UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1232

ALEXIS BENSON, and/on behalf of K.C.J.; KEVIN CARBERRY, SR., and/on behalf of K.C.J.,

Plaintiffs - Appellants,

v.

LANCASTER COUNTY SCHOOL DISTRICT, represented by and individually; SUPERINTENDENT JOHNATHAN PHIPPS; LINDSAY MARINO; NICOLE LEE; SOUTH CAROLINA DEPARTMENT OF EDUCATION, THE, represented by and individually; BARBARA DRAYTON; KIMBERLY BLACKBURN; VERNIE WILLIAMS; DAVID DUFF; MEREDITH SEIBERT; BRIAN P. MURPHY; PERRY ZIRKEL; MITCHELL YELL,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. Jacquelyn Denise Austin, District Judge. (0:23-cv-01488-JDA)

Submitted: June 25, 2024 Decided: June 27, 2024

Before RICHARDSON and QUATTLEBAUM, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Alexis Carberry Benson; Kevin Carberry, Sr., Appellants Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Alexis Benson and Kevin Carberry, Sr. ("Plaintiffs"), appeal the district court's order accepting the magistrate judge's recommendation and dismissing Plaintiffs' civil action without prejudice for failure to prosecute and failure to follow a court order. We have reviewed the record and discern no abuse of discretion. *Attkisson v. Holder*, 925 F.3d 606, 620 (4th Cir. 2019) (stating standard of review). Accordingly, we affirm the district court's order. *Benson v. Lancaster Cnty. Sch. Dist.*, No. 0:23-cv-01488-JDA (D.S.C. filed Mar. 12, 2024 & entered Mar. 13, 2024). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: June 27, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1232
(0:23-cv-01488-JDA)

ALEXIS BENSON, and/on behalf of K.C.J.; KEVIN CARBERRY, SR., and/on behalf of K.C.J.

Plaintiffs - Appellants

v.

LANCASTER COUNTY SCHOOL DISTRICT, represented by and individually; SUPERINTENDENT JOHNATHAN PHIPPS; LINDSAY MARINO; NICOLE LEE; SOUTH CAROLINA DEPARTMENT OF EDUCATION, THE, represented by and individually; BARBARA DRAYTON; KIMBERLY BLACKBURN; VERNIE WILLIAMS; DAVID DUFF; MEREDITH SEIBERT; BRIAN P. MURPHY; PERRY ZIRKEL; MITCHELL YELL

Defendants - Appellees

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

FILED: June 27, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1232, Alexis Benson v. Lancaster County School District
0:23-cv-01488-JDA

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: The time to file a petition for writ of certiorari runs from the date of entry of the judgment sought to be reviewed, and not from the date of issuance of the mandate. If a petition for rehearing is timely filed in the court of appeals, the time to file the petition for writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. See Rule 13 of the Rules of the Supreme Court of the United States; www.supremecourt.gov.

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

U.S. COURT OF APPEAL FOR THE FOURTH CIRCUIT BILL OF COSTS FORM
(Civil Cases)

Directions: Under FRAP 39(a), the costs of appeal in a civil action are generally taxed against appellant if a judgment is affirmed or the appeal is dismissed. Costs are generally taxed against appellee if a judgment is reversed. If a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed as the court orders. A party who wants costs taxed must, within 14 days after entry of judgment, file an itemized and verified bill of costs, as follows:

- Itemize any fee paid for docketing the appeal. The fee for docketing a case in the court of appeals is $600 (effective 12/1/2023). The $5 fee for filing a notice of appeal is recoverable as a cost in the district court.
- Itemize the costs (not to exceed $.15 per page) for copying the necessary number of formal briefs and appendices. (The court typically orders 4 copies when tentatively calendared; 0 copies for service unless brief/appendix is sealed.). The court bases the cost award on the page count of the electronic brief/appendix. Costs for briefs filed under an informal briefing order are not recoverable.
- Cite the statutory authority for an award of costs if costs are sought for or against the United States. See 28 U.S.C. § 2412 (limiting costs to civil actions); 28 U.S.C. § 1915(f)(1) (prohibiting award of costs against the United States in cases proceeding without prepayment of fees).

Any objections to the bill of costs must be filed within 14 days of service of the bill of costs. Costs are paid directly to the prevailing party or counsel, not to the clerk's office.

Case Number & Caption: _____

Prevailing Party Requesting Taxation of Costs: _____

Appellate Docketing Fee (prevailing appellants):			**Amount Requested:** _____			**Amount Allowed:** _____	
Document	**No. of Pages**		**No. of Copies**		**Page Cost (≤$.15)**	**Total Cost**	
	Requested	**Allowed** (court use only)	**Requested**	**Allowed** (court use only)		**Requested**	**Allowed** (court use only)
TOTAL BILL OF COSTS:						$0.00	$0.00

1. If copying was done commercially, I have attached itemized bills. If copying was done in-house, I certify that my standard billing amount is not less than $.15 per copy or, if less, I have reduced the amount charged to the lesser rate.
2. If costs are sought for or against the United States, I further certify that 28 U.S.C. § 2412 permits an award of costs.
3. I declare under penalty of perjury that these costs are true and correct and were necessarily incurred in this action.

Signature: _____ **Date:** _____

Certificate of Service

I certify that on this date I served this document as follows:

Signature: _____ **Date:** _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Alexis Benson and Kevin Carberry, Sr. and/on behalf of K.J.C., Plaintiffs, vs. Lancaster County School District, Superintendent Johnathan Phipps, Lindsay Marino, Nicole Lee, the South Carolina Department of Education, Barbara Drayton, Kimberly Blackburn, Vernie Williams, David Duff, Meredith Seibert, Brian P. Murphy, Perry Zirkel, and Mitchell Yell, Defendants.	C/A No.: 0:23-cv-1488-SAL-SVH REPORT AND RECOMMENDATION

This case comes before the undersigned on Plaintiffs' motion for leave to amend/correct the amended complaint. [ECF No. 22]. Alexis Benson and Kevin Carberry, Sr., proceeding *pro se*, on behalf of themselves and their minor child, K.J.C. (collectively "Plaintiffs"), allege violations of various sections of the Individuals with Disabilities Education Act ("IDEA"), Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et. seq.* ("ADA"), Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 ("Section 504"), 42 U.S.C. § 1983, 42 U.S.C. § 1985(3), 42 U.S.C. § 1986, Title

VII of the Civil Rights Act of 1964, § 2000(e), *et seq.*, the Religious Freedom Restoration Act ("RFRA"), negligence, defamation, and criminal acts including money laundering, racketeering, embezzlement, theft, and obstruction of justice. All pretrial proceedings in this matter were referred to the undersigned pursuant to Local Civ. Rule 73.02(B)(2)(e) (D.S.C.). For the reasons that follow, the undersigned recommends denying Plaintiffs' motion and dismissing the case without prejudice.

I. Procedural Background

Ms. Benson filed an Application to Proceed in District Court without Prepaying Fees or Costs ("Form AO-240"). [ECF No. 2]. Following initial review, the undersigned issued a proper form order declining to rule on the motion because Mr. Carberry had neither paid the filing fee nor filed a motion for leave to proceed *in forma pauperis* ("IFP"), and warning Plaintiffs that failure to pay the filing fee may result in dismissal of the case for failure to prosecute and failure to comply with a court order under Fed. R. Civ. P. 41. [ECF No. 7]. Ms. Benson subsequently filed a second Form AO-240 [ECF No. 11], and Mr. Carberry filed a Form AO-240 [ECF No. 12]. On May 31, 2023, the undersigned issued a report and recommendation ("report"), recommending the district judge deny Plaintiffs' motions for leave to proceed IFP. [ECF No. 16]. On November 13, 2023, the Honorable Sherri A. Lydon, United States District Judge ("Judge Lydon"), issued an order adopting the

report, denying Plaintiffs' motions for leave to proceed IFP, and granting Plaintiffs 14 days to submit the required filing fee. [ECF No. 20].

