

MESQUITE ISD	§	BEFORE A SPECIAL
Petitioner	§	EDUCATION
	§	
v.	§	
	§	HEARING OFFICER FOR THE
	§	
STUDENT bnf PARENT	§	
Respondent	§	STATE OF TEXAS

**FINAL DECISION OF THE HEARING OFFICER**

**STATEMENT OF THE CASE**

Mesquite ISD (hereinafter referred to as Petitioner or MISD or the District) brings this action against Student bnf Parent (hereinafter referred to as Respondent, Student or Parent) under the Individuals With Disabilities Education Improvement Act (hereinafter IDEA), 20 U.S.C. § 1400 *et. seq.*

The District initiated this action pursuant to 34 C.F.R. § 300.502(b)(2)(i) following Student’s request for an Independent Educational Evaluation (IEE) (a counseling assessment) at public expense to prove that its evaluation is appropriate. Subsequently, after Student also requested an IEE in the areas of Autism and Social Skills, the District amended its request for due process to add the issue of the appropriateness of its Full and Individual Evaluation (FIE) under IDEA. Student responded and counterclaimed, asserting student’s entitlement to an IEE, and alleging violations of the District’s child find duty under IDEA and its obligation to provide student with a free appropriate public education.

**PROCEDURAL HISTORY**

On or about April 7, 2010, the District filed this request for due process with the Texas Education Agency, asserting the single issue of the appropriateness of its Counseling Assessment of Student. On or about April 16, 2010, the District filed its Amended Request for Due Process, raising the additional issue of the appropriateness of its Full and Individual Evaluation (FIE). On or about April 30, 2010, Student filed student’s counterclaim, asserting additional issues and relief, which will be set forth in full below.

During the pre-hearing proceedings, the parties raised two preliminary legal issues: 1) whether the issues raised by Student were moot as a result of Student moving out of MISD; and 2) whether one or both of the exceptions to the one-year statute of limitation for IDEA claims in Texas as set forth in 34 C.F.R. § 300.511(f) apply.

After considering the arguments submitted by the parties, I issued an order on December 23, 2010 finding that Student’s claims for relief based on alleged violations that occurred while Student attended MISD are not moot. I found that Student’s request for relief regarding student’s eligibility designation under IDEA is moot by virtue of student’s withdrawal from MISD. I carried the issue of whether one of the exceptions to the statute of limitations applies forward to the hearing. *See*, Order Denying MISD’s Motion To Dismiss On Grounds of Mootness and For Want of Jurisdiction and Student’s Motion for Sanctions issued on December 23, 2010.

Following several continuances for good cause, the due process hearing occurred on April 12, 13, 14, and 15, 2011. At the close of the hearing, I granted the parties leave to file post-hearing briefs and, by

agreement, ordered the briefs to be submitted on or before June 6, 2011. Subsequently, a request for extension of time to file briefs was granted to June 17, 2011. The parties agreed to extend the due date for the decision of the Hearing Officer commensurate with the time allowed for the filing of the parties' briefs, making the timely due date for the decision on or before July 27, 2011.

## **STATEMENT OF ISSUES AND RELIEF ASSERTED BY THE PARTIES**

### **A. Issue and Relief Asserted By Petitioner MISD**

The issue raised by MISD in this case is the appropriateness of its FIE of Student dated January 29, 2010, including its Counseling Assessment, such that Student is not entitled to an IEE at public expense.

For relief, MISD seeks an order from the Hearing Officer denying Student's request for an IEE at public expense.

### **B. Issues and Relief Asserted By Respondent Student**

The issues identified by Student for resolution are:

1. Whether MISD should provide Independent Educational Evaluations at public expense to Student in all areas of suspected disability, and in particular in the areas of FIE, Counseling, Autism, and a Functional Behavioral Assessment (FBA)? Student contends that MISD had the opportunity to conduct an evaluation in the areas of Autism and an FBA, but chose not to, and is therefore required to provide Student with an IEE in those areas even though MISD has not yet evaluated Student in those areas. MISD contends that it has the right to evaluate Student in the areas of Autism and FBA prior to being required to provide an IEE.

2. Whether MISD failed to timely identify Student as eligible for special education services? Student contends that MISD had reason to suspect Student's disability and evaluate Student for special education services from the beginning of student's enrollment at MISD in November 2008. MISD contends otherwise.

3. Whether MISD denied Student a free appropriate public education by failing to provide special education and related services to student as of November 2008? Further, whether MISD denied Student a free appropriate public education even after Student was identified as eligible for special education?

4. Whether the statute of limitations in this cause should be extended to encompass the 2008-2009 school year in its entirety based on MISD withholding and/or misrepresenting information to Student concerning student's qualifications for special education services?

As requested relief, Student seeks the following:

1. Independent Education Evaluations in the following areas: FIE, Counseling, FBA, and Autism;

2. Reimbursement to Student for all monies spent on private educational tutoring; and

3. Compensatory education in the form of prospective private placement, or in the alternative, compensatory special education and related services resulting from MISD's failure to timely and properly identify and serve Student. Such compensatory services might include: music therapy, social skills training, 1:1 academic tutoring, occupational therapy services, and counseling services.

## FINDINGS OF FACT

1. During the 2010/11 school year, Student completed the \*\*\* grade at a private school, \*\*\*. (\*\* Testimony, Transcript Volume 3, page 616) (hereinafter cited as \*\*\*, Vol. 3: 616).
2. Student currently resides within the boundaries of \*\*\* ISD; however Student lived within the MISD boundaries during the 2009/2010 and portions of the 2008/09 school years, at which time student attended school at MISD.
3. MISD is a political subdivision of the State of Texas and a duly incorporated independent school district. During the 2009/10 school year and for portions of the 2008/09 school year, MISD was Student's resident district and responsible for providing Student with a free appropriate public education under IDEA.
4. Student has a \*\*\* dating to early childhood. Student was \*\*\* by Parent, who became student's \*\*\* in approximately January 2005. (Parent, Vol. 3: 735-741).
5. Student has attended numerous schools in different school districts over the last several years. (Parent, Vol. 3: 741-743, 910-912).
6. In \*\*\* grade (2007/2008 school year), Student attended \*\*\* School (\*\*\*) in \*\*\* ISD. (Parent, Vol. 3: 742).
7. In \*\*\* grade (2008/2009 school year), Student attended \*\*\* School in \*\*\* ISD for approximately the first three (3) months of the school year. Student then transferred to \*\*\* School in MISD on or about November \*\*\*, 2008. (Parent, Vol. 3: 742).
8. Student completed student's \*\*\* grade year at \*\*\* and attended \*\*\* during student's \*\*\* grade year (2009/2010 school year) until September \*\*\*, 2009 when student transferred to \*\*\* School (\*\*\*) within MISD.
9. In June 2010, after the completion of Student's \*\*\* grade year, Student withdrew from MISD and enrolled in \*\*\* ISD. However, before the start of Student's \*\*\* grade year (2010/2011 school year), student enrolled in a private school, \*\*\*, and had attended \*\*\* for the entirety of student's \*\*\* grade year as of the date of the due process hearing.
10. Student was not identified as eligible under either Section 504 or IDEA until September 2009 when student transferred to \*\*\* School (\*\*\*) and was identified as eligible for services under § 504. (\*\*\*, Vol. 1: 72).

### **\*\*\* Grade: Student's Transfer To MISD/\*\*\* School**

11. When Student enrolled at \*\*\* School in November of student's \*\*\* grade year, \*\*\* requested student's records from student's transferring campus \*\*\*, but not from \*\*\*. Some of the pages of Student's records that were sent by \*\*\* were not properly maintained and may have been lost or never reviewed. The records did not however reflect that Student was served under Section 504 or IDEA, as the evidence is clear that Student was not formally identified as eligible for those services while at \*\*\* or \*\*\* Schools. (R. Ex. 2; R. Ex. 3)
12. The records received upon Student's enrollment from \*\*\* did however contain information that Student had been served by the Student Support Team (SST) at \*\*\* during the \*\*\* grade. The SST Action Plan

sent to \*\*\* identified areas of concern, interventions/strategies, and noted that the outcome was “successful with strategies.” (R. Ex. 3).

13. At the time of Student’s transfer to MISD in November 2008, Parent communicated to MISD that Student had a disability (ADHD) for which student took medication; however, Parent did not specifically communicate his belief that Student was served under Section 504 until later, either in December 2008 (R15: 0606) or in February 2009 when Student experienced difficulties in student’s \*\*\* grade math class. The exact date that Parent communicated his belief that Student was previously identified as a §504 student is not clear; however, by at least February 2009, Parent had communicated this information. Student’s registration information completed by Parent did not notify MISD that Student was in §504. (R. Ex. 2; P31: 0352; 0357; Parent, Vol. 3: 777-778).
14. Parent believed that Student received §504 support at \*\*\* in \*\*\* grade, as parent thought that the Student Support Team (SST) interventions were the same as a §504 plan. (Parent, Vol. 3: 743-745).

**\*\*\* Grade: Student’s Time At \*\*\* (November 2008-May 2009)**

15. The first documented indication of Student struggling at school in \*\*\* grade occurred in February 2009 when Student’s math teacher emailed Parent on 2/17/09 to report that Student had low marks on two recent tests and that she would like student to attend tutorials. (R. Ex. 5: 00068).
16. In response, Parent indicated that Student should be allowed to retake tests as a §504 accommodation resulting from Student’s ADHD, as had been the case at student’s prior school. Teacher was surprised, not knowing that Student had a §504 plan, so she contacted the school counselor and other teachers to find out about it. (R. Ex. 5: 00068-00069).
17. The counselor, \*\*\*, contacted Parent to follow up, informing him that neither student’s registration paperwork, nor Student’s records, indicated §504 services. \*\*\* requested any documentation Parent might have showing §504 eligibility. (R. Ex. 42). Parent responded that Student was tested for special education placement at \*\*\* and was receiving §504 services from both \*\*\* and \*\*\* prior to student’s transfer to MISD. (R. Ex. 4: 00071). Neither of these statements is accurate.
18. On 2/18/09, \*\*\* sent a request for records to \*\*\*, the school Student attended immediately before \*\*\*, to make sure that \*\*\* had not overlooked Student’s §504 identification. (P. Ex. 46; R. Ex. 4: 00016; R. Ex. 5: 00071).
19. On 2/23/09, \*\*\* confirmed that Student was not served under §504 during student’s \*\*\* grade year. \*\*\* also provided the complete packet of SST paperwork to \*\*\*. The SST packet contained information documenting Student’s \*\*\*, ADHD and Behavior Disorder. Parent and teacher information in the packet indicated that Student struggled in \*\*\* grade with isolation, social withdrawal, and separation from peers. The information portrayed a student whose behavior and affect were unusual. The documentation further reflected that \*\*\* determined in January 2008 that further testing was not recommended as Student was experiencing success with the strategies and interventions outlined in the SST plan. (P. Ex. 46; R. Ex. 4; R. Ex. 5: 00072; Mosty, Vol. 3: 798-799, 804-808).
20. The counselor notified Parent of \*\*\* response. Parent said student would check with \*\*\* to find out why §504 paperwork had not been provided. Parent never provided paperwork or further information about §504 identification to \*\*\*. Parent did not request that Student be evaluated for special education services at this time.

