DOCKET NO. 027-SE-1020

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

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioners, Student, b/n/f Parent & Parent (collectively referred to as 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) and Notice of Filing of Request for a Request for a Special Education Due Process Hearing was then issued by TEA on October 15, 2020.

There are two broad, primary issues in this case. First, whether the District provided the Student with a free, appropriate public education (hereinafter FAPE), and specifically, whether the District's Full and Individual Evaluation (FIE) was appropriate and if the program and placement proposed for the Student is reasonably calculated to provide the Student with the requisite educational and non-educational benefit, or whether, the Student requires a private placement in order to receive educational and non-educational benefit. The second component of this claim is that, if a private placement is warranted, then whether the proposed placement is appropriate. The second broad issue concerns the District's counterclaim requesting a finding that the FIE of the District is appropriate and that Petitioner is not entitled to an Independent Educational Evaluation (IEE), and for a finding that the Respondent is entitled to attorney's fees on the basis of undue and protracted litigation of this matter.

The hearing officer finds that the District was, and is able, to provide the Student FAPE and therefore consideration of the appropriateness of the unilateral placements is not addressed, and Petitioner is not entitled to reimbursement for the placements. The hearing officer also finds that the District's evaluation was appropriate, and the Petitioner is not entitled to an Independent Educational Evaluation at District expense. The hearing officer also declines to find that this matter was frivolous, unreasonable, without foundation, or for an improper purpose.

II. Procedural History

Petitioners, Student, b/n/f Parent & Parent (collectively referred to as 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) and Notice of Filing of Request for a Special Education Due Process Hearing was then issued by TEA on October 15, 2020. The Respondent to the Complaint is the East Central Independent School District (hereinafter District). The Initial Scheduling Order was issued on October 16, 2020, by then Hearing Officer Sandy Lowe, and on October 28, 2020, Respondent filed a Motion for Continuance. The Order granting the Motion for Continuance, Extension of Due Date and Revised Scheduling Order was then issued on October 28, 2020. Thereafter, on November 3, 2020 the First Pre-Hearing Order was issued and subsequently the same day, an Amended Order was issued.

On December 22, 2020 a Notice of Reassignment of the case to the undersigned Hearing Officer was issued. On January 4, 2021, the parties filed a Joint Motion for Continuance, and, after additional discussions of proposed hearing dates, Order No. 4, the Amended Second Revised Scheduling Order, was issued on January 13, 2021. Subsequently, a Pre-hearing Conference (PHC) was held on February 8, 2021 and due to discovery issues the hearing dates were extended by agreement. Order No. 5, an Order Following the PHC, on Continuance, and Third Revised Scheduling Order, was issued on February 10, 2021. On March 26, 2021, Respondent filed its Motion in Limine and Objections to Petitioner's Exhibit List for Due Process Hearing. Order No. 6, the Partial Order on Respondent's Motion in Limine and Objections to Exhibits was issued on March 28, 2021.

The Due Process Hearing was then held Monday, March 29, Tuesday, March 30, and Wednesday, March 31, 2021. At the close of the hearing, Respondent lodged a Motion to disqualify a witness, and the Petitioner objected. The parties then agreed to

brief the issue, and the parties also requested time for Closing Briefs, and a corresponding extension of the Decision Due Date. Order No. 7, setting forth those timelines and deadlines was issued on April 7, 2021. Thereafter, Order No. 8, setting forth the ruling on the issue of the witness and testimony was issued on May 12, 2021. The Decision Due Date of June 9, 2021 is now met.

A. Representatives

Petitioner was initially represented by Mr. Tomas Ramirez, III of the Law Office of Tomas Ramirez, and the Respondent District was represented by Eric Rodriguez of Walsh, Gallegos, Trevino, Russo & Kyle, P.C.

B. Resolution and Mediation

The parties apparently participated in a resolution session on November 5, 2020. No reported resolution was reached.

C. Continuances

There were several continuances granted in this matter of the PHCs, as well as the DPH dates as noted above to accommodate the parties in discussions and discovery. As noted, the case had been reassigned to this hearing officer on December 22, 2020. Eventually the matter was reset to the end of March 2021, and the hearing was conducted on March 29, 30, and 31, 2021.

D. Preliminary Motions and Discovery Matters

The parties, through mutual agreement, conducted depositions of key witnesses in advance of the hearing. Commissions to take Depositions were also issued when requested. Petitioner and Respondent both filed their respective disclosures in a timely manner. On March 26, 2021, Respondent filed its Motion in Limine and Objections to Petitioner's Exhibit List for Due Process Hearing. Order No. 6, the Partial Order on Respondent's Motion in Limine and Objections to Exhibits was issued on March 28, 2021.

E. Due Process Hearing

The due process hearing (DPH) was conducted on March 29, 30, & 31, 2021 in the offices of the East Central Independent School District. The Petitioner continued to be represented by Mr. Tomas Ramirez, and in addition, the Student's parents, Ms. *** and Mr. *** attended the hearing. Petitioner's designated experts, Ms. *** and Dr. *** also attended the hearing. The Respondent continued to be represented by its legal counsel, Mr. Eric Rodriguez, and Ms. ***, Director of Special Education for the District, attended the hearing as the District representative. Mr. ***, the District's expert also attended the hearing. The hearing was closed to the public, and the Student did not attend the hearing.

F. Post-Hearing Motions

Upon the closing of evidence, but prior to resting, Respondent set forth a Motion to Disqualify Petitioner's Expert, Ms. ***. Petitioner objected, and the parties agreed to brief the issue after receipt of the hearing transcript. Parties also, at that time, requested a continuance for the submission of the Closing Briefs for a time after a ruling on the Objection to Witness ***. Order No. 7, the Amended Scheduling Order Following Due Process Hearing, setting forth the timeline for the briefing of the issue of the Expert Witness and the Continuance of the Time for Closing Briefs and Extension of Decision Due Date, was issued April 7, 2021. Thereafter, and pursuant to the timeline in the Order, the parties filed their respective Motion and Response on the issue of the Expert Witness. Order No. 8, Order on Respondent's Motion to Strike Expert Witness Opinion Testimony was then issued on May 12, 2021. The parties then timely filed their respective Closing Briefs, and this decision is issued in accordance with the Ordered Decision Due Date of June 9, 2021.

