

**SOAH DOCKET NO. 701-20-2933.IDEA
TEA DOCKET NO. 209-SE-0220**

STUDENT, B/N/F PARENT AND PARENT, Petitioner	§	BEFORE A SPECIAL EDUCATION
	§	
	§	
	§	
v.	§	HEARING OFFICER FOR
	§	
LEANDER INDEPENDENT SCHOOL DISTRICT, Respondent	§	THE STATE OF TEXAS
	§	
	§	

DECISION OF THE HEARING OFFICER

I. STATEMENT OF THE CASE

Student, by next friends Parent and Parent (Student or, collectively, Petitioner) brought this action against the Leander Independent School District (Respondent or District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, and its implementing state and federal regulations. The main issues in this case are whether the District violated its Child Find duty and whether the District denied Student a Free, Appropriate Public Education (FAPE). The Hearing Officer concludes that the District violated its Child Find duties. However, once it identified and evaluated Student and found Student eligible for special education and related services, the District provided Student a FAPE.

II. PROCEDURAL HISTORY

A. Legal Representation

Student was represented throughout this litigation by Student’s legal counsel, Sonja Kerr with Connell Michael Kerr, LLP. The District was represented throughout this litigation by its legal counsel, Kelly Janes and Jamie Turner with Walsh, Gallegos, Treviño, Kyle, and Robinson P.C.

III. DUE PROCESS HEARING

The due process hearing was conducted remotely via the Zoom videoconferencing platform on April 20-22, 2021. The hearing was recorded and transcribed by a certified court reporter. Petitioner continued to be represented by Petitioner's legal counsel, Sonja Kerr. Ms. Kerr was assisted by co-counsel Dorene Philpot. In addition, Student's parents attended the due process hearing.

Respondent continued to be represented by its legal counsel Kelly Janes, who was assisted by co-counsel, Jamie Turner. In addition, ***, the Executive Director of Special Programs for the District, attended the hearing as the party representative. Both parties filed timely written closing briefs. The Decision is due on July 19, 2021.

A. Petitioner's Issues

Petitioner raised the following IDEA issues for decision in this case:

1. Untimely Child Find.

- a. Respondent deliberately and intentionally failed to complete a Full and Individual Evaluation (FIE) of Student from November 2017 until January ***, 2020 in a timely manner. The District's actions to dissuade, delay, and deflect parental requests all lead to a denial of special education eligibility contrary to the IDEA.
- b. Respondent failed to identify Student in a timely manner and this is more than a procedural error. Respondent continues to use Response to Intervention (RTI) and Section 504 as a substitute for a prompt referral for a special education FIE as required by law.
- c. Procedural Violations:
 - (1) Failure to provide parents with written consent for an FIE or Prior Written Notice as required by 19 TAC § 89.1011 in

- November 2017 and August 2018. It is not clear if Prior Written Notice was issued for the September 2019 request for an FIE.
- (2) Failure to provide parents with Notice of Procedural Safeguards as required by 19 TAC § 89.1011 in November 2017 and August 2018.
 - (3) Failure to provide parents with Notice of Procedural Safeguards at all requisite times.
 - (4) Failure to provide parents with a list of potential Independent Educational Evaluation (IEE) providers and in a timely manner when the parents requested an IEE.
 - (5) Failure to fully evaluate Student for Other Health Impairment (OHI) by obtaining its own medical evaluation for same or paying for Student's visit to doctor for same.
 - (6) No meeting was held specifically to discuss the January ***, 2020 FIE with the Student's parent and they did not have the report when the Licensed Specialist in School Psychology intern called her about it on January ***, 2020. She did not receive it until the next day, January ***, 2020. It does not appear that a Notice of Procedural Safeguards was provided to the parents with the January ***, 2020 FIE report.

2. Incorrect Child Find.

In addition to being untimely, the District has failed to fully complete Child Find. Student is a child with dyslexia, *** and ***/writing and spelling issues and as such qualifies as a child with a Specific Learning Disability (SLD). Student's *** should also qualify Student for services. The District has used a faulty means of testing for SLD that is no longer research-based. Its reasoning for failing to identify Student's *** as a disability is also wrong.

3. FAPE / Contrary to *Andrew F.* Requirements.

a. Deficient IEP.

Once finally finding Student eligible, Respondent failed to propose and fully implement an Individualized Education Program (IEP) for Student that is individualized to meet Student's unique needs as a student with ***, dyslexia, writing and spelling needs, and related disorders as well as ***. The February 2020 IEP does not provide Student with challenging goals and objectives designed to result in meaningful educational benefit, nor does it provide Student sufficiently intensive instruction and services.

b. Not Individualized.

The February 2020 IEP that went into effect on February ***, 2020, is not

individualized to meet Student's unique needs. The goals are not performance-based, accurate, and measurable. The goals are not challenging given Student's age and will not result in meaningful progress. There is no goal to address ***, reading, or writing. There are insufficient individualized services for Student's dyslexia and related disorders of *** and ***. The Dyslexia class Student is in does not provide Student an individually tailored program to meet Student's needs. The inclusion support for math is vague and not individually tailored; due to the vagueness of the term "support," the District escapes any accountability.

c. Not Collaborative.

The February 2020 IEP that went into effect on February ***, 2020, was not created in a collaborative manner. Although the parents attended the meeting, the District did not invite Dr. ***, who has evaluated Student, nor Student's medical provider(s). Student's parents did not have any information about how an IEP was to be written.

4. ESY.

The District automatically refused Student Extended School Year (ESY) services solely and apparently because Student is just now entering special education services. That is not the law. 34 C.F.R. § 300.106 forbids the refusal of ESY to a particular category of disability (i.e. children with Attention Deficit Hyperactivity Disorder (ADHD) and forbids a unilateral limit of services (i.e. none) because the child has only become eligible this year.

5. Assistive Technology Devices and Services within the IEP.

Respondent has failed to ensure that Student was evaluated for Assistive Technology (AT) and receives AT services. AT devices, without services, denies Student a FAPE. Student should be explicitly taught how to use various devices, Apps, to type, and to use all technology that can assist Student. Because of Student's dyslexia, *** and ***, Student's IEP needs to have explicit instructional time for AT devices and software so that Student will be proficient in its use. A child's needs for AT cannot be determined without evaluating the child for suspected needs. Children with dyslexia and related conditions frequently need AT and the District did not evaluate Student for same.

B. Respondent's Legal Position and Additional Issues

Respondent generally denies the factual allegations stated in Student's due process hearing request. The District contends it provided Student with a FAPE during the relevant time period, can continue to do so, and Petitioner is not entitled to any of the requested relief.

The District raised the following additional issues:

1. JURISDICTIONAL: Whether the Hearing Officer has jurisdiction to resolve claims arising under any laws other than the IDEA, and whether such claims should be dismissed.
2. STATUTE OF LIMITATIONS: Whether any of Student's IDEA claims that accrued prior to March 3, 2019 should be dismissed as outside the one-year statute of limitations rule as applied in Texas.

