

G.J. (Parent) on behalf of Z.B. (Student),	)	
	)	
Petitioner,	)	
	)	
vs.	)	Final Order
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	)	
Florence County School District One,	)	
	)	
District/Respondent.	)	
	)	
	)	

The Parent submitted the present Due Process Complaint/Request ("DPR") on March 20, 2022. The DPR was received by the District and South Carolina Department of Education ("SCDE") on March 21, 2022. District submitted a Motion to Dismiss and Sufficiency Challenge March 31, 2022. On April 1, 2022, I issued an Order, granting the Motion to Dismiss in part and denying it in part. I denied in full the District's Sufficiency Challenge.

¹ I do not accept the Parent's contention that she did not understand the Order with regard to the need to submit and amended DPR with more specificity regarding the records issue. The same type of Order was issued relative to a previous DPR filed in February 2022 and the Parent responded to that Order with an amended DPR.

(1) the allegations of a failure to develop, review, and revise an IEP on pages two and three of the DPR; and (2) the failure to provide transportation allegations on page three of the DPR.

The Parent elected a public hearing. A Scheduling Order was issued on April 28, 2022, setting the hearing dates for June 15-17, 2022. The hearing started as scheduled and concluded on June 17, 2022. Both parties elected to submit written arguments by noon on June 20, 2022, and both parties timely submitted the written arguments.

For the reasons below, I find that there were procedural violations in the handling of the March 17, 2022, individualized education program ("IEP") meeting. There is, however, no basis for granting relief sought by the Parent.

II. Facts

During the 2020-21 (fifth grade) and 2021-22 (sixth grade) school years, Student attended an elementary school in the District. The Student attended school virtually in 2020-21 and in person during 2021-22.² The Student has medical diagnoses of attention deficit hyperactivity disorder ("ADHD") and sleep apnea. He receives special education and related services under the disability categories of other health impairment (OHI) and specific learning disability (SLD) as to math.

The IEP team met at the Parent's request on August 3, 2021. The team needed to meet early because the Student's prior IEP for 2020-21 was based on a

² The Student previously attended a different elementary, which ends after the fifth grade. The current elementary school runs through sixth grade. For sixth grade, the Student would have attended Moore Middle School if he had attended his home school in the fifth grade.

virtual education model. The IEP team reviewed the Student's present levels of performance, accommodations, and behavioral intervention plan ("BIP"). The Parent requested tutoring outside the school day, which the District denied because it "believe[d] that additional instructional time outside of the school day could have a negative impact on [the Student] wanting to learn." The District also rejected the Parent's request for reading services, medical homebound, and individual services.

On September 30, 2021, the IEP team held the Student's annual review IEP meeting. The team added reading as a special education service in the IEP because there was a gap in the Student's reading proficiency and determined that extended school year ("ESY") services would be discussed at the end of the year.

The IEP team met again on November 17, 2021, for almost two hours. The main topic was development of an inclusion service-delivery model for reading services. The IEP team also made changes to how information would be provided to the Parent. The Parent requested a teacher's aide in the classroom, who would primarily instruct the Student. Amanda Dale ("A.D."), the special education coordinator who served as the local educational agency ("LEA") representative, explained that a teacher's assistant is not an instructor, and she instructed the IEP team to focus on pushing in instruction as to the services agreed upon. The District documented that it would not provide a teacher's assistant because the Student did not want to be singled out and because a teaching assistant is not qualified to provide instruction.

At the November 2021 meeting, the Parent also requested thirty minutes of English/language arts ("ELA") resource services. The Parent and District agreed that a special education teacher would work with the Student for thirty minutes and then pull the Student out of class for thirty minutes. The LEA representative added that they

would try this and then regroup at some point after Christmas to see how inclusion was working and to decide whether the plan needed to be tweaked. The parties deferred the tutoring issue.

The tenor of the discussion in November 2021 was productive and interactive with each participant allowing the others to speak and all participants focused on the issue at hand.

As soon as the Christmas break was over, the Parent requested the date for the next IEP meeting. On February 28, 2022, the Parent requested “an emergency IEP meeting” to discuss behavior services, transportation as an accommodation, a teacher's aide, after-school tutoring, and the purchase of eyeglasses.

The District scheduled a meeting for March 17, 2022. During that meeting, A.D. who served as the LEA representative, stated that scheduling the meeting was delayed by a DPR filed by Parent.³ Whether or not a result of that DPR, the tenor of the March 17, 2022, meeting was markedly worse than that of the November 2021 meeting. The March 17, 2022, meeting began with a discussion about the Parent's request for transportation services. The Parent argued that Dr. Richard O'Malley, the District's superintendent; and Brian Denny, the assistant superintendent for special education, offered or suggested that the Parent request a transfer for the Student if she was unsatisfied at his home elementary school.

³ The Parent filed a previous DPR on February 10, 2022, which also was assigned to me. On February 18, 2022, the District submitted a Motion to Dismiss. On February 21, 2022, I issued an Order granting the Motion in part and denying the Motion in part. The Parent submitted an Amended Complaint on February 28, 2022. On March 10, 2022, the District filed a Sufficiency Challenge, Motion to Dismiss, and Response as to the Amended Complaint. The Parent responded by email that evening. On March 11, 2022, I issued an Order requiring the Parent to amend with a the proper address for the Student address. That DPR never proceeded because Parent did not file an second amended DPR by the stated deadline. Instead, the Parent included her allegations from the February 10, 2022 DPR in the new DPR currently before me.