III. Issues

A. Petitioner's Issues

Petitioner alleges that the District has denied Student a free, appropriate public education (FAPE), and remains unable to provide a FAPE. Petitioner's allegations consist of the following:

The first primary issue is whether the District failed to provide the Student a FAPE, and whether the District remains unable to do so. More specifically, issues are:

- Whether the District failed to evaluate Student in all areas of suspected disability or need;
- Whether the District failed to provide the Student with an Independent evaluation as requested by the parents;
- Whether the District, when developing Student's Individualized Education Program (hereinafter IEP), failed to consider prior evaluations that the parents had provided to the District;
- Whether the District failed to provide and implement an IEP that is effective and appropriate for the Student's needs;
- Whether the District failed to provide IEP goals for the Student that are measurable or sufficiently tailored to Student's needs;

- Whether the District violated IDEA timelines by the delay of completion and delay of presentation to the parents of the resulted of the District's Full and Individual Evaluation (hereinafter FIE) conducted in 2020;

As a result of the foregoing claims, Petitioner asserts that as the District is unable to provide a FAPE, that private placement is appropriate and necessary.

B. Petitioner's Requested Relief

Petitioner requests findings of IDEA violations and a finding of eligibility of Speech Impairment, ***, and Dyslexia. Petitioner also requested that the hearing officer grant or pay for an Independent Educational Evaluation (hereinafter IEE), and thereafter order an Admissions Review and Dismissal (hereinafter ARD) meeting to design an IEP that is individualized to meet the unique needs of the Student, with measurable goals and objectives. Petitioner also requests that the District pay for future compensatory and related services for Student; that the District reimburse the parents for past expenses; and that the District pay for private placement at District or public expense for school year 2021-2022.

C. Respondent's Issues and Legal Position

Respondent District generally denies all allegations, and contends that all services, including the 2020 FIE and the subsequent Student's IEP were, and are, appropriate and reasonably calculated to provide Student a FAPE.

D. Respondent's Counterclaim

Respondent also presented a counterclaim, requesting a finding that the District's Evaluation, the FIE, was appropriate and that Petitioner is not entitled to an IEE at District expense. Respondent also, in its closing brief, requested a finding supporting a claim that this litigation was brought as unreasonable and for the purposes of harassment, and to delay proceedings and increase cost. Respondent requests its attorneys' fees.

E. Statute of Limitations

As part of its Response, as well as in its Motion in Limine, Respondent raised the affirmative defense of the statute of limitations. By agreement, as well as an Order of the hearing officer, for consideration in this DPH are claims and issues arising from the 2020 evaluation and subsequent IEP. While some of the testimony and exhibits relate to the student's attendance, education, evaluations, and services prior to that time, they were provided, were discussed, and are to be considered only in the context of background and basis for understanding the events preceding this matter that led to the current issues in dispute.

IV. Findings of Fact*

1. Student is currently *** years old, whose age-equivalent grade would be *** grade for the academic year 2020-2021. Student's permanent residence is with Student's parents within the jurisdictional boundaries of the East Central Independent School District (District).[1]

2. Student, at the time of the hearing, was attending school at ***, sometimes referred to as a home school. The cost is paid by the parents, and the Student is not receiving any related services. [2]

3. As a ***, and Student's parents took Student for evaluation.[3] At an early age, while residing in the ***, Texas area, Student was evaluated by ***, and thereafter received services of Occupational Therapy (OT) and Physical therapy (PT), and speech therapy at the Center. Student received those services for several months until the family moved to the San Antonio area.[4]

4. In 2013, the family moved to the San Antonio area, and Student enrolled in the East Central Independent School District.[5] Student initially attended what was *** for the 2014-2015 school year. Student's parent requested an evaluation when Student was ***, specifically on December ***, 2014.[6]

5. Additionally, a number of Response to Intervention (RTI) meetings were held from 2014 to 2015, where the behavior of the Student was discussed. Some interventions such as working on social skills, and learning *** were noted to be implemented for the Student.[7]

6. Thereafter, the District conducted a Full Individual Evaluation (FIE) of the Student in 2015.[8] At that time, Student was found eligible for special education and

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* References to the Due Process Hearing Record throughout this section are as follows: Citations to Petitioner's Exhibits and Respondent's Exhibits are designated with a notation of "P" or "R" respectively, followed by the exhibit number or letter and page number. Citations to Joint Exhibits are designated with a notation of "J", and followed by the exhibit number and page number. Citations to the transcript are designated with a notation of "T" followed by the page number.

[1] T. 40-41,54.

[2] T. 88-89;249-250; 446, 452, 454.

[3] T. 144.

[4] P. 5; T.47, 49, 145.

[5] T. 65.

[6] J. 6; P.14.

[7] J. 1, 2, 3, 4, 6.

[8] J. 6; T. 67

related services as a Student with a Speech Impairment. [9] Student also qualified for physical therapy (PT), and occupational therapy (OT) to address ***. The initial ARD was held on May ***, 2015 and goals were set in accordance with the evaluations, with Student in general education with related services in PT, OT, and speech along with in-class support for English Language Arts, and Math .[10]

7. In early 2016, when the Student was in *** grade at *** in the District, an IEE was conducted by Assessment Intervention Management (AIM). Regarding speech, the evaluation found significant receptive and expressive disorder, and severe articulation disorder. There were also a number of findings related to cognitive processing and a finding that due to a non-normal cognitive profile, Student did not meet eligibility criteria for a learning disability. The evaluation also noted that Student's behavior was typical of Attention Deficit Hyperactivity Disorder (hereinafter ADHD). [11]

8. The District provided parents a Prior Written Notice on July ***, 2016 reflecting the multiple ARD meetings held to consider eligibility in the area of learning disability. While it was found that Student met characteristics of dyslexia, due to the lack of a normative cognitive profile, Student did not meet criteria for a specific learning disability. However, some dyslexia intervention and instruction was proposed, as was Extended School Year (hereinafter ESY) services in the area of dyslexia instruction, which Student received.[12]

9. An Evaluation from Dr. ***, dated September ***, 2016, found that the Student had *** impacting ***. He further noted that the Student had evidence of speech ***. He noted that dyslexia had been reported. He also recommended speech therapy, as well as both occupational and physical therapies. [13]

10. Due to the existence of several evaluations to consider whether the Student was dyslexic, then District employee *** reviewed three previous evaluations in order to synthesize them. In a report dated April ***, 2016, she concluded that Student met characteristics of dyslexia,[14] but there was no finding of a learning disability.[15] Ms. *** then testified that although her work was not an evaluation, but rather a compilation of prior data, she concluded the Student was dyslexic.[16]

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[9] J. 36.
[10] J. 5.
[11] J. 40.
[12] J. 15; T. 201, .605.
[13] J. 42.
[14] J.41; T. 505.
[15] T.199.
[16] T. 505.

