

**IN THE WEST VIRGINIA DEPARTMENT OF EDUCATION
DUE PROCESS HEARING CASE NO.: D21-006**

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I. PROCEDURAL HISTORY

The request for the Due Process hearing was officially received by the West Virginia Department of Education on March 9, 2021. On that same day, the matter was assigned to Hearing Examiner [REDACTED] (the undersigned). A letter was sent to all parties on March 11, 2021. In the letter, the parties were informed that under Federal Law (IDEA 64) the school district is to meet with the parent to try to resolve the issues contained in the parent's complaint. In addition, the parties were informed that they had thirty days to try to resolve the issues contained in the parent's complaint. The letter went on to say that the 30-day period will expire on April 8, 2021.

The letter indicated that the first telephone conference call between the parties was set for March 22, 2021, at 10:00 a.m. The second conference call was set for April 5, 2021. The letter also stated that the hearing on the matter was scheduled for April 15 and 16, 2021. Additional information was given to the parties concerning timelines and what was expected during the first conference call.

On March 14, 2021, [REDACTED] sent me an email stating that a conflict of interest might exist. [REDACTED] accused this hearing officer of contacting the other parties about the dates of the various conference calls and the hearing but, failed to contact her. [REDACTED] also inquired about the Hearing Examiner's work experience, especially if he had ever worked for a school system, [REDACTED] County School's or the West Virginia Department of Education

Following the receipt of [REDACTED] email, a response was sent to all parties informing them that I was not an employee of the West Virginia Department of Education, that I had never represented the [REDACTED] County Schools, that in the past I had only represented students and

teachers, and that I have been a Hearing Examiner for the West Virginia Offices of the Insurance Commissioner for several years. In addition, I informed her that I had not contacted any party concerning dates prior to sending the March 14, 2021, letter.

████ then sent me an additional email asking me whether I have worked for the West Virginia Department of Education or if I have represented any schools against students. I again informed her that I am an independent contractor, my position was only to be a hearing examiner and I contracted with the Department of Education, but I am not an employee. I went on to explain again, that I had never worked for █████ County Schools and had never been in a position adverse to a student.

After receiving the initial letter, █████ sent an email to me saying she was only available on one of the days listed in the letter. In a reply email, I asked █████ to send me an email identifying the dates that she was available. I also informed her that from now on she should make sure that all parties are copied on her emails. I then forwarded her email and my response to all parties.

On March 23, 2021, █████ informed me that she had yet to talk to her attorney and wanted to have that opportunity before agreeing to any dates. █████ sent out various emails concerning issues with the current IEP² and requested that it be left in place until the hearing. I did not respond to those emails since they were not related to the current complaint. █████ eventually sent me an email to ask if I was ignoring her emails. I advised █████ that I was not ignoring her emails and that any future IEP's were outside the scope of the Due Process hearing currently scheduled and told her that I had yet to receive any sworn evidence. At no time did █████ mention amending her original Due Process Complaint.

¹ The parties will be identified by their initials in this case.

² Individual Education Plan

On March 23, 2021, I was informed that [REDACTED] would be representing [REDACTED]. I then sent [REDACTED] a copy of the initial letter.

The first conference call was held on March 25, 2021. During the conference call a discussion was held concerning the status of settlement negotiations. [REDACTED] stated that he was preparing a demand to give to the Local Education Agency ("LEA") and it would be sent some time in the middle of the following week.

During the first conference call neither party had any stipulations as to facts or evidence. There were no factual or legal issues identified at that time. The parties were informed that the hearing location would be at a neutral location and [REDACTED] counsel for the LEA, stated that he would obtain a location. I inquired about the status of [REDACTED] and was told that he was doing well. In addition, the parties were informed that if subpoenas were needed, they should inform the hearing examiner as soon as possible.

The parties were reminded that all communications must be sent to all parties and ex parte communication was not allowed. The parties were also advised that I expected all parties to be civil and rude behavior would not be tolerated.

Finally, the parties were told that all disclosures and exchange of evidence must occur five (5) business days before the hearing. Also, at that time the parties must provide the other party a list of witnesses and summary of their expected testimony and copies of all documents to be offered at the hearing were to be marked in advance and indexed. I encouraged the submission of joint exhibit and witness lists, if possible, and to send me a list of all documents, exhibits, and designated witnesses prior to the hearing.

During the conference call, counsel for the Student made a motion for a continuance to change the scheduled hearing dates of April 15 and 16, 2021. The basis of the motion was that

he had just entered into the case and he would need more time to prepare. He went on to state that he also had a federal mediation scheduled at the time of the hearing and was unable to change it.

After a discussion among the parties, it was determined that everyone was available on April 26 and 27, 2021, for the hearing. On March 26, 2021, the Parent's motion for a continuance was granted.

The only other issue raised during the conference was by [REDACTED]. He stated that under the rules, [REDACTED] was not the parent and did not have standing to participate in the hearing. I took [REDACTED] objection under advisement. I then sent out an Order denying [REDACTED] objection after receiving a letter from the mother of the Student indicating that [REDACTED] represented her interests.

Another meeting was held by the parties on April 5, 2021. The Hearing Examiner was not present but the parties reported that they had yet to resolve their dispute at that time.

On April 15, 2021, an unscheduled conference call was held. The call was held because [REDACTED] had filed another Motion to Continue. The basis of [REDACTED] motion was that he did not have enough time to go through the documents and that he had to close on the sale of his home in Florida. The closing was scheduled to occur April 26 and [REDACTED] had to be in Florida for the closing.

