DOCKET NO. 111-SE-1221

STUDENT b/n/f PARENT,	**§**	**BEFORE A SPECIAL EDUCATION**
Petitioners	**§**	
	§	
v.	**§**	
	§	**HEARING OFFICER FOR**
LEWISVILLE 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 an Individual Education Plan (IEP) including the provision of related services; hold an Manifestation Determination Review (MDR) under IDEA; 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 that the District was not required to conduct a MDR under IDEA. 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, Petitioner), filed a request for an expedited impartial due process hearing (the Complaint) pursuant to the Individuals with Disabilities Education Act (IDEA). The Complaint was received by the Texas Education Agency (TEA or Agency) on the 21st day of December, 2021, and the Notice of Filing of Request for a Special Education Due Process Hearing was issued by TEA on the 22nd day of December, 2021. The Respondent to the Complaint is the Lewisville Independent School District (hereinafter District or Respondent).

The Initial Scheduling Order was issued on December 23, 2021, and Respondent filed its Response, Plea to the Jurisdiction, and Motion to Dismiss on December 31, 2021. On January 4, 2022, the Pre-Hearing Conference (PHC) was held and the Order following the PHC was issued January 5, 2021. On January 6, 2022 Petitioner filed a Response to the Respondent's Motion to Dismiss. Respondent then filed a Reply to the Response. Thereafter, on January 20, 2022, Respondent filed a second Motion to Dismiss based upon grounds distinct from the first. Petitioner filed a Response on January 25, 2022. On January 21, 2022, the parties participated in mediation in lieu of a resolution session, but were unable to reach an agreement. Order No. 3, issued on January 29, 2021 denied both Motions to Dismiss.

The case proceeded and the Due Process Hearing was held on February 1, 2022. On February 3, 2022, Order No. 4 was issued and set forth the schedule for post-hearing briefs and the decision due date, that being February 9, 2022 and February 15, 2022, respectively.

A. Representatives

Petitioner was represented throughout the case by counsel Jordan McKnight. The Respondent District was represented by Nona Matthews and Sydney Keller of Walsh, Gallegos, Trevino, Kyle & Robinson, P.C.

B. Mediation and Resolution

The parties agreed to participate in mediation in lieu of a resolution session. The mediation was held on January 21, 2022, and no agreement was reached at that time.

C. Continuances

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

D. Preliminary Matters

As noted in the procedural overview, a number of preliminary issues were presented to the hearing officer. In addition to the Plea to the Jurisdiction, Respondent District also filed two separate Motions to Dismiss. Regarding the Plea, Order No. 2 issued January 5, 2022 dismissed all of the claims that did not fall under the hearing officer's limited jurisdiction. The first Motion to Dismiss was based upon standing, as the Student *** prior to the filing of the Request for Due Process. The Petitioner, however, did produce a ***, wherein the Student ***, the Petitioner in this matter. With regard to the second Motion to Dismiss, it was based upon the contention that Petitioner was not entitled to relief as a matter of law. On January 29, 2022, Order No. 3 denying the two Motions to Dismiss was issued.

The parties made their respective disclosures. The expedited due process hearing (DPH) was then conducted on February 1, 2022 on the Zoom platform, and lasted one day. The Petitioner continued to be represented by Mr. Jordan McKnight. Also attending the hearing were Ms. Debra Liva, who served to assist Mr. McKnight, and Ms. India Jackson, a legal intern for Mr. McKnight, attended a part of the hearing. The Student's parent, Ms. ***, was also in attendance. The Respondent continued to be represented by its legal counsel, Ms. Nona Matthews and Ms. Sydney Keller, and Dr. ***, Chief Executive Director of Special Education for the District, attended the hearing as the District representative.

E. Post Hearing Matters

Upon the conclusion of the presentation of evidence, but prior to closure of the hearing, the parties acknowledged the expedited nature of the proceeding and the Decision Due Date of February 15, 2022. With the understanding that the hearing transcript will be completed no later than late on February 4, 2022, the time for the submission of post-hearing briefs was set for 5:00 p.m. on Wednesday, February 9, 2022, and an Order so stating was issued February 3, 2022.

