

STUDENT, <i>B/N/F</i> PARENT & PARENT,	§	BEFORE A SPECIAL EDUCATION
	§	
Petitioner,	§	
	§	
V.	§	HEARING OFFICER
	§	
PEARLAND ISD,	§	
	§	
Respondent.	§	FOR THE STATE OF TEXAS

**FINAL DECISION OF THE SPECIAL EDUCATION HEARING OFFICER**

**I.  
STATEMENT OF THE CASE**

On September 1, 2022, Student, *b/n/f* Parent & Parent, (“Petitioner” or “Student”) filed a Complaint with the Texas Education Agency (“TEA”) against Pearland Independent School District (“Respondent” or “the District”), requesting an impartial Due Process Hearing, pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”). On September 2, 2022, TEA assigned this matter to Special Education Hearing Officer (“SEHO”) Steve Elliot, who is an Administrative Law Judge with the State Office of Administrative Hearings (“SOAH”). On May 2, 2023, TEA reassigned this case to the undersigned SEHO.

**PETITIONER’S ISSUES:**

Petitioner asserted substantive and procedural issues in Petitioner’s Complaint. Specifically, Petitioner asserted that Respondent denied Petitioner a free, appropriate public education (“FAPE”) based upon the following violations of IDEA occurring during school years 2020-21 and 2021-22:

1. Respondent failed to identify Petitioner as a child with a disability in need of special education services in violation of Respondent’s child find duty;
2. Respondent failed to conduct an appropriate and timely Full and Individual Evaluation (“FIE”) to identify Petitioner as a child with a disability who is eligible for special education and related services;
3. Respondent failed to develop an appropriate Individualized Education Program (“IEP”) for Petitioner.

**B. PETITIONER’S REQUESTED RELIEF:**

Petitioner seeks the following relief from the SEHO: An Order

1. for an Independent Educational Evaluation (“IEE”) at District expense in all areas of suspected disability, including a dyslexia evaluation;
2. for the Parties to convene an Admission, Review, and Dismissal Committee (“ARDC”) meeting to review the IEE and develop an IEP consistent with the IEE;
3. for the implementation of a reading program for Petitioner that meets four times per week for forty-five minutes per session;
4. for Petitioner’s access to the learning ally program at school and home;
5. for payment for the participation of the IEE evaluators at an ARDC meeting;
6. for compensatory education and related services to include private tutoring;
7. for reimbursement of the Parents’ out-of-pocket educational expenses; and
8. for any other appropriate remedies.

**RESPONDENT’S ISSUES/AFFIRMATIVE DEFENSES AND REQUESTED RELIEF:**

1. the SEHO has no jurisdiction to award relief to Petitioner for Petitioner’s non-IDEA claims and causes of action; accordingly, all non-IDEA claims and causes of action should be dismissed for want of jurisdiction; <sup>1</sup>
2. the two-year statute of limitations is applicable; accordingly, the SEHO should set the two-year limitations as applicable solely to the 2020-21 and 2022 school years. <sup>2</sup>

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<sup>1</sup> On September 23, 2022, SEHO Elliot dismissed all non-IDEA claims in Order No. 2: Order Memorializing Initial Prehearing Conference and Granting Joint Motion for Continuance and Extension of Decision Due Date for Good Cause.

<sup>2</sup> On September 1, 2022, Texas adopted a two-year Statute of Limitations. See 19 TEX. ADM. CODE §89.1151(c). The SEHO determined that Petitioner’s timeline for all issues accrued on September 1, 2020.

## II. PROCEDURAL HISTORY

On September 1, 2022, Petitioner filed a Complaint with TEA, requesting an impartial Due Process Hearing, pursuant to IDEA. On September 2, 2022, TEA assigned this matter to SEHO Steve Elliot, an Administrative Law Judge with SOAH. On September 7, 2022, SEHO Elliot issued Order No. 1: Initial Scheduling Order, which set the timelines for completing this non-expedited proceeding in compliance with IDEA: September 20, 2022: Prehearing Conference (“PHC”); October 6, 2022: Disclosure Deadline; October 14, 2022: Due Process Hearing; and November 6, 2022: Decision Deadline.

On September 20, 2022, the Parties convened the PHC. In attendance were the following: (1) Mr. Jordan McKnight, Petitioner’s counsel; (2) Ms. Debra Liva, Petitioner’s Educational Advocate; (3) \*\*\*, Petitioner’s Parent; (4) Ms. Kendra Yoch, Respondent’s counsel; (5) Ms. \*\*\*, Respondent’s Director of Special Programs; (6) SEHO Elliot; and (7) the court reporter, who made a record of the PHC. The Parties discussed the issues and jointly agreed to continue the Due Process Hearing and attendant deadlines as follows: January 2, 2023: Disclosure Deadline; January 5, 2023: Exhibit Objection Deadline; January 10-11, 2023: Due Process Hearing; and February 22, 2023: Decision Deadline. On September 23, 2022, SEHO Elliot issued Order No. 2: Order Memorializing Initial Prehearing Conference and Granting Joint Motion for Continuance and Extension of Decision Due Date for Good Cause, which set out the agreed new hearing and decision deadlines.

On October 19, 2022, Respondent sent Petitioner its Request for Production of Documents. On November 28, 2022, Respondent filed its Motion to Compel Production of Documents requested in Respondent’s previous Request for Production of Documents. Petitioner produced documents on December 1, 2022; however, such production did not include the report of the independent evaluation performed on Petitioner by Dr. \*\*\*\*\*.<sup>3</sup>

On December 13, 2022, Petitioner filed a Motion for Continuance of the scheduled deadlines to obtain a copy of Dr. \*\*\*\*’s evaluation and share it with Respondent. At that juncture, Dr. \*\*\*\*’s evaluation would not be completed by the January hearing dates. On December 14, 2022, Respondent filed its objection to the requested continuance.

On December 19, 2022, the Parties convened the PHC to discuss Petitioner’s continuance request. In attendance were the following: (1) Mr. Jordan McKnight, Petitioner’s counsel; (2) Ms. Kendra Yoch, Respondent’s counsel; (3) Ms. \*\*\*, Respondent’s General Counsel; (4) Ms. \*\*\*, Respondent’s Director of Special Programs; (5) SEHO Elliot; and (6) the court reporter, who made a record of the PHC. The Parties discussed the continuance issues and SEHO Elliot granted Petitioner’s continuance request. On December 22, 2022, SEHO Elliot issued Order No. 3: Order Granting Petitioner’s Motion for Continuance and Extension of Decision Due Date for Good Cause. By this Order, SEHO Elliot set out new deadlines for the hearing and other attendant deadlines: May 8, 2023: Disclosure Deadline; May 11, 2023: Exhibit Objection Deadline; May 16-17, 2023: Due Process Hearing; and June 28, 2023: Decision Deadline.

On April 5, 2023, SEHO Elliot issued his Order No. 4: Order Setting PHC on Respondent’s Motion for Production.

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<sup>3</sup> Dr. \*\*\* evaluated Petitioner on November \*\*\*, 2022.

On April 10, 2023, the Parties convened the PHC to discuss Petitioner's continued problems with Dr. \*\*\*\*\*'s failure to produce the evaluation report from the November outside evaluation. In attendance were the following: (1) Mr. Jordan McKnight, Petitioner's counsel; (2) Ms. Kendra Yoch, Respondent's counsel; (3) Ms. \*\*\*, Respondent's General Counsel; (4) SEHO Elliot; and (5) the court reporter, who made a record of the PHC. At that time, Petitioner did not have a definitive timeline for the completion of the evaluation report. It was clear to everyone that the evaluation had to be provided by May 8, 2023, the Disclosure Deadline. On April 12, 2023, SEHO Elliot issued Order No. 5: Order Setting Deadline for Report on Independent Evaluation. By this Order, SEHO Elliot required Petitioner to submit a written report on the status of the independent evaluation report by April 17, 2023. All hearing deadlines were maintained.

On May 2, 2023, TEA reassigned this case to the undersigned SEHO. SOAH transmitted SEHO Elliot's file documents, orders, and the transcripts from the PHCs. On that date the undersigned contacted the Parties to inquire about the status of the April 17, 2023, report.

