

**UTAH STATE BOARD OF EDUCATION
SPECIAL EDUCATION SERVICES
DUE PROCESS HEARING**

IN THE MATTER OF

**█ et al, on behalf of █,
Petitioners,
Vs.**

**GRANITE SCHOOL DISTRICT,
Respondent.**

* **DECISION AND ORDER**
* **Case # DP-2021-18**
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* **Hearing Officer:**
* **Frank Snowden**

DECISION AND ORDER

Brenda Diepeveen, advocate, appeared on behalf of Petitioners █, a student, by and through █, et al, ("Petitioners"). Joan Andrews, Esq., appeared on behalf of Respondent Granite School District ("Respondent"). This matter was assigned to the undersigned Due Process Hearing Officer, Frank Snowden ("Hearing Officer").

Procedural history

The student, █, (the "Student") is █ year old male who has been diagnosed with Autism Spectrum Disorder, Dysgraphia, Hearing Loss and cognitive delays. Petitioners submitted a written Request for Due Process Hearing to the Utah State Board of Education ("USBE") dated June 9, 2021, which was received and entered of record on June 17, 2021. Petitioners allege violations of the Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400 et seq. ("IDEA"), denial of FAPE, improper removal from an IEP, denial of services and supports, that the student was improperly allowed to graduate from high school which resulted in denial of eligibility for certain post-high

school programs. The Respondent filed its timely answer on June 26, 2021. The parties held Resolution meetings on June 23 and July 9, 2021, without resolution. Undersigned convened numerous Pre-Hearing Conferences via teleconference, the parties requested extensions of decision deadlines which, were granted, and by agreement, trial was subsequently set to begin on November 2, 2021, and last for 4 days based on the number of witnesses each party expected to call.

Extensions of the due process hearing timeline have been granted at the request of one or both of the parties pursuant to 34 CFR §§ 300.510(c) and 300.515(c), and USBE SER IV.R.2.

Jurisdiction: subject matter

Jurisdiction properly lies over the parties and over the subject-matter of this cause pursuant to 34 CFR § 300.507(a). Therefore, all claims presented by Petitioners under the IDEA are hearable and are reserved for decision by the Hearing Officer.

The hearing

On November 2, 2021 and each consecutive day thereafter through November 5, 2021, an impartial due process hearing was conducted at the offices of the Granite School District Offices, Salt Lake City, Utah, in this matter. The hearing was held in accordance with the procedural requirements of the IDEA and its implementing regulations found at 34 CFR §§ 300.507-515, and the Utah State Board of Education Special Education Rules IV.I-P, (October, 2016). Petitioners and Respondents stipulated to the admission of some but not all exhibits previously exchanged and submitted. The Petitioners' witnesses included [REDACTED], the student, [REDACTED], the mother of the student, [REDACTED]

██████████, a relative of the student who also participated in presenting the petitioners' case, ██████████, "designated" by Petitioners as Petitioners' expert witness, special education consultant and advocate. The Respondent's witnesses included ██████████, Granite Schools school psychologist, ██████████, Granite Schools New Teacher Specialist for Special Education Teachers, ██████████, granite schools school counselor, ██████████, teacher in English for special education, ██████████, social worker for granite school district, ██████████ psychologist with the granite school district, ██████████ assistant principal at ██████████ for this granite school district, ██████████ classroom teacher at the ██████████, ██████████, Granite Schools Post-High Teacher and ██████████, Special Education Director for Granite Schools. Petitioners submitted 29 Exhibits that were admitted into evidence. Respondent submitted 36 exhibits. The hearing transcript is in three volumes totaling 716 pages.

Burden of proof

Petitioners, as the party challenging the Respondent's identification, determination or implementation of special education and related services, has the burden of proof, by a preponderance of the evidence, for all issues raised in this matter. *Schaffer v. Weast*, 546 US 49; 126 S Ct 528; 163 L Ed 2d 387 (2005). The Tenth Circuit Court of Appeals has held that "the burden of proof in such a challenge rests with the party claiming a deficiency in the school district's efforts." *Thompson R2-J School Dist. v. Luke.*, [540 F.3d 1143](#), 1148 (10th Cir. 2008). The Hearing Officer confirmed with advocate(s) for

Petitioners at the pre-hearing conference that Petitioners would have the burden of proof and the duty to present evidence first at the hearing.

Issues

The following issues were presented to the Hearing Officer for decision:

I. Procedural Issue:

(a). Whether this hearing should relate back to March 11th, 2019, when the student was removed from his IEP and placed on a 504 plan, date which would extend by approximately 3 months the standard two year statute of limitations period for due process requests.

II. Substantive Issue for Hearing:

(a) Whether the Respondent failed to provide the Student with a Free Appropriate Public Education (FAPE) during the time the student attended the School by:

(1) inappropriately removing him from his IEP in March of 2019 and placing the student instead in a 504 plan;

(2) and inappropriately allowing the student to graduate with his peers in the 2021 graduating class; and

(b) Whether the Petitioners are entitled to financial reimbursement for costs incurred for the student's education.

Findings of fact

After considering all the evidence in the form of oral testimony and admitted exhibits, as well as the oral and written arguments of the parties' and counsel, the Hearing Officer's Findings of Fact are as follows:

The Student is [REDACTED] year-old boy, and at the times in question in this matter the Student lived with the Petitioners in [REDACTED], Utah. Petitioners are the Student's parent and attorneys-in-fact.

The student testified in pertinent part as follows:

He did not have an aid helping him in his high school classes. On occasion he would ask other students for help when he needed it and asked his teachers for help.

He ate lunch where there wasn't much noise, for example, the main office.

He struggled to hear in his classroom, so a microphone was used and that worked quite well for him. But he needed frequent help with the microphone.

He enjoyed seminary class, a religious class. When asked what classes he didn't like in high school he said probably most of them. He thought architectural design class was very interesting and thought it would be fun, but it turned out to be something that he didn't like very much. He missed a lot of architectural design classes because he thought the concepts were difficult to understand. [REDACTED] wanted to graduate from high school because he wanted to be more advanced in his life and hopefully get a career and a job.

When asked if he ever researched colleges and he said no because he's not familiar with it. When he was asked if he still wanted to be a robotics engineer, he said no because he's just not interested anymore. When asked what classes he would've needed for that he said he didn't know and guessed he didn't want to know.

He was asked if he's taking any classes right now and he said one or two classes, but not for college, and he likes that many classes a day. He's taking Adulting 101 on Monday, Employment on Tuesday, Lab on Wednesday, etiquette on Thursday - life skill classes. In his lab class he learns things like cooking. He's learning manners in etiquette class. He learns how to deal with his autistic mind he thinks in adulting class.

When looking at Exhibit 34 which is a questionnaire that was completed in [REDACTED]'s senior year, [REDACTED] was asked to look at the hand writing on top of that paper and was asked if that was his handwriting. He responded no and he did not entirely remember who wrote those answers for him. He said he did not write the answers himself because he has something called dysgraphia.

He could not remember why he only answered 13 out of the 46 questions on the questionnaire. One of the questions on the questionnaire was "what are your greatest dreams about your future?" and his answer was "secure from danger".

