

CAUSE NO. 272-SE-0405

STUDENT bnf PARENT, PETITIONER	§	BEFORE A SPECIAL
v.	§	EDUCATION HEARING
HOUSTON INDEPENDENT SCHOOL	§	OFFICER OF THE
DISTRICT, RESPONDENT	§	STATE OF TEXAS

FINAL DECISION

Statement of the Case

This special education due process case arises under the Individuals with Disabilities in Education Act, ("IDEA"), 20 U.S.C. §1400. It was filed before the statutory revisions that took effect July 1, 2005.

Petitioner PARENT is the mother of STUDENT, a student eligible for services under the Act. STUDENT resides in the Houston Independent School District (HISD). HISD is the Respondent in this case. The case is about STUDENT's diagnosis, an appropriate future placement, and compensatory services for alleged past failures of HISD to provide him a free appropriate public education ("FAPE"). Other issues concern alleged physical and verbal abuse of STUDENT by HISD personnel and alleged failures on the part of his teachers to provide and report information to the parents as required in his Individual Education Plans ("IEP"s). Daniel L. McCall is the attorney representing Petitioner. Hans Graff, Assistant General Counsel, represents the HISD. The case was filed on April 21, 2005. The original 45-day decision due date deadline was June 5, 2005. The parties held a prehearing conference by telephone on May 5, 2005. In that

prehearing conference they extended the 45-day deadline to allow time to hold an ARD to try to resolve some issues without a hearing and to accommodate the schedules of the attorneys and witnesses. A hearing on the merits was held August 16, 17, and 18, 2005. At conclusion of the evidence the record was held open for submission of briefs. Briefing dates had to be extended because of disruptions caused by Hurricane Rita. The deadline for decision has been extended by agreement of the parties until November 4, 2005.

Findings of Fact

1. HISD has found STUDENT eligible for special education services as an emotionally disturbed student. In the 2004-2005 school year he attended *** School in a Behavior Services Class ("BSC") (a small class with seven other special education students with disabilities similar to his own). STUDENT's placement in the BSC class at *** School resulted from a consensus decision in an ARD meeting the previous spring that STUDENT's mother took part in. Although her signature on the ARD committee report shows that she agreed with the placement, she claims in this hearing that the placement violates STUDENT's right to placement in the least restrictive environment ("LRE"). I find no support in the record for this claim. STUDENT has been in this type of placement for several school years. The placement finds support in appropriate ARD committee findings and the recommendations of the public and private doctors and treatment personnel who have worked with STUDENT over the years.

2. From the first day of the 2004-2005 school year STUDENT has engaged in odd, sometimes disruptive, and sometimes violent behaviors. The odd behavior consisted in part of STUDENT removing his shoes immediately on entering a room and spending hours by himself on the school playground putting rocks in bottles.

3. There were a number of disruptive incidents in the past school year involving STUDENT. An incident occurred on the first day of school when STUDENT was in the auditorium at an assembly of the entire *** grade class. STUDENT began yelling when the school principal entered the auditorium and would not become quiet until four people carried him from the auditorium each person taking an arm or a leg.

4. In January 2005, he got in a fight with one or more other students (there is conflicting evidence on how many students were involved) after STUDENT had spit water on several students. STUDENT's teacher tried to break-up the fight but was unable to do so without assistance. She summoned the principal to her classroom by use of an alarm system and with the principal's help was able to break up the fight. I find the school personnel did not intentionally prolong the fight or intentionally allow the other students to inflict injury on STUDENT. Instead, school personnel acted as quickly as they could to break up the fight, to restore order to the classroom, and to avoid injury to STUDENT and other students.

