

STUDENT *b/n/f*  
PARENTS.,

Petitioner,

V.

KELLER INDEPENDENT  
SCHOOL DISTRICT,

Respondent.

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BEFORE A SPECIAL EDUCATION

HEARING OFFICER

FOR THE STATE OF TEXAS

**DECISION OF THE SPECIAL EDUCATION HEARING OFFICER**

**I.**

**STATEMENT OF THE CASE**

Petitioner, Student *b/n/f* Parents (“Student” or “Petitioner”), filed a Request for Due Process Hearing (“Complaint”) with the Texas Education Agency (“TEA”), requesting a Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. §1400 *et. seq.*, contending that for over five (5) years, Respondent, Keller Independent School District (“Respondent” or “KISD” or “the District”), denied Student a free, appropriate, public education (“FAPE”) as follows:

**A. STUDENT’S ISSUES:**

1. whether Respondent failed to timely and appropriately evaluate Student in all areas of suspected disability;
2. whether Respondent failed to identify and address Student’s needs related to autism;
3. whether Respondent failed to provide Student and student’s Parents with appropriate speech, occupational therapy (“OT”), physical therapy (“PT”), in-home training, and parent training;
4. whether Respondent failed to provide timely written notice to Student’s Parents;
5. whether Respondent failed to follow appropriate procedures when refusing special education and/or related services or evaluations;
6. whether Respondent failed to include required personnel at Admission, Review and Dismissal Committee (“ARDC”) meetings and to provide independent ARDC meetings free of administration control;
7. whether Respondent failed to use peer-reviewed, scientifically based methods of instruction where practicable;
8. whether Respondent failed to educate Student in the least restrictive environment (“LRE”);
9. whether Respondent failed to devise measureable goals and objectives based on present levels of performance and in all areas of educational need;
10. whether Respondent failed to develop and implement appropriate Individual Education Programs (“IEPs”) and to provide timely and appropriate progress reports on all IEP goals and

objectives;

11. whether Respondent failed to assess and address communication and language needs, including assistive technology ("AT");
12. whether Respondent failed to allow meaningful parental input by allowing teachers to modify assignments and grading without parental knowledge or input;
13. whether Respondent failed to consider and review private evaluations and parental input;
14. whether Respondent failed to provide Student a safe school environment;
15. whether Respondent failed to provide Student access to academic testing in spring 2010;
16. whether Respondent altered Student's grades; and
17. whether Respondent failed to timely and appropriately provide copies of records to Parents when requested.

**B. STUDENT'S REQUESTED RELIEF:**

Student seeks a finding that exceptions to the Texas one-year statute of limitations preclude its enforcement, thereby allowing Student to recover for Respondent's acts and omissions from fall 2005 through the date of the filing of the Complaint in 2011. Student seeks an order from the undersigned Hearing Officer requiring Respondent to:

1. develop an appropriate IEP in the LRC;
2. reimburse Student's Parents for past private placement and related services;
3. reimburse Student's Parents for past private evaluations;
4. pay for Student's future private placement expenses, related services, and mileage; and
5. pay for independent educational evaluations ("IEEs") in all areas of suspected disability.

**C. RESPONDENT'S AFFIRMATIVE DEFENSE:**

Respondent asserted the Texas one-year statute of limitations, alleging that Student could not prove any exception to this statute; accordingly, Student's claims for relief on facts occurring prior to February 28, 2010, should be dismissed.

**II  
PROCEDURAL HISTORY**

Student filed student's Complaint on February 28, 2011. On that same date, TEA assigned the case Docket No. 147-SE-0211 and assigned the matter to Hearing Officer Larry Craddock. Hearing Officer Craddock sent the First Prehearing Order to the parties on March 2, 2011, stating that the pre-hearing telephone conference would convene on March 7, 2011, the Due Process Hearing would take place on March 30-31, 2011, and the Decision would issue by May 14, 2011.

On March 10, 2011, Respondent filed and served its Ten-Day Prior Written Notice Response to Complaint.

The first pre-hearing telephone conference convened on March 18, 2011. In attendance were the following: 1) Ms. Myrna Silver, Student's counsel; 2) Ms. Mara LaViola, Ms. Silver's assistant and parent

advocate; 3) Ms. Nona Matthews, Respondent's counsel; 4) Hearing Officer Craddock; and 5) the court reporter, who made a record of the telephone conference. The parties discussed the issues, Respondent's affirmative defense of limitations, and discovery deadlines, and scheduled the Due Process Hearing for May 26-27, 31, and June 2-3, 2011. The parties agreed that Respondent would file its Motion for Partial Summary Judgment, based upon limitations, on April 18, 2011; Student would file student's response by April 29, 2011; and Hearing Officer Craddock would rule on the partial summary judgment on May 6, 2011.

On March 28, 2011, Respondent filed and served its First Request for Production of Documents to Student and its Motion to Shorten Time for Production of Documents, seeking an order that Student's deadline for serving responses and for producing requested documents be shortened from April 27, 2011, under the operative Texas Rules of Civil Procedure, to April 11, 2011.

On March 30, 2011, Student filed a response to Respondent's Motion to Shorten Time, and in the Alternative, a Motion for Continuance of the Due Process Hearing to allow Student time to conduct discovery.

By April 18, 2011, no ruling on Student's Motion for Continuance had been rendered. Accordingly, on that date, Student filed a Motion for Protective Order, seeking protection from discovery until Hearing Officer Craddock could convene a second pre-hearing telephone conference to discuss Respondent's Motion to Shorten Time for Production of Documents.

Also on April 18, 2011, Respondent filed its Motion for Partial Summary Judgment and Order related to its one-year statute of limitations defense. Hearing Officer Craddock ordered Student to file student's response by the date previously determined in the first pre-hearing telephone conference. Accordingly, on April 29, 2011, Student filed its Response to [Respondent's] Motion for Partial Summary Judgment.

On April 19, 2011, Respondent filed and served its Response and Objection to Student's Motion for Protective Order, seeking an order that Student's responses and document production would be due on, or before, April 22, 2011, and that because Student failed to meet the original shortened April 11, 2011, deadline, all of Student's objections to the discovery requests should be overruled as untimely.

On April 27, 2011, Hearing Officer Craddock overruled Respondent's Motion to Shorten Time for Production of Documents, overruled Student's Motion for Protective Order, and denied Student's Motion for Continuance.

On May 2, 2011, Student filed and served student's responses and objections to Respondent's Request for Production. On May 3, 2011, Respondent filed and served its Response to Student's Objections to [Respondent's] First Request for Production of Documents. Respondent asserted that Student had objected to the majority of Respondent's Requests for Production improperly and that Student should be ordered to produce all responsive documents by May 5, 2011; alternatively, Student should be ordered to identify all information and material to which Student had lodged privilege objections.

On May 3, 2011, Respondent requested issuance of ten (10) subpoenas *duces tecum* for documents from third-party entities and individuals who provided Student medical services. Student objected to these subpoenas, asserting that Respondent was seeking privileged medical information outside the parameters of the issues presented in the Complaint. In this motion Student also re-urged its Motion for Continuance.

On May 5, 2011, Hearing Officer Craddock informed the parties that he denied Respondent's Motion for Partial Summary Judgment based upon an issue of fact related to Respondent's alleged misrepresentations to Student's Parents. Hearing Officer Craddock also signed the subpoenas requested by Respondent and informed the parties that a continuance would be granted.<sup>1</sup>

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<sup>1</sup> The Hearing Officer overlooked two (2) subpoenas and sent these unsigned subpoenas along with the signed ones to the parties. The Hearing Officer later signed these subpoenas.

On June 7, 2011, the parties convened the second pre-hearing telephone conference. In attendance were the following: 1) Ms. Silver, Student's counsel; 2) Ms. LaViola, Ms. Silver's assistant and parent advocate; 3) Ms. Matthews and Ms. Evelyn Howard-Hand, Respondent's counsel; 4) Hearing Officer Craddock; and 5) the court reporter, who made a record of the telephone conference. The parties re-scheduled the Due Process Hearing for September 26-28 and October 17-18, 2011, and extended the Decision Deadline to November 17, 2011. The parties likewise scheduled a third pre-hearing telephone conference for June 23, 2011.<sup>2</sup>

On June 16, 2011, Respondent filed its Motion for Reconsideration of Order Denying Respondent's Motion for Partial Summary Judgment. On June 27, 2011, Student filed its Response to Respondent's Motion for Reconsideration of Order Denying Respondent's Motion for Partial Summary Judgment.

Due to scheduling difficulties, the third pre-hearing telephone conference convened on June 27, 2011, for over two (2) hours. The parties and Hearing Officer Craddock spent a great deal of time discussing discovery disputes as well as Respondent's request to re-open its summary judgment motion. No resolution of these issues was reached and a fourth pre-hearing telephone conference was scheduled for July 7, 2011.

The parties convened the fourth pre-hearing telephone conference on July 7, 2011, for one and one-half (1½) hours. In attendance were the following: 1) Ms. Silver, Student's counsel; 2) Ms. Howard-Hand, Respondent's counsel; 3) Hearing Officer Craddock; and 4) the court reporter, who made a record of the telephone conference. The parties discussed the objections raised by Student to Respondent's production requests via Requests for Production as well as subpoenas *duces tecum*. At the conclusion of the telephone conference, Hearing Officer Craddock informed counsel that he would issue rulings on Student's objections and a Motion to Compel filed by Respondent.

