BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS

STUDENT,		
bnf PARENTS,	**§**	
Petitioner,	**§**	
	§	
v.	**§**	**DOCKET NO. 229-SE-0412**
	§	
MABANK INDEPENDENT	**§**	
SCHOOL DISTRICT,	**§**	
Respondent.	**§**	

DECISION OF THE HEARING OFFICER

Introduction

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

Party Representatives

Student was represented throughout this litigation by student's legal counsel, Dorene Philpot with The Philpot Law Firm. The Respondent was represented throughout this litigation by its legal counsel Holly Wardell with the law firm of Eichelbaum Wardell Hansen Powell & Mehl, P.C. Student's mother, ***, Ms. Philpot's co-counsel Chris Schulze, with the law firm of Cirkiel & Associates, and Melanie Watson, Ms. Philpot's Legal Assistant, were also present during the three days of hearing. ***, Special Programs Director for MISD was present as the party representative throughout the three days of hearing. ***, a school district speech/language pathologist, was present during the afternoon session on the first day of hearing as a consulting/testifying expert witness.

Resolution Session and Mediation

The parties met in a Resolution Session on Friday, April 20, 2012 but it was not successful in resolving the issues in this case. A mediation session was conducted on June 6, 2012 but unfortunately it was not successful either.

Procedural History

The initial request for a due process hearing was filed on April 4, 2012. The due process hearing was first continued at Petitioner's request to resolve a scheduling conflict for student's counsel and to complete an agreed upon set of Individual Educational Evaluations (IEEs). The hearing was reset for May 14-16, 2012. Petitioner requested a second continuance because the agreed upon IEES could not be completed in time for the May hearing dates and to allow the parties an opportunity to attempt mediation before proceeding to hearing. Respondent's objection to the request was overruled. The hearing was reset for June 19-21, 2012.

The due process hearing was conducted on June 19-21, 2012. At the completion of the hearing the parties requested an opportunity to submit written closing arguments and legal briefs. The parties submitted their written closing arguments and legal briefs in a timely manner on August 3, 2012. The record remained open until August 13, 2012 when additional exhibits from both parties were admitted into evidence and supplemental written arguments were added to the record. The parties agreed the Decision of the Hearing Officer would be extended in accordance with IDEA regulations and that the deadline for the Decision of the Hearing Officer was September 12, 2012.

Issues

Petitioner submitted the following issues for decision in this case:

1. Whether the exceptions to the one year statute of limitations rule should be applied in this case to include claims

arising within the three year period immediately preceding the filing of Petitioner's request for hearing on April 4, 2012; i.e., whether claims arising beginning on April 4, 2009 and going forward fall within the exceptions to the one year statute of limitations rule in this case;

2. Whether the school district failed to devise an appropriate Individual Educational Plan (IEP) within the meaning of the Individuals with Disabilities Act (IDEA) and whether the IEP was delivered in the least restrictive environment during the relevant time period;

3. Whether the school district failed to address Student's behavioral needs by failing to conduct a timely and appropriate Functional Behavior Assessment (FBA) and by failing to devise and implement an appropriate Behavior Intervention Plan (BIP) -- including the use of positive behavior supports -- during the relevant time period;

4. Whether the school district failed to provide staff with appropriate training as to the nature of Student's disabilities, appropriate behavioral interventions, how to address and avoid bullying behavior, and appropriate comments about student behavior ;

5. Whether the school district failed to conduct timely and appropriate assessments to address Student's needs; specifically whether:

    a. Student should be identified as a student with autism (based on a diagnosis of Asperger's), Other Health Impairment (OHI)(based on a diagnosis of Attention Deficit Hyperactivity Disorder)(ADHD); and, learning disabilities (based on a diagnosis of dyslexia);

    b. The school district failed to conduct Student's three re-evaluation in a timely manner;

    c. The school district should have conducted an assessment for dysgraphia and an assistive technology (AT) re-evaluation to address Student's writing deficits;

    d. The school district should have conducted an in-home training assessment;

    e. The school district should have conducted a counseling assessment; and,

    f. The school district should have conducted an assessment in order to determine Student's needs for Extended School Year (ESY) services;

6. Whether the dyslexia services stated in Student's IEP and as provided by the school district are appropriate and provide student with the requisite educational benefit under IDEA;

7. Whether Student has been the victim of bullying, whether the school district failed to address this issue appropriately and effectively, and whether the alleged failure to do so was a denial of a free, appropriate public education (FAPE) under IDEA;

8. Whether the school district failed to appropriately respond to parental requests for Student's educational records;

9. Whether the school district falsified Student's educational records, for example by:

    a. Giving student passing grades for work that was not at grade level or passing;
    b. Altering documents such as the DAEP form dated 10-7-11; and,
    c. Misstating IEP progress in mastering IEP objectives;

10. Whether the school district improperly denied the following parental requests and whether the school district failed to provide Student's parents with the requisite prior notice of its refusal with regard to the following:

    a. Videos of the behavioral incidents of ***, 2012;
    b. Disciplinary records pertaining to an aide who works with Student who has previously been disciplined for mistreating and injuring other students;

c. Records relevant to Student's defense of pending disciplinary charges; and,

d. When the school district denied parental requests to change Student's placement from the DAEP as well as its refusal to provide other changes in services and programming requested by Student's parents;

11. Whether the school district failed to properly implement Student's IEP including specifically whether the school district failed to provide services or implement student's IEP during student's placement in the DAEP and while student was suspended for more than 10 days (such as failing to provide student with sensory items student needs such as student's ***); and whether the school district failed to provide IEP progress reports to Student's parents in a timely manner;

12. Whether the school district failed to appropriately respond to a parental request for an IEE within the past school year, including whether the school district placed conditions on the requested IEE that are inappropriate under the IDEA; and,

13. Whether the IEP's failed to include objective and measureable goals and objectives based on Student's present levels of performance.

Respondent submitted the following additional issues for decision in this case:

14. Whether Petitioner can meet petitioner's burden of proof on petitioner's IDEA claims;

15. Whether the procedural violations as alleged resulted in a substantive educational harm and therefore whether there was a violation of IDEA;

16. Whether Petitioner's claims are barred in whole or in part due to Petitioner's failure to exhaust administrative remedies;

17. Whether Petitioner stated a cause of action upon which relief can be granted;

18. Whether Petitioner's claims are barred in whole or in part by the one year statute of limitations rule applied in Texas;

19. Whether Petitioner's claims are barred in whole or in part on the basis of estoppel; and

20. Whether Petitioner is entitled to access to videos that contain personally identifiable information about other students or documents protected by copyright not owned by the school district.

Requested Relief

Petitioner requests the following items of relief:

1. Reimbursement for the cost of private placement if the parties are unable to come to an agreement on an appropriate public school program and placement through settlement negotiations;

2. Reimbursement for the cost of pending outside private assessments as well as the cost, including mileage, for *** testing ($200.00 for the cost of the testing with *** miles each way for two testing sessions);

3. Compensatory educational services the type, scope, and amount to be determined by the hearing officer on the basis of the evidence, including recommendations of expert witnesses, and the time period the hearing officer finds violations occurred; and,

4. Any other relief deemed appropriate by the hearing officer based on the recommendations of the outside evaluations.

Respondent requests the following items of relief:

1. The hearing officer dismiss Petitioner's claims on the basis of estoppel, claims outside the one year statute of limitations period, and for failure to exhaust administrative remedies; and,

2. Deny all other IDEA claims.

Findings of Fact

1. Student was in the *** grade during the 2011-2012 school year at the time student's request for due process hearing was filed. In *** grade Student was eligible for special education services as a student with an emotional disturbance. (Petitioner's Exhibit 7, p. 5)(referred to hereafter as "P. Ex. ___, p. ___")(P. Ex. 8, p. 5) (P. Ex. 12, p. 5). Student was placed in a special education *** (***) with "out" classes for resource math, resource reading and general education PE. (P. Ex. 7, p. 38, 43) P. Ex. 8, pp. 45-46) (Respondent's Exhibit 41, referred to hereafter as "R. Ex. ___"). In previous years Student was identified as eligible for special education services as a student with Other Health Impairment (OHI) due to Attention Deficit Hyperactivity Disorder (ADHD).(R. Ex. 6, p. 200) (R. Ex. 9, p. 249) (R. Ex. 10, p. 286).

2. Student's initial Full Individual Evaluation (FIE) was completed on March 27, 2008 (R. Ex. 28 through 35). An OT evaluation was conducted in June 2008. (R. Ex. 26). An Assistive Technology (AT) evaluation was conducted in March 2009 (R. Ex. 23). A three year FIE re-evaluation was completed on March 12, 2011, two weeks before the re-evaluation deadline. (R. Ex. 18). The FIE reevaluation assessed Student's receptive and expressive language, student's academic achievement, educational performance, fine and gross motor abilities, intellectual and adaptive behavior, and behavior. Sociological data was a component of the FIE re-evaluation. The FIE re-evaluation met all IDEA criteria. (R. Ex. 18).

3. Additional evaluations for occupational therapy and dysgraphia, Assistive Technology, and a vision and hearing assessment were also components of the three year reevaluation. (R. Ex. 14) (R. Ex. 24) (R. Ex. 22, pp. 407, 418). Over the years the school district has evaluated Student in all areas of suspected disability including autism, OHI, and learning disabilities. (R. Ex. 18) (R. Ex. 19) (R., Ex. 21, p. 402) (R. Ex. 28) (R. Ex. 31) (R. Ex. 35) (Transcript, Volume III, page 797) (referred to hereafter as "Tr. Vol. ___, p. ___").

4. Student was first placed into special education in 2008. At the initial placement ARD Student's mother signed a receipt of the set of procedural safeguards; the safeguards contained an explanation of parental rights to a due process hearing with step by step instructions on how to request a hearing. (R. Ex. 50, p.536) (R., Ex. 40, pp. 534-535) (Tr. Vol. III, pp. 801-804).

5. It was the school district's practice to send a copy of the procedural safeguards to the parent along with the notice of every ARD meeting. (R. Ex. 39) (Tr. Vol. III, pp. 799-801). During the past two years the procedural safeguards were attached to every ARD notice sent to Student's mother by the classroom teacher. (Tr. Vol. II, p. 658). Since April 2009 the school district provided copies of the procedural safeguards to Student's mother before every ARD meeting. (R. Ex. 2, p. 4) (R. Ex. 3, p. 48) (R. Ex. 4) (R. Ex. 5, p. 138) (R. Ex. 6) (R. Ex. 7) (R. Ex. 9) (R. Ex. 10) (R. Ex. 39).

6. ARD notices and procedural safeguards were sent home in Student's backpack. (Tr. Vol. II, p. 644)(Tr. Vol. III, pp. 838, 840-841). There is some evidence that Student did not always share school materials sent home in the backpack with student's mother. (P. Ex. 19, p. 3). However, Student's mother never expressed a concern about failing to receive procedural safeguards. A copy of the safeguards was also available at every ARD meeting. (Tr. Vol. III, pp. 870-871). ARD notices were also mailed home. (Tr. Vol. III, pp. 838, 867).

7. The school district provided Student's mother with ARD paperwork, including notice of ARD decisions, for each ARD meeting held within the past four years. (R. Ex. 2, p. 42) (Re. Ex. 3, p. 57) (R. Ex. 4, p. 133) (R. Ex. 5, p. 181) (R. Ex. 39) (Tr. Vol. III, p. 811). Student's mother was a full participant in the educational process for Student. She attended ARD meetings, asked questions and offered her opinions. (R. Ex. 2, p. 43) (R. Ex. 3, p. 56) (R. Ex. 4, p. 134) (Tr. Vol. III, p. 805). Student's mother did not attend several ARD meetings due to conflicts with her work schedule although she agreed the ARD meetings could proceed without her. (Tr. Vol. II, pp. 500-501)(P. Ex. 3, p. 14) (P. Ex. 4, p. 42) (P. Ex. 7, p.197). Student's mother never requested reimbursement for outside services at an ARD. (Tr. Vol. III, pp. 805-806).

8. Student's mother was also kept informed about Student's educational performance through periodic progress reports

and communicated with school personnel through emails and notes sent back and forth in Student's backpack. (P. 41) (Tr. Vol. II, pp. 581, 597, 642-644) (Tr. Vol. III, p. 805). The school district offered a behavior training program for parents called "Love and Logic" but Student's mother did not participate. (Tr. Vol. I, p. 363(Tr. Vol. II, pp. 560, 594)). The school district maintained an on-line family access program which allows parents to look up a student's grades, attendance, etc. Student's mother accessed this program three times during the 2011-2012 school year. (Tr. Vol. I, p. 363) (Tr. Vol. II, p. 594, 560) (Tr. Vol. III, pp. 1060-1061).

9. A psychological was a component of the school district's three year March 2011 FIE re-evaluation. The purpose of the psychological was to determine whether Student continued to meet eligibility criteria for special education as a student with OHI due to ADHD and determine whether autism or an emotional disturbance would be more appropriate eligibility classifications. (R. Ex. 19, p. 390). The psychological concluded it was more appropriate to classify Student as eligible for special education as a student with an emotional disturbance (ED) because student met one of the specified ED criteria: "inappropriate behavior under normal circumstances." The psychologist determined Student's level of hyperactivity, aggression and inattentiveness surpassed that of typical ADHD and was better explained by an emotional disturbance. (R. Ex. 19, pp. 394, 398) (R. Ex. 20, p. 400).

10. Student does not display significant delays in verbal or non-verbal communication or any pragmatic language deficits that would otherwise indicate autism or a pervasive developmental disorder. (R. Ex. 13) (Tr. Vol. I, pp. 213, 661). Student's verbal skills, desire for social interaction and ability to understand humor are inconsistent with an autism spectrum disorder. (Tr. Vol. II, p. 717). IDEA criterion for an autism spectrum disorder does not incorporate or refer to the medical criteria stated in the DSM-IV-TR used by clinicians. (Tr. Vol. II, pp. 740-741)(Tr. Vol. III, pp. 907-908). The psychological test results showed it was "very unlikely" Student was a student with Asperger's Disorder and therefore autism was not an appropriate eligibility classification. (R. Ex. 19, pp. 395, 398). The psychological included a set of recommendations to meet Student's academic and behavioral needs. (R. Ex.19, p. 398).

