

Student	§	BEFORE A SPECIAL EDUCATION
	§	
BNF Parent	§	
	§	
v.	§	HEARING OFFICER FOR THE
	§	
NORTHSIDE INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Petitioner, Student bnf Parent(hereinafter Student or Petitioner) brings this action against Respondent Northside Independent School District (hereinafter Respondent or NISD) under the Individuals with Disabilities Education Act (hereinafter IDEA), 20 U.S.C. §1400 *et. seq.*

Petitioner alleges that Respondent denied her a free appropriate public education in violation of the provisions of IDEA in the following particulars:

1. Failure to identify all areas of Student's disabilities, i.e. an emotional disturbance;
2. Failure to provide an appropriate placement and services to address Student's emotional and behavioral needs;
3. Failure to provide appropriate assessment of Student and failure to provide an Independent Educational Evaluation (IEE) at public expense;
4. Failure to provide the requisite number of speech therapy hours for Student;
5. Failure to provide appropriate IEPs and services to address Student's learning disability in the area of reading;
6. Failure to implement Student's IEPs;
7. Inappropriate placement of Student into an alternative educational program in October 2003 as a result of behaviors that are manifestations of Student's emotional disability; and
8. Deliberately attempting to push Student out of school in Northside ISD by unfairly targeting her with school discipline.

For relief, Petitioner seeks reimbursement for an IEE conducted by Dr. *** , counseling for Student, identification of Student as a student with an emotional disturbance and the development of a placement and programming that addresses her behavioral and emotional needs, implementation of Student's IEPs, development and provision of appropriate services that address Student's learning disability in reading, and the provision of all speech therapy services required by Student's IEPs.

Judith Sanders Castro of Texas RioGrande Legal Aid, San Antonio, Texas represents Petitioner in this cause. Craig Wood of San Antonio, Texas represents Respondent.

PROCEDURAL HISTORY

Petitioner filed this request for due process on October 28, 2003. Following a pre-hearing conference and the granting of a continuance, the matter was set for hearing on January 9, 2004, with a disclosure deadline of December 23, 2003.

On January 7, 2004, Respondent filed a Motion to Strike non-timely evidence on the grounds that Petitioner failed to comply with the disclosure deadline of December 23, 2003. After consideration of Respondent's Motion and Petitioner's Motion for Continuance made at a pre-hearing conference on January 8, 2004, the Hearing Officer granted Respondent's Motion to Strike with respect to all non-disclosed evidence. The Hearing Officer determined that Petitioner, her next friend, Parent, and a previously disclosed expert witness, Dr. ***, could testify. The Hearing Officer denied Petitioner's Motion for Continuance for lack of good cause.

The matter came on for hearing on January 20, 2004. At the conclusion of Petitioner's presentation of evidence, Respondent moved for judgment on the grounds that Petitioner failed to meet her burden of proof on all issues. *Tatro v. Texas*, 703 F.2d 823 (5th Circ. 1983). The Hearing Officer granted Respondent's motion for judgment with respect to issue numbers 4-8 above based on Petitioner's failure to present evidence sufficient to allow a finding in her favor. The Hearing Officer denied Respondent's motion with respect to issue numbers 1-3 and Respondent proceeded to present its case pertaining to those issues.

The parties filed post-hearing briefs on January 26, 2004. The decision of the Hearing Officer is due on or before February 6, 2004.

FINDINGS OF FACT

1. Student is a student in the *** grade at *** School in NISD. Student lives within the jurisdictional boundaries of NISD, a political subdivision of the State of Texas and a duly incorporated school district.
2. Student is eligible for special education services under IDEA as a student with a learning disability.
3. Prior to the 2003-2004 school year, Student's *** grade year, Student did not exhibit behavioral or emotional problems in the school environment of any significance.
4. Beginning this school year, Student began to demonstrate behavioral problems at school that have resulted in numerous disciplinary referrals to detention, In School Suspension, suspension, and finally, a referral to an Alternative Educational Placement (AEP).
5. Student's referrals are generally due to being tardy or truant, chewing gum, being disruptive in the classroom, or demonstrating a defiant or disrespectful attitude.
6. During this *** grade year, Student has exhibited emotional distress about school.

