

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

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

**I. Introduction**

The Parent submitted a Due Process Complaint to the District on June 17, 2021, which was amended on June 26, 2021. The District filed a Sufficiency Challenge/ Motion to Dismiss/Response on July 8, 2021. On July 9, 2021, I issued an Order on the Sufficiency Challenge and Motion to Dismiss, noting that any disputes about the District's compliance with prior orders are beyond the scope of my appointment. I further ruled the District's decision on whether to grant medical homebound instruction under state law is beyond my jurisdiction. In all other respects, I denied the Motion.

The Parent opted for a public hearing. The hearing began on August 30, 2021, and concluded on September 1, 2021. After the hearing, I granted the joint request to submit written arguments. Both parties timely submitted written arguments.

For the reasons below, I find the Parent has not met her burden of proving a any substantive violation of the IDEA. Although there are two instances in which I find the District committed procedural violations, controlling case law, the statute, and the regulations preclude any relief under these circumstances. Thus, the Parent's requests for relief are denied.

## **II. Facts**

During the 2020-21 school year, the Student was a fifth grader at North Vista Elementary School ("North Vista"). The District identified the Student as eligible for special education and related services under the category of other health impaired (OHI) based on a diagnosis of attention deficit hyperactivity disorder (ADHD). The Student received general education services with specialized instruction in behavior and math, as well as counseling as a related service. North Vista provided in-person classes in 2020-21, but parents could elect to have students attend virtually. The Parent chose the virtual option.

At the beginning of the school year, the Parent retained a special education teacher, who was employed with the District, to provide two hours of tutoring in math to the Student. She provided services in person.

The IEP team met in October 2020 and decided to add a paraprofessional as a classroom assistant to check in on the Student, to monitor whether he was logged in, and to help keep him on task. Academically, the District noted the Student was nearly on grade level in math and reading, but his grades suffered because of his lack of online attendance. Later, the District documented that during the first nine weeks the Student earned a 67/D with six late assignments and two assignments not completed. For the second nine weeks (as of early November), the Student missed six of eight assignments, completed one late, and completed one on time (on which he earned a 100).

The IEP team met again in November 2020 for the annual review of the Student's IEP. The IEP team documented the Parent's comments from a teacher-parent conference that the Student was not medicated for ADHD and that he had been

having issues with sinuses, allergies, and depression related to the death of family members. The IEP team also received a letter from the Student's physician, stating the Student's allergies and sinuses might affect his alertness. The notes state the Parent will get a letter from the Student's counselor.<sup>1</sup>

The District has two methods to monitor the participation and attention of virtual students. The Google Classroom app permits instructors to view the students through the camera on a student's device. Another application, GoGuardian, allows the instructor to monitor the screen on a student's device to ensure that he or she is focusing on the correct application. Further, the instructor or paraprofessional (discussed below) can close any extraneous program or site that is open on a student's device.

The Student struggled to participate in classes. Although there were apparent technical glitches and possible equipment malfunctions at times,<sup>2</sup> it also is undisputed that the Student would log off and exit out of instructional programs for reasons that varied from not feeling well to typical behaviors that attend ADHD.<sup>3</sup> Although not

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<sup>1</sup> There is a letter in the Record from the counseling service dated the same date as the IEP meeting. [Pet. Exh. 18].

<sup>2</sup> *E.g.*, Pet. Exh. 6 (email of June 4, 2021 at 8:34 p.m.); Pet. Exh. 16 at 1 (email of January 14, 2021 at 10:22 a.m.); Pet. Exh. 26, 44 (email of April 20, 2021); Pet. Exh. 32 (emails of April 23 and April 25, 2021).

<sup>3</sup> Much time was spent discussing the operational status of the camera on the Student's school-issued Chromebook. Various reasons were provided for the camera being off, including a claim by the Parent that, for privacy reasons, the camera could not be operational when Student was with the Parent at her place of business.

directly relevant to the issues presented,<sup>4</sup> another complicating factor is the Student lost two relatives in violent episodes. [See Pet. Exh. 18].

Recognizing the Student's struggle to maintain focus, the IEP Team assigned a paraprofessional to help keep the Student on task beginning in October. [Resp. Exh. 1 at 1904].

[Student] has a one-on-one virtual paraprofessional. The paraprofessional monitors [Student] virtually on Google Classroom and through Go Guardian to make sure that [Student] is logged on and working the appropriate assignment. The paraprofessional will monitor to make sure that [Student] is not off-line or on a website that he should not be on. The paraprofessional will communicate frequently with [Parent] to make sure that she is aware of when [Student] is off task. She will also provide positive feedback when [Student] is on task and following directions. Paraprofessional will also assist in updating daily agenda with subject times and assignments to be given to the parent/student.

