

DOCKET NO. 156-SE-0317

STUDENT, b/n/f PARENT,	§	BEFORE A SPECIAL EDUCATION
Petitioner	§	
	§	
v.	§	HEARING OFFICER FOR
	§	
LANCASTER INDEPENDENT	§	
SCHOOL DISTRICT,	§	
Respondent	§	THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Petitioner, STUDENT b/n/f PARENT (collectively Petitioner) brings this action against the Lancaster Independent School District (District) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. § 1401 et. seq (IDEA) and its implementing state and federal regulations. Petitioner alleged numerous violations of the IDEA, including child find and identification violation and a failure to provide FAPE. The District denied all allegations and asserted that Student was provided with an appropriate education at all times.

The Hearing Officer finds partially for each party and orders that a functional behavior assessment (FBA) be performed by a Board Certified Behavior Analyst (BCBA) as a part of an Independent Education Evaluation (IEE) funded by the District. Based on the results of these evaluations and other considerations, an Individual Education Program (IEP), including an updated Behavior Implementation Plan (BIP), must be prepared and implemented. The hearing officer also finds that Student’s least restrictive environment (LRE) is in general education with a *** included in Student’s classroom.

I. RESOLUTION SESSION AND MEDIATION

The Complaint and First Amended Complaint were filed on March 16, 2017, and April 4, 2016, respectively. Resolution sessions were held on March 27, 2017 and April 17, 2017. This matter was not mediated.

II. DUE PROCESS PREHEARING AND HEARING

Student was represented by attorneys Nash Gonzales and Lindsey Rames. The District was represented by attorneys Nick Maddox and Kevin O'Hanlon. Debra Lopez Liva filed her authorization to be a non-attorney representative, and she also participated in the hearing.¹

The District's exhibits were provided to Petitioner and the hearing officer during the first day of hearing. Other production was previously made by the District in response to discovery but it was not in order and not offered in disclosure. For this reason, during the hearing only Petitioner's exhibits were used, absent one exhibit of the District's that was admitted.

At the conclusion of the hearing, the parties requested an extension of the decision deadline to allow briefing after the transcript was prepared. This request was granted at the hearing and memorialized in Order No. 10. Both parties submitted briefs in a timely manner, and the decision was timely issued by the deadline, July 7, 2017.

III. ISSUES

Petitioner submitted the following issues:²

1. Whether the District failed to timely evaluate and identify the student of a suspected disability for special education and related services throughout the 2016-2017 school year, and especially during the timeframe of ***.
2. Whether the District was a direct cause of the lack of progress academically, emotionally and mentally and physically.
3. Whether the District unilaterally changed student's placement.

¹ Ms. Liva questioned and cross-examined witnesses during the hearing. This was allowed as requiring Petitioner's attorneys to question the witnesses was not efficient given Petitioner's expectations and that this issue was not addressed prior to the hearing. In future cases, when a party is represented by an attorney, only the attorney will directly participate in the due process hearing. The regulations envision authorization of a non-attorney representative only when that party is not represented by an attorney.

² The following issue was struck as noted in Order No. 2: "Whether the District deliberately turned a blind eye and with deliberate indifference ignored the student's needs."

4. Whether the District failed to provide the parent with a 5-day written notice of ARD.
5. Whether the District failed to provide FAPE.
6. Whether the District failed to provide an appropriate IEP and BIP.
7. Whether the District failed to provide appropriate social skills and behavioral goals.
8. Whether the District denied Student access to ***.
9. Whether the District imposed punitive consequences for behaviors related to Student's disability.
10. Whether the District violated the Student's rights as a child not yet identified in their discipline.
11. Whether the District denied parent a meaningful opportunity to participate.
12. Whether the District adequately trained personnel to work with Student.
13. Whether the District had an appropriate program and IEP plan in place for the beginning of the 2016-2017 school year.

The requested relief includes compensatory services; an IEE at the District's expense, including an FBA, with an order that the finding be implemented by the ARDC; private counseling for Student and family; an appropriate placement in the LRE; an appropriate IEP and BIP; out of pocket expenses; ***, *** at the District's expense; private tutoring at the District's expense; and an order requiring training for District staff.

IV. TIMELINE FOR MAJOR EVENTS

***, 2015	District initiated 2015 FIE
***, 2015	Student did not qualify; Section 504 began
***, 2016	Psychological report found ADHD diagnosed
*** 2016	Student began ***
***, 2016	Student began ***.
*** 2016	Student's demonstrated repeated almost daily, behavior issues.
***, 2016	Section 504 meeting to address Student's deteriorating behavior

***, 2017	District LSSP joined in meeting to address Student's behaviors
***, 2016	Private therapy for *** hours per day at *** started
***, 2016	Private therapy ended
***, 2016	District refers student to special education testing
***, 2017	District receives consent to evaluate
***, 2017	Special education evaluation began
***, 2017	***
***, 2017	***
*** 2017	*** added to classroom for remainder of school year
***, 2017:	FIE completed
March 21, 2017	Due process hearing filed
***, 2017	Student qualified for special education, OHI-ADHD
April 5, 2017	First Amended Complaint filed

