

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
)
AB and KC,)
on behalf of KC,)
Petitioners)
)
v)
)
York County School District Four)
(Fort Mill))
Respondent.)

LOCAL IDEA DUE PROCESS HEARING

DECISION

This matter is before me pursuant to a Due Process Hearing Request (DPHR) submitted by the Petitioners on August 19, 2021. The Respondent submitted its response and Sufficiency Challenge on August 22, 2021. On August 25, 2021, an Order was issued denying the Respondent's Sufficiency Challenge. Following a teleconference, on September 24, 2021, an Order was issued establishing a Hearing date and other specifics regarding the conduct of the Hearing. An issue arose because of the Petitioners refusal to wear a face covering during the session. As a result, an Order was issued on August 28, 2021, setting a virtual Resolution Session to avoid the problem. Finally, on October 2, 2021, the Petitioners sent a letter to the South Carolina Department of Education requesting my removal as the Hearing Officer because of my Order requiring the wearing of a face covering. Accepting that letter as a Motion for Recusal an Order was issued denying the Petitioners' Motion on October 7, 2021.

The Petitioners had requested an open hearing, waiving their child's right to privacy and seeking his testimony initially choosing to attend by Zoom but later deciding to attend in person. On October 20, 2021, the Hearing convened with all in attendance wearing face covering except the Petitioners. While violating the previous Order establishing Hearing procedures, because they were not represented by legal counsel, the Petitioners were allowed to participate in the Hearing with the mother serving as legal counsel. An on the record pre-hearing conference was held to discuss

witnesses, their order of testimony and the evidence exchange. During this conference, the Respondent objected to the fact that the Petitioners submitted requests for the playing of certain videos of IEP meetings and the Resolution Session only two (2) days prior to the Hearing in violation of the Evidence Exchange regulation 34 CFR 300.512 (a)(3). That Objection was included into the Record as Hearing Officer Exhibit 8 and the Respondent's objection was noted when the video evidence was allowed. Because of a late ruling from me regarding the evidence exchanged the Petitioners were given until October 14, 2021, at noon to make additional submissions. Despite that additional time, the final submission did not occur until October 18, 2021. While the Petitioners did not submit their specific video requests in a timely fashion, they did refer to their desire to submit these videos into the record in their initial exchange document. The request to use the videos as part of their examination of witnesses was originally denied but on one occasion during the Hearing a portion of a video of an IEP meeting was allowed to be viewed over the objection of the Respondent's legal counsel. The video segment was offered to allegedly impeach a witness who attended the meeting in question. The video did not impeach said witness. The other occasion where a video was allowed was during the closing argument of the Petitioners. They chose to submit another video segment as their entire closing argument. Since closing argument is not evidence, said submission was allowed over the Respondent's objection.

Testimony began following the Pre-hearing conference continuing for the rest of the day and the following day. Because three witnesses and closing arguments were not reached the Hearing was continued and completed on October 25, 2021. The Hearing itself was extremely contentious at times but upon its completion, testimony from fifteen (15) witnesses was received and fifteen (15) exhibits were accepted into the record, including testimony from the child conducted by the Hearing Officer alone.

Based on this testimony and documentary evidence the following facts are accepted to be true:

1. The Student is a boy who was an elementary school student in the District originally attending Doby's Bridge Elementary School, River Trail Elementary School and finally at Orchard Park Elementary School. (Testimony of multiple witnesses).
2. The Student has received Special Education services pursuant to South Carolina categories of Autism, Other Health Impairment (OHI) because of a medical diagnosis of attention deficit hyperactivity disorder ADHD and was found to qualify for services under the category of Emotionally Disabled (ED). (Testimony of multiple witnesses, the Petitioners Exhibits, and the School District's Exhibit).
3. The Student is of average intelligence and has been able to perform his school work on grade level with good results (Testimony of multiple witnesses and the Petitioners' and District's Exhibits).
4. The Student was held back in the 3rd grade at the parent's request (Testimony of multiple witnesses and multiple exhibits)
5. The Student was described as bright, intelligent, funny, likeable, occasionally disruptive, often disinterested needing redirection and often insecure (Testimony of multiple witnesses and described in multiple exhibits specifically Petitioners' Exhibit 3).
6. Throughout the Student's time in school he has experienced a toileting problem, often soiling himself at multiple times during the day. The problem has been controllable at times and out of control at others but never resolved. During the period between September of 2020 and his removal from school in 2021 it was uncontrollable and created serious problems for the child, other children and school personnel. (Testimony of multiple witnesses and recognized in multiple exhibits specifically School District Exhibit 10).
7. During the Student's time at Doby's Bridge and River Trail schools, he was served educationally in a general education classroom with pull out resource services and later with push in services for counseling and emotional needs (Testimony of multiple witnesses and specified in multiple exhibits).
8. The Student was initially served under a 504 plan and had a Behavioral Intervention Plan (BIP), later qualifying for IDEA services pursuant to an IEP (Testimony of multiple witnesses, school District Exhibit 12)
9. Beginning in September of 2020 and continuing through to the time the Student was unilaterally removed from school, his behavior significantly deteriorated. In addition to his increased toileting problems, he began blurting out inappropriate utterances, becoming aggressive towards his peers, had at least two hospitalizations for aggressive behavior at home, seeing people who didn't exist hearing voices and slipping into an alternate personality of an imaginary friend (Testimony of multiple witnesses and discussed in Petitioners' Exhibit 2).
10. The School District proposed placement of in a new special services classroom at Orchard Park Elementary School designed to provide educational and other services in a small class setting, one with a special education teacher with two aides for four to six students, specifically designed for students who have performed on grade but have behavior and emotional needs. In addition, push in services from behavior specialists and other support personnel.
11. After four days in the Special Services classroom, the Petitioners unilaterally removed the child from school and he has not returned. (Testimony of the Student's father and others).
12. All witnesses were qualified to discuss the Student's education and proposed services

including the Student's father and his grandparents who were educators with appropriate knowledge of the IDEA. (Testimony of witnesses regarding their qualifications and background).

13. The IEP team was properly constructed and in accordance with the IDEA and its implementing regulations. (Testimony of several witnesses regarding their participation on the IEP team and IEP documents introduced into evidence).

ISSUES

In their DPHR the Petitioners raised the following issues:

1. The Petitioners were denied the opportunity for meaningful participation in IEP meetings and a staff meeting relating to their child.
2. The School District predetermined its decision to place the Student in the special services classroom at Orchard Park.
3. The placement at Orchard Park is not the Least Restrictive Environment (LRE) for the Student.
4. The Petitioners are seeking placement in a private school at the District's expense.

DISCUSSION

This Due Process Hearing was occasionally contentious, often diverted to irrelevant issues and often interrupted by discussions of matters outside the jurisdiction of the Due Process Hearing process, i.e. the wearing of face masks, the applicability of Governor McMaster's Executive Order prohibiting face mask mandates, a Magistrate's case involving the Petitioners and the executive director for special services, the Petitioners' religious and political beliefs and other peripheral matters. In addition, the Petitioner Mother acted as her and her former husband's attorney and, in that role, often engaged in animated arguments with the School District's attorney who replied in kind. All of these factors created an environment that made a reasonable discussion of the issues and facts difficult at best and impossible on occasion. However, the parties managed to complete the Hearing in two and a half (2 ½ days) and sufficient testimony and documentary evidence was introduced to allow the determination of the issues.

1. The Petitioners were denied the opportunity for meaningful participation in IEP meetings and a staff meeting relating to their child.

There is ample testimony often from the Petitioners themselves and others that they were at

each called IEP meeting, often with the assistance of professionals and support individuals, they video taped the meetings and they vigorously and forcefully argued for their point of view during these meetings. As members of the IEP team, their ideas, offers of information and arguments were clearly received, discussed and occasionally included in the accommodations and services provided to the child via his IEP.