The Parent stated that she agreed with the recommendation and transportation should therefore have been provided by the District. A.D. testified for the District that transportation is provided in rare times when a student's needs cannot be met at his or her home school, such as a self-contained classroom where it would not be practicable to have a teacher assigned to every school. In the Student's case, however, the services found to be necessary could be provided at any school in the District.

The District reasoned that the Parent's request for transportation was not proper because: (1) the District did not have to provide transportation when the Student transferred schools at the Parent's request; and (2) the Student was not receiving transportation as a related services at his prior school.

The next discussion at the meeting centered on tutoring services. As she did in November 2021, the LEA representative stated that added tutoring was not appropriate because it was a lot to put on a student challenged with ADHD. When the special education teacher, stated that she thought more tutoring would be beneficial, A.D. immediately responded that it might be helpful, but not appropriate. The Parent countered that the Student was already receiving more tutoring, but that she had to pay for it. The Parent also pointed out that the Student was receiving compensatory education and when that ended, the Student would need the tutoring services.⁴ A.D. immediately responded that it was the District's position that it was inappropriate

⁴Both parties point out the Student's relative success in the 2020-21 school year in meeting his IEP goals. The Parent points out that, during 2020-21, the Student received tutoring services that that the Parent sought in 2021-22.

She asked the Student's ELA teacher for her opinion, noting that the ELA teacher had earlier conveyed issues with the Student's lack of inattentiveness. Just as the teacher began to state that the one-on-one would be good for the Student, A.D. again interjected immediately and remarked that every student would benefit from 1:1 instruction. Later in the meeting, the ELA teacher again tried to provide input and explain that the Student was distracted in the classroom and would walk around. The LEA representative again cut her off. The school-based therapist confirmed that the Student did much better working with her one-on-one outside the classroom than he did in the classroom where there are too many distractions.

At one point one of Parent's invitees challenged the LEA representative for ignoring a teacher and Parent when they were seeking help. When the LEA representative claimed there was not "evidence" to support what the Parent was asking for, the Parent's invitee asked, "what evidence do you need when an employee in the district is asking you for help?"

A.D. could not be persuaded, and she repeatedly stated that it was not appropriate to add services to the school day. When, for example, the Parent challenged her as "overruling the teachers," A.D. responded that as the LEA representative she was responsible for District funds, and that she was looking for something more from the IEP team than statements that the Student could

benefit or could do better when the District had not tried something else, such as more pullout, which she described as “less restrictive.”

The IEP team also did not have the benefit of the service/time records submitted by the teacher who was providing compensatory tutoring services to the Student in the evenings. A.D. testified that she did not share these records because they were “personnel records.” The teacher was invited to the March 17, 2022, IEP meeting but she could not stay for long. In their post-hearing submissions, the Parent blames the District for not addressing the tutoring issue while the teacher was present, while the District blames the Parent for insisting on addressing the transportation issue at length, which precluded the teacher from being present for the tutoring discussion. The District’s recollection is correct. The March 17, 2022, recording begins with the Parent saying she wanted to address transportation first. The LEA representative confirmed that the Parent wanted to discuss transportation first rather than the issue on which the teacher could have provided input. The LEA representative explained that the teacher had to leave. The Parent, though, stated that she wanted to address transportation first. The teacher left before the discussions on tutoring and the teacher’s aide. The March invitation and A.D.’s reminder that the teacher’s issue would need to be addressed first shows the District was not trying to preclude the teacher from providing input.

In the end, the LEA representative documented her view in the IEP documents about 1:1 instruction.

The District and Parent agreed that added pullout time was appropriate and that the special education teacher’s resource services would all be provided on a pullout basis rather than thirty minutes in resource time outside the class and thirty minutes in the class.

The Parent requested a dedicated teacher in the regular classroom rather than a paraprofessional. At the end of the meeting, however, the Parent and District agreed to provide a paraprofessional.⁵

The school-based therapist testified that she worked with the Student on accepting the paraprofessional and the Student's relationship with the paraprofessional and herself improved over time as the level of trust improved.

⁵ There was considerable discussion about whether a paraprofessional or teacher aide was appropriate. The LEA representative explained during the March 17, 2022, that the terms paraprofessional, teacher assistant, and teacher aide are synonymous.

III. Analysis

A. Scope of DPR

The Parent's DPR consists of discrete sections of allegations. At the conclusion are lists of purported "procedural" and "substantive violations," many of which appear to relate, in varying degrees, to the general sections. This Order analyzes the issues as presented at the hearing. To the extent there are allegations addressed at neither the hearing nor in the post-hearing submission, they are dismissed.

B. Failure to develop and revise IEP

Parent makes several allegations under the paragraph:

Pursuant to Section. 300.324 Development, review, and revision of IEP

[A.D.], Brian Denny and the IEP team hired employees failed to schedule an IEP meeting to discuss transportation, student academic progress or weakness, behavior, and adding additional services and accommodations per parent request and agreement per IEP team.