5. A third incident occurred on March 31, 2005. STUDENT removed a small stool propping open the door to the gymnasium and refused to give the stool back when the gym coach asked him to. The coach then took the stool away from STUDENT by

grabbing a leg of the stool and twisting the stool so that STUDENT had to let go of it. The coach then returned to the gym. STUDENT then entered the gym drinking a coke which was against gym rules and the coach ordered him out of the gym. STUDENT then sat in the hall and refused to go to his assigned classroom. When the BCS teacher, Mr. ***, could not get STUDENT to return to the classroom without help, he phoned STUDENT's mother to ask her to talk to STUDENT and get him to return to class. STUDENT told her on the phone that the coach had hit him. An investigation by the school principal concluded that the coach had not done so. I found Coach *** to be a credible witness and believed his version of this incident as related above. I find that he did not hit STUDENT

6. Other incidents allegedly involved STUDENT breaking furniture, throwing school desks, and biting and kicking school administrators. To stop STUDENT, school administrators have sometimes grabbed him by the collar and sometimes by the belt. Vice Principal ***, BCS Teacher *** and Principal *** testified that on each occasion they only used the force necessary to prevent injury to STUDENT and other students and to subdue him. School Principal *** made a video of STUDENT breaking furniture and throwing school desks. It is in evidence, and confirms the testimony of the school officials about STUDENT's violent nature and the need to sometimes restrain him. I find that Vice Principal ***, BCS Teacher *** and Principal *** were credible witnesses. I believed their testimony. I find that they did not abuse STUDENT

7. STUDENT has had many psychological and psychiatric evaluations over the years both by outside diagnosticians and by those employed by the school district. Although there is a large degree of overlap between the findings of the various diagnosticians, few of the evaluations have reached identical conclusions. It is clear from the testimony that one reason for the difference in diagnosis is that each of the diagnosticians is working from at least slightly different factual information. For example, the private diagnosticians have not interviewed school authorities about STUDENT's classroom behavior and the school diagnosticians have not interviewed the family about his behavior at home although one of the school diagnosticians, Dr. ***, PhD., did get diagnostic information from the mother by having the mother complete a written form. All of the expert witnesses were in agreement that STUDENT suffers from multiple disorders.

8. STUDENT's mother has not always given diagnosticians consistent information about his early childhood development. All of the experts agreed that accurate information about his early development is important to an accurate diagnosis.

9. I found the testimony of Dr. ***, M.D., Dr. ***, Ph. D., and Dr. ***, Ph. D., to be the most persuasive of the testimony presented by the experts.

10. Dr. *** is Director of Mental Retardation, Developmental Disabilities Clinical Services at the University of Texas Mental Sciences Institute. She has seen STUDENT yearly since 2002. Her diagnosis of his primary problems has changed over the years. In 2002 she diagnosed his primary problems as Attention Deficit Hyperactivity

Disorder (ADHD), a Motor Tic Disorder, and a Major Depressive Disorder. In June 2003, she diagnosed his main problems as being Bipolar Disorder, Mixed, and ADHD, and Oppositional Defiant Disorder. In August 2004, she diagnosed his primary problems as Bipolar Disorder, Mixed, and ADHD. Dr. *** did not diagnose STUDENT with Asperger's until August 2005 after STUDENT's mother requested this due process hearing. In her testimony Dr. *** stated that STUDENT still has the other problems which she has diagnosed in the past but has Asperger's as well. She stated that unless the school district diagnoses him as having Asperger's, it is unlikely to provide him with some of the services that he needs.

11. Dr. ***, PhD., is a contract psychologist for HISD. She conducted a clinical interview, and tested STUDENT and also received information from his mother and teacher about STUDENT's history and behavior. The tests she used included the Behavior Assessment for Children 2nd Edition, the Child Depression Inventory, the Gilliam Autism Rating Scale (Parent and Teacher), the Kinetic Family Drawing Test, The House-Tree-Person Test, and the Roberts Aperception Test for Children. The tests Dr. *** used in her diagnosis have been validated for the specific purposes for which she used them and she followed the instructions for giving the tests when she gave them. Based on the tests she administered, Dr. *** opined that the likelihood that STUDENT has autism is low.

12. Dr. ***, Ph. D., is a psychologist in the Special Education Services Department of HISD. Her duties include working with contract placement of HISD

special education students who need placements that are not available within HISD except by contracting with outside schools. Dr. *** opined as an expert witness. She based her opinions on all the information in STUDENT's state file folder. Factors she considered included STUDENT's reported performance inside and outside the classroom, the reports of his teachers and family, his performance on various testing psychological and diagnostic tests, the diagnostic evaluations of STUDENT by both his private counselors and physicians and those retained by HISD, her experience as a placement counselor working with students with problems similar to STUDENT's problems, and her knowledge of the various placements available within the vicinity of HISD.

