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**RE: M.W., THE STUDENT AND A.W., THE STUDENT'S PARENT V. LOUDON
COUNTY SCHOOL DISTRICT, APD Case No. 07.03-191508J**

Enclosed is a *Final Order*, including a *Notice of Appeal Procedures*, rendered in this case.

Administrative Procedures Division
Tennessee Department of State

Enclosure(s)

**BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION DIVISION OF
SPECIAL EDUCATION**

IN THE MATTER OF:

**A.W. THE PARENT,
M.W. THE STUDENT,**
Petitioner,

v.

**LOUDON COUNTY SCHOOL
DISTRICT,**
Respondent.

APD Case No. 07.03-191508J

FINAL ORDER

This contested case – arising from claims made under the Individuals with Disabilities Education Act (IDEA), Title II of the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act (§ 504), and 42 U.S.C. § 1983 (§ 1983) – was heard before Administrative Judge Phillip R. Hilliard on June 17-19, 2020 and August 17-19, and 24, 2020. The Petitioners, the student, M.W., and her parent, A.W., are represented by attorney George T. Underwood, Jr. The Respondent, Loudon County School District, is represented by attorneys Caitlin C. Burchette and Arthur F. Knight, III.

At the close of the hearing on August 24, 2020, post-hearing filing dates were set, as follows: proposed findings of fact and conclusions of law were to be filed, by both parties, on or before 3 weeks after the filing of the transcript. The hearing transcript was filed on October 12, 2020,¹ and, after Respondent's request for an extension of time was granted, the parties both filed proposed findings of fact and conclusions of law, on November 6, 2020.

The issue in this case is whether M.W. was denied a free and appropriate public education (FAPE) and, if so, the appropriate remedy. Based on review of the entire record, it

¹ As reflected by an ORDER entered on October 23, 2020, the transcription of the deposition testimony of Janice Goodwin was filed on October 23, 2020.

is **DETERMINED** that the Respondent did provide M.W. a FAPE, with one exception. Mr. Buchanan having taught M.W., without the appropriate endorsements, is a procedural violation of the IDEA, and it significantly impeded parent A.W.'s opportunity to participate in the decision-making process regarding the provision of FAPE to M.W., thereby also constituting a substantive violation of the IDEA.² Therefore, the Petitioners are the prevailing party, on that issue, only, and are entitled to relief on that claim, only, as more specifically set forth at the conclusion of this Order.

Witnesses who testified at the due process hearing, in the order they first appeared,³ were: (1) Ms. Suzanne Oliver, Clinton County Schools Special Education Supervisor, Respondent's Expert; (2) Ms. Janice Goodwin, Loudon County Schools Paraprofessional; (3) Ms. Lisa Henry, Loudon County Schools Paraprofessional; (4) Ms. Melanie Amburn; Loudon County Schools Special Education Supervisor; (5) Mr. Zachary Buchanan, former North Middle School Special Education Teacher; (6) Ms. Lesly Brown, Loudon County Schools Paraprofessional and Special Education Teacher; (7) Ms. A.W., the Parent; (8) Dr. David Rostetter, Ed.D., Petitioner's Expert; (8) Ms. Sandy Stewart, Loudon County Schools Special Education Teacher; and (9) Dr. John McCook, Ed.D., Respondent's Expert.

FINDINGS OF FACT

² There is no proof that M.W. was discriminated against, or that any discrimination was by reason of her disability. Therefore, no violations of the ADA or Section 504 were shown. *I.L. through Taylor v. Knox County Bd. of Educ.*, 257 F.Supp.3d 946, 954-955 (E.D. Tenn. 2017) (citing 42 U.S.C. § 12132 and 29 U.S.C. § 794(a)) (The ADA and § 504 bar public entities from discriminating against people "by reason of their disabilities," or "solely by reason" of a disability, respectively). Neither have the Petitioners proven a violation of 42 U.S.C. § 1983, as more specifically discussed *infra*, at fnnt. 29.

³ Some witnesses testified for both parties.

