

DOCKET NO. 085-SE-1210

STUDENT bnf PARENT § **BEFORE A SPECIAL EDUCATION**
§
VS. § **HEARING OFFICER FOR**
§
CORPUS CHRISTI ISD § **THE STATE OF TEXAS**

DECISION OF HEARING OFFICER

Student (hereinafter “the student”) through his next friend, Parent (Petitioner), requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. § 1400 et. seq. The Respondent is the Corpus Christi Independent School District.

In the Request for Hearing, Petitioner alleged that CCISD denied the student a Free Appropriate Public Education (FAPE) in the following particulars:

1. Failure to implement the student’s IEP by removing him from his classroom to accommodate the schedule of ***, causing him to lose time in core academic classes.
2. Failure to provide *** after the *** originally assigned to him was ***.
3. Failure to provide *** or appropriate support during transportation.

Petitioner seeks requested the following as relief:

1. One year compensatory educational services or an amount deemed appropriate by the hearing officer. Petitioner’s Request for Due Process Hearing is incorporated herein by reference.
2. An order requiring appropriate evaluations and appropriately implemented modifications, interventions and services.

PROCEDURAL HISTORY

Petitioner filed this request for hearing on December 17, 2010. A hearing was held on February 15, 2011. Petitioner was represented by attorney Christopher Jonas. The Corpus Christi Independent School District was represented by attorney Andrew Thompson. At the conclusion of the hearing, both parties requested an opportunity to submit written argument and proposed findings of fact and conclusions of law. The decision due date was extended to March 23, 2011 for good cause to allow the parties an opportunity to submit written argument. The Decision was timely rendered and forwarded to the parties.

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law. Citations to the transcript will be designated “RR” with a notation of the volume number and page number. Citations to Petitioner’s and Respondent’s Exhibits will be designated with a notation of “P” or “R” followed by the exhibit number.

FINDINGS OF FACT

1. The Corpus Christi Independent ISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing Student a free appropriate public education

(FAPE) in accordance with the Individuals with Disabilities Education Improvement Act, 20 U.S.C.A. § 1400, et seq., and the rules and regulations promulgated pursuant to IDEIA.

2. The student resides within the geographical boundaries of the Corpus Christi Independent School District. CCISD is responsible for providing the student with a FAPE.

3. The student meets eligibility criteria and presents educational needs for special education services as a student with disability classifications of Autism and Speech Impaired. At the time of the hearing, the student was in the *** grade. (RR-17; P-5; R-4; R-19)

4. The student's placement for the 2010-2011 school year, as determined by the ARD Committee, is the general education classroom for ***, with *** being provided in the special education setting. The ARD Committee determined that the student should have *** at all times. (R4-48, R2-4). The student also receives speech and occupational therapy as related services.

5. The student exhibits inattentive and inappropriate behaviors when he is without ***. (RR-32)

6. The student's IEP does not include a provision for a shortened school day.

7. Both parties presented evidence of conflicting schedules which they argued were in effect for the student during the Fall of 2010.

8. The parent offered into evidence a schedule that provided for general education placement for *** from 10:15-11:30 and *** from 1:20-2:45 each day. The student's *** was from 2:45-3:00 each day. (P-9). The schedule specifically provided for a 3:00 p.m. dismissal time. This schedule was corroborated by times reflected on the student's daily logs.

9. The principal and the student's teacher both testified that the student's schedule from the beginning of the school year was such that the student attended *** until 2:05, at which time he returned to the learning lab to complete a daily log, and then went to *** at 2:20 as reflected in R-42. However, I find that this testimony is not credible and in fact is contradicted by the District's own documentary evidence. The District offered evidence of the student's daily logs completed beginning November 28, 2010 through February 2, 2011. The logs reflect that prior to the time the parent filed her request for hearing, the student was scheduled to remain in the *** classroom from 1:20-2:45. (R6-11, 12, 13, 15, 16 & 17).¹ Additionally, the student's IEP only provided for a special education placement for ***, all of which were provided prior to ***. (P9) Maintaining the student in the *** classroom was consistent with the student's IEP given the number of special education and general education hours provided for in the IEP. (R42-48) It is important to note that this is also the schedule of services communicated to the parent.

