

**DOCKET NO. 242-SE-0423**

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

**DECISION OF THE HEARING OFFICER**

**I. Statement of the Case**

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

The hearing officer finds that the Respondent District complied with all Child Find obligations, and that the District did not commit a procedural violation of IDEA.

**II. Procedural History**

Petitioners, Student, b/n/f Parent (collectively, Petitioner), filed a request for an expedited impartial due process hearing (the Complaint) pursuant to the Individuals with Disabilities Education Act (IDEA). The Complaint was received by the Texas Education Agency (TEA or Agency) on the 21<sup>st</sup> day of April, 2023, and the Notice of Filing of Request for a Special Education Due Process Hearing was issued by TEA on the 22<sup>nd</sup> day of April, 2023. The Respondent to the Complaint is the New Caney Independent School District (hereinafter District or Respondent).

The Initial Scheduling Order was issued on April 14, 2023, and Respondent filed its Response and Plea to the Jurisdiction on April 21, 2023. On May 1, 2023, the Pre-Hearing Conference (PHC) was held and the Order following the PHC was issued May 5, 2023. The parties participated in mediation in lieu of a resolution session, but were unable to reach an agreement.

The case proceeded and the parties timely made their respective disclosures, and the Due Process Hearing was held on May 22 & 23, 2023. On May 23, 2023, Order No. 6 was then issued and set forth the schedule for post-hearing briefs and the decision due date, that being June 19, 2023 and July 7, 2023, respectively.

#### A. Representatives

Petitioner was represented throughout the case by counsel, Ms. Janelle Davis, of Janelle L. Davis Law, PLLC. The Respondent District was represented by Erik Nichols and Matthew Acosta of Spalding Nichols, Lamp & Langlois.

#### B. Mediation and Resolution

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

#### C. Continuances

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

#### D. Preliminary Matters

The preliminary issues considered by the hearing officer addressed some of the confusion regarding the initial request for relief. Some of that relief could only be granted in an expedited hearing dealing with disciplinary matters. Order No. 2 and Order No. 3 clarified that this case would not address those matters, and further set forth the issues for the hearing. In addition, Petitioner then requested an open hearing, and as such, this hearing was open with the parameters as set out in Order No. 4.

Further, the parties made their respective disclosures in accordance with the Scheduling Order. Thereafter, the parties filed their respective objections to the disclosures in advance of the hearing, pursuant to the hearing officer's request. On May 21, 2023, Order No. 5 was issued and provided the rulings on the Objections and the Exhibits to be admitted at the hearing.

The due process hearing (DPH) was then conducted on May 22 and 23, 2023 on the Zoom platform, and lasted two days. The Petitioner continued to be represented by Ms. Janelle Davis. Also attending the hearing were Ms. Debra Liva, who is the non-attorney advocate for the family, and the Student's parent, Ms. \*\*\*. The Student's godmother/aunt, Ms. \*\*\*, was also in attendance during the hearing. The Respondent District continued to be represented by its legal counsel, Mr. Erik Nichols and Mr. Matt Acosta. Ms. \*\*\*, Director of Special Education was present

as District Representative, and Ms. \*\*\*, Coordinator for Behavioral Support also attended the hearing as the District's expert witness. Mr. Kirk Agree, with the same firm as Mr. Nichols and Mr. Acosta, attended part of the hearing as an observer.

#### E. Post Hearing Matters

Upon the conclusion of the presentation of evidence, but prior to closure of the hearing, the parties requested a continuance in order to have the requisite time for receipt of the transcript, filing closing briefs, and the final decision. They discussed the timeline, and it was agreed that the transcript of the hearing would be received no later than June 2, 2023, and that Petitioner's and Respondent's Closing Briefs were due no later than June 19, 2023. The Decision is due no later than July 7, 2023, and Order No. 6 establishing these deadlines was issued May 23, 2023. The decision is now being issued in compliance with the due date.

