

**BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS**

**STUDENT,
bnf ***,
Petitioner,**

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v.

DOCKET NO. 200-SE-0315

**HARDIN-JEFFERSON INDEPENDENT
SCHOOL DISTRICT,
Respondent.**

DECISION OF THE HEARING OFFICER

Introduction

Petitioner, STUDENT bnf *** (“Petitioner” or “the Student”) brings this action against the Respondent Hardin-Jefferson Independent School District (“Respondent,” or “the school district”) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. § 1401 et. seq. (IDEA) and its implementing state and federal regulations.

The fundamental issue in this case is whether a student who received RTI services in ***, served by the school district under Section 504 of the Rehabilitation Act of 1973, should have been evaluated under the school district’s IDEA Child Find Duty and identified as a student with a specific learning disability eligible for special education services.

Party Representatives

Petitioner was represented by Petitioner’s legal counsel Dorene Philpot of The Philpot Law Office, P.C. Respondent was represented by its legal counsel Paula Roalson with the law firm of Walsh, Gallegos, Trevino, Russo & Kyle, P.C.

Resolution Session and Mediation

The parties waived the Resolution Session in writing in order to attempt informal settlement negotiations within the 30 day resolution period. Those efforts were not successful. The parties also attempted mediation on May 19, 2015 but it was not successful in resolving the dispute either. Informal settlement negotiations were renewed in late May but again the parties were not successful in reaching a settlement.

Due Process Hearing

This case was continued once in order to allow the parties an opportunity to attempt informal settlement and mediation before proceeding with further litigation. The decision due date was extended at the request of one or both parties; first, to accommodate the new hearing date and mediation; second to provide the parties with an opportunity to submit written closing briefs with access to the hearing transcript and time for the hearing officer to review and consider the briefs in preparing the Decision.

The due process hearing was conducted on June 4-5, 2015. Petitioner continued to be represented by Petitioner’s attorney Dorene Philpot, assisted at the hearing by *** co-counsel Deborah Heaton McElvaney of the DHM Law Firm. Student’s guardian, *** also attended the hearing. Respondent continued to be represented by its attorney Paula Roalson assisted at the hearing by her co-counsel Kelly Shook with the same law firm.

In addition ***, Director of Special Education for the school district, attended the hearing as the school district’s party representative. Dr. *** was permitted to attend selected portions of the due process hearing as the school

district's consulting expert. The hearing was open to the public at Student's request. The hearing was recorded and transcribed by a certified court reporter. Both parties timely filed their respective written closing arguments on or before July 17, 2015. The decision of the hearing officer was extended to August 14, 2015 at school district request.

Petitioner's Issues

Petitioner confirmed the following issues for decision in this case:

1. Whether the school district should have identified Student as a student with a disability (for example as a student with a learning disability) eligible for special education services under the school district's Child Find duty within the meaning of the Individuals with Disabilities Education Act (IDEA) beginning in 2009 up through the present;
2. Whether, as a result of the failure to identify, the school district failed to provide Student with a free, appropriate public education (FAPE) and failed to devise appropriate Individual Educational Plans (IEPS) for Student beginning in 2009 up through the present within the meaning of the IDEA;
3. Whether the school district failed to comply with student and parental procedural rights under the IDEA; for example, by failing to provide *** with notice of procedural safeguards; additional examples are listed in Petitioner's Complaint (sub-issue b) p. 10;
4. Whether the school district violated student and/or parental rights under a cause of action arising from laws other than the IDEA; for example for claims arising under the Americans with Disabilities Act, the Family Educational Rights & Privacy Act, Section 504 of the Rehabilitation Act of 1973; additional laws are listed in Petitioner's Complaint (sub-issue c) p. 10;
5. Whether the exceptions to the IDEA statute of limitations rule should be applied in this case; specifically:
 - a. Whether the school district made specific misrepresentations that it had resolved the problems forming the basis of the Complaint; and/or
 - b. Whether the school district withheld information from *** that it was required to provide under the IDEA. Examples of the misrepresentations and information withheld are listed in Petitioner's Complaint pp. 9-10; and,
6. Whether Student's due process request was frivolous, unreasonable, groundless, meritless, without foundation, done in bad faith and/or pursued for an improper purpose.

Petitioner's Requested Relief

Petitioner requested the following items of relief:

1. Findings and conclusions of law that the school district failed to identify Student as a student with a disability eligible for special education and failed to provide Student with a FAPE within the meaning of the IDEA for the relevant time period;
2. The school district provide Student with an appropriate IEP delivered in the least restrictive environment (LRE) including any changes or additions in services, accommodations modifications, goals and objectives and/or any additional evaluations in all areas of suspected disability either through a settlement offer and/or in an Admission, Review & Dismissal Committee (ARD) meeting;

3. Any other relief the hearing officer deems appropriate and/or recommended by Petitioner's experts and evaluators;
4. Reimbursement for any private placement made while this hearing is pending, including reimbursement for past private services, evaluations and mileage;
5. The school district fund any private placement and any private related services and/or evaluations determined by the hearing officer to be appropriate going forward from the date of the Decision of the Hearing Officer; and,
6. Compensatory educational services determined to be appropriate by the hearing officer as an equitable remedy.

In addition, Petitioner will seek reimbursement for attorney's fees, expert witness fees, and other litigation costs from a court of competency jurisdiction.

School District's Legal Position

The school district asserts that Student was making progress at school and there was no reason to suspect Student was a student with a disability. The school district concedes it has a duty under the IDEA Child Find provision to identify all students with disabilities within its jurisdiction but argues it met that duty and that Student is not a student with a disability in need of special education. The school district contends it complied with all procedural requirements under the IDEA. The school district also argues that even if there were any procedural violations of the IDEA they did not impede Student's right to a FAPE, result in the deprivation of an educational benefit, or significantly impeded the parent's opportunity to participate in the decision-making process.

The school also raises the following additional legal issues:

7. Whether Petitioner's claims arising under any law other than the IDEA should be dismissed as outside the jurisdiction of the hearing officer in this special education due process hearing;
8. Whether Petitioner's claims under the IDEA should be limited to those that arose on or after March 16, 2014 as proscribed by the one year statute of limitations period as applied in Texas; the school district asserts Petitioner bears the burden of proving the two exceptions to the statute of limitations rule should apply;
9. Whether the hearing officer lacks jurisdiction to make findings of fact and/or conclusions of law as to whether Petitioner's Complaint was frivolous, unreasonable, groundless, meritless, without foundation, done in bad faith, and/or pursued for an improper purpose; and,
10. Whether Petitioner's requests for attorney's fees, expert witness fees and other litigation costs should be denied as outside the jurisdiction of the hearing officer in this special education due process hearing.

Findings of Fact

1. Student *** have resided in the school district since ***. In *** Student's ***. ***. (Transcript Volume I, pp. 133-135)(referred to hereafter as "Tr. Vol. __, p. __")(Tr. Vol. II, p. 592). Respondent's Exhibit 2, p. 1 (referred to hereafter as "R. Ex. __ - __."). At the time of the due process hearing Student was *** grader. (Tr. Vol. 1, p. 136)(Petitioner's Exhibit 1, p. 1)(referred to hereafter as "P. Ex. __ - __").
2. Student first enrolled in the school district *** in the *** school year (R. Ex. 2). Although eager to learn

Student struggled with *** at the beginning of the year. (Tr. Vol. II, p. 837). The *** teacher worked with Student in a small group giving additional instruction in learning Student's ***. (Tr. Vol. II, p. II, pp. 820-821, 870-872). The *** teacher discussed concerns about Student's difficulties identifying the *** with Student's *** in an October *** conference. (Tr. Vol. I, p. 136)(Tr. Vol. II, pp. 562, 822-823, 825).

3. Dyslexia ***. (Tr. Vol. I. pp. 50-51, 416)(P. Ex. 3-78). ***. (Tr. Vol. I. p. 416). Student's *** with the *** teacher and requested Student be evaluated for dyslexia. (Tr. Vol. I, pp. 51, 323, 416, 419). Dyslexia is a language-based deficit. (Tr. Vol. II., p. 736). The primary characteristics of dyslexia include: difficulty reading words in isolation, difficulty accurately decoding unfamiliar words, difficulty with oral reading (slow, inaccurate, or labored – also referred to as a fluency deficit), written spelling, phonological processing, and listening comprehension. (Tr. Vol. I, pp. 74-75)(Tr. Vol. II, p. 736)(P. Ex. 3-78, 3-79)(R. Ex. 14). Consequences may include difficulties in reading comprehension and/or written expression. (Tr. Vol. I, pp. 54-55)(P. Ex. 3-78). A student exhibiting two or more primary characteristics of dyslexia is a factor in determining whether the student meets eligibility for special education services under the IDEA. (Tr. Vol. I, pp. 67-68).
4. The school district utilizes The Dyslexia Handbook to implement dyslexia services to eligible students. The 2007 Dyslexia Handbook was updated in 2010 and updated and revised again in 2014. The school district used the 2010 Handbook until the updated 2014 version was issued in July 2014. (Tr. Vol. I, pp. 397, 490)(P. Ex. 3-66). The school district's dyslexia procedures are updated annually. (Tr. Vol. I, p. 384)(P. Ex. 3-15). However, information about dyslexia services on the school district's website is out of date. (Tr. Vol. I, pp. 152-153, 380)(Tr. Vol. II, p. 564).
5. The Assistant Superintendent for the school district oversees 504 and dyslexia services. Campus 504 coordinators meet with the Assistant Superintendent weekly and receive periodic training from her and outside sources. Trainings include information about dyslexia. (Tr. Vol. I, pp. 394-395, 398)(Tr. Vol. II, p. 740). The Assistant Principal at Student's *** school campus is the Campus 504 Coordinator; she also is the campus testing coordinator, oversees the implementation of tutorials and Response to Intervention (RTI) services, administers student discipline, and provides 504 training to campus staff. (Tr. Vol I, pp. 397, 408).
6. The school district is a member of the Gulf Coast Co-op. The school district's Director of Special Education is the Co-op's Director of Special Education (Special Ed Director). (Tr. Vol. I, p. 47). The school district publicizes its Child Find services through the Co-op's advertisements in the local paper and with brochures distributed to local clinics and day care facilities. (Tr. Vol. I, pp. 107-109)(R. Ex. 45). The information in the materials includes a list of staff phone numbers without much more. Student's *** did not find the materials particularly helpful when she called the phone numbers stated in the brochures. (Tr. Vol. I, pp. 149-150). Student's *** teacher could not recall any recent Child Find training from the school district – the last training she remembered was 3-4 years ago. (Tr. Vol. II, p. 856). Student's *** grade teacher could not recall any Child Find training from the school district. (Tr. Vol. II, p. 723).
7. On *** Student's *** contacted the Special Ed Director via email following the conference with the *** teacher. Student's *** expressed concerns that Student might be a student with dyslexia and requested testing. She forwarded *** reading test results with the email and reported Student could not yet identify Student's letters despite ***. (Tr. Vol. I, pp. 162, 164)(P. Ex. 11-1). Student's *** knew the Special Ed Director and thought she was the appropriate person with the authority to initiate testing. (Tr. Vol. I, p. 11)(Tr. Vol. II, pp. 558-559). The Director of Special Education referred the request to the campus and took no further action. (Tr. Vol. I, pp. 112-114)(P. Ex. 11-1).
8. The *** teacher conferred with the Assistant Principal about Student and by October *** began considering Student's need for 504 services. (Tr. Vol. I, p. 413)(Tr. Vol. II, p. 826). The school district referred Student for services under Section 504 beginning on ***. (Tr. Vol. I. pp. 412, 415) (R. Ex. 3). Student's *** signed

