DOCKET NO. 302-SE-0722

Student, *B/N/F* Parent,	§	BEFORE A SPECIAL EDUCATION
	§	
Petitioner,	§	
	§	
V.	§	HEARING OFFICER
	§	
HENDERSON INDEPENDENT SCHOOL DISTRICT,	§	
	§	
Respondent.	§	FOR THE STATE OF TEXAS

FINAL DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

I.
STATEMENT OF THE CASE

On July 28, 2022, ***, *b/n/f* ***, ("Petitioner" or "Student") filed a Complaint with the Texas Education Agency ("TEA") against Henderson Independent School District ("Respondent" or "District"), requesting an impartial Due Process Hearing, pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). On July 29, 2022, TEA assigned this matter to me as the impartial Special Education Hearing Officer ("SEHO") and sent a copy of the Complaint and Notice of Filing to Respondent. Petitioner asserted some claims related to disciplinary actions Respondent has taken against Petitioner. As such, these claims required the implementation of the expedited due process procedures under 34 C.F.R. §300.532(c); 19 TEX. ADMIN. CODE §89.1191. Petitioner also asserted claims under the regular-track provisions of IDEA. When presented with the option of bifurcating the case, the Parties agreed to carry the expedited and regular-track cases together. As such, all issues were carried under the expedited time line and tried together at the Due Process Hearing.

PETITIONER'S ISSUES:

Student asserted multiple substantive and procedural issues in *** Complaint. Specifically, Student asserted that the District denied *** a free and appropriate public education ("FAPE") in the Least Restrictive Environment ("LRE") based upon the following violations of IDEA, as well as numerous non-IDEA statutes, occurring after July 28, 2021:

1. Respondent failed to evaluate, identify, and provide Petitioner special education and related services;

2. Respondent failed to provide Petitioner services in a collaborative manner with key stakeholders;

3. Respondent failed to provide Petitioner an education in the LRE;
4. Respondent failed to provide Petitioner services with academic and non-academic benefits;

5. Respondent failed to ensure that Petitioner's staff was competent, well-trained, and well-supervised;

6. Respondent's placement of Petitioner in the Disciplinary Alternative Education Program ("DAEP") was an unlawful change in placement based upon a disciplinary complaint;

7. Respondent violated Student's and Parents' rights under other causes of action (for purposes of exhaustion). This includes legal issues pursuant to Section 504 and the Americans with Disabilities Act consistent with *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017). [1]

PETITIONER'S REQUESTED RELIEF:

Petitioner asks the SEHO to award the following:

1. assess Petitioner for recreation and leisure activities and provide Petitioner with opportunities to participate in both academic and non-academic programs;

2. provide Petitioner an Independent Educational Evaluation ("IEE");

3. provide Petitioner with an appropriate Transition Plan;

4. pay for expert consultants (a) to address Petitioner's educational and non-educational needs; (b) to attend Petitioner's Admission, Review, and Dismissal Committee ("ARDC") meetings for the next two years; (c) to train all District staff who interact with Petitioner for the next two years; and (d) to supervise Respondent's staff and Petitioner's ARDC;

5. provide compensatory services including, but not limited to, academics, social skills training, and counseling;

6. provide Petitioner social skills training;

7. provide Petitioner social work services;

8. provide home and family support services;

9. provide Petitioner's Parents with a $1,000.00 stipend for parent training;

[1] Section 504 of the Rehabilitation Act of 1973 ("Section 504") as amended, 29 U.S.C. §794; Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§12131 *et seq.,* as amended by the ADA Amendments Act of 2008 ("ADAAA"), Public Law 110-325, 122 Stat. 3553 (2008)*;* the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. 1232g; the No Child Left Behind Act of 2001 ("NCLBA"), 20 U.S.C. 6319 (2002); Section 1983 of the Civil Rights Act of 1964, 42 U.S.C. §1983; Title VI and VII of the Civil Rights Act of 1964; the Technology Related Assistance for Individuals with Disabilities Act of 1988, 29 U.S.C. §2109; the Improving Access to Assistive Technology for Individuals with Disabilities Act of 2004, Public Law 108-364; the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. §1988, 28 U.S.C. 211927, 29 U.S.C. §794a(b).

10. reimburse Petitioner's parents for out-of-pocket expenses incurred due to Respondent's failures to provide Petitioner FAPE;

11. order Respondent's school board to appoint a committee: (a) to include interested members of the public; (b) to address the alleged issues noted in Petitioner's pleading; and (c) to report back to Respondent's school board the committee's findings;

12. rescind the DAEP placement; and

13. provide such other relief as may be just and proper and within the SEHO's jurisdiction.

RESPONDENT'S ISSUES AND AFFIRMATIVE DEFENSES:

1. Respondent generally and specifically denied Petitioner's allegations and denied responsibility for providing any of Petitioner's requested relief;

2. Respondent asserted that Petitioner's request for an IEE was premature because the District had not yet completed its FIE;

3. Respondent requested the dismissal Petitioner's non-IDEA claims and causes of action, request for attorney's fees, and request for expert's fees for Want of Jurisdiction; [2] and

4. Respondent asserted the one-year statute of limitations as an affirmative defense. [3]

II.
PROCEDURAL HISTORY

Student filed *** Complaint with TEA on July 28, 2022, alleging issues regarding discipline matters as well as other substantive and procedural issues. On August 1, 2022, the undersigned SEHO issued Order No. 1: Initial Scheduling Order, which set the statutory timelines for an expedited case: August 17, 2022: Prehearing Conference ("PHC"); August 30, 2002: Disclosure Deadline; September 7, 2022: Due Process Hearing; and September 19, 2022: Decision Deadline.

