

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

DECISION OF HEARING OFFICER

Petitioner STUDENT (Student), by next friend PARENT, (collectively, Petitioner) requested an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 *et seq.* The respondent to the complaint is the Lewisville Independent School District (the District). Petitioner alleges the District failed to identify all of Student’s disabilities pursuant to the Child Find provisions of the IDEA, failed to adopt an appropriate Individual Education Program (IEP), and failed to provide the student with a Free Appropriate Public Education (FAPE). The District denies Petitioner’s allegations and alleges that its diagnosis for Student is correct. The Hearing Officer finds that the District failed to appropriately diagnose Student with autism, but the District did not violate the IDEA in regard to FAPE. Petitioner failed to prove that all special education services necessary to address Student’s disabilities were not provided.

I. DUE PROCESS HEARING

Petitioner filed a Request for a Due Process Hearing (Complaint) on August 16, 2014. The hearing was held on April 22-23, 2015, in Lewisville, Texas with both parties represented by counsel and fully participating in the hearing. Petitioner alleges:

1. The District violated the Child Find provisions of the IDEA by taking inadequate measures to identify Student’s disabilities. More specifically, by failing to identify Student as an individual with autism.
2. Neither an appropriate Full and Individual Evaluation (FIE) nor an appropriate Independent Educational Evaluation (IEE) has been performed.
3. Student’s parents were denied a meaningful process in Student’s Admission, Review and Dismissal (ARD) meetings.
4. The IEP adopted by the District’s ARD committee failed to provide Student with FAPE.

Petitioner seeks:

1. Compensation as an equitable remedy for the educational services that the District failed to provide.
2. An appropriate IEP following performance of an IEE in all areas of need.
3. Reimbursement for past and future private placement.

The District filed a counter-claim requesting a finding that its FIE was conducted in compliance with the appropriate regulations, is appropriate for Student, and that no additional IEE is necessary.

IDEA creates a presumption that a school district's decisions made pursuant to IDEA are appropriate and that the party challenging those decisions bears the burden of proof at all times.¹ To prevail, Petitioner must establish its allegations by a preponderance of the evidence. The District is the moving party on its counter-claim and bears the burden of proof on that issue.

II. EXTENSION OF DECISION DUE DATE

At the conclusion of the hearing, both parties asked for the opportunity to submit written closing arguments. At the request of the parties, the decision due date was extended on the record, for good cause, to June 22, 2015, to allow time for the preparation of the hearing transcript and for the parties to submit written briefing.² This decision was timely issued.

III. FINDINGS OF FACT

Based upon the evidence and argument of the parties, the Hearing Officer makes the following findings of fact:

1. Student, ***, resides within the geographical boundaries of the District.
2. Student first attended school in the District in ***.

History Overview

¹ *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005); *see also White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993).

² Hearing Officer Order No. 12.

3. ***, Student had articulation difficulty and developmental delays with regard to eye contact, swallowing, and fine-motor skills. Student was indifferent to separation from Student's parents and was rigid and resistant to physical touch, would ***, and was hypersensitive to loud noises.³
4. Review of Student's medical and social history confirms the presence of autism as early as the age of ***, although the diagnosis was not formally made until age ***.⁴
5. Student was especially competent at *** at an early age, and Student continues to *** and show a method of *** unlike that of most persons.⁵
6. Student began to *** and has continued to suffer ***.⁶
7. A variety of tests and evaluations were performed with Student over the years; generally, the evaluations performed by the District found intellectual disability (ID) and not autism, while those performed by private practitioners diagnosed Student with autism.
8. At age ***, when Student attended ***, and as part of a FIE, Student was evaluated for autism by a licensed psychologist, a licensed speech-language pathologist, an occupational therapist, and a student evaluation specialist. The multi-disciplinary team found Student did not demonstrate characteristics of autism. Instead, Student was found to qualify for special education services as a student with ID and Speech Impairment.⁷
9. Another FIE was completed on ***. The recommendation offered to, and adopted by, the ARD committee was that Student met eligibility for special education as a student with ID and speech impairment.⁸

***** PhD; *** and *** Evaluations⁹**

10. ***, PhD, diagnosed Student with autism and ID after evaluations on the following dates, all in ***.¹⁰
11. At the time of these evaluations, Student was *** years old.
12. Student was referred to Dr. *** by Student's pediatrician for a comprehensive evaluation.
13. Behavior assessment of Student indicated high levels of hyperactivity, impulsivity, inattention, anger dyscontrol, mood instability, social and communication deficits, difficulty adapting to change and variety, and repetitive and compulsive behaviors.
14. Student scored positive for mild autism in the Childhood Autism Rating Scale.

³ Ex. R-9 at 1.

⁴ Ex. R-9 at 6.

⁵ Ex. P-19 at 6.

⁶ Ex. R-9 at 2.

⁷ Ex. R-41.

⁸ Ex. R-38 at 23.

⁹ Ex. P-20.

¹⁰ Ex. R-9 at 1; R-20 at 4.

15. Student fell within the mild ID range in Student's intellectual and adaptive behavior score.
16. Dr. *** evaluated Student a second time on ***.
17. Student has exhibited delayed and unusual development since birth.
18. The Australian Scale for Asperger's Syndrome indicated significance for autism.
19. Student has long-standing and encompassing problems with social and emotional relatedness, communication style, and restricted range of behaviors.
20. Student falls in the center of the autistic spectrum, indicating Student is higher functioning than others with autism.
21. Student's intellectual and adaptive behaviors indicate mild intellectual disability.
22. Student has ***, engages intrusively in rote fashion and lacks reciprocal conversing.
23. Student's speech contains repetitive themes and Student makes statements over and over and out of context.
24. Student demonstrated a hyper-startle response for very mild auditory or visual stimuli.
25. During all phases of the evaluation, Student presented with atypical social, communication, and behavioral functioning that goes beyond ID.¹¹
26. Dr. *** again diagnosed Student with autism in ***.

District's * FIE**

27. Student's touch/tactile is remarkable for sometimes isolating ***self from Student's peers, and ***. Student appears bothered by ***, and had difficulty standing in line. Student prefers to ***.¹²
28. Noise, sound, or other people in the room easily distract Student.¹³
29. Student is overly sensitive to sound and does not always answer to Student's name.¹⁴
30. Observations for the *** FIE confirmed that in social and emotional areas, Student is easily frustrated and displays an emotional outburst when Student experiences difficulty performing tasks, has difficulty tolerating changes in routines, has difficulty perceiving body language or facial expressions, and frequently seems anxious.

¹¹ Ex. P-20 at 13.

¹² Ex. R-2 at 22.

¹³ Ex. R-2 at 23.

¹⁴ Ex. R-2 at 22.

