

INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Before Vernell I. Scott, Local Hearing Officer

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

In the matter of)
A.P. and M.P., Sr. on behalf of M.P.)

FINAL ORDER

Petitioners)

v.)

Florence County School District One,)

Respondent.)

PROCEDURAL HISTORY

This matter is before me pursuant to two Expedited Due Process Hearing Requests (DPRs), filed by the Parents on behalf of their minor child. The first request was dated March 9, 2023. I received the email offering the appointment to serve as the local hearing officer (LHO) on March 13, 2023. I accepted the assignment. Thereafter, a Petitioner filed a second Expedited Due Process Hearing Request dated March 16, 2023 along with a Motion to Consolidate their two expedited hearing requests.

Respondent's submitted its Response to both DPRs, denying all of Petitioner's allegations. However, Respondent did not object to Petitioner's Motion to Consolidate; and after due consideration that Motion was granted.

Pursuant to my appointment as the LHO, a pre-hearing teleconference call was held on March 25, 2023 establishing the hearing date and other specifics regarding the hearing. Present were both Petitioners and Kimberly K. Blackburn, Esq., representing Respondents. Both parties agreed to exchange relevant information prior to the hearing. The time and dates were set for March 29, 30, and 31, 2023 beginning at 10:00 am and ending at 4:00 pm each day at Florence County School District One's (Respondent's/a District's) Office located at 319 S. Dargan Street in Florence, SC.

Respondents also requested that subpoenas for documents be issued to two of Petitioner's experts. One subpoena was issued for Dr. A.S. a clinical psychologist; as he refused to respond and voiced his unwillingness to comply with the issued subpoena (Email dated 3/27/23). Shea appeared at the Hearing as one of Petitioner's witnesses but did not provide any documents as required by the issued subpoena. Respondent requested another Subpoena for Dr. M.H. a neuropsychologist. That subpoena was not issued primarily because a Petitioner provided her report to Respondents before the incident and offered the Neuropsychological Report as evidence (Parents' Exh. 1.)

The conduct leading to this Hearing on February 1, 2023 occurred in the general education setting, with the paraprofessional, seated next to the Student and engaged. He traightened out a paper clip making it into a sharp object. The Student's actions concerned the teacher given his history of throwing sharp

objects and hurting people. When the paraprofessional attempted to get the paperclip from the Student he threw a chair at his general education teacher, missing her but breaking the chair, and threw sharpened pencils at the teacher and other items at the assistant principal.

In this case there was an error regarding the basic concept of homebased vs homebound instruction. When Petitioner requested information from Respondent about the Individuals with Disabilities Education Act (IDEA) requirements regarding homebased vs homebound instruction, she was given information regarding Homebound instruction.

FACTS

The Student is a kindergartner at an Elementary School in the District. He is a student with a disabilities in the areas of Other Health Impairment (OHI) and Speech Language Impairment (SLI) and has been provided special education in a resource model in the area of behavior, along with speech therapy, school-based therapy, accommodations, and transportation. The District also conducted a functional behavioral assessment (FBA) and developed a behavioral intervention plan (BIP). The Hearing commenced on March 29, 2023 and continued through March 31, 2023 beginning at approximately 10:00 am and proceeded until approximately 4:00 pm. each day.

Both parties were offered the opportunity to begin the Hearing with an opening statement. This was followed by the presentation of the Petitioner's case and the calling of witnesses. Both parties had an opportunity to cross examine the witnesses and offer rebuttal witnesses. Afterward each party offered a written closing brief. I received the closing briefs in a timely manner.

Petitioners sought to introduce a purported diagnosis of the Student by Dr. A.S., the clinical psychologist. Dr. A.S. refused to comply with the subpoena lawfully issued by this LHO. (Email dated 3/27/23) Further, she did not offer any evidence regarding her purported diagnosis and in fact did not present any documentation except her therapy schedule. Her therapy schedule (Parents Exh. 2) did establish that she conducted an initial intake in October 2022 and she testified that she had actually seen the Student for at least five sessions between January 26, 2023 and March 22, 2023. She testified that she never conducted a comprehensive psychoeducational evaluation and never spoke with the doctor who had actually conducted the Student's evaluation. She additionally displayed no understanding of the educational requirements of a special education student.

Dr. A.S. admitted that she had never actually evaluated the Student that she had never talked with his teachers or observed him in an academic setting; nor had she spoken with the evaluator from the Medical University of SC (MUSC) who diagnosed him with attention deficit hyperactivity disorder (ADHD) inattentive type. She also admitted that she is not an expert in Student's diagnosis of X-ALD, and he is the only student with X-ALD that she has ever worked with. However, to her credit, Dr. A.S. did briefly speak with the school-based therapist when he called her seeking information about the Student.

ISSUES

1. Petitioners testified the Student was initially evaluated by the District in December 2019 after a Part C, Baby-Net referral and qualified for Early Childhood Intervention and an individualized education program (IEP) under the disability category of SLI in January 2020 through January 2021. The Student began to receive special education and related services in January 2020. Petitioners initiated the child's neuropsychological examination at the MUSC; that report was

completed in December 2022 and thereafter provided to the District on January 17, 2023.

