

**DOCKET NO. 099-SE-1103**

<b>Student, Petitioner</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
	§	
	§	
<b>v.</b>	§	<b>HEARING OFFICER</b>
	§	
<b>BROWNSVILLE INDEPENDENT SCHOOL DISTRICT, Respondent</b>	§	<b>FOR THE STATE OF TEXAS</b>

**DECISION OF THE HEARING OFFICER**

**STATEMENT OF THE CASE**

Student (Student or Petitioner), an adult student, requested a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, et seq., as amended.

The issues for hearing were as follows:

- 1) Whether Brownsville Independent School District (BISD) denied Student a free, appropriate, public education (FAPE);
- 2) Whether the district provided appropriate IEPs to address Student's disabilities, including severe agoraphobia and panic attacks, so that he could access instruction;
- 3) Whether Student's IEPs were implemented at his residential placement;
- 4) Whether BISD provided adequate oversight of Student's residential placement;
- 5) Whether Student should remain in his residential placement, as he would like to do, or move to the Brownsville area and receive homebound services and/or other instructional services from BISD, in a group home or other setting;
- 6) Whether Petitioner is entitled to further evaluations.

Petitioner's requested relief includes continued placement at the Atlantis Foundation; appropriate IEPs that effectively address his disabilities so that he can access instruction and earn a high school diploma; full implementation of all IEPs; provision of educational, psychological, neuropsychological, and psychiatric evaluations; and compensatory services in the form of instructional services and related services tailored to his disability.

Held, for Petitioner in part and Respondent in part.

## **PROCEDURAL HISTORY**

Petitioner's request for hearing was received by the Texas Commissioner of Education on November 20, 2003, and was received by the Hearing Officer on the same date. Student, an adult student, appeared pro se. \*\*\*, family friend, and Parent., Student's mother, acted as his advocates. Respondent was represented by Erik Nichols of Henslee, Fowler, et al. law firm.

Telephone prehearing conferences were postponed twice at the request of Parent telephone prehearing conference was held on December 19, 2003, and was transcribed by a court reporter. The parties requested a continuance to allow time for mediation. The continuance was granted. The hearing was reset to January 27 and 28, 2004, and subsequently reset to January 28 and 29, 2004, with a Decision due date of February 24, 2004. The parties were unable to agree on a mediation date and therefore did not mediate the issues. The hearing was held on January 28 and 29, 2004, and the Decision was issued on February 24, 2004.

## **FINDINGS OF FACT**

### **Background**

1. Student had his \*\*\* birthday during the summer of 2003. He is eligible for special education services from BISD as an adult student with emotional disturbance. Student's IQ is well above average. His problems with depression, anxiety, agoraphobia, and obsessive compulsive disorder severely affect his ability to access instruction.
2. Prior to \*\*\* grade, Student attended a private school in Brownsville. In \*\*\* grade, he transferred to a BISD campus. On many mornings before school he had panic attacks characterized by fast heartbeats, sweating, and difficulty breathing. As he progressed through the grades he missed more and more weeks of school in succeeding years. Student last attended a BISD campus in Fall 2000, when he attended \*\*\* School as a \*\*\* for a few days and then stopped attending. BISD attempted to educate him through a homebound setting, but this was not successful because he did not come out of his bedroom at home and school personnel declined to teach him in his bedroom.
3. On January 31, 2001, the admission, review, and dismissal committee (ARDC) placed Student at Atlantis Foundation residential facility in Seabrook, Texas, with his mother's approval. Student began the placement in February 2001, against his will. The August 2001 ARDC report indicated that Student was placed at Atlantis to meet his needs for 24-hour supervision/support, intensive counseling, and intensive behavioral support.
4. The services Atlantis agreed to provide included counseling from a psychologist 2 – 5 times per week; family counseling for student and parent one time monthly; academic instruction in a group setting or one to one as needed; work with private school to identify need for specific one to one tutoring and obtain a qualified tutor to provide the service; community-based instruction (CBI) activities offered five times per week; progress reports from psychologist three times per week; facilitate access to needed medical services; identify a psychiatrist who can prescribe medications for student; work collaboratively with psychiatrist and psychologist to assist Student in accepting a regimen of medication; facilitate Student's evaluation by neuropsychologist and vision

specialist. Most of these services were not provided in full and some were not provided at all, from at least March 1, 2003, to the present time.