11. During the following school year, an ARD was held on October ***, 2016. At that time, it appeared that the Student was unilaterally enrolled in ***.[17] Other testimony, however, noted that the Student left the District in 2017 when Student ***.[18]

12. Over the years, the parents received assistance from the individuals noted to be Petitioner's experts at this due process hearing, namely *** and Dr. ***. Mr. ***, Student's father, even noted that they (the ***) are ***.[19]

13. In 2017, parents filed a request for a special education due process hearing and had unilaterally placed the Student in a private school setting. The parties participated in mediation in July 2017, and through the mediation process the District and Student's family reached a settlement agreement. Pursuant to the agreement, the District paid for private placement at ***.[20] The District also provided parents with a monthly sum to access additional services for the Student.[21]

14. As part of that settlement agreement, the parents agreed to withdraw the Student from the District and agreed specifically that there was no expectation of any services from the District unless and until Student was re-enrolled in the District. The agreement also included a provision noting that upon reenrollment, the District could take any action pursuant to the IDEA concerning initial evaluation of students suspected of having a disability.[22] The parent also signed an affidavit each month stating that there was no expectation of FAPE or an IEP from the District as long as the Student is in private school.[23]

15. Dr. *** conducted a neuropsychological evaluation that was completed in early 2018. As part of the evaluation, Dr. *** reported findings of notable deficiencies in verbal cognitive abilities, cognitive deficiencies in auditory processing and analysis, ***, and deficiencies in receptive and expressive language. [24]

16. Dr. ***'s report also noted some difficulty with a reported prior diagnosis of dyslexia, as Student's showed weaknesses across all academic domains, and "demonstrated a pattern of poor effort and low interest." Additionally, Dr. *** reported the issues of inattention and distractibility during testing, as well as a

[17] J. 17: 34; T. 202.
[18] T. 150-151.
[19] T. 132-133.
[20] R.2:2-3.
[21] R.2; T. 129.
[22] R.2.
[23] R.3.
[24] P. 8.

concern with the Student's work ethic and a lack of motivation. Dr. *** also recommended additional evaluation for ADHD, as he noted that the Student demonstrated characteristics consistent with such a diagnosis. [25] This report, that appears to have been completed in May 2018, was not provided to the District until the ostensible REED meeting held in August 2019. [26]

17. In 2018, although pursuant to the settlement agreement Student was attending *** at District expense and the parents agreed that the District would not provide services, parent contacted the District to request additional services and / or funding for the Student. Specifically, on May ***, 2018, a request for mediation was faxed to the District by Ms. ***, apparently on the parent's behalf. [27]

18. Further in 2019, while nearing the end of the duration of the settlement agreement, the parents contacted the District to request placement at *** at District expense, or in the alternative at ***.[28] Although the request for a private placement was made, the parents also asked for an IEP to be in place for the Student prior to the beginning of school.[29] During the time, numerous emails between the parents, their advocates and the District occurred and as a result, Ms. ***, Director of Special Education for the District invited the parents to meet.[30]

19. The discussions and requests concerning services then culminated in a meeting on August ***, 2019, where the parents requested a reconsideration of eligibility and to have an educational plan in place.[31] Confusion existed, however, as to the purpose of the meeting, where some participants stated it was to be a Review of Existing Evaluation Data (REED) and others believed that it was to be a more general meeting with the parents (and their advocates). [32] Even the testimony was unclear as to the purpose of the meeting.[33]

20. Testimony indicated that all, or most, of the prior information and evaluations of the Student submitted by the parents was considered at the time of the REED. Specifically, at the meeting, parents and their advocates submitted a comprehensive data review.[34] At that time, the parents also submitted Dr. ***'s

[25] P.8: 10-11.
[26] T. 223-224.
[27] R. 5. T.211-212.
[28] R.10.
[29] R.12.
[30] R. 16.
[31] T.218-220.
[32] P2:3; T.79.
[33] T. 293-295; 365-367.
[34] P.3; T. 156-157.

report that they stated was just received on August ***, 2019;[35] the report, however, appears to be complete as of May 2018.[36]

21. Subsequent to the meeting, Student's mother signed the consent form for a FIE, dated August ***, 2019, noting however, on one part of the handwritten notes she was giving consent for an FIE, as long as all other data were considered. In the same phrase, however, she then specified that the consent was to be for a REED. Further, in an email dated August ***, 2019 transmitting the signed document to Ms. ***, the Student's mother noted that the consent provided was to be for a REED. [37]

22. The District did not accept the consent signed by parent as that for an FIE, as there was additional handwriting which appeared to instruct the District to consider all prior information, and the parent labeled the consent as that for a REED, rather than the FIE.[38]

23. The District determined that the needed evaluation was to be a FIE as the District considered the Student no longer eligible for Special Education due to Student's absence from the District and the parents' signed agreement and affidavits that revoked consent for special education and related services.[39]

24. No evaluation was conducted by the District subsequent to the submission of the consent form for the REED or throughout the fall of 2019, although the District made attempts to meet with the Student's mother.[40] Petitioner filed a Request for a Due Process Hearing in September, 2019.[41] The District offered to meet with the parent, but received no response. As no further consent was provided to the District for the evaluation, the District then filed a Request for Due Process hearing in order to override the need for consent. That complaint was filed on February 10, 2020.[42]

25. The parties were able to reach a resolution to the pending hearings, whereby the parent signed another consent for the evaluation and the District agreed to conduct same. As the District's view was that the Student, pursuant to the mediated settlement agreement, was no longer eligible for special education and

[35] R. 17.
[36] P. 8.
[37] R.20; T.229.
[38] R.02:1,8; T. 230-231; 305-306.
[39] R. 2.
[40] R.21; T.233.
[41] R. 23.
[42] R.25.

related services, the District proceeded with a Full Individual Evaluation (FIE), that began in February 2020.[43]

26. Generally, testimony and the IEP indicate that the evaluation, the FIE, was started on or about February ***, 2020. At that time, a number of evaluators were involved as part of the multi-disciplinary team assigned to conduct the evaluation.[44]