7. Student's problems at school result primarily from difficult relationships with two of her teachers. In addition, Student feels frustrated with her inability to keep pace with her academic work and feels she needs more assistance and support to complete her work.
8. Student's *** grade grades are good, with the exception of history and reading, the two classes in which she does not get along with the teachers.
9. Student's mother requested that NISD evaluate Student for a possible emotional disturbance due to her increased emotional and behavioral difficulties.
10. NISD completed a psychological assessment of Student on October 8, 2003. Based on this assessment, Respondent concluded that Student was not eligible for special education services as a student with an emotional disturbance.
11. NISD's psychological assessment of Student was conducted by a qualified evaluator, used a variety of testing instruments, and met best practices for conducting a psychological assessment in accordance with 34 C.F.R. § 300.532.
12. NISD's psychological assessment of Student yielded valid results for Student.
13. Student's Admission, Review, and Dismissal Committee (hereinafter ARDC) properly concluded that Student is not eligible for special education services as a student with an emotional disturbance. The evidence from Respondent's assessment of Student supports the conclusion that Student's behavioral and emotional difficulties are not related to an underlying emotional disturbance as defined by special education regulations.
14. In early November 2003, Dr. *** performed an independent assessment of Student to determine if she qualifies as a student with an emotional disturbance. Dr. *** performed this assessment on a *pro bono* basis.
15. Dr. ***, who holds a doctorate in psychology from the University of Kansas, is an associate professor in the Social and Behavioral Sciences department at St. Phillips College in San Antonio, a regionally accredited institution of higher learning. In his position, Dr. *** teaches abnormal psychology which includes the area of testing and/or identification of behavioral/psychological problems.
16. Dr. *** has experience prior to his work at St. Phillips College performing assessments and making determinations regarding psychological fitness while serving in the U.S. Army and in private practice.
17. Dr. *** holds a license with the State Board of Psychological Examiners in Wisconsin and with the State Board of Examiners of Professional Counselors in Texas. Dr. ***'s Licensed Professional Counselor (LPC) license within the state of Texas is currently designated as inactive.
18. In assessing Student for an emotional disturbance, Dr. *** performed a clinical interview of Student and administered one assessment tool, the State-Trait Anxiety Inventory (hereinafter STAI). Dr. *** did not gather information from school personnel, other than documentary records provided in Student's file, and has no knowledge as to Student's placement at *** or the particulars of her disciplinary infractions during this *** grade school year.

19. Based on the results of the clinical interview and the STAI, Dr. *** believes that Student has the condition of Generalized Anxiety Disorder (GAD), which forms the basis for her eligibility as a student with an emotional disturbance. Dr. *** believes that Student's GAD affects her educational performance and ability to learn and has caused her to engage in inappropriate behaviors during this *** grade year.
20. Dr. ***'s assessment of Student does not meet the standards of evaluation required by 34 C.F.R. § 300.532 as he did not utilize a variety of assessment tools and strategies, did not assess Student in all areas of suspected disability, and was not sufficiently comprehensive to identify all of Student's special education needs.
21. Petitioner presented no evidence that Respondent's program fails to appropriately address Student's behavioral and emotional needs.
22. Petitioner presented no evidence that Respondent failed to provide the requisite number of speech therapy hours to Student.
23. Petitioner presented insufficient evidence to prove that Respondent failed to provide appropriate IEPs and services to address Student's learning disability in reading.
24. Petitioner presented no evidence that Respondent failed to implement Student's IEPs.
25. Petitioner presented no evidence concerning the incident leading to Student's proposed placement in an AEP in October 2003.
26. Petitioner presented no evidence to prove that Respondent is deliberately attempting to push Student out of school in NISD by unfairly targeting her with school discipline.

Discussion

Given the Hearing Officer's granting of partial judgment for Respondent, three issues remain for consideration in the instant proceeding: 1) whether Respondent has improperly failed to identify Student as a student with an emotional disturbance, 2) whether Respondent has failed to provide an appropriate placement and services for Student to address her behavioral and emotional needs; and 3) whether Respondent has failed to provide Student with an appropriate assessment and with an Independent Educational Evaluation (IEE). Petitioner argues that Student's disciplinary record of the *** grade school year is due to her GAD, which forms the basis of an emotional disturbance. Petitioner further argues that Respondent has failed to identify and address this emotional condition, resulting in Student's frequent disciplinary referrals and emotional decline. Finally, Petitioner argues that Respondent's evaluation of Student was invalid due to inconsistent and unreliable testing results.

