

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

In the Matter of:

G.R. & T.R., on behalf of I.R.

Petitioner,

V.

Charter Institute of Erskine and Virtus Academy,
Respondent.

This matter is before me pursuant to an appeal by I.R.'s Parents (“Parents”), on behalf of I.R. (“Student”), of a decision by Bruce Smith, the Local Hearing Officer (“LHO”). The LHO found that Virtus Academy, a Charter School of the Charter Institute at Erskine (“District”) did not properly provide the Student a Free Appropriate Public Education (“FAPE”) by not properly developing or following the Student’s Individualized Education Program (“IEP”) in accordance with the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, *et seq.* The LHO further did not grant any remedy to the Parents due to the progress the Student made and the Parents’ acceptance of the IEP.

1. Procedural Background

I incorporate the procedural history laid out by the LHO in his decision dated July 30, 2023. The Due Process hearing was held in person on July 20 and 21, 2023. The Parents appealed the case on August 1, 2023. The transcript and exhibits were made available by August 8.¹ The Parents submitted a brief on August 14, 2023. The District submitted a response on August 21, 2023. The Parents submitted a reply brief on August 25, 2023.

2. Factual Background

The Student transitioned to Virtus Academy for his 3rd grade school year in August, 2021 from a school in Florence School District One. In Florence School District One, the Student had an IEP with services including school-based therapy, writing and reading support. (School Exhibit 1, among others). He was classified as a Student with an Other Health Impairment (“OHI”) with Attention Deficit Hyperactivity Disorder (“ADHD”). (School Exhibit 1, among others). When the Student transitioned to the District, a transition IEP was created that only provided reading and writing support. (School Exhibit 2, among others). On September 3, within the first 30 days of school, the District held an IEP meeting to develop a new IEP for this school. (School Exhibit 3, among others). The IEP developed only focused on reading and writing support and did not address all of the behavioral issues addressed in the Present Levels of Academic Achievement and Functional Performance (PLAAFP) in his original IEP. (School Exhibit 3, School Exhibit 2, LHO Opinion). The school thus failed to provide the Student with counseling as required by the Student’s IEP.

¹ For reasons that are unclear to me, it took many emails to sort out the exhibits for purpose of this review. I would encourage the District attorneys in future hearings to ensure that they work with the court reporter to ensure a thorough record.

On October 22, 2021, the IEP team held an evaluation planning meeting wherein the Parents requested occupational therapy and speech evaluations for the Student. (School Exhibit 4). The speech and occupational therapy evaluations were completed on December 3 and January 4 respectively. (LHO Opinion, School Exhibit 5, among others). On March 1, 2022, the IEP team met for an Eligibility Determination meeting and amended the IEP. (School Exhibit 5). They reviewed the tests conducted by the District as well as a private evaluation that the Parents had secured in the interim. Based on the school assessments, the Student did not meet the requirements for a Student with a speech/language impairment, but would benefit from “speech services to address recalling/listening.” (School Exhibit 5 - Evaluation Summary). Nonetheless, the IEP did not provide this service. A handwritten note on the amendment to the IEP said that “[Student] is receiving speech therapy privately, meeting the needs that the school therapist suggested he has.” (School Exhibit 5 – Signature Page). Left unsaid in that comment was that these needs were met by the Parents paying for those private services rather than the school. During this meeting, the team determined that the Student would benefit from occupational therapy. (School Exhibit 5). The meeting notes also indicate that the team determined that the Student had a specific learning disability in math on the basis of lack of progress using research-based strategies in the classroom. (School Exhibit 5 – Eligibility Worksheet Information). However, the revised IEP failed to include any math supports or any math-related goals.

On June 2, 2022, the IEP team met for an IEP amendment to discuss the Student’s behavior. (School Exhibit 6). Over the course of the year, the Student showed an increase in math scores on the MAP from 170-180 and in ELA from 169-182. (School Exhibit 7). The Student’s SC Ready scores were “Does Not Meet Expectations.” (School Exhibit 7). The Student

did improve on his STAR test scores in both reading and math by over 2 grade levels. (School Exhibit 7).

