

**SOAH DOCKET NO. 701-20-2975.IDEA
TEA DOCKET NO. 218-SE-0320**

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

v.

**WESLACO 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. STATEMENT OF THE CASE

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

The main issue in this case is whether the District violated its Child Find responsibilities by failing to evaluate and identify Student for special education and related services. The Hearing Officer concludes the District did not have reason to suspect Student may need special education and thus did not violate its Child Find obligation.

II. PROCEDURAL HISTORY

A. Legal Representation

Student was represented throughout this litigation by Student's legal counsel, Jordan McKnight, assisted by non-attorneys Debra Liva and Bonnie Garza. The District was represented throughout this litigation by its legal counsel, Elvin Houston and Priscilla Delagarza with Walsh Gallegos Treviño Kyle & Robinson, P.C.

III. DUE PROCESS HEARING

The due process hearing was conducted on April 29-30, 2021, via the Zoom videoconference platform. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Petitioner's legal counsel, Jordan McKnight, who was assisted by non-attorney Debra Liva. Student's parents also attended the due process hearing.

Respondent continued to be represented by its legal counsel, Elvin Houston, who was assisted by his co-counsel, Priscilla Delagarza. In addition, ***, the Director of Special Education for the School District, attended the hearing as the party representative. Both parties filed timely written closing briefs. The Decision in this case is due June 21, 2021.

IV. ISSUES

A. Petitioner's Issues

Petitioner raised the following IDEA issues for decision in this case:

1. FREE, APPROPRIATE PUBLIC EDUCATION (FAPE): Whether the District failed to provide Student a FAPE, including:
 - a. Whether the District failed to establish an Individual Education Program (IEP); and
 - b. Whether the District failed to provide special education services (both related and supplementary services).
2. CHILD FIND: Whether the District failed to timely identify Student as a student with a disability in need of special education instruction and related services.
3. PARENTAL PARTICIPATION: Whether the District failed to allow Student's parent to meaningfully participate in the decision making process.

B. Respondent's Legal Position and Additional Issues

Respondent generally denied the factual allegations stated in Student's hearing request. The District contends it provided Student a FAPE during the relevant time period, can continue to do so, and Petitioner is not entitled to any of the requested relief.

The District raised the following additional issues:

1. JURISDICTIONAL: Whether the Hearing Officer has jurisdiction to resolve claims arising under any laws another than the IDEA, and whether such claims should be dismissed.
2. STATUTE OF LIMITATIONS: Whether any of Student's IDEA claims that accrued prior to March 6, 2019 should be dismissed as outside the one-year statute of limitations rule as applied in Texas.

The Hearing Officer dismissed all allegations under statutes other than the IDEA in Order No. 3 issued on March 26, 2020.

V. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner seeks the following items of requested relief:

1. A finding that the District denied Student a FAPE.
2. A finding that the District violated the Child Find provision of the IDEA.
3. Order the District to provide compensatory education and related services to address Student's areas of disability and/or needs to include, but not limited to, tutoring, social skills, speech, counseling, and occupational therapy (OT).
4. Order the District to conduct an Independent Educational Evaluation (IEE) in the areas of cognitive and achievement, and a complete psychological evaluation, to include autism, for all suspected or known disabilities; speech to include expressive/receptive/pragmatic

language; counseling; assistive technology; OT, to include sensory; and a functional behavior assessment (FBA) at District expense.

5. Order the District to convene an Admission, Review, and Dismissal (ARD) Committee meeting after the completion of an IEE to establish specific and measurable goals to address Student's unique needs.
6. Order the District to reimburse for all educational and therapy expenses incurred by Student's parent.
7. Order the District to reimburse all costs and representative fees that Student's parent has incurred in filing this due process hearing request.
8. Order any and all other remedies that Petitioner may be entitled to under the law.

VI. FINDINGS OF FACT

1. Student is *** years old and lives with Student's parents, *** in Weslaco, Texas. Student enjoys ***. Student is creative and enjoys ***. Student has ***.¹
2. Student is currently in the *** grade, Student has attended schools in the District beginning in *** through the 2020-21 school year. In December 2014, Student was referred for a speech evaluation by a school counselor because a teacher indicated Student struggled with communication and was hard to understand. Student's parent requested an Autism and OT evaluations. Consent was given for a Full and Individual Evaluation (FIE) on December ***, 2014.²
3. The FIE found Student did not qualify for special education services as a student with a speech impairment or autism. Student could walk, run, sit, and perform age-level self-help skills independently and thus did not require OT. Student was diagnosed with *** by *** specialist, which causes ***. *** is a structural issue caused by *** which needed to be addressed by a physician.³
4. Student received private speech therapy and OT from the age of *** until Student was *** years old.⁴

¹ Joint Exhibit (JE) 25 at 0111; JE 24 at 0083.

