

**DOCKET NO. 102-SE-1115**

<b>STUDENT, b/n/f/ PARENT &amp; PARENT, Petitioner</b>	§ § § §	<b>BEFORE A SPECIAL EDUCATION</b>
<b>v.</b>	§ §	<b>HEARING OFFICER FOR</b>
<b>RIESEL INDEPENDENT SCHOOL DISTRICT, Respondent</b>	§ § §	<b>THE STATE OF TEXAS</b>

**DECISION OF THE HEARING OFFICER**

Petitioner STUDENT (“the Student”), by next friends, PARENT and PARENT (collectively referenced as “the Parents”), requested a due process hearing against Riesel Independent School District (“RISD” or “the District”) pursuant to the Individuals with Disabilities Education (“IDEA”), 20 U.S.C. §1400, *et seq.* and its implementing state and federal regulations.

The crux of this dispute is whether the District timely and appropriately addressed the decoding, morphology, and other reading skills of a \*\*\* student who qualifies for special education and services due to an Other Health Impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”), a Specific Learning Disability (“SLD”) in Basic Reading Skills with Co-occurring Dyslexia and Reading Comprehension, and a \*\*\* (“\*\*\*\*”) \*\*\*.

Respondent believes that the Student is making progress under this program in all areas with appropriate instructional services, interventions, and accommodations to address the Student’s unique needs. By contrast, Petitioner believes that the school district’s program did not address the Student’s needs both procedurally and substantively, and as a result, the school district denied a free and appropriate public education (“FAPE”) to the Student.

**PARTY REPRESENTATIVES**

Sonja D. Kerr and Elizabeth Angelone, attorneys with the Cuddy Law Firm, represented Petitioner. Holly B. Wardell and Amy Foster, attorneys with Eichelbaum, Wardell, Hansen, Powell & Mehl, P.C., represented Respondent.

**PETITIONER’S ISSUES AND REQUESTED RELIEF**

Petitioner alleges that RISD denied the Student a FAPE under Respondent’s program, including the following:

1. Whether Respondent devised an appropriate individualized education plan (“IEP”) for the Student;
2. Whether Respondent complied with the procedural rights of the Student and Parents;

3. Whether bullying, harassment, discrimination and/or retaliation occurred under Respondent's program that rose to the level of a denial of FAPE against the Student, the Parents, or the Student's advocate;
4. Whether Respondent met its Child Find obligation regarding the Student; and,
5. Whether the Student is entitled to an award of compensatory education.

Petitioner requested the following items of relief:

1. Compensatory \*\*\* services to address a failure to provide \*\*\* services;
2. A full evaluation of the Student and upon completion of the same, convene a meeting of the admission, review, and dismissal committee ("ARDC") to update the Student's IEP in the following areas: a) assistive technology; b) goals and objectives; and, c) accommodations;
3. Provision of a \*\*\* program for the Student;
4. Provision of measurable annual goals for the Student to monitor goal progress, areas of weakness, and effective programming;
5. Provision of staff training by Respondent to address completion of paperwork and IDEA compliance;
6. Provision of appropriate homework accommodations for the Student including limited assignments and extended completion time;
7. Compensatory and related services for the Student to address deficits in the Student's 2014-2015 IEP; and,
8. Any other relief deemed appropriate by the Hearing Officer.

### **PROCEDURAL HISTORY**

On November 30, 2015, Petitioner filed the due process complaint with the Texas Education Agency ("TEA") and the initial scheduling order issued set the hearing for a one-day setting on January 8, 2016, with the Decision Due Date on February 13, 2016.

On December 9, 2016, the parties sought and were granted for good cause shown a continuance of the initial Decision Due Date to April 20, 2016, to accommodate a two-day setting on February 23-24, 2016, and to allow the parties to submit written closing statements in lieu of oral argument at the conclusion of the hearing.

The parties participated in a Resolution Session on December 11, 2016, but were not successful and asked to continue resolution attempts during the 30-day resolution period. The parties attempted mediation on January 19, 2016, but were unable to reach agreement. The parties also participated in informal settlement negotiations during the pendency of this dispute but were unable to reach a settlement.

In February 2016, Respondent sought an opposed continuance to allow resetting the hearing because of voluminous responses needed for Petitioner's discovery requests. The parties submitted additional response and reply motions prior to participating in a telephonic conference held on February 15, 2016, duly recorded by a certified court reporter. Respondent's

continuance request was granted for good cause shown, resetting the due process hearing to March 29-30, 2016, and extending the Decision Due Date to May 23, 2016. Due to witness conflicts, ultimately the hearing was reset for good cause shown to a three-day rather than a two-day setting on April 5-7, 2016, but with no extension of the Decision Due Date.

At the request of Petitioner, the due process hearing was closed to the public and took place at the RISD Administrative Offices in Riesel, Texas, on April 5-7, 2016. The Decision of the Hearing Officer timely issued on May 23, 2016.

After the first day of the due process hearing, Petitioner filed Petitioner's Bench Brief on Respondent's Burden of Proof on Statute of Limitations. The Hearing Officer took the issue under advisement, allowed a short briefing schedule after the conclusion of the hearing that did not disrupt the Decision Due Date, and the parties complied with the same.<sup>1</sup>

Based upon the evidence and argument admitted into the record of this proceeding, the Hearing Officer makes the following findings of fact and conclusions of law:

## FINDINGS OF FACT<sup>2</sup>

### Background

1. The Student attends \*\*\* in RISD and is currently in the \*\*\* grade. The Student and Parents reside within RISD boundaries. RISD is a small school district with a student population of 500-600 students and less than 70 special education students. RISD belongs to Falls Education Cooperative ("FEC") and receives special education assistance from the cooperative including testing services. [Pleading File; P.Exs. 8 and 6 at 2; R.Exs. 2 and 22; Tr. at 60].

2. The Student became eligible for special education services \*\*\* student at age \*\*\* as a student due to the qualifying condition of \*\*\* in the area of \*\*\*. In \*\*\* in the \*\*\* grade, RISD evaluated the Student for possible special education eligibility with a Full and Individual Evaluation ("FIE") in areas of \*\*\*, language, or learning deficit and/or physical, mental, emotional condition. The \*\*\* FIE results kept \*\*\* but did not find the Student exhibited a learning disability for qualification as SLD. There is no evidence in the record that the Parents disagreed with this evaluation. [Pleading File; P.Exs. 6 at 1-3, 20 and 8 at 1; R.Ex. 5 at 75-77, 95; Tr. at 548].

3. The Student passed the state assessment, the Texas Assessment of Knowledge and Skills ("TAKS"), and passed all courses in \*\*\*, \*\*\*, and \*\*\* grades. In \*\*\* grade, the Student passed

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<sup>1</sup> See "Discussion" section below regarding the statute of limitations issue.

<sup>2</sup> References to the transcript of this proceeding are noted by page number (example: "Tr. at 6"). References to Petitioner's Exhibits ("P.Ex.") and Respondent's Exhibits ("R.Ex.") list the exhibit number and the page number (example: "P.Ex. 3 at 3; R.Ex. 3 at 67"). Respondent's exhibit pages are referenced by Bates stamps; unnecessary lead zeros in any pagination of exhibits are omitted (example: "035" would appear as "35").

the TAKS \*\*\* Assessment and all courses but did not pass the TAKS \*\*\* assessment. The Student passed all courses in \*\*\* through \*\*\* grades. [P.Exs. 3 and 8; R.Exs 2 and 22].

4. The Student did not pass any benchmark testing in \*\*\* through \*\*\* grade except for two of six benchmark tests in \*\*\* grade for \*\*\*. [P.Ex. 8 at 2; R.Ex. 2 at 33]

5. The Student did not meet state standards for the State of Texas Assessment of Academic Readiness (“STAAR”) testing in \*\*\* through \*\*\* grades. [P.Ex. 3; R.Ex. 2].

6. Over the past \*\*\* school years covering \*\*\* through \*\*\* grades, RISD held \*\*\* ARDC meetings for development and review of the Student’s IEPs with one or both of the Parents present at each meeting. [P.Exs. 15 and 18; R.Exs. 6, 8, 9, 10, 12, 13, 15, 16, 17, 18, and 19].

#### **\*\*\* Evaluation – Private Psychological Testing**

7. Prior to the beginning of \*\*\* grade in \*\*\*, the Parents had concern about the Student’s concentration and attention ability, task completion ability, organizational skills, and test-taking skills. The Parents obtained a private psychological evaluation of the Student by physician referral. Licensed psychologist \*\*\*, Ed.D of \*\*\* performed the evaluation (“\*\*\* Evaluation”). [P.Ex. 7; R.Ex. 3].

8. Dr. \*\*\* administered some parts of the Wechsler Intelligence Scale for Children – IV (“WISC-IV”), the Woodcock-Johnson Psychoeducational Battery (“Woodcock Johnson”). Dr. \*\*\* determined that the Student had a full-scale Intelligence Quotient (“IQ”) of \*\*\* on the WISC-IV, or within the “Average” range. [P.Ex. 7; R.Ex. 3].

9. The \*\*\* Evaluation included four subtests of the Woodcock Johnson III Test of Achievement (“WJ-III ACH”). The Student made the following scores on the WJ-III ACH: a) Letter-Word Identification – \*\*\*; b) Passage Comprehension – \*\*\*; c) Calculation – \*\*\*; and, d) Applied Problems – \*\*\*. Dr. \*\*\* concluded that the Student’s scores on the WJ-III ACH fell at expected levels on each achievement test commensurate with the Student’s IQ scores. [P.Ex. 7 at 3-4; R.Ex. 3 at 60-61].

10. The \*\*\* Evaluation report diagnosed the Student with ADHD, Predominantly Inattentive Type without Hyperactivity. The \*\*\* Evaluation did not determine that the Student had a learning disability, [P.Ex. 7 at 5-11; R.Ex. 3 at 62-68].

#### **\*\*\* FIE**

11. During \*\*\* grade in \*\*\*, RISD performed a FIE of the Student. The Parents sought the assessment to determine eligibility for a learning disability in reading and for an OHI designation to address \*\*\* Evaluation ADHD diagnosis. The evaluation included an OHI eligibility report from Dr. \*\*\*, a licensed physician, for the Student’s diagnosis of ADHD. [P.Ex. 8 at 1-25; R.Ex. 32-57].

12. The \*\*\* FIE multi-disciplinary team consisted of the FEC diagnostician, \*\*\*, and two RISD general and special education teachers with input from the Parents and Dr. \*\*\*, M.D. The

FEC diagnostician reviewed \*\*\* Evaluation scores for intellectual functioning and administered the Woodcock Johnson III (“WJ-III”) tests of cognitive abilities to measure general intellectual ability, specific cognitive abilities, oral language, and academic achievement. The Student scored as follows:

Assessment Component	Age Range	Standard Score	Percentile	Descriptive
AUDITORY PROCESSING (Ga)	***	***	***	Low Average
Sound Blending		***	***	Low Average
Auditory Attention		***	***	Average
PROCESSING SPEED	***	***	***	Average
Visual Memory		***	***	Low Average
Decision Speed		***	***	High Average
PHONEMIC AWARENESS	***	***	***	Low Average
Sound Blending		***	***	Low Average
Incomplete Words		***	***	Low Average
COGNITIVE FLUENCY	***	***	***	Average
Retrieval Fluency		***	***	Low Average
Decision Speed		***	***	High Average
Rapid Picture Naming		***	***	Average

[P.Ex. 8 at 1, 3-4, 20-24; R.Ex. 2 at 32, 34-35, 51-54].

