

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

M.G. ("Parent") on behalf of M.G.	)	
	)	
	)	
Parent/Petitioner,	)	
	)	
vs.	)	Final Order
	)	
Florence County School District 1,	)	
	)	
	)	
District/Respondent.	)	

I. Summary and Introduction

This case involves alleged violations with regard to the 2020-21 school year. For the reasons set forth below, I find that the Parent met her burden of proving substantive violations. Compensatory education and an independent evaluation are ordered as relief, at least preliminarily. I deny the Parent's other requests for relief for the reasons set forth below.

II. Background

The Parent first submitted the Due Process Complaint on June 24, 2021. On July 2, 2021. The District submitted a sufficiency challenge and motion to dismiss. On July 6, 2021, I issued an Order, granting the sufficiency challenge with an opportunity for the Parent to submit an amended complaint with specific issues and to explain the requested cure for the deficiencies. On July 8, 2021, the Parent amended her Complaint with a four-page document. Because I failed to understand the issues based on this response, but in recognition of Parent's efforts to respond, I emailed the Parent requesting more information about the second and third issues identified in the prior Order. The Parent responded by email.

On July 16, District filed a second sufficiency challenge and motion to dismiss aimed at the Amended Complaint. On July 27, 2021, I issued an Interim Order on the second sufficiency challenge and motion to dismiss because I could not resolve the issues based on the information provided in the Parent's email responses. This Order also suspended deadlines for the resolution process.

On August 9, 2021, I conducted a hearing by phone to obtain information from the Parent as to the nature of her contentions. During the August 9 telephone hearing, the Parent clarified that there were five issues raised by her

Amended Complaint:

- (1) Failure to provide extended school year ("ESY") services after the Student failed courses in 2020-21;
- (2) Failure to provide the following services on the IEP during 2020-21 in (a) reading; (b) math; (c) teacher training; (d) consultation; and (e) exceptional education teacher on a one-on-one basis;
- (3) Failure to hold any IEP meetings in 2021;
- (4) Failure of the District to invite Parent/notify Parent of 2020 IEP meetings; and
- (5) Failure to provide records.¹

On August 10, 2021, I issued an Order on the second motion. I denied the Motion provisionally as to the first four issues identified by the Parent. As to the fifth issue, the Parent was to provide any copies of requests for records that are the basis of her complaint. Having heard nothing from the parties regarding this fifth issue, I proceeded and assumed the Parent complied.

¹ At the beginning of the hearing, I confirmed with the parties that these were the issues to be addressed.

On October 4, 2021, the District submitted a document entitled “Corrections to the Respondent’s Response to Petitioner’s Request and Amended Request for Due Process Hearing” (“Corrections Document”).

III. Facts

This case involves concerns about the 2020-2021 school year. The Student was an eighth grader at Sneed Middle School. The Student has been identified as having a specific learning disability.

The December 2019 IEP

The 2020-21 school year began the week of September 7, 2020. The Student began the year with virtual instruction. For essentially the first two quarters of the year (through the winter break), the transitional 2019-20 IEP (“December 2019 IEP”) was in place. [District Exhibit 4].² That IEP included services for reading, math, and teacher training/consultation. [*Id.*]

The December 2019 IEP calls for 300 minutes per week, split evenly between reading and math. [*Id.* at RESP. 1085]. The only record of what District provided Student is in the form of a log created by one of the Student’s special education teachers. [Parent Exhibit 9]. That log shows only 225 minutes of services being offered. [*Id.* at pp. 1-2]. Moreover, those 225 minutes were spread over three subjects. While reading and math are two of those

² References to specific pages in District Exhibits will be to their Bates numbers. the Parent’s exhibits were inconsistent in terms of Bates numbering as to copies distributed at the hearing. To ensure the Record is correct, Bates numbers of the documents entered as exhibits were read into the Record, and both the District and the Undersigned confirmed that, although Bates numbering varies, the actual documents shared by the Parent are the same as those admitted as exhibits.

areas, the 225 minutes also included instruction in writing, which was not part of the Student's December 2019 IEP. [/d.]

The December 17, 2020, IEP

The IEP team held its annual review on December 17, 2020. Although the Parent did not attend the meeting, the Student did. The District documented that the Parent could not attend the meeting because of her work schedule. [District Exhibit 14 at 1037]. The District did not document, however, any efforts to reschedule the IEP team meeting to accommodate the Parent's work schedule.

The IEP team set new goals and objectives. The IEP team also added writing as an area in which services would be provided. The IEP team changed the measure of services from minutes per week to minutes per month. [Parent Exhibit 6 at 8 of 11; District Exhibit 4 at RESP. 1085].³ For purposes of rough comparison, if one assumes that there are four weeks in a month, a straight per week comparison between the two IEPs is as follows:

Service	Dec. 2019 IEP	Dec. 2020 IEP	Change in minutes per week
Reading	150	30	120 mins less
Writing	N/A	30	30 minutes more

³ A straight comparison of the service minutes in the two IEPs is as follows:

Service	Dec. 2019 IEP	Dec. 2020 IEP
Reading	150 mins/week	120 mins/month
Writing	N/A	120 mins/month
Math	150 mins/week	240 mins/month

Service	Dec. 2019 IEP	Dec. 2020 IEP	Change in minutes per week
Math	150	60	90 minutes less
Total	300	120	180 minutes less per week

The IEP team increased “Teacher Training and/or Consultation as a service increased from five minutes per quarter to ten minutes per quarter. [Parent Exhibit 6 at 8 of 11; District Exhibit 4 at RESP. 1085].

