

1. provide Student an appropriate Individual Education Program (“IEP”) in the least restrictive environment (“LRE”) that complies with all the procedural and substantive requirements of the IDEA and Texas special education laws;
2. alternatively, reimburse the Parent for past and current private placement and pay for future private placement;
3. reimbursement the Parent for past private services, evaluations, and mileage;
4. provide Student compensatory educational services; and
5. provide any relief that the Hearing Officer deems appropriate or which is recommended by the Student’s experts and evaluators.

II. PROCEDURAL HISTORY

Student filed student’s Complaint on March 26, 2012, against two (2) entities: Krum Independent School District (“Krum” or “the District” or “KISD”). TEA assigned the case Docket No. 219-SE-0312 and assigned the matter to the undersigned Hearing Officer. On March 26, 2012, the undersigned sent the Initial Scheduling Order to Student and Krum, stating that the pre-hearing telephone conference would convene on April 13, 2012, that the Due Process Hearing would take place on May 7, 2012, and that the Decision would issue by June 6, 2012. Due to conflicting schedules, the pre-hearing telephone conference was re-scheduled to April 18, 2012.¹

On March 26, 2012, the District’s counsel made an appearance as counsel for the District but did not mention co-Respondent Denton County Special Education Cooperative (“the Cooperative” or “Respondent Cooperative”). On April 5, 2012, the District filed and served its Response to Student’s Complaint, which included, *inter alia*, the affirmative defense of the Texas one-year statute of limitations. See TEX. ADMIN CODE §89.1151(c). The District also contested Student’s inclusion of multiple other statutes and regulations over which a Special Education Hearing Officer has no jurisdiction.

On April 16, 2012, Student and the District participated in a Resolution Session, but did not resolve their issues.

On April 18, 2012, the parties convened the pre-hearing telephone conference. In attendance were the following: 1) Ms. Dorene Philpot, Student’s counsel; 2) ***, Student’s Parent; 3) Ms. Cynthia Buechler, the District’s counsel; 4) ***, the District’s Special Education Director; 5) the undersigned Hearing Officer; and 6) the court reporter, who made a record of the telephone conference. After a brief discussion the parties and Hearing Officer re-scheduled the telephone conference for April 19, 2012.

On April 19, 2012, the parties re-convened the pre-hearing telephone conference. In attendance were the following: 1) Ms. Philpot, Student’s counsel; 2) ***, Student’s Parent; 3) Ms. Buechler, the District’s counsel; 4) ***, the District’s Special Education Director; 5) the undersigned Hearing Officer; and 6) the court reporter, who made a record of the telephone conference. The parties discussed the issues and re-scheduled the Due Process Hearing for August 20-21 and 23-24, 2012. Scheduling difficulties necessitated re-scheduling the Due Process Hearing for August 14-17, 2012.

¹ Student’s Complaint also named Denton County Special Education Cooperative as a Respondent. When TEA transmitted the Complaint to the undersigned Hearing Officer, it did not name Denton County Special Education Cooperative as a co-Respondent. When the undersigned transmitted the Initial Scheduling Order, it did not name Denton County Special Education Cooperative as a co-Respondent. Such omissions do not affect Denton County Special Education Cooperative’s status as a co-Respondent.

A. DISPOSITIVE MOTIONS:

Also during the telephone conference, the parties discussed the District's affirmative defenses related to 1) the one-year statute of limitations; and 2) the various claims brought by Student under statutes over which a Texas Special Education Hearing Officer has no jurisdiction. The undersigned ordered that the statute of limitations issue would be tried with the case but the additional claims involving other statutes and regulations would be dismissed.

On April 20, 2012, Student's counsel inquired into the legal representation of Respondent Cooperative because no Response to Complaint had been filed by the Cooperative. The District's counsel responded that she was representing the District and the Cooperative. A review of the original Complaint revealed that both Respondents were actually named in the Complaint.

On July 9, 2012, Student filed its Motion for Default Judgment as to the Cooperative for failure to file an answer or respond to the special education hearing request filed in this matter. On July 11, 2012, the Cooperative filed its Motion to Dismiss and Response to Student's Complaint, asserting the Cooperative was not referenced as a party in the documents transmitted by TEA to the parties and Hearing Officer following the original filing. On July 26, 2012, the Cooperative filed its Amended Motion to Dismiss, Response to Student's Complaint, and Response to Motion for Default Judgment, which included 1) a general denial; 2) the defenses already on file by the District related to the one-year statute of limitations and the inclusion of statutes and regulations over which a Special Education Hearing Officer has no jurisdiction; and 3) the plea that the Cooperative is not a proper party to this litigation. On July 30, 2012, the undersigned issued Orders 1) Denying Student's Motion for Default Judgment (as to Respondent Denton County Special Education Cooperative) and 2) Denying Respondents' Motion to Dismiss Denton County Special Education Cooperative.²

B. DISCOVERY ISSUES:

The parties exchanged discovery requests related to the production of documents in the possession of the respective parties, subpoenas *duces tecum* requesting third-party records, and the inspection of the *** School ("***"), a non-party to this pending due process proceeding. Objections were lodged, as were Motions to Compel and Motions for Sanctions.

On August 10, 2012, the parties convened a pre-trial telephone conference to discuss pending discovery matters and any other issue of importance prior to the Due Process Hearing. In attendance were the following: 1) Ms. Philpot, Student's counsel; 2) Mr. Tomas Ramirez, additional counsel for Student; 3) Ms. Buechler, the District's counsel; 4) the undersigned Hearing Officer; and 5) the court reporter, who made a record of the telephone conference. The Hearing Officer rendered final rulings on discovery disputes, which included allowing the District's representative to visit *** prior to the hearing; the parties discussed the line-up of witnesses and other procedural matters attendant to the pending hearing.

The Due Process Hearing convened on August 14-16, 2012. Because the parties were unable to complete the hearing in the one (1) remaining hearing date scheduled, the parties agreed to recess and reconvene at a time when the hearing could be completed in two (2) consecutive days: September 18-19, 2012. At the conclusion of the hearing on September 19, 2012, a sixth day for completion of the hearing was set to take telephone rebuttal testimony by Student: September 27, 2012.

Student opened the hearing to the public and several observers were in attendance during the hearing. Student presented student's final witnesses on August 16, 2012, and Respondents presented their case on September 18-19, 2012. Student's rebuttal testimony was taken on September 27, 2012. Both parties presented numerous witnesses, conducted extensive cross examination, and introduced documentary evidence. At the

² The Cooperative asserted that because it is neither a local educational agency nor a public agency, IDEIA does not authorize a due process hearing against it. Student responded that the Office of Special Education Programs ("OSEP") has indicated that sub grants given by local educational agencies to cooperatives made the cooperatives liable for providing FAPE. *Letter to Hokenson*, 53 IDELR 96, 109 LRP 58323 (OSEP 2009). Further, complaints against local educational agencies and cooperatives as co-Respondents have been tried in Texas. *C.B., b/n/f J.B. vs. Argyle Independent School District and Denton County Special Education Cooperative*, 111 LRP 47270 (Tex. SEA 2011); *Alba-Golden Independent School District and Wood County Special Education Cooperative*, 45 IDELR 291, 106 LRP 33860 (Tex. SEA 2005).

