

DOCKET NO. 254-SE-0617

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

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

Student, ***, b/n/f *** (Petitioner) brings this action against the Northwest Independent School District (Respondent or the school district) under the Individuals with Disabilities Education Act, as amended, 20 U.S.C. § 1401 et. seq (IDEA) and its implementing state and federal regulations.

The main issues in this case are whether the school district failed to timely evaluate and identify Student in all areas of suspected disability and whether the School District failed to provide Student with a free appropriate public education (FAPE). The hearing officer concludes the school district failed to timely evaluate and identify Student as having a specific learning disability, had no reason to suspect Student had an Emotional Disturbance or an Other Health Impairment for ADD, and provided Student with FAPE. The hearing officer also concludes Petitioner failed to meet Petitioner’s burden of proof to show the need for compensatory services for Student, and therefore, Petitioner is not entitled to any of Petitioner’s requested relief.

A. Legal Representatives

Student has been represented throughout this litigation by Student’s legal counsel, Jacqueline Dodd and Sharron Ramage of the Ramage Law Group. At the due process hearing Petitioner was represented by Ms. Dodd, along with her co-counsel, Dorene Philpot of the

Philpot Law Office. The school district has been represented throughout this litigation by its legal counsel Cynthia Buechler of Buechler and Associates.

B. Resolution Session and Mediation

The parties agreed to attempt mediation in lieu of the Resolution Session. The parties originally scheduled mediation for July 24, 2017, but it was continued to August 25, 2017, due to an emergency on behalf of the mediator. On August 25, 2017, the parties proceeded to mediation but were not successful in resolving this matter. Notice of the outcome of mediation was submitted by Petitioner on August 29, 2017.

C. Continuances

Three continuances were granted in this case. The first was at the request of both parties to allow them to attempt mediation. The originally scheduled hearing of July 24-25, 2017, was continued to August 7-8, 2017, and the decision due date of August 30, 2017, was extended for good cause to September 13, 2017. The second continuance was also a joint request to participate in mediation. The hearing was continued to November 8-9, 2017, and the decision due date was extended for good cause to December 22, 2017. The third was at Petitioner's request based on Respondent's failure to produce discovery. The hearing was rescheduled for February 7-8, 2018, and the decision deadline was extended for good cause to March 14, 2018. At the joint request of the parties, the decision due date was extended for good cause to April 13, 2018, and then to April 20, 2018, to allow for post-hearing briefing with the benefit of the hearing transcript.

D. Preliminary Motions

There were no preliminary motions filed, other than motions related to discovery.

II. DUE PROCESS HEARING

The due process hearing was conducted on February 7 and 8, 2018. Petitioner continued to be represented by Petitioner's legal counsel Jacqueline Dodd of the Ramage Law Group and for purposes of the hearing assisted by her co-counsel Dorene Philpot of the Philpot Law Office. In addition, Student's parents, *** and ***, also attended the hearing. Respondent continued to be represented by its legal counsel Cynthia Buechler. In addition, ***, Director of Special Education for Northwest ISD, attended the hearing as the party representative. The hearing was recorded and transcribed by a certified court reporter.

At the conclusion of the hearing the parties requested the record remain open in order to allow submission of written closing arguments on the seminal issues in this case. Those pleadings were submitted by both parties in a timely manner.

III. ISSUES

A. Petitioner's Issues

Petitioner asserted the following issues in this matter:

Child Find

- Respondent failed in its duty under Child Find to timely evaluate and identify Student for special education in all areas of need and related services;

FAPE

- Respondent failed to timely develop an appropriate IEP for Student, including appropriate academic, related services and social/emotional goals;
- Respondent failed to timely provide appropriate special education and related services for Student;
- Respondent failed to appropriately implement Student's IEP;

Procedural Safeguards

- Respondent failed to properly include all necessary information in the Prior Written Notice;
- Respondent interfered in Parent's ability to be a meaningful participant in the development of Student's educational program.

B. Respondent's Legal Position and Additional Issues

Respondent entered a general denial of all claims raised by Petitioner.

IV. REQUESTED RELIEF

Petitioner requests the following items of relief:

1. A Finding that Student is eligible for special education services under the classification of Other Health Impairment– AD/HD;
2. An order requiring the Respondent to adopt the *** IEE and to implement its recommendations;
3. An order requiring Respondent to develop an IEP for Student based on the *** IEE;
4. An order Requiring respondent to consult and collaborate with Student's outside evaluators, including the evaluators from ***; and
5. Compensatory education services in all academic and related services areas.

