

STATE OF SOUTH CAROLINA	)	
	)	BEFORE THE STATE LEVEL HEARING
	)	OFFICER MITCHELL YELL, PH.D.

In the matter of:

A.B. and K.C., Sr. on behalf of K.C., Jr.	)	
	)	
Petitioners,	)	STATE-LEVEL HEARING OFFICER
	)	DECISION
v.	)	
	)	
York County School District Four/Fort	)	
Mill School District	)	
	)	
Respondent.	)	
_____	)	

This matter is before me pursuant to an appeal of a due process hearing in which A.B and K.C., Sr., (“Petitioner”) on behalf of their minor son, K.C., Jr. (“Student”), appeal the decision and final order of the Local Due Process Hearing Officer, Monica R. Bohlen (“LHO”). Fort Mill School District (“District”/”Respondent”) was represented by Meredith L. Seibert, Esq. and David T. Duff, Esq.

On March 7, 2022, Petitioner filed a Due Process Request/Complaint under the Individuals with Disabilities Education Act (“IDEA”). A second Due Process Request/Complaint was filed by the Petitioner on March 9, 2022. On March 23, 2022, the LHO consolidated the two complaints. The parties held resolution sessions on the complaints but were unable to reach an agreement. The due process hearing was held on May 2, 3, and 4, 2022. The LHO issued her decision on May 19, 2022. The LHO also notified the Petitioner 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 General Counsel of their intent within ten days. On, May 20, 2022, the SCDE notified parties of the Petitioner’s request for a review of the LHO’s final order and that I would be appointed state-level review officer. I received confirmation of my role in this matter on May 20, 2022.

On May 22, 2022, I notified the Petitioner and District that I would serve in this capacity, introduced myself and my qualifications to serve in this capacity, and asked that Petitioner and the District submit their final arguments to me on the following dates: Petitioner's brief on June 1, 2022; District's brief on June 5, 2022, and Petitioner's reply brief (if needed) on June 7, 2022. Because of delays in preparing the transcript of the hearing, these dates were modified. The Petitioner was to submit their brief on June 3, 2022 and the district on June 8, 2022. Parents reply brief was to be submitted on June 11, 2022. I also requested that briefs be no more than 20 pages double-spaced and include any case law and statutes necessary to support their respective positions.

On June 3, 2022, Petitioner timely submitted their brief of 50 pages, single spaced. On June 8, 2022, the District timely submitted their brief of 27 pages, double-spaced. In response to the District's brief, Petitioner submitted their response brief of 25 pages, single-spaced, on June 11, 2022.

ROLE OF THE STATE-LEVEL HEARING OFFICER

In the two-tier system of administrative claims under the IDEA, which is the system used in South Carolina, a state-level hearing officer's (Tier Two) review of an LHO's (Tier One) ruling is limited to the issues appealed (34 C.F.R. § 300.514, 2006). The state-level hearing office must conduct an independent review of the finding and decision, which includes (a) examining the entire record; (b) ensuring that the procedures at the hearing were consistent with the procedures of due process; and (c) seeking additional evidence, if necessary (34 C.F.R. § 300.514(2)(i-iii), 2006).

Moreover, the LHO is entitled an assumption of "prima facie correctness" and if the LHO ruling is not followed, an explanation must be provided as to why the IHO's ruling was not followed (*Doyle v. Arlington County Sch. Bd* 953 F.2d 100, 105, 4th Cir. 1991). Thus, a review requires that the state-level hearing officer "reviewing the finding of hearing officers in two-tier schemes must exercise a plenary review to make the independent decision that IDEA requires except that they should defer to the hearing officer's findings based on credibility judgments unless the non-testimonial, extrinsic evidence in the record will justify a contrary conclusion or

unless the record read in its entirety would compel a contrary conclusion” (*Carlisle Area Sch. Dist. v. Scott*, 3rd Cir. 1995). This is the standard I have used in rendering my decision.

I received 1004 pages of testimony and 60 exhibits from the hearing. I have read the entire due process hearing transcripts and briefs from the Petitioner and District, and reviewed the exhibits. I have determined the hearing procedures were consistent with the requirements of due process.

