

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

In the Matter of:)
)
A.F. and R.F. on behalf of M.BF.) **STATE-LEVEL HEARING OFFICER**
) **DECISION**
Petitioners,)
)
and)
)
Hampton County School District One,)
)
Respondent.)

DECISION OF THE STATE REVIEW OFFICER

This matter is before me pursuant to an appeal of a due process hearing in which Petitioners, [REDACTED] (“Petitioners”) on behalf of their daughter [REDACTED], seek review of the decision and final order of the Due Process Hearing Officer, Douglas Dent, in [REDACTED] and [REDACTED], on behalf of [REDACTED] v. *Hampton County School District One*. Hampton School District One was represented by Kim Blackburn, Esq. and John Reagle, Esq.

PROCEDURAL BACKGROUND

On August, 24, 2016, Petitioners filed a Due Process Complaint with the Hampton alleging that the Hampton County School District One (“District”), failed to provide a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”) to their daughter, [REDACTED]. The hearing, which was held on October 27 and 28 and November 16 and 17, 2016, involved almost 40 hours of testimony and resulted in 1209 pages of testimony and 89 exhibits. On November 29, 2016, the hearing officer issued his final order that District’s special education program offered an appropriate individualized education program (IEP) that provided [REDACTED] with educational benefit, thus complying with the FAPE mandate of the IDEA. The hearing officer 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, Division of Exceptional Children of their intent. On December 12, 2016, Petitioners notified the Office of General Counsel in the South Carolina Department of Education of their intention to seek review of the IHO’s final order.

I received confirmation that I would serve as the State Review Officer in this matter from Ms. Barbara Drayton, Esq. on December 14, 2016. On December 20, 2016, I notified the Petitioners and District that I would serve in this capacity. I also asked that Petitioners and the District submit their final arguments of no more than 20 pages to me as soon as possible. On December 21, 2016, the Petitioners filed a motion to extend by 30 days, making the final decision due on February 11, 2017. The District did not object to the extension. On January 3, 2017, the Petitioners filed a motion requesting a stay-put order to maintain the placement and services from [REDACTED]'s last agreed upon and implemented IEP developed on June 2, 2014. The District responded with an objection on January 6, 2017. I responded with an order that [REDACTED]'s stay put placement would be the IEP of 2015-2016. The parties sent their closing arguments to me on February 2, 2017 (District) and February 3, 2017 (Petitioner).

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 BACKGROUND

[REDACTED] was born on May 25th with Trisomy 21, also referred to as Down Syndrome. From 2010 to 2012, she attended an early intervention program, pre-k program, and kindergarten in Beaufort County. She received special education and related services in these settings. Her parents (the Petitioners) homeschooled [REDACTED] for the 2012-2013 school year. Her parents then moved to Hampton County, and [REDACTED] entered the 1st grade at Fennel Elementary School in Hampton County School District One. She was served in a general education classroom and received speech and language services. On June 3, 2014, she was determined eligible for special education series as a student with speech or language impairments.

In response to the request for assessment information, the Beaufort County School District provided a copy of the multidisciplinary team report from March 3, 2012. They also received a copy of a psychological evaluation conducted by Dr. Greer-Simmons on July 13, 2012. The Beaufort report files contained information about [REDACTED]'s general intelligence score ("very low range"), as well as her achievement levels in letter and word recognition ("average range") and math (very low range being in the first to eight percentile range for her age). Additionally, an adaptive behavior assessment showed that [REDACTED] was in the moderate low to significantly low range in the domains of communication, daily living skills, socialization, and

motor skills. The psychological evaluation indicated that [REDACTED]'s intellectual functioning was in the extremely low range and indicate that she could be expected to perform at a level significantly below her same age peers. On an adaptive behavior measure, she scored in the moderately low to low range. [REDACTED]'s teacher completed the norm-referenced Child Behavior Checklist to assess her classroom behavior. Her teacher reported attention problems, poor concentration, difficulty following directions, difficulty learning, talking out of turn, inattention, failure to take turns, and lack of guilt. She also was shown to manifest borderline significant levels of externalizing behaviors (e.g., defiance, aggression) and clinically significant levels of behaviors associated with attention deficit hyperactivity disorder. Academically she was achieving roughly according to expectations given her low intellectual functioning.

concluded that [REDACTED] warranted a diagnosis of mild mental retardation (now referred to as mild intellectual disabilities) and made recommendations to continue special education programming and make accommodations and modifications to her classroom environment to promote learning, attention, and appropriate behavior.

On June 3, 2014, an IEP was developed for [REDACTED]. The initiation date was August 18, 2014 and the IEP was to be implemented during the 2014-2015 school year, with an ending date of June 2, 2015. The IEP team determined that a functional behavioral assessment was not needed, and behavioral issues were not addressed in the present level of academic achievement and functional performance ("PLAAFP") statements nor in the rest of [REDACTED]'s IEP. In the area of present levels of academic achievement, findings indicated that [REDACTED] had progressed in her language development but still needed work in specific areas of speech and language development. With respect to functional performance, [REDACTED] was assessed as having fine motor problems with tasks such as using scissors, writing her name, and drawing squares. Some of the accommodations to the general curriculum for [REDACTED] included a teacher assistant for re-direction and transitions, oral administration of tests, shortened assignments, and special education and speech consultation to the general education classroom teacher. The IEP also included twice monthly training of general education teachers on the characteristics of the student's disability and academic strategies.

The IEP listed 7 goals in speech and language, which were to be delivered in the speech therapy room, and 5 related services goals in occupational therapy to be delivered in the occupational therapy room. Special education services provided to [REDACTED] were 90 minutes of

individual and group work in speech and language therapy. Related services consisted of 90 minutes of small group or individual occupational therapy. [REDACTED]'s progress was to be reported to parents and teachers every 4 ½ weeks. The team members signed the final page of the IEP. Although [REDACTED] were listed as being present, they did not sign the document. Neither did the parents sign the parent statement that they had read or had the IEP explained to them, that they understood that they would receive a copy of the IEP, or that they had received a copy listing their parental rights.

When [REDACTED] entered 2nd grade, her teachers saw an increase in the frequency and severity of her problem behaviors. She was reported by her paraprofessional in behavior logs as becoming very defiant, noncompliant, and aggressive, including biting, hitting, and spitting. Additionally, her teachers reported increasing problems in her academic subjects and some amount of regression in her academic performance. Her teacher also believed the curriculum was too difficult for [REDACTED] and needed to be modified. [REDACTED]'s father indicated his consent for the IEP being implemented although he disagreed with it.

On October 2, 2014, [REDACTED] IEP was reviewed. [REDACTED]'s father participated by telephone. [REDACTED]'s parents had requested the special review to address her problems in math and reading and her increasing incidences of serious problem behavior. [REDACTED] had to be removed from class by her paraprofessional on a number of occasions and [REDACTED] had to come to school to pick her up when her behavior was out of control and she could not be calmed down. Despite the concerns expressed by teachers and [REDACTED] parents in the conference committee notes regarding [REDACTED]'s behavior, which was the purpose of the IEP review, the IEP indicated that her behavior did not impair her learning or the learning of others, on PLAAFP statements were regarding [REDACTED]'s behavior, no modifications were needed in the general curriculum, and no behavioral goals were added to the IEP.

