MISSISSIPPI DEPARTMENT OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

[REDACTED], a minor, by and through
Grafton Bragg, Esq.

Case No. D05132022-13

Complainant,

Preston Rideout,
Hearing Officer

-against-

Lee County School District,

Respondent.

FINAL JUDGMENT

FINDINGS OF FACT

1. In the [REDACTED] grade [REDACTED]), [REDACTED] was awarded a scholarship as a "high performing" student to attend [REDACTED].

2. [REDACTED] suffered a concussion which is a mild traumatic brain injury on February 21, [REDACTED], in a school bus accident while living and going to school in [REDACTED]. Following the concussion [REDACTED] suffered some dizziness, nausea, and neck and back pain. [REDACTED] also suffered intermittent headaches of varying intensity, the pain from which made it difficult for [REDACTED] to read and which diminished [REDACTED] reading retention. On account of the headaches, from the date of the February accident until the end of the semester [REDACTED] missed seventeen (17) days of school.

3. Before leaving [REDACTED], [REDACTED] had a normal MRI of the brain, a normal prolonged EEG, a normal nerve conduction study, and normal lab work.

4. The diagnosis on [redacted] last visit with the [redacted] neurology clinic was "headache."

5. At [redacted] final visit at the neurology clinic in [redacted] was given a prescription for Topomax 25mg daily for thirty (30) days with two refills for "headache prevention."

6. [redacted] and [redacted] family moved to Lee County Mississippi in June of [redacted].

7. The most comprehensive and helpful exhibit in evidence is Ex. C-1"O" (Johnson 000052 thru 000057) which is the office note from [redacted]'s September 16, [redacted], visit to LeBonheur's pediatric neurology clinic several weeks after [redacted] started [redacted] grade in the Lee County School District. It confirms after the February 21, [redacted], accident in [redacted] had headaches and neck pain and an MRI of the brain, EEG, and cervical spine x-rays were all normal. It noted the headaches had improved over the [redacted] Summer after starting the Topomax until they moved and [redacted] started in a new school in the Lee County District at Mooreville [redacted]. Upon starting school (in the [redacted] grade) the headaches had gotten worse but they improved a second time when the Topomax dosage was increased to 50mg by [redacted]'s Tupelo primary care provider. The note describes the headaches as "[T]he headaches come and go typically several times a week occurring randomly lasting for minutes. Headaches start out small and build up. [redacted] describes the pain as an ache located across [redacted] forehead. Triggers include exercise, stress and strong odors... ***They do interfere with [redacted] activities***. (Emphasis added) [redacted] is typically able to sleep the headaches off. They feel they are not occurring more frequently or becoming stronger since taking the Topomax. There is associated photo phobia, phono phobia, confusion and tingling of [redacted] arms and legs.... [redacted] is in the [redacted] grade. [redacted] is an A/B student. [redacted] denies difficulties in school. [redacted] gets along with [redacted] peers."

The note also provides "Given that the headaches began following the accident, it

is likely they are having post-concussive headaches from the head injury. These particular headaches associated with a post-concussive syndrome can last for weeks and sometimes months following the injury. Most people experience symptoms associated with a post-concussion syndrome within the first seven-ten days that resolve within 3 months although they can persist for up to a year or more. Treatment is aimed at treating specific symptoms associated with the syndrome such as headaches, dizziness, sleep disturbance, moodiness or problems remembering things. Th[ese]...symptoms will resolve with time as the concussion heals....We will continue Topomax Sprinkles 50mg as a headache preventative as [redacted] responds well to this with no side effects....[redacted] had a normal MRI Brain in May in [redacted]. The MRI was obtained after an abnormal EEG that was later found to be normal on a 24 hour continuous EEG monitor. [redacted] has never had any type of seizure activity." Under "Recommended life style changes" [redacted], PA, writes: "consider counseling to learn effective coping mechanisms to deal with stress." [redacted] also writes: "[redacted] appears to be having some tension type headaches with neck and back pain."

8. For the [redacted] school year [redacted] enrolled in the [redacted] grade at Lee County School District in the Mooreville [redacted] School. [redacted] teacher was [redacted]. Within a few days of enrolling, [redacted] began having the same type headaches the pain from which made it difficult for [redacted] to read and which diminished [redacted] reading retention.

9. The letter requesting accommodations generated by [redacted]'s 9/16/[redacted] visit at Le Bonheur's Pediatric Neurology Clinic establishes that [redacted]. was "under the care of LeBonheur Outreach Clinic and being treated by Pediatric Neurology for a diagnosis of Migraine Headaches." It establishes it was a "medical necessity" that [redacted] be allowed to "carry a water bottle at school at all times for hydration purposes" and that [redacted] also be

allowed “extra bathroom privileges.” These accommodations were prescribed by the Neurology Clinic “to assist in patient’s ability to remain at school and to decrease further class absences; however, absences may be inevitable at times.” The Nurse Practitioner writing the letter gave telephone number and said, “Please feel free to contact us for any further questions.” (Exhibit C-1N, 000051)

10. also provided a medication authorization for and this put the school on notice of the medications was taking at home and also to allow to bring Tylenol and ibuprofen to school so if had a headache, they could given it to in addition to the Topomax. also let the school know if the Tylenol or ibuprofen did not work, would need to be called to come to school and pick up. provided a copy of the medical authorization to ’s grade teacher, . also provided a copy to the main officer as well as to the school nurse.

The form was describing is titled “School Medication Prescriber/Parent Authorization” and was admitted into evidence as Exhibit C-1L, 000047. It is dated August 5, , and signed by authorizing unlicensed school personnel to assist in self-medication by . taking 50mg of Topiramate daily. (Tr. 300-301). If the Topiramate did not relieve the headache, the Authorization allowed . to take every six hours an additional two teaspoons of Children’s Motrin or Children’s Tylenol two teaspoons every four hours as needed.

The Authorization was signed by .’s Nurse Practitioner, who put her phone and FAX numbers on it also. (Exhibit C-1L, 000047).

This Medication Authorization put the school on notice suffered from migraine headaches and was taking Topiramate 50mg daily, a prescribed medication, and

Children's Motrin and Children's Tylenol to alleviate headache pain.

11. Accommodations provided by 's grade teacher were: (1) gave breaks; (2) if needed it to finish a test or assignment, gave additional time; (3) allowed to have extra bathroom breaks; (4) allowed to carry water; and, (5) if had a headache, allowed . to put head down on desk.

12. 's yearly final grades for the grade were: a ninety-one (91) or B in Math; a ninety-six (96) or A in Science; a one hundred (100) or A in Music; a one hundred (100) or A in Health; a one hundred (100) in PE or A; an eighty-seven (87) or B in Reading; a ninety-two (92) or A in Language; and, a one hundred (100) or A in Social Studies.[1]

13. The August 25, , / phone call was very short and most of what was said is hotly contested. is very adamant about saying specifically requested that her , . be evaluated for a "504 plan." testified knew nothing about either 504 plans;[2] nor did she know anything about an "Individualized Education Program" ("IEP").[3] She said she didn't even know a 504 and an IEP were two different programs. She said she was asking for whatever help was available for . testified "I can't really say, oh, needed this or needed that particular thing because I didn't know what they could do or what would help.. . I didn't know that." In a similar vein she said, "I really wasn't

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[1] These grades were all from the school year which was .'s grade year in class.

