

**INDIVIDUALS WITH DISABILITIES EDUCATION ACT
STATE-LEVEL APPEAL**

STATE OF SOUTH CAROLINA	)	
	)	
	)	
G.J. on behalf of Z.B.,	)	
	)	
Petitioner,	)	
	)	BEFORE MITCHELL YELL
v.	)	STATE-LEVEL REVIEW OFFICER
	)	
	)	
Florence County School District One	)	
	)	
District/ Respondent	)	DECISION
	)	
	)	
	)	
	)	

This matter is before me pursuant to an appeal of a due process hearing in which Petitioner, G.J. (“Petitioner”/”Parent) on behalf of her minor son, Z.B. (“Student”) seeks review of the final order of the Local Due Process Hearing Officer (“LHO”), Brian P. Murphy, in *G.J. on behalf of Z.B. v. Florence County School District 1*. Kimberly Kelley Blackburn and Vernie L. Williams represented Florence County School District One (“District”) and G.J. represented her minor son.

PROCEDURAL BACKGROUND

On July 17, 2022, Petitioner filed a Due Process Complaint with the District. The complaint was filed on the last day of a hearing in a previous complaint brought by the Petitioner. The LHO, designated the prior complaint *GJ IV* and the current complaint *GJ V*. The LHO noted that the scope of the proceeding was narrow; covering only events after the IEP meeting of March 17, 2022 through the end of the 2021-22 school year.

The *GJ V* due process hearing lasted for one day and was heard on August 23, 2022. Along with the testimony of 5 witnesses and the introduction of 22 exhibits, parts of the record in *GJ IV* were incorporated into *GJ V*. Additionally, the LHO provided time for both sides to submit post-hearing arguments. The LHO issued his decision on August 30, 2022 finding that the district committed no violations of the Individuals with Disabilities Education Act (IDEA) that warranted relief. The LHO also notified the Petitioner and the District that if either party wished to appeal the decision, they could do so by notifying the South Carolina Department of Education (“SCDE”), Office of the General Counsel of their intent within 10 days of the issuance of the order.

The SCDE and the District receive a request to appeal the LHO’s decision on September 6, 2022. On September 7, 2022, the SCDE officially notified the District and Petitioner that the appeals were received and that Dr. Mitchell Yell was appointed as the State-level review officer (“SRO”).

As the SRO, I have jurisdiction in this matter pursuant to a letter of appointment from the SCDE. I have the knowledge and ability to conduct hearings and render and write decisions in accordance with the appropriate, standard legal practices. To ensure the rights of the parties pursuant to the IDEA, on September 9, 2022, I emailed the District and Petitioner (copied to the SCDE) a request that the parties adhere to the following schedule in submitting briefs to me: Parent brief due September 23, 2022, District brief due September 27, 2022, and Parent reply brief due September 30, 2022. I received the Petitioner’s and District’s briefs in a timely manner.

I also notified the parties and the SCDE that in accordance with the IDEA’s federal regulations at 34 C.F.R. § 300.515(b), the state is required to ensure that not later than thirty days after the receipt of a request for a review, a final decision is reached in the review and a copy of the decision is mailed to each of the parties. Based on the SCDE’s receipt of the request for

appeal on September 6, 2022, the due date for the final decision on appeal was established as no later than October 7, 2022.

I received 284 pages of testimony, 22 exhibits, and 2 audio recordings from the individualized education program (IEP) meeting of May 5, 2022 and August 1, 2022. Additionally, I examined the exhibits and select testimony incorporated from the previous hearing. I have determined the hearing procedures were consistent with the IDEA's requirements regarding due process.

STANDARD OF REVIEW

In the two-tier due process system used in South Carolina, the SRO's (Tier Two) review of an LHO's (Tier One) ruling is limited to the issues appealed (34 C.F.R. §300.514). An SRO is to make an independent decision, although the decision must be based on the record of the hearing, the exhibits presented, and the applicable law and regulations. According to the U.S. Court of Appeals for the Fourth Circuit, if the LHO and SRO arrive at different conclusions, the SRO must provide sound reasons for departing from the LHO's ruling (*Springer v. Fairfax County School Board*, 1998).

