**19-052**

**COMMONWEALTH OF VIRGINIA**

**VIRGINIA DEPARTMENT OF EDUCATION**

**DIVISION OF SPECIAL EDUCATION & STUDENT SERVICES**

**OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES**

**Re: Child, by and through his parent, Parent v. LEA**

**Child & Parent(s)/Guardian: Administrative Hearing Officer:**

Child Ternon Galloway Lee, Esquire

Parent(s) 215 McLaws Circle, Suite 3A

Williamsburg, VA 23185

**Child’s Advocate(s):** (757) 253-1570

Advocates for Child (757) 253-2534

**LEA’s Attorney**

Attorneys for LEA

**Superintendent of LEA:**

Dr. Superintendent

# AMENDED DECISION**[[1]](#footnote-1)**

# I. PROCEDURAL HISTORY[[2]](#footnote-2)

On March 27, 2019, Parent filed a due process complaint (DPC) requesting a due process hearing. The Hearing Officer initially scheduled the hearing for May 13 and 14, 2019, by scheduling order entered on April 5, 2019. HO Exh. 4. The Hearing Officer issued an amended scheduling order on April 8, 2019. In the amended order, among other things, the Hearing Officer rescheduled the hearing for May 7 and 8, 2019. HO Exh. 5. The parties agreed to this rescheduling.

On April 4, 2019, the parent’s advocate requested that the due process hearing (DPH) be held off the property of the school division. The LEA objected. The Hearing Officer took the matter under advisement. In addition, the parties were given an opportunity to submit written arguments and documentation in support of their respective positions, if they desired. After careful consideration of any arguments and supporting documentation submitted on behalf of the parties, the Hearing Officer issued an order on April 11, 2019, denying the request. HO Exh. 9 (finding insufficient documentation provided to support granting the request).

On April 11, 2019, the LEA filed a motion to dismiss the DPC alleging that (i) the Hearing Officer lacked subject matter jurisdiction to hear retaliatory claims, (ii) the Hearing Officer lacked jurisdiction to hear a matter currently before another tribunal involving the same parties and issues, (iii) the parent failed to allege a violation of IDEA in the DPC, and (iv) the parent filed the DPC for an improper purpose. The Hearing Officer granted the parent’s advocate an opportunity to respond. After careful consideration of the motion and parent’s response, the Hearing Officer denied the LEA’s motion regarding its claims that the Hearing Officer lacked jurisdiction to hear any retaliation claims and that the parent had failed to allege an IDEA violation. The Hearing Officer declined to find that the parent filed the DPC for an improper purpose. In addition, the Hearing Officer dismissed without prejudice any claims made by the parent in her DPC concerning the resolution session held on March 25, 2019. HO Exh. 16.[[3]](#footnote-3)

On April 23, 2019, the parent’s advocate identified seven employees of the LEA as potential witnesses for the parent. The advocate requested that the Hearing Officer instruct the LEA to make those witnesses available for the hearing. The LEA objected to five of those employees being called as witnesses. Moreover, on April 24, 2019, the LEA requested that the Hearing Officer issue two subpoenas, one to the parent and one to the advocate, for the production of documents. The Hearing Officer directed the parties to provide with specificity the basis for their objections to certain witnesses and the production of the documents. HO Exh. 15 at 2. The LEA responded on April 28, 2019, the parent on April 29, 2019.

On April 29, 2019, the Hearing Officer held a second pre-hearing conference (PHC) to address the parties’ objections concerning the witnesses and document production requests. After consideration of their arguments and any responses filed, the Hearing Officer issued an order following the PHC. In that order, among other matters, the Hearing Officer directed the parent’s advocate to provide proffers of the anticipated testimony of the five school employees to which the LEA objected to their testifying. HO Exh. 18 at 2-3. The Hearing Officer determined that the information submitted by the advocate was insufficient. Accordingly, the Hearing Officer sustained the LEA’s objection to the request for witness subpoenas for those witnesses. HO Exhs. 22, 23, and 24. However, the Hearing Officer granted the parent’s advocate leave to submit written proffers of the anticipated testimony of the witnesses by 9:00 a.m. on the first day of the scheduled hearing. HO Exhs. 24 at 6. The advocate submitted none.

In addition, in regard to the April 29, 2019 PHC and order, the Hearing Officer granted the LEA’s requests for the production of documents and ordered the parent and her advocate to produce the documents.[[4]](#footnote-4) HO Exh. 18 at 5-6.

The Hearing Officer held the hearing on May 7 and 8, 2019. The Hearing Officer notes that she provided the parties with ample opportunity to present her/its case.

The Hearing Officer also admitted Parent’s Exhibit 1, Exhibit 3 (pages 1 through 4), Exhibit 5 (page 6); Exhibit 7 (pages 1, 2, and 5); Exhibits 8 and 9; Exhibit 10 (pages 1 through 6); Exhibit 13; Exhibit 15 (pages 11 through 13).[[5]](#footnote-5) In addition, the Hearing Officer admitted the school’s Exhibits 1 through 39[[6]](#footnote-6). The Hearing Officer admitted Hearing Officer Exhibits 1 through 25 also.

# MATTERS ARISING DURING THE HEARING PROCESS

# 1. Prohibited Use of Internet during the Hearing

The Hearing Officer is concerned about order during the hearing and the integrity of the process. The parent’s advocate has acted as a special education advocate in multiple hearings and is experienced in due process hearings. The Hearing Officer determined during the hearing by a covert beep and by the matter being raised by LEA counsel that the advocate was utilizing the internet during the hearing. When questioned, the advocate acknowledged she was on the internet. The parties were reminded of the Hearing Officer’s order precluding such. HO Exh. 24 at7 (precluding internet access by any method). The Hearing Officer instructed the advocate to disconnect from the internet and to put away her laptop – the device she used to access the internet.

# 2. Timeliness of Closing Arguments

At the conclusion of the taking of evidence, the advocate requested leave to file a written closing argument. LEA counsel did not object. The Hearing Officer set a 5:00 p.m. deadline on May 6, 2019. Thereafter, the advocate requested an extension, to which LEA counsel did not object. The Hearing Officer extended the time for the submission of the closing arguments until 4:00 p.m. on May 16, 2019. The parent’s advocate filed her closing argument at 3:46 p.m. on May 16, 2019. LEA counsel filed her closing argument at 3:51 p.m. Both are timely and have been considered by the Hearing Officer. At 4:39 p.m. on May 16, 2019, the advocate filed an addendum to her argument. LEA counsel objected due to its untimeliness. The Hearing Officer has sustained the objection and has only considered the closing arguments timely filed; that is by 4:00 p.m. on May 16, 2019.

The Hearing Officer issued her decision regarding this case on June 8, 2019. The decision here amends the June 8, 2019 decision to correct typographical errors.

# II. ISSUES

1. Since October 2018, has the LEA violated 34 C.F.R. 300.322(a)(2) and denied parental participation? If so, has the LEA denied the child a free appropriate public education (FAPE)?

2. Since October 2018, has the LEA retaliated against the parent for exercising her right to request due process hearings? If so, has the LEA denied the child a FAPE?

# III. BURDEN OF PROOF

The United States Supreme Court held in *Shaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed.2d 387 (2005), that the party seeking relief bears the burden of proof. Therefore, in this case the parent bears the burden of proof as she is challenging the LEA’s actions.

# IV. STATEMENT OF FACTS

1. On December 14, 2015, the LEA determined that Child was eligible for special education services under the category of developmental delay. (S Exh. 3 at 2).

2. One October 18, 2018, the LEA held an IEP meeting regarding the child. The parent expressed that she did not desire to move forward. Accordingly, the IEP team did not develop an IEP. Before the meeting concluded, Special Education Coordinator I (SEC I) attempted to reschedule the meeting with the parent, but she declined to do so. By correspondence dated October 22, 2018, SEC I again attempted to reschedule an IEP meeting with the parent. This correspondence proposed dates and times for another IEP meeting. They were November 1, 2018, at 12:30 p.m. or November 7, 2018, at 12:30 p.m. In the event Parent was not available during the times proposed, the letter requested parent respond with her availability by November 9, 2018. (S Exh. 7 at 2).

3. Four days later, the parent referred to the October 18, 2018 meeting as “a joke,” and by email dated October 22, 2018, the parent requested that the LEA hold further meetings off school property. In the email, the parent stated the following as her reason for the request:

**I fear that my advocate and I both are in jeopardy of being asked to stay off school property for simply standing up for ourselves and my children**.

Further, in her October 22 email, Parent indicated that she would “leave it up to her advocate.”

(S Exh. 8 at 2; P Exh. 3 at 3).

4. The LEA had never requested that the parent stay off school property, nor had the LEA made such a request of the advocate regarding the advocate’s representation of the parent for the child. (Tr. 343/20-25). Furthermore, the LEA had not threatened either the parent or her advocate with arrest.

(Tr. 263).