V. FINDINGS OF FACT

1. Student is *** year old *** grade child eligible for special education services from the school district as a student with a specific learning disability. Student was initially identified as eligible for special education services in February of 2017.¹

Student's Educational History

¹ Petitioner's Exhibit (p.Ex.) 19, page (p.) 14; P.Ex. 22, p. 2.

2. On October ***, 2013, Student was referred for consideration for services under Section 504 of the Rehabilitation Act (Section 504) related to concerns with Student's reading level and reading fluency.² The School District completed a Section 504 evaluation for Student on November ***, 2013, determining Student was a student with dyslexia, and therefore eligible for Section 504 services. Student's initial Section 504 services were to address Student's phonemic awareness, reading, reading fluency and spelling.³
3. The School District provided Student with note taking assistance, preferential seating, organizational strategies, reteaching of difficult concepts, extended time on assignments, the option to give oral responses on assignments and tests and the option of oral test administration, as accommodations under Student's Section 504 plan.⁴
4. During the 2014-15 school year, Student made progress in reading, but did not meet the end of the year reading standard for *** Grade.⁵ During *** grade, Student did not meet standards on the State of Texas Assessment of Academic Readiness (STAAR) assessments in *** and ***.⁶
5. During the 2015-16 school year, Student made minimal progress in reading and did not meet the end of the year reading expectations for *** grade.⁷ During *** grade, Student did not meet STAAR assessment standards in ***, *** and ***.⁸ The School District documented Student's lack of progress in reading as part of Student's Section 504 committee meetings.⁹
6. During the March ***, 2016 meeting of Student's Section 504 committee, Student's Parent expressed concern over Student's lack of progress in reading and posed the question of whether Student may have a learning disability.¹⁰
7. Student achieved passing grades in all of Student's courses from *** through *** grades.¹¹

² P.Ex. 2, p. 1-2.

³ P.Ex. 5, p. 1 and 3.

⁴ P.Ex. 9A, p. 1-2; P.Ex. 9B, p. 4-5; P.Ex. 14, p.5.

⁵ P.Ex. 12, p. 1.

⁶ P.Ex. 19, p. 3.

⁷ P.Ex. 11, p. 8.

⁸ P.Ex. 19, p. 3.

⁹ P.Ex. 14, p. 7.

¹⁰ P.Ex. 14, p. 7.

¹¹ P.Ex. 19, p. 2.

Student's Disability and Educational Profile

8. Student has a disorder in one or more of the basic psychological processes involved in understanding or in using spoken or written language. Student's processing deficits are significant and unexpected and have an adverse effect on Student's achievement.¹²
9. Student meets conditions as a student with dyslexia. Dyslexia is characterized by difficulties with accurate or fluent word recognition and by poor spelling and decoding abilities. These difficulties typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction. The consequences of dyslexia may include problems in reading comprehension and reduced reading experience that can impede growth of vocabulary and background knowledge.¹³
10. Student has a dysphonetic form of dyslexia, which generally manifests in deficits in the ability to hear, parse and otherwise manipulate the sounds in words.¹⁴ Student has deficits in word decoding, word reading, reading fluency, phonological awareness and phonological memory. These deficits negatively impact Student's reading comprehension.¹⁵
11. Student displays some characteristics of a visual form of dyslexia, which generally manifests in difficulties in visual tracking and scanning and orthographics, the way language looks.¹⁶
12. Relative to individuals Student's same age, Student's auditory processing, long-term recall and visual-spatial processing are significantly below average.¹⁷
13. Relative to individuals Student's same age, Student's basic reading skills, reading comprehension, reading fluency, math calculation skills and listening comprehension are below average.¹⁸
14. Student's overall cognitive skills and adaptive behavior are in the average range.¹⁹
15. At times, Student has difficulty staying on task, adapting to new situations, initiating activities independently and not becoming discouraged by difficulties or minor

¹² P.Ex. 19, p. 15.

¹³ P.Ex. 19, p. 13-14.

¹⁴ Transcript (TR) at 199-200.

¹⁵ P.Ex. 19, p. 13-14.

¹⁶ TR at 199-200.

¹⁷ P.Ex. 19, p. 7-10.

¹⁸ P.Ex. 19, p. 11-12.

¹⁹ P.Ex. 19, p. 11; P.Ex. 23, p. 3.

