

**DOCKET NO. 241-SE-0420**

**STUDENT, B/N/F PARENT AND  
PARENT,  
Petitioner**

**v.**

**NORTH EAST INDEPENDENT  
SCHOOL DISTRICT,  
Respondent**

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**BEFORE A SPECIAL EDUCATION**

**HEARING OFFICER FOR**

**THE STATE OF TEXAS**

**DECISION OF THE HEARING OFFICER**

**I. PROCEDURAL HISTORY**

Student, by next friends Parent and Parent (Student or, collectively, Petitioner), brought this case against the North East Independent School District (Respondent or District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and its implementing state and federal regulations on April 2, 2020. Respondent filed a Response on April 13, 2020.

The main issue in this case is whether the District violated its Child Find obligation, and failed to evaluate and identify Student for special education and related services. The hearing officer concludes the District violated its Child Find duty to Student, but the preponderance of the evidence did not establish Student’s eligibility for special education.

**II. DUE PROCESS HEARING**

The due process hearing convened on August 12-14, 2020, via the Zoom platform, and was recorded and transcribed by a certified court reporter.

Petitioner was represented by Dorene Philpot, assisted by co-counsel Yvonnilda Muniz. Student’s parents attended the hearing. Respondent was represented by Christopher H. Schulz, assisted by co-counsel Rick Lopez. \*\*\* attended as the party representative.

### III. ISSUES

#### A. Petitioner's Issues

The Complaint presents the following legal issues for decision:

FAPE: Whether the District denied Student a free, appropriate public education (FAPE) by failing to find Student eligible for special education and related services, and failing to propose and implement an Individualized Education Program (IEP) reasonably calculated to provide a FAPE.

EVALUATION: Whether the District failed to timely and comprehensively evaluate Student for special education and related services.

PROCEDURAL: Whether the District violated student and parental procedural rights.

NON-IDEA CLAIMS: Whether the District violated Student's rights under Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act (dismissed in Order No. 3).

#### B. Petitioner's Requested Relief

Petitioner seeks the following items of requested relief:

1. An order directing the District to find Student eligible for special education and related services, and develop an appropriate IEP in the least restrictive environment that complies with the procedural and substantive requirements of state and federal special education laws, or compensatory educational services for the same;
2. If the District is, or has been, unwilling or unable to provide appropriate services, an order directing the District to reimburse Student's parent(s) for a parentally chosen private placement, to include reimbursement for past private services and future private placement; and
3. Any other relief the hearing officer finds appropriate or is recommended by an expert or evaluator.

#### C. The School District's Legal Position

The District generally denies the allegations, and raises the below affirmative defense:

STATUTE OF LIMITATIONS: Whether claims accruing outside the one year statute of limitations should be dismissed.

#### IV. FINDINGS OF FACT

1. Student is \*\*\*, and lives with Student's mother and father in San Antonio, TX. Student's interests include \*\*\*, and Student likes \*\*\*. Student particularly enjoys \*\*\*.<sup>1</sup>
2. Student lived within District boundaries and attended schools in the District beginning in \*\*\* through a portion of Student's \*\*\* grade year. Student received programming as a Gifted and Talented student throughout Student's educational career. Student is respectful of teachers and hard working. Student did not have any disciplinary referrals or other discipline problems. State of Texas Assessment of Academic Readiness (STAAR) testing results show Student either met or mastered grade level content from 2013-2019.<sup>2</sup>
3. Student has been \*\*\*\*\*, when Student was first diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Student was doing well in school at the time. With \*\*\*, Student continued to perform well in school despite struggling with ADHD. Student \*\*\*, without which focusing would be very difficult.<sup>3</sup>
4. Student's parents discussed Student's ADHD with Student's teachers at the beginning of every school year. Communications dating back to 2016 between Student's parents and District personnel advised Student had ADHD and related organizational difficulties, forgetfulness, and need for reminders to turn in work. Student's ADHD is inattentive, rather than hyperactive, and Student has difficulties with organization, loses things, and difficulty starting and completing projects. ADHD manifested itself at school through difficulties focusing, sitting still, and remaining on track.<sup>4</sup>
5. Student's parent contacted the District in January 2017 about whether a Section 504 designation may help alleviate struggles with late and missing assignments due to ADHD. The District did not conduct an evaluation, and Student has never been evaluated for or received Section 504 or special education services in the District.<sup>5</sup>
6. Student's \*\*\*\*\*. Student with \*\*\* when Student was in \*\*\* grade. Student still maintained Student's academic performance, but \*\*\* compounded Student's struggles

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<sup>1</sup> Joint Exhibit (JE) 5 at 12; JE 19 at 3; Tr. at 150, 464.

<sup>2</sup> Joint Stipulation (JS) 1, 9; JE 26 at 2; Tr. at 72-73, 181-82, 596.

<sup>3</sup> JE 1 at 7-8; Tr. at 157.

<sup>4</sup> Petitioner's Exhibit (PE) 3 at 1-2, 3-4, 6-7, 8-9; 10-12; PE 5 at 1; Tr. at 105-06, 154-55, 379.

<sup>5</sup> PE 4 at 1; Tr. at 152.

with ADHD in terms of completing tasks, feeling overwhelmed with work, and getting work done.<sup>6</sup>

7. Student gets along well with others, and makes acquaintances easily, but has difficulty developing and maintaining relationships with peers. Student has difficulties with social communications with peers, does not read body language well, and may miss or misinterpret social cues. Student had a close friend also involved \*\*\*, but did not have other close friends in recent years.<sup>7</sup>

### 2018-19 School Year

8. Student was in \*\*\* grade during the 2018-19 school year. In January 2019, Student experienced daily, mild symptoms of ADHD lasting for hours at a time at school and home. Student had daily, mild, and manageable symptoms of \*\*\* \*\*\*. Student did not have \*\*\*. Student was \*\*\* and doing well. Student's \*\*\*\*\* continued Student's current \*\*\*.<sup>8</sup>
9. Student had increasing difficulties with \*\*\* at school and home starting in the spring of 2019. Student's emotional functioning at school was impacted beginning around this time.<sup>9</sup>
10. In early April 2019, Student's parent advised Student's \*\*\*\*\* of a several week period of increased stress, worsening \*\*\*. Student managed Student's \*\*\* at home until March 2019 when \*\*\* as needed at school.<sup>10</sup>
11. Student visited Student's academic counselor in April 2019 and reported Student was \*\*\*." Student requested a "\*\*\*\*. The \*\*\* is an intervention used with District students who \*\*\* that allows them to\*\*\*\*. Student was open to speaking to a particular\*\*\*\*. Student's mother contacted that \*\*\* on April \*\*\*, 2019, and disclosed Student's increasing \*\*\*. Student visited \*\*\* three times in May.<sup>11</sup>
12. At a \*\*\* appointment on May \*\*\*, 2019, Student had an overall better mood, with decreased day to day \*\*\*, but more frequent, recent \*\*\* due to academic stress. Student saw Student's \*\*\*\*\* again on July \*\*\*, 2019. The \*\*\* in April helped decrease daily \*\*\*. Student was doing well overall at the July visit.<sup>12</sup>

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<sup>6</sup> JE 1 at 8-9.

<sup>7</sup> JE 6 at 57; Tr. at 104, 177, 281-82, 475.

<sup>8</sup> JS 2; JE 7 at 4-5.

<sup>9</sup> JE 1 at 9, JE 3 at 10-11; Tr. at 157-58, 217-18.

<sup>10</sup> JE 1 at 12-13; JE 7 at 62; Tr. at 155-56, 383-84.

<sup>11</sup> JE 17 at 1; PE 6 at 4; Tr. at 158-59, 487-88, 499.

<sup>12</sup> JE 1 at 16-17, 18, 20; JE 7 at 66, 71.

