

STUDENT, bnf		
PARENT	§	BEFORE A SPECIAL EDUCATION
	§	
v.	§	HEARING OFFICER FOR THE
	§	
McALLEN INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioner brings this appeal, pursuant to the Individuals with Disabilities Education Improvement Act 20 U.S.C. § 1400 et seq., (hereinafter referred to as "IDEIA"), against Respondent (hereinafter referred to as "Respondent," "School District" or "School"). Petitioner (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 March 10, 2009. Petitioner was represented by Attorney Yvonnilda Muñiz of Austin, Texas. Respondent was represented by Attorney Cynthia S. Buechler of the law firm Buechler & Associates, A Professional Corporation, Texas. A telephone prehearing conference was held on March 20, 2009. A due process hearing was held on March 10, 2009, in McAllen, Texas. The parties agreed to file post-hearing briefs on or before April 27, 2009.

Petitioner raised the following issues in this case:

1. Petitioner asserts that Respondent failed to provide Student with a free appropriate public education by revising Student's current Behavior Intervention Plan ("BIP") that excluded placement at Discipline Alternative Educational Placement ("DAEP") to include placement at a DAEP without notice to Student's parent.
2. Petitioner complains that Respondent conducted a manifestation determination that ignored the recommendations in the School District's psychological evaluation and that of Student's psychiatrist.
3. Petitioner asserts that Respondent has continued to find that Student's disciplinary behaviors are not manifestations of Student's disabilities, even though Petitioner's parent states that the behaviors are manifestations of Student's disabilities, based on findings in Student's Psychological Evaluation of April, 2008.
4. Petitioner alleges that Respondent has ordered Student to attend the Instructional and Guidance Center, which is a DAEP placement.

5. Petitioner complains that Student's Parent was not given a copy of the Admission, Review, Dismissal ("ARD") Committee meeting deliberations to read prior to being asked to sign her agreement or disagreement with the decision made by the ARD Committee.

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

1. Immediately rescind its decision to place Student at the Instruction and Guidance Center.
2. Rescind the BIP developed by the ARD at the April 9, 2009 ARD meeting.
3. Retain an independent behavior specialist to review Student's BIP and provide recommendations for Student's BIP and Student's teachers.
4. Transfer Student to ** School for the remainder of the 2008-2009 school year.
5. Retain an independent consultant to provide training on Student's Individual Education Plan ("IEP") and Student's disabilities to his teachers, assistant principal and principal who work with Student.
6. Reimburse Petitioner for attorney's fees and costs.
7. Provide any other compensation that the Hearing Officer sees fit.

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

1. Student is a **-year-old who resides within the School District.
2. The School District is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing Student a free appropriate public education in accordance with the Individuals with Disabilities Education Improvement Act, 20 U.S.C.A. § 1400, *et seq.*, and the rules and regulations promulgated pursuant to IDEIA.
3. Student is eligible for special education placement, programs and services on the basis of meeting eligibility criteria as a student who has emotional disturbance.
4. On May 5, 2008, School District conducted a Full Behavioral Assessment ("FBA"). The purpose of the FBA was to identify and address behavioral problem areas in Student. The FBA identified three target behavioral problems in Student: disruption of classroom, refusal to follow adult directions, and verbal aggression.

5. On May 7, 2008 an ARD meeting was convened to consider Student's status for Other Health Impaired ("OHI") services. The ARD reviewed the following assessment data: Student's April 14, 2008 Full and Individual Initial Evaluation ("FIE"); Student's May 5, 2008 FIE Addendum, including counseling information; Student's May 5, 2008 Psychological Evaluation; information from school personnel; and parent/student information. Student met eligibility requirements for emotional disturbance. It was noted that Student takes daily medication at school.

6. An OHI eligibility was requested by Student's psychologist. The May 7, 2008 ARD meeting determined that Student would need an additional evaluation for OHI eligibility, and that the testing for that would occur on June 7, 2008.

7. The May 7, 2008 ARD meeting recommended that Student receive part or all instruction and services in a special education setting. However, it was also determined that Student would have the opportunity to participate with students without disabilities in all nonacademic and extracurricular activities. The ARDC anticipated the potential harmful effects of stigmatization and diminished access to full range of curriculum in removing the student from the general education classroom.

