

STUDENT, B/N/F PARENTS	§	BEFORE A SPECIAL EDUCATION
	§	
VS.	§	HEARING OFFICER
	§	
BLAND INDEPENDENT SCHOOL DISTRICT	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

The student, by the student’s grandparents and guardians as next friends (hereinafter “Petitioner” or “the student”), brought a complaint pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §1400, et seq., complaining of the Bland Independent School District (hereinafter “Respondent” or “BISD”).

Petitioner was represented by Myrna Silver, an attorney in Dallas. Respondent was represented by Nona Matthews and Gwendolyn Norman in the Irving office of Walsh, Anderson, Brown, Aldridge & Gallegos, P.C. Petitioner's expedited request for hearing was filed on December 2, 2009, and came on for hearing by agreement of the parties and order of the hearing officer on January 7 and 8, 2010, in the offices of the district. Counsel filed written closing arguments, and the parties agreed that this decision would be timely issued on or before March 18, 2010, in accordance with the statutory and regulatory time-line.

Petitioner alleged that the BISD improperly placed the student in a disciplinary alternative educational placement (“DAEP”), that BISD erred in the placement because the student’s behavior in question did not violate the BISD student code of conduct, that the student’s behavior was caused by and did have a direct and substantial relationship to the student’s disabilities, that the student should have had in place a behavior intervention plan (“BIP”), that the student is being denied a free appropriate public education (“FAPE”) because the student is not being educated in

the least restrictive environment, and that the student should be removed from the DAEP and placed back in school.

As relief, Petitioner seeks an order returning the student to school, that BISD reimburse the student's guardians for expenses incurred in a four-day placement at a hospital, that the student be allowed to make-up without penalty any worked missed because of the student's placement, that the guardians be reimbursed for transportation expenses to the DAEP, that the guardians be reimbursed for the cost of providing lunch at the DAEP, that the district be required to develop a BIP for the student's individual education plan ("IEP"), and that the district provide an independent educational evaluation ("IEE") including a psychological evaluation.

During the course of the hearing, Petitioner withdrew any requests for reimbursement (Transcript Pages 192-193).

Respondent has sought summary judgment on three of Petitioner's claims as enumerated in the request for hearing:

- 1) Issue #1 "Whether the student's alleged behavior of *** was in violation of the Bland ISD student code of conduct;
- 2) Issue #2 "Whether [Petitioner's] behavior during the incident in question in any way violated the Bland ISD student code of conduct; and
- 3) Issue #5 "Whether the manifestation determination ARD committee was involved in the decision to place [Petitioner] at the DAEP"

Based upon the evidence and argument of counsel, the Hearing Officer makes the following findings of fact and conclusions of law:

Findings of Fact

1. The student resides *** within BISD. [Transcript Page 155]
2. The student receives special education services based upon eligibility criteria of other health impaired (“OHI”) because of attention-deficit hyperactivity disorder (“ADHD”) and a learning disability. [Petitioner’s Exhibit 6 and Respondent’s Exhibit 5]
3. During the 2009-2010 school year, the student is attending the *** grade. [Petitioner’s Exhibit 6 and Respondent’s Exhibit 5 and Transcript Page 24]
4. The student was hospitalized once in the *** grade and twice in the *** grade for short periods of time to adjust medications and to deal with problems at home or school. [Transcript Page 207]
5. During the *** grade year (until the incident resulting in placement at DAEP) the student’s “problem behavior(s)” consisted of an incident where the student did not follow direction, the student was involved in “horseplay”, the student used inappropriate language and the student failed to complete assignments. [Respondent’s Exhibit 6]
6. The student’s principal at school described the student’s behavior as “very typical for a *** student.” [Transcript Page 65]
7. BISD personnel believed that the student’s problems in school have been due to inattention rather than hyperactivity. [Transcript Page 183]
8. BISD personnel believe that the student has shown no problems with aggression but that the student can be competitive in ***. [Transcript Page 184]
9. At an admission, review and dismissal (“ARD”) committee meeting in January 2008, one teacher for the student stated that the student needs a BIP. No one else at the ARD committee believed that the student needed behavior intervention, and the guardians for the student noted their agreement for the IEP developed for the student. [Petitioner’s Exhibit 5]

10. No psychological evaluation was requested by the student's guardians before the incident resulting in DAEP placement, and personnel at BISD familiar with the student saw no need for a psychological evaluation. [Transcript Page 307]

11. BISD personnel have not seen problems with impulsivity in the student. [Transcript Pages 249 & 268]

12. In 2007 one physician indicated that the student may be bi-polar but the district never determined that the student was eligible for services as bi-polar because no psychological evaluation had ever been completed on the student. [Petitioner's Exhibit 2 and Transcript Page 171]

13. District personnel saw no evidence of a bi-polar disorder with the student. The student did not demonstrate any problems with mood swings. [Transcript Page 185 & 248]

14. ARD committees consistently noted that the student made educational progress in school. [Petitioner's Exhibits 3-6 and Respondent's Exhibits 1, 4 & 5]

15. During the school year the student *** at school. [Transcript Page 55]

16. *** on campus is not a violation of the BISD student code of conduct. [Respondent's Exhibit 11 and Transcript Pages 53-56]

17. The student's guardian spoke with the principal about concern ***. The principal explained to the guardian that *** is not a violation of the student code of conduct. [Transcript Pages 55 & 56]

