

Student bnf Parent, Petitioner	§	BEFORE A SPECIAL EDUCATION
	§	
	§	HEARING OFFICER
	§	
Ben Bolt-Palito Blanco ISD, Respondent	§	FOR THE STATE OF TEXAS

FINAL DECISION

Party Representation

Attorney Christopher Jonas of the Center for Special Education Law, Corpus Christi, Texas, represents the petitioner. Attorney Cynthia Buechler, Buechler & Associates, P.C., Austin, Texas, represents the respondent Ben Bolt-Palito Blanco Independent School District.

Issues Presented

The petitioner asserts that school district evaluations of petitioner have not been timely. The petitioner also asserts the district hasn't implemented enough of the evaluator's recommendations. Petitioner concludes this has resulted in the district denying petitioner a free available public education ("FAPE"). Respondent asserts that:

- some of the issues the petitioner raises are outside the one-year limitations period applicable in Texas special education due process hearings, and
- the school district has provided petitioner with a FAPE which includes appropriate academic and counseling services; and
- petitioner has made remarkable academic and social progress during the 12 month period immediately preceding the filing of this litigation.

The district did a remarkable job of serving petitioner over the past year. The evidence shows to my satisfaction the district provided petitioner a FAPE in student 2010-2011 *** year. But the evidence also shows that the district failed in its child find obligation from August 2009 until April 29, 2010. A one-year limitations period applies in Texas Special Education cases. Stated another way, a petitioner can't recover on claims over a year-old. I will award petitioner compensatory education to make up for any loss of education during the portion of the 2009-2010 school year that was not time-barred when petitioner filed this suit. I will deny all other relief sought by petitioner.

Separately stated findings of fact and conclusions of law follow.

Findings Of Fact

1. Petitioner is a *** grade student who qualifies for special education services as a student with autism, specifically, Pervasive Development Disorder.
2. The petitioner is a resident of the Ben Bolt-Palito Blanco Independent School District. It is the district's duty to provide student with special education services under the Individuals with Disabilities Education Act.
3. When petitioner was very young, ***. Student's biological mother ***, and student's biological father ***. For a time, student and student's *** sisters and biological mother were ***. The petitioner sometimes ***. Eventually, student's *** of petitioner and petitioner's siblings ***. Petitioner's siblings were

*** and student ***. Student now lives with ***. Petitioner regards petitioner's *** as petitioner's parents and they regard petitioner as their ***. Any references in this decision to petitioner's parents, petitioner's father or petitioner's mother should be construed as references to the *** rather than as references to petitioner's biological parents unless otherwise specifically stated.

4. Petitioner's *** caused petitioner many problems. Student was almost entirely lacking in socialization skills when student's parents first enrolled student in the Ben Bolt-Palito Blanco *** program at the beginning of the 2009-2010 school year. Student would not look people in the eye when talking, ran from student's teachers, hid under desks and tables, and often kicked, bit, and hit teachers and other students. An ARD Committee initially placed petitioner in special education on April ***, 2010 (almost 8 months after student enrolled in the the Ben Bolt-Palito Blanco ISD). In addition to lacking rudimentary social skills, petitioner was behind student's age-group in petitioner's ability to learn when student entered school in August 2009.

5. The petitioner filed this action on March 21, 2011. Texas has a one-year-limitation-period on special education claims.¹ I have no authority to redress any violations of the Individuals with Disabilities Education Act that occurred before March 21, 2010. I only have jurisdiction to redress violations of the Act which occurred on or after March 21, 2010.²

6. The parents enrolled the petitioner in the Ben Bolt-Palito Blanco in the *** 2009-2010 academic year. Within the first few weeks of student enrolling in school, student came to the attention of ***, who is a certified special education teacher in the Ben Bolt-Palito Blanco Independent School District with *** teaching experience. *** testified in part on direct examination by Ms. Buechler [Tr. 104-105]:

A. [***] *I had the first encounter[with petitioner] when I heard someone crying in the *** room. . . . And it was a cry that was so deep, it scared me. And when I went to student . . . student said, don't turn off the lights, because *** . . ."*

Q. [Ms. Buechler] *You are referring to the *** ? . . .*

A. [***] *Yes. I'm sorry. To the ***, yes . . . And then *** within a couple of weeks when student first came, student was crying again. And so I grabbed student . . . it was like a fetal hold . . . Student was combative and student was hitting and doing everything . . . And I thought this child needs some love . . . and I held student and I rocked student and rocked student, and student was fighting me and fighting me till finally student let it go and student just cried and cried. I cried. It was terrible. I hope no other child I hear like that again because it was terrible . . .*