### III. Issues

#### A. Petitioner's Issues

Petitioner alleges that the District has denied Student a free, appropriate public education (FAPE) by its failure to comply with its Child Find obligations.

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

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

#### B. Petitioner's Requested Relief

While Petitioner requested a number of remedies in the Petition, many were outside of the hearing officer's jurisdiction, and therefore cannot be considered in this due process hearing as set forth in Order No. 3. The following were requested:

- That the Student be evaluated and determined to be a student in need of specially designed instruction or special education;

- That an ARD committee meet and create and implement an IEP based upon the Student’s unique needs;
- That an Independent Educational Evaluation be ordered at District expense;
- That a Functional Behavior Assessment (FBA) be ordered;
- That District create and implement an IEP based upon the Student’s unique needs; and
- A finding that the District violated Child Find.

In addition, while not in the Complaint, Petitioner in the closing brief filed in this matter requested that Petitioner be awarded compensatory services.

### C. Respondent’s Issues and Legal Position

In addition to a general denial, Respondent District denies that it failed to timely identify or evaluate the Student for special education, as the District was implementing strategies and assessing behavior and did make a timely referral for a special education evaluation. The District further contends that the issue of a FAPE is premature, as the Student had not been identified as eligible or in need of special education and therefore no obligation to provide such under the IDEA existed.

## IV. Findings of Fact\*

1. The Student resides with Student’s mother within the boundaries of the New Caney Independent School District [hereinafter NCISD or District], is \*\*\* years old, and, at the time of the issues in question in this case was in the \*\*\* grade at \*\*\* within the District.<sup>1</sup>
2. The Student has been enrolled in the District since January \*\*\*, 2023, as Student and Student’s mother moved to the District the Saturday prior to the enrollment in the District.<sup>2</sup> Prior to that time, it appears that Student attended school in the \*\*\* Independent School District.<sup>3</sup>

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

<sup>1</sup> T. 250; J.1; J.5.

<sup>2</sup> T. 249.

<sup>3</sup> T. 276; R.5:014-020.

3. After enrollment in New Caney ISD, the Student's mother testified that she received a telephone call from the Student's teacher, Ms. \*\*\*, at the end of Student's first day of class, which was January \*\*\*, 2023. While during most of the call the Student was described in positive terms, there was also some mention of concerns with Student's behavior.<sup>4</sup> Ms. \*\*\*'s call log shows that the first call concerning behavior was made on January \*\*\*, 2023.<sup>5</sup>
4. Student's mother testified that she continued to receive telephone calls from the Student's teacher, Ms. \*\*\* as well as school staff on a regular, if not nearly daily basis.<sup>6</sup> Records show, however, that while Ms. \*\*\* did have several telephone conversations with the Student's parent, after February \*\*\*, 2023, the communications were either in person or by email correspondence.<sup>7</sup>
5. Once the Student began exhibiting challenging behaviors, Student's teacher Ms. \*\*\*, began gathering and tracking information in an effort to better assess the situation and so that the District could provide the most appropriate support for the Student. She began tracking the Student's behavior on January \*\*\*, 2023.<sup>8</sup>
6. Ms. \*\*\*, Coordinator for Behavior Support for the District and a Board Certified Behavior Analyst (BCBA), testified that it is not uncommon for students, when first at a new school with a new teacher, to have challenging behaviors. She also indicated that the Student's parent thought that the move may be a factor as well.<sup>9</sup>
7. Ms. \*\*\* also noted the importance of gathering information in order to better assess the Student, particularly since Student was new to the District. Further, that learning the functions of Student's behaviors can then assist the District in determining the most appropriate or effective interventions for Student.<sup>10</sup>
8. Ms. \*\*\* also stated that some students can present challenging behaviors without the presence of a disability.<sup>11</sup>
9. The Student continued to have behavioral challenges and due to Student's \*\*\*, it was agreed that Student's mother would come to the school each day to pick Student up. The Student would wait for Student's mother in the front office, often with Mr. \*\*\*, the behavior specialist, who would then talk with Student's mother when she arrived.<sup>12</sup>

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<sup>4</sup> T. 251.

