DOCKET NO. 367-SE-0724

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

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioners, Student, b/n/f Parent (collectively, Petitioner), filed a request for an impartial due process hearing (the Complaint) pursuant to the Individuals with Disabilities Education Act (IDEA). The Complaint was received by the Texas Education Agency (TEA or Agency) on the 31st day of July 2024, and the Notice of Filing of Request for a Special Education Due Process Hearing was issued by TEA on August 1, 2024. The Respondent to the Complaint is the McKinney Independent School District (hereinafter District or Respondent).

The primary issues in this case are whether the District violated its Child Find obligation, and whether the District's Individual Education Plan (IEP) for the Student is appropriate and in the Student's least restrictive environment (LRE). The hearing officer concludes that no Child Find violation occurred, and that the District's proposed IEP, including the placement in the Student's LRE, is appropriate in light of the Student's unique needs.

II. Issues

A. Petitioner's Issues

Petitioner alleges that the District has failed and further has denied Student a free appropriate public education (FAPE) as follows:

- Whether the District violated its Child Find obligations in failing to timely evaluate Student in all areas of suspected disability or need;
- Whether the District violated the IDEA by failing to develop and implement an appropriate IEP, including the provision of educational and related services, thereby denying the Student FAPE;
- Whether the District IEP violated FAPE as the proposed placement was not in the Student's LRE; and
- Whether the District failed to comply with the procedural obligations under the IDEA and related laws.

B. Petitioner's Requested Relief

Petitioner requested a number of remedies in the Complaint and Closing Brief as follows:

- Find that the Student's right to FAPE has been violated;
- Order the reimbursement through public funds of the cost of an Independent Educational Evaluation (IEE) which was completed by the provider of Petitioner's choice;
- Find that the Student's IEP is deficient and inappropriate, and specifically not in the Student's LRE;
- Find that parent is entitled to reimbursement other out-of-pocket expenses they have incurred; and
- Find that parent is entitled to compensatory services for the Student and attorneys' fees for representation in this matter.

C. Respondent's Issues and Legal Position

In its Response, the District contends that the District complied with all Child Find obligations. The District further asserted that the IEP designed for the Student is appropriate in light of Student's unique needs, that all procedural requirements of the IDEA were fully complied with, and the placement was the Student's LRE. Finally, the Respondent District also filed a counterclaim specifically seeking confirmation of the appropriateness of its evaluation conducted in early 2024. As such, it is Respondent's position that accordingly Petitioner is not entitled to an Independent Educational Evaluation (IEE) at public expense.

III. Procedural History

Upon filing of the Complaint, the Agency assigned the matter to this Hearing Officer, who then issued the Initial Procedural Scheduling Order on August 2, 2024. After the Pre-Hearing Conference (PHC) and the parties' disclosures, the due process hearing was scheduled and held on September 16 & 17, 2024.

A more detailed procedural history is set forth below in Section D, noting all the preliminary matters addressed by the parties and the hearing officer. Post-hearing orders are detailed in Section E.

A. Representatives

Petitioner was represented throughout the case by counsel, Mr. Jordan McKnight of Jordan McKnight Law. The Respondent District was represented by Ms. Rebecca Bradley and Ms. Angelica Sander of Abernathy, Roeder, Boyd, & Hullett, P.C.

B. Mediation and Resolution

The parties participated in a Mediation in lieu of the Resolution Session on August 15, 2024, and no agreement was reached at that time.

C. Continuances

No continuances were requested or granted in this case.

D. Preliminary Matters

After the issuance of the Initial Scheduling Order on August 2, 2024, the Respondent District filed a Response to the Complaint on August 9, 2024. The Response included a Plea to the Jurisdiction, a Counterclaim regarding the District's evaluation, specifically seeking confirmation of the appropriateness of its evaluation, and a Request for a Ruling on the Stay Put issue. The Pre-Hearing Conference (PHC) was held on August 30, 2024, and Order No. 2, the Order following the PHC, was issued on September 1, 2024. The Order also established a briefing schedule on the stay put issue and dismissed all of Petitioner's claims that were not within the hearing officer's jurisdiction.

Petitioner timely filed a brief on the issue of stay put, and on September 10, 2024, Order No. 3, the Order on the Stay Put was then issued, which confirmed that the Student's Stay Put was general education with no services provided.

Both Petitioner and Respondent timely made their respective disclosures on September 6, 2024. Thereafter, Petitioner, on September 10, 2024 filed Objections to some of Respondent's Exhibits. No Objections to Witnesses were made by either party. On September 14, 2024, Order No. 4, the Order ruling on the admissibility of the Exhibits was issued.

E. The Due Process Hearing

The Due Process Hearing in this case was held on Monday and Tuesday, September 16 & 17, 2024. Both Petitioner's and Respondent's above-referenced counsel continued their respective

legal representation. Additionally, present for the Petitioner was the family's advocate, Ms. Debra Liva, and the Student's parents, *** and ***. Ms. ***, Senior Executive Director of Special Populations and Ms. ***, Executive Director of Special Populations for the District were also present throughout the hearing.

F. Post-Hearing Matters

Upon the conclusion of the presentation of evidence, but prior to closure of the hearing, the parties discussed the requisite time for receipt of the transcript, filing closing briefs, and the final decision. The due date for the Closing Briefs was set by agreement as October 22, 2024, with a corresponding decision due date. Order No. 5 was then issued on September 12, 2024, setting forth the due dates for the Briefs, October 22, 2024 and the Decision Due Date as November 6, 2024. Thereafter, on October 22, 2024, a request was made by Petitioner for a one-day extension of both dates, and the Respondent agreed to the one-day extension. Thus, Order No. 6 was issued on October 22, 2024 with the Closing Briefs due October 23, 2024, and the Decision due on November 7, 2024. This Decision is now timely issued.

