

FOR THE SOUTH CAROLINA DEPARTMENT OF EDUCATION

York County School District Four (Fort Mill),
Appellee.

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1. Procedural Background

I incorporate the procedural history laid out by the LHO in his decision dated November 1, 2021. The Due Process hearing was held in person on October 20, 21, and 25, 2021. The Parents appealed the case on November 1, 2021. I proposed a briefing schedule to which the Parents objected due to a delay in transcript production. I delayed setting a final briefing schedule until the transcripts were produced. The District cross-appealed the case on November 8, 2021. On November 9, I issued an order combining both appeals and setting a briefing schedule that extended the thirty-day period for the initial appeal. Transcripts were made available on November 9, 2021. The Parents submitted a brief on November 17, 2021. The District submitted a response on November 24, 2021. The Parents submitted an additional reply brief on December 1, 2021.

The Parents requested that I reconsider evidentiary decisions made by the LHO as part of the review process. I will address those issues in my decision below, but I did not allow any additional evidence to be submitted as part of the briefing process.

2. Factual Background

The Student began receiving early intervention at the age of one. (Testimony of Father). The family moved to Fort Mill, South Carolina when he was three years old. (Testimony of Father). He enrolled in the Fort Mill School District in Kindergarten, at Doby's Bridge Elementary. (Testimony of Father). During that year, he was diagnosed with Autism Spectrum Disorder and Attention Deficit Disorder. (Testimony of Father). Throughout his elementary school years, he had toileting issues. (Testimony of Father. He visited the nurse's office frequently and by second grade, the school nurse had a toileting schedule and reward systems for the Student.

In 2019-2020, the Student was in third grade at Doby's Bridge in a classroom described as having a strong behavioral management system that allowed him to thrive. He struggled with social cues and emotions. In March, 2020, the schools closed due to the COVID-19 pandemic. The Parents requested that the Student repeat third grade because of the missed time, and the principal accepted the recommendation.

The Student's father testified that in the summer of 2020, the Parents received notification that the District would start on a staggered schedule with only half the students in the building at any given time. The family requested that the Student attend five days of school with both sets of students to avoid transition issues later on down the line. The Student's father testified that the District refused this request but provided services at home on the alternate days. The team decided to try this schedule and see how it went. The family was also told that the new elementary school, River Trail, that they were now zoned for was not ready, and the students would start the year with River Trail staff, but physically in Doby's Bridge and then move half way through the year. The Parents expressed concern with this plan, as it would be yet another transition for the Student and asked if he could remain at Doby's Bridge for the year.

The Student's IEP team met on August 20, 2020, to discuss the Parents' concerns. (Respondent's Exhibit 1). The Parents expressed concern about student regression, and the school said they would provide feedback throughout the year until his annual review in November.

Because of the change to River Trail, the Student started working with new service providers at this time as well and individual providers had meetings with the new providers to transition. The Students' new third grade teacher said that she read the IEP before this meeting

to learn about the Student. In the classroom, he received accommodations and modifications like open notebook tests broken into smaller parts, support in the classroom by individual providers, checklists, group assessments, verbal comprehension checks, read aloud questions, a peer buddy, task checklist for behavior management.

The initial transition into school was positive, and the IEP team met virtually on September 4 for a special review of the IEP. At this point, the Student had not had any toileting accidents and had started making friends. During this meeting, the team discussed potential changes to the IEP suggested by the Parents and the Grandparent such as additional reading services, occupational therapy (OT) services, or a study carrel in the classroom. The District increased writing services, but refused the Parents' request to increase OT services or to have the Student attend school five days a week.

The team met again on September 17, 2020, to discuss the Parents' request to increase OT services, as well as continuing to discuss allowing the Student to attend school five days a week. The team felt that these additional services were not needed. This was the first time the Executive Director of Special Services attended the meeting as the LEA representative for the District.

On September 29, 2020, the team held a facilitated IEP meeting. The team decided to add small group assessments to the Student's plan. The team rejected additional accommodations requested by the Parents but agreed to collect additional data to determine whether an assistive technology device was needed for writing.

At the end of September, the whole school came back to five days a week in the building. The Student had a slight decline in behavior then. The Student's father testified that in November, the Parents report that the Student felt the stress of the US presidential elections and masking questions.

On November 11, 2020, the team met for the Student's annual IEP review. The team updated the goals in areas of written expression and social skills and made adjustments to services and accommodations. They did not add services for typing because it was a part of the regular education curriculum.