5. The LEA did not agree to meet off school property. A meeting had been scheduled for November 30, 2018, at Elementary School I. It did not take place. (P Exh. 7 at 1 and P Exh. 5 at 6; S Exh. 13).

6. On November 27, 2018, SEC I sent a letter to Parent asking the parent to please provide specific information regarding her reason for not desiring to meet on school property. SEC I indicated in the letter that upon receiving the information, the LEA would promptly investigate any alleged wrongdoing by LEA staff. The letter stated that the staff at Elementary School I looked forward to hearing from Parent. (P Exh. 7 at 1; Tr. 258-261). Although Parent indicated her advocate responded to the letter, Parent did not directly respond. (Tr. 261).

7. After the November 27, 2018 correspondence was sent to the parent and the LEA had received the above referenced emails indicating Parent did not desire to meet on school property, the LEA and parent participated in a resolution session on December 5, 2018, to resolve the meeting location issue. As a result of the session, the LEA and parent and her advocate agreed to meet by video conferencing to determine the child’s eligibility. (S Exh. 11; Tr. 301-302).

8. Also, on December 5, 2018, by letter, SEC I requested that Parent provide her availability between December 5, 2018, through December 13, 2018, for the child’s eligibility meeting. (S Exh. 11).

9. By email dated December 8, 2018 (December 8 email), Principal communicated with parent regarding the video conference meeting. Parent’s advocate was copied on the email. This email informed the parent that the communication platform Google Hangout would be used for the video conferencing meeting which would permit the sharing of documents during the meeting. In addition, the principal’s December 8 email stated in pertinent part, the following:

While audio recording of the eligibility meeting is permissible, the team does not agree to any video recording of the meeting. This includes, but is not limited to, video recordings intended for distribution to the public or the media, as well as any broadcasting or “live streaming” of the meeting via social media. If this occurs, we will interpret this action as a refusal to participate in the meeting, the video will be disconnected and the meeting will proceed in your absence.

(S Exh.. 11; Tr. 348-349).

10. In addition to the principal’s, December 8 email stating the conditions to which the school agreed to the video conferencing, the principal informed the parent that eligibility needed to by determined by December 13, 2018. The principal’s email reminded the parent that SEC I had previously requested, without response from the parent, the parent’s availability between and up to December 13, 2018, for the eligibility meeting. In his December 8 email, the principal again asked the parent to provide her availability for the meeting between the date of his email and December 13, 2018. He noted that if a mutually agreed upon time could not be obtained, the school would schedule the meeting and provide the parent with notice. The parent was directed to contact SEC I and provide her availability soon. (S Exh. 11).

# December 14, 2018 Eligibility

11. On December 14, 2019, the LEA held the eligibility meeting for the child. Prior to the meeting, Parent had been provided with some of the documents being used during the meeting. (Tr. 250 and 265/25; S Exh. 13). The meeting commenced with the LEA members of the team being located at Elementary School I. The parent and her advocate appeared at the meeting by video conference. Committee members present were the parent (by video conference), SEC I, General Education Teacher, Principal/School Administrator, School Psychologist, School Social Worker, Speech Language Pathologist, Teacher of Students with Disabilities, Advocate, and NAACP representative on behalf of the child/parent.[[7]](#footnote-7) (S Exh. 12 at 2 and S Exh. 13).

12. As stated previously, the communication platform used for this video conference meeting was Google Hangout. The boundaries for the video conference meeting were set prior to the commencement of the meeting and by Principal’s December 8 email to the parent. They were agreed to by both parties, the LEA and the parent/advocate. All parties understood that video recording of the meeting was not allowed. In fact, Principal confirmed with the parent and advocate before the meeting started that they were not video recording the meeting. (Tr. 300-301; S Exh. 11; S Exh. 13).

13. At the beginning of the meeting, Principal also stated the expectations regarding participants’ conduct during the meeting and the meeting’s focus. Participants were reminded to be civil, respectful of others, and not interrupt others while they are speaking. Moreover, Principal stated that the focus was to remain on the child. (Tr. 352/21-25; S Exh. 13).

14. During the meeting the team considered the child’s performance in class, results from curriculum based assessment, input solicited from the child’s teachers, input from the parent, information from the child’s acceptance letter from Private School. In addition, the team reviewed the results of several evaluations. Those considered were October/November 2018 Educational/psychological evaluation of the school psychologist; November 2018 Sociological Evaluation; a Developmental Pediatric Assessment by a private doctor dated September 24, 2015; and an evaluation dated December 13, 2018 by a private doctor. The eligibility team then elected to complete eligibility checklists for developmental delay, autism, specific learning disability, other health impairment, and speech language impairment. The team reviewed the checklists and then determined the child was not eligible for special education services. (S Exhs. 12 and 13; S Exhs. 15 and 17 at 1; Tr. 123/15-18 and Tr. 352/2-6).

15. As the team was completing the checklists for Developmental Delay, Autism, Other Health Impaired, and Specific Learning Disability (SLD), the parent/advocate disagreed with the conclusions of the LEA’s team members. They determine that the child did not meet eligibility status in those areas.

With regard to the team completing the checklists for SLD, parent/advocate expressed concern that parent may not have received the form the LEA uses to determine if a child has a SLD. Parent alleged she had not received the form. SEC I stated that she thought she had sent it, but it would be emailed while the meeting was progressing. In addition, the form was displayed on the video for viewing by the parent/advocate, as well as LEA’s team members. The advocate then argued with the school participants that the form displayed was already filled out and showed that the LEA had predetermined the child’s eligibility. School participants stated that the form was only a working draft and eligibility would be determined during the meeting.

(S Exh. 13).

16. During the discussions regarding the SLD form, Parent stated words to the effect of “we needed the document to prepare. This is bias and one sided. I do not feel like an equal member and you wonder why I don’t want to come to Elementary School I.” (S Exh. 13).

17. During the eligibility team meeting, the parent, her advocate, and the NAACP representative (invited by the parent), provided input, ask questions, and made statements. Also, as noted previously, the eligibility team reviewed, among other data, current assessment provided by the parent, November 2015 sociological assessment, eligibility checklists for OHI, Autism, and SLD, a letter regarding the private school, and evaluations/assessments conducted by the school. (S Exh. 13).

18. As previously mentioned, at the commencement of the meeting, Principal set forth expectations. The advocate failed to adhere to them. Advocate regularly interrupted the school’s members of the eligibility team as they were speaking; in many instances giving a protracted speech or argument or asking questions and not providing the team member an opportunity to completely answer. Several of the school’s team members were unable to finish their comments. In fact, on several occasions, the NAACP representative whom the parent invited, asked the advocate to wait until the team member finished speaking before Advocate asked her questions or made comments. Advocate continued to interrupt others speaking. (S Exh. 13).

The inflection in at least one school member’s voice suggested nervousness/anxiety/stress. (S Exh. 13)

19. What is more, on several occasions, Advocate stated the school’s team members were dishonest, disrespectful, unqualified, and unworthy of being trusted. Advocate explicitly stated Principal was lying and SEC I was “not telling the truth.” In addition, the advocate informed School psychologist that she intended to file an ethical complaint against her. Multiple times during the meeting, Advocate indicated she planned to file a due process complaint. (S Exh. 13).

20. In addition to the advocate’s behaviors stated above, Parent referred to the Principal as a “fool.” (S Exh. 13).

21. The eligibility process is a team process. The Hearing Officer listened to the entire audio recording of the eligibility meeting which was approximately three hours and 30 minutes. The evidence – the audio recording of the eligibility meeting – indicates that the advocate was trying to control the meeting.

The Hearing Officer finds that a reasonable person would conclude that the advocate’s behavior was offensive and disruptive. Further, the conduct of the Advocate imposed stress on LEA staff relevant to the proceedings.

22. The Hearing Officer did not identify impropriety by the school staff members attending and participating in the eligibility meeting. The Hearing Officer is concerned about the anxiety generated by the advocate’s/parent’s conduct.

23. The eligibility meeting went on for three hours and 27 minutes, as noted previously, before the principal disconnected the parent and advocate from the video conference. This action was taken because the advocate refused to remove beyond her demand for work samples.

Particularly, the eligibility team was discussing whether child was eligible under the category of SLD. It was utilizing a form which indicated the child’s weaknesses and strengths to aid in the determination. Documents regarding the strengths and weaknesses matrix, were displayed during the video conference so that they could be viewed by the participants. (S Exh. 13).

School members of the team reached the conclusion that the child’s weaknesses and strengths did not demonstrate the child was eligible for special education under the category of SLD. Child’s strengths and weaknesses were determined by his grades. Child’s report card grades showed he was meeting expectations in all areas. Child’s grades were determined by LEA policies and procedures for grading kindergarteners. Grades were not determined by work samples.

