

STUDENT bnf ***	§	BEFORE A SPECIAL
Petitioner	§	EDUCATION
	§	
v.	§	
	§	HEARING OFFICER FOR THE
YSLETA	§	
INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	STATE OF TEXAS

DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Petitioner, student (hereinafter Petitioner or student), brings this action against Respondent Ysleta Independent School District (hereinafter Respondent or YISD) under the Individuals With Disabilities Education Act (hereinafter IDEA), 20 U.S.C. § 1400 *et. seq.*

Petitioner alleges that Respondent violated the provisions of the IDEA during the time he attended YISD in the fall semester of the 2004-2005 school year by failing to provide him with a free appropriate public education. In particular, Petitioner alleges that he was not receiving the requisite benefits from his placement at YISD, that his placement was not appropriate to his needs, and that YISD failed to implement a prior order of this Hearing Officer by not providing student with compensatory counseling services during the fall of 2004.

For relief, Petitioner requests compensatory services for the denial of free appropriate public education including residential placement at public expense.

Error! Reference source not found. of Corpus Christi, Texas represents Petitioner in this proceeding. Jose Martin of Austin, Texas represents Respondent.

PROCEDURAL HISTORY

Petitioner filed his request for hearing on June 28, 2005. The case was reassigned to the undersigned Hearing Officer on July 22, 2005.

On October 18, 2005, the Hearing Officer granted a portion of Respondent's motion for partial summary judgment, holding that Petitioner's claim for **prospective** relief in the form of residential placement at public expense upon student's release from

*** was not ripe for resolution. The Hearing Officer allowed Petitioner to proceed on his claims for compensatory relief, including a request for residential placement as a form of compensatory relief, on the grounds that the type of relief to be awarded for a denial of free appropriate public education, if any, would be determined based on the evidence presented at hearing.

Following several continuances, the matter came on for hearing on February 1 and 27, 2006. The parties submitted post-hearing arguments on March 20, 2006 and this decision of the Hearing Officer is due on or before April 20, 2006.

FINDINGS OF FACT

1. Student is a *** year-old student who attended *** School in Ysleta ISD during the 2004-2005 school year from September 3 until October 1, 2004. Student is eligible for special education services under the IDEA classifications of Emotional Disturbance, Other Health Impairment, and Learning Disabled.
2. YISD is a political subdivision of the State of Texas and a duly incorporated school district. YISD was responsible for providing a free appropriate public education to student under the provisions of the IDEA at the relevant time period.
3. Student was the subject of a previous due process proceeding between these parties, *Student v. Ysleta ISD*, Docket No. 176-SE-0104 (TX SEA 2004), during which he alleged a denial of a free appropriate public education during the 2003-2004 school year and requested placement in a residential treatment center at public expense. By agreement and request of the parties, the Hearing Officer takes judicial notice of and incorporates herein the decision rendered in that cause, including the Findings of Fact and Conclusions of Law.
4. In the prior proceeding, the undersigned Hearing Officer (also the Hearing Officer in that docket) denied student's request for residential placement, but concluded that Respondent failed to provide him with a free appropriate public education during the 2003-2004 school year. In relevant part, the Hearing Officer ordered Respondent to develop an appropriate program and placement for student with all necessary and appropriate related services. The Hearing Officer further ordered Respondent to include Dr. ***, student's therapist, in the planning of the program, to designate a liaison to monitor student's program and ensure communication and coordination with his family and other health providers, and to provide student with compensatory educational and counseling services according to a schedule to be determined by student's Admission, Review, and Dismissal Committee (ARDC) commensurate with student's then current needs. The Hearing Officer's decision was issued on August 16, 2004.
5. On August 30, 2004, an ARDC convened to implement the Hearing Officer's decision and develop a program and placement for student for the 2004-2005

