

BEFORE A SPECIAL EDUCATION HEARING OFFICER

STATE OF TEXAS

**STUDENT,
bnf Parent,
Petitioner**

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v.

DOCKET NO. 079-SE-1111

**KILLEEN INDEPENDENT
SCHOOL DISTRICT,
Respondent**

DECISION OF THE HEARING OFFICER

Introduction

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

Party Representatives

Petitioner was represented throughout this litigation pro se by petitioner’s mother, Parent Respondent was represented throughout this litigation by its legal counsel Holly Wardell and Kelly Shook with the law firm of Eichelbaum Wardell Hansen Powell & Mehl. In addition, ***, principal of *** School was also present during the due process hearing as its party representative. Dr. *** and ***, LSSP, were also present for much of the hearing as the school district’s consulting and testifying expert witnesses. Petitioner requested an open hearing and observers attended portions of the hearing over the two day hearing period.

Resolution Session and Mediation

A Resolution Session was conducted on December 6, 2011 but it was not successful in resolving the issues between the parties. The parties also attempted mediation on January 30, 2012 but it was not successful either despite the best efforts of the mediation participants.

Procedural History

The due process hearing was conducted on February 22-23, 2012. The parties requested an opportunity to submit written closing arguments and legal briefs. The parties selected March 30, 2012 as a mutually agreeable date for the submission of written closing arguments and legal briefs. Written closing arguments and legal briefs were submitted by both parties in a timely manner. The Decision of the Hearing Officer was extended to April 23, 2012 in accordance with the agreement of the parties and the regulatory requirements of the IDEA.

Petitioner’s Issues

The following issues were submitted by Petitioner for decision in this case:

1. Whether the school district failed to provide Student’s mother with the requisite prior written notice within the meaning of the Individuals with Disabilities Education Act (IDEA) including specifically whether the school district failed to provide Student’s mother with notice of a reconvened Admission, Review & Dismissal Committee (ARD) meeting conducted on November 15, 2011;

2. Whether the school district violated the No Child Left Behind Act (NCLB) by allegedly failing to provide Student's mother and/or the independent evaluator with documentation of Tier 1 interventions implemented by the school district upon request from both the parent and the independent evaluator for the period of time beginning in February 2010 through the date the school district received the independent educational evaluation (IEE);
3. Whether the school district delayed timely completion of an IEE by allegedly failing to provide the independent evaluator with Student's educational records for purposes of the IEE from November 30, 2010 through December 14, 2010, and if so, whether that constitutes a violation of the IDEA;
4. Whether the school district failed to provide Student's mother with timely notice that the IEE was completed on March 15, 2011 so that the parties could convene an ARD to review the IEE and, if so, whether that constitutes a violation of the IDEA;
5. Whether the school district failed to provide Student's mother with notice of her procedural rights under IDEA in March 2010, including specifically the right to file a due process hearing or that a list of low cost or free legal services could or would be provided;
6. Whether the school district should have identified Student as a student with a disability eligible for special education within the meaning of the IDEA beginning in 2009 up through the present; and,
7. Whether the school district should have provided and should provide prospectively special education to Student within the meaning of the IDEA beginning in March 2010 up through the present.

Respondent's Issues and Legal Position

The following issues were submitted for decision in this case by Respondent:

1. Whether any or all of Petitioner's claims are barred by the one year statute of limitations typically applied in Texas;
2. Whether any or all of Petitioner's claims are barred for failure to exhaust administrative remedies;
3. Whether Petitioner can meet petitioner's burden of proof on any and all viable IDEA claims;
4. Whether the hearing officer has jurisdiction to resolve any issues arising under the No Child Left Behind Act; and,
5. Whether Petitioner has stated a cause of action in whole or in part upon which relief can be granted; specifically including the following:
 - a. whether the IDEA requires the school district provide a parent with notice of a reconvened ARD;
 - b. Whether the IDEA requires a specific time frame for the school district to provide an independent evaluator with educational records; and,
 - c. Whether the IDEA requires the school district notify a parent when an IEE has been completed.

Petitioner's Requested Relief

Petitioner requests the following items of relief:

1. The school district complete all IEE's no later than 60 days from the date an IEE is requested by a parent when the school district has previously determined the student is not eligible for special education under IDEA;
2. The school district provide all independent evaluators with relevant educational records within 15 calendar days from the date the request for such records is submitted whether the request is in writing or verbal;
3. The school district provide parents with written notice that educational records have been provided to the independent evaluator within the 15 day calendar time period noted above;
4. The school district provide parents with prior written notice as a document separate from notice of an ARD meeting and that the prior written notice shall include the following:
 - A clear statement of the actions proposed by the school district;
 - A clear statement, under a separate heading, of all actions refused by the school district;
 - A clear statement, under a separate heading, for all actions proposed by the school district; and,
 - A statement as to the purpose of the notice as follows: "The Purpose of this Prior Written Notice is to give you, the parent, advance knowledge of what the actions the district is proposing or actions refused, so that you may effectively advocate for your child at the upcoming ARD meeting scheduled for (DATE);"
5. The school district provide notice of procedural rights verbally at each ARD meeting and explain those rights to the parent;
6. The school district provide Student with appropriate special education services to address the four learning disabilities identified in the IEE;
7. The school district will strongly consider parental requests in developing an IEP and provide parents with a written explanation of how the school district considered those requests;
8. The school district will design an IEP to meet Student's needs as identified by the IEE and other scientifically-based assessments;
9. The school district provide Student with compensatory services including specifically private tutoring for one hour five times a week beginning this current school year through the end of *** school and provided by a tutor who specializes in reading fluency, reading comprehension, math calculation, and written expression;
10. Reimbursement from the school district for the cost of private educational services, including specifically the cost of a private summer reading program in *** or *** grade;
11. Advocacy fees of \$150.00 - \$300.00;
12. The school district provide Student with an independent dyslexia assessment at public expense;