He said he answered it that way because, above everything else, he wanted to be safe in his environment.

When asked why is that important to you he said because normally he's pretty anxious about his own safety as a person.

Another question on the questionnaire was “what are three things you would like to be better at? His answer was “paying attention to people“, “listening to people “, and “not interrupting “. These are things he struggled with and he still struggling with those goals now. He thinks he still struggles because he has an autistic brain. He was asked how his disabilities affect his life and he said it affects the way he perceives the world.

When given a list of classes that he took. He says he knows that he took those classes, but he doesn't really remember what they were.

Witness was asked if he recalled some of the CTE classes he took a [REDACTED] [REDACTED] and he responded that he remembered the architectural design class, web development, and game design.

Witness confirmed that he went to [REDACTED] and he confirmed he took the [REDACTED] classes on the [REDACTED] [REDACTED] which is in the complex but in a different building.

Witness stated that he got from [REDACTED] to the classes at [REDACTED] on a school bus and did not need assistance riding the school bus. Since he graduated high school, he takes the city bus to his classes (Adulting101, etiquette, etc) at the [REDACTED] [REDACTED]. He did ride the bus to high school until his grandmother started driving him and at times, he rode the city bus home from [REDACTED]. He didn't know why he stopped riding the city bus— maybe it was phased out or something he couldn't really remember what happened. He didn't know why he would be riding the city bus if a

school bus was available to him. He didn't like to stay after school and hang out. He preferred to go straight home afterwards.

Witness was asked to discuss what the process was of using a microphone in class. The device was called a ConnectClip. He would use this device as both a microphone for listening to his teachers and as sort of a Bluetooth for his phone for talking with his family. He kept the device with him and brought it from class to class. He would give it to the teachers, and they would wear it. He would normally sit in front of the class and that would help him hear.

Witness stated that he thought his English teacher, Mrs. [REDACTED], was a really good teacher and that most of his teachers were as well. He maintained a pretty friendly relationship with most, if not all of them. He said he felt like Mrs. [REDACTED], on most occasions, was willing to help him if he didn't understand something or had a hard time hearing anything that she said.

When asked if his teachers were good about letting him get up and walk around the classroom or even leave the classroom if he needed to, and he stated that they mostly let him do what he needed to do. He did need to get up and move around because most of the time during class his bottom would hurt and his back would hurt. He's had a couple of back surgeries so he would normally express needed to move around to kind of mitigate that. If he was having a low level of pain, he would just need to move around and then sit back down but if it was really bad he would have to lay down somewhere, normally in the office. He said most of the Administration Offices had couches that he

could lay down on but other times he'd have to lay down in the sick room. He does recall laying down in principal [REDACTED]'s office rather fondly.

When I asked how his back was doing right now he said he was fine.

Witness stated that when he has low energy supply sometimes, he needs to drink Pediasure during the day and that the drink was kept in the principal's office or in Assistant Principal [REDACTED]'s office. When his energy was low, he was allowed to go in there and grab a drink and then get back to class

When asked [REDACTED] if he ever talked about what he wanted to do in the future with Mr. [REDACTED] and he stated not necessarily but he felt that he was really good friends with him.

When asked how are your plans for a podcast coming along? And he said he didn't want to do a podcast and when asked if he remembered talking about a podcast with Mr. [REDACTED] and he said, No. He thought that was some sort of an assignment that he was doing in English or something but he did reiterate again that he had a pretty good relationship with Mr. [REDACTED].

The topic changed to the meeting that took place in February of his senior year. He remembers that meeting being one where his IEP was restored but he doesn't remember the particulars of it but he was there for the whole meeting because he thought it was required by the law.

Witness does not remember looking at the accommodations that were in his IEP to be sure that they worked for him and felt that it was unfortunate.

██████████, the student's mother, testified in pertinent part as follows:

Witness was asked who lives in the household. She stated her mother, ██████████ herself ██████ and her son ██████████ her son ██████████ witness does not work outside the home because she's considered disabled and has Social Security. She stated she is divorced from ██████████'s father and he lives outside of the home. She was asked if she could explain the complications at ██████████'s birth she stated that he was born early at 36 weeks and was diagnosed with hypotonia or muscle weakness. She was told that he was deaf at birth but later about six months old she was told he had mild to moderate hearing loss. He needed hearing aids and he had a little hearing aids that they put on him at six months. She stated that her placenta had died when he was born so it came out in pieces and she was told he was without oxygen when he was born.

Witness stated that ██████████'s health growing up was a struggle. He had hypotonia and spent their lives going to doctors. She said she probably went once a week to a doctor appointment with him at about a year old he was in the hospital with a major infection. Had to have a G-tube because he was having trouble thriving. And then he had a major infection, ended up in the hospital for a week and he almost died. She stated that he did overcome it and feels that he's here for a purpose because he's an amazing kid. He beat that challenge but had multiple ear surgeries and has another one coming up. He has to have a new hearing aids put in. He's also had two back surgeries.

Witness confirmed that ██████████ was diagnosed with pervasive development disorder which is now known as autism spectrum disorder.

Witness confirmed she took [REDACTED] to see Dr. [REDACTED] at Primary Children's Hospital.

When asked how autism affects [REDACTED], witness said he struggles a great deal with his education life and it has affected his ability to participate in groups in school. He refused to participate in any group activity at school. [REDACTED] did not have friends, only acquaintances. He did not sit with friends at lunch. He ate his lunch at the office. It was very difficult to eat in the lunch room because of the noise factor with his hearing disability. No students ever came over to his house to do homework with him or to hang out.

Witness was directed to read an excerpt from Exhibit 2 which is the Wechsler Intelligence Scale at Primary Children's (as read) "IQ not valid due to discrepancy across index scores". Witness was directed to read the scores aloud. "Memory is 102 processing speed is 53."

That's a 49 point difference as noted by [REDACTED].

Witness is then given scores from 2019 in Exhibit 8 stating that it appears to her that the processing speed is 63 and the verbal comprehension is 116. Examiner confirms a 53 points difference. Witness reads out loud that [REDACTED] has a score of 99 for a full-scale IQ.

Witness stated she never heard from the school to discuss a problem with the discrepancy in [REDACTED]'s scores on his IQ test. When asked what the school did after [REDACTED] took this test in 2019, she said that she couldn't remember hearing from the

school after this test and questioned the examiner if she was referring to the fact that that was the same year that they took him off the IEP

The witness testified that [REDACTED]'s hearing loss was diagnosed at the time he was born and that he wears hearing aids but it doesn't totally solve the problem because he has an ear infection and he's wearing the hearing aids and he can't hear even still because the fluid in his ears affects what he hears. Witness stated that she felt like probably when [REDACTED] was giving his testimony did he found it difficult to hear because he doesn't really hear very well at all and that he's scheduled for a new hearing test or ear surgery to get hearing aids behind the ear which will be remarkable. She's hoping to get rid of his ear infections because he lives with them constantly from the ear hearing aid.

The witness feels that [REDACTED]'s hearing loss affected his education dramatically because he spent most of his time not hearing everything because he had ear infections. And during Covid it was even more difficult for him because he typically reads lips and he wasn't able to do so with masks and made hearing even more difficult.