[/d.] Because the Student appeared to be distracted much of the time, the District also developed a behavioral intervention plan ("BIP"). [/d. at 1911-12].

The paraprofessional monitored the Student and frequently found him to be distracted or not logged on during instructional time. [Pet. Exh. 8 at 1, 2]. The paraprofessional logged the Student's attention and presence online with behavior charts. [Resp. Exh. 10; Pet. Exh. 25]. She also would message him to redirect him

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<sup>4</sup> The Parent has taken exception to the District's remarks about the reasons why the Student missed instructional time, as well as to the District's review of the Student's use of technology for non-educational purposes both during the school day and at night. The Parent has, in turn, stressed the other reasons, both medical and trauma related, to explain many of the occurrences. The issue here is not whether the Student missed instructional time for reasons that are his fault, or the Parent's fault. Fault is not the issue. While distractions associated with technology are common with all children at that age, there is no question that much of the Student's conduct relates to his ADHD. There does not appear to be any communications in which the District made decisions out of a belief that either the Student or Parent is somehow blameworthy for the difficulties Student faced in 2020-21. Nothing here should be read as premised on any notions of fault on the part of either the Student or Parent.

back to the task at hand. The paraprofessional also often texted and communicated with the Parent to discuss the Student's activities and issues affecting his performance. There also was substantial communications between the Student's teachers and the Parent throughout the year. The Student was provided other accommodations, such as breaks upon request ("break card"), to assist him when distracted.

The Student's attendance continued to be a problem throughout the year. In the virtual model, failure to log in or being offline during instruction time is an attendance occurrence. During the 2020-21 school year, the District documented fifty-four absences, thirty-eight of which were unexcused.

After obtaining more information, the IEP team met again in January 2021 to modify the IEP, to review a functional behavioral assessment ("FBA"), and to modify the BIP. The FBA documented the Student's significant struggles with staying online. The Student's practice of logging off even interfered with the observations necessary to conduct the FBA. As part of this review, the IEP team discussed medical information provided by Parent. The new BIP stressed communication with Parent.

In the beginning of the school year, days were designated as "A day" or "B day." "A days" were devoted to classroom instruction, while "B days" were spent in smaller groups or individual work, with the focus on completing assignments. Later in the year, the District eliminated the "B day" for all students when the District moved to a five-day instructional schedule. As a result, the District added ninety minutes of one-to-

one instruction to compensate for the one-to-one services previously provided by the paraprofessional during the “B day.”

The IEP team met several times throughout the year to address the Student’s progress. The District also responded throughout the year to the Parent’s requests for information, and it provided data as well as progress reports. The IEP team also met to consider information from the Student’s physician. For example, in December 2020, the physician listed recommended accommodations that the IEP team review. The IEP team documented its review and discussion of that input.

Later in the year, the Parent stated she wanted the Student’s physicians to participate in an IEP team meeting. The District did not discourage this in any way, but the physicians did not participate for reasons that are unclear. At other points in time, the Parent was resistant to allowing the District to obtain medical information. Even when the medical homebound form was submitted in November 2020, the Parent noted in the release for information: “If needed, I will get this information from his doctor (Only Me).” On March 30, 2021, the assistant superintendent for special education, Brian Denny, informed the Parent that, “[a]As we discussed in the last IEP meeting, we do not have enough information from [Student’s] physicians to justify medical homebound services.” The Parent withdrew permission she had given for the District to obtain medical information to assess the requests she had been making: “I’ve decided not to give you permission to speak to my son ENT . . . . If you need to speak to my son’s ENT doctor I will need something in writing that explains why you need to speak to the doctor and how this is not a HIPPA violation.” The Parent told Denny she was conditioning any agreement to speak to providers on the conversation being limited to questions submitted to her in advance.

The Student's grades languished mostly in the D range. His best overall grade for the year (a C) was in math, the subject identified in his IEP for which special education services were provided. The Student ended the year with D's in English Language Arts ("ELA"), Science, and Social Studies. He did, however, pass all of his classes and was promoted to the sixth grade where, by all accounts, he is doing well and attending in person.

