

**Individuals with Disabilities in Education Improvement Act
Before the Local Hearing Officer**

MW & SW on behalf of CW	)	
	)	
	)	
Parents/Petitioners,	)	
	)	
vs.	)	FINAL ORDER
	)	
Charleston County School	)	
District,	)	
	)	
District/Respondent.	)	

I. Introduction - Summary

In their Complaint, the Parents challenge the services provided by District as to reading, writing, and math for the 2018-19 school year, the 2019-20 school year, and the services provided after the 2019-20 school year before the 2020-21 school year.

For the reasons set forth below, the Parents have met their burden of proof only as to reading for part of the 2018-19 school year. The Parents have not, however, met their burden of proving that there exists a remedy. Because there are no facts or testimony in the Record that could lead to a finding that any particular service would put ("Student") where he would have been if the violation had not occurred, the Parents' request for compensatory education is denied.

II. Background

A. Procedural

The District received MW and SW's ("Parents") due process complaint ("Complaint") on February 25, 2021. The District timely responded on March 5, 2021. The Complaint raised issues with respect to three school years: (1) 2018-19; (2) 2019-20; and (3) 2020-21. On March 31, 2021, Parents dismissed, without prejudice, claims related to the 2020-21 school year. At the hearing, it was clarified that Parents challenge decisions that also relate to a period following the 2019-20 school year.

The public hearing commenced on April 19, 2021, and continued through April 21, 2021. The hearing reconvened virtually on April 26, 2021, at which point both sides rested. The Undersigned convened a conference call of counsel, which set the deadline for post-hearing briefs. Additional argument was requested regarding ESY after the 2019-20 school year. The District and Parents provided additional written argument on May 19, 2021.

B. Factual

1. Background on Student

The Student has been identified at various times as having autism, and he also has been diagnosed also with dyslexia, dyscalculia, dysgraphia, ADHD, and anxiety. By all accounts, this creates a complex picture with several moving parts, and the timeline of those identifications also has impacted the decisions made.

2. 2017-18: First grade at Trident Academy

For the 2017-18 school year, the Student attended Trident Academy as a first grader. Trident Academy is a private school that specializes in teaching children with learning disabilities. Unfortunately, things did not go as well for the Student as everyone had hoped. The Student's attendant behaviors significantly interfered with his ability to receive instruction.¹

3. 2018-19: Second grade at Belle Hall

In the spring of 2018, District personnel met with Trident Academy to prepare a transitional IEP. Because of the behavioral issues at Trident Academy, the District and Parents agreed the Student would attend Belle Hall Elementary School ("Belle Hall") for second grade, rather than the school for which Student was zoned.

At that time, the most comprehensive evaluation of the Student was the independent evaluation performed approximately one year earlier. That evaluation lists five conditions under Diagnostic Impression: attention deficit hyperactivity disorder (ADHD), generalized anxiety disorder, separation anxiety disorder, specific learning disorder with impairment in reading, and specific learning disorder with impairment in written expression. There is an additional entry "R/O Autism Spectrum Disorder," which indicates

1

The District suggests perhaps that Trident's use of the Wilson Reading System may have been a cause of the behavioral issues. [District Closing Argument at 10]. The District goes so far to claim that it "exacerbated" his behaviors. [*Id.* at 11]. The Undersigned disagrees, as there is no competent evidence to support this notion. Further, it is not clear why, in 2019, the District would agree to use the very system it now contends caused harm.

the independent evaluator ruled out that diagnosis. In his comments he noted the “[b]orderline significant scale elevations were noted for Autistic Disorder and Asperger’s Disorder.” [Id.] The independent evaluator also noted the Student’s “profile reflects mild dyslexia and dysgraphia.” [Id.] He further stated the Student’s “profile reflects well developed math calculation skills.” [Id.]

Finally, some other symptoms and issues are of clinical significance. [Student] is a boy who seems to demonstrate a very low frustration tolerance level. He is quite easily agitated. Sensory issues were described. He struggles with [his social and interpersonal skills. Some other developmental delays appear possible. In particular, I believe that will be important to rule out an Autism Spectrum Disorder.

[Id.]

The Student's school has a behavioral classroom (“BSP”) that the Parents and the District believed was appropriate given the issues at Trident Academy. The Student spent all day in the BSP classroom. By all accounts, the Student made remarkable strides in eliminating the behavioral barriers to learning.

The IEP Team met at the beginning of August 2018 to review the results of evaluations and to create a new IEP.

a. Reading

According to testimony, the Student's school used the Reading Mastery program. Belle Hall used the Reading Mastery program out of a belief the Student was not “engaged” when the Wilson method was used at Trident. One of the Student's teacher's acknowledged that Reading Mastery was not geared toward multi-sensory teaching, so she tried to incorporate multi-sensory components on her

own.² The Student's former reading teacher at Belle Hall acknowledged Reading Mastery is not recognized by the International Dyslexia Association.