IV. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner seeks the following items of requested relief:

An order finding the District has denied Student a FAPE, specifically:

1. The District, by its actions and inactions, has denied or impeded Student's receipt of a FAPE and has significantly infringed and impeded upon the parents' meaningful participation in the legally mandated IDEA process.
2. The District has denied Student a FAPE and is continuing to do so because it has failed to ensure Student has a program designed to meet the needs of Student's SLD/dyslexia/***/** and related disorders and *** during the school day that would result in meaningful benefit.
3. The District's January 2020 IEP, put into effect February ***, 2020, does not and will not provide Student a legally compliant IEP that is reasonably

calculated to result in meaningful benefit for Student both academically and non-academically and consistent with IDEA standards set forth in *Andrew F.*

Petitioner then requests that the Hearing Officer order:

4. The District must provide Student an IEP consistent with the recommendations of Dr. *** and the results of the pending IEE. The services must be intensive in nature (1:1), provided daily, and be provided by a qualified provider.
5. Parents request payment for or reimbursement for private tutoring through *** or elsewhere if they exercise their right to do so. The parents did not know about giving this notice until obtaining counsel. Tutoring has not yet started.
6. In the alternative, Petitioners request placement in a private school that will meet Student's needs.
7. The District must provide Student with compensatory education for the time Student has been deprived of an appropriate program beginning on November ***, 2017 to the date of decision.
8. The District must reimburse the parents for: 1) cost of Dr. ***'s evaluation; 2) cost of OHI visit to psychiatrist, 3) cost of any out-of-pocket expenses for *** testing and/or tutoring; therapy (including *** therapy); and 4) mileage for any of the above.
9. Any other appropriate relief deemed necessary after the hearing on this matter.
10. Petitioner has administratively exhausted pursuant to the IDEA, for purposes of any ADA or Section 504 action in other forums.
11. The family requests any and all remedies available to them, pursuant to case law, statute, and equity especially as may be needed after completion of the presently pending IEE. The IDEA expressly gives broad authority for hearing officers and courts to order all appropriate remedies, without regard to whether the family specifically mentions each possible remedy that might be deemed appropriate by a hearing officer. *See also Letter to Armstrong*, 28 IDELR 303 (OSEP 1997) (noting that hearing officers must have the authority to order any relief necessary to ensure a student receives a FAPE).

B. Respondent's Requested Relief

1. Dismiss all claims arising under laws other than the IDEA.

2. An order denying Petitioner's exceptions to the one-year statute of limitations, and dismissal of all claims arising prior to March 3, 2019.

V. FINDINGS OF FACT

Background Information

1. Student is in ***** grade at the *** in Austin, Texas. Student was enrolled in the District from the time Student was in *** in the 2016-17 school year until the end of the 2019-20 school year, when Student completed the ***** grade. Student withdrew from the District and enrolled in *** at the beginning of the 2020-21 school year. Student enjoys, among other things, ***, with Student's friends, and going on family outings. Student also enjoys reading books, particularly about ***. Student works hard in class and has always been a "joy" for Student's teachers to teach.¹
2. When Student was in *** during the 2016-17 school year, Student achieved all "satisfactory" grades. Student loved *** and considered becoming a ***. Student's teachers found Student to be "compassionate" and "joyous" both inside and outside the classroom.² Student's parents were happy with the services the District provided Student and wanted to nominate Student's *** teacher for a teacher of the year award.³

Response to Intervention

3. Student began receiving Response to Intervention (RTI) for reading at the beginning of ***** grade. Student was consistently reversing letters and numbers the prior year, which is common for students in ***. Student ended Student's *** year on Student's expected grade-level reading level. However, at the beginning of ***** grade, Student was behind Student's peers and required RTI.⁴
4. During ***** grade in the 2017-18 school year, Student made a number of friends.⁵ Student struggled with Student's reading. Student was one of two students in Student's

¹ Respondent's Exhibit 64, page 1 (R __, at __); Joint Exhibit 23, page 1 and page 9 (J __, at __), 7; Hearing Transcript, Pages 422, 763, 812 (TR __); Petitioner's Exhibit 15, page 5 (P __, at __).

² J5; TR 762, 825.

³ R54; TR 751.

⁴ TR 768, 858-59; J12.

⁵ TR 825.

class receiving RTI.⁶ Student received RTI for reading for the full school year.⁷ Student ended the year below grade-level in reading despite the RTI Student received. At the end of the year, Student was reading at Level ***, indicating Student was below grade level.⁸ The District suspected Student might have Dyslexia by the end of the ***** grade, but decided to monitor Student's progress during ***** grade as opposed to referring Student for any formal evaluations.⁹ During the school year, Student's teacher also placed Student into RTI for math because Student showed academic weakness in several areas.¹⁰

Qualifying for Section 504 Services

5. On November ***, 2017, Student's parents requested in writing that the District perform an evaluation to determine if Student qualified for special education and related services. The District met with Student's parent in-person to explain the testing process on November ***, 2017. District staff told Student's parents during the meeting that Student's parents should allow more time for RTI to work before requesting a special education evaluation.¹¹
6. On November ***, 2017, Student's parents retracted the request for a special education evaluation based on the District's advice to allow the RTI process to continue before requesting an evaluation for special education and related services. The District felt Student could make sufficient progress without special education and related services. The District provided Student's parents prior written notice indicating that Student's parents had retracted the request for a special education evaluation and that the District did not feel Student needed to be evaluated at that time.¹²
7. The District did not provide Student's parents a copy of the special education Notice of Procedural Safeguards in November 2017. On August ***, 2018, the District provided Student's parents a copy of the special education Notice of Procedural Safeguards, as evidenced by Student's mother's signed acknowledgement that she had received the Notice of Procedural Safeguards on that date.¹³

⁶ TR 843.

⁷ TR 799.

⁸ J6; TR 807-09.

⁹ J13, at 14; TR 823.

¹⁰ TR 799.

¹¹ J16; TR 58.

¹² J16; J17; R1.

¹³ R65.

8. On August ***, 2018, prior to the start of Student's ***** grade year, Student's parents requested an evaluation to determine whether Student had Dyslexia.¹⁴ The District provided Student's parents a consent form to sign before the District could conduct the evaluation. The District included with that form the tests it intended to conduct to determine whether Student had Dyslexia. Student's parents signed the form. The District also included a copy of the Notice of Rights and Procedural Protections under Section 504 of the Rehabilitation Act of 1973.¹⁵
9. The District found through testing that Student had Dyslexia. Student had poor phonological memory. Student's rate of reading and accuracy were also below average.¹⁶ On October ***, 2018, the District held a meeting to initiate Section 504 services for Student as a result of the Dyslexia testing. The Section 504 Committee found Student eligible for Section 504 services as a result of Dyslexia—specifically a deficit in phonological processing—and determined that Student's reading difficulties were not a result of Student's intellectual abilities.¹⁷
10. Dyslexia is a mental impairment which substantially limits one or more major life activities. The Section 504 Committee developed a Section 504 plan. The Section 504 plan included accommodations for all Student's classes, including extended time, having Student repeat back instructions, and the use of graphic organizers. The Section 504 plan also called for Student to receive direct instruction related to Student's Dyslexia.¹⁸
11. The daily direct Dyslexia instruction Student received in ***** grade was through a program called ***. Student received this instruction in a setting with *** other students. The *** program has, among other elements, spelling instruction, phonological awareness, site words, and a wrapping phoneme component.¹⁹
12. Despite the direct Dyslexia instruction, continued reliance on RTI, and the accommodations contained in Student's new Section 504 plan, Student continued to struggle with reading throughout ***** grade. Student had the *** for ***** grade as Student had for ***** grade.²⁰ By the end of ***** grade, despite the interventions the District implemented as a result of the Dyslexia testing and despite being one of only two students in Student's class receiving RTI, Student was still performing below grade-level.²¹ Student was in RTI for reading from the beginning of *** grade until Student began

¹⁴ J18.

