

DOCKET NO. 255-SE-0617

STUDENT, B/N/F PARENT and PARENT, Petitioner	§ § § § § § § § §	BEFORE A SPECIAL EDUCATION HEARING OFFICER FOR THE STATE OF TEXAS
v.		
JUDSON INDEPENDENT SCHOOL DISTRICT, Respondent		

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

Petitioner, Student, b/n/f Parent and Parent (“Petitioner” or “Student”) brings this action against the Judson Independent School District (“Respondent” or “District”) under the Individuals with Disabilities Education Act, as amended, 20 U.S.C. § 1401 et. seq (IDEA) and its implementing state and federal regulations. The main issues in this case are whether the District failed to provide a free appropriate public education (FAPE) to Student by failing to design and implement an appropriate Individualized Education Plan (IEP) and related services, and whether the District committed procedural violations related to Admission, Review and Dismissal (ARD) meetings.

A. Legal Representatives

Student was first represented by Lorene Dillard of Dillard Advocacy and Consulting. On July 26, 2017, Ms. Dillard filed a motion to withdraw and on July 27, 2017, Ricky J. Poole of the Law Offices of Ricky J. Poole filed a Notice of Appearance for Student. Mr. Poole represented Student throughout the remainder of the case. The District has been represented throughout this litigation by its legal counsel, John Muniz and Eric Rodriguez of Walsh, Gallegos, Treviño, Russo and Kyle, P.C.

B. Resolution Session and Mediation

The parties met in a resolution session on July 5, 2017, which was unsuccessful. The parties proceeded to mediation on September 20, 2017, but were not successful. Notice of the outcome of mediation was submitted by the parties the following day.

C. Continuances

Six continuances were granted in this case. The first was at the request of both parties to schedule a 2-day hearing and give the parties an opportunity to schedule mediation. The second was at Petitioner's request to allow Petitioner's new attorney to review the case and work with Respondent to schedule mediation. The third continuance was the result of Petitioner's filing of an amended complaint. The fourth and fifth continuances were at the request of both parties to allow for additional discovery related to the new issues raised in the Amended Complaint. The District requested the sixth continuance to avoid holding a hearing on a school holiday. The parties selected a new set of hearing dates by agreement.

D. Preliminary Motions

Two preliminary motions were resolved by written orders from the hearing officer. On September 18, 2017, the hearing officer denied Petitioner's Motion for Stay Put. On January 9, 2018, cross motions for summary judgment on the statute of limitations and affirmative defense were denied.

II. DUE PROCESS HEARING

The due process hearing was conducted on April 2 and 3, 2018. Petitioner continued to be represented by Petitioner's legal counsel, Ricky Poole. Student's parents, *** and ***, also attended the hearing. Respondent continued to be represented by its legal counsel, John Muniz and Eric Rodriguez. In addition, Dr. ***, Director of Special Education for the District, attended

the hearing as the party representative. The hearing was recorded and transcribed by a certified court reporter.

At the conclusion of the hearing, the parties requested the record remain open in order to allow submission of written closing arguments on the issues in the case. Those closing arguments were due on May 11, 2018, at the parties' request. The parties also requested extending the Hearing Officer's decision due date to June 1, 2018, to accommodate the request for review of written closing arguments. The parties then agreed by email on May 9, 2018, to submit closing arguments on May 14, 2018. They also agreed on that date to extend the Hearing Officer's decision due date to June 4, 2018. Their request to extend the closing argument deadline and decision due date was granted for good cause. Both parties submitted closing arguments in a timely manner on May 14, 2018. The decision is due on June 4, 2018.

III. ISSUES

A. Petitioner's Issues

Petitioner submitted the following overall, broad issue: Whether the District failed to provide Student with a FAPE during the 2015-16 and 2016-17 school years, and, specifically:

FAPE:

1. Whether Student failed to make meaningful progress towards mastery of IEP goals and objectives for the 2015-16 and 2016-17 school years and whether the District failed to revise Student's IEP when Student failed to make the progress expected under the March ***, 2015 IEP;
2. Whether the Present Levels of Academic Achievement and Functional Performance (PLAAFPs) used to formulate the March ***, 2015 IEP and to revise that IEP at the October ***, 2015 ARD were not dated or current, and whether the PLAAFPs failed to accurately reflect Student's academic achievement and functional performance – and therefore whether the IEP goals and objectives designed from those PLAAFPs met Student's needs;

3. Whether the District failed to utilize Student's PLAAFPs in formulating IEP goals and objectives for the 2016-17 school year particularly with regard to whether Student needed Extended School Year (ESY) services in the summer of 2017;
4. Whether the District failed to meet Student's needs by failing to address Student's failure of the STAAR-*** exam for the 2014-15 school year at the October ***, 2015 ARD;
5. Whether the District failed to provide Student with an assigned teacher to oversee Student's educational plan from November 2015 to March 2016;
6. Whether the District failed to provide Student with the support of an adequately trained paraprofessional to implement the March ***, 2015 IEP, i.e., a paraprofessional with Assistive Technology (AT) skills, knowledge about technology, and who was ***;

FAPE – RELATED SERVICES:

7. Whether the District failed to provide Student with FAPE during the 2015-16 school year by failing to provide Student with AT as a related service a component of the March ***, 2015 IEP and as revised at the September ***, 2015 ARD and the October ***, 2015 ARD;
8. Whether the District failed to provide Student with *** (***) services as a related service Student needed in order to receive FAPE.

