
DOCKET NO. 087-SE-1106

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

PETITIONER

vs. BEFORE A SPECIAL EDUCATION
HEARING OFFICER
FOR THE STATE OF TEXAS

ALIEF INDEPENDENT

SCHOOL DISTRICT

RESPONDENT

DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Petitioner, Student b/n/f Parent (“Student”), requested a Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. §1400 et. seq., contending that Respondent, Alief Independent School District (“AISD”), denied Student a free, appropriate, public education (“FAPE”) in the following particulars: 1) Student’s teacher forced him to sit in his desk against his will, threw his books on the floor, and revealed to Student’s classmates that he was receiving special education services; and¹ 2) Student’s math and reading teachers and paraprofessionals were not implementing his individual education plan (“IEP”), which requires daily in-class support for fifteen (15) minutes. To cover this omission, AISD personnel have falsified report logs relating to these services. Student seeks placement in a private school at AISD’s expense and reimbursement for outside psychological services.

¹Student does not contend that the taunting is a violation of FAPE. Student contends that his teacher's blocking his movement and revealing his disability constitute a denial of FAPE because such physical restriction and the teacher's attitude, imposed on Student but not his classroom peers, places Student in "a restrictive environment."

On November 20, 2006, the Texas Education Agency ("TEA") received Student's Request for Due Process Hearing ("the complaint"), assigned the case Docket No. 087-SE-1106, and appointed the matter to the undersigned Hearing Officer. ² On November 28, 2006, the undersigned Hearing Officer sent the Initial Scheduling Order to the parties setting forth all applicable dates related to the Resolution Period and the Hearing.

²At the time of the initial filing, Student was not represented by counsel.

On November 30, 2006, AISD filed its Notice of Insufficiency, asserting that Student's complaint failed to comply with the pleading requirements of 34 C.F.R. §300.508, which requires a petitioner to include in the complaint a description of the nature of the problem, including facts relating to the problem. Finding that Student's complaint was insufficient, the undersigned ordered Student to amend the complaint to include factual allegations sufficient to put AISD on notice of the specific problems presented. Concomitantly, the undersigned abated the proceeding until the amended complaint could be filed on, or before, December 8, 2006.

On December 4, 2006, Student's new counsel filed the Amended Request for Due Process Hearing. On December 6, 2006, AISD filed its second Notice of Insufficiency related to the amended complaint and added a Motion to Dismiss, alleging that the amended complaint was too vague in its factual recitations and that the relief requested by Student is not available under IDEIA³. On December

11, 2006, Student filed a rebuttal to the second Notice of Insufficiency, and on December 12, 2006, AISD filed its Reply to such rebuttal. On that same day, the parties convened a telephone conference to discuss AISD's objections and to clarify the issues and requested relief.

³Student originally sought damages for various tort claims, including false imprisonment, as well as mental anguish and pain and suffering.

On January 4, 2007, the undersigned granted, in part, AISD's dismissal motion and issued an Order defining the two issues for hearing, as set forth above, and dismissing any claims related to state tort matters, such as false imprisonment. Any and all relief requested by Student seeking monetary damages for mental anguish or pain and suffering were dismissed for want of jurisdiction.

Concomitantly, the Hearing Officer scheduled the Due Process Hearing for the agreed dates of January 18-19, 2007, and reminded the parties that the Disclosure Deadline would be January 11, 2007.

AISD filed and served its Disclosures on January 11, 2007. Student failed to file or serve any Disclosures by that deadline.

Prior to the hearing, Student's father contacted the Hearing Officer to inform her that his counsel was unavailable for the Due Process Hearing. Student's counsel did not personally contact the Hearing Officer regarding this matter. The Hearing Officer notified the parties that the hearing would convene on January 19, 2007.

At that time, Student's father made an appearance but Student's counsel did not. AISD's counsel and witnesses were in attendance for the scheduled hearing.

After a lengthy discussion regarding counsel's failure to appear, the Hearing Officer continued the Due Process Hearing for another date and instructed the parties that a telephone conference would convene on February 5, 2007, to discuss the status of the case and whether Student needed time to obtain additional counsel. Prior to the February 5, 2007, telephone conference, Student's counsel contacted the Hearing Officer and informed her he would

continue to represent Student in this matter. Further, Student's counsel filed and served Disclosures on January 30, 2007.

On February 5, 2007, the prehearing telephone conference convened. During this telephone conference the parties discussed the issues, including a procedural issue relating to Student's failure to make timely Disclosures, and re-scheduled the Due Process Hearing for February 23, 2007. Relying upon the federal and state statutes and regulations, AISD declined to waive its objections to the Student's failure to disclose by the January 11, 2007, deadline; Student argued that the Hearing Officer had authority to overrule AISD's objection and to allow Student to present documentary evidence and witnesses disclosed after the January 11, 2007, deadline but well in advance of the re-scheduled hearing date of February 23, 2007. Further, Student's counsel argued that he did not have the documents that he would offer into evidence until he received the Disclosures from AISD.

