

**INDIVIDUALS WITH DISABILITIES EDUCATION ACT
LOCAL DUE PROCESS HEARING**

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF YORK	)	
	)	
In the matter of:	)	BEFORE MONICA R. BOHLEN
	)	LOCAL DUE PROCESS HEARING OFFICER
A.C.B. and K.C., Sr. on behalf of K.C., Jr.,	)	
	)	
Petitioners,	)	
v.	)	<u>DUE PROCESS HEARING</u>
	)	<u>DECISION and ORDER</u>
York County School District Four (Fort Mill),	)	
	)	
Respondent.	)	
	)	

Parties

Petitioners: A.C. B. and K.C., Sr. on behalf of K.C.

Petitioners' Representative: *Pro se*

Respondent: The Fort Mill School District

Respondent's Representative: David T. Duff, Esq.
 Meredith L. Seibert, Esq.
 Duff Freeman Lyon
 P.O. Box 1486
 Columbia, SC 29202

Hearing Dates: May 2, May 3 and May 4, 2022

Decision Date: May 19, 2022

Case Background/Procedural History

This matter is before me pursuant to a request I received from the Respondent (District) that I serve as an independent hearing officer (LHO) in this matter. The first Due Process Hearing Request (Complaint 1) was filed by Petitioners (“Parents,” “Mother” or “Father”) on March 7, 2022, under the Individuals with Disabilities Education Act (IDEA), and served on the District on the same day. On March 9, 2022, the South Carolina Department of Education (SCDE) sent Parents a copy of their Procedural Safeguards: Resolution Meetings and Due Process Hearings and a document on resolution meetings. The District confirmed my appointment by email on March 11, 2022.

A second Due Process Hearing Request (Complaint 2) was filed by Petitioners on March 14, 2022 under IDEA, and served on the District on the same day. On March 17, 2022, the District provided Parents its Response to Complaint 1. On March 24, 2022, the District provided Parents its Response to Complaint 2.

The District requested the LHO to consolidate these two complaints. Parents filed an objection to the request to consolidate on March 21, 2022. After considering the District’s request and the Parents’ objection, the request to consolidate was granted. An Order consolidating the two complaints and adjusting the timelines to commence on March 14, 2022 was issued on March 23, 2022.

In its Responses to both Complaints, the District requested dismissal of all three claims in Complaint 1, and certain claims in Complaint 2.

A Preliminary Scheduling Order was issued on March 30, 2022, advising parties of the commencement of the 45- day timeline on April 14, 2022, unless one of certain events occurred that were outlined in the Order. The parties held one or more Resolution Meetings on both complaints. The parties reconvened on March 28, 2022, for a final resolution meeting, but were still unable to reach a mutually-agreed upon resolution of the matter. Parents and the District signed the “no resolution agreement” on April 4, 2022.

An initial telephonic pre-hearing conference was scheduled for April 7, 2022, by agreement of the parties, and the parties were provided a dial-in number. Parents did not participate in the conference call; only District counsel and the District representative participated. After the 47-minute conference call concluded, Mother emailed that she expected that someone would call her.

During the April 7, 2022, conference, dates for the due process hearing, for the exchange of exhibits and witness lists, and for the telephonic Pre-hearing Conference were scheduled. By the Scheduling Order dated April 7, 2022, the exchange of exhibits and witness lists was set for April 22, 2022, the telephonic Pre-hearing Conference was scheduled for April 25, 2022, and the due process hearing was scheduled for May 2-4, 2022. In addition, Parents were given an opportunity to file a response by April 13, 2022, to the District’s request to dismiss the three claims in Complaint 1 and three of the claims in Complaint 2. The timeline for the due process decision was set at May 19, 2022.

Parents filed their Response to the District's dismissal requests, which included a Motion for Clarification. In their Motion, Parents accepted the start date of the hearing on May 2, 2022, but objected that the hearing was only scheduled for three days, asserting that the dates of May 5 and May 6 should be left open. This Motion was considered and the request for additional hearing days was denied.

An Order was issued on April 21, 2022, dismissing the three claims in Complaint 1 and one of the claims in Complaint 2. This Order was subsequently amended on April 27, 2022 after the Pre-Hearing Conference. The Amended Order dismissed all three claims in Complaint 1, and one of the Parents' claims in Complaint 2.

The telephonic Pre-hearing Conference was held on April 25, 2022. Mother, the district representative and District counsel attended. Mother was permitted to tape the conference for her own use in the case. Issues were discussed about the exchange of exhibits. Mother expected electronic documents due to negotiations about that between the parties. Mother was overruled, as no agreement had been reached that would modify the Scheduling Order. Mother complained that the District wasn't ready to exchange at 4:30 p.m., as the District's counsel's email indicated, but District exhibits were available by 5:00 p.m., the time set on the Scheduling Order. The District copied all of Parents' exhibits as Mother requested. As a result of a discussion of the hearing issues, the District asked for time to amend its witness list to add one or two witnesses. Mother wanted additional time for additional documents. Issues were discussed about the order of the hearing and allocation of time to be split between the parties. Mother objected to any limitation on her presentation of her case. Mother also identified the first witness she planned to call, a District witness, and announced she would take up the whole day with that witness. Mother was cautioned by the LHO that she could be using about two-thirds of her allotted case time. All rulings were incorporated in the Amended Pre-hearing Conference Order.