13. The \*\*\* FIE report described the educational implications of the Student’s lower \*\*\* WJ-III scores as follows:

Assessment Component	Description	Educational Impact
Phonemic Awareness		
Auditory training process (no print used)	Necessary for learning phonics, isolating sounds, manipulate sounds, and blending or segmenting sounds into words	<ul style="list-style-type: none"> <li>• Word Reading</li> <li>• Reading comprehension</li> </ul>
Retrieval Fluency		
Ability to store/ fluently retrieve new/previously acquired information from long term memory	“Fishing Net” analogy of efficiently adding new nodes and links to stored knowledge for later use to retrieve the information	<ul style="list-style-type: none"> <li>• Recall</li> <li>• Recollection</li> <li>• Recognition</li> <li>• Relearning areas of memory;</li> </ul>
Working Memory		
System for temporary storage and management of information needed for complex cognitive tasks	Needed for learning, reasoning, and comprehension	<ul style="list-style-type: none"> <li>• Language acquisition</li> <li>• Basic reading skills of phonics/decoding, spelling, retrieving data)</li> <li>• Math (learning new sequential processes)</li> </ul>

[P.Ex. 8 at 5; R.Ex. 2 at 36].

14. The \*\*\* FIE reviewed \*\*\* Evaluation scores on the W-J III ACH subtests. Because the scores commensurate with the Student’s IQ, the FEC diagnostician administered additional subtests. On the Reading Fluency subtest, the Student within the Average range of achievement compared to grade peers. On the Word Attack subtest, the Student scored in the Low Average range compared to grade peers. Difficulty with Word Attack skills impacts the ability to pronounce non-words and indicates the Student will likely have difficulty pronouncing non-words above the \*\*\* age level and \*\*\* grade level. [P.Ex. 8 at 7 and 12; R.Ex. 2 at 38 and 43].

15. The \*\*\* FIE used cognitive testing from the Wechsler Individual Achievement Test, Third Edition (“WIAT III”), used to assess academic achievement of children, adolescents, college students and adults (ages 4 to 85). The Student made the following Standard Scores (“SS”) (with grade equivalencies, and percentiles) scores on the WIAT III: Reading Comprehension – \*\*\* / Grade \*\*\* (\*\*\*) percentile); Word Reading – \*\*\* / Grade \*\*\* (\*\*\*) percentile); Pseudo-Word Decoding – \*\*\* / Grade \*\*\* (\*\*\*) percentile); and, Oral Reading Fluency – \*\*\* / Grade \*\*\* (\*\*\*) percentile). The Student scored in the average range for Oral Reading Rate and Oral Reading Fluency but had difficulty with Basic Reading Skills and Reading Comprehension. The Student scored in the low average to borderline range on ability to read information with accuracy. [P.Ex. 8 at 7-8, 14; R.Ex. 2 at 38-39,45 and 33 at 493-494].

16. The FEC diagnostician reported the Student’s Present Levels of Academic Achievement and Functional Performance (“PLAAFP”) relative to deficit areas. At the time of the \*\*\* FIE, the Student showed strength in Reading Fluency, but weakness in the areas of Basic Reading Skills, Reading Comprehension, and Oral Reading Accuracy. [P.Ex. 8 at 17; R.Ex. 2 at 48].

17. The \*\*\* FIE described extensive \*\*\* during the Student’s \*\*\* when the Student’s \*\*\*. Because \*\*\*, the Student’s \*\*\* \*\*\*. [P.Ex. 8 at 13-14; R.Ex. 2 at 44-45].

18. The \*\*\* FIE report found that the Student qualified for special education services due to a SLD in Basic Reading Skills and Reading Comprehension, an OHI due to ADHD, and as \*\*\* \*\*\*. The \*\*\* FIE included multiple instructional recommendations and interventions for the Student for the educational setting. With the recommended modifications, the multi-disciplinary team determined that the Student could meet the RISD’s regular mastery level standards for receipt of passing grades and maintaining \*\*\*. [P.Ex. 8 at 9-12, 16-24; R.Ex. 2 at 40-43, 47-55].

19. The \*\*\* FIE report did not find that the Student required AT devices to access the educational environment. [P.Ex. 8 at 16; R.Ex. 2 at 47].

### \*\*\* – ARDC Meeting

20. On \*\*\*, the Student’s annual review ARDC reviewed the completed \*\*\* FIE and the Student’s IEPs. The Parents received a copy of the procedural safeguards with the first notice of the meeting, \*\*\*, as noted on the first page of the ARDC documents. The Student’s mother attended the meeting. The ARDC agreed to add eligibility areas of OHI due to ADHD, SLD in Basic Reading and Reading Comprehension, and continued eligibility in \*\*\*. Participants reviewed the Student’s schedule of services, IEP goals and objectives, updated new information and reviewed accommodations and modifications. The Student was scheduled to receive \*\*\*

minutes of math in Math Recovery and Math General Education with oral and small group administration of assessments, extended time, and use of a calculation device. The Student's mother waived the right to five-day Prior Written Notice ("PWN"). The ARDC reached mutual agreement on the decisions made at this meeting. [R.Ex. 18 at 277, 310, 313-314].

**\*\*\* – ARDC Meeting**

21. On \*\*\*, the ARDC convened at parental request. The Parents attended the meeting and expressed concerns about implementation of accommodations, communication, and progress updates. Additional accommodations were added to all classes and a communication notebook to go between home and school. The Parents waived five-day PWN to implement the decisions of this meeting. [R.Ex. 17].

**\*\*\* – \*\*\* - Private Tutoring and Reading Therapy Services**

22. On \*\*\*, the Student received a consult for private tutoring services from \*\*\* ("\*\*\*\*") in \*\*\*, \*\*\*, a private tutoring firm established in \*\*\* by \*\*\*, \*\*\*\* \*\*\*. [P.Exs. 10 and 25].

23. Ms. \*\*\* taught general education \*\*\* \*\*\* years and is not certified in special education. Ms. \*\*\* has not taught \*\*\* classes, and is not a trained dyslexia therapist, but received dyslexia training through the Education Service Center Region 12. Ms. \*\*\* uses the \*\*\* ("\*\*\*\*"), a sound-based reading program that is \*\*\* program with focus on reading fluency, \*\*\*, and the ability to manipulate sounds within a word and to form new words. Training in \*\*\* uses a four-tier level mastery approach. Ms. \*\*\* completed her \*\*\* training within six months to one year and trains other therapists in the \*\*\* method. [P.Exs. 10, 12, 23, and 25; Tr. at 238-250].

24. Ms. \*\*\*\*'s consult used \*\*\* materials to determine a composite reading score for the Student using the Student's current ability to blend, segment phonemes, manipulate phonemes (auditory processing), and \*\*\*. A score of 90 or above indicates readiness whereas a score below 89 indicates lack of readiness to encounter reading material for the upcoming \*\*\* grade year in \*\*\*. The Student scored \*\*\* on this composite, with individual scores follows: a) Blending Test – \*\*\* or in the Poor range (below \*\*\* correct) indicating problems with blending sounds in three-letter through five-letter words; b) Phoneme Segmentation Task – \*\*\* or Good range (above \*\*\* correct); c) Phoneme Manipulation Task – \*\*\* or Good range (\*\*\* or above correct); and, d) \*\*\* Test – \*\*\* correct or Poor range (below \*\*\*). This evaluation formed the baseline for the Student's tutoring during \*\*\* with \*\*\*. [P.Exs. 2, 10 at 4-8, 23, and 25; Tr. at 255-256].

25. The \*\*\* test of the \*\*\* testing lists vowels and consonants of the English language and requires a student to make the sound represented by that letter. The Student's \*\*\* score indicated that the Student had difficulty with basic language cues. [P.Exs. 10, 23 at 2, and 24 at 4; Tr. at 324-326].

26. Ms. \*\*\* did not talk to RISD staff working with Student or review RISD documents as part of the \*\*\* staff working with the prior to the \*\*\* initial consult and was not aware that the Student qualified as SLD prior to the initial consult in \*\*\*. [Tr. at 283-284].

**\*\*\* – Private Dyslexia Evaluation**

27. Petitioner obtained a private dyslexia evaluation of the Student \*\*\* grade in \*\*\* by Ms. \*\*\*, a Licensed Dyslexia Therapist and Certified Academic Language Therapist (“CALT”). The private dyslexia evaluation included review of the \*\*\* Evaluation and the \*\*\* FIE by RISD. The evaluator relied on the \*\*\* FIE results on the WIAT-III regarding Word Identification, Oral Reading, and Comprehension. [P.Ex. 8 at 7-8; P.Ex. 9 at 3-4; Tr. at 261-262, 338-341].

28. Based on the Student’s WIAT-III Oral Reading Rate score of \*\*\*, Ms. \*\*\* determined that the Student read at a slower pace in the below average range, with oral reading impacting reading endurance and classroom reading endurance. [P.Ex. 8 at 7-8; R.Exs. 2 at 38-39 and 9 at 33 at 494; Tr. at 353-355]

29. Ms. \*\*\* administered the Comprehensive Test of Phonological Processing – Second Edition (“CTOPP-2”) in the evaluation to assess phonological awareness, phonological memory and rapid naming. Phonological awareness is the explicit understanding of the sound structure of spoken words in language. The “Elision” subtest asks for removal of a sound in a word to see if a student can come up with a new word. Phonological memory is the temporary storage of phonological information in working or short-term memory. Rapid naming requires efficient retrieval of phonological information from long-term memory, as in numbers or letters. Phonological skills are required precursors to reading; without phonological skills, reading may be difficult. The Student’s CTOPP- 2 scores were:

<b>Subtest</b>	<b>Scaled Score</b>	<b>Standard Score (“SS”)</b>
Elision	***	
Blending Words	***	
Phoneme Isolation	***	
<b>PHONOLOGICAL AWARENESS COMPOSITE</b>		<b>*** - Below Average</b>
Memory for Digits	***	
Non-word Repetition	***	
<b>PHONOLOGICAL MEMORY COMPOSITE</b>		<b>*** – Poor</b>
Rapid Digit Naming	***	
Rapid Letter Naming	***	
<b>RAPID NAMING COMPOSITE</b>		<b>*** – Average</b>

[P.Ex. 9 at 3; Tr. at 341-342, 350-353].

30. The private dyslexia evaluation assessed the Student’s ability to spell on the Test of Written Spelling through writing samples. The Student scored a SS of \*\*\* or Below Average on this test. [P.Ex. 9 at 4; Tr. at 356-357].

31. Ms. \*\*\* concluded that the Student showed characteristics of dyslexia resulting from difficulty in phonological processing. The Student’s low performance is unexpected with an IQ in the Average range and impacts word reading accuracy (decoding/word recognition), rate, and spelling. The Student’s overall phonological processing scores were in the Below Average range, with weakness in blending words, letter knowledge, and phonological memory. [P.Exs. 9 at 4, 10 at 54 and 11; Tr. at 262-262, 348-349, 359-362].

32. The private dyslexia evaluation recommended direct instruction in a multi-sensory \*\*\* language program and suggested multiple educational accommodations such as not counting off for spelling errors, proximity seating, and oral administration of standardized testing. [P.Ex. 9 at 5].

33. Ms. \*\*\* is trained in several \*\*\* programs that use an alphabetic phonics program including the \*\*\*, \*\*\*, and \*\*\*. Not all \*\*\* programs teach phonological awareness skills, including the program developed by \*\*\*. Ms. \*\*\* uses some parts of the \*\*\* report form that are geared to \*\*\* and \*\*\*. [Tr. at 368-370].

#### \*\*\* – ARDC Meeting

34. The ARDC reviewed the Student’s program and the private dyslexia evaluation on \*\*\*. \*\*\* teacher \*\*\* attended this meeting with the Parents and made notes regarding these services. The ARDC deliberations documentation noted that the Student “will receive direct instruction to target the areas where deficits exist as a result of [the Student’s] dyslexia. [The Student] will work with the special education teacher for \*\*\* minutes everyday [sic] during \*\*\*. Instruction will target both reading and writing.” Ms. \*\*\*’s notes reflect the \*\*\* minutes daily in reading and writing during the “\*\*\*\*” \*\*\* by Ms. \*\*\*, the \*\*\* special education teacher. [P.Ex. 10 at 24; R.Ex. 16 at 265; Tr. at 264-265].

