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34 C.F.R. Part 99

SOAH DOCKET NO. 701-23-03509.IDEA
TEA DOCKET NO. 053-SE-1022

[redacted] **B/N/F** [redacted] **AND** [redacted]	§	**BEFORE A SPECIAL EDUCATION**
Petitioner	§	
	§	
v.	§	**HEARING OFFICER FOR**
	§	
SPRING BRANCH INDEPENDENT SCHOOL DISTRICT,	§	
Respondent	§	**THE STATE OF TEXAS**

ORDER NO. 3
GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

[redacted] (Student), by next friends [redacted] and [redacted] (Parents or, collectively, Petitioner), filed a request for a due process hearing (Complaint) under the Individuals with Disabilities Education Act (IDEA) against Spring Branch Independent School District (Respondent or SBISD) on September 2, 2022. The due process hearing in this case is set for February 9-10, 2023, with the decision due on March 30, 2023.

Respondent filed a Traditional and No-Evidence Motion for Summary Judgment (Motion) on November 8, 2022. Petitioner filed a Response on November 10, 2022, and Respondent filed a Reply on November 16, 2022. For the reasons set forth below, the hearing officer finds Respondent's Motion should be granted.

I. FACTUAL BACKGROUND

According to the pleadings and the record on file, Student resides with [redacted] family within the boundaries of Tomball Independent School District (TISD). Parents enrolled Student in a private school located within the boundaries of Houston Independent School District (HISD) from

August 2019 through April 2022. In April 2022, Parents transferred Student to the [redacted] a private school located within SBISD's boundaries.[1]

Petitioner filed the Complaint on September 2, 2022, alleging that SBISD (along with TISD and HISD) failed to evaluate Student in a timely and comprehensive manner and failed to comply with Petitioner's procedural rights.[2] Parents did not request an evaluation or proportionate share services from SBISD prior to filing the Complaint.[3] SBISD was unaware that Student was attending a private school located within its boundaries prior to the initiation of this case.[4]

SBISD's first contact with Parents occurred on September 6, 2022, when SBISD sought to schedule a resolution session. The resolution session was held on September 16, 2022, but it was unsuccessful.[5] On September [redacted], 2022, SBISD requested a copy of Student's most recent Full and Individual Evaluation (FIE) from Petitioner, along with other records. Parents provided the FIE and other documents to SBISD.[6] The records indicated that the FIE was completed by HISD on February [redacted], 2020, and that Student received proportionate share services from HISD.[7] SBISD offered to convene a meeting on September [redacted], 2022, to determine Student's proportionate share services and indicated that it is ready, willing, and able to provide services to Student.[8] SBISD also offered to complete Student's triennial reevaluation by the end of February 2023 in accordance with statutory requirements.[9]

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[1] Complaint ¶¶1, 11, 12.
[2] Complaint at 11-12.
[3] "Proportionate share services" are the special education and related services parentally-placed private school students with disabilities may receive based on the proportionate share of IDEA Part B funds that the school district must expend annually on services for these students. *See* 34 C.F.R. §§ 300.132-134, .137. A parentally-placed private school student does not have an individual right to receive some or all of the special education and related services that the student would receive if enrolled in a public school. 34 C.F.R. § 300.137(a).
[4] Motion, Exh. B.
[5] Motion, Exhs. B, H.
[6] Motion Exhs. C, D.
[7] Motion Exhs. D, G.
[8] Motion, Exh. E; Response, [redacted] Aff. ¶¶2, 8.
[9] Motion, Exh. F.

Parents have not accepted SBISD's offer to reevaluate Student and have not received prior written notice from SBISD regarding reevaluation.[10] Parents did not receive a copy of the Notice of Procedural Safeguards from SBISD prior to the filing of the Complaint.[11]

II. MOTION AND RESPONSE

SBISD's Motion is both a traditional and a no-evidence motion for summary judgment. SBISD argues that traditional summary judgment is appropriate in this case because it did not have reason to suspect Student had a disability and a corresponding need for special education services until September 2, 2022—the date Petitioner filed the Complaint. SBISD further argues that, shortly after receiving the Complaint, it offered to conduct a timely reevaluation and to provide proportionate share services.

With respect to its no-evidence motion, SBISD asserts that Petitioner has not produced any evidence that SBISD failed to conduct a reevaluation when it was obligated to do so.

Petitioner argues in [redacted] Response that (1) child find is an affirmative duty that falls on SBISD; (2) the hearing officer has authority to make determinations regarding the proportionate share services offered by SBISD; (3) a prior order entered by the hearing officer on a motion to dismiss forecloses SBISD's motion for summary judgment; and (4) a hearing is necessary in order to exhaust Petitioner's non-IDEA claims and because Petitioner seeks relief available under the IDEA.

