

STATE OF SOUTH CAROLINA	)	
	)	LOCAL IDEA DUE PROCESS HEARING
COUNTY OF FLORENCE	)	
G.J. on behalf of minor	)	
child Z.B.	)	
Petitioner	)	
v.	)	Final Order
	)	
Florence County School District One)		
Respondent	)	

This matter is before me pursuant to a Due Process Hearing Request (DPHR) received by the Respondent School District on October 6, 2020. Subsequently the Respondent issued its Response to the initial DPHR; the parties held a Resolution Session which proved to be unsuccessful; and the Respondent submitted a Sufficiency Challenge to the DPHR. The Petitioner was given an opportunity to respond to the Sufficiency Challenge and an Order was issued on November 4, 2020, finding that the DPHR was insufficient because it did not offer a potential remedy to any alleged violation of the Individuals with Disabilities Education Act (IDEA). However, the Petitioner was given the option to seek to amend its initial pleadings. The Petitioner chose that option and a submission date of November 11, 2020, was set as the Amended DPHR due date. On November 11, 2021, counsel for the Petitioner contacted me and sought an extension because of a death in her family.

On November 18, 2020, an Order Reopening the DPH was granted setting a new schedule for the submission of pleadings and a potential hearing. As a result of a teleconference with both counsel on December 22, 2020, an additional extension of time was granted because of a COVID-19 issue with a Hearing scheduled for February 11 and 12, 2021, and an exchange off witness lists and documents scheduled for February 6, 2021.

The parties successfully completed the document and witness list exchange in a timely manner, however, the Petitioner sought to submit an amended witness list on February 7, 2021, and the Respondent objected. In addition, the Petitioner sought to obtain recordings of individualized education program (IEP) meetings to introduce them at the Hearing. During a conference call with

both attorneys, held on February 10, 2021, it was determined that the ruling on both issues would be placed on the record at a pre-hearing conference to be held just prior to the Hearing on February 11, 2021.

The pre-hearing conference rulings for the record were issued as follows:

1. The Petitioner's amended witness list was issued after the exchange date as a result of the receipt of the Respondent's extensive document production and not due to any hardship, mistake, or other extenuating circumstance. In this case, the additional witnesses offered included an advocate who participated in IEP meetings and a professional counselor for the child.

The rules implementing the IDEA, specifically 34 CFR 300.512(a)(3) state that either party may seek to prohibit the introduction of evidence at the hearing not disclosed to the party at least five business days before the hearing. Subsection (d) states that all evaluations of the child must also be disclosed during said exchange. These rules offer the only official discovery available to the parties. Though woefully inadequate, the rule was put in place to prevent surprises and it must be presumed to include witnesses. Therefore, it was ruled that the Petitioner's amended witness list and witness production was improper and would not be allowed.

2. The Petitioner also requested that certain recordings of IEP meetings be produced for potential use for the impeachment of witnesses. After questioning both counsel it was determined that at least one recording may not exist, however, the Petitioner and several of the witnesses for the Respondent were in attendance at the specific IEP meetings. As a result, since those individuals would be under oath at the hearing and not in the recordings being sought, it was ruled that the testimony of the witnesses would be the best evidence of what occurred at the meetings and the Respondent was not required to produce the recordings.

The hearing was opened and each party given the opportunity to make an opening statement prior to the taking of testimony. Based on pleadings, teleconferences and said statements it appears that the issues before me were as follows:

1. Did the Respondent fail to properly implement the 2019-2020 school year IEP?
2. Did the Respondent improperly report the child's grades and progress by showing improvement when in fact none had occurred.

FACTS

Based on the testimony of witnesses and the introduction of documentary evidence the following facts were determined:

1. During the 2019-2020 school year, the child was educated at Delmae Heights Elementary School in the fourth grade. (Testimony of several witnesses and shown on IEP documents)
2. The child was a nine (9) year old student at the beginning of the year receiving special education services pursuant to a resource service delivery model under an IEP developed at a November 14, 2019, IEP meeting. (Testimony of Petitioner and Supervisor of Programs for Elementary Education, Petitioner's Exhibit 1).
3. During the 2018-2019 school year the child had a Section 504 of the Rehabilitation Act of 1973 (Section 504) accommodations plan. (Testimony of Petitioner and Supervisor of Programs for Elementary Education)
4. An evaluation was performed in September 2019 which lead to a determination that the child is eligible for special education services under the categories of Other Health Impairment (OHI), which related to a medical diagnosis of attention deficit disorder (ADD) and behavior issues; and Specific Learning Disability (SLD) because of a deficit in math and weaknesses in reading (Testimony of Petitioner, Supervisor of Programs for Elementary Education and School Psychologist, Respondent's Exhibit 5).
5. The evaluation found a Full Scale IQ of 93, with the child functioning in the average range of his intellectual ability. It further found that his achievement was in the average range, except in math. Finally, it found that his achievement was significantly impacted by his hyperactivity, attention problems, and atypically. (School Psychologist, Respondent's Exhibit 5).
6. The initial IEP set goals in math relating to rounding of multi-digit numbers, mastering multiplication in math, and behavior improvement. Accommodations included preferred seating; one-on-one assessments, a check in/check our system/check list; and frequent breaks on all assignments, tests and quizzes. Further, the IEP provided for regular instruction in a general education classroom with specialized instruction that supplements general education in a resource classroom. A behavioral intervention plan (BIP) was developed to address the child's behavior difficulties and a paraprofessional – shadow was assigned to the child. (Testimony of Supervisor of Programs for Elementary Education and School Psychologist Petitioner's Exhibit 1)
7. In December 5, 2020, a follow-up IEP meeting was held and the child's behavior goal was modified from “sitting quietly” to “remaining on task “to help him reach his educational goal. The IEP team refused to require the paraprofessional to document various events that might occur during the day. (Testimony of Supervisor of Programs for Elementary Education, Respondent's Exhibit 6).

