

HIGHLAND PARK ISD	§	BEFORE A SPECIAL
Petitioner	§	EDUCATION
	§	
v.	§	
	§	HEARING OFFICER FOR THE
	§	
STUDENT BNF PARENT	§	
Respondent	§	STATE OF TEXAS

**FINAL DECISION OF THE HEARING OFFICER**

**STATEMENT OF THE CASE**

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

The District initiated this action pursuant to 34 C.F.R. § 300.502(b)(2)(i) following Student’s request for an Independent Educational Evaluation (IEE) at public expense to prove that its evaluation is appropriate. Subsequently, the District amended its request for due process to add the issue of Student’s eligibility for special education services under IDEA. Student responded and counterclaimed, asserting student’s entitlement to an IEE and to eligibility under IDEA among other issues.

**PROCEDURAL HISTORY**

On or about December 3, 2010, the District filed this request for due process with the Texas Education Agency, asserting the single issue of the appropriateness of its Full and Individual Evaluation (FIE) of Student. On or about December 14, 2010, the District filed its Amended Request for Due Process, raising the additional issue of Student’s eligibility for special education. On or about February 5, 2011, Student filed a counterclaim, asserting additional issues and relief, which will be set forth in full below.

During the pre-hearing proceedings, the parties raised two preliminary legal issues: 1) which party has the burden of proof on the Student’s eligibility under IDEA; and 2) whether one or both of the exceptions to the one-year statute of limitation for IDEA claims in Texas as set forth in 34 C.F.R. § 300.511(f) apply and which party has the burden of proof on the issue of the statute of limitations.

After considering the arguments submitted by the parties, I issued an order on March 7, 2011 finding that Student bears the burden of proof on the issue of student’s eligibility for special education services under IDEA and on the issue of whether one of the statutory exceptions to the statute of limitations is applicable. I carried the issue of whether one of the exceptions to the statute of limitations applies forward to the hearing. *See*, Order Following Second Pre-Hearing Conference, On Petitioner’s Motion for Assignment of Burden of Proof, on Petitioner’s Motion for Partial Dismissal and Third Revised Scheduling Order issued on March 7, 2011.

Following one agreed continuance for good cause, the due process hearing occurred on March 28, 29, 30, and 31, 2011. Because the parties did not complete the presentation of evidence, the due process hearing reconvened on April 25, 2011, the first day when all parties were available. At the close of the hearing, I

granted the parties leave to file post-hearing briefs and, by agreement, ordered the briefs to be submitted on or before May 31, 2011. The parties agreed to extend the due date for the decision of the Hearing Officer commensurate with the time allowed for the filing of the parties' briefs, making the due date for the decision June 24, 2011. The parties subsequently agreed to extend the due date for the decision to June 29, 2011.

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

### **1. Issues and Relief Asserted By Petitioner HPISD**

HPISD identified two issues for resolution in this matter: 1) Whether HPISD's evaluation of Student is legally sufficient such that Student is not entitled to an Independent Educational Evaluation (IEE) at public expense; and 2) Whether HPISD's determination that Student is not eligible for special education services under IDEA is proper.

For relief, HPISD seeks an order from the Hearing Officer denying Student's request for an IEE and finding that Student is not eligible for services under the IDEA.

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

The issues identified by Student for resolution are: 1) Whether the District failed to timely and properly evaluate and identify student as eligible for special education services; 2) Whether the District failed to timely and properly serve student as a student eligible for special education service; 3) Whether the District significantly impeded student and parent participation in the decision-making process, thus causing a deprivation of educational benefits; and 4) Whether Student should be allowed to recover for claims arising within two years preceding the date of filing?

For relief, Student primarily seeks a finding that student is eligible for special education services, compensatory services for the denial of a free appropriate public education, and reimbursement for private evaluation and services obtained by the parent.

## **FINDINGS OF FACT**

1. Student is currently \*\*\* years old and lives with student's parent and sibling within the geographical boundaries of HPISD. During the 2010/2011 school year, Student was enrolled in \*\*\* grade at \*\*\* within HPISD.
2. HPISD is a political subdivision of the State of Texas and a duly incorporated independent school district.
3. Student began receiving special education services at age \*\*\* from \*\*\* ISD (\*\*\*) under the eligibility category of Speech Impaired. \*\*\* evaluated Student in an FIE dated 5/25/06 in the areas of intellectual and academic performance and found, in relevant part, that Student was in the average range of intelligence and that student's achievement scores indicated a significant weakness in written expression. \*\*\* also noted that Student was too fatigued to complete the processing speed portion of the assessment, which affected student's overall IQ score. (Petitioner Exhibit 1, pages 1-2; hereinafter cited as P1:1-2).
4. \*\*\* did not recommend Student for special education eligibility as a student with a learning disability in written expression due to the lack of educational opportunity student had received to date, making it uncertain that student had a true learning disability. (P1:2).

5. Student transferred to \*\*\* ISD in August 2006 and a transfer Admission, Review, and Dismissal Committee (ARDC) met on August 28, 2006 to admit Student to special education at \*\*\* and to review the results of the \*\*\* FIE from May 2006. The ARDC minutes reflect a discussion of the 2006 FIE and Student's deficit in written expression. Student's parent (hereinafter referred to as Mother) attended the ARDC and participated in the discussion. (P4:12). Student attended \*\*\* ISD in \*\*\* during the 2006/2007 school year.

**School Year 2007-2008: \*\*\* (First Year at HPISD)**

6. Student transferred to HPISD at the beginning of the 2007/2008 school year and repeated \*\*\* at \*\*\*. (Mother Testimony, Transcript page 1059, Lines 12-21; hereinafter cited as Mother, T. p. 1059:12-121).
7. The District proposed to evaluate Student in September 2007 to determine student's eligibility status as speech impaired, present levels of performance, and educational needs. (P9). As part of the evaluation, the District collected information from Student's \*\*\* teacher (P10:1) and from Mother (P10:2-7).
8. Student's teacher reported no concerns at the start of the school year. (P10:1).
9. Student's mother reported, in relevant part, that Student received educational testing and a speech/language evaluation from \*\*\* (P10:3). Though Mother reported some academic concerns about Student, she did not report any emotional concerns upon student's enrollment in September 2007. (P10:5-7).
10. The District's 2007 evaluation of Student included a review of existing data and formal testing only in speech/language. (P.9). The evaluation did not reference the \*\*\* FIE. The evaluation found a significant weakness for Student in the area of expressive language, which supported continued eligibility for special education services under the eligibility classification of Speech Impaired. (P11:6-7).
11. Student's ARDC reviewed the evaluation and student's present level of academic achievement at student's initial placement ARDC on 10/23/07. Student was doing well in the classroom; eligibility was accepted as Speech Impaired; and speech services were provided.

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

12. On October 21, 2008, Student's annual ARDC convened to review progress and develop new goals. The teacher reported some minor concerns in the area of Language Arts, which required after school tutoring one day per week and some work at home to support improvement in Student's fluency rate of reading. The speech therapist reported that Student had mastered all but two goals on student's Speech Individual Education Plan (IEP). (P13; P13:17)
13. Mother requested a full cross battery evaluation for learning disabilities because Student was receiving academic interventions even though student had \*\*\*. (P13: 17; Mother, T.912: 8-14). Mother did not report concerns about Student's emotional status or request testing in that area. (Elliott, T. 1176:15-25; T. 1177: 1-4). The ARDC developed an evaluation plan that included formal testing in the areas of Language, Intellectual/Adaptive Behavior, and Academic Performance. (P13:24-25).

**\*\*\* Evaluation- FIE # 1**

14. Dr. \*\*\*, Educational Diagnostician for HPISD, completed the District's FIE (hereinafter referred to as FIE #1) in draft form in December 2008 (R9:167-182) and in final form on January 9, 2009 when it was reviewed by Student's ARDC. (R9: 186-205; P14:) FIE # 1 included a new speech/language evaluation, teacher information and classroom observation for assessment in the area of emotional/behavioral, and a cross battery assessment to measure intellectual aptitude and academic achievement. (P14).
15. The speech/language evaluation found that Student's speech was within the average range of ability for student's age in all areas and did not support continued eligibility in special education as speech impaired. (P14: 2-4).
16. In the area of emotional/behavioral, Student's teacher reported although student worked well with others, was polite, and had a positive attitude, student had difficulty maintaining focus to class instruction and independent tasks, and difficulty following directions and initiating tasks. (P14:5). The teacher reported, in relevant part, the following relative strengths and weaknesses: as strengths, Student completes class work and homework, is cooperative and appropriate, makes and keeps friends at school, and has a usually happy disposition. As weaknesses, Student's comprehension of grade level reading material, student's handwriting, memory of information just heard, initiation of tasks, and ability to sustain attention to task. (P14:5).
17. Dr. \*\*\* observation Student on November 28, 2008 confirmed student's teacher's report. Dr. \*\*\* noted that when the teacher was helping other students or the students were working independently, student would "lose focus and play with student's pencil or stare away from the task at hand." (P14:6, 15).
18. Dr. \*\*\* completed formal intellectual testing using the Wechsler Intelligence Scale for Children-4<sup>th</sup> Edition (WISC-4) and the Woodcock Johnson III- Test of Cognitive Abilities (WJCog). Intellectual testing measures the presence of a cognitive or psychological processing deficit. (\*\*\*, T. 1311-1312). Intellectual testing indicated that Student functions in the average range overall, with weaknesses in the areas of working memory and processing speed.
19. Student's score of \*\*\* on the WJCog Planning Subtest (P14:7) was \*\*\* below the normative average of 85, indicating a significant weakness in this area. The Planning Subtest is a test of executive functioning that relates to attention and concentration. Student's low score on this subtest is consistent with the disability of Attention Deficit Hyperactivity Disorder (ADHD). (\*\*\*, T. 723: 5-14).
20. To measure academic achievement, Dr. \*\*\* used the Woodcock Johnson III- Tests of Achievement (WJAch) and the Comprehensive Test of Phonological Processing (CTOPP). Student's scores fell in the average range in all composite areas assessed. (P14: 8-9).
21. Dr. \*\*\* utilized a cross battery approach to analyze the data. The cross battery approach looks at intelligence and achievement in terms of broad abilities rather than a single score and seeks to determine if a cognitive or psychological processing disorder exists that manifests itself in an academic deficit. (P28: 11-15). A cognitive or psychological processing deficit indicates a deficit in an individual's information processing or learning efficiency that is less dependent on formal instruction or schooling than a deficit in specific academic skills or knowledge would be. (P28: 12, 15). An academic deficit indicates a deficit in an academic skill or store of knowledge. (P28:13).

22. A processing deficit exists if the average standard score in a broad area of cognitive processing, also called a broadband score, is below 85. (\*\*\*, T. 1312: 1-9; 1321: 1-7; R28: 11-15). Cross battery testing organizes cognitive processing into seven (7) broad areas that correlate to how information is processed. Broadband scores are achieved by averaging scores on two narrow band instruments that measure specific aspects of the broad cognitive area. If scores on the two narrow band tests administered do not fall within the same normative range and/or within 15 points of each other, a third narrow band is to be assessed. When two of the three instruments administered meet the criteria, i.e. fall within the same normative range, then those scores are averaged to measure the broadband score and the third score is considered an "outlier." (\*\*\*, T. 1315; P14:7). Scores below average on individual narrow band tests do not indicate a processing deficit in the overall broad area; only a broadband standard score below 85 points to a cognitive processing deficit. (\*\*\*, T. 1317, 1321: 1-7).
23. Outlier scores are important in understanding areas of weakness even if normative deficits in the broadband score do not exist. (\*\*\*, T. 722).
24. Dr. \*\*\* intellectual testing of Student, when analyzed with a cross battery approach, indicated that student's average standard scores in all seven broad areas of cognitive processing were in the normative average range. (\*\*\*, T. 1318: 11-16; P14:17).
25. Cross battery analysis organizes academic abilities into three achievement domains. These areas develop almost exclusively as a function of formal instruction and educationally related experiences. When an academic deficit exists, the cross battery assessment links that deficit to a logically related cognitive processing deficit in order to determine the presence of a specific learning disability. An academic deficit exists if the average standard score in one of the achievement domains falls below 85. (P28: 12-13; \*\*\* T. 1319: 20-23).
26. Dr. \*\*\* achievement testing of Student, when analyzed with a cross battery approach, showed that student's standard scores on the three achievement domains were within the average range. (\*\*\*, T. 1320:8-10; P14:17).
27. One of the purposes of the cross battery approach is to ensure that low academic performance is not attributed to the presence of a learning disability without careful analysis, as other factors such as an emotional disturbance, a medical condition, anxiety, or a psychiatric disorder can result in data that appear to suggest a learning disability. (P28:14)
28. Dr. \*\*\* testing included some errors as indicated by Student's expert Dr. \*\*\* in the scoring of the WISC-4 and the administration of the WJAch. (R35:1027). These errors did not change Student's composite scores or affect the ultimate results that she reached. (\*\*\*, T. 1337:8-14; 1340: 8-20; 1345:18-24).