On September 15, 2011, Hearing Officer Craddock issued a Revised Scheduling Order, which set out the parties' agreement to re-schedule the Due Process Hearing for January 9-13, 2012; concomitantly, the Decision Deadline was extended to February 9, 2012.<sup>3</sup>

On September 29, 2011, Hearing Officer Craddock issued several orders related to pending motions: 1) a Protective Order related to all documents requested by Respondent, whether through Requests for Production or subpoenas *duces tecum*, that contained confidential and/or HIPPA protected records; 2) an order granting Respondent's Motion for Production and Motion to Compel; and 3) an order denying Respondent's Motion for Partial Summary Judgment.

On December 28, 2011, Student filed and served student's Motion to Compel Discovery, Motion to Reopen Discovery Period, and Motion for Continuance of the Due Process Proceeding. Respondent file its Response to Student's Motion to Compel Discovery, Motion to Reopen Discovery Period, and Motion for Continuance of the Due Process Proceeding. Hearing Officer Craddock denied the Motion for Continuance on December 30, 2011.

The case was set for trial over five (5) days, beginning on January 9, 2012. The parties and Hearing Officer originally agreed that they would split the hearing time equally: each would have two and one-half (2½) days to present its case. Hearing Officer Craddock called the case to trial on January 9, 10, and 11, 2012 (T.1; T.2; T.3). When Student had not completed student's case at the end of the third day, Hearing Officer Craddock gave Student extra time, one and one-quarter (1¼) hours, to finish on the fourth day, January 12, 2012, with one of Student's Parents (T.3:850). Another witness, \*\*\*, a representative of Student's private school, was instructed to

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<sup>2</sup> During this June 7, 2011, second pre-hearing telephone conference, the parties discussed the Hearing Officer's ruling on Respondent's Motion for Partial Summary Judgment. Respondent asserted an oral Motion to Reconsider its Motion for Partial Summary Judgment. The Hearing Officer stated that while he had already denied Respondent's Motion, he could re-open the matter and hear the arguments again.

<sup>3</sup> Following the July 7, 2011, telephone conference, Hearing Officer Craddock realized he had a conflict with the October dates for the hearing and informed the parties that he needed to re-schedule that portion of the hearing.

return on January 12, 2012, with subpoenaed documents. At the conclusion of this testimony, Respondent would present its case.

The parties and Hearing Officer convened for the fourth day of hearing on January 12, 2012. Student's counsel informed all that the Parent who was to complete testimony that morning was ill and could not attend the hearing to complete her testimony (T.4:856). Over strenuous objections, the Hearing Officer agreed to adjourn the hearing and re-convene on January 23, 2012, for the Parent's testimony, remaining testimony of Ms. \*\*\*, and the presentation of Respondent's Motion for Partial Summary Judgment once Student rested student's case. The parties agreed to review their calendars for consecutive days on which Respondent could begin, and complete, its case later in the spring.

On January 18, 2012, Student sent Hearing Officer Craddock an email with a physician's letter related to the Parent's inability to testify on January 23, 2012. Student requested that the remainder of student's case and the entirety of Respondent's case be scheduled for consecutive days in the future. Respondent objected to any further delays, and on January 19, 2012, the Hearing Officer denied Student's continuance request and ordered the parties to re-convene the hearing on January 23, 2012.

On January 19, 2012, Student filed a request for removal of Hearing Officer Craddock with TEA, asserting that he had slept during the Due Process Hearing and that he was biased in favor of KISD. Student sought the Hearing Officer's removal, a declaration of mistrial, and the appointment of another Hearing Officer.

On January 20, 2012, TEA responded to Student's removal request by informing Student that the appropriate procedural vehicle was to file a Motion to Recuse with the assigned Hearing Officer. Under this procedure, if the assigned Hearing Officer granted the recusal request, TEA would assign another Hearing Officer.<sup>4</sup>

Also on January 20, 2012, Hearing Officer Craddock issued an Order setting the remaining testimony of Student's Parent and \*\*\* for January 23, 2012, as well as instructing the parties to bring their calendars to re-schedule Respondent's presentation of its case and to be prepared to discuss Respondent's pending limitations motion.

Upon his receipt of Student's recusal request, Hearing Officer Craddock sent the parties an email setting out the applicable timelines for his response to the request. Noting that the rules provided student three (3) business days in which to respond, the Hearing Officer re-affirmed his prior Order that the hearing would proceed on January 23, 2012.

The hearing convened for the fifth day on January 23, 2012 (T.4). Student's counsel and the testifying Parent did not appear. Hearing Officer Craddock declared Student's case completed (T.5:912). The Hearing Officer allowed Respondent's counsel to call \*\*\*, who appeared pursuant to subpoena, to be cross-examined by Respondent (T.5:913). Upon conclusion of this testimony, the Hearing Officer instructed Respondent that he would not rule on the pending limitations defense until he had reviewed the transcripts from the first five (5) days of hearing (T.5:923-24). The Hearing Officer and Respondent's counsel scheduled the remainder of the Due Process Hearing for April 19-20, 2012 (T.5:924).

On January 25, 2012, Hearing Officer Craddock abated the due process proceeding and requested that TEA assign the recusal motion to a senior Hearing Officer. On February 3, 2012, Presiding Special Education Hearing Officer Lucius Bunton denied Student's Motion to Recuse/Remove.

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<sup>4</sup> TEX. R. CIV. P. 18.1 and 18.2 provide the procedural requirements for a recusal. If the assigned Hearing Officer denies the recusal, then the Hearing Officer forwards the matter to a senior Hearing Officer who makes an independent determination

On February 8, 2012, the Hearing Officer issued an Order Scheduling Remaining Proceedings. He ordered the parties to submit written briefs related to the limitations issue by February 23, 2012; he ordered the hearing to re-convene on April 19-20, 2012; and he extended the Decision Deadline to May 20, 2012.

On February 8, 2012, Student's counsel notified the Hearing Officer that she would be out of the country on vacation between April 11 and 27, 2012. On February 8, 2012, the Hearing Officer requested the parties' availability for a telephone conference to re-schedule the Due Process Hearing.

On February 10, 2012, TEA re-assigned the case to the undersigned Hearing Officer. On February 13, 2012, the undersigned sent the parties confirmation of a pre-hearing telephone conference set for February 17, 2012.

On February 17, 2012, the parties convened the fifth pre-hearing conference to discuss the status of the case and procedural options. In attendance were the following: 1) Ms. Silver, Student's counsel; 2) Ms. Matthews, Respondent's counsel; 3) \*\*\*, Respondent's Director of Special Education; 4) the undersigned Hearing Officer; and 5) the court reporter, who made a record of the telephone conference. During the telephone conference Student requested a new trial, based upon the re-assignment of Hearing Officers. Respondent objected. The undersigned informed the parties that she needed to review the transcript from the first five (5) days of the hearing before ruling on the new trial request. The parties agreed to re-convene at a later date to allow for such review.

On March 1, 2012, the parties convened the sixth pre-hearing telephone conference. In attendance were the following: 1) Ms. Silver, Respondent's counsel; 2) Ms. LaViola, Ms. Silver's assistant and parent advocate; 3) Ms. Matthews, Respondent's counsel; 4) \*\*\*, Respondent's Director of Special Education; 5) the undersigned Hearing Officer; and 6) the court reporter, who made a record of the telephone conference. The parties discussed several procedural issues, including Student's new-trial request, Respondent's one-year statute of limitations defense, the presentation of final witnesses by Student, and Respondent's presentation of its case-in-chief. The undersigned issued rulings on all outstanding issues and the parties agreed to schedule the conclusion of the Due Process Hearing for May 11, 14-17, 2012.

Specifically, the undersigned denied Student's Motion for New Trial;<sup>5</sup> agreed to allow Student one (1) day to present its final witnesses; provided Respondent three (3) days for presentation of its case; and notified the parties that Respondent's affirmative defense of statute of limitations would be carried through the conclusion of all testimony.

The second segment of the Due Process Hearing convened on May 11, 2012, and carried over on May 14-16, 2012. Student opened the hearing to the public and several observers were in attendance during the hearing. Student presented student's final witnesses on May 11, 2012, and Respondent presented its case on May 14-16, 2011. Both parties presented witnesses and conducted extensive cross-examination. Remaining documentary evidence was admitted, some of which with limiting instructions, and prior to concluding the hearing, the parties and undersigned Hearing Officer made a last review of the voluminous record to ensure that all probative, admissible evidence had been admitted.

The parties and Hearing Officer agreed to a post-hearing briefing schedule. The parties would file and serve their closing arguments by July 4, 2012; the undersigned would issue the Decision by July 6, 2012. The parties filed their closing arguments on July 5, 2012. Upon receipt of these very voluminous, comprehensive closing arguments (124 pages from Student and 58 pages from Respondent), the undersigned informed the parties that the Decision Deadline would have to be moved to July 8, 2012. The parties did not object to this request. Accordingly, this Decision is issued on July 8, 2012.<sup>6</sup>

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<sup>5</sup> During the March 1, 2012, telephone conference, Student did not object to the denial of Student's Motion for New Trial in light of the fact that Student would have the opportunity to complete student's case-in-chief.

