

Student <i>b/n/f</i>	§	BEFORE A SPECIAL EDUCATION
***,	§	
Petitioner,	§	
	§	
V.	§	HEARING OFFICER
	§	
EDCOUCH-ELSA INDEPENDENT	§	
SCHOOL DISTRICT,	§	
	§	
Respondent.	§	FOR THE STATE OF TEXAS

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

**I.
STATEMENT OF THE CASE**

Petitioner, student *b/n/f* *** (“Petitioner”), requested a Due Process Hearing pursuant to the Individuals With Disabilities Education Act (“IDEA”), 20 U.S.C. §1400 *et. seq.*, contending that Edcouch-Elsa Independent School District (“Respondent” or “E-EISD” or “the District”) denied Petitioner a free, appropriate, public education (“FAPE”) in the following particulars: 1) Petitioner was sent home from school with soiled clothing; 2) Petitioner’s teaching assistants applied inappropriate discipline by slapping him on the head and by strapping him into a wheel chair; 3) Petitioner was allowed to sleep in a storage unit, or “cubby hole,” during nap time when all other children were asleep on mats; and 4) Petitioner was allowed to run out of the classroom and into the bus area unattended. Petitioner requested that the Hearing Officer enter an Order requiring Respondent to: 1) provide one year of compensatory services and 2) provide training to all of Petitioner’s educational providers to help them understand and work with children with the unique educational needs demonstrated by Petitioner.¹

**II.
PROCEDURAL HISTORY**

A. DUE PROCESS SCHEDULING ISSUES

On May 19, 2005, the Texas Education Agency (“TEA”) received Petitioner’s Request for Due Process Hearing, assigned the case Docket No. 315-SE-0505, and assigned Docket No. 315-SE-0505 to the undersigned Hearing Officer. On May 26, 2005, the Hearing Officer notified the parties that the prehearing telephone conference would be held on June 9, 2005, that the Due Process Hearing was scheduled for June 16, 2005,

¹ This case was filed prior to the effective date of the 2004 reauthorization of IDEA. Accordingly, all legal citations and applied law refer to authority in effect at the time of the filing in May 2005

and that the Decision due date was July 3, 2005. Due to conflicting schedules the prehearing telephone conference was re-scheduled to June 15, 2005.

On June 15, 2005, the telephone conference convened as scheduled. In attendance were the following: 1) Mr. Christopher Jonas, counsel for Petitioner; 2) Ms. Cynthia Buechler, counsel for Respondent; 3) the court reporter; and 4) the undersigned Hearing Officer. During the telephone conference the parties discussed the issues, re-scheduled the Due Process Hearing for September 15, 2005, and extended the Decision deadline to October 2, 2005.

On September 8, 2005, Respondent filed its Motion to Dismiss With Prejudice, alleging that because the District was offering Petitioner the relief requested, the issues to be discussed in the Due Process Hearing were moot. Petitioner responded that the settlement offered by Respondent did not, in fact, address all of the Due Process Hearing issues and requested that the hearing proceed as scheduled. On September 12, 2005, the Hearing Officer denied Respondent's Motion to Dismiss and ordered that the hearing proceed as scheduled on September 15, 2005.

On September 13, 2005, Petitioner filed his unopposed Motion for Continuance. Finding good cause, the Hearing Officer granted the motion, re-scheduled the Due Process Hearing to October 6, 2005, and extended the Decision Deadline to October 24, 2005.

In October 2005 Respondent filed an unopposed Motion for Continuance. Finding good cause, the Hearing Officer granted the motion, re-scheduled the Due Process Hearing to December 7, 2005, and extended the Decision Deadline to December 25, 2005.

On December 5, 2005, Petitioner filed his second unopposed Motion for Continuance. Finding good cause, the Hearing Officer granted the motion, re-scheduled the Due Process Hearing to February 23, 2006, and extended the Decision Deadline to March 13, 2006.

On February 21, 2006, Petitioner filed his third unopposed Motion for Continuance. Finding good cause, the Hearing Officer granted the motion, re-scheduled the Due Process Hearing to April 6, 2006, and extended the Decision Deadline to April 17, 2006.

B. THE DUE PROCESS HEARING

On April 6, 2006, the Due Process Hearing convened at the Edcouch-Elsa Administrative Building, 920 West Santa Rosa Avenue, Edcouch, Texas 78538. The following were in attendance throughout the hearing on that date: 1) Mr. Jonas; 2) Mr. Roland Ramirez, Mr. Jonas' legal assistant; 3) Ms. ***, Petitioner's mother; 4) Ms.***, Petitioner's aunt; 5) Ms. Cynthia Buechler; 6) Ms.***, Respondent's Special Education Director; 7) the court reporter; and 8) the undersigned Hearing Officer.