31. Student avoids eye contact, as recorded in the visual portion of the observation for the FIE.¹⁵
32. Student screams when ***.¹⁶
33. Student dislikes crowds and loud noises and reacts when others encroach upon Student's personal space and or touch Student.¹⁷
34. Student must have ***.¹⁸
35. The social communication questionnaire (SCQ), lifetime form, is a screening measure that tests for symptomatology associated with autism spectrum disorders.
36. The SCQ scores for Student demonstrated several symptoms consistent with an autism spectrum disorder. Student's scores were almost twice the cut-off score for possible indication of meeting the diagnostic criteria for autism.¹⁹
37. A Review of Existing Evaluation Data (REED) was initiated by Student's mother (Mother) in ***, largely due to concerns about Student's language/communication skills, sociological issues, a history of ***, maladaptation to changes in schedule, inflexibility, talking excessively and repeatedly about ***, and Student's moods.²⁰
38. As noted by Student's physical education teacher for the FIE, Student is skilled at ***.²¹
39. ***, former assessment specialist for the District, performed the cognitive testing on Student for the FIE and found Student scored in the extremely low range.²² Student's verbal skills were found to be higher than Student's visual and performance skills.²³
40. ***, Speech Language Pathologist for the District, noted that Student repeats the same questions not looking for answers or reciprocity communication.²⁴ Ms. *** does not expect Student to have social reciprocity or to be able to build and maintain relationships.²⁵
41. ***, Special Education Teacher for the District, taught Student for three years.

¹⁵ Ex. R-2 at 22.

¹⁶ Ex. R-2 at 11

¹⁷ Ex. R-2 at 11.

¹⁸ Ex. R-2 at 11.

¹⁹ Ex. R-2 at 30.

²⁰ Ex. R-2 at 43.

²¹ Ex. R-2 at 32.

²² Tr. at 73.

²³ Tr. at 80.

²⁴ Tr. at 383.

²⁵ Tr. at 389.

42. Student would ask Ms. *** the same questions every day.²⁶
43. Student would ask Student's teachers and peers the same questions every day.
44. Student would repeat the same question up to five times, Student was indifferent whether or not Student's questions were answered and Student would move on to another question before returning to the same question.²⁷
45. Outside of school, Student would ask friends the same questions.
46. Student is skilled at ***.²⁸
47. While Ms. *** was student's teacher, Student's regular question was, "***." Student was also noted to repeatedly want to go over ***.²⁹

*****, PsyD; *** IEE**

48. An IEE was performed by ***, PsyD, Licensed Psychologist and Clinical Neuropsychologist.³⁰
49. Several of Student's disorders would not necessarily manifest with only ID, thus they are better explained with a diagnosis of autism. These include sensory dysregulation, repetitive behaviors, repetitive speech, and inflexible adherence to routine with resistance to change that results in outbursts of yelling, hitting, and *** (although less often).³¹
50. Student's presentation during the IEE was consistent with a diagnosis of autism because of Student's:
 - A. Impairment in social interaction (impaired use of multiple nonverbal behaviors and lack of social and emotional reciprocity);
 - B. Impairment in communication (delay in speech *** and repetitive use of language); and
 - C. Restricted repetitive and stereotyped patterns of behavior, interests and activities (preoccupation and restricted patterns of interest, inflexible adherence to specific routines, and stereotyped and repetitive motor mannerisms including ***).³²
51. An IEE brings with it the presumption of no bias as the psychologist is not affiliated with the District and is not paid by the Petitioner.
52. Dr. *** interviewed Mother and Student's teacher of *** years, ***. Dr. *** also reviewed Student's medical records and observed Student, using several assessment techniques.³³

²⁶ Tr. at 444.

²⁷ Tr. at 459-460.

²⁸ Tr. at 448-449.

²⁹ Tr. at 452.

³⁰ Ex. R-9.

³¹ Ex. R-9 at 6.

³² Ex. R-9 at 5.

³³ Ex. R-9

53. At the time of the IEE, Student was *** years old. Student continued to enjoy *** and had moderate to severe speech articulation difficulty.
54. Student has a history of behavior outbursts in response to change that include yelling, ***, and grabbing the other person involved.³⁴
55. Student oftentimes repeats the same questions several times, even if Student is given an answer.
56. Student has poor eye contact but, with hard work, improvement with certain people and in certain situations has been achieved.
57. Upon ***, Student had significant difficulties, including screaming, ***, hitting ***self, and jumping up and down.³⁵
58. The information provided by Ms. *** and reported on the IEE is the most persuasive evidence of Student's functioning at school.
59. The evidence establishes that Student:
- A. Performs best with structure;
 - B. Has exceptional skill for recalling facts related to personal detail;
 - C. Has exceptional skill ***;
 - D. Can carry on a conversation, albeit rehearsed, redundant, and not typically reciprocal;
 - E. Experiences behavior outburst with change;
 - F. Repeats questions several times, even if Student has been given an answer;
 - G. Has variable to poor eye contact, depending on the situation; and
 - H. Improved under Ms. ***'s tutelage.³⁶
60. At the beginning of ***, Student had a difficult time and an emergency ARD was called to address Student's distress.
61. Ms. *** was consulted and she provided techniques to assist in behavior management that were ultimately successful.³⁷
62. During the IEE interview, Student asked an abundance of questions (related and unrelated), would repeat the same question up to five times (even if answered), and appeared indifferent to whether Student's questions were answered or ignored.
63. Student's affect was blunted and Student's eye contact was variable to poor during the IEE interview.³⁸

³⁴ Ex. R-9 at 2.

³⁵ Ex. R-9 at 2.

³⁶ Ex. R-9.

³⁷ Ex. R-9 at 2.

³⁸ Ex. R-9 at 3.

64. Student was impaired in most areas when Student's reasoning abilities were tested for the IEE.
65. Student's social and adaptive functioning skills are severely delayed, with demonstrated disruptive behaviors including constant talking, talking too loudly, withdrawing from activities, exhibiting tantrums with change, ***, yelling, hitting, and interrupting.
66. Student scored an above-average degree of probability of autism on the Gilliam Autism Rating Scale.³⁹
67. Dr. *** noted and the evidence indicates that Student has not lost cognitive ability compared to Student's previous diagnosis of mild ID; rather, Student has fallen behind in cognitive development when compared to the rate of Student's peers. So while Student is now moderate ID, Student was mild ID when younger.⁴⁰
68. Student has improved in some areas (partially remitted symptoms) due to successful interventions, but Student continues to demonstrate diagnostic criteria consistent with autism.
69. A review of the Student's medical and social history definitively confirms the presence of autism, as early as *** years of age.⁴¹
70. Some autistic behaviors allowed Student to have strengths in exceptional recall of certain facts (***)***; these skills are not typical of persons with moderate ID.
71. Student's autistic behaviors within the school setting would not necessarily manifest if Student only had ID. Student's primary autistic behaviors include repetitive questions, inflexible adherence to routine, and resistance to change resulting in outbursts (yelling, hitting, and ***.)