O'Donald testified that they did not switch the Student to a Wilson-trained teacher because he was improving. Under the goals initially set for the Student there was evidence of progress. The Student's initial IEP goal was to correctly read forty-six grade level 1 words by Fall of 2019. The Student was at 17 words when given a first-grade passage. The District characterized this as a "great start." In terms of letter-sound correspondence, the Student did make progress as of the September progress report. [*Id.*] The IEP further noted the Student's effort but struggles and shortcomings in performing tasks related to his goals. [*Id.* at 1913].

The IEP Team met again and set a new goal in a September 2018 IEP: "By September 2019, when presented with a grade 2 reading passage and given one minute, [Student] will read 59 correct words" That goal not only represented an increase of thirteen correct words, but also changed the grade level of the word list used from first grade to second grade.

The IEP Team discussed what would occur if the Student did not make progress with the Reading Mastery program:

Reading curriculums were discussed as [Student] is currently being instructed using the Reading Mastery program. Parent and team have discussed using Wilson Reading Systems, and while the option does exist

² There is no data, however, on how the incorporation of multi-sensory techniques impacted the Student's progress.

for this program to be used as the primary instruction, the district team, to include the parents, determined continuing with Reading Mastery was appropriate at this time as [Student] is making progress. Should [Student] stall in progress, as indicated by multiple consecutive data points using current reading program system, the team will re-visit the curriculum needs.

[Parent Exh. 2 at 1922 (emphasis added)]. The IEP Team was a little more committed later in the IEP when it stated: “The team will add time using the Wilson program if multiple consecutive data points indicate progress is stalling in the Reading Mastery Program.” [*Id.* at 1928 (emphasis added)].

The District created progress reports for the September reading goal on October 29, 2018; November 27, 2018; January 22, 2019; February 20, 2019; April 3, 2019 and May 2, 2019. The “multiple consecutive data points” appeared very quickly. Measured against the IEP Team’s own goals, the Student stalled and never really accelerated. Starting at 17 wpm in September, the Student regressed throughout the remainder of the calendar year to 13 and 16 words.³

The four-word regression to thirteen words was characterized as “minimal progress” and the subsequent level of sixteen words (a one-word regression over two months) was characterized nonetheless as “satisfactory progress.” [*Id.*]

In April 2019, the IEP Team increased the number of minutes on reading for the beginning of the next year by 25% (from 200 to 250).⁴

³ 10/29 – 13 wpm; 11/27 – 16 wpm; 1/22 – 20 wpm; 2/20 – no data; 4/3 – 17 wpm; 5/2 – 22 wpm.

⁴ The date at the top of the document was not updated. The PWN notes from the IEP meeting and the testimony established that this was an Interim IEP developed in April 2019. [*Id.* at 1668-69]

The Student never made progress that would have indicated that he could reach anything close to the fifty-nine-word goal. In the IEP developed at the end of the year, the IEP Team noted:

On his Fastbridge reading assessment, [Student] was able to read an average of 16 words a minute, this put him significantly below the 5th percentile for 2nd grade spring scores. During his spring MAP reading, he scored a 159, which is the 3rd percentile for the second grade. When given words from the 2nd grade Dolch list, [Student] was able to read 19 of the 46 words.

[Parent Exh. 5 at 1710; *id.* at 1711].

The teacher who taught the Student at Trident, continued to tutor him. By the summer of 2019, she stated the Student was still at Wilson level 2.1, which was approximately where he had been when she taught him towards the end of the 2017-18 school year.

b. Writing

Writing was addressed in the initial IEP for 2018-19. “[Student]’s Specific Learning Disability is characterized by difficulty with . . . writing fluency.” Specific goals were set at that time. [*id.* at 1884 (goals 4 and 5)]. The September 2018 IEP set two writing goals for Student: By September 2019, the Student was to be able to: (1) write a three-sentence paragraph with an introductory sentence, detail, and conclusion and with spelling, punctuation and spacing at 80%; and (2) type a corrected story with correct punctuation, spelling, and spacing at 95%.

1. The paragraph goal

At the time the three sentence paragraph was set, the Student was only “able to write a simple three word sentence,” and was working on letter formation, sizing, capitalization (including random capitals) and spelling issues.

The Student’s progress reports on writing throughout the year shows, with accommodations, he made steady progress and was writing four-sentence and five-sentence paragraphs by May (*i.e.*, the halfway point). The District did not, however, document the percentage level of accuracy. It does not appear that the Parents challenge the progress made on this goal.

2. The typing goal

There does not appear to be a present level of performance for this goal in the IEP. In the progress reports, the District documented a slow start, but increasingly better accuracy throughout the year with four of his last reports being in or above the 90% accuracy rate.