Prior to taking testimony, the parties introduced their documentary exhibits. Petitioner called two witnesses: 1) Ms. ***, Petitioner's mother; and 2) Mr. ***, Petitioner's teacher during school years 2004-2005 and 2005-2006. After Petitioner rested, Respondent called two witnesses: 1) Dr. ***, Principal at the ***, formerly known as the ***; and 2) Ms. ***, Respondent's Special Education Director.

At the conclusion of the Hearing on April 6, 2006, the Hearing Officer requested that the parties file their post-hearing Briefs by May 2, 2006, and, by agreement, the Decision deadline was extended to May 9, 2006. A transcript of the Hearing was provided to the parties prior to their briefing deadlines. Due to illness of the Hearing Officer, the Decision Deadline was extended, by agreement, to May 11, 2006.

III. FINDINGS OF FACT

1. Petitioner is a ***-year-old male. He resides within the geographical boundaries of E-EISD with his mother and siblings. Petitioner is in the ***-year-old program at the***. Last year, school year 2004-2005, Petitioner attended this school in the ***-old program. Petitioner has Down Syndrome and meets the eligibility criteria of mental retardation and speech impairment.
2. E-EISD is a political subdivision of the State of Texas and a duly incorporated independent school district.
3. Petitioner has attended *** for two years where he has been receiving speech and occupational therapy and developmental services in a self-contained classroom. He received a Full Individual Evaluation ("FIE") in spring 2004. This evaluation found that Petitioner has a mild articulation disorder and a moderate receptive/expressive language disorder. Petitioner's in-school and out-or-school behaviors do not appear to influence his learning nor do they influence his educational placement and programming. Petitioner's IQ equivalence indicates that he falls in the mild range of ***.
4. During school year 2004-2005, Petitioner's teacher was Mr. ***, a certified special education teacher. During that school year, Petitioner's classroom generally had about twelve children, with some children being pulled out for services throughout the day. The staff generally consisted of one certified classroom teacher and two or more aides.
5. During that school year, several incidents, involving Petitioner's aides, troubled Ms. ***, prompting her to file a Request for Due Process Hearing and to remove Petitioner from school in spring 2005.
6. In November 2004, Ms. *** observed Petitioner strapped into a wheelchair in his classroom. Petitioner does not use a wheelchair at school and this was not a part of his IEP. Ms. *** complained to the principal of the school, who then investigated

the incident and found that Petitioner had been strapped into the wheel chair during lunch and while a substitute teacher was in the classroom. The principal removed the wheel chair from the classroom and suspended the aide subject to the investigation. The aide was subsequently re-assigned to another campus.

7. In spring 2005, Ms.*** arrived at school a bit early for an ARD Committee meeting. She went to Petitioner's classroom and while observing through the door, she saw Petitioner hit another child and then she observed Petitioner's aide slap Petitioner across the head. Ms. *** complained to the principal, who investigated the complaint and terminated the aide's employment.
8. In spring 2005 Petitioner ran out of the classroom and into the bus area, which is located close to his classroom. Petitioner's aide found him in the area, which was filled with buses ready to load children and depart. The evidence established that Petitioner ran away from the classroom, unattended by an aide. The evidence did not establish the amount of time that Petitioner was unattended in the bus area.
9. Another incident involved Petitioner's being in a storage cabinet or "cubby hole." Ms. *** arrived early to pick Petitioner up from school and when she entered the room, she found him in the cubby while the other children were asleep on their mats. It appeared to Ms. *** that Petitioner had actually been allowed to play in the cubby and to fall asleep there. Based upon this incident, all of the handles were removed from the cubbies and they were taped to prevent students from hiding in them. The evidence did not show that Petitioner's teacher or aide placed him in the cubby. The evidence did establish that once this concern was presented to the District, it took corrective measures.
10. Ms. *** withdrew Petitioner from school in spring 2005, but re-enrolled him prior to summer school. Petitioner attended summer school with the District during summer 2005.
11. In fall 2005, Petitioner returned to the *** campus where he was assigned to another teacher besides Mr. ***, who had been his teacher during school year 2004-2005. Ms. *** requested that Petitioner be re-assigned to Mr. *** classroom, which was done. Petitioner continued throughout school year 2005-2006 in Mr. *** classroom.
12. Ms. *** believes that Mr. *** is a good teacher and he was never part of the incidents during school year 2004-2005.
13. Notwithstanding the incidents of concern to Ms. ***, the evidence established that Petitioner made educational progress during school year 2004-2006.
14. There was no evidence that Petitioner was sent home from school with soiled clothing.

15. There was insufficient to establish that Petitioner's aides were not trained in dealing with his disabilities. The evidence established that the District did provide appropriate training to its aides.

IV. DISCUSSION

Under IDEA, all state school districts receiving federal funding must provide all children with disabilities FAPE. 20 U.S.C. §1412(1) & 1414(d). The determination of whether a school district has provided a student with FAPE is two-fold: 1) the school district must comply with the procedural requirements of IDEA, and 2) the school district must design and implement a program "... reasonably calculated to enable the child to receive educational benefits." *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175, 206-207 (1982).

