

STUDENT b/n/f PARENT	§	BEFORE A SPECIAL EDUCATION
	§	
V.	§	
	§	HEARING OFFICER FOR THE
NORTHSIDE INDEPENDENT SCHOOL DISTRICT;	§	
JUVENILE JUSTICE ACADEMY; AND	§	
POR VIDA, INC.	§	STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioner Student brings this appeal by her next friend, Parent, pursuant to the Individuals with Disabilities Education Act 20 U.S.C. § 1400 *et seq.*, (hereinafter referred to as "IDEA"), against Respondent Northside Independent School District (hereinafter referred to as "Respondent" or "Northside ISD"). Petitioner Student by next friend Parent (hereinafter referred to as "Petitioner" or "Student") filed a written request for a due process hearing which was received by the Texas Education Agency on October 12,2004. Petitioner was represented by Attorney Matthew Finch of San Antonio, Texas. Respondent was represented by Attorney Craig Wood of San Antonio, Texas. Other parties present for this matter were the Bexar County Juvenile Justice Academy (hereinafter referred to as "JJA"), represented by Gary. W. Hutton. A telephone prehearing conference was held on October 20, 2004, at which time both parties waived their right to a final decision within forty-five (45) days of the date the written request for due process hearing was filed. [34 C.F.R. §300.511(c)] A due process hearing was held on Monday, December 13, 2004, in San Antonio, Texas. While Por Vida, Inc. is named as a party to this case and was notified of the hearing time and location, it failed to have a representative at the hearing or otherwise make an appearance. The parties agreed to file post-hearing briefs on or before December 30, 2004.

Petitioner and Respondents stipulated that Student is a ***-year-old student in Northside ISD who has been assigned to the Juvenile Justice Academy. She has received special education services as a student who is emotionally disturbed.

Petitioner's Statement

Petitioner raised the following issues regarding Student's special education program:

1. Student has a bipolar disorder and depression and is not receiving services necessary to meet her needs at the Bexar County Juvenile Justice Academy. Student has previously received residential treatment services for her emotional disturbance at *** Mental Health Hospital.

2. Student's educational placement at the JJA is not appropriate, and Student has had to be home schooled with support from FEAST in order to avoid the JJA placement. Petitioner also noted that although there had been agreement at the manifestation determination review regarding Student's JJA placement, the parent had not been represented by counsel and felt she

had no other recourse than to agree. Subsequently, Student's parent has determined that JJA is not providing necessary services for Student's emotional disturbance, which has included some statements of suicidal intent.

As relief in this due process hearing, Petitioner requests that Respondent be ordered to do the following:

1. Provide compensatory education and related services to Student to address her known and heretofore unknown disabilities.
2. Conduct a complete independent educational evaluation.
3. Change Student's placement to her home campus, or a more restrictive therapeutic placement.
4. Convene an Admission, Review and Dismissal Committee meeting ("ARD"), to develop a new Individualized Education Program for Student.
5. Provide individual counseling for Student with a private counselor and provide training for Student's parent to assist her in addressing Student's disability.

Based upon the evidence and the argument of counsel, the Hearing Officer makes the following findings of fact and conclusions of law.

II. Findings of Fact

A. Student's Disabilities and Personal History

1. Student is a *** year old student in the *** grade at *** School in Northside ISD. She is eligible for special education services as a student with an emotional disturbance.
2. Student has slept at her grandmother's house intermittently over the last four to five years. She has been sleeping overnight with her grandmother the last month and a half. She stayed overnight with her two weeks in October, 2004, but not during the Summer of 2004 or the spring semester of 2003 - 2004 school year. Student never officially moved in with her grandmother, but would sleep between her grandmother's house, which is located outside of Northside ISD, and her mother's house, which is located within Northside ISD. She would move between houses through the course of a single week. At all relevant times her residence was with her mother's house in Northside ISD.
3. Student was *** when she was *** years old. She was further traumatized when ***. She received counseling from the staff at *** Elementary in Northside ISD.
4. Student has received special education services since she was in the *** grade. She qualified as a student with an emotional disturbance. Student has been attending schools within Northside for at least nine years. When she was first enrolled, the District was notified about her emotional history and the abuse.