consent for a 504 evaluation on ***. (Tr. Vol. I, p. 137)(R. Ex. 5). The problem noted on the initial referral packet was for “severe visual issues and reading difficulties.” (Tr. Vol. I, p. 412)(R. Ex. 3-2)(R. Ex. 4). Student’s vision problems were addressed when Student *** shortly after the school district’s 504 evaluation began. Student’s vision was no longer a concern. (Tr. Vol. I, p. 413)(P. 2-2)(P. Ex. 4-1).

9. Beginning in early November 2013 Student began receiving private tutoring from a local dyslexia tutor. (Tr. Vol. I, p. 132)(P. Ex. 8). Student received ***. (P. Ex. 8-6). The dyslexia tutor ***, a certified master reading teacher, and the dyslexia specialist/regional representative for ***. (P. Ex. 13-19)(P. Ex. 20)(Tr. Vol. I, pp. 130-131)(Tr. Vol. II, pp. 615, 642-643, 859). She conducted an informal assessment. Student did not know ***, struggled with the concepts of before and after, struggled with generating rhyming words, was unable to count words in a sentence using markers, did not know how to segment words into sounds, and was only able to name *** of the 26 letters of the alphabet. (R. Ex. 12-3). The Assistant Principal conferred with the dyslexia tutor about Student. The Assistant Principal uses the dyslexia tutor as a resource regarding dyslexia issues. (Tr. Vol. I, pp. 422-423, 436).
10. The school district completed its initial 504 evaluation on ***. An initial 504 meeting was conducted ***. Student’s *** attended the meeting. (Tr. Vol. I, pp. 417-418)(R. Ex. 4). By that time Student had been ***. Student had not yet been exposed to phonemic reading instruction to justify or suggest the need for a dyslexia assessment. (Tr. Vol. I, p. 414-416)(Tr. Vol. II, pp. 847)(R. Ex. 4-2). The school district was aware of the ***’s concern Student may have dyslexia. However, the *** teacher and Assistant Principal explained the school district’s ***. In their view Student ***. (Tr. Vol. I, pp. 136, 139, 165)(Tr. Vol. II, p. 845, 860-861)(P. Ex. 11-1).
11. The *** teacher explained that children *** and that it was ***. (Tr. Vol. II, pp. 562, 828-829, 847)(R. Ex. 17). The Assistant Principal also conferred with the Statewide 504 Coordinator at the Texas Education Agency’s Region 10 Educational Service Center who agreed Student *** under the circumstances described by the Assistant Principal. (Tr. Vol. I, pp. 421-422)(Tr. Vol. II, pp. 607-609)(R. Ex. 5-4)(R. Ex. 6-2).
12. However, concerns that Student’s weaknesses were *** were unfounded. (P. Ex. 1-3). There is no *** requirement before a dyslexia assessment can be conducted. A student can be identified with characteristics of dyslexia ***. (P. Ex. 3-146). Characteristics of dyslexia are frequently documented ***. (Tr. Vol. I, p. 212)(Tr. Vol. II, p. 737)(P. Ex. 1-5). This is important because ***. (Tr. Vol. I, pp. 203-204)(P. Ex. 3-86). It was not until *** when the Assistant Principal reviewed the updated Dyslexia Handbook that she discovered ***. (Tr. Vol. I, pp. 489-490).
13. The December *** 504 Committee concluded Student was eligible under 504 for services as a student with “vision problems and reading difficulties” but not dyslexia. (P. Ex. 2-1)(R. Ex. 4-6, 4-9, 4-11)(R. Ex. 5-1, 5-2 to 5-4). The December *** 504 Committee designed an accommodation plan and decided to monitor Student’s progress and collect more data. (Tr. Vol. I, p. 418)(Tr. Vol. II, p. 606)(R. Ex. 5-4). Accommodations were implemented in all academic areas and included extended time, peer assistance/tutoring for center work, re-teach difficult concepts in ***, and modified tasks to limit transference. (Tr. Vol. I pp. 420, 425)(Tr. Vol. II, pp. 825-826)(R. Ex. 5-3). Student received additional instruction in the ***. (R. Ex. 6-1).
14. The *** teacher implemented Response to Intervention (RTI) services during the *** school year. (Tr. Vol. I, p. 425)(Tr. Vol. II, pp. 821, 864, 871)(R. Ex. 7-2 to 7-10)(R. Ex. 8). There are three levels or tiers to RTI: the first is a set of interventions provided to all the students in a classroom across the board; the second tier is a set of more specialized interventions provided to a selected set of students; and the third tier is an even more intensive set of specialized interventions designed specifically for the individual student. Tier 3 services can include pull out services, language-enrichment services and/or scientifically-based methods of instruction prior to consideration of a student’s need for special education services. (Tr. Vol. I, p. 191).

15. RTI documentation included administration of the Developmental Reading Assessment (DRA) used to determine guided reading level placement. (Tr. Vol. I, p. 427)(R. Ex. 7). By *** Student had adequate letter recognition and was “an emergent reader.” (Tr. Vol. I, p. 429)(R. Ex. 7-1)(R. Ex. 9)(R. Ex. 10). The school district requires ***. Student struggled with this task, worked hard on learning *** both at school and at home, and ***. (Tr. Vol. I, p. 429)(Tr. Vol. II, pp. 841-842)(R. Ex. 9).
16. The school district used the Texas Primary Reading Inventory (TPRI) to assess students “at risk” for reading problems. It is administered at the beginning, middle, and end of the academic year. (Tr. Vol. I, p. 404). In *** Student met the overall benchmark standard. (Tr. Vol. I, pp. 426-427)(Tr. Vol. II, p. 832). Student showed development in all of the five components under phonemic awareness except for “deleting final sounds” where Student scored ***. Student was also fully developed in listening comprehension and knew Student’s numbers. (Tr. Vol. I, pp. 430-431) (R. Ex. 10).
17. However, Student had difficulty writing a simple sentence ***. (Tr. Vol. II, pp. 861-862)(R. Ex. 9-2). Student was below average in reading and classroom work ***. (R. Ex. 4-2). Student’s handwriting was inconsistent and although Student’s handwriting improved it was a challenge for Student ***. (Tr. Vol. II, pp. 851-852, 853).
18. At the end of the school year students who performed poorly on the TPRI were required to attend four additional days of school called “flex days.” (R. Ex. 49-26). The *** teacher suggested Student could attend the flex days -- not because Student was technically qualified under the TPRI -- but because she thought it would be beneficial for Student and reduce the risk of regression over the summer. Student attended the flex days. (Tr. Vol. I, p. 136)(Tr. Vol. II, pp. 808-809, 823, 849-851, 857)(P. Ex. 11-3).
19. The *** teacher provided Student’s *** a list of reading resources and activities to use at home. (Tr. Vol. II, p. 839). ***. Student’s *** trusts the *** teacher and never felt the *** teacher hid any information about Student from her. (Tr. Vol. I, pp. 604-605).
20. The private dyslexia tutor conducted a follow up informal reading assessment on ***. Student continued to struggle with generating rhyming words, struggled with common vocabulary for reading instruction (such as what is a word, a syllable, or a sound), struggled ***. Student was able to write using both capital and lower case letters, could identify all 26 letters of the alphabet, and improved on the concept of before and after. (R. Ex. 12-4).
21. In the summer between *** and *** grade Student’s *** secured a language and literacy evaluation (the *** evaluation) from a member of the clinical staff at *** to address parental concerns over Student’s reading development and comprehension. (Tr. Vol. I, pp. 140, 368)(P. Ex. 7)(R. Ex. 51a-25). The *** evaluation relied on information from Student’s ***. This included reviewing school records provided by the *** although the *** evaluator had no direct communication with school district personnel. (Tr. Vol. I, p.339).
22. The *** evaluation was conducted as a private evaluation. The evaluator was a master’s level speech/language pathologist with a certificate in clinical competence qualified to conduct speech and language/literacy assessments and to diagnose language-based reading problems such as dyslexia. (Tr. Vol. I, pp. 309, 344, 368). The *** evaluation cost ***. (P. Ex. 8-2).
23. The *** provides intensive interventions for students with reading difficulties in a ***.” *** must have a reading impairment or identified disability – the interventions are tailored to the unique needs of each *** with the goal of catching the student up to grade level and improving literacy skills. By the time of the *** evaluation ***. Therefore, the testing was also to determine if *** might be helpful to Student in the future. (Tr. Vol. I, pp. 310-313). Student was *** for the ***. (P. Ex. 8-1).

