

**DOCKET NO. 167-SE-0120**

**STUDENT, B/N/F PARENT,  
Petitioner**

v.

**FLORESVILLE INDEPENDENT  
SCHOOL DISTRICT,  
Respondent**

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**BEFORE A SPECIAL EDUCATION**

**HEARING OFFICER FOR**

**THE STATE OF TEXAS**

**DECISION OF THE HEARING OFFICER**

**I. PROCEDURAL HISTORY**

Student, by next friend Parent (Student or, collectively, Petitioner), brought this case against the Floresville Independent School District (Respondent or District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and its implementing state and federal regulations. Petitioner requested a due process hearing on January 29, 2020. Respondent filed a Plea to the Jurisdiction and Response on February 7, 2020.

The legal issue presented in this case is whether the District violated its Child Find obligation, and failed to evaluate and identify Student for special education and related services. The Hearing Officer concludes the evidence did not establish Student’s eligibility for special education and related services, and thus the District did not deny Student a free, appropriate public education (FAPE) under the IDEA.

**A. Legal Representatives**

Petitioner was represented by Michael O’Dell. Respondent was represented by John Muniz and Eric Rodriguez.

## II. DUE PROCESS HEARING

The due process hearing convened virtually on October 21, 2020, via the Zoom platform. The hearing was recorded and transcribed by a certified court reporter.

Petitioner continued to be represented by Michael O'Dell. Student's father, \*\*\*, attended the hearing. Respondent was represented by John Muniz and his co-counsel Eric Rodriguez. \*\*\*, Director of Special Education, participated as the party representative for the District.

## III. ISSUES

### A. Petitioner's Claim

The due process hearing request challenges Student's educational program beginning in August 2019 and presents the following legal issue for decision:

CHILD FIND: Whether the District failed to evaluate and identify Student as a student with a disability in need of special education and related services.

### B. Petitioner's Requested Relief

Petitioner seeks the following items of requested relief:

1. An order directing the District to enroll Student, without requiring Student to enroll in \*\*\*;
2. An order directing the District to evaluate Student, and convene an Admission, Review, and Dismissal (ARD) Committee meeting to determine eligibility for special education and/or services under Section 504 of the Rehabilitation Act of 1973 (Section 504);
3. An order finding the District denied Student a FAPE beginning in August 2019 and awarding compensatory educational services; and
4. Reimbursement of parental expenses, to include attorney's fees.

### C. The School District's Legal Position

The District generally denied the allegations, and raised the following issues for decision:

PLEA TO THE JURISDICTION: Whether a hearing officer has jurisdiction to award parental expenses, to include attorney's fees.

STATUTE OF LIMITATIONS: Whether claims accruing outside the one year statute of limitations should be dismissed.

### IV. FINDINGS OF FACT

1. Student is \*\*\* years old and lives with Student's parents \*\*\* in Floresville, Texas. Student enjoys learning to \*\*\*, communicating with friends, and learning about things that interest Student.<sup>1</sup>
2. At age \*\*\*, Student was \*\*\*. Student underwent numerous \*\*\*. Student will require \*\*\* and may need additional \*\*\* in the future.<sup>2</sup>
3. Student attended two other school districts from \*\*\* through \*\*\* grade, and attended \*\*\* grade in the District from August to December 2013. Student's parents withdrew Student from the District due to concerns Student's \*\*\* needs were not being adequately met. Student has been homeschooled since that time.<sup>3</sup>
4. Student was referred for an initial evaluation under Section 504 in April 2010 due to \*\*\*. Under Student's initial and subsequent Section 504 plans, Student was to avoid \*\*\*.<sup>4</sup>
5. Student's physician provided the District information regarding Student's \*\*\* needs in October 2013. Student had \*\*\*. Student's \*\*\*, but Student was "now much better." Though Student might experience fatigue, Student could generally keep up with peers. "At this point, there is nothing for the school to do but allow Student to rest when Student is tired or has a headache." Student's physician did not state that Student needed special education services or any additional accommodations beyond those she outlined.<sup>5</sup>
6. In regard to its Child Find responsibility under the IDEA, the District attempts to locate

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<sup>1</sup> Respondent's Exhibit (RE) 5 at 1, 2.

<sup>2</sup> RE 5 at 12.

<sup>3</sup> Joint Exhibit (JE) 16 at 1, 3; Transcript (Tr.) at 177-78.

