

**DOCKET NO. 014-SE-0918**

<b>STUDENT, B/N/F PARENT,</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
<b>Petitioner</b>	§	
	§	
<b>v.</b>	§	<b>HEARING OFFICER FOR</b>
	§	
<b>SANTA ROSA INDEPENDENT</b>	§	
<b>SCHOOL DISTRICT,</b>	§	
<b>Respondent</b>	§	<b>THE STATE OF TEXAS</b>

**DECISION OF THE HEARING OFFICER**

**I. PROCEDURAL HISTORY**

Student, \*\*\*, b/n/f Parent (collectively Petitioner) brings this action against the Santa Rosa Independent School District (“Respondent” or “the school district”) under the Individuals with Disabilities Education Act, as amended, 20 U.S.C. § 1400 et seq. (IDEA) and its implementing state and federal regulations.

**A. Legal Representatives**

Student has been represented throughout this litigation by Student’s legal counsel, Sonja Kerr of Hollingsworth & Zivitz, P.C. The school district has been represented throughout this litigation by its legal counsel Heather Rutland of Eichelbaum, Wardell, Hansen, Powell & Mehl, P.C. On November 14, 2018, Abraham Barker, also of Eichelbaum, Wardell, Hansen, Powell & Mehl, P.C. filed a notice of appearance as co-counsel for Respondent.

**B. Resolution Session and Mediation**

The parties convened a resolution session on October 2, 2018, but were unsuccessful in reaching an agreement. The parties then proceeded to mediation on November 6, 2018, but were not successful. However, they kept mediation open to continue their efforts toward settlement.

On November 16, 2018, the parties advised the hearing officer that they had closed mediation and did not believe settlement was possible.

### **C. Continuances**

Two continuances and three extensions of the decision due date were granted in this case. The first was granted for good cause at Respondent's request to accommodate a scheduling conflict. The hearing originally set for November 1, 2018, was continued to December 11-13, 2018, and the decision deadline was extended from December 1, 2018, to January 14, 2019. The second was granted for good cause at Petitioner's request due to a delay in obtaining an Independent Educational Evaluation (IEE) for Student and Petitioner's counsel's previously obligated deadline for written briefs in another case pending in the 5<sup>th</sup> Circuit Court of Appeals. The parties ultimately selected a new set of dates for the hearing and the hearing was continued to January 22-24, 2019. The decision deadline was extended to February 25, 2019. An additional extension of the decision deadline was requested at the close of the hearing by both parties to allow them time to submit written briefs and the hearing officer ample time to consider the briefs before issuing a decision. The decision deadline was extended for good cause to March 22, 2019.

### **D. Preliminary Motions**

Two preliminary motions were raised in Respondent's response to Petitioner's Request for Special Education Due Process Hearing. Respondent argued that any of Petitioner's claims that arose more than one year prior to the complaint being filed are outside the one-year statute of limitations and requested that those claims be barred. Respondent additionally raised a challenge to the jurisdiction of any of Petitioner's claims that fall outside the scope of IDEA, and requested the hearing officer dismiss those claims. Both issues are addressed in the hearing officer's decision below.

## II. DUE PROCESS HEARING

The due process hearing was conducted January 22-24, 2019. Petitioner continued to be represented by Student's legal counsel Sonja Kerr and for purposes of the hearing was assisted by her co-counsel Yvonnilda Muniz of the Law Offices of Yvonnilda Muniz. In addition, Student's mother, \*\*\* attended the hearing. Respondent continued to be represented by its legal counsel Heather Rutland and Abraham Barker. In addition, \*\*\*, Director of Special Education for \*\*\* Co-op, attended the hearing as the party representative. The hearing was recorded and transcribed by a certified court reporter.

Evidentiary Issue: During the hearing the hearing officer informed the parties she believes school district employees or witnesses may be both a fact witness and an expert in an area in which that witness is certified or licensed. Petitioner objected and stated the school district employees were Texas Rules of Evidence 701 witnesses, rather than experts. Petitioner also argued this has allowed Respondent to violate the 5-day rule at 34 C.F.R. §300.512. Respondent was not aware prior to the hearing of the hearing officer's beliefs. The following school district witnesses have licenses or certifications in Texas: Student's Case manager/Special Education teacher, Student's \*\*\* teacher, and the Director of Special Education for \*\*\* Co-op. They have specialized knowledge within their area of certification. As such, these witnesses were treated as experts within the scope of their certification by the hearing officer pursuant to Texas Rule of Evidence 702 and 19 T.A.C §89.1170(e).

At the conclusion of the hearing, the parties requested the record remain open in order to allow submission of written closing arguments. Both parties submitted their pleadings in a timely manner. The parties agreed to extend the deadline for the hearing officer's decision to allow the hearing officer time to complete a review of the extensive record on file in this case, conduct the requisite legal research, and to consider the written closing arguments in preparing the decision. The Decision in this case was extended for good cause to March 22, 2019.

### III. ISSUES

#### A. Petitioner's Issues

Petitioner raised the broad issue that the school district failed to provide Student with a free, appropriate public education (FAPE) under the IDEA, and specifically:

1. IDENTIFICATION: Whether the school district failed to identify or delayed identifying Student as a student with an Other Health Impairment (OHI) due to \*\*\* and Attention Deficit Hyperactivity Disorder (ADHD).
2. PROCEDURAL: Whether the school district failed to provide parent with all the required information in a timely manner related to an IEE.
3. FAPE: Whether the school district failed to propose an appropriate Individualized Educational Program (IEP) and fully implement an IEP for Student for the relevant time frame.
4. FAPE: Whether the school district failed to properly write Present Levels of Performance and goals and objectives in meaningful and measurable ways to determine baselines to accurately track progress in any IEP used during the relevant time frame.
5. FAPE: Whether the school district failed to meaningfully monitor and review IEPs for Student by using objective progress reporting in order to determine if Student's program needed to be changed throughout the years to help Student progress or did the school district use the same goals and services for years without determining progress in an objective and meaningful way.
6. FAPE: Whether the school district failed to offer Student an appropriate IEP that included transition services, instructional services for math, reading, and other substantive skills for the relevant time frame.
7. PROCEDURAL: Whether the school district failed and is continuing to fail to comply with all procedural requirements of IDEA and Texas law including Prior Written Notice and denied Student's parents the opportunity of meaningful participation in the education decision-making process related to the provision of FAPE.
8. FAPE: Whether the school district failed to provide Student an IEP in the least restrictive environment for the relevant time frame.
9. FAPE: Whether the school district has denied Student FAPE in the least restrictive environment when Student was placed in the Disciplinary Alternative Education Program (DAEP).

10. FAPE: Whether the school district deprived Student access to gym or physical education courses or related exercise opportunities on a regular basis commensurate with gym or physical education courses other children received during any time Student was assigned to the DAEP.
11. FAPE: Whether the school district failed to offer Student appropriate Extended School Year (ESY) services for the 2016-2017, 2017-2018, and 2018-2019 school years.
12. FAPE: Whether the school district failed to provide Student with appropriate transition services by discontinuing Student's \*\*\* program during Student's time at the DAEP.
13. FAPE: Whether the school district failed to offer Student a Behavior Intervention Plan (BIP) or failed to implement Student's BIP in a way resulting in meaningful positive behavioral support programming for Student.
14. FAPE: Whether the school district failed to provide student with appropriate related services including psychological assistance and behavioral planning, with assistance to the family.
15. FAPE: Whether the school district failed to conduct an assistive technology (AT) evaluation of Student and provide AT services to Student.
16. Other causes of Action: Whether the school district violated Student's rights under § 504 of the Rehabilitation Act of 1973 (504) and the Americans with Disabilities Act (ADA).

## **B. Respondent's Legal Position and Additional Issues**

The school district generally denies the allegations in Petitioner's Complaint with respect to Petitioner's IDEA claims and contends it provided Student with FAPE during the relevant time period.

The school district raises the following additional legal issues:

1. JURISDICTIONAL: Whether the hearing officer has jurisdiction to resolve claims arising under any laws other than the IDEA, and whether such claims should be dismissed.
2. STATUTE OF LIMITATIONS: Whether any of Student's IDEA claims that accrued prior to September 14, 2017 should be dismissed as outside the one year statute of limitations rule as applied in Texas.

