

DOCKET NO. 135-SE-1203

Student, b/n/f Parent , § **BEFORE A SPECIAL EDUCATION**
Petitioner §
§
v. § **HEARING OFFICER**
§
NORTHSIDE INDEPENDENT §
SCHOOL DISTRICT, Respondent § **FOR THE STATE OF TEXAS**

DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Student, (Student or Petitioner), through her next friend Parent., requested a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, et seq., as amended.

The issues for hearing were as follows:

- 1) Whether Student is eligible for special education as a child with a disability.
- 2) Whether Northside Independent School District (NISD) failed to timely identify Student as a child with a disability in need of special education.
- 3) Whether Student was entitled to IDEA procedural protections in connection with discipline administered after she brought prescription drugs to school.
- 4) Whether Student is entitled to compensatory educational services.

Held, for Petitioner on all issues.

PROCEDURAL HISTORY

Petitioner's request for hearing was received by the Texas Commissioner of Education on December 18, 2003, and was received by the Hearing Officer on the same date. Petitioner was represented by Mr. Christopher Jonas. Respondent was represented by Mr. Craig Wood.

This matter first was filed on December 3, 2003, docketed as No. 111-SE-1203, and assigned to Hearing Officer Jeff Armstrong. Petitioner requested dismissal without prejudice. Hearing Officer Armstrong dismissed the case without prejudice on December 18, 2003. Petitioner refiled the case on December 18, 2003, and the case was assigned to Hearing Officer Armstrong on that day. It was reassigned to the undersigned Hearing Officer on February 6, 2004.

The hearing was scheduled for March 18, 2004. A prehearing conference was held on February 13, 2004, and was transcribed by a court reporter. Respondent requested a continuance due to the unavailability of school district witnesses during the district's spring break. Petitioner did not oppose the continuance. The continuance was granted and the hearing was reset to March 29, 2004. The Decision due date was extended to April 23, 2004, accordingly. The hearing was held on March 29, 2004, and the Decision was issued on April 23, 2004.

FINDINGS OF FACT

1. Student is *** years old and in *** grade in NISD. She has been diagnosed with depression/bipolar disorder, attention deficit disorder (ADD), and asthma. She currently is not served in special education. Her regular campus is *** School in NISD, but she currently attends an alternative educational placement (AEP).
2. Student was an A-B honor roll student for most of her ***-grade year. Her grades began to drop the latter part of *** grade in Spring 2003, and she had failing grades in Fall 2003.
3. During Summer 2003, Student's family doctor, Dr. ***, suspected she had depression and attention deficit hyperactivity disorder (ADHD). He gave the parent an ADHD checklist for her teachers to fill out, which the mother gave to the school in Fall 2003. The forms were never returned to the mother.
4. On September 18, 2003, Student attempted to commit suicide by ***. She was hospitalized for three days and was referred to a psychiatrist, Dr. ***, and a licensed counselor, Dr. ***. Dr. *** is treating her for bipolar disorder and ADD. Her current medications are Concerta for ADD, and two mood stabilizers, Depakote and Seroquel.
5. Student has seen Dr. *** almost weekly since the September 2003 suicide attempt. Dr. *** believes Student's depression has not improved with time and may have worsened. She needs special education counseling.
6. Student's mother informed the district of the suicide attempt at the time of the incident in September 2003. Dr. *** contacted the *** School counselor in September 2003 concerning the suicide attempt, and again in November 2003 after the second suicide attempt.
7. On November 19, 2003, Student brought several of her mother's prescription drugs to school with the apparent intent of using them in a suicide attempt. Some of the drugs got into the possession of two other students. She was expelled on November 19, 2003, for the remainder of the school year for possession and delivery of dangerous drugs. Student was admitted to a hospital for five days for psychiatric reasons due to this incident, and the district was so informed.

