

# Before the State Office of Administrative Hearings

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STUDENT, BY NEXT FRIEND PARENT,  
PETITIONER  
v.  
AUSTIN INDEPENDENT SCHOOL DISTRICT,  
RESPONDENT

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## DECISION OF THE HEARING OFFICER

\*\*\*, (Student), by next friend \*\*\* (Parent and, collectively, Petitioner), brings this action against the Austin Independent School District (Respondent or District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, and its implementing state and federal regulations. The main issue in this case is Student's eligibility under the IDEA. The Hearing Officer concludes that Student is eligible under the IDEA in the category of other health impairment due to Student's \*\*\* but is not eligible due to Student's dysgraphia.

## I. DUE PROCESS HEARING

The due process hearing was conducted on March 5-7, 2024. The hearing was recorded and transcribed by a certified court reporter. Petitioner was represented throughout this litigation by their legal counsel, Yvonnilda Muniz with the Law Office of Yvonnilda Muniz, PC. Respondent was represented in this litigation by its attorneys, J. Erik Nichols and Matthew R. Acosta with Spalding Nichols Lamp Langlois. Dr. \*\*\*, the Director of Compliance and Operations for District, attended the hearing as District's party representative.

Respondent prepared 18 joint exhibits for the parties, all of which were admitted. Petitioner offered 37 exhibits, 33 of which were admitted over any objections and two of which were withdrawn by Petitioner.<sup>1</sup>

Petitioner offered the testimony of Daphne Corder, advocate for Petitioner; Dr. \*\*\*, a licensed specialist in school psychology (LSSP) who evaluated Student; \*\*\*, District Director of Evaluations for Special Education; Dr. \*\*\*, Student's homebound teacher; \*\*\*, District's Homebound Coordinator of Student Support Services; \*\*\*, a special education teacher with District; Dr. \*\*\*, District's Director of Compliance and Operations; Dr. \*\*\*, District's Director of Instructional Delivery and Inclusion; \*\*\*, an assistant principal at Student's school;

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<sup>1</sup> Petitioner's Exhibit (P. Ex.) 16 was not offered. P. Ex. 18 was excluded on relevancy grounds. P. Ex. 15 and P. Ex. 36 were withdrawn by Petitioner. For P. Ex. 5, only pages 63-70 were admitted. For P. Ex. 8, only the emails, not the attachments, were admitted, except for page 72, which was admitted. For P. Ex. 19- 32 the audio recordings only were admitted, not the transcripts.

Student, who testified on Student's own behalf; Student's Parent; and Dr. \*\*\*, Student's pediatrician.

Respondent offered 36 exhibits, all of which were admitted without objection. However, Respondent's Exhibits (R. Ex.) 35 and 36 were discovered after the hearing to be corrupted audio files and were subsequently excluded from evidence. Respondent did not call any additional witnesses. Both parties filed written closing briefs in a timely manner. The Decision of the Hearing Officer is due on April 19, 2024.

## **II. RELEVANT TIME PERIOD**

On June 6, 2022, the date this matter was filed, Texas had a one-year statute of limitations in these matters. 19 Tex. Admin. Code § 89.1151(c). Petitioner did not raise any exceptions to the statute of limitations, and therefore any claims that accrued before June 6, 2021 are barred. The Second Amended Due Process Complaint, filed without objection on October 9, 2023, included claims up to the current 2023-2024 school year. Therefore, the relevant time period in this matter is June 6, 2021 – the 2023-2024 school year.

## **III. ISSUES**

Petitioner raised the following IDEA issues for decision in this case:

1. Whether District failed to provide Student a free, appropriate public education (FAPE) during the 2020-2021 school year.

2. Whether District failed to provide Student a FAPE during the 2021-2022 school year.
3. Whether District failed to provide Student a FAPE during the 2022-2023 school year.
4. Whether District failed to propose and provide Student a FAPE during the 2023-2024 school year.
5. Whether District failed to identify and evaluate Student in violation of its Child Find obligation.
6. Whether District failed to conduct an evaluation in a timely manner.
7. Whether District failed to find Student eligible for special education and related services as a student with an other health impairment (OHI) under the IDEA.
8. Whether District failed to timely evaluate Student for special education and related services.
9. Whether District failed to evaluate Student in all areas of suspected disabilities.
10. Whether District failed to conduct an appropriate evaluation by using an outdated version of the Wechsler Intelligence Scale for Children.
11. Whether District failed to timely provide Student's parent a Notice of Procedural Safeguards.
12. Whether District failed to provide Student with an appropriate individualized education program (IEP) during the 2020-2021 school year.
13. Whether District failed to provide Student with an appropriate IEP during the 2021-2022 school year.
14. Whether District failed to provide Student with an appropriate IEP during the 2022-2023 school year.

15. Whether District is failing to provide Student with an appropriate IEP during the 2023-2024 school year.
16. Whether District failed to provide Student with an instructional day commensurate with that of students without disabilities.
17. Whether District failed to collaborate and allow Parent to meaningfully participate in the educational decision-making process.
18. Whether District failed to train staff working with Student on Student's disabilities.
19. Whether District violated Petitioner's rights under statutes other than the IDEA.