- setbacks.²⁰ Student has poorly modulated visual attention resulting in missed and erratic responses at times.²¹
16. Student's attention in the school environment is average when compared to Student's same-aged peers and does not significantly interfere with Student's ability to learn.²²
 17. A physician's diagnosis is required for the School District to consider Student's attention deficits as a qualifying disability.²³ Student's parent never provided a physician's diagnosis to the School District, despite the School District's repeated requests for such a diagnosis.²⁴
 18. Student demonstrates some aspects of *** associated with Student's academic struggles. Student does not require specialized instruction to address these issues and does not meet the criteria for an emotional disturbance.²⁵
 19. Student's behavior does not impact Student's education. Student complies with teacher requests, is able to make friends, works cooperatively with others and responds appropriately to praise and correction.²⁶

Student's Special Education Services through the School District

20. In October of 2016, Student's Parent made a request for Student to be evaluated for special education services. The School District obtained consent to evaluate Student for special education services on October ***, 2016 and completed Student's Full Individual Evaluation (FIE) on January ***, 2017.²⁷
21. Student's Parent disagreed with the School District's FIE and requested an Independent Educational Evaluation (IEE) at School District expense.²⁸ The School District authorized the IEE requested by the parent and it was completed in April of 2017.²⁹

²⁰ P.Ex. 19, p. 6.

²¹ P.Ex. 23, p. 14.

²² TR at 270-271, 292, 393, 430, 582, 603-604, 622-623, 649 and 681.

²³ TR at 236 and 327.

²⁴ Respondent's Exhibit (R.Ex.) 13, p. 65; TR at 143.

²⁵ P.Ex. 32, p. 7.

²⁶ P.Ex. 19, p. 6; TR at 603-604 and 622-623.

²⁷ P.Ex. 19.

²⁸ P.Ex. 20.

²⁹ P.Ex. 23A; TR at 132-134.

22. On February ***, 2017, the School District identified Student as eligible for special education services with a specific learning disability in the areas of reading skills, reading comprehension, reading fluency, math calculation and listening comprehension.³⁰
23. On February ***, 2017, the School District convened an ARD committee meeting for Student. The ARD committee determined Student to be eligible for special education services and proposed an initial Individual Education Plan (IEP) for addressing Student's identified needs.³¹ At the February ***, 2017 ARD committee meeting Student's Parent consented to the initiation of special education services.³²
24. Student's proposed initial IEP contained goals to address Student's deficits in reading fluency and reading comprehension.³³ Student's IEP also provided access to the *** for reteaching opportunities to address Student's long-term memory and auditory processing deficits.³⁴ Student's initial proposed IEP lacked specificity in describing Student's present levels of academic performance and contained goals that were not measurable and that failed to address Student's specific deficits.³⁵
25. Student's initial IEP contained accommodations including oral test administration, extra time for completing assignments, note taking assistance, shortened instructions, visual aids for math, access to audio books, preferential seating, frequent feedback, small group administration of tests, ***, extra time on tests, graphic organizers for Language Arts and math charts for Math.³⁶
26. Student's placement for the remainder of the 2016-17 school year consisted of *** per week of *** and *** instruction, *** minutes per grading period of *** services and general education classes with inclusion support for all of Student's academic classes. For the 2017-18 school year, Student's placement consisted of all general education classes with inclusion support and *** minutes of *** per grading period.³⁷
27. Student's parent disagreed with the goals and objectives in Student's IEP, expressing concern about the goals and objectives not being specific enough to address Student's needs.³⁸ Following the February ***, 2017 ARD committee meeting, the School District drafted revised IEP goals to address the Parent's concerns and also proposed adding

³⁰ P.Ex. 19, p. 14; P.Ex. 22, p. 2.

³¹ P.Ex. 22.

³² P.Ex. 22, p. 19.

³³ P.Ex. 22, p. 6-7.

³⁴ P.Ex. 22, p. 13.

³⁵ TR at 129.

³⁶ P. Ex. 22, p. 8-9.

³⁷ P.Ex. 22, p. 14.

³⁸ P.Ex. 20, p. 1.

- additional accommodations to Student's IEP.³⁹ Student's parent deferred approval of the proposed revised IEP goals until the IEE was complete.⁴⁰
28. On May ***, 2017, the School District convened an ARD committee meeting for Student to amend Student's IEP and review the IEE. The ARD committee adopted revised goals for Student, containing more specific goals for use of the ***, for reading strategies, for reading comprehension and for written expression.⁴¹ Parent consented to the changes to Student's IEP.⁴²
 29. On May ***, 2017, Student's ARD committee convened again to revise Student's IEP. The School District added goals and objectives to address study skills for Student and Student's identified needs in math. The math goals and objectives were not present in the prior IEPs.⁴³
 30. The School District did not address the content of Student's dyslexia services and programming as part of Student's ARD committee meetings. School District staff attending Student's ARD committee meetings believed they lacked the authority to make decisions related to dyslexia services for Student.⁴⁴
 31. For the 2017-18 school year, Student had the option of continuing to participate in a dyslexia class. Parent preferred that Student attend *** instead of the daily dyslexia class.⁴⁵
 32. The Texas Education Agency (TEA) prescribes the procedures and guidelines for serving students with dyslexia in Texas.⁴⁶ A school district's evaluation of a student to determine whether to identify the student as having dyslexia is conducted through the Section 504 or the IDEA process.⁴⁷ School districts are to refer for evaluation for special education services Students who do not make adequate progress in a general education dyslexia program.⁴⁸ Instructional decisions for students with dyslexia are made by a Section 504 committee or an ARD committee.⁴⁹