<sup>4</sup> JE 9; JE 10; JE 11; JE 16 at 1.

<sup>5</sup> RE 1; Tr. at 59.

- children in need of special education services by having information on its website; educating staff; and providing information to hospitals, day care centers, and community centers. The District determines whether an evaluation is appropriate based on data it gathers regarding a particular student.<sup>6</sup>
7. Student's father sought to reenroll his \*\*\* in the District, and attended a registration event on August \*\*\*, 2019. The District \*\*\*.<sup>7</sup>
  8. On August \*\*\*, 2019, Student's father filed a grievance concerning the enrollment process, alleging Student was denied "a paper enrollment" and the District had not produced a policy requiring online enrollment only. The remedy sought was "[Student's] enrollment under FAPE and punitive reimbursement for damages and costs."<sup>8</sup>
  9. The District's Executive Director convened a grievance hearing on September \*\*\*, 2019 and provided a written response on September \*\*\*. The District granted the request for paper forms, and the response detailed efforts to accommodate parental concerns \*\*\*. Student, however, did not enroll in the District.<sup>9</sup>
  10. The District's Special Education Director learned Student had \*\*\* in August 2019 through a parent report. She confirmed through records Student had a Section 504 plan due to \*\*\* when Student attended school in the District in \*\*\* grade. She requested further information to gain a better understanding of the nature of Student's disability and provided Student's father an Other Health Impairment (OHI) form for Student's physician's input on August \*\*\*, 2019. Student's father did not return the document to her.<sup>10</sup>
  11. Student's father maintains he provided the completed OHI form to the Executive Director at the September \*\*\* grievance hearing, but the District did not receive it until March 2020. The discussion during the grievance hearing focused on \*\*\* enrollment, not special education services for Student.<sup>11</sup>
  12. On March \*\*\*, 2020, the District proposed a Full and Individual Evaluation (FIE) of Student and provided a Notice of Proposal to Evaluate. The proposed area of evaluation was Health. Consent was given on March \*\*\*, 2020. The District provided a second Notice of Proposal to Evaluate on August \*\*\*, 2020, with consent given on August \*\*\*, 2020. Areas of evaluation were expanded to include Health, Sociological Status, Intellectual/Adaptive Behavior, and Academic Performance.<sup>12</sup>

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<sup>6</sup> Tr. at 45, 63.

<sup>7</sup> Petitioner's Exhibit (PE) 5; PE 7 at 2; Tr. at 111-12, 199.

<sup>8</sup> PE 4 at 1-2.

<sup>9</sup> PE 7 at 1-2; Tr. at 124, 125, 127.

<sup>10</sup> JE 17 at 1-2; Tr. at 39-40, 41-42, 45-46, 69, 195, 206-07.

<sup>11</sup> PE 7 at 1; Tr. at 42, 92, 129-30, 186-87.

<sup>12</sup> RE 3 at 1-2; RE 4 at 1-3; RE 6.

13. The FIE is dated September \*\*\*, 2020, and was conducted by an experienced District Licensed Specialist in School Psychology (LSSP). Formal sources of data obtained by the LSSP included the Kaufman Assessment Battery for Children-2nd Edition, Normative Update; the Woodcock-Johnson-4th Edition processing speed subtests; the Comprehensive Test of Phonological Processing-2nd Edition; and the Kaufman Test of Educational Achievement-3rd Edition.<sup>13</sup>
14. Other sources of data for the FIE included a Parent Information Form; a Hearing/Vision Screening by a Registered Nurse on August \*\*\*, 2020; Determination of Intellectual Disability Report by \*\*\* dated January \*\*\*, 2020, which included the Wechsler Intelligence Scale for Children-5th Edition; OHI Eligibility Report dated August \*\*\*, 2019; and a Home Language Survey dated August \*\*\*, 2013.<sup>14</sup>
15. The District convened an ARD Committee meeting on October \*\*\*, 2020, to consider the FIE and Student's eligibility for special education.<sup>15</sup>
16. The ARD Committee considered a Disability Report: Other Health Impairment by Student's pediatric primary care physician. Student's \*\*\*. Student \*\*\*. Student exhibits \*\*\* – "therefore please allow [Student] to participate in physical activities as tolerated." Student also has limited alertness due to increased \*\*\*. The report did not recommend or otherwise address Student's need for specialized instruction.<sup>16</sup>
17. Student's father provided consent for the District to speak with Student's physician on March \*\*\*, 2020. In April 2020, the school nurse attempted to clarify the information on the OHI form, and was not successful. The District made additional efforts to contact the physician during the evaluation process. She declined to speak with them without a subpoena.<sup>17</sup>
18. Student was evaluated by \*\*\* on January \*\*\*, 2020, to determine whether Student may have an intellectual disability. This evaluation was considered by the ARD Committee. On the Wechsler Intelligence Scale for Children, Student obtained a Full Scale IQ of \*\*\*, indicating average intellectual functioning. Student's verbal comprehension skills were significantly elevated over visual spatial, fluid reasoning, working memory, and processing speed. The Vineland-III Adaptive Behavior Composite Scores showed no deficits in adaptive abilities. Student does not have an intellectual disability.<sup>18</sup>
19. In the area of Communication, the Home Language Survey showed English is the language

