TEA Docket No. 062-SE-1118

STUDENT,	**§**	**BEFORE A SPECIAL EDUCATION**
b/n/f PARENT	**§**	
	§	**HEARING OFFICER**
V.	**§**	
	§	**FOR**
KIRBYVILLE	**§**	
INDEPENDENT SCHOOL DISTRICT	**§**	**THE STATE OF TEXAS**

DECISION OF HEARING OFFICER

Petitioner, ***, b/n/f *** (Student or Petitioner) (Parent or ***), filed a complaint requesting an expedited impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"). Respondent is KIRBYVILLE INDEPENDENT SCHOOL DISTRICT. The complaint was received by the Texas Education Agency on November 2, 2018 and assigned to this hearing officer on November 5, 2018.

LEGAL REPRESENTATIVES

Student was represented by Sonja D. Kerr of the law firm HOLLINGSWORTH & ZIVITZ, P.C., and by Dorene Philpot of the PHILPOT LAW OFFICE. The School District was represented by Sara Hardner Leon, Michelle Alcala, and Michael Roseberry of the law firm POWELL & LEON, L.L.P.

PREVIOUS DUE PROCESS HEARING (OCTOBER 2017).

On October 25, 2017, when Petitioner was in the *** grade, the same parties in this due process hearing appeared for a 2 ½ day due process hearing before Special Education Hearing Officer Brenda Rudd. Parent, as next of friend for Petitioner, sought a ruling that Petitioner was eligible for special education under the eligibility category of emotional disturbance.

On January 7, 2018, Hearing Officer Rudd determined that Petitioner and Parent (collectively “Petitioners”) did not meet their burden of proof to establish that Petitioner qualified for special education and related services.

The Hearing Officer also determined that Petitioners did not establish that Respondent Kirbyville Consolidated Independent School District failed in its child find duties and recognized that in order to be liable for denial of FAPE, the student must be a student with a disability. *Petitioner b/n/f *** v. Kirbyville Consol. Indep. Sch. Dist., Docket 021-SE-1016 (2017), citing D.G. v. Flour Bluff Indep. Sch. Dist., 59 IDELR 2 (5th Cir. 2012), (unpublished); 34 CFR § 300.111.*

Petitioners appealed Hearing Officer Rudd's decision to the U.S. Court for the Eastern District of Texas on March 2018. That appeal is pending as of the date of this filing. In their current request for due process hearing, Petitioners also include claims that are pending in the federal court. *Petitioner b/n/f *** v. Kirbyville Consol. Indep. Sch. Dist., Cause No. 01-18-CV-120, In the United States District Court, Beaumont Division.*

CASE SUMMARY

The issues in this case center on whether the school district failed to timely and appropriately engage in child find duties, and whether the school district failed to provide a Free Appropriate Public Education (FAPE). The Petitioner makes claims relating to events occurring after Oct. ***, 2017. The Petitioner believes Student should have been identified as eligible for special education but even though Student was not, Student is still entitled to disciplinary protections under the IDEA. (Tr. Vol. 1, p. 103.) Petitioner makes other claims solely for purposes of administrative exhaustion. The lawsuit also makes claims alleging Section 504 violations.

NO BIFURCATION OF ISSUES

The request for due process hearing raises expedited issues and other issues that might typically be bifurcated for later hearing. Because of shared law and facts, both parties requested the matters be heard simultaneously. A special education hearing officer in Texas has the authority to manage the hearing process and exercise discretion in issuing any orders that justice may require. 19 Tex. Admin. Code § 89.l 170(e). Finding it will preserve judicial resources and avoid unnecessary costs, the matter proceeded to hearing without bifurcation.

CLAIMS OUTSIDE HEARING OFFICER'S JURISDICTION

Petitioner asserts claims arising under the IDEA and its implementing federal and state regulations. Petitioner also asserts claims under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131. Petitioner has been determined to be eligible for Section 504 and entitled to the protections and procedures under Section 504. Petitioner has given notice of intent to secure reimbursement under Section 504 of the Rehabilitation Act of 1973 (Section 504) for the cost of Petitioner's experts who prepared reports and testified at the due process hearing.

The jurisdiction of a special education hearing officer in Texas is strictly limited to claims arising under the IDEA. Specifically, a hearing officer has the authority to determine claims related to the identification, evaluation, or educational placement of a student with a disability or the provision of a FAPE to the student. 34 C.F.R. §§ 300.507; 300.511; 19 Tex. Admin. Code §§ 89.1151 (a), 89.1170.

Since a hearing officer has no jurisdiction to resolve claims or make an award under any law other than the IDEA, to the extent Petitioner seeks relief under Section 504, or Title II of the Americans with Disabilities Act, 42 U.S.C. 12131, or any other relief outside IDEA, such requests must be dismissed as outside the jurisdiction of the hearing officer. This hearing officer also lacks jurisdiction to order remedies for systemic violations or determining what constitutes sufficient facts to allow for administrative exhaustion. Thus, these claims should accordingly be dismissed.

DUE PROCESS

The request for due process is sufficient to meet the requirements of the IDEA. The parties participated in an unsuccessful resolution session. The parties did not participate in mediation. A pre-hearing conference was conducted, a record was made, and a copy of the transcript was delivered to the parties and this hearing officer.

A Due Process Hearing was conducted on November 27 through November 30, 2018. A record was made, and a copy of the transcript was delivered to the parties and this hearing officer.

The hearing was held within 20 school days from the date of Petitioner's request, and this Decision is timely made within 10 school days after the hearing. 34 C. F. R. §300.532(c).