V. FINDINGS OF FACT

1. Student is ***-year-old eligible for special education services from the District as a student with Other Health Impairment (OHI) with Attention Deficit Hyperactivity Disorder (ADHD), Student's current eligibility classification. ***, but it does not form the basis for Student's eligibility classification.³
2. Student resides with Parent (***) within the jurisdictional boundaries of the District.
3. Student was diagnosed with ***. This requires ***.
4. Student's initial Full Individual Evaluation (FIE) was completed on ***, 2015 (2015 FIE). The speech-language pathologist found Student did not have a communication disorder, did not meet the disability criteria for speech impairment, and that there was no adverse effect on Student's educational performance.⁴ The District sought and received consent to perform psychological, cognitive and achievement, speech, and OHI evaluations but psychological and cognitive and achievement evaluations were not performed.⁵ The 2015 FIE is outside the statute of limitations (SOL) applicable to this case.
5. An Admission, Review, and Dismissal Committee (ARDC) determined on ***, 2015, that Student did not qualify for Special Education. Instead, Student was referred to Section

³ Tr. at 21-22.

⁴ P-2 at 41.

⁵ P-2 at 20.. The exact history of evaluations and findings is difficult to obtain. Documents provided by the District during discovery were out of order, some did not include dates, and the District did not appropriately file its exhibits.

504.⁶

6. A Section 504 Plan was implemented on ***, 2015. The plan largely addressed Student's behavioral needs as noted in the classroom to include ***. It was further noted that Student ***. Student was described as having poor attention and concentration.⁷
7. Student's services and accommodations through Section 504 included: ***, ***, ***, ***, and ***. A BIP was developed and implemented.⁸
8. An outside psychological evaluation was completed on ***, 2016, ***.⁹ The clinical psychologist found that Student's behavior was much more problematic than that of most same-aged *** and that Student is often more *** than Student's peers. The psychologist concluded that Student had ADHD.¹⁰ Parent provided this evaluation to the District.
9. Student *** in *** in *** 2016. Behavioral incidents, including ***, began immediately.¹¹
10. Student's Section 504 Service Plan was revised in *** 2016.¹² More structure was necessary due to continued tantrums. At this same time, Student's BIP was updated to include *** to address Student's tantrums ***.¹³ A *** process was implemented with ***.
11. The District was provided *** showing that Student *** on or about ***, 2016.¹⁴
12. On ***, 2016, Student's tantrum lasted *** and the school counselor reported this to the District's LSSP. By ***, 2016, the District's LSSP who works with children in special education was involved to help develop new strategies for Student.¹⁵
13. The District's Special Education Director recommended a *** teacher be added to Student's classroom to provide in-classroom support in ***; at that same time, the Director stated that if further assistance was needed, a referral to special education for an evaluation should be made.¹⁶ Neither recommendation was implemented.

⁶ P-2 at 20-21.

⁷ P-4 at 56.

⁸ P-4 at 50.

⁹ P-7 at 125. (every other page of the Psychological Evaluation Report is missing)

¹⁰ P-6 at 117 (see outside evaluation results).

¹¹ P-5 at 108 and Tr. at

¹² P-3.

¹³ P-3 at 44.

¹⁴ P-21

¹⁵ P-28 at 274-6.

¹⁶ Tr. at 180.

14. Student's behavior continued to deteriorate in *** 2016. ***.¹⁷ By ***, 2016, Student's teacher reported behavior that escalated into ***. She requested ***.¹⁸ She also noted that Student's behavior was not conducive to the learning environment.¹⁹ Student was ***.²⁰
15. On ***, 2016, *** Principal contacted the District's special education director and requested training on appropriate restraints for several *** personnel.²¹ This request was made in order to have personnel always available to respond to Student's ***.
16. *** student is a red flag indicating the need for special education; Student should not have been *** in this situation but the District's special education director should have been consulted.²²
17. On ***, 2016, Student began *** hours *** *** therapy at the *** for approximately *** days, concluding on ***, 2016.²³ Student did not attend school during this time.
18. On ***, 2016, a private behavior therapist working with Student completed a recovery plan and requested authority to observe Student in the school environment one time per week. She noted Student's intense behavior issues and Student's ***.²⁴ The District refused the request.²⁵
19. It became evident by ***, 2016, that Student required additional supports, more than those provided through Section 504, to accomplish Student's work and to continue progressing.²⁶ During ***, there were several incidents where Student was ***.²⁷
20. The District had reason to suspect Student had a disability requiring special education with an educational need at least by ***, 2016.
21. The District requested consent to evaluate Student for special education as emotionally disturbed (ED) on ***, 2016.²⁸

¹⁷ Tr. at 54.

¹⁸ P-5 at 104.

¹⁹ P-121 at 153.

²⁰ Tr. at 52.

²¹ Tr. at 337.

²² Tr. at 179.

²³ Tr. at 235.

