

**STUDENT,
b/n/f PARENT and PARENT,
Petitioner**

§
§
§
§
§
§
§
§

BEFORE A SPECIAL EDUCATION

v.

HEARING OFFICER FOR

**CLEAR CREEK INDEPENDENT
SCHOOL DISTRICT,
Respondent**

THE STATE OF TEXAS

DECISION OF HEARING OFFICER

Petitioner *** (Student), by next friend *** (Father) and *** (Mother) (collectively, Petitioner) requested an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 *et seq.*¹ The respondent to the complaint is the Clear Creek Independent School District (the District). Petitioner alleges the District failed to identify all of Student’s disabilities pursuant to the Child Find provisions of the IDEA and incorrectly denied Student’s request for special education services. The District denies Petitioner’s allegations. The Hearing Officer finds that the District did not violate the IDEA in April 2013 by failing to identify all of Student’s disabilities or by denying Student special education services. Therefore, Petitioner’s requested relief is denied.

I. DUE PROCESS HEARING REQUEST

Petitioner filed a Request for a Due Process Hearing on April 11, 2014. In the Due Process Supplement (Complaint) attached to the hearing request, Petitioner alleged that the District denied Student a Free and Appropriate Public Education (FAPE), and raised the following issues related to IDEA law:

1. Student has been diagnosed with Pervasive Developmental Disorder, Not Otherwise Specified (PDD, NOS), an Autism Spectrum Disorder. The District has refused to accept any diagnosis of Student indicating Autism Spectrum Disorder, but provided Student with special education services beginning in the spring of 2011, when Student was in *** grade, on the basis of Emotional Disturbance.
2. Despite Student’s disability and related difficulties, the District dismissed Student from special education services in April 2012, when Student was a ***. Student’s parents disagreed with the District’s decision.²

¹ Father is authorized to bring this action on behalf of Student, ***, pursuant to ***. See Order No. 3 issued May 15, 2014.

² A due process hearing must be requested within “one year of the date the complainant knew or should have known about the alleged action that serves as the basis for the request.” 19 Tex. Admin. Code § 89.1151(c). The one-year statute of limitations began on April 11, 2013. Because Petitioner did not challenge the District’s April 2012 decision within the State’s one-year statute of limitations, the

3. An Independent Educational Evaluation (IEE) completed in the spring of 2013 concluded that it was likely that Student met eligibility criteria for the IDEA enumerated disability of Emotional Disturbance due to Student's pervasive depression and anxiety. After considering the IEE conclusion and other information, the District determined Student was not eligible for special education services because Student's grades were high, Student met various Texas Assessment of Knowledge and Skills (TAKS) standards,³ and Student's teachers reported Student exhibited appropriate behavior and interacted well with others. Student's parents disagreed with the District's decision, noting that Student's success was due in large part to intense efforts put forth by the parents in the home to work with Student on Student's education.
4. The District violated the Child Find provisions of the IDEA by taking inadequate measures to identify Student's disabilities.

For relief, Petitioner seeks:⁴

1. reimbursement for private educational services accessed in an attempt to replace services that the District should have provided, including private *** classes and Social Skills training;
2. access to and inclusion in the District's special education program and related evaluations;
3. in-home teaching, as made available by the District to a variety of special education students, so as to provide Student with some access to education;
4. access to and inclusion in the District's Dual Credit Program, so that Student can transition to other levels of education in a manner that will promote Student's sense of Student's own self-worth and progress;
5. accommodations for anxiety, depression, and communication deficits, as well as other accommodations appropriate to Student's disability, as identified in an IEE conducted by ***, in 2014;
6. appropriate social skills training;
7. appropriate Peer to Peer support;
8. support from the District's Autism Support Team;
9. evaluation of Student for Social Communication Disorder as defined by the DSM V;

decision cannot now be challenged. Therefore, any discussion in this decision of events occurring prior to April 11, 2013, is for background purposes only.

³ The TAKS assessments, recently replaced by the State of Texas Assessments of Academic Readiness (STAAR), measured the extent to which students had learned and could apply the State-defined knowledge and skills at each tested grade level. Texas Education Agency—TAKS Resources, <http://www.tea.state.tx./student.assessment/taks> (last visited February 4, 2015).

⁴ Some of the relief sought in the hearing request was presented with more specificity, but with no substantive changes, in Petitioner's Closing Argument Brief. See Petitioner's Closing Argument Brief at 22-23. The Hearing Officer has combined the relief requested in the hearing request with that requested in Petitioner's Closing Argument Brief.

10. reimbursement for Dr. ***'s IEE, prepared at the expense of Student's parents;⁵
11. reasonable attorney's fees;⁶ and
12. such other and further equitable relief as the Hearing Officer deems appropriate.

II. ISSUES AND BURDEN OF PROOF

A. Issues

The Hearing Officer does not have jurisdiction to hear claims arising under any law other than the IDEA. Some of the issues raised in Petitioner's hearing request fall outside IDEA statutes and State standards.⁷ Therefore, relief available under non-IDEA laws and any such claims, as well as asserted rights regarding payment of the prevailing party's attorney's fees, were dismissed in Order No. 2.

The issues before the Hearing Officer were identified in Order No. 2 as (1) the District failed to meet its Child Find obligations with respect to Student by failing to identify all of Student's disabilities; and (2) the District wrongly denied Student special education eligibility and FAPE. As clarified in an April 29, 2014 prehearing conference with the parties before Order No. 2 was issued on May 1, 2014, Petitioner's allegation is that the District did not meet its Child Find obligations in April 2013 when it did not take adequate measures to identify all of Student's disabilities before denying Student special education services.⁸

However, Petitioner's Closing Argument Brief seems to expand upon the Child Find issue by stating that the District abdicated its Child Find responsibilities with respect to Student after the April 2013 District

⁵ When parents disagree with an evaluation conducted by a school district, they have the right to request an IEE at public expense. 34 C.F.R. § 300.502(b)(1). The school must either pay for the IEE or file a request for a due process hearing to establish that its own evaluation was appropriate. 34 C.F.R. § 300.502(b)(2). In this case, Student's parents disagreed with the District's April 2012 evaluation. Respondent Ex. 11. Student's parents requested and received an IEE at public expense through ***. Petitioner Ex. 49-15; Respondent Ex. 10. Parents are entitled to only one IEE at public expense for each evaluation conducted by the school. 34 C.F.R. § 300.502(b)(5). The District did not conduct any further evaluations after April 2012. Consequently, Petitioner cannot be reimbursed for Dr. ***'s IEE.

⁶ Requested relief for prevailing party's attorney's fees was dismissed in Order No. 2 as being outside the Hearing Officer's jurisdiction.

⁷ Petitioner alleged violations of non-IDEA statutes and State standards, *e.g.* Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, State "at risk" standards, and HB 1386. Complaint at 2-3. The parties agreed that non-IDEA issues are not before the Hearing Officer. April 29, 2014 Telephonic Prehearing Conference Tr. at 18-19.

⁸ April 29, 2014 Telephonic Prehearing Conference Tr. at 8.

decision, in the 2013-2014 school year.⁹ In particular, Petitioner argues that “[The District] had an obligation throughout [Student’s] entire tenure at the school to address Student’s educational needs and to evaluate Student appropriately whenever on notice of behavior that might indicate a disability and resultant need for special education services. [The District] was on notice throughout the 2013-2014 school year.”¹⁰

Petitioner further argues that the District abdicated its Child Find obligations by failing to take heed, even though District staff was fully aware of Student’s history of severe depression, anxiety, and other emotional disturbance, of (1) Student’s increasing attendance problems in the 2013-2014 school year; (2) Student’s failure to turn in assignments on time; (3) Student’s plummeting grades; (4) the constant communication of Father as to Student’s significant problems, although District administrators had invited exactly this sort of communication; (5) Student’s increasing difficulties with socialization in the 2013-2014 school year; (6) the likely effect of reactive and inconsistent approaches to Student’s difficulties as they arose; and (7) the danger of relying entirely on reports and assessments from teachers who interacted with Student only in highly specialized environments for short periods of the day.¹¹

But the Complaint does not allege that the District should have, but failed, to refer Student for special education services during the 2013-2014 school year. Under the law regarding the subject matter of due process hearings, the party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under 34 C.F.R. § 300.508(b), unless the other party agrees otherwise.¹² Respondent does not agree otherwise.¹³ Therefore, Petitioner does not have a right to a hearing on whether the District abdicated its Child Find duties with respect to Student during the 2013-2014 school year.