13. In the alternative, if the school district is unable or unwilling to provide the foregoing items of requested relief, to place Student at *** at public expense for the remainder of the current school year through the end of *** school; and,
14. Any and all other remedies within the hearing officer's authority.

Respondent's Request for Relief

Respondent requests all of Petitioner's causes of actions and claims for relief be denied and/or dismissed.

FINDINGS OF FACT

1. Student is *** years old and in the *** grade at *** within the Killeen Independent School District. (Respondent's Exhibit 18, pp. 211, 213 to 218)(referred to hereafter as "R. Ex. ___-___"). Student has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) combined with both hyperactivity and inattention since 2009. (R. Ex. 5-043). At the time of the hearing Student was receiving accommodations through 504 and had a 504 plan. (Transcript Volume I., pp. 118-119)(referred to hereafter as "Tr. Vol. __, p. __")(Tr. Vol. II, p. 383)(R. Ex. 8-068 to 072).
2. In *** grade Student had some difficulty turning math work in on time because student tended to leave it at home. (Tr. Vol. I., pp. 179-180, 190-191). Student received some small group instruction and was an average, typical *** grader. (Tr. Vol. I., p. 181). Student was very positive, had friends, played on the playground, was very social, well liked, and well behaved. (Tr. Vol. I., pp. 184, 223).
3. Student was on grade level in *** grade and made average grades. Student's academic performance may have been affected by the *** different teachers student had that year with *** made at parental request. (Tr. Vol. I., pp. 183-184, 186, 210-211, 221)(Tr. Vol. I., pp. 207-208, 222, 224)(R. Ex. 1-8, 1-18). It is not uncommon for grades to drop between *** and *** grade because there is more new material to learn in the *** grade. (Tr. Vol. I., pp. 208-209).
4. The Texas Assessment of Knowledge & Skills (TAKS) is the state mandated assessment administered to all students at the end of third through eleventh grades to assess both how the student is progressing and how the campus is delivering the instruction. (Tr. Vol. I., pp. 65-66). Student passed the *** portion of the *** grade TAKS but not the ***. (Tr. Vol. I., pp. 215, 225). Student was offered summer school but apparently did not attend. (Tr. Vol. I., pp. 201, 229). It is possible Student did not meet expectations on the *** grade ** TAKS because student did not utilize the test-taking strategies taught in preparation for the TAKS. However, Student performed on grade level in the classroom. (Tr. Vol. I., p. 230).
5. In *** grade Student's academic performance was also average. Student was just barely below grade level in reading that year as assessed by the SRI – a computer-based reading assessment tool. (Tr. Vol. I., pp. 235-236). Student and the *** grade teacher had a good rapport. Although Student was capable of focusing on assignments for long periods of time student tended to put effort into those student enjoyed or wanted to do and lacked focus for those student did not. (Tr. Vol. p. 237).
6. Student passed the *** portions of the *** grade TAKS but not the ***. (Tr. Vol. I., pp. 241, 243)(R. Ex. 3-29). Student left school the first week of May and missed some classroom activities aimed at bridging the gap between *** and *** grade. (Tr. Vol. I., p. 233).
7. Student was first referred for a special education evaluation by student's mother in *** grade during the

2009-2010 school year. She was concerned with student's difficulty with reading. (Tr. Vol. I., p. 70)(Petitioner's Exhibit 22, p. 89)(referred to hereafter as "P. Ex. ___ - ___")(P. Ex. 5-84) (P. Ex. 6-89) (P. Ex.7-98) (R. Ex. 16). Student's mother was informed of her procedural rights at the time she requested the evaluation and was provided with a copy of procedural safeguards when she completed the referral packet. (Tr. Vol. II, pp. 336-337)(R. Ex. 1-008) (R. Ex. 17-187). She was also provided with information about the Full Individual Evaluation (FIE). (Tr. Vol. II., pp. 334-335)(R. Ex. 17-183 to 184). The school district received parental consent for the FIE on December 18, 2009. (Vol. I., p. 70)(R. Ex. 17-185). The FIE was completed on February 15, 2010. (Tr. Vol. I., p. 71)(P. Ex. 6).