According to the staff conference notes taken during the IEP meeting, [REDACTED] seemed to be having difficulties in her math class. The team agreed to amend the IEP to provide that progress monitoring would be done every two weeks, [REDACTED]'s general education teacher reported that formal progress monitoring was not conducted, and no formal reports were written, although she indicated that in her classroom informal progress monitoring was ongoing. The IEP team also deferred consideration of extended school year ("ESY") services for [REDACTED] until

June 4, 2015. There is no indication in the record that ESY was again addressed until the IEP of June 27, 2015.

Notes from a conference call in meeting on May 2015 also indicated that progress monitoring was not done every 2 weeks, that [REDACTED] was continuing to regress in her academics, and that a functional behavioral assessment "FBA" may need to be conducted.

On January 20 and 27, 2015 [REDACTED] parents requested a special review to discuss their concerns about her escalating behavior problems in school and to discuss additional assistance she needed to succeed in the general education classroom. [REDACTED]'s special education teacher reported that she was not succeeding in the regular education classroom despite the strategies that were used. Her regular education teacher stated that although [REDACTED] had been progressing earlier in the year, she was regressing functionally and academically, performing poorly and showing no progress. [REDACTED]'s teacher reported that the regular education curriculum was too difficult for her and needed to be modified. Additionally, she had behavior problems in class, including being off-task and refusing to work.

In May 2015, [REDACTED]'s parents signed a District form that requesting permission to conduct a FBA. [REDACTED]'s parents also requested an independent educational evaluation at District expense. They also called the Ombudsman from the Office of Special Services in the South Carolina Department of Education, Ms. Cheryl Fitts. Ms. Fitts assisted the parents with their evaluation concerns. She also offered to provide a trained IEP facilitator to assist the parents and District personnel at their next IEP meeting. [REDACTED]'s parents declined Ms. Fitts' offer. The parents also expressed their concern that the District was "derailing" their attempts at meet with them and their invitees because the district rejected 11 days in which the parents and invitees were available to meet and also ruled out Fridays because that day was inconvenient for a district service provider.

The IEP was finally developed for [REDACTED] on May, 27, 2015. The IEP was to begin on August 17, 2015 and be implemented throughout the 2015-2016 school year. The IEP team noted that [REDACTED]'s behavior impeded her learning and that a FBA was to be conducted. Eventually, [REDACTED]'s regular education teacher partially filled out the district's FBA form, although this was not shared with the IEP team. According to the document, a behavior intervention plan was not required although in the PLAAFP it was reported that her teacher observed outbursts and aggression when M.B.F appeared upset, and that she would "hit, kick, or

touch her classmates with no provocation.” Additionally, the PLAAFP statement included information on [REDACTED] difficulty with math concepts, understanding of addition and subtraction, and her struggles with basic number sense. Testing in math indicated that [REDACTED] had problems with counting and basic math concepts (e.g., less than, greater than). Testing in reading showed problems with spelling and comprehension. [REDACTED]’s strengths included her eagerness to please, her interactions with peers, her manners, and her social nature.

The IEP included 5 goals in speech/language, 2 in reading (1 goal on sight word recognition, 1 goal on comprehension), 5 in math (1 goal on counting by 1’s and 10’s to 100, 1 goal on basic math concepts, 1 goal on composing and decomposing numbers and another goal in improving addition and subtraction skills), 2 in written expression (both goals in spelling), 4 in motor sensory, and 2 social/emotional. One of the social emotional goals involved [REDACTED] attending to task during large and small group instruction and the other involved [REDACTED]’s social interactions with her peers. The IEP contained no goals regarding her noncompliance, defiance, or aggression. Progress reports were to be provided to [REDACTED]’s parents every 4 and ½ weeks.

Services provided to [REDACTED] included speech therapy 30 minutes twice weekly in a small group and 30 minutes weekly individually, special education services in reading for 225 minutes a week and in math 225 minutes a week in a special education support room, and additional indirect educational assistance and behavior instruction in the general education classroom for 2160 minutes a week. [REDACTED] also received the related service of occupational therapy 45 minutes twice weekly in the occupational therapy room. She was also to receive ESY services because the IEP team concluded that [REDACTED] was at a critical point in her instruction.

Although the parents attended the IEP meeting, father in person and mother by phone, they refused to participate in developing [REDACTED]’s IEP. During the meeting, [REDACTED]’s classroom teacher indicated that after the FBA was completed, that information would be added to the IEP for the 2015-2016 school year. It was also suggested that placing [REDACTED] in a resource room in Ben Hazel Elementary School, approximately 20 miles from Fennel Elementary would better meet her academic, speech, and occupational therapy needs. The parents told the team that they rejected the IEP and implementation of it and would remove [REDACTED] from school and home school her. [REDACTED]’s parents believed that the IEP was not appropriate, did not address her unique educational needs and would not prepare her for independent living.

██████'s parents withdrew her from school and home schooled her during the 2015-2016 school year.

In June and July of 2015, the parents obtained a psychoeducational evaluation from the Down Syndrome Clinic at the Medical University of South Carolina ("MUSC"). ██████ was given a Stanford-Binet Intelligence Test (5th edition), which indicated "overall intellectual functioning consistent with an intellectual disability." She scored a nonverbal intelligence quotient ("IQ") standard score of 42, an IQ standard score of 43, and a full-scale IQ standard score of 43. ██████'s academic achievement was measured using the Woodcock Johnson Tests of Achievement (4th edition), which is a highly regarded norm-referenced test that compared ██████'s performance to her same aged peers in reading, writing, and math. ██████'s scores fell in the impaired range and were "commensurate with her overall cognitive functioning."

██████'s teachers and parents also completed the Achenbach Teacher Report Form and Child Behavior Checklist, which assesses a child's emotional and behavioral problems and compares the child's behavior to the behavior of typical children of the same age. ██████'s teacher's report indicted "borderline clinically significant" on the subscales of withdrawal/depressed (e.g., sometimes seeming sad), social problems (e.g., being dependent on adults), and rule-breaking behavior (e.g., inconsistently feeling guilty for breaking rules) and "clinically significant" on the subscales of thought problems (e.g., engaging in usual or repetitive behaviors), attention problems (e.g., difficulty completing work), and aggressive behavior (e.g., losing temper easily). Her parents reported no elevated symptoms in any area.

The report concluded that aged-based demands increase rapidly at ██████'s age and emphasis on abstract reasoning increases, therefore, skills will become more difficult for individuals with intellectual disorders who generally understand information more concretely and that ██████ would benefit from instruction tailored to her specific needs and abilities to support her progress. The report ended with recommendations, which the writer of the psychoeducational report requested that ██████'s parents share with school personnel, and noted that "increasing her access to specialized instruction, particularly for core academic areas, is strongly recommended." Regarding ██████'s behavior problems, the MUSC report recommended a behavior plan focusing on prevention, noting that because her slower rate of learning, academic classes may be frustrating for her.