ISSUES FOR DECISION

Student alleges issues that pertain to a manifestation determination review following an event that occurred in October 2018. Those MDR-related issues are:

1. Whether the student's conduct was a manifestation of Student's disability:

2. Whether the student's conduct was caused by, or had a direct and substantial relationship to, Student's disability; or

3. Whether the conduct in question was the direct result of the District's failure to implement the student's IEP. 34 CFR §300.530(e). (which in this case was not supplied to Student due to the district's child find/identification failures)

4. If the student's conduct was a manifestation of Student's disability, whether the student inflicted serious bodily injury (which is defined under paragraph (3) of subsection (h) of Section 1365 of Title 18, United States Code) or had a "dangerous weapon" as defined under paragraph (2) of the first subsection (g) of section 9320 of title 18, United States Code, or involved illegal drugs, which would constitute that special circumstances exist authorizing placement in the DAEP for a period not to exceed 45 school days. 34 CFR §300.530(g).

5. Whether the removal(s) violated 34 CFR §300.530 and/or 34 CFR §300.532(b)(2).

6. Whether the district itself failed to comply with its own student code of conduct and/or the child's IEP that Student would have had if the district had engaged in even minimally competent child find activities.

Student also raises non-discipline-related issues as follows:

1. Major issue: The district denied the student Student's right to a Free Appropriate Public Education during the applicable period.

2. Subissue 5(a): Because of the violations recited in the major issue above, the student was deprived of a number of services to which Student was entitled.

3. Subissue 5(b): The district failed to evaluate student in a timely and appropriate manner.

4. Subissue 5(c): The district failed to comply with the student and parents' procedural rights.

5. Subissue 5(d): The district violated the student's rights under other causes of action (for purposes of exhaustion).

6. Subissue 5(e): The district failed to protect the student and/or family from bullying, harassment, discrimination and/or retaliation.

BURDEN OF PROOF

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 (5th Cir. 2009). The burden of proof in this due process hearing is on Petitioner. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L*., 999 F.2d 127, 131 (5th Cir. 1993).

FINDINGS OF FACT

Based upon the pleadings, evidence presented, and argument of counsel, the Hearing Officer makes the following findings of fact:

1. Petitioner is a ***-grade general education student at *** who is successful academically and is a ***. [Ex. R. 12, 13, 14] [Tr. 109]

2. Although Petitioner experienced behavioral challenges in ***,[1] since entering ***, Petitioner has had a marked improvement in Petitioner's behavior and was ***. [Ex P. 25] [Tr. 1120, lines 2-7; Tr. 1125, lines 10-24]

[1] Student's *** behavior resulted in a due process hearing that determined that Student is not a student with a disability who requires special education or related services under the IDEA. *Student b/n/f *** v. Kirbyville Consol. Indep. Sch. Dist.*, Docket 021-SE-1016 (2018) (appeal pending in *Student b/n/f/ *** v. Kirbyville Consol. Indep. Sch. Dist.*, Cause No. 01-18-cv-120, In the United States District Court, Eastern District of Texas, Beaumont Division).

3. Prior to October *** 2018, Petitioner had not received any disciplinary sanctions during Petitioner's *** grade school year. [Ex. P. 25]

4. Through a series of Section 504 Committee meetings over Summer and into Fall 2018, the District provided Petitioner with a 504 accommodation plan, which included accommodations for an alternative testing site to address testing anxiety Petitioner experienced in ***.

5. Petitioner has an A-B average, and at the time of this hearing, had an *** average in *** and a *** average in ***. Petitioner's teachers and *** report that Petitioner is a serious and successful student***. [Tr. 1050, lines 20-24] [Ex. R. 12; Tr. 1129, lines 4-6][Tr. 1035, line 21 to Tr. 1036, line 7; Tr. 1119, lines 5 – 20; Tr. 114.]

6. On October *** 2018, Petitioner participated in a fight at ***. *** [Tr. 835, line 12 to Tr. – 837, line 13; Tr. 838, line 16 to Tr. 840, line 10; Tr. 848, line 17 – 25; Tr. 850 to Tr. 852, lines 1-15; Tr. 853, line 3 to Tr. 858, line 2; Tr. 858, line 13 to Tr. 860, line 25.]

7. The fight was planned. [Tr. 862, line 25 to Tr. 863, line 5; Tr. 864, lines 1 – 19; Tr. 865, line 25 to Tr. 866, line 14.] ***." [Ex. R. 10 (KCISD 0248 – 0251)]. ***. [Tr. 863, line 3 – 5; Tr. 864, line 4 – 18.]

8. The surveillance video recording of the October *** 2018 fight demonstrates that Petitioner and ***.

9. ***. ***. ***. [Ex. R. 1.]

10. On October ***, 2018, the 504 Committee held a manifestation determination review meeting to determine whether Petitioner's behavior was a manifestation of Petitioner's disability. [Ex. R. 23; Tr. – 872, lines 14 -25; Tr. 874, lines 3 – 11.] The 504 committee determined Petitioner's behavior in connection with the fight did not result from Petitioner's disability. [Ex. R. 23.]

11. On account of Petitioner's role in the fight, Petitioner was placed in the Disciplinary Alternative Education Program ("DAEP") for 45 days. [Ex. P. 25, pg. 2.] [Ex. R. 23; Tr. 872, lines 14 – 25.]

12. Petitioner elected not to challenge the decision under either the school district's disciplinary appeal process or by requesting an appeal under Section 504. [Ex. R. 43.]

13. Petitioner's mother *** requested an expedited IDEA Due Process Hearing to challenge the disciplinary placement. [Ex. R 43.]

***** Grade.**

14. Petitioner's *** was largely uneventful from a disciplinary perspective. Petitioner received one day of in-school suspension for ***; Petitioner also received a disciplinary referral for ***. [Ex. P. 25.]

15. Petitioner earned good grades throughout Petitioner's ***-grade year. Petitioner successfully passed *** in which many of Petitioner's classmates also struggled. [Ex. R. 14-6; Ex. Pet. 14.] [Ex. R. 14-6.]

16. On May ***, 2018, Petitioners' attorney sent a letter to the District's counsel, requesting a 504 meeting for Petitioner The request did not include any new medical or evaluation information for Petitioner [Exh. Pet. 3-2 to Exh. Pet. 3-4.]

Summer 2018.