27. The evaluation was administered in all areas of suspected disability including Speech Impairment, Specific Learning Disability, Other Health Impairment, and other related areas such as Dyslexia, Physical Therapy, Adaptive Physical Education, and Occupational Therapy. Ms. ***, the District's Licensed Specialist in School Psychology (hereinafter LSSP) served as a primary evaluator for the process. As noted, other members of the multi-disciplinary team were the District's Speech Language Pathologist, the Dyslexia Specialist, the Physical Therapist, and the Occupational Therapist. [45]

28. Numerous testing methods were utilized, including actual testing or assessment instruments, physical evaluations, parent and teacher rating scales, interviews, and observations.[46]

29. The evaluation included assessments regarding whether the Student had a specific learning disability [47] Dr. *** administered several tests, reviewed the prior assessment by Dr. ***, and conduced teacher interviews, collected parent and teacher rating forms, and participated in a classroom observation. Based upon all of the data, she concluded that Student did not meet the criteria for a specific learning disability.[48]

30. During the assessment process, some evaluators had a concern about the Student's attention and reached a tentative opinion that Student may have Attention Deficit Hyperactive Disorder (ADHD). A physician form was sent to presumably Student's doctors as necessary for Other Health Impairment (OHI) eligibilities. [49] Two separate forms were returned. [50] As a result of this consideration, there is some confusion about this eligibility, as the evaluation and

[43] J. 45; T. 377.

[44] J.45:1-2; T. 377.

[45] J.45: 1-2.

[46] J.45:1-2.

[47] J. 45:62-63; T.794, 803.

[48] J. 45:63; T. 803.

[49] P.13; T. 384-385.

[50] P.13.

the subsequent IEP show OHI as ADHD, although a specific physician's diagnosis is not present.[51]

31. The responses from the physicians who were contacted to provide support for the medical diagnosis of ADHD did not support a diagnosis of ADHD. In fact two separate physician responses were received, and provided conflicting data.[52]

32. Dr. ***'s health form, signed March ***, 2020, was provided by fax to the District on or about the *** of March 2020. Dr. *** noted that the health impairment to be *** delays. He also noted, however that the student has limited ***, but did not include explanations.[53]

33. Another form was also returned to the District by fax on April ***, 2020. This form appears to be from the same fax number. On that form, Dr. (unintelligible – perhaps ***,) noted the health problems to be Dyslexia, ***, Receptive and Expressive Language Disorder, and ***. The physician went on to note that the student has limited *** and explained. The box was checked no as to limited ***, and an additional note indicated that the Student needs frequent redirection due to poor attention span.[54] No evidence was presented of this physician's qualifications to assess non-health related disabilities or learning disabilities. Additionally, there was no evidence of an examination of the Student by this physician to ascertain such learning disabilities.

34. Although neither of the physician forms confirmed a finding of ADHD, the FIE, and subsequent IEP, continued to include that finding.[55]

35. The speech evaluation consisted of several components, and examined abilities including expressive and receptive language, and articulation, and fluency. It was based on observation, feedback, and formal testing.[56] The finding was that the Student qualified in terms of expressive language and articulation.[57] Thereafter, and as part of Student's IEP, goals were set forth that address such deficits. Testimony also established that the primary disagreement at the September 2020 ARDs with the IEP was the failure to include the eligibility of SLD.[58]

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[51] J. 45. T.87-388.

[52] P.13.

[53] P.13:3.

[54] P.13:2.

[55] J.45:J.34; T. 382.

[56] J.45:3-18.

[57] J.45:16-18.

[58] J. 34:34;T. 777; 800,900.

36. As part of the evaluation, another assessment was completed regarding the Student's fine motor skills, and in particular ***. It was found that the Student demonstrated an educational need for OT services.[59]

37. In terms of the *** assessment, such was conducted by Ms. ***, a physical therapist who had worked with the Student in the past.[60] Her evaluation determined that the Student qualified for school-based physical therapy as well as ***.[61]

38. Regarding the dyslexia evaluation, testimony demonstrated that although the scores were low, the evaluator attributed some of the Student's scores to Student's inability to stay on task as well as overall low scores on cognitive achievement.[62] ***, the District's dyslexia specialist, also noted that such scores were not unexpected in relation to the Student's overall cognitive abilities.[63]

39. During the evaluation, assessors also noticed characteristics of autism and proceeded with beginning an Autism evaluation, by requesting rating scales from both Student's teacher and parent. Based on the results of those scales, they then intended to do an in-person assessment, the ADOS, but then the Covid pandemic occurred.[64]

40. Credible evidence demonstrated that over the last three academic years, the highest grade level curriculum and material that the Student was exposed to was that of a ***-grade level.[65] Testimony indicated that this lack of educational opportunity was another factor that could impact the Student's low scores.[66]

41. There was some conflicting testimony about whether prior information and evaluations were considered as part of the 2020 FIE.[67]

42. Testimony about the completion of the evaluation was conflicting and confusing. On one hand, the FIE itself demonstrates a completion date of March ***, 2020, and some testimony confirmed that.[68] Yet, the very next day the District sent the parents a prior written notice that stated that the FIE was not complete, and that

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[59] J. 45: 21-24; 64.

[60] T. 248.

[61] J. 45:20-21.

[62] T.558-559.

[63] T. 547.

[64] J. 45; T.265.

[65] J.45:62-63; T.446, 455, 547, 549.

[66] T. 477-478.

[67] T. 387.

[68] J.34; T.373-374.

the District needed to wait until a time when it could do the in-person component of the autism assessment, having considered, and declined, remote options. The correspondence also stated that the District was still actively working on those portions that did not require in-person meetings.[69]

43. While the District postponed conducting the in-person component of the evaluation, testimony showed that some considerations of doing so remotely or with protective measures in place occurred. However, the District declined to do so, citing the instructions from the producer of the assessment did not permit such an approach.[70] Other evidence, however, suggests that conducting the evaluation by remote access was not prohibited. Testimony also demonstrated that the evaluation could be completed via remote access such as through Zoom platform. Evidence also indicated that other school districts within the same geographical area did conduct testing and evaluation by Zoom or other remote means.[71]

44. As the evaluation was ongoing, the Covid-19 pandemic occurred and schools were closed. In fact, pursuant to a Governor's order, all schools remained closed to in-person attendance through April 3, 2020, and thereafter throughout the remaining school year.[72] Instruction and some related services, and other business of the District, however, continued to be provided through online efforts.[73]

45. Testimony indicated that the parents attempted to obtain the results of the FIE, but were unable to do so. Specifically, many emails between the Student's mother and Ms. *** occurred during April, 2020 demonstrating the parents' request to receive the results of the evaluation (sometimes in the correspondence called a REED).[74] The District, however held off providing any information, pending completion of the in-person component of the autism evaluation.[75]

