DOCKET NO. 224-SE-0418

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

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

Petitioner, Student, b/n/f Parent and Parent (Student or, collectively, Petitioner) brings this action against the Klein Independent School District (Respondent or District) under the Individuals with Disabilities Education Act, as amended, 20 U.S.C. § 1400 et. seq (IDEA) and its implementing state and federal regulations. Petitioner filed a request for an impartial due process hearing (Complaint) on April 27, 2018, with the Texas Education Agency (Agency) issuing notice of the Complaint on April 30, 2018.

A. Legal Representatives

Student has been represented throughout this litigation by Student's legal counsel, Dorene Philpot of Philpot Law Office, P.C. The District has been represented throughout this litigation by its legal counsel, Amy Tucker of Rogers, Morris & Grover, L.L.P.

B. Resolution Session and Mediation

The parties participated in a resolution session on May 10, 2018, but were unsuccessful in reaching an agreement. The parties did not participate in mediation, but they did continue to discuss possible settlement through informal negotiations.

C. Continuances

A continuance and extension of the decision deadline was granted on May 30, 2018. At the prehearing conference on that day, both parties requested a continuance in order to allow them to continue settlement negotiations and possibly pursue mediation. In addition, the parties requested four days for the hearing. The hearing was continued from June 13, 2018, to August 28-31, 2018, and the decision due date was extended from July 14, 2018 to October 12, 2018. Two additional extensions of the decision deadline were granted after the impartial due process hearing. On September 4, 2018, the Hearing Officer extended the decision due date at the joint request of the parties to November 9, 2018, to allow the parties time to submit written closing arguments after the hearing. On October 9, 2018, the Hearing Officer extended the decision due date to November 16, 2018, at the request of both parties, in order to allow the parties additional time to prepare their written closing arguments.

D. Preliminary Motions

After the Hearing Officer issued Order No. 3, memorializing the prehearing conference and setting forth the issues on May 30, 2018, Petitioner submitted a letter on June 1, 2018, citing errors in the issues set forth in Order No. 3 and requesting clarification of the issues. The motion was granted in part in Order No. 4 on June 7, 2018.

II. DUE PROCESS HEARING

The due process hearing was conducted August 28-31, 2018. Petitioner continued to be represented by Student's legal counsel, Dorene Philpot. Student's parents attended the hearing. In addition, Student's ***, ***, attended the hearing. Respondent continued to be represented by its legal counsel, Amy Tucker. In addition, Dr. ***, Director of Special Education for the District, and Dr. ***, Coordinator of Curriculum for the District, attended the hearing as the District's party representatives. The hearing was recorded and transcribed by a certified court reporter.

III. ISSUES

A. Petitioner's Issues

Petitioner submitted the following issues:

1. Whether the District failed to provide Student with a Free Appropriate Public Education (FAPE) as explained on page 5 of the Complaint.

2. Whether the District failed to comply with its Child Find obligation by failing to identify and evaluate Student for special education and related services in a timely manner as explained on pages 5-6 of the Complaint.

3. Whether the Individualized Education Plan (IEP) the District developed during the 2017-18 school year was reasonably calculated to provide a FAPE to Student.

4. Whether the District failed to comply with the procedural rights of Student and Student's parents as explained on page 7 of the Complaint.

B. Respondent's Legal Position and Additional Issues

The District denies each and every one of Petitioner's claims individually, declares a general denial, and asserts that it owes Petitioner none of Petitioner's requested relief.

Additionally, the District requested dismissal of any claims that may have arisen more than one year from the date on which this Complaint was filed as barred by the one-year statute of limitations. Petitioner properly invoked both of the two exceptions to the statute of limitations in its pleadings. Therefore, there are factual issues to be resolved as to whether the one-year statute of limitations applies in this case as a matter of law. Petitioner will bear the burden of proof in establishing an exception to the one-year statute of limitations rule.

IV. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner requests the following items of requested relief:

1. A finding that the District has not provided a FAPE to Student;

2. That the District be ordered to provide an appropriate IEP in the least restrictive environment that complies with the IDEA;

3. In the alternative, that the District be ordered to reimburse Student's parents for the private services, evaluations and/or mileage incurred due to the District's failure to provide a FAPE to Student, and the District be ordered to provide a private placement, evaluations and/or related services for Student going forward to remedy the harm caused by the District's violations of IDEA;

4. A finding that Petitioner is the prevailing party; and

5. Any relief deemed appropriate by the hearing officer.

V. FINDINGS OF FACT

Background Information

1. Student is *** years old and is currently a *** grade student at *** (***) in the District. Student is eligible for special education as a student with a Specific Learning Disability in reading comprehension, reading fluency, and basic reading skill. Student is also identified as a student with Dyslexia.[1]

2. Student was home-schooled during *** and ***. Student entered *** at *** (***) in the District in the 2013-14 school year. Student remained at *** through the end of the 2017-18 school year, the year in which Student completed the ***.[2]

3. Student's first educational experience in a formal school setting was Student's *** class at *** in the 2013-14 school year. In ***, Student was respectful and diligent. Student made "exceptional" grades in all Student's classes. However, Student had issues with Student's reading fluency.[3] Student's *** teacher placed Student into Tier 2 Response to Intervention

[1] Joint Exhibit 5, page 2 (J__, __).

[2] J8, 3.

[3] Transcript Pages 542-43 (TR ___); TR 550.

(RTI) to work on Student's reading fluency.[4]

4. Tier 2 RTI consisted of the *** teacher working with a group of four or five students for 45 minutes per day outside of classroom instruction time.[5] The program the District used for Student in RTI was called *** (***). Student began receiving RTI services in October 2013.[6]

5. The *** program was developed based on the research *** and appears in the What Works Clearinghouse, the United States Department of Education program for evaluating educational programs, as a research-based program.[7] The program could be individualized to the needs of an individual student. It included a writing component and a comprehension component.[8]

6. A committee of District staff at *** meets to review all students receiving RTI every third week. The goal of those meetings is to review each child's progress in the previous three weeks, determine if each child is receiving appropriate support, and to set goals for the next three weeks. The committee consists of the teachers for the student's grade level, school counselors, administrators, math and reading specialists, and lead team members. Every three weeks throughout Student's time in RTI at ***, Student's progress was reviewed by that committee.[9]

7. Student began *** in August 2014. Student's grades in *** reading, writing, and math were all at least an *** in each grading period throughout the year.[10]

8. Student performed well in class and was prepared for *** by the end of the school year, but Student was performing a full grade level below Student's peers on the District Reading Assessment. During the 2014-15 school year, Student's *** teacher felt the results of the District Reading Assessment indicated a need for ongoing RTI services.[11]

9. Student benefited from RTI throughout the year. Student's teacher recommended RTI services continue into *** due to the success Student had with those services in ***.[12]

10. In *** during the 2015-16 school year, Student remained in Tier 2 of the RTI program, utilizing *** as Student had since October 2013. Student made 1.5 years of academic

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[4] TR 543-44.