17. On June ***, 2018, Parent signed Parent's receipt of a Notice of Rights for Disabled Students and their Parents Under Section 504 of the Rehabilitation Act of 1973, and completed a Notice and Consent for Evaluation for Section 504. [Exh. Pet. 3-5 to Exh. Pet. 3-7.]

18. On the referral documents, Parent indicated Petitioner was struggling with Reading, Math and ***. Parent also indicated Petitioner "has an ED that affects *** day to day activities and learning abilities." Parent did not list any behavioral issues on the referral documents. [Ex. P. 3-7.]

19. The District formed a Section 504 Committee for Petitioner, consisting of ***, Principal of ***; ***, Counselor and Campus 504 Coordinator; ***, Petitioner's *** grade *** teacher; and Parent (collectively the "504 Committee"). The 504 Committee convened a meeting on June ***, 2018. After discussion, the meeting was tabled to resume with Ms. *** and Ms. *** to discuss general education support services for Petitioner [Ex. P. 4-1 to 4-2.]

20. On June ***, 2018, Parent requested Petitioner's grades for the year, as well as the preceding school year. Parent also requested information about support services available in the general education setting. Ms. *** provided the grades and sent a list of support services available through general education. [Ex. P. 3 – 8; Ex. P. 4-3; Ex. P. 4 – 10.]

21. Petitioner's academic performance through *** grade was considered and addressed in the previous Due Process Hearing decision issued January 7, 2018. [Ex. R. 58.]

22. The 504 Committee reconvened on July ***, 2018. The Committed determined that Petitioner qualified for nondiscrimination services under 504 as a student with a disability but determined that Petitioner did not require accommodations at that point in time based on the lack of evidence of educational impact. The 504 Committee agreed to monitor Petitioner in the general education setting with no accommodation plan. Parent signed off on the 504 Committee decision. [Ex. P. 5-1 to Ex. P. 5-3.]

***** Grade.**

23. On September ***, 2018, the 504 Committee convened to discuss Parent's concern that Petitioner was not doing well in Petitioner's *** class. Petitioner's *** teacher, Mr. ***, attended the meeting and reported that Petitioner did well on daily work but not on test grades.

24. After discussion, the 504 Committee recommended the following accommodations: 1) opportunity to take tests in a small group setting; 2) tests for test weight only, not quizzes; 3) re-test broken into parts, and 4) encourage Student to go to *** tutorials 2-3 times weekly from *** a.m. [Ex. P. 6-1 to Ex. P. 6-2.]

25. Mr. *** offers morning and afternoon tutorials to all of his *** students. Students who fail a test are permitted the opportunity to retest to raise their grade. [Ex. R. 14; Tr. – 1048, line 2 to Tr. – 1050, line 10.]

26. While Petitioner has not elected to take advantage of either of these general education supports, Petitioner passed *** with a *** and had an *** grade average in *** as of the date of the hearing. [Tr. – 1050, lines 11-24; Tr. – 1053, line 15 to Tr. – 1054, line 12.]

27. Petitioner has been successful as a *** grader. Petitioner earned a place on the ***, and Petitioner's *** describes Petitioner as a ***. [Tr. -109.] Petitioner has continued to earn good grades, including A's and B's on Petitioner's most recent report cards. [Exh. R. 12.] Beyond Petitioner's *** academic accomplishment, Petitioner was *** in September 2018. [Tr. – 1120, lines 2 – 10; Tr. – 1125, line 1- to Tr. – 1126, line 2.]

The October *** **Incident.**

28. On October ***, 2018, Petitioner became annoyed at a younger student. Parent acknowledges that Petitioner ***; Parent reported the incident to *** on October ***, 2018. [Ex. R. 10 (KCISD 0255 – KCISD 0256); Tr. – 577, line 10 to Tr. – 578, line 24; Tr. – 581, line 18 to Tr. – 582, line 19.]

29. Petitioner's ***, *** reported to Ms. *** that while Parent was in the coach's office Parent stated that ***" [Ex. R. 859. line 5 – 25; Ex. R. 7.]

30. On October ***, 2018, ***. ***. [Ex. R. 10 (KCISD 0248 – KCISD 0251).]

31. Just before *** a.m. on October ***. ***. ***. ***. [Ex. R. 3.]

32. At *** a.m. on October *** 2018, a fight occurred ***. ***. ***. [Ex. R. 1.]

33. ***. ***. [Ex. R. 1.]

34. On October *** 2018, Ms. *** suspended Petitioner for 3 days, pending the District's investigation into the fight. [Exh. R. 12 (Part D.); Tr. – 894, lines 10 – 15.] ***. [Tr. – 536, line 10 – 20.]

35. On October ***, the District conducted a manifestation determination review under Section 504 to determine whether Petitioner's participation in the fight was a manifestation of Petitioner's documented 504 disability. [Tr. - 874, lines 23-25, Tr. -875, line 1.]

36. The MDR committee reviewed video of the fight and also considered teacher input, Petitioner's *** disciplinary history, documents from the three previous Section 504 meetings, student statements regarding the fight, and available diagnostic information. [Tr. -875-878.]

37. The MDR committee determined that Petitioner behavior in participation in the fight was not related to Petitioner's 504 disability and placed Petitioner in DAEP for 45 days. [Tr. -878, lines 16-22; Ex. R. 23.]

38. On October ***, 2018, Parent requested a special evaluation for Petitioner because Parent did not agree with Petitioner going to DAEP. [Ex. R. 50.] The District sent Parent a Prior Written Notice on November ***, 2018, and Parent asked for a DAEP appeal that same day.

39. On November 2, 2018, Parent, as next of friend for Petitioner (collectively "Petitioners") filed a due process request on November 2, 2018. On November 5, 2018, Parent notified the District that Parent would not be seeking a DAEP appeal.

40. The parties participated in an unsuccessful resolution session on November 15, 2018. [Ex. R. 53.] The parties did not elect to mediate, and the present Due Process Hearing resulted. The Due Process Hearing was held November 27 - November 30, 2018.

