

"A YEAR IN REVIEW": A LOOK AT THE LEGAL CASES AND THEIR IMPACT FOR FUTURE PLANNING

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Z.W. V. SCHERTZ-CIBOLO-
UNIVERSAL CITY ISD, CASE NO.
SA-21-CV-0636-JKP

(Western District, January 2024)

Factual Background

The student had received services from the district under the eligibilities of Autism, Speech and OHI. He exhibited behaviors and his physician provided that he should receive homebound services when he could not tolerate school. He made significant academic and behavioral progress in his 4th grade year. Because they liked the teacher, the parents asked for him to be held back so that he could have the teacher for another year. The student continued to make progress both academically and behaviorally. In the spring semester, the parents withdrew him from school and lived in England for that semester. Upon returning the next school year, the physician again recommended homebound when the student could not tolerate school.

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Factual Background Continued

After a few months, the parents placed the student in a private school for autism and asked the school to pay for the program. An ARD meeting was held that determined the student could attend a full day and that they had an appropriate program. After the parents threatened to file for hearing, the school paid a lump sum for the student to receive educational services for the remainder of that school year and the subsequent school year.

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Factual Background Continued

When the services ended under the agreement, the parents sought for the school to continue paying for the private school, including the summer. The school district had an ARD meeting and asked to evaluate the student and observe the student in the private setting and to receive records of the student's performance from the private school. Several ARD meetings were held to develop a program. A one-page document was provided by the private school as to the student's current performance. Based upon their observations and the information provided, the school determined that it could provide the ESY services. The parent disagreed and continued to ask for payment for the private school. The student did not attend the district's ESY. For the first two weeks, the student and his family vacationed in Europe.

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Factual Background Continued

The ARD committee also developed an IEP for the following school year pending the results of the evaluation. The parents never brought the student to school. Instead, they continued the private school program and then placed the student residentially out of state. The parents filed for hearing asking for the private school placement and when the student was residentially placed, they requested the school pay for the residential placement.

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Factual Background Continued

After the evaluation was completed, the ARD committee met to review the evaluation. The evaluation found that the student also qualified as Intellectually Disabled. The IEP was revised based upon the evaluation. The parent disagreed with adding the ID label and with the IEP and continued to request residential placement.

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Factual Background Continued

Staff visited the residential placement and were only allowed to observe for one hour rather than two days. They were not shown an academic activity. Staff reported to them that the focus was not academics and that it was medical in nature, even though it did provide some educational program. The staff conceded that the student had regressed academically.

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Factual Background Continued

An ARD meeting was held, and it was determined that the school could provide an appropriate program. Some revisions were made based upon the visit. When the annual ARD meeting was due, the school notified the parents. The parents chose not to attend and wanted the ARD meeting to occur after the hearing. The school informed the parents that they would need to go forward with the ARD meeting. The parents chose not to attend.

Court's Findings

The Court found that the school had an appropriate educational program available for the student. The Court also found that medical, rather than educational, purposes drove the residential placement decision. The facility's focus was not on educating the student. The facility provided a highly restrictive environment that utilized seclusion and other forms of restraint, including medical restraint. Accordingly, the court found that the residential facility was a hospital facility that was not for educational purposes. While it had an educational component, that was clearly not the reason for the student's admissions.

Lessons Learned

- To determine whether an IEP provides a meaningful “educational benefit”, courts must look beyond mere “weaknesses caused by the student’s disability.” They must instead focus on the student’s overall educational benefit, not solely disability remediation.
- Progress on “IEP goals and objectives, as well as recorded test scores and percentile rankings, can aid this process, but no one factor can overwhelm it.
- To determine LRE, the courts must first ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. If it cannot and the school intends to provide special education or to remove the child from regular education, courts must ask, secondly, whether the school has mainstreamed the child to the maximum extent appropriate.

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Lessons Learned Continued

- IDEA left “primary responsibility” for formulating the educational program “and for choosing the educational method most suitable to the child’s needs to the state and local educational agencies in cooperation with the parent or guardian of the child.
- Schools determine educational methodology, not ARD/IEP committees.
- If the district offers a proper and timely FAPE, there is not an obligation to reimburse for private school expenses.
- IDEA authorizes reimbursement for the cost of private special education services when a school district fails to provide a FAPE and the private school placement is appropriate, regardless of whether the child previously received special education or related serviced through public school.

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Lessons Learned Continued

- Even when the first two factors have been met, Courts still retain discretion to reduce the amount of a reimbursement award if the equities so warrant.
- A court's review is limited to whether the IEP is reasonable, not ideal.
- School's only need to offer IEPs that are "reasonably calculated to enable" the student to make progress in light of his or her unique circumstances.

Lessons Learned Continued

- The four factors for determining whether the school district has developed an appropriate IEP are the following:
 1. Whether the program is individualized on the basis of the student's assessment and performance;
 2. Whether the program is administered in the least restrictive environment;
 3. Whether the services are provided in a coordinated, collaborative manner by the key stakeholders; and
 4. Whether positive academic and non-academic benefits are demonstrated.