21. After receipt of the SST packet from \*\*\*, the counselor met with Student's core teachers and they decided to implement the SST accommodations provided at \*\*\*. They notified Parent of these steps. Student received the accommodations and tutoring from student's math teacher for the remainder of \*\*\* grade. In an email dated 4/20/09, the math teacher confirmed that Student was attending tutoring and doing better academically. (R. Ex. 5: 00081).
22. The only other documented concern with Student's performance in \*\*\* grade was in \*\*\*. An email exchange in February 2009 indicates that Student's attitude and behavior had improved and returned to acceptable levels. (R. Ex. 5: 0636).
23. Student completed student's \*\*\* grade year with \*\*\* and \*\*\* in all subjects, except for a \*\*\* in Math. (P. Ex. 40). Student passed all sections of the TAKS test. (P. Ex. 41). Student received no disciplinary referrals during \*\*\* grade and Parent did not raise concerns about Student's behavior or emotional condition during the \*\*\* grade year.
24. Parent testified that Student suffered with \*\*\* in \*\*\* grade and complains that \*\*\* staff failed to assist student. There is no evidence though that Parent discussed this with \*\*\* staff in \*\*\* grade or that the staff knew of Student's \*\*\*. (Parent, Vol. 3: 825-826).
25. Parent testified, and the evidence supports, that Student suffered bullying in \*\*\* grade at \*\*\*. The evidence also establishes that neither Parent nor staff was aware of the bullying during Student's \*\*\* grade year. MISD staff only became aware of the bullying in September 2009, at which time Student transferred to \*\*\*. (Parent, Vol. 3: 821-822).
26. MISD had knowledge in \*\*\* grade of Student's ADHD and history of behavioral issues because of the Parent's communication of these conditions and because of the SST paperwork from \*\*\*. Despite these documented concerns, MISD did not evaluate Student for special education eligibility in \*\*\* grade. This was reasonable given that \*\*\* documented in \*\*\* grade that student was successful with the SST accommodations (P31: 0417) and did not require further testing. Student's experiences at \*\*\* also did not suggest the need for special education testing, as Student showed no serious signs at school in \*\*\* grade of academic, emotional or behavioral distress.
27. Student received private tutoring and support in order to be successful in \*\*\* grade, but it was not a level of support commensurate with special education services. Student made progress in \*\*\* grade and obtained educational benefit from student's placement in the general education program at \*\*\*.
28. Parent did not request a special education evaluation during \*\*\* grade.

### **Summer Before \*\*\* Grade**

29. Student's mental and emotional health deteriorated over the summer between \*\*\* and \*\*\* grade. During the summer, Student reported suicidal ideation during an annual physical at \*\*\*. In working with counselors there, Student reported that student had been bullied during \*\*\* grade at \*\*\* and suffered great distress as a result. In addition to issues at school, there were tensions within Student's home during the summer months and Student stopped taking student's ADHD medication due to side affects. The evidence indicates that all of these things contributed to Student's declining emotional and mental condition. (Parent, Vol. 3: 813, 829).

30. Parent corroborates that Student's emotional and behavioral functioning began to deteriorate significantly in this time period and that prior to this time, student's difficulties were more characteristic of a Student with ADHD. (P. Ex. 77: 0987).

**\*\*\* Grade: Beginning of Year Until Referral For Special Education Services**

31. When school began, Parent did not initially report Student's decline over the summer or student's experiences at \*\*\* to anyone at \*\*\* or the District.

32. Student began to exhibit behaviors of concern at school almost immediately in \*\*\* grade. Student failed to follow directions, failed to appreciate the consequences of student's actions, and was easily angered, annoyed and upset. (R. Ex. 11: 294-307; Parent, Vol. 3: 812-813).

33. Two minor behavioral incidents occurred early in \*\*\* grade, resulting in office referrals for discipline during September 2009. (P31: 0373-0375). Parent again mentioned that Student had been in §504 at student's previous schools, so school staff again reviewed records provided by \*\*\*\* and \*\*\* to be certain of Student's status. Paperwork from both districts confirmed that Student was not designated as §504 or IDEA eligible when enrolled there. (P31: 0377-0418). Staff communicated this to Parent, who continued to insist that Student was designated §504. (P. Ex. 69; R. Ex. 11:308).

34. \*\*\* convened a Problem Solving Team (PST), \*\*\* version of the SST intervention employed at \*\*\* ISD, on 9/16/09 with Student's teachers to review the strategies previously used to support Student. (P31: 0416; P. Ex. 48). Implementation never occurred as Student transferred to another campus.

35. While still at \*\*\*, on 9/17/09, Student became involved in a more serious disciplinary incident that involved alleged fighting. As a result, Student received a ticket and three days In School Suspension (ISS) as a disciplinary consequence. Parent was very angry and frustrated because he felt he had been trying to notify the school of Student's mental and emotional situation and student's §504 eligibility without success, and that these issues had now culminated in a serious disciplinary incident. (Parent, Vol. 3: 813-818).

36. Immediately upon learning of the disciplinary incident, Parent went to \*\*\* and attempted to speak with the assistant principal about his concerns regarding Student's mental health status, student's disabilities, and their impact on student's school life. At this time, Parent informed the school of Student's recent suicidal expressions and asked that disciplinary consequences be abated while Student obtained treatment for student's mental and emotional issues. (Parent, Vol. 3: 814; 829-830). The assistant principal was unable to satisfy Parent's concerns, so he went to the principal at 5:15 pm. on 9/17/09 without an appointment, forty-five minutes before Parent Night was to begin.

37. A conflict ensued between Parent and the Principal, who indicated that she could not meet with Parent at the time he had arrived. Parent felt the principal did not understand or care about the seriousness of his concerns. Parent felt so angry and frustrated as a result of the encounter that he went to central administration the next day instead of returning to meet with the principal. (Parent, Vol. 3: 816-818).

38. Parent met with central administration on 9/18/09, again insisting that Student had been in §504 at \*\*\*. Administration explained to Parent the distinction between the SST and §504; however, he still insisted that Student was served in §504 at \*\*\* despite \*\*\* ISD's representations to the contrary.

39. In response to the urgency of Parent's concerns and to doctors' letters provided by Parent stating that Student needed to transfer from \*\*\*, MISD transferred Student immediately to \*\*\* and began the §504

identification process. (Parent, Vol. 3: 820-821; P. Ex. 52). Student enrolled at \*\*\* on September 23, 2009 and Parent met that day with the \*\*\* counselor about a §504 referral. (P. Ex. 54; P. Ex. 55; P. Ex. 56; R. Ex. 11: 316).

40. The letter provided by Student's psychologist on 9/22/09 recommended both transfer and a thorough evaluation of Student for additional services in light of student's ADHD and escalating behaviors that were interfering with student's academic success. (R. Ex. 8: 00204). The \*\*\* counselor discussed a possible special education referral with Parent on 9/23/09; however, Parent declined special education testing, stating that he wanted to wait until pending doctor evaluations were completed. (P. Ex. 56; \*\*\*, Vol. 1: 74-75).
41. On October 2, 2009, a cursory §504 evaluation was reviewed, eligibility was confirmed, and a §504 Accommodation Plan was adopted. (P. Exs. 57, 58, 59; R. Ex. 10). To address Parent's primary concern about Student being disciplined for behaviors that were disability related, student's Accommodation Plan provided that Parent would be notified prior to any discipline actions. (P31: 0475; R. Ex. 10: 00220; Parent, Vol. 3: 847).
42. During October, Student's teachers contacted Parent with concerns about Student's classroom behavior such as conflicts with other students and refusal to listen to instructions and redirection. (T. Vol. 2: 439; R. Ex. 11: 327, 330-332, 339).
43. On October 19, 2009, Student's history teacher emailed Parent to report a disciplinary incident in her class of a relatively minor nature. Parent responded by indicating that the behavior she described was not typical and requesting that the teacher delay disciplinary action until Student's therapist could address the underlying emotional issues. Parent also copied the counselor on the exchange, first indicating that special education testing might be necessary and then stating that he wanted to wait about three more weeks before going forward with special education testing to allow time for increased therapy and better medication management to address Student's issues at school. (P31: 0478-0479; R. Ex. 11: 0035-0038; \*\*\*, Vol. 1: 76, 78-79; \*\*\*, Vol. 2: 443-444).
44. As of mid October 2009, Parent expressed his approval of \*\*\* response to Student's behaviors. (R. Ex. 11: 00348-00349).
45. In late October 2009, Parent, principal and Student's English teacher communicated about an escalation of Student's inappropriate behaviors and a possible relationship to Student not taking student's ADHD medication. (R. Ex. 11: 00352, 00360; \*\*\*, Vol. 2: 438-441).
46. On \*\*\*, 2009, Student experienced an emotional break down that resulted in student's hospitalization at \*\*\*, a mental health facility. On that day, student wore shoes to school that did not conform to the dress code. The school contacted Parent, who picked up Student and took student to get different shoes. In the process, Parent threw Student's "out of compliance" shoes into a dumpster. Student returned to school extremely upset and attempted to leave campus to go and retrieve the shoes out of the dumpster. Student was intercepted initially, but then left again successfully. The school SRO officer located Student several miles from the campus and returned student to school. That evening, Student continued to be so distraught that Parent took student to the emergency room at \*\*\*, where student was referred to \*\*\*. (R. Ex. 11: 00365-00369; P. Ex. 31: 0481-0482; P. Ex. 60; \*\*\*, Vol. 1: 79-80; \*\*\*, Vol. 2: 397-399; Parent, Vol. 3: 858-859).
47. On November \*\*\*, 2009, Parent notified \*\*\* that Student would return to school the next day, after several days at \*\*\*, and reported that student had been diagnosed with Bi-Polar Disorder and was taking

additional medication. (P. Ex. 79; \*\*\*, Vol. 1: 82). Parent again affirmed his appreciation of the school's non-disciplinary approach to Student's emotional and behavioral issues. (R. Ex. 11: 00372).

48. The following Monday, on November \*\*\*, 2009, Student experienced an emotional breakdown at school. Principal was called to check on Student in student's first period class because student was reported to be "acting strange." (P. Ex. 31: 0486; R. Ex. 11: 00377; \*\*\*, Vol. 1: 81). Principal's report of the incident documents erratic, aggressive, and emotionally unstable behavior, including cursing at Principal, refusing to follow instructions, and taunting comments. (P. Ex. 31: 0486; R. Ex. 11: 00377; \*\*\*, Vol. 2: 399-401). As a result of the incident, Student received a ticket \*\*\* and a disciplinary consequence from the school of ISS. (R. Ex. 11: 00375-00380),
49. Parent objected to the imposition of discipline and believed it to be in violation of Student's §504 Plan. Parent requested that the citation be rescinded and that Student attend Alternative School rather than ISS. The principal indicated that she had no authority over the citation and believed that a disciplinary consequence was important. (R. Ex. 11: 00374-00376).
50. Subsequently, in response to Parent's request, MISD intervened to obtain dismissal of the citation issued to Student and the disciplinary consequence was withdrawn prior to implementation. (P. Ex. 30: 0340; P. Ex. 108: 2970; R. Ex. 14: 00557).