8. Student received instructional interventions once the special education referral was initiated in December 2009 including tutoring. Student's grades improved with the tutoring. (P. Ex. 7-98). At the time of the FIE Student was receiving "Tier 1" interventions. (Tr. Vol. I, p. 117). Tier 1 interventions are available to all children in the regular classroom. (Tr. Vol. I., p. 118)(Tr. Vol. II, pp. 346, 359, 388, 419, 426-427). These included scientifically-based interventions using software designed for children with dyslexia such as "Fast Forward" and "CEL." The school district also used small group, pull out accelerated reading instruction known as Accelerated Reading Instruction (ARI) and Accelerated Math Instruction (AMI). (Tr. Vol. I., p. 75) (Tr. Vol. I., pp. 200, 216).
9. The FIE was completed in February 2010 following the referral. The evaluation was conducted using standard assessment procedures. The licensed school psychologist (LSSP) used a variety of assessment tools and strategies and technically sound instruments in evaluating Student. (Tr. Vol. I., p. 96). The LSSP also selected test instruments to ensure they were not discriminatory on the basis of race or cultural bias, administered in Student's native language, administered in accordance with the testing manuals, and, that the tests were used for the purposes for which they were considered valid and reliable. (Tr. Vol. I., p. 97). The LSSP evaluated Student in both reading and math. (Tr. Vol. I., p. 115).
10. The FIE also included information from Student's teachers and parents. (Tr. Vol. I., p. 98). Teachers reported that Student participated in class, appeared well-adjusted, participated in all group projects, showed improvement in reading from the previous year, and overall performed as an average student. (Tr. Vol. I., p. 111).
11. The *** grade teacher noted Student did have some organizational issues - particularly failing to turn in math work. However, she also felt student was able to retain information from week to week and could read and comprehend directions. Student was described as cooperative, adaptable to new situations, happy, and able to make and keep friends. (P. Ex. 7-98)(R. Ex. 16).
12. The determination of eligibility for special education depends on a combination of factors; the school district considers everything about the child including whether the student is meeting grade level expectations. (Tr. Vol. I., pp. 59, 61-62, 80-81). In making a determination of whether a student has a learning disability the school district considers the student's academic achievement, school records, results of standardized testing, and, teacher and parent information. (Tr. Vol. I., p. 77). Report card progress, conferences with campus administration, and passing the TAKS are also factors in making that determination. (Tr. Vol. I., pp. 38-39, 43).
13. The *** grade FIE included the Woodcock-Johnson III Tests of Cognitive Abilities (WJ-III) which assessed Student's general intellectual ability and specific cognitive skills. The FIE reported 20 individual tests and 20 "cluster" scores under the WJ-III which, taken together, provided a broad estimate of Student's cognitive ability. The WJ-III also included a General Intellectual Ability (GIA) score which is often the best single-score predictor of school achievement. Student's GIA score of *** placed student in the low average of cognitive functioning relative to student's same age peers. (P. Ex. 7-99).

14. However, on other cognitive measures student fell within the average range of cognitive functioning relative to student's same age peers, including language development (as measured by a verbal ability cluster score), long term retrieval, visual-spatial thinking, auditory processing, and fluid reasoning. (P. Ex. 7-99). Student demonstrated the most difficulty with processing speed and short term memory. (P. Ex. 7-100 to 7-103).
15. The, WJ-III included a comprehensive set of achievement tests including reading, oral language, math, and written language. 14 "cluster" scores and 4 cross-academic cluster scores provided a broad estimate of Student's academic achievement. Student scored in the average range for basic reading skills and written expression and in the low average range for math calculation and math reasoning. (P. Ex. 7-103).
16. The FIE found Student functioned overall in the average range with a few areas a little below average including student's IQ score. (Tr. Vol. I., p. 98). In general the FIE found that Student performed commensurate with student's IQ ability and sometimes above. (Tr. Vol. I., pp. 98-99). While Student showed some deficit in cognitive efficiency (which may influence student's functional level) the FIE showed student also compensated well and made satisfactory grades in school. (Tr. Vol. I., p. 99). Student's grades were commensurate with student's cognitive ability. (Tr. Vol. I., pp. 79-80).
17. The LSSP was aware of the ADHD diagnosis. She concluded Student was functioning on grade level at the time of the FIE despite student's attentional deficits and a relative weakness in reading. Student was of average cognitive functioning and average academic achievement and passing all student's classes. The LSSP concluded Student did not meet eligibility for special education services as a student with a learning disability. (Tr. Vol. I., pp. 101-102, 103, 114)(R. Ex. 16-151) (R. Ex. 5-043).
18. An ARD met on March 10, 2010 to review and discuss the results of the FIE. Student's mother again received a copy of procedural safeguards at the ARD meeting and was accompanied by a parent advocate. (R. Ex. 15-138, 15-142). The ARD, with the exception of Student's mother, agreed Student did not meet eligibility requirements for special education. The decision was based on the results of the FIE, teacher reports, and Student's educational records. (Tr. Vol. I., p. 83)(R. Ex. 15-141)(R. Ex. 16-179).
19. Student's mother was offered the opportunity to recess the ARD and reconvene within ten days but she declined the offer. (R. Ex. 15-141). Instead, she requested an IEE. (Tr. Vol. I., p. 53)(P. Ex. 25-238). The school district sent two letters to Student's mother approving the parental request for an IEE. The first, sent on April 6, 2010, contained a typographical error referencing another student. The second, sent on May 11, 2010, corrected the error. (Tr. Vol. I., p. 50)(Tr. Vol. II, pp. 258, 260)(P. Ex. 21-221)(R. Ex. 13)(R. Ex. 14). Student's mother notified the school district of her selection of the IEE evaluator on July 27, 2010. (Tr. Vol. II, p. 261). The contract was sent to the IEE evaluator that day. The IEE evaluator signed the IEE contract on July 31, 2011. (Tr. Vol. II, p. 262)(R. Ex. 12-124).
20. The IEE was not completed until March 15, 2011 and the IEE report was not provided to the school district until April 27, 2011. (P. Ex. 14)(R. Ex. 10-95)(R. Ex. 22-290). The IEE evaluator stated a copy of the report was also being sent to Student's mother in the email transmitting the report to the school district. (R. Ex. 22-290).
21. The IEE included a review of background information, school records, interviews with both teachers and parents, and formal testing. (Tr. Vol. I., pp. 132-133). The background information included developmental history, circumstances in the home, historical patterns of behavior or performance, medical information, educational history based on school records, and prior school assessments. (Tr.

