

STUDENT	§	BEFORE A SPECIAL
BNF PARENT	§	EDUCATION
Petitioner	§	
v.	§	HEARING OFFICER FOR THE
	§	
HOUSTON INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	STATE OF TEXAS

FINAL DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Petitioner, Student *** and student’s next friend and parent, *** (hereinafter referred to collectively as Petitioner and individually as Student or Parent), brings this action against Respondent Houston Independent School District (hereinafter Respondent, the District, or HISD) 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. This action was filed on February 15, 2013. The statutory limitations period begins on February 15, 2012.

Petitioner narrowed the issues for resolution in this proceeding from petitioner’s original request for due process as follows:

1. Whether HISD violated its “Child Find” obligations under the IDEA by failing to identify Student as eligible for special education and related services as of February 15, 2012, and by failing to identify Student as eligible based on a learning disability until May 2013?
2. Whether HISD failed to provide Student with a free appropriate public education during the 2012-2103 school year due to inappropriate programming and consequent lack of progress in the areas of reading and behavior?

The relief sought by Petitioner includes the following: compensatory education, staff training on Student’s BIP, and the provision of a private reading program should Respondent be unable to provide scientific research based reading instruction.

PROCEDURAL HISTORY

Petitioner filed the instant request for due process on February 15, 2013. Michael O’Dell, Attorney at Law, represents Petitioner in this proceeding. Hans Graff, Attorney at Law, represents Respondent.

The parties met in a resolution session on February 28, 2013, but did not reach resolution of the issues in dispute. A pre-hearing conference was held on March 7, 2013. An Order Following Pre-Hearing Conference was entered on March 8, 2013 outlining the issues in dispute and extending the decision due date to June 17, 2013 for good cause at the request of both parties.

On April 15, 2013, the parties jointly requested a continuance of the due process hearing and an extension of the decision due date because of scheduling conflicts with another due process hearing involving the same parties. The parties requested that the instant matter be continued to allow the other proceeding to occur on the dates set for this case because the other case had been pending longer. I found good cause to grant the parties' joint request and entered an Order Granting Second Joint Request For Continuance and Extension on April 15, 2013, resetting the due process hearing to June 11-13, 2013 and the decision due date to July 25, 2013.

The hearing took place on June 11-13, 2013 at the administrative offices of HISD. At the conclusion of the due process hearing, by joint request of the parties, I granted leave to file closing briefs and entered an Order Granting Joint Request To Extend Decision Due Date For Filing Post-Hearing Briefs, setting the due date for briefs as July 29, 2013 and the decision due date as August 29, 2013.

On July 26, 2013, Petitioner made a Motion To Reopen Hearing to allow the introduction of relevant documentary evidence that had become available since the close of the hearing in June 2013. Respondent did not object to the admission of the documentary evidence so long as testimonial evidence was allowed to explain the meaning of the document. The parties jointly requested an extension of the statutory decision due date to allow for the time required to accommodate their request to reopen the record. I found good cause to grant Petitioner's Motion To Reopen Hearing, as well as the Parties' Joint Request to Extend the Decision Due Date on the grounds that the testing data that had become available was directly relevant to the issues pending before me. Accordingly, I entered a revised scheduling order setting a telephonic hearing to admit the additional evidence for August 7, 2013, resetting the due date for the parties' briefs to August 9, 2013, and the decision due date to September 6, 2013.

This decision is timely issued and forwarded to the parties on September 6, 2013.

FINDINGS OF FACT

Based on a review of the testimonial and documentary evidence submitted in this cause, I find the following facts to be established based on the weight of the credible evidence.

1. Student lives with student's siblings and student's mother and next friend within the geographical boundaries of HISD, a political subdivision of the State of Texas and a duly incorporated school district. Student is currently *** years old and has been deemed eligible for special education and related services as a student with an Other Health Impairment (OHI) based on Attention Deficit Hyperactivity Disorder (ADHD) and a Specific Learning Disability in the areas of Basic Reading, Reading Comprehension, and Dyslexia. (Respondent Exhibit, 20, p. 273, 296) (hereinafter cited as R20-273, 296).

***** Year 1: 2010-2011 School Year @ *****

2. Student was ***. *** enrolled in *** at *** within HISD for the 2010-2011 school year. (Testimony of *** Principal, Transcript, pp. 474-475) (hereinafter cited as *** Principal or *** Teacher, pp. ____).
3. Children *** can often be behind developmentally ***. (*** Principal, pp. 474-475; Reading Intervention Teacher, p. 183).
4. During the 2010-2011 school year, Student demonstrated significant behavioral challenges at school, including temper tantrums, defiant behavior, and refusals to participate. On one occasion, Student *** the principal. The principal conferred with Parent about the behavioral issues in December 2010. (*** Principal, p. 475-476).

5. Student also demonstrated a weakness in pre-reading skills, such that student's teacher identified student for early reading intervention in the ***. (** Principal, p. 479; Reading Intervention Teacher, p. 148).
6. The *** reading intervention program at *** is a general education intervention that provides daily, phonics-based, small group instruction in a pull-out setting for students who demonstrate a need. The focus of the instruction for *** and students are exited from the program when they can successfully ***. (Reading Intervention Teacher, pp. 156-157).
7. Referral to the reading intervention class can be a part of the Response To Intervention program at ***, also called Intervention Assistance Team (IAT), but does not depend on a student being identified for IAT services. During the 2010-2011 school year, Student did not receive IAT services.
8. The reading intervention class addresses oral language, vocabulary, phonemic awareness, phonics, and all skills needed for ***. (Reading Intervention Teacher, pp. 151-152; LSSP, pp. 564, 566). Some students remain in the class for two years, though most exit the program mid-year or around spring break. (Reading Intervention Teacher, pp. 157-158).
9. The Reading Intervention teacher referred Student for a Speech and Language Evaluation for special education eligibility based on articulation during spring 2011, but student did not qualify for services. (R13-088). Student subsequently obtained an IEE for a Speech, which confirmed that Student did not require speech services.
10. Student's total reading score on the Stanford achievement testing completed in December 2010 was ***, the *** score ***. (R25-317; *** Principal, p. 490).
11. In April 2011, Student had ***. As a result of ***, student suffered a hearing loss in one ear that ***. Student's hearing loss was mild and did not impact student academically. Prior to *** in April 2011, student had no hearing loss at all. (Parent, pp. 401). As a result of ***, student missed a number of school days toward the end of the 2010-2011 school year.
12. Toward the end of the 2010-2011 school year, Parent was concerned about Student's lack of progress and requested that student repeat ***. (R31-335). Student's teacher agreed with her request and noted, on student's end of year report card, that Student exhibited defiant behavior that concerned her and would benefit from a second year of ***. (R22-302). Student's end of year *** testing showed that student did not master *** benchmarks and was "still developing" in all sections related to reading ***. (R27-321).
13. Student also did not satisfy the requirements to exit the reading intervention program by the end of the 2010-2011 school year. (Reading Intervention Teacher, p. 158).
14. During May 2011, Parent requested a Functional Behavioral Assessment (FBA) and a learning evaluation due to Student's ongoing challenges in the areas of behavior and reading. (R31-366, 368). In response, HISD convened a campus referral meeting on June 1, 2011 to consider her request. Staff from HISD psychological services attended who had observed Student and talked with student's teacher about the behaviors that led Parent to request an FBA. At the referral meeting, the committee noted Student's absences due to *** and student's hearing loss, and proposed that instead of a special education evaluation, the District put into place an Intervention Assistance Team/Response To Intervention (IAT/RTI) for Student at the beginning of the next school year. The committee recommended counseling once per week, a behavior chart and behavior plan, continued reading intervention, and evaluation for ADHD. (R34, R35-624-625).

15. Given Student's *** and behavioral challenges during student's first year of ***, I find that it was reasonable to begin the IAT process at the end of the 2010-2011 school year rather than begin a special education referral. I credit Dr. *** testimony, the head of the HISD Evaluation Division, who explained that Student was still within the developmental window of acquiring reading skills, making it difficult to discern whether student's challenges resulted from a reading deficit or disability. (Head of Evaluation, p. 699).

***** Year 2: 2011-2012 School Year @ *****

16. Before the start of the 2011-2012 school year, the IAT team met on August 19, 2011 to develop Student's intervention plan. Their focus was exclusively on behavior and not academics. (*** Year Two Teacher, p. 596). They targeted three behaviors: following directions, completing tasks, and handling disappointment appropriately/reacting appropriately when corrected by adults. For each target behavior, the plan provided for specific interventions to help achieve the goal. For example, the behavior management plan designed to support the goal of handling disappointment appropriately identified the following strategies: daily behavior chart, mom reinforces chart at home, one on one explanation from teacher, calm down place in classroom, counselor group time and one on one time, restraint as last resort. (R35-626-628).

