

**INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT
BEFORE THE STATE REVIEW OFFICER
FOR THE SOUTH CAROLINA DEPARTMENT OF EDUCATION**

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF RICHLAND	)	
	)	
In the Matter of:	)	DECISION OF THE
	)	STATE REVIEW OFFICER
H.S., on behalf of her son, M-Y.N.S.,	)	
Appellant	)	
	)	
V.	)	
	)	
Florence County School District One,	)	
Appellee.	)	

This matter is before me pursuant to an appeal by H.S. (“the Parent”), on behalf of M-Y.N.S. (“the Student”) from a decision by Doug Dent, the Local Hearing Officer (“LHO”), determining that the Florence 1 Schools (“District”) provided the Student with a Free Appropriate Public Education (“FAPE”) and dismissing the Parent’s Due Process Hearing Request.

1. Procedural Background

I incorporate the procedural history laid out by the LHO in his decision issued on April 19, 2019. The LHO found the Parent was not denied meaningful participation in the development and implementation of the Student’s educational plans, the Student was not denied a FAPE because the District provided a safe learning environment, and the Student was not eligible for residential placement at an out-of-state private school. (LHO Decision). The Parent filed a notice of appeal on April 24, 2019. She then sent an amended notice on April 25 and a final amended notice on April 26. Via email, the parties agreed to accept the April 26, 2019 notice as the official notice of appeal. Both parties submitted briefs on May 15, 2019.

The Parent submitted a series of additional pieces of evidence at that time with her brief. I informed both parties that I would not accept or consider evidence that was not presented at the hearing.¹ Both parties submitted reply briefs on May 20, 2019. The Parent was represented by an attorney during the hearing, but is appearing pro se in the appeal.

2. Factual Background

The Student is a 15-year old, male student who had several health complications at birth, leading to significant medical issues that have followed him throughout school. (Parent Brief, p. 1-2). Currently, the Student has an Individual Health Care Plan with the school for seizures, obstructive sleep apnea, excessive daytime somnolence, migraines, attention deficit/attention deficit hyperactivity disorder. (Parent Exhibit 4).

The Student has received special education services since pre-school, when he lived in New Jersey. (Parent Brief, p. 2). He moved to the District in 2013 and has received special education services from the District in elementary, middle and high school. (Parent Brief, p.2).

The latest Individual Education Program (“IEP”) that was agreed to by both the Parent and the District was signed on May 30, 2018. (District Exhibit 6). This IEP says the Student is

¹ While the IDEA does suggest that a party can bring additional evidence on appeal, *Town of Burlington v. Dept. of Educ.*, 736 F.2d 773, 790 (1st Cir. 1984), makes clear that additional evidence should be for “gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing.” Further, *P.R. ex rel. J.R. v. Shawnee Mission Unified Sch. Dist. No. 512*, No. 11-2217-CM-DJW, at 6 (D. Kan. Apr. 30, 2012) states, “When a party chooses not to introduce evidence below, whether through oversight or for deliberate, strategic reasons, there is less of a case for admitting the evidence on review.” Citing *Walker Cnty. Sch. Dist. V. Bennett*, 203 F.3d 1293, 1297 (11th Cir. 2000) (permitting previously available evidence to be offered in the district court “would raise the dual concerns of unfairly permitting the parties to reserve their best evidence for trial while essentially converting an administrative review proceeding into a trial *de novo*.”). This law, of course, focuses on the trial level, but the standards remain at the administrative appeal level – new evidence that was not introduced at the hearing, and that cannot be properly interrogated by both parties for matters of credibility or contradicted or put in context by evidence from the other party cannot be introduced.

eligible for special education services with a primary disability of Autism Spectrum Disorder (“ASD”) and a secondary disability of Other Health Impairment (“OHI”) and Speech/Language Impairment. (District Exhibit 6). This IEP allows the Student to take high school diploma courses and receive accommodations to allow him additional supports to complete his work. He receives support in a Resource classroom, and also through a one-on-one aide. A Behavioral Intervention Plan (“BIP”) was also developed for the Student. (District Exhibit 6). This IEP was created while the Student was attending Sneed Middle School in preparation for his transition to West Florence High School. (Testimony of Parent, p. 64). While this IEP is the last one signed, it appears that questions about the IEP still remained and the IEP may not reflect the full scope of the conversation in the meeting. (Testimony of Parent, p. 64). The IEP briefly discusses the Student’s health plan, and includes information from the Parent about the Student’s history. (District Exhibit 6).

In the 2018-2019 school year, the Student has achieved grades ranging from B’s to D’s in his courses and is on track to meet the goals in the May 30, 2018, IEP. (District Exhibits 3, 10). The Student has participated on the JV Football Team and the Track Team while at West Florence High School. The Student also passed the End-of-Course Exam in Math with a 60%. Only 56% of his regular education peers passed this exam. (Testimony p. 104; Testimony of p. 175; Parent Exhibit 11).