The IDEA Regulation 34 CFR 300. 321 states an IEP team must include the parents; at least one regular ed teacher for the child; at least one special ed teacher for the child; a representative of the public agency/local educational agency (LEA); a person who can interpret the instructional implications of an evaluation results; at the discretion of the parent or the agency who have special knowledge or expertise relating to the child; and whenever appropriate the child. All of those individuals were present at the IEP meetings, including the child, his parents and his grandparents.

However, it is well settled in the law that while having an important voice in these meetings and the decisions made by the team and the parents cannot dominate the meeting or veto the final decisions of the team. *JD by Davis v. Kangwha County Bd of Educ* 48 IDELR 159 (SD WV 8/3/7). *Clark County Sch Dist* 109 LRP 77992 (SEA Nevada 11/17/9). Consideration and rejection of the parents positions and conclusions does not create a lack of meaningful participation. *In re Student with Disabilities* 52 IDELR 306 (SEA NY 4/12/0).

The apparent crux of the Petitioners' allegation of non-participation centers around a staff meeting held by some of the members of the IEP team to discuss options to present to the Petitioners in an upcoming IEP meeting. The Petitioners' claim that if placement was discussed it was an illegal IEP meeting and they should have been invited. The District's executive director for special services and other personnel testified that it was a meeting where the participants were "spitballing" regarding treatment options because of the child's deteriorating behavior and that no other than the presentation of options to the Petitioners at the upcoming IEP meeting. The

decisions were made Petitioners contend if placement was discussed at this staff meeting, exclusion of the Parent violates the IDEA. In support of their argument, they offer the language of 34 CFR 300.501 (c) which states:

“(c) *Parent involvement in placement decisions*; (1) Each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.”

However, section (3) of that Regulation states:

“(3) A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordinating of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.”

Clearly, the meeting in question falls into the definition of Section (3) and was not a violation of IDEA or the Regulations.

2. The School District predetermined its decision to place the Student in the special services classroom at Orchard Park.

The Petitioners contend that the placement offer to the Orchard Park special classroom was predetermined at the Staff meeting discussed above and thus was in violation of IDEA and the Regulations. However, interpretations of the Statute and Regulations have established that pre-IEP meetings to prepare a draft IEP does not violate IDEA, *JD by Davis v. Kanawha County Bd of Educ* 48 IDELR 259 (S.D. Wva 8/3/7); and the fact that staff discussed possible placements before the IEP team meeting does not show predetermination. *TP & SP ex rel SP v. Mamoaroneck Union Free Sch Dist* 554 F.Ed 247, 51 IDELR 176 (2nd Cir 2/3/9), *RR & DR ex rel MR v. Scarsdale Union Free Sch Dist* 615 F Supp 2nd 283, 52 IDELR 185 (S.D. NYU 5/14/9).

The Petitioners often seemed to confuse the physical school location with the concept of educational placement. Educational placement refers to the program offered and not the school where it will be located. Based on the testimony, the District felt that because of his emotional and

behavioral deterioration, they could no longer provide the educational services needed for the Student in a regular education classroom. They believed the appropriate program was the one at Orchard Park which was specifically designed to serve children who were performing on grade level but whose emotional and behavioral issues interfering with his educational progress. The testimony of those on the IEP team who offered the placement at the March IEP meeting clearly indicated that the placement was not ever considered permanent but rather an effort to gain control of the Student's behavioral issues so he could continue to grow educationally. At the IEP meeting, after discussion with the parents, the special services classroom placement offer was included it in the IEP. The parents allowed the Student to try it for only four (4) days and withdrew him allegedly because the Student indicated the behavior of the other students made it difficult for him to learn. At no time did the Student or his parents take responsibility for his behavior and how it may have impacted the other students so the class really had no chance for success.