13. Student \*\*\* in 2018, scoring in the \*\*\* percentile. Student demonstrated mastery of course knowledge and skills in \*\*\* on STAAR End of Course assessments for the 2018-19 school year. Because Student \*\*\*, Student \*\*\*.<sup>13</sup>
14. The district's attendance codes are as follows: U – Unexcused/Truant; X – Extenuating Circumstances; V – Medical – Partial Day; S – School Business. Student missed one class during the fall 2018 semester, and had five or fewer absences per class during the spring 2019 semester. Grades below 70 are considered failing at NEISD. Student earned passing grades in each subject the spring semester with \*\*\*.<sup>14</sup>
15. Student participated in \*\*\* in summer 2019, an \*\*\*. Student had good experiences at \*\*\*.<sup>15</sup>
16. Student began \*\*\* with a new counselor in June 2019. At the time, Student's diagnoses included \*\*\*, ADHD, and \*\*\*. Student reported \*\*\* due to fear of \*\*\*, and not enjoying activities of interest. On July \*\*\*, Student's \*\*\* level was six out of ten, and Student disclosed \*\*\*. The counselor shared this information with Student's parents. In response to a parental concern on August \*\*\* because Student was not doing well, the counselor told Student's parents to contact Student's \*\*\*\*\* or \*\*\*\*\* (\*\*\*) for an \*\*\* assessment if Student was \*\*\*.<sup>16</sup>

### **2019-20 School Year**

17. Student was in the \*\*\* grade during the 2019-20 school year, which began on August 19, 2019. Student had a \*\*\*.<sup>17</sup>
18. Student was looking forward to school and \*\*\* before the school year began. Student was not selected as \*\*\*. Student worked with \*\*\*. Student spoke with the teacher after Student was not selected \*\*\*, and was professional and accepting of feedback.<sup>18</sup>
19. Student attended the first week of school, and communications between the District and Student's parents about missing assignments began shortly after the school year began. Student did not complete an \*\*\*, did not turn in Student's first assignment in \*\*\*, and \*\*\*. Student's parents began considering more intensive therapeutic interventions shortly after the 2019-20 school year began. Student visited Student's academic counselor after \*\*\*,

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<sup>13</sup> JE 10 at 2; JE 25 at 1-2; Tr. at 75.

<sup>14</sup> JS 10, 13; JE 38 at 4.

<sup>15</sup> JE 1 at 18; JE 3 at 17, 21, 61; Tr. at 183, 184-85.

<sup>16</sup> JE 3 at 13, 19-20, 55-57; 62-64.

<sup>17</sup> JS 3, 4; Tr. at 81; JE 38 at 5; 525.

<sup>18</sup> JE 3 at 66; Tr. at 192, 545-46, 548-49.

- and reported \*\*\* and feeling overwhelmed at school. Student requested and received another “\*\*\*”.<sup>19</sup>
20. \*\*\* evaluated Student for \*\*\* on August \*\*\*, 2019, and Student began the next day. The \*\*\* is \*\*\* providing \*\*\*. The decision to \*\*\* was made in coordination with Student’s therapist, \*\*\*, and parents due to struggling to \*\*\*, increased \*\*\*, not completing school work, and \*\*\* behavior. The program consisted of \*\*\*.<sup>20</sup>
21. A CGAS/Global Assessment of Functioning (GAF) score is a measure of an individual’s level of functioning. A 31 to 40 indicates a major impairment to level of functioning. On August \*\*\*, when assessed at \*\*\*, Student’s GAF score was \*\*\*, with \*\*\*, inability to consistently complete school work, and disengagement at home. Student was \*\*\*.<sup>21</sup>
22. On August \*\*\*, 2019 Student’s mother told the academic counselor Student would be at \*\*\*. Student was \*\*\*, and did not want Student’s teachers to know the specifics. During the time Student was \*\*\*, Student’s parents collected schoolwork and assignments from the academic counselor to help Student not fall behind at school.<sup>22</sup>
23. On September \*\*\*, 2019, Student’s academic counselor informed Student’s teachers Student was \*\*\* during the first week of school. She also advised Student would be \*\*\* for a few weeks to \*\*\*, and asked for assistance reducing Student’s stress by providing assignments so Student could keep up at school. The academic counselor has 500 students on her caseload, and may meet with a student twice a year. Because teachers see a student every day, she asked them to report signs of \*\*\* when Student\*\*\*. She did not receive any reports, and Student did not visit the academic counselor again after Student \*\*\*.<sup>23</sup>
24. Student’s September \*\*\*, 2019 grade progress report showed the following grades: \*\*\*.<sup>24</sup>
25. Student contacted Student’s academic counselor on September \*\*\*, 2019 asking if she would speak with Student’s teachers about excusing some of the work Student missed while \*\*\*. Student had not completed much of the work, and the thought of all that awaited Student was stressful. The academic counselor could not assist because \*\*\* classes must meet certain requirements, and suggested Student consider reducing \*\*\* to help with feeling overwhelmed.<sup>25</sup>

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<sup>19</sup> JE 3 at 68; PE 6 at 8, 13; Tr. at 487-89, 493-94, 519, 521.

<sup>20</sup> JS 5; JE 1 at 19-24; JE 3 at 70; JE 4 at 8.

<sup>21</sup> JE 4 at 8, 11; JE 7 at 247.

<sup>22</sup> JS 6; PE 6 at 9; Tr. at 161-62.

<sup>23</sup> JE 22 at 2; PE 6 at 13; Tr. at 491, 497, 522-23.

<sup>24</sup> JE 38 at 5.

<sup>25</sup> PE 6 at 18, 22.

26. Student's counselor at \*\*\* spoke with Student's academic counselor on September \*\*\*, 2019 about the\*\*\*, and \*\*\* strategies to reduce \*\*\* such as alternating days for a short period of time. The school counselor shared concerns about Student's high expectations of \*\*\*self leading to stress and poor grades, and again suggested fewer \*\*\*. Student \*\*\* instead.<sup>26</sup>
27. Student attended \*\*\* for longer than anticipated due to lack of progress, and was \*\*\*. At \*\*\*, Student had decreased severity and frequency of \*\*\*, but continued significant \*\*\* when \*\*\* of \*\*\*self at school and home. Student's \*\*\* diagnoses included \*\*\*, and ADHD, inattentive type. Student did not know Student was \*\*\* from \*\*\*, which caused Student considerable stress and increased \*\*\*.<sup>27</sup>
28. Student's counselor at \*\*\* opined Student had an inability to learn that cannot be explained by intellectual, sensory, or health factors. Student also showed an inability to build and maintain satisfactory interpersonal relationship with peers and teachers, a general pervasive mood of unhappiness or depression, and a tendency to develop physical symptoms or fears with personal or school problems.<sup>28</sup>
29. \*\*\* days of absences in a semester puts a student in jeopardy of not earning credit, and the District generates notices to parents. Student's parents received an attendance warning on September \*\*\*, and notices on September \*\*\* and \*\*\* Student was in danger of not receiving credit. Student advised a campus Assistant Principal on September \*\*\* Student had been \*\*\*, and provided\*\*\*. The District considered the absences due to \*\*\* as excused for medical reasons, and coded the absences as "extenuating."<sup>29</sup>
30. The academic counselor typically receives a special education evaluation request from a parent, or multiple teachers report academic concerns. She then works with a special education coordinator and a Licensed Specialist in School Psychology to gather information to determine whether an evaluation is appropriate. This review may look at the student's grades, attendance history, testing, and teacher concerns and reports.<sup>30</sup>
31. Student's academic counselor described Student as a "high flying academic student" based on Student's \*\*\*, and involvement in \*\*\*. Despite knowledge of Student's \*\*\* at school in spring 2019, Student's academic success \*\*\* did not indicate a special education referral was necessary at the time.<sup>31</sup>

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<sup>26</sup> JE 1 at 280; JE 4 at 11-12; Tr. at 494-95, 508.

<sup>27</sup> JS at 5; JE 1 at 25, JE 7 at 234-35; Tr. at 160, 165-67.

<sup>28</sup> JE 4 at 23-24.

<sup>29</sup> JE 11 at 1; JE 12 at 1; PE 2 at 4, 5; PE 6 at 39-40, 42; Tr. at 68, 70-71.

<sup>30</sup> Tr. at 486-87, 490.

<sup>31</sup> Tr. at 490-91.