35. There are \*\*\* at the RISD \*\*\* and \*\*\* “\*\*\*\*” \*\*\*. [P.Ex. 22; Tr. at 121-122].

36. Participants mutually agreed to the decisions of this ARDC meeting and the Parents signed in agreement and waived the five school day period before implementation of the program. [R.Ex. 16 at 265-266].

#### \*\*\* – ARDC Meeting

37. On \*\*\*, the ARDC convened at parental request for review of the Student’s IEPs and to update IEP goals and objectives. At that time, the Student had mastered all but one of the Student’s goals and objectives – a math objective. Participants drafted new goals and objectives for reading and math, scheduled for three-week updates, and added additional accommodations. The Student’s mother signed in agreement and waived the five school day period before implementation of the program. [R.Ex. 15].

### Education Service Center Region 12

38. Education Specialist \*\*\* is employed in the Special Education Department of the Education Service Center Region 12 in \*\*\*, \*\*\*. Ms. \*\*\* provides support for Section 504, Dyslexia, and inclusion. As part of her job duties, Ms. \*\*\* provides TEA’s publication entitled *The Dyslexia Handbook* During \*\*\*, Ms. \*\*\* provided a copy of the Handbook to the Student’s mother. [P.Ex. 11; Tr. at 89-90].

39. No specific program of dyslexia instruction is identified in *The Dyslexia Handbook* for students with dyslexia, but teachers working with dyslexic students are required to be trained in whatever program is selected. [P.Ex. 11; Tr. at 89-94].

40. *The Dyslexia Handbook* specifies that the IEP of a student previously identified as meeting special education eligibility before identification as a student with dyslexia should include goals that reflect the need for dyslexia instruction. Also, the ARDC should identify the LRE for delivering the Student's dyslexia instruction. [P.Ex. 11 at 29].

41. Ms. \*\*\* does not have familiarity with \*\*\*'s usage with dyslexic students and does not have knowledge about the appropriateness or inappropriateness of using \*\*\* with a dyslexic student. The Student's mother spoke by telephone with Ms. \*\*\* around \*\*. During the call, Ms. \*\*\* explained that regardless of what program is used for a student's dyslexia instruction, the dyslexia instructional program must be used with fidelity. Ms. \*\*\* contacted the RISD \*\*\* campus principal, \*\*, after the phone call with the Student's mother regarding parental concerns about the \*\*\* program. [Tr. at 86-93, 107-108, 112-113].

#### \*\*\* – ARDC Amendment

42. At the request of the Parents and with parental consent, RISD amended previous ARDC documents from \*\*, to reflect specific areas of SLD “in the areas of basic reading and reading comprehension” on the Student's deliberation page. The Student's dyslexia services were to be provided through special education instruction for \*\*\* minutes \*\*\* during the “\*\*\*\*” \*\*\* to target both reading and writing. [R.Exs. 14 at 239 and 16 at 265].

43. There are no goals and objectives regarding the special education pull-out services for dyslexia for the \*\*\*-minute special education dyslexia services to target reading and writing. [R.Exs. 14, 15 and 16].

#### \*\*\* – ARDC Meeting

44. At parental request, the ARDC convened to review parental concerns regarding the Student's accommodations and IEP goals with the Student's mother and legal counsel, Mr. Burton, present. The Student's mother waived the five-day notice period to convene the meeting. Participants discussed accommodations, a weekly log from the special education teacher, and STAAR testing options. RISD provided PWN of decisions not to change accommodations, goals or objectives, and STAAR options until the annual ARDC meeting. The PWN detailed the ARDC decision to discontinue supplemental aids for math instruction because the Student had \*\*. All participants signed in agreement with the decisions of this meeting. [R.Ex. 13].

45. On \*\*, Petitioner's then-current counsel, Mr. Burton, communicated with RISD's counsel, Ms. Wardell, regarding areas of concern including: a) lack of baseline measurements for IEP goals and objectives; b) a request for dyslexia services five days a week and for continuance of \*\*\* services; c) a request for involvement of the \*\*\* teacher in the development of math goals, and d) taking the STAAR Alternate (“STAAR-A”) \*\*. At this same time, the

Parents received another copy of the Procedural Safeguards on \*\*\*, one of the three ARDC notices, to hold an ARDC meeting on \*\*\*. [P.Exs. 14 and 15 at 13; R.Ex. 12 at 188].

### **\*\*\* – ARDC Meeting**

46. On \*\*\*, the ARDC met for annual review of the Student’s program with the Parents and their attorney, Mr. Burton. The ARDC discussed \*\*\*, schedule of services, IEP goals and objectives, and direct services to address the Student’s dyslexia in the general education setting \*\*\* times a week. Although the ARDC previously accepted the dyslexia diagnosis in \*\*\*, the FEC diagnostician agreed to draft a new eligibility page to reflect basic reading with co-occurring dyslexia and is specifically written in the deliberations page of the ARDC meeting documents. [R.Ex. 12 at 227].

47. The Student’s mother waived five school-day written notice prior to implementing agreed services on the ARDC documents at this meeting and initialed the statement that the decisions developed at the meeting were by mutual agreement. [P.Ex. 15; R.Ex. 12 at 227-228].

48. At this meeting, the ARDC addressed the Student’s “\*\*\*\*” \*\*\*. The ARDC decided that the Student would receive dyslexia services \*\*\* times a week and \*\*\* \*\*\* a week during the “\*\*\*\*” \*\*\*, a period of \*\*\* in length as shown on the schedule of services information. As a result, the Parents and participants were aware that the dyslexia services took place during the \*\*\*. “\*\*\*\*” \*\*\*. [R.Ex. 12 at 225-227].

49. The ARDC agreed at this meeting that the Student would take the STAAR – Accommodated (“STAAR-A”) (\*\*\*) Grade) in \*\*\*. [R.Ex. 12 at 227].

### **\*\*\* – Goals and Objectives**

50. At the ARDC meeting on \*\*\*, the ARDC developed three reading goals for the Student in the general education classroom: a) decoding multi-syllable \*\*\* grade words using structural analysis cues (syllabification, prefixes, suffixes, derivations, antecedents) and syntax cues to infer meaning of new words having a learned linguistic/morpheme base (in 7 out of 10 trials); b) accurately reading grade-level text with fluency and comprehension and adjusting fluency with reading aloud grade-level text based on the reading purpose and the nature of the text (in 7 out of 10 trials); and, c) summarizing the main ideas, supporting details, and relationships among ideas in text succinctly in ways that maintain meaning and logical order (in 7 out of 10 trials). The three goals included nine objectives. [R.Ex. 12 at 207-209].

51. The Student’s math goals put into place at the ARDC meeting of \*\*\*, do not identify any special education math instruction but instead identify the need for \*\*\*, \*\*\*, \*\*\*, \*\*\*. The Student was to receive “\*\*\*\*” \*\*\*. [R.Ex. 12 at 227].

### **\*\*\* – ARDC Amendment**

52. On \*\*\*, the ARDC amended the Student’s special education secondary eligibility of “Basic Reading Skills and Reading Comprehension” by adding “Co-occurring Dyslexia” for the Student’s SLD to read: “Basic Reading Skills with Co-occurring Dyslexia and Reading

Comprehension.” The ARDC made no changes to the Student’s primary qualifying condition of OHI (ADHD) and tertiary qualifying condition of \*\*\*. [R.Ex. 1 at 1].

#### \*\*\* – ARDC Amendment

53. On \*\*\*, the ARDC amended the Student’s program to add STAAR-A remediation on \*\*\* during the \*\*\* after receiving notice that the Student did not meet standards on the first administration of the STAAR-A \*\*\* Assessment (\*\*\*) Grade) taken on \*\*\*. The response to the failure was an intensive \*\*\* instruction in \*\*\*. The documentation identified the Student’s need for improvement in three areas of \*\*\*. [R.Ex. 11; Tr. at 133-135].

54. The Parents were not involved in the change to the Student’s program for \*\*\* intensive STAAR-A remediation. The Parents’ signatures do not appear on the documents of the ARDC amendment made on \*\*\*. The \*\*\* of intensive STAAR-A services impacted \*\*\* of the Student’s “\*\*\*\*” \*\*\* on \*\*\* to deliver remedial STAAR-A instruction \*\*\*. [R.Ex. 11].

#### \*\*\* Grades<sup>3</sup>

55. During the Student’s \*\*\* grade year, the Student made the following final course grades: \*\*\*. [R.Ex. 22 at 402].

#### \*\*\* Grades

56. At the end of the first semester of \*\*\* grade, the Student had the following average grades: \*\*\*. [R.Ex. 22 at 401].

57. At the time of the due process hearing, the Student had the following grade averages:<sup>4</sup> \*\*\*. [R.Ex. 22 at 401].

#### \*\*\* – ARDC Meeting

58. On \*\*\*, a brief ARDC meeting convened with the Parents regarding grade placement, the Student’s failure to pass the STAAR-A \*\*\* Assessment (\*\*\*) Grade) in \*\*\* and \*\*\* testing, and make plans to prepare the Student for the third test administration of the assessment on \*\*\*. At this time, the Student’s eligibility was OHI, SLD in areas of reading comprehension and basic reading with co-occurring dyslexia and \*\*\*. Participants agreed that the Student would \*\*\*. During that \*\*\*, the ARDC agreed that the Student would receive \*\*\*. Upon completion of \*\*\*, \*\*\*, and upon taking the third STAAR-A \*\*\* Assessment (\*\*\*) Grade) on \*\*\*, participants agreed that the Student would be placed in \*\*\* grade for the \*\*\* school year. [P.Ex. 18 at 7, 12-15; R.Ex. 10 at 174, 180-182].

59. The ARDC added “\*\*\*\*” for the STAAR-A \*\*\* Assessment with a written request to TEA for a \*\*\*. The Parents agreed with the ARDC decisions at this ARDC meeting and waived the five school day period before implementation of ARDC changes. [P.Ex. 18 at 14-15; R.Ex. 10 at 182-183].

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<sup>3</sup> Grades are shown by \*\*\* in parentheses (example: “\*\*\*\* (\*\*\*)”).

<sup>4</sup> In the second semester of the \*\*\* school year, the Student’s \*\*\* class changed from \*\*\* into \*\*\* \*\*\* and the Student’s \*\*\* class switched from \*\*\* to \*\*\* \*\*\* to accommodate the change.

**\*\*\* – Third Administration of STAAR-A \*\*\* Assessment (\*\*\*) Grade)**

60. As agreed by the ARDC on \*\*\*, the Student took the third administration of the STAAR-A \*\*\* Assessment with IEP accommodations of \*\*\*. [Tr. at 1080-1082].

61. RISD Assistant Superintendent, \*\*\*, served as the test administrator for the STAAR-A \*\*\* Assessment (\*\*\*) Grade) on \*\*\*. The Student had an \*\*\*, in which to take the test and received \*\*\* whenever needed. Assistant Superintendent \*\*\* reviewed the test log of the \*\*\* administration on \*\*\*, and concluded that the Student hurried through the test rather than use all the time available. \*\*\* \*\*\* could not, under testing guidelines, remind the Student to slow down but did remind the Student to \*\*\*. The Student \*\*\* during the \*\*\* testing session. [R.Ex. 23; Tr. at 1071-1081].

62. The Student did not make use of all the special education accommodations and time available for the Student to take the assessment until \*\*\*. The computer log entries show that the Student completed the test in \*\*\*, answering a total of \*\*\* questions at an average rate of \*\*\* questions answered per minute. The Student frequently answered two questions within one minute. The Student also completed groups of questions rapidly after reading different passages, such as answering a group of five questions and a group of seven questions within a minute. [R.Ex. 23; Tr. at 1070-1082].

63. \*\*\* \*\*\* did not speak to a subsequent ARDC regarding the Student's performance on this administration of the STAAR-A \*\*\* Assessment (\*\*\*) Grade). Instead, \*\*\* \*\*\* shared this information with the Student's campus principal, Principal \*\*\*. [Tr. at 1082-1084].

