

STUDENT	§	BEFORE A SPECIAL
BNF PARENT	§	EDUCATION
Petitioner	§	
v.	§	HEARING OFFICER FOR THE
	§	
BISHOP CISD	§	
Respondent	§	
	§	STATE OF TEXAS

FINAL DECISION OF THE HEARING OFFICER- NUNC PRO TUNC¹

STATEMENT OF THE CASE

Petitioner, Student *** and student's next friend and parent, *** (hereinafter referred to collectively as Petitioner and individually as Student or Parent), brings this action against Respondent Bishop Consolidated Independent School District (hereinafter Respondent, the District, or BCISD) under the Individuals With Disabilities Education Improvement Act, as amended, 20 U.S.C. §1401 et. seq. (IDEA) and its implementing state and federal regulations. This action was filed on March 4, 2013.

The issues identified by Petitioner for resolution include:

1. Petitioner alleges that Respondent failed to provide student with a free appropriate public education during the 2012-2013 school year by its failure to timely identify, evaluate and provide special education services prior to May 13, 2013. Encompassed within this claim is Petitioner's allegation that Respondent unilaterally withdrew Petitioner from BCISD in February 2013 and refused to reenroll petitioner;
2. Petitioner alleges that Respondent improperly failed to conduct a psychological evaluation as part of Student's May 13, 2013 FIE as needed to address the student's emotional problems; and
3. Petitioner alleges that Respondent failed to provide specific goals and objectives in Student's IEP of May 30, 2013 to address Student's learning disability in math reasoning and reading comprehension.

For relief, Petitioner seeks evaluation, identification, the provision of a free appropriate public education, and compensatory services.

¹ See Texas Rules of Civil Procedure, Rule 306a. This Final Decision is reissued pursuant to T.R.C.P., Rule 306a to correct clerical errors in the regulations cited in Conclusions of Law, Nos. 6 and 7 and the related provisions of the synopsis.

The parties stipulated that Petitioner's claim for the denial of a free appropriate public education pertains to the 2012-2013 school year and not to the 2013-2014 school year. (Transcript, p. 372; hereinafter cited as T. 372).

PROCEDURAL HISTORY

Petitioner filed the instant request for due process on March 4, 2013. Christopher Jonas, Attorney at Law, represents Petitioner in this proceeding. Susan Morrison, Attorney at Law, represents Respondent.

The parties met in a resolution session on April 8, 2013, but did not reach resolution of the issues in dispute. A pre-hearing conference was held on April 12, 2013. An Order Following Pre-Hearing Conference was entered on April 17, 2013 outlining the issues in dispute. Petitioner subsequently filed a First and Second Amended Request for Due Process with the permission of the Hearing Officer. A revised Statement of Issues for Due Process was entered on September 17, 2013.

Both jointly and individually, the parties requested several continuances of the due process hearing and extensions of the statutory decision due date, which were granted for good cause by the Hearing Officer.

The hearing took place on November 12-13, 2013 at the Education Service Center, Region 2, in Corpus Christi, Texas. At the conclusion of the due process hearing, by joint request of the parties, I granted leave to file closing briefs and entered an Order Granting Joint Request To Extend Decision Due Date For Filing Post-Hearing Briefs, setting the due date for briefs as December 17, 2013 and the decision due date as January 14, 2014.

This decision is timely issued and forwarded to the parties by both email and U.S. Mail on January 14, 2014.

FINDINGS OF FACT

Based on a review of the testimonial and documentary evidence submitted in this cause, I find the following facts to be established based on the weight of the credible evidence.

Background Facts Prior To Student's Enrollment At BCISD

1. Student lives with student's mother and next friend within the geographical boundaries of BCISD, a political subdivision of the State of Texas and a duly incorporated school district.
2. Student is currently *** years old and has been deemed eligible for special education and related services as of May 30, 2013 based on the IDEA eligibility categories of Other Health Impairment (OHI) based on Attention Deficit Hyperactivity Disorder (ADHD) and Depression, and a Specific Learning Disability in the areas of Reading Comprehension and Math Problem Solving. (Petitioner Exhibit, 11) (hereinafter cited as P. Ex. 11).

3. From *** years of age until November ***, 2012, Student attended *** ISD (***ISD). Student received special education services for speech in student's early education, but was dismissed from speech therapy and found not to qualify for IDEA services on the basis of a learning disability or Section 504 services for ADHD in *** grade. (Respondent Exhibit B; hereinafter cited as R. Ex. B).
4. On April 10, 2009, Student was evaluated by *** (hereinafter referred to as ***) and diagnosed with Bipolar Disorder NOS and ADHD. Student's presenting problems were described as, "Depression, not following rules, problems with concentrating and finishing student's class work, low self esteem, few friends, argumentative with *** (Parent), lying." Student's treatment plan included meeting with a counselor two times per month for counseling and with a doctor one time per month for medication management and psychological evaluation. (R. Ex. C., pp. 124-128).
5. On July 7, 2011, Student was discharged from *** because student missed student's three previously scheduled doctor appointments. The discharge summary described Student's presenting problem as, "Student would often be defiant at home and in school. Trouble following rules and getting along with family. Anger outbursts and some depression symptoms. Same trouble managing anxiety." (R. Ex. H, pp. 55-57).
6. ***ISD requested and received Student's records from *** in April 2012. (R. Ex. H).
7. Subsequent to receiving the *** records, ***ISD began to serve Student under Section 504 for ADHD. The exact date when student became Section 504 eligible is not clear from the records produced; however, student was served under Section 504 as of November 28, 2012, the date of student's withdrawal from ***ISD. (R. Ex. G).
8. During the 2011-2012 school year at ***ISD, Student experienced truancy problems and received failing grades in all of student's classes. (T. 328, 335).
9. On November 19, 2012, Student again accessed *** services as a patient of Dr. ***, a child psychiatrist employed by ***. Dr. *** provided Student with both counseling therapy via telemedicine (Skype) and medication management. In November 2012, Dr. *** diagnosed Student with Depressive Disorder NOS, ADHD, and ***. In December 2013, following *** at BCISD, Dr. *** added the diagnosis of Anxiety Disorder, NOS. (T. 37-40).
10. There is no evidence to indicate knowledge of Dr. *** diagnoses and treatment of Student by either ***ISD or BCISD prior to the filing of this action.