² JE 24 at 0079; Respondent's Exhibit (RE) 4 at 0002, 0027-0029; RE 2; Transcript (TR) Vol. I at 104.

³ RE 5 at 2; RE 6 at 0002; RE 7 at 0003.

⁴ TR Vol. I at 80.

5. An ARD Committee met on March ***, 2015, to consider the FIE. The ARD Committee determined that Student did not qualify for special education as a student with autism or a speech impairment. The ARD Committee did not find that Student was in need of special education and related services. Eligibility as a student with an Other Health Impairment (OHI) due to Attention Deficit Hyperactivity Disorder (ADHD) was considered, but based on intelligence and academic testing, grades, and benchmark data, Student did not appear to need special education services on this basis. Student's parent was in agreement with the ARD Committee's decisions regarding eligibility.⁵
6. The ARD Committee provided Prior Written Notice and a Notice of Procedural Safeguards to Student's parent at the March 2015 ARD Committee meeting.⁶

2018-19 School Year

7. Student was in the *** grade during the 2018-19 school year. In December 2018, Student's parent had Student evaluated for an Autism Spectrum Disorder by a private psychologist after Student did not meet the standard for Reading on the State of Texas Assessments of Academic Readiness (STAAR) exam in *** grade. Dr. *** completed the evaluation on January ***, 2019. Formal sources of data included the Wechsler Abbreviated Scale of Intelligence-2nd Edition (WASI-II); Wechsler Nonverbal Scale of Ability (WNV); Adaptive Behavior Assessment System, 3rd Edition; Adaptive Behavior Assessment System, 3rd Edition; (ABAS 3); Youth Self-Report (YSR 11-18); Conners 3rd Edition-Self Report Short Form (Conners 3-SR(S)); The Child Behavior Checklist, Parent (CBCL 6-18); Conners 3rd Edition-Parent Short Form (Conners 3-P(S)); Child Depression Inventory-2nd Edition (CDI-2:P); Multidimensional Anxiety Scale for Children, 2nd Edition, Parent (MASC 2P); and the Autism Spectrum Rating Scales for ages 6-18, Parent (ASRS 6-18).⁷
8. Student's general intelligence as measured by the WASI-II and the WNV were in the low average range. The assessment of Student's adaptive functioning on the ABAS 3 was based only upon parent ratings, with the conceptual and practical domains in the low average range and the social domain in the borderline range. The CBCL and Conners 3-P(S) were used to obtain Student's parent ratings of Student's emotional and behavioral functioning. The scores were clinically significant for anxiety, thought problems, and problems in social relationships. Student's self-ratings on the YSR and Conners 3-SR(S), the scores fell within the normal range for emotional and behavioral functioning. On the ASRS, which was based on one-to-one testing, reported history from Student's parents, and observations of Student, the results indicated Student had symptoms confirming Student met the DSM-5 diagnostic criteria associated with characteristics of autism.⁸

⁵ RE 8.

⁶ RE 3; RE 9; TR Vol. I at 100-102.

⁷ Petitioner's Exhibit (PE) 1 at 0003-0008.

⁸ PE 1 at 0009.

9. In addition to the Autism Spectrum Disorder diagnosis, Student was diagnosed with ADHD-Inattentive type, ***, Unspecified Communication Disorder, and Educational Problems (likely secondary to ADHD and anxiety). Recommendations included medication, continued OT, reinstate ST, and working closely with school staff to determine Student's eligibility for special education services. This testing was not intended as a replacement for a special education evaluation.⁹
10. Dr. *** administered only standardized tests that relied on information from Student's parent and did not consider the 2015 FIE or information or records from Student's school showing Student's current level of functioning in the school setting. She did not seek information or input from any District teachers and the evaluation did not consider information from current teachers. On February ***, 2019, Student's parent notified the District of the results of the private evaluation and requested a meeting to "discuss how Student would get the help Student needs from the school if educationally there are no struggles, but Student is easily distracted..." Student's parent did not request a special education evaluation.¹⁰
11. On February ***, 2019, the District sought parental consent for an initial evaluation of Student under Section 504 due to the information from the private psychological evaluation shared by Student's parent. Student's parent provided consent for the District to conduct an initial evaluation under Section 504 on February ***, 2019. The District provided the Notice of Rights and Procedural Safeguards under Section 504 with the consent form.¹¹
12. The Section 504 Committee met on February ***, 2019, and determined that Student qualified for Section 504 services as a student with multiple impairments: autism, ADHD, and a speech delay. The Committee considered a variety of data sources: parental input; teacher/administrator input and recommendations; and Student's grades. Student's parent gave consent for services under Section 504. Student's Section 504 service plan required extra time for STAAR testing and if needed, for classwork, homework, and benchmarks in ***. The Section 504 Committee considered related services but determined they were not required.¹²
13. The parent input report for Section 504 services stated that Student was not having educational difficulties, but struggled with noises and other students' negative behaviors, such as speaking out-of-turn and misbehaving. Student was unable to ignore it and these distractions led to Student ***". The report indicated that Student interacts well with adults

⁹ PE 1 at 0009.

