

STUDENT	§	BEFORE A SPECIAL EDUCATION
b/n/f PARENT	§	HEARING OFFICER
	§	
v.	§	FOR THE
	§	
IDEA PUBLIC	§	
SCHOOLS	§	STATE OF TEXAS

DECISION OF HEARING OFFICER

Petitioner, *** (“Student”), by next friend, *** (“Parent”), filed a complaint requesting an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”). The complaint was received by the Texas Education Agency August 24, 2021. The Respondent in the complaint is IDEA Public Schools (“IDEA ****”). The parties convened for a due process hearing December 1 and 2, 2021. Jordan McKnight, attorney, represented Petitioner. Petitioner’s next friend was present throughout the hearing. Parent’s advocate, Debra Liva, was present. Christopher Schulz and Alyssa Sandersen, attorneys, represented Respondent. ***, Director of Special Program Compliance for IDEA Public Schools, appeared as Respondent’s party representative.

Procedural History

At the initial prehearing conference September 9, Respondent was granted a continuance. On October 16, Petitioner was granted a continuance and the due process hearing was scheduled for December 1 and 2. On November 18, Respondent filed its Motion for Summary Judgment and Motion for Finding of Frivolousness and Protraction. Petitioner filed Petitioner’s response November 23, and Respondent replied to the response. At the outset of the due process hearing, the parties argued Respondent’s Motion for Summary Judgment.

Order of Denial of Motion for Summary Judgment

A motion for summary judgment requires the Hearing Officer to determine if the moving party is entitled to judgment as a matter of law based on the evidence thus far presented. The Texas Rules of Civil Procedure Rule 166 a (c) requires the motion to state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Summary judgment is proper if the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”¹

¹ *Kee v. City of Rowlett*, 247 F.3d 206, 210 (5th Cir. 2001).

In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party and all reasonable inferences must be drawn in favor of the non-movant.²

A school district must “identify, locate, and evaluate students with suspected disabilities within a reasonable time after the school district is on notice of facts or behavior likely to indicate a disability.”³

Respondent argued that it offered an evaluation and Petitioner did not provide consent for a full and individual evaluation (“FIE”); thus, Respondent reasons that if Petitioner wants to receive special education services, Petitioner is required to allow Respondent to evaluate Student. Respondent argues that because Parent failed to provide consent for the FIE, summary judgment must be granted as a matter of law.

After reviewing the pleadings and arguments of the parties, considering the evidence presented in the light most favorable to the non-moving party, and drawing all reasonable inferences in favor of Petitioner, the non-movant, I find that Respondent’s motion for summary judgment is DENIED.

Resolution Session

The parties participated in an unsuccessful resolution session September 8, 2021.

Issues for Hearing/Requests for Relief

Student is ***-year-old child who resides within the geographical boundaries of the IDEA Public Schools. Student does not receive special education services from the IDEA Public Schools.

Petitioner alleges the following:

1. IDEA Public Schools failed to timely evaluate and identify Student for all known or suspected disabilities specifically, autism and other health impairment (“OHI”) due to attention deficit hyperactivity disorder (“ADHD”);
2. IDEA Public Schools failed to address Parent’s concerns regarding bullying of Student;
3. As a result of IDEA Public Schools’ failure to evaluate and identify Student, it denied the child a free appropriate public education (“FAPE”) by its failure to develop an individualized education program (“IEP”) that addressed all areas of the child’s unique needs including provision of appropriate goals, accommodations, and supports;
4. IDEA Public Schools failed to appropriately place Student, who has difficulty self-advocating, in the least restrictive environment August ***, 2021 when it placed Student in an isolation room with multiple student suspected of being exposed to COVID and endangering Student’s health; and
5. IDEA Public Schools failed to provide Student with related services including counseling, speech and psychological services.

² *Id.*

³ 34 C.F.R. §§ 300.111(a), (c)(1); *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 676 (5th Cir. 2018); *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 790- 91 (5th Cir. 2020).

