** grade level, but need a little push so they are ready for *** grade and can pass the *** STAAR. This program is not designed for students with learning disabilities or problems.⁴⁷ It is designed to help those *** students in the *** grade class identified by the teacher as needing additional help with the grade level *** curriculum.⁴⁸
30. The *** teacher referred Student to the *** program because Student had not *** before the April ***, 2016 STAAR *** test and she was worried Student had not been able to concentrate fully.⁴⁹ Despite not ***, Student passed the first administration of the *** STAAR test so Student was released from the *** program.⁵⁰
31. The *** Student was in the *** program (***), Student participated in the *** assessment and the ***, both *** tests, and Student performed at the *** grade *** level.⁵¹ The *** teacher teaching Student with *** other students did not have any concerns with Student's ability to focus.⁵²
32. Student passed all the *** grade STAAR tests without any accommodations and on occasion ***.⁵³
33. Student received *** while Student was in *** grade for discipline but it was for something ***.⁵⁴ This was an isolated incident and did not indicate that Student had behavioral issues.⁵⁵
- 504 Meeting in 2016***
34. In February 2016, Student's mother asked ***, a private school in ***, to enroll Student but the school was at capacity. *** told Student's mother she needed to request the District

⁴⁵ Tr. at 387-388.

⁴⁶ Tr. at 388-389.

⁴⁷ Tr. at 383; Res. Ex. 3 at 44.

⁴⁸ Tr. at 417.

⁴⁹ Tr. at 430.

⁵⁰ Tr. at 419.

⁵¹ Tr. at 422; Res. Ex. 3 at 44.

⁵² Tr. at 431.

⁵³ Res. Ex. 3 at 48; Tr. at 395-396.

⁵⁴ Tr. at 401.

⁵⁵ Tr. at 435, 437.

- to provide Student with a Section 504 evaluation.⁵⁶ Student's mother requested a Section 504 meeting on March ***, 2016, and the District arranged for the 504 meeting to take place on April ***, 2016.⁵⁷
35. On March ***, 2016, Student's Psychiatrist wrote a letter stating that Student had been under his psychiatric care since ***, and was diagnosed with ADHD. Student's Psychiatrist recommended that Student received the following 504 accommodations:
- Increased testing time when needed;
 - Testing in a separate room with a small number of students in a quieter setting;
 - Having instructions and questions read aloud when necessary;
 - Ability to leave class to go to counselor when necessary; and
 - Ability of teacher to redirect student by touching Student on shoulder as well as verbal direction.⁵⁸
36. On March ***, 2016, the District sent a Section 504 Notice and Consent for 504 Evaluation to Student's mother. On March ***, 2017, Student's mother verified that she received notice of her Section 504 parental rights, and acknowledged that this was not a special education evaluation."⁵⁹ Student's mother also signed that she received a copy of Notice of Parent and Student Rights under Section 504.⁶⁰ On March ***, 2016, Student's mother signed the consent form for a 504 evaluation.⁶¹
37. On March ***, 2016, Student's mother completed an Educational Screen/Existing Evaluation Data in which she described Student's behavior at home as "not well behaved concerning doing homework . . ." ⁶² She also reported that she hired a *** tutor who reported that Student could do the work, but is unable to do it in *** class perhaps due to distractions.⁶³
38. On April ***, 2016, Student's *** teacher completed an Educational Screening/Existing Evaluation Data-Observation Data form in which she indicated Student exhibited some of the following: (1) poor attention and concentration; (2) difficulty staying on task; and (3) rushing. She further reported that Student was below average in initiating activities

⁵⁶ Tr. at 38-39.

⁵⁷ Tr. at 40-42.

⁵⁸ Res. Ex. 1 at 16, 27.

⁵⁹ Res. Ex. 1 at 1-2.

⁶⁰ Res. Ex. 1 at 3.

⁶¹ Res. Ex. 1 at 4-5

⁶² Res. Ex. 1 at 18.

⁶³ Res. Ex. 1 at 19

independently, responding appropriately to praise or correction, and in exhibiting organization in accomplishing tasks.⁶⁴