³⁹ P.Ex. 55; P.Ex. 56; P.Ex. 59.

⁴⁰ P.Ex. 59.

⁴¹ P.Ex. 25, p. 15-18.

⁴² P.Ex. 25, p. 28.

⁴³ P.Ex. 27, p. 9-10.

⁴⁴ P.Ex. 27, p. 19-20; P.Ex. 70.

⁴⁵ P.Ex. 27, p. 19; TR at 136, 506-507 and 544-545.

⁴⁶ P.Ex. 86, p. 8.

⁴⁷ P.Ex. 86, p. 21.

⁴⁸ P.Ex. 86, p. 31.

⁴⁹ P.Ex. 86, p. 37.

33. In September of 2017, in response to parental concerns, the School District offered to conduct a psychological evaluation of Student and to evaluate Student's need for occupational therapy, vision services, speech therapy and assistive technology. Student's parent did not consent to these evaluations.⁵⁰
34. For the 2017-18 school year, the School District offered to provide Student with *** minutes of individualized tutoring four days a week before or after school. Parent did not accept this offer of tutoring for Student.⁵¹
35. On February ***, 2017, the School District provided Parent with Prior Written Notice (PWN) of the initiation of special education services for Student, beginning on February ***, 2017. Parent signed this PWN on February ***, 2017.⁵² On April ***, 2017, the School District provided PWN to Parent for the proposed changes to Student's IEP to be discussed at the May ***, 2017 ARD committee meeting. Parent signed the April ***, 2017 PWN on May ***, 2017.⁵³ On May ***, 2017, the School District provided PWN to Parent for the changes proposed to Student's IEP at the May ***, 2017 ARD committee meeting. This ARD committee meeting recessed without agreement, leaving the PWN unsigned by Parent.⁵⁴ The School District provided Parent with a Notice of Procedural Safeguards on February ***, 2017, May ***, 2017 and May ***, 2017.⁵⁵

Student's Educational Progress

36. For the 2016-17 school year, Student met standards on the *** STAAR assessment and failed to meet standards on the *** STAAR assessment.⁵⁶
37. Student made significant progress in reading during the 2016-17 school year.⁵⁷
38. Student is currently able to read and comprehend *** grade level material, perform grade level math assignments, complete tasks on time and complete homework as assigned. Student is very organized with Student's school work and Student's hand writing is neat and legible.⁵⁸

⁵⁰ R.Ex. 13, p. 29 and 31-35; TR at 141-142.

⁵¹ R.Ex. 13, p. 29; TR, at 141-142.

⁵² P.Ex. 22, p. 23.

⁵³ P.Ex. 25, p. 10.

⁵⁴ P.Ex. 27, p. 35.

⁵⁵ R.Ex. 5, p. 6-8.

⁵⁶ P.Ex. 26, p. 1.

⁵⁷ R.Ex. 8, p. 1; TR at 429-430 and 625.

⁵⁸ TR at 391-394, 581-582, 603-605, 623, 646-647, 654 and 680-682.

VI. DISCUSSION

A. Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a Free Appropriate Public Education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. *20 U.S.C. § 1400 (d)*. Under IDEA a school district has a duty to provide a FAPE to all children with disabilities residing within its jurisdictional boundaries between the ages of 3 and 21. *34 C.F.R. § 300.101 (a)*. The evidence showed Student was a child with a disability residing within the jurisdiction of the School District and thus the School District had the duty to serve Student under IDEA.

The seminal issues in this case are:

- Whether the School District timely identified and evaluated Student for special education services in all areas of suspected disability; and
- Once Student was receiving special education services, whether the School District provided Student with a FAPE.

More specifically:

- Whether the School District timely identified Student as a student with a learning disability;
- Whether the School District should have also identified Student as having an Emotional Disturbance (ED) and an Other Health Impairment (OHI) for an Attention Deficit Disorder (ADD); and
- Whether the special education services the School District provided to address Student's learning Disability were appropriate to meet Student's individualized needs.