conclusion of the hearing, the parties requested, and upon good-cause found, obtained an extension of the Decision Deadline to allow for review of the Transcript, preparation of closing arguments, and completion of the Decision. The parties' closing arguments were due on October 30, 2012, and the Decision Deadline was extended to November 9, 2012. This Decision is rendered on its November 9, 2012, deadline.³

III. FINDINGS OF FACT

1. KISD is a political subdivision of the State of Texas and a duly incorporated Independent School District. The Cooperative contracts with KISD to provide certain special education personnel and services as a cost-saving measure. Both Respondents are responsible for providing Student FAPE under IDEIA and its implementing rules and regulations.
2. Student is ***-year-old *** who currently attends ***, which is a private placement funded by Student's Parent. Student entered KISD during student's *** grade year, school year *** (P.1:2).
3. Student's residence is within the jurisdictional boundaries of KISD. Respondents currently do not provide Student with educational services.
4. In October 2007, the *** ("****") assessed Student at the request of student's Parent, who reported that Student met all developmental milestones but communication appeared below average (P.1:2). Student's Parent requested an assessment of Student's expressive and receptive language skills as well as articulation (P.1:2). *** determined that Student presented with a moderate articulation disorder, resulting in mispronounced sounds and potentially impacting student's educational success (P.1:5). *** recommended speech therapy two (2) times per week for a minimum of thirty (30) minutes each session (P.1:5). *** provided Student speech therapy beginning in April 2008 (P.1:6). Student's therapy manifested some difficulties in decoding simple unfamiliar words.

School Year 2008-2009: * Grade**

5. Based upon Student's decoding problems, *** conducted a reading and writing assessment in November 2008 (P.1:6). *** used a battery of standardized assessments:
 - a. **Gray Oral Reading Tests – 4th Edition ("GORT-4"):** This assessment measured Student's oral reading rate, accuracy, fluency, and comprehension:
 - (1). Rate: measured the speed at which Student reads; Student scored in the expected range for student's chronological age (P.1:8);
 - (2). Accuracy: measured Student's deviations in reading from a printed story; Student scored in the expected range for student's chronological age, although the assessor noted that Student's deviations increased "significantly" as the complexity of the story increased. Student made no effort to sound out words that student did not know, choosing to guess based on context and to skip unfamiliar words in their entirety (P.1:9).
 - b. **Test of Word Reading Efficiency ("TOWRE"):** This assessment measured Student's word decoding skills, *i.e.*, whether Student is aware of the rules for decoding both real and nonsensical words (P.1:8).

³ References to the Certified Court Reporter's Transcription of testimony are as follows: August 14 ("T.1"); August 15 ("T.2"); August 16 ("T.3"); September 18 ("T.4"); September 19 ("T.5"); September 27 ("T.6"). The numbers following the volume designation refer to the pages within the particular volume of testimony. "P.:#:#" refers to Petitioner's Exhibits by number and page; "R.:#:#" refers to Respondents' Exhibits by number and page.

- (1). Sight Word Efficiency: measured Student's ability to recognize familiar words as whole words and read them within a time limit; Student's score of *** was within the normal limits on this subtest (P.1:8);
- (2). Phonemic Decoding: measured Student's ability to decode, or sound out, nonsense words quickly within a time limit. Student's score of *** was below the expected range (P.1:8).

Student's overall standard score of *** on the TOWRE demonstrated that student was within the expected range, although Student demonstrated that student did not have a strong foundation of the phonological rules for word decoding (P.1:8).

c. **Comprehensive Test of Phonological Processing ("CTOPP")**: This assessment measured Student's phonological awareness, phonological memory, and rapid naming skills, which are processing skills needed in learning how to read as well as support effective mathematical calculation, listening comprehension, and reading comprehension (P.1:8):

- (1). Phonological Awareness Composite: measured Student's sound awareness and student's access to the sound structure of student's oral language; Student's score of *** was within the normal limits (P.1:8);
- (2). Phonological Memory Composite: measured Student's ability to code information phonologically for temporary storage in student's short-term memory; Student's score of *** was within the normal limits (P.1:8);
- (3). Rapid Naming Composite: measured Student's ability to retrieve phonological information from long-term memory; Student's score of *** is slightly below student's performance on other subtests, but it was still within the normal limits (P.1:9).

d. **Test of Early Written Language ("TEWL-2")**: This assessment was used to evaluate Student's early written language skills utilizing three subtests:

- (1). Basic Writing: measured Student's understanding of written language and writing mechanics; Student scored above average, indicating a strength in student's understanding of written language (P.1:10);
- (2). Contextual Writing: measured Student's ability to generate a writing sample assessing student's application of punctuation, capitalization, syntactic maturity, vocabulary, and spelling; spelling presented difficulty in that Student could recognize when student misspelled a word, but student could not utilize strategies to correct the spelling (P.1:10).

Student obtained a Global Score on the TEWL-2 of ***, indicating that Student's early written language skills met expectations for student's age level (P.1:10).

e. **Test of Written Spelling – 4th Edition ("TWS-4")**: This test assessed Student's written spelling skills by measuring the number of words student could spell from a set list. Student scored ***, which is more than one standard deviation from the norm of 100 and which falls below the expected range for student's chronological age. Student showed difficulty in spelling digraphs and blends, and student had some vowel confusion (P.1:11).

Student's overall standard score of *** on the TOWRE demonstrated that student was within the expected range, although Student demonstrated that student did not have a strong foundation of the phonological rules for word decoding (P.1:8).

6. Based upon its analysis of these assessments, *** diagnosed Student with dyslexia due to student's

difficulties in decoding nonsense words and written spelling, a result of weakness in phonological process, specifically rapid naming (P.1:11). Further, the assessors noted Student's attention difficulties during the testing and recommended that Student be evaluated for attention deficit, hyperactivity disorder ("ADHD") (P.1:12).

7. Student's Parent provided the District with the *** report. The District placed Student in its dyslexia program, which utilized the Herman Method, and conducted its own assessment (R.12). The District's dyslexia evaluation consisted of the administration of the following assessments:
 - a. **Yopp-Singer Test of Phoneme Segmentation:** This assessment measured Student's phonological awareness; Student's score of *** out of 22 confirmed student's results on the CTOPP, administered by ***; Student was phonologically aware (R.12:1).
 - b. **Jerry John's Basic Reading Inventory:** This assessment measured Student's reading comprehension. As a *** grader, Student was able to read at a *** grade level with *** accuracy and at a *** grade level with 96% accuracy, which surpassed the TEKS goal for *** graders (R.12:2).

At the time of the District's dyslexia assessment, Student had been in the District's dyslexia program and was progressing rapidly through the lessons (R.12:2).

8. Based upon Student's dyslexia assessments, including that of ***, and student's rapid progress in the District's dyslexia program, the District recommended that Student not participate in the dyslexia program (R.12:2; R.4). The Parent agreed with this decision.
9. In spring 2009, the District administered the Iowa Tests of Basic Skills ("ITBS") (P.25:25). Student's reading comprehension and spelling were above average with a grade equivalency of *** in both areas (P.25:25).