17. The IAT team met on September 1, 2011 and noted that Student's teacher had referred student to Reading Intervention and that student seemed to be adjusting well to school. The Plan of Action was to continue the present IAT and reconvene in two weeks. (RR35-632). Student's reading intervention services were the same as those student received during the 2010-2011 school year. (Reading Intervention Teacher, pp. 148, 153-155, 176)

18. The team met on October 11, 2011 with Student's teacher reporting that student was easily distracted and Parent reporting that she believed student has regressed from the previous year. The Plan of Action was to continue with IAT. (R35-638).

19. On October 27, 2011, the IAT team met and school staff reported that Student tended to get frustrated and shut down with academics, student didn't know ***, and did not recall what student had learned in Reading Intervention from the previous school year. The Plan of Action was to continue IAT in the classroom, get documentation from Parent on Student's hearing and ADHD, and refer to the campus referral committee for an academic evaluation. (R35-633).

20. As of October 27, 2011 when the IAT team referred Student for academic evaluation, it was clear that the District had reason to suspect Student had a disability underlying student's academic challenges. By that point, Student was repeating *** and had received daily intervention for reading for over one full school year with little to no response. Student was clearly demonstrating student's inability to "pick up" on *** skills and student's resulting frustration. As HISD's Dr. *** testified, if a student is not closing the gap as would be expected with the provision of services, the IAT team should suspect a disability and turn to a referral committee. (Head of Evaluation, p. 701).

21. The team met next on November 30, 2011. School staff again reported that their primary concern was Student's lack of academic progress. The staff noted improvement in the area of behavior. The Plan of Action was to continue with the IAT and have the referral committee decide on evaluation. (R35-634).

22. In response to *** request, Dr. *** provided medical information concerning Student's hearing on November 30, 2011. The assessment indicated that Student had normal hearing in student's right ear

and a mild conductive hearing loss in student's left ear. Dr. ***, recommended preferential seating in the classroom to maximize hearing opportunities from Student's right ear. (R2).

23. On January 10, 2012, Parent provided documentation to HISD from Student's psychiatrist, Dr. ***, confirming Student's treatment for ADHD and requesting an Other Health Impairment (OHI) eligibility form so that Student could receive services. (R3-016).
24. Based on Dr. *** diagnosis of ADHD, school staff completed an eligibility form documenting Student's disability of OHI on April 9, 2012. (R4).
25. On February 8, 2012, the campus referral committee met to consider the IAT team's evaluation referral dated October 27, 2011. The referral was based on Student's lack of academic progress despite retention in *** and reading intervention. The referral committee recommended special education evaluation, noting that positive results had been shown with behavioral interventions, but little progress had been noted since school began academically. (R38).
26. HISD completed its Full and Individual Evaluation (FIE) of Student on April 9, 2012. The FIE testing focused on Student's academic challenges exclusively. In the area of behavior, the FIE incorporated Student's OHI designation, but noted that student's behavior did not impede student's or other students' learning. (R5-4). Testing indicated that Student functions in the average range of intelligence with a full scale IQ OF *** and falls in the average range in the four processing areas measured on the Kaufman Assessment Battery for Children: Sequential (short-term memory), Simultaneous (visual processing), Learning (long-term retrieval), and Knowledge (comprehension and language development). (R5-021-023; LSSP ***, pp. 534-535).
27. LSSP *** administered the C-TOPP, a test of phonemic awareness and phonological processing, because of Student's reading deficits. Student scored "below average" in all subtests and both composites on the C-TOPP, indicating a deficit in phonemic awareness and a diagnosis of dyslexia. The LSSP testified that Student's testing profile demonstrated the characteristics of dyslexia, but she understood that a student ***. (R5-023-024; LSSP ***, pp. 536-537, 561).
28. LSSP *** understanding is contrary to research that indicates the importance of *** and intervention for reading disorders generally, and dyslexia specifically. With ***, struggling readers can receive intensive and proper instruction, which has been shown to be effective in remediating reading difficulties and allowing struggling readers to catch up with their peers. (P7-1-6, 14-16).
29. To measure Student's achievement, LSSP *** administered the Woodcock-Johnson III Test of Achievement (WJ-III). Student's reading scores fell well below average in every area except *Word Attack*, a test measuring the ability to apply principles of phonics to read nonsense words. Composite scores are more reliable indicators for measuring the presence of a disability and overall performance than individual subtest scores. (LSSP ***, p. 577). Student's overall score on the *Basic Reading Skills* composite was a standard score of ***, falling in the *** percentile. On the *Reading Comprehension* composite, student's standard score was ***, falling in the *** percentile. Student's standard score on the *Written Expression* composite was an ***, falling in the *** percentile. The LSSP testified that Student could not read any of the words in the *Reading Comprehension* portion of the test and could not complete any portion of the *Writing Fluency* subtest. (R5-024-025).
30. When compared to Student's IQ of ***, student's scores on the reading skills, reading comprehension and writing composite represent a 24, 32, and 28 point discrepancy respectively, indicating the significance of the gap between Student's cognitive abilities and student's actual achievement in these

areas. Whether these discrepancies are relied on to diagnose a learning disability or not, they provide important information for understanding Student's reading and language deficits and developing appropriate programming to address them. (Head of Evaluation, p. 714).

31. The FIE reported Student's Stanford and TPRI scores from the current year. Student's total reading score on the Stanford completed in December 2011 was *** percentile, *** stanine, indicating a low average score. (R25-318). Student's TPRI screening status for the end of year testing was "Still Developing," indicating that student had not yet mastered *** benchmarks. (R27-325). Student's *** teacher confirmed that student had not mastered benchmarks and testified that student received thirty minutes per day extra instruction from her in addition to student's Reading Intervention class because of student's score on the TPRI. (*** Year Two Teacher, p. 609, 626).
32. LSSP *** believed that her testing reflected a learning disability in reading and dyslexia based on the correlation between Student's phonological processing deficit identified by the C-TOPP and student's low achievement in basic reading on the WJ-III, but she concluded that the most appropriate label for special education purposes was OHI. She believed OHI better captured what was known about Student at that time. *** was reluctant to find a learning disability given that Student was ***, had a hearing loss in one ear and a number of absences as a result of ***, and had attention and focus issues that impacted student's learning. (LSSP ***, pp. 541-544, 579-580, 588-590).
33. As a result, the FIE recommended eligibility based on OHI and specialized instruction in reading that was multi-sensory, accompanied by visual stimuli, simultaneous visual-verbal presentation, and sequential. She provided a sequence of skills for the instruction of Reading and Writing and indicated that the teacher should not progress to a new skill until the previous skill was mastered. (R5-027).
34. Dr. ***, LSSP, of HISD completed an FBA on May 3, 2012 with an addendum on May 11, 2012, to analyze Student's behavior in the school setting. (R6, R7). Dr. *** reviewed the data kept by Student's teacher for student's IAT behavior chart, interviewed Student and student's Parent, Teacher, and Counselor, observed Student, and made findings and recommendations. Dr. *** concluded that Student received consistently positive behavior ratings with the support of the behavioral interventions and modifications student received throughout the year, but that student's two most problematic behaviors were becoming emotionally upset and defiant. *** linked Student's upset to student's frustration with Reading and Language Arts and student's defiance to restlessness and irritability associated with ADHD. (R6-031-035).
35. Dr. *** recommendations included: increased instructional support in Reading and Language Arts, continuation of Student's behavioral interventions, modifications, and supports as set forth in student's Student Intervention Plan, and continued counseling. (R6-034-035).
36. An Admission, Review, and Dismissal Committee (ARDC) convened on May 17, 2012 to review the FIE and FBA and make a determination of Student's eligibility for special education services. The ARDC discussed Student's reading deficits and characteristics of dyslexia, as well as Dr. *** conclusion that Student's negative behavior could be addressed, at least in part, by increased instruction in Reading and Language Arts. The ARDC recommended eligibility based on OHI and an Individual Education Plan (IEP) designed to address Student's reading and writing deficits. (R14-112).
37. In relevant part, Student's proposed IEP included the following components: 1) Present Levels of Academic Achievement and Functional Performance (PLAAFP) indicated characteristics of dyslexia and ADHD translating to difficulty maintaining attention and with phonological awareness and a need for specialized instruction in Reading and Written Expression; 2) Accommodations of individual or

small-group administration of tests, positive concrete reinforcement, small discrete directions, preferential seating, tests read to Student, and visual, verbal, tactile reminders to stay on task; 3) Two annual goals with objectives, one in Reading and one in Language; and 4) Schedule of services providing for two hours of instruction in the Resource setting, one hour each in Language Arts and Reading. (R14-097, 099-200, 105).