5. Atlantis provides transportation for residents to private schools in the area. Student attended Friendswood Christian School for approximately 14 days in April, 2002, and occasionally attended school later in that year. He did not attend school frequently enough to earn any credits. He was not provided with a tutor, although Atlantis staff at times helped him with his homework when he was attending classes. Since at least March 1, 2003, Student has not attended school at all.
6. Student's behavioral intervention plan (BIP) drafted in August 13, 2001, had three goals: 1) Participate in CBI outings; 2) Participate in academic settings and academic activities, small group academic settings outside of residential program; 3) Maintain a schedule during the day. Desired activities were to be used as reinforcers: driving lessons, drum lessons, concerts, purchase/rental of audiotapes/CDs, computer, and contingency contracting was to be used. The BIP was not fully implemented from at least March 1, 2003, to the present time.
7. Atlantis Foundation proposed a new BIP in December 2001, with a plan to deprive Student of positive reinforcers, including computer usage and field trips, as a behavioral consequence if he did not prepare for departure to school by 10:00 on school days, four out of five times per week. In an ARDC meeting on December 23, 2001, Parent disagreed with the new behavior plan, and then declined to attend reconvened ARDC meetings scheduled for January 21 and February 7, 2002. In a letter to Parent, a former BISD \*\*\* stated that the proposed BIP would be implemented on February 18, 2002, but no evidence indicates that this was done.
8. The record contains no evidence that Student was ever deprived of any privileges as a consequence for refusing to attend school. The Atlantis Daily Residential Log from 2002 contain numerous notations of Student declining to attend school and later on the same day being taken by staff out to eat, to movies, to video arcades, shopping, and the like. The primary staff members who attended to Student were two young women who were college students in psychology.
9. Student's CBI outings with staff included going to the beach, canoeing, riding go-carts, shopping for groceries and clothes, and visiting museums. Atlantis staff also took Student to the bank, to the Atlantis office to visit with the, \*\*\*, and to medical, dental, psychiatric and psychological appointments. Student was almost always late to appointments and frequently missed them altogether because he was not ready to leave until hours after the scheduled time. He also was hours late in being ready for most of his scheduled community outings with staff. He often stayed up all night and slept through the day, and he took extremely long showers, up to two hours long.
10. ARDC meetings were scheduled for May 23, 2002, and for August 21, 2002, but were "canceled" at Parent's request. Parent, with legal representation, filed for due process in September 2002. That case, Docket No. 010-SE-0902, was settled in mediation and resulted in dismissal with prejudice by another hearing officer on February 28, 2003. Therefore the relevant time period for consideration of relief in the current filing for due process begins on March 1, 2003.

11. Student did not attend school at all in 2003. Beginning in March 2003, his participation in community outings with staff and his attendance at appointments with psychologists and medical doctors, including his psychiatrist, began to decline drastically from previous months. In March 2003, he attended lunch and a movie with his mother on March 1; visited his psychiatrist, went out to eat with staff, and visited \*\*\* on March 10; attended psychologist appointments on March 12 and March 19; went out to eat and to the mall on March 26; and went to two stores and a movie on March 28. Otherwise he stayed in his room and did not participate in outings.
12. In April 2003, Student went on outings with staff on April 9 and 11. Otherwise he stayed in. He went to Brownsville to visit his mother from April 15 until May 3, 2003. In May 2003, Student went out to eat and visited \*\*\* on May 9. On May 10, he attended a psychological testing appointment four hours late. On May 12, he attended a psychological appointment, also late. Otherwise he did not participate in outings.
13. Student visited his mother in Brownsville from May 24 until July 18, 2003. Student has a very difficult time leaving home once he gets there, due to his anxiety about transitions and about feeling unsafe outside his room. In July, August, and September 2003, Student did not participate in outings, other than when his father visited him on September 27, 2003.
14. In October 2003, Student left his room for outings, including medical and dental appointments, on October 11, 13, 14, 20, 22, and 28. He also participated by telephone in an ARDC meeting on October 20. In November 2003, Student participated in an ARDC meeting by telephone and went out to eat on November 3; had outings on November 6, 13, and 18; and was visited by his mother on November 26 through November 30. In December 2003, Student was taken to the mall on December 3. He went to visit his mother on December 20, 2003, and remains with her, pending the outcome of this hearing.
15. At some point in 2003, staff stopped making daily offers to take Student out of the house. He understood from staff that a decision had been made to force him to ask when he needed something. In his room, Student slept, listened to music, watched TV, and surfed the Internet. He often spent the entire night using the computer.
16. Pursuant to the February 2003 settlement agreement, the district agreed to provide an independent educational evaluation. Dr. \*\*\*, psychologist, performed an independent evaluation of Student in May 2003. He found Student to have “a great deal of psychological distress . . . severely depressed, with psychotic features in the form of paranoia and obsessive-compulsive tendencies present. Student also has a very significant panic disorder, which he is not able to control. . . [He has] a ‘learned helplessness’ framework; i.e, he feels that he is not able to influence the outcome of any situation. . . [He has] essentially no coping skills whatsoever. He is not able to deal with even minor amounts of stress effectively . . . Compounding this is the fact that he does have neurological/organic involvement, as evidenced by the results of the Quantitative EEG . . . Student has not begun to emotionally separate from his mother to the extent that a \*\*\* year-old should have.” Respondent’s Exhibit 40.

