

[REDACTED]

STUDENT

v.

ST. MARY'S COUNTY

PUBLIC SCHOOLS

* BEFORE STEPHEN W. THIBODEAU,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-STMY-OT-19-07461

* * * * *

**RULING ON ST. MARY'S COUNTY PUBLIC SCHOOLS' MOTION TO DISMISS, OR
IN THE ALTERNATIVE, MOTION FOR SUMMARY DECISION**

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STATEMENT OF THE CASE

On March 11, 2019, [REDACTED] (Parent), on the Student's behalf, filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH). In the Complaint, the Parent alleges that the St. Mary's County Public Schools (SMCPS) has violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415(f)(1)(A) (2018),¹ by denying the Student a free appropriate public education (FAPE) by failing to properly test and evaluate the Student, failing to properly place the Student in an appropriate program by falsifying the Student's progress, and illegally sharing the Student's records without the Parent's consent, all of which occurred in 2016 and 2017. The Student subsequently left the jurisdiction of the SMCPS and enrolled in the [REDACTED] County Public Schools ([REDACTED] CPS). The Parent's requested remedy is monetary compensation for the difference of cost-of-living from St. Mary's

¹ U.S.C.A. is an abbreviation for United States Code Annotated.

County to [REDACTED] County; tutoring costs for Student; and unspecified costs related to “pain and suffering” and “family/child counseling costs.”

On April 18, 2019, I conducted a telephone pre-hearing conference and subsequently issued a Pre-Hearing Report and Order on April 24, 2019. Prior to the telephone pre-hearing conference, the SMCPS filed a Motion to Dismiss the Complaint, or in the Alternative, for Summary Decision (Motion) on April 9, 2019. During the pre-hearing conference, the Parent was informed that she would have until April 24, 2019 to file her response to the Motion (Response), and I set the date for my ruling on the Motion, pending the Parent’s Response, if any, for no later than May 17, 2019. The Parent timely filed the Response along with several exhibits. The SMCPS filed a reply memorandum (Reply) to the Response on April 26, 2019.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov’t §§ 10-201 through 10-226 (2014 & Supp. 2018); Code of Maryland Regulations (COMAR) 13A.05.01.15C; COMAR 28.02.01.

ISSUE

Should the Motion filed by the SMCPS be granted?

EXHIBITS

The SMCPS attached the following exhibits to its Motion:

- SMCPS Ex. #1 Affidavit of [REDACTED] dated April 8, 2019
- SMCPS Ex. #2 Affidavit of [REDACTED] dated April 8, 2019

The Parent attached many documents to the Response. I have marked them collectively as Student Exhibit 1, and the exhibit includes the following documents:

- SMCPS Student Record Release Form for the Student, undated

- Student's Individualized Education Program (IEP) Team Meeting Sign-in Sheet, dated May 16, 2017
- Student's IEP Team Meeting Sign-in Sheet, dated January 15, 2016
- Student's IEP Team Meeting Sign-in Sheet, dated May 26, 2015
- Student's Record of Transfer of Pupil Records, dated June 22, 2017
- Student's SMCPS 2016 Kindergarten Progress Report, effective date of January 21, 2016
- [REDACTED] CPS Authorization for Release of Confidential Information, February 27, 2018
- SMCPS Assessment Report for the Student, June 12, 2017
- E-mail string between the Parent and the SMCPS, subject line "Re: Summer Camps," April 22, 24 and 25, 2017
- E-mail string between the Parent and the SMCPS, subject line "Re: IEP Meeting," May 12 and 13, 2017
- Handwritten note from "Mrs. [REDACTED]" to the Parent, June 2, 2017
- Assessment Data for the Student, May 2017
- SMCPS Student Record Release for the Student, October 14, 2015
- Letter from [REDACTED] Attorney, to the Civil Court Clerk for the District Court of Maryland for St. Mary's County, February 1, 2016
- Motion filed in the District Court of Maryland for St. Mary's County by the Parent in the case of [REDACTED] *as Mother and Next Friend to [REDACTED] a minor v. [REDACTED] et al.*, District Court Case Number [REDACTED] June 8, 2015
- Request to Shield Information in a Case Record filed in the in the District Court of Maryland for St. Mary's County by the Parent in the case of [REDACTED] *as Mother and Next Friend to [REDACTED] a minor v. [REDACTED] et al.*, District Court Case Number [REDACTED] February 1, 2016
- [REDACTED] CPS Functional Behavioral Assessment Summary Report for the Student, February 2, 2018
- [REDACTED] CPS Behavioral Intervention Plan for the Student, February 12, 2018
- Letter "To whom it may concern" from [REDACTED] undated
- Unidentified Child Protective Services² Detailed Contact Report, November 5, 2015
- Grade 3 Report Card for the Student from the [REDACTED] CPS for 2018-2019
- Letter from [REDACTED] of [REDACTED] Elementary School addressed to "ESY Families," July 9, 2018
- E-mail string between the Parent and the SMCPS, subject line "Re: Evaluation Form," May 11 and 12, 2017
- Grade 2 Report Card for the Student from the [REDACTED] CPS for 2017-2018