Discipline and Harassment

Over the course of this school year, the Student has been involved in a handful of incidents regarding discipline or behavior. The pertinent incidents are listed below:

- October 17, 2018:** The Parent testified that the Student was injured in the locker room after football practice. He came out of the locker room with just his pants on, had a hand slap mark on his face, abrasions on his back, and a busted lip. (Testimony of Parent, p. 87, 89). She called the to report the incident. (Testimony of Parent p. 89; Testimony of Coach p. 161-162). The Coach said he would investigate the incident. (Testimony of Parent, p. 80; Testimony of Coach, p. 164). At the hearing, the Coach said that he spoke with the Student and his one-on-one aide together. The Student said while the students were running to get their pants, he simply got jostled and bumped into the wall. (Testimony of Coach, p. 162). After this incident, the Coach insisted that a coach be in the locker room at all times. (Testimony p. 163). The Coach said the Student raised no other bullying or harassment concerns. (Testimony p. 163). He did not report the results of his investigation to the Parent. (Testimony p. 164). The Parent filed a police report about this incident on February 8, 2019. (Testimony of Parent, p. 90-91, Parent Exhibit 13).
- November 1, 2018:** The Student was asked to come to the office to have his phone inspected due to rumors of inappropriate videos being sent around the school. Several administrators were present during the check and they discussed the seriousness of having inappropriate videos on the phone. (Testimony of Assistant Principal, p. 232; Testimony of One-On One Aide, p. 48). The Student gave his phone to the administrators to check. The Parent testified that the Student said that the administrators yelled at him and threatened him with jail time, and that he asked to call his mother. (Testimony of Parent, p. 74). The one-on-one aide was present during this meeting and said the Student seemedf earful during this conversation but that he never asked to call his mother. The assistant principal, reports that the

conversation was cordial, and that they discussed football and the Student seemed okay.

The Parent said the Student skipped school the next day because he was so embarrassed by the conversation. The LHO made no credibility determinations in his decision relating to the facts of this situation. (LHO Decision).

- **November 13, 2018:** The Student's teacher asked him to remove his hood in class. Another student removed it for the Student, involving himself in the matter. (Testimony of Assistant Principal p. 237). The two students exchanged words and then the other student smacked the Student on the head. The teacher stopped the altercation. the assistant principal determined the other student was the aggressor in the situation and the Student was not disciplined. The special education teacher reported that this incident did not get out of control because the Student handled himself well, and that he "knew what was going to happen because he used to be that student." The one-on-one aide, was not present during this situation. (Testimony of Parent, p. 76). The Student's BIP states that, when the Student does not follow rules, the teacher and paraprofessional should re-direct him, and then he should receive a cool down period. (Parent Exhibit 5). The Parent reports the Student said he was suspended for this incident. (Testimony of Parent, p. 75). However, discipline records from the school do not indicate a suspension (District Exhibit 4), and the assistant principal, who is in charge of 9th grade discipline, said the Student did not have any punishment for this incident. (Testimony of Assistant Principal p. 229). The LHO concluded the Student received no punishment for this incident. (LHO Decision).

- **December 2018:** The principal of the school asked the Student and another boy to come to his office because they were “messaging around.” They reported to him that they were friends and were just arguing. The Parent described this incident as an attack in the cafeteria that happened before school, before the one-on-one arrived, and the principal told her that the other child would be disciplined. (Testimony of the Parent, p. 86). The LHO concluded the Student received no punishment for this incident. (LHO Decision).
- Beyond these events, the disciplinary summary indicates a few notes regarding improper use of cell phones or disrupting class. (District Exhibit 4). In his 8th grade year at Sneed Middle School (the school year before the relevant time period), the Student had 11 suspensions. (District Exhibit 6).
- The one-on-one aide testified that some students would say things to the Student about why he has a shadow or talk about his clothes. She said that she never witnessed the Student report these incidents to teachers or administrators. The one-on-one aide also said that she never reported any of these incidents to her supervisor. She said that incidents that happen come from issues that started in middle school, and that she has seen other students defend the Student.

IEP Meetings and Procedure

The May 30, 2018 IEP referenced earlier was created in a facilitated IEP meeting at Sneed Middle School. According to the Parent, this written IEP did not include various therapies and promises made verbally during the meeting. (Testimony of Parent, p. 70). The IEP lists an

updated diagnosis of Autism, but does not include the results of every test completed as part of an Independent Educational Evaluation (IEE) in the spring of 2017. (Parent Exhibit 1, District Exhibit 6).

The following are other procedural points that are relevant to the decision in the case:

- **November 19, 2018:** The Parent asked for an IEP meeting. Her advocate was on the phone for the meeting. The Parent sent an agenda to the team ahead of the meeting. (Testimony of Parent, p. 77; Testimony of Denny, p. 135-136; District Exhibit 7). This agenda included discussion points around the incidents on November 1 and 13, 2018 and asked for a review of the Student's BIP and crisis intervention plan. At the bottom of the agenda, the Parent stated that she was "providing 10-Day Notice for an Out-of-District Placement at the Riverdale Military Academy in GA at the District's expense. For the 2019-2020 Academic School Year as well." (District Exhibit 7). She included a letter stating that in 10 days, she would remove the Student and place him at Riverside Military Academy and would request reimbursement. (District Exhibit 7).² The Parent reports that she took the lead in the meeting, trying to explain the full back story of her child's medical history to the team, as this was the first meeting at the high school (Testimony of Parent, p. 77). The Parent said the LEA representative, Mr. Denny, eventually took over and walked out of the meeting saying that he would not agree to send the Student to the out-of-district placement. (Testimony of Parent, p. 78). Mr. Denny said that the Parent called him incompetent, and that he left the meeting because it had become unproductive. (Testimony of Denny, p. 138). Testimony described the communication as " . . .when Mr. Denny would try to say something she would stop him and

² Note that the school being discussed is Riverside Military Academy. At times, in writing and in speech, the Parent referred to the school as Riverdale Military Academy. She clarified at hearing that she means Riverside. (Testimony of Parent, p. 77).

start talking, and when Mr. Denny, she would ask Mr. Denny a question, he would try to answer, and she would start talking and cut him off.” The Parent reports that the meeting ended at this point. The principal, said they tried to continue the meeting after Mr. Denny left, but that the Parent got sick because of the stress. The Parent says that she had a physical reaction to this departure. The District sent a prior written notice (PWN) the next day reporting that they would not agree to the private placement because the District was providing him a FAPE. (Parent Exhibit 6). Mr. Denny then sent a letter on November 29, 2018, offering a meeting on December 7th to discuss the IEP as a whole. (District Exhibit 7). This meeting did not happen, as the Parent requested a facilitated IEP instead. The LHO did not make a specific finding of fact related to whether the meeting continued after Mr. Denny left; however, he did describe the IEP meetings as “contentious” and said that the Parent sought to take over the meeting.” (LHO Decision 4-5).