FAPE: FAILURE TO IMPLEMENT:

9. Whether the District failed to provide Student with a FAPE during the 2015-16 school year by failing to provide Student with a properly modified adaptive *** as referenced in the ARD documents of September ***, 2015 and October ***, 2015;
10. Whether the District failed to provide Student with a FAPE during the 2016-17 school year by failing to:
 - Provide Student with occupational therapy (OT), physical therapy (PT), adaptive physical education (adaptive PE), and speech therapy (ST) services as stated in the March ***, 2017 IEP;
 - Provide Student with “****” in the general education setting as stated in the March ***, 2017 IEP;
 - Convene an ARD meeting to address Student's need for ESY in May 2017 as stated in the March ***, 2017 IEP;
 - Convene a meeting between the occupational therapist and Student's parents on or before March ***, 2017, to discuss direct vs. indirect OT services;
 - Provide Student with necessary portals to access Student's AT devices;

- Provide Student with the AT devices Student needed to address Student's *** and communication needs as stated in the March ***, 2017 IEP;
- Provide Student with *** as agreed in the March ***, 2017 IEP; and,
- Follow and implement the services plan for community outings in a timely manner as stated in the March ***, 2017 IEP;

EVALUATION:

11. Whether the District failed to conduct *** evaluations every *** years by a certified *** specialist to determine Student's need for *** services as a related service;

PROCEDURAL RIGHTS:

12. Whether the District violated student and parental procedural rights under the IDEA during the 2015-16 and 2016-17 school years by:
- Failing to convene an ARD in March 2016 to review, revise and implement the IEP for the 2016-17 school year;
 - Failing to have an IEP in place at the beginning of the 2016-17 school year;
 - Failing to provide Student's parents with an opportunity to participate in an annual ARD to develop Student's IEP for the 2016-17 school year;
 - Withholding information from Student's parents by failing to provide Student's parents with Notice of Procedural Safeguards at least once a year during the 2015-16 and 2016-17 school year, upon the filing of a Complaint with the Texas Education Agency (TEA Complaint) on May 13, 2017 and/or upon the filing of the initial Complaint in this case on June ***, 2017;
 - Failing to indicate the outcome of Student's STAAR-*** exam on Student's IEP and failing to inform Student's parents of the option Student could re-take the exam or other options to address any of the deficiencies identified by Student's failure to pass the exam;
 - Whether the "LRE Service Alternatives" section of Student's IEP, as modified at the October ***, 2015 ARD, contained inaccurate and misleading information;
 - Failing to provide Student's parents with notice of its intent to convene an ARD to review and revise Student's March ***, 2015 IEP;
 - Failing to provide Student's parents with a copy of Student's 2016-17 IEP;

- Failing to provide Student's parents with Prior Written Notice (PWN) when the District refused a parental request for a change in the location of Student's placement for the 2016-17 school year from one *** to another closer to Student's home;
- Failing to convene ARD meetings with the requisite personnel in attendance as follows: (i) occupational therapist at the March ***, 2017 ARD; (ii) special education teacher and no Director of Special Education at the May ***, 2017 ARD; and (iii) physical therapist, special education teacher, Director of Special Education, and adaptive PE teacher at the proposed ARD for June ***, 2017;
- Failing to provide Student's parents with the requisite ARD documents, specifically, the consent page excusing the special education teacher and the Director of Special Education from the May ***, 2017 ARD;
- Failing to provide Student's parents with proper and updated IEP progress reports in a timely manner and whether the reports that were provided failed to include appropriate measures of Student's progress;
- Failing to provide Student's parents with an opportunity for parental input in the provision of FAPE when the District made a counter proposal regarding compensatory services;
- Failing to honor a parental request for an educational Power of Attorney (POA) sent to the District on May ***, 2017;

B. Respondent's Legal Position and Additional Issues

The District generally denies the allegations in the Amended Complaint. The District proposes to conduct an updated Full Individual Evaluation (FIE) and seeks parental consent to do so; if Student's parents refuse to consent to the FIE, the District asserts a counterclaim to override the lack of parental consent to conduct the FIE.

IV. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner requests the following items of requested relief:

1. The District reimburse Student's parents for the cost of educational and related services during the summer of 2017;
2. The District provide Student's parents with updated and revised IEP progress reports for each grading period beginning with the 2016-17 school year through the current 2017-18 school year;
3. The District provide Student with compensatory educational services that include the use of appropriate AT devices in an amount equal to the instructional time Student lost as a result of the District's failure to provide Student with appropriate AT supports and devices and based on success measures stated in the March 2017 IEP;
4. The District conduct a new AT evaluation for updated software on Student's iPad;
5. The District conduct an *** therapy evaluation within thirty calendar days of the date of the Hearing Officer's Decision;
6. The District conduct a *** therapy evaluation within thirty calendar days of the date of the hearing officer's Decision;
7. The District provide Student with compensatory educational services beginning on or after Student *** either at home or at school in an amount equal to the instructional time Student was denied FAPE;
8. The District provide Student with a certified teacher to provide Student with tutoring at home to work on IEP goals and objectives during the school year.

B. Respondent's Requested Relief

The District requests the Hearing Officer make findings of fact as to whether Petitioner unreasonably protracted the final resolution of the issues in controversy as stated in 19 Tex. Admin. Code § 89.1185(m)(1)(2).

V. FINDINGS OF FACT

Student's Background

1. Student is a *** year old who has resided and attended public school in the District since Student was a *** student.¹ Student is eligible for special education as a student with Other Health Impairment (OHI), *** (***), *** (***), and Speech Impairment (SI).²
2. Student was ***, ***.³ This condition resulted in multiple, *** disabilities, including developmental delays, a *** ***, and ***.⁴
3. Student has an IQ equivalence of *** and exhibits significant deficits in adaptive behavior in areas such as ***.⁵
4. ***.
5. ***, ***, ***.⁶ Student received homebound services during that time.⁷

Educational History

6. Student began receiving special education and related services at the age of ***. From the time Student was in *** until today, Student has been educated in a *** classroom in the District for all of Student's core academic subjects.⁸
7. Student attended *** from the 2010-11 school year through the 2012-13 school year. Student then attended *** from the 2013-14 school year as a *** grader through the 2015-16 school year, when Student completed *** grade. Since the beginning of the 2016-17 school year, Student has attended ***, ***. Student is currently a student at ***.⁹
8. ARD meetings were conducted for Student each year Student has attended school in the District. Parents received a copy of procedural safeguards at least once in each of the ***, and *** school years.¹⁰

¹ Due Process Hearing Transcript, Page 52 (TR ____).