APPLICABLE LAW

Under the IDEA the school district is responsible for providing all children with disabilities residing within its jurisdiction between the ages of 3 and 21, with such instruction and services at public expense and to comport with the child's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. vn. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and sufficient related support services with specifically

designed personalized instruction that is reasonably calculated to meet the unique needs of the child in order for them to receive an educational benefit, and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400 (d).

The obligation to provide a FAPE requires a school district to have in effect an IEP at the beginning of each school year. The ARD Committee develops the IEP and must consider the student's strengths, the results of the most recent evaluation data, the student's academic, developmental and functional needs, and parental concerns for enhancing the student's education. 34 C.F.R. 300.324(a).

An 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). It is constructed only after careful consideration of the student's present levels of achievement, disability, and potential for growth. 20 U.S.C.§§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv); Endrew F., 137 S.Ct. at 999.

The IDEA does not require the IEP to guarantee a certain level of accomplishment. It is not required to provide Student with the best possible education. It need not be designed to maximize a student's potential. The issue is not whether the school district could have done more. ***Houston Ind. Sch. Dist. v. V.P.***, 582 F. 2d 576 (5th Cir. 2009) cert. denied, 559 U.S. 1007(2010).

The IDEA guarantees only a "basic floor of opportunity," by requiring that the IEP must be specifically designed to meet Student's unique needs, supported by services that permit Student to benefit from the instruction. The inquiry is whether Student received an educational benefit. ***Rowley***, 458 U.S. at 188-189.

DISCUSSION

The controlling issue concerns identification of the Student as an IDEA-eligible student. Petitioner alleges that the Student suffered from punitive consequences for behaviors that might be linked to a suspected disability. Petitioner claims the Student should be protected as a student not yet identified.

Based on the totality of the record before me, the Student is subject to the general education consequences and expectations on student's campus. Although the IDEA prohibits a disciplinary change of placement for eligible students, it does not prohibit consequences, designed to discipline students with disabilities, and strategies, "designed to correct behavior by imposing disciplinary consequences." See Comment to 34 C.F.R. §300.530(e), 71 Fed.Reg. 46721.

At the hearing, neither party disputed the Student's diagnosis, but the parties disagreed as to whether the Student is a qualified student under the IDEA who requires special education services. Respondent believes the Student made progress in all areas – academically, behaviorally, and socially – without the need for specially designed instruction.

The student in this matter has exhibited problems at school. The issue, though, is whether or not the student (during the year prior to the filing of the request for hearing) should have been afforded special educational services. Petitioners' burden in this litigation is high. Petitioners did not meet the burden.

School districts have an affirmative duty referred to under the IDEA and its implementing regulations as the "Child Find" obligation to identify, locate, and evaluate students whom they suspect may be disabled and provide them with special education services. 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. §300.111(a), (c)(1). While the IDEA's Child Find duty includes students who are suspected of having a disability that requires special education instruction, not every struggling student with a disability requires an evaluation

Special education under the IDEA and its implementing regulations is limited to students who meet the definition of a "child with a disability." 20 U.S.C. § 1401(3)(A); 34 C.F.R. §300.8. A student meets the criteria for special education as a student with an emotional disturbance when a student exhibits one or more of five specifically enumerated characteristics over a long period of time and to a marked degree that adversely affects the student's educational performance.

Even if a student can meet the criteria of one or more of the disability classifications a student must also demonstrate a need for special education and related services for eligibility purposes. 34 C.F.R. § 300.8 (a)(1). Only certain students with disabilities are eligible for special education and related services under the IDEA.

To qualify for special education and related services, a student must have both: 1) a qualifying disability; and, 2) by reason of the qualifying disability, must need special education and related services to address those needs. See Alvin Ind. Sch. Dist. v. A.D., 503 F.3d 378, 384; 34 C.F.R. §300.111(a)(1). The determination of whether a student who is advancing from grade is "in need of special education" must be determined on an individual basis. Bd. of Hendrick Hudson Int. Sch. Dist., v. Rowley, 458 U.S. 176, 207 (1982).

Here the Student engaged in inappropriate behavior at school but not so frequently that it impacts Student's ability to learn. Student benefitted from the interventions and instruction being provided in the general education setting and was making progress. Student's grades indicated Student functioned within the expected range of performance – Student was able to learn and perform based on the instruction received in the classroom.

The July 2018 ARD committee did not suspect a disability under the IDEA that resulted in a need for specially designed instruction. As a result, the committee did not make a referral for special education but instead found the Student eligible for services under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794, et seq.).

While they concluded that Student met eligibility criteria as a student with an emotional disturbance, the major issue in this case is whether the school district should have identified student as eligible for special education services prior to the October incident.

Before a student is referred for a special education evaluation the student experiencing difficulty in the general classroom should be considered for support services available to all students including tutorials, response to research-based intervention, remedial services and other academic or behavioral supports. 19 Tex. Admin. Code § 89.1011, eff. November 1, 2007, amended eff. January, 1, 2015.

The evidence showed that Student received those supports through the math and reading intervention classes. In addition, after school tutoring was available although Student apparently did not choose to take advantage of it.

Under the IDEA, the educational plan developed by a school district is presumed

appropriate and the burden of proof for challenging that program is placed on the party making the challenge. *Shaeffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 536-537 (2005); *R.H. v. Plano Indep. Sch. Dis*t., 607 F.3d 1003, 1010-1011(5th Cir. 2011). Petitioner, as the party challenging the District's program, bears the burden of proof in this dispute and must overcome the presumption in favor of the District's educational plan and establish that the District failed to provide a FAPE.

The record established that the District did not have reason to suspect that the Student required specially designed instruction because student performed as a typical student academically, behaviorally, and socially within the general education setting with very few accommodations.

The record before me established that the District did not violate its Child Find duty under the IDEA by not evaluating the Student for special education eligibility. The preponderance of the record evidence shows that the Student did not exhibit a suspected disability that called for special education instruction.

Student has remained successful in the general education setting at all times pertinent to this dispute. The evidence established that the Student behaved as an average student within student's general education program. The Student's teachers had high expectations of the Student and student's peers that required classwork and homework completion to achieve the goal of getting an education. These requirements are not inconsistent with the IDEA.

