

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

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF RICHLAND	)	
	)	
In the Matter of:	)	DECISION OF THE
	)	STATE REVIEW OFFICER
G.J., on behalf of minor	)	
child, Z.B.,	)	
Appellee	)	
	)	
V.	)	
	)	
Florence County School District One,	)	
Appellant.	)	
_____	)	

This matter is before me pursuant to an appeal by Florence County School District One (“District”) from a decision by Douglas Dent, the Local Hearing Officer the Parent is entitled to relief in a due process matter under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, *et seq.*

1. Procedural Background

I incorporate the procedural history laid out by the LHO in his decision dated February 22, 2021. The Due Process hearing was held via Zoom on February 11 and 12, 2021. The District appealed the case on March 5, 2021. The parties agreed to a briefing schedule via email.

In briefing, the Parent's attorney included additional exhibits, and the District, in reply, included exhibits as well. Only evidence presented at the hearing was included in my decision.

2. Factual Background

The Student attended 4th grade at Delmae Heights Elementary School during the 2018-2019 and 2019-2020 school years. (Testimony of Parent). The Student is currently a 5th grader at North Vista Elementary School. (Testimony of Parent). When the Student was in 2nd grade, he was placed on a 504 plan after being diagnosed with Attention Deficit Disorder ("ADD"); he continued to struggle with math, English and behavioral issues. (Testimony of Parent, p. 26, 30). The Parent requested an initial evaluation to determine the Student's possible eligibility as a student with a disability under the Individuals with Disabilities Education Act (IDEA) at the end of the 2018-2019 school year and the team met at the start of the 2019-2020 school year to start the evaluation. (Testimony of Parent, p. 31).

A team at Delmae Heights Elementary School met during the first week of school to plan the evaluation (Testimony of Parent, p. 31, Respondent's Exhibit #4), and the evaluation was conducted within 60 calendar days. The team decided the Student is eligible for special education services under the category of Other Health Impairment ("OHI"), related to a medical diagnosis of ADD, and a Specific Learning Disability ("SLD") because of a deficit in math. (Respondent's Exhibit #5). They met to develop an Individualized Education Program ("IEP") on November 14, 2019. (Testimony of Parent, Petitioner's Exhibit #1). The IEP team set goals related to the rounding of multi-digit numbers and mastery of multiplication, as well as behavior improvement. (Testimony p. 118-120). The IEP included 120 minutes of service per week for math and behavior and support from a paraprofessional throughout the day. The team

also decided to use a checklist and a point sheet to monitor the student's behavior and have a check in/check out system. (Petitioner's Exhibit #1). The team also developed a Behavioral Intervention Plan ("BIP"). At this point in the year, the Student's math average was an F. (Testimony of Parent, p. 41).

Several weeks after implementation of the IEP was scheduled to begin, the Parent was concerned that the services were not being provided. (Testimony of Parent, p. 42). The team met again on December 5, 2019, to discuss the implementation of the IEP. The team discussed what had and had not yet been implemented and made commitments to start the needed services. (Testimony of Parent, p. 43; Testimony p. 180). The team changed the target skill from staying on task to completing assignments. (Testimony p. 129; Respondent's Exhibit #6). The team also clarified the communication needed with the Parent, and refined the check in and check out sheet so that the Parent could understand what it meant, and to ensure that it went home on a daily basis as they had not yet been provided. (Testimony p. 130, 182, Respondent's Exhibit #6). The Parent requested a new paraprofessional as well. (Respondent's Exhibit #6).

The team met again on January 22, 2020. (Testimony of Parent, p. 45, Respondent's Exhibit #7). The Parent had been concerned that the Student was receiving resource help in English instead of math and was concerned about the behavior of the paraprofessional. (Testimony of Parent, p. 51). During this meeting, the team discussed the fact that all paperwork was not going home to the Parent. (Testimony p. 136). They talked about who would do the check in/check out sheet if the special education teacher was not present, and clarified the role of the paraprofessional. The Parent asked for the provision of special education services to be documented by the paraprofessional, but the District said the Parent would get some overall

documentation at the end of the quarter. (Testimony p. 137-140, Respondent's Exhibit #7).

Between December 2020 and March 2020, the Student had three different paraprofessionals. (Testimony of Parent, p. 46-48; Testimony p. 178). The Parent expressed challenges with each (taking things from bookbag, reading magazines rather than paying attention to the Student, or saying to the Student that he needed to 'stop acting gay.' (Testimony of Parent, p. 46-48). The third paraprofessional did have a personnel issue. (Testimony p. 178).