On February 20, 2007, Student filed its Motion to Include Disclosure Information, contending that under the facts of this case, the Hearing Officer may allow late-filed disclosures if good cause is shown for such late filing. On that same date, the Hearing Officer granted Student's motion. AISD filed a motion to reconsider, which was carried forward to the hearing.

The Due Process Hearing convened as scheduled on February 23, 2007. In attendance throughout the hearing were counsel for both parties, Student's father, Student, and AISD's party representative. Student called two (2) witnesses; AISD called three (3). At the conclusion of the Hearing, the parties agreed upon the post-hearing briefing schedule. The parties agreed to file and serve their closing arguments by March 23, 2007, and agreed to extend the Decision Deadline to April 3, 2007.

FINDINGS OF FACT

1. Student is a young male who resides with his parents and siblings within the jurisdictional limits of AISD. AISD is a political subdivision of the State of Texas and a duly incorporated independent school district.

2. Student currently receives special education services from AISD under the classification of learning disabled (“LD”). He is fully mainstreamed in the general education population, receiving in-class support in math and reading fifteen (15) minutes per day from two (2) paraprofessionals.
3. Student has been receiving special education services since first grade. Until school year 2006-2007, Student made good grades and passed his courses.
4. On ** an incident occurred in class between Student and his teacher. The teacher got angry at Student, apparently for getting up out of his desk when he was supposed to stay seated. The teacher had another student push his desk behind Student to block him from getting up again. This prevented Student from being able to retrieve his books from his desk. The teacher tossed the books on the floor and made a statement regarding Student’s being in special education. Until that statement, Student did not know that he was receiving special education services, despite the fact that he had been receiving such services for years.
5. AISD investigated the incident and made a report of its findings. Per the parents’ insistence, AISD assigned Student to another teacher effective **.
6. Student states that he has been teased by his friends, although no AISD teacher or paraprofessional has observed such teasing. Student’s parents have taken him to a psychologist to aid him in developing coping skills.
7. The evidence was insufficient to establish that that Student has been teased so severely that he cannot derive an educational benefit from the special education services provided by AISD.
8. Student’s teachers observe that he is not a behavior problem; that he is friendly and polite; he has friends in the classrooms and appears to fit in with the other students. He works well in group activity; he participates in class activities; he is beginning to take a leadership role in the classes.
9. Student has not made all passing grades as in previous years, which causes great concern to Student’s parents. Student does not always turn in his homework or complete his class work. Student is often reluctant to utilize the in-class support.
10. The evidence was insufficient to establish that AISD is not implementing Student’s in-class support in math and reading.
11. The evidence was insufficient to establish that AISD personnel falsified the daily log reports of in-class support. However, the logs were not always completely accurate.
12. The evidence was insufficient to establish that Student has not made educational progress.

DISCUSSION

On ** Student and one of his teachers became embroiled in an incident in the classroom. Student’s teacher became upset when Student got out of his seat to throw something in the trash can. She allegedly forced him to sit in his chair against his will by having another student scoot his desk behind Student. When

Student had trouble retrieving his books from his desk, his teacher started going through his books and papers, dropping them on the floor as she inquired about them. She did not pick these items up. Concomitantly, she referred to his special education status in front of his classmates. Until that moment, Student did not know that he was receiving special education services and had been receiving such services for several years. Student claims that his friends and classmates have ruthlessly taunted him about special education. Student asserts that this has resulted in his inability to enjoy school, his aversion to even coming to school, and his inability to perform academically as he has in the past. Additionally, Student claims that his math and reading teachers have never provided him with the in-class support he is supposed to receive daily. Student asserts that the evidence proffered by AISD, the In-Class Support Weekly Student Reports, was falsified for the Due Process Hearing, basing this allegation on the numerous errors on daily entries, the failure of the teachers and paraprofessionals to always sign/initial the reports, and the complete failure of the supervisor to ever sign/initial the reports.

IDEIA mandates that all state school districts receiving federal funding must provide all handicapped children a free, appropriate, public education. The United States Supreme Court, in *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175 (1982), established a two-part test for determining whether a school district has provided a student FAPE: 1) the school district must comply with the procedural requirements of IDEIA, and 2) the school district must design and implement a program "... reasonably calculated to enable the child to receive educational benefits." An educational benefit must be meaningful and provide 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." *Rowley*, 458 U.S. at 200-01. In determining whether a child is receiving FAPE, the Rowley Court insisted that the reviewing court must not substitute its concept of sound educational policy for that of the school authorities. *Id.*, 458 U.S. at 206. 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).