[5] TR 544.

[6] Petitioner's Exhibit 9, page 1 (P_, _).

[7] TR 936.

[8] TR 544.

[9] TR 277, 545, 575, 585, 644.

[10] P12, 3.

[11] TR 179.

[12] *Id*.

progress during *** in reading.[13] By the end of the year, Student was reading on a *** level. Specifically, Student was reading on a ***, which puts Student directly at a *** level.[14]

11. Even though Student was reading overall on a *** level, Student's fluency was still below grade level. Student's *** teacher thus kept Student in Tier 2 of RTI for the entire school year and recommended Student remain in Tier 2 of RTI in ***, with Student continuing to use the *** program as Student had since ***.[15]

12. In addition to fluency, Student also struggled in *** with reading comprehension. While Student was able to understand basic concepts, Student struggled to make inferences. Student also struggled with formal testing. Student would become anxious in the days leading up to an exam and, despite Student's teacher's efforts to keep Student calm, would display significant anxiety during test taking. This led to Student not meeting "standard" in Student's District Common Assessments during the year.[16]

13. Student passed the *** and displayed mastery of *** Texas Essential Knowledge and Skills (TEKS) during the 2015-16 school year in spite of Student's anxiety and struggles with fluency and reading comprehension.[17]

Efforts to Evaluate Student during the 2015-16 School Year

14. In May 2015, Student's mother requested that Student be screened for Dyslexia due to Student's issues with reading and due to *** family history of Dyslexia. ***'s reading specialist responded to the request by stating Student would be screened for Dyslexia in the fall of 2015 since there was not sufficient time left in the school year to conduct the screener.

15. In November 2015, when Student was in ***, the District completed a Dyslexia screener. Using the Woodcock Johnson IV and samples of Student's work and standardized tests, the District tested the four primary characteristics and two secondary characteristics of Dyslexia.[18]

16. Student was found to be in the average range in the primary Dyslexia characteristics of Letter-Word Identification, Word Attack, and Spelling. Student also scored within 10 words above or below the 50th percentile in the primary characteristic of Fluency. In the secondary characteristics, Student scored in the low range in reading comprehension and in the average range in writing composition.[19]

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[13] TR 588.

[14] J8, 16; P8, 1.

[15] TR 587.

[16] P56, 3.

[17] TR 585.

[18] P17.

[19] P17.

17. The District concluded that Student did not meet criteria for Dyslexia, but also noted that teachers should monitor Student's progress in reading comprehension in the future.[20]

18. On November ***, 2015, after learning that Student did not meet criteria as a student with Dyslexia, Student's mother requested a Full Individual Evaluation (FIE) via email to determine if Student qualified for special education and related services as a student with a Specific Learning Disability.[21] Student's ***—***—assisted *** with making the request.[22]

19. On December ***, 2015, the District sent Student's mother paperwork, including consent forms and parent information forms, so the District could conduct the evaluation. As part of the information sent home to Student's mother, the District sent a copy of the Notice of Procedural Safeguards.[23]

20. The District's standard consent for evaluation form contained inaccurate language stating that federal guidelines require the District to exhaust and document all general education interventions prior to considering special education services.[24] The District revised the form to remove that language in the fall of 2016.[25] Even when the form was in use, it was not the policy of the District to exhaust all general education interventions prior to referring a student for an evaluation for special education and related services.[26]

21. Student's mother filled out and signed the District's paperwork for a special education evaluation referral on January ***, 2016. On that same day, she also acknowledged with her signature that she had received the Notice of Procedural Safeguards.[27]

22. In addition to receiving the Notice of Procedural Safeguards, Student's mother was aware of her due process rights, because *** informed Student's mother during the 2014-15 school year, and reminded her continually over the following three years, that she had a right to "sue" the District if she was dissatisfied with the educational services Student was receiving.[28] *** had filed for a due process hearing against her children's school district six times and was familiar with the procedure for doing so.[29]

23. A special education referral committee, consisting of an assistant principal, Student's ***

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[20] P18, 2.

[21] Respondent's Exhibit 10, page 1 (R__, __).

[22] TR 503.

[23] R10, 11; TR 681-82.

[24] R10, 2.

[25] TR 49.

[26] TR 100, TR 267, TR 568.

[27] P19, 2-3.

[28] TR 496.

[29] TR 495.

teachers, and a school counselor, met on January ***, 2016, to discuss the request for special education. The referral committee determined Student did not need to be evaluated for special education and related services, primarily because Student was making progress in Student's classes and passing the *** exams in each subject.[30]

24. The assistant principal then had a meeting with Student's parents to clarify the reasons for not evaluating Student for special education and related services. The assistant principal explained that Student was passing Student's classes and making progress with the RTI interventions, so Student did not require an evaluation for special education. She also stated that Student would continue receiving RTI services and the District would look into Section 504 accommodations for Student to help with reading.[31]

25. Student's parents agreed with the District's plan.[32] The District then sent prior written notice of the decision not to evaluate Student on February ***, 2016, after the in-person meeting with Student's parents had taken place.[33]

26. On March ***, 2016, a Section 504 Committee found Student eligible for Section 504 accommodations due to Student's "reading difficulty."[34] The Committee implemented several accommodations, including providing additional wait time for Student to process information and oral administration of Student's assignments and *** exam.[35] Student's teachers had informally been implementing many of the recommended accommodations even before Student was found eligible for Section 504 accommodations.[36]

Student's * Year in the 2016-17 School Year**

27. Student began *** at *** with Section 504 accommodations in place in August 2016. While Student was a hard worker, Student continued to struggle with fluency and needed an "extra push" when it came to reading comprehension. Student's progress in Student's *** year was "inconsistent."[37] Student did not pass *** exams for the first time in Student's academic career in the spring of 2017.[38]

28. On the District Common Assessments beginning in the fall of the 2016-17 school year, Student failed to meet expectations in all reading and writing tests administered. This was consistent with Student's classroom performance and cannot solely be attributed to poor test

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[30] TR 683-84.

[31] TR 683-85.

[32] TR 683-84.

[33] R10, 13.

[34] J7, 3.

[35] J7, 2.

[36] J7, 3.

[37] TR 711.