- **January 14, 2019:** The team held a facilitated IEP meeting. The Parent again had an advocate present by phone for this meeting. The Parent expected to work on updating the IEP at this meeting. (Testimony of Parent, p. 82). Other team members expected to discuss private school placement. (Testimony of Denny, p. 141; The meeting notice stated that the purpose of the meeting was “Special Review.” (Parent Exhibit 7). During the meeting, the Parent said she was “tabling” the discussion of private placement. Instead, the Parent

raised the question of previous data from the 2017 IEE that was not yet included in the IEP, and started discussing an annual review. Mr. Denny asked his team to update present levels to update the IEP at a meeting in February. (Testimony of Denny, p. 144; Parent Exhibit 8).

- **February 15, 2019:** Another IEP meeting was scheduled for February 15, 2019. (Testimony of Denny, p. 144; District Exhibit 8). The team sent the Parent a draft IEP, marked draft, for discussion. (District Exhibits 8, 11). The Parent objected to a draft being created ahead of time, to information left out of the draft, including IEE data from 2017, and to changes in services like the removal of assistive technology devices. (District Exhibit 8; Testimony of Parent, p. 84-85). The Parent filed a due process request (“DPR”), and the District postponed the meeting to allow for the resolution meeting to take place. (District Exhibit 8). As part of the DPR, the Parent requested that the May 30, 2018, IEP remain in effect. (District Exhibit 8). The LHO made a finding of fact that the IEP presented prior to this meeting was, in fact, a draft. (LHO Decision).
- The LHO also made a finding of fact that the Student is embarrassed by his Special Education designation and expressed a desire to no longer have a shadow. (LHO Decision). District personnel testified about a conversation with the Student about his being embarrassed of his one-on-one aide, saying that “he ducks and dodges so that he gets to class before he does.” The Parent has told all staff not to have any conversations with the Student about upcoming IEP meetings or about his services. (District Exhibit 9). The Student missed one month of speech therapy because he did not think it was

helpful and he told his teacher, that his mother told him he did not have to go.

The Parent's DPR requested a finding that the District was not providing a FAPE by creating a psychologically unsafe environment for the Student at West Florence High School, and that the District had failed to update the Student IEP with diagnostic data from the IEE. She wishes for a private placement for the Student. She also alleged that the District unilaterally changed the IEP by sending a draft IEP ahead of the scheduled February IEP meeting. All incidents described in the DPR took place during the 2018-2019 school year.

3. Standard of Review

Federal and state regulations provide that a party aggrieved by a LHO decision may appeal to a state review officer ("SRO") and that the SRO 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 state review officer 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 local hearing officer 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 state review officer 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 Parent, 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).

4. Hearing Officer’s Findings

The LHO concluded that the District had provided a FAPE to the Student. He argued that the District had provided sufficient opportunities to participate in IEP meetings, obtain information on the Student, and participate in decision-making. (LHO Decision p. 5). The Student was provided FAPE in a safe learning environment and neither students nor staff were harassing or bullying the Student (LHO Decision p. 7). Since the Student was achieving success in the current placement, and the Parent did not present evidence regarding the benefits of the specific private school she was seeking, the Parent did not have a right to a private placement at this out-of-state school. (LHO Decision p. 8-9).

5. Discussion³

The Parent’s Notice of Appeal (“NOA”), Petitioner’s Brief on Appeal (“Parent Brief”), and Petitioner’s Reply Brief (“Parent Reply Brief”) each raise several issues that go beyond the initial DPR. The IDEA hearing process is designed to allow for a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” 20 U.S.C. §1415 (b)(6)(A).

³ The fundamental issue in this case is whether the District has provided the Student with a FAPE. However, because the Parent raises a number of specific issues, I will attempt to address those within the FAPE analysis.

Further, the DPR was filed to address issues that took place during the 2018-2019 school year, and my decision will focus on these issues. *See* 34 CFR §300.511(d) (stating that the hearing may not address issues that were not raised in the complaint unless the other party agrees otherwise). Similarly, to avoid a decision on issues that have not been considered through proper procedures and which lack a trial-level record, an appeal of a due process hearing decision will not generally address issues not raised or litigated before the LHO. Following this rule, below are issues raised on appeal which are thus outside the scope of my jurisdiction:

- 1) A claim of “ineffective counsel” by the lawyer who represented her in the local hearing. (NOA; Parent Brief, p. 17).⁴
- 2) Complaints about District and school personnel’s professional conduct (NOA; Parent Brief, p.5, 7)⁵
- 3) Claims of racism. (NOA)⁶
- 4) Violations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) with regards to the subpoenas of medical records. (NOA, Parent Brief p. 15, Parent Reply Brief, p. 20).⁷

⁴ In a due process hearing, the IDEA guarantees 1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities; and 2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses. *See* 20 U.S.C. § 1415(h)(1) and (2). The IDEA does not create a guarantee that counsel will be provided, as in criminal or parental rights proceedings, nor does it create a right to effective counsel. Concerns about the effectiveness of counsel must therefore be raised outside of this administrative structure.