### **ARDC Review of FIE # 1**

29. The ARDC reviewed FIE # 1 in January 2009. (P15:7). Based on the speech/language evaluation, the District members of the ARDC proposed dismissal from special education on the basis of speech impairment. Mother disagreed. (Mother, T. 914-915; P15:7). The ARDC also concluded that Student was not eligible for services on the basis of a learning disability due to Student's average scores in both cognitive processing and achievement. (P15:7). Mother indicated that she wanted to recess and review the report with the input of others and requested that a copy of the protocols be provided for that purpose. (P15:7-8).

30. A ten-day reconvene ARDC meeting was scheduled for January 28, 2009; however the meeting did not actually occur until May 26, 2009. (P15:8-9). Student continued to receive speech services between the January and May ARDC meetings. Student's teacher reported that student was meeting expectations in reading. Mother disagreed with the ARDC's conclusion that Student was not eligible with a learning disability and requested an IEE. Mother agreed to dismiss Student from special education based on speech contingent on the District granting the IEE. (P15:9).
31. The District granted an IEE, to be performed by Dr. \*\*\*. (P16; Mother, T. 918:19-24). The District provided formal notice to Student of student's dismissal from special education on July 31, 2009 and agreed to schedule an ARDC meeting to review the results of Dr. \*\*\* evaluation when it was complete. (P17).

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

32. Dr. \*\*\* began the IEE in August 2009, but did not finish until June 2010. (P21). As such, Student was not served in special education during \*\*\* grade.
33. During the process of Dr. \*\*\* conducting the IEE for Student, Mother became aware of and obtained a copy of the \*\*\* 2006 FIE. Mother believed the \*\*\* FIE supported the existence of a learning disability and was very concerned that she and the other ARDC members had not been aware of the evaluation when discussing Student's eligibility. Mother believed that the District purposely withheld knowledge of the \*\*\* FIE. (P18:2; Mother, T. 905-906, 908: 2-8).
34. The District explained why the \*\*\* FIE was not relied upon, how it was overlooked, and why it was not relevant to Student's current eligibility. (P18:4).
35. The District did not intentionally withhold the \*\*\* FIE from Mother or the ARDC members considering Student's eligibility. The information contained within the \*\*\* FIE does not affect the cross battery analysis completed by Dr. \*\*\*, which ruled out the presence of a learning disability.
36. Mother may not have remembered the \*\*\* FIE, but she had knowledge of it at the time it was completed and then reviewed by \*\*\* ISD in August 2006 at the ARDC where she was present.
37. Student's teacher in \*\*\* grade was \*\*\*. (\*\*\*, T. 334: 12-16).
38. During \*\*\* grade, Student received tutoring one time per week after school at student's teacher's request to assist with reading comprehension and fluency (\*\*\*, T. 385:5-7). Student received small group instruction in class (\*\*\*, T. 385: 8-9). Student exhibited a fear of speaking in front of the class. (\*\*\*, T. 378:20-23; 380:1-6). Student was absent from school 17 times during \*\*\* grade (\*\*\*, T. 367: 9-19); nine absences or more is considered a "problem." (\*\*\*, T. 368: 3-5).
39. \*\*\* testified that Student "hit a plateau" during the fourth six weeks, causing \*\*\* to become concerned about student and student's academic performance. (\*\*\*, T. 371: 1-20). In February 2010, \*\*\* requested a conference with Mother indicating that Student's grades were declining, student hadn't turned in several homework assignments, and that student seemed very tired. (R22:598). In addition, \*\*\* noted that Student had reported to her that student was having a hard time sleeping. (\*\*\*, T. 372:11-13).

40. During spring 2010, \*\*\* and Mother met to discuss Student's academic status. \*\*\* reported that Student was struggling in class and was unable to sustain attention. Mother and \*\*\* discussed the possibility of Student having ADHD. (\*\*\*, T. 423:6-18).

**\*\*\* IEE**

41. Dr. \*\*\* is an educational diagnostician and speech pathologist with 34 years of experience in the special education setting in public schools. Dr. \*\*\* completed her IEE of Student on June 10, 2010, following the conclusion of student's \*\*\* grade year. (P21:1). Dr. \*\*\* began her testing of Student in the fall semester and completed it in the spring semester, but she testified that all testing scores comprise a single evaluation. (\*\*\*, T. 856:2-14; P21:2). Dr. \*\*\* observations of Student in the classroom occurred in May 2009, on the last day of \*\*\* grade, and on April 29, 2010 during Student's \*\*\* grade year. (P21:1).
42. Dr. \*\*\* obtained information from a variety of sources, including Mother, Student's \*\*\* and \*\*\* grade teachers, classroom assessment data, a review of records, and observational data. (P21:4).
43. Student's \*\*\* grade teacher described student as shy, reserved, and distractible. The only concern expressed by the \*\*\* grade teacher was that Student completed less schoolwork than student's peers, which could be related to student's distractibility. She viewed this as a mild interference with student's education. (P21:6).
44. On a checklist completed in March 2010, Student's \*\*\* grade teacher reported that student was caring and helpful, but insecure and withdrawn. She described Student as unhappy and sad. \*\*\* noted that Student required more one-to-one attention than student's peers, but completed less schoolwork. Student often failed to pay close attention to student's work and made careless mistakes, with the result that student had difficulty finishing tasks. Student often had difficulty sustaining attention to tasks, often does not follow through on instructions, is lethargic and seems lacking in energy. (P21:6-7). \*\*\* rated these issues as "slightly serious" in their impact on Student's opportunity to learn. (P21:6). The information provided to Dr. \*\*\* by \*\*\* described Student during the spring semester when student was declining and struggling in the classroom. (KG, T. 352).
45. Teacher information combined with information reported by Dr. \*\*\* in FIE # 1 led Dr. \*\*\* to conclude that Student has difficulty with sustained attention during academic tasks. As a result, Mother consulted with Student's pediatrician who requested preliminary results from Dr. \*\*\* testing. Following a review of \*\*\* testing and consultation with Dr. \*\*\*, the pediatrician diagnosed Student with ADHD and prescribed a trial of medication. Mother, Student and \*\*\* all reported that the medication helped Student focus, complete work, and perform better in the classroom. (\*\*\*, T. 423:6-18; 425:16-19; P21:7)).
46. In the area of academic history and performance, Student's \*\*\* grade teacher reported average skills in all areas, with all academic instruction on grade level. (P21:8).
47. Student's \*\*\* grade teacher, \*\*\*, reported average skills in basic reading and math calculation, with limited skills in reading comprehension, math reasoning, spelling and written expression. These limitations were reflected on Student's year-end report card. (R22:609-610). \*\*\* also reported that Student received all academic instruction on grade level. (P21:9).
48. National, state and local assessment data placed Student at grade level performance in Reading. (P20).
49. Assessment data indicated grade level performance in Writing. (P20:2, 7-12).

50. Local and national assessment data placed Student at grade level in Math. Although Student's performance average on the MAP testing in math fell in the norm group average, student's rate of growth measured only a \*\*\* as compared to the typical growth rate of 13. (P20:1-2, 6).
51. Dr. \*\*\* completed a cross battery assessment of Student. (P21:21-30). In all broad areas of cognitive processing, Student scored in the average range. In all achievement domains, Student scored in the average range except for Spelling/Written Expression Ability, in which Dr. \*\*\* reported that Student obtained a standard score of 81. Based on this score, and other data, Dr. \*\*\* concluded that Student has a learning disability in Written Expression.
52. When all subtests administered by Dr. \*\*\* in the Broad Ability/Writing domain during the Fall 2009 and Spring 2010 are averaged together (Dr. \*\*\* testified the scores comprise one evaluation), Student's broad ability/writing score is an \*\*\*, which is in the average range. (P21:29; \*\*\*, T. 843:21-25; 850:24-25; 851:1-3; 856: 2-14).
53. In addition, the Broad Ability/Writing score obtained by Dr. \*\*\* in spring 2010 was not accurately obtained because the two narrow ability indicators are more than 15 points apart; indicating that a third subtest should have been administered. This could have impacted the broad ability score. (\*\*\*, T. 850:17-20; \*\*\*, T. 1315).
54. Dr. \*\*\* concluded that Student should be identified as eligible for special education services under the eligibility categories of Learning Disability in Written Expression and Other Health Impaired (OHI) based on ADHD. (P21:31-32).

#### **Dr. \*\*\* Diagnosis of Student**

55. On or about July 29, 2010, Mother took Student to Dr. \*\*\*, a child psychiatrist practicing for 20 years. In addition to the ADHD and difficulty with focus and concentration at school, Student presented with other concerns such as \*\*\* and increased anxiety. (\*\*\*, T. 641:4-6). Dr. \*\*\* focused on Student's anxiety and depression because student's pediatrician had already diagnosed and prescribed medication for student's ADHD. (\*\*\*, T. 641:10-12).
56. Dr. \*\*\* diagnosed Student with depression on student's first visit to her office and prescribed medication for the condition. (Martin, T. 643:15). She waited to add anxious mood to student's diagnosis until February 2011 when she determined that it had worsened and was not solely attributable to another condition such as depression or ADHD. (Martin, T. 641: 18-25). Dr. \*\*\* described Student as having "tremendous anxiety," as evidenced by gastrointestinal problems with no physical basis and student's notable social withdrawal. (\*\*\*, T. 651:4-11, 16-17).
57. Dr. \*\*\* concurs with Student's diagnosis of ADHD and observed student to have the symptoms of ADHD during student's brief time in her office. (Martin, T. 642:3-17). Dr. \*\*\* explained that Student's ADHD is hidden by student's anxiety because student's anxiety causes student to want to please. She opined that it is more difficult to diagnose ADHD in children with anxiety because they control the ADHD symptoms to manage their anxiety. (\*\*\*, T. 650).
58. Dr. \*\*\* testified that inattentiveness is Student's biggest problem (\*\*\*, T. 652:18-19) and that she believes Student has an emotional disability (\*\*\*, T. 655:15-17) based on an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; inappropriate types of feelings under normal circumstances; a general, pervasive mood of unhappiness or depression; and a tendency to develop physical symptoms or fears associated with school or personal problems. (Martin, T. 656:1-16).

59. \*\*\* opinion is based on personal observation, information provided by Mother, and clinical appointments with and observations of Student. Student expressed to Dr. \*\*\* that student does not have any friends, is uncomfortable in the school setting, and believes that student's ADHD medication helped student to complete student's work and perform in the classroom. (\*\*\*, T. 651:20-25; 652:1-7).
60. \*\*\* did not observe Student in a school setting or social setting, or collect information about Student from student's teachers or sources beyond the family. She did not administer any standardized testing measures. (\*\*\*, T.658:18-20; 659).