[10] Motion, Exhs. B ¶8.
[11] Response, [redacted] Aff. ¶¶4-5.

III. LEGAL STANDARDS

Except as modified or limited by certain federal regulations, the Texas Rules of Civil procedure apply in a due process hearing under the IDEA. 19 Tex. Admin. Code § 89.1185(d). Under the Texas Rules of Civil Procedure, a party seeking to recover on a claim, counterclaim, or cross claim may, at any time after the adverse party has appeared or answered, move for summary judgment in the party's favor in whole or in part, with or without supporting affidavits. This rule extends to a defending party. Tex. R. Civ. P. 166a(a)-(c). Due process hearings under the IDEA in this state are currently not exempt from the rules regarding summary judgment.

In addition, Federal Rule of Civil Procedure 56 governs motions for summary judgment in federal court. Fed. R. Civ. P. 56. The wording of the Texas and federal rules are materially the same, and federal precedent is considered persuasive. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 86-87 (Tex. 2018).

A. Traditional Summary Judgment

Summary judgment is appropriate when the record on file, including discovery responses, the pleadings, affidavits, stipulations of the parties, and authenticated or certified public records, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(a)-(c). In considering a traditional motion for summary judgment, the non-movant's burden cannot be satisfied by conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence. *See, e.g.*, *T.W. bnf K.J. v. Leander Indep. Sch. Dist.*, Cause No. AU-17-CA-00627-SS, 2019 WL 1102380, at *3 (W.D. Tex. Mar. 7, 2019); *Jones v. Houston Indep. Sch. Dist.*, 986 F. Supp. 2d 812, 819 (S.D. Tex. 2013). Factual controversies are to be resolved in favor of the non-movant, but only when there is an actual controversy—that is, when both parties have submitted evidence of contradictory facts. *M.L. ex rel. A.L. v. El Paso Indep. Sch.*

Dist., 610 F.Supp. 2d 582, 594 (W.D. Tex. 2009), *aff'd*, 369 Fed. Appx. 573 (5th Cir. 2010) (per curiam).

Once the moving party has made an initial showing that there is no evidence to support the non-moving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of genuine fact issues. When ruling on a traditional motion for summary judgment, the hearing officer is required to view all inferences drawn from the factual record in the light most favorable to the non-moving party. Furthermore, the hearing officer may not make credibility determinations or weigh the evidence in ruling on a motion for summary judgment. *T.W. bnf K.J.*, 2019 WL 1102380, at *2.

B. No-Evidence Summary Judgment

Texas Rule of Civil Procedure 166a also permits a party to file a no-evidence motion for summary judgment. It states:

> After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

Tex. R. Civ. P. 166a(i).

When a movant files a proper no-evidence motion for summary judgment, the burden shifts to the non-moving party, and unless the non-moving party produces summary judgment evidence raising a genuine issue of material fact, the motion must be granted. *Id.* To defeat a no-evidence motion for summary judgment, the non-movant need not marshal [redacted] evidence, but must point out

in [redacted] response evidence raising a fact issue as to the challenged elements. *See* Tex. R. Civ. P. 166a(i) cmt. If the non-moving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof, summary judgment must be granted.

C. Materiality

The substantive law identifies which facts are material. Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. Disputed fact issues that are irrelevant and unnecessary will not be considered in ruling on a summary judgment motion. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Isbell v. Ryan*, 983 S.W.2d 335, 338 (Tex. Ct. App. 1998).

IV. ANALYSIS

A. Child Find

1. SBISD's Traditional Motion for Summary Judgment

Under the IDEA, school districts have a "child find" obligation and must identify and evaluate all students who are reasonably suspected of having a disability regardless of whether they are enrolled in a public or private school. *See* 34 C.F.R. § 300.111(a)(1). This duty extends to students attending private schools located within a school district's boundaries even if those students do not reside within the district. 34 C.F.R. § 300.131(a). Once the district is on notice of facts likely to indicate a disability and the need for special education, it must identify, locate, and evaluate the private school student within a reasonable time. *See A.L. v. Alamo Heights Indep. Sch. Dist.*, No. SA-16-CV-00307-RCL, 2018 WL 4955220, at *6-7 (W.D. Tex. Oct. 12, 2018); *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 791, 793 (5th Cir. 2020); *Heather B.*

v. Houston Indep. Sch. Dist., No 21-20229, 2022 WL 4299727, at *4 (5th Cir. Sep. 19, 2022). Reasonableness is measured based on the delay between notice and the school district's referral of the student for evaluation. *Heather B.*, 2022 WL 4299727, at *4; *O.W.*, 961 F.3d at 791; *Dallas Indep. Sch. Dist.* v. *Woody*, 865 F.3d 303, 320 (5th Cir. 2017). A delay is reasonable if a school district takes proactive steps to comply with its child find duty during this intervening period. *O.W.*, 961 F.3d at 793; *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 676 (5th Cir. 2018); *Woody*, 865 F.3d at 320.