32. In the fall of 2019, the academic counselor did not consider \*\*\* a red flag Student may need special education because this is a common strategy with students experiencing academic stress. In her experience, special education students also exhibit a “learning gap” or “learning disability,” and a resulting gap in knowledge. The counselor did not consider a need for special education because Student performed well in even the most demanding classes, and did not have a deficit in Student’s ability to learn based on previous academic performance. Finally, “a student \*\*\* is not a trigger for special education” because families at Student’s \*\*\* , and it is not uncommon for students to \*\*\* to school without issue.<sup>32</sup>
33. Student’s October \*\*\*, 2019 grade progress report showed the following grades: \*\*\*.<sup>33</sup>
34. Student saw Student’s \*\*\* on October \*\*\*, 2019. \*\*\* school heightened Student’s \*\*\*. Student was behind on completing the school work Student missed in September, and overwhelmed. Despite another \*\*\* at \*\*\*, ADHD was a barrier to completing the work, with moderate inattention, distractibility, and hyperactivity at home and school lasting for hours. Student had daily, \*\*\*. Student experienced \*\*\*. Student had \*\*\*.<sup>34</sup>
35. Student’s \*\*\* opined Student displayed inappropriate types of behavior or feelings under normal circumstances, a general pervasive mood of unhappiness or depression, and a tendency to develop physical symptoms or fears with personal or school problems.<sup>35</sup>
36. District teachers can excuse daily assignments stemming from absences. Absent students are expected to make up quizzes and tests so no test comprises more than twenty percent of the student’s grade, which is District policy.<sup>36</sup>
37. Student’s \*\*\* teacher sought feedback from parents at the beginning of the school year. Student’s mother reported Student was working on forming barriers in relationships, and had \*\*\* and ADHD. The teacher knew Student had a \*\*\*, which no other student in the class had. Student\*\*\*, engaged in instruction, and participated in class.<sup>37</sup>
38. The \*\*\* teacher excused most daily assignments related to content presented in class while Student was at \*\*\*. The teacher also waived an assignment after Student returned. Student did not turn in all missing assignments, but the teacher did not have concerns about the work Student completed.<sup>38</sup>

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<sup>32</sup> Tr. at 495-96, 500-01, 508-09.

<sup>33</sup> JE 38 at 6.

<sup>34</sup> JE 1 at 24-27; JE 7 at 76.

<sup>35</sup> JE 1 at 59-61; Tr. at 370-71.

<sup>36</sup> Tr. at 397.

<sup>37</sup> JE 23 at 1; Tr. at 314-15, 318; 324-25, 330-31.

<sup>38</sup> PE 6 at 26; JE 35 at 1; Tr. at 327-30, 333-34.



39. \*\*\* students had an assignment to \*\*\*. \*\*\*.” Because the \*\*\*, the teacher did not read it until it was provided in response to a document request after this case was filed.<sup>39</sup>
40. \*\*\* is a demanding course, with a faster pace, nightly homework, more difficult tests, and required projects. Student had a \*\*\* in the class as of October \*\*\*, 2019. Student was not in class and did poorly during the first nine week grading period. District students who fall behind or fail to meet course expectations may be offered a credit recovery program.<sup>40</sup>
41. At the end of the first nine week grading period, an October \*\*\*, 2019 report card showed the following grades: \*\*\*.<sup>41</sup>
42. The District notified Student’s parents on October \*\*\*, 2019 Student was failing \*\*\*, in part due to a missing exam, which comprise sixty percent of the grade. Student was offered credit protection if the work was completed by November \*\*\*. Student completed only part of the credit recovery agreement terms, and received a \*\*\*. The \*\*\* teacher did not observe \*\*\* at school, but Student was flustered by the large amount of work to complete for the credit recovery program. A communication from Student’s mother to the \*\*\* teacher on October \*\*\* reported Student’s \*\*\* were still “debilitating,” and Student was struggling with organizing the work Student needed to complete.<sup>42</sup>
43. The \*\*\* teacher excused assignments Student missed while \*\*\*, including certain work done in class. Student did not complete much of the missing work. Student’s performance on the work Student completed did not raise concerns. Student earned a \*\*\* in the second nine week grading period, and mastered the content as shown by achieving \*\*\* on two exams. Student did not have any excused assignments.<sup>43</sup>
44. Student performed well in \*\*\*. The teacher excused certain assignments Student did not participate in while \*\*\*. Student’s \*\*\* teacher described Student as enthusiastic, driven, and “a joy to have in class.” Student achieved good grades, and when in class Student performed well.<sup>44</sup>
45. Student did not improve after \*\*\* from \*\*\*, leading to discussions between Student’s \*\*\*, therapist, and parents about whether Student needed a higher level of care, including residential placement. Less intensive services were not helping control \*\*\*, and both providers supported a higher level of care. Student was not functioning well at school or at home, with interpersonal struggles in the family.<sup>45</sup>

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<sup>39</sup> JE 19 at 1, 4-5; Tr. at 323-24.

<sup>40</sup> JE 38 at 6; Tr. at 82, 398-99, 419-20, 526.

<sup>41</sup> JE 38 at 7.

<sup>42</sup> PE 6 at 64-66, 75; JE 13 at 1; JE 18 at 1-2; Tr. at 400, 403, 416-17, 420-21.

<sup>43</sup> PE 6 at 67; JE 35 at 5; Tr. at 395-96, 402-03, 428-29; 436-37, 438-39.

<sup>44</sup> JE 35 at 14; Tr. at 542, 548, 584.

<sup>45</sup> JE 1 at 30-32, 36, 55-56, 450-53; JE 3 at 29-30, 73-74; Tr. at 368-69.

46. Student continued to see Student's \*\*\* counselor after Student's \*\*\* from \*\*\*. On October \*\*\* Student was excited to \*\*\*, and looking forward to Student's \*\*\*. On November \*\*\*, Student reported difficulty keeping up with school work, with the breaks Student needed to help maintain attention leading to increased \*\*\*. Student's parents were still considering residential placement at the time, and working with a consultant to identify an appropriate program.<sup>46</sup>
47. On November \*\*\*, 2019 Student's mother communicated with a former teacher whom Student stayed in contact with that the family was considering residential placement due to \*\*\*.<sup>47</sup>
48. Student's November \*\*\*, 2019 grade progress report showed the following grades: \*\*\*.<sup>48</sup>
49. Student went \*\*\*. The \*\*\* was important to Student, and Student's parents let Student attend before leaving for residential treatment. At the end of the \*\*\*, Student told the \*\*\* teachers Student was leaving for a residential treatment facility. This was surprising because Student appeared to enjoy class and the \*\*\*. Neither teacher was aware Student was \*\*\*.<sup>49</sup>
50. Student was \*\*\* from \*\*\* therapy because Student needed more intensive services to address \*\*\*. Student's \*\*\* counselor opined Student displayed inappropriate types of behavior or feelings under normal circumstances, a general pervasive mood of unhappiness or depression, and a tendency to develop physical symptoms or fears with personal or school problems.<sup>50</sup>
51. Student attended school most days \*\*\*, but getting Student there was challenging and required significant parental support. Student's parents also struggled on a daily basis with getting Student to complete the work Student missed. Student was not motivated to complete the work, even if Student did not receive credit, except in \*\*\*. Deadlines were extended repeatedly, and Student still did not complete the work. Student's parents received almost daily missing assignment, low score, and low grade notifications between mid-September and December 2019.<sup>51</sup>
52. Student did not complete any additional work after Student withdrew from school. Student did not earn any credits in the fall of 2019 because Student did not complete the semester.<sup>52</sup>

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<sup>46</sup> JE 2 at 19-21, 69-72; JE 3 at 71, 75.

<sup>47</sup> PE 6 at 76-77; Tr. at 170-71.

<sup>48</sup> JE 38 at 8.

<sup>49</sup> Tr. at 294-96, 452, 553-54, 563, 601-02, 603

<sup>50</sup> JE 3 at 8, 37-38; 34-35.

<sup>51</sup> JE 11 at 1; PE 21 at 4-128; Tr. at 164-65, 172-73, 299-300.

<sup>52</sup> Tr. at 69, 451-52, 511.

