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

MYNS (student) and HS (parent/guardian),	)	
Petitioners,	)	**FINAL ORDER**
vs.	)	
Florence County School District One,	)	
District/Respondent.	)	

I. Summary

For the reasons that follow, Parent's due process complaint ("Complaint") lacks merit, and there is no basis upon which there can be a finding that District has denied Student a free and appropriate education ("FAPE") with respect to the allegations in the Complaint. Further, District's counterclaim is granted.

II. Procedural Background

The Parent previously submitted her Complaint on November 19, 2019. After the local hearing officer (LHO) John J. Fantry issued an Order on District's Motion to Dismiss on November 26, 2019, the case was dismissed, without prejudice, upon request of the Parent. Fantry Order December 5, 2019.[1]

[1] This is Parent's second time filing the same due process complaint. The first case was heard by the local due process hearing officer ("LHO") Douglas Dent, who issued a decision dated April 19, 2019, denying relief. Parent appealed and the decision and the State Administrative Review Officer ("SARO"), Avni Gupta-Kagan affirmed that decision on May 26, 2019.

Parent re-submitted the Complaint, which the District received on September 16, 2020. The Undersigned issued a Scheduling Order on September 25, 2020, which was amended on October 12, 2020. On September 28, 2020, the Undersigned issued an Order, granting in part and denying in part, District's Motion to Dismiss. On October 1, 2020, the Undersigned issued an Order, denying District's Motion to Reconsider the same.

This matter came to a hearing on October 22 - 23, 2020. District was represented by counsel. The Parent represented herself and Student. At the conclusion of the evidentiary portion of the hearing, the parties requested five business days for submission of post-hearing submissions, and the Undersigned held open the hearing for the limited purpose of receiving the same. Each party provided a post-hearing submission on October 30, 2020.[2]

III. Facts

Efforts to create an updated individualized education program (IEP) late in the 2019-20 school year were put on hold because of the pendency of the first Complaint. The state administrative review officer ("SARO") issued a decision at the very end of the 2019-20 school year.

[2] Parent provided an email of 5:15 p.m. entitled "Closing Argument." Later that evening, she provided another email entitled "(Revised) Closing Argument." The next day, Parent provided an email entitled "Weekly Behavior Logs." Although this last submission was late, the Undersigned will nonetheless consider it along with the two other emails. Since the submission of argument, however, Parent has either emailed the Undersigned or copied him on emails to others. These will not be considered. At the conclusion of the Hearing, the Undersigned made clear that each party may submit one statement by the deadline, and that there would be no responses or replies. As addressed below in the Notice section, neither party should email or submit any more argument on this matter to the Undersigned unless there is a remand from an appeal.

After the parties had the benefit of the findings from the first proceedings, District made efforts to convene another IEP Team meeting to ensure that an updated IEP was in place at the beginning of the 2019-20 school year. District sought to schedule an IEP Team meeting in May, July, and August 2019. (*See, e.g.*, Dist. Exh. 2). Parent thwarted those efforts by refusing to cooperate and by insisting that the IEP Team could not meet unless they did so on a date and time that was "mutually agreed upon." (Dist. Exhs. 3 at 1, 6 at 2; Parent Exhs. 11 at 1, 19 at 2). Unfortunately, the Record is devoid of serious efforts by Parent to provide such a date and time.

District ultimately convened a meeting on August 9, 2019, after giving notice and after receiving more arguments about the propriety of such a meeting. (Dist. Exh. 7, 9). District continued to try to offer Parent more time if necessary, and explained the purpose of having its counsel there was to advise the District. (Dist. Exh. 8 at 1). A recording of the meeting was introduced at Parent's request as Parent Exhibit 24 after Parent was provided an opportunity to review its contents and ensure its accuracy. Despite the assembly of the entire team and time spent trying to arrange the meeting, the meeting ultimately accomplished nothing. Parent and an advocate, Advocate, questioned the attendance of certain persons, focused on the fact that counsel for District attended, and complained about the continued participation of the District's Director of

Office of Exceptional Children ("OEC")Programs,[3] Brian Denny.[4] Parent and Advocate also argued about the purpose of the meeting and the impact of the prior proceedings and the SARO's decision from a previous hearing on the scope of the meeting. Mr. Denny repeatedly attempted to explain that the IEP needed to be updated, and that doing so was the purpose of the meeting. Advocate stated that he and Parent would not participate until they received a ruling as to whether it was appropriate for District's counsel to attend a meeting. Parent made no effort to present substantive information or to work towards the creation of a new IEP.

