

DOCKET NO. 046-SE-1120

STUDENT	§	BEFORE A SPECIAL EDUCATION
	§	
b/n/f PARENT and PARENT	§	
	§	
v.	§	HEARING OFFICER FOR THE
	§	
FRISCO INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

**DECISION OF HEARING OFFICER**

On April 26, 2021, the parties appeared for the due process hearing in the instant action. Stephanie Holan, Attorney, represented Petitioner, \*\*\* (“Student”). \*\*\* (“Parent”) was present as next friend of Student. Nona Matthews, Attorney, and Co-Counsel, Lindy French, represented Respondent, Frisco Independent School District (“District” or “Frisco ISD”). \*\*\*, incoming Executive Director of Special Education, and \*\*\*, Managing Director for Special Education, were present as District’s party representatives.

**Procedural History**

Petitioner filed the request for due process hearing and complaint November 5, 2020 and requested an expedited hearing. The matter was assigned to this hearing officer who entered a scheduling order for an expedited hearing. By letter dated November 12, Petitioner’s attorney requested removal from the expedited track; following the withdrawal, a revised scheduling order was entered November 13. Respondent filed its ten-day response to the complaint denying the allegations, and moved for partial dismissal of all claims outside the IDEA.

On November 23, 2020, attorneys for both parties appeared for a prehearing conference. The hearing officer dismissed all claims outside the IDEA. The parties discussed Petitioner’s allegations of violations of Student’s due process rights to present evidence, cross examine witnesses, present witnesses and other such actions taken during prior complaint(s) filed against District. The allegations were dismissed as outside this hearing officer’s jurisdiction. Petitioner requested, and was granted a continuance of the due process hearing and an extension of the decision due date.

On February 3, 2021, the parties entered into an agreed motion for continuance and extension of the decision due date. The motion was granted and the hearing was rescheduled a second time and the decision due date was extended.

The parties filed a joint motion for continuance and extension of the decision due date on March 31, 2021. Mediation was scheduled for one of the dates previously scheduled for the hearing. The due process hearing was continued a third time and rescheduled for April 26 and 27. The decision due date was extended to June 8.

The parties participated in a mediation session in lieu of holding a resolution session. The mediation was unsuccessful.

### **Claims of Petitioner**

Student is a \*\*\*-year-old child who resides within the geographical boundaries of the District. Student receives special education services from the District under IDEA as a child with an Other Health Impairment (“OHI”), specifically Attention Deficit Hyperactivity Disorder (“ADHD”).

Petitioner did not allege any exception to the one-year statute of limitations. The one-year statute of limitations applies and no claims of violations of the IDEA that occurred prior to November 5, 2019 are considered.

Petitioner complained of failures that occurred in conjunction with a February \*\*\*, 2020 admission, review and dismissal (“ARD”) committee meeting, specifically as follows:

1. Respondent failed to correctly identify suspected disabilities and needs, specifically failed to update Student’s OHI eligibility to include \*\*\*, failed to identify Student as a child with emotional disturbance based on stress and anxiety, a result of \*\*\*, failed to recognize that all of Student’s classroom behaviors are common with \*\*\*, and failed to adequately communicate with private doctors;
2. Respondent failed to develop an appropriate Individualized Education Program (“IEP”), specifically failed to appropriately accommodate Student for the specific disorder of \*\*\*, failed to consider recommendations of private doctors, insisted on implementing a Behavior Intervention Plan (“BIP”), failed to call an Admission Review and Dismissal (“ARD”) committee meeting to address Student’s difficulties, failed to focus on \*\*\* practices and make relevant notations in Student’s February 2020 IEP; and

3. Respondent failed to provide appropriate placement for Student, specifically its continued attempt to keep Student out of the mainstream classroom without appropriate accommodations; failed to communicate with Parent about the location of the bulk of Student's instruction; and failed to timely consider other services for Student that addressed Student's additional OHI impairment.