64. The Student did not pass the STAAR-A test on the third administration in \*\*\* 2015 after receiving the \*\*\* remediation program and \*\*\*. [R.Ex. 23; Tr. at 1070-1086].

**\*\*\* – ARDC Meeting**

65. \*\*\*, FEC Director, is an educational diagnostician who never evaluated or taught the Student. The FEC Director testified during the due process hearing regarding his attendance in many of the Student's ARDC meetings. The FEC Director also worked with teachers on some implementation of \*\*\*. [Tr. at 30-32].

66. The ARDC convened at parental request on \*\*\*, to discuss the Student's placement, related aids and services, possible addition of assistive technology devices (such as “\*\*\*” or “\*\*\*”), and possible need for compensatory services. The Student's mother waived the five school day notice period to convene the meeting. The FEC Director attended this meeting as well as the Parents and Petitioner's advocate, David Beinke. No Dyslexia specialist attended this ARDC meeting. [R.Ex. 9 at 150 and 153; Tr. at 57-59].

67. ARDC participants at this meeting discussed the Student's functional reading ability. As of \*\*\*, the Student mastered \*\*\* of the nine reading short-term objectives put in place on \*\*\*: accurately reading aloud \*\*\* grade level irregular sight words, developing sight word

vocabulary, answering questions about selections previously read silently, and answering factual questions about a selection read. [R.Ex. 9 at 164-165].

68. The deliberations of this meeting reflect that dyslexia instruction would be given to the Student \*\*\*. The Parents wanted the dyslexia instruction to be expanded to a class period. At hearing, the FEC Director recalled the discussion about the length of time the dyslexia instruction would be given to the Student during this meeting and believed the duration discussed was \*\*\*. [R.Ex. 9 at 150; Tr. at 71-73].

69. At hearing, the FEC Director reviewed proposed choices for dyslexic instruction subsequently prepared by Principal \*\*\* on or about \*\*\*. FEC Director \*\*\* confirmed that there was not a similar schedule for dyslexic instruction in place before the conclusion of the ARDC meeting on \*\*\*. [R.Exs. 9 and 25; Tr. at 72-74].

70. The ARDC participants discussed the Student's struggles in \*\*\* and current grades and a suggestion of pulling the Student out of \*\*\* class for \*\*\* to get math assistance. The FEC Director suggested several options for the Student's math instruction such as \*\*\*. Emails between the Student's mother, the RISD Superintendent \*\*\*, and Principal \*\*\* confirmed that there was \*\*\* \*\*\* classroom on the Student's campus. [P.Exs. 9 at 150 and 19 at 8-9; Tr. at 60-61, 138-140,143].

71. FEC Director \*\*\* did not issue a specific PWN following this meeting regarding the amount of dyslexia services that the Student would receive as a result of this ARDC meeting, but the ARDC documentation included information about the decisions made, why the decision was made, options considered, whether or not rejected, evaluation procedures (and tests, records, reports used) as a basis for a decision, and other factors. [R.Ex. 9 at 152; Tr. at 70-71 and 76].

72. The Parents signed the ARDC documentation of this meeting but did not check agree or disagree. RISD sent notice for an ARDC meeting set for \*\*\*. The first notice issued on \*\*\*, and was given and mailed to the Parents. The second notice issued on or before \*\*\*. [R.Exs. 8 at 136-139 and 9 at 151].

#### **\*\*\* – ARDC Meeting**

73. On \*\*\*, the ARDC convened with the Parents and advocate for further discussion of a change to the Student's schedule for dyslexia instruction. \*\*\*, an FEC diagnostician and Admission, Review and Dismissal ("ARD") Facilitator, attended and wrote the deliberations of this meeting. The deliberation page specifies that the Student will receive "Dyslexia instruction \*\*\*" and also stated, "It was also discussed that a possible change to [the Student's] course schedule will be considered in order to include a period for dyslexia instruction." Deliberations also specified that scheduling options would "be made available for review." [R.Ex. 8 at 133; Tr. at 80-82].

74. The length of the "period" for Dyslexia instruction is not specified in the meeting deliberations of this meeting. At hearing, FEC Director \*\*\* that it was FEC policy to specify a

total amount of time offered in ARDC documentation and could not explain why there was an omission of that information for the Student. [Tr. at 81-83].

75. \*\*\* is the campus principal at the RISD \*\*. One week after the second ARDC meeting on \*\*, Principal \*\* sent the Parents an email regarding scheduling an \*\* for dyslexia services with four suggested options for a \*\* during the \*\*. These options would require the Student to \*\* – \*\* and did not include the \*\* “\*\*\*\*” \*\* during the \*\* as one of the options. [R.Exs 8 at 133 and 25 at 413; Tr. at 121-122 and 126-130].

76. FEC diagnostician and ARDC facilitator, Ms. \*\*, confirmed at the hearing that the ARDC documents of the second \*\* do not contain PWN and that no PWN was sent to the Parents after this meeting regarding the proposed schedule of dyslexia services. [R.Ex. 8; Tr. at 1065-1066].

77. After the \*\* ARDC meetings, the Parents never agreed to \*\* and the Student’s \*\* at specified \*\* did not change. [R.Ex. 22 at 401; Tr. at 970].

#### **Parents’ \*\* Request for \*\* Class**

78. On \*\*, the Parents requested moving the Student into a \*\* class via email to Principal \*\* and Superintendent \*\*. In a second email to Principal \*\* and Superintendent \*\* on \*\*, the Parents asked for the change of math class from Ms. \*\*’s \*\* “due to the hostile environment [the Student] is experiencing in the classroom.” The Parents requested that the change occur as soon as possible by ARDC amendment without holding an ARDC, stating their belief that there is \*\*. [P.Ex. 19 at 10-11; Tr. at 143-146].

#### **\*\* – ARDC Amendment**

79. An ARDC amendment took place to the ARDC meeting of \*\*, to change the Student’s \*\* to \*\*. The Parents signed the amendment with added comments that they agreed with the change in part “because the \*\* is a hostile environment” and specifying the Parent’s belief that the Student was not receiving a FAPE or that \*\* “will ensure FAPE.” [P.Ex. 19; R.Ex. 7].

80. Petitioner presented no evidence that the Student experienced a hostile environment in the \*\*.

#### **\*\* \*\* Evaluation**

81. On \*\*, \*\* teacher \*\* re-evaluated the Student at the request of Petitioner’s counsel, in anticipation of the due process hearing, and as a follow-up to the \*\*-Student’s \*\* \*\* program. The \*\* evaluation took place over an hour and a half to two hours on \*\*. Ms. \*\* performed informal assessment of the Student’s current reading level to be prepared to give an opinion of the Student’s current reading levels. [P.Ex. 23 and Tr. at 285-286 and 291-292].

82. Based on observation, Ms. \*\* did not see the Student exhibit any attention difficulties on this testing due to ADHD. The Student did show some difficulty with \*\*/\*\* on the \*\* and Ms. \*\* recorded what the Student \*\*. [P.Ex. 24 at 6-7; Tr. at 312-315, 318-324].

83. The \*\*\* and \*\*\* \*\*\* evaluations used the same \*\*\* instruments to assess the Student's current fluency rate and overall reading proficiency. The \*\*\* \*\*\* evaluation included informal assessment for classroom teachers, \*\*\*. Ms. \*\*\* used the \*\*\* with the Student to gauge current reading level and the Student read \*\*\*-grade reading level tasks with accuracy and ease. [P.Exs. 23 and 24; Tr. at 266-269, 275, 285-286, and 302-304].

84. During the \*\*\* \*\*\* evaluation, the Student approached reading tasks hesitantly, frequently did not take time to sound out words, and resorted to "guessing" a word rather than rather than sounding it out. On the \*\*\* \*\*\*, students' correct answers are grouped by \*\*\*: Independent Level – 24-25 correct; Instructional Level – 22-23 correct; and, Frustration Level – 21 or fewer correct. The Student made the following scores on \*\*\*: \*\*\* grade – \*\*\* / Independent Level; \*\*\* grade – \*\*\* / Frustration Level; and, \*\*\* grade – \*\*\* / Frustration Level. Ms. \*\*\* did not administer the \*\*\*-grade \*\*\* because the Student struggled significantly with \*\*\*-grade \*\*\*. [P.Exs. 23 at 2-3 and 24 at 160-161; Tr. at 302-304].

85. The \*\*\* \*\*\* results scored the Student at a High Instructional Reading Level on \*\*\*-grade and \*\*\*-grade passages but at a Low Independent Reading Level on both \*\*\*-grade and \*\*\*-grade passages. The \*\*\* testing looked at miscues by the Student to determine a range of reading levels progressing from the lowest level, Frustration Level, forward through Instructional Level, to Independent Level. The Student's comprehension was relatively high compared to reading ability at an Instructional Level on all reading passages. The Student appeared to have more "buy in" as well as some background for the \*\*\*-grade word passage. The Student may have a higher reading ability than observed in the evaluation as the Student's effort invested in a reading task varied according to the Student's interest level in the passage. [P.Exs. 23 at 3-4 and 24 at 8-15; Tr. at 275, 308-309, and 329-330].

86. Both the \*\*\* and \*\*\* \*\*\* testing used program-specific \*\*\* testing rather than norm-referenced testing of the Student and does not provide standard deviations. [Tr. at 280-282, 295-296 and 298-299].

87. The Student did not make an expected increase in \*\*\* between the \*\*\* and \*\*\* \*\*\* evaluations. The Student scored a \*\*\* accuracy rate on the \*\*\* administration of \*\*\*, falling in the Poor Range for the Student's age group. [P.Exs. 23 at 2 and 24 at 4; Tr. at 326-328].

88. \*\*\* teacher and evaluator \*\*\* recommended continued instruction for the Student through \*\*\* services \*\*\*. In Ms. \*\*\*'s opinion, the Student's levels on the second \*\*\* \*\*\* evaluation were not consistent with the amount of \*\*\* instruction instituted by the \*\*\* therapists. As a result, the Student would likely struggle during \*\*\* \*\*\* with increasing task demands, increasingly difficult reading levels, and would likely have difficulty passing the STAAR testing. The Student's two coping mechanisms of reading context clues and guessing would not be successful test-taking strategies on the STAAR testing. [Tr. at 270-277].

89. Ms. \*\*\* recommended an intensity of \*\*\* instruction of \*\*\* instruction for \*\*\* would be effective for the Student. [Tr. at 278].

90. Currently, the Student does not receive \*\*\* instruction at RISD. Instead, the Student receives reading instruction through \*\*\*, \*\*\* program that Ms. \*\*\* believes is comparable to the \*\*\* program and is effective. [Tr. 1 at 274. 334-336].

91. The \*\*\* \*\*\* evaluation did not include any input from RISD staff or any data or direct observation of the Student within RISD and Ms. \*\*\* did not provide a copy of the completed report to RISD. Ms. \*\*\* provided the completed report to Petitioner about a week after completion of the testing. [Tr. at 290-291, 314-315].

**\*\*\* – Private Assessment by Petitioner’s Diagnostician**

92. \*\*\* is a licensed diagnostician with experience primarily working with school districts, with expertise in \*\*\*. She has familiarity with other reading and computer programs including the \*\*\* method, \*\*\*, \*\*\*, and \*\*\*. Ms. \*\*\* assessed the Student on \*\*\*. She observed the Student in the \*\*\* \*\*\* classroom, a class consisting of \*\*\* students with a teacher, Ms. \*\*\*, and a teacher’s assistant. The Student was pleasant and cooperative during the evaluation session. Ms. \*\*\* observed the Student be a “good guesser” regarding phonemic decoding skills with ability to read at the \*\*\*-grade level with average intelligence. [P.Ex. 21 at 4; Tr. at 605-607].

