
DOCKET NO. 116-SE-0206

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

PETITIONER

vs. BEFORE A SPECIAL EDUCATION
HEARING OFFICER

PEARLAND INDEPENDENT SCHOOL DISTRICT
FOR THE STATE OF TEXAS

SCHOOL DISTRICT

RESPONDENT

DECISION OF THE HEARING OFFICER

Statement of the Case

The Petitioner,*** by next friend, ***1, brings this action against the Respondent, Pearland Independent School District (Pearland ISD or PISD), under the Individuals with Disabilities Education Act (IDEA), as amended, 20 U.S.C. §§ 1400 et seq. The Petitioner raises two issues to be heard at a Due Process Hearing:

1. Whether Pearland ISD has inappropriately provided transportation services to *** because of the utilization of a restraining harness (safety vest) and/or window padding on ***'s school bus?
2. Whether Pearland ISD has failed to appropriately provide a functional behavioral assessment (FBA), counseling services and/or supportive interventions to *** because of the lack of a proper FBA and/or counseling on ***'s school bus and/or lack of proper transportation scheduling?

As relief, the Petitioner requests that the Respondent: (1) designate a specified school bus morning pick-up time for ***; (2) conduct an FBA of ***; (3) assign a paraprofessional to implement the recommendations from the FBA on the school

bus for ***; (4) discontinue the use of the restraining harness (safety vest) for ***; and (5) provide such other appropriate relief to which *** may be entitled.

¹In this Decision, references to “***” are references to the child.

Procedural History

The Texas Education Agency (TEA) received the Petitioner’s request for a due process hearing/due process complaint notice on February 2, 2006. The Respondent filed its response to the due process complaint notice on February 13, 2006. The Respondent filed its objections to the sufficiency of the due process complaint notice on February 16, 2006. On or about February 17, 2006, the Respondent held a resolution session with the Petitioner; the session did not resolve the dispute.

On February 21, 2006, the Hearing Officer issued an order determining that the Petitioner’s due process complaint notice was insufficient in part and permitting the Petitioner to file an amended due process complaint notice. The Petitioner filed an amended due process complaint notice on February 27, 2006. On February 27, 2006, the Hearing Officer issued a order determining that the Petitioner’s amended due process complaint notice met the requirement of IDEA § 615(b)(7)(B), as amended². As of February 27, 2006, the successive timelines for the 30-day resolution period and the 45-day hearing decision period recommenced under IDEA §§ 615(c)(2)(E)(ii) and 615(f)(1)(B)(ii), as amended³. On March 8, 2006 and March 31, 2006, the Hearing Officer conducted prehearing conferences that addressed discovery matters, the timing and scope of the due process hearing and hearing procedures. The parties disclosed their witnesses and exhibits on March 31, 2006.

The due process hearing was conducted on April 10, 2006 in Pearland, TX. During the hearing, the Petitioner was afforded a fair opportunity to offer and solicit evidence and testimony to satisfy the burden of persuasion the Petitioner has under *Schaffer v. Weast*, 126 S. Ct. 528, 44 IDELR ¶ 150 (2005)⁴. The Hearing Officer permitted the parties to file post-hearing written closing

statements. The Petitioner submitted its written closing arguments on May 1, 2006, and the Respondent submitted its written closing arguments on May 2, 2006⁵.

²Section 615(b)(7)(B) states that the Petitioner may not have a due process hearing until a due process complaint notice that meets the requirements of § 615(b)(7)(A)(ii) is filed. 20 U.S.C. § 1415(b)(7)(B), as amended.

³Section 615(c)(2)(E)(ii) states that the resolution period timeline recommences upon the filing of an amended due process complaint notice. Section 615(f)(1)(B)(ii) states that if the school district has not resolved the parent's complaints within 30 days of receipt of the due process complaint notice, then (1) a due process hearing may occur and (2) the decision period timeline commences. The Hearing Officer interprets § 615(f)(1)(B)(ii) as applying as well to the receipt of an amended due process complaint notice in light of § 615(c)(2)(E)(ii). 20 U.S.C. §§ 1415(c)(2)(E)(ii), 1415(f)(1)(B)(ii), as amended.