Plaintiffs failed to submit the required filing fee by the deadline of November 27, 2023, and have not submitted it as of the date of this report. On November 29, 2023, Plaintiffs filed a motion to amend/correct the amended complaint. [ECF No. 22].

II. Discussion

It is well established that a district court has authority to dismiss a case for failure to prosecute or failure to comply with a court order. "The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962). In addition to its inherent authority, this court may also sua sponte dismiss a case for lack of prosecution or failure comply with a court order under Fed. R. Civ. P. 41(b). *Id.* at 630.

Despite having been warned that the case may be dismissed for failure to prosecute or failure to comply with a court order [ECF No. 7], Plaintiffs failed to comply with Judge Lydon's November 13, 2023 order. Instead of submitting the required filing fee, they filed a second motion to amend the

amended complaint. [ECF No. 29].

> A party may amend its pleading once as a matter of course no later than:
>
> (A) 21 days after serving it, or
>
> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

Fed. R. Civ. P. 15(a)(1). "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). The court should freely give leave when justice so requires. *Id.*

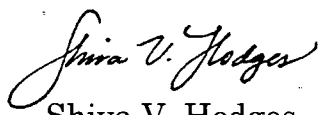
A review of the docket reveals that Plaintiffs previously amended the complaint. [ECF No. 10]. Because a pleading may only be amended once as a matter of course pursuant to Fed. R. Civ. P. 15(a)(1), Plaintiffs require leave of court to amend their complaint. *See* Fed. R. Civ. P. 15(a)(2).

Amendment would be futile given Plaintiffs' failure to pay the required filing fee, and justice does not require the motion be granted. Therefore, the undersigned recommends the court deny Plaintiffs' motion for leave to amend the amended complaint. The undersigned further recommends the case be dismissed for failure to comply with the court's prior order. *See Link*, 370 U.S. at 630–31 (1962); Fed. R. Civ. P. 41(b).

III. Conclusion and Recommendation

For the foregoing reasons, it is recommended the district judge deny Plaintiffs' motion to amend/correct the amended complaint. It is further recommended that the district judge dismiss the case without prejudice based on Plaintiffs' failure to submit the required filing fee within the period permitted by the court.

IT IS SO RECOMMENDED.



December 13, 2023
Columbia, South Carolina

Shiva V. Hodges
United States Magistrate Judge

The parties are directed to note the important information in the attached "Notice of Right to File Objections to Report and Recommendation."

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Alexis Benson and Kevin Carberry, Sr. and/on behalf of K.J.C.,	Case No. 0:23-cv-1488-JDA
Plaintiffs,	**OPINION AND ORDER**
v.	
Lancaster County School District; Superintendent Johnathan Phipps; Lindsay Marino; Nicole Lee; the South Carolina Department of Education; Barbara Drayton; Kimberly Blackburn; Vernie Williams; David Duff; Meredith Seibert; Brian P. Murphy; Perry Zirkel; Mitchell Yell,	
Defendants.	

This matter is before the Court on Plaintiffs' motion for leave to amend/correct the Amended Complaint [Doc. 22] and on a Report and Recommendation ("Report") of the Magistrate Judge [Doc. 23]. Plaintiffs are proceeding pro se on behalf of themselves and their minor child, K.J.C. In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.), this matter was referred to United States Magistrate Judge Shiva V. Hodges for pre-trial proceedings. On December 13, 2023, the Magistrate Judge issued a Report recommending that the motion for leave to amend/correct the Amended Complaint be denied and the case be dismissed without prejudice. [Doc. 23.] The Magistrate Judge advised Plaintiffs of the procedures and requirements for filing objections to the Report and the serious consequences if they failed to do so. On January 8, 2024, Plaintiffs filed objections to the Report. [Doc. 26.]

STANDARD OF REVIEW

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). The Court is charged with making a de novo determination of only those portions of the Report that have been specifically objected to, and the Court may accept, reject, or modify the Report, in whole or in part. 28 U.S.C. § 636(b)(1). The Court will review the Report only for clear error in the absence of an objection. *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2015) (stating that "in the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation" (internal quotation marks omitted)).

It is well established that a district court has authority to dismiss a case for failure to prosecute. "The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962). In addition to its inherent authority, this Court may also sua sponte dismiss a case for lack of prosecution under Fed. R. Civ. P. 41(b). *Id.* at 630.

DISCUSSION

On November 13, 2023, the Court ordered Plaintiffs to submit the filing fee required to bring the action. [Doc. 20.] Instead of submitting the required filing fee, Plaintiffs filed a motion to amend the Amended Complaint. [Doc. 22.] The Magistrate Judge therefore recommends denying the motion for leave to amend and dismissing the action for lack of

prosecution because Plaintiffs have failed to comply with the Court's Order, despite having been warned that the case may be dismissed for failure to prosecute or failure to comply with a court order. [Doc. 23.] In their objections, Plaintiffs generally object to the Report and oppose dismissal, citing statutes and case law related to their causes of action. [Doc. 26 at 1–5.] Plaintiffs additionally argue that Rule 15 of the Federal Rule of Civil Procedure states that the complaint can be amended at any time up to 21 days after the summons is served, and the summons in this case has not yet been served. [*Id.* at 6.] Nowhere in their objections do Plaintiffs address the required filing fee. Nor have Plaintiffs ever paid the filing fee they were ordered to pay to continue with this case.

The Court concludes that Plaintiffs' objections, liberally construed, fail to address the Report's recommendations. Nevertheless, out of an abundance of caution for a pro se party, the Court has conducted a de novo review of the Report, the record, and the applicable law. The Court concludes that Plaintiffs have failed to prosecute this case and have failed to comply with an Order of this Court, and thus the Court accepts the Report and Recommendation of the Magistrate Judge and incorporates it by reference. Accordingly, the motion for leave to amend/correct the Amended Complaint [Doc. 22] is DENIED and the case is DISMISSED without prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

s/ Jacquelyn D. Austin
United States District Judge

March 12, 2024
Columbia, South Carolina

NOTICE OF RIGHT TO APPEAL

The parties are hereby notified of the right to appeal this order pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

Exhibit A

INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT

BEFORE THE STATE REVIEW OFFICER

FOR THE SOUTH CAROLINA DEPARTMENT OF EDUCATION

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)) In the Matter of:)) Alexis Benson and Kevin Carberry, Sr.) On behalf of Kevin Carberry, Jr.) Appellant)) V.)) Fort Mill School District,) Appellee.)	**DECISION OF THE STATE REVIEW OFFICER**

This matter is before me pursuant to an appeal by Alexis Benson and Kevin Carberry, Sr. ("Parents"), on behalf of Kevin Carberry, Jr. ("Student") from a decision by Douglas Dent, the Local Hearing Officer ("LHO"), finding that the Fort Mill School District ("District") was not in violation of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.* This matter is also before me pursuant to a cross-appeal by the District of the same decision's finding that the District should add additional services to the Student's plan, despite having provided a Free and Appropriate Public Education ("FAPE").

1. Procedural Background

I incorporate the procedural history laid out by the LHO in his decision dated November 1, 2021. The Due Process hearing was held in person on October 20, 21, and 25, 2021. The Parents appealed the case on November 1, 2021. I proposed a briefing schedule to which the Parents objected due to a delay in transcript production. I delayed setting a final briefing schedule until the transcripts were produced. The District cross-appealed the case on November 8, 2021. On November 9, I issued an order combining both appeals and setting a briefing schedule that extended the thirty-day period for the initial appeal. Transcripts were made available on November 9, 2021. The Parents submitted a brief on November 17, 2021. The District submitted a response on November 24, 2021. The Parents submitted an additional reply brief on December 1, 2021.

The Parents requested that I reconsider evidentiary decisions made by the LHO as part of the review process. I will address those issues in my decision below, but I did not allow any additional evidence to be submitted as part of the briefing process.