With the commencement of the 2019-20 school year, the District made further efforts to schedule a meeting. After some disciplinary issues and incidents, Parent requested a manifestation determination review ("MDR"). District gave notice of consecutive meetings of the IEP Team for November 13, 2019, to conduct a MDR and an IEP Team meeting to review and revise the IEP.

---

[3] This is the title for Denny in the IEP documents. His current position is Assistant Superintendent for Exceptional Children.

[4] District gave prior notice of the attendance of the meeting and informed Parent of her right to have counsel present. Parent and Advocate contended that District was required to provide counsel to Parent if District had an attorney present, and Parent argued that it was a conflict of interest because of the position counsel has taken in the prior proceeding. That issue was not raised in the Complaint. To the extent that it is raised in the Complaint, District did not violate the IDEA by bringing counsel to the meeting. Further, it should be noted that the recording shows that counsel simply introduced herself as counsel to advise the LEA. She was not introduced as a member of the IEP Team, and she did not play a leading or even facilitating role at all at the meeting.

Parent insisted that the only purpose of the November 13, 2019, meeting be the MDR that she requested. Parent repeatedly stated she would not agree to an IEP meeting for that date even though she clearly was available to meet. Parent apparently believes the "stay put" provisions of the Individuals with Disabilities Education Act (IDEA) foreclose any change to the IEP unless Parent agreed to meet, although why that was a concern is unclear as District has never sought to change the student's placement.

After the November 13, 2019, MDR, Parent and Advocate left. The remaining IEP Team members reviewed the IEP, made changes (some of which are discussed below) and sent Parent the revised IEP, the behavioral intervention plan ("BIP"), and a prior written notice ("PWN").

IV. Analysis of Parent Allegations

A. Parent's allegations from Complaint

Issues at a due process local hearing are limited to those raised in the Complaint. 34 C.F.R. § 300.511(d). Accordingly, while both Parent's opening statement and her post-hearing submission transcend the issues raised in the Complaint, and some are not properly before the Undersigned, this Order addresses only the issues properly raised and that are within the scope of the Undersigned's jurisdiction.[5]

[5] Parent's post-hearing submissions, for example, mention religious discrimination about which there was no testimony or documents. Even if this issue is somehow cognizable under the IDEA, it is not properly raised in the Complaint.

Many of Parent's allegations are repeated in different sections of her complaint. To ensure that all discernible and proper allegations are considered, the Undersigned addresses the allegations seriatim and will simply refer to the prior arguments for explanation where issues are repeated.

1. Denial of FAPE (failing to follow 5/30/2018 IEP/BIP as per Previous SARO Decision).

Parent first avers that District "is failing to follow the Strategies, Interventions, and Crisis Plan in my child's IEP/BIP" by "not providing the appropriate accommodations and modifications to certify academic success." Parent provided no evidence at the hearing to support this allegation.[6] There was no evidence offered as to what transpired in the classroom, other than the testimony of District personnel, including the Student's adult education assistant. No witness established that District failed to provide any of the services provided for in the IEP.

The issues of the type services Student received, and the reasons why he required these services, should have been the central issues in this case. At the end of the day, however, Parent's myriad of accusations and procedural arguments leaves a key question unanswered: what is the problem with the IEP? Put differently: how is it not reasonably calculated to provide a FAPE? District contends in its Closing Argument that Parent never challenged the goals of the

[6] In both the Scheduling Order and repeatedly at the Hearing, the Undersigned advised Parent that he can only consider testimony and documents as evidence, and that her argument and questioning of witnesses was not evidence. (*See, e.g.*, Amended Scheduling Order at 5). Despite these explanations, Parent chose to not testify.

IEP, and she did not identify related services or supports that are lacking.[7] (Closing Argument at 3). District's point is well taken.

Parent neither focused on this issue nor provided sufficient evidence to explain whether this is a sincere dispute about the services to be provided to Student. In the Order denying District's Motion to Dismiss, the Undersigned specifically advised:

> At the hearing in this matter, Parent must focus on the services provided to Student, on how such services failed to provide a free and appropriate education, and on what changes in those services she believes are necessary in order to provide a free and appropriate education and/or to remedy any violations.

(Order of Sept. 28 at 5). Parent never provided sufficient evidence that there is anything insufficient regarding the services provided to Student.

This problem continues through the submission of post-hearing submissions. Parent provides approximately twenty assertions, but none of them focus on the services provided or not provided by District.[8]

Each staff member and educator who testified was well versed as to Student's history and his needs. While, for example, Parent has directed much of her ire at the principal, he had excellent insight into Student, developed a rapport with him, and was knowledgeable about both his educational and social needs. It is clear from these proceedings that there has been palpable friction between Parent and District personnel.

