

**Individuals with Disabilities in Education Improvement Act
Before the Local Hearing Officer**

G.J. (Parent) on behalf of Z.B.	)	
(Student),	)	
	)	
Petitioners,	)	
	)	
vs.	)	Final Order – GJ VI¹
	)	
	)	
Florence County School	)	
District One,	)	
	)	
District/Respondent.	)	

I. Procedural Background

Parent submitted this due process complaint (DPR) on March 1, 2023. District moved to partially dismiss on March 12, 2023. On March 14, 2023, the local hearing officer (LHO) issued an Order that dismissed certain claims related to access to information.² On March 27, 2023, the LHO issued a Scheduling Order, setting the hearing for April 24–26. The hearing was held on these dates.

The LHO provided the parties through May 9, 2023, to file post-hearing submissions. The LHO also posed questions to each party in writing. Both parties timely submitted written arguments.

¹ Parent submitted five previous DPRs on behalf of Student: June 17, 2022; March 20, 2022; Feb. 10, 2022; June 17, 2021; and October 6, 2020.

² The LHO dismissed claims about the alleged failure to produce legal documents and documents regarding compliance with a prior SRO order.

II. Background Facts

Student began the 2022–23 school year as a seventh grader. This was a transition for Student, who finished elementary school last year.

A. The August 1, 2022, Individualized Education Program (IEP) meeting and IEP amendments

1. Intermittent homebound discussions

The IEP team met after the first day of school. District’s assistant superintendent of exceptional children (“ASEC”) approved intermittent medical homebound for the Student. He mentioned the need to document occasions when Student falls asleep. He also directed teachers to forward such data to the medical homebound case manager. [8/1/22 IEP meeting].³

The ASEC explained that documentation is important to determine how much additional instructional time is needed for the Student. [8/1/22 IEP Meeting]. The team confirmed that teachers would complete documentation daily, even if there were no issues that day.

The existing IEP stated: “Medical absences will be added to compensatory services.” [Special Instruction, second paragraph].

³ There were four video recordings of IEP meetings collectively admitted as District Exhibit 9.

2. Services model

Student's existing IEP called for special education services along with participation in general education classes. The IEP team acceded to Parent's request that Student be instructed solely through an inclusion model even though the special education teacher ("SET") felt that Student would benefit from pull-out services. [8/1/22 IEP meeting]. The IEP team openly discussed various options and agreed that it could revisit the service delivery model (model) later if inclusion did not work.⁴

The SET co-taught in Student's English Language Arts (ELA) and math classes.⁵ At the beginning of the year, she also served as a backup tutor.

3. Tutoring

The IEP team agreed to continue tutoring in the evening. The IEP team agreed on five hours per week, split between math and reading. [8/1/22 IEP meeting].

⁴ The ASEC, Parent, and the rest of the team discussed and agreed to remove the paraprofessional.

⁵ The special education teacher was to provide special education services inside the general education classroom.

4. Transportation

The ASEC also agreed to Parent's request for transportation. [8/1/22 IEP meeting].

5. Daily report regarding assignments and homework

The IEP team documented:

Mom requested the homework for [Student] emailed to her daily with the assignment that he must complete for the day per IEP. Mom requested the assignment be written in the student agenda as well. On Friday, if there is homework for the next week, it should be emailed and printed per IEP.

As a result, the IEP team agreed that the SET would "email homework assignments daily."

6. Sleeping concerns

District did not include in the IEP the requirement of reporting missed time to the medical homebound coordinator. The IEP team documented only that "[t]eachers will document sleeping concerns."

7. Additional time for assignments

The IEP team documented an extra day to complete assignments as an accommodation.

B. The November 2022 IEP meeting and IEP amendments

The IEP team reconvened in November 2022 with help from a state facilitator. The meeting occurred over two sessions on November 22 and November 29. Over these two days, the IEP team met for almost five hours. These meetings occurred shortly after the interim grade reports were issued.

1. Reinstatement of pull-out services

Prior to the November IEP meetings, Student requested that he attend the SET's enhanced learning class. Although not documented in the IEP itself, the IEP team reinstated special education services (enhanced learning) as pull-out service at the November 22 meeting. [11/ 22 IEP meeting].

As a result, the SET had direct contact with Student during three class periods: the enhanced learning (resource) class, ELA, and math. Along with these classes, the SET became Student's tutor sometime during the second quarter.⁶

2. Disciplinary issues

Student's behavior and resulting discipline was a recurring issue during the 2022-23 school year. During IEP team discussions about consequences for Student's behavioral issues, Parent would defend Student's actions in school (of which she had no first-hand knowledge) and she advocated against the

⁶ She worked with Student in the evenings and on weekends.

corrections and discipline being used to address the Student's behavior.

[11/22/22 IEP meeting and 11/29 IEP meeting].

The SET urged Parent to understand the need for consequences, and the need for her to support the school in imposing them. [11/22 IEP meeting]. As she stated, "These rules turn into laws eventually." Student's accountability was a main point of contention during the meetings. [11/29 meeting].

3. Functional behavioral assessment

The ASEC agreed to Parent's request for a functional behavioral analysis ("FBA") during the November 22, 2022, meeting "the ASEC stated that he would reach out to have someone set this up."

4. Daily behavioral logs

The IEP team also discussed the importance of daily behavior logs, including that teachers email them daily to Parent. [11/29 IEP meeting]. The IEP team documented: "[Student] will receive daily communications logs emailed to the mother daily and the SET will print all completed forms on Friday for [her]." "A daily log was created for all teachers to use."