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<sup>13</sup> JE 16 at 1, 4-7; Tr. at 140.

<sup>14</sup> JE 16 at 1-2.

<sup>15</sup> JE 14 at 1-2.

<sup>16</sup> PE 3; Tr. at 154-55, 196.

<sup>17</sup> PE 12; Tr. at 72-73, 149, 200-01.

<sup>18</sup> JE 15 at 2-5; JE 16 at 1.

- Student speaks and understands best. Student's parents reported some difficulty pronouncing words. During testing, Student demonstrated age appropriate expressive and receptive language skills, could understand and follow directions, spoke in complete sentences, and used average to above average vocabulary.<sup>19</sup>
20. In the area of Health/Motor Abilities, Student passed the vision screening \*\*\*. Student's vision was within normal limits. Student \*\*\*. Student reported having \*\*\*. While not within normal limits, Student appeared to have functional hearing.<sup>20</sup>
  21. In the area of Sociological, the LSSP found Student lacked educational opportunities in reading and math due to attending multiple school districts and home school instruction since \*\*\* grade. As a result, Student did not have the opportunity to benefit from the Response to Intervention process targeting academic deficits.<sup>21</sup>
  22. In the area of Emotional/Behavior, parent reports indicated Student is well-behaved and sociable and relates to others at a level of someone older than Student's age. Student exerted Student's best effort throughout testing and was cooperative and compliant. The LSSP found Student's behavior did not impede Student's learning or that of others.<sup>22</sup>
  23. The LSSP did cognitive and achievement testing to rule out a Specific Learning Disability. Student was given a cross-battery assessment to determine cognitive strengths and weaknesses, including the Kaufman Assessment Battery for Children, the Comprehensive Test of Phonological Processing, and the processing speed subtests of the Woodcock-Johnson Tests of Cognitive Abilities. Standard scores of 85-115 are within the average range on these instruments.<sup>23</sup>
  24. On the Kaufman Assessment Battery for Children, Student achieved scores in the average and above average ranges. The Crystallized Intelligence subtests, which measure acquired knowledge, yielded a score of \*\*\*; the Long-Term Retrieval subtests, which measure ability to take and store information, yielded a score of \*\*\*; the Fluid Reasoning subtests, which measure thinking when faced with a new task and problem-solving, yielded a score of \*\*\*; the Short-Term Memory subtests, which measure comprehension, holding, and use of information, yielded a score of \*\*\*; and the Visual Processing subtests, which measure ability to perceive and analyze with visual patterns and stimuli, yielded a score of \*\*\*.<sup>24</sup>
  25. On the Woodcock-Johnson processing speed subtests, which measure ability to perform cognitive tasks fluently and automatically, Student achieved a \*\*\*. On the Comprehensive

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<sup>19</sup> JE 16 at 2; RE 5 at 2.

<sup>20</sup> JE 16 at 2, 3.

<sup>21</sup> JE 16 at 3-4.

<sup>22</sup> JE 16 at 4; RE 5 at 1, 7.

<sup>23</sup> JE 16 at 4; Tr. at 141.

<sup>24</sup> JE 16 at 5.