The Hearing Officer finds the only issues to be decided are whether the District’s April 2013 decision to deny special education services to Student was correct and whether the District met its Child Find obligations regarding its assessment of Student’s disabilities in making the April 2013 decision.

⁹ Petitioner’s Closing Argument Brief at 22.

¹⁰ Petitioner’s Closing Argument Brief, footnote 2.

¹¹ Petitioner’s Closing Argument Brief at 25.

¹² 34 C.F.R. § 300.511(d); *see also* 20 U.S.C.S. § 1415(f)(3)(B).

¹³ Respondent’s Closing Argument at 24.

B. Burden of Proof

IDEA creates a presumption that a school district's decisions made pursuant to IDEA are appropriate and that the party challenging the decisions bears the burden of proof at all times.¹⁴ To prevail, Petitioner must, therefore, establish that (1) the District failed to meet its Child Find obligations with respect to Student by failing to identify all of Student's disabilities; and (2) the District wrongly denied Student special education eligibility and FAPE.

III. HEARING AND EXTENSION OF DECISION DUE DATE

The hearing was held on December 2-4, 2014, before Hearing Officer Sharon Cloninger¹⁵ at the District's Clear View Educational Center, 400 South Walnut Street, Webster, Texas 77598. Attorney Mark Whitburn represented Petitioner. Attorney Amy C. Tucker represented the District.

At the conclusion of the hearing, both parties asked for the opportunity to submit written closing arguments. At the request of the parties, the decision due date was extended on the record, for good cause, to February 20, 2015, to allow time for the preparation of the hearing transcript and for the parties to submit written briefing.¹⁶ This decision was timely rendered and forwarded to the parties on February 20, 2015.

IV. FINDINGS OF FACT

Based upon the evidence and argument of the parties, the Hearing Officer makes the following findings of fact:

1. Student, ***, resides with Mother and Father within the geographical boundaries of the District.
2. Student has been variously diagnosed with Generalized Anxiety Disorder; Asperger's Syndrome; PDD, NOS; depression; suicidal ideation; and Attention Deficit Hyperactivity Disorder (ADHD).¹⁷

¹⁴ *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005); *see also White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d. 373, 377 (5th Cir. 2003); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993).

¹⁵ The case initially was assigned to Hearing Officer Renee M. Rusch. The case was reassigned to Hearing Officer Cloninger on September 11, 2014, to accommodate the parties' request for continuance to hearing dates on which Hearing Officer Rusch was not available. *See* Order Nos. 9 and 10.

¹⁶ Tr. at 465; *see* Order No. 11.

¹⁷ Petitioner Exs. 18-1, 47, 49-60, 51-2, 59-20.

3. Student began attending District schools in ***.
4. Most recently, Student attended ***, a school in the District, with ***.
5. Student stopped attending all but one class in the spring of 2014.¹⁸
6. Student has ***, has ***, and has ***.¹⁹
7. In February 2011, when Student was in *** grade, Father requested that Student be evaluated for special education services.²⁰
8. An April 19, 2011 Full and Individual Evaluation (FIE) identified Student as having the IDEA enumerated disabilities of Emotional Disturbance and Other Health Impairment and a need for special education services.
9. Student was admitted to special education services at a May 2, 2011 Admissions, Review, and Dismissal (ARD) Committee meeting.
10. An Individualized Education Program (IEP) was developed for Student, with a start date of May 2, 2011.²¹
11. While receiving special education services in the 2011-2012 school year, when Student ***, Student behaved appropriately in the classroom and Student's final grades were three A's and four B's.
12. By March 2012, Student had mastered two of the annual IEP goals early, including the social skills goal and transition goal, and was close to mastering the third goal, related to organizational skills.²²
13. An April 2, 2012 FIE completed by the District concluded that Student no longer met the IDEA criteria as a student with an Emotional Disturbance or any other IDEA enumerated disability.²³
14. On April 4, 2012, the ARD Committee dismissed Student from special education services after determining Student no longer met eligibility requirements.²⁴
15. Father disagreed with the ARD Committee's April 4, 2012 decision to dismiss Student from special education services.²⁵

¹⁸ Petitioner Exs. 22, 49-84, 52-1, 53-1, 54-1, 59-1.

¹⁹ Tr. at 5, 84.

²⁰ Petitioner Exs. 49-2, 57-1.

²¹ Petitioner Ex. 13; *see* 34 C.F.R. §§ 300.112, 300.32-.324.

²² Respondent Ex. 12-2, 12-3; Petitioner Ex. 13.

²³ Petitioner Ex. 31-30.

²⁴ Petitioner Ex. 11.

²⁵ Petitioner Ex. 12.

16. The ARD Committee reconvened on April 18, 2012, and, despite Father's disagreement, did not change its decision to terminate special education services for Student.²⁶
17. On April 18, 2012, Father requested an IEE.²⁷
18. *** completed an IEE between January 17, 2013, and March 19, 2013, when Student ***, and concluded it was "likely" Student met eligibility criteria for Emotional Disturbance due to Student's pervasive depression and anxiety.²⁸
19. The *** IEE found that, pursuant to the Autism Diagnostic Observation Schedule, Student did not meet the criteria for a classification of Autism or Autism Spectrum Disorder on the Reciprocal Social Interaction or Communication domains, or on the overall total score.²⁹
20. Father agreed with the *** IEE conclusion that Student has pervasive depression and anxiety but disagreed with the conclusion that Student does not meet the criteria for classification of Autism or Autism Spectrum Disorder.³⁰
21. Father agreed with the *** IEE recommendations that Student be given more individualized attention as needed, allowed to complete assignments in a room with fewer distractions, provided more frequent breaks as needed, and allowed more time for transition between activities; that teachers make eye contact with Student before giving Student instructions and that they give Student one instruction at a time; and that Student be allowed access to a school counselor to discuss how mood symptoms were affecting Student and to monitor any suicidal thoughts.³¹
22. On April 15 and April 18, 2013, ARD Committee meetings were convened to consider the *** IEE and revisit Student's eligibility for special education services.³²
23. The ARD Committee concluded Student was not a child with an IDEA enumerated disability in need of special education and related services.³³ The determination was based in part on a May 2, 2011 vocational assessment; an FIE, a psychological evaluation, and a speech and language evaluation, all dated April 2012; the *** IEE; information from Father, school personnel and school records; and information from other agencies/professionals.
24. The ARD Committee determined that Student did not meet the IDEA criteria for the enumerated disability of Emotional Disturbance.

²⁶ Petitioner Ex. 7.

²⁷ Petitioner Exs. 8-1, 9-1, 49-9.

²⁸ Petitioner Ex. 6.

²⁹ Petitioner Ex. 6-9; Respondent Ex. 2-3.

³⁰ Tr. at 46-47.

³¹ Petitioner Exs. 4-3, 4-4, 6-11, 6-12.

³² Petitioner Exs. 4, 5.

³³ "Related services" means "transportation and such developmental, corrective, or other supportive services as are required to assist a child with a disability to benefit from special education" and includes such things as psychological services, counseling, and social work services. 34 C.F.R. § 300.34.

25. The ARD Committee decided Student was not eligible for special education services because there was no demonstrated educational need; that is, Student did not require special education services in order to progress in the general education setting and through general education curriculum with passing averages.³⁴
26. The ARD Committee determined that the *** IEE recommendations could be provided through the Student Support Team and school counseling staff with no need for special education services.³⁵
27. The ARD Committee determined that, based on administrator and teacher observations, Student did not present a need for social skills training.³⁶
28. Between April 2012, when Student was dismissed from special education, and April 2013, when the District determined Student was not eligible to be readmitted to special education, Student earned final grades of 7 A's; met or exceeded TAKS standards; behaved appropriately and interacted appropriately with other students and teachers at school; and demonstrated social skills typical of same age and same grade peers.³⁷
29. Father disagreed with the District's April 2013 decision to deny Student special education services.³⁸
30. Student's parents hired Dr. ***, who conducted an IEE of Student in April and May of 2014, and issued an IEE report in November 2014.³⁹
31. Dr. *** concluded that the results of the data in his evaluation could not conclusively determine the presence or absence of an Autism Spectrum Disorder.⁴⁰
32. The preponderance of the evidence establishes that, in April 2013, Student was not a child with one of the IDEA enumerated disabilities who, by reason thereof, was eligible for special education and related services.
33. The preponderance of the evidence establishes that, in April 2013, the District properly considered the *** IEE and other information when determining that Student was not a child in need of special education and related services in order to progress in the general education setting and through the general education curriculum.
34. The preponderance of the evidence establishes that, in April 2013, the District complied with its Child Find obligations regarding Student in assessing Student's disabilities before deciding not to provide Student with special education services.

