

INDIVIDUALS WITH DISABILITIES EDUCATION ACT
BEFORE THE REVIEW OFFICER
FOR THE SOUTH CAROLINA DEPARTMENT OF EDUCATION

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF RICHLAND	)	
	)	
In the Matter of:	)	
	)	DECISION OF THE
M.G. on behalf of her daughter M.G., ¹	)	STATE REVIEW OFFICER
Co-Appellant	)	
	)	
v.	)	
	)	
Florence 1 Schools, ²	)	
Co-Appellant	)	

This matter is before me as the State Review Officer (SRO) pursuant to appeals by both the Parent and the District of a decision by Brian P. Murphy, the Local Hearing Officer (LHO). As explained in specific detail *infra*, the LHO determined that (a) the District denied “free appropriate public education” (FAPE) for certain services in the Student’s Individualized Education Programs (IEPs) for the school year 2020–21, including extended school year (ESY), but (b) did not violate the Individuals with Disabilities Education Act (IDEA) with regard to the Parent’s other claims. As a result, the LHO ordered the District to provide the Parent with compensatory education and an independent educational evaluation (IEE).

I. PROCEDURAL BACKGROUND³

The procedural background of the LHO’s decision (SRO-1) is incorporated herein for the full details at that stage. This section provides the major highlights along with the updates

for this review stage.

On June 24, 2021, the Parent filed the complaint in this matter under the IDEA. After two District sufficiency challenges and related LHO clarification requests, the Parent identified the final five issues for this case:

- (1) failure to provide extended school year services (“ESY”) after Student failed courses in 2020–21;
- (2) failure to provide the following services called for under the IEPs during the 2020–21 school year 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 District to notify and invite Parent for the December 2020 IEP meeting;
- (5) failure to provide records.

On October 25, 2021, after holding hearing sessions on October 11, 12, and 13, the hearing officer issued a final decision. [SRO-1]. The LHO’s rulings for the five issues in this case, here in summary form that starts with the overall yes-no answer in terms of denial of the IDEA’s core obligation of FAPE, were:

- (1) Yes. The District’s failure to provide ESY at the end of the 2020–2021 school year was prejudicial, because the Student was eligible for it.
- (2) Yes in part. The District failed to implement the Student’s IEP for the 2020–21 school year in (a) reading and (b) math, but not for (c) teacher training, (d) consultation, and (e) 1:1 special education instruction.
- (3) Yes. The District’s failure to conduct an IEP meeting during the second semester of the 2020–21 school year a violation in light of “the totality of these circumstances, as well as Student’s poor academic performance . . . during [this] school year.” [SRO-1, at 22].⁴
- (4) No. The District did notify and invite the Parent to the December 2020 IEP meeting.
- (5) No. Any violation with regard to providing the Student’s records was nonprejudicial.

The LHO's resulting remedial order consisted of (a) 50 hours of compensatory education⁵ and (b) an IEE followed by an IEP meeting.⁶ Characterizing his remedy as "interim relief," the LHO expressly retained jurisdiction "to address any issues with regard to the enforcement or modification of this Order." [SRO-1, at 31].

On November 5, 2021, after both parties appealed the LHO's decision within the applicable 10-day period, the state superintendent of education appointed me as the state review officer (SRO) in this case. The appointment notice included the due date of November 28, 2021 for my decision in this matter. [SRO-2].

On November 10, 2021, I held a preparatory meeting with the parties via Zoom and e-mailed them the next day a summary of the results of the meeting. [SRO-3].

On November 19, 2021, which was the deadline included in the aforementioned summary, both parties submitted their written arguments. [SRO-4, SRO-5].

II. STANDARD OF REVIEW

The standard of review for a SRO under the IDEA is for an "independent decision" after examining the entire record. [34 C.F.R. §§ 300.514(b)(2)]. The SRO finds persuasive the interpretation of the Third Circuit in *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 529 (3d Cir. 1995), requiring "plenary review" with one narrow exception: "[the SRO] should defer to the hearing officer's findings based on credibility judgments unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion."⁷

III. FINDINGS OF FACT

On December 20, 2019, the Student's IEP team, which included the Parent, met and issued an annual IEP that extended from the second semester of 2019–20 (grade 7) through the

first semester of the 2020–21 school year (grade 8). [D-4]. Identifying the Student as having a specific learning disability, the IEP specified the specially designed instruction (SDI) as 150 minutes per week in reading and 150 minutes per week in math. It additionally provided for 5 minutes per quarter for indirect teacher training and/or consultation. The IEP designated the Student's placement as general education for the remainder of the time, which was at least 80% of the school day.

For the second semester of the 2019–20 school year, the Student made minimal or, especially during the start of virtual instruction due to the pandemic, unsatisfactory progress in reading and math. [D-8].

