

DOCKET NO. 129-SE-0114

STUDENT § **BEFORE A SPECIAL EDUCATION**
§
VS. § **HEARING OFFICER**
§
HOUSTON INDEPENDENT §
SCHOOL DISTRICT § **FOR THE STATE OF TEXAS**

DECISION OF THE HEARING OFFICER

*** (hereinafter “the student”) through student’s next friends, *** and *** (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 Houston Independent School District.

The issues before the hearing officer were as follows:

1. Whether the District failed to implement the student’s IEP, including student’s transportation plan, and if it did, whether such failure resulted in a denial of a FAPE.
2. Whether the District failed to provide an appropriate IEP that provided academic and non-academic benefit and that addressed student’s need for safety.
3. Whether the District failed to provide a FAPE in the least restrictive environment.
4. Whether the District denied the parents meaningful participation in the development of the student’s IEP by failing to allow them to view surveillance video.

Held for Respondent.

PROCEDURAL HISTORY

Petitioner filed this request for hearing on January 17, 2014.¹ Respondent raised the affirmative defense of the statute of limitations and this hearing officer ruled that all claims based on alleged acts or omissions of the District occurring prior to January 17, 2013, were time barred. The evidence is undisputed that the student withdrew from HISD prior to beginning the 2013-2014 school year to attend ***. R18-365; R21. Therefore, the relevant time period in consideration is from January 17, 2013 through the end of the 2013-2014 school year.

¹ The request for hearing was filed *via facsimile transmission* after 5:00 p.m. on Friday, January 17, 2014, but not docketed until the following business day, January 21, 2014. This hearing officer previously ruled that the request for hearing was deemed filed on the date it was delivered to TEA’s docketing clerk. Tex. R. Civ. Proc. 22, 74; 19 Tex. Admin. Code 1189.1165(a).

The Due Process Hearing was initially scheduled for March 3, 2014. Following a continuance for good cause, the hearing was held on April 10, 2014. Petitioner appeared with counsel, Daniel Garza. Respondent appeared with its designated representative, Susan Hurta, and counsel, Hans Graff. At the conclusion of the hearing, both parties requested an opportunity to present written argument and an extension of the Decision due date to May 23, 2014. 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.

FINDINGS OF FACT

1. The student resides within the geographical boundaries of the Houston ISD. Houston ISD was responsible for providing the student with a FAPE during the relevant time frame. The student is eligible to receive special education and related services as a student with an emotional disturbance due to Bi-Polar Disorder. R3; R6; R12-163, 190.

2. The student has been enrolled in HISD at various times during student's life. Student most recently returned to HISD in *** 2011, after ***.²

3. The student's *** placements developed *** plans that recommended structured environments and monitoring due to impulsivity and elopement. R3-52.

4. The ARD Committee convened on January 31, 2012, to develop the student's IEP, and determined the student's placement in a behavior support classroom to be the least restrictive environment. ***. RR165; R12.

5. The IEP developed at a December 10, 2012 ARD Committee meeting was in effect on ***, 2013. The IEP contained a provision for Personal Care Services, including assistance during transitions, as well as upon bus arrival and bus departure. R13-229. The student's BIP identified leaving the assigned area as a challenging behavior. R13-238.

6. The student's placement was in the Behavior Support Class, a self-contained classroom, for all core classes. The student participated in *** and another elective in the general education setting. R13-249.

7. On ***, 2013, the student participated in student's *** class at the end of the day. According to the *** instructor, a special education support staff would accompany student to the class and then pick student up at the end of class to escort student to the bus. RR139. The teacher acknowledged that he understood the escort to be necessary because of the student's tendency to run off, although he had not observed that behavior in his class. RR139.

8. The student did not have a previous history of leaving the campus or the

² The evidence is clear that the student was not ***. Rather, student entered ***. (RR-59)

classroom. RR193-194. The parent acknowledged that ***, 2013, was the first occasion for the student to leave the campus. RR94.

9. After lunch hour on ***, 2013, the student made plans to leave school with *** at the end of the day. R28-435. Toward the end of student's last class period, student asked to be excused to the bathroom and never returned. When the aide arrived at approximately 3:00, student had already left the campus. RR142.

10. According to *** left the school ***e. R28-435.

11. District personnel contacted the student's parents to notify them that the student was missing. The police and family members discovered the student the following day. According to the investigation, the student left ***. R28-435. It is undisputed ***.

12. The parents refused to return the student to student's campus for the remainder of the school year. Pending a determination of eligibility for homebound services, the District accommodated the parents' request that the student receive student's assignments at home. (R-131-132). On ***, 2013, the parents requested homebound instruction and the student's psychiatrist recommended 1:1 supervision if the student returned to the campus or homebound instruction. R7.