During the IEP meeting on 11/17/21 the team agreed to have a meeting in the January 2022. [A.D.] and IEP team has not scheduled a meeting per parent many requests to address concerns of [the Student] academic and behavior struggles and adding additional services and accommodations. (12/20/21, 12/16/21, 11/17/21 IEP recorded meeting)

In the IEP meeting on 03/17/22 [A.D.] denied parent access to [the Student] educational records and did not provide the requested information in the meeting. Behavior logs, [the teacher's] records of services she provided to [the Student] for ESY and tutoring, Medicaid bills included counseling records never received to review the counseling notes of services allegedly provided on two date of services. These documents are needed to discuss placement and services in [the Student] IEP. [A.D.] and the team continue to express they need data and documentation but yet I must fight the District to provide me with the requested information. This information is needed to provide my son with a teacher aide and tutor with the documentation to show the need.

1. Failure to schedule IEP meetings

The first two paragraphs of this Section allege failures to schedule IEP meetings. The Parent apparently was frustrated that meetings were not scheduled as fast as she wanted. The Parent has failed to show any deficiency in this regard. The IEP team met three times in late 2021. Although there was some delay in getting the next meeting scheduled, March 2022 was not an unreasonable time to reconvene. Reconvening in the first days of January would not have given the IEP team accurate data about the Student's performance, especially right after the Christmas break. As everyone recognized, there was regression during breaks. Although the Parent requested an "emergency" meeting in February 2022, there was no emergency.

2. Allegations about the March 2022 meeting

Unlike the prior IEP meetings, the March 2022 meeting is at times difficult to understand. Participants on both sides talked past each other. At times there would be three people having different discussions. What is clear, however, is that it did not proceed as envisioned by the IDEA.

a. Tutoring or 1:1 instruction

There was much discussion about what constitutes "tutoring," as well as what, if any distinction there is between a paraprofessional, a teacher's aide, or a teacher's assistant. What is clear, however, is that the Parent was seeking additional 1:1 instruction for the Student in November 2021 and in March 2022. What is most troubling about the March 2022 meeting is the inflexibility of A.D. as the LEA, who continued to claim there was "no evidence" to support requests when she continually

shut down even the teachers who sought to provide such “evidence.” The Parent's invitee had it right: You can't stop teachers from providing evidence so that you can claim there is no evidence.

It is also not proper to reject the broader issue of instruction simply because one does not favor the proposed form in which one member of the team sought them. It is important to distinguish between the “what” and the “when,” the “where,” and the “how” in terms of how those services would be delivered. The first question should be what services are needed (regardless of the label used by various persons to describe those services). Here, the “what” is 1:1 instruction. Tutoring is a form of 1:1 instruction (*i.e.*, the “how”). Parents cannot be expected to understand the distinctions between what is instructional and what is not, or what terms to use. The IEP team should determine what the needs are, and not just throw the “what” baby out with the “how,” “when,” or “where” bath water.

Although the discussion in March 2022 should have started with the “what” stage (1:1 instruction), A.D. stopped any such discussion at the mere mention of the word “tutor.” At one point, for example, A.D. questioned the special education teacher about her observation. As soon as the special education teacher began to speak in favor of additional 1:1 service, however, A.D. cut her off. The special education teacher only spoke for a few seconds.

The LEA representative assumed that the services requested were additional out-of-class services that would lengthen the school day. In other words, she focused solely on the “when,” and did not allow the IEP team to even discuss the “what.” IEP

team members must be allowed to “kick around” and “brainstorm” ideas and options. But as soon as anyone tried to speak up favorably towards the Parent’s request, A.D. stopped the comments and argued about context. This is not a mere denial of parental participation, but a denial of IEP team participation.

A.D.’s inflexibility is highlighted by her comments that it was not appropriate to add time to the end of the day, at one point exclaiming: “It’s just not.” She argued that as the LEA representative it was her job to commit District funds and that there was no evidence that services that would lead to a longer day are appropriate. The Parent, however, raised several points and suggested a review of data showing a correlation between tutoring services the Student was receiving (at Parent’s expense) and completion of homework, which Student was not getting done during the day. Although A.D. did not want to consider it, that also is “evidence.” The school-based therapist emphasized that the Student is more productive once the distractions of the classroom are eliminated. That too is “evidence.” A.D. continued to direct all comments to her preferred outcome of additional (non-instructional) paraprofessional services and did not seriously entertain any discussion about additional 1:1 instruction.

The District takes a troubling position in its post-hearing submission: “[T]he team must seek consensus, and when consensus is not reached, the LEA must make the decision.” In a generic sense, that is accurate. Letter to Richards (OSEP January 2010).⁶ If, however, consensus always requires an LEA representative’s agreement, then logic

⁶ <https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/letters/2010-1/richards010710iep1q2010.pdf>

dictates the LEA representative's position is the only one that ever matters. A rule that the LEA representative's consent is necessary to constitute consensus is essentially pure veto power. During the deliberation process, nothing in the Regulations provide that the LEA representative occupies any more importance than a parent and educator members of the team. 34 C.F.R. § 300.324(a)(1), (3); *see id.* § 300.321(a).⁷

Congress did not create IEP teams to be merely advisory committees for LEAs. This situation well illustrates the problem when even instructors could not fully participate.

The LEA representative's reasoning often was strained at best. At one point, she reasoned that tutoring does not comply with the IDEA's LRE requirements. LRE is a concept related to placement, and it is not a limitation on the support services that an IEP team can add. See 34 CFR § 300.114. As the LEA representative she missed the point that the Parent was not advocating for services that would diminish his inclusion in the regular education setting. Adding services at night would not create an LRE issue.