### **III. Analysis**

#### **A. Framework for analyzing Parent's Issues**

In reviewing the Parent's many allegations, it is important to determine whether each issue is an allegation of a procedural violation or a substantive violation of the IDEA. "Faced with thorny counterfactuals, it 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 [(4<sup>th</sup> 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 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 Public Schools*, 919 F.3d 237, 248 (4<sup>th</sup> Cir. 2019), cited in *E.S. v. Smith*, 767 F. App'x 538, 538 (4<sup>th</sup> Cir. 2019); e.g., *Dibuo v. Bd. of Educ.*, 309 F.3d 184, 190-91(4<sup>th</sup> Cir. 2002) (noting, in a reimbursement case, that a violation of a procedural requirement of the IDEA (or one of its implementing regulations) must actually 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 decisionmaking 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 (4<sup>th</sup> Cir. 2018).

There are differences between the test set forth in *R.F.* and the one that appears in the statute itself. 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, which is the same as the second element in the statute. The first element in *R.F.* regarding the 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.*

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).

## **B. 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, this Order addresses only the issues properly raised and that fall under the Undersigned’s jurisdiction.

The Parent’s proper allegations fall into six categories: (1) Failure to add services as agreed to the IEP; (2) Failure to provide services; (3) Failure to consider a placement change; (4) Failure to provide information; (5) Failure to consider other information; and (6) Failure to communicate/provide information.

## 1. Failure to add agreed-to services to the IEP

The Parent raises two allegations that the PWN and IEP do not reflect what was agreed upon by the IEP Team.<sup>5</sup> First, the Parent alleges that “the IEP team agreed to add ELA to the ESY service and continue math and behavior services during ESY. These corrections need to be added to the Prior written notice and I would like an updated copy.” [Amended Complaint at 3]. Second, the Parent alleges that “Brian Denny is not responding and updating the prior written notice of what was agreed upon with the IEP team members.” [*Id.* at 2].

The Fourth Circuit has cautioned that, “[i]n evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself. *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007) (citing *County School Board of Henrico County v. Z.P.*, 399 F.3d 298, 306 n. 5 (4th Cir. 2005); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001)).<sup>6</sup>

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<sup>5</sup> The District moved to dismiss allegations of amending records. I understood this to be about the amendment of educational records, and not documents such as PWNs or IEPs. If the District’s Motion was aimed at these allegations, such argument would lack merit. Hearing Officers have broad discretion to grant relief, and there is no reason to doubt that such authority could include a requirement that PWNs or IEPs be amended in a proper circumstance if necessary to remedy a violation. Whether that is appropriate in any given case, of course, is a different matter.

<sup>6</sup> The *A.K.* Court explained that “[e]xpanding the scope . . . to include a comment made during the IEP development process would undermine the important policies” of the IDEA. *Id.* In other words, if alternatives proposed and discussed can become fodder for claims of an agreement, teachers, staff, and administrators will be motivated to remain silent, which is contrary to the purposes of promoting a full and flowing dialogue in team meetings.

The Parent did request ESY for ELA in the Spring of 2021. [Pet. Exh. 28]. Denny testified that the IEP team agreed to this request. The video from the June 4, 2021 IEP meeting shows although ELA was not specifically mentioned as a part of the IEP, Denny agreed to ELA being included as part of the twelve hours agreed-to services for ESY if the tutor agreed as she provided the ESY services. [/d. at 11:03]. The Parent appears to be satisfied with what the tutor provided. It does not appear that there remains a substantive dispute about ESY services provided at the conclusion of the 2020-21 school year. Nor was there evidence of any other issues about the content of the IEP.

## **2. Failure to provide services**

Parent alleges:

There were days ZB did not have one on one instructions and/or a paraprofessional per IEP. The resource teacher did not provide weekly resource services in math and behavior. An instructor was not providing daily one on one instructions by an instructor per IEP.

[Amended Complaint p. 3].

A failure to execute an IEP violates the IDEA where such failure is material. *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 484 (4th Cir. 2011) (citation omitted). That said, the daily logs refute any notion that instructors failed to provide services in any material way. Although there is one incident the Parent complained about the teacher not paying attention, an isolated allegation about a single incident cannot establish a denial of a FAPE even if substantiated.

Most of the testimony from instructors and from the paraprofessional is uncontroverted. They each displayed good knowledge of the Student, his issues, and his progress. The Parent has not shown that any of them failed to provide services called for under the IEP.

### **3. Failure to consider placement change and necessary services**

The Parent did not choose or seek a placement change as that term is used in the IDEA. Placement and location of services are distinct concepts under the IDEA. *AW v. Fairfax Cty. Sch. Bd.*, 372 F.3d 674, 682 (4th Cir. 2004) (“[T]he touchstone of the term “educational placement” is not the location to which the student is assigned but rather the environment in which educational services are provided.”); *see also A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 683 (4th Cir. 2007) (Gregory, J., dissenting) (noting that location or setting under the IDEA is not the same as “placement”). At all times, the Student’s placement was general education with resources.