PROCEDURAL BACKGROUND

The dates pertinent to this appeal are as follows:

- March 7, 2022-Petitioner files a due process hearing request (Complaint 1).
- March 14, 2022-Petitioner files a second due process hearing request (Complaint 2).
- March 23, 2022-LHO issues an order consolidating the two complaints.
- April 4, 2022-Petitioner and District personnel sign a “no resolution agreement.”
- April 25, 2022-Prehearing conference was held by telephone.
- May 2, 3 and 4, 2022-Hearing was convened at the Fort Mill School District administrative building.
- May 19, 2022-LHO issues ruling.
- May 20, 2022-Petitioner files an appeal with SCDE.
- May 20, 2022-Dr. Yell is appointed state-level review office for the appeal.
- June 3, 2022-Petitioner submitted her brief to Dr. Yell.
- June 8, 2022-District submitted their brief to Dr. Yell.
- June 11, 2022-Petitioner submitted the response brief to Dr. Yell.

DISCUSSION

Prior to addressing the issues on which this appeal is based, five topics will be examined: (a) the burden of proof in a due process hearing; (b) the impartiality of the LHO; (c) the authority of the LHO to set timelines, to weigh credibility, and accept evidence; (d) the availability of remedies under the IDEA; and (e) the effect of the Covid-19 pandemic on the delivery of a free appropriate public education (“FAPE”)

The Burden of Proof

The IDEA is silent as to which party bears the burden of proof in a due process hearing or court case. The term “burden of proof” involves two related concepts: (a) the burden of production, and (b) the burden of persuasion. The party in a hearing with the burden of production must offer sufficient evidence at the onset of the action to be allowed to proceed. After both sides have presented their evidence, the party with the burden of persuasion must have convinced the hearing officer or judge of the existence of certain facts to prevail. The burden of persuasion is especially important because the party who has this burden, will lose the hearing or case if the LHO or judge is not persuaded by the evidence the party presents. In 2005, the U.S. Supreme Court ruled that the party that challenges the special education provided through a student’s IEP, bears the burden of proof (*Schaffer v. Weast*, 469 U.S. 2005). The author of the majority opinion in this case, Justice Sandra Day O’Connor, wrote that “the burden of persuasion lies where it usually falls, upon the party seeking relief” (p. 537). In *A.B. and K.B. Carberry, Sr. on behalf of K.C., Jr. v. Fort Mill School District*, the LHO concluded that Petitioners failed to offer sufficient evidence that the Fort Mill School District to prove their case on any of the four issues in the hearing. On the following issues, the LHO concluded that:

ISSUE #1-Whether the District failed to provide Student a FAPE in the LRE between March 15, 2020 to June 15, 2020 due to building closures in response to COVID. *“There was insufficient evidence that the District failed to provide Student a FAPE in the LRE between March 15, 2020, and the end of the school year, due to building closures in response to Covid”* (Due Process Hearing Decision and Order, page 17, conclusion of law 5).

ISSUE #2-Whether the District failed to provide Student a FAPE during the summers of 2020 and 2021 by failing to provide ESY and the services requested. *“There was insufficient evidence that the District denied Student a FAPE during the summer of 2020 by failing to provide ESY and services requested.” “There was insufficient evidence that the District denied Student a FAPE during the summer of 2021 by failing to provide ESY and services requested.”* (Due Process Hearing Decision and Order, page 17, conclusions of law 7 and 8).

ISSUE #3-Whether the District failed to provide Student equal access to nonacademic services, including transportation, from March 2020 until March 2022. *“There was insufficient evidence that the District denied Student an equal opportunity to participate in non-academic services, specifically recreational activities, from March 2020 until March 14, 2022, 34 C.F.R. § 300.107.” “ There was insufficient evidence that the District denied Student an equal opportunity for transportation during that 2021-2022 school year. 34 C.F.R. § 300.107”* (Due Process Hearing Decision and Order, page 17, conclusions of law 9 and 10).