[2] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794(a).

[3] The IEP is defined at 20 U.S.C. §1401(10) as "a written statement for each child with a disability that is developed, reviewed and revised in accordance [20 U.S.C. §1414(d)]." Definition taken from SPECIAL EDUCATION DICTIONARY 169-70 (Julie J. Kline, Esq. ed., LRP Publications) (2017).

specifically...inquiring about any particular [accommodation] because I don't know what all was available to help in situation."

14. testified she acted like a "liaison" between parents on the one hand and the 504 co-ordinator and the Special Education Director on the other. She said the parents would write a request for either an IEP or 504 and she would discuss that with the parents "what that looks like, I try to discuss with parents so that they truly understand...." (Tr. 494)

15. knew had a diagnosis of migraine headaches. (Tr. 223).

16. admitted the IDEA does not require parents use the words "IEP" in their request to have their child evaluated. (Tr. 222). She further admitted the IDEA "just requires them to initiate a request for an evaluation. . . ." (Tr. 222).

17. testified the amount of work involved in evaluating whether a 504 plan is needed as opposed to investigating whether an IEP is needed, the amount of work is "about equal because we have to . . . gather the same information pretty much for both." (Tr. 503). She said convening a MET team for an IEP or convening a 504 team, "it's the same." (Tr. 503). She indicated you had to do the same steps with a 504 team as you did with a MET team for an IEP. (Tr. 503-504). She said She and "would be considered the team that evaluated the information." (Tr. 504). She said an IEP was not requested and they were looking at the 504 qualifications. (Tr. 505).

18. When asked whether she was convening a MET team, replied, and I discussed what . . . what information we had before us." (Tr. 505). She said she never attempted to convene a MET team. (Tr. 505-506).

19. testified: "For MET when we meet, we actually meet with what we call our District Support Team, whether it's a 504 or an IEP request, and we look at that based on

all the information that is presented. Due to the pandemic, the Central staff was very limited to coming to the schools . . . .

20. Through the office of Principal, , the Lee County School District acted passively, not actively, in its child find efforts in the case of

21. Normally explained to parents the differences between a 504 plan and an IEP plan. However, she did not do this in s case. There is nothing in the record to indicate asked anything in their August 25, , phone call other than about the medical release for the LeBonheur records.

22. What would have found out if she had asked in her September 2, , phone call with was: (4) could not keep up with assignments and grades were "F's."

23. is currently working at grade level in both English Language Arts and Math.

24. In their September 2, , phone call says read August 27, , email[4] to affirming ineligibility for a 504 plan. The email said there were "minimum" medical concerns and history of academic performance was "above average." According to , the only thing which told her was did not qualify for a "because of grades from last year...." (Tr. 325). There is no basis upon which to impugn the credibility of either or on this point. Therefore, neither is found as fact.

25. based their decision on: (a) the LeBonheur's neurology note generated by 's August 12, appointment at LeBonheur's Neurology Clinic; (b) 's

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[4] See Exhibit R-6.

grades from [redacted] [redacted] grade year; and, (c) [redacted] conversation with [redacted]'s [redacted] grade teacher, [redacted].

26. The ineligibility decision given to [redacted] [redacted] on September 2, [redacted], was made by [redacted] and concurred in by [redacted].

27. The decision to not consider [redacted] for an IEP under the IDEA was made by [redacted] [redacted] and concurred in by Superintendent [redacted].

28. The decision to withdraw [redacted] and [redacted] siblings from school in the Lee County School District was made by [redacted] and concurred in by Superintendent [redacted].

29. Superintendent [redacted] told [redacted] [redacted] although he did not agree with the way she handled the 504/IEP situation, he was leaving it up to [redacted] and he was also leaving the residency issue up to [redacted]. (Tr. 337)

30. On September 3, [redacted], [redacted] visited the [redacted] address [redacted] [redacted] was listing as her address. She learned neither [redacted] [redacted] nor her children were there. [redacted] [redacted] learned from a Life Core therapist the Tupelo Apartment address where she has visited. [redacted] found [redacted] and [redacted] siblings at the apartment. On the basis of these findings, [redacted] made the decision to withdraw [redacted] [redacted]'s children from the Lee County District. When she related this decision to [redacted] [redacted] in their September 3, [redacted], phone call she told [redacted] [redacted] there was nothing [redacted] [redacted] could do to contest her decision. (Tr. 335)

31. [redacted] testimony to the extent it dealt with [redacted]s medical condition after September 2, [redacted] is irrelevant. To the extent it was about matters pre-dating September 2, [redacted], it added only marginally to what was already otherwise in the record and on which this decision is based.

CONCLUSIONS OF LAW

1. The hearing officer shall not be bound by common law or by statutory rules of evidence or by technical or formal rules of procedure.

2. An IDEA Hearing Officer's jurisdiction is "limited to issues involving matters related to the identification, evaluation, and educational placement of students, as well as the provision of FAPE under the IDEA." Angela B. v. Dall. Indep. Sch. Dist., 2020 U.S. Dist. LEXIS 76831, at *20 (N.D. Tex. 2020) citing 34 C.F.R. 300.507(a).

3. The burden of proof is on the Complainant to prove her case by a preponderance of the evidence.

4. When reviewing an eligibility determination, "we should consider it only with the information contemporaneously possessed by the eligibility decision-makers." Lisa M. v. Leander Indep. Sch. Dist., 924 F. 3d 205, 214 (5th Cir. 2019).

5. The District's child find mandate, which has an intentionally low threshold, is an affirmative duty placed on the District by IDEA which requires it to *actively* work to identify, locate and evaluate children with disabilities. Depending solely on to identify and locate was passive.

The District violated Child Find when it failed to actively determine whether was requesting the best and most effective help available for . regardless of whether it was a 504 plan, an IEP under IDEA, or something else; when it failed to actively determine s relevant medical history; and, when it failed to send Complainant's request for an initial evaluation to the IDEA MET Team for an initial evaluation decision and, if necessary, an initial evaluation.

6. The decision whether to undertake an initial evaluation is a decision which "shall be made by a team of qualified professionals and the parent of the child." 20 U.S.C. §1414(b)(4)(A). [redacted] had the right to fully participate in the decision made in September [redacted] not to undertake an initial IDEA evaluation in [redacted]'s case. The district violated IDEA when it decided to deny [redacted]. an initial evaluation without first having accorded [redacted] right to participate fully in the decision-making process.

[redacted] was never afforded the opportunity to make an informed decision on whether to pursue special education for [redacted] under the IDEA; [redacted] was never afforded the opportunity to discuss or present her point of view on reviewing only [redacted]'s [redacted] year grades, [redacted] input, or whether there were relevant medical records other than the Le Bonheur's office note of August 12, [redacted]. Instead, on September 2, [redacted], [redacted] was presented with the *fait accomli*, the "accomplished fact," there was to be no initial evaluation, and no accommodations whether in a 504 plan, an IEP, or otherwise.

7. IDEA does not allow a district to make a determination whether a child is disabled and in need of special education until after it has the results of the initial evaluation.

8. [redacted] had the right to be provided with Written Prior Notice of her rights within seven calendar days after the District's decision not to provide [redacted] with an initial evaluation.

9. Compensatory education awards are calculated by "requiring individualized compensatory awards that remedy...an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student and are reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place."