During the first semester of the 2020–21 school year (grade 8), the Student continued on virtual instruction, with incomplete participation [D-12] despite the special education teacher's efforts [e.g., D-5]. The Student's progress in both reading and math was generally lower than the planned trajectory. [D-8].

On November 12, 2020, the special education teacher sent the Parent information to facilitate Parent's access to the Student's progress and participation in the scheduling of the upcoming annual IEP meeting. [D-6].

On December 7, 2020, the District sent the Parent an invitation to attend an IEP meeting scheduled for December 17 at 2:30 pm. [P-7/D-10]. Due to the Parent's work schedule, the Parent was unable to attend the IEP meeting. [D-14].⁸

On December 17, 2020, without attempting to reschedule the meeting or otherwise facilitate the Parent's participation, the IEP team convened and, after a records-review reevaluation [D2], issued the next annual IEP. [P-6/D-9]. As in the previous IEP, this one used a checklist of four factors, including significant regression, to document a determination of non-

eligibility for ESY.⁹ Unlike the previous IEP, this one specified the teacher training/consultation at 10 minutes per month and the SDI as 120 minutes per month in reading, 240 minutes per month in math, 120 minutes per month in writing, and 10 minutes per quarter in teacher training and/or consultation.¹⁰

Yet, for both the first semester of 2020–21 under the December 2019 annual IEP and the second semester of 2020–21 under the December 2020 annual IEP, the implementing teachers documented a steady level of 225 minutes per week of specially designed instruction equally divided between reading, math, and writing. [P-9, at 1; P-3].¹¹

On February 2, 2021, at the Parent’s election, the District changed the mode from virtual to in-person, in-school instruction. [D-1]. The Student’s progress improved from the previous semester in relation to the expected trend line, although still limited and erratic. [P-3]. Moreover, the Student had clearly failing grades for all subjects in general education, including math and language arts, without improvement from the first to the second semester. [P-4].

On May 21, 2021, the Parent requested, via and in acknowledged agreement with the Parent’s advocate, an IEP meeting to review the Student’s services and progress, reconsider the Student’s ESY eligibility, and add the advocate to the Student’s IEP team. [P-18]. The District did not implement this request.

Instead, on June 10, 2021, the District unilaterally issued an amendment to the IEP that changed the SDI for the next year, which would be in high school, as follows: (a) reading – 120 minutes monthly (30 minutes per week) to 100 minutes per week; (b) math – 240 minutes monthly (60 minutes per week) to 100 minutes per week; and (c) writing – 120 minutes monthly (30 minutes per week) to 100 minutes per week. [P-1].¹² The unilateral amendment also removed the teacher consultation/training. The District falsely characterized the Parent as

agreeing to these changes. Moreover, the record lacks any evidence of prompt notification to the Parent of the amendment.

On June 24, 2021, the Parent filed for the due process hearing in this case. On the same date, the Parent requested, with an accompanying authorization, that the District provide the advocate with “information on my behalf to assist with my child’s IEP education services.” [P-10; P-12]. The District did not respond to this request.

On July 29, 2021, the Parent repeated the request for an IEP meeting and also asserted the District’s failure to provide “copies of [Student’s] IEP records, IEP records from the teacher showing [that] resources services were provided per IEP with the dates of service, time services were provided, classwork, assessments, and any services provided to [the Student] during the 2020–21 school year.” [P-13].

On August 5, 2021, in response to Parent’s request, the District e-mailed the Parent the Student’s the December 2020 IEP, the June 10 unilateral amendment, the general education teachers’ acknowledgement of consultation during four of the months of the 2020–21 school year, the progress reports for the second semester of the 2020–21 school year, and the special education teachers’ service logs for the 2020–21 school year. [D-11; D-12]. In immediate response, the Parent filed a grievance with the school board, alleging that the response to the Parent’s records request was unsatisfactory and a violation of the Parent’s legal rights. [P-11].

On August 9 and 17, 2021, the Parent sent e-mails to the school board and the administrator for special education, respectively, further specifying dissatisfaction with regard to the response to the records requests. [P-14; P-15; P-17]. The August 9 e-mail included a request for verification of the alleged agreement for the June 10, 2021 IEP amendment.

On September 1, 2021, the Parent e-mailed to said administrator a Freedom of

Information (FOI) law request for “all [the Student’s] IEP records, behavior counseling records, resource records, evaluation records, and evaluation records [sic].” [P-16].

On September 24, 2021, the Parent received from said administrator unspecified records.

On October 3, 2021, said administrator sent a letter to the Parent reporting recently discovering that the description of the June 10, 2021 IEP amendment as agreed to by the Parent was inaccurate. [P-2].