1. The due process complaint was first received, by the Respondent, on October 1, 2019.

2. An amended due process complaint was filed on January 2, 2020

3. At the time of the hearing, M.W. was a thirteen-year-old girl living in Loudon County, Tennessee.

4. A.W. is M.W.'s mother.

5. M.W. has been a student in Loudon County Schools (LCS) since kindergarten.

6. M.W.'s 5th grade year was August of 2017 through May of 2018. Her 6th and 7th grade year followed, accordingly.

7. M.W. has been educated under Individualized Education Plans (IEPs) at LCS since she was initially determined to be eligible for Special Education services, in her kindergarten year (2013).

8. Parent A.W. attended a number of IEP, or other, meetings throughout M.W.'s educational time at LCS, including on the following dates: January 2013, September 2013, May 2014, April 2015, August 2015, April 2016, May 2016, September 2016, October 2016, January 2017, November 2017, September 2018, March 2019, April 2019, and September 2019. Some of these meetings were held annually, and others were at A.W.'s request, or were precipitated by additional information provided by parent A.W. to the Respondent.

9. During or before these meetings, parent A.W. often requested that the Respondent perform or consider evaluations that were in addition to those the school conducted or planned. These include such requests in January of 2013, May of 2013, March of 2014, April of 2016, and May 2016.

10. Some of the requests for additional evaluations came as a result of diagnoses from M.W.'s medical providers (e.g., May of 2013, May of 2015 and April 2016).

11. During IEP meetings, parent A.W. often expressed specific concerns, regarding A.W., for the IEP team to work through. These included concerns of an academic nature; as well as those of a social, emotional, or health-related nature.

12. Parent A.W. was accompanied by one or more advocates when attending IEP meetings for the 4th grade year (Ex. 8) and for the last two IEPs (September 21, 2018 to September 21, 2018 and April 2, 2019 to April 2, 2020), the latter of which is still in effect. (Exs. 4 and 7).

13. Some of the advocates attending meetings with A.W. were from Peninsula Mental Health. Others were privately retained advocates who were paid for their services, by parent A.W.

14. At the conclusion of IEP meetings, parent A.W. was given the opportunity to sign the IEP to show that she attended the IEP meeting, that she participated in the development of the IEP, and asking whether she was in agreement with the IEP.

15. Parent A.W. signed to express her agreement to all IEPs for M.W.

16. The original eligibility evaluation of M.W., in 2013, determined that she was eligible for special education due to a language impairment. Shortly thereafter, parent A.W. asked for an additional evaluation for speech/language and cognitive development, and M.W. was given the Woodcock Johnson Test of Cognitive Abilities, on which she scored an 87, which is in the category of “low average.” This did not result in any added eligibilities.

17. At that time, parent A.W. also requested a reevaluation due to a diagnosis, from M.W.’s medical provider, of attention deficit hyperactivity disorder (ADHD). The IEP team added other health impairment (ADHD) as M.W.’s primary eligibility, and language impairment as secondary, referring M.W. for an occupational therapy appointment.

18. In March of 2014, at parent A.W.'s request, M.W. was reevaluated for a learning disability, but no such disability was determined to be present, at that time.

19. In May of 2015, M.W. was reevaluated, per outside evaluations provided by parent A.W. during a May 15, 2015, annual IEP meeting, and M.W.'s eligibility changed solely to other health impairment (OHI) for her ADHD. The prior language impairment designation was removed due to significant progress toward her language goals and objectives. (Ex. 3). A specific learning disability was again ruled out during this evaluation.

20. On April 26, 2016, an IEP meeting was held to discuss a neuropsychological evaluation conducted by one of the Respondent's psychologists. (Ex. 3).

21. At a May 12, 2016, IEP meeting, parent A.W. requested a comprehensive evaluation, including both cognitive and occupational therapy evaluations. That evaluation was completed, ultimately resulting in intellectual disability being added as M.W.'s primary impairment, with other health impairment (ADHD) as the secondary impairment. This was due to a degradation of M.W.'s adaptive behavior issues, intellectual ability, and academic performance. These findings were noted in a September 2016 Psychoeducational Evaluation Report (Ex. 3) and/or were reflected in a Reevaluation Summary Report from September 18, 2019. (Ex. 10).

22. The Woodcock Johnson Academic Assessment (both the Woodcock Johnson III and IV)⁴ was administered to M.W. several times during her years with the Respondent, with the scoring, taken from Ex. 10, noted in the following table:

Date	Reading Fluency	Math Calculation	Letter Word ID	Passage Comp	Basic Reading	Math Solving
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⁴ It is unclear what the difference is between these two versions of the test.

