

Student <i>b/n/f</i>	§	BEFORE A SPECIAL EDUCATION
Parent ,	§	
Petitioner,	§	
V.	§	HEARING OFFICER
	§	
SAN ANTONIO INDEPENDENT	§	
SCHOOL DISTRICT,	§	
Respondent.	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Procedural History and Issues

Parent, the mother of Student (“Petitioner”), requested this Due Process Hearing on April 12, 2004, under the Individuals with Disabilities in Education Act, 20 U.S.C. §1400 *et seq.*, (hereafter “IDEA”), complaining about the failure of San Antonio Independent School District (“Respondent” or “the District”) to provide Student with a free appropriate public education (FAPE). In the prehearing conference conducted on April 30, 2004, Mr. Christopher Jonas, Attorney for the Center for Special Education Law, represented Petitioner; Respondent was represented by Ms. Wesley Johnson, of the law firm Escamilla & Poneck, Inc. During the prehearing conference the case was set for hearing and the issues were identified as follows:

- (1) whether the Respondent failed to conduct a manifestation determination before imposing discipline; and
- (2) whether the Respondent failed to develop an appropriate behavior intervention plan.

As relief Petitioner requested compensatory services, including tutoring and a summer program.

On May 12, 2004, the Hearing Officer convened the Due Process Hearing. Both parties were represented by the same counsel that participated in the prehearing conference. Petitioner had requested that an interpreter be provided for Parent during the hearing. However, before the hearing started, Parent informed the Hearing Officer that she had difficulty understanding the interpreter who had been retained. After some discussion off the record, Parent agreed to accept the services Mr. ***, an employee of the District, to interpret the proceedings for her. Mr. *** was sworn to interpret faithfully from English to Spanish and Spanish to English to the best of his ability.. On the record Petitioner, through her attorney, stated that she had no objection to Mr. *** performing the interpreter duties for Parent.¹

Others attending the hearing included Alejandrina Garcia, advocate for Petitioner; Raquel Greene, Mr. Jonas’s assistant; ***, coordinator for monitoring and compliance for the District; and Diane Garcia, Attorney, with the law firm Escamilla & Poneck, Inc.

¹ It should also be noted that Mr. *** is a special education coordinator and, therefore, familiar with the terms used in Due Process Hearings. Parent had met Mr. *** previously during some of the ARD meetings.

Testimonial and documentary evidence was received, and a transcript was made of the proceedings by a certified court reporter. The parties agreed to present post-hearing briefs to summarize their arguments by June 9, 2004, but this date was extended by mutual agreement until June 21. The Decision Deadline was also extended until July 9, 2004.

Findings of Fact

Based upon the matters of record and matters of official notice, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following findings of fact based on a preponderance of the evidence:

1. Student is a ***-year-old student residing with his parents within the geographic boundaries of San Antonio Independent School District. Student has been identified as a student eligible for special education services under the classification of emotional disturbance.
2. Student completed *** grade during the 2002-2003 school year at *** School. The parties stipulated the issues in this case were limited to the period of April 12, 2003 through June 3, 2003.
3. In 1996 Student was diagnosed with attention deficit hyperactivity disorder (ADHD) and oppositional defiant disorder. In 1998 he was diagnosed with ADHD, dysthymia, and generalized anxiety disorder. Student was diagnosed in 1999 with bipolar disorder and ADHD. In 2002 a psychologist diagnosed schizophrenia -- disorganized type -- severe, and a psychiatrist in a separate diagnosis, found that Student had bipolar disorder, mixed type and ADHD.
4. The District conducted a complete re-evaluation of Student in early 2002. Parent also provided the District with discharge notes from Student's attending psychiatrist at Southwest Mental Health Center from March 2002.
5. Based on evaluations Student appears to function academically in the average to high average range. He demonstrates a strong foundation in his native language (Spanish) as well as in English.
6. Parent had asked for counseling for Student. However, Student was already being treated by an outside psychologist, and the District declined to provide individual counseling to prevent a conflict between therapists covering the same issues.
7. Prior to April 17, 2003, problems with Student's behavior had been increasing, both in frequency and in seriousness. He had received five or six disciplinary referrals, some of which resulted in In School Suspension (ISS), and two of which resulted in suspensions requiring his absence from school. Principal *** monitored these referrals.
8. Student's individualized educational plan (IEP) specified that he would be accompanied by an aide during each of his classes. Prior to April 17, 2003, Student received services in regular education classrooms. Student's two aides -- both experienced, certified special education teachers -- split their time with him. *** supported Student in language arts, science and reading. ***, worked with Student in

