

**SOAH DOCKET NO. 701-21-3308.IDEA**  
**TEA DOCKET NO. 252-SE-0821**

<b>STUDENT, B/N/F PARENT AND</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
<b>PARENT,</b>	§	
<b>Petitioner</b>	§	
	§	
<b>v.</b>	§	<b>HEARING OFFICER FOR</b>
	§	
<b>HAYS CONSOLIDATED</b>	§	
<b>INDEPENDENT SCHOOL DISTRICT,</b>	§	<b>THE STATE OF TEXAS</b>
<b>Respondent</b>	§	

**DECISION OF THE HEARING OFFICER**

**I. STATEMENT OF THE CASE**

\*\*\* (Student), by next friends \*\*\* and \*\*\* (Parents or, collectively, Petitioner), brings this action against the Hays Consolidated Independent School District (Respondent or District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and its implementing state and federal regulations.

The main issues in this case are whether the District violated its Child Find obligation and whether the District denied Student a free, appropriate public education (FAPE) by failing to convene an Admission, Review, and Dismissal (ARD) Committee meeting to develop an Individualized Education Program (IEP) for Student for the 2021-22 school year. The hearing officer concludes Petitioner did not meet Petitioner’s burden of proof as to either claim and is thus not entitled to any relief.

**II. LEGAL REPRESENTATION**

Petitioner was represented throughout this litigation by Petitioner’s legal counsel, Jordan McKnight, of the Law Office of Jordan McKnight. The District was represented throughout this litigation by Elvin Houston of the firm Walsh, Gallegos, Treviño, Kyle and Robinson, P.C.

### **III. DUE PROCESS HEARING**

The due process hearing was conducted via the Zoom videoconferencing platform on April 5, 2022 and was recorded and transcribed by a certified court reporter.

Petitioner continued to be represented by Jordan McKnight. Mr. McKnight was assisted by educational advocate Debra Liva and legal intern India Jackson. Parents attended the hearing. Respondent continued to be represented by Elvin Houston. Michelle Velasquez, the District's Executive Officer of Special Education, attended as the party representative.

The parties filed timely written closing arguments. The hearing officer's decision is due on May 31, 2022.

### **IV. ISSUES**

#### **A. Petitioner's Claims and Relief Sought**

The relevant time period for Petitioner's claims is August 19, 2020, to the present. The legal issues presented in this case are as follows:

1. Whether the District denied Student a FAPE by failing to convene an ARD Committee meeting to develop an IEP after Student re-enrolled in the District.
2. Whether the District failed to identify and evaluate Student for special education and related services.
3. Whether the District violated Student's rights under statutes other than the IDEA (dismissed on jurisdictional grounds in Order No. 2).

Petitioner seeks the following items of relief:

1. An order directing the District to provide Student services consistent with Student's last IEP from on campus learning school services until the District can hold an ARD Committee meeting.
2. An order directing the District to hold an ARD Committee meeting at a time and place agreeable to Parents.
3. An order placing Student in the \*\*\* grade consistent with same age non-disabled peers or, in the alternative, placing Student in \*\*\* grade.
4. An order directing the District to provide \*\*\*.
5. An order that \*\*\*.
6. Compensatory education and related services to address Student's areas of disabilities and/or needs, including but not limited to, private tutoring, counseling, and any other services as determined by independent evaluations at District expense.
7. Reimbursement of all out-of-pocket expenses incurred by Parents due to the District's failure to follow Child Find regulations and denying Student a FAPE.
8. Reimbursement of all costs and representation fees Parent has incurred in filing this due process hearing request (dismissed on jurisdictional grounds in Order No. 2).
9. Any and all other remedies that Petitioners may be entitled to under the law.

**B. Respondent's Legal Position**

Respondent denies the allegations and further denies that Petitioner is entitled to any relief. Respondent also raised the affirmative defenses of the statute of limitations, laches, and mootness.

Respondent also requests specific findings of fact as to whether Petitioner unreasonably protracted the final resolution of the issues in controversy. 19 Tex. Admin. Code § 89.1185(m)(1).