### **Requested Relief**

Following dismissal of requests for relief that fell outside the hearing officer's jurisdiction, Petitioner requested an order that directed Respondent to do the following:

1. Allow Petitioner to remain in Student's home campus, \*\*\*, through the end of Student's \*\*\* grade school year (i.e. 2019-2020);
2. Conduct an ARD committee meeting to add a BIP goal to specifically address how Petitioner is supposed to handle bullying from peers regarding Student's disability, appearance, character, and staff support Student receives;
3. Put into place restorative practices as well as a conflict resolution plan that outlines how Student and others involved are to move forward; this hearing officer only has authority to consider Student's education program and lacks jurisdiction to order Respondent to take action regarding other children;
4. Add \*\*\* diagnosis to Petitioner IEP; and
5. Include Parent notification of any new entries or modifications in On Course and a new 10-day timeframe for appeal.

### **Joint Stipulations of Fact and Findings of Fact**

Based on the parties' stipulation of facts, documentary evidence and testimony of witnesses before this hearing officer, the following are the stipulation of facts and the findings of fact in the instant action. Citations to the parties' Joint Stipulation of Facts, Petitioner's Exhibits, Joint Exhibits, and Respondent's Exhibits are designated with a notation of "SF," "P," "J," or "R" respectively, followed by either the Stipulation of Fact number, or exhibit and page numbers as appropriate. Citations to the transcript are designated with a notation of "T" followed by the page numbers.

1. A private neuropsychologist evaluated Student at age \*\*. Student's cognitive abilities were in the high average range across verbal nonverbal and spatial reasoning skills. Academically

Student was above average for reading development, spelling, and math. Student exhibited impulsive and aggressive behaviors. Diagnostic impressions were \*\*\*. J-16

2. At age \*\*\*, Student was confirmed with ADHD. J-17
3. During the summer between \*\*\* grade, \*\*\*. T-pg. 98
4. At \*\*\* years of age when Student was in \*\*\* grade, \*\*\* was diagnosed. The neuropsychological re-evaluation was conducted when Student was \*\*\* of age. The report does not mention \*\*\*. J-18
5. While Student was in §504, District informed Parent of its three-strike rule. A transfer student's transfer privileges can be revoked if Student has three disciplinary infractions. Student was a transfer student. T-pg. 126; 264-265
6. In the fall semester of Student's \*\*\* grade year, prior to eligibility for special education, Student exhibited inappropriate and defiant behaviors. J-12; T- pg. 209
7. Frisco ISD completed Petitioner's initial Full and Individual Evaluation ("FIE") on October \*\*\*, 2018, when Petitioner was a \*\*\* grade student at \*\*\* in response to concerns regarding Petitioner's behavior and social skills. SF #1
8. The FIE assessed the possible disability categories of Emotionally Disturbed ("ED"), Autism ("AU"), and Other Health Impaired ("OHI"). The multidisciplinary evaluation team recommended eligibility for special education services based on an OHI, specifically Attention Deficit Hyperactivity Disorder ("ADHD"). SF #2
9. Parent did not report any involvement in \*\*\* when completing their report for the FIE. T-pg. 434
10. The District conducted Petitioner's initial Admission, Review, and Dismissal ("ARD") committee meeting on October \*\*\*, 2018. The ARD committee found Petitioner eligible for special education service and developed an Individual Education Program ("IEP"). Petitioner's IEP included goals and accommodation to support organization, social skills, and behavior; a Functional Behavior Assessment ("FBA") and an Behavior Intervention Plan ("BIP") to address non-compliance and inappropriate gestures and comments to peers and teachers; special education instruction in social skills; special education inclusion support in Petitioner's general education \*\*\* classes; and the related services of direct counseling and indirect Assistive Technology ("AT"). Petitioner's parents acknowledged receipt of their Procedural Safeguards under the IDEA, participated in the ARD committee meeting, documented their agreement with the decisions of the ARD committee, and provided written consent for placement in special education. SF #3; T-page 134