On May 3, 2023, the Parties confirmed that Dr. \*\*\*\*\* had released his evaluation report and both Parties had a copy of the report. Petitioner alerted the undersigned that Petitioner was not seeking a continuance of the May 16-17, 2023, Due Process Hearing or the June 28, 2023, Decision Deadline. However, Petitioner requested to call Dr. \*\*\*\*\* to testify out of order because Dr. \*\*\*\*\* would be out of the country during the May 16-17, 2023, Due Process Hearing. Petitioner proposed three dates for Dr. \*\*\*\*\*'s testimony: June 1, 2, or 8, 2023. Respondent objected to this proposal. Because Respondent had a copy of Dr. \*\*\*\*\*'s written report well in advance of the May 16-17, 2023, Due Process Hearing, and Petitioner sought to have Dr. \*\*\*\*\*'s testimony scheduled for early dates in June, which would not affect the then-current June 28, 2023, Decision Deadline, the undersigned granted Petitioner's request to allow Dr. \*\*\*\*\* to provide his testimony via ZOOM and out of order.

On May 5, 2023, the undersigned issued Order No. 6: Order (1) Granting Petitioner's Motion to Take Expert's Testimony Out of Order and (2) Confirming Due Process Hearing and Attendant Deadlines. By this Order, the undersigned confirmed the current hearing and decision deadlines but allowed Petitioner to call Dr. \*\*\*\*\* out of order on one of the three dates provided by Petitioner: June 1, 2, or 8, 2023.

Also on May 5, 2023, Petitioner filed an unopposed Motion for Continuance based upon the need for \*\*\* Interpreter and Petitioner's request that the hearing be conducted in person because of the need for the interpreter. While Respondent did not oppose this continuance, it did oppose convening the hearing in-person. Finding good cause for Petitioner's Motion for Continuance, the undersigned granted the motion and requested the availability of the Parties for the hearing between May 17, 2023, and June 8, 2023. The Parties responded with their available dates: June 1 & 2, 2023. Respondent requested a third date, June 5, 2023, because it had one witness who would be unavailable on June 1-2, 2023.

On May 8, 2023, the undersigned issued Order No. 7: Order Granting Petitioner's Unopposed Motion for Continuance and Rescheduling the Due Process Hearing and Attendant Deadlines. By this Order, the undersigned set out new deadlines for the hearing and other attendant deadlines: May 25, 2023: Disclosure Deadline; May 29, 2023: Exhibit Objection Deadline; June 1-2 & 5, 2023: Due Process Hearing; and June 28, 2023: Decision Deadline.

### **The Due Process Hearing:**

The Parties made their Disclosures timely. The SEHO convened the in-person Due Process Hearing on June 1 & 2, 2023; the SEHO convened the ZOOM hearing on June 5, 2023. The Parties' Exhibits were admitted; the Parties called a total of fourteen witnesses, who presented direct testimony and cross-examination testimony.

During the Hearing, Petitioner was represented by (1) Mr. Jordan McKnight, Petitioner's counsel; (2) \*\*\*, Petitioner's Parent; (3) Ms. Kendra Yoch, Respondent's counsel; (4) Ms. \*\*\*, Respondent's General Counsel; and (5) Ms. \*\*\*, Respondent's Director of Special Programs. Also in attendance throughout the Hearing were (6) \*\*\*, Petitioner's \*\*\*; (7) Ms. Debra Liva, Petitioner's Advocate; (8) Ms. \*\*\*, Respondent's expert witness; (9) Mr. \*\*\*, \*\*\* Interpreter; (10) the undersigned Hearing Officer; and (11) the court reporter, who made a record of the Hearing.

At the conclusion of the Hearing, the Parties requested a continuance of the Decision Deadline to allow them to file Closing Arguments. This request was granted and on June 6, 2023, the undersigned issued Order No. 8, which extended the Parties' briefing deadline to July 7, 2023, and the Decision Deadline to July 28, 2023.

The Parties later requested an extension of time to file their Closing Arguments. This was granted and the undersigned instructed them to file the Closing Arguments by midnight, July 17, 2023. Both Parties filed their Closing Arguments timely. The Decision in this case is rendered timely on July 28, 2023.

### III. RESOLUTION SESSION

The Parties waived the Resolution Session and convened mediation on October 4, 2022. The Parties did not settle.

### IV. FINDINGS OF FACT <sup>4</sup>

1. Respondent is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing FAPE under IDEA and its implementing rules and regulations.
2. Petitioner is a \*\*\*-year-old young \*\*\* who resides with Student's family within Respondent's jurisdiction. Petitioner moved into the Respondent's jurisdiction when Petitioner was in the \*\*\* grade and remained in such enrollment until Student's Parents withdrew Student in February 2022 [J.19]. No ARDC has determined that Petitioner is a student with a disability recognized under IDEA and needs special education and related services because of such disability.

#### A.

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<sup>4</sup> References to the Due Process Hearing Record are identified as follows: "T#.#.#" refers to the three-volume Court Reporter's Transcription of testimony made on June 1, 2, & 5, 2023, and the specific volume, page, and line numbers contained therein; "J#.#" refers to the Joint Exhibits by Exhibit number and page; "P#.#" refers to Petitioner's Exhibits by Exhibit number and page; and "D#.#" refers to Respondent's Exhibits by Exhibit number and page.

## Educational History Prior to the Relevant Period of September 1, 2020-September 1, 2022:

### School Years 2013-14 and 2014-15:

- Petitioner attended school in \*\*\* ISD in \*\*\* grades, school years 2013-14 and 2014-15. In the \*\*\* grade, Petitioner passed all subjects.

Petitioner had \*\*\* absences during \*\*\* grade, school year 2013-14 [D27.0503].

- In \*\*\* grade, school year 2014-15, Petitioner achieved passing grades in all areas. Benchmark data indicated adequate progress. Student's oral reading fluency norms showed Student's performance was between the \*\*\* percentile norms, which is average. Petitioner met the passing standard of the \*\*\* State of Texas Assessments of Academic Readiness ("STAAR"). Petitioner did not pass the \*\*\* STAAR.<sup>5</sup>

Petitioner had \*\*\* absences in \*\*\* grade, which was \*\*\*% of the school year attendance. This percentage placed Petitioner within the state-mandated attendance requirement of 90%. [TII.542.23-543.6; D27.0503].

### Pearland ISD: School Years 2015-2016 – 2019-2022:

- Petitioner enrolled in the PISD for \*\*\* grade, school year 2015-16. Respondent provided Student with Response to Intervention ("RTI") Services in \*\*\*. Student passed all Student's classes as well as the \*\*\* STAAR exams.

Petitioner had \*\*\* absences in \*\*\* grade, which was \*\*\*% of the school year attendance. This percentage placed Petitioner within the state-mandated attendance requirement of 90% [TII.543.8-544.22; D27.0502; 0505].

- In \*\*\* grade, school year 2016-17, Petitioner passed all Student's classes for the year but did receive a failing grade \*\*\* during the \*\*\* grading period. Petitioner met the standards on the \*\*\* STAAR exams. Petitioner did not meet the standard for the \*\*\* STARR exam; sixty-five percent of the state's students did not meet this standard [TII.544.24-545.6; D27.0502;0506].

Petitioner had only \*\*\* absences for the entire year, which was \*\*\*% of the school year attendance. This percentage placed Petitioner within the state-mandated attendance requirement of 90%.

- Petitioner's Parents withdrew Student from the District for the \*\*\* grade, school year 2017-18. Petitioner's Parents provided homeschooling services using the \*\*\* Homeschool Program. This Program had no enrollment and kept no records; the Program was not a school, just a curriculum resource; the Parent was charged with creating, maintaining, and providing records. No tests were administered in this Program; the founders of the Program admonished Parents not to keep any grades unless required by another entity. Petitioner's Parents reported that Petitioner earned all

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<sup>5</sup> TEA did not originally establish passing standards for the \*\*\* test for its administration in the spring 2016.

passing grades. Aside from the grades, Petitioner's Parents provided no specifics about the curriculum or instruction. Petitioner did not take the STAAR test [TII.545.8-16; D27.0502; 0507].

8. Petitioner re-enrolled in PISD at the beginning of \*\*\* grade, school year 2018-19. Respondent placed Student in the \*\*\* class for the first semester. This class is "an intensive supplemental program designed to address the needs of an individual student in acquiring the knowledge and skills required at his or her grade level and/or as a result of a student not meeting the passing standard on the state-mandated assessment" [D27.0502]. The \*\*\* class is a Tier 2 intervention. Petitioner failed the first grading period of \*\*\*; Student passed all other courses in all grading periods for the remainder of the school year and all final grades were passing. Petitioner did not meet the standards on the \*\*\* STAAR.

\*\*\* grade was the first year that Petitioner had difficulty with absences; Student was absent \*\*\* days, or \*\*\*% of the school year attendance. This percentage placed Petitioner outside the state-mandated attendance requirement of 90% [TII.545.22-546.22; TI.181:6-12; D27.0508; D9.0191].