24. The *** evaluation identified Student as a student with symptoms of dyslexia and a moderate oral and language impairment. (Tr. Vol. I, pp. 69-70, 315-316, 320). (P. Ex. 7-23, 7-25). Student's *** shared information from the dyslexia tutor and the *** evaluation report with the school district. (Tr. Vol. I, pp 130-131, 166-167)(Tr. Vol. II, pp. 615, 859)(P. Ex. 13-19, 13-20)(P. Ex. 11-5, 11-7). Student's *** provided the *** evaluation to the Assistant Principal on *** with a letter from the dyslexia tutor. (Tr. Vol. I, pp. 432, 435).
25. The letter from the tutor described Student's needs, the results of her two informal assessments, and recommendations for an intense, systematic, multisensory curriculum with gradual introduction of a few *** at a time. The tutor also recommended Student ***. (R. Ex. 12). Student's *** asked to be notified if the school planned to set up an evaluation. (Tr. Vol. I, p. 167)(R. Ex. 11). The Assistant Principal forwarded the *** evaluation information and the tutor's letter to the *** teacher because she was knowledgeable about Student and served on Student's 504 Committee. (Tr. Vol. I, pp. 167-168, 169, 433)(P. Ex. 11-6, 11-7). (R. Ex. 11-2, 11-3) (R. Ex. 12-3, 12-4).
26. In response to the ***'s request the school district evaluated Student for dyslexia. (Tr. Vol. I, pp. 440, 441)(R. Ex. 11-2)(R. Ex. 13). On the 504 Notice and Consent for Evaluation Student's *** stated her view that Student's reading difficulties were due to dyslexia. (R. Ex. 4, p. 5)(Tr. Vol. I, p. 51). At the time of the school district's proposed 504 evaluation the school district was also aware that Student's ***. (R. Ex. 4, p. 3)(Tr. Vol. I, p. 51).
27. The school district completed its dyslexia evaluation on ***. (Tr. Vol. I, pp. 64-65, 67)(P. Ex. 5) (R. Ex. 14). The school district's evaluation referenced the *** evaluation that included administration of the GORT V and the CTOP. (Tr. Vol. I, pp. 69-70, 141, 440)(Tr. Vol. II, p. 748). The school district's dyslexia teacher administered the KTEA II. (Tr. Vol. I, pp. 141, 265, 441)(Tr. Vol. II, pp. 742, 793)(R. Ex. 13). The KTEA II can be used to screen a student for dyslexia. (Tr. Vol. II, p. 741). Because Student had not yet received any *** instruction at the time the Student was scored two ways on the KTEA II: ***. (Tr. Vol. II, p. 743). Student fell in the average range under both scoring approaches for word reading, word decoding, written spelling, and phonological processing. (Tr. Vol. I, pp. 438-439)(Tr. Vol. II, pp. 585, 747)(R. Ex. 14-1, 14-2).
28. The *** and KTEA II data were summarized in a form entitled "Dyslexia Assessment Student Profile" dated ***. (R. Ex. 14). Student scored below average in reading comprehension on the KTEA-II and had poor fluency under the GORT-5 administered by ***. These results showed a deficit in two or more of the primary characteristics of dyslexia. (R. Ex. 14-1). Student also scored below average in listening comprehension on the KTEA II -- evidence of "unexpectedness." (Tr. Vol. I, pp. 141, 440)(Tr. Vol. II, pp. 551, 556)(R. Ex. 14). Not all parts of the KTEA II were administered – it did not include a fluency assessment and some decoding information. (Tr. Vol. II, pp. 877-879). The KTEA II also has a written expression subtest that was not administered – thus no formal assessment for dysgraphia was included in the school district's dyslexia evaluation. (Tr. Vol. I, pp. 93-94).
29. The *** teacher, the Assistant Principal, and the dyslexia teacher met with Student's *** in a 504 meeting on *** prior to the beginning of *** grade. (Tr. Vol. I, p. 443)(R. Ex. 16). The 504 Committee reviewed the *** evaluation and integrated that data into the school district's data to determine if Student met the criteria for dyslexia. (Tr. Vol. I, p. 440)(R. Ex. 11)(R. Ex. 14-2)(R. Ex. 17). At the meeting the ***'s primary concern was Student's readiness for *** grade. Student's *** proposed Student be *** as recommended by the dyslexia tutor. (Tr. Vol. I, p. 437)(Tr. Vol. II, p. 859). School personnel disagreed concluding any weaknesses were due to Student's ***. The 504 Committee ultimately decided to ***. (Tr. Vol. I, pp. 337, 438, 518)(R. Ex. 16-3). The 504 Committee also determined Student did not meet dyslexia criteria. (Tr. Vol. I, p. 444)(R. Ex. 17-3).

30. School personnel felt Student had simply not yet been exposed to enough reading instruction to be labeled with dyslexia. However, the school staff also recognized Student exhibited some reading deficiencies. (Tr. Vol. I, p. 445)(R. Ex. 16)(R. 17-2). Therefore, a set of accommodations was added to Student's *** grade program including preferential seating, re-teaching difficult concepts, and RTI services from the campus dyslexia teacher for 45 minutes a day four times a week with a focus on multisensory skills, phonics, and spelling. (Tr. Vol. I, pp. 402, 444)(Tr. Vol. II, p. 665)(R. Ex. 16-2). The *** 504 Committee decided Student was eligible for continued 504 services but not dyslexia services. (R. Ex. 17-5).
31. The 504 Committee also recommended a screening for dysgraphia and a reassessment for dyslexia. (Tr. Vol. I, pp. 146, 457)(P. Ex. 2-18). The dyslexia reassessment was planned for *** using a new matrix the school district was in the process of acquiring and implementing. The new matrix included more information from a broader variety of sources in making the dyslexia determination. (Tr. Vol. I, pp. 148, 179, 456, 477-478)(Tr. Vol. II, pp. 578, 635, 794)(R. Ex. 27-4).
32. The TPRI was administered again in *** at the beginning of *** grade. There were two sections to the *** grade TPRI – a screening section and an inventory section. Student's screening score was "Developed" -- this meant Student was not expected to have difficulty learning to read given appropriate instruction. (R. Ex. 19-1). The Inventory section measured phonemic awareness, phonics, word reading, reading accuracy, fluency, and comprehension. (R. Ex. 19-1). Student was assessed to be performing at or above grade level benchmark on this instrument. (Tr. Vol. I, p. 446)(R. Ex. 19-2).
33. In *** grade a *** program was offered each morning at school as an optional morning tutorial. Student initially attended the morning tutorial. (Tr. Vol. I, pp. 446-447)(R. Ex. 24). However by *** Student chose not to attend the tutorials and began *** at school instead. Student's *** was not aware Student was no longer attending the tutorials. (Tr. Vol. I, pp. 157-160, 447-448)(R. Ex. 24). Attendance of *** students at the morning tutorial was not closely monitored. (Tr. Vol. I, p. 480). The *** grade teacher did not know whether Student attended the morning reading tutorial nor was she responsible for monitoring Student's attendance. (Tr. Vol. II, pp. 713-714).
34. Student's *** communicated with the ***, *** grade, and dyslexia teachers frequently. The teachers were responsive to the ***'s questions and concerns and attempted to respond with answers and information. (Tr. Vol. II, pp. 567, 694-695, 845, 847-848) (R. Ex. 31)(R. Ex. 32)(R. E. 48)(R. Ex. 49).
35. At the ***'s request the *** grade teacher sent home a list of *** for the upcoming week to work on at home. However the *** grade homework was a "nightmare." Student told Student's *** the homework was "too hard" and it was frustrating studying for weekly spelling tests. (Tr. Vol. II, pp. 546-547) (R. Ex. 28). Student's *** met with the principal over homework concerns. The principal stated ***. The amount of homework eased up after that although Student continued to bring home unfinished class assignments. (Tr. Vol. I, p. 547)(Tr. Vol. II, p. 625).
36. The only ***. A log identifying the book and the reading level accompanied the reader. The guided reader was not graded homework. (Tr. Vol. II, pp. 666-667, 669)(P. Ex. 14-115). Student found the guided reader difficult and became exhausted and quit before finishing the book. (Tr. Vol. II, p. 548).
37. Student's *** grade teacher provided Tier 2 RTI services under the 504 plan. (Tr. Vol. II, pp. 686, 702, 715)(R. Ex. 23)(R. Ex. 30). Student received 30 minutes daily for RTI. In the *** semester Student received pull out RTI services with three other students from the *** grade teacher. (Tr. Vol. II, pp. 686-687)(R. Ex. 23). Although the teacher had *** years of teaching experience and training in teaching children with reading difficulties it was her *** year teaching *** grade. She was supported by weekly meetings with a mentor teacher. (Tr. Vol. II, p. 661-663).