The IEP meeting notes from the end of the year state that “Parents also expressed that they are very impressed with his writing.” At the hearing, the Student’s father did not take issue with the progress reported.

c. Math

The IEP Team’s transition goal was to have the Student increase his correct answers on a grade 1 math probe from 16 to 30 items. He quickly achieved that goal by September.

The IEP Team noted in September that, “[w]hen given a 2nd grade math computation probe, [Student] earned 20 points which puts him just above the 50th

percentile.” The Team set a new goal of forty-four correct items on a second-grade probe by September 2019. The Student’s progress towards the new goal was minimal, at best, through the remainder of the school year. His high-water mark was twenty-five items, and, by May, he was back to twenty where he started the prior September. In the last assessment of the school year, the District characterized the Student’s performance as “inconsistent.”

As noted above, the IEP goal was stated in terms of a second-grade probe. In testing that combined first and second grade problems, the Team noted the Student scored a 91% average, with an 81% average over the last four weeks. The IEP Team also noted the Student’s MAP scores put him in the 13th percentile for the Spring, and his Fastbridge score put him in the 20th percentile for the Winter.

The District maintains the math instruction the Student received was in fact multi-sensory. O’Donald testified that multi-sensory strategies can be incorporated into any curriculum. Kendra Stewart added she understood there was a use of Touch Points with the Student, a form of kinesthetic learning and multi-sensory instruction.

d. Behavioral development and transition plan

All agree the Student made great strides in coping and addressing the behaviors that were inhibiting progress at Trident Academy.⁵ Accordingly, the parties began to

⁵ ~~Apparently, different~~ teachers had different experiences. One teacher testified one would have never known that Student had a history of behavioral impediments, while the second teacher testified that there were issues at the beginning of the year that abated by the end.

discuss a plan to transfer Student to the school for which he would normally be zoned. The change involved a move from a behavioral program to a resource classroom. (transitional IEP). It also appears from the testimony and documents that, as the behavioral issues that caused interference at Trident subsided, the nature of the Student's conditions and disabilities became more apparent. This is consistent with the observation by the independent evaluator that the Student's impatience and behaviors were complicating his ability to diagnose in areas such as Autism.

e. ESY post 2018-19

In the April transitional notes, the IEP Team also "proposed ESY services in the area of reading fluency due to the progress of reading being significantly below the IEP goal."

4. 2019-20: Third grade at Carolina Park

The IEP Team developed a new IEP at the end of May 2019 to be in place at the start of the 2019-20 school year.⁶ The IEP Team noted:

[Student]'s educational deficit in Reading, Written Expression, and Math require specialized instruction to ensure educational progress. The district is taking these actions due to his high level of specific needs in the areas of reading, writing, math, as documented through qualification as a student with a Specific Learning Disability.

⁶

The date on the PWN [1722] is erroneous and was not changed from a prior document. The date of the meeting (5/28/19) appears in the body of the PWN.

The team considered instruction in math that supplants the general curriculum however this was rejected due to [Student]'s progress in the general math curriculum. The team instead proposed to increase time in the general education setting for math.

[Parent Exh. 5 at 1722].

New IEPs were developed in September and November 2019

a. Initial goals

1. Reading

The initial reading goal established in late May 2019 was to have Student reading 40 of 46 words correctly from the second grade Dolch list over three consecutive weeks by May 2020. At the time the goal was developed, the Student was able to read 19 of the 46 words.

There were two progress reports measuring performance against this goal. On August 20, 2019, progress varied widely between 23-33 words. By late September, when words were broken down into smaller groups of twenty-five words, the Student was getting 60% correct (as opposed to 87% of a larger list). There is no data on how he performed on a list of forty-six words.

2. Writing

The initial writing goal developed in late May 2019 was to have the Student independently write four sentences (intro, details, and concluding sentence) with correct capitalization and punctuation over three consecutive trials by May 2020. The best data apparent in the record as to comparable present levels shows that, by May 2, 2019, Student was already creating four and five sentence paragraphs. It was noted, however,

that this required teacher assistance. Apparently, the difference in the goals for 2019-20 was to achieve independence in creating four sentence paragraphs.

Progress against this goal was measured once in late September. By that time, it was noted that the Student was creating the four sentence paragraphs independently, but still needed to make progress regarding capitalization and punctuation.

3. Math

The initial math goal from late May 2019 was to have the Student maintain an average of 85% or higher when given a grade level curriculum-based assessment by May 2020. There is no grade level data apparent in the IEP for the second grade, as the testing apparently was a combination of first and second grade tests. There also is no apparent baseline because the Student never was tested at the third-grade level when the goal was set.

The Student's progress against this goal was measured one time, and he scored a 0. The IEP Team noted, however, that the curriculum changed from the time the goal was set.

b. Second set of goals and the November 2019 IEP

In early November, the IEP Team created another IEP.