¹⁵ J20.

¹⁶ J22; TR 472-74.

¹⁷ J26, at 3.

¹⁸ J26, at 2; TR 482.

¹⁹ TR 474-75.

²⁰ TR 789.

²¹ TR 813.

receiving special education services in February 2020. Student was in RTI for math in *** grade and *** grade. Student exhibited *** and struggled in math.²²

13. Student was in *** grade during the 2019-20 school year. Student began the year in Tier III RTI for reading and Tier II RTI for math and still with the same Section 504 plan and accommodations Student had in *** grade.²³ Student also continued to receive Dyslexia services in a small setting with *** other students. The Dyslexia services provided in *** grade started by continuing the *** program Student had been working on in *** grade. Then Student moved onto the *** program, another Dyslexia intervention.²⁴

Student Qualifies for Special Education and Related Services

14. On September ***, 2019, Student's parents requested that the District evaluate Student for eligibility for special education and related services.²⁵ On October ***, 2019, the District obtained consent to conduct an initial FIE during a meeting the District organized with Student's parents. At that time, nearly two years after Student's parents had initially requested an evaluation for special education and related services before retracting the request on the District's advice, the District acknowledged Student had not been making adequate progress in math and reading and needed to be evaluated for special education and related services.²⁶
15. The goal of the FIE was to determine whether Student qualified for special education and related services, specifically in the areas of emotional disturbance, OHI, and SLD. The District completed its FIE on January ***, 2020. Student's parents had a phone conversation with a District staff member the same day. That staff member told Student's parent erroneously that a student with Dyslexia could never qualify for special education and related services as a result of the Dyslexia. Student's parent had a similar conversation with another District staff member on January ***, 2020.²⁷
16. In conducting the FIE, District staff obtained information from Student's teachers and parents, asked Student to rate ***self in certain areas, and relied on several formal testing instruments to obtain the results.²⁸ A Licensed Specialist in School Psychology (LSSP) intern took the lead in preparing the FIE under the supervision of an LSSP. A multidisciplinary team was part of preparing the FIE. A special education teacher and a general education teacher were part of reviewing the results of the FIE. The District

²² J23, at 22; TR 716, 728, 829.

²³ J15; TR 544-45.

²⁴ TR 476.

²⁵ J19.

²⁶ J21.

²⁷ J23, at 1; P38; P42.

²⁸ J23, at 1; TR 278.

incorporated the results of a private evaluation Student's parents obtained from Dr. ***, an outside psychologist and LSSP, into the FIE. A registered nurse conducted vision and hearing screening. Student's private psychiatrist recommended Student's eligibility for OHI. The multidisciplinary team also assessed Student's communicative status and motor abilities.²⁹

17. During the interviews the District's evaluators conducted with multiple teachers and with Student's parents as part of obtaining information, it became clear that Student has "lots of friends" and a number of activities both in and out of school Student enjoys. Student's teachers also agreed Student was a hard worker and a polite, kind ***. However, Student's parents and teachers reported concerns about Student's ability to pay attention during class and, in the case of Student's parents and one of Student's teachers, concerns about Student's ***. During classroom observations, the evaluators observed Student's struggles to pay attention and noted that Student fell behind the rest of Student's class during classroom work. The evaluators ultimately concluded based on multiple observations and the results of formal testing that Student's ability to pay attention was an issue that impacted Student's educational progress, but that Student's ***—though one teacher and Student's parents found it to be an area of concern—did not prevent Student from making educational progress.³⁰
18. As for the formal testing instruments in the FIE, District evaluators utilized the Wechsler Intelligence Scale for Children-5th Edition and the Woodcock Johnson Tests of Cognitive Abilities and Oral Language IV to determine whether Student was a Student with an SLD. Student's scores on those tests indicated Student was in the average or high-average range in Student's cognitive abilities. Student was "intact for academic progress" and did not have a sustained pattern of cognitive impairment indicative of an SLD. Student has average to above-average cognitive functioning. The District arrived at its determination that Student does not have an SLD after conducting its own testing and also consulting with an outside psychologist, Dr. ***, who had evaluated Student in December 2019 and had found Student did meet criteria as a student with a Specific Learning Disability in math. District staff reviewed that psychologist's report and consulted with her directly to ask follow-up questions, but ultimately disagreed with her conclusion that Student had an SLD. The FIE made extensive reference to Dr. ***'s evaluation.³¹ The FIE did note Student's continued diagnosis as a student with Dyslexia.³²
19. The FIE also determined Student did not qualify for special education and related services as a student with an emotional disturbance. Student's private psychiatrist conducted an assessment as to whether Student qualified as a student with OHI due to ADHD and concluded Student did. The District's evaluation adopted that recommendation and found

²⁹ J23, at 1-3, 47.

³⁰ J23, at 10-12, 16.

³¹ J23, at 17-22; TR 636, 645 (the Hearing Officer further addresses Dr. ***'s report below).

³² J23, at 33.

Student qualified for special education as a student with OHI due to ADHD. The District noted that, while Student did not qualify as a student with an SLD, interventions would be required on an ongoing basis in math due to Student's weakness in that area.³³

20. The FIE recommended several accommodations for Student as well. These included the use of visual number charts and a calculator in math to alleviate ***. They also included accommodations aimed specifically at Student's issues with inattention, including repeating directions, checking for understanding, and additional check-ins during class periods to ensure Student could understand Student's assignments.³⁴
21. The multidisciplinary team assessed the use of AT and whether it would be appropriate for Student. Ultimately, the multidisciplinary team concluded Student did not require AT in reading, but may require it in math. Student's teachers did not feel Student required AT.³⁵
22. On February ***, 2020, the District held an initial Admission, Review, and Dismissal (ARD) Committee meeting to initiate special education and related services for Student. The ARD Committee determined, in accordance with the FIE, that Student was eligible for special education as a student with an OHI due to ADHD. Student would receive all Student's education in the general education setting, as Student had been since Student began Student's education in the District. Student was to have *** minutes per day of "in-class support" for math, in accordance with the FIE's recommendation of extra support for math. "In-class support" involves special education staff support in the general education setting. Student would also continue to attend Student's Dyslexia class with *** other students in it. The ARD Committee also discussed the provision of Extended School Year (ESY) services, but decided they were not necessary at the time. However, the ARD Committee agreed to collect data to determine if Student regressed during any of Student's school breaks. Student's parents attended the ARD Committee meeting and agreed with the proposed IEP.³⁶
23. The District developed three annual IEP goals, each in the area of math. Each goal was accompanied with a method of measuring the goal as well as Student's PLAAFP in relation to the goal. The IEP then listed Student's accommodations. The accommodations were broken down into four categories: adapt classroom instruction, adapted or additional materials, manage behavior, and alter assignments or testing. Under each of those categories, the IEP listed between two and eight accommodations. The IEP included each of the accommodations recommended in Student's FIE. The ARD Committee also

³³ J23, at 34-35.

³⁴ J23, at 38.

³⁵ J23, at 33; TR 591.