[7] District also contends that Parent did not dispute the present levels of academic success. That is not entirely correct. The Parent has contended that the levels of academic success are not sufficient and introduced a report card and cross-examined witnesses on this point. This was a contested issue.

[8] The only actual challenge related to the IEP contents is the second assertion that there was a failure "to update the IEP with IEE data." The evidence did not substantiate this purported failure. Both parties, however, agree that updated evaluation data is needed. This is addressed below in Section V.

For purposes of the central issue in this matter, however, there was none as to District personnel and Student.

2. Exclusionary Discipline (punishing my son for manifestation of his disabilities).

Parent next claims that Student "was constantly suspended and excluded from his regular educational setting for discipline" until she filed for a request for a MDR. Parent further claims that, during his in-school suspension ("ISS"), District failed to provide resource services and speech therapy. Parent also claims that District suspended Student "at a disproportionate rate for behaviors that are a manifestation of his behaviors," and that they failed to follow his behavior intervention plan ("BIP") or provide appropriate documentation to Parent.

There are no out-of-school suspensions at issue. The three disciplinary issues (a phone violation, a fighting incident, and a refusing instruction violation) resulted in a total of three days of ISS. The cumulative amount and length of any suspensions did not violate Student's IEP or result in a change in placement. In terms of the denial of services during ISS, Parent offered no evidence that District denied Student services while he was in ISS.

Parent's complaint that the suspensions are inappropriate because the underlying behavior was a manifestation of his conditions appears to be a simple misunderstanding of the law as applied here for two reasons.[9]

[9] In the typical manifestation determination dispute, an LEA has determined that the behaviors leading to discipline were *not* a manifestation of any underlying condition. Such a finding can, in many circumstances, permit a change in placement to an interim alternative educational setting. 20 U.S.C. § 1415(k)(1)(C), (E). Parents in such situations often argue that the behavior is a manifestation of the child's disability, which precludes a change in placement. Because the change in placement is a matter of urgency, the IDEA provides an expedited review. 34 C.F.R. § 300.532(c). Those provisions are limited, however, to disputes "regarding placement." Id. § 300.532(a).

First, the IEP Team was not required to conduct a MDR in this situation. Parent Exhibit 25 is an audio of the MDR conducted on the same day as the IEP meeting. At the outset, Mr. Denny explained that the MDR was being conducted at the request of Parent, but that it is was actually not required under the IDEA because District never sought disciplinary action that would have resulted in an alternative educational placement. 20 U.S.C. § 1415(k)(1)(B), (C), (K).[10] Likewise, the length of the suspensions Student received (three days) did not trigger any obligations on the part of District because, cumulatively, they did not result in a change of placement. 20 U.S.C. § 1415(k)(1)(B), (C).

The MDR recording (Parent Exh. 25)[11] shows the District focused solely on the phone violation apparently because it was most clearly tied directly to the issues raised in his outside counselor's pinions, discussed below. In other words, it appears District was intentionally seeking to find an affirmative finding of manifestation,

---

Here, the opposite of that occurred. District found that Student's behavior leading to discipline *was* a manifestation of his conditions and it never sought a change in placement. For this reason, the Undersigned determined that the expedited process did not apply here. *See* Initial Scheduling Order at 1. For the same reason, there can be no prejudicial failure with regard to how the District reached its conclusion, including whether it answered the second question improperly.

[10] The fact that District agreed to hold an MDR when one was not required simply evidences an attempt to solicit and consider input from Parent.

[11] As with Parent Exhibit 24, the Undersigned entered the exhibit at Parent's request after giving Parent an evening to review the recording to ensure it was a complete copy of what she wished to have entered.

rather than trying to find ways in which it could find the absence of one. The IEP Team reached a consensus on this point, which should have ended the matter.[12]

The MDR audio recording also exemplifies the cause of the breakdown in communications. Each time Mr. Denny attempted to explain the purpose of the meeting and what was at issue, Parent argued, sought to change the subject, and made allegations about District personnel and their motives. Further, Parent expended significant energy arguing about emails and procedural items. Parent, for example, spent considerable time arguing about who should be at the meeting when, in fact, District was not seeking an alternative placement and Student was not facing any serious discipline. Mr. Denny repeatedly tried to bring the meeting back to its intended purpose, but Parent persisted in arguing legal points and issues without considering what Mr. Denny was explaining to her. She instead accused him of lying and of forgery of documents, and she would, for example, refer to the IEP team as a "gang."[13]

3. Failure to provide PWN of MDR on 11/13/2019 at conclusion of the review and a failure to poll the Team on Question #2.