On July 29, 2022, Respondent filed its Notice of Appearance of Counsel and on August 8, 2022, Respondent filed its Ten-Day Response to Complaint, Motion to Reclassify Expedited Status of Due Process Hearing, Motion for Partial Dismissal, Plea to the Jurisdiction, and Status Update on Resolution Meeting. Respondent requested the dismissal of all claims under non-IDEA statutes and the dismissal of any issues occurring prior to July 28, 2021, under the former one-year Texas Statute of Limitations.

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[2] On August 26, 2022, the SEHO dismissed all non-IDEA claims in Order No. 2: Order Confirming the Due Process Hearing and Attendant Deadlines Following Prehearing Conference.

[3] At the time of Petitioner's filing, the one-year Statute of Limitations in Texas was in place. On September 1, 2022, Texas adopted a two-year Statute of Limitations, which does not apply to this case. See 19 TEX. ADM. CODE §89.1151(c). The SEHO determined that Petitioner's timeline for all issues accrued on July 28, 2022.

On August 11, 2022, Petitioner filed several Motions for Issuance of Subpoenas, which were granted and executed on August 16, 2022.

On August 17, 2022, the Parties convened the PHC. In attendance were the following: (1) Mr. Kenneth Perry, Petitioner's Counsel; (2) Mr. Fernando de Urioste, Petitioner's Educational Advocate; (3) Ms. Jennifer Carroll, Respondent's Counsel; (4) Mr. John C. Hardy, Respondent's General Counsel; (5) the undersigned SEHO; and (6) the court reporter, who made a record of the PHC. The Parties discussed the issues, added a second date for the Hearing, and Petitioner clarified that for statute of limitations purposes, Petitioner's Complaint relates to issues going back one year to July 28, 2021. Respondent withdrew its Motion to Reclassify Expedited Status of Due Process Hearing and the Parties agreed to try all issues together under the expedited timeline.

On August 26, 2022, the SEHO dismissed all non-IDEA claims in Order No. 2: Order Confirming the Due Process Hearing and Attendant Deadlines Following Prehearing Conference. Additionally, the SEHO specified the following deadlines related to the expedited hearing: (1) Exhibit and Witness Disclosures would be made on August 30, 2022; (2) the Hearing would convene on September 6-7, 2022; and (3) the Decision would issue on September 19, 2022.

The Due Process Hearing:

Respondent made its Disclosures timely but Petitioner did not. The SEHO granted Respondent's objections to the introduction of some of Petitioner's Exhibits on that basis.

The SEHO convened a ZOOM Due Process Hearing on September 6-7, 2022. The Parties introduced their Joint Exhibits; Respondent offered some of its Exhibits; Petitioner offered its Exhibits, to which Respondent objected to some of the Exhibits on the grounds that Petitioner's Disclosures were untimely. The undersigned SEHO sustained Respondent's objections; however, Respondent withdrew its objection to P8, which was admitted. Petitioner called several witnesses, who were cross-examined by Respondent; Respondent called one witness, who was cross-examined by Petitioner.

During the Hearing, Petitioner was represented by *** counsel (1) Mr. Kenneth Perry, (2) Mr. Fernando de Urioste, Petitioner's Education Advocate; and (3) Student's Parents. Respondent was represented by its counsel (1) Ms. Jennifer Carroll, (2) Mr. John Hardy, Respondent's General Counsel, (3) Ms. Amanda Wallace, Assistant Superintendent, and (4) Ms. Marla Cannefax, Expert Witness-Licensed Specialist in School Psychology. At the conclusion of the Hearing, the Parties agreed to file and serve their Closing Arguments by midnight, September 14, 2022. Both Parties complied with this deadline. The Decision deadline remained September 19, 2022, which is school day 10 following the conclusion of the expedited Due Process Hearing.

This Decision of the Special Education Hearing Officer is being delivered to the Parties on the Decision Deadline of September 19, 2022.

III.
RESOLUTION SESSION

The Parties participated in the Resolution Session on August 12, 2022, but were unable to settle the case.

IV.
FINDINGS OF FACT [4]

1. The District is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing FAPE under IDEA and its implementing rules and regulations.

2. Student is *** who attended *** School during *** school year, 2021-2022. Student and *** family have lived within the District's boundaries since ***.

3. Petitioner enrolled in the District during *** year, ***. Petitioner continued enrollment in the District through *** grade. [Jt33.1]

4. From *** through *** grade, Petitioner excelled at school in all academic and non-academic areas: Petitioner earned mostly ***, with a few ***; met or exceeded the standard on all statewide assessments; and participated in the *** Program. Petitioner's teachers consistently documented *** citizenship as "Excellent" citizenship in all areas with no record of attendance issues or discipline referrals. [Jt32.1-3; 13-21]

5. At the beginning of *** grade, Petitioner began ***. These therapies focused on Petitioner's ***. [Jt2.1]

6. Following ***-grade year, Petitioner began manifesting ***, including *** with ***. ***. Due to the amount of stress, disappointment, and ***, Petitioner decompensated and demonstrated *** [R44.17] On ***, 2020, Petitioner was placed at ***. [Jt18.1]

7. Upon discharge, *** presented Petitioner's discharge diagnoses: (1) *** Disorder, recurrent, severe, ***; (2) *** Disorder; and (3) *** Disorder. *** also noted that Petitioner had "improved" from the time of admission in the areas of ***. [Jt18.2]

8. *** found that Petitioner's *** issues were of no concern at school, including academic performance, behavior/attendance problems. [Jt18:18] At the time of ***, Petitioner was able to ***. [Jt18:2] [5]

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[4] References to the Due Process Hearing Record are identified as follows: "T#.#.#" refers to the two-volume Court Reporter's Transcription of testimony made on September 6-7, 2022, and the specific volume, page, and line numbers contained therein; "Jt#.#" refers to the Joint Exhibits by Exhibit number and page; "P#.# refers to Petitioner's Exhibits by number and page; and "R#.#" refers to Respondent's Exhibits by number and page.