*****, PhD**

72. ***, PhD, performed a psychological evaluation on Student, with a report issued on ***. Dr. *** diagnosed Student with autism spectrum disorder and moderate ID.
73. Dr. *** is well qualified and her opinion is given significant weight. She earned a PhD in School/Child Clinical Psychology and has decades of experience working in the areas of autism in children, developmental-behavioral pediatrics, and other general psychological treatments. She was a clinical assistant professor of psychiatry at *** for two decades and worked as a Clinical Child Psychologist at ***. Dr. ***'s doctoral dissertation was *** and she completed a Master's Thesis regarding *** Dr. ***'s prior public presentations include ***. She has specialized in autism since graduate school.
74. Student's repetition with questions increased Student's score on the Autism Diagnostic Observation Schedule (ADOS) and increased the likelihood of an autism diagnosis on that test.⁴²
75. Student's repetition was noted in the District's evaluation but the District failed to acknowledge it.⁴³

³⁹ Ex. R-9 at 4.

⁴⁰ Ex. R-9 at 5.

⁴¹ Ex. R-9 at 6.

⁴² Tr. at 258

⁴³ Tr. at 256.

76. It is acknowledged in the District's evaluation that Student met the criteria for being autistic on the ADOS, but it is not well explained why then the District decided Student was not autistic.⁴⁴
77. The ADOS will not over diagnose; it will not diagnose someone who is intellectually disabled as someone who is autistic.
78. The ADOS test and the Childhood Autism Rating Scale (CARS) provide the tools to differentiate a diagnosis between autism and intellectual disability.
79. The ADOS looks for behaviors that are seen in autism and not in other illnesses.
80. In the ADOS, Student met the criteria for autism in both communication and social interaction.⁴⁵
81. Student perseverates on topics during conversations.
82. The evidence does not support Dr. ***'s opinion that Student holds reciprocal conversations and does not persevereate.
83. In order to determine whether Student was repeating memorized questions during the *** FIE, the District's examiner should have gone back to the parents or teachers and asked if the questions were common topics. Had the examiner done so, she would have found that Student was repeating questions on the same topics.
84. Student frequently perseverates on the topic of *** and on other topics like ***.
85. People with ID do not ***; this is absolutely contrary to a conclusion that Student has ID alone.⁴⁶
86. Student's ability *** is a peak skill, only seen in autism.
87. It is common for autistic children to ***. ***.⁴⁷
88. Dr. ***'s testimony was fair and unbiased.
89. A small percentage of autistic children are described as friendly, they smile, but they are not reciprocal. They say things that are embarrassing without knowing it.
90. Student's social responsiveness scale demonstrates Student is in the autism spectrum range. This scale is valid and it is used at the Yale Child Study Center.⁴⁸
91. The childhood autism rating scale used by Dr. *** is the best rating scale for differential of autism and ID and Student demonstrated mild to moderate autism.⁴⁹

⁴⁴ Tr. at 260.

⁴⁵ Tr. at 261.

⁴⁶ Tr. at 268.

⁴⁷ Tr. at 270.

⁴⁸ Tr. at 272.

⁴⁹ Tr. at 274-276.

92. At age ***, the District incorrectly diagnosed Student with a learning disability.⁵⁰
93. ***.
94. It is common for a person with autism to also have ID.

*****, PhD**

95. ***, PhD is well-qualified and earned her doctorate in Psychology with a concentration in school psychology. She is a licensed psychologist and a licensed specialist in school psychology (LSSP).⁵¹ Dr. *** has performed approximately 150 in-depth, multi-disciplinary autism team evaluations over the last seven years. She has a broad-based training and background in psychology, the field of cognitive abilities, and research regarding interpretation of cognitive functioning.⁵² She evaluated Student for the FIE and developed the outcome after discussions with the multi-disciplinary team.⁵³
96. Dr. *** did not know Student by name before observing Student for the FIE.⁵⁴
97. Dr. ***'s observations of Student were that Student asked a variety of questions that related to thoughts, experiences, and feelings.⁵⁵ Dr. *** opined that students with autism ask fact-finding questions, not those related to feelings. Dr. *** observed Student to have social exchanges and conversation, unlike that of a student with autism.⁵⁶
98. Dr. *** did not indicate knowledge about Student's ***.⁵⁷
99. Dr. *** opined that she did not observe any repetitive behaviors, particularly those that interfered with Student's interactions with others.⁵⁸
100. Dr. *** said Student's repetition with questions referred to different questions, not repetition of the same questions.
101. Dr. *** would not answer when presented with whether Student would qualify for an autism diagnosis if the DSM-V, ID rule out was not applied.⁵⁹

⁵⁰ Tr. at 280.

⁵¹ Tr. at 124.

⁵² Tr. at 183.

⁵³ Tr. at 128.

⁵⁴ Tr. at 131.

⁵⁵ Tr. at 136.

⁵⁶ Tr. at 138.

⁵⁷ Tr. at 140.

⁵⁸ Tr. at 141.

⁵⁹ Tr. at 344. The provision for the medical diagnosis of autism rules out autism if the behavior is best described as related to ID. See 5th Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V).

102. Dr. ***'s observations were not supported by the great weight of evidence and were contradicted by evidence including:
- A. Dr. ***'s professional opinion;
 - B. Dr. ***'s professional opinion;
 - C. Dr. ***'s professional opinion;
 - D. Mother's testimony;
 - E. Stepfather's testimony;
 - F. Parts of Ms. ***'s interview (teacher for *** years);
 - G. Social responsiveness scales used by the FIE evaluators;
 - H. The CARS;
 - I. Autism Spectrum Rating Scales (ASRS)⁶⁰
 - J. The ADOS;
 - K. *** Behavior Intervention Plan targeting Student's perseverative and repetitive conversations;
 - L. *** and its multi-disciplinary team addressing Student's behavior as related to the symptoms of autism.⁶¹
103. Discrepancies existed between the observations of Student as noted by Dr. *** and the other employees of the District, including speech pathologist *** (who confirmed that Student repeated sentences and issues across settings and across interactions between different individuals) and others who confirmed Dr. ***'s observations, including *** (Student's current special education teacher), *** (Student's occupational therapist), and *** (Student's speech therapist).⁶²
104. The District discounted the IEE for not being performed by a multi-disciplinary team but the District did not provide enough money for a multi-disciplinary team. The IEE was sufficiently detailed and reliable.
105. Dr. ***'s testimony is not as credible as that of Dr. ***, because Dr. *** did not appropriately consider the reports, information, and evaluations of others, particularly the information provided by Ms. *** and Mother.

Other Findings

106. If the District does not find the IEE acceptable for the purposes to which it paid for the IEE, the District may pay for another IEE and pay for a multi-disciplinary team.
107. The ADOS is the "gold standard" for standardized assessment of communication, social interaction, and play for individuals referred for evaluation to assess the possibility of autism.⁶³
108. When evaluated with ADOS by District personnel, Student's overall ratings for the communication and social interaction domains met the threshold for autism classification.⁶⁴

⁶⁰ Ex. P-13 at 32.

⁶¹ Ex. P-74 at 7.

⁶² Tr. at 468-471; 577-579; and 636-638.

⁶³ Ex. P-13 at 34.