Spring Branch Indep. Sch. Dist. v. O.W., 961 F. 3d 781, 800 (5th Cir. 2020). ’s f grade marks at Lee County were exemplary and current IEP provides is working on grade level in both English Language Arts and Math. There is therefore no educational deficit to make up. Complainant’s prayer for compensatory education is therefore denied. Compensatory education is also denied because it is a remedy for denial of FAPE and I am finding only the procedural violations of Child Find and refusing to allow to exercise right to fully participate in the eligibility decision. The denial of a FAPE issue would not have been ripe until a compliant initial evaluation had been done. The FAPE decision will not be decided because has expressed her intent to leave her children in the Tupelo School District.

10. makes four claims: (1) the Lee County District violated IDEA by not providing . with FAPE for the Fall semester; (2) Lee County violated IDEA by not giving prior written notice of procedural safeguards regarding its decision not to give an IDEA initial evaluation; (3) the Lee County School District withdrew . from school in the District in retaliation for having advocated for a special education initial evaluation for ; and, (4) The Lee County School District discriminated against . and one of siblings when the District forced them to withdraw from school in the Lee County District when it allowed a similarly situated student of another race to remain enrolled in the District. (See Ex. C-16, March 2, 2022, resolution letter from the Office of Civil Rights (“OCR”)).

Issues (1) and (2) are subject to exhaustion and have been exhausted. Issues (3) and (4) are not subject to exhaustion.

ANALYSIS

1. **Procedure and Evidence**

The only advice given an IDEA Hearing Officer governing a Due Process hearing is to conduct the hearing and write the decision "in accordance with appropriate, standard legal practice." Rule 74.19, at §300.511(c)(1)(iii), (iv). It is left up to the individual Hearing Officer to decide what is "appropriate, standard legal practice."

I have concluded as a matter of law the "appropriate, standard legal practice" in Mississippi administrative law is as stated in Miss. Code Ann. §37-9-111(6),[5] which, in pertinent part, provides:

> "In conducting a hearing, the...hearing officer shall not be bound by common law or by statutory rules of evidence or by technical or formal rules of procedure..., but may conduct such hearing in such manner as best to ascertain the rights of the parties...; however hearsay evidence, if admitted, shall not be the sole basis for the determination of facts."

This is the standard which I am following in this case as the "manner...best to ascertain the rights of the parties."

Provided a timely hearsay objection has been made, I generally follow the residuum rule unless I decide it would be unfair to do so.

2. **The Burden of Proof**

At the administrative level, the party challenging an IEP bears the burden of proof. Schaffer v. Weast, 546 U.S. 49, 62, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005); and, Richardson v. ISD v. Michael Z., 580 F. 3d 286, 292, n. 4 (5th Cir. 2009) In a child find dispute where the parent is the contesting party, the parent has the burden of proof to

[5] This statute is a part of the Education Employment Procedures Law of 2001. It sets the hearing parameters. I am citing this as an example, not as an applicable statute. It is the best statement of the law I have found outside scattered case law.

prove a violation by a preponderance of the evidence. Zamora v. Hays Consol. Indep. Sch. Dist., 2021 U.S. Dist. LEXIS 114815, at *23 (W.D. Tex. 2021) ("Plaintiffs have not demonstrated by a preponderance of the evidence that the District violated its Child Find obligations under the IDEA.") .

3. Child Find - Only the Facts Before The Decision-Maker

As the Lisa M. Court said:

> [T]he eligibility question...is whether a student had a present need for special education services, such that the reviewing court should not judge a school district's determination in hindsight.
>
> While judicial review unavoidably looks backward, our task is to assess eligibility with the information available to the...committee at the time of its decision. An erroneous conclusion that a student is ineligible for special education does not somehow become acceptable because a student subsequently succeeds. Nor does a proper finding that a student is ineligible become erroneous because the student later struggles. Subsequent events do not determine ex ante reasonableness in the eligibility context. *Id.*

The following exhibits which post-date September 2, [redacted], concern information which was not available to the decision-makers at the time the decision was made not to do an IDEA initial evaluation. Therefore, under the holding in Lisa M. these exhibits and related testimony are irrelevant and have not been pro or con in this administrative decision:

1. Exhibit C-2, the 4/22/[redacted] Social Security Disability Determination;
2. Exhibit C-3, [redacted]s Tupelo [redacted] grade (4/19/[redacted]-5/27/[redacted]) IEP;
3. Exhibit C-4, [redacted]'s Tupelo [redacted] grade (8/4/[redacted]-5/24/[redacted]) IEP;

4. Exhibit C-5, ██'s Tupelo ██████ grade (8/4/██-5/24/██) IEP;[6] and,

5. Exhibit C-7, ██'s (4/19/██) IDEA Eligibility Report.

4. Child Find's Affirmative Mandate

The Mississippi Department of Education and all school districts are "public agencies" within the meaning of the IDEA. State Board Policy Chapter 74, Rule 74.19, §300.33. Under Rule 74.19, §300.111 "Each public agency must have in effect policies and procedures to ensure that–All children with disabilities residing in Mississippi...regardless of the severity of their disabilities, and who are in need of special education and related services are ***identified, located, and evaluated***....even though they are advancing from grade to grade." (emphasis added)

"Unlike an initial evaluation a [child find] screening includes basic tests administered to, or procedures used for, *all* children in a school, grade, or class. Mass screenings used in connection with child find activities are not considered evaluations. Letter to Holmes, 19 IDELR 350 (OSEP 1992) and thus do not require the prior parental consent and notice and consent requirements that apply to initial evaluations. 34 CFR 300.300(d)(1)(ii)." Identify, Locate and Evaluate, Child Find Under the IDEA and Section 504, 3 (Frank Ferreri ed., LRP Publications 2019).

Also a difference between a child find screening and an initial evaluation is anyone may request a child find screening and "anyone" includes "a parent, teacher, health care provider or other individual with knowledge about the child." However, only a Local

[6] The ██████ Grade IEP will be relied upon to the extent it establishes ██ is currently working at grade level in both English Language Arts and Math which is relevant to Complainant's request for compensatory education.

Education Agency (which includes a school district) or a parent may request an initial evaluation. See: 34 CFR §300.301(b). Return to School Roadmap: Child Find under Part B of the Individuals with Disabilities Education Act, Office of Special Education and Rehabilitative Services (August 24, [redacted]) 5, Question B-1.

It makes no difference which route a child follows. The destination is the same: an Initial Evaluation under 34 CFR §300.301thru 34 CFR §300.305. The child find duty is to "identify, locate and evaluate." The identification and location can take place through a child find inquiry from anyone, a general child find screening, or a request from the district or a parent. In all four cases the next step after identification and location is the initial evaluation or refusal of the initial evaluation by the MET Team. This is a decision committed solely to the MET team. It is not a decision which can be made by a Principal in conjunction with a 504 co-ordinator. 34 C.F.R. §300.301(b).

A finding of a Child Find violation turns on three inquiries: (1) the date the child find requirement triggered due to notice of a likely disability; (2) the date the child find duty was ultimately satisfied; and, (3) the reasonableness of the delay between these two dates. Beyond these three elements a plaintiff alleging an actionable Child Find violation must also prove: (1) the violation resulted in a denial of a student's educational opportunities; (2) a deprivation of a student's educational benefits; or, (3) deprivation of a parent's participation rights. Heather B. & Nozar Nick S. v. Houston Indep. Sch. Dist., 2021 U.S. Dist. LEXIS 63793, at *15 (S.D. Tex. 2021).