Lessons Learned Continued

- To comply with IDEA, an IEP sufficient under the IDEA need not be perfect nor must it insulate a child from experiencing hardships while being subject to the IEP.
- The fact that a parent's position regarding their child's education was not adopted by the ARD/IEP committee does not mean that the parents were denied the ability to be a participant in their child's education.
- "Freedom from restraint" is a benchmark of LRE along with the freedom to associate with able-bodied peers to the maximum extent possible.
- The fact that the student's behavioral issues affected his ability to receive educational benefit does not transform the issues from a medical/safety issue to one primarily for educational purposes. A need for hospitalization is a medical/safety issue that transcends any educational issue a child might have. IDEA is not intended to provide for hospitalization admissions or to pay for them if parents unilaterally choose that route.

Lessons Learned Continued

- For a residential placement to be approximate under IDEA, it must be essential in order for the student to receive a meaningful educational benefit.
- IEPs concern the educational needs of students, but they are not required to provide perfect educational opportunities nor are they required to address every desire of a parent or every medical need.
- A student's hospitalization does not mandate a finding that a school district has failed to provide the student with FAPE.
- The nature of IEPs and BIPS demand some flexibility for modification should needed changes become apparent. Such flexibility does not mean that a developed IEP is insufficient to provide a FAPE. It simply recognizes the reality that changes may be needed as more data is available.

Lessons Learned Continued

- Procedural errors do not constitute a violation of the right to FAPE absent a showing of substantive harm.
- Without a reasonable request to delay or reschedule , there is no substantive harm from a school district proceeding with a needed ARD/IEP meeting that parents had declined to attend. Absent a showing that the request for delay was reasonable, a school district's failure to accommodate a request to delay or reschedule does not seriously infringe on a parent's opportunity to participate in the IEP formulation.
- A soon-to-be teacher satisfies the IDEA requirements for ARD/IEP required members for a student who is not currently attending the school district.

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STUDENT V. LITTLE ELM ISD,
SOAH DOCKET NO. 701-23-
05447.IDEA, TEA DOCKET NO.
088-SE-1122

(June 2023)

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Factual Background

The student entered the school district with an IEP for Speech in February 2019. An evaluation was conducted in November 2019 and it was determined that the student no longer qualified for special education and that his needs in the areas of sensory, self-regulation and attention issues could be effectively addressed in the classroom. The parents agreed to the dismissal.

During the 2020-2021 school year the teacher indicated that the student had some issues with task refusal and sensory difficulties, but Student still received passing grades.

Factual Background

At the beginning of the student's 2021-2022 school year, the student's teacher noted the student's refusal to complete work. The teacher and father emailed to discuss strategies to help Student in class and the father mentioned obtaining a private ADHD evaluation.

In November 2021, Student's teacher initiated the SST due to the student's lack of participation in activities. The teacher testified he was trained to initiate response to intervention services before requesting a special education evaluation. SST services started in November 2021. The SST provided accommodations to the student; however, the student's lack of participation and group work refusal did not improve, and student's teacher noted in March 2022, that even with the accommodations, the student refused to complete 80 percent of his work.

Factual Background

The parent requested an evaluation in April of 2022. The school began the evaluation process in May and completed it in October of 2022.

The evaluation did not include an FBA or an OT or counseling assessment. The evaluation found that the student has deficiencies in social communication that lead to substantial interference with everyday social interactions, which are typically associated with a diagnosis of autism. The evaluation showed many characteristics of a child on the autism spectrum, but the evaluator concluded that the characteristics were due to ADHD. The evaluation found that the student qualified as OHI for ADHD.

Factual Background

An ARD meeting was held to place the student in special education. The parent returned the IEP indicating that they agreed that the student qualified for special education services but disagreed that the student did not qualify as autistic, nor did they agree with the IEP. The school treated this as a disagreement to place the student in special education and did not provide special education services.

The parents filed for hearing and obtained a private evaluation from an LSSP and BCBA that found that the student qualified as a student with autism and ADHD.

Court's Findings

The Hearing Officer found that the District had reason to suspect the student may need special education and related services as a result of a disability by the beginning of spring semester of 2022. SST interventions began in November 2021 after the student's work refusal continued from the beginning of the school year. In the spring of 2022, the interventions aimed at increasing participation proved unsuccessful, and the student continued to not participate.

Court's Findings Continued

The District finally initiated an evaluation only after Dad requested one in April 2022, and the evaluation was completed in October 2022. The hearing officer found that the four month delay between January 2022 and May 2022 to initiate the evaluation was unreasonable and violated the district's Child Find obligation.

The hearing officer further found that the district failed to identify the student as autistic even though the data contained in the evaluation conclusively found the student met the eligibility. As such, the hearing officer found the IEP to be inappropriate because it did not have clear goals for social skills nor did it address the Autism Supplement.

Lessons Learned

- A delay in evaluating can be reasonable if the District takes proactive steps between notice and referral. The District's SST interventions were proactive steps, but once it was clear those interventions are not working, a District needs to evaluate a student.
- A student does not need to first receive interventions through RTI before being referred for a special education evaluation.
- When a parent puts qualifiers on their consent for services, an ARD meeting needs to occur to address the qualifier.