During the meeting the IEP Team determined that Student's conduct was a manifestation of his disabilities. (Dist. Exh. 12). There was no PWN regarding the manifestation determination because nobody at District ever sought to obtain a finding that would have triggered a notice requirement.

---

[12] Parent, however, spent most of her time arguing about what happened and about perceived procedural issues, rather than recognizing that the manifestation determination finding protected Student's rights. At one point in the recording, Parent appears to express the view that a manifestation determination precludes discipline. That is certainly not the case. The manifestation review may impact certain removals and changes of placement, but it does not prevent discipline, which itself is an important aspect of the educational process.

[13] There was no evidence to substantiate these accusations.

The result that the IEP Team reached as to the "second question" or second prong of the Regulation also does not matter for purposes of determining whether there was a manifestation. The two questions by which a manifestation is found are set forth in 34 C.F.R. § 300.530(e)(1)(i)-(ii). Conduct can be found to be a manifestation under either the "direct and substantial relationship" prong or the "failure to implement the IEP" prong or both. These two situations are set forth in the alternative, meaning that a "yes" determination as to either one renders moot any determination as to the other for purposes of determining whether the conduct was a manifestation. *Id.* § 300.530(e)(2); see also Dist. Exh. 12 at RESP 322 (setting forth the two prongs); Dist Exh. 15 at RESP 1000 (explaining the process in the Procedural Safeguards Notice). Here, the IEP Team answered affirmatively as to the first prong, so it was unnecessary to address the second prong. The IEP Team nonetheless entertained discussion on the issue because Parent seemingly desired to discuss it. Parent's desire to argue the point, however, was unproductive and, to the extent it was understandable at first, she simply refused to listen when the process was explained repeatedly to her.

Parent's allegation that the IEP team was not "polled" is not accurate. First, Parent points to no requirement under the IDEA that there be a poll. Nonetheless, the recording of the meeting (Parent Exh. 25) reveals that Mr. Denny went around the table to get each member's views on the issue.

Under Section 3 of the Complaint, Parent also asserts that District failed to implement the IEP/BIP as retaliation for her advocacy. As discussed above, Parent provided no evidence that the IEP Team or District failed to implement an extant IEP. Accordingly, there was no failure that could have been motivated by Parent's advocacy.

Even if there was some evidence of a shortcoming in either the implementation of the IEP or in its design, there is no evidence that District did anything in retaliation because of Parent's advocacy. Based on the Undersigned's observance of the witnesses, there is no reason to believe that any of them would take any adverse action against Student that was not based on merit or bona fide disciplinary needs. District personnel spoke fondly of Student, and they displayed an appropriate understanding as to the causes of the difficulties he has at times.[14] District personnel simply do not appear to be the type of people that would retaliate against a child because of any ill will they may possibly harbor towards a parent. Certainly, nothing was proven here in that regard

Parent also alleges that she was "denied input to the Team on 11/13/2019 regarding [Student's] education when they met." Parent's claim that she was denied input on November 13, 2019, is baseless. After vehemently opposing both the meeting, and having refused to cooperate earlier in August, Parent voluntarily exited before the IEP meeting was held. In fact, at the end of the MDR meeting (Parent Exh. 25), Mr. Denny makes one last effort to explain why an IEP meeting is necessary and why Parent should remain for it. Parent still chose to leave, and District personnel neither said nor did anything that would warrant such action.

[14] Student did not testify, but he did attend the second day of the hearing and did speak with the Undersigned in passing. He presents as a polite and quiet young man, while clearly withdrawn and likely nervous from having a room full of adults (including at least one stranger) discuss him and his progress in school. He responded very positively and in a friendly manner when some of the witnesses entered to participate in the hearing and he remained appropriate throughout the long proceeding.

The Undersigned has reviewed the recording of the MDR (Parent Exh. 25) and notes that the meeting is almost two hours in length when, in fact, there was an apparent consensus from the outset regarding the outcome. Mr. Denny repeatedly yielded the floor so that Parent and her Advocate could speak, even when their points did not relate directly to the issue on the table, which was most of the time. There was considerable back-and-forth on factual issues (e.g. what occurred in the classroom) and responses to concerns raised by Parent and Advocate. There simply is no reason to believe that District was attempting to deny Parent input. Rather, it displayed a continued willingness to discuss all issues – even after Parent raised her voice and made inflammatory comments directed to other team members (including “Don’t address me” and “I’m not listening to you”).