38. The proposed IEP did not contain any goals or objectives related to behavior, did not continue the behavioral interventions, modifications, and supports as recommended by Dr. ***, and did not include counseling as a related service. (R14).
39. Parent asked that the ARDC be tabled to allow her time to review Student's proposed program. The ARDC reconvened on May 29, 2012. Parent disagreed with the ARDC decision to not find Student eligible on the basis of a learning disability and requested an IEE in that area. LSSP *** confirmed that the FIE revealed that Student had the characteristics of a student with dyslexia, but the label was not being added due to compounding issues such as Student's hearing loss. Student's IEP would, however, address the deficits identified by the testing. The ARDC provided that the behavior management system referenced in Dr. *** FBA would remain in place for next school year even though it was not included as part of the IEP. Parent agreed to the provision of services and to the IEP that had been proposed previously, with some minor changes in Student's goals and objectives. (R15-140).
40. The Reading goal adopted for Student was to use the relationship between letters and sounds to decode a written list of 60 *** words. Student's baseline score was denoted at 0% and student's mastery level at 70% by 5/28/13. Objectives included identifying all upper and lower case letters, knowing the individual sounds of all letters and combining sounds to read 20 *** words, and identifying and reading 80 words from ***. Baseline scores on all objectives were marked at 0% with mastery at 70%. (R14-099).
41. The Language goal was for Student to understand the function and convention of language to write five complete, proper simple sentences. Student's baseline score was 0 and mastery was set at 70%. Objectives included forming upper and lowercase letters legibly in text, and using letter sound patterns to spell and write a list of 40 *** words. Baseline scores on both objectives were 0, with mastery at 70%. (R14-100).
42. At the conclusion of Student's second *** year, student had not yet "graduated" from the reading intervention program, indicating that student was not able to name all of the letters and sounds of the alphabet. The reading intervention teacher described student as "struggling," and unable to read, and testified that student was just beginning to hear letters and sounds. With direct 1:1 instruction, student was just beginning to blend sounds in *** words. (Reading Intervention Teacher, pp. 156, 158, 169-170, 188, 194, 199; *** Year Two Teacher, pp. 612-615). Student's teacher testified that Student was very inconsistent from day-to-day as to what student knew and that student was ***. (***) Year Two Teacher, p. 625). Student's end of year report card reflects mastery or "ready to apply" for only 2 of 17 objectives evaluated in the area of language arts. (R22-30).
43. Behaviorally, Student had experienced greater success by the end of student's second year of *** due to the efficacy of the behavioral interventions. Teacher communications to Parent indicate, however, that Student continued to display disrespect and engage in hitting, throwing, refusal, and defiance approximately 3-4 times per month during the spring of 2012. (R31-379, 451-452; R32-517-579). Student's end of year report card indicates "ready to apply" for only 1 of 7 objectives evaluated in the area of Social Development/Social Skills. (R22-30).

*****: 2012-2103 School Year @ *****

44. During the summer of 2012, Mother decided to enroll all of her children for the 2012-2013 school year at *** School (***). Mother was drawn to *** because of her interest in her family learning *** and tensions her family had experienced at ***. (Mother, p. 407).
45. *** is a *** school for grades ***, such that students spend ***. (*** Assistant Principal, T. pp. 739-743; *** Teacher, pp. 659-660).
46. Before the start of the 2012-2013 school year, the *** assistant principal (AP) expressed her concern to Parent that it would not be feasible to implement Student's IEP as written at *** with two hours of resource time each day. As written, Student would be in the *** classroom for only thirty minutes a day, which was not enough time to cover the core content of Language Arts, Social Studies, and Math and Science reinforcement. Parent indicated she understood and would remove Student from *** if the reduced resource time did not work. (*** AP, pp. 44-45).
47. An ARDC convened on September 5, 2012 and reduced Student's resource time to 30 minutes per day for Reading and 30 for Written Language so that it would work with the *** schedule. The schedule change was not based on any information related to the Student's needs. No other changes were made in the IEP that was adopted at the May 29, 2012 ARDC. The ARDC did not discuss or seem to be aware of the behavior management system referenced in Dr. *** FBA that was to remain in effect for the 2012-2013 school year. Parent agreed with the reduction in resource time. (R16-170; *** AP, p. 745; *** Teacher, p. 662; Resource Teacher, pp. 348-349).
48. During the fall semester, Student received individualized, direct instruction from the resource teacher, ***, for one hour each day. *** is a 19-year veteran teacher with training in various reading programs that she incorporates into her work with students. (Resource Teacher, pp. 211-213). *** described Student at the beginning of the year as a "non-reader" who could not read any words, was not able to identify any letter sounds, and who knew only some letter names. (Resource Teacher, pp. 214-216).
49. Based on *** description of Student's skill level, student either lost some of the minimal pre-reading skills student had gained at West U. over the summer or was displaying the pattern of inconsistency in student's abilities that has been documented by all of student's teachers during student's tenure at HISD.
50. In her work with Student, *** used components of the Neuhaus Reading Readiness Strategies, manipulatives, a mirror to look at mouth position, and multisensory techniques such as clapping and tracing sandpaper letters. The program *** provided in the fall included direct instruction in phonemic awareness, phonics, language structure, and strategies for decoding, word recognition, and comprehension. The instructional approach provided was explicit, structured, multisensory, one to one, and intensive (60 minutes per day). (Resource Teacher, pp. 224, 373-374; *** AP, pp. 762-763).
51. In addition to reading deficits, *** testified that Student had no self-esteem or tolerance for making mistakes or trying to master new skills. (Resource Teacher, p. 240). *** worked successfully with Student to improve student's confidence and willingness to attempt new skills and student improved significantly in this area. (Resource Teacher, p. 241).
52. During the first semester, both Parent and *** agreed that Student began to make tangible progress. Student and *** had a positive rapport and Parent testified that the reading program at *** was better than at *** and that *** was able to work with Student "much better" than student's prior teachers. (Resource Teacher, pp. 348-349; Parent, p. 418, 444).

53. By October 18, 2012, an audiologist who tested Student observed that student could write student's first and last name, knew the letters of the alphabet, and knew most letter sounds. (R-052). By December 18, 2012, when the ARDC met to review Student's academic progress, student's PLAAFP indicated that student had developed sound symbol correspondence for letters, could blend sounds to read *** pattern words, could produce and recognize one syllable rhyming words, could produce and recognize phonemes to pronounce one syllable words, and unblend *** words into their original phonemes. (R17-182). At the ARDC, *** reported that Student knew all of the letters, could blend sounds, knew 40 of the 100 high frequency words, and could properly be characterized as a "**** reader." Student's English teacher confirmed student's progress with phonics skills and writing sounds. (R17-197).
54. At the December 2012 ARDC, Parent, through her attorney, asked the ARDC to consider increased resource time for Student. *** reported that Student had made considerable progress since the beginning of school and she did not believe that increased resource time would benefit student. In fact, *** recommended continuing to provide 30 minutes of Language Arts instruction in the Resource setting, but changing Student's reading services to 30 minutes of reading support in the general education setting rather than reading instruction in the Resource room. *** planned to provide reading support through Student's classroom work rather than continue the intensive systematic curriculum she provided in the fall. (R17-197; Resource Teacher, pp. 237-238, 350). *** proposed this change in Student's services because she believed student could benefit from more time in student's general education classroom and to allow more focus on writing where Student had made less progress. (Resource Teacher, p. 239). The ARDC adopted *** proposed change for the delivery of Student's special education services.
55. The reading and writing goal from Student's IEP remained the same and progress was not updated on student's IEP. One additional writing goal with objectives was adopted by the ARDC: Student will use elements of the writing process to compose text. (R17-184-185).
56. Neither *** nor Student's teachers reported any behavioral concerns at the December ARDC, though daily communication sheets from teachers show an increase in problem behaviors beginning in early November 2012. (R33).
57. After the winter break, Student's new schedule of services was implemented, along with a change in student's regular school schedule. (Resource Teacher, p. 350). The schedule changes meant that Student would have more frequent transitions in student's day. (R18-220).
58. Beginning in January 2013 and continuing throughout the spring semester, Student demonstrated a marked change in behavior and attitude that impacted student's learning and academic progress. (Resource Teacher, p. 351; *** Teacher, p. 669). Student's behavior deteriorated and student regularly engaged in non-cooperative, defiant, and physically aggressive behavior. (Resource Teacher, p. 241). Records reflect that Student's behaviors were frequent and serious, with a restraint in January and 4 days of suspension in February. In addition, Student frequently refused to work with ***, both in the general education setting and the resource classroom, resulting in lost academic time. (R18-220).
59. An ARDC scheduled to discuss Student's behavior in January was cancelled, but ultimately took place on February 7, 2013. *** reported that Student's behavior had changed drastically since the first semester and that student had only allowed her to work with student three times since returning from winter break in early January. She stated that Student's behavior and emotional condition impeded student's ability to work. Student's *** and *** teachers also reported challenging behavior, describing that Student called them names and refused to complete work. (R18-220; Resource Teacher, p. 375; *** Teacher, pp. 666-668).