It was suggested that the hearing be held on May 3, 2021, but [REDACTED] had an Opioid trial beginning on that date and the Hearing Examiner was scheduled to go to trial in the Circuit Court of Kanawha County. The trial in Kanawha County was unrelated to anything to do with my role as a Hearing Examiner for the West Virginia Department of Education.

It was decided that the hearing would now be held on May 10, 11, and 12, 2021. At no

point during the discussion did any party ask for an alteration of the resolution period, but it was my understanding that the opportunity to resolve the matter would continue until the hearing.

I sent a letter out on April 16, 2021, summarizing the meeting. During the meeting, [REDACTED] had stated that he had a proposal to submit to LEA Schools. In the letter, I encouraged [REDACTED] to present the proposal as soon as possible. I also reminded the parties that witness lists and exhibits must be submitted to the other party five (5) days before the start of the hearing. Finally, I stated that I did not anticipate granting any more motions to continue.

On or about April 26, 2021, [REDACTED], not her attorney, requested that she be allowed to amend her complaint. [REDACTED] objected. I attempted to schedule a conference call later that week or the beginning of the next week. [REDACTED] was in depositions the rest of that week and [REDACTED] was unavailable on May 3 or the morning of May 4, 2021. Since it would be impossible to meet prior to the May 3, 2021, deadline for exchanging witnesses and the fact that many of the issues raised by [REDACTED] could be addressed at the hearing, I denied her motion to amend the complaint. She was also told that if the issues that she had raised were not dealt with at the hearing she would have an opportunity to file another due process complaint. I was also concerned that if I allowed the amendment I would, in effect, be granting another continuance. In the April 16, 2021, letter, I had advised all the parties that I had stated that I did not anticipate granting any more continuances.

On or about May 2, 2021, [REDACTED] sent an email to the West Virginia Department of Education requesting mediation by the West Virginia Office of Civil Rights. [REDACTED], Assistant Director for the WV Department of Education, responded to the email informing [REDACTED] that both parties must agree to mediation before it could occur. In addition, [REDACTED] informed [REDACTED] that the West Virginia Department of Education has mediators under contract and the West

Virginia Office of Civil Rights does not conduct mediation for Due Process complaints.

On May 4, 2021, I informed all parties that the hearing would take place on May 10, 11, and 12, 2021, at the [REDACTED] beginning at 9:30 a.m.

On May 6, 2021 at 9:40 p.m., [REDACTED] sent an email to her attorney, which was carbon copied to all parties, listing complaints about the Hearing Examiner. One of the complaints was that I refused to get involved in the scheduling of a new IEP for the Student, which is outside the power of the Hearing Examiner. [REDACTED] also incorrectly accused me of failing to follow the required timelines. Finally, she stated that I failed to allow her to add additional complaints to her current due process complaint. I determined that each of the additional complaints proposed by the Parent were already contained in a broad reading of the original complaint or were not related to the original complaint.

The hearing began at 10:03 a.m. on Monday May 10, 2021, and the first day was completed at 4:46 p.m. The second day of testimony began at 9:33 a.m. on May 11, 2021, and was concluded at 3:30 p.m.

At the end of the second day of testimony, a discussion was held by the parties concerning the timeline to submit Findings of Fact and Conclusions of Law. [REDACTED], the Student's attorney, stated that he would be out the first week of June and was having surgery on June 10, 2021. He was unsure when he would recover. [REDACTED] made a motion to expand the time limits and that each parties' briefs would be due on August 13, 2021. The Hearing examiner would have three weeks after submission of briefs to issue his decision. The LEA did not object to the August 13, 2021, date so the motion was granted.

The third and final day of testimony, May 12, 2021, began at 9:00 a.m. and concluded at 1:40 p.m.

On August 9, 2021, counsel for the Respondent made a motion for an additional week in which to submit its brief. Counsel for the Student did not have any objections to this motion. The motion was granted. The briefs were then due on August 20, 2021.

On August 20, 2021, counsel for the Student filed a motion to extend the deadline for the parties' Findings of Facts and Conclusions of Law until August 25, 2021. The basis of this motion was that the Student's great grandmother was very ill and being taken care of by Hospice. Due to this situation, [REDACTED] was unable to review the Findings of Fact and Conclusions of Law in time for the August 20, 2021, deadline. Counsel for the Respondent did not have any objections to the continuance. I informed both parties that the motion was granted.

Both parties submitted their Findings of Fact and Conclusions of Law prior to the end of business on August 25, 2021, as required.

II. ISSUES PRESENTED

General Complaints:

1. The LEA failed to provide [REDACTED] Free Access Public Education ("FAPE") when it failed to provide services contained in the Student's IEP and/or failed to prepare an adequate IEP.
2. Failure to properly train Special Education teacher [REDACTED], as well as other teachers on the requirements contained in the student's IEP.
3. Discrimination against the Student by teachers and other students due to the Student's disability which it impacted the LEA's ability to provide FAPE,

Specific Complaints:

1. IEP Issues

- a) The IEP does not cover the Student's Dyslexia or Dysgraphia, only his alleged ADHD. The grandparent claims that she was told that the West Virginia Department of

Education does not have a program dealing with either of these issues.

- b) The IEP did not address [REDACTED] physical needs.
- c) The Student is not allowed to go to the bathroom when needed, which is a violation of the Student's IEP.
- d) The IPAD, provided to the Student as required under the Student's IEP, does not have a working text to speech or speech to text capabilities and that all of his textbooks are not uploaded to his IPAD.
- e) The February 20, 2020, IEP was prepared prior to the Student's grandparent's attendance at the IEP meeting, thus not allowing any input into the IEP by the grandparent.