⁴Over the course of the one-day hearing, approximately 6¼ hours in aggregate were devoted to both direct testimony by the Petitioner and the examination of witnesses on behalf of the Petitioner.

⁵In addition to closing arguments, the Petitioner also filed a document labeled "Restrain Consideration" raising a new issue for consideration. The Respondent filed an objection to the consideration of the Petitioner's new issue. Section 615(f)(3)(B) states that the Petitioner may not raise issues at the due process hearing that were not raised in the due process complaint notice, unless the Respondent agrees. The Hearing Officer interprets § 615(f)(3)(B) as applying as well to the post-hearing period.

Therefore, the Petitioner's new issue is barred from consideration in this case. The Petitioner's only recourse would be to file a separate due process complaint notice under § 615(o). 20 U.S.C. §§ 1415(f)(3)(B), 1415(o), as amended.

Findings of Fact

Based upon the testimony and evidence taken on the record in this proceeding, I make the following findings of fact:

1. *** is an *** year-old child whose primary disability is autism. *** functions on approximately a *** grade level. (Tr. at v. 1, pp. 27, 188, v. 2, pp. 395, 450-51; Resp't Ex. pp. 3, 7-9, 20)
2. *** resides within PISD. Under an agreement with PISD, *** attends a *** school. (Resp't Ex. p. 21)
3. PISD provides transportation for *** on school mornings to travel from home to the *** school and on school afternoons to return home from the *** school. (Resp't Ex. p. 25)
4. During the 2005-06 school year, a PISD special needs school bus picks *** up at ***'s home at approximately 7:25 a.m. on school days. There are two students already on the bus who also attend the *** school. (Tr. at v. 1, pp. 97-98; v. 2, pp. 359-60)
5. During the trip to the *** school from ***'s home, the PISD special needs school bus makes one stop to pick up another student who also attends the *** school. The additional stop does not require a different route than would otherwise be taken to travel directly from ***'s home to the school. This additional stop adds no more than five minutes to the bus ride. (Tr. at v. 1, p. 97, v. 2, pp. 363, 382-83)
6. The PISD special needs school bus arrives at the *** school at approximately 7:45 a.m. on school days. The projected travel time for *** from home to the *** school is 20 minutes. (Tr. at v.1, p. 97, v. 2, pp. 363-65, 406, 408, 447, 467, 470)
7. On some occasions, the PISD special needs school bus arrives at the school between 7:45 a.m. and 7:55 a.m. on school days due to discipline issues on the bus or other factors such as traffic delays. (Tr. at v. 2, p. 363)
8. Upon arrival at the *** school, *** departs from the PISD special needs school bus and enters the *** school. (Tr. at v. 1, p. 187, v. 2, p. 364, 382, 470-71)
9. There are two bus monitors on the PISD special needs school bus. One monitor sits at the rear of the bus and the other sits near the front of the bus. The monitor near the front supervises *** (Tr. at v. 2, pp. 379, 396, 447-48)
10. During the morning ride to the *** school, *** has engaged in behaviors such as unbuckling the lap seat belt and attempting to move about the PISD special needs school bus. *** has also slapped, kicked and spit at the bus monitors and other bus passengers. (Tr. at v. 2, pp. 359, 366-67, 369, 375, 414-18, 441-44; Resp't Ex. pp. 45-113)