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

61. Mother requested a transfer to \*\*\* in \*\*\* grade, which was granted.

### **ARDC Review of \*\*\* IEE and \*\*\* Diagnosis**

62. An ARDC convened on September 7, 2010 to review Dr. \*\*\* IEE. In addition, Mother informed the ARDC of Student's diagnosis of ADHD from student's pediatrician and presented the ARDC with a letter from Dr. \*\*\* diagnosing Student with ADHD. Student's \*\*\* grade teacher, \*\*\*, was present at the ARDC; however, student's current \*\*\* grade teacher did not attend because she had known student for such a short time.
63. The ARDC concluded that Student did not have a Learning Disability in Written Expression because Dr. \*\*\* IEE, like FIE # 1, did not document a processing deficit in one of the broad cognitive areas. (R48; P22).
64. The ARDC also reviewed Student's progress data from \*\*\* grade to determine if student had an educational need for special education. Based on Student's grade level performance, the ARDC no educational need for special education services. (R48; P20).
65. \*\*\*, Student's \*\*\* grade teacher, reported to the ARDC that Student struggled with sustaining attention in class, particularly before student began taking medication for ADHD. (R48).
66. With regard to the ADHD diagnosis from the pediatrician and Dr. \*\*\*, the ARDC recommended that the District do additional assessment to look at OHI eligibility since they had not evaluated for ADHD when completing FIE #1. Dr. \*\*\*, the District's LSSP, suggested the evaluation in order to gather standardized testing to measure attention formally, rather than relying solely on the more subjective observation data provided by the pediatrician, Dr. \*\*\*, and Dr. \*\*\*. (R48). Although Mother believed that sufficient information existed for the ARDC to find Student eligible based on ADHD, she consented to the additional evaluation in any areas they believed were necessary. (R48; P22).
67. Mother did not report to this ARDC about Student's depression or anxiety or request a psychological assessment in addition to OHI. (R48; \*\*\*, T. 1585:16-20).
68. The ARDC did not reach consensus on eligibility, but agreed to complete an evaluation for OHI within thirty (30) school days and reconvene. (P22:6-7).
69. The school members of the ARDC did not pre-determine the result of the ARDC before it convened.
70. The ARDC reasonably decided to do additional evaluation to assess eligibility for OHI. Although the ARDC had substantial information documenting Student's attention issues in class, both Dr. \*\*\* and

the pediatrician's diagnosis of ADHD failed to consider information from a variety of sources, including a review of school records, input from school personnel, or any quantitative testing measures. \*\*\* reported that Student had struggled throughout \*\*\* grade, but improved toward the end of the year. It was reasonable for the ARDC to decide to gather additional data to determine the presence of the disability and the Student's current educational need as presented in \*\*\* grade.

71. Mother requested educational records following the ARDC meeting. Records were provided in accordance with her request. (P30:55-73; \*\*\*, T. 1595; 1598; 1599:3-6).

### **\*\*\* Evaluation- FIE # 2**

72. Dr. \*\*\*, Ph.D. and LSSP, completed FIE # 2 on November 1, 2010. Dr. \*\*\* has been an LSSP for ten years and a Ph.D for one year. FIE #2 specifically evaluated Student to determine student's eligibility for OHI. Dr. \*\*\* did not evaluate Student for the presence of an Emotional Disturbance (ED), although she did some screening assessments that provided information about Student's emotional status. (Gin, T. 1398:13-16; 1405:2-9; 1439-1440).

73. Dr. \*\*\* utilized a variety of assessment tools and strategies and collected information from numerous sources of data, including education records, prior evaluations, parent information, teacher interviews, classroom assessment and observation, student interview, and standardized assessments. (P23).

74. Dr. \*\*\* reviewed Student's school and evaluation history and noted concerns with attention and focus issues beginning in \*\*\* grade. (P23:3).

75. Parent information provided to Dr. \*\*\* reported the following concerns: significant difficulties in the classroom with schoolwork, organization, sustaining attention, following instructions, and making friends. Parent reported no concerns with sleep or other health issues.

76. Dr. \*\*\* reported information from Student's \*\*\* grade teacher, \*\*\*, provided in October 2010 as follows: Student is working on grade level with extra attention in content areas. Student requires extra attention through one to one guidance because student is shy and reluctant to ask for help. Student appears to pay attention, but may be processing information more slowly as student is very slow at pacing and completing assignments. Student is extremely shy, self-isolating, and withdrawn socially and never initiates interaction with classmates. In addition, Student does not seek teacher help when needed. Student's organization and study skills are average to above average. Dr. \*\*\* reported that \*\*\* provides the following assistance to Student as support: tutoring outside of class, pullout and small group instruction within class, preferential seating, partner work, and assigned buddies. (P23:4-5). Dr. \*\*\* testified that \*\*\* reported that Student had an even, happy disposition that was not consistent with anxiety or depression. (\*\*\*, T. 160:16-22).

77. Dr. \*\*\* reported information from Student's \*\*\* grade teacher, \*\*\*, provided to her in October 2010 as follows: Student is somewhat withdrawn socially, though improved over the course of the year. Student was often tired, student's attention to detail was poor at times and student tended to "zone out," though she noticed an improvement after student began medication for ADHD. Student worked on grade level, but needed extra support in reading, small group instruction for math and reading, and after school tutoring. Student was withdrawn much of the time and needed encouragement to ask for help. \*\*\* saw improvement by the end of the school year. (P23:5).

78. In two classroom observations, Dr. \*\*\* observed Student and completed time samples of on-task behavior. Student was on task 95-100% of the time when compared to student's peers. Student

struggled with a writing assignment, but that did not appear to be related to attention or learning issues. (P23:5-6; \*\*\*, T. 162-164).

79. Dr. \*\*\* administered the Behavior Assessment Scale for Children-Second Edition (BASC-2) to Mother, \*\*\*, and Student. The BASC-2 is a broad assessment of behavior and emotion and is a screening tool for ED. (\*\*\*, T. 1405:2-9). Mother scored Student with “at risk” elevations in Anxiety, Internalizing Problems, and Attention Problems; Mother scored Student with “clinically significant” elevations in Withdrawal. Teacher scored Student with “at risk” elevations in Leadership and Adaptive Skills; Teacher scored Student with “clinically significant” elevations in Withdrawal and Social Skills. (P23:6-7; \*\*\*, T. 165-166). Neither Mother nor Teacher reported elevations in any of the composite scales on the BASC-2. Student’s self-report ratings were generally within the average range, with the exception of “at risk” elevations in Anxiety and Depression. Student reported that student often worries; sometimes feels depressed, used to be happier, and often feels sad. (P23:9). \*\*\* reported that Student’s ratings indicate “some underlying social/emotional distress.” (P23:9). Student reported average ratings on the ADHD measures in the BASC.
80. Dr. \*\*\* administered the Conners-3<sup>rd</sup> Edition (Conners) to Parent, \*\*\*, and Student. The Conners more specifically measures ADHD and related problems in executive functioning and learning (P23:8; \*\*\*, T. 168-169). The Conners’ results were inconsistent across raters. Mother indicated “very elevated” scores in inattention and the overall ADHD composite. Teacher’s only “very elevated” score was in Peer Relations. Student endorsed elevations in Inattention and the overall ADHD Composite, with a “very elevated” score in Learning Problems. These scores reflect Student’s poor concentration and difficulty sustaining attention and student’s need for extra help at school. (P23:10).
81. Dr. \*\*\* reported that the Conners ratings did not yield profiles consistent with a diagnosis of ADHD on either teacher or parent ratings. (P23:8). However, the Conners assessment report summary for Mother states that an ADHD classification is strongly indicated (87% probability), but that other clinical information should be considered. (\*\*\*:168). The Conners assessment report summary for Teacher states that ADHD is borderline indicated with a 51% probability, meaning “this score is more common for ADHD cases than general population cases.” (\*\*\*:211). For Student’s self-report, the Conners summary also states that ADHD is borderline indicated with a 52% probability. (\*\*\*:190). With borderline scores, Conners instructs that judgment based on other information is especially important. (\*\*\*:211).
82. Dr. \*\*\* failure to mention the probability scores for the Conners’ ADHD Index resulted in an incomplete and inaccurate reporting of the Conners’ results in measuring the presence of ADHD.
83. The Conners results obtained by Dr. \*\*\* from Mother, Student and Teacher recommended further investigation for anxiety and depression, with possible consideration of ED eligibility under IDEA. (\*\*\*, T. 1268:15-24; Joint Exhibit A: 168, 190; 211). \*\*\* did not report the Conners’ recommendations for consideration of ED in her FIE.
84. Dr. \*\*\* looked at the data collected and determined that further testing for ED was not needed; had she had concerns about a possible ED eligibility, she would have obtained additional consent to do more testing. (\*\*\*, T. 1438:13-16; 1439:23-25; 1440:1; 1442:22-25). In reaching this conclusion, \*\*\* minimized the recommendations of the Conners and the other data concerning Student’s significant social and emotional deficits.
85. \*\*\* testified that Student was shy, but not depressed. \*\*\* attributes the repeated observations of Student’s withdrawn and isolated behavior and the ratings student obtained that indicated significant social issues to shyness and personality rather than depression or anxiety. (\*\*\*, T. 1405:14-21;

1406:11-16l 1550:17-22). This attribution fails to consider the data provided by teachers and the “red flags” indicated by both the Conners and the BASC ratings.

86. Dr. \*\*\* administered the Attention-Concentration subtest of the Wide Range Assessment of Memory and Learning (WRAML-2), a subtest commonly used in the school setting as part of an ADHD evaluation. Student scored in the average range. (P23:10; \*\*\*, T. 174:14-25; 257:14-20; 259:13-16; 259:23-24).
87. Dr. \*\*\* also administered the Connor’s Continuous Performance Test-2 (CPT-2), an objective attention measure. The overall confidence index from Student’s score was 72.6%, meaning that the chances are 72.6% that a clinically significant attention problem exists. \*\*\* reported that although student’s score was very high, she did not believe it to be indicative of an attention deficit. She attributed student’s score instead to slow processing speed and low levels of activation and arousal. (P23:11; \*\*\*, T. 177:2-18). \*\*\* testified that Student had several scores in the average range and only a few atypical scores. (\*\*\*, T. 1400:17-24). \*\*\* interpretation of the CPT-2 results minimized Student’s overall score and failed to analyze the link between slow processing speed, low levels of activation and arousal, and ADHD. (\*\*\*, T. 731).
88. \*\*\* testified that her view of Student is that student is slow and careful in student’s work, sustains attention to task, and is not easily distracted or forgetful. (\*\*\*, T. 179:11-19). \*\*\* view is not supported by the consistent reports of student’s teachers and Mother concerning student’s difficulty with sustained attention.
89. \*\*\* summarized her data, concluding that Student was struggling socially with mild anxiety and sadness, which should be monitored. Academically, \*\*\* reported that Student was working on grade level, but required extra attention to complete tasks due to slowness and reluctance to ask for help. In terms of attention, \*\*\* reported that all teacher reports on standard for attention fell in the average range. (P23:12).
90. \*\*\* reviewed academic assessment data from \*\*\* and \*\*\* grade, but did not administer any formal measures of achievement testing and instead relied on the 2008 testing from FIE # 1. (\*\*\*, T. 1449:19-25). \*\*\* testified that Student had been tested a lot through student’s IEE, but she did not use the more recent scores. (\*\*\*, T. 1399:11-20).
91. \*\*\* more recent testing of academic achievement showed a decline in each academic domain, but especially in writing and math. This information is important in considering academic progress and educational need. (P21:21-29).
92. \*\*\* grade academic data showed Student on grade level and average on the DRA, MAP, and student’s report card. (P23:17).
93. Dr. \*\*\* emphasized Student’s grade level performance in looking at educational need and de-emphasized the information showing that Student struggles, has academic deficits, and requires substantial intervention to perform at grade level. Dr. \*\*\* testified that working on grade level does not exclude a student from special education eligibility. (\*\*\*, T. 1456:24-25; 1457:1-2).
94. \*\*\* concluded that Student’s ADHD as diagnosed by student’s psychiatrist and pediatrician was not corroborated by her testing. In reaching this conclusion, Dr. \*\*\* minimized the breadth of information indicating Student’s ADHD, such as reports from student’s teachers, parent, psychiatrist, pediatrician, \*\*\* IEE, and \*\*\* own testing on the CPT-2 and Conners.