11. Following admission into special education, Student's behaviors improved. Student's goals included conflict resolution skills, coping skills, and understanding Student's and others' perspectives. T-pgs. 172-174, 209-212, 326
12. The ARD committee met again on October \*\*\*, 2019, when Petitioner was in the \*\*\* grade, to conduct Petitioner's annual ARD committee meeting. The ARD committee dismissed Petitioner from the related service of counseling and social skills instruction since Student had mastered Student's counseling and social skills goals. Petitioner's new IEP included behavior goals; accommodations to support organization and behavior; a BIP to address inappropriate gestures and comments to peers and teachers; special education inclusion support in Petitioner's general education \*\*\* classes; and indirect AT support. Petitioner's parents participated in the ARD committee meeting and documented their agreement with the decisions of the ARD committee. SF #4; J-4
13. In the second reporting period of \*\*\* grade, Student was making progress sufficiently to meet annual behavior goals. District sent IEP goal data to Parent. P-7; J-4, pg. 10; T-330-335
14. In \*\*\* grade, Student received in-school suspension for a \*\*\* incident. Student \*\*\*." Student was given in-school suspension ("ISS"). J-12, pg. 7
15. Three months later, on \*\*\*, Student was accused of \*\*\*. Statements were conflicting; thus the incident was unsubstantiated. J-12, pg. 7
16. The next month, on \*\*\*, Student \*\*\*." Student then \*\*\*. \*\*\*. J-12, pg. 7-8
17. On \*\*\* there was another incident, referred to by witnesses as \*\*\*." It encompassed Student's \*\*\*; District substantiated the \*\*\* and that it occurred frequently. That incident was considered a \*\*\*. J-12, pg. 8
18. \*\*\* days later, there was another \*\*\* incident, referred to as \*\*\*." It involved Student's \*\*\*. Student admitted to \*\*\*. The incident was considered \*\*\*. J-12, pg. 8; T-pgs. 182-190
19. After the "\*\*\*\*" was reported, Student reported \*\*\*. The Assistant Principal met with \*\*\*. The Assistant Principal did not find evidence that Student had been bullied. T-pgs. 176-182
20. After the "\*\*\*\*," District sent notice to Parent of an upcoming revision ARD meeting for Student on February \*\*\*, 2020. P-9; T-pgs. 219-221
21. On February \*\*\*, 2020, the Assistant Principal sent an email to Parent and explained that new legislation required a manifestation determination review ("MRD") when there is a bullying incident and the student is in special education. P-12, pg. 1; T-pgs. 266-267
22. District sent an updated ARD notice with an explanation that a MDR would be included as part of the revision ARD meeting. P-12, pg. 1; T-pgs. 191-195

23. Petitioner's ARD committee convened on February \*\*\*, 2020, to review petitioner's behavior and to conduct a MDR. The ARD committee increased Petitioner's inclusion support, re-initiated social skills instruction, and added indirect psychological services to Petitioner's IEP. The District members of the ARD committee felt that Petitioner's behavior was not a manifestation of Student's disability of ADHD. Petitioner's parents disagreed. The ARD committee agreed to recess and reconvene the meeting on February \*\*\*, 2020. SF #5; R-1
24. On February \*\*\*, 2020, following Student's report of having been bullied, District reported the conclusion of its investigation. The report found that the complaint did not meet the criteria for bullying as defined by District's board policy. P-17
25. One of the \*\*\* of Petitioner. As a result, the District reassigned Petitioner from \*\*\* to \*\*\*. SF #6
26. On the scheduled day for the reconvene ARD meeting, Student's \*\*\* administrators learned of the \*\*\*. School administrators met with Parent before the scheduled reconvene ARD meeting and informed them of the \*\*\*. Parents wanted additional time to process the \*\*\* decision. The reconvene ARD meeting was changed to March \*\*\*. T-pgs. 196-197; 230; 282-292
27. The ARD committee reconvened on March \*\*\*, 2020, to continue its discussion and to determine if Petitioner's IEP could be implemented at \*\*\*. Petitioner's attorney, Ms. Holan, expressed concern that Petitioner's "previous diagnosis of \*\*\* was not addressed in Petitioner's FIE, and she questioned how Petitioner did not meet eligibility requirements for ED. The District's Licensed Specialist in School Psychology ("LSSP") shared with the ARD committee that Petitioner's current FIE and Petitioner's private evaluation reports provided to the District did not address \*\*\*. She also confirmed that the District assessed, but did not identify an ED eligibility. An outside neuropsychological evaluation indicated Petitioner's medical diagnoses of ADHD and \*\*\*, but there was no mention of \*\*\* in the private evaluation report. The ARD committee determined that Petitioner's IEP could be implemented at \*\*\*. The new IEP was scheduled to go into effect at \*\*\* on March \*\*\*, 2020. SF #7; R-1; T-pgs. 226-229, 336
28. At the March \*\*\* reconvene ARD meeting, Student's therapist sent a letter that was read aloud to the ARD committee. The letter indicated \*\*\* history. It did not mention a \*\*\* diagnosis of Student. J-6; T-pgs. 240-242; 448-450
29. On March \*\*\*, 2020, the Managing Director of Student Services informed Parent of the ARD committee's confirmation that \*\*\* could carry out the IEP with fidelity and that a transfer to another campus did not constitute a change of placement for Student. The letter told Parent that due to Student's repeated and pervasive nature of the bullying incidents, Student would be