Petitioner requested the following items of relief:

1. An order requiring District to find Student eligible under the IDEA as a student with an OHI due to \*\*\* and \*\*\* due to dysgraphia.
2. An order directing District to develop IEP goals and objectives, including specialized instruction with appropriate modifications and accommodations, that are appropriately ambitious to meet Student's educational needs.
3. An order directing District to reimburse Parent for private tutoring services obtained during the 2021-2022, 2022-2023, and 2023-2024 school years.
4. An order directing District to provide a separate homebound teacher that can provide instruction in math at the level Student's courses require.
5. Compensatory services in all areas of academic concerns to address any missed educational opportunities that resulted from Student not receiving timely homebound instruction for the past two academic years.
6. An order directing District to expedite the assistive technology and

occupational therapy evaluations Parent consented to in May 2023, grant independent educational evaluations in both areas if Parent disagrees with the findings, and provide any recommended compensatory services.

7. Train all staff who worked with Student during the 2021-2022 and 2022-2023 school years and those working with Student during the 2023-2024 school year on Student's disabilities, including but not limited to dysgraphia, written expression, and \*\*\*.

8. Provide those who have been involved in the admission, review, and dismissal (ARD) committee process and the Section 504 meetings training on the difference between eligibility under the IDEA and Section 504.

9. An order directing District to pay for a private \*\*\* consultant who specializes in helping individuals with special needs to assist Student to \*\*\* that can meet Student's needs.

10. Such other and further relief the Hearing Officer deems just and proper.

#### **IV. FINDINGS OF FACT**

1. Student is \*\*\* years old and in the \*\*\* grade. Student has been enrolled in District at all times relevant to this dispute.<sup>2</sup>
2. Student is currently receiving services under Section 504 of the Rehabilitation Act of 1973 (Section 504) due to dysgraphia and \*\*\*.
3. Throughout the relevant time period, Parent and District staff regularly met to discuss Student's needs and accommodations in Section 504 meetings.<sup>3</sup>

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<sup>2</sup> Transcript Citation (Tr.) 11-12.

<sup>3</sup> Joint Exhibits (JE.) 1, 3, 5, 6, 9, 10, 11, 12.

4. District does not dispute that Student has dysgraphia and \*\*\*, or that dysgraphia and \*\*\* are qualifying disabilities under the IDEA. District, however, disputes that Student needs special education and related services as a result of these disabilities.<sup>4</sup>
5. Due to Student's \*\*\*, Student \*\*\*, normally \*\*\* hours a day, and \*\*\* easily, generally after 60 to 90 minutes.<sup>5</sup>
6. The parties stipulated that the relevant time period in this matter began on June 7, 2021.<sup>6</sup>
7. In \*\*\* grade, Student was identified as having dysgraphia. Dysgraphia is a neurodevelopmental disorder manifested by illegible and/or inefficient handwriting due to difficulty with letter formation. It is a result of deficits in graphomotor function and/or storing and retrieving orthographic codes. Secondary consequences may include problems with spelling and written expression.<sup>7</sup>
8. In \*\*\* grade, Student was diagnosed with a \*\*\*. Student was diagnosed with \*\*\* in \*\*\* grade and was given homebound services.<sup>8</sup>
9. Homebound services are an educational setting designed to provide instruction in the home or hospital to students with special health problems, temporary illness, or injuries that prevent their attendance on campus. The homebound program is constructed to help students keep up with their schoolwork during their absences from school due to medical

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<sup>4</sup> Tr. 65, Resp. Closing at 7.

<sup>5</sup> Tr. 255, 470, 478, 508, 540,

<sup>6</sup> Tr. 14. Because the initial complaint was filed on June 6, 2022, the statute of limitations bars claims that accrued before June 6, 2021. However, the one-day difference in the stipulated relevant time period and the statute of limitations period is not relevant in this matter.

<sup>7</sup> P. Ex. 10.

<sup>8</sup> P Ex. 7 at 3.

reasons in order that they may continue in their regular academic programs with as little loss as possible.<sup>9</sup>

10. Homebound services address core classes only, not \*\*\* classes.<sup>10</sup>
11. Due to not being able to complete Student's assignments on time, at the end of the semesters during the relevant time period Student was failing some of Student's classes. Student was allowed to complete missing assignments after the semester and Student's grades were changed to reflect the additional work submitted. Due to this, Student's grades do not accurately reflect Student's abilities, performance, or need for special education.<sup>11</sup>

### **2021-2022 School Year - \*\*\* Year**

12. On September \*\*\*, 2021, when Student was in \*\*\* grade, Student was diagnosed with \*\*\*. On September \*\*\*, 2021, Parent spoke to a District counselor about homebound services. Parent submitted a request for homebound services on or about October \*\*\*, 2021. Parent was informed that District was on hold to add any new students to homebound and Student would be placed on a waitlist.<sup>12</sup>
13. On October \*\*\*, 2021, Student was diagnosed with \*\*\*. District was notified of this diagnosis on October \*\*\*, 2021 via email from Parent.<sup>13</sup>
14. \*\*\* is also known as \*\*\*. Common symptoms of \*\*\* are \*\*\*

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<sup>9</sup> P Ex. 3; 19 Tex. Admin. Code § 89.1005(c)(2).

<sup>10</sup> Tr. 84, 255.

<sup>11</sup> Tr. 96, 257-258, 413, 527, 538.

