

- E. Failing to provide Student with appropriate Individualized Education Program (IEP) goals and objectives individualized to meet Student's unique needs;
- F. Failing to develop an appropriate Behavior Intervention Plan (BIP) uniquely tailored to meet Student's individualized needs;
- G. Failing to provide an appropriate Functional Behavior

continued numerous times because of health issues of counsel and other concerns raised by the parties. The hearing was held on May 26-29, 2015. Attorneys Yvonnilda Muniz, Dorene Philpot, and Olivia Ruiz represented Petitioner. Attorneys Leonard Schwartz and Maia Levenson represented TSD. After the hearing was concluded, the decision due date was extended to August 31, 2015, by request of the parties, to allow both parties an opportunity to submit written arguments. This Decision is being timely issued.

III. SUMMARY OF DECISION

At the outset, the Hearing Officer finds it helpful to discuss this case in a general sense, with the specific issues reserved for more detailed discussion further below.

A. Summary of the Applicable Law

It is first appropriate to discuss the legal framework of this case. Under IDEA, a school district is required to provide FAPE to all children. To provide FAPE to a child with a disability, a school district must design and implement an individualized program reasonably calculated to enable the child to receive educational benefits.³ When evaluating whether an educational program is calculated to provide meaningful educational benefit consistent with IDEA, there are four factors to consider: (1) whether the program is individualized on the basis of the student's assessment(s) and performance; (2) whether the program is administered in the least restrictive environment; (3) whether the services are provided in a coordinated, collaborative manner by key stakeholders; and (4) whether positive academic and non-academic benefits are demonstrated.⁴ The educational program offered to a student under IDEA is presumed to be appropriate, and the burden of proof is on a challenging party to show that the school district did not provide the services required by law.⁵ Thus, Petitioner has the burden of proof on the issues raised in Petitioner's due process complaint.

However, the burden of proof is shifted in regard to issues related to a parental request for an IEE. In this case, Petitioner requested an IEE. Under 34 C.F.R. § 300.502(b)(2), TSD must either cover the cost of the IEE or file a due process complaint to show that its evaluation was appropriate. TSD denied the request for an IEE, and filed a due process complaint seeking a hearing on Petitioner's request, as well as its own request for a

³ *Bd. Of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982).

⁴ *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).

⁵ *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1010 (5th Cir. 2010).

IDEA is an admirable law that seeks to ensure that all children receive an appropriate education. It would be unfortunate and misguided to apply a hyper-technical standard to its application that looks at form over substance. In this case, the Hearing Officer is convinced that TSD took good faith efforts throughout Student's educational experience to ensure that Student received an appropriate education in light of Student's disabilities. TSD certainly fulfilled the goals and requirements of IDEA, despite the fact that it did not label Student with

2. Student is a ***-year-old student enrolled in TSD, who was recently promoted to the *** grade. At the time the due process complaint was filed, Student was ***-year-old student who was completing the *** grade at TSD. Pet. Ex. 18, p. 5.
3. The due process complaint was filed by Petitioner on April 30, 2014. Accordingly, the scope of this proceeding encompasses the 1-year period from April 30, 2013, through April 30, 2014.⁹
4. Student, Student's mother, *** reside *** Independent School District but Student's mother has parentally placed Student at TSD. Pet. Ex. 18, p. 5.
5. ***. Pet. Ex. 18, p. 5.
6. Student is currently eligible for special education and related services under IDEA as a child with AI, with severe to profound bilateral hearing loss. Pet. Ex. 2, p. 10; Pet. Ex. 20, p. 2. Student's dominant language is American Sign Language (ASL), ***. Pet. Ex. 2, p. 7.
7. Student has attended TSD since the *** school year, when an ARD meeting was held on ***, to plan for Student's ***. Pet. Ex. 1, pp. 4-24.
8. The initial Full and Individual Evaluation (FIE) is dated ***. Pet. Ex. 5, pp. 10-15. Findings indicated Student's cognitive functioning appeared to be average with some skills in the below average range. Pet. Ex. 5, p. 13. Student's academic skills ranged from ***.