#### **\*\*\* Grade: Referral For Special Education Evaluation**

51. Following Student's two emotional breakdowns in November, Parent agreed to and initiated a referral for special education on November 18, 2009. It is clear that both Parent and MISD believed that the area of suspected disability that required evaluation was an emotional disturbance (hereinafter referred to ED). (R. Ex. 11: 0609; P. Ex. 31: 0489; P. Ex. 62: 0886-0887; P. Ex. 77: 0997; \*\*\*, Vol. 1: 82, 84-85; \*\*\*, Vol. 1: 204; Parent, Vol. 3: 860).
52. MISD's evaluation of Student pursuant to the November 2009 referral was timely. Prior to November 2009, Student was served in §504 and did not present a need for special education services. Following the events of November 2009, it became clear that Student needed the additional support of special education in order to access student's education at MISD. In addition, prior to November 2009, when special education testing seemed to be possibly warranted, Parent expressed his disagreement with testing and his desire to wait and see if Student's doctors and therapist could address Student's needs.
53. The referral for special education indicates concern with behaviors and emotional issues, stating that grades were declining due to behavior and missing school as a result of mental/emotional issues. (P34: 0643-0644). The evaluation properly focused on Student's emotional issues. (\*\*\*, Vol. 2: 337).
54. A copy of the Rights and Procedural Safeguards was provided to Parent on 11/18/09. (R. Ex. 31: 0490; P. Ex. 34: 0641). A second copy was provided on January 15, 2010. (P. Ex. 66; R. Ex. 31: 0506).
55. On December 4, 2009, MISD notified Parent of a refusal to evaluate because Student failed student's vision test. Student's evaluation was delayed until Student received new glasses. (P. Ex. 63; \*\*\*, Vol. 1: 86-87). Student obtained new glasses and completed the referral for special education on 12/16/09.
56. On 12/17/09, consent for testing was sent home to Parent. (P. Ex. 31: 0491-0504). Parent provided provisional consent for testing on 1/8/10 and complete consent on 1/12/10 after he spoke with the LSSP about the tests that would be administered. As of 1/12/10, Parent was clear that the psychological evaluation was to determine the existence of an ED. (P. Ex. 31: 0501; P. Exs. 64, 65).

57. In January 2010, while Student's Full and Individual Evaluation (hereinafter FIE) was being conducted, the tone of the relationship between the parties changed. Student continued to display disruptive behaviors in class and Parent continued to ask that disciplinary consequences be delayed pending the determination of Student's eligibility for special education. (R. Ex. 12: 00434-00442; 00461-00464).
58. During January and February 2010, Parent requested information pertaining to events at \*\*\* in \*\*\* grade (P. Ex. 31: 0528-0533; R. Ex. 14: 00561-00580; R. Ex. 61) and initiated a complaint through the MISD grievance process. Several confused email exchanges occurred in connection with the grievance in which Parent indicated his intent to file suit against the District and his awareness of the one-year statute of limitations for pursuit of an action at TEA. The emails do not clearly illuminate Parent's understanding (or lack thereof) of the legal process or what he thought was required in order to file suit. (R. Ex. 12: 00443-00445; Parent, Vol. 4: 987). On March 2, Parent noticed the District with a 90-day notice of lawsuit. (R. Ex. 54: 4116).
59. Parent pursued a complaint through the MISD grievance process concerning several issues that are also raised in this due process proceeding: 1) the enrollment process at \*\*\*; 2) Student's assignment to ISS at \*\*\* and student's receipt of a ticket in September 2009; 3) Student's identification for services under §504; 4) Student's difficulty with Math in \*\*\* grade; 5) Issues with the coach at \*\*\* in September 2009; and 6) Student's receipt of a ticket at \*\*\* for inappropriate conduct. (R. Ex. 12: 00401-00408). Most of the grievance pertained to issues at \*\*\*.
60. In January and February 2010, Parent expressed that his primary concern with Student's education at MISD were student's experiences at \*\*\* and their failure to serve Student properly. (P. Ex. 65: 0900; P. Ex. 80:1021; P. Ex. 103: 1972; R. Ex. 12: 00408, 00457; R. Ex. 13: 00471; R. Ex. 17: 00847).
61. On 1/29/10, MISD notified Parent that the FIE was complete and the District was ready to schedule the Admission, Review, and Dismissal Committee (hereinafter ARDC) meeting to consider the results of the FIE and Student's eligibility for special education services. Parent asked for a copy of the FIE, which was provided. (P31: 0535).
62. The ARDC was originally noticed for 2/2/10, but rescheduled to 2/4/10 at Parent's request, at which time it convened to review Student's FIE. (P31: 0537-0543; P. Exs. 72, 73, 74).

### **MISD's Full and Individual Evaluation of Student**

63. Student's FIE consisted of two portions: educational and academic achievement completed by MISD educational diagnostician, \*\*\*, and a psychological evaluation completed by \*\*\*, a Licensed Specialist In School Psychology (LSSP). (P. Ex. 77; \*\*\*, Vol. 1: 143, 145; \*\*\*, Vol. 1: 200-201).
64. \*\*\* evaluation included the following sources of data: parent information, information from educational records, teacher information, classroom observation, and cognitive and achievement testing. (P. Ex. 77: 0965-0972; \*\*\*, Vol. 1: 143).
65. Student's grades and TAKS benchmark scores during the fall of \*\*\* grade all demonstrated acceptable progress. (P. Ex. 77: 0966). \*\*\* noted no behaviors or issues of concern in her classroom observation of Student on January 27, 2010. (P. Ex. 77: 0966).
66. Teacher information collected in late November/early December 2009 describes the following instructional and behavioral weaknesses: easily distracted; not serious about assignments; tries to be the center of attention in an unhealthy way; difficulty listening and following instructions, difficulty

focusing; talks out when too distracted or angry to concentrate; not responsive to correction or redirection; easily frustrated; shuts down; highly emotional and over-reactive. Each of the six teachers providing information for the evaluation stressed Student's inability to maintain focus and difficulty paying attention. (P34: 0645-0650; P. 75: 0967).

67. Parent information indicated that Student had been volatile over the last several weeks, exhibiting anger, depression, crying, profanity, and difficulty sleeping. Parent reported that Student lacked social skills, had poor impulse control, had difficulty processing information, and had been absent due to personal problems. (P34: 652-656).
68. Academic achievement was measured by the Woodcock-Johnson III (WJ-III) and resulted in average scores in all areas. Intellectual aptitude was measured by the Wechsler Intelligence Scale for Children-4<sup>th</sup> Edition (WISC-IV) and revealed average scores in all areas except Processing Speed, in which Student obtained a \*\*\* (average scores fall between 85 and 100). (P. 77: 0971). Student's low processing speed score is consistent with parent and teacher information about student's performance in the classroom and with student's emotional issues and ADHD. (\*\*\*, Vol. 1: 190).
69. Recommendations for Student's educational program were made as follows: reduce distractions; provide one or two-step directions; provide preferential seating; and check for understanding. (P. Ex. 77: 0974).
70. \*\*\* psychological evaluation included the following sources of data: review of referral information including \*\*\* records and teacher data from November 2009; Interviews with Parent, Student, and teachers; teacher information; Social Skills assessment form from Parent and one teacher; Parent information and developmental history; Behavior Assessment System for Children-2<sup>nd</sup> Edition (BASC-2) Parent and Teacher ratings; Millon Adolescent Clinical Inventory (MACI); Kovacs' Children's Depression Inventory (CDI); and the Forer Structured Sentence Completion Test. (P. Ex. 77: 0980; \*\*\*, Vol. 1: 208-209). \*\*\* evaluation was consistent with a professional standard of care and satisfied the criteria for evaluations in IDEA. (\*\*\*, Vol. 2: 335).
71. Parent reported that Student's emotional and behavioral functioning deteriorated significantly toward the end of \*\*\* grade as a result of bullying at school. He described Student as unable to establish and maintain meaningful friendships with peers. (P. Ex. 77: 0981).
72. Teacher information indicated that Student could become emotional in a very short period of time, was easily frustrated and had a difficult time regrouping emotionally, and had mood swings that affected student academically. Teachers also described Student as withdrawn, socially isolated, and as displaying odd and unusual behaviors. (P34: 0645-0650; P. 75: 0967, 0981). Teachers noted that Student was notably calmer and more controlled when student returned to school after \*\*\*. (P. Ex. 77: 0982; R. Ex. 16: 00707).
73. On the social skills' assessment forms, both Parent and Teacher indicated that Student seemed to have fewer friends than most; however, Parent endorsed this item as severe and the teacher endorsed it as moderate. (P. Ex. 77: 0982; R. Ex. 16: 00706).
74. In Student's interview with \*\*\*, student acknowledged feelings of depression, suicidal ideation one time in the past, being more emotional than other students student's age, and hearing voices when not on student's medications. Student also reported being teased and bullied by peers. (P. Ex. 77: 0983).
75. The BASC-2 is designed to identify and measure the severity of problem behaviors. Behaviors in the "clinically significant" score range indicate maladjustment; whereas, scores in the "at risk" range

identify issues that may not be occurring frequently enough to warrant intervention, but may be a warning and require monitoring. The BASC ratings include three scales: clinical scales, adaptive scales, and content scales. (P. Ex. 77: 0984).

76. Parent scores on the BASC-2 indicated more areas of clinically significant concern than Teacher. Parent rated Student as clinically significant (or almost so) in almost every area on all scales. Teacher did not rate Student as clinically significant in any area, though at risk elevations were indicated in most areas. (P. Ex. 77: 0984-0985; \*\*\*, Vol. 1: 208-210).
77. The CDI is a self-report instrument designed to measure the presence of depressive symptomology in children. Student did not report “clinically significant” scores in any of the areas measured on the CDI. (P. Ex. 77: 0985; \*\*\*, Vol. 1: 210).
78. The MACI is also a self-report measure. It is designed to assess personality characteristics and clinical syndromes. Student endorsed “clinically significant” scores in the areas of inhibited personality, peer insecurity, and depressive affect. Student indicated the presence of symptoms in the following areas: doleful personality, oppositional personality, borderline tendencies, self-devaluation, and impulsive propensity. (P. Ex. 77: 0986; \*\*\*, Vol. 1: 211-212).
79. Student’s responses to the sentence completion task reflected feelings of inadequacy and a desire to achieve. (P. Ex. 77: 0987).
80. Based on all of the data collected, \*\*\* concluded that Student demonstrated the characteristics of ED according to the Texas Education Agency (TEA) guidelines and IDEA. Specifically, \*\*\* found that Student demonstrated a general pervasive mood of unhappiness or depression and inappropriate types of feelings or behaviors under normal circumstances. (P. Ex. 77: 0988; \*\*\*, Vol. 1: 213).
81. \*\*\* made numerous recommendations for Student’s educational programming, including: monitor for suicidal ideation; reduce stimulation and need to make social judgments when Student is approaching emotionally labile behavior; do not over stimulate with excessive academic or behavioral demands; focus on positive coping skills and mirror positive handling of academic and social situations back to Student; provide Student with “toolbox” of social strategies to address social skills deficits; overtly validate and provide opportunities for Student to be a leader; do not overlook Student if student is quiet or withdrawn; and employ classroom accommodations to assist with focus and attention such as use of a visual and auditory cueing system, eye contact, proximity control, preferential seating, and checking for understanding.
82. MISD’s FIE did not include an evaluation or discussion of Student’s ADHD or whether student met eligibility criteria as a Student with Other Health Impairment despite MISD’s knowledge of Student’s ADHD and its impact on student’s education. The FIE should have included an ADHD evaluation and made specific recommendations to the ARDC concerning OHI eligibility. (R. Ex. 77). Recommendations made by \*\*\* and \*\*\* did however address Student’s attention issues even though they did not evaluate for ADHD. (\*\*\*, Vol. 1: 145; \*\*\*, Vol. 1: 103).
83. The FIE’s failure to evaluate Student in January 2010 for the presence of an Autism Spectrum Disorder (ASD) was reasonable in that MISD had no reason to suspect that Student had a disability in that area. The information available to MISD, including school records, teacher information, parent information, Student observation, and medical records from \*\*\*, all reasonably supported MISD’s decision to evaluate Student in the area of ED. (\*\*\*, Vol. 1: 205-206).