Parents filed a number of motions, including a Motion for Recusal of the LHO on April 21, 2022. Subsequently, Parents also filed a state complaint with South Carolina Department of Education (SCDE). This proceeding did not postpone the due process hearing. This Motion was considered and denied on April 28, 2022. (Included in LHO Exhibit 5).

Below is a list of the pleadings and orders filed in this matter (LHO Exhibit 5):

- | | |
|--|----------------|
| 1. Due Process Request/Complaint | March 7, 2022 |
| 2. Letter to Parents from SCDE | March 9, 2022 |
| 3. Letter to District from SCDE | March 9, 2022 |
| 4. Due Process Request/Complaint | March 14, 2022 |
| 5. Response to Complaint 1 | March 17, 2022 |
| 6. Parents' Disciplinary Complaint | March 17, 2022 |
| 7. Parents' Resolution Meeting Conclusions | March 21, 2022 |
| 8. Parents' Objection to Consolidation | March 21, 2022 |
| 9. Order Granting Request to Consolidate | March 23, 2022 |
| 10. Parents' Objection to Order | March 23, 2022 |
| 11. Response to Complaint 2 | March 24, 2022 |

12. Parents' Resolution Meeting Conclusions	March 28, 2022
13. Preliminary Scheduling Order	March 30, 2022
14. Parents' Resolution Not Possible	March 31, 2022
15. Parents' Resolution Agreement (No Agreement)	April 4, 2022
16. Scheduling Order	April 7, 2022
17. Parents' Motion for Clarification and Response	April 13, 2022
18. Parents' Motion for Clarification and Response	April 14, 2022
19. Parents' Motion for No Contact	April 19, 2022
20. Parents' Objection to Witness List, etc.	April 19, 2022
21. Order on the District's Request to Dismiss Claims	April 21, 2022
22. Parents' Motion for Recusal/Objection to Order	April 22, 2022
23. Order on Parents' Motion for No Contact, etc.	April 22, 2022
24. Order on Parents' Motion to Clarify	April 22, 2022
25. Pre-Hearing Conference Order	April 25, 2022
26. Notice of Hearing	April 25, 2022
27. Amended Pre-Hearing Conference Order	April 25, 2022
28. Amended Order District's Request to Dismiss Claims	April 27, 2022
29. Order on the Parents' Motion for Recusal	April 28, 2022

Hearing Procedures

A hearing was convened on May 2, 2022, at the Fort Mill School District administration building, located at 2233 Deerfield Drive in Fort Mill, South Carolina. A final pre-hearing conference was held to discuss the hearing procedure, clarification of the issues, attendance by virtual witnesses, the handling of exhibits, and other preliminary matters. Mother, both District counsel and the District representative were present on all hearing dates. Mother repeated her objection to any limitation on the time for her presentation of her case, which was set in the Pre-hearing Conference Order. The LHO explained that, under IDEA's short timelines, hearing officers had discretion to manage the due process hearing in order to comply with the 45-day timeline for the decision. Neither party requested any extension of the timeline. The hearing was scheduled for three days total. Each party would have one-half of the available hearing time to present their case. Mother disagreed that the LHO had any discretion to manage the hearing, and argued that she could take as much time as she wanted.

The hearing was open. K.C. ("Student") did not attend the hearing. Both parties were afforded all due process rights. Both parties gave opening statements, Mother then proceeded to call her witnesses, followed by the District calling its remaining witnesses. On May 3, 2022, the parties agreed that Mother would not call Superintendent Epps or any other witness if the District would permit her to call four specific witnesses the following morning, mindful that time constraints would apply. The remaining time would be reserved for District witnesses that had not been called by Mother.

After the parties presented their cases, each party gave their closing arguments. Mother departed the hearing during the District's closing argument. The hearing was adjourned at 5:30

p.m. on May 4, 2022. The hearing time for each party to present their case was calculated. Parents used 70% of the available time over the three-day hearing and the District utilized 30%.

After the hearing, by email, Mother elected to receive a copy of the Decision electronically and specified how the electronic version was to be created.

Issues

The issues in the hearing, as agreed in the pre-hearing conference, modified at the beginning of the hearing, and modified during the hearing (Issue 4), were:

1. ISSUE #1 – Whether the District failed to provide Student a FAPE in the LRE between March 15, 2020 to June 15, 2020 due to building closures in response to COVID.
2. ISSUE #2 – Whether the District failed to provide Student a FAPE during the Summers of 2020 and 2021 by failing to provide ESY and services requested.
3. ISSUE #3 – Whether the District failed to provide Student equal access to non-academic services, including transportation, from March 2020 until March 14, 2022.
4. ISSUE #4 - Whether the District failed to provide physical education to Student from March 2020 until March 14, 2022. Mother stipulated that this issue did not include the 2020-2021 school year.