At the outset, Respondent strenuously argues that Petitioner has not met her burden of proof with respect to these issues in that the expert testimony relied on to prove Student's emotional disturbance, the assessment by Dr. ***, should be stricken by the Hearing Officer as improper due to Dr. ***'s lack of qualifications to conduct a psychological assessment of Student. Respondent further argues that its testing of Student is appropriate and in accordance with the required standards of IDEA and properly concludes that Student is not emotionally disturbed.

The Hearing Officer declines to make factual or legal determinations as to whether Dr. ***'s assessment of Student violates relevant provisions of the Texas Administrative Code and/or the Texas

Occupational Code.¹ Dr. ***'s educational background, experience, and expertise are sufficient to allow him to testify as an expert in this due process proceeding concerning Student's emotional condition.

The Hearing Officer finds that Petitioner failed to produce sufficient probative evidence to establish that Student meets the definition of a student with an emotional disturbance under IDEA. 34 C.F.R. § 300.7 defines emotional disturbance, in relevant part, as "...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." The evidence presented does not support the conclusion that any of the conditions exhibited by Student have existed over a long period of time or to an obvious degree that adversely affects her educational performance. Rather, the evidence suggests that Student began experiencing difficulties at the beginning of this school year, primarily as a result of conflicts with two of her teachers. Further, Student's educational performance is good, with the exception of her grades in the classes taught by the teachers with whom she has a conflict.

The evidence presented portrays a difficult school year due to personality conflicts with certain teachers and possible academic issues, not the existence of a serious emotional disturbance. The Hearing Officer understands that Student's emotional state at this time is fragile and that many of her responses to stressors at school are not appropriate; however, the issue is not whether Student is "doing well" at school, but whether her difficulties result from an emotional disturbance/disability of an enduring nature that noticeably interferes with her education.

Although Dr. *** is qualified to testify as an expert regarding Student's emotional condition, the Hearing Officer concludes that Dr. ***'s assessment of Student fails to satisfy the evaluation standards required by IDEA as set forth in 34 C.F.R. § 300.532. For example, in concluding that Student has an emotional disturbance based on a clinical interview and only one assessment tool, Dr. *** failed to utilize a variety of assessment tools and strategies, or to conduct an evaluation sufficiently comprehensive to identify all of Student's special education needs. Further, Dr. ***'s testimony revealed a lack of factual knowledge about Student's placement and program at school, as well as any specifics concerning her disciplinary infractions, their relationship to her GAD, and their impact on her education. As such, the Hearing Officer finds Dr. ***'s assessment and conclusions concerning Student of little probative value in determining Student's eligibility for special education.

In conclusion, Petitioner did not meet her burden of proving that Student's difficulties in the school setting during this 2003-2004 school year result from an underlying emotional disturbance requiring special education and related services.

With regard to Petitioner's request for an IEE, the Hearing Officer concludes that Respondent's assessment of Student is appropriate such that an IEE is not required at public expense. Further, the IEE completed by Dr. *** was performed on a *pro bono* basis and no fee is owed.

CONCLUSIONS OF LAW

¹ Respondent correctly points out that the provisions of the Occupational Code governing the practice of psychology prevent Dr. *** from representing himself as a **psychologist** or evaluating mental or emotional disorders and disabilities using **psychological techniques** given his licensing as an LPC; however, the provisions of the Occupational and Administrative Codes governing LPCs specifically allow assessment and appraisal in individual settings for the purposes of determining a client's ...mental condition, emotional stability... and for diagnosing mental problems. See, Tex. Admin. Code, § 681.31 and Tex. Occ. Code, § 503.003. Whether Dr. ***'s performance of an assessment on Student complies with his allowed scope of practice under these provisions, particularly given the inactive status of his license, is beyond the scope of this Hearing Officer's jurisdiction and is unnecessary to the determination of whether Dr. ***'s testimony can be properly relied on as expert testimony in this proceeding.

