

STATE OF SOUTH CAROLINA)
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COUNTY OF RICHLAND)
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In the Matter of:)
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L.T. and A.W., on behalf of J.T.,)
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Appellant)
)
V.)
)
Richland County School District Two,)
Respondent.)

This matter is before me pursuant to an appeal by L.T. (“Father”) and A.W. (“Mother”) (or both together (“Parents”)), on behalf of the student J.T. from a decision by Douglas Dent, the Local Hearing Officer (“LHO”), ruling the Richland County School District Two (“District”) provided J.T. an appropriate individualized education program (“IEP”) that provided a Free Appropriate Public Education (“FAPE”) in the least restrictive environment (“LRE”) to the Student, appropriate transition services to Student, and meaningful participation in the IEP process for the Parent.

A request for a due process hearing was submitted to the District on September August 21, 2017, and a second request on August 23, 2017. The hearing date was set for October 16 and 17, 2017. An Interim Order dated September 19, 2017, determined that J.T. should “stay put” in the pre-school program at Forest Lake Elementary, but the parties agreed to allow J.T. to attend the

kindergarten program at Forest Lake Elementary. The LHO issued his written decision on October 24, 2017.

The Parents appealed the LHO's decision, which was received by the South Carolina Department of Education on November 6, 2017. On November 7, 2017, I set a briefing schedule for the parties, via email, to which both parties agreed.

2. Factual Background

This appeal involves a due process complaint filed by the Parents, contending that they did not have a meaningful opportunity to participate in the IEP and the placement and program suggested by the IEP team was not appropriate for the Student. The LHO found the District provided the Parents a meaningful opportunity to participate in the decision-making process, regarding the Student's placement and educational program, and upheld the placement decision of the District. The Parents appealed, contending that the LHO's decision was based on multiple errors of fact that affected the outcome of his decision.

J.T. enrolled in the Pre-K program at Killian Elementary School in the fall of 2016. In September 2016, the intervention assistance team (including the Parents) at Killian Elementary School met to discuss speech concerns and J.T.'s difficulty handling classroom demands. (District Exhibit 11). After this meeting, J.T. began working with an intervention specialist at Killian Elementary School, in an attempt to manage J.T.'s severe behaviors (self-injury, hitting, spitting, biting, cursing, throwing objects, running away). (Testimony of intervention specialist, Tr. p. 153). While in her classroom, J.T. had an individual schedule, help with transitions, a timer for large group activities, and a place to calm down. (Tr. p. 154). The intervention specialist testified that J.T.'s behaviors occurred nearly every day or multiple times a day. (Tr. p. 191, District Exhibit 15). She believes some of the behaviors slightly improved over the time

she worked with him (self-injury), but not all of them, and some seemed to go back and forth (language). (Tr. p. 157-158, 196-197). She reported that J.T.'s mother started seeing some of these behaviors at home after an in-home therapist visited the home as well. (Tr. p. 158). The intervention classroom was very structured, and ideally, students are supposed to decrease the amount of time in that classroom, but J.T.'s time in the intervention classroom was increasing. (Tr. p. 159-163). Between August 29, 2016, and November 18, 2016, J.T. had 12 behavior incident reports, and was sent home a total of 3 times. (District Exhibit 15, *See also* District Exhibit 12, Parents Exhibit 14, 15).

On October 26, 2016, the intervention assistance team met with the Parents again to discuss J.T.'s lack of progress. This team discussed J.T.'s injurious behaviors and the fact that this behavior was still a concern and stated there were more incidences of outward aggression, particularly towards adults. The team said the behaviors exhibited at school are evident at home as well. The team discussed the possibility of evaluating the Student. (Parents Exhibit 10).

In early November, a team of District officials and the Parents met at Killian Elementary School for a pre-evaluation meeting. (District Exhibit 12). The evaluation was conducted and the IEP team met at Killian Elementary School on January 6, 2017, to discuss the results of the evaluation. The team determined J.T. has a developmental delay and agreed J.T. had not made enough progress to justify returning J.T. to a general education classroom. (District Exhibit 13). The school-based team members recommended at least two placement options, and J.T.'s parents asked to observe classrooms before making a placement decision. (District Exhibit 13). The District set up meetings at Rice Creek Elementary School and Forest Lake Elementary School, but the Parents only visited the classroom at Forest Lake Elementary School before selecting Forest Lake Elementary School. (District Exhibit 16). On January 13, 2017, the IEP team met

again and agreed to a placement in the Developmental Delayed program at Forest Lake Elementary School, with fewer than 10 hours per week in the general education setting. The IEP team finalized an IEP that was based on J.T.'s need for skill development in behavior, social/emotional growth, and speech. (Parents Exhibit 1).

