APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 21-20229

[Filed September 19, 2022]

HEATHER B., *Parent, Guardian, and Next Friend of* S.S., *a Minor with Disabilities*; NOZAR NICK S., *Parent, Guardian, and Next Friend of* S.S., *a Minor with Disabilities*; S.S., *a minor*, *Plaintiffs—Appellants*,

versus

HOUSTON INDEPENDENT SCHOOL DISTRICT; PEARLAND INDEPENDENT SCHOOL DISTRICT TEXAS EDUCATION AGENCY, *Defendants—Appellees*.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CV-3579

Before JONES, STEWART, and DUNCAN, *Circuit Judges*.

PER CURIAM:*

Plaintiffs-Appellants Heather B. and Nick S. ("Parents") brought suit on behalf of their minor child, S.S., against Defendants-Appellees Houston Independent School District ("HISD"), Pearland Independent School District ("PISD"), and the Texas Education Agency ("TEA") (collectively, "Defendants"), for alleged violations of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq*. We affirm the district court's grant of summary judgment in favor of Defendants.

I. FACTUAL AND PROCEDURAL BACKGROUND

A.

"The IDEA offers federal funds to States in exchange for a commitment: to furnish a 'free appropriate public education'—more concisely known as a FAPE—to all children with certain physical or intellectual disabilities." *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 748 (2017) (citing 20 U.S.C. § 1412(a)(1)(A)); *see also Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993 (2017); *Dall. Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 309 (5th Cir. 2017). S.S. has been visually impaired since her birth in 2007. She lived with her Parents in Houston until 2014. During the 2009–10 school year, S.S. attended public preschool in HISD, which gave her

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* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

a Full and Individual Evaluation ("FIE") and provided her Parents notice of the IDEA's procedural safeguards. *See* 20 U.S.C. §§ 1414, 1415(d).

HISD's evaluation found S.S.'s impairment was a qualifying disability, but she was not "functionally blind" because she could use her limited vision to learn (rather than using Braille or tactual symbols). HISD then held an Admission, Review, and Dismissal ("ARD") committee meeting on January 10, 2010, which determined S.S. was IDEA-eligible, developed her Individualized Education Program ("IEP"), and gave her Parents another copy of the notice. *See, e.g.*, *Endrew F.*, 137 S. Ct. at 994 (observing the IEP is the "centerpiece" of IDEA's "education delivery system"); *Lauren C. by and through Tracey K. v. Lewisville Indep. Sch. Dist.*, 904 F.3d 363, 367–68 (5th Cir. 2018) (discussing role of ARD committee in developing the IEP). The IEP proposed placing S.S. at a preschool program for children with disabilities at her public elementary school in Houston. But at the end of the school year, her Parents withdrew S.S. from public school and enrolled her in a private preschool within HISD boundaries for 2010–11. She has not attended HISD since June 2010.

In June 2014, S.S. and her family moved to Pearland, within the PISD. But S.S. continued to attend her private school in Houston. In November 2015, her Parents contacted the Texas Regional Education Service Center ("Region 4"),[1] inquiring about

[1] Regional service centers are state administrative agencies created to assist school districts. Tex. Educ. Code §§ 8.001, *et seq*.

the availability of special education services. Region 4 advised them to contact both PISD and HISD. On January 21, 2016, Heather B. emailed an HISD employee, Angela Terry, and a PISD employee, Jacqueline Yancy, expressing interest "in having [S.S.] receive vision services" and asking "how to move forward." The email explained S.S. was low vision and attended a private school in Houston but lived in Pearland. Yancy did not respond. She resigned in March 2016 and never forwarded the email to anyone at PISD. But Terry responded that same day, telling the Parents that if S.S. "is in a private school within HISD and you want her to remain there, you can receive an evaluation and limited services if she qualifies for them through proportionate agreement." The Parents affirmed their desire to keep S.S. in private school and asked for next steps to get an evaluation.

HISD conducted another FIE in April and May, completing it on May 25, 2016. HISD then convened an ARD meeting on June 7, 2016, which determined that S.S. did not qualify for IDEA services. Because S.S. was going to a new private school for the 2016–17 year, the ARD committee recommended another evaluation for the new environment. HISD evaluators visited S.S. three times at her new school in August and September 2016. The first two visits showed S.S. had "no problem accessing things in the environment at that time," but the third visit revealed S.S. struggling to keep up with the material on the board in math class.

They are educational service agencies for IDEA purposes. *See* 20 U.S.C. § 1401(5).

Based on those observations, HISD completed a new FIE on October 26, 2016. The district found that S.S. was visually impaired, though not functionally blind, and would benefit from special education services. The ARD committee met again on January 19, 2017 and found S.S. eligible for services. But her Parents disagreed with the evaluation's findings and requested an Independent Educational Evaluation ("IEE"). *See* 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502. HISD agreed to pay for an IEE and to delay final determination of eligibility until after the IEE was complete. HISD commissioned Emily Gibbs, a PISD teacher for the visually impaired, to conduct S.S.'s IEE in spring 2017. While HISD's IEE progressed, the Parents emailed PISD on May 15, 2017.[2] PISD responded the next day and scheduled a meeting.

The Parents sought IDEA services through both PISD and HISD in May 2017. Gibbs issued her findings for HISD on May 30, 2017. The Parents also met with PISD, which agreed at a June 20, 2017 resolution meeting that S.S. was eligible for special services and provided her Parents with release forms for evaluations. The Parents did not sign the forms until more than a month later on July 31.

B.

On June 7, 2017, S.S.'s Parents filed due process complaints against HISD and PISD. The gravamen of

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[2] Pam Wilson, PISD's executive director, had not seen the January 2016 email that was sent to Yancy. Wilson had PISD's IT department investigate, and they found Yancy did not forward the email to anyone at PISD.

the complaints was that the districts failed to comply with the child-find requirement and other procedural obligations under the IDEA. *See Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 791 (5th Cir. 2020) (discussing "the IDEA's child find requirement"), *cert denied.*, 141 S. Ct. 1389 (2021); *see also* 20 U.S.C. § 1412(a)(3), (a)(10)(A)(ii). Both districts continued to work with the Parents after the complaint was filed. As PISD undertook its evaluations that summer, HISD held a third ARD meeting on June 27, 2017. There, HISD determined S.S. to be eligible for IDEA services. HISD agreed to meet to determine their IDEA obligations to S.S. as a student attending a private school within HISD while residing in PISD. *See, e.g.*, *Woody*, 865 F.3d at 309 (noting "IDEA and its regulations impose obligations on the public-school district even for students who are being educated in private schools") (citing 20 U.S.C. § 1412(a)(10); 34 C.F.R. §§ 300.130–300.148).

PISD emailed the Parents on July 18 to schedule another ARD meeting, but they did not respond. So, PISD unilaterally scheduled a meeting for August 18, 2017, which was delayed for ten days due to disagreement between the parties. The meeting was delayed again by Hurricane Harvey before reconvening on September 27, 2017. There, the ARD committee proposed a new IEP for S.S. that included help from specialists to transition S.S. into a PISD public middle school. The Parents again disagreed with this plan and requested a due process hearing.

C.

A Special Education Hearing Officer ("SEHO") held due process hearings to evaluate the Parents' claims against HISD and PISD. In separate decisions, the SEHO ruled in favor of the districts. It concluded that the Parents' claims were largely barred under the applicable one-year statute of limitations. To the extent the claims were not time-barred, the SEHO ruled that the districts had complied with their child-find obligations.

D.

On November 21, 2017, S.S.'s Parents filed a complaint in federal district court to challenge the SEHO's ruling as to HISD. They later added PISD and TEA as defendants. They sought discovery from TEA on various topics. TEA resisted the discovery, moved for a protective order, and moved to dismiss the Parents' claims.

The district court eventually ruled in favor of the districts and TEA. On September 19, 2019, the court granted HISD summary judgment, ruling that the claims against it were time-barred and that it had otherwise complied with its child-find obligations. After further proceedings before a magistrate judge, on March 31, 2021, the district court accepted the magistrate's recommendation to grant PISD and TEA summary judgment as well. S.S.'s Parents timely appealed to our court.

II. STANDARD OF REVIEW

In IDEA cases, our standard of review is "more expansive than the usual *de novo* review for summary judgments." *O.W.*, 961 F.3d at 790 (quoting *E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 762 (5th Cir. 2018)). We review legal questions *de novo* and factual questions for clear error. *Ibid.* (quoting *Woody*, 865 F.3d at 309). "Mixed questions should be reviewed under the clearly erroneous standard if factual questions predominate, and *de novo* if the legal questions predominate." *Ibid.* (quoting *Seth B. ex rel. Donald B. v. Orleans Par. Sch. Bd.*, 810 F.3d 961, 967 (5th Cir. 2016)). Whether a district failed to provide a FAPE or timely comply with its child-find requirement are mixed questions reviewed *de novo*, with "[t]he underlying factual determinations . . . reviewed for clear error." *Ibid.* (citing *Krawietz ex rel. Parker v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 676 (5th Cir. 2018); *Woody*, 865 F.3d at 390).

III. DISCUSSION

The Parents challenge on several grounds the district court's dismissal of their claims against HISD, PISD, and TEA.

A. Statute of Limitations

As a preliminary matter, we note the district court held that Texas's statute of limitations barred the Parents' claims that arose more than a year prior to June 7, 2017—the filing date of their due process complaint. *See* TEX. ADMIN. CODE § 89.1151(c). Texas law mandates that parents request a due process hearing "within one year of the date the parent . . .

knew or should have known about the alleged action that serves as the basis of the request." *Id.* The Parents do not challenge this ruling, nor do they argue that their claims fall within the statutory tolling provisions. *See* TEX. ADMIN. CODE § 89.1151(d). Thus, our review of the Parents' appeal is limited to alleged actions that arose after June 7, 2016. *See* FED. R. APP. P. 28(a)(8)(A); *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993) (claims not properly briefed are waived).

B. Claims Against HISD

The district court found HISD fulfilled its child-find duties for S.S., as a student enrolled in a private school within its boundaries. The Parents argue that the district court erred because HISD unreasonably delayed finding S.S. eligible for IDEA services. We disagree.

Although S.S. is not a resident of HISD, HISD has child-find duties for children with disabilities attending private school within its boundaries. *See* 34 C.F.R. § 300.131(a) ("Each [school district] must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private . . . schools located in the school district."). Once HISD is on notice of "facts . . . likely to indicate a disability," it must identify, locate, and evaluate that private school student within a reasonable time. *O.W.*, 961 F.3d at 791. Reasonableness is measured based on the delay between notice and the school district's referral of the student for evaluation. *Id.* at 793; *see Woody*, 865 F.3d at 320 (considering time period between notice and referral for evaluation). A delay is reasonable if the district takes "proactive steps to comply with its child

find duty" during this intervening period. *O.W.*, 961 F.3d at 793. Moreover, a school district's delay is excused if it is not attributable to school officials. *See Woody*, 865 F.3d at 320 (suggesting a parent's delay in returning consent forms is not attributable to the district).

Once a student is referred for evaluation, a school district must complete an FIE within 45 school days of receiving the parents' written consent for the evaluation. 19 TEX. ADMIN. CODE § 89.1011(c)(1) Following completion of an FIE, the school must then convene an ARD committee meeting within 30 calendar days to determine whether the student qualifies for IDEA services. *Id.* § 89.1011(d).

HISD's delay in referring S.S. for evaluation was reasonable. HISD received two separate notices that S.S. may qualify for IDEA services, but only one is relevant here. The Parents initially gave notice of S.S.'s suspected disabilities in a January 21, 2016 email to an HISD employee. HISD immediately responded and referred her for evaluation in April 2016. But we do not decide whether this delay was reasonable because, as discussed, the limitations period bars claims for actions prior to June 7, 2016.

Turning to the second notice, HISD received notice that S.S. may qualify for IDEA services on June 7, 2016, when her Parents informed administrators that S.S. would be attending a new private school in the fall. Although a May 2016 FIE deemed S.S. ineligible for IDEA services, her new school environment potentially impacted her IDEA eligibility. After receiving this notice, HISD recommended additional evaluations and

performed three informal observations of S.S. in her new environment once school resumed. From these observations, which concluded in September 2016, HISD referred S.S. for a complete reevaluation and completed an FIE in October 2016. These intervening observations, or "proactive steps," to collect information necessary to determine S.S.'s IDEA eligibility show that HISD's delay between notice and referral was reasonable. *See Krawietz*, 900 F.3d at 677 (a delay in referring a student for evaluation is reasonable when the district takes "proactive steps" throughout that period to "comply with its Child Find obligation").