social studies, math and French. Student's IEP also included a behavior intervention plan (BIP) that contemplated use of a signal whereby Student could inform his teacher that his frustration or anger was escalating, and he needed a break. This procedure usually worked very well. All of Student's teachers and related staff members had been trained on the BIP prior to the beginning of the 2002-2003 school year. When Student changed classes for the second semester, his new teacher and the campus police officer received the same training.

9. Principal *** became concerned about Student's escalating behavior problems, especially after an incident in P.E. on March 27, 2003. While Student and a group of boys were playing softball, Student struck out, but refused to relinquish the bat. The other boys tried to explain to Student that he was out and it was someone else's turn. Student walked over to another student and hit him with his fist. Following an investigation, Student was suspended for one day. Additionally, *** scheduled a conference for April 3, 2003, with Student's mother and school personnel to discuss the problem.
10. The April 3 conference was not a formal Admission, Review and Dismissal (ARD) committee meeting. After that conference, though, an ARD committee meeting was set for April 10, 2003. The committee decided that Student's schedule was appropriate, but that further consideration needed to be given to the BIP. The meeting was tabled until Parent could have her translator present with her to discuss the BIP. The meeting was re-set for April 17, 2003.
11. Before the April 17 ARD committee meeting could occur, Student became involved in another incident, again in P.E. During a game of basketball, Student became angry when he thought it was his turn to enter the game and was told no. He attacked the first person he saw, another student, and kned him in the stomach. Student also picked up a bench and tried to throw it at another student. After several punches that only made light contact with the student, Student stated that he was going to kill him. Student was completely uncooperative and had to be physically restrained by a police officer with handcuffs.
12. When Parent. arrived at school for the ARD committee meeting on April 17, Principal *** told her about the incident that occurred in P.E. She did not try to telephone Parent because she was talking with the police, trying to intervene on Student's behalf. The police finally agreed to not arrest Student and take him to juvenile detention. Student received a three-day suspension for this incident.
13. On April 24, 2003, the ARD committee met to review the April 17 incident and to discuss Student's placement. The committee conducted a manifestation determination review, and concluded that Student's behavior on April 17 was a manifestation of his disability. Also, the committee looked at the relationship between Student's behavior and his environment as it prepared a functional behavioral assessment. The committee also discussed Student's need for close supervision, particularly in language arts, math, and science. They felt he was functioning well and following the BIP in social studies. Based on this, the ARD committee determined that Student should be placed in the behavior academic curriculum (BAC) classroom for three classes per day. The BIP

was revised with the assistance of a psychologist familiar with Student's behavior and needs. It included positive interventions and strategies to help him be successful,

14. Parent requested another ARD committee meeting. It occurred on May 13, 2003. Parent told the committee it was her understanding from the last ARD meeting that Student's placement in the BAC classroom was only for one week. Ms. *** explained that no time element had been placed on the instructional placement, but that the committee could review his progress. The BAC classroom was structured with the use of a level system, meaning that a student could "earn" his way back to a regular classroom through displaying appropriate behavior and progressing to the next level. The committee did not finish its discussion, so the meeting continued on May 14, 2003, and again on May 28, 2003. All committee members except Parent agreed with placement in the BAC for three classes.
15. The last day of school was June 3, 2003. Although Student attended classes in the BAC classroom for a short period of time, his teachers believed he was making progress.