12. To date, no ARD committee for TSD has specifically determined that Student is eligible for special education services under IDEA as a child with OHI for ADHD. However, TSD has been aware of Student's ADHD since at least *** and has adapted Student's educational program to ensure that Student receives appropriate education in light of Student's ADHD.
13. Student's *** report card for the *** indicates Student only reached the proficient level in ***. Pet. Ex. 21, p. 1. According to the report card, Student could ***. *Id.* During the *** grading period, Student's teacher wrote that Student needs 1:1 help to stay focused and not hurt Student's peers. Pet. Ex. 21, p. 2.
- 14.

20. The REED was completed on ***

26. Student was absent from school *** days during *** grade, in addition to missing an additional *** days at the beginning of *** prior to being re-enrolled at TSD. Thus, Student had a total of *** days absent from school during *** grade. TSD Ex. 89, pp. 2695-2696; TSD Ex. 16.

27.

36. TSD adopted practices, including short instructions, frequent and immediate feedback, repeating and explaining instructions, opportunities for 1:1 instruction at times, opportunities for small group instruction, classroom structure and management adjustments, frequent breaks, and behavior improvement techniques reflected in the BIP, among other things, to assist Student in learning despite Student's ADHD. TSD Ex. 19; TSD Ex. 21; TSD Ex. 23; Tr. 258. These practices were appropriate, reasonable, and designed to ensure that Student received FAPE.
37. Student was absent from school *** days during *** grade, and *** of those absences were unexcused. TSD Ex. 89.
38. Student's absences adversely affected Student's academic and behavioral progress. Tr. 532. However, despite this, Student still made progress in *** grade. TSD Ex. 50.
39. There is no indication that Student's many absences were a manifestation or effect of any of Student's disabilities.
40. During an ARD meeting on ***, the committee discussed the possibility of placing Student in TSD's special needs program. However, when Petitioner objected to this, no further action was taken and Student was never placed in the special needs program.
41. Student's BIP was properly individualized and tailored to meet Student's needs, including Student's ADHD, and was designed to ensure that Student received an appropriate education. Tr. 446-450, 851. The BIP recognized Student's specific struggles associated with ADHD symptoms (Short attention span, noncompliance, aggression towards peers and staff, struggling with transitions times, does not like to change activity if the next activity is more challenging[, and] ***. There has been an increase in aggression towards peers, not staying in assigned area.) and provided specific tools for dealing with them (frequent breaks and the ability to move around the back of the room, frequent prompts, immediate praise so Student can connect the praise with the positive conduct, and assigned seating away from high traffic areas to help Student not be distracted by other students). Pet. Ex. 15, pp. 31-32.
42. At ARD meetings on ***, and ***, a required teacher was not present. Thus, on at least two occasions, TSD did fail to have all necessary persons present at an ARD committee meeting. However, these failures are merely technical procedural violations that did not deprive Student of FAPE nor did they in any way deprive Parent of meaningful opportunity to participate in Student's educational process.
43. At an ARD meeting on ***, the ARD committee recommended Student's family pursue a neurological examination. Pet. Ex. 20, p. 38. At that ARD meeting, Ms. *** encouraged the parents to have a neurological evaluation done because it would give an extensive amount of information that would offer the committee answers. Ms. ***'s FBA report, however, merely indicates that a neurological evaluation be considered, whereas a psychological evaluation was definitively recommended. TSD Ex. 21, p. 432.
44. The evidence does not demonstrate that a neurological evaluation was a necessary, required evaluation for Student's educational services.
45. The evidence does not demonstrate that Parent ever formally requested a neurological evaluation at TSD's expense or that TSD formally refused to pay for a neurological evaluation deemed necessary for Student.

