
DOCKET NO. 057-SE-1105, 132-SE-0206, and 165-SE-0306

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

PETITIONER

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

DECISION OF THE HEARING OFFICER

Statement of the Case

Student is a wheelchair-bound *** year-old male with spina bifida, a shunt, cerebral palsy, and visual and speech impairment. He is a *** grade student who resides in and attends one of the schools in the El Paso Independent School District, *** School. He is a student with special education needs as defined under both state and federal statutes and regulations. This is undisputed by the parties and confirmed by all of the evidence presented. What is in issue is whether the El Paso Independent School District denied student a free appropriate public education ("FAPE") during a portion of the 2005-2006 academic year and, if so, what remedies student is entitled to under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 et seq.

Student is represented in these proceedings by his mother and next friend, ***, who appears pro se. The School District is represented by its attorney, Mr. Steven L. Hughes, of the law firm of Mounce, Green, Myers, Safi, & Galatzan. In the past year Ms. *** has filed four requests for due process hearings as follows:

Tea Docket No.	Date filed	Original decision due date	Disposition
No. 025-SE-2005	October 10, 2005	December 25, 2005	Agreed order of dismissal October 17, 2005
No. 057-SE-1105	November 16, 2005	January 30, 2006	Consolidated into this action; due date extended to Aug. 10, 2006
No. 132-SE-0206	February 22, 2006	May 8, 2006	Consolidated into this action; due date extended to Aug. 10, 2006
No. 165-SE-0306	March 29, 2006	June 16, 2006	Consolidated into this action; due date extended to Aug. 10, 2006

In addition, Ms. *** has filed several complaints with the Texas Education Agency including complaints docketed as TEA Complaint Nos. 20062117, 20062118, and 20062090. She has also filed complaints against the licenses of the therapists who worked with student at the beginning of the 2005-2006 academic year. In addition, Ms. *** has filed an apparently unfounded criminal complaint against at least one of the therapists with the El Paso District Attorney's Office and multiple complaints against the school district and its personnel with the Texas Attorney General's Office and other state and federal agencies and officials.

In two of the four requests for due process hearings Ms. *** has filed, she has had attorneys but fired one of them and either fired the other attorney also or that attorney resigned -- the record is unclear which occurred.

With the possible exception of No. 025-SE-2005, all requests by Ms. *** for due process hearings have involved closely related facts and overlapping time periods. It is my understanding that most of the complaints filed with TEA and other agencies also involve at least some aspects of these same facts and time periods.

The evidentiary hearing on TEA Docket Nos. 057-SE-1005 and 132-SE-0206 was held at the School District administrative offices in El Paso on March 27-28, 2006. Ms. *** filed the due process hearing request docketed by TEA as No. 165-SE-206 on March 29, 2006 (the day following the evidentiary hearing). Ms. *** hired an attorney on Docket No. 165-SE-206. Her attorney agreed to consolidate the new case with the other two cases and asked for an extension of the decision due date so that he could familiarize himself with the facts and issues and attempt to negotiate a settlement or, perhaps, reopen the evidence. I granted that request without any objection from the school district². Ms. *** later fired this attorney and moved for an immediate decision³.

²Ms. *** is, of course, bound by the acts and agreements of her attorney on her behalf. See *Fonseca v. State of Texas*, 163 S.W. 3d 98 (Tex. App. -- Fort Worth 2005, pet. refused) and cases cited.

³In the final conference call related to this case on July 11, 2006, I explained the doctrine of res judicata to Ms. *** I said that it would act as a bar to her relitigating these claims in a future due process hearing. Simply stated, the gist of the res judicata doctrine is that a defendant is entitled to have all of a plaintiff's related causes of action brought in a single action instead of presented through piecemeal litigation. This keeps the defendant from having the expense and confusion of defending multiple lawsuits growing out of the same cause of action and conserves judicial resources. The doctrine of res judicata applies in Texas Special Education Hearings. See *Ariel B. v. Fort Bend Indep. Sch. Dist.*, 428 F. Supp. 2d 640 (S.D. Tex., Houston Division, 2006). See also, *Veronica P. v. Evolution Academy Charter School*, TEA Docket No. 268 SE 0404, 42 IDELR 219 (2004); *Matthew L. v. Fort Bend ISD*, TEA Docket No. 188 SE 0104, 104 LRP 30665 (2004); *Pruett P. v. Conroe ISD*, TEA Docket No. 231-SE-0302, 102 LRP 17456 (2002); and *Andrew E. v. Dallas ISD*, TEA Docket No. 346 SE 698,