The Parent’s decision for a virtual option did not lead to a change of placement. Nor would the requesting of additional services change the placement. The specific services she requested, however, warrant deeper discussion.

#### **a. Tutoring related**

The Parent makes several allegations regarding the District’s failure to provide a tutor. [See Amended Complaint at 3 (“Brian Denny denied tutoring services stating this is not covered by the IDEA and FSD1.”); *id.* (“I requested tutoring services to continue for my son and he was denied these services by Brian Denny multiple times.”); *id.* (“I paid for tutoring services that should have been provided by FSD1”)].

The District discussed the Parent’s request at two meetings. At the annual review in November 2020, the District declined the request for tutoring services “because the current IEP provides appropriate services for the student to participate in the general education curriculum.” [Resp. Exh. 1 at 1891; *see* Resp. Exh. 5 at 1884 (stating in October 2020

that “The team refused extra tutoring services asked for by the parent”)). The issue was discussed again in January. [Resp. Exh. 2 at 1874].

The Parent, the Student's teacher, and the school principal all testified that Denny informed the IEP team that tutoring was not a service under the IDEA. The Parent credibly testified that she understood that this meant that the IEP would not consider her request for a tutor. That view is supported by the testimony of the teacher who appears to share the Parent's understanding as to what Denny said.

The Parent's view also is bolstered by the wording of the IEP team minutes, as well as the notion that the decision was made by Denny (“the LEA”) and not the IEP team. In January 2021, the IEP team noted: “The LEA determined the district would not provide the student with outside tutoring . . . tutoring is not an appropriate service provided through his IEP.” [Resp. Exh. 2 at 1874; see *also* Resp. Exh. 6 at 1869 (“The LEA determined that tutoring services were not appropriate.”)].<sup>7</sup> Likewise, the March 2021 PWN states:

[Parent] has requested the district provide “tutoring” for him and has asked that it be added to his IEP. The LEA determined that tutoring services were not appropriate. The student is provided appropriate specialized instruction, and he has numerous absences. It is not clear what role tutoring would play in his current program as an IEP service. Additionally, “tutoring” is not typically an IDEA service or therapy.

[Resp. Exh. 6 at 1869]. In each instance, the decision is attributed to Denny, and not to the team.

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<sup>7</sup> This is not the only reason documented for the denial. District also documented that data revealed that Student could complete his work. [*Id.*]

Consistent with the recollections provided of the IEP meetings, Denny testified that he does not consider tutoring to be an IEP service. He testified that: (1) the issue is what the instructional needs of the student are; and (2) that tutoring, as a support, was not effective if Student was not receiving instruction in the first place. Put differently, Denny testified that “tutoring” is meant to help the student apply a lesson. If the Student never received the lesson, Denny reasons, tutoring was not the correct service to fix the problem.

There appears to be no dispute that Denny does not view tutoring to be a special education service. There are several problems with this view. First, it presumes that tutoring is not instructional. Second, the reasoning Denny gave at the hearing is not what other attendees at the meeting understood. Nor is it what the IEP team documented. The phrasing of “tutoring is not an appropriate service” caused understandable concern on the part of the Parent, and the IEP team failed to properly consider it given Denny’s instruction that tutoring was not an issue before them.

My primary concern here is that it is Denny individually, and not the IEP team, was making decisions. That concern is heightened by the comment in the IEP minutes that “[i]t is not clear what role tutoring would play.” [*Id.*] That is precisely the role of the IEP team – to determine what role tutoring could play.

Further, the categorical notion that tutoring is not a special education service is simply wrong:

[T]utoring is understood to be one of the many services covered by the IDEA

. . . .

the term "special education" means specially designed instruction . . . to meet the unique needs of a child with a disability, including . . . instruction conducted in the classroom,

in the home, in hospitals and institutions, and in other settings.

. . .

20 U.S.C. § 1401(25). Academic tutoring is specially designed instruction, or special education, as opposed to a related service. See *Spilsbury v. District of Columbia*, 307 F. Supp. 2d 22, 26 (D.D.C. 2004)(referring to "academic tutoring"); *Johnson v. District of Columbia*, 190 F. Supp. 2d 34, 37 (D.D.C. 2002) (referring to "one-on-one tutoring as compensatory education"); *Roca v. D.C.*, 2005 U.S. Dist. LEXIS 5130, Civ. No. 02-01646 (HHK), 2005 WL 681462, \*5 (D.D.C. Mar. 14, 2005) (distinguishing "related services" of occupational therapy from "individual tutorial support specifically designed to help him improve his reading and writing skills"). *Solomon v. District of Columbia*, 2005 U.S. Dist. LEXIS 5657, at \*15-17 (D.D.C. Mar. 31, 2005).