<sup>12</sup> P. Ex. 8, R. Ex. 4.

<sup>13</sup> R. Ex. 1, P. Ex. 8 at 22.



\*\*\*. Student does not regularly exhibit \*\*\* but exhibits the other symptoms.<sup>14</sup>

15. On November \*\*\*, 2021, a Section 504 meeting was held and Student was found eligible to receive services due to \*\*\* and dysgraphia. Accommodations were added to allow Student to reduce or omit assignments when multiple absences occurred, to allow for reduced questions on tests and quizzes to show Texas Essential Knowledge and Skills (TEKS) mastery, and to allow Student extra time to complete assignments.<sup>15</sup>
16. On November \*\*\*, 2021, a Notice and Consent for Evaluation under Section 504 was provided to Parent by District. The notice stated that no formal testing was needed.<sup>16</sup>
17. Student began receiving homebound services on February \*\*\*, 2022.<sup>17</sup>
18. On March \*\*\*, 2022, Parent emailed District asking how to qualify Student for special education for Student's \*\*\* as well as requesting testing for written expression and related disorders.<sup>18</sup>
19. On March \*\*\*, 2022, Parent purchased \*\*\* hours of academic tutoring for \$\*\*\* to help Student catch up with Student's coursework.<sup>19</sup>
20. On May \*\*\*, 2022, Parent purchased \*\*\* hours of academic tutoring for \$\*\*\* to help Student catch up with Student's coursework.<sup>20</sup>

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<sup>14</sup> Tr. 592-593.

<sup>15</sup> JE 3.

<sup>16</sup> JE 4.

<sup>17</sup> P. Ex 8 at 75.

<sup>18</sup> P. Ex. 8 at 74.

<sup>19</sup> P. Ex. 10 at 6.

<sup>20</sup> P. Ex. 10 at 2.

21. At the Section 504 meeting on May \*\*\*, 2022 the parties discussed compensatory education for Student. District offered 56 hours of compensatory education, consisting of four hours per week for each week that homebound services were not provided. Parent wanted the compensatory services to begin over summer, but District said they would not have staff available during the summer. Evaluations were also discussed, and District indicated that they could not conduct the evaluations until they received consent for evaluations.<sup>21</sup>
22. Parent paid another tutor \$\*\*\* on June \*\*\*, 2022, \$\*\*\* on June \*\*\*, 2022, and \$\*\*\* on June \*\*\*, 2022, to help Student catch up with Student's coursework.<sup>22</sup>
23. On June \*\*\*, 2022, District notified Parent that they had coordinated a schedule of compensatory service hours to support Student, consisting of 18 hours of compensatory services per subject area.<sup>23</sup>

#### **2022-2023 School Year - \*\*\* Year**

24. On August \*\*\*, 2022, a Notice of Full and Individual Evaluation form was provided by District to Parent, which was signed on August \*\*\*, 2022.<sup>24</sup>
25. Student's \*\*\* school year began on August \*\*\*, 2022. Student was able to attend the first two days of school but was not able to attend for the remainder of the week due to \*\*\*. Student attended one day of the following week but was not able to attend for the rest of the year.<sup>25</sup>
26. On September \*\*\*, 2022, the FIE report was completed. The evaluator reviewed Student's previous evaluations; obtained classroom observations; educational history; Student's current interventions; progress; and

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<sup>21</sup> P. Ex. 24.

<sup>22</sup> P. Ex. 10 at 5.

<sup>23</sup> R. Ex. 7.

<sup>24</sup> JE 13.

<sup>25</sup> P. Ex. 9 at 5, R. Ex. 32.

performed the Wechsler Individual Achievement Test (WISC-V). The formal testing was performed on August \*\*\*, 2022.<sup>26</sup>

27. The FIE found that Student was very advanced for Student's age, falling on the high average range when compared to other children Student's age. Student's weakest performance area, processing speed, was still in the average range. Student was meeting state grade level expectations in writing and Student's gross motor and overall fine motor coordination appeared within normal limits. The report found that the data did not indicate any academic deficits and that Student did not meet criteria as a student with a specific learning disability. Additionally, the report found that assistive technology services were not needed to provide Student a FAPE. The report concluded that Student did not appear to have an educational need for special education services.<sup>27</sup>
28. On October \*\*\*, 2022, an ARD committee meeting was held to discuss the FIE. District agreed with the evaluation's finding that Student was not eligible for special education services. Parent disagreed with the evaluation and informed District Parent would be requesting an independent educational evaluation (IEE). The meeting ended in disagreement.<sup>28</sup>
29. On November \*\*\*, 2022, a \*\*\* physician's form was provided to District by Parent regarding Student's \*\*\*, notifying District that Student would need a shortened school day, frequent rest breaks, access to the nurse's office, and the ability to go home if Student's symptoms worsen.<sup>29</sup>
30. On December \*\*\*, 2022, Student's physician provided a physician information report with proposed accommodations to District regarding

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<sup>26</sup> JE 14. At the hearing, Petitioner pointed out that the FIE was inconsistent on if the outdated WISC-IV was given or if the proper WISC-V was given. However, based upon a review of the report and the testimony offered at the hearing by Dr. \*\*\* (Tr. 128-129), and Ms. \*\*\* (Tr. 167, 213) the Hearing Officer is satisfied that the proper WISC-V was given.