39. The 504 meeting convened on April ***, 2016, with Student's mother and teachers in attendance along with the 504 Coordinator, the *** teacher, the Assistant Principal, and ***.
40. Student's teachers reported at the April ***, 2016 Section 504 meeting that Student had difficulty focusing in class, but when Student did focus Student did well and participated in class activities. The *** teacher also reported Student turned Student's class work in on time, but rushed through the work to be finished and that Student responded positively to visual reminders and knowing how Student's grades affected Student's overall average.⁶⁵
41. During the Section 504 meeting, Student's mother reported Student had been very positive during the last week, and enjoyed discussing ***, but she was concerned about Student's confidence level and behavior at school and the long-term effects of ***.⁶⁶ There was no discussion indicating that Student was having trouble with ***.⁶⁷ Student's mother did not ask the District for a special education evaluation or any additional evaluations.⁶⁸ Student's mother did not express any concerns that Student might have dyslexia.
42. On April ***, 2016, the Section 504 Committee, which included Student's mother, determined that Student's ADHD limited Student's performance in concentrating and thinking and required placement in the general education setting with the following accommodations:
- ***;
 - Reteaching difficult concepts;
 - Extending time up to 1 day;
 - Checking for understanding: ***;
 - Verbal and tactile reminders to stay on task; and
 - Monitoring behavior with non-verbal cues for redirections.⁶⁹
43. After the Section 504 plan was agreed to in the initial meeting, Student's teachers received a copy of the plan and implemented it.⁷⁰ However, the Student was only in school another

⁶⁴ Res. Ex. 1 at 11-14.

⁶⁵ Res. Ex. 1 at 35.

⁶⁶ Res. Ex. 1 at 35.

⁶⁷ Tr. at 375.

⁶⁸ Tr. at 276-277, 365.

⁶⁹ Resp. Ex. 1 at 21-23.

⁷⁰ Tr. at 277.

- month. The *** teacher did not keep any behavioral data because Student was doing well in class and Student's grades were fine.⁷¹
44. In a May ***, 2016 email sent to the District, Student's mother wrote that the 2015-2016 school year was the first time Student had to struggle with *** because of Student's *** teacher."⁷² Petitioner accused the *** teacher of refusing to allow Student to use Student's *** and of humiliating Student in class by ***.⁷³
45. On May ***, 2016, Student's mother sent the District an email regarding her *** against the *** teacher and suggesting that Student might need testing for dyslexia.⁷⁴
46. Student did not demonstrate any indications at school to suggest Student had dyslexia.⁷⁵ No evidence was presented to indicate that Student has ever been diagnosed with dyslexia.
47. On May ***, 2016, Student's mother and Petitioner's two special education advocates met with the school principal. One of the special education advocates told the school principal that Student needed to have a Section 504 behavioral evaluation. The District made arrangements for Student to undergo a behavioral evaluation, but Student's mother cancelled it.⁷⁶
48. At Student's mother's request, the District set another Section 504 meeting to be held on May ***, 2016, to review Student's progress.
49. Student's mother sent an email to the District on May ***, 2016, informing the District she was enrolling Student in *** as there was now an opening for Student.⁷⁷ Later that day, Parent sent another email to the District clarifying that Student would complete the school year at the District school, but would be attending *** for the fall.⁷⁸
50. At the hearing, Student's mother stated that Student has not made academic or behavioral progress since *** grade based on Student's grades and Student's STAAR reports, but experienced serious regression. However, Student's mother had previously written that Student had no problems at school until *** grade.⁷⁹

⁷¹ Tr. at 278.

⁷² Pet. Ex. B at 30; Tr. at 58-59.

⁷³ Pet. Ex. B at 30.

⁷⁴ Pet. Ex. B at 32.

⁷⁵ Tr. at 374.

⁷⁶ Tr. at 43-45.

⁷⁷ Res. Exs. 1 at 34 and 2 at 39.

⁷⁸ Res. Ex. 2 at 40.

⁷⁹ Tr. at 30-31; Pet Ex. B at 119.

51. Although Student received an unsatisfactory grade in *** throughout *** grade, Student had no bigger discipline problem than ***.⁸⁰ None of Student's teachers ever discussed with the 504 Coordinator any concerns about Student's academic performance.⁸¹
52. Student's performance during *** grade reflects that Student made behavioral and academic progress. Student had passing grades in all subjects from *** grade through *** grade, except for the unsatisfactory grade Student received in ***, and passed all the *** grade STAAR tests. Student was a polite student, who behaved just as other *** *** at school, and was not a discipline problem.⁸²