Between February and July, 2016, [REDACTED]'s parents obtained a neuropsychological evaluation from [REDACTED] of the Mind & Motion Developmental Centers of Georgia, a Jacobs Ladders 4 Dynamics evaluation from Jacobs Ladder Neurodevelopmental School and Therapy Center, an auditory processing evaluation by [REDACTED], audiologist and Little Listeners Auditory Clinic in Georgia. A conference committee was convened on July 25, 2016, to review the evaluations completed by the outside agencies. [REDACTED] participated by phone. [REDACTED]'s father attended the meeting and [REDACTED] attended via phone.

On July 25, 2016, District personnel proposed a new IEP to begin on August 12, 2016, and last through the 2016-2017 school year. A few team members on the IEP team were not in attendance, and [REDACTED] told the team that he had not excused those members from the meeting. However, [REDACTED] was willing for the IEP meeting to continue.

In the PLAAFP statements regarding [REDACTED]'s academic and functional strengths, the team cited the report from the Mind & Motion Developmental Center as listing her memorization skills and ability to label simple feelings. The team also cited the report from the Lowcountry Therapy Center listing pragmatic skills, auditory and visual alertness, [REDACTED] strong desire to interact with people, and good social interaction skills among her strengths.

In the PLAAFP, the team listed [REDACTED]'s difficulties in math, specifically addition and subtraction fluency and problem-solving, reading comprehension, and oral reading fluency. The team also listed speech/language and occupational therapy needs identified in the Lowcountry Therapy Evaluation Center.

The team recommended that [REDACTED] receive specialized instruction in a self-contained classroom with 60% of her time in a special education classroom and 40% in a general education classroom where she would participate in related arts, lunch, and recess with her nondisabled peers. The team discussed an educational setting for [REDACTED] and concluded that that Ben Hazel Primary School would be the most appropriate placement because the school had the special education program that could best accommodate her educational needs. Additionally, the IEP team determined that this setting would benefit [REDACTED], academically and functionally, because of the lower teacher to student ratio and fewer distractions.

[REDACTED] also would receive 90 minutes of occupational therapy, 90 minutes of speech therapy, and a number of accommodations as suggested in [REDACTED]'s evaluation. The team

declined to adopt some of recommendations of [REDACTED] and [REDACTED] including integrative listening therapy, metronome therapy, QEEG testing, neurofeedback therapy, and eye exercises.

The team agreed to provide accommodations such as monitoring [REDACTED]'s progress by using curriculum-based measurement on a bi-weekly basis; reviewing or teaching vocabulary terms when reading content-related materials; allowing oral instead of written responses; extended time to complete assignments, quizzes, and tests; and a slant board for reading and writing tasks.

In the 2016-2017 IEP, the team concluded that [REDACTED]'s behavior did not impede the student's learning or the learning of others, did not require a FBA, nor a behavioral intervention plan. Although [REDACTED]'s parents referred to the behavior problems, attentional problems, and aggression in their information from her previous teachers, the MUSC evaluation, and Dr. Cantor's reports, the IEP included no information on behavior in the PLAAFP. The PLAAFP statements also included information on [REDACTED]'s performance in math (addition, subtraction, and problem-solving), reading comprehension and oral reading fluency. Findings on the highly-respected Wechsler Individual Achievement Test, Third Edition ("WIAT-III") indicated that [REDACTED] was severely impaired in total reading skills (comprehension, basic reading, decoding, and fluency) written expression (sentence composition and spelling), and mathematics (numerical operations, addition, subtraction, and problem-solving).

The annual goals for [REDACTED] included 5 speech goals, 1 daily living skills goal on distinguishing similarities and differences on picture cards, 1 reading goal on identifying sight words, 1 math goal on counting to 100 by ones and 10s, and 1 goal on fine motor skills (tracing upper and lower case letters, printing her first and last name legibly, copying simple words legibly, and manipulating buttons and laces).

On August 24, 2016, [REDACTED]'s parents filed a due process complaint with the District and the South Carolina Department of Education.

HEARING OFFICER'S FINDINGS

The Petitioners in this complaint raised several issues: (a) the parents were not allowed meaningful participation in the IEP meeting; (b) the IEPs offered by the District for school years 2014-2015, 2015-2016, and 2016-2017 were not designed to provide [REDACTED] with educational progress and, thus denied her a FAPE; and (c) the program offered by Jacob's Ladder in Georgia

would be appropriate and confer educational benefit, therefore, Petitioners asserted that the District should pay for the program.

After hearing four days and almost 40 hours of testimony and receiving evidence from both parties, the due process hearing officer ruled first that the Petitioners were provided the opportunity to participate in the IEP meetings in a meaningful way. Second, the hearing officer ruled that the IEPs developed for the 2014-2015, 2015-2016, and 2016-2017 school years met the requirements of the IDEA and provided [REDACTED] with a FAPE. Third, the hearing officer found that because only cursory information had been provided on the Jacob's Ladder program, neither the testimony nor evidence were sufficient to find the District should reimburse [REDACTED]'s parents for placing her at Jacob's ladder.

STANDARD OF REVIEW

Federal and state regulations provide that a party aggrieved by a local hearing officer decision may appeal to a state review officer and that review officer must examine the entire hearing record and make an independent decision on completion of the review (34 C.F.R. § 300.514(b)(2)(i)(v)(2014); 2 S.C. Code Ann. Regs. 43-243(V)(15)(b)(2)(i)(v)(Supp. 2014). Furthermore, in doing so the findings of fact of the local hearing officer are entitled to great deference and are considered prima facie correct. *See M.S. ex rel. Simchick v. Fairfax County School Bd.*, 553 F.3d 315, 326, 4th Cir. 2009. Moreover, where the hearing officer and review officer reach different results, the reviewing officer must provide reasons for departing from the hearing officer's decision. *See Springer v. Fairfax County School Board* 134 F.3d 659, 664, 4th Cir. 1998.

DISCUSSION

In their final argument, the Petitioners assert that the hearing officer made a number of specific errors in his final order. In their closing argument, the attorneys for the District correctly noted that the ultimate question is whether [REDACTED] was offered a FAPE by the District. I will leave the FAPE question until the end of the discussion and first address other issues raised by the petitioner in the original due process hearing and in the appeal of the final order.

Petitioner argument: [REDACTED]'s parents were not allowed to meaningfully participate in the development of her IEPs. Parents' participation is of the utmost importance to the provision of FAPE, as the U.S. Supreme Court has emphasized repeatedly. *See Rowley*, U.S. 176, 1982 through *Forest Grove v. T.A.* 557 U.S. 230, 2009. In fact, according to the U.S. Court of

Appeals for the Ninth Circuit, interference with parental participation in IEP development undermines the very essence of the IDEA (*see Amanda J. v. Clark County School District*, 267 F.3d. 877, 9th Cir. 2001).

