
DOCKET NO. 067-SE-1106

B/N/F***&***

PETITIONER

vs. BEFORE A SPECIAL EDUCATION
HEARING OFFICER

EL PASO INDEPENDENT FOR THE STATE OF TEXAS

SCHOOL DISTRICT

RESPONDENT

DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner, acting through his parents as next friend, requested a due process hearing pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400, et seq., as amended. The issues for hearing were as follows:

1. Failure to provide speech therapy services as specified by the student's individualized educational program ("IEP") after August 24, 2004, without disclosure or notice to the student's parents as required by 20 U.S.C. §1415(b)(3), and unknown to the student's parents until October 2006;
2. Denial of a free appropriate public education ("FAPE") and a deprivation of educational benefit for the ***and *** grade years; and,
3. Significantly impeding the parents' opportunity to participate in decision-making process regarding the provision of a FAPE to the student, by a failure to notify the parents of changes made to the student's IEP during his *** grade year (2004-2005).

Petitioner requests the following relief:

1. An order that Respondent make no changes to the student's IEP without proper notice to the student's parents in accordance with 20 U.S.C. §1415(b)(3);

2. Provision of compensatory speech therapy services by Respondent in an amount equal to services not provided to the student during his ***, and *** grade years; and,
3. An order that Respondent convene a meeting of the Admission, Review, and Dismissal Committee (“ARDC”) to develop goals and objectives for compensatory speech therapy services.

HELD, for Petitioner.

Procedural History

Petitioner (“Student”) filed the above-captioned Request for Due Process (“Request”) with the Texas Education Agency on November 7, 2006, and the Hearing Officer received the case assignment on November 9, 2006. The Hearing Officer issued an order on November 10, 2006, setting November 23, 2006, as the apparent statutory resolution-meeting deadline and setting the hearing on December 22, 2006, following the required 30-day resolution period. El Paso ISD (“Respondent” or “EPISD”) did not file an objection to the sufficiency of Petitioner’s Request. The Decision Due Date was set for January 21, 2007. Petitioner filed his First Set of Interrogatories and Request for Production of Documents to EPISD and Motion to Shorten Time for Answering or Objecting to Petitioner’s Interrogatories and Request for Production of Documents (“MTST”) on November 10, 2006. On November 14, 2006, Respondent objected to Petitioner’s interrogatories and MTST. On the same date, Respondent filed a Motion for Continuance, unopposed by Petitioner, granted for good cause shown during the telephonic pre-hearing conference held on November 29, 2006. The revised procedural schedule set the due process hearing for two days on January 10-11, 2007, with the revised Decision Due Date set for February 9, 2007.

On November 29, 2006, Respondent filed its Response to Petitioner’s Request for Due Process Hearing and Prior Written Notice Regarding the Subject Matter of the Complaint, including its assertion of a one-year statute of limitations defense. By written order dated December 29, 2006, the Hearing Officer denied Petitioner’s

interrogatory request as an impermissible discovery method under the Administrative Procedure Act and the Texas Rules of the Commissioner of Education under 19 T.A.C. §89.1180(f), specifying the inspection of identifiable student records be held on school district premises, and allowing the parties to put on limited evidence at the due process hearing of costs associated with discovery in this dispute.

The matter proceeded to an evidentiary hearing on January 10-11, 2007. Prior to beginning Respondent's case on the second hearing day, Respondent made a verbal Motion for Directed Verdict ("Respondents Motion"). As Petitioner objected to the oral form of the Motion, the Hearing Officer granted Respondent leave to file a written Motion, timely filed on January 18, 2007. The record closed upon the timely filing of Respondent's Response to Petitioner's Motion on January 31, 2007. Subsequent to delayed arrival of the hearing transcript and the Hearing Officer's illness, the Parties agreed to extend the Decision Due Date to February 19, 2007. The Decision of the Hearing Officer was issued on February 19, 2007. Based upon the evidence and argument admitted into the record of this proceeding, the Hearing Officer makes the following findings of fact and conclusions of law:

Findings of Fact

Background

1. Petitioner is a *** year-old student who resides with his parents within the jurisdictional boundaries of EPISD. [Transcript ("Tr.") Volume ("Vol.") II at 358].
2. The student is enrolled in the *** grade for the 2006-2007 school year. He entered EPISD in August 2004 as a *** grade student. According to his parents, he previously received speech therapy services in his former school district. Respondent referred the student to special education for a full and individual evaluation ("FIE") on August 24, 2004, temporarily placing the student into special education while Respondent completed academic and speech evaluations of the student. [Respondent's Exhibit ("R.Ex.") 2; Tr.Vol.I at 18].
3. Respondent completed assessment of the student using a variety of testing instruments and data from parents and teachers in October 2004. Based on this data, the student exhibited a severe discrepancy between the student's intelligence

and reading comprehension to qualify him as a student with a Learning Disability (“LD”). The multi-disciplinary team concluded the presence of a mild to moderate receptive language disorder and a moderate expressive language disorder as well as the presence of a Speech Impairment (“SI”). The completed FIE report recommended a resource classroom placement for the student with modifications of the Texas Essential Knowledge and Skills (“TEKS”). [Petitioner’s Exhibit (“P.Ex.”) 2; R.Ex. 3].

4. There is a nation-wide shortage of certified speech therapists impacting Respondent’s current ability to hire sufficient numbers of speech therapists to cover all campuses and student speech therapy needs in EPISD. This situation is compounded further by EPISD’s geographical border location within the state. [Tr.Vol.II at 330-331].

2004-2005 School Year

5. On October 27, 2004, Respondent convened a permanent placement and annual review of the student’s ARDC to review the completed FIE. The student’s parents attended the meeting and all participants agreed to place the student in the general education setting with modifications and supports for Math, Social Studies, and Science, and with a resource classroom setting for reading and written language instruction. The ARDC specified that the student would receive “60 minute weekly” speech therapy for the coming instructional year. The ARDC decided that the Texas Assessment of Academic Skills (“TAAS”) exam was not grade appropriate for the student at that time. [R.Ex. 5].
6. The October 2004 ARDC set one speech goal for the student, “to improve production of speech sounds to improve clarity and intelligibility,” and specified three objectives with mastery levels and completion dates. [R.Ex. 5].
7. The student’s campus principal arrived at the elementary campus in November 2004. The campus principal does not know what happened to the speech services log for the student’s 2004-2005 school year. [Tr.Vol.I at 105].
8. An instructional school year at EPISD consists of 36 weeks or 180 instructional days. [Tr.Vol.I at 89].
9. The student was entitled to receive 36 hours or 2,160 minutes of speech therapy during the 2004-2005 school year. [R.Ex. 5].
10. The student did not receive 1,050 minutes (17.5 hours) of his designated speech therapy during the 2004-2005 school year. [R.Ex. 24; Tr.Vol.I at 283].
11. At no time during the 2004-2005 school year did the ARDC make a determination to reduce the student’s designated 2,160 minutes of speech therapy. [R.Exs. 4 and 5].
12. At hearing, the student’s 2004-2005 speech therapist admitted that the student’s *** grade speech services documentation log covered only the period between August through mid-October 2004, as the speech therapist became burdened by keeping up with documentation at that point in the school year. Instead, the evidence submitted at hearing of the student’s speech sessions after mid-October are limited to attendance documentation, detailed in 15-minute units acceptable for Medicaid documentation of speech sessions¹. Further, the student’s 2004-2005

speech therapist did not recall producing documentation of speech goal and objective mastery during the school year, but believed that notes indicating what the student was doing in speech therapy went home to the student's parents. Although the speech therapist routinely prepared a one-paragraph summary of each student's speech therapy at the end of the year, the therapist does not know if the summary reached the student's next therapist. [R.Ex.24; Tr.Vol.I at 259-262 and 287-290].