²⁴ P-27 at 223.

²⁵ P-27 at 222.

²⁶ Tr. at 215.

²⁷ Tr. at 337-338.

²⁸ Tr. at 91.

22. Parent signed and returned the consent in *** 2017, after the ***, and the evaluation was immediately initiated.²⁹
23. In *** 2017, Student was limited to *** for behavioral reasons by the Principal at ***. ***.³⁰ The *** were not successful.
24. On *** 2017, Student ***. Student also ***.³¹
25. ***. ***.³²
26. Student was ***³³ Student was diagnosed with ***.³⁴
27. The Districts Director of Special Education added a *** to student's class in *** or *** 2017, even before the FIE was complete and before the ARDC met regarding Student's IDEA eligibility.³⁵
28. Parent agreed to participate in the ***, 2017 ARDC meeting, and she declined offers to postpone the meeting as she desired special education services for Student as soon as possible.³⁶
29. Parent agreed with the decision to move Student to a campus with ***, ***, when proposed by the District in *** 2017, because Parent believed Student was not receiving acceptable services at ***.³⁷ This was prior to the success demonstrated with a *** in Student's classroom.
30. Parent agreed with the ARDC IEP proposed on ***, 2017, desiring special education services for Student quickly and presuming that the District had worked out an agreement with her attorney which it had not.³⁸
31. The 2017 FIE report was completed on ***, 2017.³⁹ The Evaluator concluded that a

²⁹ Tr. at 204.

³⁰ P-26 at 219.

³¹ P-5 at 68.

³² P-5 at 65.

³³ Tr. at 64; P-

³⁴ Tr. at 65.

³⁵ The exact date this occurred is unclear with witnesses indicating different dates, but all were in *** or *** of 2017.

³⁶ Tr. at 79 and 356.

³⁷ Tr. at 81-82.

³⁸ Tr. 114.

³⁹ P-6 at 111.

- medical condition of ED was not supported. Instead, she found that ADHD was supported.⁴⁰
32. The FIE did not include ADHD as a medical condition to evaluate although ADHD was addressed in the determination.⁴¹
33. Student has chronic ADHD and Student's heightened alertness to environmental stimuli limits Student's alertness to the educational environment.⁴²
34. The *** ARDC adopted the FIE report and found Student was not eligible for special education services due to ED.⁴³
35. The ARDC understood Student needed special education and pursued a diagnosis letter confirming ADHD from student's Physician. Once this letter was received, Student was found to qualify for special education services with OHI-ADHD.⁴⁴
36. ***⁴⁵ did not include all of Student's behavior incidents. The incidents occurred ***.⁴⁶
37. While Student passed all courses in ***, Student's behavioral issues were beginning to affect Student's academics, particularly in ***.⁴⁷ Student did not pass the *** TEKS. In the spring of 2017, Student was also included in the District's *** with ongoing difficulty and struggles with *** and ***. Student also demonstrated significant weakness in ***.⁴⁸
38. Once the *** was added to Student's classroom, Student progressed well and demonstrated success at ***. Student experienced fewer behavior incidents and those incidents experienced were less severe.⁴⁹
39. Student's success with the educational placement in general education with the *** as an accommodation is significantly due to the relationship piece of the accommodation.⁵⁰ This piece was not proven to be available at ***, where a *** would not be in Student's classroom but Student would be removed from general education and sent to the ***.

⁴⁰ P-6 at 121.

⁴¹ P-6 at 111.

⁴² P-6 at 121.

⁴³ P-1.

⁴⁴ P-1.

⁴⁵ A response to intervention (RTI) *** that the District maintains for every student.

⁴⁶ Tr. at 384.

⁴⁷ Tr. at 83-84 and 306.

⁴⁸ P-13 at 156.

⁴⁹ Tr. at 216 and 331. P-28 at 271.

⁵⁰ Tr. at 213.

40. Parent signed the *** ARDC document stating that Student did not qualify for emotionally disturbed but she believes Student is emotionally disturbed.⁵¹
41. The FIE Evaluator determined that Student did not qualify as a Student with emotional disturbance and found that Student's medical condition of ADHD mimics some of the behaviors that are prevalent with children who are emotionally disturbed.⁵²
42. The FIE Evaluator did not obtain information from Student's ***, and she was unaware of Student's ***.⁵³ Information regarding Student's ***, was not reviewed for the FIE.
43. The Evaluator inaccurately perceived that Student's behavior issues were disobedience and off task, with some emotional outburst.⁵⁴ The Evaluator did not develop a sufficient understanding of Student's behavior. Student's outburst ***.⁵⁵
44. Student's *** teacher from *** and ultimately all of the 2016-2017 school year was not invited to the ARDC meeting because it was held at ***.⁵⁶
45. Student was to move to *** by agreement, but this never occurred due to Petitioner's change in request and Stay Put.⁵⁷
46. Participants during the *** 2017 ARDC meeting did not include teacher or principal from ***. A teacher from *** who did not teach Student was included.⁵⁸
47. Student never attended *** due to Stay Put, even though Student's ARDC convened at *** and the IEP developed at that ARDC meeting placed Student at ***.⁵⁹
48. Information regarding the support of a *** in Student's class was not discussed during the *** ARDC meeting.⁶⁰
49. Student is academically ready to progress to ***,⁶¹ but Student did not pass the TEKS for

⁵¹ Tr.at 119.