**V. FINDINGS OF FACT**

**Background Information**

1. Student is \*\*\* years-old and lives in the District with Student’s \*\*\* Parents. Student attended school in the District beginning in \*\*\* until the fall of 2018, Student’s \*\*\* grade year.<sup>1</sup>
2. Early in Student’s school career, Student had difficulty focusing and with impulsivity. Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) in \*\*\* grade and has \*\*\* since that time. Even with this diagnosis, Student performed well in school until \*\*\*, achieving good grades and mastering grade level standards in all subjects on State of Texas Academic Achievement and Readiness (STAAR) testing in \*\*\* grade.<sup>2</sup>
3. In the second semester of the 2017-18 school year, Student’s \*\*\* grade year, Student began experiencing \*\*\* and it became increasingly difficult for Student to go to school. Student’s \*\*\* were later determined to be related to \*\*\* and \*\*\*.<sup>3</sup>
4. When Student started \*\*\* in the fall of 2018, Student experienced significant \*\*\* and had difficulty attending school, missing \*\*\* of the \*\*\* days Student was enrolled. Student was \*\*\*. Student has received private counseling since April 2019.<sup>4</sup>
5. Parents requested a special education evaluation on September \*\*\*, 2018 due to Student’s \*\*\* and related school absences. The District agreed to evaluate Student and made several unsuccessful attempts to meet with Parents and their advocate to gather further information and obtain consent for an initial evaluation.<sup>5</sup>
6. On October \*\*\*, 2018, Parents filed a due process hearing request alleging that the District violated its Child Find duties under the IDEA.<sup>6</sup>
7. Parents advised the District they would not consent to an evaluation on October \*\*\*, 2018. On October \*\*\*, 2018 and again on November \*\*\*, 2018, the District confirmed Parents’ September 2018 request for a special education evaluation and its agreement to evaluate

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<sup>1</sup> Joint Exhibit (Jt. Ex.) 1 at 1; Respondent’s Exhibit (R. Ex.) 3 at 17; Transcript (Tr.) at 59-60.

<sup>2</sup> Jt. Ex. 1 at 4-5; Petitioner’s Exhibit (P. Ex.) 1 at 2; R. Ex. 3 at 54-55; Tr. at 60.

<sup>3</sup> Tr. at 61-62, 171.

<sup>4</sup> Jt. Ex. 1 at 1; P. Ex. 1 at 2-3; P. Ex. 5; Tr. at 65-66, 76-77, 171-74, 180-81.

<sup>5</sup> R. Ex. 3 at 1.

<sup>6</sup> Tr. at 94; *Samuel Z. b/n/f Luis and Emily Z. v. Hays Consolidated Indep. Sch. Dist.*, No. 028-SE-1018; *see Zamora v. Hays Consol. Indep. Sch. Dist.*, No. 1:19-CV-1087-SH, 2021 WL 2531011, at \*3 (W.D. Tex. June 20, 2021).

Student and provided notice and consent for a Full and Individual Initial Evaluation (FIIE). Parents did not consent to the proposed FIIE.<sup>7</sup>

8. Parents withdrew Student from the District in November 2018 after Student \*\*\* and was allowed to go home unsupervised.<sup>8</sup>
9. In February 2019, Parents obtained an independent neuropsychological evaluation by Dr. \*\*\*, a licensed psychologist and Licensed Specialist in School Psychology (LSSP). Diagnostic impressions included ADHD, combined type, moderate to severe; \*\*\*, \*\*\*, moderate; Specific Learning Disorder with Impairment in Writing (including \*\*\*), moderate; and emerging symptoms of \*\*\* and \*\*\*.<sup>9</sup>
10. Dr. \*\*\* found that “[Student’s] functioning is consistent with the handicapping condition of an emotional disturbance (\*\*\* and \*\*\*) a (sic) as well as specific learning disabilities in writing (including \*\*\*) that are contributing to overall learning difficulties” and Student exhibited severe symptoms of ADHD. She further opined that Student was eligible for “student support services” based on Student’s diagnoses.<sup>10</sup>

### **Prior Litigation Between the Parties**

11. In connection with Petitioner’s October 2018 due process hearing request, Special Education Hearing Officer Sandy Lowe found the District was not required to accept Dr. \*\*\*’s independent evaluation for purposes of establishing eligibility and ordered Parents to make Student available for an FIIE by the District on March \*\*\*, 2019. Parents signed consent on April \*\*\*, 2019. Completing the evaluation required further intervention from the hearing officer and Hearing Officer Lowe also ordered Parents to consent to observations of Student at Student’s current school.<sup>11</sup>
12. The District’s June 2019 FIIE was conducted by a multidisciplinary team, including a licensed psychologist/LSSP/nationally certified school psychologist, an LSSP/nationally certified school psychologist, an occupational therapist, and a behavior specialist, and comprehensively considered Student’s eligibility as a student with a Specific Learning Disability (including \*\*\*), Emotional Disturbance, and Other Health Impairment. The FIIE evaluators found Student did not meet eligibility criteria for special education and related services under these classifications. In addition, the FIIE evaluators found it was

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<sup>7</sup> R. Ex. 1 at 1-4; R. Ex. 3 at 1; Tr. at 96.

<sup>8</sup> Tr. at 65.

<sup>9</sup> P. Ex. 1; P. Ex. 1 at 1, 17, 21.

<sup>10</sup> P. Ex. 1 at 18.

<sup>11</sup> R. Ex. 2; R. Ex. 3 at 1; Tr. at 98.