3. The placement in at Orchard Park is not the LRE for the Student.

The concept of Least Restrictive Environment is a fluid one, not set in stone. Over the years, attempts have been made to set up scales, pyramids, and progressive lists, however, it is a concept that actually depends on the circumstances of the child. The IDEA clearly states a disabled child's IEP must provide for the education of the child “to the maximum extent possible” with non-disabled peers. 20 U.S.C. § 1412(5) (B). The case of *Oberti v. Board of Educ.*, 801 F Supp 1392 (D.N.J. 1992) set up a two-pronged test: (1) can the regular ed classroom with supplemental aids and services be satisfactorily achieved for the student; (2) if not, has the student been mainstreamed to the maximum extent appropriate.

In the Student's case, he was educated in a regular education classroom with resource services and accommodations for several years. His toileting issues, while always present, varied in intensity During those years. The District attempted several strategies to deal with the problem; using a sensory

room, a schedule of periodic visits to the nurse and allowing him to visit the bathroom if needed.

Also, during these years, the use of his BIP and the strategies established in it to redirect the Student when he strayed from academic tasks or acted out inappropriately were moderately successful. As a result, he was able to develop peer relationships and perform well in his academic pursuits. The Strategies, while not perfect, seemed to be successful.

During his second 3rd grade year, he was faced with several major transitions at school; changing schools on two occasions because of a change in attendance zones and the construction of a new school; changes in school services due to the Covid 19 virus, including the closing of school and the use of virtual education; changing teachers and support staff; increases in intensity of support. To a child with Autism those changes can be very disruptive and disturbing.

However, he was also experiencing changes and turmoil at home; a divorce and remarriage of his mother; living periodically with both natural parents; exposure to an active and vocal parent expressing publicly strong political and social stances which were contrary to the norm; conflict between the School District and his parents to which he was directly exposed.

Only the Student knows whether one of those sets of circumstances had a more profound impact on him than the other, but for whatever reason, beginning sometime in September 2020 and continuing through 2021 his behavior and mental stability began to deteriorate. He experienced two hospitalizations because of aggressive behavior at home. His toileting problem got dramatically worse causing him to substantially increase the number and intensity of his incidents often sitting in his own defecation and voiding until discovered by a teacher or peer. He was acting aggressively towards his peers, punching one of them in the stomach and attempting to choke another. He was hearing voices and seeing people who did not exist. He was slipping into his imaginary persona. He was disrupting class with inappropriate outbursts verbalizing loudly things that had nothing to do with his classwork.

All of these circumstances caused the School District teachers and service providers to

question whether they could continue to educate him in a regular education classroom. They tried to bring a behavior specialist into the classroom to work one-on-one with the Student. They provided push-in counseling assistance. They tried to establish a schedule for the Student to get him into a pattern of activity which would provide some stability during his day at school. Nothing worked. As a result, the District proposed a change of educational placement to the special services classroom at Orchard Park which would allow him to continue to interact with his non-disabled peers at related arts, lunch and recess. It is evident that they were attempting to educate the Student “to the maximum extent appropriate” with his non-disabled peers and thus it was the LRE for the Student at that moment.

4. The Petitioners are seeking placement in a private school at the District's expense.

Ironically, the Petitioners response to the Orchard Park program and placement has been to opt for Homeschooling or placement in a private school at the District's expense, both of which are clearly more restrictive in nature than the Special Services Classroom. To accomplish a private placement the Petitioners must meet two tests as established by the *Florence County School District Four v Carter* 510 US 7 (1993). They are: (1) they must show that the educational program offered by the School District does not provide the Student a Free Appropriate Public Education (FAPE); and (2) that their alternative educational placement does provide FAPE.

For all the reasons stated above, the School District has worked hard to meet the standard set by *Bd of Educ v. Rowley*, 458 US 176 (1982) and *Endrew F v. Douglas County School District RE-1* 580 US ____ (2017), i.e. to offer a individualized educational plan in the least restrictive environment appropriate from which the Student can receive meaningful educational progress. The standard is not that they must provide the optimal program or that they cure whatever influences may have a negative impact on the child at home or other environments which the school cannot control, but only that they offer an appropriate program to educate him in school. It is the parents' choice as to whether they keep the child in school, but they are required to provide education on some form by

State Law.