Requested Relief

Following dismissal of requests for relief that fall outside the hearing officer's jurisdiction, the following requests remain: Petitioner requests a finding of denial of FAPE and an order directing IDEA Public Schools to do the following:

1. Provide an Independent Educational Evaluation ("IEE") in all areas of actual or suspect need including, but not limited to, cognitive, achievement, complete psychological evaluations for all suspected disabilities, autism specific learning disability, Functional Behavior Assessment, ADHD, counseling, speech and occupational therapy ("OT");
2. Provide compensatory education and related services to address Student's area of disabilities and/or needs to include, but not limited to, tutoring and counseling;
3. Convene an admission, review, and dismissal ("ARD") committee meeting following completion of the IEEs to establish supports, accommodations, and specific and measurable goals to address Student's unique needs;
4. At Respondent's expense, provide for participation of each evaluator that conducts the IEE at an ARD meeting to review the evaluations;
5. Reimburse Parent for the cost of any and all private evaluations and private services obtained for Student; and
6. Any and all other remedies to which Petitioner may be entitled under the law.

Findings of Fact

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

1. Beginning in ***, Student attended in IDEA Public Schools in ***, Texas. In *** grade, Student enrolled in IDEA **. At the time of the due process hearing, Student was *** years old, in *** grade, and had not been identified as a child with a disability in need of special education services. T-pg. 146
2. In April 2013, at age ***, *** diagnosed Student with ADHD, autistic disorder, and mood disorder. The report recommended management of hyperactive-impulsive symptoms, along with therapy to address social interaction skills and behavioral problems, parent training and family therapy. The report recommended that Parent contact *** ("***"). P-1

3. When Student was *** years old, Dr. *** (“Dr. ****”) of *** conducted his initial assessment of Student. The assessment was based on information from Parent. At that meeting, Student had been on medication and Student’s behaviors showed improvement. Dr. *** prescribed the same medication that Student had been taking for ADHD. Another clinician saw Student in 2020. Dr. *** saw Student again in the fall 2021 and increased Student’s medication. Dr. ****’s understanding is that children with ADHD and autism diagnoses will benefit from §504 modifications because they might be struggling. T-pgs. 47-53, 225
4. In September 2019, Dr. *** recommended modifications under §504. Dr. ****’s report indicates that a note would be sent to the school. It was his practice to tell a family to pick up the note and deliver it to the school. P-2, pg. 525, T-pgs. 61-62
5. *** conducts a three-month update with Parent to determine clinical needs. It uses an assessment entitled “**** (****”).” The *** is based on Parent’s information. From June 2020 through August 2021, in the *** section of the ***, with a single exception in August 2021, the information reflects no evidence of needs in school. The August exception indicated moderate needs. P-2, pgs. 43, 109, 155, 281; T-pg. 125-128
6. Student has regular psychiatric visits at ***. From September 2020 through August 2021, the psychiatric notes reflect normal/hyperactive behaviors in Student with the exception of one visit. All the notes for that time period reflect that Student displayed appropriate affect, normal speech and language, and exhibited direct goal oriented thought content/process. P-2, pgs. 23, 195, 253
7. In March 2020, a *** clinician recommended an evaluation for individualized education program for possible §504 accommodations. *** notes indicated that Parent would be provided a letter requesting an evaluation. P-2, pg. 401; T-pg. 68
8. Student receives services twice per month from ***. Student’s case worker is a qualified mental health provider (“QMHP”) and provides the services. She has worked with Student for approximately *** years teaching coping and relaxation skill, social skills, decreasing hyperactivity and distractibility, temper tantrums, and minor conduct and behavioral issues at home and school. The QMHP and Parent develop objectives for Student. P-2, pgs. 379, 409, 413, 561, 0565 T- pgs. 92-99
9. *** provides the option for its services to take place in a child’s school. Parent chose the option. T-pgs. 116-118
10. Prior to COVID and during the current school year, the QMHP worked with Student at Student’s school. From the Spring 2020 through September 2021, she provided Student’s services via the telephone, not face-to-face. P-2, pgs. 3-355; T-pgs. 53-54, 93-96, 133