As detailed below, the School District failed to timely evaluate and identify Student as a student with a learning disability, but had no reason to suspect Student had either ADD or and ED requiring the provision of special education services. In addition, once the Student was

identified with a learning disability, the School District provided Student with a FAPE and offered remedial services to further address Student's deficits.

B. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.⁵⁹ *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F. 2d 127, 131 (5th Cir. 1993). Therefore the burden of proof is on Student to prove the School District failed to timely identify Student for special education services and the IEP at issue was not reasonably calculated to enable Student to make educational progress given Student's unique, individual circumstances.

C. Obligation to Evaluate and Identify – “Child Find”

The first issue in this case is whether the School District failed to conduct a timely evaluation to determine and identify Student as a student with a disability eligible for special education services under the IDEA. The School District has an *affirmative duty* to identify, locate, and evaluate all children with disabilities residing within its jurisdiction who may need special education. *See* 20 U.S.C. § 1412(a)(3); *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp.2d 918, 949–50 (W.D. Tex. 2008). This affirmative duty is known as a school district's “Child-Find” obligation. 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.128, 300.220. Under Texas law, a special education referral is required as part of a school district's overall regular education referral or screening system for students experiencing difficulty in the regular classroom. 19 *Tex. Admin. Code* § 89.1011.

The Child Find obligation is triggered when the school district has reason to suspect the student has a disability and reason to suspect the student is in need of special education services. 34 C.F.R. §§ 300.8 (a)(1); 300.111(a)(c)(1) (Child find also must include . . . children who are

⁵⁹ There is no distinction between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 292 n. 4 (5th Cir. 2009).

suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade . . .).

The School District completed a FIE and determined Student indeed had a disability and was in need of special education as a student with a specific learning disability. The School District convened an ARD meeting within thirty days of completing the FIE to review and discuss the results of the FIE, identified Student as eligible for special education services under the learning disability category and began providing Student with special education services. *19 Tex. Admin. Code Section 89.1011(d)*. Thus, there is no real dispute that Student is a student with a disability in need of special education services under IDEA. However, the parties disagree as to whether the School District should have conducted the FIE at an earlier point in time and whether Student should also be identified as a student with an ED and an OHI with ADD, as additional eligibility categories under the IDEA.

1. Learning Disability

The credible evidence supports the conclusion that by at least March of 2016 the School District had reason to suspect Student might have a learning disability and might need special education services. Under Child Find the school district is charged with monitoring the educational performance of its students. *34 C.F.R. §300.111(a)(c)(1)*. While the achievement of passing marks and the advancement from grade to grade is important in determining educational need it is but one factor in the analysis. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 n. 28 (1982); *Daniel S.*, 2002 WL 550455, at 2. The decision of whether a student who is advancing from grade to grade is in need of special education must be determined on an individual basis. *Rowley*, 458 U.S. at 207.

In this case, Student had been identified as having dyslexia and had been receiving Section 504 services to accommodate Student's disability since 2013. Dyslexia is specifically listed in the federal regulations as a type of condition that may lead to eligibility for special education services. *34 CFR § 300.308(c)(10)(i)*. The evidence showed the School District clearly was aware Student had a disability as early as the 2013-14 school year.

Student was achieving passing grades and advancing from grade to grade through the *** grade. However, even with the provision of services under Section 504, Student's reading level was lagging significantly behind Student's same aged peers and Student made virtually no progress in reading in the *** grade during the 2015-16 school year. The School District documented Student's reading struggles in Student's Section 504 records and Student's Parent explicitly inquired whether Student had a learning disability during a Section 504 meeting in March of 2016.

Based upon Student's struggles with reading during the 2015-16 school year and Parent's inquiry about a possible learning disability in March of 2016, the School District had reason to suspect Student may be in need of special education services by March of 2016. As such, the School District should have initiated the special education referral and evaluation process at that point in time. However, the School District did not initiate the special education referral process until October of 2016, a six month delay.

2. Identification Of Other Disabilities

Petitioner contends the School District should have also evaluated and identified Student under the categories of ED and OHI for ADD. Again, the "Child Find" obligation is triggered when the school district has reason to suspect the student has a disability and reason to suspect the student is in need of special education services. *34 C.F.R. §§ 300.8 (a)(1); 300.111(a)(c)(1)*.

Petitioner asserts the School District should have suspected that Student had an ED and required special education services to address an ED. Under the IDEA, an ED is a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- An inability to learn that cannot be explained by intellectual, sensory, or health factors;
- An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

- Inappropriate types of behavior or feelings under normal circumstances;
- A general pervasive mood of unhappiness or depression;
- A tendency to develop physical symptoms or fears associated with personal or school problems.