46. At some point in time, the parents withdrew their consent for the autism portion of the FIE. The timing of such is not clear, although it appears to be at the September ***, 2020 ARD meeting.[76]

47. Dr. ***, Petitioner's expert, testified that the services based upon the completed parts of the evaluation should have been provided for the Student, before the

[69] R. 26.
[70] T.310-312.
[71] T. 873-874.
[72] R.26:1.
[73] T.309.
[74] P.19.
[75] R.19:6; T. 262-263.
[76] J.34:34; T.117.

completion of the autism portion.[77] He also noted that the Student had many characteristics that demonstrated that Student was not a child with autism.[78]

48. Dr. *** also testified that he disagreed with some of Dr. ***'s analysis in terms of the impact of the cognitive abilities of the Student on the assessment of other disabilities or eligibilities.[79] Dr. *** asserted that the evaluators misrepresented the child.[80] Dr. *** also contended that the OHI of ADHD should not have been included in the conclusions as there was insufficient evidence for an ADHD finding.[81]

49. On August ***, 2020, a meeting, originally thought to be an ARD as the invitation was for an ARD meeting, was held.[82] A discussion and review of the findings of the FIE took place. At that time, a review of the FIE was conducted with the Student's mother and her advocate, Ms. ***. The parents disagreed with the evaluation because it lacked a finding of a learning disability, and specifically dyslexia.[83]

50. After the meeting in August 2020, an ARD committee meeting was held on September ***, 2020. Student's parents, along with their advocates *** and Dr. ***, attended the meeting. As part of the meeting, it appears that the District proposed eligibility for special education and related services as OHI: ADHD, and Speech Impairment.[84] The Student's proposed IEP was review at the meeting.

51. While testimony from the District indicated that an IEP for the Student was not in place at the time of the first day of school in the District,[85] other evidence demonstrated that, since ARDs were convened, that an IEP was likely available. Further testimony indicates that the IEP was reviewed at both the September ***, 2020 meeting and the subsequent September ***, 2020 meeting.

52. The goals set forth in the Student's IEP were derived from the FIE, as noted by the documents in evidence and the witnesses.[86]

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[77] T.860.
[78] T.861-862.
[79] T.866-867.
[80] T. 869.
[81] T. 855-857.
[82] J. 31.
[83] J. 31; T.621.
[84] J.34.
[85] T. 314.
[86] J.34.

53. Several of the IEP goals were reviewed, and in most instances found to be objective and measurable as they were set out in the Student's IEP.[87]

54. A few of the goals, however, were less than clear. Testimony revealed that some confusion or misunderstanding about what specifically was expected from the student resulted from the way the goals were written. For example, the PT and *** goal was unclear as to what was expected of the student.[88]

55. Taken in its entirety, the IEP demonstrates appropriateness for the Student. The IEP addresses the Student's disabilities and provides education and related services specifically designed for the Student. Further, the District proposed a co-teach model for most of the Student's classes. This approach allows the student to receive instruction in the general education classroom while simultaneously receiving instruction from a special education teacher.[89]

56. Testimony indicated that the parents as well as their experts, and in particular Dr. *** were in agreement with several of the goals and services in the Student's IEP, except for the finding of ADHD and the lack of a dyslexia finding.[90] At no time did the parents or their advocates submit proposed written changes for the IEP.[91]

57. The September ***, 2020 ARD meeting ended in disagreement and another was scheduled for September ***, 2020. The second meeting was also attended by the parents and their representatives, the ***.[92]

58. At the September ***, 2020 meeting, when the parents requested services for reading and dyslexia type services, the District did not decline to provide such. Rather, the response was that the District would identify an appropriate program once the student is enrolled in the District.[93]

59. At the time of the September ***, 2020 meeting, the parents explicitly expressed that they had no intention of the Student returning to, or enrolling in, the District.[94] At the time of the due process hearing, the father also confirmed that the parents had no intent of returning the Student to the District.[95]

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[87] J.34.

[88] J. 34; T. 810, 970.

[89] T.768-770.

[90] T. 776-777.

[91] T.633-635; 777.

[92] J. 34.

[93] J.34:33; T. 740.

[94] J.34.

[95] T.87, 124.

60. This Request for Due Process Hearing was filed October 15, 2020.

V. Discussion

The following discussion reviews the legal standards that govern the considerations and issues brought forward in this case.

A. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Tood L.*, 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 224, 292 n.4 (5th Cir. 2009).

In terms of the application of the 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. As a result, the burden of proof is clearly placed on the Petitioner to prove that the IEP at issue was not reasonably calculated to enable the student to make educational progress given the student's unique, individual circumstances.

B. Duty to Provide FAPE

The primary purpose of the IDEA is to ensure that all children with disabilities have available a free, appropriate public education (FAPE) that emphasizes special education as well as related services, and that the services are designed to meet the unique needs of that student. Under the IDEA, school districts have a duty to provide a FAPE to all children with disabilities residing in the jurisdictional boundaries of the district between the ages of three and twenty-one. 34 C.F.R. §300.101(a). When an action is brought pursuant to the IDEA, challenging the appropriateness of an IEP, the inquiry for analysis is two-fold. The first consideration is whether the school district in question complied with the procedural requirements of the IDEA; and second, did the district design and implement a program reasonably calculated to enable the child to receive educational benefit. *Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, (1982).

Additionally, and more specifically, a free, appropriate public education is special education, related services and specially designed personalized instruction with sufficient

support services to meet the unique needs of the child in order that the student receives an educational benefit. The instruction and services must be provided at public expense and comport with the child IEP. 20 USC 1401(9); *Rowley*. 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 unique circumstances. The adequacy or sufficiency of a given IEP turns on the unique circumstances of the student for whom it was created. *Endrew F. v. Douglas Cnty. Sch. Dist.,* 137 S. Ct. 988 (2017). The Supreme Court also held that IDEA cannot promise any particular outcome. Id. at 998.

The Fifth Circuit has developed the components for the determination of FAPE. These four factors must be assessed in order to determine whether the IEP in issue, as developed and implemented, was reasonably calculated to provide the student 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 F3d 245, 253 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 690 (1998). There is no requirement that these four factors are considered in any particular order or that a particular weight be given each in any way. *Richardson Ind. Sch. Dist. v. Michael Z.,* 580 F. 3d 286, 293 (5th Cir. 2009). In terms of any standards of IEP appropriateness, the considerations require examination of both the underlying evaluations that was used to formulate the IEP as well as the content of the IEP itself.

