

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

A.J.W. and V.W. (Parent) on behalf	)	
of AW (Student),	)	
	)	
Petitioners,	)	
	)	
vs.	)	Final Order
	)	
Fort Mill School District,	)	
	)	
	)	
District/Respondent.	)	

I. Introduction and Summary

This is a tuition reimbursement case. The core disagreement between the parties is placement. Parents advocated to keep Student in a general education class with push-in special education instruction. District sought to change placement to self-contained service delivery model a special class outside the general education setting. When the parties could not agree, Parents withdrew Student and enrolled her at a private school in Charlotte, N.C. Almost two years later, they filed the pending due process request ("DPR").

Parents' request for reimbursement is denied. Parents did not carry their burden of proving District failed to offer Student a free appropriate education ("FAPE"). Even if they had, Parents did not carry the burden of showing Student's placement at the private school was proper. Finally, even if Parents had shown both things, Parents provided no evidence of out-of-pocket expenses related to the unilateral private school placement.

II. Procedural Background

Parents submitted their DPR on August 19, 2024. The DPR alleges violations back to the 2016-17 school year. There were many prehearing disputes. Besides the typical Scheduling Order and Hearing Procedures Order issued on September 11, prehearing disputes necessitated seven additional prehearing orders:

- An Order on Parents' Objection and Motion for Recusal (Sept. 11);
- Order on District's Motion to Dismiss (Sept. 17);
- Order on Subpoena Requests (Sept. 17);
- Order on Parents' Motion for Continuance and for a Pretrial Conference (Sept. 23);
- Preliminary Order regarding Witnesses (Sept. 30)
- Order on Motions to Bifurcate, to Compel, and for Reconsideration regarding Copies (Sept. 30); and
- Preliminary Order on Amended DPR submitted by Parents (Oct. 1).

The hearing was conducted on October 2-4, 7, and 23rd. After the hearing, the parties submitted post-hearing briefs.

III. Facts

Student attended Orchard Park Elementary beginning in the 2016-17 school year. Student was a fourth grader at the start of the 2022-23 school year. Student has been identified under the primary category of autism with a secondary category of other health impairment (OHI). In the 2021-22 and beginning of 2022-23 school years, Student was in the general education setting with pull-out special education services (resource service delivery model).

Parents dispute an individualized education program (IEP) finalized in September 2022. That IEP is based, in part, on a re-evaluation conducted in late 2021 and in the early part of 2022. In February 2022, the IEP team met to review re-evaluation data. Parents provided two reports: (1) A speech and language evaluation; and (2) an audiological report. [Pet. Exh. 3-5]. On March 30, 2022, the IEP team met to review information from District's audiologist. [Pet. Exh. 10, 13].¹ On April 22, the IEP team met to discuss accommodations. [Pet. Exh. 42]. The IEP team met again on May 25 to start the annual review process for the 2022-23 IEP. The IEP team added testing. It also began creating new goals. The IEP team met again on May 27 to discuss extended school year (ESY) services.

The spring meetings were contentious. District requested a state facilitator for subsequent meetings. The IEP team met again for about four hours on September 1. The team focused on goals. As to the second and third goals related to reading, the team added another reading goal and stated its intention to add another after Student mastered certain skills. [Pet. Exh. 23 at 2722]. The IEP team also decided to update the fourth goal related to reading. The IEP team agreed to adjust or modify writing goals 11-13 and 17. [*Id.*] The IEP team continued the September 1 meeting and reconvened on September 7. District reviewed the current and proposed schedule. [Pet. Exh. 25; Dist. Exh. 12].

¹ See Dist. Exh. 7 (email attaching Block notes).

District representatives also agreed to delay the implementation date of any changes five days for Parents to observe the school setting. [Pet. Exh. 25].

District issued the prior written notice on September 9. [Pet. Exh. 45].

In the end, Parents and District agreed on three points. First, the parties agreed on Student's academic and social challenges. Although Student made progress on the goals in his Individualized Education Program ("IEP") goals, she did not progress academically in a way that satisfied either party and both parties agreed on Student's needs in terms of socialization. Everyone describes Student as well- behaved, pleasant, prepared, and eager to please. But she struggled with peer interactions, both in class and out of class (e.g., recess).

Second, the parties agreed that Student needed more special education services.

Third, both parties recognized that frequently pulling Student out of the classroom and bringing her back ("transitions") was detrimental.

The parties' disagreements centered less on the "what" or the "why." Rather, they disagreed more on the "where" and the "how." District's IEP team members proposed that District provide all math, reading, and writing instruction in a self-contained classroom. [Pet. Exh. 45]. That is a change from the pull-out nature of services it provided in a resource room. District describes the difference as supplanted (special education classroom) versus supplemental (resource room). This change also meant that a different special education teacher would provide special education services. Parents wanted District to

provide all services in the general education classroom, not in a resource or special education room.

On September 16, Parents' attorney submitted a ten-day removal letter. [Pet. Exh. 33]. Parents enrolled Student at the John Crosland School ("Crosland") in Charlotte. Crosland is a private school, dedicated to educating children with certain disabilities. Student has attended Crosland since October 2022. Student is taught in a classroom setting. Because of the nature of Crosland, student are not exposed to general education peers.

IV. Discussion

A. Prehearing matters

There were two unresolved concerns heading into the hearing. First, the DPR alleges violations back to Kindergarten, which drew a statute of limitations challenge from District. Second, Parents submitted an amended DPR the week of the hearing.

1. Statute of limitations

Prior to and at the hearing, I ruled that some, but not all, allegations are time-barred. I have considered the parties' post-hearing arguments and reaffirm these rulings.

Congress detailed how the statute of limitations applies in an IDEA case:

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for

requesting such a hearing under this part [20 USCS §§ 1411 et seq.], in such time as the State law allows.

20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.507(a)(2) (“The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint.....”).²

The statute of limitations does not allow Parents to raise any issue if they file within two years of any violation. Likewise, it does not allow parents to seek a two-year remedy for time-barred violations. At the same time, however, the statute does not bar evidence just because it is older than two years. Section 1415(f)(3)(C) bars violations older than two years from the DPR date, and no remedy can be provided for them. Evidence from before that date, however, may be relevant to determining whether a local education agency (“LEA,” *i.e.*, school district) violated the IDEA within the limitations period.

The statute must be applied by analyzing each purported violation. Resolution of statute issues requires a “fine-grained analysis.” *Damarcus S. v. District of Columbia*, 190 F. Supp. 3d 35, 45 (D.D.C. 2016). A hearing officer must “determine discovery dates in a complaint alleging so many different IDEA violations.” *Id.* A hearing officer must also “analyz[e] each alleged IDEA violation

² There are specific exceptions to the knew-or-should-have-known principle. 20 U.S.C. § 1415(f)(3)(D). Parents have not argued that they apply.

individually.” *Id.* at 47; accord *E.G. v. Great Valley Sch. Dist.*, No. 16-5456, 2017 U.S. Dist. LEXIS 77920, at *24 (E.D. Pa. May 23, 2017) (citing *Damarcus*).

Secondly, whether District offered a FAPE must be analyzed year-by-year. *Simchick v. Fairfax County Sch. Bd.*, 553 F.3d 315, 324 (4th Cir. 2009). This rule further undercuts any theory that violations in one school year insulate an LEA from claims in later years covered by different IEPs.