34 CFR Section 300.8(c)(4)(i). Petitioner asserts Student has an ED related to Student's learning struggles. However, at school, Student exhibits no behavioral problems, makes friends, interacts appropriately with Student's teachers, displays no signs of depression and exhibits no physical symptoms associated with Student's academic struggles. In sum, Student shows no indications of an ED at school.

Petitioner further argues that Student could benefit from some services to help with the *** Student experiences over Student's academic struggles. However, to be eligible for special education services, a student must both have a qualifying disability and be in need of special education services to address the disability, not simply be likely to benefit from special education services. *Alvin Ind. Sch. Dist. V. A.D. ex rel Patricia F.*, 503 F.3d 378, 382 (5th Cir. 2007). While it may be true that Student could benefit from services, such as counselling, to help with school related ***, the evidence, including the report and testimony of Petitioner's own expert, showed that Student does not meet the criteria for an ED. At best, Petitioner's expert speculated Student may meet criteria for ED in the future. However, a fear that a student may experience problems in the future is not by itself a valid basis for special education eligibility. *Eric H. ex rel. Gary H. v. Judson Ind. Sch. Dist.*, 2002 WL 31396140 (W.D. Tex. Sept. 30, 2002). Student displayed no signs of emotional issues at school, Student's behavior did not impact Student's learning and the School District had no reason to suspect Student had an ED.

Petitioner also argues the School District should have identified Student as OHI for ADD and asks this hearing officer to declare the Student eligible for services under OHI. Based upon a clinical evaluation, Petitioner's expert determined Student not only had ADD, but Student's ADD led to a need for special education services. These conclusions were reached without conducting observations of Student at school or interviews of Student's teachers. In weighing evidence, teacher observations are most instructive when determining the impact a disability, or potential disability, has on a Student's educational performance. *Christopher M. ex rel Lveta*

McA. v. Corpus Christi Ind. Sch. Dist., 933 F.2d. 1285, 1292 (5th Cir. 1991). The credible testimony of Student's teachers indicated Student displayed no attention issues in the school environment and demonstrated organizational skills superior to Student's peers. On this basis, the School District had no reason to suspect Student had ADD and no reason to suspect Student needed special education services to address any potential attention issues. Moreover, Petitioner failed to produce an OHI form signed by a physician. Without the physician's diagnosis, neither the School District, nor this hearing officer may find the Student eligible under OHI. *19 Tex. Admin. Code Section 89.1040 (a)(8)*.

D. Provision Of FAPE

A FAPE is special education, related services, and specially designed personalized instruction with sufficient support services to meet the unique needs of the child in order for the child to receive an educational benefit. The instruction and services must be provided at public expense and comport with the child's IEP. *20 U.S.C. § 1401(9); Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982). While the IDEA guarantees only a "basic floor of opportunity," the IEP must nevertheless be specifically designed to meet Student's unique needs, supported by services that permit Student to benefit from the instruction. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. at 188-189.

1. IEP

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

To meet its substantive obligation under the IDEA, a school district must offer an IEP that is reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. The adequacy of a given IEP turns on the unique circumstances of the student for whom it was created. *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). While the IEP need not be the best possible one nor must it be designed to maximize a student's potential, the school district must nevertheless provide the student with a meaningful educational benefit – one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. VP*, 582 F. 3d 576, 583 (5th Cir. 2009) cert. denied, 559 U.S. 1007(2010).

The question in this case is whether the IEP designed by the School District at the February ***, 2017 ARD committee meeting, and then later modified in May of 2017, is reasonably calculated to provide the requisite educational benefit given Student's unique circumstances. *Rowley*, 458 U.S. at 206-20; *Andrew F. v. Douglas Cnty. Dist. RE-1*, 137 S. Ct. 988 (2017). As initially drafted in February of 2017, Student's IEP did not address Student's unique needs and would not have provided Student with educational benefit. The initial IEP contained no goals to address Student's identified needs in math and lacked goals to address Student's unique reading related needs. When Parent raised concerns related to the deficiencies in Student's IEP, the School District drafted revised IEP goals, tailoring them to address Student's unique needs. The IEP that ultimately emerged at the end of May of 2017, after three ARD committee meetings, discussions with Parent and consideration of the IEE, contained goals and services to address Student's reading comprehension and fluency needs, Student's math calculation deficits and study skill concerns. The final IEP designed through the ARD process and implemented by the School District was reasonably calculated to meet Student's unique needs.