10. The student's *** teacher is also his *** teacher. (RR-160) The teacher provided inconsistent testimony regarding the student's schedule. He stated the student always left the classroom due to his difficulty in observing multi-media content provided to the other students, even though the content was not shown daily. He also stated that the student left his class to return to social skills instruction. (RR-165). The student's IEP does not provide for social skills instruction in the schedule of services or social skills goals and objectives. The *** teacher acknowledged that the other students remained in the classroom after 2:05 because it was ***. The teacher was flexible with his schedule and *** instruction did not always end at 2:05, even though the student was removed from the classroom at 2:05.

¹ The ARD Committee convened in January 2011 and changed the student's IEP to reflect 42 minutes of *** instruction per day. (R1-51)

11. The *** teacher testified that the schedule for the student offered as R-42 was provided to him at the beginning of the school year. (RR-168-169). This testimony is not credible and is inconsistent with the District's documentary evidence and the testimony of other witnesses.

12. The parent filed her request for hearing on the last day of the Fall Semester (December 17, 2010). Entries in the student logs beginning in January 2011 (after the request for hearing was filed) reflect a changed schedule, with *** from 1:20 until 2:05 p.m.² According to the student's daily log beginning in January 2011, there are no instructional activities other than the completion of a daily log after 2:05 p.m., which is consistent with the parent's complaint and *** testimony. (R6).

13. During the Fall 2010 semester, the school's administrator began to require the *** during the student's *** block. (RR-34; RR-97-98; RR-142) *** testified that she also *** frequently during lunch and during science in order to ***. (RR-95) The student's special education teacher acknowledged that the student had been without *** during lunch for the entire school year. (RR-179). *** was not able to testify as to a specific number of days that the student was *** in the lunchroom. She testified that the student exhibited behavioral problems such as stealing food when he was ***. (RR-106).

14. In order to perform the duties required of her, *** removed the student from his general education classroom at 2:05 every day, accompanied him to gather his belongings, and then took him to the *** class with her at 2:20. (RR-34; R-98, 100). The student participated in *** with the other students. (RR-37).

15. There were approximately 80 children in the *** class, with another 8 students from ***. *** duties involved assisting and supervising the *** students and engaging them in activities during ***. (RR-142)

16. The student's regular *** was from 8:15-9:00 a.m. The change in *** schedule resulted in the student attending two *** per day, during one of which he was not receiving the assistance of ***. The student was removed from the classroom to ***. This change began approximately 3-4 weeks prior to *** (mid-November). (RR120).

17. Prior to the time the District changed *** schedule, the student's *** time was at the end of the day, beginning at 2:45 p.m. (P-9; RR-116) After the schedule was changed, *** was moved to 2:20-2:35. (P2). At 2:35 the student would have a snack and was dismissed by 2:45. (P2)

18. District personnel testified that "all" adaptive education children have a shortened school day and acknowledged that the student was released at 2:45. (RR191-192) The district changed the student's written schedule after the first of the year to reflect a shortened school day even though there was no ARD Committee decision and no notice to the parent. (RR-86-87)

19. The principal testified that the student left at 2:45 because it was a requirement for special education transportation. (RR-213) The principal was not aware that the student did not ride the bus home in the afternoon. (RR-220).

20. *** was absent for approximately 10 days prior to December 1, 2010. On ***, 2010, *** while supervising adaptive education students during what should have been the student's *** block. During the Fall

²The parent agreed a that 45 minutes was a reasonable time for *** instruction and the student's IEP adopted in January reflected this. However, that student did not remain in his *** after 2:05, instructional services were provided to the other students during that time, he received little instruction after that time, and the district documented that it was shortening his day to end at 2:45.

Semester, there were 7 days when *** was absent and there was no substitute provided. (R-40). *** was absent *** from ***, 2010 through the date of hearing. (R40). At the time of hearing, the student had another ***.

21. The student's special education teacher would take the student to her classroom when *** was absent. Although the teacher testified that she would go to the general education classroom with him (RR-185, 188), I find that her testimony is not credible. Emails from the teacher to other staff demonstrated that she took the student into her classroom and another teacher testified that the student was spending a lot of time in the special education classroom. Based on a preponderance of the credible evidence I find that the teacher would remove the student to her special education classroom, where she would work with the student as well as other students on days that *** was absent. (P14-7; RR-152-158). Consequently, I find that the student was not receiving instructional time in the general education classroom on those dates.

22. The special education teacher referred to herself as the student's "caretaker" on dates when *** was not with him. (RR-185)

23. The principal testified that *** was merely another set of eyes for the adaptive education students in *** while the student was at *** and that the *** staff were responsible for the adaptive education students. (RR-214, 222) I find the principal's testimony to wholly lack credibility. The *** teacher's testimony corroborated the testimony of *** and other personnel that she was responsible for the 8 adaptive education students during the afternoon ***. (RR228-231) During this time, she was also responsible for the student. There were approximately 80 children in the *** class. (RR-118-119).