11. When the QMHP provides services at Student's school, she does not sign in. A receptionist walks her to an office to work with Student. T-pgs. 94-95
12. At IDEA, the process for evaluations are: a) a parent brings a request to the §504 person and b) the school requests an assessment if the student is having difficulties, academically or socially. T-pg. 85
13. Respondent's Child Find efforts include: a) child find referral information on Respondent's website b) child find information posted within the schools c) administrators and staff are informed of the services available for students who are struggling d) child find signs are posted in health aide offices and e) information regarding contact information for parents is included in the student handbook. T-pgs. 321-322
14. When a verbal request for evaluation is brought to the school, campus staff is trained to ask a parent to put the request in writing with a date stamp. The school then knows when the 15-day response should be made. Upon receipt of the request, either the response to intervention ("RTI") person, the §504 person, or a designee on the campus begins to look at the student's academics and concerns that may be present. T- pgs. 322- 324
15. In *** and *** grade, Student's grades were in the 80's and 90's. J-1, 2
16. Student's *** grade year was conducted virtually. When called upon in math class, Student replied in complete sentences and answered correctly. Student's overall performance produced A's and B's for the most part. Student experienced some attention problems while learning online. Student's semester grade averages were *** and ***. J-3, 9; T- pgs. 347-368, 373
17. In *** grade reading, Student's 1st and 2nd semester grades were *** and ***. J-3
18. In *** grade reading class, Student's log-ins varied. When Student did not log in or if Student ***, the teacher texted Parent. Student's distractions during virtual learning were not uncommon with the rest of Student's class. Student worked independently without assistance. Student volunteered with answers to questions. T-pgs. 379-380
19. All *** grade Math assessments are reflected in a document taken from what is called Power School. Assessments are taken at the middle and end of each of six modules. Performances on the assessments are ranked as "critical" noted in red, "did not meet" noted in orange, "approaches" noted in yellow, "meets" noted in light green, and "masters" noted in dark green on the Power School printout. Over the course of the *** grade year in Math, Student did well except for two tests. J-9; T-pgs. 358-367
20. IDEA *** has what is called *** class. When students are two or more years behind in reading or math, and need more assistance than an after-school 30-minute tutoring, they are pulled from their *** classes and receive help in the *** class. T- pgs. 386-387

21. The *** (“****”) tests are conducted campus-wide at the beginning, middle, and end of the school year. At each of the three test times, there is a two-week window during which a student may be tested. Even though a student may take the test more than one time, only the score from first time it is taken during the testing window is counted. If a student does not take the test during the two-week window, the school has no data on that student for that test. Multiple factors may impact a student’s score. If a score reflects “****,” it could have been one key concept that student didn’t understand, or that he/she had a bad day. T-pg. 388-407
22. For decisions regarding *** for a student, IDEA *** considers both a student’s STAAR score and his/her *** scores. If a student does not pass the STAAR exam, Student is flagged for ***. If the student passes the STAAR, the staff looks at Student’s *** test. If a student scores two grade levels below on the *** test, the staff starts to consider Student for *** for the following year. In considering the *** program, IDEA *** also considers test results in a student’s core classes. Student has not been put in the *** program. T-pg. 387-389, 401-407
23. The following chart reflects Student’s *** Annual Progress Report. J-6, 7, 8

Year/Grade	Test Date	Reading/Grade Equivalent	Test Date	Math/Grade Equivalent
***	***	***	***	***
***	***	***	***	***
***	***	***	***	***
***	***	***	***	***
***	***	***	***	***
***	***	***	***	***
***	***	***	***	***
***	***	***	***	***
***	***	***	***	***
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***	***	***	***	***
***	***	***	***	***
***	***	***	***	***
***	***	***	***	***
***	***	***	***	***
***	***	***	***	***
***	***	***	***	No *** report

24. When Student was a *** grader, Student did not take the STAAR test. The State of Texas allowed the option. T-pg. 326
25. At the time of the due process hearing, Student was on average with other *** graders in math. Student asks questions when needed. Student works with Student’s partners. T-pgs. 294-295
26. In *** grade *** class, Student is described as having good penmanship, smart, social with no issues communicating with the teacher or other students. Student exhibited the ability to answer questions and comprehend directions. T-pg. 251