April 2015	36th %	29th%	24th%			
August 2016	13th%	0.2%	19th%	6th%	11th%	
September 2016 (WJ IV)	5th% Grade 1.7	1st% Grade 1.5	6th% Grade 1.8	13th% Grade 2.2		5th% Grade 1.8
April 2017 (WJ III)	19th% Grade 1.3	49th% Grade 1.9	50th% Grade 1.9	33rd% Grade 1.5		21st% Grade 1
September 2018 (WJ III)	6th% Grade 2.8	0.1% Grade 1.9		8th% Grade 2.7		
March 2019 (WJ III)	Grade 4.7 ⁵	Grade <K.2	Grade 3.4	Grade 2.7		

23. In September of 2016, M.W.'s overall Woodcock Johnson score was 70; down from the overall score of 87, achieved in 2013.

24. M.W.'s IEPs contain documentation about her present levels of performance at the time of those IEP meetings, which are based on information taken from previous periods.

25. M.W.'s IEPs also contain goals, in a number of areas, for the upcoming period.

26. M.W.'s IEPs further list what types of information will be used to measure those goals.

AIMSWEB

⁵ Percentiles for the March 2019 score results were not provided.

27. Aimsweb tests are referred to as “probes.” These are short, timed tests lasting anywhere from 1 to 8 minutes.

28. In addition to the probes (test sheets), there is also a scoresheet that the teacher uses to document the scores from a given probe. The scores can then be plotted on a graph. Those same scores can also be input on a progress monitoring improvement report.

29. Grade level probes are to be conducted every nine weeks. It is not uncommon for students with IEPs to be given probes monthly.

30. Aimsweb testing probes were administered to M.W. as one way to show progress in the area of academic readiness. The IEPs in evidence make reference to Aimsweb testing twice in EX. 8 (for M.W.’s 5th grade year) and twice in EX. 9 (M.W.’s 6th grade year). These references are in the areas of reading fluency (128 words “as measured by monthly reading probes”) and math calculation (“32 points on an eight-minute math test”).

31. M.W. sometimes performs better on the Woodcock Johnson testing than she does on Aimsweb probing; particularly in math, which is the academic discipline in which M.W. has always struggled most.

32. M.W. has more difficulty when she takes tests that are timed.

33. Children often prefer to work in subject-matter areas that they do well in. Conversely, children often will avoid, or be averse to, working in subject areas in which they struggle.

34. M.W. has difficulty focusing, due to her ADHD, which causes her to have issues in problem solving, such as math problem solving, which involves multiple steps.

35. Instructional levels for a child, or performance in general, can change from day to day. This can be due to how a child is feeling or how invested the child is in learning that day.

36. Aimsweb is not a diagnostic instrument, but instead is an observational piece of data that represents one to 8 minutes, per month, out of the roughly 7200 minutes of instruction a child receives in a month's time.

37. Using multiple data points is a better indicator of progress than using one metric.

38. While not specifically otherwise referenced in terms of progress monitoring on M.W.'s IEPs, Aimsweb probes were one of many items that were used to measure her academic progress in reading and math. The academic goals in M.W.'s IEPs were based on M.W.'s instructional level (which varied depending on the subject matter) – not her grade level.

39. Other forms of measuring progress include teacher observations, data collection, progress monitoring, teacher-made tests, and classroom work samples.

40. Different teachers and paraprofessionals administered Aimsweb probes to M.W. The scores are reflected on the Aimsweb chart *infra*, at pp. 10-12.

41. For the 6th grade year (2018-2019), in *Reading Fluency*, instructional level probes were produced for October, November, January, February, and May. The probes for August, September, December, and April are missing.

42. For that same period, a progress monitoring report was produced, which contains scores for all months except August, December and April. A graphed chart reflects the same.

43. For the 6th grade year (2018-2019), in *Reading Comprehension*, instructional level probes were produced for October, January, February, March, and May. They are missing for August, September, November, December, and April.

44. For that same period, a progress monitoring report was produced, which contains scores for all months except September, November, December and April. A graphed chart reflects the same.

45. For the 6th grade year (2018-2019), in *Math Problem Solving* (Math Concepts, Word Problems), instructional level probes were produced for October, December, January, February, March, and May. They are missing for August, September, November, and April.

