

STUDENT, B/N/F GUARDIAN,

Petitioner,

V.

DALLAS INDEPENDENT SCHOOL DISTRICT,

Respondent.

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BEFORE A SPECIAL EDUCATION

HEARING OFFICER

FOR THE STATE OF TEXAS

**FINAL DECISION OF THE SPECIAL EDUCATION HEARING OFFICER
IN NON-EXPEDITED CASE**

**I.
PROCEDURAL HISTORY**

On April 5, 2024, ***, (“Petitioner” or “Student”) b/n/f ***, (“Guardian” or “****”) filed a Complaint with the Texas Education Agency (“TEA”) against Dallas Independent School District (“Respondent” or “District”), requesting an impartial Due Process Hearing, pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”). On April 8, 2024, TEA assigned this matter to me as the impartial Special Education Hearing Officer (“SEHO”) and sent a copy of the Complaint and Notice of Filing to Respondent. Petitioner asserted that the following issues constitute a denial of Petitioner’s receipt of a free, appropriate public education (“FAPE”) between:

1. Respondent failed to conduct Student’s Full and Individual Initial Evaluation (“FIIE”) timely following the Guardian’s request in June 2023;
2. Following an Independent Educational Evaluation (“IEE”) completed in February 2024, Respondent failed to convene Student’s Admission, Review, and Dismissal Committee (“ARDC”) in a timely manner and to develop an appropriate Individualized Educational Program (“IEP”);
3. Respondent failed to develop an IEP scheduling compensatory services between the time Student requested the FIIE, June 2023, and the ARDC meeting scheduled for April ***, 2024.

Petitioner requested the following relief as remedies for Respondent's alleged FAPE failures:

1. Tutoring conducted by an outside provider;
2. Counseling conducted by an outside provider; and
3. Reimbursement of education supplies.¹

II. PROCEDURAL HISTORY

Student filed Student's Complaint with TEA on April 5, 2024, and TEA referred the Complaint to the undersigned SEHO on April 8, 2024. On April 12, 2024, the undersigned issued the Initial Scheduling Order, which scheduled the hearing and attendant deadlines in compliance with IDEA's non-expedited timelines: Prehearing Conference ("PHC"): May 7, 2024, at 10:30 a.m.; Disclosures: May 16, 2024; Due Process Hearing: May 23, 2024; and Decision: June 22, 2024.

On April 16, 2024, Respondent reported that the Parties waived the Resolution Session as well as mediation. The undersigned immediately informed the Parties that this waiver could terminate the Resolution Period and start the Hearing Period on April 17, 2024. Under this timeline, the Final Decision would be due on, or before, May 31, 2024. The undersigned requested the Parties' response to this request. The Parties did not respond to the SEHO's request at this point.

On April 23, 2024, Respondent filed its Plea to the Jurisdiction, Answer to Complaint, and Notice of Insufficiency. Following a review of the Respondent's April 23, 2024, Notice of Insufficiency, the undersigned issued Order No. 2: Denying Respondent's Notice of Insufficiency.

On May 7, 2024, the Parties convened the PHC as scheduled in the Initial Scheduling Order. In attendance were the following: (1) ***, Petitioner's Guardian; (2) Ms. Rebecca Bradley, Respondent's Counsel; (3) Dr. ***, Respondent's Executive Director for Special Services; (4) the undersigned SEHO; and (5) the court reporter, who made a record of the PHC. The Parties discussed the issues and agreed to maintain the Due Process Hearing deadlines as set forth in the Initial Scheduling Order: Disclosures – May 16, 2024; Due Process Hearing – May 23, 2024; and Decision Deadline – June 22, 2024.

On May 16, 2024, the Parties produced their respective exhibits, witness lists, and exhibit lists. Respondent included ***, Petitioner's Guardian, as a potential witness "as part of Respondent's presentation in the [case]." The Guardian responded by filing Petitioner's Motion to Remove and Exclude Respondent's Witnesses, asserting that the Guardian, ***, would be a witness representing the Student in Petitioner's case-in-chief and did not agree that Guardian could be called as a witness for the District. Respondent filed a timely response to Petitioner's Motion, asserting that Petitioner misunderstood the practical implications of Respondent's including Guardian on Respondent's witness list.

¹ Petitioner pled two additional issues over which a Special Education Hearing Officer has no jurisdiction under the facts of this case: (1) all the Guardian's ***, and (2) admonishment of the District's administration to address Student's issues so this does not happen again.

On May 21, 2024, the undersigned issued Order No. 3: Order Confirming Due Process Hearing Deadlines Following a Prehearing Conference and Defining Scope of Petitioner's Testimony. By this Order No. 3 the undersigned explained that the Respondent could cross-examine Guardian while Guardian provided Guardian's own testimony in Guardian's case in chief.