The special education teacher had several absences.¹ Between November 19, 2019 and March 13, 2020, the Student should have received 27 hours of special education resource time. The special education teacher provided 18 hours of resource instruction. (Testimony p. 163; Respondent's Exhibit #10).

The professionals at the school believed the IEP was substantially implemented. On March 13, 2020, the Governor of South Carolina ordered that all schools close due to the COVID-19 pandemic. Between March 13, 2020, and the end of the school year, the District calculated that it had to provide 30 minutes of service a week to the Student. During this 9 week period of time the Student received 5.7 hours of service. The Student received no other services, including no paraprofessional and no check in and check out sheets. The District said behavioral

¹ While the Parent expressed concern the resource teacher, was not working with the Student, the teachers at the school did not express concern about this. Two said they had "never observed" th teacher working with him but had no reason to believe that she wasn't. (Testimony p. 241; Testimony p. 274). I put this note in a footnote to make clear that these concerns were raised; however, no evidence was presented that suggested that the teacher didn't provide services and I will make my decision, therefore, on the assumption that the Student received the services the District said were provided.

goals were not a focus during the COVID shut down.

District personnel testified that virtual class time did not include any live instruction, but included assignments and an ability to ask the teacher for help. No new concepts were introduced to students. No formal assessments were provided by the District during this time. While in virtual school, the Student struggled to start or finish assignments and spent time on unauthorized web sites.

In May 2020, the team met again to discuss Extended School Year (“ESY”) services. The team agreed to ESY services to prevent regression in the Student’s progress. (Testimony of Parent, p. 53; Testimony p. 147, Respondent’s Exhibits #1, #8). For ESY services, the District hired a tutor. The tutor provided over 30 hours of services paid for by the District – 1 hour per week on math and 1 hour for behavior. (Testimony p. 69). The Student received these services one on one because of COVID; her typical ESY instruction is in small groups. (Testimony p. 95).

In July 2020, the IEP team met and added a goal relating to fractions in math because the Student “had an assessment that indicated an additional need in instruction with fractions.” (Respondent’s Exhibit #9). Further, the team lengthened ESY services by 8 hours because the summer was extended due to COVID-19, and the Student was “just beginning to show progress in multiplication using the lattice method and needs additional instruction to master the method.” (Respondent’s Exhibit #9). In addition, the District provided 8 hours of compensatory education for services not provided during the 2019-2020 school year due to the absences of the special education teacher.² (Testimony p. 155-156; Respondent’s Exhibits #2, #9).

² The number of hours for compensatory education were calculated on an hour-by-hour basis. “On November 18, 2019, services initiated for your son. Direct services for him per his IEP were a total of 2 hours weekly. Between

The Parent continued paying for private tutoring from after the end of ESY and compensatory education services, upon an agreement with the Parent that the Student could use even more support. (Testimony p. 70).

Between November 2019 and the end of the summer of 2020, the Student made the following progress (Respondent's Exhibits #1, #3; Testimony p. 82):

- Math Goal 1 (place value and rounding): He began at 33% and reached 80% by the end of the ESY time period.
- Math Goal 2 (multiplication): He began at 42% and reached 70% by the end of ESY.
- Behavior Goal: He began at being able to sit quietly for 20% of the time. By the end of ESY, he could work quietly for 23 minutes. His tracking sheet shows him currently reaching 50%.
- Math Goal 3: This goal began on July 16, 2020, with a baseline of 0 out of 5. No progress was documented during ESY.

During this time, the Student improved in math facts and place value, but still struggled with multiplication and division, as well as fractions and other math skills. (Petitioner's Exhibit #2)

Over the course of the year, the Student's made some growth in math. (Testimony p. 170; Respondent's Exhibit #3). His STAR Math score went from 4.3 at the start of the year to grade level by the end of the year. (Testimony p. 231). His disciplinary referrals went down in January and February as well. (Testimony p. 197). At the end of