Even with this general education setting success, the District offered accommodations. Student received appropriate and sufficient instructional accommodations that allowed student to exhibit both academic and non-academic success – all without the addition of special education instruction.

Interestingly, even if Respondent had identified the Student as having a suspected disability under the IDEA, the record before me established that there would have been no change to the Student's interventions. The preponderance of the evidence shows that the Section 504 accommodation plan proposed by the District contained only the general education accommodations that were already in place in the general education classroom.

As Petitioner did not need special education instruction in order to be successful. The record before me shows that the Student made consistent progress under student's general education program provided by the District. I conclude that Petitioner did not sustain Petitioner's burden to prove Respondent violated the Child Find provisions of the IDEA.

The District's general education program did not remediate the Student's disability, but instead allowed the Student to receive an overall educational benefit within mainstream classes that includes passing grades and advancement from grade to grade. *Klein Independent School Dist. v. Hovem*, 690 F.3d 390, 398 (5th Cir. 2012). Petitioner did not sustain Petitioner's burden to show a denial of a FAPE to the Student.

I find that the presumption of the appropriateness of the District's general education program for the Student withstands challenge in this dispute. Petitioner did not meet Petitioner's burden to show that the District's program for the Student failed to provide a FAPE, the District violated the IDEA, or the Student needed specially designed instruction. As a result, I decline to award any relief to Petitioner.

DISCUSSION

Under the IDEA, the District is required to provide eligible students with special education and related services. The District is also required to identify students with disabilities who it suspects are eligible for special education. 34 C.F.R. § 300.111.

There is no evidence that Petitioner requires special education and/or related services. Instead, the record reflects that Petitioner has progressed both academically and behaviorally since the last due process hearing, in which it was determined that Petitioner does not qualify for special education services.

The testimony of Petitioner's expert Dr. *** and Petitioner's counselor Ms. *** establish that their recommendations for Petitioner are general education supports. Accordingly, the District did not have a reason to suspect that Petitioner was a student with a disability who required special education services, nor should this Hearing Officer make such a determination.

A. Petitioner Does Not Have Emotional Disturbance Under IDEA

To be eligible for benefits under IDEA, a student must have a qualifying disability and, by reason thereof, have a need for special education and related services. 20 U.S.C. § 1401(3)(A); *Alvin Indep. Sch. Dist. v. A. D.*, 503 F.3d 378, 382 (5th Cir. 2007).

A "qualifying disability" is a physical or mental condition that satisfies the criteria of one or more of the disability categories specified in the federal regulations. 34 C.F.R. § 300.8. Petitioners allege that Petitioner qualifies as a student with emotional disturbance and specific learning disabilities in mathematics and reading. They failed, however, to meet their burden of proof.

The disability category of emotional disturbance is defined as a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (a) an inability to learn that cannot be explained by intellectual, sensory or health factors; (b) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (c) inappropriate types of behavior or feelings under normal circumstances; (d) a general pervasive mood of unhappiness or depression; or (e) a tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R.§ 300.8 (c)(4).

A specific learning disability means "a disorder in one or more of the basic psychological process involved in understanding or in using language spoken or written, that my manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations." 34 C.F.R.§ 300.8 (10).

In order for a student to qualify for special education services under either eligibility category, the student must be experiencing developmental delays and, by reason thereof, require special education and related services. 34 C.F.R.§ 300.8 (1), (2).

Petitioners' case relies in large part on the expert report and testimony of Dr. ***. [Tr. – 418, line 6 – Tr. 419, line 16.] Dr. *** performed his evaluation of Petitioner for purposes of this litigation. [Tr. – 422, lines 3 – 12.] He noted that the purpose of the evaluation was to address Petitioner's parents' concern that Petitioner was being disciplined for the October *** 2018 incident. [Exh. Pet. 28; Tr. 441, line 22 – Tr. 443, line 7.]

Dr. *** did not review current year academic information, nor did he obtain any information from any of Petitioner's teachers. Tr. – 428 – 430.He relied almost exclusively on self-reports from Petitioner and Petitioner's parents. Tr. – 430, line 19 – 433, line 3.

Dr. ***'s failure to review current data from either Petitioner's teachers or Petitioner's private counselor is significant. Both the teachers and the counselor reported that Petitioner has shown steady improvement, both emotionally and socially, since the conclusion of the last due process hearing in October 2017. Ex. P. 13 – 52.

It is important to acknowledge the extensive experience of Student's teachers, not only as qualified professionals in the field of education, but with Student specifically. The Fifth Circuit has recognized the importance of the opinions of those with the most immediate knowledge of a student's performance – the educators who work with the student on a daily basis. See *Michael F.*, 118 F.3d at 253-54.

The only evidence of record that supports the Petitioner's theory that Petitioner requires specialized instruction and services to address Petitioner's emotional disturbance is expert witness ***'s report and testimony. But Dr. ***'s evaluation contains no supporting academic or disciplinary information from the school. Tr. 461, line 10-19

Significantly, his eligibility conclusions fail to address the educational impact prong of the IDEA eligibility analysis, a fatal flaw. 34 C.F.R. §300.8(c)(4). He acknowledges that all of his recommendations can be implemented in the general education setting through 504 accommodations. Tr. – 470, line 21 – Tr. 471, line 1.

In contrast, the educational professionals who work daily with Petitioner paint a more wholistic image of Petitioner as a student who is doing "quite well" in mathematics and *** without need for general education supports. Tr. – 1053, line 15 to Tr. – 1054, line 12; Tr. – 1128, line 12-16; Tr. – 1136, line 23 to Tr. – 1138, line 13. Petitioner does not demonstrate the social or emotional characteristics of a student with an emotional disturbance while Petitioner is at school. Tr. – 1051, line 25 to Tr. – 1053, line 14; Tr. 1130, line 5 to Tr. – 1138, line 13.

