

DOCKET NO. 016-SE-0921

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

DECISION OF THE HEARING OFFICER

I. Statement of the Case

This matter concerns a claim brought by Petitioner pursuant to the Individual with Disabilities Education Act [hereinafter IDEA], and its implementing state and federal regulations, for violations of the Act. In particular, the issue is whether the District violated the IDEA by failing to: comply with its Child Find obligations; develop and implement an Individual Education Plan (IEP); and comply with procedural obligations under the IDEA and related laws.

The hearing officer finds that the Respondent District complied with all Child Find obligations and offered to conduct an evaluation. It is also determined that that the evidence did not establish Student’s eligibility for special education. Further, it is found that the District did not commit a procedural violation of IDEA. Hence, the District did not deny the Student FAPE under the IDEA.

II. Procedural History

Petitioners, Student b/n/f Parent (collectively referred to as Petitioner), filed a request for an impartial due process hearing (the Complaint) pursuant to the Individuals with Disabilities Education Act (IDEA). The Complaint was received by the Texas Education Agency (TEA or Agency) on the 14th day of September 2021 and Notice of Filing of Request for a Special Education Due Process Hearing was then issued by TEA on September 15, 2021. The Respondent to the Complaint is the Allen Independent School District (hereinafter District). The Initial Scheduling Order was issued on September 16, 2021 and Respondent filed its Response and Plea to the

Jurisdiction on September 24, 2021. Thereafter, on September 27, 2021, the parties participated in a Resolution Session, but were unable to reach a resolution.

The parties also submitted a Rule 11 Agreement, extending the discovery dispute deadline. On October 1, 2021, the Pre-Hearing Conference (PHC) was held, and on the same day, Petitioner filed an Opposed Motion for Continuance. On October 3, 2021, Order No. 2, the Order after the PHC and for a Continuance, was issued.

The case proceeded and the Due Process Hearing was held at the end of November. On November 30, 2021, Order No. 3 was issued setting forth the schedule for post-hearing briefs and the decision due date, that being January 11, 2022 and January 31, 2022, respectively. On January 4, 2022, Petitioner requested a brief continuance of the deadline for the post-hearing briefing. Respondent agreed to the request, along with a corresponding extension of the decision due date. Order No. 4, issued January 5, 2022, ordered new due dates in accordance with the request.

A. Representatives

Petitioner was represented throughout the case by counsel Daniel Garza of Cirkiel & Associates. The Respondent District was represented by Jennifer Carroll and Lindy French of Walsh, Gallegos, Trevino, Kyle & Robinson, P.C. Prior to the due process hearing, on November 15, 2021, Petitioner filed a notice of appearance for Martin J. Cirkiel and Kenneth C. Perry, both of Cirkiel & Associates, as well as for Nicole Miller of Nicole Miller Law, PLLC.

B. Mediation and Resolution

The parties participated in a Resolution Session on September 27, 2021, and no agreement was reached at that time. The parties did not participate in mediation.

C. Continuances

There were a total of three continuances requested and granted in this matter as noted above, with the final extension for the post-hearing briefs and decision due date. At the time of the initial PHC, a Request for a Continuance was made, and the Continuance was granted, and the Due Process Hearing (DPH) then set for November 29 & 30, 2021. At the conclusion of the hearing, a continuance was granted setting the due dates for the post-hearing briefs and decision. Thereafter, in January 2022, Petitioner requested an extension of time for the submission of the briefs, with a corresponding extension of the decision due date, which was granted on January 5, 2022 setting the final briefing due date on January 18, 2022, and decision due date for February 7, 2022.

D. Preliminary Matters

The Request for Continuance was noted earlier, as was the additional appearance of counsel for Petitioner. In addition, Respondent filed a Motion for Subpoena Duces Tecum on September 27, 2021, and the parties also entered an Agreed Qualified Protective Order for the Medical Records produced in this matter.

E. Due Process Hearing

The parties made their respective disclosures. While some discussion occurred concerning the timeliness of some of the exhibits submitted, the parties were able to reach agreement on their submission. The Due Process Hearing (DPH) was then conducted on November 29 & 30, 2021 on the Zoom platform, and lasted one and a half days. The Petitioner continued to be represented by Mr. Daniel Garza, Mr. Martin Cirkiel, and Ms. Nicole Miller (who was present for only a part of the hearing). In addition, the Student, *** attended the hearing, as did Student's mother, Ms. ***. The Respondent continued to be represented by its legal counsel, Ms. Jennifer Carroll and Ms. Lindy French. Ms. ***, Section 504 Coordinator for the District as well as Mr. ***, Executive Director of Special Services for the District, also attended the hearing as the District representatives.