November 18 and March 16, when schools were closed due to COVID 19, there were 14 weeks of instruction for a total of a potential of 28 hours of special education services. During that time, [Student] was absent one day of proposed services, bringing the total to 27 hours of services. According to the records of the teacher, he received 18 of those service hours. This leaves 9 hours of owed services. Further, between March 16 and May 21, when services ended, there were potentially 9 weeks of special education services. . . . In the state guidance for services, their recommendation was no more than 30 minutes per week of distance learning services [document linked]. This would lead to the district owing 4.5 hours of services during school closure. The resource teacher provided 340 minutes (5.7 hours) of special education services during the closure. Once all hours are calculated, there are 7.8 hours of special education services were not provided. {sic}." (Letter from Dale to Parent, June 16, 2020; Respondent's Exhibit #9).

the year, the Student received a C in math, and he received his “multiplication certificate” for basic facts. (Testimony p. 237, Respondent’s Exhibit #12)

The Student’s classroom teacher, had an error analysis policy in which students could correct problems on tests and recoup points lost. (Testimony p. 232-236).

In June 2020, in response to a request from the Parent for records from the District, the District sent a letter stating, first, that math test and work could not be sent to parents because of copyright laws and that the work is no longer a part of the educational record once grades are in gradebooks. (Respondent’s Exhibit #10).

3. Standard of Review

Federal and state regulations provide that a party aggrieved by a LHO decision may appeal to a State Hearing Officer (“SHO”) who must “[e]xamine the entire hearing record” and “[m]ake an independent decision on completion of the review.” 34 C.F.R. § 300.514(b)(2)(i) and (v) (2014). The SHO must also consider the hearing officer’s advantage of examining the demeanor of the witnesses when credibility determinations are at issue. *Id.*; *Shore Reg’l High Sch. Bd. Of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In doing so, the findings of fact of the LHO are entitled to deference and are considered prima facie correct. *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 326 (4th Cir. 2009); *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991). However, the SHO must still determine the weight of the evidence and questions of law independently. *Springer v. Fairfax Cnty. Sch. Bd.*, 134 F.3d 659, 663 (4th Cir. 1998) (differentiating itself from *Doyle*).

The burden of proof in this case lies with the Parent, as the party seeking relief. See *Schaffer ex. Rel. Schaffer v. Weast*, 546 U.S. 49 (2005) (holding that the burden of proof in an

administrative hearing challenging an IEP under the IDEA is properly placed upon the party seeking relief, whether that is the child with a disability or the school district).

Consistent with these principles, a SHO reviews the record created through an administrative trial before the LHO, and does not rehear evidence and generally does not admit or hear evidence not considered by the LHO. A SHO does have discretion to admit evidence not considered below. 34 CFR § 300.514(b)(2)(iii).

4. Hearing Officer's Findings

The LHO found the District did substantially implement the Student's IEP prior to the shutdown. After the shutdown, however, he found the child was not progressing well nor was the education program "appropriately ambitious." He finally found no inflation or deception on the part of the District with regard to the grades and test scores reported for the Student.

Prior to the shutdown, the LHO found, while portions of the plan (check in/check out, paraprofessional) were not implemented in whole, "for the most part the child was receiving the services required under the IEP." He found credible the testimony from District witnesses that they had observed the resource teacher working well with the Student.

After the shutdown, he found the implementation less conclusive. He argued that many students regressed and expressed concern that a child with attention issues would struggle on the computer. "Even with direct education from [the tutor] during the ESY portion of his 2019-2020 school year education, he required additional tutoring just to hold his own." (LHO's Order, p. 6). He found the District could have made more of an effort to provide services.

Finally, the LHO found credible the concept that the school's error analysis process could lead to higher grades for the Student. He did not find any deception on the part of the District with regards to grades or test scores.

The LHO ordered that the District (quoted in whole):

“design an IEP which provides a more aggressive approach to the child's education to include more aggressive goals and compensatory education designed to get his education back on track. This component should include one on one instruction. In addition, the parties should conduct a review of the child's BIP to see if there are additional measures that will focus him and improve his opportunity to achieve educationally. The check in/check out point system may be effective but it should be reviewed. Possibly there is an alternative that may work better for everyone. Finally, it appears that the ‘shadow’ was ineffective and not wanted by the Petitioner or the child. While he will need additional evidence, it would seem that rather than a paraprofessional, one on one attention would be more effective. If a paraprofessional is involved, that person should be more attentive and interested in the child's well-being.” (LHO Order, p. 7-8).