School Year 2009-2010: * Grade**

10. In March 2010, *** conducted a Speech-Language Evaluation at the request of Student's Parent, who expressed concerns about Student's struggles with reading and spelling and overall academic success (P.2). The Parent also reported that Student had difficulty staying focused and often became frustrated or angry when presented with a challenging task (P.2).
11. *** assessed Student using numerous standardized assessments, screenings, an informal narrative analysis, and an informal spelling inventory. During the testing, Student required multiple breaks, verbal reinforcements, and at one point, the intervention of student's grandmother to aid student in completing the testing (P.2:2):
 - a. **Informal Narrative Analysis:** This assessment measured Student's narrative skills, which revealed that student was performing below what was expected for student's chronological age, which was *** at the time of the testing (P.2:1-2).
 - b. **Clinical Evaluation of Language Fundamentals – 4th Edition ("CLEF-4"):** This assessment measured Student's receptive and expressive language:
 - (1). Core Language Composite: This composite measured Student's overall understanding and use of language; student's score of *** placed student within the expected range;
 - (2). Receptive Language Composite: This composite measured Student's understanding of language; Student's score of *** placed student within the expected range;
 - (3). Expressive Language: This composite measured Student's ability to use language; Student's score of *** placed student within the expected range;

- (4). Language Memory: This composite measured Student's ability to apply working memory to linguistic content and structure (formulate sentences with given words, recall spoken directions, and identify semantic relationships; Student's score of *** placed student above the expected range (P.2:3).

The CLEF-4 yielded overall age-appropriate skills in auditory comprehensive and verbal expressive skills.

- c. **The Writing Process Test ("WPT")**: This assessment measured Student's written language abilities in development and fluency as well as student's awareness of the process of writing a composition. Student's score placed student in the expected range of development for student's age; however, the assessor noted that student's spelling was problematic, *i.e.*, student made spelling errors that were often not phonetically written (P.2:4-5).
- d. **Test of Written Spelling ("TWS")**: This assessment measured Student's spelling capabilities. Student scored ***, which placed student below the expected range; Student manifested problems with blends and digraphs (two letters put together to make a new sound, such as "sh") (P.2:5).
- e. **Informal Spelling Inventory**: This assessment evaluated Student's understanding of certain spelling rules; Student's scores placed student below the expectations of student's age; Student had difficulty with words that had digraphs and blends and student manifested vowel confusion (P.2:6).
- f. **GORT-4**: The assessment, also administered to Student by *** in 2008, measured reading fluency and comprehension; Student's subtest scores placed student in the expected range in the areas of Fluency and Comprehension; low-average in Accuracy; and above the expected range in Rate (P.2:7); Student's reading errors indicated poor decoding skills when reading a word that is unfamiliar (P.2:5).
- g. **TOWRE**: This assessment, also administered to Student by *** in 2008, evaluated decoding skills; Student's scores on the subtests placed student within the expected range (P.2:8).
- h. **CTOPP**: This assessment, also administered to Student by *** in 2008, measured phonological awareness, phonological memory, and rapid naming skills; Student scored *** in the Phonological Memory Composite, which placed student in the expected range; Student scored *** in Phonological Awareness and Rapid Naming Composites, which placed student in the low-average range (P.2:8).

The discrepancies in these composite scores indicated that while Student was able to store information, student had difficulty retrieving it rapidly, which is indicative of a reading disability (P.2:8).

- i. **Wechsler Individual Achievement Test-Second Edition ("WIAT-II")**: This formal evaluation measured Student's academic functioning:
- (1) Reading Composite: Student scored ***, which placed student in the average range; Student transposed letters when student gave answers to questions on the Reading Comprehension subtest; student correctly decoded *** out of 22 pseudo-words (P.2:9);
- (2). Mathematics Composite: Student scored ***, which placed student in the average range; Student had difficulty with problems involving money and decimals (P.2:9);
- (3). Written Language Composite: Student scored ***, which placed student in the average range; Student scored in the average range on spelling and written expression subtests;

Student would not attempt phonetic spelling of unfamiliar words; student capitalized the letters “b” and “d” in the middle of sentences (P.2:9).

Student’s difficulties with spelling, decoding, and “b/d” confusion are characteristic of dyslexia (P.2:9).

12. *** again diagnosed Student with dyslexia and recommended that student receive services from a Speech-Language Pathologist or other qualified reading or dyslexia specialist for instruction using a multi-sensory structured approach (P.2:10).
13. In March 2010, *** completed a psycho-educational assessment at the request of student’s Parent (P.3) based upon concerns about Student’s reading and spelling difficulties, as well as problems controlling student’s frustration (P.3:2). Student’s Parent was frustrated with the District, which did not appear to notice Student’s reading difficulties. Student’s Parents described student as intelligent, humorous, and fun (P.3:3). Student’s teachers reported that student works hard and was learning at an age appropriate level (P.3:7). Student’s teachers expressed concerns regarding student’s social problems, particularly student’s difficulty in getting along with others; controlling student’s emotions, especially frustration and anger; and student’s aggression towards others, thought problems, rule-breaking behavior, occasional mood changes, and temper (P.3:7; 10-11). Student’s teachers did not report significant concerns with a) Student’s ability to sustain student’s concentration or b) hyperactive behaviors in school (P.3:9).
14. *** administered multiple assessments, including intellectual ability and behavior assessments. Student demonstrated superior cognitive abilities, with higher scores in verbal comprehension, perceptual reasoning, and working memory over lower scores in mental operation and visual-motor coordination (P.3:10). Behavior assessments indicated that Student did not feel accepted by student’s peers and feels unhappy about student’s social functioning. Student struggles with anxiety, depression, and low self-esteem.
15. Student had been receiving speech therapy from *** since spring 2008. Student’s summer report in 2010 noted that student continued to have difficulties in encoding (spelling) simple words given student’s grade level (P.4:2). *** recommended continued speech therapy two (2) times per week for forty-five (45) minutes per session during summer (P.4:2).
16. During school year 2009-2010, Student maintained excellent grades, earning ***, with the lowest spring semester average of *** in Language Arts (R.13:3). Student had six (6) unexcused and six (6) excused absences for the entire year and student amassed eleven (11) tardies over the course of the year (R.13:3). Student passed both areas, math and reading, of the Texas Assessment of Knowledge and Skills (“TAKS”) (R.14:1).

School year 2010-2011: * Grade**

17. At the beginning of Student’s *** grade, teachers reported problems with behaviors. In September 2011, Respondents referred Student to the Student Support Team (“SST”), which is Respondents’ Response to Intervention (“RTI”) process (P.20). At the first meeting on September 10, 2010, teachers reported that Student was emotionally triggered by student’s peers; student has difficulty with, and was defiant against, substitute teachers; student had ***; student had ***; student was experiencing *** frequently in class. Student’s Parent reported that Student was on Ritalin for the ADHD (P.20:2).
18. Student’s SST met again on October 6, 2010. Student attended the meeting but student’s Mother did not. The SST informed Student that student would be separated from other students during class due to student’s escalating and aggressive behaviors; student would receive direct counseling for de-escalation techniques as well as group counseling; Student would have access to a *** to attempt to prevent student’s outbursts (P.20:2).
19. In fall 2010, Student participated in ***, which met *** time a ***. The *** was run by the school’s speech therapist and Licensed Specialist in School Psychology (“LSSP”). The focus *** was building positive peer interaction skills. Student experienced a couple of meltdowns during ***, but overall,

student appeared enthusiastic. Student's teachers continued to report problems with student's rapid mood changes when triggered by student's misperception of a social interaction with a peer or when not getting student's way (P.20:4).