After completing an FIE for S.S., HISD fulfilled its other child-find duties: it convened an ARD meeting that concluded S.S. qualified for IDEA services; it provided a subsequent IEE when the Parents disagreed with the ARD's findings; and it offered revised IDEA services once the IEE concluded. *See* 20 U.S.C. §§ 1414–15.

In sum, we find no reversible error in the district court's ruling that HISD fulfilled its child-find duties to S.S.

C. Claims Against PISD

The Parents argue that PISD (1) similarly failed to fulfill its child-find duties as to S.S., and (2) failed to provide S.S. with a FAPE. The district court correctly rejected both claims.

First, the district court found that PISD timely satisfied its child-find requirements. As with the claims against HISD, we must decide whether there was an unreasonable delay between PISD's notice of S.S.'s

suspected disabilities and its referral of S.S. for evaluation. We agree with the district court that, at the latest, PISD referred S.S. for evaluation on June 20, 2017, when it found S.S. eligible for IDEA services and requested parental consent for evaluation. So, we must determine when PISD received notice and whether the delay between that notice and the referral date was reasonable.

The district court found PISD had notice in March 2017 when a PISD teacher, while working for HISD, performed an IEE. But the Parents contend PISD had notice earlier: either in 2014 when S.S. moved to Pearland (located within PISD), or, alternatively, in January 2016, when the Parents emailed a PISD employee requesting vision services.[3] In our view, however, none of these three dates is the relevant one for notice purposes. We conclude instead that PISD did not have adequate notice of S.S.'s suspected disability until May 15, 2017.

The Parents claim PISD had notice as early as 2014 when S.S. moved into PISD's boundaries but remained enrolled in a Houston private school. We disagree. "A school district's child find duty is triggered when the district 'had reason to suspect [the child] had a qualifying disability.'" *D.C. v. Klein Indep. Sch. Dist.*,

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[3] Although Texas's one-year statute of limitations bars consideration of the Parents' alleged actions that arose prior to June 7, 2016, we can review "events preceding" the statute of limitations for "evidence of a child find violation." *O.W.*, 961 F.3d at 793 n.11. Since the referral date—June 20, 2017—falls within the statute of limitations, we can review when PISD had notice to determine if this referral was timely.

860 F. App'x 894, 901 (5th Cir. 2021) (quoting *Woody*, 865 F.3d at 320) (alteration in original). S.S.'s move to Pearland—while remaining enrolled in a private school in Houston—did not afford PISD notice that S.S. was a student within its jurisdiction, let alone that S.S. had a disability.

The Parents also claim PISD had sufficient notice when they copied both PISD and HISD administrators on a January 21, 2016 email. But the district court concluded the email did not give PISD adequate notice that the Parents sought an evaluation for IDEA services. Whether the Parents sought an IDEA evaluation is a fact question we review for clear error. *See Durbrow v. Cobb Cnty. Sch. Dist.*, 887 F.3d 1182, 1192 (11th Cir. 2018); *see also Seth B.*, 810 F.3d at 967 (reviewing "underlying factual determinations" in child-find claims for "clear error"). In the email, the Parents explained that S.S. attended a Houston private school but lived in Pearland and was interested in vision services. When the HISD administrator replied explaining that HISD could provide proportionate share services if S.S. remained enrolled in private school, the Parents stated they planned to keep S.S. in private school and proceeded with the HISD evaluation. Following that exchange, the Parents never followed up to ask PISD specifically to perform its own evaluation. In light of that, we cannot conclude the district court clearly erred in finding that the initial email failed to give PISD effective notice.[4]

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[4] The district court also found PISD did not have effective notice because the PISD administrator, Jacqueline Yancy, resigned shortly after receiving this email and did not forward the email to

We disagree with the district court, however, that PISD had notice of S.S.'s suspected disabilities in April 2017 when a PISD teacher, Emily Gibbs, conducted an IEE for HISD. Although Gibbs was a PISD teacher, she was performing S.S.'s IEE as a private contractor for HISD. In such a role, Gibbs is prohibited from sharing S.S.'s personal information to PISD, absent her Parents' consent. *See* 34 C.F.R. § 300.622(a). Thus, any information Gibbs learned about S.S. cannot be imputed to PISD.

Rather, we conclude that PISD received notice on May 15, 2017, when the Parents emailed a PISD administrator to request special education services. The very next day, PISD promptly began the identification and evaluation process, scheduled a meeting, and referred S.S. for evaluation on June 20, 2017. PISD's approximate one-month delay, while taking proactive steps, was well within the boundaries of reasonableness.

Finally, the Parents contend that PISD failed to timely provide S.S. a FAPE, because the school district did not complete her IEP until September 2017, after the start of the school year. School districts are required to have an effective IEP for each eligible student "[a]t the beginning of each school year." 34 C.F.R. § 300.323. But the district court excused PISD's delay because (1) S.S.'s Parents did not return the necessary consent forms until July 31 (more than a month after receiving such forms), (2) the Parents had

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other PISD administrators. In light of our conclusion here, we need not address that alternative finding.

to reschedule an August ARD meeting, and (3) the rescheduled meeting was delayed by Hurricane Harvey. Since the untimely IEP was not attributable to PISD's actions but was instead substantially caused by the Parents' tardiness, the district court did not err in finding the delay reasonable. *See Woody*, 865 F.3d at 320 (a three-month delay was not unreasonable where it "was not solely attributable to the District" and "neither the District nor the parent react[ed] with urgency or with unreasonable delay").

D. Claims Against TEA.

The Parents asserted a menagerie of claims against TEA that fall under two general categories: (1) TEA has *respondeat superior* liability for the school districts' failure to find S.S.; (2) TEA systemically failed to coordinate with other state agencies to implement state-wide child-find procedures. The district court correctly rejected these claims.

First, even assuming *arguendo* that TEA may have *respondeat superior* liability for some failure on the school districts' part to find S.S. under IDEA, that would not help the Parents here.[5] As discussed, the district court did not err in finding that neither HISD nor PISD failed in their IDEA obligations to S.S. Both

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[5] *Cf. St. Tammany Parish Sch. Bd. v. Louisiana*, 142 F.3d 776, 784–85 (5th Cir. 1998) ("[I]n determining whether to allocate . . . costs against the state, or the local, educational agency, [courts] should consider 'the relative responsibility of each agency for the ultimate failure to provide a child with a free appropriate public education.'" (quoting *Gadsby by Gadsby v. Grasmick*, 109 F.3d 940, 955 (4th Cir. 1997))).

districts fulfilled IDEA's child-find obligations and PISD prepared an appropriate IEP, ensuring S.S. a FAPE for the 2017-18 school year.

Second, the Parents' claim that TEA failed to implement statewide child-find procedures fares no better. Specifically, the Parents argue: (1) TEA failed to coordinate with other agencies to find disabled students; and (2) TEA imposed an 8.5% cap on IDEA-eligible students. To begin with, given that neither HISD nor PISD failed in their IDEA duties to S.S., it is doubtful whether the Parents would have standing to assert any systemic claim against TEA. *See Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 811 (5th Cir. 2003) (standing requires parties to show that a "procedural deficiency resulted in a loss of educational opportunity" or some other IDEA-related harm). In any event, the district court found no evidence supporting the Parents' claims against TEA, and on appeal the Parents fail to explain why the court clearly erred.[6]

IV.

The district court's judgment is AFFIRMED.

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[6] The Parents also claim the district court erred by denying their request to depose a TEA representative under Federal Rule of Civil Procedure 30(b)(6). We disagree. The court based its rulings on an extensive administrative record developed in two separate proceedings. A party's request to introduce "additional" evidence is left to the district court's discretion. *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 763 (5th Cir. 2018) (citation omitted). The Parents fail to show that the district court abused its discretion in disallowing the TEA deposition.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:17-CV-3579

[Filed March 31, 2021]

HEATHER B., *et al*,	)
Plaintiffs,	)
	)
VS.	)
	)
HOUSTON INDEPENDENT	)
SCHOOL DISTRICT, *et al*,	)
Defendants.	)
	)

ORDER

Before the Court are United States Magistrate Judge Frances H. Stacy's Memorandum and Recommendation filed on March 9, 2021 (Doc. #155), Plaintiffs' Objections (Doc. #158), and Defendant Pearland Independent School District's Objections (Doc. # 161). The Magistrate Judge's findings and conclusions are reviewed de novo. FED. R. CIV. P. 72(b); 28 U.S.C. § 636(b)(1); *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989). Having reviewed the parties' arguments and applicable law, the Court

adopts the Memorandum and Recommendation as this Court's Order.

It is so ORDERED.

MAR 31 2021	/s/ Alfred H. Bennett
Date	The Honorable Alfred H. Bennett
	United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-17-3579

[Filed March 9, 2021]

HEATHER B. and NOZAR NICK S., Parents and Guardians and Next Friends of S.S., a Minor with Disabilities, Plaintiffs,	)
V.	)
HOUSTON INDEPENDENT SCHOOL DISTRICT, PEARLAND INDEPENDENT SCHOOL DISTRICT, and TEXAS EDUCATION AGENCY, Defendants.	)

MEMORANDUM AND RECOMMENDATION

The pending motions in this case have been referred to the undersigned Magistrate Judge for a Memorandum and Recommendation. Those pending motions are: Plaintiffs' Motion for Partial Summary Judgment against Defendant Pearland Independent School District (Document No. 117), Plaintiffs' Motion for Partial Summary Judgment against Texas

Education Agency (Document No. 120), Pearland Independent School District's Motion for Summary Judgment (Document No. 124) and Defendant Texas Education Agency's Motion for Summary Judgment (Document No. 129). Having considered the motions, the responses and additional briefing, the administrative record[1] and the additional evidence submitted by Plaintiffs,[2] and the applicable law, the Magistrate Judge RECOMMENDS, for the reasons set forth below, that the Motions for Summary Judgment by Pearland Independent School District and Texas Education Agency be GRANTED and Plaintiffs' Motions for Partial Summary Judgment be DENIED.

I. Background

This is a Individuals with Disabilities Education Improvement Act ("IDEA") case brought by the parents of S.S., who is visually impaired, and who, Plaintiffs

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[1] The Administrative Record, filed as Document No. 18, is referred to herein as "AR" with a corresponding page number.

[2] Plaintiffs' two Motions to Accept Additional Evidence in Support of their Motions for Partial Summary Judgment against Pearland Independent School District and Texas Education Agency (Document Nos. 118 and 121) are both GRANTED. Much of what Plaintiffs have offered as "additional evidence" is "additional" within the meaning of the *Town of Burlington* standard. *See E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 762 (5th Cir. 2018) (adopting standard for admission of additional evidence in IDEA case set forth in *Town of Burlington v. Dep't of Educ. for Mass.*, 736 F.2d 773, 790-91 (1st Cir. 1984)). Moreover, none of the statements in the affidavits Defendant Texas Education Agency has objected to, and none of the exhibits submitted as additional evidence, have any bearing on the ultimate, substantive determinations made herein on Plaintiffs' claims.

allege, was not timely identified by Defendants Houston Independent School District ("HISD") and Pearland Independent School District ("Pearland ISD") as needing special education and related services. Plaintiffs also allege that Defendant Texas Education Agency ("TEA") does not have a viable system or method for identifying children needing special education and related services, and that it discouraged school districts from finding and identifying children needing special education and related services by virtue of a recommended 8.5% cap on the number of such children as a percentage of the school district's student population.

In Plaintiffs' Second Amended Complaint, Plaintiffs alleged that TEA: (1) violated the "Child Find" provisions in the IDEA by failing to develop and implement a "practical method" for determining "which children with disabilities are currently receiving needed special education and related services, including child find for children in private schools;" (2) failed to publish accurate Notices of Procedural Safeguards;" (3) failed to provide a fair special education due process hearing system; and (4) failed to provide S.S. with needed special education and related services when such services were not provided by the local educational agencies. With respect to Defendant Houston Independent School District ("HISD"), Plaintiffs alleged that the administrative hearing officer incorrectly determined that HISD did not violate the Child Find provisions as they related to S.S. from June 2014 through June 2017. Finally, with respect to Pearland Independent School District ("Pearland ISD"), Plaintiffs also allege that the administrative hearing

officer incorrectly determined that Pearland ISD did not violate the Child Find provisions as they related to S.S. from June 14, 2014, through August 2017.