5. Discussion

The LHO's Factual Conclusions

The District raised several questions regarding the LHO's findings of fact, and argued that the LHO's factual and legal conclusions were not regularly made. The District also argued that I must give deference to the LHO's regularly made factual and legal conclusions. I agree that I must give deference to the LHO's factual conclusions, particularly those that are based upon a credibility determination. However, I hold the ability to reverse or amend his factual decisions if needed based on the evidence put before me, particularly when no question of credibility is at the heart of the interpretation. (See, *Supra*, Standard of review).

Below is a review of the factual issues that the District raised in appeal:

Issue #1: The LHO stated that the Student had a learning disability because of a deficit in math and a weakness in reading. I find that the Student had a learning disability because of a

deficit in math only. (Testimony p. 117-120; Testimony p. 312-313; Petitioner's Exhibit #1).

Issue #2: The LHO stated that the student received virtual education but did not include resource sessions. The Student did receive instruction. (Testimony p. 261-63; Testimony p. 164; Testimony p. 50-51).

Issue #3: The LHO suggested that the ESY services were virtual. The ESY services were face to face. (Testimony p. 77).

Issue #4: The LHO found that during the COVID-19 shutdown, the "child appeared to make slow progress." My findings of fact above list the Student's specific progress.

The LHO's Legal Conclusions

The District argues that the LHO's decision was not regularly based on the fact that his conclusions were not supported by the Record, his Final order is not thorough and careful, and the remedies awarded are inconsistent with the conclusions he draws. While giving deference to the LHO's ability to make credibility determinations, as stated above, I will re-examine his legal conclusions.

In particular, the LHO suggested that the IEP needed to be re-calculated. The Parent did not raise a question about the IEP formulation itself; changes to the IEP should not have been a part of the remedy. I will make no comment as to the structure of the IEP, but instead will examine whether the District provided the student a free appropriate public education (FAPE) under the IEP as written.

Grade Inflation/Tampering with Assessments

I agree with the LHO's conclusion that the Parent did not demonstrate that any issues existed regarding grade inflation or tampering with assessments. All of the District representatives were able to clearly articulate the process by which they allow students to re-do portions of tests through error analysis. No documentation or other questioning raised questions about whether the scores presented were accurate.

Provision of a FAPE

The educational program must be reasonably calculated to enable a child to make progress in light of their circumstances. *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-II*, 137 S.Ct. 988 (2017). Services developed as part of a proper IEP define the education program that, per *Endrew F.*, must be reasonably calculated to enable a child to make progress in light of their circumstances. Failure to provide substantial portions of the IDEA can therefore rise to IDEA violations - even if the child continues to make some progress. *Endrew F.*'s essential holding is that the amount of progress must be reasonably determined based on the child's circumstances; that may be more than some minimal forward momentum. Accordingly, if a district fails to implement substantial portions of the IEP, but the student still makes some progress, the district may still be found to have not provided a FAPE, especially when implementing more of the IEP could have led to greater progress in light of the child's circumstances as defined by a properly-designed IEP. Indeed, any rule to the contrary would weaken both the *Endrew F.* holding and the importance of IEPs, and would permit districts to violate IEPs with impunity so long as students make some modest progress. The IDEA requires more.

The District requests a more lenient standard, that a school district has provided a FAPE when significant provisions of the IEP were followed. *See Houston Independent School District*

v. Bobby R., 200 F.3d 341 at 349 (5th Cir. 2000); *Burke Cnty Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990); *M.M ex rel. DM v. Sch. Dist. of Greenville County.*, 303 F.3d 523 (4th Cir. 2002); *Adam v. Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003). Further, they claim that a direct nexus must exist between the lack of any specific services and a failure to make educational progress for a denial of a FAPE to have occurred. *Burke*, 895 F.2d at 982; *Leighty v. Laurel Sch. Dist.*, 457 F.Supp.2d 556 (W.D. Pa. 2006).

For purposes of clarifying the standard, I reviewed the line of cases cited by the District. This line of cases does not lead to the more lenient standard requested. For example, *Denton* addressed a student with very significant needs; at the heart of the case was a question about whether the District should be offering full-time home health care in addition to education services. The court found that the full-time home health care, while potentially helpful to education, was not required for the student to make educational progress. In the section of the case where the court addressed a failure to make educational progress, the court was discussing procedural issues in the development of the IEP – not a failure to provide services that were on an agreed upon IEP. The student “benefitted educationally from the instruction required under the Board’s IEP. Federal law requires no more.” *Denton*, 897 F.2d at 982. I read *Denton*, then, to refer to the decisions about what service the IEP ought to require, rather than a statement that the District can ignore services in the IEP and still provide a FAPE.