Vol. I, pp. 133-134, 158-159). The IEE evaluator did not recall having an issue with securing the necessary records from the school district in order to conduct the IEE. (Tr. Vol. I, pp. 162-163).

22. The IEE also evaluated Student's academic performance and found that overall student demonstrated substantial skills in a variety of different cognitive areas. (Tr. Vol. I, p. 136). Student's verbal skills were in the average range across the board as well as student's nonverbal fluid reasoning skills. Spatial skills and motor performance were also in the average range while student demonstrated some difficulty with phonological processing, working memory, and processing speed. (Tr. Vol. I, p. 137-139).
23. Working memory and processing speed are areas that reflect how the brain is structured and as such are more difficult to remediate than phonological processing. The instructional process for Student needs to be sensitive to those deficits and include appropriate accommodations. (Tr. Vol. I, pp. 140-142, 155).
24. The test scores reported in the IEE were consistent with the scores reported in the FIE. (Tr. Vol. I, p. 142). One difference was that the IEE reported only a set of specific reading subtest scores and did not include an overall reading cluster score. The IEE evaluator uses the subtest scores to better describe the nature of the student's reading problem in order to select and identify appropriate instructional interventions and/or accommodations. (Tr. Vol. I, pp. 151, 154, 168-169).
25. The LSSP had a slightly different focus and purpose. She included an overall reading cluster score in addition to reporting reading subtest scores in order to determine whether Student exhibited a learning disability for special education eligibility purposes. (Tr. Vol. I. pp. 106-107, 108-109).
26. While the scores identified in the IEE suggested a learning disability in reading the IEE evaluator deferred to the judgment of the ARD in determining eligibility for special education. She agreed student's reading needs could be met under 504 with the appropriate set of accommodations. (Tr. Vol. I, p. 143-147)(R. Ex. 10). The IEE recommended pre-teach, teach and re-teach as an appropriate instructional approach for Student. (Tr. Vol. I, p. 155). This strategy is a common technique routinely used by Student's regular education teachers. (Tr. Vol. II, pp. 383, 435, 451).
27. The IEE also showed Student is a good student – focused, motivated to do student's work, and very cooperative during testing. (Tr. Vol. I, pp. 145-146). A copy of the IEE was sent to the school district on April 27, 2011 and should have been forwarded to the parent as was the IEE evaluator's usual practice. (Tr. Vol. I, pp. 148-149)(R. Ex. 22-290).
28. Student was withdrawn from the school district on *** before an ARD could be convened to review and discuss the results of the IEE. (Tr. Vol. I, pp. 233-234)(Tr. Vol II. p. 267)(R. Ex. 20-251 to 252). Student re-enrolled in the school district in July 2011. (R. Ex. 18). Student's mother requested an ARD in October 2011 to review the IEE. (R. Ex. 22-299).
29. An ARD was conducted on November 2, 2011 to consider the IEE. The IEE evaluator participated in the ARD. School district members of the ARD concluded Student was not eligible for special education but continued to be appropriately served under 504. (R. Ex. 7-055) (R. Ex. 9-81). Student's mother disagreed. (R. Ex. 7-056, 7-062). A written parent statement was included with the ARD documents. (R. Ex. 9-084)(R. Ex. 22-277). The ARD recessed and reconvened on November 15, 2011. (Tr. Vol. II, pp. 340-341). The date of the follow-up ARD was established at the November 2nd ARD. (R. Ex. 9-081 to 9-082).
30. Student's mother provided her input, asked questions, and received information at both November 2011 ARD meetings. (R. Ex. 7)(R. Ex. 9). A Notice of Refusal to Provide Services was included as a component of the November 15th ARD documents. (R. Ex. 7-060 to 061).