2. Training Issues

- a) The School System failed to properly train [REDACTED], the Special Education teacher, on how to deal with Student's disabilities.
- b) Each of the Student's teachers were not trained properly because they were unaware of all [REDACTED] needs contained in the IEP.

3. Discrimination Issues

- a) The school has allowed other students to call the Student names, make fun of the Student's disabilities, and bully the student without any corrective action taken by the Respondent.
- b) The Student has been spied on and followed into the bathroom by teachers.
- c) The Student has had to attend reteach sessions to make up for time spent in the bathroom.
- d) The Student's locker was taken from him and he was forced to use a cubby located in the coach's room, which anyone could access.

e) The Student was denied Occupational Therapy because the test results of another student were used to disqualify the Student.

f) The Student has suffered anxiety, chest pains, and being uncomfortable around [REDACTED] [REDACTED] allegedly sat and stood too close to the Student in the classroom and harassed the Student during Friday telephone calls.

III. FINDINGS OF FACT

1. As of the hearing date, the Student was 12 years and 9 months old and a student in the seventh grade in [REDACTED] Middle School. The Student began his education at [REDACTED] Elementary, in [REDACTED] County, West Virginia. While at [REDACTED] Elementary, the Student was sent for an evaluation on January 5, 2017, to determine whether he should have an IEP. (Tr. 19)

2. The evaluation was made on January 31, 2017. The evaluation used the assessments Star Reading, Star Math, Woodstock Johnson IV Tests of Achievement, Kaufmann Assessment Batter for Children – II, Brown Attention Deficit Scales, and Achenback Child Behavior Checklist Ages 6-18. The results of the assessments indicated, among other items, that [REDACTED] had ADHD, enuresis and encopresis.

3. The Student received his first IEP on March 10, 2017, while in third grade at [REDACTED]. [REDACTED] the Student's grandmother, testified that the Student had been subjected to bullying, discrimination, and harassment while a student at [REDACTED] Elementary. (Tr. 22)

4. The Student then transferred from [REDACTED] Elementary School to [REDACTED] Elementary School for the fifth grade. Per the testimony of his grandmother, the Student was happy and was receiving good grades while attending [REDACTED] Elementary School. (Tr. 51)

5. The Student then attended the [REDACTED] Middle School for the sixth grade. The Student's grandmother testified that the Student began experiencing similar problems at the

Middle School that he had experienced at [REDACTED] Elementary. (Tr. 47)

6. The Student's grandmother claimed that the Student suffered from enuresis and encopresis. This was reflected in the January 31, 2017, evaluation. However, during the hearing, there were no medical records submitted to support this contention other than a note from a nurse practitioner at [REDACTED] Pediatric Associates recommending that the Student be excused to go to the bathroom as needed. This was received by the LEA on September 21, 2020. (Tr. 213; LEA Ex. 60)

7. Upon receipt of the [REDACTED] Pediatric Association's letter, [REDACTED] sent a HIPPA release to [REDACTED] Parent to obtain permission for [REDACTED] to contact [REDACTED] Pediatric Associates. The purpose of the HIPPA release was to obtain medical information to determine whether a Health Care Plan should be prepared for [REDACTED]. The HIPPA form was not returned by the Parent. Without this release, [REDACTED] was unable to prepare a Health Care Plan. (Tr. 214, 516; LEA Ex. 60)

8. [REDACTED] claims that [REDACTED] was diagnosed with enuresis and encopresis while a student in kindergarten at [REDACTED] Elementary School by an unnamed doctor in Huntington. [REDACTED] did not present these records because she claimed that [REDACTED] Elementary School lost the records. (Tr. 135-136)

9. It was the testimony of [REDACTED] school nurse at [REDACTED] Middle School, that Enuresis and Encopresis are not disabilities but could be symptoms of an illness or a disability. (Tr. 515)

10. The only other medical information for [REDACTED] available to the LEA was a November 2019 Neuropsychological report which indicated that [REDACTED] had nighttime incontinence and occasional daytime incontinence. The report recommended that the Student have a full medical workup

with a urologist or neurologist to see if there is a medical issue for his incontinence. (Tr. 238; LEA Ex. 44) If this occurred the LEA was not provided the results.

11. [REDACTED] testified that the family “will never give a copy of his medical records to the School Board.” (Tr. 157)

12. [REDACTED] stated that [REDACTED], while at [REDACTED] Elementary, was forced to attend reteach at lunch. [REDACTED] contended that this was punishment to make up for the time that he spent in the bathroom. (Tr. 36-37)³

13. The Principal at the Student’s Middle School is [REDACTED]. The Student’s English teacher is [REDACTED]. [REDACTED] teaches the Student Spanish. [REDACTED] is the Student’s home room teacher, as well as his Science teacher. [REDACTED] is a long-term substitute teacher who taught the Student Math. [REDACTED] was the Student’s Special Education teacher.⁴ (Tr. 461)

14. The Student testified that he had been bullied while at the Middle School. His major complaint was that one person was making fun of his laugh by telling him he had a “gay” laugh. On November 5, 2019, the Student’s grandmother [REDACTED] sent the LEA an email informing it that the Student was being bullied. [REDACTED] opened an investigation and the first thing she did was to contact [REDACTED] Mother and asked if there was a problem with bullying and she said there was not. At that point [REDACTED] closed the investigation. (Tr. 442; LEA Ex. 41, Parents Ex. 20)

15. On December 19, 2019, Ms. Mills received another complaint of bullying from [REDACTED]. Following the winter break, [REDACTED] investigated the accusations and interviewed the student,

³ If this occurred it was outside the statute of limitations.