In an Order entered on September 30, 2019, the Court dismissed Plaintiffs' claims against HISD (Document No. 108). The contents of that Order serve as a guide for the analysis of Plaintiffs' claims against Pearland ISD and TEA. As a preface to a discussion of those claims, the following factual background information, in chronological order, is needed to provide context:

> S.S. was born prematurely in 2007. SS has a visual impairment that she has had since birth.
>
> Up until June 14, 2014, S.S. and her parents lived within the geographical boundaries of HISD.
>
> For the 2009-2010 school year, HISD developed an individual education plan (IEP) for SS that allowed her to attend a preschool for children with disabilities within HISD. That IEP was based on S.S.'s visual impairment.
>
> During the spring of 2010, Plaintiffs withdrew SS from that HISD preschool program.
>
> Between 2010 and 2012, S.S. attended, at Plaintiffs' expense, the School for Young Children, a private school within the within geographic boundaries of HISD. She also attended the School for Young Children during the 2012-2013 school year, for kindergarten; and the 2013-2014 school year, for first grade.

On or about June 14, 2014, S.S. moved with Plaintiffs to a residence within the geographic boundaries of Pearland ISD. At the time of the move, S.S. was still attending the School for Young Children in Houston. She continued to attend the School for Young Children in Houston during the 2014-2015 school year for second grade, and the 2015-2016 school year for third grade.

In July 2015, Plaintiffs had S.S. evaluated at the Perkins School for the Blind in Massachusetts. That evaluation led Plaintiffs to contact the Texas School for the Blind and Visually Impaired in Austin.

In November 2015, Plaintiffs sought information from TEA about the availability of special education and related services. In January 2016, in response, Plaintiffs were advised to contact both HISD and Pearland ISD.

In January 2016, SS was evaluated by Dr. Valerie Van Horn Kerne at Plaintiffs' behest. In a report dated, January 21, 2016, Dr. Kerne stated that SS would "strongly benefit from a supportive academic setting in which visual impairment services are available to support her academic skill development. . . . Should she enroll in public school, an Individualized Education Plan (IEP) should be considered by her educational team as the appropriate strategy for providing services/supports needed given [her] medical history, visual impairment,

and neurocognitive weaknesses (i.e., fine-motor skills deficits)."

On January 21, 2016 Plaintiffs sent emails to both HISD and Pearland ISD. The content of those two emails is as follows:

> Dear Dr. Terry and Ms. Yancy: Good morning. We received your contact information from Cecilia Robinson (Region 4 Education Service Center). We have a 9 year old daughter, S. that is low vision (legally blind, limited peripheral vision, nystagmus). She attends a private school in Houston, but we live in Pearland. We are interested in having her receive vision services, but do not know how to go about doing so and which school district would be able to help. We had S. evaluated at the New England Low Vision Clinic (Perkins) this past summer and they highly recommend an O&M evaluation and vision aid for the classroom. If either or both of you could advise us how to move forward we would greatly appreciate your assistance.

Plaintiffs did not receive a response to the January 21, 2016, email from Pearland ISD. HISD responded to the email, and Plaintiffs pursued their requests for special education and related services with HISD throughout 2016, and into 2017.

In May 2016 HISD completed its evaluation of S.S.

On June 7, 2016, in connection with an admission, review and dismissal ("ARD") meeting with HISD, Plaintiffs were advised of HISD's determination that SS was not eligible for special education or related services, whether she attended a private school or a public school.

In the fall of 2016, S.S. began to attend the Joy School (a private school) in Houston, at Plaintiff's expense.

On September 22, 2016, the Texas School for the Blind and Visually Impaired ("TSBVI") advised HISD, from its evaluation of SS, that SS should be considered eligible for special education and related services under the IDEA.

In the Fall of 2016, the Houston Chronicle published a series of articles about TEA's recommended 8.5% cap on special education and related services. S.S. was featured in an article dated December 30, 2016, which noted that HISD had determined that SS was not eligible for special education and related services despite being legally blind.

On January 19, 2017, Plaintiffs attended an ARD meeting with HISD. At that ARD meeting, HISD reiterated that SS was not eligible for services. Plaintiffs responded by asking HISD for an independent educational evaluation (IEE).

Between March and April 2017, an IEE was done for HISD by Emily Gibbs, a teacher of the visually impaired at Pearland ISD.

On May 15, 2017, Plaintiffs, upon the advice of their attorneys, re-contacted Pearland ISD by email. That email stated, in pertinent part:

> As you know, we are residents of Pearland ISD. Our daughter [ ] is legally blind and needs special education and related services. She also had Chronic Lung Disease.
> We wrote to Pearland ISD on January 21, 2016 (email attached). At that time we did not understand that Pearland, as our resident district, could be responsible to provide special education and related services for [SS]. No one contacted us back from Pearland ISD at that time. We want you to know that we are only having [SS] attend private school because while we were residents of HISD, we didn't think she was getting and appropriate program and that is what led us into private school. Since then, [SS] has continued to attend private school and everyone told us that HISD was responsible for her because her private school was located in Houston. But, if she could receive what she needed in a public school, of course, we would be willing to have her in public school.

Pam Wilson, Executive Director of Special Education at Pearland ISD, promptly responded to the May 15, 2017, email, acknowledged that the email to Ms. Yancy from the year before had been received but had not been forwarded it to anyone at Pearland ISD, and had not been seen by her until May 15, 2017.

In Emily Gibbs' IEE, dated May 30, 2017, she found that SS was eligible for special education and related services.

On June 1, 2017, Pearland ISD met with Plaintiffs. Emily Gibbs was at that meeting and she advised Plaintiffs that the IEE she had done for HISD was favorable, but she did not provide them with a copy of the written evaluation.

On June 7, 2017 Plaintiffs requested a due process hearing to challenge HISD's determination that SS was not IDEA eligible.

On June 7, 2017, Plaintiffs also requested a special education due process hearing to complain about Pearland ISD's failure to timely identify and evaluate SS for special education and related services. *Pearland ISD S.S. B/N/F H.B. and N.S. v. Pearland Independent School District*, Dkt. No. 249-SE-0617.

On June 20, 2017, Pearland ISD agreed and conceded that SS was a student with a visual impairment entitled to special education and related services under the IDEA.

On August 11, 2017, prior to the commencement of the 2017-2018 school year, an ARD meeting was held between Pearland ISD and Plaintiffs. The meeting was reconvened on August 18, 2017. An IEP was completed on September 27, 2017. No agreement was reached between Pearland ISD and Plaintiffs about the services to be made available to SS. While the IEP offered to Plaintiffs was for placement for SS at Jamison Middle School in Pearland ISD, Plaintiffs declined that offer and continued SS at the Joy School in Houston.

Between October 10 and October 11, 2017, a due process hearing was held in the Pearland ISD case. On December 8, 2017, the hearing officer, Lucius Bunton, concluded that Pearland ISD had not violated its IDEA Child Find obligations.

This case was filed on November 21, 2017, against HISD. In a Second Amended Complaint filed on January 3, 2018, claims against Pearland ISD and TEA were added.

In December 2018, while this case was pending, SS and her family moved to Massachusetts.

On September 30, 2019, the Court granted HISD's Motion for Summary Judgment, and dismissed all of Plaintiffs' claims against HISD.

II. Standard of Review

The parties in this case have filed cross Motions for Summary Judgment (Document Nos. 117, 120, 124 and

129). IDEA cases such as this may be decided upon summary judgment. *J. L. v. Clear Creek Indep. Sch. Dist.*, No. CV H-15-1373, 2016 WL 4704919, at *22 (S.D. Tex. Aug. 16, 2016) ("An IDEA case may be adjudicated on motion for summary judgment."), *report and recommendation adopted sub nom. L. v. Clear Creek Indep. Sch. Dist.*, No. CV H-15-1373, 2016 WL 4702446 (S.D. Tex. Sept. 7, 2016), *aff'd sub nom. D. L. by & through J.L. v. Clear Creek Indep. Sch. Dist.*, 695 F. App'x 733 (5th Cir. 2017), *as revised* (July 31, 2017). In so doing, a federal district court reviews the decision of a hearing officer "virtually de novo." *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 808 (5th Cir. 2003). That means, in a summary judgment context, that the court receives the "state administrative record" and "additional evidence at the request of either party," and affords the hearing officer's findings "due weight," while arriving at "an independent conclusion based on a preponderance of the evidence." *Id.* Unlike in a traditional summary judgment context, "the existence of a disputed material fact will not defeat a motion for judgment on an IDEA claim," and it is the plaintiff who bears a burden of "persuasion." *T.W. by K.J. v. Leander Indep. Sch. Dist.*, No. AU-17-CA-00627-SS, 2019 WL 1102380, at *2 (W.D. Tex. Mar. 7, 2019). Therefore, in an IDEA case such as this, "summary judgment 'is not directed to discerning whether there are disputed issues of fact, but rather, whether the administrative record, together with any additional evidence, establishes that there has been compliance with IDEA's processes and that the child's educational needs have been appropriately addressed.'" *Seth B. ex rel. Donald B. v. Orleans Parish Sch. Bd.*, 810 F.3d 961, 967 (5th Cir. 2016) (quoting

Wall by Wall v. Mattituck-Cutchogue Sch. Dist., 945 F. Supp. 501, 508 (E.D.N.Y. 1996)).

III. IDEA

The IDEA applies to states, and the school districts within them, that receive federal funding. The IDEA requires that children with disabilities be provided with an education "to the maximum extent appropriate with children who are not disabled," in an environment that is the "least restrictive [ ] consistent with their needs." *William V. v. Copperas Cove Indep. Sch. Dist.*, No. 617CV00201ADAJCM, 2019 WL 5394020, at *3 (W.D. Tex. Oct. 22, 2019), *aff'd sub nom. William V. as next friend of W.V. v. Copperas Cove Indep. Sch. Dist.*, 826 F. App'x 374 (5th Cir. 2020). The State of Texas accepts federal education funding; as a consequence "all school districts within its borders must comply with the IDEA." *Id.*

As is relevant to the claims asserted in this case, the IDEA contains a "Child Find" provision, which requires that "[a]ll children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services." 20 U.S.C.A. § 1412(a)(3)(A). The Child Find obligations in the IDEA arise when a school district "has reason to suspect a disability coupled with reason to suspect that

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). "Once the suspicions arise, the school district 'must evaluate the student within a reasonable time after school officials have notice of behavior likely to indicate a disability.'" *Id.* (quoting *Strock v. Indep. Sch. Dist. No. 281*, No. 06–CV–3314, 2008 WL 782346, at *7 (D.Minn. Mar. 21, 2008)). These Child Find obligations apply regardless of whether a student is currently attending a public school, is attending a private school, or is home-schooled. 20 U.S.C. § 1412(a)(3)(A); *Bellflower Unified Sch. Dist. v. Lua*, 832 F. App'x 493, 495–96 (9th Cir. 2020) ("The Department of Education's regulations implementing the IDEA specifically contemplate that, upon a parent's request, a school district must evaluate a child residing in its district for purposes of making a FAPE available to her, even if she is enrolled in a private school in another district.").

A two part inquiry is generally undertaken to determine whether a school district has met its Child Find obligations. "First, the Court must examine whether the local educational agency had reason to suspect that a student had a disability, and whether that agency had reason to suspect that special education services might be needed to address that disability. Next, the Court must determine if the local educational agency evaluated the student within a reasonable time after having notice of the behavior likely to indicate a disability." *A.L. v. Alamo Heights Indep. Sch. Dist.*, No. SA-16-CV-00307-RCL, 2018 WL 4955220, at *6–7 (W.D. Tex. Oct. 12, 2018).

There are three elements to a Child Find violation claim: (1) whether a school district had notice of a likely disability; (2) whether and when a school district satisfied its Child Find obligations; and (3) the reasonableness of any delay between the date a school district had notice of a likely disability and the date the school district satisfied its Child Find obligations. *Spring Branch Indep. Sch. Dist. v. O.W.*, 961 F.3d 781, 793 (5th Cir. 2020) ("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."), *cert. denied*, 2021 WL 666472 (Feb. 22, 2021). Beyond these three considerations, a plaintiff alleging a Child Find violation must prove that the violation resulted in a denial of a student's educational opportunities, a deprivation of a student's educational benefits, or a deprivation of a parent's participation rights. *D.H.H. by & Through Rob Anna H. v. Kirbyville Consol. Indep. Sch. Dist.*, No. 1:18-CV-00120-MAC, 2019 WL 5390125, at *11 (E.D. Tex. July 12, 2019), *report and recommendation adopted sub nom. D.H.H. by Rob Anna H. v. Kirbyville Consol. Indep. Sch. Dist.*, No. 1:18-CV-00120-MAC, 2019 WL 4052200 (E.D. Tex. Aug. 27, 2019); *T.C. ex rel. Student v. Lewisville Indep. Sch. Dist.*, No. 4:13-CV-186, 2016 WL 705930, at *13 (E.D. Tex. Feb. 23, 2016) (quoting *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565 (3rd Cir. 2010)) ("[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.")).