³⁴ Petitioner Exs. 3-1, 4-5, 4-6.

³⁵ Petitioner Ex. 4-8.

³⁶ Petitioner Ex. 4-5.

³⁷ Petitioner Ex. 3-1.

³⁸ Petitioner Ex. 2.

³⁹ Petitioner Ex. 59.

⁴⁰ Petitioner Ex. 59-23.

V. APPLICABLE LAW

A. Child Find Requirement

Under the IDEA, a school district must identify, locate, and evaluate any child that it suspects (1) has a disability, and (2) needs special education and related services.⁴¹ The Fifth Circuit has explained that the existence of a disability, even when coupled with persistent academic difficulties and misconduct, does not automatically trigger a school's duty to conduct a special education evaluation.⁴² Rather, the "Child Find duty 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 the disability."⁴³ When these suspicions arise, "the local educational agency must evaluate the student within a reasonable time after school officials have notice of behavior likely to indicate a disability."⁴⁴ Children to be evaluated include those "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[.]"⁴⁵

B. Eligibility Law

To be eligible for IDEA special education services, a student must: (1) have one of the 13 disabilities enumerated in the IDEA, *e.g.* Emotional Disturbance; and (2) by reason of that disability, need special education and related services.⁴⁶ In Texas, eligibility determinations are made by an ARD Committee based on all the information available.⁴⁷

⁴¹ 20 U.S.C § 1412(a)(3)(A); 34 C.F.R. § 300.111; *see also D. G. v. Flour Bluff Indep. Sch. Dist.*, 481 Fed. App'x. 887, 891 (5th Cir. 2012).

⁴² *See Alvin Indep. Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F.3d 378, 384 (5th Cir. 2007).

⁴³ *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 950 (W.D. Tex. 2008); *see also C.P. v Krum Indep. Sch. Dist.*, No. 4:13CV63, 2014 WL 4651534, *10 (E.D. Tex. Sept. 17, 2014).

⁴⁴ *Richard R.*, 567 F. Supp. 2d at 949-50.

⁴⁵ 34 C.F.R. § 300.111(c)(1); *Richard R.*, 567 F. Supp. 2d at 950.

⁴⁶ 34 C.F.R. § 300.8(a)(1).

⁴⁷ 19 Tex. Admin. Code § 89.1050(a)(5); 34 C.F.R. § 300.306(c).

To determine whether a student is a “child with a disability” eligible for IDEA services, a school must conduct an FIE in compliance with the extensive procedural requirements contained in the IDEA.⁴⁸ After initial eligibility determinations, a school must conduct a reevaluation if the school determines that “the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation” or if the child’s parent or teacher requests a reevaluation.⁴⁹ Reevaluations are limited to once a year, unless the school and the parent agree otherwise, but not less than once every three years, unless the school and the parent agree otherwise.⁵⁰ Parents who disagree with the ARD Committee’s eligibility decision may request a due process hearing to challenge the decision.⁵¹

C. Establishing Emotional Disturbance⁵²

The *** IEE identified Student as a child with clinical diagnoses of Anxiety Disorder, NOS, and Depressive Disorder, NOS.⁵³ However, as reflected in the IDEA’s definition of Emotional Disturbance, a diagnosis by a physician or psychologist, *e.g.* anxiety or depression, does not, by itself, establish eligibility because the IDEA is educationally—not diagnostically—oriented.⁵⁴ Instead, the IDEA sets out the criteria for a finding that a child has an enumerated disability of Emotional Disturbance. Under the regulations promulgated by the Department of Education, Emotional Disturbance 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:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

⁴⁸ See 34 C.F.R. §§ 300.301-.311.

⁴⁹ 34 C.F.R. § 300.303.

⁵⁰ 34 C.F.R. § 300.303(b).

⁵¹ 34 C.F.R. § 300.507(a)(1).

⁵² Although Father believes Student has Autism, neither the *** IEE nor Dr. ***’s IEE concluded Student has Autism or an Autism Spectrum Disorder. Respondent Exs. 2-3, 10-5, 10-6; Petitioner Ex. 59-23. According to Dr. ***’s evaluation, Student meets the criteria for Autism Spectrum Disorder for two of three factors with the final factor being one point below the diagnostic cutoff. Petitioner Ex. 59-17. Consequently, this analysis is limited to the only potentially qualifying disability suggested by the *** IEE and Dr. ***’s IEE, *i.e.* Emotional Disturbance. Respondent Ex. 10-11; Petitioner Ex. 59-23.

⁵³ Petitioner Ex. 6-10. Dr. ***’s November 2014 IEE, which suggested Student might have an Emotional Disturbance, was not before the ARD Committee for its consideration in April 2013.

⁵⁴ Tr. at 424 (testimony of Ms. ***); *see A.D.*, 503 F. 3d at 384; *see also, J.M. v. Lake Travis Indep. Sch. Dist.*, No. A-07-CA-152-SS, at *9 (W.D.Tex. Filed Aug. 10, 2007) (unreported decision attached to Respondent’s Closing Argument as Exhibit A).

- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behaviors or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.⁵⁵

D. Establishing Need for Special Education and Related Services

If the ARD Committee determines a student has an IDEA enumerated disabling condition and the condition adversely affects Student's educational performance, the next question is whether, by reason of the disability, Student needs special education and related services.

"Special education" is defined to mean "specially designed instruction . . . to meet the unique needs of a child with a disability, including (i) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (ii) instruction in physical education."⁵⁶ "Specially designed instruction" means "adapting as appropriate to the needs of the eligible child under this part, the content, methodology, or delivery of instruction (i) [t]o address the unique needs of the child that result from the child's disability; and (ii) [t]o ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children."⁵⁷ In short, to qualify as a "student with a disability" pursuant to the IDEA, Student must need "specially designed instruction" in order to have access to, and benefit from, the general educational curriculum.

Importantly, the "need" for special education must be a present need. That is, concern that a student may experience problems in the future that could affect Student's learning or behavior is not a valid basis for

⁵⁵ 34 C.F.R. § 300.8(c)(4)(i).

⁵⁶ 34 C.F.R. § 300.39(a)(1).

⁵⁷ 34 C.F.R. § 300.39(b)(3).

IDEA eligibility.⁵⁸ As the 7th Circuit explained, “[i]t is not whether something, when considered in the abstract, *can* adversely affect a student’s educational performance, but whether in reality it *does*.”⁵⁹

Significantly, a student who has a disability and needs only a related service, but not special education, is not a “student with a disability” under the law.⁶⁰

VI. DISCUSSION

A. Overview of the Evidence

Petitioner offered 57 exhibits, which were admitted. The District offered 22 exhibits, which were admitted. The following witnesses testified:

- Father
- ***, Assistant Principal, ***
- ***, Licensed Specialist in School Psychology, District employee
- ***, Ph.D., Licensed Specialist in School Psychology
- ***, Teacher, ***
- ***, Director of Psychology and Assessment Services, ***
- Dr. ***, Executive Director of Special Education
- ***, Alternative Academic Instruction Specialist, District employee
- ***, Counselor, ***
- ***, Teacher, ***
- ***, Teacher, ***

B. Background

⁵⁸ *Eric H. v. Judson Indep. Sch. Dist.*, 2002 U.S. Dist. LEXIS 20646, *9 (W.D. Tex. Sep. 30, 2002) (finding parents’ fear of future failure does not meet IDEA eligibility requirements).

⁵⁹ *Marshall Joint Sch. Dist. No. 2 v. C.D. ex rel. Bryan D.*, 616 F.3d. 632, 637 (7th Cir. 2010) (emphasis added) (affirming dismissal of a student with orthopedic impairment from special education services because it was not shown the disability still had an adverse impact on Student’s educational performance, only the potential to have such impact).

