

**INDIVIDUALS WITH DISABILITIES EDUCATION ACT
STATE-LEVEL APPEAL**

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF CHARLESTON	)	
	)	
In the matter of:	)	BEFORE MITCHELL YELL
	)	STATE-LEVEL REVIEW OFFICER
M.W. and S.W., on behalf of C.W.,	)	
	)	
Petitioner/Parents,	)	
	)	
v.	)	DECISION
	)	
Charleston County School District,	)	
	)	
Respondent/District.	)	
	)	

DECISION OF THE STATE REVIEW OFFICER

This matter is before me pursuant to an appeal of a due process hearing in which Petitioners, M.W. and S.W. (“Petitioners”) on behalf of their minor son, C.W. (“Student”) and the Charleston School District (“District”) seek review of final order of the Local Due Process Hearing Officer (“LHO”), Brian P. Murphy, in *M.W. and S.W. on behalf of STUDENT v. Charleston County School District*. Kimberly Kelley Blackburn, Esq. and Vernie L. Williams, represented the District and Andrew T. Potter, Esq. and John M. Read, IV, Esq. represented the Petitioners.

PROCEDURAL BACKGROUND

On February 25, 2021, Petitioners filed a Due Process Complaint with the District alleging that the Charleston County School District failed to provide Student a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”). The public hearing was held on April 19, 2021, through April 21, 2021, and reconvened virtually on April 26, 2021. Additional arguments regarding the provision of extended school year (“ESY”)

services was requested, with the Petitioners and the District responding on May 19, 2021. On May 20, 2021, the LHO, issued his final order. The LHO also notified the Petitioners and the District that if either party wished to appeal the decision, they could do so by notifying the South Carolina Department of Education (“SCDE”), Office of the General Counsel of their intent.

On May 28, 2021, the District and Petitioners notified the SCDE of their intent to appeal the ruling of the LHO. On June 2, 2021, the SCDE officially notified the District and Petitioners that the appeals were received and appointed Dr. Mitchell Yell as the State-level review officer. I also received official confirmation that I would serve as the State Review Officer (“SRO”) in this matter on June 2, 2021.

As the SRO I have jurisdiction in this matter pursuant to a letter of appointment from the SCDE. I also have the knowledge and ability to conduct hearings and render and write decisions in accordance with the appropriate, standard legal practices. To ensure the rights of the parties pursuant to the IDEA, I emailed District and Petitioners (copied to the SCDE) a request that the parties adhere to the following schedule: (a) Petitioners’ brief due on Monday, June 14, 2021, (b) District’s response brief due on Friday, June 18, 2021, and (c) Petitioners’ reply brief (if needed) due on Tuesday, June 22, 2021. I received the District’s and Petitioners’ briefs in a timely manner.

I also notified the parties and the SCDE that in accordance with the IDEA’s federal regulations at 34 C.F.R. § 300.515(b), the state is required to ensure that not later than thirty days after the receipt of a request for a review, a final decision is reached in the review and a copy of the decision is mailed to each of the parties. Based on SCDE’s receipt of the request for appeal on May 28, 2021, the due date for the final decision on appeal was established as June 27, 2021. As a result of an illness in June, I underwent a medical procedure on Friday, June 18, 2021. On the evening of Saturday, June 19, 2021, I notified the attorneys for each party that I would have to undergo surgery on Monday, June 21, 2021; and that while I was unsure of the expected recovery time, I was advised that it would be more than one week. I have a second procedure on August 4, 2021. On July 13, 2021, I proposed a deadline for issuing my ruling of July 27, 2021.

On July 6, 2021, I received 1044 pages of testimony and 38 exhibits from the Hearing. I have reviewed the entire due process hearing transcripts, exhibits, and final arguments of the Petitioners and District. I have determined the hearing procedures were consistent with the requirements of due process.

FACTUAL BACKGROUND¹

1. **Background and Trident Academy.** The Student is one of the Parents' four children. In kindergarten he attended Laurel Hill Elementary in the District. The following year he was homeschooled. The Student began attending Trident Academy in Mount Pleasant, SC a year later. Trident Academy is a private school that focuses on teaching students with learning problems. The Student left Trident Academy “because the behavior became an issue at Trident” (M.W.’s Hearing testimony, page 29, lines 8-9).
2. **Attendance at Belle Hall.** The Student attended second grade at Belle Hall in the District in the 2018-2019 school year (because the Student was homeschooled and then went to Trident Academy where the Students are placed according to ability, he went into second grade when he returned to the District). Belle Hall was not the Student’s home school but “it was determined during the IEP meeting that a behavioral classroom at Belle Hall would be more appropriate for Student given the behavioral challenges that were being reported from Trident” (M.W.’s Hearing testimony, page 30, lines 5-9). The Belle Hall full-day behavior support class provided “specially designed instruction in the areas of behavior, social-emotional, reading, and math...with indirect services in the area of speech-language and occupational therapy as outlined in the IEP agreed upon in 8/1/2018.” (Parent Exhibit 1, Prior Written Notice [PWN], Bates Stamp-Respondent 0764)
3. **Eligibility Determination on 8/1/2018.** Participants in an Eligibility Determination meeting on August 1, 2018, concluded the Student met the special education criteria for autism spectrum disorder, that his disability did have an adverse effect on his educational performance, and he demonstrated significant behavioral difficulties that impeded his academic and functional performance in the classroom. The team also determined the Student had a specific learning disability that had an adverse effect on his educational performance and required specially designed instruction. “[The Student] requires small group direct instruction in the areas of basic reading, reading, reading fluency, reading comprehension, and written expression” (District Exhibit 4, Eligibility Determination,

¹ Because the dispute in this case only involves reading, writing, and math, in the sections on IEPs, I only address the goals, services, and progress in those areas.

Bates Stamp-Respondent 1876). Student was also diagnosed with Attention-Deficit Hyperactivity Disorder (ADHD) and a generalized anxiety disorder.

The Wechsler Intelligence Scale for Children-Fourth (WISC-IV) edition administered by an independent evaluator in March and April 2017 indicated the Student had a full scale IQ score of 92, within the average range (District Exhibit 4, Evaluation Report, Bates Stamp-Trident 0015-0023). The evaluator also administered the Woodcock-Johnson Test of Achievement-Third edition (WJ-III). The WJ-III, which is one of the most used and accurate tests of academic achievement, revealed the Student's broad reading score of 79 (standard score[SS]) and written language score of 76 (SS) to be in the borderline functioning range, meaning the Student will struggle in these areas, and a broad mathematics score of 90 (SS), which is in the average range of 90 to 110. An additional independent evaluator conducted a psychoeducational evaluation of Student on September 29, 2020; September 30, 2020; and October 19, 2020 (Parents Exhibit 12, Bates Stamp-Respondent 0518-0548). The independent evaluator reported that the Student received a lower full scale IQ score on the WISC-V (i.e., 72), and lower academic scores on the WJ-IV (i.e., Broad Reading-47 [SS], Broad Writing-69 [SS], Broad Math-77 [SS]) than he did in testing conducted in 2017. However, in her report she warned that "[The Student] had great difficulty sustaining attention for longer than a few minutes and this likely interfered with optimal performance. His level of cooperation vacillated greatly, and he struggled to persist through tasks that were perceived as difficult. This should be considered when interpreting testing results" (Parents Exhibit 12, Bates Stamp-Respondent 0522).