5. Daily assignments

The IEP team altered the requirement somewhat from the SET emailing assignments daily to both the SET "and General Education teachers . . . email[ing] homework assignments daily copied to tutor." Parent complained throughout the year that Student's teachers did not all send assignments daily.

6. Sleeping concerns

As noted above, the prior IEP required the documentation of sleeping concerns only. The November IEP is more specific. It includes the need to document details of each occurrence:

If the student is asleep during academic instructions due to sleep apnea, teacher should document that duration of sleeping, classwork/assignments missed should be provided to the SET. This information will be relayed to parent and the tutor.

The requirement to document time asleep is repeated on the same page:

“Teachers must document the duration of sleep and note it in the communication form.”

7. Additional time for assignments

Although not reflected in the accommodations section of the IEP, the IEP team elsewhere documented an increase in the time for Student to turn in assignments:

If student is sleeping, he will have 2 days to complete his assignments with the tutor. If the tutor is out, the tutor will contact the general education teachers to ask for the time extension as needed. Teachers must document the duration of sleep and note it in the communication form.

Absent Medical Homebound: If the student is absent due to sickness, he will have 5 days to complete assignments with tutor. For every additional day he will receive 2 days per absentee. [sic.]

8. Medical absences

As noted above, Student's IEP at the start of the 2022-23 school year provided that make up services for medical absences would be added to the Student's compensatory services. There is no such provision in the November 2022 IEP. It is unclear how or why this provision was removed given the ASEC's explanation of the purpose of tracking absenteeism and sleeping.

C. Student's performance and conduct in 2022-23

1. Attendance

It is hard to determine how often Student was either tardy or absent. District's attendance records, which inexplicably double count every documented instance, do not jibe with other contemporaneous evidence of attendance issues.

During the second semester, Student's attendance problems are significant. A comparison of the documented instances to the school calendar shows the regularity of documented occurrences before the filing of this DPR:

Week of	Occurrences
Jan 2	No occurrences documented for the four days
Jan 9	Occurrence every day (5)
Jan 16	Occurrence on 3 of 4 days (Monday holiday)
Jan 23	Occurrence every day (5)
Jan 30	Occurrence every day (5)
Feb 6	Occurrence every day (5)
Feb 13	Occurrence 3 of 4 days (Friday off)

During this third quarter, there were forty-six school days on the calendar. There are only twelve days in the attendance record where there is not an incident (1/19, 2/14, 2/27-2/28, 3/1, 3/6, 3/8, 3/10, 3/13-16).⁷

But the attendance records do not capture every occurrence. [See, e.g., Parent Exh. 19 at Resp. 1928 (tardiness on August 25); Parent Exh. 24 (lateness on 10/31)]. Testimony, the IEP team meeting recordings, and an email also show Student was late on the first day of school. Apparently, the occurrence was “removed” from the PowerSchool database. [(email of August 5].

⁷ During the first semester, Student had far fewer documented instances, most of which occurred on a Monday or Monday and Tuesday combination.

2. Behavioral issues

District's disciplinary records show more issues documented in the first part of the year:

Date	Issue
08/26/22	Not following rules, disrespect, disruption of class; watching YouTube on Chromebook, and repeated behavior five minutes after intervention
9/7/22	Shoved a female student during lunch detention and disrespect to administration
9/22/22	Refusal to follow directions
9/23/22	Disrupted class and interrupts class
10/14/22	Put another student in chokehold
10/24/22	Wearing hoodie
11/07/22	Cutting class and vandalism of restroom
11/15/22	Cutting class – stayed in restroom
11/29/22	Brought nerf gun to school
12/01/22	Threw candy bar and hit another student
12/05/22	Use of vape
2/14/23	Failure to display ID

[Parent Exh. 3].

3. Grades

The first semester consists of both Q1 (8/1 – 9/30) and Q2 (10/10 – 12/16). Students grades for the semester originally were reported as follows:

Class	Q1	Q2	First Sem. Cum.
Math lab	-	-	-
Enhanced learning (elective)	(Was in Flight & Space)	75	75
Science 7	58	55	56
Social Studies 7	50	51	51
Flight & Space (elective)	51	(enhanced learning)	-
Phys Ed 7	-	76	-
Math 7	77	74	73
Language Arts 7	50	55	51

In other words, Student's report card initially showed that he failed three of his four general education core subjects during the first semester.

Parent complained that the grades did not reflect assignments Student turned in late. The principal and the ASEC "looked into the concern" and found that, contrary to the IEP, grades were not updated with late assignments.

Student's teachers changed his grades in three of the four general education subjects:

Class	Q1	Q2	First Sem. Cum.
Science 7	60 (+2)	60 (+5)	59 (+3)
Social Studies 7	60 (+10)	60 (+9)	60 (+9)
Language Arts 7	64 (+14)	60 (+5)	59 (+8)

Student went from failing three of four core classes to failing two (ELA and science) but being within a point of passing in both. In the third class (social studies), Student went from failing to passing.

III. Analysis

While Parent repeats many of her allegations in the DPR, they are essentially comprised of five types of allegations: (1) access to records; (2) the development of the IEP; (3) conduct of the IEP meetings; (4) implementation claims; and (5) miscellaneous claims of mistreatment.

A. Access to Records

Parent alleges two access to records issues that remained for the hearing:⁸ (1) that District failed to provide daily copies of school behavior daily log; and (2) that District failed to provide daily assignments, homework, completed work, and work not completed. Based on the evidence at the hearing, these are better characterized as failure-to-implement claims. Those claims are discussed below in sections III(C)(5)-(6).