⁶⁰ 34 C.F.R. § 300.8(a)(2).

Student, ***, resides with Student's parents within the District's geographical boundaries. Student began attending District schools in ***. In April 2013, Student was ***, a District school, ***. The spring semester of Student's *** year, Student stopped attending all classes except Student's *** class, held *** the day.⁶¹ Student remains enrolled as a student, although not attending school, and has access to the District's online learning platform which Student could use to earn the second-semester *** and *** class credits Student needs ***, or Student could attend classes at the ***.⁶² Student has ***, has ***, and has ***. Currently, Student ***.

***** year and admission to special education⁶³**

The District first determined Student to be eligible for special education services on May 2, 2011, at the end of Student's *** year. Earlier that year, Student received Section 504 classroom accommodations on the basis of anxiety, depression, and ADHD.⁶⁴ In the middle of the year, Student began seeing a private therapist at *** who noted the "chief complaint" upon intake was depression, anxious mood, conflict with parents, and excessively ***.⁶⁵ On February 1, 2011, Father notified the campus principal that he wanted Student tested for special education services.⁶⁶

The District completed an FIE on April 19, 2011.⁶⁷ The FIE noted that Student had been tardy or absent numerous times, that Student had failed *** the first semester, and Student was having trouble completing Student's assignments in the allotted time.⁶⁸ As reported by Student's teachers, the FIE also noted that Student sometimes was off-task and needed redirection in class, especially with independent assignments.⁶⁹ Student's teachers also reported clinically significant scores in the areas of withdrawal, and at-risk scores in the areas of hyperactivity, attention problems, anxiety, depression, somatization, atypicality, and adaptability.⁷⁰ These

⁶¹ Tr. at 81.

⁶² Tr. at 414-415 (testimony of Dr. ***).

⁶³ See Petitioner's Closing Argument Brief at 4-5; see also Respondent's Closing Argument at 3-7.

⁶⁴ Respondent Ex. 9-4.

⁶⁵ Respondent Ex. 21-2.

⁶⁶ Petitioner Ex. 49-2.

⁶⁷ Respondent Ex. 9.

⁶⁸ Respondent Ex. 9-1, 9-5.

⁶⁹ Respondent Ex. 9-5.

⁷⁰ Respondent Ex. 9-6.

scores indicated that, at school, Student “may be overly active in the classroom at times, have the tendency to be easily distracted and unable to concentrate more than momentarily and may have difficulty readily adapting to changes in Student’s environment. This may indicate that [Student] may overreact to relatively minor physical complaints, Student may experience behaviors stemming from worry, nervousness and/or fear. [Student] may also be withdrawn, pessimistic and/or sad and may sometimes act in ways that others consider odd.”⁷¹ Based on information from Student and Student’s parents, the FIE also documented clinically significant problems in the home environment related to anxiety and depression.⁷²

The FIE concluded that Student met criteria for Emotional Disturbance on the basis of (1) inappropriate types of behavior or feelings under normal circumstances; and (2) a general mood of unhappiness and depression.⁷³ The evaluator explained that Student’s “anxious and depressive feelings are impacting Student’s daily functioning in and out of the school setting as well as affecting Student’s interpersonal relationships with peers.”⁷⁴

An ARD Committee met on May 2, 2011, and, on the basis of the FIE and all other information provided to the District, found Student had both a qualifying disability and a need for special education services.⁷⁵ The ARD Committee recommended that Student’s organizational and study skills be monitored, and that Student work on goals related to ***.⁷⁶ Both general education and special education teachers were responsible for implementing the goals.⁷⁷ A special education teacher was assigned to indirectly monitor Student’s progress in the general education classrooms every three weeks through progress/report cards.

To support these services, the ARD Committee recommended a single related service: psychological services for one hour per nine-week grading period.⁷⁸ Student also was provided the same classroom accommodations Student had received pursuant to Section 504: extended time, assignment notebook,

⁷¹ Respondent Ex. 9-6.

⁷² Respondent Ex. 9-7.

⁷³ Respondent Ex. 9-12.

⁷⁴ Respondent Ex. 9-7.

⁷⁵ Respondent Ex. 7-2.

⁷⁶ Respondent Ex. 7-5 to 7-8, 7-21.

⁷⁷ Respondent Ex. 7-6.

⁷⁸ Respondent Ex. 7-17, 7-21; *see also* Petitioner Ex. 17-2.

preferential seating, and frequent check-ins on long-term assignments.⁷⁹ Student's final grades Student's *** year were three A's, two B's, one C, and one F.⁸⁰

On ***, 2011, Student was home alone and angry about being denied access to ***. In response to Student's anger, Student ***. When the *** Student, Student went to a neighbor's house. As a result of this incident, Student was ***.⁸¹

Over the summer break, Student engaged in at least two physically aggressive acts in which Student threatened *** with physical harm. Father declined to pursue the residential placement recommended by Student's therapist. The second of these incidents immediately followed Student's *** being taken away as part of therapy for Student's ***.⁸² No evidence in the record suggests that Student's parents shared any of the information regarding Student's summer behavior with the District.

***** *Year with Special Education Services***⁸³

When school resumed in August 2011, the District continued to implement the special education services and psychological counseling recommended by the ARD Committee. In contrast to Student's behavior at home over the summer break, Student's school performance improved dramatically during Student's *** year. On October 5, 2011, the note from Student's private provider at *** indicated "[t]his school year has begun much better for Student. Student's in *** classes and has met some new people."⁸⁴

An ARD Committee meeting was held on February 1, 2012, to consider Father's request for a new evaluation in that Father was concerned that Student had an Autism Spectrum Disorder. The ARD Committee agreed to conduct the requested testing.⁸⁵

⁷⁹ Respondent Ex. 7-17.

⁸⁰ Respondent Ex. 14-1. Student failed Student's *** class after refusing to take the final examination. Respondent Ex. 2-4.

⁸¹ Respondent Ex. 22-2, 22-3 (confidential document).

⁸² Respondent Ex. 21-30, 21-34, 21-36.

⁸³ See Respondent's Closing Argument at 7; see also Petitioner's Closing Argument Brief at 4-5.

⁸⁴ Respondent Ex. 22-4 (confidential document).

⁸⁵ Respondent Ex. 5-10.

Shortly after the ARD Committee meeting, Student's teachers reported Student's progress on Student's IEP goals. Student had mastered two of the annual goals early, including the social skills goal and transition goal, and was close to mastering the third goal, related to organizational skills.⁸⁶ Student's final grades for the 2011-2012 school year were three A's and four B's.⁸⁷

Reevaluation and dismissal from special education at the end of *** grade⁸⁸

The April 2, 2012 FIE concluded not only that Student did not have any additional qualifying conditions that the Father suspected, *i.e.* Autism Spectrum Disorder, but Student no longer exhibited in the school environment the concerns previously documented in the 2011 FIE.⁸⁹ To the contrary, Student's teachers, all seven of whom provided information for the FIE, reported:

[Student is] attentive in class and stays on task. [Student] completes assignments on time and is cooperative and friendly. Teachers shared that [Student] is pleasant, reliable, diligent and cooperative. Teachers indicated no behavioral concerns at this time. Teachers shared that socially [Student] acts appropriately with Student's peers and with adults in the classroom. [Student] at times, can be more quiet and reserved than some classmates, but Student will work together with peers to problem solve or complete work. [Student] is very respectful of adults and has no problem approaching teachers for help. Teachers shared that academically [Student] is a strong student and is doing well in difficult classes. Teachers noted that [Student] is able to communicate Student's needs effectively in the classroom. [Student] will ask a lot of questions during a given work time. Student will check ***self for understanding, clarify instructions and follow directions and will do so without prompting.⁹⁰

Observations of Student's behavior, one of which was conducted by a member of the District's Autism Support Team, confirmed the teachers' reports that Student was highly appropriate and successful academically, socially, and behaviorally in all Student's classes.⁹¹

⁸⁶ Respondent Ex. 12-2, 12-3; *see* 20 U.S.C. § 1414(d).

⁸⁷ Respondent Ex. 14-4.

⁸⁸ *See* Petitioner's Closing Argument Brief at 6-7; *see also* Respondent's Closing Argument at 8-9.

⁸⁹ Respondent Ex. 8.

⁹⁰ Respondent Ex. 8-12.