4. **Consent and IEP of 8/1/2018.** The father gave consent for the Student to receive special education and related services on August 1, 2018, (District Exhibit 4, IEP, Bates Stamp-Respondent 1878). The Student's IEP was also developed on August 1, 2018, (District Exhibit 4, IEP, Bates Stamp-Respondent 1726-1735). The IEP start date was August 1, 2018, and the annual review and end dates were July 31, 2019. In the Student's Present Levels of Academic and Functional Performance (PLAAFP) statements, weaknesses were noted in reading fluency, writing, math reasoning, and math fluency. When given the Aimsweb Reading Curriculum-Based Measurements (CBM), the Student performed significantly below his grade level peers. Results of a CBM in writing revealed Student's

scores also fell below his grade level peers. Results of the Aimsweb Math Computation probes were also below average, but not as seriously as his scores in CBM reading or writing. The IEP annual goals in reading, written expression goals were as follows:

- **Reading Goal:** By August 2019, when presented with a grade 1 reading passage, Student will improve his word identification and decoding skills by increasing from 11 words read correctly to 46 words read correctly as measured by a curriculum based measurement probe.
- **Math Goal:** By August 2019, when presented with a grade 1 Math computation probe, Student will improve his math fluency from 16 items correct to 30 items correct as measured by a curriculum based measurement probe.
- **Written Expression Goal:** By August 2019 when given a topic and 1 minute to think about his story and then 3-minutes to write his story, Student will improve grammar, spelling, and the use of conventions to improve from 1 correct writing sequence to 9 correct writing sequences as measured by a curriculum based measurement probe.

Special education programming included 90 minutes daily of specially designed reading instruction in the special education classroom, 90 minutes daily of specially designed math instruction in the special education classroom, and 45 minutes daily of specially designed writing instruction in the special education classroom.

Progress Report in 9/21/2018. On September 21, 2018, a report was issued on the Student's progress toward achieving the goals from his August 1, 2018 IEP. Progress was reported toward the following goals (see Parent Exhibit 4, Progress Report, Bates Stamp-Respondent 1593-1594):

- **Reading Goal #1:** Goal status (9/21/2018)-Satisfactory progress. Student could read 17 words per minute from a grade 1 reading passage. The goal for Student was to read 46 words read correctly in 1 minute.
- **Reading Goal #2:** Goal status (9/21/2018)-Satisfactory progress. Student was able to read 35 correct letter sounds in one minute. The goal for Student was to read 46 sounds correctly.

- **Math Goal:** Goal status (9/21/2018)-Mastered. Student earned 31 points on a 1st grade math computation probe. Student's goal was to improve to 46 items correct on the test.
 - **Written Expression Goal #1:** Goal status (9/21/2018)-Satisfactory progress. Student was able to write 4 correct word sequences. Student's goal was to improve to 9 correct word sequences
 - **Written expression Goal #2:** Goal status (9/21/2018)-Mastered. Student achieved 95% accuracy in typing the dictated sentence; his goal was 90% accuracy.
5. **Prior Written Notice on 9/25/2018.** The District issued a Prior Written Notice ("PWN"); (Joint Exhibit 2, PWN, Bates Stamp-Respondent 1922) in which school personnel proposed to provide specially designed instruction in the areas of behavior, pro-social, reading, writing, and math in a behavior support room across the following settings: Behavior support room, resource small group setting, and general education in a 2nd grade classroom. According to the section on other options considered and reasons why they were rejected: "Reading curriculums were discussed as [the Student] is currently being instructed using the Reading Mastery program. Parent and team have discussed using Wilson Reading Systems, and while this option does exist 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 [the Student] is making progress. Should [the Student] stall in progress, as indicated by multiple consecutive data points using the current reading program system, the team will re-visit the curriculum needs." The procedures, assessments, records, or reports used as a basis for these actions include CBM in reading and math for fall 2018, student work, parent and teacher input, student input, related service provider consultations, and observational data completed by the school psychologist.
6. **Revised IEP of 9/25/18.** The Student's revised IEP was developed on September 25, 2018 (Joint Exhibit 2, IEP, Bates Stamp-Respondent 1912-1921). The IEP start date was September 25, 2018, and September 24, 2019, was the date of the annual IEP review and IEP end date. In the Student's PLAAFP statements, weaknesses were noted in reading and writing. The Student and his parents agreed that his strength was in math. His

PLAAFP statement indicated that math was a relative area of strength, with assessment on a 2nd grade math probe indicated he was above the 50th percentile. Measurable annual goals were written in the following areas: (a) reading, (b) math, and (c) two goals in written expression. The goals (Joint Exhibit 2, IEP, Bates Stamp-Respondent 1915) were as follows:

- **Reading Goal:** By September 2019, when presented with a grade 2 reading passage and given one minute, Student will read 59 correct words as measured by a curriculum based measurement given by the special education teacher.
- **Written Expression Goal #1:** By September 2019 when given a story starter or picture, Student will write at least a three sentence paragraph: Intro sentence, detail, conclusion, with correct capitalization, punctuation, phonetically correct spelling and spacing with 80% or above as measured by Student work samples taken by the special education teachers.
- **Written Expression Goal #2:** By September 2019 when given a copy of his corrected three sentence story, Student will type the corrected story with correct capitalization, punctuation, spelling and spacing with 95% or above accuracy as measured by special education teachers and Student work samples.
- **Math Goal:** By September 2019, when presented with a grade 2 Math computation probe, Student will improve his math fluency from 20 items correct to 44 items correct as measured by a curriculum based measurement given by the special education teacher.

Special education programming included 200 minutes weekly of specially designed reading instruction in the special education classroom, 200 minutes weekly of specially designed writing instruction in the special education classroom, 225 of specially designed math instruction in the special education classroom. Student was also provided the following accommodations and modifications: multiple or frequent breaks, daily visual schedule with manipulatives, sensory diet provided by the OT, small group setting for quizzes and tests, chunking work tasks into smaller parts to encourage task engagement, and alternate spelling words and fewer number of words.

7. **Prior Written Notice on 4/17/2019.** The District issued a PWN in which the team proposed to change the special education setting and placement for the Student finding

“that the data supports the transition from a self-contained behavior classroom to a resource room, at Carolina Park” in the District (Joint Exhibit 3, PWN, Bates Stamp-Respondent 1668-1669). The Student was to begin at Carolina Park in August 2019. The team also proposed provided “ESY services in the area of reading fluency due to the progress of reading being significantly below the IEP goal” (Joint Exhibit 3, PWN, Bates Stamp-Respondent 1668).

8. **Amendment to the IEP on 4/17/2019.** Student’s revised IEP was developed on September 25, 2018, (Joint Exhibit 3, IEP, Bates Stamp-Respondent 1670-1681). The IEP start date was September 25, 2018, and September 24, 2019, was the date of the annual IEP review and IEP end date. In updated information on the Student’s progress, weaknesses were noted in reading, math, and writing. In reading, the Student scored in the high risk range for reading on Fastbridge (1st percentile of 2nd grade) and Measures of Academic Progress (MAP; 3rd percentile for 2nd grade). In math, when given a 2nd grade math computation probe, the Student scored above the 50th percentile. Scores on measures of growth in math, Fastbridge and MAP, indicated that the Student scored at the lower end of 2nd grade (i.e., Fastbridge-20th %, MAP-11%). The Student’s reading goal, math goal, social emotional goal, and two written expression goals did not change.

Special education programming in direct reading instruction remained at 200 minutes per week until August 21, 2019, when it increased to 250 minutes a week. Direct specially designed instruction in writing remained at 200 minutes weekly until August 21, 2019, when direct services were decreased to 100 minutes weekly. Similarly, direct math instruction remained at 225 minutes per week until 8/21/2019 when direct services were decreased to 150 minutes weekly.

9. **IEP of 5/28/19.** The Student’s annual review IEP was developed on May 28, 2019 (Parent Exhibit 5, IEP, Bates Stamp 1709-1721). The IEP start date was May 28, 2019, and May 27, 2020, 5/27/2020 was the date of the annual IEP review and IEP end date. In the Student’s PLAAFP statements, weaknesses were noted in reading (Fastbridge-16 words per minute which is 5th percentile for 2nd grade spring scores; MAP-3rd percentile for 2nd grade) and writing (No data provided). Difficulties were present to a lesser extent in math (Fastbridge-20th percentile for winter 2nd grade; MAP-13th percentile for 2nd grade). The annual goals in reading, written expression, and math were as follows:

- **Reading Goal:** By May 2020, when given the second grade Dolch word list, Student will be able to read 40 of the 46 words over three consecutive weeks as measured by the correct words as measured by the second grade Dolch word list taken by the special education teacher.
- **Written Expression Goal:** By May 2020, provided with a topic and/or picture, Student will independently write four sentences, an introduction, details and concluding sentence with correct capitalization and punctuation, and a cohesive thought over three consecutive trials as measured by Student writing samples taken by the special education teacher.
- **Math Goal:** By May 2020, when given a grade level curriculum based assessment, Student will maintain an average of 85% or higher as measured by a CBA test given by the special education teacher.