29 IDELR 930 (1998). I told Ms. *** that, if she wished to present evidence in TEA Docket No. 165-SE-206 (the case filed after our evidentiary hearing), I would entertain a motion to reopen the evidence in all the consolidated cases before I wrote the decision. I told her this was her last opportunity to present evidence related to the events covered in these cases in a due process hearing.

Issues And Analysis

Four issues are presented in these consolidated cases. Following a brief discussion and overview of these issues, I will set forth separately stated findings of fact and conclusions of law.

1. **Whether Records Have Been Falsified By School District Employees -- Ms. *** asserts that student's therapists and his paraprofessional have deliberately falsified records.** This is an underlying issue in all of these consolidated due process hearing requests. Ms. *** had the burden of proof on this issue². Based on a preponderance of the evidence and considering the demeanor of the witnesses, my best efforts to reconcile their testimony, and the written documentation, I find no substantiation of the claim that the therapists have falsified time sheets or other records. However, I do find the paraprofessional aide's time logs are inaccurate and untrustworthy. They can't be reconciled with the other evidence in this case. (I do not find that the paraprofessional deliberately falsified these logs -- only that they are inaccurate. I find that this is probably due to her lack of understanding of how to complete these logs accurately and perhaps her lack of proficiency in the English language rather than any deliberate intent to mislead on her part.)

²See Schaffer ex rel. *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005) (the burden of proof in a special education due process hearing is on the party seeking relief)

2. **The next issue is how much compensatory education, if any, is student entitled to based on the paraprofessional aide's time logs which show him to have been outside the classroom a substantial part of the school day? --** I discussed this issue on the record with the parties during the hearing. That discussion explains my decision here and reads, in part, as follows (beginning at Tr. 355):

THE HEARING OFFICER: I've heard a lot of testimony here and I'm not sure how it relates, how it ties into a remedy. On the logs, for example, I'm not going to rule from the bench, but --

MS. ***: You mean the therapists' log or the paraprofessional logs?

THE HEARING OFFICER: . . . The paraprofessional logs. I've heard a lot of testimony that [student] was in class all of that time; at the same time, the logs are clearly inaccurate if that's the case.

MS. ***: Yes.

THE HEARING OFFICER: But even if we assume that the logs are correct and that student was out of class all that time, have you calculated how much class he missed?

MS. ***: No, I haven't.

THE HEARING OFFICER: Would it make any sense to calculate that and provide that as compensatory services?

MR. HUGHES: From what I've seen of the logs is that you can't tell hide nor hair.

THE HEARING OFFICER: Well, I can't tell hide nor hair, either, but even if we assume those logs are correct, I don't think he's missed a great deal. He's missed some.-- [Continuing at Tr. 362 and talking to Ms. ***.]. . . If I were going to order something, do you have any idea how much time he's missed, if any?

MS. ***: I would think maybe a hundred hours.

THE HEARING OFFICER: And you base that on these logs? . . .

MS. ***: Yes.

I will order the School District to provide student a hundred hours tutoring either at home or at school as determined by the ARD committee to make up for any time missed by student as a result of any improper activities by student's paraprofessional aide as documented in her logs⁴.

⁴Compensatory education is available under IDEA as an equitable device to remedy procedural or substantive violations. *Burlington Sch. Comm. v. Department of Educ.*, 471 U.S. 359, 369 71 (1985); *Alamo Heights Indep. School Dist. v. State Bd. of Educ.*, 790 F.2d 1153 (5th Cir.1986); *Parents of Student W. v. Puyallup School District*, No. 3, 21 IDELR 723 (9th Cir. 1994). The evidence indicates that the aide's logs are inaccurate and that student probably wasn't absent from class nearly to the extent documented by the logs. However, the school was responsible for teaching Ms. *** how to prepare the logs and a school official had responsibility for regularly monitoring the logs. Failure to keep precise and accurate records is resolved by using the best information available. See *Anderson v. Mt. Clemens Pottery Company*, 328 U.S. 680, at 688 (1946); and *Martinez v. Deaf Smith County Grain Processors*, 583 F. Supp. 1200 at 1206 (N.D. Tex. 1984). The estimate by Ms. *** that student missed 100 hours of class time probably overly compensates student for the class time he actually missed but the paraprofessional's logs are the best information I have to make the estimate of the amount of compensatory time due student for the time he may have missed due to Ms. ***'s taking him out of class at inappropriate times.