IV. Findings of Fact*

1. The Student resides with Student's family and at all times relevant to this case, was within the boundaries of the McKinney Independent School District [hereinafter District]. Student is currently *** years old, with a birthdate of ***.[1]

2. Student has attended school within the District for nearly ***, since the beginning of the *** school year. Student was *** at the time the issues giving rise to the claims in this case occurred.[2]

3. According to testimony, the Student has not attended school in the District since April ***, 2024.[3] Student did not attend school at the beginning of the 2024-2025 school year, as Student's Parent never completed the registration process. Student is not enrolled in the District, and testimony indicated that the Student is being homeschooled.[4]

4. The Student's Parent testified that the primary reason that Student failed to return to school for the beginning of Student's ***-grade year, the 2024-2025 school year, was that Parent was concerned and afraid that the District was going to send the Student to

[1] T.105; J.3.
[2] T.84; J.12.
[3] T.205.
[4] T. 111, 142, 159; J.22.

the Disciplinary Alternative Education Program (DAEP) if Student returned. The parents, however, received a welcome email from the school principal, Ms. ***, noting that the Student would be placed in the *** (Student's IEP placement) at the beginning of the school year.[5] While the Parent testified that Parent was unclear as to what that meant, there was no evidence that Parent asked anyone for clarification.

5. Testimony and other evidence showed that during Student's early years, the Student attended several ***. It appears that the Student's parent noted that Student was kicked out of several ***. The Student's Parent, however, testified that the family left the first one due to issues with commuting; the second one, due to the *** telling them that they were understaffed; the third was because Student didn't feel safe. They finally were able to find a suitable ***.[6]

6. Initially, during the Student's *** year, there was no record of any behavior incidents until approximately ***, 2023. At that time, the Student disrupted the class, ***, refused to comply with instructions, and then ***.[7]

7. Testimony showed that the Student had two different teachers at the beginning of the academic year, before the permanent teacher, Ms. *** returned from *** on October ***, 2023.[8]

8. Testimony and the record demonstrate that the substitute teacher began collecting data in a behavior log on *** October 2023.[9]

9. Documentation showed that the Student's conduct or behavior was problematic, and by the end of October, the District began to implement a Multi-Tier System of Supports (MTSS) to provide interventions to assist Student.[10]

10. Ms. ***, the Principal at ***, the Student's home campus in the McKinney ISD, testified concerning the District's MTSS process and noted that once the classroom teacher exhausts her strategies, a MTTS committee mets and established additional interventions and goals for the Student. In this case, the interventions provided included: calm down corner, breathing strategies, community circle, social skills stories, use of a point sheet, preferential seating, reminders, frequent breaks, immediate positive reinforcement, positive verbal affirmations, well-defined limits and setting task expectations.[11]

[5] T. 168-169; J.21.
[6] T. 143 -144; J.3:1.
[7] R.3.
[8] T. 303-304, 307.
[9] T. 304; J.18.
[10] T.192-193, 277; J.17, J.18.
[11] T. 193-194; J. 17.

11. It was also noted that from the initiation of the MTSS until mid-January, the Student did not make progress toward Student's goals.[12]

12. The testimony also demonstrated that during this time, and despite the interventions, the Student continued to *** peers and staff. Student would also ***.[13]

13. The Student's teacher, Ms. *** testified that she used accommodations and interventions as noted, including a calm down corner, the use of breathing strategies, age-appropriate social skills stories, community circle, preferential seating, reminders to stay on task, positive reinforcement of positive conduct, and set task expectations.[14]

14. Testimony also indicated that the District utilized point sheets for the Student, that were designed to encourage positive behavior. The point sheets were designed by Ms. ***, along with Mr. ***, a campus assistant principal, and were used to measure the Student's success in reaching behavior goals.[15]

15. The Student's teacher testified that on several occasions, she had to evacuate the classroom due to the Student's behavior. This occurred approximately *** times from the end of October until mid-April.[16]

16. Ms. *** also noted that Student's behavior had an adverse impact on the class, and that during the Student's outbursts and aggressive conduct, the other students would ***, and were emotionally affected. She also noted that Student's behavior was consuming about an hour or two of her time nearly each day, and, as a result, the entire class lost instructional time.[17]

17. Ms. ***, the school principal, compiled a listing of the approximate total loss of instructional time for the class that was attributed to the Student's outbursts and aggression. The result was approximately seventeen hours or two and one-half days of instructional time lost. She also noted that it was, in reality, more than that.[18]

18. During October and November 2023, the District gathered data about the Student's incidents, including general information, disciplinary or conduct referrals, as well as threat assessments.[19]

[12] T.194, 196
[13] T. 197.
[14] T. 283.
[15] T. 307, 314-315; J.11.
[16] T.197-198; 276, 284.
[17] T. 284-285.
[18] T. 202-204; R.1.
[19] T. 205; R.3.