Student's Enrollment And Attendance At BCISD: November/December 2012

11. Parent enrolled Student at BCISD on November ***, 2012. (T. 23; R. Ex. A-1). The BCISD registrar is responsible for the enrollment process and the completion of enrollment forms. (T. 270). Parent testified that during the enrollment process, she had a casual conversation of a "joking" nature with the registrar, during which

- she referenced that Student took medication and was an *** patient. (T. 22-24). The registrar testified that Parent did not discuss Student's medications with her or mention that Student received any special education services from ***ISD. (T. 281).
12. The information on the enrollment forms is very important, as it alerts the school of any special needs a student may have. The registrar's practice if a student is noted on the registration forms as either IDEA or Section 504 eligible is to call the previous school the day of enrollment to obtain records and ensure prompt provision of necessary services. (T. 275-276; 282-283; 320).
 13. Because of the importance of the enrollment forms, the registrar's practice is to review the forms before the parent leaves the office to make sure they are complete and the information is clear. In accordance with this practice, the registrar reviewed Student's enrollment forms on November 29, 2012 before Parent left the office. (T. 283-285). Parent asked if the registrar needed additional information and the registrar indicated she would ask if she did and that she would obtain information from ***ISD. (T. 23-24).
 14. The enrollment form completed by Parent on November 29, 2012 reflects that Parent filled in all of the sections of the form except the section pertaining to whether student was previously enrolled in special programs. In that section, the form asks whether the student was previously enrolled in special education, bilingual education, gifted and talented, Section 504, and other; the form then provides boxes to check yes or no for each of the identified programs. In this section of the form, Parent did not make any markings at all, i.e. she did not check the box for yes or no next to any of the programs. (R. Ex. A-1). Neither party presented evidence as to why Parent did not complete that section of the form.
 15. In contrast, Parent completed the previous section on the form asking if Student had participated in the migrant or immigrant program by checking the box for no for each of those programs. (R. Ex. A-1).
 16. After reviewing Parent's completed enrollment form, the registrar did not ask Parent to finish filling out the form by checking yes or no for each of the special programs. Instead, she assumed, based on her experience of registering students, that Parent left the boxes unchecked because the special programs did not pertain to Student. The registrar did not ask Parent any further questions about the form. (T.286).
 17. The BCISD diagnostician who later evaluated Student testified that the information on the enrollment form is very important and the registrar should have asked Parent if Student received special services at ***ISD given that she left that portion of the form blank. (T. 320).
 18. Because the registrar assumed that Student was not designated as IDEA or Section 504 eligible, she did not contact ***ISD at the time of enrollment to inquire about Student's services. Instead, she requested Student's records through

the Texas Records Exchange (TREx) some time in December 2012, shortly before the winter break recess. (T. 271; R. Ex. G, p. 2).

19. The registrar was notified in December 2012 that ***ISD would not be able fulfill the request until January 7, 2013 because their office was under construction and the file was not available. (T. 272). ***ISD mailed the records to BCISD on January 9, 2013, but evidently BCISD did not receive them. (R. Ex. G, pp. 1-2).
20. Student began attending school at BCISD in early December 2012. Student attended for *** school days, *** of which were absences, when student was involved in an incident involving *** on December ***, 2012, Student alleges that student was ***.
21. BCISD investigated the incident, including a review of a video of the students in the hallway before and after the time they ***, interviews with both students, and with a teacher who ***. Based on the investigation, BCISD concluded that Student *** at school. As a consequence, BCISD suspended Student for three (3) days and assigned student to the Disciplinary Alternative Education Setting (DAEP) for thirty (30) days.
22. At the time of *** and assignment of Student to the DAEP, BCISD had no reason to suspect that Student had a disability or that Student was in need of special education services. The only knowledge BCISD *may* have had as of December 2012 was that Student received counseling through ***.
23. Regardless of Student's role in the incident of December ***, 2012 ***, in response to the incident, student became very anxious and distressed. Student's psychiatrist, Dr. ***, noted Student's increased anxiety following the incident and changed student's diagnosis and increased student's medication. (T. 40, 46, 69).
24. As a result of *** at school, Student began seeing a licensed counselor, ***, in addition to Dr. *** for an hour each week. Based on *** work with Student, he diagnosed student with Post Traumatic Stress Syndrome (PTSD), ADHD, Anxiety, and Depression. He found that Student had been the victim over time of ***. (T. 148-151).
25. Both *** and Dr. ***, the clinical psychologist who evaluated Student in May 2013, testified that whether Student *** in December 2012 or was *** is not important in determining whether Student has an emotional disability and requires treatment. (T. 146-147; 160-161).

