CONFIDENTIAL

SOAH Docket No. 701-24-11804.IDEA
TEA Docket No. 185-SE-0224

Before the State Office of Administrative Hearings

Student, by next friends Parent and Parent, Petitioner

v.

McAllen Independent School District, Respondent

DECISION AND ORDER

Student (Student), by next friends Parent and Parent (Parents and, collectively, Petitioner), brings this action against the McAllen Independent School District (Respondent or the District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, and its implementing state and federal regulations. The main issue in this case is whether the District failed to evaluate and identify Student as eligible for special education. The Hearing Officer concludes that the District did not have reason to suspect that Student had a disability and, therefore, the District did not violate its Child Find obligation.

I. DUE PROCESS HEARING

The due process hearing was conducted on September 11-12, 2024, through the Zoom videoconferencing platform. Student was represented by attorney Jordan McKnight. Parents attended the hearing. The District was represented by attorney Cynthia Buechler. In addition, ***the Executive Director for Special Education, and ***Special Education Coordinator, attended the hearing as party representatives for the District. The hearing was closed to the public.

The parties offered joint and separate exhibits. Petitioner offered testimony of Parents (Parent and Parent), and ***who was designated as an expert. Respondent offered testimony of Student's ***principal, one of Student's teachers, Student's ***assistant principal, a District police officer***, and a District licensed specialist in school psychology (LSSP), who was designated as an expert. On rebuttal, Petitioner offered additional testimony of Parent and***, an independent LSSP. The hearing was recorded and transcribed by a certified court reporter. On September 17, 2024, Petitioner filed an opposed motion to supplement the record with an affidavit from***. The motion is hereby **GRANTED** and the affidavit is admitted as Petitioner's Exhibit
25. Both parties filed written closing briefs by the October 16, 2024 deadline. The Decision in this case is due on October 29, 2024.

II. ISSUES

A. PETITIONER'S ISSUES

Petitioner alleged the following IDEA issues for decision in this case:

1. Child Find: Whether the District has failed to timely identify and evaluate Student for special education eligibility.
2. Free, Appropriate Public Education (FAPE): Whether the District failed to provide Student with a FAPE during the relevant timeframe, by failing to develop an appropriate individualized education plan (IEP) for Student, including appropriate counseling or psychological services, speech therapy, and consideration of the autism supplement.

B. PETITIONER'S REQUESTED RELIEF

Petitioner requested the following items of relief:

1. Order the District to place Student in a private placement; alternatively
2. Order the District to find Student eligible for special education in the areas of autism and specific learning disability;
3. Order the District to provide Student compensatory services, including counseling, psychological services, and speech therapy;
4. Order the District to hold an admission, review, and dismissal (ARD) committee meeting and develop an appropriate IEP for Student in a homebound setting with appropriate supports and services;
5. Order the District to compensate independent evaluators to attend an ARD committee meeting;
6. Order the District to provide Student with ***;
7. Order the District to reimburse Parents for expenses on privately obtained educational, evaluation, and counseling services; and
8. Any other relief the Hearing Officer deems appropriate.

C. RESPONDENT'S LEGAL POSITION

Respondent generally and specifically denied Petitioner's factual allegations and legal claims. The District also raised the two-year statute of limitations as an affirmative defense.

III. FINDINGS OF FACT

1. Student is currently attending *** grade in the ***Independent School District. Student has not been identified as eligible for special education by any school district. Student lives with Student parents and ***.[1]

2. Student's family lives in the geographic boundaries of the ***Independent School District. Student attended nearby schools in the District for ***through ***grade pursuant to the District's open enrollment transfer policy.[2]

3. Student attended part of ***grade and all of ***grade virtually due to COVID-19. Parents and District witnesses testified that, during ***school, Student presented as a normal kid who did fine in school. However, on rebuttal, Parent also testified that the family worked with Student a lot at home to keep up on Student schoolwork and Student has never made good eye contact with others.[3]

4. In the 2021-2022 school year, Student was in ***grade at***School in the District, attending in person. Student was an average student with good behavior.[4]

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[1] Transcript (Tr.) 73-74, 78, 86, 480.