⁴ As [REDACTED] special education teacher, she implements and keeps track of the student’s IEP progress.

█████ that was allegedly doing the bullying. █████ admitted to making fun of the Student's laugh. (Tr. 447-448; LEA Ex. 47)

16. Following the investigation, █████ informed █████ Mother that she had talked to the alleged bully and he had admitted that he had made fun of █████ laugh. █████ then asked █████ Mother whether there were any other issues and she said no. After taking these actions, █████ closed her investigation. Later that day, █████ contacted █████ and was belligerent and extremely upset that the investigation had been closed. (Tr. 450-451; LEA Ex. 47)

17. Per █████, the student accused of bullying now calls █████ a "snitch" and this occurs daily. The Student has not reported the new bullying, about being a snitch, to the school's administration, but claims that it is visible on video cameras in the school. (Tr. 267)

18. The Student testified that he is no longer being followed or checked on by a teacher when he goes to the bathroom. On two different occasions a teacher has sent a friend of the Student to check on him while he was in the bathroom. (Tr. 269)

19. The Student claimed that at the beginning of the school year █████, while in the classroom, sat right next to the Student making him anxious. █████ stated that she believed that the fact that █████ was sitting next to █████ was a form of harassment. Per █████ she had to go pick up █████ at school because he was having chest pains due to the stress of █████ sitting beside him and stalking him. █████ testified that █████ no longer sits beside him in class. (Tr. 203-204, 263-264)

20. Another complaint alleged by █████ was that █████ called the student every Friday while the LEA was on Covid 19 shutdown, and kept him on the phone going over assignments for an hour to an hour and a half. █████ was told by █████, Vice-Principal of █████ Middle School, that she was to call all IEP students on Friday to provide aid. The

purpose of the phone calls was to spend ten minutes on Math, ten minutes on English, and ten minutes on Organizational Skills. According to [REDACTED], the phone calls were making [REDACTED] feel like he was being stalked by [REDACTED]. (Tr. 195, 584-585)

21. [REDACTED] complained to the LEA about the alleged harassment during the phone calls. [REDACTED] investigated the Complaint about [REDACTED]. During her investigation, [REDACTED] talked with the teachers that work with [REDACTED]. Each teacher told [REDACTED] that [REDACTED] was very professional and they had not observed any misconduct. (Tr. 481-482) To avoid any other issues, [REDACTED] was instructed not to make any more calls to [REDACTED]. (Tr. 195)

22. [REDACTED] stated that she believes that the stress of [REDACTED] sitting beside [REDACTED] in the classroom and the Friday phone calls exacerbated [REDACTED] medical conditions. [REDACTED] did not present any medical evidence to support this position. (Tr. 64)

23. [REDACTED] as part of her daily routine maintained lessons plans and observations notes. (LEA Ex. 101)

24. It was [REDACTED] position that [REDACTED] was discriminated against because his testing for occupational therapy indicated that he did not need occupational therapy. [REDACTED] based this contention because the name of [REDACTED] appeared in at least three places on the occupational therapy evaluation that was supposed to be for [REDACTED]. The parent believed that the scores were for a student named [REDACTED] and not [REDACTED] scores (Tr. 185-186; LEA Ex. 37; Parents Ex. 17)

25. [REDACTED] Occupational Therapist for the LEA, prepared [REDACTED] occupational therapy evaluation. [REDACTED] testified that she does not know a student named [REDACTED]. She explained that the reason [REDACTED] name appeared on the evaluation was due to auto correct in her word processing program. She stated that the occupational therapy evaluation was for [REDACTED] and not [REDACTED]. She went on to state that [REDACTED] evaluation did not warrant him receiving

occupational therapy. (Tr. 536-538; LEA Ex.37)

26. ██████ stated that the IEP did not address ██████ coordination disorder. At the hearing there was no expert testimony given to support this accusation,

27. Another complaint by ██████ was that ██████ had his locker was taken away from him as punishment for being late for class after going to the bathroom. She contends that this was discrimination against him because of his disability. According to her testimony, ██████ was asked to remove his personal items from his locker and to place them in an open cubby in the coaches' room. Another student was given ██████ locker. Once ██████ found out about ██████ loss of the locker, she complained to the LEA. The locker was allegedly returned to ██████ the next day. (Tr. 47-49)

28. On or about February 3, 2020, ██████ asked the LEA for an IEP meeting to go over ██████ dysgraphia. (Ex 48; Tr. 210). Per the request of ██████, an IEP meeting was scheduled for February 11, 2020. The meeting was then rescheduled for February 24, 2020. (LEA Ex. 53) ██████ testified that she arrived for the meeting on time but was kept outside the meeting room for half an hour. It was ██████ contention that the IEP had been prepared prior to her entering the meeting without any input from the parent. (Tr. 56-57) During the meeting a draft IEP was prepared with the result that ██████ was to be placed in 100% general education classification

29. The next IEP meeting was held on September 11, 2020. During that meeting ██████ and ██████ parent advocate, were present. Modifications to the Student's IEP were discussed including new accommodations. During the meeting, ██████ raised the issue that ██████ had been placed into a learning skills class without permission of his mother. ██████ had signed up for robotics or band. ██████ schedule was changed the next day. (Tr. 58-59, 227; Parents Ex. 14)