- school year. Dr. *** attended the ARDC and participated in developing student's program and drafting a Behavior Intervention Plan (BIP) for Student. In addition, student's parent and his attorney participated in the ARDC meeting.
6. The program developed for student included the following components: placement in a small group setting in a self-contained behavior classroom; group counseling for 1 hour per week and individual counseling for 30 minutes per day for the first two weeks, decreasing to 30 minutes per week thereafter; implementation of a BIP developed by Dr. *** and school psychologist Dr. *** that included rewards specific to student and access to a relaxation area; 1:1 supervision throughout the school day; an anger management group program on a weekly basis; 1:1 monitoring by Dr. *** for the entire school day for the first two weeks of student's return to school, with ongoing access to Dr. *** for crisis management; consultation by Dr. *** with other staff working with ***; transportation to and from school with 1:1 supervision, including student arriving at school two hours early due to his parent's work schedule; daily student's parent illustrating progress made toward student's social skills IEP goals. Dr. *** was designated the liaison for student's program.
 7. The program developed for student at the August ARDC was based substantially on the testing and recommendations of Dr. ***. Dr. *** recommended to the ARDC that the first 2-3 weeks of student's program be viewed as a stabilization or transition period. School personnel, including Dr. ***, concurred that the first weeks of student's placement would be an adjustment period. Dr. *** and Dr. *** similarly agreed that not all of student's days could be expected to be positive upon his return to YISD.
 8. The ARDC discussed and agreed, including student's attorney, to delay consideration of the compensatory education and counseling services awarded by the prior decision until a later time.
 9. Student returned to school at School on September 3, 2004, after being out of the public school environment since January 2004. He attended YISD until October 1, 2004, a total of 20 school days or 4 school weeks.
 10. On October 1, 2004, when student returned from school in the afternoon, he exited the school bus and bolted before his mother could apprehend him. After six days of being missing, student was found and taken by the police to a mental health holding center. Student was dehydrated, barefoot, had not eaten or taken his medications in days, and was in a deteriorated state. Student's parent and aunt came to retrieve him at the holding center, at which time student pulled a knife on them, grabbed the car keys, and left. The police later found student in a panic state, threatening to kill himself. The police took student directly to the hospital. Subsequently, student was adjudicated for Aggravated Assault/Unauthorized Use

of a Motor Vehicle and placed at the *** as of 10/20/06. Student remains incarcerated at *** and has not returned to YISD since 10/01/04.

11. During student's 4 weeks at YISD, Dr. *** spent the entire school day with student from September 3, 2004 through September 17, 2004. On those days, student received individual counseling for 30 minutes per day. Between 9/20 and 10/1/04, Dr. *** conducted 3 additional individual counseling sessions with student and 3 group sessions. Dr. *** spoke with student's parent approximately 6 times during the 4-week period.
12. Daily progress records documenting student's behavior indicate that he had positive days in which he was able to stay on task, follow directions, complete his work, and demonstrate mostly appropriate behavior. He also experienced negative days during which he was not on task and became argumentative or otherwise inappropriate. Over half of his 20 days (approximately 12) can be characterized as primarily positive. Approximately 6 of the days can be characterized as primarily negative and 2 of the days as mixed- positive and negative.
13. During student's 20 days in YISD, he had two physical altercations with another student in his behavior classroom. The first incident occurred on 9/14/04 and involved student punching at the student after a disagreement in the gym. Dr. *** account of the incident states that, from her perspective, the other student shoved student first. The second incident, occurring on 9/27/04, happened in the classroom when student hit the same student after he made a comment while the teacher was talking to student about his attitude that day. On both occasions, student directed his aggression solely toward the student and not toward the teachers or administrators who were involved in the incidents.
14. Student processed each of these events of aggression with Dr. ***, looking at antecedents, and consequences in accordance with his IEPs and BIP. The type of assaultive conduct student demonstrated was consistent with his prior conduct at *** (summer 2004) and with more current behavior at ***. Both Dr. *** and Dr. *** testified that it was reasonable to expect some behavioral episodes, particularly during the initial stabilization period.
15. On 9/30/06, student left campus immediately after getting off the school bus, before making contact with his aide. Student's aide contacted school security and El Paso police and followed student. Before the police arrived, student's aide was able to convince him to return to school. Over the course of the day, student processed this event with Dr. *** and demonstrated his understanding of the concept of consequences for his actions, stating that he chose to return to school so that he could attend the upcoming homecoming dance. Both Dr. *** and Dr. *** viewed this incident as positive in the sense that student returned to school, discussed the incident, and ultimately had a positive day at school.

16. On August 30, student's teacher had a conference with student and his mother to review his academic and behavioral progress. Several areas of concern were noted at the conference, including student's physical aggression, his frequent use of the relaxation area, and his *** progress *** academically.
17. During student's four weeks at ***, student completed course work in all subjects and made more than trivial academic progress. Student academic progress reports showed that as of 9/28/06, student had completed most assignments except in Speech and had earned grade point averages as follows: *** in Health, *** in Weights and Conditioning, *** in World History, *** in English, *** in Algebra, *** in Environmental Science, and *** in Speech.
18. During September 2004, student's behavior in the home and community was very challenging and beyond his parent's control. Student required constant supervision to ensure that he attended school; he hit, pushed or slapped his mother on several occasions and was non-compliant with household rules. Between the time of the first due process hearing and the ARDC meeting of August 30, 2004, student's behavior deteriorated to the point that the family was afraid of student. His mother expressed the belief at the ARDC that student continued to require residential treatment in order to receive a free appropriate public education.

DISCUSSION

Whether Respondent Failed To Provide JM With A Free Appropriate Public Education During September 2004?