August 2016 Private Evaluation

53. When a student is admitted into ***, the new student is required to undergo a comprehensive evaluation by an evaluator on ***'s approved list of evaluators.⁸³ Student's mother requested that a clinical psychologist/neuropsychologist on ***'s list of evaluators perform Student's evaluation (the ***-Approved Psychologist).
54. At Student's mother's request, the ***-Approved Psychologist performed Student's psychoeducational testing on August *** and ***, 2016, and met with Petitioner on August ***, 2016, to review her findings and to discuss her letter to Student with him.⁸⁴ The evaluation was done for ***.⁸⁵
55. On August *** and ***, 2016, the ***-Approved Psychologist gave Student the following battery of tests: (1) the Wechsler Intelligence Scale for Children, 5th edition; (2) the Woodcock Johnson achievement battery of tests, 4th edition; (3) the Woodcock Johnson Texas of Cognitive Abilities, 4th edition, (4) the Conner's Continuous Performance Test, 3rd edition, and (5) the Conner's Continuous Auditory Test of Attention (CATA), a new test for listening.⁸⁶
56. The ***-Approved Psychologist evaluated Student while Student was *** because she prefers to see how a child performs ***.⁸⁷ During Student's evaluation, Student talked almost non-stop, had difficulty listening, and took an unusual number of restroom breaks.

⁸⁰ Tr. at 366.

⁸¹ Tr. at 367.

⁸² Res. Ex. 3 at 41-42.

⁸³ Tr. at 509-510.

⁸⁴ Tr. at 510-511.

⁸⁵ Tr. at 492, 506; Pet. Ex. G at 224-231.

⁸⁶ Pet. Ex. G at 225.

⁸⁷ Tr. at 503; Pet. Ex. G at 226.

- Had Student ***, Student would not have been as silly and would not have talked so much.⁸⁸
57. The ***-Approved Psychologist did not request any documentation or information from Student's *** grade teachers or from the school's personnel in performing her evaluation.⁸⁹ The only information about Student's performance during *** grade was from Student and Student's mother.⁹⁰
58. ***.⁹¹ ***.⁹² However, it does not fill in learning gaps.
59. The ***-Approved Psychologist was unaware Student passed Student's state assessment tests in *** and did not review the *** grade STAAR test results.⁹³
60. The ***-Approved Psychologist's assessment was a snapshot of Student's educational ability while Student ***.⁹⁴ Based on her observations of Student, she found Student's behavior while Student *** to be annoying and immature for Student's age, but Student did not do anything bad.⁹⁵ Although Student has a high average IQ, *** Student was inattentive and Student performed better on short assignments. Student's processing speed ranged from average to low average depending on the complexity of the task.⁹⁶
61. The ***-Approved Psychologist agreed Student had ADHD, but also opined that Student has a specific learning disability (SLD) with reading comprehension.⁹⁷ In her opinion, Student does poorly when Student has to ***. Student was reading at the *** grade level.⁹⁸
62. The ***-Approved Psychologist tested Student after Student had been out of school for a couple of months for the summer holidays.⁹⁹ She did not retest Student to determine how Student performed ***.¹⁰⁰

⁸⁸ Tr. at 516.

⁸⁹ Tr. at 492, 512.

⁹⁰ Tr. at 512-514.

⁹¹ Tr. at 534.

⁹² Tr. at 535-536.

⁹³ Tr. at 516-517.

⁹⁴ Tr.at 537.

⁹⁵ Tr. at 494.

⁹⁶ Tr. at 501.

⁹⁷ Tr. at 495.

⁹⁸ Tr. at 495, 502.

⁹⁹ Tr. at 503, 533.

¹⁰⁰ Tr. at 514-516.

63. The ***-Approved Psychologist made several recommendations specific for ***. These included (1) breaking down information into short chunks instead of paragraphs, (2) repeating lessons more than once, (3) learning to keyboard to avoid getting bogged down with writing, (4) practicing remedial reading, (5) providing immediate positive or negative responses to Student's behavior, (6) providing short exercise breaks before Student starts lessons, and using perhaps a standing desk, and (7) engaging in physical activities.¹⁰¹
64. After August ***, 2016, the ***-Approved Psychologist had no further interaction with Student. She has never observed Student in class.¹⁰²

65. *** was established to meet the needs of students who have learning disabilities, ADHD, and dyslexia. Every three years, students receive a battery of cognitive tests that is discussed with the parents and from which the school's psychologist creates a set of accommodations for the student that the teachers are to follow, monitor, and keep data on.¹⁰³
66. Although Student began attending *** at the beginning of the 2016-2017 school year, it had not yet done its own evaluation of Student.¹⁰⁴ According to Student's *** and *** teacher (the *** teacher), she has not seen the August 2016 evaluation of Student done by the ***-Approved Psychologist, was unaware that the District had identified Student as a student with ADHD, or that the District had offered and implemented a Section 504 plan.¹⁰⁵
67. The *** teacher agreed that ***, and re-teaching difficult concepts are accommodations beneficial for Student as is giving Student extended time on assignments and deadlines, checking for understanding by ***, and redirecting Student from time to time. But she does not keep behavioral data on Student because Student does not require it.¹⁰⁶ *** students are not required to take state assessment tests.¹⁰⁷
68. Student is currently doing *** grade ***. In ***, Student is making a "C" or "C+". In ***, Student has *** other students in Student's class of various grade levels. *** at *** includes ***. Student is at a *** grade level in ***, but is making an "A" in the class.