- 3. Whether the School District should compensate student. for failure to fully provide him with the adaptive physical education and therapy required by his IEP during the period from August 25 to October 12, 2005?** -- At the beginning of the 2005-2006 academic year, Ms. *** faxed the School District a copy of a doctor's order with a note attached asking the District to stop all physical exercise. Through a series of miscommunications by School District personnel which I find to have been unintentional, but which Ms. *** argues were deliberate, the School District failed to fully implement the adaptive physical education program called for in student's IEP from August 25, 2005 (the date that student's doctors said the District could resume student's physical and occupational therapy programs) until October 12, 2005. I will order the ARD committee to decide how much adaptive physical education called for in the IEP that student missed during the period in question and provide compensatory services. (The record is clear that he received all of the therapy called for in his IEP during this period so there is no need to compensate him for any missed therapy.)

4. **Whether student is entitled to compensation under IDEA for the District's failure to adequately supervise student on November 22, 2005, when student attempted to operate his own wheel chair ***.**--- I have concluded that this was an accident which has had no affect on student's education program. School authorities are required by IDEA to provide special education students with a safe environment⁵. It is clear from the record that this was an accident that had little, if any, bearing on student's receipt of a FAPE since he was back in class the next day.

⁵See *Lillibask v. State of Connecticut Department of Education*, 397 Fed. 3d 77, 42 IDELR 230 (2d Cir. 2005) (IDEA due process hearing officers have jurisdiction to review safety challenges to a child's IEP). The petitioner asserted during the hearing that the Dowell Elementary School Building is not in compliance with public building requirements under the American with Disabilities Act, 42 U.S.C. 12181. (I have no jurisdiction to enforce the American with Disabilities Act but could order that this student be educated elsewhere if the school building were a non-compliant building.) However, this was merely an unsubstantiated allegation with no evidence to support it.

Findings of Fact

1. As previously stated, student is a wheelchair-bound *** year-old male with spina bifida, a shunt, cerebral palsy, and visual and speech impairment. He is a *** grade student who resides in and attends one of the schools in the El Paso Independent School District, *** School. He is eligible to receive and requires special education and related services because of his physical condition.
2. Student's teachers report that he is very pleasant, bright, cooperative, and easy to work with and that he is well liked by both his teachers and his peers.
3. Shortly before the beginning of the 2005-2006 school year, on August 11, 2005, Ms. *** faxed the School District a copy of a doctor's order and her own handwritten note stating that all physical exercise for student should be stopped immediately. A copy of this fax is in evidence as Exhibit R-4.
4. Ms. *** coordinates Special Education for *** School. She received the fax. She immediately telephoned Ms. *** and talked to her about student's situation. She learned that the doctors had found some tissue growing in student's spinal column called tether cord and that student should have no pulling on the spine because it could cause his problem to become worse. Ms. *** agreed to contact student's paraprofessional, the school nurse, and student's therapists to make them aware of student's condition and the request by Ms. ***.
5. Ms. *** immediately contacted ***, student's head physical therapist. Ms. *** asked Ms. *** to immediately stop exercising student and*** and complied with it.

