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ADMINISTRATIVE HEARINGS  
Jessie Harbin, CLERK

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STATE OFFICE OF  
ADMINISTRATIVE HEARINGS  
Jessie Harbin, CLERK

**CONFIDENTIAL**  
Pursuant to FERPA – 20 U.S.C. § 1232(g);  
34 C.F.R. Part 99

**SOAH DOCKET NO. 701-22-0264.IDEA**  
**TEA DOCKET NO. 029-SE-0921**

<p>██████████, B/N/F ██████████ and ██████████ <b>Petitioner</b></p> <p>v.</p> <p><b>PEARLAND INDEPENDENT SCHOOL DISTRICT,</b> <b>Respondent</b></p>	<p>§ § § § § § § §</p>	<p><b>BEFORE A SPECIAL EDUCATION</b></p> <p><b>HEARING OFFICER FOR</b></p> <p><b>THE STATE OF TEXAS</b></p>
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**ORDER NO. 8**  
**GRANTING RESPONDENT’S MOTION FOR SUMMARY JUDGMENT**

██████████ by next friends ██████████ and ██████████ (Student or, collectively, Petitioner), filed a request for a due process hearing under the Individuals with Disabilities Education Act (IDEA) against the Pearland Independent School District (Respondent or the District) on September 27, 2021. The due process hearing in this case is set for February 16-18, 2022, with the decision of the hearing officer due on April 8, 2022.

On January 27, 2022, Respondent filed a Motion for Summary Judgment (Motion). Petitioner filed an untimely response (Response) on February 3, 2022. For the reasons set out below, the hearing officer finds the Motion should be granted.

**I. MOTION AND RESPONSE**

Respondent’s Motion is both a traditional and a no-evidence motion for summary judgment. Respondent’s no-evidence motion argues that summary judgment is warranted on all claims because Petitioner has presented no evidence through discovery or otherwise to support the allegations. Respondent’s traditional summary judgment motion argues that there is no genuine issue of material of fact with regard to any of Petitioner’s claims, and attaches evidence in support for each claim. The allegations Respondent asserts are appropriate for summary judgment are those identified in Order No. 5, which include claims alleging that the District failed to meet its Child Find obligation to Student, that the District failed to appropriately evaluate Student, a denial of

Student's right to a free, appropriate public education (FAPE) by failing to offer an appropriate Individualized Education Program (IEP), failure to implement Student's IEP, and procedural violations. As relief, Respondent seeks an order granting its Motion and dismissing Petitioner's claims with prejudice.

Responses to motions must be submitted no later than 5 p.m. on the third business day following a party's receipt of the motion, unless another deadline is set by order, or agreed to in writing by the parties and filed with the hearing officer. *See* Order No. 5. This requirement is also set out in the Guidelines for Special Education Due Process Hearings issued with Order No. 1. Petitioner filed an untimely response on February 3, 2022 and did not request an extension of the deadline to respond. Petitioner's Response does not respond to the substance of the Motion and instead contests the applicability of summary judgment in due process hearings under the IDEA.

## II. LEGAL STANDARD

Except as modified or limited by certain federal regulations, the Texas Rules of Civil Procedure apply in a due process hearing under the IDEA. 19 Tex. Admin. Code § 89.1185(d). Under the Texas Rules of Civil Procedure, a party seeking to recover on a claim, counterclaim, or cross claim may, at any time after the adverse party has appeared or answered, move for summary judgment in the party's favor in whole or in part, with or without supporting affidavits. This rule extends to a defending party as well, i.e. a party against whom a claim is asserted. A summary judgment shall be rendered if the record on file, including discovery responses, the pleadings, affidavits, stipulations of the parties, and authenticated or certified public records, show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(a)-(c).

Due process hearings under the IDEA are not exempt from the rules regarding summary judgment. The summary judgment standards have been applied by the federal courts in the context

of IDEA cases under the Federal Rules of Civil Procedure, specifically Federal Rule of Civil Procedure 56.<sup>1</sup> The wording between the federal and Texas rules is materially the same. Federal precedent on the federal rule is considered persuasive when applied to the Texas rule.<sup>2</sup>

**A. No-Evidence Summary Judgment**

The applicable rules authorize a party to file a no-evidence motion seeking summary judgment. Tex. R. Civ. P. 166a(i). Specifically,

“After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.” *Id.*

A no-evidence motion should be specific as to the challenged elements to give fair notice to the non-movant of the matters on which it must produce some evidence.<sup>3</sup> A party can contest every element of its opponent’s case so long as each element is distinctly and explicitly challenged.<sup>4</sup>

When a movant files a proper no-evidence motion for summary judgment, the burden shifts to the non-moving party, and unless the non-moving party produces summary judgment evidence raising a genuine issue of material fact, the trial court must grant the motion for summary

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<sup>1</sup> *M.L. ex rel. A.L. v. El Paso Indep. Sch. Dist.*, 610 F.Supp.2d 582 (W.D. Tex. 2009), aff’d 369 Fed. Appx. 573 (5th Cir. 2010) (per curium).

<sup>2</sup> *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 86-87 (Tex. 2018) (operative clauses in Federal Rule 56a and Texas Rule 166a are materially indistinguishable).

<sup>3</sup> *See Cmty. Initiatives, Inc. v. Chase Bank of Texas*, 153 S.W.3d 270, 279 (Tex.App.—El Paso 2004, no pet.).

