

STATE OF SOUTH CAROLINA	)	
	)	LOCAL IDEA DUE PROCESS
COUNTY OF SPARTANBURG	)	HEARING
A.R. and J .R. on behalf of their	)	
minor child L.R.,	)	
Petitioners	)	
	)	
v	)	HEARING OFFICER DECISION
	)	
Spartanburg County School District 2	)	
Respondent	)	

This matter is before me pursuant to a Due Process Hearing Request submitted by the Petitioners to the District on August 6, 2019. On August 8, 2019, the Petitioners were sent a letter from this Hearing Officer explaining their rights and responsibilities in a Due Process Hearing. The District Responded to the Petitioners' Request for a Due Process Hearing on August 16, 2019. On August 21, 2019, a Resolution Session was held without a settlement.

On August 30, 2019, the Respondent submitted a Motion to Compel requesting that the Petitioners be required to present their child for a psycho-educational evaluation to be conducted by the Respondent District's personnel. Each party submitted through their legal counsel, briefs in support of their respective positions and on September 8, 2019, an Order was issued denying the Respondent's Motion but requiring the Petitioners to fully respond to the Respondent's subpoena seeking information concerning a private educational evaluation obtained by the Petitioners.

Compliance with subpoenas occurred and a Hearing was convened on September 26. Because of a death in the family of the Petitioners' legal counsel, the Hearing was continued and completed on the Monday September 30, 2019.

ISSUES

Issues presented to the Hearing include the following:

1. Did the Respondent District commit a procedural violation of the Child Find provisions of IDEA and its implementing regulations by not conducting an evaluation to find out if the subject child eligible for Special Education?
2. Did the Respondent District deny the child FAPE by failing to find him eligible for Special Educational?
3. Is the Respondent District require to reimburse the Petitioners for an independent Psycho-educational evaluation obtained without the knowledge or participation of the District?
4. Is the Respondent District required to reimburse the Petitioners for tuition costs incurred in a unilateral private placement of the child?

FACTS

Based on the testimony of witnesses and the documentary evidence presented at the Hearing, I find the following Facts:

1. The Student is a child who was to be a rising third (3rd) grade student in the subject School District where he had been receiving his education for several years. (Testimony of the mother and other witnesses and documentary evidence).
2. In June of 2018, the Petitioners after consulting with the Student's pediatrician, contacted the Principal and notified her that they were concerned about the Student's progress in reading and felt he may have symptoms of dyslexia. The Principal responded that after checking with his teachers and reviewing his records she felt that the child was progressing normally and suggested a team meeting to discuss the matter.
3. In December of 2018 while a student in the 2nd grade, the Petitioners again contacted the Principal by email and requested that their child be given a formal evaluation and offered consent to the process.

4. The school psychologist followed-up and on January 19, 2019 a meeting was held by an evaluation team which included the Mother. The team decided that based on MAP scores, iReady data, COGAT Scores, Teacher observations and Parent observation they would not conduct a formal evaluation of the child but would provide interventions and strategies to assist the child with executive functioning, reading comprehension and Self-correction.

In March 2019, after another contact by the Petitioners, the matter was referred to a Response to Intervention (RTI) Team to consider the child's progress and the Petitioners' concerns. As a result, a Team meeting which included the Mother, was convened and Grades, MAP scores and other information was considered. Again, it was determined that the interventions would continue but that the child was doing well in school and an evaluation was not needed.

In June of 2019, a scheduled review meeting was held and the Petitioners requested that their child be referred for evaluation and possible Special Education services because of perceived reading difficulties. An Evaluation Team meeting was held consisting of an entirely new set of members to review the child's progress and the need for a formal evaluation. The Team which included the Petitioners, concluded that the Child was receiving average or above average grades in school, reading; doing work on grade level; and qualified for Gifted and Talented in Math. As a result, the team did not suspect a disability at that time and did not recommend an evaluation.

5. In July of 2019, the Petitioner's contacted Greenville Assessment & Learning Specialists and had a psycho-educational evaluation performed. The evaluator found the child had a mild form of Attention Deficit Hyperactivity Disorder, a Mild form of Specific Learning Disorder with impairment in Reading (Dyslexia), a Moderate form of a Specific Learning Disorder in with impairment in writing (Dysgraphia) and an unspecified Anxiety Disorder,
6. Mother discussed possible enrollment of child with the private school in June and finally decided to enroll him in that school in August of 2019. She informed the District around that time that she was not going to enroll the child in public school. However, she did not notify the District of the private evaluation, provide a copy of it to the District, nor did she inform the District that the private school had also performed an evaluation of the child and recommended that he be retained in 2nd grade be serviced by the schools Vistas program.

