

STUDENT <i>b/n/f</i>	§	BEFORE A SPECIAL EDUCATION
PARENTS,	§	
	§	
Petitioner,	§	
	§	
V.	§	HEARING OFFICER
	§	
BIRDVILLE INDEPENDENT	§	
SCHOOL DISTRICT,	§	
	§	
Respondent.	§	FOR THE STATE OF TEXAS

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

I.

STATEMENT OF THE CASE

Petitioner, Student *b/n/f* Parents (“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.*, contending that for the two-year period prior to the date of his Complaint, Respondent, Birdville Independent School District (“Respondent” or “BISD” or “the District”), denied Student a free, appropriate, public education (“FAPE”) as follows:

A. Student’s Issues:

1. Respondent failed to assess Student appropriately and timely in all areas of suspected disability;
2. Respondent failed to provide Student’s Parents with prior written notice when denying parental requests;
3. Respondent failed to provide Student’s Parents with a copy of their procedural safeguards at all required junctures;
4. Respondent determined, prior to Student’s Admission, Review, and Dismissal Committee (“ARDC”) meeting, that Student would not be eligible for special education and related services;
5. Respondent failed to identify Student as a student eligible for special education and related services;

6. Respondent failed to develop and implement an appropriate educational plan in the least restrictive environment (“LRE”); and
7. Respondent failed to timely and appropriately respond to Student’s records requests, including those specified in the Complaint.

B. Student’s Requested Relief:

1. compensatory educational and related services for the two (2) years Student was denied FAPE;
2. staff training related to such denial of FAPE;
3. reimbursement for all costs associated with Student’s private placement, evaluations, mileage; and
4. all future costs related to Student’s continued private placement for one (1) school year, 2011-12.

C. BISD’s Claims:

BISD asserts that several issues pled by Student are either a) not within the jurisdiction of a Texas Special Education Hearing Officer¹ or b) not ripe for consideration as of the date of the filing the Complaint.² Respondent requested in its Response that these issues be dismissed.

BISD also affirmatively pled the one-year statute of limitations employed in Texas for filing an IDEIA Complaint, alleging that Student’s Complaint contained no facts sufficient to support an exception to the one-year statute.

II PROCEDURAL HISTORY

Student filed his Complaint on February 25, 2011. On that same date, TEA assigned the case Docket No. 139-SE-0211 and assigned the matter to the undersigned Hearing Officer. The Hearing Officer sent the Initial Scheduling Order to the parties, stating that the pre-hearing telephone conference would convene on March 17, 2011, the Due Process Hearing would take place on April 12, 2011, and the

1 Petitioner raised issues and requested relief under numerous statutes over which the Hearing Officer has no jurisdiction: Section 504 of the Rehabilitation Act; the Americans with Disabilities Act (ADA); the Family Educational Rights Privacy Act (FERPA); the No Child Left Behind Act (NCLBA); Section 1983 of the Civil Rights Act of 1964; Title VI of the Civil Rights Act of 1964; the Technology Related Assistance For Individuals With Disabilities Act; and multiple statutes that provide for attorneys’ fees, including IDEIA.

2 Petitioner made several requests for accommodations and rulings, particularly related to discovery disputes, as well as requests for exemptions from several state and federal rules and statutes, most of which were not ripe for adjudication at the point of filing the Complaint.

Decision would issue by May 11, 2011.

Respondent filed its Response to Complaint on March 7, 2011, asserting several defenses and requesting dismissal of all of Petitioner's issues related to 1) any alleged exception to the one-year statute of limitations; 2) all claims deriving from statutes over which a Texas Hearing Officer has no jurisdiction, and 3) all matters preemptively alleged.

The parties participated in a Resolution Session on March 9, 2011, but were unable to reach an agreement.

On March 17, 2011, the parties convened the pre-hearing telephone conference. In attendance were the following: 1) Ms. Dorene Philpot, counsel for Petitioner; 2) *** & ***, parents of Petitioner; 3) Mr. J. Erik Nichols, counsel for Respondent; 4) ***, Special Education Director; 5) the undersigned Hearing Officer; and 6) the court reporter, who made a record of the telephone conference. The parties discussed the issues and re-scheduled the Due Process Hearing for April 27-29, 2011.

The parties also discussed Respondent's dismissal requests. The undersigned agreed to dismiss all claims deriving from statutes over which the Hearing Officer had no jurisdiction. The statute of limitations issue was reserved for later ruling after the presentation of evidence; no decision was made regarding Petitioner's preemptive complaint regarding discovery matters.