¹According to the student's 2004-2005 speech therapist, the units of time represented on the speech therapy attendance sheet covered a range of minutes. For example, one unit represented between eight and 15 minutes, while two units of time represented between 23 and less than 30 minutes.

13. At no time during the 2004-2005 school year did Respondent give written notification to the student's parents that the student did not receive all the speech therapy services designated by the ARDC. [Tr.Vol.II at 352-353 and 362].

2005-2006 School Year

14. On October 11, 2005, the ARDC convened for the student's annual review of his *** grade IEP. The student's father attended this meeting and all participants reached agreement for the student's continued placement in the general education setting with modifications for Social Studies and Science, with a resource setting for Math, English/Language Arts, and Reading. The ARDC set expected mastery levels at the *** grade level for Reading, Spelling, and Writing, with the Math mastery level expectation set as the ability "to complete task in *** grade" level. The ARDC set two weekly 30-minute speech sessions for the student. [R.Ex.7].
15. The October 2005 ARDC agreed that the student should not take the Texas Assessment of Knowledge and Skills ("TAKS") during his *** grade year because he received Texas Essential Knowledge and Skills ("TEKS") instruction below grade level. Instead, the ARDC specified that the student be tested with the State Developed Alternative Assessment ("SDAA") for Reading at 1-III and for Math at 1-II². [R.Ex.7 at 18-19].

²The SDAA-II designation reflects the instructional level tested in the TEKS curriculum and may differ from the grade in which the student is

- enrolled. For example, 1-II represents *developing* whereas 1-III represents *proficient* knowledge and skills related to the TEKS at this instructional level.
16. The October 2005 ARDC specified the student's 2005-2006 speech goal to increase the student's receptive and expressive language skills with 80% mastery of seven objectives. [R.Ex.7 at 11].
 17. Respondent's October 2005 ARDC meeting documentation does not include minutes detailing review of the student's grades or progress as the ARDC developed the student's academic and speech goals for 2005-2006. [R.Ex. 7; Tr.Vol.I at 233-234].
 18. The student was entitled to receive 32 hours or 1,920 of speech therapy during the 2005-2006 school year. [R.Ex.7; Tr.Vol.I at 230].
 19. The student did not receive 570 minutes (9.5 hours) of his designated speech therapy during the 2005-2006 school year. [R.Ex.25; Tr.Vol.I at 120].
 20. At no time during the 2005-2006 school year did the ARDC determine that the student's designated 1,920 minutes of speech therapy should be reduced. [R.Ex. 7].
 21. At hearing, the student's 2005-2006 speech therapist confirmed that the parents did not received written notification of the deficit speech services given to the student for his *** grade year. Although the speech therapist kept an observation chart for each speech session to assist with "paperwork" completion concerning the therapist's work with the student and the student's progress, the speech therapist did not keep the chart, does not know what happened to it, and does not recall handing the student's observation chart to any EPISD administrator upon leaving the district at the end of the school year. The 2005-2006 speech therapist admitted that the student's speech therapy observation chart consisted of tests or measurements of how well the student progressed toward

- mastery of his speech goal and objectives. [R.Ex. 25; Tr.Vol.I at 230 and 249-250].
22. In the Spring 2006 semester, the student met the ARDC expectations on the SDAA-II in Reading at level *** and exceeded expectations in Math by reaching level ***. [P.Ex.3; Tr.Vol.I at 148-149].

2006-2007 School Year

23. The student had the same special education teacher during his *** and *** grade years. The teacher administered portions of the Elementary Reading CLASS test at the *** grade level and portions of the CLASS Plus *** grade level Math test to the student on August 14, 2006, and was of the opinion that the student had mastered Reading at the *** grade level and was working at, but had not mastered, the *** grade level for Math. The teacher conceded at hearing that the teacher administered only a partial Class Plus Reading test and could not determine whether the student had met *** grade reading skills³. [P.Exs. 11 and 12; Tr.Vol.II at 493-494, 559-563, and 569-570].

³The CLASS Plus test for Math and the Elementary Reading CLASS test are curriculum-based tests

24. The student's special education teacher did not administer any written language evaluation of the student in August 2006 for comparison with the teacher's previous administration of an Elementary Written Language CLASS Plus test at the *** grade level on September 2, 2005. [P.10; Tr.Vol.II at 514, 521, and 568].
25. As the student began his *** grade year in August 2006, his elementary campus did not have a speech therapist. Five weeks after the school year began, on September 25, 2006, the student's elementary campus principal contacted the EPISD Associate Superintendent for Special Education via E-mail transmission to inform EPISD administrative staff

about the speech therapy problem that impacted approximately 22 students on the campus. In response, the EPISD Associate Superintendent for Special Education informed the campus principal that Respondent "...with our attorney, [are] drafting a letter to parents to advise them that speech therapy will be offered during the summer for campuses not serviced during the school year." [R.Ex. 28; Tr.Vol.I at 131 and Tr.Vol.II at 331-332].

26. On September 26, 2006, Respondent gave notice of an ARDC meeting set for October 10, 2006. Respondent's notification to the parents of the meeting specified the need for an annual ARDC meeting and indicated discussion would include "Audiological Services, Speech Therapy" with options considered prior to convening the meeting as "Speech Therapy AI Services" and counseling "At Risk" services. Individuals invited to the meeting included a speech therapist and an "AI Teacher."⁴ The parent signed the notice on September 26, 2006. [R.Ex. 8]

⁴The notice did not define the abbreviation "AI," but in context presumably the designation is for "auditory impairment."

27. On October 5, 2006, the EPISD Superintendent sent a letter addressed to parents identified by the EPISD Special Education staff whose students were impacted by the "shortage of speech language pathologists" that included the following:

In an effort to provide services stipulated in the students' Individualized Education Plans (IEP), the District would like to inform you that compensatory services for sessions missed resulting from the prolonged absence or unavailability of service providers will be offered to students affected by this circumstance. Campuses affected by this shortage during the 2006-07 school year will convene Admission, Review and Dismissal (ARD) meetings to determine compensatory services due your child. ARD committees will identify the frequency and duration of these services as stipulated in your child's current IEP and will provide these services in an appropriate manner once providers are obtained. Options that ARD

committees may consider include offering additional sessions during the school day, after-school sessions, or speech camps during the summer.