⁶⁴ Ex. P-13 at 35.

109. The testing of Student consistently demonstrates an autism diagnosis; three psychologist diagnosed autism, Parents' description of their child's social interactions and other life experiences all point to a diagnosis of autism.
110. Student is adept at ***, atypical for a diagnosis of ID only.⁶⁵
- A. Student can ***.⁶⁶
 - B. At age ***, ***.⁶⁷
 - C. As noted by Student's Physical Education teacher for the FIE, Student is ***.⁶⁸
 - D. Student's preferred activities include only three things: ***.⁶⁹
111. Student is appropriately diagnosed with autism, in addition to other diagnosis not contested.
112. The ARD incorrectly found that ID better explains Student's behaviors than autism. The ARD applied the medical definition of autism in the educational (IDEA) context.
113. Autism better explains Student's behaviors than ID in the areas of sensory dysregulation, repetitive behaviors and/or speech, and inflexible adherence to routine with resistance to change.
114. The *** completed by Student's special education teacher reveals Student lacks competence in most areas. The teacher did not know whether Student maintained pro-social behavior in a variety of settings or established friendships in a variety of settings in regard to interpersonal relationships.⁷⁰
115. The ARD committee failed to sufficiently consider the parental input, the work of Drs. *** and ***, and Student's medical, social, and educational (Ms. ***'s) histories when making their diagnosis.
116. The IEE better considers the historic and present educational behaviors of Student than the FIE.
117. Student repeats ***self and does not stop talking when at home. Student does not engage in a conversation but repeats ***self.⁷¹
118. When Student was *** years old, the District's teacher and principal convinced Mother that she would not want Student to have the diagnosis of autism. This was performed by showing Student's mother a room with students who were less functional than Student and telling her that this is where Student would be if the Mother agreed to put the autism diagnosis on Student's report.⁷²
119. Regardless of improvements in Student's behaviors, it is appropriate to retain the diagnosis of autism.

⁶⁵ Ex. R-9 at 6.

⁶⁶ Tr. at 651.

⁶⁷ Tr. at 65.

⁶⁸ Ex. R-2 at 32.

⁶⁹ Tr. at 652.

⁷⁰ Ex. R-54.

⁷¹ Tr. at 34.

⁷² Tr. at 35.

120. *** taught Mother different ways to address Student's deficiencies that have been successful.
121. Student made progress under the *** program; Student is not as frustrated and is beginning to learn ***.⁷³
122. In the *** ARD meeting, several persons who voted had never met Student.⁷⁴
123. Although the District did not diagnose Student with autism, the District nonetheless addressed Student's disability needs in Student's IEP without regard to Student's diagnosis. This included concerns expressed about ***, repetitiveness speech, and behavior modifications.
124. The District uses the applied behavior analysis (ABA) therapy.
125. Dr. *** agreed with the District's IEP and said it could not be improved upon.
126. The Student's present IEP is appropriate in all areas, including those of intellectual, social, behavioral, speech, an occupational therapy, despite the fact that it is not tied to a diagnosis of autism.⁷⁵
127. The District's FIE was appropriately performed in accordance with the IDEA.
128. The District has provided Student with FAPE.

IV. APPLICABLE LAW

A. Child Find Requirement

Under the IDEA, a school district must identify, locate, and evaluate any child that it suspects (1) has a disability, and (2) needs special education and related services.⁷⁶ The Fifth Circuit has explained that the existence of a disability, even when coupled with persistent academic difficulties and misconduct, does not automatically trigger a school's duty to conduct a special education evaluation.⁷⁷ Rather, the "Child Find duty is triggered when the local educational agency has reason to suspect a disability coupled with reason to suspect that special education services may be needed to address the disability."⁷⁸ When these suspicions arise, "the local educational agency must evaluate the student within a reasonable time after school officials have notice of

⁷³ Tr. at 40.

⁷⁴ Tr. at 49.

⁷⁵ Tr. at 67.

⁷⁶ 20 U.S.C §1412(a)(3)(A); 34 C.F.R. §300.111; *see also D. G. v. Flour Bluff Indep. Sch. Dist.*, 481 Fed. App'x. 887, 891 (5th Cir. 2012).

⁷⁷ *Alvin Indep. Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F.3d 378, 384 (5th Cir. 2007).

⁷⁸ *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 950 (W.D. Tex. 2008); *see also C.P. v Krum Indep. Sch. Dist.*, No. 4:13CV63, 2014 WL 4651534, *10 (E.D. Tex. Sept. 17, 2014).

behavior likely to indicate a disability.”⁷⁹ Children to be evaluated include those “who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade[.]”⁸⁰

Decision: As discussed below, the Hearing Officer finds that the District failed to identify Student as a child with the disability of autism.

B. Eligibility Law

To be eligible for IDEA special education services, a student must: (1) have one of the 13 disabilities enumerated in the IDEA, *e.g.* ID and autism; and (2) by reason of that disability, need special education and related services.⁸¹ In Texas, eligibility determinations are made by an ARD Committee based on all the information available.⁸²

To determine whether a student is a “child with a disability” eligible for IDEA services, a school must conduct an FIE in compliance with the extensive procedural requirements contained in the IDEA.⁸³ After initial eligibility determinations, a school must conduct a reevaluation if the school determines that “the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation” or if the child’s parent or teacher requests a reevaluation.⁸⁴ Reevaluations are limited to once a year, unless the school and the parent agree otherwise, but not less than once every three years, unless the school and the parent agree otherwise.⁸⁵ Parents who disagree with the ARD Committee’s eligibility decision may request a due process hearing to challenge the decision.⁸⁶

Decision: As discussed below, the Hearing Officer finds that the District failed to identify that Student was eligible for special education services as a student with the disability of autism.

C. FIE Requirements

⁷⁹ *Richard R.*, 567 F. Supp. 2d at 949-50.

⁸⁰ 34 C.F.R. § 300.111(c)(1); *Richard R.*, 567 F. Supp. 2d at 950.

⁸¹ 34 C.F.R. § 300.8(a)(1).

⁸² 19 Tex. Admin. Code § 89.1050(a)(5); 34 C.F.R. § 300.306(c).

⁸³ 34 C.F.R. §§ 300.301-311.

⁸⁴ 34 C.F.R. § 300.303.

⁸⁵ 34 C.F.R. § 300.303(b).

⁸⁶ 34 C.F.R. § 300.507(a)(1).