Under the Second Order Scheduling Due Process Hearing, the parties' Disclosure Deadline was set for 5:00 p.m., Wednesday, April 20, 2011. On Tuesday, April 19, 2011, the parties and the Hearing Officer convened a telephone conference to address a discovery dispute raised by Petitioner's counsel, Ms. Philpot. Ms. Philpot asserted that she had specified in Petitioner's Complaint that she was requesting production of Petitioner's education records, which included a request for "... any and all records maintained by the school concerning the student at issue, including ... standardized testing results, test protocols, " Ms. Philpot stated that throughout the process, she had been informed by Respondent's counsel that no protocols existed. However, on the prior Friday, April 15, 2011, Respondent's counsel informed her that test protocols did exist for Petitioner; however, Respondent would not produce these protocols because of copyright restrictions. When, during the telephone conference, the undersigned asked Ms. Philpot exactly what she meant by "test protocols," she informed all that she was seeking Petitioner's answers to test questions.

Following the telephone conference, the undersigned issued an Order requiring Respondent to produce all test protocols related to Petitioner that are, by definition, "education records." This included completed test instruments or question booklets containing information that identified Petitioner, whether his actual name appeared on the booklet, or question booklets that included both the questions and Petitioner's responses. In light of the fact that Respondent had only recently informed Ms. Philpot that Petitioner's test protocols existed, the undersigned ordered that the production of

the protocols take place by April 22, 2011, and that Petitioner would be allowed to offer these documents into evidence, notwithstanding the fact that the ordered production was after the Disclosure Deadline.

A couple of days prior to the scheduled hearing, Respondent notified the Petitioner and the undersigned that Respondent had unintentionally failed to disclose in a timely fashion pivotal assessments performed by the District in summer 2010, the assessments upon which the Student's ARDC based the decision not to find Student eligible for special education services. Respondent requested that these omitted Disclosures be allowed into evidence; alternatively, Respondent requested a continuance of the hearing to enable it to make its Disclosures timely. Petitioner objected to both requests and a telephone conference was ordered. During the telephone conference, the undersigned denied Respondent's request for a continuance and granted Respondent's request to introduce the evaluations into evidence. The undersigned informed Petitioner's counsel that she could make a record of Petitioner's objections to these rulings at the beginning of the hearing.

The Due Process Hearing convened on April 26, 2011, and concluded on April 27, 2011. Both parties introduced documentary evidence; Student called eleven (11) witnesses; BISD called one (1) witness. Both parties conducted cross-examination of the witnesses.

During the hearing, Student was represented by counsel, Ms. Philpot. Also in attendance throughout the hearing were 1) *** and ***, Student's parents; and 3) Ms. Melanie Watson, Ms. Philpot's paralegal. BISD was represented by counsel, Mr. Nichols. Also in attendance throughout the hearing was ***, Respondent's Special Education Director. Student opened the hearing and observers were in attendance at various times.

When Respondent introduced its Exhibits 1-6, which contained the assessments that were omitted from Respondent's original Disclosures, Petitioner objected to Exhibits 4-6, asserting that these Exhibits had not been disclosed in a timely manner. The undersigned allowed the parties to argue their respective positions, overruled Petitioner's objections, and allowed Respondent's Exhibits 4-6 to be introduced under the permissive language of 34 C.F.R. §300.512(b).³

At the conclusion of the hearing on April 26, 2011, the parties and Hearing Officer agreed to a post-hearing schedule: closing arguments would be due by May 27, 2011, and the Decision would be rendered by June 3, 2011. The parties and Hearing Officer agreed to extend the briefing deadline to June 3, 2011, and the Decision Deadline to June 29, 2011.⁴

³ Section 300.512(b) permits a Hearing Officer to allow the introduction of **evaluations** that were not timely disclosed.

⁴ References to the Due Process Hearing Record are identified as follows: "T.I" or "T.II" refers to the Certified Court Reporter's Transcription of testimony made on April 26 and 27, 2011, and 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.

III. FINDINGS OF FACT

1. BISD 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 child who does not receive special education and related services. Student currently is enrolled in the *** program at *** School, which is a private placement made and funded by Student's Parents.
3. Student lives within the jurisdictional boundaries of BISD with his Parents and sibling. BISD has not provided Student with educational services.
4. Student attended *** from age *** to age ***. In spring 2009, when Student was just over *** years old, he began demonstrating extremely negative behaviors at school: throwing chairs, overturning furniture, manifesting raging behaviors (T.II.121). Student's Parents did not observe this behavior at home. In July 2009, *** informed the Parents that due to his violence and the fear of harm to himself and others, Student was no longer welcome at ***.
5. Student's Parents then enrolled him in ***, where he behaved himself for a short period of time. By February 2010, Student was once again out of control: disrupting class, screaming, refusing to follow directions, throwing things, and kicking others. By this time, Student's Parents were observing these behaviors at home. Because of his behaviors, *** informed the Parents that Student was no longer welcome.
6. At the age of ***, Student had been kicked out of two daycare facilities based entirely upon his aggressive, explosive behaviors.
7. On May 27, 2010, Student entered the psychiatric day treatment program at ***. *** diagnosed Student with Unspecified Episodic Mood Disorder, prescribed Risperdal,⁵ and developed a behavior system to identify, teach, and reinforce appropriate behaviors, which Student's Parents incorporated into the home setting (R.6.6; P.9.1). *** discharged Student on June 11, 2010, and encouraged the Parents to contact BISD for assistance (T.I.62; T.1.217). Student's behavior improved with the administration of the Risperdal.
8. On June 14, 2010, the Parents enrolled Student in the *** School in ***, a therapeutic summer program for children who are challenged with learning, social, emotional and/or behavioral difficulties (P.9.1).