11. In order to qualify for special education services as a student with a specific learning disability the learning problems cannot be the result of an emotional disturbance -- an exclusionary factor. (R. Ex. 18, p. 384) (Tr. Vol. III, pp. 850, 855-856). Even if Student was identified as eligible for special education under a classification other than ED, the label would not drive the services; instead the school district's focus is on whether student's educational program and placement address all areas of need. (Tr. Vol. III, p. 868).

12. Student's mother first mentioned Student might have dysgraphia at an ARD on December 16, 2008 because student's handwriting was so poor. (R. Ex. 12, p. 333). The school district addressed this concern with an occupational therapy (OT) assessment and an assessment in written expression. (P. Ex. 15, pp. 5-8) (R. Ex. 24) (R. Ex. 26) (T. Vol. I, pp. 853-855) (Tr. Vol. III, p. 797). The OT and written expression testing were completed by March 13, 2009 and reviewed at an ARD on May 8, 2009. (R. Ex. 10, p. 317) (R. Ex. 11, p. 326). The school district conducted an Assistive Technology (AT) assessment on March 10, 2009 also reviewed at the May 2009 ARD. (P. Ex. 15, pp. 2-4) (R. Ex. 10, p. 317) (R. Ex. 23).

13. An OT three year re-evaluation conducted on February 15, 2012 concluded student's handwriting skills were "good." (R. Ex. 14, p. 344). A three year reevaluation writing assessment was conducted in 2011 as part of the three year FIE reevaluation. (R. Ex. 15). Although Student's handwriting improved from the earlier writing assessment student scored in the below average range for written expression. (Tr. Vol. III, pp. 845-847)(R. Ex. 15).

14. Student's handwriting is difficult to read. (P. Ex. 38, pp. 7, 8, 12, 12, 15) (P. Ex. 40, p. 155) (P. Ex. 54). Student's legibility varies depending on the length of the writing sample. (Tr. Vol. III, p. 939). Student's IEP included some strategies to accommodate student's deficits in written expression. (R. Ex. 4, pp. 107, 109-111, 116), 118-119) (R. Ex. 5, pp. 157-159, 163) (R. Ex. 7, p. 157). For example, accommodations included providing Student with *** (P. Ex. 12, p. 16) (Tr. Vol. II, p. 532). Student also had some exposure to keyboarding instruction but use of the computer has been somewhat difficult for student in the past. (P. Ex. 2, p. 26) (R. Ex. 23, p. 448) (Tr. Vol. I, p. 178) (Tr. Vol. II, p. 582). The March 2010 AT evaluation recommended continued keyboard strengthening exercises and "Handwriting without Tears" for cursive writing. (R. Ex. 23, p. 449).

15. The school district conducted two psychological evaluations and three Functional Behavior Assessments over the past four years. (R. Ex. 15) (R. Ex.19) (R. Ex. 31) (R. Ex. 32) (R. Ex. 33) (R. Ex. 35) (R. Ex. 36). The psychological component of the school district's FIE's addressed Student's need for counseling services. (R. Ex. 20, p. 399).

Student has received counseling as a related service from the school district since 2008. (R. Ex. 12, p. 332). However, the amount of counseling services is inadequate to address Student's needs; last year student received 10 minutes of counseling every other week. In March 2012 the amount of counseling services was increased to 10 minutes every week. (P. Ex 41, p. 25) (P. Ex. 32, p. 16) (Tr. Vol. I, p. 156). Student needs 30-45 minutes of counseling each week. (Tr. Vo. I, pp. 156, 158) (Tr. Vol. II, p. 689) (P. Ex. 37, pp. 3, 4, 19) (P. Ex. 40, pp. 101, 237, 247).

16. For the past four years the school district collected data at the beginning of each new school year to determine whether Student regressed. However, the documentation is not particularly descriptive and the underlying data is unclear. (R. Ex. 48). School staff determined Student was capable of recouping skills for previously mastered goals and student therefore did not exhibit the need for extended school year services based on regression of academic skills. (R. Ex. 4, p. 127) (R. Ex. 48) (Tr. Vol. III, pp. 861-862).

17. Student was identified as a student who exhibits dyslexia tendencies in October 2007. The use of *** was recommended. (P. Ex. 15) (R. Ex. 37, p. 525). In *** grade, Student resisted the use of the *** as "too babyish." Therefore, student's classroom teacher consulted with the school district's dyslexia specialist and the Director of Special Education and developed her own individualized program for Student that incorporated the required components of dyslexia instruction. (Tr. Vol. II, pp. 580-581). This approach was continued by Student's *** and *** grade teacher. (R. Ex. 72). Student also received the "dyslexia bundle" as accommodations in student's IEP. (R. Ex. 3, p. 3) (R. Ex. 4, p. 109) (R. Ex. 5, p. 157).

18. During the 2011-2012 school year Student received individualized dyslexia instruction in student's behavior adjustment class for 47 minutes per day and another 47 minutes per day in student's resource reading class. (P. Ex. 8, p. 46) (R. Ex. 4, p. 127) (Tr. Vol. II, p. 643). Student's final reading grade for the 2011-2012 school year was an ***. (R. Ex. 41). Student met or exceeded level of mastery criteria on three of student's four current Reading IEP goals and objectives. (R. Ex. 43, p. 551). Although the 2011 FIE reevaluation found Student did not meet eligibility criteria as a student with a learning disability continued dyslexia services were recommended along with other reading strategies to facilitate learning. (R. Ex. 18, p. 385). Student also received the "dyslexia bundle" as accommodations in student's reading IEP. (R. Ex. 3, p. 3) (R. Ex. 4, p. 109) (R. Ex. 5, p. 157).

19. Student's final grades for the 2011-2012 school year were: science ***; PE ***; Art ***; Math ***: Language Arts ***; Reading ***; Enrichment ***; and History ***. (R. Ex. 41). Student earned "Commended Performance" on the spring 2010 TAKS reading test. Student took the TAKS-M, a modified version of the TAKS test; nevertheless the TAKS-M is an on grade level test. (R. Ex. 47) (Tr. Vol. II, pp. 629, 652). The decision to administer the TAKS-M was discussed at an ARD meeting on March 31, 2011 and based on Student's academic and behavioral needs. (P. Ex. 7, pp. 29-31, 43) (R. Ex. 6) (Tr. Vol. II, pp. 671-674, 812-813).

20. Student made progress socially. Student had friends at school. (Tr. Vol. II, pp. 486, 585). Student participated in the general education PE class without the need for special modifications and interacted with classmates appropriately. Student enjoyed PE. (Tr. Vol. III, pp. 1045-1046). Student had a positive experience *** in *** grade. ***. (Tr. Vol. I., pp. 385-386)(Tr. Vol. III, pp. 818, 1049, 1059-1060). Student has never reported being the victim of bullying to school staff. (Tr. Vol. I., p. 386).

21. In student's *** grade resource math class Student was fun to be around and generally exhibited typical *** behavior. The math resource teacher enjoyed having student in her class. Student's behavior was much improved from the previous year. (Tr. Vol. III, pp. 1077-1078). Student enjoyed going to the cafeteria and student developed a circle of friends and an interest in ***. At school student talked about riding bikes with friends in the neighborhood and spending the night with them. (Tr. Vol. I., p. 385). Student's teachers and the behavioral specialist who worked with Student spoke about student with affection. (Tr. Vol. I., pp. 385)(Tr. Vol. II., pp. 594, 596)(Tr. Vol. III, pp. 944-945, 1077-1078).

22. Student has been supported by the school district's behavioral specialist since *** grade. (Tr. Vol. I, pp. 350, 364-366). Last year the behavioral specialist interacted with Student at least once a week for all 36 weeks of the school year. (Tr. Vol. I., p. 393). The behavioral specialist is a special education counselor with 31 years of experience and also serves as the school district's autism specialist. (Tr. Vol. I., pp. 359-360, 361). He is also the school district's trainer in non-violent crisis prevention intervention (CPI). (Tr. Vol. I, p. 359). All staff who worked with Student was trained in CPI techniques. (Tr. Vol. I., p. 360).

23. Student's IEP for the 2011-2012 school year included a Behavior Intervention Plan (BIP). Student remained subject to both the regular Student Code of Conduct and student's BIP. (Tr. Vol. I., p. 329)(R. Ex. 2, p. 13) (R. Ex. 4, p. 100). Student's IEP also included a "sensory diet" (R. Ex. 3, p. 41) (Tr. Vol. III., pp. 962-963). The sensory diet included use of *** that Student used when student became over stimulated. (Tr. Vol. I., p. 382). Student also used certain sensory strategies such as *** and *** or ***. (Tr. Vol. I., pp. 382-383). At times student'll ***. The sensory diet was developed by an occupational therapist. (Tr. Vol. I., p. 383)(Tr. Vol. III, p. 936). Student made progress using the sensory diet and is now independent asking for the sensory diet accommodations. (R. Ex. 2, p. 46) (Tr. Vol. III, pp. 936-938).

24. A functional behavioral assessment (FBA) is a systematic collection and analysis of data across time and across settings. (Tr. Vol. I., p. 354). The school district's most recent FBA was conducted in December 2011. (R. Ex. 15). The behavior specialist participated in the FBA. (Tr. Vol. I., pp.367-368). The school district uses a two-tiered approach to the FBA process. In the first tier the assistant principal gathers data from the parent and teachers. The assistant principal also gathers discipline data, office referrals, and student directory-type information. (Tr. Vol. I., p. 368).

25. The assistant principal conducts three observations in different settings at different times throughout the school. All that information is passed on to the behavior specialist for the second tier. The behavior specialist conducts three more observations and distributes a set of motivation assessment scales and a Student Function Behavior profile to each of Student's teachers. The behavior specialist reviews and analyzes all this data to determine the motivation and function of the student's behavior. (Tr. Vol. I., p. 369). The school district also requested parent information. Student's mother did not return the parent information for purposes of the December 2011 FBA. (Tr. Vol. I., p. 370).

26. The FBA discovered the primary motivation and function of Student's behavior is to gain attention from adults in order to avoid a task. The secondary motivation and function is to escape an adult. (R. Ex. 15) (Tr. Vol. I., p. 371). The purpose of much of Student's behavior in school is to escape academics. (Tr. Vol. II, pp. 541-542). Refusal to work has been a long standing issue and a behavioral trigger. (Tr. Vol. II, pp. 448, 489, 576, 653). The FBA also identified a number of incentives to reinforce desired behaviors. (R. Ex. 15, pp. 348, 350). Information from the December 2011 FBA was shared at the February 9, 2012 ARD meeting and used to develop Student's most recent BIP. (P. Ex. 11, p. 1) (R. Ex. 3, pp. 53, 58-59). Student's mother attended the ARD, provided her input, and agreed to the BIP. (R. Ex. 3) (Tr. Vol. I., pp. 371-372).

27. The BIP in place during the 2011-2012 school year addressed Student's greatest behavioral needs that impede student's learning and the learning of others: (i) maintain a safe physical environment; (ii) maintain a safe, non-disruptive verbal environment; and, (iii) comply with staff directives. The BIP includes specific criteria and the replacement of desired behaviors. (R. Ex. 2, p. 13) (R. Ex. 3, pp. 58, 80) (R. Ex. 4, p. 100) (R. Ex. 15, p. 352). These needs have continued over time; therefore, a number of student's behavioral goals have remained the same or similar. (P. Ex. 4, p. 21) (P. Ex. 7, p. 13) (P. Ex. 8, p. 19) (P. Ex. 10, pp. 21, 34) (P. Ex. 12, p. 11).

28. The BIP included positive behavioral supports, and setting well-defined limits, rules, and expectations in a structured environment with a consistent routine. The BIP also provides Student with time to process information. The BIP included the use of consumable rewards as well as computer time and social time with friends. (R. Ex. 2, p. 13) (R. Ex. 3, p. 58) (R. Ex. 4, p. 100) (R. Ex. 5, p. 149). These strategies helped Student improve student's behavior. (Tr. Vol. I., pp. 373-374). Student's BIP has been reviewed and revised eight times over the past few years. (R. Ex. 2, p. 10) (R. Ex. 3, p. 53) (R. Ex. 4, pp. 100-101) (R. Ex. 5, pp. 149-150) (R. Ex. 7, pp. 208-209) (R. Ex. 9, p. 274) (R. Ex. 10, pp. 299, 317) (R. Ex. 12, p. 333).

29. Student was placed in the DAEP twice during the 2011-2012 school year. The first time in *** 2011 for ***. (R. Ex. 44, pp. 574-575). A manifestation determination (MDR) ARD meeting was held in a timely manner. A March 2009 Functional Behavior Assessment (FBA) was on file and reviewed by the MDR ARD as part of the decision-making process. (R. Ex. 4, p. 85). The MDR ARD concluded the behavior was a manifestation of student's disability. The suspension at the DAEP was for *** days. (Tr. Vol. I, p. 976). The MDR ARD revised student's BIP, reversed the suspension, and returned Student to student's home campus. (R. Ex. 4, p. 132).

30. The second DAEP placement was for ***. (R. Ex. 44). A MDR ARD convened in a timely manner on ***, 2012. (P.

Ex. 12, p. 4) (R. Ex. 2, pp. 11-12). The behavioral specialist was a member of that ARD. (R. Ex. 2, pp. 41, 43). The updated December 15, 2011 FBA report was reviewed by the MDR ARD as part of its decision-making process along with other data and information. (R. Ex. 2, p. 6). The MDR ARD determined that the conduct was a manifestation of Student's disabilities. (P. Ex. 12, p. 10) (Tr. Vol. I., pp. 335-336, 383). At the time of the MDR meeting Student had already served some time in the DAEP. (Tr. Vol. I., p. 336).