30. On November 4, 2020, a Due Process Complaint was filed on behalf of ██████ Eventually

this complaint was withdrawn.⁵

31. [REDACTED] alleged that the IPAD given to [REDACTED] did not work from September 2020 until March 2021. She stated that there were problems with the text to speech function, as well as the speech to text function. (Tr. 61) [REDACTED] testified that he uses his IPAD while at school. He believes that he needs a keyboard for his IPAD to function correctly. (Tr. 259-261)

32. [REDACTED] Principal of [REDACTED] Middle School, stated that she was unaware of any problems with text to speech on [REDACTED] IPAD. In addition, [REDACTED] stated that [REDACTED] parent did not want the principal to have any direct interaction with [REDACTED]. Per [REDACTED], [REDACTED] was responsible for making sure that [REDACTED]'s to fully utilize the IPAD. (Tr. 482)

33. [REDACTED] testified that she believed that all of [REDACTED]'s textbooks should be on his IPAD. [REDACTED] stated that the only textbooks available to be placed on an IPAD are for History and Health. [REDACTED] testified that it is the responsibility of the Special Education teacher to make sure the IPAD is working correctly. (Parents Ex. 36; Tr. 485, 493)

34. [REDACTED] stated that it is his desire to improve his reading and writing skills and does not believe that the current IEP is helping in these areas. (Tr. 262-263)

35. It is the position of the LEA that [REDACTED] was behind in reading and writing for his grade level due to his ADHD. [REDACTED] denies that [REDACTED] has ADHD because he is not hyperactive. [REDACTED] believes that other methods should be used to improve [REDACTED]'s reading and writing skills. [REDACTED] testified that the best program for dyslexia is Orton-Gillingham. According to [REDACTED], this program is not available at the LEA. [REDACTED] said that [REDACTED] should be provided a tutor four to five hours a week and during the summer. (Tr. 69-70,150; LEA Ex. 24)

⁵ The procedural history of this complaint is not relevant to the current due process complaint and will not be discussed in detail.

36. [REDACTED] stated that she didn't believe that the LEA was following any part of the IEP. (Tr. 55)

37. [REDACTED]'s grades during the relevant time of the Due Process claim were almost all A's and B's. (LEA Ex. 1) [REDACTED] testified that [REDACTED]'s grades were mostly D's and F's during his time at [REDACTED] Middle School. (Tr. 169-170; LEA Ex. 1)

38. There was only one incident of discipline against [REDACTED] while at [REDACTED] Middle School. (LEA Ex. 3)

39. The only witnesses called by the Parent were [REDACTED] [REDACTED] and [REDACTED] during the Parent's case in chief.

IV. CONCLUSIONS OF LAW

1. The statute of limitations for a due process complaint is two years. The statute begins to run at the point in time when a parent knew or should have known that the alleged action or disputed decision occurred. This due process complaint was filed on March 9, 2021, therefore any actions or decisions made before March 9, 2019, will not be considered in this decision.

2. The burden of proof in a due process complaint is on the party seeking relief. The burden is proof by a preponderance of the evidence. The burden of proof consists of the burden of production and the burden of persuasion. Schaffer v. Weast, 546 U.S. 49, 62 (2005)

3. When a student is suspected of needing special education and related services, WV Policy 2419 establishes the procedures and requirements for evaluating the student. The initial evaluation is expected to gather information to determine whether the student has a disability, what the educational needs of the student are, including his present levels of academic achievement, his related developmental needs, the effects of the disability on educational and functional performance, whether the student needs especially designed instruction and the nature

and extent of the special education needed by the student. *WV Policy 2419 Evaluation/Reevaluation, Ch. 3 § 24*

4. No single measure or evaluation may be used as the sole criterion for determining whether a student is a student with a disability and for determining an appropriate educational program for the student. *WV Policy 2419 Evaluation/Reevaluation, Ch. 3 § 4 B.2*

5. Special education is defined as “specially designed instruction, at no cost to the parents, to meet the unique needs of the student with an exceptionality.” *WV Policy 2419 Evaluation/Reevaluation, Ch. 4 § 3*

6. Specially designed instruction means “the content, methodology, or delivery of instruction is adapted, as appropriate, to address the unique needs of the student that results from the student’s exceptionality and to ensure access of the student to the general curriculum so that the student can meet the educational standards that apply to all students.” *WV Policy 2419 Eligibility, Ch. 4 § 3A*

7. In matters alleging a procedural violation, a hearing officer may find that a student did not receive a free appropriate public education only if the procedural inadequacies “... (i) impeded the child’s right to a free appropriate education, or (ii) significantly impeded Parent’s opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to parents’ child; or (iii) caused a deprivation of educational benefits to the student.” 20 U.S.C. § 1415(F)(3)E(ii) and *WV Policy 2419, Ch. 11 § 4 M*. However, the Fourth Circuit has determined that the hearing officer may find that a student did not receive a free appropriate public education only if the procedural inadequacies (i) impeded the child’s right to a free appropriate education; and (ii) significantly impeded Parent’s opportunity to participate in the decision-making process regarding the provision of a free

appropriate public education in parents' child; and (iii) caused a deprivation of educational benefits to the student. R.F. v. Cecil County Public Schools, 74 IDELR 31 (4th Cir. 2019)

8. The FAPE standard was clarified by the U.S. Supreme Court in March of 2017 from the Bd. Of Ed. Hendrick Hudson Sch. Dist v. Rowley, 455 US 176 (1982) standard that a student requiring special education and related services must receive some benefit from his educational services to the standard developed in Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1, 137 S.Ct. 988 (2017) focusing on the student's progress and requiring a school to provide the student with meaningful benefit, although not necessarily equivalent to those benefits provided to other students. The IEP must be reasonably calculated to enable a child to make progress appropriate in light of the individual child's circumstances and the goals for the child be appropriately ambitious. The evidence at the hearing was that [REDACTED] was receiving benefit from the services of the LEA.