⁹¹ Respondent Ex. 8-13.

In the interview with the examiner, Student also reported that Student feels successful. Student told the examiner that Student's feelings of anxiety and depression were under control at school and at home. Student shared that Student had friends and was getting to school on time.⁹²

In conclusion, the examiner explained that the assessment data did not indicate any communication or social skill deficits, and that Student did not meet disability criteria as a student with Autism. Moreover, the examiner determined that neither attentional nor emotional concerns were impacting Student in the educational environment.⁹³

Student's ARD Committee met to review the new FIE on April 4, 2012, and again on April 18, 2012. The ARD Committee also considered a March 21, 2012 recommendation from Student's treating physician, ***, M.D., that Student be provided special education services due to Student's history of ***, learning disabilities, language disorder, ADHD, and neuro-cognitive dysfunction.⁹⁴ The ARD Committee concluded Student did not meet specific IDEA eligibility criteria to receive special education services under the IDEA.⁹⁵

While Father agreed that Student's depressive symptoms had improved, Student attributed the improvement to permitting Student to ***.⁹⁶ Regardless of the reasons for Student's success academically, socially, and behaviorally at school, the ARD Committee determined Student no longer exhibited a disabling condition, including Emotional Disturbance, or a need for special education services.⁹⁷ Father disagreed with the FIE and ARD Committee decision and requested an IEE.⁹⁸

****** year success without special education services⁹⁹***

Student earned final grades of all A's Student's *** year, without special education services or Section 504 accommodations. Although Student struggled with being tardy to school early in the year, the problem was

⁹² Respondent Ex. 8-13, 8-14.

⁹³ Respondent Ex. 8-29, 8-30.

⁹⁴ Petitioner Ex. 46. Dr. *** did not state how any of Student's diagnoses met any of the IDEA enumerated disabilities.

⁹⁵ Respondent Exs. 4-2, 3-2.

⁹⁶ Respondent Ex. 3-3.

⁹⁷ Respondent Ex. 3-3, 3-4.

⁹⁸ Respondent Ex. 11.

⁹⁹ See Respondent's Closing Argument at 9-11; see also Petitioner's Closing Argument Brief at 7-10.

soon resolved.¹⁰⁰ Notes from Student's private *** therapist dated March 12, 2012, documented Student's "improved grades" and "improved socialness."¹⁰¹ More specifically, the therapist stated "**** made all A's on Student's last report card and is working independently now. Student has stayed for social events at school with friends and likes it."¹⁰²

In March of Student's *** year, Student's *** teacher, ***, emailed Father, reporting "Great kid, and Student is earning some reputation with Student's class as the *** when they miss something. Student keeps track of Student's warm-ups, assignments, and projects."¹⁰³

As part of Dr. ***'s IEE, Father reported that he helped Student through Student's *** year by acting as a tutor, managing Student's time, frequently writing Student's teachers, and advocating for Student. Student told Dr. *** that most of Father's help related to keeping Student on task.¹⁰⁴

C. The District's April 2013 Assessment of Student's Disabilities Comports with the IDEA's Child Find Provisions

The ARD Committee reviewed the April 2012 FIE and the March 5, 2013 *** IEE at both of its April 2013 meetings. Neither of the evaluations concluded that Student had an IDEA enumerated disability. The April 2012 FIE stated that Student had no IDEA enumerated disability at all. The *** IEE determined Student did not meet criteria for Autism Spectrum Disorder and only found it "likely" that Student had the disability of Emotional Disturbance. Dr. ***'s IEE was not reviewed by the ARD Committee as the IEE was not available until November 2014. However, Dr. ***'s IEE does not conclude Student has the IDEA enumerated disability of Autism or an Autism Spectrum Disorder or that Student met any one of the criteria for Emotional Disturbance.¹⁰⁵

As previously discussed, Student was identified as a child with a disability and was admitted to special education in May 2011. The April 19, 2011 FIE considered by the ARD Committee in making its 2011

¹⁰⁰ Student was tardy to Student's *** the rest of the school year. Petitioner Ex. 49-18; Respondent Ex. 14-3.

¹⁰¹ Respondent Ex. 21-50.

¹⁰² Respondent Ex. 21-50.

¹⁰³ Respondent Ex. 18-11.

¹⁰⁴ Petitioner Ex. 59-4, 59-6.

¹⁰⁵ Tr. at 430 (testimony of Ms. ***); Petitioner Ex. 59.

decision found Student to be eligible for special education services due to Emotional Disturbance, in that Student demonstrated two of the five criteria for Emotional Disturbance: inappropriate types of behaviors or feelings under normal circumstances, and a general pervasive mood of unhappiness or depression.¹⁰⁶ Student also was eligible due to Other Health Impairment.¹⁰⁷

A year later, Student was evaluated for all areas of potential disability, with three possible outcomes: additional disability, continuing disability, or dismissal from special education services.¹⁰⁸ The resulting April 2012 FIE concluded Student neither had any additional disability nor the continuing disability of Emotional Disturbance.¹⁰⁹ Specifically, the evaluators found Student did not display any of the behaviors necessary for a finding that Student met the criteria for Emotional Disturbance. Student no longer exhibited inappropriate types of behaviors or feelings under normal circumstances, in that Student had no discipline referrals, was described positively by teachers, and did not act out. Student also no longer exhibited a general pervasive mood of unhappiness or depression in that Student no longer endorsed significant feelings related to depression and suicidal ideation, teachers did not express concern about Student's depression in the educational setting, and Student's medication appeared to adequately address Student's depression.¹¹⁰ On April 4, 2012, the ARD Committee dismissed Student from special education services.¹¹¹

Father disagreed with the 2012 ARD Committee decision and requested an IEE, which was prepared by ***. The *** IEE, completed on March 13, 2013, identified Student as a child with clinical diagnoses of Anxiety Disorder, NOS and Depressive Disorder, NOS.¹¹² *** concluded that Student met criteria for anxiety and depressive disorder and that Student "likely . . . still meets eligibility criteria for the emotionally disturbed

¹⁰⁶ Petitioner Ex. 15-7, 15-8; *see* 34 C.F.R. § 300.8(c)(4)(i)(C) and (D).

¹⁰⁷ Petitioner Ex. 15-1; *see* 34 C.F.R. § 300.8(c)(9).

¹⁰⁸ Respondent Ex. 5-10.

¹⁰⁹ The April 2, 2012 FIE is silent as to Student's Other Health Impairment. The FIE was considered by the ARD Committee both in April 2012, when Student was dismissed from special education services, and again in April 2013. Respondent Exs. 2-1, 3-1.

¹¹⁰ Respondent Ex. 8-30.

¹¹¹ On August 3, 2011, *** administered the Childhood Autism Rating Scale to Student and found Student to be in the non-Autistic range for Autism so *** assigned Student a diagnosis of PDD, NOS. Petitioner Exs. 29-3, 47. The record contains no evidence that the *** diagnosis was considered by the April 2012 FIE team or the ARD Committee in April 2012. Respondent Exs. 3, 4, 8. However, Student is listed as having an Autism Spectrum Disorder in a September 10, 2013 request from *** that Student be excused from school. Petitioner Ex. 27. Because the absence note references no underlying information, it is not clear if *** reevaluated Student for Autism or if the note is in error. The Hearing Officer gives no weight to the absence note.

¹¹² Petitioner Ex. 6-10.

handicapping condition.”¹¹³ But the IEE did not explain which of the IDEA’s Emotional Disturbance criteria applied.¹¹⁴

In addition, *** determined Student did not meet criteria for Autism Spectrum Disorder.¹¹⁵ The *** IEE found that, pursuant to the Autism Diagnostic Observation Schedule, Student did not meet the criteria for a classification of Autism or Autism Spectrum Disorder on the Reciprocal Social Interaction or Communication domains, or on the overall total score.¹¹⁶

Father agreed with the *** IEE conclusion that Student has pervasive depression and anxiety but disagreed with the conclusion that Student does not meet the criteria for classification of Autism or Autism Spectrum Disorder.¹¹⁷

Similarly, while Dr. ***’s IEE discusses Student’s depression, anxiety, and significant health concerns in depth, it, like the *** IEE, wholly fails to consider the IDEA criteria necessary to establish Emotional Disturbance under the IDEA.¹¹⁸ Dr. *** concluded generally that Student currently has significant emotional issues, but he did not identify which of the five criteria for the IDEA’s definition of Emotional Disturbance applied to Student.¹¹⁹ For example, other than noting Student’s decision to *** school Student’s *** year and the attendance issues related to that decision, Dr. *** did not discuss whether Student’s educational performance was “adversely affected” by one or more of the statutory criteria for an Emotional Disturbance.¹²⁰ Additionally, while Dr. *** explains that Student’s emotional disturbance has “impacted Student’s social relationships” (among other areas of Student’s life), he does not conclude that Student has “an inability to build or maintain satisfactory interpersonal relationships with peers and teachers,” as required for IDEA eligibility.¹²¹

¹¹³ Petitioner Ex. 6; Respondent Ex. 10-11.