13. On ***, 2013, the ARD Committee convened and developed an IEP to provide homebound services. R17. The student progressed academically and successfully completed the school year. R18, R19.

14. Ultimately, Petitioner's parents withdrew petitioner from HISD prior to the beginning of the 2013-2014 school year and enrolled petitioner in *** school. R21; RR96.

15. Petitioner failed to produce any evidence that the student's IEP during the relevant time period was not appropriate.

16. *** was not caused by the aide's failure to escort the student to the bus on ***, 2013.

17. Petitioner failed to produce any evidence that the District denied the parents an opportunity to meaningfully participate in the development of the student's educational program. In fact, the evidence establishes that the District actively engaged the parents in developing the student's IEP following the incident and accommodated their requests for homebound services.

DISCUSSION

Did the District Fail to Provide and Implement an Appropriate IEP

The educational program offered by the school district is presumed to be appropriate. Petitioner, as the party challenging the educational program bears the burden of proof in showing

why the IEP is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). *Schaffer v. Weast*, 126 S.Ct. 528 (2005). This includes the burden of proof with regard to harm or a deprivation of educational benefit. The law does not require that the student's educational potential be optimal or "maximized." Rather, the program must enable the student to receive some educational benefit from student's program.

The United States Supreme Court established a two-prong test for determining whether a school district has provided a free appropriate public education. The first inquiry is whether the school district complied with IDEIA's procedural requirements. The second inquiry is whether the student's IEP is reasonably calculated to confer an educational benefit. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S.Ct. 3034 (1982). An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Id.*; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). 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. *Id.*

In this case, Petitioner does not allege procedural violations of IDEIA. Rather, the central issue is whether HISD failed to implement the IEP on ***, 2013, and if so, did that failure result in a deprivation of an educational benefit following that incident. The issue is not whether the student experienced *any* harm at a time following the District's failure to implement the IEP. Clearly, student left the campus unescorted, ***. There is no doubt the student was ***. ***, however, is not directly related to student's departure from the campus. ***, it is not a cognizable issue under IDEIA. The sole issue before me is whether the failure to escort student to the bus resulted in a deprivation of educational benefit.

In evaluating whether an educational program is reasonably calculated to confer an educational benefit, the Fifth Circuit Court of Appeals has identified four factors to consider:

1. Is the program individualized on the basis of the student's assessment and performance?
2. Is the program administered in the least restrictive environment?
3. Are the services provided in a coordinated and collaborative manner by the key stakeholders?
4. Are positive academic and nonacademic benefits demonstrated?

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245 (5th Cir 1997); cert. denied, 522 U.S. 1047 (1998). 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 this case, the parent does not challenge the appropriateness of the IEP in existence on ***, 2013. Rather, the parent's complaint is that the District failed to implement the IEP when it

failed to provide the student an escort from student's *** classroom to the bus at the end of the day. However, the issue is not whether the District failed to implement the IEP and following that failure, the student ***. The issue is whether the failure to implement the IEP resulted in a deprivation of educational benefit.

First, a failure to implement an IEP results in a denial of FAPE only if the failure is more than *de minimis*. *Houston ISD v. Bobby R., supra*. In other words, did the District fail to implement significant portions of the student's IEP? In this case the District did not fail to do so. The evidence during the relevant time period is that the aide failed to escort the student to the bus on one occasion.³ This finding in no way minimizes the seriousness of *** away from campus. However, there is no evidence that the District failed to implement significant portions of the student's IEP. In fact, a preponderance of the credible evidence is that the aide went to the student's classroom to escort student to the bus in order to implement the IEP. Unfortunately, the student left the campus before student could be escorted to the bus, and ***.

The student's IEP included a provision for the student to be assisted during transitions throughout the school day, as well as to and from the bus. R13-229. On ***, 2013, although the student was escorted to class, student left the classroom toward the end of the period, asking to go to the bathroom across the hall. RR141-142. Unfortunately, student left the school ***. When the aide arrived to take student to the bus, student had already left. RR142, 149. Although the student denied leaving to go to the bathroom (RR28), student's testimony is inconsistent with the credible testimony of the *** teacher. RR142, 149. The student admitted that student *** and left the campus ***. RR34. Although the aide did not accompany student to the bus, the student had already left the building by the time he arrived. It could be argued that the student should have been supervised during the time student left to go to the restroom. However, the teacher followed the standard practice for the class in allowing student to go across the hall with the expectation student would return. This was the protocol he had followed with the student previously and student had never left student's assigned area. RR141-143. Although the IEP provided for assistance during transitions, the IEP did not require a high level of supervision such that the student must be supervised when going to the restroom. R13-229. The District did not fail to implement the student's IEP on ***, 2013. To the extent failing to supervise the student as student left the classroom to go to the restroom was a failure to implement the IEP, it was *de minimis*.

