

**BEFORE A SPECIAL EDUCATION HEARING OFFICER  
STATE OF TEXAS**

**STUDENT  
bnf PARENT,  
Petitioner,**

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v.

**DOCKET NO. 141-SE-0112**

**HOUSTON INDEPENDENT  
SCHOOL DISTRICT,  
Respondent.**

**DECISION OF THE HEARING OFFICER**

**Introduction**

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

Party Representatives

Petitioner was represented throughout this litigation by petitioner’s legal counsel, Clint McGuire with the Law Firm of Alton C. Todd. Respondent was represented by its legal counsel Hans Graff, Assistant General Counsel, for the school district. At the due process hearing Student’s mother, \*\*\* and student’s grandmother, \*\*\*, were both present throughout the hearing. Mr. McGuire’s assistant, Heather Ybarra, was also present. The school district’s party representative was \*\*\*, Senior Manager for Special Education. Sherry Wetsch, a special education mediator, observed the first day of the hearing with permission from both parties.

Resolution Session and Mediation

The parties met in a Resolution Session on February 16, 2012 but it was not successful. The parties attempted informal settlement but that was not successful either. The parties did not attempt mediation in this case.

Procedural History

The initial request for a due process hearing was filed on January 27, 2012. The due process hearing was continued, at Petitioner’s request, in order to allow the parties an opportunity to attempt informal settlement negotiations and to resolve scheduling conflicts for Petitioner’s counsel. The hearing was reset for April 11-12, 2012 by agreement of the parties. Respondent filed a Counterclaim on February 27, 2012 challenging Petitioner’s request for an Independent Educational Evaluation (IEE).

The due process hearing was continued a second time, at Petitioner’s request, to resolve a scheduling conflict for petitioner’s testifying expert witness. The hearing was reset for May 8-9, 2012 by agreement of the parties. The due process hearing was continued a third time, at Respondent’s request, to resolve scheduling issues for school personnel due to a conflict with mandated state-wide assessments that were previously unknown to Respondent’s counsel. The hearing was reset to June 12-13, 2012 by agreement of the parties.

The due process hearing was conducted on June 12-13, 2012. At the completion of the hearing the parties requested an opportunity to submit written closing arguments and legal briefs. The parties selected a mutually agreeable date to submit the written closing arguments and legal briefs. The parties also agreed the Decision of the Hearing Officer would be extended in accordance with IDEA regulations. The parties submitted their written closing arguments and legal briefs in a timely manner on July 27, 2012. The Decision of the Hearing Officer is due on or before August 31, 2012.

## **Issues**

The issues in this case are as follows:

1. Whether the school district met its obligations under the Individuals with Disabilities Education Act (IDEA) in a timely manner, including specifically whether the school district should have conducted a Full Individual Evaluation (FIE) within the past year and before the parent initiated a request for an FIE on January 24, 2012;
2. Whether the school district's failure to evaluate Student in a timely manner for eligibility under the IDEA resulted in the denial of a free, appropriate public education (FAPE) including whether the school district used improper discipline and failed to address Student's emotional and behavioral issues within the past year;
3. Whether the school district failed to provide Student's mother with the requisite "prior written notice" when the school district allegedly denied Petitioner's request for special education services and allegedly made unilateral changes in educational services; and,
4. Whether the school district's FIE was appropriate within the meaning of the IDEA and, if so, whether Petitioner is entitled to an Independent Educational Evaluation (IEE) at school district expense.

## **Requested Relief**

Petitioner requests the following items of relief:

1. The school district complete the FIE and a Functional Behavior Assessment (FBA);
2. The school district convene an Admission, Review & Dismissal Committee (ARD) meeting for the purpose of reviewing the results of the FIE and FBA, determining Student's eligibility for services under IDEA, and designing an Individual Educational Plan (IEP) to be implemented for the remainder of the school year until the date of Student's next annual ARD meeting;
3. If the school district fails to develop an IEP that adequately addresses Student's needs the school district will fund Student's placement at a private school;
4. Reimbursement for the mileage required for the time Student's mother was required to come to school to either pick Student up or to assist school personnel in disciplining Student; and,
5. Compensatory educational services – the scope and type of services to be determined by the hearing officer on the basis of the evidence presented at the due process hearing.

Respondent requests a finding and conclusion of law that it met all of its Child Find obligations, that the school district's FIE was appropriate within the meaning of the IDEA, and that Petitioner is therefore not entitled to an IEE at school district expense.

## **Findings of Fact**

1. Student is \*\*\* years old and lives with student's mother, \*\*\* siblings, and \*\*\* within the geographical boundaries of HISD. (Transcript Volume I, page 257)(referred to hereafter as "Tr. Vol. \_\_\_, p. \_\_\_)(Petitioner's Exhibit 94, pp. 172, 174)(referred to hereafter as "P. Ex. \_\_\_")(Respondent's Exhibit 2, p. 11)(referred to hereafter as "R. Ex. \_\_\_)(R. Ex. 4, p. 68). Student's mother sets high academic expectations for Student as well as for student's siblings \*\*\*. (P. Ex. 94, p. 172). Student has asthma and takes medicine for it at school as needed. (P. Ex. 94, p. 185) (R. Ex. 2, p. 11).

2. Student attended \*\*\* and \*\*\* at \*\*\* within HISD. Student transferred to \*\*\* in \*\*\* grade for the 2010-2011 school year. At the time of the due process hearing Student completed \*\*\* grade during the 2011-2012 school year. (Tr. Vol. I, pp. 111-112) (P. Ex. 1) (P. Ex.2) (P. Ex. 11) (P. Ex. 94, p. 3) (R. Ex. 2, p. 11).
3. Student's mother and father separated when Student was around \*\*\* years old. (P. Ex. 101, p. 241) (Tr. Vol. I, p. 258). Student loves student's father who has "moved on with his life." Student doesn't see student's father regularly and experiences disappointment in the relationship. Student misses student's father and wishes student's father was more involved in student's life. Student also expresses negative feelings about student's father at times. (P. Ex. 94, pp. 174,178) (R. Ex. 2, pp. 13, 17) (R. Ex. 4, p. 68) (Tr. Vol. I. pp. 197-198). The involvement of Student's father in student's education has been somewhat inconsistent. (P. Ex. 94, p. 175) (P. Ex. 101, p. 241) (R. Ex. 2, p. 14) (Tr. Vol. I., pp. 130, 281-282).
4. \*\*\* Student pesters and irritates student's \*\*\* siblings to gain their attention. (P. Ex. 94, p. 174) (R. Ex. 2, p. 13). Student constantly seeks student's mother's attention and has trouble staying focused. At home Student tantrums when Student doesn't get student's way and can become easily upset and somewhat aggressive. Student is punished at home for misbehavior at school. Student has difficulty relating to other children and may play too roughly with them. Student does not have \*\*\*. (P. Ex. 94, p. 174) (R. Ex. 2, pp. 13-14) (R. Ex. 2, p. 68).
5. Student expresses significant negative, angry feelings about family members, feels that Student does not get along with student's siblings, and that Student has no friends. (P. Ex. 94, pp. 179-180) (R. Ex. 2, pp. 16-18, 31). Student feels Student has a poor relationship with student's parents and feels incidental to family life and decision making. (R. Ex. 2, p. 26). Student is highly defensive, doesn't trust most adults and feels most people (particularly teachers) are unfair to student. (Tr. Vol. I., p. 54).
6. On the other hand, Student can also be very sweet and loving at home; Student loves to crack jokes and share what Student sees on TV or movies. Student loves animals and enjoys \*\*\* and drawing. Student's mother appreciates student's smile and laugh. (R. Ex. 2, p. 30) (R. Ex. 4, pp. 68-69). She recognizes student's inner anger, that Student misses student's father, probably does not get enough attention from student's siblings, and is easily upset. (R. Ex. 2, p. 31). Student is a challenging child to parent. (R. Ex. 4, p. 79).
7. Student began exhibiting behavioral problems during the 2009-2010 school year in \*\*\* grade at \*\*\*. (P. Ex. 16) (P. Ex. 24) (P. Ex. 26) (R. Ex. 10). There were at least ten documented behavioral incidents with peers including bullying, hitting or striking classmates, being disrespectful to peers in class, and, inappropriate behavior, including making lewd gestures. (P. Ex. 29) (P. Ex. 32) (P. Ex. 33) (P. Ex. 34) (P. Ex. 106). There were at least six documented behavioral incidents with teachers including failure to follow teacher directions, misbehaving in line, and general disruptive misbehavior. (P. Ex. 16) (P. Ex. 35) (P. Ex. 36) (P. Ex. 106) (R. Ex. 10). These misbehaviors led to \*\*\* separate suspensions at \*\*\* in the \*\*\* grade. (P. Ex. 25) (P. Ex. 27) (P. Ex. 28) (P. Ex. 30) (P. Ex. 31).
8. Student's misbehavior continued at \*\*\* in \*\*\* grade during the 2010-2011 school year. (P. Ex. 17) (P. Ex. 18) (P. 106) (R. Ex. 11). There were five documented incidents of bullying and hitting. One instance of overly rough horse-play resulted in \*\*\*. Student also made nasty and inappropriate gestures towards peers. (P. Ex. 17)(P. Ex. 20)(P. Ex. 22)(P. Ex. 37)(P. Ex. 106). There were at least 18 documented incidents of misbehavior or disruptive classroom behavior in \*\*\* grade, including destroying furniture and not listening to the teacher. Student also threatened \*\*\*. (P. Ex. 17)(P. Ex. 20)(P. Ex. 21)(P. Ex. 38)(P. Ex. 39)(P. Ex. 40)(P. Ex. 41)(P. Ex. 63-66)(P. Ex. 106). Student was suspended at least \*\*\* that year. (P. Ex. 42) (P. Ex. 106).
9. During the 2011-2012 \*\*\* grade year Student's misbehavior continued to escalate and worsen. Student began the year with "severe behavior." (P. Ex. 78) (Tr. Vol. I., pp. 119, 249). There were seven documented incidents where Student bullied and struck or hit classmates. There were five documented incidents where Student was disrespectful to classmates or made nasty and inappropriate gestures. (P. Ex. 18, 19, 23, 46-51, 52-54, 72, 78, and 106) (R. Ex. 11) (R. Ex. 11). Student failed to follow directions, was defiant, disrupted the educational process, and engaged in general misbehavior. (P. Ex. 18-20, 22, 23, 45, 46, 55, 56, 57, 58, 78, 106).

