

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

<b>STATE OF SOUTH CAROLINA</b>	)	
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	)	
<b>G.J. on behalf of Z.B.,</b>	)	
	)	
<b>Parent/Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>BEFORE MITCHELL YELL</b>
	)	<b>STATE-LEVEL REVIEW OFFICER</b>
	)	
	)	
<b>Florence County School District One,</b>	)	
	)	
<b>District/ Respondent.</b>	)	<b>DECISION</b>
	)	
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This matter is before me pursuant to an appeal of a due process hearing in which Petitioner, G.J. (“Petitioner”) on behalf of her minor son, Z.B. (“Student”) seek review of final order of the Local Due Process Hearing Officer (“LHO”), Brian P. Murphy, in *G.J. on behalf of Z.B. v. Florence County School District One*. Kimberly Kelley Blackburn and Vernie L. Williams represented the Florence County School District One (“District”) and the Petitioner represented her minor son.

**PROCEDURAL BACKGROUND**

On June 17, 2021, the Petitioner filed a Due Process Complaint with the Florence County School District One. The Complaint was amended on July 26, 2021. A public hearing was held on August 30, 2021 through September 1, 2021. On September 10, 2021, the LHO, issued his final order denying the Petitioner’s requested relief. Although the LHO found two instances of procedural violations committed by the District, he held that the Individuals with Disabilities Education Act (“IDEA”), regulations to the IDEA, and controlling case law precluded relief. The LHO also notified the Petitioner and the District that if either party wished to appeal the decision, they could do so by notifying the South Carolina Department of Education (“SCDE”), Office of the General Counsel of their intent.

On September 13, 2021, the Petitioner notified the SCDE of her intent to appeal the ruling of the LHO. On September 14, 2021, the SCDE officially notified the District and Petitioner that the appeal was received and Dr. Mitchell Yell was appointed as the State-level review officer (“SRO”).

As the SRO, I have jurisdiction in this matter pursuant to a letter of appointment from the SCDE. I also have the knowledge and ability to conduct hearings and render and write decisions in accordance with the appropriate, standard legal practices. To ensure the rights of the parties pursuant to the IDEA, on September 18, 2021, I emailed the District and Petitioner (copied to the SCDE) a request that the parties adhere to a schedule on submitting briefs to me. The District and Petitioner requested an extension so I proposed the following schedule: (a) Petitioner’s brief due on Tuesday, October 4, 2021, (b) District’s response brief due on Thursday, October 7, 2021, and (c) Petitioner’s reply brief (if needed) due on Monday, October 11, 2021. I received the District’s and Petitioner’s briefs in a timely manner.

I also notified the parties and the SCDE that in accordance with the IDEA’s federal regulations at 34 C.F.R. § 300.515(b), the state is required to ensure that not later than thirty days after the receipt of a request for a review, a final decision is reached in the review and a copy of the decision is mailed to each of the parties. Based on SCDE’s receipt of the request for appeal on September 11, 2021, the due date for the final decision on appeal was established as October 11, 2021.

I received 617 pages of testimony and 61 exhibits from the Hearing. I have reviewed the entire due process hearing transcripts, exhibits, and final arguments of the Petitioner and District. I have determined the hearing procedures were consistent with the requirements of due process.

#### **STANDARD OF REVIEW**

In the two-tier due process system used in South Carolina, the SRO’s (Tier Two) review of an LHO’s (Tier One) ruling is limited to the issues appealed (34 CFR §300.514). The issues brought forth by Petitioner in her complaint of June 17, 2021 and the amended complaint of June 28, 2021 alleges that Brian Denny and the District: (a) refused to provide Prior Written Notice (PWN), (b) failed to maintain proper educational records, (c) denied parental access to records, (d) denied a free appropriate public education (FAPE) because of an inappropriate individualized education program (IEP) and services, (e) failed to implement the IEP, (f) denied tutoring services, (g) refused to provide medical homebound placement, and (g) failed to notify the parent

of her son's absences. An SRO is to make an independent decision, although the decision must be based on the record of the hearing, the exhibits presented, and the applicable law and regulations. According to the U.S. Court of Appeals for the 4<sup>th</sup> Circuit, if the LHO and SRO arrive at different conclusions, the SRO must provide sound reasons for departing from the LHO's ruling (*Springer v. Fairfax County School Board* 134 F.3d 659, 663 (4th Cir. 1998)).

