

DOCKET NO. 271-SE-0520

STUDENT, B/N/F PARENT AND
PARENT,
§ Petitioner
CK1 EMC /TH
v.

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§
§

BEFORE A SPECIAL EDUCATION

II. PROCEDURAL HISTORY

A. Legal Representation

VI. FINDINGS OF FACT

Student Needs and Eligibility

1. Student is ***- year-old *** grader in the District. Student lives with Student's mother, father, ***. Student was first diagnosed with autism in June 2011 at the age of *** when— after noticing a regression of milestones, d (E)sr no s fd w (E 1 (f)p (d we (r)c

determine whether Student might benefit from some of the same online instructional programs *** was using during school closures.²²

22. Parents and the District agreed to amend the May 2019 IEP in accordance with a Special Education Emergency Contingency Plan (Plan) on or about May ***, 2020. The Plan agreed upon by Parents and the District offered direct speech therapy services for 30 minutes once a week or indirect services three times per grading period. Parents requested indirect speech services.²³
23. The Plan indicated that Student would receive modified work weekly and participate in learning through online tools and lessons, including ***. Plan identified the following accommodations supervision, visual aids (pictures, flashcards, etc.), manipulatives, frequent breaks, ***, positive reinforcement, chunking assignments, ***, and modified curriculum. It also identified additional resources that could be accessed through learning maps and District choice boards for ***.²⁴
24. The ARD committee meeting originally noticed for February ***, 2020, was held on May ***, 2020. The committee reviewed Student's PLAAFP. Student made passing grades in a modified curriculum. As of March **, 2020, Student was demonstrating mastery of Student's speech therapy goals. Student also met the third benchmark towards two of Student's annual reading goals and was making progress towards a Student made some progress from May 2019 to March 2020, with respect to behavior and self help goals. Although Student did not meet the benchmarks in Student's ** goals, Student showed progress over the course of the school year. Student showed regression in one of Student's reading goals, all three Student's math goals, and Student's science and *** goals. Student's lack of progress was result of Student's prompt dependence and a lack of accuracy in certain skill sets.²⁵
25. Student was reading at an independent level and was able to answer *** comprehension questions correctly. Parents disagreed with the data and indicated that Student was reading higher level books at home and was able to answer questions about them. Parents expressed similar concerns regarding Student's reported present levels of performance in *** and math.²⁶
26. Parents provided videos of Student working ~~one~~ with Student's mother. In these videos, with visual and verbal prompting from the parent and limited or no visual or

²² PE 9 at 20; Tr. at 277:121.

²³ JE 14 at 2.

²⁴ JE 14 at 23.

²⁵ JE 15 at 4648; JE 16 at 49; JE 24 at 17; Tr. at 594:613, 730:21734:12.

²⁶ JE 15 at 4, 46, 47.

auditory distractions, Student was able to read a higher level book and write simple sentences on a dry erase board²⁷

27. Student did not engage with peers or adults, attend to classroom instruction, or participate in small group activities in the general education setting. Student continued to struggle with ***. Parents offered input and suggestions related to the behaviors, including providing support for seating during instruction, and reminders to slow down. The District identified seating and visual supports it used to meet Student's needs, noted Student's need for frequent movement, and agreed that *** were helpful.²⁸
28. The May 2020 IEP proposed to continue Student's modified curriculum, accommodations, and supports. The ARD committee reviewed proposed goals. Parents agreed with the speech goals, but expressed concerns and requested revisions to the reading, math, ***, science and *** goals. Student's goals were revised to take into account Parents' concerns.²⁹

29.

the 2020 school year: Because Student showed progress in reading, reading was a preferred activity, Student receive reading instruction. Due to Student's struggles with functional routines, lack of

- 31. ABA strategies help students learn to manage their behavior and include, among other things, first/then practices, visual schedules and supports, structured teaching and learning, social skills training, and shaping, modeling, and task analysis. ABA strategies also recognize a prompting hierarchy in which prompts are given at the lowest level possible

