

STUDENT, *b/n/f*  
PARENTS,

Petitioner,

V.

LEWISVILLE INDEPENDENT  
SCHOOL DISTRICT,

Respondent.

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BEFORE A SPECIAL EDUCATION

HEARING OFFICER

FOR THE STATE OF TEXAS

**DECISION OF THE SPECIAL EDUCATION HEARING OFFICER**

**I.  
STATEMENT OF THE CASE**

Petitioner, Student *b/n/f* Parent (“Petitioner” or “Student”), filed a Request for Due Process Hearing (“Complaint”) with the Texas Education Agency (“TEA”), requesting a Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. §1400 *et. seq.* Student asserted multiple issues in student’s Complaint against Lewisville Independent School District (“Respondent” or “the District” or “LISD”), some of which were related to disciplinary matters subject to the expedited hearing rules and regulations set forth in 20 U.S.C. §1415(k)(3) & (4)(B); §1415(f)(1)(A); 34 C.F.R. §300.532(c)(2). The parties agreed to bifurcate the hearing to allow for 1) a timely expedited hearing on the discipline issues and 2) a subsequent hearing on the remaining IDEIA issues.<sup>1</sup>

The issues presented in the subsequent Due Process Hearing, which are the basis for this Decision, are as follows:

1. whether LISD failed to evaluate Student in all areas of suspected disabilities;
2. whether LISD failed to find Student eligible for special education services in the area of Autism; and
3. whether LISD failed to provide Student with appropriate special education services to address student’s Autism.

Student seeks the following relief from the undersigned Hearing Officer:

1. an order directing LISD to classify Student as a student with Autism and to develop a program for Student in the least restrictive environment (“LRE”) to address all of student’s needs in this area; and
2. an order granting compensatory services in all areas in which LISD failed to provide Student FAPE.

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<sup>1</sup> The sole issue for consideration in the Expedited Due Process Hearing concerned Student’s appeal of the Manifestation Determination (“MD”) made by Student’s Manifestation Determination Review Committee (“MDRC”) on April \*\*, 2012, and April \*\*, 2012, which found that Student’s misconduct, \*\*\*, was not a manifestation of student’s disabilities. Student asserted that the alleged misconduct was, in fact, a manifestation of student’s disabilities; the resulting assignment to LISD’s Disciplinary Alternative Educational Placement (“DAEP”) for thirty-five (35) days was a prohibited change in placement; and as such, LISD deprived Student of a free, appropriate, public education (“FAPE”). The Expedited Due Process Hearing convened on May 10, 2012, and the undersigned Hearing Officer issued the Interim Decision of the Special Education Hearing Officer on Expedited Appeal on May 24, 2012.

## II. PROCEDURAL HISTORY

### A. The Bifurcated Proceeding: The Expedited Due Process Hearing

Student filed student's Complaint on April 17, 2012. On that same date, TEA assigned Docket No. 241-SE-0412 to the undersigned Hearing Officer, who immediately sent the Initial Scheduling Order to the parties, setting out the procedural deadlines of the expedited proceeding. The parties participated in a Resolution Session on April 25, 2012, but did not resolve the expedited due process issues.

On April 27, 2012, LISD filed its Motion for Partial Dismissal for Lack of Jurisdiction (seeking dismissal of all non-IDEIA claims) and Ten-Day Response to Complaint.

Also on April 27, 2012, the parties convened the pre-hearing telephone conference. In attendance were the following: 1) Mr. Tomas Ramirez, III, Student's counsel; 2) Ms. Jan Watson, LISD's counsel; 3) Ms. \*\*\*, LISD's Special Education Director; 4) the undersigned Hearing Officer; and 5) the court reporter, who made a record of the telephone conference. The parties discussed Student's pending request for records, the location of the hearing, stay-put during the pendency of the expedited proceeding, and confirmed the May 10, 2012, setting for the Expedited Due Process Hearing. The undersigned 1) denied Student's stay-put request, which was not available during this phase of an appeal of a MD, pursuant to 20 U.S.C. §1415(k)(4)(A) and 34 C.F.R. §300.533; 2) granted Student's request to conduct the expedited hearing at a neutral location, but instructed Student's counsel to locate the venue and inform the parties; 3) ordered LISD to provide Student's Parents with the student records requested in Student's Complaint, as well as any additional documents that the Parents requested prior to the MDRC meeting on April \*\*\*, 2012; and 4) agreed to dismiss all issues and claims for relief over which Texas Special Education Hearing Officers have no jurisdiction.

On April 28, 2012, the undersigned issued the Orders 1) Scheduling Expedited Due Process Hearing and 2) Abating Unrelated Issues. Per this Order, the undersigned scheduled the Expedited Due Process Hearing for May 10, 2012, confirmed the agreed Disclosure Deadline for 5:00 p.m., May 3, 2012, as well as the Decision Deadline of May 24, 2012.

The Expedited Due Process Hearing convened on May 10, 2012, and was closed to the public. Per the applicable deadlines, the undersigned issued the Interim Decision of the Special Education Hearing Officer on Expedited Appeal on May 24, 2012. By this Interim Decision, the undersigned found that 1) Student's \*\*\* was a manifestation of student's disabilities; 2) Student may not be disciplined for this violation of the Student Code of Conduct; and 3) within five (5) school days, Student's ARDC would convene and conduct a new FBA and develop a BIP and return Student to student's educational placement. This Interim Decision lifted the abatement of the remaining due process issues, effective May 29, 2012, stating that all valid issues that are unrelated to those tried in the May 10, 2012, Expedited Due Process Hearing would be tried in a second Due Process Hearing utilizing the normal procedural deadlines of the due process proceeding.

### B. The Bifurcated Proceeding: The Remaining Due Process Issues

Prior to the issuance of the new scheduling order, Student filed a First Amended Due Process Complaint on May 30, 2012, setting forth the remaining due process issues. As such, this filing date marked the date for calculating all remaining resolution and hearing deadlines. The parties waived the second Resolution Session and agreed to participate in mediation.

On June 8, 2012, LISD filed its Motion to Dismiss in Part (seeking dismissal of all non-IDEIA claims) and Ten-Day Response to Complaint.

On June 15, 2012, the parties convened the pre-hearing telephone conference. In attendance were the following: 1) Mr. Ramirez, Student's counsel; 2) Ms. Watson, LISD's counsel; 3) the undersigned Hearing

Officer; and 4) the court reporter, who made a record of the telephone conference. The parties discussed the remaining issues and re-scheduled the Due Process Hearing for August 30-31, 2012.

On June 30, 2012, the undersigned issued the Order Scheduling Second Part of Bifurcated Due Process Hearing, which delineated the issues, scheduled the disclosure and decision deadlines, and dismissed all non-IDEIA claims pled by Student.<sup>2</sup>

The Due Process Hearing convened on August 30, 2012, and concluded on August 31, 2012, at a neutral location, as requested by Student, and was closed to the public. Both parties introduced documentary evidence, called witnesses, and conducted cross-examination. Student was represented by student's attorney, Mr. Ramirez, and Ms. Melanie Watson, paralegal. Also in attendance were Mr. and Mrs. \*\*\*, Student's Parents. LISD was represented by counsel, Ms. Jan Watson and Ms. Nona Matthews. Also in attendance were \*\*\*, LISD's Executive Director of Special Education, and Ms. Melissa Scherer, an attorney with LISD's representative law firm.

At the conclusion of the hearing Student's counsel made an oral closing argument, and the parties and Hearing Officer agreed to a post-hearing schedule: LISD's closing argument and Student's rebuttal argument would be due by September 28, 2012, and the Decision would be rendered by October 5, 2012. The parties and Hearing Officer agreed to extend the Decision Deadline to October 10, 2012.<sup>3</sup>

### III. FINDINGS OF FACT

1. LISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing FAPE under IDEIA and its implementing rules and regulations.
2. Student is a \*\*\*-year-old student who resides within the jurisdictional boundaries of LISD with student's Parents and \*\*\* siblings. Student has attended LISD since \*\*\*. LISD is responsible for providing Student with an appropriate education under IDEIA and its federal and state implementing statutes.
3. Student currently qualifies for special education and related services under the primary disability of Other Health Impairment ("OHI"), based upon Attention Deficit Hyperactivity Disorder-Combined Type ("ADHD"), and a secondary disability of Emotional Disturbance ("ED"), based upon a general and pervasive mood of unhappiness or depression (R13.3). Student's ADHD is classified as moderate, characterized with impulsivity; poor attention, focus, and organizational skills; irritability; and inappropriate social skills, resulting in an inability to make and maintain friendships with student's peers.