On September 13, 2021, the Petitioner notified the SCDE of her intent to appeal the ruling of the LHO. In the notification, the Petitioner wrote that wrote that "I [the Petitioner] appeal the decision rendered by Brian P. Murphy on September 10, 2021 for bias, prejudice, conflict of interest in favor of district and incompetent of his qualifications." The Petitioner also wrote "Furthermore, I Object to any outlandish illegal jurisdictional claims of any matter regarding my son from Brian P. Murphy." I do not address Petitioner's jurisdictional claim because this issue was not raised in the hearing.

## **DISCUSSION**

### **Allegation of LHO bias, conflict of interest, and incompetence**

Prior to discussing the findings of the LHO, I will examine the Petitioner's assertion that the LHO acted out of "bias, prejudice, conflict of interest" and was "incompetent." An LHO "enjoys a presumption of honesty and integrity, which can only be rebutted by a showing of some countervailing reason to conclude that a decisionmaker is actually biased with respect to factual issues being adjudicated" (*Harline v. DEA* F.3d 1199 (10<sup>th</sup> Cir. 1998) p. 1204).

Although, the Petitioner made these allegations, there is nothing in the record nor the Petitioner's brief that supports these claims. The LHO conducted a fair and impartial hearing, and at points during the hearing helped petitioner structure her questions to witnesses, which he characterized as "great questions" (see for example pages 7 and 8 of day 2 transcript), and also assisted the Petitioner in presenting evidence (see for example pages 31 and 41 of day 1 transcript) and making objections (see for example page 115 of day 1 transcript). There is simply no substantiation that the LHO was biased, prejudiced, or incompetent. Thus, the LHO's findings are entitled to deference by the SRO.

## **Issues brought up by Petitioner**

In her brief to the SRO, the Petitioner raised two issues that were addressed in the hearing. First, she brought up the five business day rule for disclosing evidence, which allows evidence that is not disclosed with five business days to be prohibited by the LHO. According to the Petitioner, the District did not provide its evidence by noon on the 5<sup>th</sup> business day and instead submitted evidence at the close of the 5<sup>th</sup> business day. The LHO determined that the District did comply with the law, the Petitioner's case was not compromised, and allowed the evidence to be submitted. Although the Petitioner did address this issue in her brief to the SRO by noting that she had initially objected at the hearing, she did not allege a violation of the five-business day rule in her notice of appeal to the SRO.

Second, in her brief to the SRO, the Petitioner also noted that she had requested that Dr. Richard O'Malley, the superintendent of the District, testify at the hearing. The LHO addressed the District's objections via its motion in limine at the beginning of the hearing. The LHO left the issue open so the Petitioner could have called Dr. O'Malley, subject to District objection. Petitioner chose not to call Dr. O'Malley during the hearing. The Petitioner noted that Dr. O'Malley "should have been compelled to testify under oath" and "he should be held accountable for his gross negligence" but did not raise the issue in her notice of appeal to the SRO.

### **Procedural and substantive dimensions of a free appropriate public education**

The IDEA includes a series of procedural and substantive requirements to which school districts must adhere in providing a FAPE. When considering an IDEA complaint against a school district, a hearing officer must consider both these procedural and substantive requirements of the law.

