

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

DECISION OF THE HEARING OFFICER

Issues

Student’s parents (“Petitioner”), requested this Due Process Hearing on October 20, 2004, under the Individuals with Disabilities in Education Act, 20 U.S.C. §1400 *et seq.*, (hereafter “IDEA”), raising several complaints against Northside Independent School District (“Respondent” or “the District”). In the prehearing conference conducted on November 30, 2004, Karen Seal, Attorney at Law, represented Petitioner. Respondent was represented by Craig Wood, of the law firm Langley & Banack, Inc. During the prehearing conference issues were identified as follows:

- (1) whether the Respondent has properly identified and classified all of the student’s handicapping conditions;
- (2) whether Respondent has failed to follow the Individualized Education Plan (IEP) prepared by the Admission, Review and Dismissal (ARD) committee;
- (3) whether an Independent Educational Evaluation (IEE) should be performed for the student, including a psychological evaluation;
- (4) whether the Respondent failed to prepare an appropriate Behavior Intervention Plan (BIP) for the student; and
- (5) whether the Respondent has appropriately communicated with Petitioner about the student’s progress.

As relief Petitioner requested compensatory educational services, development of an appropriate BIP, an IEE including a psychological evaluation, an order requiring that Respondent follow the IEP. Petitioner also requests some type of weekly report from the school to help with communication about the student’s progress.

The Due Process Hearing was initially scheduled for November 30, 2004, but during the prehearing conference, the parties informed the Hearing Officer they had agreed to schedule an ARD meeting and would like additional time to review information about the student’s program.

The Hearing Officer rescheduled the Due Process Hearing to February 3, 2005. The parties requested additional time, and the hearing was rescheduled for March 10-11, 2005.

On *** 10, 2005, the Hearing Officer convened the Due Process Hearing. Student's parents appeared in person and through the counsel that represented them during the prehearing conferences. Dr.*** , appeared for Northside ISD, along with their attorney who had participated in the prehearing conferences. The following witnesses testified during the two day hearing: *** father; *** mother; ***,***, ***,***, ***,***; ***, ; ***. A transcript containing 463 pages was made of the proceedings by a certified court reporter. The Decision Deadline was April 11, 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:

Background

1. Student is a ***-year-old student residing with her parents within the geographic boundaries of Northside Independent School District. Student has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). While student was in *** grade at *** School during the 2003-2004 school year, her parents believed she needed accommodations for the ADHD. Her parents believed she was protected by Section 504, but it does not appear the Section 504 Committee ever met to formally recognize student as a Section 504 student or prepare an accommodation plan for her. The school, however, did agree to assign student a locker in a location better suited for her to retrieve her books and supplies for each class.¹
2. Student's parents became quite upset with school officials at *** during her *** grade year as a result of an incident involving student and another student. They disagreed with how school administrators handled the situation and filed a number of complaints with various authorities. This lack of trust set the tone for the relationship between student's parents and most of the staff at ***.
3. Sometime in November or December 2003 student began seeing a counselor, Dr.***. student exhibited problems with sleeplessness, headaches, stomach aches, and listlessness. Dr. *** diagnosed student with Generalized Anxiety Disorder. Student stopped seeing Dr .*** because she felt like it was not doing any good, and also because she was displeased that Dr. *** had shared certain information with student's parents.
4. Student's parents continued to seek help for her. They submitted a form completed by student's pediatrician to substantiate their request for special education services based

¹ Student's parents had also requested a special hall pass permitting student to wait five minutes until the hall was clear before going to her next class. Student was given the pass, but it was later taken away. The parties disagree about the appropriateness of rescinding the pass. Resolution of this fact issue is not required for the Hearing Officer to reach the Decision in this case.

on Other Health Impairment (OHI). Dr. *** indicated diagnoses of Generalized Anxiety Disorder and ADHD combined type, with inattention and impulsivity as functional implications for educational purposes.