1. The IDEA regulations require the school district use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student -- including information from the parent. This information is to be used to confirm the student's eligibility within the meaning of the IDEA. The information is also to be used to determine the content of the student's IEP, including information related to enabling the student to be involved in and progress in the general education curriculum.⁸⁷
2. No single measure or assessment may be used as the sole criterion for determining the student's eligibility or an appropriate educational program.⁸⁸
3. The district must use technically sound instruments that assess the relative contribution of cognitive and behavioral factors in addition to physical or developmental factors.⁸⁹
4. The district must ensure that assessments and other evaluation materials used to assess the student are selected and administered so as not to be racially or culturally discriminatory.⁹⁰
5. The assessments and other evaluation materials must be provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally unless it is clearly not feasible to do so.⁹¹
6. The assessments and other evaluation materials used must be valid and reliable.⁹²
7. Trained and knowledgeable personnel must administer the assessments and other evaluation materials.⁹³
8. The assessments and other evaluation materials must be administered in accordance with the instructions provided by the producer of the assessments.⁹⁴

The IDEA regulations also require the student be assessed in all areas of suspected disability.⁹⁵ Furthermore, the evaluation must be sufficiently comprehensive to identify all of student's educational and related service needs. The evaluation must also use assessment tools and strategies that are useful in meeting the student's

⁸⁷ 34 C.F.R. § 300.304(b)(1)(i)(ii).

⁸⁸ 34 C.F.R. § 300.304(b)(2).

⁸⁹ 34 C.F.R. § 300.304(b)(3).

⁹⁰ 34 C.F.R. § 300.304(c)(i).

⁹¹ 34 C.F.R. § 300.304(c)(1)(ii).

⁹² 34 C.F.R. § 300.304(c)(1)(iii).

⁹³ 34 C.F.R. § 300.304(c)(1)(iv).

⁹⁴ 34 C.F.R. § 300.304(c)(1)(v).

⁹⁵ 34 C.F.R. § 300.304(c)(4).

educational needs.⁹⁶

Decision: As discussed below, the Hearing Officer finds that the District's FIE appropriately addressed all areas required by IDEA.

D. Establishing/Defining Autism

A diagnosis by a physician or psychologist does not, by itself, establish eligibility because the IDEA is educationally—not diagnostically—oriented.⁹⁷ Instead, the IDEA sets out the criteria for a finding that a child has an enumerated disability of autism and intellectual disability. Autism is defined as:

... a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. ... Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section. ... A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph (c)(1)(i) of this section are satisfied.⁹⁸

As indicated above, a rule out exception to an autism disability is present for emotional disturbance but not for ID. In Texas, the regulations simply refer to the above CFR for a definition of autism.⁹⁹ And, like the IDEA, the Texas regulations do not contain a rule out exception for ID. Moreover, both federal and state law provide for a designation of multiple disabilities when the student's disability is expected to continue indefinitely and the disabilities severely impair performance in two or more of the following areas:

1. psychomotor skills;
2. self-care skills;
3. communication;
4. social and emotional development; or
5. cognition.

Decision: As discussed below, the Hearing Officer finds that autism is appropriately included as one of Student's disabilities.

⁹⁶ 34 C.F.R. § 300.304(c)(6)(7).

⁹⁷ *In re* Springfield R-XII School District., 46 IDELR 178, 106 LRP 38662, (June 21, 2006).

⁹⁸ 34 C.F.R. § 300.8

⁹⁹ 19 Tex. Admin. Code § 89.1040(c)(1)

E. Individual Education Plan

In order to provide a FAPE to a student with a disability, the student's education is required to be tailored to the unique needs of the child by means of an individualized education plan (IEP).¹⁰⁰ The IEP is prepared at a meeting of the IEP team, which consists of (1) the student's parents, (2) at least one regular education teacher of the child, (3) at least one special education teacher of the child, (4) a representative of the public agency with appropriate authority, (5) an individual who can interpret the instructional implications of evaluation results, (6) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, and (7) where appropriate, the child himself.¹⁰¹ In Texas, the IEP team is known as the Admissions, Review, and Dismissal (ARD) Committee.¹⁰²

The FAPE, however, "need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction."¹⁰³ Stated another way, the IDEA guarantees only a "basic floor of opportunity ..." for every disabled child, consisting of "specialized instruction and related services which are individually designed to provide educational benefit"¹⁰⁴ Still, "the educational benefit to which the IDEA refers and to which an IEP must be geared cannot be a mere modicum or *de minimis*; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement."¹⁰⁵

Decision: As discussed below, the Hearing Officer finds the District provided FAPE and addressed all of Student's needs through its IEP. This is despite the fact that the ARD committee failed to include autism as a diagnosis.

V. DISCUSSION AND ANALYSIS

A. The District violated the Child Find provisions of the IDEA by taking inadequate measures to identify Student's disabilities. More specifically, the District failed to identify Student as an individual eligible for services related to autism. Found for the Petitioner.

¹⁰⁰ *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 128 (5th Cir. 1993).

¹⁰¹ 34 C.F.R. § 300.321(a).

¹⁰² *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 805 n.1 (5th Cir. 2012).

¹⁰³ *R.P. ex rel. R.P.*, 703 F.3d at 809.

¹⁰⁴ *Board of Educ. of Hendrick, Hudson Central Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 201 (1982).

¹⁰⁵ *R.P. ex rel. R.P.*, 703 F.3d at 809.

Petitioner met Petitioner's burden to overcome, by a preponderance of the evidence, the presumption that the ARD Committee's decision was correct when it failed to diagnose student with autism disorder.

Distinguishing between autism and ID is difficult, and as found in this case, highly educated, well-trained, and astute experts may disagree. In fact, comorbidity with ID and autism is common, and it is the diagnosis for Student supported by the great weight of evidence offered during this hearing. This applies to the medical and the IDEA definitions for autism, although the Hearing Officer will primarily address the IDEA definitions, as they legally govern this case.

The difference in the definitions is that the medical definition, as documented in the DSM V, has a rule out exception to clarify when comorbid diagnosis should occur and when only a diagnosis of ID is appropriate. The relevant language is that autism should be included in the diagnosis only when the symptoms "are not better explained by intellectual disability." Dr. *** and the District admittedly relied upon the rule out provision, even though it is not included in the IDEA definition of autism.¹⁰⁶ In so doing, the ARD committee found all of Student's symptoms were better explained with ID. In reaching this conclusion, the evidence demonstrates that the ARD committee, and Dr. *** in particular, failed to appropriately consider the observations of other experts, a past teacher, and Mother. Dr. *** applied too much emphasis on her limited observation of Student, approximately three hours over a three-day period in preparation for the 2013 FIE.¹⁰⁷

When reviewing all the data gathered on Student over Student's lifetime, the great weight of evidence establishes that Student is appropriately diagnosed with autism. This determination is based greatly on the qualifications, expertise, and presentations of the expert witnesses and the tests performed by them, along with significant weight given to the testimony of Mother, Student's primary caregiver ***, and to that of Student's former teacher of *** years, Ms. **. For these reasons, the Hearing Officer finds that the appropriate diagnosis for Student is autism and ID, for purposes of the IDEA.

Another reason for the diagnosis is the lack of confidence the Hearing Officer has in Dr. ***'s testimony. She is qualified, appeared honest and sincere, but her answers suggested she was entrenched or perhaps overly confident in her assessment. She answered questions concerning whether Student had traits suggesting autism with defensive responses like, "but this is not unexpected with someone who has ID." Dr. *** had difficulty

¹⁰⁶ Tr. at 78.