46. Student's IEP called for 270 minutes of OT services each 9-week grading period, beginning at the end of ***. TSD Ex. 21. Student received Student's first 35-minute session on ***, but had no more sessions during that 9-week grading period. During the next nine weeks, TSD provided Student with 160 minutes of OT services. During the final nine weeks, TSD provided Student with 105 minutes of OT services. In total, TSD failed to provide Student with approximately 4.5 hours of a prescribed 9 hours of OT services between *** and ***.
47. Student accomplished most of Student's IEP goals, including Student's OT goal, even with the missed OT services. The evidence does not demonstrate that

54. The amendments to Student's science and social studies IEP goals at a *** ARD meeting were procedural defects by TSD, but they did not meaningfully deprive Parent of her rights under IDEA nor impact Student's education in such a way as to deny FAPE.
55. In ***, TSD had medication administration errors with Student. Pet. Ex. 40, pp. 1, 10. These errors were minor, and there is no evidence they impacted Student's education. The medication given to Student on *** and the medical personnel involved noted no issues of concern. Parent was properly notified of the error and proper protocols were followed for handling the error, consistent with Texas Department of State Health Services guidelines. Two errors in a span of two school years do not represent a systemic problem with TSD's procedures, nor is there any evidence that the errors impacted Student's education.
56. The standard practice for TSD was to have a contract psychiatrist perform services for TSD in regard to

case is never simply about the amount of testimony offered, or the qualifications of one side's witnesses over the other, but those are factors that play into the weight to be given to the evidence offered. In this case, the contrast in evidence is striking. The discussion below demonstrates the stark contrast in evidence offered by each side.

A. Summary of Witness Testimony

1. Petitioner's Witnesses

Petitioner offered the testimony of five witnesses: (1) ***, an advocate; (2) ***, Ph.D.; (3) ***, Ph.D.; (4) ***; and (5) Parent. Their testimony is very briefly discussed below.

Ms. *** was offered as a fact witness, because she was involved in assisting Petitioner through the ARD process. She testified as to ARD meetings and her review of Student's educational records and her observations of Student's experience at TSD. She also testified regarding TSD's facilities, including the special needs classroom.

Dr. *** was also offered as a fact witness, although some of his testimony was more akin to expert testimony. Petitioner asked Dr. *** to observe Student in the classroom setting and testify about his observations and opinions about Student's education and placement. Dr. *** testified to his observations and opinions regarding the quality of education that Student was receiving at TSD. This testimony is essentially an expert opinion. However, Dr. *** was not designated by Petitioner as an expert and, in fact, lacks the requisite qualifications to qualify as an expert in the area of Student's education. Without going into great detail on this point, Dr. *** himself testified that he does not have that much training in education of children ***,¹⁰ e0

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Petitioner's last witness was Parent, who testified as to Student's disabilities, Student's education, and Parent's experience with TSD. Parent was not qualified to offer an opinion about the adequacy of Student's education or curriculum, however, because she lacks any expertise. So, the value of her testimony was limited to the facts surrounding Student's education.

To summarize, then, Petitioner offered four fact witnesses and only one expert witness, who was not an educator and was not qualified to testify about educational curriculum or deaf student populations.

2. TSD's Witnesses

TSD offered the following witnesses: (1) ***, Ph.D.; (2) ***; (3) ***; (4) ***; (5) Ms. ***; (6) ***; (7) ***; (8) ***; (9) ***; (10) ***; (11) ***; (12) ***; (13) ***; (14) ***; (15) ***; (16) ***; and (17) ***, Ph.D.

Dr. *** was offered as an expert witness on deaf education. He is an adjunct professor at *** and a full-time professor at ***. Dr. *** has expertise in the education of deaf children and their cognitive functioning. Dr. *** opined that it is generally preferable to avoid giving additional disability labels to students with AI, as it can have negative effects by making a child feel more disabled than they are.²⁰ Rather, the child's needs should simply be addressed in Student's

Dr. *** was offered as an expert witness on educational and psychological testing. Most recently, Dr. *** was a tenured professor at *** and has been significantly involved in authoring educational psychological tests and textbooks. Dr. ***'s experience and expertise in the area of educational psychology and testing is significant and not subject to challenge.²⁴ Of particular note, Dr. *** is the senior author of ***.²⁵ He also has authored a textbook on ADHD.

