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| STUDENT <i>b/n/f</i> | § | BEFORE A SPECIAL EDUCATION |
| PARENT, | § | |
| | § | |
| Petitioner, | § | |
| | § | |
| V. | § | HEARING OFFICER |
| | § | |
| BROWNSVILLE INDEPENDENT | § | |
| SCHOOL DISTRICT | § | |
| | § | |
| Respondent. | § | FOR THE STATE OF TEXAS |

DECISION OF THE HEARING OFFICER

Issues

Parent, of Student (“Petitioner”), requested this Due Process Hearing on October 12, 2004, under the Individuals with Disabilities in Education Act, 20 U.S.C. §1400 *et seq.*, (hereafter “IDEA”), raising several complaints against Brownsville Independent School District (“Respondent” or “BISD”). In the prehearing conference conducted on October 22, 2004, Christopher Jonas, Attorney at Law, Center for Special Education Law, represented Petitioner. Respondent was represented by Erik Nichols, of the law firm Henslee, Fowler, Hepworth & Schwartz, L.L.P. During the prehearing conference the case was set for hearing and the issues were identified as follows:

- (1) whether the Respondent dropped the classification of emotionally disturbed inappropriately for this child;
- (2) whether the Respondent’s determination that Student’s behavior in an April 2004 incident was not a manifestation of his disability was appropriate;
- (3) whether the placement in the Alternative Education Center beyond 45 days was appropriate;
- (4) whether the Respondent violated the stay-put requirement by placing the Student in boot camp;
- (5) whether an Independent Education Evaluation should be ordered; and
- (6) whether the Respondent failed to conduct a functional behavior assessment and prepare an appropriate behavior intervention plan.¹

As relief Petitioner requested classification as emotionally disturbed, four months compensatory educational services for issues one through three above, an additional amount of compensatory educational services for the violation of stay-put, and an independent educational evaluation including speech and language and a psychological evaluation.

¹ During the Due Process Hearing Petitioner withdrew the issue concerning the functional behavior assessment and behavior intervention plan.

The Due Process Hearing was initially scheduled for November 22, 2004, but during the prehearing conference, the parties agreed to reschedule the hearing to November 29, 2004. On November 17 Petitioner's counsel requested a continuance, and the Hearing Officer conducted a prehearing conference with the parties by telephone on November 22, to discuss the request for continuance that was premised on Petitioner's request for production of documents. The Hearing Officer granted the request for production of documents and the motion for continuance. The parties agreed to the date of January 17, 2005, to begin the Due Process Hearing.

On January 17, 2005, the Hearing Officer convened the Due Process Hearing, but the parties' presentations were not concluded on January 17. The parties agreed to reconvene the hearing on January 24, 2005. Both parties were represented by the same counsel that participated in the prehearing conference. The following witnesses testified at the hearing: *****. The Hearing Officer received over 65 exhibits into evidence. A transcript containing 302 pages was made of the proceedings by a certified court reporter. The parties presented post-hearing briefs to summarize their arguments on February 14, 2005. At the conclusion of the hearing the Decision Deadline was February 24, 2005, but the Hearing Officer requested one additional week to complete the Decision. The parties agreed to the extension of time, thereby making the Decision Deadline March 2, 2005.

Findings of Fact

Based upon the matters of record and matters of official notice, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following findings of fact based on a preponderance of the evidence:

1. Student is a ***-year-old Student residing with his Parent within the geographic boundaries of Brownsville Independent School District. Student began receiving special education services from Brownsville ISD in first grade. Until February 2004 Student was classified as emotionally disturbed and learning disabled.
2. During school year 2003-2004 Student attended *** grade classes at *** School. He received numerous disciplinary referrals.² These incidents ranged from refusing to perform his schoolwork to threatening school personnel with a pair of scissors. The main recurring infraction was failure to tuck in his shirt, although there were also instances of Student hitting a water fountain and denting it, as well as fighting, and *****. Discipline ranged from Student conferences to placement at the juvenile detention center. As a result of Student's behavior on the bus, he was suspended from the bus for the remainder of the school year.³ Student received in-school suspensions

² Twenty Student Discipline Referral slips were admitted into evidence. The Hearing Officer believes the parties intended to include all of the referrals, but it is possible that more exist.