38. The campus dyslexia teacher also provided Student with RTI services in *** grade for 45 minutes four times a week. (Tr. Vol. I., p. 402)(R. Ex. 21). Unfortunately she had *** that year. Student's *** expressed concerns over the loss of RTI service time. (Tr. Vol. I., pp. 464-465)(R. Ex. 31-1)(R. Ex. 32-1). The dyslexia teacher later made up the hours. She also provided Student with *** for about two months. (Tr. Vol. I., pp. 450-451)(Tr. Vol. II, pp. 771-772)(R. Ex. 28). In the *** the dyslexia teacher made a minor adjustment in the RTI services schedule in order to fulfill her additional responsibilities to conduct annual dyslexia screenings. (Tr. Vol. II, p. 804).
39. The dyslexia teacher used the Neuhaus Language Enrichment program – a supplemental reading and language program to support students who struggle with reading.(R. Ex. 46-1) The dyslexia teacher was trained in the Neuhaus program. (R. Ex. 47). The dyslexia teacher collected RTI data using the Neuhaus syllabus and documented Student's progress. (Tr. Vol. II, pp. 754-755)(R. Ex. 21)(R. Ex. 22)(R. Ex. 26)(R. Ex. 38). A "Mastery Check" was used to document student's progress in phonological awareness, letter recognition, handwriting, reading, and spelling. (Tr. Vol. II., pp. 758-760)(R. Ex. 26). Although Student showed progress Student was evaluated as "poor" in completing assignments independently. (R. Ex. 27-3).
40. Student participated in guided reading in both *** and *** grade. Students were grouped based on their reading levels. Teachers used data to determine which reading skills should be addressed in the reading group. (Tr. Vol. I., p. 403)(Tr. Vol. II, pp. 672, 682-683). The Developmental Reading Assessment (DRA) is the guided reading assessment used by the school district to gather this data. (Tr. Vol. I., p. 427).
41. At the beginning of *** grade Student fell somewhere between DR Levels ***– most *** graders typically begin the year on Level ***. The DR reading program assesses a student's independent reading level, frustration/listening level, and, instructional reading level. (Tr. Vol. I. p. 428)(Tr. Vol. II., pp. 671-674)(P. Ex. 11-16)(P. Ex. 13-4, 13-15)(P. Ex. 14-334)(R. Ex. 20)(R. Ex. 36-2, 36-3) At DRA Levels 1 to 7 the student is considered to be "developing" reading strategies. Fluency is addressed once the student has developed basic readings skills and reached Levels 8 and above. (Tr. Vol. II, pp. 678-679).
42. Progress on the DRA was documented in a set of "running records." The student is provided with a book the student has never seen before and asked to do a "cold read" of the book. (Tr. Vol. I, p. 449). The teacher monitors errors and fluency and inputs the scores into a formula to determine whether the book is an appropriate instructional level for the student. (Tr. Vol. I., pp. 449, 515-516)(Tr. Vol. II., pp. 671-672, 675, 831).
43. Student's "running records" are somewhat difficult to decipher or understand -- the running records were supposed to report Student's independent, instructional, or frustration/listening levels. The forms should have indicated what type of reading level was being documented but many forms were blank. (Tr. Vol. I., pp. 474-475, 488-489)(R. Ex. 36-4 to 36-7). The running records are somewhat inconsistent over time. (P. Ex. 14-1, 14-7, 511) (R. Ex. 36-4, 36-7).
44. Another 504 Committee met again on *** to discuss updates to Student's accommodations. Student's *** attended the meeting. (R. Ex. 25)(R. Ex. 27). The 504 Committee addressed the ***'s concerns about Student's spelling and academic progress. (Tr. Vol. I., p. 143). The dyslexia teacher attended the meeting and explained the 504 accommodations for spelling. The 504 Committee added two more accommodations to Student's program: limit spelling tests to *** words and ***. (Tr. Vol. I., pp. 143, 453)(Tr. Vol. II, pp. 764-765)(R. Ex. 27).
45. Those accommodations were added at the ***'s request although the teachers did not share the ***'s concern over spelling at school. (Tr. Vol. I., p. 452). Student continued to receive spelling instruction in the regular *** grade classroom ***. (Tr. Vol. I., p. 453)(Tr. Vol. II, pp. 755-756). The dyslexia teacher confirmed she was providing RTI services to Student in a subsequent letter to Student's *** on ***. (Tr. Vol. I, p. 169)(P. Ex. 11-15)(P. Ex. 2-21)(R. Ex. 28).

46. The dysgraphia assessment recommended by the *** 504 Committee was finally completed on ***. (Tr. Vol. II., p. 766)(R. Ex. 29). The dyslexia teacher administered the Process Assessment of the Learner (PAL-II) test for the dysgraphia assessment. With the exception of a low average score on a spelling subtest Student scored within the average range on all composite scores. Numerous scores were in the “high average” or “superior” range” in syllables, phonemes, and rhymes. Under this measure Student did not qualify as a student with dysgraphia. (R. 29).
47. Another 504 meeting was conducted on *** to discuss the results of the dysgraphia assessment and Student’s overall progress. (Tr. Vol. I., p. 458)(R. Ex. 30). The campus dyslexia teacher did not attend the meeting but the Assistant Principal reviewed the dyslexia teacher’s testing. Student was “still developing” on reading stories all the way through under the TPRI. (Tr. Vol. II, pp. 679-682). Student was putting effort into completing work and continued to receive daily small group pull out instruction. A running record probe conducted on *** showed Student was independent somewhere between Level *** and became frustrated at Level ***. (Tr. Vol. I., pp. 459, 460)(R. Ex. 30).
48. In *** Student began working through a reading program called *** – a reading incentive program for students who reached ***. (Tr. Vol. I., p.461)(Tr. Vol. II., pp. 679-682)(R. Ex. 30). Student was motivated and enjoyed the *** program – it included a tangible rewards reinforcement component. (Tr. Vol. I., pp. 451, 461)(Tr. Vol. II., p. 682). Although Student continued to *** grade so did some of Student’s peers – the teacher worked with Student on this and by *** Student was catching Student’s own mistakes. *** at the *** grade level are often *** but can signal a problem if they continue. (Tr. Vol. II., pp. 718, 722-723).
49. *** graders are expected to be at DRA Level *** by the middle of the school year. At mid-year Student’s guided reading was at Level ***. (Tr. Vol. I., p. 461). At the end of the *** Student made ***. (P. Ex 14-207)(R. Ex. 34)(R. Ex. 35). Student’s *** TPRI assessment showed Student developed in phonemic awareness and graphophonemic knowledge and correctly answered all comprehension questions on the stories read during the assessment. (R. Ex. 37).
50. The reading program recommends students end *** grade at a *** instructional level. (Tr. Vol. II, p. 676)(P. Ex. 14-207). By the end of the *** grade Student reached an independent level of *** and instructional level of ***. (Tr. Vol. II, pp. 671, 675-676, 698-699)(P. Ex. 14-1). The *** grade teacher conferenced with the *** grade teacher about Student’s ***. One of the *** grade teachers reported that about *** students do not begin *** grade at a Level *** instructional level. (Tr. Vol. II, pp. 677-678). (R. Ex. 36).
51. By the end of *** grade Student demonstrated characteristics of dyslexia. Student needs to be re-screened for dyslexia. (Tr. Vol. II., p. 775). Student was adding letters and fluency continued to be poor. Student exhibited difficulty with spelling and relied on a lot of teacher help. Student definitely struggled with reading. (Tr. Vol. I., p. 210) (Tr. Vol. II, pp. 670, 684, 775-777). Student needs continued interventions and accommodations and work on fluency in order to be successful in *** grade. (Tr. Vol. II., pp. 688, 692). The school district did not adequately assess Student’s fluency in *** grade – an important factor in assessing reading comprehension and a characteristic of dyslexia. (Tr. Vol. I, pp. 74-75, 79-80, 219-220, 328, 468, 470) (Tr. Vol. II, pp. 704, 706, 708, 796). A single fluency assessment at the end of *** grade showed Student’s fluency rate at *** – the expected fluency rate at the end of *** grade is ***; a fluency rate of *** is something school staff should be concerned about. (Tr. Vol. I., pp. 141, 220, 469)(Tr. Vol. II., pp. 691-692, 763)(R. Ex. 37-1).
52. Despite the ***’s continuing concerns over Student’s academic difficulties the school district consistently reassured her Student was making educational progress and doing well. (Tr. Vol. I., p. 178)(Tr. Vol. II., pp. 560-561, 573, 576)(R. 34)(R. 35). Student’s *** sees a different child at home. In her view Student is not able to perform academic tasks independently. (Tr. Vol. II., pp. 552-553, 576). Student’s *** works with Student on reading every day of the week, including every night and on Saturday mornings after breakfast.

Student is restless, upset, and frustrated when doing homework or studying at home with Student's ***. (Tr. Vol. I., p. 143)(P. Ex. 15).

53. Student's *** requested copies of the RTI data, the KTEA II dyslexia assessment, and the dysgraphia test in *** and again in early ***. (Tr. Vol. I., pp. 175-176)(P. Ex. 15)(R. Ex. 30)(R. Ex. 32-1). She finally received the dysgraphia testing but did not receive the RTI data or KTEA II until discovery was conducted when this litigation ensued. (Tr. Vol. I., pp. 175-176)(Tr. Vol. II, pp. 543-544, 578-579) (P. Ex. 11-22).
54. Student's *** did not receive a copy of the Notice of Procedural Safeguards until this litigation was filed. (Tr. Vol. I., pp. 163, 167). However, Student's *** has been involved ***. Student's *** attended numerous Admission, Review & Dismissal Committee (ARD) meetings ***, knew the Special Ed Director, and, received Notice of Procedural Safeguards at those meetings. (Tr. Vol. I., p. 110)(Tr. Vol. II., pp. 548, 569, 597-598, 609, 655).
55. Student's ***. The Assistant Principal was shocked and angry *** because it was ***. *** gave the impression the school district was ***. The *** generated questions and concerns from other parents. (Tr. Vol. I., pp. 508-509, 519-520, 522).
56. Student is a very loving child and thinks highly of all Student's teachers. Student is easily re-directed, exhibits no behavior problems in the classroom, is very social, verbal, gets along with Student's peers, and has a big heart. Student's *** grade teacher has great affection for Student. (Tr. Vol. II., pp. 695-696). Student is well behaved, never received a discipline referral nor do teachers identify any social skill deficits. Although Student needs some redirection from time to time Student appears to be a happy *** at school. (Tr. Vol. I, p. 471)(R. Ex. 39).
57. Student continues to struggle significantly with most TPRI measures at the frustration level. Student's phonological memory is well below average. (Tr. Vol. I, pp. 28-20, 28-23, 354, 360, 363). Student demonstrates deficits in semantics/word retrieval, syntax, comprehension, phonological sensitivity and pragmatics (narrative retell), oral reading fluency, and contextual writing. (P. Ex. 1-5)(P. Ex. 4-14, 4-15).
58. Student needs a specific reading program that is multisensory, phonics-based, sequential, systematic, highly structured, and repetitive enough to provide Student with practice and review of concepts over time. Student needs one on one and/or small group daily reading instruction (1:3 ratio) delivered by a dyslexia specialist or teacher trained in the reading program for at least 45 minutes per day. (Tr. Vol. I., p. 214)(P. Ex. 1-5).
59. As a student with dyslexia characteristics Student needs adapted reading materials without diluting content or concepts. For instructional purposes the emphasis should be on content and comprehension instead of the mechanics of reading and spelling. (P. Ex. 4-19). Student needs the following classroom modifications:
- read material to Student when the purpose of the lesson is to gather information rather than practice reading;
 - extended time to complete reading assignments;
 - no timed reading activities;
 - avoid requiring Student to read aloud in front of peers unless Student is comfortable with the reading material and volunteers to do so;
 - provide frequent breaks when Student is working on reading assignments to facilitate completion of assignments in a reasonable amount of time; oral administration of standardized tests;
 - address spelling needs within the context of Student's remedial reading program; subdivide assignments into shorter segments to facilitate completion of work;
 - as individual sections of work are completed support Student in proofing, checking, correcting, and, adding work; and,
 - extra time to complete written assignments. (P. Ex. 4-19, 4-20).