20. Student's SST met again on February 12, 2011. The Team referred Student for a Full and Individual Evaluation ("FIE") based upon continuing social and emotional concerns (P.20:3).

21. Respondents conducted the FIE in spring 2011 (R.1). The FIE was thorough, focusing on the areas of emotional/behavioral, language/communication, physical/health, sociological, speech/language, intellectual/adaptive behavior, academic performance, and assistive technology (P.17:8-9; R.1:1-2). Selected areas of assessment relevant to the issues in this case include the following:

a. **Comprehensive Assessment of Spoken Language ("CASL"):** This is a norm-referenced evaluation consisting of fifteen (15) individually administered Core and Supplementary tests. Each test can be used independently to identify language difficulties or combined to form composite or index scores. This test is used effectively to measure language delay, or language disorders, dyslexia, and aphasia. The Core tests measure the most representative aspects of each language category for a given age group. Respondents administered six (6) Core tests appropriate for Student's age:

(1). Antonyms: This test measured Student's ability to identify words that are opposite in meaning (P.12:32 & 34); Student's score of *** placed student above the expected range (R.1:4);

(2). Syntax Construction: This test measured Student's knowledge and use of words and word combinations; Student's score of *** placed student in the expected range (R.1:4);

(3). Paragraph Comprehension: This test measured Student's knowledge of grammar; Student's score of *** placed student in the expected range (R.1:4);

(4). Nonliteral Language: This test measured Student's comprehension of complex language whose meaning is not directly available from lexical or grammatical information (P.12:35); Student's score of *** placed student above the expected range (R.1:4);

(5). Inference: This test measured Student's comprehension of complex language whose meaning is not directly available from lexical or grammatical information (P.12:35-36); Student's score of *** placed student in the expected range (R.1:4);

(6). Pragmatic Judgment: This test measured Student's awareness of the appropriateness of language in relation to the situation in which it is used and the ability to modify language to the situation (P.12:34); Student's score of *** placed student in the expected range (R.1:4).

b. **Behavior Assessment System for Children -2 ("BASC-2"):** This assessment is used to facilitate the differential diagnosis of a variety of emotional and behavioral disorders of children and adolescents. Scores in the "clinically significant" range suggest a high level of difficulties or maladjustment; scores in the "at-risk" range identify either 1) a significant problem, which may not be severe enough to require formal treatment, or 2) indicates a potential or developing problem that requires careful monitoring.

(1). BASC-2 Parent Rating Scales Report: Student's Mother rated student "clinically significant" in the areas of hyperactivity, depression, and activities of daily living; "at-risk" in the areas of behavioral symptom index, externalizing problems, aggression, conduct, internalizing problems, somatization, withdrawal, attention, and adaptability (R.1:27);

(2). BASC-2 Teacher Report: Student's teachers rated student "clinically significant" in

aggression, conduct, internalizing problems, depression, withdrawal, atypical behavior, and adaptability; “at-risk” in the areas of hyperactivity, adaptive skills, functional communication; leadership, and somatization (R.1:27-28);

(3). BASC-2 Student Report: Student rated ***self “clinically significant” in such areas as attitude toward teachers and school, emotional symptom index, internalizing problems, depression, locus of control, social stress, sense of inadequacy, atypicality, personal adjustment, relation to Parents, interpersonal relations, self-esteem and self-reliance; “at-risk” in such areas as attention problems, hyperactivity, inattention/impulsivity, and anxiety (R.1:28).

c. **Gilliam Asperger’s Disorder (“GAD”)**: This is a norm-referenced assessment used to evaluate unique behavior problems in individuals suspected of having Asperger’s Disorder. It provides an Asperger’s Disorder Quotient and was to be completed by Student’s teachers and Parents. Teacher #1 provided a quotient of ***, which is not indicative of Asperger’s Disorder; Teacher #2 provided a quotient of ***, which is significant for Asperger’s Disorder; Student’s Parent did not complete the assessment (R.1:29).

Respondents’ assessor reported on the FIE that instead of the GAD, he used the Asperger Syndrome Diagnostic Scale (“ASDS”) (P.7:5). This was incorrect. All references to the ASDS in the written report were actually related to the GAD (T.2:626-628). Additionally, Respondents’ assessor erroneously reported Teacher #2’s score as *** when it was actually *** (P.41:5; T.3:655-58).

d. **Autism Diagnostic Observation Schedule (“ADOS”)**: This evaluation is used to diagnose Autism; it is semi-structured, consisting of tasks that involve social interaction between the examiner and the subject; only one module is given, with the determination of the appropriate module based upon the age and verbal fluency of the subject. The assessor failed to present any explanation of his findings on the ADOS, which had rendered a score of ***. A diagnosis of Autism is indicated when a score is between 7 and 10. There is no mention of Student’s scoring within the Autism rate on the ADOS (T.3:699-700; P.41:5).

e. FBA: Student’s FIE did contain an FBA, which was conducted by LSSP *** (R.1:9-10). Student’s problem behaviors were identified as tantruming, crying, screaming, and aggression toward peers (R.1:9). The antecedents of such behaviors at school were identified as activities leading to Student’s frustration with an academic task or when student did not get student’s way (R.1:9-10). The function of these behaviors was identified as control and escape (R.1:10). The FBA showed that Student experienced low self-concept and difficulty controlling feelings; increasing student’s coping strategies with both self and peers would improve school functioning (R.1:10).

22. On March 25, 2011, Student’s Physician diagnosed ADHD (R.9:1).

23. Student’s ARDC met on April 21, 2011, to review Student’s FIE (P.15; R.16). The Committee determined that Student qualified for special education and related services under the classifications of Emotional Disturbance (“ED”) and Speech Impairment (“SI”) (P.15; R.16).

24. The ARDC reviewed and discussed Student’s Present Levels of Academic Achievement and Functional Performance (“PLAAFPS”) (P.15:2; R.16:2) in the areas of Speech/Related Services, Behavior, Reading, and Math (P.15:2-3; R.16:2-3). The ARDC determined that Student’s behavior impeded student’s learning and that of others (P.15:3; R.156:3).

a. The Committee developed Annual Goal 7.0 to reduce the number of times Student left the classroom due to behavior issues, with a short-term objective of Student’s being able to self-select to leave the classroom using a system set up with the teacher to allow student to regain composure without principal assistance at least 80% of the time as measured by the discipline records (R.16:5);

- b. Annual Goal 11.01 to provide social skills instruction and counseling to manage school-related anger and frustration, with short-term objectives of Student's developing and using strategies to manage frustration with academics and with peers (R.16:6);
- c. Annual Goal 14.0 to aide in articulation (R.16:7); and
- d. Annual Goal 14.1 to address social situations requiring problem-solving, with short-term objectives of Student's being able to state problem solutions with 70% accuracy (R.16:8).