Parents’ amorphous DPR caused considerable confusion about what issues I needed to resolve. In other words, it is difficult to tell from the DPR what claims are timely. Because each alleged violation must be considered separately, I ordered as follows:

I find it appropriate and economical to define the issues at the start of the hearing. But I do not adopt District’s proposed approach that it put on evidence and an argument to which Parents should respond.

I will begin the hearing with questions for Parents. I will ask them to specifically identify each alleged action on the part of District that forms the basis of the DPR. They should be prepared to identify when they knew about District’s action for each listed action. I may request that they present evidence to support their statements at that time. Parents may wish to prepare for this segment by listing specific actions for which they seek relief and the evidence they have that shows when they knew about the issue. If it assists them, Parents may – but are not required to – submit such a list in writing. And they may do so either before or at the beginning of the hearing if they choose that option.

After we review this issue, I intend to issue a preliminary Order on the Record as to whether the statute of limitations bars specific issues. I may also address whether there are any limitations on evidence. Although this will somewhat delay the calling of witnesses, I am inclined to agree with District that the potential benefits of a preliminary approach might outweigh the risks of

proceeding as I usually do considering Parents' pre-hearing disclosures.

[Sept. 30 Order on District's Motion to Bifurcate at 4].

After Parents identified specific issues, I reaffirmed the denial of District's Motion seeking to dismiss the entire case. I also rejected the argument that evidence is barred just because the evidence was known to Parents more than two years before the submission of the DPR. At the same time, I rejected Parents' argument that they can avoid the statute of limitations by merely seeking a remedy for the past two years.

I ruled that Parents may seek a remedy only for violations they knew or should have known about within two years of the DPR. I also ruled that evidence predating that time might still be relevant if it relates to a purported violation within that time.

In its post-hearing brief, District relies on a New Jersey case that does not suggest an error in my ruling. In *McLean v. Eastampton Sch. Dist.*, No. 19-11009 (RBK/KMW), 2020 U.S. Dist. LEXIS 25345 (D.N.J. Feb. 11, 2020), the parent asserted in March 2016 that the LEA was not providing FAPE and threatened to remove the child. *Id.* at **1 1-2 (D.N.J. Feb. 11, 2020). In June, the IEP team developed an IEP that the parent rejected. *Id.* at *2. The parent then removed the student that month. *Id.* At or just before the beginning of the 2018-19 school year, the parent filed a DPR, complaining about the June 2016 IEP. *Id.* at * 3. The ALJ in *McLean* found that the two-year statute for the 2016-

17 school year commenced in June 2016 when the parent rejected the 2016-17 IEP. *Id.* at ** 3-4. The *McLean* Court agreed. *Id.* at * 10. Neither the LEA nor the ALJ posited that March 2016 (when the parent threatened withdrawal) was the appropriate date. Rather, the LEA, the ALJ, and the District Court all focused on the issuance and rejection of the IEP for the relevant school year as the triggering date.³

McLean supports my ruling. The knew-or-should-have-known date here is the same as it was in *McLean*. It is the date Parents knew of and rejected the IEP for the school year at issue. Because the IEP team completed the IEP in September 2022, alleged violations during that month are timely because they are within the two-year window that opened on August 19, 2022.

In short, I accept neither party's arguments about the statute of limitations. The statute of limitations permits Parents to pursue only alleged violations they knew or should have known about within two years of the DPR. Alleged violations in September 2022 are timely. Alleged violations about which Parents knew or should have known before August 19, 2022, are not timely.

District seeks to bar allegations regarding the IEP team's re-evaluation in late 2021 and the spring of 2022. As standalone alleged violations, District would be correct. But Parents focus on the allegedly insufficient IEP that resulted.

³ In *McLean*, the parent argued that the statute did not commence until she withdrew the student in the fall of 2016. Parents do not make that argument here.

They could not have asserted such a claim until September 2022 when the IEP team issued the proposed IEP. Before then, District had done nothing that resulted in any alleged denial of a FAPE, and Parents do not contend that the re-evaluation itself denied a FAPE. All agree that the IEP team considered re-evaluation data during the later IEP meetings. And if that data was improper, the IEP team's use of it in the fall of 2022 could support a claim that arose only when District allegedly denied a FAPE through an insufficient IEP. Accordingly, evidence about the re-evaluation directly relates to whether District violated the IDEA in September 2022.

2. Amendment of DPR

On Sunday, September 29, Parents submitted a response to District's Motion to Bifurcate. In that response, Parents stated:

It is at this time that the petitioner is aware of the typo in the complaint indicating 2021 rather than 2022. It is at this time the Motion is made to Amend this mistake to indeed show that the relief sought is only within the 2 years statute of limitation.

[Parents' September 29 Response to District Motion to Bifurcate at 2].

On September 30, Parents sent an email, stating: "Please see the attached amended complaint." Attached to the email is a document entitled "DPC [Student] – Amended 9:30:24.pdf." The document does not correct a "typo." Rather, it added arguments that Parents seek recovery of private-school tuition for two years even though they want to prove violations for Student's entire time with District.

The IDEA limits an LHO's ability to permit an amendment:

(i) In general. A party may amend its due process complaint notice only if—

(I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or

(II) the hearing officer grants permission, except that **the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.**

(ii) Applicable timeline. The applicable timeline for a due process hearing under this part [20 USCS §§ 1411 et seq.] shall recommence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).

20 U.S.C. § 1415(c)(2)(E) (emphasis added); 34 C.F.R. § 300.508(d).

The five-day deadline is not a deadline for requesting an amendment. It is a deadline for *granting* a request. That said, Parents did not request leave to amend.

The hearing commenced October 2, 2024, just two days after Parents submitted the Amendment. Regardless of what dates are considered, I could not have granted any request five days or more “before [the] due process hearing occurs.”

District contended “that the effort to amend the complaint should be addressed at the outset of the hearing as part of the inquiry the LHO has already ordered.” [Seibert email 10/1/24]. Because the scope of the claims remained unclear, I agreed with that approach given the prior decision allowing Parents to clarify the issues. [See Order of October 1 at 2; Order of September 30

regarding Motion to Bifurcate at 3-4]. At the beginning of the hearing, Student's Mother conceded that District never agreed in writing to an amendment. Thus, the statute is clear, and I could not have granted a request if Parents had made one.

If I had discretion to grant a request—and if one infers that Parents made such a request—I would have exercised the discretion to deny it. This case was filed almost two years after the Student's removal. On the eve of the hearing, Parents tried to frustrate the mandatory scheduling deadlines by commencing a FERPA matter and then seeking to delay this case based on their belated action. An amendment to the DPR resets the dates, which would be especially wasteful and disruptive given the time and expense of convening the hearing. There is no justification for delaying the resolution of disputes that arose in the Spring and Fall of 2022. If Parents wanted to pursue FERPA issues, they could have done so earlier. And they had two years to flesh out any issues in their DPR.

B. Merits of the DPR

Parents identified seven issues for resolution. These issues fall within two main categories. First, Parents challenge the development of the 2023-23 IEP with their first, fourth, fifth, and seventh issues. They allege violations as to the development of IEP (first). They also allege failures to consider the developmental function needs of Students despite Parents bringing those concerns to the District (fourth), to choose a placement in the least restrictive

environment (“LRE”) (fifth), and to adopt supplemental aids and services to keep Student in the least restrictive environment (“LRE”) (seventh).⁴

Second, three of Parents’ issues involve an alleged denial of parental input. Parents generally allege a failure to consider Parents’ concerns and input (second). They raise two specific parental input allegations related to outside independent evaluations (third) and placement (sixth).