The witness discusses [REDACTED]'s dysgraphia. Explaining that he has major handwriting disabilities so he writes everything very large and you can't read it at all. He can barely read his own handwriting and it takes half a page to write one word practically. Witness explained that it has affected his education because he spent a lot of his time trying to sharpen his pencil. He could spend half a day sometimes in the classroom trying to sharpen his pencil to a certain point. He was totally fixated on that and couldn't focus on the classwork.

When asked about [REDACTED]'s scoliosis, the witness stated that he had two major back surgeries in high school, and it was really terrible. He's lived with and still lives with massive back pain 24/7. Witness states that scoliosis has affected his education because he couldn't sit in chairs and had to get up and walk around. When asked about [REDACTED]'s jaw problem, witness stated that he can't chew. It takes him forever to eat lunch, so he's always running late to his classes. They had to send special food with him to eat because he lives on a special diet. Everything about that situation was quite difficult. The fact that he didn't want to eat with the other kids because of the hearing loss and he ate in the office. His life was rough and very hard.

When asked about the accommodations [REDACTED] received in high school, witness stated it he was able to stand and get up and walk around a little to help with the pain with the scoliosis during his classes. The school also provided a microphone for his hearing, but they did not provide [REDACTED] with an aid in his main stream classes and high school and also did not provide tutors for [REDACTED]. The school also did not provide peer notetaking because of [REDACTED]'s dysgraphia in high school. Witness doesn't believe the school provided [REDACTED] with a review of the directions in his classes because of [REDACTED]'s low processing speed. Witness doesn't believe that the school provided help for him to stay on task. She also doesn't believe that the school provided a special education teacher to check in with [REDACTED] his junior year and most of his senior year.

The examiner wants to look at the goals on [REDACTED]'s last IEP before he was removed from the IEP in 10th grade.

(It reads) "██████ will when given homework, a homework assignment, independently record his work on his tablet and file papers in binder pockets. He will do a binder check at home two times weekly with parent."

Witness felt these were great goals but he was a disaster and was very unorganized and he struggled to understand what he supposed to be doing in his classes because he couldn't hear and he had trouble processing. He still has not overcome the struggles. Witness has to repeat things three and four times to ██████ to get him to do things. He never did record anything in his tablet and he didn't ever check in with his mother even though she would have to check in with him.

Witness states she had constant communication with the school about him not meeting his goals. Constant communication with his teachers and his counselors. Witness feels this is probably an unreasonable goal because she didn't think he was capable of doing the goals set for him. And she didn't feel that he was getting the necessary support from the school to help him reach those goals. And also in the ninth grade he was dealing with major medical things at that time too.

When asked if she objected to the school when the IEP was drawn up she said she was never given an option to object to goals or given the option of being involved in the IEP process necessarily.

Witness states she went to all of the IEP meetings but was just told to sign here. She said she was never told what the goals were going to be necessarily or what he was

going to be achieving and if she agreed with those goals and how that process was going to work for him.

Witness states even though she was at the meeting, she was not really aware this was a goal or she would've objected to it if she had known but she doesn't know if she was given the option.

Examiner, still looking at the IEP from ninth grade and read an excerpt

(As read) "Except for special education class time noted in the services section of this IEP, the student will participate in the regular class, regular PE, extracurricular, and non-academic activities to the same extent as children without disabilities or with other exceptions"

Witness states that [REDACTED] did not participate in regular PE, she doesn't believe he participated in any extracurricular activities and didn't participate in any non-academic activities because he had major back surgery that year and also because he had a doctors permission to get out of PE.

Witness states that she has been attending IEP meeting since [REDACTED] started going to school. And she was never offered accommodations due to her being legally blind. She was also never told that accommodations could be made for her until just recently by the examiner.

Witness states that she was never asked what her normal mode of communication was. And she would've liked for someone to have read the documents out loud to her because she doesn't read braille.

Witness states that every time she came to an IEP meeting that she was asked to sign papers as soon as she walked in the door. She assumed that signature meant that she was there but that's all it meant. That she was a participant, sort of like a rollcall.

For the IEP meeting that removed [REDACTED] from services in the 10th grade she was not given any accommodations because of her being legally blind. She was asked to sign papers as soon as she walked in the door. Hearing officer Snowden verified with her that like every other IEP meeting she would come in and sign her name to the paper. She had no idea what she was signing until after the meeting had already begun and then someone would come in and tell her what was going on and this is the way it's always been done. Hearing Officer Snowden asked if she ever expressed her objection to this scenario and she said she was never given an option to that. She didn't know she had a choice in the matter. No one said she could object.

Witness states that in the final IEP meeting, the lady walked in, handed us the paperwork, and said "he's too smart, and he's going to be taken off the IEP." Witness stated she didn't say anything because she was in a state of shock. She agrees that he is smart but doesn't agree that he's too smart to be on an IEP.

She had no idea that she was signing anything at this meeting to take him off an IEP. She was never given a forewarning. And when she left that final IEP she said she was in a state of shock and didn't know what to think.

Witness stated that she was told they were putting him on a 504 and that it was exactly like an IEP. She didn't know the name of the person but it was a district person.

Witness does not recall being asked her opinion about removing [REDACTED] from the IEP. She felt she didn't have a choice and didn't feel like her opinion mattered.

Witness reiterated that she had absolutely no knowledge that they were taking him off the IEP and believes the Granite school system did prevent her from giving her opinion and input and not informing her of the final IEP.

Examiner has an exhibit that is public knowledge that shows the date of the meeting was 3/11/19, the date of the signatures was 3/11/19, and the date [REDACTED] was removed from the IEP was 3/11/19.

Witness states she did not agree with changing [REDACTED] to a 504 but she didn't think she had a choice in the matter.

Witness states, during [REDACTED]'s high school years, she kept in constant correspondence with the school and with his teachers through email. She also kept in constant correspondence with the counselors and the principal.

Witness reads aloud an email she sent to the counselor, Mrs. [REDACTED], on November 2, 2019. Exhibit 19. (As read)

First, Mrs. [REDACTED], I am trying to get [REDACTED] Social Security. SSI paperwork process started for when he turns 18. I'm trying to get on top of a huge nightmare. Mrs. [REDACTED] and I talked this week about the troubles with the 504 plan. It doesn't have the same helps that the IEP has. I am feeling frustrated, especially after all the medical stuff [REDACTED] has gone through this year. I feel like he needs to be on an IEP not 504. I don't think he's getting the same helps he was last year. I don't know who his file holder is, but we need to talk about changes again, especially concerning his future after high school. This needs to be done now, not next year. I can't even really start the SSI paperwork for when he turns 18 until we get him back on an IEP. I think that is critical to this process. He needs that in place for school services post high school. He also needs, we also need him on an IEP for "voc rehab" services past high school as well. These are major concerns we cannot ignore.

Witness states this is just one of the times she disagreed with a 504. She explains that the 504 is not the same as an IEP because an IEP has legal teeth. She said the school did not listen to her about putting [REDACTED] back on an IEP. She said having [REDACTED] on the 504 was just a nightmare. They didn't have any help. It was a nightmare because she spent every avenue she had, every family member, and person. His grandmother took him everywhere, back and forth to school, trying to find people to help him get tutors. They emailed every person they knew. She spent a lot of time trying to find tutors for him to get the help he needed.