19. The Student's behavior consisted primarily of *** toward peers, staff and objects; ***, non-compliance, and ***.[20]

20. At some point in November, approximately three and a half months after school started, the Student's teacher made a referral for special education. The District determined that it was appropriate to conduct a Full and Individual Initial Evaluation (FIIE) for the Student. The Student's parent provided consent for the evaluation on December ***, 2023 during a meeting with the evaluator.[21]

21. While the MTSS were implemented, and numerous interventions and accommodations used, as witnesses noted they were not successful. The Student's aggressive conduct continued. Although the special education evaluation was in progress, the District determined that it would also be appropriate to make a referral for Section 504 services. Teacher input was gathered, and notice and consent for the 504 referral was made on February ***, 2024.[22]

22. A Functional Behavior Assessment (FBA) was completed as part of the FIIIE and was finalized February ***, 2024. A Behavior Intervention Plan (BIP) was finalized on February ***, 2024, and implemented the same day as part of the Student's 504 plan.[23]

23. The District convened an initial 504 meeting on February ***, 2024 in order to put into place accommodations and interventions as part of the Student's BIP.[24]

24. The BIP included four target behaviors: ***, ***, non-compliance and ***. There were numerous strategies and a number of behavior replacement techniques and strategies.[25]

25. Several documents were kept by the District related to the Student's behavior. These demonstrated that several different accommodations and supports were used and that generally none of them were successful. Testimony indicated that the MTSS were not successful, and the 504 plan was not sufficient.[26]

26. The District's progress monitoring document also demonstrated that the Student continued to struggle with Student's behavior, and never made any real growth.[27]

[20] J. 10:8-9.
[21] T. 329; J.1.
[22] T.196, 210-211; J.6.
[23] T.382; J.7.
[24] J.7.
[25] J.7: 11-12.
[26] T.193-195, 197, 275, 290, 346.
[27] T.281; J.17

27. Evidence also indicated that the interventions did not help with the Student's behavior, and that the behavior continued to increase in frequency and severity, until it occurred almost daily. In essence, the Student was not successful in the general education setting. [28]

28. The FIIE was conducted, completed, and finalized February ***, 2024. The evaluation was conducted in the Student's native language by trained, knowledgeable personnel, and the Student was assessed in all areas of suspected disability.[29]

29. Ms. ***, a LSSP with the District, noted that she has conducted hundreds of special education evaluations. She noted that the information gathered for the Student's evaluation was from a variety of sources. These included parent and teacher input forms, direct observation, a functional behavior assessment, and testing of the Student's cognitive and behavioral development.[30]

30. Testimony also showed that measures used in the evaluation assessed cognitive, behavioral, physical and developmental data and they were used in accordance with the instructions and procedures indicated for those instruments.[31]

31. The Student's Present Levels of Academic Achievement and Functional Performance (PLAAFP) indicate that the Student struggled with emotional regulation, and the emotional disturbance impacts Student's conduct, making it difficult to manage emotions, follow directions, and comply with instructions.[32]

32. Testimony indicates that the Student's proposed IEP meets the Student's identified needs, particularly in light of the severity of Student's behavior. The Student's PLAAFPs indicate a needed level of support that is most appropriately provided through the District's *** placement. Thus, the IEP was tailored to the individual student.[33]

33. The evaluation found that the Student demonstrated difficulties with attention, had high levels of hyperactivity, impulsivity, and behavioral difficulties which indicated ADHD.[34] While it is unclear what happened concerning the OHI form, a District OHI form signed by the Student's pediatrician was never provided to the District. Nonetheless, the District proceeded with the Student's BIP which addressed those behaviors, and further, the IEP accounted for the Students difficulties with attention and hyperactivity.[35]

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[28] T.294; J.10:8-9.
[29] T.334-335.
[30] T. 328, 332-333; J.3:1.
[31] T.333-334; J.3.
[32] T.342; J.3.
[33] T.342-344; J.3.
[34] T.336.
[35] T.260, 348; J.7.

34. The BIP was also clear in stating that the Student needed a highly structured environment in order to provide the high levels of behavior support.[36]

35. Additionally, Ms. *** observed the Student twice as part of the evaluation and during those observations observed "almost no inappropriate behaviors". However, when Ms. *** was on the campus at other times, she did see the Student *** staff members.[37]

36. The evaluation also showed that the Student met Special Education eligibility under Emotional Disturbance (ED) as well as Speech Impairment (SI), with articulation.[38]

37. During the time the evaluations were being completed, the District continued to work with the Student utilizing the MTSS, as well as the Section 504 plan and the BIP.[39] Evidence shows that the Student's teacher was also guided by a behavior coach.[40]

38. Testimony and other evidence including the evaluations established that the Student was on grade level academically and was a bright student. Student's behavior, however, impeded Student's learning, and testimony noted that it will continue to do so.[41]

39. The District timely completed its FIIE on February ***, 2024, and the evaluators met telephonically with the parents on March ***, 2024 to discuss and review the evaluation. They were provided opportunities to ask questions about the evaluation.[42]

40. The initial ARD committee meeting was set for March ***, 2024. During the meeting, the committee reviewed the Student's proposed IEP. At that time, the parents expressed disagreement regarding the placement of the Student in the *** (***). The parents also were concerned that the location was at ***, a different campus than the Student's home campus. The parents did not agree with the IEP, and the ARD ended in disagreement. The parents were able to discuss concerns and ask questions during the meeting.[43]

41. As the initial ARD ended in disagreement, a reconvene ARD was scheduled for April ***, 2024. A notice of an ARD reconvene was sent and the reconvened ARD was set for April ***, 2024. During the reconvened ARD meeting, the parents again disagreed with the placement but noted that they wanted the Student to begin receiving speech services in the general education placement.[44]

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[36] J.3:31.
[37] T.350-351, 370-371.
[38] T.336; J. 3.
[39] T.194,196; J.
[40] T.219.
[41] T. 41, 281, 287, 299, 317.
[42] J. 19.
[43] T.282; J.11.
[44] T.105.