The evidence establishes that the IEP team failed to fully consider tutoring to be an option. In fact, there appears to be no dispute that the IEP team followed the instruction from Denny that it was "not an IEP service." This 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).

### **1. Application of R.F. test**

Under *R.F.*, three questions must be answered in the affirmative to find that the procedural violation led to substantive harm or warrants substantive relief:

- (1) whether the Parent alleged 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 Student was denied a FAPE as a result.

*R.F.*, 919 F.3d at 248.

The answer to the first question is "yes."

The second question is the toughest one. On balance, I find that Denny's decision about tutoring did not "significantly impede" Parent's participation. The Parent raised the issue to the IEP team, and it was discussed, although not fully after Denny stated that tutoring was not an IDEA service. As discussed above, the IEP team merely posed a rhetorical question of how it would matter when it should have been a matter for discussion and resolution.

The bar is set rather high for proving that a procedural violation "significantly impeded" a Parent's rights to participation. The interpretation of "significantly impeded" was the core issue in *R.F.*:

Our analysis here starts and ends with the second prong of this standard: whether a violation of parents' procedural rights under the IDEA "significantly impeded" their opportunity to participate in decisionmaking regarding their child's education. Appellants contend that CCPS violated their parental participation rights under the IDEA by changing R.F.'s placement without involving them in an IEP meeting and by destroying data relating to R.F.'s progress on her IEP goals. We hold that neither constitutes a significant impediment to parental participation on these facts.

With respect to changing R.F.'s placement, the parties agree that "Mr. K.'s unilateral determination to alter the environment in which some of R.F.'s IEP services were offered . . . constituted a procedural violation of [the parental rights provisions of] the IDEA." Appellees' Br. at 17; see 20 U.S.C. § 1415(b)(3).

However, R.F.'s parents' opportunity to participate in decision-making regarding R.F.'s education was not "significantly impeded" when CCPS changed R.F.'s placement for four months without involving her parents. 20 U.S.C. § 1415(f)(3)(E)(ii)(II). As discussed above, in changing R.F.'s placement, CCPS provided her more special education services, not fewer, in the ICSC, consistent with her parents' objection that her IEP contained too many hours in the general education classroom. CCPS did not significantly impede R.F.'s parents' participation rights when it failed to inform them that it was gradually changing R.F.'s placement in line with their expressed wishes.

Additionally, R.F.'s parents did eventually have an opportunity to participate in decisions about R.F.'s placement when her mother attended the

December 2016 IEP meeting. See *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565 (3d Cir. 2010) (holding that a school district did not violate the IDEA when it ignored parents' letters for months but included the parents in their child's IEP meeting because "they ultimately had an opportunity to participate meaningfully in the creation of an IEP" for their child). Therefore, the only form of relief that Appellants seek--private placement for R.F.--"cannot reasonably be traced" to CCPS's failure to include R.F.'s parents in decisions regarding her placement in August 2016. *Id.* at 566. We cannot agree with Appellants that CCPS's procedural violation of R.F.'s parents' right to participate in decisions about her placement rises to the level of a substantive IDEA violation that could be cured by private placement.

*R.F.*, 919 F.3d at 249.

In *R.F.*, no substantive relief was awarded even though the parents were not involved in a placement change and requested data was destroyed. The Parent here had more involvement than did the parents in *R.F.*, and the action taken by the school in *R.F.* was far more consequential than what is at issue here.

There also is not sufficient evidence to answer third question in the affirmative. What the Parent really sought was someone to provide services in person and in her home. The evidence also shows that the benefit of a person being with the Student would be the increased attention and concomitant inability of Student to "turn off" or tune out his instruction. The District offered in person instruction that would have eliminated the issue. The Parent had every right, as did every parent, to elect a virtual option. In the end, however, the issue is whether the District offered services that were reasonably calculated to provide a FAPE. Because in-person instruction would have seemingly improved the attention issues that frustrated everyone, the District met its substantive obligations.

Of course, if the Student could not attend in person for medical reasons, that would be a different issue.<sup>8</sup> But the weight of the evidence did not support the Parent's assertion in this regard. The closest the Parent comes to establishing this is with the scant and vague information provided by the Student's pediatrician. The Parent first provided a November 2020 medical homebound form signed by the pediatrician. His response on the form states the Student "cannot attend school," rather than the "Intermittent Homebound" option.<sup>9</sup> Denny documented that the pediatrician conveyed that he believed he was putting the Student on intermittent medical homebound. The District sought clarification. [Resp. Exh. 2 at 1874 (final paragraph under Actions)].<sup>10</sup> The District sent the pediatrician another form, which he completed in late January 2021. The pediatrician changed the election to intermittent medical homebound.<sup>11</sup> Apparently, he simply changed his election to note that, at times, the Student would not need medical homebound.