#### **School Year 2005-06: \*\*\***

4. \*\*\*, a private Licensed Psychologist, conducted a psychological evaluation of Student in October 2005 over a three-day period (P.13). At that time, Student was \*\*\* years, \*\*\* months old and attending \*\*\* in LISD. Dr. \*\*\* administered the following assessments:
  - a. Kaufman Brief Intelligence Test: Student scored "above average" on the verbal assessment and "average" on the non-verbal assessment, resulting in an I.Q. Composite of \*\*\*, which is "above average" (P.13.3).

<sup>2</sup> Specifically, all issues and claims for relief included under the following statutes and regulations were dismissed for want of jurisdiction: Section 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act (ADA), as amended by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA); the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g, 34 C.F.R. Part 99; the No Child Left Behind Act (NCLBA); Section 1983 of the Civil Rights Act of 1964, 42 U.S.C. §1983; Title VI of the Civil Rights Act of 1964; the Technology Related Assistance for Individuals with Disabilities Act, 29 U.S.C. §2109; Section 505, Civil Rights Attorneys' Fee Award Act of 1976, 42 U.S.C. §1988; 28 U.S.C. §1927; 29 U.S.C. §794a(b); and the Civil Rights Act of 1871.

<sup>3</sup> References to the Due Process Hearing Record are identified as follows: "T.I" refers to the Certified Court Reporter's Transcription of testimony made on August 30, 2012; "T.II" refers to the Certified Court Reporter's Transcription of testimony made on August 31, 2012; the numbers following the volume designation refer to the pages within the particular volume of testimony. "P.#.#" refers to Petitioner's Exhibits by number and page; "R.#.#" refers to Respondent's Exhibits by number and page.

- b. Wide Range Achievement Test: Student scored in the \*\*\* level in reading decoding, spelling, and arithmetic (P.13.3).
  - c. Test of Visual-Motor Integration: Student scored an age equivalent of \*\*\* years, \*\*\* months (P.13.3).
  - d. Australian Scale for Asperger's Syndrome: Student's Parents rated student at a raw score of \*\*\*; Student's teacher rated student at \*\*\*. Both scores are below the base raw score of forty-eight (48). A raw score of forty-eight (48) and above is considered "significant" (P.13.3).
  - e. Conner's Parent Rating Scale-Revised: Student's Parents rated student high for psychosomatic complaints (P.13.3).
  - f. Conner's Teacher Rating Scale-Revised: Student's teachers rated student high in the areas of perfectionism, compulsivity, inattention, restlessness, and impulsivity (P.13.3).
5. Dr. \*\*\* found no developmental or academic concerns. She noted that during the testing, Student exhibited unusual perfectionism along with mild inattention (P.13.4). Dr. \*\*\* ruled out Autism but diagnosed Student with an Adjustment Disorder (P.13.4). Dr. \*\*\* recommended that Student be assessed for disfluency (breaks, irregularities, or non-lexical vocables that occur within the flow of otherwise fluent speech) and expressive language difficulties. She further recommended that Student's problems with perfectionism, compulsivity, attention span, and social relatedness problems be monitored and re-evaluated if indicated (P.13.4).
  6. Based on Dr. \*\*\* recommendations, LISD referred Student to the Response to Intervention Team ("RTI") for disfluency and expressive language problems. Student's teacher observed that student was easily distracted, paid a lot of attention to what student's peers were doing, demonstrated some awkward gross motor skills when running, and was very much the perfectionist. Student's teacher reported that student was a bright student performing on grade level (R.2.2).
  7. On April 13, 2006, LISD completed Student's Full and Individual Evaluation ("FIE") to determine whether Student had a disability that required special education services (R.1). LISD assessed Student as follows:
    - a. Emotional/Behavioral: This assessment found that Student takes longer to complete tasks because student wants the work to be perfect; Student was easily distracted and did not adapt easily to changes in routine; Student's behavior in and out of school did not appear to influence learning and did not affect student's educational placement, programming, and discipline (R.1.3).
    - b. Intelligence/Adaptive Behavior: Student's intellectual functioning appeared to be "average" to "above average"; Student's adaptive behavior appeared to be age appropriate; Student's intellectual functioning was consistent with student's adaptive behavior (R.1.1).
    - c. Educational Performance Levels: Student was performing on grade level; Student's speech was choppy; Student would stop talking at times to gather student's thoughts (R.1.3).
    - d. Language Development: This assessment consisted of many subtests that provided an objective and standard means of identifying deficiencies in the ability to communicate through speech. Student scored in the "average" to "superior" range on each of the subtests administered (R.1.4).

- e. Composite Score Results: The various combinations of the Language Development subtests provide information related to six (6) composites:
- (1). Spoken Language: Student scored in the “superior” range on this composite, which provided a comprehensive estimate of student’s overall language ability (R.1.5);
  - (2). Listening: Student scored in the “superior” range on this composite, which provided an estimate of student’s receptive language or student’s ability to understand speech (R.1.6);
  - (3). Organizing: Student scored in the “above average” range on this composite, which provided an estimate of student’s ability to arrange and associate words to form meaningful ideas (R.1.6);
  - (4). Speaking: Student scored in the “above average” range on this composite, which provided an estimate of student’s expressive language or the ability to communicate thoughts orally (R.1.6);
  - (5). Semantics: Student scored in the “superior” range on this composite, which provided an estimate of student’s knowledge of words (R.1.6);
  - (6). Syntax: Student scored in the “above average” range on this composite, which provided an estimate of student’s ability to understand and generate acceptable sentences (R.1.6).
- f. Articulation: This assessment measured Student’s articulation of consonant sounds. Student scored “above average” (R.1.7).
- g. Stuttering: This assessment measured stuttering severity based on the frequency of repetition and prolongation of sounds, the estimated duration of the three longest stuttering events, and observable visible and audible distractions that accompany speech. Student scored in the “mild” range on this assessment (R.1.8).
- h. Speech: Student manifested voice within normal range as well as adequate structure and mobility to support functional communication (R.1.9).
- i. Educational Competencies: Student manifested mastery of the following communication skills: a) comprehend word meanings, b) remember information just heard, c) display adequate vocabulary, and d) use adequate grammar for general understanding. Student had not mastered the following communication skill: express self fluently when called upon to speak (R.1.9).
- j. Assistive Technology: Student did not manifest a need for assistive technology (R.1.10).
8. Student’s Mother completed an information sheet indicating that Dr. Wooten had previously assessed Student for Autism but did not diagnose Autism (R.1.14). Student’s assessors noted that during the evaluations, Student was verbal, offering compliments to both the examiner and other adults; Student engaged in conversations and used vocabulary and syntax skills appropriately; Student did not always use good eye contact when speaking to others, which the assessors found to be distracting to the listener. The evaluators recommended that Student’s fluency continue to be monitored by student’s teachers, but they found no educational need for special education intervention (R.1.10).
9. LISD provided the Parents with copies of the Notice of Procedural Safeguards, Rights of Parents of Students with Disabilities October 2002, and A Guide to the Admission, Review and Dismissal Process Manual on February 27, 2006 (R.1.21).

10. Student's ARDC met on April 18, 2006, and determined that Student was not in need of special education and related services. The Parents attended this meeting and were in agreement (R.1.19).

**School Year 2008-2009: \*\*\* Grade**

11. During \*\*\* grade, Student manifested difficulties with inattentiveness, social issues, and completing work. Student was easily distracted, although clearly very bright. Student's teachers provided the following modifications and accommodations: a) shortened assignments, b) extra time, c) one-on-one assistance, d) sessions with the guidance counselor, e) study hall, f) a timer for assignments, g) \*\*\*, and h) a reward plan. Academically, Student was an A and B student; attendance was regular; and student's scores on the Texas Assessment of Knowledge and Skills ("TAKS") were very strong in both reading and math (R.2.2).

**School Year 2009-2010: \*\*\* Grade**

12. In \*\*\* grade, Student required excessive redirection and assistance in focusing and completing tasks. Student was described as respectful, creative, intelligent, and eager to please. Student typically began a school day with a positive attitude and the ability to grasp concepts and make generalizations, although student's inattention interfered with this ability to maintain sustained focus throughout the day. Student exhibited emotional needs resulting in general education guidance and counseling referrals. Student continued to demonstrate social skill difficulties and problems with attention, focus, and completion of assignments (R.2.2).
13. In spring 2010, Students' Parents requested that the RTI Team refer Student for another special education evaluation based upon the following problem areas: a) anxiety, b) peer problems, c) suspected Autism/Asperger's Disorder, and d) ADHD (P.11.6; P.21.3). In April 2010, Student's Parents completed a Developmental History in preparation for a second FIE (P.11).
14. On April 26, 2010, LISD sent the Parents a Notice of Refusal, informing them that LISD was refusing to conduct a second FIE due to the timing of the Parents' request. Specifically, LISD declined to conduct the requested Autism evaluation at that time because 1) there was insufficient time to observe Student in the natural school setting, and b) there was no emergency shown by Dr. \*\*\*October 2005 assessment that would "warrant a summer evaluation" (P.21.3).