Additionally, 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* at 380. The deference is given to the 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.*

With regard to issues of the failure to provide FAPE as a result of procedural violations of the IDEA, 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 denied parents the opportunity or ability

to participate in the child's education, or caused a deprivation of educational benefit, then those violations could be considered a denial of FAPE. 34 C.F.R. **§**300.513(a)(2); *Rowley*.

Procedural requirements under the IDEA consist of the following timelines: time from consent for the FIE until the completion of the evaluation; time from evaluation completion to a meeting to develop and craft the IEP; and a timing requirement for a student's IEP to be in place. Under the IDEA, a school district must complete an evaluation of a student within 60 days from the time of parental consent. *See* 34 C.F.R. **§**300.301 (c)(1)(i). Texas law, however, modifies that time, and provides that the evaluation shall be complete within 45 school days from the time of consent. TEX. ADMIN. CODE §89.1011(c). Further, the IEP team (in Texas, the Admission, Review and Dismissal [ARD] committee) must hold a meeting within 30 days of the evaluation's completion. 34 C.F.R. § 300.323 (c); TEX. ADMIN. CODE §89.1011(d). The significance of these timelines and deadlines is to help assure that students are able to have the needed education and services available in a timely fashion.

C. Private Placement

A student is entitled to reimbursement for a unilateral private placement or to be placed in a private school in those instances where it is demonstrated that the school district's program does not provide the student with FAPE. Where tuition reimbursement is sought after a parent's unilateral placement, case law provides that at least three factors are to be considered, in what is often referred to as the three prongs of the Burlington-Carter test. See *Sch. Comm. of Burlington v. Mass. Dept. of Educ.,* 471 U.S. 359 (1985); *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). These factors are as follows: whether the district provided a student a FAPE; if the district failed to provide FAPE, then whether the private placement chosen by the parent is appropriate; and a consideration of the equities in requiring a district to pay for a unilateral placement for the student. *Id*. The private placement need not meet all state requirements for reimbursement purposes as long as the private placement meets the student's individualized needs and therefore is appropriate. *Id. at.*13,15.

Alternatively, if the Student's IEP in the local public school district was appropriate, then there is no need to inquire further as to the appropriateness of any other program or placement.

D. Considerations of Counterclaim of the LEA

In those cases where 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. Conversely, school districts may also bring forth legal proceedings in the form of a request for a due process hearing in order to establish the appropriateness of its evaluation at issue, and thereby deny the request for an IEE. 34 C.F.R. §300.502 (b)(2)(i). The IDEA specifies the evaluation procedures for conducting an FIE to determine a student's eligibility and need for special education and related services. 34 C.F.R. §300.301(a).

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 information. If the student is found eligible for special education and related services, the information obtained then informs the content of the student's IEP. The IDEA also prohibits any single measure or assessment as the sole criterion for the determination of whether the student meets the definition of a "child with a disability" or in crafting an appropriate educational program for the student. 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 school district must also ensure that the assessments and other evaluation materials and methods are not discriminatory on a racial or cultural basis; are provided and administered in the student's native language or other mode of communication; and be in a form most likely to yield accurate information on what the student knows and can do. Additionally, are used for the purposes for which the assessments and measures are valid and reliable; are administered by trained and knowledgeable personnel; and are administered in accordance with the instructions provided by the producer of the assessments. 34 C.F.R §300.304 (c) (1).

Further, the student must be evaluated in all areas of suspected disability. The evaluation must also be sufficiently comprehensive so to identify all the student's special education and related services needs. The tools must also provide relevant information that assists in determining the needs of the student. 34 C.F.R §300.304 (c) (4) (6) (7). IDEA provisions also require that the ARD committee review existing evaluation data. Once the evaluation process had been completed, the ARD committee must convene and determine the student's eligibility and need for special education and related services. 34 C.F.R §300.306; 19 TEX. ADMIN. CODE §89.1011.19(d). Additionally, a parent is entitled to an IEE at school district expense if the parent disagrees with the school district's evaluation. 34 C.F.R §300.502. A school district, however, can challenge the parent's right

to the IEE at district expense by filing a due process request to demonstrate that its evaluation is appropriate. If the district meets its burden on that issue, while the parents are still entitled to obtain an IEE, they do so at their own expense. 34 C.F.R §300.502 (b).

E. Issues of Protracted Litigation

The IDEA also contains provisions that address the claims for attorneys' fees by a prevailing party, including a LEA. Specifically, and as noted, 34 C.F.R. §300.517 (a) provides that attorneys' fees can be awarded to the prevailing LEA and against the attorney for a parent who files a complaint that is frivolous, unreasonable, or without foundation. It also notes that attorneys' fees can be awarded if it is found that the matter was brought to harass or delay litigation resolution.

VI. Analysis

In this case, Petitioner brings forth issues and alleges both procedural and substantive violations of the IDEA. In examining this matter, the exhibits in evidence and the testimony of the witnesses, the issues surround the appropriateness of the FIE and the subsequent IEP that was then designed for the Student.

A. The Evaluation and Assessment: Procedural Issues

The initial issue deals with the evaluation, in terms of the procedurally required timelines. The second matter concerns the more substantive issues of the adequacy of the FIE, and is addressed within the section addressing the District's counterclaim.

Consideration of the allegation of a denial of FAPE based upon procedural violations of the IDEA depends upon timelines and deadlines that are examined in this case. First, the FIE was not completed timely, or at the very least a great deal of confusion existed about its completion. In one view, the evaluation was complete, but the District failed to have the ARD timely. In this case, it was complete on March ***, 2020, then the District was in compliance with both the IDEA and the Texas statute providing that an evaluation must be completed within 45 school days from the time of consent. The other competing view is that the evaluation was not complete until September 2020. In either view, some deadline was violated. Further, evidence is inconsistent as to whether the District had an IEP in place on the first day of school as necessitated by IDEA. The evidence did show that some of the timelines of the IDEA regarding evaluation and the existence of an IEP were not met by the District.

However, the Student at no time has been enrolled in the District, and in fact the parents have made it clear that they do not intend to enroll Student. Therefore, any established delay is de minimis, particularly in light of the fact that the evidence was clear that the parents had, and still have, no intent on enrolling the Student in the District. In order for a procedural violation to rise to the level of a denial of FAPE, such violation must impede the Student's right to FAPE; impede parental participation; or cause educational deprivation. 34 C.F.R. § 300.513 (a)(2). In this instance, evidence did not establish that the procedural violations of the IDEA resulted in any deprivation of education or impeded the student's right to FAPE or the parental participation. Evidence demonstrated that, at the very latest, an IEP was ready for implementation in early September, 2020, and the reason that it was not implemented was that the Student was not enrolled.