IV. CONCLUSIONS OF LAW

Both the Parent’s and the District’s written arguments were broad-based, warranting this review decision to address the LHOs rulings for each of the five issues in seriatim. As a prefatory matter, in light of the IDEA requirement to examine the hearing procedures for consistency with due process, I shall address two belated allegations in the Parent’s written arguments [SRO-4, at 1]. Both should be considered waived, because in the November 10 Zoom conference in response to my specific request that the parties identify any issues of procedural fairness, the Parent did not raise either of them. [SRO-3]. Even assuming *arguendo* that these allegations were not waived, both merit summary rejection. The first claim was that the LHO was biased in (a) not ascribing fault to the special education administrator for the material inaccuracy about the June 10, 2021 IEP amendment and (b) not providing “enough compensatory services to help ... recoup [the Student’s] educational neglect of 5 years.” Instead, an objective reading of the entire transcript reveals that the LHO amply accommodated the Parent’s pro se status and was, in relation to both parties, clearly and consistently within the broad range of impartiality under the IDEA.¹³ Moreover, although the transcript specifically revealed who was responsible for the discrepancy [Tr. I-28], the individual attribution was in no way material to the identified issues of or outcome of the case. Similarly, the alleged bias with

regard to compensatory services is clearly without foundation. The Parent's aspersions aside, the LHO decision provided all of the compensatory education that the Parent requested and potentially more for the clearly identified scope of the case, which was one year.

The second claim was that the LHO decision lacked timeliness in relation to the IDEA's regulatory timeline for completion, which is 45 days and any granted extensions after completion of the resolution stage. [34 C.F.R. § 300.515(a)-(c)]. Yet, the transcript reveals that, based on the applicable period, which presumably took into consideration the successive sufficiency problems with the complaint and the resolution period, the deadline was October 25, 2021, which is the date of the LHO's decision. [Tr. III, at 83]. Not only did the Parent fail to object to this deadline determination on the record, but also the case law is clear that any delays need to be much more flagrant to amount to possible prejudice. [*See, e.g.,* Pangerl v. Peoria Unified Sch. Dist., 780 F. App'x 505, 507 (9th Cir. 2019); C.W. v. Rose Tree Media Sch. Dist., 395 F. App'x 824, 827–28 (3d Cir. 2010); Heather S. v. Wis., 125 F.3d 1045, 1059 (7th Cir. 1995); Amann v. Stow Sch. Sys., 982 F.2d 644, 653 (1st Cir. 1992)].

Issue 1: ESY

For ESY, the District determined that the Student was not eligible at its December 2020 meeting and did not reexamine this determination during the subsequent semester even after the Parent requested an IEP meeting in late May for this purpose. After determining that the District's credibility-based evidence about the alleged progress of the Student was contradicted by the attendance data in the first semester, the progress reports and continuing failing grades in both semesters, the "crucial" imminent change from middle to high school, and the June 2021 significant increase in projected SDI, the LHO concluded: "The failure to convene and discuss ESY is prejudicial because the totality of the evidence establishes that Parent met her burden of

proving that ESY was necessary after the 2020-21 school year.” [SRO-1, at 14–15].

On balance in a close call, I defer to the LHO’s ultimate ESY ruling because his determination is rooted in a credibility-based determination and because the District did not provide any response to the Parent’s May 2021 request for an IEP meeting, which included updated ESY eligibility consideration. However, due to the closeness of this call, I specify two caveats. First, neither the LHO’s nor the District’s (in its IEP checklist or its written arguments) identification of the decisive factors clearly squares with the applicable legal standard for ESY eligibility. In establishing that ESY is necessary “when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months,” the Fourth Circuit appeared, via its supporting citations, to embrace the factors from three other circuits. These factors primarily focus on regression-recoupment analysis but extend to various specified other considerations, such as educational structure of the home, alternative resources, and the child’s vocational needs. [MM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 537–38 (4th Cir. 2003)].

In contrast, the District’s brief primarily relies on a Fourth Circuit decision that distinguishably addresses appropriateness of, rather than eligibility for, ESY and, in any event, that supports the LHO’s consideration of expert testimony, student progress, and the window in transition from middle to high school. [JH v. Henrico Cnty. Sch. Bd., 395 F.3d 185, 197–98 (4th Cir. 2003)]. The other two cases cited by the District are inapposite. One only addressed the timing of the ESY determination, which the LHO showed to be clearly questionable in the specific circumstances of the instant case [Reinholdson v. Sch. Bd. of Indep. Sch. Dist. No 11, 187 F. App’x 672, 683 (8th Cir. 2006)], and the other was an Oregon hearing officer decision that was reversed on appeal and that—contrary to the Fourth Circuit—is limited by case law

and state regulation to the regression-recoupment factor [Grants Pass Sch. Dist., 114 LRP 28009 (Or. SEA 2014), *rev'd sub nom. Grants Pass Sch. Dist. v. Student*, 65 IDELR ¶ 207 (D. Or. 2015)]. Similarly, to the extent that the LHO relied on the “risk of regression” [SRO-1, at 15], it is counter to the Fourth Circuit’s admonition that “the mere fact of likely regression is not a sufficient basis.” [MM, 303 F.3d at 538].