24. *** testified that her *** class was moved to the morning after the Christmas holidays (after the filing of the request for hearing) so the *** would no longer be required to relieve her. (144-145).

25. Although the student's *** testimony was called into question by the District because she was on a growth plan, I found her to be credible regarding the student's instructional services and schedule and the implementation of the student's IEP.

26. The evidence presented by the Petitioner was credible. The evidence presented by the District was contradictory and lacked credibility.

27. I find based on a preponderance of the credible evidence that the District shortened the student's school day by 15 minutes per day beginning in November 2010, and that his instructional day for all practical purposes ended at 2:05 p.m., resulting in a lack of instruction for 40 minutes per day. I further find that the District altered the student's schedule to accommodate its staffing needs to the detriment of the student's educational program.

28. I find based on a preponderance of the credible evidence that the District failed to provide *** for the student for a minimum of 55 minutes per day beginning in November 2010, 15 minutes of which occurred during ***.

29. I find based on a preponderance of the credible evidence that the District caused the student to be removed from the general education classroom on dates when *** was not present in the classroom and moved him into the learning center with the special education teacher. This occurred on at least 7 occasions during the Fall of 2010.

30. I find based on a preponderance of the credible evidence that the District failed to implement significant portions of the student's IEP by removing him from the general education classroom, ending his

instructional day early, and failing to provide *** at all times. The District's acts resulted in a denial of educational opportunity for the student.

31. Petitioner failed to meet his burden that a denial, if any, of *** during transportation to school resulted in a denial of FAPE. The evidence conclusively established that the student did not ride the bus after school.

DISCUSSION

Petitioner complains that the District failed to implement the student's IEP beginning in November 2010, and that this failure resulted in a denial of a Free Appropriate Public Education in the least restrictive environment. The Fifth Circuit has set forth the legal standard governing a claim of failure to implement an IEP under IDEA: "to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead must demonstrate that the ... school ... failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit." *Houston ISD v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000), *writ denied*, 531 U.S. 817 (2000).

In *Bobby R.*, the Fifth Circuit Court of Appeals found no denial of FAPE based on a school's failure to implement modifications such as highlighted texts and modified tests in light of the student's academic improvements during the school year. The Court reasoned that the failure to implement was merely *de minimis*. Additionally, the school had also provided compensatory education to address previously missed speech services. The Court analyzed whether the failure to implement amounted a denial of FAPE by applying the factors identified in *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3rd 245 (5th Cir 1997); cert. denied, 522 U.S. 1047 (1998):

- (1) whether the program is individualized on the basis of the student's assessment and performance;
- (2) whether the program is administered in the least restrictive environment;
- (3) whether the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and
- (4) whether positive academic and non-academic benefits are demonstrated.

Id. In applying this standard to the facts of this case, I find that the district's failure to implement the student's IEP was not *de minimis* and that the student was denied educational opportunity for periods of time which cumulatively denied the student a FAPE.

The 5th Circuit Court of Appeals has held that the four factors do not necessarily need to be applied in a particular manner or afforded the same weight. Rather, the factors are intended as a guide in the determining whether the student received a FAPE. *Richardson ISD v. Leah Z.*, 580 F.3d 286 (5th Cir. 2009). In applying the *Michael F.* factors to this case, there is no issue as to whether the student's IEP was based on his assessment and performance. In fact, Petitioner asserts that the IEP itself is appropriate, but was not implemented. I agree. The district offered evidence that the student had in previous years made progress under his educational program. However, the student's performance in previous school years has no relevance on the issue of whether or not the

District implemented his current year IEP and whether the failure to implement was more than *de minimis*.

The key factor in this case is the District's apparent failure to implement the student's IEP in a coordinated and collaborative manner. The student's *** teacher testified (without credibility) that at the beginning of the school year, he had been provided a schedule that could not have possibly existed until after the parent filed her request for due process hearing. He testified that the student left his classroom to go to the learning center, but was not sure where it was located. Further, he was inconsistent in his testimony regarding the time at which the student left his *** classroom, even though it appeared that the remainder of the general education classroom remained with him through the end of the day and that *** instruction occurred during that time. Although the student's IEP that existed prior to the time the parent filed her request for hearing did not specify (erroneously) a specific amount of time for *** instruction, it did not provide for social skills instruction, which the teacher testified was a reason for the student's early departure from his classroom. Additionally, the student's initial schedule for the 2010-2011 school year provided that the student was to remain in the *** classroom with his peers until his *** at 2:45. (P-9) This schedule appeared to be consistent with the student's IEP, which only provided for special education instruction in ***.

