

DOCKET NO. 201-SE-0305

Student BNF Parent, Petitioner	§	BEFORE A SPECIAL EDUCATION
	§	
VS.	§	HEARING OFFICER FOR
	§	
FLOUR BLUFF INDEPENDENT SCHOOL DISTRICT,	§	
Respondent	§	THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

ATTORNEY FOR PETITIONER

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Statement of the Case

Petitioner, Student, by his next friend Parent, brought this action against Flour Bluff Independent School District (hereafter Flour Bluff ISD) pursuant to the Individuals with Disabilities Education Act (hereafter IDEA), as amended by the IDEA Amendments of 1997, 20 U.S.C. §1400 *et seq.*, seeking to change Petitioner’s educational placement from the general curriculum with special education support services to a more restrictive educational placement in a social intervention class. Petitioner also complains that Flour Bluff ISD has failed to comply with the student’s behavioral intervention plan (hereafter BIP) since March 2004.

Procedural History

Petitioner filed this request for a due process hearing on March 2, 2005. I was assigned as the hearing officer on March 4, 2005. A telephone prehearing conference was held on March 28, 2005, wherein the issues for hearing were identified. The parties jointly requested a continuance of the April 12, 2005 hearing date due to scheduling conflicts and to allow them additional time to prepare for the hearing. This request was granted and the hearing was rescheduled and held on May 23, 2005. The parties also agreed to extend the decision due date to June 16, 2005. Petitioner was represented at the hearing by his legal counsel, Mr. Christopher Jonas, with the Center for Special Education Law. Flour Bluff ISD was represented by its legal counsel, Ms. Cynthia Buechler, with the law firm of Buechler & Associates.

Based upon the evidence presented and admitted into the record of this proceeding, I make the following findings of fact and conclusions of law:

Findings of Fact

1. Student is an ***-year-old *** grade student who resides with his mother and step-father within the jurisdictional boundaries of Flour Bluff ISD. [Hearing Transcript, pages 13-14, hereafter T. ____].
2. Flour Bluff ISD is a political subdivision of the State of Texas and a duly incorporated independent school district located in Nueces County, Texas.
3. Student began *** grade at a Charter School in California. During the fall semester of the 2003-2004 school year, Student received numerous office referrals for hitting and threatening to kick his teacher, throwing rocks at other students and refusing to comply with adult instructions. [Petitioner’s Exhibit #10, hereafter P. Exh. #____].

4. In September/October 2003, Student was referred for an evaluation to determine if he had an Attention Deficit Hyperactivity Disorder. This was precipitated by his disrespectful, defiant and aggressive actions towards his teacher and others. He had high academic and language skills, but poor communication skills, poor impulse control and poor peer relations.
5. Student was diagnosed by his physician with Attention Deficit Hyperactivity Disorder and Oppositional Defiant Disorder. [T. 21]. He was prescribed Concerta for his hyperactivity, and it slightly improved his behavior. [T. 21].
6. In January 2004, when Student was in the *** grade, he moved with his family from California to Corpus Christi, Texas, and enrolled in Flour Bluff ISD. [T. 23]. This move adversely affected Student and after an initial adjustment period in his new school, his behavior deteriorated. [T. 22].
7. *** [P. Exh. #1, page 30].
8. *** [P. Exh. #1, pages 29-30].
9. *** [P. Exh. #1, page 29].
10. *** [P. Exh. #1, page 25-28].
11. Due to concerns about Student's behavior, he was referred for an evaluation to determine if he had a disability and needed special education and related services. [Respondent's Exh. #1, hereafter R. Exh. #__].
12. *** [P. Exh. #1, page 23].
13. *** [P. Exh. #1, page 22].
14. *** [P. Exh. #1, page 21].
15. *** [P. Exh. #1, page 20].
16. On March 30, 2004, Student became upset for not getting enough stars on his classroom behavior chart and hit the bus driver with his backpack and hid under a seat. While being carried off the bus to the office, he screamed obscenities and was kicking and hitting. In the office, he threw objects and kicked and spit on staff. As a result of this incident, he was assigned to in-school suspension for 3 days and suspended from the bus for 5 days. [P. Exh. #1, page 17].
17. On March 31, 2004, Student became upset and had to be restrained for hitting and kicking his teachers. [P. Exh. #1, page 15].
18. In April, 2004, Student's mother took him to a mental health professional who reviewed his records and recommended that he be taken to the Padre Behavioral Hospital for an emergency admittance. [T. 34].