27. In *** grade, Student was involved in a behavioral incident that occurred *** at school. The following month, Student was involved in a behavioral incident ***. As punishment, Parent chose a loss of *** privileges as opposed to staying after school. P-2, pgs. 395, 410; T-pgs. 106-109, 202-203
28. In the current school year, Student has had no behavioral issues or suspensions at school. T-pg. 219
29. In August 2021, IDEA *** notified *** grade families of a student that had tested positive for COVID. Parent had Student tested for the virus. The result was negative. Student took the negative test result to school and was placed in an isolation room for one day, August ***. P-4; T-pgs. 166-169,
30. Following Student's one day in COVID isolation, Student was quarantined for 14 days, and due to Parent's health issues, continued to remain at home until mid-October, 2021. Parent contacted IDEA *** to arrange for online learning again. T-pgs. 198-201
31. On the first day of school, August ***, 2021, Parent asked IDEA ***'s principal about obtaining §504 services due to Student's disabilities. Parent agreed. T-pgs. 165-166
32. On August ***, 2021, IDEA *** staff completed an Educational Screening form ("Screening Form"). The Screening Form provides information regarding academic, social, behavioral, or communication concerns. The Screening Form reflected no concerns regarding Student. R-6
33. On August ***, 2021, IDEA *** emailed Parent and attached a §504 Meeting Notice, Receipt of Notice of Parent and Student Rights, Notice of Parent and Student Rights Under Section 504 and Parent input form. Additionally, the documents were mailed certified mail. R-4, 6, 7, 8; T-pgs. 174-178, 324-325
34. On September ***, 2021, Respondent sent a second email with the same materials. Parent did not attend the meeting. R-8, 9; T-pgs. 174-183
35. On September ***, 2021, Respondent emailed Parent and attached Consent to Evaluate for Special Education Services along with Procedural Safeguards in both English and Spanish. Parent received the email. Parent did not open the attachments. R-4, 12, 13, 14, 15; T-pgs. 184-188
36. Respondent sent Notice of Full and Individual Evaluation and Notice of Procedural Safeguards to Parent September *** and ***, 2021. Parent received the notice. R-9, 10, 11, 12, 13, 14, 15
37. Respondent texted Parent regarding the 504 meeting and consent for evaluation. Parent received the texts. R-22; T-pgs. 218-219
38. Parent has not given consent for evaluation. T-pg. 213
39. Respondent scheduled a Resolution Session. Emails were sent to Parent and her advocate that listed the individuals who would be present at the session. T-pg. 328

40. At the Resolution Session held September 8, 2021, Respondent offered to conduct a special education evaluation. Parent did not give consent. Parent and advocate left the session. T-pg. 328

Statute of Limitations

Unless an exception is shown, in Texas, a parent or public education agency must request a hearing within one year of the date the complainant knew or should have known about the alleged action that serves as the basis for the request.⁴ Petitioner did not allege an exception. Petitioner's counsel indicated that the one-year limitations rule applies.⁵ Therefore, only allegations of failures by Respondent that occurred August 24, 2020 to the date the request for due process hearing was filed will be considered ("The relevant time period").

Burden of Proof

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.⁶ The burden of proof is therefore on Petitioner to show the District violated its obligations under the IDEA and did not provide Student a FAPE.

Child Find

The child find provision requires that States must have in effect policies and procedures to ensure that all resident disabled children with disabilities residing in the State who are in need of [SEP] special education and related services are "identified, located, and evaluated and a practical method is developed and implemented to determine which children are currently receiving needed special education and related services."⁷ A procedural child find violation is "actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits."⁸

The IDEA requires a two-pronged analysis for determining whether a student should be identified as eligible for special education services. The "Child Find" obligation is triggered when the school district has reason to suspect the student (i) has a disability; and (ii) the student is in need of special education services.⁹ Not every student who struggles in school requires an evaluation for special education.¹⁰ "The inquiry is not

⁴ 19 T.A.C. §11.51(c).

⁵ T- pgs. 15-16

⁶ *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005)

⁷ 20 U.S.C. §1412(a)(3)(A); 34 C. F. R. §300.111(a); 34 C.F.R. §§ 300.111(a), (c)(1); *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 676 (5th Cir. 2018); *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 790- 91 (5th Cir. 2020).

⁸ *D. H.H. v. Kirbyville Consolidated Indep. Sch. Dist.* No. 1:18-CV-00120-MAC, 2019 U S. Dist. (E. D. Tex. July 12,2019); *T. C. ex rel. Student v. Lewisville Indep. Sch. Dist.*, No. 4:13-CV-186, 2016 U. S. Dist. LEXIS 21976, 2016 705930 (E. D. Tex. Feb. 23, 2016)(quoting *D. S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565 (3rd Cir. 2010).

⁹ 34 C.F.R. §§ 300.8(a)(1); 300.111(a); *Goliad Ind. Sch. Dist.*, 32 IDELR 134 (SEA Tex. 2000). TX 2002); *Dallas Indep. Sch. Dist. v. Woody*, 178 F. Supp. 3d 443, 467 (N.D. Tex. 2016), *aff'd in part and rev'd in part*, 865 F. 3d. 303, 320 (5th Cir. 2017).

