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| ***., B/N/F | § | BEFORE A SPECIAL EDUCATION |
| ***. | § | |
| PETITIONER | § | |
| | § | |
| VS. | § | HEARING OFFICER |
| | § | |
| NORTHSIDE INDEPENDENT | § | |
| SCHOOL DISTRICT | § | |
| RESPONDENT | § | FOR THE STATE OF TEXAS |

FINAL DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Petitioner, ***, by his next friend, ***. (hereinafter Student) brings this proceeding against Respondent Northside Independent School District (hereinafter Respondent or District) under the Individuals with Disabilities Education Act (hereinafter IDEA), 20 U.S.C. § 1400 et. seq.

Petitioner filed his request for a due process proceeding on May 25, 2006. Petitioner was represented by Matthew Finch of San Antonio, Texas. Craig Wood Buechler with Langley & Banack of San Antonio Texas represented Northside ISD.

ISSUES AND REQUESTED RELIEF

Petitioner alleges that Northside ISD denied him a free appropriate public education during the spring 2005, 2005-2006, and the 2006-2007 school years based on the following claims:

1. The District failed to provide Student an appropriate placement by allowing Student to attend regular education classes rather than restricting his placement to a self-contained classroom.
2. The District violated the requirements of the least restrictive environment.
3. The Student's math goals were inappropriately removed.
4. The Student's Behavior Intervention Plan failed to provide measurable goals and objectives.

Final Decision of the Hearing Officer
*** v. Northside ISD
Docket No. 226-SE-0506
April 2, 2007

5. The Student's evaluation was untimely and resulted in an inappropriate educational plan.

6. The April 2006 manifestation determination was inappropriately conducted.
7. The District's teachers were not "highly qualified" as required under IDEA.
8. The Student was not provided the opportunity to participate in extracurricular activities.
9. The Student's Parent was denied the opportunity to meaningfully participate in her son's October 2006 Admission, Review, and Dismissal (ARD) meeting.
10. The District failed to provide counseling and special education transportation.

As relief, Petitioner seeks general compensatory services and related services, tutoring, services from the Sylvan Learning Center, reimbursement for private counseling, personnel training, individual and family counseling by a private provider at District's expense, a pizza party sponsored by District personnel, an invitation to homecoming dances for the remainder of his high school years, an Independent Educational Evaluation (IEE), and an order requiring compliance with the least restrictive environment mandate.

PROCEDURAL HISTORY

After the request for a due process hearing was filed on May 25, 2006, the Hearing Officer scheduled a prehearing conference for June 21, 2006 and the due process hearing for July 6, 2006. On June 13, the Parties requested a continuance of both to pursue settlement discussions. Accordingly, the prehearing conference was reset and held on September 12. The hearing was scheduled for October 9-10, 2006. On October 2, Petitioner sought a second continuance of the prehearing conference in order to seek a new attorney. Petitioner's second request was granted, and, the hearing was reset to November 13-14, & 17, 2006. On October 16, Mr. Matthew Finch, made an appearance on behalf of Petitioner.

On November 6, 2006, Respondent's Motion for Summary Motion was heard and denied. As a result, the due process hearing was rescheduled to allow the Parties time to prepare for the hearing and to resolve several legal issues surrounding the disclosure of a videotape.

The due process hearing was held on December 13-14, 2006, and January 5, 2007. At the conclusion of the hearing, the Hearing Officer asked the Parties to submit written closing arguments by February 19 and set a February 26 deadline for Petitioner's Reply. On February 19, the Parties agreed to extend the filing deadline to February 21 and the Reply deadline to March 1, 2007. Petitioner and Respondent timely submitted their respective briefs.

Taking continuances into account, the deadline for the final decision was April 3, 2007. The Hearing Officer issued her decision on April 2, 2007.

FINDINGS OF FACT

PLACEMENT

Final Decision of the Hearing Officer
*** v. Northside ISD
Docket No. 226-SE-0506
April 2, 2007

1. Student is a 9th grader who resides within the Northside Independent School District. Northside ISD is a political subdivision of the State of Texas and a duly incorporated independent school district. Currently, Student qualifies for special education services as a student having an Emotional Disturbance.