⁵ The Parent has raised specific concerns about educator misconduct relating to District personnel. These complaints are not appropriate for a due process complaint. I will address process and content of the IEP as well as its implementation, and in doing so, will look at some of these incidents only as they relate to those issues. However, I will not address any concerns relating to Ms. L., as the incident with her took place prior to the scope of the DPR. I will also not address concerns related to the “mandated reporter” status of any of these individuals as enforcing any mandated reporter obligations is beyond scope of administrative reviews under the IDEA.

⁶ The Parent has already filed complaints with the Office for Civil Rights, the proper body to address these complaints.

⁷ The Parent raises complaints about the appropriateness of the District sending subpoenas to doctors relating to the Student’s health records. While I can review the procedures of the hearing to ensure consistency with due process, I will not make a ruling on whether HIPAA allows for the release of these records.

- 5) Concern about the qualification of the author of the resolution letter.⁸
- 6) Concern that the District did not meet its child find requirements.⁹

The Parent also raises several concerns about the conduct of the hearing and the hearing officer. She initially objected to subpoenas being issued for medical records. (NOA; Parent Brief, p. 15; Parent Reply Brief p. 2, 20). She raised concerns about inaccuracies in the LHO's decision and allegations that were not addressed. (NOA; Parent Brief, p. 19). She claimed that she requested an open hearing, and that Mr. Denny should not have been allowed to sit in the room throughout the hearing. (NOA; Parent Brief, p. 3). Further she claims that some emails were entered into the record over her objection. (Parent Reply Brief, p. 19). She also claims that some of the parties perjured themselves. (NOA; Parent Brief, p. 16; Parent Brief, p. 19). Finally, she claims that the LHO was biased and that he demonstrated a partiality towards the District both in his conduct during the hearing (nodding and laughing with particular witnesses) and in his decision where he made personal attacks against the Parent. (NOA; Parent brief, p. 8, 18; Parent Reply Brief, p. 21).

The legal question underlying these concerns is whether the hearing officer's decision was "regularly made." *Henrico v. Z.P.*, 399 F. 3d 298 (4th Cir. 2005). "Factual findings are not regularly made if they are reached through a process that is far from the accepted norm of a fact-

⁸ The Parent did not raise this concern during the hearing, nor was any evidence entered at the time of the hearing related to the author of the resolution letter.

⁹ The Parent raises a number of issues regarding the difficulty she had over the last several years convincing the District to identify the Student as a student with ASD. (Parent Brief, p. 3, 4; Parent Reply Brief, p. 4, 6, 8). These include delays and problems with ordering the IEE, and changes to the IEP that took place prior to the scope of this hearing. I make no decision on these issues. These issues are outside the scope of my jurisdiction. They were not raised during the hearing, no evidence was presented, and no witnesses testified to the actions that took place before May, 2018. Many of these incidents also fall well outside of the statute of limitations. At the point of this hearing, the Student has had two IEEs as well as the district evaluation, and has been classified with ASD, Speech & Language Delays, and ADHD.

finding process.” *Z.P.*, 399 F.3d at 305 (internal quotation marks omitted). Both the Parent and the District presented evidence and made arguments, and “the hearing officer by all indications resolved the factual questions in the normal way, without flipping a coin, throwing a dart, or otherwise abdicating his responsibility to decide the case.” *J.P. ex rel. Peterson v. Cnty. School Bd. Of Hanover Cnty.*, 516 F.3d 254, 259 (4th Cir. 2008). The Parent, additionally, was given several opportunities to amend her due process request as well as her notice of appeal. If the findings of fact are made “in a regular manner and with evidentiary support, they are entitled to presumptive validity.” *King v. Bd. Of Educ. Of Allegany Cnty.*, 999 F. Supp. 750 (D.Md. 1998). While the LHO’s findings of fact were sparse, each finding was based in reasonable evidence presented at the hearing.¹⁰ The Parent, through her attorney, had the opportunity to raise questions about credibility of each witness; the final decision about credibility, however, lies with the LHO. The LHO is responsible for determining credibility of the witnesses, and his credibility determinations do not need to be explained in great detail. While the LHO in this case did not make explicit credibility findings – and while one might prefer LHO opinions to do so – the LHO’s factual conclusions imply that he found the District’s witnesses credible. *See Z.P.*, 399 F.3d 298 (ruling that despite the local hearing officer not explaining his credibility determinations, credibility determinations implied in the findings of fact must stand).

The LHO’s decision veered, in my opinion, beyond the scope of ruling on the legal claims raised in the DPR and into more general advice to the parent. The transcript did not demonstrate, however, any bias, and any objections made by the Parent through her attorney were considered by the LHO appropriately. While, in my review, I must give heavy weight to

¹⁰ I do give weight to the fact that the LHO must issue his decision in a short timeline, without the benefit of the transcript as well. Minor issues in facts will happen, given this timeline. None of the errors in his decision are significant enough to have changed his outcome. They are differences in dates and times, rather than in substance.

LHO's findings of credibility, I will be making decisions based on the evidence presented and a fresh legal analysis.

I will turn now to the fundamental questions in this case, which are those raised in the Parent's DPR - whether the Student is receiving a FAPE at West Florence High School and whether the District violated the IDEA by failing to include data from the IEE in the IEP and other procedural violations. Both parties agree the Student is making academic progress. The Parent argues the Student has been bullied and treated unfairly for years, and that academic progress aside, his emotional health is suffering, and therefore a more drastic step is needed. The District argues the Student is thriving in its school and they have substantially followed the required procedures under the IDEA. I find that the District is providing the Student with a FAPE, considering both procedural compliance with the IEP process and substantive compliance with his IEP.