This letter did not give further details about which campuses had been impacted, nor did the letter specifically state that the student had not received any speech therapy services for the 2006-2007 school year. [R.Ex. 12].

28. At hearing, both the Respondent's party representative and student's campus principal testified that parents on campuses affected by the speech language pathologist shortage received the superintendent's letter dated October 5, 2006, including the parent of approximately 22 students impacted at the student's campus. [Tr.Vol.I at 128-129 and Vol.II at 336-338].
29. The student's parents did not receive the notification letter from the EPISD Superintendent until four days after the ARDC meeting for the student on October 10, 2006. [R.Ex. 12 at 2; Tr.Vol.I at 79-83].
30. The student's annual ARDC convened as scheduled on October 10, 2006. The student's special education teacher, general education teacher, the diagnostician serving the student's campus, and campus principal recall that the student's father attended the ARDC meeting and was verbally told that the student was not receiving speech services at the current time but would begin receiving services as soon as the campus got a speech therapist. [R.Exs. 9 and 10; Tr.Vol.I at 139 and Vol.II at 503-504, 458, and 548-549].
31. Minutes of the ARDC meeting on October 10, 2006, recorded by the EPISD diagnostician that attended the meeting, are recorded in a "draft" version and a final computer-generated version due to computer problems at the time of the meeting. There are differences between the two documents including a signature of the father in the "draft" version that is represented by a typed notation in the final copy. Additionally, the mastery

- level for English/Language Arts, Reading/Cognitive Communication Skills Development, and Math goals are listed as “**** and early *** grade” level in the hand-written documents but are listed as only “**** grade” in the final computer-generated version. [R.Exs. 9 and 10; Tr.Vol.II at 469-478].
32. The student’s father denies that he participated in person in the ARDC held on October 10, 2006, as he had an emergency medical appointment out-of-town at that time and was unable to be “two places at once.” He does not believe that his signature on the hand-written ARDC documentation is valid. [R.Ex. 9 at 16; Tr.Vol.II at 363-364].
33. The student’s special education teacher participated in the ARDC meeting on October 10, 2006. At hearing, the teacher recalled a verbal explanation during this ARDC from the diagnostician for the father that there was no speech therapist available, but that the student would get all the speech services “as soon as we got one.” The special education teacher informed the student’s father during the ARDC meeting that the student was doing well academically and making good grades. The teacher also discussed which TEKS the teacher currently used to instruct the student. [Tr.Vol.II at 502-504].
34. The student’s 2006-2007 speech goals from the ARDC meeting on October 10, 2006, state “continue goals/objectives 10/10/06 to 10/10/07.” [R.Exs. 9 and 10; Tr.Vol.I at 72-77].
35. The ARDC determined that the student would receive 1,920 minutes (32 hours) of speech services for the 2006-2007 school year. [R.Ex. 10 at 18].
36. At hearing, the student’s special education teacher clarified that there was additional testing of the student’s performance in the teacher’s possession, including testing presented to the ARDC committee in October 2006. This testing is not a part of the record evidence disclosed in this proceeding. [Tr.Vol.II at 585-586].
37. On October 26, 2006, the father participated in a teacher conference held at the request of the student’s special education teacher. The special

education teacher and the student's father concluded the meeting in the campus principal's office. At hearing, the campus principal described the father's behavior as threatening to the special education teacher and recalled the father stated that he planned to withdraw the student. After further discussion about where the father planned to enroll the student, the father agreed to leave the student at his current campus but requested a different teacher. The campus principal detailed options for the student: a) remaining with his special education teacher; b) participation in the "PUSH IN" program in general education classes with extra academic support; c) transferring the student to a nearby school; or, d) placement in a behavior intervention class ("BIC") for Reading, Math, and Language Arts. [R.Ex. 18; Tr.Vol.II at 421].

38. At hearing, the student's father described his dissatisfaction with the student's special education teacher, including an allegation that the teacher refused to let the student go to the restroom. According to the student's father, the student is on medication for Attention Deficit Disorder/ Attention Deficit Hyperactivity Disorder that results in an increased need to use the restroom. [Tr.Vol.II at 375-376].
39. The student's father did not recall the date he wrote out a complaint against the special education teacher but knows that it was during the Fall 2006 semester. The written complaint asks that the student be removed from the special education teacher's classroom and states, "The EPISD is supposed to provide transportation to another school for speech therapy. Half of the school [year is] almost gone and still no speech therapy." At hearing, the student's father explained that he understood that the school district could transport the student to another school for speech therapy and return the student back to his current campus. [R.Ex. 17; Tr.Vol.II at 378-380].
40. On October 27, 2006, the student's father participated in an ARDC meeting held at his request to discuss the possibility of a change of

- placement for the student. The student's father signed the waiver of notice dated October 27, 2006, adding that his signature "is to verify that I was here for meeting – didn't agree with anything discussed." Although the student's father signed a written request for a change of placement into a BIC classroom on the same date, he did not agree to a change of placement at the end of the ARDC meeting. The ARDC made plans to reconvene on November 3, 2006. [R.Exs. 13 and 21].
41. After the ARDC meeting of October 27, 2006, the student remained in his current resource placement with his special education teacher. [Tr.Vol.II at 418].
 42. The ARDC sent out notice to reconvene the October 27, 2006, ARDC meeting on November 3, 2006. The parent did not sign and return the notice, instead filing this Request four days later on November 7, 2006. [R.Ex. 26 at 17; Pleading file].
 43. The student's parents were not notified that the student would be receiving no speech therapy services under his current IEP beginning August through October 10, 2006. [Tr.Vol.I at 137-140].
 44. Respondent admits that Petitioner did not receive all the speech therapy services due the student during the 2004-2005, 2005-2006, and 2006-2007 school years. [R.Ex. 26; Tr.Vol.I at 228 and 286, and Vol.II at 327 and 344; Pleading File].
 45. Respondent's Associate Superintendent for Special Education admitted at hearing that "[a]ny loss of speech therapy is significant." [Tr.Vol.II at 327].
 46. The student's campus principal testified at hearing that the speech therapy shortage of approximately 600 minutes in the 2005-2006 was "substantial." [Tr.Vol.I at 121].
 47. Respondent's Response to Petitioner's Request for Due Process Hearing and Prior Written Notice Regarding the Subject Matter of the Complaint included an offer of 37 hours of compensatory time to the student to address 13 hours of missed speech during Fall 2006, 9.5 hours for the