Dr. *** reviewed the documents in this case, interviewed teachers and staff, observed the classroom settings, and also participated in depositions and hearings observations. After reviewing all of the materials and speaking with the appropriate TSD staff, Dr. *** concluded that Student's FBA was administered in an exemplary manner by Ms. *** and, in fact, her administration would likely be used by him as a positive model in future workshops.²⁶ Dr. *** also opined that the BIP used by TSD for Student was a very appropriate BIP for

by Parent and which is now the subject of TSD's counterclaim).²⁹ He further opined that Student was provided an education in the least restrictive environment and was receiving positive academic and nonacademic benefits from Student's education.³⁰ Ultimately, Mr. *** concluded his direct testimony with the following comments:

So, [Ms. ***] selected a good instrument. She administered it well. She got our test results. The school is doing a really impressive job with what they had at the time. And I think, again, it's ongoing. So this is a shifting, moving target. But I've been very impressed with the school and the services they have here. If I had a deaf child, this would be one of the three or four places in the country that I would look at relocating to place my own child here, and I can think of no higher endorsement because I have pretty high standards for my kids.³¹

TSD also offered the testimony of numerous members of its staff. Because of the large number of

Evaluation Report for School Health Services was completed by the school nurse, with the diagnostic impression being identified as ADHD and the reason to dispense the medication was to help Student focus and stay on task. Thus, at least as early as ***, TSD's own staff recognized Student's diagnosis of ADHD.

Further, TSD developed a BIP to improve Student's focus and performance in class. An ARD meeting was held on ***, to plan for Student's *** school year.³⁸ It was at this ARD meeting that the first BIP was accepted.³⁹ Behaviors reported by school staff that "interfere with learning" were listed as "Short attention span, noncompliance, aggression towards peers and staff, struggling with transitions times, does not like to change activity if the next activity is more challenging[,]***. There has been an increase in aggression towards peers, not staying in assigned area."⁴⁰ These behaviors were symptomatic of Student's ADHD. So, not only was TSD aware of Student's prior diagnosis of ADHD, but TSD also took steps to address the symptoms of Student's condition through the adoption of the BIP that targeted the behaviors associated with ADHD.

At an ARD meeting held on ***, the ARD committee adopted the previous IEPs developed for Student. The ARD committee also developed a BIP for Student based on Student's prior BIP. The BIP was to continue for 6 weeks at which time it developed for PTheC4hC4i4iNM0ks ontinu3 3>0(e)4(ks)-nBTontinu3 Aghe ain,4(t)-01(thi

was not given by TSD, the Hearing Officer concludes that TSD did, in fact, properly recognize and assess Student's ADHD and account for it in providing services to Student under IDEA. This conclusion is further supported by the expert testimony of Mr. ***, who testified TSD had properly evaluated Student in all areas of suspected disability,⁴³ and Dr. ***, who testified that the BIP and IEP for Student were appropriate and individualized to Student's needs, and that adding the classification of ADHD would not have changed the services offered to Student.⁴⁴

2. *Did TSD fail to find Student eligible as a child with an Other Health Impairment, specifically ADHD, in a timely manner?*

As noted above, the evidence conclusively establishes that TSD did not specifically identify and label Student as a child with an OHI, specifically ADHD. However, the Hearing Officer concludes that TSD was not required to do so. Student was already identified as a child entitled to special education services by virtue of Student's identified hearing impairment. Accordingly, under the law, Student was entitled to all required educational services necessary to ensure that Student received FAPE.

The Hearing Officer concludes that, once a child is deemed entitled to special education services under IDEA, TSD is not required to identify every other potential qualifying impairment that might entitle the child to special education services. Rather, TSD is simply required to provide all necessary services the child might need. Put simply, TSD did not have to identify and label Student as having ADHD, provided that TSD provided the services necessary to ensure that Student, with Student's ADHD, was receiving FAPE. As discussed above, and in more detail

Much time was spent at the hearing and in briefing addressing this issue. Ultimately, though, the Hearing Officer finds that the mere recommendation, without any further action by TSD, does not reflect actionable conduct by TSD to place Student in an overly-restrictive setting.⁴⁶ Accordingly, the Hearing Officer finds that TSD did not violate IDEA by merely discussing and recommending placement of Student in a special needs classroom in an ARD meeting, without any further action.⁴⁷

4. *Did TSD fail to provide Student an appropriate educational program individualized to meet unique needs?*

The Hearing Officer concludes that TSD provided Student with an appropriate educational program individualized to meet Student's unique needs. The various ARD committee deliberations reflect that TSD was aware of Student's unique needs resulting from both Student's AI and also Student's ADHD and adjusted Student's educational program accordingly. The BIP was specifically adopted in recognition of the symptoms of Student's ADHD and was designed to help Student overcome the impairments from Student's ADHD so Student could continue to receive an appropriate education. Student's teachers testified that the IEP and BIP were individually tailored to meet Student's specific needs. There is no credible evidence in the record that Student's educational programs were not individualized, although there is some dispute as to whether they were appropriate. This is a matter for expert determination.