60. On ***, after the due process Complaint was filed, the Director of Special Education offered to conduct a Full and Individual Evaluation, including dyslexia testing. A Notice of FIE and Consent for FIE as well as Notice of Procedural Safeguards were transmitted along with the letter offering the FIE. (R. Ex. 40). The school district offered the FIE again on ***. (R. Ex. 41). As of the date of the due process hearing Student's *** had not provided consent for the proposed FIE because the school district did not respond to her request for an explanation of the test instruments the school district planned to use. (Tr. Vol. I., p. 154)(Tr. Vol. II., p. 584).

Discussion

Statute of Limitations Issue

As Student's guardian Student's *** is a "parent" within the meaning of the IDEA. *34 C.F.R. § 300.30 (a)(3)*. Under the IDEA a parent may file a due process complaint on any matter relating to the identification, evaluation, or educational placement of a child with a disability or the provision of a free, appropriate public education (FAPE) to the child within two years from the date the parent knew or should have known about the alleged action that forms the basis of the complaint. *20 U.S.C. § 1415 (b)(6)(f)(3)(C); 34 C.F.R. §§ 300.503 (a)(1)(2); 300.507 (a)(1)(2)*.

The two year limitations period may be more or less if the state has an explicit time limitation for requesting a due process hearing under IDEA. In that case the state timelines apply. *20 U.S.C. §1415 (f) (3) (C); 34 C.F.R. § 300.507 (a) (2)*. Texas has an explicit statute of limitations rule. In Texas a parent must file a request for a due process hearing within one year of the date he or she knew or should have known about the alleged action that serves as the basis for the hearing request. *19 Tex. Admin. Code § 89.1151 (c)*. Petitioner filed the request for a due process hearing on March 16, 2015. Petitioner alleged claims arising in ***.

Exceptions to the One Year Statute of Limitations Rule

The one year statute of limitations rule will not apply in Texas if the parent was prevented from requesting a due process hearing due to either:

- Specific misrepresentations by the school district that it had resolved the problem that forms the basis of the due process hearing request; or
- The school district withheld information from the parent that it was required to provide under IDEA. *20 U.S.C. § 1415 (f) (3) (D); 34 C.F.R. § 300.511 (f) (1) (2)*

Accrual of Petitioner's Claims

Petitioner's cause of action under the IDEA accrued when Student's *** knew or had reason to know of the injury that forms the basis of the due process Complaint. *See, Doe v. Westerville City Sch. Dist., 50 IDELR, 132, pp 5-6 (D.C. Ohio 2008) (holding cause of action for failure to provide FAPE when student first diagnosed with a learning disability)*. In making the determination as to whether the exceptions should apply in this case, I must calculate the limitations period from the date Student's *** knew or should have known of the complained of actions of the school district and *not* one year from the date Student's *** learned from Student's attorney that school district actions were wrong. *Bell v. Bd. of Educ. Albuquerque Pub. Sch., 50 IDELER 285, pp 8-9, 15-15 (D.C. N.M. 2008)(holding IDEA claims that student was misidentified as MR rather than LD and thus denied FAPE were limited to two year SOL period)*.

Misrepresentation Exception

Neither the IDEA nor its related regulations clarify the scope of what constitutes a “misrepresentation” under the first exception. The United States Department of Education left it to hearing officers to decide on a case by case basis the factors that establish whether a parent knew or should have known about the action that is the basis of the hearing request. *71 Fed. Reg. 46540, 46706 (Aug. 14, 2006)*. Case law provides some guidance in making that determination.

The alleged misrepresentation must be intentional or flagrant. Petitioner must establish not that the school district’s educational program was objectively inappropriate but instead that the school district subjectively determined Student was not receiving a free, appropriate public education and intentionally and knowingly misrepresented that fact to Student’s ***. *D.K. v. Abington Sch. Dist., 2012 U.S. App. LEXIS 21060 (3d Cir. 2012)*(*student could not show misrepresentations caused failure to request a hearing or file a complaint on time – teachers did not intentionally or knowingly mislead parents about extent of academic and behavioral issues or efficacy of solutions and programs attempted*). See, also, *Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 U.S. Dist. LEXIS 91442, pp. 4-5 (D.C. Pa. 2008)*.

Furthermore not any misrepresentation triggers the exception. Instead the misrepresentation must be such that it prevents the parent from requesting a due process hearing regarding claims that would otherwise be time-barred. *C.H. v. Northwest Ind. Sch. Dist., 815 F. Supp 2d 977, 984 (E.D. Tex. 2011)*; *G.I. v. Lewisville Ind. Sch. Dist., 2013 U.S. Dist. LEXIS 120156 (E.D. Tex. 2013)*(*Magistrate’s Report and Recommendation*).

Petitioner contends the school district consistently misrepresented Student’s educational progress when Student’s *** raised concerns about Student’s educational progress and that doing so prevented her from filing a due process Complaint. However, “misrepresentation” does not include actions by a school district anytime it fails to remedy an educational concern raised by a parent. See, *Evan H. v. Unionville-Chadds Ford Sch. Dist. 2008 U.S. Dist. LEXIS 91442 at p. 5, n. 3*. This issue was considered in a Pennsylvania case where the parent alleged the school district repeatedly misrepresented that the student was doing well and making significant progress in all areas including reading. The parents alleged the school district misled them by withholding information about the student’s standardized test scores. *Sch. Dist. of Philadelphia v. Deborah A., 2009 U.S. Dist. LEXIS 24505, pp. 3-4 (D.C. Pa. 2009)*.

The federal court found that at most the parent merely demonstrated the student’s IEPs were deficient. The court reasoned the exception would swallow the rule if all that was required was merely a showing that IEP’s were inadequate to meet a student’s needs. In hindsight, parents may consider the school district’s assessment of a student’s progress to be wrong, but that does not rise to a specific misrepresentation for statute of limitation purposes. *Id.*

Notice of Procedural Rights

Furthermore, the evidence showed that Student’s *** received Notice of Procedural Safeguards at ARD meetings involving ***. Although those Notices were not provided specifically in response to concerns over Student’s progress it is reasonable to infer from the evidence that Student’s *** did or should have known of her procedural right to a due process hearing to address her concerns over Student.

When a school district delivers a copy of IDEA procedural safeguards to a parent the statute of limitations period for IDEA violations begins regardless of whether the parent later examines the text to acquire actual knowledge of procedural rights – the simple act of delivering the procedural safeguards notice suffices to impute constructive knowledge of parental rights under IDEA. *El Paso Ind. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 945 (D.C. Tex. 2008)*, *aff’d in part and vacated on o.g. 591 F. 3d 417 (5th Cir. 2009)*; *C.P. v. Krum Ind. Sch. Dist., 2014 U.S. Dist. LEXIS 131098 (E.D. Tex. 2014)*(*one year SOL applied to limit IDEA claims where school district gave parents copies of procedural safeguards on numerous occasions*).

Conclusion on Statute of Limitations Issues

I conclude that the record on file in this case does not support a finding that the school district's actions rose to the level of flagrant, intentional misrepresentation required by the first exception to the statute of limitations rule. In order to apply this exception Petitioner had to establish that the school district knew that it was not providing Student with an appropriate education and intentionally misled Student's *** into believing otherwise. I find insufficient support for such a conclusion in the record. *D.K. v. Abington Sch. Dist., supra; See, Evan H. v. Unionville Chadds Ford Sch. Dist., 2008 U.S. Dist. LEXIS 91441 at p. 5 (D.C. Pa. 2008)*. In addition, the evidence supports the reasonable inference that Student's *** had at least constructive knowledge of her procedural rights, including the right to file a due process Complaint. *El Paso Ind. Sch. Dist. v. Richard R., supra*.

Eligibility as a Student with a Disability - General Rule

A free, appropriate public education must be available to any individual child with a disability who needs special education and related services. *34 C.F.R. § 300.101 (c) (1)*. The determination that a child is eligible for special education and related services must be made on an individual basis by the group responsible for making eligibility determinations. *34 C.F.R. § 300.101 (c) (2)*. In Texas that group is the Admission, Review & Dismissal Committee (ARD). *19 Tex. Admin. Code §§ 1040 (b); 89.1050 (a) (5)*. The student must be a "child with a disability" within the meaning of the IDEA to be eligible for special education services in Texas. *19 Tex. Admin. Code § 89.1040 (a)*.

Child With a Disability

A "child with a disability" is a defined term under the IDEA. The student must meet the criteria under one or more of the enumerated disability classifications. *34 C.F.R. § 300.8 (a)*. A child with a disability may qualify for special education services under more than one classification. *E.M. v. Pajaro Valley Unified Sch. Dist., 758 F. 3d 1162(9th Cir. 2014), cert. denied, 2015 U.S. Lexis 204 (2015)*.

Educational Need

Even if a student can meet the criteria of one or more of the disability classifications a student must also demonstrate a need for special education and related services for eligibility purposes. *34 C.F.R. § 300.8 (a)(1)*. The determination of whether a student who is advancing from grade is "in need of special education" must be determined on an individual basis. *Bd. of Hendrick Hudson Int. Sch. Dist., v. Rowley, 458 U.S. 176, 207 (1982)*.

Educational need is not strictly limited to academics but also includes behavioral progress and the acquisition of appropriate social skills as well as academic achievement. *Venus Ind. Sch. Dist. v. Daniel S., 2002 U.S. Dist. LEXIS 6247 (N. D. Tex. 2002)*. While the achievement of passing marks and the advancement from grade to grade is important in determining educational need it is but one factor in the analysis. *Bd. of Hendrick Hudson Int. Sch. Dist. v. Rowley, 458 U.S. 176, 207, n. 28 (1982)*. *Venus Ind. Sch. Dist. v. Daniel S., supra*. The decision of whether a student who is advancing from grade to grade is in need of special education must be determined on an individual basis. *Rowley, supra*.

Child Find

The school district has a duty under the IDEA to identify, locate, and evaluate students with disabilities who are in need of special education and related services. This duty is known as "Child Find." *34 C.F.R. § 300.111 (a) (1) (i)*. The Child Find duty includes children suspected of having a disability and in need of special education even though they are advancing from grade to grade. *34 C.F.R. § 300.111 (c) (1)*. Under Texas law special education referral is required as part of the school district's overall regular education referral or screening system for students experiencing difficulty in the regular classroom. *19 Tex. Admin. Code § 89.1011*.