9. In \*\*\* grade, school year 2019-2020, Respondent placed Petitioner in the \*\*\* and \*\*\* classes because Student did not pass the \*\*\* STAAR exams in \*\*\* grade. Data points to track Petitioner's progress in the interventions were taken throughout the year. Petitioner met or exceeded the target performance of \*\*\* data points taken in \*\*\*; Student met or exceeded the target of \*\*\* of the data points taken in \*\*\*. Petitioner passed all classes. Students did not take the STAAR due to Covid.

Petitioner had \*\*\* absences between the start of school year 2019-20 to March \*\*\*, 2020, which was the last day of instruction before Respondent's closure and the transfer of educational services to virtual instruction due to Covid, which was one-hundred twenty-four (124) days of instruction. Petitioner's rate of absences was \*\*\*, which was outside the state-mandated attendance requirement of 90% [TII.547:1-548.17; D27.0503 & 0509; D9.0192].

## B.

### Educational History During the Relevant Time Period: September 1, 2020-September 1, 2022:

10. The COVID pandemic affected the educational systems tremendously. Students were abruptly uprooted from their in-person instruction and placed before a computer for online instruction. TEA reported that students' learning was negatively impacted [TII.540.7-23].
11. In the fall of 2020, parents determined whether their children would attend school in person or online [TI.232.12-14; TIII.625.8-9]. To aid in the online instruction, Respondent provided students with laptops and hotspots; Respondent sent emails and posted on the website how families could get technical support.

### \*\*\* Grade: 2020-21: \*\*\* School:

12. Student enrolled in \*\*\* School for Student's \*\*\* grade. \*\*\* is a school of choice; students apply to attend. Typically, students are evaluated based on their attendance and discipline. But for the class entering in the fall of 2020, the attendance issue was waived because of COVID.

13. \*\*\* offers regular classes, \*\*\*, \*\*\* classes, and \*\*\* classes with \*\*\*. \*\*\* uses a block schedule: on Mondays and Wednesdays students attend periods 1-4; on Tuesdays and Thursdays students attend periods 5-8; and on Fridays students attend all classes. Classes on Monday through Thursday are 90 minutes long [J17; TI.231.18-232.7].
14. Petitioner began the first semester of \*\*\* grade as a virtual learner. Petitioner did not present \*\*\*self for Student's on-line courses on at least \*\*\* days in fall 2020. Petitioner's poor attendance prompted the school counselor and assistant principal to convene an attendance conference with Petitioner's Parent on November \*\*\*, 2020. Petitioner's Parent informed them that Petitioner had been having technical difficulties. [D11; TI.206.6-16; T.III.627.14-24]. However, no one from Petitioner's family had informed anyone at the school that Petitioner was having technical difficulties [TI.197.8-10; 206.6-16; 235.16-19; 246.25-247.2; TII.304.25-305.3; 378.14-22;438.14-439.10].
15. During the attendance conference call, the school counselor and assistant principal recommended that Petitioner return to school for in-person instruction [D27.0500; D11; D16.390; D18.425].
16. Petitioner returned to campus for in-person instruction after Thanksgiving on November \*\*\*, 2020. Student's attendance continued to be poor [D27.0500; TIII.639.2-3].
17. On January \*\*\*, 2021, Respondent presented Petitioner with an attendance contract to improve Student's attendance [D27.0500]. Petitioner failed to sign the contract and failed to live up to the terms of the contract.
18. During \*\*\* grade, Petitioner took \*\*\*. Petitioner's absences from these block courses was staggering:  
 \*\*\*.  
 ,  
 \*\*\*.  
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 \*\*\*  
 \*\*\*.  
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 \*\*\*
19. At the end of \*\*\* grade, Petitioner failed \*\*\* of Student's core courses, passing only \*\*\*. Student met the standard for \*\*\* STAAR, Student did not meet the standard on \*\*\* STAAR \*\*\*; Student did not take the \*\*\* STAAR because Student was absent [D27.0501.]
20. Petitioner attended summer school \*\*\* and \*\*\*.

**\*\*\* Grade: 2021-2022: \*\*\* School:**

21. Petitioner attended \*\*\* grade at \*\*\*. Student and Student's Parents wanted Student to take the advanced classes to hopefully challenge Student. They believed that if Student did not understand the material in the on-level course, maybe Student would get more help in \*\*\* [TII.298.18-25; D27.0511].
22. Respondent accommodates a Parent's request for their child's enrollment in advanced courses. In this case, Respondent recommended that Petitioner take on-level classes because the classes are



extremely rigorous and require a lot of outside homework. Because Petitioner's Parents encouraged Student to take all classes in a \*\*\* setting, Respondent accommodated this request. [TII.238.7-16; D16.394-396].

23. Petitioner did not pass any of the advanced courses for the \*\*\* grading periods or for the first semester. Petitioner continued Student's rate of excessive absences. Between the beginning of the school year and Petitioner's withdrawal from the District on February \*\*\*, 2022, Petitioner incurred \*\*\* absences out of 106 (\*\*\*) instruction days. This percentage placed Petitioner outside the state-mandated attendance requirement of 90%.
24. On January\*\*\*, 2022, Petitioner's Parent requested that Respondent change Student's schedule by removing Student from all \*\*\* classes and re-enrolling Student in the on-level courses [D27.0512]. On February \*\*\*, 2022, Petitioner's Parents withdrew Student from the District. As of the date of the Due Process Hearing on June 1, 2, & 5, 2023, Petitioner has not returned to the District.

### C.

#### **Respondent's Response to Petitioner's Excessive Absences: September 1, 2020 – September 1, 2022:**

25. When students are absence three days, Respondent sends letters to parents and the attendance clerks also reach out to parents. As absences accumulate, the counselor gets involved; the assistant principal gets involved. During the 2020-21 school year, Respondent did not refer students to Truancy Court because of COVID pandemic [TIII.629.23-631.20; D10].
26. Petitioner's counselor and assistant principal met with Petitioner several times about Student's absences and grades. Both asked Student if Student was struggling with the content, but Student denied that was the problem, explaining Student was working to catch up. Petitioner did not inform them that Student needed more help [TIII.631.11-17; 632.5-16; TII.236.5-14;D12; D13].
27. Student's assistance principal spoke with the school nurse to see if Petitioner had been to see her, but Student had not. Petitioner informed the assistant principal that Student would text Student's Parent to pick Student up.
28. Petitioner's Parent excused Petitioner's absences [TI.172.8-12]. Petitioner's Parent excused Student's absences monthly for \*\*\*. [D15; TII.313.15-17; 314.11-12; D15; D9.193-196]. If Petitioner simply wanted to stay home from school, Student's Parent required Student to go.
29. Petitioner's Parent asserted at the hearing that Petitioner was not attending school because Student was frustrated that Student was receiving no help from Respondent [TI.186.9-12]. Parent claimed that Student was getting sick because of the psychological pressure and the fear Student was having about going to school [TI.186.17-19]. Parent acknowledged, however, that Parent and Parent's \*\*\* excused Student's absences but never informed Respondent that Student was having these issues. [TI.188.1-3; 240.11-14]. No other witness supported this idea that Petitioner felt sick due to difficulties at school.
30. Multiple absences have a negative impact on a student's learning and grades. School officials, experts, Petitioner, and Petitioner's Parents testified to this impact:

- a. Respondent's expert affirmed that if a student is not in school, Student will not effectively learn. Doing makeup work can help, but when a student misses direct instruction, point-of-performance feedback, and consistent engagement, that will be extremely detrimental to Student's learning. And because many skills build on each other, gaps in learning can be especially detrimental and difficult to remediate [TII.538.10-11; 562.15-25; 563.1-5].
- b. Student's counselor testified that poor attendance negatively impacted Petitioner's grades because Student missed so much instruction [TI.249.11-19].
- c. The assistant principal explained that even for the work Student did when Student was in attendance, poor performance could be a result of missing the lesson where that material had been taught [TIII.641.5-7; 642.9-16].
- d. Petitioner recognized that when Student was absent from class Student would not learn anything [TII.306.4-6].
- e. Petitioner's Parent stated that Petitioner's excessive absences caused Student to struggle [TI.172.17-22].
- f. Petitioner's expert recognized the excessive absences are detrimental to the student's learning [TI.114.1-].

**D.**  
**Respondent's Response to Petitioner's Academic Performance**  
**Between September\*\*\*, 2020–September\*\*\*, 2022:**

**\*\*\* Grade: 2020-2021:**

\*\*\*:

31. In the fall of \*\*\* grade, Petitioner was a remote student. Student enrolled in \*\*\*. Students are expected to complete their reading, projects, and essays outside of class. In class the students engage in discussion and interact with the text [TII.375.5-10].