The special education services, beginning on May 18, 2019, and ending on June 7, 2019, consisted of direct specially designed instruction in (a) reading, 200 minutes weekly; (b) writing, 200 minutes weekly; and (c) math, 225 minutes weekly. Beginning on August 21, 2019, the minutes of direct special education services were changed to the following: (a) reading, 300 minutes per week; (b) writing, 100 minutes per week; (c) math, 150 minutes per week. The services were to end on May 27, 2020. Additionally, the IEP team decided to provide the Student with ESY services because he was “at a critical point in instruction (e.g., emerging skill, transition point, etc.) such that continued specialized instruction and related services, without a break, is crucial to the Student’s educational program” (Parent Exhibit 5, IEP, Bates Stamp-Respondent 1720).

10. **Progress Report from 8/20/2019.** The progress report from Carolina Park Elementary includes progress data from August 20, 2019, and September 23, 2019, on reading and September 23, 2019, in writing and math (Parent Exhibit 6, Progress Report, Bates Stamp-Respondent 1163 and 1164). The reading progress score from August 20, 2019, is data on the ESY goal in reading: “By September 2019, when presented with a grade 2 reading passage and given one minute, [the Student] will read 59 correct words as measured by a curriculum based measurement given by the special education. [The Student] varied from 22 words per minute to 33 words per minute with an average of 3 mistakes” (Parent Exhibit 6, Progress Report, Bates Stamp-Respondent 1163). According

to the progress report this represents “minimal progress.” The progress report on September 23, 2019, reports “satisfactory progress” on the goal of reading Dolch words. In three trials, the Student correctly identified 14, 15, and 16 Dolch words. On September 23, 2019, the Student’s writing goal was, “By May 2020, provided with a topic and/or picture, [The Student] will independently write four sentences, an introduction, details and concluding sentence with correct capitalization and punctuation, and a cohesive thought over three consecutive trials as measured by [the Student] writing samples taken by the special education teacher.” The progress report listed satisfactory progress because when he was provided with a topic and/or picture he was able to independently write four sentences with an introduction, details, and a concluding sentence in 3 of 3 consecutive trials. However, the (Student only correctly capitalized and punctuated sentences on 1 of 3 trials. In math, the progress report listed “minimal progress,” although the teacher filling out the report noted that the method of assessment had changed. Student was able to add and subtract one and two digit numbers with 25% accuracy.

11. **IEP of 11/7/2019.** The Student’s IEP was developed on November 17, 2019, (Parent Exhibit 7, IEP, Bates Stamp Respondent 1950-1963). The IEP start date was November 17, 2019, and November 6, 2020, was the date of the annual IEP review and IEP end date. In the Student’s PLAAFP statements, weaknesses were noted in reading (correctly identifies 58% of sight words), writing (unable to independently add punctuation independently to his writing), and math (weakness in computation, 29th percentile on the MAP). The annual goals in reading, written expression, and math were as follows:

- **Reading Goal:** Decoding: By October 2020, when given a list of 20 single and multisyllabic real words containing closed, open, and silent-e syllable types, Student will demonstrate improved reading and decoding skills by correctly identifying and reading 16 out of 20 given words (80% accuracy), assessed biweekly by a special education teacher using curriculum based assessments.
- **Written Expression Goal:** By October 2020, provided with a topic and/or picture chosen by the teacher, Student will independently write six sentences, an introduction, details and concluding sentence with correct capitalization and punctuation, and a cohesive thought over three consecutive trials as measured by Student writing samples taken by the special education teacher.

- **Math Goal:** By October, 2020, when given five 3-digit addition problems and five 3-digit subtraction problems with regrouping on graph paper and 2-3 verbal prompts for all ten problems, Student will accurately solve with 80% accuracy from a baseline of 10% accuracy (2-digit) in 3 out of 4 trials as measured by the special education teacher using data collection logs.

The special education services, beginning on November 7, 2019, and ending on November 6, 2020, consisted of direct specially designed instruction in (a) reading, 250 minutes weekly; (b) writing, 100 minutes weekly; and (c) math, 150 minutes weekly.

12. Progress Reports on 12/2/2019, 1/21/2020, 2/24/2020, 3/30/2020, 5/4/2020, 6/8/2020, 8/26/2020, and 10/12/2020. Carolina Park Elementary issued a progress reports with information from a number of dates (Parent Exhibit 8, Progress Report, Bates Stamp-Respondent 2002-2007). The progress monitoring information in reading, writing, and math were reported on the following dates: 12/2/2019, 1/21/2020, 2/24/2020, 3/30/2020, 5/4/2020, 6/8/2020, 8/26/2020, and 10/12/2020. The reading goal for monitoring progress in reading was “By October, 2020, when given list of 20 single and multisyllable real words containing closed, open, and silent-e syllable types, [the Student] will demonstrate improved reading and decoding skills by correctly identifying and reading 16 out of 20 given words (80% accuracy), assessed biweekly by a special education teacher using curriculum based assessments.”

- **Reading Goal Status (12/02/2019)**-Satisfactory progress. Out of 20 single-syllable words, Student could correctly identify and decode of average of 93%. Student was able to correctly identify and decode 20/20 words (single-syllable, real/nonsense, containing between 3 and 4 sounds).
- **Reading Goal Status (1/21/2020)**-Satisfactory progress. Out of 20 single closed-syllable words, Student could correctly identify and read of average of 96%. Student was able correctly identify and decode 94% words (real/nonsense single closed-syllable words).
- **Reading Goal Status (2/24/2020)**-Satisfactory progress. Student is currently being taught with the Wilson Reading System. The District is using the Wilson Progress Monitoring Word Chart. He was placed on Substep 1.3 and has advanced to Substep 3.1. On the Wilson measures of reading fluency, which is

basically the same as the curriculum based measurement reading fluency measure used when Student was in 2nd grade, he read a total of 39 correct words per minute with 93% accuracy.

- **Reading Goal Status (3/30/2020)**-Satisfactory progress up to the mandated extended school closure due to the Covid pandemic. When Student was given a mixed list of real and nonsense two-syllable words Student correctly decoded and read 15 of 20 words without teacher prompting (75%). When provided with teacher prompts, he was able to decode and read 17 of 20 word (85% correct).
- **Reading Goal Status (5/4/2020)**-Satisfactory progress. Student received instruction through e-learning platforms since March 13, 2020. He was able to read 17 of 20 words correctly when given a mixed list of real and nonsense two-syllable words.
- **Reading Goal Status (6/8/2020)**-Satisfactory progress. Reflects data collected through mandatory school closure on March 13, 2020 to May 22, 2020. The Student received instruction through e-learning platforms since March 13, 2020. The Student was reading 17 of 20 when given a mixed list of real and nonsense two-syllable words.
- **Supplemental ESY (8/26/20)**-Minimal progress. Student read 7 out of 15 words and another 4 of 15 words per minute at Wilson level 3.2. His ESY goal was 5 out of 15 words (33%) accuracy.
- **Reading Goal Status (10/12/2020)**-Not mastered. Student was still testing at 17 of 20 words on a mixed list of real and nonsense two-syllable words.

Student's goal in written expression was "By October, 2020, provided with a topic and/or picture, [the Student] will independently write four sentences, an introduction, details and concluding sentence with correct capitalization and punctuation, and a cohesive thought over three consecutive trials as measured by [the Student] writing samples taken by the special education teacher."

- **Written Expression Goal Status: 12/2/2019**-Satisfactory progress. Student was able to write 3 sentences in correct form. He required prompting on capitalization and punctuation.