18. On November 6, 2009, an incident occurred with the student and another student involving ***. The principal determined that the student *** another student after the student ***. The incident occurred during *** class, and the *** teacher took statements from students who witnessed the incident. [Petitioner's Exhibit 9 and Transcript Pages 101-107]

19. No one was injured in the incident. [Respondent's Exhibit 7 and Transcript Page 321]

20. On November 12, 2009, a placement meeting was convened by the principal to discuss placement for the student. Present were the principal, the director of student services, and two teachers. Student's guardians were invited to the meeting and did not attend. District personnel determined that the student should be placed in DAEP for forty-five days. [Petitioner's Exhibit 12 and Transcript Pages 26-28]

21. The guardians were advised that they could appeal the placement decision. [Petitioner's Exhibit 12]

22. The student was placed in out-of-school suspension November 9-11, 2009. [Respondent's Exhibit 6 and Transcript Page 46]

23. The student's guardians did not appeal the DAEP placement to school officials. [Transcript Page 72]

24. The student did not begin attending the DAEP placement until December 1, 2009, after *** and the Thanksgiving holiday. [Transcript Pages 51, 72 & 222-223]

25. A manifestation determination ARD committee met on November 30, 2009. The committee determined that the student's IEP had been implemented, that there had been no behaviors in the past warranting the development of a BIP and that the conduct in question was not caused by or had a direct and substantial relationship to the student's disabilities. [Respondent's Exhibit 12]

26. The student's guardians did not agree with the determination of the committee. Counsel for the parties were present at the meeting. Petitioner's counsel and the guardians stated that they believed *** and that the student did violate the code of conduct. BISD and Petitioners could not agree on ***. Petitioners maintained that the student needed a BIP and that the behavior had a direct relationship to the student's disabilities. Because *** are allowed at school, the parties could not agree how *** and whether or not ***. The committee adjourned without agreement. [Respondent's Exhibit 12 and Transcript Pages 43-55 & 92-95]

27. The parties also could not agree whether or not the student ***, ***, ***,
[Transcript Page 78]

28. The student has been successful in the DAEP both academically and behaviorally.
The student's IEP is implemented in the placement. [Transcript Pages 148-149]

Discussion

The incident on November 6, 2009, with the student and *** at school fortunately did not result in any physical injury but the incident did create substantial disagreements with the parties. BISD made a disciplinary placement decision and considered at an ARD whether the student's disabilities had a direct and substantial relationship with the conduct in question or if the student's IEP had not been implemented. Petitioners seek findings and an order dealing with the determinations of the district in enforcing the student code of conduct. Petitioner's failed, however, to avail themselves of the protections in BISD policy in appealing the decision for discipline by school personnel. Respondent's maintain and have asked for summary judgment on three issues raised by Petitioner:

- 1) Issue #1 "Whether the student's alleged behavior of *** was in violation of the Bland ISD student code of conduct;
- 2) Issue #2 "Whether [Petitioner's] behavior during the incident in question in any way violated the Bland ISD student code of conduct; and
- 3) Issue #5 "Whether the manifestation determination ARD committee was involved in the decision to play [Petitioner] at the DAEP."

Petitioner asserts that the language of IDEA allows the hearing officer jurisdiction over these issues, but Respondent's summary judgment argument is meritorious. The issues under the hearing officer's jurisdiction do not involve the application of the district's student code of conduct. IDEA cannot be used as a tool to litigate a district's determination of its own student code of conduct. The remaining issues involve the procedures and substance of the manifestation

determination. Petitioner failed to prove that IDEA was violated in the district's handling of the student.

Conclusions of Law

1. Respondent is entitled to summary judgment dismissing Petitioner's claims in its request for hearing entitled Issues 1, 2, and 5. Jurisdiction of the hearing officer is limited to 19 T.A.C. §89.1151(a). The ARD committee under IDEA makes determinations regarding the identification, evaluation, educational placement, and the provision of FAPE to a student in special education and the Code of Federal Regulations at 34 CFR 300.507(a)(1) limits the issues of due process complaints to the provisions as stated in the Texas Administrative Code at 19 T.A.C. §89.1151(a).

2. Petitioner failed to meet its burden of proof to demonstrate that the district did not provide an appropriate individualized educational placement for the student under the standard of Board of Education of the Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982), 34 CFR 300.552, and 19 T.A.C. §89.1055, and Cypress-Fairbanks ISD v. Michael F., 118 F.3d 245 (5th Cir. 1997), 34 CFR 300.300, and 19 T.A.C. §89.1055.

ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that all relief requested by Petitioner is DENIED.

SIGNED this 18th day of January, 2010.

 /s/ Lucius D. Bunton
Lucius D. Bunton
Special Education Hearing Officer

DOCKET NO. 072-SE-1209

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B/N/F PARENTS	§	
	§	HEARING OFFICER
VS.	§	
	§	
BLAND INDEPENDENT	§	FOR THE STATE OF TEXAS
SCHOOL DISTRICT	§	

SYNOPSIS

ISSUE: Whether or not FAPE was provided.

CFR CITATIONS: 34 CFR 300.507(a)(1), 34 CFR 300.552 and 34 CFR 300.300

TEXAS CITATION: 19 T.A.C. §89.1151(a) and 19 T.A.C. §89.1055.

HELD: For the District.