The fact that Student's *** did not specifically request "a special education evaluation" is not determinative. The

IDEA does not require a parent to use any specific “magic words” to request a special education evaluation or special education services. It is the school district’s duty to locate and identify children who are suspected of having a disability not the parent’s duty. *34 C.F.R. § 300.111*. The statute ultimately lays the responsibility for identifying students with disabilities at the school district’s door-step. *34 C.F.R. § 300.301 (b)*.

The IDEA requires a two-pronged analysis for determining whether a student should be identified as eligible for special education services. The “Child Find” obligation is triggered when the school district has reason to suspect the student (i) has a disability; and (ii) the student is in need of special education services. *34 C.F.R. §§ 300.8 (a) (1); 300.111 (a) (c) (1); Goliad Ind. Sch. Dist., 32 IDELR 134 (SEA Tex. 2000)*. Not every student who struggles in school requires an evaluation for special education. *Alvin Ind. Sch. Dist. v. A.D., 503 F. 3d 378, 384 (5th Cir. 2007); 34 C.F.R. § 300.111 (a)(1); Carrollton-Farmers Branch Ind. Sch. Dist. 113 LRP 14998 (SEA Tex. 2013)(school district had no reason to suspect student who performed well academically, behaviorally and socially had a disability or was in need of special education)*.

School District’s Child Find Duty

The school district argues it had no duty to conduct a special education evaluation until Student’s *** filed her request for a due process hearing on *** because it had no reason to suspect Student was a student with a disability in need of special education. I disagree. Once the school district received the *** evaluation and dyslexia tutor information in *** it had reason to suspect Student might be a student with a specific learning disability in need of special education services under the IDEA.

By then Student had received a set of fairly intensive RTI services during *** in addition to the outside private tutoring. It was certainly clear that Student exhibited some deficits in reading and spelling by the end of ***/beginning of **. School staff also *** evaluate for dyslexia. This was important because dyslexia can be one of the conditions noted in the IDEA’s definition of a specific learning disability. *34 C.F.R. § 300.8 (c) (10)*.

I agree with the school district that the one year statute of limitations period bars any claims the school district failed to fulfill its Child Find Duty prior to ***, 2014. This means that any Child Find violation based on the ***’s email request for testing to the Director of Special Education in *** and the decisions of the *** 504 Committee are barred by the one year statute of limitations. However, the school district had a continuing Child Find Duty beginning in March 2014 (the spring semester of Student’s ***), through the summer of 2014 and throughout the *** grade year. *34 C.F.R. § 300.11; 19 Tex. Admin. Code § 89.1011*.

The school district knew ***. The evidence showed that the *** evaluation and private tutor information presented to the school district in ***, along with continuing parental concerns and requests for testing, were reason enough to suspect Student might be a student with a disability (even if Student was performing adequately academically) to trigger the Child Find duty. *34 C.F.R. § 300.111*. All of these factors should have led the school district to suspect a possible learning disability – even if it was not based on dyslexia.

There was a certain amount of tunnel vision with regard to whether Student was a student with dyslexia without broader consideration of whether Student might nevertheless be a student with a specific learning disability. A diagnosis of dyslexia is not the sole criteria for meeting the definition of a specific learning disability under the IDEA. *34 C.F.R. § 300.8 (c) (10)*. The school district’s dyslexia and dysgraphia screenings were not comprehensive enough to meet the school district’s Child Find duty under the IDEA. *D.K. v. Abington Sch. Dist., 696 F. 3d 233 250 (3d Cir. 2009)(a poorly designed evaluation does not satisfy Child Find obligations)*.

The school district argues it had no reason to suspect Student might be in need of special education because Student was making progress. This is a close case in that regard to be sure. All of Student’s teachers are to be commended for their diligent efforts and commitment in attempting to meet Student’s needs. It is clear from the evidence and their testimony they all cared deeply about Student and Student did make good grades and demonstrated some

educational gains. However, the evidence also showed that despite their best efforts Student continued to struggle with reading -- and there is no real dispute that Student needed, and continues to needs, accommodations and interventions in order to learn. The preponderance of the evidence demonstrates the school district should have suspected Student might have an educational need for special education. *34 C.F.R. § 300.111*.

I conclude the school district failed in its continuing Child Find Duty beginning in March 2014 when Student was struggling to ***, through the summer of 2014 when the school district received the *** evaluation and tutor information, and into Student's *** grade year during the 2014-2015 school year. *34 C.F.R. § 300.111*.

State Dyslexia Rules

In Texas students in grades kindergarten through 12th grade can be evaluated for dyslexia. Texas requires dyslexia screenings and specific instruction for students identified with dyslexia. The State Board of Education has the authority to adopt rules and standards for administering dyslexia testing and instruction. *Tex. Educ. Code §38.003*. The Texas Education Code includes provisions that: (i) define dyslexia and related disorders, (ii) mandate testing and instruction for students with dyslexia, and, (iii) give the State Board of Education (SBOE) the authority to adopt rules and standards for administering testing and instruction. *Texas Educ. Code § 38.003*. The Texas Administrative Code outlines school district responsibilities in delivering services to students with dyslexia. *19 Tex. Admin. Code § 74.28*

Beginning in 1986 the Texas Education Agency prepared an SBOE approved handbook to address the needs of children with dyslexia. The handbook has been revised numerous times over the years and is commonly referred to as "The Dyslexia Handbook." The most recent version is known as *The Dyslexia Handbook – Revised 2014: Procedures Concerning Dyslexia and Related Disorders* (referred to hereafter as "*The Dyslexia Handbook*"). I take judicial notice of *The Dyslexia Handbook*. *Tex. R. Evid. 201*.¹ The purpose of *The Dyslexia Handbook* is to provide flexible guidelines for school districts and parents in the identification and instruction of students with dyslexia. *See, 19 Tex. Admin. Code § 74.28 (b); The Dyslexia Handbook, pp.3, 6*.

The Dyslexia Handbook specifically states children in *** can be assessed for dyslexia. *The Dyslexia Handbook, Appendix C, Q & A, Nos. 14, 15, p. 64*. Early intervention, such as that provided by RTI services, is useful in documenting a student's learning difficulties, provide on-going assessment, and monitor reading achievement. However, The Dyslexia Handbook specifically states that progression through tiered intervention is not required to begin the identification of dyslexia. Implementation of RTI services should not delay or deny an evaluation for dyslexia, especially when parent or teacher observations reveal the common characteristics of dyslexia. *The Dyslexia Handbook, p. 14*.

Once a parent requests a dyslexia assessment the school district is obligated to review the student's history (using both formal and informal data) to determine whether there is reason to believe the student has a disability. If so, the school district must evaluate the student following The Dyslexia Handbook guidelines. Furthermore the school district must consider whether low reading or spelling skills are "unexpected" given the student's cognitive abilities and effective classroom instruction. *The Dyslexia Handbook, p. 23*. If the school district does not suspect a disability and refuses to conduct a dyslexia evaluation it must provide the parent with a copy of due process rights under § 504. *The Dyslexia Handbook, p. 14*.

More significantly, a student may be referred for an evaluation for special education *at any time* during an assessment for dyslexia, the identification process, or dyslexia instruction. *The Dyslexia Handbook, p. 23*. This means that Student could have been referred for a special education evaluation at the same time or after the school district conducted its dyslexia screening in the fall of 2014 or at any time thereafter.

¹ *The 2007 Dyslexia Handbook* was also entered into evidence as P. Ex. 3-66 to 3-247.

Specific Learning Disability

A specific learning disability under the IDEA is a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, and spell or to do mathematical calculations. Dyslexia is one of the enumerated conditions that may support identification of a student with a specific learning disability. A specific learning disability does *not* include learning problems that are primarily the result of visual, hearing or motor disabilities, mental retardation, emotional disturbance, or due to environmental, cultural or economic disadvantages. *34 C.F.R. § 300.8 (c) (10); 19 Tex. Admin. Code § 89.1040 (c) (9); The Dyslexia Handbook, p. 15.* A variety of assessment tools and strategies are required under the state rule to determine whether the student meets the federal regulatory criteria for a learning disability. *19 Tex. Admin. Code § 89.1040 (c) (9) (B) (i).*

The state rule also requires a finding that a Student may be identified as a student with a specific learning disability if the Student does not achieve adequately for the student's age or meet state-approved grade-level standards in one or more of the following: oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, mathematics calculation or mathematical problem-solving *when provided appropriate instruction* and as indicated by performance on multiple measures such as in-class tests, grade averages over time, norm or criterion-referenced tests, statewide assessments *or a process based on the child's response to scientific, research-based intervention.* *19 Tex. Admin. Code § 89.1040 (c) (9) (B) (ii)(emphasis added).*

In this case the evidence showed Student received learning experiences and instruction appropriate for Student's age or State approved grade level standards. The evidence showed Student also received scientific, research-based interventions. The record demonstrates that although Student made progress in oral expression and listening comprehension Student continued to exhibit difficulties in spelling and reading. Therefore, Student met the criteria of a student with a specific learning disability under the IDEA and demonstrated an educational need for special education. *34 C.F.R. §§ 300.307; 300.309 (a)(10)(2)(i).*

Failure to Provide a FAPE

The IDEA requires the school district must provide a free, appropriate public education to all students identified as eligible for special education services. The educational program must provide the student with a disability a "meaningful, educational benefit." *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 248 (5th Cir. 1997).* Special education is defined as specially designed instruction, adapting the content, methodology or delivery of instruction, to ensure the student has access to the general curriculum. *34 C.F.R. § 300.26.*

When the school district failed to conduct a special education evaluation under its Child Find duty in a timely manner or identify Student as a student with a specific learning disability it therefore also failed to design and implement an Individualized Education Plan (IEP) as required by the IDEA. *34 C.F.R. § 300.320; 300.323 (a).* These procedural violations impeded Student's right to a free, appropriate public education and caused a deprivation of educational benefit. *34 C.F.R. § 513 (a)(2)(i)(iii).*

Although well intentioned the school district's continued use of RTI in *** grade only delayed an evaluation for special education under the school district's Child Find duty where, as here, the evidence showed the school district had reason to suspect Student demonstrated characteristics of dyslexia and exhibited deficits in reading and spelling. The RTI strategies and services provided by the *** grade teacher and the campus dyslexia teacher, while beneficial, were not sufficient to address Student's needs in phonological awareness, reading comprehension, and overall fluency.