10. By December 2011 Student had been suspended \*\*\* times. (P. Ex. 42, 43, 44, 48, 49, 50, 52, 53, 54, 106) (R. Ex. 9) (R. Ex. 11). HISD did not document many other incidents of misbehavior that could have led to even more suspensions. (Tr. Vol. I., pp. 123-124). Student's attendance was excellent except for the days Student was suspended. (P. Ex. 13) (R. Ex. 7, pp. 164-165). A pattern of suspensions can be an indicator of the need for a special education evaluation. (Tr. Vol. II, p. 388).
11. Teachers noted Student did not respond appropriately to initial instructions, used immature or limited vocabulary for student's age and grade, continually disrupted the classroom, was unable to inhibit responses, rarely listened, was often disorganized, inexact, careless, extremely excitable, totally lacking in self control, avoided by others, and disregarded the feelings of others. (P. Ex. 12) (P. Ex. 78). Teachers also found student to be easily distracted, hyperactive, frequently frustrated, angry, mischievous, very aggressive, bossy, and confrontational and defiant with adults. There was an element of unpredictability to Student's behaviors. (R. Ex. 2, p. 15). Student was often unable to focus and, at times, would tantrum. (Tr. Vol. I., pp. 246-248, 250).
12. Student was frequently out of student's seat, taunted and bothered classmates interfering with their learning as well as student's own. Student's behavior was a distraction to the rest of the class. (P. Ex. 94, p. 176) (R. Ex. 2, p. 15). Student had difficulty keeping student's mind on student's work, gave up easily and was easily bored. Student appeared restless and impulsive. Student had difficulty learning and remembering concepts and had to be told the instructions for an assignment more than once. Student had difficulty with friendships, poor social skills and was not readily accepted by student's peer group. (R. Ex. 2, pp. 28, 31) (Tr. Vol. I., pp. 199-200) (Tr. Vol. II., pp 362-363, 428, 432).
13. In sum Student has a history of significant problems with self-regulation, emotional regulation, and social interactions. Student has challenges with impulsivity and sustained attention. (R. Ex. 4, p. 80). Student's suspicion and degree of alienation towards others, particularly adults, is very high. (Tr. Vol. I., p. 55). While Student could be very polite, helpful, sweet, and charming with school staff student's overall behavior in \*\*\* and \*\*\* grades adversely affected student's educational performance. Educational performance is both academic and behavioral. (P. Ex. 12) (R. Ex. 2, p. 31)(Tr. Vol. I., pp. 120, 122-123, 137, 199, 243-244, 249-250) (Tr. Vol. II, pp. 360-361).
14. Despite a history of behavioral difficulties Student was regularly promoted from grade to grade and made some academic progress. (P. Ex. 1)(P. Ex. 2)(P. Ex. 11)(R. Ex. 7). Student's final grades for the 2010-2011 \*\*\* grade school year were: \*\*\* in reading, \*\*\* in language arts, \*\*\* in math, \*\*\* in science and \*\*\* in social studies. (R. Ex. 7, pp. 157-158). Student's final grades for the 2011-2012 \*\*\* grade year were: \*\*\* in reading, \*\*\* language arts, \*\*\* math, \*\*\* science, \*\*\* social studies and satisfactory grades in fine arts, handwriting, PE, health & safety, music, and library with excellent progress in computer lab. (R. Ex. 7, pp. 157-159) (R. Ex. 18). Student is a bright child and capable of performing above average and doing better academically. (Tr. Vol. I., pp. 73, 75, 159, 203-204, 244-245).
15. On April 15, 2011, following a three day suspension, Student's mother wrote a letter to campus administrators requesting assistance for Student and voicing her disagreement and concern with the continuing use of suspension to address student's behavior. (P. Ex. 59). Student's mother was also frustrated when the school district contacted her at work. She was not permitted to take personal calls at work. She also wished to keep Student's issues at school private. School personnel had permission to contact Student's grandmother or father if they could not reach student's mother. (P. Ex. 59) (Tr. Vol. I., pp. 108, 146, 260, 286-287). However, Student's father did not always return calls and instead the school most often ended up communicating with Student's grandmother. (P. Ex. 69) (Tr. Vol. I., p.132).
16. The school district has social workers and counselors on staff available to work with parents in finding community services to meet the needs of the student and family. (Tr. Vol. II., pp. 482-483). The school counselor met with Student's mother in April 2011 to discuss the mother's concerns regarding Student's persistent misbehavior. The counselor recommended Student be evaluated by a physician. She also referred Student's mother to \*\*\*, an outside mental health agency serving children. (P. Ex. 21) (R. Ex. 16) (Tr. Vol. I., pp. 177, 187-188, 190) (Tr. Vol. II, pp. 346-347).