<sup>27</sup> JE 14.

<sup>28</sup> JE 16.

<sup>29</sup> JE 7.

Student's \*\*\*. The physician indicated that Student would be confined to the home for six months.<sup>30</sup>

31. At the Section 504 meeting held on December \*\*\*, 2022, District informed Parent that homebound services were ready and would begin in January when Student returned to school.<sup>31</sup>
32. On April \*\*\*, 2023, the IEE report was completed by Dr. \*\*\*, a LSSP. Dr. \*\*\* reviewed Student's history, interviewed Parent, reviewed educational and medical records, and performed a variety of testing. Dr. \*\*\* found that Student is resilient and hard-working and that Student had many academic strengths. She noted that, although Student's cognitive processing skills are within the expected level, there is a statistically significant difference between this and Student's verbal comprehension and fluid reasoning abilities. Student also has difficulties maintaining attention and focus, has deficits with Student's working memory, and demonstrates below average visual perception and fine motor coordination and low visual motor integration.
33. The IEE found that Student demonstrates poor spacing, poor letter formation, and poor legibility, and it was recommended that Student receive interventions with an occupational therapist to address Student's difficulties with the fine motor coordination required for handwriting. Student's spelling was found to be average for Student's age, as was written expression. It was noted that Student's written production is below expectations when compared to Student's superior verbal comprehension.
34. Dr. \*\*\* concluded Student meets the specific disability criteria as a student with an OHI due to \*\*\* and also exhibits dysgraphia which impacts Student's written output. Occupational therapy and assistive technology evaluations were recommended due to Student's dysgraphia. Dr. \*\*\* found that Student's disabilities impact Student's learning and demonstration of knowledge.<sup>32</sup>

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<sup>30</sup> JE 8.

<sup>31</sup> JE 9 at 8.

<sup>32</sup> JE 17.

35. An ARD committee meeting was held on May \*\*\*, 2023 to discuss the IEE. Dr. \*\*\* summarized her findings, but the District members of the committee determined that Student does not need specialized instruction and that Student's needs can be met through Section 504. Therefore, Student was found to not be eligible under the IDEA. Parent continued to disagree.<sup>33</sup>
36. During this ARD committee meeting, a District representative stated that specialized instruction was already provided through Section 504 accommodations. The representative pointed out that Student's days and times were already being modified to meet Student's individual needs. The representative also agreed that, due to delays in starting homebound instruction, Student needed compensatory services. While some of the compensatory services had already been provided, additional deficiencies still existed due to this delay.<sup>34</sup>
37. On May \*\*\*, 2023, a Section 504 meeting was held to add Dr. \*\*\*'s proposed accommodations to Student's Section 504 plan. Accommodations were discussed and agreed on by all parties.<sup>35</sup>
38. In June 2023, the ARD committee reconvened. District continued to assert that Student could be served under Section 504, and therefore did not qualify under the IDEA. Parent continued to disagree. The meeting ended in disagreement.<sup>36</sup>

### **2023-2024 School Year - \*\*\* Year**

39. On August \*\*\*, 2023, Dr. \*\*\* provided District with \*\*\* guidelines for Student. Dr. \*\*\* recommended that District not have Student participate in any activities that worsen Student's symptoms, allow Student to attend partial days for the next three months, allow Student to go home if Student's symptoms do not subside after a break, and to not allow Student to

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<sup>33</sup> JE 18.

<sup>34</sup> P Ex. 20 at minute mark 39, 43.

<sup>35</sup> J. Ex. 10.

<sup>36</sup> P. Ex. 31.

participate in \*\*\*. Dr. \*\*\* also recommended that Student be given a longer time to complete testing; reductions to Student's workload and homework to focus mainly on content mastery; allow for rest breaks during the day; allow Student to turn in late assignments without penalty; allow Student to retake any test without penalty if Student performs worse than Student's previous average; and allow Student to leave class 2-3 minutes before the passing period so Student does not need to rush. At the hearing, Dr. \*\*\* testified that her recommendations for Student have not changed.<sup>37</sup>

40. On August \*\*\*, 2023, Dr. \*\*\* provided a \*\*\* physician's form to District informing them that, even though Student is on homebound, Student may be able to attend school if Student is feeling ok.<sup>38</sup>
41. At the September \*\*\*, 2023 Section 504 meeting, Dr. \*\*\*'s suggestions were discussed, new accommodations were adopted, all parties agreed on accommodations, and the meeting ended in agreement.<sup>39</sup>
42. At the hearing, Parent testified that the remedies Parent was seeking were reimbursement of the amounts spent on tutors; for Parent's \*\*\* to be found eligible under the IDEA so Student would have a case manager to facilitate communication and evaluation; and for District to provide a homebound instructor who specialized in math instruction because of Student's high proficiency with math making it difficult for the homebound instructor to educate Student. Parent also discussed the need for \*\*\*.<sup>40</sup>
43. Dr. \*\*\*, Student's homebound teacher, limits Student's instruction to 60 to 90 minutes a day and moved back the start time of Student's instruction to accommodate Student's \*\*\*. Dr. \*\*\* also gives Student preference in scheduling the time of day Student receives instruction due to Student's \*\*\*. Student is excused from repetitive assignments and only focuses on

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<sup>37</sup> R. Ex. 25, Tr. 594.