Bobby R. addressed a situation in which some services were not provided, but the District provided compensatory education for those services. It found:

“To prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP’s, but it still holds those agencies accountable for

material failures and for providing the disabled child a meaningful educational benefit.” *Bobby R.*, 200 F.3d at 349.

In its analysis, the court referred to U.S. Department of Education guidance noting that, “as long as there is no change in the overall amount, some adjustments in scheduling [IEP] services should be possible (based on the professional judgment of the service provider) without holding another IEP meeting.” 34 C.F.R. part 300, app. C, question 51 (1997). This case suggests, therefore, that a mere scheduling issue does not constitute a failure to implement the IEP, but that a failure to implement substantial or significant provisions of the IEP may constitute a denial of a FAPE, especially when not corrected through meaningful compensatory education services.³ Notably, the rule applied here – that a substantial failure to provide IEP services violates the IDEA – is consistent with *Bobby R.*’s language.

These cases, as well as *Leighty*, all used a since outdated standard for educational progress, that the IDEA does not require a maximization of a disabled student’s educational potential, but merely some benefit. *Board of Educ. v. Rowley*, 458 U.S. 176 (1982). It is noteworthy that the U.S. Supreme Court strengthened that standard in *Endrew F.*

Accordingly, we turn to the question of whether the District failed to implement substantial portions of the IEP.

November-March 2020: Between November 2019, and March 2020, the LHO found that the District provided a FAPE. I affirm the LHO’s finding that the Parent did not meet her

³ The other case referenced by the District, *Keller*, turned on procedural issues in the development of the IEP rather than failure to implement the IEP. A footnote in the case distinguished itself from the *Bobby* standard. I, therefore, do not address this case in detail here. *Keller*, 328 F.3d footnote 24.

burden of proof to demonstrate that a FAPE was not provided, but the Parent did raise significant concerns. I refer in particular to the following issues:

- The Student had 3 different paraprofessionals in 4 months. The Parent had significant and legitimate concerns about each paraprofessional.
- The school did not start implementing the check in/check out process in earnest until the mid-to-end of January.
- In the 14 weeks of instruction between November 18, 2019, and March 16, 2020, the Student missed 1/3 of his service hours (Respondent's Exhibit #10). The District accounted for these hours during compensatory education later in the summer, but it is concerning that the Student missed so much even before COVID-19 hit. Some questions were raised during the proceedings as to whether the resource teacher actually provided the services when she said she did. Because the LHO did not question whether the services were provided, I defer to his ability to make credibility decisions.

Because these issues were corrected (through compensatory education, new paraprofessionals, eventual implementation of the check in/check out process), these issues do not now rise to the level of a substantial failure to implement.

March-May 2020: In March 2020, the Governor of South Carolina ordered schools shut down due to COVID. After an initial period of waiting for decisions as to how to provide services to schools, districts began providing e-learning. Between March 16, 2020, and the end of the school year (9 weeks), the District provided 5.7 hours of special education services to the Student, and no other services. In contrast, the IEP called for 2 hours of special education

services to be provided through a resource service delivery model, or 18 hours over that 9 week period. The Student struggled to start or finish assignments and spent time on unauthorized web sites. The District claimed that this was the extent of services they were required to provide during the COVID shut down.

The federal government clearly stated that districts “must” provide children with “the special education and related services identified in the student’s IEP,” adding that when schools resume normal operations, each IEP team “must make an individualized determination whether and to what extent compensatory services may be needed” in light of services that were missed.⁴

The District defends the reduced amount of resource time provided by arguing that the State of South Carolina’s Department of Education suggested that students receive no more than 30 minutes per week of “distance learning services.” After a thorough review of the District’s submissions to the SHO and the LHO, it is not clear on what the District bases this assertion. The District referred to a document⁵ that suggested that live learning should last for no more than 15 minutes *at a time*, and that districts should provide “*at least* two lessons per week.” (emphasis added). Simply nowhere does the document suggest that students receive “no more than 30 minutes per week of distance learning,” as the District asserts. (Respondent’s Exhibit #10). The District’s assertion is particularly concerning in light of the clear guidance from the US

⁴ US Department of Education, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, March 2020, p. 2, available at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf> See also, US Department of Education, Office for Civil Rights, Office of Special Education and Rehabilitative Services, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, March 21, 2020, available at <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>.