19. Student was admitted to the Padre Behavioral Hospital on April 14, 2004 due to his extreme aggressive, violent and assaultive behaviors. These behaviors continued in the hospital setting, where he kicked and punched hospital staff. His DSM-IV Axis I diagnosis was: A. Bipolar Affective Disorder, severe, recurrent, with psychotic features; B. Intermittent Explosive Disorder; and C. Attention Deficit Hyperactivity Disorder. He remained in the hospital for one week. [P. Exh. #8, T. 34]. He remains under the care of a physician and is prescribed medication for his hyperactivity and behavior.
20. On April 19, 2004, Flour Bluff ISD completed its psychological evaluation of Student. The school psychologist diagnosed Student with an Attention Deficit Hyperactivity Disorder and a Major Depressive Disorder. Recommendations for dealing with Student's behavior in the school setting included counseling; academically challenging assignments; developing a social skills program; developing a behavior intervention program to improve his skills for expressing frustration and resolving conflict; improving his skills in coping with frustrating situations; and developing a program to improve his interaction with others. [R. Exh. #2].
21. On May 4, 2004, an ARD Committee meeting was held wherein Student was found eligible for special education services as a student with an emotional disturbance. The ARD Committee determined that Student could not follow the Student Code of Conduct. Instead, it developed a BIP designed to assist Student in developing appropriate reactions to requests initiated by adults and to improve his behavior during transitions, since many of his behavior outbursts occurred during these periods. The BIP included positive behavior reinforcers, work completion contracts, allowing for a cooling-off period, a home-school reward system, teaching alternative behaviors, and providing for immediate consequences. It also included consequences for bad behavior. These included parent conferences, in-school suspensions and suspensions for up to 3 consecutive days without ARD, physical restraint/therapeutic holding, and emergency removal. The ARD Committee also provided for Student to receive individual and group counseling services 5 times during a 6 week period to work on improving his social skills. Additionally, the ARD Committee designed an IEP to assist Student in developing independent study skills. The ARD Committee determined that Student's educational placement would be in the general curriculum, with content mastery assistance 15 minutes per week. [R. Exh. #4].
22. A Star Behavior Chart was also implemented for Student, wherein he would receive stars and points for good behavior that could then be redeemed for rewards. [T. 29-30].
23. In October, 2004, despite implementation of the BIP, Student had significant behavioral problems. On October 1, 2004, he struck another student on the left cheek with his fist while on the school bus. As his consequence for this act of aggression, Student was suspended from the bus for 5 days and removed from the Good Choice Club. The Good Choice Club is a club available for all students who maintained good behavior during a 6-week grading period. They receive a field trip as a reward. [T. 127].
24. On October 8, 2004, Student stabbed a staff member with his pencil. He then refused to go to the office and latched onto his desk. While Student was kicking and fighting, his teacher cleared the classroom of students. Staff members then physically escorted him to another class. When there, he crawled under a table, grabbed a wire and threw it at a staff member. [P. Exh. #1].

25. *** [P. Exh. #1].
26. *** [P. Exh. #1].
27. *** [P. Exh. #1 and 3].
28. *** [P. Exh. #1].
29. The Social Intervention class is a self-contained behavior class designed to assist and educate behaviorally challenged students.
30. As a result of the Student's numerous acts of physical aggression towards others, an ARD Committee meeting was held on November 5, 2004. Student's mother was concerned that he was not being successful behaviorally in the regular education setting and requested that Student be placed in a more structured, self-contained classroom. However, in lieu of changing Student's educational placement, the ARD Committee sought a Functional Behavioral Assessment ("FBA") that was to be completed by December 10, 2004. Additionally, the ARD Committee assigned the Social Intervention teacher/staff to assist in Student's classroom and to oversee Student during transition times. The ARD Committee also modified his IEP to allow him to go the Social Intervention classroom in lieu Content Mastery for academic and behavioral assistance and to gain composure. Further, the ARD Committee agreed that Student would start and end his school day in the Social Intervention class. [P. Exh. #3].
31. The November 5, 2004, ARD Committee also modified Student's BIP. First, it identified three prioritized behaviors: (1) appropriate reaction to adult directions; (2) appropriate transition; and (3) work at work times. Then it eliminated several behavior strategies for increasing prosocial behaviors but added the following behavior strategies: (1) a point system; (2) permit student to remain in a quiet, non-threatening, non-stimulating place to regain control when upset (a safe area) – in the classroom or in the Social Intervention classroom; and (3) Crisis Plan, including CPI escort and therapeutic control by CPI certified staff. [R. Exh. #4 and 5].
32. Additionally, in November, 2004, Student was assigned to another *** grade class and a new teacher because of a conflict with another student. [T. 85]. Student liked his new teacher and this change in placement also improved his behavior.
33. The FBA was completed on December 8, 2004, but was not reviewed by the ARD Committee until January 26, 2005. Student's physical aggression was found to be a function of a need for attention from adults, a need to control adults, a lack of trust, and poor motivation for appropriate behavior. Recommended strategies for behavior improvement included allowing the student to decide between appropriate choices; learning to communicate expectations without threats; developing communication skills; making preferred activities contingent upon participation and work completion; and rehearsing appropriate behaviors. The ARD Committee reviewed the FBA, but made no changes to Student's BIP. However, the ARD Committee developed a Crisis Intervention Plan to address Student's physical aggression. The Plan provided for trained staff members to physically escort and restrain Student if he is unable to "cool off" on his own and allowed for his placement in the Social Intervention class in lieu of in-school suspension if it was deemed more constructive. [R. Exh. #6].