2. Factual Background

The Student began receiving early intervention at the age of one. (Testimony of Father, p. 56, 93). The family moved to Fort Mill, South Carolina when he was three years old. (Testimony of Father, p. 93). He enrolled in the Fort Mill School District in Kindergarten, at Doby's Bridge Elementary. (Testimony of Father, p. 95). During that year, he was diagnosed with Autism Spectrum Disorder and Attention Deficit Disorder. (Testimony of Father, p. 57). Throughout his elementary school years, he had toileting issues. (Testimony of Father, p. 57). He visited the nurse's office frequently and by second grade, the school nurse had a toileting schedule and reward systems for the Student. (Testimony of Father, 57; Testimony of Callahan, p. 100).

In 2019-2020, the Student was in third grade at Doby's Bridge in a classroom described as having a strong behavioral management system that allowed him to thrive. (Testimony of Father, p. 57; Testimony of Castillo-Thompson, p. 197, 199). He struggled with social cues and emotions. (Testimony of Castillo-Thompson, p. 213, 215). In March, 2020, the schools closed due to the COVID-19 pandemic. The Parents requested that the Student repeat third grade because of the missed time, and the principal accepted the recommendation. (Testimony of Father, p. 58).

In the summer of 2020, the Parents received notification that the District would start on a staggered schedule with only half the students in the building at any given time. (Testimony of Father, p. 59). The family requested that the Student attend five days of school with both sets of students to avoid transition issues later on down the line. (Testimony of Father, p. 59, 111-112; Testimony of Shepperd, p. 254). The District refused this request but provided services at home on the alternate days. (Testimony of Father, p. 158-9). The team decided to try this schedule and see how it went. (Testimony of Shepperd, p. 262). The family was also told that the new elementary school, River Trail, that they were now zoned for was not ready, and the students would start the year with River Trail staff, but physically in Doby's Bridge and then move half way through the year. (Testimony of Father, p. 60). The Parents expressed concern with this plan, as it would be yet another transition for the Student and asked if he could remain at Doby's Bridge for the year. (Testimony of Father, p. 60).

The Student's IEP team met on August 20, 2020, to discuss the Parents' concerns. (Respondent's Exhibit 1). The Parents expressed concern about student regression, and the school said they would provide feedback throughout the year until his annual review in November. (Testimony of Shepperd, p. 262; Respondent's Exhibit 1).

Because of the change to River Trail, the Student started working with new service providers at this time as well and individual providers had meetings with the new providers to transition. (See, e.g. Testimony of Castillo-Thompson, p. 220; Testimony of Callahan, p. 241; Testimony of Sova, 524-5). The Students' new third grade teacher said that she read the IEP before this meeting to learn about the Student. (Testimony of Shepperd, p. 292). In the classroom, he received accommodations and modifications like open notebook tests broken into smaller parts, support in the classroom by individual providers, checklists, group assessments, verbal comprehension checks, read aloud questions, a peer buddy, task checklist for behavior management. (Shepperd, p. 316, 405, 407; Testimony of Swank, p. 444).

The initial transition into school was positive. (Testimony of Swank, p. 469; Testimony of Swank, p. 450), and the IEP team met virtually on September 4 for a special review of the IEP. (Respondent Exhibit 1). At this point, the Student had not had any toileting accidents and had started making friends. (Respondent Exhibit 1). During this meeting, the team discussed potential changes to the IEP suggested by the Parents and the Grandparent such as additional reading services, occupational therapy (OT) services, or a study carrel in the classroom. (Respondent Exhibit 1). The District increased writing services, but refused the Parents' request to increase OT services or to have the Student attend school five days a week. (Respondent Exhibit 5).

The team met again on September 17, 2020, to discuss the Parents' request to increase OT services, as well as continuing to discuss allowing the Student to attend school five days a week. The team felt that these additional services were not needed. This was the first time the Executive Director of Special Services, Amy Maziarz, attended the meeting as the LEA representative for the District. (Respondent Exhibit 1; Respondent Exhibit 5).

On September 29, 2020, the team held a facilitated IEP meeting. (Respondent Exhibit 5; Testimony of Shepperd, p. 360). The team decided to add small group assessments to the Student's plan. (Testimony of Shepperd, p. 361; Respondent Exhibit 5). The team rejected additional accommodations requested by the Parents but agreed to collect additional data to determine whether an assistive technology device was needed for writing. (Respondent Exhibit 1, 5).

At the end of September, the whole school came back to five days a week in the building. The Student had a slight decline in behavior then. (Sheppard, p. 264-5). In November, the Parents report that the Student felt the stress of the US presidential elections and masking questions. (Testimony of Father, 114, 164).

On November 11, 2020, the team met for the Student's annual IEP review. The team updated the goals in areas of written expression and social skills and made adjustments to services and accommodations. They did not add services for typing because it was a part of the regular education curriculum. (Respondent Exhibit 5; Respondent Exhibit 1).

The Parents reported a decline in behavior at home in December 2020 as the Student prepared for the transition to the new school building. (Testimony of Father, p 115). The Student stated that they did not feel comfortable with the mask requirements at the school. (Testimony of Father, p. 116). The Student was hospitalized over the December holiday. (Testimony of Sheppard, p. 312).

In February, 2021, the IEP team thought a re-evaluation would be appropriate given declining behaviors and the hospitalization. (Testimony of Sheppard, p. 368; Testimony of Swank, p. 478). At this meeting, the Parent suggested more time outside the general education

classroom or a paraprofessional in the classroom if that was not an option. (Respondent Exhibit 1).

The team conducted a re-evaluation at this point, including academic tests, observations, and an update of information. (Testimony of Swank, p. 487; Testimony of Estes, p. 549-550; Testimony of Williams, p. 608; Testimony of Kobak, p. 713). During this time, also, the Student reported that he hears and sees things that others cannot – people mumbling, screaming, or walking around. (Testimony of Kobak, p. 724). He emailed the school in February 2021, a message about his imaginary friend Jeff. (Testimony of Swank, p. 482; Respondent Exhibit 9).

At the March 29, 2021, meeting to discuss the re-evaluation, the team agreed to add sensory room breaks after visits to the nurse, extra support in the school building, more behavioral intervention, and mental health counseling. (Testimony of Kobak, p. 716-717, 721; testimony of Swank, p. 479). The team moved to more pull out special education services instead of inclusion, as the Student was uncomfortable with having support in the classroom. (Testimony of Swank, p. 483, 486). The team created a new schedule for the Student and agreed to extended school year (ESY) services. Respondent Exhibit 1; Respondent Exhibit 4). The team added Emotional Disability to the IEP. (Testimony of Father, p. 121; Testimony of Swank, p. 489; Testimony of Kobak, p. 785 Respondent Exhibit 1; Respondent Exhibit 5).

Over the last few months of the school year, the Student's behavior continued to decline. There were two incidents of physical aggression, (Testimony of Sheppard, p. 375, p. 382), making fun of students who wore masks, (Testimony of Sheppard, p. 379), mis-use of technology, (Testimony of Sheppard, p. 383), a drop in grades (Testimony of Sheppard, p. 393; Respondent Exhibit 3), a decrease in work completion (Testimony of Sheppard, p. 320) and an increase in toileting accidents (Testimony of Swan, p. 490; Respondent Exhibit 9). Individuals

who testified had different theories about the reason for the decline, from outside factors like COVID (Testimony of Father, p. 174), to the removal of the mask mandate and political issues in the country (Testimony of Sheppard, p. 322), to trauma and instability at home (Testimony of Kobak, p. 731), to boredom from repeating third grade (Testimony of Kobak, p. 797).

In May 2021, the school staff had a conversation about the Student's struggles and talked about a potential proposal to move the Student to a more specialized setting. (Testimony of Maziarz, p. 866).

On June 7, 2021, the team had another special review IEP meeting. This meeting ended with a change in the IEP to reflect a new placement at Orchard Park Elementary, a specialized setting for the Student. Teachers believed this would be helpful because of the smaller classrooms (Testimony of Sheppard, p. 358; Testimony of Williams, p. 611), a better alignment with his needs (Testimony of Williams, p. 613; Testimony of Kobak, p. 730), and fewer transitions (Testimony of Sheppard, p. 291). The Parents disagreed with this placement. (Testimony of Father, p. 126; Respondent Exhibit 5). The team stated that other options in the District with smaller class sizes would not allow the Student to access grade level curriculum. (Testimony of Sheppard, p. 387).