The Due Process Hearing convened as scheduled on May 23, 2024, and ended on that day. Following the Hearing, the Parties and Hearing Officer discussed post-hearing deadlines. In light of the fact that the SEHO ordered the Parties to present post-hearing briefing following their receipt of the Record from the Court Reporter, the Parties requested that the Decision Deadline be maintained as June 22, 2024. Counsel for Respondent requested a continuance of the May 31, 2024, Decision Deadline to June 22, 2024, based upon the briefing deadlines and delivery of the record of the hearing. Finding good cause, the undersigned concurred with the requested continuance and maintained the June 22, 2024, Decision Deadline.

III. DUE PROCESS HEARING

Both Parties made their Disclosures timely. The SEHO convened a ZOOM Due Process Hearing on May 23, 2024. The Parties' Exhibits were admitted; the Parties called witnesses, who presented direct testimony and were cross-examined by the opposition.

During the Hearing, the Parties were represented as follows: (1) Petitioner was represented by ***, Petitioner's Guardian; (2) Respondent was represented by Ms. Rebecca Bradley, Respondent's attorney. In attendance some, or all, of the time were (3) Dr. ***, Respondent's Executive Director of Special Services; (4) Ms. ***, Respondent's Deputy General Counsel; (5) Ms. ***, Respondent's In-House Counsel; and (6) Ms. ***, Respondent's Critical Case Coordinator. At the conclusion of the Hearing, the Parties agreed to file and serve their Closing Arguments on, or before, June 17, 2024. On May 31, 2024, the undersigned issued Order No. 4, which set the agreed Decision Deadline of June 22, 2024. Both Parties filed their Closing Arguments timely. The Decision Deadline remained June 22, 2024. The Decision is issued on June 22, 2024.

IV. RESOLUTION SESSION

The Parties waived the Resolution Session and mediation. As such, the Decision Deadline was shortened to May 31, 2024, to accommodate the reduced Resolution Period. Based upon a good-cause finding, the Decision Deadline was continued to June 22, 2024, per Respondent's Motion for Continuance and the original scheduling order.

**V.
FINDINGS OF FACT ²**

1. Student is ***-year-old *** who is enrolled in the District, where Student attends *** (“***”), Student’s zoned school [R7.1]. Student has attended *** since Student’s *** school year 2017-18 [R7.3].
2. During Student’s *** school year, the District performed a Full and Individual Initial Evaluation (“FIIIE”) at the request of Student’s Guardian. At the time, Student was *** years old. The FIIIE Report was issued on December ***, 2017. Based upon multiple sources of data from the Guardian; Student’s teachers; review of educational records, observations, and assessment information, the Multidisciplinary Team (“MDT”) determined that Student did not meet the disciplinary criteria for special education services [R6.10]. The results of the evaluation indicated that Student’s early cognitive ability and achievement were within the average range [P1.3; R1.3].
3. Student’s ARDC met on January ***, 2018, to review the results of the FIIIE [R1.1]. The ARDC reached consensus that Student did not qualify for special education and related services at that time. Student’s Guardian agreed with this determination [P1.14; R1.4].
4. In October 2022, Student’s Guardian requested another evaluation for special education and related services. The Guardian expressed concerns related to Student’s behavior, cognitive abilities, and a specific learning disability in reading. The District failed to respond in a timely manner to the Guardian’s evaluation request. The Guardian contacted the District in spring 2023 requesting information about the status of the evaluation. When no information was provided, on May ***, 2023, the Guardian filed a Complaint with TEA, asserting that six (6) months had passed without any action on the requested evaluation and that Student was being denied FAPE [P4].

TEA’s June*, 2023, Special Education Complaint Investigative Report:**

5. On June ***, 2023, TEA issued its Special Education Complaint Investigative Report, which determined that the District was not compliant with 34 C.F.R. §300.111 and 19 TEX. ADM. CODE §89.1011. Specifically, TEA found that the District did not ensure that it identified, located, and evaluated Student as required by federal and state law [R15].
6. TEA ordered the District to take corrective action: (a) within five calendar days of TEA’s Report, the District had to provide Student’s Guardian with prior written notice and the opportunity to sign consent for the Student’s special education evaluation; (b) if consent was obtained, the District had to expedite the evaluation and complete it no later than September ***, 2023; (c) within thirty calendar days of the evaluation report, Student’s ARDC had to meet and determine the Student’s eligibility for special education; and (d) if appropriate, the ARDC must develop an IEP and determine Student’s placement [R15.4].
7. The District notified Student’s Guardian of the need to schedule a meeting to discuss policy and

² References to the Due Process Hearing Record are identified as follows: “T#.#” refers to the one-volume Court Reporter’s Transcription of testimony made on May 23, 2024, and the specific volume, page, and line numbers contained therein; “P#.#” refers to Petitioner’s Exhibits by number and page; “R#.#” refers to Respondent’s Exhibits by number and page.

procedures and to obtain signed, informed consent for the evaluation. The District initiated contact with the Guardian on June ***, 2023, to schedule the consent meeting. Through the rest of June, all of July, and all of August, scheduling efforts with the Guardian were futile [R8 & 9]. Finally, the Parties set September ***, 2023, as the date for the face-to-face meeting to obtain the Guardian's written consent. The Guardian provided signed consent on that day.