⁵ Risperdal is a psychotropic medication used for children with emotional and behavioral problems, such as severe agitation and bipolar disorder (T.1.191; T.II.103).

9. In June 2010, Student's Parents contacted Respondent to obtain an evaluation for special education and to obtain educational services. The Parents provided Respondent with Student's behavioral history, including information related to his dismissal from ***, as well as the psychiatric admission, evaluations, and medications (T.1.64) (P.12.16.).
10. Respondent conducted a full, individual evaluation ("FIE") in June 2010. The evaluator who conducted the intellectual and achievement portion of the assessment used the following assessment instruments and procedures: a) home language survey; b) teacher information; c) health information; d) parent information; e) Speech Evaluation; f) Psychological Evaluation; g) Developmental Assessment of Young Children ("DAYC"); h) Developmental Assessment Screening Inventory – II ("DASI – II"); and i) competencies (R.4.1).
11. The Speech Pathologist used Parent information, the DAYC, and informal language samples to assess Student's receptive and expressive language skills (R.4.1; R.5.1). Student demonstrated average receptive and expressive communication skills and no speech therapy was recommended (R.4.2; R.5.2).
12. Respondent used the DAYC and Parent information to evaluate Student's physical and motor skills abilities (R.4.2), which revealed that Student's gross and fine motor skills are age appropriate (R.4.2). Student demonstrated no need for adaptive physical education (R.4.1).
13. Respondent assessed Student's intellectual and adaptive behavior skills by using the DAYC and the DASI – II (R.4.3). The DASI – II consists of five subtests that measure cognition, communication, social-emotional development, physical development, adaptive behavior, and general development (R.4.3). Student's intellectual and adaptive behavior skills were consistent with each other, with the Student scoring in the "average" range, although the examiner felt that Student's cognitive abilities are higher than manifested (R.4.3). Student scored *** or higher on all of the other subtests, which placed him in the "average" range. However, Student scored at the *** level in the social-emotional subtest, a score that is approximately *** below his other scores (R.4.3).
14. Respondent's Licensed Specialist in School Psychology ("LSSP") performed the psychological evaluation (R.4.2). The Parents informed the LSSP of Student's behavioral history, his psychiatric history, and the medication he was taking (R.4.2). The LSSP observed Student's positive ability to transition during the assessment, his excellent communication skills, his engagement with the evaluators, and his "happy, even" disposition throughout the two-hour assessment (R.4.2-3; R.6.3). The LSSP used the Behavior Assessment System of Children, Second Edition ("BASC – 2"), which provided information from the Parents and one of Student's previous *** (R.6.3). The Parents and *** rated Student in the following composites: Behavioral Symptoms Index, Externalizing Problems, Internalizing Problems, and Adaptive Skills.

Behavioral Symptoms Index: the Parents rated Student's behaviors as "clinically significant" in the area of aggression, "at risk" in the areas of hyperactivity, depression and withdrawal, and "average" in the areas of attention problems and atypicality; the *** rated Student's behaviors as "clinically significant" in the areas of hyperactivity, aggression, depression, and atypicality, "at risk" in the attention problems subtest, and "average" in the area of withdrawal (R.6.3).

Externalizing Problems: the Parents rated Student's behaviors as "clinically significant" in the area of aggression and "at risk" in the area of hyperactivity; the *** rated Student's behaviors as "clinically significant" in the areas of hyperactivity and aggression (R.6.3).

Internalizing Problems: the Parents rated Student's behaviors as "at risk" in the area of depression and "average" in the areas of anxiety and somatization; the *** rated Student's behaviors as "clinically significant" in the area of depression and "average" in the areas of anxiety and somatization (R.6.4).

Adaptive Skills: the Parents rated Student's behaviors as "clinically significant" in the area of adaptability, "at risk" in the area of social skills, and average in the areas of activities of daily living and functional communication; the *** rated Student's behaviors as "at risk" in the area of social skills and "average" in the areas of adaptability, activities of daily living, and functional communication (R.6.4).

15. Ratings in the "clinically significant" category indicate a high level of maladjustment (R.6.3).
16. The LSSP found the *** responses to be more severe than warranted, challenging their reliability and discounting their impact (R.6.3).
17. The Parents and *** also provided ratings on the Social Skills Rating System (SSRS), which is a questionnaire that documents the frequency and importance of the behaviors that are affecting the student's social competence and adaptive functioning (R.6.4). The SSRS rates behaviors in Social Skills and Problem Behaviors and has a mean of 100 and a standard deviation of 15.