Every semester, they would take [REDACTED] 3 to 4 times a week for tutoring for chemistry, astronomy and math. They also drove him back and forth to the school for additional

math tutoring. There were also tutors that drove from Colorado and when they were in town they would drive [REDACTED] to South Jordan to be tutored in math. They drove to South Jordan about five times every semester

Hearing Officer Snowden asked the witness what kind of remedy she is wanting the school to make. Witness states that she just wants the system to change for other kids, so they don't go through what they've been through.

Witness was asked to read a communication from a teacher named Mr. [REDACTED], he taught social studies. This is one page from an email correspondence totaling eight pages.

(As read) "I have noticed that for the past several weeks [REDACTED] has been clearing his throat and swallowing uncomfortably much more frequently than in the past. Are there exercises or some type of physical therapy for this that he can work on? It has become a bit of a distraction for other students and I am hoping we can figure something out together."

Witness cannot remember what the throat clearing was about and was told not to testify if she couldn't remember or was just speculating. But stated there are other issues like this with his disabilities in classes.

Witness was asked to read another excerpt from correspondence with a different teacher Exhibit 17

(As read) "I have had several students complain to me about the things [REDACTED] was saying during class yesterday while I was working with other groups and during the short periods of lecture. He was discussing sexual activities in a graphic and detailed manner, which made students uncomfortable. This type of conversation is simply unacceptable and give - and gives how he was attempting to in- in even a small way to view a pornographic related website several weeks ago, I am becoming more and more concerned by [REDACTED]'s school behavior."

Witness claims she had a conversation with him about the situation and he said he accidentally got on that website and it scared him. He didn't know how it happened and got out of it as soon as possible. Examiner explained that this situation shows that he was struggling in his classes. Witness says she emailed his teacher back and explained that it was an accident. He was using his Chromebook which was given to him by the school. Due to his dysgraphia, he needed to type everything because of his horrible handwriting.

Witness stated that [REDACTED] had a hard time getting back into his class work after his back surgery. He had a lot of pain and he couldn't sit through one class. [REDACTED] was doing all he could but was still behind in school. Witness feels like if he had more support from the school and had been on an IEP he would have been able to keep up. She felt he needed less and shorter assignments and more time to do his schoolwork both at home and in class.

Witness stated that [REDACTED] was the teacher that was doing home hospital with [REDACTED] and came about once a week for about an hour each time and would do

tests with him. Outside of [REDACTED] coming for an hour a week witness stated that she and [REDACTED]'s grandmother are the ones that did all the work with him. If he needed help with math they would have to try to find someone to assist. He was in pain, still had trouble hearing and still had his slow processing speed. All of this caused [REDACTED] to have stress. They did this basically by themselves through the fall of 2019 and then right after he got back into school Covid hit.

Examiner Submits email witness sent to a counselor on January 9, 2020 (as read)

I'm concerned about [REDACTED]'s lack of organizational skills and ability to plan. I know this is probably no surprise to you. I'm wondering how we can teach him the skills and help him understand the needs of having the skills for future independence. It doesn't work coming from his mother or grandmother. He doesn't want to hear it from us. I have honestly tried, and I'm honestly failing. I'm feeling quite nervous with him where he is at his age. What can the school do to help?

Examiner submits email sent to [REDACTED] January 17, 2020 about [REDACTED] struggling in chemistry. Witness said they got through it with lots of tutoring from many many people.

Witness lined up a tutor for [REDACTED] to get him completely caught up on all of his classes and then focus completely on math and chemistry. That was in April 2020.

Witness was successful in getting guardianship of [REDACTED]. And she did this because [REDACTED] needs lots of help with his medical needs and for financial reasons.

Witness states that [REDACTED] doesn't really know when he's hungry. He has alarms on his phone to remind him to eat. And his mother has to remind him even after the alarm. He can't go to the store and purchase an item without assistance. He needs to be reminded to take a shower.

Examiner has Witness read aloud the financial cost of having to tutor [REDACTED] without the schools help.

Hours of tutoring 1,695.5

Miles driven 230

Monetary value of tutoring \$68,971.30.

Hours fighting the school for an IEP 371

Miles driven 2,368

On Cross-Examination

Witness admitted the tutoring invoices are from relatives of the witness, and when asked if these invoices have actually been paid out or are these relatives expecting to be paid based on the outcome of this hearing, the Witness said they would definitely like to be paid for their time they spent tutoring [REDACTED].

Witness claimed again that the school did not offer any tutoring not even virtual. The only help they got was during home hospital.

The witness testified she doesn't know if they were created in 2020 at time of services rendered or in 2021 for this hearing. But she attests to the truthfulness of the hours and time given from the people that helped her with the tutoring. She doesn't know who created the invoices and she can't remember when she saw them for the first time.

Witness testifies that she is able to create her own emails and she did in fact create her own emails when communicating with the teachers about [REDACTED].

Sometime in 2020 witness turned over the advocacy efforts on behalf of [REDACTED] to [REDACTED] and [REDACTED], family members. She gave them power of attorney. Once this was done she still communicated with the school about [REDACTED]'s needs but not as much.

Witness did not attend the meeting in January 2021 when [REDACTED] was determined to be re-eligible for special education. She doesn't believe she attended the IEP meeting in February 2021 either. She does recall communicating to her attorneys-in-fact about what she wanted for [REDACTED] in connection with the development of the IEP in the spring of 2021. Witness assumed that [REDACTED] would be retested.

When presented with an exhibit showing that witness attended a meeting on March 11, 2019. Witness signed a statement about "procedural safeguards" which explains her rights. Witness claims it to be in microscopic print and she couldn't read it if she tried.

When asked why she delayed filing of the due process hearing for more than two years after [REDACTED] was exited from special education. Witness states that she just wants to see a change made in the system because it's a mess. They faced many challenges getting to this point. Lots of struggles and the district didn't make it easy on their family trying to get help for [REDACTED]. She felt the district didn't help by not getting the paperwork that she

needed in a timely manner. She thought the district was very difficult and uncooperative saying it should've taken 90 days to get the paperwork and it took at least four months. Witness states that [REDACTED] has been in the system from the age of 5 until 18 and she's sure she's read the procedural safeguards once or twice.

[REDACTED] Student's cousin testified in pertinent part as follows:

Witness explained that she became involved in [REDACTED]'s education because the grandmother had an accident so she needed to come in with [REDACTED] for a few months to assist [REDACTED] because she was overwhelmed. This is when [REDACTED] gave [REDACTED] and [REDACTED] power of attorney to represent [REDACTED] "in dealing with schools, tutoring, class changes, transportation, benefits, and aids for her dependent children. Also to be able to access medical information for the principal ([REDACTED]) and her dependent children." She testified she started working with the school to try to change the 504 in September 2020 Which was within the two-year period stated in the procedural safeguard.

Witness testified that she was told that a 504 and an IEP were the same. And she was told this at an IEP meeting when they were trying to get him back on an IEP.