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<sup>8</sup> The Parent's contention that much, perhaps most, of the time the Student missed was because of an inability to stay awake raises another question. The Parent made many claims throughout the year that she could not keep Student alert, and even sent a picture of Student sleeping on her shoulder; *see also* Pet. Exhs. 12-16, 45]. Because even the Parent's physical presence failed to maintain a wakened state with the Student, any one-to-one instruction would have apparently also been ineffective.

<sup>9</sup> There is no explanation as to what "attend school" meant to the pediatrician. Does it mean "in person" only, or does it contend that the Student cannot receive instruction even virtually?

<sup>10</sup> The IEP team also documented that the District had insufficient information and did not believe that full-time medical homebound was appropriate. [Resp. Exh. 2 at 1875].

<sup>11</sup> Again, nothing in the pediatrician's notes discusses the virtual nature of the services elected by the Parent.

There is little detail or information that could carry the Parent's burden of proof in asserting that the Student could not attend school for medical reasons. Indeed, much of the medical evidence the Parent presented is unhelpful at best and self-defeating at worst. The Student's counselor's November report never states that Student cannot attend school. [Pet. Exh. 18]. Additionally, the December letter from the pediatric specialist apparently assumes that Student was attending in person since he recommends such things as "[p]referential seating" and that instructions be provided "verbal[ly] . . . not by video . . . ." [Pet. Exh. 17]. Further, as Denny noted, there were more than twice as many absences (thirty-eight) that were unexcused, compared to sixteen that were covered by a parent note.

In conclusion, the District erred in its failure to fully consider tutoring to be a service to be provided. That failure does not, however, necessitate a substantive remedy under the elements set forth in *R.F.* What the Parent essentially sought is one-to-one instructional services. What she fails to acknowledge is that this is what the District offered. While electing the virtual option may have been a valid parental prerogative, it does not negate the fact that the District offered what the Parent now claims was needed.

The Student passed his courses and was promoted to the next grade. Under these circumstances, there simply is no remedy or order that is appropriate.

## **2. The statutory test**

As discussed above, the test set forth in *R.F.* diverges from the statutory (and regulatory) text:

### **Procedural issues**

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2).

Because the elements in the statute are posed in the disjunctive and they include an element not found in *R.F.*, I will address the statutory elements separately out of an abundance of caution. I find that the procedural violation set forth above did not impede Student's right to a FAPE. For the reasons set forth above, I also find that it did not "significantly impede" Parent's participation rights under the standard in *R.F.* Finally, I find that the procedural violation did not "cause[] a deprivation of educational benefits." Again, the District offered one-to-one instruction in person. The Student did not receive it was "caused" by the Parent's decision, and not by a procedural violation.<sup>12</sup>

**b. Home-based services**

The District has correctly pointed out, and the Parent concedes, that her allegations repeatedly use the phrase "medical homebound." As noted in my Order on the Motion to Dismiss, the District also is correct that I have no jurisdiction to address decisions that the state law defines as "medical homebound." See S.C. Code Ann. § 59-21-540; S.C. Code Regs. § 43-241.

The Parent has credibly asserted that she is not completely versed in all the various terminology used in each statute. Substance prevails over form, and I cannot

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<sup>12</sup> Because I find the Parent did not carry her burden as to any of the three elements, it ultimately makes no difference that the elements are in the disjunctive in the statute.

dismiss an allegation because a lay person the Parent does not use certain “magic words” or because she very understandably conflates complex legal terms. I credit the Parent’s testimony that her allegation is that she was trying to convey that Student needed one-to-one instruction in some form. This testimony is strengthened because she requested a “tutor,” which is a form of one-to-one instruction. Further, in March, the Parent wrote, “He needs an interventionist, coach, tutor, or whatever the school is calling additional resources my son needs to assist with his learning struggles . . . .” The Parent did not know what to call it, but she knew she wanted someone to provide one-to-one services.<sup>13</sup> The teacher confirmed that she understood that, by using such terms as “tutoring,” the Parent conveyed a desire to have services provided at home.