Despite adjustments to the minutes in the IEP, the amount of minutes the District provided, however, apparently stayed the same. Both of the Student’s special education teachers, for periods when the Student attended in person, documented 225 minutes per week consisting of five classes that were each forty-five minutes in length. While math was to be 50% of the minutes (*i.e.*, twice as much as either reading or writing), there is no record that the Student received either more or less instruction in math under the December 2020 IEP than what the District provided under the 2019 IEP, and that is so regardless of whether one compares it to what was provided in reading or whether one looks at total minutes just for math.⁴

The December 2020 IEP Goals and Student’s Recorded Performance

Reading

For reading, the IEP team set a goal of increasing the percentage of answering comprehension questions from a baseline “of 25% to 75% accuracy as measured by two teacher made and/or curriculum based measures per nine weeks.” [Parent Exhibit

⁴ Again, I recognize that the total minutes under the December 2020 IEP decreased significantly when comparing apples to apples (*e.g.*, weekly to weekly).

5 at RESP. 333]. Putting aside the fact that there were no actual standards for such “measures,” the Student still did not meet these objectives. In the first nine weeks of Q3, the two scores were 40% and 47%. In other words, rather than a 300% increase (from 25 to 75), she increased 60% (from 25 to 40) and 92% (from 25 to 47). In the second nine weeks measured (Q4), Student initially improved 100% (from 25 to 50) and then regressed to her first Q3 score – a 40 (representing a 60% increase from the baseline). The average of her two scores from Q3 and Q4 are 43.5 and 45 respectively.

Math

In math, the IEP team set two goals. The first provides: “[W]hen presented with 5 multi-step, algebraic expressions, [Student] will correctly apply the order of operations to solve, increasing from 30% accuracy to 80% accuracy as measured by two teacher made and/or curriculum based measures per nine weeks.” [Parent Exhibit 5 at RESP. 334]. The documented performance for Q3 was 20% -- a 33% decrease from the baseline rather than a targeted 270% increase. [*Id.*] The second Q3 score was a marked improvement with a score of 86%. For Q4, performance met the target of 80% by the interim report, but it decreased to below the goal (60%) during the second reporting period of Q4. Overall, neither nine-week period led to the two measures achieving 80%, although there was marked improvement between Q3 and Q4.

The second math goal provides: “When presented with 5 algebraic equations, [Student] will apply the skill of adding, subtracting, multiplying and dividing with positive and negative integers to solve algebraic equations (including word problems), increasing from 38% to 65% accuracy as measured by two teacher made and or curriculum-based measures per nine weeks.” [Parent Exhibit 5 at RESP. 335].

Against this goal, the Student made significant and sustained progress in Q3 and Q4, increasing from a baseline of 38% to 50% to 90% by the end of the second semester.

The Student's math grades throughout 2020-21 were all at the failing level, except for Q3 in which she barely obtained a D level by one point. [Parent Exhibit 4]. Her overall score for the year was a 51. [*Id.*]

Writing

The IEP team's set the following goal for written expression: "[W]hen presented with a text, [Student] will be able to edit given text for language conventions and organization, increasing from 44% to 80% accuracy as measured by two teacher made and/or curriculum-based measures per nine weeks." [Parent Exhibit 5 at RESP. 336]. Again, the documented scores show the Student did not achieve this objective for either Q3 or Q4. In fact, she met the 80% mark only one time. [*Id.*] The Student's 2020-21 grade for language arts also was an F (a 52). [Parent Exhibit 4]. For the second semester, the Student's language grade decreased from a 66 to a 55. [*Id.*]⁵

Caveat

The foregoing review of performance against goals is based on assessments from the Student's special education teacher, Folk. For the reasons below related to the June 2010 Amendment, I find that the results of these assessments are questionable and are not sufficiently reliable to support a finding the Student made sufficient progress.

⁵ The date by which each IEP goal was to be measured was "the end of the IEP," which would be in December 2021. [Parent Exhibit 5 at RESP. 333 (reading); *id.* at RESP. 334 (math); *id.* at 335 (math); *id.* at RESP. 336 (written expression); testimony of Cross].

The IEP Team's Inactivity Post December 17, 2020

The IEP team never met to review the Student's progress against the goals the team set in December. Although the team set goals and the District collected data, the Student's performance was never reviewed, and her performance against those goals played no actual role in any decisions made about the Student's IEP, including the important issue of whether the District should provide ESY services at the conclusion of the 2020-21 school year.

On May 21, 2021, both the Parent and her advocate specifically requested a meeting of the IEP team to discuss: (a) services provided to Student; (b) ESY services; (c) adding the advocate to the IEP team and having invitations sent directly to her; and (d) the progress report on the Student's strengths and weaknesses. [Parent Exhibit 18]. The District did not respond to the Parent's request for an IEP meeting.

Folk's Unilateral June 10 Amendment to the IEP

Less than three weeks after the Parent requested an IEP meeting, Folk unilaterally amended the IEP to show service hours to be in effect at West Florence High School at the beginning of the next year. The [Parent Exhibit 1 "June 10 Amendment"]. To justify not holding an IEP team meeting (as Parent had requested), Folk misrepresented several things:

On 6/10/2021, [the Parent and Folk] exchanged emails and agreed to change the IEP for [Student] Gee without a meeting. Enclosed is a copy of the amended IEP along with a prior written notice that explains the reasons for the changes. Any questions regarding the amended IEP can be directed to [Folk].