In this case the Child Find duty was triggered [redacted] knew [redacted] had medical assessments of migraine and post-concussion headaches coupled with [redacted]

telling ██ ██, an A/B student, had failing grades for the month of August,[7] the first month of the ██████ school year. The district MET team was never convened to make a decision on whether to provide an IDEA initial evaluation and thus the District never met its child find duties and this deprived ██ █████ of her right to participate in the evaluation process.

In carrying out its Child Find duties, a school must have realistic expectations of a parent seeking help:

> [A] parent who is a neophyte to special education and is unacquainted with IDEA cannot be expected to appear and say 'My child is eligible for special education services under IDEA, and I am here to refer my child for an individual assessment.' A request for assessment is implied when a parent informs a school that a child may have special needs. Robertson County Sch. Sys. v. King, 1996 U.S. App. LEXIS 27257, at *12 (6th Cir. 1996).

According to ██ █████ she told ██████ she was inquiring about a "504/IEP." ██████ is adamant ██ █████ asked only about a 504 plan. There is no basis in the record to impugn the credibility of either witness. There is therefore no way to settle this dispute.

However, ██ █████ was a neophyte and ██████ should have treated ██ as a neophyte. Even if ██████████ asked that ██ be evaluated for a 504 Plan, this triggered an affirmative duty on the part of ██████ to discuss with her the practical ramifications of excluding an IEP from consideration. Said another way, ██████ was obligated to have made a reasonable effort to ensure that if ██████████ was deciding

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[7] School started on August 6, ███ and the first nine weeks ended on October 9, ███. See Exhibit R-1.

to exclude an IEP from consideration, she was doing so with a working knowledge of the meaning and effect of her decision on ██'s education.

██████ testified she normally, upon such requests by parents, would discuss with them the differences between a 504 and an IEP. However, she did not do so for ██ █████. In fact there is nothing in the record to indicate ██████ asked ██ ██████ anything, except about the release, during their short August 25, ███, phone conversation.

Why would the District not evaluate for eligibility under the IDEA? The District had the far superior knowledge between it and the parent, ██ █████, about 504's and IEP's. Creating an IEP meets the need for a 504 Plan. 34 CFR §104.33(b)(2).[8] Conversely, a 504 Plan is not a substitute for an IEP. Letter to Morse, 41 IDELR 65 (OSEP 2003) ("[A] Section 504 plan that does not meet the specific IEP requirements of the IDEA may not be used to substitute for an IEP") and, Spring Branch Indep. Sch. Dist. v. O.W., 961 F. 3d 781, 794 (5th Cir. 2020) ("[C]ompliance with *§504* does not absolve a school district of its duty to comply with the IDEA...."); According to ██████ testimony the same type and amount of work went into evaluating for an IEP as that for an IEP.

As between §504 and IDEA, "the school is not free to choose which statute it prefers." Yankton Sch. Dist. v. Schramm, 93 F. 3d 1369, 1376 (8th Cir. 1996) "[W]hether or not a child is entitled to receive services under IDEA is statutorily defined and not a matter of educational policy." *Id.,* at fn. 9.

There is though an important caveat. "IDEA does not penalize school districts for

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[8] ███████, the 504 co-ordinator, agreed that if a student had an IEP, the requirements of §504 are satisfied. (Tr. 158). She said 504 and IEP plans can be "pretty related...." (Tr. 158).

not timely evaluating students who do not *need* special education....Child Find requires States to identify and evaluate children with disabilities to ensure that they receive *needed* special-education services." D.G. v. Flour Bluff Indep. Sch. Dist., 481 Fed. Appx. 887, 893 (5th Cir. 2012) (emphasis the court's, internal citations and quotations omitted).

See also D.H.H. v. Kirbyville Consol. Indep. Sch. Dist., 2019 U.S. Dist. LEXIS 146470 (E.D. Tex. 2019):

> The child find provision requires that States plan to ensure that all resident disabled children needing special education are identified, located, and evaluated and a practical method developed to determine whether they are receiving required services. 20 U.S.C. § 1412(a)(3)(A). [A] procedural child find violation is actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits." T.C. ex rel. Student v. Lewisville Indep. Sch. Dist.,...2016 U.S. Dist. LEXIS 21976, 2016 WL 705930, at *38 (E.D. Tex. Feb. 23, 2016) (quoting D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 565 (3rd Cir. 2010). Because ██ does not qualify for special education and related services, ██ did not lose an educational opportunity or become deprived of an educational benefit, and ██ parents were not deprived of their participation rights. *Id.,* at *32-*33. (Internal quotations omitted)

Describing them as "suspicions;" "The Child Find duty is triggered when the local educational agency has reason to suspect a disability coupled with reason to suspect special education services may be needed to address that disability." El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 950 (W.D. Tex. 2008); and, C.C. v. Beaumont Indep. Sch. Dist., 2015 U.S. Dist. LEXIS 192513, at *4-*5 (E.D. Tex. 2015).

"Although there is no bright-line rule, a school district generally has sufficient notice if it is aware of facts suggesting the child has a disability and that the child is struggling academically." D.C. v. Klein Indep. Sch. Dist., 860 Fed. Appx. 894, 901 (5th Cir 2021)and,

To the same effect see: O.P. v. Weslaco Indep. Sch. Dist., 2022 U.S. Dist. LEXIS 151874, at *17 (S.D. Tex. 2022).

Under IDEA the information necessary to trigger Child Find – the "mere suspicion of educational disability" – has a "low threshold." O.P. v. Weslaco Indep. Sch. Dist., 2022 U.S. Dist. LEXIS 151874, at *20 (W.D. Tex. 2022).

> "The standard of 'suspecting a child may have a disability' is an intentionally low threshold to ensure that all children who may – but not necessarily will – qualify for special education services are provided a comprehensive evaluation....**The MET should not attempt to pre-determine whether or not a child will be eligible for special education before conducting a comprehensive evaluation**." Vol. I Mississippi Dep't of Education, Ofc. Of Special Education, Procedures For State Board Policy 74.19, Child Find Evaluation and Eligibility, at 13.[9]

No later than August 25, ████, the date she received the Le Bonheur office note by email, Dr. ████ was aware ██ had a diagnosis of migraine headaches. By September 2, ████, Dr. ████ also knew Ms. ████, the mother, was concerned the headaches were causing ██ to get failing grades. These two things together were sufficient to trigger IDEA Child Find.

████ testified without credible contradiction from the beginning of the ██ grade in the Summer of ████ until September ██ had failing grades. Had Dr. ████ pursued the question of whether the grades were failing during this time frame, she could

[9] (Emphasis added.) An agency's construction of a statutory provision is entitled to considerable weight if it a reasonable interpretation. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc, 467 U.S. 837, 843-44 (1984). The same deference is applied under state precedent. Limbert v. Miss. Univ. for Women Alumnae Ass'n., 998 So. 2d 993, 1000 (Miss. 2008) ("In reviewing an administrative agency's findings of fact, the [trial] court and this Court afford great deference to an administrative agency's construction of its own rules and regulations and the statutes under which it operates."). This quotation was taken from the Mississippi Department of Education's website. Courts may take judicial notice of information on government websites. In re Katrina Canal v. Breaches Consol. Litig., 533 F. Supp. 2d 615, 632 (E.D. La. 2008); and, Lloyd v. Birkman, 127 F. Supp. 3d 725, 744 (W.D. Tex. 2015).

have proven either the truth or untruth of this allegation. She did not do so or at least there is nothing in the record to indicate she did so. She and [redacted] relied solely on [redacted]'s grades from the prior [redacted] grade year. Having good marks in the [redacted] grade tells us a lot about the [redacted] grade but tells us nothing about the [redacted] grade.