17. Student began having paranoid feelings and unusual behaviors in \*\*\* school. He felt that other children always stared at him and picked on him. As a teenager he grew his hair long and began dressing in leather cuffs and chains to help him manage his feelings of paranoia by providing an explanation for his feeling that people are always staring at him. Student's problems with panic and anxiety frequently prevent him from leaving his room. He arrived for his testing session with Dr. \*\*\* four hours late, and was also late for the second session. Once he arrived, he was cooperative and fully compliant, though anxious.
18. Student has \*\*\*-average memory and intellectual functioning. During Dr. \*\*\*'s testing, he demonstrated attention and concentration within the \*\*\* range. His "stream of mental activity was within the \*\*\* range, coherent and reality based. His thought processes were logical and goal directed." On a standardized test of achievement, Student's reading and spelling scores were at the \*\*\* school level, and his math score at the \*\*\* level.
19. Dr. \*\*\* recommended that \*\*\* be evaluated by a psychiatrist for the use of psychotropic medication. "It is imperative that the depression and paranoia be treated in order for Student to be able to function adequately. It is also imperative that Student be fully compliant with taking his medication." Dr. \*\*\* recommended that Student be referred to a neurologist for a neurological evaluation, and that he receive individual therapy on a regular basis, as well as family therapy. He should stop residing at the Atlantis Foundation, which is an inappropriate placement. Dr. \*\*\* also said Student should not reside in or attend school in Brownsville due to his negative feelings about the area. He suggested Student might live with his father or elder brother, or in a halfway house where he could be semi-independent. Respondent's Exhibit 40.
20. Student has a very long history of conflict with and over-dependence upon his mother. In June 1998, \*\*\*, BISS's \*\*\*, evaluated Student and found that his frustration, depression, and agitation were in part due to his attempts to achieve independence and autonomy from his mother. He described the parent-child relationship as "intense enmeshment." Joint Exhibit 18, p. 394.
21. A psychological evaluation was performed by Dr. \*\*\*, L.S.S.P., in May and June, 2001, and Dr. \*\*\* provided Student's counseling sessions for several months. Dr. \*\*\* found that Student has a full-scale IQ of \*\*\*. Based on information provided by Student and his mother, Dr. \*\*\* found that Student "views himself as helpless and in an infantile role especially in the context of family relationships," that he has "a great deal of underlying anger," and that "a long-standing, highly conflicted parent/child relationship problem" exists between Student and his mother. At the time of Dr. \*\*\*'s evaluation, Student was not exhibiting a thought disorder or psychotic processing, though he did have "very maladaptive strategies with regard to trying to resolve conflict, and . . . very significant obsessiveness in reference to both his thought patterns and his behavior." Dr. \*\*\* found that Student had marked symptoms of anxiety and depression, and a severe level of emotional disturbance. He recommended continued residential placement at that time, and individual counseling for both Student and Parent. Respondent's Exhibit 36.
22. On August 28, 2003, the ARDC reviewed Dr. \*\*\*'s psychological evaluation. BISS proposed ending the placement at Atlantis and moving Student to a halfway house at a Sunflow facility for retarded adults. Student participated by telephone, and disagreed.