- transferred to \*\*\* when District resumed school operations as normal and would remain there until the end of the 2019-2020 school year. Parent was informed of appeal rights. R-3; T-pg. 115
30. Before the District could implement Petitioner's IEP at Student's new campus, the District was closed to in-person learning for the remainder of the 2019-2020 school year due to COVID-19. The District finished the 2019-2020 school year with virtual instruction, and Petitioner remained enrolled at \*\*\*. Student was provided special education support through the end of the year. SF #8; T-pgs. 339-340
31. Petitioner entered the \*\*\* grade at Student's home campus, \*\*\*, for the 2020-2021 school year. The ARD committee convened on August \*\*\*, 2020, to review Petitioner's IEP and address Petitioner's parents' concerns from the spring of 2020. Petitioner's parents wanted Petitioner to have a fresh start \*\*\*. The ARD committee ultimately agreed to the parents' requests to discontinue use of a point sheet, discontinue daily check-in with Petitioner, and instead, Petitioner's \*\*\* would conduct at least one weekly check-in (i.e., \*\*\*) to evaluate whether Petitioner requires more support prior to Petitioner's next annual ARD committee meeting. Petitioner's parents and their attorney participated in the ARD committee meeting and agreed with the decisions of the ARD committee. SF #9; R-4; T-pgs. 341-347
32. The District convened Petitioner's annual ARD committee meeting on October \*\*\*, 2020. Petitioner and Student's father participated in the ARD committee meeting. Petitioner's father did not want any changes made to the BIP because Student was doing well. The ARD committee reviewed and revised Petitioner's goals and accommodations. The ARD committee agreed that Petitioner would continue in all general education classes with some special education inclusion support. Petitioner's father agreed with the decisions of the ARD committee and waived Petitioner's right to wait five school days prior to implementing the new IEP. SF #10; R-5, pg. 23; T-pg. 145-146, 148
33. By March \*\*\*, 2021, Student had mastered Student's goals to improve verbal/written interactions with peers and teachers, improve in Student's personal space with peers and teachers, and use a physical planner to accurately write down assignments/homework/assessments across all classes. J-11;
34. Student's \*\*\* grade report card reflects grades in the \*\*\*. Student's \*\*\* grades in the current school year were \*\*\*. J-13; T-pg. 480; 490
35. District requested information regarding \*\*\* diagnosis from Parent. Parent did not provide the information. T-pg. 140

## Standard of Review

Public school districts must comply with the IDEA procedures for identifying children with disabilities who need special education, and delivering appropriate services as necessary to provide a free and appropriate public education (FAPE). The educational program must be meaningful, and reasonably calculated to produce progress as opposed to *de minimis* advancement. To meet its substantive obligations under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. 20 U. S. C. § 1412(a)(1); *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 189 (1982); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989).