Is the Student Receiving a FAPE?

First, we turn to the substantive question of whether the Student is receiving a FAPE. The Parent's claims can be summarized in two questions: 1) Are the teachers aware of and following the IEP and BIP? 2) Is the atmosphere of bullying and hostility at the school making it impossible for the Student to receive a FAPE?

Teachers and staff are aware of and are implementing the IEP and BIP.

The primary special education teacher working with the Student is most familiar with his IEP and supports teachers in implementing the IEP. Before the Student starts a class with a new

teacher, she reviews the IEP with that teacher. (*See, e.g. Testimony of teacher, p. 244-248, stating that she reviewed the IEP with him 2-3 days before the start of the quarter; Testimony of teacher, p. 252*). She asks teachers to complete a weekly google doc form with information on his behavior. The Parent also, as an advocate for her child, gave teachers and administrators a copy of the IEP at the start of the school year. (*Testimony of Parent, p. 71; Testimony of Principal, p. 109*). The Parent raised the concern that Ms. R. had not read the IEP because she was not aware of the Student's narcolepsy. Ms. R's testimony said that she reviewed it when the teacher gave it to her at the beginning of the year. The Student fell asleep in her class, and she called the Parent. She then went back and reviewed the IEP again with special attention to the narcolepsy and, in the future, let him sleep it off in class. The issue seems not to be that Ms. R. did not read the IEP, but instead, forgot about the narcolepsy. She corrected this mistake quickly and has been allowing him to sleep in class as needed. No evidence was presented to suggest that – in that one incident – the Student suffered any harm. Since that incident, she has been substantively following the IEP, and there is no evidence that teachers are not aware that the Student has an IEP and BIP.

Further, the Parent asserts that she should be getting weekly behavior logs. (*Testimony of Parent, p. 71*). She referenced page 2 of the BIP, which states the following (Parent Exhibit 5):

Communication about the Behavioral Intervention Plan:

1. Weekly through daily behavior log in Google docs.
2. Progress reports every 4.5 weeks

Parents will be consistently informed by:

- *Email
- * Progress Report

Based on testimony cited above, teachers were completing behavior reports on google docs, but the Parent testified that she did not see any documents regarding behavior reports. The BIP is not clear whether the behavior logs are to go to parents or how the school team will communicate about the BIP. Regardless, if the Parent wants access to the behavior logs, the team could discuss that at a future IEP meeting and set up a system to provide the information to the Parent. Failure to send these logs, given the confusion in the BIP and IEP, and given the fact that teachers were communicating regularly with the Parent, does not constitute a lack of a FAPE.

Next, the Parent asserts that her son has been improperly disciplined, and she has not been contacted for disciplinary issues. (NOA, Parent Brief 12, 13, Parent Reply Brief 1). The LHO found credible the school official statements that they contacted the Parent when there were disciplinary issues involving other students, and that he had not been suspended. (LHO Decision, p. 7).

Finally, the Parent asserts that the Student was inappropriately removed from a classroom when the paraprofessional was sick in January 2019 and forced to wait in the office until the principal returned from the bank. (Parent Reply Brief, p. 5). The principal's testimony was that "...when she had to leave I didn't feel comfortable leaving the Student in the classroom alone, so the Student came down to the office while I could get another paraprofessional to go back to class with him so that we weren't violating any of his accommodations. I would say a total the Student was down at my office, or around in the front office just for a few minutes and we had him back in class." (Testimony of Principal, p. 112; District Exhibit 5 showing emails between the Parent and Principal confirm this timeline). The Principal was at the bank at some point during this time, and the Parent was concerned it was a personal trip, which the principal denies. Whether it was personal or a professional trip bears no consequence on the issue – the issue is

whether the school was following the IEP and BIP when the paraprofessional had to leave early. Given the emphasis the IEP team, and the Parent, have placed on making sure that the Student's one-on-one aide is with him at all times, besides in his special education classroom, a brief visit to the office to find a replacement on a single occasion could not be considered isolation or a denial of a FAPE.

An atmosphere of bullying and hostility is not making it impossible for the Student to receive a FAPE.

The Parent brings up claims that her son is being significantly bullied at school, and that the bullying is affecting his mental health. (NOA; Parent Brief p. 7, 16; Parent Reply Brief p. 1, 17). The IDEA is expressly concerned not only with academic success, but also with socio-emotional progress. Bullying and hostility at school, whether as a result of the disabilities or not, could lead to a denial of FAPE. (OSEP Dear Colleague Letter, August 20, 2013; OCR Dear Colleague Letter, October 21, 2014).

“ . . bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of a free appropriate public education (FAPE) under the IDEA that must be remedied. Students with disabilities are disproportionately affected by bullying. . . The school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the students' needs have changed such that the IEP is no longer designed to provide meaningful educational benefit . . . The IDEA placement team . . . should exercise caution when considering a change in the placement or the location of services provided to the student with a disability who was the target of the bullying behavior and should keep the student in the original placement unless the student can no longer receive FAPE in the current LRE placement.” (OSEP Dear Colleague Letter, August 20, 2013)

Specifically, bullying is “characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or

has the potential to be repeated over time. (OSEP Dear Colleague Letter, 2013 61 IDELR 263, p. 31)

The Office for Civil Rights followed up with a more detailed test for determining whether bullying is preventing the receipt of FAPE:

“OCR would find a disability-based harassment violation under Section 504 and Title II when: (1) a student is bullied based on a disability; (2) the bullying is sufficiently serious to create a hostile environment; (3) school officials know or should know about the bullying; and (4) the school does not respond appropriately.”