[2] Tr. 32-35, 72.

[3] Tr. 57-58, 72-73, 77-78, 85, 144-47, 151-52, 478-83.

[4] Tr. 32, 160-61, 175-76, 195-96.

5. During the fall 2021 semester, Student's semester grades were *** in, ***in ***, ***in ***,*** in ***, and *** in math.[5]

6. Student missed a few weeks of school at the beginning of the spring 2022 semester due to contracting COVID-19.[6]

7. On February ***, 2022, Student received a disciplinary referral. One of Student teachers reported that Student had ***.[7]

8. *** of this kind is a very common discipline issue at ***School. The assistant principal spoke to Student in her office, then called a ***, as was their standard practice.[8]

9. Both the assistant principal and the police officer testified that Student was contrite, embarrassed, and nervous, which was common of students facing discipline ***.[9]

10. The assistant principal called Parent and Parents came to school to meet with ***to discuss the incident. Student received a three-day out-of-school suspension.[10]

11. Parents testified that Student would not leave Student room after this incident, and that Student was scared and embarrassed to return to school.[11]

12. On March ***, 2022, Parents submitted to the District a level 1 grievance challenging the discipline decision. The grievance stated that the teacher's

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[5] Respondent Exhibit (RE) 17.

[6] Tr. 36, 188.

[7] Joint Exhibit (JE) 1; JE 6; JE 9.

[8] JE 9; Tr. 181-84, 222-23, 227-28.

[9] Tr. 182-83, 188, 223-26.

[10] JE 1; JE 10; Petitioner Exhibit (PE) 6; PE 7; Tr. 38, 94, 184.

[11] Tr. 43, 57, 95-96, 99.

allegation was ***. Parents stated that Student was afraid to return to school and was receiving therapy. The grievance requested that ***.[12]

13. With the level 1 grievance form, Parents submitted a February ***, 2022 note on a prescription pad from a nurse practitioner treating Student. The note, in its entirety, states: "Please place child on a distance learning/homebound status effective today. Student is currently being evaluated and treated for *** ***. In person learning at this time may be detrimental to Student progress."[13]

14. ***and the District LSSP testified that acute stress reactions are typically temporary conditions and Dr. ***testified that *** *** is not a clinical diagnosis.[14]

15. Based on the February ***, 2022 appointment with the nurse practitioner, Student's pediatrician completed a "general education homebound" form. The form states that student has a medical condition requiring home instruction for the remainder of the semester or "maybe less" due to "***, ***." The form goes on to state that "child had a stressful/traumatizing event happen at school and fearful and anxious about going back to campus at this time." The form notes that Student was taking *** and no other medications. The record does not reflect when the form was completed or when it was provided to the District, although Parent testified that it was provided to the school.[15]

16. Parents also wrote individual affidavits for themselves, and a report purportedly from Student describing the incident. All three of these

[12] JE 2.

[13] JE 8; PE 11.

[14] Tr. 382-83, 430.

[15] PE 8; Tr. 45.

documents asserted that the teacher ***. Parent's affidavit stated that Student was experiencing *** following this incident. Parent's affidavit reported the same and stated that Student was afraid to return to school and was receiving therapy. The record is not clear on when these were provided to the District.[16]

17. On March ***, 2022, Student had an intake appointment with the ***Student and Parents described the incident to the therapist. The therapist's note indicated that Student presented for therapy due to "***." Parent testified that this note was provided to the District when the level one grievance was filed; however, this appointment did not occur until after the grievance had been filed. Therefore, it is unclear when this document was provided to the District.[17]