11. The frequency of *** engaging in negative behaviors such as attempting to move about the PISD special needs school bus has varied. During some months the behavior was limited and other months it occurred almost every day. (Tr. at v. 2, pp. 361, 396-97, 452; Resp't Ex. pp. 45-113)
12. ***'s negative behaviors, such as attempting to move about the PISD special needs school bus, may occur within minutes of being picked up. (Tr. at v. 1, p. 111, v. 2, p. 359; Resp't Ex. p. 42)
13. A safety vest or restraining harness is an outfit consisting of a zippered vest and attached belts. A bus monitor first places the vest on ***'s upper body. Once *** has the vest on, *** takes a designated bus seat. With *** seated, the bus monitor fastens the lap seat belt. The monitor also connects the harness belts with clips to anchoring points near ***'s waist. *** has free movement of the arms and legs; only the movement of the torso is restricted. The harness essentially holds *** in the seat during the bus ride. (Tr. at v. 1, pp. 156-59, 165, v. 2, pp. 367, 381, 389, 397, 454)
14. The bus monitors began utilizing the restraining harness on or about September 16, 2005. ***'s parent was provided an opportunity to inspect the harness. (Tr. at v. 1, p. 40; Resp't Ex. pp. 50, 52)
15. During the morning ride to the *** school, if *** does not remain seated on the PISD special needs school bus, attempts to move about the bus and does not respond to instructions, the bus monitors are authorized to place the safety vest on *** to restrict *** to ***'s seat. (Tr. at v. 2, pp. 366-68, 397, 403, 448-49)
16. The use of the safety vest is limited to two (2) days – the initial day when its use is required and the next day. On the second day, the bus monitors may place the safety vest on *** to restrict *** to ***'s seat as soon as *** boards the PISD special needs school bus. (Tr. at v. 1, p. 162, v. 2, pp. 384, 397-98, 452-53)
17. The restraining harness is effective in keeping *** from moving about the bus. Delayed arrivals at the *** school are minimized with the use of the restraining harness. The use of the safety vest is necessary to safely transport *** to the *** school. (Tr. at v. 1, p. 121-22, 131, v. 2, pp. 381, 385, 389-90, 402, 420-21, 453, 479-80, 504)
18. With the restraining harness in place, *** may still slap and spit at the bus monitor stationed nearby. (Tr. at v. 1, p. 132-33, v. 2, pp. 406, 420, 466)
19. The bus monitors began utilizing a pad over the window adjacent to ***'s seat on or about November 3, 2005. ***'s kicking at the window and the bus monitors' worry about the glass breaking prompted the use of the window pad. The pad was removed and no longer used within about a month after that particular behavior ceased. (Tr. at v. 1, pp. 127-29, 137-40, 159-60, v. 2, p. 417-18, 484; Pet'r Ex. p. 1; Resp't Ex. p. 21)
20. The window padding neither precluded *** from having a view outside the bus toward the front and towards the left nor access to daylight. (Tr. at v. 1, p. 160-61, v. 2, p. 419)
21. There is communication and collaboration among the staff on the bus and district officials about ***'s behavior and interventions attempted. (Tr. at v. 1, pp. 115-16, 128-29, 140, 149-51, 161-62, 169, v. 2, pp. 369, 372-73, 408, 427-28)