F. Post Hearing Matters

Upon the conclusion of the presentation of evidence, but prior to closure of the hearing, the parties jointly moved for a continuance to accommodate the completion of the hearing transcript, to allow the submission of post-hearing briefs, and a time allotment for the hearing officer to complete the decision. Order No. 3, granting such joint request was then issued on November 30, 2021. Petitioner thereafter requested a brief extension for the submission of briefs, with a corresponding move of the due date for the decision. Respondent agreed, and the Decision is hereby issued in compliance with the decision due date of February 7, 2022.

III. Issues

A. Petitioner's Issues

Petitioner alleges that the District has denied Student a free, appropriate public education (FAPE), and the denial of FAPE consists of both substantive matters and procedural violations that rise to the level of a substantive violation of FAPE. More specifically, Petitioner's claims consist of the following components:

- Whether the District violated its Child Find obligations in failing to timely evaluate Student in all areas of suspected disability or need and failed to conduct the evaluation by remote means;
- Whether the District failed to provide Student a FAPE due to procedural violations;
- Whether the District failed to develop and implement an individual education plan (IEP) appropriate with Student’s unique and individual needs; and,
- Whether the District failed to provide educational services or instruction by remote means, resulting in a denial of education in the least restrictive environment.

B. Petitioner’s Requested Relief

- That Student be evaluated for special education and that the evaluation be conducted entirely by remote means;
- That Student be determined to be a student in need of specially designed instruction and an IEP be developed and implemented providing Student education through remote or virtual means; and
- That the Student be provided compensatory education services.

C. Respondent’s Issues and Legal Position

In addition to a general denial, Respondent District denies that it failed to timely identify or evaluate the Student for special education. The District further contends that the Student was provided a FAPE, and that Student received positive academic and non-academic benefits through the general education curriculum and Student’s Section 504 accommodations. Respondent also raised the issue of the Statute of Limitations as well and a Plea to the Jurisdiction, which have been agreed upon and addressed herein.

IV. Findings of Fact*

1. The Student resides with Student’s parents within the boundaries of the Allen Independent School District [hereinafter AISD or District] and at the time of the due process hearing Student was in the *** grade.¹

*References to the Due Process Hearing Record throughout this section are as follows: Citations to Petitioner’s Exhibits and Respondent’s Exhibits are designated with a notation of “P” or “R” respectively, followed by the exhibit number or letter and page number. Citations to Joint Exhibits are designated with a notation of “J”, and followed by the exhibit number and page number. The parties submitted Joint Stipulated Facts, and they are designated by SF and the number. Citations to the transcript are designated with a notation of “T” followed by the page number.

¹ J. 17; T.64.

2. Student has been enrolled in the District since Student's *** grade year,² and attended schools within the District since that time, the most recent being ***.³
3. The Student has been receiving Section 504 services since at least the 2018-2019 school year when Student was placed at *** campus within the District.⁴
4. In January 2019, the Student was referred for a Full Individual Evaluation (FIE), for a suspected disability of Other Health Impairment (OHI), and the District agreed to conduct the evaluation. At that time, the District provided the Student's parents the Special Education Notice of Procedural Safeguards and Guide to the ARD Process.⁵
5. At that time, that is, the 2018-2019 school year, Student was a *** grade student, and due to the construction of the building at Student's campus, Student experienced environmental challenges, due at least in part, to Student's *** and *** (***).⁶ This resulted in some health challenges for the Student.⁷
6. A Section 504 hearing was then held on March ***, 2019, due to the Student's placement at the *** campus, ***, and the construction there. The hearing officer, in an Order dated April 12, 2019, directed that accommodations be provided and instruction be by video conferencing or other virtual means when Student could not attend class. Tutoring was also ordered, and the order also included instructions in the event the Student remained at *** the next school year.⁸
7. The following school year, however, that of 2019-2020, Student attended school at a different building, ***, and attended in person without difficulty until the time of the Covid-19 pandemic in March of 2020.⁹
8. For the early 2019 evaluation, numerous doctor reports were submitted and reviewed. One report from Dr. *** reported that the Student's ***, now known as *** (***), is triggered when the student is exposed to certain ***, and that can lead to ***. Should that occur, the Student can become ***, and may have difficulty with focus if experiencing ***.¹⁰
9. Dr. *** completed an OHI form for Dr. ***, and noted that the Student had been diagnosed with ***. The February ***, 2019 report stated that Student's vision is not

² T.64;

³ J.17:1.