[5] For two years Petitioner's Parents did not provide Respondent with a copy of the *** records; Petitioner provided the *** in spring 2022 when Respondent requested the documents to gather information for Petitioner's FIE on June 14, 2022. [Jt18:1]

9. On November 1, 2020, *** wrote a letter to an attorney to file with the court ***. [Jt2.1-3] The letter stated Petitioner had been ***. [Jt2.1-2]

10. Petitioner's Parent gave the letter to teachers so that they could help her watch out for her child regarding concerns outside of school. [T1.206.24-25; T1.207.1-17] The letter does not express any concerns, needs, or recommendations related to school. [Jt2.1-3]

11. On May 5, 2022, ***, diagnosed Petitioner with ***. [R45.1, 5] [6] *** did not report any concerns with school. [R45.3-4]

12. In Fall 2021, Petitioner was enrolled in ***. Petitioner earned grades of ***. [Jt32.24] Petitioner participated in extracurricular activities. Teachers and Administrators did not suspect Petitioner was a student with a disability that required special education and related services. [Jt37.7, 9, 10, 15, 24, 27] Teachers and Administrators did not receive any reports of bullying from Petitioner or *** family during Fall 2021; Petitioner did not report any bullying to ***. [Jt37.7, 10, 15, 24, 27; R44.18-29; T1.126.2-25; T1.127.1-25; T1.128.1-6]

13. Between ***, 2022, and ***, 2022, Petitioner missed school due to ***. [Jt33:7]

14. On January *** 2022, Petitioner participated in ***, an extracurricular activity associated with ***. [Jt33:8]

15. On ***, 2022, Petitioner filed a written statement regarding the bullying perpetrated on *** by another *** student. [Jt3.23; Jt37.2, 9-10, 14. 24, 27] Petitioner confronted the alleged bully ***. This resulted in the alleged bully's *** [Jt3.21, 23]

16. Respondent conducted an investigation of Petitioner's allegations but determined that the conduct of the alleged bully did not meet the definition of bullying because there was no imbalance of power between Petitioner and the alleged bully. [T2.259.6-15] Respondent required both students to verbally agree to "stay-away" from each other, *i.e.,* the students would not talk to, or about, each other. [Jt3.21; Jt26.1]

17. On ***, 2022, another student filed a Voluntary Statement informing the school that (a) the alleged bully had ***; (b) Petitioner had told another student not to *** the alleged bully because ***; and (c) Petitioner had called the alleged bully a variety of inappropriate names. [Jt3.21, 26, 30]

18. Following another investigation, Respondent found that both students had violated the verbal "stay-away" agreement. As a consequence, Respondent (a) assigned Petitioner to ***; (b) asked each

6 *** is a temporary condition that occurs when individuals *** [T2.252.4-25].

student to agree to a written "no social communication" contract; and (c) asked the students to write apology letters to each other. [7] [Jt3.21]

19. Petitioner's Parent refused to allow Petitioner to enter into the agreement or write an apology letter. [Jt3.21-22]

20. On ***, 2022, the school principal and Petitioner's Parents met to address the Parents' concerns regarding bullying and their disagreement with Respondent's assigning Petitioner the *** The Principal stated she would investigate the situation and report back her findings. [Jt3.7]

21. On ***, 2022, the alleged bully's parent made a report to *** regarding issues with Petitioner's Parents' posting *** on Facebook.[8] [Jt38.2] The officer determined that the acts reported did not constitute a criminal issue at that time. [Jt38.2]

22. On ***, 2022, Respondent informed Petitioner's Parents that Petitioner and a group of ***. [Jt3.10] On ***, 2022, Respondent informed Petitioner's Parents that each allegation had been confirmed and consequences issued. [Jt3.11]

23. On ***, 2022, after receiving the results of the investigation from the Principal, Petitioner's Parents filed a Level One Grievance through Respondent's School Board Policy. [Jt3.1-2]

24. On ***, 2022, Petitioner participated in the ***, an extracurricular activity associated with ***. [Jt33:9]
25. On ***, 2022, Petitioner participated in the ***, an extracurricular activity associated with ***. [Jt33:11]

26. On ***, 2022, Petitioner and *** family had another encounter with the alleged bully. Petitioner's family had *** before school. [Jt4.6-7] As Petitioner's family was proceeding into the building, the alleged bully ***. The alleged bully *** laughing at what had just happened. [Jt4.6]

27. When Petitioner arrived at school, *** informed a group of friends that *** intended to ***. [Jt4.8-9; R49; T2.273.1-15] When the alleged bully arrived at school, Petitioner ***. [Jt4.6-7; T2.273.16-18] In response, the alleged bully *** Petitioner. [Jt38.5

28. On ***, 2022, the District suspended Petitioner for the remainder of ***, 2022, as well as ***, 2022. [Jt34.2] Petitioner complied with this disciplinary consequence.

29. Also on ***, 2022, Respondent notified Petitioner's Parents that Petitioner had been recommended for placement at the DAEP for violation of the Student Conduct. The placement conference was set to convene on ***, 2022.

[7] A "no social communication" contract required each student to cease all communication about, and to, each other or there would be consequences. [Jt3:21]

30. On ***, 2022, Respondent convened a Notice of Removal Conference after investigating and determining Petitioner engaged in conduct subject to discipline. [Jt4.3, Jt34.2-3] Respondent considered factors related to the offense: (1) whether Petitioner had a disciplinary history; and (2) whether Petitioner had a disability that impaired *** capacity to appreciate the wrongfulness of *** conduct.