31. At the request of Student's mother the ARD agreed Student would remain in the DAEP for *** days as a behavioral intervention rather than as a punishment. The rationale was to teach student there are consequences for student's behavior. (Tr. Vol. I, pp. 336-337, 338-339, 376, 378) (R. Ex. 2, p. 41). While placed at the DAEP Student was subject to both student's BIP and the DAEP Code of Conduct. (Tr. Vol. I., pp. 343, 377)(Tr. Vol. II, p. 460). This meant possible suspension for violating DAEP rules which required student to remain in a cubicle and work on assignments. (Tr. Vol. II, p. 460). There was an in-depth discussion about the application of DAEP rules with Student's mother at the MDR ARD. (R. Ex. 2, p. 41). The school district's behavioral specialist visited and consulted with Student's DAEP special education teacher and the DAEP Coordinator frequently during the spring 2012 DAEP placement. (Tr. Vol. I, pp. 332, 339).

32. DAEP staff received a copy of Student's BIP and the set of instructional accommodations stated in student's IEP. (R. Ex. 45). DAEP staff was trained on Student's BIP. (Tr. Vol. I., pp. 377-378). A paraprofessional who worked frequently with Student in both the BAC and DAEP may not have understood student's precise IDEA eligibility classification but she was aware of student's needs and trained on student's IEP and BIP. The paraprofessional worked under the direction and supervision of special education personnel and school administrators. (R. Ex. 45) (Tr. Vol. II, pp. 446-447, 450-451, 479-480, 482).

33. In the second DAEP placement Student initially tested the boundaries. (Tr. Vol. III, p. 975). Student was either sent home early or suspended several times from the DAEP for various behavioral infractions of the DAEP Code of Conduct. (P. Ex. 37, pp. 28, 29, 33, 40-43, 45, 50-52, 69-70, 71, 75-77, 227). However, compared to other DAEP students Student's misbehavior was mild. (Tr. Vol. III, p. 1039). By the end of the 45 day DAEP placement period Student worked through the structured behavioral criteria and reached the highest behavioral level attainable. (Tr. Vol. III, p. 975, 985). Student told student's mother student was bullied by the older kids on one occasion to comply with DAEP rules. (Tr. Vol. II, p. 539)

34. Student received three citations during the second DAEP placement handled by the justice system. The first was for ***. (Tr. Vol. II, pp. 544-545). A second citation was issued for ***. *** resolved those two citations with ***. (Tr. Vol. II, pp. 546-547)(Tr. Vol. III, p. 988). A third citation ***. (Tr. Vol. II., pp. 546-547).

35. The school district maintained a video at the DAEP that recorded the argument between Student and the paraprofessional. (Tr. Vol. II, p. 545). The DAEP Director distributed a directive to DAEP staff that limited authority for handling Student's discipline to herself, the special education teacher, and the behavioral specialist. (P. Ex. 52). The paraprofessional was reprimanded for failing to follow the directive and for speaking to Student in an unprofessional manner. (P. Ex. 41, p. 22) (Tr. Vol. II, pp. 470-472, 480). Student's mother requested a copy of the video. (Tr. Vol. II, p. 545)(P. Ex. 41, p. 2).

36. Student's IEP was implemented during student's *** day placement at the DAEP. (Tr. Vol. III, p. 977). The DAEP Coordinator met with the DAEP special education teacher to review Student's IEP and determine whether any additional materials were needed for implementation. (Tr. Vol. III, p. 977). Student's BIP was very similar to the way the DAEP is structured – consistency in routine, well-structured classroom environment, and clearly defined limits and expectations. (Tr. Vol. III, p. 1011).

37. The DAEP special education teacher provided Student with student's instruction in accordance with the IEP. (Tr. Vol. III, p. 1001). Student was also provided with dyslexia instruction while at the DAEP. (Tr. Vol. III, p. 1001). In addition student received PE and art. (Tr. Vol. III, pp. 1003-1004). Student also had access to *** while at the DAEP despite the argument with the paraprofessional. (Tr. Vol. III, p. 1011)(P. Ex. 41, p. 22).

38. All school district staff who worked with Student had the requisite credentials and professional development including student's administrators, classroom teachers, the behavior specialist, and related service and assessment personnel. (R. Ex. 57) (R. Ex. 58) (R. Ex. 59) (R. Ex. 63) (R. Ex. 64) (R. Ex. 65) (R. Ex. 66) (R. Ex. 67). Student's

behavioral specialist provided on-going training, consultation and modeling for classroom staff. (Tr. Vol. I, p. 365) (Tr. Vol. II, pp. 596, 646).

39. Student made behavioral progress at school. Initially student's behaviors were frequent with a high intensity level and of significant duration. The effectiveness of intervention strategies was at best sporadic. As student has grown and matured and learned new strategies through the behavior adjustment class student's behaviors, though still present, are not as frequent, with less intensity and of shorter duration. (Tr. Vol. I., p. 366). The latency period has also decreased; i.e., the period of time when a positive behavioral support is put into place to the point at which Student exhibits compliant, on-task behavior. (Tr. Vol. I., pp. 366-367).

40. In addition, in the ***, Student required the use of restraints to cope with self injurious and risky behavior such as ***. Over time the number of restraints decreased. In *** grade student was restrained *** times because student's behavior posed an imminent risk to *** and/or others. (R. Ex. 46). In *** and *** grades the number of restraints was *** per year. (R. Ex. 46). During the past *** grade year student did not require any restraints at all. (P. Ex. 33) (R. Ex. 46) (Tr. Vol. I., pp. 375-376) (Tr. Vol. II., p. 655). Student no longer exhibits the types of behaviors that require restraint. (Tr. Vol. I, pp. 375-376).

41. Because the behavioral strategies implemented by Student's BIP were effective this past school year student's time in general education classes for the 2012-2013 school year was increased to three classes: PE, social studies and ***. (P. Ex. 14) (R. Ex. 1) (R. Ex. 3, p. 37) (R. Ex. 4, p. 127) (Tr. Vol. I., pp. 384-385) (Tr. Vol. II, p. 661) (Tr. Vol. III, p. 817).
    Student will also continue to receive special education instruction in the *** and resource classes. (R. Ex. 4).

42. The goals and objectives stated in Student's *** grade IEP are measureable and based on present levels of academic performance (PLAP). The PLAP is listed above each goal and/or objective for each subject matter. Goals include mastery criteria and methods of evaluation. The school district measured Student's progress towards meeting the IEP goals and student showed progress in all areas by the end of the 2011-2012 school year. (R. Ex. 4) (R. Ex. 43, pp. 550-553, 555, 557). The school district reported Student's progress on student's *** grade IEP goals and objectives. There was a software problem with a few of the IEP progress reports that resulted in dates becoming auto-populated forward. However the substantive information stated in the reports was accurate. (Tr. Vol. II, p. 69).

43. Student's mother requested an IEE in an email to the Director of Special Education on March 22, 2012 for the following assessments: OT, PT, AT, another FBA, and dyslexia and dysgraphia assessments. (P. Ex. 41, pp. 7, 27). She wrote the school district again on March 27, 2012 and added evaluations for autism, pervasive developmental disorder, and OHI to her IEE request. (P. Ex. 41, p. 39). That same day the Director of Special Education emailed Student's mother to clarify the areas of parental disagreement with the school district's evaluations and the dates of each disputed school district assessment. (R. Ex. 51, p. 617). The request for an independent PT assessment was somewhat of a surprise. The school district never conducted a PT assessment because that had never previously been an area of suspected need. (R. Ex. 51, p. 612).

44. The Director of Special Education requested a meeting with Student's mother either in person or by phone to discuss the scope and reasons for the requested IEE. (R. Ex. 51, p. 617) (Tr. Vol. I, p. 108). Student's mother declined to meet with the Director of Special Education and challenged the school district's request for additional information. (P. Ex. 41, p. 38) (R. Ex. 51, p. 612). The Director of Special Education responded in writing to clarify the school district was not placing any conditions on the IEE request but instead merely wished to clarify the scope of the request and determine what complaints Student's mother had with the school district assessments. (R. Ex. 51, p. 612) (Tr. Vol. I., pp. 107-110). The Director of Special Education also provided Student's mother with information about IEEs and a copy of the school district's IEE criteria. (R. Ex. 51, pp. 612-616).

45. The school district did not deny the parental request for the additional independent evaluations of OT, PT, AT and an FBA because Student's mother did not identify independent examiner selections for those assessments. (Tr. Vol. I., pp. 107-110). The school district approved IEE requests for a full psychological and a speech/language assessment within a reasonable time after further communications with Student's mother. (R. Ex. 54) (R. Ex. 55) (Tr. Vol. I., p. 108). The psychological included the IEE requests to assess for dyslexia and dysgraphia. (P. Ex. 22) (P. Ex. 57).

46. The agreed upon psychological IEE report was completed on May 22, 2012 and amended on July 23, 2012. (P. Ex.

22) (P. Ex. 57, p. 16) (Tr. Vol. I. pp. 107, 109). The psychological IEE identified Student as a student with pervasive developmental disorder (PDD), dyslexia, learning disabilities in math and written expression, and dysgraphia. (Tr. Vol. I, pp. 175-176, 257). (P. Ex. 22) (P. Ex. 57). The psychological IEE included an extensive set of behavioral and academic recommendations. (P. Ex. 22, pp. 12-16) (P. Ex. 57, pp. 12-16). Many of the recommendations stated in the IEE are already being implemented by the school district. (Tr. Vol. I., p. 389)(R. Ex.2) (R. Ex.4).

47. The speech/language IEE report was completed on June 5, 2012. (P. Ex. 23, p. 1) (R. Ex. 13, p. 335). The purpose of the speech/language IEE was to determine Student's need for speech-language services, specifically in the area of pragmatics. (P. Ex. 23, p. 11) (R. Ex. 13, p. 336). Student's behavior during the formal testing had an impact on the validity of the results. Although student was cooperative on easy test items student shut down and became uncooperative and rude on more difficult items. The testing included a detailed observation. The speech/language pathologist decided Student's use of pragmatic language during the observation was more accurate than the formal testing. The speech/language IEE concluded Student did not exhibit a pragmatic language disorder nor did student require speech/language services. (P. Ex. 23, pp. 14-16).

48. Student's behavior at home has been very challenging. Over the years student has been argumentative, didn't get along well with others, and was *** (P. Ex. 16, p. 10). Student has also been somewhat violent and destructive at home; ***. Student frequently rages at home. (P. Ex. 16, p. 16) (Tr. Vol. II, pp. 524-529).

49. Student's behavior issues at home and school interfere with student's mother's ability to work. (Tr. Vol. I, p. 501) (Tr. Vol. II, pp. 502-503, 505, 529). Student needs in-home training and a behavior management system that is consistent between home and school. It is important that school and home work together as a team to support Student's progress. Student's mother would benefit from parent counseling or training in order to meet this need. (Tr. Vol. I., pp. 157-158)(R. Ex. 15, p. 351).

50. Student's mother receives support from caseworker services through ***, an outpatient mental health facility. (Tr. Vol. II., pp. 410-411). A CRCG meeting convened in spring 2012 to discuss a parental request for Student's residential placement at the ***. (Tr. Vol. II, pp. 415-416). At the time of the CRCG meeting Student did not ***; therefore the CRCG decided to *** a referral to ***. (Tr. Vol. I., p. 301)(Tr. Vol. II, pp. 416, 418-419). Although the school district's behavior specialist attended the CRCG meeting he did not personally recommend residential placement because he did not believe it was appropriate for Student. (Tr. Vol. I., pp. 301-302).

Discussion

Statute of Limitations

Federal and State Laws

A parent may file a due process complaint on any matter relating to the identification, evaluation, or educational placement of a child with a disability or the provision of a free, appropriate public education (FAPE) to the child within two years from the date the parent knew or should have known about the alleged action that forms the basis of the complaint. *20 U.S.C. § 1415 (b)(6)(f)(3)(C); 34 C.F.R. §§ 300.503 (a)(1)(2); 300.507 (a)(1)(2).*

The two year limitations period may be more or less if the state has an explicit time limitation for requesting a due process hearing under IDEA. In that case the state timelines apply. *20 U.S.C. §1415 (f) (3) (C); 34 C.F.R. § 300.507 (a) (2).* Texas has an explicit statute of limitations rule. In Texas a parent must file a request for a due process hearing within one year of the date he or she knew or should have known about the alleged action that serves as the basis for the hearing request. *19 Tex. Admin. Code § 89.1151 (c).* Petitioner filed petitioner's request for a due process hearing on April 4, 2012. Petitioner has alleged claims arising as far back as April 4, 2009. *Petitioner's Request for Hearing, pp. 4-5; First Revised Notice of Hearing and First Interim Order, pp. 1-3.*

Accrual of Petitioner's Claims

Petitioner's cause of action accrued when petitioner's parents knew or had reason to know of the injury that forms the basis of petitioner's hearing request. *Doe v. Westerville City Sch. Dist., 50 IDELR, 132, pp 5-6 (D.C. Ohio 2008) (holding cause of action for failure to provide FAPE when student first diagnosed with a learning disability).* I must calculate the limitations period as one year from the date Student's parents knew or should have known of the complained of actions of the school district and *not* one year from the date Student's parents learned from their attorney that school district actions might have been wrong. *Bell v. Bd. of Educ. Albuquerque Pub. Sch., 50 IDELER 285, pp 8-9, 15-15 (D.C. N.M. 2008)(holding that IDEA claims that student was misidentified as MR rather than LD and thus denied FAPE were limited to two year SOL period).*

Exceptions to the One Year Statute of Limitations Rule

The one year statute of limitations rule will not apply in Texas if the parent was prevented from requesting a due process hearing due to either:

- Specific misrepresentations by the school district that it resolved the problem that forms the basis of the due process hearing request; or

- The school district withheld information from the parent that it was specifically required to provide under IDEA.