⁴ P.10

⁵ SF.1,2.

⁶ SF.4; J.4

⁷ T. 157-158.

⁸ P.10.

⁹ T.65,198-202.

¹⁰ SF.4; J.3:3.

affected and that Student does not have a chronic or acute health problem that limits vitality, strength, or alertness, although Student does have some ***. Student's parent reports that ***. ¹¹

10. Dr. ***, in discussing the medical diagnosis of ***, noted some ***, but also stated that this did not have an impact on Student's strength, vitality, or alertness in the educational environment. ¹²
11. Evaluation results also indicated that the Student had typical communication, and did not exhibit significant emotional, behavioral, or attention difficulties. It was further determined that the Student's cognitive ability and academic achievement were in the average to superior range. ¹³
12. On April ***, 2019, the District completed the Student's FIE. The evaluators explained that, although Petitioner had *** health problems as recorded by Student's physicians, Student did not demonstrate a need for specially designed instruction. ¹⁴ The FIE also recommended that Student continue to receive accommodations through Student's Section 504 plan. ¹⁵
13. When the ARD Committee met to discuss the FIE on April ***, 2019, the District members determined that the Student did not demonstrate a need for specially designed instruction, as Student had passed all classes and mastered content on state assessments. The meeting, however, ended in disagreement as the Student's parent disagreed with the conclusion. ¹⁶
14. The ARD Committee reconvened on May ***, 2019 to discuss the prior decision and the Student's technology needs. It was also noted that Student would be attending classes in a different building the following year (the 2019-2020 school year), and the meeting ended in agreement. ¹⁷
15. On April ***, 2020, after the Covid-19 pandemic had caused all instruction to be virtual, ¹⁸ the Section 504 committee met to review services and Student's progress. The committee determined to continue the 504 services in accordance with the plan that was in place. ¹⁹
16. During the 2019-2020 school year, Student was in *** grade, and Student attended *** in person, until March 2020 when the Covid-19 pandemic resulted in the closure of all schools

¹¹ SF.3; J.3:3.

¹² J.3:3.

¹³ J.3.

¹⁴ SF.6; J.4.

¹⁵ SF.5.

¹⁶ SF.6; J.4:3.

¹⁷ J.5.

¹⁸ T.133,199.

¹⁹ J.8.

within the District.²⁰ The Student noted that Student enjoyed the *** experience before the pandemic.²¹

17. From March 2020 until the end of that school year, the Student, as did all students, received instruction by virtual means.²² This included both asynchronous work and thereafter, virtual means of instruction.²³
18. For the following year, the 2020-2021 school year, the District provided students the option of in-person school, or alternatively, to receive virtual instruction.²⁴ During this year, the Student and *** attended virtually. Student had no difficulty and was successful in all Student's classes.²⁵
19. On March ***, 2021, the Student's Section 504 Committee met to review Student's plan and data. Data demonstrated that the Student was doing well, and no concerns about the Student's progress or Student's 504 plan were voiced by anyone at that time.²⁶
20. During the 2020-2021 year, Student also participated in ***, an in-person activity, and attended practices at the school as well as traveled to competitions. Student noted that distancing was in place for such activities and that travel to competitions was with Student's mother only.²⁷
21. Ms. *** was the Student's teacher for *** for the 2019-2020 and 2020-2021 school years. She testified that during the 2019-2020 year (until March of 2020) the Student did not have difficulty during the in-person classes and demonstrated no medical, health, or related issues. She also noted that the Student was a very good student, and did well with As and Bs, and exhibited no need for specially designed instructional services.²⁸
22. The Student's ***, Dr. ***, noted on March ***, 2021 during a visit that Student's *** was well controlled, that Student should be careful with Covid, and that getting a Covid-19 vaccine was ok.²⁹
23. The District determined and announced that for the 2021-2022 school year, virtual instruction for students would not be available. In other words, all students must attend school in person, and masks were optional for both staff and students.³⁰

²⁰ T.65

²¹ T.65.