<sup>5</sup> T. 197-198; J3:097.

<sup>6</sup> T. 252-255.

<sup>7</sup> J. 3:097.

<sup>8</sup> T. 199-200; J3:098.

<sup>9</sup> T. 109-110.

<sup>10</sup> T. 118-119.

<sup>11</sup> T. 120.

<sup>12</sup> T. 246-249.

10. There was additional testimony that the parent picked up the student every day, and as many of the behaviors occurred at the end of the school day, Ms. \*\*\*, the principal of the \*\*\* school at the time, would often meet with the Student's parent at the time of pick-up.<sup>13</sup>
11. The District was informed that the Student's behaviors that were at issue at school did not occur at home and had not occurred at the previous school district.<sup>14</sup> The parent noted in late January 2023 that the Student was still adjusting to the move.<sup>15</sup>
12. At the time of enrollment and when the Student began attending school in the District, the District did not have the Student's records from the previous District where Student had attended\*\*\* and the fall semester of \*\*\* grade.<sup>16</sup> The record is unclear as to exactly when the records were received, but appears an email on February \*\*\*, 2023 may have indicated such receipt.<sup>17</sup>
13. It is clear that such records had been received by the District by March \*\*\*, 2023, as they are included in the packet the staff was preparing for the Student's referral for a special education evaluation.<sup>18</sup> The paperwork did establish that the Student had been on a tier support process while in Alief ISD.<sup>19</sup>
14. The Student also attended several days of in-school suspensions (ISS), starting on February \*\*\*, 2023 with the referral to \*\*\*, the District's disciplinary placement. A second such disciplinary referral was made on March \*\*\*, 2023, and both referrals were made by the Assistant Principal, Mr. \*\*\*. The District, however, in both cases, made a subsequent determination that Student would not attend \*\*\*, but rather serve ISS.<sup>20</sup>
15. During at least some of the time the Student was in ISS, the District staff was working with the Student in terms of Student's conduct, and worked with the Student on behavior strategies, such as calming techniques.<sup>21</sup>
16. In response to the Student's difficulty with behavior, on February \*\*\*, 2023, a meeting of the Student's care team was held, and reviewed the information gathered by the Student's teacher, Ms. \*\*\*. The team determined that interventions were appropriate. The committee then established for the Student a plan of addressing the behaviors, that being a Response to Intervention (RTI) and Multi-Tiered Systems of Support (MTSS) to assist with

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<sup>13</sup> T. 142,168-169.

<sup>14</sup> T. 106-108, 276.

<sup>15</sup> T. 109-110; J.3: 097.

<sup>16</sup> T. 112; J.1.

<sup>17</sup> T. 129; J.9:152.

<sup>18</sup> R. 5.

<sup>19</sup> R. 5:17-18.

<sup>20</sup> T. 143-145, 166.

<sup>21</sup> T. 342-343.

the Student's behavioral challenges.<sup>22</sup> As all students are on Tier 1, the Student was then placed on the tier 2 level.<sup>23</sup>