A.D. also argued that 1:1 instruction was not proper because it would assist the Student generally in terms of completing class work, rather than being directed specifically at goals in the IEP. This is too narrow of a view. The Regulations define services as related if "required to assist a child . . . benefit from special

⁷ The only time the IEP team can be bypassed is by agreement of a district and parent. 34 C.F.R. §300.324(a)(4)(i).

education.” 34 C.F.R. § 300.34(a). As the examples show, there is no requirement of a direct nexus between the service and an IEP goal. The nexus is between the service and benefitting from special education.

The proper procedure would have been to determine whether additional instruction is necessary based on present levels of performance. If they was a need, then the IEP team should have considered the way they would best be delivered, including the when, where, and how.

The failure to consider a related service is a procedural violation of the IDEA. *Dibuo v. Bd. of Educ.*, 309 F.3d 184, 191 (4th Cir. 2002); *R.S. v. Bd. of Dirs. of Woods Charter Sch. Co.*, No. 1:16-cv-119, 2019 U.S. Dist. LEXIS 33760, at *39 n.27 (M.D.N.C. Mar. 4, 2019). Based on the above, I find that the District committed a procedural violation on March 17, 2022, when it failed to properly consider additional 1:1 instruction, either as tutoring or in some other form. The next question then becomes what relief, if any, can be provided. Resolution of that question turns on an established test that measures the effect of, or consequences of, the violation.

“[I]t is the duty of the fact-finder to carefully weigh the evidence to discern whether a procedural violation has in fact adversely affected a student's education.” *T.B. v. Prince George's Cty. Bd. of Educ.*, 897 F.3d 566, 574 (4th Cir. 2018).

There is no bright line distinguishing all the "procedural" requirements of the IDEA from its "substantive" requirements. If such a line could be drawn, it might be done by looking to the consequences of the violation of the IDEA requirement in question. The violation of a substantive requirement results, of necessity, in the denial of a FAPE, whereas the violation of a procedural requirement does not, *see*

DiBuo [v Board of Education], 309 F.3d [184,] 190 [(4th Cir. 2002)].

A.K. v. Alexandria City Sch. Bd., 484 F.3d 672, 684 (4th Cir. 2007) (Gregory, J., dissenting).

Under both the statute and its regulation, a hearing officer's "determination of whether a child received a FAPE must be based on substantive grounds." 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. § 300.513(a)(1). A hearing officer may find that a child did not receive a FAPE as to procedural inadequacies only if the procedural violations "impeded the child's right to a FAPE," they "significantly impeded the parent's opportunity to participate in the decision-making process," or they "[c]aused a deprivation of educational benefit." 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); *R.F. v. Cecil county Pub. Schools*, 919 F.3d 237, 248 (4th Cir. 2019), cited in *E.S. v. Smith*, 767 F. App'x 538, 538 (4th Cir. 2019); *e.g.*, *Dibuo v. Bd. of Educ.*, 309 F.3d 184, 190-91(4th Cir. 2002) (noting, in a reimbursement case, that a violation of a procedural requirement of the IDEA (or one of its implementing regulations) must interfere with the provision of a FAPE before the child and/or his parents would be entitled to reimbursement"); accord *R.S. v. Bd. of Dirs. of Woods Charter Sch. Co.*, No. 1:16-cv-119, 2019 U.S. Dist. LEXIS 33760, at *50 (M.D.N.C. Mar. 4, 2019).

Under [20 U.S.C.] § 1415(f)(3)(E)(ii)(II), an [LHO] must answer each of the following in the affirmative to find that a procedural violation of the parental rights provisions of the IDEA constitutes a violation of the IDEA: (1) whether the [petitioners] "alleg[ed] a procedural violation," (2) whether that violation "significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a [FAPE] to the parents' child," and (3) whether the child "did not receive a [FAPE]" as a result. *Id.* § 1415(f)(3)(E). Unless an [LHO] determines that a given procedural violation denied the child a FAPE, [h]e may only order compliance with the IDEA's procedural requirements and cannot grant other forms of relief, such as private placement or compensatory education. See *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 754 n. 6 (2017) ("Without finding the denial of a FAPE, a hearing officer may do nothing more than order a school district to comply with the [IDEA's] various procedural requirements.").

R.F., 919 F.3d at 248; *T.B. v. Prince George's Cty. Bd. of Educ.*, 897 F.3d 566, 573-74 (4th Cir. 2018). There are differences between the test set forth in *R.F.* and the one that appears in the statute itself.⁸ Because any review of this decision would be governed by Fourth Circuit precedent, *R.F.* will be applied as binding precedent.

The first question raised by *R.F.* is whether Parent has alleged a procedural violation. The answer is "yes." The second question is whether that violation significantly impeded Parent's opportunity to participate in the decision-making process. Again, my answer is "yes." The Parent's input simply was not considered, nor were the educators' opinions properly considered on the matter. This is not a situation in which the Parent

⁸ The three statutory elements are set apart with the disjunctive ("or"), meaning that a violation can be found if any of the three are met. The Fourth Circuit recitation of somewhat different elements are set apart with the conjunctive ("and"), meaning that all three of its elements must be present. The Fourth Circuit made the first statutory element (FAPE) its third element, thus making it a requirement along with the second element, the same as the second element in the statute. The first element in *R.F.* about pleading does not appear in the statute or regulation. Finally, the third statutory element ("deprivation of educational benefits") does not appear at all in *R.F.*

was the lone dissenter or in which the professional educators disagreed with her. Here, there was a breakdown where only one viewpoint was considered, and A.D.'s adamance is clear.