## **ARDC Review of the FIE, Determination of Eligibility, and Creation of Individual Education Plan (IEP) for Student**

84. On February 4, 2010, the ARDC reviewed the FIE and agreed that Student was eligible for special education services as a Student with an ED. (\*\*\*, Vol. 1: 127; P. Ex. 80). The ARDC did not discuss Student's ADHD or the eligibility category of OHI.
85. The ARDC completed a Functional Behavioral Assessment (FBA) at the ARD meeting and noted two behaviors of concern: non-compliance and impulsivity. The ARDC noted that the function of the behaviors was for Student to gain emotional self-control, as well as peer attention. (P. Ex. 80: 1034-1035, 1055). The FBA was completed at the ARDC and was not based on observations of Student over time and in a variety of settings. MISD's method of completing Student's FBA does not conform to best practices for performing FBAs. (\*\*\*, Vol. 2: 538-540).
86. The ARDC developed a Behavior Intervention Plan (BIP) with interventions to address the targeted behaviors in the FBA as follows: a travel card for Student to take from class to class to receive stickers and record behaviors for rewards; cooperative grouping with other students; private discussion with positive praise; and the use of non-confrontational techniques. (R. Ex. 80: 1036). The ARDC also developed a Behavior IEP with two behavioral goals: comply with adults by second request 75% of the time and positively respond to redirection when off task 75% of the time. (R. Ex. 80: 1025; \*\*\*, Vol. 1: 147).
87. In the area of instructional support, the ARDC developed an IEP for Student to progress on enrolled grade-level TEKS at the mastery level of 70%. To support Student in this goal, the ARDC provided for content mastery inclusion support in the general education classroom for 30 minutes per six-week grading period. (R. Ex. 80: 1026, 1032). In addition, the ARDC agreed to these accommodations and supports: small group testing, use of an assignment notebook, preferential seating, frequent reminders of homework, reteach/reassess as needed, frequent feedback, copy of notes, use of restroom upon request, use of non-confrontational techniques, and peer tutoring. (R. Ex. 80: 1027).
88. The ARDC also requested a counseling assessment to determine if Student needed the related service of counseling. The assessment was requested for completion in March 2010. (P. Ex. 80: 1021).
89. At the conclusion of the 2/4/10 ARDC, Parent indicated that he would like to review the paperwork before signing and concluding the ARDC. As such, the ARDC was scheduled to reconvene on 2/12/10, but inclement weather required that it be rescheduled to 2/16/10. (P31: 0545; P. Ex. 75; \*\*\*, Vol. 1: 148-149).
90. Between the 2/4/10 and the 2/16/10 ARDC meetings, Parent expressed concern about the counseling assessment being completed by MISD rather than a private provider due to confidentiality issues. Parent then agreed that MISD could do the assessment, but expressed his inclination toward Student's private therapist providing the counseling. (R. Ex. 14: 00546-00549, 00581-00583).
91. The ARDC reconvened on 2/16/11. The ARDC implemented an agreed upon travel card to help monitor progress on Student's Behavior IEP, amended the FBA to include changes requested by Parent, and agreed to provide one hour of tutoring each morning in lieu of special education transportation. (P. Ex. 80: 1055; R. Ex. 13). Parent provided consent for a counseling assessment and consent for special education services. (P. Ex. 76; P. Ex. 80: 1055; \*\*\*, Vol. 1: 149).

92. The process of performing Student's FBA did not include observation over time of Student's behaviors in a variety of settings and did not produce a BIP that addressed all of the key areas of concern for Student, such as student's social withdrawal and lack of social skills. However, by the conclusion of the February 16 ARDC, the BIP and Behavior IEP that were implemented for Student included strategies that were designed to meet Student's unique needs (see Finding of Fact, number 85) and mirrored the strategies later suggested in July 2010 by Dr. \*\*\*. The BIP and Behavior IEP provided Student positive benefit in the area of managing behaviors that interfered with student's learning.
93. During February and March 2010, the grievance and TEA complaint processes were ongoing. Parent requested a continuation of the tutoring Student was receiving through the 2010/2011 school year, private counseling rather than counseling from the District LSSP through the 2010/2011 school year, dismissal of Student's pending tickets, attendance at the \*\*\* school of student's choice, and compensatory reimbursement for tutoring obtained prior to MISD tutoring. Parent also indicated his intent to seek monetary damages as a result of MISD's denial of services to Student. (R. Ex. 54: 4172-4177).
94. Email correspondence between the parties about Parent's grievance indicates that the issue of Student's tickets was resolved by MISD requesting their dismissal (P. Ex. 108: 2970; 3074), but that issues related to Student's counseling were outstanding; i.e. who would provide the counseling and for what length of time. (P. Ex. 108: 2930-2935, 2941).

### **MISD Counseling Assessment**

95. LSSP \*\*\* completed a counseling assessment of Student on 2/19/10. The assessment involved an interview with Student and a review of records. \*\*\* concluded that Student demonstrated social difficulties and feelings of inadequacy and recommended that the ARDC provide school counseling that focused on the development of social skills and improving self-esteem. (P. Ex. 78; R. Ex. 48). The assessment's recommendations properly addressed the areas of concern documented for Student. (\*\*\*, Vol. 1: 215-216).

### **ARDC Review of Counseling Assessment and Spring ARDCs**

96. An ARDC meeting convened on March 9, 2010 to consider the counseling assessment. All members of the ARDC agreed that Student required counseling as a related service; however, they disagreed as to who would provide the counseling. Parent wanted Student's private counselor to provide the services; while the District proposed to use a District LSSP. Parent requested a ten-day recess to evaluate the credentials of the LSSP. (P. Ex. 81: 1089; \*\*\*, Vol. 1: 150-151).
97. The ARDC reconvened on 3/24, at which time the LSSP provided Parent with his resume. To provide Parent additional time to review the information, the ARDC was tabled until April 1, 2010. (P. Ex. 81: 1089; \*\*\*, Vol. 1: 152-153; \*\*\*, Vol. 1: 223-224).
98. Parent requested a postponement of the April 1 ARDC to allow time for him to complete a reference and background check of MISD's LSSP. (P. 108: 3159). Correspondence indicates that MISD wished to proceed with the ARDC meeting so that counseling services could be offered to Student, though Parent viewed the services as inappropriate. At this point, tensions ran high and Parent indicated he would seek a court order requiring MISD to provide counseling with Student's private therapist. (P. Ex. 108: 3220). Parent requested an independent counseling assessment on March 31, 2010 and the ARDC meeting was rescheduled to April 9, 2010. (P. Ex. 81: 1140-1143).

99. On April 7, 2010, MISD filed the instant action to prove the appropriateness of its counseling assessment rather than grant Parent's request for an independent counseling assessment.
100. The ARDC convened on April 9, 2010. Parent attended with an advocate to assist him. (\*\*\*, Vol. 1: 153). The ARDC reviewed teacher input, which indicated that Student continued to be somewhat disruptive and insubordinate, but also showed improvement both academically and behaviorally. The ARDC offered Student 15 minutes per week of counseling to be provided by the District LSSP to work on the following goals: 1) Student will demonstrate interest by participating in classroom activities (self-esteem, motivation); 2) Student will improve student's perception of school-related experiences (self-esteem); 3) Student will communicate with others in an acceptable manner in the classroom (social skills with other students); and 4) Student will respond appropriately to redirection in social situations (compliance). (P. Ex. 81: 1103-1106).
101. The goals and objectives contained in Student's counseling assessment were drafted immediately prior to the ARDC meeting. The goal of having Student "improve student's perception of school related experiences" was not appropriate. (\*\*\*, Vol. 2: 559-560). The counseling IEP was never implemented because agreement was not reached at the April ARDC.
102. The parties discussed many issues and areas of concern at the ARDC meeting. Parent and advocate raised several issues that had not been previously considered: 1) the FIE failed to assess Student in all areas of disability and in particular in the areas of Autism and social skills deficits; 2) the FIE failed to consider and identify Student as eligible under the OHI category; 3) additional evaluations were required in the areas of music therapy and assistive technology; 4) the FBA and BIP did not address all of the documented areas of behavioral concern from the FIE and were not sufficiently comprehensive to address Student's needs; 5) the Counseling Assessment, proposed Counseling goals and objectives, and counseling services offered were inappropriate and insufficient; 6) Parent requested several changes to Student's IEP in terms of services, levels of mastery, and accommodations and supports; and 8) Parent requested compensatory tutoring and counseling dating to the fall of \*\*\* grade when Student began at \*\*\*. (P. Ex. 81).
103. Prior to the April ARDC, MISD staff had never suspected or heard anything from Parent that would suggest Student was living with an ASD. (\*\*\*, Vol. 1: 156; \*\*\*, Vol. 1: 225-226; \*\*\*, Vol. 2: 407-408).
104. The ARDC made the following decisions after consideration of Parent concerns: provide additional assessment for music therapy, assistive technology, and OHI; increase content mastery time and provide additional assistance for organization; raise the level of mastery in Student's Behavior and Content Mastery IEPs from the minimum of 70%; provide consultation and on-going support to teachers from LSSP, including a meeting at the beginning of the next academic year regarding Student's unique history and needs; and allow additional time for test taking and additional support and feedback for note taking. (R. Ex. 81: 1074-1122).
105. Parent agreed with aspects of the ARDC decisions, but disagreements remained in these areas: FIE not sufficiently comprehensive; FBA and BIP not sufficient; and counseling assessment insufficient and unduly delayed. Parent requested an independent educational evaluation (IEE) in the area of Autism and Social Skills in addition to the Counseling Assessment that had already been requested. Parent declined to provide consent to counseling services to be provided by the District LSSP. (P. Ex. 81: 1128-1129; R. Ex. 36; R. Ex. 41). Parent submitted documents entitled "qualifications to the signature page of the IEP" & "addendum to the minutes," which were added to the ARDC documents. (R. Ex. 36).