42. The District noted that the IEP was a "package" and that it must be consented to as a whole. Testimony also noted that the *** was the most appropriate for the Student so that Student would be able to access Student's services.[45]

43. At the time of the reconvene on April ***, 2024, when the parents were at the school, the Student engaged in destructive behavior. The Student's Parent testified that Parent requested that one of the parents assist the Student, but that they were denied that opportunity by the District.[46]

44. The incident that occurred on April ***, 2024 led to the eventual referral of the student to the Disciplinary Alternative Education Program (DAEP). Notice of the Section 504 manifestation determination review (MDR) was sent to the parents and the MDR was held on April ***, 2024. The MDR committee found that the conduct was not a manifestation of Student's disability, and the Student was placed in the DAEP.[47]

45. The Student's Parent testified that the DAEP referral for the conduct on April ***, 2024 was retaliation for the parents' failure to agree to the IEP.[48]

46. Several witnesses noted that the ARD committee did consider the parents' input, although the Student's Parent felt otherwise. The parents were able to ask questions at both meetings. The record shows that the location of the *** was changed from the *** campus to *** between the initial ARD and the reconvene.[49]

47. The District continued to collect and review data between the two ARD meetings, and in fact, the Student had *** conduct referrals during that time.[50]

48. Testimony regarding the Student's conduct throughout the *** year until Student's last day in attendance, April ***, 2024, noted that Student had approximately *** conduct referrals and *** threat assessments. In addition, the Student was restrained at least *** times.[51]

49. At the time of each restraint, paperwork was completed and the information was sent to the parents. Restraints were done by qualified staff who were trained in the Crisis Prevention Intervention. Testimony noted that restraints are done as a last resort, when other interventions do not work.[52]

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[45] T.97-98,08; J.19.
[46] T.400.
[47] J.9; P.6:7.
[48] T.109.
[49] T.215.
[50] T.214, 254-255.
[51] T.205, 213; J. 20.
[52] T. 208, 210, 249; J.20.

50. Testimony and other evidence clearly demonstrated that the goal of the *** is to help students return and be successful in the general education setting.[53]

51. In May 2024 the parents signed an altered consent form and sent it to the District around May ***, 2024. Upon receipt, the District responded noting that it was looking forward to serving the Student in accordance with the IEP noted on April ***, 2024.[54]

52. The Student's Parent testified that Parent disagreed with the placement as Parent wanted data to be collected regarding the interventions and accommodations. The record, however, shows that beginning October ***, 2023 the District was gathering data on the interventions.[55]

53. The Student's Parent testified that the Student needed more support than what was given in terms of accommodations and interventions through the 504 plan. When offered more, as in a smaller group with more attention, which was the ***, they declined to agree to the placement.[56]

54. The parents were provided Prior Written Notice and the Procedural Safeguards on several occasions, including at the time of consent for the evaluation and the ARD committee meetings.[57]

55. Testimony indicated that parents were not provided the opportunity to consent to the provision of services for speech only, while not agreeing to the placement or the IEP as a whole. While conflicting testimony was heard regarding box checking and signatures, in essence the parents did not, and do not, consent to the IEP.[58]

56. Dr. ***, a Board Certified Behavior Analyst (BCBA) and school psychologist (LSSP), conducted a private evaluation of the Student in May and June 2024. After the evaluation was completed, it was provided to the District.[59]

57. This private evaluation shows that the Student's cognitive capacity is normal, but also noted Student's learning is impacted by Student's behavior.[60] She found the Student had impulsivity, distractibility, hyperactivity, behavior dysregulation and aggression. This results in conduct that negatively impacts learning.[61]

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[53] T.294-295, 320, 377; J.10:8.
[54] T.114, 180; J.12.
[55] T.176,
[56] T.188.
[57] T. 330; J. 2, J.11.
[58] T. 344-345, 363.
[59] J.4.
[60] T.41,
[61] T.26,28.

58. Dr. *** testified that the primary concern or disability of the Student is in all three areas of Attention Deficit Hyperactivity Disorder (ADHD), being lack of attention, hyperactivity and impulsivity. She noted that the primary root of this is likely deficiencies in executive functioning.[62]

59. Dr. *** also stated that the *** placement may be too restrictive and general education with accommodations and supports should be tried. Nothing in Dr. ***'s private evaluation, however, contradicted the District's evaluation. In fact, the findings of both evaluations are quite similar, even though some wording or categories differ.[63]

60. The Student had seen a counselor, Ms. ***, beginning in January 2024. Ms. *** testified that the work she did with the Student was very student-centered and consisted nearly exclusively of play therapy. Such approach was in a private setting and one-on-one. Therefore, her experience with the student was not in a classroom setting, or any setting with other children present. While Ms. *** also testified that the Student could be successful in the general education classroom with appropriate interventions and supports, she did not indicate what that would be or look like.[64]

61. The District's Assistant Principal, Mr. *** did confer with Ms. *** at some point, and she was also invited to the Student's initial 504 committee meeting, but did not attend.[65]

62. Dr. ***'s report was provided to the District by the parents. Thereafter, the District held a Review of Existing Evaluation Data (REED) on August ***, 2024.[66] The Student was not enrolled or attending school in the District thereafter.[67]

V. Discussion

The following discussion reviews those legal standards governing the specific considerations and issues brought forward in this case.

A. Burden of Proof

The burden of proof in a special education due process hearing is on the party challenging the proposed IEP and placement. In essence, the burden of persuasion or proof falls upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*,

[62] T.32-33, 38, 40; J.4:4.
[63] T. 339,
[64] T. 123, 126-128.
[65] T. 214.
[66] J.5.
[67] T.348; J.22.

999 F. 2d 127, 131 (5th Cir. 1993). No distinction has been established between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n.4 (5th Cir. 2009).