¹⁰ TR Vol. I at 43, 58-59; PE 2.

¹¹ JE 7; JE 14 at 0040; TR Vol. I at 109-110.

¹² JE 11 at 0027-0028, 0030-0031; JE 9 at 0019.

in social situations but will not approach a peer to socialize. Student's parent also expressed concern that Student ***.¹³

14. Student's February 2019 report card showed the following grades: ***. On *** grade STAAR testing, Student was approaching grade level in *** and met standard in ***. "Approach" state standards indicates Student is proficient and likely ready for the next grade but may need some academic intervention. "Meet" state standards indicates Student is more than likely ready for the next grade-level with some academic intervention. Academic intervention does not necessarily mean providing special education services.¹⁴
15. Student's teachers all gave Student an average to superior rating for academic performance and behavior in relation to other students of the same age.¹⁵

2019-20 School Year

16. Student is described by Student's parent as someone who struggles with communicating or interacting with peers when Student approaches them, but not when peers approach Student. According to Student's *** grade *** teacher, this description did not fit the student he had come to know the previous school year. Student would frequently stop for small talk between classes. Student was described as a really good student who volunteered answers, partnered with other students for group projects, and did not show reluctance to engage with other students. Student's demeanor and performance in class did not create a suspicion Student may need special education and related services.¹⁶
17. In January 2020, the District reached out to Student's parent to schedule Student's annual Section 504 meeting to review Student's service plan. On February ***, 2020, Student's parent informed the District she would not come to the meeting on advice of counsel. On February ***, 2020, a letter from the District indicated the District was willing to conduct a special education evaluation if the parent requested one and included a copy of the Procedural Safeguards. On March 6, 2020, Student's parent requested a due process hearing.¹⁷
18. On March ***, 2020, the District provided a proposed Notice of FIE to determine whether Student qualifies for special education. Areas of evaluation included Language, Physical Health, Emotional/Behavioral, Sociological, Intellectual/Adaptive Behavior, and

¹³ JE 12 at 0034; TR Vol. I at 78, 85, 91, 94.

¹⁴ JE 13 at 0038; JE 6 at 0011; TR Vol. I at 177; TR Vol. II at 225-226.

¹⁵ RE 15 at 0001-0004.

¹⁶ TR Vol. I at 122; TR Vol II at 243-245, 253, 264; RE 18 at 4.

¹⁷ TR Vol. I at 111-113; RE 19 at 0001-0003; Petitioner's Notice of Filing (March 6, 2020).

Developmental/Academic/Learning Competencies. The District also provided a consent form.¹⁸

19. Student performed well academically during the *** grade. Student achieved the following grades on Student's report card during the 2019-20 school year: ***. Due to the Covid-19 global pandemic, Student's *** grade STAAR exam scores were waived.¹⁹

2020-21 School Year

20. Student's parent opted for online instruction during Student's *** grade year due to the Covid-19 pandemic. Student's *** teacher did not have concerns about Student's emotional or behavioral well-being. Student's Curriculum Based Assessment (CBA) test scores, which is used to assess Student's progress in *** indicate that Student was above the class average. He did not have reason to suspect Student had a disability or may need special education and related services.²⁰
21. Student's parent did not respond to the District's proposal to evaluate or consent to an evaluation until September ***, 2020. The consent indicated Student would receive an evaluation in the areas proposed by the District in March 2020.²¹
22. Dr. ***, Student's physician, completed an OHI report on October ***, 2020. Student's impairments were ADHD, Autism Spectrum Disorder, and a Communication Disorder. According to Dr. ***, Student's impairments cause difficulty with self-help skills; difficulty performing activities in a general classroom and may require special adaptations; difficulty maintaining alertness in the classroom. Student also ***, which is expected to affect classroom functioning, and needs additional rest periods.²²
23. Student's teachers and parent never reported Student needed rest periods or had difficulty with self-help skills or maintaining alertness in the general classroom. Student's parent also did not *** for Student as part of the *** in the FIE, besides ***.²³
24. A multidisciplinary team completed the FIE on November ***, 2020. The team consisted of a diagnostician, a Licensed Specialist in School Psychology (LSSP), and a Speech Language Pathologist. Student was evaluated in the areas of speech and language, emotional/behavioral, educational/developmental performance, physical, cognitive/intellectual, assistive technology, sociological, and adaptive behavior. The

¹⁸ JE 17.