[Parent Exhibit 2].⁶ There are several serious problems with this assertion:

⁶ District offered testimony through another witness that Folk was experiencing personal issues during this time. Although these issues are regrettable, they do not mitigate the seriousness of falsifying educational records. If anything, these issues and

- Folk never sent any email to the Parent about such a change;
- The Parent never sent Folk any email about such a change; and
- The June 10 Amendment was not sent to the Parent at the time.⁷

The June 10 Amendment makes material changes to the levels of service the District would provide the Student. The levels of service in effect at the time were those set forth in the February amendment. [District Exhibit 1].⁸ They are reproduced in the June 10 Amendment along with the new levels of service determined by Folk:

Subject/service	February 21 Amendment	June 21 Amendment
Reading	120 minutes per month	100 minutes weekly
Writing	120 minutes per month	100 minutes weekly
Math	240 minutes per month	100 minutes weekly
Teacher training and/or consultation	10 minutes quarterly	Eliminated

how Folk dealt with them only calls into further questions the accuracy of other records she created.

Likewise, while the chaos caused by the COVID pandemic is well illustrated in this case (e.g., faculty and staff not knowing whether services would be in person or virtual from one week to the next) this myriad violations occurring here simply cannot be excused by the pandemic. If they were, we would be essentially repealing the IDEA for the past school year. There are no regulations or guidance from either the State Department of Education or the United States Department of Education that would justify the actions here during the 2020-21 school year.

⁷ In its October 4 Corrections Document, District states that the June 10 “PWN was not sent in June as originally believed.” [Corrections Document at 2].

⁸ There was no challenge raised as to the February Amendment, which was created to memorialize the change to in-person instruction.

[Parent Exhibit 1 at 8 of 12]. At the hearing, Denny, the assistant superintendent for special education, attributed the differences to the different scheduling used in high school vis-à-vis middle school (i.e., four block period vs. seven periods). Likewise, the Correction Document states: “The change effected was simply to adjust the time to the high school’s schedule the following year, and it did not change the IEP in any substantive way without opportunity of parental input.” [Corrections Document at 2; see *id.* at 13 (“There is no testimony that the adjustment in minutes per month was made for anything more than to fit a high school block schedule.”)].

Contrary to that testimony, and District’s written arguments, these explanations simply do not square with the significant change in service minutes. At the hearing, Denny conceded as much. No matter if we are dealing with the shorter periods of middle school, or the longer blocks used in high school, there are only so many minutes in a week. If one assumes a month is four weeks in both middle school and high school, the changes made by Folk translates to an overall 250% increase in service minutes for reading, writing, and math when one converts the monthly minutes in the February amendment to the weekly minutes set forth in the June 10 Amendment:

Subject/service	2/21 Amend. mins.	June 10 Amend. mins.	Increase in minutes per week
Reading	120	400	280 (333%)
Writing	120	400	280 (333%)
Math	240	400	260 (154%)
Totals	480	1200	720 (250%)

Along with these changes, Folk also eliminated the service of teacher training and/or consultation. [Parent Exhibit 1 at 8 of 12].

The District's argument also is undercut by the fact that, although the narrative portions of the June 2010 Amendment still show 480 minutes per week of special education services, Folk unilaterally reduced the time in regular classrooms from 80% to 40-79%, which recognizes that the relative percentage of time spent in resource could be expanding greatly. [*Compare* Parent Exhibit 6 at 10 of 12 *with id.* at 11 of 12]. As a result, the time the Student would spend in regular education was reduced by as much as 50% with no PWN or meeting. That percentage has nothing to do with the length of each class – it applies to the time spent in school.

Parent learns of the June 10 Amendment months later

After several requests for documents from the Parent [see Parent Exhibit 10, 12-13], assistant superintendent, Brian Denny, sent the Parent records on August 5, 2021. [District Exhibit 11]. Among these documents was a copy of the June 10 Amendment. [See *id.* at RESP. 755]. August 5, 2021, was therefore the first time the District provided the Parent a copy of the June 10 Amendment.

Denny testified that he learned about the June 10 Amendment discrepancies the Wednesday or Thursday before he sent his October 3, 2021, letter (*i.e.*, Parent Exhibit 2, front). The Parent, however, raised several questions to him about it in an August 9 email that she sent only four days after first receiving a copy the June 10 Amendment from Denny:

[T]he documents you emailed last week . . . ha[ve] information that is incorrect and dates that don't coincide with the date of meetings. There are errors in my child's IEP I need clarified. Please clarify and provide me with the requested information:

- On amendment to the individualized program document dated 6/10/21 it states the amendment wa[s] implementation date 08/02/21. Who amended this document and why? Was I informed of the changes to be corrected on 08/02/2021? If so, how was I notified of this change?

- The same document states on 06/10/21 I exchanged emails with [Folk] to change the IEP without a meeting. I am requesting the emails verifying this from me and [Folk].

[Parent Exhibit 14 at RESP. 312]. The District did not respond to the Parent, and Denny apparently did not investigate her concerns.⁹

Services provided to Student

1. 2019 IEP

It is hard to ascertain the actual number of minutes provided to the Student for each area under the IEP because, in fact, they were never tracked. The Student's other special education teacher kept both a type-written log, as well as handwritten notes. [Parent Exhibit 9]. These documents simply raised more questions. As it turns out, the typewritten log is not specific to the Student. [Parent Exhibit 9, pp. 1-2].¹⁰ Rather, she documented that she offered forty-five minutes total almost every day in reading, writing, and math. But those are the total minutes offered to all students in her resource service-delivery group. There is no breakout of the time spent on each subject. That is important because, as the Parent pointed out, the IEP in place for the first semester did not include writing as a service while it does appear on the log. Likewise, there are many days (e.g., October 13-18) where there are no

⁹ Parent sent another email the same day, setting forth a list of documents she contends were requested but not included in Denny's August 5, 2021, production. [Parent Exhibit 15]. The District never responded to that email either.