93. Ms. \*\*\* reviewed the Student’s previous testing and administered the Woodcock-Johnson IV Tests of Achievement (WJ-IV ACH) in the areas of reading comprehension, mathematics, and written expression. The Student’s scores fell below grade level on WJ-IV ACH composites of Reading Comprehension and Math Calculation. [P.Ex. 21 at 3].

94. Ms. \*\*\* recommended daily \*\*\* instruction for the Student to improve phonemic decoding skills using strategies to improve phonemic decoding skills. In her opinion, “I think [the Student’s] weakness in being able to decode language has a significant impact on [the Student’s] comprehension.” [P.Ex. 21 at 7].

95. Ms. \*\*\* offered her opinion that the Student’s reading comprehension has actually declined since \*\*\*. The documentary evidence showed:

WIAT III/ WIAT IV: Exhibit / Evaluator/Date	Standard Score	Percentile
WIAT III *** RISD FIE	***	***
WIAT IV *** RISD FIE (***)	***	***

[P.Exs. 6 at 14 and 8 at 8; R.Exs. 2 at 39 and 5 at 88; Tr. at 648-652].

WJ-III ACH: Exhibit / Evaluator/Date	Standard Score	Percentile
WJ-III ACH *** (***)	***	***
WJ-IV ACH *** Private Dyslexia Report (***)	***	***

[P.Exs. 7 at 4 and 21 at 6; R.Ex. 3 at 61; Tr. at 648-652].

96. In Ms. \*\*\*’s opinion, the Student’s decoding and morphology skills have decreased in the last \*\*\* years. The WJ-III /WJ-IV Word Attack subtest is a standardized measure of these skills. The documentary evidence shows the following:

WJ-III / WJ-IV ACH Word Attack Subtest	Standard Score	Percentile
WJ-III ACH ***RISD FIE (***)	***	***
WJ-IV ACH *** Private Dyslexia Report (***)	***	***

[P.Exs. 8 at 8 and 21 at 2; R.Ex. 2 at 38; Tr. at 432, 617].

97. The FEC diagnostician, \*\*\* \*\*\*, reviewed Ms. \*\*\*'s report during the due process hearing. \*\*\* \*\* never taught the Student and has not observed the Student since \*\*\*. \*\*\* \*\* agreed that the Student has dyslexia and agreed that there was an obvious decrease of some of the SS values in the Student's testing as the Student is not meeting a year's worth of growth within a year's worth of time. [Tr. at 874-875].

\*\*\*

98. \*\*\* is a board-certified \*\*\* employed at FEC with \*\*\* years of experience. She did post-graduate work in \*\*\* and has extensive \*\*\* training and expertise \*\*\*. She worked in \*\*\* and also worked in schools before employment with FEC for the past \*\*\* years. [Tr. at 174-176].

99. Ms. \*\*\* began working with the Student began in \*\*\* grade. Initially, the Student's \*\*\*. During \*\*\* grade in the \*\*\* school year, the Student came to the \*\*\* willingly \*\*\* to work on \*\*\*. The Student mastered \*\*\* goals to be able to correctly \*\*\* with Ms. \*\*\* and outside the \*\*\* in \*\*\* with \*\*\* accuracy. Ms. \*\*\* recommended that the Student be discharged from \*\*\* at RISD during ARDC meetings held in \*\*\* because the Student had mastered the \*\*\* goals and because, in her opinion, the Student no longer required \*\*\*. [R.Ex. 36 at 701; Tr. at 182-186 and 194].

100. Ms. \*\*\* and the Student discussed possible discharge from \*\*\* after \*\*\* months if the Student continued to do well with \*\*\*. The Student has worked hard in \*\*\* and is currently successful. At the beginning of the \*\*\* \*\* grade year in \*\*\*, Ms. \*\*\* worked on carryover from the previous year with the Student. \*\*\* sessions occurred at a regularly-scheduled time of \*\*\* during “\*\*\*” \*\*\*. When there was a conflict, Ms. \*\*\* was available for \*\*\* services on \*\*\*. The Student mastered the \*\*\*, \*\*\*. At the beginning of the \*\*\* school year, the Student willingly went to \*\*\* with Ms. \*\*\* but began to decline \*\*\* as the year progressed. The Student expressed other reasons for why the Student could not attend \*\*\*, such as “saying that [the Student] has dyslexia, testing, or needs homework help.” When the Student declined \*\*\*, Ms. \*\*\* required the Student to “\*\*\*\* which [the Student] does and they are always 100% correct. Ms. \*\*\* believes that [The Student] no longer requires \*\*\*.” [R.Ex. 36 at 701; Tr. at 192-194 and 224].

101. Based on past verbal information from Ms. \*\*\*, the teacher providing dyslexic services, Ms. \*\*\* understood that the Student received dyslexic services during “\*\*\*\*” \*\*\* on the \*\*\* the Student did not have \*\*\* during the \*\*\*\*\* school year. [Tr. at 225-227].

102. Ms. \*\*\* uses informal evaluation when making a recommendation to “exit” a student with \*\*\* \*\*\* from \*\*\* when \*\*\* goals have been mastered and no \*\*\* \*\*\* occur. She also gathers information from a student's teachers to ensure that \*\*\* is correctly used. She talks with

other individuals in the life of a particular student to check \*\*\* and this is routinely done in the context of an ARDC meeting. [Tr. at 214-216].

103. Ms. \*\*\*'s \*\*\* notes detail the Student's \*\*\* and absences from \*\*\*. At times when she went to get the Student for \*\*\*, the Student was not in the assigned classroom, Ms. \*\*\* marked the Student absent for \*\*\*. An absence in the \*\*\* notes did not mean that the Student was absent from school. Instead, \*\*\* absences reflect that the Student was not present in the classroom when Ms. \*\*\* went to get the Student for \*\*\*. On one occasion, Ms. \*\*\* found the Student \*\*\*\*\*. [R.Ex. 36; Tr. at 205-207].

#### **\*\*\* – ARDC Meeting**

104. The ARDC convened for a meeting on \*\*\*, for the annual review ARDC meeting to discuss the Student's program with the Parents and the Parents' two attorneys, Sonja Kerr and Nora Cuddy. The notice documents of this meeting included a copy of the Procedural Safeguards. [R.Ex. 6].

105. Ms. \*\*\*, FEC \*\*\*, participated in the meeting by telephone as she was out of town due to a family need. Ms. \*\*\* proposed dismissal of the Student from \*\*\* during this meeting, but could not recall whether or not she had given her \*\*\* notes to the ARDC administrator, Ms. \*\*\*, before she left town. [Tr. at 208-212]

106. At the \*\*\* ARDC meeting, the Parents' attorneys asked for earlier re-evaluation of the Student than the deadline for a three-year evaluation during this meeting. No dyslexia specialist attended this meeting. New expedited testing would include areas of achievement, \*\*\*, and OHI. A dyslexia specialist would be part of the re-evaluation assessment team. The ARDC extended the Student's \*\*\*. Petitioner's attorneys suggested a reduction in the \*\*\* for the Student's \*\*\* participation. Participants agreed to reconvene on \*\*\*, to consider new data and develop the Student's IEP. [R.Ex. 6; Tr. at 54].

107. ARDC documents from this meeting include PWN of the ARDC decisions made at the meeting and continued the Student's current eligibility areas including \*\*\*. The documents from the \*\*\* ARDC do not show that the Parents provided consent for the extra testing. The FEC diagnostician, \*\*\* \*\*\*, confirmed that the Parents did not consent to the extra evaluation at the meeting. [R.Ex. 6; Tr. at 842-845].

108. The Student's testing accommodations documented in ARDC documents for the \*\*\* and the \*\*\* school years included \*\*\*. In \*\*\*. [R.Ex. 9 at 145, 13 at 231, 15 at 255, and 16 at 263].

#### **Respondent's Consultant**

109. Respondent contacted and hired \*\*\* as a litigation consultant around \*\*\*. Before retirement in 2013, Ms. \*\*\* served as an Education Specialist and the Education Service Center Region 12 and has experience as a classroom teacher and as a reading specialist in public

schools. Ms. \*\*\*'s area of expertise is in reading programs and the components of reading programs. [Tr. at 389-393, 411].

110. Ms. \*\*\* reviewed the Student's \*\*\* and \*\*\* FIEs, the \*\*\* report, the \*\*\* testing by Ms. \*\*\*, the \*\*\* and \*\*\* dyslexia testing by Ms. \*\*\*, and the \*\*\* evaluation by Ms. \*\*\*. She did not review the Student's IEPs to determine whether or not the Student progressed under the RISD program for the Student. Ms. \*\*\* did not evaluate the Student and never met the Student until the first day of the due process hearing. [Tr. at 389-393, 415, 489].

111. Ms. \*\*\* testified at the due process hearing, credibly, and explained that PWN should be given to parents when there is a change in a program whether it is a proposal or a refusal. Ms. \*\*\* could not recall seeing a PWN for the amount of time for the Student's dyslexia services. If there is a proposed increase or reduction in the amount of time of dyslexia service minutes for a disabled student's program, Ms. \*\*\* agreed that PWN would be necessary. [Tr. at 406-407].

112. Ms. \*\*\* explained the importance of having a baseline of the Student's decoding skills. Standardized testing of areas of decoding – word attack and word reading – would provide a measurement of skills. To create an IEP goal and objectives for decoding, including morphology skills, some type of phonics screener or some type of objective measure would need to be used to track a baseline and progress on the decoding and morphology skills. Ms. \*\*\* recommended both formal and informal testing on the Student's ability to read words in isolation and well as reading connected text. [Tr. at 421-425, 429-430].

113. The \*\*\* ARDC meeting deliberations state that the Student did not show a need for \*\*\* services through special education. At hearing, however, FEC Director \*\*\* did not recall that any RISD personnel making that statement during the ARDC meeting. [R.Ex. 6 at 107; Tr. at 45].

114. Participants in the \*\*\* ARDC agreed to recess the meeting and gather additional information and testing in areas of achievement and \*\*\*. The assessment team would include a Dyslexia specialist. There was no Dyslexia specialist in attendance at this meeting. As the Parents had requested the presence of a Dyslexia specialist, RISD and FEC participants agreed to have such a specialist when the meeting reconvened. The Parents received an OHI form to be filled out by the Student's physician at this meeting. [R.Ex. 6 at 107; Tr. at 45-48 and 53-54].

115. RISD never issued a PWN regarding the removal of \*\*\* from the Student's IEP or a PWN rejecting the Parents' request for \*\*\* that focus on \*\*\* skills instead of \*\*\*. [Tr. at 214, 222-223].

116. The Parents actively participated in the Student's ARDC meetings with one or both Parents attending each meeting.

117. The Student's special education teachers from the \*\*\* and the \*\*\* school years did not testify at the due process hearing. There are no progress notes documenting details of the Student's dyslexia services from these teachers.

118. The Student has friends at school, participates in and/or enjoys \*\*\*, \*\*\*, and \*\*\*, and particularly enjoys \*\*\* activities such as \*\*\*, and enjoys \*\*\*. Described as a polite and well-mannered student by educators, the Student enjoys \*\*\*, \*\*\* and \*\*\*. \*\*\*\*\*. [R.Ex. 12 at 202-205; Tr. at 201].

119. Petitioner did not present evidence that the Student's reading program, \*\*\*, is inappropriate. By contrast, Petitioner's reading expert, Ms. \*\*\*, testified that \*\*\* is a very good program. [Tr. 605].

120. The Student's IEPs measure progress as passing (\*\*\*) or (\*\*\*) certain reading goals. The ARDC documentation from the \*\*\* (\*\*\*) Grade) and \*\*\* (\*\*\*) Grade) school years reflect multiple accommodations for the Student's general education classroom for testing and homework, including up to two days to turn in homework. As a result, the Student's grades are not reflective of the Student's ability to read on grade level. [R.Exs. 9 at 145, 13 at 231, 15 at 255, and 16 at 263].