⁸ *Supra* n. 2 & accompanying text.

B. Development of IEP

1. Delay in scheduling IEP meetings.

Parent's first development theory is that District improperly delayed the scheduling of the post-August IEP team meetings.

The meeting to follow the August 1, 2022, meeting occurred over two days in late November. District contends that, although it intended to schedule the meetings earlier, a combination of factors caused the delay. This includes coordination with the state facilitator and the ASEC's medical leave.

I find that there was no inordinate delay under the circumstances. The passage of time between the first day of school and the full meeting in November was likely beneficial. Both parties would agree that Student has benefitted considerably from the resource services during the elective period. Student suggested the change only shortly before the November meetings. It took that time for him to build rapport and trust in the SET to overcome his initial concern about being singled out. Had the meeting been held in September, Student would have remained in full inclusion.

The IEP team also needed time to evaluate Student's needs after a settling-in period. Student moved not only to a new school, but to a new level of expectations and structure. That is a challenge for most students, but particularly so for one with Student's underlying issues.

If there was an inordinate delay in scheduling meetings, it would be analyzed as a procedural violation. A hearing officer may find that a child did not

receive a FAPE as to procedural inadequacies only if the procedural violations “impeded the child's right to a FAPE,” they “significantly impeded the parent's opportunity to participate in the decision-making process,” or they “[c]aused a deprivation of educational benefit.” 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); see also *R.F. v. Cecil Cnty. Pub. Schools*, 919 F.3d 237, 248 (4th Cir. 2019); *T.B. v. Prince George's Cty. Bd. of Educ.*, 897 F.3d 566, 573-74 (4th Cir. 2018). Based on the evidence presented, even if the delay procedurally violated the IDEA, it did not significantly impede Parent’s opportunity to participate in the process. Nor did it cause a deprivation of an educational benefit.

2. Conduct of IEP meetings/Parent participation

Parent again complains about how the IEP team meetings were conducted, including her complaint that the ASEC dominates, controls, and dictates the meetings and the outcomes. Parent further alleges that the IEP team disregards her input.

Parent’s allegations are easily disproven by the videos of the IEP meetings. The hour-long meeting on August 1, 2022 is perhaps a model of a well- structured IEP meeting with every participant demonstrating preparation and providing input. District representatives did not interrupt, deflect, or change the subject at any point. The ASEC kept discussions on point and kept the meeting moving at an appropriate pace.

A facilitator worked with the parties during the November 22 and 29 meetings. The parties met for almost five hours. It is hard to understand what issues Parent could not raise during that time. There was no effort by anyone with District to limit discussion or Parent's participation.

I find no violation regarding Parent's participation concerns.

3. Additional tutoring time/Medical homebound

The DPR makes another allegation about District's failure to "add[] additional tutoring time." [DPR at 7].⁹ Construing the term "tutoring" to refer generally to the extra instruction provided by the tutor and then the SET, Parent's concern has merit.

The stated purpose of documenting sleeping time and time missed for medical reasons was to provide more instruction under intermittent medical homebound. [*Supra* § II(A)(1)]. This is where the system broke down at every level. Teachers were to report sleeping to the medical homebound coordinator. It's not clear that ever happened, but it certainly did not happen much.

Likewise, District's absenteeism records make no accounting of how much time and which occurrences it considered medically excused. There was ample

⁹ District contends that "the DPR does not raise the needing of more medical homebound instruction." [Dist. Posthearing submission at 4]. It's true that Parent did not use that term, but the DPR does address the need for additional instruction. Further, its is unclear what District means by "more medical homebound instruction," as it is not clear that there was any such instruction. If District is referring to the five hours of tutoring as medical homebound instruction [see *id.* at 13], it is equating the tutoring to medical homebound, the same as Parent.

testimony that Student would be late for school, but there is no documentation as to how late. Rather, incidents of tardiness counted the same as a missed day if District counted them at all. District did not compile any record of total time missed because Student slept.

District argues that the set number of hours per week could mean that Student received more hours per week than necessary. [District post hearing submission at 14]. The first problem with this argument is that the instructional services agreed to in August bore no relationship to time missed in certain classes. The IEP team limited additional instruction to two subjects: Math and ELA. [*Supra* § II(A)(3)]. The team did not, for example, address the contingency of Student falling asleep or missing classes such as social studies. The IEP team agreed to additional instruction because of Student's needs in these areas, not because of anticipated absences or sleeping incidents.

District agreed in March 2023 to provide even more instruction each week. That recognition negates any notion that the IEP team believed the Student sometimes received too much instruction. District does not point to any place in the Record where the IEP team concluded that Student received more instruction than necessary.

The ASEC explained the importance of record-keeping so the District could provide instruction based on the data. [*Supra* § II(A)(1)]. That was to occur *after* the August 1, 2022, decision to provide five hours per week. District's various arguments about funding and typical practices are unavailing.

The IEP team must determine Student's needs based on data specific to Student. That did not happen as there is no good data.

District's hypotheses aside, the November meeting recordings lack discussion about adjusting the hours based on the time attributed to medical absences. The failure to even consider additional instruction based on the data reflects a fundamental failure in the development of the IEP.

C. Implementation claims

Most of Parent's allegations involve claims that District failed to implement services or actions agreed to by the IEP team.

[T]he failure to perfectly execute an IEP does not necessarily amount to the denial of a free, appropriate public education. However, as other courts have recognized, the failure to implement a material or significant portion of the IEP can amount to a denial of FAPE. See *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007) ("[A] material failure to implement an IEP violates the IDEA."); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003) ("[W]e cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit."); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) ("[A] party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP."). Accordingly, we conclude that a material failure to implement an IEP, or, put another way, a failure to implement a material portion of an IEP, violates the IDEA.