A petitioner who challenges the school district's eligibility determination or offer of services under the IDEA bears the burden to prove that the child has been denied a FAPE. *Tatro v. State of Texas*, 703 F.2d 832 (5<sup>th</sup> Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005). This includes the burden of proof with regard to harm or a deprivation of educational benefit. A school district's plan is presumed to be appropriate. *R. H. v. Plano Indep. School Dist.*, 607 F.3d 1003 (5<sup>th</sup> Cir. 2010). The party attacking the plan bears the burden of proof, by a preponderance of the evidence, of demonstrating why it does not comply with the IDEA. *Id.* at 1010-11.

There are four factors to consider as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of the child'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; and 4) Are positive academic and non-academic benefits demonstrated? *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997).

**Issue No. 1: Respondent failed to correctly identify suspected disabilities and needs**, specifically failed to update Student's OHI eligibility to include \*\*\*, failed to identify Student as a child with emotional disturbance based on stress and anxiety, \*\*\*, failed to recognize that all of Student's classroom behaviors are common with \*\*\*, and failed to adequately communicate with doctors. Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.<sup>1</sup> This means that regardless of the eligibility classification under which a child is found to need special education, the program must meet the unique needs of that child.

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<sup>1</sup> 34 C. F. R. §300.39  
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Prior to Student's receipt of special education services, Student received support through a §504 Accommodation Plan. Due to Student's behavioral difficulties during \*\*\* grade, Parent requested and received a transfer to \*\*\* where Student attended in \*\*\* grades.

Parent testified that \*\*\* between Student's \*\*\* grade years. Parent testified that after \*\*\*, Student experienced anxiety, and mistrust, \*\*\*. Parent indicated generally that when Student was in the \*\*\* classroom, Student's behaviors were \*\*\*, but provided no related instances. Student's \*\*\*. \*\*\* testified that \*\*\* knew building trust was important \*\*\*. To facilitate that trust, the \*\*\* spent time talking with Student in what \*\*\* called "non-contingent" conversation, ie., \*\*\* talked without wanting anything from Student and without telling Student about something Student needed to do differently. \*\*\* made the conversations short, calling them "incognito," because \*\*\* didn't want Student to feel singled out. \*\*\* testimony reflected no issues with the relationship between \*\*\*self and Student.

Behavioral difficulties, social deficits, inattention, impulsivity, social cue perception were a few of the reasons for the referral for a special education FIE. District conducted its FIE in the fall 2018. District used a variety of assessment tools, reviewed existing data, collected parent and teacher information, three private evaluations, health and physical data, and conducted OT and AT evaluations.<sup>2</sup> The \*\*\* occurred between Student's \*\*\* grade years. The next year, while in \*\*\* grade, Student was privately evaluated. The private assessment made no reference to \*\*\*. Based on the FIE report, the ARD committee found Student eligible for special education services as a child with OHI based on ADHD. Student did not meet the eligibility criteria for either ED or AU. The report noted Parent's information that Student had \*\*\* diagnosis. The FIE report was reviewed and Student's IEP was developed on the results of the report.

Petitioner argued that District should have included \*\*\* in the OHI eligibility. District requested information regarding a \*\*\* diagnosis, but Parent never responded. At hearing, Parent testified that he "believed" that he had relayed \*\*\* information to staff. It is unclear when or what information Parent believed he gave to District staff. Parent agreed that he had never provided any documentation of a \*\*\* diagnosis. Student's \*\*\* testified that \*\*\* knew nothing of \*\*\* until it was brought up at the ARD meeting during quarantine. The Assistant Principal testified that after \*\*\* incident, there was an "illusion" of something having happened to Student.

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<sup>2</sup> 34 C. F. R. §300.304  
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Student's \*\*\* testified that District addresses all the needs of a student whether they're related to the disability or not. \*\*\* said, "We don't write IEPs based off a diagnosis." \*\*\* testified that District looks at a child's current need, and develops the plan based on those needs. In spite of not having \*\*\* included in the OHI eligibility, District addressed Student's unique needs in the IEP including accommodations and development of a BIP.<sup>3</sup> District's Licensed Specialist in School Psychology ("LSSP") stated that "In Frisco ISD disabilities don't drive services, student needs do."