<sup>4</sup> *See Martin v. McDonald*, 247 S.W.3d 224, 233 (Tex. App.—El Paso 2006, no pet.).

judgment. Tex. R. Civ. P. 166a(i). To defeat a no-evidence motion for summary judgment, the non-movant need not marshal all evidence, but must point out in response evidence raising a fact issue as to the challenged elements.<sup>5</sup> Responding to a no-evidence summary judgment is virtually mandatory.<sup>6</sup> If the non-moving party fails to file a response and produce evidence, the party “is restricted to arguing on appeal that the no-evidence summary judgment is insufficient as a matter of law.”<sup>7</sup> The trial court is required to grant a no-evidence summary judgment if the nonmovant produces no summary judgment evidence in response to the summary judgment motion.<sup>8</sup>

## **B. Traditional Summary Judgment**

A summary judgment shall be rendered if the record on file, including discovery responses, the pleadings, affidavits, stipulations of the parties, and authenticated or certified public records, show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(a)-(c). In weighing a traditional motion for summary judgment, the non-movant’s burden cannot be satisfied by conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence. Factual controversies are to be resolved in favor of the non-movant, but only when there is an actual controversy; i.e., when both parties have submitted evidence of contradictory facts.<sup>9</sup>

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<sup>5</sup> See Comment to Tex. R. Civ. P. 166a(i).

<sup>6</sup> *Lee v. Palacios*, No. 14-06-00428-CV, 2007 WL 2990277, at \*1 (Tex. App.—Houston [14th Dist.] Oct. 11, 2007, pet. denied) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 47 S. TEX. L. REV. 409, 488 (2006)).

<sup>7</sup> *Viasana v. Ward County*, 296 S.W.3d 652, 654 (Tex. App.—El Paso 2009, no pet.).

<sup>8</sup> *Watson v. Frost Nat. Bank*, 139 S.W.3d 118, 119 (Tex. App.—Texarkana 2004, no pet.); see also *Michael v. Dyke*, 41 S.W.3d 746, 751 (Tex.App.—Corpus Christi 2001, no pet.) (recognizing that “[f]ailure to respond to a no-evidence motion is fatal”).

<sup>9</sup> *M.L. ex. rel. A.L.*, 610 F.Supp.2d at 593.

When ruling on a traditional motion for summary judgment, the hearing officer is required to view all inferences drawn from the factual records in the light most favorable to the nonmoving party. Furthermore, the hearing officer may not make credibility determinations or weigh the evidence in ruling on a motion for summary judgment.<sup>10</sup>

Once the moving party has made an initial showing there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of genuine fact issues. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment.

Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment. Disputed fact issues that are irrelevant and unnecessary will not be considered in ruling on a summary judgment motion. If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof, summary judgment must be granted.<sup>11</sup>

### III. ANALYSIS

A no-evidence motion for summary judgment is proper after adequate time for discovery. Here, Petitioner filed the due process hearing request in September 2021. The disclosure deadline is February 8, 2022. The District alleges that Petitioner has not produced any documentation to support ■ claims through the discovery process. The hearing officer concludes there has been adequate time for discovery.

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<sup>10</sup> *T.W. bnf K.J. v. Leander Indep. Sch. Dist.*, 2019 WL 1102380, at \*2 (W.D. Tex. 2019) (school district entitled to summary judgment under Fed. R. Civ. P. 56 on issue of whether high school student was in need of special education).

<sup>11</sup> *Id.* at 3.

Respondent moves for summary judgment on the ground that there is no evidence of one or more essential elements of Petitioner's claims on which ■ would have the burden of proof at trial. The burden of proof in an IDEA due process hearing is on the party challenging the IEP and placement. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The burden of proof is thus on Petitioner to show the District did not provide Student a FAPE. In addition, the District satisfied its obligation under Texas Rule of Civil Procedure 166a(i) as the moving party to state the elements as to which there is no evidence by laying out the applicable elements for each of Petitioner's claims.

Because Respondent's Motion was proper in that it challenged each element and stated the elements of each claim as to which there is no evidence, Petitioner was given fair notice of the evidence ■ must present in response. The burden to produce summary judgment evidence raising a genuine issue of material fact then shifted to Petitioner. Here, Petitioner did not timely respond to the Motion. Even considering the untimely Response, it did not address the Motion substantively and produced no summary judgment evidence raising a genuine issue of material fact. Notably, Petitioner's Amended Complaint is not sufficient. Even sworn and verified pleadings are generally not competent summary judgment evidence. *See Laidlaw Waste Sys. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex.1995). Here, Petitioner's failure to respond to the Motion substantively means that ■ cannot meet ■ burden. As such, Respondent's Motion must be granted in accordance with Texas Rule of Civil Procedure 166a(i).

Likewise, Respondent's traditional summary judgment motion offered attached evidence establishing that Respondent is entitled to judgment as a matter of law. Petitioner did not file a timely response. Even if the untimely Response is considered, the Response did not rebut the substance of the Motion or offer any evidence of contradictory facts. As such, Respondent's Motion must be granted, in accordance with Tex. R. Civ. P. 166a.

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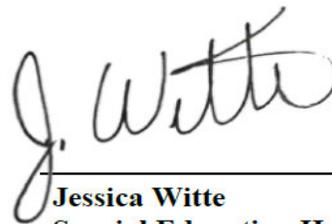
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**ORDERS**

Based upon the foregoing, the record on file, in accordance with the IDEA and its implementing state and federal regulations, and because Petitioner did not produce any summary judgment evidence raising a genuine issue of material fact under Texas Rule of Civil Procedure 166a or 166a(i), it is therefore **ORDERED** that Respondent's Motion for Summary Judgment is hereby **GRANTED** and this case is **DISMISSED WITH PREJUDICE**.

**SIGNED February 7, 2022.**



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**Jessica Witte**  
**Special Education Hearing Officer**  
**For the State of Texas**