34. From November 5, 2004 through January 26, 2005, Student did not engage in any acts of physical aggression at school. [R. Exh. #6]. However, there were several occasions when he acted up and disrupted his class and refused to comply with teachers' requests to do his work. These disruptions, however, were minimal and of short durations and did not result in a significant loss of classroom instructional time. For a vast majority of this time, Student remained on task and followed directions. [R. Exh. #7].
35. From January 27, 2005, through March 31, 2005, Student did not engage in any acts of physical aggression at school. He disrupted the class on at least 7 occasions during the 34 days of school for which behavior records were kept. Most of these disruptions were minor in nature and of short duration. For a vast majority of the instructional time, Student remained on task and followed directions. [R. Exh. #7].
36. On March 24, 2005, Student earned a reward for a root beer and a Flurry. However, his parents notified school officials that Student had been grounded for misconduct at home and that he could not have treats. [R. Exh. #7]. Consequently, his teacher gave him an IOU so he could receive the treats later when he was not grounded.
37. Although Flour Bluff ISD contended that Student's parents were thwarting its attempts to appropriately implement the BIP, this was not the case. [T. 82]. Instead, March 24, 2005 incident reflects the parties' ability, when necessary, to coordinate the disciplinary consequences for Student between home and school.
38. Student liked his Social Intervention teacher and began spending more time in the Social Intervention class, so much so, that his teachers increased the number of stars (points) he would receive for remaining in his regular classes. This modification was successful in reducing the number of minutes he spent in the Social Intervention class. [R. Exh. #6; T.88, 90].
39. On April 13, 2005, Student was unable to go on a Good Choice field trip because his parents refused consent because of his poor conduct at home. He had a behavioral outburst at P.E and had to be removed for physical aggression. [R. Exh. #7].
40. *** [R. Exh. #7].
41. On April 22, 2005, Student was disruptive on the bus and became physically aggressive toward the bus staff. [R. Exh. #7].
42. On May 2, 2005, Student became angry when he could not redeem his IOU for a Flurry because he had been grounded at home. He refused to work, began throwing things, kicking desks, hit his teacher and tried to run from the classroom. The staff had to restrain him. [R. Exh. #7].
43. Student is an extremely bright student. Despite his behavioral difficulties, he received passing grades in all subject areas. [R. Exh. #8].
44. During the 2004-2005 school year, Student made great progress behaviorally, but still intermittently engages in explosive acts of aggression directed toward teachers and peers.
45. Prior to implementation of his BIP on May 4, 2004, the severity and frequency of Student's aggressive and disruptive behaviors were significant. After implementation of

- his BIP, the severity and frequency of his inappropriate behaviors initially declined. In October 2004, when the aggressive behaviors reappeared, the ARD Committee appropriately addressed this escalation by revising his IEP and implementing the Crisis Intervention Plan.
46. Student's behavioral progress during the past school year can be attributed to the competent implementation of his BIP and the cooperation between home and school, albeit reluctantly, in implementing his BIP.
 47. Student still has significant social and behavioral problems. He lacks appropriate social skills, and although he interacts with other students at school, he has no friends, and other children fear him. Additionally, he still prefers to spend most lunch periods in the Social Intervention class having lunch with his teacher instead of with his classmates. [T. 41, 44].
 48. The potential harmful effects from maintaining Student in regular education classes include the loss of instructional time for Student and other students due to his disruptive behavior and the potential that he might injure staff or students due to his intermittent acts of physical aggression. These potential harmful effects are overcome and adequately addressed by modifications to his IEP, including his BIP and Crisis Intervention Plan. These modifications allow for Student to be educated successfully and in the regular education environment.
 49. Flour Bluff ISD has provided Student with a free appropriate public education since May 4, 2004.
 50. Flour Bluff ISD has appropriately followed Student's BIP since its implementation on May 4, 2004. School District staff implemented the behavior interventions and strategies contained in the student's BIP and modified those behavior interventions and strategies when necessary to assist him in maintaining his composure and improving his behavior.