8. During this time, Student's Guardian informed the District that Student had been diagnosed with attention deficit, hyperactivity disorder ("ADHD") by Student's physician. The Guardian provided some supporting paperwork, but the District informed Guardian that if the ARDC were to consider an Other Health Impairment ("OHI") disability category for Student's ADHD, the physician was required to complete a Physician Information Report, *i.e.*, the physician would need the Guardian's executed Consent for Disclosure of Confidential Information Form [R10.2]. Student's Guardian refused to provide consent for the District to access Student's medical records [R10.2].
9. Upon receipt of the Guardian's September ***, 2023, consent for the FIIE, the District conducted the evaluation and delivered its Report on November ***, 2023 [R7.1].

Fall 2023 FIIE:

10. Student's MDT consisted of qualified professionals, such as a Licensed Specialist in School Psychology ("LSSP"), an Educational Diagnostician, a Board-Certified Behavior Analyst ("BCBA"), a Speech Therapist/Speech-Language Pathologist, and the Lead Dyslexia Evaluator (R7.1).
11. The MDT assessed Student using formal and informal evaluations. Student's FIIE consisted of evaluations in the areas of Health, Physical, Emotional, Behavior, Academic Achievement, Developmental, Functional Intellectual, Adaptive Behavior Vocation, and Speech and Language.
12. **HEALTH/PHYSICIAN:** The school nurse reported that Student appeared to exhibit signs of ADHD as a health or medical problem. The nurse likewise reported that the Dallas ISD Health Information Form stated that Student had been diagnosed with ADHD and was taking medication at home but not at school [R7.5]. On, or about, September ***, 2023, Student's Guardian provided a copy of a report prepared by Student's physician, which identified the following medical diagnoses: ADHD, combined type; hyperactivity, inattention; *** (R7.5). The District attempted to garner the Guardian's consent for the release of medical information, which Guardian refused to supply.
13. The assessor determined that Student appeared to have one or more health problems, which adversely affected Student's ability to benefit from Student's education. Because the Guardian never provided consent for disclosure of needed confidential information, the District could not obtain a Physician's Information Report; accordingly, an OHI determination could not be effected under the pending FIIE (R7.6).
14. **EMOTIONAL/BEHAVIOR:** The District conducted a Functional Behavioral Assessment ("FBA"). The assessors used direct and indirect assessments; interviewed many of Student's *** grade teachers and the Assistant Principal; analyzed evaluation forms prepared by Student's Guardian (the Parent Input for Student Evaluation) and teachers; the BCBA observed Student four times over two days for thirty minutes each time in class, as well as *** [R7.6].

15. Student's teachers and Assistant Principal reported no significant behavior issues. At times Student did not follow directions and Student moved around during class. The assessor's observation of Student resulted in no observed significant behavior issues. She observed that at times Student would *** when the teacher was not watching; Student exhibited off-task behaviors in *** class; and in *** class, when a substitute teacher was in charge, Student did not sit in Student's assigned seat but Student ***; when Student's *** teacher was in charge of the class, the assessor observed none of these activities.
16. The FBA revealed that the function of Student's behaviors seems to be attention seeking, and these behaviors neither impact Student's ability to learn nor prevent other students in Student's class from learning [R7.7].
17. **ACADEMIC ACHIEVEMENT/DEVELOPMENTAL/FUNCTIONAL:** Student's assessors utilized multiple sources of data in evaluating Student's achievement: Guardian information; school records; teacher information; and class observations. Student's teachers rated Student below average/poor on Student's grades, written expression, math skills, classroom work, test performance, and following written directions. They likewise rated Student below average/poor on reading skills, homework, and organizational skills when completing tasks. Student's teachers noted that Student has trouble comprehending word problems and numerical concepts. Student struggles with basic fluency dealing with two operations, ***. Student struggles with poor calculation skills. Overall, Student was not performing academically in the classroom in a manner that was commensurate with current academic standards [R7.8].
18. Student's assessors utilized several standardized tests in evaluating Student's achievement: the Quick Phonics Screener-Second Edition ("QPS"); Gray Oral Reading Tests-Fifth Edition ("GORT-5"); Woodcock-Johnson-IV: Tests of Achievement ("WJ-IV ACH"); Woodcock-Johnson-IV: Tests of Oral Language ("WJ-IV OL"). These assessments revealed that Student performed in the below average range in written expression; well below average in math calculations and math problem solving; extremely below average in oral expression, listening comprehension, basic reading skills, reading fluency, and reading comprehension (R7.12].
19. **INTELLECTUAL/ADAPTIVE BEHAVIOR/VOCATIONAL:** Student's assessors relied upon information from Student's Guardian and teachers; classroom observations; a review of Student's school records; and the administration of standardized tests: Woodcock-Johnson-IV Tests of Cognitive Abilities ("WJ-IV"); Comprehensive Test of Phonological Processing ("CTOPP-2"); and Differential Ability Scales-2nd Edition (DAS-II) (R7.7). These evaluations revealed that Student's cognitive abilities measured from below average to extremely below average.
20. **SPEECH AND LANGUAGE:** Student's assessors relied upon Guardian and teacher information; review of Student's school records; direct observations of Student; and several standardized assessments to address concerns with speech and expressive language skills: the Clinical Evaluation of Language Fundamentals, Fifth Edition ("CELF-5") and the Comprehensive Assessment of Spoken Language-Second Edition ("CASL-2"). These assessments revealed that Student's oral peripheral mechanism, speech sound production/articulation, speaking fluency, and vocal skills are within normal limits. However, Student's language skills fell below normal limits. Student's speech