The Student attended Orchard Park Elementary for the first week of school at the start of the 2021-2022 school year. He said that he could not learn or concentrate and there were constant outbursts by other students. (Testimony of Father, 130-133). He was in a behavior support program, with kids who have behavioral and emotional support needs but perform at grade level. (Testimony of Johnson, p. 675-6). Each class had six students, one certified teacher and two paraprofessionals. (Testimony of Johnson, p. 675). They provide instruction and behavioral skills. (Testimony of Johnson, p. 677-8). The principal of the program says the

program usually needs 4-6 weeks to make a difference. (Testimony of Johnson, p. 697). The Student has been learning at home since leaving Orchard Park Elementary, and the Student wishes to return to his old school. (Testimony of Student).

3. Standard of Review

Federal and state regulations provide that a party aggrieved by a LHO decision may appeal to a State Hearing Officer ("SHO") who must "[e]xamine the entire hearing record" and "[m]ake an independent decision on completion of the review." 34 C.F.R. § 300.514(b)(2)(i) and (v) (2014). The SHO must also consider the hearing officer's advantage of examining the demeanor of the witnesses when credibility determinations are at issue. *Id.; Shore Reg'l High Sch. Bd. Of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In doing so, the findings of fact of the LHO are entitled to deference and are considered prima facie correct. *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 326 (4th Cir. 2009); *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991). However, the SHO must still determine the weight of the evidence and questions of law independently. *Springer v. Fairfax Cnty. Sch. Bd., 134 F.3d 659, 663* (4th Cir. 1998) (differentiating itself from *Doyle*).

The burden of proof in this case lies with the Parents, as the party seeking relief. See *Schaffer ex. Rel. Schaffer v. Weast*, 546 U.S. 49 (2005) (holding that the burden of proof in an administrative hearing challenging an IEP under the IDEA is properly placed upon the party seeking relief, whether that is the disabled child or the school district).

Consistent with these principles, a SHO reviews the record created through an administrative trial before the LHO, and does not rehear evidence and generally does not admit

or hear evidence not considered by the LHO. A SHO does have discretion to admit evidence not considered below. 34 CFR § 300.514(b)(2)(iii).

4. Hearing Officer's Findings

The LHO found that the Parents had a meaningful opportunity to participate in the IEP meetings because they were at each meeting, brought participants to the meetings, and were able to argue for their point of view during the meetings. He found that the IEP teams to be properly constituted. Further, he found the staff meeting held prior to the June 7, 2021 IEP meeting did not constitute an IEP meeting, and thus the District did not predetermine the Student's placement decision.

He found, also, that the proposed placement was appropriate. The LHO argued that the District made many attempts to make the regular education classroom work, but that the many other transitions in the Student's life – the COVID-19 closures and re-opening, a change in school placement, and outside of school issues – all affected the Students as well. The LHO found that the District had attempted to educate the Student "to the maximum extent appropriate" with his non-disabled peers but that this placement as the Least Restrictive Environment ("LRE") for the Student at the moment.

Finally, the LHO denied a private placement for the Student, as they met neither prong of the *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) test.

The LHO ordered that the educational program offered by the District for the Student is appropriate and offers him a FAPE. He also asked that the District add the use of a computer and support from a psychiatrist or psychologist for the Student.

5. Discussion

The Parents raised many issues upon appeal, and the District raised one issue. In an attempt to come to the clearest decision, both in terms of facts and law, I have grouped issues together.

The LHO made appropriate decisions at the hearing, and the Parents were able to present the evidence needed to make their case forcefully and fully.

The LHO was able to conduct the hearing impartially.

During the pre-hearing planning period, the LHO asked the parties their vaccination status and requested that all participants in the due process hearing wear a mask. The Parents opposed both requests and asked the LHO to recuse himself from this case believing this disagreement to indicate a prejudice against them. The LHO did not recuse himself, citing the appropriateness of his decision given that federal courts currently require a face mask. He did, however, allow the Parents to participate without masks in the hearing, so long as they kept distanced from others. The Parents' brief in this appeal repeated their objection to the LHO's authority over this case, given these restrictions.

The LHO has discretion over the conduct of the hearing. See, e.g. 71 Fed. Reg. at 46704, ("There is nothing in the Act or these regulations that would prohibit a hearing officer from making determinations on procedural matters not addressed in the Act so long as such determinations are made in a manner that is consistent with a parent's or a public agency's right to a timely due process hearing.") South Carolina does not restrict this discretion any further. Special Education Process Guide for South Carolina, Office of Exceptional Children, 175-76 (Revised 3/20/13). Further, I uphold the LHO's finding that nothing in state law precludes a

mask requirement. (Hearing Officer Exhibit 7). The LHO's request to both parties to wear masks does not, therefore, suggest a conflict with the LHO's objectivity.

In fact, he showed deference to the Parents in allowing them to participate without a mask despite his valid order requiring masks. Throughout the hearing, the LHO reminded the Parent to stay behind the podium when addressing witnesses, but did not request that she wear a mask again. The LHO sustained objections from both sides and overruled objections from both sides. He also admonished both sides to comport themselves more professionally throughout the hearing. He allowed the Parent great latitude as a pro se representative in her questioning and presentation of exhibits. After a careful review of the entire transcript, I find that the LHO demonstrated impartiality towards the Parents in the conduct of the hearing.

The Parents' brief also raised the concern that the appointed LHO had a "record" of siding with Districts. Under South Carolina law, the LEA has the responsibility to appoint the hearing officer. (SC Special Education Process Guide, p. 173). The requirements to be an LHO state only that the LHO may not be an employee or former employee of the LEA, that they must have knowledge and understanding of the IDEA, have knowledge and ability to conduct hearings in accordance with legal practice, and have knowledge and ability to render and write decisions in accordance with legal practice. *Id.* All LHOs must be trained by the South Carolina Department of Education, and remain qualified to be an LHO unless they do not adhere to federal and state regulations or policies and procedures. *Id.* This LHO meets those requirements. South Carolina law does not include any restrictions from serving as an LHO despite past tendencies.

The LHO properly made decisions about whether to admit or deny evidence during the hearing.

The Parents argue that the LHO improperly denied the presentation of significant parts of a recorded IEP meeting. Again, the IDEA and state regulations give broad discretion to the hearing officer to conduct the hearing and determine what evidence to admit while also encouraging the hearing officers to limit hearings to two to three hours. Given that, the hearing officer has discretion to determine whether introduction of the IEP video would unnecessarily delay the hearing or provide information pertinent to his decision-making. In this case, we saw the LHO admit evidence submitted even after the five-day deadline and admit some pieces of video testimony. He ruled on the video testimony primarily on whether or not the person testifying would be able to provide the same information as that in the recording and that is a reasonable standard to go by. The Parents were not able to successfully argue that the recording would provide information that the witnesses could not provide. The Parents did not provide a clearer description of what the Parents hoped to show with the recording that could not be shown in questioning may have supported her case more. The Parents showed video testimony as part of the closing argument. While the closing argument is not evidence, it is clear that the hearing officer took notice of it, as he asked the Parents to continue playing the video when she wanted to press pause. (Hearing Transcript, p. 913).

The Parents raise several other pieces of evidence that they should have been able to introduce. Again, the law gives the LHO significant discretion in determining what can be introduced and the procedure by which it needs to be introduced. The Parents wanted to submit more emails, historical student records, and other documents from throughout the Student's time in this District. Given that the fundamental questions in this case turn to the very end of the 2021 school year, I do not find a nexus between the evidence the Parents described as missing from

the case and the arguments the Parents are making for their case and do not think this additional evidence would be determinative.

The questioning of the Student by the hearing officer alone was appropriate.