1. Reading

The November 2019 IEP notes the Student "requires a direct, explicit, structured, sequential, systematic, alphabetic/phonetic multisensory approach to reading."

The IEP set a goal that, by October 2020, the Student would be able to identify and read sixteen out of twenty single and multisyllabic words.

The progress reports give a more detailed breakdown of the progress than the simple metrics in the goal. Pre-pandemic, the Student was making satisfactory progress as to his goals.

The IEP Team documented the Parents' request for a "specific curriculum of Wilson and Orton-Gillingham strategies/approach be used." The teacher who taught the Student reading during the 2019-20 school year utilized the Wilson Reading System. She completed the introductory Wilson course, but is not level one certified. Neither is the teacher who taught the Student at Trident. The District's reading teacher does, however, have extensive experience in Orton-Gillingham on which the Wilson Reading System is based. As the reading teacher from Trident testified, "to say that one is doing Wilson is to say that he is doing Orton-Gillingham."

The Wilson Reading System contains various levels and sublevels of achievement,⁷ progressing up to Level 12. The District's reading teacher testified that she started the Student at level 1.3. By mid-October, he had progressed to level 2.2.

After the pandemic forced remote learning, she was not able to certify achievement at any more levels. She testified that the Student likely would have shown mastery of level 3 if she could have tested him. She also testified that she and

Student

⁷ The number of sub-levels or sub-steps vary by step.

were working on word lists at the 4.2 level. To assist the Student in accessing the general curriculum, the reading teacher developed word lists that followed decoding patterns that connected up to general education topics the Student was working on at the time.

By the deadline for the goal (Oct/Nov. 2020), the Student was reading at Wilson Step 2.1. At the fourth-grade level, his Fastbridge result put him at the first percentile. He scored at less than fifth percentile at the third-grade level.

2. Writing

The writing goal from the November 2019 IEP states the Student should independently write a six-sentence paragraph with proper capitalization and punctuation over three trials.

Progress reports show that, pre-pandemic, the Student made little to no progress, especially with respect to the number of errors. District witnesses assert the Student continued to resist topics not of his choosing.

In August 2020, the IEP Team noted the Student was still “performing below expected levels in the area of writing (the craft of writing).” [District Exh. 12 at 1412]. The present levels from November of 2020 (when the goal was to be achieved), show that he was writing an average of three sentences, with half of the words misspelled. [Parent Exh. 9 at 1937; see *a/so* District Exh. 13 at 1899 (Amendment 9/14/20)].

3. Math

The November 2019 IEP notes the Student “requires a direct, explicit, multisensory approach to math.” [Parent Exh. 7 at 1960]. The math goal was to reach

80% accuracy on three-digit math problems with two to three verbal prompts by October 2020. The District continued to use Numbers World, which the District contends was augmented with multi-sensory techniques, including use of hands, sight, listening, and movement.

The progress reports show that progress was not made in terms of the large number of prompts necessary. Other than the first progress report (12/2), it is not clear from the narratives if the results reflect measurements against the original goal. The reports mention “addition and subtraction problems,” but do not specify if they are of the kind mentioned in the goal and there is no discussion about regrouping on graph paper.

At the end of the goal period, the Student was scoring in the 20th percentile on a timed test and apparently was able to complete the addition and subtraction questions.

An amendment to the IEP appears to address the goal more directly in terms of progress in September of 2020. It appears the Student was achieving the goal with “an average of 70% accuracy and 4+ prompts.” [District Exh. 13 at 1900]. By October of 2020, the Student had mastered the goal set the year before. By November 2020, the IEP team had considered decreasing math services “based on available data supporting [Student]’s relative strengths in the area of math.” [Parent Exh. 9 at 1949].

c. 2020 ESY

At the conclusion of the 2019-20 school year, the IEP Team provided ESY “in the areas of writing, mathematics, and reading fluency.” [District Exh. 10 at 1690; see *id.* at 1706-07]. The Student received reading services from another instructor as the former reading teacher left her position in June. The Record does not indicate who provided the reading services. Nor is the Record clear as to what actually transpired during this time, as the individual from the District with first-hand knowledge apparently did not testify.

III. Complaint

The Parents raise challenges regarding the 2018-19 and 2019-20 school years.⁸ The Complaint states that, for the 2018-2019 school year, the District willfully failed to properly identify the Student as qualifying for special educational services related to math, to select and implement an appropriate reading curriculum, and to select and implement an appropriate writing curriculum.

As to the 2019-2020 school year, the Parents contend the District willfully failed to properly identify the Student as qualifying for special educational services related to math, to select and implement an appropriate reading curriculum, and to select and implement an appropriate writing curriculum.

⁸ The Complaint also raises issues regarding the 2020-21 school year. The Parents, however, withdrew those allegations on March 31, 2021.