Yet, the advocate insisted on seeing work samples. They had not been brought to the eligibility meeting. This was the case because prior to the eligibility meeting, the parent had not expressed concerns about the child’s grades or work samples. Parent and advocate were informed that they could make an appointment to review them. They did not. Rather, the Advocate insisted that the meeting not progress until she and the parent see the child’s work samples. She refused to move beyond the topic. The stalemate continued for at least 30 minutes. Principal stated several times that the meeting needed to move on to the next topic. In addition, he informed Advocate that he would disconnect the video conference if she did not move on. Advocate refused, continuing to insist that the teacher go get her work samples. To do so, the teacher would have had to interrupt a class.

As a result, of the advocate’s obstinacy regarding the work samples, the eligibility meeting could not progress.

(Tr. 298 and 331; Tr. 367/20-324; Tr. 369-370/1-8; S Exh. 13).

23. Consequently, principal disconnected the video conference. (Tr. 298, 302-306; S Exh. 13).

24. Even though parent and advocate were offered to schedule a time to review the work samples, no appointment was ever made. (Tr. 370/11).

25. The Hearing Officer finds that the LEA did not deny the parent participation in any meetings from October 18, 2018, to December 14, 2018.

26. Principal became aware that the parent’s advocate made a video recording of the December 14, 2018 eligibility meeting on or about December 21, 2018, when the advocate distributed an email with a link to the video recording of a portion of the meeting. The Advocate distributed the video recording to, among others, non-members of the eligibility committee, non-employees of the LEA, non-advocates of the child, and to several media outlets. (Tr. 361-363). As a result of the breach in the agreement not to video record the meeting, the LEA declined to hold other IEP/eligibility meetings by video conference. (Tr. 109-115; Tr. 364/15-21; S Exh. 16).

Parent approved of her advocate video recording the meeting. Her approval was demonstrated by Parent’s laughter when the advocate informed the parent that Advocate had a recording of the video conference. In addition, following the advocate’s revelation, Parent’s comment to her advocate was “ I love you.” (Tr. 244-245).

27. As previously mentioned, in his December 8, 2018 email to the parent, Principal set forth the parameters for the video conference meeting; that is, no video recording of the meeting. He stated that if such occurred, it would be construed as the parent refusing to participate in the meeting.

The Hearing Officer finds that the parent’s advocate video recorded the December 14, 2019 eligibility meeting with the parent’s approval. Hence, this action constitutes a refusal to participate.

# Events Following the December 14, 2018 Eligibility Meeting

28. On December 20, 2018, SEC I sent a letter to the parent asking the parent to contact SEC I and provide parent’s availability to meet, review the child’s evaluations and other relevant information, and to consider the child’s eligibility under Section 504 of the Rehabilitation Act.

In addition, the December 20, 2018 letter (December 20 letter) enclosed documents pertaining to the eligibility committee’s finding that Child was no longer eligible for special education services. SEC I offered to review that documentation with the parent should she desire to do so. To facilitate any desired review, SEC I requested the parent contact SEC I.

The December 20 letter also requested parent’s availability in January 2019 for an IEP meeting to consider the parent’s request regarding least restrictive environment (LRE), private placement, and special transportation.

Moreover, the December 20 letter mentioned that the parent and her advocate had expressed interest in obtaining an independent educational evaluation (IEE)[[8]](#footnote-8) during the December 14, 2018 IEP meeting. Accordingly, in her December 20 letter, SEC I asked the parent to identify, among other things, the specific evaluation to which she disagreed and the reason for her disagreement. SEC I then noted that she would forward the information to the LEA’s Director of Special Education.

(S Exh. 15; Tr. 115-116; Tr. 358-359).

29. Next, on January 10, 2019, SEC I sent the parent another letter of the same date attempting to schedule IEP and Eligibility meetings.

First, the January 10, 2019 letter (January 10 letter) addressed eligibility and scheduling another eligibility meeting. The correspondence informed the parent again that during the December 14 eligibility meeting, the team determined that the child was not eligible for special education services. The letter also stated that because the parent had not consented to this finding, the IDEA “stay put” provision was in place. This meant that the child would remain eligible for special education under his existing category of Developmental Delay. Further, the child would continue to receive special education and related services under his March 27, 2018 IEP.

Moreover, the January 10 letter noted that the parent /advocate had provided information and expressed concerns during the December 14 eligibility meeting. Hence, in her letter, SEC I expressed that the team desired to reconvene the eligibility team (i) in light of this parental input and (ii) to continue discussions engaged in during the December 14 meeting about the child’s eligibility under the IDEA and/or Section 504. Accordingly, the January 10 letter proposed three dates to reconvene a meeting for these purposes. Those dates were

January 22, 2019, at noon;

January 25, 2019, at 11:00 a.m.; and

January 29, 2019, at 1:00 p.m.

The January 10 letter continues by asking the parent to inform SEC I of parent’s availability on the dates provided or to provide SEC I with alternative dates of availability. In addition, SEC I offered in the letter to arrange a time for the parent to inspect and review any documents. SEC I also requested the parent to provide the LEA in advance with any documents she desired the eligibility committee to review.

(S Exh. 17 at 1-2; Tr. 123-125).

30. Moreover, the January 10 letter addressed holding another IEP meeting. Specifically, the correspondence stated that the LEA desired to convene an IEP meeting to discuss, among other topics, the parent’s request for private placement, special transportation, and one on one adult assistance. The letter reminded the parent that SEC I had not received a response from the parent regarding SEC I’s prior December 20, 2018 letter where the LEA attempted to schedule an IEP meeting for the same reasons noted in the January 10 letter. As with her attempt to schedule the eligibility meeting, SEC I proposed the three dates and times, asked for the parent’s availability or alternative dates the parent was available. In her January 10 letter, SEC I also stated that if SEC I did not receive a response from the parent by January 22, 2019, the IEP team would convene the child’s IEP meeting on January 29, 2019 at 1:00 p.m. at Elementary School. (S Exh. 17 at 2).

Regarding the location of the eligibility and IEP meetings proposed, the LEA offered Elementary School I, the LEA’s central administration building, or another LEA school building. SEC I also offered the parent telephonic participation, and she provided the parent with the telephone dial in number for the meetings.

(S Exh. 17 at 2).

Video conference was not offered due to the advocate video recording the meeting held on December 14, 2018, in violation of the parties’ agreement not to do so. (Tr. 364/15-21; S Exh. 16).

31. In addition, regarding additional contents of the January 10 letter, it stated that the LEA had made had “every effort to implement recommendations provided by the [child’s] nurse practitioner” regarding the child’s toileting. The letter also requested more specific information regarding the parent’s expressed interest in an independent educational evaluation (IEE). (S Exh. 17).

The Hearing Officer finds the parent had sufficient and adequate notice of the January 29, 2019 meeting(s), and parent declined to not attend.

# January 29, 2019 IEP Meeting

32. On January 29, 2019, the LEA held the eligibility and IEP meetings referenced in SEC I’s January 10 letter. During the IEP meeting, the IEP team amended the child’s IEP to permit homebound instruction for two weeks. Also, the eligibility team met. Parent did not attend the meeting(s). (Tr. 126/19-21;Tr. 372/14-17; Tr. 373/3-4; S Exh. 20; P Exh. 8).

During the January 29, 2019 IEP meeting, the team developed a proposed IEP amendment which provided for homebound services for two weeks. Specifically, homebound instruction was provided for from January 11, 2019, to February 8, 2019, five hours per week. Although Parent did not attend the meeting, the LEA provided the parent with the proposed IEP on the date of its development. Accordingly, the parent had an opportunity to review the amended IEP on January 29, 2019. (Tr. 128/2-13; Tr. 254/19; S Exh. 20 at 2 and 8).

As of February 20, 2019, parent had not provided the consent necessary for the LEA to implement the homebound services. (P Exh. 9 at 2-3; S Exh. 20).

There was confusion as to whether the parent consented to the amended January 29, 2019 IEP or only provided partial consent for homebound services. The ambiguity came about because of two emails the LEA received from the parent on January 30, 2019. First, an email sent on January 30, 2019, at 7:21 a.m. stated “I [Parent] give consent for homebound services to start immediately for [Child].” Then at 8:18 a.m. on January 30, 2019, the parent sent another email to the LEA stating that the parent “refuse to sign any IEP that’s been drafted without ALL of those concerns being addressed.”

Parent eventually clarified that she was providing partial consent for homebound instruction for five hours per week for two weeks. However, because at the time of the clarification Child was no longer enrolled in a division school, the homebound services were not and have not been provided. (Tr. 100 and 126; S Exh. 20).

33. The Hearing Officer finds that the evidence is not sufficient to show that the LEA has refused to provide Child with homebound instruction.