was intelligible, but Student demonstrated difficulties with word finding and verbal organization to explain Student's thoughts and ideas. Standardized testing indicated Student has below average/deficient in receptive and expressive language skills [R7.22].

21. While Student did not meet the criteria for a Specific Learning Disability ("SLD"), including Dyslexia, Student did manifest cognitive deficits in Comprehension-Knowledge, Fluid Reasoning, Short-Term Memory, Long-Term Retrieval, Auditory Process, Visual Processing and Processing Speed, Basic Reading, Reading Fluency, Reading Comprehension, Math Calculations, Math Problem Solving, Written Expression, Oral Expressions and Listening Comprehension.
22. Based upon formal and informal evaluation data, Student's language deficits have an adverse effect on education/functional performance resulting from a communication disorder. Additionally, records indicated Student needed specialized instructional services in the areas of reading and math. Accordingly, Student's MDT recommended that Student's ARDC consider that Student meets the eligibility criteria for Speech Impairment [R7.24].
23. In conducting its evaluations of Student, the District used technically sound instruments to assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The District used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about Student and did not use any single measure as the sole criterion for determining the Student's eligibility and developing Student's educational program.
24. The District's assessments and other evaluation materials used to assess Student were selected and administered so as not to be discriminatory on a racial or cultural basis; were provided and administered in the Student's language (English); were used for the purposes for which the assessments or measures are valid and reliable; were administered by trained and knowledgeable personnel; and were administered in accordance with instructions provided by the producer of the assessments.
25. The District assessed Student in all areas of suspected disabilities but for an OHI disability related to Student's ADHD, ***, and **. Petitioner's Guardian prevented analysis for an OHI qualification because Guardian refused to provide the District with signed consent.
26. Notwithstanding the OHI issue, the District's evaluations were sufficiently comprehensive to identify all of Student's needs. The District's assessment tools and strategies provided relevant information that directly assisted Student's ARDC in determining Student's educational needs.

The November *, 2023, ARDC Meeting:**

27. In early November 2023, the District contacted Student's Guardian and provided several available dates for convening the ARDC to review Student's FIIE. At first, Guardian agreed to meet with the ARDC on November ***, 2023. However, on November ***, 2023, Guardian notified the District that Guardian would not be attending the ARDC meeting, and Guardian would not be providing consent for special education services [R11.16]. Guardian requested that the District approve Guardian's request for an Independent Educational Evaluation ("IEE") [R11.16].

28. Student's ARDC met on November ***, 2023, as scheduled. Student's Guardian did not attend or participate in any way.
29. The ARDC addressed the corrective measures ordered by TEA on June ***, 2023, because of Student's May 5, 2023, Complaint. The ARDC developed a plan to provide Student with compensatory services to address the delay in the evaluation: (a) direct pull-out math services for thirty (30) minutes two (2) times per week through the remainder of the 2023-24 school year; (b) direct pull-out reading services for thirty (30) minutes two (2) times per week through the remainder of the 2023-24 school year; and (c) direct pull-out speech therapy services for five hundred forty (540) minutes for the remainder of the 2023-24 school year [R4.28].
30. The ARDC reviewed Student's FIIE and determined that Student qualified for special education and related services for speech impairment in the areas of receptive and expressive language. The Committee noted that because the Guardian refused to provide consent, the District was denied access to the Physician's Information Report that diagnosed Student with ADHD, combined type; hyperactivity, inattention; *** (R4.35).
31. The ARDC reviewed Student's Present Levels of Academic Achievement and Functional Performance ("PLAAFP") [R4.35]. The Committee determined that Student did not require a Behavior Intervention Plan ("BIP") at that time because Student's behavior did not impede Student's learning or the learning of others. The ARDC determined that Student did not need Assistive Technology ("AT"). The Committee prepared accommodations for Student to enable Student's progress in the general education curriculum. The Committee placed Student in the general education classroom with direct speech services and in-class support in *** [R4.35].
32. On November ***, 2023, the District sent the Guardian a copy of the proposed IEP and a consent form for special education services. Guardian responded within minutes that Guardian did not agree with the findings and would not give consent for special education services [R12.1].
33. The District agreed to provide the IEE, at public expense, requested by Petitioner on November ***, 2023.