Parents’ myriad FAPE denial allegations serve a singular purpose. They are relevant to the first prong of the *Burlington-Carter* test that determines the recoverability of private school tuition. In *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359 (1985), the Supreme Court determined that IDEIA’s predecessor statute permitted a court to “order school authorities to reimburse parents for their expenditure on private special-education services.” *Id.* at 369 (emphasis added). In *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993), the Court clarified that such reimbursement is available only if it is found that “both the public placement violated IDE[A] and that the private school placement was proper under the Act.” *Id.* at 15; see *Simchick*, 553 F.3d at 323-24. Congress codified the conditions for obtaining reimbursement. 20 U.S.C. § 1412(a)(10)(C). This provision did not materially

⁴ This includes speech, OT, and behavioral interventions.

change the *Burlington-Carter* standard or the conditions for seeking reimbursement. *Forest Grove Sch. Dist. v. T. A.*, 557 U.S. 230, 239-40 (2009).

Under the first prong of *Burlington-Carter*, the local educational agency's (LEA's) proposed IEP is measured by the standard in *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) as explained further in *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 402-03 (2017). This standard is discussed more fully below. But in short, the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 403.

If an LEA fails to provide a FAPE, the inquiry turns to the second prong of *Burlington-Carter*: Is the private placement proper under the Act? "Like an IEP, a parental placement is appropriate if it is reasonably calculated to enable the child to receive educational benefits." *Simchick*, 553 F.3d at 324 (cleaned up). The costs incurred must also be reasonable. 20 U.S.C. § 1412 (a)(10)(C)(iii)(III) (noting that the "cost of reimbursement . . . may be reduced or denied . . . upon a judicial finding of unreasonableness with respect to actions taken by the parents"); *Carter*, 510 U.S. at 16 ("Total reimbursement will not be appropriate if . . . the cost of the private education was unreasonable.").

The restrictive nature of a private placement is a proper issue for consideration. *Simchick*. 553 F.3d at 327. Yet many of the requirements imposed on school districts, including least restrictive environment ("LRE"), are not strictly imposed in the same manner for private placements. *Carter*, 510

U.S. at 14; *Sumter Cnty. Sch. Dist. 17 v. Heffernan*, 642 F.3d 478, 487-88 (4th Cir. 2011).

Parents bear the burden of proving both prongs of *Burlington-Carter*. *Schaffer v. Weast*, 546 U.S. 49 (2005); see *E.M. & L. v. Rock Hill Sch. Dist. 3*, No. 0:08-CV-2097-CMC, 2009 U.S. Dist. LEXIS 143318, at *12 (D.S.C. Jan. 13, 2009) (“Parents must prove that (1) FAPE was denied at the Rawlinson Road HFA program, and (2) the desired placement at DaySpring is appropriate under the IDEA.”); *Erde v. Banks*, No. 21-CV-9285 (VSB) (VF), 2022 U.S. Dist. LEXIS 232797, at *4-5 (S.D.N.Y. Dec. 28, 2022) (“[T]he burden of establishing the *Burlington-Carter* factors rests with the student’s parents.”)

1. First Prong of Burlington-Carter: Denial of FAPE allegations

The first prong of *Burlington-Carter* asks whether District denied Student a free and appropriate public education (“FAPE”):

The IDEA requires that states, in return for federal funding, guarantee children with physical and intellectual disabilities a “free appropriate public education” (FAPE). *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 158 (2017) (quoting 20 U.S.C. § 1412(a)(1)(A)). A FAPE refers to “special education and related services” that “(1) [are] without charge, (2) meet the standards of the state educational agency, (3) include the appropriate level of education in the state involved and (4) are provided in conformity with an individualized education program (IEP).” *K.I. v. Durham Pub. Sch. Bd. of Educ.*, 54 F.4th 779, 784-85 (4th Cir. 2022).

Bouabid v. Charlotte-Mecklenburg Sch. Bd. of Educ., 62 F.4th 851, 856 (4th Cir. 2023).

The Supreme Court has made clear the importance of establishing *ambitious* goals. At the same time, it has rejected the proposition that grade level advancement is the touchstone for a FAPE where a student is not in a regular classroom.

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. [*Rowley*, 458 U. S. at 207]. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians. *Id.*, at 208-209. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. *Id.*, at 206-207.

* * * *

That the progress contemplated by the IEP must be appropriate in light of the child's circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. The instruction offered must be "specially designed" to meet a child's "unique needs" through an "[i]ndividualized education program." [20 U.S.C.] §§1401(29), (14) (emphasis added). An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth. §§1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv). As we observed in *Rowley*, the IDEA "requires participating States to educate a wide spectrum of handicapped children," and "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between." 458 U. S. at 202.

* * * *

. . . [An] IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom.

The goals may differ, but every child should have the chance to meet challenging objectives.

Of course this describes a general standard, not a formula. But whatever else can be said about it, this standard is markedly more demanding than the “merely more than de minimis” test..... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than de minimis progress for those who cannot.

Endrew F., 580 U.S. at 399-402; *M. L. v. Smith*, 867 F.3d 487, 496 (4th Cir. 2017) (quoting *Endrew F.* for the proposition that the Supreme Court “rejected [the] argument that ‘a FAPE is an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.’”).

The Fourth Circuit recently summarized the FAPE standard:

A FAPE entails “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. It is not synonymous with “the best possible education.” *MM*, 303 F.3d at 526; see *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200 (1982) (“[T]he Act [does not] require[] [States] to maximize the potential of each handicapped child”). “[F]or most children,” namely, those “integrated in the regular classroom,” a FAPE means an educational program “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Endrew F.*, 137 S. Ct. at 999-1000 (internal quotation marks omitted). “Progress through this system is what our society generally means by an ‘education.’” *Id.* at 999 (“Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material.” (internal quotation marks omitted)). “And access to an ‘education’ is what the IDEA promises”—no more, no less. *Id.*

G.M. v. Barnes, 114 F.4th 323, 342 (4th Cir. 2024).

An important first step is determining whether an alleged violation is procedural or substantive. 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 *R.F. v. Cecil County 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).

The distinction between substantive and procedural is important because, for example, it is often hard to prove that a procedural violation “significantly impeded” a Parent’s rights to participation. The interpretation of “significantly impeded” was the core issue in *R.F.*:

Our analysis here starts and ends with the second prong of this standard: whether a violation of parents' procedural rights under the IDEA “significantly impeded” their opportunity to participate in decisionmaking regarding their child's education. Appellants contend that CCPS violated their parental participation rights under the IDEA by changing R.F.'s placement without involving them in an IEP meeting and by destroying data relating to R.F.'s progress on her IEP goals. We hold that neither constitutes a significant impediment to parental participation on these facts.

With respect to changing R.F.'s placement, the parties agree that “Mr. K.’s unilateral determination to alter the environment in which some of R.F.’s IEP services were offered . . . constituted a procedural violation of [the parental rights provisions of] the IDEA.” Appellees’ Br. at 17; see 20 U.S.C. § 1415(b)(3).

However, R.F.'s parents' opportunity to participate in decisionmaking regarding R.F.'s education was not "significantly impeded" when CCPS changed R.F.'s placement for four months without involving her parents. 20 U.S.C. § 1415(f)(3)(E)(ii)(II). As discussed above, in changing R.F.'s placement, CCPS provided her more special education services, not fewer, in the ICSC, consistent with her parents' objection that her IEP contained too many hours in the general education classroom. CCPS did not significantly impede R.F.'s parents' participation rights when it failed to inform them that it was gradually changing R.F.'s placement in line with their expressed wishes.