¹⁰ *Alvin Ind. Sch. Dist. v. A.D.*, 503 F.3d 378, 384 (5th Cir. 2007); 34 C.F.R. § 300.111(a); *Carrollton-Farmers Branch Ind. Sch. Dist.*, 113 LRP 14998 (SEA Tex. 2013) (school district had no reason to suspect student who performed well academically, behaviorally and socially had a disability or was in need of special education).

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whether the student actually *qualifies* for special education, but instead whether the student should be *referred* for a special education evaluation.”¹¹ While the achievement of passing marks and the advancement from grade to grade is important in determining educational need it is but one factor in the analysis. The decision of whether a student who is advancing from grade to grade is in need of special education must be determined on an individual basis.¹²

IDEA *’s Child Find Procedures**

Respondent’s procedures in complying with its child find duties include publicizing the information in health offices and on its website, along with including it in the student handbook. Respondent trains its employees about child find requirements. Staff is trained to respond to oral requests for evaluations by telling the requesting party to put the request in writing.

Child Find Trigger: Reason to Suspect that Student has a Disability and Needs Special Education

Parent believes that having a disability is the only requirement for eligibility for special education services. While having a disability is the first requirement, the second, and equally important, requirement is a need for special education services. At the time of the hearing, Petitioner had not been evaluated for special education services.

The evidence is undisputed that at age ***, Student was clinically diagnosed with ADHD, autism, and mood disorder. Parent testified that when Student enrolled in *** grade at IDEA ***, she told the person at the front desk about Student’s disabilities. She also testified that she spoke to the person she believed was a §504 staff member and the school offered her §504. There is no evidence that she provided the evaluation that was conducted on Student. While Parent testified that she submitted some §504 paperwork given to her by the school, it is unclear whether she returned all of the requested information or whether Student received §504 services.

Parent testified that over the years, she told several people about Student’s disabilities, but she did not say when or to whom she spoke. She further testified that she gave ***’s Health Records to Respondent every year although it is unclear as to what portion of the voluminous records Parent provided to Respondent.

Without providing any timeframe or names of individuals, Parent further testified that she was told that IDEA *** only had §504 services. She explained that “[j]ust the different people ” that she spoke to told her that Respondent had no special education services. Within the relevant time period, the evidence is unconvincing that Petitioner requested evaluation for special education services.

1) * Reports**

¹¹ *Rockwall Ind. Sch. Dist.*, TEA Dkt. No. 234-SE-0320, 121 LRP 19266 (SEA TX 2021), citing *Cari Rae S.*, 158 F. Supp. 2d at 1195; *Woody*, 178 F. Supp. 3d at 467.

¹² *Bd. of Hendrick Hudson Int. Sch. Dist. v. Rowley*, 458 U.S. 176, 207, n. 28 (1982). *Venus Indep. Sch. Dist. V. Daniel S.*, 36 IDELR 185 (N.D. TX 2002).

In September 2019, the records indicate that *** would send a note to the school that recommended §504 modifications. Dr. *** was uncertain that the note was sent to IDEA ***. Petitioner offered no evidence that she picked up the note for delivery to the school.

In March 2020, *** recommended an evaluation for possible §504 accommodations. *** records indicate that it provided Parent with a letter requesting evaluation. Petitioner failed to show that Parent gave the letter to Respondent.

2) Counseling

Petitioner argued that Respondent should have had reason to suspect that Student had a disability due to the caseworker's visits with Student at the school. Respondent's expert witness indicated that several students see private providers on campus.

While other IDEA schools have a sign in procedure for such visitors, for an unexplained reason, IDEA *** failed to follow the procedure. The QMHP testified that when she came to the school for her sessions with Student, a reception took her to an office to work with Student, but did not require her to sign in. When the COVID pandemic began, the face-to-face setting stopped, approximately April 2020. From that point forward into at least September 2021, the QMHP provided Student's sessions by telephone. Student's teachers denied knowing Student was receiving *** sessions during the relevant time period. Their testimony was credible and reasonable since Student was doing online learning and the *** sessions were conducted by telephone.

The QMHP spoke to none of Student's teachers. Neither did she observe Student in the classroom. Petitioner failed to provide any information that would support a finding that Student needed the QMHP's services in order to receive educational benefit.