18. On March ***, 2022, the campus principal approved Student to participate in online remote learning beginning on Monday, March ***, 2022. Student remained learning remotely for the rest of the semester. Due to COVID- 19, the District had an online remote learning program available to students during the 2021-2022 school year.[18]

19. A level 1 grievance hearing was held with the campus principal on March ***, 2022 and, on April ***, 2022, the principal issued Student decision. The principal denied the ***.[19]

20. On April ***, 2022, Parents filed a level 2 grievance appealing the principal's determination on the level 1 grievance. Parents were assisted in the grievance process by advocate***. The focus of the April ***, 2022 level two grievance hearing was Parents' position that the allegations

[16] PE 3; PE 6; Tr. 49.

[17] PE 13; Tr. 106.

[18] JE 11; Tr. 55, 247.

[19] JE 3.

***. Parents and ***reported to the hearing administrator that Student was experiencing *** from this incident and ***. On May ***, 2022, the level 2 grievance decision was issued agreeing to remove the discipline documentation from Student's records.[20]

21. During the spring 2022 semester, Student's grades declined in the first ***-week grading period. During that grading period, Student earned a *** in ***, ***, ******, ***math, and***. Student brought Student grades up by the end of the semester. Student final grades for *** grade were ***, and *** math. Student was promoted to ***grade. Parent testified that Student's remote learning teacher worked with Student to get Student caught up so Student could pass ***grade.[21]

22. Student did not return to the District for the 2022-2023 school year. Student began attending ***Independent School District, which Student still attends. Student attended school virtually for ***grade and attends ***in person during the current school year.[22]

23. Another therapy note from the ***dated September ***, 2022, includes a diagnosis of ***. This note was not provided to the District. ***and the District LSSP testified that *** is typically a temporary condition.[23]

24. Based on payment records, Student attended therapy at the ***a handful of times in 2022. Parents testified that Student has also received ***. Parent testified

[20] JE 4; JE 5; PE 20; Tr. 134.

[21] RE 17; Tr. 477-78.

[22] Tr. 73, 125, 131-32.

[23] PE 18; Tr. 383, 431.

that Student attended professional therapy again in the summer of 2024 to prepare to return to school in person for ***grade.[24]

25. In September and October 2023, Student was evaluated by***, a clinical neuropsychologist, licensed psychologist, and LSSP. The report is not dated, and the record is not clear on when it was completed and provided to Parents. However, testimony generally indicated that it may have been provided to Parents in January 2024, or early February 2024 at the latest.[25]

26. ***evaluation did not include review of any school information, or any educator input, from any school that Student has attended, other than some documents related to the February ***, 2022 incident provided by Parents.[26]

27. ***interviewed Student as part of the evaluation; however, all testing was administered by Student ***.[27]

28. The evaluation found that Student's IQ is***, and Student cognitive ability is overall in the low average range. The report stated that Student meets Texas Education Agency (TEA) criteria for a learning disability in the area of oral expression, however this was not included among the ultimate diagnoses.[28]

29. The report concluded that Student meets medical diagnostic criteria for an autism spectrum disorder, as well as meets TEA criteria for special education eligibility based on autism.[29]

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[24] PE 22; Tr. 59, 99, 101, 122-23.

[25] Tr. 123-25, 272.

[26] PE 21 at 2-6; Tr. 347.

[27] Tr. 355-56, 392.

[28] PE 21 at 13, 28-31.

[29] PE 21 at 29-30.