⁵² Tr. at 137.

⁵³ Tr. at 142.

⁵⁴ Tr. at 144.

⁵⁵ Tr. at 305.

⁵⁶ P-1.

⁵⁷ Tr. at 233-5

⁵⁸ P-2 at 22.

⁵⁹ Tr. at 380. P-28 at 269.

⁶⁰ P-1.

⁶¹ Tr. at 240-249.

- *** in 2016 or 2017⁶² and Student's behavior through *** 2017 was negatively affecting Student's education and that of other students in Student's classroom.
50. Student's behavior disrupted Student's academics and Student's learning environment as well as that of other students in Student's class.⁶³
51. The District's efforts to address Student's behavior were unsuccessful until a *** was added to Student's class in *** or *** 2017.⁶⁴
52. There were only minor differences between the proposed BIP and the Section 504 BIP that was unsuccessful.⁶⁵
53. A doctor's note was received by the District on ***, 2017, confirming that Student has the chronic or acute health problem of ADHD and ***.⁶⁶
54. ***. If a student has a set number of behavior incidents, the child is ***.⁶⁷ Student was treated consistently with other students.

VI. DISCUSSION OF ISSUES

A. Child Find and Identification

- Petitioner Issue 1: Whether the District failed to timely evaluate and identify the student of a suspected disability for special education and related services throughout the 2016-2017 school year, ***.
- Petitioner Issue 2: Whether the District was a direct cause of the lack of progress academically, emotionally and mentally and physically due to its failure to identify.
- Petitioner Issue 3: Whether the District had an appropriate program and IEP plan in place for the beginning of the 2016-2017 school year.

The Child Find duty is triggered when the school district has reason to suspect a student

⁶² Tr. at 240.

⁶³ P-5.

⁶⁴ The exact date this occurred is unclear with witnesses indicating different dates, but all were in *** or *** of 2017.

⁶⁵ Tr. at 305 and 361.

⁶⁶ P-18 at 195.

⁶⁷ Tr. 261.

has a disability coupled with reason to suspect that special education services may be needed to address the disability.⁶⁸ When these suspicions arise the school district must evaluate the student within a reasonable time after school officials have notice of reasons to suspect a disability.

Under Texas law a special education referral is required as part of the school district's overall regular education referral or screening system for students experiencing difficulty in the regular classroom.⁶⁹ The District identified Student for screening in 2015. Evaluations were performed for speech and OHI. However, the ARDC found Student did not qualify for special education. These decisions are outside the SOL for this case. The question now is limited to whether the District failed to timely evaluate and identify the student of a suspected disability for special education and related services from ***, 2016, to date. The evidence primarily focused on the 2016-2017 school year (***, 2016 to date).

The analysis for resolving a Child Find issue is two-fold: First, did the school district have reason to suspect the student has a disability *and* suspect the student may need special education and related services.⁷⁰ The threshold for suspicion is relatively low. The inquiry is not whether the student actually *qualifies* for special education but instead whether the student should be *referred* for a special education evaluation.⁷¹

The second issue under Child Find is whether the school district evaluated the student within a reasonable time after having notice of the behavior likely to indicate a disability.⁷²

⁶⁸ El Paso Indep. Sch. Dist. v. Richard R.R., 567 F. Supp 2d at 950; Dep't of Educ., State of Hawaii v. Cari Rae S., 158 F.Supp.2d 1190, 1194 (D. Hawaii 2001).

⁶⁹ 19 TEX. ADMIN. CODE § 89.1011

⁷⁰ Dallas Indep. Sch. Dist. v. Woody, 178 F. Supp 3d 443, 467 (N.D. Tex. 2016), appeal docketed, No. 16-10613 (5th Cir. May 16, 2016).

⁷¹ Dallas Indep. Sch. Dist. v. Woody, 178 F. Supp 3d at 467. This is a critical distinction from the issue of whether a school district should have identified a student as *eligible* for special education under one of the enumerated disability classifications under the IDEA. Questions of eligibility and identification as a student with a disability are resolved on the basis of whether an evaluation shows the student meets all of the criteria of one or more of the enumerated disability classifications *and* demonstrates a *need for special education*. See, 34 C.F.R. §300.8 (a) (c) (1)-(13).

⁷² Woody, 178 F. Supp. 3d at 468 (holding referral for a special education evaluation within three months of reason to suspect a disability and completion of the evaluation within seven months was reasonable).