“Although there are no hard and fast rules regarding how much of a change in academic performance or behavior is necessary to trigger the school’s obligation to convene the IEP team or Section 504 team, a sudden decline in grades, the onset of emotional outbursts, an increase in the frequency or intensity of behavioral interruptions, or a rise in missed classes or sessions of Section 504 services would generally be sufficient.” (OCR Dear Colleague Letter, October 21, 2014).

The test further goes on to ask if the school had indication that the student’s FAPE may have been at risk, for example, by seeing adverse changes in academic performance or behavior. If not, then there is no FAPE violation. (OCR Dear Colleague Letter, October 21, 2014).

Under this test, I find that the Parent has not demonstrated that the Student has been bullied, and, even if he has, that the Parent has not demonstrated that the bullying has led to a denial of a FAPE.

In October 2018, the Student was involved in an incident in the locker room after football practice. Whether that was mere roughhousing or something more sinister, the District took adequate steps in response. The Student remained on the football team. The school officials knew about the incident and responded to it by increasing the amount of supervision. The mistake the Coach made in this situation was not calling the Parent back to report the results of his investigation. The failure to make that phone call, in and of itself, does not create a bullying environment. See *Blount Cnty. Bd. of Educ.*, 116 LRP 14556 (Ala. State Educ. Agency 2015), stating “a student or parent is not entitled to a perfect investigation or response to bullying by a

school district” when district officials investigated a bullying incident, but not as thoroughly as the parent wished.

The incidents in which the Student got into physical altercations in November and December 2018 were also not triggered by his disability. His disability factored into his response to it, and in both instances, he managed to control his behavior – itself an indication that he met appropriate social-emotional goals, and a factual point supporting the LHO’s finding that the District provided a FAPE. Moreover, the school disciplined the offending students for this behavior.

The school official’s search of the Student’s cell phone does not constitute harassment. There is no evidence that the search was triggered by his disability. If the Parent is concerned that the school engaged in a search that violated her son’s Fourth Amendment rights, any such claim is beyond the jurisdiction of an IDEA administrative process and should be litigated separately.

Both the one-on-one aide and teacher, on the other hand, state that the Student sometimes got made fun of for having a one-on-one aide, and that lead to the Student wanting to be more independent. Neither expressed that this rose to the level of bullying, and neither said the one-on-one aide was unable to work with him because of this. No evidence was presented that suggested the student’s performance or behavior changed over the course of the year as a result of this behavior. I would urge the school, the aide and teacher to keep a close eye on these behaviors. Just because they do not rise to the level of bullying yet does not mean that they cannot in the future.

Even if we took all of these incidents as bullying, they still would not amount to a denial of a FAPE. The Parent cites 34 CFR 300.532(c)(1) as a claim that, when the Student suffered

injuries by peers, the District should have expedited a new placement. This regulation is specifically related to interim alternative placements that districts place students in when they are being disciplined in some way, and therefore not relevant to this situation. (Parent Reply Brief 17). The Parent also cites several cases related to bullying.

- *Raleigh v. Independent Sch. Dist No 625*, 275 NW2d 572, 576. This case dealt with a child who was attacked based on racial tension and was focused on what evidence could be admitted. It discusses the “duty of ordinary care and proximate causation” that the district is responsible for. This case is not a special education case – it’s simply a negligence case. The injury was clear, and the parents claimed that the school had been criminally negligent. In the current case, no evidence was presented that made the extent of injuries clear; further, unlike in *Raleigh*, the LHO found that the district acted appropriately in each case and disciplined those who needed discipline immediately and thus these incidents did not amount to a denial of FAPE. Any negligence claims are beyond the jurisdiction of an IDEA administrative hearing.
- *T.K. v NYC Dept of Educ.*, NO 14-3078 (2d Cir. 2016). In this case, the level of bullying was clear and documented, and the bullying was specifically based on the student’s disability, and therefore, affected her ability to attain an education. This pattern of facts are not present here.
- *Blount Cnty. Bd. Of Educ.*, 116 LRP 14556 (Ala. State Educ. Agency 2015). In this case, because the district attempted to address the bullying, and the student did not have any academic impact from the bullying, the court found no denial of FAPE. Based on this analysis, the school addressed every incident that the Parent describes as bullying, and no

significant negative academic impact has been demonstrated, I cannot find a denial of FAPE.

I, therefore, cannot find that an environment of bullying and harassment are leading to a denial of a FAPE for the Student.¹¹

Procedural Compliance with the IEP Process

Procedural issues only constitute a denial of a FAPE when the procedural inadequacies 1) impede the child's right to a FAPE, 2) significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child; or 3) caused a deprivation of educational benefit. 34 CFR §300.513 (a)(2). Therefore, a finding of a procedural inadequacy does not, in and of itself, constitute a violation of a child's rights. The Student has received a FAPE, but I still go through each of the procedural issues raised by the Parent for the sake of addressing each of her concerns thoroughly.

The Parent has stated that the IEP meeting process in the District is flawed. In particular, the Parent is raising concerns about lack of clear invitation for the meetings, lack of clarity of purpose of the meetings, and failures by the District to provide a PWN, prepare adequately for meetings, and follow through on parent concerns and act with written notice. (NOA).

Prior to a meeting, the IDEA requires that parents be issued notice of a meeting that indicates the purpose, time and location of the meeting. 34 CFR §300.322(b)(1)(i). The IDEA requires PWN when a district proposes to or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE. 34 CFR §300.503.

¹¹ The Parent also referenced *Estate of Lance v. Lewisville ISD*, Case No. 4:11-CV-0032 (E.D. Tex. May, 11, 2012). This case applies the Title IX "deliberate indifference" analysis from *Davis v. Monroe County Board of Education*, 526 US 629 (1999). In a proceeding under the IDEA, the tests laid out in the OSEP letter apply.