The third question is whether the violation led to a denial of a FAPE. The evidence does not support a "yes" response. This finding must be based on evidence introduced at the hearing, and not merely on arguments presented at IEP meetings that are introduced as evidence.⁹

The standard for providing a FAPE is well settled, although its application in any given case requires an intense fact inquiry:

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

The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. [*Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U. S. 176, 207 (1982)]. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians. *Id.*, at 208- 209. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. *Id.*, at 206-207.

* * * *

⁹ Statements made during the IEP meeting can be evidence about whether procedural violations occurred. A denial of a FAPE, however, must be based on evidence produced at the hearing.

[T]he progress contemplated by the IEP must be appropriate in light of the child's circumstances A focus on the particular child is at the core of the IDEA. The instruction offered must be "specially designed" to meet a child's "unique needs" through an "[i]ndividualized education program." [20 U.S.C.] §§1401(29), (14) (emphasis added). An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth. §§1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv).

* * * *

. . . [An] IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

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

Andrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 999-1001 (2017); *M. L. v. Smith*, 867 F.3d 487, 496 (4th Cir. 2017).

The Parent has focused significant time and energy on process issues, such as her efforts to obtain information on what was said in meetings. Scant, if any evidence was introduced that the IEP goals were not ambitious enough. In fact, that does not appear to be Parent's contention. The Parent appears to be complimentary of the teachers and other professionals at the Student's school. The testimony of the Student's teachers and service providers show why. Each

school-level witness was engaged, focused, knowledgeable, and caring.¹⁰ There is little doubt their considerable time and effort benefited the Student immensely.

If the Parent does contend that the Student did not receive a FAPE, the Record does not support such a claim. The IEP team met several times during the year. As the Student's special education teacher testified, information was provided regularly (except for the records from the teacher providing tutorial services).¹¹ The IEP Team was flexible in making changes as evidenced, for example, by the removal and reinstitution of a paraprofessional and its alterations to the amount of pull out and push in time at the Parent's request. Further, A.D. and the IEP team apparently considered the data about present levels of performance in determining that ESY is appropriate given the losses observed over breaks. The Student progressed to the next grade level, and he will now enter middle school. Under *Andrew F.*, the instruction offered was specially-designed to meet the Student's unique needs. The Student's IEP was developed and modified after due consideration of present levels of achievement,

¹⁰ When, for example, the IEP team (with the Parent's consent) elected to include a paraprofessional to assist in redirection, the school-based therapist worked with the Student to gain his acceptance, which she was reportedly able to do.

¹¹ The Parent never responded to my April 1, 2022, Order requiring her to delineate any requests for records.

disability, and potential for growth. The goals set were sufficiently ambitious.¹² This was no doubt a challenging year for the Student, who had to acclimate to a new environment after being out of the classroom setting since the onset of the COVID pandemic. The expectations of classroom behavior for sixth graders are markedly different from the expectations placed on the Student when he last attended school in person. The Student probably never knew the other students in his classes. Add all this to the challenges normally present with ADHD, and the progress made last year easily establishes that the Student received a FAPE.

Despite my serious concerns about the consideration of 1:1 instruction, there is no evidence to establish a substantive violation of the IDEA under the third prong of the standard set by *R.F.* For purely procedural violations, hearing officers may issue orders to comply. 20 U.S.C. § 1415(f)(3)(E)(iii); 34 C.F.R. § 300.513(a)(3). The Parent has not requested relief that would qualify as for an order to comply. I therefore decline to order relief as it is not clear how it would be warranted. The District has held productive and proper meetings before with the Parent, and it is likely that any future IEP meetings will be with another team as the Student transitions to middle school. If the relationship between the Parent and District continues to

¹²Granted, academic progress was minimal, at best, across the board as was the Student's progress on his behavioral goals. Requiring too much progress vis-à-vis goals creates a catch-22 under *Andrew F.* The mandate that Districts set ambitious goals would be undermined if less-than-satisfactory progress leads to a presumption that a district denied a FAPE.

be strained, however, I strongly suggest the parties consider facilitated IEP sessions in the future.¹³

b. Denial of parent access to records at meeting

In the DPR, the Parent identifies three types of records that were not produced as part of the March IEP meeting: “Behavior logs, the teacher’s records of services she provided to [the Student] for ESY and tutoring, Medicaid bills included counseling records.” Of these, the only records about which there was evidence of non-production were the records from the teacher providing the compensatory services.

There appears to be no dispute that A.D. did not allow the IEP team to consider the the compensatory service/tutoring records. Her arguments for precluding this review are difficult to understand. For example, A.D. argues that records the teacher kept about the services she provided to the Student are not educational records. Rather, she contends they are “personnel documents.” There was no dispute that the records summarized the instructional activities and services provided to the Student. They are educational records.