The Parents reported a decline in behavior at home in December 2020 as the Student prepared for the transition to the new school building. The Student stated that they did not feel comfortable with the mask requirements at the school. The Student was hospitalized over the December holiday.

In February, 2021, the IEP team thought a re-evaluation would be appropriate given declining behaviors and the hospitalization. At this meeting, the Parent suggested more time outside the general education classroom or a paraprofessional in the classroom if that was not an option.

The team conducted a re-evaluation at this point, including academic tests, observations, and an update of information. During this time, also, the Student reported that he hears and sees things that others cannot – people mumbling, screaming, or walking around. He emailed the school in February 2021, a message about his imaginary friend.

At the March 29, 2021, meeting to discuss the re-evaluation, the team agreed to add sensory room breaks after visits to the nurse, extra support in the school building, more behavioral intervention, and mental health counseling. The team moved to more pull out special education services instead of inclusion, as the Student was uncomfortable with having support in the classroom. The team created a new schedule for the Student and agreed to extended school year (ESY) services. The team added the category of Emotional Disability to the IEP.

Over the last few months of the school year, the Student's behavior continued to decline. There were two incidents of physical aggression, making fun of students who wore masks, misuse of technology, a drop in grades, a decrease in work completion and an increase in toileting accidents. Individuals who testified had different theories about the reason for the decline, from outside factors like COVID, to the removal of the mask mandate and political issues in the country to trauma and instability at home to boredom from repeating third grade.

In May 2021, the school staff had a conversation about the Student's struggles and talked about a potential proposal to move the Student to a more specialized setting.

On June 7, 2021, the team had another special review IEP meeting. This meeting ended with a change in the IEP to reflect a new placement at Orchard Park Elementary, a specialized setting for the Student. Teachers believed this would be helpful because of the smaller classrooms a better alignment with his needs and fewer transitions. The Parents disagreed with this placement. The team stated that other options in the District with smaller class sizes would not allow the Student to access grade level curriculum.

The Student attended Orchard Park Elementary for the first week of school at the start of the 2021-2022 school year. The Student's father testified that the Student said that he could not learn or concentrate and there were constant outbursts by other students. He was in a behavior support program, with kids who have behavioral and emotional support needs but perform at grade level. Each class had six students, one certified teacher and two paraprofessionals. They provide instruction and behavioral skills. The principal of the program says the program usually needs 4-6 weeks to make a difference. The Student testified that he has been learning at home since leaving Orchard Park Elementary, and the wishes to return to his old school.

3. Standard of Review

Federal and state regulations provide that a party aggrieved by a LHO decision may appeal to a State Hearing Officer (“SHO”) who must “[e]xamine the entire hearing record” and “[m]ake an independent decision on completion of the review.” 34 C.F.R. § 300.514(b)(2)(i) and (v) (2014). The SHO must also consider the hearing officer’s advantage of examining the demeanor of the witnesses when credibility determinations are at issue. *Id.*; *Shore Reg’l High Sch. Bd. Of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In doing so, the findings of fact of the LHO are entitled to deference and are considered *prima facie* correct. *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 326 (4th Cir. 2009); *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991). However, the SHO must still determine the weight of the evidence and questions of law independently. *Springer v. Fairfax Cnty. Sch. Bd.*, 134 F.3d 659, 663 (4th Cir. 1998) (differentiating itself from *Doyle*).

The burden of proof in this case lies with the Parents, as the party seeking relief. See *Schaffer ex. Rel. Schaffer v. Weast*, 546 U.S. 49 (2005) (holding that the burden of proof in an administrative hearing challenging an IEP under the IDEA is properly placed upon the party seeking relief, whether that is the disabled child or the school district).

Consistent with these principles, a SHO reviews the record created through an administrative trial before the LHO, and does not rehear evidence and generally does not admit or hear evidence not considered by the LHO. A SHO does have discretion to admit evidence not considered below. 34 CFR § 300.514(b)(2)(iii).

4. Hearing Officer's Findings

The LHO found that the Parents had a meaningful opportunity to participate in the IEP meetings because they were at each meeting, brought participants to the meetings, and were able to argue for their point of view during the meetings. He found that the IEP teams to be properly constituted. Further, he found the staff meeting held prior to the June 7, 2021 IEP meeting did not constitute an IEP meeting, and thus the District did not predetermine the Student's placement decision.

He found, also, that the proposed placement was appropriate. The LHO argued that the District made many attempts to make the regular education classroom work, but that the many other transitions in the Student's life – the COVID-19 closures and re-opening, a change in

school placement, and outside of school issues – all affected the Students as well. The LHO found that the District had attempted to educate the Student “to the maximum extent appropriate” with his non-disabled peers but that this placement as the Least Restrictive Environment (“LRE”) for the Student at the moment.