He requested homebound instruction at his residence at the Atlantis Foundation. Dr. \*\*\* attended the meeting. He stated that the Atlantis placement was not providing proper structure or behavioral reinforcement, at least in part due to intervention by Parent, and that the situation was “a travesty.” The meeting was recessed and reconvened on October 20, 2003, and reconvened again on November 3, 2003. The district continued its proposal to move Student to a group home in the Brownsville area, and Petitioner continued to disagree. The current request for due process was filed on November 20, 2003.

23. An IEP was developed by the ARDC on November 3, 2003, with the following goals: Demonstrate measurable progress in performance in areas of educational need; Maintain acquired skills for personal independence; Demonstrate development of positive and realistic expectations of self; Participate in routine school activities; Achieve mastery of the school district curriculum objectives by completing assignments and maintaining passing grades. The IEP calls for taking credit by examination, meeting with a counselor on a weekly basis, living in a local assisted-living environment with homebound support and completing Student’s educational choice with a mastery level sufficient to accrue credits and result in a high school diploma.

## **DISCUSSION**

### **Background**

Student is an \*\*\*-year-old young man with above-average intelligence, an excellent vocabulary, and exceptional writing talent. Due to panic attacks, obsessive-compulsive disorder, depression, and severe anxiety and agoraphobia, Student has extreme difficulty leaving his bedroom for activities that require interaction with other people, including attending school, counseling appointments, and medical appointments, especially when he has not been consistently taking his medication. When he does manage to leave his room, he typically is several hours late and extremely stressed. Student did attend the hearing in this case, and presented all but a small portion of his testimony in written form.

Student began having panic attacks on school mornings in \*\*\* school. He had problems with non-attendance due to his anxiety beginning in \*\*\* grade, and the problem increased as he grew older. He attended his \*\*\* year of \*\*\* school for approximately one week in Fall 2000, and then stopped attending altogether.

### **Residential Placement**

BISD attempted to educate Student through homebound instruction, but this was not successful because he would not leave his bedroom to meet with teachers, and the district declined to send teachers into his bedroom. Student was placed by the ARDC at the Atlantis Foundation in Seabrook, Texas, in February 2001. He earned no \*\*\* credits in that placement. The ARDC began proposing in August 2003 to return Student to Brownsville and resume providing homebound services. Student disagreed, and filed for due process in the current case in November 2003.

A previous request for due process, Docket No. 010-SE-0902, was filed by Student’s mother in September 2002. It was settled and was dismissed with prejudice by another hearing officer on February 28, 2003. Therefore, the time period relevant for consideration of relief in

this case begins on March 1, 2003. However, some evaluations and ARDC documents from prior years are relevant to the current dispute.

ARDC reports indicate that Student's residential placement was intended to provide 24-hour supervision and support, intensive counseling, and intensive behavioral management. However, Student spent the vast majority of his time secluded in a bedroom in a three-bedroom house, which also housed two students with autism. The Atlantis Foundation transports its students to a local private school, but Student attended the school only very sporadically, and did not attend at all during the time period relevant to the current case. Progress reports from Atlantis indicate that his "behavioral management" there consisted primarily of being offered services, including transportation to school, which he was allowed to decline with little or no consequence. When staff called him or knocked on his door and offered to give him medication, take his blood pressure, or transport him to school, counseling, medical appointments, or recreational activities, he frequently told them that he was not ready, or he did not answer at all because he was asleep. He often stayed up all night using the Internet, and slept through many days.

Student did participate in recreational activities in previous years at Atlantis, especially going out with staff to eat and shop for groceries. However, by the time period in 2003 which is relevant for relief in this case, Student very seldom left his room, even for recreational outings or to attend medical or psychological appointments. He testified that at some point in 2003 the staff stopped making daily offers to take him out, and he understood from staff that a decision had been made to force him to ask when he needed something.

Student came home for the Christmas holidays in December 2003, and remains at home pending this Decision. It is typical that once he is at home he does not return to the residential placement for weeks or months, due to his difficulty with leaving his room and with transitions in general. Student is asking to return to his residential placement, but with full implementation of appropriate IEPs. He makes this request because over the years he became at least somewhat comfortable socially with Atlantis staff members. Further, he and his mother are both extremely stressed by family dynamics when he is at her house. This hearing officer lacks legal authority to honor Student's wishes, due to the overwhelming evidence that he did not receive a FAPE and did not make academic or nonacademic progress in his residential placement. No evidence suggests that Atlantis Foundation is appropriate to meet Student's needs.

