

DOCKET NO. 242-SE-0423

STUDENT b/n/f PARENT,

Respondent ~~83.34 22.05 -0 0 10254~~



as District Representative, and Ms. \*\*\*, Coordinator for Behavioral Support also attended the hearing as the District's expert witness. Mr. Kirk Agree, with the same firm as Mr. Nichols and Mr. Acosta, attended part of the hearing as an observer.

#### E. Post Hearing Matters

Upon the conclusion of the presentation of evidence, but prior to closure of the hearing, the parties requested a continuance in order to have the requisite time for receipt of the transcript, filing closing briefs, and the final decision. They discussed the timeline, and it was agreed that the transcript of the hearing would be received no later than June 2, 2023, and that Petitioner's and Respondent's Closing Briefs were due no later than June 19, 2023. The Decision is due no later than July 7, 2023, and Order No. 6 establishing these deadlines was issued May 23, 2023. The

That an ARD committee meet and create and implement an IEP based upon the Student's unique needs;  
That an Independent Educational Evaluation be ordered at District expense;  
That a Functional Behavior Assessment (FBA) be ordered;  
That District create and implement an IEP based upon the Student's unique needs;  
and  
A finding that the District violated Child Find.

In addition, while not in the Complaint, Petitioner in the closing brief filed in this matter requested that Petitioner be awarded compensatory services.

### C. Respondent's Issues and Legal Position

In addition to a general denial, Respondent District denies that it failed to timely identify or evaluate the Student for special education, as the District was implementing strategies and assessing behavior and did make a timely referral for a special education evaluation. The District further contends that the issue of a FAPE is premature, as the Student had not been identified as eligible or in need of special education and therefore no obligation to provide such under the IDEA existed.

## IV. Findings of Fact\*

1. The Student resides with Student's mother within the boundaries of the New Caney Independent School District [hereinafter NCISD or District], is \*\*\* years old, and, at the time of the issues in question in this case was in the \*\*\* grade at \*\*\* within the District.<sup>1</sup>
2. The Student has been enrolled in the District since January \*\*\*, 2023, as Student and Student's mother moved to the District the Saturday prior to the enrollment in the District.<sup>2</sup> Prior to that time, it appears that Student attended school in the \*\*\* Independent School District.<sup>3</sup>

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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.

<sup>1</sup> T. 250; J.1; J.5.

<sup>2</sup> T. 249.

<sup>3</sup> T. 276; R.5:014-020.

3. After enrollment in New Caney ISD, the Student's mother testified that she received a telephone call from the Student's teacher, Ms. \*\*\*, at the end of Student's first day of class, which was January \*\*\*, 2023. While during most of the call the Student was described in positive terms, there was also some mention of concerns with Student's behavior.<sup>4</sup> Ms. \*\*\*'s call log shows that the first call concerning behavior was made on January \*\*\*, 2023.<sup>5</sup>
4. Student's mother testified that she continued to receive telephone calls from the Student's teacher, Ms. \*\*\* as well as school staff on a regular, if not nearly daily basis.<sup>6</sup> Records show, however, that while Ms. \*\*\* did have several telephone conversations with the Student's parent, after February \*\*\*, 2023, the communications were either in person or by email correspondence.<sup>7</sup>
5. Once the Student began exhibiting challenging behaviors, Student's teacher Ms. \*\*\*, began gathering and tracking information in an effort to better assess the situation and so that the District could provide the most appropriate support for the Student. She began tracking the Student's behavior on January \*\*\*, 2023.<sup>8</sup>
6. Ms. \*\*\*, Coordinator for Behavior Support for the District and a Board Certified Behavior Analyst (BCBA), testified that it is not uncommon for students, when first at a new school with a new teacher, to have challenging behaviors. (nt3.8450.905 0 Td0 Tw prr)TJs behavior3.5. to

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the Student's behavioral challenges.<sup>22</sup> As all students are on Tier 1, the Student was then placed on the tier 2 level.<sup>23</sup>

17. Specific goals for the Student were established at that time, and included reduction in \*\*\*, utilization of calming strategies, and increased compliance with instruction.<sup>24</sup>

18. It was also noted that if the Student did not respond well to the interventions, that a move to the tier 3 level would indicate that the Student did not respond well to the interventions.