17. Specific goals for the Student were established at that time, and included reduction in \*\*\*, utilization of calming strategies, and increased compliance with instruction.<sup>24</sup>
18. It was also noted that if the Student did not respond well to the interventions, that a move to the tier 3 level would indicate the collection of additional information for a special education evaluation.<sup>25</sup>
19. The District also assigned a behavior specialist, Mr. \*\*\*, to work with the Student, and at that time Student showed some improvement. The Student's conduct improved, and Student was able to go on the class field trip, as long as Student's mother went as well.<sup>26</sup> Mr. \*\*\* worked with the Student about 2-3 weeks.<sup>27</sup>
20. Mr. \*\*\* along with Ms. \*\*\* also created a 'challenging behavior plan' for the Student with information on dealing with some of Student's conduct.<sup>28</sup>
21. The Student's teacher, Ms. \*\*\* also testified that Mr. \*\*\* had provide her some tools to assist with the Student's maladaptive behavior.<sup>29</sup>
22. Testimony demonstrated the necessity of data collection of the student's behavior in terms of learning about Student's conduct, including such matters as triggers and responses, so that the interventions would be as effective as possible.<sup>30</sup> Mr. \*\*\* gathered data on the Student's behaviors and also completed a behavior reinforcement assessment for the Student in an effort to determine what the most effect positive reinforcements may be.<sup>31</sup>
23. In mid-February, after the Student was referred to the Disciplinary Alternative Educational Placement (DAEP), it was noted by Student's aunt/godmother that Student made a \*\*\*, as Student also did upon the second disciplinary referral.<sup>32</sup> In both instances, the campus counselor, Ms. \*\*\* completed a \*\*\* Report, involving the Student, Student's parent, and the school administrator.<sup>33</sup>

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<sup>22</sup> T. 92-93, 105.

<sup>23</sup> J. 1:003.

<sup>24</sup> J. 1:005-007.

<sup>25</sup> T. 110.

<sup>26</sup> T. 32-34, 36, 38-39.

<sup>27</sup> T. 243.

<sup>28</sup> R. 4.

<sup>29</sup> T. 206.

<sup>30</sup> T. 117, 344.

<sup>31</sup> T. 240, 244-45; J.9:155.

<sup>32</sup> T. 50-51.

<sup>33</sup> J. 4.

24. The evidence also demonstrated that on some days the Student had no maladaptive behaviors and was able to remain on task.<sup>34</sup>
25. The evidence also showed that by February \*\*\*, 2023, the Student was consistently demonstrating appropriate behaviors.<sup>35</sup>
26. Mr. \*\*\*, however, was then moved back to Student's home campus,<sup>36</sup> and another behavior specialist, a paraprofessional, Mr. \*\*\* was assigned to work with the Student. At some point prior to Student's departure, Mr. \*\*\* also worked with Ms. \*\*\* so that she would be familiar with the Student's interventions.<sup>37</sup>
27. Evidence shows that on February \*\*\*, 2023, the Student was consistently demonstrating appropriate behaviors.<sup>38</sup>
28. When Mr. \*\*\* was no longer present, the Student's difficult behaviors increased somewhat, and in essence were variable.<sup>39</sup>
29. During the time the Student was enrolled in the District, Student did make some educational progress. The testimony also demonstrated that Student's teacher would support the Student in the classroom, as needed with a variety of approaches.<sup>40</sup> It is also clear that the teacher and the Student's mother were working collaboratively.<sup>41</sup>
30. The Student's mother's testimony indicated that while in the District, the Student made progress with support from Mr. \*\*\* and made some academic progress as well.<sup>42</sup>
31. Early on, the parent told the District that the Student did not have behavioral issues in the past, and testified that she was unaware of tiered support.<sup>43</sup> The mother's other testimony, however indicated that she did inform the District of some past behavior challenges.<sup>44</sup>
32. Evidence indicated that the Student was exhibiting many of the same or similar behaviors in New Caney that Student did in the prior district,<sup>45</sup> although testimony of the parent and the aunt/godmother indicated that Student did not have any of the noted behaviors at

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<sup>34</sup> T. 218; J.2.

<sup>35</sup> J. 9:156.

<sup>36</sup> T. 207.

<sup>37</sup> T. 217-218, 243.

<sup>38</sup> J. 9:156.

<sup>39</sup> T. 243.

<sup>40</sup> T. 200-201; 214.

<sup>41</sup> T. 203-204.

<sup>42</sup> T. 278-279.

<sup>43</sup> T. 270, 276.

<sup>44</sup> T. 277.