Finally, identification is addressed as it immediately follows Child Find. Questions of eligibility and identification as a student with a disability are resolved on the basis of whether an evaluation shows the student meets all of the criteria of one or more of the enumerated disability classifications and demonstrates a need for special education.⁷³

The hearing officer concludes that the District did not violate the Child Find or Identification provisions of the IDEA. From Student's *** year within the SOL, ***, 2016, there is little evidence suggesting the District had reason to suspect that Student had a disability needing special education and related services. Turning to Student's *** year, beginning in *** 2016, the question concerns whether the District timely acted when it referred Student for an evaluation on ***, 2016. In addition, Petitioner urges that the District failed to evaluate Student within a reasonable time after having notice of Student's behavior indicating a disability.

During *** and ***, a private psychologist conducted an evaluation and diagnosed Student with OHI-ADHD. The psychologist recommended that consideration be given to requesting an ARDC meeting to develop an IEP and provide Student with consistent accommodations for Student's ADHD.⁷⁴ This diagnosis was completed in *** 2016 and was provided to the District.

Student's acting out began *** 2016. On ***, ***, and ***, Student's outbursts were included in the District's *** incident reports.⁷⁵ Student's teachers testified that behavioral issues started even during the *****.⁷⁶ By ***, 2016, Student ***. ***.⁷⁷

The District responded by calling Section 504 team meetings on ***, 2016 and ***, 2016, in attempts to address these behaviors.⁷⁸ By ***, 2016, Student's teacher requested ***.⁷⁹

⁷³ 34 C.F.R. §300.8 (a) (c) (1)-(13).

⁷⁴ P-7 at 126-127.

⁷⁵ P-5 at 106-109.

⁷⁶ Many incidents were not recorded in ***.

⁷⁷ P-5 at 105.

⁷⁸ Tr. at 319-320, 332.

At this point, Student's behavior was new and different than that previously identified by the District in the 2015 FIE, and the District had reason to request a special education evaluation. As noted by the Principal, ADHD is not usually associated with ***. Throughout *** and ***, the District and Parent attempted to address Student's behavior with Section 504 accommodations, but without success. Parent was concerned and on ***, 2016, she enrolled Student ***. During this time, it appears Student was not attending class.

While the District had reason to suspect a disability affecting Student's education at least by ***, 2016, it was not unreasonable for the District to wait until after the private *** therapy sessions and to affect the referral on ***, 2016. Student returned to school on ***, 2016, and immediately another outburst occurred ***. The District then referred Student to a special education evaluation for emotional disturbance on ***, 2016. The month delay did not affect Student's education. Giving these particular factors, the District's timing in making the referral to a special education evaluation was reasonable.

Petitioner further urged that there was additional delay in *** 2017. However, by this time a special education evaluation was being performed. The evaluation was performed within the state mandated time frame. Accordingly, this allegation is unsupported.⁸⁰ Thus, Petitioner failed to meet its burden of proving that the District failed in Child Find or Identification of Child. No IEP was in place nor required to be in place at the beginning of the 2016-2017 school year. The District timely evaluated Student of a suspected disability for special education and related services. Moreover, the evidence establishes that the District, even without an IEP in place, took actions to address Student's behaviors. The District's one to two month delay in referral was not unreasonable.

Finally, Petitioner urged that the District's 2017 evaluation was unsupported in its

⁷⁹ P-5 at 104.

⁸⁰ Also in ***, the District's Special Education Director added *** to Student's class to address Student's immediate needs. Tr. at 304. This action is commendable and ultimately proved to be the accommodation that would affect significant progress in lessening Student's outbursts and ***. Tr. at 364-365.

determination that Student did not qualify as a child with emotional disturbance. This is a difficult analysis to perform ***, given the statutory elements for emotional disturbance. The LSSP who performed the evaluation (Evaluator) testified that she did not review any documents from the ***. Moreover, the Evaluator was unaware that Student ***. ⁸¹ Student's *** was not contacted nor were any *** reports from *** requested. Relying on *** and parent and teacher input, the Evaluator testified that Student's behavior issues were basically disobedience and off task, with some emotional outburst. ⁸² This is not an accurate description of the behavioral issues established in the record which include ***. ⁸³

The Evaluator did not develop a sufficient understanding of the extent of Student's behavior. *** was not shown to be comprehensive in that many incidents were not included. *** were significant events that removed student from the educational environment for approximately *** (***). *** must be reviewed and included in an evaluation for ED, a disability that is defined by behavior that is observed over a long period of time and to a marked degree. ***, and the failure of numerous behavior strategies must be more thoroughly addressed. Without this necessary information, the District's 2017 FIE failed to gather the necessary and relevant functional, developmental, and academic information about Student. ⁸⁴ Thus, Petitioner's request for an IEE at the District's expense is granted. ⁸⁵ This includes an FBA to gather all relevant information, to more fully understand the extent of Student's behavioral issues, and to more fully address the most helpful responses.

B. Duty to Provide FAPE

⁸¹ Tr. at 142.

⁸² Tr. at 144.

⁸³ Tr. at 385.

⁸⁴ *34 C.F.R. § 300.304(b)(1)*.