17. The school counselor followed up with a letter to Student's mother on April 20, 2011. The letter provided a brief explanation of the \*\*\* services and advised Student's mother therapy sessions would cost \*\*\* per session. (P. Ex. 20)(P. Ex. 61)(Tr. Vol. I, pp. 190-191). Student's mother could not afford the \*\*\* services and felt she could not commit the time to follow through with the outside referral. She also rejected the counselor's suggestion that Student's grandmother could take student to therapy sessions. (Tr. Vol. I, pp. 115, 187-189, 262-263, 265-266).
18. School personnel acknowledged that by April 2011 they had reason to suspect Student might be a child with a disability in need of special education services. (Tr. Vol. I, p. 114) (Tr. Vol. II, pp. 368-369, 507). Student's overall conduct grades for the first three grading periods of \*\*\* grade 2010-2011 school year were "unsatisfactory" and Student needed improvement in all work habits including: effective use of time/material, follows classroom directions, classroom participation, completes homework, is courteous, works and plays well with others, follows classroom rules and completes class work. (R. Ex. 7, p. 158).
19. School staff felt Student's mother should follow through on the community resource information they'd provided to secure an evaluation and obtain assistance. (Tr. Vol. I, pp. 124-125, 141, 209-210). In addition, school staff felt Student's mother was quick to defend student and tended to blame others for student's misbehavior. (P. Ex. 72) (Tr. Vol. I, pp. 135-136, 146-147). However, Student continued to exhibit aggressive behaviors including hitting and bullying peers and disrupting the educational process after April 2011. (P. Ex. 18, 45, 46, 47, 49, 63, 106). By the final fourth nine week grading period in \*\*\* grade Student's overall general conduct was now "poor" (a step up from "unsatisfactory") but Student continued to "need improvement" in all work habits. (R. Ex. 7, p. 158).
20. Student's \*\*\* grade teacher initiated a referral to the campus Intervention Assistance Team (IAT) on October 5, 2011 due to Student's persistent misbehavior. She specifically noted student's refusal to follow rules, hitting and kicking other students, yelling out and talking back. (P. Ex. 80) (R. Ex. 17) (Tr. Vol. I, p. 233).
21. The IAT included the referral team chairperson, the school counselor, the teacher of record, the campus Title I coordinator, and, campus administrators. The goal of the IAT meeting was to seek resources to address Student's behavior and provide support to both parent and student. (Tr. Vol. I, pp. 144-145, 147, 174, 204-205). The IAT process required the team to design a set of interventions and then reconvene in 8-9 weeks to discuss their effectiveness. (Tr. Vol. I, pp. 206-207, 222-223). The IAT team designed a set of interventions that consisted of the following: preferential seating, visits with the counselor (as needed) and eating lunch in the office or with the assistant principal. (P. Ex. 80) (Tr. Vol. I, p.185).
22. Student needed help interacting with peers and playing with them appropriately. (Tr. Vol. I, p. 119-120, 195). On October 13, 2011 Student's mother gave her consent so Student could participate in a school district social skills group play therapy. (P. Ex. 67) (R. Ex. 16, p. 287). Unfortunately, Student's mother learned in December 2011 that Student may have only received a single session of the social skills therapy when the program was terminated due to lack of continued funding. (Tr. Vol. I, pp. 196, 267-268).
23. The principal was reluctant to refer Student for special education. She viewed special education as a "last resort." She was mindful of the problem of \*\*\* (such as Student) as emotionally disturbed students with placement in special education behavior classes. (Tr. Vol. I, p. 145) (Tr. Vol. II, pp. 345-346). Furthermore, the principal felt the school district must first exhaust all types of resources in regular education to avoid the stigma attached to special education and to ensure the student is educated in the least restrictive environment with peers. (Tr. Vol. II, pp. 479-480).
24. There were five children, including Student, with behavior issues in the \*\*\* grade classroom. The principal scheduled a group meeting with the parents of all five children to discuss the behavior problems and then met individually with the parents of each child. (Tr. Vol. I, pp. 178-179). As with the other parents, the principal wrote a letter to Student's mother on December 2, 2011 advising her that Student's behavior was disrupting the educational process on a daily basis and set a "mandatory" meeting to discuss the issues. The letter included a warning that Student could be suspended or student's mother might be ticketed by the police if the misconduct continued. (P. Ex. 68) (Tr. Vol. I, pp. 131-132).

25. Student was suspended for \*\*\* days on \*\*\*, 2011 for \*\*\*. (P. Ex. 18)(P. Ex. 52)(P. Ex. 54)(P. Ex. 69). In an email to Student's mother the principal rescheduled the "mandatory" meeting for the date Student was to return to school from the suspension. The principal stated her concerns over Student's persistent misbehavior and the principal's frustration in attempting to communicate with Student's mother. Student's mother was offended by the principal's tone and interpreted the principal's communications as a personal attack. (P. Ex. 69) (Tr. Vol. I., p. 149).
26. Student and student's mother ultimately met with the principal and other school staff in mid December 2011 to discuss student's persistent misconduct. The principal suggested Student could avoid suspensions if Student was "under 504" as a special education student. Student's mother did not understand the meaning of "504" and was initially reluctant to embrace the principal's suggestion. (Tr. Vol. I., pp. 148-151, 175, 207-208, 227, 270-271). She was also distressed that the principal characterized Student's behavior problems as "chronic" and that she did so in Student's presence. (Tr. Vol. I., pp. 107, 131, 271, 280). It was not until she conducted her own research and discovered the avenue to secure help for Student was to request a Full Individual Evaluation (FIE). (P. Ex. 70) (Tr. Vol. I, pp. 290-291).
27. In January 2012 the school counselor began providing informal counseling to Student to address continuing behavioral issues. (P. Ex.21) (R. Ex. 12) (R. Ex. 16) (Tr. Vol. I., pp. 184-185). The school counselor met with Student at least nine times as confirmed by her counseling notes. She also saw student other times that were not documented. (Tr. Vol. I., pp. 191-192, 198, 224-225).
28. On January 4, 2012 Student's mother wrote a letter to the campus requesting an FIE and behavioral assessment. (P. Ex. 70) (R. Ex. 12, p. 231) (R. Ex. 14) (Tr. Vol. I, p. 274). The campus acknowledged receipt of the request for an FIE on January 6, 2012. (P. Ex. 71) (R. Ex. 12, pp. 231-232, 235-236). Communications between the principal and Student's mother continued to be strained and somewhat adversarial. (P. Ex. 72) (P. Ex. 73) (P. Ex. 74) (R. Ex.12, pp. 240-246).
29. Another IAT met on January 18, 2012 to consider the parent-initiated special education referral. Concerns about Student noted in the referral included difficulties remaining on task and during transitional periods, the need for constant redirection to keep student's hands to himself, and that Student continuously hit other students and refused to complete assignments. Student was disruptive in class and refused to follow classroom and cafeteria rules. Student threw food on the floor, kicked the feet of student's classmates, kicked student's desk, and walked out of ancillary classes and the cafeteria apparently without permission. (R. Ex. 15).
30. The January 2012 IAT also considered the effectiveness of previous regular education interventions. Those included: informal counseling, one on one intervention with the teacher, smaller group settings, working alone or with a partner to complete tasks, being accompanied by the teacher during transitions to the restroom and cafeteria, and, eating lunch with an adult (including a male vice principal). Although Student and the vice principal developed some rapport Student had little insight into student's continuing inappropriate behavior. The vice principal described Student's behavior with peers as "immature." (P. Ex. 80, pp. 132-134) (P. Ex. 94, p. 176) (R. Ex. 15). Student needs a relationship with a \*\*\* role model. (R. Ex. 4, p. 82) (Tr. Vol. II, p. 342).
31. The IAT concluded Student performed better in smaller settings and recommended an evaluation to determine student's eligibility for special education. (P. Ex. 81) (R. Ex. 15). Following the IAT's decision Student continued to misbehave and receive discipline referrals. (R. Ex. 12, pp. 238-239, 247, 251, 253-256, 261-263).
32. While the special education referral was pending Student's mother filed the request for a due process hearing on January 27, 2012. (Tr. Vol. I., p. 274). She then signed and returned her consent for the FIE on January 31, 2012. (P. Ex. 73) (p. Ex. 82) (R. Ex 15, p. 281) (Tr. Vol. I., p. 293). The school district sought medical records and a medical evaluation as a necessary component of the FIE. (P. Ex. 75). There was an unexplained delay in securing parental consent for the medical evaluation until March 7, 2012. (P. Ex. 83)(R. Ex. 15, p. 279).