² Joint Exhibit 18, Page 1 (J____, ____).

³ TR 45-7.

⁴ TR 45-7.

⁵ J21, 8.

⁶ J16, 32-3.

⁷ *Id.*

⁸ TR 51-2.

⁹ TR 51.

¹⁰ J2, 5; J6, 57; J7, 1; J9, 1; J14, 49; J17, 55.

9. Parents filed a request for a due process hearing against the District in March 2007. The parties entered into a settlement agreement that year before going to a due process hearing.¹¹

Student's Qualifying Disabilities and Their Impact on Student's Education

10. The District conducted a Review of Existing Evaluation Data (REED) on March ***, 2015. There were three evaluators who conducted the REED: a Licensed Specialist in School Psychology (LSSP), a physical therapist, and a teacher of ***. There was also a team of 12 other people, including Student's father, who composed the multidisciplinary team that reviewed the evaluation.¹²
11. The REED showed Student continued to qualify for special education and related services as a student with OHI due to ***, ***, ***, and SI.
12. Student is ***. Student uses multiple means of communication in the school setting, including ***, and *** AT devices: ***. The *** is an augmentative communication device.¹³ The *** is programmed with classroom material so Student can understand the material and participate in class.¹⁴ ***, but otherwise needs little redirection to use Student's language abilities and Student's AT devices.¹⁵ Student is dependent on AT to function in the classroom.¹⁶
13. Because Student is ***, Student must rely on ***.¹⁷ While Student has received *** services in the past, the REED did not recommend Student receive those services for Student's ***.¹⁸
14. Since Student was in ***, the District has provided Student a 1:1 paraprofessional to support Student and to help Student access the educational curriculum throughout the day.¹⁹ ***.²⁰ ***,²¹ ***.²² ***.²³

¹¹ TR 93-4

¹² J21.

¹³ TR 157.

¹⁴ J11, 2.

¹⁵ J11, 2-3.

¹⁶ J17, 3.

¹⁷ J21, 4.

¹⁸ J21, 17.

¹⁹ TR 76.

²⁰ TR 281-83.

²¹ TR 283.

²² TR 59

15. The physical therapist recommended that Student need only receive PT services on a consultation basis, but agreed at parental request to continue providing 30 minutes per week of direct services to support Student's adaptive PE goal.²⁴

Student's IEP

16. Student's annual ARD meeting for the 2014-15 school year took place on March ***, 2015. Student's ARD committee met again on September ***, 2015, in order to put homebound services in place after Student's ***. The ARD committee met again on October ***, 2015, so that Student could rejoin the campus environment.²⁵ Student returned to campus on October ***, 2015.²⁶
17. An annual ARD meeting took place on February ***, 2016, with both of Student's parents in attendance. The ARD meeting did not end in consensus, because the parties disagreed over the provision of ESY services and the campus Student would attend for the 2016-17 school year.²⁷ Student had attended *** in the 2015-16 school year, but Student's parents requested Student attend ***, ***.²⁸ The District was not yet certain at the time of the ARD meeting whether *** students in the 2016-17 school year and thus could not promise Student would attend that campus.²⁹
18. The ARD committee did not put a new IEP into place at that time, but left the IEP goals and objectives and the PLAAFP's developed at the 2014-15 annual ARD in effect.³⁰
19. ***. ***.³¹ The District wanted to hold a reconvene ARD only after Student's parents had ***. Consequently, a reconvene ARD was not held during the 2015-16 school year.³²
20. Before the end of the 2015-16 school year, the District had agreed to provide ESY during the summer of 2016 and had transferred Student from *** to *** for the start of the 2016-17 school year.³³

²³ TR 56-7.

²⁴ J21, 7.

²⁵ J16, 32-35.

²⁶ *Id.*

²⁷ TR 64.

²⁸ TR 65.

²⁹ TR 487.

³⁰ J17, 34.

³¹ Respondent's Exhibit 23, page 1 (R___, ___).

³² TR 536-37.

³³ TR 67-8.

21. In September 2016, the parents hired an advocate to help them ensure Student's *** and IEP goals and objectives were appropriate.³⁴
22. The ARD committee reconvened the February 2016 annual ARD meeting on November ***, 2016, where Student's parents were in attendance along with their advocate. The ARD committee also finished the November 2016 meeting without reaching consensus, because the parties both decided a *** therapy assessment should take place before agreeing to a new IEP.³⁵
23. The *** therapy assessment was completed in January 2017. The ARD committee met again on March ***, 2017, where it adopted the *** therapy evaluation, put new PLAAFPs and IEP goals and objectives into place, and reached consensus.³⁶ From the annual ARD in March 2015 until this new IEP was agreed upon in March 2017, the IEP developed at the March 2015 ARD meeting remained in effect.³⁷
24. At the March 2017 ARD meeting, a special education teacher, a general education teacher, a district representative in the form of the campus principal, both Student's parents and their advocate, and the special education program coordinator who can interpret evaluations were all present. A *** Specialist was also present, as were several related services providers.³⁸ Student's parents agreed in writing to excuse the adaptive PE teacher, the occupational therapist, and the *** therapist from participating in the meeting.³⁹
25. The District developed PLAAFPs in the areas of reading, ST, AT, PT, OT, written expression, math, behavior, functional performance, ***, ***, and ***.⁴⁰ The District then used those PLAAFPs to develop new IEP goals and objectives for Student in the areas of ST, *** therapy, adaptive PE, ***, ***, ***, ***, ***, ***, and ***. Each goal developed by the District was measurable and was appropriate to Student's abilities.⁴¹
26. The PLAAFPs showed Student's speech improved from *** to ***.⁴² In written expression, Student developed the ability to ***.⁴³ In PT, over the same two year period, Student was *** and developed the ability to ***.⁴⁴

³⁴ TR 76-9, R22, 1.

³⁵ J17, 34.

³⁶ J17, 34.

³⁷ TR 546; Petitioner's Exhibit 22, page 21 (P____, ____).

³⁸ J22, 38.

³⁹ J17, 36.

⁴⁰ J17, 2-6.