January-February 2013

26. Following *** in December, Student did not return to school at BCISD. During January 2013, Parent objected to Student's DAEP placement and ***. The record reflects that Parent did not inform BCISD in January 2013 of Student's psychological history or condition, that student received Section 504 services while at ***ISD, or that she was requesting IDEA evaluation; rather, the evidence indicates only that Parent objected to the DAEP placement because she believed

Student had not engaged in misconduct on December ***, 2012 because student ***.

27. BCISD Principal, ***, made several unsuccessful attempts to schedule a DAEP placement hearing with Parent. Student did not attend school and Parent provided sporadic doctors' excuses to justify student's absences, several of which were from ***. (P. Ex. 1, T. 337).
28. At some unspecified date during January 2013, *** contacted Principal *** on behalf of Student to discuss Student's return to BCISD in a placement other than the DAEP. The evidence does not indicate that *** provided Principal *** with any information at that time regarding Student's emotional condition or diagnoses; but rather, that he asked to discuss the terms of Student's return with Principal ***. *** made it clear to *** that Student would be required to attend the DAEP upon student's return to BCISD because of student's misconduct. (T. 159-160, 349-350).
29. On approximately January 20, 2013, Parent sought enrollment at *** ISD because she believed that Student could not safely attend BCISD. (T. 29). The attempt to enroll triggered a TREx records request from *** to BICSD. In response, the registrar contacted Parent for permission to send Student's records to *** and to confirm her withdrawal request. Based on her conversation with Parent, the registrar understood that Parent wished to withdraw Student from BCISD to attend ***. She processed the withdrawal on February 4, 2013. (R. Ex. F; T. 276-277).
30. When Parent learned that the principal at *** had denied her request to enroll, she went to *** on Friday, February 8, 2013 to meet with the superintendent. ***, accompanied Parent. Parent learned from *** on 2/8/13 that BCISD had withdrawn Student and that *** would not accept student because of student's absences from BCISD and the pending DAEP placement. (T. 33, 94-95).
31. Parent went directly to BCISD on 2/8/13 because Parent had not intended to withdraw Student and she was upset about this status. (T. 33). She met with Principal *** who indicated there must have been a misunderstanding. He asked Parent to return on Monday, 2/11/13 to discuss bringing Student back to school at BCISD. (T. 33-34).
32. Parent returned on 2/11/13 to BCISD, accompanied by ***. Principal *** indicated that he would not proceed with the DAEP hearing scheduled for that day with *** present unless he had an attorney present. (T. 34-35, 117, 353).
33. Conversations between the parties about enrollment and attempts to reenroll Student during the remainder of February 2013 are unclear and confusing. Principal *** tried to explain to Parent that she could complete the registration paperwork for Student, but that Student would not be officially enrolled until student was in attendance at school. (T. 354). Ultimately, Parent did not complete the enrollment papers for Student to reenroll until March ***, 2013. (R. Ex. O).

34. BCISD did not refuse to enroll Student in February 2013. The withdrawal of Student by BCISD reflected a misunderstanding that the District was willing to correct.
35. The ongoing confusion and misunderstanding about Student's reenrollment and return to BCISD in February 2013 continued to revolve around whether Student would attend the DAEP placement. The "stand-off" between the parties concerning the DAEP placement continued throughout February 2013.
36. On February 15, 2013, BCISD sent Parent the first notice concerning Student's absences. (P. Ex. 4). Although Student had not attended school since December ***, 2012, BCISD did not refer student for truancy proceedings because of the pending DAEP placement and sporadic doctors' excuses. (T. 254, 361).
37. During January and February 2013, BCISD viewed Student's nonattendance at school solely as avoidance of the DAEP placement. Although BCISD had notice that Parent objected to the DAEP placement and that Student was an *** patient, BCISD did not have information concerning Student's Section 504 status at ***ISD for ADHD or student's psychological condition or diagnoses either from Parent or from the ***ISD records.
38. During January and February 2013, BCISD evidently had not yet received Student's records from ***ISD, which also contained prior *** records pertaining to Student. The records should have been provided within ten business days of the request made by BCISD in December 2012. (T. 273). Although ***ISD reported mailing the records on January 9, 2013 as promised, the evidence reflects that BCISD did not receive them, as BCISD requested them again through TREx and written correspondence on April 2, 2013. (R. Ex. G., pp. 1, 2, 6). Principal *** ultimately obtained the records by picking them up from ***ISD on ***. (T. 275, 348).
39. The BCISD registrar and Principal *** testified that BCISD contacted ***ISD following the expiration of the original December records request to inquire about the records, but they did not testify to the date of this call. ***ISD records indicate no request for records from BCISD following the December 2012 request until early April 2013. (R. Ex. G., p. 2).
40. I find that BCISD did not take steps to obtain Student's records from ***ISD following its original December 2012 request during January or February 2013.