6. The school nurse told Ms. *** that, in order to discontinue the physical and occupational therapy and other exercise called for in student's IEP without holding an ARD, Ms. *** needed a doctor's note stating that it should be discontinued. Ms. *** telephoned student's doctor's office and talked to the doctor's nurse. The doctor's nurse asked Ms. *** to fax the doctor a form with the information she wanted the doctor to sign and, perhaps, the doctor would sign it. Ms. *** prepared such a form in her own handwriting and faxed it to the doctor on August 18, 2005. That form was later mistaken by Ms. *** as a note that had been signed by the doctor. (It is also what Ms. *** claims is a falsified document which Ms. *** was misrepresenting as a doctor's order. Alternatively, and somewhat inconsistently, Ms. *** claims it was a document that Ms. *** sent to the doctor to try to get him to change student's treatment.) I find that Ms. *** was merely carrying out her proper function under the IEP as liaison to student's doctors when she faxed this document to the doctor for signature. There was nothing improper or inappropriate in her doing this.
7. School District personnel gave no physical therapy or occupational therapy to student until after a doctor's order allowing it had been received. That order is in evidence as Exhibit R-6. It is a handwritten note that says, "Contin[ue] P.T. / O.T. in the schools." The note is dated August 25, 2005, is on a prescription form and contains an illegible signature at the bottom (said to be the signature of student's physician, Dr. ***). Ms. *** started student's physical therapy five days later on September 1, 2005.
8. "Adaptive physical education" is physical education for individuals whose disabilities prevent their participation in the school's regular physical education program. The District didn't restart student's regular adaptive physical education program at the same time as student's physical therapy and occupational therapy because the doctor's note did not address adaptive physical education. The therapists and school administrators worried that adaptive physical education was more strenuous and that student might injure himself. They requested (and then waited for) an order from student's doctors instructing them to fully resume student's adaptive physical education program. That order didn't arrive until October 12, 2005. The District restarted adaptive physical education promptly after receiving the doctor's order to do so. Student did not use his walker to exercise from August 25 until near the beginning of October because he needed special footwear to protect his ankles when using the walker and the footwear had been ordered by Ms. *** but had not arrived. School Officials were motivated by a desire not to injure student and to protect themselves from liability by waiting for more detailed instructions rather than by any improper motivation when they delayed restarting student's adaptive physical education program. (In ordering compensatory adaptive physical education to compensate student for any adaptive physical education that he missed for the period from August 25 until October 12, 2005, I do so without criticizing school authorities for the delay in resuming the adaptive physical education program called for in student's IEP. I find that the school authorities thought they were acting in student's best interest in delaying resumption of student's adaptive physical education program.)

9. During student's M.R.I., the doctors determined that student had serious lung problems that would prevent him from receiving anesthesia in future operations and *** was working against the recommended program and requested that the School District remove Ms. *** and her assistant, Ms. ***, as student's physical therapists. The School District honored this request and appointed another person to provide physical therapy to student. In addition to having Ms. *** removed as student's therapist, Ms.*** also tried to get her removed from the *** School campus and filed a grievance against her with the state agency that licenses physical therapists and an apparently unfounded criminal complaint against her with the El Paso District Attorney's Office.
10. Mr. *** was student's occupational therapist. He worked with student on student's motor skills. At the beginning of the School Year, student was in diapers. A decision was made in consultation with Ms. *** to implement toilet training for student. But after student's paraprofessional aide expressed concern that the toilet training was not covered in student's IEP, Mr. ***inquired of the school's special education department whether a new ARD was necessary. He was told that an ARD should be held before implementing toilet training for student. After the ARD meeting to revise student's IEP to include toilet training, Ms. *** decided that Mr. *** was working against student's toilet training. She requested that the School District remove Mr. *** as student's occupational therapist. The School District granted this request and appointed another person to provide occupational therapy to student. Ms. *** also filed a grievance against Mr. *** with the state agency that licenses occupational therapists.
11. Ms. *** charged that Mr. ***'s log for a therapy session held with student on October 21, 2005 was falsified. Mr. *** testified that he had held the therapy session and his log was not falsified. He testified that he had investigated the allegation by Ms. *** that student was not at school at the time Mr. *** says he held the October 21 therapy session. Mr. *** testified that the note that Ms. *** presented stating that student was, in fact, at the Texas Tech University Health Science Center at the time Mr. *** held the therapy session couldn't be verified through either the school records (which show student to have been present at school and not absent or tardy on that date) or by Health Science Center records or personnel. Mr. *** made a credible witness and Ms. *** did not carry her burden in this hearing of proving that Mr. *** had falsified his logs.
12. Ms. *** was student's paraprofessional aide for student's aide and a different aide has been appointed to work with student. Ms. *** helped him with his physical activities, including walking and other forms of exercise, diaper changes, moving from class to class and eating lunch. She had no responsibility for student's academic training. Ms. *** speaks English but is not fluent. She testified through an interpreter. Beginning some time in the fall semester, the School District tried to get Ms. *** to keep logs of student's daily activities. Although all of the witnesses with whom Ms. *** came in contact testified that she was a conscientious aide to student, her logs did not confirm this. Her logs contain many almost nonsensical entries showing that student spent most of the day eating lunch or in the nurse's station getting his diaper changed, or even that he spent several hours brushing his teeth. Although Ms. *** testified that her logs were accurate --

