

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

LOCAL IDEA DUE PROCESS HEARING

Douglas F. Dent

A.M. On behalf of minor child A.S.L.,)
Petitioner,)
)
v)
)
Spartanburg County School District Four))
Respondent.)

DECISION

This matter is before me pursuant to a Due Process Hearing Request (DPHR) from the Petitioner received by the Respondent on April 7, 2022. I was appointed as the Local Hearing Officer on April 11, 2022. A letter was sent to the Petitioner on April 14, 2022, informing her of her rights and responsibilities under the Due Process Hearing regulations and confirming my appointment as an independent Hearing Officer. The Parties held a Resolution Session on April 22, 2022, which did not result in a settlement. A hearing date was established for June 13 and 14, 2022, and it did occur on those dates with each party represented by legal counsel. Testimony was taken and exhibits introduced into the record. The parties were given until Friday, June 17, 2022, at 5:00 pm to submit written closing arguments and each party complied.

BACKGROUND

The child in this matter was a kindergarten student in the Respondent School District during the 2015-2016 and 2016-2017 school years. During that time he received special education services until September 2017 when the Petitioner withdrew consent for the child to receive special education services. In October 2017 the Petitioner withdrew the child from school and home-schooled the child for the remainder of first and second grade. During the COVID-19 school year of 2020-2021, the Petitioner enrolled the child in school for the virtual school program.

During the 2021-2022 school year the child attended school in person, starting in a general education fourth grade class. In September 2021, with the Petitioner's consent, the Respondent conducted a comprehensive evaluation to determine if the child was eligible for special education services. It was determined that he did qualify for services under the category of Autism Spectrum Disorder (ASD). In addition, the child has a medical diagnosis of ADHD and anxiety disorder. The Petitioner consented to receipt of special education services and an individualized education program (IEP) was developed. The IEP provided for services to be delivered in a general education classroom with accommodations and special education services. A behavioral intervention plan (BIP) was developed to address the child's behavior issues.

Subsequently, the child's behaviors became more difficult to control and a series of IEP meetings were held with the Petitioner in attendance. The IEP team agreed upon additional special education services and a change in placement with special education provided outside the general education classroom and added modifications to his IEP. Ultimately, the Respondent sought to place the child in its McCarthy-Teszler School, which is a special intensive program designed to address behavioral issues and provide concentrated educational services in a special education classroom. The Petitioner objected and filed a DPHR.

ISSUES

While not contesting the child's IEP, the Petitioner, alleging a denial of a Free Appropriate Public Education (FAPE), raised the following issues in her DPHR and during the hearing:

1. Placement - The Petitioner rejected the Respondent's offer of placement in a self-contained special education classroom at the McCarthy-Teszler School seeking continued placement in a general education classroom with special education services. While not raised in the DPHR, during the hearing the Petitioner contended the offered placement violates the standard of placement in the least restrictive environment (LRE).
2. Compensatory Services – The Petitioner contended that the child's right to a FAPE was denied when the Respondent reduced his access to school to a half day, 8:00 am to 10:30 am. In addition, the Petitioner alleged that a FAPE was denied when he was not allowed to attend school but was not officially suspended. She sought compensatory services for

time lost from school in both instances.

4. **Manifestation Determination** - The Petitioner alleged that the Respondent had, in fact, suspended the child for more than 10 days, which pursuant to the Individuals with Disabilities Education Act (IDEA) requires that a Manifestation Determination Review (MDR) be held to decide if the child's behavioral issues were caused by his disability. No such hearing was held.
5. **BIP** – The Petitioner alleged that the BIP developed for the child was inadequate and a proper BIP should have been prepared. Further, that the Respondent's failure to develop a “proper” BIP was a violation of the IDEA.
6. **Attorney's fees** – The Petitioner alleged that she was entitled to Attorney Fees.