3) Student Progress

During the relevant time period, Student was learning virtually. There were times when Student did not log in. Student also missed some assignments. Student's teachers called and texted Parent during those times. The documents from *** consisted of over 550 pages of information regarding the assessments to determine services and the QMHP's sessions with Student. Using information from Parent and Student, *** completed the *** approximately every three months to determine level of care. During the relevant time period, the *** reports consistently indicated that Student had no school needs.

The QMHP testified that both Parent and Student indicated that Student did well in school and was passing Student's classes. She indicated that Student did well on state assessments. Her notes reflect consistently positive reports from both Parent and Student regarding Student's school performance. Both Student and Parent indicated to the QMHP that Student was getting passing grades including a 100 on a math test, and completing assignments.

Throughout Student's years at IDEA ***, Student's report card grades have been average or above average. Parent agreed that Student's grades were good in *** and *** grades and that Student made passing grades in *** grade, and continued to do so in the current school year. Student's *** grade *** teacher testified that Petitioner is a high performing student who can use the *** vocabulary in the fast-paced class.

Student's educational record displays no consistent pattern of struggles or failure that would have put IDEA *** on notice as to a need for an evaluation of Student. The *** Annual Progress Report shows a steady trend upward throughout Student's years at IDEA *** until *** grade. Both Reading and Math were on a *** grade level at the beginning of the year. At the end of that year, both grade levels had dropped. Student's Math level on the *** had dropped two years. At the beginning of *** grade, Student's Reading level had rebounded to ***.

The change in grade levels on the *** Progress Report occurred in the 2nd half of *** grade. Parent reported that toward the end of that school year, Student was tired of online learning. The decline was unlike the overall upward trend in Student's progress.

On other Math assessments, Student's *** grade Math teacher credibly testified that different assessments were taken at multiple points throughout the *** grade year. The teacher noted that on two TEKS assessments, Student scored low. On the majority of the assessments, Student scored either "Meets" or "Masters."

Student's Math teacher checked Student for background knowledge at the beginning of *** grade. She testified that academically, Student is on average with the other *** graders. Student has been making A's although the teacher recalled a *** on one assignment. Student remained at home after Student's one-day of COVID isolation and did not turn in some assignments while doing online study. When Student returned to class, Student's performance improved. With Student's teacher's help, Student was able to catch up on pending assignments. The *** grade teacher explained that academically, Student's performance is ranked either "meets" or "masters," indicating that Student is on *** grade level in Math. Student's teacher testified that Student works with Student's partners and communicates well.

Once Student returned to in-class learning in the current school year (*** grade), the evidence shows that Student exhibited positive academic performance. Student exhibited the ability to comprehend and answer questions in complete sentences, has friends in school, and has very good penmanship. Student mastered an initial test given by Student's Reading teacher. Student's current *** teacher, who is also special education certified, explained that earlier in the school year, Student was not in class for a very long time. Once Student returned to class, Student's attendance had been consistent. The teacher observed that Student's performance is "like Student was never gone."

In *** class, the teacher observed other students wanting to talk with Petitioner both in class and after school. She repeatedly emphasized that Student is a friendly individual.

The evidence is clear that Student throughout Student's time at IDEA ***, Student has been an average to above average student. While Student's *** records indicate a backward slide in grade level toward the end of *** grade, it occurred during online learning and was a temporary slide. Currently, Student is passing Student's classes. Student's Math and Reading teachers report positive performance. When reviewing screening data completed by Student's current teachers, Respondent's expert testified that Student is where Student needs to be at this time. She stated, "As a matter of fact, it's actually a good reflection, considering that a lot of our kids were not in person last year."

4) Behavior

***'s records reflect generally that Parent's concerns were regarding Student's behaviors in the home environment. For example, Parent reported that Student was defiant at home and would not listen when instructed to do things. She reported that Student told lies and went to Student's room when Student didn't get Student's way. The QMHP could not recall that Student has had any discipline problems during the relevant time period. Her notes reflect only minor behavioral and conduct issues at home, but consistently reflect that Student's conduct at home was a concern of Parent.

According to Student's teachers, Student exhibited some difficulty focusing during online learning. The evidence shows that while learning online, Student struggled at times with distractions***. The credible testimony showed that Student's difficulties with attention while online learning were no more than what Student's peers experienced.

In June 2020, Petitioner reported to *** that Student was hyperactive, impulsive and defiant at home. Student's teachers confirmed that they had no behavioral issues with Student. Petitioner presented no evidence that Student had any behavioral or disciplinary problems at school in *** or *** grade.