Another of the Petitioner's alleged procedural violation was that of the Texas Education Code. Specifically, it was noted that TEX. ED. CODE § 38.003 prohibits a school district from re-evaluating a student once it has been determined that Student is dyslexic. Taking judicial notice of the complete statutory provision, it states that a 'student determined to have dyslexia during screening or testing… or accommodated because of dyslexia may not be rescreened or retested for dyslexia until the district re-evaluates the information from the previous screening or testing'. In this instance, based upon the evidence presented, it appears that the District reviewed that prior information at the REED held in August 2019.

Petitioner also asserts the failure to consider all of the submitted information as a violation of the IDEA, and as an example included the OHI forms submitted. However, the forms were not only contradictory in part, even though having originated from the same office, ***, but also included matters such as learning disabilities. Such matters are not considered as OHI, as set forth in the Commissioner's Rules Concerning Special Education Services. §89.AA.7. Thus, while the evidence showed that the District likely did not consider these reports when concluding the FIE, any impact on the FIE or the IEP was minimal.

B. The IEPs

In this case, Petitioner raises issues with regard to the timeliness of the proposed IEP, as well and the substance of its provisions. As noted, the IDEA provides that an IEP be in place on the first day of school. What is problematic, however, is that at no time during the events at issue in this case, was the Student enrolled in the District. Although the IEP may not have been in place at the time school started, it was in place in September. The issue then was the disagreement with some of the services by the parents, and their failure to enroll the Student. In fact, it is unequivocal that the parents had no intent to

enroll the Student in the District and reaffirmed that position at the hearing. Therefore, if the District committed a technical violation of this provision, no harm or FAPE denial was possible as the Student was not available to receive educational and related services, as Student was not enrolled. Further, even if the parents changed their minds, and assuming that could be the case, then the next consideration is an examination of the IEP that was proposed at the time of the September *** and ***, 2020 ARD meetings.

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. *Cyprus-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). In examining whether the IEP in question provides a program that provides the Student FAPE, the four components should be reviewed. This substantive consideration of the provision of FAPE, in conducting the *Michael F.* analysis, establishes that the IEP developed by the District for school year 2020-2021, along with any amendments, was reasonably calculated to provide Student a meaningful educational benefit under the IDEA. As noted, four discreet issues are to be analyzed in determining whether the school district's program meets the requirements for FAPE.

Factor I: Was the Program Individualized Based on Student's Assessments and Performance?

The student had not been enrolled in the District since sometime in 2016, and therefore its own data in terms of present levels was somewhat limited. The District, however did conduct an FIE and obtained some information from the two placements where Student had been since Student left the District.

The subject IEP was developed after the evaluation, and included those goals deemed to be appropriate for the Student based on the available information. The program was individualized for this Student based upon the information and data that the District personnel gathered and considered. The IEP addresses the Student's areas of disability and states sufficiently objective and measurable goals. Although some of the goals could be more specific and detailed, such shortcomings do not sufficiently interfere or impede the ability of the IEP to afford the Student a FAPE, with a program designed to enable the Student to make progress, in light of Student's circumstances.

Once the student is in the District, it is anticipated that modifications to the IEP will be made, as IEPs are often modified as additional information and data become available. The evidence demonstrated that the IEP at issue includes the Student's current levels, goals, and educational and related services. In addition, the evidence also established that, while not explicitly included in the Student's current IEP, that the District

was willing to consider a reading program once the Student was enrolled in the District. The evidence demonstrated, however, that the Student will not be so enrolled. Thus, the credible evidence showed that the IEP was, in fact, reasonably calculated to provide the Student a FAPE. At set forth in the preceding pages, the IEP took into consideration the complete evaluation through the FIE process, and further considered the input of the parents along with their advocates.

1. Academics

The goals set forth in the IEP were based upon the FIE conducted by the District as well as input from Student's current teacher. As the evidence was clear that the student has been exposed to only material at the ***-grade level, the proposed goals were drafted to meet Student at Student's level. A co-teach model of educational services was proposed, and is included in the IEP. The Student can then be in the general education classroom, while at the same time, receive additional instruction from a special education teacher.

2. Related Services

The District's IEP includes the related services of speech, OT, and PT. An IEP need not provide every service that the student had been receiving elsewhere, where the district's own evaluation does not demonstrate a need for those services. The services offered in the IEPs are sufficient related services, based again on the information they gathered from the FIE conducted in 2020; as such, they are designed to provide the Student with both educational and non-educational benefit based upon Student's unique needs.

3. Behavioral Matters

While some concerns have been raised both historically, and in the evaluation in question, the 2020 FIE, about the student's inattentiveness and distractibility, it was noted that the parents refused to consent to allow the District to conduct a Functional Behavior Assessment. (FBA) Thus, although some of the provisions in the IEP do address implementing actions to assist the Student and it is suggested that a Behavioral Intervention Plan (BIP) could be helpful, consent for an FBA was not provided. As a consequence, no BIP was developed or put in place to address any behavioral challenges of the Student. The District did however demonstrate its willingness to provide both the FBA and a BIP, and specific provisions regarding strategies to address the Student's behavioral challenges are included in the IEP.

Factor II: <u>Was the Program Delivered in the Least Restrictive Environment</u>

Certainly, the law is clear that a student's IEP must be administered in the least restrictive environment (LRE). This means that the District is required to educate Student with others who are nondisabled to the maximum extent that is appropriate. 34 C.F.R. §300.114 (a)(2). It has been emphasized by the courts that students be integrated into the regular classroom. *Endrew F.* at 1000. The LRE requirement is a key component of an appropriate placement under the IDEA. The evidence showed that the District is committed to ensuring that the Student is placed in a general education classroom, while at the same time receiving education and support from a special education teacher. This is noted to be a co-teach arrangement and assures that the Student is provided what is needed in terms of additional educational support while remaining in a general education setting.

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

This factor requires that the educational program be developed by the key stakeholders, and done so in a coordinated and collaborative fashion. The District made significant effort to involve the parents on numerous occasions, and included the parents' advocates and advisors in all meetings. The evidence showed that the parents' advocates had a major role in all of the ARDs held over the last several years, with the District taking into account many of their recommendations and requests. And as noted, parental participation does not rise to the level of dictating the contents of the IEP. *White, supra*.