It is not enough to establish that a student has emotional concerns—the second prong of

the eligibility standard must also be satisfied. 20 U.S.C. § 1401(3). Petitioners had the burden of proof to establish whether, by reason of Petitioner's reported emotional difficulties, Petitioner requires special education and related services. 34 C.F.R. § 300.8 (a)(1). On this point, the evidence of record is clear, unequivocal, and uncontradicted by any credible evidence. Petitioners offered no evidence that Petitioner's reported emotional difficulties had any educational impact. In contrast, the record shows:

1) Petitioner earns above-average grades in the general education setting and has successfully advanced from grade to grade. Petitioner passed the reading and math sections of the STAAR exam each year during the relevant period. Ex. R. 11 – 14, 16 – 21 While Petitioner struggled in ***-grade ***, Petitioner passed the state End of Course examination. Ex. R. 16. In ***, which builds upon concepts learned in ***, Petitioner is showing strong academic gains. Tr. – 1035, line 5 to Tr. – 1037, line 4; Ex. R. 11,12,13,14,16,17.

2) In ***-grade ***, Petitioner is an "excellent student" who is diligent and eager to share Petitioner's writing with Petitioner's classmates and is a leader in Petitioner's class. Tr. – 1118, line 21 to Tr. – 1120, line 24.

3) Petitioner's teachers note that Petitioner enjoys positive relationships with both peers and teachers. Tr. – 1037, line 16 to Tr. – 1039, line 8; Tr. – 1124, line 11 to Tr. – 1126, line 1; Tr. – 108, line 14 to Tr. – 109, line 12; Tr. – 1121, line 16 to Tr. – 1124, line 23.

3) During the time period in issue, Petitioner has had no pattern of disciplinary issues. Ex. R. 22. Petitioner's occasional conduct issues have been minor in nature and do not demonstrate any discernable pattern.

The overwhelming weight of the evidence of record supports a finding that Petitioner consistently earns average grades of "A" and "B" in Petitioner's courses Ex. R. 12. and receives a benefit from the general education curriculum. Petitioner's teachers reported no instructional or behavioral concerns, with Petitioner's *** teacher reporting that Petitioner is an excellent student who is eager to do well. Tr. – 112, line 24 to Tr. – 117, line 21.

Petitioner does not have an extensive disciplinary history that would suggest an adverse educational impact. Despite the limited disciplinary issues Petitioner has experienced, Petitioner has nevertheless been successful academically, as demonstrated through grades, standardized tests, and evaluation instruments. Petitioner's teachers did not report any disciplinary concerns in the school setting.

Petitioner does not satisfy the definition of a child with a disability within the meaning of the IDEA on account of the absence of educational impact, and Petitioner does not require special education services.

i. Petitioner Does Not Demonstrate an Inability to Learn

Petitioner has earned good grades Ex. R. 11-14, 17-21.and passed Petitioner's STAAR exams. Ex. R. 16. Testimony from Mr. *** demonstrates that Petitioner takes Petitioner's studies seriously, has no behavioral issues, and that Petitioner has improved as a student over the past year. Tr. – 1035, line 21 to Tr. – 1044, line 8. Dr. ***, Petitioner's ***-grade *** teacher, discussed how engaged Petitioner is in Petitioner's *** class, and even suggested that Petitioner could succeed in *** if Petitioner were in a class with the right mix of students. Tr. – 1182, lines 12 – 19. When Petitioner does require additional support due to Petitioner's 504-designated disability of anxiety, those supports can be provided in the general education setting through a 504 plan. Tr. – 884, line 24 to Tr. 886, line 8.

ii. Petitioner Maintains Satisfactory Interpersonal Relationships

The evidence shows Petitioner can and does maintain satisfactory interpersonal relationships. Petitioner was ***, and Petitioner's peers ***. Tr. – 1125, lines 10 – 25; Tr. – 1126, lines 1 – 2. Petitioner is friends with the ***. Tr. – 565, lines 4 - 7. Petitioner gets along with most of Petitioner's peers, and Petitioner's teachers observe Petitioner engaging in typical *** conversation with friends and classmates.

According to Petitioner's *** teacher, Dr. ***, Petitioner can be observed between classes socializing with Petitioner's friends in the hallway and walking with them to class. Dr. *** reported that emotionally, Petitioner presents as similar to many of Petitioner's peers in the class. Tr. – 1124,

lines 11 - 20. Mr. ***, Petitioner's ***-grade *** teacher, noted that Petitioner frequently socialized with peers in Petitioner's *** class. Tr. – 1031, lines 4 – 10. Mr. ***, Petitioner's ***, noted that Petitioner is a *** who is an active participant in *** and offers encouragement to ***. Tr. – 108, lines 23 – 25; Tr. – 109, lines 1 - 12.

In fact, the record only identifies a few students who Petitioner does not get along with, and those are the same students that were involved in the fight, ***. The fact that a student does not get along well with every student in the *** is not an indication that Student has an emotional disturbance. Quite to the contrary, it shows that Petitioner, like most *** students, has positive relationships with many of Petitioner's peers, but also encounters students Petitioner does not get along with. Rather than demonstrating that Petitioner has a disability, such behavior suggests Petitioner is in many ways a very typical *** student.

iii. Petitioner Does Not Display Inappropriate Types of Behavior Under Normal Circumstances

As with many students, Petitioner has shown improvement in Petitioner's behavior since Petitioner's ***-grade year. Petitioner encountered very few disciplinary issues during Petitioner's ***-grade year and was doing well behaviorally until the October *** incident. Ex. P. 25, p. 2. One poor decision to participate in a fight does not equate to a finding that Petitioner has inappropriate feelings or behaviors for a long time to a marked degree, as Emotional Disturbance is defined under IDEA.

iv. Petitioner Does Not Show a Pervasive Mood of Unhappiness or Depression

There is no evidence in the record to conclude that Petitioner experiences pervasive unhappiness or depression. ***, Petitioner's private counselor, observed that Petitioner's emotions ebb and flow, and that Petitioner is able to use skills Petitioner has developed to control Petitioner's emotions, even if Petitioner does not do so all of the time. Tr. – 275, lines 10-25.