### **Free, Appropriate, Public Education**

The district's proposed educational program is entitled to a legal presumption of appropriateness. Petitioner bears the burden of proving that it is not appropriate. *Tatro v. Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983). An appropriate placement under IDEA is one that enables a student to obtain "some benefit" from his education. A district is not required to "maximize" a student's educational potential or provide an optimal education. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). Schools are not required to provide all services from which a child might benefit. Rather, the district must provide personalized instruction with sufficient support services to permit the student to receive an "educational benefit," i.e., a program that is meaningful and is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Rowley, id.*; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000).

A threshold requirement of IDEA is the provision of access to education for disabled students. Student is entitled to an education that is accessible given his unique needs, i.e.,

tailored to his disabilities. During the time period relevant for relief in this case, this \*\*\*-year-old student with \*\*\* average intelligence almost never left his room, did not attend school, did not receive tutoring, educational software, or any other type of educational instruction, and earned no \*\*\* credits. No significant changes were proposed to his IEP until August 2003, in spite of overwhelming evidence that he was receiving no educational benefit at all.

The district's contention that it could not change the program because the parent declined to attend ARDC meetings is without merit. The ARDC could have met during the relevant time period to develop a more effective behavior management plan and to devise a method of providing Student with some type of educational services. The school district is required by law to develop and offer an appropriate program even when the parent (or adult student) disagrees with the program or declines to attend ARDC meetings.

The record contains several references by school staff to Parent "canceling" ARDC meetings. Districts are required to schedule ARDC meetings at times that are reasonably convenient for parents, and they must make every reasonable effort to ensure that parents attend and participate in all ARDC meetings. 34 C.F.R. §300.345 (a) – (c). However, districts are not required to "cancel" ARDC meetings altogether or to postpone them indefinitely at parent request. The federal regulations specifically provide: "A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place." 34 C.F.R. §300.345 (d). A school district risks legal liability if its failure to convene an ARDC meeting to provide needed services results in substantive educational harm to the student, as happened in this case. See *Adam J. v. Keller ISD*, 328 F. 3d 804 (5<sup>th</sup> Cir. 2003).

Even during a stay-put placement, the parties can mutually agree to change aspects of the program, including the placement itself. See 34 CFR §300.514. Petitioner's advocate, Mr. \*\*\*, had requested in-room tutoring at ARDC meetings for several years before the stay-put placement took effect in November 2003, and Student himself had requested homebound instruction at Atlantis. I have no reason to doubt Petitioner would have agreed to in-room tutoring at Atlantis or to using instructional software to earn credits, especially given his obvious aptitude for using the computer. Even if Petitioner did not agree to proposed IEP changes, at least the district now would be on record as having offered more than an inadequate, outdated program that obviously was not working.

The district was not absolved from liability for FAPE by virtue of Student's placement in the residential facility. No matter how much effort or money a school district expends in providing a residential placement, the ultimate responsibility for educating the child always remains with the district. The placing district must ensure the provision of a FAPE, which includes overseeing the residential placement to ensure that it is appropriate. Tex. Educ. Code §29.008(d); 19 T.A.C. §§89.1115(d)(A)(ii); 89.61(a).

## **Placement**

Student is entitled to be educated with his nondisabled peers to the maximum extent appropriate. *Daniel R.R. v. State Board of Educ.*, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989). Student is correct that placing him with students who have autism did not provide education in the least restrictive environment (LRE) appropriate, and also that placing him in a halfway house with mentally retarded adults is not appropriate, because he needs socialization with non-disabled

peers. The district tried to find an appropriate group home for Student in the Brownsville-Harlingen area, but at the time of the hearing had found only a group home for mentally retarded adults.