Discussion

The issues presented in this case involve the manifestation determination review and Student's BIP. The federal regulations implementing the IDEA address how the ARD committee is to perform the manifestation determination review:

- (1) First consider, in terms of the behavior subject to disciplinary action, all relevant information, including --
 - (i) Evaluation and diagnostic results, including the results or other relevant information supplied by the parents of the child;
 - (ii) Observations of the child; and
 - (iii) The child's IEP and placement; and
- (2) Then determine that --
 - (i) In relation to the behavior subject to the disciplinary action, the child's IEP and placement were appropriate, and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;
 - (ii) The child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and
 - (iii) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

34 C.F.R. § 300.523 (c).

The evidence in this case establishes that the ARD committee worked through the process and properly concluded that Student's disability did in fact impair his ability to understand the impact and consequences of his behavior, and that he was unable to control the behavior that was subject to disciplinary action.

Petitioner contends that Student required an appropriate BIP and a paraprofessional to be successful in a regular classroom setting. No one disagrees with this proposition. The disagreement lies with whether the incident on April 17, 2003, would have occurred if Student's aide had been present with him in P.E. An essential element of the BIP at that time was for Student to signal his aide that he needed a break. In the instance on April 17 there was no signal, and no time for anyone to intervene. Although some indicators may have been present – Principal *** seemed to think so and called the April 3 meeting – it is unrealistic to think that anyone would have reasonably expected Student to have reacted so quickly or so forcefully as he did on April 17 in P.E. Was the BIP perfect? No. Was it appropriate? Yes.

Petitioner also contends that counseling should have been provided as a related service. Maybe there should have been some counseling or social skills training for Student in addition to what he was receiving privately. That is not an issue in this case, though. Moreover, even if Student had been receiving counseling, anger management or social skills training, it is questionable whether it would have prevented Student's explosion on April 17, 2003.

In evaluating this case overall, the question is whether the District provided an individualized education plan reasonably calculated to enable Student to receive meaningful educational benefits. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 189 (1982). The court has adopted a four-factor test to determine whether an IEP has been reasonably calculated to enable the child to receive meaningful educational benefits. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997). Those four factors are:

- (1) the program is individualized on the basis of the student's assessment and performance;
- (2) the program is administered in the least restrictive environment;
- (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and
- (4) positive academic and non-academic benefits are demonstrated.

The facts in this case support a finding that San Antonio ISD provided Student with an IEP that was reasonably calculated to enable him to receive meaningful educational benefits.

Conclusions of Law

After due consideration of 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 is a student who is eligible for special education services under the IDEA as a child with an emotional disturbance. 20 U.S.C. §1401 (3) (A); 34 C.F.R. §300.7 (c) (4).
2. Petitioner bears the burden of proof with respect to his claims that Student was denied a free appropriate public education. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984). Petitioner did not meet his burden of proof in this case.
3. With respect to San Antonio ISD's program developed for Student for the 2002-2003 school year, the IEP was reasonably calculated to enable him to receive educational benefits. The four factors set forth in *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), are met.
4. The Admission, Review and Dismissal committee properly developed the behavior intervention plan for Student as part of his IEP. *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
5. San Antonio ISD conducted a manifestation determination review in accordance with the applicable regulations. 34 C.F.R. § 300.523 (c).
6. San Antonio ISD properly concluded that Student's behavior on April 17, 2003, was a manifestation of his disability. 34 C.F.R. § 300.523 (c).

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the relief sought by Petitioner is DENIED. Finding that the public welfare requires the immediate effect of this Final Decision, the Hearing Officer makes it effective immediately.

SIGNED this 9th day of July 2004.

/s/
Lucyretia Dillard
Special Education Hearing Officer

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SYNOPSIS

ISSUE: *Whether the Respondent school district failed to conduct a manifestation determination before imposing discipline?*

HELD: For Respondent.

CITATION: 34 C.F.R. § 300.523 (c)

ISSUE: *Whether the Respondent failed to develop an appropriate behavior intervention plan?*

HELD: For Respondent.

CITATION: *Board of Education v. Rowley*, 458 U.S. 176 (1982); *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997)