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home or at Student's prior school.<sup>46</sup> Additional testimony also indicated that the parent inform



47. It appears that the meeting was never scheduled, and consent was never obtained as the Student stopped attending school.<sup>63</sup>
48. No evidence was presented that the District followed up with the parent after the 3 pages of packet was returned and no evidence was presented as to what exactly was sent to the parent with regard to the referral packet.<sup>64</sup>
49. There was no evidence presented that the Student's parent or aunt/godmother contacted the District as to the status of the evaluation after the packet of three pages was returned on March \*\*, 2023.
50. The Student's last day attending school in the District was March \*\*, 2023.<sup>65</sup> Therefore, the Student attended school in the District from January \*\*, 2023 until March \*\*, 2023.
51. The Student was unenrolled from the District on April \*\*, 2023.<sup>66</sup>

## 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. In essence, the burden of persuasion or proof falls upon the party seeking relief. *See* [redacted], 546 U.S. 49, 62 (2005); [redacted], 999 F.2d 127, 131 (5<sup>th</sup> Cir. 1993). No distinction has been established between the burden of proof in an administrative hearing or in a judicial proceeding. [redacted], 580 F.3d 286, 292 n.4 (5<sup>th</sup> Cir. 2009).

In terms of application of this approach, the Fifth Circuit went on to establish that a presumption exists "in favor of a school system's educational plan, placing the burden of proof on the party challenging it". [redacted] 343 F.3d 373, 377 (5<sup>th</sup> Cir. 2003); [redacted] at 132. Accordingly, Petitioner bears the burden of demonstrating that the District violated its Child Find obligation and failed to provide the Student FAPE.

### B.

A primary purpose of the IDEA is to ensure that all chi

Petitioner to demonstrate a need for specially designed instruction, or educational services, as a result of the disability. Consequently, a student who meets eligibility criteria but who does not show a need for special education services, has not met the definition of a student with a disability under the IDEA. See 34 C.F.R. §300.8.

This section provides further clarification in saying that

“...if it is determined, through an appropriate evaluation under §§ 300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.”

34 C.F.R. §300.8(2)(i).

Courts are clear that the Child Find obligation is “triggered when the local educational agency has reason to suspect a disability coupled with reason to suspect that special education services may be needed to address that disability.” (Emphasis added.)

567 F. Supp. 2d 918, 950 (W.D. Tex. 2008). Thus, it is clear that the suspicion must be of both the disability and the need for special education services.

Once a Child Find violation has been triggered, that is, a finding that the District



Notwithstanding the lack of evidence of a disability, the District did proceed with initiating the special education evaluation process. So, in examining the time frames in this case, it is first important to note that the total time that the Student attended school in the District was \*\*\* school days – assuming there were no absences. And during that time, it is unclear just when

the District to help the Student. In addition, the District was actively gathering information that would inform any evaluation.

**B. Claim for Denial of FAPE**

In this case as noted, the burden on Petitioner to demonstrate that the Student had a qualifying disability and, by reason of that disability, needed specially designed instruction and related services. There is nothing in the record demonstrating that the Student has a qualifying disability or is eligible for special education. In such an instance, a school district does not deny FAPE. In this case then, as IDEA eligibility was not established, the District did not deny the Student FAPE.

**C. Procedural Considerations**

Petitioner also claims that Respondent committed procedural violation of IDEA, in addition to the Child Find claim. 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). The evidence fails to support Petitioner's claims that the Student's parent was not involved collaboratively with the District. The Student's parent was very involved with her \*\*\* schooling. In fact, the evidence showed that the Student's mother experienced a great deal of participation and involvement throughout the time Student was enrolled in the District, and that the District was quite collaborative with the mother.

In essence, no violations of IDEA were established, and the evidence clearly demonstrated that the District did not violate its Child Find obligation. In summary, the Petitioner did not meet Petitioner's burden of proving the school district violated student or parental substantive or procedural rights under the IDEA.

**VII. Conclusions of Law**

1. The New Caney Independent School District (NCISD) is responsible for properly identifying, evaluating, and serving students under the provisions of IDEA, 20 U.S.C. §§1412 and 1414; 34 C.F.R. §300.301, and 19 TEX. ADMIN. CODE §89.1011.
2. Petitioner failed to carry the burden of proof to establish a violation of IDEA or a denial of FAPE. 546 U.S. 49, 126 S.Ct. 528 (2005); , 703 F.2d 832 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984).
3. Petitioner did not meet the burden of proof on the claims asserted against the District in this case, as the burden is on the party seeking relief. 546 U.S. 49 (2005).



4. Petitioner failed to prove that the District violated its Child Find duties. 34 C.F.R. §300.111.
5. Petitioner did not meet the burden of proving the Student is a child with a disability who is eligible for special education and related services under the IDEA. 34 C.F.R. §300.8.
6. Petitioner did not prove the District failed to work collaboratively with the Student's mother. 546 U.S. at 62; 34 C.F.R. §300.501(b)(c); 34 C.F.R. §300.322.

### 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.

All other relief not specifically stated herein is DENIED.

Signed this 6<sup>th</sup> day of July 2023.

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Kimberlee Kovach

Special Education Hearing Officer for the  
State of Texas

### NOTICE TO THE PARTIES

The Decision of the Hearing Officer in