² The Contact Report is redacted, and it is unclear what department or jurisdiction this Child Protective Services report is from.

UNDISPUTED MATERIAL FACTS

1. The Student is nine years old and diagnosed with autism.
2. From March 12, 2017 through June or July 2017, the Student was enrolled with the SMCPSS receiving special education and related services through the school district.
3. In May 2017, the Parent was provided the Student's first grade assessment data in language arts, reading, writing, and math. Several of the Student's scores showed him at or above "mastery" level in many subjects.
4. In April 2017, the Parent requested an Educational Assessment from the SMCPSS.
5. As a result, on May 16, 2017, an Individualized Education Program (IEP) team meeting was convened for the reevaluation and reassessment of the Student. The Parent was present at the meeting.
6. As a result of the IEP team meeting, the SMCPSS, through the IEP team, recommended a full battery of tests for the Student, including reading, math, written language, receptive/expressive language, pragmatics, intellectual/cognitive functioning, emotional/social behavioral development, autism, attention deficit hyperactivity disorder (ADHD), functional behavior, and sensory.
7. Initially, the Parent did not consent to any of the proposed assessments from the IEP team. However, on May 25, 2017, the Parent consented to all of the recommended assessments from the IEP team except for assessments in autism and ADHD.

8. On June 12, 2017, the IEP team produced an Assessment Report which showed the Student's scores pursuant to the Woodcock Johnson IV (WJ-IV) achievement tests in reading, math, and written language. The WJ-IV data showed the Student's scores to be low average, low, or very low in all subjects.
9. The SMCPS filed a due process complaint on June 22, 2017 to obtain authorization for the Student's proposed autism and ADHD assessments.
10. Sometime in June or July of 2017, the Student moved from St. Mary's County to ██████████ County and enrolled in the ██████ CPS.
11. The SMCPS did not become aware of the Student's enrollment in the ██████ CPS until early July 2017. At that time, the SMCPS withdrew its due process complaint to obtain authorization for the autism and ADHD assessments for the Student.
12. On or about August 2, 2017, the ██████ CPS contacted the SMCPS to obtain the Student's academic records. The SMCPS shared the Student's academic records with the ██████ CPS at that time.

DISCUSSION

The identification, assessment, and placement of students in special education is governed by the IDEA. 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Md. Code Ann., Educ. §§ 8-401 through 8-417 (2018 & Supp. 2018); and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a FAPE, which "emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living" 20 U.S.C.A. § 1400(d)(1)(A).

During the telephone pre-hearing conference, the following issues were identified as pursuant to the Parent's due process complaint for hearing, and were outlined in the Pre-Hearing Report and Order issued on April 24, 2019:

1. Whether the SMCPs improperly or illegally shared the Student's records without the Parent's consent, and as a result, whether that action constituted a denial of a FAPE for the Student;
2. Whether the SMCPs denied the Student a FAPE by failing to properly test or evaluate the Student;
3. Whether the SMCPs denied the Student a FAPE by falsifying the Student's progress, and;
4. Whether the Student is entitled to monetary damages as a result of the SMCPs' alleged conduct.

