

DOCKET NO. 097-SE-1123

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

DECISION OF THE HEARING OFFICER

I. Statement of the Case

This matter concerns an expedited claim brought by Petitioner pursuant to the Individual with Disabilities Education Act [hereinafter IDEA] and its implementing state and federal regulations, for violations of the Act. In particular, the issue in this case is whether the District violated the IDEA by failing to: comply with its Child Find obligations; develop an Individual Education Plan (IEP) including the provision of related services; failure to conduct a Manifestation Determination Review (MDR) as to disciplinary placement; and comply with procedural obligations under the IDEA and related laws. Petitioner also filed this case against the Texas Education Agency (TEA) and Mike Morath, both of whom were dismissed in accordance with their Motion to Dismiss.

The hearing officer finds that the Respondent District complied with all Child Find obligations, that there was no obligation to conduct an MDR pursuant to IDEA, and that the District did not commit a procedural violation of IDEA.

II. Procedural History

Petitioners, Student, b/n/f Parent (collectively, Petitioner), filed a request for an expedited impartial due process hearing (the Complaint) pursuant to the Individuals with Disabilities Education Act (IDEA).

The Complaint was received by the Texas Education Agency (TEA or Agency) on the 27<sup>th</sup> day of November 2023, and the Notice of Filing of Request for a Special Education Due Process Hearing was issued by TEA on November 28, 2023. The Respondents to the Complaint were the New Caney Independent School District (hereinafter District or Respondent); the Texas Education Agency (TEA) and Mike Morath. The Agency assigned the matter to this Hearing Officer, who



Thereafter, the parties made their respective disclosures on December 12, 2023 in accordance with the Scheduling Order. On December 18, 2023, Respondent filed objections to a number of the Petitioner's exhibits. Several of those exhibits objected to were not offered, as they were relevant only to the dismissed Respondents. Thus, of those remaining Petitioner's Exhibits, all were admitted into evidence except for P.1. Parts of P.1 were then admitted into evidence during the hearing. All of the Respondent's Exhibits were admitted, as no objections had been filed. Finally, all of the fourteen Joint Exhibits were admitted into evidence.

Further, the Petitioner, on December 19, 2023, filed a Motion to Compel the attendance at the hearing of a previously identified witness. The Respondent District filed a Response, and eventually the parties agreed to a date and time for his appearance. Order No. 4, enforcing the agreement and ordering the Witness to appear at the hearing on December 21, 2023 was then issued on December 20, 2023.

It was also noted by the parties and the hearing officer that a due process hearing was held on May 22 & 23, 2023, which involved the same parties and many of the same or similar issues. The decision in that matter was issued on July 6, 2023. Therefore, only those issues arising after May 23, 2023 are the subject of this due process proceeding as set forth in Order No. 5 issued December 20, 2023.

The due process hearing (DPH) was then conducted on December 20 and 21, 2023 on the Zoom platform. The Petitioner continued to be represented by Ms. Janelle Davis. Also attending the hearing were Ms. Debra Liva, who is the non-attorney advocate for the family, and the Student's parent, \*\*\*. The Respondent District continued to be represented by its legal counsel, Mr. Erik Nichols and Mr. Matt Acosta. Ms. \*\*\*, Director of Special Education for the District was present as District Representative. Mr. \*\*\*, the Lead Licensed Specialist in School Psychology (LSSP) for the District, was also present during the hearing, and was identified as the District's Expert Witness, although he was never called to testify.

During the Due Process Hearing, the Petitioner offered the testimony of Ms. \*\*\*, who testified about the request for an evaluation; Ms. \*\*\*, Ms. \*\*\*, and Mr. \*\*\*, the three evaluators who testified about the evaluation; and \*\*\*, the Student's Parent, who testified about Parent's requests to the District and Parent's understanding of the evaluation and findings. Respondent called no witnesses, and it rested upon conclusion of the presentation of Petitioner's case.