- 2005-2006 school year, and 14.5 hours for the 2004-2005 school year.
[R.Ex. 26 at 3].
48. As of the close of the record evidence in this proceeding, Petitioner did not accept Respondent's offer of November 29, 2006.
49. On December 8, 2006, Respondent offered some compensatory services for missing 2006-2007 speech therapy services in the form of a Saturday speech camp on December 16, 2006, to recoup four hours of speech therapy services. [R.Ex. 27; Tr.Vol.I at 129 and Vol.II at 306].
50. The student's father did not accept the offer of speech camp in December 2006, because it interfered with the student's and parent's quality time. [Tr.Vol.II at 369].
51. Respondent did not notify the student's parents that the student could be transferred to another school in order to begin receiving speech therapy services. [Tr.Vol.II at 306-308].
52. During the first nine-week grading period of the 2006-2007 school year, the student received the following grades in his resource placement: Reading – ***; Language Arts – ***; and, Mathematics –***. In his general education classes, the student received the following grades: Social Studies –***; and, Science –***. The student's general education teacher clarified at hearing that instruction in his general education classes was with modifications, reflecting the student's achievement at the *** rather than the *** grade level. [R.Ex. 32; Tr.Vol.II at 589].⁵

⁵The range for a "D" (passing grade) average ranges between 70 and 74, a "C" grade represents an average between 75 to 79, and a "B" grade represents an average between 80 and 89.

53. The student's special education teacher did not administer the CLASS Elementary Written Language test to the student in August 2006, and did not administer other testing to determine whether the student mastered second-grade level reading objectives on the TEKS, such as word attack

- skills, ability to read aloud unfamiliar passages, and ability to read grade-level words using syntax and context from random lists. [Tr.Vol.II at 575-578].
54. Because the student finished the *** grade level spelling book in 2005-2006, the student's special education teacher began the 2006-2007 school year with a ***-grade level spelling text. Based on the student's performance on spelling tests, the special education teacher believed that the student was spelling and writing at a *** grade level by October 2006. [P.Exs. 13 and 14; Tr.Vol.II at 571-573].
55. According to the student's campus principal, speech service logs are not kept in the student's eligibility folder, but instead are maintained by the provider of the service. The student's parents did not get access to the student's speech therapy logs for his *** grade year (2004-2005) and *** grade year (2005-2006) until Respondent was ordered to disclose the documents by written order in this proceeding on December 29, 2006. Prior to that time, Petitioner was unable to determine what the speech therapy deficits were for the student's *** and *** grade years. [Tr.Vol.I at 121-122; Pleading file].
56. At hearing, the special education teacher had not completed administration of the CLASS Plus test to the student to determine his grade level performance. In the teacher's opinion, the student functioned at a *** grade, early *** grade level. [Tr.Vol.II at 502-503].
57. The student received no speech therapy services in 2006-2007 through the date of the due process hearing. At hearing, the EPISD Executive Director of Special Education Compliance agreed that the student had missed 19 weeks or 1,140 minutes (19 hours) of speech services of the speech therapy services due the student for 2006-2007. [Tr.Vol.I at 87-90].

Discussion

Background

This proceeding concerns the amount of speech therapy Respondent failed to provide the student under his IEP, whether the student is entitled to receive compensatory services for missed speech therapy services, and if so, for what time period of the omitted services. Respondent believes that its offer to provide 37 hours of compensatory services to the student in response to this Request more than compensated the student for missed speech services and exceeded the amount due to the student under the applicable statute of limitations period of one year. [R.Ex. 26]. By contrast, Petitioner argues that Respondent did not disclose the student's speech therapy deficit for his *** grade year in 2006-2007 to the student's parents until October 2006, and did not get notice from Respondent of the speech therapy deficits for the student's *** and *** grade years, the 2004-2005 and 2005-2006 school years, until November 2006 when Respondent admitted the deficits to Petitioner. Even after this admission, Petitioner argues that the student's parents did not have access to the speech therapy service logs until this Hearing Officer ordered Respondent's production of the logs to Petitioner, so that Petitioner was unable to calculate the precise amount of missing compensatory time.

The educational program proposed by the school district is presumed appropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir.1983) *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984). The party attacking the appropriateness of a school district's educational program bears the legal burden of proving why the IEP and resulting placements were inappropriate under IDEA. *Schaffer v. Weast*, 156 S.Ct. 528, 44 IDELR 150 (2005); *Cypress-Fairbanks*, *supra*. Here, Petitioner has the burden to prove that Respondent's educational program for the student was inappropriate. Petitioner met his burden.

Statute of Limitations

The Texas Education Agency received and docketed Petitioner's Request on November 7, 2006. Respondent plead the affirmative defense that a one-year statute of limitations applies in this dispute when Respondent filed its Response

to Petitioner's Request for Due Process Hearing and Prior Written Notice Regarding the Subject Matter of the Complaint on November 29, 2006. Respondent argues that all claims outside the one-year limitations period under 19 T.A.C. §89.1151(c) should be barred, thus precluding any recovery for missing speech services that occurred prior to November 7, 2005. Petitioner argues that a one-year limitations period should not apply in this dispute because not only did Respondent fail to notify the parents of the lack of speech therapy services as required by 20 U.S.C. §1415(b)(3), but the changes to the speech services for the student were "kept secret" from the student's parents and only with the father's diligence in Fall 2006, was Petitioner able to discover the school district's omitted speech therapy services and ultimately quantify the amount of the deficit, arguing that the doctrine of "fraudulent concealment" is applicable in addition to the "discovery rule."

The Individuals with Disabilities Education Improvement Act of 2004 added a federal statute of limitations for due process hearings under IDEA:

A parent or agency shall request an impartial due process hearing within 2 years of the *date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint*, or if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows. 20 U.S.C. §1415(f)(3)(C). (Emphasis added).

As the second part of the federal limitations period provides above, Texas has enacted an explicit time limitation period of one year in which a complaining party must bring a due process hearing:

Effective with requests for due process hearings filed on or after August 1, 2002, a parent or public education agency must request a due process hearing within one year of the *date the complainant knew or should have known about the alleged action that serves as the basis for the hearing request*. 19 T.A.C. §89.1150 (c) (Emphasis added).

Both the federal and the Texas limitations provisions make it clear that the one-year limitations period does not begin to run until the date the complainant *knew or should have known about the alleged action* that serves as the basis for the

complaint. (Emphasis for illustration only). The pivotal issue before this Hearing Officer in this matter is when Petitioner knew or should have known that the student was not receiving all the speech services specified by the student's ARDC in the student's IEP. After review of the record evidence, I find that Petitioner did not know prior to October 2006 that the student had not received the specific amount of speech therapy designated by his ARDC committee for the 2006-2007 school year, and was unable to find out whether the student had actually received the specified speech services until he brought his Request. The record evidence conclusively established that EPISD did not tell Petitioner that the student was not receiving speech therapy, as scheduled by duly constituted ARDC decision. Further, the record evidence shows that the student's parents were regular and active participants in ARDC meetings, without any mention in ARDC prior to October 2006 that the student was not receiving the speech services ordered by the ARDC committee. I agree with Petitioner that the student's parents had no way of knowing or discovering, prior to October 2006, that the school district did not provide all the speech services specified by the student's IEP, as the record is clear that Petitioner did not know about or have access to the speech therapy delivery logs that were not maintained with the student's eligibility folder until after filing his Request. And access to the speech delivery logs, albeit incomplete logs for the 2004-2005 school year, was not forthcoming until Petitioner litigated his right to access the documents, granted by this Hearing Officer at the end of December 2006.