Full and Individual Evaluation

5. The District received the OHI Eligibility Report on April 22, 2004. The evaluation process began immediately, culminating in the Full and Individual Evaluation dated April 30, 2004.
6. ***, LSSP for the District, administered the following tests to student:
 - Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV)
 - Woodcock-Johnson III Tests of Achievement (WJ-III)
 - The Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI)
 - Revised Children’s Manifest Anxiety Scale (RCMAS)
 - Children’s Depression Inventory (CDI)
 - Behavior Assessment System for Children – Teacher Rating Scales – Adolescent
 - Behavior Assessment System for Children – Parent Rating Scales – Adolescent
 - Behavior Assessment System for Children – Self-Report – Adolescent (BASC)
 - Roberts Apperception Test for Children (RATC)
 - HAAC Sentence Completion (Secondary Form)
 - House, Tree, Person
 - Kinetic Family Drawings
 - Clinical Interview

Ms. *** report verified that, “Evaluation of this student **was** conducted using standard procedures for all tests administered. All standardized tests have been validated for the specific purpose for which they were used. They were administered by trained and knowledgeable personnel who took into consideration the student’s cultural, linguistic, and socioeconomic characteristics and their impact on learning.” (emphasis in original)

7. Ms. *** reported that student had been asked to complete a variety of measures to assess her emotionality. The overall Emotional Symptom Index yielded a result representing an average score; however, in the areas of Attitude to School and Sensation Seeking, student rated those items with at-risk ratings. The Clinical Maladjustment composite and Personal Adjustment composite were both rated within the average range. The report continued:

There were no other areas of significant elevations. An independent measure of anxiety failed to indicate a significant level of distress. Some feelings of anxiety were revealed. Projective narratives shared an overall theme that things were not going great, but presented an optimistic sentiment that things would improve. By self-report, student presents a happy disposition with limited difficulty within the school environment. She describes her absences a terribly cycle that she is unable to resolve. She becomes overwhelmed by the amount of work she must make-up and

then her stress and anxiety over the work manifests itself into physical symptoms. Student stated that she believes that things will improve for next year and recognizes that her performance is not horrible. She holds a higher standard for her grades than what she has obtained for the current school year. Student confirmed that her level of distractibility and concentration has worsened and she finds it difficult to attend in class. Given the data presented, student does not demonstrate significant emotional deficits at this time.

8. Ms. *** report concluded that student did not appear to meet eligibility criteria as a student with an Emotional Disturbance. She did appear to meet eligibility criteria under Other Health Impairment, because her characteristics of ADHD interfered with her ability to profit from the educational process. Ms. *** report also included recommendations for an ARD committee to consider in preparing an IEP for student.

Initial ARD Committee Meeting

9. The duly constituted ARD committee met on May 12, 2004 to initiate special education services and develop an IEP for student. The committee found that student was eligible to receive special education services with a primary disability of OHI. No other disabilities were indicated. The committee further determined that student was capable of following the District's Student Code of Conduct with modifications specified in the Behavior Intervention Plan. The general modifications and strategies for student included: frequent feedback, check for understanding, immediate positive feedback, preferential seating, peer tutoring, extra time for make up work, break up longer assignments with clear time lines, shortened assignments as per teacher discretion, have student restate/rephrase directions, clear and concise directions, pass for five minutes early release from class. All of student's classes were in the general education setting using the complete curriculum and credit requirements, including the TAAS/TAKS. The committee identified three targeted behaviors for the BIP: staying on task, completing work, and tardy to class. A functional behavior assessment had been completed and was reviewed by the committee. The committee developed an appropriate BIP designed to address the targeted behaviors utilizing the information from the functional behavior assessment and other input from information provided to the committee. The committee agreed upon the IEP developed for student during the May 12, 2004 meeting.