Additionally, R.F.'s parents did eventually have an opportunity to participate in decisions about R.F.'s placement when her mother attended the December 2016 IEP meeting. See *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565 (3d Cir. 2010) (holding that a school district did not violate the IDEA when it ignored parents' letters for months but included the parents in their child's IEP meeting because "they ultimately had an opportunity to participate meaningfully in the creation of an IEP" for their child). Therefore, the only form of relief that Appellants seek--private placement for R.F.-- "cannot reasonably be traced" to CCPS's failure to include R.F.'s parents in decisions regarding her placement in August 2016. *Id.* at 566. We cannot agree with Appellants that CCPS's procedural violation of R.F.'s parents' right to participate in decisions about her placement rises to the level of a substantive IDEA violation that could be cured by private placement.

R.F., 919 F.3d at 249.

The distinction between procedural and substantive is also essential because the IDEA limits available remedies when violations do not meet the standards in 20 U.S.C. § 1415(9f)(3)(E)(ii). For purely procedural violations, hearing officers may issue orders to comply. 20 U.S.C. § 1415(f)(3)(E)(iii); 34 C.F.R. § 300.513(a)(3); *Barnes*, 114 F.4th at 343 ("Without finding a substantive violation, however, a hearing officer or court 'may do nothing more than order a school district to comply with the IDEA's various procedural requirements.'")

(quoting *R.F.*, 919 F.3d at 248) (cleaned up); *Miller v. Charlotte-Mecklenburg Sch. Bd. of Educ.*, 64 F.4th 569, 576 (4th Cir. 2023) (“[A] bare procedural violation of the IDEA does not warrant a remedy unless a plaintiff shows the violation resulted in the student being denied a free appropriate public education.”) (citing *R.F.*, 919 F.3d at 251-52).

a. Preliminary issues about the scope of Parents’ FAPE arguments

Parents’ post-hearing brief repeats the problem that occurred often during the hearing. Parents continue to make arguments about issues not raised in the DPR. In their post-hearing brief, Parents cite purported evidence that was not admitted—and sometimes not even offered—during the hearing.

Issues at a due process local hearing are limited to those raised in the Complaint. 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d). Parents clarified the scope at the start of the hearing in response to my Orders of September 30 and October 1. Parents may not expand the proceedings, or the issues, with such offerings. Nor will I consider arguments unsupported by record evidence.⁵ Parents also fill their submission with opinions about methodology and pedagogy they did not offer through a witness with expertise in the area. This Order does not swing at every pitch in Parents’ post-hearing brief. I will not address arguments not

⁵ I recognize that the parties did not have an opportunity to fully brief with the benefit of a transcript. I did not have a transcript available in the review of this matter or for the preparation of this Order.

properly raised,⁶ assertions not offered through appropriate testimony, or tangible evidence, including exhibits,⁷ that were not admitted during the hearing.⁸ None of these things can support a finding that District violated the IDEA.

⁶ For example, in the section of Parents' post-hearing brief regarding parental input, they assert what appears to be a claim for violation of stay put. [Pet. Br. at 11-12]. This was never raised before, likely because of Parent's removal of Student. Likewise, Parents spin a new theory by claiming that District violated the IDEA by extending the IEP meetings into the Fall. [Pet. Br. at 14]. This new argument is self-defeating. If Parents had raised this argument before, it would have been time-barred under the Statute.

Parents also now question the qualifications of the Resource SET. [See Pet. Br. at 24]. It is unclear, at best, as to what allegation in the DPR such an argument relates. In April 2022, Parents gushed about Resource SET's teaching to the point that District's representative appreciated how Mother was "doting on her." [Pet. Exh. 42 at 11:32-:44; *id.* 17:10-20; *id.* 25:39-26:30]. Later in September 2022, however, Parents started accusing her of not providing instruction with fidelity. At the hearing, Parents argued that the Resource SET was not qualified and lacked a certification in Spire, which does not even exist. In their brief, Parents improperly argue that the Resource teacher lacks training. The evidence does not support this argument either.

Addressing the issues in this matter is akin to playing Whack-A-Mole. That is not how the IDEA works. While some fluency in terms of issues is expected, especially with unrepresented Parents, it is improper to simply audition new arguments at every stage. This is precisely why the focus must be on: (1) what were issues at the time; and (2) what issues were raised in a timely DPR.

⁷ The following Exhibits were properly offered and admitted during the hearing:

Parents: 1, 3-8, 10, 13, 15-26, 28, 29 (ruling held in abeyance), 31, 33-37, 40, 42, 44-46, 49-58, 62

District: 1-15

Having reviewed the file, I am admitting Parent Exhibit 29 and have reviewed it in reaching my decision. After the hearing, Parents sought to provide even more exhibits they did not offer before. As stated above, I will not consider any evidence that was not admitted during the hearing.

After the hearing, Parents also complained about "pleadings" and orders not being made exhibits. During the hearing, I explained to Parents that they are free to

b. Development of IEP issues

The Fourth Circuit has cautioned that “[i]n evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself.” *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007) (citations omitted).⁹

Whether the IEP team developed an IEP reasonably calculated to provide FAPE is at the heart of the IDEA. Accordingly, I will review these issues as allegations of substantive violations.

refer to matters of record at any point. I also explained that, if they wanted to make something an exhibit, they needed to comply with the Hearing Order, provide copies, and move for admission during the hearing. Parents did not provide copies as required.

⁸ Nor is it necessary to address every fly-specking argument about whether District witnesses correctly understood, for example, whether the term “resource,” is in the IDEA. [See, e.g., Parents’ Brief at 22]. The issue here is whether District denied Student a FAPE, and not whether District staff correctly answered quiz questions at the hearing. This questioning served no purpose other than to harass District personnel and prolong the proceedings. In most instances, Parents’ questioning merely reflected their own misunderstanding of IDEA concepts. From a substantive perspective, there is no reason to doubt the qualifications of any District witness. It does not matter whether individual staff know whether services or aids are provided by law or by policy. What matters is whether they know when to utilize them, and whether they did so appropriately.

⁹ *A.K.* instructs that hearing officers and courts are to substantively evaluate the final product rather than police every comment made during the process. In *A.K.*, for example, the Court explained that “[e]xpanding the scope . . . to include a comment made during the IEP development process would undermine the important policies” of the IDEA. *Id.* If alternatives proposed and discussed can become fodder for claims of substantive violations, teachers, staff, and administrators will be motivated to remain silent, which is contrary to the purposes of promoting a full and flowing dialogue in team meetings.

1. Consideration of developmental function needs of Student

During the reevaluation in 2022-23, District reviewed Student's progress and decided to obtain more data on cognitive functioning and academic achievement. The IEP team reviewed that information, along with information provided by Parents.

Ultimately, it is unclear what developmental function needs Parents claim to have been unconsidered. This was not the crux of the parties' dispute at the time. In any event, Parents have not met their burden of proving that the IEP failed to consider the developmental function needs of Student.

At the hearing and in their brief, Parents press the argument that District did not complete a comprehensive triennial evaluation. Nothing in the DPR complains of a failure to provide a comprehensive evaluation. Yet, Parents now contend that, in developing the IEP, District needed to conduct a complete battery of testing in every area.