8. On December 3, 2003, Petitioner requested a special education due process hearing. Rather than send Student to the Juvenile Justice Academy for her expulsion, the district placed her in an alternative educational placement (AEP) at the *** School, which she began attending in early December 2003. At the time of the hearing, she had attended the AEP for approximately 47 days. Student had no serious disciplinary infractions before or after the drug incident.
9. On December 8, 2003, a grade report indicated Student was failing most of her classes. Her grades at that time were Theater Arts ***; Physical Education ***; World Geography ***; Integrated Physics/Chemistry ***; Spanish ***; Algebra ***; and English ***.
10. On December 9, 2003, Student was found eligible for Section 504. The Section 504 paperwork notes her ADD diagnosis from Spring 2003 and her bipolar diagnosis from Fall 2003. The Section 504 committee decided that most of her academic problems stemmed from failure to turn in work, and developed instructional accommodations including content mastery assistance; daily assignment sheet filled out by student and initialed by teacher; frequent reminders about assignments; immediate feedback to student on her performance and behavior; contact parents when concerns arise; and seating at or near front of room. The Section 504 plan addresses ADD symptoms but does not address Student's emotional disturbance.
11. Student's failing grades and the incident of bringing prescription drugs to school in November 2003 to kill herself were caused by her disabilities. In December 2003, the licensed specialist in *** for *** School, ***, performed a full individual evaluation (FIE) of Student and completed her report on January 13, 2004. The FIE determined that: "Academic goals and achievement are very problematic for Student (*sic*) . . . psychological testing provides strong evidence of global psychological dysfunction which is chronic and serious and which is characterized by clinical levels of depression and anxiety. . . . Characteristics of the student's behavior both in school and out of school do appear to influence learning and educational placement, programming, or discipline. . . . [Student's] emotional problems are more serious than those which are generally considered to be social maladjustment. The problems may be reflected in some or all of the following characteristics and behavior which are considered to be a direct result of the emotional disturbance and have functional implications for situations involving instruction: Depressed mood . . . poor concentration or difficulty making decisions . . . impulsiveness in potentially self-damaging areas; recurrent suicidal threats, gestures, or behaviors, or self-mutilating behavior; marked mood shifts; difficulty controlling anger; transient, stress-related paranoid ideation or severe dissociative symptoms." [Emphasis added.] Petitioner's Exhibit 11.
12. Student's disabilities have a significant negative effect on her ability to benefit from instruction. She has a verbal IQ of ***, in the average range, and a performance IQ of ***, in the *** average range, with a general IQ score of ***. She has a significant discrepancy between her intellectual ability and her academic achievement scores in

written expression, with a standard score of ***; and basic reading skills, with a standard score of ***. However, the *** found that Student's emotional disturbance cannot be ruled out as the primary factor causing the discrepancy, and therefore, a learning disability cannot be established. Petitioner's Exhibit 11.

13. The FIE recommended: "Support that may be provided through Special Education services to help Student achieve and maintain satisfactory progress: More classroom structure and supervision than is possible with only general education support. Specialized methods, materials or modified instructional content as needed to address Student's emotional problems. Smaller class size and/or more individual support. Specialized behavior management techniques." The FIE concluded: "The student does appear to meet specific eligibility criteria for Special Education services for the following condition(s): Emotional Disturbance." Petitioner's Exhibit 11.
14. A meeting of the admission, review, and dismissal committee (ARDC) was scheduled for February 12, 2004, but was tabled because the parent failed to attend due to a doctor's appointment. During the prehearing conference held on February 13, 2004, the Hearing Officer ordered the parties to convene an ARDC meeting as soon as possible to review the FIE and determine whether Student was eligible for special education. The ARDC met on February 16, 2004, and reviewed the FIE. The committee found that Student's needs were effectively addressed by her Section 504 plan and that she lacked educational need for special education services. Student and her parents disagreed. They requested an other health impairment (OHI) form to give to their family doctor. They declined a 10-day ARDC recess.
15. Student's grades improved somewhat by the end of the Fall 2003 semester after she was placed at the *** school, but she still had failing grades. Her grades at the end of the Fall semester were: English ***; Algebra ***; Integrated Physics/Chemistry ***; World Geography ***; Physical Education ***; Spanish ***; Theater Arts ***.
16. Student currently is passing most of her courses in the AEP. Her class work in the AEP consists of filling out worksheets using an open book and taking tests using an open book. She does not have textbooks or workbooks to take home, no homework is assigned, and no studying is required before tests. Her AEP class has approximately ten students and enforces very strict disciplinary rules. She finds the AEP work easy to perform. The classes she will return to at her regular *** school campus are radically different, in that they require a significant amount of homework, closed-book tests, study prior to taking tests, and have larger classrooms with more students and changing of classes throughout the day.