Beginning of *** Grade

10. In the fall of 2004 student began her *** grade school year at ***. She received several disciplinary notices beginning in September for minor violations of school rules. For example, student was told to put her backpack in her locker, but she continued to carry it to class. She was observed pushing students in the hallway, not wearing her shoes, and coming to class late. Matters came to a head in mid-October when student had problems in three separate classes the same day, October 13. In journalism she refused to stand for the pledge. She disobeyed the teacher's instruction to use the worktable for her project and instead walked directly to the teacher's desk and put her notebook on top

- of items on the teacher's desk. Additionally, she would not be quiet during a guest speaker's presentation to the class, and when asked to sign the teacher's discipline book, she only put "****" and refused to sign her name. In science student did not have her book, and when the teacher was speaking to another student about his book, student yelled out, "****" and began ***. The teacher sent student to the CMC class when she was unable to calm student down. Instead of going to the CMC class, student went to her locker. She remained sitting in front of her locker with all of the locker's contents spread around her. When asked what she was doing, she did not give a straight answer. So she was escorted to the vice principal's office. The vice principal notified student and her parents that she was being referred to In School Suspension for three days,***.
11. Student's parents vehemently disagreed with the school's decision to send student to ISS. Student's father asked for a manifestation determination review to be conducted by the ARD committee. He was informed that such a review was not necessary for this situation in which student was only being assigned to ISS for three days.

Dr. *** Diagnoses

12. Dr. ***, a psychiatrist, interviewed student and submitted a letter to the District dated October 14, 2004. Dr. *** confirmed student's previous diagnosis of ADHD and Generalized Anxiety Disorder, and she also diagnosed student with Depressive Disorder Not Otherwise Specified. She reached her conclusions from the clinical interview she conducted and also from information supplied by student's parents. Dr. *** recommended a reduction in homework and schoolwork so student would not be overwhelmed. She also recommended seating close to the teacher and the option of going to Content Mastery Class if student was not understanding something. She also recommended not to use ISS in a punitive manner, especially if it was for behaviors that had to do with her emotional disturbance. Finally, Dr. *** recommended that student be given a pass where she could leave for five minutes so that she would not be tardy. Dr. *** prescribed medication for student and has continued to treat her.²
13. The District wanted additional information from Dr. *** and attempted to speak with her on the phone. The District also asked Dr. *** to attend an ARD committee meeting, offering to pay for her time. She provided only the letters.

Parents Request ED Label

14. Student's parents requested an ARD committee meeting to revise student's IEP. The District convened an ARD meeting on September 30, 2004. The meeting was not completed, so the meeting reconvened on October 20, 2004. The primary issue at both of these sessions was the parents' belief that student should also be classified for special education eligibility as Emotionally Disturbed (ED). Their belief was premised upon Dr. *** co morbid diagnoses of Depression, Generalized Anxiety Disorder, and ADHD. At the October 20, 2004, meeting the ARD committee had two letters from Dr.***, dated October 14 and October 18. In neither of the letters did Dr. *** refer to any evaluations.

² As have many patients, student experienced a number of side effects from the medications, requiring adjustments in dosage and even discontinuation of certain drugs. In particular, student suffered from irritability as a result of one of the drugs, and drowsiness or lethargy from another.

The need for data to support the addition of the ED eligibility was discussed. The District offered additional testing – either by District personnel or through independent providers -- to determine whether student qualified as ED, but the parents declined. The parents also presented a three page documents to the ARD committee at the October 20 meeting. The first two pages outlined changes they wanted in student’s educational environment, and the last page specified their ideas for student’s Behavior Intervention Plan. The meeting was adjourned, and the parties agreed to meet again on October 27, 2004.