[38] TR 715.

taking ability.[39] Student was reading below grade level for the entirety of Student's *** year, even though Student had ended *** reading on grade level.[40]

29. Student's first standardized Measures of Academic Progress (MAP) test of the year showed Student's reading was in the *** percentile, but by the middle of the year, the MAP score showed Student was reading in the *** percentile.[41]

30. Reading passages in *** and *** become more challenging and progress in reading requires a wider variety of comprehension *** skills. That is the reason Student did not improve in reading in the ***, even with the RTI interventions that had helped Student improve previously.[42]

31. Student's reading level plateaued in ***. Student was reading at Level *** at the end of ***. By the end of ***, Student's reading level was still Level *** and Student did not pass Student's STAAR reading exam, indicating that Student did not make progress in reading in the 2016-17 school year.[43]

32. Student made progress in areas other than reading during ***. Student scored in the *** percentile on the STAAR math exam.[44] Student's grades in all subjects other than reading were *** or higher.[45] Student had friends in Student's classes and was well-liked by peers and staff.[46]

Student's Parents' Response to Student's * Reading Issues**

33. Student's parents brought Student to an outside Dyslexia services provider in October 2017. The provider conducted an evaluation of Student and then began providing Student services in reading *** at Student's parents' expense.[47] The outside provider is a neurologist without educational certifications or experience working in a school district. The program Student provided is aimed at treating Dyslexia.[48]

34. The October 2017 evaluation stated only that Student would be considered a Student with Dyslexia "in Europe, where all languages but English and Danish have consistent symbol-

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[39] J8, 13.

[40] TR 745.

[41] TR 839.

[42] TR 783.

[43] J8, 15-6; J5, 17.

[44] P14, 31.

[45] R2, 1.

[46] TR 705.

[47] P33, 2.

[48] TR 913.

sound associations."[49] The evaluator never stated that Student has Dyslexia under any definition used in the United States.

35. In addition to seeking outside help, on September ***, 2017, when Student was in ***, Student's mother requested an FIE for Student.[50] She had previously requested an FIE when Student was in ***, so this request was the second she had made since Student was a student in the District.

Student's FIE Referral During the 2017-18 School Year

36. When Student's mother requested an FIE on September ***, 2017, the District was still not in session due to the effects of Hurricane Harvey. Students returned to school at *** on September ***, 2017.[51] The District wanted the chance to meet with Student's mother in person to discuss her request. The meeting between the District and Student's mother occurred on September ***, 2017.[52]

37. After that meeting, Student's parents continued to ask about the status of the FIE.[53] The District, however, did not decide to conduct an FIE and obtain consent from Student's mother until October ***, 2017, the 30th school day following the request.[54] The District also gave Student's parents the Notice of Procedural Safeguards on that day.[55]

38. The District completed its FIE on January ***, 2018, 43 school days after consent was signed. The parties came together to discuss the evaluation in an ARD meeting on February ***, 2018, the 24th calendar day following completion of the evaluation.[56]

39. The District relied upon various sources of information in conducting its evaluation. Those sources included multiple observations of Student, an interview with Student, a parent information form and a parent survey form, a teacher screener, a review of Student's records, a home language survey, and a review of Student's health records. In addition, the District administered the Woodcock Johnson IV Test of Cognitive Abilities, the Woodcock Johnson IV Test of Academic Achievement, and the Woodcock Johnson IV Test of Oral Language Battery.[57]

40. The District relied on informal data to identify fluency as an area of weakness for Student.

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[49] J10, 7; *See also* TR 376, 913.

[50] P39, 7-8.

[51] TR 304.

[52] P39, 7.

[53] P39, 26; TR 323.

[54] *See* J11.

[55] J5, 23.

[56] J8, 2; J11, 1.

[57] J8, 2.

The District recognized there was enough informal data in Student's records to support that finding without conducting a separate standardized test.[58]

41. The evaluation showed that, while Student's basic reading skills are in the *** percentile, Student's reading comprehension is in the *** percentile.[59] Student scored in the average range on letter and sight word identification and on word attack, which measures a student's ability to apply phonic and structural analysis to pronunciation of unfamiliar words.[60]

Student's Need for a Reading Comprehension Program

42. The District realized Student's fluency issues are caused by the slow speed at which Student processes and comprehends the information Student is reading. Student takes extra time to comprehend the words Student is reading, which slows down the speed at which Student reads.[61]

43. The *** reading material of *** and *** exacerbated the comprehension and fluency issues.[62] Student's reading comprehension deficit is the root of Student's issues with reading fluency and Student's primary area of need.[63]

44. The evaluation recommended Student met eligibility criteria for special education as a student with a Specific Learning Disability in reading comprehension, with specific weaknesses in comprehension/knowledge, fluid reasoning, long term memory, and processing speed.[64]

45. Student needs a program to address Student's reading comprehension deficit.[65] The program should also include other reading skills in order to support attacking Student's reading comprehension deficit.[66] The program should take place in a small group and should take place 45 minutes per day at least four days per week.[67]

46. The evaluator met in person with Student's mother for two and a half hours to review the results of the evaluation shortly after it was completed. Student's mother asked a number of questions about how to interpret the testing results. Those questions were "typical" questions

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[58] TR 864-65; R13, 61.

[59] J8, 14.

[60] J8, 15.

[61] TR 915-16.

[62] TR 783.

[63] TR 916; R13, 65.

[64] J8, 22.

[65] R13, 49; TR 947.

[66] J9, 3; *see also* P1, 7.

[67] P1, 7; TR 920;

parents ask upon seeing a student's FIE.[68]

47. After the two and a half hour meeting, the evaluator told Student's mother to contact her if Student's mother thought of additional questions. The meeting was cordial and the parties felt they were on the same page.[69] The cordiality and openness of the meeting is consistent with the positive communication between Student's parents and the District throughout Student's *** years at *** prior to the February ***, 2018 initial ARD Committee meeting.[70]

Three ARD Committee Meetings in the Spring of 2018

48. On February ***, 2018, an initial ARD Committee meeting was held for Student to determine Student's eligibility for special education and develop an IEP. Student's mother and father attended the meeting. ***, who had not attended any previous meetings with the District or communicated with District staff directly before, also attended the meeting as Student's advocate. The District had all required ARD Committee members in attendance.[71] The meeting lasted for more than four hours.[72]

49. ***. Attendees from the District described the ARD meeting as "unpleasant," "***," and a "***."[73] The tone of *** was "***" to staff members from the District.[74]

50. The meeting lasted several hours and it was "exhausting."[75] The evaluator who had conducted the FIE did not have a chance to discuss the evaluation due to the *** nature of the ARD meeting.[76] Instead, *** insisted to the ARD Committee that Student should qualify as a student with Dyslexia.

51. *** presented the outside evaluation conducted by the outside provider in October 2017 to bolster the claim that Student had Dyslexia. The ARD Committee accepted the outside evaluation and identified Student as a student with Dyslexia, despite the fact that the outside evaluation had never stated Student had Dyslexia under any definition accepted in the United States.[77]

52. The ARD Committee felt pressure to identify Student as a student with Dyslexia and provide Student with Dyslexia interventions due to the contentious nature of the ARD meetings.

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[68] TR 862.

[69] TR 862-63.