Written Notice

Petitioner points to Respondent's affirmative duty to report changes to the amount of speech therapy *prior to* implementation of changes, under IDEA's procedural requirement that mandates prior written notice to parents of a student whenever the school district *proposes to change* the identification, evaluation, or educational placement of the student or the provision of a FAPE to the student. 20 U.S.C. §1415(b)(3). Respondent argues that Petitioner was "properly noticed on September 26, 2006," that an ARDC would be held that included discussion of

speech services. I find that the ARDC notice on September 26, 2006, was insufficient to inform Petitioner that *no speech services had been provided to the student in the 2006-2007 school year* for the first six weeks of the school year or that no speech pathologist had been hired for the campus; instead, the notice indicated only that an annual ARDC was due and that as part of the discussion, “audiological services, speech therapy” would be discussed as well as counseling services with an “at risk” designation. The record evidence conclusively established that the school district’s special education administration knew by September 25, 2006, that there was no speech pathologist on the student’s campus based on communication directly from the campus principal. Yet, this ARDC notice does not specify that the speech omissions will be discussed. Indeed, the record evidence established that the student’s parents did not receive the “official” notification letter from the superintendent of the school district until four days *after*, not before, this annual ARDC meeting took place on October 10, 2006.

Respondent points to the contradicting evidence that the father participated in the ARDC on October 10, 2006, and refutes the father’s representation that he was not present due to a medical appointment. While I find that the preponderance of the record evidence established that the father was present during this ARDC and signed the “handwritten” copy of the ARDC documents and all school district witnesses present at the meeting “recall” discussion of speech services with the father, it does not alter the dearth of written information in either the handwritten or the computer version of the ARDC documents of this meeting – there was simply no written documentation that the student’s campus did not have a speech pathologist hired for the 2006-2007 school year, or that the student had received *no speech services at all* for more than eight weeks of school by this point in the semester. Undeniably, there was no discussion of compensatory services at this ARDC meeting or the presentation of any documentation to the ARDC members for determination of what *amount* of speech services were due the student. In fact, the only notation on the schedule of related services page on

both the handwritten and computer-generated copies of the ARDC meeting documents states that speech/language pathology services will be provided at the campus speech room *by a speech language pathologist* twice a week for 30-minute sessions, with an additional comment that the sessions would be provided “32 out of 36 weeks.” Even construing the evidence for Respondent that “verbal” discussion about the lack of speech therapy services occurred with the father in attendance at this meeting, I find no written indication that the ARDC had changed the delivery of speech services in either version of the ARDC documents. Instead, neither the handwritten nor the computer-generated ARDC minutes give *written notice* of a change in the schedule of services for the delivery of speech therapy. In fact, as this ARDC took place within the ninth week of school the school district already had fallen short by four weeks of delivery of 32 weeks of speech therapy.

Regardless of whether the parent did or did not attend an ARDC meeting on October 10, 2006, the fact remains that the parent did not receive written notice from EPISD until October 14, 2006. Respondent argues that this letter sufficiently informed the father that there was no speech therapy *specifically at the student’s campus*, and that the student, in fact, had missed speech sessions. Petitioner counters that this notice was conditional, failed to adequately inform Petitioner that the student in fact was an affected student, and set up a process for determination of compensatory services that Respondent subsequently failed to follow. I agree with Petitioner.

Although the hearing testimony of Respondent’s party representative and the student’s campus principal indicates that the parents of all 22 students impacted by the speech language pathologist shortage on the student’s campus received the superintendent’s letter dated October 5, 2006, I find nothing on the face of the letter that indicates that *this* student is missing speech hours, as the letter is addressed to “Dear parent” and does not mention the student’s campus by name. Instead the language of the letter indicates a possibility, not a certainty, that “[c]ampuses affected by this shortage *during the 2006-2007 school year* will

convene ARDC meetings “to determine compensatory services” and “will identify the frequency and duration of these services due your child.” [R.Ex. 12]. I agree with Petitioner that this letter failed to inform the student’s parents that *their* student had missed speech therapy and no speech language pathologist was available at the student’s campus for the 2006-2007 school year.

Discovery Rule and Fraudulent Concealment

While the record evidence established that the parent did not receive *any* written notice of the *possibility* that his son’s campus had a shortage of a speech pathologist until mid-October 2006, the record is likewise clear that the parent filed his Request before ever receiving any written admission from the school district that indeed, as the parent began to suspicion, the student’s speech therapy services during his *** grade (2004-2005) and *** grade (2005-2006) school years had been also been decreased. Not until November 29, 2006, is there a written admission from the school district that the student received less than the full amount of speech therapy services specified by the ARDC for 2004-2005 and 2005-2006. While Respondent argues that Petitioner is precluded from complaining of a lack of speech therapy services that predate the one-year limitations period specified under the Texas Administrative Code, Petitioner believes the facts of this case are precisely the type of situation that allows a hearing officer to disregard the one-year limitations period, as Petitioner believes that the student’s parents were prevented from discovering the student’s speech deficits for 2004-2005 and 2005-2006 school years by the actions of Respondent that Petitioner believes rise to the level of “fraudulent concealment.” While I disagree that Respondent “fraudulently concealed” the student’s reduced speech services in his *** and *** grade years from Petitioner, I agree that Petitioner was not able to discover and did not receive notice that the speech services had been reduced in time to file a Request within the statutorily-mandated limitations period of one year. I find that these facts are precisely the type of facts envisioned by the discovery rule so clearly enunciated in IDEA as amended that allow a

Hearing Officer to determine that the one-year limitations period should be tolled. I so determine in this case.