31. At the November 15th ARD Student's *** grade science and math teacher described student as "a joy to have in the classroom." Student actively participated in class discussions in math and science, was seated *** the room, and was able to stay on task and focus on math and science lessons. (R. Ex. 9-088).
32. Student's *** grade reading teacher noted student's difficulty with fluency but also that student was on grade level for comprehension, an attentive listener, understood and responded to class conversations, participated and gave student's point of view, wrote creatively, and could answer questions although student needed reminders to use proper capitalization and punctuation. (R. Ex. 9-088).
33. The school district also conducted a dyslexia evaluation in November 2011. (Tr. Vol. I., p. 113) (R. Ex. 6). The dyslexia evaluation showed a higher fluency rate and better comprehension than the FIE did. The dyslexia evaluation also showed good phonological awareness and good rapid naming (which correlates with memory). The dyslexia evaluation confirmed Student is a slower but accurate reader; i.e., Student comprehends what student reads and simply reads at a slow rate. (Tr. Vol. I., p. 113)(R. Ex. 6). Comprehension is more important to reading than fluency. (Tr. Vol. I), p. 288).
34. A 504 meeting was convened on November 15, 2011 immediately following the ARD to discuss the dyslexia evaluation and Student's eligibility for services under 504. The 504 Committee concluded Student displayed "dyslexic tendencies" and would therefore receive accommodations in the classroom. (R. Ex. 7-049)(R. Ex. 8-071). A 504 Services Plan was developed which identified a set of accommodations as well as tutoring in reading and math as part of the 504 plan. (R. Ex. 8-072).
35. At the time of the hearing Student was making average to above-average grades in the regular *** grade setting with some 504 accommodations. (Tr. Vol. II, pp. 384, 432, 451). First semester grades in core academic classes ranged from *** (in reading) to *** (in science) with grades of ***, ***, and *** for social studies, writing, and math, respectively. (R. Ex. 1-001)(R. Ex. 2-020-021). Student is supported with additional tutoring in reading and math. (R. Ex. 2-020). Student receives the same set of instructional interventions that 80% of the students on the same campus receive. (Tr. Vol. II, p. 359). Student's teachers describe student as an average student without the need for specialized instruction. (Tr. Vol. I, pp. 180, 222, 226)(Tr. Vol. II, pp. 404, 433, 451).

DISCUSSION

Statute of Limitations

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

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

Accrual of Petitioner's Claims

Petitioner's cause of action accrued when Petitioner's mother knew or had reason to know of the injury that forms the basis of Petitioner's hearing request (i.e., the failure to identify student as a student with a disability eligible for special education under IDEA). *Doe v. Westerville City Sch. Dist.*, 50 IDELR, 132, pp 5-6 (D.C. Ohio 2008) (holding cause of action for failure to provide FAPE arose when student first diagnosed with a learning disability). Petitioner filed Petitioner's request for a due process hearing on November 21, 2011.

Exceptions to the One Year Statute of Limitations Rule

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

- Specific misrepresentations by the school district that it had resolved the problem that forms the basis of the due process hearing request; or
- The school district withheld information from the parent that it was required to provide under IDEA.

20 U.S.C. § 1415 (f) (3) (D); 34 C.F.R. § 300.511 (f) (1) (2). Petitioner does not allege the school district made specific misrepresentations but does allege it withheld information from Student's mother that it was otherwise required to provide.

In making the determination as to whether an exception to the statute of limitations rule should apply I must calculate the limitations period as one year from the date Student's mother knew or should have known of the complained of actions of the school district and not from the date Student's mother learned the school district's actions were wrong. *Bell v. Bd. of Educ. Albuquerque Pub. Sch.*, 50 IDELER 285, pp 8-9, 15-15 (D.C. N.M. 2008)(holding that IDEA claims that student was misidentified as MR rather than LD and thus denied FAPE were limited to two year SOL period).

Withholding Information/Prior Notice

In order to extend the statute of limitations Petitioner must prove that Student's mother was prevented from requesting a due process hearing because the school district withheld information from her it was otherwise obligated to provide under prior notice provisions of the IDEA. 20 U.S.C. § 1415 (f)(3) (D).

The information that a school district must provide to parents under IDEA for statute of limitations purposes is specific and includes:

- Notice of evaluation procedures the school district proposes to use;
- Notice that the school district has determined no further evaluation is necessary and that parents may then seek an IEE;
- Notice of procedural safeguards; and,
- Prior notice any time the school district proposes to initiate or change the identification, evaluation or educational placement of the child or the provision of FAPE or refuses to change the identification, evaluation, or educational placement of the child or the provision of FAPE.

20 U.S.C. § 1415 (b) (6) (A) (B) (c); 34 C.F.R. § 300.511 (f).

When a school district delivers a copy of IDEA procedural safeguards to parents the statute of limitations period for IDEA violations begins regardless of whether parents later examine the text to acquire actual knowledge of Decision of the Hearing Officer

procedural rights – the simple act of delivering the procedural safeguards notice suffices to impute constructive knowledge of parental rights under IDEA. *El Paso Ind. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 945 (D.C. Tex. 2008), *aff'd in part and vacated on o.g.* 591 F. 3d 417 (5th Cir. 2009). The record on file in this case supports the conclusion that Student's mother received the requisite notice of procedural safeguards.

While Student's mother may have repeatedly expressed concerns about student's educational progress as early as *** grade the record on file demonstrates that the school district provided her with the requisite notice of procedural safeguards at all required junctures. In doing so, Student's mother had either actual or constructive knowledge of her right to file a due process hearing at any point along the way whether she knew her concerns were actionable or not. *See, Sch. Dist. of Philadelphia v. Deborah A.*, 2009 U.S. Dist. LEXIS 24505 pp. 4-5 (D. C. Pa. 2009); 19 Tex. Admin. Code § 89.1151 (c).