ISSUE #4-Whether the District failed to provide physical education to student from March 2020 until March 2022. The Petitioner stipulated that this issue did not include the 2020-2021 school year. *“There was insufficient evidence that the District failed to provide Physical Education to Student during the Covid closure period or during the 2021-2022 school year. 34 C.F.R. § 300.108”* (Due Process Hearing Decision and Order, page 17, conclusion of law 11).

In the hearing, the LHO rightly put the burden of proof on the Petitioners and found that Petitioners submitted insufficient evidence to meet this burden. I will set forth my specific reasons for my decision later in this order, but I agree with the LHO that Petitioner has failed to meet the burden of proof regarding the four issues being appealed.

The Impartiality of the Hearing Officer

The regulations to Part B of the IDEA at 34 C.F.R. § 300.511(c)(1) sets forth the following minimum requirements for hearing officers:

A Hearing officer

- A. must not be an employee of the state educational agency (SEA) or local educational agency (LEA) that is involved in the education or care of the student;
- B. must not have a personal or professional interest that conflicts with that person’s objectivity in the hearing;
- C. must possess knowledge of, and the ability to understand, the provisions of the IDEA, Federal and State regulations pertaining to the IDEA, and the legal interpretations of the IDEA by Federal and State courts;

- D. must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice;
- E. must possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

In my reading of the transcripts and the LHO decision and order I find that Ms. Bohlen properly weighted the evidence and conducted the hearing fairly and properly. The decision relied on the IDEA and regulations implementing the law and federal case law. The LHO clearly possessed the knowledge and ability to conduct the hearing in accordance with standard legal practice and wrote a logical and well-supported decision. Additionally, the LHO was fair, deferential, and helpful to the Petitioner's *pro se* status. Although *pro se* parties are generally held to less stringent standards, they still must comply with the rules of the IDEA and orders set by the LHO (*Card ex rel JD v. Citrus County Sch. Bd.*, 65 IDELR 3, MD FL 2015).

With respect to the charges of impartiality, an LHO enjoys a presumption of honesty and integrity that can only be overcome by a showing of bias (*AM v. Dist. of Columbia*, 933 F.Supp.2d 193, DDC 2013). In the briefs of June 3, 2022 and June 11, 2022, the Petitioner challenge the impartiality of the LHO. Following are verbatim examples of such statements from the Petitioner:

- “Ms. Bohlen now turning my own words against me...in gaslightings a tactic used by narcissists in and of itself. The video she claims is bullying is a parent and a grandparent BEGGING for their child to be treated fairly within the law. Only a master manipulator would turn a claim of the petitioner on harassment and bullying around onto the parent! This is a HUGE ethical concern I have for Ms. Bohlen.” (Petitioner Brief 1, page 21, point 58).
- “Ms. Seibert and Ms. Bohlen Prior Relationship/collusion.” “Ms. Bohlen having been an (sic) hearing officer for the State Department have had a mentor/mentee relationship. They had many experiences together and I’m certain through discovery we will be able to find this violation of communication” (Petitioner Brief 1, page 21, point V.A.).
- “I also have reason to believe that the orders that have been filed as Ms. Bohlen are not all written by her. There is an enormous amount of grammatical, linguistic, and

organizational differences among them. Petitioner brought this up before the hearing...It is how they caught the Unabomber. They very much seem to be Ms. Seibert writing them”

- “The hearing officer did not follow any of the procedural safeguards. Whether this is deliberate (sic) or not or lack of training...Although I have been unable to find an officer this century. It is clear that this proceeding has been anything but impartial” (Petitioner Brief 1, page 27, point V.A.).
- “The district did not seek to request 6 dismissal; it was only 1. That was a form of manipulation and collusion amount Mrs. Bohlen and Ms. Siebert, in an attempt to take advantage of a pro se litigant” (Petitioner Brief #2, Page 8, number 2).
- “This is just another contradiction and evidence that Ms. Seibert wrote the order herself and Mrs. Bohlen just signed it” (Petitioner Brief #2, Page 18).