¹¹⁴ Respondent Ex. 10-11.

¹¹⁵ Respondent Exs. 2-3, 10-9.

¹¹⁶ Petitioner Ex. 6-9; Respondent Ex. 2-3.

¹¹⁷ Tr. at 46-47.

¹¹⁸ See Petitioner Ex. 59-21 to 59-23; Tr. at 430 (testimony of Ms. ***).

¹¹⁹ See Petitioner Ex. 59-21 to 59-23; Tr. at 430 (testimony of Ms. ***).

¹²⁰ See Petitioner Ex. 59-21 to 59-23; Tr. at 430 (testimony of Ms. ***).

¹²¹ See 34 C.F.R. § 300.8(c)(4)(i)(B).

At most, Dr. *** explained that Student lacks the motivation to develop those relationships—a distinct difference from Student’s ability to do so.¹²²

Dr. ***’s conclusion regarding Student’s social relationships is contrary to the information provided by Student’s only teacher at the time, Ms. ***, in March 2014. She scored Student in the *** percentile or “superior” range in the socialization domain of the Vineland Adaptive Behavior Scales.¹²³ Ms. ***, who taught Student for two years and, at Father’s request, provided information for Dr. ***’s evaluation, explained Student had become more outgoing during Student’s *** and *** years. She noted that Student continued to attend her class during the spring of Student’s *** year to socialize with friends even after Student stopped attending Student’s other classes.¹²⁴ She reported Student wanted to *** at home, did ***, and did ***, as Student knew Father would ***. She described Father as enabling Student’s behavior.¹²⁵

In summary, the April 2012 FIE concluded Student had no IDEA enumerated disability. Neither the *** IEE nor Dr. ***’s IEE found Student to have Autism or Autism Spectrum Disorder or established how Student meets criteria for Emotional Disturbance. Therefore, neither of the evaluations considered by the ARD Committee nor Dr. ***’s IEE supports a conclusion that Student currently has a qualifying disability under the IDEA or that Student had a qualifying disability in April 2013. The ARD Committee met its Child Find duty as it relates to Student in finding Student had no IDEA enumerated disability.

D. The District’s April 2013 Decision to Deny Special Education Services to Student Was Correct

Assuming, *arguendo*, that the ARD Committee had found Student to have an IDEA enumerated disability, thus establishing the first prong of the eligibility test, the ARD Committee would have had to further determine that, by reason of the disability, Student needed special education services in order to find those services should be provided. None of the information before the ARD Committee, or available later in Dr.

¹²² See Petitioner Ex. 59-23.

¹²³ Petitioner Ex. 59-19, 59-20. The Fifth Circuit has explained that teachers who work with a student on a daily basis are in the best position to determine educational need. *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F. by Barry F.*, 118 F.3d 245, 253-54 (5th Cir. 1997) (finding teachers who worked with student daily had most immediate knowledge of student’s school performance); *see also A. D.*, 503 F.3d at 384 (giving deference to firsthand testimony of teachers who worked with student daily regarding the student’s need for special education over the opinions of experts who were not privy to that information).

¹²⁴ Petitioner Ex. 59-20.

¹²⁵ Petitioner Ex. 59-19, 59-20, 59-22. Dr. *** noted that Ms. ***’s response style of circling every single response in the test in the same way and of circling large blocks of ratings at the same time, suggests the results are of questionable validity. Petitioner Ex. 59-19.

***'s IEE, supports a conclusion that Student needed special education services in April 2013. Petitioner disagreed with the ARD Committee decision that Student's clinical diagnoses did not negatively impact Student's educational performance and that Student did not require specially designed instruction to succeed at school.¹²⁶

When the ARD Committee met in April 2013, it recognized Student's educational performance had improved during Student's *** year without special education services.¹²⁷ Student was on the ***, taking ***; had excellent attendance; and was earning straight A's.¹²⁸ Student achieved that success without accessing supports available to all students, such as tutorials.¹²⁹ Student was behaviorally and socially successful in school according to at least six of Student's teachers.¹³⁰ Specifically, Student's teachers reported Student was demonstrating interactions and leadership within groups at school.¹³¹ Student passed all sections of the State's Exit Level TAKS, exceeding expectations with "commended performance" in the four areas tested.¹³² Student finished Student's *** year with straight A's.¹³³

*** *IEE*

The *** IEE did not include any information to support a conclusion that Student's clinical diagnosis of depression and anxiety "adversely affect[ed] [Student's] educational performance," as required for being provided special education services pursuant to the IDEA.¹³⁴ The only school-based information included in the *** IEE was an observation made by the IEE evaluator documenting appropriate academic, social, and emotional behavior in one class. The classroom teacher reported to the *** evaluator that the observed behavior was typical of Student's behavior in the class.¹³⁵ Because the *** evaluator obtained no information

¹²⁶ Tr. at 422, 424 (testimony of Ms. ***).

¹²⁷ Respondent Ex. 1-4.

¹²⁸ Respondent Ex. 2-4; Petitioner Ex. 1.

¹²⁹ Respondent Ex. 2-4.

¹³⁰ Petitioner Ex. 1.

¹³¹ Respondent Ex. 2-4.

¹³² Respondent Ex. 15-1.

¹³³ Respondent Ex. 14-3.

¹³⁴ 34 C.F.R. § 300.8(c)(4).

¹³⁵ Respondent Ex. 10-8.

from the school or Student's teachers, other than conducting one classroom observation, the evaluator deferred to the ARD Committee to determine Student's educational needs.¹³⁶

Nevertheless, the *** IEE offered recommendations for Student's educational success. The *** IEE stated that the recommendations were "only suggestions and implementation is not required by the school system," adding that it was important for Mother and Father to discuss Student's needs directly with the school district.¹³⁷ The *** IEE recommended that Student be given more individualized attention as needed, allowed to complete assignments in a room with fewer distractions, provided more frequent breaks as needed, and allowed more time for transition between activities; that teachers make eye contact with Student before giving Student instructions and that they give Student one instruction at a time; and that Student be allowed access to a school counselor to discuss how mood symptoms were affecting Student and to monitor any suicidal thoughts.¹³⁸

Father agreed with the *** IEE recommendations. But the ARD Committee determined that the *** IEE recommendations could be provided through the school's Student Support Team and counseling staff with no need for special education services.

Dr. ***'s IEE

The District argues that, to the extent Dr. *** opined that Student needs special education services, his opinions are based on faulty information.¹³⁹ First, Dr. *** emphasized repeatedly that the success Student experienced at school corresponded with extensive efforts by Father at home,¹⁴⁰ an opinion not supported by the evidence. Second, Dr. *** erroneously believed that Student's success Student's *** year was accompanied by attendance problems.¹⁴¹ Further, Dr. *** was not aware that Student had received "commended performance" on all sections of the TAKS.¹⁴² Moreover, contemporaneous notes taken by the family's private therapist

¹³⁶ Respondent Ex. 10-11.

¹³⁷ Respondent Ex. 10-11.

¹³⁸ Petitioner Exs. 4-3, 4-4, 6-11, 6-12; Respondent Ex. 10-11, 10-12.

¹³⁹ *See A.D.*, 503 F. 3d at 384 (finding opinions of teachers with firsthand knowledge more persuasive than the opinions of experts with faulty information.)

¹⁴⁰ Tr. at 260, 265, 280; Petitioner Ex. 59-24.

¹⁴¹ Tr. at 280; *see also* Respondent Ex. 14-3 (*** grade report card documenting good attendance).