- **Written Expression Goal Status:** 1/21/2020-Satisfactory progress. Student was able to write 4 to 5 sentence but continued to struggle with capitalization and punctuation.
- **Written Expression Goal Status:** 2/24/2020-Satisfactory progress. Student was able to write an average of 3 sentences with 8 to 9 spelling and grammar errors.
- **Written Expression Goal Status:** 3/30/2020-Satisfactory progress. Data was obtained prior to school closure because of the Covid-19 pandemic. Student continued to write 3 sentences with 8 to 9 spelling errors.
- **Written Expression Goal Status:** 5/4/2020-Minimal progress. During the school closure he was able to write an average of 3 sentences of 5 to 6 words and with an average of 3 errors.
- **Written Expression Goal Status:** 6/8/2020-Satisfactory progress. In virtual lessons, Student was spelling with 62% accuracy and continued to produce an average of 3 sentences with 60% accuracy (average of 2 errors).
- **Supplemental ESY:** 8/26/2020-Satisfactory progress. Student was at 65% accuracy on his ESY goal.
- **Written Expression Goal Status:** 10/12/2020-Not mastered. Student continues to produce an average of 3 sentences of about 22 words with 9 errors. He is able to identify corrections but is unable to make them independently.

The Student's goal in math was "By October, 2020, when given five 3-digit addition problems and five 3-digit subtraction problems with regrouping on graph paper and 2-3 verbal prompts for all ten problems, [the Student] will accurately solve with 80% accuracy from a baseline of 10% accuracy (2-digit) in 3 out of 4 trials as measured by the special education teacher using data collection logs."

- **Math Goal Status:** 12/2/2019-Satisfactory progress. Student cannot solve 3-digit addition or 3-digit subtraction problems. Student is able to solve 2-digit addition and 2-digit subtraction problems with 30% accuracy.
- **Math Goal Status:** 1/21/2020-Satisfactory progress. Student is able to solve addition and subtraction problems with an average of 64% accuracy.
- **Math Goal Status:** 2/24/2020-Satisfactory progress. Student is completing 3-digit addition and subtraction problems with 65% accuracy.

- **Math Goal Status:** 3/30/2020-Satisfactory progress. Data was obtained prior to school closure because of the Covid-19 pandemic. Student's accuracy when completing addition and subtraction problems was 60%.
- **Math Goal Status:** 5/4/2020-Satisfactory progress. Student was answering addition and subtraction problems with regrouping with an average of 81% accuracy.
- **Math Goal Status:** 6/8/2020-Satisfactory progress. Student answered addition and subtraction 3-digit problems with 82% accuracy.
- **Supplemental ESY Goal Status:** 8/26/2020-Satisfactory progress. Student was at 70% accuracy on his ESY goal.
- **Math Goal Status:** 10/12/2020-Mastered. Given 3-digit addition and subtraction problems with regrouping, Student answers correctly 80% of the time with an average of 1 verbal prompt.

13. **IEP of 11/4/2020** (no signatures or names of meeting attendees). The Student's IEP for grades 4 and 5 was developed with a start date of November 4, 2020, and an annual review and end date of November 3, 2021 (Parent Exhibit 9, IEP, Bates Stamp Respondent 1932-1947). In the PLAAFP statements, weaknesses were noted in reading, in which he scored in the 1st percentile on the 4th grade Fastbridge in reading fluency. The PLAAFP in writing showed problems in capitalization and spelling. When given a writing prompt, the Student wrote an average of 3 sentences with 4 correct word sequences. In math the Student scored at the 20th percentile in the 4th grade Fastbridge. The annual goals in reading, written expression, and math were as follows:

- **Reading Goal #1:** By November 2021, when given a timed oral reading fluency probe, Student will increase oral reading fluency from a score of 14 correct words per minute (10th percentile) at the 2nd grade level to 68 correct words per minute (25th percentile) at the 3rd grade level, with 75% accuracy 4/5 documented observations, as measured by curriculum based measures and data logs.
- **Reading Goal #2:** By November 2021 given a list of 15 words (real word and nonsense word lists) including words with 2 closed syllables, blends, and prefixes, Student will read increasing words from 7/15 to 13/15 words in 4/5 documented observations as measured by curriculum and teacher made logs.

- **Written Expression Goal #1:** By October 2021, given up to 5 dictated sentences, Student will improve spelling and punctuation by increasing written work accuracy from a baseline of 66% accuracy in 4/5 observations, as measured by Student work samples and teacher data logs and supported by OT.
- **Written Expression Goal #2:** By October 2021, provided with a topic and/or picture chosen by the teacher, Student will independently write six sentences, an introduction, details and concluding sentence with correct capitalization and punctuation, and a cohesive thought over three consecutive trials as measured by Student writing samples taken by the special education teacher and supported by an occupational therapist.
- **Math Goal:** By October 2021, given a 4th grade math process CBM, 15 minutes and access to a number line and scratch paper, Student will increase his score from 10 points (20th percentile) to 35 points (25th percentile), in 4/5 documented observations as measured by the curriculum based measures and teacher data logs.

The special education services, beginning on November 4, 2020, and ending on November 3, 2021, consisted of direct specially designed instruction in (a) reading, 450 minutes weekly; (b) writing, 150 minutes weekly; and (c) math, 450 minutes weekly.

THE LOCAL DUE PROCESS HEARING

On February 25, 2021, the Petitioners filed a Due Process Complaint against the District alleging that the District failed to provide the Student a FAPE under the IDEA. The public hearing was held on April 19, 2021, through April 21, 2021, and reconvened virtually on April 26, 2021. Additional arguments regarding the provision of ESY was requested with the Petitioners and District responding on May 19, 2021. In the hearing, parents challenged the IEPs and services provided in reading, writing, and math to their son in the 2018-2019 and 2019-2020 school years. On May 20, 2021, the LHO issued his final order. The findings were as follows:

A. 2018-2019 school year

- **Reading:** “Parents have met their burden of proving the District failed to provide FAPE for the 2018-2019 school with respect to reading beginning some point after the commencement of the school year” (LHO decision, page 26).

- **Writing:** “Parents have not proven that District failed to provide FAPE with regard to writing in the 2018-2019 school year” (LHO decision, page 26).
- **Math:** “Student did not make good progress on these new goals. But there is nothing in the Record that establishes that 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” (LHO decision, pages 26-27).

B. 2019-2020 school year

- **Reading:** “Parents have not sustained their burden of proving a denial of a FAPE with regard to reading as to the 2019-20 school year” (LHO decision, page 27).
- **Writing:** “There is no question that Student made little, if any, progress in writing over the 2019-20 school year. What is not clear is how District failed in this regard. Parents’ arguments are long on theory, but short on actual evidence. Although Student’s writing performance presents a troubling picture, there is no evidence from which findings could be made that substantiate a denial of FAPE” (LHO decision, page 28).
- **Math:** “At the end of the day, the evidence shows that 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 District denied Student a FAPE regarding math” LHO decision, page 29).

C. Post 2019-2020 ESY

- “Parents contend that services provided after the conclusion of the school year failed to provide a FAPE . . . Parents note the regression . . . but there is no real evidence in the record that the regression was a result of any failure to implement the IEP. Although there is ‘before’ and ‘after ESY evidence of 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 FAPE; or (2) that the services were inadequate” (LHO decision, page 30).

D. Remedy Issues

- “Parents seek compensatory education as a remedy. In addition to bearing the burden of proof as to a denial of FAPE, Parents also bear the burden of proving that compensatory education is an appropriate remedy...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 FAPE” (LHO decision, page 30-31).

In the summary of his decision the LHO wrote: “In their complaint, Parents challenge the services provided by the district as to reading, writing, and math for the 2018-19 school year, the 2019-20 school year, and the services provided after the 2019-2020 school year before the 2020-2021 school year. For the reasons set forth below, Parents have met their burden of proof only as to reading for part of the 2018-19 school year. 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 services would put the Student where he would have been if the violation has not occurred, Parents’ requests for compensatory education is denied.” (LHO Decision, page 1).