5. Student adversely responds to stress. When confronted with stress, she will make poor choices and “spiral downward.” Her mother and grandmother have tried to place her in several private facilities to address her emotional problems, but have not had much success.

B. Student’s Educational Program Prior to Her Expulsion

6. As of her January 27, 2004 ARD, Student has a BIP to address her issues of off task behavior and work completion that was intended to last for one academic year. Also, her ARD Committee had performed a Functional Behavior Assessment.

7. On March 8, 2004, Student’s ARD Committee conducted a triennial review of her last comprehensive assessment that had been completed in the year 2001. During the triennial review, the ARD Committee considered Student’s tendency to engage in off-task behavior and problems with work completion.

8. As of the March 8, 2004 triennial review, no member of Student’s ARD Committee noted a serious concern other than off task behavior, work completion and academic motivation. Moreover, no member of this ARD Committee, including her mother, stated a need for her to have further assessment.

9. On May 10, 2004 an ARD meeting was convened on Student’s behalf. The purpose of the meeting was to discuss Student’s *** grades.

10. Since 1999, Student has not been charged with severe disciplinary infractions prior to May 19, 2004. Most of her infractions have consisted of rude, disruptive behavior, conflicts with her peers and insubordination.

11. On May 19, 2004, Student was accused of distributing a controlled substance, an Adderall tablet, on her school’s campus. The offense was a felony violation of school rules. A Manifestation Determination Review (“MDR”) was held and it was found that the offense was not a manifestation of her disability. Student was expelled from her campus and assigned to Bexar County JJA during a disciplinary hearing that was held on May 20, 2004.

12. On the same day Student was accused of distributing drugs on campus, she was *** because she told the Northside police officer that ***.

13. Student’s grades deteriorated toward the middle of her *** grade year. Her grades for the school year started relatively strong, and became progressively worse.

14. Student *** on the Texas Assessment of Knowledge and Skills (“TAKS”) test that she took for the 2003 - 2004 school year.

15. On May 20, 2004 an ARD meeting was convened on Student’s behalf. The ARD meeting following the hearing wherein Student was assigned to the JJA. In that meeting, Student’s IEP was not changed, she was not given a BIP, and extended school year services (“ESYS”) were not considered. Student’s mother, ***, did not check “agree” or “disagree” because she did not know the full implications of the subject matter discussed in the meeting.

16. There was no representative of the JJA at Student's May 20, 2004 MDR or her disciplinary hearing.

17. At the time of the incident where Student was accused of distributing a controlled substance, there was no history or written document available to Student's ARD Committee that stated that Student could not control her impulses. The *** incident was the result of Student making conscious, albeit inappropriate choices rather, than impulsive ones.

18. At the May 20, 2004 ARD meeting that followed the disciplinary hearing, all ARD Committee members, including Student's mother, had the opportunity to discuss the need for new evaluations, IEP strategies, placement, and the role of Student's known disabilities in her disciplinary infraction.

19. Student's ARD Committee, including her mother and grandmother, on May 20, 2004, were preoccupied with the issues surrounding her disciplinary hearing; such as her need for consequences, her lack of remorse for the violation, and Student's apparent anger. Student's affect was angry and defiant at the disciplinary hearing. The entire Committee did not appear to anticipate the deepening depression and increased fragility in Student's emotional state that followed during her attendance at the JJA.

20. At the May 20, 2004 ARD, it was discussed that on May 19, 2004, when Student was found with the controlled substance, she had *** and *** and was taken to ***.

21. Given Student's personal history, it is predictable that she would adversely react to being placed in a classroom where she was subjected to sexual harassment from multiple classmates. Student's *** was not discussed at her ARD meetings convened on January 27, 2004, March 8, 2004, May 10, 2004, or May 20, 2004.