The second caveat, however, is that for purposes of the resulting remedial relief of compensatory education, the calculation should include the unusually limited length of the summer 2021 break. More specifically, as the transcript reveals and the District’s brief points out, the summer 2021 break amounted to only 34 school days. [Tr. III, at 27]. Moreover, an added equitable consideration is that the Parent’s request in late May left limited time for due consideration and, if eligible, individually crafted implementation.

Issue 2: IEPs for 2020–21

For the issue of failure to provide five services listed in the IEPs for 2020–21, the analysis starts by focusing on the applicable standard for implementation in relation to the IEP for the first semester. The applicable standard for denial of FAPE is material, i.e., more than minor, shortfalls in implementation of the IEP. [Sumter Cnty. Sch. Dist. 17 v. Heffernan, 642 F.3d 478, 484 (4th Cir. 2011)]. For the first semester, the District provided 75 minutes per week for reading and 75 minutes per week for math. [*Supra* note 11]. The SDI specified in the IEP for that period amounted to 150 minutes for reading and 150 minutes for math. The shortfall for these significant provisions of the IEP is clearly substantial.

The transition to the next annual IEP to the rest of the 2020–21 school year, however, revealed a fatal underlying problem inextricably tied to the surface issue of implementation. More specifically, four successive major actions framed this fatal problem: (a) the IEP meeting

on December 17, 2021 that, without any attempt at rescheduling upon receiving notice of the conflict with Parent's work schedule, reduced the total SDI from 300 minutes to 120 minutes per week despite the Student's lack of meaningful progress; (b) the continuation during the second semester of the 225 minutes per week of SDI regardless of the IEP specifications; and (c) the failure to convene an IEP meeting in response to the Parent's May 21, 2021 request; and (d) the unilateral amendment on June 10, 2021 that, purportedly based on the high school's block schedule, arrived at a 300 weekly minutes of SDI, which was the same total as, but one third less time for both reading and math than, in the 2019 IEP. The resulting pivotal and fatal pattern is the lack of individualization and attendant opportunity for parental participation.

Unpacking each of the four framing actions reveals successive procedural violations. First, for the December 2020 meeting, a reasonableness rather than per se approach applies with regard to parental participation at IEP meetings. [*See, e.g., A.L. v. Jackson Cnty. Sch. Bd.*, 635 F. App'x 774 (11th Cir. 2015); *Doug C. v. Haw. Dep't of Educ.*, 720 F.3d 1038 (9th Cir 2013)]. In this case, the evidence preponderates in favor of a procedural violation based on the District's lack of any record of attempts to reschedule the meeting or to use alternative means for participation. [34 C.F.R. § 300.322(c)-(d)].

Second, the continual use of a flat amount of SDI on a group basis for the entire year regardless of the specifications of the successive IEPs shows the failure to follow the critical "I" in "IDEA." [*See, e.g., Thomas A. Mayes, Keeping the "I" in IDEA*, 2018 B.Y.U. EDUC. & L.J. 141]. Indeed, the only relationship between the actual resource room SDI and the specifications in the IEPs was the addition of writing in the December 2020 IEP, thus having the District's resource-room practice rather than the Student's individual needs dictate the provisions in the IEP. This failure is not just procedural but also inevitably substantive, because "the focus on

the particular child that is at the core of the IDEA.” [Endrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988, 999 (2017)].

Third, although the IDEA does not necessarily require an IEP meeting upon request, the District’s failure to respond to the Parent’s May 2021 request with at least a refusal explaining the reason(s) for not convening the meeting contributes to the overall pattern with regard to parental participation and FAPE provision.

Finally, the June 10 unilateral amendment constitutes a clear procedural violation of the IDEA’s regulatory requirements. [34 C.F.R. 300.324(a)(4)]. This violation alone does not constitute a per se denial of FAPE. [See, e.g., R.F. v. Cecil Cnty. Pub. Schs., 919 F.3d 237, 247–48 (4th Cir. 2019)]. However, one of the distinguishing circumstances from those in *R.F.*, in addition to the cumulatively prejudicial pattern of procedural violations, was that the District provided false documentation (and tardy notification) of the requisite parental agreement. The District’s administrator for special education compounded this falsification by only belatedly acknowledging it.¹⁴ Moreover, as the LHO cogently explained, the District failed to provide reasonable evidence to support its purported justification that the high school block schedule dictated the amendment. [*Supra* note 12 and accompanying text]. Even if the District had proved that these drastic changes were attributable to the block schedule, it would have constituted another example of having the District’s institutional interests rather than the Student’s individual needs dictate the formulation of the IEP’s SDI specifications.