9. The IDEA does not require an LEA to maximize the potential of each student. Rowley at 198-200. In the instant matter, the Parent asserts that [REDACTED] should receive more services to improve his writing and reading skills. This desire is irrelevant to FAPE since [REDACTED] is advancing from grade to grade and receiving A's and B's. The Parent failed to provide any expert testimony concerning the Student's current disabilities or how any change would impact the Student's potential. -

10. "The parent/adult student is a member of the evaluation team and must be provided an opportunity to provide input and participate in making team decisions, including what additional data, if an, are needed to fulfill the purposes of an initial evaluation/reevaluation." *WV Policy 2419 Evaluation/Reevaluation, Ch. 3 § 1*. Other than [REDACTED]'s allegations that she was forced to wait for a half an hour outside the meeting room for one IEP meeting, there was no

evidence presented that [REDACTED] was not allowed to provide input or participate in the IEP decision making process. [REDACTED] did not prove that the IEP was significantly impacted by the half an hour wait.

11. “[B]ullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of a free appropriate public education (FAPE) under the IDEA that must be remedied.” *Dear Colleague Letter, United States Department of Education, Office of Special Education and Rehabilitative Services* (August 20, 2013). The only evidence presented by [REDACTED] was that the Student was bullied by one student, [REDACTED], which, when brought to the attention of the LEA, was addressed appropriately. The Parent failed to prove that the bullying impacted the Student’s ability to receive a free appropriate public education.

12. “A parent/adult student has the right to obtain an IEE⁶ at public expense if he or she disagrees with an evaluation obtained or conducted by the district.” *WV Policy 2419 Procedural Safeguards, Ch. 20 § 7 A*. In this action the parent disagrees with the evaluation that the Student has ADHD and believes that he has Dyslexia and Dysgraphia. The Student should receive an IEE at public expense to determine the correct evaluation. However, the parent stated, during the hearing on numerous occasions, that she will not provide the LEA with the Student’s medical records. To get an IEE at public expense, the parent must sign a release for the results to be released to the LEA prior to any IEE.

13. The parent alleged that the Student’s evaluation for occupational therapy was for another student and not [REDACTED]. The parent pointed to the appearance of the name of [REDACTED] on the evaluation as proof that it was not [REDACTED]’s evaluation. The occupational therapist that gave the evaluation of [REDACTED] testified that it was [REDACTED]’s evaluation and that it was a problem with her word

processing program which changed [REDACTED]'s name on the form. Therefore, the parent did not prove that the Student was entitled to occupational therapy.

14. The parent alleged that the Student's assistive technology, his IPAD, was not working from September 2020 to March 2021. This allegation was not supported by the testimony of the Student or by the testimony of [REDACTED]. The student testified that he did use his IPAD while in the classroom. Without factual support, the parent did not meet her burden to proof to indicate that the Student's assistive technology was not working.

15. The trier of fact determines the credibility of a witness. Credibility can be ascertained by the witness's memory or lack thereof, interest in the outcome of the hearing, testimonial demeanor, knowledge of the matters in which the witness is testifying, fairness of the testimony and the reasonableness of the witness. See State v. Stevenson, 147 W.Va. 211, 235-236, 127 S.E.2d 638, 653 (1962) and State v. McKenzie, 197 W.Va. 429, 442-443, 475 S.E.2d 521, 533-535 (1996). The chief witness for the Parent was [REDACTED]. During [REDACTED]'s testimony, she was combative and evasive. In addition, she testified to several events that she did not observe. Many of the items [REDACTED] testified about were not supported by the testimony of other witnesses, including [REDACTED]. [REDACTED] also seemed to lack memory of the Student's physician's name and stated unequivocally that she would not provide medical records to the LEA.

V. DISCUSSION

The Parent's allegations contained in her due process complaint are very general. The Parent's testimony, however, was very specific as to the complaints she had with the LEA. While it was difficult to categorize each issue, I have broken down her complaints into three general areas: Failure to provide and/or implement a proper IEP; Failure to properly train the

⁶ Independent Educational Evaluation.

special education teacher as well as other teachers of [REDACTED] and, finally, discrimination by teachers and other students due to his disability.

To properly explain the Parent's complaint more fully, in the Issues Presented section of this decision, I have broken down each of the general categories into specific allegations.

The first issue to address is the allegations that the LEA failed to provide and/or implement a proper IEP. The Parent stated that the current IEP does not consider [REDACTED]'s dyslexia or dysgraphia. In addition, she alleges that the LEA does not have any program to deal with these disabilities. The Parent denies that [REDACTED] has ADHD simply because he is not hyperactive. She believes that his issues with reading and writing are solely due to his dyslexia and dysgraphia. [REDACTED] testified that the LEA should have the Orton-Gillingham program and provide [REDACTED] with a tutor four to five times a week and during the summer. Under the IDEA, the LEA is not required to maximize a student's potential. Therefore, the fact that the LEA does not provide the Orton-Gillingham program or tutors is not a violation.

The next issue under this category is that the LEA has failed to allow [REDACTED] to go to the bathroom when necessary. The Parent alleges that this is a violation to [REDACTED]'s IEP. While the Parent alleges that [REDACTED] has been denied bathroom privileges, [REDACTED] only testified that he no longer gets teased about having accidents at school. Neither counsel directly asked [REDACTED] whether he was currently being denied bathroom privileges. However, the fact that [REDACTED] isn't being teased about soiling his clothes indicates that he is being allowed to go to the bathroom when needed.