22. Throughout the 2005-06 school year, PISD has employed other strategies to mitigate negative behavior by *** on the PISD special needs school bus. These strategies include switching from a smaller to larger bus to have more space between passengers, closer supervision by a bus monitor, verbal redirection, having toys and other items on board to occupy ***'s attention, and behavioral observations. (Tr. at v. 1, p. 94, v. 2, pp. 372-73, 375-79, 386-87, 423-24; Pet'r Ex. p. 13; Resp't Ex. pp. 36, 41)
23. PISD assigned a school psychology intern working toward her licensed specialist in school psychology (LSSP) certification to perform a series of informal behavioral observations of *** on the PISD special needs school bus on or about January 25, 2006. The school psychology intern subsequently prepared a report summarizing the behavior observed and outlining five recommendations. (Tr. at v. 2, pp. 340, 498-500; Resp't Ex. pp. 41-44)
24. The school psychology intern concluded that the function of ***'s behavior is attention seeking. (Tr. at v. 2, pp. 323, 339, 346-47, 510-11, 530-31)
25. The essential purpose of an FBA is to understand why a child demonstrates a particular behavior. In that regard, the informal behavioral observation served this purpose. (Tr. at v. 2, pp. 323, 339, 344-46, 535)
26. An ARD committee meeting was held on November 30, 2005. During the meeting, the ARD committee, among other things, reviewed and discussed the use of the safety vest and window padding. Among those in attendance were the parent and an administrator and teacher from ***'s *** school. (Tr. at v. 1, p. 192; Resp't Ex. pp. 1-25)
27. An ARD committee meeting was held on January 6, 2006. During the meeting, the ARD committee, among other things, reviewed and discussed the use of the safety vest. Among those in attendance were the parent and an administrator and teacher from ***'s *** school. (Tr. at v. 1, pp. 206-07, v. 2, pp. 242, 333-37; Pet'r Ex. pp. 13-14; Resp't Ex. pp. 26-40, 43)
28. *** is educated at a *** school to receive instruction and intense behavioral interventions. (Tr. at v. 1, pp. 184-85, 189; Resp't Ex. pp. 5-12, 30-34)
29. ***'s behavior at the *** school regressed during the spring, 2006 semester. According to ***'s special education teacher at the *** school, the regression is due to a change in classroom and a change in staff at the school. The regression is not attributable to the morning ride on the PISD special needs school bus. (Tr. at v. 1, pp. 197, 199-200, 211-13, 220-21, 226-28; Pet'r Ex. pp. 17-18)

Discussion

Issue 1 – Transportation Services

The Petitioner's first allegation is that the Respondent inappropriately provides transportation services to ***. Specifically, the Petitioner complains that the Respondent inappropriately uses a restraining harness on *** during the morning bus ride to ***'s school. Further, the Petitioner complains that the Respondent

has inappropriately used padding that blocked the window adjacent to ***'s designated bus seat.

Under the IDEA, transportation is considered a related service that school districts are obligated to provide to eligible children with disabilities.

Transportation service is intended to make reaching school possible for a student with a disability. As the U.S. Supreme Court has observed: "The [IDEA] makes specific provision for services, like transportation, for example, that do no more than enable a child to be physically present in class" *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891, 555 IDELR ¶ 511 (1984). Here, the Respondent provides daily bus rides for ***, enabling *** to reach and return home from a *** educational facility that the parties previously agreed upon.

The controversy in this case centers on the manner in which the Respondent transports *** to the *** educational facility in the morning on school days.

Beginning about mid-October, 2005, PISD began using an outfit on *** once *** was picked up at home in the morning. The Petitioner refers to the outfit as a "restraining harness" while the Respondent refers to it as a "safety vest." In this Decision, the Hearing Officer will use these terms interchangeably.

The restraining harness is an outfit consisting of a zippered vest and attached belts. On days when the harness is used, a bus monitor first places the vest on ***'s upper body. Once *** has the vest on, *** takes a designated bus seat. With *** seated, the bus monitor fastens the lap seat belt. The monitor also connects the harness belts with clips to anchoring points near ***'s waist. *** has free movement of the arms and legs; only the movement of the torso is restricted. The harness essentially holds *** in the seat during the bus ride.

Beginning about early November, 2005, PISD began placing a pad over the bus window adjacent to ***'s seat. The pad was there so that *** could not kick out the window and be injured. PISD stopped using the window pad about a month later.

In considering the Petitioner's transportation claim, I must analyze whether the manner in which PISD transports ***, uses the safety vest and used the window

padding is or has denied *** a free appropriate public education (FAPE). Under the IDEA, a Hearing Officer must find a deprivation of FAPE for the Petitioner to prevail. 20 U.S.C. § 1415(f)(3)(E)(i).

The question of whether there is a denial of FAPE is examined under a two-part test enunciated by the *U.S. Supreme Court in Board of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982). According to *Rowley*, there is a deprivation of FAPE if a child's program and services are not (1) in compliance with IDEA procedures, and (2) reasonably calculated to enable the child to receive educational benefits. My analysis concentrates on the second prong of the *Rowley* inquiry. In the Fifth Circuit – which includes Texas – there are four factors to look at when deciding whether or not a child's program and services are reasonably calculated to confer educational benefits. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253, 26 IDELR ¶ 303 (5th Cir. 1997), cert. denied 522 U.S. 1047 (1998). I will do so in turn.