Petitioners allege that the District infringed on their right to be meaningfully involved in the development of [REDACTED]'s IEPs. The hearing officer found that the District followed the requirements of the IDEA by (a) notifying the parents in advance of all meetings involving [REDACTED]'s special education programming, (b) ensuring that one or both parents were present at IEP meetings in person or via the telephone, and (c) working with Petitioners to schedule meetings at times that were appropriate for them. My review of the testimony and exhibits, including the IEPs and conference notes, show that District personnel made sufficient efforts to include the Petitioners in all of [REDACTED]'s IEPs and formal conference proceedings regarding [REDACTED]'s educational programming.

In Petitioners' closing argument, they discussed the evaluations they had conducted of [REDACTED]'s neuropsychological status, auditory processing abilities, visual motor integration performance. These evaluations were included among the Petitioners' exhibits. Petitioners also noted that the IEP team rejected these recommendations made by these evaluators. In fact, District personnel considered the results of these evaluations and even incorporated some of the suggestions into [REDACTED]'s IEPs. The IDEA requires that IEP teams consider the results of independent educational evaluations; however, they do not need to implement the suggestions.

The hearing officer also noted that at several of the meetings, the District offered a draft IEP and correctly points out that such a practice is perfectly legal as long as the proposed IEP is just that, a proposal. Moreover, the proposed IEP was discussed with the parents and changes were made when appropriate and prior to implementing the IEP. As a federal district judge memorably pointed out in 1992, "school personnel must come to the IEP table with an open mind. But this does not mean they should come to the IEP table with a blank mind" (*See Doyle v. Arlington County School Board*, 806 F. Supp. 1053, 1056, E.D.VA., 1992).

A theme in many of the petitioner's arguments is that the District failed to provide FAPE because the IEP team did not adopt and implement wholesale the methodologies and procedures suggested in these independent evaluations. As previously noted, the District, considered the independent evaluations and included suggestions from the evaluations in [REDACTED]'s IEP. As the District correctly argues, parents do not have the right under the IDEA to dictate a particular

methodology or program option. Courts have granted school districts great leeway in determining the appropriate methodology for educating students with disabilities (“The choice of the particular methodology employed is left to the school system,” *Barnett v. Fairfax County School. Bd.*, 4th Cir. 1991).

I affirm the hearing officer’s ruling that the District provided [REDACTED]’s parents with meaningful participation in her IEP meetings, conferences, and special review meetings.

Petitioner argument: The hearing officer erred in not finding that [REDACTED] placement at Jacob’s Ladder is appropriate. The final issue addressed by the due process hearing officer concerned the parents request that [REDACTED] be placed in a private school called Jacob’s Ladder Neurodevelopmental School in Roswell, Georgia at the Districts expense. According to the U.S. Supreme Court, the burden of persuasion in challenging an IEP is properly placed on the party seeking relief. *See Schaeffer v. Weast*, 44 IDELR 150, 2005). Additionally, although a unilateral private placement does not need to meet all the requirements of the IDEA that a public school must meet to provide FAPE, the private placement must still be reasonably calculated to enable a student to receive educational benefits. *See Frank G. v. Bd. of Educ.*, 459 F.3d 356, 364, 2nd Cir. 2006). Petitioner, however, provided no evidence that the Jacob’s Ladder would provide an appropriate educational program for [REDACTED]. The due process hearing officer correctly ruled that the District would not be required to pay for this placement because no evidence was provided regarding the appropriateness of this setting.

The programming at Jacob’s ladder include various therapies for addressing auditory processing disorders, visual perceptual problems, sensory issues and was based on an “in-depth, holistic evaluation of four key domains: neurodevelopmental and physiological function, academic levels and learning style, and emotional, behavioral, and social development.” Additionally, student’s “individualized curriculum is composed of dozens of specific daily interventions spanning the four domains...” Some of the therapies listed in the Jacob’s Ladder brochure include a few research-based interventions (e.g., cognitive behavioral interventions), interventions that research has shown are not effective in working with children with disabilities (e.g., learning styles), and many interventions that have little or no research showing any educational efficacy (e.g., music therapy, therapeutic yoga, therapeutic listening program, and hyperbaric oxygen chamber therapy). The Petitioners have not demonstrated that any of these therapies are required for [REDACTED] to benefit from her special education and related services.

The hearing officer also addressed the issue of least restrictive environment (LRE), despite the fact that the parents did not identify this as an issue raised by the Petitioners. The spirit and letter of the LRE requirement of the IDEA argue against placement at Jacob's Ladder. LRE is a mandate of the IDEA requiring that students with disabilities be educated in the general education in the regular classroom environment, with supplementary aids and services if necessary, to the maximum extent appropriate and if that setting is not appropriate, that students be educated with the least possible segregation from their nondisabled peers. Major reasons (in addition to the legal requirements) for encouraging educational programming in the LRE, are the nonacademic benefits that children with disabilities receive through interacting, socializing, communicating, and observing their nondisabled peers in an integrating setting. The explanation of the Jacob's Ladder in the petitioner's exhibits and on the Jacob's Ladder webpage (<http://jacobladdercenter.com/our-services/school-or-in-home-placements/>) describe the program as either an intensive custom program taught in a full time setting in the Jacob's Ladder school, which consists of one-to-one therapy with opportunities for selected group school activities or an in-home program provided by the parents who receive training and support from Jacob's Ladder staff or on an hourly basis provided by a Jacob's Ladder teacher or therapist. On the continuum of alternative placements listed by the hearing officer and described in the regulations to the IDEA at 34 CFR 300.115(a) either of the Jacob's Ladder programs, in the school in Georgia or in the home, are very restrictive placement options because they would provide very few opportunities for integrating [REDACTED] with her nondisabled peers, thus depriving her of the many nonacademic benefits in the less restrictive setting of her school. As the hearing officer aptly describes, it is difficult to square the Petitioners' initial agreement with [REDACTED] being educated in the regular classroom via the resource model, later objecting to the self-contained placement at Ben Hazel Elementary School as being too restrictive, and then withdrawing to be homeschooled and seeking payment of a private placement in a special school, which are the most restrictive options. Additionally, as the hearing officer correctly asserts: "It has been long held by various courts that parents cannot compel a specific methodology for the delivery of special education services."

I affirm the hearing officer's ruling that the District will not have to pay for [REDACTED]'s placement at Jacob's Ladder.

Petitioner Argument: The hearing officer erred in not finding the [REDACTED]'s frequent removals from the classroom amounted to a change in placement and denied parental participation. Testimony and behavioral observation records showed that [REDACTED]'s was removed for her classroom for short periods of time when she exhibited disruptive behavior (e.g., hitting, kicking, spitting, & screaming). The purpose of these removals was to allow [REDACTED] to calm down and allow the class to continue with disruption. A couple of times when [REDACTED] did not calm down, her parents were called and came and removed her from school. Petitioner's contended that such removals constituted a change in placement because the removals in effect constituted in-school suspensions that circumvented the District's disciplinary policy.

According to the IDEA, for suspensions to amount to a change of placement, a student must be suspended for 10 consecutive days (34 C.F.R. 300.530[b]) or to be suspended in excess of 10 cumulative days if there is a pattern of removals (34 C.F.R. 300.536). The hearing officer correctly ruled that these brief removals did not change [REDACTED] placement nor did they alter her educational programming.