Although \*\*\* is not specifically included in Petitioner's issues, the LSSP testified that some of Student's IEP accommodations can support \*\*\* as well as ADHD. For example, accommodations such as "providing immediate feedback," "small group administration of tests", and "flexible seating," support both disabilities. Also, "offering choices" helps a child feel more in control and supports those with \*\*\*.

Petitioner accurately alleges that District did not identify Student with an ED. The FIE evaluation included assessment for ED, but Student did not meet eligibility criteria. Parent testified that he does not believe Student should be eligible under an ED classification. Student's \*\*\* testified that Student exhibited no stress at school, but was happy and outgoing. Petitioner failed to prove that Student exhibited the characteristics for ED under the IDEA.<sup>4</sup> Petitioner failed to carry Petitioner's burden of proving that \*\*\* should be included under the OHI disability or that Student should be identified with ED as a result of \*\*\*.

While Petitioner claimed that Respondent failed to recognize Student's behaviors as common \*\*\*, Petitioner failed to identify the behaviors of Student that are common \*\*\* behaviors. Granted, Student experiences behavior difficulties; however, Student's IEP and BIP address those behaviors.

The evidence shows that a therapist sent a letter to District regarding Student. The letter was read aloud to the March \*\*\*, 2020 ARD committee. The letter indicated that Student had a history of \*\*\* and had been working on \*\*\*, but lacked any information about the \*\*\* from which a \*\*\* diagnosis could have originated. In fact, there was no mention of \*\*\* in the letter.

District obtained consent from Parent to communicate with the therapist. District staff attempted to communicate with the therapist. She indicated that she needed to obtain her own permission from Parent to speak about Student. Following the discussion, the therapist did not contact District. Because

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<sup>3</sup> 34 C. F. R. §300.320(a)

<sup>4</sup> 34 C. F. R. §300.8 (c)(4).

the current consent form was almost expired, District's LSSP emailed Parent and requested an updated informed consent letter that would give consent for District to speak with Student's doctors. Parent indicated he would consider it. Parent did not return a signed consent. Petitioner presented no evidence of any other third party provider that District should have contacted. Petitioner failed to prevail on Issue #1.

**Issue No. 2: Respondent failed to develop an appropriate IEP**, specifically failed to appropriately accommodate Student for the specific disorder of \*\*\*, failed to consider recommendations of private doctors, insisted on implementing a BIP, failed to call an ARD committee meeting to address Student's difficulties, failed to focus on \*\*\* and make relevant notations in Student's February 2020 IEP.

An IEP must be "specially designed" to meet a child's "unique needs" and be constructed after careful consideration of the child's present levels of achievement, disability, and potential for growth. *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000-01 (2017).

A District is required to conduct an ARD committee meeting to review a child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved, and revise the IEP, as appropriate, to address any lack of expected progress toward the annual goals and in the general education curriculum, if appropriate; the results of any reevaluation conducted; information about the child provided to, or by, the parents, pertaining to additional requirements for evaluations and reevaluations; the child's anticipated needs; or other matters.<sup>5</sup>

Petitioner claims that Student's IEP was inappropriate because it did not accommodate Student for \*\*\*. Petitioner presented no evidence of any accommodations that should have been included but were omitted from Student's IEP.

Other than the private therapist who sent a letter to District in March 2020, Petitioner offered no recommendations of private doctors. As earlier stated, the private therapist failed to respond to District's efforts to discuss Student.

The ARD committee developed a BIP to address Student's needs at the 2018 initial ARD meeting. Parent agreed with that ARD committee meeting's decisions. Further, Parent agreed to Student's

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<sup>5</sup> 34 C. F. R. §§300.305; 300.324(b).  
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IEPs in October 2019 and 2020, each of which included a BIP. Parent disagreed with the February 2020 ARD decisions, but failed to provide evidence that the BIP was unnecessary.

Petitioner claimed that District failed to focus on \*\*\*. The IDEA does not require implementation of \*\*\*.