46. For that same period, scoresheets were produced for October, December, January, February, March, and May. They are missing for August, September, November, and April.

47. For that same period, a progress monitoring report was produced, which contains scores for all months except September, November and April. A graphed chart reflects the same.

48. In the area of math problem solving, M.W.'s IEP goals were, therefore, not tied to "solving the problem" but instead to determining what next steps might be (e.g., determining whether the problem requires addition versus subtraction).

49. For the 6th grade year (2018-2019), in *Math Computation*, instructional level probes were produced for September, October, December, January, February, March, and April. They are missing for August and November.

50. For that same period, scoresheets were produced for August, September, October, December, January, February, March, April, and May. They are missing for November.

51. For that same period, a progress monitoring report was produced, which contains scores for all months except November. A graphed chart reflects the same.

52. Results from the Aimsweb documents in evidence⁶ are noted⁷ in the following tables:

Date or Grade	Reading Fluency	Reading Comprehension	Math Concepts, Word Problems	Math Calculation, Fluency, and Computation
10/4/2016	Below 10th% (4G)	Above 50th% (2G)		Above 25th% (2G) ⁸
				25th% (4G)
9/25/2017	99 words/1 min/8 errors (3G)	8 of 42 Correct (3G) ⁹	3 of 29 Correct (2G) ¹⁰	8 of 28 Correct (2G)

Date or	Reading Fluency	Reading Comprehension	Math Concepts, Word Problems	Math Calculation, Fluency, and
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⁶ These results are taken from the IEPs in evidence, as indicated in the chart, as well as EXS. 23, 25-30, which are the Aimsweb documents (probes, test scores, etc.) in evidence.

⁷ The grade level of the probe stated in the IEP goal, if specified, or otherwise used in the probes, is noted in a parenthetical (e.g., grade level 1 is noted as (G1)).

⁸ The IEP (EX. 8) also notes testing conducted on grade level 2 but notes an inconsistency of scores.

⁹ It is noted, in the corresponding IEP (EX. 9), that when in class, M.W. “can answer comprehension questions correctly when she is focused and on task.”

¹⁰ In EX. 23, a math concepts probe and test and answer key, both dated May of 2017, show a score of 10 of 30 correct on grade level 2.

Grade				Computation
6 th Grade ¹¹	<u>Goal of 128</u> <u>Words (EX. 9)</u> Sept 74 words/6 errors (4G) (just below 25th%) <u>Goal of 110 (4G)</u> <u>words/min at 90%</u> <u>accuracy (EX. 4)</u> Oct 111/114 (97%) Nov. 117/119 (98%) Jan. 100/101 (99%) Feb. 110/113 (96%) <u>Goal of 90 (4G)</u> <u>words/min at 80%</u>	<u>Goal of 90% (G2-3)</u> <u>Accuracy (EX. 4)</u> Oct. 17/22 (77%) Jan. 13/15 (86%) Feb. 9/37 (25%) March 22/25 (88%) <u>Goal of 80% (G2-3)</u> <u>(EX. 7)</u> May 13/38 (34%)	<u>Goal of 80-90%</u> <u>(EX. 9, 4, and 7)¹²</u>	<u>Goal of 32 Pts (EX.</u> <u>9)¹³</u> September 32 (G1) <u>Goal of 90%</u> <u>Correct (EX. 4)</u> Oct. 36/48 (75%) (G1) Oct. 9/41 (22%) (G2) Dec. 4/50 (8%) (G2) Jan. 24/48 (50%) (G2) Feb. 28/50 (56%) (G2)

¹¹ For the 6th grade year, only results for which there are probes and scoresheets are included.

¹² The IEP written for September 27, 2017 to September 21, 2018 (EX. 9) states M.W.’s goal as follows: “will determine what information she is given, what she needs to calculate, and what she is trying to solve as well as a plan for solving the problem with 80% accuracy on 4 out of 5 sessions as measured by teacher-made test (sic) and data collection.” The IEP written for September 21, 2018 to September 21, 2019 (EX. 4) lists the goal as follows: “at grade 2, [M.W.] will identify the information needed, with accuracy at 90% on 4 of 5 trials, as measured by data collection, work samples, and monthly progress monitoring.” The IEP written for April 2, 2019 to April 2, 2020, states M.W.’s goal as follows: “identify the information needed, with accuracy at 80%.” Because the Aimsweb probes only score a correct or incorrect answer, these scores are found to be of little value in determining whether the stated goals were met.