- Test of Phonological Processing, which measures ability to perceive, analyze, and synthesize sounds, Student achieved a score of \*\*\*. Overall, cognitive and achievement testing showed Student has average to above average cognitive abilities, and the ability to complete the same work as same-aged peers.<sup>25</sup>
26. Student's adaptive behavior was assessed using informal measures. Student demonstrated age appropriate skills and was independent in self-care needs consistent with Student's intellectual functioning.<sup>26</sup>
  27. Student was given the Kaufman Test of Educational Achievement, with standard scores of 85-115 considered average. Student achieved Average scores in Letter and Word Identification (\*\*\*), Reading Comprehension (\*\*\*), and Written Expression (\*\*\*) and Below Average scores in Math Concepts and Application (\*\*\*) and Spelling (\*\*\*). Student scored in the Low range in Math Computation (\*\*\*). Student reported Student had not used math in a long time, and math calculation was identified as a relative area of weakness.<sup>27</sup>
  28. The LSSP obtained information from Student's parents for the FIE. Student's strengths include progressive thinking, reasoning, and deductive logic. Student is well-behaved, very sociable, and does not require discipline. Student is quick to learn, reads well, and picks up clearly explained concepts, including complex concepts. Student has a history of \*\*\*. Student \*\*\*.<sup>28</sup>
  29. Student's mother gave the ARD Committee a list of needs related to Student's \*\*\*. These include \*\*\*. Student needs to \*\*\*. The LSSP concluded these needs can be met through accommodations and in the general education curriculum.<sup>29</sup>
  30. The FIE concluded Student did not meet eligibility criteria as a student with a Specific Learning Disability. While Student demonstrated "underachievement" in the areas of Math Computation, Math Concepts and Application, and Spelling, Student did not exhibit any cognitive weaknesses or normative deficits indicative of a Specific Learning Disability. Student's average cognitive abilities also suggest any underachievement may be due to limited educational opportunities and exposure to these skills. The LSSP could not rule out attending multiple different schools and homeschooling since the \*\*\* grade as primary contributors to the deficits identified.<sup>30</sup>
  31. Student has \*\*\*, but information gathered for the FIE did not demonstrate Student is eligible as a student with an OHI. While Student's physician reported \*\*\* resulting in

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<sup>25</sup> JE 16 at 5-6; Tr. at 155.

<sup>26</sup> JE 16 at 6.

<sup>27</sup> JE 16 at 6-7; Tr. at 142.

<sup>28</sup> JE 16 at 2; RE 5; RE 5 at 1, 2, 4, 5, 7, 11, 12; Tr. at 162.

<sup>29</sup> Tr. at 79, 151-52, 180.

<sup>30</sup> JE 16 at 6-8; Tr. at 157.

limited strength, alertness, and vitality, the only limitation noted was engaging in physical activities as tolerated. The LSSP concluded Student's \*\*\* did not have a direct and adverse impact on educational performance or necessitate specially designed instruction.<sup>31</sup>

32. Student's \*\*\* needs can be served through accommodations under Section 504 rather than special education. The LSSP recommended continued programming under Section 504 and general education services, including tutoring, to address academic deficits, particularly in math.<sup>32</sup>
33. The ARD Committee did not reach agreement. District members of the ARD Committee did not find Student eligible, and Student's parents disagreed with the FIE results and recommendation regarding eligibility. The District convened a ten-day recess ARD Committee meeting that again ended in disagreement.<sup>33</sup>
34. As of the date of the hearing, Student has not been enrolled in the District since 2013. If and when Student is enrolled, the District is prepared to offer Section 504 services.<sup>34</sup>

## V. DISCUSSION

Petitioner alleges the District denied Student a FAPE by abridging its Child Find obligation, and failing to evaluate Student and find Student eligible for special education.

### A. Burden of Proof

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

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<sup>31</sup> JE 16 at 8; Tr. at 144-45, 154-55, 157.

<sup>32</sup> JE 16 at 8; Tr. at 52, 164.

<sup>33</sup> Tr. at 151, 159-60.

<sup>34</sup> JE 16 at 3; Tr. at 208.



**B. Free, Appropriate Public Education**

Under the IDEA, students with disabilities are entitled to a FAPE that provides special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A). School districts must offer a FAPE to all students with disabilities living in its jurisdiction between the ages of three and twenty-one. 34 C.F.R. § 300.101(a); Tex. Educ. Code § 29.003. These students must receive specially designed, personalized instruction with sufficient support services to meet their unique needs and confer educational benefit. Instruction and services must be at public expense and comport with the Individualized Education Plan developed by the student's ARD Committee. 20 U.S.C. § 1401(9)(A)-(D); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 200-01, 203-04 (1982).