The IDEA requires no such thing. Re-evaluations must occur at least every three years. 20 U.S.C. § 1414(a)(2)(B)(ii). Such re-evaluations are conducted under Section 1414(b)-(c). *Id.* Neither section 1414(b) nor (c) supports the Parents' argument that all new testing must be done in every area. Section 1414 (b) provides:

In conducting the evaluation, the local educational agency shall—

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining—

* * *

(ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

Id. § 1414(b)(2). In addition:

Each local educational agency shall ensure that—

(A) assessments and other evaluation materials used to assess a child under this section—

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;

(iii) are used for purposes for which the assessments or measures are valid and reliable;

(iv) are administered by trained and knowledgeable personnel; and

(v) are administered in accordance with any instructions provided by the producer of such assessments;

(B) the child is assessed in all areas of suspected disability;

(C) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided; and

(D) assessments of children with disabilities who transfer from 1 school district to another school district in the same academic year are coordinated with such children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

Id. § 1414(b)(3).

Section 1414(c) provides:

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team and other qualified professionals, as appropriate, shall—

(A) review existing evaluation data on the child, including—

(i) evaluations and information provided by the parents of the child;

(ii) current classroom-based, local, or State assessments, and classroom-based observations; and

(iii) observations by teachers and related services providers; and

(B) on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine—

(i) whether the child is a child with a disability as defined in section 1401(3) of this title, and the educational needs of the child, or, in case of a reevaluation of a child, whether the child continues to have such a disability and such educational needs;

(ii) the present levels of academic achievement and related developmental needs of the child;

(iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum.

Id. § 1414(c)(1).

Nowhere does the statute mandate a particular test or evaluation. Nor does it require that assessment tests be administered in every area. That is left to the discretion of the IEP team. And for good reasons. In many cases, like this one, there is no disagreement about a Student's needs in a particular area and no need to suspect other disabilities.¹⁰

In their post-hearing brief, Parents assert that the “most alarming[]” failures to evaluate relate to “[o]ccupational evaluation, [s]peech and language,” “functional behavioral/FBA,” “adaptive behavior,” and “psychological.” [Parents’ Br. at 15].

Nothing is alarming about an IEP team not conducting assessments that nobody thought necessary. Two years after the fact, Parents adopt a kitchen-sink approach to alleging violations that do not reflect the issues in 2022. For example,

¹⁰ The statute mandates that a child be assessed in all areas of suspected disability. 20 U.S.C. § 1414(b)(3)(B). One suspected area for Student was OHI. Parents and their advocate stated that Student should be identified as OHI as a secondary disability. District agreed with this parental input. [Pet. Exh. 6 at 2 (Bates 165); Pet. Exh. 7 at 1].

Parents continually questioned witnesses as to why District did not conduct a functional behavioral assessment (“FBA”). There is no mention of an FBA issue in the DPR. That aside, there were no behavioral concerns at the time to warrant an FBA. An FBA determines the cause of behaviors so an IEP team can develop appropriate interventions. Everyone understood the cause of Student’s behaviors that naturally attend her disabilities.

Likewise, Parents’ fixation on occupational therapy (“OT”) is another after-the-fact theory that does not reflect any issues in 2022. OT was not a concern then, and Parents did not request an evaluation or OT services.

Parents also complain that Student received speech therapy in group situations. [Pet. Br. at 18]. District explained that it addressed both speech and social skill goals in a group setting to help Student apply the skills. That does not mean that it failed to provide individual therapy. This appears to be just another argument that Parents devised well after the fact.

The IEP team considered present-level data, progress data, assessments such as ESQ, and the input and opinions of both regular education and special education teachers. District made specific changes to the IEP and the accommodations. Further, it modified goals in academic and social/emotional needs areas based on updated information.

Parents nonetheless assail District’s assessments as not being “technically sound,” “[e]vidence based,” or “[n]orm based.” [Parents’ Br. at 15; see *also id.* at 15-16 (criticizing District’s assessments)]. But Parents improperly substitute

unsupported argument for evidence to make this argument.¹¹ Parents did not prove that the District's assessments are inappropriate, or that this was even an issue two years ago.

Parents correctly argue that the IDEA requires the use of various tools for assessing children. [Pet. Br. at 17]. The IDEA, however, does not limit consideration to "tools" in the assessment sense. It also instructs IEP teams to consider "strategies" and to gather "relevant functional development and academic information." 20 U.S.C. § 1414(b)(2)(A). The data to be considered includes, for example, "observations by teachers and related service providers." *Id.* § 1414(c)(1)(A)(iii); 34 C.F.R. § 300.305(a)(1). The statute does not limit what valid information may be considered. Rather, it requires that the IEP team consider various types of information based on the child's needs. And that has been District's point all along.

Parents list assessments District did not use and contend that District's alleged failure to use them proves a denial of FAPE. [See *id.*] That is not even close to true. In every situation involving every child, there are many assessments IEP teams do not use. That is because there are many assessments available. The statute vests discretion in the IEP team to choose the proper ones.

¹¹ Even when Parents sought opinions, their evidence lacks credibility. For example, their former advocate argued that special classrooms are *never* appropriate. That opinion cannot be squared with the statute or the regulation, both of which expressly mention them as a placement.

The IEP team engaged in robust discussions about Student's cognitive, communication and language, behavior, and social needs. Further, District witnesses credibly testified that they would have explored any area of additional concern if Parents had raised any. The contemporaneous documentation does not suggest that District ignored any concerns. Nor does it suggest a need to explore other areas further.

Parents have not proven that District failed to consider Student's developmental function needs.

2. Failure to place in LRE

Student's placement was a key area of the parties dispute in 2022.

Parents contend that District's 2022-23 IEP failed to educate student in the LRE.

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A); *see also* 34 C.F.R. § 300.114(a)(2).

Continuum of alternative placements.

- (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.
- (b) The continuum required in paragraph (a) of this section must—

- (1) Include the alternative placements listed in the definition of special education under §300.39 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and
- (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

34 C.F.R. § 300.115.

Placement does not refer to the room in the school where District provides services. Placement and location of services are distinct concepts under the IDEA. *AW v. Fairfax Cty. Sch. Bd.*, 372 F.3d 674, 682 (4th Cir. 2004) (“[T]he touchstone of the term “educational placement” is not the location to which the student is assigned but rather the environment in which educational services are provided.”); see also *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 683 (4th Cir. 2007) (Gregory, J., dissenting) (noting that location or setting under the IDEA is not the same as “placement”).

The statute and regulation differentiate between “regular classes” and “special classes” when discussing various placements. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.115(b)(1). Resource room, by contrast, is defined as a “supplementary service.” 34 C.F.R. § 300.115(b)(2).¹²

¹² The statute defines “supplementary aids and services” as “aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled

Before the proposed change, Student received services in the regular education classroom or the resource room. After the proposed change, Student would receive most academic instruction in the special classroom.¹³ Student was attending regular classes for mini sessions of reading (30 minutes), writing (15 minutes), and math (15 minutes). Student attended regular classes for concepts and related arts. Student was with general education peers for non-academic time (recess and lunch). The proposed change eliminated the mini sessions in the regular education setting (one hour per day). The percentage of time spent receiving special education services increased from 37.19% to 49.87%, while the time spent for non-academics (recess and lunch) otherwise remained the same. [Dist. Exh. 12].

The proposed change to a classroom with more time removed from the general education setting changed Student's placement along the continuum. A

children to the maximum extent appropriate in accordance with section 1412(a)(5) of this title." 20 U.S.C. § 1401(33).