- 2.e In the IEP meeting held on January 12, 2023 Petitioner reported to the team that the Student had recently been diagnosed with ADHD (Parents Exb 4). The Student's Eligibility Determination occurred on January 12, 2023 and his Reevaluation and IEP were dated January 13, 2023.e
- 3.e Petitioners allege a denial of parental participation in the IEP development. They offered testimony that they provided Respondent with a copy of the MUSC Neuropsychological Evaluation, dated December 20, 2022, in mid-January 2023. They further testified that at the IEP meeting that they requested that Respondents add an ADHD diagnosis to the Student's IEP.e
- 4.e The record establishes that the January 2023 manifestation determination review (MDR) was appropriately and thoroughly conducted. During that meeting Petitioners had ample opportunity to offer their input. They did not provide any evidence during the Hearing that would support their allegation that they were prevented from participating as full members of the Team or from offering their input. The fact that they did not agree with the Team's final decision does not negate the value of their input.e
- 5.e On February 7, 2023 Respondents/District convened a MDR to review the Student's conduct on February 1, 2023. His behavior occurred in a general education setting. Specifically, he made a weapon from a paper clip. Staff attempted to get the paper clip from him, and he threw a chair at his general education teacher, missing her but breaking the chair. Additionally, he threw pencils at the teacher and threw other items at the assistant principal. This behavior not only disrupted the classroom but it also placed everyone in the class in danger of being injured.e
- 6.e Petitioners argue that the IDEA specifically requires the IEP Team to consider the use of positive behavioral interventions and supports (PBIS) for any student with a disability whose behavior impedes their learning or that of others. 34 CFR §300.324(a)(2)(1). No evidence or testimony was elicited to support this allegation.e

FINDINGS

The primary issue is whether the IEP team properly determined on February 7, 2023 that the Student's conduct that is the subject of this due process hearing was a manifestation of his disability. Did Respondent, through the IEP team, properly determine at the February 7, 2023 IEP Meeting that the Student's conduct of forming and using a paper clip as a weapon in the classroom and throwing a chair at his general education teacher was a manifestation of his disability?

Testimony, supporting evidence, and arguments presented at the hearing were all considered in my findings as they relate to the issues set forth above.

The general education teacher testified that the Student's behavior was disruptive and dangerous. She stated that she sought guidance from her boss because she was concerned about the safety of herself and everyone else in the classroom. She stated that she and her aide often had to stand between the Student and other children in the class because he was aggressive toward them. She testified that it got to the point that neither one of them could teach; that the Student would head-butt them or slap them – that they often had to stop teaching and that the other children would get upset because it became so violent in the classroom. They had to remove the other children from the classroom for their protection until the Student quit engaging in that behavior.

A local educational agency (LEA) that believes maintaining the current placement of the child is substantially likely to result in injury to the child or others must initiate a change of placement and a new MDR must be performed. 34 CFR §300.530(e). Pursuant to 34 CFR §300.530(e)(1), conduct must be found to be a manifestation of the child's disability under the following circumstances:

- * The conduct in question was caused by, or had a direct and substantial relationship to the child's disability; or

- * The conduct in question was the direct result of the District's failure to implement the IEP.

In this case, the record shows that Petitioners were also provided the opportunity to meet with the IEP Team on March 2, 2023 to review the decision of the team regarding the Student's status. The District planned another meeting on March 10 that they ultimately needed to postpone to address the resolution meeting and the expedited due process hearing.

The homebased placement was intended to be temporary and was totally appropriate initially given the fact that the Student's behavior was determined to not be caused by his disability. Under the IDEA, it is appropriate for the Team to consider the impact of the student's behavior not only on his own learning and safety, but also on the learning and safety of others.

Petitioners alleged that the Respondent/District failed to offer a free appropriate public education (FAPE) by failing to provide services to the student in a manner consistent with their work schedules. Respondent presented several witnesses who testified that they made substantial efforts to schedule and deliver instruction while the Student was on homebased status. The speech language pathologist described in some detail the efforts she made to work with the Student, including instructing him on how to work with her in the virtual Google Classroom she developed specifically for sessions such as those she provided to him. This was done before his homebased instruction began. She was only able to provide two sessions before Petitioners' scheduling conflicts caused the Student to miss sessions. The Student's sessions ended because Petitioners wanted her to meet with the Student after 3:00 p.m. o'clock and her workday ends at 3:00 pm.

The testimony introduced established that Petitioners advised staff members and teachers that they did not like scheduling sessions during the schoolday, even though they demonstrated the ability to do so by scheduling Dr. A.S.'s sessions and even some of school-based therapy sessions during the school day. However, the school-based therapist testified that after the Petitioners filed their DPRs they

advised him that they would no longer attend his sessions with and for the Student.

The most discomfoting problem in this case occurs because the record reflects the Student was on homebased placement for well over the ten days of his initial placement, and there was no follow up, no reconvening of the IEP Team, no meeting to ensure that he was receiving the necessary services after he was placed on homebased beginning on February 8, 2023.