A hearing officer's decision on an alleged Child Find violation is subject to review in this Court pursuant to 20 U.S.C. § 1415(e)(2) ("The Court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of the party, and, basing its decision on the preponderance of the evidence, shall grant relief as the court determines is appropriate"). As set forth above, a review of the hearing officer's decision is virtually *de novo*.

With respect to the "Child Find" and related claims against TEA, because the TEA was not a party to the due process proceedings against Pearland ISD and HISD, Plaintiffs' claims against TEA are not directly the subject of the hearing officer's decisions. However, Plaintiffs' claims against TEA are derivative of the claims asserted by Plaintiffs against both HISD and Pearland ISD because the claims against TEA are premised on a denial of IDEA services and a violation of the Child Find obligations. Therefore, while the hearing officer made no findings relative to TEA because it was not (and could not have been) a party to the due process proceedings, the findings that were made by the hearing officer relative to both HISD and Pearland ISD affect the viability of Plaintiffs' claims against TEA.

IV. Discussion – Claims against Pearland ISD

Plaintiffs allege in this case that Pearland ISD violated its Child Find obligations under the IDEA between January 21, 2016, when they first made an

email inquiry of Pearland ISD about special education and related services, through June 20, 2017, when Pearland ISD acknowledged that SS was eligible for services under the IDEA.[3] Plaintiffs also maintain that the hearing officer's decision to the contrary is incorrect and unsupported by the evidence. Pearland ISD responds that the record evidence supports the hearing officer's determination that it did not violate the Child Find provisions in the IDEA, and that the IEP formulated for SS on September 27, 2017, was appropriate and provided SS with a Free Appropriate Public Education (FAPE).[4]

There is no dispute in the evidence that: Plaintiffs moved to a residence within Pearland ISD on June 14, 2014; Plaintiffs sent Pearland ISD an email inquiry about IDEA services for SS on January 21, 2016; Pearland ISD did not respond to the January 21, 2016, email inquiry; a Pearland ISD employee, Emily Gibbs, evaluated SS for HISD in March-April 2017, and concluded in a report dated May 30, 2017, that SS was

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[3] Plaintiffs also allege that Pearland ISD's Child Find violation dates to June 2014, when they moved into the District. As set forth herein, imposing that date as the date Pearland ISD was on notice of SS's likely disability is both unsupported by the evidence and objectively unreasonable.

[4] Pearland ISD also argues that any claim related to any time before June 7, 2016, is, as also found by the hearing officer, barred by the one year statute of limitations. While this limitations argument has merit, the evidence in the record establishes by more than a preponderance of the evidence that Pearland ISD did not, at any time, violate the Child Find provisions in the IDEA, nor did it fail to properly and timely evaluate SS and offer appropriate services for her visual impairment.

eligible for services; and SS was featured in a Houston Chronicle article dated December 30, 2016, about HISD's denial of her requests for special education and related services. Those facts relate to the notice element and, in particular, when Pearland ISD had notice of a likely disability. Those facts, however, only support a conclusion that Pearland ISD had notice of SS's likely disability in April, 2017, when Emily Gibbs learned from discussions with Plaintiffs that SS lived within Pearland ISD.

First, it cannot be said that Pearland ISD had notice of SS's likely disability in June 2014, when the family moved to a residence within Pearland ISD. Plaintiffs did not present any evidence to the hearing officer, and there is nothing in any additional evidence, that would have sufficed as notice to Pearland ISD of SS's presence in the district or SS's likely disability in June 2014. Plaintiffs' argument that Pearland ISD should have done something to determine that SS lived within Pearland ISD after June 14, 2014, places an unreasonable and impossible burden on the District to know, at all times, the identity and location of all students within the District. While the wording of the Child Find provision in the IDEA may suggest that there is such a burden, no Court has held that the burden is as high as that argued for by Plaintiffs in this case. *See e.g., P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727 (3d Cir. 2009) (upholding District Court's determination that the District's Child Find efforts, which included posting of Child Find notices in local newspapers and on the District's website, sending information in residents' tax bills, and placing posters and pamphlets in private schools, were

appropriate and sufficient).[5] Plaintiffs' move to Pearland ISD in June 2014 does not, in and of itself, suffice as notice to Pearland ISD of SS's likely disability.

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[5] The record evidence is undisputed that Pearland ISD had information on its website about both Child Find and special education and related services in the District. Pam Wilson, the Executive Director of Special Education at Pearland ISD explained at the hearing, as follows, Pearland ISD's Child Find efforts:

> So we have information on the web page. We have flyers there, information there about who to contact, which would be myself. We put notifications in the local newspapers. We provide a lot of parent training. Every year we would have trainings here and at different schools that's open to the public, where parents can attend, and we'll do call-outs and put information on the website. We post those advertisements on Facebook too. We do a disabilities fair. We collaborate with several surrounding school districts. And we do sessions for parents, or anybody really wanting to attend. And vendors come, advocates, and people that provide resources to parents. And again, that's advertised. We meet with our private schools in our district and we talk about the process for evaluating students. If they have students there that need evaluation, we give them the contact list of our LSSPs and speech pathologists. We have staff members that volunteer in the community. I know some of our speech pathologists volunteer at the local day cares to do screenings. Dr. Brandon is our district psychologist, and he is on the board of CRCG, the Community Resource Coordination Group. And so he works with different agencies. If they know of families that need help, then he's aware of that.

AR 1728-1729. The efforts undertaken by Pearland ISD were at least as expansive as that found by the Third Circuit to be appropriate in *P.P.*

Second, while the January 2016 email from Plaintiffs to Ms. Yancy at Pearland ISD can be seen as some "notice" of SS's presence in the district and her likely disability, it was not effective or reasonable notice given the evidence at the hearing on October 10-11, 2017, that Ms. Yancy resigned from Pearland ISD in 2016, the January 21, 2016, email was not forwarded by her to anyone prior to her resignation, and Pearland ISD only discovered the existence of the January 2016 email when it was attached by Plaintiffs to a subsequent email dated May 15, 2017.[6] That single email from January 2016, with no follow-up of any kind by Plaintiffs for more than a year, cannot be seen as effective notice to Pearland ISD of SS's likely disability in January 2016.

Third, the Houston Chronicle article, dated December 30, 2016, did not provide Pearland ISD with notice that SS was living in Pearland ISD and was likely eligible for services from Pearland ISD. All the Houston Chronicle article mentioned were the struggles SS was having seeking IDEA services from

[6] The hearing officer's determination that there was no evidence that anyone at Pearland ISD received the January 21, 2016, email is supported by the record. While Plaintiffs argue that Pearland ISD should have had some method for ensuring that emails were not lost, Plaintiffs admit that they did not send a follow-up email for over year, did not look at Pearland ISD's website to determine who to email about a request for services, and made a conscious decision to pursue services from HISD.

HISD; nowhere is her residence in Pearland or Pearland ISD mentioned.[7]

Fourth and finally, the contact between Emily Gibbs and Plaintiffs in March-April 2017 in connection with the IEE Gibbs did for HISD should, and does, suffice as notice to Pearland ISD that SS was likely eligible for services from Pearland ISD. Emily Gibbs, while completing an IEE for HISD, was a teacher for the visually impaired at Pearland ISD. In connection with the IEE, she became aware in April 2017 that SS lived within the geographic boundaries of Pearland ISD. She concluded in her IEE report for HISD that SS was visually impaired and eligible for IDEA services. As such, because Emily Gibbs was a teacher for the visually impaired at Pearland ISD and knew in April 2017 that SS lived within Pearland ISD and was likely disabled, and as testified to by Pam Wilson, Gibbs had Child Find obligations, *see* AR 1767-68, Pearland ISD had notice of SS's likely disability in April 2017.

That notice date does not end the inquiry. Next to be considered is when Pearland ISD fulfilled its Child Find obligations, and whether the delay between its notice and its fulfillment of its Child Find obligations was reasonable. "[T]he reasonableness of a delay is not defined by its length but by the steps taken by the district during the relevant period. A delay is reasonable when, throughout the period between notice

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[7] Plaintiffs' complaints about the hearing officer's exclusion of the Houston Chronicle article are meritless. Because the article did not connect SS to Pearland or Pearland ISD, it had no relevance to the issue of when Pearland ISD had notice of SS's likely disability and her eligibility for services in Pearland ISD.

and referral, a district takes proactive steps to comply with its child find duty to identify, locate, and evaluate students with disabilities. Conversely, a time period is unreasonable when the district fails to take proactive steps throughout the period or ceases to take such steps." *O.W.*, 961 F.3d at 793.

Here, the record evidence shows that Pearland ISD fulfilled its Child Find obligations as early as May 16, 2017, when Pam Wilson, Executive Director of Special Education at Pearland ISD, responded to Plaintiffs' May 15, 2017, email and began the identification and evaluation process, or as late as June 20, 2017, after an informal meeting was held with Plaintiffs on June 1, 2017, and Pearland ISD informed Plaintiffs on June 20, 2017, that SS was eligible for IDEA services. Using either date, the delay between Pearland's notice of SS's likely disability and Pearland ISD's acknowledgment of SS's eligibility, was a period of approximately two months. That two month delay came towards the end of the academic school year, at a time when any earlier evaluation of SS would not, and could not, have resulted in any lost educational opportunities or benefits for SS during the 2016-2017 school year. That delay was, therefore, not unreasonable and did not result in any injury to SS.

As for the delay in developing an IEP for SS at Pearland ISD, the record evidence shows that the September 27, 2017, IEP was completed within a reasonable time, even if it was completed after the start of the 2017-2018 school year. The record evidence shows that Plaintiffs did not sign the required consents for Pearland ISD to obtain information about SS from

both the Joy School and TSBVI until July 31, 2017, even though the consents were provided to Plaintiffs on June 20, 2017, *see* AR 1742; no one from the Joy School was available to participate in an ARD until after August 22, 2017, *see* AR 1745; and the effects of Hurricane Harvey resulted in school closures throughout the Houston and Pearland area in late August, early September 2017.[8] In addition, that IEP was, based on the evidence in the record, appropriate to meet the needs of SS at Pearland ISD. Plaintiffs' expert, Michael Munro testified, in accord with his expert report, that the IEP was both fair and appropriate. AR 1048-1054; 1969-1983. Dr. Rona Pogrund, Pearland ISD's expert, testified that the IEP was appropriate for SS, and that many of the services contained in the IEP could not be provided by the Joy School. AR 2354-55; 2358. While Michael Munro expressed concerns about SS's transition from private school to public school, *see* AR 1952-1954, the IEP contained mechanisms and strategies for minimizing

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[8] Ideally, the IEP should have been ready the first day of the 2017-2018 school year, as provided for by 34 C.F.R. § 300.323 ("At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320"). The 2017-2018 school year, particularly the beginning of it, with the landing of Hurricane Harvey in Houston on August 26-28, 2017, was a school year like none other. The school closures occasioned by Hurricane Harvey damage, coupled with the unavailability of anyone from the Joy School until late August 2017, after the beginning of the school year, are two circumstances that were out of Pearland ISD's control. In addition, the fact that the IEP was being discussed in August, as opposed to earlier in the summer, was the result of Plaintiffs' failure to sign the consents needed by Pearland ISD to obtain information about SS.

the disruption of such a transition for SS, and Dr. Pogrund testified that Jamison Middle School, was very linear, and that delaying SS's transition to public school would not, in the long run, be in SS's best interests. AR 2350, 2352-53. Dr. Pogrund also testified that Pearland ISD, in the fall of 2017, had "a whole team of people and specialists and administrators who seem[ed] more than willing to bend over backwards to meet [SS's] needs and accommodate whatever it [was] that she [needed]." AR 2348.

Upon this record, under the virtually *de novo* standard of review, Pearland ISD did not violate its Child Find obligations and did not deny SS a Free Appropriate Public Education (FAPE). As for Plaintiffs complaints about the hearing officers' decision, none of the procedural complaints resulted in an unfair proceeding or a denial of due process at that proceeding. The hearing officer did not misconstrue or mis-characterize Michael Munro's testimony. Munro *did* testify that the September 27, 2017, IEP was fair and appropriate for SS's needs. While Munro also stated that more of a plan was needed for SS's transition to public school, he did not find any significant fault with the elements of the September 27, 2017, IEP. As for the hearing officer's exclusion from the hearing of the Houston Chronicle article mentioning SS and her visual impairment and Plaintiff Heather B.'s affidavit, neither evidentiary exclusion resulted in a denial of a fair hearing. As set forth above, the Houston Chronicle article had no relevance as to when Pearland ISD knew SS lived within the District because nothing in that article stated that SS lived in Pearland/Pearland ISD. The exclusion of

Plaintiff Heather B.'s affidavit was appropriate given that she testified at the hearing. Finally, Plaintiff's complaints about the change in hearing officers, and the break taken during Dr. Pogrund's testimony in violation of the sequestration order, have not been shown by Plaintiffs to have had any effect on the result of the proceeding.