## DISCUSSION

### Statute of Limitations

Under the IDEA, a parent may file a due process complaint regarding matters relating to the identification, evaluation, or educational placement of a student with a disability or the provision of a FAPE to the student within two years from the date the parent knew or should have known about the alleged action that forms the basis of the complaint.<sup>5</sup>

A state may have an explicit time limitation for requesting a due process hearing under IDEA, and if so, the state's timeline applies.<sup>6</sup> Texas has an explicit statute of limitations rule that parent or public education agency must request a hearing within one year of the date the complainant knew or should have known about the alleged action that serves as the basis for the request.<sup>7</sup> Petitioner filed the request for a due process hearing on November 30, 2015.<sup>8</sup> Petitioner's complaint references events occurring as far back as \*\*\*.<sup>9</sup> Respondent invoked the one-year statute of limitation applicable to Texas in its Answer to Petitioner's Request for Special Education Due Process Hearing and Required Notice and established that it applied to the issues in this case.<sup>10</sup>

During the due process hearing, Petitioner alleged that Respondent abandoned its affirmative defense of a one-year statute of limitations period by including some documentation before the applicable one-year limitation period. As a result, Petitioner alleged that Respondent's actions "opened the door" by the submission of documents that exceed the one-year period.<sup>11</sup> After review of this record and the arguments of counsel, I do not find that the admission of background information documents in this record waived Respondent's affirmative defense of the Texas one-year statute of limitations period. Instead, the documents admitted into this record that pre-date

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<sup>5</sup> 20 U.S.C. § 1415 (b)(6)(f)(3)(C); 34 C.F.R. §§ 300.503 (a)(1)(2); 300.507 (a)(1)(2).

<sup>6</sup> 20 U.S.C. § 1415 (f)(3)(C); 34 C.F.R. § 300.507(a)(2).

<sup>7</sup> 19 Tex. Admin. Code § 89.1151(c).

<sup>8</sup> See Pleading File, Due Process Complaint at 1.

<sup>9</sup> See, e.g., Petitioner's Request for a Special Education Due Process Hearing, at 7-8,11.

<sup>10</sup> See Respondent's Answer to Petitioner's Request for Special Education Due Process Hearing and Required Answer, at 2.

<sup>11</sup> Petitioner objected to R.Ex. 1 at 1 (\*\*\* ARDC amendment), R.Ex. 3 at 7 (also admitted as P. Ex. 7), and R.Ex. 36 (2013-2016 \*\*\* notes).

November 30, 2014, include the Student’s school and private testing results as well as IEP development and progress that form the basis for the Student’s program in place as of November 30, 2014.

### **Exceptions to the One-year Statute of Limitations Rule**

The one-year statute of limitations rule will not apply for a special education dispute if the parent was prevented from requesting due process hearing due to either specific misrepresentations by the school district that it had resolved the problem that forms the basis of the due process hearing request; or, if the school district withheld information from the parent that it was required to provide under IDEA.<sup>12</sup> Petitioner bears the burden of proof to show that an exception to the statute of limitations period exists sufficient to extend the limitations period further than one year as set forth by the IDEA and Texas law.<sup>13</sup>

In this dispute, Petitioner alleges that the District withheld procedural information from the Parents in the form of both The Notice of Procedural Safeguards and Prior Written Notice (“PWN”), discussed below.

#### **A. Notice of Procedural Safeguards**

The IDEA and its implementing regulations require that school district develop the educational program of a student with a disability in a procedurally compliant manner.<sup>14</sup> When a school district delivers a copy of the Notice of Procedural Safeguards to a parent, the statute of limitations period begins for IDEA violations regardless of whether the parent later examines the

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<sup>12</sup> 20 U.S.C. § 1415 (f)(3)(D); 34 C.F.R. § 300.511 (f)(1)(2).

<sup>13</sup> See *G.I. v. Lewisville Indep. Sch. Dist.*, 2013 WL 4523581 at \*8 (E.D. Tex. Aug. 23, 2013); *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540, 46706 (Aug. 14, 2006) (party complaining about application of limitations period would need to ask the hearing officer for determination on whether an untimely due process complaint can proceed to hearing based on misrepresentations by an local education agency; the hearing officer would then determine whether the party’s allegation constitutes an exception to the applicable timeline). See also *Student v. Hardin-Jefferson Indep. Sch. Dist.*, Dkt No. 200-SE-0315 at 14 (TX SEA July 31, 2015) (holding complaining party had to establish that school district knew it was not providing the student with an appropriate education and intentionally misled student’s parent into believing otherwise).

<sup>14</sup> *Richardson ISD v. Michael Z.*, 580 F.3d 286, 293 (5th Cir. 2009); *Jackson v. Franklin County School Bd.*, 806 F.2d 623, 629 (5th Cir. 1986); *D.B. v. Gloucester Twp. Sch. Dist.*, 489 Fed. Appx. 564, 567 (3d Cir. July 19, 2012).

text to acquire actual knowledge of procedural rights.<sup>15</sup> Delivering the notice is sufficient to impute constructive knowledge of parental rights under IDEA<sup>16</sup> The record before me established that the Parents received at least eight copies of the Notice of Procedural Safeguards between \*\*\* and \*\*\*.

### **B. Prior Written Notice (“PWN”)**

School districts must also give PWN to parents at critical junctures before a school district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.<sup>17</sup> A separate form for PWN is not required and an IEP may suffice for PWN as long as the document meets. The Department of Education’s guidance on PWN states, “There is nothing in the Act or these regulations that would prohibit a public agency from using the IEP as part of the prior written notice as long as the document(s) the parent receives meet all of the requirements in 300.503.”<sup>18</sup>

Even assuming, *arguendo*, that any procedural deficits of PWN or the like occurred *prior to* November 30, 2014, the record in this dispute shows that the Parents have had able assistance from an advocate and three different attorneys during the period from \*\*\* forward. The record evidence in this dispute does not support a finding that the Parents were prevented from requesting a due process hearing prior to November 2015.

### **Accrual of Petitioner’s Claims**

Therefore, for the foregoing reasons, I determine that the one-year statute of limitations period applies in this case. The statutory limitations period runs forward from November 30, 2014.

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<sup>15</sup> See, *Student v. Hardin-Jefferson Indep. Sch. Dist.*, Dkt No. 200-SE-0315 (TX SEA July 31, 2015) (citing *El Paso Ind. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 945 (D.C. Tex. 2008), aff’d in part and vacated on other grounds 591 F. 3d 417 (5th Cir. 2009); *C.P. v. Krum Ind. Sch. Dist.*, 2014 WL 4651534 (E.D. Tex. 2014)(one-year SOL applied to limit IDEA claims where school district gave parents copies of procedural safeguards on numerous occasions).

<sup>16</sup> *Id.* at 13.

<sup>17</sup> 34 C.F.R. § 300.503.

<sup>18</sup> 71 Fed. Reg. 466691; See also *Letter to Lieberman*, 52 IDELR 18 (OSEP 2008).

**Applicable Law: Free Appropriate Public Education (“FAPE”)**

The primary purpose of IDEA is to ensure that a student with a disability has access to a free and appropriate public education that ensures the student’s unique needs are met with a program of special education and related services to prepare the student for future education, employment, and independent living.<sup>19</sup> A disabled student is guaranteed a “basic floor of opportunity” under IDEA that includes specialized instruction and related services that are individually designed to provide the student with an educational benefit.<sup>20</sup>

The U.S. Supreme Court established a two-part test for determining whether a school district provided a FAPE to a student under IDEA: 1) did the school district comply with IDEA’s procedures; and, 2) was the IEP reasonably calculated to confer educational benefit to the student.<sup>21</sup>

A school district’s educational program is presumed appropriate and the party challenging a school district’s eligibility determination or offer of services under the IDEA bears the burden to prove that the child has been denied FAPE.<sup>22</sup>

A hearing officer must make a determination that a student did not receive a FAPE based on substantive grounds.<sup>23</sup> In matters alleging procedural violations, an impartial hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child’s right to FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the parent’s child, or caused a deprivation of educational benefit.<sup>24</sup>

In addition to the Notice of Procedural Rights and PWN discussed above, Petitioner raised numerous procedural inadequacies within the District’s program in addition to substantive

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<sup>19</sup> 20 U.S.C.S. § 1400(d)(1)(A); 34 C.F.R. § 300.1.

<sup>20</sup> *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189 (1982).

<sup>21</sup> *Rowley*, 458 U.S. at 176.

<sup>22</sup> *Schaffer v. Weast*, 126 U. S. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff’d on other grounds sub nom., Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).

<sup>23</sup> 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(1).

<sup>24</sup> 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

inadequacies. On the whole of the record before me, I conclude that there are both procedural and substantive inadequacies within the Student’s program.

## **I. Dyslexia Instruction**

### **A. \*\*\* School Year**

**Eligibility Areas** At all times pertinent to the statutory limitations period in this dispute, the Student was identified as a student with three areas of eligibility of OHI (ADHD), SLD, and \*\*\*. The Student’s SLD identification as “Basic Reading and Reading Comprehension” (in place since \*\*\*) changed within the first twelve weeks of the pertinent time limitations period in this dispute. This change was a direct response to the Parents’ request at an ARDC meeting on \*\*\*. Eligibility changed to “Basic Reading Skills with Co-occurring Dyslexia and Reading Comprehension.” Changing the wording of the SLD eligibility areas of need, however, did not correct problems in the Student’s program to provide the Student with uniquely designed dyslexia instruction tailored to the Student’s specific needs in an ongoing program.

**Amount and Location of Services** The Student’s special education dyslexia instruction specified for the \*\*\* school year included \*\*\* instruction with a special education teacher to address areas of reading and writing, the amount of services in place for the Student at the beginning of the statutory period.<sup>25</sup> There is no schedule of service page in ARDC documents to specify when and where the designated special education instruction would occur up to \*\*\*. No special education teacher of the Student in either \*\*\* or \*\*\* testified at the due process hearing. While other witnesses gave their belief as to when the instruction took place, the testimony conflicted as to whether the instruction took place \*\*\* during the “\*\*\*\*” \*\*\*, a \*\*\* lasting \*\*\*, or at another time. It was also unclear as to whether \*\*\* interrupted the \*\*\* delivery on \*\*\*. Certainly if the instruction occurred during the \*\*\* “\*\*\*\*” \*\*\*, the Student did not receive an entire designated amount of \*\*\* of instruction in a \*\*\*.

**No Goals and Objectives for Dyslexia Special Education Services** There are no special education goals and objectives regarding this specialized instruction in the record before

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<sup>25</sup> P.Ex. 10 at 24; R.Ex. 16 at 265; Tr. at 264-265.

me for the Student's special education dyslexia instruction for *any* period forward from November 30, 2014. As a result, there is no way to know what goals, baselines, mastery levels, and progress the Student made during these sessions. The guidelines for dyslexia instruction issued by TEA in *The Dyslexia Handbook* specify that the IEP should include goals that reflect a student's need for dyslexia instruction and should determine the least restrictive environment for delivering the dyslexia instruction.<sup>26</sup> Without any such special education goals, it is impossible to know how the special education teacher addressed the Student's instructional needs and what progress, if any, that the Student made with the special education goals.

**Program Information** The evidence in this dispute established that there was some special education instruction that did occur with the Student's special education teacher using \*\*\*, \*\*\* program. Yet, there is not sufficient information about which program was used, exactly what training was necessary to implement the program, whether the special education teacher had the necessary training required for the specific program, and whether it was used with the fidelity necessary to deliver a meaningful program of dyslexia instruction specifically tailored to the Student.

**Location and Amount of Instruction** The \*\*\* ARDC amendment changed the Student's instruction without consent of the Parents to give the Student instruction in STAAR-A remedial instruction \*\*\* during "\*\*\*\*." This was a procedural error that had the substantive impact of changing the amount of special education instruction by \*\*\* for three weeks, or a total of \*\*\*.