¹⁰¹ Tr. at 496-498.

¹⁰² Tr. at 511.

¹⁰³ Tr. at 200.

¹⁰⁴ Tr. at 203.

¹⁰⁵ Tr. at 203-204, 207; Pet. Ex. G at 224, 227-229.

¹⁰⁶ Tr. at 211-212.

¹⁰⁷ Tr. at 215.

IV. ANALYSIS

A. The IDEA and Its Implementing Regulations

Under the IDEA, and its implementing regulations, school districts in Texas must identify and afford children with disabilities, who by reason thereof, need special education and related services, to provide the student with a FAPE. The IDEA defines a FAPE as special education and related services that (a) are provided at public expense, under public supervision and direction, and without charge; (b) meet State standards (including IDEA requirements); (c) include an appropriate preschool, elementary school, or secondary school education; and (d) are provided in accordance with a properly developed IEP.¹⁰⁸ It is essential to establish that the child has a disability under IDEA, and by reason of this disability, the child needs special education and related services, such as a child with OHI or a SLD.

B. Whether District Failed to Identify Student as a Student with a Disability in Need of Special Education Services

The first issue to address is whether the District met its Child Find obligation towards Student. The District does not dispute that Student had a diagnosis for ADHD. What is disputed is whether the District had reason to suspect that Student was in need of special education and related service.

Congress enacted the IDEA provisions to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs.¹⁰⁹ To that end, each school district has an affirmative duty to have policies and procedures in place to identify, locate, and evaluate children with suspected disabilities in its

¹⁰⁸ 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

¹⁰⁹ 20 U.S.C. § 1400(d)(1)(A).

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.”¹¹⁰ This is commonly referred to as Child Find.¹¹¹ A student with an impairment is not eligible for special education under IDEA unless the student has a need for such services.¹¹²

1. Reason to Suspect Disability

For a child to be a “child with a disability,” the child must have a disability, such as an OHI, and “by reason thereof need special education and related services.”¹¹³ Under 34 C.F.R. § 300.8(c)(9), to meet criteria as a student with OHI the student must have “limited strength, vitality, or alertness, . . . that results in limited alertness with respect to the educational environment that (i) is due to chronic or acute health problems such as . . . ADD or ADHD . . . ; **and** (ii) [a]dversely affects a child’s educational performance.”¹¹⁴ As previously discussed, the District does not dispute that Student has been diagnosed with ADHD. Therefore, the District had reason to suspect Student was a student with OHI.

Child Find also requires that the District’s teachers or personnel had reason to suspect Student had a disability, such as an OHI, that adversely affected Student’s educational performance such that Student was in need of special education and related services.¹¹⁵ Although Petitioner contends Student has a SLD based on *** psychoeducational evaluation done in August 2016, the evidence was insufficient to show that the District had reason to suspect Student had an SLD while Student was in *** grade. The credible evidence does not support a finding that the District had reason to suspect Student was a student with an SLD.

¹¹⁰ 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.111(a) (c)(1), .128, .220; *El Paso Indep. Sch. Dist. v. Richard R.R.*, 567 F. Supp. 2d 918, 949 (W.D. Tex. 2008).

¹¹¹ 34 C.F.R. § 300.111.

¹¹² 34 C.F.R. §§ 300.8; .101. *Dallas Indep. Sch. Dist. v. Woody*, 178 F. Supp. 3d 443, 467 (N.D. Tex. 2016), appeal docketed, No. 16-10613 (5th Cir. May 16, 2016).

¹¹³ 20 U.S.C. § 1401(3)(A).

¹¹⁴ Emphasis added.

¹¹⁵ 34 C.F.R. §§ 300.8(a)(1), (2)(i), (9)(i)(ii), (10); .111.

2. Reason to Suspect a Need for Special Education

Student presented at school as a typical *** grade *** student. Student had very few behavior issues and on the few occasions that Student did misbehave at school, the District's interventions, used for all general education students, were appropriate and effective. Student passed all Student's courses, passed the state assessment tests, and exhibited no unusual behavioral issues for *** grader. Student even passed Student's *** grade *** state assessment test ***.

Both Student's core curriculum teachers in *** grade, Student's *** teacher and Student's *** teacher, testified that Student had good days and bad days, just as any other *** grade student. Neither observed any behavior at school that caused them to suspect that Student was in need of special education and related services. While Student sometimes performed poorly on quizzes and tests, this was not a consistent pattern. When the District considered Student might benefit from accommodations under Section 504, Student's mother declined a Section 504 evaluation until the spring of 2016, after *** counseled her to do so.