In her amended complaint of June 6, 2021, Petitioner alleges that that the District was "denying my son a FAPE through an effective IEP and services, the teachers are failing to implement the IEP as written." The Petitioner raised a number of procedural issues in the complaint (e.g., failing to update PWNs, failing to provide records, dates, and services). The LHO noted that in reviewing the Petitioner's allegations, it was important to carefully weigh the evidence to determine whether the issues raised were procedural or substantive violations (see *T.B. v. Prince George's County Board of Education*, 897 F.3d 566, 2018). "There is no bright line distinguishing all the 'procedural' requirements of the IDEA from its 'substantive'

requirements” (*A.K. v. Alexandria City School Board* 848 F.3d 672(4<sup>th</sup> Cir. 2007), p. 684). Nonetheless, it is important that the LHO’s make this determination.

Generally procedural requirements include the IDEA’s obligations such as PWN, providing a notice of procedural safeguards, membership of the IEP team, components of the IEP, and parental participation requirements. Moreover, courts have developed variations of a two-step harmless error approach in which courts would determine if the (a) school district committed a procedural violation of the IDEA or corollary state law, and (b) the procedural violation resulted in a cognizable loss to the student or the student’s parents (Zirkel, 2021). If a court found that a procedural violation met the two tests, it may be a violation of a student’s right to a FAPE. In the 2004 amendments to the IDEA, Congress codified the second step of the harmless error approach by requiring that hearing officers only rule that procedural violations deny a student a FAPE when the violations (a) impeded a student’s right to a FAPE, (b) significantly impeded parents’ right to participate in the special education decision-making process regarding a FAPE, or (c) deprived a student of educational benefits (20 U.S.C. § 1415(f)(3)(E)(ii)).

The substantive dimension of FAPE focuses on the adequacy of the IEP in terms of its likely or actual results (Zirkel, 2017). In 2017, the U.S. Supreme Court required that “to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances” (*Andrew F. v. Douglas County School District RE-1*, 580 (U.S. \_\_\_ 2017), p. 15). Typically, a substantive violation under the IDEA arises when the content of the IEP (e.g., the present levels of academic achievement and functional performance [PLAAFP] statements, the measurable annual goals, the special education services) is not sufficient to enable a student to receive a FAPE (Berney & Gilsbach, 2017). Because 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)), the LHO considered the District’s procedural and substantive compliance with IDEA.

### **Procedural violations committed by the District**

The LHO was rightly concerned about the District’s failure to provide a tutor for Z.B. In the amended complaint, the Petitioner noted that "Brian Denny denied tutoring services stating that this [tutoring] is not covered by the IDEA” and “I requested tutoring services to continue for my son and he was denied these services by Brian Denny multiple times.” According to the

LHO the parent, the Student's teacher, and the school principal testified that Brian Denny informed the IEP team that tutoring was not a service under the IDEA. In testimony on Day 2 of the hearing, the Petitioner asked Brian Denny “was tutoring a covered service of the I.D.E.A. in Florence School District One?” (Day 2 testimony, page 6, lines 11-13). Mr. Denny replied “Tutoring is not a I.E.P. service. Specialized instruction from a special education teacher related to goals is an IEP service” (Day 2 testimony, page 6, lines 14-16). Three issues were raised by the LHO regarding Brian Denny’s assertion that tutoring was not a special education service. First, Mr. Denny presumes that tutoring is not instruction. Second, Brian Denny, and not the IEP team, was making decisions regarding services to be provided the Student The LHO wrote tutoring “is precisely the role of the IEP team—to determine...” (LHO Final Order, page 14). Thus, tutoring was an issue the IEP team should have decided. Third, the LHO aptly notes that the “notion that tutoring is not a special education service is simply wrong” (LHO Final Order, page 14).

Brian Denny testified that specialized instruction is instruction provided by a special education teacher related to goals. The definition of special education in the IDEA is as follows: “the term ‘special education’ means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability” (20 U.S.C. § 1401(29)). Additionally, the LHO cites courts have referred to as tutoring being specially designed instruction (*Johnson v. District of Columbia* 190 F. Supp 2d 34 (D.D.C. 2002); *Spilsbury v. District of Columbia*, 307 F. Supp 2d 22 (D.D.C. 2004). In his final order, the LHO wrote that “the evidence establishes that the IEP team failed to fully consider tutoring to be an option. In fact, there appears to be no dispute that the IEP followed the instruction from Denny that it [tutoring] ‘was not an IEP service.’ This is a procedural violation of the IDEA” (LHO Final Order, page 15).