106. Following the ARDC, MISD provided Parent with consent forms for an OHI evaluation (review of medical records), Music Therapy evaluation, and Assistive Technology evaluation. (P. Ex. 87: 1223-1226; \*\*\*, Vol. 2: 453). MISD amended its request for due process to prove the appropriateness of its FIE in addition to its counseling assessment.
107. MISD also provided notice on 4/14/10 of a reconvene ARDC following the 4/9 ARDC that ended in disagreement. The notice states that the school proposes to change Student's identification, evaluation, or the provision of a free appropriate public education due to Parent's disagreement with the 4/9/10 ARDC, and "develop an evaluation plan for Autism Evaluation including Social Skills Assessment & Speech Evaluation, Adaptive Behavior Assessment, and FBA. Discuss "qualifications to the signature page of the IEP & addendum to the minutes" documents submitted by Parent." (P. Ex. 81: 1154-1155; Parent, Vol. 4: 983). A second notice was sent on April 16, 2010. (P. Ex. 82: 1159).
108. Parent requested a different date and time for the reconvene ARDC due to work obligations. MISD offered an alternative and reiterated the wish to move forward with developing evaluation plans and discussing Parent's disagreements with the April 9 ARDC decisions. (P. Ex. 82: 1159). The ARDC was then scheduled for 4/21 @ 2:00 p.m.
109. MISD cancelled the ARDC scheduled for 4/21 at Parent's request due to health issues that prevented Parent from attending. (P. Ex. 84: 1185).
110. Parent filed his request for due process in this cause on April 30, 2010.
111. The litigation process ensued during April and May 2010. Mediation occurred in May 2010, but was not successful. (P. Ex. 88: 1253).
112. On May 24, 2010, MISD noticed Parent of an ARDC on 6/1/2010 to develop a transition plan for \*\*\* and proceed with an evaluation plan as described in the April 2010 ARDC notices. (P. Ex. 88: 1248-1249).
113. On May 25, 2010, Parent responded, through his advocate, that he would not participate in any further ARDC meetings until the pending due process proceeding was concluded and that he had retained an attorney to represent him in that matter. (P. Ex. 88: 1253).
114. On May 26, 2010, MISD, through counsel, contacted Parent's newly retained counsel urging participation in the ARDC process. In relevant part, MISD stated, "the matters MISD personnel believe need to be addressed are: Develop an evaluation plan for an Autism evaluation, including a social skills assessment and speech evaluation; an adaptive behavior assessment and FBA; discuss the "Qualification to the Signature Page of the IEP" and "Addendum to Minutes" submitted by Parent; and develop a transition plan to \*\*\*. The Autism issue was raised by Ms. LaViola at the first ARD that she attended and MISD has been, and is, willing to assess in this area, however, the parties need to formulate a plan for this assessment." (P. Ex. 88: 1254-1255).
115. Parent responded, through counsel, on June 9, 2010, indicating his intent to withdraw Student from MISD due to his lack of trust and inability to work with the District. (P. Ex. 120: 3731). MISD indicated that it would continue to pursue the ARDC process until such time as Student officially withdrew from the District. As such, MISD noticed an ARDC for June 21, 2010. (P. Ex. 120: 3712-3739).

116. MISD was never allowed to conduct the evaluations requested by Parent at the April 9 ARDC meeting. (\*\*\*, Vol. 1: 157).

### **Student Performance During Spring 2010**

117. The evidence indicates that MISD implemented the travel card, behavioral chart, and other accommodations described in Student's IEP following the February 16, 2010 ARDC meeting. Additional accommodations and intervention strategies were added following the April 2010 ARDC meeting. When issues arose with the implementation of the travel card, MISD staff monitored those concerns and proposed changes to the system. (P. Ex. 108: 2915-2916).

118. Progress data shows satisfactory progress toward the identified behavioral goals throughout the spring semester. (P. Ex. 92; \*\*\*, Vol. 2: 405). Student had no disciplinary referrals following student's identification for special education services. Behavioral incidents were minor in nature and Student's behavior improved notably. (P. Ex. 91; \*\*\*, Vol. 1: 111; \*\*\*, Vol. 1: 246-247).

119. There is no evidence of Student experiencing serious emotional distress at school or at home during the Spring 2010 semester. Parent continued to be very concerned about Student's mental and emotional health; however, there is nothing in the record to indicate any further incidents at school or home like those in the Fall of 2009.

120. Academic progress data reflects satisfactory progress in all classes and on the \*\*\* grade TAKS. Student's lowest grade on student's year-end report card was \*\*\* in Math. (P. Ex. 92: 1315; P. Ex. 93: 1427; P. Ex. 94: 1429; \*\*\*, Vol. 2: 405-407).

121. Student received 71 hours of tutoring from MISD between student's identification as IDEA eligible in February 2010 and the end of the school year. (P. Ex. 116; R. Ex. 44).

122. The evidence reflects that \*\*\* staff worked collaboratively with Parent to resolve issues that arose and responded to Parent's requests for information and feedback about Student. Staff worked to ensure Student's success in the classroom, both academically and behaviorally. Email communications in April and May 2010 reflect responsiveness to Parent's requests and concerns. (P. Ex. 108: 2883; 2918; 2950; 2955-3076; 3128; 3150; P. Ex. 109: 3445; 3447; 3541-3543; P. Ex. 110: 3582; 3586; 3587; 3593).

### **Student's Withdrawal From MISD**

123. On June 14, 2010, Parent withdrew Student from MISD, indicating he had enrolled in \*\*\* ISD. (P. Ex. 126).

124. Before the start of the 2010/11 school year, Parent withdrew Student from \*\*\* ISD and enrolled student in \*\*\*, a private school. Parent did not notify MISD of its intent to enroll Student in \*\*\* and seek private placement for Student at District expense. (\*\*\*, Vol. 1: 240).

### **\*\*\* Grade: \*\*\* School**

125. The owner of \*\*\* School, \*\*\*, learned of Student from student's advocate, who requested that \*\*\* consider Student for enrollment. Because she thought Student could benefit from attending \*\*\*, \*\*\* has deferred student's tuition. As of the due process hearing, Student had not paid any tuition to \*\*\* at all. (\*\*\*, Vol. 3: 616, 627-628, 677, 682-683).

126. \*\*\* is a private school serving students living with disabilities in \*\*\* through \*\*\* grade. The majority of students are living with emotional disabilities or an autism spectrum diagnosis. \*\*\* offers a therapeutic milieu in the classroom, group therapy for one hour two times per week, and access to a counselor for individual therapy as needed. The therapy offered is didactic and insight oriented as opposed to educational counseling. (\*\*\*, Vol. 3: 619-622, 624-625).
127. \*\*\* believes that Student requires more than 15 minutes per week of counseling and that the counseling goals developed by MISD were not appropriate for Student's needs related to anxiety and developing relationships with peers and adults. (\*\*\*, Vol. 3: 653-658)
128. Academically, \*\*\* offers small classes of 8-10 students at the \*\*\* level with a traditional \*\*\* curriculum. Student has consistently made \*\*\* throughout the school year. (\*\*\*; Vol. 3: 623, 637-638).
129. Behaviorally, Student has demonstrated lessening anxiety and increased ability to make friends while at \*\*\*. Student has not had any behavioral problems or incidents of aggression. (\*\*\*, Vol. 3: 638-639).
130. Student exhibits deficits at \*\*\* in these areas: organizational skills, pragmatic social language, and social skills. Based on these deficits and Student's perseverative interests and difficulties with transition, \*\*\* believes that Student has high functioning Aspergers. \*\*\* has not completed any formal assessment of Student. (\*\*\*, Vol. 3: 639-641, 664, 681-682).
131. \*\*\* agrees that Student's social skills deficits also correlate with student's \*\*\*. (\*\*\*, Vol. 3: 678-679).
132. \*\*\* offers many benefits to Student that enable student to feel safe and less afraid. Student's self-esteem and demeanor has significantly improved since attending \*\*\*. (\*\*\*, Vol. 3: 638; Parent, Vol. 4: 989-990).

## **Private Evaluations of Student and Respondent's Expert Witnesses**

### **Evaluation of \*\*\***

133. \*\*\*, Ph.D, LSSP, evaluated Student during July and August of 2010 at the request of Parent. Her evaluation is dated 8/21/10 and precedes Student's enrollment at \*\*\*. (R. Ex. 60).
134. Dr. \*\*\* evaluation is thorough, extensive, relies on numerous sources of information and carefully considers all available data pertaining to Student. (\*\*\*, Vol. 2: 359; \*\*\*, Vol. 2: 575). Dr. \*\*\* met with Student on three distinct days of evaluation and observed student over a significant period of time. Although Dr. \*\*\* did not testify at the due process hearing, I find her evaluation to be reliable and trustworthy in its assessment of Student.
135. Dr. \*\*\* undertook a comprehensive neuropsychological evaluation in order to assess psychological factors and clarify Student's diagnostic profile. She evaluated Student in all areas of potential disability identified by Parent, including ED, OHI, and an ASD. She administered numerous formal measures, as well as conducting interviews and extensively reviewing all of Student's medical, psychiatric, developmental, and educational history.
136. Based on her review of Student's history and her current testing, Dr. \*\*\* concluded that Student continued to exhibit ADHD and meet eligibility for special education as a student living with OHI;

however, she also concluded that Student's more salient concerns were student's mood and anxiety symptoms. Dr. \*\*\* concluded that Student's high and chronic anxiety, coupled with student's mood fluctuations and symptoms of personality disorder, account for student's difficulty with social relatedness, social skills deficits, and academic challenges. She also found Student to satisfy eligibility for special education as a student living with an ED. Dr. \*\*\* conclusions are similar to those reached by MISD in its FIE.

137. In considering the presence of an ASD, Dr. \*\*\* stated that she very seriously considered Autism or Asperger's Disorder as diagnostic categories for Student, but that they were not appropriate because student does not seem to have exhibited the necessary symptoms from an early age according to available records. Based on all available data, including genetic propensities and historical information, Dr. \*\*\* concluded that the symptoms exhibited by Student which might correlate to an ASD (difficulty developing peer relationships, pragmatic language deficits) are "due to other issues, primarily student's behavior, mood, and anxiety dysfunction." (R. Ex. 60: 4254).
138. Dr. \*\*\* made extensive recommendations with regard to Student's psychological functioning, behavioral management, education, social skills, and organizational functioning. (R. Ex. 60: 4254-4258).
139. The majority of recommendations made by Dr. \*\*\* in August 2010 had been incorporated by MISD into Student's IEP in February, March and April 2010. For example, Student's IEP and program included a travel card and related reward system to reinforce student's behavior; an instruction that teachers use non-confrontational techniques; an instruction that teachers not over stimulate Student with excessive academic or behavioral demands and adjust expectations to match student's level of functioning; a provision that MISD's LSSP would consult with teachers and provide ongoing support about Student's unique needs and history; a provision for private discussions with Student and positive praise; teacher assigned cooperative groups and peers for tutoring; organization support through CMC inclusion to address Student's deficits in executive functioning, including 1:1 support twice per week and daily check-in; tutoring to address areas of academic weakness; additional time for assignments and tests; an assignment notebook; preferential seating; reteach and reassess; frequent feedback; class notes and designation of important concepts; one or two step instructions; and proposed access to the campus counselor through special education counseling. (P. Ex. 80; 81). Each of these items included in Student's IEP correlate to one of the recommendations made by Dr. \*\*\* in her report. (R. Ex. 60: 4254-4258).
140. Attached to Dr. \*\*\* report is an undated addendum prepared at the request of Parent and his advocate. The addendum clearly was sought to address Respondent's concern that Dr. \*\*\* concluded that Student did not have the disability of an ASD. I find that the Addendum does not change the conclusions reached or recommendations made by Dr. \*\*\* in her evaluation of Student. (R. Ex. 60: 4259).

#### **Evaluation of \*\*\***

141. \*\*\* is a speech language therapist assisting students living with autism. Ms. \*\*\* completed a pragmatic language assessment of Student in January 2011 at the request of Parent. (R. Ex. 58; \*\*\*, Vol. 2: 258-261).
142. Ms. \*\*\* administered two formal measures to Student, one of which could not be formally scored because it was not normed for Student's age. (\*\*\*, Vol. 2: 266, 269-270). This limits the usefulness of \*\*\* evaluation results. (\*\*\*, Vol. 2: 371-372).

143. Ms. \*\*\* concluded, consistent with Dr. \*\*\* evaluation, that Student has pragmatic language deficits. Ms. \*\*\* attributes those deficits to an ASD. (R. Ex. 58: 4207; \*\*\*, Vol. 2: 266, 269-270).
144. Ms. \*\*\* did not conduct a comprehensive evaluation of Student that would allow her to determine the underlying basis for Student's pragmatic language deficits. (\*\*\*, Vol. 2: 305, 308).
145. Ms. \*\*\* impressions of Student as withdrawn and inward suggested to her that Student has an ASD. She is not familiar enough with the condition of ED to know if those traits would also be consistent with that disability. (\*\*\*, Vol. 2: 261-262, 269, 308).