In the instant action, Petitioner argues that YISD denied student a free appropriate public education during September 2004 by failing to provide him with compensatory counseling services as ordered by the Hearing Officer's prior decision, and by failing to provide an appropriate program as demonstrated by his deteriorating behaviors at school and at home that ultimately culminated in his ***. For the reasons set forth below, the Hearing Officer finds that Petitioner did not meet his burden of proving that Respondent's program and placement were not appropriate for student during the relevant time frame.

1. Failure to Provide Compensatory Counseling Services

With regard to Petitioner's complaint regarding the provision of compensatory services, the Hearing Officer finds that the parties mutually agreed at the August 2004 ARDC meeting to delay consideration of the provision of those services. Before that discussion could resume, student left the district due to his incarceration and has not since returned. The Hearing Officer's award of compensatory services placed no time limit on the provision of the compensatory services and, in fact, stated that the timing of the services was to be determined by the ARDC based on student's needs. As such, the

mutual decision to delay consideration did not constitute a failure to implement the Hearing Officer's order. *Veronica P. v. Garland ISD*, Docket No. 235-SE-0403 (TX SEA 2003).

Further, the failure to provide the compensatory services during the 20 days student attended school did not deny student a free appropriate public education as those services were designed to remedy **past** violations. The appropriateness of student's program during the 20-day period must be determined by the program designed and implemented at that time and not on the provision of services for past violations.

2. Failure to Provide An Appropriate Program and Placement

The essence of Petitioner's claim that Respondent failed to provide an appropriate program during September 2004 is that Petitioner required residential treatment in order to be appropriately educated as of the time of his *** in October 2004.¹ Petitioner contends that student's behavior had deteriorated to the point where he could not be educated at YISD despite their best efforts.

The U.S. Supreme Court has defined a free appropriate public education is one that consists of "personalized instruction with sufficient services to permit the child to benefit educationally from that instruction." *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the court developed a two prong analysis to determine if a school district has met its obligation to provide a free appropriate public education: 1) whether the district complied with the procedural requirements of IDEA, and 2) whether the district offered a program to the student that was reasonably calculated to provide educational benefit. *Id.* at 206-207. Only substantive violations are at issue in this cause.

The essence of determining whether a substantive violation of IDEA has occurred is whether the school's program has provided the student with the requisite educational benefit. IDEA does not require an education that maximizes a student's potential; rather, the school must provide an education that is reasonably calculated to enable the child to achieve *some* benefit. *Some* benefit means an educational program that is meaningful and offers more than a *de minimus* educational benefit; it must be "likely to produce progress,

¹ Petitioner's focus on whether student required residential treatment at Respondent's expense in October 2004 is misplaced. The issue before this Hearing Officer is not whether student required residential treatment in October 2004; but rather, whether student was provided a free appropriate public education during the time he attended YISD. As of October 1, 2004, student never returned to YISD and Respondent had no further ability to affect his placement, as well as no obligation to offer a revised one. *San Diego county Office of Education and San Diego County Office Mental Health*, 39 IDELR 169 (CA SEA 2003). Respondent's legal liability for student's education must be premised on the time period during which he attended YISD, before his *** in October 2004.

not regression or trivial educational advancement.” *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997).

Although courts have not adopted a specific substantive standard to determine when a free appropriate public education has been provided, the Fifth Circuit in *Michael F.* identified four factors to consider in analyzing a school’s program:

1. Is the program individualized and based on 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; and
4. Are there demonstrated positive benefits both academically and non-academically to the student.

Applying these standards to student’s program, the Hearing Officer concludes that Petitioner failed to meet his burden of proving that Respondent’s program for student during September 2004 was inappropriate under the IDEA. *Schaffer v. Weast*, 126 S.Ct. 528 (2005).

The evidence demonstrates that Respondent developed a program for student, in conjunction with his therapist, parent, and attorney, which was highly individualized to his unique needs and based on current assessment and observation. His teacher, a 1:1 aide, and the school psychologist provided extensive services to student. The evidence further reflects detailed daily progress reports of student’s behavior to ensure monitoring of the behavior, as well as communication with his mother. In addition, Respondent prepared weekly graphs to demonstrate student’s level of progress toward his goals on his social skills IEP. Dr. *** maintained contact with student’s mother and with other staff who worked with student. In short, as both student’s mother and Dr. *** testified, Respondent made every attempt to develop a program that would maximize student’s chances of success.

Despite these efforts, Petitioner claims that Respondent’s program was inappropriate because it did not work: student continued to be aggressive at school, ran away from school on one occasion, and continued to exhibit aggressive and dangerous behaviors at home and in the community.