[70] *See* R13; R14; TR 528; TR 684; TR 735; P39.

[71] J5, 27.

[72] TR 863.

[73] TR 495, 890-91, 966.

[74] TR 780.

[75] *Id.*

[76] TR 863.

[77] J5, 16-7.

However, the District did not feel Student had Dyslexia or required Dyslexia interventions.[78]

53. The ARD Committee knew Student's Specific Learning Disability was in the area of reading comprehension. Nevertheless, the ARD Committee also qualified Student as a student requiring special education and related services for a Specific Learning Disability in the areas of reading comprehension, reading fluency, and basic reading skill due to pressure from ***.[79]

54. The ARD committee met for more than *** hours on February ***, 2018, before continuing the ARD on March ***, 2018. Following the February *** meeting, Student's mother contacted the evaluator to apologize for the contentious nature of the ARD Committee meeting.[80]

55. The ARD Committee met for more than *** hours on March ***, 2018. The meeting ended in consensus, but *** requested an opportunity to review the ARD documents before the parents would agree to the IEP. The ARD committee met again on March ***, 2018, at which point Student's parents signed the paperwork to indicate their agreement.[81]

56. During the contentious March ***, 2018 ARD, *** requested compensatory education services for Student. The District stated they needed time to meet with other District representatives before offering compensatory education.[82]

57. On March ***, 2018, Student's parents requested all of Student's RTI data from *** through ***. The District provided the requested records on March ***, 2018.[83]

58. Student's IEP, which began on March ***, 2018, contained two goals. One goal related to improving Student's reading comprehension and one related to improving Student's reading fluency.[84]

59. Student received all instruction in a general education curriculum with 3.75 hours per week of "co-teach reading" instruction.[85] The co-teacher's job is to work with the regular education teacher to provide supports and accommodations to Student and to other students in the classroom.[86]

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[78] TR 119; TR 913; TR 965-66; J8, 22; R13, 28.

[79] J5, 2; J5, 16-7.

[80] TR 890.

[81] J5, 22-5.

[82] J5, 22.

[83] R13, 43.

[84] J5, 5-6.

[85] J5, 11.

[86] TR 771.

60. Student also received Dyslexia services in the general education environment.[87] The Dyslexia services provided to Student were the *** (***). *** focuses on phonological awareness and decoding, which are skills on which Student already performs in the average range for Student's age. The District did not feel extra work in those skills was necessary to meet Student's needs.[88]

61. The District felt Student would benefit from a program such as ***—which emphasizes reading comprehension—as opposed to ***.[89] Student's greatest need is instruction directed toward reading comprehension.[90] *** does not work on a student's reading comprehension.[91]

62. The District also knew *** would not harm Student in any way. The District agreed to provide *** to Student as an innocuous way to satisfy the demands of ***. The District still believed Student did not have Dyslexia and would not benefit from a ***.[92] Student receives *** services approximately 45 minutes per day, four days per week.[93]

April *, 2018 ARD Meeting to Discuss Compensatory Education**

63. On April ***, 2018, the ARD committee met to discuss compensatory education. Before the ARD meeting, District staff members had a "pre-meeting" among themselves to discuss how much compensatory education and what type of compensatory education would be offered.

64. At the April ***, 2018 meeting, the District offered 20 hours of compensatory education services. The District offered those services not as an admission of guilt, but rather as a way to try to collaborate with Student's parent ***.[94]

65. The compensatory services would be provided through *** and would focus on Dyslexia services. The services would be provided during the remainder of the school year and into the summer.[95] Whether the 20 hours of *** services would be the final compensatory education award was an ARD Committee decision open to discussion among all ARD Committee members.[96]

66. *** stated during the ARD meeting that the 20 hour compensatory education offer was only

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[87] J5, 11.

[88] TR 773, TR 119, TR 914.

[89] TR 970.

[90] TR 914, TR 916.

[91] TR 172.

[92] TR 964-66.

[93] J3, 2.

[94] TR 776-77.

[95] J3, 2.

[96] TR 841.

the District trying to "***" as opposed to "supporting the child."[97]

67. Student's parents requested that the District pay for Student's outside Dyslexia program and reimburse Student's parents for expenses they had incurred through the program as compensatory education. Student's parents also requested that the outside Dyslexia program be implemented in Student's IEP. The District did not grant those requests and did not provide prior written notice of its decision not to grant those requests.[98]

68. The ARD meeting ended in disagreement and the parties agreed to reconvene on May ***, 2018, to discuss compensatory education further.[99] Petitioner filed a request for an impartial due process hearing on April 27, 2018. No further ARD Committee meetings occurred during the 2017-18 school year.

VI. STATUTE OF LIMITATIONS

The parties disagree as to the timeframe in which causes of action can be recognized in this case. Petitioner filed Student's request for an impartial due process hearing on April 27, 2018. Respondent therefore asserts that claims arising before April 27, 2017, 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 April 27, 2017, are not time-barred and should be considered.

A. 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

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[97] TR 777.

[98] TR 340.

[99] J3, 3.

- 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 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.

B. Withholding Exception

Petitioner asserts the District failed to provide Student's parents with the notice of procedural safeguards and with prior written notice of the District's decision not to evaluate Student for special education and related services in the 2015-16 school year. Petitioner asserts the District's 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 Independent School 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").

The record shows that the District sent a copy of the procedural safeguards to Student's parents as part of a packet of information in 2015 after Student's parents had requested the District conduct an FIE of Student. Student's mother acknowledged receipt of the notice of procedural safeguards in writing at the time. The record also reflects that the District sent Student's parents prior written notice of its decision not to evaluate after meeting with Student's parents in person to discuss that decision. The receipt of procedural safeguards and prior written

notice following an in-person meeting placed Student's parents on "constructive notice" of their due process rights. *See Id.*, at 949.

Even if the record had shown that the District withheld the notice of procedural safeguards and prior written notice, Student's parents should have had knowledge of how to file a request for a due process hearing. ***, who had experience filing several requests for a due process hearing for ***, had encouraged them to file a request for a due process hearing for several years. She had informed them of their right to file a request for a due process hearing and she had knowledge of how to do so. Thus, the District's alleged withholding of information from Student's parents could not have prevented Petitioner from filing a request for a due process hearing when *** had already made Student's parents aware they had that right. *See Id.*, at 945 (noting that a school district's withholding of procedural safeguards would prevent parents from requesting a due process hearing "until such time as an intervening source apprised them of their rights").

C. Specific Misrepresentation Exception

1. Petitioner's Specific Misrepresentation Allegations

Petitioner also asserts that the District prevented Petitioner from filing for a due process hearing due to four specific misrepresentations by the District:

- The District told Student's parents that they had to wait three years from the initial Dyslexia evaluation before Student could be evaluated for Dyslexia again;
- The District's consent for evaluation form claimed Student could not be evaluated for special education before all regular education options were exhausted;
- A teacher from the District told Student's parents in December 2015 that the District was "doing all we can" for Student when that was not the case by that teacher's own admission; and
- Teachers from the District represented to Student's parents that they were prohibited by District policy from referring Student for Dyslexia testing.[100]

[100] Petitioner's Closing Argument, 47-8.