**School Year 2010-2011: \*\*\* Grade**

15. On September 10, 2010, Student's Mother executed an Authorization for Services, granting LISD permission to use campus psychological services to aid in Student's educational programming. This authorized LISD to observe and speak with Student (P.21.5). Student's Mother spoke with \*\*\*, an LISD Licensed Specialist in School Psychology ("LSSP"), who discussed the Autism portion of the FIE and referred to \*\*\*, one of the District's Autism specialists (P.21.5).
16. On September 28, 2010, LISD provided written notice of its request to perform a second FIE, based upon a) Student's lack of success in the general education program with modifications and accommodations and b) the Parents' request (R.2.26). The Parents provided informed written consent on September 28, 2010, allowing LISD to assess Student in the areas of a) language, b) physical/health, c) emotional/behavioral, d) sociological, e) cognitive functioning and adaptive behavior, and f) developmental, academic, and learning competencies (R.2.28).
17. As part of the FIE, Student completed several assessments:
  - a. Self-Report of Personality Behavior Assessment System for Children—Second Edition ("BASC-2"): Student's responses did not indicate any "clinically significant" scores. Student did show "at risk" scores for attention problems or interpersonal relations (R.2.8).

- b. Children's Depression Inventory ("CDC"): This assessment screened for symptoms of depression. Student did not have elevated scores on this assessment (R.2.8).
- c. Revised Children's Manifest Anxiety Scale ("RCMAS-2"): This assessment screened a variety of anxiety dimensions; Student's scores did not reveal any "clinically significant" difficulties (R.2.8).
- d. Piers-Harris 2: This assessment screened for self-esteem. Student admitted a few problematic behaviors. Student's high score indicated that either a) student has a defensive denial of unpleasant mood states, such as sadness, nervousness, or worry; or b) student perceives \*\*\*self as well behaved and able to comply with rules and expectations at school and at home (R.2.8).
- e. Draw-A-Person Screening Procedure for Emotional Disturbance ("DAP"): Student's score on this assessment did not indicate the need for further assessment (R.2.8).
- f. Roberts-2: This storytelling assessment evaluated Student's interpersonal perceptions and social understanding. Student was able to draw plenty of emotions into student's stories, demonstrating that student has a sound ability to take the perspectives of others; that student can identify causal factors and consequences; and student could explain thoughts and emotions. The outcome of student's stories, however, were often unrealistic and had an impulsive quality as if student had given little thought to the problem-solving process (R.2.8).

18. As part of the FIE, LISD assessed Student using multiple formal assessments:

- a. Woodcock-Johnson III Tests of Cognitive Abilities with Normative Updates ("WJ III COG-NU"): This formal assessment measured Student's cognitive ability.
  - (1). Student scored "superior" scores on the following subtests: verbal comprehension, concept formation, and visual-auditory learning–delayed (R.2.11);
  - (2). Student scored "high average" scores on the following subtests: visual-auditory learning, spatial relations, sound blending, general information, and picture recognition (R.2.11);
  - (3). Student scored "average" on the following subtests: numbers reverse, auditory working memory, auditory attention, analysis-synthesis, decision speed, and memory for words (R.2.11);
  - (4). Student scored "low average" on the following subtest: visual matching (R.2.11); and
  - (5). Student scored "low" on the following subtest: retrieval fluency (R.2.11).
- b. Beery Buktenica Developmental Test of Visual-Motor Integration, 5<sup>th</sup> Edition ("Beery VMI"): This paper and pencil test assessed Student's visual and fine motor skills. Student scored in the "very high" range, indicating very superior functioning (R.2.13).
- c. Comprehensive Test of Phonological Processing ("CTOPP"): This assessment measured phonological awareness, phonological memory, and rapid naming:
  - (1). Student scored "average" on the following subtests: elision (the ability to remove phonological segments from spoken words to form other words), blending words, memory for digits, rapid digit naming, rapid letter naming, phonological awareness, and rapid naming (R.2.13);

- (2). Student scored “below average” on the following subtests: non-word repetition and phonological memory (R.2.13).
- d. Wechsler Individual Achievement Test, Third Edition (“WIAT-III”): This formal evaluation measured Student’s academic functioning.
- (1). Student scored “above average” on the following subtests: listening comprehension and reading comprehension (R.2.14);
- (2). Student scored “average” on the following subtests: math problem-solving, written expression, word reading, pseudo-word decoding, numerical operations, oral expression, oral reading fluency, spelling, math fluency-addition, math fluency-subtraction, and math fluency-multiplication (R.2.14).
- e. Behavioral Assessment System for Children–Second Edition (“BASC-2”): This assessment is used to facilitate the differential diagnosis of a variety of emotional and behavioral disorders of children and adolescents. Scores in the “clinically significant” range suggest a high level of difficulties or maladjustment; scores in the “at-risk” range identify either 1) a significant problem, which may not be severe enough to require formal treatment, or 2) indicates a potential or developing problems that requires careful monitoring.
- (1). BASC-2 Parent Rating Scales Report: Student’s Parents rated student’s behavior at home and in the community. Student’s Mother rated student “clinically significant” for depression and atypicality; “at-risk” for hyperactivity, withdrawal, attention problems, social skills, leadership, activities of daily living, and functional communication. Student’s Father did not rank Student “clinically significant” on any of the scales, but student did show “at-risk” concerns for depression, withdrawal, and social skills (R.2.6);
- (2). BASC-2 Teacher Report: Student’s teacher, \*\*\*, rated Student as “clinically significant” in the areas of hyperactivity, aggression, depression, atypicality, and withdrawal; “at-risk” in the areas of conduct problems, attention problems, adaptability, social skills, and leadership (R.2.6). A validity index cautioned that \*\*\* profile appeared to have inconsistent responses.
- \*\*\*, another of Student’s teachers, rated student “clinically significant” in the areas of depression and withdrawal; “at-risk” in the areas of aggression, attention problems, adaptability, social skills, and leadership (R.2.6). The evaluator cautioned that \*\*\* responses may have been excessively negative (R.2.6).
- f. Conner’s 3<sup>rd</sup> Edition (“Conner’s-3”): This assessment is a measure of symptoms commonly associated with ADHD and commonly co-occurring groups of disorders.
- (1). Parent Assessment Report: Student’s Father indicated elevated scores in the inattention scale; Student’s Mother indicated elevated scores in the areas of executive functioning, hyperactivity, and impulsivity; both Parents showed concerns in peer relations (R.2.6);
- (2). Teacher Assessment Report: The teachers endorsed similar difficulties to those of the Parents. Both teachers rated Student with high scores in the area of peer relations. \*\*\*\* endorsed high scores in the areas of defiance and aggression. The teachers’ scores indicated that Student may be argumentative and physically or verbally aggressive; Student often annoys others on purpose; student occasionally bullies, threatens or scares others; student can be angry and resentful; student occasionally loses student’s temper and starts fights with others. (R.2.6).