¹⁹ RE 23 at 0001; JE 25 at 0118.

²⁰ TR. Vol I at 97; TR Vol. II at 273-275; RE 25 at 0002.

²¹ JE 20.

²² JE 22; JE 24 at 0078.

²³ *Id.*; TR Vol. I at 164-165.

District evaluators determined that Student did not qualify for special education services based on information from Student's parents and teachers, grades, benchmark scores, and formal assessments.²⁴

25. The FIE included the Woodcock-Johnson IV Test of Cognitive Abilities (WJ-IV) and the Kaufman Assessment Battery for Children II (KABC-II) in order to formally test Student's cognitive abilities, fluid reasoning, and visual processing abilities. The WJ-IV measured seven areas of cognitive ability: Crystallized Intelligence, Fluid Reasoning, Long-Term Retrieval, Visual Processing, Processing Speed, Short-Term Working Memory, and Auditory Processing. The Cattell-Horn-Carroll (CHC) Cross-Battery approach to assessment was used, which is an approach that allows practitioners to use more than one area of tests to determine Student's general intellectual ability (GIA). Student's GIA was ***, which is in the average range.²⁵
26. Student was given the Kaufman Test of Education Achievement, Third Edition (KTEA-3), an individually administered formalized test which measures academic achievement. Student scored in the average to above average range in Reading, Writing, and Math computations. Student scored in the below average range in math concepts.²⁶
27. The FIE included an Autism evaluation by an LSSP who is part of the District's Autism team and the same LSSP who conducted the 2015 Autism evaluation of Student. As part of the evaluation, the LSSP interviewed Student, Student's teachers, and Student's parent and the evaluation included questionnaires completed by the Student's parent, Student, and Student's teachers from the previous and current school years. She also reviewed Student's educational records, the 2019 psychological report by Dr. ***, the OHI form, and the 2015 FIE.²⁷
28. Student's teachers reported that Student was a quiet student who had no behavioral or communication problems, socialized with other students, demonstrated appropriate social skills, adapted to different routines, and grasped the content of each class. Student's parent reported Student had ***, struggled to make friends, disliked changes in routine, and demonstrated repetitive behavior with ***.²⁸
29. Testing was conducted via a virtual platform over the course of four separate interactions. Additionally, Student was virtually observed in the classroom on five separate occasions. Due to the Covid-19 global pandemic, some instruments that were used to assess Student for autism were developed or identified as being appropriate for virtual testing, including

²⁴ JE 25 at 0110, 0120.

²⁵ *Id.* at 0113; TR Vol. I at 144, 168-169.

²⁶ *Id.* at 0118-119; TR Vol. I at 178-179.

²⁷ TR Vol. II at 284, 288-289, 303-305; JE 24 at 0077.

²⁸ JE 24 at 0077-0082.

Clinical Assessments of Pragmatics (CAPs) and Brief Observations of Symptoms of Autism (BOSA), an alternative to Autism Diagnostic Observation Schedule (ADOS). The difference between the BOSA and ADOS is that the evaluator does not engage with Student, but observed Student interact with Student's parents in Student's bedroom.²⁹

30. During virtual classroom observations of Student, Student was observed to have Student's camera off during most class periods like the other students. When Student's camera was on Student was attentive, actively participating in class discussions, and did not display any odd body movements. Student was able to answer the evaluator's questions, engage in appropriate reciprocal conversation, and appeared to have appropriate insight into social situations. Student was also observed interacting and holding back and forth conversations with other students during a virtual breakout session.³⁰
31. The first evaluation of Student used CAPs, which is a standardized assessment using video-based evaluation of pragmatic language skills for children between ages 7 through 18 years. Scoring is based on intonations, inflections, and facial expressions. It is comprised of six subtests: Instrumental Performance Appraisal; Social Context Appraisal; Paralinguistic Decoding, Instrumental Performance, Affective Expression, and Paralinguistic Signals. Student performed average to below average on this assessment.³¹
32. The scores are in stark contrast to the interactions the District evaluators had with Student. During Student's personal interview with the LSSP, there was an opportunity to observe Student participate in social routines, determine how well Student picked up on social context cues, and evaluate Student's ability to detect a speaker's intent and recognize nonverbal cues such as facial expressions and tone of voice while communicating.³²
33. The BOSA was administered as two members of the multidisciplinary team observed Student's interactions with Student's parents. Student was observed being very protective of Student's friends' privacy during a discussion with Student's parents regarding Student's friends and moving with ease from one task to another. Student did not display stereotyped and repetitive behaviors. Using the ADOS-2 algorithm, Student did not meet the criteria for an Autism Spectrum Disorder diagnosis, there was minimal to no levels of autism spectrum-related symptoms.³³
34. Four formal, peer-reviewed testing instruments were used to test Student's behavioral and psychological characteristics. These included the Behavior Assessment System for Children, Third Edition (BASC-3), an overall assessment of behavior, adaptive skills,

²⁹ JE 24 at 0084-0086, TR Vol. II at 315-316, 319, 348.