BISD has offered to work with Student to accelerate his education and his graduation date by providing modular and/or other forms of instruction. The district also proposes to provide one-on-one homebound instructional services to Student for four hours per school day in the afternoons, in recognition that Student is more alert later in the day. In addition, BISD proposes to provide counseling services, family therapy, and in-home family training/counseling as needed. A similar homebound program was offered in the past without success. Student's medical and educational needs are inextricably intertwined, and both must be addressed before he can make any educational progress. His severe anxiety and agoraphobia make it highly unlikely that he can leave his room even to access homebound instruction until his anxiety is stabilized by consistent medication and psychotherapy, and he is provided with an effective BIP with appropriate positive reinforcers and consequences. The IEP currently proposed by the district lacks sufficiently detailed and measurable goals and objectives. Student needs further psychological consultation and/or evaluation, with a specific emphasis on behavioral strategies. The evaluator should then provide specific input to the ARDC about programming and related services to effectively address the disabilities and develop an appropriate IEP. In addition, the ARDC may wish to use the services of an educational consultant who specializes in behavioral strategies. Student's own input, of course, should be carefully considered and utilized in developing the IEP, including the BIP.

While the evidence is unequivocal that Atlantis Foundation is not an appropriate placement, the issue of Student's living arrangement cannot be fully resolved without further psychological consultation and/or evaluation. The only expert who testified at hearing, \*\*\*, BISD \*\*\*, has not evaluated Student since 1998, and gave only general testimony based on a review of records. The most recent psychological evaluation, by Dr. \*\*\* in May 2003, indicated that a supported arrangement such as a halfway house would be appropriate, but also stated that Student should not be forced to live in the Brownsville area. Dr. \*\*\* did not testify. Further input as to the educational implications of Student living in the Brownsville area is needed from Dr. \*\*\*, or from another psychologist who has evaluated or worked with Student. In the alternative, another psychologist could evaluate Student and give input to the ARDC. I note that as recently as Summer 2001, Dr. \*\*\* recommended that Student stay in residential placement, in spite of the fact that he found Student's disabilities to be less severe than Dr. \*\*\* found them to be in May 2003. In sum, further psychological input is needed to allow the ARDC to make an informed placement decision.

In addition, Dr. \*\*\* recommended a neurological evaluation and this should be obtained promptly. At the time of the hearing, Student recently had obtained a prescription for antidepressant medication. The record is void as to what type of doctor prescribed the medication. Student is entitled to a psychiatric evaluation if he has not had one in the relatively recent past to address his medication needs and to evaluate whether he needs other psychiatric services. To the extent the parent has out-of-pocket expenses in regard to neurological, psychological, and/or psychiatric evaluations that are necessary to enable Student to access instructional services, such evaluations are related services and the district should provide them at no cost to the parent. 34 C.F.R. 300.24(a).

Pending further evaluation, Student is entitled to an interim IEP providing compensatory

one-on-one tutoring, which, if he chooses, should be provided in his room at his mother's house or wherever he resides, to enable him to access instruction and begin earning \*\*\* credits as soon as possible. In developing the interim IEP, the ARDC should consider to what extent educational needs can be addressed through educational software, and provide such software, if available, on his computer as soon as possible. The interim services of one-on-one tutoring and educational software should not be delayed while the ARDC waits for further evaluation results.

Parent loves her son dearly and has made many sacrifices in her attempts to help him. However, her anxiety about Student's welfare and her strenuous efforts to intervene at every level of his education led to strained relationships with both BISD and the Atlantis Foundation. The record suggests that Parent may have interfered with the application of behavioral consequences for not attending school at Atlantis. Parents, no matter how well intentioned, do not have the right to dictate educational methodology, including behavioral strategies. See *Lachman v. Illinois St. Bd. of Educ.*, 852 F. 2d 290, 297 (7<sup>th</sup> Cir. 1988). However, the district must ensure that FAPE is provided even in a situation where a parent does attempt to dictate methodology.

Student is an adult now and must begin taking responsibility for his own life, health, and education. As Dr. \*\*\* said in his report, it is critical that Student take his medication consistently and attend regular psychological counseling. Student is a very bright young man, and capable of making many educational choices for himself. His written testimony in this case is articulate, thoughtful, and insightful, demonstrating that if allowed to communicate in a way that is comfortable for him, he can advocate for himself. He is now \*\*\* years old and the law provides that he is entitled to do so. See Tex. Educ. Code §29.017; 34 C.F.R. §300.517. The evidence established that Student needs to resolve separation issues with Parent. Allowing him the opportunity to exercise his legal right to make his own educational decisions would, in part, address this need. He should be encouraged to advocate and make educational decisions for himself to the maximum extent possible.