³ A Student Discipline Referral dated September 23, 2003, noted that Student was suspended from the bus for 10 days, and the next violation would result in suspension for the remainder of the school year. A referral slip dated September 24, 2003, says, "See referral dated 9/23/03 for consequences." The inference is that Student was suspended for the remainder of the school year because of his behavior on September 24. However, during the ARD meeting on

- (ISS) totaling 14 days, home suspensions totaling 5 days, placement at the alternative center for 30 days, placement at the juvenile detention center for 10 days, and ultimately, expulsion to the TLC – also known as boot camp – for 96 days, which carried over into the 2004-2005 school year.
3. Student's mother appealed the expulsion first to the superintendent's designee and then to the board of trustees, but the decision was not overturned. The letter from the board of trustees upholding the expulsion was dated May 30, 2004. On August 18, 2004, Student began the 2004-2005 school year at the TLC (TLC).⁴
 4. Dr. *** conducted a psychological evaluation of Student in October 2000. He diagnosed Student as having attention deficit disorder without hyperactivity, depression (not otherwise specified), dysgraphia, oppositional–defiant traits, and reading disability. Based on these findings, Dr. *** concluded that Student continued to qualify for special education services as an emotionally disturbed Student .
 5. By 2003 it was time for a three-year psychological reevaluation for Student. Dr. *** did not actually conduct the evaluation, but supervised *** who evaluated Student on December 11, 2003. *** at that time was a Licensed Specialist in School Psychology Trainee. Her conclusions, endorsed by Dr. ***, found that Student no longer qualified as an emotionally disturbed child. Their report noted oppositional defiance and social maladjustment on Axis I; behavior problems, slow learner, and borderline intellectual ability on Axis II.
 6. On February 4, 2004, the Admission, Review and Dismissal (ARD) Committee met to review the psychological report from Dr. *** and ***. The Committee determined that Student no longer met eligibility criteria as emotionally disturbed (ED). The report from the ARD meeting noted:

Student has been resistive to accepting the counseling services. Given the findings of the latest psychological, it is recommended that special education counseling be discontinued. As per psychological report, regular education counselor should be utilized to help Student should he need help or guidance.
 7. Parent attended the February 4, 2004, ARD meeting. She went along with the Committee's decision to remove the ED classification for Student. The assistant principal at *** explained that Student could be disciplined according to the regular code of conduct, depending on his actions.
 8. The pivotal event in this case occurred April 14, 2004. Student was placed in ISS, but continued to misbehave. The teacher sent Student to the office two times, and on the second time, The assistant principal advised Student to phone his mother so she could come and pick him up because he was being suspended. Student continued to misbehave while in the office area waiting for his mother. A special education teacher walking through the area asked the assistant principal if she wanted the teacher to take

April 20, 2004, school personnel told Student's mother that transportation had never reported the restriction to the staff at *** School.

⁴ The school year actually began on August 16, 2004.

Student back to ISS and complete his work. Student refused to go with the teacher. As the teacher walked out of the office she asked a BISD police officer if he could help her with Student and escort him to the classroom to finish his work. Student refused to go with the officer. Student became very agitated. The paraprofessional from the special education room arrived and asked Student to go with her, telling him he could use the phone in her room. Student said he would not go with her either. She advised him he would have to go or would be led to the room under restraint. Student then picked up a pair of scissors, and in Spanish told the paraprofessional and police officer, "Who's going to be first?" Student also told them in Spanish, "Come on."⁵ For this incident Student was expelled and sent to the TLC.

9. The ARD Committee met on April 20, 2004 to conduct a manifestation determination review. The minutes from this meeting are quite brief. To summarize:
 - The diagnostician reported that all assessments were current.
 - Teachers reported on his progress. He failed science and history the last six weeks. One teacher stated her only concern has been Student's absences to his first period class, and she had reported his excessive absences to the home visitor.
 - The behavior intervention plan was reviewed and revised. Changes were made to address the latest demonstrated behavior.
 - No academic changes were made. Student would continue with resource reading and math along with content mastery.
 - The assistant principal presented the latest discipline report and described the events that led up to Student threatening the paraprofessional and security officer with a pair of scissors.
 - Parent expressed her concern that school personnel frustrated Student, knowing how he gets when he is pressured. She stated that Student's low self-esteem causes him to become easily frustrated. She felt that the behavior in question was a result of his learning disability.
 - The manifestation determination checklist was completed. No further assessments were recommended.
 - Consensus was not reached because of the parent's disagreement. The committee would meet again on April 30, 2004.
10. The ARD committee reconvened on April 30, 2004. Parent indicated she had not understood the last psychological evaluation that recommended removal of the ED label. She asked for an independent evaluation to be performed by Dr. ***. Except for the parent, the committee determined that Student's inappropriate behavior in question was not a manifestation of his disability.
11. Eventually the District agreed and authorized an evaluation by Dr. *** concerning Student's cognitive and emotional status. Dr. *** report dated July 5, 2004, contained

⁵ Student's actual statements were "¿Quien es primero?" and "Vengase."