Social Skills: the Parents failed to complete this subscale, thereby rendering the information "incomplete"; the *** rated Student's behavioral level at ***, which is "average," in the areas of cooperation, assertion, and self-control, but the daycare worker did not provide a rating in area of responsibility (R.6.4). The LSSP should have followed up with the Parents in completing this assessment.

Problem Behaviors: the Parents rated Student's behavior level as ***, which is "above average," in the area of externalizing [physical, verbal aggression, and hyperactivity], and "average" in the area of internalizing [sadness or poor self-esteem]; the *** rated Student's behavioral level at ***, which comports with the Parents' rating (R.6.4).

18. Based upon the results of her assessments, the LSSP determined that Student did not manifest a mood disorder, stating that Student's evaluation results did not "presently support eligibility for Special Education as a student with Emotional Disturbance" (R.6.6). Rather, Student's behaviors were typical for an individual who is seeking to obtain something or trying to escape something (R.6.6). The LSSP concluded that Student's *** had encouraged the negative behaviors when they sent Student to the office to sit with a "grandmother" figure or when they allowed him to be a "special helper" during his escapades (R.6.6). The LSSP suggested that the Parents enroll Student in *** that will evoke creative expression while reinforcing appropriate behaviors (R.6.6).
19. Student's ARDC meeting convened on June 30, 2010, at Student's home school, ***, to review the results of the FIE. In attendance were Student's Parents, the District's Representative, a Special Education Teacher, the Speech Therapist, the LSSP, and the Educational Diagnostician (R.1.7). The ARDC determined that Student did not qualify for special education and related services (R.1). The ARDC reached consensus; Respondent provided Parents with copies of the procedural safeguards (T.1.68; R.1.6).
20. In performing the FIE, Respondent did not contact ***, ***, *** or Student's psychiatrist or psychologist. The Director of ***, who has a degree in educational childcare, would have informed the District of her beliefs that Student met the criteria of an emotional disturbance (T.1.307-08). Student was not observed during the FIE in his educational setting at *** School or home (T.1.53). This would have been an appropriate component of the FIE given the Student's history of maladaptive behaviors in ***, at home, and requirement for psychiatric hospitalization at *** age of ***.
21. Respondent did not administer a formal cognitive assessment to ascertain Student's intelligence quotient ("IQ") (T.1.67). Respondent was able to informally assess Student's cognitive abilities. Accordingly, the failure to use a formal IQ assessment does not render the FIE inappropriate.
22. Respondent did not conduct a functional behavior assessment ("FBA"). This omission does not render the FIE inappropriate.
23. Respondent did not do an occupational therapy ("OT") assessment (T.1.195). At the time of the June 2010 FIE, Student was not demonstrating the sensory issues he now manifests. Accordingly, this omission does not render the FIE inappropriate.

24. Student attended two four-week sessions of *** School during summer 2010. The Parents were pleased with Student's behavioral progress and enrolled him in the *** class for school year 2010-11. No other option had been provided to the Parents by BISD.
25. Student is performing above grade level in all subjects (T.I.102; P.4.28-36). *** School is providing Student with academic educational services at the *** level. Student is challenged by the curriculum, which keeps him from becoming bored, which thereby triggers negative behaviors. Student's Parents describe him as a "totally different child" (P.9.2). His more positive behaviors have generalized to community activities (P.9.2). Student is demonstrating sensory integration difficulties, primarily involving food (P.9.2).
26. On January 12, 2011, *** administered the Kaufman Test of Educational Achievement, Second Edition ("KTEA – II"), which found him "average " in the descriptive category with the following grade equivalency scores: Reading, ***; Math, ***; and Writing, *** (P.4.37).
27. On January 15, 2011, Student's Parents obtained a private psychological evaluation from Dr. *** (P.9). Dr. *** based her evaluation on the following: a) review of previous testing; b) school observation and interview with Student's teacher [at *** School]; c) clinical interviews with Student and Parents; d) the ***; e) Developmental Test of Visual-Motor Integration – 5th Edition ("VMI"); f) Wechsler Individual Achievement Test – 3rd Edition ("WIAT – III"); g) play interview with Student; h) Rorschach Inkblot Test; i) Child Behavior Checklist for Ages *** – Parent & Teacher Forms; and j) Conners' Rating Scale Revised – Parent & Teacher Forms (P.9.2).
28. Dr. *** observed Student at *** School on January 10, 2011. She noted that at the time of her observation, Student's activity level appeared normal, despite the fact that he had been restrained earlier following a "meltdown". Student was mostly cooperative and able to play with other children. He demonstrated appropriate social ability. Student's teacher stated that he had not required restraining since November 2010; however, he is subject to radical and swift mood changes and can become physically aggressive – kicking, biting, and scratching (P.9.3).
29. During her evaluation, Student generally was cooperative. He was not "wiggly" for a couple of hours but he was impulsive at times and a bit oppositional (P.9.4).
30. Dr. *** assessed Student's intellectual functioning, obtaining a full-scale IQ of *** on the *** (P.9.4). She assessed Student's visual perception and motor coordination using the VMI, which rendered a composite age equivalency of ***

years, *** months (P.9.5).⁶ Dr. *** did not find obvious problems with fine motor coordination (P.9.5).