13. The schools which the parties have asked me to consider as possibly meeting STUDENT's placement needs are ABC East, Memorial Hall, and the Monarch School. Dr. *** is familiar with all three schools. She opined that ABC East would be a suitable placement for a student with STUDENT's background and history even if his doctors were to confirm their tentative diagnosis of Asperger's or Pervasive Development Disorder ("PDD" -- a form of autism distinct from Asperger's). Dr. *** has helped place other students with these disorders at ABC East. She opined that ABC East has staff with the training and experience to educate students who have these disorders even when they also have significant behavioral problems.

14. According to Dr. ***, Memorial Hall takes students that are foreign students who come over to study and they take children with some learning disabilities but Memorial Hall is unwilling and unable to handle children with any significant emotional

or behavioral problems such as the problems demonstrated by STUDENT in the classroom setting. I found Dr. *** a reliable witness and find her testimony on these facts to be true.

15. According to Dr. ***, Monarch School serves children with Asperger's, with PDD, with ADHD and some learning problems. However, Monarch School is not able to serve children with significant behavioral problems which are impeding their education. Moreover, Monarch School is not accredited by the Texas Education Agency. I found Dr. *** a reliable witness and find her testimony on these facts to be true.¹

16. I found Dr. *** to be much more knowledgeable about the three schools that I was asked to consider as an appropriate placement for STUDENT in the 2005-2006 school year than any of the other witnesses.

17. Considering all the evidence including Dr. ***'s opinion, I find ABC East to be the most suitable placement of those suggested. Since this placement is suitable whether he is autistic or not, it is unnecessary for me to find whether in fact STUDENT is autistic and, if so, what type autism he has. Instead, I find the diagnosis of whether he is autistic is uncertain. The diagnosticians have reached no consensus about this. I find

¹ There is some dispute in the record on the issue of whether HISD could place a child in a school that TEA has not accredited. The law is that if no other suitable placement is available, the parents can voluntarily place the child in a school which is not TEA accredited although HISD could not make such a placement over the parent's objection. See Florence County School District Four v. Carter, 510 U.S. 7 (1993).

there is enough evidence that he may have an autistic disorder that the ARD committee should consider the so-called "autism supplement" in drafting his IEP.²

18. The record is ambiguous regarding any IEPs that were in place for STUDENT's counseling and behavior intervention programs. There are notations in some of STUDENT's current ARD records indicating that I.E.P.'s for counseling and a Behavior Intervention Plan (BIP) have been adopted by reference from ARD meeting records of past years. STUDENT's teachers and counselors in the 2004-2005 school year were, at least for the most part, unfamiliar with these I.E.P.'s from past years and have not been following them in planning STUDENT's programs or reporting STUDENT's performance under these plans to his parents. Ms. ***, an HISD Special Education Coordinator with oversight responsibilities over *** School, reviewed STUDENT's file and concluded (and based upon her testimony I find) that appropriate IEP's for counseling and a BIP were not in place for STUDENT during the past school year.

19. Dr. *** reviewed STUDENT's academic progress based on his grades and his performance on the Woodcock-Johnson test which measures his academic progress compared with other students his age and with himself in an earlier year. Dr. *** found that he has achieved academic progress. Based on her testimony I find that STUDENT

² See 19 TAC §89.1055(e). "For students with autism/pervasive developmental disorders, information about the following shall be considered and, when needed, addressed in the IEP:

- (1) extended educational programming;
- (2) daily schedules reflecting minimal unstructured time;
- (3) in-home training or viable alternatives;
- (4) prioritized behavioral objectives;
- (5) prevocational and vocational needs of students 12 years of age or older;
- (6) parent training; and
- (7) suitable staff-to-students ratio.

has been making educational progress and receiving an educational benefit from HISD that meets the Rowley standard.³

20. HISD has offered 36 hours of one-on-one counseling services and an Extended School Year ("ESY") at ABC East to compensate STUDENT for loss of counseling services and a behavioral intervention plan under properly drawn IEPs in the 2004-2005 school year. I am unable to decide from the record because of no evidence on point how HISD arrived at this offer or whether it is in the correct amount to compensate STUDENT for any services he missed. And while the Petitioner is dissatisfied with the compensatory package that HISD has offered, the Petitioner has not suggested any other compensatory package that she would find acceptable.