8. An IEP meeting was held on January 22, 2020, because the Petitioner felt she was not getting appropriate feedback as to the child's behavior and progress. In addition she raised issues relating to the paraprofessional's role and activity. The IEP team discussed the check in/check out system and it was determined that the child was having some behavior issues and the paraprofessional would be required to signal the teacher when she was alerted to those behaviors. (Testimony of Petitioner, Supervisor of Programs for Elementary Education, Respondent's Exhibit 7).
9. It was admitted that while the check in/check out and point systems were in place, the provision of information to the Petitioner was inconsistent and some information was not reaching home. (Testimony of Supervisor of Programs for Elementary Education).
10. In March 2020, the scheduled program was interrupted when school attendance was halted by an Order of the Governor because of the COVID-19 pandemic. It was stated that there was a period of time when the District was evaluating how it was going to provide services to all students, including this child. (Testimony of Supervisor of Programs for Elementary Education)
11. During this period, the U.S. Department of Education issued a statement that school districts were to continue to provide services to students with disabilities regardless of any closures during the COVID-19 pandemic. The S.C. Department of Education began working with school districts to assist with their efforts to provide virtual education and other services to all its students. (Statements of US Education Secretary DeVos and SC Education Superintendent Spearman).
12. A program was established for the child providing virtual education, but did not include sessions of resource services or a paraprofessional. (Testimony of Petitioner and Supervisor of Programs for Elementary Education)
13. On May 28, 2020, a virtual IEP meeting was held and a determination was made that the child would receive extended school year (ESY) services. His program included some virtual instruction as direct services from a special education teacher. who provides services through a resource service delivery model.
(Testimony of Petitioner, Supervisor of Programs for Elementary Education and Special Education Teacher, Respondent's Exhibit 8 and 9).
14. Throughout the school year, the Petitioner raised concerns that she wasn't getting feedback regarding the child's progress and felt his test grades and progress reports were inaccurate, giving a false representation of progress. (Testimony of Petitioner and Supervisor of Programs for Elementary Education, Respondent's Exhibits 6, 7, and 10).
15. Until the interruption of the normal school year, the child appeared to be making good progress educationally and in his behavior. (Testimony of Supervisor of Programs for Elementary Education, Assistant Principal, and General Education Teacher, Respondent's Exhibits 3 and 11).
16. From the time of the regular school year interruption and throughout the summer session, the child appeared to make slow progress (Testimony of Petitioner and ESY Special Education Teacher, Petitioner's Exhibit 2, Respondent's Exhibits 3 and 11).

DISCUSSION

The issues are relatively straight forward: 1) Did the Respondent implement the child's IEP and 2) Did the District inflate the child's grades and show progress when it did not really exist. Because of all that has occurred during the last year, and continues to this day, the solutions are not as straight forward.

It is clear that the Petitioner is dedicated to supporting and fighting for her child. It is also evident that the Respondent and its employees are walking through uncharted waters in their attempt to educate children, and in particular this child. However, we are bound by the facts of this case and the parameters of the law.

In the initial Supreme Court Special Education Case of *Board of Education v. Rowley*, 458 US 176, the Court set several standards for the education of special needs children. It required school districts to provide a free appropriate public education (FAPE) for each child identified as a child in need of special education and that once identified, that child must have an IEP. It also required that the plan be administered in the least restrictive environment which allowed for educational progress. Subsequent Court cases said that the IEP must provide an educational plan which is designed to let the child make “meaningful” educational progress and in *Endrew F. v. Douglas County School District*, 580 US ___, (2017) Chief Justice Roberts wrote a decision that swept aside the “*de minimus*” progress standard in favor of a standard that showed the “educational program must be appropriately ambitious in light of his circumstances”. The Decision of the Court was unanimous.