“questionable” Student was demonstrating educational needs that could not be met through general education programming options and that Student’s performance could be adequately accommodated by continuing to provide the accommodations in Student’s Section 504 plan.<sup>12</sup>

13. District evaluators thoroughly considered Dr. \*\*\*’s independent evaluation, including her diagnostic impressions, testing and assessments, and recommendations, before concluding Student was not eligible under the IDEA.<sup>13</sup>
14. The District did not convene an ARD Committee meeting to review the June 2019 FIIIE with Parents. Parents did not file a due process hearing request challenging the District’s June 2019 FIIIE or failure to convene an ARD Committee to consider the evaluation.<sup>14</sup>
15. On June 14, 2019, the District moved for summary judgment on Petitioner’s Child Find claim. On August 12, 2019, Hearing Officer Lowe granted the District’s motion for summary judgment and entered a final judgment in favor of the District, finding that it did not violate its Child Find responsibilities during the relevant time period (October \*\*\*, 2017 through November \*\*\*, 2018) because the evidence did not demonstrate that Student was eligible for special education and related services during that time period.<sup>15</sup>
16. This decision was affirmed by the U.S. District Court for the Western District of Texas in June 2021, which found the District complied with the IDEA and adequately addressed Student’s educational needs during the relevant time period. Parents did not appeal this ruling.<sup>16</sup>

**\*\*\* (December 2018-February 2020)**

17. Student enrolled in \*\*\*, a charter school, in December 2018. \*\*\* initially provided Student a Section 504 services plan.<sup>17</sup>

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<sup>12</sup> R. Ex. 3 at 3, 62-68.

<sup>13</sup> R. Ex. 3 at 2, 5, 7-17, 19-20, 34, 37, 39-40, 44-54, 57-59, 62-67; Tr. at 142.

<sup>14</sup> Tr. at 99-100, 114-16, 190-91, 204.

<sup>15</sup> Tr. at 102-03; *Zamora v. Hays Consol. Indep. Sch. Dist.*, No. 1:19-CV-1087-SH, 2021 WL 2531011, at \*4, \*7 (W.D. Tex. June 20, 2021).

<sup>16</sup> Tr. at 103; *Zamora v. Hays Consol. Indep. Sch. Dist.*, No. 1:19-CV-1087-SH, 2021 WL 2531011, at \*12 (W.D. Tex. June 20, 2021).

<sup>17</sup> R. Ex. 3 at 21; Tr. at 66-67.

18. Parents filed a due process hearing request alleging a Child Find violation against \*\*\* in May 2019.<sup>18</sup>
19. \*\*\* did not conduct an FIIE. \*\*\* instead convened an initial ARD Committee meeting on July \*\*\*, 2019 and determined Student was eligible for special education and related services as a student with an Emotional Disturbance and an Other Health Impairment based on Dr. \*\*\*'s independent evaluation, finding the results “suggest eligibility for special education services.”<sup>19</sup>
20. Parents were provided the District’s June 2019 FIIE prior to the July 2019 ARD Committee meeting and did not provide the FIIE to \*\*\*. \*\*\* thus only considered and found Student eligible based solely on Dr. \*\*\*'s evaluation.<sup>20</sup>
21. Student’s July 2019 IEP from \*\*\* included annual goals in written expression, transition, and counseling. Accommodations included extra time for oral and written responses, study materials, reduced assignment length, reminders to stay on task, seating near teacher, private discussions about behavior, and checks for understanding on directions and assignments. The IEP called for 15 minutes of in-class support per week in \*\*\*, one 30-minute counseling session per week, and daily 10 minute check-ins with the counselor. The IEP also included a crisis safety plan.<sup>21</sup>
22. Student initially performed well at \*\*\* but then began to again experience attendance issues due to \*\*\* and \*\*\*. Parents withdrew Student from \*\*\* in February 2020 to attend an online program from home in an effort to reduce Student’s “\*\*\*\*” and because the program was not meeting Student’s needs.<sup>22</sup>

**\*\*\* (February 2020-January 2021)**

23. Student enrolled in the \*\*\*, an online, self-paced program, in February 2020.<sup>23</sup>
24. The \*\*\* convened an annual ARD Committee meeting on April \*\*\* and April \*\*\*, 2020 to develop an IEP. The April 2020 IEP included annual goals targeting logging into each course at least 5 days a week, responding to emails from instructors to report success or communicate situations that produce \*\*\*, submitting at least 2 assignments per week for

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<sup>18</sup> Tr. at 98-99.

<sup>19</sup> Jt. Ex. 2; Jt. Ex. 2 at 1, 18, 22; Tr. at 68, 100-01, 208.

<sup>20</sup> Jt. Ex. 2 at 1; R. Ex. 6 at 2; Tr. at 144, 210-12.

<sup>21</sup> Jt. Ex. 2 at 8-12, 16, 19.

<sup>22</sup> Jt. Ex. 3 at 1; Tr. at 71-72, 101-02, 181-83.