Over the course of the year, the Parents complained about the lack of certain services (such as counseling) and requested that the District provide additional services in areas where they believed the Student was struggling, such as writing. The District did not provide these services, beyond what is described above. The Parents then procured a number of services to support their Student, including a math tutor, a therapist, a writing tutor through the National Institute for Learning Development (NILD), and a speech therapist. (Testimony of Bush, Allen, Rose). It is not clear from the record what dates the Parents secured each of these supports.

3. Standard of Review

Federal and state regulations provide that a party aggrieved by a LHO decision may appeal to a State Hearing Officer (“SHO”) who must “[e]xamine the entire hearing record” and “[m]ake an independent decision on completion of the review.” 34 C.F.R. § 300.514(b)(2)(i) and (v) (2014). The SHO must also consider the hearing officer’s advantage of examining the demeanor of the witnesses when credibility determinations are at issue. *Id.*; *Shore Reg’l High Sch. Bd. Of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In doing so, the findings of fact of the LHO are entitled to deference and are considered prima facie correct. *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 326 (4th Cir. 2009); *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991). However, the SHO must still determine the weight of the evidence and questions of law independently. *Springer v. Fairfax Cnty. Sch. Bd.*, 134 F.3d 659, 663 (4th Cir. 1998) (differentiating itself from *Doyle*).

The burden of proof in this case lies with the Parent for her claim, as the respective party seeking relief. See *Schaffer ex. Rel. Schaffer v. Weast*, 346 U.S. 49 (2005) (holding that the burden of proof in an administrative hearing challenging an IEP under the IDEA is properly placed upon the party seeking relief, whether that is the disabled child or the school district).

Consistent with these principles, a SHO reviews the record created through an administrative trial before the LHO and does not rehear evidence and generally does not admit or hear evidence not considered by the LHO. A SHO does have discretion to admit evidence not considered below. 34 CFR § 300.514(b)(2)(iii).

4. Hearing Officer's Findings

The LHO reached four conclusions:

- 1) The District failed to provide FAPE by failing to follow the IEP as written, denying needed services and accommodations.
- 2) The District's "evaluations were not appropriate and that their process and procedures for developing and administering the Student's education were not appropriate and in violation of IDEA."
- 3) The LHO did not grant compensatory education or reimbursement "in light of the accomplishments by this student in a least restrictive environment, without noted accommodations and in light of the parent's involvement in the development and acceptance of his initial District IEP."
- 4) The LHO rejected the Parents' other allegations of IDEA violations by the District.

5. Discussion

The briefs presented by the parties raised a number of issues. To begin this discussion, I would like to clarify what is at issue in this appeal.

First, to clarify the remedies at issue, the Parents' complaint sought compensatory services, reimbursement for tutoring, counseling, summer educational services, work with NILD, and legal fees. The Parents' claim is, essentially, that the District failed to provide FAPE, requiring them to make up for the District's failures. They do not argue that there were unmet needs beyond what they provided. Therefore, the Parents could be entitled to reimbursement for the services provided but not for compensatory education. Claims to legal fees must be addressed in district court. My opinion, therefore, will focus only on the reimbursement requests by the Parents.

Second, to clarify the issues on appeal, the Parents appeal the third and fourth point from the LHO's conclusion. The District did not appeal the first two points of the LHO's decision, which were in the Parents' favor, despite, in a footnote, objecting to the LHO's findings on point (1) and (2). Accordingly, I must accept findings (1) and (2) and take them as a basis for this decision. I will review points (3) and (4).

Further, both parties seek to change inappropriately what is at issue in this appeal. The Parents seek reimbursement for IEEs, but they did not seek this in their due process complaint and cannot now request it. Any request for reimbursement or other relief beyond what is included in the due process complaint is denied, and there is no need for further discussion of those claims. The Parents also raise other issues of concern, such as the District taking the child out of social studies. But none of the relief sought is connected to this action. The relief sought is connected to other District failures, such as the lack of school-based counseling and the failure to

provide specialized services in math. Given that the LHO opinion already found that the District failed to provide FAPE and the appeal is focused on the lack of relief, I will only explore disputed issues that are tied to relief sought by the Parents.