³⁶ R2, at 1, 10, 18.

considered whether Student could benefit from AT. The ARD Committee, consistently with Dr. ***'s evaluation, concluded Student did not require AT services.³⁷

Further Evaluations of Student and the Proposed 2020-21 IEP

24. Student's parents filed this request for a due process hearing on February 28, 2020. Due to COVID-19, the District began providing virtual instruction in March 2020. Student remained in virtual instruction for the remainder of the 2019-20 school year.³⁸ Student withdrew from the District and enrolled in *** for the entire 2020-21 school year.³⁹
25. The District granted Student an Independent Educational Evaluation (IEE). Student's parents did not think the District's FIE sufficiently highlighted Student's weaknesses in math. They wanted an independent evaluation to explore those weaknesses.⁴⁰ In August 2020, Dr. *** completed an IEE of Student. Dr. *** found Student eligible for special education and related services as a Student with OHI and SLD. Dr. *** submitted two reports. Her initial report made no recommendation about the school in which Student should receive Student's education. At the urging of Student's parents, Dr. *** sent an updated evaluation a week later which recommended Student attend a private school, specifically ***.⁴¹
26. The evaluator made 20 recommendations. Among other things, the evaluator recommended the District provide "continued math intervention," multisensory teaching methods, a schedule for Student to follow, preferential seating at the front of the class, small group instruction "whenever possible," additional time for exams and assignments, "continued" Dyslexia intervention, and "consideration" of providing academic counseling. She did not recommend any use of AT the District was not already employing.⁴²
27. The District convened an ARD Committee meeting on September ***, 2020, and invited Dr. ***. Student's parents also attended the meeting. The District reviewed each of Dr. ***'s 20 recommendations, with the exception of the recommendations among the 20 Dr. *** felt were "geared toward home." The ARD Committee meeting was then tabled until September ***, 2020, to finish going through each of Dr. ***'s recommendations. Dr. *** and Student's parents also attended that meeting. The District was already providing the majority of supports and services Dr. *** recommended, including Dyslexia services for *** minutes per day in a small group of three students, small group math instruction, multisensory teaching methods, and other services and supports. In response

³⁷ R2, at 4-6, 17; J23, at 38.

³⁸ TR 421; R5.

³⁹ TR 452.

⁴⁰ R2, at 18; TR 658.

⁴¹ P1, at 6; TR 666-67.

⁴² P1, at 6-8.

- to Dr. ***'s evaluation and recommendations, the District agreed to add additional accommodations, including providing study guides for Student, rubrics for all of Student's classes, an assignment checklist, and other additional supports.⁴³
28. During the ARD Committee meetings, the District also reviewed Student's progress under the February 2020 IEP. Student had demonstrated significant progress in two out of Student's three IEP math goals from the February 2020 IEP. There had not yet been enough time to observe the impact of the IEP fully. The ARD Committee recommended leaving the goals in place and observing Student's progress on them during the 2020-21 school year, when Student would receive services in-person.⁴⁴
29. In addition to the IEE, Student's private psychiatrist referred Student to Dr. *** for a psycho-educational evaluation. Dr. *** produced an evaluation report on December ***, 2019. Dr. *** conducted clinical interviews with Student and Student's parents. She also reviewed a folder of Student's school paperwork. She performed a Feifer Assessment of Reading, Feifer Assessment of Math, Conners Continuous Performance Test-Third Edition, and the Behavior Rating of Executive Functioning-Second Edition. She chose those particular assessments after consulting with the District's LSSP, because Dr. *** did not want to duplicate the District's testing. Dr. *** was aware that the District's FIE was already underway when Dr. *** began her evaluation. Therefore, she chose to use testing methods the District was not using. Dr. *** did not do any in-person observations of Student in Student's educational environment in the District. She also did not review Student's grades or progress reports.⁴⁵
30. Dr. *** recommended Student be found eligible for special education and related services as a student with an SLD and OHI for ADHD. Dr. ***'s recommendations for accommodations and services for Student resembled those in the District's IEP. Dr. *** recommended 4-5 days per week of a reading intervention program, preferred classroom placement, extended time on tests, number charts, breaking tasks into manageable parts, and other interventions and accommodations the District has agreed to provide in its IEP. Dr. *** also recommended to Student's parents that Student's parents should employ a Certified Academic Language Therapist (CALT) who specializes in Dyslexia to work with Student outside of Student's academic day.⁴⁶
31. On May ***, 2020, an outside licensed Dyslexia therapist named *** also conducted an assessment of Student. Ms. *** relied on Dr. ***'s assessment to find Student had an SLD in math and reading and ADHD. Ms. *** made several reading recommendations for the District to incorporate into its IEP. Specifically, Ms. *** recommended the District give Student extended time on Student's assignments, small-group testing, access to

⁴³ R4, at 6-11.

⁴⁴ R3, at 6-7.

⁴⁵ P6, at 1; TR 84-85, 154.

⁴⁶ P6, at 10, 16; TR 151-53.

Bookshare/Learning Ally, access to audio books, and that the District not penalize Student for spelling errors. Those accommodations are all provided in Student's IEP September 2020 IEP.⁴⁷

VI. DISCUSSION

A. Statute of Limitations

The parties disagree as to the timeframe in which causes of action can be recognized in this case. Petitioner filed the request for an impartial due process hearing on February 28, 2020. Respondent therefore asserts that claims arising before February 28, 2019, are time-barred by the one-year statute of limitations. Petitioner asserts that there are two exceptions to the one-year statute of limitations rule that apply in this case and, therefore, claims that arose before February 28, 2019, are not time-barred and should be considered.

1. Statute of Limitations Rules

In Texas, a parent must request a due process hearing within one year of the date the parent knew or should have known about the alleged action that serves as the basis for the complaint. 19 Tex. Admin. Code § 89.1151(c). The one-year statute of limitations rule does not apply to a parent if the parent was prevented from filing a due process complaint due to:

- Specific misrepresentations by the school district that it had resolved the problem forming the basis of the due process complaint; or
- The school district's withholding of information from the parent that it was required to provide under the IDEA. 19 Tex. Admin. Code § 89.1151(d); 34 C.F.R. § 300.511.

The IDEA statute of limitations period "is not subject to equitable tolling." *Wood v. Katy Indep. Sch. Dist.*, 163 F.Supp.3d 396, 409 (S.D. Tex. 2015). Parents bear the burden of establishing

⁴⁷ P15, at 1, 6; R3, at 8; TR 505.

an exception to the one-year limitations period. *G.I. v. Lewisville Ind. Sch. Dist.*, 2013 WL 4523581, *8 (E.D. Tex. 2013). Petitioner asserts that both exceptions apply in this case.

2. Withholding Exception

Petitioner asserts the District failed to provide Student's parents with the Notice of Procedural Safeguards after Student's parents requested an evaluation for special education in the fall of 2017. Petitioner asserts this failure prevented Petitioner from filing a request for an impartial due process hearing.

A copy of the procedural safeguards "must be given to the parents [of a child with a disability] only one time a school year." 34 C.F.R. § 300.504(a). Receipt of the procedural safeguards indicates the parent "knew or should have known" of the alleged action that serves as the basis for the request. *El Paso Ind. Sch. Dist. v. Richard R.R.*, 567 F. Supp. 2d 918, 945 (W.D. Tex. 2008) ("When a local educational agency delivers a copy of IDEA procedural safeguards to parents, the statute of limitations for IDEA violations commences without disturbance...that simple act suffices to impute upon them constructive knowledge of their various rights under the IDEA").