⁴¹ J17, 11-20.

⁴² J13, 2; J17, 2.

⁴³ J13, 3; J17, 3.

⁴⁴ J13, 3; J17, 4.

27. Student was assigned to a special education *** classroom for all of Student's classes, with the exception of receiving adaptive PE, where the *** curriculum was implemented, in the general education setting during the 2016-17 school year.⁴⁵ The IEP also lists all of Student's previous STAAR *** test results and Petitioner did not present evidence as to whether those results were discussed during the March 2017 ARD meeting.⁴⁶
28. In the March 2017 ARD meeting, the ARD committee agreed to provide Student the following related services: *** minutes of direct and *** minutes of indirect OT per grading period; *** minutes weekly and an additional *** minute session in alternating weeks of ST; *** *** minute weekly sessions of Adaptive PE; *** minutes of direct and *** minutes of indirect *** therapy per week; and *** minutes of direct Adaptive PE per week. Student was provided the same AT devices Student had been using previously.⁴⁷ The District did not find *** an appropriate related service, because there were *** limitations that would make its implementation difficult.⁴⁸
29. After the March 2017 ARD meeting, Student's parents were confused about the distinction between direct and indirect services for OT. The occupational therapist reached out to Student's parents to explain the difference, and Student's parents referred the occupational therapist to Petitioner's advocate. Petitioner's advocate failed to follow up with the occupational therapist.⁴⁹
30. Student received Student's IEP accommodation of modified *** consistently in the 2016-17 school year.⁵⁰ Student's 1:1 paraprofessional during the 2016-17 school year was effective, going "above and beyond" what previous paraprofessionals had done in helping Student access the academic curriculum and make progress toward Student's IEP goals.⁵¹ Teachers and paraprofessionals worked appropriately with Student during the 2016-17 school year.⁵²
31. During the 2016-17 school year, progress reports were produced on four separate occasions, tracking Student's progress toward Student's IEP goals and objectives. The reports contained data tracking what percentage of the time Student met the goals set out in Student's IEP. They also contained narrative commentary, providing anecdotal evidence of Student's progress.⁵³

⁴⁵ J17, 28.

⁴⁶ J17, 6.

⁴⁷ J17, 51.

⁴⁸ J17, 40-1.

⁴⁹ R9, 3.

⁵⁰ TR 261.

⁵¹ TR 292-93.

⁵² R17, 55.

⁵³ J48.

32. The progress reports showed Student's response time to indicate effective listening utilizing Student's AT devices went from an average of *** to a range between *** during the 2016-17 school year. By the end of the year, Student's longest response time in any given trial was *** faster than Student's average time earlier in the 2016-17 school year.⁵⁴ Student also improved Student's ability during the 2016-17 school year to communicate with Student's peers and staff members.⁵⁵
33. Student began the 2016-17 school year unable to ***.⁵⁶ By the end of the school year, Student was consistently able to ***.⁵⁷ Student similarly increased Student's ability to *** when given verbal prompts, improving from not being able to *** being able to ***.⁵⁸

ESY Services

34. ESY services were not recommended and not provided in the summer of 2015, because the District determined Student did not demonstrate regression.⁵⁹ Student had never previously qualified for ESY.⁶⁰ The ARD committee did not recommend ESY services for the summer of 2016 at the ARD meeting held on October ***, 2015.⁶¹ However, Student did receive ESY in the summer of 2016 in the areas of ST and OT through an agreement between the District and Petitioner.⁶² The District, while lacking specific documentation of regression, was concerned about Student's potential regression over the summer and provided ESY services in Student's home.⁶³
35. The District did not propose providing ESY in the summer of 2017 and Student's parents disagreed with that proposal. The District concluded Student would regress during the summer, but had not gathered the specific data to determine how long it would take Student to recoup skills previously taught.⁶⁴ The parties agreed to schedule a meeting in May 2017 to further discuss the provision of ESY.⁶⁵

⁵⁴ J48, 1.

⁵⁵ J48, 21.

⁵⁶ J48, 20.

⁵⁷ J48, 4.

⁵⁸ J48, 4-5.

⁵⁹ J13, 35.

⁶⁰ J6, 33.

⁶¹ J16, 28.

⁶² TR 68, 465.

⁶³ TR 503.

⁶⁴ R19, 35.

⁶⁵ J17, 28.

36. The parties convened for an ARD meeting May ***, 2017, with Student's parents and their advocate in attendance. At the meeting, the District informed Student's parents the District would not be offering Student ESY in the summer of 2017.⁶⁶ The *** therapy provider had recommended ESY,⁶⁷ but the District declined to offer ESY in any areas. Student's parents proposed that Student receive adaptive PE, *** therapy, PT, AT, ST, and OT at home as part of an ESY program. The ARD committee could not reach consensus at the May 2017 meeting.⁶⁸
37. The District did propose, in lieu of ESY, a "summer program" for 2017 combining compensatory services in adaptive PE with other services. The District proposed providing the program June ***-August ***, 2017. The program proposed by the District offered *** minutes per week of adaptive PE, *** minutes per week of *** therapy, *** minutes per week of OT, *** minutes per week of PT, and *** minutes per week of ST.⁶⁹ The District determined compensatory education was owed in adaptive PE due to ***.⁷⁰ The other services were provided as part of a "summer program," even though the District felt neither compensatory education nor ESY were owed to Student.⁷¹
38. The District proposed an ARD be convened to discuss the proposal in June 2017. Student's parents were out of town, but authorized their advocate to act in their stead through a POA.⁷² Student's parents stated that Student's special education teacher needed to be present for the ARD, but the teacher was not available in June. The ARD meeting did not take place and the program was never implemented. Instead, Student's parents secured outside professionals to provide Student with services during the summer of 2017 at their own expense.⁷³

The Due Process Complaint

39. On June ***, 2017, Petitioner filed a request for a due process hearing through their advocate. The District attempted to settle the dispute in July 2017 by offering compensatory education in the amount of *** minutes of adaptive PE, *** minutes of *** therapy, and *** minutes of OT. Additionally, the District offered to provide *** minute tutoring sessions per week through the 2017-18 school year, a third-party consultant to work with all Student's special education teachers, and to revise the District's data reporting system with input from Student's parents.⁷⁴

⁶⁶ TR 82.