III. Issues

A. Petitioner's Issues

Petitioner alleges that the District has denied Student a free, appropriate public education (FAPE), and that the Student is entitled to a Manifestation Determination Review based upon IDEA and its procedures.

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

- Whether the District violated its Child Find obligations in failing to timely evaluate Student in all areas of suspected disability or need;
- Whether the District violated the IDEA by failing to develop an Individual Education Plan (IEP), including the provision of related services;
- Whether the District violated IDEA in failing to conduct a MDR in compliance with the protections of the IDEA procedure; and
- Whether the District failed to comply with procedural obligations under the IDEA and related laws.

B. Petitioner's Requested Relief

- That Student be evaluated and determined to be a student in need of specially designed instruction or special education;
- That the District create and implement an IEP based upon the Student's unique needs;
- That Student's placement in the Disciplinary Alternative Educational Program (DAEP) be overturned; and
- That the Student be provided compensatory education.

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, as there was no suspicion that Student was a student with a disability in need of specially designed instruction. 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.

IV. Findings of Fact*

1. The Student resides with Student's mother within the boundaries of the Lewisville Independent School District [hereinafter LISD or District], is *** years old, and currently in the *** grade at ***.[1]

2. Student has been enrolled in the District since Student's *** grade year attending ***. [2] The Student first qualified for Section 504 for Attention Deficit Hyperactivity Disorder (ADHD) and *** when Student was in school in ***, and the accommodations followed Student to *** ISD for Student's *** year of *** then to Lewisville ISD beginning Student's *** year.[3]

3. Upon enrollment in *** in the Lewisville Independent School District, the Student continued to receive Section 504 accommodations in accordance with Student's eligibilities of *** and

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

[1] R.2.
[2] T.93; R.11.
[3] T.270-271.

ADHD. Those accommodations included technology to type assignments, additional time to complete testing, and tutoring.[4]

4. Mr. ***, an Assistant Principal (AP) at the ***, has been the student's AP since Student's *** year. Mr. *** also serves as the Section 504 coordinator for a number of students, and in particular served as the coordinator for the Student in this matter.[5]

5. Student was *** or advanced in math classes, as Student had *** in *** grade, and then was enrolled in *** for Student's *** year when in the *** School District. In ***, Student's grades were passing, at ***. A couple other grades that year were in the *** range as well. [6]

6. Then for Student's *** year, school year 2019-2020, Student had enrolled in ***. During that time, the Student encountered some difficulties and some failing grades in the *** classes. The evidence demonstrated that some of the difficulties, at least in math, were due to the fact that Student was not attending the tutoring classes.[7] Student was then moved to the on-level *** and on-level *** classes, and Student did well in those classes. Further, as the pandemic forced all courses to be completed online, Student received a P for pass due to the online nature of the course.[8]

7. During the following year, Student's *** year, the 2020-2021 school year, during the fall 2020 semester Student was successful in all of Student's classes.[9]

8. Testimony demonstrated that while some of the Student's grades were failing, Student's teacher made comments that Student was doing great academically, and that the grade was likely due to not turning in Student's assignments. Thus, the low grades were due, in part, to the Student's missing grades and failure to complete assignments.[10]

9. In December 2020, the Student's father, ***. Mr. *** received an email notice from the Student's mother, noting what had happened and they were leaving town ***.[11] Student's parents ***.[12]

10. Mr. *** assured the Student's mother that District personnel would be notified and would be of support and subsequently check in on Student. Mr. *** did inform the Student's

[4] T.57; P.5.
[5] T.35-36.
[6] T.95-97; R.11:1.
[7] T.98,120-121, 219, 221, 223.
[8] T.98-100; R.11:2.
[9] T.104; R.11:3.
[10] T.55-56.
[11] T.104; P.16:102-107.
[12] P.5.

teachers, and when Student returned to school, the Student received a referral to Ms. ***, a counselor, and Mr. *** did check-in with Student as well.[13]