Witnesses

Testifying at the hearing were: [REDACTED] the Coordinator of Special Education; the Principal at River Trails Elementary School; the Assistant Superintendent of Student Services; the Executive Director of Special Services; the Behavior Interventionist; the Resource Teacher; an Advocate to Parents and Schools; Father; Student's Maternal Grandfather and Educator; Student's Maternal Grandmother and Educator; the Principal at Doby's Bridge Elementary School; the Physical Education Teacher; the Resource/Inclusion Teacher; the Principal at Orchard Park Elementary School and the Routing Coordinator.

Findings of Fact

Based on the relevant testimony and evidence presented at the hearing, the hearing officer makes the following findings of fact, including facts outside of the two-year limitations period, which are included for historical background only:

1. Student was ten years old as of the time of the hearing. He was receiving services in the home pursuant to an Order issued by a State Review Officer on December 8, 2021. Parents

filed a previous due process request in August of 2021.¹ Parents appealed the decision of the LHO in that case. The SRO issued a decision, affirming in part and reversing in part, the LHO. The SRO also retained jurisdiction in the case until such time as a new IEP was determined. Parents then appealed the ruling of the SRO, filed in the Federal District Court in Charlotte, N. Carolina.

2. Student has had an IEP for most of his enrollment in the District. Student is eligible for special education services due to Multiple Disabilities. Prior to November 2020, Student's primary area of disability was Autism Spectrum Disorder (ASD), and Other Health Impairment (OHI), specifically a medical diagnosis of ADHD. Academically, Student was average in performance.

2019-2020 School Year

3. During the 2019-2020 school year, Student, who was eight years old, attended third grade, mostly in General Education, with minimal time in the Special Education Room (Resource Service-Delivery Model). He received specially-designed instruction pursuant to an IEP, with effective dates of November 7, 2019, to November 5, 2020, following a re-evaluation in October, 2019. The IEP stated five goals in the areas of Written Expression, Behavior (two goals), and Social Skills (two goals). Student's main issues were in the social, behavioral, and emotional areas. The IEP provided Student with certain accommodations and related services to work on Student's goals, consisting of the following direct services:

1. 160 minutes quarterly of social/emotional services by a Behavior Specialist in the Behavior Counseling room;
2. 120 minutes quarterly of behavior services by a Behavior Specialist in the General Education Classroom;
3. 15 minutes weekly of specially-designed instruction in behavior by the Special Education Teacher in the Resource Room;
4. 45 minutes weekly in Writing by the Special Education Teacher in the Resource Room; and
5. 90 minutes weekly in Writing by the Special Education Teacher in the General Education Classroom. Indirect services of these providers with each other, as well as consultations with an Occupational Therapist (OT), were also specified. A Functional Behavioral Assessment (FBA) was completed in October and a Behavioral Intervention Plan (BIP) was created. Student's toileting needs were addressed in an accommodation provided by the school nurse to support his toileting schedule and needs, noting Student continued to wear pull-ups.

4. At the November, 2019 IEP meeting, Parents requested Extended School Year (ESY) for Student for the summer of 2020. After reviewing Student's data and the criteria for ESY eligibility, the IEP team determined that Student did not meet the requirements for ESY, concluding that significant regression was not anticipated if ESY services were not provided, the nature and severity of his disability would not impact the maintenance of his attained skills, he was not at a critical point of instruction and there were no special

¹ Parents raised certain issues in this case that were related to the previous complaint. Those were dismissed pursuant to the Amended Order of Dismissal.

circumstances. The team agreed that ESY could be discussed later in the year, if needed. A prior written notice (PWN) was sent by the District to Parents the same day. This PWN confirmed that Parents had been given their annual copy of the Notice of Procedural Safeguards.

5. Student made much progress on his IEP goals during the 2019-2020 school year, as well as academically in his General Education classes. As of March 15, 2022, Student was well into his third quarter and had mastered Goal 2 (behavior) of his IEP and was making satisfactory progress on his other two behavior goals.

6. The 2019-2020 school year was interrupted by the occurrence of the Covid-19 pandemic and its unprecedented effect on the education of all children, including children with disabilities, here and around the country and the world. Judicial notice was taken of the fact that on March 15, 2020, Governor Henry McMaster (“McMaster”) issued an Order, in response to the growing concern about the Covid-19 pandemic, to close all South Carolina public schools to in-person education, effective the following day, March 16, 2020. McMaster’s Order was designed to protect the health, safety and well-being of students and school staff. McMaster subsequently extended this Order throughout the 2019-2020 school year, concluding with his Order of April 27, 2020, that allowed for flexibility in the last two weeks of school.

7. The District scrambled to switch to virtual programming for educating students and implementing IEPs. The District began distance learning for all students on March 18, 2020. The District informed Parents throughout the closure about the District’s offerings to provide IEP services to its students with disabilities to the greatest extent possible under the closure circumstances, including a letter, dated April 2, 2020, reinforcing that “it is extremely important for families and schools to collaborate and communicate regarding students with disabilities.”