- g. Behavior Rating Inventory of Executive Function (“BRIEF”): This assessment analyzed Student’s executive functions, a collection of processes that guide, direct and manage cognitive, emotional, and behavioral functions, particularly during active, novel problem-solving. All completed BRIEF forms were valid.
- (1). Parent Form: Student’s Father set Student’s profile within normal limits, suggesting that student’s Father had no current concerns for Student’s executive functioning in everyday behavior at home. Student’s Mother indicated concerns with initiating problem-solving or activity, sustaining working memory, planning and organizing problem-solving approaches, and monitoring student’s own behavior (R.2.6);
  - (2). Teacher Form: Both teachers’ responses suggested that Student may experience difficulties in several areas of executive functioning in the school environment. \*\*\* noted concerns that include Student’s ability to inhibit impulsive responses, modulate emotions, initiate problem-solving or activity, sustain working memory, plan and organize problem solving approaches, organize student’s environment and materials, and monitor student’s own behavior. \*\*\* registered clinically elevated scores in the areas of inhibit and working memory scales, which are often seen in children diagnosed with ADHD-Combined Type. \*\*\* scores were not as elevated as \*\*\*. They suggested that Student has a moderate degree of difficulty in organizing student’s work materials and marked difficulties beginning or getting going on tasks, activities, and problem-solving approaches (R.2.6-7).
- h. Social Behavior Assessment Inventory: Both teachers completed this assessment, identifying interpersonal behaviors as the social behaviors that Student appeared to be most lacking. Specific weaknesses were evident in the areas of coping with conflict, gaining attention appropriately, helping others, making conversation, organized play, demonstrating a positive attitude towards others, and playing informally (R.2.7).
19. The fall 2010 FIE suggested that Student experiences significant difficulties with attention and concentration at home and at school. Student is disorganized, forgetful, easily distracted, fidgety, impulsive, and has difficulties initiating and completing assignments independently. Student’s social relationships were problematic. Student is unaware of the personal space of student’s peers; student teases and argues with peers. Based upon classroom observations and information from the Parents and teachers, including the BASC-2, Conner’s-3, and BRIEF, the multidisciplinary team suggested a diagnosis of ADHD–Combined Type. The team recommended that Student’s ARDC consider special education eligibility under the OHI eligibility category if supported by Student’s physician (R.2.18).
20. Parent and teacher checklists indicated several “clinically significant” scores for depression and withdrawal. The multidisciplinary team recommended that Student’s ARDC consider special education eligibility under the ED category due to a general pervasive mood of unhappiness or depression (R.2.18).
21. Noting that Student’s Parents had expressed concerns that Student may have Asperger’s Disorder, the multidisciplinary team determined that Student’s social difficulties and immature, impulsive behaviors displayed towards peers are common manifestations of ADHD. Further, Student did not appear to have any sensory concerns, inflexible adherence to routines, atypical mannerisms, unusual preoccupations or rituals, or a limited range of intense interests. Simply put, the multidisciplinary team opined that classroom and test observations noted that Student demonstrated many behaviors **not** typically seen in children with Autism. After consultation with a lead member of one of LISD’s Autism teams, it was determined that further evaluations of Autism by a multidisciplinary team were not necessary (R.2.18).

22. The multidisciplinary team found that Student did not meet diagnostic criteria for a Learning Disability (“LD”); that with appropriate documentation from a physician, Student’s ARDC could consider student’s eligibility for special education under OHI due to ADHD-Combined Type; and that Student met the criteria as a student with ED due to a general pervasive mood of unhappiness or depression (R.2.20). The team concluded that Student met the profile for Dysthymia, which is characterized in children with feelings of inadequacy, poor social skills, poor concentration, insomnia or hypersomnia (sleeping too much), and poor appetite or overeating (R.2.18).
23. On December 7, 2010, Student’s ARDC convened to review the FIE and consider Student’s admission into the special education program. The ARDC completed a Review of Existing Evaluation Data (“REED”) and determined that Student demonstrated eligibility for counseling as a related service (R.3.28). The ARDC qualified Student for special education and related services under the Primary Disability of ED (R.3.6) and agreed to pursue OHI eligibility from a physician due to Student’s ADHD.

The ARDC conducted a Functional Behavioral Assessment (“FBA”), which indicated problem behaviors in attracting attention of peers inappropriately and not initiating work independently (R.3.10). The ARDC developed a Behavior Intervention Plan (“BIP”) to replace these behaviors: Student would treat student’s peers in a respectful manner, *i.e.*, by not teasing or name-calling and by keeping hands and feet to \*\*\*self; and Student would initiate work independently by remaining on task to complete assignments with minimal redirection (R.3.12).

The ARDC developed counseling and behavior goals and objectives focusing on peer relationships and independent work (R.3.12-13). The Committee recommended direct counseling, twenty (20) minutes per week (R.3.21), the purpose of which was for Student to develop coping strategies, improve self-monitoring, and use coping strategies to improve peer relationships (R.3.12-13).

The ARDC reviewed all of Student’s benchmark scores, noting that Student passed all benchmarks that were given prior to October 2010. The Committee adopted accommodations in the general education setting (R.3.15). The Committee did not modify grade-level curriculum but did provide Student with special education support in all academic areas by a) allowing access to a quiet setting for work completion and testing; b) providing strategies for organization and problem-solving skills; c) using check-in and check-out lists for planner and daily work check; and d) providing positive feedback (R.3.14).

The ARDC determined that Student would take the regular TAKS in all subjects with no accommodations (R.3.23). Student would receive all of student’s instruction in the general education classroom with inclusion support in math and language arts to monitor and help student with organization and problem-solving skills (R.3.23).

24. The December 7, 2010, ARDC reached consensus (R.3.24).
25. Student’s ARDC met on February 23, 2011, to review additional assessments, including the OHI report from Student’s Pediatrician, Dr. \*\*\*. Dr. \*\*\* diagnosed Student with ADHD-Combined Type (Moderate), ED, and Dysthymia (R.4.8). The Committee accepted the OHI eligibility and revised Student’s BIP (R.4.3; R.4.5). The Committee reached consensus (R.4.6).
26. Student was successful during \*\*\* grade. Student passed all classes with final averages ranging from 91 to 98 (R.9.10). Student met standards and achieved Commended Performance in all areas of the TAKS (R.6.18; R.9.2-3).

**School Year 2011-2012: \*\*\* Grade:**

27. On November 18, 2011, Student’s ARDC convened student’s annual ARDC meeting (R.6). Student’s teachers reported much improvement; Student was being successful in class; student behaved

appropriately and attempted student's work. The teachers reported some instances of distractibility, blurting out, and losing focus, but none of these were problematic. Student's Mother reported that she was very pleased with student's progress, that student appeared to be doing much better, and that student was being accepted for \*\*\*self. She also noted continued problems with student's organizational skills (R.6.18).

Because Student was not a behavior problem, the Committee reviewed and discontinued student's BIP. The Committee adopted new counseling goals and discontinued some accommodations due to Student's progress. Student would continue to receive all academic instruction in the general education classroom. Student would receive counseling for twenty (20) minutes per week until the end of the third grading period and then twenty (20) minutes every other week (R.6.18).

28. The November 18, 2011, ARDC reached consensus (R.6.17). Student's Parents were provided a copy of the Explanation of Procedural Safeguards (R.6.1).
29. Student progressed through the \*\*\* grade without any major problems until the spring semester. Until March \*\*\*, 2012, Student was on medication for the ADHD. Because student appeared to be making progress in controlling student's behaviors, student's Parents and Pediatrician agreed to withdraw this medication.

#### **The \*\*\* Incident:** <sup>4</sup>

30. On the morning of April \*\*\*, 2012, Student's Parents met with student's teachers to discuss concerns about student's increasing negative behaviors and decreasing academic performance since the cessation of student's ADHD medication in early March 2012. When the Parents arrived for this meeting, the Assistant Principal at \*\*\* School, \*\*\*, met them and explained briefly that an incident had occurred that day involving Student (the \*\*\* incident) but an investigation had to be completed before she could discuss the ramifications. The Parents proceeded with the scheduled meeting, which concluded without reference to the \*\*\* incident.
31. Later in the afternoon of April \*\*\*, 2012, the Principal of \*\*\* School, \*\*\*, contacted Student's Mother to come back to the school and pick up Student because student was being suspended for three (3) days, April \*\*\*, \*\*\*, and \*\*\*, 2012, for \*\*\*. At that time, \*\*\* provided the Parent with copies of three (3) office referrals related to the incident.
32. Earlier on April \*\*\*, 2012, \*\*\* received several reports that Student was compiling \*\*\*. \*\*\* immediately conducted an investigation into the allegations and completed her report on April \*\*\*, 2012. The report consisted of teacher-input on discipline referral sheets; notes taken during student interviews; students' written statements; teachers' written statements; notes taken during the interview with Student and student's Mother; and Student's written statement. \*\*\* learned that Student had been \*\*\*. Over the months that Student made \*\*\* as Student received reinforcement from student's teacher and student's peers.
33. Because \*\*\* had suspended Student for three (3) days, beginning on April \*\*\*, 2012, Student's Father stayed home with student on April \*\*\*, 2012. \*\*\* contacted Student's Mother on that date and requested that she and Student return to school for interviews related to the \*\*\*. At the conclusion of these interviews, \*\*\* informed Student and student's Mother that she was sending Student to LISD's DAEP for thirty-five (35) days, or through the remainder of the school year.

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<sup>4</sup> Findings of Fact Nos. 30 through 36 are taken from the Interim Decision of the Special Education Hearing Officer On Expedited Appeal, rendered on May 24, 2012. These Findings provide historical information and do not affect the ultimate Decision rendered in this second phase of the bifurcated hearing. References to the Transcript and Exhibits from the May 24, 2012, Expedited Hearing have been omitted to prevent confusion.