⁶⁷ TR 166.

⁶⁸ J18, 36-7.

⁶⁹ P17.

⁷⁰ J18, 36.

⁷¹ *Id.*

⁷² TR 84.

⁷³ TR 83-4.

⁷⁴ R24.

40. The District made additional settlement offers in September 2017 after Petitioner had secured the services of an attorney and in December 2017. Petitioner did not accept any of the District's settlement offers. Petitioner rejected the settlement offers, because Petitioner felt the services and attorneys' fees offered were inadequate.⁷⁵

VI. STATUTE OF LIMITATIONS

A. Statute of Limitations Rules

Petitioner filed a Request for an Impartial Due Process Hearing on June 20, 2017. In Texas, the Petitioner must request a hearing within one year of the date Petitioner "knew or should have known" about the alleged action that serves as the basis for the complaint. 19 Tex. Admin. Code § 89.1151(c). The one year statute of limitations rule does not apply to a parent if the parent was prevented from filing a due process complaint due to:

- (1) Specific misrepresentations by the District that it had resolved the problem forming the basis of the due process complaint; or
- (2) The District's withholding of information from the parent that it was required to provide under IDEA. 19 Tex. Admin. Code § 89.1151(d).

The IDEA limitations period "is not subject to equitable tolling." *Wood v Katy Indep. Sch. Dist.*, 163 F.Supp.3d 396, 409 (S.D. Tex. 2015). Parents bear the burden of establishing an exception to the one year limitations period. *G.I. v. Lewisville Ind. Sch. Dist.*, 2013 U.S. Dist. LEXIS 120156 (E.D. Tex. 2013).

B. Withholding Exception

Petitioner raises the second exception to the statute of limitations rule. Petitioner asserts the school's failure to provide them with the notice of procedural safeguards during the 2015-16 school year prevented Petitioner from filing for due process in a timely manner.⁷⁶

⁷⁵ TR 136-38.

⁷⁶ P's Closing Argument, 4-5.

A copy of the procedural safeguards “must be given to the parents [of a child with a disability] only one time a school year.” 34 C.F.R. § 300.504(a). Receipt of the procedural safeguards indicates the parent “knew or should have known” of the alleged action that serves as the basis for the request. *El Paso Independent School Dist. v Richard R.*, 567 F. Supp. 2d 918, 945 (W.D. Tex. 2008) (“When a local educational agency delivers a copy of IDEA procedural safeguards to parents, the statute of limitations for IDEA violations commence without disturbance. Regardless of whether parents later examine the text of these safeguards to acquire actual knowledge, that simple act suffices to impute upon them constructive knowledge of their various rights under the IDEA”).

The record shows that, at least since the *** school year, Petitioner has received a copy of the notice of procedural safeguards every year Student has been receiving special education and related services from the District.

Although Student’s father testified that he did not recall receiving a copy of the procedural safeguards during the 2015-16 school year, he also acknowledged in that same testimony that he and his wife generally did not pay attention to the documents provided to them at ARD meetings and did not specifically recall receiving the procedural safeguards in any academic year prior to 2015-16, even though he was confident the procedural safeguards had been provided annually in prior years.⁷⁷

Finally, the record shows Petitioner could not have been “prevented” from filing a request for a due process hearing, because Petitioner had previously filed a request for an impartial due process hearing in 2007. Thus, Petitioner had knowledge of how to file for a due process hearing and was not “prevented” from doing so in a timely manner by any alleged failure of the District in providing procedural safeguards.

C. Conclusion

⁷⁷ TR 136-38.

The Hearing Officer finds Petitioner did not meet their burden of proving the District withheld information and thus prevented Petitioner from filing a request for a due process hearing as an exception to the one year statute of limitations. The record shows the District provided Petitioner with procedural safeguards at least one time per school year since the *** school year. Petitioner also knew how to file a request for a due process hearing, having done so previously. Therefore, the one year statute of limitations applies to this case and Petitioner's claims are limited only to those that arose within one year from the filing of this request for a due process hearing.

VII. DISCUSSION

A. Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d). Under IDEA, the school district has a duty to provide a FAPE to all children with disabilities residing within its jurisdictional boundaries between the ages of 3 and 21. 34 C.F.R. § 300.101(a). The evidence showed Student was a child with a disability residing within the jurisdiction of the District and thus the District had the duty to serve Student under IDEA.

A FAPE consists of special education, related services and specially designed personalized instruction with sufficient support services to meet the unique needs of the child in order to receive an educational benefit. The instruction and services must be provided at public expense and comport with the child's IEP. 20 U.S.C. § 1401(9); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982).

B. IEP

In meeting the obligation to provide a FAPE, the school district must have in effect an IEP for each child with a disability at the beginning of each school year. An IEP is more than simply a written statement of annual goals and objectives and how they will be measured. Instead, a child's IEP must include a description of the related services, supplementary supports and services, the instructional arrangement, program modifications, supports for school personnel, designated staff to provide the services, and, the duration and frequency of the services and the location where the services will be provided. 34 C.F.R. §§ 300.22, 300.323(a). The instruction and services must be provided at public expense and comport with the child's IEP. 20 U.S.C. § 1401(9); *Rowley*, 458 U.S. 176, 188-189, 200-201, 203-204 (1982). While the IDEA guarantees only a "basic floor of opportunity," the IEP must nevertheless be specifically designed to meet Student's unique needs, supported by services that permit Student to benefit from the instruction. *Rowley*, 458 U.S. at 188-189.

From the annual ARD in March 2015 until the annual ARD in March 2017, the evidence shows no ARD meeting ended in consensus. Petitioner argues, because of this, that no IEP was in effect from March 2016-March 2017. Additionally, Petitioner asserts Student failed to make progress toward Student's IEP goals and objectives during the 2016-17 school year and that the IEP was not appropriate for Student.