To ascertain the educational benefits of an IEP, the reviewing entity must examine whether the student has received the "basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit to the handicapped child." *Hendrick Hudson Central School District v. Rowley*, 458 U.S. at 200-01. Although the school district need only provide "some educational benefit," the educational program must be meaningful. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). The educational benefit cannot be a mere modicum or *de minimis*. It must be likely to produce progress, not regression or trivial educational advancement. *Houston Independent School District v. Bobby R. and Caius R.*, 200 F.3d 341, 347 (5th Cir. 2000).

In *Cypress-Fairbanks Independent School District v. Michael F.*, the Court set forth four factors that can aid in evaluating whether a student is receiving the "basic floor of opportunity, or access to specialized instruction and related services which are individually designed to provide educational benefit" to that student: 1) whether there is an individualized program based on the student's assessment and performance; 2) whether the individualized program is administered in the least restrictive environment ("LRE"); 3) whether the services are provided in a coordinated and collaborative manner by the key stakeholders; and 4) whether positive benefits are demonstrated both academically and non-academically.

There is no issue in this due process proceeding related to the appropriateness of Petitioner's individualized 2004-2005 program or whether it was provided in the LRE or whether it was devised by his key stakeholders or whether Petitioner made academic and non-academic progress. The core issue is whether the four events of 2004-2005, involving Petitioner's aides, deprived Petitioner of educational benefit such that he was denied FAPE.

The four events discussed in the Due Process Hearing were as follows:² 1) the wheel chair incident, in which Petitioner's aide strapped him into a wheel chair during lunch; 2) the slapping incident, in which Petitioner's aide slapped him across the head when Petitioner struck another student; 3) the cubby incident, in which Petitioner's mother found him inside a cubby during nap time; and 4) the running away incident, in which Petitioner darted from the classroom and into the bus area before his aides could reach him..

Of these four, the District took full responsibility of the wheel chair and slapping incidents. The District immediately investigated the complaints of Ms. *** and took severe action by either terminating or re-assigning the aide. In both matters, Ms. *** complaint was taken seriously and immediately handled.

In the remaining two events, *i.e.*, those involving Petitioner's being found in the cubby during nap time and running away from his aides into the bus area, the District did not concur that these events occurred as presented by Ms. ***. The evidence presented at the hearing was insufficient to establish that these events occurred as perceived by Ms. *** or that they occurred because Petitioner's teacher or aides were not properly trained or were remiss in educating him.³

Ms. *** was extremely diligent in presenting her concerns to the principal about Petitioner's treatment by his aides. Indeed, two such incidents resulted in disciplinary action against the aides. There is no modicum of tolerance in the educational environment for such treatment of our children. The District's prompt, decisive response to these incidents exemplifies this fact. However, it is too far a stretch to infer that the fact of these events equates to a denial of FAPE. All other factors considered, Petitioner enjoyed a successful school year 2004-2005, making appropriate educational progress, so much so that his mother re-enrolled him in the school for summer 2005 and requested his placement back into Mr. *** classroom for school year 2005-2006.

V. CONCLUSIONS OF LAW

1. Petitioner received an appropriate education during school year 2004-2005. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175, 206-207 (1982); *Cypress-Fairbanks Indep. School District v. Michael F.*, 118 F.3d 245, 245 (5th Cir. 1997).

² In the original complaint, Ms.***alleged that Petitioner had been sent home with soiled clothing. There was no evidence presented at the hearing related to this claim.

³ Mr. *** testified that Petitioner crawled into the cubby when he saw his mother coming into the room. Mr. *** perceived that Petitioner was simply trying to hide from his mother; he was never placed into the cubby for naptime. Mr. *** also testified that many younger students have a tendency to run and chase and that Petitioner was no different. The District had a plan in place for an event such as Petitioner's running into the bus area. Petitioner was out of the room for just minutes and was promptly located by his aides.

**VI.
ORDER**

Based upon the record of this proceeding and the foregoing Findings Of Fact and Conclusions Of Law, it is ORDERED that the relief requested by Petitioner is DENIED.

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

SIGNED this 11th day of May 2006.

Deborah Heaton McElvaney
Special Education Hearing Officer

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SYNOPSIS

ISSUE: *Whether the actions of Petitioner's aides in strapping him into a wheel chair and slapping him on the head deprived him of FAPE.*

C.F.R. CITATION: 34 C.F.R. 300.300; 300.550-553.

HELD: For Respondent. The incidents involving Petitioner's aides strapping him into a wheel chair and slapping him across the head were inappropriate and certainly not part of his IEP. However, they were investigated and the investigation led to disciplinary action. There was no proof that Petitioner's program was affected by these incidents such that they deprived him of FAPE.