33. Information provided by the school district to the physician for the medical evaluation supported evidence of ADHD Combined Type. (P. Ex. 91) (R. Ex. 1, p. 4). The physician – a psychiatrist – diagnosed Student with ADHD w/ hyperactivity and recommended further medical evaluation to rule out a conduct disorder and Oppositional Defiant Disorder (ODD) and to evaluate Student’s emotional status. (P. Ex. 93) (P. Ex. 101, p. 254) (R. Ex. 1, p. 3) (R. Ex. 4, p. 8) (Tr. Vol. I, pp. 60, 99). Student also needs a medical evaluation to determine whether medication would be helpful. (R. Ex. 4, p. 82) (Tr. Vol. II, p. 342).
34. The FIE consisted of several assessments conducted by a multi-disciplinary team including a licensed specialist in school psychology (LSSP), an educational diagnostician, and a classroom teacher. (R. Ex. 2, p. 10). The assessments complied with IDEA evaluation criteria. (R. Ex. 5) (Tr. Vol. II, pp. 419-420). A behavioral/emotional assessment was a component of the FIE. (R. Ex. 20) (Tr. Vol. II, p. 398). The FIE discovered Student had low self-esteem, experienced conflict in student’s interpersonal relationships, was not happy underneath student’s outward appearance, lacked confidence in student’s ability to effect change, and was frequently irritable and impatient with others. (R. Ex. 2, p. 20). Irritability can be a hallmark of depression in children. (Tr. Vol. I, p. 50).
35. The FIE found Student disliked school intensely and viewed student’s teachers as unfair and overly demanding. (R. Ex. 2, p. 26). Student felt Student had little control over student’s life and was blamed for things Student did not do. Student acknowledged difficulty establishing and maintaining close relationships with others and felt isolated and lonely. Student generally felt sad, misunderstood, and that life was getting worse. (P. Ex. 94, p. 181) (R. Ex. 2, pp. 19-20, 26) (R. Ex. 20) (Tr. Vol. II, p. 398).
36. The FIE also included behavior rating scales completed by Student’s classroom teachers and student’s mother. The rating scales measured several aspects of behavior and personality. Teacher responses placed Student in the clinically significant range for frequently engaging in behaviors that are considered strange or odd and that Student generally seemed disconnected from student’s surroundings. Teachers noted Student was generally alone, had difficulty making friends and was unwilling to join group activities at times. Teacher responses also placed Student in the clinically significant range for hyperactivity, aggression, conduct problems, and depression. (R. Ex. 2, pp. 23-24). The teachers rated Student’s behavior in the clinically significant range more often than student’s mother did. (Tr. Vol. I, pp. 330, 332-333). It is not unusual that hyperactivity and aggression are seen more often at school than at home due to the higher demands of the school environment. (Tr. Vol. II, p. 400).
37. The LSSP conferred by phone with the psychiatrist about psychological results that suggested possible depression. The psychiatrist described Student as “aggressive and difficult” and “extremely angry.” The psychiatrist expressed some concerns about the adversarial nature of the relationship between Student’s mother and the school district and felt it needed to more cooperative. He also concluded there were some family issues that needed to be addressed. (P. Ex. 94, p. 8) (R. Ex. 2, pp. 15-16).
38. During the FIE Student made statements about \*\*\* and \*\*\*. (R. Ex. 2, p. 18). Per school district policy Student was therefore referred for further risk assessment by another HISD psychologist. (R. Ex. 3) (Tr. Vol. II, pp. 321, 420-421). The risk assessment concluded Student was not a serious or imminent risk of harm to student’s self or others. The risk assessment noted Student’s perception that student’s siblings received preferential treatment and student’s feelings of resentment. (R. Ex. 3) (Tr. Vol. II, p. 322). The risk assessment also found Student to be more mischievous than malicious but that Student often crossed the line in seeking attention and responded in anger when others reacted negatively to student’s provocations and persistent efforts at getting attention. The risk assessment confirmed Student’s needs for social skills training to help student better understand how others perceive student and how to get student’s needs met appropriately. The risk assessment concluded Student suffered from wounded self esteem (typical for students with untreated ADHD) and Student needed an increase in attention and structure both at home and at school. (P. Ex. 96) (R. Ex. 3).
39. The FIE was completed on March 24, 2012. (P. Ex. 94) (R. Ex. 1) (R. Ex. 2). The FIE concluded Student met eligibility criteria for special education as a student with Other Health Impairment (OHI) based on student’s ADHD but not as a student with an emotional disturbance. (P. Ex. 94) (P. Ex. 95) (Tr. Vol. II, p. 334). The school district used IDEA criteria to determine whether Student exhibits an emotional disturbance rather than the DSM-

IV diagnostic standards used by clinicians. The IDEA criterion uses a somewhat different standard than the clinical standard stated in the DSM-IV. (Tr. Vol. II, p. 333).

40. The FIE also identified Student with ODD. (P. Ex. 94) (P. Ex. 95) (Tr. Vol. II., p 334). ADHD and ODD can co-occur and are not mutually exclusive. (Tr. Vol. I, p. 67) (Tr. Vol. II, p. 385). The school district's LSSP concluded Student's behaviors could be explained by student's ADHD and ODD rather than as an emotional disturbance. (Tr. Vol. II, pp. 403-404, 407).
41. The FIE attributed Student's self-ratings of depression to circumstances at home and within the family. (P. Ex. 101, p. 15) (R. Ex. 2, p. 32) (Tr. Vol. II, pp. 339, 340-341). The FIE attributed Student's aggressive and defiant behavior and student's inability to build or maintain satisfactory relationships as "a learned, maladaptive means for expressing student's impatience and irritation with others" that nevertheless did not prevent student from making reasonable academic progress in the general education setting. (R. Ex. 2, p. 32) (Tr. Vol. II, pp. 341-342, 344).
42. Family issues and other factors outside the school environment have an impact on Student's behavior at school. (P. Ex. 101, p. 254) (Tr. Vol. I, pp. 87, 89, 93-95) (Tr. Vol. II, p. 335). Student exhibits both ADHD and emotional difficulties that could result in serious, severe mental health and behavioral issues if they are not addressed regardless of their etiology. (Tr. Vol. I, pp. 56, 57, 96). The FIE concluded Student's disability negatively impacts student's behavior in the school setting. (R. Ex. 2, p. 40).
43. An extensive and detailed set of recommendations for behavioral management was also a component of the FIE including the use of a Behavior Support Plan (BSP) and strategies to help Student manage student's mood at school, address student's disruptive and defiant behavior, and to increase student's ability to focus on academic tasks. (R. Ex. 2, p. 41). The FIE also recommended both individual school counseling and family counseling. (R. Ex. 2, p. 42).
44. The FIE also included an assessment of Student's cognitive abilities. (Tr. Vol. II, p. 451). Student's overall intellectual ability and visual processing and processing speed fell within the high average range. Comprehension-knowledge, long term retrieval, auditory processing, fluid reasoning and short term memory fell in the average range with a significant weakness in long term retrieval. Student's general verbal comprehension abilities fell in the average range and general perceptual reasoning abilities in the high average range. (P. Ex. 86)(P. Ex. 90)(R. Ex. 2, pp 50-51, 58).
45. An assessment of academic achievement was another component of the FIE. Oral language skills and fluency with academic tasks fell within the average range. Ability to apply academic skills fell within the low average range. Student also fell within the average range for broad reading, basic reading, reading comprehension, brief reading, broad mathematics, math calculation, math reasoning and brief mathematical skills. Student fell within the low average range for written expression. (P. Ex. 88)(P. Ex. 95, p. 31)(R. Ex. 2, pp. 39, 45). The FIE did not find a learning disability in written expression because student's relatively slight weakness in writing did not correlate to a complementary cognitive weakness. (Tr. Vol. II, pp. 458-459, 462).
46. An ARD was initially scheduled for March 29, 2012 to review the results of the FIE but was later rescheduled to April 9, 2012 to accommodate Student's mother. (P. Ex. 92) (P. Ex. 97) (R. Ex. 5, pp. 90, 122). Student's father attended the April 9<sup>th</sup> ARD. (Tr. Vol. I, p. 161). The April 9<sup>th</sup> ARD concluded that Student met special education eligibility criteria as a student with OHI based on student's ADHD. (P. Ex. 99) (R. Ex. 5).
47. The April 9<sup>th</sup> ARD designed an educational program for Student. The IEP was developed with input from key stakeholders including Student's mother, father, grandmother, a special education resource teacher, the school nurse, the campus principal, the LSSP, the school counselor, an assistant principal, Student's attorney, two regular education teachers, a special education administrator, and the school district's attorney. (R. Ex. 5) (Tr. Vol. II, p. 501). The IEP was aimed at promoting Student's emotional and behavioral growth. (Tr. Vol. II, pp. 419, 502-503).