FACTS

The testimony and evidence presented yielded the following facts:

1. Since entering school in 2021, the child exhibited numerous behavioral issues, including inappropriate noises, failure to stay seated, inappropriate touching of fellow students, standing on his desk, harassing female students in an inappropriate manner, waving his arms, singing in class, running in the hallway, removing his clothes, making shooting gestures with his hands and throwing pencils.
2. In September 2021 a comprehensive evaluation was performed by a team of District employees which included the collection of information from the Petitioner, the child's doctor, teachers, and service providers. The evaluation included the administration of several assessments (i.e. the Reynolds Intellectual Assessment Scales – Second Edition (RAIS -2), the Woodcock – Johnson IV, the Autism Diagnostic Observation Schedule Second Edition (ADOS-2), the Dyssomnia Rating Scale-School Screening, the Oral Written Language Scales -Second Edition (OWLSA-II), the Systematic Adaptive Behavior Characteristics Checklist, the Adaptive Behavior Assessment System Third Edition (ABAS-3), Wide Range Assessment of Visual Motor Abilities (WRAVMA), the Childhood Autism Rating Scale-Second Edition (CARS-2:ST, the Social Inferencing Assessment, the Underlying Characteristics Checklist- HF Teacher Report and classroom observations.)
3. A meeting was held September 23, 2021, with the participation of the Petitioner and her advocate. During the meeting it was determined that the child qualified for special education services under the category of ASD.
4. As a result of the September 23, 2021, meeting an IEP and a BIP were developed and an Autism Team formed.
5. In December 2021 an IEP meeting was held to discuss the child's behavior.

6. On November 9, 2021, a “reentry” meeting was held following a suspension of the child which resulted in the IEP team reducing the child's school day to attendance from 7:50 am to 10:30 am.
7. On February 16, 2022, the Petitioner and special education director met and agreed to amend the child's IEP, adding a one-on-one adult assistant.
8. On March 17, 2022 an IEP meeting was held that resulted in the IEP team changing the child's placement to the McCarthy-Teszler School Program and other service modifications.
9. On April 7, 2022 the Petitioner filed a DPHR.
10. The child's report card issued on May 27, 2022, indicated passing grades and sometimes very good grades for work completed, but his progress report showed little progress. The testimony of several witnesses confirmed that he had made little progress toward his IEP goals

DISCUSSION

There are two items that are clear from the testimony and documentation; 1) This child has been out of school much more than he has been in a structured educational program for the last four years, and 2) the child is having significant behavioral issues that have impeded his ability to receive educational benefit, and if not addressed will result in his inability to receive any real educational benefit from school.

District personnel testified that the child was clearly not ready to reenter school when he arrived in fourth grade. There was no testimony from the Petitioner as to what his home-school program included but his ASD is significant and it would be unusual for a child to be out of school with little or no special education services for three years and show meaningful educational progress. Proof of his inability to perform in school came from the evaluation results and the testimony of his teachers that he was successfully doing work only on the kindergarten or first-grade level. Despite the services provided in a regular education classroom, and later in a special education classroom, his progress was minimal.

The Respondent, at the Petitioner's request, and as is required by the IDEA went through the progression of placements in an attempt to find one that would give the child the best opportunity to learn during the 2021-2022 school year in the LRE. This progression is clearly shown by the

various IEP meetings, service attempts, IEPs, and Prior Written Notices offered into evidence. The Petitioner contends the Respondent's placement offer violated the LRE directive in the IDEA. In section 34 CFR 300.114, the LRE requirement is laid out as follows:

“Section 300.114 (2) Each Public agency must ensure that ---

- (I) to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
- (II) Special classes, separate schooling, or other removal of children from the regular educational 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 cannot be achieved satisfactorily.”

In this case, the child was not being satisfactorily educated in the regular classroom and the services being provided were doing little to improve his education.

The evaluation of the child within a few weeks of his entry into school showed immediately that serious special education services were needed to allow him to progress educationally. The Composite Intelligence Index of 62-69 on the RIAS-2 test showed the child's limited capacity. The severity of his Autism and his behavioral issues in the classroom showed that substantial services were required for him to make any educational progress. The Respondent formed an Autism Team to deal with his disability and work with his teachers and service providers to develop programs which would help him learn. His initial IEP goals were modest and designed to try to determine what he was capable of doing educationally. All of these efforts were appropriate and positive.

The lack of any meaningful change to those IEP goals as the school year progressed showed the IEP team's failure to consider educational options because they were overwhelmed by the child's inappropriate behavior. Yet, the provision of only one behavior goal with no changes, given his actual behavior, is mystifying. None of the witnesses really addressed this issue. While some items in the IEP were modified and accommodations and behavior modification efforts were added or in place via

the Autism Team, the educational goals remained the same.