The experts who were adequately qualified to assess Student's education testified that the IEP was properly individualized to Student's needs, including Student's ADHD, and provided an appropriate education to Student.⁴⁸ Further, the expert testimony indicates that the BIP was properl

distracted by other students.⁵⁰ These active strategies were directly related to addressing Student's ADHD symptoms.

In contrast, Petitioner offered no competent evidence to demonstrate that TSD failed to provide Student an appropriate educational program individualized to meet Student's needs. The only expert designated by Petitioner was Dr. ***, and she lacked qualification in the education of deaf students. Perhaps even more troubling, Dr. *** had not even reviewed Student's BIP when she made her initial report and recommendations.⁵¹ The BIP was the primary tool used to address Student's ADHD symptoms. An expert opinion that was not based on a specific review of Student's BIP has very little value in answering the question of whether Student's educational programs were individualized and appropriate. Thus, Petitioner has no competent expert testimony that demonstrates inadequacy in the individualized educational programs offered to Student by TSD.

The weight of the evidence in the record establishes that TSD provided Student with an appropriate educational program individualized to meet Student's unique needs. However, even if TSD's evidence had not shown that, Petitioner's evidence still would not be sufficient to prove that TSD had failed to provide an appropriate individualized educational program to Student.

recommendations for both home and school. In sum, Ms. ***'s FBA administration and analysis was detailed and, by all qualified expert accounts, proper. Petitioner has failed to offer competent evidence to the contrary. Thus, Petitioner has failed to show any right to relief on this issue.

8. *Did TSD f parents the ability to fully participate in ARD committee discussions to make educational decisions for Student by denying them prior access to information available to all other members?*

This allegation appears primarily based on evidence showing that prior to an ARD meeting in Student's *** grade year, TSD staff shared and discussed the FBA report and BIP for Student before they were provided to Parent. The Hearing Officer finds that this does not give rise to a right to relief in this case.

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12. Did TSD fail to provide OT services?

Petitioner alleges that TSD should have provided more OT services to Student. In particular, Student's IEP called for 270 minutes of OT services each 9-week grading period.⁶⁴ This requirement was put into place during an ARD meeting ***. Student received Student's first 35-minute session on ***, but had no more during that 9-week grading period.⁶⁵ During the next nine weeks, TSD provided Student with 160 minutes of OT services. During the final nine weeks, TSD provided Student with 105 minutes of OT. This was indisputably less than the amount of OT services Student was entitled to.

TSD offered evidence showing some of the reasons for the missed OT services. Some were due to Student absences, some due to school closings, and some due to school activities. Regardless of the reasons, TSD argues that the missed OT services did not deny Student FAPE. The Hearing Officer agrees.

A mere technical failure to comply with an IEP does not necessarily mean that FAPE has been denied to a student. Rather, a party challenging the implementation of the IEP must show more than a *de minimis* failure to implement all elements of the IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant portions of the IEP.⁶⁶ In this case, Student received about half of the OT services Student was entitled to during the second semester of Student's *** grade year, meaning Student did not receive approximately 4.5 hours of OT services during the semester. The records demonstrate that Student accomplished most of Student's IEP goals, including Student's OT goal, even with the missed OT services, so it does not appear that Student's education suffered in any significant way due to the missed OT services.⁶⁷

As TSD cites, numerous courts have held that FAPE was still properly given even though OT services were not provided consistent with an IEP.⁶⁸ In the same way, the Hearing Officer here finds that the missing 4.5 hours of OT services does not constitute a denial of FAPE or otherwise give rise to relief in this case.

⁶⁴ TSD Ex. 21.