The February *, 2024, IEE:**

34. Petitioner provided the District with a copy of the IEE on February ***, 2024. On that same date Petitioner requested an ARDC meeting to review the IEE. Petitioner again requested the meeting on March ***, 2024. The District responded that it was in the process of setting up the meeting, but the pending spring break necessitated scheduling the meeting for the week of March ***, 2024. On March ***, 2024, Petitioner made Petitioner's third request for the meeting to review the IEE. At that time Petitioner provided the District with an executed OHI form [R18.1]. The District responded that day informing Guardian that the meeting was set for April ***, 2024. Guardian then requested that the meeting be moved to April ***, 2024; however, Guardian provided additional dates if the District had conflicts: April ***. The District canvassed the committee members and set the meeting for April ***, 2024 [R14.1-14].
35. On April 5, 2024, Student filed this pending Request for Due Process Hearing. Guardian sent a copy of the Request and informed the District that Guardian was invoking stay put [R.14.14].

Child Find:

36. The District's child-find obligation to evaluate Petitioner was triggered in October 2022 when the Student filed a request for an FIIE.
37. The District did violate federal and state statutes when it failed to respond to Petitioner's request for an FIIE until Petitioner filed Student's Complaint with TEA on May 5, 2023. However, the District complied with TEA's required corrective action when it contacted Petitioner on June ***, 2023, to set a consent meeting to begin the FIIE process.
38. Petitioner caused the delay in completing the FIIE by September ***, 2023, by failing to provide written consent for the FIIE until September ***, 2023.
39. Petitioner caused the delay in convening the ARDC meeting until November ***, 2023.
40. Petitioner's failure to attend the scheduled ARDC meeting on November ***, 2023, and denial of consent for special education services caused the delay in implementing Student's IEP during school year 2023-24.
41. The District complied with its child-find duty when it completed Petitioner FIIE in November 2023.

FAPE:

42. Student's November ***, 2023, IEP was individualized on the basis of Student's assessment and performance.
43. Student's November ***, 2023, IEP would have been administered in the LRE.
44. Analysis of whether Student's services would be provided in a coordinated and collaborative manner and whether Student would demonstrate positive academic and non-academic benefits is premature. Petitioner's failure to allow the District to implement the IEP prevents a clear analysis of these two factors.
45. The District's delay in scheduling an ARDC meeting to review Petitioner's February ***, IEE was not a FAPE violation. Both Parties requested rescheduling of this meeting until the agreed date of April ***, 2024, was determined.
46. Petitioner's April 5, 2024, filing of the current due process proceeding precluded the ARDC's review of Student's IEE.
47. Petitioner failed to prove any exception to the two-year Statute of Limitations. Accordingly, the applicable Statute of Limitations accrued on April 5, 2022.

V. DISCUSSION

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 (5th Cir.2009). 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 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 762-63 (*citing Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 249 (5th Cir. 1997); *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1010-11 (5th Cir. 2010).

A. DUE PROCESS HEARING ISSUES

1. Statute of Limitations:

In Student's original Complaint, Petitioner alluded to problems with (1) Student's 2017 allegedly inappropriate FIIE, which found Student ineligible for special education services; and (2) Student's failure to make academic progress since school year 2017-18. In Student's Closing Brief, Petitioner argued that from school year 2017-18 to the present, the District has failed to provide Petitioner with an appropriate FIIE and IEP, thereby denying Student FAPE since ***. As such, Petitioner should be allowed to seek remedies for IDEA violations since Petitioner was *** years old.

Under IDEA a parent may file a due process complaint on any matter relating to the identification, evaluation, or educational placement of a child with a disability or the provision of a free, appropriate public education (FAPE) to the child within two years from the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. § 1415 (b)(6)(f)(3)(C); 34 C.F.R. §§ 300.503 (a)(1)(2); 300.507 (a)(1)(2). The two-year limitations period may be more or less if the state has an explicit time limitation for requesting a due process hearing under IDEA. In that case the state timelines apply. 20 U.S.C. §1415 (f) (3) (C); 34 C.F.R. § 300.507 (a) (2). Texas has an explicit statute of limitations rule. In Texas, a parent must file a request for a due process hearing within two (2) years of the date he or she knew or should have known about the alleged action that serves as the basis for the hearing request.

The IDEA only allows two limited exceptions to the statute of limitations, which are not supported by the evidence here. It is only where a parent was prevented from filing a due process complaint due to (1) specific misrepresentations by the District that it had resolved the problem forming the basis of the due process complaint or (2) the District's withholding of information from the parent that it was required under IDEA to provide to the parent. 20 U.S.C. § 1415 (f) (3) (D); 34 C.F.R. § 300.511 (f) (1) (2). Neither of these two exceptions obtains here.

The first exception requires evidence that the District made specific misrepresentation that it resolved the problems. The misrepresentation must be intentional or flagrant. Petitioner must establish not that the school district's educational program was objectively inappropriate but instead that the school district subjectively determined Student was not receiving a FAPE and intentionally and knowingly misrepresented that fact to the student's parents. *D.K. v. Arlington Sch. Dist.*, 2012 U.S. App. LEXIS 21060 (3d Cir. 2012).

