

STATE OF SOUTH CAROLINA	)	
	)	LOCAL DUE PROCESS HEARING
COUNTY OF SPARTANBURG	)	
CJ and WJ on behalf	)	
of their minor child LJ,	)	
Petitioners	)	
	)	
v	)	FINAL ORDER
	)	
Spartanburg County School District Five,	)	
Respondents.	)	

This matter was initiated by the Petitioners' filing of a Due Process Hearing Request (DPHR) on May 5, 2021, followed by a request from the Respondent that I serve as an Independent Hearing Officer on May 13, 2021. On May 16, 2021, the Petitioners were notified via a letter from me to them and their legal counsel of my appointment and their rights and responsibilities during a DPH. The Respondent School District submitted its Response on May 13, 2021, and the parties held a Resolution Session within the prescribed time limit.

On June 24, 2021, the parties' legal counsel participated in a teleconference setting Hearing dates of August 4, 5 and 6, 2021. Witness lists and Documents were exchanged by agreement and an Interim Order was issued establishing the Hearing Date and other preliminary deadlines related to the Hearing.

On the day of the Hearing, a pre-hearing conference was held to discuss procedural matters and all issues requiring inclusion in the record were disclosed prior to the taking of testimony. A court reporter was present to record the proceedings and testimony began at approximately 10:30am on August 4, 2021, and continued as reported above for three (3 ½) days without incident.

All parties and their legal counsel participated in the Hearing, which continued through the allotted days, and by Interim Order issued on August 7, 2021, continued on August 9, 2021. At the conclusion of the taking of testimony it was agreed that the parties would have until August 23, 2021, to submit closing arguments in writing and established the Final Order due

date to be on or before September 3, 2021.

At the request of the Petitioners the Hearing was open and the child did not appear.

Testimony was taken from Petitioners' witnesses: the Student's mother, Dr. Lesli Doan, Amanda Ledbetter, and Genia Batson. Although she did not appear, the Psychological Evaluation of Dr. Renee Lake was admitted into evidence. Witnesses for the Respondent included: Michael Powell-Principal Berryshoals, the Student's teachers, two school psychologists, and Dr. Wendy Hite-Director of Special Services. These witnesses will be identified further as evidence is discussed.

ISSUES

The Issues both legal and factual presented at the Hearing include the following:

1. Did the Respondent School District commit procedural violations of the IDEA by 1) denying the Petitioners meaningful participation in IEP meetings by withholding notice of said meetings, 2) failing to properly implement the Student's IEP from August 2020 to September 2020, and 3) failing to provide the proper amount of time to enable the team to develop an appropriate IEP.
2. Did the Respondent School District fail to deliver the services required by the Student's IEP during the "Covid Shutdown"?
3. Did the Respondent School District fail to offer the Student a FAPE with its 2020-2021 IEP?
4. Did the private school placement at Oakbrook Preparatory School offer a FAPE?
5. Are the Petitioners' entitled to reimbursement for the cost of tuition and other expenses related to the Student's private school placement and the provision of services by a tutor during the summer of 2020?

FACTS

Because of the extensive testimony and documentary evidence presented at the DPH, not all facts developed will be identified here. Rather only those which form a basis for the discussion which will follow will be stated. They include:

1. The Student is a 12-year-old female who was educated in Abner Creek Elementary School for 4th Grade and Berry Shoals Intermediate School in Spartanburg County School District Five for 5th and 6th grade, entering the District in 2018.