The Parents requested that the Student himself testify in the hearing. The LHO allowed the Student to speak via video call, but only the LHO questioned him. The Parents argue that the Student should have been allowed to be questioned by both parties.[1]

The law is clear that the Parents have the right to have the child who is the subject of the hearing present. 34 CFR § 300.512(c)(1). The law is also clear that the LHO has the discretion to determine appropriate witness testimony (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,691 (Aug. 14, 2006) (codified at 34 C.F.R. pt. 300)). While generally, I favor Student's abilities to make statements on their own behalf, the LHO here knew how contentious this hearing was and questioned the Student on all of the pertinent issues. We heard the Student's opinion on his current placement and his wish for return to his previous school. Further testimony would not have added to the argument.

The credibility of Amy Maziarz should have been at question in the hearing.

The Parents argue that Amy Maziarz was clearly impeached through the recording evidence in the hearing.[2] The LHO made no finding on this topic. The Parents introduced this

[1] The District asserts on appeal that the Student's testimony with questions only by the LHO was by agreement of the parties. The District did not provide a citation to such agreement and I have not located it in the record. I therefore analyze the issue as if there was no agreement.

[2] The Parents' briefs on appeal include several personal attacks on Dr. Maziarz, including an attack on her perceived family status and sexual orientation. These attacks are beyond inappropriate; they are offensive attacks that have no place in this proceeding.

recording as their closing statement, so the District did not have the opportunity to cross-examine or question Dr. Maziarz, and the recording was not officially part of the evidence. Given the LHO's interest in the recording (as noted above, he asked the Parent to continue playing it when she pressed pause), I have accepted the recording into my decision-making. My review of the transcript concludes that Dr. Maziarz's testimony at the hearing directly contradicts what the recording reflects she said to the team during the IEP meeting on June 7, 2021.

Below are pertinent parts of the transcript from the June 7, 2021 meeting recording:

Maziarz: I think based on where he is with his social/emotional, we've seen very little progress on his goals. We're thinking he needs a more restrictive setting. . . He needs to be in a class where we can really zero in on the social/emotional aspects -- . . . -- of it. You know, he can still go out for his related arts and participate in recess and lunch with his non-disabled peers, but I think that the staff only use -- that he should be in a special education class the majority of his day to start next year." (p. 904).

[The Mother then argued that she would ask the school to try a one-on-one aide before moving to this step, and the two of them discussed whether or not a one-on-one aide had been tried and what they had learned from the attempts.]

Maziarz: Well, at this point, that is the school's proposal. (p. 908).

Maziarz: I talked to all the staff who have shared their -- -- with me. (p. 912).

[The Mother asked if the Student's placement as discussed before the IEP meeting.]

Maziarz: No. Staff contacted me with concerns about his regression and where we needed to go from, so we scheduled an IEP meeting. (p. 914, emphasis added)

Mother: **Okay. So they – and then you didn't talk to them about what is your recommendation is for his placement next year? (p. 914, emphasis added).**

Maziarz: No, I did not. (p. 914, emphasis added).

[Ms. Sheppard then jumped in and shared her concerns as well]

Sheppard: I support the decision that he needs to go to a special settings classroom.

Mother: Okay. Well, I appreciate your opinion. Ms. Sheppard, did you have that opinion, did you share that opinion with Amy before this second that you just said it?

Sheppard: Yes.

During her hearing testimony, Dr. Maziarz described a staff planning meeting in which "We discussed keeping him in his current placement, we discussed whether or not a one on one would be beneficial to him, we discussed whether or not he needed to be moved to a special setting class." (Testimony of Maziarz, p. 866). The Mother responded: "So you discussed placement at that staff meeting? Is that correct?" Dr. Maziarz responded "We did. Yes." (Testimony of Maziarz, p. 866). That affirmative response contradicts the negative response to a similar question at the IEP meeting, when Dr. Maziarz denied having discussed placement with other District staff.

This contradiction is concerning and raises credibility concerns. It is likely that Dr. Maziarz gave an honest answer during her testimony – she and District colleagues discussed placement prior to the IEP meeting. If that is right, however, it appears that she was not honest with the Parent during the team meeting. As an SHO, I am required to give deference to the LHO's credibility findings; however, I find this discrepancy concerning and therefore will not consider Dr. Maziarz's testimony in my decision-making. I referenced her testimony only one time in the facts section, only to note the occurrence of this meeting.

The LHO's factual and legal conclusions regularly made.

While I will analyze the LHO's legal conclusions *de novo,* the Parents have not demonstrated that the conclusions he made were not regularly made. The hearing was conducted fairly and both sides had ample opportunity to present their case. The LHO created the statement of facts based on his own understanding of the situation and conducted his own legal analysis,

and did not merely restate either party's statement of facts. As stated earlier, I find no abuse of discretion in the LHO's handling of evidentiary decisions in a contentious hearing.[3]

During the June 7, 2021 meeting there was a procedural violation that impeded the Parents' ability to participate in the meeting, thus leading to a denial of a FAPE.

The pre-meeting held by the staff was not an IEP meeting.

The Parents argue that the school had an illegal IEP meeting in May 2021, and that at this meeting, the team made a determination about the Student's placement. They argue, then, that the school refused to consider parental input into this placement decision at the June 7, 2021 properly constituted IEP meeting.

While the IDEA requires parents to be "a member of any group that makes decisions on the educational placement of the parent's child," 34 CFR § 300.501(c), it also clarifies that a "meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting." 34 CFR § 300.501(c)(3). We do not know the details of what happened in this meeting, but the existence of a meeting to discuss a proposal does not make it an IEP meeting, and therefore,

[3] Hearing officers generally have authority to determine procedural matters not specifically outlined in the IDEA, as long as they are consistent with the party's IDEA rights. *See Letter to Kane*, 65 IDELR 20 (OSEP 2015) (While acknowledging that the IDEA doesn't specifically limit the time a parent or parent's attorney may spend presenting evidence or questioning witnesses at a due process hearing, OSEP stated that a guideline issued by the Minnesota Office of Administrative Hearings generally limiting evidentiary hearings to three days didn't appear to be inconsistent with the IDEA.). Hearing officers may set time limits on due process hearings in accordance with state guidelines, so long as both parties have an adequate opportunity to present evidence and cross-examine witnesses. *B.S. v. Anoka Hennepin Pub. Schs.*, 66 IDELR 61 (8th Cir. 2015) (holding that an administrative law judge did not deprive a teenager's parents of their due process rights when he allotted their attorney nine hours to present their IDEA claims against a Minnesota district).

parental participation is not required in the meeting. The LHO properly rejected Parents' argument to the contrary.

Parental Participation More Generally

That does not, however, mean that the Parents were able to participate meaningfully in the central decisions regarding IEP services and placement. What is essential is that a district's proposal developed in a pre-meeting is simply that – a proposal. See, e.g. *Doyle v. Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992) (holding that merely proposing a placement before IEP completion without making up its mind did not deny meaningful parental input)., aff'd, 39 F.3d 1176 (4th Cir. 1994). In *Knox County Schools*, the U.S. Court of Appeals for the Sixth Circuit emphasized that school officials are permitted to form opinions and compile reports prior to IEP meetings. *Knox County Sch.*, 315 F.3d 688 (6th Cir. 2003), at 693-94 n.3. The court cautioned, however, school officials must still be "willing to listen to the parents." *Id.* at 694-95 (noting that school system representatives should "come to the meeting with suggestions and open minds, not a required course of action").

Parental participation is a cornerstone of the IDEA. The IDEA requires that parents must be included in an IEP team meeting. 34 CFR § 300.321. Districts must ensure that parents have appropriate notice of the meeting and understand the purpose of the meeting. 34 CFR § 300.322(b). Parents' voices must be considered in meetings; however, they cannot dominate the meeting or veto the final decisions. That said, courts look to see whether the school makes changes based on parental voice. "Where there was no way that anything the [Parents] said, or any data the [Parents] produced, could have changed the School System's determination of appropriate services, their participation was no more than after the fact involvement." *Hamilton*

County Department of Education v. Deal, 392 F.3d 840, 858 (6th Circuit, 2015), finding that being present and speaking does not necessarily equate to participation. The lack of parental participation in *Deal* led to a finding of a substantive violation of IDEA because of predetermination, including numerous procedural and substantive errors, a school district unofficial policy of refusing to consider certain programs, a financial motivation for the district, and a refusal to allow the parents to ask questions during meetings.