34. On April \*\*\*, 2012, Student's Mother obtained an Integrated Assessment and Psychosocial Assessment from \*\*\* (\*\*\*). \*\*\* provided the Parents with information about this facility. This assessment was a risk assessment in light of Student's \*\*\*. \*\*\* issued its report ("the \*\*\* Report") on April \*\*\*, 2012, and found that generally, Student was not a danger to \*\*\*self or others and that student could be returned to the home for out-patient treatment with referrals. The \*\*\* Report indicated the following problems that should be addressed: a) depressed mood; b) inattentive/impulsive/disruptive behaviors; and c) poor social skills/pervasive developmental behaviors. The \*\*\* Report indicated the following Axis I clinical disorders/conditions that may be a focus of clinical attention: a) Mood Disorder-NOS; b) ADHD-Inattentive Type; and c) rule out PDD-NOS.
35. On April \*\*\*, 2012, Student's ADRC convened the mandatory MDR of the April \*\*\*, 2012, \*\*\* incident. In attendance were the following: a) \*\*\*; b) Ms. Melanie Watson, Parent Advocate; c) \*\*\*; d) \*\*\*, one of Student's General Education Teachers; e) \*\*\*, Special Education Teacher; f) \*\*\*, Evaluator; g) \*\*\*, Special Education Director; h) \*\*\*; i) \*\*\*, Psychology Intern; and j) \*\*\*. Student's Pediatrician, \*\*\*, attended the meeting for a period of time to provide information regarding her years of treating Student.

The MDRC attempted to review Student's current evaluations: a) the November 26, 2010, FIE, which concluded that Student is ED and ADHD-Combined Type, although there was no supporting Physician's OHI eligibility form; b) Student's December 8, 2010, OHI eligibility form completed by Dr. \*\*\*, which diagnosed ADHD-Combined Type; c) Dr. \*\*\* April 9, 2012, letter, which set out her concerns over Student's delayed behavioral development, the inappropriate reinforcement of Student's teacher related to Student's \*\*\*, her diagnosis of PDD-NOS, and Student's inability to understand the ramifications of student's misconduct; and d) the April \*\*\*, 2012; \*\*\* Report.

The MDRC reviewed information from Student's Parents and student's Pediatrician regarding the recent cessation of student's ADHD medication and its potential impact on student's behavior.

The MDRC attempted to review information from Student's IEPs developed by student's ARDC on December 7, 2010, February 23, 2011, September 15, 2011, and November 15, 2011.

The MDRC discussed the fact that since the fall semester, Student had been engaging in \*\*\*.

After three (3) hours of the attempted MDR, Student's Parents and Advocate concluded the meeting and left prior to completing the MDR. Student's Parents requested a re-convene MDR after they had an opportunity to consult an attorney.

36. On April \*\*\*, 2012, Student's MDRC re-convened to complete the MDR. Although the Parents received notice of this meeting, they declined to attend. Because the prior MDR failed to achieve resolution to the two (2) MD questions, the April \*\*\*, 2012, MDRC re-visited both inquiries and evaluated the relevant information in Student's file, as well as information provided prior to, and at, the April \*\*\*, 2012, MDR.

The MDRC determined that Student's conduct, the \*\*\*, was not caused by, or did not have a direct and substantial relationship to, student's disabilities (ADHD and ED).

The MDRC determined that Student's conduct, the \*\*\*, was not the direct result of LISD's failure to implement Student's IEP.

The Committee adopted \*\*\* recommendation that Student be placed at the District's DAEP for thirty-five (35) school days.

The Committee added a new counseling goal to aid Student in advocating for \*\*\*self, processing annoying situations, and role-playing positive ways to gain peer attention. The Committee reviewed and reinstated Student's BIP (R.8.13).

37. Student's Parents did not allow Student's placement in the DAEP, which subjected them to truancy proceedings.
38. As a result of Student's non-attendance for the remainder of the semester, Student's grades plummeted. Where one year prior Student had attained grades between 91 and 98, Student's final grades were much lower, ranging from 68 in Language Arts to 82 in Reading (R. 9.11).
39. On May 24, 2012, the undersigned Hearing Officer affirmed that Student's conduct, the \*\*\*, was not the direct result of LISD's failure to implement Student's IEP.
40. On May 24, 2012, the undersigned Hearing Officer overturned LISD's determination that Student's conduct, the \*\*\*, was not caused by, or did not have a direct and substantial relationship to, student's disabilities.
41. Pursuant to the Order of the undersigned Hearing Officer, Student's ARDC convened on August 20, 2012, to conduct an FBA and revise Student's BIP to address Student's behaviors associated with \*\*\*(R.13). The Committee developed Student's BIP and requested consent to perform a formal FBA to address all of Student's behaviors at school (R.13.13). Student's Parents provided the requested consent.

The Committee reviewed Student's counseling goals, including the social skills goal added in the spring, and added another goal to assist Student in identifying instances of bullying and peer conflict (R.13.13). The Committee agreed to provide Student direct counseling for thirty (30) minutes per week, with direct random observations by the counselor two (2) times per month for fifteen (15) minutes each visit, and consult time with the classroom teacher one (1) time per month for ten (10) minutes. The Committee recommended that a Behavior Interventionist observe Student two (2) times per month for fifteen (15) minutes each visit. Student's Parents requested that the prior LSSP not be part of Student's educational programming, and the Committee agreed to try and honor this request. Student's Parents agreed to the immediate implementation of the Committee recommendations (R.13.13).

### **Asperger's Disorder**

42. During the April \*\*\*, 2012, MDR, the Committee discussed the characteristics of Asperger's Disorder (R.8.12). Dr. \*\*\*, Student's Pediatrician, diagnosed Student with PDD-NOS in a letter dated April \*\*\*, 2012 (R.8.12). As such, Student's ARDC requested consent to complete an Autism evaluation (R.8.12). Student's Parents refused to provide consent (R.13.13). Dr. \*\*\* April \*\*\*, 2012, diagnosis of PDD-NOS was the first time she made and conveyed this diagnosis to the District.
43. At the August 20, 2012, ARDC meeting, LISD again requested consent to perform an Autism evaluation. Student's Parents again declined consent for the Autism evaluation, stating that they first wanted completion of the Independent Educational Evaluation ("IEE") that the Parents were obtaining. LISD agreed to fund the IEE but the evaluator chosen by the Parents did not meet the District's fee-setting criteria (R.13.13; R.14.1).
44. On May 16, 2012, Student's Parents obtained an independent evaluation from Dr. \*\*\*, who diagnosed Student with Asperger's Disorder (P.2.4). Dr. \*\*\* did not observe Student in any educational setting; he did not contact the District for information. Dr. \*\*\* relied upon the Parents for information, some of which was recorded incorrectly in his report. Dr. \*\*\* administered some of the subtests from the Autism Diagnostic Observation Scales Module 3 ("ADOS Module 3"). He did not record any score obtained on the ADOS (P.2.4). His administering only part of the test brings into question his diagnosis of Asperger's Disorder (T.II.142).

Dr. \*\*\* administered the Childhood Depression Inventory ("CDI") (P.2.4). Student and student's Parents obtained different ratings, which Dr. \*\*\* did not address in his report. Student's Parents completed the Conner's Comprehensive Behavior Rating Scales, which indicated that Student meets the criteria in the

Diagnostic and Statistical Manual, Fourth Edition, Text Revision (“DSM IV-TR”) for ADHD, Inattentive Type and Asperger’s Disorder (R.2.4). Dr. \*\*\* used an unknown observer to complete the Conner’s Teacher Scale, who likewise rated Student as meeting the DSM-IV diagnostic criteria for ADHD, Inattentive Type and Asperger’s Disorder (P.2.4). Dr. \*\*\* erroneously stated that Dr. \*\*\* suspected back in 2005 that Student had Asperger’s Disorder (P.2.6). Dr. \*\*\* had actually ruled out an Autism disorder.