- the following diagnostic impressions concerning Student: Axis I, dysthymic disorder (provisional), rule out depressive disorder (not otherwise specified); Axis II, borderline intellectual functioning (note: chronic emotional status may have effected current evaluation data); Axis IV, educational problems; Axis V, Global Assessment of Functioning, *** (current).
12. Dr. *** administered the Wechsler Intelligence Scale for Children – R (WISC-); the Wide Range Achievement Test – 3; and the Beery Developmental Test of Visual-Motor Integration. Additionally, he conducted individual interviews with Student and Parent, and reviewed some limited information from the school, including the behavior intervention plan and functional behavior assessment.
 13. Dr. *** conclusions concurred with those of Dr. *** regarding borderline range of intellectual ability. Dr. *** placed more emphasis on Student’s performance IQ score of ***and the demonstrable functional data, as opposed to the full-scale IQ of ***. The results from the achievement test likewise indicate that Student’s performance was below his peers, with a standard score of *** in reading, *** in spelling, and *** in arithmetic.
 14. Dr. *** report contained recommendations:
 - Student should be considered for a psychiatric consult to determine if a trial period of an appropriate antidepressant may be of benefit.
 - Student may also benefit from involvement in ongoing psychotherapy for the purpose of assisting him:
 - a. develop a clear understanding of his strength and weaknesses
 - b. improving his self-awareness and self-image
 - c. develop more effective coping/adjustive strategies
 - Student’s academic skills are significantly below his CA and it is probable that such skill levels will not improve substantively. Consideration and thought should be given early to exploring a more vocationally oriented path and to begin exploring possible interests in this direction.
 15. The ARD committee met October 28, 2004, to review Dr. *** report. Although Parent had indicated she would attend, she did not. The committee reviewed the report, but concluded they did not agree with the results and recommendations from Dr. *** evaluation. Thus, the committee did not reinstate the ED classification. No changes were made to Student’s behavior or educational plan.
 16. Dr. *** believed Student had been depressed for a significant period of time. He believed Student’s emotional status may have affected his performance on the tests given during the psychological evaluation. Dr. *** professional opinion that Student was, and had been, depressed for a significant period of time would have satisfied the criteria for Student to be classified as ED.

17. Dr. *** also believed that Student was aware of the difference between right and wrong and could control his actions.
18. Dr. *** finding of *** in his December 2003 report rested on earlier test results. No additional tests were given in 2003. Both the 2000 and 2003 reports from Dr. *** contained only minimal information about the tests used to reach the conclusions and recommendations in the reports. BISD presented no evidence of actual test dates or results that its personnel had administered to Student.
19. In his testimony at the hearing Dr. *** criticized the use by Dr. Freeberg of the WISC-R. Dr. *** believed the new WISC-IV to be a more reliable instrument for determining intellectual ability. However, both experts agree that Student has ***.
20. The program at TLC is run basically like a military school. During intake the Student and parent are given a list all the rules and expectations; they must sign the agreement to abide by the rules. The indoctrination phase, or boot camp, takes five days. They learn to march and to drill, how to salute, as well as learning about flag etiquette, customs and courtesies, and social skills. TLC bases its management model on the Boys Town Behavioral Model. After graduating from boot camp, the Student's return to the classroom as a TLC cadet where they are placed on a merit and level system where they earn privileges and incentives. A typical day finds cadets reporting at 7:00 a.m., participating in physical training for about an hour, changing into their uniforms, observing colors, and receiving any announcements from either the drill instructor or the principal. Following breakfast the cadets go to classes. After lunch there are more classes until 3:15 p.m. At that time they go through a drill and ceremony, and occasionally may play basketball or football as a reward for performing well. To complete their expulsion time, a cadet must (1) advance to private or PFC by earning sufficient merits, (2) pass all their courses, and (3) participate in whatever counseling is offered to them at the school.
21. While at TLC Student performed very well. When he first arrived he was very quiet and withdrawn and struggling with his academics. He seemed to adjust very well. Student achieved PFC rank very quickly and successfully completed the TLC program at the conclusion of the first semester of school year 2004-2005. TLC had two certified special education teachers for the *** school students.⁶ Student received instruction in the content mastery class, but sometimes remained in his homeroom class if the work fit within his skill level. Student also received counseling while at TLC. His homeroom teacher found Student to be a wonderful Student , very polite and well behaved. When he left TLC Student was passing all his subjects.
22. A review of Student's grades for the 2003-2004 school year indicates mixed results. He appears to be capable of producing average work when inclined to perform. He had a significant number of absences, some probably due to his disciplinary problems.