The District seemingly is not as concerned about this issue. According to the Respondent’s Brief in Opposition to Petitioner’s Appeal (Page 26) “the LHO’s conclusions regarding a procedural violation misconstrue the evidence in the Record” because the issue was discussed multiple times. I am not as sanguine as the District. I agree with the LHO that Mr. Denny made a serious procedural error in telling the IEP that tutoring was not a covered service under the IDEA, when clearly it is a possible service and furthermore that the decision regarding tutoring should have been the province of the IEP team.

The LHO analyzed the tutoring procedural error using the test developed by the U.S. Circuit Court of Appeals for the 4<sup>th</sup> Circuit in *R.F. v. Cecil Count Public Schools*, 919 F.3d 337

(4<sup>th</sup> Cir. 2019). In this test, an LHO must ask three questions about the procedural error and answer each in the affirmative. If all three questions are answered yes, the procedural violation led to substantive harm, thus violating a student's FAPE. The three questions are whether: (a) the Petitioner alleged a procedural violation, (b) the violation significantly impeded the parent's opportunity to participate in the decision-making process regarding the parent's child, and (c) the violation denied the student a FAPE (*R.F.*, 2019, p. 248). The LHO concluded that although the District made a procedural error in failing to consider tutoring, that failure did not necessitate a substantive remedy under the three-part test developed by the 4<sup>th</sup> circuit.

The LHO also noted that the District committed a procedural violation by preventing the IEP team's consideration of home-based services. In applying the R.F. test to home-based instruction, the LHO concluded that the District did not deny the Student a FAPE by declining to provide an instructor in home.

I agree with the LHO that the District committed procedural violations but find no compelling reason to overturn his conclusion that these violations did not cause substantive harm or deny a FAPE to the Student.

## **FINDINGS**

It is my task to analyze the LHO's order, the entire hearing record, and make an independent decision on the LHO's ruling upon the completion of the review. At the same time, the findings of fact of the LHO are entitled to great deference and are considered prima facie correct (See *M.S. ex rel. Simchick v. Fairfax County School Board.*, 553 F.3d 315, 4<sup>th</sup> Cir. 2009). Moreover, where the LHO and I reach different results, I must provide reasons for departing from the LHO's decision. I present my conclusions vis-a-vis the LHO's findings.

### **LHO Findings-Final Order**

**LHO Finding #1. Failure to add agreed to services to the IEP.** Petitioner raised two allegations that the PWN and IEP do not reflect what was agreed upon by the IEP team. The LHO noted that the United States Court of Appeal for the 4<sup>th</sup> Circuit cautioned that in evaluating whether a school district provided a FAPE, a court must generally limit its consideration to the IEP itself (*A.K. v. Alexandria City School Board*, 848 F.3d 672, 4<sup>th</sup> Cir. 2007). The LHO concluded that there did not appear to be any substantive dispute about services provided at the conclusion of the 2020-2021 school year nor was there any evidence of other IEP content issues.

**SRO-The LHO's finding is affirmed.**

**LHO Finding #2. Failure to provide services.** The LHO cited *Sumter County School District # 17 v. Heffernan ex rel.*, 642 F.3d 478, (4<sup>th</sup> Cir. 2011) that a failure to implement an IEP is a violation of the IDEA when the failure is material. The LHO concluded that the daily logs kept by the teachers refutes any notion that the instructors failed to provide services in any material way. The LHO further noted that teachers displayed a good knowledge of the Student, his issues and his progress and that the Petitioner did not show that any of the Student's teachers failed to provide services in his IEP.