A. The Incident

There is no debate that the undersigned Hearing Officer has no jurisdiction over the incident or the administrative investigation and findings resulting therefrom. Indeed, AISD has contended from the beginning that this incident has no place in this proceeding. However, and over AISD’s objection, the undersigned determined that she did have jurisdiction to hear claims regarding this incident’s impact on Student’s educational progress.

Candidly, it has been difficult to ascertain exactly what IDEIA claim remains as a result of the incident. In the beginning, there were assertions that Student was being taunted and harassed to such an extent that he no longer cared about school or attending school. However, in Student’s closing argument, his counsel states that Student “is not arguing that other kids’ taunting [Student] is violation of FAPE.” Student clarifies that the issue is that the teacher’s attitude toward Student and the restraint applied to him, that was not applied to non-disabled peers, constitutes “a restrictive environment,” and that this treatment was not shown by AISD to be part of the school’s disciplinary or instructional tools.

This restraint argument was not made at the hearing, and indeed, in this case, falls under AISD’s administrative procedures in investigating the episode. However, notwithstanding his statements recited above, Student included a comprehensive argument related to the teasing that he contends has occurred since the incident and the negative impact it has had on him. This aspect of the ** incident is analyzed under IDEIA.

Parent testified that Student wanted to stay home and never return to school because of the teasing he has endured by friends and classmates who now know he is receiving special education services. Student has hidden from Parent in the morning to avoid going to school. Parent even contacted TEA and the Hearing Officer to garner a reprieve from compulsory attendance during the pendency of this process. Parent has taken Student to a psychologist who is working with him on developing coping mechanisms. Clearly, Parent is concerned for Student’s mental well-being and emotional distress.

AISD presented evidence that it took remedial measures immediately following

the incident. Student never returned to that teacher's class and within two (2) school days, he was transferred to another teacher. AISD elicited sworn testimony that school personnel have not observed Student's being harassed or taunted; that he works well with his classmates and fits in well within the regular education setting. Student was shy at the first of the year but has grown out of that. He is more involved and participatory in group activities. Student is well-behaved, polite, although he does need re-directing to complete his work. Student's teachers and paraprofessional testified that he is making academic progress and developing more skills.

Student had the burden of proving that the incident resulted in a denial of FAPE, which required proof that the teacher's attitude and indifference, coupled with severe teasing, denied Student the benefit of the services that he was offered by AISD. *M.L. v. Federal Way School District*, 394 F.3d 634, (9th Cir. 2002). Student failed to meet this burden.

B. In-Class Support

Student's current IEP mandates that he be provided in-class support for math and reading fifteen (15) minutes per day. This is carried out by his paraprofessionals, who come to his classes, generally at the end of the period, to help him with any aspect of the lesson he fails to understand. Sometimes he needs, and accepts, the support. Sometimes he is resistant to it.

Student's providers report this in-class support on a daily basis on documents entitled "In-Class Support Weekly Student Reports." These forms have a place for daily entries of work done in class, as well as signature lines for the classroom teacher and supervisor.

Student testified at the hearing that he had never received any in-class support from his assigned paraprofessionals, although he did know who they were and could describe them. There was no other testimony offered in support of this issue. While Student believes this to be true, the overwhelming evidence established that he was, in fact, receiving in-class support in math and reading.

Both parties introduced copies of these weekly logs. Student's teachers and paraprofessional testified that the work was done as reported on the days it was reported by the providers required to render such support to Student. There were numerous clerical errors, such as absences of signatures and entries of actions on holidays. Per Student, this carelessness shows that the logs were, in fact, falsified and prepared for the hearing.

There was no credible evidence that the supporting daily logs had been falsified. There were many errors, which can occur when time is short and sufficient attention is not being paid to the paperwork. However, errors and haste do not equate to falsification.

Finally, Student contends that his drop in grades is a manifestation of AISD's failure to properly implement his reading and math in-class support. The record reveals that Student's grades have fallen this year. However, the only testimony reasonably explaining this drop came from AISD's teachers and paraprofessional, who testified that Student does not always complete his work, that he is resistant to the paraprofessionals' working with him in class, and that he is not turning in all of his homework.

While this drop in grades should be a concern to all, it is not, per se, a manifestation of a denial of FAPE. There is no requirement that school districts issue passing grades to students with disabilities who fail to complete their required class work. However, this is certainly an issue of importance to Student's ARD Committee as it convenes for his annual ARD.

CONCLUSIONS OF LAW

1. Student is eligible for special education services, based upon his classification of LD.
2. AISD is required to provide Student FAPE.
3. The incident did not result in a denial of FAPE to Student.
4. AISD has implemented Student's math and reading IEP.

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 Student is DENIED. It is further

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

SIGNED this 3rd day of April 2007.

Deborah Heaton McElvaney
Special Education Hearing Officer