²² T. 69,75,133.

²³ T.69-70.

²⁴ SF.9; P.14.

²⁵ SF 9,11.

²⁶ SF.10; J.12.

²⁷ T.75-76;78.

²⁸ T.197-204.

²⁹ J.11.

³⁰ J. 13:3; P.16.

24. In August 2021, the Student's mother attended several in-person meetings at the District. Student's mother attended at least 15 such meetings.³¹ The Student attended at least one meeting.³²
25. On August ***, 2021 the Student's Section 504 Committee met and reviewed Student's 504 plan and accommodations in response to Student's parent's request for virtual instruction. A request was also made that the Student receive Homebound instruction, and while initially the District apparently agreed to provide services, the request was later declined.³³
26. At that time, and upon review of the information, documentation, and the concerns of the Student's physicians, the District members of the Committee recommended that Student have face-to-face or in-person instruction, with accommodations or precautions for reducing interaction with other students, teachers, and staff.³⁴
27. The District declined the parent's request for virtual or homebound education for the 2021-2022 school year.³⁵
28. The Student did not attend school, and due to the concerns about attendance, the District proposed to conduct a FIE and consider eligibility for special education. Student's parent provided consent for the evaluation, but required that it be conducted entirely by virtual means.³⁶
29. The District had concerns with an all-virtual evaluation, including the invalidation of results, and instead agreed to put into place a number of safety protocols.³⁷ On October ***, 2021, District Educational Diagnostician, Mr. ***, sent an email to the Student's parent following up on scheduling the evaluation.³⁸ The District never received a response or suggested revisions from the parent or the Petitioner's attorney, although the parent's testimony noted that she responded to her attorney, although it is unclear what that response was.³⁹ While the District did not have the opportunity to evaluate the Student due to parental limitations, this factor did not unreasonably protract the final resolution of this matter.
30. At one point at the beginning of the fall 2021 semester, Student was disconnected from the online platform Student had been using. Student testified that Student was unable to access Student's work. District testimony noted that the District had experienced some

³¹ T.208.

³² T.175.

³³ SF.13; P.18; T.163-166.

³⁴ SF.13; J.13.

³⁵ SF.12.

³⁶ SF.15.

³⁷ SF.15; J.21; T.214.

³⁸ J.22.

³⁹ T.184,214,226.

technology issues in the Google access account and it impacted several students. It was then reinstated in less than 24 hours.⁴⁰ Student testified that Student does not have access to most of Student's previous work.⁴¹

31. The Student's 504 Committee met again on September ***, 2021, as Student had not yet attended school.⁴² A number of additional safety measures and accommodations were proposed to address parental concerns about Covid-19. These included a SAFE PASS, which allowed the Student to enter the hallways early to avoid crowds, accommodations for distancing at lunch, and adjustments to the preferential seating to keep Student at least six feet away from others.⁴³
32. Since the Student did not attend school, Student was no longer enrolled in the District. The District sent correspondence to Student's mother explaining that, based upon the Texas Education Agency's Student Attendance Accounting Handbook, it must unenroll student.⁴⁴ The District also sent email correspondence to the Student's mother regarding potential re-enrollment in the District.⁴⁵
33. Testimony demonstrated that the student does not meet the general definition or qualify as a medically fragile student.⁴⁶
34. Student has received the Covid-19 vaccine, but has not yet received the booster.⁴⁷
35. Petitioner's expert testified that the Covid-19 virus can have great impact on individuals with high-risk medical conditions. She further noted that the universal mitigation tool is that everyone is masked in order to stop the chain of transmission.⁴⁸

V. Discussion

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

A. Preliminary Rulings

⁴⁰ T.71-72,208-209.

⁴¹ T.71-73.

⁴² SF.14.

⁴³ SF.13, 15; J. T.167-168.

⁴⁴ J.20.

⁴⁵ J.19; J.20.

⁴⁶ T.147-148.

⁴⁷ T.209.