<sup>6</sup> References to the Due Process Hearing Record are identified as follows: "T.#" refers to the Certified Court Reporter's Transcription of testimony made on January 9, 10, 11, 12, 23, 2012; and May 11, 14, 15, 16, 2012. The numbers following the volume designation refer to the pages within the particular volume of testimony. "P.#:#" refers to Petitioner's Exhibits by number and page; "R.#:#" refers to Respondent's Exhibits by number and page.

### III. FINDINGS OF FACT

1. KISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing FAPE under IDEIA and its implementing rules and regulations.
2. Student is a \*\*\*-year-old \*\*\* who currently attends \*\*\* School, which is a private placement funded by Student's Parents. Student's Parents have guardianship of student and may legally make educational decisions for student.
3. Student's residence is within the jurisdictional boundaries of KISD. KISD currently does not provide Student with educational services.

#### A. STUDENT'S EDUCATIONAL HISTORY:

##### **School Year 2004-2005 (\*\* Grade):**

4. During school years 2003-2004 and 2004-2005, Student was enrolled in the \*\*\* School District ("\*\*") where student received special education and related services under the eligibility category of Emotional Disturbance ("ED"). Testing established that Student had Attention Deficit Hyperactivity Disorder ("ADHD") and Bipolar Disorder; that student's cognitive abilities were within the high-average-to-superior range; and that student's expressive/receptive language skills were relatively strong (R.1:7) (P.4; P.6).
5. In spring 2004, Student received a mental health assessment (P.4:14) and a psycho-educational evaluation (P.6:27-37). At the time of the mental health assessment, Student had no history of hospitalizations and student was in the \*\*\* program at school (P.4:17). This evaluation showed that Student had exceptional needs and recommended outpatient mental health services to include individual and group therapy, family therapy, and a medication evaluation by a psychiatrist (P.4:14). Student's \*\*\* Admission, Review, and Dismissal Committee ("ARDC") incorporated some of these recommendations into student's Individual Education Program ("IEP") (P.5).
6. In September 2004, \*\*\* recommended that Student be placed in \*\*\* School, a private therapeutic school (P.8:51; P.12; P.13; R.2:12; T.6:973). Student attended \*\*\* School during school year 2004-2005 and summer 2005 (P.12; P.13; P.14).
7. Student's ARDC met in April 2005 at \*\*\* School for student's annual ARDC meeting (P.14:70-95). The Committee recommended a behavior goal to address Student's problem-solving and coping difficulties in the areas of crying, verbal retaliation, and use of age-appropriate behaviors (P.14:74).

##### **School Year 2005-2006 (\*\* Grade):**

8. Student and student's Parents moved \*\*\* in \*\*\* 2005 and enrolled student in KISD in \*\*\* 2005.
9. On \*\*\*, 2005, Student's ARDC convened to place Student temporarily until student's educational records arrived from \*\*\* (R.4). Based upon information related to Student's most recent \*\*\* IEP, the ARDC placed Student in a \*\*\* ("\*\*") until KISD received Student's transfer records. Student's Parents agreed with this placement (R.4.5)
10. Student's ARDC convened on \*\*\*, 2005 (P.20; R.6). The ARDC conducted a Functional Behavior Assessment ("FBA") and developed a Behavior Intervention Plan ("BIP"). Student's Parents did not request additional assessments for autism and did not indicate on a parental information form that

Student was exhibiting any characteristics of autism. Student's Parents agreed with the decisions of the \*\*\*, 2005, ARDC (T.7:1439).

11. On February 17, 2006, KISD convened Student's permanent placement/annual ARDC meeting (R.7). The ARDC continued the ED eligibility and reached consensus (R.7:28).
- 12.. Student passed all of student's \*\*\*-grade classes; Student \*\*\* the state standards on \*\*\* of the Texas Assessment of Knowledge and Skills ("TAKS"); Student \*\*\* the state standard on \*\*\* (R.79).
13. \*\*\* provided Student a \*\*\* program from \*\*\*, 2006, to \*\*\*, 2006 (P.30). Diagnostic impressions included Generalized Anxiety Disorder; Bipolar Disorder (NOS), ADHD (Combined Type), and Asperger's Syndrome, although the scale indicated that this was *very unlikely* (R.8:2).

#### **School Year 2006-2007 (\*\*\* Grade):**

14. Student's ARDC convened on August 31, 2006. Student's Parents requested that KISD perform an autism assessment (R.9:6). Subsequently, the Parents withdrew this request (R.9:9; T.7:1445-46).
15. In September 2006, Dr. \*\*\*, of \*\*\*, performed an evaluation of Student and found the following: Student appeared to have Asperger's Syndrome, Generalized Anxiety Disorder, Bi-Polar Disorder (NOS), and ADHD (Combined Type). Dr. \*\*\* recommended an Occupational Therapy ("OT") assessment to rule out a Sensory Integration Disorder (P.32:360-61).
16. Student's ARDC convened on October 16, 2006, to discuss Parents' renewed request for an autism assessment and to discuss Student's progress (R.11:1). Student's Parents informed the Committee of Dr. \*\*\* assessment and stated that they would share the report when they received it (R.11:4). Student's ARDC agreed to perform an autism assessment (R.11:4). The ARDC reached consensus (R.11:6).
17. On November 15, 2006, KISD conducted its psycho-educational assessment for Autism/Pervasive Developmental Disorder ("PDD") and determined that Student's educational profile and behaviors were consistent with ED rather than autism/PDD (R.12.9).
18. On December 7, 2006, Student's ARDC met to review the District's autism assessment (R.14). The Committee determined that Student should continue receiving special education and related services under the ED eligibility and that Student did not demonstrate symptoms characteristic of autism or other PDD, specifically Asperger's Syndrome (R.14:2 & 16). Student's Parents did not agree with the District's autism assessment and declined the District's offer of a ten-day recess (R.14:16-18).
19. Student's ARDC convened student's annual ARDC meeting on February 13, 2007 (P.43; R.15). The ARDC requested that a psycho-educational evaluation be conducted by May 19, 2007, for Student's three-year re-evaluation (R.15:1). The ARDC did not find Student eligible for services under the autism category. The Committee developed new goals and objectives based on Student's emotional/behavioral skills, non-verbal behaviors, and coping skills but did not modify the grade-level curriculum due to Student's high performance (R.15:11-14 & 24; T.7:1453-54). The Committee placed Student in all general education classes except for one (1) special education \*\*\* Class and continued counseling as a related service (R.15:22). The Committee made the \*\*\* Classroom available to Student for help in \*\*\* (P.43:501) and Content Mastery for academic support. The Committee discussed Student's struggles in math and concerns of the Parents that Student was not completing student's work and was failing. Student's Parents agreed with Student's IEPs but disagreed with the continued denial of the autism eligibility (R.15:27).
20. The ARDC re-convened on February 22, 2007 (R.15:26). Student's Parents again disagreed with the Committee's determination that Student did not qualify for services under the autism eligibility and

asked that the scheduled psycho-educational assessment be put on hold until they made the decision to file for a Due Process Hearing or to proceed with the District's assessment (R.15:26).

21. Student's Parents did not file for a Due Process Hearing; rather, they provided KISD with consent to perform the psycho-educational assessment (R.17; T.7:1457). The Licensed Specialist in School Psychology ("LSSP") found that Student continued to exhibit an educational profile and behaviors consistent with ED (R.17.9).
22. Student's Parents \*\*\* on May \*\*\*, 2007 (P.48; R.20).
23. Student's ARDC convened on May 21, 2007, to review the District's recent psycho-educational assessment and the resulting ED recommendation (P.54; R.20). Because the Parents disagreed with the finding, they requested an Independent Educational Evaluation ("IEE") (R.20:10; R.21).
24. Student's ARDC reconvened May 25, 2007 at which time the Parents provided a "Parent Attachment" to the minutes of the May 21, 2007, ARDC meeting, setting out their disagreements with the May 21, 2007, ARDC decisions (P.54; R.20:12-14). Student's Parents requested student's placement in a self-contained special education class with fewer students, less distractions and stressors, adult supervision, and a curriculum that could be flexible to student's emotional needs (R.20:17). The Parents expressed concern about Student's \*\*\*, poor performance in school, bullying incidents, and obsessions. Student's ARDC agreed to change student's placement for school year 2007-2008 to the \*\*\* classroom until Student felt ready to be mainstreamed (R.20:15; T.7:1461).
25. Student passed all of student's \*\*\* grade classes (R.78:1). Student \*\*\* the state standard of performance on the TAKS \*\*\* (R.79:3).
26. Student's Parents met with KISD's Director of Special Education on July 24, 2007, to discuss their concerns. During this meeting, the Parents withdrew their request for an IEE. The Parents accuse the Director of inappropriately talking them into withdrawing their request (R.26).
27. On September 25, 2007, the Director of Special Education sent the Parents a letter and Notice of Proposal or Refusal documenting the Parents' withdrawal of their request for an IEE (R.27; R.26).
28. On August 29, 2007, \*\*\* conducted an OT evaluation (R.25). The assessor did not recommend OT (R.25.3).