95. \*\*\* further concluded that Student was making progress in student's \*\*\* grade classroom so, if student had ADHD, it was not adversely affecting student's educational performance and student had no need for special education services. (P23:18).
96. \*\*\* evaluation report was provided to Mother for review prior to the ARDC meeting. By email dated November 5, 2010, Mother indicated her disagreement with the evaluation and requested an IEE to be conducted by Dr. \*\*\*, LSSP, Ph.D. (R30:958).

### **ARDC Review of FIE # 2**

97. The District made several attempts to provide notice to Mother of an ARDC meeting scheduled for November 23, 2010 to review FIE #2. (P25:6; \*\*\*, T. 1601-1602). By email dated November 18, 2010, the District again contacted Mother due to her lack of response about the November 23 ARDC and asked for three alternative times prior to the December 1 deadline for holding the ARDC if November 23 was not workable. The District informed Mother that if she failed to respond or provide alternative dates prior to 11/23/10, the ARDC would meet without her. (P25:9).
98. Mother responded by providing the alternate date of December 1. By letter dated November 22, 2010, \*\*\*, Interim Director for Special Programs, informed Mother that December 1 was not a mutually agreeable date and proposed November 29 as an alternative. Ms. \*\*\* informed Mother that if she did not respond or provide alternate dates, the ARDC would proceed without her on November 23. It is not clear how the letter dated 11/22/10 was transmitted to Mother or when she received it. (P24:1; \*\*\*, T. 1603-1604).
99. By email dated November 22 @ 5:05 p.m. Mother informed \*\*\* that Student was sick and she was at the doctor with student. She asked that the ARDC be rescheduled due to Student's illness and because she had not received requested records. (R31:993B).
100. On the morning of November 23, 2010, by email @ 7:42 a.m. and 8:36 a.m., Mother notified Student's teacher, \*\*\*, that student would not be at school and she could not attend the ARDC meeting. She asked \*\*\* to notify the principal as well, indicating that she had already notified \*\*\* the preceding day. (R31:993).
101. \*\*\* replied to Mother's November 22 @ 5:05 email by email dated November 23, 2010 @ 9:10 a.m. She informed Mother that the ARDC must convene by December 1 and offered an alternative date of November 29 at 2:00 p.m. She told Mother that if she could not agree to November 29, they would need to proceed with the ARDC on that day and that Mother could participate by telephone. (R31:993A).
102. By email response dated November 23, 2010 @ 10:20 a.m., Mother replied that she was working on November 29, but could meet on December 1. It is not clear that Mother had received \*\*\* November 22 letter saying that December 1 was not an agreeable date. She also reported that Student had a fever and she was concerned about Student, so she would not be online for a while. (R31:993A).
103. \*\*\* responded by email on November 23, 2010 @ 10:48 a.m. She said that December 1 was not a mutually agreeable time and that because Mother had not agreed to November 29, 2010, the ARDC would proceed at 11:00 a.m. and they would contact Mother by telephone to participate. (P30:86).
104. The ARDC contacted Mother by telephone at the start of the ARDC and she did not answer. The ARDC proceeded to review FIE # 2 and make a determination of Student's eligibility without the parent. (P25:3).

105. The ARDC reviewed FIE #2 and concluded that Student was not eligible for special education due to a lack of educational need for special education services. (P25:3; \*\*\*, T. 1610:6-11).
106. \*\*\* reviewed her evaluation with the ARDC, but did not discuss the presence of ED or whether more testing was needed to determine ED eligibility at the ARDC meeting. Dr. \*\*\* did not report to the ARDC the Connors' recommendation to explore possible ED eligibility. (P25; \*\*\*, T. 1545).
107. Dr. \*\*\* testified that Student does not meet the criteria for ED eligibility because student does not have the characteristics of a student with an emotional disturbance over a long period of time; that if student did have the characteristics, they aren't adversely impacting student's education; and finally, because student has no educational need for special education. (\*\*\*, T. 1433:10-17).
108. Prior written notice was provided to Student on November 23, 2010 notifying Student of the ARDC's decision on eligibility. The notice also denied request for an IEE and noticed Student that the District would file due process to defend FIE #2. The District offered a ten-day reconvene ARDC to be held prior to December 10, 2010. (P26:2). The District filed the instant action to defend FIE #2 on December 2, 2010. (\*\*\*, T. 1613).

### **Relevant Information Available To the Hearing Officer That Was Not Presented to the ARDC In November 2010**

109. Subsequent to the ARDC meeting in November, the instant litigation ensued concerning FIE #2 and Student's eligibility for special education. No further ARDCs have met to consider Student's eligibility in light of additional information that has been obtained.
110. Additional information includes a psychological evaluation obtained by Student from Dr. \*\*\* in January 2011 (R35: 1034A-1034L) and a review of records and further testing obtained by Student from Dr. \*\*\* in March 2011 (R35:1034M1-1034M5). In addition, current academic performance data from \*\*\* grade was submitted into evidence.
111. In addition, raw data forming the basis for FIE #2, such as evaluation protocols and teacher interview notes, was submitted into evidence for review. Some of this data was available to Student prior to the due process hearing (R24, R25, R26, R27), while some was discovered on day one of the due process hearing and provided at that time (R51). In addition, Student's \*\*\* and \*\*\* grade teachers testified about the information they provided to Dr. \*\*\* and Student's performance in their classes.
112. The parties have agreed to submit the question of Student's eligibility to this hearing officer based on all the evidence, including the evaluations that were obtained following the ARDC meeting of November 2010. The parties seek a determination of Student's eligibility based on the possible classifications of SLD, OHI, and ED. (T.1645:4-7).

### **Psychological Evaluation by Dr. \*\*\* (Psych Eval)**

113. Dr. \*\*\* is a psychologist employed by \*\*\* for 22 years and a private evaluator specializing in the areas of autism spectrum disorders, learning disabilities, and emotional disturbances. (\*\*\*, T. 1220-1223).
114. Dr. \*\*\* reviewed FIE #2 and noted two concerns with the evaluation: 1) the results of the CPT-2 were not regarded as indicative of Student's ADHD despite the high score; and 2) Dr. \*\*\* ignored

“huge red flags” pointing to ED by failing to do further assessment that would have specifically looked at psychological issues. (\*\*\*, T. 1228-1229; 1232:2-15; 1234:17-24).

115. Dr. \*\*\* completed a psychological evaluation of Student that included a review of prior testing, school observation, clinical interviews with Student and Mother, administration of standardized measures to look at LD, ED, and OHI, and information from teacher and parent. Dr. \*\*\* evaluation relied on a variety of sources, was properly administered, and yielded reliable results.
116. Current information provided concerning the Student indicated a significant increase in anxiety, depression, and corresponding physical symptoms over the course of 2010. Student \*\*\* over the course of the year, requiring student to discontinue ADHD medication and to have exploratory GI surgery in December 2010. Nothing was found, so it is reasonable to conclude that stress and anxiety were the cause of Student’s stomach difficulties. (R35:1034c; \*\*\*, T. 1239; 1257). Student’s illness was often tied to an anxiety-provoking event at school. (\*\*\*, T. 1257:7-21; Mother, T. 679-682).
117. Dr. \*\*\* observed Student at school in January 2011 over a period of a couple of hours. She described student as very still and slow moving, isolated from the group, never smiling, not speaking or engaging with peers in the classroom or at lunch, and with a flat affect throughout the day, except for a brief interaction with peers at recess. (\*\*\*, T. 1234:1-16; R35:1034e). These observations were consistent with student’s behavior during her testing of Student, along with additional behaviors of fidgeting, zoning out, and difficulty sustaining attention. (R35:1034e-1034f; \*\*\*, T. 1260:19-23).
118. Dr. \*\*\* administered a brief form of intellectual testing and found Student to be of average intelligence. In her language screening of Student, she found student to score below average on the Story Recall subtest and significantly below average on Story Recall-Delayed, which reflect deficits in Student’s auditory attention and memory. (R35:1034f; (\*\*\*, T. 1260). Dr. \*\*\* administered the Woodcock Johnson-III to measure academic achievement. Student obtained a Broad Mathematics score of \*\*\*, but other broad scores were average. Standard scores in Writing and Math fell below the comparable scores received on 2008 achievement testing done in FIE #1 and were consistent with \*\*\* more recent achievement testing. (P21:21-29).
119. Dr. \*\*\* administered the CPT-2 test to Student, as had Dr. \*\*\*, a test that is highly indicative of ADHD. Student’s score of \*\*\* indicated the presence of a clinically significant attention deficit with an \*\*\* confidence index. (R35:1034g).
120. Dr. \*\*\* assessed Student’s emotional and behavioral functioning by interview, self-report, projective measure, and parent and teacher report. Student reported symptoms on the Children’s Depression Inventory and the Anxiety Scale, which is uncommon for \*\*\*, of hopelessness, fatigue, not having fun, and self-dislike. (\*\*\*, T. 166). Based on Student’s self report, Dr. \*\*\* was “very very worried about how serious student’s depression is.” (\*\*\*, T. 1267:45).
121. Mother reported significant levels of anxiety and depressive symptoms and high levels of inattention. (R35:1034j).
122. Student’s teacher, \*\*\*, completed behavior rating forms and a teacher checklist in February 2010. She reported “mild elevations” on the Withdrawn/Depressed scale and a “highly significant elevation” in Peer Relations. She described Student as working at grade level and as very shy and withdrawn. (R35:1034j). Teacher reported the following ratings: “very much true” that Student has poor social skills; “just a little true” that Student is happy, cheerful, and has a positive attitude; “very much true” that Student does not know how to make friends; “pretty much true” that Student has trouble keeping

friends; and “pretty much true” that she cannot figure out what makes Student happy. (R23:681-683; SB, T. 542-543).

123. Dr. \*\*\* concluded that Student’s academic skills fall below what student’s intellectual capability would predict and that student is particularly behind in math. Student’s attention issues are often not readily observable, but are reflected in student’s frequent staring off, poor performance on tests of auditory and visual attention, and reports by Mother and Teacher. Dr. \*\*\* further concluded that student has struggled with learning over a period of time and is now experiencing depression as a complicating factor. (R35:1034j).
124. Dr. \*\*\* diagnosed Student with ADHD, Major Depressive Disorder, Anxiety Disorder, Mathematics Disorder, Disorder of Written Expression, and Dysgraphia. (R35:1034L). She believes student meets eligibility criteria under IDEA for the disability categories of LD, OHI, and ED. (\*\*\*, T. 1269-1270; 1290).

**Dr. \*\*\* Neuropsychological Evaluation and Records Review**

125. Dr. \*\*\* is a pediatric neuropsychologist with ten years experience. (\*\*\*, T. 708). Mother retained Dr. \*\*\* in March 2011, shortly before the due process hearing, to review and analyze previous assessment data concerning Student and to supplement student’s profile with any additional assessment that was necessary. (\*\*\*, T. 713; R35:1034M-1).
126. Dr. \*\*\* reviewed prior assessments and noted indicators of difficulty with focus, deficits in processing speed and executive function, and with performance lower than student’s skill level. (R35:1034M1-1034M-3; \*\*\*, T. 715-727).
127. Dr. \*\*\* testified that activation and arousal are required for sustained attention and that deficits in these areas reflect attention issues. (\*\*\*, T. 731:8-12). She testified that the CPT-2 is a strong indicator of inattention. (\*\*\*, T. 731-732).
128. Dr. \*\*\* administered several tests to Student in March 2011 in the areas of weakness previously noted. She observed behaviors and affect consistent with the mood disorders diagnosed by Dr. \*\*\*. (R35:1034M). Dr. \*\*\* administered the WJCog and found Student’s working memory and short term memory to be average to low average, and student’s cognitive efficiency and processing speed to be extremely low. Processing speed is a measure of Student’s ability to perform automatic cognitive tasks, particularly when measured under pressure to maintain focused attention. Student’s areas of weakness are typical of children with ADHD. (R35:1034M-4; \*\*\*, T. 744-745).
129. Dr. \*\*\* observed Student in student’s classroom and her observations were consistent with Dr. \*\*\* in terms of Student’s isolation, withdrawal, and reticence to interact. (\*\*\*, T. 745-747). Dr. \*\*\* did not obtain information from Student’s teachers as part of her evaluation (\*\*\*, T. 756) and she did not complete a cross battery analysis of data. (\*\*\*, T. 781).
130. \*\*\* concluded that Student’s ADHD was clear as it impacted student’s learning. (\*\*\*, T. 745:23-25; T. 746:1-4). She concluded that the data supports problems with Student’s cognitive and executive processing and mood that manifest in ADHD and Learning Disabilities in the areas of Written Expression, Dysgraphia, and Mathematics.