#### **B. \*\*\* School Year**

In \*\*\*, the ARDC met twice. In the first meeting, the ARDC discussed the Parents' request for a \*\*\* of dyslexia instruction as well as math class options. The second meeting included discussion of the request, but ended with the Parents' signatures but without specifying agreement or disagreement. The District supplied possible \*\*\* to the Parents approximately one week later. Ultimately the District sent no PWN regarding the proposed dyslexia services for

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<sup>26</sup> *The Dyslexia Handbook – Revised 2014: Procedures Concerning Dyslexia and Related Disorders*, Texas Education Agency at 23; P.Ex. 11 at 29.

\*\*\*. I find that this procedural error reflects the District’s failure to look more specifically at the Student’s individualized needs at this point in time.

In \*\*\*, because of the Student’s repeated failure to pass state assessment, the District provided \*\*\* to address the Student’s inability to pass the STAAR-A \*\*\* Assessment (\*\*\*) Grade) that included \*\*\* \*\*\* of direct instruction in \*\*\*. Even with this instruction, the Student was not able to pass the assessment and this instruction did not supply a FAPE to the Student. The TEA publication on dyslexia describes the impact of dyslexia on a Student with multiple disabling conditions and cautions that such students may exhibit symptoms of anxiety, anger, depression, lack of motivation, or low self-esteem that may lower a student’s motivation and engagement in learning.<sup>27</sup> In fact, the evidence showed that that the Student took the third administration of the assessment in only \*\*\* rather than using all accommodations available to the Student for \*\*\* and \*\*\*, likely using “guessing” as an ineffective test-taking strategy.

I conclude on the record before me that the Student needed, but did not receive, additional special education dyslexia programming to target *all areas of instruction* in \*\*\* and the program of \*\*\* services provided failed to deliver a FAPE for the Student. The delivery of IEP accommodations to the Student does not make up for the failure to deliver sufficient instructional services to for the Student’s for dyslexia.

The Student’s passing grades over the years do not convince me that the Student was still “making progress” under the District’s program due to the accommodations in place that effectively reduced the requirements for the passing grades in the general education program. General education grades and yearly advancement are not adequate measures of academic progress where grades are the result of modifications.<sup>28</sup> This is particularly applicable to the Student because the \*\*\* \*\*\* avoided the Student’s \*\*\* \*\*\* grade.

Petitioner’s recent assessment data prepared for this litigation found that there is a widening gap instead of a closing gap between the Student’s previous standard scores and current scores between \*\*\* and \*\*\*, demonstrating that the Student is decreasing rather than increasing gains under Respondent’s program for the Student’s dyslexia in reading morphology, comprehension, and phonemic decoding skills. With this widening gap, the Student’s inability

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<sup>27</sup> *Id.* at 9; P.Ex. 11 at 14.

<sup>28</sup> *See e.g., Houston v. VP. Juan P.* 582 F.3d 576 (5th Cir. 2009).

to engage in prolonged assessment for the third time is a good indication that the Student needs additional – and more specifically tailored – dyslexia instruction.

## II. \*\*\*

The evidence before me established that the Student has made great strides in \*\*\* goals addressing \*\*\* under the District’s program for both \*\*\* and \*\*\* school years. As of the due process hearing, the District had not acted on Ms. \*\*\*’s suggestion that the Student be exited from \*\*\* \*\*\* during the ARDC meeting of \*\*\*. I do not find any substantive flaw with the Student’s \*\*\* program, however the Student began to refuse to go to \*\*\* during the \*\*\* school year. The record is silent on whether this information was communicated to the Parents and if not, if the Parents could learn about the absences without information from the \*\*\*. There is also some indication that the Student may require \*\*\* to address areas of weakness other than \*\*\*.

## III. Denial of FAPE due to Bullying, Harassment, Discrimination, and/or Retaliation

Petitioner made allegation that a “hostile environment” led to the Parents’ decision to change the Student’s \*\*\* class to a \*\*\* class. The Parents did not agree that the change would provide a FAPE to the Student.<sup>29</sup> Petitioner offered no credible evidence on this claim or how such a claim resulted in a denial of a FAPE.

## IV. Child Find

Petitioner argues a “Child Find” violation of the District to have identified the Student earlier as a student with dyslexia.<sup>30</sup> However, the evidence before me established that the District fulfilled its obligation to locate, evaluate, and identify Petitioner as a student in need of special education services as early as \*\*\*. The District evaluated the Student in \*\*\* and \*\*\* in all areas of suspected disability. The Student has received special education services to address OHI (ADHD), SLD in Basic Reading and Reading Comprehension, and \*\*\* since before \*\*\*.

I do not find that the District failed its obligation to identify the Student eligible for special education during the pertinent period. Petitioner remains eligible for special education as

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<sup>29</sup> P.Ex. 19; R.Ex. 7.

<sup>30</sup> 34 C.F.R. § 300.111(c)(1).

a student with OHI(ADHD), Specific Learning Disability – Basic Reading and Reading Comprehension, and \*\*\*, since \*\*\*, almost a \*\*\* before this due process hearing. Prior assessment determined the Student to be eligible as SLD with assessment data demonstrating a lack of expected achievement for a student’s age and grade in one or areas of oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, mathematics calculation, or mathematics problem solving.<sup>31</sup>

While I do not find that the District failed to identify the Student as SLD, the District for the reasons previously discussed, has not developed a more intensive program of dyslexia services for the Student prior to \*\*\* during this pending litigation. There is indication in the record that the Student’s \*\*\* need additional evaluation as the Student struggled and ultimately failed in \*\*\* in \*\*\*. In development of the Student’s prospective program in \*\*\*, the parties gathered additional information and made plans to reconvene after the conclusion of the in-person due process hearing.

It is not sufficient to merely have a diagnosis of dyslexia to determine the existence of a SLD. Dyslexia is akin to a learning disability in Basic Reading.<sup>32</sup> Texas eligibility criteria for a Specific Learning Disability require deficits in one of these areas listed above. Petitioner offered no credible evidence that the District failed in its child find obligation.

#### **V. Failure to Provide a FAPE**

The Fifth Circuit established criteria for consideration as indicators of whether an educational program is reasonably calculated to provide meaningful benefit:

- The program is individualized on the basis of the student’s assessment and performance;
- The program is administered in the LRE;
- The services are provided in a coordinated and collaborative manner by the key stakeholders; and,
- Positive academic and non-academic benefits are demonstrated.<sup>33</sup>

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<sup>31</sup> 19 Tex. Admin. Code § 89.1040(b)(9)(ii).

<sup>32</sup> Tr. at 496-497, 588-589.

<sup>33</sup> *Michael F.*, 118 F.3d at 247-249.

These four factors must be applied in any specific way.<sup>34</sup> Instead, the four factors serve as indicators of the appropriateness of an educational program and are intended to guide a court in a fact-intensive inquiry in the evaluation of whether an educational program conferred an educational benefit.<sup>35</sup>

#### A. Individualized Program

Petitioner met the Student's burden of proof in establishing that the program developed for Student was not appropriately individualized on the basis of the Student's assessment and performance. The evidence indicates that the Student had specific needs in the area of dyslexia instruction. The program developed by the District did not include goals and objectives related to the special education dyslexia instruction.<sup>36</sup> Although the Student did have general reading goals that included decoding skills and reading with fluency and comprehension, but they were not sufficient to ensure that the Student's dyslexia needs are identified in the *Texas Dyslexia Handbook* were being met.<sup>37</sup>

Credible testimony from Petitioner's experts indicates that the Student needs instruction \*\*\* in \*\*\* instruction with specific goals to target areas such as phonemic decoding.<sup>38</sup> There was no testimony from Student's special education teacher to indicate specifically what kind of program the Student received for dyslexia and reading instruction, and documentation from the Student's IEP is inadequate to provide sufficient information regarding the services provided or the duration of those services. The implementation of remediation services for STAAR-A testing \*\*\* interrupted Student's scheduled dyslexia services.<sup>39</sup> Additionally, the IEP developed at the \*\*\* ARDC meeting does not indicate the length of the dyslexia instruction.<sup>40</sup>

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<sup>34</sup> *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

<sup>35</sup> *Id.*

<sup>36</sup> R. Ex. 14, 15, and 16.

<sup>37</sup> R. Ex. 12 at 207-209.

<sup>38</sup> Tr. at 278; P. Ex. 21 at 7.

<sup>39</sup> R.11.

<sup>40</sup> R. Ex. 8 at 133; Tr. At 80-82.

**B. Academic and Non-Academic Benefits**

The Student did not receive academic benefits in the area of reading instruction that were sufficient for the provision of a FAPE during the relevant time period. Assessment data indicated a decrease in the Student's testing scores indicating the Student is not meeting a year's worth of growth within a year's worth of time in reading instruction.<sup>41</sup> The Student has not passed state assessments or benchmark assessments within the relevant time. The Student has maintained passing grades in all classes, but the evidence indicates that the Student is not making progress commensurate with intellectual ability.

The Student did make progress in the area of \*\*\* in the area of \*\*\*. However, there may be a need for \*\*\* in areas beyond the area of \*\*\*, such as \*\*\*.

Petitioner did not meet Petitioner's burden to show that the Student was denied non-academic benefits. The evidence indicates that the Student has friends, participates in \*\*\*, and is not a behavioral concern. Petitioner did not provide evidence sufficient to establish that any claims of bullying or harassment rose to the level of a denial of a FAPE.

**C. LRE for Program Implementation**

Based on the evidence in this record, I find that Petitioner met the burden to prove that the District's program failed as the LRE for the Student. The Student requires specialized, systematic dyslexia instruction – implemented with fidelity – in order to make educational progress. Although the Student received all services in the general education environment, with the exception of a recent change to math \*\*\* class made at the request of the Parents, the evidence indicates that the Student requires more intensive instruction in the area of dyslexia than what can be offered in the general education “\*\*\*” \*\*\*.

**D. Coordination and Collaboration of Key Stakeholders**

The record before me of testimony and exhibits supports indicates a collaborative process with the Parents. At all times during the Student's education at the District, the Parents have been full and active participants in meetings, and their input has been

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<sup>41</sup> Tr. At 874-875.

appropriately considered in the development of Student's program, although the program itself was inadequate to provide FAPE. The Parents' written concerns have also been considered by District staff working with the Student at this small school district.

After the school district officials and parents agree to an IEP, the school district must put the IEP into effect.<sup>42</sup> Failure to implement a material or significant portion of the IEP can amount to a denial of FAPE, but the party challenging the IEP implementation must show that the failure to implement was more than a *de minimis* failure to implement all IEP elements. Instead, the challenging party must show that the school board or other authorities failed to implement substantial or significant provisions of the IEP.<sup>43</sup> In the matter before me, the District failed to both provide a program reasonably calculated for the provision of FAPE, and failed to implement the program in place. The Student's dyslexia instruction \*\*\*\*\* school year was interrupted for the provision of STAAR-A remediation services. There is no indication in the IEP paperwork from the \*\*\* ARDC meeting indicating the duration of dyslexia services, though the FEC director indicated he believed it was \*\*\*.<sup>44</sup> Although the principal later offered to expand dyslexia instruction to \*\*\* via email to the parents, this program was never agreed to through the ARD process and the Student's schedule was never changed. Even had the IEP been appropriately implemented, assessment data indicates that a more intensive program for dyslexia services is required for the Student to receive meaningful educational benefit.

## VI. Appropriate Relief

Because of the denial of a FAPE to the Student, I find that the following relief is appropriate for this Student for the 2016-2017 school year unless otherwise specified herein:

- For the 2016-2017 school year, and thereafter as deemed appropriate by the ADRC, RISD should provide the Student with a specially-designed program of direct instruction in a linguistics-based \*\*\* program that meets all requirements of Texas Education Agency's publication, *The Dyslexia Handbook – Revised 2014*.

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<sup>42</sup> 20 U.S.C.S. § 1414(d)(2)(A); 34 C.F.R. § 300.323; *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012).