¹³ In its reports to SCDOE, District classifies the amount of time spent outside the general education setting in three tiers: (1) 0-39%; (2) 40-79%; and (3) 80-100%. District noted that the change proposed by District would increase the amount of time Student spent outside general education within the second tier. But these levels are not "placements" under the IDEA, even though various materials refer to the levels with terms like "full inclusion" and "partial inclusion." These levels are "Monitoring Priorities and Indicators" for reporting under 20 U.S.C. § 1416. [See Part B State Performance Plan (SPP) and Annual Performance Report (APR) Part B Indicator Measurement Table at 7, first column (available at https://sites.ed.gov/idea/files/2023_Part-B_SPP-APR_Measurement_Table.pdf)]. Accordingly, I am not considering whether a change within the second tier is a change in "placement."

change in placement to a more restrictive environment is not an LRE violation per se. Removal from regular classes can occur “only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A); see also 34 C.F.R. § 300.114(a)(2). “[T]he IDEA’s mainstreaming provision establishes a presumption, not an inflexible federal mandate.” *Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997).

The statute poses this question: Could Student have satisfactorily been educated in the regular classroom with supplementary aids and services? I find she could not have been.

Although Student made progress on IEP goals, nobody was satisfied with her academic progress or standing. And all agreed that Student needed more special education services. Further, Student needed more special education instruction, not merely paraprofessional support.

Parents argue that “[l]imiting transitions is NOT an adequate reason through IDEA law to change placement.” [Pet. Br. at 23]. Parents cite no supporting authority for this statement, which is wrong. There are few absolutes in IDEA law when it comes to what considerations are appropriate. Each child is unique. The desirability of limiting transitions can be a reason for determining placement. But District never suggested it was the sole reason.

District personnel reasonably concluded that frequent transitions were detrimental. The continual change in environments adversely affected Student's focus and her focus was a significant concern.

Parents also cite an IDEA regulation for the proposition that Student should not have been moved solely because Student's needs required a curriculum modification. [Pet. Br. at 12 (citing 34 C.F.R. § 300.116(c))]. But they provided no evidence that the IEP team sought a change solely for this reason. District had modified the curriculum and provided accommodations to keep Student in the regular classroom. Unfortunately, it did not work to anyone's satisfaction.

Parents also argue that Student should not have been moved because her behavior did not disturb the general education students. [Pet. Br. at 39-40]. This is another straw man. District did not claim that it needed to move Student because she disrupted the classroom. Rather, it was classroom instruction and activity that disrupted Student's education.

This leads to the fundamental problem with Parents' position. The evidence, including Parents' own evaluations, establishes that Student had significant difficulties with attention and with processing information in a busy environment. Parents provided a diagnosis of auditory processing disorder, which materially affects Student's attention. [Pet. Exh. 4]. Dr. Block also observed Student in the regular education classroom and noted: "[S]tudent

appears disengaged or possibly overwhelmed by environment.” [Pet. Exh. 10 at 2, Recommendation 5].

Parents wanted to have a dedicated special education instructor teaching Student while the general education teacher provided different instruction to the rest of the class. Student struggled with only one instructor. Adding another one who is saying different things would only be more disorienting. Paraprofessional assistance was not enough. Nor did accommodations, such as chunking, or curriculum modifications achieve the desired results. Student needed more special education instruction, and she needed it in an environment that would be more conducive to learning, given her challenges.¹⁴

I credit the views of District’s personnel that the special classroom was the appropriate setting and LRE for the 2022-23 school year.

3. Supplemental aids and services to keep Student in the LRE, including speech, OT, and behavioral interventions.

The purported failure by IEP team to consider a related service is analyzed as a procedural violation. *Dibuo v. Bd. of Educ.*, 309 F.3d 184, 191 (4th Cir. 2002). But I construe Parents’ challenge more broadly than a failure to consider. They appear to be raising the issue more in terms of failure-to-provide than as a failure-to-consider claim. In the end, however, the result is the same. The third

¹⁴ In fact, Parents contend that such an environment is the reason for Student’s perceived success at Crosland.

prong of *Dibuo* ultimately requires the finding of a FAPE denial. *Id.* I do not require any showing on the first two prongs of *Dibuo* at this point.

a. Speech, OT, and behavioral interventions

Parents again list speech, OT, and behavioral intervention as aids and services District failed to provide. They offered no argument, however, that is different from their assertion about the consideration of developmental needs. I have addressed this already in Section IV(B)(1)(b)(1).

b. The paraprofessional concerns

Parents reiterate a specific issue addressed at the hearing in the aids and services portion of their Brief. Parents again assert that the paraprofessional improperly collected data while performing services. [Parents' Br. at 36]. It is unclear why Parents believe this is improper. Every knowledgeable witness credibly testified that paraprofessionals and educators routinely collect data during class. It would raise more questions if they did not collect data at the time. In any event, Parents offered no evidence that this practice deterred anyone from providing services. Nor was there any evidence that the services were insufficient.

Parents also argue that the paraprofessional data did not show that services in a special classroom were necessary. [See *id.* at 37]. But this is a false construct built on a premise that District never suggested. The IEP team decided to provide more intensive special education instruction based on Student's academic progress, not based on paraprofessional data. The

paraprofessional input was considered, as it should have been. But it was just one piece of information the team considered.

Parents then raise two new arguments that contradict each other. First, Parents argue that the IEP “did not indicate what exactly the Paraprofessional’s role was,” while arguing in the next sentence that she “FAILED to provide the service as indicated on the IEP.” [Pet. Br. at 38]. How someone failed to provide something that was never defined is hard to understand. But the Record supports neither argument. To make it even more confusing, Parents use these two contradictory and unsupported premises to fashion another unsupported conclusion. Parents state that District should have continued the improper paraprofessional services that “FAILED” before changing placements. [*Id.*] At this point, Parents are just throwing every argument against the wall to see if anything sticks. Moreover, Parents’ argument at the time was not for more paraprofessional services. They wanted pushed-in special education instruction instead of instruction in a special classroom.

c. Parental participation challenges

1. Parents’ concerns and input

The first issue raised by Parents at the hearing is a general allegation that District failed to consider Parents’ concerns and inputs.¹⁵ “Parents and

¹⁵ In addition, they raise two specific parental participation allegations (consideration of evaluations and placement) are discussed below.

guardians play a significant role in the IEP process." *Schaffer*, 546 U.S. at 53.

"The core of the statute . . . is the cooperative process that it establishes between parents and schools." *Id.* (citing *Rowley*, 458 U.S. at 205-06); *AW ex rel. Wilson v. Fairfax Cnty. Sch. Bd.*, 372 F.3d 674, 678 (4th Cir. 2004). At the same time, courts have long held that Parents have no right to insist on a particular methodology, placement, or outcome under the guise of participating. "[T]he right conferred by the IDEA on parents to participate in the formulation of their child's IEP does not constitute a veto power over the IEP team's decisions." *AW v. Fairfax Cty. Sch. Bd.*, 372 F.3d 674, 683 n.10 (4th Cir. 2004) (citing *White v. Ascension Par. Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003)).

[T]here is a difference between parental involvement and parental consent. Congress certainly intended parents to be involved in the decisions regarding the education of their disabled child; nevertheless, this participation does not rise to the level of parental consent or a parental veto power absent an explicit statement by Congress. Put differently, the IDEA is designed to ensure parental participation in decisions regarding their disabled child, but it does not ordinarily require parental consent such that parents may usurp or otherwise hinder an LEA's authority to educate and discipline disabled children.

Fitzgerald v. Fairfax Cty. Sch. Bd., 556 F. Supp. 2d 543, 551 (E.D. Va. 2008).