⁶ The number of middle school Student s at TLC varied. When Student was there, approximately 20 to 25 *** school students were attending TLC. At the time of the hearing, there were approximately 30 school Students.

23. At some earlier point at ***, Student had been assigned to the Behavior Intervention class. Neither Student nor his mother liked this placement. Student refused to carry his point sheet with him, and thus, it was not an effective method to control his behavior.

Discussion

The Hearing Officer concludes that the ARD Committee failed to give proper heed to Dr. *** report. Dr. *** was not invited to the meeting in October 2004, and it appears the committee picked his report apart, looking for any reason not to believe it. The Hearing Officer also concludes that BISD's reports, without any supporting information, are difficult to find persuasive. No test dates are indicated, no test results are reported, and they explain very little about the professional bases for the conclusions reached. Thus, the Hearing Officer finds that dropping the ED classification for Student was inappropriate.

The ARD meeting in which the manifestation determination review (MDR) occurred was flawed because it considered only whether Student's learning disability was linked to the behavior. Moreover, someone should have noticed the escalating pattern of Student's disciplinary problems, or at least the volume of disciplinary referrals should have led someone to ask whether a problem existed with Student's behavior intervention plan.

Putting all of that aside, even though the MDR was flawed the testimony indicates that Student's behavior on April 14, 2003, warranted discipline and was not linked to his emotional disability. The specific question is whether the disability impaired the Student's ability to understand the impact and consequences of the behavior subject to the discipline in question. Even Dr. *** testimony supported the absence of a link between the behavior and the disability. Accordingly, the placement at TLC was appropriate.

What remains? The information about Student's *** intellectual functioning needs to be updated. Student's program should be reviewed, particularly in light of Dr. *** report and Student's success at TLC.

None of this is said to excuse Student's behavior. Student needs to learn to develop better "coping strategies" as Dr. *** said. Perhaps Student's experience at TLC has already started him on the way.

Conclusions of Law

After due consideration of matters of record, matters of official notice, and the foregoing findings of fact, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following conclusions of law:

1. Student is a Student who is eligible for special education services under the IDEA as a child with an emotional disturbance and learning disability. 20 U.S.C. §1401 (3) (A); 34 C.F.R. §300.7 (c) (4), (10).
2. Respondent's action of dropping the emotional disturbance classification for Student in February 2004 was not appropriate.
3. Petitioner bears the burden of proof with respect to his claims that Student was denied a free appropriate public education. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984). Petitioner met his burden of proof in this case with respect to a portion of the issues.
4. Respondent's placement of Student at the TLC was appropriate. Such placement was not a violation of stay-put.
5. Respondent ultimately provided the independent evaluation requested by the parent on April 30, 2004, thereby rendering this issue moot.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the a portion of the relief sought by Petitioner is GRANTED and a portion is DENIED. Respondent Brownsville ISD is ORDERED:

- (1) to reinstate the emotionally disturbed label for Student
- (2) to provide two months of compensatory educational services for Student in the form of an appropriate counseling program that focuses on the recommendations included in Dr. *** report dated July 5, 2004. Such services shall total at least eight hours but may be provided on a schedule that works for the parties. For example, such services may be provided as two half-hour sessions per week for eight weeks, or for one one-hour session per week for eight weeks.
- (3) to convene an ARD meeting within ten school days from the date of this order to develop a plan to update the information concerning Student's intellectual ability and develop a comprehensive program designed to meet all of Student's needs.

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 2nd day of March 2005.

Lucyretia Dillard
Special Education Hearing Officer

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