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was escape/avoidance and concluded that there were secondary concerns related to attention and sensory needs.³⁶

36. Ms. *** recommended frequent but short breaks, and prompt and proximity fading. A *** is a system by which a student receives frequent reinforcements. The May 2020 IEP and BIP proposed the use of a frequent reinforcement system with Student, frequent breaks, a first-then strategy to gain compliance, and teaching strategies that included a prompting hierarchy and prompt fading.³⁷
37. Ms. *** recommended that staff preview lessons with Student; incorporate errorless teaching strategies; and provide a dynamic learning environment in which Student would be able to stand for some instruction and have the chance to walk, jump, or run briefly and frequently when appropriate and under instructional control. Student's case manager previewed lessons with Student, embedded content lesson concepts across the curriculum, integrated errorless teaching strategies, and provided Student with a learning environment that incorporated the opportunity for movement by jumping, walking, and acceric22k9x -12 (c)
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DOCKET NO. 271-SE-0520

with the campus principal prior to committee meetings. Members of the ARD committee did not believe that an in-home or parent training assessment was necessary.⁵²

52. Dr. *** recommended that the District provide ESY services in the areas of self communication, and social skills training. The ARD committee discussed ESY services for summer 2019 and agreed that Student would receive one instruction over the course of two weeks in reading, math, and writing. The District planned to collect data during ESY for goals agreed upon by the committee. Parents declined those services because the campus Student would attend for ESY services offered a *** program, and Parents believed this to mean that Student would receive ESY services in a *** setting. In addition, the District offered related services for two weeks in the summer of 2019, but Parents were traveling and unavailable to receive those services.⁵³
53. The District offered Extended School Year (ESY) services again in May 2020—this time in a virtual setting due to COVID-19. Parents rejected the District's offer to the parties' disagreement over the appropriate educational placement for Student. Parents also opted not to receive related services from the District that summer for the same reason, believing that the services would not be beneficial.⁵⁴

VII. DISCUSSION

A. Duty to Provide FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique

with Student's IEP. 20 (U) S. C. § 119 (b) (7) Etc. H.A.R. 7-13407 (0.8 323 B 15 d. 46) j Of 0 F 37 d 0 6.2.843 [4.8

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program. *Richardson Ind. Sch. Dist. v. Leah Z.*, 580 F. 3d 286, 294 (5th Cir. 2009).

Parents contend in this case that the May 2019 IEP was not reasonably calculated to enable Student to make appropriate progress and that the District failed to implement it in a manner that would warrant the placement proposed in the May 2020 IEP. They assert that, with additional services and supports offered in the ~~the~~ and general education settings, Student will make appropriate progress. The District, on the other hand, argues that the May 2019 IEP was sufficiently individualized and properly implemented, but that Student's unique circumstances dictate a more restrictive environment in order to

When developing an IEP and behavior plan, a school district must consider the student's strengths, Student's parent's concerns for enhancing Student's education, results of the most recent evaluation data, and Student's academic, developmental, and functional needs. 34 C.F.R. 300.320(a)(1)(i). For a student whose behavior impedes Student's learning and that of others, the school district must also consider positive behavioral interventions and supports and other behavioral strategies when developing Student's IEP and BIP. 34 C.F.R. § 300.324(a)(2)(i); v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801, 813 (5th Cir.2012).

3. The May 2019 IEP

In May 2019, the ARD committee developed academic, functional, speech therapy, behavior, and *** goals based on Student's present level performance as determined by teacher observations and Student performance in the classroom and on assessments as well as the *** Evaluation.⁵⁶ B1 Tw -13.63333 (i)-2y ***

assistive technology, frequent breaks, and access to the campus. Student also received inclusion support during *** classes.