8. The District created a Distance Learning Plan (Plan) for Student, individualized to his particular IEP, including continuing the accommodations. The District offered Student services with his General Education Teacher, his Resource Teacher and his Behavior Interventionist, among others. Phone and email contact to discuss and inform Parents about the Plan was initiated on March 17, 2020. The District also provided Student Heavy Work Activities from the OT on March 25, 2020, and ELA/Math and Physical Education via Choiceboards. Student could pick his activity and Student was expected to do those on his own. Student participated in regular Physical Education prior to the school closure.

9. The District’s Plan had three phases due to the fact that Districts did not know at the outset how long the closure would last. Phase I lasted about 10 days before the Spring Break, Phase II was implemented on April 14, 2020 and Phase III on May 8, 2020. During Phase I, Parents were given a choice between receiving teacher-prepared paper packets, which were to be completed by Student, or virtual services with teachers and related services providers. Parents chose paper packets. Parents picked up the Phase I and Phase II teacher-prepared paper packets, but did not return the completed packets. The Resource Teacher expected the Student to do the work in the paper packets himself. The Resource Teacher emailed Parents about picking up the

Phase III packet in April, 2020, but Parents did not pick that up.

10. The Resource Teacher and Physical Education Teacher also established office hours and notified Parents of same. Parents and students could contact the Resource Teacher from 8:00 a.m. to 3:00 p.m. Monday through Friday and the Physical Education Teacher during his daily hours, 8:00 a.m. to 11:00 a.m. The School Nurse, the Counselor, and other staff made themselves available during school hours for Parents' questions/concerns through various virtual mediums.

11. At the time of the closure, Father, who was a police officer, was deemed an essential worker. Father had no educational experience, and deferred to Mother on educational matters. There was no evidence about Mother's work, if any, during the school closures.

12. Parents' compliance with the Plan was sporadic during the rest of the school year. Student attended only one session with the Resource Teacher, on March 25, 2022 and did not attend again. At that session, Mother advised the Resource Teacher she was adding additional work, teaching Student Spanish. The Resource Teacher emailed the on-line class schedule to Parents the next day and received a response that Student would attend, but he did not. Student and Mother attended his first session with the Behavior Interventionist on March 26, 2020. The District worked with Parents on scheduling issues throughout the closure. Weekly sessions for the most part continued with the Behavior Interventionist, except for Spring Break week in April, 2020, until the end of the school year. Father said Student enjoyed his sessions with the Behavior Interventionist. The Behavior Interventionist continued all indirect IEP services to Student (the teacher consultations). Student attended some sessions of Google Meets with his General Education Teacher. The General Education Teacher sent numerous emails to Parents about Student's lack of attendance at virtual sessions, their lack of returning of his work, and how these shortfalls would be counted as unexcused absences. Father joined at least one online meeting on April 2.

13. During the school closure, Mother informed the Behavior Interventionist on April 17, 2020, that she and Student had moved and that Student would be with Father through the following Wednesday. Mother also stated that she requested from the Principal that Student repeat third grade the following year. After April 17, 2020, all notes on the Behavior Interventionist log about contacts with Parents refer to Student's Father.

14. The Behavior Interventionist noted Student's lack of attendance with the Resource Teacher's sessions on her log and his failure to return the paper packets. On May 26, 2020, the Behavior Interventionist reminded Father to turn in all paper packets that week. Paper packets were not turned in. Due to this, the District was unable to obtain required data to determine Student's progress on goals.

15. The Resource Teacher emailed the written Plan to Parents on April 21, 2020, explaining that this is the plan that had been implemented during the school closure. Stated on the Plan was that special education, supports, accommodations and related services will be provided “to the greatest extent possible,” as the District had been advised by the U.S. Department of Education. The Plan also indicated that once Student returns to school the District will provide special education and related services according to Student’s IEP.

16. On April 28, 2020, Mother emailed the Resource Teacher that she had concerns about Student’s lack of social interaction and regression in his toileting. Mother requested as many sessions of summer school as possible and that Student repeat the third grade. The November, 2019 IEP was still in effect. The Resource Teacher responded that, per the state and federal guidelines, students that are eligible for ESY are eligible based on data collected prior to the school closure. She explained that because Student was showing satisfactory progress or mastery of his goals before the closure, he was not eligible for ESY during the 2020 summer. The Resource Teacher further explained that based on the data that would be collected about Student when school resumed, the IEP team will determine if supplemental or compensatory services were warranted. The Resource Teacher also noted in her response Student was making such great progress in toileting before the school closure. Toileting was mentioned on Student’s November, 2019 IEP as an Accommodation only, that he would have scheduled bathroom breaks and indirect services from the School Nurse.