**School Year 2007-2008 (\*\*\*) Grade):**

29. Student's ARDC met several times in fall 2007 to discuss assessments and disciplinary problems: August 28, 2007; September 12, 2007; and September 19, 2007. Student's Parents brought legal counsel to each of these meetings (R.24; T.7.1475). At the September 12, 2007, meeting, the ARDC agreed with the Parents' request to allow this to become Student's annual meeting (R.24:30). The Committee made changes to Student's BIP goals and objectives (R.24:3-7; 15-19). The ARDC recommended that Student gradually transition from the \*\*\* to general education classes with support (R.24:25). The ARDC completed Student's \*\*\* and determined that \*\*\* (R.24:8). The ARDC reached consensus (R.24:33).
30. Student's Parents requested an IEE on October 3, 2007 (R.29). KISD agreed to this request and the Parents obtained this IEE from \*\*\*, Ph.D., who completed the IEE on February 13, 2008, concluding that Student did not demonstrate an autism spectrum disorder (T.7:1480; R.35:4).
31. Student's ARDC met on January 9, 2008, in response to the Parents' concerns that Student's transition from the \*\*\* classroom into mainstream classes was not being effected (R.33). The Parents were concerned that Student's teachers were changing student's grades while concomitantly not holding Student to the same academic standards as student's non-disabled peers (R.33:28; T.7:1490).

Student's Parents informed the ARDC that student was \*\*\*, although the District members of the ARDC did not see any need for \*\*\* (R.33:29; T.7:1489). Student's Parents declined to provide KISD with consent to speak with Student's private counselor and physician (R.33:29-30; T.7:1489). The Parents' attorney attended this ARDC meeting (R.33:30a). The Parents neither agreed with the ARDC decisions nor the requested ten-day recess (R.33:30).

32. Student's ARDC met on April 24, 2008, to review Dr. \*\*\* report (R.36). The ARDC reviewed the IEE report and determined that Student continued to meet eligibility criteria as a student with ED rather than autism (R.36:2 & 5). The Parents' attorney attended this ARDC meeting, which again, failed to reach consensus. Student's Parents' declined the offer of a ten-day recess (R.36:6).
33. Student's ARDC again met on May 28, 2009 (R.37:1). The ARDC recommended that based upon Student's progress over the school year, student would start student's \*\*\* grade year in all general education classes with support from the \*\*\* Room for thirty (30) minutes per week (R.37:5). The ARDC reached consensus (R.37:8).
34. Student passed all of student's \*\*\* grade classes \*\*\*, and student earned \*\*\* (R.78:2). Student \*\*\* standards of performance on TAKS in \*\*\* (R.79:3; T.7:1585-86).

#### **School Year 2008-2009 (\*\* Grade):**

35. Student's ARDC met for student's annual ARDC meeting on September 12, 2008 (R.39). Student participated in this meeting, along with student's Parents and their attorney, and presented \*\*\*self impressively (R.39:25). The Committee reviewed Student's \*\*\*, which documented \*\*\* (R.39:4-6). The ARDC continued to anticipate Student's \*\*\* based on \*\*\* (R.39:7-10). The Committee agreed that Student no longer demonstrated a need for a BIP based on student's progress and current behavioral competencies and that student's behavioral needs could be addressed through accommodations in student's IEP (R.39:20). The ARDC decided that Student would continue to receive student's instruction in all general education classes with instructional accommodations and support from the Charger Room for thirty (30) minutes per week (R.39:12). The ARDC reached consensus (R.39:22-23).
36. Student achieved success during the fall 2008 semester (T.9:1937-38). However, Student \*\*\*. Student's Parents informed KISD that Student had been\*\*\* for a brief time (P.94:1083). After this \*\*\*, Student's Parents withdrew student from the District in \*\*\* and enrolled student at \*\*\* School ("\*\*\*"), which is associated with \*\*\* (P.95:1088; P.96:1089-92; R.43:1; T.7:1507-10).
37. On March 9, 2009, \*\*\* convened an ARDC meeting and continued Student's eligibility under ED (R.44:1). Student attended \*\*\* for the remainder of the spring 2009 semester (R.46:1 & 5).
38. Student's \*\*\* lists student's diagnoses as Bipolar, Mixed, currently mild; Organic Mood Disorder, secondary to cerebral dysrhythmia; and Asperger's Syndrome (R.47:4).
39. Student passed all of student's \*\*\* grade classes \*\*\*, and student earned \*\*\* (R.78:2). Student \*\*\* the state standard on the TAKS in \*\*\* (R.79:5).

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

40. Student returned to KISD at the beginning of the school year. Student's ARDC convened student's annual ARDC meeting on August 26, 2009 (R.48). The Committee recommended a psychological evaluation (R.48:21). A representative from \*\*\* participated in the ARDC meeting and recommended that Student be placed in a combination of general education and special education classes as Student is comfortable with special education support as a safe place when stressed (R.48:21). The Committee agreed to place Student in the \*\*\* Room full time with gradual transition into general education classes (R.48:21). The ARDC reached consensus (R.48:23).

41. KISD completed the psychological evaluation on October 7, 2009 (R.49). The evaluator determined that Student continued to exhibit emotional factors interfering with educational progress to the extent that an emotional disturbance was present (R.49:15).
42. Student's ARDC met on October 21, 2009, to review the psychological evaluation (R.50). Student's Parents were accompanied by an advocate. The Parents continued to dispute the autism issue. The Parents requested another autism assessment, which the ARDC declined (R.50:15). The ARDC meeting ended without consensus; Student's Parents declined a ten-day recess (R.50:15-16).
43. The ARD committee met again on November 18, 2009 (R.51). The District obtained consent to conduct the previously requested FBA (R.51:15). The Parents continued to disagree with the lack of autism eligibility (R.51:15). The Committee discussed placement options. The Parents wanted Student in a general education environment with a smaller student-to-teacher ratio (P.119); the District members wanted to continue Student's placement in mainstream classes with \*\*\* Room support (R.51:15). The Committee did not reach consensus and the Parents declined a ten-day recess (R.51:15).
44. KISD completed the FBA on December 10, 2009 (P.119; R.53). The ARDC convened on January 5, 2010, to review the FBA (R.54). Student's Parents reported that Student had been \*\*\* and that student's psychiatrist was recommending homebound placement, although they did not produce the physician's Homebound Needs Assessment (R.54:18). The ARDC reviewed the FBA, developed a BIP, and added special education counseling as a related service to address some of Student's social skills objectives (R.54:18). The Parents requested a copy of Student's educational records (R.54:18). The Committee did not reach consensus but the Parents agreed to a ten-day recess (R.54:18).
45. Student's psychiatrist, Dr. \*\*\*, completed the Homebound Needs Assessment on January 14, 2010, recommending homebound placement through mid February due to Student's severe anxiety, depression, and irritability (R.55:1). He also recommended a three-month re-integration process, including less stimulation, more one-to-one individual instruction, and more time to work when Student returned to regular school. (R.55:1-2)
46. The ARDC re-convened on January 20, 2010 (R.54:19). The Committee agreed to provide Student with an AT evaluation (R.54:20). The Parents again requested that Student receive student's general education instruction in a smaller setting, much like the setting at \*\*\*. The Committee recommended that when Student returned to school, student would initially receive all instruction in the \*\*\* Room with gradual integration into the general education classrooms with \*\*\* Room support (R.54:21). The ARDC did not agree with the physician's Homebound Needs Assessment, recommending that all suggested homebound services could be implemented school (R.54:21). The Committee did not reach consensus (R.54:25).
47. Student did not return to school in spring 2010. Accordingly, student's ARDC met on January 28, 2010, to reconsider the homebound services (R.57; T.7:1530). The District requested consent to talk to Student's physician, but the Parents declined (R.57:8; T.7:1530-31). The Committee agreed to provide homebound instruction for \*\*\* minutes, \*\*\* times per week, through \*\*\*, 2010 (R.57:5). The District members of the Committee recommended that the fall semester final exams be waived since Student had not been at school to take the exams, but student's Parents disagreed (R.57:8). The ARDC reached agreement regarding the homebound instruction (R.57:9).
48. KISD did not provide Student with all of the homebound instruction prior to the expiration of the Homebound Needs Assessment (T.7:1533). The Parents provided KISD with a second Homebound Needs Assessment, dated February 15, 2010 (R.58). Student's ARDC convened on February 17, 2010, to review the new Homebound Needs Assessment and to garner consent to talk with Student's physician over concerns that the homebound services could be delivered at the school in the LRE (R.59). Again, the Parents refused such request (R.59:17). The District declined to continue Student's

homebound instruction and the meeting ended without consensus (R.59:18). The Committee agreed to re-convene on February 22, 2010.