¹⁴² Tr. at 324-25.

during Student's *** year contradict Dr. ***'s understanding of Student's situation. The March 2013 note states that Student's earned straight A's on Student's last report card and is working more independently.¹⁴³

Assuming that family efforts at home can independently establish a need for special education services, Dr. ***'s understanding of the family's efforts are not supported by the record.¹⁴⁴ When Father was questioned about what he did at home to help Student with school work, he described his efforts as largely encouraging Student to use Student's textbooks and removing distractions—such as locating a highlighter and pencil for Student instead of permitting Student to leave Student's desk to get those things ***self.¹⁴⁵ Father told Dr. *** that Student used an organizer during Student's *** year but said has refused to use one since.¹⁴⁶ Importantly, Dr. *** acknowledged “discrepancy between [Student's] level of functioning at home and Student's strengths displayed in [Dr. ***'s] testing.”¹⁴⁷

When it comes to determining a student's educational needs, the Fifth Circuit has specifically declined to create any presumption in favor of the parents' experts.¹⁴⁸ Instead, the Fifth Circuit has repeatedly emphasized the importance of opinions of the educational professionals who work with the student at school each day.¹⁴⁹ Importantly, evaluations by school personnel, which are conducted pursuant to extensive procedural requirements, are generally accorded a presumption of correctness.¹⁵⁰

Dr. ***'s evaluation does not accurately reflect Student's educational needs as it contains virtually no information from the school, and the school information that was obtained was wholly disregarded with respect

¹⁴³ Respondent Ex. 21-50.

¹⁴⁴ Respondent's Closing Argument at 23-24.

¹⁴⁵ Tr. at 120-21.

¹⁴⁶ Petitioner 59-17.

¹⁴⁷ Petitioner Ex. 59-23.

¹⁴⁸ *Christopher M. by Laveta McA. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1292 (5th Cir. 1991) (affording considerable deference to the school personnel who worked with the student daily over the opinions of the student's pediatrician and diagnostician regarding a student's educational needs).

¹⁴⁹ *Michael F.*, 118 F.3 at 253-54 (finding teachers who worked with student daily had most immediate knowledge of student's school performance); *see also See A. D.*, 503 F.3d at 384 (giving deference to firsthand testimony of teachers who worked with the student daily regarding the student's need for special education over the opinions of experts who were not privy to the information).

¹⁵⁰ *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 205-06, 102 S. Ct. 3034, 3050, 73 L. Ed. 2d 690 (1982) (noting extensive IDEA procedural requirements designed to ensure substantive compliance with IDEA); *see also J. M. v. Lake Travis Indep. Sch. Dist.*, No. A-07-CA-152-SS, at *20 (unreported decision attached to Respondent's Closing Argument as Exhibit A).

to the recommendations made.¹⁵¹ As Ms. ***, the District's LSSP, testified, educational evaluations target a student's educational needs in the school environment.¹⁵² Dr. *** did not observe Student in the school environment and received information from only one teacher.¹⁵³ Ms. *** explained that in educational evaluations, it is important not only to observe the student, but to get information from multiple teachers to account for possible variations in behavior across different settings, *e.g.* structured *v.* unstructured, academic *v.* elective, morning *v.* afternoon.¹⁵⁴ Ms. ***'s approach emphasizing school-based information to determine educational need is consistent with the Fifth Circuit's approach.¹⁵⁵

The extensive educational recommendations Dr. *** made, *e.g.* social skills training and organizational assistance, are not supported by the results of the District's educational testing nor the reports and testimony of numerous school personnel regarding Student's school performance over the last several years.¹⁵⁶ Instead, Dr. ***'s "educational programming" recommendations are based almost exclusively on the "deficiencies" in the home environment, as reported by Father.

Dr. ***'s IEE is insufficient to overcome the presumption that the ARD Committee's decision to deny special education services to Student in April 2013 was correct under the IDEA.

Father's assistance at home and concern about a "safety net"

At the ARD Committee meeting, Father expressed concern that even though Student was doing well in school, the success might not last, and Student needed a special education services "safety net" to ensure Student's continued success.¹⁵⁷ While Father argues that Student's *** year success was only possible because of extensive parental support and involvement, that argument is not supported by the reports from Student's teachers, the contemporaneous notes taken by Student's private therapist, or Father's own testimony regarding

¹⁵¹ Petitioner Ex. 59-20, 59-21, 59-24.

¹⁵² Tr. at 397.

¹⁵³ Tr. at 291-292. The only teacher Dr. *** received information from was Ms. ***, who taught the only class Student was attending in the spring of 2014 when Dr. *** conducted his evaluation.

¹⁵⁴ Tr. at 395, 397.

¹⁵⁵ *See, e.g., Michael F.*, 118 F.3d at 254.

¹⁵⁶ *See* Respondent Exs. 1, 8.

¹⁵⁷ Respondent Ex. 2-8.

his role in assisting Student with academics at home.¹⁵⁸ Even if Student needed the accommodations Father suggested, (extra time for homework, tests, and projects), a need for accommodations alone does not establish IDEA eligibility.¹⁵⁹ To the extent psychological counseling was indicated, counseling is a related service and the isolated need for a related service does not establish eligibility.¹⁶⁰

Father's suggestion that the ARD Committee should engage in the practice of predicting future need is not supported by the IDEA.¹⁶¹ In addition, even though Student has effectively dropped out of school, perhaps supporting Father's contention that Student needed a special education "safety net," the appropriateness of ARD Committee decisions cannot be judged in hindsight; rather, decisions must be considered on the basis of what was known to the ARD Committee at the time it met.¹⁶²

Here, the April 2013 ARD Committee had two evaluations, the District's FIE concluding Student did not have a disability and the *** IEE concluding Student "likely" still qualified as a student with an emotional disturbance, but leaving it to the ARD Committee to determine educational need for special education services.¹⁶³ The ARD Committee also had extensive information from school records indicating two years of Student's highly successful academic, social, and behavioral performances.¹⁶⁴ In addition, the fact that Student's educational performance had improved without special education services during Student's *** year is contrary to any suggestion that Student needed special education services going forward.¹⁶⁵

Therefore, the ARD Committee correctly rejected Father's argument that past need or the possibility of an unknown future need supported Student's eligibility for special education services.

¹⁵⁸ See e.g., Respondent Ex. 21-50 (*** therapist progress note dated March 12, 2013, reporting straight A's at school and working independently); Tr. at 120-21 (Father's testimony regarding encouraging Student to use Student's textbooks and retrieving highlighters/pencils if Student needed them).

¹⁵⁹ Tr. at 74-75; 34 C.F.R. § 300.8(a)(1).

¹⁶⁰ 34 C.F.R. § 300.8(a)(2); Tr. at 422-23 (testimony of Ms. ***).

¹⁶¹ See, e.g., *Eric H.*, 2002 U.S. Dist. LEXIS 20646, *9 (finding parents' fear of future failure does not meet IDEA's eligibility requirements); see also *Marshall Joint Sch. Dist. No. 2*, 616 F.3d at 637.

¹⁶² See *K. E. ex rel. K. E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 808 (8th Cir. 2011) (refusing to find IEP inadequate on the basis that it lacked services for a specific disorder not definitively identified or described until the due process hearing).

¹⁶³ Petitioner Ex. 6 at 11.

¹⁶⁴ See, e.g., Respondent Ex. 8-12 to 8-14.

¹⁶⁵ Respondent Ex. 1-4.

VII. ANALYSIS

Petitioner did not meet Petitioner's burden to overcome, by a preponderance of the evidence, the presumption that the ARD Committee's decision was correct when it determined that (1) Student neither had a qualifying disabling condition, nor (2) a need for special education services pursuant to the IDEA.

A. **Issue 1: Whether the District Met Its Child Find Obligation by Taking Adequate Measures to Identify Student's Disabilities before Denying Student Special Education Services**

The evidence establishes that Student was admitted to special education in May 2011 with IDEA enumerated disabilities of Emotional Disturbance and Other Health Impairment. In February 2012, Father requested that the District evaluate Student for any other potential disabilities. The resulting April 2012 FIE concluded Student no longer met the criteria for Emotional Disturbance, did not have Autism, and had no other qualifying disability. Student was dismissed from special education in April 2012. Father requested an IEE.