2. It has been determined that the Student is eligible for special education services under the IDEA pursuant to the categories of Other Health Impairment (ADHD) and Specific Learning Disabilities (Dyslexia and Dysgraphia).
3. The Student has been found to have an IQ in the 100 range and has been described as "bright, witty, funny, outgoing, and an eager student in the classroom,"
4. The Student has received above average grades in both elementary and intermediate school performing well in regular education classrooms with some individual assistance in the areas of reading and writing expression.
5. The Student's teacher testified the Student's grades were earned with the aid of accommodations and special education services provided in a resource-services delivery model, not the result of any weighting or other preferential treatment.
6. The school principal and director of special services testified that the Student did not have a disciplinary record at school and was never referred to the assistant principal for a disciplinary problem.
7. At the beginning of the 2019-2020 school year, the Student was re-evaluated by the Respondent District's School Psychological team lead by Dr. Audrey Whitley because of a social/emotional goal designed to help the Student be more assertive and confident in the classroom.
8. During the summer of 2020, the parents hired a tutor to work with the Student.
9. On August 24, 2020, the parties participated in an IEP meeting at which time the Petitioners offered an outside evaluation performed by Dr. Renee Lake that found a clinical diagnosis that the Student has Autism.
10. At the September 28, 2020, meeting it was agreed that the District's school psychologist, Dr. Stoupe, would review Dr. Lake's evaluation and the IEP meeting would be reconvened to finalize the IEP.
11. Dr. Stoupe did not find that the Student's clinical diagnosis of Autism qualified the Student for special education services under the educational disability category of Autism.
12. The Respondent District offered an IEP which did not have a social/emotional goal, alleging the Student had mastered her previous goal. The Petitioners insisted that a new social/emotional goal was necessary because of emotional breakdowns which were occurring at home and because of an incident where the Student expressed a desire to die in September of 2020.
13. The parties were unable to agree on an IEP for the 2020-2021 school year and on October 12, 2020, the Petitioners notified the Respondent in writing that they were withdrawing the Student from school to be homeschooled until January 2021, at which time she would be enrolled in Oakbrook Preparatory School.
14. The Student was enrolled at Oakbrook in January 2021 and has continued to progress well at that school.

15. The Petitioners are seeking reimbursement for the cost of their tutor during the summer of 2020, cost of private placement for the 2020-2021, 2021-2022 and 2022-2023 school years.

DISCUSSION

This Hearing produced three and one half (3 1/2) days of important testimony, thirty Petitioner exhibits and thirteen exhibits from the Respondent. It was conducted in a professional and efficient manner with each party presenting their case thoroughly and well. The legal issues are multiple but relatively straight forward and well developed. The following is a discussion of those issues.

1. Did the Respondent School District commit procedural violations of IDEA by 1) denying the Petitioners' meaningful participation in IEP meetings by withholding notice of said meeting, 2) by failing to properly implement the child's IEP from August 2020 to September 2020, and 3) by failing to provide the proper amount of time to enable the team to develop an appropriate IEP.

When the IDEA was passed into law one of its important points was the absolute right of the Parents to have meaningful participation in the IEP process, *Alexis v. Bd. Of Educ. for Baltimore Public Schools*, 268 F.Supp. 551, 40 IDELR 7 (D. Md. 10/6/3). Although the Parents have an absolute right to participate in the IEP process they do not have the right to **dominate** the process. *J.D. By Davis v. Kanawka*, 42 IDELR 159 (SD WVA 8/3/7). In this case the parents participated in each IEP meeting and were given the opportunity to bring in documentation; the outside evaluator, Dr. Lake; and an advocate. The fact that the IEP team considered, but rejected, the Parents request for certain methodologies, a social/emotional goal request, and the request that the Student qualified for services under the category of Autism is not, in and of itself, a violation of IDEA. *In re Student with Disabilities* 52 IDELR 306 (SEA NY 4/12/9). It is rather a team decision after reviewing the evidence and facts presented to them.

The parents allege that during August and September of 2020, the Respondent failed to properly implement the Student's IEP. The Student's ELA Teacher during this period was briefed on

the Student's IEP and accommodations and implemented them for the brief period that the Student was in her classroom. Teaching of the Student included direct instruction to the class, work in small groups and close up teaching, one-on-one. The Student was making good progress toward her goals and was really improving her writing skills, as was illustrated by the preparation of a very good short story with minimal supervision prior to her withdrawal from school. Her grades for the first nine weeks were excellent. There is no evidence that shows a failure to implement the Student's IEP during this period.

As a final procedural violation, the Petitioners allege the Respondent failed to allot sufficient time to properly develop an appropriate IEP. It is difficult to understand this allegation. Testimony from participants in the IEP team indicate that each IEP meeting lasted several hours and the team met on numerous occasions to develop the IEPs, some on the District's normal schedule and some at the request of the Petitioners. Dr. Lake participated via Zoom in the September 28, 2020, IEP meeting and was given ample time to explain her evaluation. The Petitioners' advocate participated in IEP meetings and actively engaged in the discussions. Some of the Petitioners' and the advocate's requests were honored and included in the Student's IEP. There is no evidence to show the Petitioners, their support team, or their independently developed information regarding the Student was excluded or limited during the extensive IEP meeting held on the Student's behalf.