Petitioner's \*\*\* teacher counted remote students as present if they logged on to Teams; Student did not require them to turn on their cameras or respond verbally or via chat. Petitioner missed \*\*\* classes in the first semester (during remote learning) and \*\*\* classes in the spring semester [TII.377.6-16; 19-378.13].

In mid-September, Petitioner's teacher informed the Parents that Petitioner had not logged into Student's \*\*\* since school started. Petitioner's Parent responded that Petitioner was struggling to understand the material and asked for help. The teacher said she could help and needed Petitioner to let her know how she could help. Although the teacher followed up with Petitioner, Petitioner did not respond. That was the only time that Petitioner's Parents reached out to this teacher with concern [TII. 383.13-384.538; 392.17-21; D18.421-422].

The teacher reached out directly to Petitioners in October, November, March, and May because of her concerns that Petitioner was not attending or not completing work. In May, Petitioner's Parent responded that Petitioner was doing well and they had been out of town \*\*\*. Petitioner's Parent said Petitioner was working on finishing up Student's class work to bring up Student's grades. Parent did not ask for additional help from the teacher or indicate that Petitioner was struggling with the assignments [TII.385.4-387.16; J18.426-427, 430, 432; D18.432].

Petitioner's teacher reached out to the counselor in both October and May because she had not heard from Petitioner for a long time.

Petitioner never told Student's \*\*\* teacher that the work was too hard or that Student needed help from Student's teacher; the teacher did not suspect a disability because she observed that Petitioner could do the work, including reading and answering questions, when she was near Petitioner. If she stepped farther away, Petitioner would get distracted and not continue working [TII.280.15-20; 389.14-390.15; 382.21-25; 380.11-20; 389.9-13].

\*\*\*

32. Petitioner enrolled in \*\*\* in \*\*\* grade. Petitioner's \*\*\* teacher does not give a lot of homework; students do most of their work in class. The teacher lectures with fill-in-the-blank notes; the student's complete maps; the students take open book quizzes where students read and find answers in the text.

Petitioner's teacher wanted virtual learners to turn on their camera. Petitioner did not inform her that Student was having technical difficulties

Petitioner had \*\*\* absences \*\*\* each semester [J4]. Student's teacher provided Student with all the information Student needed to make up missing work. However, Petitioner never attended tutorials to work on the missing assignments [TII.441.21-442.22; D19.434-436, 438-439].

The teacher noted that Petitioner was fully capable of doing the work as long as she was near Petitioner. Petitioner could read the textbook and find information.

Petitioner earned a passing grade on some assignments that were scored for accuracy. Student also earned a \*\*\* on many daily assignments because the work was done late [J10]. Student's teacher informed Petitioner as to what Student needed to do to pass; she also reached out to Petitioner's Parents to let them know what Student needed to do [D19.437]. Neither Petitioner nor Student's Parents informed her that Petitioner was struggling or that Student did not understand the work. The teacher did not have concerns about Petitioner's abilities; when Student came to class, Student could get the work completed acceptably.

\*\*\*.

33. In \*\*\* grade, Petitioner took \*\*\*. Student was absent for \*\*\* days of \*\*\* and failed the course. Student was absent for \*\*\* days of \*\*\* and passed first semester but not second [J4]. Petitioner passed the \*\*\* exam, failed the \*\*\* STAAR exam by one point, and did not take the \*\*\* STAAR because Student was absent [J15.40; D27.0501].

Petitioner's \*\*\* teacher informed Petitioner's Parents, via email, as to how Petitioner could access help; he provided updates on Petitioner's grades in the class [P17, P19, P20, P23, P26, P27, P31, P32]. Neither Petitioner nor Student's Parents responded to these emails.

Petitioner's \*\*\* teacher sent multiple emails home explaining class expectations and options to obtain assistance. On December \*\*\*, 2020, she sent an email to Petitioner's Parents noting that she had left phone messages and was concerned that Petitioner was in danger of failing the class. The teacher outlined the steps Petitioner could take to raise Student's grade [D17.409]. On January \*\*\*, 2021, Petitioner's Parent responded to a general email from the \*\*\* teacher thanking her for her support of Petitioner [D17.410].

\*\*\*.

34. Petitioner was enrolled in \*\*\*, which Student passed despite numerous absences; Student was also enrolled in \*\*\*, which Student failed; and Student was enrolled in \*\*\*, which Student passed despite having \*\*\* absences [J4].

## Summer School 2021:

35. Because of Student's failures during school year 2020-2021, Petitioner enrolled in summer school to make up the classes Student had failed [D16.391-393]. Petitioner passed \*\*\* .
36. Petitioner's assistant principal offered tutoring for Petitioner under HB 4545 after Student failed the \*\*\* STAAR. HB 4545 established new requirements for supplemental accelerated instruction for students who do not pass the STAAR. The statute became effective on June 1, 2021, with supplemental accelerated instruction practices required during the 2021-22 school year for all students based on STAAR results from Spring 2021; Petitioner's Parents declined [TIII.649.6-11; 650.14-16].

## \*\*\* Grade: 2021-2022:

37. \*\*\* classes are extremely rigorous. Typically, the students take notes for most of the period, whereas for on-level classes, the students take shorter notes and enjoy time in class to work on their assignments. In \*\*\* classes, students learn the material and then apply it; in on-level classes, the work the students do follows the lesson directly.
38. In \*\*\* grade, Petitioner and Student's Parents wanted Student in advanced classes asserting that Petitioner wanted to be challenged. While Respondent did not support this request, it accommodated Petitioner and Student's Parents, as is Respondent's policy, and enrolled Student in \*\*\* courses. Petitioner did not succeed.

\*\*\*;

39. Notwithstanding the fact that Petitioner failed \*\*\* in the previous \*\*\* grade, Petitioner enrolled in \*\*\*. The \*\*\* class also has more homework, including projects. \*\*\* is a class that builds on itself; at the end of the year, students are still referring to the first lesson.

Petitioner missed \*\*\* classes of \*\*\* during first semester. Petitioner did not consistently do Student's work. When Petitioner was in class, Student could answer questions when Student was called on; Student rarely took notes unless Student's teacher walked by to check on Student; Petitioner did not attend the tutorials to get help on the lessons when Student was absent. Student's teacher attributed Student's low grades to lessons and assignments Student had missed [TII.279.25-280.17; 273.17-19; 267.4-7; D23.483].

\*\*\*;

40. Petitioner enrolled in \*\*\*. This class teaches students to \*\*\*. In class, students practice \*\*\*; students are expected to \*\*\*. The on-level class, in contrast, has less reading outside of class and the analysis is not as in depth.

Petitioner missed \*\*\* classes of \*\*\* during the first semester, which was an excessive amount of time for the block schedule [J5]. Petitioner demonstrated on some assignments that Student was capable of the work; Student's writing mechanics and development were average for \*\*\* [J14].

However, Petitioner turned Student's work in late and Student's quizzes indicated that Student was not reading outside of class.

Petitioner did not receive full credit on some of Student's assignments because Student's work was late or incomplete. Student's teacher talked with Student about Student's grades and how Student could bring them up; Petitioner never told Student's teacher that Student was struggling to understand the work.

\*\*\*.

41. Petitioner enrolled in \*\*\*. This class covers \*\*\*. The class period starts with a warmup, which is a review or preview, and then there is instruction with notes and demonstrations of the math involved. For the most part, \*\*\* students are expected to do their practice at home as homework.

The material in \*\*\* is cumulative; the information learned in the beginning units is used throughout the year. Students need to know \*\*\* to be successful in \*\*\*. Students get to use calculators in the class, but they also are required to show their work for credit.

Petitioner's \*\*\* teacher gave a math test at the start of the school year to see if students had the skills they needed. The test includes \*\*\* skills like \*\*\*. Petitioner earned a \*\*\* on the test [J12].

Petitioner missed \*\*\* classes of \*\*\* first semester. These absences meant that when Petitioner was in class, Student was always trying to catch up [J5].

Petitioner did not come in to correct Student's tests. Student sent Student's teacher an email about coming to tutorials to make up one test Student missed, but even then Student did not come – Student ended up with a \*\*\* on that test [TIII.417.10-11; 424.1-3; D21.464; J12].

\*\*\*.

42. Petitioner was also enrolled in \*\*\*.

During the first semester, Petitioner was absent \*\*\* times from \*\*\*; Petitioner failed the class.