IV. Analysis

Before delving into an analysis of whether the District provided a FAPE, it is important to comment on a few aspects of the proof offered in this case. The educational testing data on the Student is all over the place. As several witnesses recognized the Student's testing results must be considered considering the Student's reluctance and resistance when faced with a new person or changed circumstances, which applies at the beginning of every school year or with every new tester. The Student's reluctance and impatience as a factor in testing is further supported by the documentation of both independent evaluators.⁹

There were two changes in schools during the period covered by this Complaint. Even within a specific school year, there were changes in personnel. To make things more complicated, the pandemic uprooted everything in education and required yet another change. Further, the COVID protocols necessary to protect the Student and others may also have materially impacted test results.

The mixing of different types of tests administered at different points of the year also complicates matters. Even during the same period, there are tests showing the Student performing in the first percentile and the sixty-sixth percentile in the same subject area.

⁹ To be clear, the term "behaviors" here is not intended to imply the Student was not intending to be cooperative or that he "misbehaved" in any intentional way. The Undersigned understood from the testimony and records that the behaviors exhibited attend his underlying disabilities. As the video shows, and as every teacher testified, the Student is an intelligent, vibrant, and personable young man, who certainly appears to be trying his best to learn.

The data diverges greatly even when one considers a common measuring stick, such as FSIQ. The fourteen-point difference between the results the most recent independent evaluator and Ms. Hipp measured is significant, as is the difference between their results and those of the former independent evaluator. As Ms. Hipp also remarked, the differences between the results obtained by the independent evaluators also are notable.

None of this is to call into question the credibility of any of the testers. The most recent independent evaluator and Ms. Hipp both acknowledged that testing results could be significantly affected by environment and other factors that affected the Student's performance on any particular testing date. It is for this very reason that little value can be placed on any one test.

If all that was not enough, there is another layer of complexity overlaid on this picture because of the Student's comorbidities. Even after the behavioral issues no longer posed an impediment, the District and Parents were still posed with the Herculean task of attempting to identify and address a complex set of conditions while still dealing with the uncertainties of change and their effect on Student. Educating the Student could be compared to attempting to change a tire while driving down the road at sixty miles per hour.

This discussion is necessary because both parties have, in part, relied on subsequent evidence to contend the IEPs were either deficient or sufficient. A determination of whether, for example, the IEP Team made proper identifications and created an effective IEP, must be made based on the information available to the IEP Team at the time. *Bd. of Educ. v. Michael M.*, 95 F. Supp. 2d 600, 609 (S.D. W. Va. 2000) (citing *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999)); see *Schaffer v.*

Weast, 554 F.3d 470, 475 (4th Cir. 2009) (characterizing use of subsequent IEPs to establish a denial of FAPE in a prior year as a “a hindsight-based review that would have conflicted with the structure and purpose of the IDEA”). That gate must swing both ways. While it is critical to not improperly second guess an IEP Team’s goals with the benefit of hindsight, an LEA should not be able to rely on evidence of subsequent progress in other areas to argue “no harm no foul.”

The best *initial* measuring stick, and the one most faithful to precedent, is to examine progress against the very goals that the IEP Team set over time. Although the Parents challenged the ambitiousness of some of these goals (especially writing), an initial focus on the IEP Team’s own goals pays due respect to the expertise and judgment of educational experts. *MM v. Sch. Dist.*, 303 F.3d 523, 532 (4th Cir. 2002) (citing *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990))¹⁰

The Parents’ focus on whether goals were achieved is understandable at a parental level. Parents want the IEP to result in the Student “catching up” and attaining “grade level” performance. Every dedicated parent wants that, and the Student’s parents certainly have demonstrated their dedication. The failure to attain

¹⁰ District over-states the deference principles to the extent by mixing issues of *MM*’s discussion of deference to educators with *Doyle*’s deference to LHO’s. [District Closing Arguments at 2].

Certain District witnesses testified that, even where minimal or no progress was made as to IEP goals, the Student still made sufficient progress. This testimony is concerning because it renders pointless the IEP process of measuring current levels and setting ambitious goals.

ambitious goals cannot be prima facie evidence of a denial of a FAPE. If it were, LEAs would be incentivized to sandbag goals, which is contrary to the purpose of the *Rowley/Endrew F* standard.

The Supreme Court has made clear the importance of establishing *ambitious* goals. At the same time, it has rejected the proposition that grade level advancement is the touchstone for FAPE where a student is not in a regular classroom.

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. [*Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U. S. 176, 207 (1982)]. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians. *Id.*, at 208-209. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. *Id.*, at 206-207.