2. Did the Respondent School District fail to deliver the services required by the Student's IEP during the "Covid Shutdown"?

In March of 2020 the whole State and most of the Nation shut down because of the rapid and deadly spread of the Covid 19 virus. By Order of the South Carolina Governor, schools were closed and all educational services were provided to disabled and non-disabled students alike via the internet. Many school districts were not prepared to provide education virtually, but the Respondent District was able to quickly develop a system of service delivery. To say that it was an adequate substitute for in-person, in-class education would not be an appropriate conclusion. It wasn't. However, fortunately it was available and allowed all students, including the Student to

continue to receive educational services.

The U.S. Department of Education took the position that School Districts were required to continue to provide the services specified in the IEPs of its disabled students. The issue is whether the services provided during this difficult and extraordinary time were appropriate or sufficient. In the Student's case she was predominately in general education classes with special education services. Her teachers had one week to prepare for this new world. Her primary ELA teacher used Google Docs and Google Handouts to provide the Student lessons. She typed lessons for the Wilson Multisensory Reading Program, shortened lessons so the Student would not be overwhelmed, and worked one-on-one with her three days per week through the rest of the school year. Her evaluation was that the Student made good progress toward her IEP goals inspite of the Covid shutdown.

There is no doubt that all students would have benefited from in-person, in-class instruction from March to June of 2020. However, that was not an option. According to the testimony of her teachers and those who conducted evaluations of her, the Student did well adjusting to virtual education and held her own while making progress toward her IEP goals.

3. Did the Respondent School District fail to offer a FAPE with its 2020-2021 IEP?

The development of the Student's 2020-2021 IEP took several months and multiple IEP meetings. The Petitioners' primary issues appeared to be: 1) the District's declaration that the Student met her previous social emotional goal and their unwillingness to establish a new one; and 2) the District's unwillingness to agree that the Student was eligible for services under the State special education criteria for Autism along with 3) the Petitioners' long-standing efforts to have certain methodologies used that were rejected by the District.

The social/emotional goal issue arose because of alleged instances when the Student would have emotional melt downs when returning home after school and an incident where she said

that she “just wanted to die” at the end of September. Multiple District personnel in contact with the Student testified they saw no emotional breakdowns from the Student while at school. They described her as friendly, witty, funny, engaging, smart, bright, social and a willing student. She apparently had friends, participated in class, volunteered to read out loud, and had a good relationship with her teachers.

When informed of the incident of alleged interest in self-harm, the District did an investigation, brought in the school guidance counselor and psychologists, and met with her regarding the incident. In an IEP meeting where the Student attended, she was told directly that anytime she felt anxious she could meet with the school counselor as she had done when at Abner Creek Elementary School. In the end, it was determined that the Student made the statement in a moment of frustration but there was no serious threat to actually harm herself.

The decision of the IEP team was that whatever was occurring at home, it was not manifesting itself in school; the Student was doing well in her classes; and no social/emotional goal was needed in her IEP. Shortly, thereafter the Student was withdrawn from School.

The IEP developed for the Student addressed her educational needs and she was making progress towards those goals. IEPs are required to address the educational, social, and medical needs of a child that may impair that student's ability to progress educationally. In this case, the Student was progressing even with the increased intensity of the more difficult work that comes as one matriculates to each grade. Clearly, the accommodations and special education services provided by the Respondent were working. The Student was making excellent grades in regular education settings in competition with her fellow non-disabled students and was clearly acquiring the skills necessary to continue to grow educationally.

Dr. Lake's clinical diagnosis of Autism is a little surprising but the District agreed to have Dr. Lake present her conclusions at an IEP meeting and have Dr. Shoupe, a school Psychologist with

Autism experience and the parent of a child with Autism, evaluated the diagnosis, apply the results to the State Criteria for designating a Child with Educational Autism and make a recommendation to the IEP Team. After reviewing Dr. Lake's findings and applying the state standards, Dr. Stroupe concluded the Student did not qualify for special education services under the category of Autism.