<sup>23</sup> Jt. Ex. 5 at 26; Jt. Ex. 6 at 1; Tr. at 71.

each course during the spring semester, and following course pacing guides to stay on track for completion. Accommodations included 50% extended time for tests.<sup>24</sup>

25. Even with reduced \*\*\* in the home setting, Student continued to have difficulty focusing on Student's school work and completing assignments and exams. This program did not meet Student's needs and Student withdrew from \*\*\* on January \*\*\*, 2021 to participate in an online homeschool program with fewer courses and demands.<sup>25</sup>
26. Student's IEP from \*\*\* expired on April \*\*\*, 2021.<sup>26</sup>

### **January 2021-Present**

27. Student was homeschooled for the remainder of the 2020-21 school year. Student was not successful in this learning format, with continued difficulty completing Student's courses.<sup>27</sup>
28. In the summer of 2021, Parents decided to re-enroll Student in the District. On July \*\*\*, 2021, Parents requested that the District hold an ARD Committee meeting prior to the beginning of the school year. Student had not re-enrolled in the District at the time.<sup>28</sup>
29. The District's Executive Officer of Special Education initially agreed to convene a meeting on August \*\*\*, 2021 but asked to reschedule due to another commitment and asked for other dates Parents could meet. Parents provided alternative dates.<sup>29</sup>
30. On August \*\*\*, 2019, the Executive Officer of Special Education agreed to follow-up with Parents the following week regarding alternative dates for a meeting. She also asked Parents to provide "any documentation about special education eligibility or programing [Student] received at other schools for the 2020-2021 school year."<sup>30</sup>
31. On August \*\*\*, 2021, the Executive Officer of Special Education again requested that Parents provide the previously requested records, "including special education records, if any, that reflect [Student's] eligibility and any IEP that was in effect at the end of the 2020-

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<sup>24</sup> Jt. Ex. 5; Jt. Ex. 5 at 1, 11, 18, 27.

<sup>25</sup> Jt. Ex. 6 at 1; Tr. at 72-73, 77-78, 80-82, 102, 183.

<sup>26</sup> Jt. Ex. 5 at 11.

<sup>27</sup> Tr. at 81-82.

<sup>28</sup> P. Ex. 2 at 1; R. Ex. 5 at 16-17; Tr. at 82-84.

<sup>29</sup> P. Ex. 2 at 2-3; R. Ex. 5 at 13-15; Tr. at 123-24, 189-90.

<sup>30</sup> R. Ex. 5 at 11-12.



2021 school year.” She explained these records were needed “to understand why [Student] may be entitled to an ARD committee meeting at this time (since we have no record of Student’s special education eligibility)” and to “prepare for any meeting to collaborate concerning comparable services, if Student has been determined eligible for special education.”<sup>31</sup>

32. Parents, through their advocate, provided the District Student’s IEPs from \*\*\* and the \*\*\* on August \*\*\*, 2021. Parents did not provide any additional records supporting Student’s current eligibility for services.<sup>32</sup>
33. On August \*\*\*, 2021, the District’s counsel acknowledged receipt of Student’s prior IEPs and requested “a copy of the [Full and Individual Evaluation] that was completed in 2019” to help the District understand Student’s needs. Parents’ advocate responded by asking for a time for the ARD Committee to meet the next day. Counsel advised the advocate that the District could not convene an ARD Committee meeting without the necessary information to develop an IEP and confirmed the District would not convene a meeting the next day.<sup>33</sup>
34. On August \*\*\*, 2021, the District’s counsel again requested “the evaluation report(s) and any other records from the prior schools, as well as any records concerning [Student’s] instruction during the 2020-21 school year.” Counsel clarified that the District was not presently refusing to convene an ARD Committee meeting but needed this information to prepare and ensure the necessary persons attended. This communication further advised Parents the District was proposing to evaluate Student because there was not sufficient information available to ensure that Student was offered an appropriate IEP.<sup>34</sup>
35. On August \*\*\*, 2021, the District provided a Notice of Evaluation and Consent for Initial Evaluation because, after reviewing the available records, more information was needed to determine Student’s needs and plan an appropriate school program. Information considered before recommending an evaluation included the District’s June 2019 FIIE.<sup>35</sup>
36. The District requested Student’s special education records through the Texas Records Exchange system and received IEPs from \*\*\* and \*\*\*. The last available information the District had concerning Student’s educational performance was obtained from the IEP progress report from \*\*\* reflecting Student’s progress through September 2019. No

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<sup>31</sup> P. Ex. 2 at 4; R. Ex. 5 at 6-7.

<sup>32</sup> P. Ex. 2 at 5-6; R. Ex. 5 at 5-6; Tr. at 106-07, 126-27.

<sup>33</sup> R. Ex. 5 at 3-4.

<sup>34</sup> R. Ex. 5 at 1-2.

<sup>35</sup> R. Ex. 4 at 1-3.