According to the LHO, the issues brought forth by Petitioner in her complaint of June 17, 2022 alleges that the District:

- failed to provide the results of student's independent educational evaluation (IEE) for the IEP team to review and determine educational services,
- failed to provide K.B, the tutor's, records from compensatory education, tutoring, and extended school year (ESY) services,
- cancelled the IEP meeting scheduled for May 31, 2022 and failed to provide ESY in accordance with the IEP team's agreement,
- failed to provide a one-to-one inclusion special education teacher,
- rejected the assignment of Student to Williams Middle School,
- did not allow the IEP team to determine if transportation was a related service, and
- denied evening tutoring services for student.

FINAL ORDER OF THE LHO

The LHO began his decision with the language of the IDEA found at 20 USC, § 1415[f][3][E][ii]) and the U.S. Circuit Court of Appeals in *R.F v. Cecil County Public Schools* (919 F.3d 239 (4th Cir. 2019), which require that claims of a denial of a free appropriate public

education (FAPE) must be based on substantive, rather than procedural grounds. The LHO acknowledged that the big picture alluded him because the Parent, while applauded the good work of teachers and staff at North Vista Elementary School, asserted that despite the best efforts of teachers, District special education administrators, Brian Denny, the Assistant Superintendent for Special Education, and Amanda Dale, the Elementary Supervisor for Programs for Exceptional Children denied the Student FAPE at a district level. This seems to be due to the parent's perception that the District is not responding to her demands for records and information, thus "the more substantive issues...continue to get lost in arguments over procedural matters and squabbling with district representatives" (LHO's final order of 8/30/2022, p. 3).

In his final order of August 30, 2022, the LHO addressed the following issues:

1. Allegations of procedural violation in the May 5, 2022 IEP meeting. The IEP team met virtually on May 5, 2022. In Petitioner's brief, she alleged that during the meeting, Amanda Dale, failed to provide the independent education evaluation (IEE) for the IEP team to review (Parent's brief submitted to SRO, 9/23/2022, p. 1). The LHO, however, noted that Parent had a copy of the IEE before the meeting and did not bring up the results of the IEE during the meeting, although she blamed the District for not providing the information. The LHO found that there was no evidence that the District prevented the parent from discussing the IEE at the May 5, 2022 IEP meeting and, therefore, found that the District committed no violation by failing to discuss the IEE.

The regulations to the IDEA require that "If the parent obtains an independent educational evaluation...the results of the evaluation (1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child, 34 C.F.R. § 300.502(c). If the District had prepared a meeting agenda of important topics to cover during the meeting, this oversight may have avoided. Nonetheless, the parent knew the results of the IEE, drove the IEP meeting, and yet failed to discuss the IEE. I agree with the LHO, that the District did not commit a violation by failing to discuss the IEE

The Parent also alleged that K.B.'s records were not provided to the IEP team, so the team could review strengths and weaknesses of programming provided to Student. In *GJ IV*, the LHO found that the district had committed a procedural violation by categorizing the tutor's records as personnel documents. I concurred that this was a procedural violation. The records

were made available to Parent on June 2, 2022 (Petitioner's exhibit #8, Parent Contact Log, 6/2/2022). The tutor. was present at the May 5, 2022 IEP meeting and could have provided information to the team. The LHO correctly noted that during the meeting the Parent did not address how the services that the tutor provided could be added to the IEP. The LHO again found that the failure to provide the tutor's records was a procedural violation but that the issue was remedied prior to the Petitioner filing the due process request in *GJ V*. I agree with the LHO that there was no evidence this procedural violation resulted in a substantive denial of a FAPE nor that the violation warranted relief.

