

STUDENT F.,

Appellant,

v.

ANNE ARUNDEL COUNTY
BOARD OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 21-51

OPINION

INTRODUCTION

The parents of Student F filed an appeal to the State Board on June 25, 2021, asserting that the Anne Arundel County Board of Education (“local board”) had failed to issue a final written decision on the appeal they filed to the local board on March 19, 2019. That appeal had wended its way through several local administrative levels of review until it was presented to the local board for consideration in August 2019. The local board, for a variety of reasons, failed to issue a decision until August 11, 2021. On that same day, the local board responded to Student F’s appeal to the State Board.

Thereafter, the Appellants filed a Response; the local board filed a Reply. The Appellants followed up with a Motion to Strike the local board’s Reply as untimely. The local board filed an Opposition to the Motion to Strike.

FACTUAL BACKGROUND

Student F is an 11-year-old 7th grader at ██████ Middle School ██████. At the time of the events underlying this appeal, he was a 9-year-old 4th grader at ██████ Elementary School. He had been diagnosed with several disabilities affecting his participation in the general education curriculum since at least August 2010, shortly before his 3rd birthday when Anne Arundel County Public Schools (“AACPS”) first developed an Individualized Education Program (“IEP”) for him. Student F and his parents provided documentation to AACPS from Student F’s psychiatrist and his psychotherapist that he was diagnosed with Anxiety Disorder, Autism Spectrum Disorder and Attention-Deficit/Hyperactivity Disorder (“ADHD”) – Combined Type. The documentation stated that Student F required weekly therapy sessions and occasional psychiatric appointments, and that on occasion those appointments would require him to leave school early or come to school late.

Student F’s attendance record indicated that, at the beginning of the 2018-2019 school year, notes for psychiatric or psychotherapy appointments were accepted as the basis for a “Lawful” absence. On at least 8 occasions, later in the school year, however, AACPS began marking absences for psychotherapy appointments as “Unlawful.”

Student F and his parents appealed these “Unlawful” absences in writing to the principal of ██████ Elementary on December 16, 2018; then to the AACPS regional assistant superintendent on January 3, 2019; then to the AACPS associate superintendent on January 18, 2019; and then to the AACPS deputy superintendent on February 3, 2019. Following denials of these appeals, Student F and his parents timely noted their appeal of the “Unlawful” absences to the local board on March 15, 2019. On June 28, 2019, the local board invited Student F and his parents to submit materials supporting their appeal. They did so on July 22, 2019, submitting a 10-page memorandum and 16 exhibits; the superintendent submitted a response on August 6, 2019; and the local board advised that it would consider the appeal at its August 21, 2019 meeting. After the meeting, Student F and his parents were advised that the decision was under review by the local board’s legal counsel. Despite calls and emails to the local board and their legal counsel throughout 2020 and 2021, the local board failed to release its decision on the appeal.

The local board finally issued its decision on August 11, 2021, a month and a half after Student F filed his appeal to the State Board. The local board attributed that significant delay to complications and staffing issues related to the COVID-19 pandemic and to the interplay between the IEP process and the absences related to psychotherapy appointments.

After considering the facts surrounding the administration’s decision to designate as “Unlawful” Student F’s absences to attend psychotherapy appointments, the local board affirmed that decision, but stayed “the issuance of its final decision and any related actions...for a period of time” apparently to allow AACPS, “if requested by the Appellants, [to] undertake a review of [Student F’s] records in light of developments with respect to his performance in school, attendance history, changes to his IEP services, and any other relevant information since the 2019-2020 school year....” (Local Board Opinion at 22-23). It has now been more than two months since that “stayed” decision was issued. Neither the local board nor the Appellants have communicated that the suggested review of Student’s F records has occurred.

Thus, we turn to the appeal before us and will review the substantive decision of the local board to affirm the designation of Student F’s absences to attend psychotherapy appointments as “Unlawful.”