- progress reports were received from \*\*\*. These records also did not reflect that Student had an IEP in another school district after April 2021.<sup>36</sup>
37. On the morning of August \*\*\*, 2021, the Executive Officer of Special Education advised Parents the District had requested the “necessary records” from the schools Student previously attended in order to convene an ARD Committee meeting and she would “be in touch soon about the meeting.” She again requested Parents provide any additional records concerning Student’s special education program during the 2020-21 school year.<sup>37</sup>
38. On August \*\*\*, 2021, the District issued Prior Written Notice declining Parents’ request for an ARD Committee meeting. Specifically, after considering Parents’ request, the District “determined that [Student] is not entitled to an ARD Committee meeting as the District has not received an [IEP] that was in effect and the District has not received [an FIIE] that supports [Student’s] eligibility for special education. The only evaluation reports the District has access to, dated February \*\*\*, 2019 and June \*\*\*, 2019, do not support special education eligibility.” The District again provided Parents a Notice of Evaluation and Consent for Initial Evaluation.<sup>38</sup>
39. The Prior Written Notice detailed the basis for the District’s decision, the options considered and why they were rejected, the evaluation procedures, tests, records, or reports used as a basis for the decision, and other factors relevant to the decision. These factors included that the only evaluation received from \*\*\* was not appropriate to support Student’s eligibility in the spring of 2019 and the District’s June 2019 FIIE, which found Student did not qualify for services, was not considered by \*\*\* when it proposed an IEP in July 2019.<sup>39</sup>
40. The District did not have information available to it in August 2021 that would have allowed it to develop an IEP for Student because Student did not have an IEP in effect after April 2021 and the District lacked adequate information supporting Student’s current eligibility for services.<sup>40</sup>
41. The District’s first day of instruction for the 2021-22 school year was August 19, 2021.<sup>41</sup>

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<sup>36</sup> Jt. Ex. 4 at 1-2; Tr. at 125-26, 148-50, 158-59.

<sup>37</sup> R. Ex. 5 at 19.

<sup>38</sup> R. Ex. 5 at 24-26, 51-53.

<sup>39</sup> R. Ex. 5 at 25-26.

<sup>40</sup> Tr. at 150-51, 158-59.

<sup>41</sup> Tr. at 146.

42. Parents were unwilling to allow Student to return to school in the District without an IEP. While Parents were not concerned about Student's safety, they feared Student would not be successful without supports in place. Parents did not re-enroll Student in the District for the 2021-22 school year.<sup>42</sup>
43. Parents refused to consent to the District's proposed FIIE.<sup>43</sup>
44. Apart from the District's June 2019 FIIE, no other school district has completed an evaluation of Student to determine Student's eligibility under the IDEA.<sup>44</sup>
45. The District furthers its Child Find obligation by putting notices in the paper and pediatricians' offices, visiting area private schools two times a semester, and posting notices on its Facebook page.<sup>45</sup>
46. Petitioner did not unreasonably protract the final resolution of the issues in controversy.

## **VI. DISCUSSION**

Petitioner alleges the District violated its Child Find duty and further alleges the District denied Student a FAPE by failing to convene an ARD Committee meeting to develop an IEP for the 2021-22 school year and impeding Parents' meaningful participation in the process.

As an initial matter, the hearing officer confirms that this decision is limited to claims accruing during the relevant time period (August 2020 to present). Petitioner urges the hearing officer to find that Parents were entitled to an ARD Committee meeting because they are entitled to participate in any meetings concerning eligibility and argues that District employees' unilateral determination regarding eligibility in August 2021 violated Parents' right to participate in the eligibility determination process. *Petitioner's Closing Brief* at ¶¶ 4, 10. However, Petitioner's

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<sup>42</sup> Tr. at 87-88, 187-88.

<sup>43</sup> Tr. at 108, 159-60.

<sup>44</sup> Tr. at 151.

<sup>45</sup> Tr. at 139.

attempt to cast the District's eligibility determination as occurring in August 2021 is not supported by the record.

In Texas, state regulations require a parent to request a due process hearing within one year of the date he or she knew or should have known of the alleged action forming the basis of the complaint. 19 Tex. Admin. Code § 89.1151(c). The limitations period begins to run when a party knows, or has reason to know, of an injury. *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995). The District raised the affirmative defense of the statute of limitations.

The evidence showed that Parents were provided the District's FIIE in June 2019 and thus knew or should have known of the District's conclusion regarding eligibility at that time, not in August 2021. Therefore, to the extent Petitioner seeks to challenge the District's June 2019 eligibility determination and failure to convene an ARD Committee meeting to consider it in the instant action, any such claims accrued more than one year prior to filing this case in August 2021 and fall outside the limitations period. Any such claims are therefore not properly before the hearing officer.

**A. Burden of Proof**

There is no distinction between the burden of proof in an administrative hearing and judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n. 4 (5th Cir. 2009). The burden of proof in a due process hearing is on the party challenging the student's IEP and placement. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1291 (5th Cir. 1991). The burden of proof in this case is on Petitioner.