In his first couple of weeks at Forest Lake Elementary School, J.T.'s teacher quickly saw the same challenging behaviors from his previous school. She used a visual schedule, positive reinforcement, sticker charts, and instruction in social skills to help J.T. She would also take him on walks out of class, sometimes with her and sometimes with other administrators. (Testimony of intervention specialist). She kept charts for positive reinforcement and a log of phone calls with the Parents. (Parents' Exhibits 2, 4). On January 30, 2017, J.T.'s father requested an IEP meeting to discuss why his son was out of class with administrators after a January 27, 2017, incident. The team discussed these issues and decided not to make any changes to the IEP to allow time for J.T. to transition to his new classroom, but agreed to continue communicating with the Parents about J.T.'s behaviors. (Parents Exhibit 3).

Over the next several months, J.T. continued his placement in the self-contained service delivery model. He continued exhibiting challenging behaviors on an almost-daily basis. (Testimony of intervention specialist Tr. p. 10). Notes and testimony suggest that he continued to have challenging behaviors, with no significant improvement.

On April 26, 2017, the IEP team convened to discuss J.T.'s progress. The team requested a functional behavioral assessment (FBA) to develop a more targeted plan. J.T.'s parents expressed concern that Forest Lake Elementary School had not communicated with his previous

school about J.T.'s challenging behaviors and strategies for addressing his behaviors. (Parents Exhibit 3).

On May 24, 2017, the IEP team met to discuss J.T.'s progress report, as well as the result of the FBA completed by District personnel. (Parents Exhibits 6, 12). The progress report indicated satisfactory progress toward all of his goals. The team discussed placement options for the next school year and the school-based team members recommended that J.T. attend a behavior support program, designed to help students without academic difficulties, at Killian Elementary School. (Parents Exhibit 12). The Parents preferred that J.T. stay at Forest Lake Elementary School, either in a general education classroom with pull-out support, or a self-contained setting with students with academic as well as behavioral challenges. (Parent Exhibit 12).

On May 26, 2017, the IEP team met to develop a behavioral intervention plan (BIP) for J.T. (District Exhibit 2). On June 2, 2017, the team met to discuss placement again, and the school-based members of the team continued to state that J.T.'s behavior could not be addressed in a general or multi-categorical program, but suggested a more structured approach. The meeting ended with placement unresolved. (District Exhibit 3)

At the end of the summer, the Parents received notification that J.T. was enrolled in the behavior support program at Conder Elementary School program rather than Forest Lake Elementary School, as they had believed. After the Parents complained, the District enrolled J.T. at Forest Lake Elementary School, and J.T.'s father filed a due process request on August 21, 2017. (Parents Exhibits 13, 14, 18). Because the due process hearing request was filed, the District retained J.T. in pre-school to allow him to "stay put" during the proceedings. On

September 15, 2017, the IEP team decided that J.T. could begin to go to a kindergarten classroom with an assistant to see how the transition would go. (District Exhibit 5).

J.T. is working with a special education teacher at Forest Lake Elementary School in a pull out special education service-delivery model. She works with him 60 minutes per day to check in and check out from the day. J.T. requires constant support. (Tr. p. 395). In his general education classroom, J.T. works with a second teacher assistant who states J.T. is not making adequate progress towards his IEP goals. The assistant principal at Forest Lake Elementary School states the plan is still not working and has been called to intervene 18 times since September 7, 2017. (Tr. p. 122).

3. Standard of Review

Federal and state regulations provide that a party aggrieved by a LHO decision may appeal to a state review officer (SRO) and that the SRO 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 state review officer 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 local hearing officer are entitled to great deference and are considered prima facie correct. *M.S. ex rel. Simchick v. Fairfax Cnt. 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 state review officer must still determine the weight of the evidence independently. *Springer v. Fairfax County School Bd*, 134 F. 3d 659 (1998), 663, differentiating itself from *Doyle*. Similarly, when the opinion of the LHO is cursory or conclusory, the SRO may make an independent decision on

the facts. *Id.* The SRO must, however, provide reasons for departing from the LHO's language. *Id.*

4. Hearing Officer's Findings

The LHO determined the IEP developed for the 2017–18 school year and the proposed placement in a behavior support program at Conder Elementary School to be appropriate for J.T., despite the Parent's objection to the placement at Conder Elementary School. He found that the District offered the Petitioner meaningful participation in the IEP process, as well as appropriate transition services to J.T. as he moved from pre-school to kindergarten. He also recommended individual counseling for J.T. (LHO Decision, p. 7).