And on cross-examination by Mr. Jonas, *** continued this testimony [Tr. 117-118]:

Q. [Mr. Jonas] ****, the story you were telling us about when you held [petitioner] when was that?*

A. [***] *That was student's *** year.*

Q. [Mr. Jonas] *What month?*

¹ The one-year limitations period is found in 19 Tex. Admin. Code ' 89.1151 (c). It precludes petitioner from asserting claims prior to one year from the date of the filing of the request for due process hearing (March 21, 2011). See *K.C. b/n/f M.C. and W.C. v. Mansfield ISD*, 618 F. Supp. 2d 568 (N. D. Tex. 2009); *Texas Advocates Supporting Kids with Disabilities v. Tex. Educ. Agency*, 112 S.W.3d 234, 240-41 (Tex. App. -- Austin 2003, n.w.h.).

² There are exceptions to the Texas 1 year limitation period for violations of IDEA, but none that apply to the facts of this case.

A. [Ms. ***] *If I'm correct it's August. That was at the very beginning [of student's enrollment in school at Ben Bolt-Palito Blanco ISD], August-September [2009]. . .*

Q. [Mr. Jonas] *And at that time, did you feel that [petitioner] was a student that needed special education services?*

A. [Ms. Mayorga] *Yes.*

7. Also immediately after petitioner's enrollment in 2009-2010, petitioner came to the attention of school personnel because of disciplinary infractions. On August 25, 2009, the district filed a disciplinary report in petitioner's file. Petitioner placed a pencil in petitioner's mouth on the school bus and refused to obey school personnel who told petitioner to remove it. On August 28, 2009, the district contacted petitioner's parent on another disciplinary report. Petitioner left class twice, once in the morning and once in the afternoon. School personnel after some searching finally found petitioner hiding under a table in the morning and in the afternoon found petitioner in the school library. The school district asked parent for help in deciding how to handle this type situation. A second August 28, 2009 report states, "[petitioner] refuses to comply with directions. Kicked teacher when student was escorted to the [lunch] line." On September 3, 2009, the school again contacted parent stating in part, "On September the first 2009, [petitioner] bit a *** student and a resource teacher. Student also kicked an instructional aide and scratched the *** teacher. On September second, student left the classroom without permission and came to the front office. Student then started taking leaves off a tree and put them in student's mouth. The student continues to not comply with school rules. We are concerned for student's safety as well as the [safety of] other students." Petitioner was disciplined with a two-day suspension. On September 10, 2009, the school wrote parent, "[petitioner] continues to leave the classroom without permission. Student kicked a student and slapped another student. The student continues to not comply with school rules. We are concerned for student's safety as well as the [safety of] other students." The district disciplined petitioner on this occasion with a one-day suspension. (Petitioner exhibit 24).

8. The petitioner asserts it was clearly evident from the time petitioner entered school (August 2009) that petitioner needed special education services. Petitioner asserts the school district violated its child-find duty under IDEA to identify petitioner and test petitioner for special education eligibility. Petitioner asserts the district had a duty to test petitioner several months before the district actually tested petitioner (January and February 2010). Petitioner asserts the district then unreasonably delayed placing petitioner in a Special Education program for several months (until April ***, 2010).

9. Dr. ***, a consultant hired by the parents, diagnosed petitioner as autistic at the end of 2009.³ The district hired a licensed provider of psychological and counseling services to perform a psychoeducational evaluation of petitioner soon afterward.⁴ The provider, Dr. ***, performed the evaluation on January ***, 2010, and February ***, 2010, and issued a written report.⁵ Dr. *** found that petitioner qualified for special education services as a student with autism, specifically, Pervasive Development Disorder. The petitioner's ARD committee reviewed the report on April ***, 2010. The April ***, 2010 ARD committee classified petitioner as eligible for special education services.

10. The ARD committee decided in its April ***, 2010 meeting that petitioner should receive the *** curriculum for social skills from petitioner's special education teacher and should also receive counseling from the general education counselor. The April ***, 2010 ARD committee also decided that petitioner didn't need a

³ Tr. 28 – Testimony of petitioner's father. There is no information in the record about Dr. *** full name and no information about the precise date on which he diagnosed petitioner as autistic.