20 U.S.C. § 1415 (f) (3) (D); 34 C.F.R. § 300.511 (f) (1) (2)

Misrepresentation Exception

Neither the IDEA nor its related regulations clarify the scope of what constitutes a "misrepresentation" under the first exception. The United States Department of Education left it to hearing officers to decide on a case by case basis the factors that establish whether a parent knew or should have known about the action that is the basis of the hearing request. *71 Fed. Reg. 46540, 46706 (Aug. 14, 2006).* Case law provides some guidance in making that determination.

The alleged misrepresentation must be intentional or flagrant. Petitioner must establish not that the school district's provision of FAPE was objectively inappropriate but instead that the school district subjectively determined Student was not receiving FAPE and intentionally misrepresented that fact to student's parents. *Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 U.S. Dist. LEXIS 91442, pp. 4-5 (D.C. Pa. 2008)(holding that school district's failure to identify student as eligible for special education did not constitute a specific misrepresentation – no evidence that school district determined student was eligible for services but specifically misled parents otherwise) .*

Petitioner argues the school district misrepresented Student's academic progress (i.e. that student was on grade level). Petitioner contends the school district failed to inform Student's mother student would be subject to different disciplinary rules at the DAEP, misinformed her about scheduling rules for ARD meetings, and pre-dated some IEP progress reports. Petitioner argues these actions constitute misrepresentations that should toll the one year statute of limitations period. However, to read the term "misrepresentation" to include actions by a school district anytime it fails to remedy an educational problem encountered by a student is too broad. Such an interpretation would "swallow the rule established by the limitation period." *Evan H. v. Unionville-Chadds Ford Sch. Dist. 2008 U.S. Dist. LEXIS 91442 at p. 5, n. 3.*

This reasoning was applied in a case where the parent alleged the school district repeatedly misrepresented that the student was doing well and making significant progress in all areas. The parents protested that the student's needs were not being met and alleged the school district misled them by withholding information about the student's standardized test scores. *Sch. Dist. of Philadelphia v. Deborah A., 2009 U.S. Dist. LEXIS 24505, pp. 3-4(D.C. Pa. 2009).* The Pennsylvania federal district court found that at most the parent merely demonstrated the student's IEP's were deficient. In hindsight, parents may consider the school district's assessment of a student's progress to be wrong, but that does not rise to a specific misrepresentation for statute of limitation purposes. *Id.*

The allegations that the school district misstated Student's grade level, pre-dated some IEP progress reports, or failed to clearly explain DAEP rules and the ARD scheduling process do not constitute the sort of misrepresentations required to toll the statute of limitations rules. The alleged misrepresentation must be intentional and flagrant. *See, Evan H. v. Unionville Chadds Ford Sch. Dist., 2008 U.S. Dist. LEXIS 91441 at p. 5 (D.C. Pa. 2008).* Even if true (which the credible evidence showed they

were not) these allegations constitute at most simple oversights, clerical errors, or miscommunications -- none of which prevented Student's mother from filing a request for a due process hearing.

I conclude that the record on file in this case does not support a finding that the school district's actions beginning in April 2009 rose to the level of flagrant, intentional misrepresentation required by the first exception to the statute of limitations rule. In order to apply this exception Petitioner had to establish that the school district knew that it was not providing Student with FAPE and intentionally misled petitioner's parents into believing otherwise. I find insufficient support for such a conclusion in the record. *Evan H. v. Unionville Chadds Ford Sch. Dist., supra; Sch. Dist. of Philadelphia v. Deborah A., supra.*

Withholding Information/Prior Notice

The second exception to the application of the one year statute of limitations rule requires a determination that Student's parents were prevented from requesting a due process hearing because the school district withheld information from them it was otherwise required to provide under IDEA. *20 U.S.C. § 1415 (f (3) (D).* Petitioner contends the school district did not fulfill IDEA notice obligations when it: (i) changed Student's eligibility from OHI to ED without a medical diagnosis; (ii) changed Student's administration of the TAKS-A to the TAKS-M; (iii) ***; (iv) "predetermined" Student would not be eligible as a student with a learning disability or OHI prior to ARD meetings; (v) failed to explain it could pay for private outside services; and, (vi) failed to clearly explain disciplinary consequences during Student's behavioral placement at the DAEP.

The information that a school district must provide to parents under IDEA for statute of limitations purposes is specific and includes:

- Notice of evaluation procedures the school district proposes to use;
- Notice that the school district has determined no further evaluation is necessary and that parents may then seek an IEE;
- Notice of procedural safeguards; and,
- Prior notice any time the school district proposes to initiate or change the identification, evaluation or educational placement of the child or the provision of FAPE or refuses to change the identification, evaluation, or educational placement of the child or the provision of FAPE.

20 U.S.C. § 1415 (b) (6) (A) (B) (c); 34 C.F.R. § 300.511 (f).

When a school district delivers a copy of IDEA procedural safeguards to parents the statute of limitations period for IDEA violations begins regardless of whether parents later examine the text to acquire actual knowledge of procedural rights – the simple act of delivering the procedural safeguards notice suffices to impute constructive knowledge of parental rights under IDEA. *El Paso Ind. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 945 (D.C. Tex. 2008), aff'd in part and vacated on o.g. 591 F. 3d 417 (5th Cir. 2009).* The record on file in this case supports the conclusion that Student's parents received the requisite notice of procedural safeguards.

While Student's mother may have expressed concerns about student's educational needs over time, the record on file demonstrates the school district provided the requisite notice of procedural safeguards time and time again. In doing so, Student's parents had either actual or constructive knowledge of their right to file a due process hearing at any point along the way whether they knew their concerns were actionable or not. *Deborah A., 2009 U.S. Dist. LEXIS 24505 at pp. 4-5; 19 Tex. Admin. Code § 89.1151 (c).*

Student's mother participated in a number of ARD meetings and communicated with school district personnel about Student's educational needs numerous times over the past four years. The school district did not refuse to change or initiate Student's eligibility without reviewing and discussing relevant assessment data at ARD meetings – to which Student's mother was invited. ARD documents were provided to her following each ARD which stated the basis for all ARD decisions, including eligibility and the change from the TAKS-A to the TAKS-M. The school district did not refuse to change or initiate an educational placement without reviewing and discussing the issue in an ARD meeting. There was no credible evidence placement decisions were "predetermined." The school district did not deny a request for a change in placement – indeed, the evidence shows that a parental request for a change in placement was honored; i.e. the behavioral placement at the DAEP.

Information about Student's possible eligibility for *** is, first of all, somewhat premature since student just completed the

*** grade. Furthermore it is not the type of information contemplated by the statute's prior written notice provision. The evidence also showed the school district did not refuse to pay for outside services because Student's mother never submitted a request for the school district to do so. A miscommunication or misunderstanding about DAEP disciplinary policy does not constitute the type of information that falls under the prior written notice provisions of the IDEA. Every piece of information or data that might be relevant to a student's educational program is not subject to the prior written notice provisions. These are not examples of a refusal to provide or change FAPE. *34 C.F.R. § 300.511 (f).* Instead, the notice provisions for purposes of the statute of limitations rules are in the nature of procedural safeguards. *Evan H. v. Unionville Chadds Ford Sch. Dist., supra.* The record shows the school district provided the requisite notice regarding the evaluations used to identify Student as eligible for special education services, the basis of placement decisions, and, notice of procedural safeguards.

Furthermore, the one year statute of limitations contemplates parental exercise of reasonable diligence to discover facts that give rise to an IDEA claim. The one year time frame is consistent with the legislative intent that special education disputes should be resolved in an expeditious manner. *See, Mandy S. v. Fulton Cnty. Sch. Dist., 31 IDELR 79 (D.C. Ga. 1999)("IDEA expresses a preference for short statutes of limitations since the interests of the student are best served by the prompt resolution of educational disputes" -- holding state's two year personal injury limitations period applied to IDEA claims).*

The allegation that the school district intentionally misled Student's parents and failed to inform them of their right to a due process hearing is simply not supported by the record on file in this case. *Fern v. Rockwood R-VI Sch. Dist., 48 IDELER 35, pp. 3-4(D.C. Mo. 2007)(holding neither of the exceptions applied where record showed parents fully participated in IEP process, met with district representatives and were continuously advised of the status of child's program).* Therefore, I conclude the one year statute of limitations rule applies to Petitioner's claims in this case and that student's IDEA claims are limited to those which arose beginning in April 2011. All claims that arose prior to April 2011 must be dismissed as outside the applicable limitations period. *20 U.S.C. §1415 (f) (3) (C); 34 C.F.R. § 300.507 (a) (2; 19 Tex. Admin. Code § 89.1151 (c).*

Failure to Exhaust Administrative Remedies

A parent may file a due process complaint about the school district's proposal to initiate or change (or its refusal to initiate or change) the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child. *34 C.F.R. § 300.507.* In this jurisdiction, there is no requirement that a parent must first request an ARD meeting or lay out her concerns at an ARD before invoking the right to file a due process complaint. *19 Tex. Admin. Code §§89.1151 (a); 89.1165(c) (d); Letter to Lenz, 37 IDELR 95 (OSEP 2002).* I conclude Petitioner did not fail to exhaust petitioner's administrative remedies for purposes of pursuing the due process hearing.

FAPE: Appropriate IEP in the Least Restrictive Environment

The IDEA requires the school district provide Student with a free, appropriate public education through implementation of an individualized education program, i.e. an IEP. *34 C.F.R. §§ 300.1; 300.17.* While the IDEA guarantees only a "basic floor of opportunity" the IEP must nevertheless be specifically designed to meet Student's unique needs, supported by services that permit student to benefit from the instruction. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 188-189 (1982).* While the IEP need not be the best possible one nor must it be designed to maximize Student's potential the school district must provide Student with a meaningful educational benefit – one that is likely to produce progress not regression or trivial advancement. *Houston Ind. Sch. Dist. v. VP, 582 F. 3d 576, 583(5th Cir. 2009) cert. denied, 2010 U.S. LEXIS 2578 (2010).* The basic inquiry is whether the IEP was reasonably calculated to provide the requisite meaningful educational benefit. *Rowley, 458 U.S. at 206-207.*

Four Factors Analysis

In this jurisdiction there are four factors to determine whether the IEP at issue is reasonably calculated to provide a meaningful educational benefit under IDEA. These factors are:

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

Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997). There is no requirement the four factors

be considered or weighed in any particular way. *Richardson Ind. Sch. Dist. v. Michael Z., 580 F. 3d, 286, 293 (5th Cir. 2009).*The evidence in this case shows the IEPs in effect for the relevant time period were reasonably calculated to provide Student with the requisite meaningful educational benefit. *Rowley, supra; Michael F., supra.*

Individualized

First, the IEP and BIP were designed and individualized on the basis of a variety of assessment data as well as Student's classroom performance and behavior. The IEP goals and objectives addressed student's academic needs to learn the appropriate grade level curriculum with a specified set of modifications and accommodations to address both student's identified behavioral needs and academic deficits and skills. The credible evidence confirms the program met the first factor of the analysis.

Least Restrictive Environment

Second, the evidence showed the program was administered in the least restrictive environment – while Student needed the small, highly structured setting of the *** class for much of student's instruction the program also included resource math and reading classes and mainstreaming opportunities in a general education PE classroom last year. The evidence showed that Student's opportunities for mainstreaming have widened this school year to include a general education social studies class and an elective as well as PE. The IDEA requires mainstreaming only to the maximum extent appropriate. *34 C.F.R. § 300.114; Daniel R.R. v. State Bd. Of Educ., 874 F. 2d 1036, 1045 (5th Cir. 1989).*

The nature and severity of Student's disability are factors in considering whether student is being educated in the least restrictive environment. Student's disruptive behavior and student's demands on teaching personnel are relevant to this consideration. *Daniel R.R. 874 F. 2d at 1049.* The evidence confirms that the thoughtful mix of special education behavior and resource classes and a general education PE class were successful and laid the foundation for a gradual transition into greater mainstreaming opportunities this school year. Student's temporary placement in the DAEP last spring was a behavior intervention strategy that appeared to be fairly successful -- Student was able to attain the highest behavioral level by the end of student's *** day placement.

Petitioner requests residential placement for Student – one of the most restrictive placements on the continuum of instructional settings. *See, 19 Tex. Admin. Code § 89.63(c) (10).* School district staff spoke with affection about Student; student has friends at school and in the neighborhood; student *** last year and hopefully will be able to do so again this year; student received both academic and non-academic benefit from student's educational program. It would be inappropriate to remove Student from student's community and deprive student of these relationships and opportunities. The credible evidence demonstrates residential placement would not be appropriate for Student for educational reasons. *See, Michael Z., 580 F. 3d at 299.* The evidence confirms the program met the second factor of the analysis.

Coordinated and Collaborative Manner

Third, the evidence shows Student's educational program was provided in a coordinated and collaborative manner by key stakeholders. Student was supported by special education teachers, a behavioral specialist, a regular PE teacher, and an occupational therapist. Assessment personnel and administrators were also involved in designing and implementing student's educational program. Student's mother participated in ARD meetings and through other communications with school personnel to provide her input into student's educational program. The evidence confirms the program met the third factor of the analysis.