“Special education” means specially designed instruction to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, and instruction in physical education. 34 C.F.R. § 300.39(a)(1). “Specially designed instruction” means adapting, as appropriate to the needs of the eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability; and to ensure access to the general curriculum so the child can meet the educational standards applicable to all children. 34 C.F.R. § 300.39(b)(3).

**C. Enrollment and Obligation to Provide a Free, Appropriate Public Education**

As a preliminary matter, the Hearing Officer addresses the unresolved dispute between the parties concerning method of enrollment on Student's right to a FAPE. Petitioner argues the District's obligation to provide Student a FAPE cannot be met until Student is enrolled, and alleges the District failed to do so beginning in August 2019. \*\*\*. The District argues the parties' disagreement regarding enrollment is not related to whether a Child Find violation occurred, and not relevant because it has not refused to enroll Student. The Hearing Officer agrees.

A school district's duty to offer a FAPE to a student with a disability depends on residency, not enrollment. *Dallas Indep. Sch. Dist. v. Woody*, 865 F. 3d 303, 306 (5th Cir. 2017); *C.C. Jr. v. Beaumont Indep. Sch. Dist.*, 65 IDELR 109 (E.D. Tex. 2015). Here, there is no dispute Student resides in the District and is eligible to enroll. The evidence showed Student's father attempted to enroll his \*\*\* in August 2019, the parties reached an impasse regarding method of enrollment, and Student did not enroll in the District. However, the District did not condition an evaluation on Student's enrollment and does not dispute it has an obligation to offer Student a FAPE under the IDEA if Student is eligible. Notably, Student was not enrolled in the District when it conducted an FIE and convened an ARD Committee meeting to consider Student's eligibility for services. The District is also ready to serve Student under Section 504 when Student enrolls. The Hearing Officer concludes the impasse regarding method of enrollment is unrelated to Student's potential right to a FAPE under the IDEA in the District.

#### **D. Child Find Under the IDEA**

The IDEA's Child Find provisions guarantee access to special education for students with disabilities. 20 U.S.C. § 1400(d)(1)(A); 34 C.F.R. § 300.111. A school district, like Respondent, has an affirmative duty to have policies and procedures in place to locate, and timely evaluate, children with suspected disabilities in its jurisdiction, including “[c]hildren who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade.” 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.111(a), (c)(1); *El Paso Indep. Sch. Dist. v. Richard R.R.*, 567 F. Supp. 2d 918, 950 (W.D. Tex. 2008).

The Child Find obligation is triggered when a school district has reason to suspect the student has a disability, coupled with reason to suspect special education services may be needed to address the disability. *Richard R.R.*, 567 F. Supp. 2d at 950; *Dep't of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001). When these suspicions arise, the school district must evaluate the student within a reasonable time after school officials have notice of reasons to suspect a disability. *Richard R.R.*, 567 F. Supp. 2d at 950. State regulations also require referral and evaluation of potential special education students as part of a school district's overall

regular education referral or screening system for students experiencing difficulty in the regular classroom. 19 Tex. Admin. Code § 89.1011(a).

Petitioner contends the District violated its Child Find duty by failing to locate, evaluate, and identify Student for services under the IDEA. This claim would typically be resolved through a two-part inquiry: whether the school district has reason to suspect the student had a disability *and* reason to suspect the student may need special education and related services. *Dallas Indep. Sch. Dist. v. Woody*, 178 F. Supp. 3d 443, 467 (N.D. Tex. 2016), *aff'd in part and rev'd in part*, 865 F.3d 303, 320 (5th Cir. 2017).

In this case, however, the weight of the credible evidence does not support Student's eligibility under the IDEA. While there is a disagreement between the parties about whether the District received the OHI form before litigation commenced, even if it had, or otherwise should have evaluated Student earlier, a school district is not liable for a Child Find violation unless the student has a need for special education. *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 Fed. Appx. 887, 893 (5th Cir. 2012) ("the IDEA does not penalize school districts for not timely evaluating students who do not need special education"). A school district's liability is predicated on an eligibility finding. In this case, Student's eligibility was not established. Therefore, Petitioner is not entitled to relief on the sole issue pled.