March-May 2013

41. On March 4, 2013, Petitioner filed the Request for Due Process that initiated this action. In petitioner's original Request for Due Process, Petitioner alleged that Student was IDEA eligible under the eligibility category of OHI, that *** in December 2012, and that Respondent had withdrawn Student from BCISD and refused to reenroll or serve student following the December incident.
42. Following the due process hearing request, Parent reenrolled Student on March ***, 2013. At that time, Parent indicated on the reenrollment form that Student

- had received Section 504 services at student's prior school. (R. Ex. O). Upon learning that Student had received Section 504 services, BCISD asked Parent to sign consent for release of Section 504 record from ***ISD, which she declined to provide. (T. Ex. G, p. 5).
43. On March 23, 2013, Petitioner filed petitioner's First Amended Request For Due Process, alleging a failure to timely evaluate and identify Student as IDEA eligible.
 44. When Parent did not provide consent, BCISD Principal *** contacted ***ISD in writing and went to ***ISD to obtain the records ***. (See Fact Finding # 37 herein; R. Ex. G; T. 275, 343, 348).
 45. Upon receipt, the ***ISD records provided Respondent with knowledge of the following relevant information: Student's Section 504 eligibility based on ADHD at the time of student's withdrawal from ***ISD, student's truancy and failing grades during the fall semester of the 2012-2013 school year, and student's history of psychological diagnoses of Bipolar Disorder, Depression and ADHD and treatment by *** from 2009-2011. (See Fact Findings ## 3-8 herein). The records did not include information concerning Student's recent treatment by *** in 2012-2013 or student's diagnoses related to *** or PTSD.
 46. After obtaining the ***ISD records, on April 4, 2013, BCISD provided Parent with Notice of Assessment/Evaluation seeking an initial evaluation for IDEA eligibility. The Notice of Assessment indicated that Respondent wished to test Student in the identified areas, one of which was specified as, "Emotional/Behavioral: Informal and formal assessment of the student's social and emotional adjustment and interpersonal relationships which may include: behavioral observations and rating scales, parent and teacher observations and reports of home and classroom behavior; student interview; and projective tests as needed." The Notice of Assessment also indicates in the section titled, Other factors relevant to this evaluation, "Psychological."
 47. The Notice did not provide Parent with the name and type of examination to be done or with an explanation of how the examination would be used to develop an appropriate Individualized Education Program (IEP) for Student and there is no evidence to indicate that Parent requested that such information be provided. (R. Ex. J, p. 5).
 48. Along with the Notice of Assessment/Evaluation, BCISD provided Parent with Consent for Assessment/Evaluation and Notice of Procedural Safeguards dated April 4, 2013. On April 10, 2013, Parent signed Consent for Assessment and provided it to BCISD along with the Parent referral packet. Information provided by Parent in the referral packet documents Student's diagnoses of Depression, Bipolar, ADHD, PTSD, the behaviors underlying these diagnoses, and student's treatment. (R. Ex. J, pp. 1-4).
 49. Upon review of the referral packet provided by Parent, the BCISD diagnostician determined that psychological testing needed to be done. She asked Parent for

- permission to do a psychological evaluation and Parent stated that one had previously been done by *** and was in Student's file. The diagnostician could not find the *** evaluation and asked Parent again about completing one. The Parent said she would let her know, but never got back to her. (T. 311-312).
50. The diagnostician did not follow up with Parent to inquire further about the psychological before the FIE was completed on May 13, 2013. The diagnostician did not provide information to Parent concerning the name and type of examination or test sought and an explanation of how the examination would be used to develop an appropriate IEP for Student.
 51. The District's Full and Individual Evaluation (FIE) of Student was completed on May 13, 2013 and did not contain any psychological testing at all. (P. Ex. 10). Delays in conducting the FIE between April 10, 2013 and May 13, 2013 were caused by Petitioner's failure to attend scheduled testing sessions. (R. Ex. L).
 52. The FIE includes a section on Emotional/Behavioral, which states that Student's behavior does not appear to influence student's education placement, program or discipline, though the only data provided from Parent indicated that Student has serious psychological issues that impact student both at home and school. The FIE also notes that Dr. *** completed an OHI eligibility form based on ADHD and Depression and provides that Student appears to meet eligibility for the conditions of Specific Learning Disability (SLD) and OHI.
 53. At the time the FIE was conducted, Student was receiving homebound services from BCISD based on excessive anxiety related to the December event at school. (P. Ex. 9). Student began receiving homebound services on or about April ***, 2013.
 54. Respondent convened an Admission, Review, and Dismissal Committee (ARDC) on May 30, 2013 to review the FIE and OHI eligibility form. The ARDC agreed that Student was IDEA eligible based on the categories of SLD in Reading Comprehension and Math Problem Solving and OHI based on Depression and ADHD. (P. Ex. 11, p. 2). The ARDC agreed to continue Student's homebound services for the remainder of the 2012-2013 school year, including the summer of 2013, and developed accommodations and modifications for Student. (P. Ex. 11, p. 8). The ARDC provided that Student would receive thirty minutes of counseling per week from a special education counselor/LSSP/ (P. Ex. 11, p. 9). For the 2013-2014 school year, the ARDC developed a schedule that contemplated Student's return to BCISD *** School in the general education with accommodations and counseling. (P. Ex. 11, pp. 11-12).
 55. The ARDC developed three IEP goals for Student for implementation from May 30, 2013- May 29, 2014. The goals did not specifically address Student's identified areas of learning disability because Student was progressing adequately in all of student's classes at the time of the ARDC meeting. (P. Ex. 11, p. 14; T. 316). Student's goals were revised to address these areas of disability at beginning of the 2013-2014 school year. (T. 316).

56. BCISD continued to provide homebound and counseling services to Student during the summer of 2013. (T. 318).

57. Student made academic progress with the homebound services provided by BCISD. (T. 52, 335-336).

DISCUSSION

The instant case raises the following issues pertaining to BCISD's education of Student in the 2012-2103 school year: 1) Whether Respondent violated the child find provisions of IDEA and denied Student a free appropriate public education by failing to timely evaluate, identify, and serve Student as eligible for special education services; 2) Whether Respondent improperly failed to conduct a psychological evaluation as part of Student's May 13, 2013 FIE; and 3) Whether Respondent failed to provide specific goals and objectives in Student's IEP of May 30, 2013 to address Student's learning disability in math reasoning and reading comprehension.