³⁰ TR Vol. II at 350-356; JE 24 at 0106.

³¹ JE 24 at 0087-0102; TR Vol. II at 312-313.

³² TR Vol. II at 360-363.

³³ *Id.* at 318-319; JE 24 at 0098.

internalizing and externalizing behaviors, and school behaviors given to Student and Student's parent and teachers; the Social Responsiveness Scale (SRS), a questionnaire given to Student's parent and teachers to assess interpersonal behavior, communication, and repetitive/stereotypical behavior that are characteristic of Autism Spectrum Disorders; the Children's Depression Inventory, 2nd Edition (CDI-2)-Self-Report was given to Student's parent to assess the presence and severity of depressive symptoms in Student; and Revised Children's Manifest Anxiety Scale (RCMAS-2), a self-report instrument designed to assess the level and nature of anxiety in Student.³⁴

35. The composite scales on the BASC-3 Student self-report are based upon Student's rating of ***self, fell within the average range for school problems, internalizing problems, inattention/hyperactivity, and personal adjustment. The Emotional Symptoms Index (ESI) is the most global indicator of an emotional disturbance, and Student's score fell within the average range. The composites on the BASC-3 parent and teacher rating scales also fell within the average range. Student's teachers were consistent in rating Student's behavior in the average range for externalizing problems, internalizing problems, school problems, and adaptive skills. Parent reported Student At-Risk on withdrawal, internalizing problems, adaptive skills, and severe deficiencies in reciprocal social behavior. Student was rated as having average to moderate social responsiveness skills by Student's teachers.³⁵
36. Student's results on the RCMAS-2 and CDI-2 indicated an overall level of anxiety to be no more problematic than for most students with an average level of depressive symptoms. Student did not meet eligibility criteria as a student with an Emotional Disturbance.³⁶
37. The Attention-Deficit/Hyperactivity Disorder Test-2 (ADHDT2) was administered to Student to identify any behavioral problems that may be indicative of ADHD. Student's parent reported Student's probability of ADHD as possible. Student's teachers reported Student's probability of ADHD as unlikely to very unlikely. The FIE determined that Student does not meet the OHI eligibility criteria due to ADHD.³⁷
38. Student was evaluated in the areas of receptive, expressive, and speech communication skills using the Oral Written Language Scales, Second Edition (OWLS-II), an assessment of receptive and expressive language; the Comprehensive Assessment of Spoken Language, Second Edition (CASL-2), an assessment of receptive and expressive language; and the Goldman-Fristoe Test of Articulation 3rd Edition, an individually administered standardized assessment used to measure speech sound abilities in the area of articulation.³⁸

³⁴ JE 24 at 0088-0089; TR Vol. II at 331-336, 338.

³⁵ JE 24 at 0088, 0091-0092; TR Vol. II at 357-359.

³⁶ JE 24 at 0101, 0109.

³⁷ *Id.* at 0102-0103; TR Vol. II at 359-360.

³⁸ JE 23 at 0052-0053.

39. Student's scores fell in the average range for listening comprehension, oral expression, and oral language composite on the OWLS-II. Student's scores fell within the average range for nonliteral language and meaning from context on the CASL-2. Student ranked in the *** percentile on the Goldman-Fristoe Test of Articulation. Student's articulation of speech sounds is age appropriate and intelligible. Student did not qualify as a student with a speech impairment or for special education speech therapy services.³⁹
40. The FIE was conducted by staff members who are appropriately certified and credentialed to administer each test. The staff members used technically sound instruments so as not to be culturally or racially biased. All tests were provided in Student's native language. The OWLS-II; WJ-IV; KABC-II ; and the K-TEA-3 were used in a way that is valid and reliable in assessing Student's language and communication, cognitive abilities, and academic abilities.⁴⁰
41. On April *** and ***, 2021, the District emailed an invitation for an ARD Committee meeting to Student's parent along with a Notice of Procedural Safeguards for the purpose of discussing the completed FIE.⁴¹ The ARD Committee meeting did not take place prior to the due process hearing.