#### **E. Eligibility Determinations under the IDEA**

In determining whether a student qualifies for special education, assessments and other evaluations must assess the student in all areas of suspected disability. 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4). An evaluation must also be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. § 300.304(c)(6). The school district should also consider a student's academic, behavioral, and social progress in determining whether the student needs special education for purposes of Child Find and IDEA eligibility. *Alvin Indep. Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F.3d 378, 384 (5th Cir. 2007); *D.L. v. Clear Creek Indep. Sch. Dist.*, 695 Fed. Appx. 733, 738 (5th Cir. 2017).

Here, the evidence showed the LSSP conducted various assessments to develop an understanding of Student's potential disabilities and educational needs, including cognitive and achievement testing. In addition to the assessments by the LSSP, other sources of data included a Parent Information Form and consideration of parental input regarding Student's \*\*\* needs by the ARD Committee; a Hearing/Vision Screening; a parentally-obtained independent evaluation of whether Student may have an intellectual disability; a parentally-obtained OHI Eligibility Report; and a Home Language Survey. In addition to considering whether Student may be eligible as a student with an OHI, the District also considered eligibility under other classifications. The Hearing Officer finds the FIE assessed Student in all areas of suspected disability, and was sufficiently comprehensive to identify Student's potential special education and related service needs. 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. §§ 300.304(c)(4), (c)(6).

#### **1. Whether Student is Eligible as a Student with an OHI**

An eligibility determination is made on the basis of an evaluation that meets IDEA criteria and a finding a student meets one or more of thirteen eligibility classifications, and by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3)(A); 34 C.F.R. §§ 300.8(a)(1), (c)(1)-(13); 34 C.F.R. §§ 300.304-300.306; 19 Tex. Admin. Code § 89.1040(c)(1)-(13).

Petitioner contends Student is eligible as a student with an OHI due to Student's \*\*\*, including \*\*\*, and requires specially designed instruction under the IDEA as a result. An OHI is defined as having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that: (i) is due to chronic or acute health problems such as asthma, attention deficit disorder or ADHD, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) *adversely affects a child's educational performance*. 34 C.F.R. § 300.8(c)(9)(i)-(ii) (emphasis added).

Here, the ARD Committee considered the OHI form completed by Student's pediatric primary care physician. In addition to listing Student's diagnoses, she indicated Student exhibits limited strength and vitality due to \*\*\*, and recommended participation "in physical activities as

tolerated.” Student also exhibits limited alertness due to \*\*\*. The information provided by Student’s physician supports the conclusion Student meets the first prong of the OHI definition – limited strength, vitality, and alertness due to \*\*\*. 34 C.F.R. § 300.8(c)(9)(i).

It is not clear, however, from the OHI report how Student’s \*\*\* adversely affect Student’s educational performance, as must be shown to support a finding Student is a student with an OHI under the IDEA. 34 C.F.R. § 300.8(c)(9)(ii). The District’s efforts to obtain additional information from Student’s physician were not successful, and thus the ARD Committee had only her recommendation Student participate in physical activities as tolerated and a statement about increased \*\*\* when considering Student’s eligibility. The Hearing Officer finds the limited information provided by Student’s physician – notably, the only contemporaneous information from a medical provider before the ARD Committee – did not sufficiently link Student’s \*\*\* to educational need or performance. It thus does not support the conclusion Student meets criteria as a student with an OHI by a preponderance of the evidence.

Even if the FIE supported the conclusion Student’s \*\*\* have an adverse impact on educational performance, an evaluation must also demonstrate the student *needs special education and related services as a result*. 34 C.F.R. § 300.8(a)(1) (emphasis added).

In addition to the OHI eligibility report, the ARD Committee considered a list of Student’s needs related to Student’s \*\*\* provided by Student’s parent. These included \*\*\*. Student also \*\*\* during the school day. The needs identified by the parent can be met in the general education curriculum with a Section 504 plan to provide certain accommodations. Here, while Student requires certain flexibility and/or accommodations, including assistance with \*\*\*, to ensure Student remains healthy at school, the needs identified do not impact Student’s ability to access the general education curriculum consistent with Student’s peers, or point to a need for specially designed instruction. Specifically, the evidence does not support the conclusion Student requires adaptation of content, methodology, or delivery of instruction to ensure access to the general curriculum. *See* 34 C.F.R. § 300.39(b)(3). Student’s need for special education services as a result of Student’s \*\*\* was thus not established.