### **Testimony of Dr. \*\*\***

146. Dr. \*\*\* is a psychologist in private practice, who was retained by Parent one week before the due process hearing to review all of Student's records and offer her opinions about the evaluation and program provided to Student by MISD. Dr. \*\*\* evaluates students and provides therapy, with a central focus on students living with Autism and Aspergers. (\*\*\*, Vol. 2: 482-486, 565).
147. Dr. \*\*\* had not met Student personally; but rather, formed her opinions based on an extensive review of the evaluation reports completed by MISD, Dr. \*\*\* and of all school records. Dr. \*\*\* did not conduct an evaluation of Student. (\*\*\*, Vol. 2: 488-489, 566).
148. Dr. \*\*\* believes that Dr. \*\*\* erred in concluding that Student does not an Autism Spectrum Disorder based on not exhibiting symptoms at an early age because information about Student from an early age, i.e. before 3.5 years, is not available. (\*\*\*, Vol. 2: 494-495).
149. Dr. \*\*\* believes MISD should have suspected the presence of both OHI and an Autism Spectrum Disorder in December 2009 when completing its FIE based primarily on parent information and the records and teacher reports from \*\*\* grade/\*\*\* ISD that document social withdrawal and social skills deficits. Dr. \*\*\* did not review Student's records from \*\*\*. (\*\*\*, Vol. 2: 506-518, 568).
150. Based on her review of records and of a video of Student during an alleged altercation at school, \*\*\* believes there is a "strong possibility" that Student has an Autism Spectrum Disorder. (\*\*\*, Vol. 2: 535).
151. Dr. \*\*\* also testified that the IEP developed for Student by MISD did not provide student with a free appropriate public education because the IEP was not based on accurate or meaningful present levels of performance; the FBA was not properly conducted and did result in a BIP that targeted Student's primary areas of concern such as social withdrawal and social skills deficits; and the proposed counseling was inadequate in level of service and in proposed goals and objectives. (\*\*\*, Vol. 2: 536-545).

### **Statute of Limitations**

152. Respondent filed its request for due process on April 30, 2010.
153. Parent failed to prove that he was prevented from requesting a due process hearing due to specific misrepresentations by MISD that it had resolved the problem that forms the basis of this complaint. MISD made no representations that the problems raised in Respondent's complaint had been resolved. The evidence clearly indicates ongoing communications between the parties throughout the

2009/10 school year about the issues in dispute and in which Parent communicated his displeasure with the fact that the issues had not been resolved.

154. MISD made no representations that Student was not eligible for special education services or that services under 504 were the same as IDEA services.

155. Parent failed to prove that he was prevented from requesting a due process hearing on account of MISD's withholding of information it is required to provide under IDEA. MISD first provided Parent with procedural safeguards as required by IDEA in November 2009 when Parent requested that Student be evaluated for special education services. Parent did not request evaluation for special education prior to 11/09. (Transcript, Vol. 4: 944).

## **DISCUSSION**

The issues to be resolved in this proceeding are as follows: 1) Is Student entitled to assert claims beyond the one-year statute of limitations; 2) Did MISD timely evaluate Student for IDEA eligibility; 3) When MISD evaluated Student, were its FIE, Counseling Assessment, and FBA appropriate to identify all of Student's disabilities and develop a proper IEP; and 4) During the time when Student was or should have been identified as IDEA eligible, did MISD provide Student with a free appropriate public education?

### **I.**

#### **Whether An Exception To The One Year Statute of Limitations Applies**

IDEA provides that a parent must request a due process hearing within two 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 limitations period can be more or less if the State adopts an explicit time limitation for filing a request for a due process hearing. 34 CFR 300.511 (e). In Texas, such an explicit time limitation has been adopted: a parent must file a request within one 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 v. Texas Education Agency*, 112 S.W. 3d 234 (Tex. App.- Austin 2003, no pet.); *Marc V. v. North East ISD*, 455 F. Supp. 2d 577 (W.D. TX 2006), *aff'd on appeal*, 242 Fed. App. 271 (5<sup>th</sup> Cir. 2007).

Within IDEA, two exceptions are delineated to the application of the statute of limitations: 1) when the parent is prevented from filing the complaint due to specific misrepresentations by the school district that it had resolved the problem forming the basis of the complaint; or 2) when the parent is prevented from filing the complaint because the school district withheld information from the parent that it was required to provide under IDEA. 34 C.F.R. § 300.511(f).

Because Student has asserted claims beyond the statute of limitations, the District has the burden to assert and raise the defense of statute of limitations and prove that claims have been asserted that are beyond the statute. MISD has satisfied that burden. The burden of proof then shifts to the Student to prove facts supporting the applicability of one of the exceptions to the statute. *J.L. Ambridge Area School District*; 2009 Lexis 35403, WL 1119608 (W.D. PA 2009); *Upper Merion Area School District*, 110 LRP 57940 (SEA PA 2010). Student has failed to meet student's burden of proof regarding either exception to the statute of limitations.

Student filed student's claims on 4/30/10, so that the limitations period begins on 4/30/09. Student alleges the applicability of both of IDEA's exceptions, arguing that the limitations period should be extended back to November 2008 when Student first enrolled in MISD.

First, Student did not establish that the District made specific misrepresentations that it had resolved the problems forming the basis of Student's complaint. The problems raised by Student's complaint are *when* student was identified for special education services under IDEA and the *services provided* once student was (or should have been) identified. Student produced no evidence that MISD represented that these problems were resolved, i.e. that Student was being served under IDEA. In fact, the evidence shows ongoing communications between the parties throughout the 2009/10 school year about the issues in dispute. Parent clearly communicated his displeasure in those communications that the issues had *not* been resolved.

Student also claims that the District misrepresented student's eligibility for IDEA services by telling student that §504 services were the same as IDEA services and by telling student that student would not be eligible for IDEA services because student's academics were too high. Student argues that these misrepresentations prevented student from filing for due process. The evidence does not support Student's claims. Rather, the evidence indicates that no such representations were made during \*\*\* grade, as the parties never discussed Student's IDEA eligibility that year. When MISD talked with Parent in September and October 2009 about IDEA eligibility, the evidence shows that Parent declined special education referral at that time because he wanted to wait, not because he thought Student wasn't eligible for services. Finally, the evidence shows that, to the extent Parent waited until 4/30/10 to file for due process despite his documented disagreements with MISD, it was because Parent mistakenly believed he had to provide notice of his intent to file suit and exhaust remedies through the grievance process. Parent expressed these beliefs after his receipt of the procedural safeguards in November 2009. As such, I cannot conclude that MISD is responsible for Parent's misunderstanding of the process. I find no evidence of misrepresentations by MISD that satisfy the first exception to the statute of limitations.

Similarly, Student did not present evidence to show that MISD withheld information it was required to provide under IDEA. Student argues that MISD failed to provide student with procedural safeguards as required by IDEA during \*\*\* grade and when special education was discussed in September 2009. In relevant part, IDEA provides that procedural safeguards must be made available upon parent request for evaluation or upon parent request. 34 C.F.R. § 300.504(a)(1)(4). The evidence is clear that parent did not request an evaluation or a copy of the procedural safeguards at any time during \*\*\* grade or in September 2009. In fact, parent specifically declined special education evaluation in September 2009. I find no evidence that MISD withheld information from Parent that it is required to provide under IDEA.

Because Parent failed to establish that one of IDEA's exceptions to the statute of limitations applies to this action, the one-year statute of limitations in Texas is applicable to these proceedings. Claims arising on or after April 30, 2009 fall within the statutory limitations period.

## **II. Whether MISD Timely Evaluated Student For IDEA Eligibility**

IDEA requires that all children with disabilities ... "who are in need of special education services be identified, located, and evaluated." 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a). This obligation is known as the "child find" requirement.

The Child Find duty is triggered when the local educational agency has reason to suspect a disability coupled with reason to suspect that special education services may be needed to address that disability. When these suspicions arise, the local educational agency "must evaluate the student within a reasonable time after school officials have notice..." *El Paso ISD v. Richard R.*, 567 F. Supp. 2d 918, 950 (W.D. TX 2008); *D.G. v. Flour Bluff Indep. Sch. Dist.*, 2011 U.S. Dist. LEXIS 55252 (S.D. TX 2011).

A two-part inquiry determines whether a local educational agency has complied with its Child Find responsibilities. First, when did the local educational agency have reason to suspect that a student had a disability *and* reason to suspect that special education services might be needed to address that disability. Next, did the local educational agency evaluate the student within a reasonable time after having notice of the behavior likely to indicate a disability and a need for services? *Flour Bluff, supra*. There is no bright line rule as to what constitutes a "reasonable time," and the Fifth Circuit has yet to rule on this issue. Certain courts have found periods as short as a few months unreasonable, whereas others have found periods a year or longer to be reasonable, depending on the circumstances.

Applying the legal standards to the facts of this case, I find that MISD did not violate its Child Find responsibilities with respect to Student. As indicated previously, the statutory limitations period begins on 4/30/09, at the end of Student's \*\*\* grade year; however, I will evaluate the facts in light of Student's contention that student should have been identified and evaluated for IDEA eligibility in November 2008 upon student's enrollment at MISD. Any relief would be limited to violations within the limitations period.

#### **A. Student's \*\*\* Grade Year**

The evidence supports Student's claim that MISD had reason to suspect that student was living with a disability during student's \*\*\* grade year based on student's documented diagnoses of ADHD and \*\*\*. The evidence does not, however, establish that MISD had reason to suspect a need for special education services in order to address Student's disability. In claiming otherwise, Student relies heavily on the SST paperwork from \*\*\* ISD that documented intervention strategies designed to support Student academically. The problem with Student's reliance on the SST documentation is that it very clearly indicates that Student was successful with the general education interventions provided and that special education testing was not deemed necessary. The \*\*\* records did not give MISD reason to suspect a need for special education services; indeed, they explicitly concluded that no such need existed.

More importantly, Student's performance at MISD in \*\*\* grade also did not raise a suspicion of the need for special education services. Student achieved academic success with only minor challenges in math and band and evidenced no significant behavioral problems that were evident to student's teachers. Student's grades, TAKS scores, and disciplinary record all support this conclusion. Though Parent testified to Student's academic struggles and need for outside tutoring- and to student's emotional challenges and resulting \*\*\*- the evidence is clear that MISD had no knowledge of these difficulties during Student's \*\*\* grade year. Communications about Student during \*\*\* grade reflect only minor issues and make no mention of such struggles.

In light of Student's academic and behavioral record during \*\*\* grade, I find that nothing arose that should have caused MISD to suspect that Student was in need of special education services as a result of a disability.

#### **B. Student's \*\*\* Grade Year**

As of the start of \*\*\* grade, MISD still had reason to suspect that Student was living with a disability, but no reason to suspect a need for special education services. The parties agree that Student's behavior at school changed from the start of student's \*\*\* grade year. Over the summer, Student's emotional status had deteriorated, in part, as a result of bullying student had experienced in \*\*\* grade, and student reported suicidal ideations during the course of student's annual physical at \*\*\* in August 2009. Parent did not, however, report this to MISD at the start of the school year, so it was not known to MISD when, on September 11 and 15, 2009, Student received student's first two disciplinary referrals at MISD. These referrals were for relatively minor events. In addition to office referrals, Student was behaving differently in the classroom by failing to follow

directions and demonstrating a lack of compliance. Then, on September \*\*\*, 2009, Student received a referral for more serious conduct- allegedly participating in a fight.