On April 9, 2019, the SMCPs filed the Motion with the OAH and argued the following grounds for dismissal and/or summary decision:

1. The Parent did not sufficiently allege that SMCPs failed to properly identify, evaluate, place, or provide a FAPE to the Student;
2. The relief sought by the Parent is properly characterized as monetary or compensatory damages, which is not recoverable under IDEA;
3. To the extent that some portion of the relief requested by the Parent is based upon any action or inaction by SMCPs is deemed to be one for compensatory education services, the Complaint should be dismissed, or summary decision be granted in SMCPs' favor because the Parent obstructed SMCPs' efforts to conduct and present the results of the Student's reevaluation, and because the

Parent made clear that she is seeking financial settlement, not compensatory services, and;

4. Any surviving claims must be based upon the actions or inactions by SMCPS that occurred during a very limited time period that remains actionable under IDEA.

In the Response, the Parent did not directly address the legal arguments made by the SMCPS in the Motion. Instead, the Parent made several other allegations in the Response regarding the SMCPS' treatment of the Student and the Parent, which included the following:

- There was a breakdown in communications between herself and the SMCPS;
- The Student, at an unspecified time, was moved to the back of classroom and removed from the classroom without academic instruction for more than half a day;
- The Student, at an unspecified time, was often left in the care of a person who was not a special needs educator and did not have a teaching license;
- The SMCPS "retaliated" against the Student and his family by filing a Department of Social Services complaint;
- The Parent was removed by security from the Student's school when the Parent arrived at the school to get forms for the Student's evaluation;
- In 2016, the SMCPS indicated that the Student was proficient for his level in writing, math, and reading, but the Parent had the Student independently evaluated which showed "inconsistencies" with the evaluations made by the SMCPS;
- In 2017, the SMCPS provided assessment data for the Student that showed the Student was at a "mastery level" for math and writing, but then subsequently changed that assessment when the family moved and reenrolled in CPS;
- Later in 2017, an evaluation by the CPS showed the Student to be a year behind in reading and math;
- Between 2015 and 2017, the SMCPS put unidentified "defamation remarks" in the Student's folder, including accusations of abuse, neglect, and erratic behavior against the Student's family, and;
- The SMCPS reached out to the CPS without the Parent's written or verbal consent in violation of the Health Insurance Portability and Accountability Act (HIPAA).

In addition, the Parent confirmed she is trying to recover monetary damages from the SMCPS for "pain and suffering" for having to move out of St. Mary's County and enrolling the

Student in the [redacted] CPS. No other remedy is proposed in the Response; however, the Complaint lists the following proposed remedies sought by the Parent:

“School pays cost of living difference for relocating to an area that tests and provided services according to the law. Cost of living difference \$500 per month for 11 years (\$66,000) plus tutoring to catch student up (\$20,000). \$86,000 subtotal. Pain and suffering cost in addition for family/child and counseling costs.”

Standards for Motion to Dismiss and Summary Decision

The OAH’s Rules of Procedure provide for consideration of a motion to dismiss under COMAR 28.02.01.12C and a motion for summary decision under COMAR 28.02.01.12D.

Those regulations provide as follows:

C. Motion to Dismiss. Upon motion, the judge may issue a proposed or final decision dismissing an initial pleading which fails to state a claim for which relief may be granted.

D. Motion for Summary Decision.

(1) Any party may file a motion for summary decision on all or part of an action, at any time, on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. Motions for summary decision shall be supported by affidavit.

(2) An affidavit supporting or opposing a motion for summary decision shall be made upon personal knowledge, shall set forth the facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated in the affidavit.

(3) The judge may issue a proposed or final decision in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

In contrast to a motion to dismiss, where an administrative law judge (ALJ) may only consider the “initial pleading”³ when ruling on a motion for summary decision, an ALJ may also consider admissions, exhibits, affidavits, and sworn testimony for the purpose of determining

³ An initial pleading is defined by COMAR 28.02.01.02B(7) as “a notice of agency action, an appeal of an agency action, or any other request for a hearing by a person.”

whether a hearing on the merits is necessary. *See Davis v. DiPino*, 337 Md. 642, 648-50 (1995) (comparison of motions to dismiss and for summary judgment), *vacated in part on other grounds*, 354 Md. 18 (1999).