The witness states that the principal, two vice principals, and a counselor was there and they were all telling her that the 504 in the IEP were the same.

Witness claims she was told that the IEP and 504 were the same at every meeting she attended. Counselor [REDACTED] was a counselor that made that statement along with AP [REDACTED] and AP [REDACTED].

Witness states she asked for [REDACTED]'s file at the meeting in September 2020 and they didn't receive the file until February 2021.

[REDACTED] was put back on the IEP in February 2021. Witness states [REDACTED] was reinstated because he was autistic and she actually took in documentation from his doctors. Once the school found out he was autistic they put him back on the IEP.

Witness states that [REDACTED], who is over special education in [REDACTED] did not know [REDACTED] was autistic because [REDACTED] told her that.

Witness states that once she received [REDACTED]'s file, it was very large, and took her through mid summer to go through everything.

Witness reads aloud the highlighted section of [REDACTED]'s 10th grade "Prior notice for identification and determination of eligibility" in his file. (As read) "[REDACTED] does not have a disability, as defined in the IDEA.": This is the year they took him off of the IEP.

It is the witness's opinion that [REDACTED] does have a disability. After reading and doing research by medical physicians and psychologist, he has level 2 autism. And he has many other disabilities that would fall under the disability education act. And after researching, she found that children with autism can be qualified under IDEA.

On cross-examination, [REDACTED] testified:

The documentation of expenses incurred on behalf of [REDACTED] were provided including invoices, billing, detailed itemization of services provided-- including money owed was created at the time the service was rendered.

██████ asked for invoices, receipts and everything that happened and what they had paid so they tried to recreate the invoices to the best of the tutor's recollection.

When asked how ██████ paid for the services, the witness replied that she didn't pay her rent last month so she could pay for the ████████████████████ They are receiving some financial assistance. The portion the witness gave is what they are required to pay.

The Jones center is a 4-year program. if he had not graduated, he could have gone to the Jones Center for four years and it is free to them because it is a school provided.

Because ██████ graduated, he is unable to attend the Jones center.

The witness also testified concerning invoices submitted into evidence and expenses incurred on behalf of the student,

██████████████████, **Petitioners' proposed expert.**

██████████████████ Former Special Education Teacher, and Special Consultant/Advocate was permitted, over objection by the district, to testify. Because, in the judgment of the Hearing Officer, ████████████████████ was not properly qualified and admitted she had personal knowledge of the student, having never met hi, her testimony is not being considered by the trier of fact.

██████████████████ school psychologist for the district testified

That part of her job responsibility is to help with special education evaluations and she also does counseling and works with challenging behaviors in classes and she was a part of [REDACTED]'s evaluation in 2019.

Witness is asked to look at exhibit 3, her psycho educational report and a summary of the testing that was done in that evaluation.

That every three years they look at eligibility for special education students. [REDACTED]'s reevaluation included cognitive tests, academics by a resource teacher and some behavioral testing in the form of an observation. The cognitive test that was administered was the WISC- V 5th edition. This testing is done to look at learning potential and to be a predictor of how a student will do in an academic setting.

His overall IQ is in the average range. He does have a scatter of strengths and weaknesses. His verbal comprehension is a strength for him. He understands language-based information, vocabulary, facts, more permanent or crystallized information. He also has a strength in his working memory he can remember and use small pieces of information and those items were higher than average in those areas.

A weakness for him was his processing speed and it is in the extremely low range. The processing speed is a measure of how quickly he can identify and use simple information.

It is noted in his testing that he frequently asked to be assisted with the testing-- especially when test items became more difficult and he had to be encouraged to

continue. Persistence is going to play a role in the score because they are timed subtests so if a student is not persistent, their score will be lower.

The full-scale IQ is 99. However, there are times when subtests were inaccurate because there might have been a mistake on a test due to processing speeds. Because this test may not be completely accurate they do further testing as well because there are things like student attention concerns or if a student is having a bad day, their scores ebb and flow a little bit. This is a peer reviewed test and it's used by many people and is a proven track record of being a pretty good predictor.

██████████ administered the Woodcock Johnson test, then she inputted the test results online and then ██████████ wrote them to be a part of this evaluation. The Woodcock Johnson measures performance in academic areas including reading, math, writing. It assesses where a student is at academically. This test is also peer reviewed and is standardized and has good reliability invalidity.

There were several recorded test dates--- November 13th 2018, January 9th 2019, and January 16 2019. These are the dates the specific test word ministered they're not all completed on the same day.

WISC was administered 1-16-2019

Woodcock Johnson administered on 1-09-2019.

The observation was completed on 11-13-2018.

The exhibit is a compilation of all of those findings.

The results of the Woodcock Johnson test is communicated with the special education teachers. There were three areas that were administered for [REDACTED] on the Woodcock Johnson test—reading, writing, and math.

The first paragraph is his reading testing and this is similar where 100 again is the mean-- where we would expect most students to be between 90 and 109. His basic reading skills, which is his ability to decode words, to break them down, to read, (just the basics of reading) was in the superior range and that is a strength for him.

His fluency rate is in the average range it is a 91 so he is able to read at the same pace as his typical peers. His comprehension of what he reads is in the above range as well.

He did score extremely low in the sentence reading fluency--that is a measure of how quickly and smoothly he can read and answer questions (completed silently). So they're reading portions would indicate that he is able to read at the same level as his peers or a higher level in some instances.

With his writing portion, he scored in the average range with a broad written language. In written expression, he is a bit below average at an 88. (90-109 is average)

Sentence writing fluency, he scored in the extremely low range. He is able to do the reading and writing, it takes him longer to do so. This part of the test is handwritten and looks at content only—not neatness.

There are two math portions. One is a measure of problem solving or reason ability. He is in the average range.

The second portion of math is the calculation skills—following the steps to solve an equation and the procedural aspects of math. He scored 72. His conceptual understanding of math is where we expect it to be but the step by step was lower than his typical peers.

The classroom observation is for behavior. The purpose is to look at if the student follows directions, how they interact with their teacher, with their peers, are they on task.

The observation is conducted in intervals of every 10 seconds, to see if [REDACTED] is on task. There are symbols indicating if he is talking or out of his seat, playing with an object, or inactive. Another male student in the class is used as a comparison.

[REDACTED] was in the hall for MOST of the observation. Ms. [REDACTED] stood in the doorway so that she could see [REDACTED] in the hallway. He was on a couch. He was in the hallway because of the audio system that was being used. It was easier for him to hear when they were reading. He had his audio system in use at the time. They were reading a novel as a whole group. [REDACTED] was engaged some of the time. He was also looking at his phone and some of the time he was attending to the teacher.

His On-Task behavior was above his peers. He was on task 67% of the time. His male peers were on task 57% of the time.

The pattern that we saw with the cognitive testing and the academic testing is that he might benefit from additional time to complete tests and assignments. The testing seems to indicate he has the ability and skills, it just takes him longer to accomplish some of the tasks.