Lessons Learned Continued

- While the label does not drive the programming for the student, the student's strengths and weaknesses do. If a student exhibits the characteristics that are consistent with autism, even if the ARD/IEP committee do not choose to add the label, the ARD committee needs to address all of the elements of the Autism Supplement to ensure that all of the student's needs are met.
- When conducting an evaluation for autism, an OT should be part of the multidisciplinary team.
- When developing a program for a student, services need to be different than what has been already tried and found unsuccessful.

STUDENT V. CONROE ISD, SOAH DOCKET NO. 701-21-3042.IDEA TEA DOCKET NO. 230-SE-0721

(February 2022)

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Factual Background

A student had two outside evaluations that diagnosed the student with autism. The parents requested a special education evaluation at the beginning of the 2019-20 school year. While the evaluation was pending, Student received Section 504 services.

Using information obtained from observations, interactions with Student, parent and teacher information, and testing data, the Licensed Specialist in School Psychology (LSSP), educational diagnostician, and speech therapist completed the Child Autism Rating Scale, Second Edition (CARS2-HF), a behavior rating scale to determine whether a high functioning individual has sufficient symptoms to be considered for a diagnosis of autism spectrum disorder.

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Factual Background Continued

Student achieved a total raw score below the standard clinic cutoff. However, the CARS2 assessment was completed before the occupational therapist completed her evaluation which showed numerous areas of sensory processing dysfunction. The 2019 FIE did not include further assessments specific to autism. The LSSP relied on Student's previous diagnoses, ability to interact socially with students and make eye contact, and lack of sensory seeking indicators in not conducting the Autism Diagnostic Observation Schedule (ADOS) or other measures.

Factual Background Continued

The BASC-3 was also administered. Children who present with elevated scores on the BASC-3 Autism Probability Index likely exhibit a variety of unusual behaviors and problems with developing and maintaining social relationships. All three teachers gave ratings in the clinically significant range, with the parent ratings in the at-risk range. Across settings, Student demonstrated impaired emotional/social reciprocity and rigidly adhered to routines/rituals.

Factual Background Continued

On the BASC-3 Emotional Behavioral Disturbance Probability Index, all ratings fell in the clinically significant range. Across settings, Student had verbally or physically aggressive temper outbursts and an irritable or angry mood between outbursts.

However, the evaluation did not find the student eligible as autistic, but rather emotionally disturbed.

Court's Findings

Because the student had been eligible for special education services since 2018, the hearing officer found that the District satisfied its Child Find obligation at that time and determined that the claim was appropriately construed as a challenge the District's failure to properly evaluate and identify Student's eligibility under the IDEA, rather than a Child Find claim. Because Student's eligibility under the IDEA has been established, the relevant inquiry is whether the District provided Student a FAPE.

Court's Findings Continued

The hearing officer found that the District's 2019 FIE was not sufficiently comprehensive in the area of autism and its conclusion that the student did not meet eligibility criteria was not supported by its own data. Despite two recent private evaluations conducted in 2019 diagnosing Student with an autism spectrum disorder, the 2019 FIE included a single measure specific to autism, the CARS-2 HF.

Court's Findings Continued

Further, in determining Student's eligibility in 2019, the LSSP attributed Student's significant social deficits to "cognitive distortions," but did not assess cognitive distortion and this conclusion was reached without data to support it. In contrast, in addition to the comprehensive assessment of Student's characteristics of autism, the outside evaluator thoroughly and credibly explained her conclusion as to why autism, rather than an emotional disturbance, combined with ADHD, are Student's "core" diagnoses.

Court's Findings Continued

In determining Student did not meet criteria as a student with autism in September 2021, the Hearing Officer found that the District inappropriately discounted the ADOS-2 administered by the outside evaluator due to a concern over scoring validity related to the use of a plexiglass shield during testing. However, the outside evaluator credibly confirmed during her testimony describing her evaluation room that she did not conduct the evaluation with a plexiglass shield between herself and Student. Further, the District misinterpreted the IEE as to the ASRS findings.

Because Autism was not identified, the Hearing Officer found the student did not receive behavioral support services or the services contained in the autism supplement and therefore did not receive FAPE.

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Lessons Learned

- A school district that has determined a student is eligible for special education and provided the student with an IEP has satisfied its Child Find obligations even if the parties disagree over the correct eligibility condition.
- A specific classification or label is not required as part of the Child Find obligations or as part of the IDEA itself; rather, the relevant inquiry is whether the student received a FAPE.
- An evaluation must also be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified.

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Lessons Learned Continued

- The school district should also consider a student's academic, behavioral, and social progress in determining whether the student needs special education for purposes of IDEA eligibility.
- Eligibility for services under the IDEA is a two-pronged inquiry:
 - (1) whether the student has a qualifying disability, and
 - (2) whether, by reason of that disability, the student needs IDEA services.

Lessons Learned Continued

- In making an eligibility determination, the ARD committee must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior.

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