# March 25, 2019 Annual IEP Meeting and Actions Preceding the Meeting

34. By February 1, 2019, SEC II had become the special education coordinator at Elementary School I. Accordingly, by letter dated March 7, 2019, SEC II sent correspondence to Parent by U.S. mail introducing herself as the new special education coordinator for Elementary School I. Also the child’s annual IEP was due to be reviewed/developed by March 25, 2019. Accordingly, in the March 7, 2019 letter (March 7 letter), SEC II stated that Child’s annual review or development of his IEP was due before March 26, 2019. The lettered continued by proposing to hold an IEP meeting for the review at Elementary School I. Three dates were mentioned as possible dates for the meeting. They were March 12, 2019, from 12:30 p.m. to 2:30 p.m.; March 13, 2019, from 12:30 p.m. to 2:30 p.m.; and March 20, 2019, from 12:30 p.m. to 2:30 p.m. In the March 7 letter, SEC II requested Parent inform the LEA if she was available any of the times mentioned or, if not available, to provide dates and times she was available for the meeting before March 26, 2019. (S Exh. 21; Tr. 426-427).

35. On March 12, 2019, SEC II sent another letter to the parent by email and by U.S. mail because she had not received a response from the parent to her March 7 letter. The March 12, 2019 letter (March 12 letter) reminds the parent of the need to conduct an annual review of the child’s IEP. This letter also provides three proposed dates to meet and hold an IEP meeting at Elementary School I for the annual review. The proposed dates and times for the meeting were March 20, 2019, from 12:30 p.m. to 2:30 p.m.; March 22, 2019, from 12:30 p.m. to 2:30 p.m.; and March 25, 2019, from 11:30 a.m. to 1:00 p.m. SEC II requested Parent inform the LEA if she was available any of the times mentioned or, if not available, to provide dates and times she was available for the meeting before March 26, 2019. (S Exh. 22; Tr. 429-430).

36. By March 18, 2019, SEC II had not received a response to either of her letters sent to the parent. Accordingly, on March 18, 2019, SEC II sent a third letter to Parent by email and U.S. mail reminding the parent of the IEP team’s need to hold an IEP meeting to review the child’s IEP. SEC II’s March 18 letter again proposed three dates to hold the meeting at Elementary School I. Those dates were March 20, 2019, from 12:30 p.m. to 2:30 p.m.; March 22, 2019, from 12:30 p.m. to 2:30 p.m.; and March 25, 2019, from 11:30 a.m. to 1:00 p.m. The March 18, 2019 letter (March 18 letter) also offered parent’s participation by telephone. In this letter, SEC II also stated “[i]f I do not hear back from you by March 20, 2019, the IEP Team will select a date and a meeting notification will be sent to you.” (S Exh. 23; Tr. 430-431).

37. Parent declined to respond to SEC II’s correspondence. Accordingly, on March 20, 2019, via email, SEC II sent the parent notification of an IEP meeting scheduled for March 25, 2019, at 11:30 a.m. to develop Child’s annual IEP. The notice informed the parent that the location of the meeting was Elementary School I. Attached to the correspondence were the procedural safeguards. (S Exh. 24; Tr. 431). On March 22, 2019, SEC II sent the parent an updated meeting notification that informed the parent that the school social worker had been invited to the meeting also. School social worker was invited in consideration of the parent’s advocate requesting consideration of social work services. (Tr. 432-433; S Exh. 25).

38. Parent never responded to the LEA’s correspondence mentioned above about the parent attending or participating in the IEP meeting to conduct an annual review of the child’s IEP. (Tr. 433/2-5).

39. On March 25, 2019, the LEA members of the child’s IEP team met at Elementary School I for the annual review of Child’s IEP. The LEA attempted to reach the parent by telephone at the beginning of the meeting. The parent hung up the telephone. A message was left for the parent. (Tr. 194/23-25; Tr. 375; Tr. 433-434; P Exh. 8).

The LEA members of the IEP team reviewed the IEP and proposed an IEP that provided for study skills and social skills. These services were based on the child’s March 27, 2018 IEP. This was the case because although, the eligibility team had previously determined that the child was not eligible for special education services and it was the LEA’s opinion that the child did not need of special education services, the parent had declined to consent to the termination of special education services. (Tr. 450-451).

The Hearing Officer gives deference to the educator’s assessment that Child is no longer in need of Special Education Services because of the progress he has made. (Tr. 450-451).

40. As previously mentioned, at the beginning of the March 25, 2019 IEP meeting an attempt was made to reach the parent by telephone so she could participate by that means if she desired. Upon the parent informing her advocate of the meeting and the LEA’s offer to permit the parent to participate by telephone, Parent’s advocate sent an email to Special Education Specialist on March 25, 2019, giving pre-notification of the filing of a due process complaint. Special Education Specialist responded and, among other comments, stated …. “should your advocate file a fourth due process hearing in this matter, [LEA] will consider the due process complaint to be frivolous and will take appropriate action.” (P Exh. 9 and S Exh. 26).

The Hearing Officer finds that Special Education Specialist letter to Parent was not a threat or retaliation. Rather, a response to the parent’s notice or threat of a lawsuit. In addition, the Hearing Officer finds that the parent had adequate and sufficient notice of the March 25, 2019 IEP meeting and that she declined to attend.

# Parent’s Claims of Retaliation

41. In her testimony, Parent stated the LEA retaliated against her. She stated that in the fall of 2018, when she started advocating that Child be placed in a private school, the LEA commenced the retaliation. (Tr. 196/4-7). In her testimony, Parent alleged the retaliation took place in the following ways:

(i). LEA called the parent and requested that the parent come to school to address a health related matter about her other child that is not the subject of this due process proceeding. Parent stated that once she arrived at school, it became clear that the call was pretext to talk about Child and his IEP. Parent stated she had previously made it clear that any discussions about Child and his special education would need to be discussed with her while her advocate was present. Parent stated that upon arriving at school for a situation the school had led her to believe involved her other child, LEA staff cornered her and tried to get her to sign the IEP about Child. (Tr. 153-155).

(ii). Also, during her testimony, Parent stated that another example of retaliation was every time she raised concerns about Child in meetings, the IEP team would not listen. (Tr. 165/9-13; Tr. 218-219).

(iii). Parent stated that the eligibility team failed to provide work samples during the December 14, 2018 eligibility meeting and this was retaliation. (Tr. 166-167).

(iv). Parent stated that she was required to participate in IEP/eligibility meetings on school property. Because of this she was losing time from work and jeopardizing her job. As such she stated this was a form of retaliation. (Tr. 190/7-15).

(v). Parent stated that the school taking the position that they would no longer permit videoconference meeting was retaliation. (Tr. 163).

(vi). Parent stated the LEA did not discuss private placement during the December 14, 2018 eligibility meeting and that the LEA delayed discussing it until January 29, 2019. Parent stated the delay was retaliation. (Tr. 170/17-20 and Tr. 171-172).

(vii). Parent stated there was additional retaliation after she informed the LEA in January 2019, that she was going to file a due process complaint. Parent stated the retaliation was removing Child from school and the LEA refusing to provide Homebound services for the child. (Tr. 204 and 217).

(viii). Parent stated that she was threatened by General Education teacher at the December 14, 2018 eligibility meeting. Stated that after the threat, she did not feel comfortable at school. (Tr. 196/10-21).

(ix). Parent stated that it was retaliation for the IEP team to hold IEP meetings without her participation and she was not offered a place off school property. (Tr. 181).

(x). Parent stated that the LEA failed to provide social worker services in retaliation. (Tr. )

(xi). Parent stated the LEA retaliated against her by finding her child not eligible for special education and related services. (Tr. 80/18-25; Tr. 81/1-19).

(xii) Parent contends Special Education Specialist’s letter dated March 26, 2019, threatened adverse action due to parent requesting or planning to file for due process.

42. Regarding the parent participating in IEP meetings by telephone, prior to October 2018, Parent had requested to participate in an IEP meeting involving Child by telephone, and she did so on March 27, 2018. In addition, Parent received/was offered her procedural safeguards from the LEA. (S Exhs. 3 and 4 at 1; Tr. 220-223).

43. Parent has received some work samples from Child’s kindergarten general education teacher. (Tr. 282-283).

44. The LEA has not threatened to arrest Parent. Further, the LEA has not threatened to arrest advocate during her representation of Parent/Child. (Tr. 263).

45. Before filing the due process complaint which is the subject of the instant case, Parent did not provide the LEA with any documentation to support her allegation that she has anxiety. (Tr. 258-263).

46. Prior to the due process hearing in the instant case, parent’s advocate requested that the hearing not take place on any school division property. The advocate argued that such a location would subject the parent to anxiety/trauma. The school objected to the request. The parties were given an opportunity to submit written arguments and documentation in support of their respective positions. As documentation to support the parent’s argument, her advocate submitted an email on April 9, 2019, with an image. The advocate stated in the email that the documentation showed “Parent receiving mental health support services due to issues going on within the school setting with her children.” This documentation/image in the email consisted of the image of Healthcare’s logo and a form “excuse from work/school” note. This form note read as follows:

Date: March 25, 2019

To whom it may concern:

[Parent] was seen in the office today for professional services. Please excuse his/her absence from work/school today.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_/s\_/\_\_\_\_\_\_\_\_\_\_\_, LCSW.

Parent provided nothing further to support her request for the hearing to be held off school division property. (HO Exh. 7).