I affirm the hearing officer's ruling that the District did not change [REDACTED]'s placement by removing her from class for brief periods of time to calm her.

Petitioner Argument: The hearing officer erred in his interim order which limited the admissibility of evidence to evidence that predated August 24, 2014, which represents the two-year statute limitation for requested a hearing. The regulations implementing the IDEA, at 34 CFR 300.511(e) require that a parent or agency request an impartial hearing on their due process complaint within two years of the date the parent or agency know or should have known about the alleged action that forms the basis of the due process complaint. The hearing officer modified his interim order on October 14, 2017, so that evidence and testimony that was offered that predated the two-year period would be determined to be relevant based on its own merits and its admissibility would be ruled on at the time it is offered. The petitioner attempted to introduce into evidence the IEP of June 3, 2014, and the District objected because the IEP was developed outside the statute of limitations. Although the hearing officer stated that he was disposed to allowing the IEP into evidence, he ruled that the IEP was out of order. The IEP developed by the District on June 3, 2014, was then subject to a special review and modified on October 2, 2014. The date of October 2, 2014, which was in effect two months after [REDACTED] began her school year and throughout the 2014-2015 school year, was within the two-year statute

of limitations. The October IEP was allowed into evidence as Petitioners Exhibit 24. Thus, the hearing officer ruled an IEP out of order was that was only in effect during approximately 40 days of the 2014-2015 school year. I will include the October 2, 2014 IEP in the evidence I will address in my ruling.

I affirm the hearing officer's interim agreement.

Petitioner Argument: The hearing officer erred in finding that the IEPs offered FAPE. The U.S. Supreme has court addressed the meaning of a FAPE. In *Board of Education v Rowley*, 458 U.S. 176, 1982, the Court noted that the rather cryptic definition of “appropriate” in the IDEA could only be decided case-by-case based on an individualized consideration of the unique needs of each eligible student. The Court also provided some guidance to lower courts to interpret the FAPE mandate of the IDEA in the form of a two-part analysis that a court should undertake to determine appropriateness: “First, has the state complied with the procedures set forth in the [IDEA]? And, second is the individualized education program developed through the [IDEA’s] procedures reasonable calculated to enable the child to receive educational benefits? If this two-part analysis is met, the State has complied with the obligation proposed by Congress and the courts can require no more.”

The first part of the test, the procedural standard, required that a court examine whether a school district adhered to the procedural requirements of the IDEA. In the 2004 amendments to the IDEA, Congress codified a harmless-error approach in which a procedural error or errors (a) impeded a student’s right to a FAPE, (b) caused a deprivation of educational benefit, or (c) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE (IDEA, 20 U.S.C. § 1415[f][3][E]). Additionally, multiple procedural violations may cumulatively result in a denial of FAPE, even if the violations, when considered individually, do not. (*See S.Y. and R.Y. v. New York City Department of Education*, 116 LRP 42811, S.D.N.Y., 2016; *R.E. v. New York City Department of Education*, 694 F.3d 167, 2nd Cir. 2012). Additionally, the failure to implement a material portion or significant provisions of the IEP may be a procedural error that amounts to a deprivation of FAPE (*See School District of Philadelphia v. Williams*, 115 LRP 54719, E.D.PA, 2015).

The second part of the test, the substantive standard, required that a court examine whether a student’s IEP was reasonably calculated to provide educational benefit. The substantive test does not require that schools deliver the best possible education nor provide an

education that maximizes a student's potential, but it does require that the student's program confer educational benefit. *See Board of Education v Rowley*, 458 U.S. 176, 1982. As the district correctly observes, under this standard a student's educational program must be reasonably calculated to produce more than minimal academic advancement. *See Hall v. Vance County Board of Education*, 774 F.2d 629, 636, 4th Cir. 1985. Thus, Congress did not intend that a school district could discharge its duty under the IDEA by providing a program that produces some minimal academic advancement, no matter how trivial (*See Hall v. Vance County Board of Education*, 774 F.2d 629, 636, 4th Cir. 1985).

The second part of the Rowley test has proven been a difficult determination for courts, as can be seen in the case that was argued before the U.S Supreme Court on January 11, 2017, *Andrew F. v. Douglas County School District*. The question the Supreme Court will answer in this case is as follows: What is the level of educational benefit that school districts must confer on children with disabilities to provide them with FAPE as guaranteed by the IDEA? There is currently a split in the circuits with some circuit courts holding that the second part of the Rowley tests is met, and FAPE is provided, when schools confer a degree of educational progress that is more than trivial, whereas other circuit courts hold that schools must confer the higher standard of meaningful educational benefit to provide FAPE. In Rowley, the Supreme Court recognized that no single substantive standard would sufficiently describe how much educational benefit is sufficient to satisfy the Act. Instead, the Supreme Court left that matter to the courts for case-by-case determination (*See Hall v. Vance County Board of Education*, 774 F.2d 629, 636, 4th Cir. 1985).

The U.S. Court of Appeals for the 3rd Circuit, in *Polk v. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 3rd Cir. 1988, interpreted the Rowley some educational benefit to mean more than de minimis or trivial benefit. The court noted that the facts of the Rowley case, that she was a very bright child who was performing above average in the regular education classroom, allowed them to sidestep the substantive standard of the two-part test and focus on the procedural standards, the first part of the test. In the Polk decision, however, the 3rd circuit court found the question of how much benefit was sufficient to confirm to be meaningful to be inescapable because the student in question, Christopher Polk, was severely disabled with extremely low cognitive capabilities. The Polk court held that the IDEA calls for more than trivial benefit and required that an IEP provide for significant learning and confer meaningful benefit. In *Hall v.*

Vance County Bd. of Educ., 774 F.2d 629, 636, 4th Cir. 1985, the court also noted that the law calls for more than trivial benefit and significant learning.

In *Cypress-Fairbanks Independent School District v. Michael F.*, the U.S. Court of Appeals for the 5th Circuit (118 F.3d 245, 5th Cir. 1997) adopted a four-part test to use in determining educational benefit: (a) Was the student's IEP individualized on the basis of a student's assessment and performance? (b) Was the program delivered in the least restrictive environment appropriate to a student's needs? (c) Were the services provided in an accurate, coordinated, and collaborative manner? and (d) Were positive academic and nonacademic benefits demonstrated?

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*, 471 U.S. 359, 1985) and the centerpiece (*Honig v. Doe*, 484 U.S. 305, 1988) of the IDEA. It is both (a) the written document that memorializes the 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 program is designed.

The Petitioners contend that the District developed three IEPs that failed to provide FAPE to [REDACTED]. The three IEPs in questions were as follows: The first IEP was redeveloped in a special IEP review on October 2, 2014 for the 2014-2015 school year; the second IEP was developed on May, 27, 2015, to begin on August 17, 2015 for the 2015-2016 school year; and the third IEP developed on May 25, 2016 to begin on August 15, 2016 for the 2016-2017 school year. I will address each in turn. First, I examine the first part of the Rowley test and the three IEPs.