The Petitioner fails to present any evidence of impartiality, collusion, or that the LHO was biased because of a mentor/mentee relationship with Ms. Seibert. No evidence is provided that Ms. Seibert and the LHO engaged in *ex parte* communications or that Ms. Seibert drafted orders that the LHO signed as the Petitioner alleges. Rather, the Petitioner presents suppositions but does not offer proof of her allegations.

The Authority of the LHO to set Timelines, to Weigh Credibility, and Accept Evidence

Throughout the hearing transcripts and briefs, Petitioner asserts that the LHO denied her due process rights by limited the hearing to three days, not accepted her efforts to impeach witnesses, and failing to accept evidence. The following are a few of the allegations Petitioner makes regarding the authority of the LHO:

- “Limiting the time to cross examine witnesses is not permitted in the IDEA” (Transcripts, page 212).
- “what I’m saying is that I don’t know because you’ve put time constraints on my due process. If there weren’t time constraints and we could actually have a fair due process hearing then we wouldn’t have this discussion” (Transcripts, page 359 and 360).

- “Furthermore her (the LHO) time constraints and limited my time to not be able to call all my witnesses or limit them to 30 min. is egregious out of line with hearing rights per IDEA” (Petitioner Brief #1, page 22).
- “There were several times through the hearing where I share with Mrs. Bohlen how her choosing to limit the hearing to 3 days was not allowed and severely limited my right to due process” (Petitioner Brief #1, page 25).

The case law is rather clear that a 3-day hearing is well within the LHO's discretion and courts have deferred to practices that LHOs have used to reduce the lengths of hearings. The following are examples of cases in which such practices were held to be permissible:

- The U.S. Court of Appeals for the Ninth Circuit upheld an LHO's pre-hearing order to nine hours based on the circumstances of the case (*B.S. ex rel. K.S. v. Anoka Hennepin Pub. Sch. District*, 799, F.3d 1217, 8th Cir., 2015).
- The district court for Washington D.C. upheld the HO's pre-hearing order limiting time for cross examination as reasonable in the context of a hearing length of no more than four days (*T.M. v. District of Columbia*, 75 F. Supp. 3d 233, D.D.C 2014)
- The district court in the southern district in Texas upheld an IHO's non absolute allocation of four hours to each party during a hearing (*M.V. v. Conroe Indep. Sch. Dist.*, 75 IDELR § 134, S.D. TX 2019)
- The district court in the eastern district of Virginia upheld an IHO's enforcement of time limits in accordance with a pre-hearing agreement.

Policy interpretations from the Office of Special Education Programs (OSEP) have also supported IHO's authority to engage in time setting efficiency measures. OSEP is the agency within the U.S. Department of Education with responsibility for administering the IDEA. In *Letter to Kane* (65 IDELR 20, OSEP, 2015), officials at OSEP opined that a state's best-practice guideline that limited a hearing to three days of six hour each day (18 hours total) did not violate the IDEA as long as the state guideline allowed a IHO to make an exception if needed.

Interestingly, the LHO in this case calculated that during the hearing the petitioner used 70% of the available time over the three-day hearing and the District used 30% of the available time (Doe Process Hearing Decision and Order, page 5).

Due process hearing officers have the authority to control the hearing process and regulate the conduct of the hearing (*In re Student with a Disability*, 103 LRP 20843, SEA, WV, 2002; *Warrior Run Sch. Dist.*, 114 LRP 37530, SEA PA, 2014). A hearing officer has implied powers, similar to those of a court, and has broad authority in accepting and rejecting evidence and imposing respect and decorum (*Stancourt v. Worthington City Sch. Dist. Bd. of Educ.*, 44 IDELR 166, OH App. Ct., 2005).

In this case, the Petitioner asserted that the LHO's actions hindered the right to a due process hearing, however, Petitioner does not provide an explanation of how these rights were hindered. Despite Petitioner's allegations to the contrary, the LHO conducted a fair and impartial hearing and did not engage in any conduct that impeded Petitioner's right to a fair due process hearing.