31. On the WIAT – III, Student manifested academic skills in the “above-average” range in his mastery of early reading skills, “well above-average” in understanding mathematical concepts, and “average” in his ability to write the letters of the alphabet quickly (P.9.5).
32. In assessing Student’s emotional and behavioral functioning, Dr. *** assessed Student through interview, projective measure, and play interview as well as reports from the Parents and Student’s teacher (P.9.5).
33. Because Student is so verbal, Dr. *** administered the Rorschach. The results of the Rorschach indicate that Student has a serious mood disorder and an impairment in reality-testing capacities; Student is vulnerable to episodes of anxiety, depression, and disorganization, while having fewer coping resources than expected for his age and cognitive abilities. Because of his impairment in reality testing, Student misinterprets what is happening around him and at times his thinking may become unusual (P.9.6).
34. Student’s teacher noted that he is currently manifesting physical problems, particularly related to food. He will gag or vomit if the texture or smell offends him. Student’s Parents and teacher report cycles in his inappropriate behaviors where his mood can change quickly (P.9.7).
35. Based upon her observations and the results of formal and informal assessments, Dr. *** diagnosed Student with Unspecified Episodic Mood Disorder and made recommendations based thereon (P.9.7). Dr. *** noted that Student may need to be assessed in the future for dysgraphia (P.9.7).
36. Student’s psychiatrist, Dr. ***, testified that Student “absolutely” has an emotional disturbance (T.2.101). Dr. *** did a psychiatric evaluation of Student in his office and his diagnosis is consistent with Dr. *** (T.2.96).
37. The evidence supports a finding that Student is Emotionally Disturbed (“ED”).
38. The evidence supports a finding that Student needs special education and related services to obtain an appropriate education.
39. The evidence supports a finding that in the area of the psychological assessment, the FIE was not appropriate.
40. The evidence supports a finding that the BISD failed to develop an appropriate IEP in the LRE for Student in June 2010.

⁶ This age equivalency comes from the average of his superior range in visual perception (*** years, *** months) and below average in motor coordination (*** years, *** months).

41. The Parents' decision to keep Student in the private placement at *** School was their only option in light of the District's determination that Student did not qualify for special education services.

Procedural Issues:

42. The evidence fails to support a finding that Student's ARDC pre-determined Student's educational status prior to the June 2010 ARDC meeting.
43. The evidence fails to support a finding that BISD did not provide the Parents the type of prior written notice mandated by IDEIA.
44. The evidence fails to support a finding that BISD did not provide the Parents procedural safeguards as required under IDEIA.
45. The evidence supports a finding that BISD did not fully comply with Student's document requests in a timely manner:

The District failed to provide Student's Parents with the Disability Report at the time of the June 2010 ARDC meeting (R.6.6-8; T.2.9-10; T.2.6-15). This document should have been attached to the ARDC documents (T.2.73). The Parents received this document two days before the hearing.

The District destroyed copies of certain test protocols following the June 2010 FIE (T.1.182).

The District failed to locate and either a) produce or b) object to the production of, test protocols that fall within the definition of "student records." The District located the test protocols a week prior to the hearing. These test protocols/educational records were not shared with the Parents at the ARDC meeting in June 2010 nor were they available for production to Dr. ***.

46. The District's failure to share these documents with the Parents at the ARDC meeting in June 2010 deprived Student's Parents of the opportunity to participate in the decision-making process regarding the provision of FAPE to Student.
47. Student's Parents unilaterally placed Student at *** School in June 2010, prior to the ARDC meeting, for summer school. When the District declined to provide Student with special education and related services, or to offer any services of any kind for school year 2010-11, Student's Parents were left to find an appropriate ***.
48. *** School provided Student with an appropriate education during the second semester of summer 2010, fall 2010, and spring 2011.

49. Respondent is liable for the reimbursement costs for educational services it failed to provide Student during the second semester of summer 2010, fall 2010, and spring 2011.
50. The evidence fails to support a finding that an exception to the one-year statute of limitations applies in this case.

IV. DISCUSSION

All state school districts receiving federal funding must provide all handicapped children FAPE. The United States Supreme Court, in *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175 (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." The first step in designing an appropriate program is the evaluation process.

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.