I. Whether Respondent Denied Student A FAPE By Failing To Timely Evaluate And Identify Student For Special Education

The Legal Standards for Child Find

IDEA provides that school districts have the responsibility to identify, locate and evaluate all children with disabilities residing within their jurisdiction who are in need of special education. This responsibility is known as "Child Find." 20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.128 and 300.220.

IDEA sets forth a two-pronged analysis for determining whether a student should be evaluated to determine eligibility for special education services. The "Child Find" obligation is triggered when the school district has reason to suspect the student has a disability and that the student is in need of special education services. 34 C.F.R. §§ 300.8(a)(1); 300.111(a)(c)(1).

It is well settled that IDEA does not penalize school districts for a failure to timely evaluate students who are not ultimately found to be eligible for special education. *D.G. v. Flour Bluff ISD*, 59 IDELR 2 (5th Cir. 2012). In other words, a violation of child find is actionable only if the student is ultimately determined to be eligible for special education services. In this case, BCISD determined that Student was eligible for special education services in May 2013. As such, Petitioner is entitled to recover for a violation of Child Find if Respondent should have referred Student for evaluation prior to April 4, 2013, the date of the initial referral of Student in this case.

Positions of the Parties

Student claims that BCISD violated this requirement by failing to evaluate (and identify) student for IDEA eligibility upon enrollment or at least by January 2013 when Student stopped attending school following the incident in December 2012. Petitioner argues that Respondent's knowledge that Student received services from ***, coupled with the inconclusive information about Student's status as Section 504 or IDEA eligible on student's enrollment form, should have given Respondent reason to suspect that Student had a disability and need for special education services in January 2013.

Respondent counters that it had no reason to suspect that Student had a disability prior to the filing of this action because Parent did not indicate that Student received special services at student's prior school district and did not bring forward any information to BCISD about Student's diagnoses or treatment history with *** other than the casual mention made to the registrar on enrollment. Instead, Parent focused on her disagreement with Respondent's conclusion about Student's behavior on 12/***/12 and the decision to assign Student to DAEP.

Whether Respondent Should Have Referred Student For Evaluation Earlier Than April 4, 2013

The record reflects that when Respondent finally obtained records from ***ISD on April 2, 2013, it acted quickly to initiate a referral of Student for an IDEA evaluation on April 4, 2013. The information contained in the ***ISD records reflected that Student had received Section 504 services at ***ISD in the fall of 2012, had experienced problems with truancy and failing grades during the fall of 2012 despite the services, had a documented history since 2009 of ADHD, Depression, Bipolar Disorder, and other behavioral concerns, and had received both therapy and medication for student's diagnosed conditions. This information, coupled with Student's involvement in the December 2012 incident, student's inability/failure to return to school following the incident, and the knowledge that student was currently receiving treatment from a psychiatrist through *** and a counselor, correctly gave Respondent reason to suspect that Student may have a disability and a need for special education services. In response, Respondent referred Student for evaluation, which ultimately led to Student's identification as IDEA eligible.

Had Respondent received the ***ISD records by the end of January 2013, the same circumstances that triggered Respondent's child find duty in April 2013 would have triggered the duty two months earlier. By the end of January, Respondent knew of Student's involvement in the December 2012 incident, student's inability/failure to return to school following the incident, and that student was currently receiving treatment from a psychiatrist through *** and a counselor. As in April, this information coupled with that contained in the ***ISD records would have given Respondent a reason to suspect a disability and need for services, such that a referral for evaluation would have occurred.

The evidence indicates that both parties bear responsibility for Respondent's failure to obtain the records from ***ISD in a timely manner.

At key junctures, Parent failed to inform Respondent of Student's psychological history and needs, student's receipt of services at ***ISD, and student's ongoing psychiatric conditions. Upon enrollment in November 2012, Parent's casual conversation with the registrar about medication and ***, which she described as joking, was not sufficient to alert BCISD to a possible disabling condition, particularly given that she failed to note on Student's enrollment form that student received special services at ***ISD by checking the box on the enrollment form. Petitioner offered no evidence to explain why she did not check the appropriate boxes on the form or otherwise inform BCISD of Student's needs at the time of enrollment.

Again, in January and February 2012, Parent clearly expressed her disagreement with Student's assignment to DAEP by *** and talking with Principal ***, both herself and via ***, but the evidence does not indicate that she provided information to Respondent of Student's emotional history or history of receiving Section 504 services at ***ISD. Prior to filing for due process on March 4, 2013, Parent did not communicate to Respondent directly at any point that Student had emotional disabilities that had been diagnosed and treated prior to student's arrival at BCISD.

Similarly, at key junctures, Respondent failed to exercise its affirmative child find obligation with respect to Student. Initially, upon enrollment, the registrar noticed that Parent did not complete the section of the enrollment form that would have provided the critical information about whether Student had been served under Section 504 or IDEA. The registrar noticed that Parent did not finish completing the form, but made an assumption that Parent meant "no" by leaving it blank rather than discharging her duty to ensure that Parent completed the form. As the BCISD diagnostician testified, this was a critical error on Respondent's part because the information on the form is very important to ensuring that students receive necessary services to which they may be entitled. Had the registrar asked Parent to complete the form, the evidence suggests she would have indicated Student received Section 504 services at ***ISD, as she did when she completed the form correctly on March ***, 2013. BCISD would then have contacted ***ISD immediately and obtained records right away.