C. Student's Educational Program at the Bexar County Juvenile Justice Academy ("JJA")

1) Relationship of JJA to Its Affiliates and Contractors

22. The JJA conducts a one-on-one intake interview with the parent and the student at admission. It is required by the Texas Juvenile Probation Commission to conduct only a very basic baseline academic achievement assessment.

23. JJA's intake form requests typical demographic information such as student name, address, city, state, zip code, date of birth, the expulsion date, proposed return date to the school district, total number of days of expulsion, name and address of the parents, parent's employers, work telephone numbers and addresses. JJA is supposed to submit daily attendance reports to the home school district of its students.

24. On one of the JJA's social history checklist in its intake form, one of the boxes on the form was checked "yes" regarding counseling or social services. It also indicates that when she was *** years old, Student received individual counseling ***. The information should have alerted the JJA to be especially careful with Student's educational environment and it should have been reported to Northside ISD.

25. The JJA and the Bexar County Juvenile Board (“Juvenile Board”) has a Memorandum of Understanding (“MOU”) Agreement with 16 individual school districts, including Northside. While the Juvenile Board has contracted with Por Vida to provide educational services, there is no relationship between Por Vida and individual school districts. Por Vida is an agent of the Juvenile Board.

26. Under the MOU between the Juvenile Board and Northside ISD, Northside was to retain the ultimate responsibility of providing educational services to a student sent to the JJA.

27. The JJA contracts with another private entity called Communities in Schools to provide counseling services to students assigned to the JJA.

28. The JJA is funded through the Texas Juvenile Probation Commission, local school districts (for students sent there under a discretionary category) and “Chapter 41” dollars. The JJA, in turn, contracts with Por Vida, Incorporated to manage the “educational component” of the JJA.

29. No one ever explained to Student’s mother the relationship between Northside ISD, the JJA, and the juvenile probation office. Parent was never informed that *she* had to report changes in Student’s JJA placement to Northside ISD.

30. Student’s Individualized Education Program (“IEP”) was not changed for her assignment to the JJA. Student was not given a different Behavior Intervention Plan (“BIP”) from what was already in place for the summer placement at the JJA.

2) *Por Vida, Inc.*

31. Por Vida is a private entity that provides JJA’s “educational component” by virtue of its contract with the Bexar County Juvenile Board.

32. Por Vida would have been the entity that would have attended the ARD that assigned Student to the JJA. It was not present at any of Student’s ARDs prior to Student’s expulsion.

33. Por Vida employs a special education facilitator that is certified in special education. It is Por Vida’s responsibility to implement a special education student’s IEP and BIP. As between the JJA and Por Vida, it is Por Vida’s obligation to request an ARD meeting for any special education student, if necessary.

34. Por Vida would have had the responsibility of reassigning Student to another class if ***.

3) *Incidents at JJA*

35. Parent removed Student from the JJA during the Summer of 2004 because she believed that the JJA was too dangerous for Student.

36. Student attended the JJA a total of nine days and was recorded as unexcusedly absent for a total of *** days. In the first nine weeks of Student’s enrollment in the JJA, she had ***

recorded, unexcused absences. After a student receives five unexcused absences, the JJA is supposed to contact the probation department, the student's probation officer, and the student's school district of origin.

37. Student was subjected to sexual harassment while she attended the JJA. At the request of her mother, she was changed from one JJA class to another,***. However, the harassment and her adverse reaction to it did not improve.

38. Student's mother informed the officials at the JJA about Student's history on a JJA intake form. JJA had access to Student's educational records.

39. While attending the JJA, Student repeatedly came home upset and crying. She was upset because she was *** girls in a classroom of mostly boys. Several of the boys consistently *** during class. Student stated to her grandmother that she did not want to return to the JJA because the atmosphere made her feel bad.