Discussion

This is a least restrictive environment case involving a *** grade student with behavior problems. This is a somewhat unusual case in that the student is being educated in the general curriculum supplemented by support services through special education, but his mother seeks a more restrictive, structured behavior intervention program to deal with her child's aggressive behavior and poor social skills.

The IDEA provides that to the maximum extent appropriate, children with disabilities are to be educated with children who are not disabled and that removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. §1412 (a)(5)(A). The IDEA's implementing federal regulations also provide that when selecting the least restrictive environment, the ARD Committee (IEP Team) give consideration to any potential harmful effect on the student or on the quality of services that he or she needs and the student not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum. 34 C.F.R. §300.552(d) and (e).

The primary issue in dispute is whether Student's behavior problems can be appropriately addressed in the regular education environment with special education support services from the Social Intervention staff. Subsumed in this issue is whether the potential harmful effects to Student from this placement outweigh the IDEA's presumptive benefits from being educated with children without disabilities. Also subsumed in this issue is whether Student otherwise needs a quality of services unavailable in regular education setting.¹

Petitioner contends that potential harmful effects to Student and others from placement in the regular educational setting outweigh any benefit he might derive from being educated with children without disabilities. Petitioner points to the severity of Student's behavior outbursts, his propensity to lash out and harm others, and his lack of appropriate social skills, as potential dangers to Student and to others. Petitioner also claims that these behavioral outbursts indicate a need for a quality of services unavailable in the regular education setting. Petitioner claims that Student requires a more structured educational setting with staff trained in behavior strategies and techniques to bring his aggressive behaviors under control and to provide him with the social skills training he needs to make friends and be accepted by others. Moreover, Petitioner fears that if Student is left in his current placement, he will lose control of his temper and injure a teacher or another student.

The evidence confirms the potential for Student to be physically aggressive towards school staff and other students and that he has the ability to cause injury to himself or others. As the most recent behavioral incident on May 2, 2005 indicates, despite behavioral progress, Student still has significant problems, including the propensity to lose self-control and lash out at others. Accordingly, based on a preponderance of the evidence presented, I find that the potential harmful effects from maintaining Student in the regular education setting include the loss of instructional time for Student and other students due to his disruptive behavior and the potential that he might injure staff or students due to his intermittent acts of physical aggression. However, I also find that school officials and the ARD Committee have adequately and timely addressed these concerns through implementation of the Crisis Intervention Plan, along with implementation of an appropriately developed BIP. The Crisis Intervention Plan allows trained staff to perform therapeutic holds on Student when he becomes physically aggressive and to remove him to a safe environment until he gains his composure, while the BIP has been successful in reducing the severity and frequency of his behavioral outbursts. The combination of these plans has allowed Student to be successfully educated in the regular education environment. The loss of instructional time due to Student's behaviors did not significantly interfere with his education or that of other students and has been lessened over the course of the school year Student has made great progress during the past school year in learning to control his behavior. Prior to implementation of his BIP beginning on May 4, 2004, the severity and frequency of his

¹ School districts must carefully examine the educational benefits, both academic and nonacademic, available to a child with a disability in a regular classroom. Among the factors to be considered are the advantages derived from modeling the behavior of children without disabilities; the effects of such inclusion upon the other children in the class, both positive and negative; and the cost of necessary supplementary services. *Barnett v. Fairfax County School Board*, 927 F.2d 146, 153-54 (4th Cir.), cert. denied, 112 S. Ct. 175 (1991); *Daniel R.R.*, 874 F.2d 1036 (5th Cir. 1989). However, the preference or presumption in favor of inclusion will not be rebutted unless it is shown either that the child's disabilities are so severe that he or she will receive little or no benefit from inclusion; that he or she is so disruptive as to significantly impair the education of other children in the class; or that the cost of providing an inclusive education "will significantly affect other children in the district. *Daniel R.R.*, 874 F.2d at 1048-50.

aggressive and disruptive behaviors were significant. After implementation of his BIP, the severity and frequency of his inappropriate behaviors initially declined. In October 2004, when the aggressive behaviors reappeared, the ARD Committee appropriately addressed this escalation by revising his IEP and implementing the Crisis Intervention Plan. Student's behavior charts confirm that over the course of the school year, there has been a reduction in the frequency of his aggressive behaviors, in the number of classroom disruptions, and in the number of his refusals to comply with teacher and adult directives.