The State Standard for the Category of Educational Autism is as follows:

"b. Autistic Disorder (1) In addition to the characteristics listed in (a)(1) and (2) of this subsection, there also is evidence that the child demonstrates impairments in communication, such as delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime). In individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others, stereotyped and repetitive use of language or idiosyncratic language, or lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level is noted. (2) The adverse effects of the Autistic Disorder on the child's educational performance require specialized instruction and/or related services. c. PDD-NOS (1) There is evidence that the child demonstrates any of the characteristics listed in a or b of this subsection without displaying all the characteristics associated with either Asperger's Disorder or Autistic Disorder. (2) The adverse effects of the PDD-NOS on the child's educational performance require specialized instruction and/or related services."

Section 43-243.1. C.2.b. *South Carolina Code of Regulations, State Board of Education.*

Testimony from the Student's mother and teachers, and the Oakbrook representatives, it is clear that she is perfectly capable of carrying on a conversation and communicate well her thoughts both verbally and in writing. She participates in sports, has made friends both in the public and private school setting, is bright and has a good sense of humor. Comparing the Student's personal traits and abilities in school to this standard makes it clear that whether she suffers from ADHD or Autism or both, she does not qualify for special education services under the Autism Category.

One of the Petitioners' long-standing issues with the District was that the District refused to use the Orton-Gillingham (O-G) Reading program. Instead, complying with state standards, the District utilized the Wilson Multisensory Reading program which is based on O-G principals but offers a broader approach. This was an issue that was raised multiple times and when a tutor was hired during the summer of 2020, she utilized the O-G program. She now works for Oakbrook which

utilizes the O-G program. It is well settled that parents cannot compel specific Methodology, *Lessard v. Wilson-Lyndeborough Coop. Sch. Dist*, 592 F. 3rd 267, 53 IDELR 279 (1st Cir 1/20/10).

The Wilson Program has been accepted an appropriate Reading program for children with Dyslexia by the State of South Carolina. If the Parents choose to use the O-G program with a tutor or at Oakbrook, that is their right, but the District's use of the Wilson Program is not a violation of the child's rights.

Based on the above information, the Student was offered FAPE in her 2020-2021 IEP.

4.e Did the private school placement at Oakbrook Preparatory School offer a FAPE?

The short answer is, we don't know. The testimony of Amanda Ledbetter, the director of external affairs at Oakbrook, staff at Oakbrook, and the Student's mother is that the Student is enjoying her time at Oakbrook and doing well in school. Ms. Ledbetter testified that Oakbrook does not utilize IEPs or 504 plans but they do have a special program designed to provide additional services for children with special needs. Oakbrook staff who testified was familiar with the Student because she also was her tutor over the summer of 2020. She testified that she believes the Student has progressed since enrolling in Oakbrook. According to the mother, the Student is happy, participating in cross country running and soccer at the school and has made new friends. She believes the Student is happier and doing better at Oakbrook, but not objective information or other tools to measure her educational progress.

The Student's apparent happiness is good news. Even though her private school does not provide all the services and specialists that are available in the District, the environment of a small school which most likely does not have as much social pressure, can be a nurturing environment for children who need to develop social skills and confidence. Time will tell if the school provides educational benefit. Hopefully, it will but since the District has offered a FAPE, it is not necessary to determine if the Oakbrook placement offers her a FAPE.

5. Are the Petitioners' entitled to reimbursement for the cost of tuition and other expenses related to the child's placement in private school and the provision of services by a tutor during the summer of 2020?

The test for determining whether the Petitioners are entitled to reimbursement for private school tuition is found primarily in a United States Supreme Court ruling from South Carolina, *Florence County School District 4 v. Carter*, 510 U.S. 7 (1993). Although the ability to seek reimbursement for private school placement was established in *Burlington Sch Comm. v. Mass. Dept. of Ed.* 471 U.S. 359 (1985), the test as to the specific factual situation that had to be met to allow recovery. *Carter* provided that test. In brief it specifies that the IEP for the child proposed for the child by the School District must be found to not offer an opportunity for meaningful educational progress and the educational plan or program offered by the private school does offer the child the opportunity to make meaningful educational progress.