11. During the time after Student's ***, Ms. ***, a student assistance counselor at the ***, met with the Student to provide *** counseling. She first met the Student in January, 2021 and met with Student once a month. The evidence also showed that when Student met with Ms. ***, the Student was doing fine emotionally, socially, behaviorally, and academically. She testified that she had no reason to suspect that Student needed a referral for special education.[14]

12. In February 2021, the District did not conduct an in-person annual review of the Student's progress and Section 504 accommodations. Instead, Mr. *** testified that a 'snapshot' was done, which entails reviewing the documents and input of teachers, Student's parent and others. The committee did not voice any concerns about the Student, and Student's teachers noted that Student always responded, was a good kid, and was doing well.[15]

13. At the time of the review, evidence showed that the Student's mother's concern was that Student receive Student's accommodation for the STAAR examination. Student did very well in the STAAR testing that spring.[16]

14. At that time of the snapshot, the Student was failing ***, although the teacher's comments were that Student was doing great academically. Student did, in fact, do well on the *** STAAR assessment.[17]

15. During the Spring 2021 semester, the Student was enrolled in *** and Ms. *** was Student's teacher. She noted that when Student was in class Student worked and had no behavior issues. She did explain that Student's failing grade was due to a number a factors, such as not following or accessing Student's Section 504 accommodations, such as tutoring. In addition, the Student would miss tests, not make them up promptly, fail to complete homework, fail to upload assignments, and received a zero for a test due to cheating.[18]

16. Ms. *** also noted that she was following the Student's 504 accommodations, and that she had observed nothing about the student academically, socially, or emotionally that caused her to suspect a disability and need for a special education referral or evaluation.[19]

[13] T.104-106.
[14] T.171, 184.
[15] T.50-52, 61, 63; P.6.
[16]T.62-63; P.6:2; R.12.
[17] T.55; P.6:2; R.12.
[18] T.224-228,235.
[19] T.227-228, 235.

17. Although the Student struggled with ***, the evidence showed that Student was successful in all of Student's other classes.[20] The Student did earn credit for the *** class during summer school.[21]

18. Evidence showed that many of the issues regarding the Student's grades were related to not turning in assignments when due.[22]

19. The Student's discipline report for *** had only that Student was tardy *** times, until the time of the incident on ***, 2021.[23]

20. The Evidence clearly demonstrated that the District had no suspicion of any need for a referral for special education evaluation, and the Student did not exhibit any problems academically, socially or emotionally that would cause such a suspicion.[24]

21. While during the summer of 2021, the Student's mother contacted the *** by email and informed them of the Student's ***, the correspondence was primarily in the context of why Student was not at practice. She also thanked them for the support they provided.[25]

22. Prior to the Student's *** year, Mr. *** talked with *** about the Student, and was told that he (***) enjoyed having the Student (and Student's ***) as part of the ***.[26]

23. No evidence was presented of any other communication from the Student or Student's mother about *** or *** prior to the incident on ***, 2021. Student's mother did express concern about the Student's failure to complete assignments during the Covid pandemic.[27]

24. The Student's fall semester 2021 grades were all very good, ranging from ***.[28] Additionally, Student's teacher at the time, Dr. ***, completed a questionnaire for the Student as part of a Level 2 Campus Team Assessment after the ***, 2021 incident. She noted that Student had superior behavioral skills, above average social skills, and stays on task.[29]

25. On October ***, 2021, Ms. ***, a counselor at the ***, sent Student's mother an email with some suggested resources for family and *** counseling.[30]

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[20] T.107; R.11:3.
[21] T.47-49,237; R.11:5.
[22] T.56-57.
[23] T.102-103; R.13.
[24] T.88-89, 109, 111.
[25] T.287; P.16:128-129.
[26] T.128.
[27] P.16:84,87.
[28] T.109; R.11:4.
[29] R.5:1.
[30] P.16:130-131.