The principal testified that the student went to *** early so he could be released by 2:45 to board the school bus, even though the evidence was very clear that the student did not ride the bus in the afternoon. Additionally, she testified that *** was merely an extra set of eyes for 4 adaptive education students while the student was at ***, when the evidence clearly established that *** was responsible for working directly with 8 students during their *** class, while she was also charged with being the student's ***. Both the principal and the student's special education teacher testified that the student participated in learning lab from 2:05 until 2:20 each day, when in fact, the student's daily logs completed prior to the time the parent filed her request for hearing reflected that the student remained in his *** until 2:45. Additionally, the special education teacher testified (without credibility) that on days when the student did not have ***, she accompanied him to his general education to be his "caretaker." However, another teacher testified, credibly, that the student was outside the general education setting for a significant amount of time, and internal correspondence between the teacher and other staff reflects that she in fact removed the student to her classroom on days when there was ***.

In the light most favorable to the District, personnel involved with the delivery of educational services to the student did not have a clear understanding of his schedule, the responsibilities of *** or other personnel working with the student, or his IEP. Further, District personnel did not work with the parent, another key stakeholder in the student's education, by keeping her informed of the schedule changes and the shortened school day. Alternatively, District personnel were not being truthful in their testimony and created a schedule to accommodate changes to the student's program after the fact to create a false impression. In either scenario, the preponderance of the credible evidence is that the student's educational day for all practical purposes ended at 2:05 to accommodate staffing needs of the school. The student's educational needs were secondary.

The student's program for a portion of the day was not administered in the least restrictive environment. A reasonable inference from the evidence is that when *** was not present, the student did not receive his instruction in the general education classroom. The student was removed from his *** class with same age, non-disabled peers, and required to participate in a second *** class with *** grade and *** students who required the assistance of *** to participate. During this time, not only was the student not receiving educational services in the least restrictive environment, he was repeating *** for the day to accommodate the campus staffing needs, and not receiving the benefit of ***. Although his IEP as developed may have been individualized to his needs, the implementation of his program was not. Additionally, although the ARD Committee adopted a new IEP which provided for 42 minutes of *** instruction per day, the District continued to shorten the student's school day, with a dismissal at 2:45 and

practically no instruction after 2:05. The schedule adopted by the school after January 1, corroborated *** testimony that the time after 2:05 consisted of the student gathering his belongings and preparing to leave. Even though the student was no longer required to accompany *** to the adaptive education *** class, the schedule reflects that he received no meaningful instruction for the remainder of the day.

It is particularly alarming that district personnel have an apparent lack of understanding of the role of the ***. The student's special education teacher referred to the role as that of a "caretaker" and the principal referred to the role as that of "an extra set of eyes." (RR194-195) The fact that more than one district witness characterized *** role in this manner leads to an inference that the student's educational needs were not a priority, and therefore, removing the student from the classroom, having the student accompany *** to other duties, depriving him of ***, and shortening his school day were viewed as having no consequence. This, of course, is inconsistent with IDEA.

The student's instructional day for all practical purposes ended at 2:05. Additionally, even the student's dismissal at 2:45 is a shortened school day that was not approved by the ARD Committee. Removing from consideration *** time of 15 minutes,³ the District failed to provide the student with approximately 40 minutes per day of instructional time beginning on the day *** was required to assist in *** and continuing through the date of hearing. It is concerning that school personnel did not appear to understand the problem with shortening the student's school day to accommodate personnel schedules or that requiring *** to supervise an additional eight students deprived the student of ***, a service deemed necessary by the ARD Committee. Based on these circumstances, I find that the student's IEP was not followed and the student was denied educational opportunity for a significant period of time which should have been provided to him. Therefore, it is appropriate to order the District to compensate the student for such deprivation.

RELIEF

For relief, Petitioner requests compensatory services. Compensatory relief is available under IDEA as an equitable device to remedy substantive violations. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEIA requires that relief be designed to ensure that the student is appropriately educated within the meaning of IDEA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9th Cir. 1994). Thus, determining what compensatory relief is appropriate turns on a consideration of the extent of the denial as well as what services would be needed to provide a free appropriate public education in light of that denial.