**SRO-The LHO's finding is affirmed.**

**LHO Finding #3. Failure to consider placement change and necessary services.** The Petitioner's decision to allow the Student to be educated using a virtual option did not lead to a change of placement nor did the request for additional services. The LHO further discussed the District's failure to provide a tutor. The LHO found, and I agree, that this was a procedural error when Brian Denny essentially shut down the IEP team's discussion of the tutor (see earlier section on FAPE). The LHO also found the issue of home-based instruction to be a procedural error. The LHO held, however, that neither procedural error necessitated a substantive remedy.

**SRO-The LHO's finding is affirmed.**

**LHO Finding #4. Failure to consider other information.** The Petitioner alleged that trauma experienced at another school became an issue for the Student. The LHO, however, found nothing in the record to support the notion this resulted in the denial of a FAPE. Neither did he see how the trauma that the Student experienced would be alleviated by in-person instruction. With respect to medical information, the LHO found the District open to receiving and considering medical information from any of the Student's providers.

**SRO-The LHO's finding is affirmed.**

**LHO Finding #5. Failure to provide information.** The Petitioner devoted much of the amended complaint to requests for records, documents, classwork, and data. The LHO noted that teachers provided data and information even though they did not provide all the data on the Student nor all the classwork that he completed, the communication was robust and there was no violation of the IDEA. According to the LHO the District did not fail to provide information and any failure to provide the information requested by the Petitioner would not have led to a substantive violation.

**SRO-The LHO's finding is affirmed.**

**SUMMARY OF RULING**

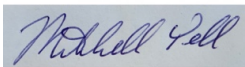
I agree with the LHO that the District's stance regarding tutoring was a procedural error. I also agree with the LHO that this error did not result in substantive harm. The Student's IEP team did a good job of fashioning and implementing the Student's IEP in the very challenging environment of the pandemic. The Petitioner was very involved in not only developing but monitoring the success of Student's IEP and her efforts undoubtedly led to a more effective program. Student's team met on many occasions and modified his program. Although there were technical, attendance, and participation problems, the Student nonetheless made progress and received a FAPE.

**ORDER**

For the reasons stated herein, I affirm the LHO's decision.

**NOTICE OF APPEAL RIGHTS**

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



Mitchell L. Yell, Ph.D.  
State-Level Hearing Review Officer

## References

- A.K. v. Alexandria City School Board, 848 F.3d 672 (4<sup>th</sup> Cir. 2007).
- Berney, D.J., & Gisback, T. (2017) Substantive vs. procedural violations under the IDEA.  
<http://www.berneylaw.com/2017/11/12/subantive-vs-procedural-violaions-idea/>
- Andrew F. v. Douglas County School District RE-1, 580 U.S. \_\_\_\_ (2017).
- Harline v. DEA, F.3d 1199 (10<sup>th</sup> Cir. 1998).
- Sumter County School District # 17 v. Heffernan ex rel., 642 F.3d 478 (4<sup>th</sup> Cir. 2011)
- Johnson v. District of Columbia, 190 F. Supp 2d 34 (D.D.C. 2002).
- M.S. ex rel. Simchick v. Fairfax County School Board., 553 F.3d 315, (4<sup>th</sup> Cir. 2009).
- Spilsbury v. District of Columbia, 307 F. Supp 2d 22 [D.D.C. 2004).
- Springer v. Fairfax County School Board, 134 F.3d 659 (4<sup>th</sup> Cir. 1998).
- R.F. v. Cecil County Public Schools, 919 F.3d 337 (4<sup>th</sup> Cir. 2019).
- T.B. v. Prince George's County Board of Education, 897 F.3d 566 (4<sup>th</sup> Cir. 2018).
- Zirkel, P.A. (2017). Failure to implement the IEP: The third dimension of FAPE under the IDEA. *Journal of Disability Policy Studies*, 28(3), 174-179.
- Zirkel, P.A. (2021). The four faces of FAPE, *Intervention in School and Clinic*, DOI: 10.1177/10534512211032627.