Individualized Services

Under the first *Michael F.* factor, I focus on whether the transportation service is individualized. Here, I find that ***'s bus ride is tailored to meet ***'s needs. PISD employed the safety vest after observing ***'s behavior on the school bus and recognizing the possible danger to not just *** but to the other bus passengers. During a phase when *** was kicking at the bus window, padding was used to prevent injury to ***'s feet and legs; its use was not motivated by cruelty.

The U.S. Department of Education, in nonregulatory guidance, has stated that for a disabled child receiving transportation as a related service, his or her IEP team must determine the appropriate mode of transportation based on the child's needs⁷. Here, ***'s ARD committee met on November 30, 2005 and January 6, 2006 and, among other things, discussed and developed a plan for transporting ***. ***'s parent attended the ARD committee meetings and had an opportunity to provide input. The ARD committee determined the appropriate mode of transportation should include the restraining harness and window padding based upon a need to protect and safely transport ***.

764 Fed. Reg. 12551 (1999).

LRE

The second *Michael F.* factor is whether the child's program is administered in the least restrictive environment (LRE). This factor is not pertinent to this case because ***'s placement is not at issue. Even if the LRE factor applies to the mode of transporting a child with a disability, I find that PISD attempted to control *** using less restrictive interventions, such as verbal redirection, before employing the restraint harness. The harness is the least restrictive method available to safely carry *** to the *** school.

Further, the use of the harness is not inconsistent with Texas law that limits how educators can physically restrain public school students. Under TEA regulations, a school district may utilize restrictive safety devices when transporting students. 19 Tex. Admin. Code § 89.1053(f)(4).

Key Stakeholders

Under the third *Michael F.* factor, I focus on whether the key stakeholders provide the transportation service in a coordinated and collaborative manner. On this point, I must credit the district because it included not just its own staff but also the teacher and administrator from ***'s *** school in ARD committee meetings when the topic of transportation was reviewed. There was no evidence produced at the due process hearing to suggest that communication and collaboration among the staff on the bus and district officials was faulty.

Educational Benefit

Under the fourth *Michael F.* factor, I focus on whether ***'s transportation service is reasonably calculated to generate educational benefits. Mindful that the sole benefits that should derive from transportation are being able to arrive at and attend the educational setting where instruction and learning takes place, I find that ***'s bus ride is reasonably calculated to safely and dependably deliver *** to the *** school.

While *** has recently experienced some regression in behavior at the *** school, the Petitioner failed to establish by a preponderance of evidence a linkage between this regression and the use of the safety vest or window padding. I conclude that the relevant *Michael F.* factors in the FAPE analysis weigh in favor of the Respondent and, thus, PISD prevails on Issue No. 1.

Issue 2 – FBA and Supportive Interventions

The Petitioner's second allegation is that the Respondent has failed to provide an FBA and supportive interventions to ***. Specifically, the Petitioner complains that the Respondent has neither conducted a proper FBA of *** on the PISD special needs school bus nor properly scheduled the PISD special needs school bus to transport *** to a nonpublic day school. The Petitioner at one point also alleged that *** was denied counseling. During the due process hearing, the Petitioner clarified that the reference to counseling was essentially restating the Petitioner's call for observation and study of ***'s behavior on the bus⁸.

⁸Due Process Hearing Tr. at 59-60, 149.

Under the IDEA, ARD committees must consider, if appropriate, positive behavioral strategies, interventions, and supports to address the behavior of a child that impedes his or her learning or that of others. Further, ARD committees must, after considering the positive behavioral strategies, interventions, and supports, include in the child's IEP any particular device or service (including an intervention, accommodation, or other program modification) that they determine the child needs in order to receive a FAPE⁹. Here, the Petitioner insists that PISD must formally study the behaviors that *** displays during the morning bus ride from home to the *** school to understand and address them. Further, the Petitioner insists that PISD must adjust the timing of ***'s pick-up and drop-off on school day mornings to accommodate ***'s behaviors.