The first FAPE inquiry under Rowley is the procedural test. The Petitioners contended that there were a number of procedural errors made during the development of the three IEPs. A school district's procedural failure must have effectively denied the child a FAPE either because it (1) "impeded the child's right to a [FAPE]," (2) "significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a [FAPE] to the parents' child," or (3) "caused a deprivation of educational benefits" (20 U.S.C. § 1415(f)(3)(E)). Although, the District did make some procedural errors in developing the IEPs (e.g., failing to include an important member of the IEP team, the occupational therapist, without

first securing the parent's permission to excuse her), these errors in the three IEPs were primarily technical in nature and certainly didn't raise to a substantive violation of [REDACTED]'s right to a FAPE.

The second FAPE inquiry under Rowley is the substantive test. According to the District, the true issue raised by the Petitioners involved the second part of the Rowley inquiry: Was the IEP reasonably calculated to confer educational benefit? To determine whether [REDACTED]'s IEP was reasonably calculated to confer educational benefit it is first necessary to examine the assessments/evaluations conducted and considered by the IEP team. Additionally, the IEP team must take into account any information provided by a student's teachers and parents. Indeed, the first test the U.S. Court of Appeals for the 5th Circuit used in *Cypress-Fairbanks I.S.D. v. Michael F.*, (118 F.3d 245, 5th Cir. 1997) to determine educational benefit was whether the IEP was individualized on the basis of the student's assessment and performance. To the extent that a student's assessment is incomplete, inaccurate or outdated, the student's IEP will also be inadequate. The purpose of the assessment is to identify the disability-related academic and functional needs of a student. The IEP team then lists the problems identified in the assessment, which interfere with the student's academic and functional performance, and include those needs in the PLAAFP statements, which in turn become the basis of the annual goals and special education services that are developed later in the IEP meeting. According to the U.S. Department of Education,

There should be a direct relationship between the present levels of performance and the other components of the IEP. Thus, if the statement describes a problem with a child's reading level and points to a deficiency in reading skills, the problem should be addressed under both (1) goals and objectives, (2) specific special education and related services provided to the child" (34 C.F.R. § 300, App. C, question 36, 11-1-1989 Edition).

The assessment and PLAAFP statements, which are reflections of the information gained in the assessment, are the foundations of the IEP and the first step toward meaningful special education programming. The annual goals and special education services are based on the PLAAFP statement. When goals are written correctly teachers and parents are able to monitor a student's

progress in a special education program and make educational adjustments when necessary.

According to the U.S. Department of Education

The statutory requirement for including annual goals and objectives...provide a mechanism for determining (1) whether the anticipated outcomes for the child are being met (i.e., whether the child is progressing in the special education program) and (2) whether the placement and services are appropriate to the child's special learning needs. In effect, these requirements provide a way for the child teacher(s) and parents to be able to track the child's progress in special education (34 C.F.R. § 300, App. C, question 37, 11-1-1989 Edition).

The petitions assert that the District committed serious errors by failing to include information from the assessments conducted by _____, and the Jacob's Ladder evaluations. To the contrary, the District considered these assessments and included some of the suggestions made by the evaluators in _____'s IEPs. The hearing officer correctly points out that these independent evaluations were from a clinical and not an educational perspective. The District's primary concern is in providing an appropriate education for _____, and as _____ and _____ acknowledge, neither was an educational expert. The District, therefore, clearly met the requirements of the IDEA with respect to these independent evaluations.

IEP for the 2014-2015 school year (Developed on October 2, 2014). There were three serious problems with this IEP. The first problem was the assessment of _____'s needs. It became obvious early in _____'s years at Fennell Elementary that her classroom behavior was a serious problem. The evaluations conducted for the Beaufort County School District reported that _____'s teacher in Beaufort observed attention problems, poor concentration, difficulty following directions, difficulty learning, talking out of turn, inattention, failure to take turns, and a behavior rating checklist showed that _____ manifested borderline significant levels of externalizing behaviors (e.g., defiance, aggression) and clinically significant levels of behaviors associated with attention deficit hyperactivity disorder. Furthermore, her teachers at Fennell Elementary expressed concerns about the frequency and severity of _____'s problem behavior. _____'s paraprofessional reported her behavior in daily logs. The paraprofessional noted that _____ was very defiant, noncompliant, and aggressive, her problems included screaming,

biting, hitting, and spitting. Indeed, the staff conference notes from the IEP meeting showed that the purpose of the special review was to address the increasing seriousness of [REDACTED]'s problem behavior.

Despite these problems, which inhibited her learning and probably the learning of her peers, the District failed to conduct assessments of [REDACTED] classroom behavior. Moreover [REDACTED] behavior problems were not listed as student needs in the PLAAFP statement. A federal court judge in the decision Kirby v. Cabell County Board of Education, 2006, WL 2691435 (not reported in F. Supp. 2d, 2006) addressed the importance of the PLAAFP statements as follows:

If the IEP fails to assess the child's present levels of academic achievement and functional performance the IEP does not comply with the (IDEA). This deficiency goes to the heart of the IEP; the child's level of academic achievement and functional performance is the foundation on which the IEP must be built. Without a clear identification of (a student's) present levels, the IEP team cannot set measurable goals, evaluate the child's progress, and determine which special education and related services are needed

Serious crack appeared in the foundation of the 2014-2015 IEP. There was no mention of problem behaviors in the PLAAFP statements and these behaviors were, therefore, not addressed in the annual goals, special education services, related services, nor in the accommodations to the general curriculum.

In fact, the IEP team checked a box on the IEP form answering "No, not a concern," to the following question: In the case of a student whose behavior impedes his/her learning or that of others, do strategies and supports, including positive behavioral interventions, address that a behavior. [REDACTED]'s problem behaviors in the classroom was a concern of [REDACTED]'s evaluators, teachers, and parents. Despite the occurrence of significant problem behaviors that impeded [REDACTED]'s learning and possibly the learning of her peers, programming to address her behavior problems were not included in the 2014-2015. See *Alex R. ex rel. Beth R. v. Forrestville Valley Community School District #211*, 375 F.3d 603, 613 7th Cir. 2004, "To meet the substantive criterion of Rowley, an IEP must respond to all facets of the students' disability, both academic and behavioral. See also *Neosho R-V School District v. Clark*, 315 F.3d 1022, 1029-1030, 8th

Cir. 2003, holding that a school district failed to provide educational benefit by not addressing a student's behavioral issues.

A second serious problem with the 2014-2015 IEP occurred with respect to academic problems. The psychological evaluations completed in the Beaufort County School District and by [REDACTED] indicated that [REDACTED]'s intellectual functioning was in the extremely low range and that she could be expected to perform at a level significantly below her same age peers. Furthermore, [REDACTED] made recommendations to continue special education programming and make accommodations and modifications to [REDACTED]'s classroom environment to promote learning, attention, and appropriate behavior.