Evidence submitted in support of SBISD's Motion indicates that SBISD was unaware Student was attending a private school within its boundaries until the Complaint was filed and that neither a request for an evaluation or for proportionate share services was made before then. Petitioner offers no evidence to dispute these facts. [redacted] argues instead that SBISD has an affirmative duty to locate students in need of special education and that the district did not do enough to "find" Student. Resolution of SBISD's traditional motion for summary judgment thus turns, in part, on whether the IDEA requires something more than Student's presence in the district as a private school student to put SBISD on notice of a disability.

A recent decision by the Fifth Circuit, *Heather B. v. Houston Independent School District*, is instructive on this issue.[12] No. 21-20229, 2022 WL 4299727 (5th Cir. Sep. 19, 2022). In *Heather B.*, the petitioner argued that the district's child find duty was triggered when the student moved into Pearland ISD in 2014. The Fifth Circuit rejected this argument, finding that the student's move to a home within the jurisdictional boundaries of Pearland ISD—while remaining enrolled in a private school in Houston ISD—did not afford Pearland ISD notice that the student was within

[12] Petitioner contends that reliance on *Heather B.*is prohibited because it is an unpublished opinion. Response at 9, ¶¶31-32. This argument lacks merit. It is well-settled that—although unpublished opinions issued after January 1, 1996, are not controlling—they may serve as persuasive authority. *E.g.*, *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205 n.7 (5th Cir. 2019) (citation omitted); *Butler v. S. Porter*, 999 F.3d 287, 296 (5th Cir. 2021) (citation omitted); *Thetford v. State*, 643 S.W.3d 441, 451 (Tex. Ct. App. 2022).

its jurisdiction, let alone that the student had a disability. *Heather B.*, 2022 WL 4299727, at *5. The court determined instead that Pearland ISD received notice on the day the parents emailed a district administrator to request special education services in May 2017. *Id.* at *6. In this case, the undisputed evidence shows that SBISD was unaware that Student was attending a private school within its jurisdiction until Petitioner filed the Complaint on September 2, 2022. Thus, this is the date SBISD had notice of facts likely to indicate a disability.[13]

The uncontroverted evidence further demonstrates that, shortly after the Complaint was filed, SBISD scheduled and convened a resolution session, requested Student's FIE and related documents, and attempted to meet with Parents in an effort to identify appropriate proportionate share services. SBISD also offered to evaluate Student, but Parents have not yet accepted SBISD's offer. These undisputed facts establish that, once it was on notice of facts likely to indicate a disability and the need for special education, SBISD took proactive steps to evaluate and provide services to Student within a reasonable time. *See, e.g.*, *Woody*, 865 F.3d at 319-20 (finding three-month delay was reasonable where delay was not solely attributable to the district); *Heather B.*, 2022 WL 4299727, at *2-6 (finding Houston ISD's four-month delay and Pearland ISD's one-month delay reasonable).

Petitioner does not address the reasonable time standard articulated above but posits instead that SBISD could have called, sent a letter, or stopped by the [redacted] to provide information regarding its child find process and offer evaluations and proportionate share services

[13] While the cases cited by Petitioner recognize that school districts have an affirmative child find duty, none of them support the conclusion that a student's presence in the district by itself (either as a private school student or as a resident) is enough to put a school district on notice of facts likely to indicate a disability and the need for special education. *See, e.g.*, *Krawietz*, 90 F.3d at 676 (student's academic decline, hospitalization, and illegal activity were sufficient to cause the school district in which student was enrolled to suspect that her disabilities created a need for special education); *N.G. v. Dist. of Columbia*, 556 F. Supp. 2d 11, 26-27 (D.D.C. 2008) (district's child find obligation was triggered by parents' letters to teachers explaining student's condition and by its knowledge that student had attempted suicide, was hospitalized, suffered declining grades, and was diagnosed with severe depression); *C.C. Jr. v. Beaumont Indep. Sch. Dist.*, Civil Action No. 1:13-cv-685, 2015 WL 13648561, at *8 (E.D. Tex. Mar. 23, 2015) (parent's conversations with district's speech pathologist regarding student's speech put district on notice of student's disability).

to students attending the school. Response at 6-9, ¶¶20-30. The Complaint, however, challenges SBISD's child find obligation specifically to Student. To the extent Petitioner's argument challenges the broader issue of whether SBISD has policies and procedures in place as a part of an overall child find program, that claim was not raised in the Complaint against SBISD or discussed during the initial prehearing conference. *See generally* Complaint; Prehearing Tr. (Sep. 23, 2022). Petitioner cannot avoid summary judgment by making unsubstantiated assertions on an unpled claim.