#### IV. REQUESTED RELIEF

##### A. Petitioner's Requested Relief

Petitioner requests the following items of relief:

1. The hearing officer determine the Student was denied FAPE.
2. The hearing officer determine the school district failed to evaluate Student in all suspected areas of disability.
3. The school district develop an appropriate IEP, which includes any needs associated with Student's \*\*\* and ADHD.
4. The school district have a nurse or other medically licensed individual participate in Student's Admission, Review, & Dismissal (ARD) committee meetings and regularly update Student's IEP with respect to Student's \*\*\* and ADHD including any \*\*\*. The school district shall train staff about Student's \*\*\* and ADHD.
5. The school district provide Student's parent meaningful participation at future ARD meetings by ensuring her receipt of documents at least 5-days before the meeting, a copy of any document discussed at meetings, and a copy of any document completed at the ARD meetings at the same time as it is logged into any electronic IEP system and available to staff.
6. The hearing officer determine the Student was denied FAPE because the school district failed to ensure Student had a legally compliant IEP and received meaningful academic and non-academic benefit.
7. The school district release Student from the DAEP and not use it in the future for Student because it does not provide Student FAPE or alternatively ensure the DAEP includes a licensed special education teacher at all times Student is sent to DAEP.
8. The school district provide private, individualized, outside counseling at the school district's expense for two IEP years.
9. The school district provide private, individualized tutoring at the school district's expense (including transportation costs) for the timeframe equivalent of February 2016 to the completion of this case by decision of the Special Education Hearing Officer.
10. The school district provide all listed accommodations, modification, and interventions as they are listed in Student's IEP/BIP and ensure that each accommodation and modification is objective and measurable for purposes of tracking implementations.

11. The school district provide Student a revised IEP, consistent with the IEE results, that includes goal/objectives and services that provide meaningful educational benefit and are based on Student's disability.
12. The school district provide Student direct instruction from a licensed special education teacher in the areas of reading, math, writing, and other core subjects (such as science and social studies) and transition services.
13. The school district provide Student with compensatory education in an amount equal to a full school day program from February 2016 forward.
14. The school district correct Student's disciplinary records and provide a corrected copy to Petitioner parent.
15. Any other relief the Hearing Officer deems necessary and just.
16. The hearing officer find Student's parent and Student have administratively exhausted pursuant to the IDEA, for purposed of any 504 or ADA action in other forums.
17. The hearing officer find Petitioner the prevailing party.

#### **B. Respondent's Requested Relief**

Respondent requests the hearing officer to dismiss any claims arising outside of the scope of IDEA and any claims that arose outside of one year prior to the filing of the complaint by Petitioner.

### **V. FINDINGS OF FACT**

#### **STUDENT'S EDUCATIONAL HISTORY**

1. Student enrolled in the school district as a \*\*\* grader in the 2013-2014 school year.<sup>1</sup> In 2011, Student was determined eligible for special education by a prior school district as a student with \*\*\* (\*\*\*)<sup>2</sup>
2. \*\*\*. \*\*\*. Student was diagnosed with ADHD, \*\*\*, and \*\*\* at the age of \*\*\*. \*\*\*.<sup>3</sup>

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<sup>1</sup> Joint Exhibit 7 p. 133 (referred to hereafter as JE \_\_\_ or JE \_\_\_ at \_\_\_).

<sup>2</sup> Respondent's Exhibit 24 p. 310 (referred to hereafter as RE \_\_\_ or RE \_\_\_ at \_\_\_).

<sup>3</sup> Petitioner's Exhibit 2 p. 11-12 (referred to hereafter as PE \_\_\_ or PE \_\_\_ at \_\_\_).

3. Special Education Services for the school district are provided by the \*\*\* Cooperative (\*\*\* Co-op). The Co-op consists of \*\*\* school districts with a shared services arrangement. The Co-op is headed by the Special Education Director. The Co-op does not supervise teachers, only diagnosticians, speech pathologists, Licensed Specialist in School Psychology (LSSP), and other licensed special education providers.<sup>4</sup>
4. On November \*\*\*, 2014, the \*\*\* Co-op conducted a psychological evaluation on Student and Student met the criteria for \*\*\*. Student displayed the following characteristics which adversely affect Student's educational functioning: inappropriate types of behavior or feelings under normal circumstances and a general \*\*\*. Student showed defiance and impulsivity, which is consistent with Student's diagnosis of ADHD. ADHD is characterized by increased levels of inattention, behavioral activity, and impulsivity which often disturbs others and can result in rule violation.<sup>5</sup> \*\*\*. The current information indicated the presence of a \*\*\*.<sup>6</sup>
5. The recommendations of the 2014 psychological included the following: the ARD committee determine Student's eligibility for special education; continue special education counseling; if Student continues to \*\*\*, inform the physician to address possible \*\*\*; use of different tools to remind Student to stay on task; use of logical consequences as a disciplinary technique; use of a behavior plan to address specific behaviors; and ensure home and school have the same expectations for Student.<sup>7</sup>
6. The school district completed a Full Individual Evaluation (FIE) of Student on January \*\*\*, 2015. At the time of the evaluation, Student was a \*\*\* grader in the school district. Student's overall general intellectual ability was in the average range. The Woodcock-Johnson Normative Update Test of Achievement, 3<sup>rd</sup> Edition was administered to Student to measure Student's academic achievement and oral language abilities. Most of Student's scores were in the average range; however, Student was in the low average range for reading comprehension, broad mathematics, and math calculations.<sup>8</sup>
7. The 2015 FIE indicated Student did not require AT to access grade level curriculum because Student displayed no physical ailments that prevented Student from accessing the classroom or utilizing school computers. Student's vision and hearing were within the normal range.<sup>9</sup> The FIE acknowledged Student had a prior diagnosis of ADHD, which Student was \*\*\* at the time of the evaluation.<sup>10</sup> The FIE recommended the ARD

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<sup>4</sup> Transcript Volume IV at 503 (referred to hereafter as T.V. \_\_\_ at \_\_\_).

<sup>5</sup> PE 2 at 17.

<sup>6</sup> RE 24 at 317.

<sup>7</sup> RE 24 at 318-19.

<sup>8</sup> RE 26 at 325-26.

<sup>9</sup> RE 26 at 327-28.

<sup>10</sup> RE 26 at 323.



committee determine Student's eligibility for special education services and acknowledged the 2014 psychological evaluation did indicate eligibility for \*\*\*.<sup>11</sup>

8. In the 2014-2015 school year, Student had \*\*\* discipline referrals by February 2015. The referrals included aggressive behavior, elopement, and refusal to do work.<sup>12</sup> Student had \*\*\* referrals during the 2015-2016 school year.<sup>13</sup> During the 2016-2017 school year, Student had \*\*\* discipline referrals.<sup>14</sup> The most serious occurred on \*\*\*, 2017 and resulted in a 12 day assignment to the DAEP.<sup>15</sup>
9. A Functional Behavioral Assessment (FBA) was completed on Student on May \*\*\*, 2017.<sup>16</sup> Student exhibited the following behaviors: non-compliance, task refusal, and elopement. The function of the behavior is avoidance or escape. Previously effective strategies have been behavior counseling, positive reinforcements, parent conference, office referral, and ignore negative behavior.<sup>17</sup> Student can become easily frustrated and angered, making the way Student is spoken to important.<sup>18</sup>
10. In June 2017, Parent filed a Level II complaint of Student's \*\*\* 2017 DAEP assignment as well as other complaints of school district actions. Parent filed this Level II complaint directly with the school district using its grievance process with the help of her advocate.<sup>19</sup> Parent then filed a Level III complaint for the same issues in \*\*\* 2017.<sup>20</sup>

#### THE 2017-18 SCHOOL YEAR

11. Student's annual ARD was held on September \*\*\*, 2017, for Student's \*\*\* grade year.<sup>21</sup> Student's reading level was two grades below Student's grade; however, Student passed the Reading State of Texas Assessments of Academic Readiness (STAAR) in \*\*\* grade.<sup>22</sup> Student's IEP contained English, math, science, social studies, \*\*\*, and counseling goals.<sup>23</sup> Each goal included information on how the goal was to be measured and the timeframe for

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<sup>11</sup> RE 26 at 328.

<sup>12</sup> JE 1 at 6.

<sup>13</sup> JE 1 at 11.

<sup>14</sup> JE 20 at 627-29.

<sup>15</sup> JE 1 at 11.

<sup>16</sup> JE 1 at 2.

<sup>17</sup> JE 1 at 3.

<sup>18</sup> JE 1 at 9.

<sup>19</sup> PE 15 at 1.

<sup>20</sup> PE 16 at 1.

<sup>21</sup> RE 1 at 7.

<sup>22</sup> RE 1 at 11.