The Availability of Remedies Under the IDEA

The U.S. Supreme Court has held that the IDEA gives courts broad authority to grant such relief as the court determines appropriate when there has been a violation of the IDEA (*Forest Grove Sch. Dist v. T.A.*, 557 U.S. 230). Due process hearing officers also have the authority to award many types of relief, provided that the type of relief awarded has been recognized as available under the IDEA. This includes orders for future conduct, tuition reimbursement, and compensatory education. Courts have ruled that LHOs and state-level hearing officers lack jurisdiction to award attorney's fees (*Zipperer v. School Bd. of Seminole County*, 23 IDELR 19, M.D. FL, 1995, *aff'd in part*, 25 IDELR 1085, 11th Cir., 1997; *New Haven Bd. of Ed.*, 20 IDELR 42, D. CT 1993; *Mathern v. Campbell County Children's Ctr.*, 559 IDELR 273, D. WY 1987).

Courts have not awarded monetary damages under the IDEA (*A. W. v. Jersey City Pub. Schs.*, 486 F.3d 791, 3rd Cir. 2007; *Bradley v. Arkansas Department of Education*, 37 IDELR

181, 8th Cir 2002; *Chambers v. School District of Philadelphia Board of Education*, 53 IDELR 139, 3rd Cir 2009; *Doe ex rel Doe v. East Lyme Bd. of Educ.*, 790 F3d 440, 2nd Cir., 2015).

Petitioner requested that the LHO make the following awards of relief (Petitioner Brief #2: Page 23; Transcript, Petitioner closing argument, pages 989 to 992):

- Because of the denial of FAPE during Covid, Petitioner expects standard private tutoring rate of \$100 per hour for 150 hours per month-\$15,000 per month for 3 months plus an additional \$7500 for the first 4 weeks of school on the A/B schedule. **Total \$52,500.**
- Student was denied FAPE because the district denied ESY and summer camps. Petitioner expects comparable costs to a residential camp for children with autism. The average cost is \$2000 per week for 12 weeks of the summer for two summers. **Total \$48,000.**
- Student was denied FAPE during the 2020-2021 school year because of the A/B schedule and the implementation of inappropriate Covid measures which psychologically, socially, emotionally, and mentally damaged the student. Petitioner expects one year of compensation for a residential school for a child with autism in the amount of \$100,000. **Total \$100,000.**
- District failed to provide nonacademic services, such as transportation, ABA therapy, equestrian therapy, counseling, OT, aquatic therapy, chiropractic services, acupuncture, and Brain Balance in the 2020-2021 school year and in the fall of 2021. The Petitioner demands reimbursement of those therapies and immediate implementation. Petitioner requests travel on the first day of school, August 26, until the order on December 10th. **Total \$950**
- District has not provided physical education services to Student from March 2020 to June 2020 and for 10 months of the current school year. Petitioner seeks industry standard rate of \$100 per hour for 53 weeks. **Total \$5300.**

In total, the Petitioner sought **\$207,800** in compensatory services plus attorney's fees.

Because the LHO found against the Petitioner on the four issues, she did not address relief. Nonetheless, the relief Petitioners requested are primarily damages and not awarded under the IDEA.

The Effect of the Covid-19 Pandemic on the Delivery of a FAPE

The COVID-19 pandemic has presented challenges to administrators, principals, teachers, parents, and their children. This has been especially problematic in special education, where federal and state laws guarantee the educational rights of eligible students with disabilities. School administrations and teachers across the United States have been struggling with how to implement students Individualized Education Programs (“IEPs”) and provide a FAPE during the school closure. Officials in the OSEP have recognized the strain educators had to face when providing appropriate education services during the pandemic but, nonetheless have affirmed the importance of continuing to provide a FAPE to students with disabilities eligible for services under the IDEA.¹

Officials in OSEP recognized the use of distance and online instruction to provide special education and related services may be necessary to protect the health and safety of administrations, teachers, and students. They also noted disability-related modifications and services such as (a) distance instruction, (b) teletherapy and tele-intervention, (c) videos with accurate captioning or embedded sign language interpreting, (e) speech or language services through video conferencing may be provided online.