Other cases have found meaningful parental participation using the standard in *Deal. Winkelman v. Parma City Sch. Dist.*, 411 F.Supp. 2d 722, 728-29 (N.D. Ohio 2005); *W. G. v. Board of Trustees of Target Range School District No. 23,* 960 F.2d 1479, 1485 (9th Cir. 1992); *EW ex rel. C.W. v. Rocklin Unified School District,* (E.D. Calif., 2006) (finding that a pre-created IEP report with five different placement options to be considered was appropriate); *T.P. ex rel S.P. v. Mamaroneck Union Free School Dist*, 554 F.3d 247 (2nd Cir. 2009) (distinguishing *Deal* based on the consistent rejection of the parental requests and a lack of "open mind" as to the use of particular programs); *T.P.* at 253. *Seladoki v. Bellaire Local School Dist. Bd. Of Educ.*, (S.D. Ohio, ED, 2009) (distinguishing *Deal* based on lack of financial motivation or district policy); *J.D. by Davis v. Kanwha County Bd of Educ*, CIVIL ACTION NO. 2:06-cv-00167 (S.D.W. Va. Aug. 3, 2007) (distinguishing *Deal* because the team took breaks to consider parental information and incorporated ideas into IEP). Procedural issues can infringe upon a parent's ability to meaningfully participate in their student's IEP. *Knable ex rel. Knable v. Bexley City School Dist.*, 238 F.3rd 755 (6th Cir, 2001). However, if the Student was able to receive a meaningful educational benefit despite procedural violation, then it would not rise to a denial of a FAPE. *MM ex rel DM v School Dist. of Greenville County*, 303 F.3d 523 (4th Cir., 2002).

By discussing placement prior to goals and services, the District denied the Parents meaningful participation in the meeting.

The staff pre-meeting focused on a change in potential placement, and the staff came into the IEP meeting with an opinion prior to the meeting. That is permitted under the IDEA. However, the question is whether the Parents were able to meaningfully participate in the meeting at which school staff proposed that placement change. Here, the evidence reflects that the District failed to involve the Parents in a complete discussion of the goals and services that the Student needed – a discussion which should have occurred *before* determining placement. The District compounded this failure by refusing to provide adequate information and options about its proposed placement.

The June 2021 meeting was called to conduct a special review of the IEP. (Respondent Exhibit 1). A review of the IEP should start with a discussion on progress toward current goals, and then changes to goals and services needed. Placement is the last step of the process. (SC Special Education Process Guide, p. 92). Placement decisions must be based on the child's IEP. 34 CFR § 300.116. That is, the team must first develop a child's IEP, including assessing the child's current progress, identifying appropriate goals, and the special education services necessary to achieve those goals. Once an IEP is created, the team must then discuss placement options to determine which is best suited to implement the IEP.

Instead of following this process, the District first determined placement, and then crafted IEP services to match that placement.[4] By flipping this order, I find that the District denied Parents the ability to participate meaningfully in developing both the IEP and the placement.

The meeting did start with a discussion of current progress. Academically, the Student was making sufficient progress. He scored "within the average range on both the Spring Reading STAR benchmark (68th percentile) and the Math STAR benchmark (58th percentile). His AIMSweb Plus benchmark fell within the 60th percentile (average) and in the area of Math and in the 55th percentile (average) for reading." (Respondent Exhibit 2). He had also mastered both the writing goals on his IEP. However, the Student's functional skills had regressed. He was completing 30-40% of his general education assignments "even with the increase of services inside the resource setting." During class, he required adult prompting and was shouting and blurting out frequently. ". . . teachers also report an increase in taunting, teasing, and threatening his peers. . ." In addition, he was averaging two to three accidents per day with a significant increase in the last three months of the year. (Respondent Exhibit 2).

But then, the team did not discuss updating the Student's goals for the next school year, the root causes of this regression, or the services he needs. Instead, they immediately jumped directly to a placement discussion. "A. Maziarz explained that given [the Student's] functional regression and limited progress towards his goals, they would like to propose changing [the Student's] to a special setting." (Respondent Exhibit 1). The Parents then countered with a

[4] Note that the below analysis depends largely on the exhibits introduced and accepted by the various parties, rather than the testimony provided by individuals in the hearing. The testimony provided jumped from topic to topic and rarely covered the core issues from either side. No party, however, questioned the validity of these notes and these documents aside from the Mother who believes information as left out of them. My review is based on the detailed notes of the June 7 meeting (Respondent Exhibit 1), the PWN of the June 7 meeting (Respondent Exhibit 5), and the IEP created at that meeting (Respondent Exhibit 5). These records were developed by the District and the District raised no objection to them.

request for a 1:1 aide, and the team discussed previous attempts at in-class support. The team explained to the Parents why they believed this special setting would be helpful. The school officials' focus on supporting their placement proposal inhibited the discussion of services and goals which should have come first.

Failing to identify appropriate goals and services at this point was problematic in at least two respects. First, it denied the Parents the opportunity to participate meaningfully in setting those goals and services. Second, it denied the Parents the opportunity to participate meaningfully in setting the educational placement, because without agreed upon goals and services, there was no appropriate standard against which to measure proposed placements. Moreover, the District refused to provide adequate information about its proposed placement, further inhibiting the Parents' ability to participate in that decision. When the Parents asked for more information about the District's proposed placement, the District explained that "she has a right to do her research but that the team will update his IEP to reflect a change in service at this time." (Respondent Exhibit 1). Eventually, the Parents left the meeting, and only after that point did the discussion of a change in goals or service hours happened.

Despite the academic progress the Student made, the team increased the Students' academic services significantly in a special education classroom. Despite the District's concerns about the Student hearing voices and increased aggression, they maintained counseling at only 270 minutes per quarter (30 minutes/week). (Respondent Exhibit 1; Respondent Exhibit 2). These changes seem designed to align to the program, rather than necessarily to the Student's individual tailored goals. (Respondent Exhibit 1). For instance, increasing academic service hours matched what would be provided in the District's proposed placement, even though the team had established that the Student was making adequate academic progress.

As further evidence of the incorrect sequence of changes, the IEP Amendment specifically states: "Based on updated present level data showing a continued decline in functional performance, the IEP team determined that KJ will receive his specialized instruction in a special setting classroom for next school year. Services and goals were updated to reflect this change in placement." (Respondent Exhibit 2) (emphasis added). The services and goals should be updated first, and placement decisions then made to best implement those services and goals.

The Prior Written Notice also reflects this issue. "The district proposes to update services to reflect a change of placement to the special setting classroom for the 2021-2022 school year at Orchard Park Elementary." (Respondent Exhibit 5).

I do not argue that the Parents in this case did not have sufficient time or space to advocate for their child. Instead, by discussing placement before a change in services or goals, the Parents are unable to start with their expertise – the child's needs – and instead is arguing about placement options in the District, something only the District is expert in. In addition to updating the IEP prior to discussing placement, had the District provided a list of all placement options, and explained how the Student's goals would not be aligned to those options, or the District started by making the case that the Student needed 600 minutes of behavioral support to meet their goals, the situation may have been different. Finishing the IEP update and reconvening after giving the Parents a week to learn more about the other offerings in the District may have been sufficient as well. The contentious nature of the relationship between the District and the Parents should not relieve the District of the obligation to follow the basic procedures of the IDEA.

I find, therefore, that the District committed a procedural violation by failing to fully address the Student's unique and individual needs, and to design services, supports, and annual goals to ensure Student's progress in the general education curriculum before moving to a placement decision. This procedural violation substantially interfered with the Parents' ability to participate in the meeting and it substantially interfered with the creation of an IEP that was based on the Student's goals, rather than the design of the special education program. The Student's educational program and placement were then not designed to provide him a FAPE in the LRE, given his unique and individual circumstances.