### CONCLUSIONS OF LAW

1. Student currently resides in BISD, a legally constituted independent school district within the State of Texas, and is entitled to special education services pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, et seq., as amended.
2. The educational program proposed by the school district is presumed to be appropriate. As the party challenging the educational program proposed by the district, Petitioner bears the burden of proof. *Tatro v. State of Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983), aff'd 468 U.S. 883 (1984); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000). Petitioner has met that burden.
3. The relevant time period for relief in this case begins on March 1, 2003. During the relevant time period, Student was denied a FAPE in the least restrictive environment appropriate. His IEPs were not reasonably calculated to provide an educational benefit, and they were not fully implemented. He made no academic or non-academic progress and earned no high school credits. *Hendrick Hudson District Board of Educ. v. Rowley*, 458 U.S. 176 (1982); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997). *Daniel R.R v. State Bd. Of Educ.*, 874 F2d.1036 (5<sup>th</sup> Cir. 1989).

4. BISD was not relieved of its responsibility to provide a FAPE by placing Student in a residential facility. The failure of another agency, including a residential facility, to provide services required by the IEP does not excuse a school district from ultimate responsibility for providing FAPE. The district was required to oversee the residential placement and ensure the provision of a FAPE there. The district failed to do so during the time period relevant for relief in this case. Tex. Educ. Code §29.008 (d); 19 T.A.C. §§89.61 (a); 89.115 (d) (A).
5. Student's mother was not entitled to dictate educational or behavioral methodology, even before he reached the age of majority in Summer 2003. BISD was not and is not relieved of its responsibility to provide Student a FAPE by virtue of its strained relationship with his mother, or by the fact that she declined to attend some ARDC meetings. The district is required by law to develop and implement an appropriate program, in an appropriate setting, whether or not the parent chooses to attend ARDC meetings or to agree with ARDC proposals. The district failed to do so during the relevant time period relevant for relief, and this omission caused Student substantive educational harm. *Lachman v. Illinois St. Bd. of Educ.*, 852 F. 2d 290, 297 (7<sup>th</sup> Cir. 1988); *Hendrick Hudson District Board of Educ. v. Rowley*, 458 U.S. 176 (1982); *Adam J. v. Keller ISD*, 328 F. 3d 804 (5<sup>th</sup> Cir. 2003).
6. The IEP currently proposed by the district does not specifically address Student's disabilities in a manner that is reasonably calculated to permit him to access instruction and receive an educational benefit, and it does not contain sufficiently detailed and measurable goals and objectives. *Hendrick Hudson District Board of Educ. v. Rowley*, 458 U.S. 176 (1982).
7. Petitioner needs further evaluations, to be provided at no out-of-pocket cost to the parent. The independent psychological evaluation performed in May 2003 does not provide sufficiently specific educational information to enable the ARDC to devise appropriate IEPs with measurable goals and objectives, including behavioral strategies that will enable Student to access instruction. The ARDC also needs additional expert input as to where Student should live. The ARDC should consult with Dr. \*\*\* or obtain further input on these issues from another psychologist who has evaluated or worked with Student. In addition, Student should be provided a neurological evaluation, and he should be provided a psychiatric evaluation if deemed necessary by the ARDC in conformity with this Decision.
8. Petitioner is entitled to compensatory education in the form of appropriate instruction, to include one-on-one tutoring delivered, at least at first, in his room if he so chooses, as well as educational software for his school-provided computer. He is entitled to instruction of a nature and in an amount sufficient to enable him to graduate from high school with a high school diploma within a reasonable length of time. He also is entitled to compensatory individual and family counseling in an amount sufficient to enable him to graduate from high school and transition into college and/or employment within a reasonable length of time.

## ORDER

Based upon a preponderance of the evidence and the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the relief requested by Petitioner in the form of continued placement at Atlantis Foundation is **DENIED**.

It is further **ORDERED** that the relief requested by Petitioner in the form of compensatory educational instruction and compensatory individual and family counseling is **GRANTED**.

It is further **ORDERED** that the relief requested by Petitioner in the form of additional evaluations is **GRANTED in part**.

It is further **ORDERED** that the ARDC shall meet as soon as practicable, but in no case later than two weeks from the date of this Decision, to arrange for an expedited psychological consult with Dr. \*\*\* or another psychologist who has evaluated or worked with Student, or, in the alternative, arrange to obtain an additional psychological evaluation to provide specific programming and placement information to the ARDC. In addition, Student will be provided a neurological evaluation, and, if necessary in conformity with this Decision, a psychiatric evaluation.