Parent’s documentation or image provided in the April 9, 2019 email is/was insufficient.

47. Parent has provided varying reasons at different times regarding why she does not desire to meet on school division property. First, as noted above, parent articulated on October 22, 2018, that she feared that she and her advocate were in jeopardy of being asked to stay off school property for simply standing up for ourselves and my children. *See* “Finding of Fact” # 3 and

S Exh. 8 at 2). Next, on December 14, 2018, during the eligibility meeting, Parent indicated she did not desire to meet at her child’s school because the LEA is bias and the meetings are one-sided. (S Exh. 13). Then, the reason for desiring to meet off school property became due to trauma/anxiety.

48. Special Education Specialist is the LEA’s staff person who conducts retaliation training. When a retaliation complaint is filed, he is the staff person appointed to investigate it. Special Education Specialist did not recall Parent ever filing a retaliation complaint. (Tr. 35-36).

The Hearing Officer finds that the evidence is not sufficient to establish the parent has filed a retaliation claim with the LEA.

49. The fact that the LEA held the meetings at Elementary School I was not retaliation against the parent and advocate because they were advocates for the child. (Tr. 377/8-9).

50. During the December 14, 2018 eligibility meeting, a request was made for General Education Teacher I to position herself so that the teacher appeared on the camera. Accordingly, the teacher did not stand up and point her finger at the parent in retaliation or to show hostility toward the parent. The teacher did not threaten the parent. (S Exh. 13; Tr. 298; Tr. 330/16-19).

51. The LEA works with parents in determining a mutual place to hold meetings. Moreover, in comparison to scheduling meetings with other parents, this parent was treated like all other parents. (Tr. 133-134 and 137 -138/12-13).

# OTHER

52. The Hearing Officer qualified Special Education Coordinator II as an expert in special education grades kindergarten through 12. (Tr. 424).

53.. The Hearing Officer qualified Special Education Specialist as an expert in special education compliance. (Tr. 102/11-13).

54. The Hearing Officer qualified Principal as an expert in the area of school administration Kindergarten through twelfth grade. The parent had no objection. (Tr. 339/14-16; Tr. 340/5-11).

55. When the LEA attempted to schedule IEP or eligibility meetings with the parent, the LEA did not give priority to the schedules of school staff over the parent’s. (S Exhs. 17, 21, 22).

56. On March 27, 2018, the school held an IEP meeting to develop the child’s IEP. Those in attendance at the March 27, 2018 meeting were Parent, Case Manager, SEC I, and the general education teacher. During the time of the March 27, 2018 IEP meeting, parent was not represented by Advocate. Parent agreed to the IEP developed. (S Exh. 3/1).

57. The LEA offered Parent alternatives to meeting at Elementary School I. Those other locations included other elementary schools, the division’s central office building. (Tr. 132). Telephone conferencing was also offered. However, the parent declined to participate in this manner since fall 2018. (Tr. 139).

58. Participation by telephone is reliable and viable means of participating in an IEP and eligibility meetings. (Tr. 106/7-17; Tr. 431).

59. Typically the location of the IEP meeting is at the school the child attends. (tr. 462/24-24). Also, the school listing a particular school as the location for a meeting is a proposal to the parent to meet at the named location. In all her correspondence to Parent, SEC II listed Elementary School I as the location for any proposed meeting. SEC II was not informed that the parent did not desire to meet on school property. (Tr. 465 and 467).

60. Reasons to hold the meeting on school property include security, confidentiality, staffing schedules, the logistics, being able to adhere to LEA policies and procedures. (Tr. 103-105, 277 and 376-377).

61. During the 2018-2019 school year, Child was enrolled as a kindergartener. Kindergarteners do not receive letter grades. Rather, they are graded on a number scale from one (1) to four (4). The explanation of each number in the scale is noted below:

4 = Student’s performance exceeds standard/expectation, and student consistently produces outstanding work.

3 = Student’s performance meets standard/expectation, and student consistently produces quality work.

2 = Student’s performance is approaching standard/expectation and student inconsistently applies learned skills.

1 = Student’s performance is below standard/expectation and student frequently requires re-teaching.

NA = This skill or concept was not assessed during this grading period.

(S Exh. 19).

62. Child’s report card for the first two quarters of the 2018-2019 school year shows the child received grades of 3s and 4s during that period. Hence, Child’s report card indicated that he was meeting or exceeding expectations. (S Exh. 19; Tr. 445-446). By the third quarter, Child was no longer enrolled in a division school.

63. Child’s progress reports show that by November 2, 2018 and January 25, 2019, the child was making appropriate progress and mastering his IEP goals. (S Exhs. 9 and 18; Tr. 84-85 and 87-90; Tr. 319/20-21; Tr. 439-444).

64. Child was administered the PALs on October 15, 2018. The PALs assessment is a phonological assessment. The PALs was not scored by LEA personnel. Specifically, the child was administered the test online by a software program. The program also scored the child’s results. This test measures a child’s ability to identify sounds, rhymes inside words, spelling, and word concept. (Tr. 447-449; S Exh. 6).

65. The PALS score of the child demonstrated that he had met or exceeded benchmarks. (S Exh. 6).

66. Parent filed another due process complaint on or about January 2019. The earlier complaint was not assigned to this Hearing Officer to adjudicate. (P Exh. 10).

67. The parent’s advocate has acted as a special education advocate in multiple hearings and is experienced in due process hearings.

# V. LEGAL ANALYSIS

The Individuals with Disabilities Education Improvement Act (IDEA/Act), 20 U.S.C. § 1400 *et, seq,* requires a state, as a condition of acceptance of federal financial assistance, to ensure a “free appropriate public education” (FAPE) to all children with disabilities. 20 U.S.C. § 1400 (d) and § 1412(a)(1). The Commonwealth of Virginia has elected to participate in this program and has required its public schools, including the LEA here, to provide FAPE to all children with disabilities residing in its jurisdiction. Va. Code Ann. § 22.1-214-215.

The Act imposes extensive substantive and procedural requirements on states to ensure that children receive a FAPE. 20 U.S.C. § 1415. *See also Board of Education v. Rowley*, 458 U.S. 176 (1982) and *Endrew v. Douglas County – School District RE-1,* 580 U.S. \_\_\_\_\_\_\_\_ (2017) 137 S. Ct. 988. Moreover, the IDEA and its implementing regulations emphasize the importance of parental participation in the provision of special education services for a child with a disability.

Parental participation in the IEP process is important to achieving the purpose of the IDEA. See 20 U.S.C. § 1414(d)(1)(B)(i) (including the parent as a required member of the IEP team). Moreover, implementing regulations of the IDEA provide that the LEA must take steps to ensure that one or both parents of a child with a disability are present at each IEP meeting or given the opportunity to participate. See 34 C.F.R. § 300.322(a). In addition, the Supreme Court has emphasized that the IDEA's structure relies upon parent participation in developing successful IEPs. *Rowley,* 458 U.S. at 206, 102 S. Ct. 3034 ("Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, as it did upon the measurement of the resulting IEP against a substantive standard."). Courts have recognized, “[t]he core of the statute …is the cooperation process that it establishes between parent and schools.” *Schaffer,* 546 U.S. at 53. (Citing *Rowley*, 458 U.S. at 205-06).

Moreover, parental participation in an IEP meeting must be meaningful. *See e.g., Spielberg ex rel. Spielberg v. Henrico County Public Schools,* [853 F.2d 256](https://www.specialedconnection.com/LrpSecStoryTool/servlet/GetCase?cite=853+F.2d+256) (4th Cir. 1988). (Fourth Circuit affirmed the district court’s determination that the school district had predetermined the placement of the child with a disability before the IEP meeting. The court indicated that the student’s placement decision by the district before developing an IEP with the parent’s participation violated the principle of parental involvement/meaningful parental involvement. Accordingly, in this case, there was no meaningful parental involvement regarding placement because the decision had been predetermined).

Even though parental participation in developing the IEP of a child with a disability is important as noted here, implementing regulations of the IDEA provide for instances in which a LEA may proceed with an IEP, and by reason an eligibility meeting, in the parent’s absence. Particularly, 34 C.F.R. § 300.322(d) states the following:

(d) Conducting an IEP Team meeting without a parent in attendance. A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as --

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

34 C.F.R. § 300.322(d).

Hence, following the regulatory requirements, if a parent refuses to attend an IEP meeting or takes actions that are equivalent to refusing to attend an IEP meeting, the LEA may hold the meeting in the absence of the parent to develop the child’s IEP. *Id.*

# A. Parental Participation

In the instant case, the parent contends that the LEA impeded or denied the parent’s participation by meeting without her on at least two occasions between October 22, 2018, and March 25, 2019, and by not holding IEP or eligibility meetings at a mutually agreeable location.

# 1. Holding Meetings in the Absence of Parent

The Hearing Officer addresses these allegations.

In regard to the January 29, 2019, and March 25, 2019 meetings that the school held in the absence of the parent, the evidence clearly shows that the LEA attempted to obtain the parent’s participation in those meetings and afforded the parent an opportunity to participate.