On December \*\*\*, 2021, Petitioner's \*\*\* teacher reached out to Petitioner's Parents to inform them that Petitioner was not passing. Work that Student had turned in was incomplete [P42]. Two weeks later he informed Petitioner's Parents that Petitioner failed to take retake tests on Student's last two (2) tests. Petitioner's Parent asked that the teacher allow Petitioner to turn in Student's missing work. Petitioner's Parent did not inform the teacher that Petitioner was struggling with the reading or needed help.

43. Following the Christmas break, Petitioner's Parents requested that Petitioner be removed from the \*\*\* classes and reenrolled in on-level classes [D16.401-402]. Several of Petitioner's teachers voiced the same idea.
44. The \*\*\* is a school of choice for students who have failed multiple core classes. The program provides a more flexible schedule so students can catch up on credits and graduate with their class. \*\*\* is not

a special education program. It is not primarily for students who have behavioral problems. This Program appeared to be appropriate for Petitioner because Student struggled with completing assignments; Student was behind on several credits; and Student needed help and motivation to catch up \*\*\* with Student's class [J18.51].

45. Petitioner applied to \*\*\* and was accepted, but Petitioner's Parent informed the counselor that Petitioner would not attend \*\*\* [D16.401-402]. In January 2022, Petitioner's Parent requested that Petitioner be moved to on- level classes, which the counselor arranged [D16.401-402].
46. On February \*\*\*, 2022, Petitioner's Parents withdrew Student from the District [J19].
47. Petitioner filed the Due Process Hearing Complaint on September 1, 2022. On October \*\*\*, 2022, Respondent sent the family a notice of an FIE and Consent for the evaluation [D1]. Petitioner's Parents did not provide consent for the proposed FIE.
48. On April \*\*\*, 2023, Petitioner provided Respondent with an outside evaluation completed by Dr. \*\*\*\*\*. Upon receipt of the evaluation, the Respondent invited Petitioner and Student's Parents to an ARDC meeting to review the evaluation and consider eligibility [D2]. Notwithstanding multiple attempts to garner Petitioner's cooperation in scheduling the ARDC, Petitioner and Student's Parents did not attend the ARDC to review Dr. \*\*\*\*\*'s evaluation [D3].
49. The ARDC met on May \*\*\*, 2023 [D4.170]. The purpose of the meeting was to review Dr. \*\*\*\*\*'s evaluation and discuss whether there was a disability; whether more testing was needed; and whether the ARDC should develop an IEP or gather more information [TII.485.7-13].  
  
Dr. \*\*\*\*\* made the following findings: Petitioner has a cognitive weaknesses in verbal comprehension and fluid reasoning for a full-scale IQ of \*\*\*; Petitioner has average skills in basic reading and reading fluency, a mild impairment in reading comprehension, below average listening comprehension, and significant weaknesses in math calculations and problem solving. Dr. \*\*\*\*\* determined that Petitioner has a Specific Learning Disability ("SLD") in Reading Comprehension, Math Computation, and Math psychological disorders [J20; D4.170].
50. The ARDC did not accept Dr. \*\*\*\*\*'s evaluation because more information was needed to determine if there was a disabling condition and eligibility under the IDEA. Dr. \*\*\*\*\*'s IEE did not have all testing components required by the IDEA [D4.170].

**E.**  
**Dr. \*\*\*\*\*'s IEE:**

**General Review of Dr. \*\*\*\*\*'s Assessments:**

51. Dr. \*\*\*\*\* used a variety of rating scales and questionnaires to look at attention deficit hyperactivity disorder ("ADHD"), executive functioning, behavior, and emotional functioning [J20.61-62], including the Conners Rating Scale Fourth Edition, the Behavior Assessment Scales for Children, Third Edition ("BASC-3"), the Behavior Rating Inventory of Executive Function (BRIEF-2), the Children's Depression Inventory 2<sup>nd</sup> Edition ("CDI-2"), the Piers-Harris Self Concept Scale, Third Edition, and

the Screen for Child Anxiety Related Disorders (“SCARED”). Dr. \*\*\*\*\* concluded that there were no concerns related to ADHD, anxiety, or depression, and that Petitioner has a relatively healthy level of psychological functioning [J20.80].

- a. Petitioner’s scores produced a full-scale IQ of \*\*\*. Dr. \*\*\*\*\* stated that the full-scale IQ score was not meaningful when the indexes are not in the same basic range, such as here where Student’s index scores are in the \*\*\* [TI.53.1-11]. Petitioner’s scores on the ancillary WISC-V indices were all between \*\*\*, but Dr. \*\*\*\*\* dismissed these scores as irrelevant [TI.126.9-16; D28.522].
- b. Dr. \*\*\*\*\* identified Verbal Comprehension and Fluid Reasoning as cognitive deficits.
- c. Dr. \*\*\*\*\* found academic deficits in Reading Comprehension, Math Computation, and Math Reasoning; listening comprehension was a weakness but not a deficit.

Dr. \*\*\*\*\* gave the Developmental Test of Visual-Motor Integration as a test of visual-spatial abilities [J20.075]. Petitioner did not score well, but he dismissed the score as an outlier.

- d. Dr. \*\*\*\*\* assessed Petitioner’s verbal and non-verbal memory using the Wide Range Assessment of Memory and Learning – Third Edition (“WRAML-3”) and the California Verbal Learning Test – Third Edition (“CVLT-3”). Student scored in the average range, which indicated that Student is capable of learning [J20.072-073].
- e. Dr. \*\*\*\*\* assessed Petitioner’s auditory processing using the Comprehensive Test of Phonological Processing, Second Edition (“CTOPP-2”). Student scored in the average or low average range for several subtests and in the severely impaired range for the rapid naming tests. Dr. \*\*\*\*\* dismissed these low scores as outliers [J20.074].
- f. Petitioner scored in the average range on reading words, nonsense words, and reading fluency. Petitioner’s reading comprehension was a deficit on the Woodcock Reading Mastery Test – Third Edition (“WRMT-3”) and below average on the Gray Oral Reading Test – Fifth Edition (“GORT-5”).
- g. Petitioner has a deficit in math computations and math reasoning. Student was able to use a calculator for the math reasoning tests.
- h. Petitioner did very well on the written assessments, which was surprising to Dr. \*\*\*\*\* . Student is a competent \*\*\* and Student’s ability to \*\*\* was significantly above average, despite the typical finding that a person’s ability to write is no better than their ability to comprehend what they read [TI.84.12-16].



### **Respondent's Disagreements with Dr. \*\*\*\*\*'s IEE:**

52. Dr. \*\*\*\*\*'s report includes a review of Petitioner' STAAR scores over the course of multiple years [J20.60-61]. Inconsistencies were noted in his comparison of reading and math scores [D28.517]. This inconsistency misrepresents Petitioner's performance relative to the passing standard and undermines his conclusion that Petitioner was showing an increasing degree of failure to maintain academic standards:
- a. Dr. \*\*\*\*\* did not include grades or STAAR scores from Petitioner's \*\*\* grade, Student's homeschooled year, because he had no data or any information about \*\*\* grade. This information should have been provided by Petitioner's Parents.
  - b. Dr. \*\*\*\*\* did not review or consider data related to Petitioner's school attendance. Because Student was not retained for poor attendance, he assumed it was not a concern [TI.115.5-13].
  - c. Dr. \*\*\*\*\* did not observe Petitioner in a classroom setting; Tr. 105:11-14 (M.R.). He did not review any work samples [TI.105.11-14; 106.2-6].
  - d. Dr. \*\*\*\*\* did not collect information from Petitioner's teachers; he did not collect information about her curriculum, attendance, or performance in the homeschool program [TI.105.16-19; 20-TI.106, 115.19-116.8].
  - e. Dr. \*\*\*\*\* did not have teachers complete rating scales or have Petitioner's Parent complete a teacher rating scale as Student's current homeschool teacher.
  - f. Dr. \*\*\*\*\* did collect some information related to Petitioner's developmental history but did not include it in his report.
  - g. Dr. \*\*\*\*\* did not do vision or hearing screening. He stated that Petitioner has \*\*\* but did not include that information in his report.
  - h. Dr. \*\*\*\*\* does not include a medical portion in his evaluations; the nurse at school might collect that information if relevant.
  - i. Dr. \*\*\*\*\* was aware that Petitioner and Student's family \*\*\* at home and considered it, but he did not include it in his report.

### **Use of Cross-Battery Model in Assessing for a SLD:**

53. A Cross-Battery Assessment is a process by which assessors use information from multiple tests. It allows the examiner to conduct assessments that approximate the total range of broad and narrow cognitive abilities more adequately than what is possible with a single intelligence battery. It also takes into consideration a variety of exclusionary factors that could affect a student's academic performance.