30. The autism portion of the evaluation included administration of the Autism Diagnostic Observation Schedule – 2 (ADOS-2) and Parents completing the Autism Spectrum Rating Scales (ASRS) and Social Responsiveness Scale – Second Edition (SRS-2). While Parents rated some areas of concern on theASRS, their overall scores were not consistent with a diagnosis of an autism spectrum disorder. On the SRS-2, Parents' ratings put Student in the normal range. On theADOS-2, Student's total score was *** Scores of 9 or higher are considered consistent with a diagnosis ofautism.[30]

31. The report ruled out post-traumatic stress disorder because Student had not experienced a qualifying incident to trigger that diagnosis. Instead, the report diagnosed Student with "***" based on Student disproportionate traumatic response to the incident in February 2022. The report also diagnosed Student with "****.[31]

32. ***testified that the *** administered the ADOS-2; however, Student and the *** scored it together. The District LSSP testified that this is not permitted by the ADOS manual and invalidates the results. ***agreed that the individual who administers the ADOS-2 should be the one to score it, although her testimony was less definitive.[32]

33. The District LSSP testified that ***report included evidence that Student has pragmatic language skills that contradict a diagnosis ofautism. ***also faulted ***report for not including any developmental history or any school information, which ***testified were necessary to make an autism eligibility determination. The LSSP also disagreed with the diagnostic criteria that *** used to diagnose***.[33]

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[30] PE 21 at 22-26; Tr. 307-08, 310-11.

[31] PE 21 at 30-31; Tr. 332-33.

[32] Tr. 389-90, 405-06, 434-35, 470-71, 499-500, 522.

[33] Tr. 437-40, 446, 472-73.

34. Parents have not shared ***report with the school district that Student currently attends. Student has never been evaluated for special education by a school district or received any services under Section 504.[34]

IV. DISCUSSION

Petitioner alleges that the District violated its Child Find obligation to evaluate Student, identify Student as eligible for special education, and provide Student a FAPE. Petitioner specifically argues that after the February ***, 2022 disciplinary referral, and in light of Student's response to it, the District should have suspected that Student had a disability and initiated an evaluation. In Student Closing Brief, Petitioner narrowed Student requested relief to reimbursement for the *** evaluation and the therapy obtained from the ***.

A. BURDEN OF PROOF

The burden of proof in a due process hearing is on the party challenging the IEP and/or placement. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n.4 (5th Cir. 2009). The burden of proof in this case is on Petitioner to show that the District failed to timely evaluate Student and provide Student with a FAPE. *Tatro v. State of Tex.*, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part, rev'd in part sub nom. Irving Indep. Sch. Dist. v. Tatro,* 468 U.S. 883 (1984), and *vacated in part*, 741 F.2d 82 (5th Cir. 1984).

[34] Tr. 74, 84, 89.

B. RELEVANT TIME FRAME

A parent may file a due process complaint on any matter relating to the identification, evaluation, or educational placement of a child with a disability or the provision of a FAPE to the child within two years from the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. § 1415(b)(6), (f)(3)(C); 34 C.F.R. § 300.507(a)(1), (2).

Petitioner's Complaint was filed on February 16, 2024. Respondent asserted the two-year statute of limitations. Petitioner did not plead any exceptions to the two-year statute of limitations. Therefore, Petitioner was required to bring claims within two years of when Student knew or should have known (KOSHK) about the actions that form the basis of the complaint. Petitioner has not argued, and the evidence has not established, that the KOSHK accrual date is any later than two years backward from the date of filing. Therefore, the timeframe for the claims at issue here begins on February 16, 2022. *See, e.g.*, *Hooker v. Dallas Indep. Sch. Dist.*, 2010 WL 4025776,
*10-*11 (N.D. Tex. 2010). Petitioner is not a resident of the District and did not attend the District after the spring 2022 semester. Therefore, the relevant time frame for this proceeding is the time period from February 16, 2022 to the end of the 2021-2022 school year, roughly three and a half months.

Petitioner's Closing Brief argues that the time period should include the summer of 2022, at least up until school started again for the fall 2022 semester. The record includes no evidence on the process for open enrollment transfers or when the District knew that Student was not returning for the 2022-2023 school year. The record does not reflect that Student participated in summer school or that any

District staff had contact with the family during the summer of 2022. In this circumstance, where Student is not a resident of the District, attended in the 2021-2022 school year pursuant to a transfer request, and did not participate in any District summer programs, the Hearing Officer concludes that the District's Child Find obligation to Student ended with the spring 2022 semester.