⁸⁵ It should also be noted that in its First Amended Petition, Petitioner requested an IEE. This request was not responded to by the District so a technical violation also occurred in that the District must either agree to the IEE or file a due process complaint in support of the FIE. No such case was filed nor was a counter claim filed by the District to prove up its FIE and at this point any such filing amounts to unnecessary delay. This is yet another basis upon which Petitioner prevailed and an IEE is ordered at the District's expense. *34 C.F.R. § 300.502(b)(2) and 34 C.F.R. § 300.502(d)*.

- Petitioner Issue 3: Whether the District unilaterally changed student's placement. [It is alleged that a 5-day notice of the ***, 2017 ARDC meeting was not provided to parents. It is also alleged that Student's placement was moved, but then Student was returned to Student's initial placement].
- Petitioner Issue 5: Whether the District failed to provide FAPE. [In addition to the other matters specifically noted in other issues, this includes Petitioner's assertion that Student needs a more restrictive placement and/or more intensive supports].
- Petitioner Issue 6: Whether the District failed to provide an appropriate IEP and BIP.
- Petitioner Issue 7: Whether the District failed to provide appropriate social skills and behavioral goals.
- Petitioner Issue 8: Whether the District denied Student access to *** and *** in particular.

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free, appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living.⁸⁶ Under IDEA, the District has a duty to provide a free appropriate public education to all children with disabilities residing within its jurisdictional boundaries between the ages of 3 and 21.⁸⁷ The evidence showed Student was a child with a disability residing within its jurisdiction and thus the District had the duty to serve Student under IDEA.

A free, appropriate public education is special education, related services and specially designed personalized instruction with sufficient support services to meet the unique needs of the child in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with the child's IEP.⁸⁸

In meeting the obligation to provide a FAPE, the District must have in effect an IEP for each child with a disability at the beginning of each school year. An IEP is more than simply a

⁸⁶ 20 U.S.C. § 1400 (d).

⁸⁷ 34 C.F.R. § 300.101 (a).

⁸⁸ 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).

written statement of annual goals and objectives and how they will be measured. Instead, a child's IEP also includes 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, and, the duration and frequency of the services and the location where the services will be provided.⁸⁹

The Four Factors Test

In Texas the Fifth Circuit has articulated a four factor test to determine whether a school district's program meets IDEA requirements.⁹⁰ 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.

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 for reimbursement purposes.⁹¹

Application of the four factors to the evidence in this case supports the conclusion that the school district's proposed special education program as contained in the ***, 2017 IEP fails to consider Student's individual needs and unique circumstances and fails to provide FAPE. It should also be noted that for the remaining school year, the District continued to provide *** in Student's classroom and did not implement the IEP, believing that Stay Put limited their ability to do so.

⁸⁹ 34 C.F.R. §§ 300.22, 300.323 (a).

⁹⁰ *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 253 (5th Cir. 1997).

⁹¹ *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

1. Individualized Program.

First, the school district's proposed program is not individualized on the basis of assessment and performance. The FIE was limited in scope (ED only) and in the data relied upon as discussed above relating to the issue of identification. Given these limitations, the Evaluator made inaccurate conclusions as to Student's behavior challenges. The ARDC at *** relied upon the FIE to develop Student's IEP.⁹² Without an appropriate evaluation, the IEP was not prepared in consideration of Student's unique needs.

Moreover, the *** 2017 ARDC was held at *** even though Student never attended ***. Student's *** teacher from *** did not attend the ARDC meeting that adopted the proposed 2017 IEP. Without her input, the *** 2017 ARDC was not properly staffed to determine whether Student was capable of achieving Student's IEP goals in the general education classroom with additional supports and services, rather than removal from general education for special education as was determined.

To remedy these shortcomings, an FBA is necessary to identify the function or purpose behind Student's behavior, looking at a wide-range of Student's unique and complex social, affective, and environmental behaviors. The FBA must be performed by a Board Certified Behavior Analyst (BCBA) in order to address Student's unique and specific behaviors that go far beyond that expected of a Student with ADHD.

These further evaluations will affect a more complete profile of Student, including Student's strengths, weaknesses, and needs, as well as how to address them. This is necessary for Student's IEP to be individualized with more specific goals than the single and vague goal presently included. The additional evaluations must also address Student's ***. It also should address Student's *** which may be the impetus for Student to act out ***.⁹³ ***, Student presents complex emotional, social, and behavioral issues that require an FBA prepared by a

⁹² Tr. at 377-378.

⁹³ It was noted that Student's *** *** was a key component to Student's improved behavior.

BCBA.

Turning to another issue raised by Petitioner, the 2017 IEP was not required to have present levels of academic achievement as Student was not failing academically. With no immediate academic issues, there was no reason to prepare academic Present Levels of Academic Achievement and Functional Performance. Rather, the PLAAFP focused on Student's functional performance (behavior).

2. Least Restrictive Environment

The District's proposed program was not proven to be implemented in the least restrictive environment, but additional information must be considered before making this determination. This information includes an FBA and input from Student's *** Teacher and Principal regarding Student's behavior once provided the *** was provided as support.