Petitioner emphasized that Student received an "unsatisfactory" grade in *** throughout the year indicating Student had behavioral issues. However, Student's teachers explained that Student did not receive this grade because Student was acting up in class, but because Student would forget to turn in Student's homework, or to bring back Student's books. Student's *** teacher clarified that during *** grade, the school is trying to prepare all students for *** and are required to be more independent. Student's unsatisfactory grade in *** did not indicate Student had behavioral issues.

Petitioner relied heavily on the evaluation performed by the ***-Approved Psychologist specifically for ***. The ***-Approved Psychologist did not review Student's school records, did not discuss Student with Student's *** grade teachers, did not consider Student's performance on

the STAAR tests, and did not test Student while Student was ***. Although the evaluation may have met the criteria for ***, it was not intended to be a retrospective evaluation of Student's performance in *** grade. Consequently, Petitioner did not meet the burden of proof to show Student had a SLD or that Student needed special education and/or related services while Student was in *** grade.

The ***-Approved Psychologist admitted she did not review Student's educational records from the District, did not consult with any of Student's teachers at the District, and did not redo the evaluation while Student *** even though Student *** while Student was in *** grade. In addition, the evaluation was intended specifically for *** and took place after Student had been on summer break for two months. The ***-Approved Psychologist does not know how Student performed academically or how Student behaved while Student was in *** grade.

In this case, Petitioner failed to show that the District had reason to suspect that Student had a disability that required special education or related services. Student was able to progress academically and behave appropriately for *** grade student even without the Section 504 accommodations put into place during the last month of the school year. Student's ability to perform well academically and behaviorally even without Section 504 accommodations further supports a finding that Student did not require special education or related services under IDEA.¹¹⁶ Because Petitioner failed to show that the District had reason to suspect that Student was a student with disabilities and in need of special education and related services, the other allegations raised by Petitioner are moot.

V. CONCLUSIONS OF LAW

1. The North East Independent School District (the District) is a local educational agency responsible for complying with the Individuals with Disabilities Education Improvement Act (IDEA) as a condition of the State of Texas's receipt of federal education funding, and

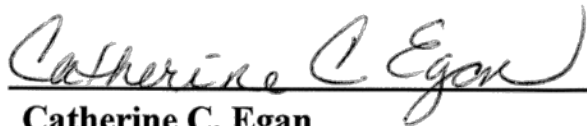
¹¹⁶ The hearing officer is aware that she is without jurisdiction to rule on the actions of the 504 Committee. However, the hearing officer considers the information from those meetings as relevant to the issue of whether the District should have suspected Student's need for special education.

- the District is required to provide each disabled child in its jurisdiction with a FAPE, pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*
2. Parents of students with disabilities are entitled to file a due process complaint and have a hearing on any matter relating to the identification, evaluation, or educational placement of the student, or the provision of a FAPE to the student. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.507-.513.
 3. *** (Student), b/n/f *** (collectively, Petitioner), bears the burden of proof on the issues raised in the proceeding. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L.Ed.2d 387 (2005).
 4. The one-year statute of limitations applies to this proceeding, resulting in an accrual date of January 13, 2016. 19 Tex. Admin. Code § 89.1151(c).
 5. The District had no reason to suspect that Student's diagnosis of Attention Deficit Hyperactivity Disorder, ***, adversely affected Student's educational and behavioral performance while Student was in *** grade. 20 U.S.C § 1412(a)(3); 34 C.F.R. §§ 300.8(a)(1); 19 Tex. Admin. Code § 89.1040(a), (c)(8), (c)(9).
 6. The credible evidence did not establish by a preponderance that Student was a child in need of special education and related services in order to progress in the general education setting and through the general education curriculum. 34 C.F.R § 300.8(a)(1).
 7. The District fulfilled its Child Find obligation as to Student. 34 C.F.R. § 300.111; 19 Tex. Admin. Code § 89.1011.

ORDER

Having considered the evidentiary record and the foregoing Findings of Fact and Conclusions of Law, the hearing officer hereby orders that all claims and remedies requested are denied.

SIGNED June 30, 2017.



Catherine C. Egan
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

This Decision of the hearing officer is a final and appealable order. Any party aggrieved by the findings and decision made by the Hearing Officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States.¹¹⁷

¹¹⁷ 20 U.S.C § 1415(i)(2); 34 C.F.R. § 300.516; 19 Tex. Admin. Code § 89.1185(n).