Consistent with the recommendations of Mrs. *** and ***, Student's program offered a balance of intensive supports in an attempt to promote independence and provide opportunities to

DOCKET NO. 271-SE-0520

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5. Least Restrictive Environment

The IDEA requires that a student with a disability shall be educated with ~~disabled~~ disabled peers to the maximum extent appropriate and that special classes, separate schooling and other removal from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This provision is known as the “least restrictive environment requirement.” 34 C.F.R. § 300.114(a)(2)(ii).

minimize disruption.⁵⁸ Moreover, Student's program should include a balance of intensive support to develop Student's abilities to manage self with more independence along with opportunities to practice with nondisabled peers. The weight of credible evidence establishes that the placement proposed by the District in the May 2020 IEP is the least restrictive setting in which the District will be able to meet Student's needs in this regard.

The District's program offers a full curriculum that is modified to meet the individual needs of students with cognitive and adaptive behavior deficits. The classroom is configured to minimize distractions and support whole group instruction, one and one-to-two instruction, and individual work. It is highly structured and incorporates organizational systems designed to develop the student's ability to function independently. The program uses ABA principles throughout the day and focuses on academic needs as well as functional needs, communication, vocational needs, transition planning, and social skills. Importantly, the District is not suggesting that Student be assigned to this setting for the entire school day. Rather, the District proposes additional settings along a continuum to further support Student's movement through the four levels of learning identified by Dr. *** and to provide Student with the opportunity to practice these skills with Student's nondisabled peers in the general education setting as recommended by Dr. ***. In this manner, the District's proposed placement mainstreams Student to the maximum extent possible.

parents have the right to dictate an outcome, because parents do not possess “veto power” over a school district’s decisions. *Me ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003). Absent bad faith exclusion of a student’s parents or refusal to listen to them, a school district must be deemed to have met the IDEA’s requirements regarding collaborating with a student’s parents. *Id.*

The evidence establishes that services were provided in a coordinated, collaborative manner by key stakeholders. The District collaborated with parents. The District provided Parents with appropriate notice of proposed ARD committee meetings. Because of their busy schedules, Parents requested two to three weeks notice of the meetings. The District honored their request. Parents conferenced with staff outside of ARD meetings and met with the campus principal prior to ARD committee meetings. Parents were active members of the ARD committee during both the May 2019 and May 2020 ARD committee meetings. The District revised goals to incorporate Parents’ input and to address their concerns regarding Student’s education. The District made adjustments to Student’s program and agreed to Parents’ request to keep Student in a ***/general education setting for the 2019-20 school year, even though the District’s recommended placement included a *** setting. The District also provided daily *** to Parents from August 2019 until approximately March 2020 when campuses in the District were closed due to COVID-19.

Members of the staff who worked with Student collaborated with one another. Campus education, support, and administrative staff collaborated at the beginning of each year to discuss Student’s needs, curriculum modifications, and accommodations. Student’s case manager, paraprofessional, and classroom teacher collected data on Student’s progress and reviewed it to evaluate progress. The District provided training to Student’s teachers and support staff on general ABA principles and autism. Meanwhile, Student’s case manager resulted with a program specialist in an effort to identify resources and provide support for Student learning during school closures.

Finally, as discussed more fully above, the May 2019 and May 2020 IEPs and 2020 BIP either reflected

. Meanwhile, the District incorporated suggestions made by Dr. into its teaching strategies and supports for Student.

Parents argue in this ~~case~~ however, that the District's efforts were insufficient. They contend that they were denied a meaningful opportunity to participate in the educational decision-making process for Student. Their argument is threefold. First, ~~they~~ contend that the District was obligated to provide them with a copy of Dr.***'s report, and that it failed to do so. The ~~***~~ report, however, arose out of the parties' 2018 settlement agreement ~~which~~ required the District to contract with an outside BCBAD to make recommendations based ~~on~~ observations of Student. It was not an evaluation of Student's needs and abilities. Rather, it was

attempting to withhold information from parents in an effort to exclude them from the decision-making process.