The IDEA specifies that services may be provided in the home in the appropriate case. See 20 U.S.C. § 1401(29)(A) (“The term ‘special education’ means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including . . . in the home . . . .”); 34 C.F.R. § 300.115(b)(1) (“The continuum [of alternate placements] . . . must . . . [i]nclude . . . home instruction, and instruction in hospitals and institutions”); *R.L. v. Miami-Dade Cty. Sch. Bd.*, 757 F.3d 1173, 1185 (11th Cir. 2014).

<sup>13</sup> There was conflicting testimony on whether Parent requested one-on-one services in her home, or merely one-to-one instruction. Parent testified to the former, and Denny testified that it was the latter. The IEP team minutes do not specify that any request was for a one-to-one teacher in the home. [See Resp. Exh. 2 at 1874 (“The LEA determined the district would not provide the student with a one-to-one teacher during the day”)]. On balance, it seems more reasonable that Parent at least intended to have the requested services provided in person. Her paid tutor provided services in person. Even if one resolves that conflict in favor of the Parent, however, that would not lead to a finding that the District denied the Student a FAPE.

As with the tutoring issue, the testimony indicates that discussion about home-based services was shut down by Denny. At the hearing, the Parent asked the teacher what happened when the teacher raised the possibility of home-based services. The teacher testified that the team was told that it was a separate issue, an apparent reference to the District's position that homebound would be handled by the administration. On redirect, the teacher confirmed that, while the IEP team discussed the Parent's request, home based services were not an option and was not a decision for the team.

Denny's own testimony supports the notion that home-based services were not fully discussed. Denny testified that the IEP team only decides what services should be provided if District decides to grant a homebound request.

For the reasons set forth above regarding tutoring, I find the District committed a procedural violation by preventing the IEP team's consideration of home-based services. And for the same reasons set forth above, I find that the District did not deny a FAPE by declining to provide an instructor inside the home after the Parent elected for a virtual option. As with the analysis for tutoring, I reach this result under both the three-prong test in R.F. and under the statutory test.

#### **4. Failure to consider other information**

**The** Parent has alleged that "[t]he trauma" Student experienced from a purported comment at another school "has been an issue of him turning his camera on and he has been fearful to address how he feels to administrators." [Amended Complaint p. 2]. As discussed above, there was substantial testimony about the Student turning off the camera and the malfunction of his device. If any of these incidents related to trauma from events preceding the Student's time at North Vista,

nothing in the Record supports the notion that this resulted, in any way, in a denial of FAPE. The Parent did not explain how the trauma that purportedly resulted from in-person instruction would be alleviated by at-home instruction.

It also is not clear from the due process complaint how the Parent believes the back-and-forth about medical information relates to any purported violation. If the Parent is seeking to contend that the District should have done something differently regarding medical information Parent sought to provide, I disagree. The District was open to receiving information from any of Student's providers. Parent complicated the process, withdrew consent, and conditioned her consent. Although the District has an obligation to consider information provided by the Parent, it is not under an obligation to jump through every hoop the Parent decides to erect. Nor can the Parent insist that the District has an obligation to consider information that she impedes it from collecting based on misguided interpretations of FERPA and HIPAA. Cooperation must go both ways, and the District simply never violated any affirmative obligation it has to consider medical information.

## **5. Failure to provide information**

**The** Parent devotes much of the Amended Complaint to her many requests for records, documents, classwork, and data.<sup>14</sup> The right to obtain and examine

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<sup>14</sup> Amended Complaint at 3 ("ESY services was approved for my son's excessive absences which was due to his medical condition. In the meeting, no records were provided per my continuous request, showing my son was progressing per the resource teacher. No records were provided showing my son received resources in math and behavior per his IEP as outlined with the dates, minutes, service provided, resource teacher lesson plan, and the work my son completed in the session;" *id.* ("have asked the resource teacher for his portfolio of his daily assignments, assessments, and anything used to provide learning instructions to track the progress and monitoring used to assess his performance. I want to know what tool is used to access my child. I need the data and documents used to show progression per statements made in meetings by resource

records is a procedural one. *R.F.*, 919 F.3d at 248 (“The IDEA and its regulations grant the parents of a child with a disability certain procedural rights, including the right to ‘examine all records’ relating to that child and to ‘participate in meetings with respect to the identification, evaluation, and educational placement’ of the child.”) (quoting 20 U.S.C. § 1415(b) and citing 34 C.F.R. § 300.322).

The IDEA does not specify how often a school system should collect data or how long it should be maintained. Nor does a violation occur when conclusions are presented but not every piece of underlying data is made available. *R.F.*, 919 F.3d at 249-50. Neither a later destruction of data, nor a purported failure to provide all information sought, translates into a violation of the IDEA under these facts. *Id.* at 249; *see, e.g., Coleman v. Wake Cty. Bd. of Educ.*, No. 5:17-CV-295-FL, 2020 U.S. Dist. LEXIS 18891, at \*17 (E.D.N.C. Feb. 3, 2020).