In terms of application of this approach, the Fifth Circuit went on to establish that a presumption exists "in favor of a school system's educational plan, placing the burden of proof on the party challenging it". *White ex Rel. White v. Ascension Parish Sch. Bd.* 343 F.3d 373, 377 (5th Cir. 2003); *Teague* at 132. Accordingly, Petitioner bears the burden of demonstrating that the District violated its Child Find obligation and failed to provide the Student FAPE by not having an appropriate IEP and violating procedural mandates.

B. Child Find and Evaluation

Child Find under the IDEA is an affirmative obligation of school districts to have policies and procedures in place in order to locate, and timely evaluate, children with suspected disabilities in the district's jurisdiction. The Child Find duty is initiated when a school district has reason to suspect a disability, along with reason to suspect that there is a need for special education and related services. In fact, a Texas court was clear in stating that Child Find is "triggered when the local educational agency has reason to suspect a disability coupled with reason to suspect that special education services may be needed to address that disability." See *El Paso Indep. Sch. Dist. v. Richard R.R.*, 567 F. Supp.2d 918, 950 (W.D. Tex. 2008). Thus, it is clear that the suspicion must be of both the disability, and the need for special education services.

When conducting an evaluation, a school district must comply with the procedures set forth in 34 C.F.R. §§ 300.304-300.311. Once the evaluation is complete, the Admission, Review and Dismissal (ARD) committee has the responsibility to make determinations of eligibility, and if the student is found eligible, then design and implement educational as well as related services for the student. The student must meet the criteria under one or more of the enumerated disability classifications set forth in the IDEA. 34 C.F.R. §300.8(a). The disabilities are then specifically defined. 34 C.F.R. §300.8(c).

Once the evaluation has begun, or consent from the parent received, then the timeline must be considered. The FIIE and its corresponding written report must be completed no later than 45 school days from the date the school district obtains written consent. Tex. Educ. Code § 29.004(a)(1). In terms of the actual evaluation under the IDEA, the school district must (1) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's IEP; (2) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and (3) use technically sound instruments that may assess the relative contribution of

cognitive and behavioral factors, in addition to physical or developmental factors. 34 C.F.R. § 300.304(b).

Additionally, should a parent disagree with a district's evaluation, the parent may request an Independent Educational Evaluation (IEE) or private evaluation. The district then may grant the request, and allow the private evaluation at district expense, or alternatively file a due process proceeding to defend the evaluation. 34 C.F.R. § 502. The parent is not entitled to an IEE or reimbursement for an IEE when the school district demonstrates in a hearing that its evaluation is appropriate, and meets IDEA and state law requirements. 34 C.F.R. § 502 (b)(3).

C. Duty to Provide FAPE

A primary purpose of the IDEA is to ensure that all children with disabilities have available a free, appropriate public education (FAPE) as well as related services. It is essential that the educational and related services are designed to meet the unique needs of that particular student. 34 C.F.R. § 300.39 (b)(3). Under the IDEA, school districts have a duty to provide a FAPE to all children with disabilities between the ages of three and twenty-one who reside within the jurisdictional boundaries of the district. 34 C.F.R. §300.101(a). Therefore, If a child has been determined to meet the eligibility of special education, then the Local Education Agency, the school district, is obligated to provide that student a FAPE. Further, the IDEA notes that FAPE consists of specially designed instruction designed to meet the unique needs of a child with a disability and related services as may be required to assist a child with a disability. See 20 U.S.C. §1401(9).

The statute also has specifically set forth the elements that the IEP must include. These are a statement of the student's present levels of academic achievement and functional performance (PLAAFP); a statement of measurable goals including academic and functional goals; a description of how the student's progress toward the goals will be measured and an explanation of the extent that the student will not be in general education; and a statement of appropriate accommodations. See: 34 C.F.R. §§ 300.22, 300.320.

Additionally, the United States Supreme Court has provided guidance as to the determination of whether a school district provided FAPE to a student, with both substantive and procedural considerations. Specifically, the school district must: comply with the procedural requirements of IDEA; and, design and implement a program that is reasonably calculated to enable the student to receive an educational benefit. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176 (1982). Further, 'educational benefit' has been defined as that which is meaningful and provides a basic floor of opportunity or access to specialized instruction and related services individually designed to provide educational benefit. *Id*.

In order to meet its substantive obligation under the IDEA, the school district must offer an individualized education plan (IEP) that is reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. The adequacy of a given IEP turns on

unique circumstances of the student for whom it was created and the student's progress must be something more than mere de minimis progress. *Endrew F. v. Douglas Cnty. Sch. Dist.,* 137 S. Ct. 988, 1000-1001 (2017).

The Fifth Circuit has developed the elements or benchmark for the determination of FAPE. These four factors must be assessed in order to determine whether the IEP in issue and as developed and implemented was reasonably calculated to provide students with necessary educational benefit under the IDEA. These factors are as follows:

- Whether the program is individualized on the basis of the student's assessment and performance;
- Whether the program is administered in the least restrictive environment (LRE);
- Whether the services are provided in a coordinated and collaborative manner by key stakeholders; and
- Whether positive academic and nonacademic benefits are demonstrated as a result.

Cyprus – Fairbanks Indep. Sch.Dist. v. Michael F., 118 F.3d 245, 253 (5th Cir. 1997).

A determination of whether the program is individualized for each student often turns on the information used to establish the program. As the court stated, the program must be based on the assessment and evaluation of the student, as well as any additional student-specific information gathered by the district.