⁴ My impression is that the district hired the licensed provider at the insistence of petitioner's parents, but I have been unable to find this in the record.

⁵ Respondent's Exhibit 8. I was unable to locate a date on the written report showing what date Dr. *** issued it.

behavioral intervention plan ('BIP'). Petitioner's mother was part of the April ***, 2010 ARD committee. She signed as concurring with all the ARD committee's decisions and recommendations.

11. At petitioner's age and grade level, social skills and counseling are embedded in the general curriculum. Teaching and counseling petitioner has been a team effort involving petitioner's regular teacher, the paraprofessional aide or "shadow" assigned by the school district to work with petitioner, a special education counselor, and the physical education coach (Tr. 77; 86). ***, petitioner's regular teacher last year; ***, petitioner's special education teacher last year; ***, petitioner's general education school counselor last year; ***, who was petitioner's physical education teacher last year and who is petitioner's general education school counselor this year; and ***, LSSP, a private consultant who the school has hired to provide petitioner supplemental services all testified to the student's remarkable transformation during the 2010-2011 school year. When they began working with petitioner at the beginning of the school year, student seldom made eye contact, with anyone student was talking to, had few, if any, school friends, rarely played with other children, hit, bit, kicked, and choked them, and was prone to temper tantrums. By the end of the school year, petitioner's eye contact was generally good, student had bonded with *** in the class, and, while the temper tantrums and other misbehavior didn't entirely disappear, student was generally cooperative with petitioner's teachers. Student was described at the end of the year as a very good dancer, ***, and someone who is often chosen as a partner in school activities by other children. During free play time student now plays with the other children but student didn't do so at the beginning of the school year. Also at the first of the school year, student was far behind the other children academically and by the end of the year was performing on grade level. Even the student's mother agreed that student had made remarkable socialization and academic progress during the 2010-2011 school year. An outside autism specialist, ***, who was brought in to consult with the district on petitioner's school program at the parents' request, recommended that the ARD committee consider providing a counseling and academic program in the 2011-2012 school year similar to the one the district had provided in the 2010-2011 school year.

12. Petitioner has received counseling 30 minutes a week from April ***, 2010 to the present from a general education school counselor. *** provided the counseling while petitioner was in ***. *** provided the counseling in ***. Ms. *** has been providing this counseling since petitioner has advanced to the *** grade.

13. The ARD committee reconvened on December ***, 2010. School counselor for general education, ***, attended the ARD committee meeting and discussed petitioner's counseling services with the committee. She recommended (and the ARD committee offered to the parents) in-home training for parents of an autistic child but the parents declined the offer. (This training has been offered to the parents several times, but the parents have always declined it.) The December ***, 2010 ARD committee discussed petitioner's academic and behavioral progress. The petitioner's teacher told the committee that petitioner was making great gains academically and behaviorally. The December ***, 2010 ARD committee agreed to a consultation by an autism specialist, ***, to advise on petitioner's academic and counseling program. The committee also recommended that a psychological assessment be conducted for petitioner, including a special education counseling assessment, by an outside professional.

14. The petitioner's parents were part of the December ***, 2010 ARD committee. They concurred in all the ARD committee's decisions and recommendations.

15. *** is a licensed specialist in school psychology (LSSP) and an employee of Dr. ***, who is a psychologist as well as a licensed specialist in school psychology (LSSP). *** came to the school district to conduct the psychological evaluation and assessment recommended by the December ***, 2010 ARD committee. She and Dr. *** prepared a report containing their findings and recommendations. They completed their report on January 24, 2011. It is in evidence as Respondent's Exhibit 3; Petitioner's Exhibit 12.

16. *** and Dr. *** psychological evaluation report finds that petitioner continued to meet eligibility criteria for special education as a student with autism. It also finds that petitioner could benefit from receiving counseling as a related service.

17. The ARD committee met to consider the report on May 12, 2011. Petitioner's parents did not attend on the advice of petitioner's attorney Mr. Jonas. The May 12, 2011 ARD committee reviewed the psychological evaluation report and accepted its recommendation that petitioner receive counseling as a related service. The school district hired *** as an outside consultant to provide such counseling services for 30 minutes a week. (*** actually began providing such counseling in February 2011 prior to the May ***, 2011 ARD committee meeting. Tr. 135.)