The 2017 IEP proposes removing Student from the general education setting with supplementary aids and services noting that Student had a previously unsuccessful placement in a general education campus.⁹⁴ However, the need for removal from general education setting was not established, particularly given the successful general education experienced by Student from *** to *** 2017.

The 2017 ARD Committee recommended that Student receive part or all of Student's instruction in a special education setting, noting that Student had an unsuccessful placement in the general education setting. This decision was made without consideration of the success obtained with a *** *** to Student's general education classroom.⁹⁵ This accommodation occurred prior to the adoption of an IEP and should have been considered as LRE as it keeps Student in the general education classroom full time. Moreover, the accommodation has proven successful, primarily because of Student's *** ***. Student would not have the same *** in the behavior unit at ***, when pulled out of class and sent to the behavior unit.

⁹⁴ P-12 at 008.

⁹⁵ Tr. at 304.

The District may urge that Parent agreed to a more restrictive setting but her testimony, when taken on whole, is that she wants a successful placement and education for her child. She was seeking immediate help for her *** after a year of struggling. It would be mistaken to conclude that Parent preferred a more restrictive setting to that of general education with additional supports, such as a ***, if both were successful. In fact, the issue as presented by Petitioner in the Complaint is for a more restrictive placement and/or more intensive supports. The present record demonstrates that with more intensive supports in general education, Student's needs are met. The Principal at *** confirmed this and disagreed that placement at *** was not working (after the *** was added).

3. Services provided in a coordinated and collaborative manner.

The services were provided in a coordinated and collaborative manner. Petitioner urged that the District did not work collaboratively when responding to Parent's concerns. Parent understood Student's needs earlier than the District and it took time for the District to respond in accordance with Parent's desire. While Parent's frustration is reasonable, the District's responses both in actions taken and length of time were also reasonable.

Student was *** *** and it is not unreasonable for the District to have less concern in ***, a time when *** may normally occur. Student's behavior quickly escalated and by *** and *** the District was collaborating with Parent on various strategies, attempting to find success. The record reflects that at all times Parent was involved in the actions taken and the District and Parent were working well together.

From *** 2016 through *** 2017, the District collaborated and coordinated with Parent when implementing and adjusting Section 504 strategies, addressing Student's immediate needs in ***, referring Student to a special education evaluation, and when attempting to immediately address Student's needs (and Parent's stated desire) to move Student to *** with a behavior support room. Petitioner urges that the District unilaterally changed Student's placement but the record does not support this allegation. Rather, the District was working with Parent to address

Student's needs as quickly as possible. In this regard, it is unclear whether Parent and Parent's Special Advocate had an understanding over the requested placement at ***.⁹⁶

4. Demonstrated Positive Academic and Non-academic Benefits

Presently, Student is maintaining acceptable academic performance. *** is understandably of concern to Parent as Student did not pass the *** TEKS. With ADHD, Student's education performance is at risk as Student progresses into higher grades and must retain and build on prior year learning. The immediate concern for this factor is Student's behavior disrupting the educational benefit for Student and other Students in Student's classroom. It should again be noted that the education plan from *** to *** has demonstrated non-academic benefits. While the benefits in the 2017 IEP are hoped for and even expected, the education benefits of having a *** in the Student's classroom are proven. When asked, the District's LSSP could not say whether the 2017 IEP would be more or less beneficial than the accommodation of a *** in general education.

For the above reasons, the evidence establishes that the proposed 2017 IEP was not reasonably calculated to provide Student with the requisite educational and non-academic benefits and does not provide Student with FAPE.⁹⁷ The District must provide Student with a meaningful educational benefit—one that is more than merely de minimus and likely to produce progress not regression or trivial advancement.⁹⁸ The basic inquiry in this case is whether the IEP proposed by the District and adopted by the ARDC was reasonably calculated to provide Student the requisite meaningful educational benefit.⁹⁹ Given the evaluation deficiencies and the LRE considerations, the IEP is not appropriately ambitious in light of the child's unique

⁹⁶ Petitioner challenged the District's change of Student's placement from *** to ***, urging that the District violated "Stay Put." The District responded that it understood Parent was in agreement. When the Stay Put issue raised by Petitioner was addressed during the prehearing conference, Parent's Advocate stated a desire to have the Student returned to *** and that was ordered. During the hearing, Parent testified that she agreed with the change of placement to ***.

⁹⁷ See, *Cone v. Randolph Cnty. Sch. Bd. of Educ.*, 2009 U.S. Dist. LEXIS 87163 at 9-10 (D.C. N.C. 2009).

⁹⁸ *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 197 (2017); *Houston Ind. Sch. Dist. v. VP*, 582 F. 3d 576, 583 (5th Cir. 2009) cert. denied, 559 U.S. 1007(2010).

⁹⁹ *Rowley*, 458 U.S. at 206-207.

circumstances.¹⁰⁰

C. Alleged procedural violations

Petitioner Issue 4: Whether the District failed to provide the parent with a 5-day written notice of ARD.