These two things together (migraine headaches plus failing grades) were sufficient to trigger an IDEA child find initial evaluation or a decision by the MET that a full initial evaluation was not needed. In either case to be followed by prior written notice of rights. Only the MET Team is authorized to make the decision whether a comprehensive initial evaluation is necessary. Failing to move the IDEA initial evaluation question to the MET Team was a procedural violation.

The required procedure is set out 34 C.F.R. §300.301(b)(1): Within fourteen days of a parent's request for an initial evaluation, the MET team must meet and "consider the request and...determine if a comprehensive evaluation is necessary." Within seven calendar days after the meeting, the MET team must give the parent either Written Prior Notice for Initial Evaluation or Written Prior Notice for Refusal to Evaluate.[10]

An IEP must be preceded by a "full and individual evaluation" ("FIE"). Without the FIE there can be no IEP and no special education. "Each public agency must conduct a full and individual initial evaluation...before the initial provision of special education and related services to a child with a disability...." Rule 74.19, at §300.301(a).

In Spring Branch Indep. Sch. Dist. v. O.W., *supra.,* 960 F. 3d at 794, the Fifth Circuit

[10] Only the MET team, including the parent, may make the decision to do or not do the initial evaluation. This decision, at least under the IDEA, cannot be made by the Principal along with the 504 Coordinator.

said: “We...recognize that determining whether a child find violation occurred is a fact-intensive inquiry and highlight that §504 accommodations are not a substitute for an evaluation once a school district is on notice of acts or behavior likely to indicate a disability.” *Id.* (internal citations and quotations omitted.)

Had the District done its due diligence in determining ’s goal (whatever was best for her child), this coupled with ’s report of failing grades, it would have been on “notice of acts or behavior likely to indicate a disability” no later than September 2, , the date of the second phone call between Dr. and

I want to make this clear. The 8/12/ LeBonheur’s neurology clinic note recorded migraine and post-concussion Assessments and complaints of frequent headaches. It is my opinion that this coupled with ’s report of failing grades was sufficient to trigger Child Find (with its admittedly low threshold trigger); and, require the matter then be put in the hands of the MET team to make the decision whether a comprehensive initial evaluation was necessary.

Before making its decision the MET team was required to review the request “and other pertinent documentation.” 34 C.F.R. §300.301(b)(1)(i)(a). It is also my opinion ’s missing but available medical records were part of the “other pertinent documentation” to have been assembled by Dr. and put in the hands of the MET team.

Finding that relying on Child Find referrals by parents and private school teachers was not compliant with IDEA, the Court in R.M.M. v. Minneapolis Pub. Sch., 2017 U.S. Dist. LEXIS 99923 (D. Minn. 2017) cited the ALJ’s opinion with approval where the ALJ had said, “Such ‘passive’ efforts were not, in his view, in keeping with the affirmative duty

imposed by the IDEA on school districts to seek out, identify, and evaluate children in need of disability services." *Id.* at *12.

The Court in R.M.M. cited numerous cases supporting its holding a district does not meet its affirmative child find duty by passively waiting on parents to ask that their child be evaluated:

> This duty is the sole responsibility of the school districts – it may not be discharged simply by passing the burden on to private school educators or parents. See, *e.g.* N.B. and C.B. v. Hellgate Elementary Sch. Dist., 541 F. 3d 1202, 1209 (9th Cir. 2008) ("A school district cannot abdicate its affirmative duties under the IDEA."); M.J.C. *ex rel.* Martin v. Special Sch. Dist. No. 1..., 2012 U.S. Dist. LEXIS 63843, 2012 WL 1538339 at *9 (D. Minn. 2012) ("[S]chool districts cannot shift their assessment responsibilities to parents."); N.G. v. District of Columbia, 556 F. Supp. 2d 11, 28 [(D.C.D.C. 2008)] ("[E]ven though a parent may help a school district satisfy the IDEA's requirement that it identify children in need of services, the school district is not relieved of its requirement to further locate and evaluate those children." The reason for this requirement is self-evident – private school officials and parents may be unwilling or unable to recognize the need for an evaluation, and are under no duty to assist the district. See, *e.g.*, M.G. ex rel. J.C. v. Cent. Reg'l Sch. Dist., 81 F. 3d 389, 397 (3rd Cir. 1996) ("[A] child's entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem)...."). R.M.M., *supra.,* at *15.

In R.M.M. the Court concluded, "Here, the passivity of the School District's child find activities evidenced an abrogation of its responsibilities that the IDEA simply does not permit." *Id.* at *15-*16.

At least one court has distinguished D.G. v. Flour Bluff, *supra.* In Indep. Sch. Dist. No. 413 v. H.M.J., 123 F. Supp. 3d 1100 (D. Minn. 2015), the school district appealed an ALJ's decision ordering it to re-do its initial evaluation of H.M.J. because its first initial

evaluation was so flawed it was impossible to determine from it whether H.M.J. needed special education. The district in its appeal to District Court cited Flour Bluff, *supra.*, and argued:

> The ALJ found that the parents did not meet their burden of showing that H.J.'s absenteeism should be addressed through specialized instruction, nor did they prove where H.J. would be performing but for an alleged denial of FAPE....The District argues that by finding the District liable anyway, due to a lack of medical evidence for the District's evaluation, the ALJ impermissibly shifted the burden onto the District. See, *e.g.* D.G. v. Flour Bluff Indep. Sch. Dist, 481 Fed. App'x 887, 893 (5th Cir. 2012) ("IDEA does not penalize school districts for not timely evaluating students who do not need special education.") (citing Adam J. Ex rel. Robert J. v. Keller Indep Sch. Dist., 328 F. 3d 804, 812 (5th Cir. 2003) ("Procedural defects alone do not constitute a violation of the right to a free appropriate public education unless they result in the loss of an educational opportunity. (Alterations omitted, the court's)).
>
> The District's argument is well taken, but the Court finds that it is not on point here. Although the School District would be correct if the ALJ had found a denial of FAPE, that was not the ALJ's conclusion. Indeed, the ALJ specifically denied H.J.'s request for compensatory education, which would have been an appropriate substantive remedy had the parents met their burden of showing a denial of necessary specialized services....Rather, the ALJ made a limited determination that there were serious procedural errors in the District's special education evaluation....[T]he ALJ ordered a procedural remedy designed to bring the District's special education evaluation in line with state and federal procedural requirements. The School District protests that the "IDEA does not penalize school districts for not timely evaluating students who do not need special education," D.G., 481 Fed. App'x at 893, but it was impossible to know whether H.J. needs special education due to the procedural errors in the evaluation process. Therefore, the Court will order the School District to remedy the procedural errors so that the record accurately reflects H.J.'s needs. H.M.J., *supra.*, 123 F. Supp. 3d at 1112.