<sup>45</sup> T. 69-72; R.5:17-18.



home or at Student's prior school.<sup>46</sup> Additional testimony also indicated that the parent informed the District that there was no history of prior behavior issues, and that they do not occur at home.<sup>47</sup>

33. Records of Student's \*\*\* year in the prior school district show that the Student did have some challenges with behavior such as attempts at \*\*\*, and demonstrating need for redirection often.<sup>48</sup>
34. The Student's parent never requested a special education evaluation by the District and did not voice any indication of a disability.<sup>49</sup>
35. The evidence also indicated some reluctance on the part of the Student's mother with regard to proceeding with a special education evaluation.<sup>50</sup>
36. The District had implemented strategies for working with the Student and noted that a special education referral was not made earlier than March as District personnel were trying to get to know the Student first, and gather information on matters such as behavior triggers and functions of behavior so to do a better assessment. The District also wanted to give the interventions a chance to work, and had no information about, or indications of, a disability.<sup>51</sup>
37. The District was also relying on the information provided that the Student had no history of these behaviors, that they do not happen at home, and that there is no diagnosis of a disability.<sup>52</sup>
38. Ms. \*\*\*, a licensed specialist in school psychology (LSSP) with the District, testified that she observed the Student in Student's classroom one day in mid-February for the purpose of providing some feedback and suggestions to Student's care team with regard to the proposed RTI interventions and support.<sup>53</sup>
39. Ms. \*\*\* also testified that the behaviors demonstrated by the Student when she observed were not indicative of a disability.<sup>54</sup>
40. The evidence clearly demonstrated that the Student's mother, and to some degree Student's aunt/godmother, were continually updated as to Student's progress and that the

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<sup>46</sup> T. 107, 109.

<sup>47</sup> T. 106, 109; J.3; J.8:145.

<sup>48</sup> P. 6:1004; R. 5:18.

<sup>49</sup> T. 108-109, 277.

<sup>50</sup> T. 88, 173.

<sup>51</sup> T. 131, 343-344.

<sup>52</sup> T. 352.

<sup>53</sup> T. 302.

<sup>54</sup> T. 316-317.

District was quite collaborative in working with the Student's mother, and was implementing her suggestions as to working with the Student.<sup>55</sup>

41. The evidence shows that the District continued efforts to gather information for the special education referral by March \*\*\*, 2023, and that the request was made that day. The packet included questionnaires for the Student's teacher.<sup>56</sup> Also included in the packet was an observation form completed by Ms. \*\*\*, the District's RTI Specialist, on March \*\*\*, 2023. The observation indicated that the Student's behavior was quite disruptive, and that Student \*\*\* Ms. \*\*\* several times.<sup>57</sup> At this time, the District was in the process of completing the referral form for a special education evaluation.<sup>58</sup>
42. Evidence also indicated that Ms. \*\*\* had at least two conversations with the Student's mother about the special education evaluation, specifically on March \*\*\* and March \*\*\*, 2023. At that time, the Student's parent was upset that the District did not wait on the special education referral until March \*\*\*, 2023, which was the date by which the Student was to have met the RTI/MTSS goals. The Student's mother also noted at this time that Student was meeting Student's goals.<sup>59</sup>
43. The parent packet part of the special education referral packet was sent to the Student's mother on or about March \*\*\*, 2023, and according to the parent's testimony contained only three pages to complete. There was no evidence that the Parent inquired as to missing pages, as the pages appeared to be numbered.<sup>60</sup>
44. The Student's mother then sent Ms. \*\*\* an email on March \*\*\*, 2023, and stated that she had attached the completed form to the email.<sup>61</sup>
45. There was no evidence that the District inquired as to why only three pages of the parent information packet was returned.
46. The testimony indicates that the parent consent for the evaluation was to be obtained by the \*\*\* Diagnostician, \*\*\*, during a meeting with the parent. While Ms. \*\*\* noted that she contacted \*\*\* and wanted to attend the meeting in order to establish rapport with the parent, the meeting never occurred.<sup>62</sup>

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<sup>55</sup> J.1:24-25.

<sup>56</sup> J.9:161; P.5:11-16.