¹³ [\[Link to the facilitated IEP program in South Carolina\]](#). This program is discussed more fully at the SCDE special education site under parent resources. In her post-hearing submission, the Parent asks that this be ordered. Because the program was established by the SCDE as a voluntary program, it is not clear that I can order this. Further, the only violations found here are procedural, which limits relief to orders to comply. The District has not been out of compliance by holding IEP meetings without a facilitator. Having reviewed the issues for the past couple of years, however, I strongly urge both sides to avail themselves of these services. Each side contends the other side has been unreasonable. That is a situation that calls out for mediation or facilitation.

The records of compensatory tutoring services provided to the Student could help explain both the activities that benefited the Student and the specific areas on which the teacher focused. Because the compensatory tutoring services were instructional, they could have led the team to conclude that additional 1:1 instruction was necessary to enable the Student to benefit from special education services.¹⁴ There was no legitimate reason to withhold them.

Just as puzzling is A.D.'s assertion that she spoke to the teacher, who had no data other than what was documented in her time sheets. This statement simply buttresses the notion that the sheets contained data about services provided and were educational records, rather than personnel documents. Moreover, if the mere content of those records were enough to answer all of A.D.'s questions, that is even more reason that they should have been provided to the rest of the IEP team.

¹⁴The parties spent considerable time on the independent evaluation in which the evaluator states: “[Student] would benefit from 1:1 tutoring. Providing group tutoring or an in-class paraprofessional increases social embarrassment and impairs attentional processes.” There appears to be no dispute that the District received this evaluation after the DPR and after the March 17, 2022, meeting at issue. Although the District objects to the quoted conclusion, I find it of little to no use because it is not directed to the standard at issue. The question is not whether someone would “benefit” from a service. The issue is whether that service is needed to provide a FAPE. Because the independent evaluator offers no opinion in that regard, I attach no weight to her conclusion.

Further, the statement could not be evidence of a failing on the part of the IEP team since examination of an IEP is based on information available (or offered to) the IEP team at the time. *Bd. of Educ. v. Michael M.*, 95 F. Supp. 2d 600, 609 (S.D. W. Va. 2000) (citing *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999)); see *Schaffer v. Weast*, 554 F.3d 470, 475 (4th Cir. 2009) (characterizing use of subsequent IEPs to establish a denial of a FAPE in a prior year as a “a hindsight-based review that would have conflicted with the structure and purpose of the IDEA”).

The failure to fully review the information at the IEP meeting constitutes a procedural violation. *R.F.*, 919 F.3d at 248. I find the District committed a procedural violation of the IDEA by not providing the records from the teacher providing the compensatory tutoring services to the IEP team.

For the same reasons as noted above regarding tutoring, I cannot find under the third prong of *R.F.* that the Student was denied a FAPE. As to appropriateness of an order to comply, a new IEP team will be handling the Student's IEP going forward, and it is not clear whether the compensatory tutoring service records will be requested or will be necessary for the next meeting.¹⁵ An order to comply remedy is not warranted based on this Record. 20 U.S.C. § 1415(f)(3)(E)(iii); 34 C.F.R. § 300.513(a)(3).

c. Dedicated teacher

As noted above, the Parent and District did not share an understanding as to the meaning of paraprofessional or aide and an instructor. Once the distinction was explained, the IEP team records show the Parent believed the Student should have an instructor, but she did not favor a paraprofessional. In the same March 17, 2022, meeting in which the Parent made the request, however, she also agreed to replace

¹⁵ The District should understand, however, that such records are educational records, and any future refusal to produce such information will be done at the District's own peril.

the push in services provided by a certified special educational instructor with additional pull-out services.

The concept of a full-time certified special education educator focused solely on the Student is extraordinary. The IEP team, including the instructors, believed that additional pull-out services (instructional) were appropriate along with an in-classroom paraprofessional (non-instructional). The Student's special education teacher suggested this and, after discussion, the Parent's invitee agreed that it "sounds fine," and Parent agreed. Thus, while the IEP team did not adopt the Parent's proposed solution, it considered the issue and reached a consensus on the next step to try.

The Parent failed to explain how a special education instructor in the classroom could provide instruction during a class in which the regular education instructor also was teaching. The issue in the classroom was less about instruction and more about Student's attentiveness for which a paraprofessional is more appropriate to address. Further, the Parent's professed opposition to a paraprofessional is based on the Student's reported aversion to being singled out when other students observe him receiving special ed services. Having an instructor full time in the classroom working with Student would seemingly exacerbate any such problem.

Based on the evidence introduced, there is no basis for finding that the IEP team's decision to decline the Parent's request for a dedicated special education instructor is a violation of the IDEA.

d. Sleep apnea related services

The Student's sleep apnea apparently leaves him drowsy at times. The District addressed this in the August 2021 IEP meeting, and it provided an individual health plan under which the Student could go to the nurse to sleep on days where he could not stay awake, and those occasions were documented. The Student's instructors and the nurse established, however, that this is not as significant of an ongoing problem as the Parent believes.

In her post-hearing submission, the Parent seeks compensatory education for times when the Student falls asleep. The Parent did not, however, introduce evidence that the Student fell asleep in class enough to deprive him of the benefits of the services already provided. The Parent's use of the sleep apnea to request tutoring indicates that this is just another perceived vehicle to obtain tutoring services under a different argument. In the end, however, no evidence suggests that any sleep issues require tutoring.