Positive Benefits

Fourth, the credible evidence demonstrated that while Student still exhibits some challenging academic and behavioral needs student has made progress over the relevant time period. Student made more than passing grades, mastered the state mandated assessment, and improved behaviorally and socially. The evidence confirms the program met the fourth factor of the analysis. Therefore, Petitioner failed to meet petitioner's burden of proof challenging the overall meaningful benefit provided by the school district's educational program. *Schaffer v. Weast, 546 U.S. 49, 62 (2005); See, Klein Ind. Sch. Dist. v. Per Hovem, 2012 U.S. App. LEXIS 16293 (5th Cir. 2012) motion for rehrg. en banc pending (provision of FAPE must be judged by the overall educational benefits received and not solely by remediation of student's disability).*

Objective and Measureable Goals and Objectives

The IDEA requires an individualized education program (IEP) for each child with a disability in need of special education. *34 C.F.R. § 300.320 (a).* The IEP must include a statement of measureable annual goals, including academic and functional goals, designed to meet the child's needs in order to allow the child to be involved in and make progress in the general curriculum and meet other educational needs that result from the child's disability. *34 C.F.R. § 300.320(a) (2) (i) (A) (B).* The IEP must also include a description of how the child's progress in meeting the annual goals will be measured. *34 C.F.R. § 300.320(a) (3) (i).*

The record shows that the IEPs implemented during the 2011-2012 school year and those proposed for the 2012-2013 school year met these requirements. The IEPs addressed Student's behavioral and academic needs. They included measureable goals and objectives in each subject area including behavior. A description of the mastery criteria was also included. *34 C.F.R. § 300.320 (a) (2) (i) (A) (B).* There was little controverting evidence on this issue. Petitioner did not meet petitioner's burden of proof on this issue. *Shaffer v. Weast, supra.*

Functional Behavior Assessment and Appropriate BIP

FBA Rule

When a child with a disability is disciplined with a change in placement an ARD meeting must convene within ten school days of the date of the placement decision and determine if the conduct that triggered the disciplinary decision was caused by, or had a direct and substantial relationship to, the child's disability. This is known as a "manifestation determination review" (MDR). *34 C.F.R. § 300.530 (e) (1) (i).*

If the MDR ARD concludes that the conduct in question *was* a manifestation of the child's disability the ARD must *either* (i) conduct a functional behavioral assessment and implement a behavior intervention plan *or* (ii) if a behavior intervention has already been developed -- review the plan and modify it *if necessary.* A functional behavior assessment is *not* required if the school district conducted a functional behavior assessment before the behavior at issue occurred. *34 C.F.R. § 300.530 (f) (1) (i) (ii) (emphasis added).*

First DAEP Placement

The evidence showed that during the 2011-2012 school year a change in placement for Student was contemplated twice for disciplinary reasons. The first was in *** 2011. The evidence showed Student was placed in the DAEP for *** days and an ARD convened in a timely manner to consider whether the conduct in question was a manifestation of student's disability. *34 C.F.R. §§ 300.530 (b) (1) (e).* The ARD determined that it was and student was returned to student's previous placement. *34 C.F.R. § 300.530 (f) (2).*

At the time of the disciplinary incident there was a behavior intervention plan in place based, in part, on a 2009 FBA. The *** 2011 MDR ARD reviewed Student's BIP, discussed the incident, and revised student's behavioral IEP and BIP. These actions were lawful under the second option provided by the federal regulation; no functional behavior assessment was necessary. *34 C.F.R. § 300.530 (e) (f) (1) (ii).*

Second DAEP Placement

The second DAEP placement decision arose in *** 2012 when Student ***. A disciplinary decision was made to place student in the DAEP for violating the Student Code of Conduct. The evidence showed an MDR ARD met in a timely manner to determine whether the conduct in question was a manifestation of student's disability. Again, the ARD determined that it was. However, instead of returning to *** Student's mother proposed student remain at the DAEP for a *** day period. The rationale was to teach Student there are consequences for student's behavior. The ARD agreed with the proposal.

The second MDR ARD also had the updated December 2011 FBA available in making these decisions. The behavioral specialist who conducted the FBA was a member of that ARD. A behavior intervention plan was already in place. Again, because there was a functional behavior assessment on file and a BIP in place there was no legal requirement to conduct yet another FBA. Furthermore, the MDR ARD was only required to modify the BIP, if necessary to address the behavior at issue. *34 C.F.R. § 300.530 (f) (1) (i) (ii).* I conclude that based upon the record on file and the credible evidence the school district met its responsibility in that regard.

An FBA was on file both times Student was subject to a change in placement for disciplinary reasons. Therefore, another FBA was not required under the IDEA. The December 2011 FBA was thorough, included behavioral information from a variety of sources across a variety of settings and was analyzed by a qualified behavioral specialist. Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast, supra; 34 C.F.R. § 300.530 (f) (1) (i) (ii).*

BIP

The IDEA requires that in the case of a child whose behavior impedes child's learning and/or the learning of others, as is true for Student, the ARD must *consider* the use of positive behavioral interventions and supports and other strategies to address that behavior. *34 C.F.R. § 300.324 (a) (2) (i) (emphasis added).* The evidence in this case shows the school district met this responsibility and did more than merely *consider* the use of positive behavioral interventions, supports and other strategies. In fact, the Behavior Intervention Plans in place for Student included all of these items. The credible evidence also demonstrated that while Student may have continued to exhibit inappropriate and disruptive behaviors during the 2011-2012 school year the school district implemented a BIP that addressed student's behavioral needs and that, over time, student's behavior improved at school.

The BIP is a component of Student's IEP. The IDEA does not require the school district to guarantee a particular result or to maximize the student's potential but instead only that it provide the student with a meaningful educational benefit. *Houston Ind. Sch. Dist. v. VP, 582 F 3d at 590: See, Corpus Christi Ind. Sch. Dist. v. C.C., 59 IDELR 42 (S.D. Tex. 2012).* Thus, although the school district's BIP did not succeed in extinguishing all of Student's inappropriate behaviors the evidence showed it was designed to meet student's needs, included the requisite features, and provided a meaningful educational benefit because student's behavior at school improved. *34 C.F.R. § 300.324 (a) (2) (i); Rowley, 458 U.S. at 206-207).* Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast, supra; 34 C.F.R. §300.324 (a) (2) (i).*

Staff Training

The preponderance of the evidence demonstrated that school staff who worked with Student was adequately trained within the meaning of the IDEA and it's implementing federal and state regulations. *34 C.F.R. § 300.18; 19 Tex. Admin. Code § 89.1131.* The teachers, the behavioral specialist, other related service and assessment personnel, administrators, and the paraprofessional were all duly qualified and attended continuing education opportunities – many of them with a focus on behavioral issues. The behavioral specialist also trained teaching staff by coming in to the classroom on a frequent basis for consultation and modeling appropriate instructional techniques and behavioral strategies. He also met with the Director and special education teacher at the DAEP and trained them on the implementation of Student's IEP and BIP. Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast, supra.*

Timely and Appropriate Evaluations

Eligibility as Student with Autism, OHI and Learning Disabilities

First, Petitioner's claims that the school district failed to conduct timely assessments for eligibility as a student with autism, OHI and learning disabilities fall outside the relevant one year statute of limitations. The evidence showed the school district did, in fact, conduct assessments for autism, OHI and learning disabilities in previous school years. Any claims that those were not timely or inappropriate are dismissed as outside the one year statute of limitations rule applied in Texas. *19 Tex. Admin. Code §89.1151 (c).*

The school district did change Student's eligibility classification from OHI to ED as a result of the psychological conducted as a component of a three year re-evaluation in December 2011. The evidence showed the ARD recognized Student continued to exhibit attention deficits that interfered with student's ability to learn but also that eligibility as a student with an emotional disturbance was more accurate based on the recommendation of the psychological. The law merely requires a physician be a member of the multi-disciplinary team making the OHI eligibility determination. *19 Tex. Admin. Code § 89.1040 (c) (8).* Because the ARD decided Student's eligibility should be based on an emotional disturbance there was no need to confirm student's continued eligibility for special education as a student with OHI based on ADHD.

The evidence showed that the change in classification did not drive the design of Student's IEP and BIP but instead it was the identification of student's needs through assessment data that did; therefore, there was no reason for the school district to

conduct another assessment to confirm whether student continued to be eligible for special education services as student with OHI because student was already eligible. Student's program was designed to address student's various and unique needs. While it might have been prudent for the psychologist to confer with Student's physician about his findings I conclude no substantive educational harm resulted from the failure to do so.

Student's behavioral needs were sufficiently met through the school district's IEP and BIP and student's eligibility for special education services was never in question. The psychological also considered whether autism would be an appropriate eligibility classification for Student and determined it was not. This conclusion is supported, in part, by the IEE speech/language evaluation that concluded Student did not exhibit any pragmatic language deficits.

The evidence also showed that the school district assessed Student's academic ability and achievement when it conducted the three year reevaluation FIE in March 2011. Student's eligibility for services as student with specific learning disabilities was considered in that FIE. There was insufficient evidence to show those assessments were untimely or inappropriate. While the school district did not identify Student as a student with a learning disability (because student's emotional disturbance was an exclusionary factor) the school district recognized student's deficits in written expression and reading and made appropriate accommodations and modifications to address them. *See, 34 C.F.R. § 300.8 (c) (10) (ii).* Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast, supra.*

Three Year Re-evaluation

The school district is required to ensure a re-evaluation is conducted at least once every three years. It may not occur more than once a year unless the parties agree otherwise. *34 C.F.R. § 300.303.* The evidence showed Student's initial FIE was completed on March 27, 2008. Student's three year re-evaluation FIE was completed on March 12, 2011 – two weeks before the three year deadline. The evidence showed the re-evaluation was comprehensive and assessed all areas of suspected disability. There was no evidence the three year re-evaluation did not meet IDEA criteria. A mere disagreement between the experts on the interpretation of test results does not mean the school district's assessment is legally faulty. Reasonable experts may disagree and they did here. However, the credible evidence supports the conclusion the school district's three year re-evaluation was timely and appropriate. In any event, any complaint about whether the March 2011 FIE was not appropriate falls outside the one year statute of limitations rule. *19 Tex. Admin. Code § 89.1151 (c).*

Dysgraphia Assessment/Assistive Technology Assessment

The record on file confirms that the school district conducted assessments for dysgraphia through its OT and written expression evaluations as components of the initial FIE and the three year FIE reevaluation. The 2009 *** grade AT assessment recommended Student's need to continue developing keyboarding skills and to use a specified handwriting curriculum. An AT checklist was a component of the three year March 2011 reevaluation. The checklist stated Student's handwriting is legible.

Although I conclude there is no further need to assess Student for dysgraphia (since there is no factual dispute that student has handwriting deficits) it would be prudent for the school district to conduct an updated AT assessment that is more than a mere checklist especially because written academic tasks seem to be a behavioral trigger. However, any claims that the school district's 2009 or 2011 AT evaluations were not appropriate fall outside the one year statute of limitations rule. *Id.*

In-home Training Assessment

The evidence showed that Student needs a consistent behavioral approach between home and school. Although Student's mother did not take advantage of available training through the school district's Love and Logic program she would benefit from some assistance in coping with Student's uncooperative and unruly behavior at home. Therefore I conclude an in-home training assessment is appropriate to determine how Student's behavior plan at school can be better supported at home. Student's mother will need to make herself and Student available to school district personnel for this purpose. In-home training and parent training are related services under the IDEA. *34 C.F.R. § 300.34 (a)(c)(8)(iii).*

Counseling Assessment

The evidence showed that Student needs more than just 10 minutes of counseling once a week – instead the evidence supported the need for 30-45 minutes of weekly counseling. The evidence does not lead to the need for a counseling

assessment per se since there is plenty of behavioral and assessment data that describe Student's counseling needs. Instead student's IEP must be revised to increase the amount of weekly counseling to a minimum of 30 minutes per week for the remainder of the current school year. This could be split into two 15 minutes sessions or a single 30 minute session –whatever makes sense considering the availability of a qualified counselor and Student's own class schedule. Counseling is a related service under the IDEA. *34 C.F.R. §300.34 (a)(c)(2).*

ESY Assessment

Extended school year services (ESY) are individualized instructional programs beyond the regular school year for eligible students. The need for ESY must be determined on an individual basis by the ARD. In determining the need for ESY a school district must not limit the services to particular disability categories or unilaterally limit the type, amount or duration of the services. *19 Tex. Admin. Code § 89.1065(1).*

The need for ESY must be documented from either formal and/or informal evaluations provided either by the school district or the parent. The documentation to support the need for ESY must show that the student exhibited (or may be reasonably expected to exhibit) severe or substantial regression in one or more critical areas addressed in the student's IEP that the student is unable to (or will be unable to) recoup within a reasonable period of time. *19. Tex. Admin. Code § 89.1065 (2) (3).*

The law also provides that ESY may be justified without consideration of whether the critical skills can be recouped within a reasonable amount of time if the loss of acquired skills would be particularly severe or substantial or if the loss of the skills could reasonably be expected to result in immediate physical harm to the student or others. *19. Tex. Admin. Code § 89.1065 (3).*

ESY for Academic Skills

The evidence showed that Student's teachers administered evaluations at the beginning of each year. Those evaluations showed student did not demonstrate substantial regression in critical academic areas that student could not recoup within a reasonable amount of time. The law does not require a specific method or type of documentation for ESY purposes. Therefore, an ARD discussing a student's need for ESY could rely on a current written evaluation report or periodic progress reports to assist it in making the ESY determination. In this case, the school district maintained a specific ESY form for documenting whether Student exhibited substantial regression in critical IEP areas. The documentation using the school district's ESY form for determining ESY for 2011 met the regulatory requirement.

The documentation using the school district's ESY form for deciding whether Student needed ESY for summer 2012 lacked the same amount of information as the previous year. However, the ARD did have current assessment data in written form available to it when it discussed Student's need for ESY at an ARD during the spring 2012 semester. The evidence showed Student did not particularly need ESY to avoid regression of academic skills that could not be recouped within a reasonable amount of time. *19. Tex. Admin. Code § 89.1065 (2) (3).*

ESY for Behavioral Skills

It is more difficult to ascertain whether the documentation was sufficient to support the ARD decision that Student did not require ESY to address the critical behavioral areas addressed in student's IEP and BIP. The ARD could have considered current assessment data, including the updated December 2011 FBA, that noted the motivation and function of Student's behaviors at school was mostly to avoid work. However, that documentation does not necessarily support the conclusion that student was able to recoup critical behavioral skills within a reasonable amount of time. The evidence suggests the ARD considered only student's academic skills and did not consider whether student needed ESY to maintain behavioral skills as well. It's difficult to tell from the record on file.