31. Respondent determined that based on the evidence presented regarding the alleged bully's ***, the alleged bully's action was determined to be self-defense. [Jt38.5] As to Petitioner's action of ***, Respondent determined that Petitioner *** the alleged bully. [Jt38.6]

32. On ***, 2022, the Respondent placed Petitioner in the DAEP ***. [Jt34.2] Petitioner did not return to school after *** DAEP assignment, accumulating *** absences between *** 2022, and ***, 2022. [Jt33.3]

33. Following this placement at the DAEP, Petitioner's Parents commenced efforts to fight the DAEP placement. On ***, 2022, Petitioner's Parents filed a Level One Grievance to challenge the DAEP placement. [Jt4.1] On the Grievance form, Petitioner's Parents noted that Petitioner had received treatment *** since 2020, that Petitioner was under treatment from ***, and that as a result of the DAEP assignment, Petitioner had ***. [Jt4.1] The Assistant Superintendent instructed Petitioner's parents to contact the campus administration to attempt to resolve the issues at the lowest level. [Jt37.17]

34. On ***, 2022, Petitioner's Parents sent an email to the campus Principal to schedule the meeting and informed the Principal that Petitioner and *** Parents were now represented by an attorney. [Jt4.15] The Principal obtained contact information for the attorney and shared that information with Respondent's attorney. [Jt4.14-15]

35. On ***, 2022, Petitioner resumed counseling sessions with *** again***. [R44.33] This session was the first documentation during counseling of alleged bullying during the 2021-2022 school year. [T1.128.7-12]

36. On ***, 2022, Respondent's attorney contacted Petitioner's attorney to schedule a meeting with the campus Principal, as well as to schedule the Level One Grievance Hearing. Respondent received no response as to availability. [Jt4.16]

37. On ***, 2022, Respondent provided Petitioner's Parent with a Notice of Full and Individual Evaluation, Consent for Full and Individual Evaluation, and Procedural Safeguards. [Jt6.1-74; Jt9.1] The Coordinator of Special Programs, affixed post-it notes to the documents for informational purposes because Petitioner's Parent refused to meet with the Coordinator so she could explain all the documents to Petitioner's Parent. [Jt6.24; Jt37.3; T1.210.22-25; T1.211.1-3] Petitioner's Mother informed Respondent that she would consult with her attorney before consenting to an evaluation. [Jt6.22-23]

38. On ***, 2022, the Director of Special Education ("Respondent's Director") sent a follow-up email to Petitioner's Parent regarding the special education evaluation. [Jt8.1-2]

39. On ***, 2022, Petitioner filed her Request for Special Education Due Process Hearing with the Texas Education Agency. [Jt37.28, 32] This case was assigned to the undersigned SEHO.

40. On May 17, 2022, Petitioner's advocate sent an email to the Coordinator of Special Programs requesting a copy of the documents emailed on April 22, 2022, without sticky notes. [Jt9.1; Jt37.4, 32]

41. On ***, 2022, Respondent's attorney responded to Petitioner's advocate with the requested documents. [Jt10.1-39; Jt37.4, 32] On ***, 2022, Respondent's Director received the signed Consent for the FIE and Consent to Release Confidential Information to ***. [Jt11; Jt37.32] Respondent's attorney sent an email to Petitioner's advocate with a message proposing dates, times, and location for conducting the in-person portions of the *** portions of the evaluation. [Jt12; Jt37.4, 32]

42. Petitioner did not *** for the remainder of the 2021-22 school year. [Jt33.3]

43. On ***, 2022, Respondent sent a fax to *** seeking *** evaluations to assist with determining Petitioner's eligibility and/or services. [Jt13.1] Respondent followed up with Petitioner's Parent regarding consent to disclose confidential information to the other ***provider, ***, listed in the Parent Information Forms that were provided to Respondent on ***, 2022. [J11.5; Jt14]

44. On ***, 2022, *** conducted the *** portion of Petitioner's FIE. [Jt37.32; P13.6.6- 8] During the evaluation, the primary concern expressed by both Petitioner and Petitioner's Parent was the DAEP assignment. [P13.19.3-7] Petitioner was very clear in the interview that *** did not want to go to DAEP. [P13.21.2-4] *** contacted ***to obtain additional information, but *** refused to provide it and referred *** back to the District to obtain records. [Jt16.1-2]

45. On ***, 2022, *** conducted the in-person components of the cognitive and achievement *** portions of Petitioner's evaluation. [Jt37.32]

46 On ***, 2022, the Director of Special Education received notification from *** that *** concerns were noted and *** conditions were listed by the Parent. [Jt15; Jt37.32] In one of the documents, Petitioner's Parent reported that Petitioner has difficulties with ***. [Jt15] Based on this information, the District needed to assess *** formally to ensure evaluation of all areas of suspected disability and need. [Jt15] The Parent reported Petitioner's medical issues, such as ***. [Jt15]

47. On ***, 2022, Respondent's attorney contacted the Parent's attorney to follow up on the Consent to Release Confidential Information documents for all private *** providers so Respondent could obtain *** records, and seek an Other Health Impairment ("OHI") eligibility for the *** issues outlined by the Parent. [Jt16] In addition, Respondent's attorney requested assistance in obtaining information from *** because neither Petitioner's Parent nor *** would give *** a copy of any of *** records, and the only complete copy available to the District was obtained with a subpoena and protected by a Qualified Protective Order for litigation purposes only. [Jt16]

48. On ***, 2022, Respondent received the Parent's signed Consent to Release Confidential Information documents for ***. [Jt17.3, 8, 11; Jt37.33] Respondent immediately requested records from *** [J17; Jt37.33]

49. On ***, 2022, the District received records from ***. [Jt18]

50. On ***, 2022, Petitioner filed a Motion to Dismiss without Prejudice involving the May 2, 2022, Request for Due Process Hearing. On ***, 2022, the undersigned SEHO issued a Notice of Dismissal without Prejudice.