**B. Free, Appropriate Public Education**

Under the IDEA, students with disabilities are entitled to a FAPE that provides special education and related services designed to meet their unique needs, and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A). A school district must offer a FAPE to all students with disabilities living in its jurisdiction between the ages of three and twenty-one. 34 C.F.R. § 300.101(a); Tex. Educ. Code § 12.012(a)(3). These students must receive specially designed, personalized instruction with sufficient support services to meet their unique needs and confer educational benefit. Instruction and services must be at public expense and comport with the IEP developed by the student’s ARD Committee. 20 U.S.C. § 1401(9)(A)-(D); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 200-01, 203-04 (1982).

**C. Child Find Under the IDEA**

The IDEA's Child Find provisions guarantee access to special education for students with disabilities. 20 U.S.C. § 1400(d)(1)(A). 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, 949-50 (W.D. Tex. 2008).

The Child Find obligation is triggered when a school district has reason to suspect the student has a disability, coupled with reason to suspect special education services may be needed to address the disability. *Richard R.R.*, 567 F. Supp. 2d at 950; *Dep't of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. 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*.

A two-part inquiry is required to resolve a Child Find claim. The first inquiry is whether the school district had reason to suspect the student has a disability. The second inquiry is whether the school district had reason to suspect the student may need special education and related services as a result of the disability. *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 inquiry is not whether the student actually *qualifies* for special education, but instead whether the student should be *referred* for a special education evaluation. *Cari Rae S.*, 158 F. Supp. 2d at 1195; *Woody*, 178 F. Supp. 3d at 467.

**1. Reason to Suspect a Disability and Need for Special Education Services**

The relevant time period for Petitioner's Child Find claim is August 2020 to present. Student has not been enrolled in a District school since November 2018. Indeed, apart from the litigation regarding whether the District complied with its Child Find duty between October 2017 and November 2018, the record does not reflect any communication between the parties concerning Student or Student's educational needs between November 2018 and July 2021, when Parents asserted Student was eligible under the IDEA and requested an ARD Committee meeting to develop an IEP for the 2021-22 school year. Thus, while it is reasonable to assume the District had knowledge that a student with a disability may reside in its jurisdictional boundaries, the record does not support the conclusion it had reason to suspect Student may need special education and related services earlier in the relevant time period. To the contrary, the most recent information available to the District at the time—its June 2019 FIIE, which comprehensively considered Student's eligibility for services under the IDEA and Dr. \*\*\*'s evaluation and findings—did not find Student eligible or otherwise conclude Student needed specially designed instruction.

Here, the weight of the credible evidence supports the conclusion the District's Child Find duty was triggered (i.e. the District had reason to suspect a disability *and* reason to suspect Student may need specially designed instruction) in July 2021. *Woody*, 178 F. Supp. 3d at 467.

## **2. Reasonable Time Period for an Evaluation**

A school district must “identify, locate, and evaluate students with suspected disabilities within a reasonable time after the school district is on notice of facts or behavior likely to indicate a disability.” *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 676 (5th Cir. 2018); *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 790-91 (5th Cir. 2020). A delay is reasonable when, throughout the period between notice and referral, a school district takes proactive steps to comply with its Child Find duty to identify, locate, and evaluate students with disabilities. Conversely, a time period is unreasonable when the school district fails to take proactive steps throughout the period or ceases to take such steps. *O.W.*, 961 F.3d at 793.

Having concluded that any Child Find obligation the District owed Student was triggered in July 2021, the hearing officer next considers the reasonableness of any delay between notice and referral for an evaluation. In this case, while the District disputed its obligation to convene an ARD Committee meeting and proceed as Petitioner proposed and further disputed the propriety of developing an IEP with the limited information available to it, the District nonetheless took swift steps to comply with its Child Find obligation by initiating a referral and proposing to evaluate Student in August 2021.

When a school district proposes to conduct an initial evaluation to determine if a child qualifies as a child with a disability, it must first obtain informed consent from the child’s parent. 34 C.F.R. § 300.300(a)(1)(i). School districts must make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability. 34 C.F.R. § 300.300(a)(1)(iii). While Parents take the position that further evaluation was not warranted and refused to consent to an evaluation when initially proposed and have not consented to date, the District nonetheless took the proactive steps required to evaluate Student and satisfied any Child Find obligation it may owe Student by making immediate and continuing

efforts, albeit unsuccessful ones, to obtain consent for an evaluation. As such, the evidence supports the conclusion the District did not unreasonably delay an evaluation after it was on notice of facts or behavior likely to indicate a disability in July 2021. *O.W.*, 961 F.3d at 790-91, 793. Moreover, any delay in completing an evaluation to determine Student’s eligibility for services is attributable to Parents, not the District. In addition, Petitioner’s position that an evaluation was unnecessary was not reasonable given the District’s prior eligibility finding and the lack of information available to the District in August 2021 to support not only Student’s eligibility for services, but to determine Student’s current educational needs.