The ARDC developed accommodations and modifications for implementation in the general education setting; provided Content Mastery for ten (10) minutes per six (6) weeks; provided nine (9) sessions of Speech Therapy for thirty (30) minutes per session per six (6) weeks; provided four (4) thirty-minute sessions per six (6) weeks of direct psychological services (R.16:18). The Committee likewise discussed and adopted a BIP that targeted the identified behaviors of crying, screaming, and tantruming (P.15:27). The Committee reached consensus.

- 25. On May 19, 2011, Student's ARDC convened to modify the April 21, 2011, ARDC Report (P.15:29). The ARDC modified Student's BIP to address student's self-harm statements (P.15:29 & 32-33). The LSSP recommended a psychiatric consult, and the Parent provided consent (P.15:29). The Committee likewise noted that Student's medications had been modified.
- 26. Reports of Student's progress on student's goals and objectives were entered at the end of the year on June 1, 2011 (R.23).

School Year 2011-2012: * Grade**

- 27. In fall 2011, Student's providers implemented student's IEPs and reported progress on student's speech goals and by the end of the fall semester, Student had mastered these goals (R.23:1-4). Student was working on student's social skills goals and by January 2012, student had mastered these goals (R.23:10-11 & 23-27).
- 28. Student's ARDC sent a notice of ARD meeting to the Parent in October 2011 to convene an ARDC on November 9, 2011. At the request of the Parent, the ARDC meeting was moved to November 29, 2011 (R.18:102-110). The Parent again requested that this ARDC meeting be re-scheduled; the diagnostician re-scheduled the meeting for January 4, 2012. Upon the Parent's request, this meeting was re-scheduled for January 5, 2012 (R.18:87-97).
- 29. Student's ARDC convened for student's annual ARD on January 5, 2012 (P.16). Student's Parent reported some meltdowns in public and concerns with social situations in school; the teachers reported that Student appeared to be managing stress better. The Committee provided the Parent with an Other Health Impairment ("OHI") form to obtain a diagnosis of ADHD. Student's Parent requested an Independent Educational Evaluation ("IEE") because she now disagreed with the FIE finding that Student is ED. The Committee adjourned to allow time to discuss this request with the Director of Special Education (P.16:1-2).
- 30. Student's ARDC re-convened on January 26, 2012 (P.16:3). Student's Parent expressed her disagreement with the District's previous 2009 dyslexia screening. The Parent stated that she had never received a copy of that screening. The Parent referred to the 2010 *** language assessment that again diagnosed dyslexia; however, the Parent had never provided Respondents with a copy of the assessment (P.16:3-5). The Committee reported on Student's present levels of academic and functional performance, noting that Student has strong academic skills but continues with social difficulties; improvement was discussed related to office referrals; student was able to de-escalate more quickly and demonstrate compliance in the classroom; Student appeared to be self-regulating and self-referring for cool downs; and student's current grades were passing. The ARDC reviewed the proposed BIP and adopted it (P.16:3). The ARDC requested to do its own dyslexia assessment, which the Parent

declined. The ARDC agreed to adjourn until February 20, 2012, to allow the Parent time to review proposed goals and to allow the District time to locate the 2008 dyslexia screening (P.16:4).

31. Student's ARDC did not re-convene as scheduled on February 20, 2012. Based upon the Parent's request, the ARDC was re-scheduled for February 27, 2012. The Parent failed to attend. The Parent was contacted and the Committee agreed to re-convene on March 7, 2012, so that the Parent could attend. The ARD notice informed the Parent that there would be no further continuances of the ARDC (R.18:23). The Parent contacted the District the day before the March 7, 2012, ARDC meeting and requested that it be re-scheduled. The Committee denied this request but did offer the Parent the opportunity to participate by conference call. The Parent declined to participate and the March 7, 2012, ARDC meeting convened as scheduled (R.18:23).
32. The March 7, 2012, ARDC continued Student's eligibility as ED and SI (R.18:1). The Committee reviewed Student's PLAAFPS (R.18:2-3):
 - a. Speech/Related Services: Student had mastered student's articulation goals and was making progress on pragmatic deficits; when given a social scenario, Student could state problem solutions and justifications for resolution with 60% accuracy given 3-5 cues; Student attended speech therapy independently during non-instructional times; Student did not appear to be aware of articulation errors and did not attempt to self-correct, although student did occasionally self-correct in speech therapy; teachers reported greater concerns with student's coping skills in problem situations (R.18:2);
 - b. Behavior: Student is intelligent, caring, and artistic; student expresses strong desires to control ***self; student has difficulty controlling student's emotional state when frustrated with ***self and peers; student's behavior can disrupt the class, which necessitates making an alternate setting available to help student gain control; Student had experienced no meltdowns; there were five (5) office referral; Student uses Content Mastery to regain control and to focus; in 25 weeks of school Student has been to Content Mastery on the average of one time per week to de-escalate and regain composure (R.18:2-3);
 - c. Other: Student was functioning on grade level in all academics; student passed TAKS in reading, math, and writing; student did not pass TAKS in ***, scoring *** out of 4; Student was on grade level in word recognition, reading comprehension, and above grade level in fluency; Student was proficient in math problem-solving and computation skills; Student's grades do not reflect student's academic capability because student is inconsistent in following directions and successfully completing assignments; student is able to participate and enjoy class but is inconsistent in student's ability to relate to student's peers and demonstrate appropriate coping skills; Student has a weakness in organizational skills, which causes assignments to be late or incomplete (R.18:3).

The March 7, 2012, ARDC developed goals in a) functional skills to address self-control, positive interaction with peers, and organizational strategies; b) social/emotional skills to address anger and frustration; and c) speech therapy to address articulation and pragmatics skills (R.18). The ARDC authorized direct services in Content Mastery for twenty-five (25) minutes per week; direct Speech Therapy consisting of eight (8) thirty-minute sessions per six (6) weeks (R.18:19).

The ARDC noted that the Parent had not returned the OHI form presented to her on January 5, 2012. The Committee requested an Assistive Technology ("AT") assessment.

The Committee discussed positive behavioral interventions and supports, including the utilization of a data collection behavior rubric and reward system; the Committee discussed consulting with a Behavior Specialist to observe and review Student in the classroom environment and assist in developing additional behavior supports and interventions (R.18:23).

33. On March 20, 2012, Student's ARDC sent the Parent a Notice of ARD Meeting, which scheduled a meeting for March 28, 2012, to allow the Parent an opportunity to review the March 7, 2012, Report and

discuss lingering questions (R.18:32). The Parent declined to participate in the March 28, 2012, ARDC meeting because she filed her Complaint on March 26, 2012 (R.18:38).