STANDARD OF REVIEW

Decisions of a local board involving a local policy or a controversy and dispute regarding the rules and regulations of the local board shall be considered *prima facie* correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.06A. A decision may be arbitrary or unreasonable if it is contrary to sound educational policy, or if a reasoning mind could not have reasonably reached the conclusion of the local board. COMAR 13A.01.05.06B.

LEGAL ANALYSIS

The Appellants raised issues concerning the untimeliness of the local board’s response and the incorrect dates and other errors included in the local board’s Opinion. They ask us to

strike the local board's Response as untimely and rule that the local board's Opinion is "illegal" because of incorrect dates and other errors. We find there is no compelling basis for granting those requests. Moreover, doing so would at best, provide a superficial victory to the Appellants, without resolution of whether Student F's absences were lawful or unlawful. It is our view that resolution of that issue -- the educational and medical needs of Student F-- is the more important issue.

Were The Absences Lawful or Unlawful?

There are two types of absences -- excused absences, which are considered lawful and unexcused absences, which are considered unlawful.

Specific to this case, Maryland law defines as "lawful" absence for "illness." COMAR 13A.08.01.03(B). If an absence for illness is "continuous," State law requires the parent to provide a "physician's certificate." COMAR 13A.08.01.03(B). The local board defined a continuous absence as one "occurring without interruption or gap." (Local Board Opinion at 13). We agree. Using that definition, the local board concluded correctly that Student F's absences were not "continuous." Student F was absent on an intermittent basis for psychotherapy appointments.

The local board noted that at the beginning of the 2019-2020 school year, notes reflecting psychiatric and psychotherapy appointments were accepted as the basis for a "Lawful" absence, even for part of the school day. For example, when Student F attended a psychotherapy appointment on September 5, 2018, it was marked as a "0.5 Lawful" absence. On September 18, 2018, he attended a psychiatric appointment and was marked having a "0.5 Lawful" absence. Several subsequent psychiatric or therapy appointments were marked similarly. However, AACPS officials eventually marked at least 8 of Student F's absences for psychiatric or psychotherapy appointments as "Unlawful," "Truant," or "Other Unlawful." This occurred from December through March 2019. *Id.*

Apparently, one of the reasons that the administration used to conclude that Student F's absences were unlawful was because his parents provided a note from Student F's psychotherapist rather than from his psychiatrist, a physician. Because Student F's absences were not "continuous", a physician's note is not required by law. Thus, we deem that rationale, used to support the conclusion that the absences were unlawful, arbitrary and unreasonable as a matter of law.

The local board also considered whether Student F's intermittent absences were due to "illness". It recognized that Student F's psychiatrist diagnosed him with Anxiety Disorder, possibly Autism Spectrum Disorder, and ADHD. (*Id.* at 3). Further, as the local board, noted:

In March 2018, [Student F] was independently evaluated by a psychologist, Dr. [REDACTED] T[REDACTED]. In her evaluation report, Dr. T[REDACTED] noted a family history significant for anxiety, concerns for his social development, sensory seeking behaviors and sensory sensitivities, concerns about autism spectrum behaviors, and his

tendency “to become over motional, self-critical and self-punishing.” (App. 7). Dr. T [REDACTED] also noted that “parent and teacher reports indicate that when compared to other males of his age range, [Student F] exhibits significant difficulty with aspects of executive functional skills relating to flexibility, emotional control, self-monitoring, working memory, planning and organization.” (*Id.*). Dr. T [REDACTED] diagnosed Student F with Autism Spectrum Disorder; Attention-Deficit/Hyperactivity Disorder – Combined Type; and Anxiety Disorder.

(*Id.* at 3-4). She recommended that Student F continue with behavioral therapy sessions.