Further, the two hours spent on bickering could have been well spent on focusing on any legitimate concerns and formulating the best possible IEP for Student. The necessary people were assembled, prepared, and ready to work. The fact that nothing productive was accomplished is not the result of any effort by District to deny Parent the right to provide input.

Parent is incorrect in her belief that her participation is both mandatory and that her decision to withhold it disables the IEP process. The issue is whether District denied Parent the opportunity to participate, and not whether Parent took advantage of the opportunity. *MM v. Sch. Dist.*, 303 F.3d 523, 534-35 (4th Cir. 2002).

Parent contends the IEP meeting proceeding without her violates the “stay put” provisions of the IDEA, and complains further that she did not receive a timely PWN. The IDEA does indeed, have a “stay put,” provision, but it only requires

that a placement be maintained during the due process hearing process. 20 U.S.C § 1414(j). Ironically, the purpose of the notice is to alert the parent/guardian so he or she can exercise the right to participate. Parent faults District while not seeking to participate. In any event, District never sought a change in placement, so there are no violations of "stay put" at issue.

Likewise, the PWN provisions of the IDEA requires prior notice when an LEA proposes to begin or change the identification, evaluation, or educational placement of a student or the provision of a FAPE, or when it refuses to begin or change the identification, evaluation, or an educational placement. 34 CFR § 300.503(a).

To the extent changes were implemented, District provided the PWN and the new IEP immediately after the meeting during which they were decided upon. Parent has failed to either identify a violation of the PWN requirements or shown how they resulted in a denial of a FAPE. Further, the purpose of Parent's complaints regarding lack of notice is unclear as she fails to meaningfully avail herself of the right to participate in anything other than the adversarial due process mechanisms.

4. Failed to follow MDR Procedures (Discipline Disputes).

For reasons set forth above, the IEP Team's consensus of "yes" with regard to the "direct and substantial relationship" prong is not a palpable violation of the IDEA, especially since Parent agreed. Only a negative determination could possibly be adverse.

Parent's next complaint about the MDR requires further consideration. Parent alleges after making the positive manifestation determination, Mr. Denny "deliberately failed to update my child's IEP with (PLAAFP) and the IEE Testing Data and recommendations for related and support services to address his Autism needs. This is a Child-Find Mandate Violation."

The Regulations provide what an LEA must consider and what it must do upon a finding that behavior was a manifestation of a child's disability:

> If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must -
> (1) Either –
>
> > (i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or
> >
> > (ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior . . . .

34 CFR § 300.530(f). Subsection (1)(i) is not at issue because no change in placement occurred. Subsection (1)(ii) here was satisfied to the extent it applied (again, all of this is predicated on a change in placement, which never occurred). The IEP Team discussed the BIP at the MDR, including redirections of behavior and interventions.[15] This occurred towards the end of the MDR before Parent left, and it included a discussion of what Student was doing while looking at his phone (i.e. watching videos). Further, after Parent left, the IEP Team reviewed the BIP during the IEP team meeting.[16] In terms of what the IEP Team was required to consider, it complied with the Regulation and there is no evidence in the Record of information provided by Parent that the IEP team did not consider.

---

[15] During the meeting, Mr. Denny reviewed these requirements and discussed the need to conduct an IEP meeting. It was at this point that Parent refused to meet further. Nonetheless, it is clear from the recording that Mr. Denny was operating from the Regulation.

[16] The earbuds are not specifically mentioned in the BIP, but that appears to be appropriate given the behaviors addressed (refusal to follow directions). As discussed above, the earbuds are repeatedly provided for as an accommodation in the IEP.

Finally, Parent makes allegations for which no evidence was provided at the hearing (e.g. availability of file by Denny, and inclusion of observations, assessments, and evaluations, as well as opinions of "licensed experts"). Again, because the absence of such information would be prejudicial only if there was a finding of no manifestation, any procedural violation here (which never was proven) could not have resulted in a substantive violation of any kind.

5. Failed to Provide Proper Notice of a "mutually" agreed upon IEP Meeting.

Parent next alleges that District's failure to give notice resulted in a denial of a FAPE because it left Student without an "accurate effective IEP/BIP." She continues her argument that she "continuously instructed the District that the sole purpose for the Meeting on 11/13/2019 was for a MDR." She did indeed, but Parent has no right to dictate what a meeting will cover, and she has no right to prevent conducting an IEP meeting without good cause.