2. In May 2004, while in 6th grade, a reevaluation review was conducted as Student's triennial review. The reevaluation consisted of a review of the following: current evaluation data, Student's September 2001 Full Individual Evaluation (FIE), the May 2004 Functional Behavioral Assessment (FBA), teacher and Parent input, and Student's then present levels of performance (PLOP). The Admission, Review, and Dismissal ("ARD") Committee concluded that Student continued to qualify for services and no other test was necessary to maintain his eligibility as a student with an Emotional Disturbance (ED), Other Health Impairment (OHI), and Learning Disability (LD).

3. The ARD Committee determined that Student would follow the Student Code of Conduct with modification as provided his Behavior Intervention Plan (BIP). A "Flex" Behavior Modification Class ("Flex BMC") was mentioned in the 2004 Individual Education Plan (IEP), however, Student did not utilize the program in 6th grade. In 6th grade, Student had 13 referrals for inappropriate behavior.

4. "Flex" BMC is a self-contained placement for students whose behaviors warrant a special education setting but who demonstrate an increased responsibility to attend regular education classes. As the increased responsibility is demonstrated, the BMC teacher has the option to move students into a less restrictive environment while providing behavior and academic BMC support. During both Student's 7th and 8th grade years, the Student's teacher's and mother had several conversations about the use of "Flex" BMC.

5. In the 2004-2005 school year, Student was in 7th grade. During that year, Student was placed in a BMC except for lunch and one elective. Student's disciplinary referrals decrease from 13 to eight that year. The IEP stated that if his behavior warranted, Student would be provided more mainstream opportunities. The IEP provided for a Flex BMC in order to allow more flexibility to move Student into regular education classes.

6. In May 2005, an annual review was held to plan for Student's 8th grade. During his 7th grade year, the District used "Flex" BMC sparingly, but for 8th grade the ARD Committee wanted to increase Student's regular education classes while providing him BMC support. In 8th grade, Student utilized "Flex" BMC to attend regular education classes and to return to BMC for support.

7. During the 2005-2006 school year, Student attended 8th grade in the behavior classroom with “Flex” BMC as an option. The “Flex” BMC was an appropriate placement because Student understood his responsibilities in a regular education classroom, and the arrangement gave his regular education teachers the option to return Student to the BMC without permanently removing him from regular education classes.

8. The “Flex” BMC placement for Student’s 7th and 8th grades did not violate the requirement for the least restrictive environment. Student received the structure he needed through the BMC and the flexibility to attend regular education classes. Parent’s position that Student needed BMC full-time without regular education classes was not demonstrated by the evidence, and, if implemented, would have deprived Student of the least restrictive environment.

9. There was no evidence that Student’s ninth grade placement in a BMC classroom was inappropriate or that Student’s ninth grade IEP was inappropriate.

BEHAVIOR INTERVENTION PLAN

10. At the May 2005 annual ARD, the Committee set an IEP goal to increase Student’s behavior to an age appropriate level. After completing a Functional Behavioral Assessment (FBA), the Committee also created a BIP for Student’s 8th grade year. The BIP addressed verbal aggression, physical aggression, and non-compliance. At the due process hearing, Parent did not object to this behavior IEP.

11. The Parent complained that the BIP goals and objectives were not measurable. The District did not collect data to explain what triggered the inappropriate behavior. Parent argues that without data, the BIP is inappropriate.

12. The 2005-2006 BIP identified Student’s targeted behaviors, allowed the teacher several options to address misbehavior while providing positive reinforcement (attending regular education classes) for good behavior. In general, the number and the severity of disciplinary incidents decreased during middle school. The 2005-2006 BIP was appropriate.

13. During 8th grade, Student had eight disciplinary incidents, four of which occurred during a three-week period in the fall semester. In February 2006, Student was involved in an incident on the school bus. The videotape of the bus incident showed that Student instigated the disruption, but the other student continued attacking after Student stopped the misbehavior. At the minimum, both students had equal responsibility for the disruption. This incident and the disciplinary action imposed did not violate Student’s right to a free appropriate public education (FAPE).

MANIFESTATION DETERMINATION

Final Decision of the Hearing Officer

*** v. Northside ISD

Docket No. 226-SE-0506

April 2, 2007

14. On April 11, 2006, an ARD convened to discuss Student's discipline referrals and to address problems with transportation. The ARD reviewed Student's failing grades in reading and math. After reviewing his IEP, BIP, and FBA, the Committee concluded that all remained appropriate and that Student was failing because of missing homework in both classes.