40. During Student's attendance at the JJA in the Summer of 2004, she went to see one of the JJA counselors. Student went to see the JJA counselor because she was upset about the harassment from the boys in her class. That counselor contacted Student's mother and, without disclosing what Student told her, recommended that Student see a doctor. Student's mother took her to see a doctor, which resulted in Student's in-patient treatment at ***.

41. Student left the JJA after school one day ***, ***. Her mother had been looking for her on that day and ultimately found her *** occurred.

42. Other than the JJA's truant officer, there is no record that anyone else at JJA knew that Student had been admitted to ***. There is no record that JJA notified Northside ISD that Student had been admitted to ***.

43. There are no records held by the JJA indicating that Student was referred to ***. There are no records with the JJA indicating that Student was ***.

44. Student was administratively withdrawn from the JJA on October 7, 2004. Prior to that time, the JJA truant officer had been told by Student's mother that Student was at *** and then home schooled because she did not want Student back at JJA. The truant officer did not file truancy charges but he did file a request for judicial action for nonattendance on August 20, 2004 (after the start of the 2004-2005 school year) and again on September 13, 2004. Apparently, no representative of the JJA informed Northside of any of this information.

4) * Treatment Center**

45. Student was placed in the *** facility on July 17, 2004. Student's mother informed the JJA truant officer of Student's whereabouts when she failed to attend school at the JJA.

46. The JJA truant officer repeatedly called Student's mother for 1½ to 2 weeks while Student was in *** even though each time he called he was told the same thing. Student's mother even gave the truant officer *** Treatment Center's phone number (****).

47. Student was evaluated by a psychologist while she was in *** prior to the filing of this due process hearing request. At ***, Student was diagnosed with a bi-polar disorder. Student's Discharge Diagnoses were the following:

Axis I: ***

Axis II: ***

Axis III: ***

Axis IV: ***

Axis V: ***

48. Student was placed in the *** on July 7, 2004. She was placed on Zoloft 25 mg q.a.m. to decrease ***. She remained in that unit for approximately seven days to be stabilized as was discharged to the *** (residential unit) on July 15, 2004, and discharged, against medical advice, on July 23, 2004. The psychiatrist at *** told Student's mother that Student had indicated that she had ***.

49. When Student was discharged from ***, her mother did not inform the JJA that she did not intend for Student to return there. She informed ***, Student's probation officer from the drug distribution offense, and expected that he would inform the JJA. *** did not inform the JJA or Northside ISD.

50. Student's 2004 stay in *** was paid by Parent and her health insurance.
D. Student's Educational Program for the 2004 - 2005 School Year.

51. Student's Admission, Review, Dismissal ("ARD") Committee met in October, 2004 at its *** Campus. Student was placed in the therapeutic environment there and the District agreed to provide her with counseling.

52. The *** placement has been beneficial to Student. It is an appropriate placement for her. She likes the teachers and the small setting. While at ***, the District has evaluated Student and found her to be seriously emotionally disturbed.

53. *** is a self-contained campus in Northside ISD for *** through *** grade students. It is a special education campus with all special education certified teachers and assistants. It is a much smaller campus than the typical campus (50-60 students) with small self-contained classes.

54. Since Student's October, 2004 placement in ***, she has been receiving special education counseling.

55. As of the date of this hearing, Student was scheduled to have an ARD meeting on December 15, 2004 to consider additional District evaluations conducted in the Fall of 2004 and data from ***.

III. Discussion

Student's educational experience following her expulsion from Northside ISD was characterized by disparate and loosely affiliated entities that failed to operate as a coherent system to provide her with a free appropriate public education ("FAPE"). Student's unfortunate personal history and her challenging disabilities, combined with a serious disciplinary offense, caused the "system" to treat her more as a criminal than as a student in crisis. In essence, Student fell through a bureaucratic net composed of a local education agency, two (or three) county organizations and one (or two) private contractors. Whoever ultimately shoulders the responsibility of compensating Student and her family for the system's failures is less important than whether the compensation is actually received.