2. Cancelled IEP meeting on May 31, 2022. In the Parent's brief it was alleged that "Amanda Dale cancelled the IEP meeting of May 31, 2022 on May 31, 2022 as her abuse of authority and retaliation to deny ZB (Student) the right to receive additional services and accommodations he needed" (Petitioner's brief submitted to SRO, 9/23/2022, p. 1). In fact, the District scheduled an IEP meeting for May 31, 2022 and cancelled the meeting a few hours before it was to be held (Petitioner's Exhibit #18, series of emails on the IEP meeting cancelation). The reason for cancelling the meeting according to Amanda Dale's email on Tuesday May 31, 2022 at 11:01 am was "Meeting canceled pending results of hearing in two weeks" (Petitioner's Exhibit #18, 1st email in series). When Petitioner emailed Amanda Dale, Brian Denny, and Richard O'Malley of the District, inquiring why the meeting was canceled at such short notice and requesting Prior Written Notice (PWN), Brian Denny emailed back: "We have cancelled today's meeting. Many of the concerns that you would like addressed that were brought up in the last meeting are also a part of your due process hearing that is already scheduled" (Petitioner's Exhibit #18, 3rd email in series).

According to the LHO "(A)s a general proposition, Parent is correct. An IEP team's proceedings normally should not be halted because a parent pursue his or her right to due process. This is not, however, a normal circumstance" (LHO's final order of 8/30/2022, p. 7). The LHO then noted three factors that were critical in his decision that this was not a normal situation. First, the IEP team had recently met for two hours and the District provided Parent an opportunity to raise any issues that she believed were important. Second, on May 5, 2022, there were only a few days left in the school year and staff were undoubtedly handling many issues. Third, even if the IEP team has met on May 31, 2022, it would not have made a difference during the 2020-2021 school year. The LHO found that a procedural violation did not occur

because District was actively engaged with Parent, and even if a procedural violation did occur the violation did not lead to a denial of FAPE.

In most cases, a school district's unilateral canceling an IEP meeting shortly before the meeting was to be held is not good practice. In the IDEA and the regulations implementing the law, Congress and the Department of Education have strongly emphasized the importance of including parents as partners in the IEP process. According to the U.S. Supreme Court "(T)he core of the statute...is the cooperative process it (IDEA) establishes between parents and schools" (*Shaffer v. Weast*, 546 U.S. 4, 9, 2005). Moreover, "Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA (*Amanda J. v. Clark County School District*, 260 F.3d 877, 895, 9th Cir. 2001), and, of course, "in matters alleging a procedural violation, a hearing officer may find that did not receive a FAPE only if the procedural inadequacies--Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child" (34 C.F.R. § 300.513[2][ii]).

In normal circumstances, unilaterally canceling an IEP meeting less than three hours before the meeting is to be held and against the parent's expressed complaint, could be a serious procedural error. However, as the LHO found, this was not a normal situation and in the final analysis the District was actively engaged with the Parent. I agree with the LHO's finding that a procedural violation did not occur here.

3. Extended School Year Services for 2022. In Parent Exhibit #1 Amanda Dale questioned R.G., the special education teacher, about Student's regression during extended breaks in the school year. The teacher reported that Student had regressed. Amanda Dale correctly determined that Student qualified for extended school year (ESY) services. Parent then asked about the number of hours that the district would provide, which was eventually agreed upon as 26 hours (although more hours were eventually provided to Student). R.G. then stated that she would provide ESY services, to which Parent reported being pleased. Parent and R.G. then agreed to work together to determine the hours and services of ESY services. Although Parent contended that the school district agreed to ESY services in the evenings, no evidence is provided that this occurred. I agree with the LHO that there is no evidence that the manner in which ESY services were provided lead to a denial of FAPE and there is no evidence that District failed to provide ESY services in accordance with student's IEP.