¹⁰ The special education teacher Cross's handwritten notes specific to the contain several entries where the Student was either absent or not attentive or when she was not logged in. [Parent Exhibit 9, pp. 3-5].

activities listed on the printed log for reading, a subject for which the Student was to receive services. [Parent Exhibit 9, at 1].

Under the December 2019 IEP, which was in place through the end of the winter break in 2020, the District was to provide services totaling 300 minutes per week, split evenly between reading and math. [District Exhibit 4 at RESP. 1085]. During that time, Cross was providing the services. She documented forty-five minutes each day, which, as mentioned above, was spent on three subjects, one of which (writing) was not part of the IEP in place for the Student. There are sixteen days (i.e., more than three weeks) through November 11 in which no reading was taught. [Parent Exhibit 9 at 724]. Even if the District could claim credit for forty-five minutes each day, the total for service minutes is 225 per week (5 x 45), which is seventy-five minutes shy of what is called for under the IEP. Given the number of days that reading was not apparently taught, it would be generous to assume that the three areas covered (reading, writing, and math) were provided on a 1/3, 1/3, 1/3 basis. If one uses that calculation, the Student only received 150 minutes for both reading and math (i.e., seventy-five minutes each) – which is one-half the time provided for under the IEP then in place, which called for 150 minutes of each.

2. December 2020 IEP

After winter break 2020, the new IEP levels of service applied. The two key distinctions between it and the 2019-20 IEP are:

- Services now include writing; and
- Service minutes went from 300 minutes per week to 480 minutes per month (about 120 minutes per week).

[Compare Parent Exhibit 6 at 8 of 11; with District Exhibit 4 at RESP. 1085].

Cross testified that her services ended February 18, 2021, and that the later entries on the second typewritten page of Parent Exhibit 9 are unrelated to the Student. This causes even further confusion because the Folk records of services [Parent Exhibit 3] do not pick up until March 1, 2021.

But again, each teacher documented 45 minutes per day for five days each week. Again, that is 225 minutes per week, which is about 100 minutes per week more than what the December 2020 IEP calls for in all three subjects.

IV. Analysis

A. Failure to provide ESY after Student failed courses in 2020-21.

In December 2020, the IEP Team documented the following:

The IEP team used the following information and data in determining the need for ESY services:

- Direct observation of the Student's classroom performance
- IEP goals and objectives

[Parent Exhibit 6 at 10 of 11]. The District made the decision to not provide ESY services at the same time it set goals for the rest of the 2020-21 school year. [Parent Exhibit 6, at 10 of 11]. As noted above, the Student's progress on these goals was never reviewed by the IEP team. When the Parent questioned Cross as to whether the District considered ESY services later in the year, Cross plainly testified that it did not because the matter was "already decided" the prior December.

Attendance after the winter break also was not considered. All the IEP team could have reasonably anticipated as of December 17, 2020, was that attendance would be a consideration since the Student already had seven absences by Mid-

November [District Exhibit 6 (email dated 11/12/20 stating, “[The Student’s] absences are also high”; see Parent Exhibit 9 at p. 3 (entries for 9/24, 10/2, 10/7, 10/12, 11/2)].

Along with attendance problems before the December 17 2020 meeting, the Student never achieved the goals set at that time, and her grades were poor through the end of the year.

Further, the IEP team never discussed any documentation regarding the consideration that a change from middle school to high school is a crucial and challenging period in one’s education.

The notion that the Student was not at risk of regression without more services is severely undercut by the significant increase in service minutes that Folk documented as necessary in June 2021. It simply is not clear how such an increase can be necessary on the one hand while contending that services over the summer were unnecessary on the other hand.¹¹ The District relies on the testimony of Folk for the proposition that “[The Student] made meaningful progress, nearly mastering many of her goals.” [District Br. at 12]. I find that such testimony not only is not supported by either the progress reports, but it also is undercut by Folk’s own determination that a surge in services was necessary going forward. Finally, given Folk’s conduct, I do not find her testimony here to be credible. This ~~determination is buttressed~~ by the fact that it does not appear that Folk provided

¹¹ District speculates that, had the IEP met, it might have considered the relative short summer break in making its determination that ESY was unnecessary. [Dist. Brief at 12]. Although there was testimony that the summer period was short (forty-four days), the evidence shows that District believed that the Student needed more services. There is no evidentiary basis for the notion that more services were needed, but a continuity of service was unnecessary. In any event, the District is not entitled to presumptions about what it might have anticipated had it met.

individualized services to the Student or that the contents of the Student's IEP made any difference. There may have been an IEP on paper, but in practice the Student was not being offered services tailored to meet that plan.

Based on a totality of the evidence, the IEP team clearly erred in not reconvening to assess the need for ESY services after the December 17, 2020 meeting. This is especially so given not only the record of the Student's performance, but also the District's knowledge that it had not been providing the level of services required under the IEP. Further, it is extremely difficult to infer any good faith in the District's failure to even respond to the Parent's May 2021 request for an IEP meeting to discuss, among other things, the need for ESY services.