2020-2021 School Year

17. During the 2020-2021 school year, Student was able to transition back to school. The District granted Mother’s request that Student repeat the third grade. The IEP team met virtually on August 20, 2020, to discuss Parents’ concerns about Student’s regression. The team decided to reconvene in early September virtually after collecting data, to review Parents’ request for increased services.² At Parents’ request, the virtual team meeting on September 4, 2020 or a portion of the meeting was permitted to be videotaped. Mother showed an approximately 14-minute clip of the videotape during the hearing. The videotape showed Mother and her mother yelling and bullying the District attendees, who could hardly get a word in during the clip. During the meeting, but not shown in the clip, Mother reported that Student was going back and forth to Father’s residence and toileting was inconsistent in the two homes. The District reported extensively on the data that had been gathered by staff during the first week of school, indicating Student was making a very smooth transition to school that year, including in toileting. Due to Mother’s concerns, the team decided to increase the IEP writing service on his IEP from 45 minutes weekly to 150 minutes weekly (90 minutes inside the General Education Classroom and 60 in the Resource Room). Based on the OT data, the team did not agree to increase the OT services. A PWN was sent to Parents.

² Parents also raised objections to the District’s proposed phase-in schedule for Student. This is not an issue of this hearing and will not be addressed.

18. The IEP team met again virtually a couple of weeks later, at Mother's request, to review progress notes from Parents' outside provider of OT services. The team concluded that Student was being successful in the school environment with his current sensory supports and concluded the data did not support direct OT services for Student or an increase in his indirect OT services. A PWN was sent to Parents.

19. Student's IEP team met virtually on November 12, 2020, for the annual review of his IEP. Both parents participated. The effective dates of this IEP were November 16, 2020, through November 11, 2021. The IEP team changed Student's disability to Multiple Disabilities. The IEP identified Student's home and service school, based on Father's address.

20. A PWN was issued. Student was found ineligible for ESY based on recent data which indicated he was performing on grade level to slightly below grade level in the area of writing. Mother asked for assistance in connecting with a private ABA therapy provider and the Mental Health counselor recommended Thrive and agreed to work with Mother to facilitate that.

21. After Student and his class transferred to the new elementary school when it opened. Student's behavior regressed after the move. The IEP team met to conduct a special review of the IEP on March 29, 2021, to consider Mother's request for ESY, among other issues. The team decided Student was eligible for ESY from July 6, 2021 through July 22, 2021, based on his recent Classroom behavior which was reported to be 41% off-task. There was a discussion about summer camps at that meeting, but Parents did not request summer camps. Student was

2021-2022 School Year

22. Parents filed a Due Process Hearing Request/Complaint on August 19, 2021 concerning Student's placement at Orchard Park Elementary School. Parents appealed the decision of the LHO in that case. The SRO issued a decision on December 8, 2021, affirming in part and reversing in part, the LHO. This was followed by an Order dated December 10, 2021, clarifying her December 8, 2021, Order, in which the SRO ordered the District to provide Student with two hours weekly of home-based instruction and 30 minutes weekly of counseling. The District provides home services at Father's home because Mother has not lived in the District since August, 2020. The SRO retained jurisdiction in the case until such time as a new IEP was determined. Parents then appealed the ruling of the SRO, filed in the Federal District Court in Charlotte, N. Carolina on February 22, 2022. The SRO's retention of jurisdiction was transferred to the South Carolina Department of Education on March 2, 2022. An IEP meeting had not occurred as of the date of the hearing.

23. Parents participated in resolution sessions with the District after filing their Due Process Complaint. On September 3, 2021, during the resolution period, Parents emailed the District a Comprehensive Assessment of Student, completed on September 2, 2021, by a Brain Balance Achievement Center. Parents requested that the District provide this therapy. This request was

not proposed at an IEP team meeting. The District refused the request during the Resolution period, explaining that District staff were unable to find any peer-reviewed research supporting the approach. Staff did find research discrediting Brain Balance therapy. Ms. Grant offered to reconsider if Mother provided them with peer-reviewed research supporting therapy through Brain Balance. None has been furnished.

24. Student was enrolled at Orchard Park in the fourth grade. Five weeks into the 2021-2022 school year, Parents requested bus transportation for Student in September, 2021. Student had not yet attended school. The Principal called Mother on September 11, 2021, to ask if there was anything they could do to help to facilitate Student's attendance at school, including transportation. Mother informed him she was planning to drive Student to school on September 13, 2021. On September 13, Mother requested bus transportation for Student.

25. The Transportation Supervisor initially proposed a route that involved a 6:15 a.m. pick up and a 75-minute ride. Mother complained about both the time and duration of the bus trip. The Principal agreed that the 6:15 pick-up was very early and he worked with the Transportation Department to come up with an alternate solution. That was revised on September 15, 2021, with a temporary solution of a pick-up at 7:15 starting September 20, 2021. That would have been a 15-20 minute ride. Student's last day attending his assigned school was September 17, 2021. Student attended only four-and-a-half days. Parents drove him to school on those days. Parents decided not to return him to school after that. Mother emailed the Principal, informing him they were keeping Student at home. The District advised Parent on September 17, 2021, that transportation would no longer be provided due to Student's non-attendance and the District's limited bus resources. The District policy is to cancel transportation for any student if the student does not ride the bus.