When a motion to dismiss goes beyond the initial pleading, relying as it does in this case on other documents, then the motion may properly be treated as a motion for summary judgment or for summary decision. *See* Md. Rule 2-322(c); *Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 93 Md. App. 772, 782-83 (1992), *cert. denied*, 330 Md. 319 (1993). As I have taken into consideration information beyond the initial pleading, I will treat the Motion as a motion for summary decision.

An ALJ ruling upon a motion for summary judgment, or summary decision, is concerned with whether a dispute of material fact exists and whether the moving party is entitled to judgment strictly as a matter of law.⁴ *Tri-Towns Shopping Ctr., Inc. v. First Fed. Sav. Bank of W. Md.*, 114 Md. App. 63, 66 (1997). Maryland courts have provided the following guidance about what constitutes a “material fact,” about the method of proving such facts, and about how a judge ruling upon such a motion should weigh the information presented:

“A material fact is a fact the resolution of which will somehow affect the outcome of the case.” A dispute as to a fact “relating to grounds upon which the decision is not rested is not a dispute with respect to a *material* fact and such dispute does not prevent the entry of summary judgment.” We have further opined that in order for there to be disputed facts sufficient to render summary judgment inappropriate “there must be evidence on which a jury could find for the [non-moving party].”

The trial court, in accordance with Maryland Rule 2-501(e), shall render summary judgment forthwith if the motion and response show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. The purpose of the summary judgment procedure is not to try the case or decide factual disputes, but to decide whether there is an issue of fact that is sufficiently

⁴ There is no substantive difference between a motion for summary judgment and one for summary decision. *Compare* Md. Rule 2-501, *with* COMAR 28.02.01.12D.

material to be tried. Thus, once the moving party has provided the court with sufficient grounds for summary judgment, it is . . . incumbent upon the other party to demonstrate that there is indeed a genuine dispute as to a material fact.

Id. at 65-66 (citations omitted) (emphasis in original).

As the moving party, the SMCPS bears the burden to demonstrate both the absence of genuine disputes of fact and that it is entitled to judgment as a matter of law. *See Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005); *Comm'r of Labor & Indus. v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996).

Analysis

1. Statute of Limitations Under IDEA

I must first address the statute of limitations in this case. IDEA provides that the Parent must request a due process hearing within two years of when the Parent knew or should have known about the alleged actions that form the basis of the Complaint. See 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.507(a)(2). The Parent has provided a variety of actions that she alleges occurred sometime between 2015 and 2017; however, she filed the Complaint on March 11, 2019. As such, only alleged actions by the SMCPS that occurred after March 11, 2017 may form the basis of the Complaint.

2. Whether the Student was denied a FAPE by the SMCPS

The SMCPS argues that the first ground for dismissal and/or summary decision is that the Parent has not sufficiently alleged that SMCPS failed to properly identify, evaluate, place, or provide a FAPE to the Student. A “free appropriate public education” or FAPE, as defined in IDEA, are special education and related services that are provided at public expense that meet the standards of a state educational agency, including elementary school education, that is provided to a given student in conformity with an IEP. 20 U.S.C.A. §1401(9); COMAR 13A.05.01.03B(27).

IDEA contemplates that the goal of a FAPE is to fully integrate a child into a classroom setting, meaning a level of instruction “reasonably calculated to permit advancement through the general curriculum.” *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1*, 137 S.Ct. 988, 1000 (2017). As such, in order to provide a FAPE, a school district does not need to provide a child with “disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society” in a way that is “substantially equal to the opportunities afforded children without disabilities.” *Id.* at 1001.

Again, the issues identified for hearing as a result of the pre-hearing conference are whether the Student was denied a FAPE through the alleged improper and illegal sharing of the Student’s records by the SMCPS, through the alleged failure to properly test and evaluate the Student, and through the alleged falsification of the Student’s progress. I will address each issue below.

a. Alleged denial of FAPE due to improper or illegal sharing of the Student’s records

The Parent alleges that sometime in 2017, the SMCPS improperly or illegally shared the Student’s records without her consent with the █████ CPS. It is undisputed that the SMCPS, per a request from the █████ CPS after the student enrolled in the █████ CPS, shared the Student’s academic records with the █████ CPS on or about August 2, 2017 (SMCPS Ex. 1, paragraph 7). This did not constitute a denial of FAPE to the Student.