SCOPE OF REVIEW

The 2006 regulations to the IDEA established guidelines for how an SRO should conduct the review of the issues that are properly within the scope of the SRO’s authority (34 C.F.R. § 514 [b][2]). The SRO must examine the entire hearing record (34 C.F.R. § 514 [b][2]) and ensure that the Hearing was conducted consistent with the requirements of due process (34 C.F.R. § 514 [b][2][ii]). Additionally, the SRO must exercise plenary review and make an independent decision while giving due deference to the LHO’s findings unless the evidence in the record justifies a contrary conclusion (*Amanda J. v. Clark County School District* [9th Cir. 2001]; *Carlisle Area Schools v. Scott P.* [3rd Cir. 1995]; *Doyle v. Arlington County School Board* [4th Cir. 1998]; *O’Toole v. Olathe District School Unified School District Number 233*, [10th Cir. 1998]).

BRIEFS ON APPEAL

On June, 14, 2021, I received the Petitioners’/Parents’ brief from Andrew T. Potter, Esq. and John M. Read, IV, Esq. On June 18, 2021, I received briefs from the District/Respondents,

the Charleston School District, represented by Kimberly Kelley Blackburn, Esq. and Vernie L. Williams, Esq.

The Petitioners' brief presented the following three issues:

- (a) the LHO erred by failing to find the District failed to properly develop and implement an IEP for the Student that would provide him with a FAPE for the 2018-2019 school year in writing and math;
- (b) the LHO erred by failing to find the District failed to properly develop and implement an IEP for the Student that would provide him with a FAPE for the 2019-2020 school year in reading, writing and math; and
- (c) the LHO erred by failing to find the Student was entitled to compensatory education from the District's denial of a FAPE.

The District's brief presented the following issues:

- (a) The LHO properly found the District offered a FAPE;
- (b) The LHO erred when he found the District failed to provide an appropriate reading program during the 2018-2019 school year; and
- (c) The LHO correctly found that the Petitioners failed to present evidence upon which to base a remedy.

Both the District's and Petitioners' briefs were logical, well-written, and presented strong arguments.

DISCUSSION

Prior to turning to the ruling, I will comment on a few issues of importance.

Free Appropriate Public Education. This hearing turned on the following questions: Did the IEPs the District developed and implemented for the Student in 2018-2019 and 2019-2020 deny him a FAPE? To answer this question it is important, to briefly examine what constitutes a FAPE. The relevant cases to examine vis-a-vis Student are the U.S. Supreme Court's rulings in *Board of Education of the Hendrick Hudson Central School District v (1982)* and *Endrew F. Douglas County School District Re-I (2017)*.

In writing for the majority in *Rowley*, Chief Justice Rehnquist noted that "No one can doubt that this would have been an easier case if Congress had seen to provide a more comprehensive statutory definition of the phrase 'free appropriate public education.' But

Congress did not do so, and our problem is to construe what Congress has written” (*Rowley*, 1982, footnote 11). The *Rowley* court found that the Congressional statutory language “Set forth extensive procedures to be followed in formulating personalized education programs for handicapped children” (*Rowley*, 1982, p. 194) was clear but the “determination of when handicapped children are receiving sufficient educational benefits to satisfy the Act presents a more difficult problem” (*Rowley*, 1982, p. 202). Nonetheless, the Supreme Court fashioned a two part inquiry that lower courts (and hearing officers) could use in determining if a Student’s IEP had provided him or her with a FAPE: “First, has the state complied with the procedures set forth in the (IDEA)². And second, is the individualized education program developed through the (IDEA’s) procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more” (*Rowley*, 1982, pp. 207-208). The two part test solidified the notion that a FAPE consists of a procedural and substantive dimension. This distinction was later confirmed by Congress (see footnote #2).

The first part of the test did not seem a difficult determination, however, the second part of the *Rowley* test proved more difficult for courts when determining if a school had provided a FAPE to an IDEA-eligible student with disabilities. In fact, FAPE cases that have reached the U.S. Circuit Courts of Appeals led to differences in interpretations of the educational benefit standard, with some circuit courts adopting a higher meaningful benefit standard, i.e., the 3rd, 5th, and 6th circuits, and other circuit courts adopting a lower standard, i.e., the 2nd, 4th, 6th, 7th, 8th, 10th, and 11th (Solicitor General, 2017). The split in the circuits on FAPE, made it likely that eventually the U.S. Supreme Court would hear another case. The opportunity presented itself in a case out of the U.S. Courts of Appeals for the 10th Circuit: *Endrew F. v. Douglas County School District* (2015). The parents of a child with autism alleged that their son’s special education provided by the Douglas County School District had not conferred a FAPE and filed a due process complaint. The school district subsequently won at a due process hearing, in the U.S. District Court for the District of Colorado, and the U.S. Court of Appeals for the 10th Circuit.

² The IDEA now requires that in a complaint under the law, a hearing officer is supposed to make his or her decision based on “substantive grounds based on a determination of whether the child received a free appropriate public education” (20 U.S.C. § 1415[f][3][E][i]) and “in matters alleging a procedural violation a hearing officer may only find that child did not receive a free appropriate public education if the procedural violation resulted in substantive harm (20 U.S.C. § 1415[f][3][E][ii]).

The lower standard used the 10th circuit court in *Endrew F.* was that a school district provided FAPE as long as “Educational benefit (provided is) merely...more than de minimis” (*Endrew F.*, 2015, p. 1338). The parents filed a petition for a writ of certiorari asking the U.S. Supreme Court to take the case and answer the following question: “Whether the educational benefit provided by a school district must be merely...more than *de minimis* in order to satisfy the FAPE requirement” (Solicitor General, 2017, p. I). On September 29, 2016, the High Court granted the writ. Oral arguments were heard on January 11, 2017 and the opinion in *Endrew F. v. Douglas County School District* was rendered on March 22, 2017.

In an 8-0 unanimous opinion³ in *Endrew F.*, Chief Justice John Roberts wrote:

Thirty-five years ago, this Court held that the Individuals with Disabilities Education Act established a substantive right to a “Free Appropriate Public Education” for certain children with disabilities...We declined, however, to endorse any one standard for determining “when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act...That “more difficult problem” is before us today (*Endrew F.* 2017, p. 993).

The standard announced by the Supreme Court was “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” (*Endrew F.* 2017, p. 999). Chief Justice Roberts further observed that “whatever else may said of it, this standard is markedly more demanding than the ‘merely more than *de minimis* test’ applied by the tenth circuit” (*Endrew F.* 2017, p. 1000).

The Individualized Education Program

The IEP is the primary mechanism for ensuring the provision of FAPE. It has been described by the U.S. Supreme Court as the *modus operandi* (*School Committee of the Town of Burlington v. Department of Education of Massachusetts*, 1985) and the centerpiece (*Honig v. Doe* (1988) of the IDEA. It is the written document that memorializes the (a) essential components of a student’s appropriate educational program and (b) the collaborative process between a student’s parents and the school district in which the student’s appropriate educational

³ Justice Scalia had passed away and not yet been replaced when *Endrew F.*, was heard and decided.

program is designed (U.S. Department of Education, 1994). The task of the team is to develop an IEP “that aims to enable a child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement (*Endrew F.*, 2017, p. 999). Chief Justice Roberts further wrote that “The 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” (*Endrew F.*, 2017, p. 999). The essential nature of a student’s IEP consists of four components. First, the PLAAFP statements upon which the rest of the IEP is developed. Second and third, based on the student’s needs identified in the PLAAFP statements, the team develops his or her measurable annual academic and/or functional goals then systematically measures the student’s progress towards the goals. Moreover, the student’s progress toward the goals, or lack thereof, must be reported to a student’s parents. Fourth, statements of special education services based on the PLAAFP should include information on frequency, duration, and location of these services.

The PLAAFP statements are the foundation upon which a student’s IEP is based. Well-written PLAAFP statements create a baseline by which a student’s goal can be developed and his or her progress can be measured. The PLAAFP statement should be expressed in objective and measurable terms and must not be written in a vague or general manner (U.S. Department of Education, 1994). Moreover, every need identified in the PLAAFP statements must lead to a goal, a service, or a goal and a service (U.S. Department of Education, 1994).