15. A day after the ARD met to review Student's disciplinary incident, Student was involved in a more severe violation of the Student Code of Conduct. A disciplinary hearing officer ordered Student expelled for 45 days. On April 12, 2006, a manifestation determination ARD was held to review whether Student's behavior was a manifestation of his disability. At the April 12 ARD, the Parent requested an assessment in all area and asked that the meeting be postponed until the assessment was completed. The Committee agreed to provide an assessment, but declined to postpone the hearing.

16. The ARD Committee, with the exception of the Parent, concluded that Student's misconduct was not related to his Learning Disability, OHI, or his emotional disturbance. In making this determination, the ARD Committee reviewed Student's IEP, BIP, referrals, the comments of Student's private counselor to the disciplinary hearing officer, and Student's placement. Additionally, the ARD Committee considered the input of Parent's and Student's grandparents. After determining that the misconduct was not related to his disabilities, the Committee addressed whether the misconduct was a result of the District failure to implement Student's IEP. Again, with the exception of Student's mother, the other members of the ARD concluded that the misconduct was not a result of a failure to implement his IEP.

17. After the manifestation determination, the ARD Committee addressed placement during the 45-day suspension. The Committee considered many options, including Parent's request that Student remain at his middle school in a self-contained classroom with no regular education classes. The members of the ARD agreed to this request but required Student to be escorted when outside the classroom. The Parent agreed to this arrangement. Student's disciplinary placement in a self-contained classroom was not a change of placement and was an appropriate setting where his IEP was implemented.

18. Student's BIP required he follow the Student Code of Conduct with the exception of conduct identified in his BIP. Like all students involved in a severe violation of the Code, Student was not allowed to participate in extracurricular activities, specifically a school dance and an awards ceremony. Denying participation in a school dance and an awards ceremony during a suspension period did not violate Student's BIP. The BIP incorporated the Code of Conduct and its implementation did not deny Student a FAPE.

EVALUATIONS

19. A triennial evaluation was conducted in May 2004. The Committee, including the Parent, agreed that Student still qualified for special education services and that no formal testing was needed. There was no evidence offered that the May 2004 reevaluation was inappropriate.

20. Parent requested a formal evaluation on April 26, 2006, and it was completed on June 13, 2006. The June 2006 evaluation used standardized testing and was conducted in accordance with 34 C.F.R. §300.532 and 300.533. There was no evidence to show the evaluation was inappropriate.

21. Parent made the request for an evaluation on April 26, 2006. Respondent completed its FIE on June 13, 2006, but the ARD Committee did not convene to review the results until September 6, 2006. The District failed to comply with the timelines for referral and assessment mandated by law. The ARD Committee should have reviewed the results no later than July 26, 2006. This error, however, did not deny Student a FAPE. Under the 2004 evaluation and the resulting IEP, Student had more services and eligibilities than he had under the 2006 evaluation. No harm was caused by convening an ARD six-weeks late.

MATH GOALS

22. Student has had the same math goal for three years: to increase mathematical skills to an age appropriate level. The IEP for 9th grade (2006-2007) did not include a math goal because his June 2006 FIE found he no longer qualified as a student with a Learning Disability in Math.

23. During middle school, his ARD Committees determined that Student should take the State Developed Alternative Assessment (SDAA) Test for Math and Reading. Concerning Math, Student met expectations in sixth grade, but not in seventh and eighth grade. His eighth grade scores showed he regressed in his math skills.

24. Indeed the regression in his SDAA math scores are a major concern for this Hearing Officer. However, there was no evidence offered to show that the Reynolds Intellectual Assessment Scales and the Woodcock-Johnson III Test of Achievement were inappropriate or incorrectly administered; therefore, there can be no finding that removing the Learning Disability in Math and the related math goal is inappropriate.

OTHER ISSUES

25. Petitioner asserts that Student's middle school and his ninth grade teachers were not "highly qualified" as required under IDEA. In both settings, a student in a BMC has a trailer course where the BMC teacher and the general education teacher work together to teach the

child. Generally, the general education teacher instructs the BMC teacher on the material and the BMC teacher is responsible for implementing the general education teacher's curriculum.

Sometimes, the general education teacher comes into the BMC to teach the student.

26. There was no evidence that this "tagging" arrangement was inappropriate. The evidence showed that Student's BMC teachers in middle school and ninth grade were not certified to teach core courses, however, both were supervised by general education teachers. There was no evidence to show that this arrangement was inappropriate.