⁵ “Planning for Equitable Instruction” available at <https://ed.sc.gov/districts-schools/special-education-services/information-about-covid-19-coronavirus/planning-for-equitable-virtual-instruction/>

Department of Education that districts “must” provide all of the services identified on a student’s IEP “to the greatest extent possible.” While the exigencies of COVID-19 may have rendered provision of some specific services on some students’ IEPs impractical, it did not justify anything like the arbitrary maximum limit on distance learning services suggested by the District. Indeed, federal guidance rejects that limit.

Consistent with this view, the SC Department of Education issued the following guidance to Districts at the beginning of the shutdown:

The USED also provided updated guidance on the provision of special education and related services, as well as children’s rights under Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and the Individuals with Disabilities Education Act (IDEA). We urge you to carefully consider this guidance as you serve students with disabilities. We recognize, however, that during this historic crisis, not all of each students’ services may be provided; therefore, districts should develop plans to reconvene Individualized Education Program (IEP) teams when school resumes to determine what, if any, compensatory services are owed to each child with a disability, or whether or not extended school year services are appropriate. Furthermore, as of the date of this memorandum, the USED has not issued any relief or flexibilities with respect to IDEA timelines, including child-specific and dispute resolution ones. In the absence of federal relief, we encourage you to adhere to these timelines; however, when it is not practical for child-specific IEP-related timelines, use the Enrich option of “circumstances beyond our control.” State of South Carolina Department of Education, *Memorandum Re: COVID-19 Impact on Accountability and Federal Programs*, March 16, 2020, available at <https://ed.sc.gov/newsroom/school-district-memoranda-archive/covid-19-impact-on-accountability-and-federal-programs/covid-19-impact-on-accountability-and-federal-programs-memo/>

While giving districts leeway to use the compensatory education process to meet student needs, this guidance does not in any way suggest that a students’ hours should be cut dramatically. Rather, when such cuts occur, the State Department of Education’s guidance suggests that compensatory education will be appropriate.

The question of how much service is required under the IDEA based on failure to provide IEP-required services during COVID is still working its way through the courts. To date, there

have been a few reported due process hearings, all of which suggest that we do need to pay close attention to the number of minutes provided during the COVID shut down and provide service hours to make up for time missed during COVID-19 shutdowns. See, *e.g. Los Angeles Unified School District*, 77 IDELR 116 (Cal. SEA Aug. 24, 2020) (finding that the District failed to provide significant services to a student and awarding additional service hours).

Much was made in the District's case about the hours of service provided online by the special education resource teacher, and that she provided more hours than the District believed was required. The District argued that they owed 4.5 hours of services during the 9 weeks of closure, and that the District provided 340 minutes (5.7 hours).

I find fault with that analysis. Prior to the shutdown, the Student received:

- 2 hours/week of services -1 for math, 1 for behavior
- Support from a paraprofessional for 1830 minutes weekly
- A check in/check out process to monitor behavior and work for the day.

Even if we are to accept the reduction of services from 2 hours per week to 30 minutes per week in order to accommodate the shift to e-learning (which, as discussed above, I do not), the Student still received a substantial reduction in services. He did not have check in or check out time to help him monitor his work nor support from a paraprofessional to stay on task.

(Testimony p. 260). The Student's classroom teacher said the Student struggled to complete his work, often wandering onto unauthorized websites, or needed additional reminders to get started. (Testimony p. 247-248). His behavior was significant enough that, had this been in person, the teacher stated he would have likely received office referrals.

(Testimony p. 248).

I find, therefore, that the District's provision of only a fraction of resource time required by the IEP, coupled with the failure to provide check in or check out time and support from a paraprofessional amounted to a substantial failure to implement the IEP during this nine-week time period.

Summer, 2020: When the team met in May, they decided to provide ESY services to maintain attained skills and because he was at a critical point in instruction. (Respondent's Exhibits #8). ESY does not represent compensatory education – ESY services are a part of the IEP, agreed upon to serve a specific, identified goal. In fact, the team had deferred deciding on ESY services until May even prior to the COVID shutdown. (Petitioner's Exhibit #1).

The ESY services met the IEP requirements and allowed for the Student to make educational progress.

Student Progress: When substantial portions of the IEP are not implemented, a finding of a complete lack of student progress is not necessary, as explained above. Nonetheless, we consider the question of whether the Student made progress.