¹³ These probes were given on either grade level 1 (G1) or 2 (G2).

	<u>accuracy</u> May 91/94 (96%)			March 2/48 (4%) (G1) <u>Goal of 80%</u> <u>Correct (EX. 7)</u> April 5/51 (9%) (G2) May 1/~50 ¹⁴ (2%)
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53. M.W.'s IEP written for January 19, 2017 to October 5, 2017, lists goals (and the method of evaluation) for each, in the following areas of need: Fine Motor Skills (Teacher Observations), Academic Readiness (Teacher Observations, Data Collection, Progress Monitoring, and Teacher-Made Tests), Social/Emotional Behavior (Teacher Observations and Data Collection), Pre-vocational Skills (Teacher Observations and Data Collection), and Adaptive Behavior Skills (Teacher Observations and Data Collection). (EX. 8).

54. The IEP contains present levels of performance for all areas of need, showing clinically significant issues in the area of social/emotional behavior (e.g., internalizing and externalizing problems).

55. Progress monitoring reports, completed by teachers, are another way of measuring progress made by a student, with respect to their IEP goals. These reports indicate the procedures used for evaluating progress, which include teacher observations, data collection, classwork samples, and other progress monitoring.

¹⁴ The correct values for the first several problems are not legible. They are presumed to be worth 1 point per question.

56. During M.W.'s 5th, 6th, and 7th grade years, the progress reports (EXS. 35-37) state that it was anticipated she would meet her IEP goals by the end of the operative IEP, with the exception of two goals that she mastered during that year.

57. Progress monitoring reports for the 5th, 6th, and 7th grade years give examples of work being done by M.W. and the extent to which she progressed. (EXS. 35-37).

58. The progress monitoring reports also include status narratives that explain M.W.'s progress.

PROGRESS MONITORING REPORTS FOR THE 5TH GRADE

59. During the first reporting period of the 5th grade year, M.W. did not make progress on annual goal 1 (handwriting) because she did not enjoy working solely on handwriting. The occupational therapist incorporated handwriting into different activities, which helped with this issue. Some progress was made on the objective, within goal 1, to copy complex shapes. Significant progress was made in reporting period two. M.W. received a progress rating of 65% in reporting period 3.

60. During the first reporting period of the 5th grade year, M.W. made progress on annual goal 2 (academic readiness – reading and math). On 3/17,¹⁵ M.W. achieved a rating of 53%.¹⁶ On 5/17, M.W. continued to make progress “in all areas,” and, by the end of that nine-week reporting period was “completing reading on a high second grade/low third grade level.” On 1/4/18, she was making “good progress.”

61. On all of the IEPs in evidence, M.W.'s behaviors are addressed in her goals and objectives for social/emotional behaviors.

¹⁵ While the date isn't clear, “3/17” is noted in every other entry of the report; thus, 3/17 is the presumed date, here.

¹⁶ It is unclear whether the percentages noted in the report represent a percentage of accuracy (e.g., 53% accuracy) or a percentage of the target (e.g., 53% of the 80% target).

62. In M.W.'s IEP written for January 19, 2017 to October 5, 2017, her social/emotional behavioral goal and objective read, as follows: –

Goal - By the end of 36 weeks M.W. will improve her social emotional behaviors to a more appropriate and functional level as evidenced by mastering objectives to 80% as determined by data collection.

Objective - Given direction from an adult, M.W. will comply with the directions with only one verbal prompt as measured by teacher observation and social/emotional/behavior checklist for 80% of the time on 4 to 5 consecutive school days.

63. In M.W.'s IEP written for January 19, 2017 to October 5, 2017, her pre-vocational goal and objective read, as follows:

Goal - Given instruction and intervention in 36 weeks M.W. will improve her pre-vocational skills to a more appropriate and functional level as evidenced by mastering objectives to 80% as determined by data collection.

Objective - Given oral instructions from a teacher or adult, M.W. will follow directions and stay on task with two or less prompts while accepting responsibility for her work and its completion on 4 to 5 trials as measured by teacher observation and data collection by the end of 36 weeks.