60. Dr. *** from HISD psychological services attended the ARDC and made suggestions for working with Student: provide a cool down area in the classroom, provide Student with options to allow student greater control, use verbal praise and stickers, provide counseling to teacher and reinforce strategies for emotional and behavioral management, and chunk assignments. (R18-220). Student's *** teacher confirmed that she observed very significant issues with peers, isolation during the first semester and aggressive social interaction during the second semester. She testified that Student requires counseling and social skills training. (*** Teacher, p. 680).
61. The suggestions made by Dr. *** were the same strategies used previously with Student at *** that should have been implemented from the beginning of student's *** year as per the recommendations made by Dr. *** and the May 2012 ARDC.
62. The ARDC proposed a Behavior Support Plan (BSP), behavioral goals to incorporate in Student's IEP, and to conduct an FBA. Petitioner requested a recess of the ARDC so that she could review the proposed plan. (R18-220).
63. The ARDC reconvened on February 15, 2013 to review the proposed BSP based on data provided by teachers, to be revised following completion of the FBA. Parent disagreed with the proposed BSP because she believed it was not based on sufficient data, but agreed to its implementation anyway pending the completion of an independent FBA. The ARDC adopted the BSP and behavior goals. The ARDC did not provide counseling as a related service. (R18-220).
64. The ARDC adopted two behavior goals for incorporation in Student's IEP: 1) Comply with teacher requests with a related objective of completing assignments and 2) Use strategies to remain clam, focused, complaint and able to follow the daily schedule. The ARDC made no provision for instruction, such as social skills or counseling, to assist Student in developing replacement behaviors and strategies for achieving the goals. (R18-194; Tibo, pp. 61-62).
65. The BSP adopted by the ARDC targeted two behaviors: emotional tantrums and noncompliance. The BSP lists supports, rewards, and consequences for each behavior, but does not provide any strategies or explanations that would assist teachers in effectively working with Student. The same list of supports, rewards, and consequences is provided for each targeted behavior and many of the reinforcement/rewards listed are rated as "not effective" for Student in the information provided by student's teachers. (R19-252-255; ***, pp. 101-102, 111, 118).
66. *** testified that she did not implement the BSP because she understood it was not to be implemented because of Parent's disagreement, even though Parent had in fact consented to its use. (Resource Teacher, pp. 341-342). Student's *** teacher, however, did implement the BSP. (*** Teacher, p. 689).
67. *** observed both teachers when completing her independent FBA and testified credibly that she did not observe effective intervention or an effective behavior management system in place. She documented Student's behaviors escalating in response to redirection, resulting in student calling out "****" and other names 27 times during one *** test. Student's escalation caused decreased demands for compliance by the teacher. (R12-079, Tibo, p. 58).
68. I find the BSP did not provide appropriate or sufficient information about effective strategies for working with Student. I further find that staff did not consistently or effectively implement the BSP during the spring semester.

69. The credible evidence establishes that many factors contributed to Student's behavioral decline in the spring semester, including student's schedule change which resulted in decreased instructional support in reading and less one on one time with ***, coupled with a lack of counseling and behavioral interventions, modifications, and supports. The recommendations made by Dr. *** in Student's May 2012 FBA to address student's upset and defiance that were provided in the fall semester were discontinued in the spring semester (increased instructional support in reading), leading to a return of the behaviors they were intended to address (upset and defiance).
70. Petitioner obtained two Independent Educational Evaluations (IEEs) in April 2013: a psychoeducational evaluation completed by Dr. ***, and an FBA completed by ***. (R10, R12).
71. Dr. *** testing documented that Student has a learning disability in reading, significant reading deficits, and ADHD. Student's scores on the Wechsler Intelligence Scale for Children- IV (WISC-IV) indicated a full scale IQ of ***, almost identical to HISD's FIE, but also revealed a psychological processing deficit in *Working Memory* with a standard score of ***. Student's cognitive deficit correlates with student's reading deficits to establish a learning disability. (R10-064-065; Dr. ***, p. 265; HISD Head of Evaluation; p. 710).
72. Dr. *** administered the WJ-III to examine achievement and found the following standard scores in the composite areas: *Basic Reading Skills Cluster*: ***, *Brief Reading Cluster*: ***, *Academic Skills*: ***, and *Brief Writing Cluster*: ***. (R10-065-066). Dr. *** of HISD confirmed that these scores reflected academic deficits, but explained that comparing the WJ-III scores from the IEE to those obtained on Student's FIE was not an accurate measure of progress or the lack of progress. He testified that while these scores may indicate a lack of regression, they cannot be used to assess progress. Dr. *** explained that progress is best measured by more frequent data collection, rather than "snapshot" assessment on a given day. (Head of Evaluation, pp. 718-723).
73. Dr. *** also administered the Gray Oral Reading Test (GORT) to measure reading fluency and comprehension. Student scored in the "significantly delayed" range, with a standard score of *** and a percentile score of less than ***. Dr. *** explained that Student "bottomed out" the test in that the scores do go any lower. (R10-066; Dr. ***, pp. 271-272).
74. Dr. *** concluded that Student presents with a "classic profile" of having a reading disorder, dyslexia, and ADHD. Given the interventions student was receiving with minimal to no improvement, Dr. *** concluded that the interventions have not been successful in addressing Student's deficits. ((R10-068; Dr. ***, p. 278). Dr. *** credibly testified that although Student is learning to decode, student still shows phonological awareness deficits and could not read a sentence at the time of student's testing. (Dr. ***, pp. 321-322). Dr. *** assessment is consistent with Parent's observation that Student cannot read. (Parent, p. 420).
75. Dr. *** recommended the following: classify Student as eligible for special education with a specific learning disability in reading and OHI; provide intensive intervention in language arts and reading for 1-2 hours per day within a small group setting, with a preference for 2 hours per day in a 1:1 setting, outside of the general education environment; consider compensatory services in the amount of two hours per day for at least 80 hours to remedy the lack of timely interventions. Dr. *** also recommended classroom accommodations to address academics and behavior, implementation of a BSP, and counseling. (R10-069-072; Dr. ***, pp. 283, 286-287, 292).
76. *** completed an independent FBA based on a review of records, four observations, and documentation from both teachers and staff. Based on her thorough and credible review of Student's records and her

observations, *** recommended that Student be placed in a highly structured classroom and routine with a high rate of reinforcement and frequent behavioral feedback from student's teachers. Student requires individualized reinforcement multiple times per day, frequent breaks, chunking work, a structured work system, visuals, a cool down area, and social studies. She further recommended that Student receive regular direct instruction to address social skills and compliance and that student's teachers receive regular support and feedback on their classroom interventions. (R12-083-084; ***, pp. 71-78).

77. Student's annual ARDC convened on May 28, 2013 and reviewed both IEEs. The ARDC agreed that Student meets eligibility for special education as a student with a learning disability in the area of basic reading and reading comprehension, dyslexia, and OHI for ADHD. Student's *** teacher reported that student's behavior was still not appropriate with student's peers, but that student's reading had improved. *** reported that Student continued to display anxiety and to act out to avoid work tasks that may be too difficult; she indicated that student's behavior continued to prevent student from doing well academically. She stated that Student was more willing to work and appeared more confident in the Resource setting than in general education.
78. Based on a review of the data, the ARDC amended Student's IEP and BSP to incorporate some of the recommendations made in *** FBA and the IEE. The ARDC recommended 90 minutes per day of special education instruction even though it would be difficult to implement given the *** schedule. In addition, HISD offered Student the ability to participate in a summer remediation program for 40 hours of 1:1 reading intervention with *** or a *** enrichment program offered through ***. (R20-296; *** AP, p. 775; ***, p. 793; Parent, p. 422). Parent chose to participate in the *** enrichment program because she wanted the *** instruction and planned to pursue private reading services during the summer, which she believed would be more effective. (Parent, pp. 347, 422).
79. *** assessed Student's skills at the end of the 2012-2013 school year as follows: Student knew student's letters and sounds, understood the principle of manipulating sounds to form words, could decode *** words, was able to read simple *** sentences on occasion with her instruction and support while student attempted, and could occasionally write simple words. (Resource Teacher, pp. 226-227, 233).
80. Parent did not receive progress reports on any of Student's IEP goals at any point during the 2012-2013 school year, or any other type of ongoing assessment data that would indicate Student progress. The ARDC did not update Student's PLAAFPs at the May 2013 meeting with current levels of performance. Student's IEP was not updated with baseline scores on repeat IEP goals and, to the extent, new information was provided, it showed minimal to no progress. (R20-274-278).
81. Student's TPRI screening status at the end of 2012-2103 was "Still Developing," though student had mastered some subtests, indicating that student did not meet *** benchmarks. (R27-328).
82. Student's Stanford Achievement test administered in May 2013 indicated a *Total Reading* score of ***. The grade equivalency of student's score is ***. This score represents a notable drop from student's 2011-2012 Stanford score. The credible evidence is that the score is low because the administration of the test at *** requires Student to read and work independently, which is challenging for student and caused resistance to the tasks. While the May 2013 scores may be lower than what Student is actually capable of, they clearly demonstrate that student continues to have a very significant reading deficit.
83. Both *** and Student's *** teacher find that Student's ability to demonstrate student's knowledge of student's reading/pre-reading skills is inconsistent and varies greatly from day-to-day.