49. Student's ARDC re-convened as scheduled. The Committee again requested consent to talk with Student's physician about the recommended homebound instruction (R.59:18). The Parents refused and the ARDC meeting ended without consensus (R.59:20).
50. But for some instruction during summer 2010, Student never returned to KISD (T.7:1539; T.6:1181).
51. On March 1, 2010, Student's Parents requested a copy of student's educational records, which KISD produced on March 12, 2010 (P.132:1950; P.133:1919; T.7:1550).
52. The Parents filed a complaint with TEA on April 5, 2010, complaining, in part, about KISD's failure to provide all of the homebound services authorized by the January 28, 2010, ARDC (P.135:1966-76). TEA investigated the complaint and on May 26, 2010, determined that KISD had failed to ensure that Student receive all of student's homebound services and ordered Student's ARDC to consider compensatory instruction (P.135:2000-09).<sup>7</sup>
53. KISD sent a letter to the Parents on May 3, 2010, asking the Parents a) to schedule Student's annual ARDC meeting, b) to provide consent for the ARDC to speak with Student's physician, and c) to provide consent for the District to conduct a medical evaluation by a psychiatrist (P.136:2026-27), all of which the Parents declined (T.7:1553-54).
54. The District conducted Student's annual ARDC meeting on May 27, 2010 (R.65). The Committee again requested consent to conduct a medical evaluation, which the Parents again refused (R.65:2 & 30).
55. At the time of this annual ARDC meeting, Student had not attended school or received any educational instruction from KISD since student's homebound instruction ended on February 15, 2010. As such, Student was failing student's classes (R.65:30; T.7:1554-55). The District's Transition Specialist attended the ARDC meeting to assist with transition planning (T.7:1555; R.65). Prior to the meeting, the Transition Specialist sent the Parents a survey form to complete with Student and return to the ARDC; however, the Parents failed to bring the survey form to that ARDC meeting (R.65:30). The ARDC revised Student's FBA and BIP; developed new goals and objectives to decrease Student's anxiety, increase student's positive social interactions with peers and adults, and to increase student's academic productivity; recommended placing Student in the \*\*\* Room at the beginning of the next school year and, as before, gradually transitioning student to mainstream classes with \*\*\* Room support (R.65:31). The Committee recommended instructional accommodations as well as special education counseling as a related service (R.65:31). The ARDC did not reach consensus and agreed to re-convene on June 4, 2010 (R.65:31).
56. The ARDC meeting re-convened on June 4, 2010. The Committee considered compensatory educational services as ordered by TEA and recommended twelve (12) hours of compensatory one-on-one instruction at the \*\*\* school during summer 2010 (R.65:32). Although Student passed student's fall semester classes, student did not pass any of the spring semester classes due to student's absences. Likewise, Student did not participate in the TAKS. The ARDC determined that with \*\*\* (R.65:32). The Committee failed to reach consensus (R.65:32).
57. Student received some of student's compensatory services during summer 2010 (T.7:1560; T.9:1950-52). Before student could complete these services, Student was admitted to \*\*\* on June 29, 2010

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<sup>7</sup> TEA found no violation in response to the remainder of the Parents' allegations: TAKS was administered in accordance with required procedures (P.135:2002 & 2005); homebound services were determined in accordance with required procedures (P.135:2002 & 2005); required procedures were followed when the Parents requested amendment of the records regarding Student's physical education limitations (P.135:2006-07); and the ARDC's eligibility process for making a determination, related to autism, was in accordance with required procedures (P.135:2007-08).

(R.63:1; T.9:1952). KISD attempted to complete these services by paying for the instruction at the residential facility, but the Parents declined the District's offer (T.7:1560–61).

### **School Year 2010-2011 (\*\* Grade)**

58. Student attended \*\*\* during the fall semester. \*\*\* conducted a re-evaluation and determined that Student demonstrated characteristics of autism or PDD (R.69:12). The \*\*\* ARDC determined that Student's primary eligibility was ED, and student's secondary disability was autism (R.70:3). This determination is inconsistent with federal regulations (T.7:1565).
59. Upon Student's \*\*\*, student's ARDC conducted a transfer meeting on October 29, 2010 (R.73). The Parents attended this meeting with a new advocate (R.73:11). The District ARDC members accepted the ED eligibility but requested consent to conduct an autism assessment (R.73:9). Student's Parents declined consent but presented the ARDC with a report from \*\*\* (R.66). The ARDC reviewed this report and recommended that Student be placed in the \*\*\* ("\*\*\*\*") classroom (R.73:9). The Committee also offered to provide Student with the remaining compensatory services at student's home, which the Parents refused (R.73:10; T.8:1805-06). The Parents requested that the ARDC place Student in a private residential facility (R.73:9; T.7:1568). The ARDC failed to reach consensus (R.73:12).
60. Student's physician completed another Homebound Needs Assessment on November 4, 2010, recommending student's confinement at home from October 19, 2010, through February 29, 2011 (R.74:44-45). Student's Parents continued to deny KISD permission to speak with Student's physician (T.7:1570–71).
61. On December 1, 2010, Student's Parents informed the District that Student had been unilaterally placed at the \*\*\* (P.145:2908-09).
62. On December 16, 2010, Student's ARDC conducted student's annual meeting. Student's Parents did not attend this ARDC meeting (R.74:42-43). The ARDC reviewed the recent Homebound Needs Assessment and the Parents' request for private placement at \*\*\* (R.74:42-43). The District attempted to include representatives from the \*\*\* in the ARDC meeting, but the Parents did not provide consent (R.74:39). The ARDC continued Student's ED eligibility (R.74:2). The Committee developed an FBA and BIP; developed goals and objectives to address social skills; recommended special education transportation and special education counseling by an LSSP as related services; continued instructional accommodations, including AT; and placed Student initially in the smaller class environment of the \*\*\* classroom to allow student's transition from \*\*\* (R.74:13; T.7:1573–74). The ARDC did not recommend placement at the \*\*\* (R.74:40). The ARDC completed the Transition Supplement based on available information (R.74:35-37).

### **B. STATUTE OF LIMITATIONS:**

63. The Texas Statute of Limitations period for bringing a Complaint under IDEIA is one (1) year. Two (2) exceptions allow for the tolling of the one-year statute of limitations: a) intentional, specific misrepresentations by a district that it had resolved the problem forming the basis of the Complaint; or b) failure by a district to provide the disabled student with information that the district was required to provide.
64. Student failed to prove that KISD made intentional, specific misrepresentations that prevented the Parents from requesting a Due Process Hearing during school years 2005-2006; 2006-2007; 2007-2008; 2008-2009; and 2009-2010.
65. Student failed to prove that KISD withheld required information from the Parents that prevented the Parents from requesting a Due Process Hearing during school years 2005-2006; 2006-2007; 2007-2008; 2008-2009; and 2009-2010.

### **C. SUBSTANTIVE FINDINGS**

66. The evidence did not prove that Respondent failed to timely and appropriately evaluate Student in all areas of suspected disability.
67. The evidence did not prove that Respondent failed to address Student's needs related to autism.
68. The evidence did not prove that Respondent whether Respondent failed to provide Student and student's Parents with appropriate speech, occupational therapy ("OT"), physical therapy ("PT"), in-home training, and parent training.
69. The evidence did not prove that Respondent failed to provide timely written notice to Student's Parents.
70. The evidence did not prove that Respondent failed to follow appropriate procedures when refusing special education and/or related services or evaluations.
71. The evidence did not prove that Respondent failed to include required personnel at Student's ARDC meetings and to provide independent ARDC meetings free of administration control.
72. The evidence did not prove that Respondent failed to use peer-reviewed, scientifically based methods of instruction where practicable.
73. The evidence did not prove that Respondent failed to educate Student in the LRE.
74. The evidence did not prove that Respondent failed to devise measureable goals and objectives based on present levels of performance and in all areas of educational need.
75. The evidence did not prove that Respondent failed to develop and implement appropriate IEPs and to provide timely and appropriate progress reports on all IEP goals and objectives.
76. The evidence did not prove that Respondent failed to assess and address communication and language needs, including AT.
77. The evidence did not prove that Respondent failed to allow meaningful parental input by allowing teachers to modify assignments and grading without parental knowledge or input.
78. The evidence did not prove that Respondent failed to consider and review private evaluations and parental input.
79. The evidence did not prove that Respondent failed to provide Student a safe school environment.
80. The evidence did not prove that Respondent failed to provide Student access to academic testing in spring 2010.
81. The evidence did not prove that Respondent altered Student's grades. and
82. The evidence did not prove that Respondent failed to timely and appropriately provide copies of records to Parents when requested.

### **IV. DISCUSSION**

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

Student's Parents alleged multiple substantive and procedural violations of IDEIA dating back to fall 2005, more than five (5) years prior to the filing of the Complaint on February 28, 2011. KISD responded by pleading the affirmative defense of statute of limitations. Student countered with an assertion that exceptions to this one-year statute of limitations exist.

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

IDEIA allows very narrow exceptions to its time limitations: 1) the statute of limitations shall not apply if a parent was prevented from requesting a due process hearing due to specific misrepresentations by the local district that it had resolved the problem forming the basis of the complaint; 20 U.S.C. §1415(f)(3)(D)(i); 34 C.F.R. §300.511(f)(1); and/or 2) the statute of limitations shall not apply where a parent failed to exercise his/her right to a due process hearing because the local district withheld information that it is required to provide to the parent. 20 U.S.C. §1415(f)(3)(D)(ii); 34 C.F.R. §300.511(f)(2). There are no other exceptions.

Student argued that the one-year statute of limitations is not applicable to the facts of this case because KISD withheld required information and made misrepresentations that prevented the Parents from filing a timely request for due process hearing. Student had the burden of proving that one (1) of these exceptions tolled the one-year statute of limitations. *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F.Supp.2d 918, 945 (W.D. Tex. 2008), *rev'd in part on other grounds*, *El Paso Indep. Sch. Dist. v. Richard R.*, 591 F. 3d 417 (5<sup>th</sup> Cir. 2009).