Sumter Cty. Sch. Dist. 17 v. Heffernan, 642 F.3d 478, 484 (4th Cir. 2011).¹⁰

1. Transportation accommodations

Parent claims that the IEP team failed to implement transportation accommodations. Parent has identified nothing agreed to by the IEP team that District did not provide.

At the August 1, 2022 meeting, District agreed to provide the special transportation Parent sought in GJ V. [*Supra* § II(A)(4)]. While Parent loosely alleges that, at times, the bus failed to show, there is no evidence to bolster such a claim. There certainly is none that would show a material failure-to-implement.

Parent has sought essentially the right to have the bus come back and pick up Student whenever he awakens and is ready for school. The IEP team never agreed to this, and there is no evidence that such an accommodation was necessary. In fact, there is no evidence about when or how often Student missed the bus.¹¹

¹⁰ District argues that *Heffernan* requires, “[a] nexus between the failure to implement and harm to the student.” [Dist. Posthearing Submission 7-8 ¶ 2]. The relevant portion of *Heffernan*, however, does not mention either a “nexus” requirement or “harm to the student.” The harm issue, of course, would be addressed in terms of what, if any, remedy is available. The issue in terms of whether there is a violation is “materiality.”

¹¹ This is another example of Parent complaining about data readily available to her. [See also GJ V at 5 (noting that Parent had been complaining about the need for records she already read and initialed)]. Parent bears the burden in these cases, and she easily could have documented the times she drove Student to school and when he arrived.

Even if there were a failure in this regard, there is no remedy necessary. After Parent filed this DPR, District agreed to compensate Parent for mileage. [3/31/23 IEP meeting].

2. Failure to provide abbreviated days

Parent also alleges that District failed to implement abbreviated days. District first agreed to abbreviated days after Parent filed this DPR. [3/31/23 IEP meeting beginning at 31:29]. Although Parent mentioned this as an issue she wanted to discuss on November 22, 2022, the IEP never discussed or addressed the issue during the period covered by this DPR. There was no evidence at the hearing that would support a finding that District violated the IDEA by failing to provide “abbreviated days.” In fact, there was no evidence or clarification on what Parent means by “abbreviated day,” how “abbreviated” the day should have been, and when it should have begun. Parent has not established a violation as to this claim.

3. Functional Behavioral Analysis

District agreed to an FBA during the November 22, 2022 meeting. [*Supra* § II(B)(3)]. District failed to promptly schedule an FBA. There is no evidence of an effort to set one up before Parent filed this DPR. Student’s aversion and disobedience has continued throughout this year.

How Student acted in an elementary setting (where the last FBA was conducted) poses different issues than the environment and expectations placed on him in middle school.

At the hearing, the ASEC stated that the first observation occurred the week before the hearing (i.e., almost five months after the November meeting and about six weeks after Parent filed this DPR).

Parent raised this issue again at the March 31, 2023, meeting. District told Parent that it needed completed permission forms. [3/31/23 IEP Meeting]. This response is unsatisfactory, as there is no reason why District waited almost five months to request signatures.

I find that District failed to implement a material part of the IEP by seeking an FBA in an untimely manner.

4. Failure to document sleeping in class

Parent's claim that District failed to document sleeping in class also has merit. The IEP team documented the requirement. [*Supra* §§ II(A)(1), II(B)(6)]. Teachers also testified that Student slept in class, although the frequency of episodes and the depth of that sleep is somewhat unclear. The behavior interventionist confirms that he has observed Student sleeping, and he estimated it has occurred once or twice a week. The STEM teacher confirmed that Student slept and that she documented it in the behavior logs. She did not, however, seem to be familiar with the reporting requirement.

The ELA teacher testified that she documented sleeping in the behavioral logs. On November 4, 2022, she documented that he placed his head on the desk at 2:42 until announcements came on. She did not, however, state how much instruction, if any, Student missed. On November 14 and 17, the teacher

documented that he went to sleep, but she does not state how long. On January 4, 2023, the ELA teacher documented apparent sleeping from 2:24 – 3:18 pm (54 minutes). She also documented sleeping on February 27 for around 31 minutes. There are several other instances of Student putting his head on the desk, but not detail about whether Student slept. (noting on November 30 that Student had his head down from 2:47 until 3:15 (28 minutes); *id.* at 2921 (noting that, on February 8, Student put his head down at 2:51 and did not raise it until 3:32 (41 minutes)). Many of these “head down” incidents appear to be defiance, response to corrective action, or disinterest in what was being taught. [(11/17 entry for “paying attention”)).

Data on Student falling asleep, or even putting his head down and “shutting down,” would be useful in conducting and reviewing an FBA.¹² District failed to document instructional time missed agreed to by the ASEC at the IEP meeting. Because how much time Student missed is important, the failure to document is material, as is the failure to document the requirement itself.

¹² Parent has argued that the information is necessary to help with medical diagnosis as well. This assertion is somewhat puzzling as Parent has not kept data regarding Student's sleep issues, including the reported waking in the middle of the night or episodes of unexpected sleeping. I do not reach that issue, however, because the IEP team itself addressed the need to document sleeping.