51. On ***, 2022, the District received records from ***. [Jt19] *** did not provide any evaluations, but sent her letters drafted to the school, including letters dated March 8, 2022, April 20, 2022, April 25, 2022, and May 31, 2022. The District previously received the April 20, 2022 letter on April 21, 2022, and the April 25, 2022 letter on April 25, 2022. [Jt5; Jt7] The District first received the March 8, 2022 and May 31, 2022 letters prior to June 15, 2022. [Jt19.6, 10]

52. On ***, 2022, Respondent's attorney sent an email to the Parent's attorney asking if Petitioner was available on ***, 2022, for the in-person portion of the *** evaluation. [Jt20; Jt37.33]

53. On June 27, 2022, Respondent resubmitted the requests for records and OHI Disability Reports to *** and ***. [Jt21; Jt22]

54. On June 28, 2022, Respondent's Director sent a follow-up email to Petitioner's Parents regarding scheduling the in-person portions of the *** evaluation. [Jt23; Jt37.33]

55. On June 29, 2022, Respondent received a completed OHI Disability Report from *** for symptoms related to ***. [Jt24]

56. On June 29, 2022, Respondent's Director received an email response regarding the *** from Petitioner's Parent indicating that the family was ***, and that July 11, 2022, would work for the in-person portion of the *** evaluation. [Jt25:1; Jt37.33]

57. On June 30, 2022, Respondent's Director responded via email to Petitioner's Parent and provided the assessment date, time, and the name of the *** contracted to complete the evaluation. [Jt25:1; Jt37.33]

58. On July 1, 2022, Respondent received a completed OHI Disability Report from *** for symptoms related to ***. [Jt26]

59. On July 10, 2022, Petitioner's Parent canceled the July 11, 2022, *** because Petitioner ***. [Jt27:3-4] On that same date, Respondent's Director contacted Petitioner's Parent and suggested setting

the evaluation for July 18, 2022. [Jt27:3; Jt37.33] On July 12, 2022, the Director provided alternative dates for the evaluation: August 1 and 8 for the *** Evaluation. [Jt27:3; Jt37.33]

60. On July 14, 2022, Respondent's Director sent a follow-up email to Petitioner's Parent attempting to confirm Monday, July 18, 2022, for the ***. [Jt27:2; Jt37.33]

61. On July 14, 2022, Petitioner's Parent responded and agreed to have the *** Evaluation on Monday, July 18th at 9:00 am. [Jt27:1; Jt37.34]

62. On July 18, 2022, Respondent completed the in-person portions of the *** evaluation. [Jt37.34]

63. On July 28, 2022, Petitioner's Parents filed the current Request for Due Process Hearing, which included requests for additional evaluations and an Independent Educational Evaluation ("IEE"). Petitioner requested a *** Evaluation that addresses ***; a *** Evaluation and *** Services; a ** Assessment; and *** Recommendations/Considerations regarding the need for a Behavior Intervention Plan ("BIP") and/or social work. [Jt37.34]

64. On August 1, 2022, Petitioner's Parents requested information about the completion of the FIE and requested to pick up the evaluation report. [Jt28; Jt37.34] Respondent's Director reported that although the evaluations were conducted, the report was not finalized. [Jt28; Jt37.34]

65. On August 9, 2022, Respondent notified Petitioner's Parents of the need to evaluate formally the new areas of concern set for the in Petitioner's Complaint. The latent request for additional evaluations postponed the finalization and completion of the FIE. [Jt37.34]

66. On August 11, 2022, the Parties discussed the Parents' wanting *** services for Petitioner. [Jt37.34]

67. On August 12, 2022, Respondent's Director inquired about a missing parent protocol/form that was previously provided to the Parent. [Jt30.2; Jt37.34] Respondent's Director sent an email to Petitioner's Parents with the parent information that was needed for other new components being evaluated in the FIE. [Jt37.35]

68. On August 15, 2022, Respondent's Director sent an email to Petitioner's Parents with the Parent *** Surveys and the *** Services Acknowledgement form for parent/student acknowledgement of services. [Jt30.2; Jt37.35]

69. On August 16, 2022, the Director of Special Education followed up with the Parent regarding the emails sent on August 12, 2022, and August 15, 2022. [Jt37.35]

70. On August 17, 2022, ***, who conducted the psychological portion of the FIE, stated that based on her portion of the evaluation, she recommended the ARDC identify Petitioner as a student with an Emotional Disturbance. [P13.6.20-24] *** stated she sent drafts of her report, but that the FIE was not complete because of Petitioner's request for additional assessment. [P13.10.15-23] *** reported

that she anticipated her portion of the incomplete FIE would be completed in two to three weeks, but that she is not completing all remaining portions of the evaluation. [P13.11.1-2]

71. On August 17, 2022, Respondent sent the *** Assessment to ***. Rather than sending the completed form back to the District, *** sent the form to Petitioner's Parent. Petitioner's Parent then sent the form to the District. [Jt31.1-12]

72. On August 18, 2022, Respondent received the *** Assessment completed by ***. [Jt31.5-8]

73. The Due Process Hearing convened timely on September 6-7, 2022. Petitioner's FIE was not completed at that time and no evidence was proffered that Petitioner's ARDC had convened to consider Petitioner's FIE and develop an appropriate IEP, if the Committee determined that Petitioner qualifies for special education services.

V.
DISCUSSION

IDEA defines FAPE as special education and related services that (1) are provided at public expense, (2) meet the standards of the state education agency, (3) include an appropriate preschool, elementary school, or secondary school education in the state involved, and (4) are provided in conformity with an IEP that meets the requirements of 34 C.F.R.§§300.320-324.