C. Transportation services

Parent alleges:

Richard O'Malley and Brian Denny denied transportation to and from [e]lementary school daily for [the Student] with his zoning transfer approval due to allegations of [the Student] being bullied, discrimination, called "gay" by his paraprofessional, civil rights violated, retaliation, and denied rights to a free and appropriate education at [his home school].

In an IEP meeting dated 03/17/2022 for [the Student], [A.D.] denied the team the opportunity to discuss and decide on providing transportation and transportation reimbursement. Mom provided documents to be reimbursed to the team but was refused

transportation to and from school and reimbursement by [A.D.], abusing her authority to intimidate, bully and retaliation which denied [the Student] the right to a free and appropriate public education. In the meeting the parent experienced anxiety, stress and had to leave the room and cried throughout the remainder of the meeting due to being verbally attacked and bullied by [A.D.]. Mom could not address issues and provide parent input due to the abuse of authority by [A.D.].

Transportation is a “related service” under the IDEA. “The term “related services” means transportation and such . . . other supportive services . . . designed to enable a child with a disability to receive a free appropriate public education.” 20 U.S.C. § 1401(26)(A) see *also* 34 C.F.R. § 300.34(c)(16) (defining transportation). The Regulations state more forcefully that a service must be “required to” (rather than merely “designed to”) permit the Student to benefit from special education. 34 CFR § 300.34(a).

The Parent’s request for a transfer was not based on a need to change schools for the Student to access a FAPE. Rather, she requested the transfer because Parent alleged that the Student was “bullied, retaliated against, targeted, discriminated against and more.” There is no documentation that anyone considered the transfer request to be based on considerations of a FAPE.

The District also put the Parent on notice from the start that she would be responsible for transportation. The transfer request form for the 2021-22 school year

states: "Parents must provide transportation to and from school (some exclusions may apply)."¹⁶

The transportation allegations in the DPR also claim a denial of parental participation about transportation.¹⁷ A.D. maintains that the decision was hers as LEA representative to make. Although a regular education and special education teacher also participated as team members, A.D. explained that, as LEA representative, it was her role was to commit funds. My review of the March 17, 2022, recording does not suggest that either the Student's special or general education teacher offered an opinion on transportation, nor were they specifically asked to do so.

On this point, I agree with A.D. The issue of transportation was not properly before the IEP team. The IEP team did not have any issues about the content of the IEP for which transportation would be a related service, nor was there any issue about transportation generally as the Student had never received transportation services to his home elementary school.

¹⁶ A July 2020 letter to the Parent for the 2020-21 school year states: "You will need to provide transportation to and from school each day." No such letter was introduced for the 2021-22 school year. The District contends that the same letter sent to the Parent for 2020-21 and 2022-23 also was sent for 2021-22. Under the Best-Evidence rule, I am not considering the testimony. Nobody from the District explained why such a letter was not offered as evidence. A May 2021 letter was used only for refreshing Dr. O'Malley's memory on whether he denied transportation. That was the only permitted purpose for which I allowed the May 2021 letter.

¹⁷ Parent does not allege that the IEP team denied her the opportunity to consider a transfer for educational reasons. By all accounts, the transfer issue was settled between the Parent and District administration back in 2020.

The Student was enrolled at his current elementary school for 1½ years before the Parent brought up the issue of transportation in her February 10, 2022, DPR.¹⁸ The Parent presented no educational reason why transportation was necessary to permit the Student to benefit from special education as required by the IDEA statute and the regulations. The Parent claims in her post hearing submission that the Student “needs a monitor on the bus to provide him the safety support he needs to protect him and other students.” In other words, it’s not just transportation, but now transportation with a “monitor.”¹⁹ There was no evidence presented to either the IEP team or at the hearing to justify that transportation, with or without a monitor, is necessary to enable the Student to access his special education services.

If A.D. should have permitted the IEP team to make the decision regarding transportation, her failure to do so would constitute a procedural violation. As an alternative, separate, and independent basis for denying relief, I find that any such violation did not lead to a denial of a FAPE.

¹⁸ In her post-hearing submission, the Parent states: “I did not address transportation in a previous due process complaint. I am addressing it now due to my recent knowledge of my son should have received transportation as a related service.” This statement acknowledges that the issue was not part of the transfer arrangements made in 2020. At the hearing, however, the Parent claims she brought up transportation during the 2020-21 school year. When questioned as to why she would do so when the Student attended school virtually, the Parent said there were certain activities during the year that the Student attended. There is no evidence in the Record, however, that transportation was ever raised before February 2022, nor was it raised in either of the two prior DPR’s that went to a hearing.

¹⁹ Again, it is not clear how a monitor would not exacerbate concerns that the Student is being singled out.

Finally, as to the transportation allegations, I reject the Parent's allegation that the LEA representative "bullied" or "attacked" her. A.D. was clear in her reasoning, but she never criticized the Parent. The Parent perceives A.D. making this decision to be a usurpation of the IDEA process, and the Parent has every right to challenge that decision, but there was no "bullying" or "attacking" of any sort. Disagreeing is not "bullying" or "attacking."

D. Discipline issues

Paragraph 9 of a section in the DPR titled "procedural violations," reads: "Failure of the school to prevent punishment of the child for actions or inactions that are manifestations of the child's disability (caused by the child's disability). ([The Student] is getting writing up for things caused by his ADHD)." At the hearing, the Parent contended that the issue of a manifestation determination was an allegation she was pursuing.