<sup>23</sup> RE 1 at 11-17.

progress reports, which was concurrent with the report card schedule.<sup>24</sup> Student was scheduled to take \*\*\* at the school district.<sup>25</sup> Student's IEP contained goals for all of Student's classes at \*\*\* ISD and the school district.<sup>26</sup> Student started \*\*\* ISD on September \*\*\*, 2017 for \*\*\*.<sup>27</sup>

12. The September \*\*\*, 2017 IEP contained a statement of Student's present levels of academic achievement and functional performance (PLAAFP) for physical, behavioral, discipline, functional, and academic. Student was receiving grade-level instruction in all classes in the general education classroom.<sup>28</sup> The ARD committee reviewed Student's most recent FIE, psychological, BIP, STAAR tests, information from Parent, information from Student, and information from school personnel to develop Student's IEP.<sup>29</sup> PLAAFPs are a snapshot of how a student is doing at the time of the IEP. Student participated in this ARD meeting.<sup>30</sup> Parent attended the ARD, signed receipt for procedural safeguards, signed receipt of Prior Written Notice, and waiver of the 5-day waiting period to implement the IEP.<sup>31</sup>
13. Student's counseling goal for the 2017-2018 school year was that Student will learn to utilize coping skills to use for 85% of the school day to prevent walking off \*\*\* and the use of aggressive behaviors. The following objectives were included: Student will learn and demonstrate self-calming techniques to manage Student's mood, behavioral choices, and prevent aggressive behaviors in 4 out of 5 daily situations; Student will learn to identify and differentiate between good and poor behavioral choices in 7 out of 8 daily situations; and Student will learn how to manage frustration levels in the school setting to increase compliance at a rate of 85%.<sup>32</sup>
14. A BIP has been in place for Student since Student started receiving special education services in the school district.<sup>33</sup> Student's 2017-2018 school year BIP was put in place on September \*\*\*, 2017. It included the following appropriate behavior interventions: staff should go over to Student's desk and check for understanding, refer to regular education counselor for positive support, nurse's office will be Student's safe area to regain control, provide two choices, redirect in private away from the other students, and impose

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<sup>24</sup> RE 1 at 11-17.

<sup>25</sup> RE 1 at 10.

<sup>26</sup> RE 1 at 20-26.

<sup>27</sup> JE 14 at 453, RE 1 at 10.

<sup>28</sup> RE 1 at 11-17.

<sup>29</sup> RE 1.

<sup>30</sup> RE 1 at 34.

<sup>31</sup> PE 1 at 34, 36.

<sup>32</sup> RE 1 at 17.

<sup>33</sup> JE 1 at 11.

- consequences immediately and consistently. Progress reports were to be provided every 6 weeks. Staff was to use a point sheet to document Student's positive behavior.<sup>34</sup>
15. During the 2017-2018 school year, Student received \*\*\* discipline referrals.<sup>35</sup> Student received \*\*\*.<sup>36</sup>
  16. On \*\*\*, 2017, Student \*\*\*. On \*\*\*, 2017, Parent received notice of an expulsion hearing for Student's \*\*\*, 2017 infraction. The expulsion hearing was scheduled based on the school district's Student Code of Conduct.<sup>37</sup> At the expulsion hearing the School Board recommended Student serve \*\*\* days at JJAEP with a review at \*\*\* days to determine if the expulsion term should be reduced.<sup>38</sup> Parent was informed in a letter she could appeal the expulsion order.<sup>39</sup> Student was scheduled to start at the JJAEP on November \*\*\*, 2017.<sup>40</sup> \*\*\* ISD was scheduled to send Student packets to complete Student's work while in the JJAEP.<sup>41</sup>
  17. The assistant principal hand delivered the Manifestation Determination Review (MDR) ARD invitation and procedural safeguards to Parent on \*\*\*, 2017, for Student's \*\*\*, 2017 infraction.<sup>42</sup> An MDR was held on \*\*\*, 2017, to review Student's placement and expulsion to the JJAEP. The ARD committee determined the behavior was not related to Student's disability of \*\*\*. Parent was present at the MDR and her attorney participated by phone. Parent was provided procedural safeguards at the meeting, but refused to sign receipt until she received the finalized ARD paperwork. At the conclusion of the MDR, Student received \*\*\* days out-of-school suspension and \*\*\* days DAEP.<sup>43</sup>
  18. A review ARD was held on \*\*\*, 2017, to review the change of placement to the JJAEP. Parent was sent three notices of this ARD meeting and called during the meeting; however, she did not participate.<sup>44</sup> Student was not utilizing content mastery and was academically successful so content mastery was removed from Student's IEP at this ARD meeting.<sup>45</sup>

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<sup>34</sup> RE 1 at 56.

<sup>35</sup> JE 20 at 624-26

<sup>36</sup> JE 2 at 27.

<sup>37</sup> PE 20.

<sup>38</sup> JE 2, PE 21.

<sup>39</sup> PE 20.

<sup>40</sup> PE 21 at 1.

<sup>41</sup> RE 2 at 78.

<sup>42</sup> JE 2 at 25.

<sup>43</sup> JE 2.

<sup>44</sup> RE 2 at 75, 76.

<sup>45</sup> PE 2.

19. Student was placed in DAEP on \*\*\*, 2017 based on the \*\*\*, 2017 MDR assignment.<sup>46</sup> Student never went to the JJAEP and was assigned to the DAEP for the remainder of the 2017-2018 school year instead of the JJAEP assignment.<sup>47</sup> Student returned to regular classes from the DAEP on \*\*\*, 2018 during the 2018-2019 school year.<sup>48</sup>
20. \*\*\*, \*\*\*, \*\*\*.<sup>49</sup>
21. Parent emailed the school principal on \*\*\*, 2017 and expressed her concerns about disorganization and lack of communication within the school district administration. She requested a copy of Student's schedule, information on who will provide instruction, copies of all work Student is assigned, and weekly grades in the parent portal system while in the DAEP.<sup>50</sup> Parent would text with the Director of Student Services about Student.<sup>51</sup>
22. An additional change of placement ARD was held on \*\*\*, 2017. Student's placement was officially changed to the DAEP. Parent attended the meeting with her advocate. Parent signed the IEP acknowledging receipt of Prior Written Notice and waiving the 5-day waiting requirement prior to implementing the ARD decisions. Procedural safeguards were provided to parent.<sup>52</sup>
23. On \*\*\*, 2017, Parent wrote an email to the school district's superintendent. She was concerned that school district employees were discussing confidential information on Facebook about Student's discipline issue from \*\*\* 2017. Parent requested Student's current special education case manager be removed due to the posts.<sup>53</sup> The special education manager was removed and a new one put in her place.<sup>54</sup>
24. An ARD meeting was held on \*\*\*, 2018. The purpose of this ARD was to present the Review of Existing Evaluation Data (REED) and the following additional evaluations were requested: Psychological, cognitive, academic, and OHI. Academic goals and objectives were removed from Student's IEP. Counseling and \*\*\* goals and objectives remained in place. Due to time constraints, the committee decided to have an additional ARD at a later date. Parent indicated Student would have an appointment for a hearing evaluation soon.<sup>55</sup> Parent was provided prior written notice and waived the 5-day waiting period for

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<sup>46</sup> RE 16 at 238.

<sup>47</sup> JE 15 at 550.

<sup>48</sup> JE 15 at 468.

<sup>49</sup> JE 20 at 625.

<sup>50</sup> JE 14 at 424-25.

<sup>51</sup> RE 17.

<sup>52</sup> JE 3.

<sup>53</sup> PE 26.

<sup>54</sup> T. V. VI at 730.