2. Specific Misrepresentation Law

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 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).

3. Petitioner's Alleged Exceptions Do Not Meet The Legal Standard

Each of the four specific misrepresentations asserted by Petitioner did not prevent Petitioner from filing a request for a due process hearing. The District did not offer any "intentional or flagrant" misrepresentations and did not knowingly mislead Student's parents. Further, none of the District's conduct prevented Student's parents from filing a request for a due process hearing.

First, the evidence did not establish that anyone from the District told Student's parents that Student had to wait three years from the initial Dyslexia evaluation to be evaluated for Dyslexia again. Even if the evidence had established that, that particular misrepresentation would not have prevented Student's parents from filing a request for a due process hearing if they had disagreed with the Dyslexia evaluation. *See C.H.*, 815 F.Supp.2d at 984-85. Petitioners were aware they could file a request for a due process hearing if they disagreed with the initial evaluation due to

advice from *** and the notice of procedural safeguards they had received previously. They knew they did not need to wait three years to file a request for a due process hearing. They knew they had the right to file a request for a due process hearing any time they disagreed with an evaluation regardless of the District's policies about retesting.

Second, the evidence established that, while the consent for evaluation form contained language asserting all regular education options needed to be exhausted before a special education evaluation could be conducted, that was not the District's actual practice. The evidence showed that the District explained to Student's parents why Student was not to be evaluated for special education and related services. The District felt that since Student was making progress with RTI interventions, passing Student's classes, and passing the STAAR exam, Student did not require special education. Petitioner didn't present sufficient evidence that the District either believed or told Student's parents that the reason had anything to do with a failure to exhaust all regular education interventions.

Third, the evidence established that the teacher in question did believe she and the District were providing Student the educational services Student needed. She was not intentionally misleading Student's parents by stating "we are doing all we can" for Student without simultaneously acknowledging to Student's parents that "there's always more outside on Saturdays and Sundays" that a teacher could be doing for a student.[101]

Fourth, the evidence did not establish that teachers were prohibited from referring students for Dyslexia testing or that they had represented that to Student's parents.

D. Conclusion

The Hearing Officer concludes Petitioner did not meet their burden of proving the District made specific misrepresentations or withheld information in a way that prevented Petitioner from filing a request for a due process hearing as an exception to the one-year statute of limitations. The record shows the District did not make "intentional" or "flagrant"

[101] TR 674.

misrepresentations to Student's parents regarding the issues forming the basis the Complaint. *See D.K.*, 696 F.3d at 245. Petitioner also received the notice of procedural safeguards in 2015 and received prior written notice in 2016 after the District decided not to evaluate Student for special education and related services. Finally, Petitioner knew how to file a request for a due process hearing due to advice ***, who had previously filed several requests for due process hearings for her own children, had given to Student's parents.

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 Complaint was filed on April 27, 2018. 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 April 27, 2017-April 27, 2018.

VII. PETITIONER'S ISSUES

A. Petitioner's Issues Presented

Petitioner presented four issues in the Complaint, two of which concerned a denial of FAPE. Petitioner's first FAPE issue alleges the District failed to provide Student a FAPE due to the District's failure to evaluate Student in a timely manner.[102] By not developing an IEP for Student and providing special education and related services before finally identifying Student as a Student requiring special education and related services, the District denied Student a FAPE.[103] Petitioner's second issue presented is that the District failed in its Child Find obligations. In the third issue, Petitioner claims that the IEP developed after the completion of the initial FIE over the course of three ARD meetings in 2018 was not reasonably calculated to provide Student a FAPE.

[102] Complaint, at 6.

[103] *Id.*

The Hearing Officer will address the first and second issues presented together as part of an analysis of the District's compliance with its Child Find obligation. The Hearing Officer will then analyze Petitioner's third issue by examining whether the 2018 IEP was reasonably calculated to provide Student a FAPE. Finally, the Hearing Officer will examine Petitioner's fourth issue, whether the District's alleged procedural violations constituted a denial of FAPE.

B. Respondent's Child Find Duty

The District did not complete an FIE until January 2018 and finally reached consensus on an IEP in March 2018. Petitioner has asserted that the District has not complied with its duty under the IDEA to identify and evaluate Student in a timely manner for special education and related services. Petitioner has asserted the District should have conducted an FIE well before it finally did so.

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).

Federal courts have developed varying standards for determining what constitutes a "reasonable" amount of time to conduct an evaluation. *See W.B. v. Matula*, 67 F. 3d 484, 501 (3d Cir. 1995) (six month delay from observation of child's behavior until referral was a triable Child Find issue); *Dept. of Educ. Hawaii v. Cari Rae*, 158 F.Supp.2d 1190, 1195-97 (D. Haw. 2001) (six month delay from time school district had reason to suspect a disability to scheduling the evaluation was a Child Find violation).

Under Texas regulations, once a parent requests an initial evaluation, the District has 15 school days either to provide the parent an opportunity to consent to an evaluation or to provide prior written notice of a refusal to evaluate. 19 Tex. Admin. Code § 89.1011(b).

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 April 27, 2017, the beginning of the one-year statute of limitations period. Student had been receiving Section 504 services since Student was in ***, so the District was aware Student had a disability. During the 2016-17 school year, when Student was in the ***, the District should have suspected Student needed special education and related services as a result of the disability. Student began the 2016-17 school year on Reading Level *** and did not improve Student's reading during the course of the year. By the middle of the year, Student's MAP score placed Student in the *** percentile in reading for Student's age group,

which was consistent with Student's classroom performance. Student failed *** test in the spring of 2017 and performed at a low level on the District-wide assessments throughout the year.

As witnesses from the District testified, reading comprehension difficulties often manifest in *** and *** as the reading material becomes more complex. The District's Dyslexia assessment in the fall of 2015, when Student was in ***, had recommended monitoring Student's reading comprehension deficit closely. The reading difficulties manifested sharply early in Student's *** year in the 2016-17 school year, as should be expected with reading comprehension deficits. The District, however, did not monitor Student's reading comprehension deficit closely enough to consider testing Student for special education until the fall of 2017, and then only at the request of Student's parents.

A child's right to a FAPE should not depend upon the vigilance of a child's parents. *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396 (3d Cir. 1996). The District should have proactively sought to evaluate Student for special education eligibility before Student's parents requested an evaluation. *See Id*. The District then took 30 school days to respond to Student's parents' request for evaluation and obtain consent. That process should have taken no more than 15 school days. 19 Tex. Admin. Code § 89.1011(b).