<sup>38</sup> R. Ex. 24.

<sup>39</sup> JE 12.

<sup>40</sup> Tr. 562-567.

mastery assignments. Dr. \*\*\* can understand Student's writing and Student has never had any assignments returned because a teacher cannot read it. Student can process Student's thoughts and write quickly, at up to 120 words-per-minute. Student types all Student's assignments for school.<sup>41</sup>

44. Student has not taken any state or district assessments, including end of course examinations (EOCs) or State of Texas Assessment of Academic Readiness (STAAR) tests during the relevant time period, which are required for \*\*\*. Parent testified Parent did not realize these assessments were required. District had scheduled days for Student to take these assessments, but Student either was not up to it or was absent.<sup>42</sup>
45. In total, Student missed approximately six months of instruction, four months during Student's \*\*\* year and two months during Student's \*\*\* year, due to District delays in providing homebound services. Parent has paid a total of \$\*\*\* to tutors to address Student's educational shortfalls due to this missed instructional time.<sup>43</sup>

## V. DISCUSSION

### A. ELIGIBILITY UNDER THE IDEA

The primary dispute in this matter is over Student's eligibility as a student with a disability under the IDEA. In order to qualify as a student with a disability, the student must:

1. Meet the definition of one or more of the categories of disability; and
2. Need special education and related services as a result of Student's disability or disabilities. 34 C.F.R. § 300.8(a).

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<sup>41</sup> Tr. at 255 - 256, 269, 277, 279, 468-469.

<sup>42</sup> Tr. 248, 307, 442, 472, 566, P. Ex. 34.

<sup>43</sup> P Ex. 20 at minute mark 39, P. Ex. 10, Tr. 515.

Both Respondent and Petitioner agree that Student satisfies the first element because Student meets the definition of one or more of the categories of disability due to Student's dysgraphia and \*\*\*. However, Respondent contends that Student does not need special education and related services as a result of Student's disabilities. Respondent argues that Student's academic deficits are being addressed through Student's Section 504 plan and that additional accommodations are not needed for Student to receive an educational benefit.

A student needs special education and related services when the student requires those services in order to receive an educational benefit from the educational program. *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 616 F.3d 632 (7th Cir. 2010). A student with an impairment is not eligible for special education under the IDEA unless Student has an educational need for such services. *See, e.g., D.L. v. Clear Creek Indep. Sch. Dist.*, 695 F. App'x 733 (5th Cir. 2017) (holding that a high schooler with anxiety, depression, and ADHD did not require special education or related services under the IDEA).

Evidence that a student with an impairment has made non-trivial educational progress after receiving general education interventions is a strong indicator that Student does not require IDEA services. *See, e.g., M.P. v. Aransas Pass Indep. Sch. Dist.*, 67 IDELR 58 (S.D. Tex. 2016). However, the eligibility team must distinguish between general education interventions and specialized instruction. The fact that some of the special education and related services may also be considered "best teaching practices" or "part of the district's regular education program" does not preclude



those services from meeting the definition of “special education” or “related services.” *Letter to Chambers*, 59 IDELR 170 (OSERS 2012).

The IDEA defines special education as specially designed instruction, provided at no cost to the parents, that is intended to meet the unique needs of a child with a disability; including 1) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and 2) instruction in physical education. 34 C.F.R. 300.39(a)(1).

Specially designed instruction is defined as adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction 1) to address the child’s unique needs resulting from the disability; and 2) to ensure the child’s access to the general curriculum, so that the child can meet the educational standards that apply to all children within the jurisdiction of the public agency. 34 C.F.R. 300.39(b)(3).

Regarding Student’s \*\*\*, Student \*\*\*. Because of this, Student is unable to attend school full time. To address Student’s unique needs resulting from Student’s \*\*\* so that Student can access the general education curriculum, District has adapted the delivery of Student’s education by significantly limiting the amount of time per day and per week Student receives instruction. District also changes how the material is delivered to Student to accommodate the shorter instructional time. Because of these adaptations to the delivery of instruction, District is providing specially designed instruction which meets the definition of special education. Because

Student's \*\*\* meets the definition of one or more of the categories of disability and causes Student to need special education to access Student's education, the weight of the credible evidence showed that Student qualifies as a student with a disability under the IDEA due to Student's \*\*\*.

Regarding Student's dysgraphia, the IEE found that Student demonstrates poor spacing, poor letter formation, and poor legibility, and it was recommended that Student receive interventions with an occupational therapist to address Student's difficulties with the fine motor coordination required for handwriting. Student's spelling was found to be average for Student's age, as was written expression. It was noted that Student's written production is below expectations when compared to Student's superior verbal comprehension. The FIE found that Student is meeting state grade level expectations in writing and that Student's gross motor and overall fine motor coordination appeared within normal limits. Student's homebound teacher testified that Student could read Student's writing and that no assignments had been returned because a teacher could not read it. Student also testified that all Student's assignments are type written. Student did not report any concerns with Student's written work negatively impacting Student's ability to access Student's education. Taken together, while Student is receiving benefit from accommodations related to Student's dysgraphia provided under Section 504, the evidence does not support a finding that Student needs adaptations to the content, methodology, or delivery of instruction in order to access the general curriculum due to Student's dysgraphia. Therefore, the Hearing Officer concludes that Student is not eligible under the IDEA due to Student's dysgraphia.