<sup>55</sup> JE 4 at 68, 73, 79.

implementation of the IEP.<sup>56</sup> Parent received procedural safeguards with notice of the ARD on \*\*\*, 2018.<sup>57</sup>

25. In the ARD on January \*\*\*, 2018, Student's counseling goal changed to note that Student will learn to express Student's anger and frustration through healthy outlets such as, using self-talk, deep breathing, and visualize a calming place. Student's objectives added Student will verbalize consequences associated with Student's actions and Student will verbalize healthy alternatives to poor behavioral choices through counseling scenarios. Additionally, Student would manage frustration levels by writing a letter, seeking adult assistance, and requesting a self-directed time-out.<sup>58</sup>
26. An ARD was held on February \*\*\*, 2018. The purpose of the ARD was to update Student's BIP and counseling goals. The FIE and psychological were pending at the time of the ARD. Parent attended the ARD with her advocate.<sup>59</sup> Parent was provided Prior Written Notice and waived the 5-day waiting period to implement the IEP.<sup>60</sup> Parent received procedural safeguards.<sup>61</sup>
27. A three year reevaluation report was completed on Student on May \*\*\*, 2018 when Student was a \*\*\* grader in the school district.<sup>62</sup> At the time of the reevaluation, Student's psychiatrist at \*\*\* had diagnosed Student with ADHD, \*\*\*, and \*\*\*.<sup>63</sup> The core features of \*\*\* include \*\*\* and \*\*\*.<sup>64</sup> The reevaluation concluded Student no longer met the eligibility for \*\*\*.<sup>65</sup>
28. Teacher interviews for the reevaluation indicated Student had made significant progress since \*\*\*. Student completes tasks and is compliant with teacher directives. Student had a history of being defiant when redirected in class and "visiting" with peers; however, the behavior had improved. Student is not considered a discipline problem.<sup>66</sup>
29. The reevaluation results did not indicate significant findings for depression or other mood disorders. Student's Behavior Assessment System for Children, Third Edition (BASC-3) profile was consistent with a conduct disorder. Student did intentionally break rules of

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<sup>56</sup> JE. 4 at 65.

<sup>57</sup> JE 4 at 52.

<sup>58</sup> JE 4 at 60.

<sup>59</sup> JE 5 at 100.

<sup>60</sup> JE 5 at 97.

<sup>61</sup> JE 5 at 82, 104.

<sup>62</sup> JE 7 at 133.

<sup>63</sup> JE 7 at 134.

<sup>64</sup> PE 2 at 17.

<sup>65</sup> JE 7 at 140.

<sup>66</sup> JE 7 at 134.

society without compunction. Student blames others for problems and believes Student will not have consequences for infractions.<sup>67</sup> Student's General Intellectual Ability score was \*\*\*, which is average. Student had a weakness in auditory processing and reading recall. Student had strengths in cognitive processing speed and cognitive efficiency.<sup>68</sup>

30. The reevaluation concluded Student met the criteria for Other Health Impairment (OHI) – ADHD.<sup>69</sup> Student did not need any assistive technology devices because Student can participate in all activities without the use of assistive devices. Student can hear and follow directions without the use of aids or devices.<sup>70</sup> Student had no academic needs and the reevaluation recommended the following accommodations: behavior intervention plan, clearly defined/consistent limits, cooling-off period, frequent breaks, frequent reminder of the rules, minimize distractions, positive reinforcers, and preferential seating/proximity control.<sup>71</sup>
31. Another recommendation of the reevaluation was Student no longer needed special education counseling because Student no longer had the characteristics of \*\*\* or inappropriate behavior.<sup>72</sup>
32. An ARD meeting was held on May \*\*\*, 2018. At this meeting Student's eligibility was changed from OHI - \*\*\* to OHI – ADD/ADHD.<sup>73</sup> The entire three year reevaluation report was read out loud at the ARD.<sup>74</sup> During this ARD, parent disagreed with the reevaluation and indicated she would attain an IEE. The evaluation parent did not agree with was achievement, IQ, and psychological.<sup>75</sup> The school district granted the IEE and another ARD meeting would occur upon receipt of the IEE.<sup>76</sup> Parent's advocate attended the meeting by telephone.<sup>77</sup> Parent was provided procedural safeguards.<sup>78</sup> An IEE was completed in December 2018.<sup>79</sup>

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<sup>67</sup> JE 7 at 140.

<sup>68</sup> JE 7 at 143-45.

<sup>69</sup> JE 7 at 147.

<sup>70</sup> JE 7 at 146.

<sup>71</sup> JE 7 at 147.

<sup>72</sup> JE 7 at 147.

<sup>73</sup> JE 6 at 116, 128.

<sup>74</sup> T. V. V at 623-24.

<sup>75</sup> T. V. V. at 652.

<sup>76</sup> JE 6 at 128.

<sup>77</sup> JE 6 at 128.

<sup>78</sup> JE 6 at 127.

<sup>79</sup> RE 2 at 1.

33. Parent disagreed with the IEE providers the school district suggested. One person on the list was no longer in business and the two others were friends or former co-workers of the Director of Special Education for the \*\*\* Co-op.<sup>80</sup> Parent was provided IEE operating guidelines from the school district.<sup>81</sup> The guidelines state steps to request an IEE, which include providing the name of the proposed evaluator to the school district to allow the school district to contract directly with the evaluator.<sup>82</sup>
34. Parent never notified the school district of the name of the IEE provider for the school district to contract with.<sup>83</sup> Parent never asked her advocate for help with the IEE process.<sup>84</sup> The guidelines state an evaluator must be located within 100 miles of the school district.<sup>85</sup> However, the school district has contracted with independent providers outside its guidelines for an IEE.<sup>86</sup>

#### SERVICES AT THE DAEP

35. The DAEP classroom has students at work stations \*\*\*. Between each work station is a dividing wall. The room has book shelves and a computer for students to use.<sup>87</sup> A teacher is assigned to the DAEP and in the 2017-2018 school year, the teacher was certified in special education.<sup>88</sup>
36. Student's special education case manager said Student does not come to him for content mastery because Student does well academically. Student came to his room on \*\*\* during \*\*\* because Student is not allowed to \*\*\* or Student would \*\*\*.<sup>89</sup> Student participated in \*\*\* while during DAEP.<sup>90</sup> Student worked on \*\*\* from \*\*\* ISD while in the DAEP.<sup>91</sup>
37. Student's case manager/content mastery teacher visited Student almost daily while Student was in the DAEP.<sup>92</sup> Student's regular teachers visited Student and provided instruction

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<sup>80</sup> T. V. III at 387-88.

<sup>81</sup> T. V. III at 389-91.

<sup>82</sup> PE 47.

<sup>83</sup> T. V. V. at 649.

<sup>84</sup> T. V. IV at 457

<sup>85</sup> PE 47.

<sup>86</sup> T. V. V at 652.

<sup>87</sup> PE 23.

<sup>88</sup> T. V. VI at 707.

<sup>89</sup> T. V. VI at 699, 702.

<sup>90</sup> T. V. VI at 702, 705.

<sup>91</sup> T. V. VI at 716.

<sup>92</sup> T. V. VI at 705.

while Student was in the DAEP.<sup>93</sup> Student received direct instruction and online instruction while at the DAEP.<sup>94</sup> It was common for teachers to sign-in to the DAEP sign-in log when visiting students and not sign-out.<sup>95</sup>

38. Student's \*\*\* grade \*\*\* teacher visited Student in DAEP almost daily.<sup>96</sup> He would check for Student's understanding and Student received high marks. The \*\*\* teacher believed Student's grades were "even more legitimate" than student's in the regular class because Student was not able to cheat or copy off another student.<sup>97</sup> The teacher spent more one-on-one time with Student than other students in the regular classroom.<sup>98</sup>
39. In the 2017-2018 school year Students final grades were: \*\*\*.<sup>99</sup> Parent received Student's report cards in the 2017-2018 school year.<sup>100</sup> Student passed Student's STARR exams for \*\*\*.<sup>101</sup> Student did not need ESY because there was no documentation of Student regressing after a break.<sup>102</sup>
40. Progress reports were recorded during the 2017-2018 school year.<sup>103</sup> Student made progress on academic goals and they were removed from the IEP.<sup>104</sup> Student made some progress on Student's counseling goals and was still working on them.<sup>105</sup>

#### THE 2018-19 SCHOOL YEAR

41. In the most recent annual IEP dated September \*\*\*, 2018, Student was eligible for special education with an OHI – ADHD.<sup>106</sup> Parent attended the ARD with the case manager for student from \*\*\* and her advocate participated via telephone.<sup>107</sup> Parent received the

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<sup>93</sup> T. V. VI at 706-07.

<sup>94</sup> T. V. VI at 774.

<sup>95</sup> T. V. VI at 813.

<sup>96</sup> T. V. VI at 774.

<sup>97</sup> T. V. VI at 779-80.

<sup>98</sup> T. V. VI at 815.

<sup>99</sup> JE 13 at 290.

<sup>100</sup> JE 13.

<sup>101</sup> PE 31 at 3.

<sup>102</sup> T. V. IV at 533

<sup>103</sup> RE 16.

<sup>104</sup> JE 4 at 68.

<sup>105</sup> RE 8 at 153-156.

<sup>106</sup> RE 4 at 88.