45. On July 30-31, 2012, Dr. \*\*\* conducted a psychological evaluation of Student (P.3). Dr. \*\*\* was concerned about the District’s earlier decision to place Student in the DAEP (P.3). Dr. \*\*\* observed Student at student’s Scout meeting; spoke with Dr. \*\*\*; interviewed Student and student’s Mother; reviewed previous evaluations; and administered several assessments (P.3.9):
- a. Wechsler Intelligence Scale for Children–IV (“WISC-IV”): Student scored in the “superior” to “average” range on Verbal and Perceptual Tests. Student manifested high abilities in the areas of abstract thinking, nonverbal reasoning, visual-spatial integration, and immediate memory (P.3.12). However, student had significant difficulty with fine motor coordination (P.3.12). Student obtained an overall Verbal IQ of \*\*\*, which places student in the “superior” range (P.3.12).
  - b. Woodcock-Johnson III Tests of Achievement–Normative Update (“WJ-III”): Student was given selected language tests to assess specific functions. Student’s scores correlated with student’s Verbal IQ (P.3.12). Student performed above student’s grade level in reading; student was “average” and above grade level in math concepts and applications; Student had significant difficulty doing simple arithmetic problems quickly, manifesting a fine motor deficit (P.3.14). Written language is Student’s weakest academic area (P.3.14).
  - c. Comprehensive Assessment of Spoken Language (“CASL”): Student was given one (1) subtest from the CASL to assess pragmatic language (the practical use of language for social communication) (P.3.13). Student scored in the “average” range (P.3.13).
  - d. Adaptive Behavior Assessment System-II (“ABAS-II”): Student’s Mother completed this assessment of Student’s adaptive functioning. Her scores ranked Student significantly below that which would be expected and significantly below the normal range. Student’s Mother indicated that student has difficulty with socialization, self-direction, use of leisure time, use of the larger community, and chores at home. She ranked Student in the “borderline” range in communication, which was significantly lower than student’s other verbal skills would predict (P.3.13).
  - e. Visual-Motor Integration: Student had an overall standard score of 111, which is above average but well above average for student’s age level (P.3.13). Student showed difficulties with fine motor coordination.
  - f. Emotional Functioning: This was assessed by interview, self-report, projective measure, and by reports from the Parents (P.3.15). Student expressed concern about bullying at school. Student’s Parents reported extreme peer relationship problems (P.3.15). Student’s Mother reported mild mood symptoms, hyperactivity/impulsivity, and mild learning problems. On the Social Communication Questionnaire, the Mother’s score falls at the beginning of the range for suspected Autism Spectrum Disorder (“ASD”). This score is the cut-off where more in-depth evaluation is needed. Student’s Mother noted that Student often seems to annoy and anger student’s peers; student is not invited to others’ homes; student has no close friends; student has trouble working in a group; Student’s Father was concerned that Student has a hard time making and keeping friends; student does not understand boundaries.
  - g. Childhood Autism Rating Scale 2-HF: This is a measure of the presence and severity of symptoms associated with ASD in high-functioning children. Student’s score falls in the mild-to-moderate range for ASD.

46. Dr. \*\*\* diagnosed Student with Asperger's Disorder, stating that student's history and current presentation are consistent with this diagnosis. Dr. \*\*\* noted that unlike most people on the Autism Spectrum, Student is rather east-going (P.3.16). Dr. \*\*\* warned that it is highly inappropriate, even dangerous, to place a child, who is on the Autism Spectrum, in a behavior adjustment class with acting-out children who are not on the spectrum. Dr. \*\*\* advocates that recognizing that a child is on the spectrum changes our expectations for them and changes the way we interact with them (P.3.17).
47. Student's November 2010 FIE was credible, thorough, and appropriate. The multidisciplinary team used a variety of assessment tools and strategies to assess Student in all areas of suspected need. Student demonstrated significant difficulties with attention, concentration, and emotionality, and student met the disability requirement for OHI due to ADHD and ED (R.2.18). As such the team's decision not to administer an Autism evaluation was based upon data from which it could make a differential diagnosis using the DSM-IV-TR criteria and thus, rule out ASD as a suspected disability (T.I. 124-126). The decision not to conduct an Autism evaluation is set forth on the face of the FIE (R.2.18), which was reviewed at the December 7, 2010, ARDC (R.2.18). The Parents attended this meeting and fully agreed with the ARDC disability recommendations of ADHD and ED (R.3.24). The Parents received a copy of the FIE with the Autism assessment information contained therein.
48. LISD's November 2010 FIE was more credible than the subsequent assessments of Dr. \*\*\*, Dr. \*\*\*, and Dr. \*\*\*. Each of these assessments were made following Student's assignment to the District's DAEP. Each of these assessments present passionate arguments against Student's assignment to the DAEP, which appears to be the catalyst for the ASD determination. But for Dr. \*\*\* evaluation, the ASD diagnoses are not grounded on a variety of assessment tools and strategies, including critical information from the District.
49. The evidence did not establish that LISD failed to evaluate Student in all areas of suspected disabilities.
50. The evidence did not establish that Student was eligible for special education and related services in the area of Autism.
51. The evidence did not establish that Student manifested an educational need for services in the area of Autism.

### **Statute of Limitations**

52. The Texas Statute of Limitations period for bringing a Complaint under IDEIA is one (1) year. Two (2) exceptions allow for the tolling of the one-year statute of limitations: a) intentional, specific misrepresentations by a district that it had resolved the problem forming the basis of the Complaint; or b) failure by a district to provide the disabled student with information that the district was required to provide.
53. Student failed to prove that LISD made intentional, specific misrepresentations that prevented the Parents from requesting a Due Process Hearing during school year 2010-2011.
54. Student failed to prove that LISD withheld required information from the Parents that prevented the Parents from requesting a Due Process Hearing during school year 2010-2011.
55. The time period pertinent to this case began on April 17, 2011. Any claims for relief for acts and omissions occurring prior to April 17, 2011, are outside the applicable period.

## IV. DISCUSSION

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

At the start of the Due Process Hearing, Student asserted that the one-year statute of limitations should not apply because LISD made misrepresentations to the Parents regarding whether LISD performed an Autism evaluation in November 2010 as part of Student's FIE. Student asserts entitlement to litigate issues going back to November 2009.

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

#### 1. Student Failed to Prove Intentional, Specific Misrepresentations.

IDEIA allows very narrow exceptions to its time limitations: 1) the statute of limitations shall not apply if a parent was prevented from requesting a due process hearing due to specific misrepresentations by the local district that it had resolved the problem forming the basis of the complaint; 20 U.S.C. §1415(f)(3)(D)(i); 34 C.F.R. §300.511(f)(1); and/or 2) the statute of limitations shall not apply where a parent failed to exercise his/her right to a due process hearing because the local district withheld information that it is required to provide to the parent. 20 U.S.C. §1415(f)(3)(D)(ii); 34 C.F.R. §300.511(f)(2). There are no other exceptions. Student had the burden of proving that one (1) of these exceptions tolled the one-year statute of limitations. *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F.Supp.2d 918, 945 (W.D. Tex. 2008), *rev'd in part on other grounds*, *El Paso Indep. Sch. Dist. v. Richard R.*, 591 F.3d 417 (5<sup>th</sup> Cir. 2009).

Student argued that the one-year statute of limitations is not applicable to this case based on the following facts: 1) LISD knew the Parents suspected an Autism disability in spring 2010; 2) LISD stated that it would assess Student for Autism as part of the November 2010 FIE; 3) LISD was required to assess Student for Autism because it was a suspected disability; 4) LISD did not, in fact, conduct an Autism evaluation in that FIE; 5) LISD made affirmative statements to the Parents that Student did not have Autism when it had never conducted an Autism evaluation.

The record presents a different picture of the Autism evaluation and the November 2010 FIE. Student's Parents were concerned that Student was demonstrating characteristics of an ASD and conveyed this concern to LISD. The multidisciplinary team was prepared to conduct an Autism evaluation and indicated such on information provided to the Parents. The multidisciplinary team considered a wide variety of sources of data and used a differential diagnostic process based on the DSM IV-TR to determine whether Student demonstrated Autism characteristics. The team administered more instruments than typically would be used in order to address the Parent's concerns. Using this differential diagnosis process, the team concluded that Student actually demonstrated characteristics *not* seen in children with Autism. Rather, the team found that Student displayed characteristics of ADHD and ED (R.2.18).

The team ruled out Autism as a suspected disability and determined no further assessment for Autism was necessary. This information was provided on the FIE and the team's rationale was clearly explained (R.2.18). The Parents received a copy of the FIE; the FIE was the focal point of the December 7, 2010, ARDC, which reviewed the assessment results and accepted the recommendations therein.

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

## **2. Student Failed to Prove KISD Withheld Required Information.**

The information that a district is required to provide is specific and includes, *inter alia*, 1) prior written notice when the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child (20 U.S.C. §1415(c); 34 C.F.R. §300.503(a)); and 2) copies of procedural safeguards (20 U.S.C. §1415(d); 34 C.F.R. §300.504(a)). In this case Student alleges that LISD failed to provide the Parents with Notice of Procedural Safeguards in April 2010 when LISD informed the Parents that it would not conduct the FIE in spring and summer 2010 but would do so in fall 2011. Student asserts that such failure deprived the Parents of knowledge of their federal rights and allows the tolling of the statute of limitations.