48. Student needed a behavior intervention plan with coordination between home and school. (P. Ex. 101, p. 254) (R. Ex. 4, pp. 81-82) (Tr. Vol. I, p. 62) (Tr. Vol. II, p. 378). The IEP included a Behavior Support Plan (BSP). The BSP identified Student's inappropriate behaviors, listed a set of attempted positive behavioral supports, and focused on two main behavioral goals that addressed Student's emotional issues. (P. Ex. 99, pp. 223-225) (R. Ex. 5) (Tr. Vol. I, p. 51). The BSP included a point system. Daily communication with Student's mother was also contemplated by the BSP. (R. Ex. 5, p. 102).
49. The BSP specifically targeted the development of appropriate social skills and reducing Student's aggression. (P. Ex. 99, pp. 223-226)(R. Ex. 5). The April 9<sup>th</sup> ARD proposed placement in a self contained special education behavior services classroom with the support of direct counseling services of 30 minutes per week. (P. Ex. 99, pp. 223, 227, 229, 231) (R. Ex. 5, pp. 106, 108, 110). Measureable counseling goals and objectives focused on Student's needs to develop appropriate social skills with peers and adults and to articulate feelings instead of resorting to aggressive behavior. (P. Ex. 99, pp. 218, 226).
50. An Individual Health Care Plan was also a component of the IEP to support Student in effectively managing student's asthma. (P. Ex. 99, p. 220) (Tr. Vol. II, pp. 492-493). Although the school district did not identify Student as a student with a learning disability in written expression the IEP/ARD software noted written expression was an area of concern. (Tr. Vol. II, pp. 489-490).
51. The April 9<sup>th</sup> ARD recessed to give Student's parents an opportunity to consider the educational program proposed at the ARD. (R. Ex. 5) (R. Ex. 6) (Tr. Vol. I, p. 276). The ARD reconvened on April 23, 2012 and reviewed an independent educational evaluation (IEE) secured by Student's mother. The IEE testing was conducted on March 19, 26, and April 4, 2012 and a report issued on April 19, 2012. (R. Ex. 6, p. 146) (Tr. Vol. I, p. 33) (Tr. Vol. II, p. 421). The cost of the IEE and for the IEE examiner's testimony at the hearing was \$ 4, 329.00. (Tr. Vol. I, p. 64).
52. The IEE supported the school district's conclusion that Student met IDEA criteria for services as a student with OHI based on student's ADHD and agreed with the diagnosis of ODD. (Tr. Vol. I, p. 97)(Tr. Vol. II, p. 350). However, the IEE also found Student met IDEA criteria as a student with an emotional disturbance and a learning disability in writing. (P. Ex. 101, p. 253)(R. Ex. 4)(Tr. Vol. I, pp. 35-38, 49). The FIE and IEE writing achievement results were consistent with one another but differed in the interpretation of those results. (Tr. Vol. I, pp. 60-61)(Tr. Vol. II, pp. 458-459, 464, 471).
53. Both the FIE and IEE noted Student needs a classroom that focuses on improving student's behavior. (Tr. Vol. I, p. 76). The IEE recommended the educational setting include a high degree of structure in a well developed behavioral milieu (such as the use of a level system) with a specific behavior plan for Student. (Tr. Vol. I, p. 77)(Tr. Vol. II, pp. 354, 377). The school district's behavior class met those recommendations. The goal of the behavior class is to return the student to the mainstream. The student earns time back in the mainstream through a level system with frequent feedback about whether the student is meeting expectations. (Tr. Vol. II, pp. 355-356, 499-500).
54. Student needs an occupational therapy assessment to address student's difficulties with handwriting. (P. Ex. 101, p. 255)(R. Ex. 4, p. 82). Student needs social skills training to improve student's social skills, social problem solving, social perspective taking, empathic thinking and integration into the school community. A social skills curriculum is also a component of the school district's behavior classes. (Tr. Vol. II, pp. 355-356, 499-500).
55. Specific social skill techniques need to be practiced and reinforced both at home and at school. (P. Ex. 101, p. 255) (R. Ex. 4, p. 83) (Tr. Vol. II, pp. 377-378). Student needs a communication log and an academic planner to keep track of assignments and to facilitate communications between home and school. (P. 101, p. 255) (R. Ex. 4, p. 82). Daily communication between home and school was contemplated by the IEP. (R. Ex. 5) (R. Ex. 6).
56. Student's mother gave her consent at the April 23rd ARD for Student's initial placement into special education and implementation of the proposed IEP and BSP. However she also felt Student required additional services to address student's emotional needs and difficulties with writing as recommended by the IEE. (R. Ex. 6, p. 147,

149) (Tr. Vol. II, pp. 526-529). Student began receiving special education services in the behavior services classroom following the April 23<sup>rd</sup> ARD. (Tr. Vol. I., p. 104).

57. After student's placement into special education with implementation of the IEP and BSP Student had few behavioral incidents at school and student's behavior significantly improved. There were few, if any, incidents of aggressive behavior. (Tr. Vol. I., pp. 139-140, 168-169). As of the date of the hearing Student received four direct, one on one counseling sessions of 30 minutes per session. Student was much less aggressive in the smaller group. There were no office referrals and Student was doing very well. Student's grades improved. Student appeared to have a good rapport with student's teacher and was learning to get along with student's classmates. (Tr. Vol. I., pp. 199-201, 203, 213, 219).

## **Discussion**

### Failure to Evaluate and Identify – “Child Find”

The threshold 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 the responsibility to identify, locate and evaluate all children with disabilities residing within its jurisdiction who are in need of special education. This responsibility is known as “Child Find.” *20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.128 and 300.220.* Under Texas law special education referral is required as part of the school districts' overall regular education referral or screening system for students experiencing difficulty in the regular classroom. *19 Tex. Admin. Code § 89.1011 (emphasis omitted).*

The IDEA requires a two-pronged analysis for determining whether a student should be identified as eligible for special education services. The “Child Find” obligation is triggered when the school district has reason to suspect the student has a disability and that 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 suspected of being a child with a disability ... and in need of special education, even though they are advancing from grade to grade ...*”).

### Disability

The credible evidence supports the conclusion that the school district had reason to suspect Student might have a disability by the spring of 2011 – as early as January (when Student began receiving informal counseling from the campus counselor) and certainly by April 2011 – when school personnel referred student's mother to an outside mental health agency. The evidence showed that Student exhibited persistent, on-going behavioral problems to a marked degree over a period of at least two years. However, the school district did not conduct a Full Individual Evaluation (FIE) for special education eligibility until nine months later – and not until Student's mother filed the request for a due process hearing.

While this litigation was pending the school district completed an FIE and determined that Student indeed had a disability and was in need of special education as a student with Other Health Impairment (OHI) based upon Attention Deficit Hyperactivity Disorder (ADHD). *34 C.F.R. § 300.8 (c) (9).* The school district convened an ARD meeting in a timely manner to review and discuss the results of the FIE, identified Student as eligible for special education services under the OHI category, placed student in a special education behavior class, implemented a behavior plan, and began providing student with direct counseling services.

By all accounts Student is beginning to make both behavioral and academic progress in student's new placement with the behavioral and instructional supports the special education program now provides. Thus, there is no real dispute that Student is a student with a disability in need of special 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 emotional disturbance and a specific learning disability as additional eligibility categories under the IDEA.

## Response to Intervention

The school district contends that an earlier referral to special education was not warranted because it was first required to address Student's behavioral issues through its Response to Intervention (RTI) regular education program. However, the evidence showed that in fact the RTI strategies were not particularly successful. Furthermore, a school district may not use RTI strategies to delay or deny a special education evaluation or release a school district from its Child Find responsibilities. *El Paso Ind. Sch. Dist. v. R.R.*, 567 F. Supp 2d 918, 947 (W.D. Tex. 2008), *rev'd on o.g.*, 591 F. 3d 417 (5<sup>th</sup> Cir. 2009); *D.A. v. Houston Ind. Sch. Dist.*, 716 F. Supp 2d 603, 615 (S.D. Tex. 2009); *Memorandum to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011).