Furthermore, not any misrepresentation triggers the exception. Instead, the misrepresentation must be such that it prevents the parent from requesting a due process hearing regarding claims that would otherwise be time-barred. *C.H. v. Northwest Ind. Sch. Dist.*, 815 F. Supp. 2d 977, 984 (E.D. Tex. 2011); *G.I. v. Lewisville Ind. Sch. Dist.*, 2013 U.S. Dist. LEXIS 120156 (E.D. Tex. 2013).

The second exception requires evidence that the District withheld information "[r]equired [under IDEA] to be provided to the parent," such as the requirement to provide parents with a copy of procedural safeguards. *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp.2d 918, 943 (W.D. Tex. 2008). See *C.H. ex rel. C.H. v. Northwest. Indep. Sch. Dist.*, 815 F. Supp. 2d 977, 986 (E.D. Tex. 2011) "The rationale for the exception is that a local education agency's withholding of procedural safeguards would act to prevent parents from requesting a due process hearing ... until such a time as an intervening source apprised them of their rights. *T.C. v. Lewisville Indep. Sch. Dist.*, 4:13CV186, 2016 WL 705930 (E.D. Tex. Feb. 23, 2016).

The United States Department of Education left it to hearing officers to decide on a case-by-case basis the factors that establish whether a parent knew or should have known about the action that is the basis of the hearing request. 71 Fed. Reg. 46540, 46706 (Aug. 14, 2006).

In this case, Petitioner presented no probative evidence to support either exception. Accordingly, the applicable timeline for this case is April 5, 2022-April 5, 2024.

2. 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(9th 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 assessed 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 is in need of 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 (5th Cir. 2007); 34 C.F.R. §300.111 (a)(1); *Carrollton-Farmers Branch Ind. Sch. Dist.*, 113 LRP 14998 (SEA Tex. 2013).

Educational need is not strictly limited to academics but also includes behavioral progress and the acquisition of appropriate social skills as well as academic achievement. *Venus Ind. Sch. Dist. v. Daniel S.*, 2002 U.S. Dist. LEXIS 6247 (N. D. Tex. 2002). While the achievement of passing marks and the advancement from grade to grade is important in determining educational need, it is but one factor in the analysis. *Bd. of Hendrick Hudson Int. Sch. Dist. v. Rowley*, 458 U.S. 176, 207, n. 28 (1982).

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 as a result 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.).

In the instant case, the evidence shows that the District did not violate its child find obligations with respect to Student.

a. Respondent’s “Child Find” Obligation Was Not Triggered Until October 2022:

The 2017 FIIE determined that Student did not present with a qualifying disability that required special education and related services. Throughout the ensuing school years, 2018–23, Student did not demonstrate a need for special education services. Student’s teachers reported no serious behavior problems, although Petitioner did show some inattention and wandering around the classroom; Petitioner was easily redirected; Student’s grades were average but low in the areas of ***. Petitioner passed each year into the next grade level [R7.3].

In October 2022, Petitioner’s Guardian requested a second FIIE. This is the day Respondent’s child-find obligation was triggered.

b. After the TEA Complaint Report, the District Evaluated Student in a Timely Manner: ³

There is no debate that the District failed to evaluate Petitioner in a timely manner following Petitioner’s request for an FIIE in October 2022. On June ***, 2023, TEA issued its Special Education Complaint Investigative Report, which determined that the District did not ensure that it identified, located, and evaluated Student as required by federal and state law [R15].

TEA ordered the District to take corrective action: (a) within five calendar days of TEA’s Report, the District had to provide Student’s Guardian with prior written notice and the opportunity to sign consent for the Student’s special education evaluation; (b) if consent was obtained, the District had to expedite the evaluation and complete it no later than September ***, 2023; (c) within thirty calendar days of the evaluation report, Student’s ARDC had to meet and determine the Student’s eligibility for special education; and (d) if appropriate, the ARDC must develop an IEP and determine Student’s placement [R15.4].

The District immediately initiated contact with the Guardian on June ***, 2023, to schedule the consent meeting. Through the rest of June, all of July, and all of August, scheduling efforts with the Guardian were futile [R8 & 9]. Finally, the Parties set September ***, 2023, as the date for the face-to-face meeting to obtain the Guardian’s written consent. The Guardian provided signed consent on that day.

³ The following discussion concerns issues related to Student’s November 2023, FIIE. Based upon the authorities and findings set out above, no child find issue relates to Petitioner’s October 2017 FIIE.

The fact that the District was unable to coordinate the consent meeting until September ***, 2023, resulted in the District's inability to meet the September ***, 2023, deadline for completing the FIEE. This fact rests on the shoulders of the Guardian, not the District.

c. After the TEA Complaint Report, the District Evaluated Student in an Appropriate and Comprehensive Manner:

Once the District received the Guardian's written consent for the FIEE, the District expedited Student's FIEE and issued its Report on November ***, 2023 [R7.1]. The Guardian was concerned about Student's reading, behavior attributed to Student's ADHD, and Student's cognitive abilities.