I found insufficient evidence in the record to determine whether the spring 2011 or 2012 ARD meetings considered, reviewed, or documented behavioral data over Student's possible need for ESY to maintain critical behavioral skills. There is also insufficient evidence to show whether the ARD meetings considered whether the loss of behavioral skills would be severe or substantial or expected to result in immediate physical harm to student or others.

Therefore, when the ARD convenes this coming spring in 2013 the school district needs to ensure that behavioral data has been collected and documented to determine whether Student was able to maintain critical behavioral skills over the summer

of 2012 and/or whether the loss of behavioral skills would reasonably be expected to be severe or substantial or result in an immediate safety risk for purposes of determining student's need for ESY in 2013. *19 Tex. Admin. Code § 89.1065.*

Dyslexia Services

The evidence showed the school district addressed Student's need for specialized reading instruction. Petitioner contends the school district failed to provide student with FAPE because it failed to follow state dyslexia rules. *Texas Education Code § 38.003* (1) defines dyslexia and related disorders, (2) mandates testing and instruction for students with dyslexia, and (3) gives the State Board of Education (SBOE) the authority to adopt rules and standards for administering testing and instruction. *The Texas Administrative Code* outlines school district responsibilities in delivering services to students with dyslexia. *19 Tex. Admin. Code § 74.28*

Beginning in 1986 the Texas Education Agency prepared an SBOE approved handbook to address the needs of children with dyslexia. The handbook has been revised numerous times – the most recent version is known as *The Dyslexia Handbook – Revised 2007, Updated 2010: Procedures Concerning Dyslexia and related Disorders* (referred to hereafter as "*the Dyslexia Handbook")*. The purpose of the *Dyslexia Handbook* is to provide flexible guidelines for school districts and parents in the identification and instruction of students with dyslexia. *See, 19 Tex. Admin. Code § 74.28 (b); Dyslexia Handbook, p. 6.*

Significantly, *the Dyslexia Handbook* states that school districts are to follow the IDEA if a student with dyslexia is referred for special education. *Dyslexia Handbook, p. 14; Appendix A, p.19.* The ARD Committee has the responsibility to determine the manner in which a special education student participates in the school district's dyslexia reading instruction program, if at all. *Dyslexia Handbook, Appendix A, p. 18 ("If a student is qualified as a student with a disability under special education, the … ARD … should determine the least restrictive environment for delivering the student's dyslexia instruction.").*

It is for the ARD Committee to determine what appropriate reading instruction is for a particular student based on the student's unique needs; that may include reading instruction through the school district's dyslexia program or it may include placement in regular education with sufficient supports, or in a special education class. An ARD may select a number of options depending upon the needs of the student. *Id.*

The state dyslexia rules may be of some relevance in determining whether a student has been properly served under IDEA. However, the issue of whether a student's educational program provides a free, appropriate public education must be analyzed under the IDEA, it's federal and state regulations, the case law, and policy interpretations of the federal and state agencies charged with its implementation. *See, Grant v. St. James Parish Sch. Bd., 2000 U.S. Dist. LEXIS 16544 (D.C. La. 2000) (school complied with IDEA and state dyslexia identification procedures).*

The credible evidence showed that Student's reading needs were met through the development of a reading program designed specifically for student by student's classroom teachers and provided in both student's behavior class and in student's reading resource class. Student was provided with the "dyslexia bundle" as additional accommodations to student's reading IEP. These efforts satisfy the law with regard to Student's needs as a student with dyslexia. *Tex. Educ. Code § 28.006 (h).* The evidence also showed that Student's reading abilities were assessed by the school district as a component of the most recent FIE as well as the IEE psychological. There is no requirement that a discrete, separate assessment for dyslexia is required by the IDEA under the unique factual circumstances of this case. The evidence showed Student was timely assessed in all areas of suspected disability, including reading. Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast, supra.*

Bullying

There was insufficient evidence in the record to support the conclusion that Student was a victim of bullying or that, if student was, it resulted in a failure to provide student with a free, appropriate public education. *See, T.K. v. New York City Dept. of Educ., 79 F. Supp. 2d 289 (D.C. N.Y. 2011)(school district's motion to dismiss denied where parents showed bullying adversely affected student's educational benefit and school district failed to take preventive steps or prompt and appropriate actions to investigate reports of bullying).* Student never reported or complained of bullying behavior to school staff.

The only evidence of bullying was a complaint Student made to student's mother that some of the older students in the DAEP

harassed student for student's failure to comply with DAEP rules. Indeed, the evidence is somewhat to the contrary; i.e., that Student engaged in some bullying type behavior ***self through name-calling and rude remarks to peers. That behavior was and is addressed in student's current IEP and BIP with goals and objectives related to improving student's social skills and learning how to use appropriate language and other strategies. Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast, supra; T.K. v. New York City Dept. of Educ., supra.*

Educational Records

Discovery Request

Petitioner embedded a broad request for production of documents in petitioner's request for due process hearing. (Petitioner's Request for Hearing, pp. 16-19) (April 4, 2012). Petitioner contends the school district did not produce a number of requested documents in a timely manner. (Tr. Vol. III, pp. 781-783). At the hearing, Petitioner's counsel listed the following documents that Petitioner contends should have been produced during discovery: a video from the DAEP, records related to the pending citation, the directive from the DAEP Director regarding Student's discipline, and, the reprimand to the paraprofessional. (Tr. Vol. II, pp. 748-749)(P. Ex. 40) (P. Ex. 42, pp. 1-25, 28-29) (P. Ex. 51) (P. Ex. 52) (P. Ex. 53) (P. Ex. 54) (P. Ex. 55).

School district test protocols and behavior rating scales utilized by school district evaluators were produced for review by Student's independent expert prior to the hearing. (P. Ex. 53) (Tr. Vol. II, p. 262). Some year end teacher notes, a work sample from the last FIE, and a transportation log were also produced the day before the hearing began. (P. Ex. 51) (P. Ex. 54).

Parental Requests for DAEP Records

Student's mother made an Open Records request for access to any reprimands contained in the personnel file of the paraprofessional who worked with Student in the *** and at the DAEP. Generally, personnel records evaluative in nature are deemed confidential and protected from disclosure under Texas law. *Tex. Gov't Code § 552.101; Tex. Educ. Code § 21.355; See, Attorney General Open Records Decision No. 643.* However, the school district did produce the reprimand related to Student at the hearing and it was admitted into evidence. *(P. Ex. 41, p. 22) (Tr. Vol. II, pp. 557-558).* The school district also produced the memo from the Director of the DAEP limiting the authority of DAEP staff allowed to discipline Student. It too was admitted into evidence at the hearing. (P. 52) (Tr. Vol. III, p. 760).

While I have no jurisdiction over complaints regarding an Open Records Request I do have the authority to manage the discovery process in special education hearings. *Tex. Gov't Code § 552.301; 19 Tex. Admin. Code §§ 89.1170(a) (b); 89.1180 (g).* Because the DAEP records were produced I conclude that any complaint with regard to those records is now moot. There is no other meaningful relief I can grant. Furthermore, Petitioner's counsel elicited testimony on the subject matter of both the reprimand and the disciplinary directive so those facts were in evidence even without the documents.

Documents Produced at the Hearing

A number of documents produced at the hearing predated Petitioner's document request; i.e., the records were more than four years old. Others were documents created after the parties met in the Resolution Session where documents responsive to Petitioner's document request were produced. A few others were not created until May 2012. Those documents were provided to Petitioner as they became available. (Tr. Vol. III, p. 784). A number of additional documents were produced at the due process hearing in consultation with the hearing officer and admitted into evidence. (Tr. Vol. III., pp. 763-781). Those documents include:

- A set of behavior point sheets generated after the Resolution Session were produced at the hearing and admitted into evidence as additional pages to a previously admitted exhibit. (P. Ex. 40, pp. 251-252) (Tr. Vol. III, pp. 763-764).

- The school district produced a print-out of two sets of behavior rating scales utilized by the psychologist in conducting the March 2011 psychological from the FIE. The rating scales are not considered to be "test protocols" but the psychologist was able to create the scales from the scoring report stored electronically on his computer. Those documents were also produced at the hearing and admitted into evidence. (P. Ex. 53) (Tr. Vol. III, pp. 764, 767).

- Test protocols for the school district's FIE were produced to Petitioner's expert a short time prior to the hearing. (Tr. Vol. III, p. 768). Another copy was produced at the hearing and admitted into evidence. (P. Ex. 54) (Tr. Vol. III, pp. 780-781).

- There were no additional documents related to Student's dyslexia instruction (specifically to the MTA reading program) other than those previously produced. (R. Ex. 72) (Tr. Vol. III, pp. 768-769, 770).

- The school district also produced a May 2012 Medicaid bill. Other Medicaid bills created after the Resolution Session were produced to Student's counsel on June 8, 2012 prior to the hearing. (Tr. Vol. III, pp. 774-775). The May 2012 bill was admitted as additional pages to a previously admitted exhibit. (P. Ex. 43, pp. 47-51).

- Petitioner requested all FBA reports not previously produced. There were 3 FBAs: the first in November 2007, the second March 2009 and the third completed in December 2011. The second and third FBA reports were produced and admitted into evidence. (P. Ex. 10) (P. Ex. 24). The school district produced the 2007 FBA later and explained it wasn't previously produced because it predated Petitioner's document request; i.e., documents more than four years old. The 2007 FBA was admitted into evidence as an exhibit. (P. Ex. 24).

Discovery in a Special Education Hearing

If Petitioner had concerns that the school district's response to petitioner's document request was incomplete Petitioner should have submitted the issue to the hearing officer prior to the hearing. The proper mechanism would have been to submit a Motion to Compel stating the grounds for the motion with a list of documents the school district failed to produce. The school district would have had an opportunity to offer an explanation or submit an objection as to why certain documents had not been produced.

Both parties were under a continuing obligation to supplement their discovery responses up to the date of disclosure; in this case that date was June 11, 2012. There is not much a hearing officer can do when discovery disputes arise in the middle of a hearing except to continue the hearing to allow the complaining party five school days to review any newly discovered documents. In this case the number of documents produced just prior to or during the hearing either predated Petitioner's document request or were generated after the Resolution Session held on April 20, 2012 – a date apparently agreed upon by the parties as the date for production.

Neither party requested the intervention of the hearing officer nor sought the need for a discovery plan prior to the hearing. Petitioner did not request a continuance during the hearing when newly discovered documents were produced. The school district should have produced the directive from the DAEP Director prior to the hearing but Petitioner failed to show that failure effected a material change in petitioner's case; it certainly did not impact the outcome one way or the other.

While it is preferable for counsel to work through discovery in a collaborative manner it was up to the Petitioner to clearly articulate either the set of documents requested or the basis for any discovery issues. A broad discovery request embedded in a hearing request is not a proper or clearly articulated document request. Discovery in a special education hearing is governed by the methods established under the Texas Administrative Procedures Act. The parties should have followed those rules. *19 Tex. Admin. Code § 89.1180 (g); Tex. Gov't Code § 2001.091 et seq.*

Accuracy of Records

Petitioner contends the school district "falsified" Student's educational records by misstating petitioner's grades and that student was performing on grade level. Petitioner also complained IEP progress reports contained inaccurate information. However, the evidence showed there were date errors due to a glitch in the software program used in generating the reports. The credible evidence did not prove the school district falsified records or misstated Student's academic progress. Even if it did, Petitioner did not prove there was a substantive educational harm as a result. Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast, supra.*

Video

Respondent raises the issue of whether Petitioner is entitled to access to a school district video that contains personally identifiable information about other students. During the hearing the school district's counsel noted conflicting legal authority

over the issue but agreed to produce the video. (Tr. Vol. III, p. 759). The parties submitted post-hearing written submissions and additional exhibits on that issue. (P. Ex. 58)(R. Ex. 75). This issue arises under the Family Educational Rights and Privacy Act (FERPA) and not the IDEA. As such, I have no jurisdiction to determine whether the DAEP video is an "educational record" within the meaning of FERPA and whether any exceptions to disclosure apply. *See, 20 U.S.C. §1232g et seq.; 34 C.F.R. § 99.31.*

However, whatever its reservations the school district agreed to produce the DAEP video; if there are concerns about revealing the identities of other students on the video the school district may utilize available software and/or relevant technology to obscure their identities but the video should nevertheless be produced. However, Petitioner did not demonstrate that the failure to produce the video effected a material change in Petitioner's case and it did not impact the outcome one way or the other.