The Hearing Officer cannot conclude, based on the evidence of record, that Respondent’s program was ineffective for student. Most significantly, student only attended YISD for 4 weeks, with both parties agreeing that 2-3 of those weeks would be a stabilization/transition period. The Hearing Officer cannot determine the efficacy of Respondent’s program when it was implemented for only 20 days. This is particularly true because the evidence does not conclusively establish that the program was not working for student. Although student had several behavioral incidents during the 20

days, he had more good days than bad and the behavioral events that occurred were consistent with what would be expected given student's past behaviors and disabilities. The evidence further shows that student made some progress during that initial period, by developing a relationship with Dr. ***, processing behavioral and emotional incidents, and completing schoolwork sufficiently to maintain passing grades.

In short, the Hearing Officer finds that nothing occurred during Respondent's implementation of student's program during September 2004 that would have required Respondent to alter or revise that program prior to student's arrest in October. In other words, although student continued to experience serious challenges and difficulties at school, they were not of the frequency or intensity that would have required Respondent to revisit his program during the 20 day period, particularly in light of the Hearing Officer's decision in August 2004 directing Respondent to implement the program that it did.

The Hearing Officer is aware that student's behavior at home and in the community during this time frame was considerably more dangerous and inappropriate than at school, as evidenced by the events of October 2004 that led to ***. Clearly, student is a student with serious mental health concerns and needs for treatment; however, IDEA does not place the legal responsibility for that treatment on Respondent when student is no longer enrolled at YISD, and received a free appropriate public education during the brief duration of his enrollment during September 2004.

CONCLUSIONS OF LAW

1. Student is a student who attended the YISD during fall 2004 who is eligible for special education services under the provisions of IDEA and its implementing regulations.

2. Respondent YISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA and its implementing regulations. During the time student attended YISD during fall 2004, YISD had the responsibility to provide student with a free appropriate public education under the IDEA. 20 U.S.C. §1401 (a)(18).

3. As the party seeking relief in this administrative proceeding, Petitioner has the burden of proving that Respondent's program was inappropriate. *Schaffer v. Weast*, 126 S.Ct. 528 (2005).

4. Respondent's program and placement for Petitioner during the fall 2004 provided Petitioner with a free appropriate public education under the IDEA. *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); 34 CFR 300.552; 19 T.A.C. §89.1055.

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, this Hearing Officer hereby **ORDERS** that all relief sought by Petitioner is hereby **DENIED**.

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

SIGNED and **ENTERED** this 20th day of April 2006.

/s/ Lynn E. Rubinett

Lynn E. Rubinett

Special Education Hearing Officer

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SYNOPSIS

Issue: Whether Respondent failed to provide student with a free appropriate public education during fall 2004 by failing to provide compensatory counseling and an appropriate placement?

Held: For Respondent. Respondent’s failure to provide compensatory counseling to Petitioner during the 20 days of his enrollment at YISD did not deny him a free appropriate public education or violate a Hearing Officer’s order given that the Hearing Officer ordered the ARDC to determine the timing of the services and the ARDC agreed to delay consideration of the compensatory services.

Petitioner failed to prove that Respondent’s program and placement for student was inappropriate. Student’s program was reasonably calculated to provide him with the required benefits under IDEA. Further, student was not enrolled at YISD for a sufficiently long enough period of time to conclude that his program was not effective, particularly in light of evidence that showed progress as well as continued difficulties.

Cite: *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997); 34 CFR 300.300.

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v..	§			
	§			
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SUMMARY

The mutual decision to delay consideration of compensatory educational services did not constitute a failure to implement the Hearing Officer’s prior order. The failure to provide the compensatory services during the 20 days the student attended school did not deny the student a free appropriate public education as those services were designed to remedy past violations. A free appropriate public education is one that consists of personalized instruction with sufficient services to permit the child to benefit educationally from that instruction. There is a two prong analysis to determine if a school district has met its obligation to provide a free appropriate public education: 1) whether the district complied with the procedural requirements of IDEA, and 2) whether the district offered a program to the student that was reasonably calculated to provide educational benefit. The essence of determining whether a substantive violation of IDEA has occurred is whether the school’s program has provided the student with the requisite educational benefit. IDEA does not require an education that maximizes a student’s potential; rather, the school must provide an education that is reasonably calculated to enable the child to achieve some benefit. Some benefit means an educational program that is meaningful and offers more than *de minimus* educational benefit; it must be likely to produce progress, not regression or trivial educational advancement. There are four factors to consider in analyzing a school’s program.

1. Is the program individualized and based on 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; and

4. Are there demonstrated positive benefits both academically and non-academically to the student.

The IDEA does not place the legal responsibility for treatment for dangerous and inappropriate behavior at home and in the community, when the student is no longer enrolled in the district, and when the student received a free appropriate public education for the duration of his enrollment.