* * * *

That the progress contemplated by the IEP must be appropriate in light of the child's circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. The instruction offered must be "specially designed" to meet a child's "unique needs" through an "[i]ndividualized education program." [20 U.S.C.] §§1401(29), (14) (emphasis added). An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth. §§1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv). As we observed in *Rowley*, the IDEA "requires participating States to educate a wide spectrum of handicapped children," and "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between." 458 U. S. at 202.

* * * *

. . . [An] IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just

as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

Of course this describes a general standard, not a formula. But whatever else can be said about it, this standard is markedly more demanding than the “merely more than de minimis” test It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than de minimis progress for those who cannot.

Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 999-1001 (2017); *M. L. v. Smith*, 867 F.3d 487, 496 (4th Cir. 2017) (quoting *Endrew F.* for the proposition that the Supreme Court “rejected [the] argument that ‘a FAPE is an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.’”).

Accordingly, the difficult task here is to analyze the three main subjects at issue (reading, writing, and math) over two years considering the complex picture posed by the different data and varied testimony presented over four days. In undertaking this review, it is important to remember that, as discussed above, a denial of FAPE cannot be an exercise in Monday morning quarterbacking.

Parents bear the burden of proof as to each claim that District denied a FAPE. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

A. 2018-19 school year

1. Reading

Parents alleged:

Through the 2018-2019 IEP the school district selected and implemented a reading curriculum called “Reading Mastery” for Student. This reading curriculum was never designed to teach children with Dyslexia and Dysgraphia how to read and write. Therefore, the school district has failed to implement a reading curriculum appropriate to his needs.

[Complaint at 3].

The Parents first question the District’s decision to utilize Reading Mastery, which is not geared toward multi-sensory teaching or recognized as a program aimed at dyslexia. The initial IEP does not focus on dyslexia, which the initial independent evaluator raised as a possible “mild” case. There is not sufficient evidence that failure to implement the Wilson Reading System at the outset calls into question whether the initial IEP was reasonably calculated to provide sufficient educational benefits.

What is not a close call is the District’s failure to adapt when there was regression and never any progress. Twice the IEP Team noted that it would change course, and it even expressly agreed to implement some Wilson time if the Student did not make progress. The Student did not make progress. [*Supra* section II(B)(3)(a)].

The District argues that selection of a “methodology” or “program” is a matter of discretion vested in the educators. [District Closing argument at 5-6]. To the extent an LEA provides a FAPE, that is probably so, but deference does not mean blind adherence. None of the cases cited by the District stand for the proposition that an LEA can stick to its decision as to methodology in the presence of clear evidence that

the methodology or program is not working. Perhaps most importantly, the IEP Team itself decided it would use Wilson in the event there were indications of that Reading Matters was not effective. the District's own assessments show that it was not effective.

The Parents have met their burden of proving the District failed to provide a FAPE for the 2018-19 school year with respect to reading beginning some point after the commencement of the school year.

2. Writing

Parents alleged:

In conjunction with Student's reading challenges, the Student suffers from a dysgraphia which dramatically impacts his writing and which is inextricably bound to his reading. As set forth above, the chosen reading curriculum was never designed to teach children with Dyslexia and Dysgraphia how to read and write. Therefore, the school district has failed to implement a writing curriculum appropriate to his needs.

[Complaint at 3].

The picture painted of the Student indicates that writing has always been a challenge from a motivational standpoint. The data, however, also shows that Student made progress as to both of his goals. Although the level of accuracy was not clear, the Student went from writing a three-word sentence to writing four to five sentences. There appears to be no dispute as to whether he met his typing goal. [Supra Section II(B)(3)(b)].

The Parents have not proven the District failed to provide a FAPE with regard to writing in the 2018-19 school year. The Parents argue that the Student's "failure to make appropriate progress in writing demonstrates that his IEP was not reasonably calculated for him to do so." [Parent Closing Brief at 19]. As the Supreme Court noted in *Rowley*, "the intent of the Act was more²³ to open the door of public education to

handicapped children on appropriate terms than to guarantee any particular level of education once inside.” *Bd. of Educ. v. Rowley*, 458 U.S. 176, 192 (1982). It is not a strict liability statute and, as discussed above, a finding consistent with Parents’ argument would have the effect of setting goals inconsistent with *Endrew F.*’s requirement that they be “ambitious.” *Endrew F.*, 137 S. Ct. at 1000.

3. Math

Parents alleged:

The 2018-2019 IEP did not address the root cause of the Student’s math issues though the IEP team specifically added a math goal to this IEP. The team, thereafter, failed to prescribe any testing to identify and address the specific issues Student was having with math. The school district, therefore, failed to test and identify Student’s Dyscalculia and implement appropriate goals related to it.

[Complaint at 2-3].

Math poses a difficult analysis, even with the ability to analyze the evidence with the benefit of hindsight. As discussed above, the proper analysis requires that the District’s actions be measured against what the District knew at the time.