1. Student is a student in the Northside ISD who is eligible for special education services under the IDEA and its implementing regulations as a student with a learning disability.
2. Respondent Northside ISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA. NISD is Student's resident district and has the responsibility to provide her with a free appropriate public education under the IDEA. 20 U.S.C. §1401(a)(18).
3. Student does not meet the eligibility requirements under IDEA as a student with an emotional disturbance. 34 C.F.R. §300.7(c)(4); 19 T.A.C. §89.1040 (c)(4).
4. Respondent's evaluation of Student's eligibility as a student with emotional disturbance is appropriate and was conducted in accordance with 34 C.F.R. §300.532.
5. Petitioner is not entitled to an Independent Educational Evaluation at public expense pursuant to 34 C.F.R. §300.502 (b)(3).
6. Petitioner failed to meet her burden of proof and establish that the educational programs provided for Student by Respondent are inappropriate to meet Student's behavioral and emotional needs. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983).
7. Petitioner failed to meet her burden of proof and establish that Respondent failed to provide appropriate or required services to Student in the areas of speech therapy, reading, or any other area addressed by her IEPs. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983).
8. Petitioner failed to prove that Respondent's proposed placement of Student into an AEP is based on behaviors that are manifestations of Student's emotional disability. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983).
9. Petitioner failed to prove that Respondent is deliberately attempting to push Student out of school in NISD by unfairly targeting her for discipline. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983).

ORDER

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

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

SIGNED and **ENTERED** this 6th day of February 2004.

/s/ Lynn E. Rubinett

Lynn E. Rubinett

Special Education Hearing Officer

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	§	
v.	§	HEARING OFFICER FOR THE
	§	
NORTHSIDE INDEPENDENT	§	
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SYNOPSIS

Issue: Whether Respondent failed to identify all areas of Student’s disabilities, i.e. an emotional disturbance?

Held: For Respondent. Respondent properly concluded, after evaluating Student, that she does not meet the eligibility requirements under IDEA for a student with an emotional disturbance.

Cite: 34 C.F.R. §300.7 (c)(4); 19 T.A.C. §89.1040 (c)(4).

Issue: Whether Respondent failed to provide an appropriate placement and services to address Student’s emotional and behavioral needs?

Held: For Respondent. Petitioner failed to meet her burden of proof and establish that Student’s program and placement do not adequately address her emotional and behavioral needs.

Cite: 34 C.F.R. §300.300.

Issue: Whether Respondent failed to provide an appropriate assessment of Student such that Petitioner is entitled to an IEE at public expense?

Held: For Respondent. Respondent’s evaluation of Student was appropriate and conducted in accordance with the evaluation requirements of IDEA; as such, Petitioner is not entitled to an IEE at public expense.

Cite: 34 C.F.R. §300.532 and §300.502

Issue: Whether Respondent failed to provide the requisite number of speech therapy hours for Student?

Held: For Respondent. Petitioner failed to prove that required speech therapy hours were not provided.

Cite: 34 C.F.R. §300.342

Issue: Whether Respondent failed to provide appropriate IEPs and services to address Student’s learning disability in the area of reading?

Held: For Respondent. Petitioner failed to meet her burden of proof to establish that Respondent did not appropriately address Student's learning disability in the area of reading or provide Student with a free appropriate public education.

Cite: 34 C.F.R. §300.300.

Issue: Whether Respondent failed to implement Student's IEPs?

Held: For Respondent. Petitioner failed to meet her burden of proof to establish that Respondent did not implement Student's IEPs.

Cite: 34 C.F.R. §300.342

Issue: Whether Respondent's proposed placement of Student into an alternative educational program in October 2003 is inappropriate because it results from behaviors that are manifestations of Student's emotional disability?

Held: For Respondent. Petitioner offered no evidence concerning Respondent's proposed placement of Student into an AEP.

Cite: 19 T.A.C. §89.1185(l).

Issue: Whether Respondent is deliberately attempting to push Student out of school in Northside ISD by unfairly targeting her with school discipline?

Held: For Respondent. Petitioner offered no evidence that Respondent was unfairly targeting Student with school discipline to attempt to push her to leave NISD.

Cite: 19 T.A.C. §89.1185(l).