The general rule under the IDEA is that IEP Teams and placement teams must ensure that while an LEA has every right to remove a disruptive child from the classroom, that the instructional methodology for delivery (e.g., in-person, virtual, hybrid) timing, frequency, service setting and location of services appropriately support the child with a disability in achieving the functional and academic goals set out in the child's IEP, including those that address the child's social, emotional, and behavioral needs.

SUMMARY

Petitioners filed this action alleging a violation of FAPE (34 CFR § 300.513(a)(1)). They alleged that on February 7, 2023 MDR wrongfully changed the student's placement from his home school – the least restrictive environment (LRE) - to Homebound/Homebased instruction.

The record presented established that during the February 7, 2023 MDR the Team reviewed the Student's eligibility determination from January 12, 2023, his current IEP, the FBA/BIP, evaluations, the incident report, academic records, and input from Team members, including Petitioners.

- a) Based on the following analysis I do not find that Respondent denied a FAPE (Pursuant to Sec 300.324) by amending the Student's MDR and by removing the child from his home school and placing him on homebased instruction on February 7, 2023.

The rule is that Respondent is responsible to convene the IEP team including the LEA, parents and other relevant members and to examine assessment data to determine if the student's removal of longer than 10 days when viewed in the entirety of days constitutes an unlawful pattern of removals (**IDEA Regulations, 34 CFR §300.530 [e & f]**).

The Rule (**IDEA Regulations, 34 CFR §300.530 [b][2]**) also provides that after a removal of over 10 days, on day 11 and beyond the educational services provided must enable the child to appropriately progress in the general curriculum irrespective of the relationship between disability and misconduct.

By leaving the Student on that "temporary" status for more than 10 school days during the pendency of this action does raise the removal status to a violation even given the fact that Respondent did revise the Student's FEA on or about February 8, 2023.

Provision § 300.513 provides as follows: (a) Decision of hearing officer on the provision of a FAPE. (1) Subject to paragraph (a)(2) of this section, a hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. (iii) Caused a deprivation of educational benefit.

b) Based on the following analysis I do not find that Respondent denied a FAPE (Pursuant to Sec 300.324) by amending the child's MDR and by removing the child from his home school and by placing him on homebased instruction on February 7, 2023. However, by leaving the child on that status without doing more for more than 10 school days during the pendency of this action does raise the removal status to a violation even given the fact that Respondent did revise MP's functional behavior assessment.

c) Petitioners alleged that Respondent denied their parental participation and violated FAPE (pursuant to 34 CFR 300.322) by developing an "ineffective IEP" without parental input.

I do not find that Respondent denied Petitioners parental participation by not adding ADHD disability as a category of disability. The testimony of the several teachers that even if the Student was considered to have ADHD of either Inattentive Type or the Combined Type, the behavior displayed was not impulsive. Instead, the testimony of school staff who worked with the Student shows he knew and understood that his conduct was intentional – he thought out his actions and his behavior. For example – if he was selecting items to throw, he chose those items that would do the most damage. He often chose the sharpest pencils or the item intended to do the most damage.

The student is eligible for services under the category of speech language impairment, and OHI. The bottom line of the Student's IEP reads as follows: "It has been determined that the student is not eligible for extended school year services." I find that given the LEA's failure to take any action or provide any plan after the initial 10 days of the Student's continued change of placement to homebased placement constitutes a violation of FAPE and must be remedied, to include, as appropriate, a functional behavioral assessment, and revised behavioral intervention services and modifications, specifically designed to address his behavior violations so that it does not happen again.

Respondent is directed to conduct assessments designed to address any behaviors necessary to determine if MP is indeed affected by any emotional disturbance based on the behavior demonstrated by his activities that led to this Hearing.

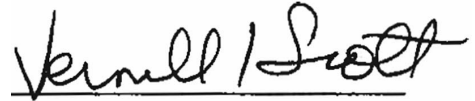
THEREFORE, IT IS ORDERED THAT:

1. A new IEP shall be developed with an emphasis on extended school year services, with a focus on a plan that truly offers an opportunity to make meaningful educational progress and improve his counterproductive behavior.
2. Petitioner shall cooperate with Respondent to implement any resultant programs and shall participate in any counseling or other program that will help them to consistently encourage behavior modification for the student at home and at school.
3. In this case, I do not find that there is any prevailing party. The Petitioners seek to have their son back in school and the school seeks to have a safe

environment for the entire student body. The IEP team should focus on finding a way to provide this for both parties.

4. It is my decision that the Respondent must promptly convene an IEP team to amend the Student's IEP to avoid any further deprivation of educational benefit, to conform to the rule that when a child is removed from the classroom for more than 10 consecutive school days the district must put safeguards in place to ensure that the child is not deprived of any educational benefit.

So ORDERED this 24th day of April, 2023.

A handwritten signature in black ink, reading "Vernell I. Scott". The signature is written in a cursive style with a horizontal line underneath the name.

Vernell I. Scott
Local Due Process Hearing Officer