The District seeks to minimize its violation by claiming that its failure to implement the IEP was for a two-week period only. If this were true, it would indeed make it difficult to establish that such a short gap would cause such harms as to require the reimbursement sought. But after a thorough review, it is impossible to square the District's "only two weeks" claim with the evidence of the LHO's opinion. The LHO's findings of an IEP violation and denial of FAPE are based on a failure to provide school-based counseling as part of the behavioral plan incorporated into the IEP, failure to provide specialized instruction in math even after the IEP noted the Student's specific learning disability related to math, failure to provide additional supports in writing following Parents requests and inadequate progress in those areas, and failure to provide speech services that the District acknowledged the Student needed. Because the District did not file its own appeal, the LHO's findings are accepted in the analysis of this case.

Following the above analysis, this opinion will address the Parents' challenge to the LHO's finding that no reimbursement or compensatory education would be granted because the child made adequate progress. I find that the Parents proved that their accessing private services was a reasonable attempt to remedy the failures of the District; thus, the LHO's decision on that matter is reversed and the District is required to pay limited reimbursement to the Parents as outlined below.

The Student's Progress

The LHO's ruling is based on his understanding "of the accomplishments by this student in a least restrictive environment, without noted accommodations." (emphasis added). This finding is plainly erroneous. There were accommodations for the Student's disability. They were simply provided by the Parents in response to the District's failure to provide FAPE rather than by the District. When the District failed to provide in-school counseling, the Parents provided outside counseling. When the District failed to provide adequate specialized math instruction, the Parents paid for one-on-one math tutoring. To accept the LHO's conclusion requires ignoring these accommodations.

Had the Parents not provided these services, I would have ordered compensatory education and would have ordered counseling, math tutoring and writing tutoring. However, because the Parents paid for these services, I order the District to reimburse the Parents for the provision of these services because the District did not provide FAPE, as found by the LHO.

Counseling. Prior to transferring to Virtus, the Student's IEP called for school-based counseling. (School Exhibit 1). This provision was not included in the IEP after transferring to Virtus. (School Exhibit 2). While the Parent may have accepted that IEP at the start of the school year, as the Student started voicing emotional concerns around his academic achievement (Testimony of Lawhon, Rose, Moran) and started having greater behavioral troubles, it was the responsibility of the District to serve his needs. During the hearing, teachers testified that the Student was well-behaved (Testimony of Wilson, Moran, Hernandez). However, there is also evidence that teachers struggled with his behavior. (Testimony of Buell, Moran, Hernandez; Parent Exhibit 8). During one IEP meeting, the team discussed that the Student could not sit in the front of the classroom because his fidgeting would distract other Students. (Parent Exhibit 2). In this same meeting, the team changed the IEP to include time for the guidance counselor to

advise the teacher on working with the Student. (School Exhibit 5). The Parents had reasonable reason to believe the Student needed additional support and procured services for their child. Re-incorporating the counseling that left off the IEP without any justification should have been the District's responsibility. The District is ordered to reimburse the Parents for the cost of this therapist.

Math: On March 1, the team held an eligibility determination meeting and found the Student had a specific learning disability in math based on the fact that the Student “does not make sufficient progress to meet age or State-approved grade-level standards when using a process based on the Student’s response to scientific, research-based instruction.” (School Exhibit 5 – Eligibility Worksheet Information). This determination was based on progress monitoring data from curriculum-based measures and individual achievement measures. (School Exhibit 5 – Eligibility Worksheet Information). However, the IEP was not adjusted to incorporate any specific goals around math, or services to support the Student’s growth in math. Nonetheless, the District claims that the Student made appropriate progress in math by moving 10 points on the MAP test. These 10 points, according to the MAP report, still leaves the Student at an early 2nd grade level in Math. (Parent Exhibit 11). The Student also scored “Does Not Meet Expectations” on the SC Ready test. (School Exhibit 7). On the STAR test, however, the Student made some progress in math. (School Exhibit 7).

Given that the team found in March that the Student had not made sufficient progress in Math and had a specific learning disability in math, it is hard to see how these test scores are enough for the District to now claim that it was justified in failing to provide any math supports. While the standard for progress is not that the Student must be on grade level, the District agreed at the March 1, 2022 IEP meeting that that the Student had a disability related to math and that

he had not made sufficient progress. The District was thus obligated to provide some kind of math support services and to set goals for the Student in math to measure his progress.