The evidence presented indicates that all aspects of the District's FIEE were appropriate and the FIEE met all the regulatory requirements for an appropriate evaluation. The evaluators were appropriately credentialed and had significant years of combined experience. The assessment used a variety of tools and strategies to gather relevant functional, developmental, academic, and parent information. No single measure or assessment tool was used as the sole criterion for determining Student's educational needs. The FIEE included technically sound instruments to assess cognitive, academic achievement, behavioral, physical, and developmental factors. The FIEE included assurances that the assessment and evaluation materials were selected and administered so as not to be discriminatory on a racial or cultural basis and were provided and administered in the Student's native language. The FIEE assured us that the assessments and evaluation materials were used for the purposes for which they were valid and reliable. They were administered in accordance with the instructions by trained and knowledgeable educational personnel.

The District assessed Student in all areas of suspected disabilities but for the OHI assessment.⁴ The District's evaluations were sufficiently comprehensive to identify all of Student's needs for special education and related services. The District's assessment tools and strategies provided relevant information that directly assisted Student's ARDC in determining Student's educational needs.

3. FAPE:

IDEA defines FAPE as special education and related services that (1) are provided at public expense; (2) meet the standards of the state education agency; (3) include an appropriate preschool, elementary school, or secondary school education in the state involved; and (4) are provided in conformity with an IEP that meets the requirements of 34 C.F.R. §§300.320-324.

The United States Supreme Court established a two-part requirement for determining whether a district has provided a student FAPE: (1) the district must comply with the procedural requirements of IDEA, and (2) the district must design and implement a program reasonably calculated to enable the child to receive an educational benefit. The Court defined "educational benefit" as one that is meaningful and that provides a "basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit to the handicapped child." *Hendrick Hudson Central*

⁴ The District learned of Student's diagnosis of ADHD, ***, and *** when in September 2023, the Guardian shared an informal report from Student's physician that diagnosed Student with ADHD, combined type; hyperactivity, inattention; ***, ***, and *** (R4.35). The District attempted to evaluate Student for an OHI disability and requested a copy of the Physician's Information Report, the legal standard for assessing OHI issues, but the Guardian refused to give consent for the release of Student's medical information on the Physicians' Information Report.

School District v. Rowley, 458 U.S. 175 (1982). In a more recent opinion, the Court affirmed that IDEA cannot, and does not, promise any particular educational outcome. *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 998 (2017). The correct standard for providing FAPE is the development of an IEP that is reasonably calculated to enable a student to make appropriate progress in light of the student's individual circumstances. *Id.* at 999.

a. The District Did Not Deny Student FAPE Under the Michael F. Factors:

In 1997, the Fifth Circuit established a four-factor test to determine whether a school district's IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA: (1) Is the program individualized on the basis of the student's assessment and performance?; (2) Is the program administered in the least restrictive environment ("LRE")?; (3) Are the services provided in a coordinated and collaborative manner by the key stakeholders?; and (4) Does the student demonstrate both positive academic and nonacademic benefits? *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 249 (5th Cir. 1997). These factors were re-affirmed by the Fifth Circuit as appropriate under, and consistent with, *Endrew F. E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018). These four factors need not to be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry.

The Michael F. analysis presupposes that an IEP has already been developed and implemented. At the time Student filed Student's Complaint, April 5, 2024, the ARDC had developed Student's IEP on November ***, 2023, but had not implemented it due to the Guardian's refusal to provide consent for the implementation of the IEP. Accordingly, conducting a Michael F. analysis is difficult under the record of this case.

(1). Student's November *, 2023, IEP was Individualized on the Basis of Student's Assessment and Performance and Would Be Administered in the LRE:**

It has already been determined that Student's FIIE assessed Student in all areas of suspected disabilities except for the OHI assessment precluded by the Guardian's refusal to provide consent; the District's evaluations were sufficiently comprehensive to identify all of Student's needs; the District's assessment tools and strategies provided relevant information that directly assisted Student's ARDC in determining Student's educational needs. Student's IEP was individualized to Student's needs, based on assessment data, performance, and reasonably calculated to allow Student to make progress appropriate in light of Student's unique circumstances.

The ARDC reviewed Student's FIIE and determined that Student qualified for special education and related services for speech impairment in the areas of receptive and expressive language. The Committee noted that because the Guardian refused to provide consent, the District was denied access to the Physician's Information Report that diagnosed Student with ADHD, combined type; hyperactivity, inattention; ***, ***, and *** (R4.35).

The ARDC reviewed Student's PLAAFPs [R4.35]. The Committee determined that Student did not require a BIP at that time because Student's behavior did not impede Student's learning or the learning of others. The ARDC determined that Student did not need AT. The Committee prepared accommodations for Student to enable Student's progress in the general education curriculum. The Committee placed Student in

the general education classroom with direct speech services and in-class support in *** [R4.35]. This program placement is the LRE for Student.

The ARDC also addressed the corrective measures ordered by TEA on June **, 2023. The ARDC developed a plan to provide Student with compensatory services to address the delay in the evaluation: (a) direct pull-out math services for thirty (30) minutes two (2) times per week through the remainder of the 2023-24 school year; (b) direct pull-out reading services for thirty (30) minutes two (2) times per week through the remainder of the 2023-24 school year; and (c) direct pull-out speech therapy services for five hundred forty (540) minutes for the remainder of the 2023-24 school year [R4.28].