5. Daily behavioral logs

a. Failure to send daily

The IEP team established the requirement that the teachers provide Parent with daily behavioral logs in late November. [*Supra* § II(B)(4)]. The testimony about the logs became confused with the requirement of daily assignments. As with daily assignments (discussed below), teachers did not always send the logs every day. (ELA teacher stating that she may not have done it daily, but did, “for the most part”).¹³

District did not fully comply with the requirement to send the daily logs on daily basis.

b. Negative content

Parent also complains that teacher input on the logs “has been negative.” [DPR at 6]. I share District’s confusion about this allegation. Negative behaviors will lead to negative comments. Otherwise, what is the purpose of the log? I have reviewed the logs submitted. For the most part, they contain both positive and negative comments. In any event, the stated purpose of the logs is to identify behaviors that need to be corrected. To the

¹³ The ELA teacher would share the Google document for the week at issue with Parent, who could then access the document throughout the week to see the updates as information for each day was added. Later, she began to send the reports to Parent as pdf attachments to an email.

extent, for example, that the social studies teacher logs focus more on that, this is no basis for finding a violation.

6. Failure to email assignments daily

The IEP team established the daily requirement that it provide Parent with assignments in August. [*Supra* § II(A)(5)]. There was confusion or changes, however, as to who was to send the assignments to Parent and how often. The original requirement that the SET send them daily was changed to both the SET and the general education teachers being required to send them daily. [See *supra* § II(B)(5)].¹⁴

Throughout the year, Parent has pointed out when she did not receive daily assignments, and she has reminded District of the requirement. [*E.g.*, *Supra* § II(B)(5)]. There appears to be no dispute that the teachers did not fully comply with the requirement to email assignments to Parent each day. [*E.g.*, (SET acknowledging that the sending of assignments was not “consistent across the board with all teachers”); (nothing “there was some push back” from teachers; and (ELA teacher acknowledging that daily report does not inform Parent of the assignments))].

¹⁴ Prior to the November IEP meeting, there apparently was confusion resulting from the earlier requirement that they be provided to the SET.

District's failure to email assignments daily does not mean that District did not convey some or most of the information. The SET became Student's tutor at some point in the second quarter. The teachers shared necessary information with her, and she was present in the classroom at times as well. By her account, the SET has had regular, if not daily, communication with Parent to discuss both behavioral and assignment issues.

At the same time, however, the need for communication regarding assignments is critical. The accommodation of allowing late assignments has a material effect on Student's grades. [*Supra* § II(C)(3)]. One cannot therefore dismiss the failure to implement daily reporting as an immaterial snafu.

7. Additional time to complete or make up assignments (first and second nine weeks).

The principal testified that she understood that Student was permitted additional time to make up assignments and that the tutor was working with Student to complete them. While that is true, the teachers did not count the late assignments in three classes until after Parent complained. [*See supra* § II(C)(3)].¹⁵ What is unclear is whether the post-hoc adjustment of grades

¹⁵ During the hearing, the LHO acknowledged he prematurely challenged Parent's reliance on the grade evidence because it was not apparent how it related to any allegation in the DPR. Parent correctly argued that the evidence related to allegation about the accommodation for extra time to complete assignments. The LHO did not exclude any evidence and, after careful review, stated he did not believe there was additional evidence necessary to establish Parent's point. For the record, LHO considered the evidence and now agree with Parent that the evidence is relevant on the issue of whether District accommodated Student per the IEP.

for the first semester was based on the accommodation in place during the first quarter (i.e., no more than one day) or the more generous accommodation agreed to in November (mid-second quarter). [See *supra* §§ II(A)(7), II(B)(7)].¹⁶

After Parent complained, the teachers counted the late assignments. In social studies, District increased Student's first-semester score by 18%. District increased language arts by 16% for the semester, with a 28% improvement in the first quarter. [*Supra* § II(C)(3)].

This data proves two things. First, the late assignments turned in by Student had a material effect on his grades. Second, the tutoring services provided to Student were essential to enabling him to make up the work. Student's on time assignments led to failing grades. The extra time allowed him to pass another class and to come within one point of passing two others.

The interplay between this accommodation and the requirement that District provide Parent with daily assignments cannot be overstated. The balance of the evidence shows that when Parent and tutor were aware of assignments, they endeavored to have Student complete them. In the end, District counted the late assignments. There is no evidence that District

¹⁶ In other words, for the first quarter, teachers may not have counted assignments turned in after the one-day grace period, but later counted them after the accommodations were changed in late November.

improperly rejected any (after Parent complained). As a result, there is no demonstrated violation with regard to the failure to count assignments.

8. The wearing of a hoodie as an accommodation

Parent also has alleged that the IEP team agreed to Student wearing a hoodie, but that it then disciplined him for doing so.

The IEP team never agreed to permit Student to wear a hoodie as an accommodation. Whether it should be an accommodation is not before me in this DPR.

9. Denial to see school behavior therapist

There was no evidence at the hearing that a teacher denied Student the opportunity to see the school behavioral therapist. Thus, it is not necessary to even determine whether Student had a right under the IEP to see the therapist upon request.

10. Denial of medical homebound (refusal to re-approve)

The evidence about medical homebound was certainly confusing. As for Parent's claim that it was denied at some point at issue, the important issue is whether anything changed. The medical homebound was set to expire, and the ASEC agreed to extend it. District apparently did not cease counting absenteeism as medically excused at any point covered by the DPR.¹⁷

¹⁷ Parent produced an email stating that MHB was denied the day after Parent submitted this DPR. It is unclear whether there is an existing dispute about this issue.

In short, there may have been a technical lapse of intermittent medical homebound in the fall of 2022,¹⁸ but it does not appear to have mattered, or to have affected anything. Because no educational benefit was affected, there is no violation of the IDEA on this issue.