8. The Petitioners paid \$1,850 for the private evaluation and have been charged \$8,277 in tuition and \$4,935 for the Vistas Program, a total of \$13, 212 for the private school. They seek reimbursement for all sums expended.
9. The District's consistent position relating to the child's need for Special Education was that he had average intelligence; was progressing well in school; making average or above grades; scoring in the average range on standardized tests and assessments, i.e. MAP, iReady, COGAT, Fountas & Pinnell. As a result, it was not appropriate to perform a psychoeducational evaluation or provide Special Education. Further, they believed that the RtI interventions were sufficient for him to receive meaningful educational progress.
10. Based on a limited evaluation by an evaluator at the private school, the private school determined that the child should be retained in 2nd Grade and be additionally served in a resource type of model through their Vistas program.

Discussion

The Petitioners have been and continue to be strong advocates for their child and clearly are seeking to help him in any way they can to achieve academically and in life. Their involvement with his education and advocacy for him is admirable and will be rewarded wherever he receives his education. From the description of the child by all witnesses, he is a bright, well behaved, an eager learner with a desire to please and a hard worker even at the Student's age which is also a testament to his upbringing and support of his parents.

Having participated in many of these Hearings, I fully understand the emotional and very personal feelings of Parents as well as those who serve students in school. However, it is my task to evaluate the testimony and evidence and then to apply current and applicable law to them. The result may often seem uncaring and insensitive, but Hearing Officers are not given the luxury of becoming emotionally involved. Rather we must ensure that both

parties are treated fairly under the law and that the decision rendered follows the law.

Reviewing the testimony and evidence in this case makes it clear that the child is a willing and eager learner with average intelligence. That is confirmed by the District's evaluations of his abilities and the private evaluator's results in the Wechsler Intelligence Scale for Children, Fifth Edition. This is a well-recognized test for the determining of specific and general intelligence. She found a Full-Scale IQ of 102, with breakdowns in Verbal, visual and Reasoning of higher abilities and a less able score in processing which reduced the overall IQ score. (Petitioners Exhibit 12 page 14). This is important because it plays significantly into the decisions of both parties.

There seems to be agreement on the part of all witnesses that his ability in Math is above average, even qualifying for the Gifted and Talented program at his school. Even though the child did exhibit some propensity to reverse numbers when writing them down, his ability to add, subtract and perform other purely mathematical activities seems to be within the average or above average range for students his age and he was and is performing well within the 3rd Grade level.

1. Did the Respondent District commit a procedural violation of the ChildFind provisions of the IDEA and its implementing regulations by not conducting an evaluation to find out if the subject child is eligible for Special Education services?

The Regulations which implement the IDEA require each State to have policies and procedures to ensure that all children with disabilities are identified and evaluated. They further state that "Children who are suspected of being a child with a disability under Sec. 300.8 and in need of special education, even though they are advancing from grade to grade" should be include in "Child Find". 34 CFR 300.111(c)(1). This language as interpreted by the Courts

has set up a two-pronged test. First, is the child suspected of having a disability and second is there a *need* for Special Education. This *need prong* is the issue here. In this case, the Petitioners clearly suspected that the child had a disability which would qualify him under Child Find and consistently sought an evaluation which they believed would allow him to receive Special Education services. The District personnel were not convinced that he qualified as a child with a disability and did not believe he needed Special Education services. While there may be a procedural violation of Child Find for not evaluating the child, the Courts have held that failure to evaluate when the child is not in need of Special Education is, in effect, harmless error. *T.B. v. Prince Georges Cty. Bd. of Educ.*, 897 F. 3rd 566, 72 IDELR 171 (4th Cir. 2018) cert. denied. 239 S.Ct. 1307 (2019); *M.G. v. Williamson Cty. Sch.* 720 F. App's 280, 71 IDELR 102 (9th Cir. 2018). *Burnett v. San Mateo Foster City Sch. Dist.*, 739 F. App's 870, 72 IDELR 147 (9th Cir. 2018).

The Petitioners' concerns initially related to his reading, reading comprehension and writing. On this point there is some disagreement among the witnesses. The Student's 2nd grade teacher for most of the school year, testified that some of his difficulties were not uncommon for her students and she had been teaching 2nd grade for eleven years. Further she stated that the child received reading services in small groups as well as one on one and in the larger class setting. She did acknowledge that he did have some reading problems but stated that he did not stand out as a poor reader. He did leave out some words and had some comprehension problems early on but that by the end of the school year he was reading on or above grade level as is borne out by the Fountas & Pinnell results (Respondent's Exhibit # 5). She also testified that she had received training in Dyslexia and that she did consult with the Literary Coach to make sure she was providing appropriate help for the child. Finally, she felt viewing his test scores, grades

and other measures of his academic progress, the Student was performing in the average range for 2nd grade students in her class.