The failure to convene and discuss ESY services is prejudicial because the totality of the evidence establishes that the Parent met her burden of proving ESY services were necessary after the 2020-21 school year.

B. Failure to provide services called for under the IEP during 2020-21

The ability to analyze services provided is complicated by the wild swings in service levels documented to be provided in the December 2019 IEP vis-à-vis the December 2020 IEP. The dramatic cut in total minutes that resulted from the "per week" to "per month" measures, while adding writing as another service, can only mean one of two things:

- The significant decrease in minutes per week was a scrivener's error and there were serious deficiencies in the service minutes provided after the winter break (if District intended 450 minutes per week); or
- District intended a significant decrease in service minutes that is not supported by any data or narrative in the December 2020 IEP itself.

One must wonder how serious the attention was paid to the service time provided for if the dramatic changes were not discussed or documented anywhere. Piquing my suspicion about the issue are two other facts:

- It did not matter what the IEP documented because, throughout the year, Plaintiff received the same 45 minutes per day of instruction in three areas that others in the resource room received; and
- Folks altered the service minutes again in June, 2021. and apparently nobody even noticed.

As written, the District provided far less time than what was required under the December 2019 IEP or perhaps far more than the drastically reduced amount of time under the December 2020 IEP. In either instance, the District was not tailoring the Student's instruction to either IEP.

1. Reading

The first chart provided by Cross covers eight weeks between September 21 and the first three days of the week of November 11, 2020.¹² [Parent Exhibit 9 p. 1]. As noted above, during that time, reading – which was one of the Student's services -- was not provided for sixteen of the thirty-eight days (or roughly three of eight weeks). [Id.] Even if we assume that services were provided for the rest of the week of November 11, there are only five weeks documented in which the 1/3, 1/3/, 1/3 assumption would be appropriate. Thus, the lack of services for reading would be as follows:

3 weeks x 150 minutes = 450 minutes

5 weeks x 75 (150 minutes required – 75 (225 minutes ÷ 3)) = 375 minutes

If one assumes that there were additional days in which reading was not taught at the same rate for about four weeks remaining in 2020 between November 11 and winter

¹² It is not clear why the chart stops at November 11, which is mid-week. Nor is it clear why there are no services charted by either Cross or Folk for any period between November 11, 2020 and February 4, 2021. [See Parent Exhibit 3, 9].

break, then you must add another four weeks of seventy-five minutes through December, or 300 minutes.

Accordingly, from District's records, the best estimate available is the Student did not receive **1125** ($450 + 675$) **minutes** (18.75 hours) of reading between the start of the 2020-21 school year and the end of 2020 during which the 2019-20 IEP was still in place.

2. Math

Under the December 2019 IEP, the District provided seventy-five fewer minutes total per week than what was called for under the IEP (300-225). Of the 225 minutes provided, five weeks was split over three subjects, of which math was one. For that five-week period, the deficit in math would be: $225 \div 3 = 75$. The IEP called for 150 minutes, which means there was a deficit in math time of seventy-five minutes per week. [District Exhibit 4 at R8 1085]. As a result, the deficit for that five-week period is: $5 \times 75 = 375$ minutes. Of the remaining three weeks, the District provided 225 minutes for two subjects (math and writing). Divided equally, the District provided around 112.5 minutes of the 150 minutes called for, leaving a deficit of 37.5 minutes for that three-week period. Thus: $3 \times 37.5 = 112.5$ minutes. The total math deficit under the 2019 IEP is 487.50 minutes ($375 + 112.5$).

3. Bottom line regarding reading, writing, and math

Besides the questionable records that do not specify what services the Student received, one thing is clear. Whether the Student at times received less or more time than what was provided for in her IEP, two things are clear. First, for the first part of the year, there is a significant deficit, which likely affected the Student's poor performance in the

second half of the year as well. Second, the services provided throughout the year were not based on either IEP implemented during for the 2020-21 school year. That is not a FAPE. “The term ‘free appropriate public education’ means special education and related services that . . . are provided in conformity with the individualized education program” 20 U.S.C. § 1401(9)(D).

4. Teacher training

The Parent provided no evidence that teacher training and consultation were not provided under the December 2019 IEP or the December 2020 IEP during the 2020-21 school year. The Parent did show, however, that Folk unilaterally eliminated this service without a PWN or consultation with the IEP team. This constitutes a separate violation.

5. Consultation

See above regarding teacher training.

6. Exceptional education teacher on a one-on-one basis.

Both IEPs provide for specialized instruction in the academic support classroom or virtually. [District Exhibit 4 at RESP. 1085; Parent Exhibit 1 at 9 of 12]. If the Parent argues the Student was to have her own teacher, she failed to carry her burden in that regard.

C. Failure to hold any IEP meetings in 2021.

The Parent’s complaint about the failure to hold meetings is well taken. In fact, there appears to have been a concerted effort to avoid meeting with the Parent dating back to the December 17, 2020, meeting. Although the District documented that Parent could not attend the IEP Team meeting on the date chosen by the District, it made no effort to accommodate the Parent’s work schedule. The IEP Regulations are specific that LEAs must endeavor to schedule IEP meetings at a time that is

“mutually agreed on,” and that all efforts to secure attendance also must be documented. 34 C.F.R. § 300.322(a)(2) (“Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including . . . [s]cheduling the meeting at a mutually agreed on time and place.”); *id.* 300.501(c)(3) (“If [a] parent can[not] participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency must use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing”).