In addition, Student's mother repeatedly voiced concerns over student's problems at school to school personnel – who made judgments about the impact of family issues on student's behavior instead of responding to her requests for help. The evidence also shows the teachers certainly had their hands full trying to cope with Student's on-going and repeated set of challenging, unpredictable and disruptive behaviors. The school district did not meet its Child Find responsibilities when it continued to work through the RTI process and conferenced with the parent. Student's behavioral and disciplinary history should have led the school district to suspect a disability and that Student was in need of special education. Instead, the school district attempted a number of interventions that were not effective and left it to the parent to secure an evaluation at her own expense based on the belief that the student's behavior was a result of parenting and family issues.

## Educational Need

Educational need is not strictly limited to academics but also includes behavioral progress and the acquisition of appropriate social skills as well as academic achievement. *Venus Ind. Sch. Dist. v. Daniel S.*, 2002 U.S. Dist. LEXIS 6247 (N.D. Tex. 2002). Furthermore, 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 Hendrick Hudson Int. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 n. 28 (1982); *Venus Ind. Sch. Dist. v. Daniel S.*, *supra*. 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*, *supra*.

In this case the evidence showed that despite student's behavioral challenges Student nevertheless managed to make average grades and pass from \*\*\* to \*\*\* grade. However, the evidence also established that Student is capable of making better than average grades and that student's inappropriate behavior at school progressively worsened over time.

The numerous disciplinary steps that the school district was required to take to address Student's behavioral needs support the conclusion that student's educational performance was indeed adversely impacted by student's disability. The evidence showed that Student was in need of acquiring appropriate social skills, especially with regard to managing conflict, getting along with others, and getting student's needs met appropriately. Student's long-standing and chronic behavior problems constantly and consistently interfered with the educational process on an almost daily basis and impeded student's ability to learn and that of student's classmates. *See, Killeen Ind. Sch. Dist.*, 55 IDELR 239 (SEA Tex. 2010) (*school district ordered to conduct FIE where student exhibited anger and aggression despite making academic progress*).

## Family Issues

Even if Student's emotional and behavioral problems were related to family issues that did not excuse the school district from its responsibility to investigate whether Student might qualify for special education services. The IDEA criterion needed to meet the emotional disturbance classification does not exclude emotional issues arising from family problems. It is reasonable to infer from the evidence that Student often brought student's feelings from home to school. As noted in the IEE, the mere fact that student's feelings could be tied to family issues did not reduce their negative impact on student's ability to function at school.

While the IDEA also excludes children who are “socially maladjusted” (unless they otherwise meet the ED criteria) – the school district under “Child Find” has the responsibility to conduct the initial and appropriate evaluation. *34 C.F.R. § 300.8 (c) (4) (i) (ii)*. It cannot rely on informal judgments by school personnel that family and parenting issues are simply to blame for the student’s behavior at school.

#### Communication Issues

It is often difficult for a parent to realize and accept their child may be different from peers and have “special needs.” Parents are often rightfully concerned about the potential and unfortunate stigma attached to special education and may be reluctant to accept the suggestions and recommendations of well-meaning school personnel. Parents may not be aware of the special education referral process or that a request for an FIE may trigger that process.

Perhaps Student’s mother appeared resistant, confrontational, and uncooperative to school personnel because she was working through this gradual, painful process. Perhaps she was not, at least initially, able to view Student’s behavior objectively and had a tendency to blame school personnel for Student’s behavioral issues at school. It is understandable that school staff might have been offended when Student’s mother questioned their professionalism. Miscommunication and misunderstanding between Student’s mother and the principal, in particular, developed as Student’s behavioral difficulties continued to escalate.

However, the IDEA places the affirmative duty for identifying children in need of special education on the school district not on the parent. 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)* Where, as here, a parent raises repeated concerns about the student’s progress over a period of time and there is a significant history of persistent behavioral misconduct the school district must initiate the special education evaluation process. Unfortunately, it is reasonable to infer from the evidence that the school district failed to meet this obligation, in part, due to the miscommunications and ill will between the parent and principal.

#### Over-Identification

School personnel felt they were taking appropriate steps to address Student’s educational needs. They were trying to avoid \*\*\* into special education. While \*\*\* in special education is a legitimate and grave social concern, the unique needs of the individual student under the IDEA are paramount. *See, 34 C.F.R. §§300.1, 300.39 (a) (b) (3) (i) (ii)*.

The record in this case leads me to conclude that by April 2011 an IAT should have convened and considered a special education referral. By their own admission, school personnel acknowledged they had reason to suspect a disability by April 2011. They felt a referral to an outside mental health agency was warranted as Student’s behavior at school continued to be disruptive and student’s mother repeatedly asked for help. Instead, an IAT did not convene until October 2011 – a good nine weeks into the next school year. Even then the school district failed to recognize the need to conduct a special education evaluation until Student’s mother initiated legal proceedings in January 2012.

#### Additional Eligibility as a Student with ED and LD

The issues of whether the school district should also have identified Student as a student with an emotional disturbance and with a learning disability in written expression were not squarely presented at the beginning of this litigation nor specifically discussed during the prehearing conference where the issues were clarified and confirmed. However, the parties appeared to have agreed to include those issues as aspects of the school district’s counterclaim placing the FIE at issue. Evidence was presented by both parties on these eligibility issues at the hearing – therefore I will consider them here.

An emotional disturbance under the IDEA means a condition exhibiting one or more of five specified characteristics over a long period of time and to a marked degree that adversely affect the child’s educational performance. It is important to note the definition only requires the existence of one of the five characteristics for eligibility purposes. *34 C.F.R. § 300.8 (c) (4) (i) (A)-(E)*. Those characteristics are:

- 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; and,
- A tendency to develop physical symptoms or fears associated with personal or school problems. *Id.*

The evidence from all of the various assessments establish that Student certainly demonstrated an inability to build or maintain satisfactory interpersonal relationships with peers and teachers as well as exhibiting inappropriate types of behavior or feelings under normal circumstances. Student's constant irritability might also be a sign of depression. That question requires further evaluation.

The evidence supports the need for further psychiatric evaluation to further define student's emotional status as well as a medical evaluation to consider whether medication might address some of student's behavioral and emotional needs. The evidence showed Student meets at least two of the five characteristics of an emotional disturbance for special education purposes. *Id.*

Petitioner did not meet petitioner's burden of proving Student met eligibility criteria as a student with a learning disability in written expression. Although both the FIE and IEE identified writing as a weakness the data did not rise to the level of identifying a learning disability in that area. *34 C.F.R. §300.8 (c) (10)*.

#### Substantive Educational Harm – Failure to Provide FAPE

Petitioner asks whether the school district's failure to conduct a timely special education evaluation resulted in the denial of a free, appropriate public education. In this jurisdiction, the issue is resolved by a four factor analysis:

- 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 and collaborative manner by key stakeholders; and,
- Positive academic and non-academic benefits are demonstrated.

*Cypress-Fairbanks Ind. Sch. Dist., v. Michael F., 118 F. 3d 245, 253 (5<sup>th</sup> Cir. 1997)*. There is no specific requirement to weigh the factors in any particular way. *Richardson Ind. Sch. Dist., v. Michael Z., 580 F. 3d 286, 293 (5<sup>th</sup> Cir. 2009)*.

The evidence in this case shows that once the special education evaluation was completed the ARD met and designed an individualized IEP with a BSP that met the needs identified by the assessment data. Student finally received the specialized instruction and support services Student needed in a small group, highly structured setting. The goal of the behavior services classroom is to return the student to the mainstream through a series of clearly articulate, graduated behavioral steps. Thus the program is being administered in the least restrictive environment.

The IEP and BSP were implemented in a coordinated and collaborative manner by key stakeholders. The evidence showed that once Student was placed into the behavior class with a special education teacher and the support of direct counseling services, Student began to respond positively both academically and behaviorally. Therefore, the program demonstrated positive academic and non-academic benefit.