The evidence showed Student needs specialized reading instruction delivered in a highly structured and systematic way by persons trained in the program. Student needs teachers who are trained to implement instructional strategies that are individualized, multisensory, phonics-based, sequential, systematic, highly structured, and repetitive.

Because of the failure to timely evaluate and identify Student as a student with a learning disability there was no IEP or educational program implemented with these features. This is the type of procedural violation that caused a substantive educational harm and impeded Student’s right to a free, appropriate public education. *34 C.F.R. § 300.513 (a)(2)*.

Procedural Violations

Petitioner contends the school district failed to give Student’s *** notice of procedural safeguards or prior written notice when it denied her request for evaluations and services and failed to timely and appropriately respond to her requests for records. Petitioner contends these procedural violations significantly impeded her opportunity to participate in the decision-making process regarding the provision of a free, appropriate public education to Student. *See, 34 C.F.R. § 300.513 (a)(2)(ii)*.

Prior Written Notice

The parties dispute whether the school district provided Student’s *** with notice of procedural rights under § 504 when it refused to evaluate Student for dyslexia at the end of *** in the spring of 2014. However, as a special education hearing officer in Texas my jurisdiction is strictly limited to issues arising under the IDEA. I have no authority to rule on a possible procedural violation for failure to provide notice of procedural rights under § 504 and make no findings or rulings with regard to that issue. *See, 34 C.F.R. §§ 300.503; 300.507 (a)*.

Under the IDEA prior written notice *to the parent of a child with a disability* is required whenever a school district refuses to initiate an evaluation among other triggering events. *34 C.F.R. § 300.503(emphasis added)*. When Student’s *** met with the Assistant Principal, the dyslexia teacher and the *** teacher in *** the school district agreed to conduct a dyslexia evaluation that could have led to identification of Student as a student with a learning disability in need of special education under the IDEA. The mere fact that it did not does not mean the school district was required to provide Student’s *** with prior written notice. The school district in fact agreed to initiate the dyslexia evaluation. *Id.*

Furthermore, the prior written notice provisions are limited by the plain language of the statute and its implementing regulations to apply only to a parent of *a child with a disability* – an identified term under the IDEA. *34 C.F.R. § 300.8; 300.503(a)*. Because student was not “a child with a disability” within the meaning of the IDEA the school district had no obligation to provide Student’s *** with prior written notice of its refusal to either initiate or refuse to conduct an evaluation.

The Child Find duty merely requires the school district to identify and then evaluate children who may have a disability and are in need of special education services – but it does not guarantee the child will meet the eligibility definitions under the IDEA. Therefore, the school district’s failure to meet its Child Find duty did not give rise to a concomitant duty to provide Student’s *** with prior written notice of its refusal to initiate a special education evaluation.

Student was not yet identified as a “child with a disability” within the meaning of the prior written notice provisions. This does not mean there is no redress for the school district’s Child Find violation – only that the prior written notice provisions do not apply to the parent of a student who has not yet been identified as a student with a disability within the meaning of the IDEA. *Id.*

Educational Records

Student’s *** also contends the school district failed to respond appropriately and in a timely manner to her request for RTI data, the KTEA II test results, and, the school district’s dysgraphia test. She argues these failures significantly impeded her opportunity to participate in the decision-making process regarding the provision of a free, appropriate public education to Student.

Under the IDEA the school district must permit a parent to inspect and review any education records related to their child that are collected, maintained, or used by the school district. The school district must comply with a parental request for access to those records without unnecessary delay and before any IEP meeting (in Texas an ARD meeting) or any due process hearing or resolution session conducted under the due process hearing procedures. *34 C.F.R. § 300.613*. Education records within the meaning of the IDEA are the type of records defined by the Family Educational Rights and Privacy Act (FERPA). *34 C.F.R. § 300.611(b)*.

To the extent that the request for the KTEA II and dysgraphia test records included any test protocols, those types of records may be exceptions to FERPA's definition of "education records." Access to test protocols are often limited to review by a qualified expert who is bound by professional licensure and ethical standards not to divulge or disseminate test protocols in order to preserve the integrity of the test instruments. Because the records were produced prior to the due process hearing I find no procedural violation in that regard. *34 C.F.R. § 300.613*. Furthermore, there is a separate process under FERPA for resolving disputes regarding educational records. *See, 34 C.F.R. § 300.619*.

The evidence also showed that Student's *** was an active participant in all school meetings and that her ideas and requests were considered and often agreed to. She communicated frequently with the teachers. There is little evidence to suggest that her opportunity to participate in the educational decision-making process was impeded by any delays in responding to her records requests. *34 C.F.R. § 300.513 (a)(2)(ii)*.

Other Claims

As mentioned above the jurisdiction of a special education hearing officer is strictly limited to claims related to the identification, evaluation, educational placement or the provision of a free, appropriate public education under the IDEA. *34 C.F.R. §§ 300.503; 300.507; 300.511*. I have no jurisdiction to resolve claims arising under § 504 of the Rehabilitation Act of 1973 or any other statute or law other than the IDEA. Therefore, to the extent that any of Petitioner's claims arise under any law other than the IDEA those claims shall be dismissed for want of jurisdiction.

Attorney's Fees

The decision of the hearing officer in an IDEA due process hearing may be appealed to any state court of competent jurisdiction or to any federal district court without regard to the amount in controversy. *34 C.F.R. § 300.615*. A state court of competent jurisdiction or a federal district court that hears the appeal may, in its discretion, award reasonable attorney's fees as part of the costs of litigation to a prevailing party. A parent of a child with a disability or a school district may be a prevailing party for purposes of attorney's fees under certain specified circumstances. *34 C.F.R. § 300.517*. However, by its terms, those provisions under the IDEA are limited to the discretion of the courts and not to a special education hearing officer. Therefore, to the extent Petitioner seeks an award of attorney's fees or any related findings those requests for relief are outside my jurisdiction and shall be denied.

Appropriate Relief

I will grant Student's request to confirm Student's identification and eligibility as a student with a specific learning disability in need of special education services under the IDEA based on Student's deficits in reading and spelling and characteristics of dyslexia. It is also appropriate for the school district to conduct the proposed FIE – not for the purposes of eligibility² which I have already determined here – but instead for the purpose of identifying Student's present levels of performance and academic needs in assisting the ARD Committee to design an appropriate IEP for Student to be implemented in the upcoming 2015-2016 school year. The FIE should include IQ and achievement testing and a re-assessment for dyslexia using the school district's updated matrix.

² Student's continued eligibility for special education will be reviewed again at Student's next annual ARD as required by the IDEA. *34 C.F.R. § 300.324 (b)*.

The FIE should include recommendations for effective instructional strategies (including specifically those noted in the *** evaluation and by the dyslexia tutor) and for related and/or support services. A speech/language assessment should be included also -- not to address any articulation or speech issues -- but instead to determine whether Student needs speech/language services to address any language processing or expressive deficits. A parent training assessment should also be a component of the FIE to determine how parent training services can assist Student's *** in effectively supporting Student at home and reduce conflicts and frustration over homework and/or academic tasks and activities. Once the FIE is completed an ARD must convene for the purpose of designing an IEP for Student. 34 C.F.R. §§ 300.320, 300.321, 300.324.

The ARD Committee has the responsibility to determine the manner in which a special education student participates in the school district's dyslexia reading instruction program, if at all. *Tex. Educ. Code § 28.006 (h)*. It is for the ARD Committee to determine what "appropriate reading instruction" is for a particular student based on the student's unique needs. Appropriate reading instruction may include reading instruction through the school district's dyslexia program or placement in regular education with sufficient supports or both. An ARD may select a number of options depending upon the needs of the student. Access to the general curriculum and placement in regular education classes with non-disabled peers "to the maximum extent appropriate" meets IDEA goals and preferences. 20 U.S.C. § 1400 (c)(5)(A)(D); 20 U.S.C. § 1412 (A)(5); 34 C.F.R. § 300.114(a)(2)(i)(ii).

A student eligible for special education who also meets Texas criteria for dyslexia may not be denied access to the school district's dyslexia programs *unless* the ARD committee determines such a program would deny the student a free, appropriate public education ... and [an] educational benefit. *The Dyslexia Handbook, Appendix C, Q & A, pp. 72-73 (emphasis added)*. However, in making those decisions the ARD Committee shall also consider the set of recommendations stated in the *** evaluation as stated in Petitioner's Exhibit 4, pp. 19-20.

Compensatory Services and Equitable Relief

It has long been the rule that compensatory education is a proper method for providing a free, appropriate public education to students with disabilities who have been improperly denied that right. An impartial hearing officer has the authority to grant all relief deemed necessary, including compensatory education, to ensure the student receives the requisite educational benefit denied by the school district's failure to comply with the IDEA. *Letter to Kohn, 17 IDELR 522 (OSERS 1991)*.

Compensatory education imposes liability on the school district to pay for services it was required to pay all along and failed to do so. *See, Meiner v. Missouri, 800 F. 2d 749, 753 (8th Cir. 1986); D.A. v. Houston Ind. Sch. Dist., 716 F. Supp 2d 603, 612 (S.D. Tex. 2009), aff'd 629 F. 3d 450 (5th Cir. 2010)(upholding HO's decision that student failed to prove amount of compensatory reimbursement student entitled to for school district's failure to timely evaluate)*.

Compensatory education may be awarded by a hearing officer after finding a violation of the IDEA. It constitutes an award of services to be provided prospectively in order to compensate the student for a deficient educational program provided in the past (or in this case the complete absence of a special education program). *G. ex. Rel RG v. Fort Bragg Dependent Schools, 343 F. 3d 295 (4th Cir. 2003)*. Hearing officers have broad equitable powers, as courts do, to fashion appropriate relief where there has been a violation of the IDEA. *Burlington Sch. Comm. v. Dept. of Educ., 471 U.S. 35, 374 (1996); Harris v. Dist. of Columbia, 19 IDELR 105 (D.C.D.C. 1992)*. The trend in the case law is to utilize a qualitative, rather than quantitative, standard in fashioning appropriate compensatory and equitable relief. *Reid ex rel Reid v. District of Columbia, 401 F. 3d 516, 523-524 (D.C. Cir. 2005)*.