A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as -

- (1) Detailed records of telephone calls made or attempted and the results of those calls;
- (2) Copies of correspondence sent to the parents and any responses received; and
- (3) Detailed records of visits made to the parent's home or place of employment

Id. § 300.322(d).¹³

When Plaintiff specifically requested an IEP meeting to discuss performance and ESY services, the District not only ignored the request, but Folk falsified a document claiming that she had communications with the Parent, who agreed to changes that, in fact, were never even discussed with the Parent or the IEP team. 34

C.F.R. § 300.9 (“Consent means that:

¹³ *Cf. id.* 300.501(c)(4) (“A placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parent's participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement.”)

(a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication; (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and (c)(1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.”)

To conceal this action, Folk never sent the June 10, 2021, Amendment to the Parent, which is another violation. The only conceivable purpose in doing so was to keep the Parent in the dark at a time when the Parent was specifically seeking more dialogue.

Equally concerning is the District’s contention that this issue did not surface until the preparations for the hearing. Although the Undersigned has no doubt that counsel for the District was unaware of any issues until their preparation for the hearing, the Parent flagged this issue prominently to the District in her August 9 email. [Parent Exhibit 14]. This serious revelation was simply met with more silence, and District did not even acknowledge the issue for almost two months when counsel learned of it.

Although the District contends it communicated with the Parent about issues, there is little evidence of that in the Record. Other than Cross’s November 12, 2020 email [District Exhibit 6], there is a dearth of evidence on outreach by the District to discuss issues with the Parent. McDonald testified that she sent emails and that an email notice of failing grade would have been sent to the Parent. No such documents, however, were introduced as exhibits at the hearing. The District’s failure to secure the

Parent's involvement in December 2020 and its inexplicable refusal to respond to her in May suggests an active effort to not communicate with the Parent.

Given the totality of these circumstances, as well as the Student's poor academic performance in 2021, I find that there was a failure to conduct IEP meetings in 2021 during the 2020-21 school year.

D. Failure of District to invite Parent/notify Parent of 2020 IEP meetings

For the school year at issue, there was only one IEP meeting in 2020 (the December 17 meeting). The Parent was notified of the meeting. [District Exhibit 9 at RESP. 486; District Exhibit 10; Parent Exhibit 7 at RESP. 20-22; *id.* at RESP. 28]. The problem was not one of notification, but whether the District tried to secure her attendance by rescheduling the meeting or documenting efforts to do so, which is a violation as noted above. As to the specific allegation regarding lack of notice, I find the Parent has not sustained her burden.

E. Failure to provide records

The Parent's evidence on her requests for information relate to requests made *after* the 2020-21 school year. [Parent Exhibit 10-11, 13, 15-17]. Although there is an issue of whether documents were provided in August 2021, those issues were not part of the Complaint filed in June. The emails are relevant to the issue of when the District learned of Folk creating the June 10 Amendment, but they do not independently establish a substantive violation for failure to produce information. Even if they did, such issues would not impact education decisions made during the 2020-21 school year. The Parent has thus failed to carry her burden as to this allegation and, even if she did, any failure would have been a procedural violation at most.

This does not mean that post-school year communications are irrelevant to whether a violation occurred or as to the District's knowledge of such violations. Those issues are discussed separately above.

V. Procedural vs Substantive Violations

“Faced with thorny counterfactuals, it is the duty of the fact-finder to carefully weigh the evidence to discern whether a procedural violation has in fact adversely affected a student's education.” *T.B. v. Prince George's Cty. Bd. of Educ.*, 897 F.3d 566, 574 (4th Cir. 2018).

There is no bright line distinguishing all the "procedural" requirements of the IDEA from its "substantive" requirements. If such a line could be drawn, it might be done by looking to the consequences of the violation of the IDEA requirement in question. The violation of a substantive requirement results, of necessity, in the denial of a FAPE, whereas the violation of a procedural requirement does not, *see DiBuo [v Board of Education]*, 309 F.3d [184,] 190 [(4th Cir. 2002)].

A.K. v. Alexandria City Sch. Bd., 484 F.3d 672, 684 (4th Cir. 2007) (Gregory, J., dissenting).

Under both the statute and its regulation, a hearing officer's “determination of whether a child received FAPE must be based on substantive grounds.” 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. § 300.513(a)(1). A hearing officer may find that a child did not receive a FAPE as to procedural inadequacies only if the procedural violations “impeded the child's right to a FAPE,” they “significantly impeded the parent's opportunity to participate in the decision-making process,” or they “[c]aused a

deprivation of educational benefit.” 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2).¹⁴

Based on the above, I find that the District’s violations above are substantive as they significantly impeded the Parent’s ability to participate in the decision-making process. This finding is based mainly on five significant violations:

- (1) The failure to schedule the IEP meeting at a time convenient to the Parent in December 2020;
- (2) The failure by the District to respond to the Parent’s request for an IEP meeting in May 2020;
- (3) The unilateral imposition of a significantly different IEP in June 2021 without any PWN or involvement of the Parent (or anyone else on the IEP team);
- (4) The intentional misrepresentations by Folk [Parent Exhibit 2] to justify her failure to provide notice or to follow the IDEA in formulating an IEP; and
- (5) The intentional concealment of (3) and (4), which Folk accomplished for months by not mailing the Parent a copy of the June 10 Amendment.

As a separate ground for finding that the violations were substantive, I find the Districts’ violations caused the deprivation of an educational benefit. This benefit not only consists of ESY services, but also services during the year of which the Student was deprived.