In considering the Petitioner's FBA and supportive interventions claim, I must analyze whether the lack of an FBA and shortened bus ride resulted in the denial

of FAPE. As above, I will concentrate on the second prong of the *Rowley* inquiry on receipt of educational benefit.

⁹20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. §§ 300.346(a)(2)(i), (b), (c).

Individualized Determination

Under the first *Michael F.* factor, I focus on whether there was an individualized determination on whether *** needed an FBA and rearranged bus schedule.

Here, I find that ***'s ARD committee discussed the behaviors being demonstrated on the school bus and dispatched observers to ride the bus with ***. PISD officials, therefore, weighed the need for an FBA and determined less formal study would suffice. The function of ***'s behavior was identified through an informal series of observations so the ARD committee has the essential information that a formal FBA would generate.

PISD staff considered that the bus route that *** currently takes is the most direct path from ***'s home to the *** school. Even if the PISD special needs school bus picked up *** last and proceeded directly to the *** school, the time savings would be negligible.

LRE

The second *Michael F.* factor on LRE is not pertinent.

Key Stakeholders

Under the third *Michael F.* factor, I focus on whether the key stakeholders worked in a coordinated and collaborative manner. As pointed out above, the ARD committee meetings were inclusive to gain perspective not just from PISD staff but also staff from the *** school. The LSSP intern conversed with the bus staff about *** when the observations were conducted.

Educational Benefit

Under the fourth *Michael F.* factor, I focus on whether the behavior of *** impeded ***'s learning. As discussed above, *** has recently experienced some regression at the *** school. I credit the testimony of ***'s teacher at the ***

school that the regression is due to issues at the *** school¹⁰. I find, therefore, that this regression was not attributable to the misbehavior on the school bus. I conclude that the PISD prevails on Issue No. 2.

¹⁰See *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1292, 17 IDELR ¶ 990 (5th Cir. 1991) regarding the weight to be given to testimony from those with daily and continuing observation within the classroom environment.

Conclusions of Law

After due consideration of the foregoing findings of fact, I make the following conclusions of law:

1. The Petitioner, ***, is eligible for special education and related services as a child with a disability under IDEA.
2. The Respondent, Pearland Independent School District, is responsible for the provision of FAPE to the Petitioner, ***.
3. The Respondent, Pearland Independent School District, did not inappropriately provide transportation service to the Petitioner, ***.
4. The Respondent, Pearland Independent School District, did not inappropriately deny an FBA and supportive interventions to the Petitioner, ***.
5. The Respondent, Pearland Independent School District, has not denied a FAPE to the Petitioner, ***, under *Board of Educ. v. Rowley*, 458 U.S. 176 (1982) and *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

Order

Based upon the foregoing findings of fact and conclusions of law,
IT IS HEREBY ORDERED THAT:

1. All relief sought by the Petitioner shall be and is DENIED.

SIGNED this _12th_ day of May, 2006.

Steven R. Aleman

Special Education Hearing Officer

DOCKET NO. 116-SE-0206

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

PETITIONER

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

SYNOPSIS OF DECISION

ISSUE: Whether Pearland ISD has inappropriately provided transportation services to ***?

CITATION: 34 C.F.R. §§ 300.24(b)(15), 300.300(a)(3)(i)

For the Respondent. The use of a harness to restrict child's movement during school bus ride was reasonably necessary to safely transport child given child's behavior on bus. The temporary use of window padding next to child's seat on school bus was reasonably necessary to protect child from injury.

ISSUE: Whether Pearland ISD has failed to appropriately provide a functional behavioral assessment, counseling services and/or supportive interventions to ***?

CITATION: 34 C.F.R. §§ 300.346(a)(2)(i), 300.520(b)(1)

HELD: For the Respondent. The Petitioner failed to demonstrate that the child's behaviors on the school bus impeded the child's learning, necessitating an FBA.