The United States Supreme Court case that basically established Special Education is *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). This ruling said that public schools had an obligation to offer an individualized educational plan (IEP) for children with disabilities which addressed their educational, emotional, physical and medical conditions that negatively impacted their ability to learn. In so doing it had to do so in the least restrictive environment and must be designed to provide the child with an opportunity to make meaningful educational progress. Subsequently, the decision in *Endrew F. v. Douglas Co Sch Dist RE-1*, 580 U.S. ____ (2017), emphasized that "meaningful educational progress" meant real progress, not just incremental improvement.

In the *Rowley* decision, the Court recognized that public schools do not have unlimited resources and they are not required to provide the optimal education possible for a student with disabilities but only one that will offer the opportunity for meaningful educational progress. The analogy used was that the public school had to provide a real good Chevrolet but not a Cadillac.

Since that ruling and subsequent ones, the Courts have made it clear that the Chevy must be equipped with enough extras to make a real impact. But the analogy still holds.

While to date, private schools have not been held to the same standards, the ability for parents to recover the cost of a private placement still requires the private school to demonstrate that whatever plan or program it offers is helping the child progress educationally.

Public school is not for every student. Particularly middle and high school. The social atmosphere and educational standards as students leave the cocoon of elementary school are challenging and difficult particularly to students who already are struggling because of disabilities and are going through extraordinary growth changes. That doesn't mean that they are bad or unable to offer a student an opportunity to make real progress educationally.

In this case, the Student was in the Respondent District schools for a little over three years. During that time, she progressed through three grades, making good educational progress and acquiring both educational and social skills. Her IEP goals, on the surface may seem modest but her progress while encountering an increasingly demanding curriculum shows that they were designed to help her make meaningful educational progress. Throughout her time in the District she has made excellent grades in a regular education setting with accommodations that do not include any special weighting or diluting the requirements for obtaining those grades. It is clear that, her school behavior was very good and she was growing socially, making friends, exhibiting an outgoing and endearing personality and participating in the classroom. The fact that her IEP team believed that she had mastered her social/emotional goal of becoming an advocate for herself shows sufficient progress to end the need for a social/emotional goal for the Student.

The Petitioners demands that the School District address alleged emotional outbursts at home and a clinical diagnosis of Autism. The District did not believe that behavior interfered with the Student's educational progress. The establishment of a social/emotional goal to address behavior

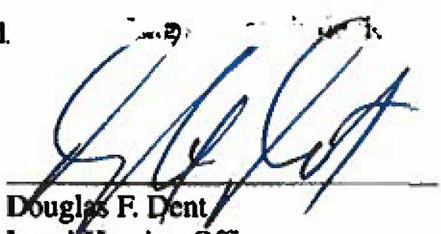
or environments outside the school setting which does not impact the child's educational growth is not required by the requirements of the IDEA, its implementing regulations or case law.

Applying the *Carter* test, the Respondent has offered an IEP which is designed to provide the Student with meaningful educational progress. The fact that the Petitioners have not been able to control her educational methodology or obtain services through the District for matters that do not impact the Student's ability to learn and grow does not mean that the District's IEP is not appropriate and provides a FAPE. Having found the Respondent is not in violation of the IDEA and has offered the Student a FAPE, there is no need to explore the program at Oakbrook. The Petitioners request for reimbursement for private school tuition and tutoring cost fails.

THEREFORE, IT IS HEARBY ORDERED that the Respondent has offered an IEP which is designed to provide meaningful educational progress and thus has offered the child a FAPE. Having complied with IDEA and its implementing Regulations the Petitioners' demand for reimbursement for the cost of private placement and tutoring services is denied.

IT IS SO ORDERED.

September 2, 2021
Greenville, South Carolina



Douglas F. Dent
Local Hearing Officer

APPEAL

Should either party wish to appeal this Order, they must contact the South Carolina State Department of Education, Office of General Counsel, 1429 Senate Street, Columbia, South Carolina, 29201, (803) 734-3933 within ten (10) days of receipt of the Order.