Factor IV. Did the Student Demonstrate Positive Academic and Non-academic Benefits

This factor is difficult to ascertain, as the IEP has yet to be implemented. No ability currently exists to assess if any benefit has been demonstrated as the student remains unilaterally placed. The greater weight of the evidence demonstrated that the District did comply with legal requirements in terms of designing an IEP that would provide the Student with a program that is designed to provide education and related services that will allow the Student to make progress in light of the circumstances and the Student's unique needs. The parents, however, have declined to allow implementation of the IEP.

In summary, Petitioner did not meet Petitioner's burden to establish that the program developed by the District did not or would not provide FAPE to the Student.

C. Appropriateness and Cost of Private Placement

To be entitled to tuition reimbursement, Petitioner must prove (1) that the District did not provide FAPE to Student; and (2) that the Student's private placements were, and the current placement is now, appropriate. 20 U.S.C. §1412(a)(10)(C)(i); 34 C.F.R.

§300.148(c). There was no testimony or other evidence provided regarding the appropriateness or lack of such with regard to both of the placements for which the parents are seeking reimbursements and future payment.

When applying the *Burlington-Carter* test, however, a consideration of the appropriateness of the placement is brought into question only after a finding is made that the school district failed to provide FAPE. In this case, since the finding is that the East Central Independent School District provided the Student FAPE, the next inquiry need not be made.

Therefore, considering the presumption in favor of the District's IEP, the burden on Petitioner to demonstrate the failure to provide FAPE, and the evidence in this case, including the record, documents, and the foregoing Findings of Fact and Discussion, it is established that the District did not fail to provide Student FAPE. Accordingly, consideration of the appropriateness of any of the parents' unilateral placements is not necessary or warranted.

D. The District's Counterclaim

In this case, the Respondent District had also filed a counterclaim, requesting that the hearing officer find that the FIE conducted by the District was appropriate, and thereby denying the Petitioner's request for an IEE at District expense. In examining the criteria for an FIE under the IDEA, the evidence showed that the District's FIE used a variety of tools and methods, and no single measure was used in reaching the decisions and conclusions in the FIE. In this instance, both formal and informal measures were employed in the process, along with observations of the Student and considerations of parental input. The record supports that Petitioner was assessed in all areas of suspected disability. While the evidence was unclear regarding the consideration of prior information, this does not rise to the level of impacting the evaluation to any degree of invalidation. Further, the evaluation was an initial FIE.

The evaluation process included a multi-disciplinary team who were trained and knowledgeable in each area of respective expertise. There was no controverting evidence presented on this issue. The assessors used valid and reliable instruments and administered the tests in accordance with instructions. No evidence was produced demonstrating that the evaluators failed to comply with the instructions of the testing instruments. While some debate and contradictory evidence was set forth regarding the in-person portion of the autism evaluation, the parents eventually withdrew their consent for that evaluation, deeming the issue moot. While Petitioner's expert was critical of the way the evaluation was conducted in terms of both process and result, the limited

criticisms were primarily with the process for reaching the conclusions that were made, rather than the testing processes themselves.

Thus, it is found that the Respondent met its burden in demonstrating that the evaluation conducted by the District was appropriate and in compliance with the standards set forth in the IDEA. Any request by Petitioner for an IEE at District expense is hereby denied.

E. Protracted Litigation Considerations

The IDEA also contains provisions that address the claims for attorneys' fees by a prevailing party, including a LEA. Specifically and as noted, 34 C.F.R. §300.517 (a) provides that attorneys' fees can be awarded to the prevailing LEA if it is found that the litigation brought is for an improper purpose, to harass or cause undue delay, or if unreasonable or frivolous. The weight of the evidence presented did not sustain Respondent's claims of a frivolous or unreasonable claim or one that was brought for harassment or unnecessary delay. Thus, there is no finding consistent with 34 C.F.R. § 300.517.

Therefore, considering the presumption in favor of the District's IEP, the burden on Petitioners to demonstrate the failure to provide FAPE, and the evidence in this case, including the record, documents and the foregoing Findings of Fact and Discussion, it is established that the Petitioner was unable to sustain Petitioner's burden show that the District failed to provide Student FAPE. Student is not entitled to reimbursement or future payment for unilateral, parental placements. Further, Respondent sustained its burden to demonstrate that the FIE was appropriate and met all requirements of the IDEA. 34 C.F.R. §§ 300.301, 300.304. Respondent failed to sustain its burden to demonstrate that this matter was frivolous or unreasonable or for purposes of harassment or delay.

VII. Conclusions of Law

1. Student is eligible for a free appropriate public education under the provisions of IDEA, 20 U.S.C. §1400, et seq., 34 C.F.R. §300.301 and 19 TEX. ADMIN. CODE §89.1011.

2. The East Central ISD is responsible for properly identifying, evaluating, and serving Student 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.

3. Petitioner failed to carry the burden of proof to establish a violation of IDEA or a denial of FAPE. *Schaffer v. Weast,* 126 S.Ct. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984).

4. The Petitioner did not sustain Petitioner's burden to establish that the District, East Central ISD, failed to provide Student a FAPE during the relevant time period. Petitioner did not meet Petitioner's burden of proving that the Student's IEP was not reasonably calculated to address the student's needs in light of Student's unique circumstances. *Endrew F. v. Douglas County Sch. Dist*. RE-1, 137 S.Ct. 988, 998 (2017); *Bd. of Hendrick Hudson Int. Sch. Dist. v. Rowley,* 458 U.S. 176 (1982).

5. Respondent sustained its burden to establish the appropriateness of the FIE. Respondent conducted a Full Individual Evaluation that met all requirements under the IDEA. 34 C.F.R. §§ 300.301, 300.304.

6. Although Petitioner's parents continue to be entitled to an Independent Educational Evaluation (IEE), they are not entitled to obtain such at Respondent's expense. 34 C.F.R. §300.502 (b)(3).

7. Respondent failed to meet its burden to establish that this matter was frivolous or unreasonable or for purposes of harassment or delay. 34 C.F.R. §300.517.

ORDERS

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that all relief requested by Petitioner is DENIED and all claims of Petitioner are DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Respondent's Counterclaim establishing the appropriateness of the evaluation is GRANTED.

All other relief not specifically stated herein is DENIED.

Signed this the 9th day of June 2021.

_____

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(p); Tex. Gov't Code, § 2001.144(a)-(b).