Additionally, a failure to implement the student's IEP, if any, did not result in a loss of educational benefit or a denial of FAPE. The District continued to provide the student with an appropriate education after ***, 2013. The parents refused to return the student to school, so the District accommodated the parents and continued to provide assignments to the student at home until student became eligible for homebound services. During this time, the District engaged in ongoing discussions with the parents to discuss options for the student's return, including assignment to another campus. RR252-253. On ***, 2013, the student's psychiatrist

³ There was testimony that the failure had occurred on two other occasions in the days preceding ***, 2013. However, even if these other occasions been within the limitations period, the failure to implement would still be *de minimis*.

recommended 1:1 supervision during the school day *or* homebound instruction. R7. The parents acknowledged that they had no complaints about the student's homebound program. RR132-133. It is undisputed that the student made academic progress during the 2012-2013 school year as evidenced by student's passing grades and TAKS scores. R18, 19. The parents assert that alternatives discussed by the District were not appropriate for the student, such as returning to the same level of supervision as existed prior to the incident or placement in a behavior adjustment class with more intensive supervision. These discussions, both before and during the ARD Committee meeting, are actually evidence that the District attempted to work collaboratively with the student and student's parents to facilitate student's return to school after student ***. Ultimately, both the District and parent ARD Committee members agreed for the student to receive homebound instruction. R17-345. The parents then withdrew the student from HISD prior to the beginning of the 2013-2014 school year, where student now ***.

It is certainly true that there was a delay in convening the ARD Committee meeting to discuss homebound services. The parents made the request on ***, 2013, and the ARD Committee convened on ***, 2013. However, the delay in convening the ARD Committee meeting is a procedural error. Procedural flaws do not automatically require a finding of a denial of a free appropriate public education. It is only procedural inadequacies that impede the child's right to a FAPE, result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the development of the IEP that result in the denial of a free appropriate public education. 20 USC 1415 (f)(3)(E); *Adam J. v. Keller ISD*, 328 F. 3d 804 (5th Cir. 2003). In this case, the District was faced with a student who was essentially truant, but worked with student and the parents to accommodate student due to ***. The record is clear that District personnel worked with the parents and the student to accommodate student during this period of time by providing student with assignments and ultimately providing homebound instruction. The student made educational progress for the school year. Any delay in convening the ARD Committee meeting did not result in a loss of educational benefit to the child.

***. It is also understandable that the parents were angry with school personnel and reluctant to return student to HISD following ***. *** is not cognizable under IDEIA. The Petitioner failed to establish that HISD failed to provide the student with a FAPE. The Petitioner has wholly failed to meet petitioner's burden.

CONCLUSIONS OF LAW

1. The student is eligible for special education services as a student with a disability under IDEIA, 20 U.S.C. §1400 *et. seq.* and its implementing regulations.

2. The district's educational program is entitled to a legal presumption of appropriateness. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). Petitioner bears the burden of proving that it is not appropriate or that the District has not complied with the procedural requirements under the IDEIA. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Petitioner has wholly failed to meet petitioner's burden.

ORDER

Based upon a preponderance of the evidence and the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the relief requested by Petitioner is **DENIED**.

Finding that the public welfare requires the immediate effect of this Final Decision and Order, the Hearing Officer makes it effectively immediately.

SIGNED this 23rd day of May, 2014.

Sharon M. Ramage
Special Education Hearing Officer

SYNOPSIS

Issue No. 1: Whether the District failed to implement the student's IEP.

Held: For the District. The District did not fail to implement significant portions of the student's IEP. To the extent there was a failure to implement, it was *de minimis*, and did not result in a denial of a FAPE.

Citation: 34 CFR §300.320; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

Issue No. 2: Whether the District failed to provide an appropriate IEP.

Held: For the District. The IEP in effect during the relevant time frame was appropriate for the student. Additionally, the student's homebound placement following *** was in the least restrictive environment and developed collaboratively with the parents.

Citation 34 CFR § 300.320; 34 CFR §300.322; 34 CFR §300.115

Issue No. 3: Whether the District denied the parents meaningful participation in the development of the student's program.

Held: For the District. The District collaborated extensively with the parents and the student following *** and prior to developing the homebound services IEP.

Citation: 34 CFR §300.322