27. Parent was not denied the opportunity to meaningfully participate in Student's October 2006 ARD meeting. Based on the demeanor demonstrated at the due process hearing, Parent is intelligent, knowledgeable, and assertive. There is little doubt that if Parent could not have participated in the ARD by telephone, she would have told the Committee.

28. The District offered Student counseling during the September 2006 ARD meeting. Correspondence sent to Parent shows that the District was willing to pay for private counsel. Prior to the 2006-2007 year, Parent declined the offer for counseling because Student was seeing a private counselor.

29. During the September 2006 ARD, the District offered special education transportation. Parent declined the transportation because she did not believe it would be appropriate for Student. Parent had previously denied offers for special education transportation.

DISCUSSION

The IDEA entitles every student with a disability to receive a free appropriate public education (FAPE). The United States Supreme Court established a two-prong test for determining whether a school district provided a free appropriate public education. The first inquiry is whether the district complied with IDEA procedural requirements. The second inquiry is whether the student's education program is reasonably calculated to confer an educational benefit. *Board of Education of Hendricks Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S.Ct. 3034 (1982).

A substantive violation of IDEA occurs when the school's program fails to provide the student with the requisite educational benefit. The school must provide an education that is reasonably calculated to enable the child to achieve *some* benefit. *Some* benefit means an education program that is meaningful and offers more than a *de minimus* educational benefit; it must be "likely to produce progress, not regression or trivial educational advancement." Although the educational benefit must be meaningful, schools are not required to maximize a child's potential or provide the best program. *Cypress-Fairbanks Indep. Sch. DIST. v. Michael F.*, 118 F.3rd 245 (5th Cir 1997); cert. denied, 522 U.S. 1047 (1998).

The Fifth Circuit delineated four factors to consider in determining whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of the student's assessment and performance; 2) Is the program administered in the least restrictive environment; 3) Are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) Are positive academic and non-academic benefits demonstrated? *Id.* at 253.

Applying these standards to Student's program the Hearing Officer concludes that Petitioner failed to meet his burden of proving that Respondent's program was inappropriate under the IDEA. There are two important comments to make.

First, Parent complains that the manifestation determination was inappropriate. Despite my finding that the determination was appropriate, the Parent should understand that placing Student full-time in the BMC rather than allowing him to attend regular education classes was, effectively, a finding that Student's behavior was a manifestation of his disability. Student did not change classrooms, teachers, or campus. Student was accustomed to having his access to regular education classes restricted based on his conduct. For all practical purposes, Student received no disciplinary action.

Second, I am very concerned about Student's math skills. The Parent did not offer any evidence to challenge the appropriateness of the FIE which found Student did not qualify as having a Learning Disability. However, the cumulative evidence shows that Student has math problems. I recommend that the District conduct additional assessments to determine the extent of his problems in math. I cannot order a new math assessment because the FIE was appropriate, but there are sufficient indicators to show that Student continues to struggle with math. An ounce of prevention may prevent Student from failing his state math assessment and thus be unable to graduate.

CONCLUSIONS OF LAW

1. Northside Independent School District is an independent school district duly constituted in and by the State of Texas, and is subject to the requirements of IDEA, 20 U.S.C. §1401, and its implementing federal and state regulations.

2. Residing within NISD, Petitioner is currently eligible for special education services under the classifications of Emotional Disturbance.

3. Petitioner's 2005-2006 and 2006-2007 placement for Petitioner was appropriate.

4. Petitioner's 2004 reevaluation and June 2006 Full Individual Evaluations were appropriate.

5. Petitioner's Math goals were not inappropriately removed.
6. Petitioner's Behavior Intervention Plan provided measurable goals and objectives.
7. The April 2006 manifestation determination was appropriate.
8. Petitioner failed to carry his burden of proof to show that his teachers were not highly qualified..
9. The Parent was not denied an opportunity to meaningfully participate in the October 2006 ARD meeting.
10. Respondent did not fail to offer Petitioner counseling and special education transportation.

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, this Hearing Officer hereby ORDERS that all relief sought by Petitioner is hereby DENIED.

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

SIGNED and ENTERED this 2nd day of April 2007.

/s/ original signed
Olivia B. Ruiz
Special Education

Hearing Officer

Notice to the Parties

Under State Board of Education Rules, it is no longer 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 days after the date of this Decision, specified additional or amended findings of fact or conclusions of law. 19 Tex. Admin. Code §157.8(n, o).

Final Decision of the Hearing Officer
S.B. v. Northside ISD
Docket No. 226-SE-0506
April 2, 2007