With regard to Plaintiffs' complaints about the hearing officer's findings, the hearing officer's decision on the Child Find claim focused on the following facts: (1) Plaintiffs did not seek to enroll SS in Pearland ISD; (2) there was no evidence that the January 2016 email to Ms. Yancy was received or read by anyone at Pearland ISD; and (3) Plaintiffs decided, in 2016, not to pursue services with Pearland ISD and instead decided to seek services from HISD. None of those findings are incorrect. Plaintiffs did not enroll SS in Pearland ISD; there was no evidence that anyone at Pearland ISD read the January 2016 email addressed to Ms. Yancy; and Plaintiffs testified at the hearing that a conscious decision was made in early 2016 to pursue services via HISD. Those factual findings might not cohesively support the hearing officer's conclusion that Pearland ISD met its Child Find obligations, the other record evidence, set forth above, supports that conclusion.

In all, the record evidence presented to the hearing officer, as well as the additional evidence submitted by Plaintiffs herein, supports the conclusion, by a preponderance of the evidence, that Pearland ISD met its Child Find obligations, and that any delay between the date Pearland ISD had notice of SS's presence in the district and her likely disability, and the date

Pearland ISD determined SS was eligible for services, was not unreasonable and caused SS no injury. The record evidence also supports the conclusion that the IEP for SS, dated September 27, 2017, was not untimely or unreasonably delayed, that it was appropriate and served to meet SS's visual impairment needs, and that Pearland ISD met its obligation to provide SS a FAPE. On this record, summary judgment is warranted for Pearland ISD.

V. Discussion – Claims against TEA

Plaintiffs allege that TEA policies led to the untimely identification of SS as a student eligible for services under the IDEA. Plaintiffs also complain that SS was not provided an appropriate IEP, and was thereby denied a FAPE. TEA responds, and argues that there are only two claims remaining against it in this proceeding: a systematic Child Find claim and a denial of services claim. TEA further argues, in its Motion for Summary Judgment on those claims, that the provision of an IEP for SS at Pearland ISD, which afforded SS a FAPE, renders meritless any claim against it for denial of IDEA services. As for the systematic Child Find claim, TEA maintains that the 8.5% recommended cap was discontinued during the 2016-2017 school year, and that because both HISD and Pearland ISD complied with their Child Find obligations, Plaintiffs have not asserted a viable Child Find claim against it.

Under Texas law, it is the local school districts that are responsible for complying with the IDEA. *See* TEX. EDUC. CODE § 29.001 ("The agency shall develop, and modify as necessary, a statewide design, consistent with federal law, for the delivery of services to children

with disabilities in this state that includes rules for the administration and funding of the special education program so that a free appropriate public education is available to all of those children between the ages of three and 21. The statewide design shall include the provision of services primarily through school districts and shared services arrangements, supplemented by regional education service centers."); TEXAS ADMIN CODE § 89.1050(a) ("Each school district must establish an admission, review, and dismissal (ARD) committee for each eligible student with a disability and for each student for whom a full individual and initial evaluation is conducted pursuant to §89.1011 of this title (relating to Full Individual and Initial Evaluation). The ARD committee is the individualized education program (IEP) team defined in federal law and regulations, including, specifically, 34 Code of Federal Regulations (CFR), §300.321. The school district is responsible for all of the functions for which the IEP team is responsible under federal law and regulations and for which the ARD committee is responsible under state law"). It is only when a school district has not, or cannot, comply with its obligations under the IDEA that the TEA becomes responsible for doing so. The regulations governing the IDEA make it clear that state education agencies such as the TEA must directly provide services under the IDEA if the local school district:

> (i) Has not provided the information needed to establish the eligibility of the LEA [local education agency] or State agency, or elected not to apply for its Part B allotment, under Part B of the Act;

> (ii) Is unable to establish and maintain programs of FAPE that meet the requirements of this part;
>
> (iii) Is unable or unwilling to be consolidated with one or more LEAs [local education agencies] in order to establish and maintain the programs; or
>
> (iv) Has one or more children with disabilities who can best be served by a regional or State program or service delivery system designed to meet the needs of these children.

34 C.F.R. § 300.227(a). But, despite the responsibilities under the IDEA falling primarily to local school districts, state education agencies may, in some circumstances, be liable for violations of the IDEA. *St. Tammany Parish Sch. Bd. v. State of Louisiana*, 142 F.3d 776, 784 (5th Cir. 1998).

Here, the two claims that remain against TEA can be resolved by reference to the resolution of the claims against HISD and Pearland ISD. First, the denial of services claim against TEA is defeated by the resolution of the denial of services claim against Pearland ISD. In particular, the hearing officer found, and the evidence in the record shows, that Pearland ISD evaluated SS, and prepared an appropriate IEP for SS for the 2017-2018 school year. That appropriate IEP served to ensure SS a FAPE. Because Pearland ISD did not deny SS a FAPE, TEA cannot have denied SS a FAPE. Upon this record there was no denial of services for which TEA could be liable.

As for the alleged Child Find violations, it must be noted that the TEA's policies and procedures for ensuring that school districts can and do find students with likely disabilities are far from perfect. As explained by Plaintiffs throughout this case, there is no policy or procedure at the state level that allows for the identification and tracking of all visually impaired students in the state. The Registry compiled and maintained by the Texas School for the Blind and Visually Impaired does not function in that way,[9] and TEA has not, in any event, mandated that school districts use the Registry to "find" students with visual impairments. Moreover, even if the Registry had been a mandated source for identification of visually impaired students, there is no evidence in the record that SS would have been found by either HISD or Pearland ISD during the time period at issue in this case. SS was on the registry in 2009 and 2010 when she was identified by HISD as eligible for preschool services, but was not on the Registry thereafter once she was enrolled in private school. There is, therefore, no evidence that any expanded use of the Registry would have made any difference in this case.

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[9] Dr. Pogrund explained at the hearing that the TSBVI Registry is "done every year in the beginning of January for that previous year of the current students enrolled in that January window. It's like a window picture in that moment in time. So I would imagine she was counted, when she was PPCD (preschool), by Houston ISD. And them when she left the district, I guess they no longer would count her.." AR 2391-92. She also testified that there is no one who "connect[s] the list that the Texas Education Agency keeps of the visually impaired children with the individual districts to let them know that they have a visually impaired student living in their district." AR 2393

Beyond that, the hearing officer found that HISD fulfilled its Child Find obligations for the time period that was not subject to the statute of limitations, and Pearland ISD did as well. Those determinations are supported by the record evidence, and should be upheld on virtually *de novo* review herein. Those determinations, likewise, defeat Plaintiffs' claim against TEA based on the same alleged Child Find violations.

In all, because there was no actionable denial of IDEA services by HISD and Pearland ISD, and no actionable violation by HISD and Pearland ISD of their Child Find obligations under the IDEA, there is no viable claim against TEA and summary judgment in TEA's favor is warranted.

VI. Conclusion and Recommendation

Based on the foregoing and the conclusion that Pearland ISD did not violate its Child Find obligations under the IDEA, and provided SS with an appropriate IEP, and a FAPE, as found by the hearing officer in his December 8, 2017 decision, the Magistrate Judge RECOMMENDS that Pearland Independent School District's Motion for Summary Judgment (Document No. 124) be GRANTED, and Plaintiff's Motion for Partial Summary Judgment against Pearland Independent School District (Document No. 117) be DENIED.

In addition, based on the foregoing and the conclusion that Pearland ISD offered SS an IEP that was both appropriate and afforded her a FAPE, and that neither HISD nor Pearland ISD violated their

Child Find obligations under the IDEA, and that TEA has no liability to Plaintiffs as a consequence, the Magistrate Judge RECOMMENDS that Texas Education Agency's Motion for Summary Judgment (Document No. 129) be GRANTED, and that Plaintiffs' Motion for Partial Summary Judgment against Texas Education Agency (Document No. 120) be DENIED.

The Clerk shall file this instrument and provide a copy to all counsel and unrepresented parties of record. Within fourteen (14) days after being served with a copy, any party may file written objections pursuant to 28 U.S.C. § 636(b)(1)(C), FED. R. CIV. P. 72(b), and General Order 80-5, S.D. Texas. Failure to file objections within such period shall bar an aggrieved party from attacking factual findings on appeal. *Thomas v. Arn*, 474 U.S. 140, 144-145 (1985); *Ware v. King*, 694 F.2d 89, 91 (5th Cir. 1982), *cert. denied*, 461 U.S. 930 (1983); *Nettles v. Wainwright*, 677 F.2d 404, 408 (5th Cir. 1982) (en banc). Moreover, absent plain error, failure to file objections within the fourteen day period bars an aggrieved party from attacking conclusions of law on appeal. *Douglass v. United Services Automobile Association,* 79 F.3d 1415, 1429 (5th Cir. 1996). The original of any written objections shall be filed with the United States District Clerk.

Signed at Houston, Texas, this 9th day of March, 2021.

/s/ Frances H. Stacy
Frances H. Stacy
United States Magistrate Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:17-CV-3579

[Filed September 30, 2019]

HEATHER B., *et al*,	)
Plaintiffs,	)
	)
VS.	)
	)
HOUSTON INDEPENDENT	)
SCHOOL DISTRICT, *et al*,	)
Defendants.	)
	)

ORDER

Before the Court are Defendant Houston Independent School District's Amended Motion for Summary Judgment (the "Motion") (Doc. #87), Plaintiffs' Response (Doc. #93), and Defendant's Reply (Doc. #98). Having reviewed the parties' oral arguments from the April 18, 2019 hearing, the parties' briefed arguments, and applicable legal authority, the Court grants the Motion.

This civil action brought under the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C.

§§ 1400 *et seq*.) is an appeal of a hearing officer's decision from a special education due process proceeding styled *S.S., b/n/f H.B. & N.S. vs. Houston Independent School District*, Docket No. 248-SE-0617. In that proceeding, Plaintiffs alleged that the Houston Independent School District ("HISD") "failed to timely identify and evaluate [Plaintiffs' child] as a student attending a private school" from 2010 to 2017 for purposes of providing special education and related services in violation of the IDEA. Doc. #5 at AR 31. But the hearing officer held that the relief sought by Plaintiffs on behalf of their child (1) was either time-barred because of the applicable statute of limitations or (2) moot. Doc. #45, Ex. A at 5. Through this action and appeal, Plaintiffs seek relief from the hearing officer's decision. Now, HISD moves for summary judgment, arguing that the decision was in fact correct.

"When a federal district court reviews a state hearing officer's decision in an impartial due process hearing under the IDEA, the court must receive the record of the administrative proceedings and is then required to take additional evidence at the request of any party. Although the district court must accord 'due weight' to the hearing officer's findings, the court must ultimately reach an independent decision based on a preponderance of the evidence. Accordingly, the district court's 'review' of a hearing officer's decision is 'virtually *de nova*.'" *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. by Barry F.*, 118 F.3d 245, 252 (5th Cir. 1997).

Under the IDEA, for parentally-placed private school children with disabilities, school districts must

follow the "child find" procedures applicable to public school children with disabilities. 34 C.F.R. § 300.131(a) ("[e]ach [school district] must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private . . . schools located in the school district"). Specifically,

> a school district shall conduct a full and individual initial evaluation before the initial provision of special education and related services to a child with a disability. This evaluation is called the "Full and Individual Evaluation," or "FIE." The FIE must consist of procedures to determine whether a child is a child with a disability as defined by the IDEA and to determine the educational needs of such child. Each of those determinations is crucial because eligibility for IDEA services is a two-pronged inquiry: (1) whether the child has a qualifying disability, and (2) whether, by reason of that disability, that child needs IDEA services.
>
> . . .
>
> Upon completion of the administration of assessments and other evaluation measures, the determination of whether the child is a child with a disability and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child. Texas, by statute, has named that team the "admission, review, and dismissal," or "ARD" committee. In making its eligibility determination, the ARD committee must draw upon information from a

> variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior.

Lisa M. v. Leander Indep. Sch. Dist., 924 F.3d 205, 208–09 (5th Cir. 2019) (citing 20 U.S.C. §§ 1401 and 1414, 34 C.F.R. § 300.306, and 19 Tex. Admin. Code § 89.1040) (cleaned up). If the parents disagree with the FIE, they may request an independent educational evaluation of their child ("IEE"). 34 C.F.R. § 300.502(a). The school district then must either ensure that the IEE is provided "at no cost to the parent" or "[f]ile a due process complaint to request a hearing to show that its [FIE] is appropriate." 34 C.F.R. § 300.502(a)(3)(ii), (b)(2).