## B. CHILD FIND OBLIGATION

Petitioner alleges that District failed in its obligations under Child Find when it failed to timely respond to a written request for a special education evaluation. Congress enacted the IDEA's Child Find provisions to guarantee access to special education. 20 U.S.C. § 1400 (d)(1)(A). To that end, the IDEA's Child Find obligation imposes on each school district an affirmative duty to have policies and procedures in place to locate and timely evaluate children with suspected disabilities in its jurisdiction, including “[c]hildren who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.111(a); (c)(1); *Spring Branch Indep. Sch. Dist. v. O.W. bnf Hannah W.*, 938 F.3d 695, 704 (5th Cir. 2019); *El Paso Indep. Sch. Dist. v. Richard R.R.*, 567 F. Supp. 2d 918, 949 (W.D. Tex. 2008).

The Child Find duty is triggered when the school district has reason to suspect the student has a disability coupled with reason to suspect that special education services may be needed to address the disability. When these suspicions arise, the school district must evaluate the student within a reasonable time after school officials have notice of reasons to suspect a disability. *Richard R.R.*, 567 F. Supp 2d at 950.

The analysis for resolving a Child Find claim requires three factual determinations. First, the date the school district had notice of the student’s likely disability. Second, the date the Child Find duty was ultimately satisfied (i.e., the date the FIE began once parental consent was received). Third, the reasonableness of the

delay between those two dates. *O.W.*, 938 F. 3d at 706; *Krawietz ex rel. Parker v. Galveston Indep. Sch. Dist.*, 900 F. 3d 673, 676 (5th Cir. 2018). In Texas, if a parent submits a written request to an administrative employee of the school district, within 15 school days the school district must either provide the parent with prior written notice of its proposal to evaluate and the opportunity to give written consent for the evaluation or provide the parent prior written notice of its refusal to evaluate the student. 19 Tex. Admin. Code § 89.1011(b)(1), (2).

In their closing briefs, both parties agree that District had notice of Student's likely disability on March \*\*\*, 2022, when Parent emailed a District administrator requesting Student be tested under special education for a specific learning disability in written expression and related disorders, and to discuss whether Student may qualify as a student with an OHI due to \*\*\*. District provided a form to Parent requesting consent for an evaluation on August \*\*\*, 2022, which was signed and returned to District by Parent on August \*\*\*, 2022. This was a delay of almost five months, including 50 school days. While the 50 school day delay is greater than the 15 school days allowed under Texas law, District argues that this delay was not unreasonable.

A delay between the time the school district has notice of a suspected disability and the time the evaluation is conducted is reasonable when, throughout the period between the notice and referral, the school district takes proactive steps to comply with its Child Find duty. Conversely, the time period between notice of the suspected disability and the evaluation is unreasonable when the school district fails to take any proactive steps or ceases to continue taking proactive steps during the

time period. *O.W.*, 938 F. 3d at 706-07. District argues that Petitioner failed to offer any evidence to show that District failed to take proactive steps during the intervening period. Specifically, they argue that no evidence was offered to show additional inquiries regarding the status of the requested FIE and that, while Petitioner's attorney asked witnesses at the hearing about the request for evaluation, she did not ask about subsequent actions District took after receiving the request.

There is no requirement that, after a parent makes a request, they are responsible for following up with District to ensure that District is meeting its obligations. Additionally, while the burden of proof is on Petitioner, Petitioner has proven, by a preponderance of the evidence, that District delayed 50 school days in sending Petitioner consent for an evaluation. While neither party offered evidence showing why District took 50 school days to respond, the lack of evidence of activity by District is not the same as evidence of activity. The only evidence in the record supports that there was an extensive, unexplained delay between the request for evaluation and District's request for consent. Therefore, Petitioner has met its burden to show, by a preponderance of the evidence, that the 50 school day delay in this matter was not reasonable and that District violated its Child Find obligation by failing to timely evaluate Student.

### **C. PROCEDURAL SAFEGUARDS**

Petitioner also alleges that District failed in its obligation to provide Parent with a copy of Parent's procedural safeguards after receiving the request for evaluation.

District was obligated to provide Parent with a copy of the procedural safeguards

when Parent requested an evaluation on March \*\*\*, 2022. 34 C.F.R. § 300.504(1). However, the record does not reflect that Parent was provided with a copy of the procedural safeguards until August \*\*\*, 2022, when Parent received the request for consent from District. Therefore, District violated its obligation to provide Parent with a copy of Parent's procedural safeguards after Parent requested an evaluation. However, Petitioner did not present any evidence that this failure impeded Student's right to a FAPE, significantly impeded Parent's opportunity to participate in the decision- making process regarding the provision of FAPE, or caused a deprivation of educational benefits. 34 C.F.R. § 300.513(a)(2). Therefore, the failure to timely provide Parent with a copy of the procedural safeguards was a procedural violation only and did not result in a denial of FAPE.