A. Student's FIE Is Inappropriate.

Petitioner alleges that BISD denied Student FAPE in the administration of Student's FIE: 1) BISD failed to provide an appropriate, timely FIE in all areas of suspected disability; and 2) BISD's FIE was inappropriate in that a) it did not consider information from a variety of sources, b) the time spent with the Student was only two hours, c) BISD did not observe Student in his classroom, and d) BISD did not conduct an FBA or OT assessment. While I find that BISD did, in fact, timely evaluate Student in all areas of suspected disability, it did not provide an appropriate evaluation.

It is certainly understandable that there is reluctance to label a *** year old child ED. Indeed, no professional was willing to actually diagnose Student with bipolar disorder. At most, they are willing to state that he fits the classification of "mood disorder, NOS." This trepidation is probably appropriate when defining the label to apply to the child. It cannot, however, form any basis for denying the reality of the glaring "red flags" presented in the evaluation process, as in this case and the psychological assessment performed by BISD.

The psychological assessment is inappropriate on multiple grounds: 1) it fails to give due credence to Student's behavioral history, which unbelievably consisted of dismissals from ***, psychiatric services, and the need for Risperdal, all at the age of ***; 2) it discounts the results of its own instruments that manifested extreme maladjustments as well as a two-year gap in Student's social/emotional test while concomitantly showing average ability in all other areas; and 3) it ignores the referral from ***, which included a very serious psychiatric diagnosis, as well as the reports and comments of Student's prior teachers and his Parents explaining the depth of his outbursts and his inability to control himself or be easily controlled.

B. Student Qualifies for Special Education and Related Services as ED.

A child with a disability under IDEIA is a child with one or more delineated impairments and who, because of such impairment, needs special education and related services. 34 C.F.R. 300.8(a)(1).

BISD does not contest that Student has been diagnosed with a mood disorder, NOS, and that it creates a potential basis for eligibility under IDEIA as a student with ED. BISD asserts that Student's mood disorder is not an ED.

1. Student is ED.

A student is diagnosed as ED if the student demonstrates one or more of the following characteristics over a period of time and to a marked degree that adversely affects the student's educational performance: 1) an inability to learn that cannot be explained by intellectual, sensory, or health factors; 2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; 3) inappropriate types of behavior or feelings under normal circumstances; 4) a general pervasive mood of

unhappiness or depression, or 5) a tendency to develop physical symptoms or fears associated with personal or school problems. §300.8(c)(4)(i).

Petitioner's witnesses categorically testified that Student exhibited one or more of these characteristics and that he had been doing so since he was *** years of age. While the Petitioner's witnesses identified different characteristics with some overlap, all concurred that Student manifests characteristic number 3: inappropriate types of behavior or feelings under normal circumstances. BISD had no one to testify otherwise. BISD evaluated Student after he had demonstrated these negative behaviors for more than a year. When one realizes that Student is currently *** years old and that he has been demonstrating these negative behaviors for almost half his life, the requirement that Student demonstrate a marked degree of these negative behaviors over a "period of time" is clearly met.

2. *Because of His Disability, Student Needs Special Education and Related Services.*

BISD argues that qualifying Student for special education and related services at this juncture would be premature because 1) time is needed in the regular education environment to test intervention strategies; and 2) Student is showing marked improvement in his behaviors in his current placement at *** School.

Student's experts, Dr. ***, his psychiatrist, and Dr. *** were both unflappable in their findings that Student "absolutely" has an emotional disturbance (Dr. ***) or at the very least, a mood disorder, NOS (Dr. ***). Student's actions are not those of a spoiled or manipulative child. Student has serious issues with reality testing, lashing out for things that he clearly misinterprets, aggressive behaviors that injure himself and others. There is no debate that the private *** would much rather maintain their student population rather than lose them, whether it is for financial reasons or a belief system. The fact that Student was kicked out of not one but two *** within a year's time is extremely "telling."

Student is making progress at *** School because it provides the kind of environment that he needs: structure, behavior reinforcement, communication with the Parents, clear expectations, and academic stimulation. However, Student's "progress," though commendable, continues to be a work in progress. While Student is doing remarkably well academically, he continues to bully, misinterpret actions of others, become aggressive, overreact, ***, and threaten harm to himself and others. This is not a child who is capable of making educational progress in a regular education classroom.

C. BISD's Failure to Produce Timely, and Maintain, Student's Educational Records Constitute Procedural Violations of IDEIA.

Parents may request a copy of their child's education records. 34 C.F.R. §300.613(b)(2). These records should be provided without unnecessary delay. In a case such as the case at bar, the Parents made their written request for Student's education records in their February 25, 2011, Complaint. Included was a specific request for test protocols.

Respondent produced some of the test protocols after being ordered to do so by the Hearing Officer. The only test protocols ordered to be disclosed were those that constituted Student's "educational record." The District only made these protocols available a week prior to the hearing. Accordingly, the Parents did not have benefit of these protocols at the June 2010 ARDC meeting.