34. During school year 2011-12, Student continued to have difficulties with self-control, anger, and organization. These problems affected Student's performance in that student did not complete work and turn it in, although student clearly had the academic basis to perform and achieve excellent grades.
35. In school year 2010-2011, Student had three (3) tardies; in school year 2011-2012, Student had eighty-four (84) tardies (R.13). The Parent asserted that she had great difficulty getting Student to school in the morning because student hated school (T.3:957).
36. In April and May 2012, *** conducted a psychological evaluation of Student (P.12). *** observed Student at school and spoke with the LSSP, speech therapist, and teacher; she interviewed Student and student's Mother; reviewed previous evaluations; and administered several assessments:
 - a. **Wechsler Intelligence Scale for Children-IV ("WISC-IV"):** Student scored in the "superior" to "average" ranges on Verbal and Perceptual Tests, manifesting a full scale IQ of *** (P.12:5).
 - b. **Visual-Motor Integration ("VMI"):** Student had an overall standard score of ***, which is average; Student manifested some difficulties with paper and pencil work that was consistent with fine motor deficits (P.12:6).
 - c. **Woodcock-Johnson III Tests of Achievement-Normative Update ("WJ-III"):**
 - (1). Language: Student scored in the average range on assessments measuring auditory attention and memory of short stories and low-average on a word retrieval task (P.12:6);
 - (2). Academics: Student scored *** on Broad Reading, *** on Broad Math, and *** on Broad Written Language (P.12:8). All scores on supporting subtests ranged from "superior" to "average."
 - d. **CASL:** Student was given two (2) tests to measure pragmatic communication skills:
 - (1). Nonliteral Language: Student was required to understand the use of metaphor (P.12:7); Student's score of ***, although within the expected range, was lower than student's previous score of *** on this same assessment in spring 2011 (R.1:4);
 - (2). Inference: Student was required to draw conclusions based on incomplete information (P.12:7). Student's score of *** placed student within the expected range and was actually higher than student's previous score of *** on this same assessment in spring 2011 (R.1:4).
 - e. **Adaptive Behavior Assessment System-II ("ABAS-II"):** Student's Mother completed this assessment of Student's adaptive functioning. Student's scores ranked Student significantly below that which would be expected of a student with student's Verbal IQ (P.12:7).
 - f. **Emotional Functioning:** This area was assessed through interview, self-report, projective measure, and behavior rating scales completed by the Parent and teachers (P.12:9). Student expressed concern about bullying at school, problems with peers, and acceptance (P.12:9). Student's Parent reported mood symptoms, high levels of mood lability, anxiety, inattention, and hyperactivity/impulsivity; she reported learning problems, somatic complaints, problems with peer relationships, and problems with executive functioning (P.12:9-10). On the Social Communication Questionnaire, the Mother reported enough of the behaviors associated with Autism to suspect an Autism Spectrum Disorder ("ASD") (P.12:10).

Two (2) of Student's teachers completed social rating scales, which indicated that Student had mood problems, rule-breaking behaviors, oppositional behaviors, and significant emotional lability, leading the assessor to conclude that these scores were consistent with a mild-to-moderate ASD (P.12:10). However, when she scored these assessments, ***. This translated to *** assigning lower scores, which provided an incorrect ASD finding.

- g. **Childhood Autism Rating Scale 2-HF ("CARS2-HF"):** This is a measure of the presence and severity of symptoms associated with ASD in high-functioning children. Student's score of *** falls in the mild-to-moderate range of ASD (P.12:10).
37. *** diagnosed Student with mild-to-moderate Asperger's Disorder. *** also diagnosed Student with dyslexia, noting that most people with Asperger's Disorder do not have dyslexia (P.12:11).
 38. *** used the wrong score on the Social Responsive Scale, which resulted in an erroneous finding that such scales evidence Student's having Asperger's Disorder (T.5:1699-1700).
 39. Student's spring 2011 FIE was appropriate, although it contained some disturbing misstatements and omissions. The multidisciplinary team used a variety of assessment tools and strategies to assess Student in all areas of suspected need.
 40. Student's 2011 FIE was more credible than the subsequent IEEs.
 41. The evidence did not establish that Respondents failed to evaluate Student in all areas of suspected disabilities.
 42. The evidence did not establish that Student was eligible for special education and related services in the area of Asperger's Disorder.
 43. The evidence did not establish that Student manifested an educational need for services in the area of Asperger's Disorder.
 44. The evidence did not establish that Student manifested an educational need for services in the area of dyslexia.
 45. The evidence did not establish that Respondents failed to conduct an appropriate FBA.
 46. The evidence did not establish that Respondents failed to develop an appropriate IEP and BIP.
 47. The evidence did not establish that Respondents failed to appropriately respond to the Parent's request for an IEE.
 48. The evidence did not establish that Respondents failed to provide Student with appropriate speech, social skills training, and counseling.
 49. The evidence did not establish that Respondents deprived Student's Parent from participating in the March 2012 ARDC meeting.
 50. The evidence did not establish that Respondents failed to respond to the Parent's records requests.
 51. The evidence did not establish that Respondents failed to provide the Parent with written notice.

Statute of Limitations

52. The Texas Statute of Limitations period for bringing a Complaint under IDEIA is one (1) year. Two (2) exceptions allow for the tolling of the one-year statute of limitations: a) intentional, specific misrepresentations by a district that it had resolved the problem forming the basis of the Complaint; or b)

failure by a district to provide the disabled student with information that the district was required to provide.

53. Student failed to prove that Respondents made intentional, specific misrepresentations that prevented the Parent from requesting a Due Process Hearing prior to March 26, 2011.
54. Student failed to prove that Respondents withheld required information from the Parent that prevented the Parent from requesting a Due Process Hearing prior to March 26, 2011.
55. The time period pertinent to this case began on March 26, 2011. Any claims for relief for acts and omissions occurring prior to March 26, 2011, are outside the applicable period.

IV. DISCUSSION

A. THE ONE-YEAR STATUTE OF LIMITATIONS APPLIES TO THIS CASE.

IDEIA provides that a parent must request a due process hearing within two (2) years of the date the parent knew, or should have known, about the alleged action that forms the basis of the complaint. However, the two-year statute of limitations may be more or less if the state adopts an explicit time limitation for filing a request for due process hearing. 20 U.S.C. §1415(f)(3)(C); 34 C.F.R. §300.511(e); 300.507(a)(1)(2). Texas has adopted such an explicit time limitation: a parent must file a request for due process hearing within one (1) year of the date the complainant knew, or should have known, about the alleged action that forms the basis of the complaint. 19 TEX. ADMIN. CODE §89.1151(c); *Tex. Advocates Supporting Kids With Disabilities*, 112 S.W.3d 234 (Tex. App. – Austin 2003, no pet.).

IDEIA allows very narrow exceptions to its time limitations: 1) the statute of limitations shall not apply if a parent was prevented from requesting a due process hearing due to specific misrepresentations by the local district that it had resolved the problem forming the basis of the complaint; 20 U.S.C. §1415(f)(3)(D)(i); 34 C.F.R. §300.511(f)(1); and/or 2) the statute of limitations shall not apply where a parent failed to exercise his/her right to a due process hearing because the local district withheld information that it is required to provide to the parent. 20 U.S.C. §1415(f)(3)(D)(ii); 34 C.F.R. §300.511(f)(2).

There are no other exceptions. Student had the burden of proving that one (1) of these exceptions tolled the one-year statute of limitations. *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F.Supp.2d 918, 945 (W.D. Tex. 2008), *rev'd in part on other grounds*, *El Paso Indep. Sch. Dist. v. Richard R.*, 591 F.3d 417 (5th Cir. 2009).

Student argued that the one-year statute of limitations is not applicable to student's claims against Respondent Cooperative because the Cooperative failed to file a timely Response to Complaint and assert the affirmative defense of statute of limitations. Student further asserts that the one-year statute of limitations is not applicable to student's claims against both Respondents because they 1) made representations "in relation to a complaint and other issues" and 2) they withheld information in the form of providing Student the evaluation requested in all suspected areas of disability. Neither exception is found in this record.