¹⁰⁷ The observation was "perhaps" 30 minutes one day, 45 minutes another, and 90 minutes on yet another. Tr. at 377.

admitting to any traits that suggested autism.¹⁰⁸ Her demeanor was defensive and she appeared to have a level of professionalism or personal reputation wrapped up in the outcome of this case. Finally, when asked if the student did not have ID, would Student be diagnosed with autism (effectively removing the rule out provision), Dr. *** could not answer. This opinion stands in sharp contrast to the testing and expert opinions of her equally educated and qualified colleagues.

A few examples of where Dr. ***'s observations stood alone include that Dr. *** opined Student did not persevere beyond what is expected due to Student's ID.¹⁰⁹ It appeared that Dr. *** based this determination on her observation of Student and her own determination that Student's repetitive behaviors were not to the degree that it interfered with Student's ability to interact or respond to people¹¹⁰ But, the evidence establishes the contrary. Stepfather testified that Student starts asking questions at 7:30 a.m. and continues asking them until Student goes to bed at 9:30 p.m.¹¹¹ He stated that Student asks the same question over and over again and is indifferent to whether Student's question is ignored or answered. As an example, he testified that Student asks him if ***, and he will answer yes. Then, Student will ask if "****," and he will answer yes. Then Student will return to those same questions. His testimony was similar to the testimony of Mother and the observations of other experts who evaluated Student, including Dr. ***. Moreover, Dr. ***'s observations that Student lacked repetitive behaviors that interfered with Student's communications is not supported by the testimony and reports from Student's teachers and other District employees.¹¹²

Similarly, Dr. *** testified that Student does not demonstrate stereotypy behaviors, which the Hearing Officer interprets as Dr. *** meaning Student does not demonstrate those behaviors beyond the extent expected of a person with ID. However, the ASRS contradicts her conclusion. In the ASRS, Stepfather, Mother, and Student's special education teacher all reported Student's stereotypy behavior as "very elevated."¹¹³ In fact, the

¹⁰⁸ In contrast, ***, Speech Language Pathologist testified about Student's communication deficits that they may look like an autism disorder but are not due to the rule out provision. Tr. at 388.

¹⁰⁹ Tr. at 141.

¹¹⁰ Tr. at 142-143. (I did not observe any repetitive behaviors. I was aware that others had observed repetitive behaviors by parent report and teacher reports.)

¹¹¹ Tr. at 643.

¹¹² Tr. at 74-76. (***, Assessment Specialist: Q. Do you recall whether Student would ask the same questions over and over again? A. I believe so.) Tr. at 382-383. (***, Speech Language Pathologist: While in the classroom and at lunch Student ... will repeat questions that Student has or Student will repeat comments that Student has and that was noticed throughout. The same questions ... and typically Student is not looking for answers.)

¹¹³ Petitioner's Ex. 13 at 32.

ASRS resulted in total scores that indicate Student has “very elevated” clinically-significant problem areas. Broken down, Student’s scores were indicative of autism in social/communication, unusual behaviors, self-regulation, DSM-IV-TR Scale (very elevated), peer socialization, social/emotional reciprocity, atypical language, stereotypy, behavioral rigidity, and sensitivity. The only area where Student’s behavior was not rated as clinically significant, considering the scores from all four participants, was attention. The conclusion of the ASRS reads:

Overall, parent and teacher rating on the ASRS resulted in total scores that indicate that (Student) has many behavioral characteristics similar to youth diagnosed with Autism Spectrum Disorders, including difficulties using verbal and nonverbal communication skills appropriately to initiate, engage in, and maintain social contact; difficulty tolerating changes in routine; engagement in apparently purposeless/stereotypical behaviors, overreaction to certain sensory experiences; and difficulties controlling thoughts/behaviors, maintaining focus, and resisting distractions.¹¹⁴

Returning to the IDEA definition of autism and ID, Student may receive a diagnosis of multiple disabilities if Student is expected to indefinitely remain disabled and the disabilities severely impair performance in two or more of the following areas:

1. psychomotor skills;
2. self-care skills;
3. communication;
4. social and emotional development; or
5. cognition

Student meets these criteria. Student’s disabilities severely impair Student’s performance in social and emotional development (with Student’s inflexible adherence to routine) and in communication (with Student’s repetition of questions and lack of reciprocity).¹¹⁵ Even under the medical definition, Student should be diagnosed with autism and ID, as the autism manifests itself greater than ID in the educational context in these same areas.

For the above reasons, the Hearing Officer finds Student’s is appropriate diagnosis is comorbidity of autism and ID, in addition to other diagnosis not in contest.

¹¹⁴ Petitioner Ex. 13 at 32-33. The conclusion noted that although the special education teacher ratings on the ASRS indicate that Student demonstrates the unusual behaviors and self-regulation difficulties that are often characteristic of Autism Spectrum Disorder (with a total score of very elevated overall), the teacher rating on the ASRS do not indicate that Student demonstrates the same degree or severity of deficits in Student’s social/communication skills (slightly elevated), Student’s social/emotional reciprocity (slightly elevated), and attention (average).

¹¹⁵ Ex. R-9 at 6.

B. The Full and Individual Evaluation (FIE) and the Independent Educational Evaluation (IEE) performed were appropriate. Found for the District.

The District's FIE and the IEE appropriately addressed all requirements for a sufficient evaluation of Student. The Hearing Officer understands Petitioner to object more to the analysis in the District's FIE rather than to its procedural requirements. Petitioner's primary objection is that the ARD committee applied the rule out analysis whenever characteristics could be explained by ID rather than determining whether they were best explained by ID, instead of autism.¹¹⁶ Petitioner asserts this fundamental flaw in Dr. ***'s analysis became dispositive in its own right of the ARD committee's determination on this issue, noting that despite working on many of these cases, Dr. *** could recall no ARD committee disagreeing with her on this issue. Moreover, there appears to have never been a rigorous inquiry on the part of other District Staff on Dr. ***'s conclusions.

The Hearing Officer agrees, noting that the weaknesses in Dr. ***'s analysis are already discussed above, in determining Student's diagnosis. Put in overly simplistic terms, this determination comes down to Dr. ***'s limited observation of Student resulting in Dr. ***'s conclusions about Student's social and communication skills versus the observations of many other and results from autism testing tools and criteria. Surely Dr. *** discussed these matters with others on the District's IEP team, but the record does not reflect the detailed and in-depth discussion and understanding between the team that would support the ARD committee's determination. Or, if those discussions were had, the differences in observations of Student's presentations to IEP team members, former teachers, and other evaluators were not sufficiently explained in the IEP report or during the hearing.

As noted above, in any event, the Hearing Officer disagrees with reliance on the rule out analysis and instead applies the IDEA definitions for the disabilities. In any case, the differences in this case relate to the applied law or interpretation of the law, not the mechanics of the FIE as performed.¹¹⁷ The FIE and IEE were performed in accordance with the requirements of IDEA.

C. Student's parents were NOT denied a meaningful process in Student's Admission, Review and Dismissal (ARD) committee meetings. Found for the District.