2. Application of the Four Factor Test

To determine whether the School District's program was appropriate for Student, a hearing officer must determine whether the School District offered and provided a FAPE to Student. The Fifth Circuit has articulated a four factor test to determine whether a Texas school district's program meets IDEA FAPE requirements. Those factors are:

- The program is individualized on the basis of the student’s assessment and performance;
- The program is administered in the least restrictive environment;
- The services are provided in a coordinated, collaborative manner by the “key” stakeholders; and,
- 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. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

a. The program is individualized on the basis of the student’s assessment and performance

Student’s program was developed using Student’s FIE, took into account the IEE and considered parental input. Student’s program addressed Student’s individual reading deficits through goals, interventions and accommodations. Student’s program also ultimately addressed Student’s math calculation individual needs through goals, accommodations and the provision of ***. The ARD committee failed to address the content of Student’s dyslexia services, but the School District continued to offer dyslexia services to Student. When Parent chose *** over the dyslexia class for Student, the School District offered to provide *** tutoring for Student, as an alternative to the dyslexia services. Student, however, chose not to access the tutoring. When viewed as a whole, Student’s program was individualized on the basis of Student’s assessments and needs. *Klein Independent School District v. Per Hovem*, 690 F. 3d 390, 391 (5th Cir. 2012).

b. Program is administered in the least restrictive environment

The IDEA requires that students with disabilities be educated in general education settings with nondisabled students to the maximum extent appropriate. The IDEA has a strong

preference in favor of educating students with disabilities in general education settings with their nondisabled peers. However, if a school district cannot satisfactorily educate a student with a disability in the general education setting, then the school district may remove the student from the general education setting and place them in special education classes. *20 U.S.C. § 1412 (a)(5); 34 C.F.R. § 300.114(a) (1) (2) (i) (ii)*. This requirement of the IDEA is referred to as a school district's obligation to educate a student in the least restrictive environment (LRE). *Id.*

In this case, Student is being educated primarily in general education classes with some inclusion support. All of Student's core academic classes and Student's *** classes are in a general education setting with Student's nondisabled peers. Student is only removed to a special education setting for one-on-one instruction to reinforce concepts being delivered in Student's general education classes. This removal only occurs when necessary and does not have a significant impact on Student being educated with Student's nondisabled peers. In sum, Student is being educated in Student's LRE.

c. The services are provided in a coordinated, collaborative manner by the key stakeholders

Student's IEP and program were developed during a series of ARD committee meetings in the spring of 2017. The School District was responsive to Parent's concerns with the IEP goals, resulting in revised goals and accommodations individualized to meet Student's specific needs. The School District and Parent communicated regularly. The School District considered Parental input in designing Student's IEP and selecting appropriate support services. The School District immediately responded to Parent's request for an IEE and made changes to Student's program after reviewing the IEE. The School District also offered to conduct additional evaluations in the areas of vision, occupational therapy, assistive technology and psychological function to address Parent's concerns. Student's special education services were delivered in a coordinated and collaborative manner involving Parent and appropriate School District staff.

d. Positive academic and non-academic benefits are demonstrated

Student made significant progress since special education services were provided by the School District in February of 2017. Student's reading level increased significantly, putting Student near, or at, grade level. Student utilizes Student's reading and math intervention strategies more regularly and Student gained confidence in Student's ability to perform math calculation. The issue is not whether the school district could have done more for Student. Rather, the inquiry is whether Student received an educational benefit. *Houston Ind. Sch. Dist. v. V.P.*, 582 F. 2d 576, 590 (5th Cir. 2009). In this case, although the School District could have made adjustments to Student's dyslexia programming and added some additional accommodations for Student, a review of the overall educational program shows Student made progress with the program as it was developed. *Klein Independent School District v. Per Hovem*, 690 F. 3d 390, 391 (5th Cir. 2012).

3. Procedural Violations

Petitioner did not meet Petitioner's burden of proving the school district violated student or parental procedural rights under the IDEA. The school district provided Student's parents with the requisite Prior Written Notice (PWN), notice of ARD meetings, consent for evaluations notices, and ARD documents. 34 C.F.R. § 300.503 (a) (c). The record supports the conclusion the school district met its responsibilities under these procedural safeguards.

Furthermore, even if there were any procedural violations, Petitioner did not prove those violations, if any, impeded Student's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefit. 34 C.F.R. §300.513 (a) (2). Parent was an active participant in ARD committee meetings, the School District was responsive to input from Parent and Student received FAPE through the program that was designed and implemented.