Finally, the LHO denied a private placement for the Student, as they met neither prong of the *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) test.

The LHO ordered that the educational program offered by the District for the Student is appropriate and offers him a FAPE. He also asked that the District add the use of a computer and support from a psychiatrist or psychologist for the Student.

5. Discussion

The Parents raised many issues upon appeal, and the District raised one issue. In an attempt to come to the clearest decision, both in terms of facts and law, I have grouped issues together.

The LHO made appropriate decisions at the hearing, and the Parents were able to present the evidence needed to make their case forcefully and fully.

The LHO was able to conduct the hearing impartially.

During the pre-hearing planning period, the LHO asked the parties their vaccination status and requested that all participants in the due process hearing wear a mask. The Parents

opposed both requests and asked the LHO to recuse himself from this case believing this disagreement to indicate a prejudice against them. The LHO did not recuse himself, citing the appropriateness of his decision given that federal courts currently require a face mask. He did, however, allow the Parents to participate without masks in the hearing, so long as they kept distanced from others. The Parents' brief in this appeal repeated their objection to the LHO's authority over this case, given these restrictions.

The LHO has discretion over the conduct of the hearing. See, e.g. 71 Fed. Reg. at 46704, ("There is nothing in the Act or these regulations that would prohibit a hearing officer from making determinations on procedural matters not addressed in the Act so long as such determinations are made in a manner that is consistent with a parent's or a public agency's right to a timely due process hearing.") South Carolina does not restrict this discretion any further. Special Education Process Guide for South Carolina, Office of Exceptional Children, 175-76 (Revised 3/20/13). Further, I uphold the LHO's finding that nothing in state law precludes a mask requirement. (Hearing Officer Exhibit 7). The LHO's request to both parties to wear masks does not, therefore, suggest a conflict with the LHO's objectivity.

In fact, he showed deference to the Parents in allowing them to participate without a mask despite his valid order requiring masks. Throughout the hearing, the LHO reminded the Parent to stay behind the podium when addressing witnesses, but did not request that she wear a

mask again. The LHO sustained objections from both sides and overruled objections from both sides. He also admonished both sides to comport themselves more professionally throughout the hearing. He allowed the Parent great latitude as a pro se representative in her questioning and presentation of exhibits. After a careful review of the entire transcript, I find that the LHO demonstrated impartiality towards the Parents in the conduct of the hearing.

The Parents' brief also raised the concern that the appointed LHO had a "record" of siding with Districts. Under South Carolina law, the LEA has the responsibility to appoint the hearing officer. (SC Special Education Process Guide, p. 173). The requirements to be an LHO state only that the LHO may not be an employee or former employee of the LEA, that they must have knowledge and understanding of the IDEA, have knowledge and ability to conduct hearings in accordance with legal practice, and have knowledge and ability to render and write decisions in accordance with legal practice. *Id.* All LHOs must be trained by the South Carolina Department of Education, and remain qualified to be an LHO unless they do not adhere to federal and state regulations or policies and procedures. *Id.* This LHO meets those requirements. South Carolina law does not include any restrictions from serving as an LHO despite past tendencies.

The LHO properly made decisions about whether to admit or deny evidence during the hearing.

The Parents argue that the LHO improperly denied the presentation of significant parts of a recorded IEP meeting. Again, the IDEA and state regulations give broad discretion to the hearing officer to conduct the hearing and determine what evidence to admit while also encouraging the hearing officers to limit hearings to two to three hours. Given that, the hearing officer has discretion to determine whether introduction of the IEP video would unnecessarily

delay the hearing or provide information pertinent to his decision-making. In this case, we saw the LHO admit evidence submitted even after the five-day deadline and admit some pieces of video testimony. He ruled on the video testimony primarily on whether or not the person testifying would be able to provide the same information as that in the recording and that is a reasonable standard to go by. The Parents were not able to successfully argue that the recording would provide information that the witnesses could not provide. The Parents did not provide a clearer description of what the Parents hoped to show with the recording that could not be shown in questioning may have supported her case more. The Parents showed video testimony as part of the closing argument. While the closing argument is not evidence, it is clear that the hearing officer took notice of it, as he asked the Parents to continue playing the video when she wanted to press pause. (Hearing Transcript, p. 913).