Mother and Stepfather (Parents) were present, either in person or by representative, at the ARD meetings held by the District. The documentary evidence is clear that Parents participated in ARD meeting discussions,

¹¹⁶ Petitioner's Closing Argument Brief at 14.

¹¹⁷ The Hearing Officer should note that should the rule out provision be applicable, the Hearing Officer agrees with Petitioner's analysis and he would still find that the correct diagnosis includes autism, based on the evidence presented at this hearing.

asked questions that were answered by the District ARD members, and made requests that were honored by the ARD committee. For example, because Petitioner disagreed with the eligibility classification of ID rather than autism, the District paid for an IEE. Parents simply disagreed with the outcome of the ARD meetings, because the District failed to find Student eligible as a child with autism. The right to provide meaningful input is simply not the right to dictate an outcome and obviously cannot be measured by such.¹¹⁸

Petitioner brought forth no probative evidence to support the allegation that parents were denied meaningful participation in the process. As such, Petitioner failed to meet its burden of proof on this issue.

D. The IEP adopted by the District's ARD committee provided Student with FAPE. Found for the District

The educational program offered by the school district is presumed to be appropriate. Petitioner, as the party challenging the educational program bears the burden of proof in showing why the IEP is not appropriate.¹¹⁹ This includes the burden of proof with regard to harm or a deprivation of educational benefit. The law does not require that the student's educational potential be optimal or "maximized." Rather, the program must enable the student to receive some educational benefit from student's program.

The United States Supreme Court established a two-prong test for determining whether a school district has provided a FAPE. The first inquiry is whether the district complied with the IDEA's procedural requirements. The second inquiry is whether the student's IEP is reasonably calculated to confer an educational benefit.¹²⁰ An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement.¹²¹ In evaluating whether an educational program is reasonably calculated to confer an educational benefit, the Fifth Circuit Court of Appeals identified four factors to consider:¹²²

1. Is the program individualized on the basis of the student's assessment and performance?
2. Is the program administered in the least restrictive environment?
3. Are the services provided in a coordinated and collaborative manner by the key stakeholders?
4. Are positive academic and nonacademic benefits demonstrated?

¹¹⁸ *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003).

¹¹⁹ *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). *Schaffer v. Weast*, 126 S.Ct. 528 (2005).

¹²⁰ *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S.Ct. 3034 (1982).

¹²¹ *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

¹²² *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); cert. denied, 522 U.S. 1047 (1998).

The 5th Circuit Court of Appeals has held that the four factors do not necessarily need to be applied in a particular manner or afforded the same weight. Rather, the factors are intended as a guide in the determining whether the student received a FAPE.¹²³

In applying the four factors to this case, Student's program is individualized based on Student's assessment and performance, not on the diagnosed medical condition. There does not appear to be any disagreement in that the program is administered in the least restrictive environment, the special education classroom, and that Student participates with non-disabled peers in appropriate environments. Petitioner does not contest that positive academic benefits have been achieved but is frustrated by Student's lagging non-academic progress. Specifically, Mother requested that the school focus more on Student's adaptive functioning skills, such as *** and improved communication with fewer rote and repeated questions. Mother and Stepfather report some success with the after-school program Student has been attending for the past year at ***, a private-care program.

The evidence establishes that *** uses the same instructional program as the District, applied behavior analysis (ABA) therapy. However, Petitioner urges that it is in the implementation of the therapy that the District fails. First, Mother testified that *** provided a new method for addressing Student's repetition with questions and obsession over ***.¹²⁴ Rather than simply ignoring the conduct, as presumably the District has suggested, *** implemented a transitioning program, moving Student from one activity to another in order to lessen Student's repetition and obsession. According to Mother, this transition approach has improved Student's behavior, as Student is less angry and frustrated. Mother also indicated that Student's life skills have improved with ***. Student now understands it is important ***.

Petitioner argued in Petitioner's closing brief that *** has a more rigorous ABA therapy, as compared to the District's "loose" approach. Petitioner points to the therapy logs for support, insisting that the District's testing for success in the various goals is random, as compared to daily practice of ***. But the Hearing Officer does not find that Petitioner met its burden of proving that the District's practice is deficient. Rather, while ***'s practices may be superior to the District's practices, it has not been shown that the District's educational program is not meaningful. ***'s ABA is reported on an updated software program when the District's is not. Nevertheless, the District has daily logs that indicate the tasks attempted¹²⁵ and then progress report logs that

¹²³ *Richardson ISD v. Leah Z.*, 580 F.3d 286 (5th Cir. 2009).

¹²⁴ Tr. at 39.

¹²⁵ Ex. R-28 at 1.

record success or failure, and also whether a prompt or other assistance was needed.¹²⁶

In the *** report, it is noted that intense intervention with ABA has been scientifically shown to result in better treatment outcomes. *** also notes that someone who is a Board-Certified Behavior Analyst should oversee an ABA program.¹²⁷ *** applied the BACB guidelines for Health Plan Coverage of ABA Treatment for autism spectrum disorder (BACB, 2012b) when treating Student and, by all accounts, functional improvements have been seen. However, there was no Board-Certified Behavior Analyst who testified for Petitioner. So again, it was proven that *** has a good program, but it was not proven that the District's program is insufficient.

To the contrary, Dr. *** opined that the District's program has resulted in some partially remitted symptoms for Student. Over the years, Mother has been generally pleased with the District's program, and the record is absent therapeutic suggestions made by Parents that were not implemented. Dr. *** wrote in her evaluation that District's evaluation team completed a comprehensive evaluation with very appropriate recommendations to address Student's intellectual, social, behavioral, speech-related, and occupational therapy-related delays.¹²⁸

Perhaps most importantly, Petitioner urges that Student remains incompetent now in respect to the same life skills Student was incompetent in ***. Over this same time period, Student attended ***, as well as the District's program. The *** program could as easily be faulted for Student's failure to obtain better proficiency at life skills as the District. The Hearing Officer notes this, not to put the *** program on trial, but as evidence that the program held out to be far superior than the District's IEP is getting no better results.

Petitioner is understandably concerned that if Student cannot ***, Student is significantly hindered from *** and from ***. The evidence establishes that these skills continue to be significantly addressed in Student's IEP. Nevertheless, the District presented its willingness to review this and other parts of Student's IEP. If there are specific strategies that appear to be working with ***, Parents should present them to the District for inclusion in Student's IEP and transition plan.

It is hoped that by this point that parties have worked out misunderstandings about the District's

¹²⁶ Ex. R-17 at 20.

¹²⁷ Ex. P-74 at 7. The Behavior Analyst Certification Board (BACB) is the international certifying body for Board Certified Behavior Analysts.

¹²⁸ Ex. R-9 at 6.

recommendation that Student be transitioned into the District's "****" program.¹²⁹ Parents were confused as the advertisements for that program appeared to cut against what Student needs, at least in time and ***. But the District explained that Student's program would be individualized to meet Student's particular needs. Student's individualized program at *** should include: more rigid and frequent recording of ABA therapy application as related to Student's ***; extension of the program to a full school day, rather than the advertised half day program; and other strategies that Parents think may be of benefit, such as those used by *** (i.e. redirection, if not already in use).