The evidence also shows the school district provided Student's mother with notice of the FIE and the procedures it would use, that no further evaluation was necessary (following the ARD which reviewed the FIE), and information about the IEE. All relevant ARD documents provided Student's mother with notice of the school district's refusal to identify Student as eligible for special education under IDEA.

Statute of Limitations Conclusion

I therefore conclude that under the facts of this case Student's mother had either constructive or actual notice of her right to file a request for a due process hearing by March 10, 2010 – the date of the ARD where the results of the FIE were discussed. This means, under the Texas one year limitations rule, Student's mother could have filed her request for a due process hearing to contest the eligibility issue up through March 20, 2011. However, Petitioner's request for hearing was not filed until November 21, 2011 – outside the one year limitations period applied in Texas.

Therefore, to the extent that Petitioner's claims arose prior to March 20, 2011 those claims are dismissed as outside the applicable limitations period. 20 U.S.C. § 1415 (b)(6)(f)(3)(C); 34 C.F.R. §§ 300.503 (a)(1)(2); 300.507 (a)(1)(2); 19 Tex. Admin. Code § 89.1151 (c). Petitioner's claim that the school district should also have identified Student as eligible for special education at the November 2011 ARD meetings -- based on the results of the IEE -- falls within the one year limitations period and therefore survives.

Timely Notice of ARD

The evidence showed an ARD was conducted on November 2, 2011 in order to review and discuss the results of the IEE. Under Texas law when an ARD does not reach consensus the school district must offer the parent a single opportunity to recess for a period of time not to exceed ten school days. 19 Tex. Admin. Code § 89.1050 (h)(1). The date, time, and place for continuing the ARD must be determined by mutual agreement prior to the recess. 19 Tex. Admin. Code § 89.1050 (h)(3).

The November 2nd ARD reconvened on November 15, 2011. That date was selected by the parties at the November 2nd ARD prior to its recess. Notice of the recess and the date for the follow up ARD were stated in the November 2nd ARD documents. Under these facts the school district complied with the ARD notice requirements of the IDEA in a timely manner.

No Child Left Behind

The jurisdiction of a special education hearing officer is strictly limited to those issues arising under the IDEA. 34 C.F.R. § 300.507(a); 300.511; 19 Tex. Admin. Code §§ 89.1151(a)(b); 89.1170(a). Claims arising under the No Child Left Behind Act (NCLB) are outside the jurisdiction of a special education hearing officer in Texas.

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Thus, any claims that the school district failed to comply with NCLB requirements in implementing or delivering instructional interventions to Student are outside my jurisdiction and must be dismissed. *Id.*

Failure to Provide Records for IEE

There is virtually no evidence that the school district failed to cooperate with the IEE evaluator or, specifically, to provide the IEE evaluator with whatever educational records the evaluator needed or requested. Indeed, the credible evidence is to the contrary – the IEE itself includes references to a number of educational records and school information. The school district cooperated with the IEE evaluator by providing opportunities for classroom observation and feedback from Student’s teachers as well as producing educational records. There is no duty under IDEA for the school district to provide either the parent or the IEE evaluator with a list of documents supplied to the evaluator. Petitioner did not meet petitioner’s burden of proof on this issue. *Schaffer v. Weast, 546 U.S. 49, 62 (2005) (burden of proof in administrative hearing on party seeking relief.)*

Timely Notice of IEE

There is no specific requirement under IDEA that the school district provide a parent with notice that an IEE is completed, nor is there a specific time line for the school district to consider the results of an IEE under IDEA. *34 C.F.R. § 300.502*. Even if there were, the facts of this case support the conclusion that the school district took appropriate steps. The school district received the IEE report on April 27, 2011 and reasonably relied on the representation of the IEE evaluator that a copy was also being sent directly to Student’s mother.

While it would have been prudent for the school district to follow up with Student’s mother to ensure she in fact received the IEE report, the evidence also showed that Student was withdrawn from school on *** shortly after the IEE report was issued and before an ARD could be scheduled to review it. Under these facts the school district was not under an obligation to provide “notice” to Student’s mother that the IEE had been completed.

However, the evidence also showed that Student was re-enrolled at the end of July 2011. The school district did not convene an ARD to review and discuss the results of the IEE until Student’s mother requested the meeting on October 18, 2011. The ARD convened on November 2, 2011 (a date selected by Student’s mother). While the school district should have convened an ARD much sooner – certainly within the first few weeks of the new school year – no substantive educational harm occurred because the ARD was held and the eligibility decision remained unchanged. *See, 34 C.F.R. § 300.502(c) (1) (school district must consider results of IEE in any decision regarding provision of FAPE)*. Furthermore, the school district promptly responded to the parental request for the ARD, provided the proper notice, and scheduled the ARD at a mutually convenient time. *See, 34 C.F.R. § 300.322 (a)(1)(2)*.