Implementation of IEP During Disciplinary Placements

A child removed from his current placement for disciplinary reasons must continue to receive educational services to enable the child to continue to participate in the general education curriculum and progress towards meeting IEP goals. *34 C.F.R. § 300.530 (d)(1)(i).* The student may also receive, as appropriate, a FBA and behavior intervention services and modifications designed to address the behavior violation so that it does not recur. *34 C.F.R. § 300.530 (d)(1)(ii).* The educational services may be provided in an interim alternative educational setting. *34 C.F.R. § 300.530 (d)(2).*

The credible evidence showed the school district did implement Student's IEP and BIP while student was in the DAEP during the relevant time period. There was simply no credible controverting evidence to the contrary. While Student was also subject to the DAEP Code of Conduct the impact of that was discussed at length at the MDR ARD with Student's mother. Petitioner did not meet petitioner's burden of proof on this issue. *Schaffer v. Weast, supra.*

IEE

The parents of a child with a disability have the right to obtain an independent educational evaluation (IEE). The school district must provide to the parents, upon request, information about where the IEE may be obtained and the applicable school district criteria for the IEE. *34 C.F.R. §300.502 (a)(1)(2).* A parent has the right to an IEE at the school district's expense if the parent disagrees with an evaluation obtained by the school district. If the parent requests an IEE at school district expense the school district must, without unnecessary delay, either file a request for a due process hearing to show its evaluation was appropriate or ensure the IEE is provided. *34 C.F.R. § 300.502 (b)(1)(2)(i)(ii).* If the school district files a request for hearing and is successful in proving its own evaluation was appropriate, the parent still has a right to an IEE but not at school district expense. *34 C.F.R. § 300.502 (b)(3).*

The evidence revealed a mixed set of facts. The school district agreed to and did provide parental requests to evaluate Student for autism, pervasive developmental disorder and OHI. The IEE psychological was completed and included evaluations for parental requests for dyslexia and dysgraphia as well. The IEE speech/language evaluation was completed and addressed a concern over Student's pragmatic language skills – an important factor in making a determination of eligibility for autism. Furthermore, the school district provided Student's mother with information about IEEs and the school district's IEE criteria.

What were left unresolved were the parental IEE requests for OT, PT, AT and another FBA. The school district never assessed Student for PT since it was never previously an area of suspected need. Therefore, the parental request for a PT IEE is premature. The school district must first be allowed to conduct its own PT evaluation before the parental right to a PT IEE arises. *34 C.F.R. § 300.502 (b).*

Under IDEA the school district may ask for the reason underlying the parent's objection to the school district's evaluation. However, the school district may not require the parent to provide an explanation as a condition of approving the IEE or unreasonably delay in either providing the IEE or filing for a due process hearing. *34 C.F.R. § 300.502 (b)(4).* In this case the school district did ask Student's mother the basis of her disagreements with school district evaluations but it also clearly did not condition the approval of the IEE requests on her response. The school district did not file a request for hearing to determine whether its own OT, AT and FBA evaluations were appropriate.

However, the evidence also showed that Student's mother never identified the independent examiners who met school district criteria for the purpose of those evaluations. The due process hearing was filed seven calendar days after the parties exchanged

initial email communications about the IEE requests. It is understandable that communications about the remaining IEE requests were suspended at that point.

The evidence showed the school district did not unreasonably delay in communicating with Student's mother or in approving the IEE evaluations once Student's mother identified the two independent evaluators she'd selected. The credible evidence leads me to conclude the school district was waiting for Student's mother to identify the OT, AT and FBA independent examiners she'd selected to approve the remainder of the IEE requests. I conclude the school district did not violate the parental right to an IEE under the unique factual circumstances of this case. *34 C.F.R. §300.502 (a)(1)(2).*

Conclusions of Law

1. The one year statute of limitations rule applies to the student's claims in this case. All claims that arose prior to April 2011 fall outside the applicable one year limitations period. The student did not meet student's burden of proving one or both of the exceptions should apply to toll the one year limitations period. *34 C.F.R. §§300.503 (a)(1)(2); 300.507 (a)(1)(2); 300.511 (f)(1)(2); 19 Tex. Admin. Code §89.1151 (c).*

2. The student was not required to exhaust student's administrative remedies by presenting parental concerns to an Admission, Review & Dismissal Committee (ARD) before invoking the parental right to a due process hearing under the IDEA in this jurisdiction. *19 Tex. Admin. Code §89.1151 (c); Letter to Lenz, 37 IDELR 95 (OSEP 2002).*

3. The school district provided the student the student with a free, appropriate public education in the least restrictive environment during the relevant time period. *34 C.F.R. §§ 300.1; 300.17;300.114; Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997); Daniel R.R. v. State Bd. Of Educ., 874 F 2d 1036, 1045 (5th Cir. 1989).*

4. The school district provided the student with an Individual Educational Plan (IEP) that included the requisite objective and measureable goals and objectives. *34 C.F.R. § 300.320.*

5. The school district met the student's behavioral needs by conducting a timely and appropriate Functional Behavior Assessment (FBA) and devising and implementing a Behavior Intervention Plan (BIP) that included the use of positive behavior supports during the relevant time period. *34 C.F.R. §§ 300.324 (a)(2)(i); 300.530(f).*

6. The school district staff were qualified and sufficiently trained as to the nature of the student's disabilities and appropriate behavioral interventions. *34 C.F.R. § 300.18; 19 Tex. Admin. Code § 89.1131.* The student did not meet student's burden of proving student was a victim of bullying, that staff failed to address any bullying, or that staff made inappropriate comments about student's behavior that resulted in the denial of a free, appropriate public education. *Schaffer v. Weast, 546 U.S. 49, 62 (2005); T.K. v. New York City Dept. of Educ., 79 F. Supp 2d 289 (D.C. N.Y. 2011).*

7. The school district's identification of the student as a student with an emotional disturbance for eligibility under the IDEA was appropriate. *34 C.F.R. §300.8 (c)(4)(i)(C).* The student's IEP and BIP continued to address student's needs as a student with attention deficits but student's eligibility as a student with an emotional disturbance was more accurate than eligibility under Other Health Impaired based on Attention Deficit Hyperactivity Disorder. *34 C.F.R. § 300.8 (c)(9).*

8. The student was not eligible for special education as a student with autism. The student's educational performance was primarily the result of an emotional disturbance. *34 C.F.R. §300.8 (c)(1)(ii).*

9. The student is not eligible for special education as a student with a learning disability. Specific learning disabilities do not include learning problems that are primarily the result of an emotional disturbance. The student's IEP and BIP addressed the student's deficits in reading and written expression. *34 C.F.R. § 300.8 (c)(10)(ii).*

10. The school district conducted the student's three year reevaluation in a timely manner. *34 C.F.R. § 300.303.* Any claim that it was untimely fell outside the one year statute of limitations. *19 Tex. Admin. Code § 89.1151 (c).*

11. The school district conducted appropriate assessments to address dysgraphia and to assess the student's skills in written expression as an area of suspected disability in a timely manner. *34 C.F.R. § 300.304 (c)(4).* Any complaint

that the assessments were not appropriate or untimely is barred by the one year statute of limitations. *19 Tex. Admin. Code § 89.1151 (c).*

12. The school district did not conduct an in-home training assessment within the relevant time period. The student needs an in-home training assessment. *34 C.F.R. § 300.34 (a)(c)(8)(iii).*

13. The school district conducted a counseling assessment. Any complaint that the counseling assessment was not appropriate or untimely is barred by the one year statute of limitations. *19 Tex. Admin. Code § 89.1151 (c).* However, the student needs more counseling as a related service per week than student's current IEP provides. The school district must increase the student's counseling from 10 minutes per week to 30 minutes per week. *34 C.F.R. § 300.34 (a)(c)(2).*

14. The school district properly documented the formal and/or informal measures used in concluding the student did not require ESY in the summer of 2011 or 2012 in order to maintain academic skills. The school district did not properly document whether the student could maintain behavioral skills or that student would not reasonably be expected to harm ***self or others without ESY. The school district must compile behavioral data for purposes of an ARD in the spring 2013 to determine whether the student needs ESY in order to maintain behavioral skills addressed in student's IEP and BIP. *34 C.F.R. § 300.1065.*

15. The school district addressed the student's needs as a student with dyslexia through student's special education program. *34 C.F.R. §300.320; Tex. Educ. Code* §*38.003; 19 Tex. Admin. Code § 74.28.*

16. The student failed to meet student's burden of proving student was the victim of bullying at school or that if student was it resulted in the denial of a free, appropriate public education. *34 C.F.R. § 300.1; T.K. v. New York City Dept. of Educ., 79 F. Supp 2d 289 (D.C. N.Y. 2011).*

17. The school district responded appropriately to parental requests for the student's educational records with the exception of a single document related to the student's behavioral intervention placement at an alternative educational placement. The production of that document was untimely but ultimately produced and included in the record in this case. Therefore, no substantive educational harm was a result of this error. *34 C.F.R. § 300.501; 300.513(a)(2).*

18. The student did not meet student's burden of proving the school district falsified student's educational records or failed to accurately report student's academic progress. *Schaffer v. Weast, supra.* The school district did not improperly deny parental requests for certain specified records. Any complaints that the school district failed to produce requested documents were resolved prior to and/or during the due process hearing and no substantive educational harm was a result of any delay in producing requested documents. *34 C.F.R. § 300.501; 300.513(a)(2).*

19. The school district was not required to disclose any reprimands related to the paraprofessional who worked with the student because personnel records evaluative in nature are deemed confidential and protected from disclosure. *Tex. Gov't Code §552.101; Tex. Educ. Code §21.355.* Furthermore, no substantive educational harm occurred because the school district produced the reprimand and it was tendered into evidence by the student as an exhibit. *34 C.F.R. § 300.501; 300.513(a)(2).*

20. The school district agreed to produce a video maintained by the school district at the alternative educational placement that recorded a behavioral incident between the student and the paraprofessional. Having agreed to produce the video the school district must do so but may also use available software and/or other technology to protect the identities of other students who may appear on the video. *34 C.F.R. § 300.613.* No substantive educational harm resulted from the school district's failure to produce the video. *34 C.F.R. § 300.501; 300.513(a)(2).*

21. The hearing officer has no jurisdiction to consider whether any of student's records request fall within the scope of educational records that may be disclosed or withheld under the Family Educational Rights and Privacy Act or under the Texas Public Information Act. A hearing officer's jurisdiction in Texas is limited strictly to issues arising under the IDEA. *19 Tex. Admin. Code §§89.1151; 89.1170(a)(b).*

22. The school district properly implemented the student's IEP and BIP, including while student was placed at an alternative educational placement as a behavioral intervention. The student did not meet student's burden of proof on

this issue. *34 C.F.R. § 300.530 (d)(1)(2); Schaffer v. Weast, supra.*

23. The school district did not unreasonably delay in responding to a parental request for an IEE to evaluate the student for eligibility for autism, OHI, dysgraphia and dyslexia. The school district ensured the evaluations were provided in a timely manner. *34 C.F.R. § 300.502(b).*

24. The parent is not entitled to an independent evaluation for physical therapy. The school district has not conducted its own evaluation for PT because that was not historically identified as an area of suspected need. The parent's right to an independent PT will arise when and if the parent disagrees with the school district's PT evaluation. *34 C.F.R. § 300.502(b)(1).*

25. The school district did not unreasonably delay or fail to ensure independent OT and AT evaluations or an FBA were provided because the parent did not notify the school district of the independent examiners the parent selected to conduct those evaluations who met school district criteria. *34 C.F.R. § 300.502(b).* The school district met its obligation to provide information about where the independent evaluations could be obtained and applicable school district criteria. *34 C.F.R. § 300.502(a).*

26. The school district had the right to request the reasons for parental objections to the school district's evaluations in considering the parental requests for various independent assessments. The school district did not improperly condition approval of the requests on the parent's explanation. *34 C.F.R. § 300.502(a)(b).*

ORDERS

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

1. The school district shall conduct an in-home training assessment within 30 school days from the date of this Decision. The student's parent shall cooperate fully in scheduling and conducting the in-home training assessment. The school district shall be relieved of its responsibility to conduct the in-home training assessment if the parent fails to cooperate in scheduling and/or conducting the assessment within the 30 day time period;

2. The school district shall amend the student's IEP to increase the amount of counseling services to 30 minutes per week for the remainder of the current school year. The amendment to the IEP may be completed without the necessity of a formal ARD meeting as specified in 34 C.F.R. § 300.324 (a)(4)(6) but it must be completed no later than 30 school days from the date of this Decision;

3. The school district shall produce to the student a copy of the video from the DAEP as requested. The school district shall have 30 school days from the date of this Decision to use available software and/or technology to protect the identities of other students who may appear on the video. The school district shall produce the video to the student no later than 35 school days from the date of this Decision;

4. The school district shall conduct and complete a physical therapy evaluation of the student within 60 calendar days of the date of this Decision and provide the parent with a copy of the PT evaluation report by that deadline;

5. The school district shall collect and document behavioral data for a period of at least eight weeks from the date of this Decision during the 2012-2013 school year and present that data to an ARD meeting that shall convene in the spring of 2013 for the purpose of considering whether the student needs ESY services in order to maintain critical behavioral skills or if the loss of acquired skills (without regard to whether the student can recoup the skills within a reasonable amount of time) could reasonably be expected to result in immediate physical harm to the student or to others. The school district's behavioral documentation may take any form the school district wishes to use but it must confirm the data was presented to the spring 2013 ARD and that the issue of ESY for both academic and behavioral skills is discussed. The ARD to consider the need for summer 2013 ESY shall be scheduled by mutual agreement of the parties.

6. The parent shall submit a list (in writing) to the school district of selected independent examiners who meet school district criteria to conduct the parental requests for an FBA and independent OT and AT evaluations no later than 30

school days from the date of this Decision. The school district shall submit a contract to each qualified independent examiner no later than 10 school days from the date the school district receives the list of selected and qualified examiners from the parent. The school district shall request that the independent assessments be completed within 60 calendar days of the date the contract is submitted to each examiner; however, the independent assessments shall be completed depending upon the availability of each independent examiner and the cooperation of the student and student's mother in conducting the assessments. The school district will be deemed to be in compliance so long as it submits the contract and makes the request to each independent examiner as directed herein. The parties may agree otherwise to any of these provisions regarding the independent FBA, OT and AT evaluations.

It is further **ORDERED** that Respondent's requests for relief are **GRANTED IN PART AND DENIED IN PART** as follows: Petitioner's claims arising outside the one year statute of limitations period in Texas are dismissed. Petitioner's claims arising under the Family Educational Rights and Privacy Act and the Texas Public Information Act are dismissed as outside the hearing officer's jurisdiction.

All other relief not specifically stated herein is DENIED.