E. Relief

An impartial hearing officer has the authority to grant all relief deemed necessary, including compensatory education, to ensure the student receives the requisite educational benefit denied by the school district's failure to comply with the IDEA. *Letter to Kohn, 17 IDELR 522 (OSERS 1991)*. 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, Meiner v. Missouri, 800 F. 2d 749, 753 (8th Cir. 1986)*; *D.A. v. Houston Ind. Sch. Dist., 716 F. Supp 2d 603, 612 (S.D. Tex. 2009)*, *aff'd 629 F. 3d 450 (5th Cir. 2010)*(upholding HO's decision that student failed to prove amount of compensatory reimbursement student entitled to for school district's failure to timely evaluate).

Compensatory education may be awarded by a hearing officer after finding a violation of the IDEA. It constitutes an award of services to be provided prospectively in order to compensate the student for a deficient educational program provided in the past. *G. ex. Rel RG v. Fort Bragg Dependent Schools, 343 F. 3d 295 (4th Cir. 2003)*. 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. 35, 374 (1996)*; *Harris v. Dist. of Columbia, 19 IDELR 105 (D.C.D.C. 1992)*.

In this case, the School District failed to timely evaluate and identify Student as eligible for services with a specific learning disability. This resulted in a six month, or more, delay in the provision of service to Student. The question then becomes how to determine the compensatory relief to award to Student.

The trend in the case law is to utilize a qualitative, rather than quantitative, standard in fashioning appropriate compensatory and equitable relief. *Reid ex rel Reid v. District of Columbia, 401 F. 3d 516, 523-524 (D.C. Cir. 2005)*. The evidence presented demonstrated that Student has made significant educational progress in the just over one year since special education services were initiated. In addition, the School District made additional remedial services available to Student in the form of *** tutoring, which Parent declined to take advantage of. Petitioner brought forward no

expert testimony explaining the nature and scope of the compensatory services Student requires to remedy the sixth month delay in identifying Student as eligible for special education services. Based upon Student's progress, the remedial services offered by the School District and the lack of expert testimony from the Petitioner, this hearing officer concludes that Petitioner did not meet Petitioner's burden of proof for entitlement to compensatory education services. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

VII. CONCLUSIONS OF LAW

1. The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993).
2. Petitioner did not meet Petitioner's burden of proving that Respondent failed to identify Student in all areas of suspected disability. *Schaffer ex rel. Schaffer v. Weast*, *supra*; 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.8 (a)(1); 300.111(a)(c)(1); *El Paso Indep. Sch. Dist. v. Richard R.* *supra*.
3. Petitioner met Petitioner's burden of proving that Respondent failed to timely evaluate and identify Student as a student with a specific learning disability. *Schaffer ex rel. Schaffer v. Weast*, *supra*; 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.8 (a)(1); 300.111(a)(c)(1); *El Paso Indep. Sch. Dist. v. Richard R.* *supra*.
4. Petitioner did not meet Petitioner's burden of proving entitlement to compensatory relief for Respondent's failure to timely identify Student as having a learning disability. *Schaffer ex rel. Schaffer v. Weast*, *supra*; *Meiner v. Missouri*, *supra*; *D.A. v. Houston Ind. Sch. Dist.*, *supra*; *Reid ex rel Reid v. District of Columbia*, *supra*.
5. Respondent provided Petitioner with a free, appropriate public education and devised an appropriate IEP for the 2016-17 school year that provided the requisite educational benefit. Petitioner did not meet Petitioner's burden of proof on this issue. *Andrew F. ex. Rel. Joseph F. v. Douglas Cnty. Sch. Dist.*, *supra*; *Schaffer ex. rel. Schaffer v. Weast*, *supra*; *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, *supra*; 34 C.F.R. §§ 300.22, 300.323 (a); 19 Tex. Admin. Code § 89.1055 (e).
6. Respondent proposed and implemented a free, appropriate public education and devised an appropriate IEP for the 2017-18 school year that was reasonably calculated to provide the requisite educational benefit. The educational program, implemented while this case was pending, provided Student with the requisite educational benefit. Petitioner did not meet Petitioner's burden of proof on this issue. *Id.*
7. Respondent complied with student and parental procedural rights under the IDEA. Any

procedural violations, if any, did not impede Petitioner's right to a free, appropriate public education, significantly impede the parent's opportunity to participate in decision-making regarding the provision of a free, appropriate public education, or cause a deprivation of educational benefit. 34 C.F.R. §§ 300.503 (a) (c); 300.504(a) (d); 300.513 (a) (2).

VIII. ORDERS

Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief are **DENIED**. All other requests for relief not specifically stated in these Orders is hereby **DENIED**.

SIGNED April 20, 2018.



Steve Elliot
Special Education Hearing Officer
For the State of Texas

IX. NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 20. U.S.C. § 1415 (i)(2); 19 Tex. Admin. Code Sec. 89.1185 (n).