For instance, on December 20, 2018, SEC I sent Parent a letter asking the parent for her availability to meet to discuss, among other things, the child’s eligibility and to schedule an IEP meeting. The parent failed to respond to the letter.

Accordingly, on January 10, 2019, SEC I sent parent another letter asking the parent for her availability to meet about, among other things, the child’s eligibility and to hold an IEP meeting to address specific concerns that had been raised by the parent. Specific concerns were noted in the letter. The January 10 letter proposed three dates in January to meet. Moreover, the letter requested the parent provide alternative dates and times to meet if those listed in the letter conflicted with her schedule. The January 10, 2019 letter also informed the parent that if she did not respond by January 22, 2019, the team would meet on January 29, 2019, at Elementary School I. Places offered to meet in the letter were Elementary School I, central administration office, another elementary school in the district, or participation by telephone conference. The parent failed to provide her availability and did not attend the meeting. Even so, the very day the team developed the proposed IEP, the team sent it to the parent. Parent acknowledged receiving it on January 29, 2019, and reviewing it. In fact, the proposed IEP provided for homebased services for two weeks. Parent agreed to this provision of the IEP.

The Hearing Officer finds that parent was afforded an opportunity to attend the January 29, 2019, meeting but declined to attend. Accordingly, she was afforded the opportunity to participate.

Now turning to the March 25, 2019 IEP meeting, the LEA also sought to obtain parent’s participation in an IEP meeting held to review/develop the child’s annual IEP. To demonstrate, on March 7, 2019, SEC II sent Parent a letter informing the parent of the need to meet to conduct the annual review of the child’s IEP. In this letter, SEC II provided the parent with three available dates and times for the meeting and asked the parent for her availability or in the alternative, SEC II asked the parent to provide her availability. The parent did not respond. Accordingly, SEC II sent the parent another letter on March 12, 2019. Again, SEC II provided available times for the IEP. She also asked Parent to provide alternative times if the ones proposed by the school conflicted with the parent’s schedule. Parent did not respond. Hence, on March 18, 2019, SEC II sent the parent another letter with proposed dates for the meeting. SEC II also offered the parent participation by telephone. SEC II stated in the letter that if the parent did not respond, the LEA would select a date for the annual review of the IEP and notify the parent. As Parent did not respond to the March 18, 2019 letter, SEC II scheduled the IEP meeting for March 25, 2019, from 11:30 a.m. to 1:00 p.m. SEC II also provided the parent notice of the meeting. SEC II updated the meeting notice on March 22, 2019, to inform Parent that a social worker had been invited to the meeting in light of the parent’s request for social services. Parent was not present for the meeting on March 25, 2019. In an attempt to obtain, parental participation, immediately before the meeting started, SEC II telephoned the parent. She hung up on the call. The LEA then left a message for her regarding participating in the meeting.

Considering the above, the Hearing Officer finds that detailed records were kept of any telephone calls made to the parent in an attempt to acquire her participation in the meeting(s). Moreover, the LEA documented correspondence sent to the parent and any responses regarding the parent participating in the January 29, 2019, and March 25, 2019 meetings. Clearly, the evidence above establishes that under 34 C.F.R. § 300.322(d), the LEA had the authority to proceed with the meetings in the parent’s absence.

The Hearing Officer finds the LEA afforded the parent an opportunity to participate in both meetings. This determination has been made cognizant of the parent’s articulating a desire to meet off school property and declining to participate by telephone.

# 2. Not Holding Meeting at Mutually Agreed Upon Location

Second, the parent contends parental participation was denied because the LEA did not agree to meet at a mutually agreed on location.

As previously noted, a desired goal of IDEA is parental participation. One way the LEA fosters this goal is by its implementation of 34 CFR § 300.322. Specifically, the regulation requires the LEA to take steps to ensure that the parent(s) of a child with a disability be afforded the opportunity to participate in meetings with the school members at a mutually agreed on time and place. 34 C.F.R. 300.322(a)(2).

In the instant case, the evidence shows no agreement amongst the parties on the meeting’s location after the December 14, 2018 eligibility meeting. Prior to December 14, 2018 the LEA agreed to meet by video conference. This mode of meeting became unavailable due to the parent/advocate’s conduct. This is the case because even though the parties had agreed that the meeting would not be video recorded, the parent’s advocate did so anyway and distributed the recording to among others, the media. The parent approved her advocate’s conduct. Upon being informed of the video recording, LEA withdrew its offer to permit meeting by video conferencing. Meeting options offered after the December 14, 2019 meeting included parental participation by telephone conferencing, holding the meetings at a school other than Elementary School I, and holding the meeting at the central school office building. Parent has refused all these options.

Parent argues, in effect, that for the LEA to proceed with IEP/eligibility meetings, parent must give her consent, and the parent has not provided such because the parties have failed to agree on a location.

While the IDEA requires the LEA to afford parents the opportunity to participate, parental consent to such a meeting is not required. Furthermore, 34 C.F.R. § 300.322(a)(2) does not give parents the power to prohibit the LEA from conducting IEP/eligibility meetings with school members when the parent and LEA are unable to agree on a location. *See Fitzgerald v. Fairfax Co.* 556 F.Supp. 2d 543 (E.D. 2008). In the *Fitzgerald* case the parents argued that the IDEA requires parents to consent to the composition of the manifestation determination review (MDR) committee members, including the LEA’s members of the committee. The parents based their interpretation on language in the law’s implementing regulation stating that the MDR committee would comprise members of the child’s IEP team **“as determined by the parent and LEA.”** (emphasis added). The *Fitzgerald* court rejected the parents’ position, stating that such an interpretation would in effect give the parents a veto power such that the parents would be able to veto any member of the MDR committee selected by the LEA. The court went on to say that the parents’ proposed interpretation of the law could have the potential of hamstringing the LEA and causing a stalemate such that the educational and disciplinary process would come to a halt. The *Fitzgerald* court concluded that a review of the IDEA in context did not support the parents’ interpretation which in effect gave parents a veto power that could preclude the MDR meeting from occurring. *Fitzgerald v. Fairfax Co.* 556 F.Supp. 2d 543 (E.D. 2008).

Similarly, in the case at hand, if the Hearing Officer adopts the parent’s interpretation of 34 C.F.R. § 300.322(a)(2), the LEA would be disabled. This would be the senseless result, even though IDEA makes the LEA the agency responsible for providing education to a child with a disability (in this case the parent’s child). 34 C.F.R. § 300.33. Accordingly, the LEA would not be able to plan for Child’s education and the provision of FAPE, hampered by the stalemate over agreeing to a meeting place.

In addition, a review of the IDEA regulations in context fails to support the parent’s claim that parental consent is needed to hold an IEP meeting. This is so because the regulation explicitly permits the LEA to hold an IEP meeting in the parent’s absence when the parent cannot be convinced to attend. 34 C.F.R. § 300.322(d). As previously discussed, the evidence in this case shows that the parent in effect has refused to attend the IEP meeting, or could not be convinced to do so.

Equally important, the evidence shows that the LEA has made reasonable efforts to hold the meeting at a mutual agreeable location. Prior to December 14, 2018 the LEA had agreed to meet by video conference. For reasons already discussed, such is no longer available due to the parent/advocate’s conduct. The parent has refused all other options offered.

In addition, of particular note, the evidence demonstrates that Parent has given varying reasons by testimony and other evidence of record for not desiring to meet on school property. In her October 22, 2018 email to the LEA she stated that she was afraid that she and her advocate would be asked to stay off school property. The LEA received a subsequent email noted the same on or about November 12, 2019. The school took action and followed up with the parent. Particularly, a letter was sent to the parent on November 27, 2018, asking for details of any staff person who engaged in wrongdoing and concerns of the parent. The parent did not respond. Then during the December 14, 2018 eligibility meeting, the parent indicated that she did not desire to attend meetings at the school because the meeting was one-sided and the LEA was bias. Next, Parent articulated another reason for not wanting to meet at the school. She stated it was due to anxiety and trauma. The evidence shows that parent provided no documentation to support her allegation. Any image or documentation provided to show anxiety and trauma was insufficient as noted in “Findings of Fact” # 45.

Worth mentioning here also is the parent has claimed that anxiety/trauma is inflicted upon her when she sets foot on school property. Yet, the Hearing Officer finds after listening to the audio recording of the December 14, 2018 eligibility meeting, that the Hearing Officer has concerns about anxiety and stress imposed on school personnel by the advocate/parent’s conduct. Such conduct includes name calling, offensive remarks, threats, and regularly interruption others as they speak.

Furthermore, the parent now contends telephone conferencing is not a viable means of meeting. But the evidence demonstrates that previously she requested telephone conferencing, participated by that method, assisting in developing the child’s IEP, and consented to it.

The Hearing Officer had an opportunity to observe the parent’s demeanor as she testified. The Hearing Officer found the witness’ responses self-serving, contradictory, and non-persuasive. The parent was not a credible witness.