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 April 2017, the beginning of the one-year statute of limitations period. By that time, Student had failed to make progress in Student's reading level in the ***, was performing poorly in reading in the classroom, and had scored in the *** percentile in reading on the MAP test. Student also did not pass *** in the spring of 2017. An evaluation was not completed until January 2018 and Student was not admitted into special education until March 2018. 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.

C. Respondent's Provision of a FAPE

Petitioner has asserted that the 2018 IEP developed and implemented by Respondent failed to confer a FAPE to Petitioner. Petitioner claims the FIE the District conducted did not assess Student in all areas of need, because it did not test Student for Dyslexia or test Student's fluency.[104] Petitioner further claims that the Dyslexia program offered to Student did not meet Student's needs.[105]

The IDEA requires states like Texas which receive federal funding to make a FAPE available to all students with disabilities residing in the state. 20 U.S.C. § 1412(a)(1)(A); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 232 (2009). In order for a child to receive a FAPE, a school district must provide a student an educational program reasonably calculated to enable a student to make progress appropriate in light of the child's circumstances. *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 983, 1001 (2017). That progress must be something more than mere *de minimis* progress. *Id.*, at 1000.

The Fifth Circuit has articulated a four-factor test to determine whether a school district's program meets IDEA requirements. Even after the Supreme Court's 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. *Renee J. v. Houston Indep. Sch. Dist.*, 2017 WL 6761876, *7 (S.D. Tex. 2017). 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;

[104] Complaint, at 6; Petitioner's Closing Argument, at 12-3.

[105] Petitioner's Closing Argument, at 22.

- 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).

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

1. Whether the Program Is Individualized

The District assessed Student and found Student to be a student with a Specific Learning Disability in the area of reading comprehension, with specific weaknesses in comprehension/knowledge, fluid reasoning, long term memory, and processing speed. Student's teachers dating back to *** had stated that Student's reading issues were in the areas of reading comprehension and fluency. Testing dating back to the 2015-16 school year indicated a weakness in reading comprehension and urged the District to monitor reading comprehension difficulties closely. Those difficulties in reading comprehension manifested as the material became more difficult. Student's reading comprehension deficit also causes Student's issues with reading fluency.

However, at the ARD meeting on February ***, 2018, *** convinced the District to adopt the view that Student's primary area of need was in the area of Dyslexia. No evaluation data supported identifying Student as a student with Dyslexia. The District's FIE, Petitioner's expert, and Petitioner's outside Dyslexia services provider all did not identify Student as a student with Dyslexia.

The only specialized reading program the District recommended for Student was ***,

which is a general education *** that did not address Student's reading comprehension issues. The District also placed Student into a co-teach classroom 3.5 hours per week to assist with providing Student's accommodations. Placement in the co-teach classroom was an effort to accommodate but not remediate Student's reading comprehension issues. Thus, the District did not provide Student a program that was individualized on the basis of assessment and performance and focused on Student's difficulties in reading comprehension.

2. Least Restrictive Environment

Second, the District's program was delivered in the least restrictive environment. Student has been in all general education classes for Student's entire academic career. Neither the District nor Petitioner argued Student was in an overly restrictive academic setting.

3. Whether Services Were Provided in a Collaborative Manner

Third, despite the District's effort to accommodate Student's parents' requests, the services were not provided in a coordinated, collaborative manner. 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). 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. *White ex rel. White v. Ascension Par. Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003).

The IDEA does not, however, require a school district, as part of 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 a "veto power" over a school district's decisions. *White ex rel. White*, 343 F.3d at 380.

In this case, *** insisted that Student had Dyslexia and required a ***. The evidence did not support that conclusion. The District was aware that evaluation data, classroom observation,

and *** school years of experience working with Student supported Student's needing a program to address reading comprehension. The District nevertheless implemented a ***. The result of this was that the District's program did not sufficiently address Student's area of need in reading comprehension.

The District should be commended for its desire to maintain a positive and collaborative relationship with Student's parents. The District also knew that the Dyslexia program would not harm Student. However, Student needs a program with a focus on reading comprehension to receive a FAPE. By giving a veto power to Student's parents and ***, the District failed to include the opinions of school staff who work with Student daily. They also ignored the expertise of their own diagnostician, who could not even fully present her own opinions due to the contentious nature of the ARD Committee meetings. The District gave a "veto power" to Student's parents at the expense of the other key stakeholders.

4. Academic and Non-Academic Benefit

Fourth, the evidence showed Student did derive nonacademic benefit, but did not derive sufficient academic benefit from Student's program. The evidence shows that Student has friends and derives the nonacademic benefit of interacting appropriately with Student's nondisabled peers and with Student's teachers and staff. The evidence also shows that Student made progress in areas such as math and science. However, the evidence shows that Student made minimal progress in reading, Student's primary area of need.

Whether education was provided in the least restrictive environment was not an issue in this case. When weighing the other three *Michael F.* factors, Student benefited from having friends and being around non-disabled peers. Student also made progress in most academic areas. However, the District provided a program that was not individualized on the basis of assessment and performance and ignored input from the key stakeholders other than Student's parents and ***. The District failed to address Student's reading comprehension deficit adequately in its proposed program. The District's failure to address that deficit sufficiently, the deficit by reason of which Student qualifies for special education, is the most important factor in

the Hearing Officer's analysis. Therefore, the Hearing Officer concludes that the District did not provide Student a FAPE. *See Michael F.*, 118 F.3d at 253.

D. Procedural Violations of the IDEA

The Complaint asserts that Respondent failed to comply with the procedural requirements of the IDEA. Specifically, Petitioner asserts the following procedural violations:

- The District's answer was not timely and therefore the District's affirmative defenses cannot be considered.
- The March ***, 2018 ARD meeting did not have a key decision maker present from the District.
- The District engaged in "predetermination" by conducting a "pre-meeting" ahead of the ARD without Student's parents present.
- The District failed to provide prior written notice of several key decisions.
- The District failed to give Student's parents a copy of all of Student's records in a timely manner in the spring of 2018.[106]

In order to constitute a denial of a FAPE, a failure to comply with a procedural requirement of the IDEA must result in the loss of educational opportunity or it must infringe on a parent's right to participate in the IEP process. *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 812 (5th Cir. 2009); *See also* 34 C.F.R. 300.513(a)(2). None of the procedural violations asserted by Petitioner constitute such a loss or denial.

1. The District's Allegedly Untimely Answer

Petitioner raised the issue of whether Respondent's answer was untimely for the first time during the due process hearing itself. Petitioner never filed a motion on this issue, but stated on the first day of the hearing that Petitioner objected to Respondent's answer as untimely.

[106] Petitioner's Closing Argument, 51-3.