## **Teacher Interview Notes Summarized In FIE #2 and Teacher Testimony**

131. \*\*\*, Student's \*\*\* grade teacher, completed a teacher interview sheet for Dr. \*\*\* on or about October 22, 2010. (R51:11). The following differences exist between \*\*\* written report and Dr. \*\*\* reporting of \*\*\* information. \*\*\* reported the following educational concerns: "Student really struggles in all areas academically- needs one on one guidance for instruction, is very slow at pacing and completing assignments." \*\*\* reported the following behavioral concerns, "is extremely shy and withdrawn socially (which makes it difficult to know when student needs help.)" In a follow-up interview with Dr. \*\*\* on October 25, 2010, \*\*\* reported that despite Student's struggles, student was working on grade level with extra attention in all content areas. (R51:11). Dr. \*\*\* reported \*\*\* educational concerns as follows: "Student is working on grade level academically with extra attention in content areas. Because student is shy and reluctant to ask for help, student needs extra attention and encouragement through one on one guidance." (P23:4).
132. Dr. \*\*\* summary of \*\*\* educational concerns for Student fails to reflect \*\*\* reporting that student *really struggles* in all academic areas and needs one to one guidance *for instruction*. As reworded by Dr. \*\*\*, the meaning appears to be that Student needs assistance because student is shy rather than due to academic deficits. This difference is significant given that the ARDC declined Student's eligibility for special education based on a finding of no educational need for special education services.
133. Dr. \*\*\* testified that she did not report what \*\*\* said because she felt it was inaccurate since student was on grade level. (Gin, T. 1418:16-24). This omission deprived the ARDC of relevant information on the issue of Student's educational need for special education services.
134. \*\*\* testified that Student worked with a tutor during class for re-teach approximately once a week. (\*\*\*, T. 546). \*\*\* checked for understanding and provided 1:1 support for Student. (\*\*\*, T. 565-566). During \*\*\* grade, Student routinely \*\*\* to finish class work that student was unable to complete during class. Mother expressed her concern and \*\*\* reduced her expectation of what Student had to complete, so that student would not \*\*\* routinely. (\*\*\*, T. 549-550). Student experienced great stress from not being able to complete all of student's work as expected.
135. \*\*\* testified that with extra one-on-one support, pullout, and the other things she provides, Student is "where student needs to be." (\*\*\*, T. 591, 601-602).
136. Dr. \*\*\* interviewed \*\*\*, Student's \*\*\* grade teacher, for input into FIE #2. The following differences exist between the interview notes and Dr. \*\*\* summary. \*\*\* reported that Student was "very withdrawn," and Dr. \*\*\* reported that student was "somewhat withdrawn." \*\*\* reported that Student "always seemed tired" while Dr. \*\*\* reported that student "often seemed tired." (R51:124; P23:5).
137. \*\*\* reporting of \*\*\* description of Student minimized Student's emotional difficulties in \*\*\* grade.

### **Credibility of Expert Witnesses**

138. Each of the experts who testified was well qualified and knowledgeable in her area of expertise. I found Dr. \*\*\* particularly credible in her testimony because of her demeanor. She responded frankly and truthfully to the questions, without regard to the impact of her testimony on the outcome of this action. (\*\*\*, T. 1220-1300).

139. The District believes that Drs., \*\*\*, \*\*\*, and \*\*\* are biased because they have received referrals for independent evaluations from Mother in other cases, and thus have a pecuniary interest in testifying favorably for Student.
140. Drs. \*\*\*, \*\*\*, and \*\*\* have no greater pecuniary interest in testifying favorably for Student than do Drs. \*\*\* and \*\*\* in testifying favorably for the District, their employer.

### **Parental Access to Educational Records**

141. Parent made requests for Student's educational records after the September 2010 ARDC and again before the November 23, 2010 ARDC meeting. The District properly provided records or made access available to records in response to Parent's requests. (P24:1; P30:55-73; R49:1531; \*\*\*, T. 1595, 1598-1599; 1608).
142. Respondent properly responded to Student requests for documents during the pendency of this litigation with the exception of the production of documents contained in R51. The documents contained in R51 were inadvertently not produced due to a misunderstanding about how to house evaluation protocol documents. (\*\*\*, T. 1612).
143. The District did not withhold information from Student that it was required to provide.

### **Ultimate Findings of Fact**

144. FIE # 2 failed to accurately and fully report all relevant data gathered concerning Student's disability and need for special education services. It failed to provide all relevant information to the ARDC to evaluate Student's disability and need for services.
145. The District failed to assess Student in all areas of suspected disability. After Dr. \*\*\* completed testing in FIE #2, the District has significant information to suspect the presence of an emotional disturbance. Further testing should have been completed.
146. Student does not have a disorder in one or more of the basic psychological processes. Student does not meet the definition of having a SLD under IDEA.
147. Student has limited strength, vitality, and alertness due to a chronic condition of ADHD. Student's condition adversely impacts student's educational performance.
148. Student exhibits an inability to build or maintain satisfactory interpersonal relationships with peers and teachers over a period greater than six months that adversely impacts student's educational performance.
149. Student exhibits inappropriate types of behavior or feelings under normal circumstances over a period greater than six months that adversely impacts student's educational performance.
150. Student exhibits a general pervasive mood of unhappiness or depression over a period greater than six months that adversely impacts student's educational performance.
151. Student exhibits a tendency to develop physical symptoms or fears associated with personal or school problems over a period greater than six months that adversely impacts student's educational performance.

152. Student has a need for specially designed instruction. The supports and interventions received by Student in \*\*\* and \*\*\* grades, when taken as a whole, constitute specially designed instruction.

153. Student requires the supports and interventions student has received in \*\*\* and \*\*\* grades in order to perform at grade level and make meaningful educational progress.

## DISCUSSION

### I.

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

IDEA provides that a parent must request a due process hearing within two years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint. However, the two year limitations period can be more or less if the State adopts an explicit time limitation for filing a request for a due process hearing. 34 CFR 300.511 (e). In Texas, such an explicit time limitation has been adopted: a parent must file a request for due process hearing within one year of the date the complainant knew or should have known about the alleged action that forms the basis of the complaint. 19 Tex. Admin. Code 89.1151 (c). Therefore, in Texas, a one-year statute of limitations applies to filing a request for a due process hearing. *Tex. Advocates Supporting Kids With Disabilities v. Texas Education Agency*, 112 S.W. 3d 234 (Tex. App.- Austin 2003, no pet.); *Marc V. v. North East ISD*, 455 F. Supp. 2d 577 (W.D. TX 2006), *aff'd on appeal*, 242 Fed. App. 271 (5<sup>th</sup> Cir. 2007).

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

Student alleges the applicability of one or both of these exceptions, claiming that the District withheld the 2006 \*\*\* FIE from her when completing its 2007 evaluation of Student for continued speech eligibility and again when completing FIE #1. Student argues that student's lack of knowledge of this evaluation directly prevented student from filing a complaint when the District found student ineligible for services in June 2009. As a result, Student argues that student should be entitled to reach back two years to February 5, 2009 to challenge the eligibility determination made by the District in January 2009.

Student failed to meet student's burden of proof regarding either exception to the statute of limitations. First, Student did not establish that the District intentionally misrepresented any facts concerning the \*\*\* FIE to her. Though Mother testified that she asked the District about educational testing done by \*\*\* and they answered that none existed, there is no evidence of intentional misrepresentation by the District. More importantly, the evidence is clear that Mother was aware of the \*\*\* FIE at the time of its completion. Though she may have forgotten its contents by 2009 when she rediscovered it. Mother participated in an ARDC meeting at \*\*\* ISD in August 2006 when the \*\*\* FIE was reviewed and discussed. Indeed, the minutes reflect that Mother participated in the discussion. Further, when Mother enrolled Student at HPISD in 2007, she reported that Student had received *both* educational and speech/language testing from \*\*\* ISD.

The one-year statute of limitations in Texas is applicable to these proceedings. Claims arising on or after February 5, 2010 fall within the statutory limitations period.

### II.

## **Whether FIE #2 Is Appropriate Such That Student Is Not Entitled To An Independent Educational Evaluation At Public Expense**

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

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

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

The District asserts that FIE #2 is appropriate and meets the standards set forth in IDEA because the LSSP, Dr. \*\*\*, used a variety of assessment tools, analyzed data from a variety of sources, administered the assessments properly and in accordance with their producer's instructions, and appropriately addressed all areas of suspected disability. Student argues that FIE #2 was not appropriate because the LSSP did not rely on or report complete and accurate information (achievement data, teacher interview notes, results from standardized measures), did not administer assessments for their proper purpose (WRAML), and did not comprehensively assess Student in all areas of suspected disability (ED).

I find, based on a preponderance of the evidence, that FIE #2 does not comply with the provisions of 34 C.F.R. §§ 300.304-300.305 for two primary reasons: 1) FIE #2 fails to accurately and fully report the functional, developmental, and academic information collected concerning whether Student is a child with a disability who, by reason thereof, needs special education and related services under 34 C.F.R. § 300.8 and 2) FIE #2 is not sufficiently comprehensive to identify all of Student's special education needs and failed to assess Student in all areas of suspected disability.

### **A. Failure to Accurately and Fully Report Information Gathered**

#### **1. Information Concerning The Presence of ADHD**

Dr. \*\*\* reported in FIE # 2 that her data did not corroborate Student's diagnosis of ADHD made by student's pediatrician, psychiatrist, and independent evaluator Dr. \*\*\*. In reaching that conclusion, Dr. \*\*\* failed to accurately and fully report collected data, thus depriving the ARDC of relevant information needed to determine Student's eligibility.

First, Dr. \*\*\* reported that the Conners' ratings from the parent and teacher, a test that specifically measures ADHD, did not yield profiles consistent with a diagnosis of ADHD. However, the materials provided by the producers of the Conners explain that Mother's ratings indicate an \*\*\* probability that Student meets the criteria for an ADHD classification and Teacher's ratings indicate a \*\*\* probability. Because of these scores, the Conners instructs that judgment based on other information is particularly important. \*\*\* failure to mention this information in her report left the ARDC without a complete picture as to the Student's ratings on this important measure. The Conners' rating did not rule out ADHD as \*\*\* reported; but rather, were inconclusive and pointed to the increased importance of looking at other existing data. Given that three other professionals had already diagnosed Student with ADHD, this information was especially relevant to the ARDC.

Second, Dr. \*\*\* reported Student's CPT-2 score of \*\*\*, a strong objective measure of attention, but she discounted the score by stating that Student did not appear inattentive during the test, only scored below average on three of the twelve measures, and scored low due to slow processing speed and low levels of activation and arousal rather than an attention deficit. Student's overall score of \*\*\* is the relevant figure in determining whether student's overall performance matches that of persons with ADHD and not the ratio of average to below average measures. As was emphasized by both of the District's experts, Dr. \*\*\* and Dr. \*\*\*, proper interpretation of evaluation data requires looking at normative scores and not results on individual measures. Further, Student's slow processing speed has been consistently noted in both formal assessment and teacher observation since 2006. Processing speed is a measure of a child's ability to perform automatic cognitive tasks, particularly when measured under pressure to maintain focused attention. Student's slow processing speed is typical of children with ADHD and should have caused Dr. \*\*\* to discuss the importance of this long documented deficit rather than discount Student's high CPT-2 score. Finally, adequate levels of activation and arousal are required for sustained attention; as such, Dr. \*\*\* discounting of Student's CPT-2 score on this basis was also inappropriate.