#### **D. EVALUATION IN ALL AREAS OF SUSPECTED DISABILITY**

Petitioner alleges that District failed to evaluate Student in all areas of suspected disability. Student has two areas of suspected disability, dysgraphia and \*\*\*. The record reflects that an FIE was completed on September \*\*\*, 2022, which included evaluations of the effects of Student's \*\*\* as well as Student's dysgraphia. Petitioner requested an IEE, and Student's needs were again evaluated in both areas of suspected disability. While Petitioner disagreed with the findings of the FIE and had specific complaints about the testing performed, the record reflects that Student was evaluated for both Student's dysgraphia and Student's \*\*\*, Student's two areas of suspected disability.

## **E. APPROPRIATENESS OF THE FIE**

Petitioner alleges that an outdated version of the Wechsler Intelligence Scale for Children (WISC) was used during District's FIE. The FIE report is inconsistent regarding what test was utilized. It states, in varying places, that either the WISC-IV or the WISC-V was administered. However Dr. \*\*\*, Petitioner's expert, testified that the wrong test being listed in the FIE was possibly a typo or old data in the form. Ms. \*\*\*, District's Director of Evaluations for Special Education, testified that the WISC-IV has not been in District's inventory and the scoring software has not been available for a number of years, making it unlikely that version of the test was administered. While the FIE inconsistently states which test was performed, the record reflects that, most likely, the appropriate version of the test, the WISC-V, was used. Therefore, Petitioner failed to prove, by a preponderance of the evidence, that the FIE was not appropriate.<sup>44</sup>

## **F. DUTY TO PROVIDE FAPE**

Petitioner alleges that District failed to provide Student with a FAPE and an appropriate IEP during the relevant time period. The purpose of the IDEA is to ensure that all children with disabilities have available to them a free, appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and

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<sup>44</sup> In its written closing argument, Petitioner alleges several additional procedural concerns with District's evaluation. However, these concerns were not included in the issues to be decided in this matter in Order No. 11. Therefore, the Hearing Officer will not address those additional concerns.

independent living. 20 U.S.C. § 1400(d). In meeting the obligation to provide a FAPE, the school district must have in effect an IEP at the beginning of each school year. 34 C.F.R. § 300.323(a). Due to District's failure to recognize Student as being eligible under the IDEA, District has failed to prepare any IEP for Student at any time during the relevant time period, which constitutes denial of a FAPE. However, Student was receiving services under Section 504 comparable to the services Student is entitled to under the IDEA. While the failure to prepare an IEP for Student when District was obligated to do so was a denial of a FAPE, the injury this failure caused to Student was limited, as discussed in the section on remedies below.

#### **G. PREDETERMINATION**

Petitioner argues that, because the FIE included the statement that Student does not appear to have an educational need for special education services, District predetermined Student's eligibility and "poisoned" the collaborative nature of the ARD committee meeting, denying Parent equal participation in the ARD process. Predetermination occurs when district members of the IEP team unilaterally decide a student's educational placement in advance of an IEP team meeting. *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004). While the record reflects that the evaluator offered a recommendation regarding Student's needs for special education services, the record does not reflect that the district members of the ARD committee adopted this recommendation without consideration of the underlying data in the report or input from Parent and Student's teachers. Also, there is no indication that any decision was made by district members of the ARD Committee in advance of the IEP meeting. Petitioner also argues that



Student's eligibility was predetermined before the ARD committee meeting held to discuss the IEE, but no evidence was offered regarding the basis for this claim. Therefore, Petitioner failed to prove that District predetermined Student's eligibility or failed to collaborate with Petitioner.

#### **H. FAILURE TO TRAIN STAFF**

In its closing written closing argument, Petitioner argues that District failed to properly train staff who worked with Student regarding Student's disabilities and in the difference between eligibility under the IDEA and Section 504. However, no evidence was offered to show that District personnel did not have the necessary understanding of dysgraphia or \*\*\*. Additionally, beyond the legal disagreement on the classification of the services Student is receiving, there was no evidence offered that District did not understand the differences between the IDEA and Section 504. Therefore, Petitioner did not meet its burden to prove that District failed to properly train staff.

#### **I. INSTRUCTIONAL DAY**

Petitioner alleges that District failed to provide Student with an instructional day commensurate with that of students without disabilities. However, no evidence or argument was offered on this issue. Therefore, the Hearing Officer finds that Petitioner has not met its burden to prove that District failed to provide Student with an instructional day commensurate with that of students without disabilities.

## J. REMEDIES

Hearing officers have “broad discretion” in fashioning relief under the IDEA. Relief must be appropriate and further the purpose of the IDEA to provide a student with a FAPE. *School Comm. Of Town of Burlington, Mass. v. Dept. of Educ.*, 471 U.S. 359, 369 (1985). The IDEA’s central mechanism for remedying perceived harms is for parents to seek changes to a student’s program. *Polera v. Bd. Of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 483 (2<sup>nd</sup> Cir. 2002).

The evidence offered in this matter, as well as the testimony from both parties, indicates that Student is being well served by the accommodations currently in place under Student’s Section 504 plan. While Petitioner is concerned that Student is not completing Student’s coursework during the school year, they are not seeking changes to Student’s homebound placement or the accommodations available to Student. Instead, Parent testified that Parent wants Student to be found eligible under the IDEA so Student will have a case manager to facilitate communication. Additionally, Parent wants reimbursement for the amounts spent on tutors and a more experienced \*\*\* teacher to be assigned to Student.