When Student's parents requested an evaluation in November 2017 and then retracted that request, the District sent Student's parents prior written notice of its decision not to evaluate in light of the retraction and the District's determination that an evaluation was premature at that time. The District did not give Student's parents a copy of the Notice of Procedural Safeguards. The District did provide Student's parents a Notice of Procedural Safeguards in August 2018, just after the start of the 2018-19 school year.

The District also gave Student's parents a copy of the Section 504 procedural safeguards during the 2018-19 school year when Student began receiving Section 504 services. Student's parents again received the Notice of Procedural Safeguards during the 2019-20 school year when Student qualified for special education and related services. The receipt of procedural safeguards

and prior written notice each school year beginning in the 2018-19 school year placed Student's parents on "constructive notice" of their due process rights. *See Id.*, at 949. Student's parents then had one year under the Texas statute of limitations rule to file a request for an impartial due process hearing. 19 Tex. Admin. Code § 89.1151(c). Student's parents did not do so. Regardless of whether Student's parents took advantage of the rights about which they were on "constructive notice," the withholding exception does not apply in this case.

3. Specific Misrepresentation Exception

a. Petitioner's Specific Misrepresentation Allegations

Petitioner also asserts that the District prevented Petitioner from filing a request for an impartial due process hearing by making specific misrepresentations to the parents. Specifically, Petitioner asserts that District employees informed Student's parents that students with Dyslexia do not qualify for special education and related services.⁴⁸

Under the "specific misrepresentation" exception to the one-year statute of limitations rule, the alleged misrepresentation must be "intentional or flagrant." A petitioner must establish not that the school district's educational program was objectively inappropriate, but instead that the school district subjectively determined the student was not receiving a FAPE and intentionally and knowingly misrepresented that fact to the student's parents. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 245 (3d Cir. 2012) (student could not show misrepresentations caused failure to request a hearing or file a complaint on time, because the student's teachers did not intentionally or knowingly mislead parents about extent of academic and behavioral issues or efficacy of solutions and programs attempted).

Furthermore, every misrepresentation does not fall under the exception. Instead, to fall under the exception, a misrepresentation must be such that it prevents the parent from requesting a due

⁴⁸ Petitioner's Closing Brief, at 10-11.

process hearing regarding claims that would otherwise be time-barred. The misrepresentation also must indicate the school district in question has resolved the issues forming the basis of the complaint. *C.H. v. Northwest Ind. Sch. Dist.*, 815 F.Supp.2d 977, 984-85 (E.D. Tex. 2011).

The specific statements the District staff made are contrary to federal law because students with Dyslexia can qualify for special education as students with an SLD. However, these inaccurate statements came in January 2020. The District was already in the process of evaluating Student by that point. In February 2020, Student began receiving special education and related services. And on February 28, 2020, Student's parents filed this request for a due process hearing. Therefore, the District's misstatements did not prevent Petitioner from filing a request for a due process hearing in a timely manner.

B. Conclusion

The evidence showed the District did not make specific misrepresentations or withhold information in a way that prevented Petitioner from filing a request for a due process hearing. Petitioner received the Notice of Procedural Safeguards in the 2018-19 and 2019-20 school years. Petitioner also received prior written notice whenever the District took or refused to take a specific action. And while District personnel misstated the law to Student's parents in January 2020, such statements did not prevent Petitioner from filing a timely request for a due process hearing. To wit, Student's parents filed a request for a due process hearing the next month.

The one-year statute of limitations applies in this case and Petitioner's claims are limited only to those that arose within one year of the filing of this request for a due process hearing. The hearing request was filed on February 28, 2020. Unless a petitioner can prove an exception to the statute of limitations rule, claims arising prior to one year before the date of filing are time-barred. *Richard R.R.*, 567 F.Supp.2d at 944; *Hooker v. Dallas Indep. Sch. Dist.*, 2010 WL 4025776, *11 (N.D. Tex. 2010); *T.C. v. Lewisville Indep. Sch. Dist.*, 2016 WL 705930, *9 (E.D. Tex. 2016). This decision will therefore consider only violations of the IDEA that may have occurred between February 28, 2019 and February 28, 2020.

C. Duty to Provide a FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free, appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d). The District has a duty to provide a FAPE to any children with disabilities ages 3-21 in its jurisdiction. 34 C.F.R. §§ 300.101(a), 300.201; Tex. Educ. Code § 29.001.

A school district is responsible for providing Student with specially designed, personalized instruction with sufficient support services to meet Student's unique needs in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with Student's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

D. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.⁴⁹ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). The burden of proof in this case is on Petitioner to show the District failed to comply with its Child Find duties, provide Student with a FAPE, and offer a program that is reasonably calculated to provide Student with the requisite educational benefit. *Id.*

E. Child Find

In February 2020, the District identified Student as a student in need of special education and related services. Petitioner asserts Student should have qualified for special education and related services before that time.

⁴⁹ There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n. 4 (5th Cir. 2009).

1. Child Find Generally

Congress enacted the IDEA's Child Find provisions to guarantee access to special education. 20 U.S.C. § 1400(d)(1)(A). To that end, the IDEA's Child Find obligation imposes on each school district an affirmative duty to have policies and procedures in place to locate and timely evaluate children with suspected disabilities in its jurisdiction, including “[c]hildren who are suspected of being a child with a disability....and in need of special education, even though they are advancing from grade to grade.” 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a), (c)(1); *Richard R.R.*, 567 F.Supp.2d at 949.

The Child Find duty is triggered when a school district has reason to suspect a student has a disability and reason to suspect that special education services may be needed to address the disability. When these suspicions arise, the school district must evaluate the student within a “reasonable” time after school officials have notice of reasons to suspect a disability. *Id.* at 950.

The analysis for resolving a Child Find issue is two-fold:

1. Whether the school district had reason to suspect the student has a disability *and* had reason to suspect the student may need special education and related services as a result of the disability; and
2. Whether the school district acted in a “reasonable” amount of time after having reason to suspect the student may need special education and related services. *Id.*; *Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 320 (5th Cir. 2017); *A.L. v. Alamo Heights Ind. Sch. Dist.*, 2018 W.L. 4955220, *6 (W.D. Tex. 2018).

A school district must “identify, locate, and evaluate students with suspected disabilities within a reasonable time after the school district is on notice of facts or behavior likely to indicate a disability.” *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 676 (5th Cir. 2018); *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 790-91 (5th Cir. 2020). A delay is reasonable when, throughout the period between notice and referral, a school district takes proactive steps to comply with its Child Find duty to identify, locate, and evaluate students with

disabilities. Conversely, a time period is unreasonable when the school district fails to take proactive steps throughout the period, or ceases to take such steps. *O.W.*, 961 F.3d at 793.

2. The Child Find Duty in This Case

In this case, the District had reason to suspect Student needed special education and related services by at least February 28, 2019, the beginning of the one-year statute of limitations period. Student had been receiving RTI services since the beginning of the 2017-18 school year. Student was one of *** students in Student's class receiving RTI services during the 2017-18 and 2018-19 school years, in which Student had the *** school years. The District was aware Student had unique challenges in math and reading. The District was also aware Student was an intelligent, hard-working student. Student's challenges in math and reading could thus not be explained as a result of laziness or consistent with Student's general aptitude.