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53. Student's parents feared escalation of \*\*\*, before Student entered a residential treatment center. Student's parents chose \*\*\*, a residential treatment facility in \*\*\*, and Student entered the program on November \*\*\*, 2019. School records indicate Student withdrew from school on December \*\*\* to attend \*\*\*. In processing Student's withdrawal, the District became aware \*\*\* is a \*\*\* treatment facility after checking to see whether the program offered educational services as well as treatment. In response to a District request, the facility verified Student enrolled on November \*\*\*, 2019.<sup>53</sup>
54. \*\*\* is an \*\*\* program with a focus on \*\*\*. The \*\*\* provides therapeutic, educational, psychological, medical, and psychiatric services \*\*\*. Participants work with licensed therapists and receive individual and group therapy twice each week and family therapy once a week.<sup>54</sup>
55. A \*\*\* therapy program, such as \*\*\*, consists of \*\*\*. Participants are \*\*\*. A \*\*\* therapy program focuses on whole person wellness and emotional stabilization through intensive therapeutic interventions and assessment.<sup>55</sup>
56. The primary focus of the \*\*\* program is wellness. The \*\*\*, not an educationally-focused school, and the program prioritizes mental health stability and support, with academics as a secondary aspect of that. During a typical stay, \*\*\*. \*\*\*. Academic credit is available. Courses include \*\*\*.<sup>56</sup>
57. Student had a psychological evaluation at \*\*\* in December 2019. The purpose of a psychological evaluation in a residential setting is diagnostic clarification in order to guide treatment and generate recommendations for ongoing treatment and supports. The evaluator administered a variety of assessments. These included the Wechsler Intelligence Scale for Children-Fifth Edition; the Woodcock Johnson Test of Achievement-Fourth Edition; Behavior Assessment System for Children-Third Edition (BASC-3) Adolescent Parent Report; Rorschach Inkblot Test; Minnesota Multiphasic Personality Inventory; Million Adolescent Clinical Inventory; Sentence Completion Exercise; and Substance Abuse Subtle Screening Inventory.<sup>57</sup>
58. A Mental Status Examination of Student yielded endorsement of symptoms of \*\*\*, including feelings of lethargy, isolation, increased difficulty with attention and

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<sup>53</sup> JE 29 at 1-3; JE 20 at 1; Tr. at 177-78, 452, 459, 513-15.

<sup>54</sup> JE 5 at 5, 10; JE 29 at 4.

<sup>55</sup> Tr. at 201, 248, 252.

<sup>56</sup> JE 2 at 35-36; JE 29 at 4-5; PE 10 at 1; PE 12 at 47-49; Tr. at 265-67.

<sup>57</sup> JE 5 at 10-29; Tr. at 203-04.

concentration, sleep and appetite disturbances, and \*\*\*. These symptoms adversely impact Student's life and education.<sup>58</sup>

59. The evaluator gathered Student's academic history through information collected from Student's parents, including a developmental history questionnaire and phone interview. Student's academic history noted Student struggled with attentional difficulties from a young age, and benefitted from learning and implementing different organizational strategies. Student had maintained \*\* until Student began to "struggle more with attendance and\*\*\*." Student's attendance also "fell off in the spring of 2019." Student missed a few weeks of school after the 2019-20 school year began secondary to participation in a \*\*\* program, and returned to school with minimal participation barring work in \*\*\*.<sup>59</sup>
60. Accurate historical information for an evaluation is important, and creates context about the examinee. The evaluator reviewed the documentation in Student's \*\*\* records and enrollment application, and other records available to her at the time. The evaluator did not review or request Student's educational records from the District, including report cards or grades. She was not aware Student took \*\*\*, and did not consider Student's performance on state assessments because measures of academic proficiency were not relevant given the purpose of the evaluation. The evaluator did not request or review Student's attendance information from the District, and instead garnered this information only from parent and student reports.<sup>60</sup>
61. On the Wechsler Intelligence Scale for Children-Fifth Edition, Student's Full Scale Intelligence Quotient was \*\*\* and in the \*\*\* percentile. Student is intellectually very capable. Student also underwent academic achievement testing. On the Woodcock Johnson Test of Achievement-Fourth Edition, Student's Overall Reading score was in the superior range. There was significant variability in math skills and Student showed strength in applied math skills and a relative weakness in rote mental math. Overall, Student's writing skills were superior, with a relative weakness in writing fluency. Each of Student's academic skills, barring the Math Fluency score, were average or above. Though Student's Math Fluency score fell into the low average range, this alone was not sufficient to diagnose a specific learning disability.<sup>61</sup>
62. The BASC-3 is a behavioral rating scale used to aid in identification and diagnosis of emotional and behavioral disorders. Student's mother completed the BASC-3 Parent Form, reporting an unusually high number of maladaptive behaviors, suggesting the measure should be interpreted with a certain degree of caution. The Parent Form yielded responses showing Clinically Significant elevations on the \*\*\*, Attention Problems, Atypicality, Activities of Daily Living, and ADHD Probability. At Risk elevations included

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<sup>58</sup> JE 5 at 14; Tr. at 206.

<sup>59</sup> JE 5 at 13; Tr. at 222.

<sup>60</sup> Tr. at 221-25.

<sup>61</sup> JE 5 at 15-18; Tr. at 206-07.

- Hyperactivity, Somatization, Withdrawal, Functional Communication, Development of Social Disorders, Emotional Self-Control, Executive Functioning, and Autism Probability. The evaluator did not have a teacher complete a BASC-3, which would provide a teacher rating and opinion about how an educator views Student's functioning in class.<sup>62</sup>
63. The Minnesota Multiphasic Personality Inventory measures internalizing conditions like \*\*\* and behavioral difficulties. Student reported significant emotional distress on this measure with \*\*\*. Student endorsed \*\*\*. Student expressed a negative attitude towards school, which Student considered "a waste of time."<sup>63</sup>
64. Based on testing responses on the Rorschach Inkblot test, Student had underdeveloped social skills and is likely to come across as awkward and/or naïve in relating to others. Student's \*\*\* and active mental cognition contribute to missed social cues, and \*\*\* impacts how Student relates to people. The evaluation yielded diagnoses of \*\*\*, and ADHD.<sup>64</sup>
65. The evaluation recommended continued \*\*\* support, and continued weekly individual therapy and cognitive behavioral interventions to develop tools for emotional regulation. The evaluation recommended Dialectical Behavioral Therapy, a modality combining elements of cognitive behavioral therapy and mindfulness techniques, to increase stress tolerance and reduce self-destructive behavior. Other treatment recommendations included expressive art therapy, group therapy to help overcome \*\*\* and support building healthy relationships, family therapy and parent coaching, a wellness plan, and participation in healthy pro-social activities Student enjoys to generate more positive self-esteem.<sup>65</sup>
66. The evaluation made several educational recommendations. These included continued residential placement and a therapeutic school setting to build on recent treatment gains, and build skills to strengthen overall sense of self, learn self-regulation and impulse management, and develop more adaptive coping strategies as Student is reintroduced to an academic environment. Student would benefit from working with a Learning Specialist, Educational Therapist, or Executive Functioning Coach around organizational skills related to ADHD, structure, and motivation to complete school work. The evaluation also recommended an academic environment with a low teacher to student ratio to give Student more individualized attention and create accountability. The evaluation did not recommend a Section 504 plan or special education services.<sup>66</sup>

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<sup>62</sup> JE 5 at 18-19, Tr. at 234.

<sup>63</sup> JE 5 at 21; Tr. at 208-09.

<sup>64</sup> JE 5 at 19-20, 26-27; Tr. at 207-08.

<sup>65</sup> JE 5 at 27-29.

<sup>66</sup> JE 5 at 27-29, Tr. at 214-15.