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

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

In this case, Student alleged that KISD made multiple misrepresentations/and or promises, starting in fall 2005, on which the Parents depended to their detriment: a) Student's KISD program was based, in part, on an FIE performed by \*\*\* in March 2005; b) the services offered Student in fall 2005 were comparable to those under student's IEP from \*\*\*; c) Student's eligibility "label" was irrelevant in that student's educational needs were being met; d) Student's teachers had the prerogative to make modifications to student's class work based on their estimation of what student could do; e) a child had to have either an articulation problem or language difficulties to qualify for speech special education services; f) the Parents' concerns would be addressed by student's ARDC in the fall 2007 without the need for the IEE the Parents requested; g) the \*\*\* evaluation was deficient; h) Student did not manifest autism traits at school; i) regression and recoument data would be used

to determine whether Student required extended school year services (“ESY”) during the summer of 2008; j) Dr. \*\*\*, whom the Parents chose to perform the IEE, would evaluate Student in accordance with the guidelines set out in IDEIA; and k) medical conditions do not include psychiatric conditions, and depression is not a medical condition.

Assuming that each alleged “misrepresentation” was made to Student, none of the “misrepresentations” rises to the level required to establish an exception to the one-year statute of limitations. None of the referenced comments manifests an intentional misstatement that the District had resolved the problems. Certainly, none of the alleged “misrepresentations” prevented the Parents from filing a request for due process hearing before February 28, 2011. Accordingly, Student failed to meet student’s burden of proof for establishing an exception to the one-year statute of limitations based upon “misrepresentations.”

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

The information that a district is required to provide is specific and includes, *inter alia*, 1) prior written notice when the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child (20 U.S.C. §1415(c); 34 C.F.R. §300.503(a)); and 2) copies of procedural safeguards (20 U.S.C. §1415(d); 34 C.F.R. §300.504(a)). In this case Student alleges that KISD failed to provide written notice to the Parents at all required junctures. However, Student’s assertions in this area often conflate instances where notice is required and instances where no such requirement obtains.

### **a. Notices of Initiation, Change, or Refusal**

The record reveals that KISD provided Student’s Parents with prior written notice in relation to the following events: 1) March 1, 2007: KISD refused to conduct another autism evaluation; 2) March 1, 2007: KISD refused to change Student’s eligibility from ED to autism; 3) September 25, 2007: KISD sent a letter following the Parents’ withdrawal of a request for an autism assessment; 4) October 23, 2009: KISD refused to conduct another autism evaluation; 5) November 30, 2009: KISD refused to conduct another autism evaluation; and 6) April 28, 2010: KISD refused to provide homebound services.

These notices fulfilled KISD’s obligation to the Parents and regarding the decisions prompting the notice. With the delivery of each notice, the Parents were put on notice that KISD was refusing a requested service, that there was a dispute related to the Student’s program, and that their need to contest KISD’s decision via a request for due process hearing was in the offing.

### **b. Procedural Safeguards**

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

In this case, the evidence established that KISD provided the Parents with multiple copies of the Procedural Safeguards beginning in fall 2005: 1) November 2005 when Student enrolled in KISD; 2) February 15, and February 17, 2006; 3) October 16, 2006; 4) December 7, 2006; 5) February 22, 2007; 6) December 12, 2007; 8) April 7, 2008; 9) August 29, 2008; 10) October 23, 2009; and 11) November 30, 2009. The content of these Procedural Safeguards provided the Parents with statutory notice of their rights, including their right to request a due process hearing, within one (1) year of the accrual of a claim. With each delivery of a copy of the Procedural Safeguards, the statute of limitations for IDEIA violations “commence without disturbance.” *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F.Supp.2d at 945.

### **c. Miscellaneous Notices**

Student presented numerous instances of perceived failure on the part of the District to provide information to the Parents that is not contemplated by 20 U.S.C. §1415(c) & (d) and 34 C.F.R. §300.503(a) & 504(a). Nonetheless, Student asserts that the following additional acts and omissions serve to toll the one-year statute of limitations: 1) KISD failed to provide Student with comparable services upon student's transfer from \*\*\* and to inform the Parents of such requirement; 2) KISD failed to inform the Parents that Student was eligible for ESY services; 3) KISD failed to inform the Parents that in Texas, the autism eligibility provides for additional services; 4) KISD failed to explain to the Parents the difference between an autism "screening" and "evaluation"; 5) KISD failed to inform the Parents that a student has a right to a Manifestation Determination when a district proposes a disciplinary change in placement; and 6) KISD failed to inform the Parents that a Special Education Director cannot usurp an ARDC decision. Assuming that each of these acts or omissions occurred, none of them provides a basis for tolling the one-year statute of limitations. 20 U.S.C. §§1411-1419.

These Parents are intelligent and patently committed to Student. Throughout their history with the District they passionately advocated for their \*\*\*: one or both Parents attended every ARDC meeting; they communicated with District staff; they manifested no reluctance to provide Student with outside assessments, \*\*\*, and services; and they utilized the services of both attorneys and special education advocates, beginning in fall 2007, in making decisions related to Student's education. These actions, in and of themselves, clearly manifest an understanding of their \*\*\* rights. However, this understanding of rights is further exemplified by the Parents' actions when 1) they contemplated filing a Request for Due Process Hearing in February 2007 over the District's refusal to change Student's eligibility from ED to autism; 2) they presented the District with lists of their disagreements and concerns in October 2009; and 3) when, in 2010, they filed a Complaint with TEA over Student's loss of homebound instruction, lack of opportunity to take the TAKS in spring 2010, and the District's continued refusal to change Student's eligibility to autism.

In summary, the District provided the required notice every time it proposed or refused to initiate or change the identification, evaluation, educational placement or the provision of FAPE to Student. The District provided the Parents with copies of the Procedural Safeguards at every requisite event. Finally, to read the term "misrepresentation" to include actions by a district anytime it fails to remedy an educational problem is far too broad. This interpretation would "swallow" the role established by the limitations period. *Evan H. v. Unionville-Chadds-Ford Sch. Dist.*, 51 IDELR 157 (E.D. Pa. 2008).

Having determined that the one-year statute of limitations applies to this case, the remaining analysis concerns KISD's alleged substantive and procedural IDEIA violations between February 28, 2010, and February 28, 2011.

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

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

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

A substantive violation of IDEIA depends on whether the school district's program has provided the student with the requisite educational benefit. IDEIA does not require an education that maximizes a student's potential; rather, the school district must provide an education reasonably calculated to enable the child to achieve some benefit. "Some benefit" means an educational program that is meaningful and provides the "basic floor of opportunity, or access to specialized instruction and related services, which are individually

designed to provide educational benefit to the handicapped child.” *Rowley*, 458 U.S. at 200-01. Although the school district need only provide “some educational benefit,” the educational program must be meaningful. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). The educational benefit cannot be a mere modicum or *de minimis*. It must be likely to produce progress, not regression or trivial educational advancement. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5<sup>th</sup> Cir. 2000). In determining whether a child is receiving FAPE, the *Rowley* Court insisted that the reviewing court must not substitute its concept of sound educational policy for that of the school authorities. *Rowley*, 458 U.S. at 206.

## 1. Was KISD’s Refusal to Add the Autism Eligibility Inappropriate?

This case basically focuses on one (1) conflict: KISD’s refusal to replace Student’s eligibility of ED with autism. It is the Parents’ belief that a) because KISD has refused to replace Student’s eligibility label of ED with autism, b) KISD has failed to develop and implement an appropriate program for Student in the LRE, c) the result of which precipitated Student’s descent into such depths of depression, anxiety, and morbidity d) that it necessitated \*\*\*. The record fails to establish these claims.

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

IDEIA does not mandate that a school district classify a child by his/her specific IDEIA-qualifying disability.<sup>8</sup> Rather, IDEIA requires the school district to provide an “appropriate education, not with coming up with a proper label. “. *Pohorecki v. Anthony Wayne Sch. Dist.*, 637 F.Supp.2d 547, 557-58 (D.C. OH 2009) (Classification of disability is not critical to determining the provision of FAPE; rather, the determination rests on whether the goals and objectives are appropriate for the student); see also *Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7<sup>th</sup> Cir. 1997) (“...whether the student was described as cognitively disabled, other health impaired, or learning disabled is all beside the point. The IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe Heather’s multiple disabilities”).

Accordingly, the real issue does not concern the “label” KISD declined to assign; it concerns the appropriateness of the Student’s educational program between February 28, 2010, and February 28, 2011.

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

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

### a. Student’s IEPs Were Individualized and Based on Student’s Assessments and Performance.

Evaluation procedures are carefully spelled out in the federal and state rules and regulations implementing IDEIA. 34 C.F.R. §300.304 specifies that in conducting the evaluation, the school district must 1) use a variety of assessment tools and strategies to gather functional, developmental, and academic

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<sup>8</sup> “Nothing in this chapter requires that children be classified by their disability so long as the child who has a disability listed ... in this title and who, by reason of that disability needs special education and related services is regarded as a child with a disability under this subchapter.” 20 U.S.C. §1412(1)(3)(B)

information; 2) not use a single measure or assessment as the sole criterion for determining a disability; and 3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The district is charged with administering assessments and other evaluation materials that are tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient. Assessments must be selected and administered in a manner that best ensures that the assessment results accurately reflect the child's aptitude or achievement level or other factors that the test is measuring. The child being assessed must be evaluated in all areas related to the suspected disability. The assessment must be sufficiently comprehensive to identify all of the child's special needs. As part of the overall evaluation, the assessors should review all existing evaluation data, including information provided by the parents, current classroom-based, local, or state assessments, classroom-based observations, observations by the child's teachers and related-services providers. 34 C.F.R. §300.305. Once the assessments and other evaluation measures are completed, the student's ARDC must consider all of the information gathered and make a recommendation based upon that information.