4. One-to-one inclusion special education teacher. Parent believes that because the IEP team at Williams Middle School provided Student with a special education teacher, the team recognized that Student should have had a dedicated special education teacher in elementary school. As the LHO noted, however, “(T)he move from elementary to middle school is a daunting one for many students at many developmental, social, and educational levels. It is no surprise that District would consider additional supports perhaps unnecessary in elementary school” (LHO’s final order of 8/30/2022, p. 12). Moreover, Brian Denny testified, and the audio recording of May 5, 2022, confirms, that many services the Parent requested were provided to the Student (e.g., transportation to Williams Middle School, tutoring services, an inclusion teacher). The LHO concludes that “nothing in the record before me changes the result reached in *GJIV* that a dedicated or inclusion teacher was unnecessary to provide a FAPE in the 2021-22 school year (LHO’s final order of 8/30/2022, p. 13). I agree with the LHO’s finding.

5. Assignment to Williams Middle School. During the IEP meeting on May 5, 2022, there was a discussion regarding the Student’s placement at Williams Middle School. Brian Denny noted that the Parent needed to fill out an administrative zoning transfer. The District did not oppose the transfer of Student to Williams Middle School and eventually provided transportation to the middle school. I agree with the LHO that “(P)arent’s assertion that the team should have made the decision is a point without purpose...(A)ny theoretical procedural issue simply could not be the basis of an alleged denial of FAPE when parent immediately got precisely what she wanted” (LHO’s final order of 8/30/2022, p. 15).

6. Tutoring/Instructional services. According to the LHO, the Petitioner alleged in the IEP meeting of May 5, 2022, that “(M)om requested tutoring services and was denied. Mom requested evening services to help with the missing services during the day due to Sleep Apnea. Mom stressed the Student struggling and not meeting IEP goals. The Parent’s claim is not so much that the IEP team did not discuss tutoring. Her claim is that the IEP team erred in failing to provide it (LHO final order of 8/30/2022, p. 15). In the brief of September 23, 2022, the Parent also alleged “there was no time made for sleeping per her request in IEP meetings and emails. The district failed to address this issue to provide compensatory services for sleeping in resources and general education class from April 2022 to the end of school June 2022. My son was not progressing in class and resource and needed this make up time to help him with missed instruction” (Parent’s brief submitted to SRO 9/23/2022). In the record and the audio recording

of the IEP meeting of May 5, 2022, there are mentions of the Student falling asleep and being difficult to wake up because of the Student's Sleep Apnea (or possibly Narcolepsy). This issue was included in the Student's IEP and his previous individual healthcare plan to allow him to go to the nurse.

The Parent used the terms "tutoring" and "compensatory services" to refer to additional instructional services to enable the Student to receive a FAPE because of his problems falling asleep and being awakened. (See email exchanges and notes between Parent, R.G., and other teachers regarding the Student's sleeping in class and his refusal to do work and noncompliance (petitioner exhibits #5, #6 and #7). According to the LHO, the District asserted that even though the Student's progress was uneven it cleared the bar set by the Supreme Court in *Endrew F. v. Douglas County School District RE-1* at 137 S.Ct. 988 (2017). The LHO observed that even if the Student did clear this bar, perhaps it was the services provided by the tutor that were needed to provide the Student with a FAPE.

There was a discussion during the IEP meeting of May 5, 2022, of whether the tutor was working on homework or classroom work (IEP meeting on 5/5/2022, minutes 23 to 35). The tutor reported that she was unclear if it was homework or classroom assignments, but that she did not document Student's progress toward his IEP goals. Amanda Dale commented that tutoring was working on homework and homework is not necessarily related to his IEP goals and are not a special education service because specific goals were not being worked on. The LHO correctly rejected this argument in *GJ IV* because "the Regulations do not create a direct nexus between goals and services; they create one more broadly between service and education" (LHO Final Order of 8/30/2022, p. 17).