84. The credible evidence from Student's teachers, Parent, Dr. ***, and testing results all demonstrates that Student cannot read. Any progress Student has demonstrated in isolated aspects of the reading process has not been sufficiently meaningful to allow Student to "break the code" of reading. Despite average intelligence, substantial general education intervention, and some special education instruction, student remains significantly below grade level expectations and has failed to make more than *de minimus* progress in reading.
85. Research shows that over 90% of readers with Student's profile can remediate and significantly improve their reading abilities with intensive phonologically based intervention. (P7). Student began to demonstrate progress when student received this type of intervention in the fall semester of 2012. Given the delay in interventions for Student until the 2012-2013 school year, coupled with the decrease in services in the spring semester, I find that Student's failure to make progress in learning to read cannot be attributed to treatment resistance at this point in time. I find that student's failure to progress in reading is more likely to result from delayed intervention followed by a lack of sufficiently intensive intervention, coupled with a lack of effective of behavioral management. I do not find that the number of Student's absences is a significant contributing cause to student's failure to make progress.
86. In order to make progress in Reading, Student requires intensive 1:1 or small group specialized instruction in Reading and Language Arts for 1-2 hours per day outside the general education setting. In addition, the link between Student's behavioral and academic needs must be understood and addressed through specialized instruction provided by counseling and/or social skills, an effective BSP, and consistent implementation of recommendations made in the FBAs completed for Student.
87. Student's teachers and the AP at *** reasonably do not believe *** is an appropriate school for Student due to the challenge of *** on top of remediating a severe reading disability. The AP believes that Student needs two hours per day in Resource as originally indicated by the ARDC at *** in order to make appropriate progress, but two hours is not possible at ***. *** staff testified that they attempted to meet Student's needs as appropriately as they could, but actually do not believe Student can get what student needs at ***.

DISCUSSION

The instant case raises the following issues pertaining to HISD's education of Student in the 2011-2012 and 2012-2103 school years: 1) Whether Respondent violated the child find provisions of IDEA and denied Student a free appropriate public education by failing to timely evaluate and identify Student as eligible for special education services until May 2012; 2) Whether Respondent violated the child find provisions of IDEA and denied Student a free appropriate public education by failing to identify Student as eligible on the basis of a learning disability in reading until May 2013; and 3) Whether Respondent failed to provide Student with a free appropriate public education (FAPE) during the 2012-2013 school year due to inappropriate programming and consequent lack of progress in the areas of reading and behavior.

I. Child Find- Failure To Timely Evaluate And Identify For Special Education

IDEA provides that school districts have the responsibility to identify, locate and evaluate all children with disabilities residing within their jurisdiction who are in need of special education. This responsibility is known as "Child Find." *20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.128 and 300.220.* Under Texas law, special education referral is required as part of school districts' overall regular education referral or screening system

for students experiencing difficulty in the regular classroom. *19 Tex. Admin. Code § 89.1011 (emphasis omitted)*.

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 has a disability and that the student is in need of special education services. *34 C.F.R. §§ 300.8 (a)(1); 300.111(a)(c)(1)* (“*Child find also must include ... children who are suspected of being a child with a disability ... and in need of special education, even though they are advancing from grade to grade*”).

Student claims that HISD violated this requirement by failing to evaluate (and identify) student at the end of the 2010-2011 school year in light of student’s academic and behavioral concerns in the classroom. Petitioner seeks relief for this violation only from February 15, 2012 forward, the date when the statutory limitations period begins. Respondent counters that that it timely reviewed Parent’s referral of Student in May 2011 and reasonably decided to refer Student to IAT first given Student’s ***, recent ***, frequent absences, and Parent’s decision to retain Student in *** for the 2011-2012 school year. Respondent served Petitioner through IAT and referred student for special education evaluation in February 2012.

It is well settled that IDEA does not penalize school districts for a failure to timely evaluate students who are not ultimately found to be eligible for special education. *D.G. v. Flour Bluff ISD, 59 IDELR 2 (5th Cir. 2012)*. In other words, a violation of child find is a procedural violation that results in a denial of a free appropriate public education only if causes a deprivation of educational benefit. *34 C.F.R. § 300.513*. In this case, HISD determined that Student was eligible for special education services in May 2012, at the conclusion of the 2011-2012 school year and provided an IEP with specialized instruction for Student to begin at the start of the 2012-2013 school year. The question raised is whether Student should have been evaluated and found eligible for such services at some point between February 15, 2012 and the end of the 2012-2013 school year?

The credible evidence supports that Student should have been evaluated and identified for special education services prior to the end of student’s second *** year. I concur with Respondent that referral of Student to IAT in June 2011 was appropriate in that Student’s ***, lack of formal behavioral intervention during the preceding school year, and recent *** and related absences clouded the determination of whether Student had a disability and/or a need for special education services. I credit the testimony of Dr. ***, Head of HISD Evaluation that Student was still *** at the end of student’s first year of *** and that retention and continued intervention made sense.

Student began the 2011-2012 school year with structured interventions in both Reading and Behavior through the IAT process and the reading intervention services offered at student’s school. The IAT met regularly and by the end of October, the team noted that Student was shutting down academically and not making academic progress despite the interventions student received last year and continued to receive. In November, the IAT again noted that the primary concern was Student’s lack of progress. As Dr. *** explained, if a child is not closing the gap as would be expected with the provision of interventions, then one would begin to suspect that a known deficit is due to a disability. Indeed, the IAT properly suspected the presence of a disability when it referred Student for an academic special education evaluation on October 27, 2011. Subsequently, Parent obtained a doctor’s diagnosis of ADHD and made a request for an OHI eligibility form on January 10, 2012. Despite the request to evaluate in October 2011 and the request for eligibility based on a diagnosed disability in early January 2012, Respondent’s referral committee did not begin the evaluation process until February 2012 and it was not completed until April 2012.

I find that Respondent had reason to suspect that Student had a disability and a need for special education services as of October 27, 2011 when the IAT actually made that determination and requested evaluation. Student’s doctor further confirmed the presence of a disability as of January 2012, but the OHI eligibility form

was not completed until April 9, 2012. Respondent's failure to timely act on the IAT referral and OHI eligibility resulted in a meaningful delay of services to Student. Once Respondent began the process of evaluation and identification of Student, it took approximately 2 ½ months (February 15, 2012 until May 2, 2012- the date the District first proposed an ARDC to consider eligibility) to complete. Assuming this approximate amount of time as necessary to conclude the process, Respondent would have concluded the evaluation and identification of Student on or about the beginning of February 2012, taking into account the Thanksgiving and winter break holidays, had Respondent timely begun the process shortly after October 27, 2011 when the IAT team referred Student for evaluation. Accordingly, Student would have received specialized instruction to address student's deficits in reading for a substantial portion of the spring semester during student's second year of ***. Research shows that intensive intervention of the type provided by Student's May 2012 IEP could produce significant progress in reading for over 90% of students. In fact, Student's progress during the fall 2012 with only half of the intensive instruction provided for by the May 2012 ARDC validates these research findings. In sum, Respondent's failure to evaluate Student when the IAT referred student for evaluation deprived student of needed services to address student's reading deficits.

For all of the above reasons, I find that Student prevails on this issue. Respondent's failure to find Student eligible for special education as of February 2012 constitutes a violation of the child find provisions of IDEA that resulted in substantive educational harm to Student.

II. Child Find- Failure To Timely Identify As Student With Learning Disability

While the determination of whether a student is eligible for services under IDEA may present either procedural or substantive issues (or both), it is clear that the designation of a particular eligibility category is procedural in nature and does not constitute a denial of a free appropriate public education unless the student's program is itself inappropriate and fails to substantively provide the student with a free appropriate public education.

IDEA provides that:

“Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed...in this title and who, by reason of that disability needs special education and related services is regarded as a child with a disability under this subchapter.” *20 U.S.C. § 1412(a)(3)(B)*.