The Parents hired a private tutor to work with the Student on math given that the Student did not receive services at the school. I order the District to reimburse the Parents for any costs incurred for this private tutor after the March 1 meeting given their failure to provide a FAPE for the Student related to his math needs.

Writing: The Student had writing goals in his IEP at the start of the year. (School Exhibit 2). Based on his progress reports, I do not find evidence of substantial progress towards his goals. The first goal states, “Based on curriculum based assessment, by the end of this IEP, given a grade level reading comprehension assessment, [Student] will go from correctly answering 4 out of 10 main idea and sequencing questions to answering 7 out of 10 correctly.” (School Exhibit 9). In Q1, he was reported as having an average of 56% on “teacher assessments.” It is unclear whether those teacher assessments are focused on main idea and sequencing questions. In Q2, he received an average of 60% on those assessments. In Q3, the report simply said that “During this grading [Student] has move forward on his goals,” and Q4 says “New IEP.” The graph shows him below his goal. The second goal states, “Based on curriculum based assessment, by the end of this IEP, when given a writing prompt, [Student] will write 3 complete sentences using correct capitalization and punctuation 3 out of 5 trials.” At the first quarter, the report stated that he answered 25 out of 45 questions correctly about his writing goal. It is unclear how that report is connected to the goal. At the second quarter, his progress was barely improved 27 out of 45 questions. In the third quarter, the report is that “[Student] has been working on this goal.” In the fourth quarter, again, the report is “New IEP.” (School Exhibit 9). For both of these goals, the progress report does not seem to be aligned to the goal nor do the

third or fourth quarter goals provide any information to prove progress towards the goal. The presence of a new IEP for the next school year does not negate the need for a progress report. Similarly, the Student had an occupational therapy goal focused on legibility. The goal was to move from a 1 out of 5 to a 4 out of 5, but the fourth quarter report says that his average was still 1 out of 5, revealing zero progress on this goal. (School Exhibit 9).

These updates demonstrate that the Student did not make substantial progress on his goals. The Parents, who noted the Student's struggles and sought additional writing supports, began paying for private tutoring in writing to help the Student. I order the District to reimburse the Parent for writing support.

Speech: At the eligibility meeting in March 2022, the District found the Student was not eligible for speech services. (School Exhibit 5). However, the speech therapist had recommended that the Student would benefit from "speech services to address recalling/listening." (School Exhibit 5 - Evaluation Summary). A handwritten note on the amendment to the IEP said "[Student] is receiving speech therapy privately, meeting the needs that the school therapist suggested he has." (School Exhibit 5 – Signature Page).

Once again, the school depended on the Parent providing private services for related services that should have been provided by the District. I order the District to reimburse the Parent for speech services provided after the March 1 meeting.

Conclusion

In the areas of counseling, writing, math, and speech, the Parents compensated for the District's failures to provide the Student with a FAPE. These services are tied specifically to services the District should have provided but did not and reflect what is now a shared

understanding of the Students' needs. As I stated before, had the Parents not provided these services, I would have ordered compensatory education and the addition of these services. Given that the Parents have already provided these services, I order for reimbursement of these services.

Reimbursement requests for other services are denied as beyond the scope of the complaint.

I order the Local Hearing Officer to determine the specific amount of this reimbursement. The District should reimburse for all services provided for math, writing, and speech during the 2021-2022 school year and summer. The District should also reimburse the parents for those counseling services that were designed to address the Student's academic and functional deficits. Parents must provide documentation from each service provider that details the type of service provided, the amount of services provided and the amount paid for services as part of the LHO's determination.

6. Notice of Appeal Rights

Any party aggrieved by this decision may commence a civil action with respect to the complaint presented in any state court of competent jurisdiction or in a district court of the United States within ninety (90) days of the date of this decision. 20 U.S.C. § 1415(i)(2)(A)-(B) and 34 C.F.R. § 300.516.



Avni Gupta-Kagan

State Hearing Officer

August 31, 2023