For "parentally-placed private school children with disabilities," a "services plan must be developed and implemented for each private school child with a disability who has been designated by the [school district] in which the private school is located to receive special education and related services." 34 C.F.R. § 300.132(b).

Notably, complaints that a school district has failed to meet the step-by-step procedural requirements outlined above—such as conducting the FIE, convening the ARD committee, and securing an IEE if applicable (*i.e.*, "child find" requirements)—must be filed with the school district in which the private school is located. 34 C.F.R. § 300.140(b). On the other hand, complaints that a school district has failed to meet other requirements, such as "the provision of services indicated on the

child's services plan" must be filed with the state. 34 C.F.R. § 300.140(a), (c); *see also* 19 Tex. Admin. Code § 89.1096(f).

Importantly, a complaint filed with the school district about "child find" requirements is considered a "due process complaint" that must result in an "impartial due process hearing" and is ultimately appealable to a federal district court. 34 C.F.R. §§ 300.511, 516. But complaints regarding "the provision of services indicated on the child's services plan" cannot be appealed in that manner. 34 C.F.R. § 300.140(a); *see also Special Sch. Dist. No. 1, Minneapolis Pub. Sch. v. R.M.M. by & through O.M.*, 861 F.3d 769, 773 (8th Cir. 2017) ("No longer do private school students have an individual right to special education and related services based on their needs. Instead, private school students as a group now receive services based on proportionate-share funding. And if the parents of a private school student take issue with the services provided by the school district, they have no access to an impartial due process hearing. Their only recourse is through the state complaint procedures." (citing provisions and regulations of the IDEA) (cleaned up)); *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 158 (1st Cir. 2004), *abrogated on other grounds by Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009) (once the school district identified the child as a student with a disability attending a private school, "the district had performed every act reviewable by a hearing officer; any subsequent obligations it had to provide educational services to [the child] were matters for the state administrative procedure, which would

apply different standards to evaluate the services provided than did the due process hearing officer").

Furthermore, in Texas, "a parent . . . must request a [due process] hearing within *one year* of the date the parent . . . knew or should have known about the alleged action that serves as the basis for the request" unless (1) "specific misrepresentations by the public education agency that it had resolved the problem forming the basis of the request for a hearing" or (2) "the public education agency's withholding of information from the parent that was required . . . to be provided to the parent." 19 Tex. Admin. Code § 89.1151(c) (emphasis added).

Here, Plaintiff first filed a complaint or "Request for a Special Education Due Process Hearing" on June 7, 2017. Doc. #5 at AR 31. The complaint alleges that HISD "failed to timely identify and evaluate [Plaintiffs' child] as a student attending a private school" from 2010 to 2017 for purposes of providing special education and related services in violation of the IDEA. *Id.* It is undisputed that the relief sought by Plaintiffs based on events occurring between June 2016 and June 2017 is not time-barred by the one-year statute of limitations. However, in order for Plaintiffs to toll limitations and seek relief based on events occurring before June 7, 2016, Plaintiffs must identify either (1) a specific misrepresentation by HISD that led them to believe that the relief they eventually sought through the complaint had been resolved *or* (2) a failure by HISD to provide Plaintiffs with a notice of procedural safeguards outlining certain rights.

However, Plaintiffs are unable to satisfy either exception. First, in their Response, Plaintiffs provide a timeline of events from 2010 to 2016, and although Plaintiffs detail HISD's many failures to act, nowhere do Plaintiffs identify in the administrative record that was before the hearing officer a misrepresentation made by HISD that would have caused Plaintiff to delay the filing of their request for a due process hearing. *See* Doc. #93 at 5 ("No one from HISD ever followed up."), 6 ("HISD took no steps to identify [Plaintiffs' child] through Child Find."), and 7 ("HISD did not contact Plaintiffs about re-evaluating [Plaintiffs' child] in the fall of 2015.").

Second, the administrative record before the hearing officer establishes by a preponderance of the evidence that not only did HISD not withhold information from Plaintiffs that it was required to provide, but as far back as 2009, HISD had provided Plaintiffs with a notice that outlined all of the procedural rights afforded Plaintiffs. *See* Doc. #5 at AR 89 ("A copy of the *Notice of Procedural Safeguards: Rights of Parents of Students with Disabilities* is attached to this form." (emphasis in original)), 856 (in her affidavit, Plaintiff Heather B. concedes that"[d]uring the 2009-2010 school year, I acknowledge that we probably received the Notice of Procedural Safeguards"), and 1605-1606 (notice of procedural safeguards were provided prior to a January 5, 2010 evaluation); *see also* "Notice of Procedural Safeguards: Rights of Parents of Students with Disabilities," AR at 826 ("You must request a due process hearing within one year of the date you knew or should have known

about the alleged action that forms the basis of the hearing request.").

Accordingly, the hearing officer was correct in ruling that all relief sought by Plaintiffs based on events occurring prior to June 2016 is time-barred. *See* Doc. #45, Ex. A. at 5; *see also* 19 Tex. Admin. Code § 89.1151(c).

Consequently, the remaining issue is whether HISD fulfilled its obligations under the IDEA between June 2016 and June 2017. During that period, it is undisputed that Plaintiffs and their child lived in Pearland ISD ("PISD") and that Plaintiffs' child attended The Joy School, a private school located within HISD. Doc. #5 at AR 853 and 855.

Back in January 2016, Plaintiffs had requested that HISD evaluate their child for "vision services." *Id.* at 768 and 854. Pursuant to the IDEA, HISD completed a FIE dated May 25, 2016, which concluded that although the child had "visual limitations," the child did not qualify for services under the IDEA. *Id.* at 946–57; *see also Lisa M.*, 924 F.3d at 208. Subsequently, pursuant to the IDEA, an ARD committee convened on June 7, 2016, to consider the FIE and concluded that the child "does not meet the disability condition criteria to receive special education and related services." *Id.* at 1034; *see also Lisa M.*, 924 F.3d at 209. Nonetheless, HISD supplemented the FIE with additional observations of the child at The Joy School and concluded in a subsequent FIE dated October 26, 2016, that the child was visually impaired. *Id.* at 982. Again, on January 19, 2017, an ARD committee convened to consider the October 2016 FIE.

Id. at 1045. However, Plaintiffs disagreed with the conclusions in the October 2016 FIE, and pursuant to 34 C.F.R. § 300.502(a), HISD complied with Plaintiffs' request for an IEE. *Id.* at 1093.

As explained above, the hearing officer and this Court only has jurisdiction to hear complaints regarding "child find" requirements, such as conducting the FIE, convening the ARD committee, and securing an IEE if applicable. 34 C.F.R. §§ 300.140(b), 300.511, and 516.[1] Because HISD fulfilled its "child find" responsibilities under the IDEA applicable to children with disabilities enrolled by their parents in private schools, the hearing officer correctly ruled that any relief sought by Plaintiffs for their child was moot. *See* 34 C.F.R. § 300.131(a); Doc. #45, Ex. A at 5.

For the foregoing reasons, the Motion is hereby GRANTED, and HISD is hereby DISMISSED from this action.[2]

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[1] To the extent Plaintiffs' June 7, 2017 complaint discusses issues beyond these procedural requirements, Plaintiffs must avail themselves of Texas state administrative procedures to address those issues. *See* 34 C.F.R. § 300.140(a), (c); *see also* 19 Tex. Admin. Code § 89.1096; *Special Sch. Dist. No. 1, Minneapolis Pub. Sch.*, 861 F.3d at 773; *Greenland Sch. Dist.*, 358 F.3d at 158.

[2] Citing 20 U.S.C. § 1415(i)(2)(C)(ii), Plaintiffs argue that they are entitled to seek discovery from now non-party Texas Education Agency before the Court rules on the Motion. However, with regards to permitting additional evidence when reviewing an administrative decision, "courts should avoid turning the administrative hearing into a mere dress rehearsal followed by an unrestricted trial *de novo." E. R. by E. R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 763 (5th Cir. 2018). In this action,

It is so ORDERED.

SEP 30 2019	/s/ Alfred H. Bennett
Date	The Honorable Alfred H. Bennett
	United States District Judge

Plaintiffs fail to explain how the additional discovery they seek would in any way impact this Court's review of the administrative records with regards to either HISD's or PISD's duties under the IDEA. *See* Doc. #86; Doc. #93 at 13. Accordingly, Plaintiffs' Motion to Compel Discovery (Doc. #86) is hereby DENIED, and non-party Texas Education Agency's Motion for Protection (Doc. #88) is hereby GRANTED.

APPENDIX E

BEFORE A SPECIAL EDUCATION HEARING OFFICER FOR THE STATE OF TEXAS

DOCKET NO. 249-SE-0617

[Filed December 8, 2017]

S.S.,	)
B/N/F H.B. & N.S.	)
	)
VS.	)
	)
PEARLAND INDEPENDENT	)
SCHOOL DISTRICT	)
	)

DECISION OF THE HEARING OFFICER

Statement of the Case

S.S., by next friend and parents H.B. and N.S. (hereinafter "Petitioner" or "the student"), brought a complaint, pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. § 1400, et seq., complaining of the Pearland Independent School District (hereinafter "Respondent", "the district", "Pearland ISD", or "PISD").

The case was filed on June 7, 2017, and originally assigned to Cathy Egan, a hearing officer with the

State Office of Administrative Hearings. On July 27, 2017, the matter was reassigned to another hearing officer - Sherry Wetsch – who was an independent hearing officer with the Texas Education Agency. And, later the case was reassigned to the undersigned Hearing Officer on August 29, 2017.

Petitioner was represented at the hearing by Sonja Kerr and Devin Fletcher from the Austin office of the Cuddy Law Firm. Respondent was represented by Merri Schneider-Vogel and Jessica Witte of the firm Thompson & Horton.

By agreement of the parties and order of the Hearing Officer, the matter came on for hearing in the offices of the district in Pearland on October 10 and 11, 2017. Both parties filed written closing arguments and agreed that this decision would be timely issued on December 8, 2017.

Petitioner alleged that the district failed to comply with its Child Find obligations pursuant to 20 U.S.C. §§1412(3) and 1412(10), 34 C.F.R. §§300.140(b) and 300.131. Petitioner further alleged that the district, at the hearing, did not prove up a statute of limitations defense and that its claims are not barred by the provisions of U.S.C. § 1415(B)(6)(b) and the one-year limitation in Texas set forth in 19 T.A.C. §89.1151(c).

As relief, Petitioner seeks a finding that the district did not meet its obligation under Child Find to locate, identify, and serve the student with a free appropriate public education ("FAPE"). Petitioner seeks reimbursement for costs associated with private evaluations, reimbursement for tuition and related

expenses at a private school, compensatory educational services, and prospective relief in providing private services until the student can be served appropriately within the district.

When Petitioner filed for hearing, Petitioner also filed against the Houston Independent School District ("HISD") for alleged violations of special education laws. The claims against HISD were addressed in an order granting summary judgment for HISD in Docket No. 248-SE-0617 on October 24, 2017.