C. FAPE

In Texas, the Fifth Circuit has articulated a four-factor test to determine whether a school district's program meets IDEA requirements. Those factors are:

- The program is individualized on the basis of the student's assessment and performance;
- The program is administered in the least restrictive environment;
- The services are provided in a coordinated, collaborative manner by the "key" stakeholders; and,
- Positive academic and non-academic benefits are demonstrated.

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997).

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. See *Richardson Indep. Sch. Dist. v. Leah Z.*, 580 F.3d 286, 294 (5th Cir. 2009).

1. Individualized on the basis of assessment and performance

Under the first of the *Michael F.* factors, the IEP was not individualized on the basis of assessment and performance. Student's IEP remained unchanged during a two-year period from March 2015-March 2017 in which Student made progress in several areas. In March 2015, Student was ***, but by March 2017 Student was ***. Student also developed, among other indicators of progress, an increased ability to *** during that period and learned ***. Yet, at no point during that two year period did the District modify the IEP to reflect any progress Student was making.

IEPs must be reviewed no less than "annually." 34 C.F.R. § 300.324(b)(1)(i). They must include a set of measurable "annual" goals and objectives. 34 C.F.R. § 300.320(a)(2)(i). While Respondent held ARD meetings in February 2016 and November 2016 to review the IEP, it made no updates to the PLAAFPs or to the annual goals and objectives.

2. Administered in the least restrictive environment

The IDEA requires that students with disabilities be educated in general education settings with nondisabled students to the maximum extent appropriate. The IDEA has a strong preference in favor of educating students with disabilities in general education settings with their nondisabled peers. However, if a school district cannot satisfactorily educate a student with a disability in the general education setting, then the school district may remove the student from the general education setting and place the student in special education classes. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a)(1)(2)(i-ii). This requirement of the IDEA is referred to as a

school district's obligation to educate a student in the LRE. *Id.*

While Student spent little time in a general education setting, Student received all services in Student's least restrictive environment. Given the nature of Student's disabilities, neither party disputed the appropriateness of Student's placement in primarily a *** classroom on a regular *** campus with access to the general education curriculum for adaptive PE.

3. Services provided in coordinated, collaborative manner

In this case, services were provided in a coordinated, collaborative manner. Student's parents have attended every ARD meeting throughout Student's time in the District. During the 2016-17 school year, they attended three ARD meetings with their advocate. Outside of ARD meetings, Petitioner was frequently in contact with the District's relevant staff members, either through their advocate or directly, about services for Student. The District responded to Petitioner's frequent communications and requests in a timely manner.

Although the District erred in not implementing an updated IEP following the February 2016 ARD meeting, it is reasonable to infer from the evidence that the error was the result of efforts to coordinate and collaborate with Student's parents and their advocate. The February 2016 ARD meeting did not reach consensus. The District attempted to reconvene, but Student's parents did not *** until July 2016. The District wanted an opportunity to have a meeting where Parents ***. Student's parents agreed with the District's delay in scheduling an ARD until November 2016.

In the absence of an additional ARD, the District complied with Student's parents' requests for ESY services in the summer of 2016 and for Student's transfer to *** before the start of the 2016-17 school year. When an ARD was eventually held in November 2016, Student's parents requested a *** therapy evaluation and would not agree to a revised IEP until the evaluation was completed. The District complied and completed a *** therapy evaluation in January 2017, which was then adopted in March 2017 at the annual ARD. At all relevant times, the District was obtaining the input and consent of Student's parents before implementing services for Student.

4. Positive academic and non-academic benefits are demonstrated

Finally, and most importantly, the evidence shows Student made progress during the 2016-17 school year. Student made significant progress with Student's communication device, which helped Student communicate with peers and access the curriculum more effectively. Student made improvements in every area from 2015 to 2017 according to the PLAAFPs. Even Student's ***, testified that, while she had substantial concerns about Student's program and progress during the 2015-16 school year, she had no concerns about Student's program and progress during the 2016-17 school year.

Student's progress reports from the 2016-17 school year similarly show more than *de minimis* improvement in several key areas related to Student's communication and comprehension. Student improved Student's ability to communicate with Student's peers during the 2016-17 school year, which gave Student the non-academic benefit of forming relationships with peers and staff. Student's teachers and paraprofessionals were able to provide Student with an environment in which Student could make progress.

5. Conclusion

Student made more than *de minimis* progress in Student's LRE with the full participation of Student's parents and a supportive group of providers in the school setting. The District erred by failing to revise Student's IEP from March 2015-March 2017. While the District was seeking consensus, it still had a responsibility to implement a new IEP. However, Student's progress in Student's LRE with services provided in a collaborative manner outweighs the District's error. In the end, "the whole educational experience, and its adaptation to confer 'benefits' on the child, is the ultimate statutory goal" of the IDEA. *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 397 (5th Cir. 2012). In this case, the educational program conferred "benefits" on Student, as shown primarily by the progress Student made in several key areas during the 2016-17 school year.

The supportive home environment and the outside services provided by Student's parents contributed to Student's progress. Student's parents are attentive to Student's needs and provide *** to assist Student with ***. It is impossible to determine with accuracy how much of Student's progress is due to Student's supportive parents and how much is due to the support Student receives in the District. What the evidence does show is that Student made more than *de minimis* progress and the District provided Student a FAPE in the 2016-17 school year.

D. ESY

In Texas, the need for ESY is based on the likelihood a Student will regress and not be able to recoup the skills lost in a reasonable amount of time in one or more critical areas. 19 Tex. Admin. Code § 89.1065. However, a formal assessment of regression is not required in order to provide ESY services. An actual showing of documented regression is not required if a student can be reasonably expected to exhibit regression. *S.H. ex. Rel. A.H. v. Plano Indep. Sch. Dist.*, 487 Fed.Appx. 850, 866 (5th Cir. 2012).

In this case, Student had benefited from ESY services in the summer of 2016. The District had expressed concern Student would regress in several areas during the summer of 2017. A *** therapist had recommended Student receive ESY services in *** therapy to prevent regression. The District should have offered Student ESY services in the summer of 2017 even in the absence of some sort of formal assessment.