The hearing officer concludes Petitioner did not meet Petitioner’s burden on Petitioner’s Child Find claim.

**D. Obligation to Convene an ARD Committee Meeting to Develop an IEP**

**1. Whether the District Complied with 19 Tex. Admin. Code § 89.1050(e)**

Petitioner argues the District failed to comply with state regulations in responding to Parents’ July 2021 request for an ARD Committee meeting. Upon receipt of a written request for an ARD Committee meeting from a parent, the school district must: (1) schedule and convene a meeting; or (2) within five *school days*, provide the parent with written notice explaining why the district refuses to convene a meeting. 19 Tex. Admin. Code § 89.1050(e) (emphasis added). School day means any day, including a partial day, that children are in attendance at school for instructional purposes. 34 C.F.R. § 300.11(c)(1).

Parents made a written request for an ARD Committee meeting on July \*\*\*, 2021, and the District provided Prior Written Notice declining to convene a meeting on August \*\*\*, 2021. Because the first day of instruction for the 2021-22 school year was August \*\*\*, 2021, the District provided written notice to Parents within five school days as required. In addition, the timely Prior



Written Notice provided by the District complied with the IDEA's requirements. 34 C.F.R. § 300.503(b).

**2. Whether the District Complied with 19 Tex. Admin. Code § 89.1096(b)**

Petitioner argues the District failed to comply with state regulations governing voluntarily placed private school students referred to the local school district. Under this regulation,

When a student with a disability who has been placed by his or her parents directly in a private school or facility is referred to the local school district, the local district shall convene an ARD Committee meeting to determine whether the district can offer the student a FAPE. If the district determines that it can offer a FAPE to the student, the district is not responsible for providing educational services to the student, except as provided in 34 C.F.R. §§ 300.130-300.144, or subsection (e) of this section, until such time as the parents choose to enroll the student in public school full time. 19 Tex. Admin. Code § 89.1096(b).

Student was homeschooled beginning in January 2021 for the remainder of the 2020-21 school year. While the IDEA regulations define 'parentally-placed private school student with disabilities,' the U.S. Department of Education has indicated that State law determines whether homeschooled children with disabilities are considered parentally-placed private school children with disabilities. 34 C.F.R. § 300.130; 71 Fed. Reg. 46540, 46594 (August 14, 2006). Texas courts have recognized that homeschools can be considered private schools. *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 443-44 (Tex. 1994). Moreover, Texas Education Agency (TEA) guidance on serving parentally-placed private school students with disabilities confirms that "the State of Texas and TEA have long recognized home schools as private schools . . . ." Texas Education Agency, *Frequently Asked Questions—Parentally-placed Private School Children with Disabilities* (2018) at 2 (Question 10).<sup>46</sup> Accordingly, the hearing officer construes 19 Tex. Admin. Code § 89.1096(b) to apply to a homeschool student, such as Student, referred to the local school district. Under this

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<sup>46</sup> [https://tea.texas.gov/sites/default/files/Parentally%20Placed%20Frequently%20Asked%20Questions\\_2018%20%282%29.pdf](https://tea.texas.gov/sites/default/files/Parentally%20Placed%20Frequently%20Asked%20Questions_2018%20%282%29.pdf)

regulation, a school district's obligation to convene an ARD Committee meeting extends to a "student with a disability." The hearing officer looks to the IDEA to define this term.

Each public agency (i.e. school district) must conduct an FIIE, in accordance with 34 C.F.R. § 300.304 through 300.306, before the initial provision of special education and related services to a child with a disability. 34 C.F.R. § 300.301(a). A 'child with a disability' means a child evaluated *in accordance with 34 C.F.R. §§ 300.304 through 300.311* as having one or more of thirteen enumerated disabilities and who, by reason thereof, needs special education and related services. 34 C.F.R. § 300.8(a)(1) (emphasis added).

The plain language of the regulations governing evaluation procedures contemplates an FIIE conducted by a public agency to establish a student's eligibility for services. 34 C.F.R. §§ 300.304(b), (c). Here, apart from the District's June 2019 FIIE, Student's eligibility has not been established by an FIIE conducted by a school district. In addition, though available at the time, Parents notably did not provide \*\*\* with the District's FIIE when the charter school considered Student's eligibility for services. Whether to resolve Parents' due process hearing request (as the District suggests) or for another reason altogether, \*\*\* developed an IEP based not on an FIIE conducted by a public agency, as required by the regulations, but on an independent evaluation that did not establish Student's eligibility for services under the IDEA.