██████████, Teacher at Post-High Program within Granite School District testified as follows:

Post-High program is for students 18-22 that had an IEP in high school and they're eligible to continue on with services up until the age of 22. In the '20-'21 (on or about January) school year, ██████████ replied to inquiries about post-high via email to ██████████ and ██████████ (██████████'s grandmother and mother) asking them to watch a parent information video which explains what post –high is and services provided. This video was created after the covid pandemic in order for families to have the same information electronically that they would have had in the in-person meetings previously held twice a year.

██████████ stated the Jones Center is a “training facility for individuals with disabilities” that can sometimes be part of the post –high services. There are 2 programs available at post-high.

1- JCVA (Jones Center Vocational Academics) – “for students working on credits to get their diploma”.

2- Hartvigsen (another campus post-high) – “for student's that aren't quite ready for the community...more severe students.”

After the video was sent and the family replied, ██████████ emailed the family a list of Utah resources and programs for them to consider. They had a zoom meeting with ██████████, ██████████, ██████████ and ██████████ (██████████ administrator) in order to answer any “follow-up questions about post-high”. At this point ██████████ stated she

had not received any information about [REDACTED] so she was not comfortable discussing him, and only answered questions pertaining to post-high. The family followed up with an email stating “they needed to figure out where he best fits”, therefore, [REDACTED] had no understanding if [REDACTED] and [REDACTED] were interested in the post-high program for [REDACTED].

It is not common for the family to initiate contact about the programs at post-high. As per [REDACTED] the typical pattern is for team partners at the high school level to send names in December (of students) in order for [REDACTED] to reach out to their teachers by January requesting more information. In the spring, [REDACTED] picks up the students from the high school and gives them a tour of post-high, which parents are also invited, and start registration thereafter.

This is not what happened in [REDACTED]’s case, he was not referred in December by the school with all the other students. Typically, students with a 504 are not referred to [REDACTED] for post-high services. At some point [REDACTED] district personnel, contacted [REDACTED] saying [REDACTED] might be a “potential candidate” for post-high. [REDACTED] recalled previously meeting the family back in January, but no one followed up for months. She stated [REDACTED] was in Compliance Department, and she believed [REDACTED] may have attended [REDACTED]’s IEP in February.

[REDACTED] sent [REDACTED] ([REDACTED]’s teacher) a google “matrix” form on May 13th for her to fill out pertaining to [REDACTED]. This form is something administrators, district personnel and teachers worked on and ranges in score from 1-6. It serves as a gauge to see what kind of support an individual may need, and what program might best suit

them. [REDACTED] scored a 3.92. [REDACTED]'s first and only time meeting [REDACTED] was May 17th. [REDACTED] mentioned his plans after high school were to do Columbus Connect and BYU Pathways. She gave him her contact and a pamphlet information about post-high but never heard back from anyone.

[REDACTED] did not participate in the post-high program offered to him and his family by [REDACTED] on behalf of the district and received his high school diploma. It is possible to get his score (3.92), and still graduate without partaking in post-high services. Receiving a diploma would typically take ([REDACTED]) out of the contention of participating in the program, but [REDACTED] was planning on [REDACTED] attending.

[REDACTED] did mention via email Columbus Connect to the family like she does with anyone inquiring about post-high, along with a number of other resources available. She states she never told [REDACTED] and [REDACTED] [REDACTED] was too smart for post-high, the Jones Center" because up to that point she had not yet seen any information on [REDACTED]. [REDACTED] relies heavily on teacher referrals, parent information and transition specialists such as [REDACTED] who works at [REDACTED] and the school team to make the appropriate decision regarding potential candidates to attend post-high.

[REDACTED] Director of Special Education for Granite School District with approximately 8,325 special education students (11% of the student body) testified in pertinent part as follows:

■■■■ participated in the resolution efforts in connection with this due process proceeding. A state complaint as well as a Request for Due Process Hearing were filed simultaneously regarding the same matter. The state complaint has been set aside pending the results of this due process hearing where the issues are the same. Two resolution meetings in connection with the due process complaint were held by ■■■■

The first meeting was held in June attended by ■■■■ (mom), ■■■■ (grandma), shortly joining ■■■■ and ■■■■ with associate director, ■■■■ and ■■■■. This meeting was to understand the family's complaints, to seek out, clarify, what remedies they wanted or suggested. The initial complaint included some reimbursement for tutoring, they discussed mileage, they wanted to do some professional development. They stated "never take a student who's classified as having autism off an IEP." The complaint had statements about wanting to change the system which ■■■■ says are beyond his purview.

In the June 23rd meeting ■■■■ requested the family provide invoices/receipts of what had been spent in regards to services and tutoring rendered to ■■■■ that they felt would not have been necessary if an IEP had been in place. They did so in order to examine the appropriateness of reimbursement for that. No specific offers were made, because ■■■■ did not know what actual amount had been "put out". He also wanted to know if they were expecting a reasonable reimbursement or compensation for wrong doing. Never at any point did ■■■■ concede to wrong doing during the resolution meeting. A second meeting was rescheduled for July 9th, where to ■■■■'s

understanding the family would bring back their invoices and mileage receipts in order to review and examine the expenses laid out by the family.

July meeting was held by [REDACTED] (mom), [REDACTED] (grandma), [REDACTED] and [REDACTED]. No receipts or invoices were given at that time. They all came to the conclusion that they needed to come to a resolution and have a written agreement by a week later, July 16th, or move on to due process. [REDACTED] instructed [REDACTED] to create a spreadsheet to which the family could enter hours of tutoring, mileage, and that was sent to [REDACTED] the following Monday when the family didn't produce anything.

[REDACTED] does not believe the information heard at this hearing is a reasonable request for reimbursement, since he doesn't believe they are in lieu of IEP services. He believes they are "above and beyond what schools would be offering." He has no confidence those invoices reflect tutoring hours, because if they actually had existed at the time they would have received them.

[REDACTED] and the family talked about post-high services since the family expressed their desire for [REDACTED] to receive services after high school. Family mentioned they had spoken to [REDACTED], but dismissed the possibility of going there because the Jones Center services kids who are lower functioning than [REDACTED]. [REDACTED] doesn't agree, although graduation would typically cause a student to be exited from special education services even though that doesn't exclude or preclude any determination that way. [REDACTED] stated "Section 7 of the Utah state rules and regulations prohibit the withholding of a diploma if it's rightfully earned by a student with disabilities", which he believes [REDACTED] rightfully earned. When ending services at graduation, a meeting is held, exit form is

filled out, the school provides additional information to the family that may be needed for post-secondary services. An exit form was not filled out for [REDACTED]. There is no legal reason at this point the district couldn't provide services through post-high if necessary. It is not typically done, but it's been done on the past. After an email was sent on July 12th to the family with the spreadsheet, a reply was received stating the case had been handed over by the family to [REDACTED] and someone else.

On [REDACTED]'s IEP from the February 2021 meeting it states that "Graduating with a high school diploma or reaching age 22 terminates special education services." [REDACTED] cannot speak to whether information about post-high was actually talked about during the IEP meeting or subsequent meetings, but he states during the June and July meetings he participated in, the family communicated they believed [REDACTED] was "too high functioning to benefit from the Jones Center". [REDACTED] states Granite could (still) provide post-high services to [REDACTED] at no cost to the family, on par with what he is currently receiving at [REDACTED].