In contrast, the Hearing Officer also had an opportunity to observe the demeanors of Principal, SEC II, and Special Education Specialist as they testified. They testified that telephone conferencing is an option and a reliable one for parents to participate in meetings, including Parent. These witnesses were persuasive and credible.

Additionally, schools are not excluded from considering their own scheduling needs in setting a date, time, and location for special education meetings. 34 C.F.R. 300.322(a)(2) (stating that steps to take to foster parental participation include scheduling the IEP team meeting at a “**mutually agreed on time and place”**); *see also,* 18 IDELR 1303 (May 22, 1992). In regard to the school’s scheduling, Principal qualified as an expert in the area of administration K through kindergarten; Special Education Specialists qualified in the area of special education compliance. They both articulated legitimate reasons for the LEA not agreeing to meet off school grounds. Among others they include building security, confidentiality, staffing needs, logistics, following LEA policies and procedures, etc. The Hearing Officer gives deference to their opinions.

Further, the Hearing Officer finds that parent was afforded the opportunity for meaningful participation. Several examples of this opportunity are mentioned here. In scheduling the meetings, LEA sought to address concerns raised by parents. During the December 14, 2018 eligibility meeting, LEA considered documents or information provided by parent. Parent was sent copy of the IEP and copies of documents from the eligibility meeting and its determination. The LEA offered to set appointments so the parent/advocate could view work samples. Some had already been sent home. Parent never made an appointment. The LEA scheduled a social worker to attend the March 25, 2019 IEP meeting. This was done after the parent/advocate requested social services. Parent was made aware of the meeting, but declined to attend meeting.

Assuming for the sake of argument a technical violation by the LEA not holding any meeting in a mutually agreed upon place, the hearing officer finds the error not substantive as the child has received a FAPE. Such is shown by Child’s grade reports and other assessments indicating the child was meeting expectations or exceeding them. *See R.F. v. Cecil County Public Schools*, 919 F.3d 237 (4th Cir. 2019) (Procedural violations that do not deny the child a FAPE are harmless).[[9]](#footnote-9)

Furthermore, Parent’s reliance on the case *Doug C. v. State of Hawaii Dep’t of Educ.,*  720 F.3d 1038 (9th Cir. 2013) is misplaced. First, this case is not precedent for the fourth federal circuit. Second, as discussed below, the *Doug C* case is distinguishable from the case at hand.

In the *Doug C* case, the school had scheduled an annual IEP meeting for November 9. The current placement of the child with the disability was at Horizon Academy (academy). The IEP team was due to develop the annual IEP by November 13 which was on a Saturday. Parent had agreed to attend the November 9 IEP meeting. But on the day it was scheduled, he was ill. Thus, the parent informed the school that he could not attend because of the illness. The parent requested that the meeting be rescheduled for a week later. The school asked the parent if he could attend on November 10 or 11. The parent was willing to attend on one of those alternate days provided he was over his illness. Accordingly, he informed the school of such. The school did not offer November 12 as an alternate day because some of the school’s IEP team members had conflicts with that meeting day. The school asked the parent if he could participate by telephone and the parent responded that he wanted to meet in person and did not feel well enough to participate on November 9. *Doug C.,* F.3d *at* 1042-1046.

Also in *Doug C,* the school had already asked some of its team members to change their schedules on three separate occasions to arrive at November 9 as the annual review meeting day. Hence, the school was unwilling to reschedule the meeting and went forward with the meeting on November 9. The parent did not attend. Moreover, there was no one from Horizon Academy (the academy) at the meeting. During the meeting, the child’s placement was changed from the academy to a program at the high school. The school held a follow-up IEP meeting about 30 days later in which the parent attended and a staff person form from the academy. The LEA presented a completed IEP at the meeting’s beginning. The IEP was reviewed line by line. Moreover, the school testified at the due process hearing that parent did not provide any substantive input during the meeting. The parent rejected the IEP in its entirety because he had been excluded from the development process. The IEP team made no changes to the IEP during the follow-up meeting. *Id.*

A day before the follow-up meeting, the parent filed a due process complaint alleging, among other things, failure to permit parental participation in the November 9 IEP meeting and a denial of FAPE. The ninth circuit agreed with the parent. In doing so, it found that the parent did not affirmatively refuse to attend the IEP meeting. Further, the school was not able to show that it was unable to convince the parent to attend. The court also noted that the school could not exclude the parent from an IEP meeting in order to prioritize its representatives’ schedules. To this point, the court commented that the school was not even willing to reschedule for November 10 or 11, just one or two days later than the original date set for the IEP meeting. *Id.*

In addition, the ninth circuit stated that when a school is faced with the difficulty of being able to meet two distinct procedural requirements of IDEA (in the *Doug C* case they were parental participation and conducting a timely annual review of the IEP), the school must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of FAPE. Moreover, the *Doug C* court noted that in the court’s review of an agency’s action in such a scenario, the court will allow the LEA reasonable latitude in making that determination. *Id.*

Furthermore, the *Doug C* court did not accept the school’s argument that there was no violation because the school held a follow-up meeting with the parent in about 30 days. The court stated that the “after the fact” meeting was insufficient because during the initial meeting on November 9, there was a failure to properly consider an alternative placement – the academy. The court indicated that this was the case because during that first meeting the parent was not in attendance and neither was a staff person from the academy. *Id., at* 1047.

Now the Hearing Officer explores how the instant case differs from the *Doug C* case*.*

First, in *Doug C*, the court found that the parent had not been afforded an opportunity to participate. In the instant case, the Hearing Officer has determined that Parent was given the opportunity to participate. Moreover, in *Doug C*, the court determined that the parent did not refuse to participate. In fact he had agreed to the meeting, became ill, and asked for only a week extension. He was also willing to meet the next day or the day after the scheduled date if his health permitted him. In the case at hand, the parent in effect has refused to participate. Evidence shows she did not respond to the school’s inquiries. She failed to adhere to the rules pertaining to video conferencing. Her reasons for not desiring to meet on school property are not persuasive. She was also provided the IEP developed on January 29, 2019, on the same day the IEP team developed it. Moreover, homebased services were provided for in the IEP and the parent agreed to them. The parent in *Doug C* did not agree to the changed placement.

Furthermore, as in *Doug C*, for the meeting held on March 25, 2019, the school wasfaced with the difficulty of being able to meet two distinct procedural requirements of IDEA – parental participation and timely conducting the annual review of the child’s IEP. The Hearing Officer finds the school made a reasonable determination to hold the IEP meeting. That decision promoted the purposes of the IDEA and was least likely to result in a denial of FAPE. Such was not the case in *Doug* C.

In the instant case, the parent had been afforded the opportunity to participate, but refused to do so. The parent and her advocate’s actions indicated they were obstinate and it was not likely that if the school waited a few days that the parent would agree to meet. IDEA requires annual reviews to determine the current education needs of the child and to set goals. Without conducting the annual review, the LEA would have failed at its responsibility under the IDEA.

# B. Retaliation Claim

Some courts or tribunals have recognized IDEA related retaliatory claims. *M.T.V.. v. Perdue*, 107 LRP 62829 (N.D. Ga. Feb. 3, 2004). -In the instant case, Parent also contends that the LEA has retaliated against her since October 2018 for engaging in protected activities; that is, advocating for her child/filing a due process complaint.

In her testimony, Parent stated the LEA retaliated against her. She stated that in the fall of 2018, when she started advocating that Child be placed in a private school, the LEA commenced the retaliation. In her testimony, Parent alleged the retaliation took place in the following ways:

1. Retaliation claim 1: LEA called the parent and requested that the parent come to school to address a health related matter about her other child that is not the subject of this due process proceeding. Parent stated that once she arrived at school, it became clear that the call was pretext to talk about Child and his IEP. Parent stated she had previously made it clear that any discussions about Child and his special education would need to be discussed with her while her advocate was present. Parent stated that upon arriving at school for a situation the school had led her to believe involved her other child, LEA staff cornered her and tried to get her to sign the IEP about Child.

The Hearing Officer finds the evidence is insufficient to support this claim of retaliation.

2. Retaliation claim 2: Also, during her testimony, Parent stated that another example of retaliation was every time she raised concerns about Child in the meetings, the IEP team would not listen.

The Hearing Officer finds the evidence not sufficient to support retaliation claim 2. In addition, the Hearing Officer notes that she listened to the audio recording of the December 14, 2018 eligibility meeting. It clearly shows, parent was afforded the opportunity to participate, as well as her advocate, and the NAACP representative invited to the meeting by the parent.

3. Retaliation claim 3: Parent stated that the eligibility team failing to provide work samples during the December 14, 2018 eligibility meeting was retaliation.