Was Orchard Park the LRE for the Student?

Because I find that the Student's educational program and placement were not designed to provide him a FAPE in the LRE, given that the IEP was designed to match Orchard Park's program, rather than Orchard Park's program being selected to match the Student's IEP, I cannot determine whether the school would be able to provide FAPE in the LRE. I will note, however, the Parents would carry the burden of proof and, because the Student was there for less than a week, the Parents have very little evidence as to whether Orchard Park was an appropriate placement.

Much of the testimony discussed the Student's progress the previous year, with speculation as to what caused his behavior decline – the many transitions due to COVID, the movement to a new school, the wearing of masks, volatility between the Parent and the District outside of this case, external factors at home and in the community, or even, repeating a grade or boredom. Given the complicated nature of this decline, it is impossible to say that the decline was due to a specific school decision, or to a specific decision by the Parents.

The teachers who expressed opinions as to the placement change had reasonable reasons for suggesting it – a smaller staff to children ratio in a program for students whose primary challenges are functional rather than academic, fewer transitions, the ability to access grade-level curriculum. (See Testimonies of Sheppard, p. 358, 387, Williams, p. 611, 613, Kobak, p. 729, 730). Without properly setting goals and services, it is impossible to determine if this placement was the best one to achieve those goals and implement those services, and the Parents were denied the ability to participate in both decisions

A decision about whether Orchard Park was the right LRE would necessarily have to include a proper set of decisions about the Student's goals and services, then a question of whether every attempt was made in the current school to meet those goals and implement those services, and what other placement options were available in the District and could best do so.

The Parents are entitled to relief based on the findings above.

The LHO's relief was inappropriate.

The District's cross-appeal raised concerns about the LHO's order which found, first, that the educational program offered by the District is appropriate and offers him FAPE, and second:

> "Two components should be added at the District's expense; 1) once stabilized KJ shall be given the opportunity to learn to type and use a computer or similar device, and 2) the District shall identify appropriate and offer services from a psychiatrist or psychologist in an effort to help him out of the mental health hole he is slipping into. Without this help. *[sic]* He will not be able to learn." (LHO, p. 12).

The District rightly argued that, because the LHO found no denial of a FAPE, he could not then order additional services.

The Parents are entitled to other relief.

The Parents request relief in the form of firing of certain school personnel, a service animal, a one-on-one aide, a private special placement, or support for home-based special placement. Because the Student does not currently have an IEP that is tailored to his individual goals and needs, rather than to a specific program's offering, I am unable to determine which of these remedies is appropriate, if any. The Student needs an updated evaluation to understand his current needs, and then for the team to develop an educational program based on those needs.

I am well aware that the relationship between the Parents and the District has deteriorated so greatly that a civil IEP meeting may be impossible. The lack of civility displayed by both parties at the hearing was unacceptable, and I ask both parties to comport themselves with a focus on the Student in question, rather than ad hominem attacks on each other. The Student needs to be served.

I order the District to pay for a neuropsychological evaluation, and potentially a psychiatric evaluation if recommended by the neuropsychologist. I order the IEP team to meet after the evaluation is completed to develop an updated IEP with updated goals and services, and then to determine placement. If either party creates unnecessary delay or does not comply with the Order, I ask the other party to submit a Motion to Enforce to me. I will retain jurisdiction over the enforcement of this Order.

Because of the level of dysfunction in the relationship between the District and the Parents, I lay out the steps to be taken in detail below:

1) Within 10 days of this order, the District will develop a list of three neuropsychological evaluators within 150 miles of the Student's legal residence. These neuropsychological evaluators must have a doctoral degree in psychology as

well as specialized coursework in neuropsychology. They should be a member of the divisions for clinical neuropsychology with the American Board of Professional Psychology or the American Psychological Associations.

2) Within 15 days of this Order, the Parent should choose one of these 3 neuropsychologists.
3) Within 45 days of this Order, the Parent should take the Student in for a full evaluation, completed at the District's expense. One of the questions posed to the evaluator must be whether a more in-depth psychiatric evaluation is recommended.
4) If the evaluator recommends a psychiatric evaluation, the District must facilitate this with a psychiatrist recommended by the neuropsychologist, and the Parent will be responsible for presenting their child for this evaluation in a timely manner.
5) Within 10 days of the completion of the evaluation, the IEP team must meet to discuss the Student's goals and services needed. They should then discuss placement. All parties should have an open mind as to whether the services needed can be met through a 1:1 aide in the classroom, a specialized setting within the District, or a private or residential school.
6) If the Student is not currently attending school, then the District will provide 1 hour of home-based tutoring a day starting the day after the Parents present the Student for the neuropsychological evaluation and continuing until the IEP team meets.
7) If the Parents do not present the child for evaluation, then the IEP dated June 7, 2021, stands. The Parents must then send the Student to Orchard Park Elementary School.
8) If the District does not meet the deadlines in this Order, then the Parents should file a Motion to Enforce with me.

Other Issues

The Parents' brief raises a number of other issues relating to comments made by the LHO in his order (e.g. his discussion of the divorce or description of the home environment), as well as facts that the LHO may have gotten incorrect. Those issues do not impact the resolution or remedy for this appeal.

6. Conclusion

I reject the LHO's decision that the District appropriately allowed for parental participation in the June 7, 2021, team meeting, and find that the District did not design an educational program to provide a FAPE in an LRE to the Student because they made a placement decision before deciding on new goals and services. I reject also the LHO's remedies which were based on a finding of FAPE.

I order the District to pay for a neuropsychological evaluation, and potentially a psychiatric evaluation if recommended by the neuropsychologist. I order the IEP team to meet after the evaluation is completed to develop an updated IEP with updated goals and services. If either party creates unnecessary delay or does not comply with the Order, I ask the other party to submit a Motion to Enforce.

7. 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) and 34 C.F.R. § 300.516.

Avni Gupta-Kagan

State Hearing Officer

Columbia, South Carolina

December 8, 2021

INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT

BEFORE THE STATE REVIEW OFFICER

FOR THE SOUTH CAROLINA DEPARTMENT OF EDUCATION

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)) In the Matter of:)) Kevin Carberry, Sr. & Alexis Benson,) on behalf of Kevin Carberry, Jr.) Appellant and Cross-Appellee)) v.)) For Mill School District,) Appellee and Cross-Appellant))	ORDER ON MOTION TO ENFORCE

On December 8, 2021, I issued a decision in an appeal of an order by Local Hearing Officer Douglas Dent on a matter between Kevin Carberry, Sr and Alexis Benson ("Parents") and the Fort Mill School District ("District"). The Parents and the District filed motions on December 9, 2021 to request clarification or reconsideration of the relief granted in my order, which I addressed on December 10, 2021. On February 23, 2021, the Parents filed a Motion to Enforce based on several issues that have arisen.

The Parents' Argument

The Parents' Motion to Enforce asserts that, of the three options presented to the Parents for evaluation by the District, only one responded, effectively denying them a choice. The

Motion also addresses concerns about the independence of the evaluator for the Independent Education Evaluation ("IEE"). They claim that they gave permission only for written records to be shared between the District and the evaluator and did not give permission for verbal communication.

In their reply to the District's response brief, the Parents raise several other issues regarding the provision of at home services for the Student, the membership of the IEP team, and a change in the "stay put" order. I will address only those issues in the original motion, as the District did not have the opportunity to respond to the new issues raised.

Parent Choice of Evaluator

In my order, I asked the District to compile the names of 3 potential evaluators within 150 miles of the Student's legal residence who have a doctoral degree in psychology as well as specialized coursework in neuropsychology and are members of the division of clinical neuropsychology with the American Board of Professional Psychology. The District timely provided such a list to the Parents. However, one of the evaluators stated that they did "not take these types of cases." (DE 3). The Parent emailed the other two doctors and 5 days later, only one - Carolina Neuroservices - responded. The District does not deny these facts.