Although the District should have provided Student with ESY, the District did offer to provide Student with a "summer program" and compensatory services. The services in five different areas the District offered to provide during the summer of 2017 as part of the "summer program" were more robust than those offered to Student in the summer of 2016 ESY program, when the District only provided ESY in OT and ST. Only a portion the adaptive PE sessions were considered compensatory by the District in the summer of 2017. The other services in four other areas were offered as part of a summer program to prevent regression. Whether the program was a "summer program" or "ESY" is a matter of semantics. The District offered Student an opportunity for programming from June 12 - August 4, 2017, to address potential regression, and Petitioner did

not accept the offer.

E. Failure to implement the IEP

Petitioner asserts eight ways in which Respondent failed to implement Student's IEP. Specifically, Petitioner alleges the District failed to:

1. Provide Student with OT, PT, adaptive PE, and ST services as stated in the March *, 2017 IEP**

Evidence showed the District provided all services required under the IEP for Student with the exception of two adaptive PE classes cancelled ***. The District offered compensatory education for the cancelled adaptive PE classes. The District complied with its obligation to implement the IEP fully.

2. Provide Student with "**" in the general education setting as stated in the March ***, 2017 IEP**

The District provided the "****" curriculum in Student's adaptive PE class, which was provided in a general education setting at all relevant times.

3. Convene an ARD meeting to address Student's need for ESY in May 2017 as stated in the March *, 2017 IEP**

The District held an ARD meeting on May ***, 2017, in order to discuss ESY for the summer of 2017. All required personnel were in attendance, including Student's parents and their advocate. The ARD meeting ended in disagreement.

4. Convene a meeting between the occupational therapist and Student's parents on or before March *, 2017, to discuss direct vs. indirect OT services**

The occupational therapist reached out to Petitioner, who referred the occupational therapist

to Petitioner's advocate. Petitioner's advocate failed to follow up.

5. Provide Student with necessary portals to access Student's AT devices

Petitioner did not present any evidence related to the "portals" of Student's AT devices. However, evidence did show Student benefited from Student's AT devices and that Student received a FAPE at all relevant times.

6. Provide Student with the AT devices Student needed to address Student's * and communication needs as stated in the March ***, 2017 IEP**

Student received all necessary AT devices in order to obtain FAPE. All devices agreed to on March ***, 2017, were provided to Student.

7. Provide Student with * as agreed in the March ***, 2017 IEP**

During the 2016-17 school year, Student received all of Student's *** in a format Student could access. While there was evidence this did not occur during the 2015-16 school year, any failure to do so during that school year is barred by the statute of limitations.

8. Follow and implement the services plan for * in a timely manner as stated in the March ***, 2017 IEP**

Student began receiving *** therapy on March ***, 2017. After accepting the results of the *** therapy evaluation on March ***, 2017, the District then had to contract with a *** therapy provider and begin the implementation of services. This was accomplished in less than one month, which is a reasonable amount of time.

9. Whether the District failed to provide Student with * services as a related service Student needed in order to receive FAPE and whether the District failed to evaluate Student for *** every *** years.**

Petitioner did not present evidence on Student's need for *** services and the law does not require a reevaluation specifically for *** services every *** years. The 2015 reevaluation did not recommend *** services. The ARD committee felt Student would not benefit from *** services and parents and their advocate agreed with that at the March 2017 ARD meeting. Petitioner failed to establish the District had a further obligation to provide *** services or evaluations.

F. Procedural Violations

In addition to allegations of failures to implement the IEP, Petitioner asserted a number of procedural violations. When allegations of procedural violations are raised, a hearing officer may find a school district denied a student a FAPE if the procedural errors impeded the students right to a FAPE, significantly impeded a parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefit to the student. 34 C.F.R. §300.513(a)(2). It is not enough simply to find a procedural violation. The hearing officer must conduct an inquiry into the impact of the violation of the provision of a FAPE, the right of parents to participate in the decision making process, or the deprivation of educational benefit to the student. *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 68 (3rd Cir. 2010). Specifically, Petitioner accused the District of the following procedural violations:

1. Failing to convene an ARD in March 2016 to review, revise and implement the IEP for the 2016-17 school year

An annual ARD for Student convened on February ***, 2016, before the date on which the annual ARD was due. The ARD did not end in consensus. The ARD committee met for an annual ARD meeting in a timely manner.

2. Failing to have an IEP in place at the beginning of the 2016-17 school year

An IEP was in place at the beginning of the 2016-17 school year. Although the IEP was out of date, there was an IEP in place and Student made progress during the 2016-17 school year.

3. Failing to provide Student's parents with an opportunity to participate in an annual ARD to develop Student's IEP for the 2016-17 school year

Student's parents were present for the annual ARD on February ***, 2016, and agreed to a continuance of that ARD meeting. They were present when the ARD reconvened in November 2016, along with their advocate, and agreed at that time to continue the ARD so a *** therapy evaluation could be completed. They were then present with their advocate when the ARD meeting reconvened again in March 2017 and were present with their advocate for an ARD meeting in May 2017 to discuss ESY. They were given several opportunities to participate in the development of Student's 2016-17 IEP.

4. Withholding information from Student's parents by failing to provide Student's parents with Notice of Procedural Safeguards at least once a year during the 2015-16 and 2016-17 school year, upon the filing of a TEA Complaint on May 13, 2017 and/or upon the filing of the initial Complaint in this case on June *, 2017**

The evidence showed Student's parents received the Notice of Procedural Safeguards each school year beginning in the *** school year, including in the 2015-16 and 2016-17 school years. Petitioner presented no evidence that the District failed to provide a Notice of Procedural Safeguards after the filing of a TEA Complaint or after the filing of the Complaint in this case.

