

**SOAH DOCKET NO. 701-20-2933.IDEA
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2. An order denying Petitioner's exceptions to the one-year statute of limitations, and dismissal of all claims arising prior to March 3, 2019.

V. FINDINGS OF FACT

Background Information

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

Response to Intervention

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

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

² J5; TR 762, 825.

³ R54; TR 751.

⁴ TR 768, 858-59; J12.

⁵ TR 825.

class receiving RTI.⁶ Student received RTI for reading for the full school year.⁷ Student ended the year below grade-level in reading despite the RTI Student received. At the end of the year, Student was reading at Level ***, indicating Student was below grade level.⁸

The District suspected Student might have Dyslexia by Tc 0.02 Tw].r lex4 Tc 1tudehiEl tev seveudenting

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

17. During the interviews the District's evaluators conducted with multiple teachers and with Student's parents as part of obtaining information, it became clear that Student has "lots of friends" and a number of activities both in and out of school Student enjoys. Student's teachers also agreed Student was a hard worker and a polite, kind ***. However, Student's parents and teachers reported concerns about Student's ability to pay attention during class and, in the case of Student's parents and one of Student's teachers, concerns about Student's ***. During classroom observations, the evaluators observed Student's struggles to pay attention and noted that Student fell behind the rest of Student's class during classroom work. The evaluators ultimately concluded based on multiple observations and the results of formal testing that Student's ability to pay attention was an issue that impacted Student's educational progress, but that Student's ***—though one teacher and Student's parents found it to be an area of concern—did not prevent Student from making educational progress.³⁰


 18. As for the formal testing instruments in the FIE, District evaluators utilized the Wechsler Intelligence Scale for Children-5th Edition and the Woodcock Johnson Tests of Cognitive Abilities and Oral Language IV to determine whether Student was a Student with an SLD. Student's scores on those tests indicated Student was in the average or high-average range in Student's cognitive abilities. Student was "intact for academic progress" and did not have a sustained pattern of cognitive impairment indicative of an SLD. Student has average to above-average cognitive functioning. The District arrived at its determination that Student does not have an SLD after conducting its own testing and also consulting with an outside psychologist, Dr. ***, who had evaluated Student in December 2019 and had found Student did meet criteria as a student with a Specific Learning Disability in math. District staff reviewed that psychologist's report and consulted with her directly to ask follow-up questions, but ultimately disagreed with her conclusion that Student had an SLD. The FIE made extensive reference to Dr. ***'s evaluation.³¹ The FIE did note Student's continued diagnosis as a student with Dyslexia. Student
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considered whether Student could benefit from AT. The ARD Committee, consistently with Dr. O

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

2. Withholding Exception

and prior written



process hearing regarding claims that would otherwise be time-barred. The misrepresentation also
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C. Duty to Provide a FAPE

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

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

2. The Child Find Duty in This Case

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

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

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

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

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

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

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

G. FAPE

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

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

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

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

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

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- x a school district's efforts to provide the student with supplemental aids and services in the general education setting;
- x a school district's efforts to modify the general education curriculum to meet the student's individual needs;
- x the educational benefit a student is receiving while placed in the geahe (he)4 ((he)4 (-2 4394 (t

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

4. Academic and Non-Academic Benefits

Whether a Student received academic and non-academic benefit is one of the most critical factors in any analysis as to whether a Student has received a FAPE. *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 84B (5th Cir. 2012). The District did not have an opportunity to implement and fully observe the results of its IEP. The IEP was developed only shortly before COVID-19 forced the District to shut down and the move to a virtual model for all students. Because the request for a due process hearing was filed prior to the COVID-19 shut down, the Hearing Officer is not making findings about the District's implementation of the IEP in the virtual school environment. Student then enrolled in the *** for the full 2020-21 school year.

It is thus difficult to assess the efficacy of the IEP after its limited implementation. However, the IEP was reasonably calculated to provide academic and non-academic benefits when the ARD Committee created it -

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359, 374 (1996).

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

4. In addition to offering Student a FAPE for the 2022 school year, the District shall offer Student one weekly tutoring session of 45 minutes per week during the 2021-22 school year in which the District is in session for three or more school days as compensatory education. The District and Student's parents can agree to reduce or increase the frequency of tutoring sessions and/or reduce or increase the amount of time in each session for the benefit of Student. The sessions shall be offered at the time and location in the District convenient for both parties.
5. The tutoring shall be offered with GALT and/or other qualified provider as agreed to by the District and Student's parents. Tutors should be employees of the District, but can be non-employees by agreement of the parties. The tutoring shall focus on Student's weaknesses in math and/or reading in a format agreed to by the District and Student's parents. The tutoring shall serve to reinforce the services and accommodations already

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