The staff conference notes from the October 24 IEP meeting indicated that her parents and teachers were concerned about [REDACTED]'s problems in math and reading. The meeting notes also showed that the IEP team agreed that progress monitoring system would be implemented every two weeks and that the IEP would be amended to include training for general education teachers. The information on [REDACTED]'s academic performance in math and reading were not included in the PLAAFP statements. No goals were written in either math or reading and no special education services were provided.

A third serious problem with IEP #1 is that in the IEP conference notes the team members discussed amending the IEP to include a system to monitor [REDACTED]'s program every two weeks and would focus on specific areas of weakness. No progress monitoring system is included in the IEP. Moreover, [REDACTED]'s general education teacher reported that formal progress monitoring was not conducted and no formal reports were written.

The purpose of progress monitoring is to (a) assess a student's performance, (b) quantify his or her rate of improvement, (c) adjust a student's instructional program to make it more effective and suited to the student's needs, and (d) evaluate the effectiveness of the intervention. 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 IEP team was correct that monitoring [REDACTED]'s progress was important in determining whether she was adequately progressing toward her goals, actually benefiting from the special education services, and receiving FAPE. Unfortunately, no progress monitoring method was included in [REDACTED]'s IEP and there was testimony that no progress monitoring was conducted. Without

information on [REDACTED]'s progress, or lack of progress, teachers had no information upon which they could make decisions about her educational programming. Because the IEP was based on a faulty assessment of her needs, included no special academic or behavior goals or services, and collected no progress monitoring information on her educational progress, it was not reasonably calculated to provide educational progress.

After examining the testimony and exhibits I also believe that [REDACTED] neither made academic nor behavioral progress during the 2014-2015 school year. This is not surprising because the IEP failed to address many of [REDACTED]'s needs. Furthermore, [REDACTED] Measures of Academic Progress (MAP) scores also showed regression in her academic performance in reading and math. In their closing argument, the district observes that "At most, [REDACTED]'s MAP scores only show that she is not keeping pace with her non-disabled peers, not that she received no educational benefit. The district also cites the court's opinion in *Houston Independent School District v. Bobby R.*, 200 F.3d, 341, 349, 5th Cir., 2000 which stated that "declining percentile scores do not necessarily represent a lack of educational benefit, but only a child's inability to maintain the same level of academic progress achieved by her non-disabled peers."

Unfortunately, the District officials are incorrect in their understanding of the purpose of scores on the MAP. Whereas, it is true that percentile scores, which are ordinal scores, on standardized assessment instruments do not show a student's educational progress, but rather how he or she performs relative to students in the test makers' norming sample; the MAP scores to which Petitioners refer are not percentile scores. The scores cited by Petitioners are Rasch units, however, which are equal interval scores, referred to in the MAP as RIT scores. The Petitioners also site percentile scores, but that is not what is the most significant in the RIT scores. The specific purpose of the MAP is to provide educators information on student progress so that they use this information to improve teaching and learning in the areas of reading, language usage, and mathematics, and to develop instructional strategies. The MAP scores show within child academic growth. The MAP RIT scores show that [REDACTED] did not progress, and may have regressed, in her academic achievement.

In applying the two-part Rowley test to the IEP of 2014-2015, which was reviewed and modified on October 2, 2014 for the 2014 to 2015 school year, I find District adhered to the procedural requirements of the IDEA but failed to develop an IEP that was reasonably calculated to provide [REDACTED] with educational benefit.

IEP for the 2015-2016 school year (Developed on May 27, 2015 to begin on August 17, 2015). The concerns of [REDACTED]'s parents and teachers apparently resulted in the May 22nd IEP being written to address her behavior problems. When considering special factors, the IEP team concluded that [REDACTED]'s behavior impeded her learning and the learning of her peers and determined that her problem behavior required that an FBA be conducted of [REDACTED]'s classroom behaviors. Problem behaviors, specifically difficulty focusing and outbursts and aggression when she appeared to be upset, were listed in the PLAAFP statement. Additionally, a statement regarding the impact of [REDACTED]'s disability acknowledged that her delays in communication, academics, and comprehension would result in her experiencing difficulties in the general education environment and that she needed supports from general education. Because of the stronger foundation in the PLAAFP statements, the IEP followed with goals in reading, math, behavior. Special education services were increased to 225 minutes weekly for direct services in reading/ELA in the special education support room, 225 minutes weekly for direct services in math in the special education support room, and 2160 minutes of indirect assistance in the general education classroom.

There are still problems with this IEP (e.g., although two social/emotional goals were developed, one of which addresses social interaction and the other addresses on task behavior, neither address [REDACTED] serious problem behavior), nonetheless the increase in resource room hours, the focus on behavior, the occupational and speech therapy, the ESY services, and the classroom accommodations were reasonable calculated to provide educational benefit. However, [REDACTED]'s parents withdrew her from school for the 2015-2016 school year and the IEP, which the parents had rejected, was never implemented.

IEP for the 2016-2017 school year (Developed on July 25, 2016 to begin on August 15, 2016). Staff conference notes from this IEP meeting indicate that the purpose of the meeting was to review the evaluations conducted by the outside agencies. [REDACTED] attended the meeting via telephone. The assessments used to develop the IEP, which included the WIAT-III, indicated that [REDACTED] was severely impaired in all academic areas tested. As previously noted, the U.S. Department of Education's regulations implementing the IDEA points out the importance of addressing all a student's needs in the PLAAFP and then including goals and services to address those needs. The PLAAFP statements report that [REDACTED] has problems in addition, subtraction, reading comprehension, and oral reading fluency. The IEP has one goal on

reading seating sight words but has no goals on reading comprehension or reading fluency. Similarly, the IEP contains one math goal on counting forward by 1's and 10's to 100, but has no goals on addition, subtraction, or problem-solving. The purpose of measurable annual goals is to enable prospective, formative, and retrospective review of a student's program of special education. Goals provide a roadmap to a students' teachers. The problem with the district failing to include goals in reading and math is that there is no way to determine whether [REDACTED] is progressing in her problem. As explained in the U.S. Department of Education's interpretation of the 1999 IDEA regulations in 64 Fed. Reg. 12, 471 (1999):

Measurable annual goals...are critical the strategic planning process used to develop and implement for a child with a disability. Once the IEP team has developed measurable annual goals for a child, the team can develop strategies that will be most effective in realizing these goals.

The amount of services provided to [REDACTED] was increased to 735 minutes weekly of reading direct services in special education classroom, 715 minutes weekly of math and science direct services in special education classroom. The IEP team reached consensus that the most appropriate placement in which [REDACTED]'s unique educational needs could best be met was the Ben Hazel Primary. [REDACTED] will be integrating with students in the general education setting as appropriate.

The IEP contained no annual goals in reading comprehension, reading fluency, addition, subtraction, or problem-solving math despite including information in the PLAAFP statements that these areas were academic and functional needs. The failure to address these needs in the IEP is a significant problem. Clearly, the IEP team had worked diligently and thoughtfully in offering a program of special education and related services. Because the IEP goals did not address the aforementioned critical areas of [REDACTED]'s academic and functional needs, however, I find that the IEP was not reasonably calculated to confer educational benefit.