⁴⁸ T.125,128,

As preliminary matters, Respondent raised the Statute of Limitations and a Plea to the Jurisdiction. The parties thereafter agreed and stipulated to the Statute, and therefore this matter concerns only those matters arising after September 15, 2020. Therefore, allegations of failures of Respondent that occurred prior to September 15, 2020 are not considered in this decision. With regard to the jurisdictional issues, in Order No. 2, all issues and claims falling outside of the hearing officer's limited jurisdiction were dismissed.

B. Burden of Proof

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

In terms of the application of the approach, the Fifth Circuit went on to establish that a presumption exists "in favor of a school system's educational plan, placing the burden of proof on the party challenging it". *White ex Rel. White v. Ascension Parish Sch. Bd.* 343 F.3d 373, 377 (5th Cir. 2003); *Teague* at 132.

C. Duty to Provide FAPE

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

Additionally, the United States Supreme Court has provided guidance as to the determination of whether a school district provided FAPE to a student, with both substantive and procedural considerations. Specifically, the district must: comply with the procedural requirements of IDEA; and, design and implement a program that is reasonably calculated to enable the student to receive an educational benefit. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). Further, 'educational benefit' has been defined as that which is meaningful and provides a basic floor of opportunity or access to specialized instruction and related services individually designed to provide educational benefit. *Id.* More recently, the court clarified that the IDEA does not promise any specific educational outcome, but that the IEP be reasonably

calculated to enable the student to make appropriate progress in light of that student's individual circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017).

Only certain students, however, are eligible for special education. In order to fall within the scope of the IDEA, or qualify for services, a student must have both a qualifying disability, and also, by reason of that disability, be in need of special education and related services. *Alvin Indep. v. A.D. ex rel*, 503 F.3d 378, 382 (5th Cir. 2007).

1. Child Find

It is clear that school districts are required to identify and evaluate all children where a suspected disability exists and have in place policies and procedures to ensure such. 34 C.F.R. §300.111(a). Further, if a parent requests an evaluation, then the District is obligated to respond within fifteen school days as to their agreement to complete the evaluation or conversely a denial of the request. See 19 TEX. ADMIN. CODE §89.1011(b). Additionally, when conducting an evaluation, a school district must comply with the procedures set forth in 34 C.F.R. §§ 300.304-300.311. The determination of the nature and extent of special education and related services that a child needs must also be based on an evaluation conducted in accordance with the procedures mandated by IDEA. (See 34 C.F.R. §300.15, referencing evaluation procedures found in 34 C.F.R. §§ 300.304-300.311). The evaluation must not focus on a single measure, but rather utilize a variety of instruments, multiple data, and other input, such as observations. 34 C.F.R. §300.304.

Once the evaluation is complete, the Admission, Review and Dismissal (ARD) committee has the responsibility to make determinations of eligibility, and if the student is found eligible, then design and implement educational as well as related services for the student. Even if a disability condition is identified, the second part of the eligibility determination requires the Petitioner to demonstrate a need for specially designed instruction, or educational services, as a result of the disability. Consequently, a student who meets eligibility criteria but who does not show a need for special education services, has not met the definition of a student with a disability under the IDEA. See 34 C.F.R. §300.8.

This section provides further clarification is saying that

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

34 C.F.R. §300.8(2)(i).

2. Placement

In those instances where a student is found to be eligible for special education, an ARD Committee then meets and determines the content of the Student's Individual Education Plan (IEP). One of the determinations in the IEP is the student's placement for educational services. Under the IDEA, a student with a disability must be educated with non-disabled peers to the maximum extent appropriate and that special classes, separate schooling, and other removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the "least restrictive environment requirement." 34 C.F.R. § 300.114(a)(2)(i)-(ii). And in fact, one of the criteria for assessing the provision of FAPE is a consideration the student's least restrictive environment (LRE). It is one of four factors to be considered in terms of whether an IEP, as implemented, is reasonably calculated to provide a student with the necessary educational benefit under the IDEA. See *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 293-294 (5th Cir. 2009).

3. Procedural Matters

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

Procedural requirements under the IDEA consist of certain timelines, such as the time from consent until the FIE is complete; time from completion to a meeting to review the evaluation, determine eligibility, and if appropriate, develop and craft the IEP; and time for the IEP to be in place. While the IDEA holds that a school district must complete an evaluation of a student within 60 days from the time of parental consent, 34 C.F.R. §300.301 (c) (1)(i), Texas law modifies that time frame to 45 school days from the time of consent. TEX. ADMIN. CODE §89.1011(c). Further, the IEP team (in Texas the ARD committee) must hold a meeting within 30 days of the evaluation's completion. 34 C.F.R. § 300.323 (c); TEX. ADMIN. CODE §89.1011(d). These timelines and deadlines are key in helping to assure that students have educational and related services available in a timely manner.