C. CHILD FIND

The IDEA's Child Find provisions guarantee access to special education for students with disabilities. 20 U.S.C. § 1400(d)(1)(A). A school district has an affirmative duty to have policies and procedures in place to locate, and timely evaluate, children with suspected disabilities in its jurisdiction, including children 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. 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.111(a), (c)(1); *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 949-50 (W.D. Tex. 2008).

The Child Find obligation is triggered when a school district has reason to suspect the student has a disability, coupled with reason to suspect special education services may be needed to address the disability. *Richard R.*, 567 F. Supp. 2d at 950; *Dep't of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001). When these suspicions arise, the school district must evaluate the student within a reasonable time after school officials have notice of reasons to suspect a disability. *Richard R.*, 567 F. Supp. 2d at 950. A two-part inquiry is required to resolve a Child Find claim. The first inquiry is whether the school district had reason to suspect the student has a disability. The second inquiry is whether the school district

had reason to suspect the student may need special education and related services as a result of the disability. *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).

It is undisputed that Parents have never requested a special education evaluation. Petitioner alleges that Student's disproportionate reaction to the discipline incident on February ***, 2022, and the information Parents provided to the school throughout the grievance process about Student struggles, should have caused the District to suspect that Student may have a disability and initiate a special education evaluation.

Student's grades declined in the first grading period of the spring 2022 semester. This included the time period where Student missed a couple weeks of school due to being sick with COVID-19 and Student three-day suspension. Parent testified that Student's teacher subsequently helped Student get caught up. Student's second semester grades were overall lower than Student first semester grades, but Student ultimately passed ***grade and was promoted. In light of Student's limited attendance in the fourth ***-week grading period, these lower grades do not contribute to any possible suspicion of disability. Likewise, Student lower grades in the spring 2022 semester do not rise to the level of implicating suspicion of disability.

Parents and the District were engaged in a contentious discipline appeal process in which Parents maintained that the teacher lied about the incident and sought employment consequences for school staff. Parents' representations to the District that Student was traumatized and experiencing mental health consequences

were part of a battle about the discipline determination itself. Overall, the information provided by Parents through the grievance process, the nurse practitioner note, and the homebound form from the pediatrician do not create reasonable suspicion that Student had a disability and may need special education services during the spring 2022 semester.

The District had information from Student's treating provider that Student was experiencing *** that would typically be considered a temporary impairment. Petitioner faults the District for not jumping into action to evaluate immediately upon notice of these potentially temporary conditions. However, in other cases, courts have found it reasonable for school districts to wait months through a student experiencing multiple ***, before initiating a special education evaluation to determine whether it is a more permanent disabling condition. *See D.T. by & through Yasiris T. v. Cherry Creek Sch. Dist. No. 5*, 55 F.4th 1268, 1277 (10th Cir. 2022); *Mr. P. and Mrs. P. v. W. Hartford Bd. of Educ.*, 885 F.3d 735, 750 (2d Cir. 2018). In *D.T.*, "[e]ven with hospitalization [months prior] . . . not enough evidence existed to trigger the District's child find duties until Student emotional dysfunction manifested in the school environment in the form of Student shooting threat." *D.T.*, 55 F.4th at 1277.

Petitioner's Closing Brief cited the lower court's decision in the *Mr. P.* case to argue that the District should have done more to monitor Student's needs to determine whether Student condition was temporary. In that case, the school district denied a parent request to conduct a special education evaluation to allow time to see if the student's mental health struggles persisted. Student had a ***

*** a few months prior and was already receiving accommodations at school through a Section 504 plan. When the parents requested the evaluation and the school refused, the parties instead agreed to place the student on a home tutoring program. Student was evaluated and found eligible for special education a few months later. *Mr. P.*, 885 F.3d at 742-43. The court ultimately found no Child Find violation and that "the District acted with sufficient expedition once it had a reasonable suspicion that***. might require special education." *Id.* at 752. Contrary to Petitioner's reliance, this case supports the District's course of action. The District approved the request to move Student to remote instruction, but did not jump to a premature conclusion that Student may have a disability and need of special education services.