The United States Supreme Court established a two-part requirement for determining whether a district has provided a student FAPE: (1) the district must comply with the procedural requirements of IDEA, and (2) the district must design and implement a program reasonably calculated to enable the child to receive an educational benefit. The Court defined "educational benefit" as one that is meaningful and that provides a "basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit to the handicapped child." *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175 (1982). In a more recent opinion, the Court affirmed that IDEA cannot, and does not, promise any particular educational outcome. *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 998 (2017). The correct standard for providing FAPE is the development of an IEP that is reasonably calculated to enable a student to make appropriate progress in light of the student's individual circumstances. *Id*. at 999.

The IDEA creates a presumption favoring the education plan proposed by a school district and places the burden of proof on the student challenging the plan. It is well-settled that a party challenging the district's eligibility determination or offer of services under IDEA bears the burden to prove that the child has been denied a FAPE. *Schaffer v. Weast,* 126 U. S. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *E.R. v. Spring Branch Indep. Sch. Dist*., 909 F.3d at 754, 762-63 (*citing Cypress-Fairbanks Indep. Sch. Dist. v. Michael F*. 118 F.3d at 252; *R.H. v. Plano Indep. Sch. Dist*., 607 F.3d 1003, 1010-11 (5th Cir. 2010).

A.
CHILD FIND ISSUE

A "child with a disability" is a defined term under the IDEA. The student must meet the criteria under one or more of the enumerated disability classifications. 34 C.F.R. § 300.8 (a). A child with a disability may qualify for special education services under more than one classification. *E.M. v. Pajaro Valley Unified Sch. Dist., 758 F. 3d 1162(9th Cir. 2014), cert. denied,* 2015 U.S. Lexis 204 (2015). Even if a student can meet the criteria of one or more of the disability classifications, a student must also demonstrate a need for special education and related services for eligibility purposes. 34 C.F.R. § 300.8 (a)(1). The determination of whether a student is "in need of special education" must be determined on an individual basis. *Bd. of Hendrick Hudson Int. Sch. Dist., v. Rowley,* 458 U.S. 176, 207 (1982).

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. 34 C.F.R. §§ 300.8 (a) (1); 300.111 (a) (c) (1); *Goliad Ind. Sch. Dist.,* 32 IDELR 134 (SEA Tex. 2000). Not every student who struggles in school requires an evaluation for special education. *Alvin Ind. Sch. Dist. v. A.D.,* 503 F. 3d 378, 384 (5th Cir. 2007); 34 C.F.R. §300.111 (a)(1); *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).

Educational need is not strictly limited to academics but also includes behavioral progress and the acquisition of appropriate social skills as well as academic achievement. *Venus Ind. Sch. Dist. v. Daniel S.,* 2002 U.S. Dist. LEXIS 6247 (N. D. Tex. 2002). 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. *Bd. of Hendrick Hudson Int. Sch. Dist. v. Rowley,* 458 U.S. 176, 207, n. 28 (1982).

First, a student with a disability must be evaluated in accordance with the IDEA's implementing regulations and must be found to have one of the specified disabilities. Once a disability condition is identified, the second step mandates that as a result of the identified disability, the student must demonstrate a need for special education services; consequently, a student meeting IDEA-eligibility criteria but who does not show a need for special education services, is not a student with a disability under the IDEA. *Student v. Corpus Christi ISD*, Dkt. No. 298-SE-0496 (Tex. Hrg Off. Lockwood 1996). *See also D. L. by & through J.L. v. Clear Creek Indep. Sch. Dist*., 695 Fed. Appx. 733 (5th Cir. 2017), as revised (July 31, 2017) (affirming the district court decision upholding the decision of the hearing officer who found that the student was not a student with a disability because the student did not need special education services.).

In the instant case, the evidence fails to prove that the District violated its "child find" obligations with respect to Petitioner.

1. Respondent's "Child Find" Obligation Was Not Triggered in November 2020:

On November ***, 2020, Petitioner's Parent sent Petitioner's *** Teacher a copy the November ***, 2020, letter written by ***, Petitioner's ***. This teacher noted that she was aware of one *** during the Fall of 2020. [Jt37.2] Petitioner was dealing with some *** issues related to *** ("***") [Jt37.2] Petitioner expressed worry about whether *** could get to *** at the school. [Jt37.2] The campus Principal and the English Teacher showed Petitioner the *** the school had on file, explained the system in place to make sure *** was safely ***, and assured *** could not get to ***. [Jt37.2] The information reassured Petitioner and *** was able to move on and focus on school. [Jt37.2]

During school year 2020-21, Petitioner continued excelling in all academic and non-academic areas, making all A's, approaching or meeting the standard on all statewide assessments, and participating in the *** academic classes. [Jt32:1, 23] Teachers reported Petitioner performed average to above average as compared to *** peers in all academic and non-academic areas. [Jt37.1, 12] Petitioner's teachers reported that Petitioner did not demonstrate any academic, social, behavior, or emotional needs and the teachers did not suspect a disability that required special education supports and services in the classroom or other locations in the school. [Jt37.1-2; 12-13, 20; 23; P14.16.5-13; 4.19.8-11]

2. Respondent's "Child Find" Obligation Was Not Triggered in Fall 2021:

During Fall of Petitioner's *** grade school year, 2021-22, Petitioner continued *** enrollment in all *** academic classes; *** earned grades of A's with one B. [Jt32.24] Petitioner participated in extracurricular activities such as the *** and ***, associated with ***. [Jt33.4-5] Teachers and campus administration did not report any social, emotional, behavioral, or other non-academic concerns, nor did any teachers write any office referrals for Petitioner's behavior towards other students. [Jt37.1, 8-10, 14, 24, 26]

On January 4, 2022, Petitioner reported to *** that she had not had significant *** and continued to do well day-to-day. [R44.31] *** terminated *** with Petitioner because Petitioner achieved treatment goals; *** noted that Petitioner is able to manage *** and cope with stressors appropriately. [R44.31-32]

3. Respondent's "Child Find" Obligation Was Triggered in Spring 2022:

In Spring 2022, Petitioner had encounters with another *** student who was bullying Petitioner. This alleged bully verbally attacked Petitioner, which led to Petitioner's increased ***. Petitioner received disciplinary consequences for concocting a plan to ***; Petitioner engaged in inappropriate language toward the alleged bully; Petitioner *** the alleged bully when ***.