Student's mother may fault Northside ISD, prior to Student's expulsion, for an inadequate educational program, but the hearing record tends to show otherwise. While Student qualified for special education as a student with an emotional disturbance in the *** grade, prior to May 19, 2004, her IEP and BIP seemed to be appropriate. Her discipline record since 1999 showed relatively minor infractions, conflicts and off task behavior. Student's mother and the rest of her ARD Committee seemed to be in agreement that Student was capable but needed to control her day-to-day behavior and be more motivated toward constructive choices. Student's March 8, 2004 triennial review amounted to a *unanimous* conclusion that no additional assessment or services were warranted. Even the fact that Student was failing many of her classes does not necessarily show that she required a new IEP or BIP. If she did, no one prior to May 19, 2004 seemed to think so.

Perhaps what happened to Student after her expulsion would tend to provide perfect hindsight of her 2003-2004 school year. The deteriorating grades from the beginning of the year could have indicated the onset of an emotional crisis. Certainly, the felonious incident involving the drugs, coupled with the May 19, 2004 overdose probably did represent a non-verbal outcry. Apparently, *** medical professionals counted it as one of three ***. It would be unfair to blame Northside ISD for not interpreting these factors differently, however. Even Student's mother and grandmother were more concerned with disciplining Student or minimizing her disciplinary consequences at the May 20, 2004 ARD meeting.

It may be that *all* members of Student's ARD Committee over-emphasized the volatile nature of Student's offense rather than the non-therapeutic effects of the JJA punishment. The mandatory assignment to the Bexar County Juvenile Justice Academy for such a serious offense probably clouded the Committee's judgment about the dangers of assigning an emotionally disturbed ***-year-old girl to a mostly male campus where her classmates have been assigned for violating school rules and/or state law. Student's mother was obviously distraught about the placement, but did not believe that she had other options under the law. I am not convinced that Parent was misled about her rights during the May 20, 2004 ARD, however. I wonder whether the ARD Committee sufficiently considered Student's "aftercare" monitoring while she completed her summer assignment to the JJA. In other words, while the JJA began as an appropriate placement under the law where her existing IEP and BIP *could* have been implemented theoretically, her ARD Committee could also have planned to review her progress (or lack thereof) over the summer, rather than leave her to simply serve out her time in the Bexar County juvenile justice system.

The fact that Student's Northside ISD ARD Committee did not plan to look out for Student over the summer was unfortunate, because no other agency did. It strains credulity for any entity

to contend in this case that the education Student received from JJA/Por Vida, Inc./Bexar County Juvenile Board/Texas Juvenile Probation Commission/Communities in Schools was anything other than grossly negligent, at best; to damaging, at worst. To subject a ***-year-old, emotionally disturbed, *** girl *** from a classroom of boys with behavior problems is shameful. ***.

The fact that *some* entity (probably Por Vida) changed her classroom assignments in response to complaints of sexual harassment does not mitigate the violations of Student's right to a FAPE if the harassment did not stop. The fact that someone employed by *some* entity (probably Por Vida or Communities in Schools) correctly noted Student's deteriorating emotional condition and talked to Student's mother was not enough. While Student received private treatment at her mother's expense, someone from the JJA, Por Vida, Communities in Schools or Northside ISD should have *called an ARD meeting* to amend Student's placement program, and services at the public's expense. It is ironic that either Northside or the JJA would suggest that Student did not receive educational benefit from the JJA placement because she was *absent*. She was absent because she was being treated for the damage caused by her inappropriate educational circumstances. Student's mother understandably refused to allow Student to be abused further at the JJA. The JJA truant officer knew why she was absent from the school, and he simply did not tell anyone else where Student was. The complete breakdown of communication between the various public and private agencies during the summer of 2004 and the start of the regular 2004 - 2005 school year, alone, indicated that Student did not receive a FAPE after she was expelled.