<sup>57</sup> P.5:11-12; R.5:031-32.

<sup>58</sup> T.63-64; R.5

<sup>59</sup> T. 88; J.1:7, 25.

<sup>60</sup> T.332; R.5.

<sup>61</sup> T. 80, 87-88, 125; P.2.

<sup>62</sup> T. 318-320, 322-323.

47. It appears that the meeting was never scheduled, and consent was never obtained as the Student stopped attending school.<sup>63</sup>
48. No evidence was presented that the District followed up with the parent after the 3 pages of packet was returned and no evidence was presented as to what exactly was sent to the parent with regard to the referral packet.<sup>64</sup>
49. There was no evidence presented that the Student's parent or aunt/godmother contacted the District as to the status of the evaluation after the packet of three pages was returned on March \*\*, 2023.
50. The Student's last day attending school in the District was March \*\*, 2023.<sup>65</sup> Therefore, the Student attended school in the District from January \*\*, 2023 until March \*\*, 2023.
51. The Student was unenrolled from the District on April \*\*, 2023.<sup>66</sup>

## V. Discussion

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

### A. Burden of Proof

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

In terms of application of this approach, the Fifth Circuit went on to establish that a presumption exists "in favor of a school system's educational plan, placing the burden of proof on the party challenging it". *White ex Rel. White v. Ascension Parish Sch. Bd.* 343 F.3d 373, 377 (5<sup>th</sup> Cir. 2003); *Teague* at 132. Accordingly, Petitioner bears the burden of demonstrating that the District violated its Child Find obligation and failed to provide the Student FAPE.

### B. Duty to Provide FAPE

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<sup>63</sup> T. 320; 355-357.

<sup>64</sup> T. 126.

<sup>65</sup> T. 273-274; 350. J.6.

<sup>66</sup> T. 357; J.9:174.

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

Additionally, the United States Supreme Court has provided guidance as to the determination of whether a school district provided FAPE to a student, with both substantive and procedural considerations. Specifically, the district must: comply with the procedural requirements of IDEA; and, design and implement a program that is reasonably calculated to enable the student to receive an educational benefit. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). Further, 'educational benefit' has been defined as that which is meaningful and provides a basic floor of opportunity or access to specialized instruction and related services individually designed to provide educational benefit. *Id.*

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

### C. Child Find

Child Find under the IDEA is an affirmative obligation on the part of school districts to have policies and procedures in place in order to locate, and timely evaluate, children with suspected disabilities in its jurisdiction. The Child Find duty is then triggered when a school district has reason to suspect a disability, along with reason to suspect that there is a need for special education and related services.

Thus, it is clear that school districts are required to evaluate all children where a suspected disability exists. Further, if a parent requests an evaluation, then the District is obligated to respond within fifteen school days as to their agreement to complete the evaluation or conversely deny the request. See 19 TEX. ADMIN. CODE §89.1011(b). Additionally, when conducting an evaluation, a school district must comply with the procedures set forth in 34 C.F.R. §§ 300.304-300.311. Once the evaluation is complete, the Admission, Review and Dismissal (ARD) committee has the responsibility to make determinations of eligibility, and if the student is found eligible, then design and implement educational as well as related services for the student. Even if a disability condition is identified, the second part of the eligibility determination requires the

Petitioner to demonstrate a need for specially designed instruction, or educational services, as a result of the disability. Consequently, a student who meets eligibility criteria but who does not show a need for special education services, has not met the definition of a student with a disability under the IDEA. See 34 C.F.R. §300.8.