\*\*\* discounting of Student's CPT-2 score was consistent with her view of Student as described in FIE #2 and her testimony, in which she described Student as careful in student's school work and sustaining attention to task, but simply slow. The data does not support this view of Student. Student's teacher in \*\*\* grade reported in FIE #1 that Student did not sustain attention to task and lost focus when she was not tending to student. Student's \*\*\* grade teacher reported to Dr. \*\*\* and again to Dr. \*\*\* that Student failed to pay attention to student's work, made careless mistakes, had difficulty sustaining attention, required more one-to-one attention, and struggled to complete tasks. She indicated that these symptoms improved notably when Student began taking medication for ADHD at the end of \*\*\* grade. Student's \*\*\* grade teacher corroborated the description of Student by student's \*\*\* grade teacher by reporting that Student processes information very slowly and has difficulty completing assignments. Mother also reported high levels of inattention to Dr. \*\*\*.

As a result of Dr. \*\*\* inaccurate report of the Conners' results and inappropriate minimization of the CPT-2 results, her report and summary deprived the ARDC of important information concerning Student's ADHD.

## **2. Data Concerning Need For Special Education and Related Services**

Data concerning educational need in FIE #2 primarily consists of teacher information, academic achievement data from FIE #1 that was gathered in 2008, and academic assessment data from \*\*\* and \*\*\* grade educational records.

The teacher information data concerning Student's need for special education reported by \*\*\* was substantially accurate with regard to Student's \*\*\* grade teacher, but minimized her descriptions of Student in certain key areas. The teacher described Student as very withdrawn, while \*\*\* reported student was somewhat withdrawn. The teacher described Student as always tired, while \*\*\* reported student was often tired.

In reporting the \*\*\* grade teacher's information concerning Student's needs, \*\*\* failed to reflect the teacher's report that Student really struggled academically and required one-on-one guidance for instruction. \*\*\* testified that she did not report the teacher's description of Student's needs as written because she believed them to be inaccurate given that Student was working on grade level; however she also acknowledged that a student can work on grade level and still be in need of special education. The manner in which \*\*\* characterized the \*\*\* grade teacher information deprived the ARDC of highly relevant data directly related to their determination of educational need for special education.

The academic achievement information reported by Dr. \*\*\* to help the ARDC determine Student's academic status and needs was two years old. \*\*\* testified that more recent information existed from Dr. \*\*\* testing, but she did not include it in her report. \*\*\* academic achievement information, when compared to the 2008 information reported by \*\*\*, indicates that Student's standard scores declined in each of the three academic domains calculated. In particular, Student went from a standard score of \*\*\* in Writing (\*\*\*) in 2008 to \*\*\* in 2009. In Math (\*\*\*), Student scored a \*\*\* in 2008 and \*\*\* in 2009. Although Student's scores in 2009 remained in the average range for purposes of assessing the presence of a learning disability, they reflect a decline in academic achievement when measured against student's peers, a factor that should have been considered in discussing student's educational need for special education. Notably, Dr. \*\*\* testing in January 2011 confirmed the decline in achievement scores found by \*\*\*. This underscores the importance of using current academic achievement data when looking at educational need, which Dr. \*\*\* failed to do.

The classroom-based assessment information from Student's \*\*\* and \*\*\* grade records was fully reported and discussed in FIE #2. That data shows that Student is working on grade level, receiving indicators of progress on student's report cards, and measuring within the average normative group on standardized measures of academic progress (MAP testing). The data also indicates that Student received supports in \*\*\* grade and continued to receive them in \*\*\* grade in the form of tutoring after school, small group and one-to-one instruction. Thus, despite the struggles reported, Student was working on grade level in all academic areas.

Of the three indicators of educational need in FIE #2, two of them were not accurate or up to date. In this regard, FIE #2 failed to provide all necessary and relevant academic information about Student to the ARDC.

### **3. Validity of FIE #2 In Light of The Reporting of Data**

When reviewing FIE #2 as a whole, I cannot conclude that the data was purposely misrepresented to dictate the outcome of the assessment as argued by Student. I do find, however, that the cumulative effect of the failures in reporting data undermines the overall validity of the evaluation and thus the certainty of the ARDC's determination that Student did not have ADHD and/or did not need special education and related services. This is particularly true because each of the reporting errors went in one direction—toward minimizing Student's level of disability or need in the classroom. Had the omissions or decisions made by \*\*\* about how to report or characterize the data gone in both directions, their impact would not have been as significant. However, as they were, these reporting issues affected the accuracy and validity of FIE #2 in both areas of the eligibility determination: the presence of a disability and the need for special education and related services. This renders the evaluation inappropriate under IDEA.

### **B. Failure To Assess Student In All Areas Of Disability**

IDEA is clear in its mandate to assess students in *all* areas of disability and identify *all* of a student's special education needs, whether or not they are commonly linked to the disability category being considered. 34 C.F.R. §300.304(4)(6). The District argues that it fully complied with this requirement, as it had no knowledge at the time when Dr. \*\*\* conducted FIE #2 of Student's diagnosed depression and anxiety, or of Student's developing symptoms of anxiety, somatization, and \*\*\*. Student argues that while the District may

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not have suspected a possible emotional disturbance in September 2010 when Dr. \*\*\* began her FIE, that at the conclusion of FIE #2, the data suggested a clear need to continue the evaluation process to consider the presence of an emotional disturbance.

The great weight of the evidence supports Student's position. Results obtained by \*\*\* on the BASC-2 and the Conners-3, as well as from teacher, parent, and student interviews all point to significant emotional issues. When viewed along with results obtained by \*\*\*, the picture emerges of a student who is struggling emotionally as well as academically. \*\*\* reported in her IEE that Student's \*\*\* grade teacher described student as withdrawn, unhappy, and sad. She rated Student's issues as "slightly serious" in their impact on student's opportunity to learn. The same teacher later reported to \*\*\* that her main concern about Student was that student was "very withdrawn," though \*\*\* revised this to somewhat withdrawn. Student's \*\*\* grade teacher reported that student was "extremely withdrawn," and never initiates interactions with classmates.

On the BASC-2, a screening assessment for ED administered by \*\*\*, both Mother and Teacher scored Student with "clinically significant" elevations in "Withdrawal," with Teacher also scoring Student as "clinically significant" in the area of "Social Skills." On the Conners-3, results obtained from both Mother and Teacher suggested the need for further investigation for anxiety and depression, and instructed consideration of possible ED eligibility under IDEA. In fact, Student's T-score of \*\*\* in "Peer Relations" obtained from the teacher's scorings is extremely high. Teacher reported that Student's impairment in this area "seriously affected" student's functioning "very frequently." As with Mother and Teacher, Student's self-reports on both the BASC and the Conners pointed to elevations in anxiety and depression and to further exploration of ED eligibility. As Dr. \*\*\* testified, the ratings in withdrawal, social skills, and peer relations are "huge red flags" for an emotional disturbance.

\*\*\* testified that she considered all of the data available to her, decided that no further testing was needed, and ruled out the presence of ED. In her view, Student did not have a social skills deficit because student had one friend, meaning that student *can* make and keep friends, but student's just slower at it. \*\*\* further testified that Student was adjusting to a \*\*\* and was simply shy and not depressed. As with \*\*\* view of Student when considering the presence of ADHD, she minimized the data from teachers, parent, and Student that strongly pointed to Student's fragile emotional condition. The only conclusion reached in FIE #2 concerning Student's emotional status was that student had some underlying social/emotional distress that should be monitored.

Once Dr. \*\*\* completed her assessment of Student, which revealed significant concerns about student's emotional status, she had reason to suspect a possible emotional disability and a concomitant duty to report the information to the ARDC and Mother, and then proceed with further testing specifically designed to evaluate for ED. Indeed, had she communicated with Mother about the results of the testing and the Conners' recommendation to explore ED eligibility, she would have learned that Student had been diagnosed with Depression and Anxiety by student's psychiatrist, was taking medication for the condition, and had \*\*\* over the preceding year as a result of anxiety and stress related stomach issues. All of this information was critical to the District's accurate understanding and assessment of Student and student's eligibility for special education. Further testing was recommended by the Conners, and it was required by IDEA's mandate to assess a student in all potential areas of disability.

In conclusion, the District failed to prove that FIE #2 satisfies the requirements set forth in IDEA for evaluations of students for eligibility for special education and related services. The evaluation failed to accurately and completely report and analyze the data on which it was based, both in terms of the presence of a disability and the need for special education. In addition, the District failed to assess Student in all areas of disability when it had reason to suspect possible ED following the gathering of data by Dr. \*\*\*. For both of these reasons, the evaluation did not comply with the procedures set forth in IDEA.

## **Remedy For Inappropriate Evaluation**

IDEA provides that Student is entitled to an IEE at public expense unless the District proves that its evaluation is appropriate. “A parent is entitled to only one IEE at public expense each time the public agency conducts an evaluation with which the parent disagrees.” 34 C.F.R. § 300.502(b)(5).

In this case, Mother obtained two IEEs- one from Dr. \*\*\* in January 2011 and one from Dr. \*\*\* in March 2011, immediately before the due process hearing. Dr. \*\*\* psychological evaluation addressed LD, ADHD and ED and was the type of evaluation that would typically be done to evaluate a student for disabilities. It relied on a variety of assessment tools and strategies, gathered information from a variety of sources, and was sufficiently comprehensive to identify all of Student’s special education needs. In contrast, Dr. \*\*\* evaluation is more properly characterized as a records review with minimal assessment of Student and appears to have been obtained primarily in preparation for litigation rather than for evaluative purposes. In addition, it does not gather data from a variety of sources to determine whether Student has a disability.

In light of the foregoing, I conclude that Student is entitled to reimbursement for the private psychological evaluation obtained from Dr. \*\*\*, but not from the private neuropsychological record review and assessment obtained from Dr. \*\*\*.

### **III. Whether Student Is Eligible For Special Education Services Under IDEA**

The crux of this case, the issue raised by both parties, is Student’s eligibility for special education services under IDEA. Eligibility for special education services is determined by a two part test: 1) Does the student meet the criteria for one or more of the disability classifications in the statute as determined by the evaluation procedures set forth in the Act; **and** 2) Does the student, by reason of the disability, need special education and related services? 34 C.F.R. § 300.8(a)(1); 19 T.A.C. § 89.1040. Both parts of this test must be satisfied in order to meet the eligibility requirements of IDEA.

In the instant case, both strands of the eligibility test are in dispute. Student argues that student meets the test for eligibility on the basis of the eligibility classifications of a Specific Learning Disability (SLD), Other Health Impaired (OHI) due to student’s ADHD, and Emotional Disturbance (ED). Student further argues that, by reason of student’s disabling conditions, student needs special education and related services. The District argues that Student does not meet the requirements for any of these disabling conditions and that, even if student did, student has no need for special education services given that student is progressing on grade level in student’s general education classroom. The parties have agreed that the Hearing Officer should determine eligibility in each of the asserted disability categories on the basis of all evidence presented at the due process hearing.

As the party challenging the District’s decision on eligibility, Student bears the burden of proof in this action. *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49 (2005).

Applying these legal standards to the evidence in this case, I find that Student meets the eligibility requirements for special education services under IDEA based on the disability classifications of OHI and ED.

#### **A. Does Student Have A Disability**

Student alleges that student meets the definition of a child with a disability set forth in 34 C.F.R. § 300.8 as a student with a SLD (300.8(c)(10), OHI due to ADHD (300.8(c)(9), and ED (300.8(c)(4).

## 1. Specific Learning Disability

IDEIA defines a SLD as a “disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations...” 34 C.F.R. § 300.8(10).