Following Dr. T [REDACTED]’s evaluation, Appellants set up therapy sessions with a psychologist and regular appointments for therapy and medication management with Dr. W [REDACTED], his psychiatrist. His psychiatrist wrote a letter discussing the scheduling of therapy sessions:

There will continue to be ongoing psychotherapy or doctor’s appointments where [Student F] will have to miss school to attend. I would ask that these appointments be considered medically excused as long as a note is provided as they are part of evidenced based practice for [Student F’s] psychiatric diagnoses.

It also necessary, evidenced based treatment that I have recommended that [Student F] engage in weekly psychotherapy appointments. His family is pursuing that part of his treatment through the Kennedy Krieger system.

(*See Id.* at 4-5).

Given the diagnosis of Anxiety Disorder, which if severe enough is considered a medical illness, and the medical expert’s conclusion that Student F needed psychotherapy sessions to address his Anxiety Disorder, it is our view that Student F’s absences were related to that illness. Just as treatment for an ongoing, physical illness, such as cancer, diabetes, or asthma, requires intermittent doctor’s appointments for care, an ongoing mental illness is no different. Of course, appointments for medical care, no matter the reason, should occur outside of the school day, whenever possible. In this case, however, the psychiatrist and psychotherapist were clear that, because of scheduling issues, they could not guarantee out-of-school appointments.

Because most, if not all, of Student F’s therapy appointments occurred during the school day, and because Student F had numerous other excused, lawful absences, the local board shifted its attention away from the eight therapy-session absences that AACPS designated as unlawful and focused instead on the problem of chronic absenteeism.

The local board explained that the school administration consistently focused on students’ missed time in school. “As the Superintendent pointed out in his position statement,

it's a legitimate concern: [a]ccording to the U.S. Department of Education, a student who misses at least 15 days in a school year, is considered chronically absent, whether those absences are excused or not.” (*Id.* at 15). We do not fault the school administration or the local board for focusing on Student F’s chronic absenteeism. It is a legitimate concern. Yet, chronic absenteeism occurs, as the local board correctly pointed out, whether absences are considered excused and lawful or unexcused and unlawful. Thus, designating Student F’s therapy-session absences as unlawful did not lead to a solution to Student F’s chronic absenteeism. It merely exacerbated the issue leading to an entrenched dispute between the parents and the school.

Thus, we return to the heart of the matter - - were Student F’s therapy-session absences lawful or unlawful? As we have explained herein, the absences were not “continuous,” therefore, a physician’s certificate was not legally required to excuse the absences. COMAR 13A.08.01.03B. Further, as we have explained, the absences occurred in the treatment of an illness, a mental health illness. Student F’s medical providers deemed that treatment medically necessary. Thus, we find that the absences should have been considered lawful.

That finding eliminates the basis of the substantive dispute between the parties. It does not, of course, address the fact that Student F was (and likely is) chronically absent. We believe that the local board was correct to focus on the bigger picture here - - “[t]he importance of [Student F] attending school on a regular, daily basis and receiving the necessary services and supports consistent with his IEP – including therapy....” (*Id.* at 21).

The local board asked that Student F’s care providers work with his parents, the IEP team, and school officials “to develop a long-range schedule for [Student F’s] therapy that could occur outside of the school day and minimize lost classroom instructional time and in-school services.” *Id.* We reiterate that request. It is time to move on from this dispute about whether Student F’ absences were lawful – they were, in our view -- and to seek ways to address Student F’s chronic absenteeism.

CONCLUSION

For the reasons stated herein, we reverse, as arbitrary and unreasonable the substantive decision of the local board that Student F’s therapy-session absences were unlawful. We direct the local board to issue a final opinion consistent with this decision.

Signatures on File:

Clarence C. Crawford
President

Charles R. Dashiell, Jr.
Vice-President

Shawn D. Bartley

Gail H. Bates

Chuen-Chin Bianca Chang

Susan J. Getty

Jean C. Halle

Rachel McCusker

Lori Morrow

Warner I. Sumpter

Holly C. Wilcox

Absent:
Vermelle Greene
Joan Mele-McCarthy

October 26, 2021