(2). Analysis of Whether Student’s Services Are Provided in a Coordinated and Collaborative Manner and Whether Student Would Demonstrate Positive Academic and Nonacademic Benefits is Premature:

As to the final two Michael F. factors, there is no evidence (1) to establish that Student’s IEP will not be provided in a coordinated and collaborative manner by the key stakeholders or (2) to demonstrate that Student will not garner both positive academic and nonacademic benefits.

Student’s services were planned in a coordinated and collaborative manner by the District’s key stakeholders. Student’s Guardian was invited to the November **, 2023, ARDC meeting and appeared to work with the District in scheduling the meeting; however, the Guardian ultimately declined to attend the meeting and declined to provide consent for the implementation of the Student’s IEP, thereby resulting in no special education services for Student during school year 2023-24.

The District accommodated the Parent’s request for assessments and meetings and provided the corrective action required by TEA timely and efficiently. Further the District readily agreed to Petitioner’s request for an IEE.

As to the fourth Michael F. factor, no evidence was presented to establish Student’s academic and non-academic benefits under the proposed IEP. Because Student has not been provided special education and related services due to the Guardians’ lack of consent, one would be forced to render speculation and hypothesis in analyzing this factor. Consequently, in reliance upon IDEA’s presumption favoring the education plan proposed by a school district and placing the burden of proof on the student challenging the plan, the District did not deny Student FAPE.

b. The District Did Not Deny Student FAPE Due to the Delay of the Review of Student’s IEE:

It is well-settled that if a parent disagrees with a district’s FIEE, the parent may request an IEE. 34 C.F.R. §300.502(b)(1). Once requested, the district must either file a Request for Due Process Hearing to show that the FIEE is appropriate or ensure that an IEE is provided at public expense. §300.502(b)(2). Once the IEE is completed, the district must consider it in making any decision related to a student’s FAPE. §300.502(c)(1).

Petitioner has alleged that the District denied Student FAPE when it failed to convene an ARDC meeting in a timely manner after receiving a copy of the IEE dated February **, 2024 [R14]. The evidence

established that the Guardian's delaying tactics in scheduling the meeting and the subsequent April 5, 2024, Complaint filing nullified Respondent's duty to review the IEE.

Student provided the District with a copy of the IEE on February ***, 2024. On that same date Student requested an ARDC meeting to review the IEE. Student again requested the meeting on March ***, 2024. The District responded that it was in the process of setting up the meeting, but the pending spring break necessitated scheduling the meeting for the week of March ***, 2024. On March ***, 2024, Student made Student's third request for the meeting to review the IEE. At that time Student provided the District with an executed OHI form [R18.1]. The District responded that day informing Guardian that the meeting was set for April ***, 2024. Guardian then requested that the meeting be moved to April ***, 2024; however, Guardian provided additional dates if the District had conflicts: April ***. The District canvassed the committee members and set the meeting for April ***, 2024 [R14.1-14].

On April 5, 2024, Student filed this pending Request for Due Process Hearing. Guardian sent a copy of the Request to the District and informed the District that Guardian was invoking stay put [R.14.14]. Guardian also declined to allow the ARDC to meet to review the IEE.

While there is no time restriction on reviewing an IEE, it is certainly appropriate that an ARDC meet as soon as possible to review the new assessments. Both sides had conflicting schedules that affected scheduling the ARDC meeting. The record reveals multiple email exchanges manifesting the efforts to get this meeting scheduled. Once it was scheduled on the agreed date of April ***, 2024, Petitioner filed a Complaint thereby blocking any ARDC meeting to review the IEE.

There is no denial of FAPE manifested by actions of the District. Petitioner's act of filing the Complaint stymied any ability on the part of the District to review the assessments.

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 bears the burden of proof at all times.
2. Petitioner failed to meet Petitioner's burden of proving that Respondent violated its child-find obligations. *Schaffer*, 546 U.S. at 62l; 20 U.S.C. §1412(a)(3); 34 C.F.R. §300.111; 19 TEX. ADMIN. CODE §89.1151 (c).
3. Petitioner failed to meet Petitioner's burden of proving that the District's FIIE was inappropriate. 34 C.F.R §300.304-306.
4. Petitioner failed to meet Petitioner's burden of proving that Student's IEP is not reasonably calculated to enable Student to make appropriate progress in light of Student's individual circumstances. *Andrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

5. Petitioner failed to prove that Student's November 2023 ARDC failed to develop a plan to provide Student with compensatory services as ordered by TEA.
6. Petitioner failed to prove that the delay in convening an ARDC meeting to review Petitioner's IEE violated FAPE.
7. Petitioner failed to prove either exception to the two-year Statute of Limitations. 19 TEX. ADMIN. CODE § 89.1151(c).

**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.

SIGNED this the 22nd day of June 2024.

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).

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