At the heart of this dispute is Petitioner's disagreement with the ARD committee's finding that Student's \*\*\* incidents were not a manifestation of Student's disability. District testimony was that Student's \*\*\* was not indicative of impulsivity. Further, due to Student earlier incidents involving \*\*\* showed a pattern of behavior. Petitioner presented insufficient evidence to rebut the testimony.

Petitioner argued that if District had noted \*\*\* in Student's IEP and appropriately accommodate Student for \*\*\* prior to the January \*\*\* incidents, the ARD committee would have made a different determination at the MDR meeting. Parent offered no current recommendations or diagnoses from private doctors at the MDR meeting or at the due process hearing. Petitioner failed to present evidence of accommodations that were absent from the IEP that would have addressed \*\*\* and prevented the \*\*\* incidents.

Petitioner pointed to the overall number of Student's discipline reports and argued that Student's \*\*\* incidents could have been averted had District called an ARD committee meeting earlier in the year. District staff handled minor discipline issues such as \*\*\*. Student had one \*\*\* incident in September 2019, then no more such behaviors for three months. Because the \*\*\* was a single event, and not a pattern of behavior, District staff saw no need to convene an ARD at that time. Student's annual ARD meeting occurred the following month. When the \*\*\* incidents in 2020 occurred within days of each other, District promptly called an ARD committee meeting.

District staff testified that Student did well academically, that Student did not exhibit stress, and was a happy Student. Student's \*\*\* considered Student to be incredibly smart. The Assistant Principal reported that Student had a "fabulous" fall semester. District staff testified that Student's BIP had been working successfully. Minor infractions were handled according to the BIP. It was not until the \*\*\* incidents of \*\*\* in 2020 that District found reason to call an ARD meeting.

On \*\*\*, 2020, the first incident occurred and Student was found to have \*\*\*. On \*\*\*, Student \*\*\*. On \*\*\*, Student \*\*\*. After learning of the incident, the Assistant Principal initiated an investigation. Notice of an ARD committee meeting was sent to Parent February \*\*\*.

The ARD committee, including Parent, reviewed Student's current behavior and the BIP, previous evaluations, progress on the IEP goals, and least restrictive environment. Instructional services were determined to be in the general education setting. Student's inclusion support was increased, the social skills instruction was reinstated, and indirect psychological services were added to Petitioner's IEP.<sup>6</sup> The committee discussed Student's struggles with hyperactivity, impulsivity, and inattention across settings. The committee noted that some of Student's behavior difficulties may appear to be related to \*\*\*. District committee members determined that Student's \*\*\* incidents were not a manifestation of Student's ADHD. Parent disagreed. After learning of the \*\*\*, the ARD committee reviewed Student's IEP and determined that it could be implemented at the school to which Student was to be transferred in response to the \*\*\* determination. Petitioner failed to carry the burden of proving Issue no. 2.

**Issue No. 3: Respondent failed to provide appropriate placement for Student**, specifically, its continued attempt to keep Student out of the mainstream classroom without appropriate accommodations; failure to communicate with Parent about the location of the bulk of Student's instruction; and failure to timely consider other services for Student that addressed Student's additional OHI impairment.

Petitioner failed to carry the burden of proving Issue No. 3. The IDEA requires that special education children are educated "to the maximum extent appropriate... with children who are nondisabled...[and] removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and service cannot be achieved satisfactorily."<sup>7</sup> It is clear that Student was consistently in the general education classroom with accommodations in place. There was no evidence that District attempted to keep Student out of the general education setting. When the ARD committee was to meet following the \*\*\* incidents, the Assistant Principal informed Parent that there was no change in placement sought. Even the \*\*\* did not keep Student out of the general education setting. Student's IEP, including all accommodations, was to be implemented at \*\*\*.