Student did not attend KISD in spring 2009. After \*\*\*, Student's Parents withdrew student and enrolled student at \*\*\*, the \*\*\* School associated with \*\*\*. Student attended \*\*\* through the spring semester of 2009. Student's \*\*\* indicated that at the time of admission, student was experiencing significant mood instability, depression, suicidal ideation and verbalizations, severe difficulties with peer interaction, academic difficulties, issues with impulse control, and difficulties with \*\*\*. Student's \*\*\* listed student's diagnoses as Bipolar, Mixed, currently mild; Organic Mood Disorder, secondary to cerebral dysrhythmia; and Asperger's Syndrome. While at \*\*\*, Student received special education services as a student with ED.

Student returned to KISD in fall 2009. Student's ARDC convened student's annual ARDC meeting on August 26, 2009, with student's Parents in attendance. Student's eligibility continued to be ED. The Committee recommended a new psychological evaluation.

A representative from \*\*\* participated in the ARDC meeting and recommended that Student be placed in a combination of general education and special education classes as Student is comfortable with special education support as a safe place when stressed. The \*\*\* representative reported that Student was demonstrating better problem-solving skills. The ARDC noted that Student is able to master grade-level TEKS and that student did not need resource classes. The Committee agreed to place Student in the \*\*\* Room full time with gradual transition into general education classes. The ARDC reached consensus.

KISD completed the psychological evaluation on October 7, 2009. The assessor used standard assessing procedures: clinical interview with Student; interview with Parents; teacher information; information from educational records; Behavior Assessment System for Children-2- (BASC-2) Parent Report, Teacher Report, and Self Report; Draw-A-Person; Piers-Harris Children's Self-Concept Scale; Revised Children's Manifest Anxiety Scale ("RCMAS"); Reynolds Adolescent Depression Scale-2; Sentence Completion; Children's Depression Inventory ("CDI"); Thematic Apperception Test; and Multi-score Depression Inventory for Children (MDI-C). The evaluator determined that based upon three (3) instruments given to measure depression, the MDI-C, RADS-2, and CDI, Student did not manifest significant levels of depression. The assessor noted, however, that the Parents and a teacher rated Student "clinically significant" for depression and withdrawal on the BASC-2. The RCMAS, a self-report measuring anxiety, revealed no significant levels of anxiety, although the assessor noted that Student had an elevated score on the "Lie Scale," a subscale designed to measure whether a child has intentionally lied or attempted to fake a good result. The assessment revealed that Student has a balanced self-esteem. Based upon the testing result, the assessor determined that emotional factors continue to interfere with Student's educational progress to the extent that an emotional disturbance is present.

Student's ARDC met on October 21, 2009, to review the psychological evaluation. The Parents continued to request that Student's eligibility be changed from ED to autism. The Parents requested a formal FBA, which the Committee agreed to provide.

KISD completed the FBA, performed by an LSSP, on December 10, 2009. This assessment revealed that the following behaviors appeared to be impacting Student's educational programming: 1) failure to complete assigned tasks; 2) refusal to work; 3) disrespect towards adults and peers; 4) poorly developed age-appropriate interpersonal/social skills; 5) difficulty engaging in age-appropriate coping skills; 6) frequent conflicts with peers; and 7) off- task behaviors. These behaviors serve the functions of gaining attention from adults and/or peers and task avoidance.

The LSSP noted that Student appeared to have more behavioral challenges in the \*\*\* Room than in the general education setting. She found a correlation between behavioral difficulties, the number of assignments being completed, and the location of the majority of Student's instructional time. Generally, Student engaged in more negative interactions with the peers student encountered in the \*\*\* Room. The assessor opined that this may be related to student's familiarity with this particular group of children or may be impacted by the behaviors of these children.

Based upon the data collected, observations, and teacher-input, the assessor made numerous recommendations: 1) continue current behavioral supports offered in the \*\*\* Room; 2) continue home/school daily communication; 3) continue with breaks between assigned tasks; 4) teach Student individually and in group age-appropriate social skills and conflict resolution; 5) encourage Student to identify triggers of negative feeling and the use of words to express them appropriately; 6) provide specific daily assignments and the results of Student's completion of the assignments; 7) encourage the Parents to continue to work closely with the school and share behavioral data with the psychiatrist who is monitoring Student's medication; 8) utilize a more clearly defined behavior contract that addresses specific expectations and possible rewards; 9) utilize a specific daily sheet that is more concrete and specific; 10) provide clearly defined limits, rules, expectations, and appropriate consequences for Student; and 11) develop a BIP with interventions/strategies with methodology that is fluid and flexible for Student.

The ARDC convened on January 5, 2010, to review the FBA. Student's Parents reported that Student had been \*\*\* and that student's psychiatrist was recommending homebound placement. The ARDC reviewed the FBA, developed a BIP, and added special education counseling as a related service to address some of Student's social skills objectives.

Student's psychiatrist, Dr. \*\*\*, completed a Homebound Needs Assessment on January 14, 2010, recommending homebound placement between January 14, 2010, and February 15, 2010, due to Student's severe anxiety, depression, and irritability. He also recommended a three-month re-integration process, including less stimulation, more one-to-one individual instruction, and more time to work when Student returned to regular school.

The ARDC re-convened on January 20, 2010. The Committee agreed to provide Student with an AT evaluation, as requested by the Parents.<sup>9</sup> The Parents again requested that Student receive student's general education instruction in a smaller setting, much like the setting at \*\*\*. The Committee recommended that when Student returned to school, student would initially receive all instruction in the \*\*\* Room with gradual integration into the general education classrooms with \*\*\* Room support. Student would receive individualized instruction, special education counseling to address social skill deficits and support on adaptive behavior IEP goals and objectives, a BIP, a behavioral contract, a visual schedule, transportation, accommodations, and modifications. The ARDC did not agree with the physician's Homebound Needs Assessment because the Committee believed that all of the suggested homebound services could be implemented in school.

Student did not return to school after the January 20, 2010, ARDC meeting. KISD agreed to convene another ARDC meeting January 28, 2010, to reconsider the homebound services. The District requested consent to talk to Student's physician, but the Parents declined. The Committee agreed to provide homebound instruction for \*\*\* minutes, \*\*\* times per week, through \*\*\*, 2010. The District members of the Committee

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<sup>9</sup> KISD was unable to perform the AT assessment because Student was not available and the Parents did not provide consent.

recommended that the fall semester final exams be waived since Student had not been at school to take the exams. The ARDC discussed whether Student's anxiety level would factor into taking these exams. The Parents disagreed with the recommendation that the exams be waived and suggested that the homebound teacher administer the exams without alerting Student that student actually was taking final exams. The ARDC reached agreement regarding the homebound instruction.

Student attended \*\*\* during the fall semester 2010. \*\*\* conducted a re-evaluation and determined that Student demonstrated characteristics of autism or PDD. The \*\*\* ARDC determined that Student's primary eligibility was ED, and student's secondary disability was autism.

Upon Student's return home, student's ARDC conducted a transfer meeting on October 29, 2010. The Parents attended this meeting with a new advocate. The District ARDC members accepted the ED eligibility but requested consent to conduct an autism assessment. Student's Parents declined consent but presented the ARDC with a report from \*\*\*. The ARDC reviewed this report and recommended that Student be placed in the \*\*\* ("\*\*\*\*") classroom. The Committee also offered to provide Student with the remaining compensatory services at student's home, which the Parents refused. The Parents requested that the ARDC place Student in a private residential facility. The ARDC failed to reach consensus.

Student's physician completed another Homebound Needs Assessment on November 4, 2010, recommending student's confinement at home from October 19, 2010, through February 29, 2011. Student's Parents continued to deny KISD permission to speak with Student's physician.

On December 1, 2010, Student's Parents informed the District that Student had been unilaterally placed at the \*\*\*.

On December 16, 2010, Student's ARDC conducted student's annual meeting. Student's Parents did not attend this ARDC meeting. The ARDC reviewed the recent Homebound Needs Assessment and the Parents' request for private placement at \*\*\*. The District attempted to include representatives from the \*\*\* in the ARDC meeting, but the Parents did not provide consent. The ARDC continued Student's ED eligibility. The Committee developed an FBA and BIP; developed goals and objectives to address social skills; recommended special education transportation and special education counseling by an LSSP as related services; continued instructional accommodations, including AT; and placed Student initially in the smaller class environment of the \*\*\* classroom to allow student's transition from \*\*\*. The ARDC did not recommend placement at the \*\*\*. The ARDC completed the Transition Supplement based on available information.

Throughout these various ARDC meetings, KISD developed appropriate and measurable goals and objectives in all areas of need based on Students' present levels of performance. Student did not demonstrate deficits in communication or language as these skills were assessed in the average range and were not of concern. While Student's ARDC discussed whether Student needed AT, the Committee consistently determined that Student did not require AT devices or services, or that access to technology available in the classroom was sufficient to meet Student's needs.