VII. DISCUSSION

A. Statute of Limitations

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

The two-year limitations period may be more or less if the state has an explicit time limitation for requesting a due process hearing under IDEA. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.507 (a)(2). Texas has an explicit statute of limitations rule. A parent must file a request for a due process

³⁹ *Id.* at 0052; 0054-0058.

⁴⁰ JE 23; JE 24; JE 25.

⁴¹ JE 27 at 0001-0009.

hearing within one year of the date he or she knew or should have known about the alleged action that serves as the basis for the hearing request. 19 Tex. Admin. Code § 89.1151(c).

The one-year statute of limitations will not apply if the parent was prevented from requesting a due process hearing due to either:

1. Specific misrepresentations by the school district that it had resolved the problem that forms the basis of the due process hearing request; or
2. The school district withheld information from the parent that it was required to provide under IDEA. 20 U.S.C. § 1415(f)(3)(D); 34 C.F.R. § 300.511(f)(1-2).

Petitioner raised both exceptions, alleging the District specifically misrepresented to Parent the availability of services to Student because she was told that the District only provides services to children with “severe” autism. Additionally, Petitioner alleges the District specifically misrepresented that its 2015 FIE evaluated Student in all areas of a known or suspected disability. Petitioner also contends the District withheld information relating to Parent’s rights under the IDEA by failing to provide Procedural Safeguards when she first brought up known or suspected disabilities in prior years.⁴² The District raised the one-year statute of limitations as an affirmative defense.⁴³

In order for the misrepresentation exception to apply, “the alleged misrepresentation must be intentional or flagrant.” Petitioner must establish not that the school district’s provision of a FAPE was objectively inappropriate but instead that the school district subjectively determined Student was not receiving a FAPE and intentionally and knowingly misrepresented that fact to Student’s family. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 246 (3d Cir. 2012) (student could not show misrepresentations caused failure to request a hearing or file a complaint on time – teachers did not intentionally or knowingly mislead parents about extent of academic and behavioral issues or efficacy of solutions and programs attempted). Here, Petitioner failed to present evidence that the District made specific misrepresentations to Student’s parent regarding only providing services to children with

⁴² Petitioner’s First Amended Complaint Requesting Due Process Hearing (April 1, 2020) at p. 4.

⁴³ Respondent’s Response to Petitioner’s Amended Request for Due Process Hearing (April 11, 2020) at p. 2.

“severe” autism. Similarly, Petitioner failed to present evidence that the District misrepresented the areas evaluated in Student’s FIE. This exception therefore does not apply.

Petitioner next contends that the District withheld the Notice of Procedural Safeguards from Student’s parent relating to their rights under IDEA. When a school district delivers a copy of IDEA procedural safeguards to a parent, the statute of limitations period for IDEA violations begins regardless of whether the parent later examines the text to acquire actual knowledge of procedural rights – the simple act of delivering the procedural safeguards notice suffices to impute constructive knowledge of parental rights under IDEA. *El Paso Ind. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 945 (W.D. Tex. 2008), *aff’d in part and vacated on o.g.* 591 F. 3d 417 (5th Cir. 2009). The evidence showed that Student’s parent received Notice of Procedural Safeguards at the March ***, 2015 ARD Committee meeting and in April 2021 when the District made efforts to schedule an ARD Committee meeting to discuss the completed FIE. Therefore, it is reasonable to infer from the evidence that Student’s parent knew or should have known of her procedural right to a due process hearing to address her concerns.

Student’s causes of action accrued when Student’s parent knew, or should have known, of the injury forming the basis of the complaint. *See Doe v. Westerville City Sch. Dist.*, 50 IDELR132, 5-6 (D.C. Ohio 2008). Petitioner filed a due process complaint on March 6, 2020. Texas courts have consistently ruled that claims arising prior to one year before the date of filing of a request for a due process hearing are time-barred. *Marc V. v. North East Indep. Sch. Dist.*, 455 F.Supp.2d 577, 591 (W.D. Tex. 2006) (noting that “the statute of limitations precludes recovery for any procedural violations occurring prior to one year from the date that Plaintiffs filed their request for a due process hearing.”); *Richard R.*, 567 F.Supp.2d at 918, 944; *T.C. v. Lewisville Indep. Sch. Dist.*, 2016 WL 705930, *9 (E.D. Tex. 2016). Here, the date one year prior to the filing was March 6, 2019. Any violations of the IDEA that arose prior to this date will not be considered in this case.

B. Duty to Provide FAPE

The purpose of the IDEA is 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 and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A). The District has a duty to provide a FAPE to all children with disabilities ages 3-21 in its jurisdiction. 34 C.F.R. §§ 300.101(a), 300.201; Tex. Educ. Code § 29.001.