<sup>107</sup> RE 4 at 102.



procedural safeguards and waived the 5-day waiting period for implementation of the IEP.<sup>108</sup>

42. Student is in all general education classes with 20 minutes per week of content mastery support. Student receives the following accommodations in all subjects: \*\*\* during independent work because of Student's ADHD; behavior management plan; check for understanding; check for work completion; cooling-off period; positive reinforcers; preferential seating; reminders to stay on task; reteach or retest for failing grades within 1 week; and small group administration of tests. Student receives counseling services for 20 minutes per week for three times per six weeks, excluding summer, holidays, mandated testing, student absences, and student refusals.<sup>109</sup> Student received counseling during the 2017-2018 and 2018-2019 school years at the designated amount with the allowed exclusions except for one time the counselor was absent.<sup>110</sup>
43. In the September \*\*\*, 2018 annual IEP, Student had the following counseling goal: during 36 instructional weeks, Student will demonstrate appropriate interactions toward peers and school staff in 4 out of 5 situations to prevent verbal and/or physical altercations. For example, Student will ignore negative comments from peers, will seek assistance from school staff, and will use "I" statements.<sup>111</sup> Student's counseling sessions were reduced from five 25 minutes sessions per six weeks to three 20 minute sessions per six week period.<sup>112</sup> The counseling sessions were decreased because Student was receiving counseling from outside sources, mastered one of Student's goals, and was making progress in Student's other goals.<sup>113</sup>
44. Student completed a \*\*\* on September \*\*\*, 2018, and is interested in \*\*\*. Student completed a \*\*\*.<sup>114</sup> \*\*\*.<sup>115</sup> Student enjoys math and believes it makes Student smarter.<sup>116</sup> Student's least favorite subject is writing and Student wants to learn how to write essays.<sup>117</sup>

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<sup>108</sup> RE 4 at 100, 102.

<sup>109</sup> RE 4 at 90.

<sup>110</sup> RE 8 at 150-52

<sup>111</sup> RE 4 at 104.

<sup>112</sup> RE 4 at 104, JE 6 at 119.

<sup>113</sup> T. V. IV at 540.

<sup>114</sup> RE 4 at 108.

<sup>115</sup> RE 4 at 113.

<sup>116</sup> JE 17 at 608.

<sup>117</sup> JE 17 at 606, 608.

45. The school district starts \*\*\*. The parent, student, and case manager complete \*\*\*.<sup>118</sup> Then goals are developed at age \*\*\*. At \*\*\* ARD, an FIE and \*\*\* are provided to a parent \*\*\*.<sup>119</sup>
46. Student's current BIP from September \*\*\*, 2018 states the following appropriate behavior interventions : staff will be clear, firm, and consistent with implementation of rules and consequences; staff will redirect Student in private; the campus counselor can assist with positive behavior support and guidance; Student is allowed to use a "cool off card" in a designated area selected by school staff; teachers should check for understanding and make sure independent work is at the correct level of ability; and Student will be given two choices.<sup>120</sup> The point sheet to record positive behavior was removed.<sup>121</sup>
47. Student had discipline referrals on \*\*\*, 2018 and \*\*\*, 2018 for leaving \*\*\*. Student was assigned to ISS for \*\*\* for each incident.<sup>122</sup>
48. Student is \*\*\*.<sup>123</sup> Student has passed all STAAR exams \*\*\*.<sup>124</sup>

#### SCHOOL DISTRICT ARD PROCEDURES

49. The school district drafts IEPs for ARD meetings prior to the meeting using the software program SuccessEd. Each teacher or counselor drafts the goals and objectives for a student and brings their draft to the ARD meeting. During the ARD meeting all those in attendance discuss a student and his or her program and notes are made on the draft IEPs based on the comments and discussion of all in attendance. The notes are taken back by the teachers or counselors and corrections are made to the document in the SuccessEd system.
50. After all corrections are added to SuccessEd, the document is "locked" and finalized. Then the draft documents are shredded in order to avoid confusion by having multiple copies of documents that may not be finalized.<sup>125</sup> The \*\*\* Co-op ARD meeting process includes a parent signing agreement or not signing at the time of the ARD meeting, but prior to receiving a copy of the finalized IEP.<sup>126</sup>

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<sup>118</sup> T. V. IV at 532

<sup>119</sup> T. V. V at 660.

<sup>120</sup> JE 1 at 8.

<sup>121</sup> JE 1 at 11, 8.

<sup>122</sup> JE 23 at 667, JE 20 at 630

<sup>123</sup> RE 4 at 99.

<sup>124</sup> JE 6 at 117.

<sup>125</sup> T. V. IV at 512-516.

<sup>126</sup> T. V. IV at 535-36.

51. Parent participated in ARD meetings and assisted in developing the IEP and BIP.<sup>127</sup> Teachers and administrators emailed each other multiple times about Student. The emails contained reminders for teachers to see Student at DAEP, put Student's grades in parent portal, teacher updates on Student progress, and setting ARD meetings.<sup>128</sup>
52. \*\*\* ISD did not allow Student to return to their campus for the half-day program for \*\*\*. They wanted Student to transition back into the general population of Santa Rosa ISD for a semester prior to attending \*\*\* ISD.<sup>129</sup> Student can continue to apply for the \*\*\* ISD program.<sup>130</sup>

#### STUDENT'S CURRENT CONDITION

53. Student received a neuropsychological assessment in December 2018, which was provided by two independent evaluators in \*\*\*, Texas.<sup>131</sup> The assessment confirmed Student's overall intellectual functioning was in the average range.<sup>132</sup> An auditory perception test was performed and Student scored within normal limits for Student's age. This did not rule out the presence of a hearing impairment, but did suggest a central auditory processing disorder is unlikely.<sup>133</sup> The neuropsychological diagnosed Student with \*\*\*, attention deficit hyperactivity disorder – combined type, and \*\*\*.<sup>134</sup>
54. A \*\*\* diagnosis is given when a child has had a medical or environmental condition that has affected their \*\*\*. Student has this diagnosis because of \*\*\*.<sup>135</sup> \*\*\*, which can affect Student's attention and impulsivity. Student was \*\*\*, which can impact Student's emotional regulation. The level of impact is based on the amount of exposure.<sup>136</sup>
55. During the neuropsychological assessment Student struggled with writing an essay. Student expressed Student has struggled with writing since \*\*\*. Children with ADHD often struggle with writing assignments due to the level of organization and self-direction required to complete them.<sup>137</sup>

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<sup>127</sup> T. V. VI at 711-12.

<sup>128</sup> JE 14 and 15.

<sup>129</sup> PE 34.

<sup>130</sup> T. V. VI at 718.

<sup>131</sup> PE 2 at 1, 25.

<sup>132</sup> PE 2 at 15

<sup>133</sup> PE 2 at 16

<sup>134</sup> PE 2 at 19.

<sup>135</sup> PE 2 at 200-01.

<sup>136</sup> T. V. II at 201-02.

<sup>137</sup> PE 2 at 16-17.

56. Student endorsed to the independent evaluator, through the BASC-3, Student's inattention, forgetfulness, hyperactivity, and impulsivity. These endorsements indicate Student is easily irritated and struggles to regulate Student's affect. Anger problems are common in people with ADHD.<sup>138</sup>
57. Student has a history of \*\*\*.<sup>139</sup> Student reported \*\*\*.<sup>140</sup> \*\*\*. It has also been linked to deficits in verbal memory and decision making.<sup>141</sup>
58. Student had Student's \*\*\*.<sup>142</sup> Parent reported it to the school on September \*\*\*, 2015.<sup>143</sup> \*\*\*.<sup>144</sup> On October \*\*\*, 2015, Student was diagnosed with \*\*\*.<sup>145</sup> On October \*\*\*, 2015, a note was sent to the school district from Student's neurologist which stated \*\*\*.<sup>146</sup>
59. \*\*\*.<sup>147</sup> \*\*\*. A person cannot be taught to know if Student had \*\*\*.<sup>148</sup> Student and parent were not knowledgeable about Student's \*\*\* diagnosis.<sup>149</sup>
60. The same neurologist sent a note on October \*\*\*, 2018, which stated \*\*\*.<sup>150</sup> Student was \*\*\*.<sup>151</sup> Student had poor compliance with \*\*\*.<sup>152</sup> \*\*\* which could be neurological rather than behavioral or willful.<sup>153</sup>
61. The school district developed an emergency care plan for \*\*\* for Student in 2015 after being made aware of Student's \*\*\*.<sup>154</sup> The school nurse distributed and discussed the care plan with Student's teachers.<sup>155</sup> An email was sent to the teachers on December \*\*\*, 2017

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<sup>138</sup> PE 2 at 17.

<sup>139</sup> PE 2 at 14.

<sup>140</sup> PE 2 at 13.