Again, in January 2013, Respondent failed to take necessary proactive steps when it failed to follow up with ***ISD to get Student's records after not receiving them. The known circumstances surrounding Student's short tenure at BICSD, the pending DAEP placement for ***, Student's failure/inability to attend school, and Student's treatment by *** and ***, should have minimally caused Respondent to ensure that it received Student's records from student's prior school, a requirement of enrollment under Texas Education Code, Section 25.002. Instead, Respondent took no steps to obtain the records until Parent reenrolled Student on March ***, 2013 and indicated that Student had previously received Section 504 services.

In short, following the incident of December ***, 2012, both parties became so focused on the DAEP placement and their respective views about what happened on December ***, 2013, that they failed to collaborate effectively and exchange information that was necessary to ensure Student received the services student needed.

Petitioner met petitioner's burden of proof and established that Respondent failed to exercise its affirmative child find duty with respect to Student when it failed to determine

at enrollment whether Student had received services under IDEA or Section 504, and again in January 2013, when it failed to obtain Student's records from ***ISD. As a result, Student experienced a delay in IDEA referral and receipt of services of two months, from February 1, 2013 until April 4, 2013.

Remedy For Respondent's Child Find Violation

For relief, Petitioner requests compensatory education to place Student in the same position student would be in had Respondent referred student for IDEA evaluation as of the date the Hearing Officer determines that Respondent should have suspected that Student had a disability and need of special education services. Based on the record, I find that date to be on or about in February 1, 2013.

Compensatory relief is available under IDEA as an equitable device to remedy substantive violations of IDEA. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEA requires that relief be designed to ensure that a student is appropriately educated within the meaning of IDEA. Courts favor individualized assessments of the proper amount of compensatory relief owed over rote "hour for hour" determinations. *Reid v. District of Columbia*, 2005 WL 678385 (D.C.Cir. 2005). Determining what compensatory relief is appropriate turns on a consideration of the extent of the denial of services, as well as what services are needed to place a student in the position s/he would have been, but for the denial. The ultimate award must be fact-specific and reasonably calculated to provide the student with educational benefits that would have accrued from the special education services the district should have supplied in the first place. *Reid v. District of Columbia*, 2005 WL 678385 (D.C.Cir. 2005); *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9th Cir. 1994).

The record is clear that Student received four hours of homebound services and thirty minutes of counseling per week when student was offered an IEP by the District following student's referral and evaluation. Petitioner does not challenge the appropriateness of these services, but argues instead that they should have been provided earlier in the spring semester of 2013. Had Student received these services for an additional two months, student would have received thirty-two additional hours of homebound services and four (4) additional hours of counseling.

However, compensatory education is an equitable remedy, subject to equitable considerations. Compensatory education awards have been denied or reduced when mitigating factors relieve school districts from some or all of the responsibility for the denial of a free appropriate public education. *Murphy v. Timberlane Regional School District*, 973 F.2d 13 (1st Cir. 1992); *Parents of Student W. v. Puyallup School District*, 31 F. 3d 1489 (9th Cir. 1994). One such mitigating factor is the parents' failure to provide information needed in order to provide a free appropriate public education.

The facts of this particular case persuade me that the parties are equally responsible for the two-month delay in referring Student for special education evaluation. I find that Parent's failure to communicate Student's needs and history to Respondent at enrollment and again after the December 2012 incident entitles the District to a reduction in the amount of compensatory services owed Student. As discussed previously, Parent cannot fail to provide needed information and then simultaneously complain that District does

not have the information. To reflect Parent's mutual responsibility for the delay in referral for evaluation and provision of services to Student, I am reducing the award of compensatory services by half.

Therefore, I am ordering the District to provide Student with sixteen (16) hours of compensatory 1:1 academic services and two (2) hours of compensatory counseling to place Student in the position student would have been in but for Respondent's failure to timely refer student for evaluation. The compensatory educational services shall be provided in addition to services currently provided to Student pursuant to student's IEP. The services shall be completed by the conclusion of the 2013-2014 school year unless both parties agree to a schedule of services that extends beyond the last day of the 2013-2014 school year.

The District shall convene an ARDC meeting within ten (10) school days of the date of this decision to develop a schedule for the provision of compensatory services, and goals and objectives for the compensatory hours, based on Student's present levels of performance and current academic needs.

II. Whether Respondent Denied Student A FAPE By Failing To Conduct A Psychological Evaluation As Part Of Student's FIE

The Legal Standards For Initial Evaluations And Psychological Evaluations

Procedures governing evaluation under IDEA require Respondent, in relevant part, to ensure that Student is "assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities," 34 C.F.R. § 300.304(c)(4), and that "the evaluation is sufficiently comprehensive to identify all of the child's special education and related service needs..." 34 C.F.R. § 300.304(c)(6).

With respect to consent for psychological examinations, Texas law provides that additional information be provided to a parent to obtain consent for psychological testing "on request of a child's parent." *Texas Education Code*, § 29.0041.

Positions of the Parties

Petitioner argues that a sufficiently comprehensive evaluation of Student in all areas of suspected disability must include a psychological evaluation to consider the presence of an emotional disturbance and any resulting educational needs. Rather than provide a complete evaluation, Respondent relied on Dr. *** OHI form to provide thirty minutes of counseling per week.