Third, Parents also argue that the District predetermined Student's placement^{***} in a classroom. Predetermination occurs when a school district makes educational decisions so early in the planning process that it deprives the parents of a meaningful opportunity to fully participate as equal members of the ARD committee. *E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 769 (5th Cir. 2018) (citations omitted).

Parent's predetermination argument is based, for the most part, on entries made to the District's special education software system on or about February ^{***}, 2020, and an email from Student's case manager to a ^{***}program specialist requesting resources to use during school closures. Parents' arguments are not persuasive. They overlook the fact that the District scheduled an ARD committee meeting for February ^{***}, 2020. Drafting documents, entering data, and preparing for an ARD meeting are logical steps to take prior to the meeting and, without more, do not denote predetermination. Parents' reliance on an email between colleagues attempting to identify resources to meet Student's needs is equally unavailing. In the third factor of the Michael F. analysis explicitly contemplates this type of cooperation and collaboration among stakeholders—a term which reasonably includes not only a student's teacher, but also other District staff members with different areas of expertise and exper

this case shows that Student made passing grades in a modified curriculum with intensive supports. It also establishes that Student met Student's speech therapy goals and made progress in reading as well as some progress over the course of the year towards IEP goals in ***, behavior, and ***. Student thus received an academic benefit from the program provided under the May 2019 IEP.

The record reflects, however, that Student struggled in math, science, ***, and even in areas where Student showed some growth. It also shows that this lack of progress is the result of Student's deficits in independence as well as the skills necessary to make progress in math. 15s (c)4 (h t)-2 (

F. Procedural Requirements

In addition to the claims asserted above, Parents argue that the District committed procedural violations of the IDEA by failing to provide prior written notice and comprehensively evaluate Student.⁵⁰

Liability for a procedural violation only arises if the procedural deficiency: (i) impeded the student's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the child; or (iii) or caused a deprivation of educational benefits. *Adam J. ex rel. Robert J.*

supports were provided in response to needs identified through an appropriate assessment conducted by an occupational therapist. Because the District failed to assess Student's sensory needs through occupational therapy, the District committed a procedural violation of the IDEA. For the reasons stated above, however, this procedural violation did not result in a substantive denial of FAPE.

Next, we consider whether the District improperly failed to perform an assessment for in-home and/or parent training.⁶⁰ The ARD committee considered the possible need for these related services at the May 2019 and May 2020 annual ARD committee meetings. The committee agreed on both occasions that viable alternatives to home training existed to assist Student with the acquisition of social and behavioral skills. The record also indicates that the ARD committee considered information related to parent training and support provided by personnel with experience in Autism Spectrum Disorders and determined that Parents would be invited to group parent trainings offered by the District throughout the school year. The committee noted in May 2019 that visual supports and icons would be provided to Parents and, in May 2020, that Parents could conference with teachers and service providers on successful strategies. Examples of visual supports and social and behavioral strategies would be provided upon request. The record also reflects that Parents conferenced with staff. These facts indicate that the ARD committee considered and took steps to address parent and home training needs. Thus, it cannot be said that the District failed to assess Student's needs in this regard.

Finally, Parents complain that the District failed to conduct an appropriate communication evaluation, and they request a Total Communication evaluation. Respondent, however, conducted an assistive technology evaluation, and Student's use of a PCS system (***) as a result of that evaluation. Both Petitioner and Respondent reported positive outcomes related to Student's use of the PCS, and none of the members of the ARD committee recommended a reevaluation of

⁶⁰ Parent's Closing Brief seeks an in-home/parent training assessment conducted by a BCBAD as a Petitioner's requested relief, and Parents offered testimony on the issue during the hearing. Nonetheless, the Closing Brief does

8. Petitioner did not meet Petitioner's burden of proving that Respondent failed to comply with student and parental procedural rights under the IDEA related to the provision of prior written notice. 34 C.F.R. §§ 300.503(a)

IX.