It is less important to me to assign the blame for the failure among the entities. Northside ISD was apparently kept in the dark about Student's absences and problems at the JJA, as far as anyone was qualified to testify. Por Vida seemed particularly negligent as a provider of the "educational component" of Student's education. However, it seems that no one employed by the JJA or the Juvenile Board, including Student's probation officer was aware or even concerned about Student's educational welfare. Ultimately, Northside ISD is probably responsible for Student's education pursuant to IDEA and the MOU with the Bexar County JJA. Northside, alone, is the local education agency for Student under IDEA. How Northside divides the expense of providing compensatory services to Student's family among its partners is not a concern of or determination by this hearing officer.

Student's present placement and program seems appropriate, according to the consensus of the stakeholders. The *** campus and staff seem to be well suited to a student with Student's educational needs. Some of the Petitioner's requested relief: the comprehensive individual educational evaluation, a more restrictive therapeutic placement, counseling services and a new IEP; have been provided by Northside ISD without an order from the Hearing Officer. If it had not, the Hearing Officer would have ordered it. However, Student is entitled to appropriate compensatory education to help make up for the time she lost last summer and the portion of this year before this due process hearing request was filed. Student's mother is entitled to training to assist her in addressing Student's complex disability. The duration of the compensatory services should be equal to the length of a summer term (if the Northside's Summer term is divided into two parts, then two summer terms), and a half of a full Fall term.

IV. Conclusions of Law

1. Petitioner Student is a student in Northside ISD who is eligible for special education services based on her classification as a student with an emotional disturbance. 20 U.S.C.A. § 1401(3); 34 C.F.R. § 300.7; 19 T.A.C. § 89.1040.
2. Respondent Northside ISD has a responsibility to provide Student with a free appropriate public education. 20 U.S.C.A. § 1412; 34 C.F.R. §300.300; 19 T.A.C.§ 89.1001.
3. Respondent Northside ISD singly and in concert with Respondent Bexar County Juvenile Justice Academy, and its various contractors, failed to provide Student With a free appropriate public education for the Summer semester of the year 2004 and the Fall semester of the 2004 - 2005 school year.
4. Student's placement at the Bexar County Juvenile Justice Academy was not a safe or appropriate environment for Student to complete her punishment for felony distribution of a controlled substance or to implement her IEP for the 2004 - 2005 school year.

V. Order

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by Petitioner is Granted in part.

Respondents are ordered to provide Student with appropriate compensatory services to include tutoring and counseling in an amount equal in duration to one complete summer semester and one have Fall semester.

Respondents are further ordered to provide Parent with parent training to assist her in addressing Student's disability in the same duration.

All other relief not expressly granted herein is hereby DENIED.

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.

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

SIGNED this 6th day of January, 2005.

Stephen P. Webb
Special Education Hearing Officer

NOTICE TO THE PARTIES

Under State Board of Education rules, it is not necessary for a party to perfect an appeal to state district court by filing a Motion for Rehearing. However, either party may request, within ten (10) days after the date of this decision, specified additional or amended findings of fact or conclusions of law. 19 T.A.C. § 89.1185(n) (o).

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POR VIDA, INC.	§	STATE OF TEXAS

SYNOPSIS

Issue: Whether Petitioner, a ***-year old emotionally disturbed student in the *** grade received a free appropriate public education while attending the Bexar County Juvenile Justice Academy that was the result of a mandatory disciplinary placement.

Federal Citation: 20 U.S.C.A. §1414;34 CFR §§ 300.340-300.350, and §300.502; *Hendrik Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (Fifth Circuit - 1989).

Texas Citation: 19 T.A.C. §§ 89.1050, 89.1055; *Tatro v. State of Texas*, 625 F.2d 557 (Fifth Circuit - 1980).

Held: For Petitioner, Respondents failed to maintain a safe, appropriate educational environment for Student, given her disabilities, or to respond to her need for additional services or changes in her placement.