11. Including Parent in school-based therapy once per month.

Contrary to Parent's allegation, the IEP team never agreed to include Parent in Student's therapy sessions. Parent made this request at the November 22, 2022 meeting, and there was an agreement to investigate whether that was possible. [11/22 IEP Meeting (noting that the counsel "has to get more information and will follow up with parent at a later date")]. District apparently did look into it. In the March 2023 meeting, District explained that including Parent would constitute family therapy, which cannot occur on school grounds. [3/31/23 IEP meeting].

District did not violate an agreement to provide therapy with Parent present. Nor does the evidence support a contention that such therapy is necessary to provide a FAPE.

D. Unfair treatment, discrimination, etc.

Parent raises several issues that she broadly characterizes with terms like "targeting," and "discrimination." These include times when teachers confiscated Student's Chromebook after he refused to stop watching non-instructional

¹⁸ I note that this occurred around the time of the ASEC's medical leave.

materials in class. Parent also alleges that a teacher caused Student to cry and that he did not want to attend school because of anxiety, stress, and depression that she caused. Parent alleges that another teacher documented that Student threatened him, that he recanted, but that the records were not fixed. Finally, Parent also complains about teachers providing “negative input” in Student’s behavioral logs.

I agree with the facilitator’s observation that much of what Parent complains about in this regard are not IDEA issues. [11/29 IEP meeting]. Without evidence that disciplinary actions violate the IEP or the IDEA itself, hearing officers cannot micromanage teacher disciplinary actions or conduct. [See GJ IV Final Order (“[N]othing in the IDEA precludes District from “writing up” Student for “things caused by his ADHD.”)].

That said, most of these allegations also fail because there is no competent evidence to support them. Student’s complaints to Parent is not evidence that Student’s allegations are true. Parent bears the burden of proving any allegations of wrongdoing. She has proven none.

What must be addressed is Student’s propensity to test authority figures. Both the SET and the counselor provided credible anecdotes at the March 3, 2023, IEP meeting. The SET recounted how Student would tell her “I’m going to do what I want to do when I want to do it.” [3/31/23 IEP meeting]. The counselor likewise testified that, when she told Student he had to follow the rules, he replied: “I do. My rules.” Teachers documented similar acts in the behavior logs.

[*E.g.*, Parent Exh. 16; Parent Exh. 19 (11/22 entry “comments”); (10/20 entry “comments”); (Wednesday comments under “Respects Teacher”); *see also* Parent Exh. 26; Parent Exh. 27 (teacher email of October 25)].

While Parent often claims that she is not seeking to stop District from disciplining Student, the IEP meeting recordings show that she routinely argues that he should not be disciplined and that his actions are not intentional. Every time Student faces consequences, Parent unleashes accusations of “targeting” and “discrimination” based on the consequences imposed. She continues to simply parrot Student’s arguments rather than support the school in its efforts to impose discipline.

Hoodie issues, for example, are a recurring theme this year. Parent simply disagrees with the policy, and she continues to drive Student to school wearing a hoodie. Rather than support the school, Parent argued that Student “says he needs it because y’all are getting on his nerves.”

Couple this with her grievances and complaints when District enforces its policy, and Student quickly learns that Parent supports his defiance. Student needs to learn now that we all must comply rules, even the ones with which we disagree. He also must learn that there are time, place, and manner requirements for voicing concerns about fair treatment. His insubordinate and confrontational approach portends serious problems down the road. Whether

Student's conduct can be attributed to a disability is not really the point.

Correcting it is the point.

Parent attributes far too much of Student's defiance (including cutting class, vandalism, defiance, bringing a nerf gun to school) to sleep disorders or to attention deficit disorder. In the simplest of terms, teachers "targeting" Student for misconduct is exactly what they should be doing. The consequences Student faces for defiant behavior are nothing like those that he may face in just a few years, either at work or in the community.

My bigger concern is that Student's strategy seems to be working. After several deluges of "grievances" and accusations from Parent, District has documented only one disciplinary issue this semester. [See *supra* § II(C)(2)]. Student did not magically transform over the holidays. [(counselor testifying that Student's behavior has remained the same over the year)]. It appears instead that District simply stopped documenting occurrences. [(interventionist stating that he was called in 2-3 times per week in first semester and that documentation of the incidents, including "detail or certain things that they were putting before . . . they aren't putting in now")]. When I pressed the interventionist on this point, he stated, "In some instances they could have stopped documenting, and then in some classrooms the behavior has changed." The problem is that we don't know how often District has simply "stopped documenting" the ongoing issues.

We do know, for example, about a referral the counselor wrote this semester because of Student's defiance and disrespect to her. It appears nowhere in the disciplinary records. When asked, the counselor noted "If they don't take any action, then it's not going to show up there."

I have a serious concern that District is simply taking the "path of least resistance," by declining to discipline Student so that Parent will stop complaining. If my concerns are valid, then both District and Parent are failing Student, and we will see the tragic, yet predictable, results in just a few years.

All that said, Parent has provided no evidence of improper "targeting" that would constitute an IDEA violation.

E. Summary of Findings

For the foregoing reasons, I find that District has failed to properly develop the IEP by not documenting and accounting for instruction based on the time missed for medical absences and for sleeping in class (i.e., intermittent medical homebound). Compounding this problem is the failure to document and track the time Student missed for medical reasons and the time he slept in class.