⁶⁵ There were only *** school days remaining in that grading period after the OT requirement was adopted by the ARD committee. Student was absent for *** of these days and many other days were busy with ***.

⁶⁶ *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).

⁶⁷ TSD Ex. 50; Tr. 773-74.

⁶⁸ For a listing of such cases, see TSD's closing argument, p. 52.

group instead of all *** [students] within one classroom and two teachers are working with them all.⁷⁴ When questioned in her deposition about what she meant by 1:1, Parent testified “Well, I didn’t mean one-on-one only. I meant one-on-one and small group, more of a focus concerning Student’s ADHD, Student’s attention deficit, and Student’s delay.”⁷⁵ When asked further how much one-on-one she believed should have been provided, Parent testified “I always say that I wanted [Student] to be involved in smaller groups.”⁷⁶

So, a clear request for 1:1 support services was never made to TSD and, in fact, from the evidence it appears that Parent may have simply been using a term that she had heard before without really understanding what it meant, or even what she really wanted for her child. This is not to fault Parent, as she would not be expected to know and understand educational terminology. But, at the same time, TSD cannot be faulted for not understanding what exactly Parent was seeking, nor can TSD be deemed to have refused to provide a service that was never clearly requested. In fact, virtually all of Student’s teachers testified that Student was given some 1:1 instruction in Student’s classes on a regular basis. Moreover, Student’s classes were relatively small, with Student’s *** grade classroom consisting of *** students taught by two teachers and a teaching assistant, resulting in a student to instructor ratio of ***.⁷⁷ Thus, Student was often taught in the small-group setting that Parent indicates she wanted.

Given this evidence, the Hearing Officer concludes that TSD did not refuse a clear request for 1:1 support services and, as such, did not fail to give any required notice of refusal. Therefore, Petitioner’s request for relief in this regard is unfounded.

16. *Did TSD fail to provide Student with appropriate social studies and science IEP goals and objectives and again denying her participation in an ARD decision?*

During the *** school year, TSD amended Student’s science and social studies IEP goals at a *** ARD meeting at which Parent was not in attendance. These changes in goals were made without formal written notice to Parent and without Parent’s consent. The changes primarily modified the manner in which compliance was shown, removing a required written demonstration and emphasizing other verbal expression rather than written form. This was done because of Student’s difficulty with writing. Other minor modifications were made as well.

⁷⁴ TSD Ex. 23, p. 509.

⁷⁵ TSD Ex. 117, pp. 26-27.

⁷⁶ TSD Ex. 117, p. 73.

⁷⁷ Tr. 630; TSD Ex. 120, pp. 14-15.

19. *Did TSD fail to provide Student an education from a qualified teacher?*

Petitioner expressed concerns about the FBA conducted by Ms. *** in ***

VII. CONCLUSIONS OF LAW

1. Student currently is entitled to special education services

IX. NOTICE TO THE PARTIES

This Decision is final and is appealable to state or federal district court. Any party aggrieved by the findings and decision 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. 19 Texas Administrative Code § 89.1186(n).

X. SYNOPSIS

Issue No. 1: Did TSD fail to properly identify and assess Student in all areas of suspected disability?

Held: For TSD. TSD did properly identify and assess Student in all areas of suspected disability, until such time as Parent refused consent for a complete psychological evaluation, which is necessary to evaluate Student for additional impairments.

Citation: 34 C.F.R. § 300.304(c)(6).

Issue No. 2: Did TSD fail to find Student eligible as a child with the Other Health Impairment of ADHD in a timely manner?

Held: For TSD. TSD identified and provided services for Student's ADHD, despite the fact that it did not label Student with ADHD as an OHI. The law does not require that Student's additional impairment of ADHD be labeled, so long as Student has already been identified as a Student entitled to special education services under IDEA.

Citation: 20 U.S.C. § 1412; 34 C.F.R. §

Issue No. 4: Was Petitioner entitled to an IEE at TSD's expense?

Held: For TSD. TSD conducted a proper comprehensive evaluation within the year prior to Petitioner's request for an IEE. Thus, Petitioner was not entitled to an IEE at TSD's expense.

Citation: 34 C.F.R. § 300.502(b)(2).

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