First, it is undisputed that the Student was no longer enrolled with the SMCPS at the time his records were shared with the █████ CPS on August 2, 2017. Logically, the SMCPS could not deny a FAPE through the sharing of records with another school district if the student was no longer enrolled with the SMCPS.

Second, as the Parent has argued in the Response, she feels that the alleged sharing of records is a violation of the Health Insurance Portability and Accountability Act, also known as HIPAA. HIPAA does provide for certain penalties for the wrongful disclosure of identifiable health information. 42 U.S.C.A. § 1320d-6. However, the issue before me is whether the SCMPS denied the Student a FAPE under IDEA. In due process hearings such as these under IDEA, I have no authority to determine whether another provision of federal law, such as HIPAA, was violated. Such a claim is improper in this context, and for that and the other reasons cited above, I find there is no dispute to any material fact that the SMCPSS did not deny the Student a FAPE when it shared his educational records with the ██████ CPS on August 2, 2017.

b. Alleged improper testing and evaluation of the Student

For the relevant time period that forms the basis of the Complaint, it is undisputed the Student was enrolled in the SMCPSS. It is also undisputed that the Student was identified with autism and was receiving special education and related services from the SMCPSS. It is further undisputed that the Parent, in April of 2017, requested an Education Assessment for the Student, and as a result, an IEP team meeting was convened by the SMCPSS with the Parent present on May 16, 2017.

As a result of that meeting, the SMCPSS recommended a full battery of assessments for the Student, including reading, math, written language, receptive/expressive language, pragmatics, intellectual/cognitive functioning, emotional/social behavioral development, autism, ADHD, functional behavior, and sensory. The Parent did not initially consent to the testing, but on May 25, 2017, agreed to all testing except the autism and ADHD assessments. The Parent did not request any further testing or alternative assessments that were not otherwise recommended by the SMCPSS. In fact, because the SMCPSS disagreed with the Parent's failure to consent with

the autism and ADHD assessments, the SMCPS filed a due process complaint of its own pursuant to IDEA on June 22, 2017 to obtain authorization to complete the assessments.

Again, the Parent does not dispute any of these facts in the Response. The only reference to any improper testing or evaluation comes in the Complaint, which reads simply: “St. Mary’s County refused to test/evals or address educational concerns parents had and insisted student was ‘on track.’” Given the full battery of tests recommended by the SMCPS, it is unclear what, if any, other tests or evaluations the Parent was seeking at the time of the IEP team meeting in May 2017. The Parent has not proffered a single test or evaluation that she requested that was denied and, therefore, denied the Student a FAPE.

Because there is no dispute to any material fact that the SMCPS did not deny a requested test or evaluation from the Parent, and because the undisputed facts actually show that the SMCPS recommended a full battery of tests for the Student in May 2017, some of which the Parent did not allow, I find that the SMCPS did not deny the Student a FAPE for failure to test or evaluate the Student.

c. Alleged falsification of the Student’s progress by the SMCPS

In the Response, the Parent provided documents showing two sets of progress reports for the Student she claims show inconsistencies and demonstrate that the SMCPS falsified the Student’s progress.⁵ Those documents include the Student’s Assessment Data from the SMCPS from May, 2017, which includes several scores in various subject matter areas including language arts, reading, writing, and math, and the Student’s June 12, 2017 Assessment Report

⁵ In its Reply, the SMCPS argues that I should not consider the Parent’s exhibits because they were not accompanied by an affidavit and therefore violate OAH Rules related to responses to Motions for Summary Decision. This is an incorrect statement of the rule. OAH Rules merely require the party responding to a Motion for Summary Decision to “identify the material facts that are disputed,” and there is no *requirement* the responding party submit an affidavit in response to the motion. COMAR 28.02.01.12D(2). As such, I will consider the documents the Parent has submitted in the Response.

following the Student's May 2017 IEP team meeting, which shows scores pursuant to the WJ-IV achievement tests in reading, math, and written language. The Parent argues that while the May 2017 assessment data showed the Student received several scores above a "mastery" level in several subjects in May 2017, the WJ-IV scores in subjects showed scores of low average, low, or very low.