## E. Post Hearing Matters

Upon the conclusion of the presentation of evidence, but prior to closure of the hearing, the parties

Find that the Petitioner's rights under Child Find have been violated;  
Find that the Student's right to FAPE has been violated;  
Find that the recommended



7. Ms. \*\*\* testified that the Student's scores were low to very low in a number of areas, including intellectual functioning, crystallized intelligence, fluid reasoning, short-term memory and auditory processing.<sup>7</sup>
8. She also testified that these findings can impact a student's decoding, spelling, reading comprehension, solving word problems, and cause difficulty with multi-step directions.<sup>8</sup>
9. The Kaufman Text of Educational Achievement demonstrated that the Student had a deficit in basic reading skills, low writing performance, and had a deficit in math.<sup>9</sup>
10. The Student's overall Intelligence Quotient (IQ) was noted to be in the lower range, and thus Ms.\*\*\* also did another assessment with regard to adaptive behavior, as a

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16. In one of the components of the speech evaluation, the Student had an extremely low score, which caused Ms. \*\*\* to then follow up with additional two assessments. Based upon the entirety of this testing, it was found that no disability existed within speech and language.<sup>15</sup>
  17. Ms. \*\*\* explained that the student did not present as a student with a language disorder, impairment, or disability. Thus, the Student did not meet any disability criteria in the area of speech.<sup>16</sup>
  18. \*\*\*, the third evaluator who conducted several sections of the Student's evaluation, is a Licensed Specialist in School Psychology (LSSP), and is an independent contractor with the District. He noted that his contract with the District started in September 2023, and that during that month he was requested to conduct an evaluation of the Student by Mr. \*\*\*, the District's lead LSSP. He was specifically to complete the behavioral, psychological, and emotional components of the evaluation.<sup>17</sup>
  19. Mr. \*\*\* noted that once he is assigned to conduct the evaluation, he determines the scope of the evaluation based upon the stated concerns. He also noted, however, that the process is a fluid one, and the scope can evolve.<sup>18</sup>
  20. Mr. \*\*\* also noted that he had a checklist of sorts when he did the evaluation, and that it included the types of evaluations along with notations for documenting his activity as he conducted the evaluation. The evidence demonstrated that Mr. \*\*\*'s checklist for the Student included autism, emotional disturbance and specific learning disability.<sup>19</sup>
  21. The documentary evidence showed the dates, times and places of the observations Mr. \*\*\* made of the Student, and included thirty minutes in the classroom on September \*\*\*, 2023; fifteen minutes of \*\*\* on September \*\*\*, 2023; an attempt to observe in the classroom on September \*\*\*, 2023, but the Student had already gone home; and a twenty minute classroom observation on September \*\*\*, 2023. The evidence also showed that Mr. \*\*\* conducted interviews with both the Student and the Student's Parent.<sup>20</sup>
  22. Mr. \*\*\* also testified that the Student had difficulty with regulating Student's behavior, was impulsive, showed \*\*\* and hyperactivity. The Student also reported some \*\*\*, and the Student's Parent noted some \*\*\*. Thus the
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32. The evidence showed that the Student has no di(s)1 .003 Tw8 (s)1 2 Tw 7.77.ens aTw 4.5 0 TdTD()T.34 0 2

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Student's Parent, Mr. \*\*\* explained several times what needed to be done in order for the Student to meet the Other Health Impairment (OHI) criteria so Student would qualify as a student with an IDEA disability. He also explained why a medical diagnosis was necessary.<sup>40</sup>