I agree with the LHO that the District is mistaken. The IDEA does not create a direct nexus between goals and services; rather, the law creates a direct nexus between a student's needs and the special education services that a district provides. When a student's need is identified in the present levels of academic achievement and functional performance statement, it must be addressed by a special education service, a measurable annual goal, or both a goal and a service. In most cases, a student's need will be addressed by a goal and a special education service. Not all services, however, are special education services. The law also provides for related services, supplementary aids and services, and for program modifications. 34 C.F.R. § 300.320(4). Moreover, there are two purpose of these services: "(T)o enable the child--(i) To

advance appropriately toward attaining the annual goals; (ii) To be involved in and make progress in the general education curriculum.” 34 C.F.R. § 300.320(4)(i-ii). Supplementary aids and services are further defined as “aids, services, and other supports that are provided in regular education classes.” 34 C.F.R. § 300.42. The term program modifications are not defined in the IDEA regulations; however, comments by the U.S. Department of Education to the 1999 IDEA regulations at 64 Fed. Reg. 12595 (1999) shed light on the meaning of program modifications. According to the Department of Education’s analysis: “Certain changes may need to be made in the regular education classroom to make it possible for a child with a disability to participate more fully and effectively in general curricular activities that take place in that room. These changes could involve (for example) . . . using professional or student ‘tutors’ to help the child.” Clearly, providing with help on classroom activities, including homework, could be part of an effort to assist a student to be involved in the general education curriculum.’

I also agree with the LHO that the record is lacking. There is no information about the services that were provided or the results of those services. I also agree with the LHO’s final orders in which he writes the following: “Because there is no competent evidence about the substance, details, and amount of the services [] provided, however, I cannot point to any data showing the District failed by not providing those same services” (LHO’s final order of 8/30/2022, p. 18). I also note that in the testimony of Brian Denny, he reported that the Student’s program now includes tutoring (Testimony of Brian Denny at hearing, 8/23/2022, p. 151).

7. Transportation as a related service. In the Parent’s brief she requests “reimbursement for transportation due to the district abuse of authority to deny my son the right to receive transportation” (Parent’s brief submitted to SRO, 9/23/2022, p. 1). The LHO found nothing in the record on which to base reimbursement. Furthermore, the Parent did not provide records regarding this request and did not give an amount sought. I agree that there is no basis for providing reimbursement. Again, Brian Denny reported that transportation is now being provided as a related service in the Student’s IEP (Testimony of Brian Denny at hearing, 8/23/2022, p. 1523).

8. Various requests for relief. In the LHO’s final order he dismissed the request that he order a facilitated IEP meeting and that Brian Denny and Amanda Dale be removed from the IEP team. I agree that there is no basis for ordering an IEP facilitation, although the Parent and the District may certainly contact the SCDE and requests the services of an IEP facilitator. I agree that the

removal of Brian Denny and Amanda Dale should be denied. The Parent also requested a remedy that certain services be provided in the 2022-2023. The LHO did not address any services during the 2022-2023 school year but reiterated that there were no substantive violations proven in the 2021-2022 school year (LHO Final Order of 8/30/2022, p. 25).

Summary of LHO Order

In the LHO's final order, he advised the Parent "should now focus more on the substance of student's IEP and less on the 'who said what when' arguments or on duplicative and endless request for information Student is entering a phase where young people are expected to take more accountability for their actions. That is where the focus needs to be – not on hard feelings among the adults over issues that arose some time ago. . . . For the reasons I find no violation of the IDEA that warrant relief" (LHO Final Order of 8/30/2022, p. 26). I urge the parties to heed his advice.

The Student is attending Williams Middle School and receiving the services the Parent requested. Relations between the Parent, administration, and faculty at the new middle school seem good and as the LHO noted the District seems to have shown a desire for a fresh start. Problems have occurred on both sides during this process, but hopefully these problems will be relegated to the past.

In my review of the briefs, transcripts, exhibits, and audio recordings, I find that the hearing was conducted in an exemplary manner and certainly consistent with the requirements of due process. I affirm the final order of LHO, Brian Murphy.

NOTICE OF APPEAL RIGHTS

Any party aggrieved by this decision may commence a civil action with respect to the complaint presented in any state court of competent jurisdiction or in a district court of the United States within ninety (90) days of the date of this decision. 20 U.S.C. § 1415(i)(2)(A)-(B); 34 C.F.R. § 300.516; S.C. Code Regs. § 43-243(V)(17).

Mitchell L. Yell, Ph.D.
State-Level Hearing Review Officer
October 6, 2022