5. Discussion

The Parents raised a number of issues on appeal, and my decision here is limited to those issues that they raised in their initial appeal letter. First, I will address the Parents' claim that the LHO misunderstood several facts that ultimately affected the decision. Then, I will look at whether the placement recommendation of the IEP team in May 2017 provides J.T. with a FAPE in the LRE.

Section 1: Factual Errors

The Parents raised concerns about several factual errors made by the LHO. Some of these errors had little impact on the ruling and could be dismissed as scrivener errors, or errors due to the reality of writing the opinion without the transcript. These errors include mistakes about J.T.'s age and the exact school he attended at any given time. Other errors in fact could potentially have had an impact on the ruling, but I will base my ruling entirely on the facts laid out above that appear to be agreed upon by both parties.

One set of errors bears note, however. The LHO made a series of statements about the Parents that had no basis in the record. (LHO Decision p. 3-4). These statements referred to the cause of J.T.'s disability, speculated about what the Parents were and were not doing at home. The LHO admitted that those facts had little to do with the decision, and I will not use these statements in any part of my decision-making.

Section 2: The IEP, FAPE and LRE

In this section, I will determine first whether the IEP complied with the procedural requirements of the IDEA and then whether the IEP was reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. *Endrew F. v. Douglas County School District Re. I*, March 22, 2017 (not yet published), read together with *Bd. of Ed. of the Hendrick Hudson Central Sch. Dist., Westchester Cnty. v. Rowley*, 458 US 176 (1982). In determining whether an IEP is designed to ensure adequate educational progress, *Rowley* considers both procedural compliance as well as the IEP itself, saying it is "no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard." 458 US at 205-206. Let's first turn to the question of procedure.

Procedural Requirements

The Parents questioned whether they had an opportunity to participate meaningfully in the IEP process, and whether the appropriate parties were involved in the meetings to provide information about their child. Parents must be provided opportunities for meaningful participation in any discussion of their children's education. 34 CFR § 300.322. Each public agency must ensure that a parent of each student with a disability is a member of any group that

makes decisions on the educational placement of the parent's child. 34 CFR § 300.501(c). Further, IEP teams must not exclude parents from the development of students' educational programs. Reading a list of predetermined goals, services, and placement and asking for a signature does not engage parents in collaborative decision-making.

The Parents in the current case were provided meaningful opportunities for participation. They were provided due notice of all meetings. (See, e.g. Parents Exhibit 5). When they were unable to attend a meeting on a scheduled date, the school rescheduled the meeting. The school held meetings at parent request. (See, e.g. Parents Exhibit 3). In several instances, the school delayed completing a task in a meeting until the Parents had a chance to think about their options or visit schools. (See, e.g., District Exhibit 2).

The Parents have also questioned whether, at the initial IEP meeting, the right team members were present. A District representative, J.T.'s current general education teacher, a special education teacher, and his father were all present. Because placement was not yet finalized, it was not an expectation that J.T.'s teacher from Forest Lake Elementary School be present. The teacher at Forest Lake Elementary School received the IEP and was a member of all future meetings, including one just two weeks later. (Testimony of intervention specialist, District Exhibit 3). Educational Benefit from the IEP

The IEP must be reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. *Endrew F.* In this section, I will first turn to the question of whether the IEP in place from January-May, 2017 was reasonably calculated to enable J.T. to make progress appropriate in light of the child's circumstances, and then look at same question regarding the revised placement recommendation in the current IEP (May, 2017).

IEP from January-May, 2017: The Parents question whether the team developed and implemented strategies with a strong enough understanding of J.T.'s behaviors. The Parents do not think that when developing the plan for J.T. to attend Forest Lake Elementary School, the IEP team looked at enough of the data from the months J.T. spent in the intervention classroom at Killian Elementary School. They also wonder why the team did not conduct a FBA immediately, rather than waiting four months, so that J.T. could have a meaningful BIP. The Parents are not requesting a remedy for this time in the form of compensatory education or reimbursement for private school placement; instead, they raise these issues to ask the question – “If J.T. had received stronger services from January-May 2017, would he need the more intensive placement now?” Unfortunately, I cannot answer that question. The question of placement is based on J.T.'s current behavior, not on what could have been.