The Parent never filed a request for a manifestation determination review ("MDR"), and this situation would not have warranted one. The District never proposed a change of placement here, nor did it remove the Student for the requisite number of days to trigger an MDR. 20 U.S.C. § 1415(k)(1)(A)-(C); 34 C.F.R. § 300.536. Over the course of the year, the Student missed five days because of out-of-school suspensions.

Secondly, nothing in the IDEA precludes the District from "writing up" the Student for "things caused by his ADHD." The Parent still claims in her submission that

“[p]unishing my son for things related to his disability is a violation of the IDEA.” I am unaware of any authority for this proposition, and the Parent cites none.

Early in the year the District revised the Student’s BIP and implemented an incentive system to address behavioral issues. The District used an interventionist and the school-based therapist provided therapy to help the Student deal with issues. The District also maintained records on ABE and Class Dojo, and, through the Student’s special education teacher, it shared information daily with the Parent. The IEP, including the BIP, was reasonably calculated to deal with behavior issues identified by the IEP team.

IV. Reset

The acrimony between the Parent and District that has been on display the past few years must subside for Student’s sake. The Parent’s ire appears to focus on District-level personnel. There is a palpable tension in the hearing room between the Parent and District personnel that was completely absent as between the Parent and school-level personnel.

Each side would likely point to the other as the source of the tension. The District witnesses commented on what they perceive as an inordinate number of emails and information requests from the Parent. They have a point. The Parent, on the other hand, points to actions of District personnel, such as A.D., who will not consider her various requests for services and accommodations. She has a point and while there is some truth in both perspectives, the one most at risk from this squabbling is the Student.

The Parent has focused on making information requests, in making repeated accusations about falsification of documents, accusing District officials of

wrongdoing, and in spending time in meetings arguing about what was said before. She does not focus on the big picture: Is the Student making sufficient progress? Information is important, and a parent has an entitlement to information, but the parent must understand that there must be a rule of reason in requesting it. Information requests sent to many people are difficult to deal with, and time is wasted determining how to respond and who should respond. When requests are sent to many levels, it is understandable that any one person will not know whether he or she is supposed to respond.²⁰

The Parent also fails to grasp that leveling constant accusations against District personnel makes it more likely that they will eagerly give her the time and attention she requests from them.

If even a tiny fraction of parents demanded as much and as often as the Parent has, teachers would have no time to teach, and staff would get nothing else accomplished. The Parent needs to better appreciate the time and energy spent by teachers and administrators even without requests for information, for IEP meetings, and for due process hearings.

The District, on the other hand, is apparently so frustrated with the Parent that it is falling short in its obligation to ensure that options and alternatives are fully aired out and considered. This is the second time in a little over one year in

²⁰ For example, the Parent called the Superintendent to testify at the hearing when he knew very little about anything in dispute. There was no question that he approved the Parent's school transfer request, and that was never at issue. Yet, the Parent continues to email him when he has had little to no direct involvement in the Student's instruction.

which I have found the District has denied requests for 1:1 instruction without allowing the IEP team to properly consider the requests. Here, the LEA representative not only shut down the Parent, but also the instructors who have the best insight into what happens on any given day with the Student. Although District representatives have expressed exasperation with the Parent's onslaught of allegations and information requests, they must understand that they have given her legitimate reasons for concern, which erodes the trust necessary to create a good working relationship. Likewise, the District must give serious consideration to the point the Parent makes that, when she has requested information, she has been told that she must request it from someone else. That should not be a difficult matter to streamline and address.²¹ In sum, while the District laments the Parent's many grievances, it continues to give her something legitimate about which she can complain.

The Parent has made the point that, in March 2022, the LEA representative entered the meeting with her mind made up and she was not going to change it. At the same time, that is also precisely what the Parent has been doing. The Parent has insisted, for example, on an in-classroom special education instructor while she rejects an in-classroom paraprofessional because it makes the Student feel singled out. Both the Parent and LEA representative laid out their position, they dug in, and they reflexively rejected thoughtful discussion on alternatives. That is not how the IEP process is meant to work, and it is even more reason that the parties should move forward with facilitated IEP meetings.

²¹ It would behoove the District to provide clear direction in writing to the Parent as to whom information requests should be directed, and it would behoove the Parent to direct such requests solely to that person. That way, there are no more misunderstandings. If nothing else, the issue will be clearer if the parties again resort to due process hearings.

At the hearing, I asked a witness for the definition of “reset.” She described it as removing a student from the classroom and then having him or her re-enter after becoming calm. As I heard this description, the thought came to my mind that this is precisely what the relationship between the Parent and District needs, a “reset.”

V. Conclusion

The District committed procedural violations as to the consideration of additional 1:1 instruction and by failing to provide the IEP team with the compensatory service and tutoring records. I do not find any substantive violation of the IDEA, and I do not find the need for any relief to be necessary as to the procedural violations.



Brian P. Murphy
Local Due Process Hearing Officer

Dated June 21, 2022

Notice of Appeal Process²²

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

²² The Undersigned will not accept, read, or consider any further argument about the merits on this matter unless it is remanded to him by the SRO 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 may toll or extend the time limit set forth above for filing an appeal.