Based on a preponderance of the evidence, I find that Student does not have a learning disability as that is currently defined by IDEA. The evaluations submitted that provide data concerning the existence of a disorder in one of the basic psychological processes include FIE #1, \*\*\* IEE, Dr. \*\*\* psychological evaluation, and Dr. \*\*\* neuropsychological evaluation and record review. FIE #1 and \*\*\* IEE are the only evaluations that administered a full battery of tests and utilized a cross battery assessment to analyze Student’s intellectual and academic functioning. Both evaluations found Student to be in the average range in all broad areas of cognitive processing. As such, they did not find that Student had a disorder in one or more of the basic psychological or cognitive processes.

The evaluation completed by Dr. \*\*\* used only a brief form of intellectual testing and did not analyze the data sufficiently to establish the presence of a learning disability. Similarly, Dr. \*\*\* found weaknesses in processing speed and memory, but did not establish overall cognitive deficits in one of the basic psychological processes.

In addition, in the academic domains, FIE #1 and the \*\*\* IEE found Student to be average in the three achievement areas. (I note that \*\*\* found Student to have a below average Broad Writing score, but I do not find that score to be properly calculated or obtained (Findings of Fact, numbers 53-55). While Dr. \*\*\* found Student to score below average in the achievement domain in Math, she administered only brief intellectual testing and she did not link the below average score to a deficit in one of the psychological processes.

As noted in Fact Finding # 26, one of the purposes of the cross battery approach is to ensure that low academic performance is not attributed to a SLD when other factors such as anxiety or an ED might result in data that appear to suggest a learning disability. Based on careful consideration of the evidence, I find that Student’s academic deficits and struggles are the result of other disabling conditions and not as a result of a SLD under IDEA. Student failed to meet student’s burden of proof as to the existence of a SLD.

## 2. OHI Based On ADHD

IDEA defines OHI as “having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (i) is due to chronic or acute health problems such as ... attention deficit hyperactivity disorder... and (ii) adversely affects a child’s educational performance. The term adversely affects educational performance means any adverse impact on educational performance and does not require that the adverse impact be substantial, significant, or marked. *Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1 (1<sup>st</sup> Cir. 2007).

The great weight of the evidence indicates that Student has limited vitality and alertness that is due to ADHD. The evidence reflects five diagnoses of ADHD from Student’s pediatrician, Student’s psychiatrist, and from Dr. \*\*\*, Dr. \*\*\*, and Dr. \*\*\*. The only evaluator to conclude that Student does not have ADHD was Dr. \*\*\* and the concerns with her evaluation were fully discussed previously. Corroborating these diagnoses are consistent reports over time from Student’s teachers in \*\*\*, \*\*\* and \*\*\* grades and Mother regarding student’s lack of sustained attention in the classroom and student’s inability to focus and complete work. Student’s \*\*\* grade teacher reported that Student improved notably when taking a trial of ADHD medication that student later had to stop due to anxiety and stomach issues. Student \*\*\*self reports that student struggles with attention at school. Finally, several standardized objective measures of ADHD confirm that Student has attention issues:

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Conners-3 testing by \*\*\* indicates borderline ADHD scores from Teacher and Student and probable ADHD scores from Mother; CPT-2 scores obtained by both \*\*\* and \*\*\* indicate a high probability of the presence of a clinically significant attention deficit; and numerous assessments document Student's slow processing speed, which is typical of students with ADHD.

The results obtained by Dr. \*\*\* that do not suggest the presence of ADHD, such as Student's score on one subtest of the WRAML and the time samples completed during two classroom observations, simply do not override the compelling evidence that Student has ADHD.

Similarly, the evidence is clear that Student's ADHD adversely affects student's educational performance. Teachers over three school years uniformly report that Student has difficulty completing student's work at the necessary pace, has difficulty staying focused and attentive without one-on-one guidance, and that Student requires additional help in the form of tutoring, small group instruction, and other modifications (check for understanding, one-on-one re-teach, preferential seating, reduced assignments so that Student can \*\*\*).

For the reasons set forth above, Student has satisfied student's burden of proof by showing that student has ADHD that adversely impacts student's educational performance.

### **3. Emotional Disturbance**

IDEA defines ED as a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (A) an inability to learn that cannot be explained by intellectual, sensory, or health factors, (B) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, (C) inappropriate types of behavior or feelings under normal circumstances, (D) a general pervasive mood of unhappiness or depression, and (E) a tendency to develop physical symptoms or fears associated with personal or school problems. The definition of long period of time is not found in IDEA, but Dr. \*\*\* testified that it is generally thought of as about six months. The term adversely affects, as with the definition of OHI, means any adverse impact on educational performance and does not require that the adverse impact be substantial, significant, or marked. *Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1 (1<sup>st</sup> Cir. 2007).

The great weight of the evidence establishes that Student meets the eligibility definition for ED. Dr. \*\*\*, Student's psychiatrist, began treating Student for anxiety and depression in July 2010 as evidenced by \*\*\*, \*\*\*, and unexplained stomach problems. Based primarily on Dr. \*\*\* clinical appointments with and treatment of Student, she testified that Student has an emotional disability and meets the criteria for ED set forth in IDEA. While Dr. \*\*\* testimony as to adverse impact and Student's need for special education services was not probative given that she did not observe Student in the school setting, obtain information from school personnel, or review school records, her testimony is highly probative as to Student's emotional condition and whether student exhibits one of the conditions associated with ED in IDEA.

Dr. \*\*\* psychological evaluation and testimony also concurs that Student's significant anxiety, difficulty building and maintaining satisfactory relationships with peers and teachers, tendency to develop physical symptoms associated with student's problems, and student's pervasive mood of unhappiness or depression constitute an emotional disturbance as defined by IDEA. Dr. \*\*\* obtained information from Student, Mother, and Student's teacher in concluding that student struggles with depression and social deficits that adversely impact student's school performance. Others who observed and evaluated Student, including Dr. \*\*\*, Dr. \*\*\*, Dr. \*\*\*, and student's teachers, corroborated student's depressive demeanor and flat affect.

In addition to the medical and psychological evidence, the record is replete with evidence of Student's significant anxiety, social deficits and isolation in the classroom. In \*\*\* grade, Student exhibited a fear of

speaking in front of the class, to the degree that student's teacher hesitated to address student except in a one-on-one setting. Student was absent from school 17 days, mostly as a result of doctors' appointments. Student's \*\*\* grade teacher described student as insecure, very withdrawn, unhappy and sad. Student's \*\*\* grade teacher described student as extremely withdrawn socially, self-isolating, and reluctant to ask for help. Student's teachers and observers of student's classroom portray a child who sits alone, never initiating contact with student's peers, rarely smiling, reluctant to ask student's teachers for assistance, and in virtual isolation. Clearly, Student is unable to build and maintain satisfactory relationships in student's school environment. The fact that Student had one friend in \*\*\* and \*\*\* grades, who moved away, does not negate student's teachers' honest appraisal of student's extreme isolation and withdrawal. Even without the medical and psychological testing documenting Student's emotional disturbance, the teachers' descriptions alone strongly suggest the presence of ED.

Despite the evidence discussed above, the District argues, through Dr. \*\*\*, that Student is simply a shy young man who eventually warms up to others. The evidentiary basis for this assertion is thin. It is true that Student's \*\*\* grade teacher reported that student began to break out of student's shell by the end of \*\*\* grade, but other than that one comment, the evidence is overwhelmingly consistent from \*\*\* and \*\*\* grades that student's teachers' primary concerns about Student are student's significant social isolation and lack of engagement with those around student.

As with Student's ADHD, the evidence is clear that student's ED adversely impacted student's educational performance. Student struggled both academically and socially at school and student's teachers provided numerous accommodations and supports to address student's deficits and support greater success.

For the reasons set forth above, Student has satisfied student's burden of proof by showing that student has an ED that adversely impacts student's educational performance.

### **B. Whether Student Is In Need Of Special Education Services?**

Student meets the eligibility definitions for OHI and ED, but Student is not eligible under IDEA unless student is "in need of special education and related services" by reason of student's disability. 34 C.F.R. § 300.8(a). Special education means "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability." 34 C.F.R. § 300.39(a). Specially designed instruction means "adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction – (i) to address the unique needs of the child that result from the child's disability; and (ii) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." 34 C.F.R. § 300.39(b)(3).

Student argues that student has demonstrated educational need, most clearly pointed out by the numerous accommodations and supports student receives in student's general education classroom that are themselves specially designed instruction. The District counters that Student is working on grade level and making progress with general education interventions, as evidenced by student's scores on all classroom based assessments. The District focuses almost exclusively on Student's ability to work at grade level in arguing that student had no need for special education and related services.

The proper standard for determining educational need for special education services is whether such a need can be established from a review of evidence concerning *all* indicia of student progress, i.e. academic, behavioral, and social, from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations. *Alvin ISD v. AD*, 503 F. 3d 378 (5<sup>th</sup> Cir. 2007); 34 U.S.C. § 300.306 (c). The term educational need is not strictly limited to academics, but also includes the acquisition of appropriate social skills and behavioral progress. *Venus ISD v. Daniel S.*, 2002 U.S. Dist. LEXIS, 6247 (N.D. TX 2002).

The question to be answered upon a review of this evidence, as the District argues, is whether the student can progress and obtain educational benefit in the general education environment? *Hood v. Encinitas Union School District*, 482 F. 3d 1175 (9<sup>th</sup> Cir. 2007). However, the analysis must go one step further. Can the student make academic, behavioral and social progress in the general education environment without supports and interventions, which themselves are specially designed instruction? *Alvin, supra*; *Mr. I. v. Maine School Administrative District No. 55*, 480 F. 3d 1(1<sup>st</sup> Cir. 2007); *State of Hawaii, Department of Education v. Zachary B.*, 52 IDELR 213 (U.S.D.C. HI 2009); *W.H. bnf B.H. and K.H. v. Clovis Unified School District*, 52 IDELR 258 (E.D. CA 2009); *A.P. v. Woodstock Board of Education*, 572 F. Supp. 2d 221 (U.S.D.C. CT 2008). In other words, a student's ability to progress and obtain benefit in the general education environment must be analyzed in relationship to the interventions and supports being provided to the student.

Applying these standards to the evidence in this case, I find that Student is in need of special education and related services by reason of student's OHI and ED.

The evidence strongly documents Student's needs in the areas of academics and social/emotional development. As mandated by IDEA, when considering a variety of sources on the question of Student's academic need, rather than just the classroom based assessment data that the District relies heavily upon, it is clear that Student has a need for special education.

Student's achievement test scores do not establish a learning disability, but they do establish academic deficits, particularly in the areas of writing and math. The more recent testing completed by \*\*\* and \*\*\* show a decline in achievement relative to peers from the earlier testing done by the District, indicating that Student's academic deficits relative to student's peers are increasing. Similarly, aptitude testing, though not indicative of a learning disability, documents clear and consistent deficits in working memory, processing speed, and academic fluency. In the area of social/emotional development, standardized testing also documents Student's significant deficits. This testing is previously discussed at length in relation to the disability classification of ED.

The academic and social needs identified by testing are consistent with the teacher and parent reports. As discussed at length previously in this decision, Student's \*\*\* and \*\*\* grade teachers both describe student's struggle in the classroom to maintain attention, complete work in a timely manner, master material, and meet expectations. As stated by student's \*\*\* grade teacher, "student really struggles in all areas academically," and "needs one-to-one guidance for instruction." The evidence of social deficits is even more compelling- Student is completely isolated and disengaged from peers and reluctant to interact with student's teachers. Student is depressed, anxious, and unable to participate in the life of the classroom.

The District argues that Student does not demonstrate a need for specially designed instruction because student makes progress and works at grade level in student's general education classroom. However, the District fails to account for the substantial support Student requires to achieve at grade level. The record is replete with evidence that Student's teachers were well aware of student's academic and social/emotional needs, needs which they fortunately addressed by providing significant support to Student in the form of after school tutoring, in school tutoring and re-teach, one-to-one instruction, small group instruction, assigned partners for social interaction, reduced expectations for the amount of work Student had to complete to address student's slowness so that student could \*\*\*, excusing Student from oral performances because of student's fear of speaking in class, preferential seating to help with attention, and checking for understanding to maintain Student's focus. It is abundantly clear from the record in this case that Student would not be able to perform at grade level without the multitude of supports provided student by student's excellent teachers.