Cognitive areas are broken into seven (7) broad abilities, and the first step is to determine if there is a pattern of strengths and weaknesses in the cognitive areas. The next step is to look at achievement to determine if there are deficits or discrepancies. The last step is to determine whether there is consistency between the cognitive discrepancy and achievement discrepancy, *i.e.*, does the cognitive deficit explain why the student may be having the identified academic difficulties? This is known as the dual discrepancy/consistency model [TIII.567.3-568.5].

54. Respondent uses the Cross-Battery Model to look for a pattern of strengths and weaknesses in analyzing for a Specific Learning Disability. To do that, the District completes cognitive and achievement testing and uses the Cross-Battery Assessment Software System (“X-BASS”) to analyze the results and look for a pattern based on how the cognitive and academic profiles align. [TII.475.2-3; 8-18].
55. Dr. \*\*\*\*\* does not believe the Cross-Battery Model is superior to his approach. He follows the Cross-Battery Model but does not run the numbers using the X-BASS and did not run the numbers for Petitioner’s report. When he did run the X-BASS during the hearing, he revised some of his findings. In so doing, many questions about the IEE came to bare:

Dr. \*\*\*\*\* found academic deficits in reading comprehension, math computation, and math reasoning; listening comprehension was a weakness but not a deficit. This is because Dr. \*\*\*\*\* only included quantitative information with no explanation of Petitioner’s performance [TII.571.7-24]. This did not explain Petitioner’s incredibly low scores in math aligned with Petitioner’s passing the Math STAAR in \*\*\* and \*\*\* grades and being just one question away from passing the EOC STAAR \*\*\* exam at the end of \*\*\* grade [TII.571.7-24].

Dr. \*\*\*\*\* found cognitive deficits in the broad areas of Crystallized Intelligence and Fluid Reasoning. [J20.80]. In his initial report, Dr. \*\*\*\*\* did not identify the scores he was using to determine that these were deficits. When he ran the X-BASS, he determined that Crystallized Intelligence was not considered a weakness within the model [TIII.782.6-8].

Crystallized Intelligence is known as Comprehension Knowledge or Gc. The instructions in the X-BASS caution against using Gc as an area of weakness because it measures stored acquired knowledge, which is based largely on experiences [D28.525]. Dr. \*\*\*\*\*’s use of Gc as a weakness is not supported by the cross-battery model [TII.572.24-573.2].

Additionally, when Dr. \*\*\*\*\* attempted to use the X-BASS, the scores he used for the cognitive domains did not align with the scores that Respondent’s expert expected [P63; J20.524-526].

Dr. \*\*\*\*\* denied that factors other than cognitive dysfunction (exclusionary factors) explained the deficits. Dr. \*\*\*\*\* rejected exclusionary factors because Petitioner has lived in the United States Student’s whole life; Student has been educated in the United States and understands \*\*\* but is not fluent in \*\*\*. Dr. \*\*\*\*\* explained that he did not need to do an in-depth analysis of this question because it is not his job [TI.131.15-22].

Respondent’s expert stated that Dr. \*\*\*\*\* did not fully consider potential exclusionary factors such as Petitioner’s excessive absences over the last four years, the difficulty of the \*\*\* classes that Student’s family insisted; the adequacy of Student’s homeschooling; and the unpredictable impact

of the COVID Pandemic [TII.573.20-25].

Dr. \*\*\*\*\* identified a link between Petitioner's cognitive deficits and academic deficits. He explained that Crystallized Intelligence impacts many things, including some on which Petitioner does well.

After running the X-BASS program during the hearing, Dr. \*\*\*\*\* found that Crystallized Intelligence is not a weakness for Petitioner [TII.757.1-10; 758.6-8].

56. As a neuropsychologist, Dr. \*\*\* understands that there are certain legal requirements related to an FIE or IEE that are not part of the requirements of an independent evaluator. In the school setting, a broader array of valuable information is available. An evaluator is not limited to norm-referenced data but can review that information in conjunction with other sources and domains to more fully understand a student's needs.

### **Cultural Linguistic Interpretive Matrix (“C-LIM”):**

57. The C-LIM was developed by Dr. Samuel Ortiz and is a companion to the Cross-Battery Assessment [TII.557.7-9]. Its purpose is to make sure that when a student with a second language is evaluated, that background does not negatively impact their performance on the standardized testing that was performed.

58. The C-LIM is widely used by school districts. The Texas Association of School Psychologists has provided presentations on it and Dr. Ortiz trained many people on the model through the Region 4 Education Service Center. The C-LIM is widely used, is taught in school psychology programs, and is used in the District [TII.484.18-22].

59. Dr. \*\*\* was not familiar with the C-LIM He has never seen it used; he has never had formal training on the C-LIM.

In using the C-LIM, an examiner must determine the degree of difference for the individual to be tested. In this case, Respondent's expert identified Petitioner “slightly different” because \*\*\* is spoken in the home; Student took the class \*\*\*; and Student has attended school in the United States for Student's academic career. Student explained that this information aligned with the “slightly different” definition, which includes individuals who are advanced, proficient, or fluent in English, and there is a just a slight difference because a second language is also present [TIII.650.8-13].

60. Dr. \*\*\* concluded that the C-LIM would be applied broadly to most people; he proffered that the C-LIM is racist in its assumptions and would improperly prevent students from being identified as having SLD [TIII.735.11-737.2; 786.4-10].

61. Dr. \*\*\* had originally identified Crystallized Intelligence, or Gc, as a weakness for Petitioner. Respondent's expert compared Petitioner's scores to those expected for students in the “slightly different” category. Because those subtests have higher language and cultural loading, she found Petitioner's scores were generally in the average range relative to “slightly different” peers rather than the low average range. As such Gc would not be considered a weakness because Student's lower scores likely reflect cultural and linguistic factors rather than a lack of ability [D28.514-515].

62. Excessive absenteeism, especially in light of the pandemic and resulting virtual learning, does not trigger Respondent's child find obligation.
63. Poor academic progress, especially in light of the pandemic and resulting virtual learning, does not trigger Respondent's child find obligation.
64. Petitioner's excessive absenteeism likely resulted from Student's failure to access the virtual learning in spring 2020 and fall 2020; the devastating effect of the pandemic; the loosening of truancy complaints in light of the pandemic; and Petitioner's enrollment in \*\*\* courses in following Student's failures in \*\*\* grade.
65. Dr. \*\*\*'s IEE is incomplete and does not support a finding of an SLD.

## V. DISCUSSION

### A. BURDEN OF PROOF

There is no distinction between the burden of proof in an administrative hearing and a judicial proceeding. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n. 4 (5<sup>th</sup> Cir.2009). The IDEA creates a presumption favoring the education plan proposed by a school district and places the burden of proof on the student challenging the plan. It is well-settled that a party challenging the district's eligibility determination or offer of services under IDEA bears the burden to prove that the child has been denied a FAPE. *Schaffer v. Weast*, 126 U. S. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 832 (5<sup>th</sup> Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d at 754, 762-63 (*citing Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.* 118 F.3d at 252; *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1010-11 (5<sup>th</sup> Cir. 2010).

### B. CHILD FIND

A "child with a disability" is a defined term under the IDEA. The student must meet the criteria under one or more of the enumerated disability classifications. 34 C.F.R. §300.8 (a). A child with a disability may qualify for special education services under more than one classification. *E.M. v. Pajaro Valley Unified Sch. Dist.*, 758 F. 3d 1162(9<sup>th</sup> Cir. 2014), *cert. denied*, 2015 U.S. Lexis 204 (2015). Even if a student can meet the criteria of one or more of the disability classifications, a student must also demonstrate a need for special education and related services for eligibility purposes. 34 C.F.R. § 300.8 (a)(1). The determination of whether a student is "in need of special education" must be determined on an individual basis. *Bd. of Hendrick Hudson Int. Sch. Dist., v. Rowley*, 458 U.S. 176, 207 (1982).

The child find obligation is triggered when the school district has reason to suspect the student (i) has a disability; and (ii) the student needs special education services. 34 C.F.R. §§ 300.8 (a) (1); 300.111 (a) (c) (1); *Goliad Ind. Sch. Dist.*, 32 IDELR 134 (SEA Tex. 2000). Not every student who struggles in school requires an evaluation for special education. *Alvin Ind. Sch. Dist. v. A.D.*, 503 F. 3d 378, 384 (5<sup>th</sup> Cir. 2007); 34 C.F.R. §300.111 (a)(1); *Carrollton-Farmers Branch Ind. Sch. Dist.*, 113 LRP 14998 (SEA Tex. 2013) (school district had

no reason to suspect student who performed well academically, behaviorally, and socially had a disability or needed special education).