I do want to note that the interventions suggested for J.T. in his initial IEP are not significantly different from those tried during his time in the intervention classroom. Given the significant behavioral issues and their persistence from the beginning of his time at Forest Lake Elementary School, it seems logical that a FBA should have been conducted, if not immediately, after the January 30 2017, meeting to determine more effective interventions. Further evaluation or diagnosis into the cause of his behavioral challenges may have been appropriate as well.

However, the question at hand – whether the placement recommendation constitutes a FAPE in the LRE – does not turn on the question of whether J.T. received appropriate services from January-May 2017; instead, it turns on J.T.'s current goals and needs.

May 2017 IEP: After developing a BIP, the school-based members of the IEP team recommended a self-contained special education setting with a focus on behavioral support while

maintaining academic standards. The Parents would prefer either a general education placement with support, or a multi-categorical special education classroom at Forest Lake Elementary School. The District argues that the level of services required by the IEP precludes a general education setting and that a specialized, self-contained behavior support program at nearby Conder Elementary School would better serve J.T.

In determining the appropriateness of the placement, I must show deference to the LHO's findings of fact and credibility determinations. *Simchick* 553 F.3d at 316; *Doyle*, 953 F.2d at 105, *Shore Reg'l High*, 381 F.3d at 199. The LHO found "The offer of a placement in a Behavior Support Program was the next logical placement for J.T. and clearly an appropriate step towards the District's attempt to get his downward spiraling behavior under control."

The IDEA regulations require that placement be as close as possible to the child's home, and be at the school the child would attend if not disabled, but also that consideration be given to any potential harmful effect on the child or the quality of services he needs. 34 CFR §300.116. Further, children should only be put into a separate class if education in regular classes with the use of supplementary aides and services cannot be satisfactorily achieved. 34 CFR §300.114. This high bar for a self-contained placement is at the heart of the LRE criteria under the IDEA, requiring a careful look at whether the self-contained placement is truly necessary. Further, while mainstreaming is a goal for students with disabilities, it is secondary to the goal of providing maximum educational benefit for the child, as found in *Hartmann*:

"... the IDEA's mainstreaming provision establishes a presumption, not an inflexible federal mandate. Under its terms, disabled children are to be educated with children who are not handicapped only "to the maximum extent appropriate." 20 U.S.C. § 1412(5)(B). Section 1412(5)(B) explicitly states that mainstreaming is not appropriate "when 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." *Hartmann v. Loudon Cnt*, 1118 F. 3d 986 (1997).

I need to determine, then, whether J.T.'s disability is of such a nature that a mainstream classroom would provide maximum educational benefit to J.T.

J.T. was in a general education class with supports in the fall of 2016. The interventions provided were not enough to overcome his challenging behaviors; significantly enough that the team decided to conduct an evaluation. He was then moved to a self-contained setting, and many of the behaviors continued. While J.T. met some of his IEP goals, reports from the teachers and principal suggest that the behaviors were significantly disrupting both the ability of J.T. and his peers to learn. As these proceedings have progressed, J.T. has in fact been in the setting that the Parents are advocating for, and the behaviors have not improved, despite the presence of an aide specifically dedicated to J.T. Given the significance of the behaviors, and the harm they posed to both J.T. and his peers, the team made a reasonable choice to suggest that J.T. attend a program designed specifically to address students with significant behavioral challenges.

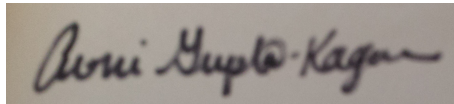
Under the Hartmann analysis, the placement suggested by the team ensures academic benefit for J.T. The behavior support program provides a greater benefit than the marginal benefit of mainstreaming, and prevents J.T. from being a disruptive force in the regular classroom setting. *See* 882 F. 2d at 1001 (citing to DeVries v. Fairfax County Sch. Bd., 882 F.2d 876 (4th Cir. 1989)). Given that the team made attempts at regular education with interventions, I must defer to the expert opinion of educators, and every educator who testified agreed that the behavior support program at Condor Elementary School would be best for J.T.'s development for a period of time, before attempting to bring him back into a mainstream classroom.

6. Conclusion

For the foregoing reasons, I uphold the LHO's finding that the placement decision was appropriate and provided FAPE in the LRE.

7. 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.

A rectangular box containing a handwritten signature in dark ink. The signature appears to read "Avni Gupta-Kagan" in a cursive script.

Avni Gupta-Kagan
Administrative State Review Officer

Columbia, South Carolina

December 5, 2017