Further, parents are entitled to be members of the group that creates the IEP and makes placement decisions. 34 CFR §300.321(a)(1); 34 CFR §300.501(c); 34 CFR §300.327. Parents have a right to meaningful participation where the team considers, with an open mind, the parent's suggestions. *Deal v. Hamilton County Bd. Of Educ.*, 392 F.3d 840 (6th Cir. 2004), *cert denied*, 110 LRP 46999, 546 U.S. 936 (2005), *on remand*, 46 IDELR 45 (E.D. Tenn. 2006), *aff'd*, 358 Fed. Appx. 863 (6th Cir. 2008). However, the decision-making during IEP meetings still belongs to the team as a whole, not any single member, and nothing in the IDEA suggests that the school must meet every demand of a parent. *See e.g., M.M. v. School District of Greenville County*, 303 F.3d 523 (4th Cir. 2002).

May 30, 2018 Meeting: On May 30, 2018, the IEP team at Sneed Middle School met to develop an IEP for the Student's transition to high school. At this meeting, the Parent presented IEE results from the spring of 2017. (Parent Exhibit 1). The record includes a meeting notice to the parent with a clear purpose of preparing for high school transition. (District Exhibit 6). The PWN describes some changes in the IEP – largely the removal of occupational therapy services and a denial of extended school year services. (District Exhibit 6). It also states the Student will continue to have a one-on-one professional and speech therapy for the purpose of addressing “appropriate social interactions with peers and adults.” (District Exhibit 6). The Parent said the team discussed adding Applied Behavior Analysis (ABA) services and compensatory education, but those were not included in the IEP. (Testimony of the Parent, p. 69-70).

One of the Parent's major concerns, raised in her DPR, in this case is the fact that the results from the IEE she procured in the spring of 2017 are not reflected in the IEP. If the IEE were not considered at all in the developing of the IEP, that could indeed be a procedural violation. However, a close read of the IEP and the recommendations from the IEE demonstrate

that the IEE was considered in the development of the IEP. Every recommendation was not included, but it is not required that the team accept every recommendation from an IEE.

- Classification of the Student as having Autism – 5/30/2018 IEP lists the Student as having a primary diagnosis of ASD.
- Behavioral approach to treatment, with a specific interest in ABA. The IEP discusses the continuation of speech language services focused on social interactions. Testimony described this as being delivered with a focus on serving a student with Autism. His behavior goal also focuses on skills around conversation, and understanding tone and self-control.
- Inclusion of social scripts or stories – these are not explicitly discussed in the IEP. Whether any of the providers used them was not presented during the hearing.
- Continued special education intervention for academic delays with a focus on academic applications and generalizing concepts – the goals in the IEP seem aligned to this need. They could be more specific, but the continued academic support is present.
- Continued medical care – the IEP does note the health needs of the Student, and the Student has health records on file at the nurse’s office for in-school care.
- Continued psychotherapy interventions – the Student has been receiving psychotherapy from Dr. Boone, and this is noted in the IEP.
- Annual re-evaluation – This is not discussed in the IEP.

This meeting followed the procedural requirements of the IDEA. The IEE was already a year old when this IEP was written and the team could have made reasonable decisions regarding each of the recommendations. At least some of the data from this IEE should have been a part of the May, 2018 IEP; however, we must look at the sufficiency of the IEP as a whole. *Lenn v. Portland School Committee*, 998 F.2d 1083, (1st Cir. 1993). (analyzing whether the IEP as a

whole addressed the student's needs – academic and social, rather than at each individual need). Notice was provided, a PWN was provided, and the parent was able to meaningfully participate in the meeting.

November 19, 2018 meeting: No concerns are raised about meeting notice for the November 19, 2018 meeting. The Parent requested the meeting and brought an agenda. (District Exhibit 7). Mr. Denny issued a PWN the next day, properly stating the District refused to take action as requested by the Parent. (Parent Exhibit 6).

The key question for this meeting is whether the Parent was afforded appropriate levels of parental participation. The Parent created the agenda for the meeting. (District Exhibit 7). Testimony suggested that the Parent led the conversation, even discussing the Student's history. (Testimony of Parent, p. 77). She said she did so because this was the first meeting at the high school and she wanted to make sure everyone understood the background. (Testimony of Parent, p. 77). However, the question is whether the ability for parent participation ended when Mr. Denny walked out and stated that he would not place the Student at Riverside. (NOA; Parent Brief, p. 14; Parent Reply Brief, p., 1, 17).

Mr. Denny left the meeting, he claims, because the Parent was making personal attacks and he thought it would be better to leave than to stay. (Testimony of Denny, p. 138). The rest of the team remained, but the Parent then became sick and could not continue. (Testimony of Parent, p. 78; Testimony of Principal, p. 110-111). Given that the team remained, the Parent cannot claim that the meeting was unilaterally ended. The conversation could have continued at that point. It is unfortunate that she got sick and the team could not complete the decision-

making, but that is not a violation of due process. Mr. Denny stated something to the effect of “As far as I’m concerned, this meeting is over.” (Testimony p. 186).

The LEA representative should not leave a meeting without a resolution – whether that is finding another time to meet or a resolution to the issue at hand, or even a more civil acknowledgment that the parties cannot reach consensus and would consider pursuing legal remedies. However, his departure did not deny the Student a FAPE. The Parent’s agenda made clear that her request was a private placement for the Student. Mr. Denny, as the LEA representative, disagreed. Had he stayed in the meeting, the outcome would have been the same – a fundamental point of disagreement between Mr. Denny and the Parent. The District would have still issued the same PWN the next day. Therefore, Mr. Denny’s departure did not lead to any denial of FAPE.