Another indication that this is no longer a problem is [REDACTED]'s allegation that [REDACTED] was allegedly punished for being late for class because he had gone to the bathroom. This statement alone negates the Parent's allegation that [REDACTED] is not being provided bathroom breaks as required

in his IEP. Therefore, since there was no proof offered to support the allegations that the Student is currently being denied bathroom privileges, the Parent did not meet her burden of proof.

The next specific issue raised by the Parent during the hearing was that [REDACTED]'s IPAD was not working from September 2020 to March 2021. It was alleged that neither the speech to text or the text to speech functions were working. [REDACTED] testified that he uses the IPAD while at school, however, he did not use it at times because he was mostly looking at the board. [REDACTED] also stated that he uses the text to speech, but most of the time the teachers read aloud to him. [REDACTED] testified that he would like a key board to work with his IPAD.

Another complaint concerning the IPAD was that [REDACTED] believed that all of [REDACTED]'s textbooks should be on his IPAD. [REDACTED] testified that the only textbooks available for an IPAD are for History and Health classes. The Parent did not offer any evidence that the statement by [REDACTED] was false. This complaint could not be supported by the Parent, therefore, there is no basis or remedy for this allegation.

Neither counsel asked [REDACTED] whether his IPAD was working for most the school year. [REDACTED] testified that she was not told that [REDACTED]'s IPAD was not working. [REDACTED] testified that if she had known that a student's IPAD was not working she would have contact and a technician. She also stated that [REDACTED] was responsible for the maintenance of the IEP students with IPADs and she had not reported any problem with [REDACTED]'s IPAD.

The final specific complaint about the Student's IEP was that the IEP that was prepared on February 20, 2021, was without input from the Parent. [REDACTED] testified that she arrived at the scheduled meeting on time and sat in the reception area for a half an hour. When she was admitted to the room, she noticed that all the participants were already seated. While in the meeting, [REDACTED] was presented with a copy of the prepared IEP. It was her contention that the IEP

had been prepared without any input from her. [REDACTED] did not provide any evidence that the IEP presented did not have any input from her or that anyone refused any input she offered.

The next general complaint by the Parent was that neither [REDACTED] or any of [REDACTED]'s teachers were properly trained in [REDACTED]'s IEP. The first basis of this general complaint is the allegation that [REDACTED], Special education teacher, was not properly trained to deal with [REDACTED]'s disabilities.

[REDACTED] testified that she had a Master degree in Art from Marshall University and had been certified in Special Education in 2019. [REDACTED] kept notes about each of her 16 IEP students daily. These notes included [REDACTED], as well as other IEP students. So, it appears from her qualifications and work activities that she generally performed her duties as a Special Education teacher.

While the Parent did not specifically challenge [REDACTED]'s qualifications, she seemed to allege that [REDACTED] was singling out [REDACTED] for different treatment than the other IEP children received. An example given by [REDACTED] was that [REDACTED] was sitting next to [REDACTED] during class, making the Student feel uncomfortable and anxious. In addition, [REDACTED] complained that [REDACTED] would call every Friday and keep [REDACTED] on the phone for an hour to an hour and a half.

[REDACTED] testified that [REDACTED] no longer sits beside him in class and is no longer calling him on Fridays. [REDACTED] also testified that she is no longer calling [REDACTED] on Fridays. The problem, if there was one, has been corrected.

[REDACTED] also alleged that [REDACTED] was not following [REDACTED]'s IEP. The Parent did not cite any instance, other than the sitting next to the Student and calling him on Fridays, where [REDACTED] did not follow [REDACTED]'s IEP. [REDACTED] did testify that [REDACTED] was not allowed to get his work done at school and had to bring it for homework, but she did not cite [REDACTED] as the cause.

The Parent failed to meet its burden of proof to prove that [REDACTED] lacked training and did not follow [REDACTED]'s IEP.

The next specific complaint under training was that [REDACTED]'s teachers were not knowledgeable about [REDACTED]'s IEP. [REDACTED] alleged that the teachers were only required to read the first page of the IEP and did not read beyond that point. Again, this was an allegation, but no proof was provided to support the allegation. Several of [REDACTED]'s teachers testified during the hearing and counsel for the Parent never asked any of them about their knowledge about [REDACTED]'s IEP. A mere allegation is not sufficient proof without some scintilla of support. Therefore, the Parent failed to prove that [REDACTED]'s teachers were not knowledgeable about his IEP.

The next general complaint by the Parent was that the Student was discriminated against by teachers and other students because of his disabilities. The first specific allegation under this category was that the LEA allowed other students to bully [REDACTED] without taking any corrective actions.

The only bullying that was brought out in the testimony at the hearing⁷ was when a student, [REDACTED], was making fun of [REDACTED]'s laugh. The student was telling [REDACTED] that his laugh was a "gay" laugh. On November 5, 2019, [REDACTED] sent an email to the LEA reporting the name calling. [REDACTED] filled out a complaint form and began her investigation. The first step in her investigation was to contact [REDACTED]'s mother to determine the nature of the bullying or name calling. [REDACTED]'s mother told [REDACTED] that there was no problem with bullying. At that point, [REDACTED] closed her investigation.

On December 19, 2019, [REDACTED] sent an email to the LEA again raising the issue of bullying.

⁷ There was some testimony that [REDACTED] was bullied while at [REDACTED] Elementary but that occurred more than two years before the current due process complaint was filed.