Petitioner argued the answer was filed more than ten days after Petitioner issued notice to Respondent. The Hearing Officer overruled Petitioner's objection on the record.

Order No. 1 in this case gave Respondent until May 10, 2018, to file an answer. Respondent complied with that timeline. There is a rebuttable presumption that Respondent receives notice of the complaint on the day the Agency issues notice. 19 Tex. Admin. Code § 89.1165(b). The agency issued notice on April 30, 2018. The Hearing Officer issued Order No. 1, establishing the deadlines in the case, on May 2, 2018. Petitioner did not attempt to rebut the Hearing Officer's presumption once that Order was issued. Petitioner did not raise the issue during the prehearing conference or in any motions while this due process hearing was pending.

Further, even if the District's Response had been untimely, Petitioner cannot argue Petitioner was surprised by the District's defense. The purpose of requiring a defendant to plead any affirmative defenses is to give the other party notice of those issues and an opportunity to rebut them. *MAN Engines and Components, Inc., v. Shows,* 434 S.W.3d 132, 136 (Tex. 2015). Petitioner had plenty of notice of Respondent's planned defenses. The parties also had a prehearing conference, during which the Hearing Officer gave Petitioner an opportunity to ask questions about Respondent's defenses on the record. Petitioner cannot claim it was unaware of the defenses on which Respondent would rely.

Petitioner did not show the District's answer was untimely. Even if Petitioner had shown that, Petitioner did not show Petitioner was unfairly surprised by anything in Respondent's answer. Most importantly, Petitioner did not show the allegedly untimely answer resulted in a denial of FAPE or a lack of parental participation in the IEP process. *See Adam J. ex rel. Robert J.*, 328 F.3d at 812. Therefore, Petitioner did not meet Petitioner's burden of proof on this procedural issue.

2. Lack of a Key Decision Maker in the 3-*-2018 ARD Meeting**

Petitioner asserts the District did not have a proper District representative at the ARD meeting on March ***, 2018, because the District representative stated she needed to discuss

Student's parents' compensatory education request with other staff from the District. The IDEA requires an ARD Committee to include a member who represents the school district and (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (III) is knowledgeable about the availability of resources of the local educational agency. 20 U.S.C. § 1414(d)(1)(B).

The representative of the District wanted an opportunity to discuss the provision of compensatory education with other District staff members after the parental request was presented to the ARD Committee. Nothing in the IDEA prevents the District representative in an ARD meeting from doing so. And no evidence was presented to suggest the District representative was otherwise unqualified to fulfill her role or that her failure to respond to the compensatory education request during the March ***, 2018 meeting resulted in a loss of educational opportunity for Student. *See Adam J. ex rel. Robert J.*, 328 F.3d at 812. Therefore, Petitioner did not meet Petitioner's burden of proof on this procedural issue.

3. The District's Alleged Predetermination

Petitioner asserts that, by holding a "pre-meeting" to discuss a "reading game plan" ahead of an ARD where compensatory education was to be offered without Student's parents present, the District engaged in predetermination of services. A school district is allowed to hold staff meetings without a student's parents present and to arrive at an ARD meeting with recommendations. *Blackmon ex rel. Blackmon*, 198 F.3d at 657. The District violates the IDEA due to "predetermination" only if it refuses to consider the view of Student's parents. *J.E. v. New York City Dept. of Educ.*, 229 F.Supp.3d 223, 237 (S.D.N.Y. 2017). A school district cannot come to an ARD meeting with a closed mind, having already determined a key aspect of the child's educational program without parental input. *R.L. v. Miami-Dade Cty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014).

The evidence suggests the District came to the ARD meeting to discuss compensatory education with a proposal, but District staff maintained an open mind. The pre-meeting was an

effort by District staff to formulate a proposed plan for compensatory services. When Student's parents refused the compensatory education offer, the District agreed to reconvene the ARD meeting at a later date to try to arrive at a consensus. The evidence does not show the District refused to consider parental input or predetermined this aspect of Student's program. *See Blackmon ex rel. Blackmon*, 198 F.3d at 657; *R.L.*, 757 F.3d at 1188; *J.E.*, 229 F.Supp.3d at 237. Therefore, Petitioner did not meet Petitioner's burden of proof on this procedural issue.

4. The District Failed to Provide Prior Written Notice of Key Decisions

Petitioner asserts that the District failed to provide prior written notice of the District's refusal to implement the program of Student's outside Dyslexia services provider or to reimburse Student's parents for that program as compensatory education. Prior written notice is required whenever a school district refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a FAPE to that child. 34 C.F.R. § 300.503(a)(2). The District did not provide prior written notice of its refusal to implement the outside provider's program or reimburse Student's parents for the outside provider's services.

Prior written notice was not required in this case, because neither Student's parents' request for reimbursement for outside services nor their request that the outside provider's program be implemented required prior written notice. Deference in the choice of methodology is given to the judgment of professional educators. Parents, no matter how well intentioned, do not have a right under the IDEA to compel a school district to provide a specific program or employ a specific methodology in providing special education. *Lachman v. Illinois State Bd. Of Educ.*, 852 F. 2d 290, 297 (7th Cir. 1988). Thus, refusing to implement the outside provider's specific program for Dyslexia as opposed to the District's choice of Dyslexia programs—***—was within the District's discretion and did not concern the provision of a FAPE.

Additionally, reimbursement for outside services paid for by a student's parent is an equitable remedy which courts and hearing officers have discretion under the IDEA to award. *Burlington Sch. Comm. v. Dept. of Educ*., 471 U.S. 359, 369 (1996). It is an exceptional remedy not expressly authorized by the IDEA. *D.A. v. Houston Ind. Sch. Dist.*, 716 F. Supp. 2d 603, 613 (S.D. Tex. 2009), *aff'd* 629 F. 3d 450 (5th Cir. 2010). A school district's refusal to provide a

parent reimbursement for outside services, therefore, does not amount to a refusal to provide a FAPE to a child. *See* 34 C.F.R. 300.503(a)(2). Because it does not constitute a FAPE denial, refusal to pay for outside services does not require prior written notice.

However, even if prior written notice had been required, the failure to provide such notice was not a violation of the IDEA. The failure to provide prior written notice did not prevent Student from receiving a FAPE and did not prevent Student's parents from participating in the IEP process. *See* 34 C.F.R. 300.513(a)(2). Student's parents made the request during the April ***, 2018 ARD meeting, which was the fourth ARD meeting in which Student's parents had participated since February 2018. And the program they were requesting, a program targeting Dyslexia, was not necessary to provide Student a FAPE. Student needed a program targeting reading comprehension, not a program targeting Dyslexia. Thus, even if prior written notice had been necessary, failure to provide prior written notice did not constitute a violation of the IDEA. Therefore, Petitioner did not meet Petitioner's burden of proof on this procedural issue.