5. Failing to indicate the outcome of Student's STAAR-* exam on Student's IEP and failing to inform Student's parents of the option Student could re-take the exam or other options to address any of the deficiencies identified by Student's failure to pass the exam**

Student's STAAR-*** results are indicated in each IEP. Parents participate in the ARD where STAAR results are reviewed at each annual ARD. Petitioner did not present evidence that parent concerns about the STAAR results were ignored. Most importantly, Petitioner did not prove that results on the STAAR exam impeded Student's ability to receive a FAPE from the District.

6. Failing to provide Student's parents with a copy of Student's 2016-17 IEP

A school district must provide parents a copy of the child's IEP at no cost to the parent. 34 C.F.R. § 300.322(f). Petitioner presented no evidence to demonstrate the District failed to do so.

7. Failing to provide Student's parents with PWN when the District refused a parental request for a change in the location of Student's placement for the 2016-17 school year from one * to another *****

PWN is required any time a school district proposes or refuses a request for a change in a student's educational placement. 34 C.F.R. 300.503(a). At the February 2016 ARD meeting, Student's parents requested Student change Student's educational placement from *** to ***, ***. The District was not sure the *** or be able to offer Student an appropriate instructional setting.

Petitioner presented no evidence the District failed to provide PWN at that time. However, even if the District had failed to provide PWN, Student did attend the *** as requested by Student's parents for the entire 2016-17 school year and Student received a FAPE during that school year.

8. Failing to convene ARD meetings with the requisite personnel in attendance as follows: (i) No occupational therapist at the March *, 2017 ARD; (ii) no special education teacher and no Director of Special Education at the May ***, 2017 ARD; and (iii) no physical therapist, no special education teacher, no Director of Special Education, and no adaptive PE teacher at the proposed ARD for June ***, 2017**

The evidence shows all required personnel were present for all ARD meetings. An ARD meeting requires the following personnel: 1. The parents of the child; 2. A regular education teacher; 3. A special education teacher; 4. A representative of the public agency; and 5. An individual who can interpret evaluation results. 34 C.F.R. § 300.321(a), 19 Tex. Admin. Code 89.1050(c). All of the requisite personnel were either present or available for all ARD meetings. Even if personnel had been missing, Petitioner did not demonstrate the impact of those absences on Student's receipt of a FAPE or Students' parents' ability to participate in the decision making

process.

- 9. Failing to provide Student's parents with the requisite ARD documents, specifically, the consent page excusing the special education teacher and the Director of Special Education from the May ***, 2017 ARD**

Petitioner failed to present evidence to establish that they never received the consent page or that this resulted in deprivation of FAPE or lack of opportunity for parental. However, even if parents had not excused those individuals, all requisite personnel were present for the meeting.

- 10. Failing to provide Student's parents with proper and updated IEP progress reports in a timely manner and whether the reports that were provided failed to include appropriate measures of Student's progress**

Progress reports with quantitative and qualitative data were produced in a timely manner on four separate occasions throughout the 2016-17 school year and provided to parents.

- 11. Failing to provide Student's parents with an opportunity for parental input in the provision of FAPE when the District made a counter proposal regarding compensatory services**

Petitioner did not establish the District refused to allow the parents input into compensatory services or any of Student's programs. While the District maintained that it only owed compensatory services for six adaptive PE classes, the District made four proposals for compensatory services, including one proposal in May 2017 before Petitioner had filed for due process, in an effort to settle the dispute with Student's parents. At each opportunity, Student's parents had an opportunity to give input.

- 12. Failing to honor a parental request for an educational POA sent to the District on May ***, 2017**

The ARD meeting proposed for June 2017 where the parents would be represented by their advocate with a POA never occurred. There was no evidence presented that the ARD meeting did not occur due to the District's failure to honor the POA. Further, refusal to honor a POA is not a violation of IDEA.

G. Whether Petitioner unreasonably protracted the final resolution of the issues in controversy

The ALJ must make a finding of fact regarding whether or not a party has unreasonably protracted the final resolution of the issues in controversy when one party requests it. 19 TAC §89.1185(m)(1). In this case, Respondent requested a finding as to whether Petitioner unreasonably protracted the litigation by rejecting Respondent's settlement offers in May 2017, July 2017, September 2017, and December 2017.

The regulation does not define what constitutes unreasonable protraction. Courts have been hesitant to find a party protracted litigation in the IDEA context. *See, e.g., Ector County Indep. Sch. Dist. v. V.B.*, 420 Fed.Appx. 338, 347-48 (5th Cir. 2011) (finding Petitioner did not unreasonably protract the final resolution despite refusing to attend an ARD meeting where the dispute may have been settled after the filing of litigation).

In this case, Petitioner outlined several reasons for rejecting the four settlement offers from the District. The hearing officer's role cannot be to evaluate a party's litigation strategy or to opine on the wisdom of accepting or rejecting particular offers of settlement. What is clear is that Petitioner took the position that it was entitled to more than Respondent was willing to offer and therefore rejected the settlement offers from Respondent. Therefore, the Hearing Officer cannot conclude that merely rejecting the District's settlement offers constitutes unreasonable protraction of the litigation.

VIII. CONCLUSIONS OF LAW

1. The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F. 2d 127, 131 (5th Cir. 1993).
2. Respondent provided Petitioner with a free, appropriate public education and devised an appropriate IEP for the 2016-17 school year that provided the requisite educational benefit. Petitioner did not meet the burden of proof on this issue. *Andrew F. ex. Rel.*

Joseph F. v. Douglas Cnty. Sch. Dist., supra; Schaffer ex. rel. Schaffer v. Weast, supra; Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., supra.

3. In all other aspects, Respondent complied with student and parental procedural rights under the IDEA. Procedural violations, if any, did not impede Petitioner's right to a free, appropriate public education, significantly impede the parent's opportunity to participate in decision-making regarding the provision of a free, appropriate public education, or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).

IX. ORDERS

Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief are **DENIED**. All other requests for relief not specifically stated in these Orders are hereby **DENIED**.

SIGNED June 4, 2018.



Ian Spechler
Special Education Hearing Officer
For the State of Texas

X. NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 19 Tex. Admin. Code §89.1185(p); Tex. Gov't Code, Sec. 2001.144(a)(b).