67. The evaluator opined Student demonstrated a general pervasive mood of unhappiness or depression and a tendency to develop physical symptoms or fears with personal or school problems.<sup>67</sup>
68. Student's treating therapist at \*\*\* opined Student had an inability to learn that cannot be explained by intellectual, sensory, or health factors due to attention and self-regulation deficits. Student also showed an inability to build and maintain satisfactory interpersonal relationship with peers and teachers, inappropriate types of behavior or feelings under normal circumstances, displayed a general pervasive mood of unhappiness or depression, and a tendency to develop physical symptoms or fears with personal or school problems.<sup>68</sup>
69. Student was at \*\*\* from November \*\*\*, 2019 to February \*\*\*, 2020. Student showed a positive response to the interventions provided. Student was motivated for change, and responded well to a relational approach with clear boundaries and expectations, but struggled with distractibility and emotional avoidance during Student's stay. Treating professionals recommended continued residential placement, or other placement outside the home, after completing the \*\*\* program due to continued emotional dysregulation and safety concerns.<sup>69</sup>

\*\*\*\*\*

70. Student enrolled in \*\*\*\*\* on February \*\*\*, 2020 through the present. \*\*\* is a residential treatment facility and school in \*\*\*. \*\*\* has a strong \*\*\* curriculum, and the curriculum lines up with Texas standards to the extent Student can earn transferable credits. The facility is accredited, and academic courses are taught by certified instructors. Class sizes range from six to fifteen students, and the smaller learning environment contributes to students gaining confidence in their abilities. The daily schedule is similar to \*\*\* to support a normal school experience.<sup>70</sup>
71. The facility's academic director communicates directly with a resident's parents about educational needs and performance. Students are also assigned an academic advisor who is also a teacher. Parents receive grade reports at the end of a term, and are notified if a student is put on academic probation. Student's parents received Student's grades for the spring semester on June \*\*\*, 2020. Student's parents spoke with the academic advisor approximately three times during the spring semester, with more frequent communication by email.<sup>71</sup>

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<sup>67</sup> Tr. at 216-17.

<sup>68</sup> Tr. at 256-58.

<sup>69</sup> JS 7; JE 5 at 5; Tr. at 259.

<sup>70</sup> JS 8; JE 2 at 40-41; PE 18 at 6, 19-20; Tr. at 344-47.

<sup>71</sup> JE 39 at 30; Tr. at 141, 150-51, 358-59.

72. \*\*\* offers schooling year round. Student received credit for Student's spring classes, and continued classes in summer 2020.<sup>72</sup>
73. \*\*\*'s treatment program consists of \*\*\*. Each resident has a treatment plan developed in coordination with the resident and his or her family. Participants progress through five or six levels depending on the person. The first two levels focus on behavioral control. Student was at level three, which involves developing tolerance for feelings and gaining the ability to self-soothe and challenge thoughts, on the date of the hearing. Level four focuses on developing and implementing a relapse prevention plan. At level five, a transition plan to help generalize skills learned is developed prior to discharge.<sup>73</sup>
74. Student's therapist referred Student's further \*\*\* assessment and \*\*\* review due to symptoms of ADHD that significantly impact Student's educational success and benefit from therapy at \*\*\*.<sup>74</sup>
75. Student's therapist at \*\*\* opined Student has an inability to learn that cannot be explained by intellectual, sensory, or health factors. Student also shows an inability to build and maintain satisfactory interpersonal relationship with peers and teachers, inappropriate types of behavior or feelings under normal circumstances. Student previously, but no longer, displayed a general pervasive mood of unhappiness or depression, and a tendency to develop physical symptoms or fears with personal or school problems.<sup>75</sup>
76. Student continues to require residential placement. Based on progress to date, Student's anticipated discharge date from \*\*\* is June 2021, but it could be sooner.<sup>76</sup>
77. Student's parents did not receive Prior Written Notice or a Notice of Procedural Safeguards from the District at any time before litigation commenced. The District provided a Notice of Procedural Safeguards when it responded to the due process hearing request.<sup>77</sup>
78. The District did not evaluate Student in response to the April 2020 hearing request, or take any action to determine whether Student may have a disability because Student did not reside in the District's boundaries at the time and was enrolled in another educational setting. According to the District, "the Child Find obligation and obligation for an evaluation rests with the school district where the child is residing and attending school."<sup>78</sup>

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<sup>72</sup> JE 39 at 30; Tr. at 153, 349-50.

<sup>73</sup> JE 6 at 36-37; Tr. at 97-100, 128.

<sup>74</sup> Tr. at 105-06.

<sup>75</sup> Tr. at 111-14.

<sup>76</sup> Tr. at 103-04, 114.

<sup>77</sup> Tr. at 151.

<sup>78</sup> Tr. at 51-52, 631-32.

79. The District's website has information on Child Find, and notices required by the Texas Education Agency are in the student handbook. The handbook describes how to request an evaluation. Each campus has at least one special education coordinator who receives ongoing training.<sup>79</sup>
80. Student's teachers, including the \*\*\* teachers, described a special education referral process for District students who may need special education that begins with a referral to a school counselor followed by gathering supporting data.<sup>80</sup>
81. Student's parents were not aware of Student's rights under the IDEA until March 2020 when first advised by counsel. Insurance did not cover all of Student's time at \*\*\*, and none of Student's time at \*\*\* or \*\*\*. Student's parents have borne these expenses.<sup>81</sup>
82. Student wants other people to think well of Student, and how Student presented at school did not reflect Student's level of stress and \*\*\*.<sup>82</sup>

## V. STATUTE OF LIMITATIONS

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

The two year limitations period may be more or less if a state has an alternate time limitation for requesting a hearing, in which case state timelines apply. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.507(a)(2). Texas regulations require a parent to request a hearing within one year of the date he or she knew or should have known (i.e. discovered) of the alleged action(s) forming the basis of the petition. 19 TEX. ADMIN. CODE § 89.1151(c).

Petitioner asserts the parents filed a request for a due process hearing within one year of the date they discovered Student was deprived a FAPE. In the alternative, Petitioner raised both the

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<sup>79</sup> Tr. at 615-17.

<sup>80</sup> Tr. at 335-36, 389.

<sup>81</sup> PE 9 at 1-4; PE 20 at 1-14; Tr. at 154, 453-54.

<sup>82</sup> Tr. at 477.



misrepresentation and withholding exceptions to the statute of limitations.<sup>83</sup> The District raised the one year statute of limitations as an affirmative defense.<sup>84</sup>

Student's causes of action accrued when Student's parents knew, or had reason to know, of the injury forming the basis of the complaint. *See, Doe v. Westerville City Sch. Dist.*, 50 IDELR 132, p. 5-6 (D.C. Ohio 2008). Student had a longstanding ADHD diagnosis. Student was diagnosed with \*\*\* in \*\*\* grade, and then later \*\*\*. The evidence showed Student began to experience increased challenges stemming from \*\*\* at school in the spring of 2019, but successfully completed the 2018-19 school year with good grades and no attendance issues.

Soon after the 2019-20 school year began, Student's functioning at home and school deteriorated significantly, and Student's parents knew of the facts underlying the complaint and leading up to Student's need for increased \*\*\* oversight and ultimately residential placement. August 2019 is the accrual date for Petitioner's claims. This case was filed in April 2020, and the parents filed within a year of the accrual date.

The affirmative defense of the statute of limitations is thus denied, and Petitioner may proceed with claims accruing after August 2019.

## VI. DISCUSSION

Petitioner alleges the District denied Student a FAPE by abridging its Child Find obligation, and failing to evaluate and find Student eligible for special education and propose an appropriate program. Petitioner also alleges the District violated student and parental procedural rights.

### A. Burden of Proof

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<sup>83</sup> Petitioner's Due Process Complaint (April 2, 2020) at 15, 18.

<sup>84</sup> Respondent's Response to Due Process Complaint (April 13, 2020) at 2.

There is no distinction between the burden of proof in an administrative hearing and judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n. 4 (5th Cir. 2009). The burden of proof in a due process hearing is on the party challenging the IEP and placement. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993); *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1291 (5th Cir. 1991). The burden of proof is on Petitioner to show the District did not provide Student a FAPE.

## **B. Free, Appropriate Public Education**

Under the IDEA, students with disabilities are entitled to a FAPE that provides special education and related services designed to meet their unique needs, and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A). School districts must offer a FAPE to all students with disabilities living in its jurisdiction between the ages of three and twenty-one. 34 C.F.R. § 300.101(a); Tex. Educ. Code § 12.012(a)(3). These students must receive specially designed, personalized instruction with sufficient support services to meet their unique needs and confer educational benefit. Instruction and services must be at public expense, and comport with the IEP developed by the student's Admission, Review, and Dismissal (ARD) Committee. 20 U.S.C. § 1401(9)(A)-(D); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89, 200-01, 203-04 (1982).