Ultimately, in bridging the gap between material implementation and such procedural violations [see, e.g., Spring Branch Indep. Sch. Dist. v. O.W., 961 F.3d 781, 799 (5th Cir. 2020)], the underlying pattern in this case resulted in both the requisite loss to the Student in terms of reasonable calculation of progress based on individualization [*Endrew F.*, at 999] and

the alternative requisite loss to the Parent in terms of the opportunity for meaningful participation in the IEP process. [20 U.S.C. § 1415(f)(3)(E)(ii)].¹⁵

Neither party's appeal raised the LHO's conclusions for the remaining IEP services of teacher training/consultation and 1:1 instruction. In any event, these conclusions clearly aligned with the record evidence in this case.

Issue 3: Lack of IEP Meetings in 2021

The LHO ruled that based on "the totality of the circumstances" [*supra* note 4], this failure was a violation of the IDEA. However, the LHO does not cite any specific support in the provisions of the IDEA or in related case law for the violation. Moreover, confusing or conflating the procedural and substantive sides of the two-part test under the IDEA [20 U.S.C. § 1415(f)(3)(E)], the LHO re-cast this failure as five separate significant substantive violations.

Although rejecting the District's appellate argument that any such violation was harmless unless the Parent specifically showed "what, if anything, would have changed had the IEP team conducted an IEP meeting," I conclude that the more appropriate consideration of this issue is as part of the pattern analysis for Issue 2, *supra*, to which the two-part test for procedural violations more clearly applies.

Issue 4: Lack of Invitation for 2020 IEP Meeting

The Parent's appeal did not challenge the LHO's adverse ruling with regard to this issue. In any event, in light of the clearly supporting record evidence, this ruling is affirmed.

Issue 5: Records

Both the Parent and the District appear to lack sufficient understanding of or at least compliance with the relevant requirements with regard to the Student's records. The LHO's conclusions for this issue would also benefit from a review of the applicable law.

The IDEA provides a specifically circumscribed right of records access that applies generally as well as after filing for a due process hearing. This right is limited to “inspect[ing] and review[ing]” the Student’s educational records, which extends to the parent’s representative. [34 C.F.R. § 300.613(a)-(b)]. However, it does not extend to copies unless essential for this inspection/review. [*Id.*]. Moreover, with a similar limited exception, the regulations permit the District to charge a reasonable fee for copying. [34 C.F.R. § 300.617].

These FERPA-type rights that are incorporated in the IDEA are within the jurisdiction of LHOs if they fit within the prescribed boundaries of “identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child.” [300.507(a)]. In contrast, to whatever extent, if any, that South Carolina’s FOI Act applies, it is not within the jurisdiction of LHOs and contains separate enforcement provisions. [S.C. CODE ANN. § 30-4-100].

In light of this framework, the Parent’s requests for records were overbroad or at least insufficiently specific in scope (e.g., “classwork” and “resource room”) and partially beyond the jurisdiction of the LHO (e.g., FOI Act). Similarly, the District’s response, particularly with regard to the rights of the Parent’s designated representative, was not clearly compliant with the applicable requirements. If the District does not correct the matter, the Parent may resolve the matter by using the enforcement mechanism under FERPA or either the state complaints process or filing for a new impartial hearing.

Finally, although the LHO’s was correct in questioning how the requests in the record, which started in late July 29, 2021, fit within the complaint’s allegation of a previous “failure to provide records,” the July 29 e-mail appears to imply an earlier request for records, and the LHO’s decision seems to report that the issues in this case were not finalized until August 9.

More importantly, regardless of the timing, the Parent's specified right of records access does not stop upon filing a complaint and certainly applies prior to the actual hearing sessions to the enforceable extent that they are within the jurisdiction of the LHO. Nevertheless, in accordance with the LHO's ultimate conclusion and that of relevant case law, the Parent failed to show how any cognizable procedural violation resulted in the requisite second-step substantive loss to the Student or significant impediment to the Parent. [*See, e.g., Simms v. District of Columbia*, 2018 WL 4761626 (D.D.C. July 26, 2018), *adopted*, 2018 WL (D.D.C. Sept. 18, 2018)].

Remedy¹⁶

As a result, I take a partially different route but arrive at basically the same bottom-line as the LHO's. Specifically, I conclude that (1) the District's actions with regard to ESY eligibility and reading and math SDI services amounted to denial of FAPE for the 2020–21 school year and the abbreviated 2021 summer break, and (2) the District's actions with regard to teacher training/consultation (except to the extent of the invalid amendment, which is part of conclusion #1) and records access do not amount to a denial of FAPE.