The IDEA certainly contemplates a collaborative process between the school district and the parents. *E.R. v. Spring Branch Indep. Sch. Dist.*, 2017 WL 3017282, *27 (S.D. Tex. 2017), *aff'd* 909

F.3d 754 (5th Cir. 2018). The IDEA does not, however, require a school district, in collaborating with a student's parents, to accede to a parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999). While collaboration with key stakeholders is certainly anticipated and expected, the right to meaningful input does not mean parents have the right to dictate an outcome, as parents do not possess "veto power" over a school district's decisions. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). Absent bad faith exclusion of a student's parents or refusal to listen to them, a school district must be deemed to have met the IDEA's requirements regarding collaborating with a student's parents. *Id.* In other words, deference is given to the District, and the right for meaningful input for a student's IEP does not equate to a parent's ability to dictate its terms.

Predetermination would, of course, violate both the law and spirit of collaboration, which is so important under the IDEA. Predetermination can occur when a school district makes educational decisions so early in the planning process that it deprives the parents of a meaningful opportunity to fully participate as equal members of the ARD committee. E.R., 909 F.3d at 769.

VI. Analysis

In this case, Petitioner has claimed that the District failed its Child Find duties in failing to evaluate the student for special education by remote means, that Student was not placed in Student's least restrictive environment, and that other procedural violations under the IDEA rose to the level of a denial of FAPE. The following examines these issues and in doing so, considers the exhibits in evidence, the testimony of witnesses, the issues presented, and the contentions of counsel.

A. Child Find: Eligibility, Evaluation, and Assessment

The Student has been receiving Section 504 services for some time, as a result of OHI, including a number of medical conditions. The evidence demonstrated that Student did well with the accommodations, and attended school and enjoyed the *** experience. The Covid-19 pandemic caused all students to have virtual instruction for several months, and in the Student's case, for over a year. Upon the District's return to in-person school, without the option for virtual instruction for the 2021-2022 school year, the Student's parent requested special education services, including homebound services. Student was found not eligible for homebound, and the District declined homebound and any virtual services. The District agreed to conduct a special education evaluation, and timely obtained consent. However, the Student's parents would permit the evaluation to go forward only if completed in its entirety by remote or virtual means. The evidence showed that the evaluation was not completed.

As noted, in order to prevail on the claim that Petitioner was denied FAPE, Petitioner must prove Student: (1) was eligible due to a qualifying disabling condition; and (2) required special education and related services. Petitioner contends Student is eligible as a student with an OHI due to Student's medical conditions 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). While the Student's OHI has served as the basis for the provision of Section 504 services, the 2019 medical documentation in Student's evaluation demonstrated that Student does not have limited strength, vitality, or alertness as a result of Student's medical conditions. The Student's Section 504 committee has held that Student has not demonstrated any need for specially designed instruction, as Student has been academically successful. Petitioners also claim that Student qualifies as a medically fragile student, although no evidence to support that position was presented.

The evidence clearly established that the Student was successful in class, and courts often look to teachers observations in making decisions about whether a disability interferes with education or rises to the level of a need for special education, since a teacher observes the student on a regular basis in the educational environment, and observation may be more reliable than physician reports. See *D.L. ex rel P. L.*, 695 F. App'x. 733 (5th Cir. 2019). The record in this case did not support Petitioner's contention that the Student required special education to receive an educational benefit. Petitioner offered no evidence that Student required specialized instruction or specially designed instruction to make appropriate academic progress.

Specially designed instruction includes adapting, as appropriate, to the needs of the child, the content, methodology, or delivery of the instruction in order to: address the unique needs of the child that result from the child's disability; and, ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. 300.39(b)(3). Certain students who demonstrate the need for specialized instruction must not only have a qualifying disability, but moreover, by reason of it, be in need of special education and related services. *Alvin*, 503 F.3d 378. In this case, evidence clearly demonstrated that the student was able to do well and succeed in the classroom, and no need for specialized instruction was established. The evidence does not support the Petitioner's contention that the Student requires any adaptation of content, methodology or delivery of instruction in order to access the general curriculum. 34 C.F.R. §300.39 (b)(3). Thus, Student's need for special education services was not established. Although

the evidence demonstrated a request for remote or virtual instruction on the basis of health concerns, the issue does not fall under IDEA as no legal basis exists at this time.