This section provides further clarification in saying that

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

34 C.F.R. §300.8(2)(i).

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

Once a Child Find violation has been triggered, that is, a finding that the District suspects or has notice of a disability, and that the student needs special education, then the next consideration is that of timing. That is, once a Child Find duty is triggered, the next part of the inquiry is the “reasonableness” of time from the date of suspicion until the referral for evaluation. *Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 320 (5<sup>th</sup> Cir. 2017); *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673 (5<sup>th</sup> Cir. 2018); *Spring Branch Indep. Sch. Dist. v. O.W. ex rel Hannah W.*, 961 F.3d 781, 790-791 (5<sup>th</sup> Cir. 2020). The courts have also indicated that the reasonableness of a delay is not defined by its length in weeks or months, but rather by the steps taken by a district during the relevant period. *Krawietz at 677*; *O.W. at 793*. Courts have also characterized a Child Find violation as a procedural violation of the IDEA. *D.K. v. Abington*, 696 F.3d 233 (3<sup>rd</sup> Cir. 2012) *citing Latasha A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 453 (5<sup>th</sup> Cir. 2010).

#### D. Procedural Considerations

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

## VI. Analysis

In this case, Petitioner brings forth issues alleging a violation of Child Find, as a procedural violation of the IDEA. The following discussion examines these issues, considering the exhibits in evidence, testimony of the witnesses, and issues presented.

### A. Child Find: Identification and Evaluation

In this case, Petitioner has claimed that the District failed its Child Find duties in failing to evaluate the student for special education. As noted, in order to prevail on the claim, Petitioner must prove: (1) that the District had notice of a likely qualifying disability; and (2) as a result, the student required special education and related services, thereby meeting eligibility under the IDEA. The statute clearly provides that:

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

The law is clear that when considering a school district’s obligation under Child Find, there must be reason to not only suspect a disability, but also suspect that special education services are likely needed to address the disability. *Richard R.R.*, 567 F. Supp. 2d at 950. IDEA also requires that a LEA respond to a request for a special education evaluation and set timelines for doing so. There was no evidence of any request for an evaluation by the Student’s mother in this case.

The question then is whether there was sufficient information concerning the Student that would give the District cause to suspect that Student had a qualifying disability under IDEA that required special education. No evidence of a disability was presented to the District and no evidence of a disability was presented at the hearing. And in fact, it was noted by the District’s experienced LSSP that at the time she observed the Student, in February 2023, that Student’s behavior was not indicative of a disability. Importantly, the evidence also showed that the Student’s parent and relative advising her were adamant that the behavior in question did not occur elsewhere.

It appears that Petitioner is relying on the Student’s conduct as the reason the District should have suspected a disability and the need for specially designed instruction. Case law however, holds that issues such as mixed academic success, disciplinary history and behavior challenges “do not, *ipso facto* signify a disability.” *Leigh Ann H. v. Riesel Indep. Sch. Dist.*, 18 F.4<sup>th</sup> 788, 797 (5<sup>th</sup> Cir. 2021). As in *Riesel*, in this case there was no evidence presented as to how the Student’s conduct related to a disability.

Notwithstanding the lack of evidence of a disability, the District did proceed with initiating the special education evaluation process. So, in examining the time frames in this case, it is first important to note that the total time that the Student attended school in the District was \*\*\* school days – assuming there were no absences. And during that time, it is unclear just when Petitioner thought that Child Find was triggered; that is, when the District was on notice or suspected a disability. Certainly, that date cannot be the first day the Student attended class. Further, the evidence is clear that it was not on February \*\*\*, 2023 when the care team met and put into place RTIs, which is around the same date that Ms. \*\*\* made her observations. The time frame from the first day of school until the implementation of the RTIs was sixteen (16) school days. And from the initiation of the RTIs until the special education referral process began was another fourteen (14) school days. This time frame seems hardly unreasonable, especially in light of the fact that the Student’s parent was informing the District that Student was still having difficulty adjusting to the move, and that Student had never had issues or difficulties with Student’s behavior before, (although later the District learned that was on a tier support at the previous school). As there was no notice of a disability, it was quite reasonable to first implement strategies for addressing the Student’s maladaptive behavior, in the effort and hope that things may change and that Student would have a positive response to the implementation of RTI/MTSS. See 19 TEX. ADMIN. CODE § 89.1011(a).