The resulting LHO denial of a remedy for the records issues, especially in light of the District's notification to the Parent of the FERPA right to remove the misleading record of an IEP amendment [P-2], is affirmed.

However, the remaining remedies of compensatory education and an IEE require modification for several reasons. First, the LHO did not provide any explanation of the approach and its application for the equitable calculus of the amount of compensatory education. Assuming that the LHO's estimates from the District's imprecise data are correct, the material shortfall in the first semester of 2020–21 amounted to 18.75 hours (reading) + 8.13 hours (math) = 26.88 hours. Rather than determine a specific amount for the second semester

and the summer break or identify a non-quantitative approach, the LHO simply and summarily granted the Parent's requested total amount of 50 hours.

Second, contrary to the IDEA requirement for finality of the decision [20 U.S.C. § 1415(a)(1)(A); 34 C.F.R. § 300.514(a)],¹⁷ the LHO provided two intertwined contingencies for the remedy: (1) designating the 50-hour compensatory education award as “a possible interim measure,” subject to consideration after the accompanying IEE [SRO-1, at 29], and (2) with regard to this “interim relief,” retaining jurisdiction “for any issues with regard to the enforcement or modification of [the remedial order].” [*Id.* at 31]. The finality requirement precludes such contingencies. [*See, e.g., C.C. v. Beaumont Indep. Sch. Dist.*, 65 IDELR ¶ 109 (E.D. Tex. 2015); *Indep. Sch. Dist. No. 283 v. S.D.*, 948 F. Supp. 860, 888 (D. Minn. 1995)].

Third, the role for the accompanying IEE was vague and overbroad in its scope and approach. The overbreadth in the LHO's assignment to the IEE, beyond the customary evaluation function as a foundation for any necessary changes to the IEP at the high school level, is to collect and assess information either to increase the compensatory education award or provide “other relief” as may be necessary for the identified denial of FAPE. [SRO-1, at 29]. Instead, in light of the identified issues in the case, the LHO's respective rulings for these issues, and the Parent's specified requests for relief, the delegation to the IEE reasonably must be limited in this case to compensatory education.

As to vagueness, the problems are (a) the ambiguity as to whether the LHO, the IEE, or the IEP team is to perform the resulting calculation for compensatory education and (b) the lack of foundational guidance as to approach and standard for the calculation. Although recognizing the remedy of compensatory education, neither the Fourth Circuit nor the federal district court in South Carolina has adopted either the quantitative or the qualitative approach. [*See, e.g., G v.*

Fort Bragg Dependent Schs., 343 F.3d 295, 308–09 (4th Cir. 2003)]. In the absence of such authority, I opt, for the limited purpose of the IEE, to follow the most influential decision to date, *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005), and the directly related case law.¹⁸ Specifically, *Reid* set forth the qualitative approach, which is an award “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” [*Reid*, 401 F.3d at 524].¹⁹ Translated to the instant case, the IEE needs to determine the amount and nature of compensatory education that would restore the Student to the position he would have occupied if the District had avoided the prejudicial violations identified in this decision. The *Reid* court further explained that this calculation is an individualized assessment and fact-specific, including “consideration of the parties' conduct.” [*Id.*]. This quoted consideration refers to equitable deductions in the amount to the extent that the parent has engaged in unreasonable conduct on a net basis when weighed against the corresponding conduct of the District. Finally, the *Reid* court explained that under this approach, unlike the cookie-cutter quantitative alternative, “[s]ome students may require only short, intensive compensatory programs targeted at specific problems or deficiencies,” whereas others may “perhaps” even warrant more than an hour-for-hour calculation. [*Id.*]

The *Reid* court also ruled that the hearing officer may not delegate this calculation to the IEP team. [*id.* at 526–27]. In contrast, subsequent cases in the D.C. circuit have authorized delegation to an IEE to craft the compensatory education award. [*See, e.g., B.D. v. District of Columbia*, 817 F. 3d 792, 800 (D.C. Cir. 2016); *J.T. v. District of Columbia*, 496 F. Supp. Ed 190, 213 (D.D.C. 2020); *Lopez-Young v. District of Columbia*, 211 F. Supp. 3d 42, 54 (D.D.C. 2016)]. The alternative, upon an insufficient information from the plaintiff-parents, of awarding

“*nothing* does not represent the ‘qualitative focus’ on [the child’s] ‘individual needs’ that *Reid* requires.” [Stanton v. District of Columbia, 680 F. Supp. 2d 201, 207 (D.D.C. 2010)].

As a result, the LHO remedy is modified for the sake of decisional finality and judicial economy. Importing an application of *Reid* from elsewhere [Bell v. Bd. of Educ. of Albuquerque Pub. Schs., 53 IDELR ¶ 161 (D.N.M. 2008)] that equitably fits, with due customization, the circumstances of this case, the modification is specified *infra*.