8. The May 7, 2008 ARDC acknowledged Petitioner's concerns about the amount of make up work required of Student and concerns over the recommendation that Student be supervised by a family member for any after school activity, citing hesitancy to participate under such restrictions.

9. Student's Individualized Education Plan ("IEP") was developed by the May 7, 2008 ARD meeting, and contained the following General Modifications and Accommodations: Check for understanding of directions by allowing the Student to underline, highlight, or rewrite instructions; unfinished work be taken home as homework; provide one (1) additional day to turn in assignment; sit in close proximity to teacher; sit away from door or window to minimize distractions; private discussions about behavior; frequent praise for compliance of appropriate behaviors; clearly define limits/rules; avoid power struggles with student by reminding student of choices and consequences; refer to counselor if/when Student appears distressed; ignore when Student appears to be inattentive to learning; note taking assistance; Special Education Contact Teacher will help Student get/maintain organization; use of planner/folders as assignment organizers; prompt cards taped inside locker as reminders "Do I have everything I need?"; and use of bag or backpack to carry books, etc.

10. Student's IEP was developed by the May 7, 2008 ARD meeting and contained the following short term educational goals for Student:

- Student will increase Behavior/Motivation and Coping skills as identified in the FBA, and the BIP by demonstrating and by meeting the objectives below with 70% mastery.
- Student will increase academic skills in the ** grade TEKS/TAKS objectives in the mainstreamed setting as a Monitor Only student with a minimum of 70% mastery.

- Student will increase academic skills in the ** grade TEKS/TAS objectives in a mainstreamed setting as a Monitor Only student with a minimum of 70% mastery.

11. The May 7, 2008 ARDC concluded that Student's behavior does impede Student's learning, but that Student is capable of following the District Student Code of Conduct with modifications specified in the Behavior Intervention Plan ("BIP".) It was decided that Principal and Associate Principal should be informed as to what means of discipline are recommended for Student and what discipline measures should be approached with caution. Student's BIP illustrates Targeted Behaviors in classroom disruption, refusal to follow adult directions, and verbal aggression.

12. Student's May 7, 2008 ARDC developed a BIP designed to ameliorate Student's targeted behaviors. The consequences of such behaviors were: verbal warning; withholding of desirable activities and privileges; response cost contracting; student/teacher conference; parent contract; detention; office referral; in school suspension; and suspension.

13. The BIP developed by Student's May 7, 2008 ARDC contained consequences, but of a kind that did not, as borne out by Student's behavior during the Fall semester of the 2008-2009 school year, have enough meaning to Student to curtail misbehavior. Therefore, a psychologist consultant to the School recommended that Student's BIP be amended to include more meaningful consequences for misbehavior. The draft BIP was presented at Student's March 6, 2009 ARD, along with a review of Student's FBA. Student's BIP developed at the May 7, 2008 ARD was successful at addressing Student's targeted behaviors intermittently for the Fall of Student's ** grade school year.

14. Student's May 7, 2008 BIP did not prohibit the option of placement of Student in a DAEP for violation of the School's Code of Conduct. Student's BIP was silent as to the placement in a DAEP. Student was always subject to the School's Code of Conduct. However, the March 6, 2009 BIP required DAEP placement to be considered as an option for such violations.

15. On May 30, 2008, the ARDC met to modify the May 7, 2008 ARD report. Student continued to be found to be eligible for special education under an emotional disturbance, and was also found to be eligible through OHI. Student passed all core classes, and appeared to be adjusting well to the ELA teacher. Student has also become used to receiving signatures from Student's teachers.

16. The May 30, 2008 ARDC determined that no changes were being made to Student's IEP or Student's BIP. One of Student's teachers said that while Student's behavior fluctuates depending on which teacher Student is with, Student's behavior has improved overall.

17. In December, 2008, the School's staff met with Student's mother to address Student's persistent classroom misbehaviors and violations of the School's Code of Conduct. On

December 11, 2008, Student's Mother consented for the School to perform a new FBA on Student.

18. On March 6, 2009, an ARD meeting was held to discuss Student's discipline issues. Student continued to be eligible for special education services through emotional disturbance and OHI. The ARD noted a substantial decline in the student's academic work and conduct, including: unacceptable behavior, insubordination, and Code of Conduct violation.