As explained by the seventh circuit, IDEA "charges a school with the responsibility of developing an appropriate education, not with coming up with a proper label." *Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7th Cir. 1997). See also, *R.C. v. Keller ISD*, No. 4:12-CV-716-A (D.C.N.D.TX 2013)(Court looks not to classification label of ED or AU, but whether the IEP was sufficiently individualized to meet student's unique needs and provide him with educational benefits); *Pohorecki v. Anthony Wayne Local School District*, 637 F. Supp. 2d 547 (N.D. OH 2009) (Classification of disability is not critical to determining the provision of a free appropriate public education; rather, the determination rests on whether the goals and objectives are appropriate for the student); *Eric H. v. Judson ISD*, 2002 U.S. Dist. Lexis 20646 (W. D. TX 2002) (Dispute over eligibility classification where student continues to be eligible for special education is a procedural matter and parent must prove that change in eligibility status resulted in cognizable harm to student).

In the instant case, where Student was found eligible by the ARDC on the basis of OHI in May 2012 (and as indicated herein, should have been found eligible by February 2012), the issue is whether Student's IEP was appropriately individualized to address Student's unique needs and provide student the requisite educational benefits. The failure to provide Student with the eligibility label of "learning disabled" is not actionable apart from a finding that Respondent denied Student a free appropriate public education.

Accordingly, I find that Respondent's failure to designate Student as eligible based on the category of a specific learning disability does not itself constitute a violation of child find or IDEA.

III. Denial of a FAPE During the 2012-2013 School Year

The purpose of IDEA is to ensure that all children with disabilities have available to them a free, appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. *20 U.S.C. § 1400 (d)*. Under IDEA, HISD has a duty to provide a free appropriate public education to all children with disabilities residing within its jurisdictional boundaries between the ages of 3 and 21. *34 C.F.R. § 300.101 (a)*. As previously discussed, I find that Student was eligible for special education services from February 15, 2012 forward.

Student alleges that student was denied a FAPE during the 2012-2013 school year due to inappropriate programming and consequent lack of progress in the areas of reading and behavior.

Legal Standards Governing FAPE

IDEA requires Respondent to provide Student with a free appropriate public education that consists of "personalized instruction with sufficient services to permit the child to benefit educationally from that instruction." *Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982)*. In *Rowley*, the court developed a two prong analysis to determine if a school district has met its obligation to provide a free appropriate public education: 1) whether the district complied with the procedural requirements of IDEA, and 2) whether the district offered a program to the student that was reasonably calculated to provide educational benefit. *Id. at 206-207*.

Petitioner alleged procedural violations of IDEA pertaining to the content of student's IEP, i.e. lack of objectives for student's annual goals and unsupported present level of performance for student's goals, and the failure to provide progress data on student's IEP to Mother. It is well settled that procedural violations constitute a denial of a FAPE only if the procedural inadequacies impeded the child's right to a free appropriate public education, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education, or caused a deprivation of educational benefit. *34 C.F.R. 300.513(a)*. Because I find that Respondent has denied Student a free appropriate public education on substantive grounds, I will not address each of the procedural violations individually.

The essence of determining whether a substantive violation of IDEA has occurred is whether the school's program has provided the student with the requisite educational benefit. IDEA does not require an education that maximizes a student's potential; rather, the school must provide an education that is reasonably calculated to enable the child to achieve *some* benefit. *Some* benefit means an educational program that is meaningful and offers more than a *de minimus* educational benefit; it must be "likely to produce progress, not regression or trivial educational advancement." *Cypress Fairbanks Independent School District v. Michael F., 118 F. 3d 245 (5th Cir. 1997)*.

Although courts have not adopted a specific substantive standard to determine when a free appropriate public education has been provided, the Fifth Circuit in *Michael F.* identified four factors to consider in analyzing a school's program: 1) is the program individualized and based on the student's assessment and performance; 2) is the program administered in the least restrictive environment (not relevant to this case); 3) are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) are there demonstrated positive benefits both academically and non-academically to the student.

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program for reimbursement purposes. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

Finally, in examining the appropriateness of Respondent's program, a presumption exists in favor of the school district's plan for educating Student. As such, Petitioner bears the burden of proving that Student's program and placement were not appropriate. *Tatro v. State of Texas*, 703 F.2nd 823 (5th Cir. 1983), *aff'd* 468 U.S. 883 (1984); *Schaffer v. Weast*, 546 U.S. 49 (2005).

Applying these legal standards to the evidence in this case, I find that Respondent did not provide Student with a free appropriate public education during 2012-2013 school year, beginning in January 2013.

Was Student's Program Individualized and Based On Assessment & Performance?

2012-2013 IEP Developed At ***

Student's IEP for the 2012-2013 school year was developed by the ARDC at *** following the completion of student's FIE and FBA in April 2012. The IEP appropriately addressed Student's unique deficits in reading and writing and recognized the severity of student's need by providing for two hours per day of specialized instruction in reading and writing in a resource setting with a special education teacher. With respect to reading, I find that the IEP was individualized and based on assessment and performance.

The IEP did not, however, address Student's behavioral or emotional needs at all. It did not include any behavior goals, a BSP or behavior management system, or provide for counseling or social skills training. Although Dr. *** FBA specifically recommended the continuation of counseling and the behavioral interventions Student had received, and the ARDC deliberations reflect an intent to continue the behavior management system, it was not addressed in student's IEP at all.

Respondent argues that Student's positive behavior, as reflected in the behavior data analyzed in the FBA and at *** in the fall semester of 2012, demonstrates that behavior was not a significant issue that needed to be addressed in student's IEP. The evidence, however, shows that Student's behavior was an ongoing issue in the spring of 2012 and, though successfully managed by student's Behavior Management Plan and interventions, continued to emerge in the school setting as upset and defiance. More significantly, the FBA specifically discussed the link between Student's behavior issues and student's reading deficits and the need to address both together and to continue behavior management and counseling. School records and teacher testimony also reflect an ongoing link between Student's frustration with academic tasks and student's inappropriate behavior. While Student's IEP reflected the recommendation made by Dr. *** to increase instructional support in reading, it failed to carry forward the other important aspects of Student's behavior management program, including counseling and a BSP with individualized behavioral strategies.

With respect to Student's behavioral needs, I find that student's IEP failed to address student's unique needs as identified by both assessment and performance. Although Student did not demonstrate behavioral regression initially at *** in the fall of 2012, student ultimately regressed behaviorally beginning in November 2012 and continuing through the remainder of the school year, exhibiting many of the behaviors student previously displayed at *** before successful behavioral interventions were employed. When student's reading instruction was reduced in the spring semester, student's behavior issues became so significant that student's resource teacher repeatedly stated that student was unable to focus on academic tasks or make progress because of student's behavior and emotional condition.

During the fall semester of 2012, Respondent's failure to address Student's behavioral needs in student's IEP had no substantive impact on student's education, as the evidence reflects that *** worked successfully with Student to move student forward in both reading and behavior. When student's reading instruction was reduced in January 2013, Student's behavior declined dramatically. Had Respondent carried forward the recommendations made by Dr. *** and the May 2012 ARDC regarding behavioral interventions and counseling, Student's behavioral regression might have been avoided or contained. As a minimum, student would have promptly received behavioral and emotional interventions rather than losing the spring semester due, in meaningful part, to student's emotional condition.

September 2012 Amendment To Student's IEP

When Student began at *** in fall 2012, the ARDC reduced student's special education resource time from two hours per day to one hour. The ARDC made no other changes in Student's IEP. The decision to reduce Student's special education time was based solely on the schedule at *** and considerations of how to mesh Student's needs with the demands of the *** program. The ARDC decision was not based on Student's assessment or performance.

While I question the wisdom of placing this struggling reader in a *** program where student's needed special education services would necessarily be reduced, I do not fault the District for this decision. The evidence indicates that Parent initiated the request to place Student at *** and adamantly pursued student's placement there. When told by the *** AP that the schedule would mean less reading intervention for Student, Parent indicated she wanted student to attend ** and would remove student if student were not successful. Respondent attempted to honor Parent's choice for her child by working to serve student in the *** program despite student's special education needs that presented challenges given the predesigned demands of the *** schedule.

I find that the District's provision of lesser services to Student for the purpose of accommodating Parent's choice to enroll student at *** does not constitute a denial of a free appropriate public education so long as Student continues to make meaningful educational progress. *St. Louis Park Public Schools, 112 LRP 30512 (SEA MN 2011)*. The evidence establishes that Student did, in fact, make progress when receiving one hour of special education services in the resource room during the fall semester of 2012.

December 2012 Amendment To Student's IEP

The ARDC met in December 2012 to review Student's progress and performance during the fall semester. Based on reports of Student's progress in reading, the ARDC decided to reduce Student's time in the resource setting to 30 minutes per day for writing and to provide reading support by working on the general education curriculum in the general education classroom. The ARDC added an additional writing goal, but made no other changes in Student's IEP.