The measurable annual goals are statements in an IEP that describe what a student can reasonably be expected to achieve, academically and functionally, in a 12-month period given the special education program (U.S. Department of Education, 1994). As previously mentioned, there must be a direct relationship between a need identified in a PLAAFP statement and a measurable annual goal. Although not a requirement of the IDEA, to be measurable, an annual goal should include the following components: (a) target behavior, an observable behavior that is to be changed; (b) a method of measurement, the instrument or strategy the team will use to measure the change in the target behavior; and (c) a criterion for acceptable performance, the data that informs the team when and if the goal has been achieved. The IDEA requires a description of how a student’s progress toward meeting the annual goals will be measured and when periodic reports will be given to parents on the progress the student is making toward meeting the annual goals (IDEA 20 U.S.C. § 1414 [d][1][A][i][III]). The purpose of progress

monitoring is to (a) assess a student's performance during the course of instruction, (b) quantify his or her rate of improvement, (c) adjust a student's instructional program to make it more effective and suited to his or her needs, and (d) evaluate the effectiveness of the IEP team's intervention. Additionally, the goals in a student's IEP must be challenging and ambitious given the student's unique circumstances (U.S. Department of Education, 2017).

An IEP is not a guarantee of a specific educational or functional result for a student with a disability (U.S. Department of Education, 2017). The law, however, does provide a means for the IEP team to revisit a Student's IEP if the expected progress is not being made. According to the U.S. Department of Education, the requirement is particularly important because of the U.S. Supreme Court's decision in *Endrew F.*, which clarified the standard that is required to determine if a student's IEP is sufficient to provide a FAPE: A school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" (*Endrew F.* 2017, p. 999). IDEA requires that if a student is not making expected progress toward his or her goals, the team must revise the IEP, as appropriate, to address the lack of progress (20 U.S.C. § 1414[d][4][A][ii]).

A student's IEP must include all the special education services, related services, and accommodations and modifications needed to address his or her needs as identified in the PLAAFP statements. It is not enough for a Student's IEP to simply list the services provided; rather the IDEA requires the beginning date of services and modifications, and a statement of the anticipated frequency, duration, and location of these services and modifications (20 U.S.C. § 1414[d][1][A][i][VII]). The definition of services also includes supplementary aids and services, which are "aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate" (20 U.S.C. § [33]; 34 C.F.R. § 300.42).

The IDEA also requires that IEP services be "based on peer-reviewed research to the extent practicable" (20 U.S.C. § 1414[d][1][A][i][IV]). According to the discussion accompanying the final 2006 regulations to the IDEA:

States, school districts, and school personnel must, therefore, select and use methods that research has shown to be effective, to the extent that methods based on peer-reviewed research are available. This does not mean that the service with

the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the (IDEA) to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in the denial of FAPE. The final decision about the special education and related services and supplementary aides and services that are to be provided to a child must be made by the child's IEP team based on the child's individual needs (Federal Register, 71, 46,665, 2006).

The case of *Ridley School District v. M.R. and J.R. ex rel. E.R.* (2012) is interesting because it presents fact someone akin to *C.W. v. Charleston School District*. *Ridley* involved a young girl with a learning disability. In the development of her IEP, school personnel suggested a phonics based program based on Orton-Gillingham titled "Project Read." The parents believed that the IEP was inadequate because it failed to provide a peer-researched reading program. They requested that the IEP include the Wilson Reading Program. School personnel countered that Project Read was based on peer-reviewed research and provided the parents a report from the Florida Center for Reading Research in which Center investigators concluded that Project Read was aligned with current peer-reviewed research in reading. In a due process hearing, which involved additional issues, the hearing officer found that because the district used a program that was not supported by peer-reviewed research, the district had failed to provide E.R. with a FAPE. The case was eventually heard by the U.S Court of Appeals for the 3rd Circuit. The circuit court found for the school district observing that (a) the court did not have to decide if the lack of peer-reviewed research denied a FAPE because Project Read was research based, (b) the IEP team retained flexibility to design an appropriate program in light of available research, (c) courts must accord deference to choices made by the school district, and (d) the IDEA does not require the school district to choose the program supported by the optimal level of research as long as the program provides a FAPE, and a FAPE, as the Supreme Court in *Endrew* tells us, is an IEP reasonably calculated to enable a student to make progress in light of his or her circumstances. With respect to the peer-reviewed issue, the opinion of the court noted "we will not set forth any bright line rule as to what constitutes an adequately peer-reviewed special education program; hearing officers and reviewing courts must continue to assess the appropriateness of an IEP on a case-by-case basis, taking into account the available research" (*Ridley*, 2012, p. 124).

Additionally, the school district must ensure that the services as set forth in the IEP are provided. In fact, in 2017 the U.S. Court of Appeals for the 9th Circuit noted that “an IEP, like a contract, may not be changed unilaterally. It embodies a binding commitment and provides notice to both parties as to what services will be provided to a student during the period covered by the IEP (*M.C. v. Antelope Valley High School District*, 2017, p. 1197). The IEP is not a commitment in the sense that it is a guarantee that a student’s goals will all be achieved; rather, it is commitment that school personnel will deliver the special education services as agreed upon by all parties and written into the IEP.

The Student’s IEPs

Issues in some of the District IEPs led to interpretive difficulties. For example, the LHO observed that “The educational testing data on Student is all over the place . . . The mixing of different types of tests at different points of the year also complicates matters” (LHO Decision, p. 19). LHO then aptly notes the crux of the problem “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” (LHO Decision, p. 19). Many of the goals in [the Student’s] IEPs do set a criterion for acceptable performance but, nonetheless could be a little clearer: “By August 2019, when presented with a grade 1 reading passage, [the Student] will improve his word identification skills and decoding skills by increasing from 11 to 46 read correctly as measured by a curriculum based measurement probe” (District Exhibit 4, IEP, Bates Stamp-Respondent 1729). The goal has a baseline of 11 and a criterion the Student was given to read the passage (i.e., how long does Student have to read the passage, 1 minute, 1 hour, 1 day?), however, with the addition of time, this goal could be measured and used to examine his progress, which was reading 46 words by August 2019. This problem was addressed in a subsequent IEP.

Some goals, although fairly well written were less clear when one is attempting to determine if the goal was used to measure Student’s progress. For example, the following goal, “By October 2020, when given five 3-digit addition and five 3-digit subtraction problems with regrouping on graph paper and 2-3 verbal prompts for all ten problems, [the Student] will accurately solve with 80% accuracy from a baseline of 10% accuracy (2-digit) in 3 out of 4 trials as measured by the special education teacher using data collection logs.” (District Exhibit 4, IEP, Bates Stamp-respondent 1698) The goal is clear until the section “as measured by the special

education teacher using data collection logs.” Why use data collection logs? If the District had developed informal tests of randomly selected five 3-digit addition and subtraction problems to give the Student systematically, this data could have been easily collected, stored, and used to inform the IEP team as to the Student’s progress toward this goal. Another question may be why a 25% failure rate (i.e., 3 of 4 trials) constitutes an ambitious goal.

In a very few goals it was difficult to interpret what the IEP team was attempting to measure: “By May 2020, when given a grade level curriculum based assessment, [the Student] will maintain an average of 85% or higher as measured by a CBA test given by the special education teacher” (Parent Exhibit 5 IEP, Bates Stamp, Respondent 17013). Although this is listed as a math goal there is no mention of math in the goal and what exactly is being measured. Thus, it is impossible to tell what is supposed to be at “an average of 85% or higher.” Most of the goals in the Charleston IEPs in question could have been used to measure the Student’s progress as the LHO suggested; but writing the goals in a clearer manner would have made interpreting the District’s IEP more straightforward and would have made it easier for the IEP team to accurately monitor Student’s performance.