In sum, SBISD made an initial showing that it did not have notice of Student's disability until September 2, 2022, and that, shortly thereafter, it offered to evaluate Student and provide proportionate share services. Petitioner was then required to come forward with competent summary judgment evidence of a genuine issue of material fact showing that an actual controversy exists with respect to the applicable legal standard. Petitioner failed to do so. Accordingly, the hearing officer finds that SBISD's motion for traditional summary judgment should be granted.

2. SBISD's No-Evidence Motion for Summary Judgment

A no-evidence motion for summary judgment is proper after adequate time for discovery. Here, Petitioner filed the Complaint on September 2, 2022, and SBISD filed its no-evidence motion on November 7, more than two months later. Petitioner argues that SBISD's motion is improper because the discovery process has not been completed. Response at 5. Rule 166a, however, does not require discovery to be complete before a no-evidence motion is filed. It requires instead that there has been adequate time for discovery. Tex. R. Civ. P. 166a(i). Moreover, when a party contends that it has not had an adequate opportunity for discovery prior to a summary judgment determination, Rule 166a(g) permits the party to file an affidavit explaining the need for further discovery. Tex. R. Civ. P. 166a(g). *See also Tenneco Inc. v. Enterprise Prod. Co.*, 925 S.W. 2d 640, 647 (Tex. 1996). Petitioner did not do so here. The hearing officer concludes that there has been adequate time for discovery.

SBISD moves for summary judgment on the ground that, not only does the evidence submitted establish that it complied with its child find duties, but also that Petitioner failed to produce any evidence otherwise supporting [redacted] claim that SBISD failed to timely evaluate Student. In its motion, SBISD identified the circumstances which require reevaluation under the IDEA. Motion at 10. Reevaluations must be conducted if (1) a school district determines that a student's educational or related services needs warrant a reevaluation; or (2) a parent or teacher requests one. 34 C.F.R. § 300.303(a). A reevaluation must occur at least once every three years unless the parent and school district agree otherwise. 34 C.F.R. § 300.303(b).[14]

Having identified the elements necessary to establish that a reevaluation by SBISD was required, the burden shifted to Petitioner to produce summary judgment evidence raising a genuine issue of material fact as to at least one of these elements. Because Petitioner failed to do so, SBISD's no-evidence motion as to a child find claim arising out of its obligation to conduct a reevaluation must be granted.

B. Petitioner's Remaining Arguments

1. Proportionate Share Services

Petitioner argues that [redacted] has alleged claims against SBISD for failing to provide appropriate proportionate share services and that the hearing officer has jurisdiction over these claims as well as the authority to make related findings. Response at 2, 9, 12-13. The hearing officer previously rejected these arguments from Petitioner and will not revisit them here. *See* [redacted] *bnf* [redacted]. *v.*

[14] Both Petitioner and Respondent concede that SBISD's triennial evaluation of Student is not ripe for review in this proceeding. Motion at 11; Response at 10-11; Reply at 4.

[redacted] *Indep. Sch. Dist.,* [redacted] *Indep. Sch. Dist., Spring Branch Indep. Sch. Dist.*, SOAH Dkt. No. 701-23-00331, TEA Dkt. No. 003-SE-0922, Order No. 6 (Order No. 6) at 4-5.[15]

2. Prior Written Notice and Notice of Procedural Safeguards

Petitioner also alleges that SBISD failed to comply with Student's and Parents' procedural rights and offers father's affidavit stating that SBISD never provided Parents with prior written notice or a consent form and did not provide notice of procedural safeguards until the Complaint was filed. Response, [redacted] Aff. ¶3-6. A school district must provide written notice to the parents of a student with a disability before the district either proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child. 34 C.F.R. § 300.503(a)(1)-(3). Meanwhile, a school district must provide a copy of the notice of procedural safeguards to parents once a year, upon initial referral for an evaluation, and when a due process complaint is filed. 34 C.F.R. § 300.504(a)(2). Here, the undisputed facts show that Student had been attending the [redacted] for less than a year when the Complaint was filed and that no request for an evaluation or proportionate share services was made until then.