January 14, 2019 meeting: An attempt at an earlier meeting in December 2018 to further discuss the placement question was cancelled because of a request by the Parent that the meeting be facilitated. (Testimony of Denny, p. 139-140).

The meeting notice stated that the purpose of the meeting was “Special Review.” This led to confusion about the purpose of the meeting. The Parent, Mr. Denny, teacher, and the speech/language pathologist all stated different purposes for the meeting. Insufficient notice of the purpose of the meeting, however, does not automatically lead to a denial of a FAPE. The question is whether the unclear notice caused a deprivation of educational benefit or impeded the parent’s opportunity to participate. The Parent had an advocate at the meeting and, to the surprise of others, tabled the question of private placement. She instead wanted this meeting to be a full review of the IEP. Given that the 5/30/18 IEP was still in effect – and wasn’t due to expire for another four and one-half months – and that the last meeting ended

without resolution on the private placement, it is logical that the District assumed the meeting purpose was to discuss private placement, not to create a new IEP. There is no evidence in the record of the Parent requesting a full IEP review before the January 14, 2019, meeting, so it is difficult to fault the District for not providing notice of that purpose. The team left the meeting, however, and quickly set a date for another meeting to review the appropriate data. The team also drafted an IEP after this meeting. The next meeting was cancelled, however, because the Parent filed her Due Process Complaint and the team moved instead to a resolution meeting. The Parent was the active participant in this meeting, again setting the agenda. There is no procedural violation by the District.

February 2019 meeting/IEP Creation: The District sent the Parent a draft IEP a few days before a scheduled IEP meeting. (District Exhibits 8, 11). The Parent raised significant objections to this draft. (District Exhibit 8). She claims that the creation of the draft denied her meaningful parental participation. However, every teacher involved in creating the draft made clear that it was a draft and were very open to conversations about making changes. (Testimony of speech-language pathologist; p. 224; Testimony of teacher, p. 190; Testimony of Denny, p. 147, 150-151). Given that the Parent filed a DPR and this meeting was postponed pending the resolution meeting, this draft IEP never took effect, and the Parent was not denied an ability to participate in its creation or amendment.

Visit to the School on April 17, 2019: In briefing materials, the Parent explained that she visited the school on April 17, 2019, after the due process hearing, and was handed the February IEP as the Student's current IEP. She further states that she was told she could not visit the classroom.

The 5/30/2018 IEP should still be in effect. The hearing presented no evidence that it was not. If, in fact the team had switched to a new IEP not signed by the team, and the changes in the IEP substantially effect the provision of a FAPE, then the school may be in violation of the IDEA. A careful comparison of the two IEPs finds that even if the District incorrectly followed the draft IEP, it did not fail to provide a FAPE. The draft IEP was more focused on high school than the May 30, 2018, IEP with more detail on the Student's health and socio-emotional challenges. It was clearly focused on a high school diploma. Services were shifted somewhat, but the Student. would still receive academic support and speech/language support, as well as the one-on-one paraprofessional to address health and behavior needs. The draft IEP did not include a laptop for the Student. to bring home to type assignments. Any analysis of which draft is in place should go beyond which draft was handed to the Parent in the office, and should instead look at the provision of services for the Student. The record of the hearing includes no evidence that the District reduced or altered services in a manner to deny a FAPE.

FAPE and Private Placement

The final question of this DPR is whether the Student is entitled to a private placement because the District is not providing a FAPE. By law, a child must receive a FAPE based on an IEP designed to give him an opportunity for meaningful educational progress. *Bd. Of Educ. V. Rowley*, 458 US 176 (1982). By all evidence presented, the Student is making meaningful educational progress – he has received 4 high school credits. Just academic progress may not be enough to satisfy a FAPE – socio-emotional progress is important as well. By all evidence presented, he is also making progress here. His disciplinary record is significantly better than in prior years. Even when other students caused incidents with him, he controlled his behavior.

Several of his teachers are very complimentary of his work. He wants some greater independence. The psychologist's report expressed improvement in issues, rather than a decline. (Parent Exhibit 1). The Student is participating actively in the school. If there were significant issues psychologically – increase in depression, increase in absences, increase in inattentiveness, etc. – then the team would be compelled to make changes to the plan to meet those needs. But the record lacks such evidence. The District has provided a FAPE, so there is no entitlement to a private placement at public expense.¹²

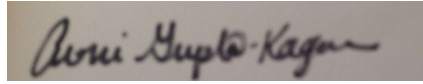
6. Conclusion

The Parent raised a number of challenges to the LHO's decision. However, after weighing all the evidence and the questions of law I find that the District has met the procedural requirements of the LEA and is providing a FAPE to the Student. Further, I find that the LHO's decision was arrived at regularly. Therefore, I cannot order a private placement. However, the District should improve some of its procedural issues as outlined above, and should confirm that the May 30, 2018, IEP is the one being implemented for the Student. No other IEP has been agreed on, and that is the only IEP in effect. That IEP needs to be updated, and the discussion of placement as well as frequency of behavior log communication can be a part of that conversation.

7. Notice of Appeal Rights

¹² Questions arose during the hearing about whether the District somehow intervened in the Parent's attempt to start an application at Riverside Military Academy. Those questions are not relevant now, as the Student is not entitled to attending that, or any other private placement, at public expense as of yet.

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 rectangular box containing a handwritten signature in dark ink. The signature appears to read "Avni Gupta-Kagan" in a cursive script.

Avni Gupta-Kagan
State Administrative Review Officer

Columbia, South Carolina
May 26, 2019