Although Petitioner alleges that Respondent's conduct included fraudulent concealment of its failure to provide necessary speech therapy services to the student. Respondent argues that in fact, the school district offered relief that would render this controversy moot through its offer of compensatory services to address Petitioner's requested relief. It is well-established law that fraudulent conduct implies a specific intent by a defendant to conceal the conduct, either requiring fraudulent misrepresentation, or if under a duty to disclose, failing to make the disclosure and concealing the facts from the complainant, and by so doing, preventing the plaintiff from discovering the cause of action against the defendant. See, e.g., *Borderlon v. Peck*, 661 S.W.2d 907, 908 (Tex. 1983) (fraudulent concealment tolls limitations until the plaintiff discovers the fraud or could have discovered the fraud with reasonable diligence); see also *Santana Natural Gas v. Harmon Operations*, 954 S.W.2d 885, 890-891 (Tex.App. – Austin 1997, pet. denied). Inherent in this argument is an intent to deceive the complaining party that I decline to find exists on the facts of the matter before me. The record evidence shows that Respondent's offer dated November 29, 2006, an offer made in an effort to settle the dispute, specifically admitted omission of the student's speech therapy services for the 2006-2007 school year, as well as the omission of speech therapy services during the previous two school years (2004-2005 and 2005-2006). I do not find that this conduct implies the intent to fraudulently conceal the deficit

Nonetheless, the record before me shows convincing evidence that although Petitioner began to suspect that there were additional speech therapy deficits prior to the 2006-2007 school year, only *after* Petitioner began to understand that the student had not received speech therapy in the 2006-2007 school year. Based on this suspicion but without any documentation to prove or disprove this concern, filed his Request in early November 2006. Only *after* filing the Request with diligent effort to obtain disclosure of exactly how many minutes of speech

therapy services the student had received, did Respondent give an admission in this matter on November 29, 2006, with a calculation of missed services that only the Respondent had access to at that time. The preponderance of the record evidence and testimony established that the speech therapy logs were in the control of Respondent's speech service providers or another location within Respondent's control that was not the student's eligibility folder. And indeed only after Petitioner obtained the speech therapy service logs was Petitioner able to compare the totals in Respondent's offer of November 29, 2006, followed by the opportunity at the due process hearing to cross-examine the two speech therapists that served the student and are no longer employed by EPISD. To now penalize Petitioner and say that Petitioner has no right to proceed on his Request because it should have been filed within one calendar year of when the behavior occurred – beginning with the 2004-2005 school year – would be patently unfair to Petitioner and give the student no redress for conduct he could not have discovered prior to accessing the speech therapy logs. Accordingly, I allow Petitioner to bring his Request complaining of omitted speech services from the 2004-2005 school year forward to the date Petitioner in the exercise of diligence discovered the omission and lodged his due process complaint with the Texas Education Agency.

Mootness

Respondent argues that this Hearing Officer should dismiss this matter as moot because Respondent made an offer of 37 hours or 2220 minutes of compensatory speech therapy to the student in its offer of November 29, 2006, alleging that this amount is equal to Respondent's requested relief of an "amount equal to that which it failed to provide him" during his ***, ***, and *** grade years and was an accurate calculation for the 13 weeks missed speech therapy for 2006-2007 school year as of the date of the offer, leaving nothing for this Hearing Officer to adjudicate. Arguing that a party seeking relief must have standing throughout the proceeding, Respondent urges that the doctrine of mootness covers developments before or after a case is filed which may eliminate standing

that arguably did exist at some earlier time. See, *Friends of the Earth Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 120 S.Ct. 693, 708-709 & n4 (2000) (addressing the issue of standing to seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future if undeterred). Respondent further urges that the exception enunciated in *Friends of the Earth*, where post-litigation voluntary compliance does not render a case moot, only applies when a claim of damages exists. *Id.* at 698. But apart from the questionable page signal in Respondent's citation, *Friends of the Earth* involved claims for injunctive relief and statutory civil penalties payable to the United States, not damages to a plaintiff. *Id.* at 700. Respondent's cite to *Buckhannon Bd. And Care Home v. West Virginian Dep't of Health and Human Res.*, 532 U.S. 598 (2001) is inapposite.

Petitioner distinguishes the current facts from a situation in which the wrongful behavior could not reasonably be expected to recur. *Spencer v. Kemma*, 118 S.Ct. 978 (1998). As the Court specifically applied a similar holding in a case concerning IDEA in *Honig v. Doe*, 103 S.Ct. 693, Petitioner notes that Petitioner, as in *Honig*, complained of an illegal action by the school district. In *Honig*, the illegal action was an expulsion rather than the failure to deliver speech therapy services. The Supreme Court in *Honig* reasoned that the student who no longer resided within the school district, although not at present faced with expulsion or suspension, still resided within California and was entitled to a FAPE within that state. The Court determined that absent a court order, the student would again suffer injury in the future. Petitioner further urges that Petitioner's pled relief of attorney's fees are still pending in this proceeding and are in the form of damages.

Although this Hearing Officer does not have jurisdiction to award attorney's fees in this proceeding, it is well-established that neither civil penalties nor damages are available under IDEA. See, *Marvin H. v. Austin ISD*, 714 F.2d 1348, 1356 (5th Cir. 1983) (remedies under the statute then known as the Education for All Handicapped Children Act were limited to prospective relief concerning

educational services and did not include compensatory or punitive damages). Yet on the facts before me I cannot ignore Petitioner's allegation that certainty does not exist in this proceeding that the challenged conduct will not resume. In fact, as of the close of the record, the alleged conduct continued with no speech pathologist hired for the student's campus, no arrangements to bring in a third party provider of services, or any indication from Respondent that speech therapy services would be available to the student and the omission of services would not repeat.

Petitioner suggests that Respondent's offer of compensatory services is an illusory one, was in the nature of an offer that Petitioner was not obligated – and chose not to – accept; instead, Petitioner sought with diligence the supporting documentation to through discovery of exactly what speech hours were delivered to the student during the 2004-2005 and 2005-2006 school years⁶. Respondent points to its letter dated December 8, 2006, as proof that compensatory services commenced in December with the offer of a four-hour speech camp on the third Saturday of December 2006. [R.Ex. 27]. After careful review of the record in its entirety, Respondent's offer of compensatory services was neither accepted by Petitioner, nor binding on Respondent or Petitioner.

⁶The record conclusively established that no speech therapy services were provided to the student in 2006-2007. By contrast, Petitioner and Respondent have differing views of the total hours of speech therapy service deficit for 2004-2005 and 2005-2006.

The Bobby R. Case

Both parties in this proceeding cite the Fifth Circuit's opinion in *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000) as the controlling case on a failure to implement services specified in the student's IEP. The service failures included an absence of speech therapy services for five months in Spring 1995 – also from a shortage of qualified speech therapists in the area. In that case, the school district identified and provided all twenty-five hours of compensatory services to the student during the summer and the Hearing Officer found that the provision of the twenty-five hours of compensatory services did not make up for

the earlier missed opportunities and as a result, the student was denied a FAPE. *Caius R. b/n/f/ Mr. and Mrs. Bobby R. v. Houston ISD*, Dkt. No. 089-SE-1096 (SEA TX - 1997). The U.S. District Court reversed the Hearing Officer's finding of a denial of FAPE, holding that the failure to implement speech services was remedied by the offer of compensatory services. *Houston Independent School District v. Caius R.*, 30 IDELR 578 (S.D.Tex. 1998). The Fifth Circuit affirmed the district court's decision, including the holding that no IEP meeting and no change in the IEP were required. *Bobby R.*, *supra*, at 344. The Fifth Circuit found that the five-month speech deprivation for the student was not a *per se* denial of FAPE because the 25 hours of speech therapy, that had been provided to the student before the Request for Hearing, were sufficient to meet the requirements of the student's IEP. *Id.* At 348.