19. The notice of the March 6, 2009 ARD meeting was hand-delivered to Student's Mother at her place of business. The notice indicates that Student's FBA would be considered and reviewed at that ARD meeting. The notice indicates that Student's BIP could be revised at the ARD meeting. Also, the notice indicated that there could be a change of placement ordered at the ARD meeting. Finally, the notice indicates that the March 6, 2009 ARD meeting would be a Manifestation Determination Review.

20. The March 6, 2009 ARD meeting was held on a Friday, late in the day and lasted longer than Student's usual ARD meetings. A copy of the completed ARD documents were not available to Student's Mother until the following day.

21. Between Student's May 7, 2008 ARD meeting and the March 6, 2009 ARD meeting, the behavioral interventions that were developed during the May 7, 2008 ARD and that were a part of the BIP from that ARD meeting were working; but Student's classroom misbehaviors were accelerating. The consensus of the March 6, 2009 ARDC was that additional consequences were necessary.

22. The primary purpose of the March 6, 2009 ARD meeting was to discuss the placing of Student at an alternative education placement. The meeting was convened to address a February 26, 2009 recommendation from the Principal to the Student's Disciplinary Committee that Student be placed in the Instructional Guidance Center, a DAEP, because of Student's persistent misbehavior.

23. The School's psychological evaluation was reviewed at Student's March 6, 2009 ARD meeting. It was explained to Student's Mother that the psychological evaluation did not preclude Student's placement in a DAEP. Student's ARD determined that Student's revised BIP was appropriate.

24. During the March 6, 2009 ARD meeting, a Manifestation Determination Review ("MDR") was performed. The details of the discipline referrals listed on the Principal's February 26, 2009 recommendation were discussed individually with Student's Mother's participation. In those instances where Student was referred for vulgar language, classroom disruption or refusal to follow directives, the elements of premeditation, confrontation and a negative exchange between Student and another person were observed. Therefore, Tourette's or any other disability was ruled out as the producing cause of the disability.

25. Student is capable of following the School's Student Code of Conduct and Student knows the difference between right and wrong. Student's misbehavior and refusal to follow school directives is not always related to Student's disability.

26. The classroom misbehavior observed by Student's teachers is primarily in the areas of inappropriate language and responses to teacher direction and a refusal to comply with redirection. The misbehaviors for which Student was given referrals were more a function of conscious deliberate actions rather than impulsive acts symptomatic of either Tourette's Syndrome or Attention Deficit Hyperactivity Disorder. While Student has displayed some impulsivity and distractibility in Student's classes, and such behavior can be indicators of Tourette's or ADHD, Student's referrals involved incidents where Student controlled Student's self in a situation and decided to make an inappropriate comment or take an inappropriate action. Student's teachers cannot confirm Student's disabilities as the producing cause of Student's assignment to a DAEP.

27. The March 6, 2009 ARDC determined that Student's IEP would remain in place with the addition of a new FBA and an additional intervention added to the BIP by the recommendation of the School Psychologist.

28. The Disciplinary Committee met during the March 6, 2009 ARD meeting, and decided that Student would be placed at the Instructional and Guidance Center. Student's Parent presented a letter from Student's Psychologist which stated:

“[Student] has been compliant with treatment and medication management; therefore, I do not recommend for [Student] to attend the alternative program. Due to [Student's] condition, any change may cause an immense reaction in condition. I'm afraid that if [Student] attends the alternative program [Student's] condition may aggravate plus treatment will be ineffective.”

Student's Parent also stated that she felt that an alternative program had not been addressed in Student's former BIP. School District Administrator stated that Student's BIP followed the Student Code of Conduct, which did allow for a student to be moved to an AEP.

29. The March 6, 2009 ARDC determined that a change in Student's placement was necessary, determining that education in the regular classroom cannot be achieved satisfactorily, and that Student has been mainstreamed to the maximum extent possible; the ARD recommends that Student is offered a continuum of services and counseling requiring small group/individual setting in a less distracting environment.

30. Student's BIP, included in the March 6, 2009 ARD assessment, recommends Social Training Skills, including instruction in pro-social behavior, teaching alternative behaviors, coaching in problem-solving situations, and role play/modeling of social skills.