The intractable problem is how to harmonize Flour Bluff, *supra.*, (*"IDEA does not*

penalize school districts for not timely evaluating students who do not need special education.") with the Mississippi Department of Education, Office of Special Education's written Special Education Procedures; Vol. I Mississippi Dep't of Education, Ofc. Of Special Education, Procedures For State Board Policy 74.19, Child Find Evaluation and Eligibility, at 13. (*"The MET should not attempt to pre-determine whether or not a child will be eligible for special education before conducting a comprehensive evaluation."*) (emphasis added)

The only way to interpret the two together in a way which gives both meaning is a rule that the decision whether a procedural violation is actionable cannot be made until after a regulatory compliant initial comprehensive evaluation has been completed.[11] With a corollary, if the hearing officer reasonably finds child find has been triggered and the District refuses to conduct or complete a regulatory compliant initial evaluation, the hearing officer may order the District to complete it, with the eligibility decision postponed until after the evaluation results have been provided to the MET Team. See the discussion above regarding the court's decision in Indep. Sch. Dist. No. 413 v. H.M.J., 123 F. Supp. 3d 1100 (D. Minn. 2015)

Child find is an affirmative duty placed on the school district and the district cannot shift this burden onto the parents. Krawietz v. Galveston Indep. Sch. Dist., 900 F. 3d 673, 677 (5th Cir. 2018) ("GISD alleges that Ashely's family failed to 'act with any urgency' until

[11] An IEP must be preceded by a "full and individual evaluation" ("FIE"). Without the FIE there can be no IEP and no special education. "Each public agency must conduct a full and individual initial evaluation...before the initial provision of special education and related services to a child with a disability...." Rule 74.19, at §300.301(a). Only students who *need* special education get an IEP. Only students who are eligible to have an IEP may be denied FAPE. Therefore, the decision whether the procedural violation of failing to move the case to the MET Team is actionable must be postponed until after the MET Team has acted upon a parent's request for an initial evaluation because only then can it be determined whether the child has been denied a FAPE.

late January 2015, but the IDEA imposes the Child Find obligation upon school districts, not the parents of disabled students."); and, C.P. v. Krum Indep. Sch. Dist., 2014 U.S. Dist. LEXIS 131098, at *34 (E.D. Tex. 2014) ("The IDEA's Child Find obligation "imposes on each local education agency an affirmative duty to have policies and procedures in place to locate and timely evaluate children with suspected disabilities in its jurisdiction, including '[c]hildren who are suspected of being a child with a disability...and in need of special education, even though they are advancing from grade to grade[.]" Richard R., 567 F. Supp. 2d at 950 (citing 34 C.F.R. §§300.111(a), (c)(1); see 20 U.S.C. §1412(a)(3)."

Districts having an affirmative duty must actively pursue Child Find, not rely passively on other parties such as parents to move the process along. "The IDEA's mandate is clear. States and local educational agencies must identify, locate, and evaluate students who they suspect may be disabled and develop methods to provide them with special education services." El Paso Ind. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 951 (W.D. Tex. 2008); and, Spring Branch Indep. Sch. Dist. v. O.W., 961 F. 3d 781, 793 (5th Cir. 2020) (Timeliness in Child Find is measured by the district's "proactive steps" taken not by how much time it takes). In other words, it is not penalized for time well spent in pursuing an initial evaluation.

On August 25, , called Dr. , Principal at Mooreville School, about daughter . She says she told Dr. at 's August 12, , appointment at the Le Bonheur's Pediatric Neurology Clinic, 's neurologist PA suggested might need a "504/IEP" plan. testified, at that point, she knew nothing about either 504 or IEP plans. In fact, she didn't even know they were two different things.

testified she was not inquiring about any particular accommodation. She says she didn't know what was available. She was just asking for help because 's headaches were so bad. She said whatever was being done for just wasn't enough to address the problem. And that's when 's Neurologist PA, , told her the school needed to consider a more formalized plan such as an IEP or a 504 for because, at the time, the medication was taking was not enough. said, " . . . I can't really say, oh, needed this or needed that particular thing because I didn't know what they could do or what would help . . . . I didn't know...."

However, Dr. is adamant asked only for a 504 plan and made no mention of an IEP. Dr. told , she needed to give the district a medical release so the district could get the LeBonheur medical records. Dr. emailed a medical release and filled it out and returned it also by email on August 25, . Dr. , also on August 25, sent the release to LeBonheur and gotten the reply forwarding the neurology clinic note from August 12, .

Because the Child Find duty is an affirmative duty which must be actively pursued by a School District, I find Dr. violated Child Find by failing to actively investigate 's medical history and failing to actively seek out and determine whether understood what she was asking for if she asked for a 504 plan instead of an IEP, by doing or failing to do the following:

1. Dr. should have, but did not, ask whether she knew any particulars on 504 and IEP plans and finding that she did not, she should have explained to the main differences between 504 and IEP plans. As a part of this discussion she should have asked

whether she was, in fact, advocating for a specific plan or was she simply advocating for the best plan available to help her child with ██ problems associated with headaches and concussion regardless of whether this was a 504 plan, an IEP, or something else such as the school's MTSS ("Multitiered System of Support") three tier plan.

2. Dr. ████ should have questioned ██████ about whether any public (federal, state or local) or private agency or any medical care provider had ever given an opinion or otherwise suggested ███ had any disability, whether total, partial and/or temporary, or any other iteration of disability.

3. Dr. ████ should have questioned ██ ██████ about any either formal or informal accommodations had ever been afforded ██ as a result of the headaches.

4. Dr. ████ should have questioned ██ ██████ to determine the identify of each medical care provider who had ever treated or examined ██, or given any type diagnosis about the medical condition revealed in her request. More specifically about headaches and concussions.

5. Dr. ████ should have questioned ██ ██████ about any diagnoses for ██ regardless of the medical condition involved.

6. Dr. ████ should have questioned ██ ██████ about any medications, prescribed or over the counter which ██ had taken for headaches and/or concussion or related to any other medical condition.

7. Dr. ████ should have questioned ██ ██████ about any surgeries or medical procedures ██ had ever undergone for anything related to

headaches and/or concussion or for any other medical condition.

8. Doctor ██ should have then followed up by obtaining medical releases and used the release to obtain all records identified in addressing the facts disclosed in response to questions 1 through 7 above.

Had Dr. ██ actively pursued this information the Lee County School District would have known:

1. ██ was involved in a school bus accident in ██ on February 21, ██, in which ██ sustained a concussion.
2. As a result of the concussion, ██ suffered intermittent headaches, neck pain, dizziness, and had diminished memory recall.
3. From the date of the accident to the end of the semester ██ was having headaches at school and had missed seventeen (17) days of School due to ██ headaches and related injuries.
4. ██ had a prescription for Topomax 25mg daily for "headache prevention."
5. ██, at the beginning of ██ grade was under the care of Le Bonheur's and ██ neurologist asked for accommodations for ██ consisting of carrying a water bottle at all times for hydration and extra bathroom privileges and with a diagnosis of migraine headaches. (See Ex. C-1N)
6. When ██ started the ██ grade, ██ was taking Topiramate 50mg daily. See Ex. C-1L.
7. Because of ██ headaches, ██, ██'s ██ grade teacher, provided the following informal accommodations to ██: (1) She gave ██ breaks; (2) if ██ needed it to finish a test or assignment, she gave ██ more

time; (3) She allowed ██ to have extra bathroom breaks; (4) She allowed ██ to carry water; and, (5) if ██ had a headache, she allowed ██ to put ██ head down on ██ desk.