The United States Supreme Court in *Endrew F. v. Douglas County School District RE-1*, 580 U.S. ____ (2017) made it clear that IEPs must be developed to provide a child with a disability an opportunity to make meaningful educational progress, not minimal progress. In this case, the child was not making meaningful educational progress. He was barely making any progress at all on very minimal goals. Clearly, the Respondent was hampered significantly by several issues; 1) the fact that the child had literally been out of school for three years and during the 2021-2022 school year he was out of school for 39 days either as the result of suspension or simply not coming to school. 2) his behaviors were not only a hindrance, it was a real deterrent to any educational progress, and 3) the Petitioner was not supporting any efforts at more intensive services. However, the failure to pay more attention to his educational goals rendered the IEP ineffective and while providing a guide to the provision of services and seeing what the child could do, it really provided no real opportunity for educational success.

With regard to the Petitioner's request for compensatory education because of the child's absences from school due to suspensions, the district's refusal to allow him to return to school, and his reduced schedule of school attendance, I find the request ingenious. Even accepting the Petitioner's argument that the child missed 9 to 15 days due to suspension and the child's reduced class schedule because of the Respondent's actions cost him education time, the other 24 to 28 days that the child simply didn't come to school was the Petitioner's choice. Based on the attendance record, failure to attend school was fairly constant throughout the year. The Petitioner must take responsibility for those days which certainly inhibited the Respondent from providing educational services to the child and compensatory education services given in the normal mode of delivery would probably have limited results.

However, it is incumbent upon the Respondent to find ways to adjust for these absences. The

accommodations and modifications to the child's IEP minimally addressed this reality. Frankly, it is evident that the IEP team, for whatever reason, was not willing to deal with the tough issues presented by this child. Even though they eventually did seek to educate the child in a special education classroom that move should have been made much sooner in the year. The recommendation that the child attend the McCarthy- Teszler program was a final attempt to find a way to control the child's behavior and provide education. Although they came to it late in the year it was the right choice and should have been reached sooner. There is no way this child can receive any meaningful education in a regular education classroom even with a one-on-one assistant (shadow) and special education services. An emersion program, such as McCarthy- Teszler, with a goal to eventually return him to regular school is the only way to get his behavior under control. While the Petitioner emotionally is opposed to this placement, if she ever expects her child to learn and become a productive adult, his behavior and learning skills need to be addressed now in a specialized classroom with professionals trained to deal with behavior issues and Autism. This is the type of program that can provide success.

The Petitioner's demand for a meaningful BIP with continued education in a regular education classroom is a minimal option and destined for failure. This child is never going to learn in a regular education classroom until he learns to control his behavior. An improved BIP might help on occasion, but like the use of traditional compensatory education, until this child is able to function in some sort of reasonable manner in an education setting, a new BIP no matter how much effort is made to implement these services, is not going to help.

Finally, with regard to the failure of the Respondent to hold a MDR. The Petitioner contends that the Respondent suspended the child for thirteen days. The Respondent alleges only nine days of suspension. The discrepancy lies in a dispute over the events of October 28, 2021. The Petitioner submitted a flash drive containing three voicemail messages, one from the child's principal, indicating

that he was not to return to school until November 8, 2021, after his four days of out-of-school suspension. This would have meant that the child was suspended for more than ten days and a MDR was required by law. In response, the Respondent presented the child's attendance record and the Respondent's Contact Log which showed that he was not suspended on November 3, 4, and 5, and that there was a second call from the principal stating the child could return to school on November 3, 2021. This call was not included on the Petitioner's exhibit even though a message was left on the same phone two hours later. I will assume that there was no attempt on the part of the Petitioner to deceive this Hearing Officer by not including the second call on its recording of messages. Possibly the second message was not heard, but apparently the call was made and a message left. Regardless of this dispute, according to the school records, the child was only suspended for nine days and a MDR was not required.