The March 2013 *** IEE, prepared at Father's request, found that Student did not meet criteria for a classification of Autism or Autism Spectrum Disorder and that it was only "likely" that Student met criteria for Emotional Disturbance. The ARD Committee reviewed the *** IEE and other information in April 2013 and decided Student did not have an IDEA enumerated disability. Because Student is not a child with a disability eligible for services under the IDEA, the District had no legal obligation to provide Student with special education services and did not do so.

Student stopped attending all but one class beginning in January 2014, the spring semester of Student's *** year. Student's parents hired Dr. *** to prepare an IEE. Dr. ***'s November 2014 IEE does not contradict the disability findings in the April 2012 FIE and *** IEE. That is, Dr. *** could not conclusively determine the presence or absence of Autism or Autism Spectrum Disorder and did not specify what Emotional Disturbance criteria, if any, were met by Student's clinical diagnoses. Dr. *** did not find Student to have any other IDEA enumerated disabilities.

On August 3, 2011, *** administered the Childhood Autism Rating Scale to Student and found Student to be in the non-Autistic range for Autism so assigned Student a diagnosis of PDD, NOS. The record contains no evidence that the *** diagnosis was considered by the April 2012 FIE team or the ARD Committee in April 2013.

The only evidence in the record that Student might have an Autism Spectrum Disorder is one sentence in a September 10, 2013 request from *** that Student be excused from school. Because the absence note references no underlying information, it is not clear if *** reevaluated Student for Autism after August 2011, if the absence note was referencing Student's diagnosis of PDD, NOS, or if the note is in error. In addition, the absence note was written several months after the ARD Committee made its determination so was not before the ARD Committee. Therefore, the Hearing Officer gives the note no weight in determining whether the District met its Child Find obligations with regard to Student.

The evidence shows that the ARD Committee had no evaluation or other information that Student had an IDEA enumerated disability rendering Student eligible for consideration for special education services. In particular, the April 2012 FIE evaluated whether Student had any potential disability and concluded Student did not. The *** IEE, completed about a month before the ARD Committee met, reinforced the April 2012 FIE determination. The ARD Committee took the necessary steps to evaluate Student for any disability, thus meeting its Child Find obligation in regard to Student.

B. Issue 2: Whether, As Reflected in the April 2013 ARD Committee Decision, the District Wrongly Denied Student Special Education Eligibility and FAPE

Assuming, *arguendo*, that the District had identified Student as a child with an IDEA enumerated disability, the ARD Committee would have had to further determine that, by reason of the disability, Student needed special education services in order to find Student eligible for special education services.

When the ARD Committee met in April 2013, Student had not received special education services for approximately one year. Yet Student was making straight A's and passed the State's Exit Level TAKS with "commended performance" in all four areas tested. According to at least six of Student's teachers, Student was interacting socially and behaving appropriately at school. Although Father argued that Student's success was due to intense support at home, Student told Dr. *** that Father's main support was in keeping Student on task. Father's testimony at hearing did not contradict Student's description of Father's support at home. Additionally, Student's private therapist noted that Student was making all A's and working more independently than in the past.

The ARD Committee considered the opinions of Student's teachers, who worked with Student on a daily basis, as well as extensive information from school records documenting two years of Student's highly successful academic, social, and behavioral performances. The ARD Committee also considered the *** IEE, which deferred to the ARD Committee to determine Student's educational needs, and noted that the *** IEE educational recommendations could be implemented through the Student Support Team and school counseling staff in a general education setting. Thus, none of the information considered by the ARD Committee supported a determination that Student was eligible for special education services.

Neither does Dr. ***'s IEE support a finding that the ARD Committee wrongly denied Student special education eligibility and FAPE. Dr. ***'s educational recommendations were based primarily on information provided by Father and not on information gathered from teachers or an observation of Student in Ms. ***'s classroom. In fact, Dr. *** acknowledged discrepancy between Student's level of functioning at home and Student's strengths displayed in Dr. ***'s testing. In addition, Dr. *** was not aware that Student had received "commended performance" on all sections of the TAKS. Dr. *** simply did not have enough information about Student's school performance to determine if Student was eligible for special education services in April 2013, a year before Dr. *** began his evaluation. Because Student's school performance Student's *** year is not at issue in this proceeding, Dr. ***'s observations related to Student's educational needs in the 2013-2014 school year are not relevant to deciding whether the ARD Committee wrongly denied special education services to Student in April 2013.

C. Conclusion

The District met its Child Find obligation by taking adequate measures to identify Student's disabilities before denying Student special education services. In addition, the ARD Committee correctly decided Student was not eligible for special education services because there was no demonstrated educational need; that is, Student did not require special education services in order to progress in the general education setting and through general education curriculum with passing averages. Therefore, Petitioner did not prove the allegations at issue and Petitioner's requested relief is denied.

VIII. CONCLUSIONS OF LAW

1. The Clear Creek Independent School District (the District) is a local educational agency responsible for complying with the Individuals with Disabilities Education Improvement Act (IDEA) as a condition of

the State of Texas's receipt of federal education funding, and the District is required to provide each disabled child in its jurisdiction with a "free appropriate public education" (FAPE), pursuant to IDEA, 20 U.S.C. § 1400 *et seq.*

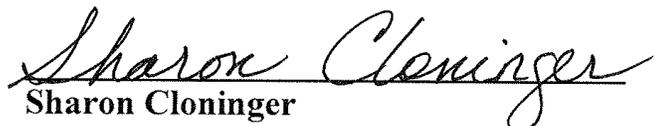
2. *** (Student), by next friend *** (Father) and *** (Mother) (collectively, Petitioner) bears the burden of proof on all issues raised in the proceeding. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).
3. In April 2013, the District complied with its Child Find obligations regarding Student in assessing Student's disabilities before deciding not to provide Student with special education services. 20 U.S.C § 1412(a)(3)(A), 34 C.F.R. § 300.111; *see also D. G. v. Flour Bluff Indep. Sch. Dist.*, 481 Fed. App'x. 887, 891 (5th Cir. 2012).
4. In April 2013, the District correctly determined that Student was not a child with one of the IDEA enumerated disabilities who, by reason thereof, was eligible for special education and related services. 34 C.F.R. § 300.8(a)(1).
5. In April 2013, the District properly determined that Student was not a child in need of special education and related services in order to progress in the general education setting and through the general education curriculum. 34 C.F.R. § 300.8(a)(1).
6. Petitioner did not prove that the District failed to meet its Child Find obligations with respect to Student by failing to identify all of Student's disabilities.
7. Petitioner did not prove that the District wrongly denied Student special education eligibility and FAPE.

ORDER

After considering the evidentiary record and the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer hereby orders as follows:

The Hearing Officer denies Petitioner's requested relief.

SIGNED February 20, 2015.


Sharon Cloninger
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

This Decision of Hearing Officer is a final and appealable order. 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.¹⁶⁶

¹⁶⁶ 20 U.S.C. § 1451(i)(2); 34 C.F.R. § 300.516; 19 Tex. Admin. Code § 89.1185(n).

DOCKET NO. 206-SE-0414

STUDENT,	§	BEFORE A SPECIAL EDUCATION
b/n/f PARENT and PARENT,	§	
Petitioner	§	
v.	§	HEARING OFFICER FOR
CLEAR CREEK INDEPENDENT	§	
SCHOOL DISTRICT,	§	
Respondent	§	THE STATE OF TEXAS

SYNOPSIS

Issue 1: Whether the District Met Its Child Find Obligation by Taking Adequate Measures to Identify Student’s Disabilities before Denying Student Special Education Services

HELD: For the District. Under the Child Find provisions of the IDEA, the District was required to evaluate Student for a suspected disability that could result in Student’s eligibility for special education and related services. The District correctly determined that Student was not a child with one of the IDEA enumerated disabilities who, by reason thereof, was eligible for special education and related services.

Citation: 20 U.S.C § 1412(a)(3)(A); 34 C.F.R. §§ 300.8(a)(1), 300.111.

Issue 2: Whether, As Reflected in the April 2013 ARD Committee Decision, the District Wrongly Denied Student Special Education Eligibility and FAPE

HELD: For the District. Pursuant to IDEA, the District was required to determine if Student needed special education and related services by reason of an IDEA enumerated disability. The District properly determined that Student was not a child in need of special education and related services in order to progress in the general education setting and through the general education curriculum.

Citation: 20 U.S.C § 1412(a)(3)(A); 34 C.F.R. §§ 300.8(a)(1), 300.111.