The question then becomes whether the federal regulations required SBISD to provide prior written notice and notice of procedural safeguards on or after September 2, 2022. The content of a school district's response to a due process complaint is substantially similar to the prior written notice requirements. *Compare* 34 C.F.R. § 300.508(e) *with* § 300.503. Section 300.508(e) states that—if a school district has not sent prior written notice to the parent regarding the subject matter contained in the due process complaint—the school district must provide a response that includes (1) an explanation of why the district proposed or refused to take the action

[15] Petitioner named three school districts (including SBISD) as respondents when the Complaint was originally filed. The case was assigned SOAH Number 701-23-00331 and TEA Docket Number 053-SE-0922. Respondents filed an unopposed Motion to Sever on September 23, 2022. That motion was granted and the claims were severed pursuant to Order No. 8 entered in the underlying case. This matter then proceeded under the SOAH and TEA Docket Numbers identified herein.

raised in the complaint; (2) a description of other options that the Admission, Review, and Dismissal (ARD) committee considered and the reasons why those options were rejected; (3) a description of each evaluation, procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and (4) a description of the other factors that are relevant to the agency's proposed or refused action. 34 C.F.R. § 300.508(e). SBISD's timely filed response to the Complaint included this information. As for the procedural safeguards, the evidence indicates that Student's father received a copy of the Notice of Procedural Safeguards from SBISD at or near the time the Complaint was filed.[16]

Accordingly, the record on file and the undisputed facts show that SBISD complied with the notice requirements set forth in 34 C.F.R. §§ 300.508(e) and 300.504(a).

3. Motions to Dismiss and for Summary Judgment

In addition, Petitioner appears to contend that SBISD's motion for summary judgment lacks merit because the hearing officer indicated that there were factual issues that could not be resolved on the face of the pleadings when she denied SBISD's previously filed motion to dismiss Petitioner's child find claim. Response at 3-4 (citing Order No. 6). As SBISD points out, however, this argument overlooks the procedural distinctions of, and different purposes served, by each type of motion. A motion to dismiss seeks dismissal of claims that have no basis in law or fact and is

[16] SBISD argues that its obligation to provide prior written notice, notice of procedural safeguards, and an opportunity for consent only arise when a written request for an evaluation is made. Reply at 11 (citing 19 Tex. Admin. Code § 89.1011(b)). This argument fails to reconcile the federal regulations with the state administrative rule. While a written request under § 89.1011(b) triggers the 15 school-day period in which a district must respond to the request, a request for an evaluation may still be made verbally. A verbal request, however, requires the school district to respond within a "reasonable time" rather than 15 school days. *Compare* 34 C.F.R. § 300.503(a) (stating that prior written notice must be provided within "a reasonable time") *with* 19 Tex. Admin. Code § 89.1011(b) (setting 15 school-day timeline for responding to written requests); *see also Technical Assistance: Child Find & Evaluation (revised June 2020), Texas Education Agency,* at 5 (addressing school districts' duty to respond to written and verbal requests for evaluation)(https://tea.texas.gov/sites/default/files/Technical%20Assistance).

decided on the face of the pleadings. Tex. R. Civ. P. 91a cmt. (stating that the rule is intended to provide for the dismissal of baseless claims upon motion and without evidence). A motion for summary judgment, on the other hand, seeks judgment on a claim as a matter of law when there are no genuine issues of material fact and contemplates the submission of evidence in support of and/or opposition to the motion. Tex. R. Civ. P. 91a, 166a. In this case, SBISD's motion to dismiss and motion for summary judgment are substantively and procedurally different.

In short, Order No. 6 did not preclude SBISD from filing a motion for summary judgment and evidence in support of it.

4. Remedies

Finally, Petitioner argues extensively that a hearing is required to determine appropriate remedies and to allow for exhaustion of Petitioner's administrative remedies under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. Response at 14-20. A party is entitled to a remedy only if they can establish liability. Thus, the hearing officer's determination that SBISD is entitled to judgment on Petitioner's child find claim as a matter of law forecloses Petitioner's ability to pursue remedies for the alleged violation.

ORDER

Based upon the foregoing, the record on file, and in accordance with the IDEA and its implementing state rules and federal regulations, and because Petitioner did not produce summary judgment evidence raising a genuine issue of material fact under Texas Rule of Civil Procedure

166a or 166a(i), it is **ORDERED** that Respondent's Motion for Traditional and No-Evidence Summary Judgment is hereby **GRANTED** and this case is **DISMISSED WITH PREJUDICE.**

SIGNED January 2, 2023.

Stacy May
Special Education Hearing Officer
For the State of Texas