In November 2017, Student's parents requested and then retracted a request for an evaluation for special education eligibility. They only retracted the request at the urging of District personnel, who encouraged Student's parents to give Student more time in RTI before requesting an evaluation. At the time, Student was already not progressing as expected. In 2018, the District began offering Student Section 504 services for Dyslexia, a mental impairment that substantially limits one or more major life activities and is thus a "disability" of which the District was aware. 42 U.S.C.A. § 12102(1). The District only began providing those Section 504 services after Student's parents had requested an evaluation, even though the District had already suspected Student might have Dyslexia during the 2017-18 school year.

Throughout the 2018-19 school year, Student continued struggling with math and reading. The District did not refer Student for an evaluation during that school year, instead keeping Student as one of only *** students in Student's class in RTI for a third year. While it is reasonable for a school district to attempt interventions like Section 504 services and RTI before evaluating a student for special education and related services, those interventions cannot be used as a substitute

for special education for a student for whom those interventions are not working. *O.W.*, 961 F.3d at 794.

The District should have taken proactive steps to evaluate Student when Student was receiving RTI for multiple years and Section 504 services for more than a year prior to the District's conducting an evaluation for special education and related services. The District was aware Student had a disability—Dyslexia—and was aware Student was reading below grade-level and struggling with math despite Student's average intelligence. It was thus on notice Student had a disability and may need special education and related services. *See Woody*, 865 F.3d at 320.

Further, a child's right to a FAPE should not depend upon the vigilance of a student's parents. *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396 (3d Cir. 1996). Given the longstanding awareness of Student's math and reading struggles, the District should have proactively sought to evaluate Student for special education before Student's parents requested an evaluation. *See Id.* However, in this case, much like with Section 504 services, the District evaluated Student only after Student's parents requested an evaluation for special education and related services. The District even noted in the form it used to obtain Student's parents' consent to evaluate in the fall of 2019 that Student had not been making adequate progress. Yet the District only began an evaluation of Student after Student's parents made the request.

3. Conclusion

A child experiences an "egregious loss of educational opportunity" when the child should be identified as a student eligible for special education and is not so identified. *Michael P. v. Dept. of Educ.*, 656 F.3d 1057, 1068 (9th Cir. 2011). In this case, Student should have been evaluated at least by February 2019, the beginning of the one-year statute of limitations period. By that time, Student was reading below grade level and not making the progress in reading and math that would be expected for someone of Student's intelligence. Instead, the District did not complete an FIE until January 2020 and did not begin providing special education and related services to Student until February 2020. The District did not comply with its Child Find duty within a reasonable

amount of time from the time when the District had reason to suspect Student was a child with a disability in need of special education and related services. *See Woody*, 865 F.3d at 320.

F. The District's Evaluation

Petitioner contests the validity of the District's 2020 FIE. While an FIE should be tailored to the specific problems a potentially disabled student is having, it need not be designed to identify and diagnose every possible disability. *D.K.* 696 F.3d at 250. The evidence showed that the District's FIE met the requirements of the IDEA. 34 C.F.R. § 300.304. The District assessed Student in the areas of suspected disability, namely SLD, emotional disturbance, and OHI for ADHD.

The FIE included a review of existing evaluation data as required. It also relied on a variety of testing methods, including multiple standard educational testing tools, parent input, teacher input, in-person observations, and an interview with Student. The District assessed Student in all areas related to the suspected disability, including health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. § 300.304(c)(4).

While the FIE did not find Student had an SLD in math, it did recommend specific special education interventions in the area of math. Whether Student should have been identified as a student with an SLD or not, the FIE complied with the IDEA by recommending specific math and reading interventions to target the issues Student was having in those areas. *See D.K.*, 696 F.3d at 250. The interventions were substantially the same ones recommended by Dr. ***, Dr. ***, and ***. All of those evaluators found Student had an SLD, but the interventions they recommended were nearly entirely those provided by the District even though the District did not find that Student had an SLD. Therefore, the exact label under which Student qualifies for special education and related services does not impact the validity of the FIE itself.

A qualified team of professionals conducted Student's FIE. The FIE then led to useful information for the development of Student's IEP, including specific requests for accommodations

and services. In short, the District conducted an appropriate FIE that provided the basis for providing a FAPE to Student.

Petitioners submit as an issue the District's failure to discuss the FIE with Student's parents prior to the ARD Committee meeting in which the results were reviewed. The IDEA, however, does not require that. *See* 34 C.F.R. § 300.304. The District therefore did not violate the IDEA by not holding such a meeting. District staff did speak with Student's parents by telephone multiple times about the FIE prior to the ARD Committee meeting in which the FIE was adopted with Student's parents in agreement. Petitioner did not present evidence that Student's parents had unanswered questions to which the District failed or refused to respond prior to or during the February 2020 ARD Committee meeting.

Petitioners also submitted the lack of a separate AT evaluation as an issue in this case. The multidisciplinary team in the FIE and subsequently the ARD Committee assessed whether Student needed AT to access the curriculum and ultimately concluded Student did not. The outside evaluations obtained by Petitioner did not contradict that assessment. The IDEA does not require a separate AT evaluation outside of the FIE. *See* 34 C.F.R. § 300.304. The multidisciplinary team appropriately assessed whether Student required AT to access the curriculum. The ARD Committee then considered the FIE and concluded Student did not need AT to access the curriculum.

Even if the FIE had violated the IDEA, the District granted Student's parents an IEE. Parents are entitled to an IEE when they disagree with a school district's FIE. 34 C.F.R. § 502(b)(1). The results of the IEE must then be "considered" by the school district in providing a FAPE to a student. 34 C.F.R. § 300.502(c)(1). In this case, Student's parents then obtained an IEE. The District considered the results of that IEE in two ARD Committee meetings in September 2019 and incorporated nearly all of the suggestions from the IEE into Student's IEP. Thus, the District cured any issues with the FIE by granting, considering, and adopting nearly all of the results of a new and independent evaluation.

G. FAPE

The next issue in this case is whether the District provided Student a FAPE once it identified Student as a Student in need of special education and related services. A complicating factor in assessing whether the District provided Student a FAPE is that the District identified Student in February 2020. Later that month, Petitioner filed this request for a due process hearing. The request did not include any issues relating to implementation of the IEP during virtual school, because no one knew COVID-19 would force schools in Texas to shut down and switch to a virtual model at the time of filing.

In March 2020, the District shut down and switched to a virtual model due to COVID-19. Student remained in virtual school for the remaining two months of the 2019-20 school year. Before the start of the 2020-21 school year, Student's parents unilaterally placed Student at ***. Because of the COVID-19 shut down, the switch to a virtual school model for the final months of the 2019-20 school year, and Student's unilateral enrollment in *** for the 2020-21 school year, the District has not had an opportunity to fully implement and observe the results of Student's IEP developed in February 2020 and amended in September 2020. The Hearing Officer must determine whether the IEP offered Student a FAPE without relying on the fully observable effects the IEP had on Student's education.