There is no question that Parent made several requests for records and information. [E.g., Pet. Exh. 33]. Further, after receiving records in one format (e.g., electronic), she requested that the District print out hard copies for her. [Pet. Exh. 29-30; Resp. Exh. 14; Pet Exh. 22 at 1:09:28]. The Parent first contends that she did not receive the resource teacher’s “records of the dates and minutes she provided for resource services in math and behavior,” including “[h]ard copies of the materials provided to my son for instructions, the assignments, tests or assessments my son process

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teacher;” *id.* at 4 (“all documents I requested that I still have not received (you have a signed medical homebound letter from my son's doctor) Brian Denny you stated the doctor provided you with another medical homebound letter and I was never provided this document per my many requests.”)

completed to show or weakness . . . .” [Amended Complaint p. 4]. The testimony at the hearing was that the teachers provided data and information, including charts. It is uncontested, however, that staff did not provide all the data or all classwork that the Student completed. [See, e.g., Pet. Exh. 24, 31, 34-35].<sup>15</sup> Under *R.F.*, however, this does not translate into a violation.

In the end, Parent’s substantive argument is that Student should have been provided one-to-one instruction in her home. There was no apparent dispute about the quality of Student’s work, which varied from excellent to not completed. Thus, it is far from clear how underlying data or classroom work would change the analysis on whether the Student should have been provided services allegedly denied by District.

The Parent next contends that she was denied “[r]ecords of when one on one instructions began per IEP to assist with missed assignments, the dates and time this service was provided to my son and what information, or assignments were covered to assist my son.” [Amended Complaint at 4]. The Parent’s point is not clear as content of services provided to the Student were always documented in PWNs and IEPs. There are also daily charts documenting the Student’s performance each day, including when he received instruction and the services provided. This is, of course, in addition to the daily communications that permeate the Record. There also was ample testimony about the paraprofessional working with the Student to assist him with missed assignments. There was no apparent confusion as to the services the tutor provided after the cessation of A/B days either. While the District may not have responded immediately to every request for every piece of paper associated with

<sup>15</sup> This staff is no longer employed with District and did not testify.

Student's work, communication here was robust and there is no palpable violation.

Parent's third contention is that she "did not receive records of how the district is counting my son absent," that she "did not receive phone calls or a letter in the mail stating my son was absent," and that "educational records were not provided in the meeting" in which homebound services were denied. [Amended Complaint p. 4]. The evidence at the hearing did not support any of these allegations. The paraprofessional messaged Parent when Student was not checking in or out, or when he logged off. Attendance also was discussed at the IEP meetings.

District investigated the causes of Student's absenteeism and discussed those findings with Parent, as evidenced by how much the review upset her. Parent knew about the absences, and she had access to the information District was using.

Despite my finding that District did not fail to provide information in a material way, as a separate and independent basis for denying relief, I find that any failure to provide information did not lead to a substantive violation under either the factors set forth in *R.F.* or those in the statute. Accordingly, these allegations provide no basis on which substantive relief can be granted.

### **C. Relief sought**

As discussed above, although there were two procedural violations related to the failure to properly consider tutoring and home-based services, I have not found evidence of any substantive violations.

Parent first requests a "PWN Correction," but it is not clear at this point what would need to be corrected. This is perhaps a reference to the fact that ELA ESY did not appear

in the IEP. There did not appear, however, to be a substantive issue about whether District provided agreed-upon ESY services through the tutor.

The Parent also requests “student educational records for progress monitoring accountability.” The Parent did not establish that she was denied a particular educational record. Although the resource teacher did not produce every document Parent requested, the District provided many records in different form that addressed Student’s progress, behavior, and achievement.

Parent never identified what she sought in the Amended Complaint regarding a health plan or virtual accommodations. The evidence is insufficient to establish that any kind of health service was necessary.

Parent also requests tutoring and medical homebound. For the reasons set forth above, Parent has not established that a remedy is appropriate regarding tutoring and home-based services.

Finally, because there is no basis for finding a substantive violation, Parent’s request for compensatory services is denied.

#### **IV. Conclusion**

For all these reasons, Parent’s requests for relief are denied.

#### **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

IT IS SO ORDERED.

A handwritten signature in blue ink, appearing to read 'B. Murphy', is written over a horizontal line.

Brian P. Murphy  
Local Due Process Hearing Officer

Dated September 10, 2021

Greenville, South Carolina