Parents participated for many hours in the process leading to the development of the 2022-23 IEP. Meetings were not cut short because of District action. Two meetings (April 25 and Sept. 1) were stopped at the Mother's behest. Substantively, the IEP team updated present levels of performance, it

changed goals, and it changed how it delivered services after considering Parents' input including the evaluations they provided.

Parents conflate the right to participate with the right to bully others. Parents introduced only one of the meetings into evidence. [Pet. Exh. 42]. A review of the April meeting seriously undercuts Parents' participation narrative. During the meeting, District personnel repeatedly tried to de-escalate tensions after Parents and their prior advocate made accusations. For example, Mother declared that the IEP team "did not want to help" Student and instead "want[ed] her to fail." [Pet. Exh. 42 at 10:58-11:02]. She also repeatedly interrupted others, attacked District personnel, and even demanded the removal of the director of special education from the IEP team. [*Id.* at 11:57 – 12:30].

Parent Exhibit 42 also illustrates how Parents, not the District, approached the meeting with a singular objective and how Parents refused to discuss other points of view constructively. District spent much time discussing the expectations behind Parents' request for a one-to-one instructor and explaining how it would not necessarily lead to the result Parents wanted. But Parents never wavered from their initial position.

The notion that District wanted to limit parental input is further undercut by District's decision to obtain an IEP team facilitator. Bringing in a third party to ensure the ability of everyone to participate would make no sense if District did not welcome constructive input. Likewise, District delayed implementation of any proposed changes so Parents could observe the class and become better

informed of Student's situation. That is also a form of parental involvement that District initiated. Further, the IEP meetings continued hour after hour, day after day, and even month after month. That is uncommon where an LEA is looking to suppress Parental input.

Parents' post-hearing arguments related to input are based on speculation, inadmissible testimony, and purported views of an attorney who never testified. [*E.g.*, Parent's Brief at 8 ("The district did not listen to understand, they listened to respond with predetermined answers."); *id.* at 10-11; *id.* at 16 (criticizing an evaluator for "having bias for aligning their results with the district rather than the child")].

Parents have proven only that District did not accede to their inflexible demands. That is not what parental participation requires. District provided opportunities for input and made changes based on constructive input. Parents have not proven any general violation of IDEA's requirement that LEAs involve parents in decision-making.

2. Consideration of outside independent evaluations

Parents contend that District failed to consider: (1) the speech evaluation; and (2) an audiological report they provided in February. [Pet. Exh. 3-5].

The Fourth Circuit has construed failure to consider independent evaluations in the context of parental participation claims. In *Dibuo*, the court illustrated situations in which the failure to consider outside evaluations can ripen into a substantive violation:

We have no doubt that a procedural violation of the IDEA (or one of its implementing regulations) that causes interference with the parents' ability to participate in the development of their child's IEP will often actually interfere with the provision of a FAPE to that child. For example, if: (1) the school district members of an IEP team refuse to consider the private evaluations offered by the parents of a deaf child establishing that their child needs to be taught by a teacher with the ability to communicate in sign language in order for the child to receive a FAPE, (2) contrary evidence is insufficient to rebut the conclusions of the private evaluations on the same point, and (3) the IEP ultimately does not provide for the child to be taught by such a teacher, the school district's refusal to place the child in a classroom with the special teacher no doubt actually interferes with the provision of a FAPE to that child. But often is not the same as always. For example, when a presumably correct finding is made that the same disabled child, under the applicable standards of the IDEA, did not need to be taught by a teacher with the ability to communicate in sign language in order to receive a FAPE, the refusal to consider the private evaluations cannot be said to have actually interfered with the provision of a FAPE to that child.

Dibuo v. Bd. of Educ., 309 F.3d 184, 191 (4th Cir. 2002).

Although the *Dibuo* Court did not establish any kind of test, I have reviewed its analysis as it would apply to these facts and find as follows:

a. Whether district members of an IEP team refused to consider the recommendation for services contained in private evaluations

District did not refuse consideration of any recommendation Parents provided. There is no basis for Parents' claim that District failed to consider either report. District's speech language pathologist explained how the IEP team incorporated recommendations for auditory treatment objectives [Pet. Exh. 4 at 6 ¶ 3(a)-(c), (d)], as well as the language objectives [*id.* at 7 ¶ 5]. The IEP team adopted the evaluation's diagnosis of auditory processing disorder as a

secondary disability. [*Supra* n. 10; see also Pet. Exh. 7 at 1; Pet. Exh. 6 at 2 (discussing audiologist's concerns about background noise)].

The IEP team also considered the audiology report, had Dr. Block look into concerns, and conducted a separate meeting to discuss the issues. [Pet. Exh. 5; Dist. Exh. 7; Pet. Exh. 13].

b. Whether contrary evidence is insufficient to rebut the conclusions of the private evaluations on the same point

District never sought to contradict the evaluations Parents presented. The only “contrary evidence” theory would be differences in the audiologist’s recommendation for an FM device, which District did not accept based on Dr. Block’s analysis. The primary issue was the ambient noise levels caused by the school’s HVAC system. [See Pet. Exh. 10 at 3]. District repaired the system, and the witnesses confirmed that the noise level dropped noticeably.

Parents still spent a long time questioning witnesses about why District did not provide Student with an FM device, and they continue that argument in their post-hearing brief. [Pet. Br. at 18]. There is no evidence that Student has *ever* needed or has used such a device, either before or after District repaired the HVAC system.¹⁶

¹⁶ Parents also continue to complain that Dr. Block’s notes are not on letterhead and do not contain a signature. [Pet. Br. at 18]. This is yet another example of not seeing the forest for the trees. It also typifies the time wasted on frivolous issues. In addition to pointless questions, Parents prolonged the hearing by not even having questions ready for witnesses they called. The printed transcript cannot reflect the amount of time between questions when Parent’s side held discussions, passed notes,

c. Whether the IEP team's rejection of the private evaluation's recommendation interfered with the provision of a FAPE to Student.

I do not consider this issue to be much of a factor because, as noted above, District did not reject any evaluation.

3. Parental input into placement

Over five days of testimony, there was ample evidence of Parents participating in the process and shared their view as to Student's placement. As

and apparently texted each other questions to ask. In many instances, Parents repeated issues already established and points not in contention. At several points, I had to exercise my discretion to limit questioning. *A.M. v. District of Columbia*, 933 F. Supp. 2d 193, 206-07 (D.D.C. 2013) (rejecting bias claims because hearing officer interrupted parent and redirected testimony to relevant issues). I did so only after warnings and repeated admonishments about wasting time and asking pointless questions. Again, much time was spent between questions coming up with the next question that often had nothing to do with an issue in dispute, questions on issues that had already been covered, or requests that witnesses read portions documentation about things with which they were not involved. For example, during the reconvened testimony of the resource teacher, Father continued to question her for hours on issues in which she was not involved. This included requests to have her read documents already admitted. Again, there was no effort to limit questions to what the witness knew. Father ignored my repeated admonitions. After I imposed a final 25-minute time limit, Father continued to waste time asking questions just to ask questions until the time ran out. What is telling about this approach is that Father stated before the reconvened testimony that he did not even need to question the witness if District would stipulate to the admission of undisclosed exhibits. But then Parents questioned the witness for hours on matters having nothing to do with any such exhibits. I also limited Parents' questioning in one instance after establishing that they could not articulate what *additional* information they needed. When questioning became protracted, pointless, and repetitive, I questioned Parents as to the need to continue. Parents would argue that they had more questions, but they would not identify even the topics to which the questions relate. It became clear to me that, just as they raise arguments to argue, Parents were asking questions just to keep asking questions.

discussed above, the parties' disagreements explain why Parents submitted the DPR. But they do not self-prove any kind of parental input violation.