B. Placement

Petitioner also claims that part of the denial of FAPE was that the Student was not placed in Student's least restrictive environment. As noted, the IDEA's least restrictive environment is in the context of the ARD Committee placement and the implementation of the IEP. Further, the least restrictive environment generally refers to the general education classroom and the general education curriculum. In this case, that is exactly what the District was trying to do. Further, as no IEP has been created, any consideration of the LRE is premature at this time.

Although Petitioner raises claims about the Student's safety, and understanding the nature of Covid, the educational placement decision was not that of an ARD Committee under IDEA, but rather that of the Allen Independent School District.

C. Procedural Considerations

An allegation of a denial of FAPE based upon procedural violations of the IDEA depends, in part, upon timelines and deadlines. Upon request, the District agreed to evaluate the Student; the parental consent, however, was conditional, upon the entire evaluation being conducted by remote means. The evidence established that the District, in response to the parent's concerns, put safety protocols in place for the evaluation, but the Student was never available for the evaluation.

Further, in order for a procedural violation to rise to the level of a denial of FAPE, such violation must impede the Student's right to FAPE; impede parental participation; or cause educational deprivation. 34 C.F.R. § 300.513 (a)(2). Petitioner claims that the District violated Student's procedural rights under the IDEA by impeding the parent's ability to participate in the decision-making process. The evidence, however, demonstrated that the Student's parent attended many meetings with the District, and that the District quite often responded to the parent's concerns.

Petitioner also contends that the District's proposed placement was predetermined. Predetermination occurs when a school district makes educational decisions so early in the planning process that it deprives the parents of a meaningful opportunity to fully participate as equal members of the ARD Committee. *E.R.*, 909 F.3d at 769. Petitioner failed to present evidence of predetermination, as the placement, in school, was one that the District made for all students, and was not made under the auspices of an ARD Committee, and thus should not be considered under IDEA. In this case, the evidence did not establish procedural violations of IDEA.

In essence, no violations of IDEA were established and no evidence of any impediment to the Student's right to FAPE was presented. The evidence clearly demonstrated that the District did not violate Child Find. The evidence also showed the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, and no deprivation of educational benefit was established. 34 C.F.R. §300.513(a)(2). In summary, the Petitioner did not meet Petitioner's burden of proving the school district violated student or parental substantive or procedural rights under the IDEA.

VII. Conclusions of Law

1. Student is eligible for a free appropriate public education under the provisions of IDEA, 20 U.S.C. §1400, et seq., 34 C.F.R. §300.301 and 19 TEX. ADMIN. CODE §89.1011.
2. The Allen Independent School District (AISD) is responsible for properly identifying, evaluating, and serving Student under the provisions of IDEA, 20 U.S.C. §§1412 and 1414; 34 C.F.R. §300.301, and 19 TEX. ADMIN. CODE §89.1011.
3. Petitioner failed to carry the burden of proof to establish a violation of IDEA or a denial of FAPE. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984).
4. Petitioner failed to prove that the District violated its Child Find duties. 34 C.F.R. §300.111.
5. Petitioner, as the party challenging the District's decision on special education eligibility, failed to meet the burden of proof on the claims asserted in this case, as the burden is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005).
6. Petitioner did not prove the District failed to include the Student's parents as key stakeholders or predetermined the Student's program. *Schaffer*, 546 U.S. at 62; 34 C.F.R. §300.501(b)(c); 34 C.F.R. §300.322.
7. It was also established that the resolution of the issues herein was not unreasonably protracted by the Student's parent. 19 Tex. Admin. Code §89.1115(m).

ORDERS

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

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

All other relief not specifically stated herein is DENIED.

Signed this 7th day of February 2022.

Kimberlee Kovach

Special Education Hearing Officer for the
State of Texas

NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the Hearing Officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 20 U.S.C. 1415 I.2. 19 Tex. Admin. Code §89.1185(n); Tex. Gov't Code, § 2001.144(a)-(b).