The evidence shows that the IEP and BSP included many of the recommendations made by the both the FIE and the IEE. Overall, the educational program and placement designed at the April ARD meetings is reasonably calculated to provide Student with the requisite meaningful educational benefit. *Rowley, supra.; Michael F., supra. See also, Klein Ind. Sch. Dist. v. Per Hovem, 2012 U.S. App. LEXIS 16293 (5<sup>th</sup> Cir. 2012)(motion for rehrq. en banc pending)(provision of FAPE to a student eligible for special education must be judged by the overall educational benefits received and not solely by remediation of the student's disability).*

### Equitable Relief for the Delay in Conducting FIE

However the evidence shows the delay in conducting the special education referral until January 2012 meant that Student, student's teachers, student's family, student's classmates, and the campus administrators all suffered through a difficult \*\*\* grade year – after all, Student did not begin receiving appropriate services until mid to late April 2012. Had the school district initiated the special education referral a year earlier – in April 2011 (or even by October 2011 when student's \*\*\* grade teacher made the IAT referral) the school district would have completed the FIE, convened an ARD, and implemented the IEP in the much earlier in \*\*\* grade instead of towards the end of the year.

While the current educational program and placement provide the requisite overall benefit the school district denied Student the opportunity of receiving a free, appropriate public education under IDEA when it failed to initiate a special education evaluation in a timely manner. This resulted in a substantive educational harm because student's needs were not addressed for a good portion of student's \*\*\* grade year. Therefore, Petitioner is entitled to some form of equitable relief to compensate for that failure. *Sch. Committee of the Town of Burlington v. Dept. of Educ.*, 471 U.S. 359, 374 (1996) (*equitable considerations in fashioning relief appropriate under IDEA*); *See*, 34 C.F.R. §300.513 (a) (2) (iii).

The evidence shows the assessments called for a few additional components missing from the current IEP and BSP -- while the missing components are not determinative of an overall lack of educational benefit -- their inclusion into Student's program is warranted by the data and would be of further benefit as compensatory and equitable relief. *Burlington, supra*.

#### Mentor by \*\*\*

First, Student needs a \*\*\* role model –the IEP should include ways for Student to meet regularly at school with a \*\*\* role model (such as the assistant principal if available). This feature of student's program supports the IEP and BSP goals of teaching Student how to resolve social problems and get needs met appropriately.

#### OT and Writing Skills Assessments

Second, Student needs an occupational therapy assessment to determine whether Student would benefit from some additional support in written expression. While Student may not qualify as a student with a learning disability, per se, both the FIE and IEE found written expression to be an area of relative weakness. Student's reading/language arts teacher or a speech/language pathologist should also conduct their own assessment of student's writing skills. An ARD should then convene to review the results of both the OT and the writing/language skills assessment and then revise student's IEP if needed to include academic IEP goals and objectives to address any identified skill deficits in that area.

#### Parent Training

Third, the evidence showed there is a need to coordinate communications between home and school and to reinforce the school's behavioral strategies at home. Therefore, the ARD should add a parent-training component to Student's IEP in the form of assisting Student's mother to formulate a behavior system at home that is consistent with the BSP at school and enhance communication between home and school. Parent training is a "related service" under IDEA. 34 C.F.R. § 300.34 (a) (c) (8) (i)-(iii). The parent training should include follow up periodic communications with Student's mother to answer any questions she may have about the plan and provide an opportunity for continued dialogue between home and school. Student's mother will need to cooperate and collaborate with school personnel to implement this aspect of Student's program.

#### Medical Evaluation

Forth, the evidence supports the need for further medical evaluation to determine the potential benefit of medication and to evaluate Student's emotional condition. Medical services are "related services" within the meaning of IDEA when they are for diagnostic or evaluation purposes. 34 C.F.R. § 300.34 (a) (c) (5). Therefore, the school district should fund up to two office visits with a medical professional for that purpose. Student's mother must cooperate and collaborate with the school district in scheduling the medical appointments and in submitting whatever documentation is needed in a timely manner for the school district to provide the medical evaluation at school district expense.

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## Social Work/Counseling Services

Fifth the evidence showed the school district has social workers and counselors available to facilitate access to outside community services and resources to meet family needs. Social work and counseling services are also “related services” under the IDEA. *34 C.F.R. § 300.34 (a) (c) (2) (10) (v) (14) (i)-(v)*. In this case the IEP should include social work and/or counselor services as a related service to assist Student’s mother in accessing outside counseling and any recommended additional medical treatment or follow-up. The evidence showed such services are needed to assist Student in resolving student’s feelings and improve interactions with family at home. Student’s mother must be willing and available to cooperate and take advantage of the social work and/or counselor services offered. The school district will not be held liable if she declines to utilize available community services.

### Petitioner’s Right to an IEE at School District Expense

The parent of a child with a disability under IDEA is entitled to an independent educational evaluation at school district expense if the parent disagrees with the school district’s own evaluation so long as the IEE meets reasonable school district criteria. *34 C.F.R. §300.502 (a) (1) (2) (3) (b) (1)*. However, a school district may challenge the parent’s request for an IEE at school district expense by requesting a due process hearing and show its evaluation was appropriate under IDEA. If the school district’s evaluation is appropriate the parent still has the right to the IEE but not at public expense. *34 C.F.R. § 300.502 (b) (2) (i) (3)*.

In this case the school district submitted a counterclaim on that issue. The credible evidence showed the school district’s FIE was appropriate under the IDEA and met all of the regulatory requirements. *See, 34.C.F.R. §§300.300, 300.301, 300.304, 300.306*. There was little evidence to the contrary. The mere disagreement between the experts on the interpretation of certain specified test results does not mean the school district’s evaluation failed to meet IDEA criteria. Reasonable experts may certainly differ and they did in this case on some aspects of the FIE. The school district’s comprehensive FIE did identify Student as a student with a disability in need of special education.

Furthermore, the IEE in this case was conducted and completed *after* Student’s mother filed her request for a due process hearing; therefore it is reasonable to infer it was conducted for purposes of litigation. While the parental right to an IEE is confirmed under the statute and supported by the case law Student’s mother did not first submit a request for an IEE to the school district as contemplated by the statute. *34 C.F.R. § 300.502(a) (1) (2)*.

Where the parent initiates an IEE it must be considered by the school district in making educational decisions and may also be presented at the hearing. *34 C.F.R. § 300.502 (c) (1) (2)*. *See, Schaffer v. Weast, 546 U.S. 49, 60-61 (2005) (“IDEA ... ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the [school district] without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.”)*.

Because the parent did not first submit a request for an IEE to the school district before she obtained one and because the school district’s FIE was put into issue and determined to be appropriate Student’s mother is not entitled to reimbursement for the cost of the IEE. *34 C.F.R. §300.502 (b) (2) (i) (3)*.

### Prior Written Notice

Petitioner also contends that the school district failed to provide Student’s mother with the requisite “prior written notice” when it allegedly denied Petitioner’s request for special education services and made unilateral changes in educational services. Petitioner did not meet petitioner’s burden of proof on this issue. The evidence established that while Student’s mother raised concerns about her child’s behavior there was insufficient evidence to show she specifically requested special education services.

The evidence showed that the school district responded appropriately and met its responsibilities once Student’s mother submitted a specific request for a special education evaluation. The school district did not deny the request. The school district completed all the necessary components of the evaluation and convened an ARD meeting to review and discuss

the results of the FIE. An unexplained delay in securing parental consent for the medical evaluation had some impact on the timeline but there was insufficient evidence to fault the school district in that regard.