In addition, Respondent failed to provide a copy of Student's Disability Report, prepared by the LSSP in June 2010, until two days prior to the hearing. Again, the Parents did not have benefit of this document at the June 2010 ARDC meeting.

Finally, Respondent stipulated that it had destroyed some of the test protocols following the June 2010 ARDC meeting. While the Parents did not have benefit of these protocols at the June 2010 ARDC meeting because they simply were not provided, this destruction of educational records prevented Dr. *** from reviewing their contents in preparing her own assessments.

Under IDEIA, a procedural violation only rises to the level of a denial of FAPE if it either 1) impeded the Student's right to FAPE; 2) significantly impeded the parent's opportunity to participate in the decision-making process regarding FAPE; or 3) caused a deprivation of educational benefits. 34 C.F.R. §300.513(a)(2).

In this case, the destruction of the test protocols and the failure to provide remaining information obtained from all evaluation sources equate to a violation of FAPE. Student's Parents clearly were deprived of important evaluation information at the June 2010 ARDC meeting. In addressing Section 504 retention requirements, the Office for Civil Rights ("OCR") has determined that information obtained during a school evaluation of a child with a disability be documented and retained to ensure parental access to relevant records used in the evaluation. *St. Charles Community Sch. Dist. #303*, 17 IDELR 18 (OCR 1990). The same logic obtains here.

D. The One-Year Statute of Limitations Applies to this Case.

In this case, Student's Parents alleged multiple substantive and procedural violations of IDEIA dating back at least two years prior to the filing of the Complaint. BISD responded by pleading the affirmative defense of statute of limitations. Student countered with an assertion that exceptions to this one-year statute exist.

Under IDEIA, two limitations options are provided: 1) the parent or agency has two years from the date the parent or agency knew, or should have known, about the alleged actions that form the basis of the complaint; or 2) if the state has a different, explicit time limitation for requesting a hearing, such time limitation is applicable to complaints filed within that state. 20 U.S.C. §1415(f)(3)(C). In Texas, IDEIA complaints must be brought within one year of obtaining “knowledge of facts” forming the basis of the complaint. 19 Tex. Admin. Code §89.1151(c).

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). Petitioner has argued that the one-year statute of limitations is not applicable because BISD withheld required information and made misrepresentations that prevented the Parents from filing a timely Complaint. Although Petitioner alleges “misrepresentations” occurred, the lion’s share of Petitioner’s argument concerns the second exception, which requires a finding that the Parents were prevented from requesting a Due Process Hearing because BISD withheld information from them that it was obligated to provide. 20 U.S.C. §1415(f)(3)(D)(ii); 34 C.F.R. §300.511(f)(2).

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 BISD failed to provide 1) written notice to the Parents at all required junctures; 2) copies of Procedural Safeguards; 3) child-find activities; 4) educational records; and 5) more. The only concrete challenges are 1) failure to provide written notice at all required junctures, which Student failed to prove; and 2) failure to provide the Parents with copies of the Procedural Safeguards, which Student failed to prove.

The evidence established that BISD provided Student’s Parents with copies of Procedural Safeguards in June 2010. The content of these safeguards provided Parents with statutory notice of their rights, including their right to request a Due Process Hearing within one year of the accrual of a claim. In other words, that copy of the Procedural Safeguards informed the Parents that they could file a complaint about any perceived IDEIA issue occurring after June 2009. Student’s Parents did not take advantage of their rights until eight months later. No exception to the one-year statute of limitations applies under the facts of this case.

E. Student is Entitled to Reimbursement for Certain Private Placement Expenses.

Generally, school districts are not required to pay for the education of children enrolled in private schools without the consent of, or referral by, the public agency if that agency made FAPE available to the child and the parents elected to place the child in such private school or facility. However, a district may be required to reimburse parents for the expenses of a private placement if 1) the district did not make FAPE available to the student and 2) the private placement is appropriate. 34 C.F.R. §300.148(c). The payment obligation may be reduced or denied 1) if a) at the most recent ARDC meeting the parents attended, prior to removal of the child from the public school, the parents did not inform the ARDC that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or b) ten business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described above; or 2) upon a judicial finding of unreasonableness with respect to the actions taken by the parents. 34 C.F.R. §300.148(d). These rights and remedies also apply to situations in which the child has not received special education services from the public school. *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2484 (2009).

Respondent argues first that the Parents are not entitled to reimbursement for Student's placement at *** School because they failed to provide written notice to the District of their intent to seek private placement at public expense. Next, Respondent argues that the Parents are not entitled to compensatory services, in the form of reimbursement for Student's placement at *** School, because entitlement to compensatory services arises not from the denial of an appropriate IEP, but from the denial of an appropriate education. Because the District has not been allowed to provide Student with an appropriate education, the District cannot be ordered to provide compensatory services.