An additional problem with some of the Student’s IEPs is that there is nothing in the record to indicate that data were collected on some of the goals included in the IEPs. Every student’s IEP must identify how his or her progress toward the annual goals will be measured and when periodic reports on this progress will be provided (34 C.F.R § 300.320[a][3]). Many of the Student’s goals call for objective measures of his progress (e.g., reading 46 words on a 1st grade passage, as measured by the second grade Dolch word list) and some of the Student’s goals use vague and subjective measures (e.g., as measured by teacher data logs, as measured by work samples). Although the LHO noted this problem (“it is not clear from the narratives if the results reflect measurement against the original goal” (LHO decision, p. 15), the record or testimony convinced the LHO that District personnel made decisions based on data on the Student’s progress.

I also had questions with the progress reports in the record (Parent Exhibit 8, Progress Report, Bates Stamp-Respondent 2002-2007). The progress monitoring information in reading, writing, and math were reported on the following dates: 12/2/2019, 1/21/2020, 2/24/2020, 3/30/2020, 5/4/2020, 6/8/2020, 8/26/2020, and 10/12/2020. My question, because these reports were included in one document is whether the parents were informed of their son’s progress on

each of these separate dates or all of these progress reports given to the parents at one time. If the former is the case, the District would have been doing an excellent job in keeping the parents updated on this important issue. If the latter is the case, however, the District would not have been keeping the parents apprised of the Student's progress in a manner that would have allowed them a meaningful role in the IEP implementation. As the U.S. Circuit Court of Appeals for the 9th Circuit wrote in the majority opinion in *M.C. v. Antelope Valley High School District* (2017):

Parental participation does not end when the parent signs the IEP. Parents must be able to use the IEP to monitor and enforce the services that their child is to receive... parents must be able to participate in both *formulation* and *enforcement* of the IEP" (*Antelope Valley*, 2017, p. 1199; emphasis added).

CONCLUSIONS

According to the LHO, his difficult task was "to analyze the three main subjects (reading, writing, and math) over two years considering the complex picture posed by different data and varied testimony presented over four days" (LHO Order, p. 21). It is my task to analyze the LHO's order, the entire hearing record, and make an independent decision on the LHO's ruling upon the completion of the review. At the same time, the findings of fact of the LHO are entitled to great deference and are considered prima facie correct (See *M.S. ex rel. Simchick v. Fairfax County School Board.*, 4th Cir. 2009). Moreover, where the LHO and I reach different results, I must provide reasons for departing from the LHO's decision. I present my conclusions vis-a-vis the LHO's findings.

LHO Findings-2018-2019 IEP

LHO Finding #1

Reading: "Parents have met their burden of proving the District failed to provide FAPE for the 2018-2019 school with respect to reading beginning some point after the commencement of the school year" (LHO decision, p. 26).

According to the LHO, the District failed when there were signs that the Student was not only failing to make progress but he was regressing (LHO decision, p. 26). The LHO noted that on two occasions the Student's IEP team agreed to change course if the data showed

instructional changes were necessary, but then failed to do so. The team had actually agreed to implement the Wilson Reading curriculum, but did not.

In reviewing the record, I found two additional problems with the District's IEP of August 1, 2018 (District Exhibit 4, Respondent, Bates Stamp 1729 and 1731) and the revised IEP of September 25, 2018 (Joint Exhibit 2, Respondent, Bates Stamp 1915 and 1917). First, the goal in the IEP of August 1, 2018, was that the Student would improve to 46 words read out of a first grade textbook and the revised goal had the Student improving to 59 correct words per minute out of a second grade textbook. By doing this, the IEP team essentially made the goal more difficult, simultaneously making it more unlikely that the Student would reach the goal. To use an analogy from archery, if the archery student could not hit the target, it would make little sense to address the student's problem by making the target smaller and moving it further away from the student! The purpose of the measurable annual goal is to monitor a student's progress toward the goal. To improve the Student's program, required a change in services delivered or methods used, not a change in the tool to measure progress. Second, the reading services in the August 1, 2018, IEP were directly delivered 90 minutes daily (assuming delivery 5 days per week the minutes per week would amount to 450 minutes per week), however, in the September 25, 2018, IEP reading services were delivered directly 200 minutes weekly. Reducing the amount of direct service will likely not result in a student making progress. If this was an error in drafting the IEP, the Student's parents should have been contacted immediately and the IEP should have been corrected.

The Student's parents argued that because the Wilson Reading System was not the curriculum the District used, the Student was not provided a FAPE. The issues that led the LHO to the finding that the 2018-2019 did not provide a FAPE was not that the IEP team did not adopt the Wilson Reading System immediately, but rather that the District failed to make instructional changes when the Student was failing to make progress on his reading goal. The IDEA defers decisions regarding the educational methodology to the school district as long as they collaborate with a student's parents and choose a methodology that provides a FAPE. Similarly, special education teachers need to be adequately trained, but if they are certified special education teachers in the state that most likely fulfills this requirement. Whereas parents certainly have the right to express their opinions about teacher training, and IEP teams must consider these

opinions, school districts are under no obligation under the law to accept parental training requests.

Testimony is varied; however, I find no reason in the record to depart from the LHO's finding.

SRO-The LHO's finding is affirmed. The District failed to provide the Student a FAPE for the 2018-2019 school year.

LHO Finding #2

Writing: "Parents have not proven that District failed to provide FAPE with regard to writing in the 2018-2019 school year" (LHO decision, page 26).

SRO-The LHO's finding is affirmed.

LHO Finding #3

Math: "Student did not make good progress on these new goals. But there is nothing in the Record that establishes that 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" (IHO decision, pages 26-27).

SRO-The LHO's finding is affirmed.

A comment is in order regarding a mistaken notion advanced in the father's testimony (Testimony, P. 80, L. 20). An attorney asks the father if it is the parents' position that the failure to incorporate the diagnosis of dyscalculia in the goals failed to provide the Student with a FAPE? The father's answer is yes. The name of a particular disorder has little to do with the question of whether an IEP team crafts a program of special education that confers a FAPE. To develop a program that confers a FAPE requires that the school district (a) conduct a thorough and relevant assessment of a student's needs, (b) develop services that addresses the student's unique needs and are reasonably calculated to enable a student to make progress in light of his or her circumstances, and (c) monitors a student's progress and makes instructional changes when the data indicates it is necessary for a student to make progress toward his or her goals.

LHO Findings-2019-2020 IEP

LHO Finding #4

Reading: “Parents have not sustained their burden of proving a denial of a FAPE with regard to reading as to the 2019-20 school year” (LHO decision, page 27).

SRO-The LHO’s finding is affirmed.

LHO Finding #5

Writing: “There is no question that Student made little, if any, progress in writing over the 2019-20 school year. What is not clear is how District failed in this regard. Parents’ arguments are long on theory, but short on actual evidence. Although Student’s writing performance presents a troubling picture, there is no evidence from which findings could be made that substantiate a denial of FAPE” (LHO decision, page 28).

I am unsure what “theory” the LHO is referring to here. The Student’s father testified that “He (Student) absolutely has not made progress in writing . . . The goals have not changed from the 9/25/18 IEP to the 11/7/19 IEP to now the 11/4/2020 IEP . . . And here we are two years later . . . and it doesn’t even seem like we’re making even the bit of progress” (Testimony, p. 127). The LHO is correct that the Student made little if any progress and this presents “a troubling picture.” Despite this lack of progress, the IEP team failed to change the student’s written expression goals and actually decreased direct services in written expressions services from the September 25, 2018, IEP. It is truly a troubling picture when progress monitoring data is showing little or no progress and the IEP team fails to make instructional changes. “After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement” (*Endrew F.*, 2017, p. 999). When the plan is failing, it is the role of the IEP team to look at a student’s data, make what they believe to be necessary instructional changes to improve the plan, and then to continue collected data. Unfortunately, this did not occur in the Student’s 2019-2020 IEP.

SRO-The LHO’s finding is reversed.

LHO Finding #6

Math: “At the end of the day, the evidence shows that 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 District denied Student a FAPE regarding math” (IHO decision, page 29).

SRO-The LHO’s finding is affirmed.