18. Although neither parent attended the May ***, 2011 ARD committee meeting, that meeting was supplemented by an ARD committee meeting held on August ***, 2011. Petitioner's mother attended and was a member of the August ***, 2011 ARD committee. The following excerpt is from the minutes of the August ***, 2011 ARD committee meeting:

*Purpose of the ARD was to review the May ***, 2011 annual ARD, have *** review new Functional Behavior Assessment and Crisis Intervention Plan, as well as reviewing counseling goals and objectives of the May meeting. . . . Signatures were taken and all committee members agree about all areas discussed. [Petitioner's mother] did not express any additional concerns and all issues were resolved as per her agreement.*

Conclusions of Law

The district did a remarkable job of serving petitioner over the past year. The evidence shows to my satisfaction the district provided petitioner a FAPE in petitioner's 2010-2011 *** year. But the evidence also shows that the district failed in its child find obligation from *** 2009 until ***, 2010. The district clearly had strong reason to suspect from the petitioner's behavior that petitioner was a child with a disability from the day the petitioner entered school. The district nonetheless delayed testing and evaluating the child for special education services from August 2009 until January and February 2010. After the district completed testing and evaluation of the petitioner in February 2010, the ISD again delayed declaring the child eligible for special education until April 29, 2010. This was eight months – an unreasonable delay.

A one-year limitations period applies to claims filed by Texas special education petitioners. I can't award petitioner compensatory education for the portion of the delay extending beyond one-year. Stated another way, petitioner can't recover for any claim petitioner may have had for compensatory education before March 21, 2010. That complaint is now time-barred. However, the delay continued past March 21, 2010 into the portion of the 2009-2010 academic year for which compensatory relief is not time-barred. Petitioner filed this suit on March 21, 2011 and is entitled to compensatory relief for the period running from March 21, 2010 until April ***, 2010. I find the district's violation of the child find obligation to be a serious one. See similarly, *D.A. ex rel. Latasha A. v. Houston Independent School Dist.*, 629 F.3d 450 (5th Cir. 2010); *Student b/n/f Parent v. Seguin ISD*, 232-SE-0205 (Sept 2005).

Order

I have no formula to use to determine the amount of compensatory education or other relief that might appropriately compensate petitioner for the child-find violation. The petitioner's counsel hasn't offered any evidence or specific suggestions for calculating the amount. But he has offered (without objection from the school district) exhibits that show what he was requesting from the district in settlement negotiations. His request to the district reads in part:

1. . . . [The petitioner] will receive 30 min. per week social skills training in classroom settings. Student will receive 30 min per week compensatory services . . . [and] an additional 43 half hour sessions for school year 2011-2012 . . . for the related service of counseling by a special education counselor . . . The counseling IEP will need to address [petitioner's] individual difficulties, behavioral difficulties, and social skills training. The counseling IEP will also need to state services are to be provided direct and in group sessions with the special education counselor. There will need to be a separate social skills IEP for social skills training. The IEP needs to identify the setting in which the IEP is to be implemented, whom is responsible for implementing the IEP, and should include the specific recommendations per the current psychological evaluation. . . . [Other areas to be addressed will include petitioner's] negative individual feelings, negative feelings in social settings, petitioner's struggles working with peers, controlling frustration, improving verbal interaction, understanding and developing friendships with peers. [The district] will need to implement these areas in the appropriate IEP with specific recommendations as per the current psychological evaluation. If needed [the district] will conduct a counseling evaluation.

2 . . . [The district] will conduct a functional behavioral assessment and implement an appropriate behavior intervention plan . . . to include recommended strategies for intervention as per the current psychological evaluation. . . .

3. . . . [The petitioner] will continue with petitioner's instructional shadow for school year 2011-2012 unless an ARD committee, including the parents, agree the shadow will be removed prior to the end of the school year.

I find the portions of petitioner's requests quoted above are reasonable and appropriate. They will compensate petitioner for any loss of opportunity to develop academic and social skills in the period from March 21, 2010 to April ***, 2010. I order the district to provide the education and compensatory services listed above. I deny all other relief sought by petitioner.

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 Federal and State Education Policy 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.

IT IS SO ORDERED, signed December 2, 2011.

/s/ Larry J. Craddock
Larry J. Craddock
Special Education Hearing Officer
for the State of Texas

Notice

Any party aggrieved by the findings and decisions of this Hearing Officer has the right to bring a civil action seeking review in a state or federal court of competent jurisdiction. The party bringing the civil action shall have no more than 90 days from the date of this Decision to file the civil action. See 20 U.S.C. § 1452 as amended.