Respondent Cooperative did, in fact, file a Response to the Complaint and an Amended Response, which asserted the one-year statute of limitations (See Procedural History, page 4). Granted, the Cooperative's Response was not filed within the ten-day deadline; however, no harm befell Petitioner because the co-Respondent, KISD, did file a timely Response and every defense asserted therein was applicable to the claims Petitioner asserted against both Respondents.

1. Student Failed to Prove Intentional, Specific Misrepresentations.

As to both Respondents, the record is devoid of any evidence of alleged misrepresentations. Simply alleging that a misrepresentation was made by a district does not carry the burden of proving that the misrepresentation prevented the disabled child from filing a complaint under IDEIA. Additionally, establishing that a misrepresentation actually was made by a district does not carry the burden of proving that the

misrepresentation prevented the disabled child from filing a complaint under IDEIA. The “misrepresentation,” contemplated by federal statutes, regulations, and interpreted by case law, must be a specific, intentional, or flagrant misrepresentation **that the problems forming the basis of the complaint have been resolved.** *Richard R.*, 567 F.Supp.2d at 944-945. In other words, the district must have subjectively determined that the student was not receiving FAPE and intentionally misrepresented that fact to the student’s parents. *Evan H. v. Unionville-Chadds-Ford Sch. Dist.*, 51 IDELR 157 (E.D. Pa. 2008); (school district’s failure to identify the student as eligible for special education did not constitute a specific misrepresentation – no evidence that the school district determined student was eligible for services but specifically misled the parents otherwise); *Student v. Pasadena Indep. Sch. Dist.*, 58 IDELR 210 (SEA Tex. 2012).

2. Student Failed to Prove KISD Withheld Required Information.

The information that a district is required to provide is specific and includes, *inter alia*, 1) prior written notice when the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child (20 U.S.C. §1415(c); 34 C.F.R. §300.503(a)); and 2) copies of procedural safeguards (20 U.S.C. §1415(d); 34 C.F.R. §300.504(a)). In this case Student alleges that Respondents failed to provide required information when they withheld “information required to be given to the parent, which is evaluation in all suspected areas of disability and timely identification of [Student] as a special education student” and when they failed to provide non-specific “prior written notice ever.”

A district is required to provide parents with a copy of the Procedural Safeguards only one (1) time a year, except that a copy also shall be given to the parents: (i) upon initial referral or parental request for an evaluation; (ii) upon the first occurrence of the filing of a due process complaint; and (iii) upon request of the parent. 20 U.S.C. §1415(d)(1)(A).

In this case, the evidence established that Respondents provided the Parent with multiple copies of the Procedural Safeguards at every required juncture: March 10, 2011, April 4, 2011, May 19, 2011, January 3, 2012, February 7, 2012, February 17, 2012, February 28, 2012, March 7, 2012, March 9, 2012, March 20, 2012, and July 23, 2012 (R.3). There was no evidence presented that Respondents had a duty to provide the Parent with the Procedural Safeguards prior to March 10, 2011. The content of these Procedural Safeguards provided the Parent with statutory notice of her rights, including the right to request a due process hearing, within one (1) year of the accrual of a claim. With each delivery of a copy of the Procedural Safeguards, the statute of limitations for IDEIA violations “commence without disturbance.” *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F.Supp.2d at 945.

Student did not carry the burden of proving entitlement to toll the one-year statute of limitations. 20 U.S.C. §§1411-1419. Having determined that the one-year statute of limitations applies to this case, the remaining analysis concerns Respondents’ alleged substantive and procedural IDEIA violations between March 26, 2011, and March 26, 2012.

B. RESPONDENTS DID NOT FAIL TO EVALUATE STUDENT IN ALL AREAS OF SUSPECTED DISABILITIES.

Evaluation procedures are carefully spelled out in the federal and state rules and regulations implementing IDEIA. 34 C.F.R. §300.304 specifies that in conducting the evaluation, the school district must 1) use a variety of assessment tools and strategies to gather functional, developmental, and academic information; 2) not use a single measure or assessment as the sole criterion for determining a disability; and 3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The district is charged with administering assessments and other evaluation materials that are tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient. Assessments must be selected and administered in a manner that best ensures that the assessment results accurately reflect the child’s aptitude or achievement level or other factors that the test is measuring. The child being assessed must be evaluated in all areas related to the suspected disability. The assessment must be sufficiently comprehensive to identify all of the child’s special needs. As part of the overall evaluation, the assessors should review all existing evaluation data, including

information provided by the parents, current classroom-based, local, or state assessments, classroom-based observations, observations by the child's teachers and related-services providers. 34 C.F.R. §300.305. Once the assessments and other evaluation measures are completed, the student's ARDC must consider all of the information gathered and make a recommendation based upon that information.

In this case, Student asserts that Respondents failed to properly evaluate and identify Student with dyslexia and Asperger's Disorder.

1. Dyslexia

Dyslexia is a reading disorder that is neurological in origin, characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities. These difficulties result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction (R.22:8).

*** first diagnosed Student with dyslexia in 2008, basing the diagnosis on Student's deficits in spelling (P.1:9). *** testing showed that Student was within normal limits in all areas of phonological processing and was on grade level in all areas of reading and above grade level in basic writing (P.1:9). Based upon this diagnosis, Respondents placed Student in the District's dyslexia program pending their screening. Respondents' screening, and Student's performance in the dyslexia program, led to the conclusion that Student did not present with characteristics of dyslexia. The screening revealed that Student, who was in the *** grade at the time, was reading at the *** grade level with independent comprehension and was correctly reading *** words per minute on grade level, far in excess of the *** words per minute for the typical *** grader. Student's April 21, 2011, FIE scores show that Student performed in the average to superior range in all areas, including reading and writing.

Student's teachers noted that Student had more difficulties with spelling when student knew that student was taking a spelling test. While Student certainly does manifest problems in spelling, with some dip in student's decoding skills, this alone does not equate to a finding of dyslexia, especially in comparison to student's abilities in reading, writing, and phonological awareness.

2. Asperger's Disorder

Student's behavior problems intensified at the beginning of school year 2010-2011. Student's SST utilized RTI strategies in the fall and in spring 2011, conducted its FIE. This FIE included several assessments for ASD, which included information from Student, student's teachers, and student's Mother. The assessments related to communication revealed that Student was in the average range for both receptive and expressive language; Student's pragmatic language scores were in the average to above-average range.

Student's scores on the autism rating scales likewise failed to identify characteristics of ASD. Rather, the scales evidenced that Student had an emotional disturbance.

**** was the only assessor who diagnosed Student with ASD. While *** is highly respected, her assessment results were brought into doubt not only by herself, but by the testimony of Respondents' expert, who noted that *** used the wrong index in scoring the Social Responsive Scale. The manual required that if a child had social difficulties, the norm of 85 would be used. Had *** used the correct norm, the two (2) teachers' scores, which *** rated at mild-to-moderate ASD, would have been below the cut-off for ASD.