<sup>43</sup> *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000). *See also Corpus Christi Indep. Sch. Dist. v. C.C.*, 59 IDELR 42 (S.D. Tex. 2012).

<sup>44</sup> R. Ex. 9 at 150; Tr. At 71-73.

- The Student’s program should be a daily program of \*\*\* duration, \*\*\* days a week, in an 1:1 setting to address the Student’s specific need for Reading Decoding and Morphology and Writing Skills;
- RISD should obtain the services of a dyslexia specialist to oversee the specific \*\*\* program selected for the Student’s specially-designed direct instruction for Reading Decoding and Morphology and Writing Skills. The dyslexia specialist must meet all requirements for qualifications set out in the selected \*\*\* program;
- A dyslexia specialist should oversee the writing and finalization of appropriate goals and objectives for the Student’s specially-designed direct instruction for the areas of Reading Decoding and Morphology and Writing Skills. Goals and objectives should include baselines and a measurement process;
- RISD should have a dyslexia specialist attend and participate in the Student’s ARDC meetings and as appropriate, as part of assessment teams;
- If the parties have not pursued additional \*\*\* evaluation of the Student since \*\*\*, to address specific \*\*\* needs of the Student regarding decoding and morphology, then RISD should assess the Student’s \*\*\* needs for decoding and morphology during \*\*\*;
- RISD should have a dyslexia specialist review any additional assessment performed since the ARDC meeting of \*\*\*, and present to the ARDC recommendations for (a) any needed assessment in the area of decoding and morphology and math calculation; and, (b) any identified need for direct instruction in math calculation and calculator usage in the area of math;
- If a dyslexia specialist identifies a need for additional \*\*\* assessment in the area of decoding and morphology and math calculation, then RISD should convene an ARDC meeting to make plans to perform the additional recommended assessment, to be completed during \*\*\*;
- Any additional assessment in \*\*\* or math undertaken by the ARDC during \*\*\*, if any, should be completed as soon as possible. An ARDC meeting should take place prior to or at the beginning of the 2016-2017 school year to review completed assessment data.

## VII. Compensatory Education

Petitioner seeks prospective and compensatory relief in this dispute. The IDEA allows compensatory relief as an equitable form of relief to remedy substantive violations.<sup>45</sup> A hearing officer has authority to grant all relief deemed necessary, including compensatory education, to ensure that a student with a disability receives the requisite educational benefit denied by a school district's failure to comply with the IDEA.<sup>46</sup> The determination of what compensatory relief is appropriate requires a fact inquiry into the extent of the denial as well as what services are required to provide an appropriate education because of that denial. Compensatory educational relief requires a school district to pay for services that the prospectively to compensate a student for a deficient educational program provided in the past.<sup>47</sup>

In awarding compensatory relief, a hearing officer may consider factors including the complexity of the student's difficulties.<sup>48</sup> A *per se* award of compensatory service may not always be appropriate but such an award may be appropriate depending on the facts of the case. In this case, the special education services actually provided to the Student did not have goals and objectives yet there is incomplete information as to what hours were, in fact, actually delivered as there are no goals and objectives for the instruction.

As previously stated, the Student needs specially designed instruction in \*\*\* program and to ensure that the Student receives lost hours of special education dyslexia programming that should have been received. I calculate the hours the Student should have received as follows:<sup>49</sup>

\*\*\* to end of \*\*\*:

- \*\*\* hours missed between \*\*\* to \*\*\*
- \*\*\* hours lost in \*\*\* due to \*\*\*
- \*\*\*hours for lost instruction (\*\*\*, forward) of \*\*\* weeks \*\*\* session of dyslexia instruction (missed for \*\*\* instruction on \*\*\*) (\*\*\*) minutes)
- Total: \*\*\*

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<sup>45</sup> *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985).

<sup>46</sup> *Letter to Kohn*, 17 IDELR 522 (OSERS 1991).

<sup>47</sup> *See, e.g., Meiner v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986); *G.ex Rel RG v. Fort Bragg Dependent Schools*, 343 F. 3d 295 (4th Cir. 2003).

<sup>48</sup> *Reid ex rel Reid v. District of Columbia*, 401 F. 3d 516, 523-524 (D.C. Cir. 2005).

<sup>49</sup> There is no school calendar in evidence for \*\*\* or \*\*\* school years at RISD. These calculations are estimates based on the totality of the facts and taking into consideration the holiday break and applicable statutory period in this dispute.

\*\*\*:

- District provided \*\*\* hours special education dyslexia instruction during \*\*\* hours of instruction, or \*\*\* hours of missed special education dyslexia instruction that should have been provided
- The \*\*\* duration of \*\*\* weeks should have been doubled to \*\*\* weeks to ensure receipt of total amount of special education services at this point due to missed instruction in the previous school year period (\*\*\* hours missing services + another \*\*\* hours of services to double program), difficulty passing \*\*\* grade, and assessment test-taking skills
- Total: \*\*\* hours

\*\*\* School Year:

- Services should have provided \*\*\* (\*\*\* minutes) of dyslexia special education services, \*\*\* times a week for \*\*\* weeks (\*\*\* minutes \*\*\* ) for \*\*\* hours
- The Student actually received only “\*\*\*\*” \*\*\* (\*\*\*\*\*) for instruction, \*\*\*, for \*\*\* weeks (\*\*\*) or \*\*\* hours
- The Student lost (\*\*\* should have received amount – \*\*\* hours actual) \*\*\* hours of needed special education instruction
- Total: \*\*\* hours

Based the above calculations, I conclude than an award of \*\*\* hours of compensatory services is appropriate in this case due to hours of instruction not given to the Student. Procedural errors in this dispute regarding these services are not *de minimis*. The \*\*\* hours of substantive special education services provided by RISD during \*\*\* was woefully insufficient to address this Student’s ongoing special education needs. In \*\*\*, special education services should have provided for a \*\*\* instead of \*\*\* and the failure to do so prevented the Student from receiving a FAPE from the District’s program.

In crafting what type of relief is appropriate for this compensatory time, I look to the Student’s need for instruction in \*\*\* program and make the determination that the Student requires additional 1:1 tutoring in \*\*\* program specifically tailored to address all the Student’s areas of difficulty due to dyslexia.

Therefore, I find that the Student should receive \*\*\* hours of compensatory 1:1 tutoring in \*\*\* program, to be provided \*\*\* or during the summer months by a dyslexia specialist. This program should be delivered to the Student as soon as practicable but should allow the Student and Parent to manage day-to- day life needs in addition to

educational pursuits. I, therefore, conclude that this 1:1 tutoring should be completed no later than the end of the beginning of the 2017-2018 school year, or as otherwise agreed by the Parties. The services should take place \*\*\* \*\*\*. If the Student is eligible for ESY services, then the 1:1 tutoring hours will be in addition to, and not in lieu of, hours of ESY services provided by RISD.

### Conclusions of Law

1. Respondent is the local educational agency responsible for determining the Student's eligibility for special education and related services under the IDEA. 20 U.S.C. §1400, *et. seq.*, and its implementing regulations.
2. Petitioner, as the party who challenged the school district's eligibility determination or offer of services under the IDEA, bears the burden to prove that the Student has been denied a FAPE during the relevant time period from November 30, 2014, forward. *Schaffer v. Weast*, 126 S.Ct. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom., Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); 34 C.F.R. § 300.101.
3. During the relevant time period, RISD denied the Student a FAPE to the Student. The Student's special education instruction for dyslexia did not include measurable goals and objectives, \*\*\* special education programming did not include sufficient special education instruction, and the \*\*\* IEP did not provide sufficient dyslexia services. The Student's special education instruction did not provide meaningful benefit. *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341 (5th Cir. 2000); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
4. Petitioner is entitled to compensatory education services and prospective relief to remedy the denial of a FAPE. *Sch. Comm. of Burlington v. Dep't of Edu.*, 471 U.S. 359, 105 S.Ct. 1996, (1985).
5. Petitioner did not meet the burden to prove any other requested relief.

### ORDERS

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, I hereby **ORDER** that the relief sought by Petitioner is hereby **GRANTED** as follows for the 2016-2017 school year unless otherwise specified herein:

1. RISD shall provide \*\*\* hours of compensatory education services of 1:1 tutoring in \*\*\* program delivered by a dyslexia specialist. The 1:1 tutoring services shall occur

\*\*\* and may include summer services. The program of services should be completed no later than the beginning of the 2017-2018 school year, or as otherwise agreed by the Parties. If the Student is eligible for ESY services, then the 1:1 tutoring hours will be in addition to, and not in lieu of, hours of ESY services provided by RISD.

2. Within 20 calendar days of this order, RISD shall convene an ARDC meeting with the assistance and attendance of a dyslexia specialist. The dyslexia specialist will oversee the specific \*\*\* program selected for the Student's specially-designed direct dyslexia instruction for Reading Decoding and Morphology and Writing Skills. The dyslexia specialist must meet all requirements for qualifications set out in the selected \*\*\* program;

3. For the 2016-2017 school year, and thereafter as deemed appropriate by the ADRC, RISD shall provide the Student with a specially-designed program of direct instruction with a linguistics-based \*\*\* program that meets all pertinent requirements of Texas Education Agency's publication, *The Dyslexia Handbook – Revised 2014*. The program shall be provided for \*\*\*, \*\*\* to address the Student's specific need for Reading Decoding and Morphology and Writing Skills;

4. A dyslexia specialist shall oversee the writing and finalization of appropriate goals and objectives for the Student's specially-designed program of direct instruction for the areas of Reading Decoding and Morphology and Writing Skills. The goals and objectives should include baselines and a measurement process;

5. The District shall have a dyslexia specialist attend and participate in the Student's ARDC meetings and, as appropriate, all assessment teams;

6. If the parties have not pursued an additional \*\*\* evaluation of the Student to address specific \*\*\* needs of the Student regarding decoding and morphology since \*\*\*, then the District shall assess the Student's \*\*\* needs for decoding and morphology, to be completed over \*\*\*, or as otherwise agreed by the parties. The Parents shall produce the Student for assessment at a mutually agreed time and place. In the event that the Student does not appear for such assessment after reasonable effort to schedule and confirm the same, the District shall not be obligated to provide the \*\*\* assessment over \*\*\*. Prior to or at the beginning of the 2016-2017 school year after completion of any additional assessment for \*\*\*, RISD should convene an ARDC meeting to review the completed reports and make any programming changes deemed appropriate by the ARDC.

7. Within 15 calendar days of this order, A dyslexia specialist should review any additional assessment performed since the ARDC meeting of \*\*\*, and present to the ARDC recommendations for (a) any needed assessment in the area of decoding and morphology and math calculation; and, (b) any identified need for direct instruction in math calculation and calculator usage in the area of Math;

8. If a dyslexia specialist identifies a need for additional \*\*\* assessment to address areas of decoding and morphology and math calculation, then RISD will convene an ARDC meeting to make plans to perform the additional recommended assessment, to be completed during \*\*\*, or as otherwise agreed by the parties. The Parents shall produce the Student for assessment at a mutually agreed time and place. In the event that the Student does not appear for such assessment after reasonable effort to schedule and confirm the same, the District shall not be obligated to provide any additional \*\*\* assessment over \*\*\*. Prior to or at the beginning of the 2016-2017 school year after completion of any additional assessment for math, RISD should convene an ARDC meeting to review the completed reports and make any programming changes deemed appropriate by the ARDC.

**IT IS FURTHER ORDERED** that any and all additional or different relief not specifically ordered herein is **DENIED**.

Signed this 23<sup>rd</sup> day of May 2016.

*/s/ Mary Carolyn Carmichael*

Mary Carolyn Carmichael  
Special Education Hearing Officer

### **NOTICE TO THE PARTIES**

This Decision of the Hearing Officer is a final and appealable order. Any party aggrieved by the findings and decision made by the Hearing Officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 34 C.F.R. §300.516; and 19 TEX. ADMIN. CODE §89.1185(n).