The Fort Mill School District responded quickly to the statewide closure of schools by South Carolina Governor Henry McMaster by developing and executing a three phase strategy for implementing distance learning plans (See Respondents Exhibit #1). The purpose of these plans was to continue educational services to all students by having teachers develop materials.

¹ U.S. Department of Education. (2020a). Fact sheet. Addressing the risk of COVID-19 in schools while protecting the civil rights of students. This document can be retrieved from <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>

U.S. Department of Education. (2020b). Supplemental fact sheet: Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities. This document can be retrieved from <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>

In the case of students with IEPs, these plans were tailored to individual student's academic and functional needs. The District then moved to Phase II and III. The Fort Mill School District acting expeditiously to offer appropriate educational opportunities to all students during these unprecedented times. Petitioner did not dispute the District's offer of specially designed instruction for the Student in question. According to the LHO "District personnel worked diligently to make distance learning work, and to implement Student's IEP" (Due Process Hearing Decision and Order, Page 14). The testimony of Ms. D.K. shows the extent to which she and other district personnel went to ensure that Student was receiving an education tailored to his individual needs despite the circumstances caused by the pandemic (Transcripts, testimony of Ms. D.K., pages 629-680).

ISSUES

The four specific issues to be considered on appeal are as follows:

ISSUE #1-Whether the District failed to provide Student a FAPE in the LRE between March 15, 2020 to June 15, 2020 due to building closures in response to COVID.

This issue arose with the statewide closure of South Carolina's schools. All parents, students, administrators, teachers, and staff had to adjust to this unprecedented situation. The pandemic particularly challenged special educators to provide students FAPE while protecting the health and safety of students, teachers, and staff. The Fort Mill School District acted with alacrity to ensure that students with disabilities received a FAPE, albeit in a different format.

Petitioner asserted that FAPE was denied to the Student because the special education was no longer free. In brief #1 parent wrote "Due to school closures from approximately March 15th to June 15 of 2020 KJ (Student) did not receive FAPE or Free and Appropriate Education in a LRE/least restrictive environment. It was not free because parents had to use their time to facilitate learning. Their time is equal to their money thus not being free" (Petitioner Brief #1, page 8; transcripts, page 46). Petitioner asked many of the witnesses if they believed that Student was actually receiving a free education (Transcripts, pages 102, 107, 144, 570, 571, 615).

As the LHO noted “IDEA only mandates what school districts must do” (Due Process Hearing and Order, Page 14). The law cannot require parents to be participates in their child’s education. However, school closures during the pandemic made it critical that parents would become involved. Unfortunately, testimony showed the difficulty teachers had in communicating with the Petitioner (Transcripts, see for example pages 651 and 653). As the LHO found, the district offered a FAPE; unfortunately, Petitioner failed to communicate with staff and did not return work packets. I agree with the LHO’s findings that Petitioner failed to satisfy the burden of proof on issue #1.

ISSUE #2-Whether the District failed to provide Student a FAPE during the summers of 2020 and 2021 by failing to provide ESY and the services requested.

The District IEP team considered the Student for extended school year services (“ESY”) services but determined that the Student did not require the services at that time because significant regressions was not anticipated. Nonetheless, the IEP agreed to consider ESY services later in later in the school year. At the time this decision was made, Student was performing satisfactorily on his IEP goals and his academic work.

In a document issued by the South Carolina Department of Education on “Special Education Covid-19 Guidance”² ESY services were explained in the following manner:

For a student to receive ESY services, the student must have exhibited substantial regression and recoupment issues during breaks in the previous IEP year (summer break, fall break, winter break, and other extended breaks in instruction) and/or there is evidence of emerging skills that are often referred to as “breakthrough” skills that would be lost if there was an extended break in instruction and support. The focus of services provided to the student as part of an ESY program are generally not upon learning new skills or “catching up” to grade level, but rather to providing practice to maintain previously acquired, learned, or emerging skills. The break from school caused by Covid-19 should not be part of the ESY

² This document is available at <https://ed.sc.gov/districts-schools/special-education-services/information-about-covid-19-coronavirus/final-guidance/>

determination. The LEAs should continue plans to provide ESY services when needed, but during the pandemic, the mode of delivery may change (South Carolina Department of Education, “Special Education Covid-19 Guidance,” page 2).