District gave notice of an IEP meeting. (See Parent Exh. 29). Parent's knowledge of the meeting is clear from the Record as she repeatedly demanded that the meeting address only MDR issues and she repeatedly refused to accept that an IEP meeting could be held and attempted to dictate who may attend. (See *id.* at 1 ("There will be no FIEP on 11/13/2019. I never agreed or signed for that date. It is not mutually agreed upon. Period!!!")); *id.* at 3 ("No I won't! I am not having both in one day! End of discussion!"); Parent Exh. 35 ("Brian Denny is not welcome!"); *see also* Parent Exh. 36 at 2).

Notwithstanding either Parent's insistence that an IEP meeting may not be held or her efforts to exclude District personnel, the District had every right, indeed an obligation, to hold a meeting. Parent offered no evidence at the hearing as to why

the meeting should not have been held other than her improper efforts to dictate the agenda and participants. She was present on November 13, 2019; the recording does not provide any scheduling conflict that precluded her from staying longer; and the considerable time spent arguing would have at least gone a long way towards covering the items necessary to develop a new IEP.

6. Excluded from Meaningful Parental Participation on 11/13/2019 IEP Development.

Parent is correct that she objected to conducting the IEP Team meeting without her, but as discussed above, she is incorrect in claiming that she can unilaterally block an IEP team meeting by simply refusing to participate.

Parent's allegation that Brian Denny and other personnel badgered and harassed her have no basis in Record. The Undersigned has listened to the entirety of Parent Exhibit 25 and the only badgering and harassment that occurred was Parent interrupting Mr. Denny with a barrage of insults, accusations, and diversions.

Based on my independent assessment of the testimony of the District's personnel, I further find that their testimony regarding what happened not only is corroborated by the recording, but that their testimony with regard to their dealings with Parent are credible and evidence no harassment or badgering.

The recordings in this case unfortunately are not the only evidence of Parent's refusal to participate or act civilly as a member of the IEP Team. With the exception of the initial August 20, 2019, email (Dist. Exh. 22 at RESP. 642), Parent's written communications with District have, at critical times, ranged from inappropriate to incendiary, and they take aim at virtually every professional serving Student. *See, e.g.*, Dist. Exh. 20 at RESP. 1061 (email: "You sound like a

fool! . . . . You guys are so incompetent. You[']r[e] going to cause my child to die" . . . . You BASTARD!"); Dist. Exh. 19 at RESP. 796 ("Please DO NOT bother meagain about speech!"); Dist. Exh. 18 at RESP. 816 ("You can jump on the Dowdell & Denny retaliation bandwagon if you want to."); Dist. Exh. 17 at RESP. 818 ("I don't need [Personnel] doing this type of documentation . . . . Please address her. I don't trust the data she is formulating when it was never asked of her. It is suspect!"); Dist. Exh. 16 at RESP. 673 ("This is fraud!");Dist. Exh. 10 at RESP. 1295 ("You will not be a part of my child's IEP Team . . . . I have expressed my contempt and disdain for you. I will never deal with you again . . . . You are an unethical liar"). Parent also refused to use the Remind system and demanded that communications be by way of email. (Dist. Exh. 22 RESP. 643).

Parent's approach continued through the hearing where Parent went so far to suggest that counsel for District was altering or removing exhibits and she repeated allegations that the email chains provided as evidence by District were excerpted inappropriately, which she never proved.

7. Predetermination of "IEP" Meeting on 11/13/2019 interfered with my child's right to an appropriate education. The IEP developed does not meet his unique needs.

This argument goes to the heart of this matter. At the end of the day, the back-and forth between Parent and District personnel must not distract from the central issue in this case, which involves the rights of Student.[17] The allegation that the IEP "does not

---

[17] Parent's unacceptable conduct throughout does not preclude a finding that District denied a FAPE. A Student may be denied a FAPE even if both parties fail to participate appropriately in the process. Parent's conduct is discussed in detail here because it is relevant to her own allegations that District denied her a right to participate and refused to consider her input. That is a serious allegation that, if true, certainly could result in a denial of a FAPE. But the accusations here are baseless.

meet" Student's "unique needs" is an important one that should have deserved the most attention at the hearing. When one considers the amount of time spent by each side of this issue, one can only conclude that District devoted most of its attention to this central issue, while Parent offered no evidence of a substantive violation.

Further, the IDEA does not permit a finding of a violation merely because an IEP does not meet the Student's needs. The standard is more refined than that:

> [W]e follow the Court's standard as articulated in *Endrew F. [ex rel. Joseph F. v. Douglas County School Dist. RE-1*, 137 S. Ct. 988 (2017)] and hold that "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 999. This standard is framed in terms of each child's unique circumstances because "[a] focus on the particular child is at the core of the IDEA." *Id.* Consequently, "the benefits obtainable by children at one end of the spectrum [of disability] will differ dramatically from those obtainable by children at the other end, with infinite variations in between." Id. (quoting [*Board of Education of Hendrick Hudson Central School Dist. v.*] *Rowley*, 458 U.S. [176,] 202 [1982]). Our analysis is therefore grounded in each particular child's circumstances.