Further, I find implementation violation, as District failed: (1) to timely obtain an FBA; (2) to communicate with Parent as promised; and (3) to keep accurate records of important issues. These violations are interrelated. For example, the lacking documentation could inform an evaluator and the IEP team in developing both the functional behavioral assessment ("FBA") and a

behavioral intervention plan (“BIP”). The records also are essential to determining what, if any, additional medical homebound instruction is necessary under the IEP.

The failures to implement are material. This is especially when one considers the cumulative effect of the various failures. A primary objective of the 2022–23 IEPs was information gathering, reporting, and sharing of information with Parent. While the IDEA never requires perfection, one cannot dismiss the continued failure to follow any of the requirements as being immaterial.

In all other respects, I find no violation with regard to Parent’s DPR.

F. Remedies

The IDEA provides hearing officers with broad authority to fashion a remedy. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993). Much of the problems results from communication problems between the adults involved. District has promised communications that it did not provide. Parent inundates District with varied demands and accusations, many of which lack merit. District’s response appears to be a mixture of attempted appeasement and avoidance.

This is the third school about which Parent has complained. This is also her sixth due process complaint. I see no end in sight to this. As I discussed at the end of the hearing, there are two precipitants to Parent’s grievances and due process requests: (1) her perception that District does not communicate with or

respond to her; and (2) Student being disciplined. There is some merit to the first, and Parent is unjustified as to the second.

Parent has a history of working well with those who directly provide services to Student. She also has had positive relationships with certain teachers. For reasons that are hard to understand, however, Parent continues to assail District staff, even when they agree to everything she requests. At the same time, as I have remarked before, “while District laments Parent’s many grievances, it continues to give her something legitimate about which she can complain.” [GJ IV Final Order at 32].

There are several important issues Parent is justified in raising. But these issues typically are resolved well before a hearing. Parent’s adversarial and confrontational approach is not serving Student’s interests. Parent is so focused on winning battles that she fails to see that Student could lose the war. Parent wants Student to become a happy and successful young man. Continually fighting those with whom Parent needs to partner is not going to get Student there. Given Student’s challenges – some of which may not be fully understood at this point – his path will likely be a hard one. Parent needs to understand that the ultimate goal for Student is far more important than being “right” about certain things.¹⁹

¹⁹ Parent’s failure to focus on the “big picture” is turning every dispute into an expensive and time-consuming hearing. Parent is extremely devoted to her child, but teachers have dozens of children to look out for; principals have hundreds; and district-

If Student falls further behind in middle school (behaviorally, socially, or academically), prospects for high school and beyond are bleak. The easy way out, such as avoidance and grade inflation, is not an option. This will be hard. None of it will work unless Parent and District improve their cooperation and model good behavior for Student.

I am loath to micromanage the interactions between the parties. Given my unsuccessful efforts to persuade the parties to work together, I see no other choice. [See, e.g., GJ V Final Order at 25-26; GJ IV at 32].

1. Additional instruction

a. Compensatory education

The obvious remedy for a failure to provide instruction is compensatory education, either through ESY or in more service hours during a school year. *G v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 309 (4th Cir. 2003). It consists of “educational services ordered . . . to be provided prospectively to compensate for a past deficient program.” *Id.* at 308.

The lack of data as to how much time Student missed complicates my ability to measure the time lost. There is no question, however, that the amount of additional time needed is material. In late March, the parties agreed that

level administrators have thousand and nobody is perfect. District devoted almost seven hours of meetings for this one student during the first two quarters. The facts require that I resolve several disputes here in Parent’s favor, but that does not mean Student “wins.” The best indicator of a Student winning will be the absence of more DPRs and hearings.

Student needs four hours additional per week, which represents an 80% increase in weekly additional instruction.²⁰ Because this reflects an agreement of the parties based on their review of the 2022–23 school year, I will adopt that amount as a lodestar.

The approximate point at which the need for additional hours would have become apparent is September 1, 2022. Between September 1, 2022, and March 30, 2023, there were thirty weeks, less around six weeks of breaks. That leaves twenty-four weeks of instruction during which District should have known that added instruction was needed. Four additional hours multiplied by twenty-four weeks would result in ninety-six hours.

For compensatory services to be effective, they need to be delivered as soon as possible to prepare Student for the eighth grade. At some point, however, Student likely views large amounts of compensatory services or ESY as punitive. District recognizes this point in arguing, “it is difficult to imagine the student tolerating any more instruction worked into his week” [Dist. Post-hearing Submission at 1]. This is all the more reason the parties must promptly cooperate with each other throughout the school year.

²⁰ The parties agreed to 36 hours per month after stating the added time needed as four hours per week, or nine hours total. [3/31/23 IEP meeting]. This was done because additional hours typically are stated in monthly terms. The IEP team used a calculation of four weeks in a month.

As of the date of this Order, there is only one week left in the 2022–23 school year. That leaves us with the option of ESY, and it puts us into the same predicament as last year. After the 2021–22 school year, the IEP team agreed to provide twenty-six hours of ESY. District actually offered eighty hours during the summer. Yet Student attended only 37½% of the time with absences again patterned around the weekend. [GJ V Final Order at 20-21].

At this point, there seems to be little option but to order that the ninety-six hours be offered over the Summer. District may provide this through its regular summer programs. If the parties can agree on a better plan, they may do so, but any agreement should be confirmed in writing before it is implemented.

2. Absenteeism and sleep time issues

While the timing of this case leaves few options, it is imperative that this situation not repeat itself. What happened at the end of 2021–22 has happened again at the end of 2022–23. It cannot happen again.

a. IEP terms

District must update the IEP with provisions regarding how the IEP team will consider additional tutoring or instruction based on sleeping or absenteeism. [See *supra* § III(B)(8)]. It also must include any reporting requirements to the medical homebound coordinator. [*Supra* § II(A)(6)].