Based upon the evidence and argument of counsel, the Hearing Officer makes the following findings of fact and conclusions of law:

Findings of Fact

1. S.S. is a ten year old student with visual impairment ("VI") who resides with the student's parents in the Pearland Independent School District. [Petitioner's Exhibit 43; Respondent's Exhibit 19; Transcript Page 338]

2. S.S. has been visually impaired since birth. [Petitioner's Exhibits 15, 19 & 37; Respondent's Exhibits 3, 6, 9, 14, 16 & 17; Transcript Pages 318-320]

3. When the student and the student's parents resided in HISD, during the school years beginning in 2009-2010, the student first attended public school in a preschool program for children with disabilities ("PPCD") during the 2009-2010 school year. [Petitioner's Exhibit 3; Transcript Page 336]

4. In Houston, the parents unilaterally placed the student in private school for the school years 2010-2011 and 2011-2012 for preschool programs. The student attended kindergarten (2012-2013) and first grade (2013-2014) privately placed by the student's parents at the School for Young Children in Houston. [Petitioner's Exhibit 7; Transcript Pages 388-402]

5. The student and the student's parents moved into the Pearland Independent School District in June 2014. The student was placed by the parents into the School for Young Children for second grade (2014-2015) and third grade (2015-2016). [Petitioner's Exhibits 6-14 & 32-34; Transcript Pages 395-397]

6. The student was privately placed by the student's parents for the fourth grade (2016-2017) at the Joy School. The parents did not seek to enroll the student within the Pearland Independent School District. (Petitioner's Exhibits 31 & 32; Transcript Pages 348-358, 396-403, 463-478 & 516-526]

7. Prior to moving to Pearland, the student was evaluated by HISD while being served there in November 2009. The student's parents were provided with a notice of procedural safeguards. The safeguards included information about the legal requirements at the time for students and parents concerning filing requests for due process, disagreeing at admission, review and dismissal ("ARD") committee meetings, and private placements at public expense. [Respondent's Exhibits 2 & 4; Transcript Pages 352-355]

8. One of the student's parents is an attorney licensed in Texas since 2002 and testified that the

safeguards were provided to them but the parent only read "parts" of them. [Transcript Pages 352-355]

9. In July 2015, the parents had the student evaluated at the Perkins School for the Blind in Boston, Massachusetts. The school referred the parents to the Texas School for the Blind and Visually Impaired ("TSBVI"). [Petitioner's Exhibit 12; Transcript Page 340]

10. In October 2015, the student was evaluated at the University of Houston Low Eye Institute by Dr. Swati Modi. [Petitioner's Exhibit 15; Transcript Page 320]

11. The student was also evaluated in January 2016 by a neuropsychologist, Dr. Valerie Van Horn Kerne. Dr. Kerne recommended an individual education plan ("IEP") for the student if returning to public school, an orientation and mobility ("O&M") evaluation, a functional vision assessment ("FVA") by a teacher of the visually impaired ("TVI"), and an assistance technology assessment. [Petitioner's Exhibit 19; Transcript Pages 320-321]

12. The student attended private schools chosen by the parents for the 2014-2015 and 2015-2016 school years. The parents made their first contact to Pearland ISD in an email addressed jointly to Jacqueline Yancy, a special education supervisor in Pearland at the time, and to Angel Terry at HISD. The email was dated January 21, 2016. It read:

> "Dear Dr. Terr and Ms. Yancy:
>
> Good morning. We received your contact information from Cecilia Robinson (Region 4

> Education Service Center). We have a 9 year old daughter, S. that is low vision (legally blind, limited peripheral vision, nystagmus). She attends a private school in Houston, but we live in Pearland. We are interested in having her receive vision services, but do not know how to go about doing so and which school district would be able to help.
> We had S. evaluated at the New England Low Vision Clinic (Perkins) this past summer and they highly recommend an O&M evaluation and vision aids for the classroom. If either or both of you could advise us how to move forward we would greatly appreciate your assistance.
> Warm regards,
> (Signed H.B. and N.S.)"

[Petitioner's Exhibit 21]

13. The parents did not receive a response from Ms. Yancy. No evidence was presented at the hearing showing that the email was ever received by Ms. Yancy or read by anyone. [Transcript Pages 341 & 360]

14. The student's parents sought evaluation of the student during the student's enrollment in private schools, and they inquired about services for the student based upon information from the evaluators. The Department of Assistive and Rehabilitative Services ("DARS") in May 2016 directed the parents to HISD as the district responsible for providing services for the student while enrolled in private school. The student's private school is geographically located within the bounds of HISD. [Petitioner's Exhibit 26; Transcript Pages 377-379]

15. Pearland ISD seeks to satisfy its responsibilities under Child Find through its presence on the district's webpage, preparing brochures identifying its Executive Director as the district's contact person to answer questions about Child Find, placing notifications in local newspapers, providing parent training sessions which are advertised on the district's webpage, posting on Facebook, holding disability fairs, meetings with private schools, and notifying employees of the district about evaluations. Child Find information and specific contact information has been on the district's webpage since at least 2015. [Respondent's Exhibit 1; Transcript Pages 34-36]

16. TSBVI provided a consultation in September 2016 for the student and the student's parents and made recommendations for the student's vision services, O&M and educational programming. TSBVI made recommendations for assistive technology ("AT") and the use and maintenance of low vision tools such as a monocular and magnifier used by the student. [Petitioner's Exhibit 37; Transcript Page 410]

17. The student attended the Joy School in Houston in the fourth grade for the 2016-2017 school year. The Joy School serves only students with educational disabilities, has small classes, many social clubs on campus, and divides students based on their skill levels. Four speech pathologists work with the students. [Petitioner's Exhibit 30 & 31; Transcript Pages 87-98]

18. The Joy School does not provide vision services, O&M, or occupational therapy services. School personnel are not familiar with other students with VI.

The school does no training for its personnel for working with students with VI. The student is currently having difficulty in using a cane at school but no one at the school is trained to support the proper utilization of the cane. The school does not provide adaptive physical education. School personnel are unfamiliar with AT which the student uses for reading. [Transcript Pages 87, 110-129 & 141-144]

19. When the student's parents did not receive a response from PISD to their 2016 email, the parents followed up with a contact person at HISD and HISD provided an evaluation of the student. The testimony from the parent indicated "this is the path we took". The parents made no other effort to contact Pearland ISD until emailing Pearland ISD on May 15, 2017, in a message to Pam Wilson, Pearland ISD's Executive Director. [Transcript Pages 352-360, 380 & 412]

20. When Pam Wilson received the email from the parents on May 15, 2017, she tried to determine if anyone in her department had received the parents' email in January 2016 to Ms. Yancy. She found no one in the department who was familiar with the parents' inquiry and determined from the district's IT department that the email had not been forwarded to anyone else within the district. Ms. Yancy resigned from Pearland ISD in March 2016. [Transcript Page 38]

21. Ms. Wilson responded to the student's parents the next day on May 16, 2017, informing them that she had not seen their email from January 2016. She also informed them that the district has a VI teacher, an O&M specialist, and provides AT services. She told

them that if an ARD committee determined that the student needed such services, the district would provide them. A time was arranged for a meeting with the parents. The parents brought no documents to the meeting and were asked to sign a release of information so that the district could obtain information about the student. Credible evidence shows the meeting was not an ARD meeting, was not intended to be an ARD, and was not represented to the parents as an ARD. The parents did not sign a release at the time. Ms. Wilson understood that the parents would send information including evaluations of the student to the district, then the district would seek consent from the parents if a determination was made that further testing was necessary, and an ARD committee meeting would be scheduled. [Respondent's Exhibit 5; Transcript Pages 39-43]

22. PISD personnel, including a VI teacher and an O&M specialist, met again with the parents on June 1, 2017. The parents expressed concern that HISD had previously found the student in eligible for services. PISD personnel discussed services which could be available for an eligible student, educational programming and class size. PISD personnel asked the parents if they were going to enroll the student because the student had been attending a private school within HISD. PISD personnel testified credibly that no one told the parent that the student must be enrolled before an evaluation could be evaluated. [Transcript Page 39]

23. On June 7, 2017, the parent emailed Ms. Wilson expressing confusion because evaluation completed by

HISD stated the student was eligible for services but ARD paperwork and prior written notice ("PWN") from HISD indicated the student was not. The parent had provided Pearland ISD with the evaluation showing eligibility. PISD asked for the ARD notice and PWN to be sent to them. The parent did not send them. [Transcript Pages 43]

24. The parents filed a request for a due process hearing that same day – June 7, 2017.

25. The evaluation establishing eligibility for the student was provided to the parents by HISD at public expense as an independent educational evaluation ("IEE"). The evaluator was Emily Gibbs, a TVI. Ms. Gibbs is an employee of Pearland ISD but was not identified as a PISD employee on the list of independent evaluators provided to the parents. An ARD committee at HISD authorized the evaluation in January 2017. Present at the meeting was Pat Freeze, a lay educational advocate for the parents. No one at the meeting, including Ms. Freeze, informed the parents that they could seek services from PISD. [Transcript Pages 151-152, 293-300 & 329]

26. After the request for hearing was filed, the parties held a resolution meeting on June 20, 2017. The district agreed that the student was eligible and an agreement was executed calling for the district to conduct additional assessment and obtain records from Emily Gibbs, TSBVI, the Joy School, and Dr. Kerne, the neuropsychologist who evaluated the student. Consent forms were returned to the district for some of the information on July 3, 2017. Consent forms for information from the Joy School and TSBVI were not

returned until July 31, 2017. [Respondent's Exhibits 9 & 11; Transcript Pages 48-49]

27. An ARD committee for the student was held on August 11, 2017. The committee reviewed assessment and evaluation. An expert retained by the parents, Michael Munro, stated that the district's VI evaluation was fair and spoke of no concerns about the evaluation or its recommendations. Assessments for AT, occupational therapy, speech, and O&M were presented. The parents did not express any disagreement with the evaluations. The district offered to perform an adaptive PE evaluation for the student whether or not the student enrolled. Records sent from the Joy School were sent for consideration by the committee but a representative from the Joy School was not able to attend the meeting. [Respondent's Exhibits 23, 25-28, 30 & 32; Transcript Pages 50-57 & 560-571]

28. The ARD committee meeting on August 11, 2017, did not complete its work and the meeting ended because one of the student's parents had to leave. The committee reconvened on August 18 , 2017, and ended in disagreement. The parties accepted a ten-day recess and the committee reconvened on September 27, 2017, when a representative of the Joy School could be present. [Respondent's Exhibits 27, 28 & 34; Transcript Page 59]

29. The district offers a placement for the student at Jamison Middle School. The district will provide instruction in Braille, the use of the monocular, independent living skills instruction, and social skills instruction. The district wants to assist the student in

orientation to the campus and provide appropriate aid during transition. The student can begin with immediate access to books on tape, AT, O&M services, VI services, and occupational therapy services. [Respondent's Exhibits 28, 31 & 32; Transcript Pages 201-205, 467-486, 552 & 620-621]

30. Michael Munro, an expert witness retained by Petitioners, is employed at Stephen F. Austin State University in the teacher preparation program for teachers of students who are blind and visually impaired. Mr . Munro is a credible witness. Mr. Munro testified that the services provided in the IEP for the student at Pearland are appropriate. [Transcript Pages 242 & 274]

Discussion

IDEA provides for an opportunity for FAPE for all students who are eligible for special education services. The United States Supreme Court has defined what such an education is to be in *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982). The Court recently addressed the standard again in *Endrew F. v. Douglas County School District*, 137 S.Ct. 988 (2017).

The Fifth Circuit has addressed the rulings in the *Rowley*, *supra*, *and Endrew* F., *supra*, cases. While *Rowley* sets the floor of opportunity for a student, the Fifth Circuit says that the *Endrew F.* decision does not displace or differ from the standard set forth for analysis of special education placement decisions in *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), 34 C.F.R. 300.300, and 19 T.A.C. §89.1055.

Ultimately, the provisions of FAPE by the district must be judged on the standard of *Michael F.*, *supra.*

In considering, the controversy presented by Petitioners and addressed by Respondent, the timeliness of Petitioner's filing determined the extent of relief which could be granted if Petitioner prevails on its claims. Petitioner's request for hearing was filed on June 7, 2017.

IDEA requires that a due process complaint must be made within two years of the date the Petitioner knew or should have known about the alleged action giving rise to the claims. 34 C.F.R. §300.511(e). In Texas, the party filing for a due process hearing must request the hearing within one year of the day the party knew or should have known about the actions giving rise to a claim. 19 T.A.C. §89.1151(c).

Petitioner raises many claims arising before June 7, 2016. Petitioner also asserts that the Texas statute of limitations is inconsistent with federal law and seeks a determination that the Texas statute does not apply. The law is well-settled and Petitioner's argument has no merit. A one-year statute applies. *D.C. v. Klein Indep.Sch.Dist.*, 711 F.Supp.2d 739 (S.D. Tex. 2010).

IDEA does provide for two limited exceptions in the timeliness of bringing claims. If a parent is prevented from filing a due process complaint due to either: 1) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the due process complaint, or 2) the local educational agency's withholding of information from

the parent that was required under this part (of the law) to be provided to the parent.

Though Petitioner makes arguments supporting equitable factors in considering the limitations period, the law does not permit them. Respondent's arguments are well-supported in cases cited by them in their written argument: *D.C. v. Klein Indep.Sch.Dist.*, *supra*; *P.P. v. West Chester Area Sch.Dist.*, 557 F.Supp.2d 648 (E.D. Pa. 2008); and *Krawletz v. Galveston ISD*, 69 IDELR 207 (2017).

The evidence in the hearing does not show that any misrepresentation was made to the parents that any problems which formed the basis for the complaint were resolved. The evidence also does not show that the district withheld information which it was required to provide. Instead, the evidence shows that the parents were informed of and furnished with procedural safeguards for special education legal matters as early as 2009. Though a parent testified that the parent read only "part" of the procedural safeguards, one parent is an attorney licensed to practice in Texas since 2002. The parents knew or should have known of the actions they could take to bring a claim against the district. In applying the controlling statute of limitations, Petitioner's claims for relief time are barred until one year prior to filing.