Petitioner has now obtained an evaluation from ***diagnosing Student with autism. This evaluation has never been provided to any school district and an ARD committee has never considered whether Student is eligible for special education. The District has raised concerns about the evaluation and its conclusions that put in question whether it would be sufficient to support an eligibility determination if it were presented to an ARD committee. Even accepting the conclusions of the ***evaluation for what they are, this after-the-fact evaluation does not support a finding that Student was showing evidence of autism when Student attended school in the District and that the District should have suspected a disability. *See, e.g.*, *Leigh Ann H. v. Riesel Indep. Sch. Dist.*, 18 F.4th 788 (5th Cir. 2021) (an independent evaluation provided years later did not establish that the school district should have suspected disability at the time).

Overall, Petitioner's Child Find allegations rely too much on hindsight to prevail. Petitioner brought this action two years after the discipline incident, after Parents watched Student struggle at home in remote learning for two years, and after obtaining an evaluation diagnosing Student with autism. However, the relevant issue is only what the District knew in February 2022 through May 2022. At that time, the District was aware that Student was struggling with *** following a discipline incident that Parents were ardently contesting, that Student grades slipped in a grading period where Student had a lot of absences, but that Student brought Student grades back up, and that Student had never previously had any behavior or academic issues at school. This is not sufficient to trigger the Child Find duty.

Petitioner complains that the District did not do more to check in on Student for the remainder of that semester. However, the record does not include any evidence that Student teacher had any concerns about Student participation in remote learning or any potential disability. The District's Child Find obligation applies equally to students in remote learning programs, but school staff do not have the same degree of interaction with a remote student as a student attending in person. *See Return to School Roadmap: Child Find Under IDEA Part B*, 79 IDELR 140 (OSERS 2021); *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016).

Petitioner has not presented a preponderance of evidence that the District should have suspected Student had a disability and may be in need of special education during the short time Student remained enrolled following the February 2022 disciplinary incident. If Student were enrolled for the fall 2022 semester and the District had notice Student was still struggling at that time, the District may have had a

different obligation. However, those are not the facts here. Therefore, Petitioner has not met Student burden on the Child Find claim.

D. DUTY TO PROVIDE A FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. 20 U.S.C. § 1400(d). The district has a duty to provide a FAPE to all children with disabilities ages 3-21 in its jurisdiction. 34 C.F.R. §§ 300.101(a), 300.201; Tex. Educ. Code § 29.001. Petitioner has not prevailed on Student Child Find claims and has not shown that Student is a student with an eligible disability entitled to a FAPE. Therefore, Petitioner also has not met Student burden on Student claim that the District denied Student a FAPE.

V. CONCLUSIONS OF LAW

1. The burden of proof in a due process hearing is on the party challenging the IEP. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

2. Petitioner did not meet the burden of proving the District violated its Child Find obligation during the relevant time period. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111.

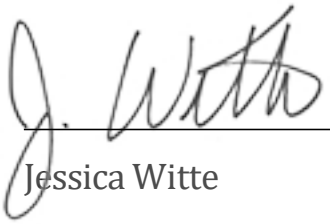
3. Petitioner did not meet the burden of proving the District owed Student a FAPE during the relevant time period. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188, 203-04 (1982); *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 403 (2017).

ORDER

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

Signed OCTOBER 28, 2024.

ALJ Signature:



Jessica Witte

Presiding Administrative Law Judge

NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this case 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. 20 U.S.C. § 1415(i)(2); 34 C.F.R. §§ 300.514(a), 300.516; 19 Tex. Admin. Code § 89.1185(n).