IV. DECISION AND ORDER

The hearing officer’s resolution of the five issues in this case is largely affirmed. The limited modifications are specified under Legal Conclusions, *supra*.

As a result, the Order for the remedy is as follows:

The Parent shall notify the District via an e-mail by a firm deadline of 5:00 pm on December 10 of its choice between the following two remedies, with the understanding that if the Parent fails to do so the District shall make the selection between these two alternatives (unless the parties arrive at a settlement agreement for a third choice):

- The LHO’s specifications for 50 hours of compensatory education, except that the only additional relief is an IEE at public expense limited to the purpose of providing useful information for the next IEP (with an IEP meeting promptly convened after completion of this IEE) but without any additional compensatory education. This 50-hours shall be on a 1:1 basis, thus being individualized and more potent than group SDI. Rather than an hour-for-hour approximation for the first-semester shortfall, the continuing prejudicial procedural violations during the second semester upon the steady actual amount of SDI, and the abbreviated summer 2021 ESY program, this 1:1 amount roughly represents a qualitative formulation.²⁰

- OR -

- An IEE at public expense per the LHO’s prescribed procedure [SRO-1, at 29–30] but focused primarily on determining the final compensatory education award, including the amount and nature of services, per the qualitative approach in *Reid* (*supra*), and their implementation (e.g., who, when, and how for the delivery of the services so as to beyond the regular school day and individually effective for the Student).²¹ The LHO’s specified procedure for selecting the evaluator-consultant and for providing sources of information, supplemented by this SRO decision (including the relevant information in *Reid* and cited related cases), apply to the extent they do not conflict with this Decision and Order. [SRO-1, at 29-30].

V. NOTICE OF APPEAL RIGHTS

The decision of this SRO is final unless an aggrieved party appeals the decision by commencing a civil action 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.

A handwritten signature in black ink, appearing to read "Perry A. Zirkel". The signature is fluid and cursive, with the first name "Perry" and last name "Zirkel" clearly distinguishable.

November 28, 2021

Perry A. Zirkel
State Review Officer

¹ Assuming that this cover section will undergo redaction, the rest of this decision will generically use “Parent” (without differentiation as to father and/or mother) and “Student” (without name or other personally identifying information). The rest of the decision will also use general roles, such as “special education teacher” (without names), and “he” or “his” (without differentiation as to actual gender) for the same purpose.

² For overall consistency, the rest of this decision will generically refer to “District.”

³ The record in this matter includes two volumes of exhibits (designated as “P” and “D” for those of the Parents and District, respectively) along other documents, such as the hearing officer’s decision (designated as “SRO-1”). The record also includes a transcript consisting of three volumes corresponding to the hearing sessions (designated as “Tr. I,” “Tr. II,” and “Tr. III,” respectively). Cross references within this decision are, per legal citation style, via “*supra*” (above) or “*infra*” (below).

⁴ The totality of the circumstances included the District’s failure to accommodate the Parent’s work schedule for the December 2020 IEP meeting, the Student’s poor performance in the second semester of the second semester of the 2020–21 school year, and the District’s falsifying response to the Parent’s request for an IEP meeting in June 2021. [SRO-1, at 19–21]. The LHO concluded that these actions resulted in the requisite prejudicial substantive loss for the Parent and, in combination with the ESY violation, for the Student. [*Id.* at 29].

⁵ The total was the full amount that the Parent had requested in the amended complaint. The specific allocation was 17 hours of reading, 16 hours of math, and 17 hours of writing “unless otherwise agreed to by Parent.” [*Id.* at 27]. The LHO characterized this part of the order as a “possible interim measure” with the following explanation: “Whether additional services are necessary, or an adjustment is necessary, may be reconsidered after the Independent Educational Evaluation.” [*Id.* at 28].

⁶ The LHO described the dual purpose of the IEE order as follows: “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.” [*Id.* at 29].

⁷ The Third Circuit explained that “beyond this rather narrow class of record-supported, credibility-based factual findings, we think that, to give the statute’s language about ‘independent’ decisions effect, the [SRO] must have much more leeway in reviewing other non-credibility based findings of the hearing officer.” [*Id.* at 528–29 (citing Perry A. Zirkel, *The Standard of Review Applicable to Pennsylvania’s Special Education Appeal Panel*, 3 WIDENER J. PUB. L. 871, 892 (1994))]. At least one other Circuit that includes one of the approximately eight states that have opted for a review officer tier, has at least indirectly approved this approach. [*Amanda J. v. Clark Cnty. Sch. Dist.*, 267 F.3d 877, 888–89 (9th Cir. 2001)]. The Fourth Circuit has only partially addressed this issue, finding that LHO’s credibility findings are entitled to deference at the SRO level. [*Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 104 (4th Cir. 1991)]. The rest of the review-standard ruling in *Doyle* and its subsequent line of decisions in the Fourth Circuit address the similar but separable issue of judicial review of LHO decisions. [*See, e.g., id.* at 104–05; *M.S. v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 326 (4th Cir. 2009)].