The Parents raise several other pieces of evidence that they should have been able to introduce. Again, the law gives the LHO significant discretion in determining what can be introduced and the procedure by which it needs to be introduced. The Parents wanted to submit more emails, historical student records, and other documents from throughout the Student's time in this District. Given that the fundamental questions in this case turn to the very end of the 2021 school year, I do not find a nexus between the evidence the Parents described as missing from the case and the arguments the Parents are making for their case and do not think this additional evidence would be determinative.

The questioning of the Student by the hearing officer alone was appropriate.

The Parents requested that the Student himself testify in the hearing. The LHO allowed the Student to speak via video call, but only the LHO questioned him. The Parents argue that the Student should have been allowed to be questioned by both parties.¹

The law is clear that the Parents have the right to have the child who is the subject of the hearing present. 34 CFR § 300.512(c)(1). The law is also clear that the LHO has the discretion to determine appropriate witness testimony (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,691 (Aug. 14, 2006) (codified at 34 C.F.R. pt. 300)). While generally, I favor Student's abilities to make statements on their own behalf, the LHO here knew how contentious this hearing was and questioned the Student on all of the pertinent issues. We heard the Student's opinion on his current placement and his wish for return to his previous school. Further testimony would not have added to the argument.

The credibility of the executive special services director should have been at question in the hearing.

The Parents argue that the District's executive director of the special services was clearly impeached through the recording evidence in the hearing.² The LHO made no finding on this topic. The Parents introduced this recording as their closing statement, so the District did

¹ The District asserts on appeal that the Student's testimony with questions only by the LHO was by agreement of the parties. The District did not provide a citation to such agreement and I have not located it in the record. I therefore analyze the issue as if there was no agreement.

² The Parents' briefs on appeal include several personal attacks on the executive director for special services, including an attack on her perceived family status and sexual orientation. These attacks are beyond inappropriate; they are offensive attacks that have no place in this proceeding.

not have the opportunity to cross-examine or question the executive director for special services, and the recording was not officially part of the evidence. Given the LHO's interest in the recording (as noted above, he asked the Parent to continue playing it when she pressed pause), I have accepted the recording into my decision-making. My review of the transcript concludes that the executive director's testimony at the hearing directly contradicts what the recording reflects she said to the team during the IEP meeting on June 7, 2021.

Below are pertinent parts of the transcript from the June 7, 2021 meeting recording:

Maziarz: I think based on where he is with his social/emotional, we've seen very little progress on his goals. We're thinking he needs a more restrictive setting. . . He needs to be in a class where we can really zero in on the social/emotional aspects -- . . . -- of it. You know, he can still go out for his related arts and participate in recess and lunch with his non-disabled peers, but I think that the staff only use -- that he should be in a special education class the majority of his day to start next year." (p. 904).

[The Mother then argued that she would ask the school to try a one-on-one aide before moving to this step, and the two of them discussed whether or not a one-on-one aide had been tried and what they had learned from the attempts.]

Maziarz: Well, at this point, that is the school's proposal. (p. 908).

Maziarz: I talked to all the staff who have shared their -- -- with me. (p. 912).

[The Mother asked if the Student's placement as discussed before the IEP meeting.]

Maziarz: No. Staff contacted me with concerns about his regression and where we needed to go from, so we scheduled an IEP meeting. (p. 914, emphasis added)

Mother: Okay. So they -- and then you didn't talk to them about what is your recommendation is for his placement next year? (p. 914, emphasis added).

Maziarz: No, I did not. (p. 914, emphasis added).

[Ms. : then jumped in and shared her concerns as well]

I support the decision that he needs to go to a special settings classroom.

Mother: Okay. Well, I appreciate your opinion. , did you have that opinion, did you share that opinion with before this second that you just said it?

: Yes.

During her hearing testimony, the executive director described a staff planning meeting in which “We discussed keeping him in his current placement, we discussed whether or not a one on one would be beneficial to him, we discussed whether or not he needed to be moved to a special setting class.” The Mother responded: “So you discussed placement at that staff meeting? Is that correct?” “We did. Yes.”

(Testimony of executive director of special services, p. 866). That affirmative response contradicts the negative response to a similar question at the IEP meeting, when the executive director of special services denied having discussed placement with other District staff.

This contradiction is concerning and raises credibility concerns. It is likely that the executive director gave an honest answer during her testimony – she and District colleagues discussed placement prior to the IEP meeting. If that is right, however, it appears that she was not honest with the Parent during the team meeting. As an SHO, I am required to give deference to the LHO’s credibility findings; however, I find this discrepancy concerning and therefore will not consider the executive director’s testimony in my decision-making. I referenced her testimony only one time in the facts section, only to note the occurrence of this meeting.

The LHO’s factual and legal conclusions regularly made.