And while certainly such interventions should not be used to delay or deny an evaluation, *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 209n.4 (5<sup>th</sup> Cir. 2019), in this case those interventions were only used a total of fourteen days before the referral process began. Additionally, the *O.W.* court, in noting that time was a factor, pointed out that it is also important to consider what the school district was doing during that time frame prior to the evaluation referral. That is, whether the District was taking proactive steps in moving toward an evaluation and assisting the Student. The court also noted that when interventions are not working, it is time to evaluate. *O.W.* at 795. In this case, however, the testimony from the Student’s own parent indicated that the interventions were working, particularly when Mr. \*\*\* was working with the Student on a 1:1 basis. Documents indicate that as of February \*\*\*, 2023, the Student was making progress, as it was noted on that date that Student was consistently demonstrating appropriate behaviors. After Mr. \*\*\* left, however, the Student’s behavior was inconsistent, and the District very quickly made the referral for a special education evaluation on March \*\*\*, 2023. The record is also clear that during this entire time, the District was gathering information about the student’s behavior in an attempt to determine what the causes may be.

Finally, and important to note, was that during this time, the District staff was intensely working with the Student in a variety of ways. As noted by the *Abington* court, the measures taken to assist the Student in the “classroom militate against a finding of a Child Find violation”. The evidence shows numerous interventions, reinforcements, and other efforts were made by

the District to help the Student. In addition, the District was actively gathering information that would inform any evaluation.

**B. Claim for Denial of FAPE**

In this case as noted, the burden on Petitioner to demonstrate that the Student had a qualifying disability and, by reason of that disability, needed specially designed instruction and related services. There is nothing in the record demonstrating that the Student has a qualifying disability or is eligible for special education. In such an instance, a school district does not deny FAPE. In this case then, as IDEA eligibility was not established, the District did not deny the Student FAPE.

**C. Procedural Considerations**

Petitioner also claims that Respondent committed procedural violation of IDEA, in addition to the Child Find claim. In order for a procedural violation to rise to the level of a denial of FAPE, such violation must impede the Student's right to FAPE; impede parental participation; or cause educational deprivation. 34 C.F.R. § 300.513 (a)(2). The evidence fails to support Petitioner's claims that the Student's parent was not involved collaboratively with the District. The Student's parent was very involved with her \*\*\* schooling. In fact, the evidence showed that the Student's mother experienced a great deal of participation and involvement throughout the time Student was enrolled in the District, and that the District was quite collaborative with the mother.

In essence, no violations of IDEA were established, and the evidence clearly demonstrated that the District did not violate its Child Find obligation. In summary, the Petitioner did not meet Petitioner's burden of proving the school district violated student or parental substantive or procedural rights under the IDEA.

**VII. Conclusions of Law**

1. The New Caney Independent School District (NCISD) is responsible for properly identifying, evaluating, and serving students under the provisions of IDEA, 20 U.S.C. §§1412 and 1414; 34 C.F.R. §300.301, and 19 TEX. ADMIN. CODE §89.1011.
2. Petitioner failed to carry the burden of proof to establish a violation of IDEA or a denial of FAPE. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984).
3. Petitioner did not meet the burden of proof on the claims asserted against the District in this case, as the burden is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005).



4. Petitioner failed to prove that the District violated its Child Find duties. 34 C.F.R. §300.111.
5. Petitioner did not meet the burden of proving the Student is a child with a disability who is eligible for special education and related services under the IDEA. 34 C.F.R. §300.8.
6. Petitioner did not prove the District failed to work collaboratively with the Student's mother. *Schaffer*, 546 U.S. at 62; 34 C.F.R. §300.501(b)(c); 34 C.F.R. §300.322.

### **ORDERS**

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

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

All other relief not specifically stated herein is DENIED.

Signed this 6<sup>th</sup> day of July 2023.

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Kimberlee Kovach

Special Education Hearing Officer for the  
State of Texas

### **NOTICE TO THE PARTIES**

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