█████ then opened another investigation, on January 6, 2020, following the winter break. █████ interviewed the student, █████, about the allegations of bullying. █████ admitted that he had made fun of █████'s laugh but denied calling it "gay." █████ then contacted █████'s parent and informed her that her child had admitted bullying another child.

Following the conversation with █████ and █████'s parent, █████ contacted █████'s mother and told her that the student had admitted bullying █████. █████ went on to say that the intervention had been done and asked █████'s mother whether she had any other concerns. █████'s mother stated she did not have any other concerns.

Later that same day, █████ called █████ and was quite belligerent and was upset that all █████ had done was to talk to █████, which █████ believed was not enough.

█████ testified that █████ no longer makes fun of his laugh but calls him a "snitch" every time he passes by him. █████ admitted that he has not informed anyone at the LEA that █████ is still calling him names. █████ stated that it was not necessary to inform the LEA since the name calling can be seen on surveillance cameras at the school.

It is never acceptable for a child to be bullied at school. There was no evidence presented to support that this bullying was related to █████'s disabilities or the fact that he has an IEP. In addition, there was no evidence that the bully impacted █████'s education. Even if that was the case, the LEA took active measures to investigate the accusations, talked to █████ and finally talked to █████'s parent. █████ stated, that while there was no guarantee that this intervention would stop future name calling, she would be prepared to take the intervention up a level if it continued.

Since █████ stated that the name calling has continued but no one has reported it to the LEA, there is no way that the LEA can be held responsible for failing to act on an event of which

they have no knowledge.

The second specific allegation under this general complaint was that teachers would follow [REDACTED] into the bathroom, making him very uncomfortable.

When asked about teachers following him into the bathroom, [REDACTED] testified that they were not following him into the bathroom this school year. He did say that on two occasions a teacher sent a friend of his to the bathroom to check on him. One could clearly understand why a child would feel uncomfortable having an adult watch him while he is going to the bathroom. It seems clear that this is no longer occurring, however, teachers should be informed not to follow any child into the bathroom. Having a friend go and check on [REDACTED] is not harassment but an adult doing the same thing, while not harassment, is not the best approach to the situation.

The next specific complaint was that [REDACTED] was forced to attend reteach to make up for time that he had spent in the bathroom. This appears to have occurred when [REDACTED] was attending [REDACTED] Elementary. Other than the allegation by [REDACTED], there was absolutely no evidence that [REDACTED] has been forced to attend reteach as a punishment for bathroom breaks.

It is easy to make allegations, but it is more difficult to prove that the allegations are true. The Parent had an opportunity to inquire of [REDACTED] and any of the teachers that testified whether [REDACTED] was being forced into participating in reteach because of his disabilities. No one asked [REDACTED] or any of the teachers about the reteach allegation. No evidence was presented about which teacher placed [REDACTED] in reteach or when it occurred. Therefore, the Parent did not prove the allegation that [REDACTED] was placed in reteach in retaliation for his disability within the statute of limitations.

The next specific allegation concerning discrimination against [REDACTED] was that his locker was taken from him and given to another student. It is difficult to see the connection between

taking [REDACTED] locker and his disabilities. The Parent did not provide any evidence that there was a discriminatory reason or impact on FAPE for the taking of his locker other than alleging it was punishment for using the bathroom. Without any real proof that this action was due to [REDACTED] disability, there can be no violation.

Finally, the Parent alleged that [REDACTED] should have qualified for occupational therapy. The Parent stated that the occupational therapy evaluation that the LEA used to disqualify [REDACTED] for occupational therapy was an evaluation for another student, not [REDACTED]. The Parent's basis for this allegation is that on three places on the evaluation the name [REDACTED] appeared instead of [REDACTED].

Since the name [REDACTED] appeared on the evaluation, the Parent stated that the evaluation was not [REDACTED]'s evaluation and, if it had been [REDACTED]'s evaluation, he would have qualified for occupational therapy. First, it is pure conjecture that [REDACTED] would have qualified for occupational therapy, because even if this was not his evaluation, one can only speculate that he would have qualified.

We do not even have to reach the point of whether [REDACTED] would have qualified or not for occupational therapy since [REDACTED] testified that it was [REDACTED]'s evaluation. She gave [REDACTED] the test and she testified that this was his evaluation. In addition, [REDACTED] had a valid explanation on why [REDACTED]'s name showed up on the evaluation. According to her testimony, her word processing auto correct changed [REDACTED]'s name to [REDACTED]. She thought she had gone through the report and corrected the problem, but missed three autocorrect mistakes. She also testified that she did not know a student named [REDACTED]. Therefore, the Parent did not prove that the evaluation was not [REDACTED]'s evaluation. The Parent also failed to prove that even if it hadn't been [REDACTED]'s evaluation, that the mistake was discrimination based on [REDACTED]'s disability.

VI. DIRECTIVES FOR IMPLEMENTATION

Except for the IEE, the Parent failed to prove each allegation contained in the parent's complaint.

1. The LEA is instructed to offer the Student an IEE concerning the LEA's diagnosis of ADHD and whether the student suffers from Dyslexia and/or Dysgraphia.
2. The LEA will not be required to provide the Student with an IEE if the parent refuses to sign an HIPPA release form allowing the LEA to review the IEE.
3. All other allegations made by the Parent were not proven, by a preponderance of the evidence, therefore are denied.

VII. APPEAL RIGHTS

Any party aggrieved by the findings and decisions made herein has the right to bring a civil action with respect to the due process hearing complaint in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within ninety (90) days of the issuance of the Hearing Officer's written decision.

SO ORDERED



Entered this 9th day of September, 2021.