Discussion

General legal standards

Students with disabilities who are protected by the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a free appropriate public education ("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 USC § 1400(d); 34 CFR § 300.1(a). The IDEA further provides

that a party may present a complaint and request for due process hearing with respect to any matter relating to the identification, evaluation, educational placement, or provision of a FAPE to a disabled student. 20 USC § 1415(b)(6).

The IDEA and its implementing regulations provide that in order to qualify as a "student with a disability" under the IDEA, a student must (1) meet the definition of one or more of the categories of disabilities which include: . . . a specific learning disability . . . , and (2) need special education and related services as a result of the student's disability. CFR § 300.8 (a)(1). A student is in need of special education and related services when the student requires those services in order to receive an educational benefit from the student's educational program. *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 54 IDELR 307 (7TH Cir. 2010); *Sebastian M. V. King Phillip Reg'l Sch. Dist.*, [59 IDELR 61](#) (1st Cir. 2012).

Jurisdiction: statute of limitations

A threshold issue in this matter involves the application of the IDEA's two-year statute of limitations to Petitioner's Complaint, which was filed on June 17, 2021. The IDEA, its implementing regulations, and the USBE SER provide, generally, that a parent must request a due process hearing within two years of the date the parent knew or should have known about the alleged action that forms the basis of the due process complaint. 20 USC § 1415; 34 CFR § 300.507(a)(2) and 300.511(e); and USBE SER IV.I.4 and IV.M.6. The limitations period was included as part of the 2004 IDEA amendments, and became effective as of July 1, 2005.

There are two exceptions to the two-year limitations period set forth in the federal regulations and state rules. They involve specific misrepresentations by the LEA and/or the withholding of required information from the parent, where either of those circumstances prevented the parent from filing a request for a due process hearing. 20 U.S.C. § 1415(f)(3)(D); 34 CFR §§ 300.507(a)(2) and 300.511(f); and USBE SER IV.I.4 and IV.M.7. Therefore, unless an exception applies, Petitioners' claims would be limited to the two-year period described in the IDEA regulations and USBE SER.

The Federal regulations provide that the timeline for requesting a hearing does not apply to a parent if the parent was prevented from filing a due process complaint due to: (1) specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or (2) the LEA's withholding of information from the parent that was required under this part to be provided to the parent. 34 CFR § 300.511(f). The USBE SER contain similar language providing that the two-year limitations period applies except if the parent was prevented from filing a due process complaint due to specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint, or the LEA withheld information from the parent that was required under Part B of the IDEA to be provided to the parent. USBE SER IV.I.4. Also, USBE SER IV.M.6 is substantively identical the Federal regulation counterpart.

The two exceptions to the two-year limitations period were the subject of some discussion by the U.S. Department of Education. The Education Department declined to expand the list of exceptions, and also explained that it would not define the term

misrepresentation stating that hearing officers would need to make decisions on a case-by-case basis as to whether parents should have known about alleged actions in order to request a due process hearing. (See Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46706 [2006].)

In Petitioners' Complaint, it is clear that some of Petitioners' claims extend beyond the two year statute of limitations period. Respondent has raised the statute of limitations as an affirmative defense to Petitioner's claims. During the initial pre-hearing conference call in this matter, and also at the beginning of the hearing, Petitioners moved the Hearing Officer for an order extending the two-year statute of limitations period back to March 11, 2019, when the Student was taken off his IEP. A ruling by the Hearing Officer on the statute of limitations question was deferred until the hearing in order to give Petitioners full opportunity to present evidence concerning the exceptions. Petitioners have the burden of proving the existence of one or both of the exceptions to the two-year limitations period (see below).

The Petitioners argue that the statute of limitations exception(s) should apply in this case based upon the school districts failure to timely disclose and provide the students records to the parent. Based upon the relevant and admissible evidence submitted, the school district's inexplicable failure to timely provide the records had some effect on the timing of the discovery of a potential violation and thus arguably prevented the Petitioners timely filing of their complaint for due process.

Petitioners' procedural issues

An allegation of a denial of FAPE to a disabled student can be based on either substantive grounds or procedural violations of the IDEA. 20 USC § 1415(f)(3)(E). *Hendrick Hudson Central School Dist v. Rowley*, 458 US 176; 102 S Ct 3034; 73 L Ed 2d 690 (1982); *Sytsema v. Academy School District No. 20*, [538 F.3d 1306](#) (10th Cir. 2008), 50 IDELR 213. "The IDEA also sought to maximize parental involvement in educational decisions affecting their disabled child by granting parents a number of procedural rights. For example, parents are entitled to: (1) examine all records relating to their child, 20 U.S.C. § 1415(b)(1); (2) participate in the IEP preparation process, *id.*; (3) obtain an independent evaluation of their child, *id.* (4) receive notice before an amendment to an IEP is either proposed or refused, § 1415(b)(3); (5) take membership in any group that makes decisions about the educational placement of their child, § 1414(f); and (6) receive formal notice of their rights under the IDEA, § 1415(d)(1)." *Ellenberg ex rel. S.E. v. New Mexico Military Institute*, [478 F.3d 1262](#) (10th Cir. 2007). The IDEA's "procedural guarantees are not mere procedural hoops through which Congress wanted state and local educational agencies to jump. Rather, the formality of the Act's procedures is itself a safeguard against arbitrary or erroneous decision making." *Daniel R.R. v. State Bd. Of Edc.*, [874 F.2d 1036](#), 1041 (5th Cir. 1989) (internal quotation marks omitted).

However, proving a procedural violation is only a first step to obtaining relief. In *Sytsema*, the court held that an "IEP's failure to clear all of the Act's procedural hurdles does not necessarily entitle a student to relief for past failures by the school district." *Sytsema*, 50 IDELR at 216; quoting *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, [520 F.3d 1116](#), 1125-26 & n.4 (10th Cir. 2008) ("[O]ur precedent hold[s] that

procedural failures under IDEA amount to substantive failures only where the procedural inadequacy results in an effective denial of a FAPE."); *quoting Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996) (holding that a procedural failure did not entitle a student to relief because that deficiency did not result in the denial of a FAPE).

Congress provided in the 2004 amendments to the IDEA that to find a denial of FAPE based on a procedural violation, the Hearing Officer must find that the procedural violation: (1) impeded the student's right to a FAPE, (2) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the student, or (3) caused a deprivation of educational benefits. 20 USC § 1415(f)(3)(E)(ii); 34 CFR § 300.513(a)(2); UCA § 53A-15-301(IV)(O)(2).

The IEP process provides that the parents and school personnel are equal partners in decision-making; the IEP team must consider the parents' concerns and information they provide regarding their child. (64 Fed. Reg. 12473 (Mar. 12, 1999).) The IDEA's requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs, since they generally observe their child in a variety of situations. (*Amanda J.*, *supra*, 267 F.3d at 891.) A parent who has had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Board of Education*, 993 F. 2d 1031,1036 (3rd Cir. 1993).) Stated another way, a parent has meaningfully participated in the development of an IEP when he/she is informed of

his/her child's problems, attends the IEP meeting, expresses his/her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools*, 315 F.3d 688, 693 (6th Cir. 2003); *Fuhrmann, supra*, 993 F.2d at 1036.)