R.F. v. Cecil County Public Schools, 919 F.3d 237, 246-47 (4th Cir. 2019).

Perhaps the best evidence that nothing was "predetermined" is that the resulting IEP is replete with mentions of the information Parent provided at the MDR (i.e. the outside psychologist's letter). The Student's psychologist issued a letter to the Parent, recommending that the Student be allowed to listen to music through his earbuds, "as a method of coping with auditory sensitivity," which she opines provides Student "with a form of sensory self-regulation." She further recommended that Student "have updated testing to more completely assess for sensory domains dysfunction." The November 2019 IEP reflects that the IEP Team considered the information made available to it regarding the psychologist's recommendations, and expressly revised the IEP based on its understanding of her

opinions and suggestions. (See Dist. Exh. 14 at RESP. 242 ("The team added the accommodation that [Student] could wear his headphones during independent work because a letter from his psychologist indicates it will help with focusing."); *id.* at R 243 "The parent presented a letter to the team from [the psychologist], but stated she would not allow the team to have a copy until another meeting was scheduled."); *id.* at RESP. 250 ("May wear earbuds/headphones during independent work in the classroom"); *id.* at RESP. 251 ("He may listen to music and wear earbuds/headphones only during independent work time. He may not have them in during instruction time and when teachers are teaching and/or speaking to him. He also is not to use them for watching videos/movies/chats."); *see also id.* at RESP. 245 (referencing no use of other electronics and that "earbuds" and others are kept out of reach, apparently during instructional time)

Parent's Exhibit 25 (the audio recording of MDR) shows that Parent lent the letter to Mr. Denny, who read its contents to the other IEP team members present. A review of the contents of the letter, which was provided at the hearing (Dist. Exh. 13) shows that there was nothing more to consider. To the extent that the psychologist implies that this accommodation be provided during instructional time, the recommendation clearly was considered.

At a substantive level, it is somewhat difficult to evaluate how well calculated the IEP was at the time. Given the information available to the IEP Team, however, there is no basis in the Record to find a violation. Student's success (which can be a non-dispositive indicator) is a mixed picture, which is not uncommon. If there is a need for further refinement of the IEP at this time, it would likely turn largely on the results of an updated evaluation. Such an evaluation may well raise issues that the

IEP Team should address. District seems to share this view, as evidenced by its counterclaim (discussed below) and the testimony of Mr. Denny, who testified that a new evaluation is needed.

The issue here is whether the IEP was proper given the record evidence of the information available to the IEP Team at the time (i.e. November 13, 2019). On that question there is no Record evidence upon which a violation could be found.

8. Retaliation, harassment and discrimination for parent advocacy.

To the extent this allegation relates to "retaliation, harassment, and discrimination" of Parent as an IEP team member, as discussed above, Parent offered no competent evidence of any such behavior. Likewise, there was no evidence whatsoever that any District personnel retaliated against, harassed, or discriminated against Student.

9. Ongoing (HIB) disability-based harassment & bullying by administrators, teachers and peers.

For the same reasons set forth above, there was no evidence presented at the hearing that would substantiate this allegation, regardless of who Parent claims was harassed or bullied.

10. Physical Attacks (Victim of Assault & Battery 3rd Degree 10/15/2019)

This appears to be an allegation regarding a fight involving the Student and another child. There was little evidence of what transpired, other than the fact that the Student was involved in a fight with another student. There is nothing in the evidence presented that would warrant a finding that the District denied a FAPE because this incident, or that the incident itself resulted in a denial of a FAPE.

11. SRO Confrontation (Failure to comply with Memorandum of Understanding (MOU).

The Student's adult assistant credibly testified about a concerning situation in which a school resource officer questioned Student in a way that, given the assistant's description, one could reasonably expect would be anxiety provoking for the Student. District personnel apparently intervened, however, and removed the Student from the situation.

Parent provided no evidence that this incident caused a denial of a FAPE. Nor did the Parent request that the IEP Team instruct the SRO on such situations, which may be advisable. At this point, however, absent a violation, there is no basis for ordering such relief given the paucity of evidence regarding what happened. The assistant's credible testimony raises a very fair question, but at the same time it appears that the District promptly addressed the issue and removed the Student from the situation.