In the Reply, the SMCPS argue that the Parent does not have the expertise to interpret the alleged inconsistent results of the progress reports, and that she did not fully cooperate with the IEP team to fully address any issues related to the progress reports prior to enrolling the Student in the █████ CPS.

On the surface, it appears the positions of the Parent and the SMCPS create a disputed fact with regards to the Student's progress reports, namely whether those reports show inconsistencies and whether any alleged inconsistencies constitute a falsification of the Student's progress. However, the issue for hearing is whether the Student was *denied a FAPE* when the SMCPS allegedly falsified the Student's progress. On that issue, the Parent has failed to raise a *material* fact in dispute, or "an issue of fact that is sufficiently material" to be decided at a hearing. *Tri-Towns Shopping Ctr., Inc. v. First Fed. Sav. Bank of W. Md.*, 114 Md. App. 63, 65-6 (1997).

At a due process hearing under IDEA, I am tasked with finding whether "on substantive grounds" the Student was denied a FAPE. 20 U.S.C. § 1415(f)(3)(E)(i). In matters alleging procedural violations, I may find the Student did not receive a FAPE if a procedural right was violated and that the violation "significantly impeded" the Parent's "opportunity to participate in the decision-making process" regarding a provision of the Student's FAPE. *Id.* at § 1415(f)(3)(E)(ii)(II).

To that end:

[A]n ALJ must answer each of the following in the affirmative to find that a procedural violation of the parental rights provisions of the IDEA constitutes a violation of the IDEA: (1) whether the plaintiffs “alleg[ed] a procedural violation,” (2) whether that violation “significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents’ child,” and (3) whether the child “did not receive a [FAPE]” as a result.

R.F. v. Cecil County Public Schools, 919 F.3d 237, 248 (4th Cir. 2019), *citing* 20 U.S.C. § 1415(f)(3)(E).

In the light most favorable to the Parent, I will find that she has alleged a procedural violation of the IDEA by alleging the SMCPS had falsified the Student’s progress, shown through inconsistent progress reports in May and June of 2017. However, I will also find that this alleged violation did not significantly impede the Parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the Student, and necessarily find the Parent’s alleged procedural violation regarding the Student’s progress reports did not deny the Student a FAPE.

The recent case of *R.F. v. Cecil County Public Schools*, 919 F.3d 237 (4th Cir. 2019), is instructive. In that case, the parents alleged that the school district denied the student a FAPE by changing the student’s placement without the parents’ involvement and destroyed the student’s raw data relating to the student’s progress. *Id.* at 249. The Court found these procedural violations did not significantly impede the parents’ opportunity to participate in the decision-making process regarding the student’s education because the change in placement without the parent’s input or consent provided more special education services, not fewer, and because the parents did have an opportunity to participate in an IEP team meeting several months later. *Id.* Moreover, because the

parents could review summaries of the student's data despite the raw data being destroyed, they were not significantly impeded in their decision making process with respect to the student. *Id.* at 249-50.

Here, the Parent's bare allegation that the SMCPS falsified the Student's progress provides less basis for a procedural violation than the parents in *R.F.*, in particular because the Parent has not demonstrated that there was actual falsification of the Student's progress. Instead, she has simply offered two seemingly conflicting progress reports a month apart in 2017. But more importantly, this alleged violation in no way significantly impeded the Parent's decision-making process regarding the Student's education based on the undisputed facts.

The Parent relies primarily on the June 12, 2017 assessment of the Student showing lower progress scores than data from May 2017. The Parent fails to note that the June 12, 2017 assessment was as a result of the Student's IEP team meeting on May 16, 2017, a meeting where the Parent was present and participated. Moreover, the May 16, 2017 IEP team meeting was the same meeting the SMCPS recommended a full battery of tests for the Student – or put another way, recommended providing *more* special education services to the Student, like the student in the *R.F.* case. The June 12, 2017 results that showed lower scores for the Student were not being used to deny the Student a FAPE. To the contrary, it appears to be used by the SMCPS to offer more services or enhance the Student's FAPE.