8. As of 8/12/██ ██ had medical assessments of migraine and post-concussion headaches, ██ complained of having frequent headaches, and the headaches were causing a ██ grade normally A/B student to get F's.

5. A Parent's Right To Participate
<u>In The Evaluation Decision</u>

In <u>O.P. v. Weslaco</u>, *supra.*, 2022 U.S. Dist. LEXIS 151874, the mother, Elizabeth Perez, on February 8, 2019, sent the school district a letter in which she said, "I would like to get together with you to discuss how [O.P.] would get the help he needs from the school if educationally there are no struggles, but he is easily distracted that I believe could be the reason why he had failed his Reading STARR last year in sixth grade." She enclosed in the letter a psychologist's report diagnosing O.P. with Autism Spectrum Disorder, inattentive Attention Deficit Hyperactivity Disorder, and anxiety and communication disorder.

On February 11, 2019, the district sent Ms. Perez a "Notice and Consent for Initial section 504 Evaluation." Ms. Perez consented to a Section 504 evaluation with the disclaimer that she understood " that this [document] is not an offer of a special Education evaluation." However, at the subsequent Due Process hearing Ms. Perez testified "that she did not understand the distinction between Section 504 evaluations and IDEA special education evaluations."

On February 14, 2019, the District sent Ms. Perez a "Notice of Section 504

Evaluation Results" which confirmed O.P. was eligible for 504 accommodation services.

On February 21, 2019, the district sent a letter to Ms. Perez saying "it was [and is] not our belief that [O.P.] was [or is] in need of services through the Special Education program" for various reasons, but that Elizabeth Perez had the "right to request such an evaluation." More specifically the letter said: "A review of school-based information indicates that [O.P.] has done well academically, socially and behaviorally....In reviewing the data and speaking with his teachers it is our continued belief that [O.P.] is not in need of an evaluation to determine his potential need for special education services."

On March 6, 2020, Ms. Perez requested a Due Process hearing. On March 13, 2020, the District requested consent to its conducting "a full individual evaluation and gather information "to determine if the student has a disability and needs special education services." Ms. Perez consented and on November 17, 2020, the District reported after its evaluation O.P. did not qualify for special education services.

The court found Ms. Perez' letter of February 8, 2019, with the psychologist's report enclosed was sufficient to trigger the district's child find duty. The court also found the district's February 2019 unilateral decision that O.P. did not require a full initial evaluation violated Perez' procedural rights because "she lacked a meaningful opportunity to *fully* participate as an equal member of the team making the special education eligibility determination." Weslaco, *supra*., 2022 U.S. Dist. LEXIS, at *15.

The court however upheld the district's November 17, 2020, report finding O.P. did not qualify for special education services. Having found O.P. did not "need" special education services, it also found the procedural violations (child find and unilateral initial evaluation decision) were not actionable.

The holding in Weslaco is apposite. Under 20 U.S.C. §1414(b)(4)(A) Ms. [redacted] had the right to participate fully in any decision whether [redacted] would receive an IDEA full comprehensive initial evaluation. [redacted] was deprived of this right and this was a procedural violation.

6. The Initial Evaluation Must Precede The Decision Whether The Child Is Disabled

Had the initial evaluation been carried out in September [redacted] by the Lee County School District instead of in April [redacted] by the Tupelo School District, no one knows whether there would have been a different result. Nevertheless, consistent with the reasons already discussed above, you cannot make a determination whether a child is disabled and in need of special education until after you have the results of the initial evaluation.

I make no finding regarding whether on September 2, [redacted], [redacted] was disabled and in need of special education. Instead, were the matter still a live dispute, I would have entered an order compelling the school district to perform a comprehensive initial evaluation and then make its decision whether it finds [redacted] is disabled within the meaning of the IDEA and whether [redacted] needs special education. See Ind. Sch. Dist. No. 413, 123 F. Supp. 3d 1100 (D. Minn. 2015) discussed above.

“[W]hen the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome, a case is considered moot. Generally, any set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot." Silva v. Tegrity Pers. Servs., 986 F. Supp. 2d 826, 830 (S.D. Tex. 2013) (Internal citations and quotations omitted).

I find this issue now moot. There is no longer a live controversy between ██ and the Lee County School District about whether ██ should be evaluated for special education by the Lee County District and whether ██ attends school in the Lee County district as a special education student.

I view the likelihood of ██ ██████ taking ██ out of the Tupelo district and re-enrolling ██ in the Lee County District as nonexistent. ██ is enrolled (for ██ third year) in the Tupelo School District where ██ has an ongoing IEP and ████████████ has expressed ██ intention to leave ██ enrolled in the Tupelo District. ██ ██████ has likewise testified she is pleased with the way the Tupelo District has handled ██'s IEP's. Therefore, no purpose would be served by now having Lee County do an initial evaluation and if ██ were found disabled and in need of special education, offering an IEP to ██.

Also, ██ ██████ has been living full-time in Tupelo for the past three years and claims it as her domicile. Therefore, before she could even attempt to re-enroll ██ in the Lee County District, she would have to move and re-establish her home in the Lee County District. Until then ██ would be unable to return to school there.

7. Prior Written Notice

Under 34 C.F.R. §300.301(b)(1)(i)(b) ████████████ had the right to be provided with Written Prior Notice of her rights within seven calendar days after the District's decision not to provide ██. with an initial evaluation. The district violated this right when it failed to provide Written Prior Notice. This is a procedural violation only.

8. Compensatory Education

Courts use either a quantitative or qualitative approach for calculating compensatory

education under IDEA. For a quantitative example see: Spring Branch Indep. Sch. Dist. v. O.W., 2021 U.S. Dist. LEXIS 149259, at *13 (W.D. Tex. 2021), citing M.C. on behalf of C. v. Cent. Reg'l Sch. Dist., 81 F. 3d. 389, 397 (3rd Cir. 1996) ("holding that a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem"). (internal citations and quotations omitted)

For a qualitative example see: Spring Branch Indep. Sch. Dist. v. O.W., 2021 U.S. Dist. LEXIS 149259, at *13 (W.D. Tex. 2021), citing Reid ex rel. Reid, *supra.*, at 524-525 ("requiring individualized compensatory awards that remedy...an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student and are reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.") (internal citations and quotations omitted)

The District Court on the remand in O.W. *supra.*, while recognizing the Fifth Circuit had not "explicitly adopted one approach over the other," concluded it would apply the "qualitative approach endorsed by Reid in light of the Fifth Circuit's reliance on the Reid case in the [Fifth Circuit's appellate] Opinion...."For the Appeal see: Spring Branch Indep. Sch. Dist. v. O.W., 961 F. 3d 781, 800 (5th Cir. 2020). Like the appellate opinion in O.W., I too shall also use the qualitative approach.

There are two questions which must be answered in order to award compensatory education and to determine the amount:

1. Whether ██ has specific educational deficits resulting from ██ loss of FAPE? If so, the second question to be answered is –

2. What specific compensatory measures are needed to best correct those deficits? Spring Branch Indep. Sch. Dist. v. O.W., 2021 U.S. Dist. LEXIS 149259, at *16 (W.D. Tex. 2021).