This is not a requirement as to what those terms should be. After Parent filed this DPR, the parties agreed to other changes in Student's schedule. It is unclear what impact those changes would have. I leave that for the IEP team to

determine. What the IEP team must not do, however, is to agree to requirements or services that are not then documented in the IEP.

b. Reporting

District must immediately improve its record keeping for Student. District must track both incidents of tardiness (dates and time of arrival) as well as absences. District must designate both tardies and absences as medically excused or unexcused.

Further, District must enforce the obligation to track any time lost because Student slept in class.

c. Communication with Parent

District will prepare a monthly report, detailing: (1) the dates and amount of time excused for medical reasons as well as unexcused absences; and (2) the amount of instructional time lost as a result of sleeping.

During the first semester of 2023–24, District will provide the first report to Parent by no later than September 5, 2023. If either District or Parent believes that the information requires an adjustment in the number of instructional hours provided, or the way they are provided, then that party must notify the other party in writing within seven calendar days of District providing the written report to Parent.

If the parties cannot reach an agreement within seven calendar days of being notified by the other party of a proposed adjustment, then the IEP team will convene within twenty-one calendar days of the request or proposal for an

adjustment. The meeting may be conducted virtually. By agreement, the IEP team can discuss any issue. A meeting to discuss an adjustment to the number of hours or how they are provided need not exceed one-half hour.²¹

Later reports should be issued by October 9, 2023, November 6, 2023, and December 2023.

4. The same procedure will apply for consultation and for holding an IEP meeting.

During the first semester, the IEP team will meet and discuss whether these requirements should be continued, discontinued, or altered for the second half of the year.

3. Daily assignments and behavioral log reporting

District must also ensure compliance with the requirements of daily assignment and behavioral log reporting. Provided, however, that if the teachers regularly use programs such as Google Classroom to post or send this information for others, they may use such systems to comply with this requirement. For example, if the math teacher posts a work sheet or applicable problems from the textbook on Google Classroom, then Parent can be expected to access this information like any other parent. If a teacher uses one of the

²¹ If either party requests a facilitator, the meeting still must be conducted within the time frame set forth in this Order unless the parties mutually agree otherwise in writing. In other words, a meeting will not be delayed if a facilitator is unavailable within the deadlines set.

programs to send messages to parents, that system *may* be used to send messages to Parent. In fact, it is preferable if the system stores messages so that District maintains a clear record of communications without having to search for emails later. Likewise, District may continue to use Google Docs to update such documents as behavioral logs.

District need not separately print documents for Parent if such documents are sent to her under the terms of this Order. If the teacher provided Student with a paper copy an assignment, District need not produce additional paper copies for Parent. This is the seventh grade: Student needs to become responsible for bringing home assignments. Otherwise, it is Parent's responsibility to print them.

If Parent contends that she cannot use Google Classroom or other systems used by District, District will have the SET demonstrate to her how the systems work.

District must provide the information promised, but Parent must cease making demands that the information be provided in specific forms and in the manner she prefers.²² Parent is a computer literate, intelligent individual. She

²² Prior to the hearing, Parent became upset when District provided its exhibits to Parent the same way that Parent provided hers to District. Somehow, Parent is able to compile and send many documents via email, but she claims to be unable to receive them the same way. Too much staff and lawyer time has been spent compiling information to satisfy Parent's ever-changing demands as to the form in which they are to be provided to her. Again, this is a waste of both time and money and none of it results in any benefit to Student.

operates several businesses, including a tax preparation and filing service. She demonstrates excellent organizational (and advocacy) skills, and she reads and writes at a high level. I cannot accept that she cannot use the same basic services used by thousands of other parents in the District.

If Parent contends that she has not received assignments or logs, she must notify the principal, in writing, before the beginning of the next week. Parent will specify: (1) the day(s); (2) class(es); and, if possible, (3) the information Parent contends she did not receive. District will respond in writing before the end of the week in which Parent notifies it of her concerns.

This requirement will remain in effect for the first half of the 2023-24 school year. During the first semester, the IEP team will meet and discuss whether these requirements should be continued, discontinued, or altered for the second half of the year.

4. FBA

At this point, it is unclear what relief is appropriate. The ASEC testified that the process had at least started in the week before the hearing. If it has not been completed, District must ensure the completion of the FBA as soon as possible. If it has not done so, District must provide a copy to Parent as soon as obtained.

If either party believes that the FBA requires a revision of the BIP, the parties should confer and seek to reach an agreement on any amendments. If

an agreement cannot be reached, IEP team will meet to discuss the issue no later than August 11, 2023, if Parent requests one by July 31, 2023.²³

It is so ordered.



Brian P. Murphy
Local Due Process Hearing Officer

Dated May 15, 2023

Notice of Appeal Process²⁴

Any party may appeal this ruling. A party seeking to appeal this ruling must do so **in writing** and **within ten (10) days** of receipt of this Order. The written appeal must be addressed to:

The South Carolina Department of Education
Office of General Counsel
1429 Senate Street
Rutledge Building
Columbia, SC 29201

²³ This may be included as part of any other IEP meeting.

²⁴ I will not accept, read, or consider any further argument about the merits on this matter unless it is remanded to him by the SRO or the District Court. No email, letter, or other written communication will be construed or considered as either a Motion to Reconsider or as a Motion to Alter or amend this Order. Further, no such communication may toll or extend the time limit set forth above for filing an appeal.