5. The District Failed to Produce Student's Records to Student's Parents in a Timely Manner

Finally, Petitioner asserts the District failed to produce Student's educational records to Student's parents. Petitioner failed to produce evidence to indicate either that the production of requested records was untimely or that Student or Student's parents were harmed by an inability to produce records.

Student's parents received the FIE on which Student's IEP was based. They then had a 2.5 hour meeting to review that FIE with the evaluator. Student's parents left the March ***, 2018 ARD with a complete copy of the IEP to review before signing agreement on March ***, 2018. Student's parents requested all of Student's RTI records on March ***, 2018, and received them on March ***, 2018. Evidence indicated Student's parents were welcome to ask questions of District staff members. The evidence does not reflect they were prevented from participation in the IEP decision making process by a failure to produce educational records. Therefore, Petitioner did not meet Petitioner's burden of proof on this procedural issue.

VIII. COMPENSATORY EDUCATION

A. Compensatory Education Generally

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 pay 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).

B. Calculating Compensatory Education

There are two methods of calculating compensatory education: the qualitative method and the quantitative method. The quantitative approach awards compensatory education in an amount equal to the amount of education time the student missed due to the school district's violation of the IDEA. *See M.C. on behalf of J.C. v. Cent. Reg'l. Sch. Dist.,* 81 F.3d 389, 397 (3rd Cir. 1996). The qualitative approach attempts to provide a flexible, equitable remedy by awarding a student what the student needs to make up for a school district's violation of the IDEA. *See Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

Appellate courts are split as to which standard is appropriate. *See, e.g., Parents of*

Student W. v. Payallup Sch. Dist., No. 3, 31 F.3d 1489, 1497 (9th Cir. 1994) (applying a qualitative approach); *Bd. of Educ. Of Fayette Cty. V. L.M.*, 478 F.3d 307 (6th Cir. 2007) (applying a qualitative approach); *M.C. on behalf of J.C.*, 81 F.3d 389 (applying a quantitative approach); *Miener by and through Miener v. State of Mo.*, 800 F.2d 749, 756 (8th Cir. 1988) (applying a quantitative approach by ordering the school district to provide two years of education services "to replace the services the defendants were obligated to provide"). The Fifth Circuit has not yet addressed the issue, but lower courts in the Fifth Circuit have applied a quantitative approach. *See, e.g., Novak v. Ennis Indep. Sch. Dist.*, 2012 WL 13026966, *9 (N.D. Tex. 2012) (granting three months' compensatory education for the three month period during which the school district failed to provide the child a FAPE); *El Paso Indep. Sch. Dist. v. F.A.*, 2010 WL 11506526, *9 (W.D. Tex. 2010) (noting a hearing officer has discretion to provide compensatory education on a quantitative basis).

C. Applying the Quantitative Approach to This Case

In this case, the Hearing Officer will apply a quantitative approach to compensatory education. The quantitative approach in this case would calculate only the amount of time Student should have been receiving a special education program focused on reading comprehension and will award that time back to Student. *See Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 669 F.Supp.2d 80, 84 (D.D.C. 2009) (noting that, even in a jurisdiction that applies a qualitative approach, a quantitative approach, provided it isn't simply "a mechanical calculation" but is truly aimed at making the student whole, may be an acceptable method).

The District failed to conduct a timely evaluation for Student under its Child Find duty. Had it done so, Student would have received the special education and support services Student needed as a student with a Specific Learning Disability sooner than Student did. Further, the educational program provided by the District did not provide Student with the reading comprehension focus Student needs. The District must provide Student those services going forward and must make up for its failure to provide them in Student's present IEP.

The District should have initiated the evaluation process on April 27, 2017, and obtained consent by May 18, 2017. *See* 19 Tex. Admin. Code § 89.1011(b). The District then should have completed the evaluation by October 19, 2017, and convened an ARD meeting by November 17, 2017 according to the District's calendar.[107] *See* 19 Tex. Admin. Code § 1011(c-d). The District then should have implemented a program providing at least 45 minutes per day, four days per week of instruction focused on reading comprehension and related skills until November 17, 2018, the date of Student's next annual ARD meeting. Student should have therefore received 108 hours of instruction specifically focused on Student's reading comprehension deficits. In order to make Student whole, the District must not only implement a reading comprehension program in Student's IEP, but also make up the hours of reading comprehension programming it should have provided.

IX. CONCLUSIONS OF LAW

1. Petitioner did not meet Petitioner's burden of proving the exceptions to the one-year statute of limitations rule as applied in Texas. 34 C.F.R. §§ 300.507(a)(2), 300.511(f).

2. Respondent failed to meet its Child Find duty in a timely manner under the IDEA beginning with the commencement of the one-year statute of limitations period (i.e. April 27, 2017) until it completed its evaluation on January ***, 2018. 34 C.F.R. § 300.111; 19 Tex. Admin. Code § 89.1151(c).

3. Respondent failed to provide Student with a FAPE within the meaning of the IDEA as a result of its failure to meet its Child Find duty by failing to devise an IEP resulting in educational benefit. 34 C.F.R. §§ 300.320, 300.512(a)(2).

4. The IEP developed over the course of ARD meetings in February-March of 2018 failed to confer a FAPE on 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.

[107] J11;

X. ORDERS

Based upon the foregoing findings of fact and conclusions of law, it is therefore **ORDERED** that Petitioner's request for relief are **GRANTED** in part and **DENIED** in part:

1. The District shall convene an ARD meeting within 30 school days of the issuance of this decision.

2. At the ARD meeting, the District shall modify Student's IEP in accordance with the District's FIE to indicate Student is eligible for special education as a student with a Specific Learning Disability in reading comprehension, with specific weaknesses in comprehension/knowledge, fluid reasoning, long term memory, and processing speed.

3. The District shall provide Student in Student's IEP 45 minutes per day of reading instruction focused on reading comprehension and related skills using *** or another peer-reviewed program on which the District and Student's parents agree. Instruction shall be provided in a one-on-one setting or in a group of no more than six students at least four school days per week, with the exception of weeks which have fewer than four school days. Extended School Year (ESY) services are neither required nor prohibited by this Order. This shall remain in effect for one calendar year from the date on which the ARD Committee meeting is held, unless Student's parents and the District agree to a different arrangement.

4. The District shall provide Student an additional 108 hours of compensatory education in a one-on-one setting focused on reading comprehension and related skills using *** or another peer-reviewed program on which the District and Student's parents agree. At the ARD Committee meeting, the District and Student's parents shall agree on a schedule for providing these compensatory services.

All other requests for relief not specifically stated in these Orders are hereby **DENIED**.

SIGNED November 16, 2018.

Ian Spechler
Special Education Hearing Officer
For the State of Texas

XI. 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. 20. U.S.C. § 1415(i)(2); 19 Tex. Admin. Code § 89.1185(n).