⁸ The record does not reveal when the Parent notified the District of this problem with attending the meeting, although it was before the District’s prior written notice regarding the meeting [D-14]. However, as an equitable matter with regard to the remedy, the record reveals a lack of an entry on the “Parent Response” section of the invitation to the meeting, which included the option to request rescheduling the meeting. [D-10].

⁹ The IEP team relied primarily on the regression factor, opining that the Student was progressing in relation to the IEP goals. [*See, e.g., Tr. I*, at 44 and 84].

¹⁰ For the purpose of comparing the SDI in this IEP to that in the predecessor IEP, the changes on a weekly basis were (a) reducing reading from 150 minutes to 30 minutes; (b) reducing math from 150 minutes to 60 minutes; and (c) adding writing at 30 minutes. The resulting total SDI changed from 300 minutes to 120 minutes per week.

¹¹ This uniform SDI allocation of 75 minutes per week for each of these three subject areas was on a group basis for all the students in the resource room, with any individualization within this setting. [See, e.g., Tr. I, at 38–40; Tr. II, at 55; Tr. III, at 42 and 56].

¹² The special education teacher who prepared this amendment did not obtain the requisite agreement with the Parent and further testified, contrary to this total 300-minute allocation, that “[the high school] has 450 minutes of resource each week.” [Tr. I, at 28–29].

¹³ See generally Perry A. Zirkel, *The Legal Boundaries for Impartiality of IDEA Hearing Officers: An Update*, 21 PEPPERDINE DISP. RESOL. L.J. 257 (2021).

¹⁴ Although the Parent specifically requested verification on August 9, 2021, the administrator did not respond to this request. [Tr. II-181]. It was not until almost two months later that the administrator acknowledged this deceptive information, disingenuously characterizing it as an “inaccura[cy]” that the Parent could have corrected under the Family Educational Rights and Privacy Act (FERPA). [P-2].

¹⁵ With due limited latitude for the status of the Parent, as pro se with a lay advocate, this issue no. 2 starts with the incomplete-implementation dimension of FAPE and, based on the record in this case, extends to the two-part test for the procedural dimension of FAPE. However, in light of the fatal lack of individualization and the accompanying pattern with regard to parental participation, it does not reach the separate application of the *Endrew F.* progress-based standard for substantive FAPE. Nevertheless, in response to the emphasis on this standard in the District’s written arguments [SRO-5], that the Fourth Circuit’s pre-*Endrew F.* substantive-FAPE decisions are “no longer good law.” [*R.F.*, 919 F.3d at 245].

¹⁶ It is odd although not controlling that the Parent’s appeal expressly seeks “maximum compensatory services” even though the LHO granted the full amount that the Parent had requested at the conclusion of the hearing, and the IEE that the Parent requested was solely for the purpose of a new IEP not additional compensatory education. [SRO-1, at 27–28]. Apart from the records remedies (issues 4–5), the Parent had not requested any other relief even if the decision were entirely in favor of the Parent for all of the remaining issues (nos. 1–3).

¹⁷ For judicial recognition and enforcement of this requirement, see, e.g., *Muth v. Cent. Bucks Sch. Dist.*, 839 F.2d 1134, 124–26 (3d Cir. 1988), *rev’d on other grounds sub nom. Dellmuth v. Muth*, 491 U.S. 223 (1989); *Antkowiak v. Ambach*, 838 F.2d 635, 641 (2d Cir. 1988).

¹⁸ The Sixth Circuit has fully adopted *Reid*, including its delegation ruling. [Bd. of Educ. of Fayette Cnty., 478 F.3d 407 (6th Cir. 2007)]. Other circuits have cited the *Reid* standard with apparent approval. [See, e.g., *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 414, 457 (2d Cir. 2015); *Ferren C. v. Phila. Sch. Dist.*, 612 F.3d 712, 717–18 (3d Cir. 2014); *R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011); *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1290 (11th Cir. 2008)].

¹⁹ The *Reid* court summarized its standard as follows: “[C]ompensatory awards should aim to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA.” [*Id.* at 527].

²⁰ As an equitable matter under the narrow circumstances in this case, including the Parent’s request and the separation from the IEE, this 50-hour award may be construed as sufficiently aimed at restoring the position the Student would have occupied but for the denial of FAPE. [*Cf. Ferren C.*, 612 F.3d at 718–19].

²¹ The calculation of the amount should include the equitable balancing of the parties’ conduct, including the actions of the Parent and the District denoted herein as relevant to the equities.