Behavior Specialist’s Report

15. ***, a behavioral specialist for the District, observed student during two of her classes on October 26, 2004. His report provided a detailed set of recommendations for teachers to use with student to deal with student’s behavior. One important recommendation was to define behaviors and consequences. He stated,

“Speak with student to explain: (a) what she is doing wrong and (b) what she needs to be doing. Discuss with her appropriate ways to seek their attention . . . Student needs to know exactly what will be expected of her. She needs to know what consequences will be administered for the inappropriate and appropriate behaviors she demonstrates. For example. [sic] student needs to know that if she disrupts the classroom environment, that she can be written up. She needs to be aware of exactly what these behaviors look like. This can be demonstrated through examples of role playing.”

He also suggested that student be offered frequent praise, that she be offered choices or options, and that teachers deal with her in a calm and deliberate manner. Focus should be on building a positive self-image for student. Additionally, he suggested that a system be established so that if student’s work was not completed by a certain time, she would be restricted from privileges until the work is done. He advised that a hierarchy of consequences needed to be agreed upon and explained to student through a team approach, including the teacher, counselor, and administrator. Finally, he recommended that consistent communication between the parents and appropriate parties should be maintained to share information about student’s progress or lack thereof.

ARD Committee Considers ISS

16. On October 27, 2004, the committee again reconvened, and this time reviewed the BIP and added another targeted behavior: inappropriate responses. Among the consequences reasonably calculated to improve behavior the committee included office referral, ISS, and suspension. Although student’s parents still disagreed with the ARD committee about the appropriateness for student to be given ISS for inappropriate responses, the decision was made that if student’s behavior resulted in a consequence of ISS, the administrator would contact the parents, and if they chose to keep student at home, it would be considered as ISS and not a suspension. Two more letters from Dr. *** were provided to the committee, one dealing with student’s medication and the other discussing Texas Education Agency eligibility criteria for ED.

17. At each of these ARD committee meetings the teachers provided a lot of input. They reported about her behavior in the classroom, in the halls with friends, and at lunchtime. They also explained the strategies that had been used successfully with student.
18. ***, the District's ***, wrote Dr. *** on November 11, 2004. She expressed the District's belief that ISS might be an appropriate consequence for student in certain circumstances and should be included in the continuum of behavior interventions available to the school staff. She wrote,

“Student has verbalized that she understands the nature of ISS and is accepting of the strategy. It is a quiet situation where students can work on their assignments. Special education services are also provided in ISS when needed. By including ISS and Suspension in student’s plan, she will have clear and consistent expectations to accompany the strict limits set on her behavior. Hopefully this consistent approach along with the medical management will assist student to control the behaviors, which are currently interfering with her learning.”

Due Process Hearing is Requested

19. Student’s parents submitted their request for Due Process Hearing in this case on October 20, 2004. While the case was pending student’s father filed a number of grievances against various school officials, many of which involved matters associated with the claims being pursued in this case. He erroneously believed that he was not receiving a response from the District, but in fact, the District’s attorney had informed counsel for Petitioner that all communications should be handled through counsel, as is a party’s legal right. Because many of the allegations contained in the grievances asserted violations of rights under IDEA, the appropriate course of action was to wait for the Hearing Officer’s decision in the case following the Due Process Hearing.

Information from Other School Personnel

20. Student’s *** grade *** teacher at *** experienced few if any of the behavior issues that student displayed in other classes. Student responded well to the strategies used by this teacher to redirect her attention.
21. Ms.***, the counselor, met regularly with student at *** beginning in March 2004. Student expressed concern about some problems she was experiencing at home. Student, however, did not want to talk with the counselor about her academics. She continued to meet with Ms. *** until her parents transferred her to *** School in January 2005.
22. Mr. *** taught the behavior intervention center (BIC) at ***. He saw student almost every day to check her planner, and on other occasions when she was sent to his room because of her behavior. If she came on a teacher referral, Mr. *** worked with student on a problem-solving assignment. They would discuss interventions and strategies on how to be more successful in class. Mr. *** also met with student’s team of teachers. He discussed ways to work with special education students, and answered their

questions about how best to approach student. In particular he explained some nonverbal signals to help student in class. Mr. *** did not see student as being depressed. He described her as bright, articulate, intelligent, and very athletic.