[REDACTED]'s parents did not accept this IEP and home schooled her during the 2016-2017 school year. The Petitioners' closing argument details the findings and programming advice of their external evaluators. It appears that the primary reason that the Petitioners rejected the 2015-2016 and 2016-2017 IEPs was because they believed that District personnel were ignoring their external evaluators finding and because their recommendations, including those of Jacobs

Ladder, were not adopted in total, thereby failing to offer [REDACTED] a FAPE. These arguments do not succeed for two reasons. First, the District considered the results of the external evaluations, as they are required to do, and even adopted some of their suggestions. Second, it has long been established that the particular methodologies to be used are within the discretion of school district personnel. Thus, the fact that the district did not adopt all of the programming suggestions of the external evaluators does not make the IEPs inappropriate. Additionally, the Petitioners requested that the District pay for placement at Jacob's Ladder but could not show that it was an appropriate program for [REDACTED]

The hearing officer found that all three IEPs in question at the hearing met both parts of the Rowley test. That is, the District's IEPs (a) complied with the procedures of the IDEA and (b) were reasonably calculated to confer meaningful educational benefit. I concur with the first part of the hearing officer's decision, that the school district met the procedural requirements. The District did make a few errors but they were not of a serious enough nature to lead to a denial of FAPE. I disagree with the second part of the hearing officer's decision, that the IEPs were reasonably calculated to confer benefit, and find that the IEPs for the 2014-2015 and 2016-2017 school years did not provide FAPE to [REDACTED]. The IEP developed for the 2014-2015 school years would have provided FAPE for [REDACTED]. However, her parents home-schooled her for the 2015-2016 and 2016-2017 school years and the IEPs were not implemented.

I reverse the hearing officer's decision that the three IEPs were reasonably calculated to provide M.B.F. educational benefit.

ORDER

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

I affirm the hearing officer's decision on issue No. 1 of the original hearing that [REDACTED] parents were provided meaningful input into the IEP development process for the 2014-2015, 2015-2016, and 2016-2017 IEPs.

I reverse the hearing officer's decision on Issue No. 2 of the original hearing that all three of the IEPs were reasonably calculated to provide meaningful benefit. I find that the hearing officer should not have sustained the 2014-2015 IEP because it was not based on [REDACTED]'s assessment information that the District had, and her PLAAFP statements neglected to address

all of [REDACTED]'s needs. Neither should he have sustained the 2016-2017 IEP because it did not include goals to address [REDACTED]'s needs as described in the PLAAFP statements.

I affirm the hearing officer's decision on issue No. 3 of the original hearing that the District does not need to pay or reimburse [REDACTED] parents for placement at Jacob's Ladder Neurodevelopment School. [REDACTED] is at an important stage in her educational development. I believe the best setting to enhance [REDACTED]'s academic achievement and functional progress is a school setting with appropriate special education and related services and opportunities to interact with and learn from her nondisabled peers. As the District correctly notes in its closing argument, [REDACTED]'s IQ is in the moderately intellectually disabled range and this is an aspect of her disability. Educating her in a one-to-one setting using educationally unproven procedures and having few or no opportunities to interact with her nondisabled peers will not enhance her development or prepare her to lead an independent life.

Because the 2014-2015 and 2016-2017 IEPs were not reasonably calculated to provide educational benefit, and thus, would not have provided FAPE, I order the District to take the following actions at District expense:

1. The District shall hire an independent behavioral expert to conduct an assessment of [REDACTED]'s behavior while at school, focusing specifically on the function of her behavior, to write a report on his or her findings, and suggest appropriate special education programming to address [REDACTED]'s needs. Furthermore, the District's IEP team shall consider including the evaluators findings into [REDACTED]'s new IEP.

South Carolina is fortunate to have experts on conducting behavior assessments with students with intellectual disabilities and then developing appropriate programming for these students. The experts are: Dr. Erik Drasgow (drasgow@mailbox.sc.edu), Dr. Katie Wolf (kmwolfe@mailbox.sc.edu) at the University of South Carolina, Dr. Debra Leach (leachd@winthrop.edu) at Winthrop University, Dr. Kent Parker (wparker@clermson.edu) at Clemson University, Dr. Christian Martin (camatin@bellsouth.net). I recommend that he independent evaluator be chosen from this list.

2. The District will hire an independent reading and math expert to conduct an assessment of [REDACTED]'s reading, written expression, and math skills and to write a report on his or her findings and suggest appropriate special education programming to address [REDACTED]'s needs. Furthermore, the District's IEP team shall incorporate his or her findings into [REDACTED]'s new IEP.

Again, South Carolina is fortunate to have a number of experts on conducting reading, written expression, and math assessments with students with intellectual disabilities and developing appropriate programming for students. The experts include: Dr. Pam Stecker (stecker@clemson.edu) at Clemson University, Dr. Kathleen Marshall (Kathleen@mailbox.sc.edu) at the University of South Carolina, Dr. Michelle Murphy (mmurphy@fmarion.edu) at Francis Marion University, and Dr. Kristen Ashworth (ashworthke@cofc.edu) at the College of Charleston. I recommend that the independent evaluator shall be chosen from this list.

3. I recommend that the District contact Cheryl Fitts, Ombudsman in the Office of Special Education Services in the South Carolina Department of Education, and arrange to use one of our state's IEP facilitators or mediators to assist in conducting the IEP meeting. At this point, it is likely that the trust level between District personnel and [REDACTED]'s parents is low. Having an independent IEP facilitator or mediator assisting in conducting the meeting (as well as the independent evaluators) may help to encourage collaboration between the parents and District personnel.

4. If parties agree to educate [REDACTED] in the District for the remainder of the 2016-2017 school year, the IEP team must be convened as soon as possible to develop a new IEP for her. The independent evaluators in behavior, reading, and math should be contacted and asked to conduct the evaluations this school year. If the student's parents and the district cannot agree upon a mutually acceptable IEP, I will review the IEP if requested to do so.

5. If parties agree to educate [REDACTED] in the District for the 2017-2018 school year, the IEP team must be convened as soon as possible to develop a new IEP for her. The independent evaluators in behavior, reading, and math should be contacted and asked to conduct the evaluations early in the school year if they have not already done so. Within two weeks after [REDACTED]'s 2017-2018 IEP is completed, the IEP will be emailed to the State Review Officer for review. If necessary, I will convene the IEP team for discussion of the needed components of [REDACTED]'s IEP. If the student's parents and the district cannot agree upon a mutually acceptable IEP, I will review the IEP if either party requests that I do so by either party.

6. Because the Petitioners' have not established that [REDACTED] requires an out of district private placement at Jacob's Ladder, if they choose to have [REDACTED] placed in that setting, the district will not be liable for [REDACTED]'s tuition or any associated costs. Additionally, if the parents refuse to

enroll [REDACTED] in the school district, the district is relieved of their duty with respect to the remedy to conduct the external evaluations and develop [REDACTED] new IEP.

The hearing officer's decision is hereby affirmed in part and reversed in part.

It is so ordered.

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 cursive script, appearing to read "Mitchell Yell", written in dark ink.

Mitchell Yell

February 26, 2017