The primary focus of this case is on the second factor – whether the program placement is the Student's LRE. In order to determine whether a school district is educating a student with a disability in the LRE, courts consider:

- Whether the student with a disability can be satisfactorily educated in general education settings with the use of supplemental aids and services; and
- If not, whether the school district mainstreamed the student to the maximum extent appropriate.

Daniel R.R. v. State Bd. Of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989).

The third factor for consideration is whether the services are provided in a coordinated and collaborative manner among the key stakeholders. This is generally focused on the participation of a student's parents or guardians, and their involvement in the IEP review and ARD process. And while the IDEA encourages parental involvement, it is not without some limits. Courts have addressed this issue, noting that while collaboration with key stakeholders is certainly anticipated and expected in accordance with the IDEA, the right of parental participation does not equate to a parent's "veto power" over an IEP team. *White, supra* at 380. Deference is given to the school district, and the right for meaningful input for a student's IEP does not equate to a parent's ability to dictate its terms. *Id*.

Finally, whether positive academic and nonacademic benefits are demonstrated as a result of the implementation of the IEP or alternatively, whether the IEP is reasonably calculated

to provide a student with positive academic and nonacademic benefits is another important factor. R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist. 703 F.3d 801, 813-814 (5th Cir. 2012).

D. Procedural Considerations

With regard to the issue of the failure to provide FAPE as a result of procedural violations of the IDEA, the law holds that a hearing officer may find that a child did not receive FAPE in limited circumstances. Specifically, if the procedural violations rise to the level of impeding a child's access to FAPE, significantly denying parents the opportunity or ability to participate in the child's education, or causing a deprivation of educational benefit, then those violations could be considered a denial of FAPE. 34 C.F.R. §300.513(a)(2); *Rowley*.

E. District's Counterclaim

In its Response or Answer to the Complaint, the Respondent District lodged a counterclaim alleging that the District's FIIE of the Student was appropriate and sound and that Petitioner is not entitled to reimbursement of the IEE that the parents obtained.

As noted earlier, where a student's parents dispute the appropriateness of an IEP, parents have the opportunity to request that a school district provide an Independent Educational Evaluation (IEE) at public expense. 34 C.F.R. §300.502. The district must then file a due process claim to demonstrate the appropriateness of its evaluation, or alternatively, provide the parents the IEE.

VI. Analysis

In this case, Petitioner brings forth issues alleging a violation of Child Find and a denial of FAPE. The following discussion examines these issues, considering the documentary evidence, testimony of the witnesses, issues and arguments presented, and the applicable law.

A. Child Find: Identification and Evaluation

As noted, the Child Find mandate under IDEA consists of several consecutive components. The first is the timely identification and referral for evaluation. This is followed by the timely evaluation, with the evaluation complying with the statutory requirements as set forth in 34 C.F.R. §§300.304-300.311

In this instance, the District very quickly identified the Student as one who should be evaluated for special education. Student started school in August, and by late October the District had put into place strategies, interventions, and accommodations for addressing Student's behavioral challenges. Further, the testimony also established that by November 2023 the staff was in the process of making the actual referral and the parent's consent was obtained by early December. The referral for evaluation was timely, only approximately three months

after the start of school, and less than two months after implementation of the MTSS, which as noted in the record, were not successful. No evidence was presented showing that the District delayed obtaining consent and proceeding with the special education evaluation. And the evidence is clear that while the evaluation was taking place, that the District continued with the interventions and accommodations through the MTSS process, and then also placed the Student on a Section 504 plan with a BIP, once the FBA was complete.

As noted, in conducting the evaluation, the school district must use a variety of assessment tools and other methods to gather academic, functional and developmental information about the student, including parent and teacher information. Further, the district must use technically sound instruments that assess the relative contribution of cognitive and behavioral factors, as well as physical or developmental factors. 34 C.F.R. §300.304(b). The evidence showed that the evaluation was administered in the student's preferred language and was administered by trained and knowledgeable personnel in accordance with the instructions provided by the producer of the assessments. 34 C.F.R §300.304 (c) (1). Further, the evidence showed that the Student was evaluated in all areas of suspected disability and the evaluation was comprehensive.

The District's evaluation, in addition to a finding of Emotional Disturbance (ED) and Speech Impairment in articulation, also found results consistent with ADHD. While the testimony was confusing regarding the provision of the District's OHI form, it was clear that the Petitioner did not provide the District an OHI form completed by the Student's pediatrician, although the private evaluator Dr. *** recommended she do so. Nonetheless, the District proceeded with interventions to address the ADHD, as set out in the BIP. Evidence also established that the IEP itself took into account the ADHD related behaviors.

The weight of the credible testimony, including that of the District's evaluator, Ms. ***, as well as the Petitioner's expert, Dr. ***, confirmed that the District's evaluation was appropriate and complied with all requirements under IDEA. Petitioner did not satisfy the burden to demonstrate a Child Find violation or entitlement to a private evaluation at public expense. In addition, the Respondent District met its burden proving that Petitioner is not entitled to an IEE at public expense.

B. Denial of FAPE

Whether the District was able to provide the Student a FAPE is controlled by the four-prong analysis set forth by the Fifth Circuit, often referred to as the *Michael F.* test. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F*., 118 F.3d 245 (5th Cir. 1997). The primary focus of this case is the second factor, that is, whether the Student can be educated in the general education setting, or, alternatively, whether, and based upon the Student's unique circumstances, the *** placement is the Student's LRE. It is also important to note that the law is quite clear, as set forth in *Endrew*, that the appropriateness or adequacy of the IEP turns on the unique circumstances of

each individual student, and further notes that the IEP be designed for a student to make progress appropriate in light of the child's circumstances.

Factor A: Was the IEP Individualized Based on the Student's Assessment and Performance?