26. On ***, 2021, Student engaged in ***', a violation of the District's Student Code of Conduct. Specifically, the Student had ***".[31] *** ***. ***.[32]

27. Student was initially ***.[33]

28. Student was then disciplined for Student's Student Code of Conduct violations, was suspended for three days, and received a placement at the District's Disciplinary Alternative Education Program (DAEP) for a total of 60 days.[34]

29. The Student's Section 504 Committee then scheduled a meeting, the Manifestation Determination Review, to determine if the Student's conduct was a manifestation of Student's disability or a result of the District's failure to implement Student's 504 accommodations. It was initially scheduled for November ***, 2021. Notice was given, and the evidence is unclear and inconsistent as to the reasons for rescheduling the meeting that was finally held on December ***, 2021. [35]

30. The Section 504 committee MDR meeting was held on December ***, 2021. Student's mother could not attend, as she was in the process of ***. She notified the District on the morning of December ***, 2021.[36] The Committee then conducted the meeting and concluded with a finding that the conduct in question was not a manifestation of Student's disability or the District's failure to implement the Student's 504 plan. At the time of the review, the disabilities considered were those on the Student's 504 plan, being *** and ADHD.[37]

31. The Student attended the DAEP beginning in November 2021. On November ***, 2021, the Student's mother contacted Student's counselor, Ms. *** about her concerns. Ms. *** then contacted Ms. ***, school counselor at the DAEP, and asked her to check on the Student, in accordance with the District's Level 2 Safety and Supervision Plan. When she did, Student noted that Student was very angry about the placement, and that Student felt that Student ***. [38]

32. Upon hearing the ***, Ms. *** contacted the Student's mother, as well as Ms. ***. Subsequently, Ms. *** had a telephone call with the Student's mother and the student regarding Student's well-being. The evidence demonstrated that the Student, as well as

[31] R.3; R.13.
[32] R.3:22-23, 26-28, 37-38.
[33] R.3:9,23.
[34] R.3:16, 20.
[35] T. 113, 292, 304; P.10.
[36] T.292; P16:241.
[37] T.87; P.16:252.
[38] T.135; P.15.

Student's mother, were very concerned and frustrated by the resulting DAEP placement.[39] The evidence showed that it is not uncommon for students placed at the DAEP to be angry and have feelings of helplessness about the inability to change the consequences.[40]

33. Student attended 5 days of school at the DAEP.[41]

34. Student's mother first informed the District of the Student's diagnosis of *** and *** in writing on November ***, 2021, after the incident.[42]

35. As noted, Ms. *** had been meeting with the Student about once a month, until Student was assigned to the DAEP after the incident. She testified that she first received information from Student's mother about *** and *** after the incident, and that the Student's mental health had declined since the incident.[43]

36. No evidence was presented that the Student was the subject of bullying.

37. The alleged psychological evaluation submitted by Petitioner is unclear as to its origin and authenticity, and as such cannot be considered reliable or credible.[44]

38. The District agreed to evaluate the Student for special education, and on January ***, 2022 sent to the Student a request for consent along with Procedural Safeguards. On January ***, 2022 the same information was sent to the Student's mother.[45]

39. Student and Student's mother, through counsel, declined to provide consent for the evaluation prior to the hearing. At the time of the due process hearing, the parent evaded answering questions as to consent, and no response from the Student was submitted into evidence.[46]

V. Discussion

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

A. Preliminary Rulings

[39] T.136.
[40] T.148.
[41] T.117
[42] T.186; P.16:214,216, 254.
[43] T. 163, 183-186.
[44] P.1.
[45] T.246-249; R.9; R.10.
[46] T.246-249;300-302.

As preliminary matters, Respondent raised a Plea to the Jurisdiction, and in Order No. 2, all of the issues and claims falling outside of the hearing officer's limited jurisdiction were dismissed. Also, as noted Respondent District filed two separate Motions to Dismiss. On January 29, Order No. 3 was issued which denied both motions, and the hearing proceeded.

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 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. *Endrew 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).

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.