The Fifth Circuit has articulated a four-factor test to determine whether a school district's program meets IDEA requirements. Those factors are:

- Whether the program is individualized on the basis of the student's assessment and performance;
- Whether the program is administered in the least restrictive environment;
- Whether the services are provided in a coordinated, collaborative manner by the key stakeholders; and
- Whether positive academic and non-academic benefits are demonstrated.

Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997). Even after the Supreme Court's 2017 decision in *Endrew F.*, the test to determine whether a school district has provided a FAPE remains the four-factor test outlined by the Fifth Circuit. *E.R. by E.R.*

v. Spring Branch Indep. Sch. Dist., 909 F.3d 754, 765 (5th Cir. 2018). These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F.3d 286, 294 (5th Cir. 2009).

1. Individualized on the Basis of Assessment and Performance

In meeting the obligation to provide a FAPE, the school district must have in effect an IEP at the beginning of each school year that is individualized for the student on the basis of assessment and performance. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, the IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, the duration and frequency of the services, and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323(a).

While the IEP need not be the best possible one nor must it be designed to maximize Student's potential, the school district must nevertheless provide Student with meaningful educational benefit likely to produce progress as opposed to regression or trivial advancement. *Houston Ind. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009). The basic inquiry in this case is whether the IEP implemented by the District "was reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 at 999 (2017). The District's obligation when developing Student's IEP is to consider Student's strengths, Student's parent's concerns for enhancing Student's education, results of the most recent evaluation data, and Student's academic, developmental, and functional needs. 34 C.F.R. § 300.320(a)(1)(i).

In this case, the District's IEP contained all the elements required under the IDEA. The District relied on the evaluations and information it had at its disposal in developing the IEP,

including Dr. ***'s outside evaluation and Student's psychiatrist's assessment that Student had ADHD. The District knew Student had issues with inattentiveness and ***. The District knew Student struggled with math. The District also knew Student had Dyslexia. The District therefore offered a program with three math goals, a Dyslexia class in a small setting, extra special education support for *** minutes per day in math, and the accommodations recommended in the District's FIE, Dr. ***'s assessment, and Dr. ***'s subsequent IEE.

When the District received a report in August 2020 from the IEE provider Dr. ***, the District convened two additional ARD Committee meetings and invited Dr. *** to attend. The District added several accommodations based on Dr. ***'s recommendations. The District did not refuse to provide any of Dr. ***'s recommended accommodations and interventions other than the recommendation, submitted after she had submitted her initial draft and at the urging of Student's parents, to provide education solely at ***. The District determined it could provide the necessary services and accommodations in the District without sending Student to a private school. The IEP is individualized based on Student's needs according to all available evaluations and information.

Petitioner also raises the failure to provide ESY as an issue in this case. However, Petitioner did not present sufficient evidence Student required ESY. A school district must make ESY services available if they are necessary to provide Student a FAPE. 34 C.F.R. § 300.106(a)(1). If a student will experience severe regression in the summer such that the educational benefit the child received during the school year will be significantly jeopardized, the student may be entitled to ESY. *Alamo Heights Indep. Sch. Dist. v. Tex. Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986). In this case, the ARD Committee considered the provision of ESY during the February 2020 ARD Committee meeting. The ARD Committee did not have evidence at that time Student required ESY. The ARD Committee agreed to collect data on Student's potential regression and offer ESY if it was necessary to provide Student a FAPE. Petitioner did not present evidence that Student requires ESY or that the ARD Committee was unwilling to make an individualized determination based on the assessment and performance as to whether Student required ESY. *See Candi M. v. Riesel Indep. Sch. Dist.*, 379 F.Supp.3d 570, 595 (W.D. Tex. 2019) (noting that the District's individualized consideration in ARD Committee meetings of whether ESY was necessary for

Student to receive a FAPE satisfied its obligation to consider the use of ESY in providing Student a FAPE).

2. Least Restrictive Environment

The IDEA requires that a student with a disability shall be educated with peers without disabilities to the maximum extent appropriate and that special classes, separate schooling, and other removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the “least restrictive environment requirement.” 34 C.F.R. § 300.114(a)(2)(i)(ii). State regulations require a school district’s continuum of instructional arrangements be based on students’ individual needs and IEPs and include a continuum of educational settings, including: mainstream, homebound, hospital class, resource room/services, self-contained – regular campus (mild, moderate, or severe), nonpublic day school, or residential treatment facility. 19 Tex. Admin. Code § 89.63(c).

To determine whether a school district is educating a student with a disability in the least restrictive environment, consideration must be given to:

- Whether the student with a disability can be satisfactorily educated in general education settings with the use of supplemental aids and services; and
- If not, whether the school district mainstreamed the student to the maximum extent appropriate.

Daniel R.R. v. State Bd. Of Educ., 874 F. 2d 1036, 1048 (5th Cir. 1989).

The determination of whether a student with a disability can be educated in general education settings requires an examination of the nature and severity of the student’s disability, the student’s needs and abilities, and the school district’s response to the student’s needs. *Id.* This determination requires an examination of:

- a school district's efforts to provide the student with supplemental aids and services in the general education setting;
- a school district's efforts to modify the general education curriculum to meet the student's individual needs;
- the educational benefit a student is receiving while placed in the general education setting; and
- the impact the presence of the student with a disability has on the general education setting and the education of the other students in the setting.

Id.

In this case, Student's IEP called for Student to receive all educational services in the general education environment with special education supports and services where appropriate. Student can be satisfactorily educated in that environment. Therefore, the Hearing Officer does not need to reach the second part of the two-part *Daniel R.R.* inquiry. Student's placement in the general education classroom maximized Student's ability to be around Student's peers without disabilities. The general education setting is Student's least restrictive environment.

3. Services Provided in a Coordinated, Collaborative Manner by Key Stakeholders

The IDEA contemplates a collaborative process between the school district and the parents. *E.R. v. Spring Branch Indep. Sch. Dist.*, 2017 WL 3017282, *27 (S.D. Tex. 2017), *aff'd* 909 F.3d 754 (5th Cir. 2018). The IDEA does not require a school district, in collaborating with a student's parents, to accede to a parent's demands. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999). The right to meaningful input does not mean a student's parents have the right to dictate an outcome, because parents do not possess "veto power" over a school district's decisions. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). Absent bad faith exclusion of a student's parents or refusal to listen to them, a school district must be deemed to have met the IDEA's requirements regarding collaborating with a student's parents. *Id.*

Student's parents were full participants in the development of Student's educational plan. Student's parents attended each of Student's ARD Committee meetings. Student's parents agreed with the initial IEP the District developed. They also participated in all of Student's Section 504 Committee meetings. District personnel called Student's parents to review the results of the FIE prior to Student's initial ARD Committee meeting. When Student's parents obtained an IEE from Dr. ***, the District convened two ARD Committee meetings and invited Dr. *** to participate and share her findings. The District then adopted several accommodations at the request of Student's parents and Dr. **. When Student's parents obtained a private evaluation from Dr. **, the District consulted directly with Dr. ** and reviewed her evaluation in developing the District's own FIE. Student's parents were key participants in developing Student's education plan.

4. Academic and Non-Academic Benefits

Whether a Student received academic and non-academic benefit is one of the most critical factors in any analysis as to whether a Student has received a FAPE. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 812-13 (5th Cir. 2012). The District did not have an opportunity to implement and fully observe the results of its IEP. The IEP was developed only shortly before COVID-19 forced the District to shut down and the move to a virtual model for all students. Because the request for a due process hearing was filed prior to the COVID-19 shut down, the Hearing Officer is not making findings about the District's implementation of the IEP in the virtual school environment. Student then enrolled in the *** for the full 2020-21 school year.