<sup>141</sup> PE 2 at 19.

<sup>142</sup> PE 7 at 16.

<sup>143</sup> T. V. I. at 33, JE 12 at 280.

<sup>144</sup> JE 12 at 261.

<sup>145</sup> PE 7 at 24.

<sup>146</sup> PE 7 at 1.

<sup>147</sup> T. V. I at 39, T. V. VI at 788-89.

<sup>148</sup> T. V. II at 214-16.

<sup>149</sup> T. V. II at 209-10.

<sup>150</sup> PE 7 at 2.

<sup>151</sup> PE 7 at 28.

<sup>152</sup> PE 7 at 67, 113.

<sup>153</sup> PE 2 at 23.

<sup>154</sup> JE 11 at 212.

<sup>155</sup> T. V. I at 34.

- regarding Student's \*\*\* condition for those providing services while Student was in the DAEP.<sup>156</sup> The school district attempted to obtain a completed OHI form from Student's neurologist for \*\*\*; however, Student never sent a completed form to the school district.<sup>157</sup>
62. Student had \*\*\* through the school district in October 2013 and January 2014, which Student failed.<sup>158</sup> Student passed the \*\*\* in November 2015.<sup>159</sup> Student also had a \*\*\* on \*\*\*, 2017 and failed.<sup>160</sup> The school nurse spoke to parent and was informed parent was planning on taking Student to a \*\*\* evaluation at a private clinic.<sup>161</sup> The school district does not have \*\*\* on staff. If a student fails \*\*\*, the school district informs the parent and it is the parent's responsibility to take the student to the doctor.<sup>162</sup>
63. Student has a history of \*\*\* or difficulty staying awake. Student reported this himself in counseling.<sup>163</sup> Student's case manager would find Student \*\*\* in DAEP at times and he would \*\*\* and get Student motivated.<sup>164</sup> Student's \*\*\* teacher would confront Student about not doing problems some times and Student would say Student was tired \*\*\* or had spent the morning reading or writing.<sup>165</sup> Student reported to the evaluator for the May \*\*\*, 2018 reevaluation that Student often stays up late \*\*\*.<sup>166</sup>
64. Parent previously filed a request for a special education due process hearing on February 20, 2018. The case was dismissed without prejudice on April 6, 2018.<sup>167</sup>
65. Student's behavior has improved.<sup>168</sup> Student is described as bright and capable.<sup>169</sup> Student is a high functioning student, "very" independent and intelligent.<sup>170</sup>

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<sup>156</sup> JE 12 at 238.

<sup>157</sup> T. V. IV at 504

<sup>158</sup> JE 12 at 237.

<sup>159</sup> JE 12 at 234.

<sup>160</sup> JE 12 at 239.

<sup>161</sup> T. V. I at 47-48.

<sup>162</sup> T. V. I at 48-50.

<sup>163</sup> JE 17 at 604.

<sup>164</sup> T. V. VI at 706-707.

<sup>165</sup> T. V. VI at 781.

<sup>166</sup> JE 7 at 134.

<sup>167</sup> PE 30.

<sup>168</sup> T. V. IV at 725.

<sup>169</sup> T. V. IV at 778.

<sup>170</sup> T. V. IV at 699.

## VI. DISCUSSION

### A. Statute of Limitations Issue

Under the 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 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 one year of the date Student or she knew or should have known about the alleged action that serves as the basis for the hearing request. 19 Tex. Admin. Code § 89.1151 (c).

The one year statute of limitations rule will not apply in Texas if the parent was prevented from requesting a due process hearing due to either:

- Specific misrepresentations by the school district that it had resolved the problem that forms the basis of the due process hearing request; or
- The school district withheld information from the parent that it was required to provide under IDEA. 20 U.S.C. § 1415 (f)(3)(D); 34 C.F.R. § 300.511 (f)(1)(2).

Petitioner claimed the second exception stating the school district withheld information that was required under IDEA. The evidence showed Student's parent received Notice of Procedural Safeguards at the annual ARD for the 2017-2018 school year on September \*\*\*, 2017. It is reasonable to infer from the evidence that Student's parent knew or should have known of their procedural rights as a result of the Notices provided to them over the course of the 2017-2018 school

year. No evidence was provided of any ARD meetings or Notice of Procedural Safeguards prior to the September \*\*\*, 2017 ARD. Student has been enrolled in the school district since \*\*\* 2011.

When a school district delivers a copy of IDEA procedural safeguards to a parent the statute of limitations period for IDEA violations begins regardless of whether the parent later examines the text to acquire actual knowledge of procedural rights – the simple act of delivering the procedural safeguards notice suffices to impute constructive knowledge of parental rights under IDEA. *El Paso Ind. Sch. Dist. v. Richard R.*, 567 F. Supp 2d 918, 945(W.D. Tex. 2008), *rev'd on o.g.* 591 F.3d.417 (5<sup>th</sup> Cir. 2009).

Petitioner filed a Due Process Complaint on February 20, 2018. At minimum, that is the date by which Parent knew or should have known about the alleged action that serves as the basis for the hearing request because the same issues were brought up in the current case. In this case, parent had a year from February 20, 2018 to file and did so by filing this case on September 17, 2018 within the one-year limitation period. The relevant time frame is the 2017-2018 school year to present. Facts from prior school years are relevant and may be used as background information to understand Student's educational program.

## **B. Duty to Provide FAPE**

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. 20 U.S.C. § 1400(d). The school district has a duty to provide FAPE to all children with disabilities ages 3-21 who are enrolled in the school district. 34 C.F.R. § 300.101(a); Tex. Educ. Code § 12.012(a) (3).

The school district is responsible for providing Student with specially designed personalized instruction with sufficient support services to meet Student's unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with the child's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent.*

*Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

### **C. Burden of Proof**

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.<sup>171</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5<sup>th</sup> Cir. 1993). In this case, the school district was obligated to provide Student with FAPE during the 2017-2018 school year and the current 2018-2019 school year and to offer a program that is reasonably calculated to provide Student with the requisite educational benefit for the same school years. The burden of proof is on Petitioner to show the school district did not do so.

### **D. Identification**

The School District has an affirmative duty to identify, locate, and evaluate all children with disabilities residing within its jurisdiction who may need special education. 20 U.S.C. § 1412(a)(3); *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp.2d 918, 949–50 (W.D. Tex. 2008). This affirmative duty is known as a school district’s “Child-Find” obligation. 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.128, 300.220. Under Texas law, a special education referral is required as part of a school district’s overall regular education referral or screening system for students experiencing difficulty in the regular classroom. 19 Tex. Admin. Code § 89.1011.

The Child Find obligation is triggered when the school district has reason to suspect a student has a disability and reason to suspect the student is in need of special education services. 34 C.F.R. §§ 300.8 (a)(1); 300.111(a)(c)(1).

While it is uncontested that Student was identified as a student with \*\*\* and then changed to OHI-ADHD, Petitioner contends the school district should have also identified Student under

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<sup>171</sup> There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 292 n. 4 (5<sup>th</sup> Cir. 2009).



OHI for \*\*\*, \*\*\*, and \*\*\*. Petitioner did not include \*\*\* or \*\*\* in Petitioner's original Complaint. The school district agreed at hearing to the issue of OHI-\*\*\*.

Student was diagnosed with \*\*\* in 2015. The school district put an emergency plan in place for Student after it was made aware of the diagnosis. Petitioner presented no evidence that Student needs special education services due to Student's diagnosis of \*\*\*. Student is able to attend school, learn while in school, and succeed academically and non-academically.

Petitioner argues that Student could benefit from some services to help Student understand Student's diagnosis and any limitations that may come along with it in the future. However, to be eligible for special education services, a student must both have a qualifying disability and be in need of special education services to address the disability, not simply be likely to benefit from special education services. *Alvin Ind. Sch. Dist. V. A.D. ex rel Patricia F.*, 503 F.3d 378, 382 (5<sup>th</sup> Cir. 2007). While it may be true that Student could benefit from education related to Student's \*\*\*, it does not impede Student's access to Student's education.

Petitioner also argues the School District should have identified Student as OHI for \*\*\* and asks this hearing officer to declare the Student eligible for services under OHI. Student failed a couple of \*\*\* assessments provided by the school district. The school district does not have \*\*\* on staff, it notifies parents of a failed \*\*\* screening, and then it is the parent's responsibility to take the child to \*\*\*. In January 2018, Parent notified the school district Student would have a \*\*\* soon. At the time of disclosures for the due process hearing, no \*\*\* screening had occurred. At the due process hearing, Petitioner offered a \*\*\* into evidence, but it was not admitted due to failure to comply with the disclosure deadline and the fact Respondent was unaware a \*\*\* had occurred. No evidence was presented by any expert that proved a \*\*\* or that any \*\*\* impacted Student's access to education.