4. None of Districts' actions could rise to the level of a substantive violation

Even if District potentially failed to permit input at some point, any such deficiency would not warrant the relief Parents seek. Parental input claims are analyzed as procedural violations. *R.F.*, 919 F.3d at 249. As discussed above, 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). Parents offered no evidence to support a finding on any of the three prongs.

d. Conclusion as to first prong

Parents have not proven that the proposed IEP for 2022-23 did not make a FAPE available to Student.

2. Second Prong of *Burlington-Carter*: Appropriateness of the private placement issues

The determination that Parents failed to prove a denial of FAPE is dispositive. 20 U.S.C. § 1412 (a)(10)(C)(ii) (permitting a reimbursement remedy only if the "hearing officer finds that the [LEA] had not made a [FAPE] available to the child in a timely manner prior to that enrollment."). I will nonetheless provide findings on the second prong of *Burlington-Carter*.

Parents contend that the services provided by District denied FAPE because District did not provide enough of them in a general education environment. Yet Parents extol the value of Crosland even though Student is in a classroom that, in public schools, would be characterized as a special, or “self-contained,” classroom. After the Crosland school director testified about its program, District’s special education teacher testified that the descriptions of Crosland reminded her of District’s special classroom. I agree.

a. Student’s goals at Crosland

Crosland developed few specific goals for 2022-23. [Pet. Exh. 34 at 1].

Most are general and do not appear to reflect Student’s individual needs:

- Reduce math anxiety; build confidence with frequent review and practice
- Build number sense and place value identification
- Build mental math skills to easily add and subtract
- Make progress with reading fluency
- Learn to differentiate syllable types
- Use Orton strategies for spelling (tapping, syllabication)
- Write in complete sentences and use correct punctuation
- Follow a graphic organizer for writing paragraphs

After a year, Crosland developed seven specific goals for 2023-24. The three reading goals were:

- [D]ecode three and four syllable words
- [S]pell words with vowel combinations and silent letters

- [C]omprehend reading material with drawing conclusions, recalling details, and making inferences.

There were two writing goals:

- [I]ndependently write a paragraph with a topic sentence that includes at least 5 sentences.
- [I]ndependently identify nouns, verbs, and adjectives.

Finally, Crosland developed two math goals:

- [I]dentify digital or analog clocks that display the same time that is shown on the other type of clock, to the nearest five minutes. She will read analog clocks to the nearest half hour, five minutes, and minute.
- [K]now her complete multiplication tables. . . . [U]nderstand the relationship between multiplication and division and be able to divide basic facts.

Crosland did not document any goals for (1) behavioral; (2) speech/language; or (3) social. Further, many of Crosland's goals are not measurable. For example, they do not set standards for accuracy or identify the number of trials. Nor do they set standards by time (e.g., words per minute). They also do not identify such things as the text level used to assess progress.

Crosland's director did not dispute that the goals align with second- and third-grade standards in South Carolina. She did not know what grade level test was used to measure Student's reading performance. The data accessible showed that Student performed at the third and fourth-grade levels. None of the current instruction is on grade level.

b. Student's progress at Crosland

The evidence of Student's progress at Crosland is murky and mixed. On direct examination, Crosland's director painted a rather rosy picture. On cross, however, District established that the director was not directly involved in the services she testified about or in developing Student's educational management plans (EMPs). Yet she portrayed a remarkable turnaround in which Student now thrives and succeeds where she once struggled. On cross, she resisted and claimed a lack of knowledge regarding measurable results, which is inconsistent with her professed knowledge of Student. Further, her purported estimate of Student's performance in measured areas was not even close when she finally relented and disclosed the numbers.¹⁷

Crosland witnesses testified to a vast improvement compared to Student's withdrawn nature when she began in the Fall of 2022. Student was withdrawn when she started at Crosland. That is understandable given the drastic change in scenery where every setting and person is new. But that timeframe is not a proper baseline for measuring Student's subsequent social or emotional progress because that was not how she acted at Orchard Park.

¹⁷ Crosland's former student support specialist was more credible. She did establish improvement in executive function and social skills. She candidly acknowledged, however, that she was not involved in Student's academics.

The Crosland witnesses testified to significant improvements in Student's socialization since enrollment. Again, this evidence cuts both ways. Student is two years older, as she would be if she remained with District. Likewise, even the Crosland witnesses attributed their setting to Student's ability to open up. But that setting does sound much like the one proposed by District. Some of her progress in social areas can be attributed to maturation and being educated with peers, which District was proposing all along.

Academically, Student is still several years behind non-disabled age peers. Her Measures of Academic Progress (MAP) scores place her within the first percentile in language usage, reading, and math. She still struggles in the same academic areas.

There are serious questions about the academic rigor of Crosland's program. The only real evidence of Crosland's academic program at the time of placement is found in the initial EMP. [Pet. Exh. 34]. As discussed above, the goals for 2022-23 are cryptic at best and do not appear to account for anything in Student's IEPs.

I recognize that private schools need not develop IEPs or meet the requirements imposed on LEAs. But the EMPs are all we have for evidence of what occurred in the Crosland classroom.¹⁸

¹⁸ I accord little weight to raw grades. Without information as to how they were calculated, or even as to how grades are distributed, they provide no usable information in terms of achievement vis-à-vis goals and objectives. That is particularly

Again, Parents bear the burden of proof. There is insufficient proof in terms of the academics or how they were designed to meet Student's individual needs. Thus, Parents failed to carry their burden of proving the second prong of *Burlington-Carter*.

c. Expenses

The lack of evidence of academics is not Parents' only problem. Both the statute and *Burlington-Carter* caselaw require Parents to show that expenses incurred are reasonable. 20 U.S.C. § 1412 (a)(10)(C)(iii)(III) (noting that the "cost of reimbursement . . . may be reduced or denied . . . upon a judicial finding of unreasonableness with respect to actions taken by the parents"); *Carter*, 510 U.S. at 16 ("Total reimbursement will not be appropriate if . . . the cost of the private education was unreasonable.").

Parents introduced no evidence of expenses. Accordingly, they have failed to prove that any expenses are reasonable. For this separate and independent reason, I find that Parents have not met their burden of proof on the second prong of *Burlington-Carter*.

d. Conclusion as to second prong

Parents have not met their burden of proof on the second prong of *Burlington-Carter*.

so here because Parents introduced little information about instruction content at Crosland.

V. Conclusion

For all these reasons, Parents have not met their burden of showing an entitlement to reimbursement for private school. They did not carry their burden of proof on the first prong of *Burlington-Carter*. As to the second prong, they neither proved the propriety of the private placement nor that there were expenses to analyze for reasonableness. For each of these reasons, the request for reimbursement is denied. Nor is other relief available as Parents did not establish an IDEA violation.

VI. Notice of Appeal Process¹⁹

Any party may appeal this ruling. A party seeking to appeal this ruling must do so **in writing** and **within ten 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



Brian P. Murphy
Local Due Process Hearing Officer

Dated November 1, 2024

¹⁹ I will not accept, read, or consider any further argument about the merits on this matter unless it is remanded to me by the SRO or the District Court. I will not construe any email, letter, or other written communication 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.