While I will analyze the LHO’s legal conclusions *de novo*, the Parents have not demonstrated that the conclusions he made were not regularly made. The hearing was conducted fairly and both sides had ample opportunity to present their case. The LHO created

the statement of facts based on his own understanding of the situation and conducted his own legal analysis, and did not merely restate either party's statement of facts. As stated earlier, I find no abuse of discretion in the LHO's handling of evidentiary decisions in a contentious hearing.³

During the June 7, 2021 meeting there was a procedural violation that impeded the Parents' ability to participate in the meeting, thus leading to a denial of a FAPE.

The pre-meeting held by the staff was not an IEP meeting.

The Parents argue that the school had an illegal IEP meeting in May 2021, and that at this meeting, the team made a determination about the Student's placement. They argue, then, that the school refused to consider parental input into this placement decision at the June 7, 2021 properly constituted IEP meeting.

While the IDEA requires parents to be "a member of any group that makes decisions on the educational placement of the parent's child," 34 CFR § 300.501(c), it also clarifies that a "meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting." 34 CFR § 300.501(c)(3). We do not know the details of what happened in this meeting, but the existence of a meeting to discuss a proposal does not make it an IEP meeting, and therefore,

³ Hearing officers generally have authority to determine procedural matters not specifically outlined in the IDEA, as long as they are consistent with the party's IDEA rights. *See Letter to Kane*, 65 IDELR 20 (OSEP 2015) (While acknowledging that the IDEA doesn't specifically limit the time a parent or parent's attorney may spend presenting evidence or questioning witnesses at a due process hearing, OSEP stated that a guideline issued by the Minnesota Office of Administrative Hearings generally limiting evidentiary hearings to three days didn't appear to be inconsistent with the IDEA.). Hearing officers may set time limits on due process hearings in accordance with state guidelines, so long as both parties have an adequate opportunity to present evidence and cross-examine witnesses. *B.S. v. Anoka Hennepin Pub. Schs.*, 66 IDELR 61 (8th Cir. 2015) (holding that an administrative law judge did not deprive a teenager's parents of their due process rights when he allotted their attorney nine hours to present their IDEA claims against a Minnesota district).

parental participation is not required in the meeting. The LHO properly rejected Parents' argument to the contrary.

Parental Participation More Generally

That does not, however, mean that the Parents were able to participate meaningfully in the central decisions regarding IEP services and placement. What is essential is that a district's proposal developed in a pre-meeting is simply that – a proposal. See, e.g. *Doyle v. Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992) (holding that merely proposing a placement before IEP completion without making up its mind did not deny meaningful parental input), *aff'd*, 39 F.3d 1176 (4th Cir. 1994). In *Knox County Schools*, the U.S. Court of Appeals for the Sixth Circuit emphasized that school officials are permitted to form opinions and compile reports prior to IEP meetings. *Knox County Sch.*, 315 F.3d 688 (6th Cir. 2003), at 693-94 n.3. The court cautioned, however, school officials must still be "willing to listen to the parents." *Id.* at 694-95 (noting that school system representatives should "come to the meeting with suggestions and open minds, not a required course of action").

Parental participation is a cornerstone of the IDEA. The IDEA requires that parents must be included in an IEP team meeting. 34 CFR § 300.321. Districts must ensure that parents have appropriate notice of the meeting and understand the purpose of the meeting. 34 CFR § 300.322(b). Parents' voices must be considered in meetings; however, they cannot dominate the meeting or veto the final decisions. That said, courts look to see whether the school makes changes based on parental voice. "Where there was no way that anything the [Parents] said, or any data the [Parents] produced, could have changed the School System's determination of appropriate services, their participation was no more than after the fact involvement." *Hamilton*

County Department of Education v. Deal, 392 F.3d 840, 858 (6th Circuit, 2015), finding that being present and speaking does not necessarily equate to participation. The lack of parental participation in *Deal* led to a finding of a substantive violation of IDEA because of predetermination, including numerous procedural and substantive errors, a school district unofficial policy of refusing to consider certain programs, a financial motivation for the district, and a refusal to allow the parents to ask questions during meetings.