In weighing evidence, teacher observations are most instructive when determining the impact a disability, or potential disability, has on a Student's educational performance. *Christopher M. ex rel Lveta McA. v. Corpus Christi Ind. Sch. Dist.*, 933 F.2d. 1285, 1292 (5<sup>th</sup> Cir. 1991). No teachers, staff, or administrators who worked with Student indicated \*\*\* as an issue.

Petitioner's expert diagnosed Student with \*\*\* in December 2018. Many of the attributes of this disorder are similar to ADHD. Petitioner did not include OHI-\*\*\* in Petitioner's Complaint. However, Student has not shown a need for special education related to this disorder. The behavioral issues related to this disorder can be addressed in Student's current counseling goals and BIP.

On this basis, the School District had no reason to suspect Student needed special education services to address \*\*\*, \*\*\*, or \*\*\*. Moreover, Petitioner failed to produce an OHI form signed by a physician for any of these diagnoses. Without the physician's diagnosis, neither the School District, nor this hearing officer may find the Student eligible under OHI. 19 Tex. Admin. Code §89.1040 (a)(8). Therefore, Petitioner did not meet Student's burden of showing the School District failed to properly identify Student for \*\*\*, OHI-\*\*\*, or \*\*\*.

#### **E. FAPE**

##### **The Four Factors Test**

The Fifth Circuit has articulated a four factor test to determine whether a Texas school district's program meets IDEA requirements. Those factors are:

- The program is individualized on the basis of the student's assessment and performance;
- The program is administered in the least restrictive environment;
- The services are provided in a coordinated, collaborative manner by the "key" stakeholders; and,
- Positive academic and non-academic benefits are demonstrated. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5<sup>th</sup> Cir. 1997).

These four factors need not 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 required in evaluating the school district's educational program. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5<sup>th</sup> Cir. 2009).

### **1. Individualized on the Basis of Assessment and Performance**

First, the evidence showed the IEP implemented during the relevant time period was individualized on the basis of assessment and performance. In meeting the obligation to provide FAPE, the school district must have in effect an IEP at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, the IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323(a). While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the school district must nevertheless provide Student with a meaningful educational benefit—one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. V.P.*, 582 F.3d 576, 583(5<sup>th</sup> Cir. 2009). The basic inquiry in this case is whether the IEP implemented by the school district "was reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 at 999 (2017).

IEP goals and objectives were developed to address Student's area of need in how Student interacts with Student's peers and teachers or administration. The PLAAFPs used as the basis for formulating IEP goals and objectives in this area were derived from assessments as well as observation and teacher input. Student's BIP was modified multiple times to specifically address Student's needs. While some of the BIP interventions remained the same, others changed such as the location of the cooling off area or the staff to refer Student to for positive support. Student's number of referrals decreased indicating Student's BIP was appropriate and working. Student's academic goals were removed during the 2017-2018 school year because Student was successful and did not need additional help academically other than 20 minutes per week of content mastery. Teachers indicate Student's behavior has improved and Student was compliant with their directives. Student's behavior does not interfere with accessing Student's educational program or

Student's academic progress.

Each IEP for Student had PLAAFPs. Petitioner claims the district failed to write the PLAAFPs in a meaningful or measurable way to determine baselines and accurately track Student's progress. A baseline is not required under the Federal Regulations for PLAAFPs. 34 C.F.R. §300.320(a)(1). The requirement is a "statement" of the child's present levels of academic achievement and functional performance. *Id.* The PLAAFPs in Student's IEPs for the relevant time period provide a snapshot of Student's present levels of academic achievement and functional performance in the areas of behavioral, discipline, functional, and academic. Student was on grade level, passing STAAR tests, and progressing as stated in the PLAAFPs. The PLAAFPs comply with IDEA requirements.

Student originally had goals for academics and behavior. Each academic goal had a list of what skills Student was expected to acquire, how the skills would be measured, and a goal for the rate of success. By February 2018, Student's academic goals were removed due to Student's success. Student's counseling goal remained with objectives, how success was to be measured, and the frequency of progress reporting.

Petitioner argues that Student needed services for math and reading. Student did well in math and it was Student's favorite subject. No evidence was presented Student needed any additional supports for mathematics. Student passed the STAAR \*\*\* assessment in \*\*\* grade. While there is a sentence in Student's September 2017 IEP that Student is \*\*\* grade levels behind in \*\*\*, it does not affect Student's learning or academic progress. No evidence or testimony was presented that Student struggles with \*\*\* or that it is impacting Student's accessing Student's education.

ESY services must be provided only if a student's IEP team determines, on an individual basis, that the services are necessary. 34 C.F.R. §300.103; 19 Tex. Admin. Code §89.1065. The need for ESY services must be documented and determine that a student has exhibited a severe or substantial regression that cannot be recouped in a reasonable period of time. 19 Tex. Admin. Code §89.1065(2). Petitioner complains Student was denied ESY services for the 2016-2017,

2017-2018, and 2018-2019 school years. Student made academic progress each of these years and displayed no signs of regression of skills after a school break. ESY was not necessary for Student to access Student's educational program or achieve academically. In addition to no ESY services, Petitioner complains Student did not receive any AT services.

The use of AT or AT services is determined by the student's IEP team on a case-by-case basis if the services are necessary for a student to receive FAPE. 34 C.F.R. §300.105. No evidence was presented that Student had any needs or a disability that prevented Student from accessing Student's educational program without AT services. Student's most recent school district evaluation assessed Student's need for AT services and determined Student had no need.

Petitioner argues Student was not provided with psychological assistance and behavioral planning with assistance to the family. Student continues to receive counseling services despite the reevaluation stating Student no longer needs it. Student was provided counseling services due to \*\*\* qualification for special education. When Student's qualification changed to ADHD, counseling services were still provided.

\*\*\*. \*\*\*. \*\*\*. \*\*\*. \*\*\*. \*\*\*. \*\*\*.

The evidence showed the school district properly began \*\*\* when Student \*\*\*. The evidence also showed the ARD Committee reviewed the \*\*\* annually. The \*\*\* was updated in September 2018 noting Student's \*\*\* as well as Student's previous \*\*\*.

Student's IEPs from September 2017 to Student's current IEP from September 2018 have a \*\*\* goal of Student \*\*\*. Student, Parent, and the content mastery teacher completed a \*\*\* to develop Student's \*\*\*. Student's IEP listed activities and services Student needed to facilitate student's \*\*\*. At \*\*\*, Student had demonstrated \*\*\* skills, Student was \*\*\*, and Student demonstrated age-appropriate \*\*\* skills. Student \*\*\* and continued that program during Student's fall semester in 2017 while in the DAEP. \*\*\*. Student was not allowed to continue \*\*\* due to Student's behavior issues at Santa Rosa ISD. Student will continue to attempt \*\*\* to pursue

Student's interest. The \*\*\* IEP address all of the areas required by state law.

Petitioner argues Student did not receive physical education on a regular basis as other students during Student's time at the DAEP. The evidence showed Student participated in physical education on a daily basis. Student only missed PE when the activity for the day was \*\*\*. Student is medically not allowed to participate in \*\*\* due to Student's \*\*\*.

## **2. Least Restrictive Environment**

The IDEA requires that a student with a disability shall be educated with non-disabled peers to the maximum extent appropriate and that special classes, separate schooling and other removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the "least restrictive environment." 34 C.F.R. § 300.114(a)(2)(i)(ii). State regulations require the continuum of instructional arrangements be based on students' individual needs and IEPs and include a continuum of educational settings, including: mainstream, homebound, hospital class, resource room/services, self-contained – regular campus (mild, moderate, or severe), nonpublic day school, or residential treatment facility. 19 Tex. Admin. Code § 89.63(c).

The evidence shows Student was educated in the least restrictive environment. Student was in all general education classes. Student went to the DAEP in the Fall of 2017. The school district determined Student's placement at the DAEP was not related to Student's disability. While at the DAEP, Student was placed with all general education students. Student was never in a room by \*\*\*self without any of Student's non-disabled peers.