Student is eligible for services under the IDEA due to Student’s \*\*\* and is entitled to full protections of that law, including rights related to evaluation, development of an appropriate IEP including goals and objectives, and communication. Therefore, Parent’s first issue of requested relief is granted.

Regarding Petitioner's request for \$\*\*\* in reimbursement for tutors, the record reflects that Student missed approximately six months of instruction over two years due to delays in District implementing homebound services. The tutors were hired to address the academic delays caused by the delay in receiving homebound services. District did not dispute this claim. Therefore, the Hearing Officer concludes that Petitioner is entitled to reimbursement of the \$\*\*\* spent on tutors.

Regarding Petitioner's request for a more experienced \*\*\* teacher, nothing in the record shows that Dr. \*\*\* is not qualified to teach Student \*\*\*. In fact, both Student and Parent praised Dr. \*\*\* as an excellent teacher. The only concern is that, given Student's excellence in \*\*\*, Student may benefit from a specialized \*\*\* teacher. However, school districts have the discretion to determine who will provide students with their programs of special education and are not required to seek parental input when a staffing decision is made. *Independent Sch. Dist. No. 11, Anoka-Hennepin*, 36 IDELR 81 (SEA MN 2001). Because Dr. \*\*\* is a qualified teacher and was chosen by District to provide Student with Student's homebound instruction, the Hearing Officer lacks the authority to grant this request. Therefore, this request is denied.

Regarding the other elements of relief requested in Petitioner's pleadings, Petitioner has not shown that Student needs any additional compensatory educational services or that staff is not adequately trained. While Petitioner requested that the Hearing Officer order District to expedite assistive technology

and occupational therapy evaluations of Student, these evaluations are related to Student's dysgraphia and the Hearing Officer did not find that Student is eligible under the IDEA for that disability. Therefore, these additional items of relief will not be granted.

## VI. CONCLUSIONS OF LAW

1. The burden of proof in this due process hearing is on Petitioner. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).
2. Petitioner met its burden of proving that Student is eligible for special education and related services under the IDEA as a student with an OHI due to Student's \*\*\*. 34 C.F.R. §300.8(9); 19 Tex. Admin. Code §89.1040(c)(8).
3. Petitioner did not meet its burden of proof to show that Student is eligible for special education and related services under the IDEA as a student with a specific learning disability due to dysgraphia. 34 C.F.R. § 300.8(10); 19 Tex. Admin. Code § 89.1040(c)(9).
4. Petitioner met its burden to prove that District failed to comply with its Child Find obligation by failing to evaluate Student in a timely manner. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); 19 Tex. Admin. Code § 89.1011.
5. Petitioner met its burden to prove that District failed to properly identify Student as eligible under the IDEA as a student with the OHI of \*\*\*. 34 C.F.R. § 300.8(a); 34 C.F.R. § 300.8(c)(9).
6. Petitioner met its burden to prove that District's failure to fulfill its Child Find duty in a timely manner and failure to identify Student as eligible under the IDEA as a student with a disability caused a deprivation of educational benefit and impeded Student's right to a free, appropriate public education. 34 C.F.R. § 300.513(a)(2).

7. Petitioner met its burden to prove that Petitioner is entitled to equitable and compensatory relief for Respondent's failure to meet its Child Find duty in a timely manner and its failure to identify Student as a student with a disability eligible for special education and related services under the IDEA due to \*\*\*. 34 C.F.R. § 300.111; *G. ex. Rel RG v. Fort Bragg Dependent Schools*, 343 F.3d 295 (4th Cir. 2003).
8. Petitioner met its burden to prove that District committed a procedural violation of the IDEA by failing to timely provide Parent with a copy of Parent's procedural safeguards after receiving a request for evaluation. 34 C.F.R. § 300.504(a)(1), 34 C.F.R. § 300.513(a)(2).
9. Petitioner did not meet its burden to prove that District failed to provide Student with an instructional day commensurate with that of students without disabilities. 19 Tex. Admin. Code § 89.1075(e).
10. Petitioner did not meet its burden to prove that District failed to collaborate and allow Student's parent to meaningfully participate in the educational decision making process. 34 C.F.R. § 300.501(b), (c); 34 C.F.R. § 300.322.
11. Petitioner did not meet its burden to prove that District failed to train staff who work with Student appropriately. 34 C.F.R. § 300.156.

## VII. ORDERS

The Hering Officer makes the following Orders:

- 1) District is **ORDERED** to find Student eligible under the IDEA as a student with an other health impairment due to \*\*\* and to convene an ARD committee meeting within 30 school days of the date of this decision to prepare an appropriate IEP.
- 2) District is **ORDERED** to reimburse \$\*\*\* to Petitioner within 30 days of the date of this decision for amounts spent by Petitioner on private tutors.

All other relief not specifically stated herein is **DENIED**.

Signed April 18, 2024.



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Jacob Wallace,  
Special Education Hearing Officer  
For the State of Texas

### **NOTICE TO THE PARTIES**

The Decision of the Hearing Officer in this case is a final and appealable order. Any party aggrieved by the findings and decisions made by the Hearing Officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. §§ 300.514(a), 300.516; 19 Tex. Admin. Code § 89.1185(n).