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

In this case, the evidence established that LISD provided the Parents with multiple copies of the Procedural Safeguards at every required juncture: 1) February 27, 2006, when LISD performed the first FIE but did not qualify Student for special education services; 2) September 28, 2010, as noted on the Parents’ consent for Disclosure of Confidential Information; 3) December 7, 2010, at Student’s ARDC meeting where student qualified for special education and related services; 4) November 18, 2011, at Student’s annual ARDC; and 5) April 12, 2012, at the MDRC meeting. The content of these Procedural Safeguards provided the Parents with statutory notice of their rights, including their right to request a due process hearing, within one (1) year of the accrual of a claim. With each delivery of a copy of the Procedural Safeguards, the statute of limitations for IDEIA violations “commence without disturbance.” *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F.Supp.2d at 945.

Student did not carry the burden of proving entitlement to toll the one-year statute of limitations. 20 U.S.C. §§1411-1419. Having determined that the one-year statute of limitations applies to this case, the remaining analysis concerns LISD’s alleged substantive and procedural IDEIA violations between April 17, 2011, and April 17, 2012.

## **B. LISD DID NOT FAIL TO EVALUATE STUDENT IN ALL AREAS OF SUSPECTED DISABILITIES.**

Evaluation procedures are carefully spelled out in the federal and state rules and regulations implementing IDEIA. 34 C.F.R. §300.304 specifies that in conducting the evaluation, the school district must 1) use a variety of assessment tools and strategies to gather functional, developmental, and academic information; 2) not use a single measure or assessment as the sole criterion for determining a disability; and 3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The district is charged with administering assessments and other evaluation materials that are tailored to assess specific areas of educational need and not merely those

that are designed to provide a single general intelligence quotient. Assessments must be selected and administered in a manner that best ensures that the assessment results accurately reflect the child's aptitude or achievement level or other factors that the test is measuring. The child being assessed must be evaluated in all areas related to the suspected disability. The assessment must be sufficiently comprehensive to identify all of the child's special needs. As part of the overall evaluation, the assessors should review all existing evaluation data, including information provided by the parents, current classroom-based, local, or state assessments, classroom-based observations, observations by the child's teachers and related-services providers. 34 C.F.R. §300.305. Once the assessments and other evaluation measures are completed, the student's ARDC must consider all of the information gathered and make a recommendation based upon that information.

In this case, Student asserts that LISD has known for years that the Parents were concerned that Student had an ASD but LISD has deliberately refrained from conducting the appropriate Autism evaluation, opting rather to stand rigidly behind its November 2010 FIE, which, according to Student, was infirm in its omission of an Autism evaluation.

The November 2010 FIE was a thorough, valid assessment of all of Student's suspected disabilities. It was performed by Student's multidisciplinary team, which was made up of highly qualified individuals.<sup>5</sup> The FIE was conducted in compliance with the operative federal regulations. 34 C.F.R. §300.304. The results of this FIE found that Student qualifies for special education and related services under the OHI and ED categories. These determinations were made, and adopted by Student's ARDC, only after the multidisciplinary team conducted exhaustive formal and informal assessments; interviewed Student and student's Parents; collected data from Student's teachers and during observations of Student across the educational grid; affirmatively ruled out an ASD or the need for further assessment; and obtained Dr. Naylor's OHI form, which concluded that Student exhibited ADHD-Combined Type, ED, and Dysthymia with no mention of PDD-NOS.

### **C. AN ASD DIAGNOSIS AT THIS JUNCTURE IS PREMATURE.**

The issues regarding whether Student has an ASD and whether LISD failed to identify this disability and provide an educational program tailored to the diagnosis only materialized in April 2012. LISD proposed to send Student to the District's DAEP when student's MDRC determined that student's conduct, the \*\*\*, had no direct or substantial relationship to student's diagnosed disabilities: ADHD and ED. Between the time of the initial investigation into Student's conduct, April \*\*\*, 2012, and the April \*\*\*, 2012, conclusion of the MDR, Student's Parents obtained a new ASD diagnosis from Dr. \*\*\* (April \*\*\*, 2012) and marshaled all efforts behind a new argument that Student's conduct was more likely caused by student's ASD and the District's failure to address that diagnosis.

The reality of this record is that until the disciplinary incident, Student was enjoying educational progress in all academic and non-academic areas. Student was making excellent grades in all academic courses; student behaved appropriately and attempted student's work. The teachers reported some instances of distractibility, blurting out, and losing focus, but none of these were problematic. Student's Mother reported that she was very pleased with student's progress, that student appeared to be doing much better, and that student was being accepted for \*\*\*self. Because Student was not a behavior problem, the November 2011 ARDC reviewed and discontinued student's BIP.

Indeed, Student was improving so much that student's Pediatrician and Parents discontinued student's ADHD medication in March 2012, just before spring break. By the end of the month, Student's teachers were

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<sup>5</sup> Student has challenged \*\*\*, the LSSP who administered many of Student's assessments, alleging that \*\*\* was not licensed when she conducted the FIE. The evidence established that at the time of the FIE, \*\*\* was, indeed, a fully licensed and certified LSSP who had all of the credentials, experience, and training necessary to determine, without supervision, whether an ASD was suspected or present (T.I.116). \*\*\*, the lead psychologist and a member of the District's Autism team, is an expert in ASD diagnoses. She concurred with \*\*\* differential diagnosis using the DSM IV-TR criteria that no further testing was needed because there was no suspicion of an ASD. \*\*\* was only supervising \*\*\* on her additional licensure as a Psychology Resident (T.I.87-89).

contacting student's Parents with concerns about student's increasing negative behaviors and decreasing academic performance since the cessation of student's ADHD medication in early March 2012. On the day the Parents were to meet with Student's teachers to discuss these new problems, the \*\*\* incident occurred and the downward spiral of the relationship between the Parents and the District was set in motion.

Student insists that student be qualified for special education and related services under the ASD diagnosis. At the hearing, Student presented the assessments of Dr. \*\*\*, Dr. \*\*\*, and Dr. \*\*\* for support of this diagnosis. Each of the assessments, which vary on the validity scale due to the types of instruments administered and the source of data collected, were all created **after** the disciplinary incident. But for Dr. \*\*\* April \*\*\*, 2012, PDD-NOS diagnosis, none of this evaluation information has been presented to, or considered by, Student's ARDC.

At the first MDRC meeting on April \*\*\*, 2012, the Committee requested consent to perform an Autism assessment in light of Dr. \*\*\* new diagnosis. The Parents declined. At the August 20, 2012, ARDC meeting to implement the Hearing Officer's Order to reinstate Student in student's school, LISD again requested consent to conduct an Autism evaluation. The Parents again declined this request. Notwithstanding the fact that both Dr. \*\*\* and Dr. \*\*\* had completed their assessments, these instruments were not provided to Student's ARDC in the August 20, 2012, ARDC meeting.

It is premature at this juncture to diagnose Student with an ASD. The November 2010 FIE considered and ruled out an Autism disorder. No additional request for an ASD was made prior to the \*\*\* incident. No one diagnosed Student with an ASD prior to the \*\*\* incident. Although the District agreed to fund an IEE if the fee-setting criteria was met, and Dr. \*\*\* has completed her IEE, this information, along with that of Dr. \*\*\*, has not been provided to Student's ARDC. Finally, the District has the absolute right to conduct its own ASD evaluation in contemplation of this diagnosis. Because the Parents refuse to provide consent, the District is blocked from conducting this requested assessment.

**D. STUDENT'S IEPS DURING THE ONE-YEAR STATUTE OF LIMITATIONS PERIOD WERE APPROPRIATE.**

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

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

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

## 1. The ASD Label Is Not Critical.

This case concerns a simple argument: Student argues that student has an ASD that has not been properly diagnosed by LISD. As such, LISD has failed to provide Student with an appropriate education tailored to student's ASD disability and driving needs.

Student's focus on the autism "label" is misplaced. The designation of a particular eligibility category is **procedural** in nature and does not constitute a denial of FAPE unless the student's program is inappropriate and fails to substantively provide the student with FAPE. *George West Indep. Sch. Dist.*, 57 IDELR 88 (SEA Tex. 2011).