## **3. Services Provided in a Coordinated, Collaborative Manner by Key Stakeholders**

The evidence shows that services were provided in a coordinated, collaborative manner by Key Stakeholders. Parent participated in seven out of eight ARDs during the 2017-2018 school

year to present. Parent typically agreed with the ARD decisions. Parent had an advocate or an attorney with her at 4 of the 7 ARDs she attended during this time. Parent's main disagreement with Student's services was Student attending the DAEP and Student's confidentiality being potentially violated \*\*\* regarding the DAEP incident. Parent was in frequent contact with the school through emails and with the Director of Student Services via text messages. Parent did express frustration in some of the emails to the school district when she was seeking Student's grades, assignments, and information on Student's level of instruction at the DAEP. The school district personnel worked in a collaborative manner amongst themselves to address any issues brought up by the Parent. The case manager was removed, teachers posted Student's grades, and teachers responded to administration's questions about how Student was performing in the classroom. A parent's disagreement with some part of a student's education plan does not mean the process is not collaborative. Parent received Student's progress reports at the required times.

Parent's complaint about the school district's process in developing the IEP did not leave parent out of the development process. While Parent did not receive a draft copy of the IEP prior to the ARD meetings, all of Student's services, goals, and objectives were addressed at the ARD meetings with parental input about academics and behavior and then that parental input was included in the finalized version of the IEP. Parent completed the \*\*\* and this was used to develop Student's IEP goals \*\*\*.

#### **4. Academic and Non-Academic Benefits**

Fourth, the evidence supports the conclusion Student received both academic and non-academic benefits from the educational program at issue. While Student may not have completely mastered Student's behavioral goals, Student did show improvement. The IDEA does not require the IEP to guarantee a certain level of accomplishment – only that the IEP is reasonably calculated to meet Student's needs given Student's unique circumstances. *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. at 999. Furthermore, the school district is not required to provide Student with the best possible education. Student does not need to improve in every academic and non-academic area to receive an educational benefit. The issue is not whether the school district could have done more. Instead, the inquiry is whether Student received an educational benefit. *V.P.*,

582 F. 2d at 590. The evidence showed Student received more than a *de minimus* educational benefit from the program provided given Student's unique circumstances. *Andrew F.*, 137 S. Ct at 999.

Student passed all of Student's classes and all of Student's STAAR assessments from \*\*\* grade to present. Student's \*\*\* grade \*\*\* teacher said Student was one of his most successful students and Student was talented. Student's teachers indicated Student was successful in class and Student's behavior improved. The number of referrals Student has received has decreased from year to year. When teachers were using the point system to monitor Student's behavior Student received points consistently. While at the DAEP, Student \*\*\*. This is significantly lower than these types of incidents in previous years. Student made progress on Student's counseling goals. Student had \*\*\* incidents of elopement in the Fall of 2018 and no incidents of physical or verbal aggression, which is a substantial improvement.

Petitioner complains the school district failed to monitor and review IEPs by using objective progress reporting. However, progress reports were completed for the 2017-2018 school year and all academic goals were discontinued because Student mastered the goals. Parent could also monitor progress through Student's report cards that were mailed to her home. Behavior issues were the Student's primary area of need and Student showed improvement. The counseling progress reports are detailed and meaningful to show Student's progress.

Student was provided FAPE by the school district. The courts have never specified the four factors must be considered or weighed in any particular way. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 293 (5th Cir. 2009). The whole educational experience, and its adaptation to confer "benefits" on the child, is the ultimate statutory goal. *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 397 (5th Cir. 2012). Whether a student demonstrates positive academic and non-academic benefits is "one of the most critical factors in this analysis." *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 814–15 (5th Cir. 2012) (citing V.P. 582 F. 3d at 588).



Student's IEP was individualized on the basis of assessment and performance, Student was educated in the least restrictive environment, services were provided in a coordinated, collaborative manner by key stakeholders, and Student made academic and non-academic progress. According to the 5<sup>th</sup> Circuit Court of Appeals, the academic and non-academic benefit is the most critical factor in the FAPE analysis. Student was successful academically as shown by Student's grades and passing the STAAR exams. Student was also successful non-academically as shown by the decrease in Student's discipline referrals and teachers' comments that Student had improved and was not a behavior problem.

#### **F. Procedural Safeguards**

Petitioner did not meet Student's burden on proving the school district violated Student's Parent's procedural rights under the IDEA. Under the IDEA, a denial of FAPE can only be found if the procedural violations: impeded the child's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE to the parent's child; or caused a deprivation of educational benefit. 34 C.F.R. §300.513(a)(2)(i-iii). A copy of procedural safeguards must be given to a parent only one time a school year, except a copy must also be given upon a parent request for evaluation. 34 C.F.R. §300.504(a)(1).

Parent was provided procedural safeguards and she signed her initials to that affect at the September 2017 ARD meeting. Parent was provided prior written notice and procedural safeguards on multiple occasions including the ARD meeting when she requested an IEE and the MDR ARD meeting. Parent complains she was unaware she could appeal the MDR decision. First, the appeal deadline has passed for the MDR decision. Second parent had an advocate at the time Student was placed in the DAEP in March 2017 and she had an attorney present at the MDR ARD for the \*\*\* 2017 incident. Third, she received all the proper procedural safeguards and prior written notice to have constructive notice of the process.

No procedural violations impeded Student's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefit. 34 C.F.R. §300.513 (a)(2). As the evidence showed, Student

was \*\*\*.

Petitioner complains Parent was not provided the information for the IEE process in a timely manner. The parent of a child with a disability under IDEA is entitled to an independent educational evaluation at school district expense if the parent disagrees with the school district's own evaluation so long as the IEE meets reasonable school district criteria. 34 C.F.R. §300.502 (a) (1) (2) (3) (b) (1). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either file a due process complaint to show its evaluation is appropriate or ensure the IEE is provided at public expense unless the school district can show the evaluation obtained by the parent did not meet the school district's criteria. 34 C.F.R. §300.502(b)(2)(i)(ii).

The first documentation of Parent's request for an IEE was at the May \*\*\*, 2018 ARD where the three year reevaluation was read and discussed.<sup>172</sup> Parent did not agree with the evaluation and requested an IEE. Upon the request for an IEE by Parent, the school district could file a due process complaint to show its evaluation was appropriate or ensure the IEE was provided at public expense, unless during a due process hearing the school district showed the IEE obtained by parent did not meet agency criteria. 34 C.F.R. 300.502(b)(i)(ii). The school district granted the request for the IEE and provided Parent with the IEE guidelines. No evidence was presented that showed Parent requested additional help from the school district with meeting the IEE criteria. Additionally, Parent had an advocate at the time of the IEE request and did not request assistance from the advocate either. Parent used evaluators outside the 100 mile limit in the IEE guidelines and failed to notify the school district of the names of the evaluators so school district could contract with them directly. The IEE was not completed until December 2018. Based on the evidence, Petitioner failed to meet Student's burden of showing school district failed to timely provide parent with the IEE procedures. The Parent's IEE will not be reimbursed.

## VII. CONCLUSIONS OF LAW

1. Student was properly identified in all areas of suspected need as a Student with OHI-

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<sup>172</sup> No evidence exists in JE 3, p. 44 about Parent's request for an IEE as Petitioner states in her closing brief.

ADHD and not OHI -\*\*\*, OHI-\*\*\*, or \*\*\*. 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.128, 300.220.

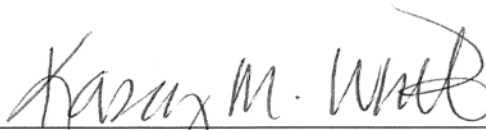
2. Student was provided FAPE during the relevant time period and Student's IEP was reasonably calculated to address Student's needs in light of Student's unique circumstances. *Rowley*, 458 U.S. 176; *Andrew F.*, 137 S. Ct. 988.
3. Respondent complied with parental procedural rights under the IDEA. Any procedural violations did not impede Petitioner's right to FAPE, significantly impede the parent's opportunity to participate in decision-making regarding the provision of FAPE, or cause a deprivation of educational benefit. 34 C.F.R. §§ 300.503(a)(c), 300.504(a)(d), 300.513(a)(2).
4. All of Petitioner's claims arising under any laws other than IDEA are outside the jurisdiction of a special education hearing officer in Texas. 34 C.F.R. §§ 300.503(a); 300.507, 19 Tex. Admin. Code § 89.1151(a).

#### VIII. ORDERS

1. Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief are **DENIED**.
2. Petitioner's claims arising under any law other than the Individuals with Disabilities Education Act are dismissed as outside the jurisdiction of the hearing officer.

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

**SIGNED March 22, 2019.**



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**Kasey M. White**  
**Special Education Hearing Officer**  
**For the State of Texas**

**IX NOTICE TO PARTIES**

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