For these reasons, the Hearing Officer concludes that the District's educational program is meaningful and is reasonably calculated to produce progress. It is individualized, administered in the least restrictive environment, provided in a coordinated and collaborative manner for all stakeholders, and positive benefits have been shown in academic and nonacademic areas. Petitioner failed to offer persuasive testimony supporting Petitioner's contention that ABA therapy, as provided by the District, is not reasonably calculated to confer an educational benefit looking at the four factors considered above. Rather, the record establishes that the IEP, as adopted and implemented by the ARD committee, provided Student with FAPE.

E. The District met its burden of proving its counter claim that the District FIE met all IDEA requirements.

When a parent requests an IEE of a student at public expense, a school district may either agree to conduct the evaluation at its own expense, or request a due process hearing to defend its evaluation.¹³⁰ In this case, Petitioner requested a second IEE at the District's expense. The District initiated a counter claim to defend its assessment and bears the burden of proof with regard to the issues raised in its counterclaim.¹³¹

Having found that the IEE performed is sufficient and persuasive, the Hearing Officer denies Petitioner's request for a second IEE. Moreover, as noted above, the FIE was also appropriately performed and satisfies all legal requirements. The issues in this case concern differing professional opinions, not the methods employed during the evaluations. Accordingly, the District met its burden of proving its FIE met all of the requirements in the IDEA.

¹²⁹ The District's acquiescence to Parent's desire that Student not be transferred into **** is an example of the District's willingness to collaborate with Parents.

¹³⁰ 34 CFR §300.502(b).

¹³¹ *Schaffer v. Weast*, 126 S.Ct. 528 (2005).

VI. CONCLUSIONS OF LAW

1. The Lewisville Independent School District (the District) is a local educational agency responsible for complying with the Individuals with Disabilities Education Improvement Act (IDEA) as a condition of the State of Texas's receipt of federal education funding, and the District is required to provide each disabled child in its jurisdiction with a "free appropriate public education" (FAPE), pursuant to IDEA, 20 U.S.C. § 1400 *et seq.*
2. *** (Student), by next friend ***, (collectively, Petitioner) bears the burden of proof on all issues raised in the proceeding except for the District's counter claim, for which the District bears the burden of proof. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).
3. The District failed to comply with its Child Find obligations regarding Student in failing to diagnose Student as autistic when assessing Student's disabilities. 20 U.S.C § 1412(a)(3)(A), 34 C.F.R. § 300.111; *see also D. G. v. Flour Bluff Indep. Sch. Dist.*, 481 Fed. App'x. 887, 891 (5th Cir. 2012).
4. The District failed to identify that Student was eligible for special education services as a student with the disability of autism. 34 C.F.R. § 300.8(a)(1).
5. The District is required to provide each disabled child in its jurisdiction with a FAPE, pursuant to 20 U.S.C. §1400, *et seq.*, as amended. Student is eligible for IDEA services with Student's specific learning disabilities including autism.
6. District provided FAPE and there were no substantive or procedural violations. *Cypress-Fairbanks Indep. Sch. Dist. v Michael F.*, 118 F.3d 245 (5th Cir. 1997).
7. The District met its burden of proving that Petitioner is not entitled to an IEE at the District's expense, because an appropriate FIE was conducted by the District. 34 C.F.R. § 300.502(b).

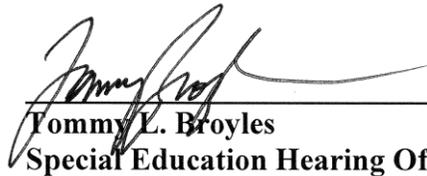
ORDER

After due consideration of the record, and the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer hereby **ORDERS** an ARD committee be convened and an appropriate IEP be developed with autism added as a disability addressed. All other relief requested is denied.

NOTICE TO PARTIES

This Decision of Hearing Officer is a final and appealable order. Any party aggrieved by the findings and decision 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(n).

SIGNED on June 22, 2015.



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

DOCKET NO. 304-SE-0814

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

SYNOPSIS

Issue 1: The District violated the Child Find provisions of the IDEA by taking inadequate measures to identify Student’s disabilities and more specifically, by failing to identify Student as an individual with autism.

Held: For the Petitioner.

When reviewing all the data gathered on Student, the great weight of evidence establishes that Student is appropriately diagnosed with autism in the education context. This determination is based greatly on the qualifications, expertise, and presentations of the expert witnesses and the tests performed by them, along with significant weight given to the testimony of Mother, Student’s primary caregiver ***, and to that of Student’s former teacher of *** years, Ms. ***. For these reasons, the Hearing Officer finds that the appropriate diagnosis for Student is autism and ID, in addition to other diagnosis not in contest, for purposes of the IDEA.

Citation: 34 C.F.R. §§ 300.8; 300.111.

Issue 2. Neither an appropriate Full and Individual Evaluation (FIE) nor an appropriate Independent Educational Evaluation (IEE) has been performed.

Held: For the District

The Hearing Officer disagrees with reliance on the rule out analysis contained in the medical definition of autism and instead applies the IDEA definitions. But in either case, the differences in positions offered during this case relate to the applied law or interpretation of the law, not the mechanics of the FIE as performed. The FIE and IEE were performed in accordance with the requirements of the IDEA.

Citation: 34 C.F.R. §§ 300.304 – 300.306.

Issue 3. Student's parents were denied a meaningful process in Student's Admission, Review and Dismissal (ARD) meetings.

Held: For the District

Mother and Stepfather (Parents) were present, either in person or by representative, at the ARD meetings held by the District. The documentary evidence is clear that Parents participated in ARD meeting discussions, asked questions that were answered by the District ARD members, and made requests that were honored by the ARD committee. For example, because Petitioner disagreed with the eligibility classification of ID rather than autism, the District paid for an IEE. Parents simply disagreed with the outcome of the ARD meetings, because the District failed to find Student eligible as a child with autism. The right to provide meaningful input is simply not the right to dictate an outcome and obviously cannot be measured by such.

Citation: 34 C.F.R. §300.322.

Issue 4. The IEP adopted by the District's ARD committee failed to provide Student with FAPE.

Held: For the District.

The Hearing Officer concludes that the District's educational program is meaningful and is reasonably calculated to produce progress. It is individualized, administered in the least restrictive environment, provided in a coordinated and collaborative manner for all stakeholders, and positive benefits have been shown in academic and nonacademic areas. Petitioner failed to offer persuasive testimony supporting Petitioner's contention that ABA therapy, as provided by the District, is not reasonably calculated to confer an educational benefit looking at the four factors considered above. Rather, the record establishes that the IEP, as adopted and implemented by the ARD committee, provided Student with FAPE.

Citation: 34 C.F.R. §§ 300.101; 300.320.