Other cases have found meaningful parental participation using the standard in *Deal*. *Winkelman v. Parma City Sch. Dist.*, 411 F.Supp. 2d 722, 728-29 (N.D. Ohio 2005); *W. G. v. Board of Trustees of Target Range School District No. 23*, 960 F.2d 1479, 1485 (9th Cir. 1992); *EW ex rel. C.W. v. Rocklin Unified School District*, (E.D. Calif., 2006) (finding that a pre-created IEP report with five different placement options to be considered was appropriate); *T.P. ex rel S.P. v. Mamaroneck Union Free School Dist*, 554 F.3d 247 (2nd Cir. 2009) (distinguishing *Deal* based on the consistent rejection of the parental requests and a lack of “open mind” as to the use of particular programs); *T.P. at 253. Seladoki v. Bellaire Local School Dist. Bd. Of Educ.*, (S.D. Ohio, ED, 2009) (distinguishing *Deal* based on lack of financial motivation or district policy); *J.D. by Davis v. Kanwha County Bd of Educ*, CIVIL ACTION NO. 2:06-cv-00167 (S.D.W. Va. Aug. 3, 2007) (distinguishing *Deal* because the team took breaks to consider parental information and incorporated ideas into IEP). Procedural issues can infringe upon a parent’s ability to meaningfully participate in their student’s IEP. *Knable ex rel. Knable v. Bexley City School Dist.*, 238 F.3d 755 (6th Cir, 2001). However, if the Student was able to receive a meaningful educational benefit despite procedural violation, then it would not rise to a denial of a FAPE. *MM ex rel DM v School Dist. of Greenville County*, 303 F.3d 523 (4th Cir., 2002).

By discussing placement prior to goals and services, the District denied the Parents meaningful participation in the meeting.

The staff pre-meeting focused on a change in potential placement, and the staff came into the IEP meeting with an opinion prior to the meeting. That is permitted under the IDEA. However, the question is whether the Parents were able to meaningfully participate in the meeting at which school staff proposed that placement change. Here, the evidence reflects that the District failed to involve the Parents in a complete discussion of the goals and services that the Student needed – a discussion which should have occurred *before* determining placement. The District compounded this failure by refusing to provide adequate information and options about its proposed placement.

The June 2021 meeting was called to conduct a special review of the IEP. (Respondent Exhibit 1). A review of the IEP should start with a discussion on progress toward current goals, and then changes to goals and services needed. Placement is the last step of the process. (SC Special Education Process Guide, p. 92). Placement decisions must be based on the child's IEP. 34 CFR § 300.116. That is, the team must first develop a child's IEP, including assessing the child's current progress, identifying appropriate goals, and the special education services necessary to achieve those goals. Once an IEP is created, the team must then discuss placement options to determine which is best suited to implement the IEP.

Instead of following this process, the District first determined placement, and then crafted IEP services to match that placement.⁴ By flipping this order, I find that the District denied Parents the ability to participate meaningfully in developing both the IEP and the placement.

The meeting did start with a discussion of current progress. Academically, the Student was making sufficient progress. He scored “within the average range on both the Spring Reading STAR benchmark (68th percentile) and the Math STAR benchmark (58th percentile). His AIMSweb Plus benchmark fell within the 60th percentile (average) and in the area of Math and in the 55th percentile (average) for reading.” (Respondent Exhibit 2). He had also mastered both the writing goals on his IEP. However, the Student’s functional skills had regressed. He was completing 30-40% of his general education assignments “even with the increase of services inside the resource setting.” During class, he required adult prompting and was shouting and blurting out frequently. “. . . teachers also report an increase in taunting, teasing, and threatening his peers. . .” In addition, he was averaging two to three accidents per day with a significant increase in the last three months of the year. (Respondent Exhibit 2).

But then, the team did not discuss updating the Student’s goals for the next school year, the root causes of this regression, or the services he needs. Instead, they immediately jumped directly to a placement discussion. “Maziarz explained that given [the Student’s] functional regression and limited progress towards his goals, they would like to propose changing [the Student’s] to a special setting.” (Respondent Exhibit 1). The Parents then countered with a

⁴ Note that the below analysis depends largely on the exhibits introduced and accepted by the various parties, rather than the testimony provided by individuals in the hearing. The testimony provided jumped from topic to topic and rarely covered the core issues from either side. No party, however, questioned the validity of these notes and these documents aside from the Mother who believes information as left out of them. My review is based on the detailed notes of the June 7 meeting (Respondent Exhibit 1), the PWN of the June 7 meeting (Respondent Exhibit 5), and the IEP created at that meeting (Respondent Exhibit 5). These records were developed by the District and the District raised no objection to them.

request for a 1:1 aide, and the team discussed previous attempts at in-class support. The team explained to the Parents why they believed this special setting would be helpful. The school officials' focus on supporting their placement proposal inhibited the discussion of services and goals which should have come first.