## **C. Child Find Under the IDEA**

The IDEA's Child Find provisions guarantee access to special education for students with disabilities. 20 U.S.C. § 1400(d)(1)(A). A school district, like Respondent, has an affirmative duty to have policies and procedures in place to locate, and timely evaluate, children with suspected disabilities in its jurisdiction, including "[c]hildren who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.111(a), (c)(1); *El Paso Indep. Sch. Dist. v. Richard R.R.*, 567 F. Supp. 2d 918, 949 (W.D. Tex. 2008).

The Child Find obligation is triggered when a school district has reason to suspect the student has a disability, coupled with reason to suspect special education services may be needed to address the disability. *Richard R.R.*, 567 F. Supp. 2d at 950; *Dep't of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Hawaii 2001). When these suspicions arise, the school district must evaluate the student within a reasonable time after school officials have notice of reasons to suspect a disability. *Richard R.R.*, *supra*. State regulations also require referral and evaluation of potential special education students as part of a school district's overall regular education referral or screening system for students experiencing difficulty in the regular classroom. 19 TEX. ADMIN. CODE § 89.1011.

A two part inquiry is required to resolve a Child Find claim. First, did the school district have reason to suspect the student has a disability *and* suspect the student may need special education and related services. *Dallas Indep. Sch. Dist. v. Woody*, 178 F. Supp. 3d 443, 467 (N.D. Tex. 2016), *aff'd in part and rev'd in part*, 865 F. 3d. 303, 320 (5th Cir. 2017). The threshold for suspicion is relatively low. The inquiry is not whether the student actually *qualifies* for special education, but instead whether the student should be *referred* for a special education evaluation. *Woody*, 178 F. Supp. 3d at 467. A critical distinction exists between whether a school district should have identified a student as *eligible* for special education under one of the enumerated disability classifications under the IDEA. As discussed below, questions of eligibility and identification as a student with a disability are resolved on the basis of whether an evaluation shows the student meets the criteria of one or more of the enumerated disability classifications *and* demonstrates a need for special education. *See*, 34 C.F.R. § 300.8(a), (c)(1)-(13).

### **1. Reason to Suspect Disability**

Student was diagnosed with ADHD in 2012. Student's parents shared this diagnosis with the District, and the District had long been aware of this disability. Beginning in the spring of 2019, the District became aware Student had \*\*\* after Student disclosed to Student's academic counselor Student was struggling with \*\*\* at school. Student was given a \*\*\* at the time, and issued another \*\*\* due to continued \*\*\* at school during the first week of the 2019-20 school year. As a result, there is no dispute the District had reason to suspect Student had disabilities.

## 2. Reason to Suspect Need For Special Education Services

The District argues it had no reason to suspect special education services may be needed to address Student's disabilities.

Student is highly intelligent and Student has no history of disciplinary or behavioral referrals at school. Student received instruction as a Gifted and Talented student since beginning school in the District. Student maintained a rigorous course schedule, \*\*\*. STAAR testing results over Student's academic career show Student met or mastered the curriculum requirements. Student was involved in extracurricular activities, including \*\*\*, Student's \*\*\*. Student historically had very good grades, and Student was able to maintain Student's performance academically even in the spring of 2019 when Student began to experience increasing problems with \*\*\* both at school and home.

The Texas Education Agency has issued Technical Assistance to school districts on Child Find and Eligibility.<sup>85</sup> This document sets forth a non-exhaustive list of circumstances that may indicate a need for a special education evaluation, and directs school districts to consider multiple data sources to determine whether the cumulative impact rises to the level of suspecting a disability and need for special education services. Among others, indicators include: hospitalization, outside evaluation/diagnosis provided by the parent, parental concerns regarding the child's struggles, and outside therapeutic services and counseling.<sup>86</sup> In this case, the evidence showed the presence of several Child Find indicators during the fall semester of 2019.

The District began receiving data on Student's disability-related struggles at the outset of the 2019-20 school year. Student attended \*\*\* before needing more intensive mental health treatment. Records from Student's \*\*\* and outside counselor detail Student's functioning at school

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<sup>85</sup> Texas Education Agency, *Technical Assistance: Child Find and Evaluation* (June 2020). Available at <https://tea.texas.gov/sites/default/files/Technical%20Assistance%20%20Child%20Find%20and%20Evaluation%20-%20June%202020%20Revised%28v5%29.pdf>

<sup>86</sup> *Id.* at 6.

and home were significantly impacted by \*\*\* at the time, necessitating first a \*\*\* placement at \*\*\*. When Student was admitted to \*\*\*, Student's GAF was \*\*\*, indicating a major impairment in Student's level of functioning. The District did not have these records at the time, and thus knowledge of the extent of Student's struggles at the time Student \*\*\* cannot be directly attributed to these sources. However, parental contacts with the District about Student's circumstances and need for more intensive mental health interventions began shortly after the school year began.

On August \*\*\*, 2019 Student's mother advised Student's assigned academic counselor Student would be \*\*\* starting the next day \*\*\* to \*\*\*. The counselor and Student's parent coordinated getting Student's school work during Student's \*\*\* stay. Student's parents continued to communicate with Student's teachers while Student was at \*\*\* and when Student returned, seeking clarification about missing assignments and deadlines. Several communications with District personnel described the impact of Student's \*\*\* on Student's functioning.

A September \*\*\*, 2019 communication from the academic counselor to Student's teachers advised Student would be \*\*\*. She asked them to report if they observed signs of \*\*\* when Student\*\*\*, and teachers did not report concerns. The evidence also showed Student was \*\*\*, and Student's outward appearance at school did not reveal the true extent of Student's mental health challenges in the fall of 2019.

Before Student was \*\*\* from \*\*\*, the academic counselor spoke with Student's counselor \*\*\* and discussed Student's continuing issues with \*\*\*, and Student's transition back to school. The counselor suggested Student reduce Student's workload by \*\*\*, and Student took this recommendation and \*\*\*. While the suggestion to reduce \*\*\* Student was taking is not problematic by itself, it points to the District's awareness of Student's academic stress at the time.

The Assistant Principal excused Student's absences accumulated while Student was \*\*\* after learning Student was \*\*\* receiving mental health treatment. Excusing absences for medical purposes was consistent with District policy, but this is yet another point of contact where the District was again made aware of Student's mental health struggles in the fall of 2019.

District educators articulated a process whereby struggling students, or students who may need special education, are first referred to a school counselor. Student's academic counselor, again identified as a starting point in the referral process, articulated several reasons why she did not consider whether Student may need special education services that evidenced an improper understanding of a school district's obligations under Child Find.

First, the academic counselor described an understanding of special education services that is limited to students with "learning gaps" or a "learning disability." This is inaccurate, and learning disabilities represents just one classification of thirteen for services under the IDEA. The evidence also showed, through the academic counselor's testimony, the District relied significantly on Student's known intellectual capability and past academic performance, including Student's ability to take a demanding class schedule and perform well academically at a high level, in not considering whether Student may need special education services.

The Office of Special Education Programs (OSEP) issued guidance to school districts on first eligibility, and then Child Find activities, for students with disabilities with high intelligence. OSEP instructed school districts not to allow intellectual prowess, or classification as gifted and talented under state law, undermine Child Find activities or eligibility determinations. Although a student has high cognition, the student may also have one of the disabilities listed in the IDEA, such as ADHD, and need special education and related services as a result. 55 IDELR 172, (OSEP 2010). OSEP again directed school districts that high cognition is not a bar to eligibility, and eligibility determinations must be made using a variety of tools and assessment and not rely on any single measure in determining eligibility. *Letter to Delisle*, 62 IDELR 240 (OSEP 2013). Finally, OSEP issued specific guidance in response to reports from parents of gifted students, in particular those with ED and mental illness, that school districts were failing to conduct an initial evaluation to determine eligibility on the basis of the student's high cognitive skills. OSEP indicated a school district's Child Find obligation applies equally to gifted students where there is reason to suspect a disability and need for special education and related services. *Memorandum to State Dir. of Special Educ.*, 65 IDELR 181 (OSEP 2015). Read together, this guidance tells school districts a comprehensive Child Find system cannot overlook the needs of students with disabilities, like Student, with high cognition.