As for the second prong of the test, the Petitioners have the burden of persuasion to show that an alternative placement and program does offer the Student a FAPE. They have not offered any out-of-school placement or program, just opposed the one offered by the District. Thus, the second prong has not been met and the District has no legal obligation to pay for a private placement.

DECISION

The education of a child with disabilities is a challenge under the best of circumstances. Parents of children with disabilities must be engaged in their children's education and lives in order to ensure that the child takes advantage of every opportunity to learn and acquire skills that will serve them later in life. There is no question that the parents in this case are heavily engaged but recently that engagement has taken an unproductive form.

Those who serve the Student in school districts in an attempt to educate him should be caring, patient, skilled and diligent in order to give him the best chance to absorb the educational opportunities presented to him. The teachers and administrators who testified were well qualified, caring and very much engaged in an effort to help the Student learn and grow.

Somewhere along the way the relationship between the parties broke down and as is often case when a Due Process Hearing takes place. Their interaction became extremely acrimonious, making reasonable dialogue next to impossible; information became distorted; and discussions became embroiled in political and social issues which were of no value in determining the best education of the Student. The result of this combative relationship between the parties is that a child with Autism who has had an emotional breakdown and is receiving no educational services. While the adults fight, he is slipping further into a mental state that could produce permanent harm. He is now temporarily with his grandfather, who is a skilled educator as well. Hopefully, this time will help him return to some sort of normal behavior but it is not a permanent solution.

The Student needs all the positive attention the School District and the parents can muster and they need to do it together. The special services placement offered by the School District is an extremely well-designed program which, given a chance, could help the Student but it needs a couple of additions to bring him back. The child's grandfather is correct that the child's toileting issues must be corrected soon or it will be too late. His peers already are distancing themselves from him in large part because of it and that peer pressure will only increase as he moves through school and life. However, a one-on-one aide will only embarrass him more and make him feel more socially insecure as the District's earlier effort at such a service showed. If he were stable emotionally, possibly a relationship with a mentor would be appropriate, but he must be brought back to reality first.

The Petitioners' attempt to blame the Student's decline solely on the transitions he has had to endure in school is not realistic. While it is true that children with Autism generally do not react well to unstructured life in school or at home, once the Student leaves the cocoon of an elementary school he will have no choice but to learn to deal with changing classes, a faster lifestyle, more significant peer pressure and more difficult schoolwork. The Petitioners must help him cope, not obstruct the District's attempts to provide services and not enable his bad behavior by denying it.

The Student is in trouble. He needs psychiatric help and soon. He needs the structure of a Special services class. He needs more attention at school and more stability at home. If he can be helped and brought back into a more stable environment at school everyone needs to act quickly and in concert.

THEREFORE, IT IS HEREBY ORDERED that the educational program offered by the School District for the Student is appropriate and offers him a FAPE. It is ambitious, and given a chance, it could bring him back into a state that could make him regain some of his strengths and momentum towards relatively productive educational and personal growth.

Two components should be added at the District's expense; 1) once stabilized the Student shall

be given the opportunity to learn to type and use a computer or similar device, and 2) the District shall identify appropriate and offer services from a psychiatrist or psychologist in an effort to help him out of the mental health hole he is slipping into. Without this help, he will not be able to learn.

IT IS SO ORDERED.

Greenville, South Carolina
November 1, 2021

Douglas F. Dent
Douglas F. Dent
Local Due Process Hearing Officer

APPEAL

Should either party wish to appeal this Order, they must contact the Office of General Counsel of the South Carolina Department of Education within ten (10) days of receipt of the Order. 1429 Senate Street, Columbia, South Carolina 29201, (803) 734-3393.