Accordingly, based on a preponderance of the evidence presented, I find that the potential harmful effects from educating Student in the regular education environment with special education support services are overcome and adequately addressed by the modifications to his IEP, including his BIP and Crisis Intervention Plan. These modifications allow for Student to be educated successfully in the regular education environment.

Accordingly, based on the preponderance of the evidence, I find that Student's current educational placement in regular classes, with support services from the Social Intervention staff, with access to the Social Intervention classroom on an as needed basis, along with a well-planned Crisis Intervention Plan, is the least restrictive environment for implementation of his IEP.

Student still has significant social and behavioral problems. He lacks appropriate social skills, and although he interacts with other students at school, he has no friends, and other children tend to fear him. Additionally, he still prefers to spend most lunch periods in the Social Intervention class having lunch with his teacher instead of with his classmates. These are issues that the ARD Committee may wish to consider when reviewing Student's IEP. The ARD Committee has the ability to reconsider a more structured educational placement should the severity and frequency of Student's aggressive behaviors increase or should his disruption of the instructional time in the regular education setting become significant.

The remaining issue involves Petitioner's claim that Flour Bluff ISD failed to appropriately implement Student's BIP. I find a lack of evidence to support this claim. The BIP was developed and became effective on May 4, 2004, and was supplemented and modified at the ARD Committee meeting on November 5, 2004. Petitioner failed to point to any occasion in which the BIP was not followed and my review of the record has failed to locate any.

I find that Flour Bluff ISD has provided Student with a free appropriate public education since May 4, 2005.

Conclusion of Law

After due consideration to 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's IEP, effective from May 4, 2004 to May 4, 2005, as modified by the November 5, 2004 and January 26, 2005 ARD Committees, is appropriate and enabled him to be involved in and progress in the general education curriculum. 34 C.F.R. §300.347(a) (2).
2. Student's IEP provided for his education with children who are not disabled to the maximum extent appropriate. 20 U.S.C. §1412 (a)(5)(A).

3. In selecting the least restrictive environment, Respondent appropriately considered the potential harmful effect on Student and the quality of services that he needed when it developed his IEP, BIP and Crisis Intervention Plan for implementation in the regular education environment. 34 C.F.R. § 300.552 (d).
4. Student's current educational placement in regular classes, with support services from the Social Intervention staff, with access to the Social Invention classroom on an as needed basis, along with a well-planned Crisis Intervention Plan, was the least restrictive environment for implementation of his IEP.
5. Student received a free appropriate public education from Flour Bluff ISD from May 4, 2004 through May 4, 2005. 20 U.S.C. §1401(a)(8).

ORDER

After due consideration of the record and the foregoing findings of fact and conclusions of law, I ORDER that all relief sought by Petitioner is DENIED.

Finding that the public welfare requires the immediate effect of this Final Decision and ORDER, I hereby make it effective immediately.

SIGNED this 16th day of June, 2005.

/s/ James W. Holtz

James W. Holtz
Special Education Hearing Officer

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SYNOPSIS

Issue: Whether *** grade student with intermitted explosive and aggressive behaviors should be removed from his educational placement in the general curriculum with special education support services to a more restrictive educational placement in a social intervention class?

Held: For School District. The school district developed and implemented an appropriate IEP, BIP and Crisis Intervention Plan that allowed the student to remain in the general curriculum with minimal disruptions of the instructional time. When the student became disruptive, he was either removed from the class or allowed to proceed to the social intervention class to gain composure. The potential harmful effect to the student and others from placement in the general curriculum with support services was adequately addressed and overcome by a Crisis Intervention Plan. The Crisis Intervention Plan allowed trained staff to perform therapeutic holds on the student when he became physically aggressive. Additionally, the student's IEP had social skills goals and objectives that the counselor implemented. As a result, the student's aggressive behaviors diminished in severity and frequency during the school year. The student was provided with an IEP that allowed him to be educated with children without disabilities to the maximum extent appropriate.

Cite: 34 C.F.R. §300.347(a) (2).

Issue: Whether School District failed to appropriately implement student's BIP?

Held: For School District. The preponderance of the evidence established that the School District staff implemented the behavior interventions and strategies contained in the student's BIP and modified those behavior interventions and strategies when necessary to better assist the student in maintaining his composure and improving his behavior.

Cite: 20 U.S.C. §1401(a)(8).