Substantive Issues

Petitioner's first substantive issue is: (a) Whether the Respondent failed to provide the Student with a Free Appropriate Public Education (FAPE) during the time the student attended the School by:

(1) inappropriately removing him from his IEP in March of 2019 and placing the student instead in a 504 plan;

The facts set forth above clearly establish that the school district performed a three-year reevaluation on the student and determined from the testing provided that his primary area of disability involved his physical infirmities with his back and his hearing loss.

There was even some evidence that at least one member of the IEP team for the school wasn't aware that he was previously diagnosed with autism spectrum disorder. The evidence further indicates that the mother of the student was given assurances that a 504 plan and an IEP were "the same thing" by members of the district staff. The evidence also indicated that, despite change to the 504 plan, that there was no substantive change in the Services provided to the student by the school district.

The evidence from the Respondent failed to provide an explanation of how the change from an IEP to a 504 plan would or should benefit the student. One of the clear and

undisputed allegations from the evidence was that the student tested consistently low on “processing speed.”

Students with disabilities who are eligible under the IDEA are entitled to be appropriately identified, evaluated, placed, and 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. 34 CFR § 300.1(a); USBE SER II.A. The IDEA provides that a child must be assessed in all areas of suspected disability. 20 USC § 1414(b)(3)(B). However, school personnel are not charged with knowledge of disabilities that they have not been made aware of or that there are no indications of at the time the IEP is developed. *Tracy N. v. Dep't of Educ, Hawaii*, 715 F. Supp. 2d 1093, 1112-13 (D. Haw. 2010).

The Hearing Officer finds that the School District failed to establish a rational basis for the student's removal from his IEP to a 504 Plan and thus finds for the Petitioners on this question. However, the Hearing Officer concludes that the violation was harmless because the Student was making and continued to make progress and, therefore was not denied a FAPE.

Therefore, Petitioner has failed to prove by a preponderance of the evidence that Respondent violated the provisions of the IDEA within the statutory jurisdiction period of Petitioners' due process Complaint, which was filed on June 17, 2019. Therefore, Petitioners have not met their burden of proof on this issue. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005).

Petitioner's second substantive issue is: (a) Whether the Respondent failed to provide the Student with a Free Appropriate Public Education (FAPE) during the time the student attended the School by:

(2) inappropriately allowing the student to graduate with his peers in the 2021 graduating class;

The petitioners alleged that the school district intentionally passed the student in classes that he did not earn a passing grade in an effort to graduate the student. The petitioners further allege that because the student was taken off an IEP for a time period, and graduated, that the student was made ineligible for post-high services.

Testimony from ██████████ referred to her efforts to obtain financial assistance from state agencies and had been told to help with graduated and or was not on an IEP. The fact is, it was on an IEP at the time he graduated and the petitioners provided no documentation of denial letter or other document supporting this contention.

Testimony from the student himself, now █████ years of age, indicated that graduating with his peers was and important milestone in his life, for which he felt very proud.

Evidence from the school district indicated that there is no legal way to void his graduation form high school and that the student earned his diploma like all graduates. Further, Special Ed director ██████████ testified that the student is still eligible for post high services at no cost with the school district. Taken all together, the Hearing Officer finds that the petitioners have failed to meet their burden of proof with regard to the

allegation that the student was passed through classes from which he didn't earn a passing grade and inappropriately graduated from high school.

Petitioner's third substantive issue is: (a) Whether the Respondent failed to provide the Student with a Free Appropriate Public Education (FAPE) during the time the student attended the School by:

(3) based on allegations of its complaint, Whether the Petitioners are entitled to financial reimbursement for costs incurred for the student's education.

The petitioners presented evidence, in the form of testimony and documents, of time, mileage, tutoring, professional consultation and the like. Petitioners contend the students education was far from "Free" if not appropriate.

The Respondents argue that the evidence of reimbursement is insufficient but offered little in the way of evidence to support that argument, but on cross-examination exposed the lack of corroborating evidence to support an award of money damages.

The hearing officer finds for the respondents on this issue. While there was ample evidence of expenses, there was virtually no evidence of actual expenditures paid by the petitioners. The most troubling issue with the question of reimbursement what's the lack of any evidence that the student required the services sought and received to access his education, coupled with no evidence that the district didn't offer this kind of assistance free to the student. The mother testified in part that they sought out people they believed to be knowledgeable and reliable, bit never indicated that the district did not offer the same services or refused to provide them. The invoices and examples of

expenditures appeared to be randomly put together. For example, [REDACTED] failed to establish on what basis she should be reimbursed \$55 per hour for attending meetings and consulting with education professionals. The record is replete with evidence that invoices were put together hastily and in preparation for this hearing and that most, if not all of the service providers were relatives trying to help out their relatives. The testimony and evidence revealed that almost none of the expenses had been paid and that the service providers would "like to be paid." This prospective notion of payment fails to meet the burden required of the Petitioners. This is an admirable endeavor but not one for which it is justifiable to hold the school district responsible,

The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians. *Id.*, at 1000. Deference is given to the expertise and exercise of judgment by the school authorities, with parents and school representatives to be given the opportunity to fully air their opinions regarding how an IEP should progress. *Id.*, at 1001. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. *Id.*, at 999 (internal citations omitted). Accordingly, for a child fully integrated in the regular classroom, an IEP typically should, as Rowley put it, be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." Rowley, at 203-204. "If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to

grade is appropriately ambitious for most children in the regular classroom." *Endrew*, 137 S. Ct. at 1001.

Conclusions of law

Based upon the foregoing Findings of Fact and analysis of issues and the Hearing Officer's own legal research, the Hearing Officer now enter the following Conclusions of Law:

1. Petitioners did meet their burden of proof that the IDEA Statute of Limitations should be extended for more than two years prior to the filing of Petitioners' Request for Due Process Hearing.
2. Petitioners did meet their burden of proof that Respondent improperly removed the student from his IEP March, 2019.
3. Petitioners did not meet their burden of proof that Respondent failed to provide the Student with a FAPE by such removal from his IEP. *Shaffer v. Weast*, [546 U.S. 49](#), 61 (2005).
4. Petitioners did not meet their burden of proof that Respondent should be ordered to reimburse the Petitioners for expenses allegedly incurred for the student to access his education. *Shaffer v. Weast*, [546 U.S. 49](#), 61 (2005).

Order

Based upon the foregoing Findings of Fact and Conclusions of Law it is hereby ORDERED as follows:

1. It is ORDERED that Petitioners' requests for relief in extending the due process statute of limitations period to March 11, 2019 is GRANTED.
2. It is ORDERED that Petitioners' request for relief in the form of a finding that the student was improperly removed from his IEP in March, 2019 is also GRANTED.
3. It is ORDERED that Petitioners' requests for relief in a finding of a denial of FAPE, as a result of such improper removal, is DENIED.
4. It is ORDERED that Petitioners' requests for relief for financial reimbursement is hereby DENIED.

All other relief not specifically ordered herein is DENIED.

Dated this 7th day of December, 2021.

//s// Frank Snowden
Hearing Officer