The District is responsible for providing an eligible student with specially designed, personalized instruction with sufficient support services to meet Student's unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with Student's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

C. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.⁴⁴ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). The burden of proof in this case is on Petitioner to show the District violated its Child Find obligation and did not provide Student a FAPE. *Id.*

D. Child Find

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

⁴⁴ There is no distinction 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).

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. Hawaii 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.*, *supra*. 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 two-part inquiry is required to resolve a Child Find claim. First, whether the school district had reason to suspect the student had a disability *and* reason to suspect the student may need special education and related services as a result. *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). The threshold for suspicion is relatively low. The inquiry is not whether the student actually *qualifies* for special education, but instead whether the student should be *referred* for a special education evaluation. *Woody*, 178 F. Supp. 3d at 467.

A critical distinction exists between whether a school district should have identified a student as *eligible* for special education under one of the enumerated disability classifications under the IDEA. Questions of eligibility and identification as a student with a disability are resolved on the basis of whether an evaluation shows the student meets the criteria of one or more of the enumerated disability classifications *and* demonstrates a need for special education. *See* 34 C.F.R. § 300.8(a), (c)(1-13).

1. Reason to Suspect a Disability

Here, the District had no reason to suspect Student may have a disability until Student's *** grade year, when Student's parent had a private psychological evaluation performed in

December 2018. Student was diagnosed with Autism Spectrum Disorder, ADHD, ***, and a Communication Disorder. Student's parent shared the results of the evaluation with the District in February 2019.

On February ***, 2019, the District found Student eligible for Section 504 services for autism, ADHD, and a speech delay based upon the private evaluation. Student's parent was in agreement with Student receiving 504 services during the 2018-2019 school year. The District was on notice Student had been diagnosed with Autism Spectrum Disorder, ADHD, ***, and a Communication Disorder in February 2019. The District therefore had reason to suspect Student may have a disability at that time.

2. Reason to Suspect Need for Special Education Services

Reason to suspect a disability is insufficient to trigger the District's Child Find obligation alone. To meet Petitioner's burden, Petitioner must also demonstrate the District had reason to suspect Student may need special education and related services. *Woody*, 178 F. Supp. 3d at 467. Despite the District's reason to suspect Student had a disability in February 2019, the District did not have reason to suspect Student may need special education or related services during the 2019-20 school year or the 2020-21 school year.

Petitioner argues that Student was struggling academically in math and that Student's sensory issues were affecting Student's ability to focus in class.⁴⁵ These arguments are not supported by the record. Student's parent never shared with the District any of the issues that Student's parent said that Student displayed outside of school, such as ***, lack of social interactions with peers, and repetitive behaviors. Student's parent noted her concerns were that Student does not like to go out with friends and Student would not ***. She also expressed concern about Student not passing the *** portion of the STAAR exam in the *** grade, but conceded that

⁴⁵ Petitioner's Closing Argument, at 23.

educationally Student is doing great. Further, Student performed well in math, completing the course with *** during the 2019-20 school year.

In addition, none of Student's teachers noted or reported any concerns about sensory issues or socialization with peers. Student's *** grade *** teacher stated that the description of Student given by Student's parent did not fit the student that he had come to know during *** grade. Student actively engaged in class discussions by volunteering answers, never showed any reluctance in engaging with other students, and maintained a solid academic performance without any behavioral issues. Student's parent noted to the District that "educationally Student is doing great" and "is not having educational difficulties."

The Hearing Officer concludes the weight of the credible evidence does not support the conclusion the District had reason to suspect a disability *and* concurrent reason to suspect Student may need specially designed instruction under the IDEA to address that disability. *Woody*, 178 F. Supp. 3d at 467. Petitioner therefore did not meet Petitioner's burden on Petitioner's Child Find claim.

Because the Hearing Officer concludes that Petitioner did not meet the burden of proof on Petitioner's Child Find allegations, the reasonableness of the delay between notice and referral is not determinative. In addition, the evidence did not show that Student was eligible for special education services. 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").

D. Eligibility Determinations under the IDEA

Petitioner contends Student is eligible under the IDEA as a student with Autism, a Specific Learning Disability-Math, a Speech Impairment, and an Other Health Impairment. An eligibility determination is made on the basis of an evaluation that meets IDEA criteria and finding a student

meets one or more of thirteen eligibility classifications, and by reason thereof, needs special education and related services. 34 C.F.R. §§ 300.8(a), 300.304-.311; 19 TEX. ADMIN. CODE § 89.1040(b). 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.*, 117 LRP 22536 (5th Cir. 2017).