In this case, the amount of compensatory services should be measured by the length of time the student was unable to access the general education curriculum due to the District's failure to implement his IEP. In other words, the student should receive compensatory services equal to the number of hours he was removed from the classroom to accompany *** to her other duties and for the missed educational time due to his shortened school day which continued to the date of hearing. It is difficult to determine the precise date on which *** began to remove the student from the classroom to accompany her to ***. However, *** testified that this occurred in mid-November, approximately 3-4 weeks prior to ***. November 15, 2010 is a reasonable date from which to calculate compensatory education services, taking into consideration that specific calculations are not being ordered for dates *** was absent and the student was removed from the classroom, as well as dates the student did not have *** during lunch. The law does not require hour for hour or day for day compensatory services. I find that it is equitable to calculate the compensatory services award in this case as ordered, without ordering hour for hour services for all denied educational opportunity based on the District's actions.

Based on the evidence, I find that *** began to remove the student from the classroom to accompany her to other duties on or about November 15, 2010, and that the District continued to shorten the student's educational day

³ Any issues raised by acts or omissions of the district during *** are *de minimis* and give rise to no relief.

through the date of hearing. Therefore, the District shall determine the number of school days (exclusive of student absences) beginning with November 15, 2010, and ending on the date of hearing, and then multiply that number by 40 minutes per day to arrive a total number of compensatory hours to be provided to the student.

The District is ordered to convene an ARD Committee meeting within 10 school days of the date of this Decision to develop a schedule for compensatory services to be provided to the student according to the calculation contained in the Order below.

CONCLUSIONS OF LAW

1. The student currently resides within the geographical boundaries of Corpus Christi ISD, a legally constituted independent school district within the State of Texas, and is entitled to special education services pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. §1400, et seq., as amended.

2. The District's educational program is presumed to be appropriate. As the party challenging the educational program proposed by the district, Petitioner bears the burden of proof. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), aff'd 468 U.S. 883 (1984) and must show more than a *de minimis* deprivation of educational benefit. *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). Petitioner has met that burden with regard to the implementation of the student's 2010-2011 IEP through the date of hearing.

3. Petitioner is entitled to compensatory education services and prospective relief to remedy the denial of FAPE. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). IDEIA requires that relief be designed to ensure that the student is appropriately educated within the meaning of IDEIA. *Parents of Student W. v. Puyallup School District No. 3*, 21 IDELR 723 (9th Cir. 1994).

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, I hereby **ORDER** that the relief sought by the Petitioner is hereby **GRANTED, in part**, as follows:

1. Respondent shall provide the student with compensatory education services, which shall consist of instruction core subject areas in a general education setting in an amount equal to 40 minutes per day for each day the student was denied a FAPE. The first date of denial for the purpose of calculation shall be November 15, 2010 and the last day shall be the date of hearing. The District shall exclude student absences from the calculation. Respondent may elect to provide these services by providing a summer program for the student. If compensatory services are provided during the summer, they shall be in addition to and not in lieu of Extended School Year services, if such are needed.
2. Respondent shall provide documentation of the compensatory services calculation and schedule to the Texas Education Agency no later than 15 school days from the date of this Decision.
3. Respondent shall complete all compensatory services no later than September 1, 2011.
2. The ARDC shall meet within ten (10) school days of receipt of this decision to begin implementation of the relief ordered herein.

All other relief not specifically granted herein is hereby **DENIED**.

NOTICE TO THE PARTIES

This Decision is final and is appealable to state or federal district court.

The District shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(p). The following must be provided to the Division of IDEA Coordination 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.

SIGNED this 23rd day of March, 2011.

/s/Sharon M. Ramage
Sharon M. Ramage
Special Education Hearing Officer

SYNOPSIS

ISSUE: Whether the District failed to implement the student's IEP by removing the student from his classroom to accommodate the schedule of ***, and failing to provide *** during *** absence and during transportation?

HELD: For the parent in part and the district in part. The district failed to implement the student's IEP by removing him from the classroom to accommodate the schedule of *** and shortened the student's instructional day without ARD Committee approval or notice to the parent. This resulted in a loss of approximately 40 minutes per day of instructional time to the student, the student being move to a more restrictive setting, and the loss of ***. The student failed meet his burden with respect to the loss of *** during transportation.

CITATION: *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), *writ denied*, 531 U.S. 817 (2000); 34 C.F.R. 300.323; 19 TAC 89.1050.