## 2. Whether Student is Eligible Under Another Classification

The District did not limit its eligibility inquiry to whether Student is eligible as a student with an OHI and broadened the scope of the FIE to include, and ultimately rule out, other potential areas of eligibility. The August 2020 Notice of Proposal to Evaluate added several areas of evaluation in addition to Health, including Sociological Status, Intellectual/Adaptive Behavior, and Academic Performance, and the LSSP considered whether Student may be eligible under other classifications.

The ARD Committee considered a January 2020 parentally-obtained independent evaluation from \*\*\* that evaluated whether Student may have an intellectual disability. The Wechsler Intelligence Scale for Children yielded a Full Scale IQ of \*\*\*, indicating Student has average intellectual functioning. The evaluation also looked at Student's adaptive functioning, and Student's Vineland-III Adaptive Behavior Composite Scores showed no deficits in adaptive abilities. Student does not have an intellectual disability and thus does not qualify for services under the IDEA on this basis.

The LSSP administered several assessments to determine Student's cognitive strengths and weaknesses and assess whether Student may have a Specific Learning Disability. On the Kaufman Assessment Battery for Children, Student achieved scores in the average range and above average ranges. The Woodcock-Johnson processing speed subtests and the Comprehensive Test of Phonological Processing yielded scores in the average range. Overall, this testing revealed Student has average to above average cognitive abilities and the ability to complete the same work as same-aged peers.

On the Kaufman Test of Educational Achievement, Student achieved Average scores in Letter and Word Identification (\*\*\*), Reading Comprehension (\*\*\*), and Written Expression (\*\*\*) and Below Average scores in Math Concepts and Application (\*\*\*) and Spelling (\*\*\*). Student scored in the Low range in Math Computation (\*\*\*). This assessment identified math calculation as an area of relative weakness. While Student demonstrated "underachievement" in the areas of Math Application and Computation and Spelling, Student did not exhibit any cognitive

weaknesses indicative of a Specific Learning Disability in these areas. Further, Student's average cognitive abilities suggest any underachievement may be due to limited educational opportunities and exposure to these skills. Based on these results, Student does not have a Specific Learning Disability and thus does not qualify for services under the IDEA on this basis.

### 3. Conclusion

A child is not a child with a disability under the IDEA if he or she does not meet eligibility criteria under one of the thirteen enumerated classifications. 34 C.F.R. §§ 300.8(a)(1), (c)(1)-(13); 34 C.F.R. § 300.306(b)(2). Student has \*\*\*, but the evidence did not demonstrate Student's eligibility as a student with an OHI because Student's \*\*\* do not adversely impact Student's educational performance.

Here, while it is undisputed Student has \*\*\*, the evidence also did not establish a need for special education and related services under the IDEA as a result of these conditions. Based on the information before it, the ARD Committee thus appropriately determined Student was not eligible over the parents' objections. Further, the FIE and the LSSP's testimony supports the conclusion the District undertook a comprehensive look at Student's potential areas of eligibility, including Intellectual Disability, Specific Learning Disorder, and OHI. Petitioner did not offer contrary testimony or evidence to support eligibility, and thus did not meet Petitioner's burden of proof. Student's need for specially designed instruction available to students with disabilities under the IDEA, and thus Student's eligibility, was not established by a preponderance of the evidence.

## VI. CONCLUSIONS OF LAW


1. As the challenging party, Petitioner has the burden of proof to establish a violation of the IDEA. *Schaffer v. Weast*, 546 U.S. 49 (2005).
2. The District assessed Student in all areas of suspected disability in determining whether Student qualifies for special education. 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).

3. Petitioner did not meet the burden of proving 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(a)(1).
4. Petitioner did not meet the burden of proving the District violated its Child Find duty. For a school district to be liable for a denial of FAPE, the student must be a student with a disability under the IDEA. 34 C.F.R. § 300.111; *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 Fed. Appx. 887 (5th Cir. 2012).

## VII. ORDERS

Based upon the foregoing findings of fact and conclusions of law, Petitioner's requests for relief are **DENIED**.

**SIGNED January 4, 2021.**



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**Kathryn Lewis**  
**Special Education Hearing Officer**  
**For the State of Texas**

## VIII. NOTICE TO PARTIES

The Decision of the Hearing Officer 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); 34 C.F.R. § 300.516(a); 19 Tex. Admin. Code § 89.1185(n).