Even if the school district committed a procedural violation under these facts any harm that occurred as a result of the procedural violation was at best *de minimis*. The evidence did *not* show the failure to convene the ARD in a timely manner impeded Student’s right to FAPE, significantly impeded student’s mother’s opportunity to participate in the decision-making process, or caused a deprivation of educational benefit. There is no violation of IDEA under these circumstances. *34 C.F.R. § 300.513(a) (1) (2) (i) (ii) (iii)*.

Notice of Procedural Rights

The IDEA requires notice of procedural safeguards must be provided by the school district to the parent at least once a year and under certain other specified circumstances. *34 C.F.R. § 300.504 (a)*. The evidence showed that the school district provided Student’s mother with notice of procedural rights a number of times and as

required under IDEA, including when notice of the evaluation for special education was initiated back in the *** grade, when she requested the IEE, and at subsequent ARD meetings. Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast, supra*.

Eligibility for Special Education Under the IDEA

A free, appropriate public education must be available to all children residing in Texas between the ages of 3 and 21, inclusive. 34 C.F.R. § 300.101 (a). The determination that a child is eligible for special education services under IDEA must be made on an individual basis by the group responsible in the school district for making eligibility determinations. 34 C.F.R. §§ 300.101 (c) (2); 300.306. In Texas that group is the Admission, Review & Dismissal Committee (ARD). 19 Tex. Admin. Code § 89.1050(a)(5).

Eligibility for special education and related services under IDEA is a two part inquiry; first, does the child meet the criteria as a child with a disability under one of the statute's eligibility classifications? In other words, does the child have a disability as identified by the evaluation procedures established under IDEA? 34 C.F.R. §§ 300.8(a); 300.306 (c). Second, does the child "need" special education and related services? 34 C.F.R. §§ 300.8 (a); 300.111 (a)(i); 300.306(c)(2).

The evidence in this case shows that while Student may indeed have a disability (i.e., Other Health Impairment based on student's ADHD, and/or a learning disability in reading) student is not in need of special education or related services. See, 35 C.F.R. § 300.8 (a)(c)(9)(10). Although the evidence demonstrated that Student has some identified educational weaknesses it also showed student is making academic progress commensurate with student's abilities, that student is doing so supported by a 504 Services Plan that includes appropriate classroom accommodations and tutoring services, and, that student is social, participates in the classroom, and well liked by teachers and peers. Therefore, even if Petitioner met petitioner's burden of proof on the first prong of the eligibility inquiry he did not meet petitioner's burden of proof on the second. See, *Schaffer v. Weast, supra*.

CONCLUSIONS OF LAW

1. Any claims arising prior to March 20, 2011 are outside the one year statute of limitations applied in Texas and are dismissed. 34 C.F.R. §§ 300.503(a)(1)(2); 300.507 (a)(1)(2); 19 Tex. Admin. Code § 89.1151 (c).
2. Respondent met the procedural requirements under IDEA of providing the parent with the requisite notice of the ARD meeting that reconvened on November 15, 2011. 19 Tex. Admin. Code § 89.1050 (h).
3. Petitioner's claims arising under the No Child Left Behind Act are dismissed as outside the jurisdiction of the hearing officer. 34 C.F.R. §§ 300.507 (a); 300.511; 19 Tex. Admin. Code §§ 89.1151 (a)(b); 89.1170 (a).
4. Respondent met its obligations under IDEA in providing educational records to the IEE evaluator as a component of its agreement to fund the parent's request for an IEE. Petitioner did not meet petitioner's burden of proving any delay in completing the IEE was a result of Respondent's actions or failure to cooperate with the IEE evaluator. 34 C.F.R. § 300.502.
5. Respondent met its obligations under IDEA when it contracted with an IEE evaluator of parental choice and when it relied on the representation that a copy of the completed IEE report was to be sent to the parent by the evaluator. Respondent did not violate IDEA procedural requirements when Petitioner withdrew from the school district before the school district could convene an ARD to

review the IEE. *34 C.F.R. §§ 300.322 (a)(1)(2); 300.502.*

6. Any procedural error committed by the Respondent did not result in a substantive educational harm when it failed to ensure the parent received a copy of the IEE or when it did not convene an ARD to review the IEE at the beginning of the next school year after Petitioner re-enrolled. *34 C.F.R. § 300.513(a)(1)(2)(i)-(iii).*
7. Petitioner's claim that Respondent failed to provide the parent with notice of procedural rights in March 2010 falls outside the one year statute of limitations period as applied in this case and is dismissed. Even if the claim fell within the limitations period the preponderance of the evidence showed Respondent did provide the parent with the requisite notice of procedural rights. *34 C.F.R. § 300.504 (a).*
8. Petitioner did not meet petitioner's burden of proving Respondent should have identified student as a student with a disability within the meaning of the IDEA for purposes of special education and related services. Although Petitioner may have met petitioner's burden of proving petitioner has a disability petitioner did not prove that petitioner was in need of special education. Therefore, Respondent was not obligated under IDEA to provide Petitioner with special education services during the relevant time period or prospectively from the date of this Decision. *34 C.F.R. §§300.8(a); 300.311 (a) (1); 300.306(c).*

ORDERS

Based upon the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Petitioner's claims arising prior to March 20, 2011 are **DISMISSED** as outside the one year statute of limitations as applied to the facts in this case.