#### **NOTICE TO THE PARTIES**

This Decision is final and is appealable to state or federal district court.

The district shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of Complaints Management at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1. Documentation demonstrating that the Decision has been implemented; or 2. If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

**SIGNED** this 24<sup>th</sup> day of February, 2004.

/s/ \_\_\_\_\_  
Janis Herd  
Special Education Hearing Officer

**DOCKET NO. 099-SE-1103**

**Student,** § **BEFORE A SPECIAL EDUCATION**  
**Petitioner** §  
§  
**v.** § **HEARING OFFICER**  
§  
**BROWNSVILLE INDEPENDENT** §  
**SCHOOL DISTRICT, Respondent** § **FOR THE STATE OF TEXAS**

**SYNOPSIS**

**Issue 1:** Did Student, an \*\*\*-year-old student with above-average intelligence and severe anxiety, depression, and agoraphobia, receive a FAPE in the least restrictive environment appropriate?

**Held:** For Petitioner. Student’s IEP did not effectively address his disabilities. He made no progress, either academic or non-academic, and earned no high school credits in his residential placement.

**Citation:** 34 C.F.R. §§300.300.

**Issue 2:** Did Student receive education in the least restrictive environment appropriate in his residential placement?

**Held:** For Petitioner. Student has severe social anxiety and needs exposure to peers who can model appropriate social skills. Housing Student only with roommates who have autism was not appropriate and did not provide education in the least restrictive environment appropriate.

**Citation:** 34 C.F.R. §§300.550 through 300.553.

**Issue 3:** Were Student’s IEPs fully implemented at his residential placement?

**Held:** For Petitioner. Critical aspects of Student’s IEPs were not implemented. During the time period relevant to this case, he did not attend school or receive any educational instruction, and missed many of his counseling appointments because he spent most of his time secluded in his room. BISD did not fulfill its duty to ensure that Student received a FAPE in the residential facility.

**Citation:** 34 C.F.R. §300.302; Tex. Educ. Code §29.008(d); 19 T.A.C. §89.61(a); §89.115(d)(A).

**Issue 4:** Should Student continue his current residential placement?

**Held:** For Respondent. The law does not allow for Student to continue the Atlantis

Foundation placement because he did not receive a FAPE there, and no evidence indicates he can be provided a FAPE there.

**Citation:** 34 C.F.R. §300.300.

**Issue 5:** Is the district's proposed IEP and placement appropriate?

**Held:** For Petitioner. The IEP proposed by the district does not specifically address Student's disabilities in a manner that is reasonably calculated to permit him to access instruction and obtain an educational benefit, or contain sufficiently detailed and measurable goals and objectives. The district proposes to provide homebound services to Student in a group home for mentally retarded adults, or, in the alternative, to provide homebound services to him at his mother's house where he currently resides. The ARDC does not have sufficient data to develop an appropriate IEP and determine where to deliver the services in the IEP, and must seek further expert input on these issues. Student needs exposure to non-disabled peers to develop his social skills. Student must be provided an appropriate placement whether or not such a placement is available in the Brownsville area.

**Citation:** 34 C.F.R. §300.346; §§300.550 through 300.553.

**Issue 6:** Is Petitioner entitled to further evaluations?

**Held:** For Petitioner. Student must be provided a neurological evaluation, as well as a psychiatric evaluation unless one has been obtained in the recent past. In addition to reviewing these evaluations, the ARDC must obtain a detailed consultation from Dr. \*\*\*, or from one or more of the other psychologists who worked with Student in the last two years, or obtain a new psychological evaluation. The additional input from psychologist(s) must address the question of how to develop effective IEPs with appropriate behavioral strategies, instruction, and related services, such that Student can access educational instruction and graduate from high school, and, further, address the question of where such services should be delivered.

**Citation:** 34 C.F.R. §§300.346; 300.532 through 300.536; §300.535; §300.552.

**Issue 7:** Is Student entitled to compensatory services?

**Held:** For Petitioner. While further evaluations are pending, BISD must develop an interim IEP as soon as possible to provide Student compensatory one-on-one tutoring in his room, instructional software on his school-provided computer, and any additional instructional methodology deemed appropriate by the ARDC to enable him to begin to earn high school credits.

**Citation:** 34 C.F.R. §300.346.