DISCUSSION

The district's proposed educational program is entitled to a legal presumption of appropriateness. Petitioner bears the legal burden of proving that the educational program currently proposed is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). Petitioner has met that burden in this case.

Student was expelled to the Juvenile Justice Academy in Fall 2003. The district has allowed her to attend its *** school instead of the Juvenile Justice Academy pending the issuance of this Decision. The district asserts that Student was not entitled to IDEA protections in connection with her discipline because she does not qualify for special education.

The threshold issue is whether Student is a student in need of special education. It is undisputed that she is undergoing treatment for bipolar disorder and ADD, exhibits symptoms of serious depression, and had failing grades and two suicide attempts during Fall 2003. The district's own evaluation, completed in January 2004, confirms the existence of an emotional disturbance. However, the district contends that Student lacks "educational need" for special education and related services. I agree with Petitioner that Student does need special education, and that her disabilities caused her failing grades and the disciplinary incident in November 2003.

The district had ample notice that Student should be suspected of having a disability requiring special education prior to her expulsion. Formerly an A-B honor student, she began making failing grades at the end of *** grade in Spring 2003. Parent expressed concerns about the failing grades and provided the district with ADD checklists from the family doctor for the teachers to fill out in at the beginning of the Fall 2003 semester. The forms were not returned to the parent. Student's grades continued to drop in Fall 2003. In September 2003, she attempted to commit suicide and was hospitalized for three days. Her mother informed the district of the reason for the hospitalization, and her private therapist, Dr. ***, contacted the campus *** about the suicide attempt. The district did not refer Student for any type of evaluation.

On November 19, 2003, Student brought several of her mother's prescription drugs to school with the stated intent of killing herself. These drugs got into the hands of two other students, resulting in Student's expulsion. She spent five days in the hospital due to the suicidal implications of the incident, and district staff was informed of this by the parent and by Dr. ***.

After the second hospitalization, Student was found eligible under Section 504 and a 504 plan was devised to provide the following modifications: content mastery; daily assignment sheet; frequent reminders; immediate feedback to student on her performance and behavior; contact parents when concerns arise; and seating at or near front of room. The Section 504 modifications are woefully inadequate to address Student's emotional disturbance and its impact on her education. The Section 504 plan does not specifically address behavior other than the need to stay focused and organized. Student has not attended her regular campus since the 504

plan was devised, and the evidence is unclear as to whether the plan was implemented in the AEP.

The district contends that Student has no educational need for special education because her grades have improved in the AEP. However, this is comparing apples and oranges. The AEP learning environment is markedly less demanding than the regular *** school classes where Student was failing. It is uncontroverted that her classwork in the AEP consists of sitting with approximately nine other students and filling out worksheets using an open book, in a classroom where strict rules are enforced. She is given only open-book tests that do not require prior study. She does not have textbooks or workbooks to take home, and no homework is assigned. In contrast, the classes she will return to, and which she was failing when she left, require a significant amount of independent work, homework, closed-book tests, and study for tests.

The district's own FIE is replete with evidence that Student's emotional disturbance affects her ability to learn and make academic progress. See Findings of Fact 11 – 13. In fact, the FIE suggests that Student might qualify for special education as having learning disabilities in two subjects if not for the emotional disturbance. She has a significant discrepancy between intellectual ability and academic achievement in both written expression and basic reading skills. According to the district's evaluation, Student's "emotional disturbance cannot be ruled out as the primary factor attenuating these scores and, therefore, a learning disability cannot be established." Petitioner's Exhibit 11.

Student is entitled to special education as a child who has an emotional disturbance due to depression and bipolar disorder, and other health impairment due to ADD. Based on her failing grades, psychiatric diagnoses, and the first suicide attempt, she should have been found eligible for special education prior to the disciplinary incident in November 2003. She was entitled to a manifestation determination, functional behavioral assessment, and behavioral intervention plan in connection with the disciplinary infraction which led to her placement in AEP, pursuant to 34 C.F.R. §§300.519 --300.528.

The record is clear that Student's behavior in bringing prescription drugs to school to use in a suicide attempt was a manifestation of her disabilities. However, even when the behavior is a manifestation of a disability, IDEA contains an exception to stay-put that permits school personnel to place a child in an AEP for up to 45 days for a drug infraction. *See* 34 C.F.R. §§300.514; 300.520; and 300.526. Student began attending the AEP in December 2003 and has already attended more than 45 days. She must be returned to her regular *** school immediately.