40. Mr. \*\*\*, during the evaluation review meeting, also went over some suggestions that he had for helping the student, such as frequent breaks, chunking assignments, and teaching replacement behaviors.<sup>41</sup>
41. Email correspondence from the Student's Parent to the District on November \*\*\*, 2023 referenced that the Student would be evaluated by the doctor for an ADHD diagnosis the very next day.<sup>42</sup>
42. No evidence was presented that demonstrated that the District provided the Student's Parent an OHI form.<sup>43</sup>
43. The evidence showed that the Student had not, at the time of hearing, obtained a medical diagnosis of Attention Deficit Hyperactivity Disorder (ADHD).<sup>44</sup>
44. No evidence was offered as to why no diagnosis of ADHD was obtained for the Student.
45. No evidence was presented that the Student's Parent disagreed with the evaluation. In addition, there was no evidence that the Student's Parent, or anyone on Petitioner's behalf, requested an Independent Educational Evaluation (IEE) from the District.<sup>45</sup>
46. Near the conclusion of the evaluation review meeting, the District inquired as to whether the Student's Parent would have Parent's advocate or attorney present at the ARD meeting. The Student's Parent declined to have either attend the ADR meeting.<sup>46</sup>
47. Notice was provided to the Student's Parent of the ARD Committee meeting to review the evaluation results and make a determination as to the Student's qualification for special education.<sup>47</sup>
48. At the beginning of the ARD, the Student's Parent was asked if Parent had any questions about the evaluation. The evidence also demonstrated that the Student's Parent did not

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<sup>40</sup> T.216; J.13:34:48-36:55, 41:33-41:51, 55:10-56:12.

<sup>41</sup> T.205; J.4: J.13:1:20-1:25; J.14:18:26-18:35.

<sup>42</sup> J.12:185.

<sup>43</sup> T.135.

<sup>44</sup> T.169.

<sup>45</sup> T. 156-158, 217-218.

<sup>46</sup> T. 41, 150-151; P.1:56-57; J.13.

<sup>47</sup> T.100, 144; J.3.

voice disagreement with the evaluation or the DNQ (Does not Qualify) decision at the ARD.<sup>48</sup> The Student's Parent also noted during the ARD meeting that Parent had observed characteristics of ADHD. While the evidence established that the Student's Parent was aware that one of the next steps in determining a special education OHI eligibility was to obtain a diagnosis from the Student's primary care physician,<sup>49</sup> no evidence was presented that the Student's Parent requested an OHI form from the District.

49. During the ARD meeting, the Student's Parent noted that schools apply ADHD to every situation, and then inquired as to whether the Student's behavior could be due to anything other than ADHD.<sup>50</sup>
  50. During the ARD meeting, the Student's Parent was told that the Student would be served through Section 504, and 504 supports and accommodations were explained to Parent in detail. There was also an explanation that should a diagnosis of ADHD be obtained, that the ARD committee could reconvene and consider the OHI eligibility for special education.<sup>51</sup>
  51. The evidence demonstrated that the Student's Parent agreed with the ARD determination. After Parent had an opportunity to review the ARD paperwork, Parent signed it
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55. Through email correspondence, the Student's Parent, on November \*\*\*, 2023, informed the District that the Student was to be evaluated by Student's doctor for an ADHD diagnosis the next day, November \*\*\*, 2023, as the matter was urgent.<sup>57</sup>

56. The evidence established that the Student's Parent, on November \*\*\*, 2023, was sent notice of the MDR meeting with two optional dates for the meeting from Ms. \*\*\*, the  
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## 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. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 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. *Richardson Ind. Sch. Dist. v. Michael Z.*, 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”. *White ex Rel. White v. Ascension Parish Sch. Bd.* 343 F.3d 373, 377 (5<sup>th</sup> Cir. 2003); *Teague* at 132. Accordingly, Petitioner bears the burden of demonstrating that the District violated its Child Find obligation and failed to provide the Student FAPE.

### B. Duty to Provide FAPE

A primary purpose of the IDEA is to ensure that all children with disabilities have available a free, appropriate public education (FAPE) as well as related services. Further, it is essential that the educational and related services are designed to meet the unique needs of that particular student. 34 C.F.R. § 300.39 (b)(3). Under the IDEA, school districts have a duty to provide a FAPE to all children with disabilities between the ages of three and twenty-one who reside within the jurisdictional boundaries of the district. 34 C.F.R. §300.101(a).

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















## 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.

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