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<sup>6</sup> 34 C. F. R. §300.324(b)

<sup>7</sup> 3 C. F. R. 300.114(a)(2)  
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After the \*\*\* incidents and the school called for a revision ARD to discuss Student's behavior, District staff was informed that a MDR was required.<sup>8</sup> Parents were notified of the requirement and told that no change in placement was intended. Granted, the timing of the \*\*\* incidents that occurred \*\*\*, the confusion about whether or not to hold an MDR after District had called for a revision ARD, and the administrative decision to grant a \*\*\* caused confusion among the parties. At each juncture, however, Parent was notified. When the \*\*\* was granted, Parent wanted time to consider the information, and District allowed the ARD meeting to reconvene at a later date. At the reconvene meeting, the committee determined that Student's IEP could be implemented at \*\*\*. Parent was at the February ARD meeting and the subsequent reconvened meetings. The evidence is clear that Respondent communicated about the location of the bulk of Student's instruction throughout the February ARD committee meeting. Because Student's IEP could be implemented with fidelity at \*\*\*, the transfer was not a change of placement.<sup>9</sup>

Although Petitioner believes that \*\*\* is an additional OHI impairment, Petitioner failed to present evidence to support its addition to the OHI impairment. Further, Petitioner failed to present evidence of other services that Petitioner believes District should have considered to address \*\*\*.

After review of all the evidence, it is clear that Student's IEP was individualized on the basis of Student's assessment and performance. The IEP addressed Student's behaviors and the BIP worked so well that the ARD committee carried it over from one year to the next. After the \*\*\* incidents, District promptly convened an ARD meeting. The committee added additional supports to address the behavior. Student was in general education class at all times which was the LRE. District staff communicated with Parent both by providing data on Student's goals, emails, and phone conversations. Parent was notified of Student's ARD committee meetings and participated in all meetings during the relevant time period of this matter. Student is an intelligent \*\*\* who performed quite successfully academically. In \*\*\* grade, Student \*\*\*. Student progressed on Student's behavior goals. The \*\*\* testified that Student thrived in \*\*\* and saw \*\*\*self as a leader because of those \*\*\*. Student "\*\*\*\*." After review of Student's IEP, it is determined that it met the requirements of *Cypress Fairbanks Independent School District v. Michael F.* and provided Student a FAPE.

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<sup>8</sup> TEC §37.0832; TEC §37.001(b-1).

<sup>9</sup> "[E]ducational placement, as used in the IDEA, means educational program -- not the particular institution where that program is implemented." *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379, 2003 U.S. App. LEXIS 16611, (5th Cir. 2003). When a school district transfers a child from one school to another, the transfer does not constitute a change in educational placement. *Weil v. Board of Elem. & Secondary Educ.*, 931 F.2d 1069 (5th Cir. 1991).F.2d 1069 (5th Cir. 1991).

### Conclusions of Law

1. Student is eligible for special education services as a student with a disability under IDEA, 20 U.S.C. §1400 et. seq. and its implementing regulations. Frisco Independent School District is responsible for providing the student with a FAPE. <sup>[[L]]</sup><sub>[SEP]</sub>
2. Respondent's educational program is entitled to a legal presumption of appropriateness. *Tatro v. Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983). Petitioner bears the burden of proving that the education program is not appropriate. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Respondent's education program is appropriate in light of Student's circumstances and provided Petitioner a FAPE. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000-01 (2017); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d . <sup>[[L]]</sup><sub>[SEP]</sub>
3. Petitioner did not carry its burden of proving that Respondent failed to identify suspected disabilities and needs; specifically, Petitioner did not carry its burden of proving that Respondent should have updated Petitioner's OHI eligibility to include \*\*\* or that Petitioner should be found eligible for ED. *Tatro v. State of Texas*, 703 F.2d 832 (5<sup>th</sup> Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005).
4. Petitioner's placement in all general education classes is the appropriate placement and the least restrictive environment. *Tatro v. State of Texas*, 703 F.2d 832 (5<sup>th</sup> Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005).

### ORDER

Based upon the foregoing findings of fact and conclusions of law, Petitioner's requests for relief are **DENIED**.

SIGNED June 2, 2021.

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Brenda Rudd  
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 §89.1185(p); Tex. Gov't Code, Sec. 2001.144(a) (b).