23. At some point in late December 2004 or January 2005 the relationship between student's parents and school personnel at *** completely broke down. Student felt that all of the teachers, with the notable exception of Mr. ***, were against her and out to get her. Her parents shared this belief. Because the instant Due Process Hearing was underway, the stay-put provision of IDEA applied, requiring student to remain at ***. The parties agreed to transfer student from *** to *** School. For some reason after the transfer occurred, student's parents kept her home from ***, and the District understood that they wanted student to receive services as a homebound placement. The District agreed to what they thought were the parents' wishes for a homebound placement. Nonetheless, student returned after a few days to *** where she still attends classes.

Student's Grades

24. While in *** grade student received the following grades at ***³:

English 6 H	***
Reading 6 GT H	***
Math 6 H	***
Science 6	***
Social Studies 6	****

25. While in the *** grade student received the following grades at ***:

English 7 H	***
Reading CT/GT H	***
Math 7	***
Science 7	***
Texas History 7	***

26. While in *** grade student received the following grades for the first semester at ***:

Journ/Yr Book	I[ncomplete]
Reading 8 CT/GT H	***
Science 8	***
English 8 H	***
US History 8 H	***

³ The Hearing Officer interprets GT to mean Gifted/Talented and H to mean Honors. Although these letters were not specifically explained, evidence in the record supports that interpretation, because testimony indicated student was in the honors program.

27. Since student has attended *** her grades have been good. Likewise, she has not received anywhere near the number of disciplinary as at ***.
28. Although communications have been difficult, school officials have attempted to provide information about student's progress.
29. Student's grades indicate that she has made meaningful educational progress.

Discussion

The central disagreement in this case arises from the classification under which the District found student eligible for special education services. The parents and their expert say student should be classified as ED; the District disagrees. The burden of proof in this case rests with Petitioner to demonstrate that the District's evaluation and program were not appropriate. A careful examination of the evidence leads the Hearing Officer to conclude that Petitioner has not met her burden.

The full and individual evaluation performed by the District in April 2004 complied with the requirements set forth in 34 CFR Section 300.532. To summarize:

- A variety of assessment tools and strategies were used
- To gather relevant functional and developmental information
- Including information provided by the parents
- Including information related to enabling the child to be involved in and progress in the general curriculum
- Use of standardized tests
 - Validated for the specific purpose for which the test is used
 - Administered by trained and knowledgeable professional
 - Given in accordance with instructions provided by the producer of the test
 - Given under standard conditions (or with any deviation explained)
- Tests and other evaluation materials included those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

Thus, the District appropriately relied upon the results obtained when the ARD committee created student IEP in May 2004. Moreover, the BIP created at that ARD meeting must be given proper weight. The committee prepared the BIP from the results of the evaluation and based on the input of all present at the meeting.

We turn now to student's experience at *** in the fall of 2004. Student's parents allege the District failed to follow her IEP, but the real difference lies in the approach to managing student's behavior. Student's parents assert that any behavior that arises out of her disability should be addressed not in a punitive manner, but rather, in a mode that merely redirects her. Student's teachers used both approaches, some with obviously better results than others. The point remains, though, the school personnel believed that strong negative consequences, such as ISS, needed to remain available.

When the school utilized this strong negative consequence, student's parents resisted. Though their reaction is understandable, and even supported by Dr. ***, the school's approach is not altogether wrong. Nothing in IDEA prohibits a school from administering discipline to a student with a disability -- even if the offending behavior arises from the student's disability -- so long as the discipline does not change the student's placement. While student's parents may vehemently disagree with this approach, the law permits it.

Student's parents also disagreed with the school's response to Dr. *** letters. They expected the school to simply accept her opinions, add the ED classification, and follow her instructions about student's behavior. Again, their frustration is understandable, but the school is not altogether wrong.