In this case, the Student had been enrolled in the District less than a year and was only *** years old during most of the year. Student's behavior, however, was quite challenging, which necessitated early intervention, eventually resulting in the implementation of MTSS, a 504 Plan, and an evaluation for special education. Once the evaluation was completed, the ARD committee met and determined the student's eligibility and need for special education and related services in accordance with 34 C.F.R §300.306; 19 TEX. ADMIN. CODE §89.1011.19(d).

Testimony indicated that not only was the data collected during the interventions used, but also a variety of sources of information from the FIIE was relied on in crafting the IEP. In fact, it was noted several times that the IEP was, in fact, individualized for this Student. The evidence clearly showed that the Student's IEP was sufficiently 'individualized' and it addresses the Student's areas of disability and states sufficiently objective and measurable goals. The evidence showed that the IEP was based on the Student's assessment and performance. Finally, an IEP must address all of the student's disabilities and areas of need. To do otherwise would be a clear violation of FAPE. See *D.C. v. Klein Indep. Sch. Dist.* 860 F. App'x 894, 903 (5th Cir. 2021). In this case, the parents want some, but not all, of the IEP services, a position not support by the law.

Factor B: Was the Program Delivered in the Least Restrictive Environment?

Certainly, the law is clear that a student's IEP must be administered in the least restrictive environment (LRE). In fact, the LRE requirement is one of the central components of an appropriate placement under the IDEA. The statute states that a district is required to educate students with others who are nondisabled to the maximum extent that is appropriate and possible. 34 C.F.R. §300.114 (a)(2). This has been emphasized by the courts, that students be integrated into the regular classroom. *Endrew F.* at 1000.

The statute itself is very clear in its direction to schools, stating in part,

" children with disabilities... are educated with children who are nondisabled, …removal of children with disabilities only if the nature and severity of the disability is such that education in the regular classroom with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. §300.114 (a)(2)

The first question is whether the Student in this case can be satisfactorily educated in the regular education setting. In making that determination, one must examine the nature and severity of the Student's disability, Student's needs and abilities, and the District's response to

the Student's needs. In fact, the Fifth Circuit in the above-refenced case went on to enumerate specific factors to consider:

- the school district's efforts to provide the student with supplemental aids and services in the general education setting;
- whether the student will receive an educational benefit in the general education setting;
- the child's overall experience in general education, balancing the benefits of general and special education; and
- the impact the student's presence has on the general education setting and on the education of the other students in that setting.

Daniel R.R. at 1048-49. And as the court also noted, no single factor is dispositive, but rather the analysis should be an individualized, fact-specific inquiry. Id. at 1048.

Looking at the evidence presented at the hearing, it appears clear that the District made extensive efforts to provide the Student with supplemental aids and services in general education. These were significant efforts, and they did so for nearly seven months. Data was collected during this time. Yet, the evidence was clear that Student was not successful in general education. While the evidence also demonstrated that the Student is bright and academically capable, Student is unable to stay on task, easily distracted, and engages in aggressive verbal and physical behavior. As several witnesses noted, this certainly interferes with not only Student's learning, but also that of Student's peers.

While the parents want the District to try even more aid, such as a behavior coach, in the general education setting, the evaluation data shows that Student needs a structured environment to achieve Student's behavior goals and objectives. Even Student's counselor noted that Student has a need to feel safe, which is much more likely in a small setting. While of course it is always possible that a school district try additional interventions, there must also be a limit on the number of different interventions in general education, particularly where they were not working. Not only were the interventions not successful, the Student's behavior was getting worse, and Student's conduct was having an adverse impact on Student's classmates as well as school staff.

And as the courts have noted, another important issue when considering the LRE is the effect of the student on other students in general education. In fact, the District is compelled by law to not only consider the needs and unique circumstances of the individual student but also the education and safety of all of the other students in the district as well as staff and administration.

Testimony noted that when the Student would be verbally and physically aggressive in the classroom, ***. Evidence shows that Student ***. Moreover, the other students in the classroom *** when Student was having outbursts. The testimony noted that the time it took

to evacuate the classroom or to have the Student removed from the classroom took away instruction time from the other students. The Student was disruptive to the entire class, and not only was Student not receiving an educational benefit in Student's classroom, the other students were not as well. There was no credible evidence offered to contradict or refute any of the District's evidence concerning the Student's violent and aggressive behavior. This case is clearly not a situation in which the district did not provide sufficient aids services and accommodations prior to recommending a more restrictive setting -- in fact it is quite the opposite. See *Daniel R.R.* 874 F. 2d, at 1048.

Although some testimony from the student counselor noted that Student may be able to succeed with particular supports and accommodations in the general education environment, no detail was provided in terms of how that would be accomplished, particularly taking into consideration the needs of the other students. The only evidence that was presented as to specifics of the Student's programming based on the evaluation and other data, was that set forth in the IEP.

As explained by the fifth Circuit in *Daniel R. R.,*

"when state and local school officials are examining the alternatives for educating a handicapped child, the child's needs are a principal concern. But other concerns must enter into the school official's calculus. Public education of handicapped children occurs in the public school system, a public institution entrusted with the enormous task of serving a variety of often competing needs. In the eyes of the school official, each need is equally important, and each child is equally deserving of Student's share of the schools limited resources. In this case, the trial court correctly concluded that the needs of the handicapped child and the needs of the nonhandicapped students in the Prekindergarten class tip the balance in favor of placing Daniel in special education"

In this case, too, the scales tip in favor of the Student's placement in the ***, Student's LRE. The next issue then, is whether the District made attempts to mainstream the Student to the maximum extent possible. The Student's IEP calls for the gradual integration of the Student back to the general education setting. Evidence at the hearing distinctly discussed the IEP and the notion that returning to general education is one of the goals for the Student. The IEP anticipated that the Student begin having access to recess or lunch in general education as soon as certain goals were achieved. The IEP itself, as well as testimony at the hearing, demonstrate that a return to general education is planned as there is no intent on keeping the Student in the *** indefinitely.