Petitioner distinguishes the facts of *Bobby R.* from the facts in the current proceeding, noting that unlike *Bobby R.*, Respondent has not made up the compensatory speech services as of the date of the close of the record. I agree with Petitioner, and note further that the amount of compensatory services in this dispute is almost double the amount of missed services in *Bobby R.*, based on the calculation of missed services from the hearing testimony, the incomplete speech therapy/speech attendance logs of 2004-2005 and 2005-2006, combined with the total number of minutes of speech therapy specified by the ARDC for the student in his second, third, and fourth grade years. Based on Respondent's calculations and from the preponderance of the record evidence, the total speech therapy services not received by the student as of the close of the record totals 46 hours – none of which has yet to be recouped by Petitioner. Petitioner further notes, and I agree, that the instant facts are unlike those in *Bobby R.* as the speech therapy deficit covered a period of three years instead of one semester, with no plan underway for this specific student that would ensure all hours of the missed services were remedied. Of note, the letter dated October 5, 2006, from the superintendent does not relay information to the student's parents that this student had been denied speech therapy in previous school years, does not

specify a date certain when a speech therapist will be available on the student's campus, and does not specify when compensatory services, if any, will be provided. Instead, the letter states that for unnamed campuses "...affected by this shortage during the 2006-2007 school year will convene Admission, Review, and Dismissal (ARD) meetings to determine compensatory services due your child." [R.Ex. 12].

The preponderance of the record evidence established that Respondent did not convene an ARDC meeting for the purpose of determining compensatory speech hours due the student for the 2006-2007 school year prior to the student's Request. Further, there was no acknowledgement of Petitioner's suspicion of speech therapy deficits, as pled in Petitioner's Request, until Respondent filed its answer on November 29, 2006. The prolonged lack of delivery of the speech services over a three-year period persuades me that the speech therapy deficit was more than de minimis under the instant facts.

Parental Participation in the ARDC Meeting Process

IDEA stresses procedural compliance on the theory that an eligible student is likely to receive an appropriate IEP if the parties follow statutory procedures as Congress intended. *Hendrick-Hudson District Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *Hall v. Vance County Board of Educ.*, 774 F.2d 629 (4th Cir.1985); *Houston ISD v. Bobby R.*, 200 F.3 341 (5th Cir. 2000). Educational harm does not necessarily result from a procedural error where the school district substantially implemented the student's IEP, the student's academic progress was more than trivial, and the student received a meaningful benefit in other academic areas. *Bobby R.* at 349-350. Likewise in *Bobby R.*, a student's educational potential does not have to be maximized or improved in every area for a student to receive an educational benefit. *Id.* at 350. Procedural defects alone do not violate a student's right to receive a FAPE unless there is an accompanying loss of educational opportunity as a result, or if the parent, as a result, is deprived of the opportunity for meaningful participation in the student's IEP, or both. *Adam J. v. Keller I.S.D.*, 328 F.3d 804 (5th Cir. 2003). Similarly,

procedural defects that infringed upon the parents' ability to participate in the IEP process are strictly scrutinized by hearing officers. *Roland M. v. Concord School Comm.*, 910 F.2d 983 (1st Cir. 1990).

Provision of FAPE

Even with a determination that the amount of speech therapy services not provided to the student rises above the de minimis level in this proceeding, Petitioner must prove his burden to show that there was a denial of FAPE because of the deprivation of speech services. To make this determination, the student's entire IEP must be viewed as a whole to ascertain whether the student received a FAPE from his educational program.

Respondent believes that the student made progress under the educational program offered by Respondent – even with the admitted speech therapy deficit. Respondent points to the student's dual disabilities of LD and SI, of which his primary disability is LD with SI as the student's secondary disability. Respondent points to the development of the student, acknowledging that while the student does not read on grade level, the student's development should be measured with respect to the individual student and not the rest of his class. *Socorro Independent School District v. Angelica Y.*, 107 F.Supp.2d 761, 767 (W.D.Tex. 2000); see also *Bobby R.*, supra at 349 Petitioner, by contrast, urges this Hearing Officer to find that the decreased delivery of speech therapy services to the student over a three-year period is a denial of FAPE that is referenced in the Individuals with Disabilities Improvement Act ("IDEIA") of 2004, a standard not in place when *Bobby R.* was decided. 20 U.S.C. §1415(f)(3)(E)(ii).

Under section 1415(f)(3)(E)(i)-(ii) of the IDEIA provides the following regarding a determination by a hearing officer:

(i) In General

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies –

- (I) impeded the child’s right to a free appropriate public education;
- (II) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents’ child; or
- (III) caused a deprivation of educational benefits.

20 U.S.C. §1415(f)(3)(E)(i)-(ii) [Emphasis added].

The statutory provisions cited above allow this Hearing Officer to make a determination that the procedural violation of Respondent’s failure to give the parents proper notice if one or more of the three above conditions are met. I will discuss each subsection individually below.

Impede the Student’s Right to a FAPE

The deprivation of speech services to the student occurred over a significant period of time – a three-year period. Further, I find that the preponderance of the record evidence established that the student’s progress toward his IEP goals and objectives in Speech in addition to his academic subjects of Reading, Language Arts, and Mathematics were not based on sufficient written data of criterion-referenced testing over time to show whether, indeed, the student was making progress under his IEP goals. Again, the facts of this case stand in contrast to the evidence of the student’s progress under *Bobby R.* In that case, the Fifth Circuit noted the testing results under widely-recognized criterion-referenced testing established that the student made progress toward his IEP goals. *Bobby R.*, supra, at 349 & n.3. Instead under the facts of this dispute, Petitioner’s speech goal progress has been halted with the lack of provision of speech services during the current school year.

Significantly Impede the Parents' Opportunity to Participate in the Decision-making Process Regarding FAPE

The preponderance of the record evidence established that the parents took an active role in their son's education and participated in ARDC meetings. Even if the father did not participate in the 2006-2007 ARDC as he alleged at hearing, the parents participated in every other ARDC meeting and in fact, the father had intended to participate in the annual ARDC meeting on October 10, 2006, as indicated in his response to the ARDC invitation. At each ARDC meeting, the student's speech services were discussed and a schedule of services implemented – and approved – by a properly convened ARDC. Without the information that the student was not receiving the full amount of speech services specified by the ARDC with each subsequent annual decision, the parent was deprived of important information regarding the student's progress. The parents' participation was significantly impeded by Respondent's failure to inform the parents (for whatever reason) that something like half of the speech services scheduled were not delivered in 2004-2005 and would not be delivered or compensated.