According to the District Court in O.W. an award of compensatory education must be consistent with IDEA's "aim to guarantee disabled students specialized education and related services designed to meet their unique needs." citing Reid and 20 U.S.C. §1400(d)(1)(A).

The Circuit Court in Reid remanded the case to the District Court and gave the District Judge the option to either take additional proof before the Court or to remand the case to the Due Process hearing officer to take additional proof on the issues of: (1) the child's "specific educational deficits resulting from his loss of FAPE; and, (2) the specific compensatory measures needed to best correct those deficits." Reid, *supra.,* 401 F. 3d 516, 526.

According to ███'s current IEP, ███ is working on grade level for both ELA and math. There is therefore no educational deficit to make up. Using the qualitative proof model, there is no basis for awarding compensatory education.

An additional, and more important reason for no award of compensatory education, is because no initial evaluation has been done by the Lee County School District. For that reason, I am not making a decision on the issue of denial of FAPE. Thus, there is no substantive basis upon which to make an award for compensatory education.

IDEA Exhaustion

The IDEA exhaustion statute is found at 20 U.S.C. §1415(l):

> Nothing in this title [20 USCS §§ 1400 et seq.] shall be

> construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities act of 1990, title V of the Rehabilitation Act of 1973 [29 USCS §§ 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this part [20 USCS §§ 1411 et seq.], the procedures under subsection (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this part [20 USCS §§ 1400 et seq.]

"The IDEA requires administrative exhaustion not just of claims arising under it, but also Rehabilitation Act claims that overlap with the IDEA....Said another way, exhaustion is required for claims brought under §504 of the Rehabilitation Act and Title II of the ADA when a plaintiff seeks relief for the denial of a free appropriate public education. The activation of §1415(l)'s exhaustion requirement depends on whether the suit seeks redress for a denial of a FAPE....However, a complaint that seeks relief, independent of any FAPE denial, is not subject to §1415(l)'s exhaustion requirement." J.V. v. Brownsvillle Indep. Sch. Dist., 2020 U.S. Dist. LEXIS 108707, at *11-*12 (S.D. Tex. 2020).

"Put another way, a party is free to pursue claims apart from the IDEA, but must exhaust the IDEA's remedial process for any such claims that include relief the IDEA can provide." Heston v. Austin Indep. Sch. Dist., 816 Fed. Appx. 977, 980 (5th Cir. 2020).

The complainant's first two claims were: (1) the Lee County District violated IDEA by not providing ███ with FAPE for the ███ Fall semester; and (2) Lee County violated IDEA by not giving ███ ███████████ prior written notice of procedural safeguards regarding its decision not to give ██. an IDEA initial evaluation.

These two claims have been administratively exhausted under the IDEA. I found both to be procedural violations. However, in both cases I found it premature to answer the

question whether FAPE had been denied. The basis for these two decisions was the District failed to do a comprehensive initial evaluation and this step in the process must be completed before the lack of FAPE decision is ripe for decision.

Complainant's child will finish up ████ year in the new district this year where ██ has an IEP, the mother has no intent to re-enroll the child in the Lee County School district, nor does she have any intent to move ██ domicile back to the Lee County School District. For these reasons I found the issue moot. I did not order the Lee County District to complete a comprehensive evaluation; nor did I grant Complainant any other relief on these two issues.

The Complainant's third claim was the Lee County School District withdrew ██. from school in the District in retaliation for ██ ████████ having advocated for a special education initial evaluation for ██. There is no overlap between IDEA and §504 of the Rehabilitation Act and Title II of the ADA. IDEA has no retaliation statute or claim among its provisions. This claim therefore is not subject to administrative exhaustion under the IDEA. When a Plaintiff alleges a claim which cannot be addressed under the IDEA, the IDEA exhaustion requirement does not apply. Ripple v. Marble Falls Indep. Sch. Dist., 99 F. Supp. 3d 662, 686 (W.D. Tex. 2015).

The Complainant's fourth claim was The Lee County School District discriminated against ██ and one of ██ siblings when the District forced them to withdraw from school in the Lee County District when it allowed a similarly situated student of another race to remain enrolled in the District. There is no overlap between IDEA and §504 of the Rehabilitation Act and Title II of the ADA. IDEA has no race discrimination provision. This claim therefore is not subject to administrative exhaustion under the IDEA. When a Plaintiff

alleges a "pure discrimination claim" which cannot be addressed under the IDEA, the IDEA exhaustion requirement does not apply. Ripple v. Marble Falls Indep. Sch. Dist., 99 F. Supp. 3d 662, (W.D. Tex. 2015).

"A [IDEA] hearing officer's jurisdiction is limited to issues involving matters related to the identification, evaluation, and educational placement of students, as well as the provision of a FAPE under the IDEA. *See 34 C.F.R. §300.507(a)...."* Angela B. v. Dall. Indep. Sch. Dist., 2020 U.S. Dist. LEXIS 76831, at *21 (N.D. Tex. 2020).

Although I have jurisdiction to adjudicate overlapping claims, I have no jurisdiction to directly adjudicate claims brought directly under either §504 of the Rehabilitation Act and/or Title II of the ADA.

FINAL JUDGMENT

The Lee County School District has committed four procedural violations. (1) the district violated Child Find when it failed to actively determine whether ██ ██████ was requesting the best and most effective help available for ██. regardless of whether it was in the form of a 504 plan, an IEP under IDEA, or something else. (2) the district violated Child Find when it failed to actively determine ██'s relevant medical history. (3) the district violated Child Find when Child Find triggered (based on known medical assessments of migraine and post-concussion headaches and ██ ██████'s allegations of ██, a normally A/B student, having failing grades for the month of August ███) followed by Dr. ██████ failure to send the matter to the MET for a decision on whether a full comprehensive initial evaluation was necessary. (4) failure to give ██ ██████ prior written notice of the district's decision not to afford ██ a comprehensive initial IDEA evaluation.

Without a comprehensive initial evaluation, there is no way to determine whether in September was disabled and in need of special education. Because there is no finding of a denial of FAPE, none of these four procedural violations are, at this time, actionable under IDEA.

Were still enrolled in the Lee County School District or if mother, the Complainant, had desired return to the Lee County School District, I otherwise would have entered a judgment ordering the District to complete a comprehensive initial evaluation and provide the MET Team with the evaluation results for its use in determining whether is a disabled child who needs special education. However, because has been a student in the Tupelo School District since October and because mother and intend to stay in the Tupelo district and intend to continue to live in that school district where has an ongoing IEP, I find the issue of the initial evaluation moot.

As to the request for compensatory education, I find applying the qualitative analysis, there is no educational deficit to make up. 's current IEP states is working at grade level in both English Language Arts and Math. I also find since there is no decision on the alleged denial of FAPE, there is no substantive basis upon which to award compensatory education.

Complainant's claims regarding denial of FAPE and failure to provide prior written notice are subject to exhaustion of administrative remedies and all administrative remedies under the IDEA have been exhausted. Complainant's claims of retaliation and racial discrimination are not subject to IDEA administrative exhaustion.

There may be other issues and objections which have not been discussed in this opinion and Final Judgment. To the extent there are, they were not considered outcome

determinative.

All matters in this administrative proceeding having been fully litigated, this case is, subject to this Final Judgment, finally dismissed with prejudice.

SO ORDERED this the 8th day of February, 2023.

/s/ Preston Rideout
PRESTON RIDEOUT, IDEA HEARING OFFICER