31. At the March 6, 2009 ARD meeting, Student's Mother agreed with Student's FBA and Student's revised BIP. Student's Mother did not, however, agree with the ultimate findings of the rest of the ARD committee.

32. During the discussion in the March 6, 2009 ARD meeting, Student's Parent presented a letter from Student's Physician regarding Student's disabilities. Student's physician asserted concerns about detrimental effects to Student's condition and treatment under an alternative program. The ARD took these concerns under consideration.

33. Student's Parent declined an offered opportunity to offer a detailed, written statement of disagreement to the decision of the March 6, 2009 ARDC.

34. At the March 6, 2009 ARD meeting, Student's ARD changed Student's BIP following a review of Student's FBA. The most important change in the Student's BIP was the inclusion of placement in the Instructional Guidance Center as a consequence to Student's misbehavior.

35. At the March 6, 2009 ARD meeting, the ARD Committee reviewed Student's FBA; the revisions to the Student's BIP; and heard the recommendations of two psychologists to the BIP.

36. At the March 6, 2009 ARD meeting, the ARD Committee listened to summaries of the eleven incidents listed on the February 26, 2009 Principal recommendation. The ARD Committee concluded that two of the eleven incidents were manifestations of Student's disability and the rest of the incidents involved a conscious choice from Student.

37. The March 6, 2009 ARD assessment included a manifestation determination that determined that the disciplinary infractions on the part of the student were not caused by, nor had a direct and substantial relationship to, Student's disability, nor was the conduct in question the direct result of School District's failure to implement the IEP, therefore not a manifestation of Student's disability.

38. During the March 6, 2009 ARD meeting, the School's LSSP explained that all but two of the discipline referrals contained in the Principal's February 26, 2009 recommendation were not related to Student's educational disability. The rest of the ARDC agreed with the LSSP's conclusions, with the exception of Student's Mother.

39. Prior to the March 6, 2009 ARD, Student was advised that the coming March 6, 2009 meeting could result in Student's placement in a DAEP. After Student was advised of this possibility, the repetitive misbehaviors that had characterized Student's classroom attendance for the 2008-2009 school year suddenly stopped.

40. Student has demonstrated an ability to control Student's behavior in a classroom over extended periods of time. Since Student has been placed in the DAEP, Student's teachers have experienced Student's greatly improved behavior and none of the misbehavior that required discipline referral. Moreover, Student has caught up in the DAEP with the schoolwork in which Student had been behind while in the Student's previous placement.

41. The School's Instruction and Guidance Center is an alternative educational program for students who have broken the code of conduct and are required to be in isolation from the rest of the regular education population. It is a small setting that provides very structured behavioral interventions. It is not a militaristic or "boot camp" environment. It is a setting that is an appropriate consequence for Student's misbehavior.

42. Student's DAEP classroom setting is a very structured setting. Student's daily goals and assignments are written on a white board in the classroom. There are no other students in the classroom with Student. Student arrives at school at 8:15 a.m., after the rest of the school begins its day at 7:55 a.m. Student is dropped off and picked up in the back of the school and is not allowed to have lunch with the rest of the Student population.

43. School maintains a discipline placement called the STAR program. This program is extremely aggressive and structurally rigid and is administered in the manner of a "boot camp." This placement was considered by Student's Principal but not proposed at the March 6, 2009 ARD meeting because the program was considered inappropriate for Student, given Student's disabilities and childhood history of abuse. Student's Mother concurs with the inappropriateness of the STAR program for Student.

III. Discussion

The record in this case contradicts all but two of the five issues raised by the Petitioner. However, the two issues as listed in this Decision, four and five, do not support the relief requested by Petitioner. The Respondent did change Student's placement to a DAEP during the March 6, 2009 ARD meeting. However, this change in placement was made appropriately and with ample notice to Student's Mother that such a change in placement was possible during the scheduled ARD meeting. Respondent did not give Student's Mother a copy of the draft ARD documents prior to the March 6, 2009 ARD meeting, but this is not required by IDEIA. Moreover, the Respondent offered Petitioner's Mother a copy of the ARD documents the next business day.