LHO Finding #7

Post 2019-2020 ESY: “Parents contend that services provided after the conclusion of the school year failed to provide a FAPE . . . Parents note the regression . . . but there is no real evidence in the record that the regression was a result of any failure to implement the IEP. Although there is ‘before’ and ‘after ESY evidence of 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 FAPE; or (2) that the services were inadequate” (LHO decision, page 30).

SRO-The LHO’s finding is affirmed.

LHO Finding #8

Remedy Issues: “Parents seek compensatory education as a remedy. In addition to bearing the burden of proof as to a denial of FAPE, Parents also bear the burden of proving that compensatory education is an appropriate remedy...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 FAPE” (IHO decision, page 30-31).

In his opinion, the LHO correctly observes that “there needs to a basis in the Record for finding that the proposed remedy is necessary and appropriate to compensate for a denial of FAPE” (LHO Decision, p. 31). The remedy proposed by the Student’s parents was compensatory education. An LHO cannot determine the amount of compensatory education unless the record provides the LHO about the type of educational services the student needs to make progress (*Branham v. District of Columbia*, 2005).

Compensatory education is not a remedy that is listed in the IDEA; however, hearing officers and courts have awarded compensatory education in appropriate circumstances by exercising their authority under the law to “grant the relief that the court determines to be appropriate” (20 U.S.C. 1415[i][2][C][iii]). Compensatory education as a potential remedy for a denial of a FAPE was affirmed in a ruling by the U.S. Supreme Court. Although the U.S.

Supreme Court did not discuss compensatory education, it established the basis for such rewards in *Burlington* (1985). In *Burlington*, the High Court ruled that parents could recover reimbursement for a student's tuition at a private school to remedy a denial of FAPE by a school district. The Supreme Court did not characterize tuition reimbursement as damages, but rather that such awards simply require a school district to "belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP" (*Burlington*, 1985 p. 359).

In 1986, the U.S. Court of Appeals for the 8th Circuit applied the *Burlington* ruling to claims of compensatory education in *Meiner v. State of Missouri*, 800 F.2d. 749 (8th Cir. 1986). The appellate court concluded that "if successful on her claim that the defendants denied her a free appropriate public education . . . recover compensatory educational services to replace the services the defendants were obligated to provide" (p. 756). Since the *Meiner* ruling, a number of appellate courts have recognized compensatory education as an available remedy under the IDEA (*Pihl v. Massachusetts Department of Education*, 1st Cir. 1993; *Burr v. Ambach*, 2nd Cir. 1988; *Ridgewood Board of Education v. N.E.*, 3rd Cir. 1999; *G. v. Fort Bragg Dependent Schools*, 4th Cir. 2003; *Hall v. Knott County Board of Education*, 6th Cir. 1999; *Board of Education of Oak Park and River Forest High School District 200 v. Illinois Board of Education*, 7th Cir. 1996; *M.C. v. Antelope Valley Union High School District*, 2017; *Parents of Student W. v. Puyallup School District*, 9th Cir. 1994; *Jefferson County Board of Education v. Breen*, 11th Cir. 1988). The Office of Special Education and Rehabilitative Services (OSERS) and Office of Special Education Programs (OSEP) of the U.S. Department of Education have also recognized compensatory education as an available remedy for the denial of FAPE (*Letter to Anonymous*, 1994; *Letter to Kohn*, 1991; *Letter to Riffel*, 2000). Awards of compensatory education are a remedy, the purpose of which is to place an IDEA-eligible student in the position the student would have been in had not their school district violated the IDEA by failing to confer a FAPE (*Central School District v. K.C.*, 2013; *M.C. v. Antelope Union High School District*, 2017). Relief is accomplished by replacing the special education services the student should have received the first place (*Reid v. D.C.*, 2005).

According to the U.S Court of Appeals for the 2nd Circuit, compensatory education is prospective equitable relief that requires a school district to fund education as a remedy for any earlier deprivations in a student's education (*Somoza v. New York City Department of Education*,

2008). The U.S. Court of Appeals for the 9th Circuit in *R.P. v. Prescott Unified School District* (2011) observed that parents do not need to explicitly detail any particular form of relief; it is up to the courts to craft the appropriate remedy. In this case, the appellate court found that the district court erred in concluding that the suit was unfounded because the parents did not identify or offer evidence of any compensatory education that would benefit (the student in question). "Thus, even if parents were happy with the current IEP, they could reasonably have expected the district court to use its equitable powers to help bring (the student) to the point at which he would have been had he received FAPE all along" (*R.P.*, 2011, p. 1117).

Because of the Student's age, compensatory education could include extended day programs, additional programming, ESY programming, or after school tutoring. Often awards equal the length of the denial of services measured in days or months although nothing in the law requires the award to be equal to the amount of time in which FAPE was denied (*Parents of Student W. v. Puylup School District*, 1994). According to the court, the length of a student's compensatory services should be based on the student's unique needs and circumstances.

The LHO ruled that the District failed to provide a FAPE during the 2018-2019 school year in reading. Additionally, I find that the District failed in its obligation to provide a FAPE during the 2019-2020 school year in writing. Such denials of a FAPE are very serious; this is especially true because the denial of a FAPE came at a formative time during the Student's educational career.

SRO-The LHO's finding is reversed.

ORDER

For the reasons stated herein, I affirm the LHO's decision in part and reverse in part.

Because the 2018-2019 IEP in reading and 2019-2020 IEP in writing did not provide a FAPE, I order the District to take the following actions at District expense:

1. Provide six months of compensatory educational services in reading. The District has improved the instruction of Student in reading as seen in most of the later progress reports. It would seem that the District's switch to the Wilson Reading System has benefitted Student. Although school districts have the choice regarding the type of educational methodology used,

because the IEP team has chosen to implement the Wilson system and it has resulted in the Student making progress, the IEP team should continue to use the system. It is important that the IEP team also continue to monitor Student's progress. I would suggest that the IEP team use CBM oral reading fluency measures to monitor the Student's progress as they did in 2018-2019 IEP. It is also important that the IEP team report Student's progress to the Parents on a frequent and systematic basis.

As mentioned previously, special education teachers need to be adequately trained but if they are certified special education teachers in the state that likely fulfills this requirement. Whereas parents certainly have the right to express their opinions about teacher training, and IEP teams must consider these opinions, school districts have no obligation under the law to accept parental training requests.

2. Provide six months of compensatory educational services in written language instruction. I would suggest that the IEP adopt an evidence based writing program (e.g., "Reasoning and Writing" by Science Research Associates/McGraw Hill) and monitor the Student's progress using CBMs. I strongly suggest that the team adopt the CBM procedures used to measure Student's growth in written expression included in the IEP developed at Belle Hall Elementary (see Parent Exhibit 4). The goals in this IEP, which measured correct writing sequences, were global measures of writing proficiency and are useful in monitoring student progress. Written expression goals, such as those used in the May 25, 2019, IEP are also very useful. As with the reading progress reports, the IEP teams needs to provide frequent and systematic information on Student's progress to his parents.

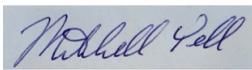
3. The particular format that compensatory education services will take (e.g., tutoring) is a determination that is left to the IEP team. The parents and school personnel know the Student well and are best situated to make these decisions.

4. The IEP team's compensatory education decisions will be reported to the SRO for approval as soon as possible, but not later than October 1, 2021. If the team needs more time, they may request an extension.

5. The SRO and SCDE, Office of General Counsel will be responsible for monitoring the implementation of this decision.

NOTICE OF APPEAL RIGHTS

Any party aggrieved by this decision may commence a civil action with respect to the complaint presented in any state court of competent jurisdiction or in a district court of the United States within ninety (90) days of the date of this decision. 20 U.S.C. § 1415(i)(2)(A)-(B); 34 C.F.R. § 300.516; S.C. Code Regs. § 43-243(V)(17).

A handwritten signature in blue ink, reading "Mitchell Yell", is displayed within a light blue rectangular box.

Mitchell L. Yell, Ph.D.

State-Level Hearing Review Officer

Columbia, South Carolina

July 27, 2021

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