As discussed above, there appeared to be little to no correlation between what the IEP team documented as the Student’s needs and what the District provided in terms of services. When the Student was to receive services for reading, there are

¹⁴ See also *R.F. v. Cecil county Public Schools*, 919 F.3d 237, 248 (4th Cir. 2019), cited in *E.S. v. Smith*, 767 F. App’x 538, 538 (4th Cir. 2019); e.g., *Dibuo v. Bd. of Educ.*, 309 F.3d 184, 190-91(4th Cir. 2002) (noting, in a reimbursement case, that a violation of a procedural requirement of the IDEA (or one of its implementing regulations) must actually interfere with the provision of a FAPE before the child and/or his parents would be entitled to reimbursement “); accord *R.S. v. Bd. of Dirs. of Woods Charter Sch. Co.*, No. 1:16-cv-119, 2019 U.S. Dist. LEXIS 33760, at *50 (M.D.N.C. Mar. 4, 2019).

large blocks of time for which no reading is documented at all. Yet the Student apparently was offered the same services for writing as the other students, even when writing was not a service provided under the IEP. Both basic math and Folk's own chart establish that there were significant deficits in the 150 minutes to be provided for math and the 150 minutes to be provided for reading under the December 2019 IEP. Even if every minute documented was offered for those two subjects, there is a seventy-five minute per week deficit but, as noted above, the reality of that deficit for reading is much worse. Further, when one discounts the 225 minutes for any estimate of time spent on writing (which was not an IEP service for the Student), the deficit simply grows larger.

Except for math, the evidence of progress is either non-existent or razor thin at best under the December 2020 IEP. But none of that mattered in the end because not only did the IEP team not meet to consider it, but the District ignored the Parent's request to convene a meeting for that purpose.¹⁵

The Fourth Circuit has constructed a somewhat different test for finding of a substantive violation:

Under [20 U.S.C.] § 1415(f)(3)(E)(ii)(II), an [LHO] must answer each of the following in the affirmative to find that a procedural violation of the parental rights provisions of the IDEA constitutes a violation of the IDEA: (1) whether the [petitioners] "alleg[ed] a procedural violation," (2) whether that violation "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child," and (3) whether the child "did not receive a [FAPE]" as a result. *Id.* § 1415(f)(3)(E). Unless an [LHO] determines that a given procedural violation denied the child a FAPE, [h]e may only order

¹⁵ This is not to suggest that an LEA must always convene a meeting just because a parent requests one. Under these circumstances, where the team set goals, but never met to consider progress or evaluations, the Parent's request was eminently reasonable, especially given the legitimate issues suggesting that the Student would benefit from ESY services.

compliance with the IDEA's procedural requirements and cannot grant other forms of relief, such as private placement or compensatory education. See *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 754 n. 6 (2017) ("Without finding the denial of a FAPE, a hearing officer may do nothing more than order a school district to comply with the [IDEA's] various procedural requirements.").

R.F. v. Cecil County Public Schools, 919 F.3d 237, 248 (4th Cir. 2019); *T.B. v. Prince George's Cty. Bd. of Educ.*, 897 F.3d 566, 573-74 (4th Cir. 2018).¹⁶ Although the test is stated differently, there is no difficulty answering each of the questions in the affirmative:

- (1) The Parent has alleged both procedural and substantive violations of the IDEA.
- (2) For the reasons set forth above, I also find that such violations "significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a [FAPE] to the parents' child."
- (3) The Student did not receive a FAPE as a result because the services provided were not in conformity with either IEP.

For these reasons, I find that District's violations in 2020-21 were substantive.

¹⁶ There are differences between the test set forth in *R.F.* and the one that appears in the statute itself. The three statutory elements are set apart with the disjunctive ("or"), meaning that a violation can be found if any of the three are met. The Fourth Circuit recitation of somewhat different elements are set apart with the conjunctive ("and"), meaning that all three of its elements must be present. The Fourth Circuit made the first statutory element (FAPE) its third element, thus making it a requirement along with the second element, which is the same as the second element in the statute. The first element in *R.F.* about pleading does not appear in the statute or regulation. Finally, the third statutory element ("deprivation of educational benefits") does not appear at all in *R.F.*

VI. Remedy

After the hearing, I requested that the parties brief the issues of what remedies, if any, would be appropriate. The Parent has requested four forms of relief.

Compensatory education/tutoring 50 hours, delivered one-on-one

Parent requests compensatory education and has specified that her request involves such services being “delivered during after-school hours and/or during the summer.” [Parent Closing at 2]. Compensatory education is a remedy that may be appropriate in some cases. *G v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 309 (4th Cir. 2003). It consists of “educational services ordered . . . to be provided prospectively to compensate for a past deficient program.” *Id.* at 308. Along with bearing the burden of proof of a denial of FAPE, Parents also bear the burden of proving that compensatory education is an appropriate remedy. *Hogan v. Fairfax Cty. Sch. Bd.*, 645 F. Supp. 2d 554, 573 (E.D. Va. 2009).

Because I find that there were violations as to math,¹⁷ reading, and writing, I am awarding initially fifty (50) hours of compensatory time. The hours should be divided between reading (17 hours), writing (17 hours), and math (16 hours) unless otherwise agreed to by Parent.¹⁸

¹⁷ Although there was more progress noted in math, I still find that compensatory education is necessary in math for two reasons. First, the December 2020 IEP called for twice as many minutes in math than either reading or writing. It appears clear that this did not happen. Second, although there is some documented progress vis-à-vis the goals, I cannot credit evaluations done by Folk, especially as the Student’s math grades were so low.