1. Child Find

It is clear that school districts are required to evaluate all children where a suspected disability exists. Further, if a parent requests an evaluation, then the District is obligated to respond within fifteen school days as to their agreement to complete the evaluation or conversely 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. 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 in saying that

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

34 C.F.R. §300.8(2)(i).

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

Once a Child Find violation has been triggered, that is a finding that the District suspects or has notice of a disability that needs special education, then the next consideration is that of timing. That is, the time between the suspected disability and the time the District satisfies its duty to evaluate is considered as part of the violation analysis. *Krawietz v. Galveston Indep. Sch. Dist.,* 900 F.3d 673 (5th Cir. 2018).

2. Entitlement to Manifestation Determination Review under IDEA

The IDEA provides that if students who qualify for special education and violate the code of conduct of the local education agency (LEA) or commit an act that would be disciplined, that they are entitled to a review in order to determine whether that conduct was a manifestation of that student's disability. 34 C.F.R. §300.530. And in some instances, even though a student has not been found eligible for special education, they may still be entitled to such protections if the district is deemed to have knowledge that a student has a disability. 34 C.F.R. §300.534. The provision of IDEA specifically provides that a school is considered to have knowledge if, before the occurrence of the behavior that caused the disciplinary action: the parent expressed concern in writing to supervisory, administrative personnel, or a teacher that the child is in need of special education and related services; the parent requested an evaluation; or the teacher or other LEA personnel expressed specific concern about a pattern of behavior demonstrated by the child. See 34 C.F.R. §300.534(b).

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 concerning evaluations and meetings to consider them, as well as development and implementation of a student's Individual Education Plan (IEP). 34 C.F.R. **§**300.301 (c) (1)(i);TEX. ADMIN. CODE §89.1011(c). 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. Additional procedural obligations include assuring 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.*

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 brings forth issues alleging a substantive violation of Child Find, as well as procedural violations of the IDEA. The following examines these issues and considers the exhibits in evidence, testimony of the witnesses, and issues presented.

A. Child Find: Identification and Evaluation

In this case, Petitioner has claimed that the District failed its Child Find duties in failing to evaluate the student for special education. As noted, in order to prevail on the claim that Petitioner was denied FAPE and the Child Find obligation violated, Petitioner must (1) prove Student was eligible under the IDEA because Student had a qualified disabling condition; and (2) required special education and related services. IDEA also requires that a LEA respond to a request for a special education evaluation and sets timelines for doing so. There was no evidence of any request for an evaluation by the Student or Student's mother in this case.

Then the question is whether there was anything about the Student that would give the District cause to suspect that Student had a qualifying disability under IDEA that required special education. No evidence was presented of a recognition of any need for specially designed instruction or cause for concern by a teacher or counselor who worked with the Student. Although Petitioner contends that the requirements of Child Find do not require a suspicion of the need for special education, that simply is not the case. A plain reading of the statute demonstrates otherwise. The Child Find provision itself is clear:

"…children with disabilities…. and who are in need of special education and related services, are identified, located and evaluated." 34 C.F.R 300.111(a).

Thus, the student must have a disability and be in need of special education and related services. Petitioner also claims that this results in a predetermination; however, it is clear that the suspicion must lead to an evaluation, and the evaluation and subsequent ARD committee deliberations result in the determination.

Petitioner also argues that the failure of the Student's 504 accommodations is itself reason to trigger a special education referral. That is not, however, what we have in this instance. No complaints were voiced concerning the nature of the 504 accommodations, other than asking if they were applied across the board, meaning in all instances. And any failure, if at all, of the accommodations was due to the Student's decision to not access or make use of them. And in fact, the evidence demonstrated that the Student was successful in class, even though at times Student's grades were low, due in large part to failure to complete assignments. None of Student's teachers communicated any suspicion or concern, 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. S*ee D.L. ex rel P. L.*, 695 F. App'x. 733 (5th Cir. 2019).