Ms. *** also noted that Petitioner sometimes experiences anxiety and depression, but that it tends to subside in the summertime. Tr. – 274, lines 18 – 25; Tr. – 275, lines 1 – 2. She also noted that stress from school can cause many students to experience anxiety and depression-related

feelings. Tr. – 275, lines 18 – 22.

Ms. *** reported that Petitioner made steady progress from January to July of 2018, when Petitioner ceased attending sessions with Ms. ***. Tr. – 296, lines 10 - 23.

Finally, Ms. *** noted that Petitioner appeared to be following a developmental pattern of becoming more comfortable in Petitioner's own skin as Petitioner ***, a pattern not uncommon with *** students. Tr. – 291, lines 10 – 16.

Notwithstanding the fact that the record does not contain evidence of Petitioner's pervasive irritability, the definition of Emotional Disturbance specifically identifies unhappiness or depression as the criteria for establishing Emotional Disturbance under IDEA.

Dr. *** concluded that Petitioner experiences pervasive irritability, which he in turn characterizes as depression. Ex. P. 28. Dr. ***'s definition fails to meet the criteria.

The evidence suggests that Petitioner's emotions ebbed and flowed, and that on many occasions Petitioner is capable of controlling them. This type of up-and-down variability in emotional regulation does not amount to a pervasive mood of unhappiness or depression. Further, as with all elements under Emotional Disturbance, pervasive unhappiness or depression must exist for a long time and to a marked degree. 34 C.F.R. § 300.8 (c)(4).

Ms. *** testified that Petitioner's condition varied, including improvement over the summer to the point that frequency of sessions could be reduced. Tr. – 274, lines 18 – 25; Tr. – 275, lines 1 – 2. Ms. *** also noted that Petitioner made progress from Summer 2017 to Summer 2018. Tr. – 296, lines 10 – 23.

Finally, the record is devoid of any evidence of educational impact of Emotional Disturbance. There is evidence from the 504 process that anxiety on occasion impacts PETITIONER in Petitioner's *** courses, especially as it relates to testing, and that a general education accommodation successfully addressed the testing anxiety. The record is devoid of any evidence Petitioner's education was impacted by emotional disturbance.

v. Petitioner Does Not Demonstrate Physical Symptoms or Fears Sufficient to Show Emotional Disturbance

The evidence does not support a finding that Petitioner exhibits physical symptoms or fears associated with personal or school problems for a long period of time and to a marked degree that adversely affects Petitioner's educational performance, as the regulation requires. 34 C.F.R. § 300.8 (c)(4)

The only indication in the record that Petitioner experiences any physical symptoms or fears is a brief reference by *** relating to apprehension about ***. Tr. – 269, line 15-25 to Tr. 270, line 1-7. There is no indication these fears existed for a long period of time and to a marked degree; indeed, Ms. *** acknowledges that Petitioner's emotions ebb and flow. Tr. – 275, lines 10-25.

Further, the evidence of record is absent a showing of adverse impact on Petitioner's educational performance. Accordingly, there is not sufficient evidence to conclude Petitioner experiences emotional disturbance based on physical symptoms or fears.

B. Petitioner Does Not Have a Specific Learning Disability

The evidence does not support a finding that Petitioner has a specific learning disability. All of the diagnostic testing of record places Petitioner's reading and math abilities in primarily in the average range, with some subtests in the high average range, and others in the low average range. Exh. Pet. 28. The record is conspicuously absent any diagnostic evaluation concluding that Petitioner has a specific learning disability.

Dr. ***'s most recent evaluation, completed in anticipation of this Due Process Hearing, did not find that Petitioner has a specific learning disability. Ex. P. 28. Further, Petitioner largely earns good grades, Ex. R. 11; Ex. R. 12; Ex. R. 13. Mr. *** and Dr. *** both report that Petitioner is engaged in class. Tr. – 1035, line 18 to Tr. – 1037, line 4; Tr. – 1120, lines 14 – 24; Tr. – 1035, lines 21 – 25, Tr. – 1036, lines 1 – 7.

To demonstrate that Petitioner has a specific learning disability requires more than determining that Petitioner has an imperfect ability to read or do math. In order to establish that a student has a specific learning disability, there must be a showing that a student does not achieve

adequately for the student's age or meet state approved grade level standards. 34 C.F.R. § 300.309

That is not the case here. Petitioner passed Petitioner's STAAR exams in both *** and *** in the *** grade. Ex. R 16. Testimony from Petitioner's *** and *** teachers reveal that Petitioner is on par with many of Petitioner's classmates in terms of comprehension and academic achievement. Tr. – 1054, lines 10 – 12; Tr. – 1052, lines 10 – 13; Tr. – 1118, lines 21 – 22; Tr. – 1119, lines 8 – 17.

Accordingly, the record does not support a finding of specific learning disability.

C. All Recommended Services Can Be Provided Through the Section 504 Process

The record contains recommendations for ways to assist Petitioner with any disability-related issues Petitioner encounters in school. All the recommendations and suggested accommodations, whether based on Student's 504 disability or not, can be provided in the general education setting.

The District developed a 504 plan for Petitioner that includes testing accommodations and changes to the way certain information in Petitioner's *** classes is presented, which the District implemented in the general education program. Ex. R. 29.

Likewise, Ms. *** recommended that the District provide Petitioner with a staff member Petitioner can speak to between counseling sessions. This precise issue was discussed in the series of 504 meetings, with the intention that it be implemented as part of accommodations in the general education setting. Tr. - 784, line 9 to Tr. – 785, line 8; Tr. – 789, line 9-11; Tr. 789, line 15-25.

Dr. *** based his evaluation addendum on the 2016 initial evaluation—an evaluation with which an earlier hearing officer determined did not establish Petitioner qualified for special education services. He prepared his evaluation for purposes of litigation, and did not communicate with any of Petitioner's teachers, counselor, or any other District employee in developing his recommendations.