The Hearing Officer finds no retaliation by the LEA. The evidence shows that the parent did receive some work samples. In addition, the LEA offered to set up a time for her to review them. She did not schedule a time to review them at school. Further, the Hearing Officer finds, it is reasonable that the school did not have work samples at the meeting. Grades and work samples had not been an issue in past IEP meetings. Accordingly, the LEA was not on notice to have them at the meeting. Parent did ask if the teacher could retrieve them and bring them to the December 14, 2018 meeting. However, such would have caused the teacher to interrupt other students in class. School’s offer to set up a time with parent was reasonable and appropriate.

4. Retaliation claim 4: Parent stated that she was required to participate in IEP/eligibility meetings on school property. Because of this she was losing time from work and jeopardizing her job. As such she stated this was a form of retaliation.

The Hearing Officer finds this claim unsupported by the evidence. The LEA offered the parent telephone conferencing which the parent rejected even though the evidence shows such mode of participation was reliable and available. Moreover, the LEA had agreed to videoconferencing. But the improper conduct of the parent’s advocate/parent precluded further use of this method after the May 14, 2018 eligibility meeting. In addition, the LEA has legitimate reasons to decline holding meetings off school division property. Those reasons include, among others, pulling staff away from the school building for extended periods of time precluding them from providing services to many other students and adversely affecting the safety of the school’s campus, maintaining confidentiality of student data, limiting access to computers, printers, copiers, etc.

5. Retaliation claim 5: Parent stated that the school taking the position that they would no longer permit videoconference meeting was retaliation.

The Hearing Officer finds that parent and advocate’s improper action resulted in the school no longer offering video conferencing. Accordingly, the claim is unsubstantiated.

6. Retaliation claim 6: Parent stated the LEA did not discuss private placement during the December 14, 2018 eligibility meeting and that the LEA delayed discussing it until January 29, 2019. Parent stated the delay was retaliation.

The Hearing Officer finds the December 14, 2018 meeting was an eligibility meeting and not an IEP meeting. Hence, eligibility, not IEP development was the focus. The LEA did attempt to schedule an IEP meeting in January 2019 with the parent participating to discuss, among other things, private placement. The Parent declined to provide her availability or to attend the January 29, 2019 IEP meeting. The parent has failed to meet her burden and show retaliation.

7. Retaliation claim 7: Stated there was additional retaliation after she informed the LEA in January 2019 that she was going to file a due process complaint. Parent stated the retaliation was removing Child from school and the LEA refusing to provide Homebound services for the child.

Hearing Officer finds insufficient evidence to substantiate this claim. Further, the evidence demonstrates that the IEP team developed an IEP which provided for homebound services. Ambiguity in the parent’s response to consenting to the IEP or providing partial consent caused a delay in the approval or implementation of the services. Moreover, by the time clarification was provided, the child was no longer enrolled in the school. The Evidence shows the LEA still offered to provide the services.

8. Retaliation claim 8: Stated that she was threatened by General Education teacher at the December 14, 2018 eligibility meeting. Stated that after the threat, she did not feel comfortable at school.

The Hearing Officer listened to the entire audio recording of the December 14, 2018 eligibility meeting. Further, she considered the testimony of Principal who was an eye witness at the meeting. The Hearing Officer finds the allegation of the teacher’s action is not substantiated. Accordingly, retaliation cannot be found. In addition, having carefully reviewed the audio recording of the meeting, the Hearing Officer is concerned that the behavior of the advocate/parent imposed anxiety and stress on LEA staff. *See* “Finding of Facts” 18 through 22.

9. Retaliation claim 9: Stated that it was retaliation for the IEP team to hold IEP meetings without her participation and she was not offered a place off school property.

For reasons already discussed here, the Hearing Officer finds the LEA did not violate any provision of IDEA by holding meetings in the parent’s absence and or at a location that was not agreed to by the parent. Further there was no retaliation.

10. Retaliation claim 10: Stated that the LEA failed to provide social worker services in retaliation.

Hearing Officer finds the evidence does not show the LEA retaliated in this manner. The evidence shows that the parent prolonged the scheduling of IEP meetings by refusing to respond to the LEA’s requests for her available meeting days. The evidence demonstrates that the LEA scheduled an IEP meeting for March 25, 2019, and invited a social worker to attend. Of note, the parent declined to attend this IEP meeting on March 25, 2019, and now complains that the LEA failed to provide those related services.

Furthermore, the Hearing Officer finds the Special Education Specialists correspondence to the parent dated March 26, 2019, was not in retaliation for the parent filing a due process complaint or expressing her intent to do so.

The parent has not met her burden and shown retaliation.

# VI. DECISION AND ORDER

The Hearing Officer has carefully considered all evidence whether specifically mentioned or not. For reasons stated above, the Hearing Officer finds the parent has failed to meet her burden on all issues

# The Hearing Officer finds with respect to the issues the following:

**Issue 1:** Since October 2018, has the LEA violated 34 C.F.R. 300.322(a)(2) and denied parental participation? If so, has the LEA denied the child a free appropriate public education (FAPE)?

The parent has not met her burden.

**Issue 2:** Since October 2018, has the LEA retaliated against the parent for exercising her right to request due process hearings? If so, has the LEA denied the child a FAPE?

The parent failed to meet her burden

The Hearing Officer notes that the two issues set forth above encompasses those questions/issues listed on parent’s due process complaint which were not previously dismissed by the Hearing Officer’s order issued on April 27, 2019.

In regard to this, the LEA has not denied the child a FAPE because it held an IEP meeting on March 25, 2019, in the absence of the parent. Further, the LEA did not require the parent’s consent to hold the meeting. Also, the LEA has not refused to comply with 34 C.F.R. § 300.322. Moreover, the parent failed to provide sufficient information to support the assertion that the parent suffered from anxiety/trauma when she was on school division property. In fact, based on the Hearing Officer’s listening to the entire audio recording of the December 14, 2019 eligibility meeting, she has concerns that the advocate’s/parent’s conduct imposes anxiety and stress on LEA personnel and hampers an environment of collaboration and cooperation.

Further, the Hearing Officer finds that with regard to the issues before her that the requirements of notice to the parents have been satisfied. The Hearing Officer also finds that the school previously determined that Child was one with a disability as defined by applicable law 34 C.F.R. Section 300.8 and that Child was in need of special education and related services. Subsequently, the LEA determined the child was not in need of special education services. However, the parent declined to consent to termination of services. The Hearing Officer also with respect to the issues before her finds that the LEA has provided Child with a FAPE.

Accordingly, the Hearing Officer orders this matter dismissed with prejudice.

# Motion to Compel/Dismiss:

In light of Hearing Officer’s decision finding that the parent has failed to meet her burden, the Hearing Officer need not address the motion to compel the production of documents. Moreover, the LEA made a motion to dismiss the case at the conclusion of parent’s presentation of her evidence. The Hearing Officer proceeded with the case.

# VII. PREVAILING PARTY

The Hearing Officer has the authority to determine the prevailing party on the issues. The LEA has prevailed on the issues.

# VIII. APPEAL INFORMATION

This decision is final and binding, unless either party appeals in a federal district court within 90 calendar days of the date of this decision or in a state circuit court within 180 calendar days of the date of this decision.

ENTERED THIS 18th day of June, 2019

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Ternon Galloway Lee, Hearing Officer

Cc: Parent

Advocate for Mother

Counsel for LEA

Special Education Specialist

VDOE Coordinator

1. No substantive changes have been made to the initial decision issued on June 8, 2019. [↑](#footnote-ref-1)
2. Throughout the decision, the Hearing Officer will use the following abbreviations:

   Transcript - Tr.

   Parents’ Exhibit P Exh.

   Local Educational Agency Exhibit - S Exh.

   Hearing Officer Exhibit - HO Exh.

   [↑](#footnote-ref-2)
3. Information presented to the Hearing Officer indicated this matter was before another hearing officer. [↑](#footnote-ref-3)
4. Parent’s advocate represented she needed three days to produce the documents. The Hearing Officer extended the time to four days. [↑](#footnote-ref-4)
5. In addition to timely filing objections to certain proposed witnesses of the parent, LEA counsel timely filed objections to certain proposed exhibits of the parent. During a third prehearing conference held on May 3, 2019, the Hearing Officer granted each side an opportunity to be heard on the objections. After doing so and careful consideration of the arguments, the hearing officer ruled on each objection. *See* HO Exh. 24 [↑](#footnote-ref-5)
6. Under the Hearing Officer’s amended scheduling, objections to exhibits were due to the extent known, by May 2, 2019. *See*  HO Exh. 5 at 2. The parent made no objections to the school’s exhibits by that date. (Tr. 18). [↑](#footnote-ref-6)
7. The audio recording of the December 14, 2018 eligibility meeting indicates that the NAACP representative appeared by telephone or video conferencing for a segment of the meeting. [↑](#footnote-ref-7)
8. During the eligibility meeting, the parent/advocate requested an independent functional behavior assessment (FBA). (S Exh. 13). [↑](#footnote-ref-8)
9. Moreover, the Hearing Officer finds that any allegation that the notice of any meeting did not contain the location of the meeting, if deemed true, was a harmless error. [↑](#footnote-ref-9)