The child's Mother testified that the family was spending many hours on homework, the child's writing was not legible, and he was having difficulty with word reversal and spacing issues. She also believed these problems were getting resolved.

The Respondent reviewed the child's records and performance and the Petitioners' concerns on three (3) occasions and determined that because of his progress and ability, he did not "need" special education services. Their failure to evaluate was a procedural violation of Child Find, but it did not impede the child's education and thus the *need prong* was not satisfied to require Special Education. *see, M.A. v. Torrington Bd. of Educ.*, 980 F. Supp. 2nd 243, 62 IDELR 29 (D. Conn. 2013).

2. Did the Respondent District deny the child a FAPE by failing to find him eligible for Special Education Services?

To qualify for Special Education services, the State has established the following definition of a Specific Learning Disability:

"1. Definition: Specific Learning disability means a disorder in one of more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

2. Eligibility Criteria

a. There is evidence that the child does not achieve adequately for his/her age or to meet state-approved grade level standards in one or more of the following areas: Basic reading skills, Reading fluency, Reading comprehension, Mathematics calculation, Mathematics problem-solving, Written expression, Oral expression, or Listening comprehension; and either

(1) does not make sufficient progress to meet age or state-approved grade-level standards when using a process based on the child's response to scientific, research-based intervention, or

(2) exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state-approved grade-level standards, or intellectual development, that is

determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments.

b. The child's underachievement is not due to: visual, hearing, or motor disability; intellectual disability; emotional disability; cultural factors; environmental or economic disadvantage; limited English proficiency; or lack of appropriate instruction in reading or math.

c. The adverse effects of the learning disability on the child's educational performance require specialized instruction and/or related services." *South Carolina Code of Regulations*, Sec. 43-243.1, K, 1&2.

These definitions and eligibility criteria make it clear that in addition to having a possibly identified specific learning disability the child must be experiencing "underachievement" due to that disability to be eligible for Special Education. That being the case, for the Respondent to have violated IDEA by not providing FAPE, it would have had to fail to identify and fail to provide services to a student who was otherwise "eligible" for those services. Such is not the case here.

The private evaluator qualified to perform the evaluation. She administered appropriate tests and found that, in her opinion, the child had certain learning disabilities. Consequently, she made recommendations that she felt would enhance his learning experience and ability, but she did not address, nor find the child met, the State of South Carolina criteria for Special Education Services.

Because the private evaluator found the child suffered from several disabling conditions, the Petitioners asserted the Respondent District denied their child a FAPE because he is a child with a Specific Learning Disability and should have qualified for special education services. They then unilaterally withdrew him from school and placed him in a private school.

Even if there is some question in the light of the private evaluation that the District committed a procedural violation by not performing its own evaluation of the child at the

parent's request, the fact that he was progressing normally in the 2nd grade in a general education setting with non-disabled peers shows that that procedural violation is not a determining factor in considering whether the District provided the child was making "meaningful" educational progress. *T.B. v. Prince Georges Cty. Bd. of Educ.* 897 F.3rd 566. 72, IDELR 171 (4th Cir. 2018) cert. denied 139 S. Ct. 1307 (2019).

Should a Specific Learning Disability be determined, State Regulations still provide the District with the option of providing intervention services like RTI before placing the child into the Special Education System. *ID* Sec. 43-132.1 (K). In this case, these interventions appear to work and the child was proceeding normally with his peers in the educational system and was eligible for promotion to 3rd grade. Thus, there was no discrepancy and no substantive violation of IDEA or denial of FAPE.

3. Is the Respondent District required to reimburse the Petitioners for an independent Psychoeducational evaluation obtained without the knowledge or participation of the District?

The Petitioners sought and obtained the private evaluation without the District's knowledge or agreement. Once the evaluation was performed, not only did the Petitioners not provide the District with a copy of the evaluation, they continued to resist providing it to the District who was able to get a copy pursuant to a subpoena. It is hard to understand the logic of not sharing this information with the District or seeking their input and counsel if the goal is to ensure that their child was receiving a *Free Appropriate Public Education*.

Clearly, the Petitioners were unhappy with the fact that the Respondent District had not performed the requested evaluation of their child, but once they had important information relating to the child, why not share it with the District to see if there was some way it could be utilized to enhance the education of their child. Ms. Metta and others testified that if

they had received the information contained in the evaluation they could have accommodated some if not all of the evaluator's recommendations in the school setting, including the provision of Orton Gillingham services.