Respondent counters that it sought permission from Parent to conduct a psychological evaluation and that Petitioner did not reply with consent. Respondent also represents that it relied on Parent's representation that a psychological had previously been performed by *** (T. 385; Respondent's Closing Brief, Proposed Conclusions of Law #10).

Whether Respondent Should Have Completed A Psychological Evaluation

The evidence is clear that Respondent had knowledge of Student's need for a psychological evaluation at the time of Student's FIE. Student was receiving homebound services for excessive anxiety, had been recommended as eligible on the basis of OHI for depression by student's psychiatrist, and Parent had provided Respondent with detailed information concerning Student's psychological diagnoses and challenges. Indeed, BCISD's diagnostician recognized the need for a psychological and sought consent from Parent to conduct one. Clearly, IDEA requires that a psychological evaluation was necessary for Student as part of student's FIE in order to comply with the requirements of 34 C.F.R. § 300.304(c).

The District's only credible explanation for its failure to conduct the psychological evaluation is that when asked to provide consent, Parent said she would confer with her attorney and get back to the diagnostician, but she failed to do so. As such, the District proceeded with its FIE without this necessary component. The District's position regarding Parent's alleged lack of consent to complete a psychological is puzzling and does not excuse its failure to comply with its legal obligations regarding evaluation.

First, the Notice of Assessment provided to Parent on 4/4/13 gave notice that Respondent intended to provide a psychological assessment. Parent provided consent on 4/10/13. Thus, it appears from the record that Parent provided appropriate consent at that time for a psychological exam. Evidently, the diagnostician believed that Tex. Educ. Code § 29.0041 applied to this situation and required additional consent from the Parent; however, nothing in the record indicates that the Parent requested additional information to trigger the applicability of 29.0041. Further, if the diagnostician believed it to be applicable, she failed to comply by providing Parent with notice of the name and type of examination or test and an explanation of how the test would be used to develop an appropriate IEP for Student. *29 Tex. Educ. Code § 29.0041.*

Second, assuming the consent provided on 4/10/13 was insufficient, IDEA provides that Respondent must "make reasonable efforts to obtain the informed consent from the parent for an initial evaluation." 34 C.F.R. § 300.300(a)(iii). When Parent did not get back to the diagnostician about the proposed psychological, the diagnostician made no attempt to follow up and seek consent.

The District also argues that it was not obligated to complete a psychological evaluation as part of Student's FIE because it relied on Parent's representation that a psychological had already been completed by ***. This representation is clearly not true, as the record is clear that the BCISD diagnostician searched for and could not locate an evaluation by *** well in advance of completing the FIE. (T. 312). Further, the only evaluation completed by *** was done in 2009 and was not complete or up to date.

In sum, Student's known needs required a psychological evaluation as part of the District's FIE. The record supports that the District had consent from the Parent to conduct the evaluation, but failed to do so. In the alternative, if the District did not have the necessary consent, the record reflects that the District failed to make reasonable efforts to obtain consent by providing additional written Notice of Assessment outlining the proposed testing and following up with Parent to explain the proposed tests. The

District's FIE did not evaluate Student in all areas of suspected disability and was not sufficiently comprehensive to identify all of Student's needs in violation of the requirements of IDEA.

Whether Respondent's Failure To Conduct A Psychological As Part of Student's FIE
Impeded Student's Right To A FAPE

The essence of determining whether a substantive violation of IDEA has occurred is whether the school's program has provided the student with the requisite educational benefit. IDEA does not require an education that maximizes a student's potential; rather, the school must provide an education that is reasonably calculated to enable the child to achieve *some* benefit. *Some* benefit means an educational program that is meaningful and offers more than a *de minimus* educational benefit; it must be "likely to produce progress, not regression or trivial educational advancement." *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997).

Although courts have not adopted a specific substantive standard to determine when a free appropriate public education has been provided, the Fifth Circuit in *Michael F.* identified four factors to consider in analyzing a school's program: 1) is the program individualized and based on the student's assessment and performance; 2) is the program administered in the least restrictive environment; 3) are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) are there demonstrated positive benefits both academically and non-academically to the student.

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

Respondent's failure to abide by the procedural requirements governing evaluation under IDEA and conduct a comprehensive FIE impeded Student's right to a free appropriate public education because student's deficits in the critical areas of emotion and behavior were not fully addressed. Given that Student was receiving student's education in the highly restrictive setting of homebound services because of student's emotional condition of excessive anxiety, it was particularly important for the ARDC to understand Student's emotional and behavioral needs so they could develop an IEP to assist Student in transitioning back into the school environment. The only component of Student's IEP that addressed student's emotional needs was the provision of the related service of thirty minutes of counseling per week. The ARDC had no assessment data to develop meaningful individualized goals or objectives for the counseling and had no basis for selecting the amount of counseling services provided. More significantly, the ARDC did not consider other services that Student might require to receive a free appropriate public education, such as positive behavioral supports, a behavior intervention plan, social skills goals, or other types of individualized instruction. Without assessment data to support the development of Student's IEP, the ARDC failed to develop an IEP that was reasonably calculated to provide Student with a free appropriate public education.

Remedy For Respondent's Failure To Conduct A Psychological

As a remedy for Respondent's failure to conduct a psychological evaluation of Student as part of student's FIE, I am ordering Respondent to conduct a complete psychological evaluation of Student to consider all areas of suspected disability and identify all of Student's special education and related service needs.