Following Student's third referral in a short period of time, the exchange of information between the parties resulted in several things: MISD became aware of Student's experience of bullying in \*\*\* grade, student's suicidal thoughts, and recent symptoms of depression. MISD transferred Student at Parent's request and upon physician recommendation to \*\*\*. MISD immediately identified Student as eligible for §504 services and developed a §504 plan that was implemented on October 2, 2009.

One of the physician's transfer recommendations provided by Parent suggested that Student be considered for IDEA eligibility. The evidence indicates that the \*\*\* §504 counselor discussed the possibility of an IDEA referral with Parent in September 2009 and Parent specifically expressed a desire to begin with §504 services pending further doctor evaluation of Student. Again in October 2009, when Student had a behavioral incident in class, the counselor talked to Parent about a special education referral. Again, Parent specifically indicated that he wanted to wait about three weeks to see if better medication management and more frequent therapy could address the situation.

I find that MISD still had no reason to suspect that Student needed special education services in September/October 2009 because student's behaviors and needs seemed reasonably addressed by student's transfer to a new school and the provision of §504 services. Prior to 9/09, Student had never had any behavioral/emotional issues at school to MISD's knowledge. In September, Student received three referrals in short succession, but it was not clear that the pattern of behavior would continue once student left \*\*\*. Further, the disciplinary referrals did not result in student's removal from school and student continued to perform at approximately the same level in student's classes.

However, even assuming that a special education referral should have been made in late September/October 2009, Parent's explicit statement on two occasions that special education testing *not* be done is significant. Under IDEA, parental consent is necessary for initial special education testing; a school's failure to pursue an initial evaluation by utilizing the procedures provided in IDEA to override lack of consent does not constitute a violation of its Child Find duties. 34 C.F.R. § 300.300(3).

In November 2009, Student had two behavioral and emotional incidents of a much more serious nature. Student suffered an emotional breakdown following a dress code violation at school and was admitted to \*\*\* mental health facility for several days. About three days after Student's return to school, student had a serious melt down and displayed aggressive and emotionally volatile behavior. Two days later, on November \*\*\*, 2009, Parent consented to and initiated a special education referral. I find that, as of November \*\*\*, 2009, when Student had a serious emotional breakdown at school following student's return from \*\*\*, clear signals existed such that MISD had reason to suspect that Student needed special education services by reason of student's disability.

MISD began the evaluation process of Student on November \*\*\*, 2009, two days after having a reason to suspect Student's need for special education services. Under any test of reasonableness, two days satisfies the District's obligation to evaluate the student within a reasonable time after having notice of the behavior likely to indicate both a disability and a need for services.

Based on the evidence of record in this cause, Student did not meet student's burden of establishing a child find violation by the District. MISD's November 2009 referral of Student for special education testing constituted a timely response to Student's need for special education testing.

### **III.**

#### **Whether MISD’s FIE, Counseling Assessment, and FBA Are Appropriate Such That Student Is Not Entitled To An Independent Educational Evaluation At Public Expense**

IDEA provides extensive regulation governing the evaluation of a child for eligibility under IDEA. *See*, 34 C.F.R. §§ 300.304-300.305. In general, the parents of a child with a disability have the right to obtain an IEE when they disagree with the school’s evaluation. 34 C.F.R. § 300.502. Once an IEE is requested, a school district must either provide the IEE at public expense or request a due process hearing to prove that its evaluation meets the standards set forth in IDEA. 34 C.F.R. § 300.502(b)(2)(i). The school has the burden to prove that its evaluation is legally sufficient. MISD seeks to prove that its FIE, FBA, and Counseling Assessment are appropriate under IDEA.

The provisions governing evaluations set forth in 34 C.F.R. § 300.304 require that a school’s evaluation use a variety of assessment tools and strategies to gather functional, developmental, and academic information about the child, including information from the parent; not use any single measure or assessment as the sole criterion for determining eligibility; and use technically sound instruments that assess the relative contributions of cognitive and behavioral factors. In addition, that section requires schools to ensure that the evaluation materials used to assess a child are not discriminatory, are in the child’s native language, are used for the purposes for which the measures are valid and reliable, and are administered by trained personnel in accordance with the instructions provided by the producer of the assessment. Finally, IDEA requires that the child be assessed in all areas related to the suspected disability and that the evaluation be sufficiently comprehensive to identify all of the child’s special education needs, whether or not commonly linked to the disability category in which the child has been classified.

Section 34 C.F.R. § 300.305 sets forth additional requirements for a school’s initial evaluation of a child: the IEP team must review existing evaluation data on the child including information and evaluations provided by the parents, current classroom-based, local, or State assessments, classroom-based observations, and observations by teachers to identify, with input from the child’s parents, what additional data, if any, are needed to determine eligibility.

After consideration of the evidence of record, I find that MISD met its burden of proving that its assessments were appropriate under the IDEA. I find procedural violations in connection with the assessments performed; however, for the reasons set forth below, those procedural violations did not result in cognizable harm to Student and are thus not actionable under IDEA.

#### **A. The FIE**

With regard to the District’s FIE, Student asserts that it did not conform to IDEA standards because it “predetermined” Student’s eligibility as ED and failed to consider other areas of suspected disability such as an Autism Spectrum Disorder and OHI. As such, Student argues that the FIE failed to assess in all areas of disability and was not sufficiently comprehensive to identify all of Student’s special education needs.

Student does not challenge the validity of MISD’s FIE on other grounds, such as the validity of the tests administered, the sources of information relied upon, or the administration of the testing.

IDEA is clear in its mandate to assess students in *all* areas of suspected disability and identify *all* of a student’s special education needs, whether or not they are commonly linked to the disability category being considered. 34 C.F.R. §300.304(4)(6). The District argues that it fully complied with this requirement, as it had no reason to suspect an ASD and Student’s ADHD was being addressed through §504 services.

## 1. Failure To Assess For Autism Spectrum Disorder

Student contends that the information available to MISD from the \*\*\* ISD SST paperwork (both teacher and parent input forms) and Parent revealed indicators of ASD that should have alerted MISD to the potential presence of that disability. MISD counters that these indicators also correlate with an ED; and that, in light of the circumstances as a whole, there was no reason to suspect an ASD. The evidence supports MISD's contention that failure to assess for the presence of an ASD did not constitute a failure to assess in all areas of *suspected* disability.

In November 2009, when the FIE referral process began, Student was presenting with an emotionally volatile condition and a recent diagnosis of bipolar disorder from \*\*\*. Both Parent and MISD staff reasonably suspected that ED was the area of disability for which Student required special education services. The possibility of an ASD had never been discussed or even mentioned by Parent. The references by Student's \*\*\* grade teachers in the SST paperwork from \*\*\* to Student's social withdrawal and isolation were not sufficient to suggest an ASD, particularly given that those indicators are also consistent with an ED and that current teacher referral data did not emphasize social withdrawal and isolation in describing Student's challenges. Nothing in the record suggests that MISD should have suspected that Student was living with an ASD; as such, MISD's failure to assess in that area of disability did not render its evaluation inappropriate.

In fact, nothing in the record even now establishes that Student is living with an ASD. The only evaluation of Student for an ASD was completed at Student's request by Dr. \*\*\* in August 2010. Dr. \*\*\* conducted an extensive evaluation of Student and concluded that the symptoms student exhibits that could be reflective of an ASD are more properly attributed to Student's anxiety and mood disorder, the basis of student's eligibility as ED. The significance of Dr. \*\*\* conclusion is not whether Student has an ASD or not; but rather that her findings in August 2010 underscore the reasonableness of MISD's view of Student's suspected disability as ED in November 2009.

The evidence presented by Student to prove that MISD should have suspected an ASD consists of educator and expert impressions of Student and a review of student's records for indicators of ASD. All of the indicators relied on by Student also correlate with the presence of ED. When considering Student's history, diagnoses and recent experiences at \*\*\* in November 2009, MISD's suspicion of an ED was reasonable.

MISD first learned of Parent's belief that Student may have an ASD on April 9, 2010 at the ARDC where Parent requested additional evaluation in that area. MISD initially declined Parent's request for an ASD evaluation at the April 9 ARDC meeting; however, MISD subsequently offered to provide such an evaluation on April 14, May 24, and May 26, 2010. Parent declined to participate in the ARDC process or to accept the District's offer to evaluate. I find that MISD's offer to provide an ASD evaluation of Student on April 14, 2010 constitutes a timely offer to evaluate upon learning of a suspected disability in that area. The failure to include testing for an ASD in its original testing does not render its FIE inappropriate.

## 2. Failure to Assess For OHI

MISD did, however, have reason to suspect OHI eligibility based on Student's clearly documented ADHD. The failure to assess Student for OHI eligibility and fully identify student's needs in that area constitutes a violation of the evaluation procedures of IDEA. However, because the FIE recommended that Student was eligible for services as ED; the failure to evaluate for OHI did not deprive Student of eligibility for services entirely. The failure to evaluate for OHI constitutes a procedural violation and is actionable only if it results in cognizable harm to the student. *Eric H. v. Judson ISD*, 2002 U.S. Dist. Lexis 20646 (W. D. TX 2002) (Dispute over eligibility classification where student continues to be eligible for special education is a procedural matter and parent must prove that change in eligibility status resulted in cognizable harm to student);

\*\*\* v. *Banquette ISD*, Docket No. 048-SE-1010 (SEA TX 2011)(Eligibility classification error under IDEA is procedural in nature).

The question then is whether the FIE's failure to evaluate for OHI eligibility resulted in an IEP that failed to address Student's needs in this area. The evidence shows that it did not. Student's IEP provided for accommodations and strategies specifically designed to address student's ADHD and attention issues. Further, the evidence shows that Student obtained the requisite academic benefits during Spring 2010 following the development and implementation of student's IEP. See, Section IV *infra*. As such, the failure to assess for OHI eligibility did not result in substantive harm to Student and does not constitute an actionable violation of IDEA.

In conclusion, the evidence demonstrates that MISD's FIE comported with the standards of IDEA and was legally appropriate such that Student is not entitled to an IEE at public expense. Student established a procedural violation in MISD's failure to assess for OHI; however, that violation did not result in any cognizable harm to Student.

## **B. The Counseling Assessment**

MISD conducted a counseling assessment of Student in March 2010, several weeks after Student's eligibility ARDC and the implementation of student's special education services. Student complains that MISD's counseling assessment was not timely and that it did not rely on formal evaluation measures.

### **1. Timeliness of the Counseling Assessment**

Student correctly asserts that student's counseling assessment should have been completed as part of a comprehensive FIE at the time of student's FIE, and not several weeks afterward. IDEA requires that an FIE include a variety of assessment tools to gather information to help determine the content of a child's IEP and that it be sufficiently comprehensive to identify all of the child's special education and related services needs. 34 C.F.R. § 300.304(b)(1); 300.304(c)(6). In evaluating Student for a suspected emotional disturbance, particularly in light of Student's developmental history and recent depression, LSSP \*\*\* had reason to suspect that Student might require the related service of counseling. \*\*\* should have conducted the counseling assessment as part and parcel of Student's psychological FIE and the failure to do so was a violation of the evaluation procedures of IDEA.