But the issue here is should the Respondent District be required to pay for the evaluation even though they knew nothing of it and did not get the results? This is a matter of equity and it is not appropriate to make the Respondent District responsible for a cost that was incurred without their knowledge or consent from which they derived no benefit.

4. Is the Respondent District required to reimburse the Petitioners for tuition costs incurred in a unilateral private placement of the child?

This issue is the last to be discussed but is the real crux of this case. It encompasses all of the other issues discussed. The U.S. Supreme Court has made it very clear regarding what must be proven for the Respondent District to be required to reimburse the Petitioners for the cost of tuition at the private school.

The Court developed a two-pronged test in the South Carolina case of *Florence Cty. Sch. Dist. 4 v. Carter*, 510 U.S. 7 (1993), must be met in order to find the parents are entitled to reimbursement for the costs of a unilateral placement in a private school. The prongs are:

1. There must be a finding that the District denied the child a FAPE; and
2. The private placement must demonstrate that it is offering the child a FAPE.

FAPE as defined in the IDEA and its Implementing regulations is defined as:

"Sec. 300.17. Free Appropriate Public Education

Free appropriate public education or FAPE means special education and related services that –

- (a) Are provided at public expense, under public supervision and direction, without charge,
- (b) Meet the standards of the SEA, including the requirements of this part;

(c) Include and appropriate preschool elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324.” 34 CFR 300

The definition doesn't really help much but the Courts have further defined a FAPE.

In the *Bd of Educ. v. Rowley*, 458 U.S. 176 (1982), the Supreme Court said that a School District must provide the child with a free, appropriate education which is designed to provide him with an opportunity to make educational progress in a public school setting. *Endrew F. v. Douglas County School District Re-I*, 137 S.Ct. 188 (2017) made it clear that there must be an opportunity for “meaningful educational progress”.

Here, the Petitioners have alleged that the Respondent District's failure to evaluate their child was a violation of the Child Find provisions of the IDEA and that violation denied him a FAPE. As cited previously, the *T.B. v. Prince Georges* and other cases have ruled that a procedural violation does not automatically mean a substantive violation of the IDEA has occurred if the *need* for Special Education is not found. While stressing that a school district must provide a child with the opportunity for meaningful educational progress, *Endrew F.* did not change the *Rowley* decision which found the District is not obligated to provide a child with the optimal educational program, only one which is reasonably calculated for him to make progress. Nor did it change previous rulings which stated school districts were not required to utilize one “methodology” versus another in providing educational services if the one being used was producing the appropriate results. It is natural for parents to look for any and all options to aid in the education of their child, but it is the decision of the child's educational team as to which methodologies, strategies and programs will be utilized. If those choices are producing appropriate results, then the school district is providing a FAPE. Viewing

all of the testimony and evidence presented, the child was receiving a FAPE.

Thus, in this case the first prong of the *Carter* test was not met. Therefore, it is not necessary to advance to the second prong, however, in this instance the witnesses for the private school failed to provide documents required by a subpoena properly issued by this Hearing Officer and under examination failed to establish that there is a current plan for the Student's education. In addition, they failed to provide any documentation of his progress in the private school other than testimony from two teachers saying he was doing well in a 2nd grade environment with Vistas services. Since the Student would be in 3rd grade in the public school, the private school's plan, if there is one, the approach of retaining him in 2nd grade hardly seems to be an aggressive effort to address the child's educational needs. Certainly not one that is superior to that offered by the District's teachers and RTI service providers.

Since the child has already been unilaterally withdrawn from the Respondent District his services from the District are limited and although the private school is not bound by the State's educational procedures and standards, it still must demonstrate that the child is receiving an appropriate education. We all hope that he flourishes in his new placement, but the District is not bound to provide Special Education or related services to the Student nor are they required to pay for the cost of the private evaluation or for his education at the private school.

Decision

THEREFORE, IT IS HEREBY ORDERED that the Respondent did commit a procedural violation of the IDEA by not evaluating the child for possible eligibility for Special Education services, but said violation did not cause the child to be denied a FAPE and

the Respondent is not required to reimburse the Petitioners for the cost of the Independent Evaluation obtained or the cost of tuition and services for his private school placement.

IT IS SO ORDERED.

Greenville, South Carolina

October 7, 2019

Douglas F. Dent, Local Hearing Officer

APPEAL

Should either party wish to appeal this decision, they may do so by notifying the South Carolina Department of Education, Office of General Counsel, 1429 Senate Street, Columbia, South Carolina, within ten (10) days of receipt of this Order.