26. After removing Student from school after September 17, Parents kept Student home without educational services from the District. The District contacted Mother about Student's unexcused absences, including by emails, informing her about the South Carolina Compulsory Attendance law, and instructing her to return Student to school, or inform the District what other arrangements have been made to address his educational needs. Parents refused to do either

27. The District provided bus transportation for any student residing more than a mile-and-a-half from the student's school. The District had 18,000 students. It was a very involved process to establish routes for the buses at the beginning of the school year and throughout the school year, as changes occurred due to the limited bus resources.

28. Parents requested bus transportation for Student again on November 13, 2021. Parents had no intention of sending Student to his newly assigned school, but believed the District still had a mandatory duty to send a bus, regardless of whether the Parents intended to utilize it. After receiving Parents' November request, the Assistant Superintendent of Student Services contacted the Director of Transportation again to arrange for bus transportation for Student.

This was difficult to arrange in November. The District had to utilize a Special Services bus to put the plan in place. This bus, Route 98, went to Father's home starting November 18, 2021. The bus driver waited 15 minutes and was told that Student would not be riding that day. The bus continued stopping at Father's home every school day until January 6, 2022. Logs were maintained with daily entries, showing the bus went to the stop a total of 19 days. Student did not ride the bus on any of these days. The District stopped as a result of an Order from the SRO in the prior case.

29. Student did not receive Physical Education after Parents unilaterally stopped sending Student to school. Physical Education was offered at the newly assigned school every fifth school day to all students. Had Student attended, he would have participated in Physical Education.

30. In December, 2021, Parents submitted several requests to the District, including to the Principal at the last assigned school to send Student to a summer residential Equestrian program in the mountains and to a winter camp for computer coding at "code ninjas in tega cay." These requests were not made in an IEP team meeting. After receipt of the SRO's clarification Order describing what the District was to provide as instruction at the Student's home and counseling services, pending the completion of an Independent Educational Evaluation (IEE) and the reconvening of the IEP team, Mother emailed to District personnel numerous requests for additional non-academic services, including related arts, health and physical education, and music lessons. The District responded that it would be implementing the services required by the SRO.

31. Parents had not, prior to the filing of their March 14, 2022, Complaint, requested ABA therapy.

Discussion

The issues stated earlier in this decision must be assessed in light of the evidence and testimony presented at the hearing, and by applying the existing pertinent IDEA law to the facts.

ISSUE #1 – Whether the District failed to provide Student a FAPE in the LRE between March 15, 2020 to June 15, 2020 due to building closures in response to COVID?

This issue arises from the unprecedented statewide closure of schools by McMaster, consistent with many other governors, during the Covid-19 pandemic. The United States Department of Education issued guidance about the school shutdowns in March, 2020, requiring school districts to ensure that, to the greatest extent possible, special education students were provided special education and related services identified in the Student's IEP. See *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease Outbreak*, 76 IDELR 77 (EDU 2020). Parents, like all parents, had to adjust to this unprecedented and abrupt school closure of having to care for their school-age children on a daily basis. This included teachers who were parents of minor children.

Parents' central argument is that the District violated Student's rights to a FAPE under IDEA because the education was not "free." Parents further argue that the District impermissibly put the burden on them to provide FAPE to their child, rather than to continue to offer in-person services in the schools. Implicit in their argument is a contention that the District should have violated McMaster's closure Order.

A free appropriate public education (FAPE) is required to be provided by states to all children with disabilities residing in the state. 20 U.S.C. §1412(A)(1)(a); 34 C.F.R. 300.17. FAPE for disabled children is provided pursuant to an IEP that provides special education and related services geared to the unique needs of the child that result from his disability. 20 U.S.C. §1412(a)(4). FAPE issues typically arise from a Parents' challenge to the IEP itself. This issue does not arise from objections to Student's IEP, but only its implementation during the Covid closures, which affected the LRE. The LRE was permissibly changed for Student, due to the unprecedented circumstances arising from McMaster's Order, which the District had to comply with.

Parents did not dispute that the District responded very quickly to implement a distance learning plan on March 18, 2020, to continue the educational services to Student, and all students, with teacher-prepared materials tailored to the individual student's IEP, via virtual or paper packets, during its Phase I. The initial week was understandably a transition period for the implementation of the District's distance learning plan. The District then continued to evolve to its Phase II and Phase III educational offerings. The District continued to offer specially-designed instruction and accommodations to Student tailored to his IEP. This was not disputed by Parents.

Early on in Phase I, Mother was involved in the distance learning plan. She chose paper packets and Parents picked up two of these packets, but did not pick up the third. Mother participated in the first session with the Behavior Interventionist and Student participated in most of the Behavior Interventionist's online sessions, but Parents undermined the provision of services by not ensuring that Student participated either in the available online sessions with his Resource Teacher and his General Education Teacher, or, at least, ensuring that all paper packets were picked up and completed and returned to the school so that the District could gather data and monitor Student's progress on his IEP goals.

There was insufficient evidence to explain why Student did not participate to the fullest extent during this closure period. Father was not credible in his explanation of what occurred with Student during the time he had him in his care, based on his demeanor, his lack of recall of many details about the closure period, and his seeming acquiescence in allowing Student to do whatever he wanted during the closure.