SIGNED the 12th day of September2012

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

NOTICE TO THE PARTIES

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

BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS

STUDENT,		
bnf PARENTS,	**§**	
Petitioner,	**§**	
	§	
v.	**§**	**DOCKET NO. 229-SE-0412**
	§	
MABANK INDEPENDENT	**§**	
SCHOOL DISTRICT,	**§**	
Respondent.	**§**	

SYNOPSIS

Issue:

Whether one year statute of limitations rule applies to student's IDEA claims or whether statute of limitations tolled under one or both exceptions to the rule.

Held: **FOR THE SCHOOL DISTRICT**

One year statute of limitations rule applied; student's claims arising outside one year limitations period barred; student did not prove one or both exceptions to limitations rule should apply. **34 C.F.R. §§ 300.503 (a); 300.507 (a) (1) (2); 300.511 (f) (1) (2); 19 Tex. Admin. Code § 89.1151 (c).**

Issue:

Whether student failed to exhaust student's administrative remedies by failing to present parental concerns to an Admission, Review & Dismissal Committee (ARD) before filing request for a due process hearing.

Held: **FOR THE STUDENT**

In Texas parent not required to present concerns to ARD meeting prior to filing request for a due process hearing.

19 Tex. Admin. Code § 89.1151 (c); Letter to Lenz, 37 IDELR 95 (OSEP 2002).

Issue:

Whether school district provided *** student with emotional disturbance, dyslexia and deficits in attention and written expression a free, appropriate public education in the least restrictive environment.

Held: **FOR THE SCHOOL DISTRICT**

School district's program that included IEP and BIP goals and objectives to address student's set of needs met the four factors test established in this jurisdiction to determine whether educational program provided requisite overall, meaningful benefit.

Student's instruction provided in small, structured *** class with resource math, resource reading, and regular education PE (in light of nature and severity of student's behavior) was LRE.

Student's *** day placement in alternative education program made by duly constituted ARD and at parental request as behavioral intervention not as punishment for Code of Conduct violation which ARD determined was manifestation of student's disability.

Proposed program for 2012-2013 school year increased mainstreaming opportunities to include regular education social studies, ***, and PE with continued mix of behavior and resource classes.

Student did not meet student's burden of proving a need for residential placement – one of the most restrictive instructional settings – where student made behavioral progress (intensity, frequency and duration, and latency period all decreased) and where evidence showed student had social relationships with peers and school district staff.

34 C.F.R. §§300.1; 300.17; 300.114; Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997); Daniel R.R. v. State Bd. of Educ., 874 F 2d 1036, 2045 (5th Cir. 1989).

Issue:

Whether IEP included objective and measureable goals and objectives as required by IDEA.

Held: **FOR THE SCHOOL DISTRICT**

IEP included statement of measureable annual goals, including academic and functional, designed to meet student's needs in each subject area including behavior. Goals included description of how student's progress in meeting goals would be measured and mastery criteria for each.

34 C.F.R. § 300.320 (a).

Issue:

Whether school district met student's behavioral needs by conducting a timely and appropriate Functional Behavior Assessment (FBA) and devising an appropriate Behavior Intervention Plan (BIP).

Held: **FOR THE SCHOOL DISTRICT**

Functional behavior assessment required if MDR ARD concludes student's Code of Conduct violation a manifestation of student's disability if student does not have current BIP in place; FBA not required where BIP in place and FBA on file reviewed by MDR ARD. School district conducted thorough FBA in December 2011 that was reviewed by MDR ARD in spring 2012. FBA also used to design and revise student's BIP. School district's two-tiered FBA process included three observations across settings and time by both assistant principal and by behavioral specialist as well as review of disciplinary records, office referrals, motivation assessment scales and student function behavior profile from classroom teachers, and student directory data. Parent did not return requested parent data for purposes of FBA.

Student's BIP based on results of FBA, addressed student's behavioral needs, and included positive behavior supports. Student's IEP included use of sensory diet to address attention deficits and behavioral needs.

34 C.F.R. §§ 300.324 (a) (2) (i); 300.530 (f).

Issue:

Whether school district staff appropriately trained as to nature of student's disability, how to address and avoid bullying behavior, and appropriate comments about student's behavior.

Held: **FOR THE SCHOOL DISTRICT**

School district staff who worked with student qualified and sufficiently trained as to nature of student's disabilities and appropriate behavioral interventions. Student did not meet burden of proving student was victim of bullying or that staff made inappropriate comments that resulted in denial of FAPE. Exchange between paraprofessional and student where paraprofessional received reprimand was only single incident of inappropriate comment by school staff member.

34 C.F.R. § 300.18; 19 Tex. Admin. Code § 89.1131; T.K. v. New York City Dept. of Educ., 79 F. Supp 2d 289 (D.C. N.Y. 2011).

Issue:

Whether school district failed to conduct timely and appropriate evaluation of student to identify student as eligible for special education as student with autism, OHI, and learning disabilities.

Held: **FOR THE SCHOOL DISTRICT**

School district conducted evaluations of student for autism, OHI and learning disabilities within past four years since initial identification as eligible for special education. Claims that evaluations conducted prior to April 2011 untimely or inappropriate outside one year statute of limitations. **19 Tex. Admin. Code § 89.1151 (c).**

School district conducted and completed three year FIE reevaluation two weeks before three year deadline so FIE was therefore timely. **34 C.F.R. § 300.303.**

School district's change in identification of student as eligible for special education as student with emotional disturbance from prior eligibility as student with OHI based on Attention Deficit Hyperactivity Disorder (ADHD) was appropriate where student's level of hyperactivity, aggression, and inattentiveness surpassed that of ADHD, better explained by emotional disturbance, and where student met one of four required ED criteria. **34 C.F.R. §§ 300.8 (c) (4) (i) (C); 300. 8 (c) (9).**

Student did not meet eligibility criteria as student with autism where student's educational performance primarily the result of an emotional disturbance, student exhibited no pragmatic language skill deficits and demonstrated ability to socialize. **34 C.F.R. § 300.8 (c) (1) (ii).**

Timely and appropriate three year reevaluation considered whether student eligible for special education as student with learning disabilities. FIE found student was not eligible under learning disabilities; specific learning disabilities do not include learning problems primarily the result of an emotional disturbance. FIE did identify student's deficits in reading and written expression. **34 C.F.R. § 300.8 (c) (10) (ii).**

Student's IEP and BIP addressed student's deficits in reading, written expression and attention; eligibility classification did not drive IEP design but instead all needs identified by assessment data addressed by IEP and BIP.
34 C.F.R. § 300.324

Issue:

Whether school district failed to conduct timely and appropriate assessments for dysgraphia and assistive technology.

Held: **FOR THE SCHOOL DISTRICT**

School district conducted appropriate assessments to address dysgraphia through OT and written expression evaluations as components of initial FIE and three year FIE reevaluation. School district conducted full AT evaluation in 2009 and AT checklist as component of three year FIE reevaluation in 2011. Claims that AT evaluations untimely or not appropriate barred by one year statute of limitations. School district should conduct updated AT evaluation beyond mere checklist because written tasks shown to be behavioral trigger.

34 C.F.R. § 300.304 (c) (4); 19 Tex. Admin. Code § 89.1151 (c).

Issue:

Whether school district should have conducted in-home training assessment.

Held: **FOR THE STUDENT**

Evidence showed student needed consistent behavioral approach between home and school and that parent needed assistance in coping with student's uncooperative and unruly behavior and to better support student's BIP at home. School district did not conduct in-home training assessment as part of its three year FIE revaluation nor within the past school year and should have done so.

34 C.F.R. § 300.34 (a) (c) (8) (iii).

Issue:

Whether school district should have conducted counseling assessment.

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

School district conducted counseling assessment; any complaint that it was untimely or not appropriate barred by one year statute of limitations; however, school district's provision of 10 minutes of counseling every other week, increased to every week in March 2012, was not appropriate; evidence showed student needs minimum 30 minutes counseling per week – school district ordered to increase amount of counseling services.

34 C.F.R. § 300.34 (a) (c) (2); 19 Tex. Admin. Code § 89.1151 (c).

Issue:

Whether school district should have conducted assessment for ESY.

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

School district properly documented formal and informal measures used to conclude student did not need ESY to maintain academic skills; school district did not properly document whether student could maintain critical behavioral skills or that student would not be reasonably expected to harm self or others without ESY. School district ordered to collect and document behavioral data to determine student's need for ESY to maintain critical behavioral skills for summer 2013.

19 Tex. Admin. Code § 89.1065

Issue:

Whether school district should have conducted dyslexia assessment and whether school district's special education program addressed student's needs as student with dyslexia.

Held: FOR THE SCHOOL DISTRICT

Student's reading needs met through individualized reading program designed by student's classroom teachers. IEP included "dyslexia bundle." Reading abilities were assessed as component of most recent FIE as well as IEE psychological. No requirement to conduct yet another discrete, separate assessment for dyslexia. State law specifically recognizes ARD has responsibility to determine manner in which special education student participates in school district's dyslexia reading program; ARD may select any number of options for providing special education student with appropriate reading instructions.

34 C.F.R. § 300.320; Tex. Educ. Code § § 28.006; 38.003; 19 Tex. Admin. Code § 74.28; Dyslexia Handbook – Revised 2007, Updated 2010: Procedures Concerning Dyslexia and related Disorders, Appendix A.

Issue:

Whether student was victim of bullying and if school district failed to properly address it and denied student FAPE.

Held: FOR THE SCHOOL DISTRICT

Student did not meet burden of proving student was victim of bullying. Single complaint to mother and no evidence of any reports or complaints to school district staff insufficient to establish bullying was a significant problem; student did not prove student was denied FAPE.

34 C.F.R. §§ 300.1; 300.17; Schaffer v. Weast, 546 U.S. 49, 52 (2005); T.K. v. New York City Dept. of Educ., 79 F Supp 2d 289 (D.C. N.Y. 2011).

Issue:

Whether school district responded appropriately to parental requests for educational records and whether school district falsified educational records.

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

Complaint that school district failed to produce records under Texas Public Information Act request outside jurisdiction of special education hearing officer in Texas. Parent's request for reprimands related to paraprofessional who worked with student as personnel record evaluative in nature deemed confidential and protected from disclosure under Texas law – however school district produced reprimand related to student and document was admitted into evidence.

Student embedded broad document request in request for hearing. Hearing Officer has jurisdiction over discovery in special education hearing. School district produced response to student's document request at Resolution Session by agreement of parties, as well as number of other documents generated after that date and while hearing was pending; additional documents were produced by school district at due process hearing that were outside four year timeframe contemplated by student's document request. School district failed to produce a memo from DAEP Director related to student in timely manner.

Discovery in special education governed by methods established under Texas Administrative Procedures Act; student's broadly worded document request embedded in request for hearing not clearly articulated document request under APA. Student failed to bring complaints about school district's failure to produce requested documents to hearing officer's attention prior to due process hearing; student did not request continuance of hearing in order to review newly discovered evidence once hearing underway.

School district responded appropriately to student's document requests with exception of DAEP Director's memo; production of memo untimely but ultimately produced and tendered by student as hearing exhibit and admitted into evidence; no substantive educational harm resulted due to the error.

Student did not meet burden of proving school district falsified any educational records. Software glitch in some IEP progress reports contained date errors but substantive educational information stated in the reports was accurate.

34 C.F.R. §§ 300.501; 300.513 (a) (2); 19 Tex. Admin. Code § 89.1180 (g).

Issue:

Whether school district should have produced video of student while at DAEP that recorded behavioral incident between student and paraprofessional that included identities of other students placed at DAEP.

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

Issue of whether school district should have disclosed DAEP security video arises under Family Educational Rights and Privacy Act (FERPA) and therefore outside hearing officer's jurisdiction. However, school district agreed to produce video during hearing; school district may use available software and/or technology to protect identities of other DAEP students prior to disclosure to parent; no substantive educational harm results from school district's failure to produce video because there was other evidence introduced that described the exchange between the student and the paraprofessional.

34 C.F.R. §§ 300.501; 300.513 (a) (2); 300.613.

Issue:

Whether school district failed to properly implement student's IEP and BIP while placed at DAEP.

Held: **FOR THE SCHOOL DISTRICT**

School district implemented IEP and BIP while at DAEP as behavioral intervention; student provided with requested sensory item and all DAEP staff trained on student's IEP and BIP; behavioral specialist consulted with DAEP staff; student received instruction from special education teacher at DAEP as well as fine arts and PE. Student subject to DAEP Code of Conduct as well as BIP during placement there which was explained and discussed in detail with student's mother at MDR ARD where placement decision made.

34 C.F.R. §§ 300.323 (d); 300.530 (d).

Issue:

Whether school district imposed an unreasonable delay in responding to parental requests for IEE to evaluate student for autism, OHI, dysgraphia, and dyslexia.

Held: **FOR THE SCHOOL DISTRICT**

School district ensured parental IEE requests to evaluate student for autism, OHI, dysgraphia and dyslexia were conducted and completed. IEE psychological and IEE speech/language evaluations tendered by student as exhibits and admitted into evidence.

34 C.F.R. § 300.502 (b).

Issue:

Whether student entitled to IEE for physical therapy.

Held: **FOR THE SCHOOL DISTRICT**

School district did not previously conduct its own evaluation for PT because not historically identified as an area of suspected need. Parent's right to IEE for PT arises when and if parent disagrees with school district's PT evaluation; school district must conduct its own PT evaluation first.

34 C.F.R. § 300.502 (b).

Issue:

Whether school district failed to respond in timely manner to parental IEE requests for OT, AT and an FBA.

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

School district did not deny parental IEE requests for OT, AT and FBA; instead school district sent parent information about IEEs and school district IEE criteria in timely manner; parent did not notify school district of parent's selection of IEE examiners who met school district criteria.

School district had right to request reasons for parental objections to school district's evaluations; school district did not condition approval of IEE requests on parental explanation.

34 C.F.R. § 300.502.