Once the child find obligation is triggered, the District must initiate the evaluation process within a reasonable time. *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 676 (5th Cir. 2018). A child find violation turns on three inquiries: (1) the date the child find requirement was triggered due to notice of a likely disability; (2) the date the child find duty was ultimately satisfied; and (3) the reasonableness of the delay between these two dates. *Spring Branch Indep. Sch. Dist. v. O.W. ex rel. Hannah W.*, 961 F.3d 781, 793 (5th Cir. 2020).

First, a student with a disability must be evaluated in accordance with IDEA's implementing regulations and must be found to have one of the specified disabilities. Once a disability condition is identified, the second step mandates that because of the identified disability, the student must demonstrate a need for special education services; consequently, a student meeting IDEA-eligibility criteria but who does not show a need for special education services, is not a student with a disability under the IDEA. *Student v. Corpus Christi ISD*, Dkt. No. 298-SE-0496 (Tex. Hrg Off. Lockwood 1996). See also *D. L. by & through J.L. v. Clear Creek Indep. Sch. Dist.*, 695 Fed. Appx. 733 (5th Cir. 2017), as revised (July 31, 2017) (affirming the district court decision upholding the decision of the hearing officer who found that the student was not a student with a disability because the student did not need special education services.).

Petitioner alleges that as early as Student's \*\*\* grade year, Respondent had reason to believe that Student was a child with a disability in need of special education and related services. Petitioner bases this claim on the District's awareness of Student's excessive absenteeism and failing grades. I do not concur.

### **Petitioner's Absences:**

The record reveals that Petitioner had no attendance problems in Student's earlier years:

- Grade \*\*\* Absences
- Grade \*\*\* Absences
- Grade \*\*\* Absences
- Grade \*\*\* Absences
- Grade \*\*\* Unknown due to homeschooling

However, the record reveals that beginning in the \*\*\* grade, Petitioner garnered excessive absences, all in violation of the state-mandated attendance regulation, *i.e.*, absences above ninety percent of the school year:

- Grade \*\*\* Absences (\*\*\*%) – excessive and in violation of the state truancy statutes
- Grade \*\*\* Absences (\*\*\*%) between start of the school and COVID-mandate closure
- Grade \*\*\*: Excessive Absences between \*\*\*% in core classes
- Grade \*\*\* Absences (\*\*\*%) between start of school and withdrawal in February 2022.

Petitioner's pattern of absences involved generally three (3) reasons: \*\*\*.

It is the practice of Respondent to notify the family when a student accumulates over three absences. As these absences accumulate, the attendance clerks, counselor, and assistant principal get involved. During

the 2020-2021 school year, Respondent did not refer students to Truancy Court because of COVID pandemic.

Respondent maintained constant pressure on Petitioner related to Student's absences. Petitioner's counselor and assistant principal met with Student several times about Student's absences and grades. Student's assistant principal spoke with the school nurse to see if Petitioner had been to see her about health issues, but Student had not.

Likewise, Respondent maintained constant pressure on Petitioner's Parents related to Student's absences. Respondent sent a plethora of emails and letters informing them of Petitioner's truancy.

The Parents routinely excused Petitioner's absences for the three reasons stated above. Only at the hearing did Petitioner's Parent assert Petitioner was not attending school because Student was frustrated that Student was receiving no help from Respondent. He claimed that Student was getting sick because of the psychological pressure and the fear Student was having about going to school. He acknowledged, however, that he and his wife excused Student's absences but never informed Respondent that Student was having these issues. No other witness supported this idea that Petitioner felt sick due to difficulties at school.

It is well settled that multiple absences have a negative impact on a student's learning and grades. School officials, experts, Petitioner, and Petitioner's Parents testified to this impact. Respondent's expert affirmed that if a student is not in school, Student will not learn effectively. Doing makeup work can help, but when a student misses direct instruction, point-of-performance feedback, and consistent engagement, that will be extremely detrimental to Student's learning. And because many skills build on each other, gaps in learning can be especially detrimental and difficult to remediate.

Student's counselor testified that poor attendance negatively impacted Petitioner's grades because Student missed so much instruction. The assistant principal explained that even for the work Student did when Student was in attendance, poor performance could be a result of missing the lesson where that material had been taught.

Petitioner recognized that when Student was absent from class Student would not learn anything.

Petitioner's Parent stated that Petitioner's excessive absences caused Student to struggle.

Petitioner's expert recognized the excessive absences are detrimental to the student's learning.

There is no debate: child find is an important, affirmative duty owed by the district to its students. Failing to meet the child find requirements is a matter of serious concern that can deny FAPE to a student whom the district should have identified. Many issues, such as frequent hospitalizations, worsening behavioral problems, and ineffective accommodations, will put a district on alert. Further, where a student is excessively absent and the district is aware the student has a medical condition that may be causing the absences, the district may have reason to suspect a disability. *Independent School District No. 423, Marshall v. H.M.J.*, 66 IDELR 41 (D. Minn. 2015) (a Minnesota District developed an IEP Health Plan to address a student's asthma and anxiety. Its knowledge of the student's diagnoses, frequent absences, and ongoing academic struggles indicated the student may qualify under IDEA's other health impairment ("OHI") category).

However, a student's absenteeism may relate to circumstances other than a disability. If so, then child find is not triggered. *Douglas County Sch. Dist.*, 75 DELR 146 (SEA Colorado 2020) (evidence that an interstate transfer student's excessive absenteeism stemmed from being uprooted from Student's friends, adjusting to the Parent's remarriage, and Student's use of alcohol, marijuana, and e-cigarettes helped the district show it had no reason to suspect a disability despite the student's diagnoses of anxiety and depression).

The fact that a student received limited instruction, due to educational disruptions because of the COVID-19 pandemic and made little academic progress as a result thereof, does not automatically mean that the student should be referred for an evaluation. Levels of student performance primarily attributable to limited instruction do not mean the student requires special education and related services under IDEA. *Return to School Roadmap Under IDEA Part B.*, 79 IDELR 140 (OSERS 2021). Also, remote learning during the pandemic as well as the duration of any academic decline the student experienced during remote learning. *IDEA Public Charter Schs. Dist.*, 123 LRP 7330 (S.D. Texas 02/16/23) (The temporary nature of a student's academic decline during virtual learning helped demonstrate that his math struggles did not necessitate special education and related services).

### **Petitioner's Academics:**

Petitioner enrolled in PISD for \*\*\* grade, school year 2015-16. Respondent provided Student with RTI Services in \*\*\* because Student failed the \*\*\* STAAR in \*\*\* grade. Student passed all Student's classes as well as the \*\*\* STAAR exams.

In \*\*\* grade, school year 2016-17, Petitioner passed all Student's classes for the year but did receive a failing grade (\*\*\*) during the third grading period. Petitioner met the standards on the \*\*\* STAAR exams. Petitioner did not meet the standard for the \*\*\* STARR exam. TEA reported that sixty-five percent of the state's students did not meet this standard.

Petitioner's Parents withdrew Student from the District for the \*\*\* grade, school year 2017-18, to homeschool Student. Although the Parents reported that Student passed all courses, the Parents failed to provide any specifics about the curriculum or instruction. Petitioner did not take the STAAR test.

Petitioner re-enrolled in PISD at the beginning of \*\*\* grade, school year 2018-19 and was placed in the \*\*\* class for the first semester. This class is "an intensive supplemental program designed to address the needs of an individual student in acquiring the knowledge and skills required at his or her grade level and/or as a result of a student not meeting the passing standard on the state-mandated assessment". The \*\*\* class is a Tier 2 intervention. Petitioner failed the first grading period of \*\*\*); Student passed all other courses in all grading periods for the remainder of the school year and all final grades were passing. Petitioner did not meet the standards on the \*\*\* STAAR.

In \*\*\* grade, school year 2019-2020, Respondent placed Petitioner in the \*\*\* and \*\*\* classes because Student did not pass the \*\*\* STAAR exams in \*\*\* grade. Data points to track Petitioner's progress in the interventions were taken throughout the year. Petitioner met or exceeded the target performance of \*\*\* data points taken in \*\*\*; Student met or exceeded the target of \*\*\* of the data points taken in \*\*\*. Petitioner passed all classes. Students did not take the STAAR due to Covid.

The COVID pandemic affected the educational systems tremendously. Students were abruptly uprooted from their in-person instruction and placed before a computer for online instruction. TEA reported that students' learning was negatively impacted.

In the fall of 2020, parents determined whether their children would attend school in person or online. To aid in the online instruction, Respondent provided students with laptops and hotspots; Respondent sent emails and posted on the website how families could get technical support.