As discussed in the context of the FIE's failure to evaluate for OHI eligibility, a procedural violation is actionable only if it results in cognizable harm to the student. In this case, had the counseling assessment been completed along with the FIE in February 2010, it would not have resulted in a different outcome for Student. The counseling services recommended by the assessment were never agreed to by Parent and never implemented during Student's tenure at MISD. In addition, the evidence demonstrates that Student obtained a free appropriate public education following the implementation of student's IEP in February 2010 despite the lack of counseling services. See, Section IV *infra*. Because I find no substantive harm that flows from MISD's procedural delay in conducting Student's counseling assessment, I decline Student's request for relief based on an untimely evaluation.

### **2. Appropriateness of the Counseling Assessment**

Student also argues that the assessment was substantively inappropriate because \*\*\* failed to conduct formal evaluation measures in her assessment. Student is correct that the counseling assessment was scant in its additional evaluation of Student and relied primarily on the recently completed psychological evaluation. However, the evaluation recommended that Student receive counseling services and correctly identified the areas of concern documented in Student's FIE. As such, the evaluation was appropriate and provided the

ARDC with the necessary information to devise a counseling plan for Student. Because the counseling assessment resulted in an offer of counseling services to Student to address student's identified needs, I find the assessment to be appropriate under IDEA.

### **C. The FBA**

Student complains that MISD's FBA was inappropriate because it was completed at the ARDC meeting rather than by observation over time of Student's behaviors in a variety of settings. As such, Student contests the propriety of the FBA and seeks an IEE in that area.

Like the Counseling Assessment, an FBA is one of the assessment tools that might be used to gather information to help determine a student's IEP. Also, like the Counseling Assessment, the FBA should have been conducted as part of Student's comprehensive FIE given Student's behavioral needs as related to student's suspected ED. MISD used the FBA to identify Student's problem behaviors and help the ARDC select interventions to directly address those behaviors; however, MISD did not conduct the FBA in accordance with best practices based on observation of Student's behavior over time and in a variety of settings.

As discussed previously with regard to the counseling assessment, the failure to conduct the FBA as part of the FIE and in accordance with best practices is a procedural issue that is actionable only if it results in the denial of a free appropriate public education to Student. The question then is whether the FBA resulted in a BIP and Behavior IEP that addressed Student's needs and conferred upon student the requisite benefit in the behavioral arena. *Lake Travis ISD v. M.L.*, Cause No. 1:06-cv-00046-SS (W.D. TX 2007).

The evidence demonstrates that Student's BIP, Behavior IEP, and accommodations and strategies contained in student's IEP adequately addressed student's behavioral needs. Behavioral data reflects meaningful progress toward Student's IEP goals. Email communication between the parties indicates no serious behavioral issues following the implementation of Student's IEP. Student received no disciplinary referrals and had no emotional breakdowns or incidents of concern at school.

Because the manner of conducting Student's FBA did not result in a failure to address Student's emotional and behavioral needs that constituted a denial of a free appropriate public education, I decline Student's request for an independent FBA. See, Section IV *infra*.

For all the reasons set forth above, I find that MISD satisfied its burden of proof and established that Student's FIE, Counseling Evaluation and FBA, satisfy the standards of IDEA. To the extent that MISD committed procedural violations in completing its assessment of Student, I find that no cognizable harm resulted from those violations. As such, Student is not entitled to an IEE at public expense.

### **IV.**

#### **Whether The District Provided Student With A Free Appropriate Public Education After Such Time As Student Was Identified As Eligible For Special Education**

Having found that MISD did not violate its Child Find duties under IDEA and that Student's identification as IDEA eligible in February 2010 was timely, the time frame for evaluating MISD's provision of a free appropriate public education to Student is from February 16, 2010 to the end of student's \*\*\* grade year. Student argues that student was not provided with a free appropriate public education due to the lack of necessary services to address student's behavioral and emotional needs, social withdrawal, social skills deficits, and areas of academic weakness.

The U.S. Supreme Court has defined a free appropriate public education as one that consists of “personalized instruction with sufficient services to permit the child to benefit educationally from that instruction.” *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the court developed a two prong analysis to determine if a school district has met its obligation to provide a free appropriate public education: 1) whether the district complied with the procedural requirements of IDEA, and 2) whether the district offered a program to the student that was reasonably calculated to provide educational benefit. *Id.* at 206-207.

Procedural violations of IDEA have been discussed previously in connection with MISD’s assessment of Student. No other procedural violations are alleged in relation to Student’s IEP.

The essence of determining whether a *substantive* violation of IDEA has occurred is whether the school’s program has provided the student with the requisite educational benefit. IDEA does not require an education that maximizes a student’s potential; rather, the school must provide an education that is reasonably calculated to enable the child to achieve *some* benefit. *Some* benefit means an educational program that is meaningful and offers more than a *de minimus* educational benefit; it must be “likely to produce progress, not regression or trivial educational advancement.” *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5<sup>th</sup> Cir. 1997).

Although courts have not adopted a specific substantive standard to determine when a free appropriate public education has been provided, the Fifth Circuit in *Michael F.* identified four factors to consider in analyzing a school’s program: 1) is the program individualized and based on the student’s assessment and performance; 2) is the program administered in the least restrictive environment; 3) are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) are there demonstrated positive academic and non-academic benefits to the student. *Michael F.*, *supra*.

Applying these factors to MISD’s provision of services to Student between February 16, 2010 and student’s withdrawal at the end of student’s \*\*\* grade year, I find that MISD provided student with a free appropriate public education during the spring semester of 2010.

Student contends that the IEP, and in particular the counseling goals and objectives, failed to address student’s social and emotional needs. I concur that the counseling goals and objectives were hastily drafted at the March ARDC meeting and that one of the goals was not proper to address Student’s needs. However, this portion of Student’s IEP was never actually implemented because agreement was not reached. The determination of a free appropriate public education must be made on the benefits conferred by the IEP as a whole.

MISD developed an IEP for Student over several ARDC meetings in February and March 2010 that contained very specific interventions and strategies that were based on student’s unique and individualized needs as identified by assessment, performance, and teacher and parent input. The appropriateness of Student’s IEP is most clearly demonstrated by comparing the accommodations and provisions of Student’s IEP to the recommendations made by Dr. \*\*\* in her report of August 2010. (FF # 139). In addition, Student’s IEP provided for 1:1 tutoring on a daily basis and Student received a substantial number of tutoring hours from MISD following student’s identification for special education services.

The evidence also demonstrates collaboration between MISD and Parent in creating Student’s IEP. Parent participated in and contributed to the development of Student’s IEP despite the contentious nature of the parties’ relationship during Spring 2010. MISD routinely communicated with Parent about Student’s needs and progress over the course of the spring, considered Parent’s input on the IEP and FBA and made changes

requested by Parent, and ensured Parent participation at ARDC meetings by rescheduling meetings when Parent requested such. I recognize that Parent disagreed with many of MISD's decisions; however, that does not mean that MISD's actions precluded Parent participation or evidenced a lack of collaboration with Parent.

Finally, the evidence establishes that Student received both academic and non-academic benefits from student's educational program during Spring 2010. Academically, Student maintained student's performance as an \*\*\* and \*\*\* student, passed all portions of student's \*\*\* grade TAKS testing, and exhibited no serious academic problems in any of classes. Behaviorally, progress data indicates that Student made meaningful progress toward student's Behavior IEP goals, received no disciplinary referrals, and developed more positive behaviors at school. Emotionally, there is no evidence in the record to suggest that Student continued to experience serious emotional incidents after the implementation of student's IEP. Certainly, no such incidents occurred at school.

In light of the Student's demonstrated progress in the least restrictive environment, student's general education classroom, Student failed to establish that MISD denied student a free appropriate public education during the Spring of 2010. Student further failed to show that any deficits in student's FBA/BIP or counseling IEP resulted in a denial of a free appropriate public education.

Having found that MISD provided Student with a free appropriate public education, Student's request for compensatory relief is hereby denied.

### CONCLUSIONS OF LAW

1. Respondent MISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEIA and its implementing federal and state regulations. MISD was Student's resident district under IDEA from November \*\*\*, 2008 through June \*\*\*, 2010. 20 U.S.C. §1401; 34 C.F.R. § 300.101.
2. The one-year statute of limitations in Texas is applicable to this action. 34 C.F.R. § 300.507; 19 T.A.C. § 89.89.1151.
3. The District bears the burden of proof on the appropriateness of its assessments of Student. 34 C.F.R. §300.502.
4. Student bears the burden of proof on the alleged violations of the District's Child Find obligations and obligation to provide a free appropriate public education. *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49 (2005).
5. The District did not violate its Child Find duties under IDEA by failing to timely evaluate and identify Student as eligible for special education services. 34 C.F.R. § 300.111(a).
6. The District's FIE, Counseling Assessment and FBA are appropriate under IDEA. Student is not entitled to an Independent Educational Evaluation at public expense. 34 C.F.R. §300.502.
7. Following Student's identification as eligible for special education services in February 2010, the District provided Student with a free appropriate public education for the remainder of the 2009/2010 school year. *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5<sup>th</sup> Cir. 1997); 34 C.F.R. § 300.101.

## ORDERS

After due consideration of the record, and the foregoing findings of fact and conclusions of law, this Hearing Officer hereby **ORDERS** that all relief sought by Petitioner District is **GRANTED**. Respondent Student is not entitled to an Independent Educational Evaluation at MISD expense.

It is further **ORDERED** that all relief sought by Respondent Student is **DENIED**.

All relief requested by either party that is not specifically awarded herein is hereby **DENIED**.

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

**SIGNED** and **ENTERED** this 27<sup>th</sup> day of July 2011.

*/s/ Lynn E. Rubinett*

Lynn E. Rubinett

Special Education Hearing Officer for the State of Texas

MESQUITE ISD	§	BEFORE A SPECIAL
Petitioner	§	EDUCATION
	§	
v.	§	
	§	HEARING OFFICER FOR THE
STUDENT bnf PARENT	§	
Respondent	§	STATE OF TEXAS

**SYNOPSIS**

**Issue:** Whether an exception to the one-year statute of limitations is applicable to this action?

**Held:** For the District. Student failed to prove the applicability of one of the two exceptions to the statute of limitations set forth in IDEA.

**Cite:** 34 C.F.R. § 300.511

**Issue:** Whether the District violated its Child Find duties under IDEA by failing to timely evaluate and identify Student as eligible for special education services.

**Held:** For the District. Student failed to prove that District did not evaluate and identify student for eligibility in a timely manner.

**Cite:** 34 C.F.R. § 300.111(a)

**Issue:** Whether the District's January 2010 FIE, Counseling Assessment, and FBA are appropriate under IDEA such that Student is not entitled to an IEE at public expense?

**Held:** For District. District met its burden of proof to show that its evaluation of Student was appropriate. The evaluation assessed Student in all areas of disability reasonably known to the District as of the time of the evaluation. To the extent that other areas were identified subsequently that required further assessment, the District was willing to assess, but Parent denied District the opportunity to complete such assessments. To the extent that the District failed to assess in the known area of OHI (based on Student's ADHD), such failure constituted a procedural violation that did not result in a denial of a free appropriate public education because the District's IEP addressed that area of disability.

**Cite:** 34 C.F.R. §300.502.

**Issue:** Whether the District denied Student a free appropriate public education after Student was identified as eligible for services in February 2010?

**Held:** For the District. The District demonstrated that it provided Student with a free appropriate public education during the spring 2010 semester, as evidenced by behavioral and academic progress data.

**Cite:** 34 C.F.R. § 300.101.