The purpose of having the District create a list from which the Parents can choose was to find an evaluator that both parties could trust. While the list had three names, in practice, the Parent had only one choice. They were not able to interview the three evaluators, look at sample evaluations, or develop trust with this evaluator. While the District provided 3 names to the Parent, the Parent did not have a true choice.

The Evaluator's Independence

The Parent raises concerns about the fact that the evaluator and the District had conversations during the course of the evaluation process. They also note that one release allowed the Parent to name specifically what evaluation materials could be shared, and another had pre-filled the phrase "Relevant Educational Records." While the format was different, the Parent signed both, allowing the District to share relevant education records with the evaluator. None of the evidence submitted demonstrates that the District and evaluator had inappropriate conversations about the Student. The correspondence submitted was simply about getting teacher scales completed (a necessary part of an IEE) and about scheduling attendance at the IEP meeting (also an acceptable part of an IEE). I find no problems in the educational record release forms and process.

However, I do find a issue in an email sent by the evaluator to the District on February 17, and in the District's response to that email. The evaluator asked the District to "please send me specific questions to be answered in the eval. Email those questions if you would." (DE #8). By asking this question only of the District and not of the Parent, the evaluator may be compromising his independence.

The Neuropsychological Evaluation

Even given the challenges above (the lack of choice and the potential bias of the evaluator), in the interest of moving quickly to get the Student the services he needs, I may have accepted the evaluation conducted if the evaluation itself demonstrated independence and an understanding of the child. However, on February 25, the District sent this team the evaluator's neuropsychological evaluation itself. I find the evaluation to be incomplete and seriously lacking the informed and individualized recommendations that were the purpose of the evaluation.

A thorough neuropsychological evaluation should include a detailed assessment of the student's history, their current skills in a broad range of areas, including executive functioning, attention and other cognitive processing. There should be detailed lists of recommendations as to how to work best with the Student. By reading a thorough neuropsychological evaluation, the Parents and District should develop a better understanding of the Student's strengths and challenges.

This evaluation gave very little of that information. While providing all scale scores for the intellectual and academic testing, the descriptions for attention/executive functioning and social perception were perfunctory. Important insights into the Student are missing, with little detail about what the scores mean. For example, the evaluation says "Theory of mind performance was well-below expectation." The evaluator did not provide details explaining what "theory of mind" means, what instrument was used to determine that he was below expectation, or the scores on tests related to theory of mind. Under the attention/executive functioning section, he says "A measure of conceptual sorting was in the average range of functioning. Auditory attention was defective. Response set performance was in the defective range. Performance on a pre-drawn clock was in the borderline range. Measures of cognitive inhibition generally ranged from the defective to superior range of functioning." Again, while scale scores are clearly available, he does not provide them, nor does he provide information to help the Parent or District understand what each of these findings mean. The Student's cognitive inhibition ranged from defective to superior range, he says. On what areas is it defective and in what areas is it superior? The evaluation does not say.

Further, in his summary, the evaluator notes that "[Student] is currently exhibiting significant externalizing problems in the classroom, including problems with aggression and conduct problems. He may also exhibit bullying towards other children . . . However, these

problems were not consistently observed by his teachers. These behavioral concerns were not observed by the patient's mother." The Student is currently learning at home with a tutor for 2 hours a day. The teachers and mother will obviously not see problems with bullying or aggression in the classroom. This paragraph demonstrates a lack of understanding of the Student's present situation.

Most problematic are the evaluator's recommendations. A typical neuropsychological evaluation presents detailed recommendations on how the Student can be served, including appropriate services and accommodations to address each identified deficit. This section is usually quite extensive, including specific strategies teachers may use in classrooms, strategies for parents to consider at home, as well as thoughts on the kinds of settings that would be appropriate. The summary notes significant auditory processing challenges, but no recommendations are presented to address them. While he lists Autism Spectrum Disorder ("ASD") as a diagnosis, none of the recommendations help the Parent and District understand how to support this neurodiverse student. Further, one of the recommendations appears illogical: "[The Student's] current academic placement in a classroom with children who have emotional or behavioral problems appears appropriate. However, any significant disruptive behaviors by other children would undoubtedly be a trigger for [the Student], and should be carefully monitored by the school psychologist." If other behaviors would trigger the Student, then how is this placement appropriate? (To be clear, I do not make any finding regarding the appropriateness of any possible placement. Rather, I use this to identify the evaluation's shortcomings.) Further, without any indication of having made a school visit to observe the placement, the evaluator is not qualified to comment on the placement but instead should be describing an ideal placement.

On a more logistical note, the evaluation does not list who conducted the tests as is typical of neuropsychological evaluations.

Finally, on February 21, the Parent and evaluator had a heated conversation which led to the evaluator refusing to meet with the Parent and only agreeing to talk through the District. While I do not know the details of this conversation, the fact that the evaluator will not speak with the Parent now means that the Parent cannot ask questions and develop a deeper understanding of the findings and recommendations in the report. This conversation is a critical part of a neuropsychological evaluation.

Finding

The Parent did not have a real choice in evaluator as ordered. The evaluator may have compromised his independence by asking the District for direction regarding the evaluation and not the Parent. These violations have led to an evaluation report that is deeply flawed.
I find that the District has not properly complied with my order.

In developing a remedy, I am aiming to continue to move things quickly for the sake of the Student and his need to get back into a classroom. I also am aiming to avoid subjecting the Student to another full day of repeat testing. A new evaluator should review the results of Carolina Neuroservices testing, complete any additional testing they deem appropriate, and create their own independent assessment of the Student's needs. They should write a complete neuropsychological evaluation report that lays out the following at a minimum:

- an assessment of the Student's strengths and needs, including the tools used to assess, the scores or findings, and an interpretation of those scores, and
- detailed recommendations for school and home on how to serve the Student's needs, including specific accommodations and modifications that may be helpful.

As I did in the previous order, I lay out the steps to be taken in detail below.

1) I have identified two neuropsychologists with strong reputations in the state for completing thorough evaluations. Dr. Elizabeth Chesno Grier at Pediatric School Psychology in Columbia, SC and Dr. Jesse Michael West with Caresouth Carolina, Inc. in Hartsville, SC. The Parent should choose one of these psychologists to conduct the follow-up evaluation. If the psychologist chosen does not respond within 2 business days or cannot complete the evaluation within 30 days of this Order, the Parent should contact the other psychologist. If that psychologist does not respond within 2 business days or cannot complete the evaluation within 30 days of this Order, I will provide an additional name.

2) The Parent must provide the psychologist a copy of this Order, the Orders dated December 8, 2021 and December 10, 2021, and the evaluation from Carolina Neuroservices so that they understand what is needed. If the psychologist has questions about the Order, then they should schedule a recorded conference call that will include me, the Parents, and a District representative. The Parent must allow the psychologist to receive all relevant educational records, including previous evaluation reports, and to talk to individuals in the District who have worked directly with the Student to get a complete picture of the Student. The psychologist may talk with others in the District for the purposes of payment, receiving records, or sending assessments for teachers to complete. The psychologist may also talk with Carolina Neuroservices to understand the testing completed in more detail.

3) The Parent must bring the Student to any additional testing necessary, or allow the psychologist to observe the Student in their current educational setting, if the psychologist believes that either of those are necessary.

4) The District will be responsible for paying the psychologist.

5) By April 15, 2022, the IEP team must meet to create a new IEP for the Student. They should talk first about the Student's needs and the goals for the Student. Only then should they discuss placement. The new psychologist must attend this meeting, and their schedule should be priority in setting the meeting date. Carolina Neuroservices may not attend. All parties must have an open mind as to whether the services needed can be met through a 1:1 aide in the classroom, a specialized setting within the District, or a private or residential school.

6) All other elements of my previous Order stand.

Avni Gupta-Kagan

State Administrative Review Officer

Columbia, South Carolina

March 1, 2022

Additional material from this filing is available in the Clerk's Office.