DECISION

The parties presented ten witnesses, all employees of the Respondent District except the Petitioner who testified on behalf of her child, and twenty-four (24) exhibits. No expert witnesses outside of the District were presented. No medical or independent test records were introduced or provided. No information was provided as to the type of educational or behavioral modification services the child received while home-schooled. No explanation was provided for the unexcused absences from school. No information was presented as to what type of compensatory education services were being sought. No information was provided by the Petitioner as to educational or behavior services that were needed, and not being provided, or what methods should be used to improve the child's behavior. No allegations were made that the Respondent was not providing the services offered in the IEP. No reason was given for the Petitioner's refusal to accept the McCarthy-Teszler placement.

After two days of testimony and a substantial record, questions remain. However, my decision must be made based on what I have before me, the believability of the witnesses and the information contained in the documentary evidence. That being the case, it appears that the Respondent has acted correctly with regard to the procedural requirements of the IDEA and its implementing regulations (34 CFR part 300). The Respondent correctly and in a timely manner identified the child as being eligible for special education services. It developed an IEP, a BIP, and regularly sought to improve said documents with the Petitioner present and participating in said meetings. It followed the LRE progression required as to the educational setting for the of the delivery of services for the child. It correctly determined that a MDR was not required.

With the understanding that the Respondent had not seen this child in three years and his behavior overshadowed educational opportunities, the IEP that was originally developed and subsequently amended was minimal and not designed to provide the child with meaningful educational progress. However, the Petitioner never specifically challenged the IEP or the quality or intensity of services provided other than to demand that he should continue to be educated in a regular education classroom with the assistance of a shadow and other accommodations. It was a placement that clearly never worked and would never garner educational or behavioral success.

This child is in trouble. In this case, four years have already been lost. The McCarthy-Teszler placement offers hope that its intensive behavioral and educational program may allow the child to one day return to a regular school setting and make some real educational and behavioral progress. Without this program or one similar to it, the child will continue to drift into a deeper hole educationally and behaviorally, resulting in much more serious consequences in the future. The McCarthy-Teszler program is a rare opportunity for the child and is not found in many other school districts.

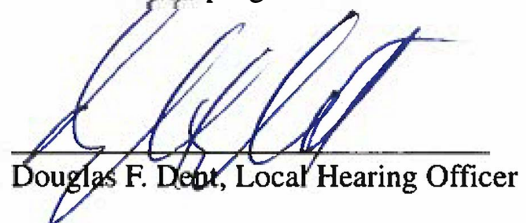
One curiosity was that with the obvious behavioral issues and the Petitioner's lack of understanding or willingness to face the severity of the problems her child was having, the Respondent never offered counseling or psychological services for the child and his family. Testimony is in the record from the special education director that the District has a relationship with a state agency that can provide counseling and psychological services to the child and the family but those services were either never made available or not accepted by the Petitioner. That portion of the testimony was brief and not clear. But clearly utilizing that relationship would have been and still can be helpful.

THEREFORE, IT IS ORDERED THAT:

1. Placing the child at the McCarthy-Teszler program is the appropriate educational placement for him and should be pursued immediately.
2. A new IEP shall be developed with the input of the Autism Team, the McCarthyTeszler professionals and any other behavior or psychological professionals as may be available that will truly offer the child an opportunity to make meaningful educational progress and improve his counterproductive behavior.
3. The Respondent shall offer counseling services, at its expense from its affiliated State agency or other individual or entity who is licensed and capable of assisting the child modify his behavior and assist the Petitioner to learn how to help him.
4. Time is of the essence for this child, so if the McCarthy-Teszler program is not available during the summer, the Respondent shall develop an extended school year (ESY) program for the child that is designed to improve his behavior and to begin to catch up on his education.
5. The Petitioner shall cooperate with the Respondent to implement these programs and shall participate in any counseling or other program that will help her understand how to work with the child at home to allow for consistent behavior modification efforts and education.
6. This Hearing Officer does not have the jurisdiction to award attorney's fees but can determine if there is a prevailing party. In this case, I find no prevailing party. Each party bears responsibility for the child's lack of educational progress.

IT IS SO ORDERED.

June 21, 2022
Greenville, South Carolina



Douglas F. Dent, Local Hearing Officer

APPEAL

Should either party wish to appeal this Order notice must be given to the South Carolina Department of Education, Office of General Counsel, within ten (10) days of receipt of this Order. The Department's address is 1429 Senate Street, Columbia, South Carolina 29201.