Issues two and three were in greater dispute in this case, but the record facts do not support Petitioner's requested relief. Petitioner asserts that Student has Tourette's Syndrome that the disability is largely responsible for Student's classroom misbehaviors and that the Respondent failed to recognize this position or consider Student's physician's position that a DAEP placement would be deleterious to Student's medical treatment. There appeared to be some dispute between the parties as to whether Student actually displayed Tourette's symptoms at all, or was merely oppositional. This dispute did not influence this Decision, on issues two and three. *Assuming that Student has Tourette's*, the more convincing testimony was that Student's persistent disruptive classroom misbehavior was not a manifestation of Student's Tourette's or any other eligible disability. The record shows that Student was able to control Student's behavior most of the time. The sudden and sustained drop in misbehavior following Student's placement in the School's Instruction and Guidance Center does not support Petitioner's position. Neither does the record of the March 6, 2009 ARD meeting. The convened ARD Committee considered and discussed Student's doctor's written admonition against placement in the DAEP. The professional opinions of psychologists in attendance at the ARD meeting and a

revised FBA were more persuasive on the manifestation determination issue and the appropriateness of the DAEP.

Finally, the ultimate issue of the case, Petitioner's issue one, supports denial of the requested relief. Student's misbehavior did not appear to be controlled adequately by the BIP developed during the May 7, 2008 ARD meeting. Student was making educational progress but Student's school behavior was not being improved sufficiently. Respondent's decision to increase meaningful consequences seems to be a reasoned change in behavior intervention. Based on the marked improvement in Student's behavior in the DAEP and Student's increase in academic productivity, the ARD Committee's placement decision is supported by the results. Student was and is receiving a FAPE. The structured environment may not be to Student's liking and may even be causing Student some emotional distress. However, the change seems to be increasing Student's academic progress. Hopefully, when Student works Student's way out of the DAEP, the lessons learned will have lasting impact.

IV. Conclusions of Law

1. Petitioner is a student in the School District who is eligible for special education services based on their 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 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 has provided Petitioner with a free and appropriate public education before and after Student's placement in the DAEP. 20 U.S.C. §1412(a)(1); *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir 1997).
4. Respondent's placement of Student in a discipline alternative educational placement was appropriate and done using appropriate procedures.
5. There is no requirement in IDEIA or its implementing regulations that ARD documents be given to a student's parents during an ARD meeting. 34 C.F.R. §§300.613-300.614.

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 DENIED.

SIGNED this 29th day of April, 2009.

Stephen P. Webb
Special Education Hearing Officer

DOCKET NO. 168-SE-0309

STUDENT	§	BEFORE A SPECIAL EDUCATION
	§	
v.	§	HEARING OFFICER FOR THE
	§	
INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

SYNOPSIS

Issue: Whether School District provided a free appropriate public education to a ** year old Student diagnosed with an emotional disturbance, Attention Deficit Hyperactivity Disorder and Tourette’s Syndrome.

Federal Citation: 34 C.F.R. §300.300; §§300.340-300.347; *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

Texas Citation: 19 T.A.C. §§89.108-89.1055.

Held: For Respondent. Respondent’s individualized educational program for Student allowed Student to make more than minimal educational progress.

Issue: Whether School District appropriately conducted a Manifestation Determination Review for Student.

Federal Citation: 34 C.F.R. §300.530(e).

Held: For Respondent. Respondent conducted an appropriate Manifestation Determination Review wherein Student’s FBA was updated, Student’s BIP reviewed, and all available input from all stakeholders and professionals, including Student’s personal physician, were considered. The decision on the Manifestation Determination Review was supported by the record.

Issue: Whether Student’s placement in an Alternative Educational Placement was appropriate.

Federal Citation: 34 C.F.R. §300.530(d)(1).

Held: For Respondent. Student’s placement in the DAEP was appropriate and the decision was based on appropriate procedure.

Issue: Whether School District appropriately served notice to Student's Parent for an Admission, Review Dismissal Meeting.

Federal Citation: 34 C.F.R. §§ 300.300, 300.322, and 300.503.

Texas Citation: 19 T.A.C. §89.1045(a).

Held: For Respondent. Student's Parent was provided with ample notice of all substantive actions regarding Student's educational program and placement.