Respondent investigated these incidents thoroughly and imposed punishment on both students. The more serious punishment for Petitioner was her assignment to the ***. Following that assignment, Petitioner failed to *** and her Parents filed the first Request for Due Process Hearing after this disciplinary setting was assigned. Notwithstanding this disciplinary action, Petitioner earned all As and one C for the *** nine weeks in Spring 2022. [Jt32.24; Jt41] Petitioner's teachers did not report any social, emotional, behavioral, or other non-academic concerns. [Jt37.6-7, 10, 14-15, 24-27] While not providing any direct services to Petitioner, *** reported seeing concerning changes in Petitioner between January and March 2022. [T1.136.5-9]

*** testified that the April 8, 2022, incident, when Petitioner ***, appeared to affect Petitioner as *** began demonstrating behavior that would not be typical of a general education student and that, combined with records indicating struggles with ***, could trigger a special education referral. [T1.103.23-25; T1.104.1-10] Ms. Cannefax stated she identified a significant change in Petitioner's *** after April 13, 2022, when Petitioner was assigned ***. [T2.260.2-10] *** stated that Petitioner was unable to *** due to the increased symptoms of *** difficulties. [Jt19.6] *** indicated that Petitioner's placement at *** posed a direct and substantial risk of harm to Petitioner.

4. Respondent's "Child Find" Obligation Was Satisfied on April 22, 2022:

Once Respondent's "child find" obligation was triggered, Respondent immediately started the FIE process. On ***, 2022, Respondent sent consent forms to the Parents for their execution. Respondent began assembling the evaluators and ascertaining the areas of needed evaluation. Between the ***, 2022, incident and the instigation of the FIE, only three weeks had passed.

5. Respondent Did Not Unreasonably Delay the FIE Process:

The incident giving rise to Petitioner's Parents occurred on April 8, 2022. On April 13, 2022, Respondent assigned Petitioner to the ***. Within fourteen days of the ***, 2022, incident, Respondent began the evaluation process. The delay between ***, 2022, or ***, 2022, and ***, 2022 is reasonable.

B.
FAPE Issues:

IDEA defines FAPE as special education and related services that (1) are provided at public expense, (2) meet the standards of the state education agency, (3) include an appropriate preschool, elementary school, or secondary school education in the State involved, and (4) are provided in conformity with an IEP that meets the requirements of 34 C.F.R.§§300.320-324.

1. Petitioner's FAPE Issues are Premature:

In 1997, the Fifth Circuit established a four-factor test to determine whether a school district's IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA: (1) Is the program individualized on the basis of the student's assessment and performance?; (2) Is the program administered in the LRE?; (3) Are the services provided in a coordinated and collaborative manner by the key stakeholders?; and (4) Does the student demonstrate both positive academic and nonacademic benefits? *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.,* 118 F.3d 245, 249 (5th Cir. 1997). These factors were re-affirmed by the Fifth Circuit as appropriate under, and consistent with, *Endrew F. E.R. v. Spring Branch Indep. Sch. Dist*., 909 F.3d 754, 765 (5th Cir. 2018).

The Michael F. analysis presupposes that an IEP has already been developed. That is not the case in this matter.

The SEHO has no information regarding whether Petitioner's program is individualized on the basis of Petitioner's assessment and performance. No program has been developed; at the time of the Hearing Respondent was in the midst of completing the FIE, which was taking longer than anticipated due to

Petitioner's filing of the current Complaint on July 28, 2022. This Complaint contained a request for numerous additional assessments, which in turn meant more time for completion.

The SEHO has no information regarding whether Petitioner's program is administered in the LRE. In fact, Petitioner has enjoyed education in the general education setting where she received *** academic services. Once Petitioner's FIE is completed and her ARDC develops her program and placement, this Michael F. factor can be utilized to determine if Petitioner's placement is in the LRE.

The SEHO has no information regarding whether Petitioner's services are provided in a coordinated and collaborative manner by the key stakeholders. Again, there is no evidence as to how Petitioner's special education services are provided because no special education services have been developed.

The SEHO has no information regarding whether, under Petitioner's special education program, she demonstrates positive academic and nonacademic benefits. To the contrary, the record is replete with evidence of Petitioner's current academic and nonacademic benefits. Petitioner has always maintained excellent grades, even in the *** academic classes. Petitioner likewise continues to demonstrate involvement in extracurricular activities such as the *** and ***, associated with ***. [Jt33.4-5]. In essence, until Petitioner's ARDC develops *** special education program, no academic and nonacademic benefits can be ascertained.

Clearly, Petitioner's FAPE issues were premature.

C.
MANIFEST DETERMINATION REVIEW

Petitioner alleges that the District violated IDEA in failing to conduct a Manifestation Determination Review ("MDR").

IDEA provides that when a district decides to change a disabled student's placement because of a violation of a code of student conduct, the student's ARDC must determine whether the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability, or was the direct result of the district's failure to implement the student's IEP. 20 U.S.C. §1415(k)(1)(E); 34 C.F.R. §300.530(e). If the behavior is determined not to be a manifestation of the student's disability, then the student may be disciplined in the same manner and for the same duration as would apply to children without disabilities. 20 U.S.C. §1415(k)(1)(C); 34 C.F.R. §300.530(c). If the behavior is determined to be a manifestation of the student's disability then, with limited exceptions, the ARDC must either modify any existing BIP or conduct an FBA and develop a BIP. 20 U.S.C. §1415(k)(1)(F); 34 C.F.R. §300.530(f). A child with a disability who is assigned to *** must continue to receive education services to enable the child to continue to participate in the general education curriculum and to make progress on *** goals. 34 C.F.R. §300.530(d). The student must receive, where appropriate, an FBA and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur.