¹⁸ There is not evidence in the Record as to where the Student is academically. The parties might be able to agree on priorities for the time that are different than the above allocation. As long as the Parent is in agreement, the parties are free to re-allocate the fifty hours.

The services must begin promptly, meaning no later than ten (10) days after this Order. Unless otherwise agreed to by the Parent, the services will be provided after hours and on a one-to-one basis. The services may be provided, in part, over breaks by mutual agreement, which may be easier for the Student.¹⁹ Although the Parent mentions that these might be provided during a future ESY period, my anticipation is that the services should be concluded well before any ESY services that the IEP may determine to be necessary for post 2021-22.²⁰ To be clear, however, the compensatory services ordered here should not be included in any hours to which the Student is otherwise entitled under an IEP, including any ESY services the IEP team may find necessary after the current school year.

This is intended as a possible interim measure. Whether additional services are necessary, or an adjustment is necessary, may be reconsidered after the Independent Educational Evaluation (“IEE”) ordered below. That evaluation, however, shall not delay the start of the compensatory time.

IEE reevaluation to be conducted by a private evaluator from a list of qualified evaluators.

The Parent requests that an IEE be “reviewed by the IEP team and the IEP will be developed by the team after consideration of the recommendations.” The IEP permits an LHO to order an evaluation as part of the relief to be granted to ensure that Student is brought to the level that he or she would have been without the violation. 34 C.F.R. § 300.502(d); *B.D. v. District of Columbia*, 817 F.3d 792, 798 (2016).

¹⁹ The District provided testimony that the schools now operate on a year-round basis with more breaks and a shorter summer break.

²⁰ Nothing in this Order is intended as a finding that any such services are, or will be, necessary.

One of the significant issues here is the falsification of records, including the IEP currently in place. Folk's actions bring into question not only the June 10, 2021 Amendment, but also all other records she created, including the assessments. And, as mentioned above, one cannot square Folk's assessments with her unilateral determination of the needs for the current school year. Because of this, the current picture as to the Student's status and needs is unclear at best.

I find an IEE is appropriate and necessary, and it needs to be conducted promptly given the upcoming anniversary date of the IEP. This is necessary not only because services were not provided in 2020-21 in accordance with the IEP then in place, but also because there is insufficient reliable data on which any current IEP has been implemented.

The IEE may be important for two reasons. First, it might provide information that other relief is necessary to provide relief for the violations I have found, or that a modification to this Order is necessary. Second, it might provide information the IEP team will need at the high school to implement a proper IEP given the inarguable fact that the one currently in place was not implemented in compliance with the IDEA.

The IEE also should address the issue of teacher training and consultation. The IEP team in December 2020 increased the amount of teacher training and consultation, which Folk unilaterally eliminated, but it is not clear what the Parent seeks by way of remedy, or if such services are needed at the high school.

Within ten (10) days of this Order, the District will provide the Parent with a list of three IEE evaluators who meet the District's qualifications. 34 C.F.R. § 300.502(e). Within five days of receiving this list, the Parent will designate an evaluator. If the

evaluator that the Parent chooses cannot provide an evaluation in time for the December 2021 IEP meeting, he or she should notify the parties and the Parent may elect another evaluator from the list.

The IEE will be provided a copy of this decision, along with a copy of all exhibits introduced at the hearing. If a transcript is prepared, one will be provided to the evaluator upon request.

The District will grant access to the IEE to observe the Student at school, and it will make any educational records available to the IEE that he or she requests.

The IEE will be provided to the Parent and the District as soon as it is completed and at the same time. Upon receipt, the District shall convene an IEP meeting at a time mutually agreeable to the District and the Parent.

Provision of records to advocate

The Parent also requests that the District provide records to the Parent's advocate upon request and to notify the Parent of the same. The District representatives testified that the problem with providing protected records to advocates is that there have been times parents rescind or change advocates. I agree that trying to administer the disclosure of records would be complicated and risky, and it might implicate FERPA and other issues not properly before an IDEA hearing officer. I do not find that such an order is necessary to remedy any violation. Thus, I deny this request for relief.

Changing of records

The Parent wants the "eliminat[ion of] the erroneous information on the 6/10/21 amendment. The changing of records is a matter covered under FERPA, and I do not believe it is necessary as relief here. The granting of relief as to the IEE

should alleviate the effects of any erroneous information. Further, the District should make this decision a part of the records, as well as any order modifying, vacating, or affirming it.

VII. Conclusion

For all the above reasons, I find that the District substantively violated the IEP during the 2020-21 school year, and I order the interim relief set forth above.

I will retain jurisdiction to address any issues with regard to the enforcement or modification of this Order. The scope of this Order, however, is limited to providing relief for violations occurring in the 2020-21 school year. To the extent the parties are unable to resolve any issues regarding the current school year, that would be a separate matter, even if that dispute arises in part or in whole as a result of information from the IEE ordered here.

VIII. Notice of Appeal Process

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

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

The parties should note that the Undersigned will not accept, read, or consider any further argument regarding the merits on this matter unless it is remanded to him by the SRO or the District Court. No email, letter, or other written communication will be construed or considered as either a Motion to Reconsider or as a Motion to

Alter or Amend this Order. Further, no such communication shall toll or extend the time limit set forth above for filing an appeal.

IT IS SO ORDERED



Brian P. Murphy
Local Due Process Hearing Officer

Dated October 25, 2021

Greenville, South Carolina