Petitioner Issue 11: Whether the District denied parent a meaningful opportunity to participate in the ***, 2017 ARDC meeting.

The evidence showed that the District provided a copy of the requisite procedural safeguards and the 5-day written notice of ARDC meetings, except when waived by Parent at Parent's sole discretion. Parent was not denied a meaningful opportunity to participate in the 2017 ARDC meeting. In fact, Parent participated by phone and then went to the school to sign the ARDC document. Parent and the District desired to quickly find Student eligible for special education.

D. Discipline Issues

Petitioner Issue 9: Whether the District imposed punitive consequences for behaviors related to Student's disability.

Petitioner Issue 10: Whether the District violated the Student's rights as a child not yet identified in their discipline.

These issues were not supported by evidence during the hearing. Moreover, as stated and without evidence to further define the situations alleged, the issues are not properly before the hearing officer as they relate to matters concerning discipline and not in relation to a manifestation determination. Accordingly, no further discussion will be made.

E. Other Issues Raised in the Complaint

Petitioner Issue 12: Whether the District adequately trained personnel to work with

¹⁰⁰ Andrew F. v. Douglas Cnty. Sch. Dist., supra.

Student.

The evidence supporting this issue is lacking. When additional training *** was necessary, it was requested and received. Petitioner failed to meet Petitioner's burden of proof on this issue.

VII. CONCLUSION

The District's special education referral in *** 2016 was reasonably timed. However, the FIE was insufficient and failed to provide the 2017 ARDC with requisite information in order to individualize Student's proposed IEP on Student's performance and assessments. Moreover, the 2017 ARDC was not properly staffed which again hindered preparation of an IEP based on Student's unique needs. Finally, the 2017 IEP failed to propose administration in Student's least restrictive environment.

It should also be noted that the District failed to timely respond to Petitioner's request for an IEE that was included in Petitioner's First Amended Complaint and Request for Due Process Hearing. This alone provides the necessary legal grounds for ordering an IEE at the District's expense.

VIII. CONCLUSIONS OF LAW

1. The District's proposed 2017 IEP fails to provide Student with a free, appropriate public education in light of Student's unique circumstances. *Bd. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*; 458 U.S. 176 (1982); *Andrew F. v. Douglas Cnty. Sch. Dist.*, No. 15-827, 2017 WL 10662601@*10 (U.S. Mar. 22, 2017); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997); 34 C.F.R. § 300.101 (a).
2. The District's proposed 2017 IEP failed to place Student in Student's LRE. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005); *Cypress*
3. The District's proposed BIP did not adequately address Student's unique educational and behavioral profile. *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist. #221*, 41 IDELR 146 (7th Cir. 2004), *cert. denied*, 543 U.S. 1009 (2004); *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005).

4. An FBA prepared by a BCBA is necessary to address Student's unique behavioral needs. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005).
5. The District failed to reasonably/timely respond to Petitioner's request for an IEE as requested in Petitioner's First Amended Complaint and Request for Due Process Hearing. 34 C.F.R. § 300.502(b).
6. Petitioner did not meet Petitioner's burden to prove that the District failed to collaborate with Parent or to provide the parent with a meaningful opportunity to participate. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005).
7. The District timely evaluated Student for special education and related services throughout all relevant times to this proceeding.
8. Petitioner did not meet its burden to prove the District failed to provide Parent with written notice of the 2017 ARDC meeting.
9. The District did not violate Stay Put when Student was to transfer from *** to ***, and then had Student's placement returned to *** pursuant to Petitioner's withdrawal of the agreement in the change in placement.

IX. ORDER

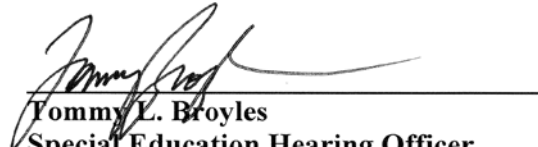
Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief are **GRANTED IN PART AND DENIED IN PART** as follows:

1. On or before ***, 2017, the District shall convene an ARDC meeting at *** for the purpose of reviewing Student's progress both academically and behaviorally and to implement an IEP with Student's Educational Placement and LRE being at *** and with a *** included in Student's class (*** in particular if possible, due to the ***). The IEP shall be prepared and implemented by the first day of school this fall, August 2017-2018.
2. The District shall fund the cost of an IEE in the areas of Emotional Disturbance, Speech, OHI-ADHD, and *** ***. The evaluation shall include a FBA prepared by a BCBA with the evaluations completed on or before the 45 day after the beginning of school for the fall 2017 semester.
3. Within 10 business days of issuance of the IEE including the FBA, the District shall convene an ARDC meeting for the purpose of reviewing Student's progress both academically and behaviorally and the recommendations in the evaluations. The ARDC

shall implement the recommendations of the FBA and prepare a BIP and IEP accordingly.

All other requests for relief not specifically stated in these Orders are hereby **DENIED**.

SIGNED July 7, 2017.



Yommy L. Broyles
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

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