The District argues that progress was made. The Student ended the year with a C in math; the progress report demonstrates progress, STAR math scores showed improvement, and the testimony of the ESY instructor demonstrated progress. Further, the District argues that the new math goal added by the IEP team in the summer is a sign of progress.

These conclusions are not supported by the record. In fact, the Prior Written Notification stated that they added a goal relating to fractions in math not because of the Student's progress but because the Student "had an assessment that indicated an additional need in instruction with fractions."

The records show that the Student did not in fact meet his goal in multiplication by the end of ESY. Further, while he was able to sit for 23 minutes at the end of his time in ESY, his behavior goal was based on in class time, suggesting that he should be able to do some work in a non-one-on-one setting. As his ESY tutor said about the Student's skills at the end of ESY, "He still struggled with basic multiplication, division, fractions...he struggles with completing assignments independently." (Testimony p. 70). While the IEP goals were intended to continue through to November 2020 so were not expected to be met by the end of ESY, I do not find persuasive an argument that the Student met all of his goals and therefore made enough progress that the substantial failure to implement the IEP on the part of the District should be overlooked.

Compensatory Education Services Provided: The compensatory education services provided by the District accounted for the missed service hours during the November 2019 - March 2020 portion of the school year. The special education teacher did not provide 9 hours of services before March 2020. However, because she provided 5.7 hours of services during the shutdown, versus the 4.5 hours of services (which the District believed was all that was required), the District provided 8 hours of compensatory services. (Respondent's Exhibit #10). The compensatory education services provided did not account for services not provided during the COVID shut down.

6. Conclusion

I affirm the LHO's decision that the District did not provide a FAPE to the Student by failing to provide the Student with services required on his IEP during the period March 16-May 17, 2020. I reject, however, the LHO's remedies, which were not directed to the central problem of the District's failure to provide services on the IEP.

Instead, I order the District provide compensatory education for the Student.

Compensatory education “involves discretionary, prospective, injunctive relief created by a court to remedy what might be termed an educational deficit created by an educational agency’s failure over a given period of time to provide a FAPE to a student.” *G ex rel. RG v. Fort Bragg Dependent Schools*, 343 F.3d 295 at 309 (4th Cir., 2003). Further, compensatory education awards “should aim to place disabled children in the same position they would have occupied but for the school district’s violations of the IDEA.” *Reid v. District of Columbia*, 401 F.3d 516, 196 Ed.Law Rep. 402 (D.C. Cir. 2005 at 523).

The student should have received 2 hours a week of services during the 9 weeks of the shutdown, in addition to check in and check out support throughout the day and help staying focused and on task throughout the day from a paraprofessional. While the District provided 4.5 hours of direct resource room support during this time, they did not provide the other services.⁶

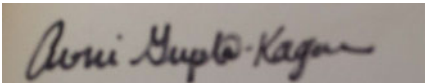
Because the student received so little support during the COVID shut down, he was not able to build his behavioral skills nor his academic skills. The District’s failure directly cost the student 13.5 hours of instructional services, and also cost him significant behavioral supports which undermined his growth in the relevant time period. The latter loss is harder to quantify in hours of services. I order that the District provide a total of 40 hours of compensatory services to allow the Student time to allow him to recover both the behavioral and the math learning lost during that time period. These services should be in the form of 1:1 support for the Student, and may be delivered at home, or if COVID guidelines permit it and the Parent feels comfortable with the bringing the Student to school with COVID restrictions, at the school. These services

⁶ In calculating compensatory education hours for this service, I am considering 4.5 hours of services to have been provided. While the District provided 5.7 hours of services, the additional time was applied to the services the Student should have received from November-March and should not be re-applied to this time period. Therefore, at least 13.5 hours of services should be provided (18 hours minus 4.5 hours).

should *not* replace any summer 2021 ESY services the IEP may determine necessary for the Student. These services should focus on his behavioral goals, and should both work on his math goals as well as any math curriculum presented in his general education class that he did not master during the COVID shutdown or since. If practicable, the District should arrange for the compensatory education to be provided by the tutor who has worked with the student. If the parties mutually agree to some alternative arrangement which amounts to an equivalent number of tutoring hours – such as the District reimbursing the Parent for the cost of 40 hours of Ms. Bush’s tutoring services which the Parent has already paid – that would be an acceptable alternative remedy.

7. 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) and 34 C.F.R. § 300.516.



Avni Gupta-Kagan

State Administrative Review Officer

Columbia, South Carolina

April 2, 2021