III. Whether Respondent Denied Student A FAPE By Failing to Develop Specific Goals and Objective To Address Student's Learning Disabilities

Petitioner argues that Student's May 30, 2013 IEP did not contain specific goals and objectives to address student's learning disabilities, but instead contained only a general objective for passing student's classes with specific accommodations to address student's identified disabilities. Respondent counters that more specific goals and objectives were not warranted because Student was passing all of student's classes and making meaningful academic progress.

The record reflects that Student's IEP was amended to add more specific goals and objectives in September 2013 for the 2013-2014 school year, so that this issue pertains only to services provided during summer 2013. The evidence demonstrates conclusively that Student made meaningful academic progress with the homebound services offered by BCISD during summer 2013. As such, Petitioner failed to prove that any procedural defects with Student's IEP goals and objectives resulted in a deprivation of educational benefit to Student. *34 C.F.R. § 300.504(2)*.

CONCLUSIONS OF LAW

1. Respondent Bishop CISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA and its implementing federal and state regulations. Bishop CISD is Student's resident district under IDEA for all time periods relevant to this action.
2. Student bears the burden of proof on all issues raised in this proceeding. *Schaffer ex. rel. Schaffer v. Weast, 546 U.S. 49 (2005)*.
3. Petitioner established that Respondent failed to timely refer Student for IDEA evaluation as of February 1, 2013. Respondent's failure to timely refer Student for evaluation resulted in a deprivation of educational services to Student for a period of two months. *34 C.F.R. § 300.111; 34 C.F.R. § 300.101*.
4. Petitioner is entitled to compensatory education to remedy the denial of a free appropriate public education and the violation of child find; however, equitable considerations support reducing the award of compensatory education. *Burlington School Committee v. Department of Education, 471 U.S. 359 (1985)*.
5. Petitioner established that Respondent failed to conduct an FIE in accordance with IDEA. Respondent's failure to conduct a psychological evaluation of Student constituted a failure to assess Student in all areas of disability and a failure to conduct an evaluation sufficiently comprehensive to identify all of the child's special education and related service needs. *34 C.F.R. § 300.304(c)(4)(6)*.

6. Respondent's failure to conduct a psychological evaluation of Student impeded Student's right to a free appropriate public education. *34 C.F.R. § 300.513*.
7. Petitioner failed to prove that any procedural defects with Student's IEP goals and objectives resulted in a deprivation of educational benefit to Student. *34 C.F.R. § 300.513*.

ORDER

After due consideration of the record, and the foregoing Findings of Fact and Conclusions of Law, this Hearing Officer hereby **ORDERS** that the relief sought by Petitioner is **GRANTED** as follows:

1. BCISD shall provide Student with sixteen (16) hours of compensatory 1:1 educational services and two (2) hours of compensatory counseling services. The compensatory educational services shall be provided in addition to services currently provided to Student pursuant to student's IEP. The services shall be completed by the conclusion of the 2013-2014 school year unless both parties agree to a schedule of services that extends beyond the last day of the 2013-2014 school year.
2. The District shall convene an ARDC meeting within ten (10) school days of the date of this decision to develop a schedule for the provision of compensatory services, and goals and objectives for the compensatory hours, based on Student's present levels of performance and current academic needs.
3. BCISD shall conduct a complete psychological evaluation of Student to consider all areas of suspected disability and identify all of Student's special education and related service needs. BCISD shall provide Parent with Notice of Assessment and a request for informed consent to conduct the psychological evaluation of Student from Parent within ten (10) school days of the date of this decision. BCISD shall complete the psychological evaluation of Student within forty-five (45) calendar days of the date on which BCISD receives written consent for the evaluation signed by Parent.
4. Following the completion of the psychological evaluation, the District shall promptly convene an ARDC in accordance with IDEA to review the results of the evaluation and develop an IEP to address any identified needs for special education and related services.

It is further **ORDERED** that all other items of relief not specifically awarded herein are **DENIED**.

SIGNED and **ENTERED** this 14th day of January 2014.

Lynn E. Rubinett

Lynn E. Rubinett

Attorney at Law

Special Education Hearing Officer for the State of Texas

STUDENT	§	BEFORE A SPECIAL
BNF PARENT	§	EDUCATION
Petitioner	§	
v.	§	HEARING OFFICER FOR THE
	§	
BISHOP CISD	§	
Respondent	§	
	§	STATE OF TEXAS

SYNOPSIS

Issue: Whether Respondent denied Student a free appropriate public education when it failed to timely evaluate and identify Student as eligible for special education services under IDEA?

Held: For the Student. Petitioner established that Respondent failed to timely refer Student for IDEA evaluation as of February 1, 2013. Respondent's failure to timely refer Student for evaluation resulted in a deprivation of educational services to Student for a period of two months.

Cite: 34 C.F.R. § 300.111; 34 C.F.R. § 300.101.

Issue: Whether Respondent denied Student a free appropriate public education when it failed to conduct a psychological evaluation as part of its FIE of Student?

Held: For the Student. Petitioner established that Respondent failed to conduct an FIE in accordance with IDEA. Respondent's failure to conduct a psychological evaluation of Student constituted a failure to assess Student in all areas of disability and a failure to conduct an evaluation sufficiently comprehensive to identify all of the child's special education and related service needs.

Cite: 34 C.F.R. § 300.304(2).

Issue: Whether Respondent denied Student a free appropriate public education by failing to develop specific goals and objective to address student's learning disabilities?

Held: For Respondent. Petitioner failed to prove that any procedural defects with Student's IEP goals and objectives resulted in a deprivation of educational benefit to Student.

Cite: 34 C.F.R. § 300.513.