The MDR is an important discipline procedure under the IDEA. It is an evaluation of a student's misconduct to determine whether that conduct is a manifestation of the student's disabilities. It must be

performed within ten (10) school days of the change in placement that stemmed from an IDEA-eligible student's violation of a code of conduct. 34 C.F.R. §300.530(e). [8]

The MDR should be conducted by the district, the parents, and relevant members of the student's ARDC, as determined by the parents and the district. 34 C.F.R. §300.530(c). The MDR must involve a review of all of the relevant information in the student's file, including the student's IEPs, teacher observations, and any other relevant information provided by the parents. 34 C.F.R. §300.530(e). While parents have the right to invite additional participants to the MDR, they do not have the right to veto a district's choice of team members or the MDRC's determination that the student's misconduct is unrelated to his disability. *Fitzgerald v. Fairfax County Sch. Bd*., 50 IDELR 165 (E.D. Va. 2008).

Respondent was not required to conduct an MDR because Petitioner was not eligible for special education and related services at the time of conduct subject to discipline. A student that is not eligible for special education is only entitled to a MDR if the district had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. A district must be deemed to have knowledge if before the behavior occurred 1) parent requested an evaluation of the student for special education; 2) the student's teacher, or other district personnel, expressed specific concerns about a pattern of behavior demonstrated by the student directly to the special education director or to other supervisory personnel of the district; or 3) parent expressed concerns; in writing; to a teacher of the child; and the child is in need of special education and related services. See 34 C.F.R. §300.534.

In this case, the fact pattern does not clearly support the need for an MDR prior to Petitioner's actions and *** placement. However, from the time of the ***, 2022, incident and the subsequent placement of Petitioner at ***, many factors have come into play that create questions as to Petitioner's ***. *** testified that the ***, 2022, incident, when Petitioner ***, appeared to affect Petitioner as *** began demonstrating behavior that would not be typical of a general education student and that, combined with records indicating struggles with ***, could trigger a special education referral. [T1.103.23-25; T1.104.1-10] Ms. Cannefax stated she identified a significant change in Petitioner's *** after ***, 2022, when Petitioner was assigned ***. [T2.260.2-10]

Since ***, 2022, the amount of information garnered by Respondent, Petitioner's Parents, and the evaluators is enormous. Anecdotal incidents and educational assessments have rendered more of an understanding of Petitioner's educational and social needs. Because there is so much information now available for review, the undersigned SEHO orders the Parties to convene an MDR.

[8] A "change of placement" occurs when the district removes the IDEA-eligible student from his current educational placement for more than ten (10) consecutive school days. 34 C.F.R. §300.536.

VI.
CONCLUSIONS OF LAW

1. HISD is a local education agency responsible for complying with IDEA. 20 USC § 1400 *et. seq*.

2. Petitioner bears the burden of proof on all issues raised under IDEA at the due process level. *Schaffer v. Weast,* 546 U.S. 49, 126 S.Ct. 528, 535-537 (2005). IDEA creates a presumption that a school district's decisions made pursuant to the IDEA are appropriate and that the party challenging the decisions bears the burden of proof at all times.

3. Petitioner failed to prove that Respondent violated its "child find." IDEA 34 C.F.R. § 300.111; 19 TEX. ADMIN. CODE § 89.1151 (c).

4. Petitioner failed to prove that Respondent denied Petitioner a FAPE.

5. Petitioner failed to prove that Petitioner was entitled to an MDR.

6. Petitioners failed to prove that the District violated their procedural rights. 34 C.F.R. §300.503 and 34 C.F.R. § 300.504.

VII.
ORDER

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the relief requested by Student is DENIED. It is further

ORDERED that within ten school days from the date of this Decision, Respondent shall convene an MDRC to determine whether Petitioner's ***, 2022, incident of ***, was a manifestation of Petitioner's disability. If it is determined that the behavior was not a manifestation of Petitioner's disability, then Petitioner may be disciplined in the same manner and for the same duration as would apply to children without disabilities. 20 U.S.C. §1415(k)(1)(C); 34 C.F.R. §300.530(c). If the behavior is determined to be a manifestation of Petitioner's disability then, with limited exceptions, the ARDC must either modify any existing BIP or conduct an FBA and develop a BIP. 20 U.S.C. §1415(k)(1)(F); 34 C.F.R. §300.530(f).

SIGNED this the 19th day of September 2022.

/s/
Deborah Heaton McElvaney
Special Education Hearing Officer

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 her written Decision in the Due Process Hearing. 20 U.S.C. §§1415(i)(2) and (3)(A) and 1415(l).

COPIES SENT TO:

VIA EMAIL: Kenneth@cirkielaw.com
Mr. Kenneth Perry
CIRKIEL & ASSOCIATES, P.C.
1901 E. Palm Valley Blvd.
Round Rock, TX 78664
Petitioner's Counsel

VIA EMAIL: jcarroll@wabsa.com
Ms. Jennifer Carroll
WALSH GALLEGOS TREVINO KYLE & ROBINSON, P.C.
105 Decker Court, Ste. 700
Irving, TX. 75062
Respondent's Representatives

VIA EMAIL: john@hardylaw.com
Mr. John C. Hardy
HARDY COOK & HARDY
2080 Three Lakes Parkway
Tyler, Texas 75703
Respondent's General Counsel