The decision to reduce Student's reading services and to discontinue the type of intensive reading instruction student was receiving, while seemingly based on student's performance during the fall semester, reflects a failure to understand the assessment data documenting student's reading disability and the severity of student's deficits. Both the FIE and FBA indicate Student's need for increased instruction in reading in order to be successful- academically **and** behaviorally. The FIE further recommends that Student's reading instruction be sequential, multi-sensory, and visual-verbal. These instructional methodologies were employed in the resource room in the fall semester, but the change in service model for the spring semester did not allow a continuation of this type of reading instruction. The evidence indicates that when these changes were made, Student's progress in reading slowed significantly and student's behavioral success evaporated.

I find that Student's IEP for the spring semester did not address student's individualized needs, either behaviorally or academically, and was not based on assessment and performance. As will be discussed below, Student failed to make progress during the spring semester as a result of this change in special education service.

February 2013 Amendment To Student's IEP

Student's behavior changed dramatically from the beginning of the spring semester of 2013 and student began to exhibit emotional upset, defiance, refusal to work, disrespect, and physically aggressive behaviors toward other students and staff. The ARDC convened in February 2013 to address the marked change in behavior. The ARDC adopted two behavior goals, a BSP, authorized completion of an updated FBA, and recommended counseling, though none was provided.

The ARDC's action to revise Student's IEP in February to address student's behavioral and emotional condition was both appropriate and necessary. However, the changes to Student's program were not based on student's assessment or performance. First, Student's IEP still did not provide for specialized instruction in replacement behaviors through either counseling or a social skills class. Student received counseling at *** and Dr. *** recommended that it continue. The February 2013 ARDC also recommended counseling, but for unknown reasons, Student received none. Second, the BSP adopted by the ARDC did not clearly delineate how to address Student's behaviors and listed as suggestions many techniques that student's teachers documented as "not effective" with student. Finally, the evidence is clear that the BSP was not implemented at all by at least one of student's teachers due to confusion about whether Parent had agreed to the plan.

In short, the ARDC's efforts to address Student's behavioral "meltdown" in February 2013 were not based on assessment or performance data about effective strategies for working with Student. The evidence further reflects that the implementation of the plan was not effective or consistent and that Student continued to exhibit behavior that impeded student's learning and academic progress throughout the spring semester.

May 2013 Amendment To Student's IEP/Summer Services

Following the review of the psychoeducational IEE and the independent FBA, the ARDC convened in May 2013 to amend Student's IEP for the 2013-2014 school year. In addition to amending IEP goals and objectives and Student's BSP, the ARDC increased Student's time in the resource setting to 90 minutes per day despite the difficulties posed by the *** schedule. Of relevance to this action, the ARDC confirmed Student's eligibility as a student with a learning disability in reading and offered Student 40 hours of 1:1 reading instruction during the summer of 2013 with *** to remediate student's reading deficits. Parent chose to attend a *** program instead.

Despite Parent's stated concerns about Student's lack of progress in reading, she continues to make choices that deprive student of additional services that could potentially be helpful. By attending ***, Student undeniably receives less intensive reading intervention than student would at a *** school. By continuing to study *** in the summer rather than pursuing the District's offer of reading intervention, Parent fails to take responsibility for the impact that these choices have on Student's progress in reading. Although Parent and Dr. *** suggested that Parent was entitled to refuse the District's offer of summer services because the prior services were ineffective, the reality is that prior 1:1 services with *** were effective in the fall of 2012. Parent herself acknowledged *** success in working with Student.

I find that Parent's failure to access the 40 hours of 1:1 reading remediation in the summer of 2013 is relevant to the consideration of what relief, if any, Student is owed for violations of IDEA by the District.

Were Services Provided in a Coordinated and Collaborative Manner?

The evidence demonstrates that the key stakeholders at *** provided services to Student in a coordinated and collaborative manner. To the extent that a lack of collaboration was shown, it was in the transfer from *** to ***. There was not collaboration to help understand the interventions Student previously received that were/were not effective and how those might guide student's instruction at ***. As discussed previously, this particularly impacted Student in the area of behavior.

Were There Demonstrated Positive Academic and Non-Academic Benefits?

This factor goes to the heart of whether Student made the educational progress required by *Rowley*. Petitioner argues that the evidence shows a clear lack of progress, proven most clearly by the fact that Student still cannot read. Respondent argues that Student progressed in certain aspects of reading while at ***; but to the extent Student's progress was less than expected, it was because of Parent's choice to attend ***.

Academic Benefits

In the area of reading, the credible evidence demonstrates that Student obtained a *de minimus* academic benefit from student's program at *** over the course of the 2012-2013 school year. The evidence concerning Student's progress is somewhat limited due to *** failure to maintain any ongoing assessment data on Student. Respondent provided Parent with no progress report updates on Student's IEP goals, student's IEP baselines were not updated at the ARDC meetings, and no classroom assessment data was maintained. As Dr. *** explained, this would be the best type of evidence to help discern whether Student made progress. Absent such evidence, I must turn to student's teachers' testimony and reports at ARDCs, anecdotal impressions of student's Parent and evaluators, and standardized test results such as the TPRI, Stanford, and WJ-III. Progress under IDEA must be measured not in relation to a student's classmates, but with respect to the individual student. *L.F. v. Houston ISD, 459 F. Appx. 358, 58 IDELR 63 (5th Cir. 2012), cert. denied 113 LRP 6979 (2013).*

Teacher testimony and anecdotal evidence indicate that Student made notable progress during the fall semester and gained improved decoding skills and beginning reading skills. However, when Student's intensive one on one reading instruction ceased in the spring semester, student's progress slowed considerably. *** description of student's skills at the end of the 2012-2013 was essentially the same as her delineation of student's PLAAFPs at the December 2012 ARDC, suggesting that little to no progress was made between December 2012 and May 2013. Both *** and the *** teacher testified that some days Student could read a few words in isolation or a simple *** sentence with assistance, but that other days, student could not. Dr. *** testified, based on personal knowledge and observation, that Student could not read sentences or decode words when he evaluated Student. Parent similarly testified that Student could not read by the end of the 2012-2013 school years.

Standardized testing outcomes also demonstrate that Student did not obtain meaningful benefit. Student's scores on the GORT administered by Dr. *** were the lowest possible on this measure of reading fluency and comprehension. Student's end of year TPRI screening status was "Still Developing," though it did indicate growth in some areas. Similarly, the WJ-III scores obtained by Dr. *** indicated growth in some areas and no growth, or even regression in others. I credit Dr. *** cautionary advice, however, and do not rely heavily on a comparison of the WJ-III scores to determine progress. Finally, Student's score on the Stanford test, the most recently completed standardized test, indicates the *** score *** and a grade level equivalent of ***. This score reflects regression from Student's previous year's score and a lack of progress at best.

In sum, while the evidence reflects that Student made some progress in certain components of the reading progress, it clearly demonstrates that at the end of *** years of schooling, with *** years of daily general education reading intervention and one year of special education intervention, Student remains a struggling beginning reader. While some skills emerge on occasion, Student lacks mastery sufficient to regularly read

even simple *** sentences. I find that the academic progress made by Student during student's *** year, and in particular during the spring semester, was *de minimus* and not meaningful as required by IDEA.

Respondent argues that Student's slow progress is caused by student's attendance at *** and the demands placed on both Student and educators by a *** program. Respondent cites legal authority to support its position that Parent cannot fault Respondent for Student's slow progress when she chose to place student there with knowledge of the potential impact. Assuming, *arguendo*, that Respondent correctly states the law concerning the impact of Student's attendance at *** on student's progress; the factual evidence does not support Respondent's position. First, it is clear that Student's deficits and failure to progress in reading pre-date student's enrollment at ***. In fact, Student made the most progress to date at ***, when student finally began to receive specialized instruction through special education. Second, the evidence supports the conclusion that Student's failure to progress during the spring of 2012-2013 school year resulted from the reduction in student's services to address student's areas of disability, behavior and reading, and not from student's attendance at ***. Despite the very real challenges for both Student and educators posed by student's attendance at ***, the record reflects that these challenges were successfully navigated in the fall semester prior to the change in Student's program.

The evidence demonstrates that what accounted for Student's progress in the fall, and what is reasonably likely to produce progress going forward, is intensive, multi-sensory, systematic and sequential reading instruction provided outside the general education classroom on a one to one or small group basis. The instruction must be provided by a trained special education teacher who knows how to deliver scientifically based reading instruction. Student received this, with success, from *** during the fall semester, but the instruction abruptly stopped when it was just beginning to take hold. As a result, Student failed to make meaningful progress in reading during the spring semester of 2013.

Non-Academic Benefits

With regard to non-academic benefits, the evidence is clear that Student had no behavioral issues in the fall semester, but student also did not interact or develop friendships with student's peers. Student made progress in dealing with student's own anxiety and willingness to tackle challenging academic tasks. In the spring semester, Student demonstrated severe behavioral regression that was not effectively managed. Although *** testified that student's behavior improved toward the end of the semester in the resource setting, Student's *** teacher testified that it did not improve at all. Both teachers testified clearly that Student's defiance and refusal to work impacted student academically and that student did not progress behaviorally. Based on the foregoing, I find that Student failed to obtain non-academic benefits during the 2012-2103 school year.