Caused a Deprivation of Educational Benefits

Respondent believes that the student progressed over time under his IEP overall, despite the failure to deliver the speech service specified by the ARDC. As evidence of this progress, Respondent points to the student's achievement of his anticipated goals on the SDAA taken in Spring 2005. While the test does indicate that the student met the goals set by the ARDC on that one testing, I do not find sufficient record evidence over time to show that the student was truly progressing in his IEP. In fact, there is a noticeable lack of grade reports in the record of this proceeding. Again, only through Petitioner's efforts, at hearing through his legal counsel's zealous representation, were there any grade reports discovered and brought to the hearing, ultimately adding to the record. [R.Ex. 32]. I find that Petitioner met his burden to show that the student's progress was less than meaningful and could not be substantiated through grades and testing.

There was no expert testimony in this proceeding to contradict Respondent's administrators, that the omission of speech therapy is significant. Also, there was no expert testimony to contradict the ARDC's determination of the necessary amount of speech services from Fall 2004 forward to show the resulting amount of speech therapy was inappropriate or unnecessary. When combined with a lack of solid evidence of educational benefit, this evidence preponderates to support the conclusion that a meaningful substantive deprivation of educational benefit occurred.

Conclusions of Law

1. The student is entitled to special education and related services at no cost to the parents under the provisions of the IDEA, 20 U.S.C.A. §1400, et. seq., and its implementing regulations.
2. The student and his parents reside within the jurisdictional boundaries of Respondent, a legally constituted independent school district operating as a political subdivision of the State of Texas. Respondent is responsible for providing the student with a free appropriate public education. 20 U.S.C. §1412(a)(1); *Hendrick-Hudson District Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C.A. §1412; 34 C.F.R. §300.300; 19 T.A.C. §89.1001.
3. The educational program proposed by the school district is presumed to be appropriate. Petitioner, as the party challenging the educational program offered by Respondent, bears the burden of proof. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), aff'd on other grounds sub nom., *Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Alamo Heights ISD v. State Board of Education*, 709 F.2d 1153 (5th Cir. 1986). Petitioner met his burden of proof in this case.
4. Petitioner met his burden to show that the one-year statute of limitations should be tolled in this proceeding, due to Respondent's failure to give notice to Petitioner of the reduction in speech services in the 2004-2005 and 2005-2006 school years, so that the Petitioner did not know nor should Petitioner have known that the student's speech services had been reduced from the level set by the student's ARDC. U.S.C. §1415(f)(3)(C); 19 T.A.C. §89.1150 (c).
5. Petitioner met his burden to show that Respondent did not give Petitioner written notice until mid-October 2006, that the student received no speech therapy services for 2006-2007. 20 U.S.C. §1415(B)(3); 34 C.F.R. §300.503(a)(1).
6. The omission is capable of repetition and as of the close of the due process hearing, Respondent had not hired a speech pathologist for the student's campus and the student had received no speech services during the 2006-2007 school year.
7. Petitioner met his burden to show that the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the student was significantly impeded by Respondent's failure to notify the parents that the

- student's speech therapy services were reduced below levels set by the ARDC beginning in Fall 2004. 20 U.S.C. §1415(f)(3)(E)(ii)(I); 34 C.F.R. §300.501(b)(1)(i).
8. Petitioner met his burden to show that the student's right to a FAPE was significantly impeded by Respondent's failure to deliver the amount of speech services specified by the ARDC over 2004-2005, 2005-2006, and 2006-2007. 20 U.S.C. §1415(f)(3)(E)(ii)(II); 34 C.F.R. §§300.17 and 300.34(a).
 9. Petitioner met his burden to show that Respondent caused a deprivation of educational benefits by the procedural violation of a failure to provide written documentation of grades and criterion-referenced instruments to show the student made meaningful progress over time. 20 U.S.C. §1415(f)(3)(E)(ii)(III).
 10. Petitioner met his burden to show that Petitioner is entitled to speech therapy services as compensation for a significant omission in the exercise of appropriate procedural safeguards by the EPISD. 20 U.S.C. §1415(f)(3)(E)(i)-(ii).
 11. Respondent is not entitled to a summary judgment.
 12. Respondent is not entitled to dismissal of Petitioner's Request on the grounds of mootness.

ORDERS

Based upon the record of this proceeding, the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that Respondent convene a meeting of the ARDC, within 10 calendar days from the date of this Decision, to make a plan for the delivery of 46 hours of speech therapy services, as compensation for the 46 hours of speech therapy services not provided by Respondent beginning in the 2004-2005 school year. The plan shall include goals and objectives for the 46 hours of speech therapy

IT IS FURTHER ORDERED that Respondent shall timely implement this Decision within 10 school days, or as otherwise provided herein, in accordance with 19 T.A.C. §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of Special Education Programs and Complaints at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1) documentation demonstrating that the Decision has been implemented; or 2) if the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the

district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented. IT IS FURTHER ORDERED that all additional or different relief requested by Petitioner is DENIED.

IT IS FURTHER ORDERED that any findings of fact that are more properly characterized as conclusions of law, and any conclusions of law that are more properly characterized as findings of fact, shall be considered and shall have the same effect as if properly characterized.

IT IS FURTHER ORDERED that any and all additional or different relief not specifically ordered herein is DENIED.

Signed this 19th day of February 2007.

Mary Carolyn Carmichael

Finding that the public welfare requires the immediate effect of this Decision, the Special Education Hearing Officer makes it effective immediately.

DOCKET NO. 067-SE-1106

B/N/F***&***

PETITIONER

vs. BEFORE A SPECIAL EDUCATION
HEARING OFFICER
FOR THE STATE OF TEXAS
EL PASO INDEPENDENT
SCHOOL DISTRICT
RESPONDENT

SYNOPSIS OF DECISION

ISSUE: A. Whether the school district failed to provide speech therapy services as specified by the student's individualized educational program ("IEP") after August 24, 2004, without disclosure or notice to the student's parents until October 2006?

CITATION: 20 U.S.C. §1415(B)(3); 34 C.F.R. §300.503(a)(1).

HELD: For the Student.

ISSUE: B. Whether the school district denied the student a free appropriate public education ("FAPE") and a deprivation of educational benefit for the student as a result of the failure to provide speech therapy services during the student's second (2004-2005), third (2005-2006), and fourth grade (2006-2007) years?

CITATION: 20 U.S.C. §1415(f)(3)(E)(ii)(III); 34 C.F.R. §§300.17 and 300.34(a).

HELD: For the Student.

ISSUE: C. Whether the school district significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the student, by a failure to notify the parents of changes made to the student's IEP during his second-grade year (2004-2005)?

CITATION: 20 U.S.C. §1415(f)(3)(E)(ii)(I); 34 C.F.R. §300.501(b)(1)(i).

HELD: For the Student.