Given the information available to them about Student's mental health challenges beginning in the spring of 2019 and continuing into the 2019-20 school year, the District's reliance on Student's past academic success overlooked the known and significant impact of Student's emotional health on Student's schooling at the time.

The academic counselor also testified it is not uncommon for the \*\*\* students at Student's \*\*\* to enter a treatment facility and then return and resume school without a problem. Not only is this contrary to TEA Child Find Guidance that indicates hospitalization may be an indicator of a need for special education, in this case it is important to understanding the District's lack of response to Student's known need for continuing intensive mental health treatment during the relevant time period.

When the 2019-20 school year began, Student attended school for \*\*\* before beginning the \*\*\* at \*\*\* to address ongoing issues with \*\*\*. The District was immediately made aware of Student's need for mental health treatment and why. Student missed more than \*\*\* weeks of instruction before returning to school after \*\*\* from the program on September \*\*\*, 2019. A little over two months later, on December \*\*\*, 2019 Student withdrew from school to attend \*\*\*. The District was aware \*\*\* was a residential treatment facility at the time Student withdrew. At that time, the District also had data underlying additional Child Find indicators prescribed by TEA including diagnoses provided by the parents, awareness of ongoing parental concerns regarding Student's struggles, and knowledge Student was receiving outside therapeutic services and counseling, and did nothing with this information.

It is the second need for intensive treatment interventions in the fall of 2019 – this time for an out of home placement in a residential treatment center – that, in combination with the other information available to the District about Student's significant mental health needs at the time, triggered the District's Child Find obligation.

The hearing officer concludes there were sufficient indicators not only that Student had a disability, but also a suspicion Student may need special education as a result. *Richard R.R.*, 567

F. Supp. 2d at 950; *Dep't of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Hawaii 2001). Again, the threshold for suspicion is relatively low, and does not turn on qualification for special education, but instead whether the student should be *referred* for an evaluation. *Woody*, 178 F. Supp. 3d at 467. The weight of the credible evidence shows the District had reason to suspect Student may have a disability and reason to suspect special education services may be needed to address the disability on December \*\*\*, 2019 when Student withdrew to attend a residential treatment program at \*\*\*.

The District argues its Child Find obligation ended when Student withdrew to attend \*\*\*. However, a school district may not condition an evaluation on enrollment. *C.C. Jr. v. Beaumont Indep. Sch. Dist.*, 65 IDELR 109 (E.D. Tex. 2015). Here, the District's Director of Special Education testified the District did not take any action to evaluate Student after receiving the due process hearing request in April 2020 because Student was not enrolled, and the District considered it the obligation of the school district where Student was now enrolled to engage in Child Find activities and provide a FAPE. To the extent that the District relied on Student's enrollment status at that time Student withdrew, when it was not known whether Student would be at \*\*\* for a week or a year, it was misplaced. Student's family continues to reside in the jurisdictional boundaries of the District, and Student will return home after Student completes treatment. The hearing officer concludes the District's obligation to further consider Student's educational needs, including a referral for a special education evaluation, did not end at the time Student left for \*\*\*.

### **3. Reasonable Time Period for an Evaluation**

The next inquiry in a Child Find case is whether the school district evaluated the student within a reasonable time after having notice of the behavior likely to indicate a disability. *Woody*, 178 F. Supp. 3d at 468. The IDEA's implementing regulations address how quickly a school district must act after parental consent to evaluate is obtained, but neither the statute nor its implementing regulations establish a specific number of days in which a school district must evaluate a student between notice of a qualifying disability and referring the student for an evaluation. *Woody*, 865 F.3d at 319. In *Woody*, the court inferred a "reasonable-time standard" into the provision. *Id.* at 320. A school district must also "identify, locate, and evaluate students



with suspected disabilities within a reasonable time after the school district is on notice of facts or behavior likely to indicate a disability.” *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 676 (5th Cir. 2018); *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 790-91 (5th Cir. 2020).

Read together, *Krawietz* and *Woody* indicate the reasonableness of a delay is not defined by its length in weeks or months, but by the steps taken by a school district during the relevant period. A delay is reasonable when, throughout the period between notice and referral, a school district takes proactive steps to comply with its Child Find duty to identify, locate, and evaluate students with disabilities. Conversely, a time period is unreasonable when the school district fails to take proactive steps throughout the period, or ceases to take such steps. *Spring Branch*, 961 F.3d at 793. Under the test set out in this jurisdiction, a finding of a Child Find violation turns on three inquiries: (1) the date the Child Find requirement was triggered due to notice of a likely disability; (2) the date the child find duty was ultimately satisfied; and (3) the reasonableness of the delay between these two dates. *See, Krawietz*, 900 F.3d at 676.

The hearing officer concludes the District’s Child Find obligation to Student was triggered due to notice of a likely disability and reason to suspect Student may need special education and related services in early December 2019. Here, the District never referred Student for a special education evaluation, and did nothing in response either at the time, when reason to suspect was established, or in response to the due process hearing request in April 2020. The District took no proactive steps to identify Student after Student entered a residential placement in December 2019. The District has not satisfied this requirement to date, and this hearing officer concludes the delay in doing so was not reasonable. *See, Krawietz*, 900 F.3d at 676.

#### **D. Eligibility Determinations under the IDEA**

Petitioner contends Student is eligible under the IDEA as a student with an Emotional Disturbance and Other Health Impairment. An eligibility determination is made on the basis of an evaluation that meets IDEA criteria and finding a student meets one or more of thirteen eligibility classifications, and by reason thereof, needs special education and related services. 34 C.F.R.

§§ 300.8(a), 300.304-.311; 19 TEX. ADMIN. CODE § 89.1040(b). Assessments and other evaluations must assess the student in all areas of suspected disability. 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).

An evaluation must also be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. § 300.304(c)(6). The school district should also consider a student's academic, behavioral, and social progress in determining whether the student needs special education for purposes of Child Find and IDEA eligibility. *Alvin Indep. Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F. 3d 378, 384 (5th Cir. 2007); *D.L. v. Clear Creek Indep. Sch. Dist.*, 117 LRP 22536 (5th Cir. 2017) (unpublished) (*per curiam*).

### **1. Meeting Definition of Disability Under the IDEA**

ED is defined as a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: an inability to learn that cannot be explained by intellectual, sensory, or health factors; an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; inappropriate types of behavior or feelings under normal circumstances; a general pervasive mood of unhappiness or depression; or a tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R. § 300.8(c)(4)(i)(A)-(E).

An OHI is defined as having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that: (i) is due to chronic or acute health problems such as asthma, attention deficit disorder or ADHD, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) adversely affects a child's educational performance. 34 C.F.R. § 300.8(c)(9)(i)-(ii).

Student had a psychological evaluation by a licensed psychologist at \*\*\* soon after beginning the program in December 2019. The purpose of the evaluation was to develop a better

understanding of Student's cognitive and emotional functioning, aid in diagnostic clarification, and generate recommendations for ongoing treatment and schooling.

An evaluation to determine a student's eligibility under the IDEA requires the use of a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, which may assist in determining whether the child is a child with a disability. 34 C.F.R. § 300.304(b)(1). In this case, the evaluator administered a variety of assessments. These included the Wechsler Intelligence Scale for Children-Fifth Edition; the Woodcock Johnson Test of Achievement-Fourth Edition; the BASC-3, Adolescent Parent Report; Rorschach Inkblot Test; Minnesota Multiphasic Personality Inventory; Million Adolescent Clinical Inventory; Sentence Completion Exercise; and Substance Abuse Subtle Screening Inventory.

The evaluation included Student's academic history based on student and parental reports, which the evaluator explained are necessary components of a psychological evaluation to create context. Here, the evidence showed certain academic and educational information the evaluator gathered and relied on in forming an understanding Student's functioning at school, were not accurate. Student did not fail most of Student's classes, and the evaluator did not have an accurate understanding of Student's attendance history when Student began to experience increasing difficulties at school in the spring of 2019.