At the time the IEP Team wrote the new goal in September 2019, the Student had just blown away the old goal based on a first-grade probe. The best information available to the District at the time is that the present course was successful.

Further, there was nothing in the files available to the District that would have alerted it to issues as severe as those later identified when the behaviors improved. The District focused on the Autism identification, which had not been confirmed a year earlier. The March 2017 independent evaluation, for example, did not identify any specific learning disorder regarding math

and, in fact, the initial independent evaluator noted math as a strength. The evaluator raised the possibility of “mild dyslexia and dysgraphia,” but does not identify possible dyscalculia. [*Id.*] The fourth quarter report from Trident does not contain any red flags as to math that would have necessarily informed the IEP Team in early 2018 of any other particular issues it needed to address. Instead, the documented concerns at the beginning of the 2018-19 school year focused on the Student’s “behavior and his difficulty learning to read.” [District Exh. 4 at 1858]. This evidence further militates against second guessing District with data regarding a different condition that was presented two years later. *Tracy v. Beaufort Cty. Bd. of Educ.*, 335 F. Supp. 2d 675, 688-89 (D.S.C. 2004).

In terms of testing data, the evidence appears to be all over the place. Although the Student’s performance on a timed math test put him at the 6th percentile, the IEP Team stated “Math Calculation” was one of his strengths at 1727]. At the same time, the Team nonetheless documented the Student’s “significant deficits in . . . math . . . require small group and specially designed instruction in a highly structured environment to make progress toward the general curriculum.” [*Id.* at 1733]. By November, the IEP Team was aware the Student’s autism “limits his ability to . . . compute grade level math problems.” [District Exh. 9 at 1636].

¹¹ Further clouding the picture is the the two IEP Teams reached different conclusions, albeit at different points in time. In contrast to Belle Hall’s statement that math calculation was a “strength”, which is consistent with the 2017 assessment the Carolina Park IEP Team noted early that “Math Calculation is a weakness for [Student],” [District Exh. 9 at 1636; see also District Exh. 11 at 1627 (Hippis evaluation in January 2020, noting “[w]eaknesses were identified in automaticity with math facts, number relationships, and number sense. [Student]’s math performance is also impacted by inattention, uneven tempo, and motivation.”)].

The Parents' main contention appears to be that the denial of a FAPE results from the District's failure to recognize the "root cause" of the math issues (i.e., dyscalculia vs. autism). The Specific Learning Disability classification covers a variety of diagnoses, including dyscalculia. 34 C.F.R. § 300.8(c)(10)(i). The District identified the Student as having a Specific Learning Disability from the outset, but it was limited to basic reading, reading fluency, reading comprehension, and written expression. The District also identified the Student as being on the Autism spectrum, which is another recognized category. 34 C.F.R. § 300.8(c)(1)(i).

The specific diagnosis of "dyscalculia" came in late 2020 from the recent independent evaluation, as it was not indicated by the former independent evaluator, it appears the District questions the recent independent evaluator's conclusion. The recent report gives a general description of the condition, which does not appear to contain any information that would be different than what the District already knew. Her recommendations for math also do not establish the District's failure to specifically cite "dyscalculia" in 2018-19 somehow resulted in a denial of a FAPE.

When the Student exceeded expectations by September 2018, the IEP Team acted promptly and set a new goal, the ambitiousness of which is hard to dispute. For reasons that are still not clear, the Student did not make good progress on these new

goals, but there is nothing in the Record that establishes the District failed to take appropriate action based on the information it had available to it at the time. For this reason, the evidence fails to establish any denial of a FAPE as to Math during this year.

B. 2019-20 school year

1. Reading

Parents alleged:

[Student] needs to participate in the effective execution of a curriculum specifically designed for his Dyslexia. The school district has selected the Wilson curriculum which does, in fact, meet the design requirements; however, it is not being implemented with fidelity. [Student]'s current instructor has not been properly trained or certified in instruction of the Wilson curriculum and is unable to be able to teach the coursework with fidelity to the process. As a result, [Student] has regressed in his reading and his reading is not progressing at the appropriate pace.

[Complaint at 4].

There is no question the Student's progress throughout 2019-20 in reading has been a high point of his education while with District. At the hearing, the Student's father agreed the Student made progress up until approximately June 2020.

Parents have not sustained their burden of proving a denial of a FAPE with regard to reading as to the 2019-20 school year.

2. Writing

Parents alleged:

The curriculum that the school district has selected to address [Student]'s Dysgraphia and writing issues is inappropriate because it requires that the participating student be able to read at a third-grade level. [Student] cannot yet do so because of the previous instruction failures related to his reading.

[Complaint at 4].

At the hearing, the Parents focused primarily on the lack of progress in the number of sentences in the goals from year to year. Although the Student's progress in that regard is not encouraging, the focus of the goal at the outset of the 2019-2020 school year was on having the Student write and self-correct *independently* and to reduce errors. That appears to have been an ambitious objective, and one with which the Student seemingly struggled.