The District's argument is neither persuasive nor in compliance with the Supreme Court's ruling in *Forest Grove*, a situation in which the District attempted to escape payment obligations for a privately placed student the District had failed to identify as eligible for special education services. The District argued that it bore no reimbursement obligations because such obligation arose only where the student had previously received special education and related services. In rejecting this argument, the Supreme Court found it "bordering on the irrational" to allow a school district's refusal to find a child eligible for special education services, no matter how compelling the child's need, to immunize the district against reimbursement obligations arising when the parents privately place the child.

In this case, Student never received special education and related services from BISD because BISD failed to identify him as a student eligible for special education services. The Parents had no other option but to enroll him in *** that could provide him

with an appropriate education. BISD's failure to appropriately assess Student, find him eligible for special education and related services, develop an appropriate IEP for delivery in the LRE, and make an educational placement available to him denied Student FAPE for the entirety of school year 2010-11. As articulated in *Forest Grove*, allowing the District to take a "pass" on these failures because the Parents did not provide written notice of their intentions to place Student at *** School "borders on the irrational."

As to Student's education in school year 2011-12, Student failed to establish that BISD cannot provide Student with an appropriate education. BISD has the right to convene an ARDC to review all requisite information and to then determine whether it can education this child. If it can, the ARDC shall craft an appropriate program and placement. If it cannot, then the ARDC can refer Student to *** School, where Student has clearly made progress, or any other setting the ARDC deems appropriate, and pay for those private educational services.

V. CONCLUSIONS OF LAW

1. The psychological assessment in BISD's FIE was inappropriate. All other components of the FIE were appropriate. 34 C.F.R. §300.303-306.
2. Student qualifies for special education and related services under the eligibility criteria of emotional disturbance. 20 U.S.C. §1400 *et seq.*
3. BISD failed to develop an appropriate educational program and placement for Student during the second semester of summer 2010, fall 2010, and spring 2010.
4. *** School provided Student with an appropriate education during the second semester of summer 2010, fall 2010, and spring 2011.
5. BISD shall reimburse Student's Parents for educational expenses at *** School from the second semester of summer school 2010 through the summer of 2011. 34 C.F.R. §300.148(d).
6. BISD's failure to provide complete educational records deprived Student's Parents of the opportunity to participate in the decision-making process regarding the provision of FAPE to Student. 34 C.F.R. §300.513(a)(2).
7. The one-year statute of limitations applies in this case. 20 U.S.C. §1415(f)(3)(C).
8. Petitioner failed to establish that BISD cannot provide Student with FAPE during school year 2011-12.

**VI.
ORDER**

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the relief requested by Petitioner is GRANTED, IN PART, AND DENIED, IN PART:

Within thirty (30) business days of the date of this Decision, BISD shall reimburse the Parents the following sums for certain educational expenses at Fourth Street School:

1. reimbursement for the second semester of *** 2010;
2. \$5,787.50 as reimbursement for tuition and enrollment fees for fall 2010;
3. \$5,362.50 as reimbursement for tuition and enrollment fees for spring 2011;
4. \$1,750.00 as reimbursement for *** 2011; and
5. mileage calculated at the state rate of \$.51 per mile.

All other requests for reimbursement are DENIED. It is further ORDERED that within thirty (30) business days from the date of this Decision:

1. Student's ARDC shall meet to review all current data and determine whether BISD can provide Student FAPE for school year 2011-12;
2. if the determination is that BISD can provide Student FAPE, the ARDC shall consider and provide additional evaluations that are necessary to develop an appropriate IEP for Student for school year 2011-12;
3. if the determination is that BISD can provide Student FAPE, the ARDC shall develop an appropriate IEP for Student for school year 2011-12;
4. if the determination is that BISD can provide Student FAPE, the ARDC shall utilize the recommendations of Dr. *** and others the ARDC deems appropriate in crafting an appropriate IEP for school year 2011-12;
5. if the determination is that BISD can provide Student FAPE, BISD shall invite all necessary personnel, whether District employee or outside evaluators, to attend the ARDC.

All other requests for relief not specifically stated in this Order are **DENIED**.

VII.
NOTICE TO PARENTS

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

The District shall timely implement this Decision within ten (10) school days in accordance with 19 Tex. Admin. Code §89.1185(p). The following must be provided to the Division of IDEIA Coordination at the Texas Education Agency and copied to the Petitioner within fifteen (15) school days from the date of this Decision: 1) documentation demonstrating that the Decision has been implemented; or 2) if the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than ten (10) school days, documentation demonstrating the District's plan for implementing the Decision within the prescribed timeline and a signed assurance from the Superintendent that the Decision will be implemented.

SIGNED this 22nd day of June 2011.

Deborah Heaton McElvaney
Special Education Hearing Officer

COPIES SENT TO:

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