Factor C: Were the Services Developed and Provided in a Coordinated and Collaborative Manner by Key Stakeholders?

This factor requires that the educational program be developed and implemented by the key stakeholders and done so in a coordinated and collaborative fashion. Here, the District made

significant effort to involve the parents on numerous occasions. Evidence showed that the parents actively participated in all of the meetings, and that even a location change was made to the IEP at their request. The District also explained things about the evaluation and the IEP, and they were able to ask questions. The District also reached out to the Student's counselor in an effort to be collaborative and invited her to the Student's 504 meeting. The evidence clearly showed that the parents were involved and their viewpoints considered. Evidence also indicated that the District initially considered a number of different approaches or alternatives to the ***. No clear evidence of predetermination by the District was presented.

It is important to note that collaboration does not equate to a requirement that a district accede to a parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 657-658 (8th Cir. 1999). So, while collaboration with key stakeholders is certainly anticipated and expected, the right to meaningful input does not mean parents have the right to mandate the outcome. *White.* Parents are not denied input just because their position was not adopted. *White.* 343 F. 3d 373, 377 (5th Cir. 2003). Parental participation does not rise to the level of dictating the contents of the IEP.

Factor D: Did the Student Demonstrate Positive Academic and Non-academic Benefits?

The weight of the evidence demonstrated that the District designed an IEP that would provide the Student with a program providing education and related services so that Student would make progress in light of Student's specific circumstances. The IEP anticipates the Student would receive both academic and non-academic benefit.

While the IEP was not implemented as the parents declined consent, the weight of the evidence demonstrated that the District complied with legal requirements in terms of offering a program designed so to allow the Student to make progress in light of the circumstances and the Student's unique needs. Thus, the IEP in this case was designed and calculated to provide the Student a FAPE. The parents, however, have declined to allow implementation of the IEP. Petitioner failed to establish that the program developed by the District did not or would not provide FAPE to the Student. Petitioner did not meet the burden to establish that the program developed by the District did not provide FAPE.

In summary, the District crafted the IEPs based on the Student's individual needs and performance, and as such, the IEP was reasonably calculated to provide the Student an educational benefit, and make non-educational progress, in light of the circumstances and the Student's unique needs. The Student's placement was in the LRE, and the services were developed and implemented in a collaborative matter. Student's program would provide a FAPE. *Endrew F., supra* at 999-1000. Moreover, Petitioner did not demonstrate any procedural violation that rose to the level of denying the Student FAPE.

Finally, another issue in this case appears to be that Petitioner would like to separate the provision of speech services under special education from the actual placement of the Student, and likely Student's behavioral services. This, in essence, is requesting a partial IEP or partial FAPE, which is not allowed by law. The law is clear that the IEP must be individualized for the student – not for part of a student. No legal basis for this contention is put forth, and in fact – just the opposite. The Office of Special Education Programs (OSEP) noted that a parent may not pick and choose among portions of the IEP. While it is recognized that OSEP offers guidance, and not law, the statement is well taken. Otherwise, we would have a partial IEP, and not one that takes into account the entire student.

VII. Conclusions of Law

1. The McKinney Independent School District is responsible for properly identifying, evaluating, and serving students under the provisions of IDEA, 20 U.S.C. §§1412 and 1414; 34 C.F.R. §300.301, and 19 TEX. ADMIN. CODE §89.1011.

2. Petitioner failed to carry the burden of proof to establish that McKinney ISD violated its Child Find obligations. 34 C.F.R. §300.111. *Schaffer v. Weast,* 546 U.S. 49, 126 S.Ct. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984).

3. Petitioner failed to meet the burden of proof to establish that the District's evaluation was not appropriate or did not comply with statutory and legal mandates. Petitioner is not entitled to an Independent Educational Evaluation at public expense. 34 C.F.R. §§300.304-300.311, 34 C.F.R. §502.

4. Petitioner did not carry the burden to establish that the District's IEP failed to provide FAPE. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.,* 118 F.3d 245 (5th Cir. 1997). Petitioner did not prove that the District failed to provide Student a FAPE under the IDEA. 34 C.F.R. §300.8; *Schaffer v. Weast,* 546 U.S. 49 (2005).

5. Petitioner did not meet the burden of showing that the District denied the Student's parents meaningful participation in the Student's education. *Schaffer v. Weast,* 546 U.S. 49, 126 S.Ct. 528 (2005).

6. Evidence established that the *** (***) is the Student's LRE and appropriate. 34 C.F.R. §300.114 (a)(2); *Daniel R.R*., 874 F.2d at 1048.

7. Petitioner did not meet the burden to prove any violation of IDEA by the District, including any procedural violation. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176 (1982). *Schaffer v. Weast,* 546 U.S. 49 (2005)

VIII. Order

Based upon the record of this proceeding, the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that all relief requested by Petitioner is DENIED, and that any and all claims of Petitioner be DISMISSED WITH PREJUDICE.

All other relief not specifically stated herein is DENIED.

Signed this 7th day of November, 2024.

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Kimberlee Kovach
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. 20 U.S.C. 1415 I.2. 19 Tex. Admin. Code §89.1185(n); Tex. Gov't Code, § 2001.144(a)-(b)(g).