The IDEA requires a school to use a variety of assessment tools and strategies when evaluating a student. As evidenced by the list of instruments *** used in April 2004, the District met this requirement. On the other hand, Dr. *** conclusions rested solely on her interview with student, a completely appropriate approach for a treating psychiatrist, but not for a school. The school properly asked Dr. *** for additional information to support or explain her diagnoses, which contradicted the data obtained from student only a few months earlier. After trying every possible avenue with Dr. *** to reconcile the differences to no avail, the District responded appropriately: it considered Dr. *** letters, and then offered the parents the opportunity to see what additional testing would show.

One of the questions before the Hearing Officer is whether student should be classified for special education purposes as ED. Accordingly to the data from April 2004, the answer clearly would be no. The information Dr. *** provided to the Hearing Officer at the Due Process Hearing would have been extremely beneficial to the ARD committee when it met in October and November 2004. But diagnoses alone do not convey ED eligibility.

Emotional disturbance is defined in the federal regulations:

- (i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
 - (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
 - (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
 - (C) Inappropriate types of behavior or feelings under normal circumstances.
 - (D) A general pervasive mood of unhappiness or depression.
 - (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.7 (c) (4) (i).

Although Dr. *** testimony sheds some light on student's emotional outlook, and it is possible that student's condition *might* meet one of the criteria above, the evidence does not rise to the level needed for Petitioner to prevail. Virtually all of the evidence supports the ADHD diagnosis, but there is contradictory evidence concerning anxiety and depression. Assuming we were to accept Dr. *** diagnoses and change the label to ED, the dilemma still would remain: the parents disagree with the school about appropriate consequences of student's behavior.

Fortunately, much of the problem should be resolved with student getting a fresh start at ***. The staff's approach to student's behavior seems to be working, and student's parents approve their efforts, generally speaking. Transferring to a different school, though difficult for student socially, makes sense here. The parties have already done everything the Hearing Officer would have ordered, such as trying a different school and looking for additional data from an independent psychologist to determine if ED is an appropriate label, but the parents do not want student to undergo more testing. Given this status, there is nothing left for the Hearing Officer to decide.

However, one concept should be mentioned. At the hearing Dr. *** expressed support for the parents' efforts to help student reach her academic potential. All parents should strive to help their children reach their potential. This laudable goal, though, extends beyond what IDEA requires of schools. The U. S. Supreme Court clearly affirmed the school's task is to provide an educational benefit, not maximize potential. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175 (1982). *See also Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

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 Other Health Impairment. 20 U.S.C. §1401 (3) (A); 34 C.F.R. §300.7 (c) (9).
2. Respondent has met its obligation to identify and classify student as a student with a disability who is eligible for special education services. 20 U.S.C. §1412 (a) (3) (A).
3. Petitioner bears the burden of proof with respect to her claims that *** 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 has not met her burden of proof in this case.
4. The IEP and BIP developed as student's educational program at Northside ISD provided a program reasonably calculated to enable her to receive educational benefit under the standard of *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 US 176 (1982); *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

5. Student made meaningful education progress during the time covered by this Due Process Hearing. *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 US 176 (1982); *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
6. Respondent offered to provide an independent educational evaluation (IEE), including a psychological evaluation for student. Petitioner has rejected Respondent's offer. The issue of whether an IEE should be provided is moot.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the relief sought by Petitioner is DENIED. Finding that the public welfare requires the immediate effect of this Final Decision, the Hearing Officer makes it effective immediately.

SIGNED this 11th day of April 2005.

Lucyretia Dillard
Special Education Hearing Officer

Copy sent to:

Karen Seal
Attorney at Law
202 East Park Avenue
San Antonio TX 78212
(210) 226-8175 (FAX)

D. Craig Wood
Langley & Banack, Inc.
Suite 900, Trinity Plaza II
745 East Mulberry
San Antonio TX 78212-3166
(210) 735-6889 (FAX)