much of the information contained in the logs is diametrically opposed to the testimony she gave on the witness stand. Both her logs and her testimony cannot be true since they were conflicting. I find that her logs are hopelessly inaccurate. Although I am using the logs to estimate the amount of compensatory education due student, to the extent that the information contained in her logs is in conflict with other evidence, I credit the other evidence rather than the information contained in her logs.

Conclusions of Law

1. Petitioner student is a student in El Paso Independent School District who is eligible for special education services under the Individuals with Disabilities Education Act. 20 U.S.C.A. § 1400, et seq., 34 C.F.R. § 300.1 et seq.; 19 T.A.C. § 89.61 et seq.
2. Respondent El Paso Independent School District has a responsibility to provide student with a free appropriate public education. 20 U.S.C.A. § 1412; 34 C.F.R. §300.300; 19 T.A.C. § 89.1001.
3. Respondent El Paso Independent School District failed to provide student with a free appropriate public education during a portion of the 2005-2006 academic year.

Order

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by Petitioner is Granted in part.

The School District is ordered to provide student with 100 hours of compensatory tutoring at home or at school as determined by the ARD Committee. The School District is further ordered to provide student with adaptive physical education in a sufficient amount to compensate him for all adaptive physical education which he missed between August 25 and October 12, 2005.

All other relief not expressly granted herein is hereby DENIED.

The district shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of Special Education Programs and Complaints at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the

Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

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

SIGNED this 31st day of July, 2006.

Larry J. Craddock
Special Education Hearing Officer

**DOCKET NO. 057-SE-1105,
132-SE-0206, and 165-SE-0306**

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

PETITIONER

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

SYNOPSIS OF DECISION

ISSUE: Whether School District employees falsified student's records?
CITATION: *Schaeffer ex. rel. Schaeffer v. Weast*, 126 S. Ct. 528 (2005).
HELD: For the District. The burden of proof in a special education hearing is on the party seeking relief. Parent failed to prove falsification of records.
ISSUE: Whether student is entitled to compensatory education based on time logs kept by his aide which show he was out of classes to which he was assigned in his IEP for substantial amounts of time during the early part of the 2005-2006 school year?
CITATION: *Burlington Sch. Comm. v. Department of Educ.*, 471 U.S. 359, 369-71 (1985); *Alamo Heights Indep. School Dist. v. State Bd. of Educ.*, 790 F. 2d 1153 (5th Cir. 1986).
HELD: For the Student. Compensatory education and services are available as an equitable remedy for deprivations of FAPE.
ISSUE: Whether student is entitled to compensatory adaptive physical education for adaptive physical education required by his IEP which he missed during the period August 25 to October 12, 2005?
CITATION: *Burlington Sch. Comm. v. Department of Educ.*, 471 U.S. 359, 369-71

(1985); *Alamo Heights Indep. School Dist. v. State Bd. of Educ.*, 790 F. 2d 1153 (5th Cir. 1986).

HELD: For the Student. Compensatory education and services are available as an equitable remedy for deprivations of FAPE.

ISSUE: Whether student is entitled to compensatory education for EPISD's failure to adequately supervise him on November 22, 2005 when attempting to operate his own wheelchair he fell ***?

CITATION: *Lilibask v. State of Connecticut Department of Education*, 397 Fed. 3d 77 (2d Cir. 2005).

HELD: For the District. School authorities must provide special education students with a safe environment but this accidental injury had little, if any, bearing on student's receipt of a FAPE.