While the hearing officer acknowledges that \*\*\* and \*\*\* developed IEPs for Student, neither did so after conducting an FIIE. The weight of the credible evidence in this case does not support the conclusion that Student meets the definition of a 'child with a disability' under the IDEA's implementing regulations and Student is thus not a 'student with a disability' under 19 Tex. Admin. Code § 89.1096(b). The District therefore did not err in declining to convene an ARD Committee under this state regulation. As such, the hearing officer further concludes the District did not violate the IDEA's requirement to have an IEP in effect at the beginning of the 2021-22 school year. 34 C.F.R. § 300.323(a).

In addition, 19 Tex. Admin. Code § 89.1096(b) limits a school district's obligations to a private school student (or here, a homeschool student) referred to a school district, and only requires the school district to convene an ARD Committee to determine whether it can offer the student a FAPE. Thus, even if the hearing officer were to conclude that Student's prior receipt of services obligated the District to convene an ARD Committee meeting, the District was not obligated to provide Student anything other than proportionate share services until Student enrolled in the District full time. 19 Tex. Admin. Code § 89.1096(b); *see Rockwall Indep. Sch. Dist. v. M.C.*, No. 3:12-CV-4429-B, 2014 WL 12642573, at \*19 (N.D. Tex. Feb. 17, 2014), *aff'd*, 816 F.3d 329 (5th Cir. 2016). Because Student has yet to enroll, the District's obligation is limited to proportionate share services. Petitioner, however, may only challenge the District's failure to provide these services through the state complaint process, not in this forum. 34 C.F.R. § 300.140(c).

The conclusion that the District was not obligated to convene an ARD Committee meeting to develop an IEP is further supported by the record before the hearing officer as to Student's receipt of services under the IDEA. When considering a receiving school district's obligation to develop an IEP for a student with an expired IEP, courts have found that, if there is not a current IEP in effect, the receiving district is not obligated to implement it and may conduct its own evaluation and determine the student's special education needs. *See In re Student with a Disability*, 115 LRP 46629 (SEA Ill. June 12, 2015) (affirmed, 70 IDELR 33 (N.D. Ill. 2017)). Further, in developing a student's IEP, an ARD Committee must consider the initial and most recent evaluations of the student and the student's academic, developmental, and functional needs. 34 C.F.R. § 300.324(a)(iii)-(iv).

Here, given the lack of information available to it in early August 2021—including an expired IEP, the absence of progress reports from \*\*\* or other information indicating that the expired IEP was ever implemented, and two remote evaluations that do not support eligibility—the District appropriately determined that it could not develop an IEP for Student without

additional information, including a new evaluation, to determine Student's current academic, developmental, and functional needs.

**3. Whether Petitioner Unreasonably Protracted the Final Resolution of the Issues**

At the request of either party, the hearing officer must make a finding of fact regarding whether or not a party has unreasonably protracted the final resolution of the issues in controversy. 19 Tex. Admin. Code § 89.1185(m)(1). Respondent requested a finding as to whether Petitioner unreasonably protracted the litigation and asserts that Petitioner's due process hearing request was brought for the improper purpose of relitigating Hearing Officer Lowe's prior decision in favor of the District. Respondent further asserts that Parents' refusal to consent to the evaluation it proposed in August 2021, after having been previously ordered to cooperate in the District's efforts to evaluate Student, was for the purpose of increasing the cost of litigation and harassing Respondent.

The regulation does not define what constitutes unreasonable protraction. Courts have been hesitant to find a party protracted litigation in the IDEA context. *See, e.g., Ector County Indep. Sch. Dist. v. V.B.*, 420 Fed.Appx. 338, 347-48 (5th Cir. 2011) (finding that Petitioner did not unreasonably protract the final resolution despite refusing to attend an ARD Committee meeting where the dispute may have been settled after the filing of litigation).

First, there is no evidence Parents intentionally sought to increase the District's litigation costs or harass the District by filing the instant action or refusing its proposal to evaluate. Moreover, while certain factual and evidentiary overlap exists between the prior and instant litigation, Petitioner raised cognizable claims against the District for a later time period than the time period at issue in the prior litigation. The hearing officer declines to conclude Petitioner unreasonably protracted the final resolution of the issues in controversy.

## VII. CONCLUSIONS OF LAW

1. As the challenging party, Petitioner has the burden of proof to establish a violation of the IDEA. *Schaffer*, 546 U.S. at 62.
2. Petitioner did not meet the burden of proving the District violated its Child Find obligation during the relevant time period. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111.
3. The District provided timely and procedurally compliant Prior Written Notice of its refusal to convene an ARD Committee meeting. 19 Tex. Admin. Code § 89.1050(e); 34 C.F.R. § 300.503.
4. Petitioner did not meet the burden of proving the District denied Student a FAPE by failing to convene an ARD Committee meeting to develop an IEP for the 2021-22 school year. 19 Tex. Admin. Code § 89.1096(b).

## VIII. ORDERS

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

**SIGNED May 31, 2022.**



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

### **IX. NOTICE TO PARTIES**

The decision of the hearing officer is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 20. U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516(a); 19 Tex. Admin. Code § 89.1185(n).