In this case, the IEP for the child provides an educational plan that meets the appropriate standard so the question is whether or not the District implemented it appropriately. While there is testimony from the Petitioner and the Supervisor of Programs for Elementary Education of the District that prior to the COVID-19 shutdown there were some instances where the check in/check out portion of the program may not have reached home and where the paraprofessional assigned to the child was not as attentive as she should have been, for the most part the child was receiving the services required under the IEP. The Petitioner seemed to focus much of her case regarding implementation on the teacher who provided the child's special education services prior to COVID-19. She contended the special education teacher's absences and teaching did not meet the standard required under the IEP. The Supervisor of Programs for Elementary Education and Assistant Principal from the District testified that they observed both the child's special and general education teachers and felt that they

were working well with the child. Since neither the Petitioner nor the Respondent subpoenaed or offered the special education teacher as a witness, we did not have the ability to evaluate her view of the child or her attempts to educate him. However, based on the whole of the testimony and the exhibits presented, particularly Respondent's Exhibit 11, it appears that the District did substantially implement the IEP for this child prior to the shutdown.

The implementation of the IEP after the COVID-19 shutdown is less conclusive. It now has been shown through credible studies that most children have suffered from the lack of face-to-face education at school and that virtual education, while the only initial viable stop gap measure available to school districts, has its limitations. Many students regressed or failed to progress in their education as a result. In this case, the child who already had attention issues and would wander to unauthorized websites while on the computer at school, seemed to struggle with home education even with some supervision. Even with direct education from a special education teacher during the ESY portion of his 2019-2020 school year education, he required additional tutoring to just hold his own. The progress reports provided by the Respondent showed he was beginning to “flat line” as the year ended and even with the efforts of the ESY special education teacher, he was making some, but not a lot of progress during the summer of 2020.

Whether or not it was the shutdown, the reliance on virtual education, the lack of one-on-one teaching in the school setting or being at home, the combination of factors the child experienced caused him to slow down in his educational progress. It is difficult to assess blame on the Respondent District for these circumstances. Yet, it is their responsibility to respond to any change in circumstances that negatively impact the education of a child covered by their special education program. In this instance, it would seem that even under these extreme conditions, more of an effort could have been made to provide services to this child during the shutdown and summer.

The second issue raised by the Petitioner was that basically she did not believe the grades provided for the child and his test scores were inflated to show progress. The general education

teacher clearly explained that all the children were given an opportunity to have their test scores reviewed and revise their answers to questions. By conducting this review the teacher could determine if the child knew the answer and simply made a mistake or if there was a lack of knowledge. In many cases the child did know the material and simply made a mistake so the answers were revised and the grades improved. This is not an uncommon procedure with young children and children with disabilities.

The grades, while not totally supported during the fourth quarter grading period, were reasonable and possible. Testimony from the child's special education teacher would have been helpful on this point. But I believe the preponderance of the evidence shows that there was no deception on the part of the Respondent or its employees regarding grades and test scores.

This child will be eleven years old this year. Given the natural order of maturity, whether mental growth occurs, physical growth will and middle school and high school are not far off. This means that the parties have about two years to lay the foundation for him to continue to learn as his distractions grow more intense. If he is to be prepared for what lies ahead of him and life, now is the time.

DECISION

Based on the testimony and documentary evidence provided, I find the Respondent did substantially implement the child's IEP prior to the shutdown. After the shutdown, though not entirely the fault of the Respondent, the child was not progressing well and the plan provided by the Respondent was not designed to provide an educational program that would have been “appropriately ambitious” even under the extreme circumstances that existed at the time.

I further find that there was no inflation or deception on the part of the Respondent or its employees with regard to the grades and test scores reported for the child.

THEREFORE, IT IS ORDERED that the Respondent design an IEP which provides a more aggressive approach to the child's education to include more aggressive goals and a

compensatory education component designed to get his education back on track. This component should include one on one instruction. In addition, the parties should conduct a review of the child's BIP to see if there are additional measures that will improve his ability to focus and improve his opportunity to achieve educationally. The check in/ check out point system may be effective but it should be reviewed. Possibly there is an alternative that may work better for everyone. Finally, it appears that the “shadow” was ineffective and not wanted by the Petitioner or the child. While he will need additional attention, it seems that rather than a paraprofessional, one-on-one attention would be more effective. If a paraprofessional is involved, that person should be more attentive and interested in the child's well-being.

IT IS SO ORDERED.

February 22, 2021
Greenville, South Carolina

Douglas F. Dent, Local Hearing Officer

APPEAL

Should either party seek to appeal this decision, contact should be made to the Office of General Counsel, South Carolina Department of Education, 1429 Senate Street, Columbia, South Carolina 29601, within ten (10) days of the receipt of this Order.