It is thus difficult to assess the efficacy of the IEP after its limited implementation. However, the IEP was reasonably calculated to provide academic and non-academic benefits when the ARD Committee created it in February 2020 and when the ARD Committee updated it in September 2020. The IEP called for Student to be educated in the general education setting so Student could receive an education with Student's peers and friends. Student has made friends with other students and participates in general education classes. *See Marc V. v. North East Indep. Sch. Dist.*, 455 F.Supp.2d 577, 596 (W.D. Tex. 2006) (noting making friends is a key non-academic

benefit). The IEP recommended specific interventions in Student's areas of weakness, namely reading and math, and is designed to provide Student academic benefit.

5. Conclusion

Taken together, the District offered Student a FAPE once it developed an IEP in February 2020 and revised the IEP in September 2020. The District individualized Student's education based on assessments and performance. The District offered to educate Student in all general education classes. The District appropriately worked with all key stakeholders, including Student's parents, in developing the IEP. And, finally, while the District has not been able to implement and fully observe the results of the IEP due to COVID-19 and then Student's withdrawal from the District, the IEP is designed to provide Student academic and non-academic benefit. Therefore, the District has offered Student a FAPE.

H. Remedy

The District violated its Child Find duties in this case. While the District is now offering Student a FAPE, the District must compensate Student for its failure to provide Student special education and related services from February 2019 until February 2020 when it should have been providing such services.

Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student. *G. ex. Rel RG v. Fort Bragg Dependent Schools*, 343 F. 3d 295, 309 (4th Cir. 2003). Compensatory education imposes liability on the school district to pay for services it was required to provide all along and failed to do so. *See, D.A.* 716 F. Supp 2d at 612 (upholding a hearing officer's decision that student failed to prove amount of compensatory reimbursement student was entitled to for school district's failure to evaluate in a timely manner).

Compensatory education may be awarded by a hearing officer after finding a violation of the IDEA. Hearing officers have broad equitable powers, as courts do, to fashion appropriate relief where there has been a violation of the IDEA. *Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359, 374 (1996).

Petitioner has requested tuition reimbursement for Student's time at *** and tuition reimbursement for the upcoming 2021-22 school year at ***. Tuition reimbursement is not appropriate in this case. The District offered Student a FAPE in February 2020. The IEP that would have been in effect for the 2020-21 school year was also designed to provide Student a FAPE. However, Student's parents unilaterally placed Student at *** instead of remaining in the District. The District does not have to reimburse Student's parents for that placement. The District's violation of the IDEA—namely a violation of its Child Find duties—took place prior to the 2020-21 school year. The District complied with the IDEA and offered Student a FAPE during the 2020-21 school year. The District's proposed program can also offer Student a FAPE for the 2021-22 school year.

For the Hearing Officer to order tuition reimbursement for either the 2020-21 or 2021-22 school year, there must be an IDEA violation in the corresponding year. *O.W.*, 961 F.3d at 800 (noting that tuition cannot be awarded in a school year in which there is not a corresponding IDEA violation). Therefore, the District does not owe Petitioner tuition reimbursement for two school years—the 2020-21 and 2021-22 school years—in which it did not violate the IDEA.

Petitioner also requested reimbursement for two private evaluations they obtained. The Hearing Officer will grant reimbursement for the evaluation by Dr. ***—completed prior to the District's evaluation—due to the District's failure to conduct a timely evaluation for special education and related services. Petitioner obtained the other evaluation by *** in May 2020. By that point, Student had already qualified for special education and related services. The District had also already granted Petitioner an IEE to obtain their own evaluation. Therefore, the District will not be required to reimburse Student's parents for that evaluation.

The Hearing Officer will also require a weekly one-on-one tutoring session with a CALT in accordance with Dr. ***'s recommendation to Student's parents to employ the services of a CALT outside of school. The goal of these sessions is to provide compensation for the full year of services—from February 2019 until February 2020—during which Student should have been receiving special education and related services but, due to the District's failure to comply with its Child Find duties, did not receive such services.

VII. CONCLUSIONS OF LAW

1. No exceptions to the one-year statute of limitations rule apply in this case. 34 C.F.R. §§ 300.507(a)(2), 300.511(f).
2. Respondent failed to meet its Child Find duty under the IDEA in a timely manner beginning with the commencement of the one-year statute of limitations period (i.e. February 28, 2019) until it completed its evaluation on January 2020 and began to provide Student special education and related services in February 2020. 34 C.F.R. § 300.111; 19 Tex. Admin. Code § 89.1151(c).
3. The District's FIE complied with all requirements of the IDEA. 34 C.F.R. § 300.304.
4. The IEP developed in February 2020 and revised in September 2020 offered a FAPE to Student. *Michael F.*, 118 F. 3d at 253.
5. Petitioner did not meet Petitioner's burden of proving Respondent failed to comply with student or parental procedural rights under the IDEA. *Schaffer v. Weast*, 546 U.S. 49 (2005); 34 C.F.R. § 300.503.

VIII. ORDERS


1. Based upon the foregoing facts, analysis, and conclusions of law, the Hearing Officer finds the District owes Petitioner compensatory education for its failure to fulfill its Child Find duties.
2. The District shall reimburse Petitioner for the cost of Dr. ***'s independent evaluation obtained prior to the District's commencement of special education and related services for Student in February 2020 as compensatory education.
3. Prior to the start of the 2021-22 school year, or at the earliest date on which all necessary parties are available, the District shall hold an ARD Committee meeting. The District shall

develop an IEP to provide a FAPE to Student during the 2021-22 school year, using the IEP developed for the 2020-21 school year, as well as relevant information from *** about Student's performance during the 2020-21 school year and Student's current PLAAFPs, to develop the IEP. The District shall continue providing Student Dyslexia services in daily classes of no more than four students. The District and Student's parents should ensure that the lessons they are teaching in their own respective settings align and reinforce the skills Student needs to be successful.

4. In addition to offering Student a FAPE for the 2021-22 school year, the District shall offer Student one weekly tutoring session of 45 minutes in any week during the 2021-22 school year in which the District is in session for three or more school days as compensatory education. The District and Student's parents can agree to reduce or increase the frequency of tutoring sessions and/or reduce or increase the amount of time in each session for the benefit of Student. The sessions shall be offered at a time and location in the District convenient for both parties.
5. The tutoring shall be offered with a CALT and/or other qualified provider as agreed to by the District and Student's parents. Tutors should be employees of the District, but can be non-employees by agreement of the parties. The tutoring shall focus on Student's weaknesses in math and/or reading in a format agreed to by the District and Student's parents. The tutoring shall serve to reinforce the services and accommodations already being offered by the District and reinforced by Student's parents to address those deficit areas. The District does not owe Student any additional compensatory education beyond the weekly tutoring services and the reimbursement for Dr. ***'s evaluation.

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

SIGNED July 19, 2021.



Ian Spechler
Special Education Hearing Officer
For the State of Texas

IX. NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent

jurisdiction or in a district court of the United States. 19 Tex. Admin. Code §89.1185(p); Tex. Gov't Code, Sec. 2001.144(a-b).