Failing to identify appropriate goals and services at this point was problematic in at least two respects. First, it denied the Parents the opportunity to participate meaningfully in setting those goals and services. Second, it denied the Parents the opportunity to participate meaningfully in setting the educational placement, because without agreed upon goals and services, there was no appropriate standard against which to measure proposed placements. Moreover, the District refused to provide adequate information about its proposed placement, further inhibiting the Parents' ability to participate in that decision. When the Parents asked for more information about the District's proposed placement, the District explained that "she has a right to do her research but that the team will update his IEP to reflect a change in service at this time." (Respondent Exhibit 1). Eventually, the Parents left the meeting, and only after that point did the discussion of a change in goals or service hours happened.

Despite the academic progress the Student made, the team increased the Students' academic services significantly in a special education classroom. Despite the District's concerns about the Student hearing voices and increased aggression, they maintained counseling at only 270 minutes per quarter (30 minutes/week). These changes seem designed to align to the program, rather than necessarily to the Student's individual tailored goals. For instance, increasing academic service hours matched what would be provided in the District's proposed placement, even though the team had established that the Student was making adequate academic progress.

As further evidence of the incorrect sequence of changes, the IEP Amendment specifically states: “Based on updated present level data showing a continued decline in functional performance, the IEP team determined that [the Student] will receive his specialized instruction in a special setting classroom for next school year. Services and goals were updated to reflect this change in placement.” (Respondent Exhibit 2) (emphasis added). The services and goals should be updated first, and placement decisions then made to best implement those services and goals.

The Prior Written Notice also reflects this issue. “The district proposes to update services to reflect a change of placement to the special setting classroom for the 2021-2022 school year at Orchard Park Elementary.” (Respondent Exhibit 5).

I do not argue that the Parents in this case did not have sufficient time or space to advocate for their child. Instead, by discussing placement before a change in services or goals, the Parents are unable to start with their expertise – the child’s needs – and instead is arguing about placement options in the District, something only the District is expert in. In addition to updating the IEP prior to discussing placement, had the District provided a list of all placement options, and explained how the Student’s goals would not be aligned to those options, or the District started by making the case that the Student needed 600 minutes of behavioral support to meet their goals, the situation may have been different. Finishing the IEP update and reconvening after giving the Parents a week to learn more about the other offerings in the District may have been sufficient as well. The contentious nature of the relationship between the District and the Parents should not relieve the District of the obligation to follow the basic procedures of the IDEA.

I find, therefore, that the District committed a procedural violation by failing to fully address the Student's unique and individual needs, and to design services, supports, and annual goals to ensure Student's progress in the general education curriculum before moving to a placement decision. This procedural violation substantially interfered with the Parents' ability to participate in the meeting and it substantially interfered with the creation of an IEP that was based on the Student's goals, rather than the design of the special education program. The Student's educational program and placement were then not designed to provide him a FAPE in the LRE, given his unique and individual circumstances.

Was Orchard Park the LRE for the Student?

Because I find that the Student's educational program and placement were not designed to provide him a FAPE in the LRE, given that the IEP was designed to match Orchard Park's program, rather than Orchard Park's program being selected to match the Student's IEP, I cannot determine whether the school would be able to provide FAPE in the LRE. I will note, however, the Parents would carry the burden of proof and, because the Student was there for less than a week, the Parents have very little evidence as to whether Orchard Park was an appropriate placement.

Much of the testimony discussed the Student's progress the previous year, with speculation as to what caused his behavior decline – the many transitions due to COVID, the movement to a new school, the wearing of masks, volatility between the Parent and the District outside of this case, external factors at home and in the community, or even, repeating a grade or boredom. Given the complicated nature of this decline, it is impossible to say that the decline was due to a specific school decision, or to a specific decision by the Parents.

The teachers who expressed opinions as to the placement change had reasonable reasons for suggesting it – a smaller staff to children ratio in a program for students whose primary challenges are functional rather than academic, fewer transitions, the ability to access grade-level curriculum. Without properly setting goals and services, it is impossible to determine if this placement was the best one to achieve those goals and implement those services, and the Parents were denied the ability to participate in both decisions

A decision about whether Orchard Park was the right LRE would necessarily have to include a proper set of decisions about the Student’s goals and services, then a question of whether every attempt was made in the current school to meet those goals and implement those services, and what other placement options were available in the District and could best do so.

The Parents are entitled to relief based on the findings above.

The LHO’s relief was inappropriate.