Nevertheless, as Dr. *** himself acknowledged at hearing, all of his recommendations could

be implemented entirely within the general education setting. Tr. – 420, lines 12 – 25; Tr. – 471, line 1.

IDEA mandates that students with disabilities be educated in the least restrictive environment. 34 C.F.R. § 300.114. The least restrictive environment is the general education setting with 504 plan accommodations, which the District is already providing.

It would contravene the intention of the least restrictive environment mandate to place a student in a special education program when all disability-related needs can be met in through 504 in the general education setting.

CONCLUSIONS OF LAW

1. The student is eligible for a free appropriate special education program under the provisions of IDEA, 20 U.S.C. §1400, et seq., 34 CFR §300.301 and 19 T.A.C. §89.1011, and related statutes and regulations.

2. The Texas one-year statute of limitation (SOL) began running one year before the date the Complaint was originally filed. 19 Texas Administrative Code § 89.1151(c).

3. The District is a Local Education Agency responsible for complying with the IDEA as a condition of the State of Texas' receipt of federal funding. The District is required to properly identify, evaluate, and serve the student, and provide each disabled child with a FAPE pursuant to the IDEA, 20 U.S.C. §§ 1400 et seq., 34 CFR §300.301, and 19 T.A.C. §89.1011.

4. Petitioner bears the burden of proof on all issues raised in Petitioner's complaint, including challenges to the proposed IEP, BIP, and LRE placement. Schaffer v. Weast, 546 U.S. 49, 62 (2005) , 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005); *Teague Ind. Sch. Dist. v. Todd* L., 999 F. 2d 127, 131 (5th Cir. 1993).

5. Petitioner did not meet Petitioner's burden to show denial of a FAPE to the Student by Respondent. The Student received an overall educational benefit within mainstream classes that includes passing grades and advancement from grade to grade. *Bd. of Educ. of*

Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 207-208, 102 S.Ct. 3034, 3051 (1982); Klein Independent School Dist. v. Hovem, 690 F.3d 390, 398 (5th Cir. 2012); 34 C.F.R. §300.111(a), (c)(1).

6. IDEA creates a presumption under the law favoring a school district's educational plan. Schaeffer v. Weast, *supra*; and Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984).

7. Respondent, at all times pertinent to this dispute, complied with its Child Find duty regarding Petitioner. 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. §300.111(a), (c)(1).

8. Respondent was not required to evaluate the Student for special education services. The Student made progress under student's general education program without the need for specially designed instruction and is not entitled to an FIE or an IEE. 34 C.F.R. §300.111(a), (c)(1).

9. Petitioner did not prove that the district's proposed educational plan fails to contain the essential components of an IEP including baselines, present levels of performance, and measurable goals. 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a); 19 Tex. Admin. Code § 89.1055.

10. The Student's diagnosis did not require special education and related services in order for the Student to progress under the District's general education program. Alvin Ind. Sch. Dist. v. A.D., 503 F.3d 378, 384; Ridley Sch. Dist. v. M.R., 680 F.3d 260, 272 (3rd Cir. 2012); 20 U.S.C. § 1401(3)(A); 34 C.F.R. §§300.8 and 300.111(a)(1).

11. Respondent was not required to provide supplementary aids and services to the Student under the IDEA and its implementing regulations. The Student made progress and showed academic and non-academic success under student's general education program without the need for supplementary aids and services. 34 C.F.R. §§300.8 and 300.111(a), (c)(1).

12. Respondent was not required to provide counseling to the Student or social skills training under the IDEA. The Student made progress with peer interactions in student's general education program without additional counseling services or social skills training and is not

a student with a disability under the IDEA. 34 C.F.R. §§300.8 and 300.111(a), (c)(1).

13. Student was placed in the general education environment to the maximum degree feasible that allowed Student to continue to make academic and non-academic progress. Student's placement meets the statutory preference for educating Student, to the maximum extent appropriate, in general education. 20 U.S.C. § 1412(a)(5)(A).

14. The School District's failure to provide all required components of prior written notice explaining its proposed actions or refusals did not result in a loss of educational opportunity or infringe upon Parents' opportunity to participate in the IEP process. The errors were educationally harmless. *Adam J. ex rel. Robert J. v. Keller Independent School Dis*t., 328 F.3d 804, 812 (5th Cir. 2003).

15. The School District has developed an educational program for the student allowing the student an opportunity to make educational and non-educational progress in accordance with the standard of *Rowley*, supra; 34 CFR §300.552; and 19 T.A.C. §89.1055.

16. Petitioner did not meet Petitioner's burden of demonstrating the District did not timely re-evaluate Student in all areas of suspected need. 34 C.F.R. § 300.303(b)(2).

17. Petitioner failed to provide evidence justifying reimbursement for private evaluations.

18. Petitioner is not entitled to any award or reimbursement in this dispute as Petitioner did not meet Petitioner's burden to prove any violation of the IDEA by Respondent.

19. Petitioner's request for an award of attorneys' fees and litigation costs, including expert witness costs, are outside the jurisdiction of a special education hearing officer in Texas. 34 C.F.R. §§ 300.516, 300.517; 19 Tex. Admin. Code § 89.1185 (n).

20. None of the injuries suffered by anyone in the October incident meet the definition of serious bodily injury under either Texas law or federal law. 18 U.S.C. Sec. 1365; (20 U.S.C. § 1415(k)(7)(D); 34 C.F.R. § 300.530(i)(3).)

ORDERS

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED:

1. All claims arising before October ***, 2017 are DISMISSED.

2. All claims arising under any law other than the Individuals with Disabilities Education Act (IDEA) including Petitioner's requests for attorneys' fees, expert witness costs, and other litigation costs are DISMISSED.

3. Petitioner's requests for relief are DENIED.

4. All other relief requested by either party not specifically granted in these Orders is hereby DENIED.

SIGNED on December 14, 2018.

s/ *Ray E Green*

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RAY E. GREEN

Special Education Hearing Officer
For the State of Texas

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NOTICE TO THE PARTIES

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