In any event, it cannot be said the varying progress reports and scores in and of themselves significantly impeded the Parent from the decision-making process regarding the Student's FAPE. Rather, the undisputed facts demonstrate, for the relevant time period of the Complaint, that the Parent participated in the May 16, 2017 IEP meeting; that the Parent

disagreed with the recommended testing for the Student by the SMCPS, but ultimately consented to all but two assessment tests (autism and ADHD); and based partially from the May 2017 IEP meeting and partially from the June 12, 2017 assessment, that the SMCPS sought to continue the Student's testing in order to more fully develop an IEP for him, but were not afforded the opportunity to do so, despite attempts to contact the Parent multiple times. After the end of the 2016-2017 school year, the Parent subsequently enrolled the Student in [REDACTED] CPS and SMCPS no longer had an opportunity to offer the Student a FAPE.

Therefore, I find that there is no genuine dispute of material fact that the alleged inconsistencies regarding the Student's progress reports from May and June 2017 did not deny him a FAPE from the SMCPS. This is because the alleged inconsistent or "falsified" reports regarding the Student's progress did not substantially impede the Parent from the decision-making surrounding the Student's FAPE in May and June 2017, as she was an active participant in the Student's IEP meeting and decision-making regarding the SMCPS' recommended assessments and tests.

d. Other collateral issues raised by the Parent in the Response

In the Response, the Parent raised several other issues that were not previously addressed in either the Complaint or during the telephone pre-hearing conference. As noted above, they include: a communications breakdown between the Parent and the SMCPS; incidents involving the Student at an unspecified time where the Student was moved within a classroom, not given instruction for half a day, and/or not provided a special needs educator; retaliation against the Student's family through a filing of a Department of Social Services complaint; a time when the Parent was escorted from the Student's school office by security; and the placement of unspecified "defamation remarks" against the Student's family in the Student's academic file.

I have not considered these collateral issues raised by the Parent in the Response for several reasons. First, none of these issues were raised in her Complaint. *See* COMAR 13A.05.01.15A(6) (decisions issued pursuant to a due process complaint under IDEA must address the allegations raised in the complaint itself). The sum total of her Complaint as it relates to the problems the Student and the Parent encountered reads as follows:

“Last 2 years, St. Mary’s County School shared student files/records without consent from parents of student. St. Mary’s County refused to test/evals or address education concerns parents had and insisted student was ‘on track.’ Falsified grades and progress.”

Based on the Complaint, at the telephone pre-hearing conference, I asked the Parent whether there were any other issues outside of the Complaint that needed to be addressed at the hearing. None were provided. Therefore, the issues as outlined in the Pre-hearing Report and Order were the only issues to be considered at the hearing, and none of those issues involved the collateral issues raised by the Parent in the Response.

Second, even if I were to consider the collateral issues raised by the Parent, it is unclear from the Response what, if any, of those issues fall within the time period prescribed by IDEA’s statute of limitations, namely actions after March 12, 2017. Because the Parent did not specify the time period of some of the collateral issues raised in the Response, I cannot find those issues are properly before me for the purposes of her Complaint.

Finally, the Parent does not argue that any of the collateral issues raised substantively denied the Student a FAPE. Instead, they read as a list of grievances the Parent had with the SMCPS during the time the Student was enrolled. As such, they do not rise to the level of creating a material fact that is in dispute with respect to the issue I must decide at a hearing, namely whether the SMCPS’ conduct worked to deny the Student a FAPE.

3. Whether the Student is entitled to monetary damages as a result of the SMCPSS' alleged conduct

Having found that the Student was not denied a FAPE by the SMCPSS, the issue of the Parent's proposed remedy is moot. However, because the SMCPSS raised the issue in its Motion, I will address it for the sake of completeness. In sum, even if the Student's claim survived the Motion on the issue of whether he was denied a FAPE, the Parent's proposed remedy would be fatal to her Complaint.

It is undisputed that the Parent is seeking monetary damages for the alleged conduct by the SMCPSS. Her Complaint outlines money sought for a cost of living difference between St. Mary's County and ██████████ County, where she and the Student currently live, as well as unspecified damages for pain and suffering. The Response reiterates that she is seeking damages for pain and suffering. Simply stated, in a hearing alleging violations of IDEA, monetary damages are not available. The available remedy is compensatory education.

"Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student." *G ex rel. RG v. Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003). Compensatory education is an equitable remedy. Courts have long held that compensatory or punitive monetary damages are not available to an aggrieved party under IDEA. *See, e.g., Sellers by Sellers v. School Bd. Of City of Manassas, Va.*, 141 F.3d 524, 526-28 (4th Cir. 1998).

Therefore, the Parent's requested remedy for a cost of living adjustment and damages for pain and suffering is not a remedy I would be able to award in a hearing on the merits of the Parent's Complaint. The only possible remedy that was pled in the Parent's Complaint that could

be classified as compensatory education is the request for \$20,000.00 for tutoring to catch-up the Student. However, this remedy is also unavailable in this case for several reasons.

First, it is well settled that reimbursement for educational expenses such as private school tuition is a form of compensatory education that can be awarded under IDEA for a school district's denial of a FAPE. *Id.* at 526. In this case, however, it is undisputed that the Student did not enroll in a private school once leaving the jurisdiction of the SMCPS. Instead, the Student enrolled in another public school with the █████ CPS. The Parent, therefore, is unable to prove any reimbursable amount of tuition for a private school.

Second, while the remedy of the cost of tutoring was raised in the Complaint, the Response to the Motion does not address any costs spent for tutoring the Student. It is unclear from the Response whether a private tutor has actually been hired, or whether one will be hired and for what purpose. It is similarly unclear, therefore, whether the Parent would be able to prove the cost of compensatory education at a hearing on the merits.

Finally, in order for the Parent to prevail in a claim for compensatory education under IDEA, the Parent must meet the requirements of the "Burlington-Carter test" as outlined in the cases of *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985) and *Florence Cty. Sch. Dist. Four v. Carter by & Through Carter*, 510 U.S. 7 (1993). The first prong of the test requires that there was a failure to provide a FAPE to a student in order to be eligible for compensatory education. See *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 320 (4th Cir. 2004); *M.S. ex rel. Simchick v. Fairfax County School Bd.*, 553 F.3d 315, 323-24 (4th Cir. 2009). Because I have found the Student was not denied a FAPE, the Parent cannot meet the first prong of the test to be eligible for compensatory education, and therefore the Student would not be eligible for any reimbursement for any alleged tutoring costs as pled in the Complaint.

Because there is no effective remedy I could grant the Parent in a hearing on the merits in this case, even if the Parent had adequately demonstrated material facts were in dispute on the question of whether the Student was denied a FAPE by the SMCPS, the case would be moot. *See In re Kaela C.*, 394 Md. 432, 452 (2006) (a case is moot “when there is no longer any existing controversy between the parties at the time that the case is before the court, or when the court can no longer fashion an effective remedy.”).

4. Other grounds for summary decision raised by the Motion

The SMCPS raised other issues in its Motion that I need not consider at this time, because the SMCPS addressed issues related to any claims that might have survived the Motion. Because I have found there is no genuine dispute to any material fact, and that the Parent has not demonstrated a denial of a FAPE to the Student, and in any event, would not have a remedy available at a hearing on the merits, no claims survive from the Complaint. Therefore, there is no need to address the SMCPS’ remaining arguments in the Motion.

CONCLUSION OF LAW

The SMCPS’ Motion for Summary Decision is granted because there are no genuine disputes of material fact that the Student was not denied a FAPE by the SMCPS anytime after March 11, 2017. COMAR 28.02.01.12D; 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Md. Code Ann., Educ. §§ 8-401 through 8-417; COMAR 13A.05.01.

ORDER

I **ORDER** that the Motion for Summary Decision filed by the St. Mary’s County Public Schools is **GRANTED**.

I further **ORDER** the Parent's due process complaint in OAH Case Number MSDE-STMY-OT-19-07461 is **DISMISSED**, and no further proceedings in this matter will be held.

May 16, 2019
Date Ruling Issued

Signature Appears on Original

Stephen W. Thibodeau
Administrative Law Judge

SWT/dlm
#179746

REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or to the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (2018). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

The Office of Administrative Hearings is not a party to any review process.

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