Student enrolled in \*\*\* School for Student's \*\*\* grade. \*\*\* is a school of choice; students apply to attend. Typically, students are evaluated based on their attendance and discipline. But for the class entering in the fall of 2020, the attendance issue was waived because of COVID.

\*\*\* offers regular classes, \*\*\*. \*\*\* uses a block schedule: on Mondays and Wednesdays students attend periods 1-4; on Tuesdays and Thursdays students attend periods 5-8; and on Fridays students attend all classes. Classes on Monday through Thursday are 90 minutes long.

Petitioner began the first semester of \*\*\* grade as a virtual learner. Petitioner did not present \*\*\*self for Student's on-line courses on at least \*\*\* days in fall 2020. Petitioner's poor attendance prompted the school counselor and assistant principal to convene an attendance conference with Petitioner's Parent on November \*\*\*, 2020. Petitioner's Parent informed them that Petitioner had been having technical difficulties. However, no one from Petitioner's family had informed anyone at the school that Petitioner was having technical difficulties.

At the end of \*\*\* grade, Petitioner failed \*\*\* of Student's core courses, passing only \*\*\*. Student met the standard for \*\*\* STAAR; Student did not meet the standard on \*\*\* STAAR by one question; Student did not take the \*\*\* STAAR because Student was absent [D27.0501.] Petitioner attended summer school for \*\*\*.

In fall of the 2021-22 school year, Petitioner returned to \*\*\* and enrolled in \*\*\* core classes. No one but Petitioner and Student's Parents encouraged this move, especially in light of Student's \*\*\*-grade failures. Again, Student was unsuccessful, failing all the classes due to absenteeism and failure to turn in work, correct tests, and attend weekly tutorials.

All of Petitioner's \*\*\* teachers testified to the same concept: Petitioner's excessive absences, coupled with Student's failure to complete Student's work in class, turn in completed assignments, and attend tutorials negatively affected Student's education. No teacher testified that he/she suspected a disabling condition. When Petitioner was in class and the teacher was close to Student, Student completed Student's work, read without confusion, and clearly indicated that Student understood the work.

Additionally, Petitioner and Student's Parents failed to alert Respondent that Petitioner was struggling with reading and needed help. It was at the hearing that the Petitioner and Student's Parents testified that Student's struggles were making Student ill and frightened to go to school.

Although Petitioner and Student's Parents insisted that Student be placed in \*\*\* classes, a questionable move given Petitioner's problems in \*\*\* grade, when presented with the alternative \*\*\* program, the Parents declined to enroll Student in that Program even though Student had been admitted.



## RESPONDENT'S CHILD-FIND DUTY WAS TRIGGERED ON SEPTEMBER 1, 2022:

The child find obligation is triggered when a school district has reason to suspect that a student has a disability, **coupled** with a reason to suspect special education services may be needed to address the disability.

In this case, Respondent's child find duty was triggered on September 1, 2022, when Petitioner filed Petitioner's Complaint alleging child find violations. Once Respondent's child find obligation was triggered, Respondent immediately started the FIE process. The child find duty was satisfied when the District offered to evaluate Petitioner on October \*\*\*, 2022, approximately one month after the child find duty was triggered. The Parties mediated this case but were unable to reach a resolution. The Parents declined the Respondent's proffered FIE. Parental consent is voluntary and may be withheld. 34 C.F.R. §300.9 (c) (1). Though consent was not given, Respondent satisfied any child find obligation it may owe Petitioner by making immediate and continuing efforts to obtain informed consent for the FIE.

### DR. \*\*\*'S IEE:

In determining whether a student is a "child with a disability," the first step is to evaluate the student, in accordance with the IDEA's implementing regulations. If this evaluation establishes that the student has one or more of the enumerated disability classifications found in 34 C.F.R. §300.8(a), then the second step is to determine whether the student demonstrates a need for special education services. In essence, a student meeting IDEA-eligibility criteria but who does not show a need for special education services, is not a "child with a disability" under the IDEA. *Student v. Corpus Christi ISD*, Dkt. No. 298-SE-0496 (Tex. Hrg Off. Lockwood 1996). *See also D. L. by & through J.L. v. Clear Creek Indep. Sch. Dist.*, 695 Fed. Appx. 733 (5th Cir. 2017), as revised (July 31, 2017) (affirming the district court decision upholding the decision of the hearing officer who found that the student was not a student with a disability because the student did not need special education services.).

In this case, the sole evaluation in evidence does not support Petitioner's eligibility under IDEA as a student with a specific learning disability. School districts are not liable for a child find violation unless the student has a need for special education. *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 Fed. Appx. 887, 893 (5<sup>th</sup> Cir. 2012) (The IDEA does not penalize school districts for not timely evaluating students who do not need special education).

An eligibility determination is made based on an evaluation that meets IDEA criteria and finding a student meets one or more of the thirteen (13) eligibility classifications, and by reason thereof, needs special education and related services. 34 C.F.R. §300.8(a)(1); §300.304-311; TEX. ADMIN. CODE §89.1040. Assessments and other evaluations must assess the student in all areas of suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. §300.304(c)(4). To determine eligibility, the team must draw on information from a variety of sources, including aptitude and achievement tests, parent input, and teacher commendations, as well as information about the student's physical condition, social or cultural background, and adaptive behavior. 34 C.F.R. §300.306(c).

Additionally, students must be assessed in all areas related to the suspected disability. For all suspected disabilities, as part of an initial evaluation, if appropriate, the team must review existing evaluation data, including evaluations and information provided by the parents; current classroom-based, local, or State assessments; current classroom-based observations; and observations by teachers and related services providers. 34 C.F.R. §305(a). The IDEA includes additional requirements to determine whether a student is eligible as a student with a specific learning disability. 34 C.F.R. §300.309. To find a student eligible, the team must determine that the student's deficits are not primarily the result of a visual, hearing, or motor disability; intellectual disability; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency. 34 C.F.R. §300.309(a)(3). Critically, to ensure that underachievement is not due to lack of appropriate instruction in reading or math, the team must consider, as part of the evaluation, data that demonstrate that the student received appropriate regular education instruction delivered by qualified personnel. 34 C.F.R. §300.309(b). Finally, the law requires that the team consider information from an observation of the student's academic performance in the regular classroom or, for students who are out of school, an appropriate environment. 34 C.F.R. §300.310.

As discussed above, Respondent did not conduct an FIE due to lack of parental consent; however, Petitioner had a private neuropsychological evaluation performed by Dr. \*\*\* in November 2022. Dr. \*\*\* used multiple standardized tests. He diagnosed Petitioner with a SLD in Reading Comprehension, Math Computation, and Math Reasoning. Respondent's expert and examiners agreed that the evaluation lacked needed educational context, *i.e.*, current educational experiences, information from current and former teachers, classroom observations to name a few. Without this context, a full picture of Petitioner's educational needs does not stand out.

### **RESPONDENT'S FAPE OBLIGATION:**

In this case Petitioner bore the burden of establishing that Petitioner had a qualifying disability and, because of that disability, needed specially designed instruction and related services. The record fails to establish these facts. In such an instance, a school district does not deny a student FAPE. In this case then, as IDEA eligibility was not established, the District did not deny the Student FAPE.

### **VI. CONCLUSIONS OF LAW**

1. Petitioner bears the burden of proof on all issues raised under IDEA at the due process level. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 535-537 (2005). IDEA creates a presumption that a school district's decisions made pursuant to IDEA are appropriate and that the party challenging the decisions always bears the burden of proof.
2. Petitioner failed to meet Petitioner's burden of proving that Respondent violated its child find obligations. *Schaffer*, 546 U.S. at 621; 20 U.S.C. §1412(a)(3); 34 C.F.R. §300.111; 19 TEX. ADMIN. CODE §89.1151 (c).
3. Petitioner failed to prove that Respondent denied Petitioner a FAPE.

### **VII. ORDER**

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the relief requested by Student is DENIED. It is further

SIGNED this the 28<sup>th</sup> day of July 2023.

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*Deborah Heaton McElvaney*  
Special Education Hearing Officer

### **NOTICE TO THE PARTIES**

The Decision issued by the Hearing Officer is final, except that any party aggrieved by the Findings and Decision made by the Hearing Officer, or the performance thereof by any other party, 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. A civil action brought in state or federal court must be initiated not more than 90 days after the date the Hearing Officer issued her written Decision in the Due Process Hearing. 20 U.S.C. §§1415(i)(2) and (3)(A) and 1415(l).

#### **COPIES SENT TO:**

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