5) Communication

The QMHP testified that she had no communication problems with Student. For example, her notes reflect that Student explained a *** project Student had completed in which Student learned how to ***. In response to the QMHP's discussion about the importance of participation in classroom discussion, Student shared that Student's teacher talked about "piggy backing off someone's ideas after reading a book together as a class." During a later session, Student had finished Student's day's online learning and explained to the QMHP that Student had learned about *** in Student's math class. The QMHP's conversations with Student indicated that Student gave examples reflecting Student's understanding of analogy. Student's teachers' testimony mirrored the QMHP's report that Student has no communication difficulties.

The QMHP's notes indicate that to make friends, Student explained that Student waited until *** and played games with the other children. Student reported to the QMHP that Student helped Student's classmates with math, reading, and writing.

6) Bullying

The U. S. Department of Education has stated that bullying may trigger a school's child find obligation to a student who has not previously been identified as a child with a disability under the IDEA.¹³ In the instant action, Parent generally testified that Student ***. She testified that the bullying occurred after school, but provided no facts about a particular incident such as when or where it occurred or who was involved. Parent testified that she asked for an investigation into bullying, but provided no further information except that she didn't hear back from Respondent. Neither did Parent follow up on her request. Petitioner failed to provide sufficient evidence to show that the alleged bullying impacted Student to such a degree that it triggered IDEA ***'s child find obligation.

The credible evidence supports a finding that Student made adequate academic progress, had no behavior or disciplinary difficulties, and interacted appropriately with teachers and students. Petitioner failed to prove that Respondent had reason to suspect that Student was in need of special education services.

Response Time to Request for Evaluation

At the beginning of the current school year, Parent asked the school's principal for help with Student. The principal agreed, and IDEA *** promptly began the process for both §504 and special education services.¹⁴ Respondent timely responded to Parent's request. At the time of the due process hearing, Parent had not given consent for Student to be evaluated.

For a district to be liable for a denial of FAPE, the student must be a child with a disability.¹⁵ Respondent did not fail in its child find obligation to identify and evaluate Student. At this time, Student is not a child with a disability in need of special education services. Thus, Student is not entitled to the rights provided under the IDEA. Consequently, no discussion is necessary regarding remaining Petitioner's issues regarding Student's bullying allegations, failure to develop an IEP and provide related services for Student or failure to place Student in the LRE under the IDEA.

Conclusions of Law

1. Petitioners have the burden of proof to establish a violation of IDEA. *Schaffer v. Weast*, 126 S. Ct. 528 (2005);

¹³ *Dear Colleague: Bullying of Students with Disabilities*, U.S. Department of Education, Office of Special Education and Rehabilitative Services (August 20, 2013) at 2; 34 C.F.R. § 300.111.

¹⁴ *Krawietz by Parker v. Galveston Indep. Sch. Dist.*, 900 F.3d 673 at 677(5th Cir. 2018).

¹⁵ *D.G. v. Flour Bluff Indep. Sch. Dist.*, [59 IDELR 2](#) (5th Cir. 2012, unpublished) (holding that a district cannot be liable for a child find violation unless the student has a need for special education).

2. Petitioners failed to prove that Respondent failed its child find obligation. Respondent had no reason to suspect that Petitioner was a child with a disability in need of special education services until August 2021, after which Respondent timely began the evaluation process. 34 C. F. R. §300.111; *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005)
3. At the time of entry of this decision, Student has not been evaluated for special education services and determined to be a child with a disability in need of special education; thus, Student is not eligible for special education services under the IDEA. Respondent did not deny Petitioner a FAPE. 34 C. F. R. §§300.101, 300. 122; *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005); . *D.G. v. Flour Bluff Indep. Sch. Dist.*, 59 IDELR 2(5th Cir. 2012, *unpublished*); *Alvin Ind. Sch. Dist. v. A.D.*, 503 F.3d 378, 384 (5th Cir. 2007).

Orders

IT IS ORDERED that all pending motions and requests for relief are **DENIED**.

SIGNED on January 14, 2022.

Brenda Rudd
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

The decision issued by the hearing officer is final, except that any party aggrieved by the findings and decision made by the hearing officer, or the performance thereof by any other party, 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 A civil action brought in state or federal court must be initiated not more than 90 days after the date the hearing officer issued his or her written decision in the due process hearing. 20 U.S.C. §§1415(i)(2) and (3)(A) and 1415(l).