The only complaint Parents expressed to the District throughout the closure was on April 28, 2020, when Mother complained that Student's toileting and social skills had regressed. Parents attributed the regression in Student's toileting skills to inconsistencies with Student's toileting between the two homes of Mother and Father, and not any shortcomings from the Plan.

IDEA does not mandate that Parents participate in their child's education. IDEA only mandates what school districts must do. A Parent may participate in the process or choose not to participate. Parents failed to establish the District denied Student a FAPE in the LRE by failing to continue to provide in-person services for Student during the Covid closures. In its distance learning plan, despite enormous challenges, the District provided Student a FAPE. It offered Student a continuation of his General Education academic coursework, and implemented his IEP, including his accommodations to the greatest extent possible. District personnel worked diligently to make distance learning work, and to implement Student's IEP.

ISSUE #2 – Whether the District failed to provide Student a FAPE during the Summers of 2020 and 2021 by failing to provide ESY and services requested.

The District did not offer Student ESY during the Summer of 2020. It was not disputed that the IEP team decided at the time of Student's November, 2019 IEP that Student did not meet the requirements for ESY, concluding that significant regression was not anticipated if ESY services were not provided, the nature and severity of his disability would not impact the maintenance of his attained skills, he was not at a critical point of instruction, and there were no special circumstances.

The District contended that the 2020 ESY issue was time-barred because Parents would have had to file a due process request by November 19, 2021 to be timely. However, because the team agreed to reconsider the ESY issue later in the year, "if needed," the ESY issue was not time-barred.

On April 28, 2020, Mother inquired what the District had decided about ESY. She also requested sessions of summer school for Student for the Summer of 2020. The Resource Teacher responded that, per the state and federal guidelines, students that are eligible for ESY are eligible based on data collected prior to the school closure. Based on this directive, she explained that because Student was showing satisfactory progress or mastery of his goals before the closure, he was not eligible for ESY during the 2020 summer.

The federal and state directives to make ESY decisions based on the data collected before the closure was not a denial of FAPE, particularly in Student's case, where the determination that Student was not eligible for ESY was initially made in November, 2019, which would be reviewed later in the year, if needed. At that time, it is reasonable to infer that there was no expectation by any of the team about unforeseen events in March, 2020. Student made much progress up on his academics and IEP goals until the closure in March, 2020. After that there was very little data transmitted back to the Districts during the Covid closure, except what was obtained by the Behavior Interventionist, who was having successful weekly sessions with Student, and the one session with the Resource Teacher, and the few sessions with the General Education Teacher.

After receiving the Resource Teacher's response to her April 28, 2020, email, in response to the ESY request, but no mention of summer school, there was insufficient evidence that Parents' summer school request was distinct from the ESY request. Further, there was no

evidence that Parents followed up with the District to clarify their summer school request if Mother intended that as a separate request from the ESY request.

Based on the November, 2019 ESY determination by the team, and the directive from the state about how school districts should handle ESY requests during the closure period, and Student's progress before the closure, there was insufficient evidence that Student was eligible for ESY in 2020. The District did not deny Student a FAPE during the Summer of 2020.

During the summer of 2021, Parents do not dispute that the District offered Student ESY in the summer of 2021. They contend, instead, that the District denied them special requests, such as summer camps and equine therapy, including residential summer camps. These non-academic services and activities fall under Parents' third issue, and are considered below.

ISSUE #3 – Whether the District failed to provide Student equal access to non-academic services, including transportation, from March 2020 until March 14, 2022.

In their Complaint, Parents contend that the District denied them numerous services from March 2020, until March 14, 2022, specifically summer camps, residential summer programs for Autistic children, ABA therapy, equestrian therapy, OT, aquatic therapy, Brain Balance, transportation, and physical education, citing to 34 CFR 300.107. The District responds that most of these, except OT, relate to non-academic services, as Parents allege in their Complaint, and that IDEA only requires Districts to grant an equal opportunity to participate in these non-academic services. Further the District contends that Parents did not request any of these non-academic services in any IEP meeting, but, rather requested most of these only during resolution sessions that occurred after the filing of their first Complaint.

Student receives indirect OT services through his IEPs. Parents have not raised an issue in their Complaint related to Student's IEPs, other than during the Covid closure period, and, thus, it cannot be considered. Most of these requests are recreational activities that fall under the category of non-academic services. 34 CFR 300.107. This section requires school districts to provide nonacademic services and activities deemed appropriate and necessary by the student's IEP team, to afford children with disabilities an equal opportunity with non-disabled children for participation in those services and activities. To establish a violation of this section, Parents must show that they requested these services during an IEP meeting, that the IEP team determined any of them were appropriate and necessary, and that the District denied Student an equal opportunity afforded to non-disabled children to participate in these activities. 34 CFR 300.107(a).

As the factual findings indicate, there was insufficient evidence that Parents ever requested summer camps, ABA therapy, residential summer programs for Autistic children, equestrian therapy, aquatic therapy, or Brain Balance during an IEP meeting, that the IEP team determined any of them were appropriate and necessary, and that the District denied Student an equal opportunity afforded to non-disabled children to participate in these activities. Some of these were raised in the resolution sessions during the 2021-2022 school year. There has been no IEP meeting as of the date of the hearing.