Student's Attendance At *** and Educational Progress

Although the appropriateness of Student's proposed plan for the next school year and student's attendance at *** are not before me, the parties presented a great deal of evidence and legal argument about the propriety of Student's placement at *** and its impact on the provision of a free appropriate public education. All of the *** staff who testified stated that Student's needs could not be fully met at *** and the assistant principal testified that she believes Student needs two hours per day in the resource setting, as originally provided by the ARDC at ***, to address student's reading and language arts deficits. Even so, the staff at *** remain willing to work with Student and attempt to provide a free appropriate public education within the confines of the structure of the *** program.

Parent must meet the District "half way" in addressing Student's reading issues while at the same time enrolling student in a *** program. The difficulties posed in providing Student needed services to address student's disability at *** are real and may impact student's rate of progress toward reading regardless of the program

provided. Although I find that the program provided at *** during the spring of 2013 was not appropriate for the reasons discussed herein, I also concur with Respondent's view that Student may not progress as rapidly at *** because of the structure of the program and the demands of *** while struggling to overcome reading and writing deficits ***.

I make no comment on the propriety of Student's placement at *** as developed at the May 2013 ARDC other than to note that school staff appear to have serious concerns about their ability to provide Student with a free appropriate public education at ***. The ARDC must address this issue when crafting an IEP for Student that is designed to meet student's unique needs and is based on assessment and performance.

Conclusion on FAPE Issue

In summary, I find that Student's IEP for the 2012-2013 school year failed to address student's unique and individualized needs in the area of emotional and behavioral programming. I further find that student's IEP failed to address student's unique and individualized needs in the area of reading during the spring semester. I further find that Student failed to obtain meaningful academic and non-academic benefits in the areas of behavior and reading during the spring semester of the 2012-2013 school year. Accordingly, I find that Respondent did not provide Student with a free appropriate public education during the spring semester of the 2012-2013 school year.

IV. Remedies For Violations of Child Find and FAPE

For relief, Petitioner requests compensatory education, staff training on student's BSP, and the provision of a private reading program should Respondent be unable to provide scientific research based reading instruction.

Compensatory relief is available under IDEA as an equitable device to remedy substantive violations of IDEA. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEA requires that relief be designed to ensure that a student is appropriately educated within the meaning of IDEA. Courts favor individualized assessments of the proper amount of compensatory relief owed over rote "hour for hour" determinations. *Reid v. District of Columbia*, 2005 WL 678385 (D.C.Cir. 2005). Determining what compensatory relief is appropriate turns on a consideration of the extent of the denial of services, as well as what services are needed to place a student in the position s/he would have been, but for the denial. The ultimate award must be fact-specific and reasonably calculated to provide the student with educational benefits that would have accrued from the special education services the district should have supplied in the first place. *Reid v. District of Columbia*, 2005 WL 678385 (D.C.Cir. 2005); *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9th Cir. 1994).

In this case, I find Dr. *** testimony to be most relevant to the determination of what compensatory services are needed to place Student in the position student would have been, but for the District's violations of FAPE. Dr. *** recommended an intensive program of reading intervention provided by a special education or reading intervention teacher in a 1:1 or small group setting, with an appropriate reading curriculum, for a period of 80 hours. Based on Dr. *** testimony, I find that 80 hours of intensive reading intervention provided in addition to an appropriate IEP would remedy the violations discussed herein.

However, compensatory education is an equitable remedy, subject to equitable considerations. Compensatory education awards have been denied or reduced when mitigating factors relieve school districts from some or all of the responsibility for the denial of a free appropriate public education. *Murphy v. Timberlane Regional School District*, 973 F.2d 13 (1st Cir. 1992); *Parents of Student W. v. Puyallup School District*, 31 F. 3d 1489 (9th Cir. 1994). One such mitigating factor is the parents' refusal of appropriate services.

In the instant case, I find that Parent's decision to decline Respondent's offer of 40 hours of 1:1 intensive reading intervention with a special education teacher entitles the District to a reduction in the amount of compensatory services owed Student. As discussed previously, Parent cannot reject appropriate services offered by the District and simultaneously complain that the District's program was inadequate.

Therefore, I am ordering the District to provide Student with 40 hours of compensatory education to address the Student's identified learning disability in reading and dyslexia. The compensatory educational services shall be provided in addition to services provided to Student pursuant to student's IEP and shall be provided outside of the regular school day. The services shall be completed by the conclusion of the fall semester of the 2013-2014 school year unless both parties agree to a schedule of services that extends beyond the last day of the fall semester of the 2013-2014 school year.

The reading intervention services shall consist of an intensive, phonics based, sequential program of reading instruction provided by a special education teacher trained in the provision of scientifically based reading instruction. The services shall be provided on a one to one basis by a provider selected by the District.

The District shall convene an ARDC meeting within ten (10) school days of the date of this decision to develop a schedule for the provision of compensatory services, and goals and objectives for the compensatory hours, based on Student's present levels of performance and current academic needs.

CONCLUSIONS OF LAW

1. Respondent Houston ISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA and its implementing federal and state regulations. Houston ISD is Student's resident district under IDEA for all time periods relevant to this action.
2. Student bears the burden of proof on all issues raised in this proceeding. *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49 (2005).
3. Respondent failed to timely evaluate and identify Student as eligible for special education services under IDEA as of February 15, 2012. Respondent's failure to timely identify Student as of February 15, 2012 resulted in a deprivation of educational benefit to Student. 34 C.F.R. § 300.8(c)(9); 19 T.A.C. § 89.1040(c)(8); 34 C.F.R. § 300.513(a)(2).
4. Respondent failed to provide Student with a free appropriate public education during the spring semester of the 2012-2013 school year. Student demonstrated that student's program during the spring of 2013 did not satisfy the indicia of a free appropriate public education and did not provide student with meaningful academic and non-academic benefits. 34 C.F.R. § 300.101 (a).
5. Petitioner is entitled to compensatory education to remedy the denial of a free appropriate public education and the violation of child find; however, equitable considerations support reducing the award of compensatory education. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985).

ORDER

After due consideration of the record, and the foregoing Findings of Fact and Conclusions of Law, this Hearing Officer hereby **ORDERS** that the relief sought by Petitioner is **GRANTED** as follows:

1. HISD shall provide Student with 40 hours of compensatory educational services consisting of 1:1 reading intervention services provided by a qualified special education teacher trained to provide scientifically based reading instruction to address a learning disability in reading and dyslexia. The compensatory educational services shall be provided in addition to services provided to Student pursuant to student's IEP and shall be provided outside of the regular school day. The services shall be completed by the conclusion of the fall semester of the 2013-2014 school year unless both parties agree to a schedule of services that extends beyond the end of the fall semester. HISD shall select the service provider.
2. HISD shall convene an ARDC meeting within ten (10) school days of the date of this decision, or at a later date if both parties mutually agree, to develop a schedule for the provision of compensatory services and goals and objectives for the compensatory hours. The schedule for the provision of services shall be developed for the mutual convenience of the parties; however, the District retains the final determination as to when the services will be provided.

It is further **ORDERED** that all other items of relief not specifically awarded herein are **DENIED**.

SIGNED and **ENTERED** this 6th day of September 2013.

Lynn E. Rubinett
Attorney at Law
Special Education Hearing Officer for the State of Texas

TEA DOCKET NO. 131-SE-0213

STUDENT	§	BEFORE A SPECIAL
BNF PARENT	§	EDUCATION
Petitioner	§	
v.	§	HEARING OFFICER FOR THE
	§	
HOUSTON INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	STATE OF TEXAS

SYNOPSIS

Issue: Whether Respondent failed to timely evaluate and identify Student as eligible for special education services under IDEA?

Held: For the Student. Student met student's burden of establishing that Respondent failed to timely evaluate and identify Student as eligible for special education services under IDEA as of February 15, 2012. Respondent's failure to timely identify Student as of February 15, 2012 resulted in a deprivation of educational benefit to Student.

Cite: 34 C.F.R. § 300.8(c)(9); 19 T.A.C. § 89.1040(c)(8); 34 C.F.R. § 300.513(a)(2).

Issue: Whether Respondent failed to provide Student with a free appropriate public education during the 2012-2013 school year?

Held: For the Student. Student met student's burden of establishing that Respondent failed to failed to provide student with a free appropriate public education during the spring semester of the 2012-2013 school year, as Student demonstrated that student's program did not satisfy the indicia of a free appropriate public education and did not provide student with meaningful academic and non-academic benefits

Cite: 34 C.F.R. § 300.101 (a).