21. Petitioner has repeatedly complained to the hearing officer about on-going grievances against the school board which have developed after the events with which this hearing is concerned.

³ See Board of Education v. Rowley, 458 U.S. 176 (1982)(a school is not required to provide the "best" education possible or one designed to maximize potential. However, the program must be based on the child's unique needs and be designed to enable the student to benefit from the education.)

Conclusions of Law

No Denial of FAPE

TEA Hearing Officer Decisions follow the law of the U.S. Fifth Circuit. In the Fifth Circuit the burden is on the parent to prove by a preponderance of the evidence the district has denied the student a FAPE.⁴ The parent in this case has not proved that HISD has denied a FAPE to STUDENT

The Fifth Circuit requires the parent to prove the loss of an educational opportunity before it will find a denial of FAPE by a school district resulted from a technical violation of IDEA. The Petitioner has proved that HISD did not implement appropriately drawn IEPs for counseling services and a behavioral intervention plan in the 2004-2005 school year. Petitioner has not proved that this procedural violation resulted in the loss of an educational opportunity for STUDENT⁵

Compensatory Counseling Hours Due STUDENT

The record contains no proof about any services that might properly compensate STUDENT for the services he missed under last year's IEP. Further, Petitioner has not

⁴ See *Adam J. v. Keller Indep. Sch. Dist.*, 238 F. 3d 804 (5th Cir. 2003); *Tatro v. Texas*, 703 F.2d 823, 830, affirmed in part and reversed in part on other grounds, sub nom *Irving ISD v. Tatro*, 468 U.S. 883 (1983); accord, *Cypress Fairbanks ISD v. Michael F.*, 118 F.3d (5th Cir 1997) cert denied 522 U.S. 1047.

⁵ See *Doe v. Defendant I*, 898 F. 2d 1186 (6th Cir 1990) (where the IEP failed to state the student's present level of educational attainment and failed to specify appropriate achievement criteria, the court held the defects were insufficient to deny FAPE because both the District and the parent were aware of the relevant information). That holding is appropriate here because both the parent and the district were aware of the significant behavioral problems impeding STUDENT's education and were regularly exchanging information sometimes on a daily basis about those problems and how best to deal with them. I believe the 5th Circuit would make this same ruling.

referred me to any judicially noticeable materials which explain how I should go about deciding the correct amount of compensatory counseling hours to make up for those that STUDENT allegedly lost in the 2004-2005 school year. Therefore, I will accept the 36 hours of compensatory counseling services identified by HISD as correct. I will order HISD to tack these counseling hours on to the hours of counseling for which STUDENT is eligible under IDEA. That is to say that I will order HISD to provide these services to STUDENT after he reaches the age of twenty-one if a future ARD committee decides that STUDENT still needs the counseling services when he reaches that age.⁶

Use of the Autism Supplement In Drafting Future IEPs

I will also order the ARD committee to consider the services listed in the ARD supplement when drafting future IEPs for STUDENT so long as his diagnosis remains in doubt and credible diagnosticians diagnose STUDENT as very likely to be autistic.

Claim for Reimbursement for Extra Diagnostic Services Bought Unilaterally by the Parent After Filing The Due Process Hearing Request

I reject the Petitioner's \$1,000 claim for reimbursement for the diagnostic services of Dr. ***, Ph.D. I found his testimony to be based on incomplete and inaccurate information. The parent hired Dr. *** after filing this action and after the most recent ARD Committee hearing. Stated another way, he appears to have been hired as an expert

⁶ See Burlington Sch. Comm. v Department of Educ., 471 U.S. 359, 369 (1985) (authorizing equitable relief in the form of an order to the school district to provide compensatory services that should have been but were not provided). See Lester H. v Gilhool, 916 F.2d 865, 872 (3d Cir. 1990) (compensatory services under Burlington may be awarded by making the petitioner eligible for such services beyond the statutory period of eligibility, i.e., beyond the age of 21).

witness for this hearing rather than to give diagnostic information to the ARD Committee. STUDENT had been repeatedly diagnosed by the school district and other outside diagnosticians so another diagnosis was of marginal value. Moreover, the parent did not give Dr. *** full and accurate information to help him correctly diagnose STUDENT⁷

Attempts to Reopen the Litigation To Cover Extra Grievances
That Occurred After Parent Filed for a Due Process Hearing

Finally, I reject the repeated tries by the Petitioner to reopen this litigation to cover new and added grievances between Petitioner and the HISD which have developed since she filed this case. Just because a due process hearing is pending before me, doesn't give me a right to exercise day-to-day supervision over disciplinary matters involving STUDENT and HISD even when they tangentially involve facts similar to those in the pending Special Education Due Process hearing.