There is no question the Student made little, if any, actual progress in writing over the 2019-20 school year. What is not clear is how the District failed in this regard. Parents' arguments are long on theory, but short on actual evidence. [See Parents Closing Brief at 22]. The District certainly never ignored any issues. Although the Student's writing performance presents a troubling picture, there is not evidence from which findings could be made that substantiate a denial of a FAPE.

3. Math

Parents alleged:

As more specifically described below, [Student] requires a multi-sensory curriculum to address his dyscalculia, yet the IEP team and the school district have failed to select and implement an appropriate math program for him. The school district is once again using "Numbers World" and has told the family that it is the "most intensive program that the district offers." Nevertheless, it is not a multi-sensory curriculum and cannot be transformed into one. [Complaint at 3].

The Parents take issue with what they perceive to be a lack of multi-sensory techniques embedded in Numbers World. The recent independent evaluator acknowledged she is not familiar with Numbers World. The District representative testified that they incorporated multi-sensory techniques. At the end of the day, the

evidence shows the Student made real progress as to his goal to the point of a discussion of reducing services in that area. There is not sufficient evidence upon which a finding could be made that the District denied the Student a FAPE regarding math.

C. Post 2019-20 ESY

The Parents contend that services provided after the conclusion of the school year failed to provide a FAPE. There are many possible reasons why the Student regressed after the commencement of ESY. The Parents note the regression [Parent Closing Brief at 21], but there is no real evidence in the Record upon which a finding could be made that the regression was a result of any failure to implement the IEP.

The only specific argument the Parents make is that the new instructor was not qualified. [*Id.*] As the District witness testified, the ESY instructor was Wilson level one certified, although neither side identified who that person is. Therein lies one problem with Parents' theory. The Parents have been adamant that the Wilson Reading System should be taught with "fidelity," which they contend requires a level-one certified instructor.¹² They challenge a point in time in which the Student was taught by a level one certified instructor, but do not seriously challenge the progress made by the Student when he was taught by two instructors (one in the District and one at the private school) who were not. Regardless of the Parent's actual position, the Record is clear that there are alternatives to level-one certification that can lead to successful outcomes.

¹² The Wilson System materials support this position. [District Exh. 34 at 2016 (screen shot)].

Although there is “before” and “after” ESY evidence of the Student’s performance, the lack of evidence as to what happened during this time, or even who provided the services, precludes any factual finding either (1) that the services agreed to were not reasonably calculated to provide a FAPE; or (2) that the services were inadequate.

D. Remedy Issues

The above finding that the District denied the Student a FAPE as to reading in the 2018-19 school year raises a serious question about remedy. How does one craft a remedy for a substantive violation of the IDEA when almost two full school years have elapsed?

Parents seek compensatory education as a remedy. [Parent Closing Br. at 26-28]. Compensatory education is a remedy that may be appropriate in some cases. *G v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 309 (4th Cir. 2003). It consists of “educational services ordered . . . to be provided prospectively to compensate for a past deficient program.” *Id.* at 308. In addition to bearing the burden of proof as to a denial of a FAPE, the Parents also bear the burden of proving that compensatory education is an appropriate remedy. *Hogan v. Fairfax Cty. Sch. Bd.*, 645 F. Supp. 2d 554, 573 (E.D. Va. 2009).

The Parent's independent evaluator was unable to opine the Student would be further ahead had his services been different because she was not sufficiently aware of the services he was provided at the time of her evaluation. She also never testified that any of the IEPs at issue in this case were not reasonably calculated to provide a FAPE. In fact, she did not review them at all in conjunction with her evaluation, and she apparently saw them for the first time shortly before the hearing.

The IDEA provides hearing officers with broad authority to fashion a remedy. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993). However, as with any violation, there needs to be a basis in the Record for finding that a proposed remedy is necessary and appropriate to compensate for a denial of a FAPE. Absent such evidence, the Undersigned is constrained to find that he cannot make findings that any particular amount of compensatory education would place the Student in the position in which he would have been if District had not implemented the Wilson Reading System during the 2018-19 school year. Nor is there evidence from which the Undersigned could make findings as to the substance of any such services.

V. Conclusion

For the foregoing reasons, the Parents' request for compensatory education is denied.



Brian P. Murphy
Local Due Process Hearing Officer

Dated May 20, 2021.

Greenville, South Carolina

VI. Notice of Appeal Process

Any party may appeal this ruling. A party seeking to appeal this ruling must do so **in writing** and **within ten (10) days** of receipt of this Order. The written appeal must be addressed to:

The South Carolina Department of Education
Office of General Counsel
1429 Senate Street
Rutledge Building
Columbia, SC 29201