Parents also included in their Complaint a claim for denial of transportation in the category of non-academic services. 34 C.F.R 300.107. Parents contend that they were denied transportation to school during the 2021-2022 school year, except for the 19 days that bus service was provided. Special transportation was not included in Student's relevant IEP.

Student's transportation issue was not an IEP issue, but was determined by the District's general busing guidelines, the same as it applied to non-disabled children. The District did not send out buses to students who were not attending school.

During the 2021-2022 school year, Student attended school at his new school only four-and-a-half days. Yet, Parents were able to convince the District's Department of Transportation to send a bus to Father's residence for 19 days during which time Student never got on the bus. Parents' assertion is frivolous and not within the scope of any IDEA right.

There was insufficient evidence that the District denied Student transportation during the 2021-2022 school year, or the previous two school years. On the contrary, the District provided Student transportation that non-disabled children would not receive under the same circumstances. Parents wasted limited District resources by causing buses to go to Father's home for 19 days.

ISSUE #4 - Whether the District failed to provide physical education to Student from March 2020, until March 14, 2022. At the hearing, Mother stipulated that this issue did not include the 2020-2021 school year.

This issue, as modified, encompasses two time periods: 1. the Covid closure period in 2020; and 2. the 2021-2022 school year. Under IDEA, Physical Education (PE) must be provided to children with disabilities, either specially designed if necessary or regular. 34 C.F.R 300.108(a). Children with disabilities must be afforded the opportunity to participate in the regular physical education program available to nondisabled children, with two exceptions that do not apply here. 34 C.F.R 300.108(b). Student participated in regular PE during the 2019-2020 school year.

During the Covid closure period, the District offered Student, PE in his Plan. All students in the District received this option in their Plans. This consisted of activities on teacher-prepared Choiceboards. Student was to choose his activity(ies), complete the activity(ies), and send the sheet back to his teacher in the packet. Further, Student and Parent could consult with the Physical Education Teacher during his daily office hours to check in and discuss any questions or concerns.

The basis of Parents' claim for the second time period, the current school year, concerns the time following the Parents' unilateral removal of Student from school and change of his LRE to home without any IEP team approval, or the specially-designed instruction that he was entitled to, pursuant to his IEP. After his removal, regular PE has been offered on a weekly basis at his new school but it required the attendance of the Student in order to partake of it.

Parents' assertion is frivolous and does not establish a denial of PE within the scope of any IDEA right.

There was insufficient evidence that the District failed to provide PE to Student during the Covid closure period in 2020 or during the 2021-2022 school year.

Conclusions of Law

1. Student is eligible for special education and related services under the Individuals with Disabilities Act ("IDEA"). 20 U.S.C. 1401, et seq.

2. Under IDEA, all eligible children are entitled to a free appropriate public education ("FAPE"). 20 U.S.C. 1412(a)(1)(a).

3. Since Parents are the party challenging the provision of FAPE, they have the burden to prove their contention by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

4. The due process complaint must allege a violation IDEA 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. 34 C.F.R 300.507(a).

5. There was insufficient evidence that the District failed to provide Student a FAPE in the LRE between March 15, 2020, and the end of the school year, due to building closures in response to Covid.

6. The District ensured that, to the greatest extent possible, Student was provided special education and related services, identified in the Student's IEP, in the LRE between March 15, 2020, and the end of the school year. See *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease Outbreak*, 76 IDELR 77 (EDU 2020).

7. There was insufficient evidence that the District denied Student a FAPE during the Summer of 2020 by failing to provide ESY and services requested.

8. There was insufficient evidence that the District denied Student a FAPE during the Summer of 2021 by failing to provide ESY and services requested.

9. There was insufficient evidence that the District denied Student an equal opportunity to participate in non-academic services, specifically recreational activities, from March 2020 until March 14, 2022. 34 C.F.R 300.107.

10. There was insufficient evidence that the District denied Student an equal opportunity for transportation during the 2021-2022 school year. 34 C.F.R 300.107.

11. There was insufficient evidence that the District failed to provide Physical Education to Student during the Covid closure period or during the 2021-2022 school year. 34 C.F.R 300.108.

IT IS SO ORDERED this 19th day of May, 2022.

NOTICE OF RIGHT TO APPEAL

The decision of the local due process hearing officer is a final order unless a party seeks a state-level review. Any party aggrieved by the hearing officer's decision has the right to appeal this decision within ten (10) calendar days of receipt of the written decision. Either party may appeal this ruling by writing a letter that includes the request to appeal to the South Carolina Department of Education, Office of General Counsel, 1429 Senate Street, Rutledge Building, Columbia, South Carolina 29201. The state-level review must be concluded and the written decision issued within thirty-calendar days from the date of receipt of the appeal.

/s/ Monica R. Bohlen
Monica R. Bohlen
Local Due Process Hearing Officer