Student is entitled to compensatory individual counseling. She also is entitled to compensatory educational services if necessary to help her catch up academically and regain lost credits.

CONCLUSIONS OF LAW

1. Student resides in Northside ISD, a legally constituted independent school district within the State of Texas, and is entitled to special education services pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, et seq., as amended.
2. The educational program proposed by the school district is presumed to be appropriate. As the party challenging the educational program proposed by the district, Petitioner bears the burden of proof. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), aff'd 468 U.S. 883 (1984); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). Petitioner met the burden of proof in this case.
3. Student is eligible for special education as a student with emotional disturbance due to depression and bipolar disorder, and other health impairment due to ADD. Student's disabilities significantly affect her ability to benefit from instruction, and she has an educational need for special education and related services. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).
4. NISD denied Student free, appropriate, public education by failing to timely identify her as a child in need of special education and failing to provide IDEA procedural protections in connection with her disciplinary infraction. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).
5. Student's behavior of bringing prescription drugs to school to use in a suicide attempt was a manifestation of her disabilities. Under the exception to stay-put for drug-related infractions, she should not have been placed in the alternative education placement longer than 45 days. Student has already attended the AEP more than 45 days. She should be returned to her regular *** school campus immediately. C.F.R. §§300.520; 300.526; 300.514.
6. Student needs individual special education counseling as part of her IEP. In addition, she is entitled to compensatory individual counseling. She also is entitled to compensatory educational services if necessary to help her catch up academically and regain lost credits.

ORDER

Based upon a preponderance of the evidence and the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the relief requested by Petitioner is **GRANTED**.

It is **ORDERED** that Student be removed from the alternative education placement and returned to her regular *** school campus on the first school day following issuance of this Decision.

It is further **ORDERED** that the district convene an ARDC meeting as soon as possible, but in no case later than two weeks from the date of this Decision, to perform the following:

- 1) Identify Student as eligible for special education as a student with emotional disturbance and other health impairment;
- 2) Develop an IEP in conformity with this Decision, the district's full individual evaluation of January 2004, and input from Student's private therapist, Dr. ***, who shall be invited to attend the meeting; and
- 3) Determine an appropriate amount of compensatory individual counseling for Student, and, in addition, determine whether she needs tutoring or other compensatory educational service to help her catch up academically and regain lost credits.

NOTICE TO THE PARTIES

This Decision is final and is appealable to state or federal district court.

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.

SIGNED this 23rd day of April, 2004.

/s/Janis Herd _____
Janis Herd
Special Education Hearing Officer

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Student, b/n/f Parent, Petitioner	§	BEFORE A SPECIAL EDUCATION
	§	
	§	
v.	§	HEARING OFFICER
	§	
NORTHSIDE INDEPENDENT SCHOOL DISTRICT, Respondent	§	FOR THE STATE OF TEXAS

SYNOPSIS

Issue 1: Whether Student is eligible for special education as a child with a disability.

Held: For Petitioner. Student is eligible for special education as a student with emotional disturbance due to depression and bipolar disorder, and other health impairment due to ADD. Student’s disabilities significantly affect her ability to benefit from instruction. She has an educational need for special education and related services, including individual counseling.

Citation: 34 C.F.R. §300.7; §300.24.

Issue 2: Whether NISD failed to timely identify Student as a child with a disability in need of special education.

Held: For Petitioner. NISD failed to timely identify Student as a child in need of special education.

Citation: 34 C.F.R. §§300.125.

Issue 3: Whether Student was entitled to IDEA procedural protections in connection with her disciplinary infraction of bringing prescription drugs to school.

Held: For Petitioner. She was entitled to IDEA procedural protections in connection with her discipline because she should have been identified as a student eligible for special education prior to the disciplinary infraction. The behavior of bringing drugs to school to use in a suicide attempt was a manifestation of her disabilities. Under the exception to stay-put for drug-related infractions, she should not have been placed in the AEP longer than 45 days. She should be returned to her regular *** school campus immediately.

Citation: 34 C.F.R. §§300.519 through 300.528.

Issue 4: Whether Student is entitled to compensatory educational services.

Held: For Petitioner. Student is entitled to compensatory individual counseling. She also is entitled to compensatory educational services if necessary to help her catch up academically and regain lost credits.

Citation: 34 C.F.R. §300.24.