The spring 2011 IEP had a few problems, such as Respondents' assessor's report that he used the ASDS instead of the GAD, and his error in reporting a teacher's score. Notwithstanding these problems, the FIE properly assessed Student in all areas of suspected need; it was a valid assessment performed by Student's multidisciplinary team, which was made up of highly qualified individuals. The FIE was conducted in compliance with the operative federal regulations. 34 C.F.R. §300.304. The results of this FIE found that Student qualifies for special education and related services under the ED and SI categories. These determinations were made, and adopted by Student's ARDC, only after the multidisciplinary team conducted

exhaustive formal and informal assessments; interviewed Student and student's Parents; collected data from Student's teachers; and observed Student in every educational area.

C. RESPONDENTS CONDUCTED AN FBA AND DEVELOPED AN APPROPRIATE BIP.

Student asserts that Respondents never conducted an FBA and that Student's ARDC proceeded to develop an infirm BIP at every ARDC meeting beginning in spring 2011.

IDEIA requires that a student's IEP must include positive behavioral interventions and supports for those students whose behavior impedes learning. 34 C.F.R. §300.324(a)(2)(i). While an FBA typically precedes the development of these positive behavioral interventions and supports, none is actually required. 71 Fed. Reg. 46575, 46683 (2006). According to the U.S. Department of Education, it is a function of the ARDC to determine whether an existing FBA is current and valid or a new FBA is needed. 71 Fed. Reg. 46721 (2006).

In the instant case, the record shows that the spring 2011 FIE did, in fact, include an FBA and that the resulting BIP was based upon Student's identified behaviors of tantruming, crying, screaming, and aggression. The antecedents were established, an intervention history was noted, and the function of these behaviors was identified as "control" and "escape." The BIP was developed to address these behaviors and adopted by the ARDC on April 21, 2011. This BIP was amended in May 2011 to address Student's new behavior of making self-harm assertions.

The central point of the FBA is to identify the function or purpose of the negative behaviors. Student's 2011 BIP and January 2012 BIP were appropriate.

D. RESPONDENTS DID NOT VIOLATE STUDENT'S PROCEDURAL RIGHTS.

IDEIA mandates that all state school districts receiving federal funding must provide all handicapped children a free, appropriate, public education. The United States Supreme Court, in *Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 175, 102 S.Ct. 3034 (1982), established a two-part test for determining whether a school district has provided a student FAPE: 1) the school district must comply with the procedural requirements of IDEIA, and 2) the school district must design and implement a program "... reasonably calculated to enable the child to receive educational benefits."

A procedural violation of IDEIA does not result in the denial of FAPE unless it results in the loss of educational opportunity to the student or seriously infringes upon the parent's opportunity to participate in the provision of FAPE to the student. 34 C.F.R. §300.513; *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003).

A substantive violation of IDEIA depends on whether the school district's program has provided the student with the requisite educational benefit. IDEIA does not require an education that maximizes a student's potential; rather, the school district must provide an education reasonably calculated to enable the child to achieve some benefit. "Some benefit" means an educational program that is meaningful and provides the "basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit to the handicapped child." *Rowley*, 458 U.S. at 200-01. Although the school district need only provide "some educational benefit," the educational program must be meaningful. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). The educational benefit cannot be a mere modicum or *de minimis*. It must be likely to produce progress, not regression or trivial educational advancement. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000). In determining whether a child is receiving FAPE, the *Rowley* Court insisted that the reviewing court must not substitute its concept of sound educational policy for that of the school authorities. *Rowley*, 458 U.S. at 206.

1. The IEE

Student's Parent requested an IEE at the January 5, 2012, ARDC meeting. Respondents granted this request and provided the Parent with a list of outside evaluators. Upon receipt of the Parent's choice of evaluators, Respondents contacted the named individuals to ensure they met Respondents' criteria. Both outside

evaluators charged far in excess of the amount allotted by Respondents. By February 24, 2012, Respondents had informed the Parent of this problem and provided the Parent with another list of outside evaluators. Student's Parent failed to respond.

Even after Student filed the Complaint in March 2012, Respondents continued to attempt to engage the Parent in a discussion about the outside evaluators. It was not until August 3, 2012, that Respondents learned that the outside evaluators had conducted their evaluations and were agreeing to reduce their fees to comply with Respondents' criteria. Respondents paid the requested fees. Under these facts, such delayed payment was not a procedural violation of IDEIA.

2. Parental Participation in the March 2012 ARDC Meeting.

Student asserts that Respondents denied the Parent the right to participate in Student's educational planning when it convened an ARDC meeting on March 7, 2012, without her participation.

34 C.F.R. §300.322(a)(1) requires a district to notify the parents of an ARDC meeting in time for the parents to make arrangements to attend. Section 322(c) provides for alternative methods of conducting an ARDC meeting if an in-person meeting is not feasible. Of course, districts have no means of coercing parents to attend an ARDC meeting. They may conduct the ARDC meeting if they have been unable to convince the parents they should attend. 34 C.F.R. 21300.322(d).

In the instant case, Respondents make multiple attempts to garner the Parent's participation in the March 7, 2012, ARDC meeting. Efforts began in fall 2011 to convene an ARDC meeting; the first meeting achieved was on January 5, 2012. This meeting had to be re-convened but efforts to get the Parent's participation in the re-convened ARDC meeting were not effective. When Respondents convened the March 7, 2012, ARDC meeting, they did so following a diligent effort to obtain parental participation.

E. RESPONDENTS PROVIDED STUDENT WITH AN APPROPRIATE PROGRAM.

Student asserted that Respondents failed to provide student with appropriate speech services, social skills services, and counseling. The record reveals otherwise.

Under student's IEPs, Student received social skills training four (4) times per grading period. These services were provided by the LSSP and the speech/language pathologist. Likewise, Student received nine (9) thirty-minute sessions per six (6) weeks of speech. Student mastered some of student's speech and social skills goals. Student made good progress on remaining goals. Student likewise made excellent grades in student's course work and on student's state and district assessments. All of this was accomplished through placement in the general education classroom with Content Mastery, speech therapy, and counseling outside that setting.

Student clearly has some behavioral difficulties that will take much time and attention to correct and/or adjust. Respondents can provide the educational setting to effect these needed developments.

V. CONCLUSIONS OF LAW

1. The one-year statute of limitations applies in this case. 34 C.F.R. §300.507(a); 19 TEX. ADM. CODE §89.1151 & 1170. All of Student's claims arising before March 26, 2011, are dismissed as outside the one-year statute of limitations.
2. Respondents appropriately evaluated Student in all areas of suspected disability. 34 C.F.R. §300.303-306.
3. Respondents' classification of Student's disabilities under the ED and SI categories was appropriate and did not deny Student FAPE. 34 C.F.R. §300.8(c)(1)(4).
4. Respondents' conducted an appropriate FBA and developed an appropriate BIP. 34 C.F.R. §300.324

5. Respondents did not commit procedural violations of IDEIA. 34 C.F.R. §300.513; *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003).

**VI.
ORDER**

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the relief requested by Petitioner is DENIED.

Finding that the public welfare requires the immediate effect of this Decision and Order, the Hearing Officer makes it effective immediately.

**VII.
NOTICE TO PARENTS**

The Decision of the Hearing Officer is final and appealable to state or federal district court.

Signed this the 9th day of November 2012.

/s/
Deborah Heaton McElvaney
Special Education Hearing Officer

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