IDEIA does not mandate that a school district classify a child by his/her specific IDEIA-qualifying disability.<sup>6</sup> Rather, IDEIA requires the school district to provide an "appropriate education, not with coming up with a proper label." *Pohorecki v. Anthony Wayne Sch. Dist.*, 637 F.Supp.2d 547, 557-58 (D.C. OH 2009) (Classification of disability is not critical to determining the provision of FAPE; rather, the determination rests on whether the goals and objectives are appropriate for the student); see also *Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7<sup>th</sup> Cir. 1997) ("...whether the student was described as cognitively disabled, other health impaired, or learning disabled is all beside the point. The IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe Heather's multiple disabilities").

Accordingly, the real issue does not concern the "label" LISD did not assign; it concerns the appropriateness of the Student's educational program between April 17, 2011, and April 17, 2012.

## 2. Student's IEPs Were Designed to Provide Educational Benefit.

In *Cypress-Fairbanks*, the Court set forth four factors that aid in evaluating whether a student is receiving the "basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit" to that student: 1) whether there is an individualized program based on the student's assessment and performance; 2) whether the individualized program is administered in the least restrictive environment ("LRE"); 3) whether the services are provided in a coordinated and collaborative manner by the key stakeholders; and 4) whether positive benefits are demonstrated both academically and non-academically.

### a. Student's IEPs Were Individualized, Based on Student's Assessments and Performance, and Delivered in the LRE.

Student's 2010-2011 educational program was developed following a comprehensive FIE in November 2010. On September 28, 2010, the Parents provided written consent for LISD to assess Student in the areas of a) language, b) physical/health, c) emotional/behavioral, d) sociological, e) cognitive functioning and adaptive behavior, and f) developmental, academic, and learning competencies. Student completed several assessments that screened for symptoms of depression, anxiety, self-esteem, interpersonal perceptions, and the ability to draw and explain emotions: the BASC-2, CDC, RCMAS-2, Revised Children's Manifest Anxiety Scale, Piers-Harris 2, DAP, and the Roberts-2.

Also as part of the FIE, LISD assessed Student's cognitive, achievement, and adaptive behavior using multiple formal assessments: the WJ III COG-NU, which measured Student's cognitive ability; the Beery VMI, which assessed Student's visual and fine motor skills; the CTOPP, which measured phonological awareness, phonological memory, and rapid naming; the WIAT-III, which measured Student's academic functioning; the BASC-2, which facilitated the differential diagnosis of a variety of emotional and behavioral disorders; the

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<sup>6</sup> "Nothing in this chapter requires that children be classified by their disability so long as the child who has a disability listed ... in this title and who, by reason of that disability needs special education and related services is regarded as a child with a disability under this subchapter." 20 U.S.C. §1412(1)(3)(B).

Conner's-3, which measured symptoms commonly associated with ADHD and commonly co-occurring groups of disorders; the BRIEF, which analyzed Student's executive functions; and the Social Behavior Assessment Inventory, which identified the interpersonal behaviors that Student appeared to be most lacking.

The fall 2010 FIE suggested that Student experiences significant difficulties with attention and concentration at home and at school. Student is disorganized, forgetful, easily distracted, fidgety, impulsive, and has difficulties initiating and completing assignments independently. Student's social relationships were problematic. Student is unaware of the personal space of student's peers; student teases and argues with peers. Based upon classroom observations and information from the Parents and teachers, the multidisciplinary team suggested a diagnosis of ADHD-Combined Type. The team recommended that Student's ARDC consider special education eligibility under the OHI eligibility category if supported by Student's physician. Because Parent and teacher checklists indicated several "clinically significant" scores for depression and withdrawal, the multidisciplinary team recommended that Student's ARDC consider special education eligibility under the ED category due to a general pervasive mood of unhappiness or depression.

On December 7, 2010, Student's ARDC convened to review the FIE and consider Student's admission into the special education program. The ARDC qualified Student for special education and related services under the Primary Disability of ED and agreed to pursue OHI eligibility from a physician due to Student's ADHD. The ARDC conducted an FBA and developed a BIP addressing targeted behaviors. The ARDC developed counseling and behavior goals and objectives focusing on peer relationships and independent work. The Committee recommended direct counseling, twenty (20) minutes per week.

The ARDC reviewed all of Student's benchmark scores, noting that Student passed all benchmarks that were given prior to October 2010. The Committee adopted accommodations in the general education setting. The Committee did not modify grade-level curriculum but did provide Student with special education support in all academic areas. The ARDC determined that Student would take the regular TAKS in all subjects with no accommodations. Student would receive all of student's instruction in the general education classroom with inclusion support in math and language arts to monitor and help student with organization and problem-solving skills.

Student's ARDC met again on February 23, 2011, to review additional assessments, including the OHI report from Dr. \*\*\*. The Committee accepted the OHI eligibility and revised Student's BIP.

On November 18, 2011, Student's ARDC convened student's annual ARDC meeting. Student's teachers reported much improvement; Student was being successful in class; student behaved appropriately and attempted student's work. Because Student was not a behavior problem, the Committee reviewed and discontinued student's BIP. The Committee adopted new counseling goals and discontinued some accommodations due to Student's progress. Student would continue to receive all academic instruction in the general education classroom. Student would receive counseling for twenty (20) minutes per week until the end of the third grading period and then twenty (20) minutes every other week.

IDEIA requires that children with disabilities shall be provided FAPE in the LRE. 20 U.S.C. §1412(a)(5)(A). Where possible, children with disabilities are not to be separated from non-disabled peers, placed in separate classes or schools, or in any way removed from the regular education environment, unless the nature or severity of the children's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 585 (5<sup>th</sup> Cir. 2009).

In this case, Student's ARDC crafted an appropriate program and placement when it determined to provide Student's educational services in the general education setting with appropriate special education supports.

**c. Student's Services Were Designed in a Coordinated and Collaborative Manner by the Key Stakeholders and Provided Student Academic and Non-Academic Success.**

The evidence at the hearing was replete with examples of Student's progress under the December 2010 IEP and the subsequent ones developed and implemented by Student's ARDC members, student's teachers, student's Parents, and related services providers. Student was successful during \*\*\* grade. Student passed all classes with final averages ranging from 91 to 98. Student met standards and achieved Commended Performance in all areas of the TAKS.

In fall 2011, Student's progress was so improved, that student's ARDC dispensed with student's BIP and several of student's non-essential accommodations. Student's teachers noted a marked difference in student in student's work ethic and peer relationships. Student's Mother was delighted that student was showing such growth in student's peer relationships and student's acceptance of \*\*\*self.

The record shows that from Student's initial placement in special education in fall 2010 until spring 2012, Student made commendable academic and non-academic strides. However, Student's progress came to an end with the \*\*\* incident and its progeny in spring 2012.

In the appeal of the MD determination, the undersigned Hearing Officer found that Student's conduct, the creation of the \*\*\*, was caused by, or had a direct and substantial relationship to, Student's disabilities. The disabilities in question were the ADHD and ED. The undersigned spent a great deal of time explaining this finding. Nowhere in that explanation was there any reference to the Parents' stance that Student had an undiagnosed ASD. There was no consideration given to whether Student had an ASD at the time of the conduct in question or whether Student's conduct was caused by, or had a direct and substantial relationship to, the proffered ASD disability.

Student did not finish the \*\*\* grade with the same positive momentum displayed prior to the disciplinary incident. Student's Parents \*\*\*, which \*\*\*. Accordingly, Student \*\*\* for the final grading period. Despite the resulting \*\*\*, Student managed to pass almost all of student's academic courses, purely on the back of the excellent record student had in the eight (8) months prior to \*\*\*.

IDEIA creates a presumption in favor of the education plan proposed by the school district and places the burden of proof on the party challenging the plan. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 536-37 (2005); *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1010-11 (5<sup>th</sup> Cir. 2011). Accordingly, Petitioner had the burden of proving that 1) LISD failed to evaluate Student in all areas of suspected disabilities; 2) LISD failed to find Student eligible for special education services in the area of Autism; and 3) LISD failed to provide Student with appropriate special education services to address student's Autism. Petitioner failed to meet this burden.

**V.  
CONCLUSIONS OF LAW**

1. The one-year statute of limitations applies in this case. 34 C.F.R. §300.507(a); 19 TEX. ADM. CODE §89.1151 & 1170. All of Student's claims arising before April 17, 2011, are dismissed as outside the one-year statute of limitations.
2. LISD's classification of Student's disability under the OHI and ED categories was appropriate and did not deny Student FAPE. 34 C.F.R. §300.8(c)(1)(4).
3. Student's IEPs in place between April 17, 2011, and April 17, 2012, were appropriate and reasonably calculated to provide Student FAPE. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997).