Student's Parents challenge whether Student's ARDC adequately considered the out-side evaluations they presented to the ARDC between February 28, 2010, and February 28, 2011, when developing Student's IEPs. The assessments included the Homebound Needs Assessment and the evaluation done by \*\*\*. There is no debate that the Committee reviewed and discussed these assessments; the ARDC simply did not agree with their conclusions.<sup>10</sup> The ARDC was charged with considering these assessments, but it was not required to adopt their results. Consideration of an IEE means the ARDC reviews it, discusses it, and to the extent it is not adopted, explains the basis for disagreement. *Letter to Anonymous*, 23 IDELR 563 (OSEP 1995). "Consider" means only to reflect on or think about with some degree of care. *T.S. v. Bd. of Educ. of the Town of Ridgefield*, 20 IDELR 889 (2<sup>nd</sup> Cir. 1993). This is exactly what Student's ARDC did.

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<sup>10</sup> The January 20, 2010, ARDC adopted the Homebound Needs Assessment after first refusing to do so. Student received some of the homebound services pursuant to that assessment.

In the five (5) years that Student attended KISD, student had a plethora of evaluations performed, or funded, by KISD: 1) an autism evaluation on November 15, 2006; 2) a psychological evaluation on May 14, 2006; 3) an autism IEE on February 13, 2008; 4) another psychological assessment on October 7, 2009; and 5) a formal FBA on December 10, 2009.<sup>11</sup> In each evaluation, the District used a variety of assessment tools, including technically sound instruments, to gather relevant functional, developmental, and academic information to determine whether Student was a child with a disability and to determine the content of student's IEP. The evaluation materials were selected and administered so as to not be discriminatory on a racial or cultural basis; they were provided and administered in Student's native language; standardized instruments were validated for the specific purpose for which they were used and were administered by trained and knowledgeable personnel in accordance with any instructions provided by the producers of the tests. The evaluations accurately reflected Student's aptitude or achievement level and other factors measured. The evaluations were sufficiently comprehensive to identify all of Student's educational needs, whether they were commonly linked to Student's ED. KISD assessed Student in all areas related to any suspected disabilities. KISD's evaluations complied with all of the requirements set forth in 34 C.F.R. 300.304(b).

**b. Student's IEPs Would Have Been Delivered in the LRE.**

IDEIA requires that children with disabilities shall be provided FAPE in the LRE. 20 U.S.C. §1412(a)(5)(A). Where possible, children with disabilities are not to be separated from non-disabled peers, placed in separate classes or schools, or in any way removed from the regular education environment, unless the nature or severity of the children's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 585 (5<sup>th</sup> Cir. 2009). Case law provides a two-part test for determining whether an IEP's placement was in the LRE: can the disabled child be educated satisfactorily in the regular classroom, with the use of supplemental aids and services? If not, and the school intends to provide special education or to remove the child from regular education, has the school mainstreamed the child to the maximum extent appropriate. *Daniel R. R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5<sup>th</sup> Cir. 1989); see also *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1013 (5<sup>th</sup> Cir. 2010).

In this case, KISD consistently implemented Student's IEPs in the environment that was appropriate to student's needs. Generally, Student demonstrated the ability to be successful in general education mainstream classes with support. However, when Student transitioned from \*\*\* to \*\*\* school, and each time Student transitioned out of \*\*\*, student's ARDC changed student's placement to the \*\*\* or \*\*\* class in order to provide student with the additional support that student needed.

Based upon that history, the IEPs developed for Student for delivery between February 28, 2010, and February 28, 2011, clearly contemplated Student's placement in the LRE. While student would begin the year in a self-contained classroom, this was only to aid student's transition into the general education setting. Student demonstrated over the years that student required a more restrictive environment when student transitioned from \*\*\*, but, without exception, Student quickly transitioned back into general education classes with support.

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

This aspect of the over-all analysis of whether KISD provided Student with an educational benefit presents an unusual scenario in that Student never accessed student's educational program between February

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<sup>11</sup> KISD requested consent for a medical evaluation, related to the Parents' request for homebound services, on May 3, 2010, and May 27, 2010, which the Parents' denied.

28, 2010, and February 28, 2001, but for a few compensatory services provided over a few hours in summer 2010.

The issues raised by Student that are relevant to this component of the analysis concern the following: whether teachers changed or falsified student's grades to show academic success in fall 2009, which impacted student's overall grades for school year 2009-2010; whether teachers "lowered" the bar in presenting student's grade-level curriculum; and whether KISD denied student the opportunity to take the spring 2010 TAKS and final exams. The evidence presented failed to prove any of these assertions.

Commendably, the Parents monitored Student's educational progress on Gradespeed, which provided a snapshot of Student's grades on a daily basis. Apparently, this daily monitoring fostered a false impression of Student's work and ability. If Student had not completed or turned in an assignment, it might appear on Gradespeed that student was failing, as was often the case. The Parents were convinced that Student was doing nothing at school and that teachers were "gifting" grades to student. However, testimony at the hearing clarified that once Student completed an assignment and turned it in, the teacher graded it and substituted that correct grade for the previous zero or incomplete.

As to Student's allegation that Student's teachers were not presenting student's curriculum on grade level and as set forth in student's IEP, the evidence failed to support this assertion. Speculation on the part of the Parents was incorrect.

Student also alleged that KISD prevented student from taking the TAKS in spring 2010 and final exams in spring 2010, and allowed student to fail school year 2009-2010. KISD established that while the underlying facts are true, *i.e.*, Student did not take TAKS or final exams or pass, these issues were completely controlled by Student's Parents.

In 2010 KISD offered Student the opportunity to take the TAKS and spring final exams even though Student's homebound placement had expired and student was technically "truant." KISD offered to allow Student to take these exams at student's high school, but student's Parents refused. The Parents wanted Student to continue in the homebound placement that ended on February 15, 2010. The only thing separating Student from a second homebound placement was the Parents' refusal to allow KISD to speak with the physician who completed the Homebound Needs Assessment. Without parental cooperation, Student was simply absent from school and student's failing grades devolved from that fact.

The record established that as of February 28, 2010, and for the period of time between February 28, 2010, and February 28, 2011, KISD provided and/or offered Student an appropriate IEP in the LRE in compliance with the procedural and substantive requirements of the IDEIA, the federal regulations, and Texas special education laws.

### **3. THE PARENTS ARE NOT ENTITLED TO KISD'S FUNDING PRIVATE SCHOOL EXPENSES.**

34 C.F.R. §300.148 provides the standard for a student's request for reimbursement of private school expenses. First of all, the school district is **not** required to pay for the cost of education, including special education and related services, if the district made FAPE available and the parents elected to place student in private school anyway. However, the district may be ordered to reimburse the parents if they enroll the student in a private school and the Hearing Officer finds that 1) the district is not making FAPE available, and 2) the private placement is appropriate. *Town of Burlington v. Dep't. of Edu.*, 471 U.S. 359, 369-370, 105 S.Ct. 1996, 2002-2003 (1985). Because Student failed to satisfy student's burden to show a violation of the IDEIA, student is foreclosed from any requested relief.

In this matter, during the applicable one-year period, Student's Parents blocked every request from KISD that could have aided Student in recouping lost or failing grades, taking the state-mandated assessment, devising and implementing a \*\*\* on course with student's peers, and generally, working together to develop an appropriate program for student's placement in the LRE: Student's \*\*\* school. The Parents refused to provide

consent for evaluations, refused to provide consent for the District to communicate with Student's physician regarding homebound services, failed to provide the required statutory notice of private placement, and refused to attend the ARDC meeting on December 16, 2010, to discuss their concerns. These actions further preclude the relief sought. *K .R. v. Anderson Community Sch. Corp.*, 125 F.3d 1017, 1018-19 (7<sup>th</sup> Cir. 1997); *Nieuwenhuis v. Delavan-Darien Sch. Dist. Bd. of Edu.*, 996 F.Supp. 885, 865-866 (E.D. Wisc. 1998); *Loren F. v. Alana Indep. Sch. Sys.*, 349 F.3d 1309, 1312-1313 (11th Cir. 2003); *Patricia P. v. Bd. of Edu.*, 203 F.3d 462, 469 (7th Cir. 2000); *M.S. v. Mullica Township Bd. of Edu.*, 485 F.Supp.2d 555, 567-68 (D. N.J. 2007); *Marc V. v. North East Indep. Sch. Dist.*, 455 F.Supp.2d 577, 593-94 (W.D. Tex. 2006)(Parents who undertake action or decline services that hinder a school district's ability to provide a FAPE to a student cannot benefit from those actions.

## V. CONCLUSIONS OF LAW

1. The one-year statute of limitations applies in this case. 34 C.F.R. §300.507(a); 19 TEX. ADM. CODE §89.1151 & 1170. All of Student's claims arising before February 28, 2010, are dismissed as outside the one-year statute of limitations.
2. KISD's classification of Student's disability under ED was appropriate and did not deny Student FAPE. 34 C.F.R. §300.8(c)(1)(4).
3. Student's IEP in place in February 2010 was appropriate and reasonably calculated to provide Student FAPE. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
4. Student's proposed IEPs between February 28, 2010, and February 28, 2011, were appropriate and reasonably calculated to provide Student FAPE. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
5. KISD did not commit procedural violations of IDEIA that equate to a denial of FAPE and equate to a denial of the Parents' meaningful participation in the decision-making process.
6. KISD did not commit substantive violations of IDEIA that equate to a denial of FAPE.