The District’s cross-appeal raised concerns about the LHO’s order which found, first, that the educational program offered by the District is appropriate and offers him FAPE, and second:

“Two components should be added at the District’s expense; 1) once stabilized [the Student] shall be given the opportunity to learn to type and use a computer or similar device, and 2) the District shall identify appropriate and offer services from a psychiatrist or psychologist in an effort to help him out of the mental health hole he is slipping into. Without this help. *[sic]* He will not be able to learn.” (LHO, p. 12).

The District rightly argued that, because the LHO found no denial of a FAPE, he could not then order additional services.

The Parents are entitled to other relief.

The Parents request relief in the form of firing of certain school personnel, a service animal, a one-on-one aide, a private special placement, or support for home-based special placement. Because the Student does not currently have an IEP that is tailored to his individual goals and needs, rather than to a specific program's offering, I am unable to determine which of these remedies is appropriate, if any. The Student needs an updated evaluation to understand his current needs, and then for the team to develop an educational program based on those needs.

I am well aware that the relationship between the Parents and the District has deteriorated so greatly that a civil IEP meeting may be impossible. The lack of civility displayed by both parties at the hearing was unacceptable, and I ask both parties to comport themselves with a focus on the Student in question, rather than ad hominem attacks on each other. The Student needs to be served.

I order the District to pay for a neuropsychological evaluation, and potentially a psychiatric evaluation if recommended by the neuropsychologist. I order the IEP team to meet after the evaluation is completed to develop an updated IEP with updated goals and services, and then to determine placement. If either party creates unnecessary delay or does not comply with the Order, I ask the other party to submit a Motion to Enforce to me. I will retain jurisdiction over the enforcement of this Order.

Because of the level of dysfunction in the relationship between the District and the Parents, I lay out the steps to be taken in detail below:

- 1) Within 10 days of this order, the District will develop a list of three neuropsychological evaluators within 150 miles of the Student's legal residence. These neuropsychological evaluators must have a doctoral degree in psychology as

- well as specialized coursework in neuropsychology. They should be a member of the divisions for clinical neuropsychology with the American Board of Professional Psychology or the American Psychological Associations.
- 2) Within 15 days of this Order, the Parent should choose one of these 3 neuropsychologists.
 - 3) Within 45 days of this Order, the Parent should take the Student in for a full evaluation, completed at the District's expense. One of the questions posed to the evaluator must be whether a more in-depth psychiatric evaluation is recommended.
 - 4) If the evaluator recommends a psychiatric evaluation, the District must facilitate this with a psychiatrist recommended by the neuropsychologist, and the Parent will be responsible for presenting their child for this evaluation in a timely manner.
 - 5) Within 10 days of the completion of the evaluation, the IEP team must meet to discuss the Student's goals and services needed. They should then discuss placement. All parties should have an open mind as to whether the services needed can be met through a 1:1 aide in the classroom, a specialized setting within the District, or a private or residential school.
 - 6) If the Student is not currently attending school, then the District will provide 1 hour of home-based tutoring a day starting the day after the Parents present the Student for the neuropsychological evaluation and continuing until the IEP team meets.
 - 7) If the Parents do not present the child for evaluation, then the IEP dated June 7, 2021, stands. The Parents must then send the Student to Orchard Park Elementary School.
 - 8) If the District does not meet the deadlines in this Order, then the Parents should file a Motion to Enforce with me.

Other Issues

The Parents' brief raises a number of other issues relating to comments made by the LHO in his order (e.g. his discussion of the divorce or description of the home environment), as well as facts that the LHO may have gotten incorrect. Those issues do not impact the resolution or remedy for this appeal.

6. Conclusion

I reject the LHO's decision that the District appropriately allowed for parental participation in the June 7, 2021, team meeting, and find that the District did not design an educational program to provide a FAPE in an LRE to the Student because they made a placement decision before deciding on new goals and services. I reject also the LHO's remedies which were based on a finding of FAPE.

I order the District to pay for a neuropsychological evaluation, and potentially a psychiatric evaluation if recommended by the neuropsychologist. I order the IEP team to meet after the evaluation is completed to develop an updated IEP with updated goals and services. If either party creates unnecessary delay or does not comply with the Order, I ask the other party to submit a Motion to Enforce.

7. Notice of Appeal Rights

Any party aggrieved by this decision may commence a civil action with respect to the complaint presented in any state court of competent jurisdiction or in a district court of the

United States within ninety (90) days of the date of this decision. 20 U.S.C. § 1415(i)(2)(A)-(B)
and 34 C.F.R. § 300.516.

A handwritten signature in black ink, reading "Avni Gupta-Kagan", written over a horizontal line.

Avni Gupta-Kagan

State Hearing Officer

Columbia, South Carolina

December 8, 2021