The school district failed to conduct a timely evaluation for student under its Child Find duty. Had it done so student would have received the special education and support services Student needed as a student with a specific learning disability. Therefore, as compensatory relief, Student is entitled to reimbursement for the cost of the *** evaluation and the outside private tutoring provided beginning with the commencement of the one year statute of limitations period (i.e., from March 16, 2014 forward).

As additional equitable relief the evidence showed the school district's Child Find and dyslexia services information on the school district's website were out of date. The school district must update that information on its website and ensure that contact information on Child Find brochures give callers specific information on which school staff members to contact for any inquiries about special education services or requests for help with their child and not simply a menu of school staff phone numbers.

The evidence also showed the school district has not provided *** teachers or administrative staff with updated Child Find training in at least 3-4 years. The Campus 504 Coordinator and dyslexia teachers also misunderstood State recommendations ***. A child with dyslexia may qualify for special education services as a student with a specific learning disability under the IDEA. Therefore, updated training in the dyslexia evaluation process is also appropriate equitable relief. The training should clarify the factors and circumstances that the school district should consider in determining the need to assess a student for dyslexia and/or eligibility as a student with a learning disability, ***.

Conclusions of Law

1. Respondent school district failed to meet its Child Find duty in a timely manner under the IDEA beginning with the commencement of the one year statute of limitations period (i.e. March 16, 2014), up through the summer of 2014 and continuing on into the 2014-2015 school year. *34 C.F.R. § 300.111; 19 Tex. Admin. Code § 89.1151 (c).*
2. Respondent failed to provide Student with a free, appropriate public education within the meaning of the IDEA as a result of its failure to meet its Child Find duty by failing to devise an Individualized Education Plan resulting in the deprivation of educational benefit. *34 C.F.R. §§ 300.320, 300.512 (a)(2).*
3. Petitioner did not meet Petitioner's burden of proving Respondent failed to comply with student or parental procedural rights under the IDEA. *Schaffer v. Weast, 546 U.S. 49 (2005); 34 C.F.R. § 300.503.*
4. Petitioner did not meet Petitioner's burden of proving the exceptions to the one year statute of limitations rule as applied in Texas. *34 C.F.R. §§ 300.507 (a)(2), 300.511 (f).*
5. Petitioner meets IDEA criteria as a student with a specific learning disability. *34 C.F.R. § 300.8 (c)(10).*
6. Any claims asserted by Petitioner that arise under any law other than the IDEA are outside the hearing officer's jurisdiction in an IDEA administrative hearing and shall be dismissed for lack of jurisdiction. *34 C.F.R. §§ 300.503, 300.507, 300.511.*
7. The hearing officer lacks jurisdiction to make any findings of fact or conclusions of law as to whether Petitioner's complaint was frivolous, unreasonable, groundless, meritless, without foundation, done in bad faith, and/or pursue for an improper purpose and Petitioner's request to do so as an item of requested relief shall be denied for lack of jurisdiction. *34 C.F.R. § 300.615.*
8. The hearing officer lacks jurisdiction to make an award of attorney's fees as litigation costs and shall be denied for lack of jurisdiction. *34 C.F.R. § 300.517.*

ORDERS

Based upon the foregoing findings of fact and conclusions of law it is hereby **ORDERED** that Petitioner's requests for relief are **GRANTED in part and DENIED in PART** as follows:

- The school district shall complete the Full Individual Evaluation as proposed in May 2015, including the

features and components identified in this Decision, no later than 60 calendar days from the date the school district secures written consent for the FIE from Student's *** as Student's legal guardian;

- Student's ***, as Student's legal guardian, shall meet with the Special Education Director no later than 10 calendar days from the date of this Decision, or at any other date and time mutually agreed upon by the parties, for the purpose of reviewing the components of the FIE as described above, explaining the assessment and/or evaluation instruments and measures contemplated by the school district; the school district has the sole discretion to select the personnel qualified to conduct the various components of the proposed FIE;
- Student's *** shall provide the school district with the requisite consent at the conclusion of the meeting with the Special Education Director as described above;
- The school district shall convene an Admission, Review & Dismissal Committee meeting no later than 30 calendar days from the date the FIE is completed at a mutually agreeable time and date for the purpose of designing an Individualized Education Plan based on the results and recommendations of the FIE and including consideration of the recommendations of the *** evaluation and dyslexia tutor as described above; the school district shall provide Student's *** with a copy of the FIE report and any draft Individualized Education Plans the school district plans to propose at the ARD meeting no later than five calendar days prior to the ARD meeting;
- The school district shall continue to implement the § 504 plan and RTI services until the Admission, Review & Dismissal Committee meets and designs an IEP for Student which the school district shall then implement for the remainder of the 2015-2016 school year;
- The school district shall reimburse Student's *** for the cost of the *** evaluation and *** for the cost of the private dyslexia tutoring sessions provided no later than 30 calendar days from the date of this Decision;
- The school district shall update the information about dyslexia services on its school website within 30 calendar days from the date of this Decision; and,
- The school district shall conduct updated training on Child Find and dyslexia assessment procedures (including when a dyslexia assessment is appropriate) for all *** school staff including administrators no later than the end of the first semester of the 2015-2016 school year; the training shall be provided either by the school district's legal counsel or an outside provider of the school district's choice but not by school district personnel.

All other relief not specifically stated herein is **DENIED**.

SIGNED the 31st day of July 2015

/s Ann Vevier Lockwood

Ann Vevier Lockwood

Special Education Hearing Officer

NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 34 C.F.R. § 300.516; 19 Tex. Admin. Code Sec. 89.1185 (n).

**BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS**

**STUDENT,
bnf ***,
Petitioner,**

§
§
§
§
§
§
§

v.

DOCKET NO. 200-SE-0315

**HARDIN-JEFFERSON INDEPENDENT
SCHOOL DISTRICT,
Respondent.**

SYNOPSIS

ISSUE:

Whether school district failed its Child Find duty when it refused to conduct a dyslexia evaluation of *** student *** who struggled *** and when school district failed to conduct a FIE for same student *** when parent presented school district with a credible third party language/literacy assessment and information from student's private dyslexia tutor and thereafter when *** grader continued to struggle with reading and spelling and clearly needed accommodations and interventions to learn.

HELD:

FOR THE STUDENT.

School district failed to meet its Child Find duty in timely manner within the one year statute of limitations period as applied in Texas – under state dyslexia rules students *** can be evaluated for dyslexia *** a dyslexia evaluation; Dyslexia is one of the conditions that may constitute a specific learning disability under the IDEA.

Once school district received the third party language/literacy evaluation that identified student with characteristics of dyslexia and moderate oral and language impairment and information from private tutor school district had reason to suspect student was a student with a disability in need of special education. **34 C.F.R. § 300.111.**

ISSUE:

Whether school district failed to provide a FAPE to student as a result of school district's failure to meet its Child Find duties in a timely manner.

HELD:

FOR THE STUDENT

School district's failure to meet its Child Find duty in timely manner resulted in deprivation of educational benefit to student and Student was entitled to a FAPE – school district failed to devise or implement an IEP for student. **34 C.F.R. §§ 300.320, 300.513 (a)(2).**

ISSUE:

Whether *** grade student met eligibility requirements as a student with a specific learning disability within the meaning of the IDEA.

HELD:

FOR THE STUDENT

*** grade student received learning experiences and instruction appropriate to student's age and state-approved grade level standards as well as RTI but evidence showed that although student made progress student also continued to struggle with spelling and reading and exhibited characteristics of dyslexia – student therefore met IDEA criteria as student with a SLD. **34 C.F.R. § 300.8 (c)(10).**

ISSUE:

Whether student met burden of proving exceptions to one year statute of limitations rule.

HELD:

FOR THE SCHOOL DISTRICT

Student did not meet burden of proving school district made misrepresentations that prevented parent from requesting a due process hearing or withheld information from parent school district was otherwise required to give under IDEA. Nature of the alleged misrepresentations were not so intentional or flagrant as to constitute the type of misrepresentation contemplated by the exception nor was school district required to provide certain types of notice to parent under IDEA. **34 C.F.R. §§ 300.507, 300.511 (f).**

ISSUE:

Whether student met burden of proving school district failed to comply with student or parental procedural rights under the IDEA.

HELD:

FOR THE SCHOOL DISTRICT

Student did not meet burden of proving that school district failed to provide parent with notice of procedural rights or prior written notice when it denied parental requests for evaluations and/or services and failed to respond to parental requests for certain records in a timely manner.

Prior written notice provisions apply only to parents of “a child with a disability” – a specifically defined term under the IDEA – student had not been identified as a student with a disability and therefore school district had no duty to provide the notices alleged in due process Complaint.

Furthermore school district did agree to conduct dyslexia evaluation and did not refuse parental request to do so. Requested records were produced either before litigation ensued or during discovery phase of the litigation – school district required to provide access to education records as defined by FERPA prior to IEP meeting, resolution session or due process hearing – evidence showed school district complied with those requirements; parent active participant in all school meetings and little evidence to suggest any delay in responding to records requests impeded parent's opportunity to participate in the decision-making process. Separate process under FERPA to resolve disputes regarding education records. **34 C.F.R. §§ 300.503, 300.513 (a), 300.613.**

ISSUE:

Whether student's claims asserted under any laws other than the IDEA should be dismissed as outside the hearing officer's jurisdiction.

HELD:

FOR THE SCHOOL DISTRICT

Hearing officer's jurisdiction strictly limited to claims arising under the IDEA related to identification, evaluation, educational placement or provision of a FAPE. Claims arising under any law other than the IDEA dismissed for want of jurisdiction. **34 C.F.R. §§ 300.503, 300.507, 300.511.**

ISSUE:

Whether student entitled to attorney's fees as prevailing party.

HELD:

FOR THE SCHOOL DISTRICT

Hearing officer has no authority in due process hearing to award attorney's fees; any party aggrieved by outcome of due process hearing may appeal to state court of competent jurisdiction or federal district court; award of attorney's fees within discretion of the courts not hearing officer. **34 C.F.R. § 300.517.**