Petitioner insists that this matter is based squarely on the violation of the Child Find requirements of IDEA. Petitioner argues that the district clearly did not meet its duty to locate, identify, and serve the student after the student moved into the district. Petitioner argues that it should prevail because the student was

not found, identified, and offered an IEP under the requirements of *Forest Grove v. T.A.*, 557 U.S. 230 (2009). The evidence shows, though, that the district's ignorance of the presence of a potential student in need of services cannot be justly blamed on the district. The parents knew or should have known of their rights to seek services several years before moving into the district. The parents knew that their child could possibly be afforded services because of the dealings with HISD in the years prior to the move. The parents did not enroll, seek enrollment, or seek evaluation until May 2017. The district's information on Child Find and special education was readily available. The information they had received from HISD was relevant to their position in the matter and their experience. Their use of a lay advocate and their own personal experience and credentials belie their claims. The law was not written to be used to seek years of reimbursement for private placement for a student who never sought services while living in the district when the unique family circumstances and experiences undermine their own claims.

Further, the evidence shows that the district did what was required of it when the student and the student's parents eventually sought appropriate interaction with the district. The district endeavored to evaluate, program for, and serve the student with an IEP that meets the requirements of *Michael*, *Rowley*, and *Endrew*. The district has developed a program 1) individualized on the basis of the student's assessment and performance, which 2) can be implemented in the least restrictive environment ("LRE"); and 3) provides services to be coordinated in

a collaborative manner by key stakeholders; and which 4) confers positive academic and non-academic benefits.

Petitioner's assertion that reimbursement should be ordered for previous private placements and prospective private placement are not meritorious. Prior to the student's placement at the Joy School, the parents did not give the district clear notice that they were seeking an IEP from Pearland Independent School District. Because the district had no opportunity to timely develop an IEP for the student, the district is not responsible for the private placement costs of their unilateral placement. *Dallas Indep.Sch.Dist. v. Woody*, 865 F.3d 303 (5TH Cir. 2017).

Conclusions of Law

1. The student resides with the student's parents in the Pearland ISD.

2. The Pearland Independent School District is responsible for compliance in delivering special education and related services for eligible students under the provisions of IDEA, 20 U.S.C. §1400, et seq.; 34 C.F.R. §300.552.

3. Petitioner bears the burden of proof to show why the district's actions involving the student do not comply with the provisions of IDEA and applicable law. *Schaffer v. Weast*, 126 S.Ct. 528 (2005); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5TH Cir. 2000).

4. Respondent proved that the one-year statute of limitations in this action applies. No evidence supports an exception to the statute. Petitioner's claims prior to June 7, 2016, are time barred. 19 T.A.C. §89.1151(c).

5. The district's educational program offered to the student now meets the requirements of *Michael F.*

6. Petitioner failed to prove any violation by the district of its Child Find obligations under 20 U.S.C. §§1401(9)(d) and 1414(d).

7. Petitioner is not entitled to reimbursement for costs of private placement for the 2016-2017 school year for the student because Petitioner did not prove the student was denied a FAPE prior to enrollment in private school or prove that the unilateral private placement is appropriate. *Stevens v. New York City Dept. of Educ.*, 54 IDELR 84 (2010).

ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that all relief requested by Petitioner is DENIED and all claims are DISMISSED with prejudice.

SIGNED this 8th day of December, 2017.

/s/ Lucius D. Bunton
Lucius D. Bunton
Special Education Hearing Officer

APPENDIX F

BEFORE A SPECIAL EDUCATION HEARING OFFICER FOR THE STATE OF TEXAS

DOCKET NO. 248-SE-0617

[Filed October 24, 2017]

S.S.,	)
B/N/F H.B. & N.S.	)
	)
VS.	)
	)
PEARLAND INDEPENDENT	)
SCHOOL DISTRICT	)
	)

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Statement of the Case

S.S., by next friends and parents H.R. and N.S. (hereinafter "Petitioner" or "the student") filed a request for hearing on June 7, 2017, pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U. S.C. §1400, et seq., complaining of the Houston Independent School District (hereinafter "Respondent", "HISD", or "the district").

Petitioner alleged that the district failed to comply with the statute's Child Find obligations pursuant to 20 U.S.C. §1412(3) and § 1412(10), 34 CFR §300.140(b) and §300.131.

As relief, Petitioner sought an order finding that Petitioner is entitled to an exception to the one-year statute of limitations, 19 T.A.C. §89.1151(c), that Respondent failed to identify and evaluate the student consistent with its Child Find obligations since the student's placement into private schools located in the respondent district beginning in the 2010-2011 school year and following years, and that Petitioner is entitled to reimbursement for costs of the private school placements.

The matter was assigned to Cathy Egan, a hearing officer with the State Office of Administrative Hearings and originally set for hearing on July 18-19, 2017. The hearing date has been reset on a number of occasions by order of the hearing officer for good cause shown and agreements of the parties.

Respondent filed a motion for summary judgment on July 7, 2017. Petitioner filed a response to the motion for summary judgment on July 21, 2017.

The case was reassigned to an independent hearing officer with the Texas Education Agency, Sherry Wetsch, on July 27, 2017. After the resignation of Hearing Officer Wetsch, the case was reassigned to the undersigned independent hearing officer on August 29, 2017.

Hearing Officer Wetsch ordered an evidentiary hearing on Respondent's motion for summary

judgment. The evidentiary hearing began on August 21, 2017, but was not completed. The hearing continued and was completed by the undersigned hearing officer on October 5, 2017. The parties filed written closing arguments on the motion. Based upon the evidence and argument, the hearing officer finds that Respondent's motion is meritorious.

Findings

The parties agree that the student was born prematurely in [redacted], was hospitalized in a neonatal unit for a period of time, suffered from serious medical problems and complications, and was considered legally blind. In 2008, the student qualified for an Individual Family Service Plan under the Early Childhood Intervention ("ECI") program and was qualified for vision services.

In January 2010, the district developed an individual education program ("IBP") for the student, after a functional vision evaluation determined the student met eligibility criteria for a visually impaired student. The student began a program in a preschool program for children with disabilities ("PPCD") at a school within the district. During the spring of 2010, the student's parents removed the student from the school and placed the student in a private school within the boundaries of HISD.

The student attended the private school for the 2010-2011 and 2011-2012 school years. The student attended another private school within the geographical boundaries of HISD for the school years of 2012-2013, 2013-2014 , and 2014-2015. In June 2014,

the student and the parents moved into the Pearland Independent School District, and the student has attended private schools located within the Houston school district boundaries since that time.

In February 2016, the student's parents notified the district that the student was attending private school within HISD and requested an evaluation for special education. An admission, review and dismissal ("ARD") committee considered an evaluation of the student in May 2016 and determined that the student did not meet criteria under IDEA as a student with a visual impairment because the committee concluded the student adequately functioned in school despite the student's vision loss. The student's parents disagreed with the district's determination of eligibility and the district recommended an orientation and mobility evaluation of the student for the fall 2016 when the student began attending a new private school within HISD.

The district completed a full individual evaluation ("FIE") of the student at the new private school in October 2016. At this point, the district recommended eligibility as a student with a visual impairment. Another ARD committee met to consider the student in January 2017. The student's parents disagreed with the evaluation of the student and requested an independent educational evaluation ("IEE") for the student at the district's expense.

The district granted the parent's request, and provided an independent evaluation of the student and gave written notice to the parents that their legal

obligations were completed because the student was attending private school.

Analysis

The district has moved for summary judgment alleging that the claims of the parents for reimbursement of the costs of private school are barred by the statute of limitations and that any further requests for relief while the student is in private school located within HISD are mooted by its granting the parents the IEE.

Petitioner alleges that the statute of limitations should be tolled to allow their case to proceed to hearing because of the exceptions to the application of the statute under 34 CFR §300.511(f). Texas law imposes a one-year statute of limitations under 19 T.A.C. §89.1151(c). Petitioner argues that the law requires tolling in this case when the district has made misrepresentations about the circumstances forming the basis of the complaint or the district has withheld information from the parent about their rights to due process under IDEA.

The district avers that the Petitioner knew or should have known that their claims could have been pursued within the time frame permitted under the law. Petitioner claims they did not.

Petitioner's claims for reimbursement are barred by the statute of limitations unless the evidence shows that they could not have been filed timely because Petitioner did not know and could not have known at the time that such claims were viable under the law.

Respondent proved Petitioner had notice of the right to file the claims timely.

The district further avers that it met its Child Find obligations to Petitioner in accordance with 34 CFR §300.131(a) for students enrolled in the district and has no further obligation for the student who is not enrolled under the provisions of Tex. Educ. Code §25.001. HISD has an obligation to provide proportionate share services to students attending private schools within the district in accordance with 34 CFR §300.132.

Proportionate share services for parentally-placed eligible students in private school who reside in the district are not required to be a free appropriate public education ("FAPE") as established under IDEA. The district is required to identify eligible disabled students and to develop a service plan. To the extent appropriate, the plan must meet the requirement of 34 CFR §300.320 (and §300.323(b) for students aged three to five) and must be developed, reviewed, and revised consistent with §§300.321-300.324.

Further, 34 CFR §300.140 states that due process hearings are not appropriate (except for Child Find cases) in cases alleging the failure of district to meet its obligations under §300.132. Instead, those allegations are addressed in state complaint proceedings as set for in 34 CFR §§300.151-300.153 and 19 T.A.C. §89.1095(f). Because the student is parentally-placed in a private school, disputes about the implementation of the student's educational program fall under the state complaint procedures. 34 CFR §§300.151-153.

Respondent cites as authority a similar case whose fact situation and ruling are on point with this case. McKinney Independent School District, 110 LRP 35315 (SEA Tex. April 28, 2010). The hearing officer found that Petitioner's claims against a district were outside the hearing officer's jurisdiction when they asserted disputes about proportionate share funding.

The pleadings, evidence, and argument of the parties demonstrate that the district met its obligations under Child Find and provided an IEE at public expense.

Conclusion

The evidence shows that Petitioner had notice of the right to file claims for violation of the law under IDEA at least two years before Petitioner brought its claims. The evidence also shows that Respondent met its obligations under the law to provide an IEE at public expense and is entitled to no other relief. Petitioner's claims for any remedies are mooted.

Findings of Fact

1. The student's parents were provided notice of procedural safeguards sufficiently explaining applicable law under IDEA after an evaluation of the student by the district in January 2009. [Transcript Pages 36-37 & 46-50].

2. The student's parents were provided the procedural safeguards again at an ARD meeting in January 2010. [Transcript Pages 68-79]

3. One of the student's parents testified by affidavit that the parent "probably received the notice of procedural safeguards". [Respondent's Exhibit 25]

4. One of the student's parents has been to law school and at the time of the hearing on October 5, 2017, had been practicing law for a period of years. [Transcript Page 337]

Conclusions of Law

1. No material fact is at issue. Respondent has proven that Petitioner's claims for relief for reimbursement are barred by the statute of limitations.

2. All other claims brought by Petitioner are moot.

ORDER

Respondent's motion for summary judgment is GRANTED. All claims brought by Petitioner are DISMISSED with prejudice.

SIGNED this 24th day of October, 2017.

/s/ Lucius D. Bunton
Lucius D. Bunton
Special Education Hearing Officer

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 21-20229

[Filed October 24, 2022]

HEATHER B., PARENT, GUARDIAN, and *Next Friend of* S.S., *a Minor with Disabilities*; NOZAR NICK S., PARENT, GUARDIAN, *and Next Friend of* S.S., *a Minor with Disabilities*; S.S., *a minor*, *Plaintiffs—Appellants*,

versus

HOUSTON INDEPENDENT SCHOOL DISTRICT; PEARLAND INDEPENDENT SCHOOL DISTRICT; TEXAS EDUCATION AGENCY, *Defendants—Appellees*.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CV-3579

ON PETITION FOR REHEARING EN BANC

Before JONES, STEWART, and DUNCAN, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX H

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

[Filed September 27, 2022]

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

September 27, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 21-20229 B. v. Houston Indep Sch Dist
USDC No. 4:17-CV-3579

The court has granted an extension of time to and including October 11, 2022 for filing a petition for rehearing in this case.

You are reminded that we must actually receive any petition for rehearing in this office by the due date.

Sincerely,
LYLE W. CAYCE, Clerk
By: /s/ Christina A. Gardner
Christina A. Gardner, Deputy Clerk
504-310-7684

Mr. Jonathan Griffin Brush
Mrs. Allison Marie Collins
Mr. Christopher D. Hilton
Ms. Hailey Janecka
Ms. Sonja D. Kerr
Mr. Nathan Joshua Oleson
Ms. Ellen Marjorie Saideman
Ms. Merri Schneider-Vogel
Ms. Amy C. Tucker
Ms. Meredith Prykryl Walker