It is further **ORDERED** that Petitioner's claims arising under The No Child Left Behind Act are **DISMISSED** as outside the jurisdiction of the hearing officer.

It is further **ORDERED** that Petitioner's remaining IDEA claims and requests for relief are **DENIED**.

It is further **ORDERED** that all other claims not specifically stated herein are **DENIED**.

SIGNED the 14th day of April 2012

Ann Vevier Lockwood
Special Education Hearing Officer

NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. *19 Tex. Admin. Code Sec. 89.1185 (p); Tex. Gov't Code, Sec. 2001.144(a) (b).*

BEFORE A SPECIAL EDUCATION HEARING OFFICER

STATE OF TEXAS

**STUDENT,
bnf Parent,
Petitioner**

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§
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§
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§
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v.

DOCKET NO. 079-SE-1111

**KILLEEN INDEPENDENT
SCHOOL DISTRICT,
Respondent**

SYNOPSIS

ISSUE:

Whether school district failed to provide parent with requisite notice of a reconvened ARD meeting.

HELD: FOR THE SCHOOL DISTRICT

Texas law requires school district must offer parent opportunity to recess for a period of time not to exceed ten days when parties do not reach consensus in ARD meeting. Date, time, and place for recessed ARD must be determined by mutual agreement prior to the recess. Evidence showed that parties selected date to reconvene prior to ending the non-consensus ARD and date was confirmed in ARD documents. No additional notice is required. **19 Tex. Admin. Code § 89.1050 (h)(1)(3)**

ISSUE:

Whether school district violated No Child Left Behind Act by failing to provide parent and IEE evaluator with documentation of Tier 1 interventions.

HELD: FOR THE SCHOOL DISTRICT

Claims arising under No Child Left Behind Act dismissed as outside the jurisdiction of special education hearing officer in Texas. Hearing officer's jurisdiction strictly limited to set of identified issues under IDEA. **34 C.F.R. §§300.507 (a); 300.511; 19 Tex. Admin. Code §§ 89.1151(a)(b); 89.1170 (a)**

ISSUE:

Whether school district delayed completion of IEE by failing to provide IEE evaluator with educational records for purposes of the IEE and, if so, whether that failure is a violation of the IDEA.

HELD: FOR THE SCHOOL DISTRICT

Petitioner failed to meet burden of proving school district did not cooperate with IEE evaluator or in providing evaluator with educational records. Evidence was to the contrary where IEE report referenced number of educational records, school information, and assessments. Testimony of IEE evaluator confirmed school district cooperated in providing records and also in providing opportunity for classroom observation and teacher interview. No specific duty under IDEA that school district must provide either parent or IEE evaluator with a list of documents school district provides for purposes of the IEE. **34 C.F.R. § 300.502**

ISSUE:

Whether school district failed to provide parent with timely notice that IEE was completed and thus whether school district failed to convene ARD to review IEE in timely manner.

HELD: FOR THE SCHOOL DISTRICT

No specific requirement under IDEA that school district provide parent with notice an IEE is completed nor does IDEA require a specific time line for school district to convene ARD to consider results of IEE. School district was entitled to rely on representation of IEE evaluator that copy of IEE report was to be sent to the parent by the evaluator. Student withdrawn from school before school district could schedule ARD to review the IEE.

School district did fail to convene ARD for that purpose within first few weeks of following school year (after student re-enrolled in school district in late summer) but any procedural error did not result in substantive educational harm where ARD was convened early November at parental request and underlying eligibility decision did not change from prior ARD. School district continued to recommend accommodations under 504 and 504 meeting conducted immediately following ARD. **34 C.F.R. §§ 300.502; 300.513 (a)(1)(2)**

ISSUE:

Whether school district failed to provide parent with notice of procedural rights in March 2010 including whether school district failed to provide parent with notice of right to due process hearing.

HELD: FOR THE SCHOOL DISTRICT

School district provided parent with requisite notice of procedural rights number of times including when special education referral initiated by parent and at subsequent ARD meetings. School district also provided parent with requisite information regarding evaluation. Claims that school district failed to provide requisite notice arose outside one year statute of limitations period and were dismissed. Petitioner did not meet burden of proof on remaining claims. **34 C.F.R. § 300.504(a)**

ISSUE:

Whether school district should have identified *** school age student with ADHD and with some identified reading weaknesses, including learning disability as identified in IEE, as eligible for special education services under IDEA.

HELD: FOR THE SCHOOL DISTRICT

Eligibility for special education a two-pronged inquiry; First, does student have a disability within the meaning of IDEA (i.e., does student meet criteria for one or more of the eligibility classifications stated in IDEA as assessed using IDEA evaluation requirements?); Second, is student in need of special education? Evidence showed that while student may meet criteria as student with either OHI (based on diagnosis of ADHD) or a learning disability in reading, evidence also showed that student did not need special education to make educational progress.

Student made average to above average grades during relevant time period and commensurate with student's abilities, demonstrated appropriate behavior and social skills, and received regular education instructional interventions and 504 accommodations that were effective. Petitioner did not meet burden of proof on this issue. **34 C.F.R. § 300.8 (a)(c); 300.111(a)(i); 300.306(c)(2)**