It is equally clear that the support provided by Student's teachers itself constitutes specially designed instruction. Student's teachers adapted the methodology and delivery of instruction to meet student's unique needs to ensure that student could meet the educational standards of the District that apply to all children. That *HPISD v. Student*; Docket No. 074-SE-1210

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is the definition of specially designed instruction. The District cannot point to Student's grade level performance to argue that student does not need specially designed instruction when the very reason for student's success is the specially designed instruction student already receives. Indeed, the very purpose of specially designed instruction is to enable a student to perform on grade level. While Student has benefitted from the supports and interventions provided student, student is entitled to the guarantee of those services as a result of eligibility under IDEA, rather than the good fortune of the services as result of student's teachers' good will and teaching practices.

In conclusion, the great weight of the evidence supports Student's need for specially designed instruction to address the academic and social/emotional deficits student has as a result of student's disabilities. Student met student's burden of proof on this prong of the eligibility test. Student has established that student meets the definition of a child with a disability set forth in 34 C.F.R. § 300.8 as having a serious emotional disturbance and an other health impairment.

#### IV.

#### **Whether Student Was Timely Evaluated And Identified As Eligible Under IDEA**

IDEA requires that all children with disabilities ... "who are in need of special education services be identified, located, and evaluated." 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a). This obligation is known as the "child find" requirement. Student claims that the District violated this requirement by its failure to fully evaluate and identify student as eligible for special education in September 2010 following the \*\*\* IEE. The District, of course, argues that Student is not eligible at all for services under IDEA. Having found that Student is eligible under the classifications of OHI and ED, I must consider whether IDEA's child find requirement mandated that Student be evaluated and served at some earlier point in time within the statutory limitations period. *Venus ISD v. Daniel S.*, 2002 U.S. Dist. LEXIS, 6247 (N.D. TX 2002).

Based on a review of the evidence, I find that the District did not violate the child find requirement of IDEA. The ARDC's decision on eligibility at the September 2010 ARDC made sense. Dr. \*\*\* IEE did not support the presence of a SLD and the ADHD diagnosis was new to the District and based on medical rather than educational information. It was reasonable for the ARDC to request a school evaluation of OHI based on ADHD. Similarly, it was reasonable for the ARDC to focus on OHI only. Although Student's \*\*\* grade teacher had reported information concerning student's withdrawal and social isolation, it was not significant enough to trigger an ED evaluation at that time, particularly given that Mother did not report any concerns about Student's emotional status to the ARDC despite student's diagnosis with depression in July 2010.

When the ARDC reviewed FIE #2 in November, they determined that Student was not eligible based on OHI. As previously discussed, FIE #2 failed to adequately and fully apprise the ARDC of all relevant data pertaining to the eligibility determination based on OHI. A finding of eligibility *could* have been made in November had all available information been reviewed by the ARDC. Even so, I cannot conclude with certainty that the District was obligated to find Student eligible at that time given the conflicting information about Student's ADHD and the lack of information about student's declining physical and emotional status.

Subsequent to the November ARDC, the instant litigation ensued. Mother provided no additional information to the District concerning Student's evaluations or student's mental/emotional condition until the hearing in this matter.<sup>1</sup> The information about Student's disabilities and educational performance that surfaced after the November ARDC through the additional evaluations performed by Drs. \*\*\* and \*\*\*, coupled with the considerable record of information from before the November ARDC, provide sufficient information at this time to conclude that Student is eligible for special education and related services.

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<sup>1</sup> The District has submitted the issue of Student's eligibility to this Hearing Officer based on all available evidence, including the evaluations obtained after the November 2010 ARDC.

Student did not meet student's burden of establishing a child find violation by the District.

## V.

### **Whether The District Impeded Parent and Student Involvement In The Decision Making Process**

Student argues that the District impeded student's involvement in the decision making process, thus causing a deprivation of educational benefits, by pre-determining the result of the September 2010 ARDC, holding the November 2010 ADRC without Mother, and denying access to educational records. I find Student's claims concerning the September 2010 ARDC and the denial of access to records to be without merit. I find, however, that the District violated IDEA by holding the November 2010 ARDC without Mother.

IDEA provides that a determination of a Student's eligibility must be made with a student's parent. 34 C.F.R. § 300.306 states that, "upon completion of the administration of assessments and other evaluations measures—(1) a group of qualified professionals **and** the parent of the child determines whether the child is a child with a disability..." (emphasis added).

In this case, the District convened the November 2010 ARDC without Mother to consider Student's eligibility for special education even though Mother had already expressed her disagreement with FIE #2, the assessment that would be considered at the meeting. To consider and decide an issue as important as a student's eligibility for services without the student's parent when the parent is available and desires to participate violates IDEA. 34 C.F.R. § 300.306(a)(1). The policy behind this requirement is demonstrated by the facts of this case: had Mother been present at the November 2010 ARDC, the ARDC could have learned information about the Student's emotional status, ongoing depression and anxiety, and deteriorating health issues. This information would have been highly relevant; both to the ARDC's determination as to eligibility based on ADHD and to the need for further testing in the area of ED. Had Mother attended the ARDC, this litigation could have potentially been avoided.

I am mindful of the District's repeated efforts to schedule with Mother and of the thirty-day timeline for convening the ARDC; however, the evidence shows that Mother had a legitimate conflict with the November ARDC resulting from Student's illness that she communicated to the special education director and Student's teacher in a timely manner. When Mother proposed December 1, 2010 as an alternate date for the ARDC in response to \*\*\* email, it is unclear that she had received \*\*\* letter indicating that December 1 was not a mutually agreeable date. Mother also indicated that she would not be available by email for a period of time due to Student's illness. Instead of calling Mother when she received that email, \*\*\* sent a reply email (even though Mother said she would be offline) indicating that the ARDC would go forward since Mother had not proposed an alternate date other than December 1. The District had only offered Mother one other date to consider- November 29- that was also not mutually agreeable since Mother had to work. Based on these facts, I find that the District did not made adequate efforts to include Mother, particularly given the requirement that she be part of an eligibility decision and their knowledge that she definitely intended to participate. *Board of Education of the Springville-Griffith Institute Central School District*, 49 IDELR 60 (SEA NY 2007) (District's failure to reschedule exit ARDC when parent cancelled on the day of the ARDC for a medical appointment violated IDEA).

This procedural violation is actionable only if it impeded the Student's right to a free appropriate public education, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education, or caused a deprivation of educational benefit. 34 C.F.R. § 300.513. In this instance, the procedural violation impeded the parent's opportunity to participate in the decision-making process and as such denied the Student a free appropriate public education, particularly because the District declined eligibility at the November ARDC. Compensatory services might be awarded if

the evidence established that Mother's participation in the November ARDC would have resulted in a determination that Student is eligible for services under IDEA at an earlier date. However, this conclusion is speculative at best. *See*, Section IV *supra*. Based on the evidence of record, I cannot conclude that this procedural violation entitles Student to compensatory relief as a result of the violation.

### CONCLUSIONS OF LAW

1. Respondent HPISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEIA and its implementing federal and state regulations. HPISD is Student's resident district under IDEIA. 20 U.S.C. §1401; 34 C.F.R. § 300.101.
2. The one-year statute of limitations in Texas is applicable to this action. 34 C.F.R. § 300.507; 19 T.A.C. § 89.89.1151.
3. The District bears the burden of proof on the appropriateness of its FIE. 34 C.F.R. §300.502.
4. As the party challenging the District's decision on eligibility, Student bears the burden of proof on eligibility. *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49 (2005).
5. The District's FIE dated November 1, 2010 is not appropriate under IDEA. 34 C.F.R. §300.502.
6. Student is eligible for special education services under the provisions of IDEA as a student with a serious emotional disturbance and an other health impairment. 20 U.S.C. § 1400, *et. seq.*, 34 C.F.R. § 300.8 (a)(1); § 300.8(c)(4)(9); 19 T.A.C. § 89.1040 (a); § 89.1040 (c)(4)(8).
7. Student is not eligible for special education services under the provisions of IDEIA as a student meeting the definition of a Specific Learning Disability. 20 U.S.C. § 1400, *et. seq.*, 34 C.F.R. § 300.8(a)(1); § 300.8(c)(10); 19 T.A.C. § 89.1040 (a); § 89.1040(c)(9).
8. The District did not violate its Child Find duties under IDEA by failing to timely evaluate and identify Student as eligible for special education services. 34 C.F.R. § 300.111(a).
9. The District committed a procedural violation of IDEA by holding the November 2010 ARDC without the parent, but Student is not entitled to compensatory relief as a result of the violation. 34 C.F.R. § 300.513; 300.501; 300.306.

### ORDERS

After due consideration of the record, and the foregoing findings of fact and conclusions of law, this Hearing Officer hereby **ORDERS** that all relief sought by Petitioner District is **DENIED**.

It is further **ORDERED** that the relief sought by Respondent Student is **GRANTED IN PART AND DENIED IN PART**. It is further **ORDERED** that an ARDC meeting shall be convened within ten (10) business days of the date of this Decision, or at a later date if both parties mutually agree, for the purpose of identifying Student as a student with ED and OHI for eligibility purposes for special education services under IDEA. It is further **ORDERED** that the ARDC shall design an Individual Education Plan for Student in accordance with the provisions of IDEA that addresses all areas of Student's documented academic, social, and emotional needs. It is further **ORDERED** that Dr. \*\*\* shall be invited to attend the ARDC at District expense to participate in the ARDC at which Student's IEP shall be developed.

It is further **ORDERED** that the District shall reimburse the Student for the IEE obtained from Dr. \*\*\* in the amount of \$3000.00.

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

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

**SIGNED** and **ENTERED** this 29<sup>th</sup> day of June 2011.

*/s/ Lynn E. Rubinett*

Lynn E. Rubinett

Special Education Hearing Officer for the State of Texas

HIGHLAND PARK ISD	§	BEFORE A SPECIAL
Petitioner	§	EDUCATION
	§	
v.	§	
	§	HEARING OFFICER FOR THE
	§	
STUDENT BNF PARENT	§	
Respondent	§	STATE OF TEXAS

**SYNOPSIS**

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

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

**Cite:** 34 C.F.R. § 300.507; 19 T.A.C. § 89.89.1151.

**Issue:** Whether the District’s November 2010 FIE is appropriate under IDEA such that Student is not entitled to an IEE at public expense?

**Held:** For Student. District failed to prove that its evaluation of Student was appropriate as the evaluation did not fully and completely report all data gathered concerning the Student and it did not assess Student in all areas of disability.

**Cite:** 34 C.F.R. §300.502.

**Issue:** Whether Student is eligible for special education and related services under the IDEA?

**Held:** For the Student. Student is eligible for special education services under the provisions of IDEA as a student with a serious emotional disturbance and an other health impairment. Student proved that student met the disability definitions for each classification and that student had an educational need for specially designed instruction.

**Cite:** 20 U.S.C. § 1400, *et. seq.*, 34 C.F.R. § 300.8 (a)(1); § 300.8(c)(4)(9); 19 T.A.C. § 89.1040 (a); § 89.1040 (c)(4)(8).

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

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

**Cite:** 34 C.F.R. § 300.111(a)

**Issue:** Whether the District denied the parent participation in the decision making process by pre-determining the result of the September 2010 ARDC, convening Student's eligibility ARDC without Mother, and denying access to educational records?

**Held:** For the Student in part and the District in part. The District committed a procedural violation of IDEA by holding the November 2010 ARDC without the parent, but Student is not entitled to compensatory relief as a result of the violation. The District did not pre-determine the outcome of the September 2010 ARDC or deny parent access to Student's educational records.

**Cite:** 34 C.F.R. § 300.513; 300.306.