B. Issues raised in Motion to Dismiss

The Undersigned denied the District's Motion in several respects because the Motion sought to preclude issues that were not clearly set forth in the Complaint itself. In other words, it was not clear what was to be "dismissed" in terms of the allegations. Out of an abundance of caution, however, the Undersigned will specifically address some of the issues raised in the Motion to ensure that all issues properly pled have been addressed. The issues of "discrimination, harassment, retaliation, forgery, and assault" are addressed above. The Undersigned disagrees with the District's continued assertion that these issues are beyond the scope of an IDEA hearing. If, for example, an LEA forged a parent's signature showing participation or approval, such a fact could bear directly on whether violations occurred. Likewise, any attempt to bully, harass or coerce a parent from exercising his or her right to be a

full participant of the IEP Team would be a very serious matter and is something that should be addressed in a due process proceeding and corrected, if it occurred. Further, if a student was denied a FAPE because an LEA failed to provide a safe environment, a hearing officer certainly is not powerless to act. Accordingly, these allegations are properly before the Undersigned.

The District is correct, however, that there is no evidence to support such allegations in this case. Specifically, as to the forgery allegations, I find there was no evidence that Mr. Denny forged anyone's signature. As to the allegations of assault, I find there was no evidence that the Parent was assaulted or that District personnel assaulted Student. Likewise, I specifically find that there is no competent evidence of harassment or coercion of either the Parent or Student.

As to allegations of non-District personnel, I find that the only issue for which evidence was presented that could fall within the Undersigned's jurisdiction would be the issues regarding the SRO's treatment of the Student as conveyed by his assistant. For the reasons set forth above, there is not sufficient evidence of a violation or a basis upon which relief could be granted.

Regarding the scope of available remedies, it is not necessary to theorize about what remedies could be proper because there are no violations on the part of District. A review of District's prior arguments regarding *res judicata* do not reveal any issue decided here that is barred by the Orders of LHO Dent and SARO Gupta-Kagan.

District's argument regarding dismissal of the MDR allegations is addressed above. Parent raises an issue about what should have happened after a finding of a manifestation of a disability, which is a proper issue for due process even if there is no adverse determination (*i.e.* a "no manifestation

finding). Likewise, Parent's allegations as to what should have been considered in the MDR are not dismissed because expecting Parent to understand the nuance between the MDR meeting and the IEP Team meeting may be expecting too much. Parent presented information (the pscyhologist's letter) and has a right to expect that the IEP Team consider this information. As discussed above, however, the IEP Team did consider the information. Accordingly, the allegation will not be dismissed but it is subject to the finding that no violation occurred.

V. Analysis of District Counterclaim and Competing Requests for an Evaluation

Both parties have requested an updated evaluation. Parent seeks an Order requiring that District pay for an independent evaluation. District, on the other hand, seeks to conduct a comprehensive psycho-educational evaluation by District. Both parties agree the current evaluation is out of date.

Parent's right to demand an independent evaluation at District's expense cannot be evaluated at this point because there is not a proper (i.e. up to date) District evaluation. 34 C.F.R. § 300.502(b)(1) (noting that, if certain conditions are met, "A parent has the right to an independent educational evaluation at public expense *if the parent disagrees with an evaluation obtained by the public agency*") (emphasis added). Because all parties agree that an evaluation is necessary, and because the District's evaluation would be a condition predicate to any request for an independent evaluation, District's counterclaim must be granted. The Regulation is clear: Any request for an independent evaluation at an LEA's request must be reviewed in the context of the LEA's evaluation. *Id.* The Undersigned cannot put the cart before the

horse andshort circuit the analysis in 34 C.F.R. § 300.502(b)(2).

District shall arrange for the evaluation(s) it wishes to perform and shall give Parent all proper notices. Parent shall cooperate in making Student available.[18]

The Undersigned will retain jurisdiction to resolve any disputes that might arise under this Section.

VI. Notice of Appeal Process

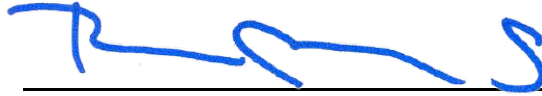
Any party may appeal this ruling. A party seeking to appeal this ruling must do so **in writing** and **within ten (10) days** of receipt of this Order. The written appeal must be addressed to:

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

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

[18] This is a grant of District's request for an evaluation, and not a request by the Undersigned for an independent evaluation pursuant to 34 C.F.R. § 300.502(d).

The parties may submit any disputes and requests for action/relief with regard to the District's counterclaim and any resulting evaluation as set forth above.



Brian P. Murphy
Local Due Process Hearing Officer

Dated November 9, 2020
Greenville, South Carolina