1. Meeting Definition of Disability Under the IDEA

Autism is defined as “a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. 34 C.F.R. § 300.8(c)(1)(i).

Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. 34 C.F.R. § 300.8(c)(10)(i).

Speech or language impairment means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance. 34 C.F.R. § 300.8(c)(11).

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).

Student had a psychological evaluation by a private licensed psychologist that was completed in January 2019 after Student did not meet expectation on the *** portion of the STAAR exam in *** grade. The purpose of the evaluation was to evaluate Student for Autism Spectrum Disorder. Student also had a FIE that was completed by the District in November 2020 for the purpose of determining whether Student qualified for special education services under IDEA.

An evaluation to determine a student's eligibility under the IDEA requires the use of a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, which may assist in determining whether the child is a child with a disability. 34 C.F.R. § 300.304(b)(1). In the case of Student's private evaluation, the evaluator administered a variety of standardized tests and evaluated Student's clinical presentation. The evaluation yielded a diagnosis of autism, ADHD, and a Communication Disorder. However, the evaluation lacked much needed educational context because the reports derived from only the parent and student. The evaluator did not review educational records from the District, or solicit information or other feedback from Student's current or past educators. No state assessment information or previous evaluations from the District were reviewed. Thus, a full picture of Student's functioning at school does not emerge. The evaluation lacked proper foundation about Student's educational performance from

contemporaneous educational records. The evaluation itself also did not recommend special education services, nor was it meant as a replacement for a special education evaluation.

The District completed an FIE of Student on November ***, 2020. The areas of evaluation included testing Student for autism, ADHD, speech, and a Specific Learning Disability. The FIE showed that Student does not have a problem communicating verbally or nonverbally nor interacting socially with Student's peers. Student was evaluated using a variety of instruments, such as the BOSA, BASC3, SRS, ADHDT, WJ-IV, and the KABC-II.

The FIE in this case included a wide variety of assessment tools: five virtual observations of Student during different class periods; interviews with Student, Student's parent, and Student's teachers; surveys completed by Student, Student's parent, and Student's teachers; several formal, peer-reviewed assessment tools to test for intelligence, academic functioning, psychological functioning, and other areas in which the District suspected Student might have deficits. It found Student does not meet criteria for the educational disabilities of Autism, ADHD, SLD, or a speech impairment.

Neither the private evaluation nor the District's 2021 FIE supports Student's eligibility under the IDEA. Petitioner therefore did not meet Petitioner's burden on the claim that Student is a child with Autism, ADHD, or a Specific Learning Disability in need of special education and related services and the District's evaluation was inappropriate.

E. Procedural Violations

Petitioner alleged the District violated student and parental procedural rights, including failing to provide Notice of Procedural Safeguards. To prevail, Petitioner must show this procedural violation significantly impeded parental opportunity to participate in the decision-making process regarding the provision of a FAPE. 34 C.F.R. § 300.513(a)(2)(ii). A school district must provide a Notice of Procedural Safeguards to parents upon initial referral or parental request for evaluation; upon receipt of the first state complaint in the school year; upon receipt of the first due process

complaint in the school year; in accordance with disciplinary procedures; and upon parental request. 34 C.F.R. § 300.504(a). Here, the evidence shows the District provided Notice of Procedural Safeguards at Student's initial ARD meeting in March 2015; in February 2019, when Student began receiving services under Section 504; again in February 2020, at the time of Student's annual Section 504 meeting; and in October 2020 as the District was preparing to conduct Student's second FIE.

Petitioner did not meet Petitioner's burden on the claim that the District failed to include Student's parent as a participant in the special education process.

VIII. 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. Petitioner did not meet the burden of proving the District violated its Child Find obligation. 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.111(a).
3. Petitioner did not meet the burden of proving Student is a child with a disability eligible for special education and related services. 34 C.F.R. §§ 300.8(a)(1); 19 Tex. Admin. Code § 89.1040.
4. Petitioner's claims arising before March 6, 2019 are barred by the one-year statute of limitations rule as applied in Texas. 34 C.F.R. § 300.507(a)(2); 19 Tex. Admin. Code § 89.1151 (c); Petitioner did not meet Petitioner's burden of proving the exceptions to the rule should apply. 34 C.F.R. § 300.511 (f)(1)(2); *G.I. v. Lewisville Ind. Sch. Dist.*, 2013 U.S. Dist. LEXIS 120156 (E.D. Tex. 2013).

IX. ORDERS

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

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

SIGNED June 21, 2021.



Yvonne Patton
Special Education Hearing Officer
For the State of Texas

X. 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); 34 C.F.R. § 300.516(a); 19 Tex. Admin. Code § 89.1185(n).