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 is **GRANTED** in part and **DENIED** in part.

It is **ORDERED** that the ARD Committee shall consider the "Autism Supplement Requirements in Drafting Future IEPs for STUDENT. It is further **ORDERED** that

⁷ For example, Dr. *** seems to believe that STUDENT has almost no appropriate interactions with other children. But the record shows that he has friends he plays dominoes with. Other misinformation (or at least inconsistent information with information she gave to Dr. ***) involved the mother's description of STUDENT's early childhood.

HISD shall provide 36 hours of counseling services to STUDENT after he reaches the age of twenty-one if an ARD Committee determines that he needs and would benefit from such services.

All other relief requested by the Petitioner should be and it is hereby in all things **DENIED.**

IT IS SO ORDERED.

NOTICE TO THE PARTIES

This Decision is final and may be appealed to a 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 Special Education Programs and Complaints at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating 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 4th day of November, 2005.

Larry J. Craddock

Special Education Hearing Officer

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SYNOPSIS

Issue No. 1: Whether placement of STUDENT in a BSC class of the *** School was consistent with LRE requirement of IDEA?

Citation: 34 C.F.R. §300.550 (b)

Held: For the District. Placement was approved by ARD committee consensus and petitioner as part of the ARD committee signed a report indicating her agreement with the placement. Also, the diagnosis of STUDENT by both public and private experts supported the placement.

Issue No. 2: Whether STUDENT suffered physical and verbal abuse from HISD personnel or from improperly supervised fellow students in the 2004-2005 school year?

Citation: 19 TAC § 89.1053; Tex. Education Code §37.0021

Held: For the District. Only such force was employed as reasonably necessary to restrain STUDENT from disrupting class activities and doing injury to himself or others. HISD responded quickly to break up fights with other students to minimize injuries to STUDENT and other students.

Issue No. 3: Whether STUDENT suffers from autistic disorders?

Citation: 34 C.F.R. §300.7 (c)(1); 19 TAC § 89.1055(e).

Held: For the Student. Although diagnosticians are not in agreement on the diagnosis for STUDENT, there is a credible diagnosis of autism. Thus HISD should address the issues of the "autism supplement" in his IEP.

Issue No. 4: Whether a proposed future placement of STUDENT in ABC East (as recommended by HISD officials) would be appropriate if approved by the ARD committee (or whether the ARD committee should place STUDENT at Memorial Hall or Monarch School as desired by the petitioner) ?

Citation: 34 C.F.R. §300.550; Tex. Education Code §29.008.

Held: For the District. The evidence reflects that ABC East will be an appropriate placement for STUDENT even if it is determined that he has Asperger's or another autistic disorder. Memorial Hall and Monarch School do not accept students with his behavior problems and Monarch School is not accredited by TEA.

Issue No. 5: Whether proper IEPs were in place for counselling and a BIP were in place for the 2004-2005 school year?

Citation: 34 CFR § 300.520, § 300.347 and § 300.300; 19 T.A.C. §89.1055.

Held: For the Student. IEP's in place for STUDENT in the 2004-2005 school year did not meet IDEA requirements and were not properly implemented by STUDENT's teachers and counselors. HISD has stipulated that STUDENT is entitled to 36 hours of counseling services to compensate him for services not provided in the 2004-2005 school year and should provide such services by tacking them on to the end of the period for which he is eligible for services under IDEA. STUDENT did not lose any education opportunities as a result of the defective IEP's except for the 36 hours of counseling services.

Issue No. 5: Whether the Petitioner is entitled to reimbursement for hiring Dr. ***, Ph.D.?

Citation: 34 CFR 300.502((a)(3)(i)).

Held: For the District. Several independent evaluations had already been conducted for STUDENT and the IEP provided by Dr. *** was adequate.