With regard to the Student's mental health, although the District was aware of Student's ***, and Student had a counselor who checked in with Student once a month, the testimony demonstrated that the Student was doing well. In fact, the counselor noted that the Student's mental health declined only after the disciplinary placement was made. Further evidence showed that such a reaction to a DAEP was not uncommon, and does not give rise to a need for specially designed instruction or special education. And while Student's mother's communication to the Student's *** about Student's *** during the summer of 2021 was informative, it was in the context of why Student was missing practice, and a request for their assistance in helping Student get on track. No mention of special education or a need for any evaluation was made.

The law is clear that when considering a school district's obligation under Child Find, there must be reason to not only suspect a disability, but also suspect that special education services could be needed to address the disability. *Richard R.R.,* 567 F. Supp. 2d at 950. In the instant case, the evidence demonstrated that the District did not suspect a disability – and even further, did not suspect that special education services may be necessary. In fact, from the District's knowledge base, the Student was doing well academically, socially, emotionally, and behaviorally prior to the incident. In this case then, evidence clearly demonstrated that the student was able to do well and succeed in the classroom, and no need for specialized instruction was established. Further, the evidence failed to establish a need for a modified curriculum or related services. Yet, the evidence also established that the District did agree to evaluate the Student, and no consent to do so was provided by either the Student or Student's mother.

Finally, as the District did not have suspicion, Child Find was not triggered, and the timelines in this matter need not be considered. Petitioner did not meet the burden of demonstrating a need for special education or related services that is the result of the Student's disabilities.

B. MDR under IDEA

In considering the protections of IDEA with regard to a MDR, in order for such to apply the District must be deemed to have knowledge, before the conduct occurred, of a disability under IDEA. The criteria, as set forth earlier in 34 C.F.R. §300.534(b), were not met in this instance. The parent did not express concern in writing about the need for special education, no request was made, and no District teacher or other personnel expressed specific concern about the Student's pattern of behavior.

In this matter, there was no evidence presented that demonstrated that any of the factors existed that would necessitate that the District would have been deemed to have knowledge. In fact, the testimony of the teachers and counselors clearly established that the Student was succeeding academically, socially and emotionally. Although some evidence was submitted showing that the Student was dealing with some *** during the summer of 2021, it was only after the conduct that resulted in the disciplinary placement that the District was notified and had knowledge of these issues. It was also noted that Student experienced the decline in mental health after the consequences for the incident in question were imposed.

C. Procedural Considerations

Petitioner also claims that Respondent committed procedural violation of IDEA. 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).

The primary allegation is that the District's failure to provide the Student and Student's mother the Procedural Safeguards deprived them of the ability to fully participate in the decision-making process. No evidence to support this claim was presented. In fact, the evidence showed that the Student's mother experienced a great deal of participation and involvement in her ***'s education.

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 was a disciplinary one, based upon the Code of Conduct, and was not made under the auspices of an ARD Committee. As such, it 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 no deprivation of educational benefit. 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. The Lewisville Independent School District (LISD) is responsible for properly identifying, evaluating, and serving students under the provisions of IDEA, 20 U.S.C. §§1412 and 1414; 34 C.F.R. §300.301, and 19 TEX. ADMIN. CODE §89.1011.

2. Petitioner failed to carry the burden of proof to establish a violation of IDEA or a denial of FAPE. *Schaffer v. Weast,* 546 U.S. 49, 126 S.Ct. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984).

3. Petitioner, as the party challenging the District's failure to evaluate Student for special education, did not 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).

4. Petitioner failed to prove that the District violated its Child Find duties. 34 C.F.R. §300.111.

5. Petitioner did not meet the burden of proving Student is a child with a disability who is eligible for special education and related services under the IDEA. 34 C.F.R. §300.8.

6. Petitioner did not prove the District failed to include Student's mother as key stakeholder or predetermined Student's program. *Schaffer,* 546 U.S. at 62; 34 C.F.R. §300.501(b)(c); 34 C.F.R. §300.322.

ORDERS

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

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

All other relief not specifically stated herein is DENIED.

Signed this 15th day of February 2022.

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Kimberlee Kovach

Special Education Hearing Officer for the State of Texas

NOTICE TO THE PARTIES

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