The Student’s IEP team, using this document as guidance, made an individualized determination of his needs and found that because he was doing well academically and making progress on his IEP goals, he did not need ESY services. I agree with the LHO’s findings that Petitioner failed to satisfy the burden of proof on issue #2.

ISSUE #3-Whether the District failed to provide Student equal access to nonacademic services, including transportation, from March 2020 until March 14, 2022.

Petitioner contended that the District failed to provide them numerous services from March 2020 to March 14, 2022. Petition listed summer camps, residential summer programs for Children with Autism, ABA therapy, equestrian therapy, occupational therapy (OT), aquatic therapy, programming at the Brain Balance Achievement Center, chiropractic therapy, and Neurofeedback therapy (Transcripts, see page 988; Petitioner Brief #2, page 24 and 25). These activities may be considered non-academic services. They also may be considered to be therapies or methodologies. In any case such services are only required if a student’s IEP team finds them to be necessary to provide a FAPE to the student. The LHO found that there was insufficient evidence that Petitioner requested these services during an IEP meeting. Even if they had been brought up for discussion during an IEP meeting, the team would have had to conclude the services were necessary to receive a FAPE.

Additionally, the IDEA requires that a student’s IEP team base special education services, related services, or supplementary aids and services on “peer-reviewed research to the extent practicable” (34 C.F.R. § 300.320[4]). Although neither the statute nor the regulations define the term, according to the U.S. Department of Education peer-reviewed research refers to “research that is reviewed by qualified and independent experts to ensure that the quality of the information meets the standards of the field before the research is published” (Analysis of Comments and Changes to the 2006 IDEA Part B Regulations, 71 Fed. Reg. 46664, August 14, 2006). To say that a program is grounded in peer-reviewed research essentially means that there

is reliable evidence that the program is effective. Unfortunately, with the exception of ABA therapy and occupational therapy, none of the Petitioners list of therapies are research-based. Thus, Ms. Jennifer Grant was correct in testifying that she could not find peer-reviewed research on Brain Balance but that the district was willing to review any peer-reviewed research that the Petitioner could provide (Transcript, testimony of Ms. Jennifer Grant, page 268).

The Petitioner also asserted that transportation was denied to student during the 2021-2022 school year. It was noted by the LHO that transportation was not included as a related service in the relevant IEP, thus transportation was provided as part of the District's bussing procedures and policies. As noted in the testimony of M.J. (Transcript, testimony of M.J., pages 937-958) and K.N. (Transcript, testimony of K.N., pages 960-975), the student usually didn't attend school and District policy was not to send busses to pick up students who were not attending school.

I agree with the IHO's conclusion that Petitioner offered insufficient evidence that the District denied Student an equal opportunity to participate in non-academic services or transportation.

ISSUE #4-Whether the District failed to provide physical education to student from March 2020 until March 2022. During the hearing the Petitioner stipulated that this issue did not include the 2020-2021 school year.

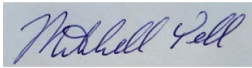
Regulations to the IDEA require that "each child with a disability must be afforded the opportunity to participate in the regular physical education program available to nondisabled children (34 C.F.R. § 300.108[b]). Student was not receiving adapted physical education services on his IEP, so the District was required to ensure he had an equal opportunity to participate in physical education as did his nondisabled peers. Student participated in regular physical education during the 2019-202 school year and during the Covid closure period, Student had an option to participate in regular physical education through distance learning, which utilized choice boards (Transcripts, Testimony of Mr. K.L., page 912). Student had an equal opportunity to participate in the physical education program. I agree with the LHO that there was insufficient evidence that the District failed to provide Physical Education to Student during the Covid closure period or during the 2021-2022 school year.

ORDER

For the reasons stated herein, I affirm the hearing officer's decision and dismiss the Petitioner's appeal.

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
June 19, 2022