There was insufficient evidence to show the school district made unilateral changes in educational services either. There was no credible evidence that the services Student should have received were not delivered. Even if there was a failure to comply with these procedural requirements there was little or no educational harm as a result since the evidence showed Student experienced both academic and behavioral progress once Student was placed into special education in April 2012. *Michael F., supra.*

### Conclusions of Law

1. The school district did not meet its obligations under the Individuals with Disabilities Education Act (IDEA) in a timely manner when it failed to conduct a Full Individual Evaluation under its “Child Find” duties beginning in April 2011. The school district should have initiated an FIE in April 2011 and no later than October 2011. *34 C.F.R. §§ 300.111; 300.301.*
2. The school district’s failure to evaluate Student in a timely manner for eligibility under the IDEA resulted in the denial of a free, appropriate public education where the delay resulted in a failure to provide student with the special education services Student needed. While the educational program and special education placement provided the overall requisite educational benefit Petitioner is entitled to equitable relief for the delay in providing student with the program Student needed due to the school district’s failure to initiate a special education referral in a timely manner. *34 C.F.R. § 300.111; Burlington Sch. Comm. supra; Michael F., supra.*
3. Petitioner meets two of the five eligibility criteria as a student with an emotional disturbance for purposes of special education services under the IDEA. *34 C.F.R. § 300.8 (c) (4) (i) (B) (C).*
4. Petitioner did not meet petitioner’s burden of proving that Student met eligibility criterion as a student with a specific learning disability. *34 C.F.R. §300.8 (c) (10).*
5. Petitioner did not meet petitioner’s burden of proving the school district failed to provide petitioner’s mother with the requisite prior written notice. Petitioner did not meet petitioner’s burden of proving the school district denied the parental request for special education services or that it made unilateral changes in educational services. *Schaffer v. Weast, 546 U.S. at 62.*
6. Petitioner is not entitled to reimbursement for the cost of the April 2012 IEE because the Respondent’s FIE met IDEA criteria and was therefore appropriate. *34 C.F.R. §300.502 (b) (2) (i) (3).*

### ORDERS

Based upon the foregoing findings of fact and conclusions of law it is therefore **ORDERED** that Petitioner’s requests for relief are hereby **GRANTED IN PART and DENIED IN PART** as follows:

- The school district shall provide mentoring opportunities for Petitioner with an appropriate \*\*\* role model on a regular, periodic basis throughout the school year beginning no later than fifteen (15) school days from the beginning of the current school year. The schedule of such opportunities shall be left to the discretion and availability of the role model in collaboration with Petitioner’s classroom teacher, the student, and/or the school counselor but in no event shall the opportunities be less than once every two (2) weeks during the school year unless otherwise adjusted by consensus of the ARD Committee and depending upon Petitioner’s attendance at school.
- The school district shall conduct an OT assessment to determine Petitioner’s needs for OT services to address any identified handwriting deficits within thirty (30) school days from the beginning of the current school year. The school district shall also conduct an informal writing skills assessment by either the classroom teacher and/or a speech/language pathologist to determine whether Petitioner needs the addition of specific academic IEP goals

and objectives to address any identified writing skills deficits to petitioner's IEP within thirty (30) school days from the beginning of the current school year.

- The school district shall provide parent training to Petitioner's mother for the purpose of formulating a behavior system to be implemented at home that reinforces Petitioner's IEP and BSP including a communication system to enhance and encourage dialogue between Petitioner's mother and school staff. The parent training shall consist of no less than two (2) one (1) hour meetings to be scheduled by Petitioner's mother and school staff designated by campus administration to provide the parent training, unless the parties agree otherwise. The communication system shall be designed by Petitioner's mother and the designated parent trainer by mutual agreement. The initial parent training session shall be scheduled by mutual agreement no later than thirty (30) school days from the beginning of the current school year unless the parties agree otherwise.
- The school district shall fund up to two (2) one (1) hour office visits to a psychiatrist or other qualified health provider for the purpose of evaluating Petitioner's need for medication, emotional status, and further medical treatment. Petitioner's mother shall work cooperatively with school district staff to schedule the office visit(s) and to provide whatever documentation is required by the school district for this purpose and in a timely manner. The school district shall initiate communications with Petitioner's mother to arrange for the initial office visit no later than thirty (30) school days from the beginning of the current school year.
- The school district shall schedule a one (1) hour conference with Petitioner's mother to provide either social work or counseling services to facilitate parental access to outside community services and resources to meet family needs. The school district shall initiate communications with Petitioner's mother to schedule the conference no later than thirty (30) school days from the beginning of the current school year. The date and time for the conference shall be by mutual agreement of the parties. The school district will be deemed to be in compliance with this provision so long as it initiates scheduling of the conference at a mutually agreeable time and place and will not be held liable if Petitioner's mother declines to accept the services.

It is further **ORDERED** that an ARD meeting shall be scheduled within ten (10) school days of the date the OT and informal writing skills assessments are completed for the purpose of reviewing the results and recommendations of those assessments and making any revisions to the IEP if needed.

It is further **ORDERED** that Petitioner's IEP shall also be amended in writing, but without the necessity of an ARD meeting, to include the provision of the mentoring opportunities, parent training and communication system, and the provision of up to two office visits for medical evaluation. The amendment shall be prepared no later than thirty (30) school days from the beginning of the current school year. The amendment shall be deemed sufficient if it tracks the provisions of this Order verbatim as written above. The IEP amendment shall be provided to Petitioner's mother no later than ten (10) school days from the date the amendment is prepared.

It is further **ORDERED** that Respondent's request for relief is **GRANTED** and Petitioner is not entitled to reimbursement for the cost of the IEE.

It is further **ORDERED** that all other forms of relief not specifically stated herein are **DENIED**.

**SIGNED the 27th day of August 2012**

/s/ Ann Vevier Lockwood  
Ann Vevier Lockwood  
Special Education Hearing Officer

#### **NOTICE TO THE PARTIES**

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

**BEFORE A SPECIAL EDUCATION HEARING OFFICER  
STATE OF TEXAS**

**STUDENT  
bnf PARENT,  
Petitioner,**

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v.

**DOCKET NO. 141-SE-0112**

**HOUSTON INDEPENDENT  
SCHOOL DISTRICT,  
Respondent.**

**SYNOPSIS**

**Issue:** Whether the school district met its Child Find obligations in a timely manner.

**Held: FOR THE STUDENT.**

School district had reason to suspect student had a disability and was in need of special education as early as April 2011-- student had history of significant behavioral issues at school and was referred to community mental health services when parent asked for assistance in addressing persistent misconduct and disciplinary actions -- and no later than October 2011- - when classroom teacher referred student to campus intervention team for continuing persistent and significant misconduct. **34 C.F.R. § 300.111**

**Issue:** Whether school district's failure to conduct FIE in timely manner resulted in the denial of FAPE.

**Held: FOR THE STUDENT IN PART AND THE SCHOOL DISTRICT IN PART.**

School district conducted FIE, identified student as eligible for special education as student with OHI based on ADHD, and provided student with educational program in special education placement student needed – therefore student received the requisite overall benefit from the program; however student entitled to equitable relief for the delay in providing student with program student needed due to school district's failure to initiate special education referral in a timely manner. **34 C.F.R. § 300.111; Sch. Committee of the Town of Burlington v. Dept. of Educ., 471 U.S. 359, 374 (1996); 34 C.F.R. § 300.513 (a) (2) (iii).**

**Issue:** Whether student met eligibility criteria as student with an emotional disturbance.

**Held: FOR THE STUDENT**

Assessment data from various sources confirmed student met at least two characteristics of emotional disturbance as defined by IDEA. **34 C.F.R. § 300.8 (c) (4) (B) (C).**

**Issue:** Whether student met eligibility criteria as student with a specific learning disability.

**Held: FOR THE SCHOOL DISTRICT.**

Student did not meet burden of proof on this issue – assessment data indicated written expression a weakness but did not rise to level of a specific LD. **34 C.F.R. § 300.8 (c)(10).**

**Issue:** Whether school district failed to provide parent with prior written notice when it allegedly refused to provide student with special education or when it made unilateral changes in educational services.

**Held: FOR THE SCHOOL DISTRICT.**

Student did not meet burden of proof on this issue – insufficient evidence that school district refused special education services or that it made unilateral changes. **34 C.F.R. § 300.503.**

**Issue:** Whether student entitled to reimbursement of IEE at school district expense.

**Held: FOR THE SCHOOL DISTRICT**

School district submitted counterclaim placing FIE at issue. FIE found to be appropriate under IDEA; parental request for IEE not submitted until after parent filed request for hearing; therefore, where school district's FIE appropriate parent still had right to IEE but not at school district expense. **34 C.F.R. § 300.502(b) (2) (i) (3).**