The evaluator did not request or review Student's education records from the District. She did not review educational records from \*\*\*, or solicit information or other feedback from Student's educators at the facility where Student was attending school at the time. No state assessment information was reviewed because the evaluator did not consider Student's academic proficiency relevant given the purpose of the evaluation. The evaluation assessed Student's adaptive functioning by soliciting parent responses only on the BASC-3. While no particular assessment instrument is required, a full picture of Student's adaptive functioning at school does not emerge.

The December 2019 evaluation yielded a diagnosis of \*\*\*, and ADHD. The evaluation included comprehensive recommendations for treatment and certain educational

recommendations. These included continued residential placement and therapeutic school setting to build on recent treatment gains, and build skills and develop more adaptive coping strategies as Student is reintroduced to an academic environment. Student would also benefit from working with a Learning Specialist, Educational Therapist, or Executive Functioning Coach around organizational skills related to ADHD, structure, and motivation to complete school work. The evaluation recommended an academic environment that has a low teacher to student ratio to give Student more individualized attention and create accountability.

The evaluator opined through testimony Student demonstrated a general pervasive mood of unhappiness or depression and a tendency to develop physical symptoms or fears with personal or school problems. This conclusion is supported by the testimony of other treating professionals, including Student's \*\*\*, private therapist, counselor at \*\*\*, and treating professionals at \*\*\* and \*\*\*, who each believed Student met three or more ED criteria. Based on the consistent opinions of multiple treating sources familiar with Student's clinical history, the hearing officer concludes Student met the first prong of the ED criteria in that Student met one or more elements by exhibiting one or more characteristics over a long period of time and to a marked degree that adversely affects educational performance. 34 C.F.R. § 300.8(c)(4)(i)(A)-(E).

Student's ADHD is present across settings. The evidence showed Student has a long history of organizational difficulties, forgetfulness, need for reminders to turn in school work, and difficulty starting and completing projects related to ADHD. In January 2019, Student experienced daily, mild symptoms of ADHD lasting for hours at a time at school and home. In October 2019, these symptoms were more pronounced. ADHD was a barrier to completing the work Student missed while at \*\*\*, with moderate inattention, distractibility, and hyperactivity at home and school lasting for hours. The testimony of Student's therapist at \*\*\* also supports an adverse impact on Student's educational performance and success due to ongoing symptoms of ADHD.

The hearing officer concludes the evidence supports a finding on the first element that Petitioner has ADHD adversely impacting education performance. 34 C.F.R. § 300.8(c)(9)(i)-(ii). Meeting the regulatory definition of an enumerated disability under the IDEA satisfies, however, only the first element of Student's eligibility as a Student with an ED and OHI.

## 2. Need for Special Education Services

In this case, Student's *need* for special education services, a required component to determining eligibility for services under the IDEA, is less clear from the \*\*\* evaluation. As discussed, parent and student reports alone about Student's academic history and attendance patterns did not provide accurate context about Student's educational functioning. The evaluation also lacked proper foundation about Student's educational performance from contemporaneous educational records. Indeed, the evaluation itself did not recommend special education services at all.

Based on the December 2019 evaluation, the weight of the credible evidence does not support a finding as to Student's educational need, and thus eligibility under the IDEA, by a preponderance of the evidence. 34 C.F.R. §§ 300.8(a)(2)(i), 300.304-.311; 19 TEX. ADMIN. CODE § 89.1040(b). *Alvin Indep. Sch. Dist.*, 503 F. 3d at 384. Without an evaluation sufficiently supporting this required element of an eligibility determination, Student's eligibility for special education and related services was not established.

## E. Procedural Violations

Petitioner alleged the District violated student and parental procedural rights, including failing to provide Prior Written Notice and Notice of Procedural Safeguards. To prevail, Petitioner must show these procedural violations significantly impeded parental opportunity to participate in the decision-making process regarding the provision of a FAPE. 34 C.F.R. § 300.513(a)(2)(ii).

### 1. Prior Written Notice

A school district must provide the parent of a child with a disability Prior Written Notice when it proposes to initiate or change the identification, evaluation, or educational placement of the student, or the provision of FAPE, or refuses to initiate or change the identification, evaluation,

or educational placement of the student, or the provision of FAPE. 34 C.F.R. § 300.503(a). If the school district has not sent a Prior Written Notice under § 300.503 regarding the subject matter of a due process complaint, the school district must, within ten days of receiving the complaint, send the parent a response that includes: an explanation of why the agency proposed or refused to take the action raised in the due process complaint; a description of other options the ARD Committee considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and a description of the other factors relevant to the proposed or refused action. 34 C.F.R. § 300.508(e).

The evidence showed the District did not provide Prior Written Notice at any point before Petitioner filed for a due process hearing on April 2, 2020 with notice of the Complaint issued by the Texas Education Agency on April 3, 2020. The District, however, filed a response to the Complaint on April 13, 2020 – the date identified in Order No. 1 – that included an explanation why it did not evaluate Student and the basis for not doing so, which served as Prior Written Notice. The District therefore satisfied this requirement. 34 C.F.R. § 300.508(e).

## **2. Notice of Procedural Safeguards**

A school district must provide a Notice of Procedural Safeguards to parents upon initial referral or parental request for evaluation; upon receipt of the first state complaint in the school year; upon receipt of the first due process complaint in the school year; in accordance with disciplinary procedures; and upon parental request. 34 C.F.R. § 300.504(a). Here, the evidence did not establish a prior obligation to provide Notice of Procedural Safeguards, and the District provided Notice of Procedural Safeguards in connection with its April 13, 2020 Response as required by the regulations.

## **VII. CONCLUSIONS OF LAW**

1. As the challenging party, Petitioner met the burden of proving the District abridged its Child Find duty to Student. *Schaffer v. Weast*, 546 U.S. 49 (2005); 20 U.S.C. § 1400(d)(1)(A).

2. Petitioner did not meet the burden of proving Student is eligible for special education and related services under the IDEA. 34 C.F.R. §§ 300.8(a)(2)(i), 300.304-.311.
3. The District did not violate parental and student procedural rights by failing to provide Prior Written Notice. 34 C.F.R. § 300.508(e).
4. The District did not violate parental and student procedural rights by failing to provide Notice of Procedural Safeguards. 34 C.F.R. § 300.504(a).

### VIII. RELIEF AND ORDERS

Petitioner sought residential placement at District expense and other appropriate remedies. The hearing officer concludes Student's eligibility for special education services was not established by a preponderance of the evidence. However, the District violated its Child Find duty to Student and, in doing so, denied Student a FAPE. Relief to compensate for this violation is therefore appropriate.

The IDEA's central mechanism for the remedying of perceived harms is for parents to seek changes to a student's program. *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 483 (2nd Cir. 2002). Hearing officers also have "broad discretion" in fashioning relief under the IDEA. Relief must be appropriate and further the purpose of the IDEA to provide a student with a FAPE. *Sch. Cmte. of Town of Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 U.S. 359, 369 (1985).


The hearing officer makes the following orders:

1. The District is ordered to arrange for an independent evaluation of Student for special education and related services at District expense in Student's current setting.
2. Petitioner shall select a provider who fits reasonable criteria set by the District to conduct the independent evaluation by no later than 5:00 p.m. Central Time on October 21, 2020. Such criteria cannot limit the independent evaluator's ability to conduct the evaluation in Student's current setting.

3. If Petitioner does not provide the name of an independent evaluator to the District by 5:00 p.m. Central Time on October 21, 2020, the District shall select a provider who meets the District's criteria by October 31, 2020.
4. Upon completion of the independent evaluation, the District is ordered to convene an Admission, Review, and Dismissal Committee meeting to determine whether Student is eligible for special education and related services under the IDEA.

All other relief not specifically stated herein is **DENIED**.

**SIGNED September 29, 2020.**

  
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**Kathryn Lewis**  
**Special Education Hearing Officer**  
**For the State of Texas**

#### **IX. NOTICE TO PARTIES**

The Decision of the Hearing Officer is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 20. U.S.C. § 1415(i)(2); 19 TEX. ADMIN. CODE § 89.1185(n).