64. In M.W.'s IEP written for January 19, 2017 to October 5, 2017, her adaptive behavior goal and objectives read, as follows:

Goal - By the end of 36 weeks when given instruction and intervention M.W. will improve her adaptive behavior skills as evidenced through mastery of individual objectives to 80% accuracy as determined by teacher observation and data collection.

Objectives -

Given teacher modeling and opportunities in the classroom, M.W. will identify appropriate social rules and codes of conduct for various social situations on 4 out of 5 trials with two or less prompts as measured by classroom data collection and teacher observation by the end of 36 academic weeks.

Given teacher modeling and opportunities in the classroom, M.W. will increase social awareness of environment by stating what is taking place in the environment or limiting actions of others on 4 out of 5 trials with two or less prompts as measured by classroom data collection and teacher observation by the end of 36 academic weeks.

Given teacher modeling and opportunities in the classroom, M.W. will work cooperatively with peers in small group settings (i.e., Share materials, allow peers to share different thoughts) on 4 out of 5 trials with two or less prompts as measured by classroom data collection and teacher observation by the end of 36 academic weeks.

Given teacher modeling and opportunities in the classroom, M.W. will develop an understanding of the relationship between her verbalizations and actions/effects on others on 4 out of 5 trials with two or less prompts as measured by classroom data collection and teacher observation by the end of 36 academic weeks.

65. During the reporting periods of the 5th grade year, M.W. made progress on annual goal 3 (Social/Emotional Behaviors). On 3/17, M.W. achieved a rating of 92%, though she did demonstrate “difficulty in the inclusion classroom.” On 5/17, she was noted to be progressing, still. On 1/4/18, she was making “good progress,” and was “student of the week.” On 10/18, she was doing well in Science (the inclusion classroom). During reporting period 3, “[M.W.] made a lot of progress with compliance [with] teacher instructions,” receiving a 95% rating.

66. During the reporting periods of the 5th grade year, M.W. made progress on annual goal 4 (Pre-vocational Skills). On 3/17, M.W. achieved a rating of 92%. On 5/17, she was “progressing toward mastery of the goal.” On 1/4/18, she was noted to be making “good progress” and was able to “stay on task with prompting.” On 5/17, she was doing “better in the inclusive setting” for that nine-week period. In the 3rd reporting period, M.W. achieved an 80% rating, and followed directions on the first prompt, most days. She was better at work completion, with fewer distractions.

67. During the reporting periods of the 5th grade year, M.W. made progress on annual goal 5 (Adaptive Behavior Skills). On 3/17, M.W. achieved a rating of 90%. On 5/17, she was “still improving on this skill.” On 1/4/18, she was making “good progress” and was “making progress in structured situations.” In reporting period 3, M.W. was having “no

problem working with her peers in the CDC classroom as well as in science and social studies,” while sometimes having conflict with her peers in less structured classes, like physical education (P.E.).

68. M.W.’s IEP for the period of September 27, 2017 to September 27, 2018, lists goals (and the method of evaluation) for each goal, in the following areas of need: Fine Motor Skills (Teacher Observations), Academic Readiness (Teacher Observations, Data Collection, Progress Monitoring, and Teacher-Made Tests), Social/Emotional Behavior (Teacher Observations and Data Collection), Pre-vocational Skills (Teacher Observations and Data Collection), and Adaptive Behavior Skills (Teacher Observations and Data Collection). (Ex. 9).

69. The IEP contains present levels of performance for all areas of need, identifying difficulties with social/emotional behaviors including focus, impulsiveness, fidgeting, and talking out of turn, but M.W. did not typically exhibit behavioral issues that required discipline. M.W. was generally happy and enthusiastic about her classes. She occasionally had difficulty beginning assignments, but she was prepared with supplies for class. The social emotional/behavior goals remained the same from her previous IEP.

70. M.W. was doing well with her fine motor skills in activities that she preferred, and she was creative, enjoying drawing.

71. The IEP notes that M.W.’s academic performance was “impeded by her lack of focus and impulsiveness,” and that she sometimes talked out of turn. She reacted poorly to correction in math.

72. M.W.’s IEP written for the period of September 21, 2018 to September 21, 2019, lists goals (and the method of evaluation) for each goal, in the following areas of need: Fine Motor Skills (Teacher Observations and Data Collection); Social/Emotional Behavior

(Teacher Observations and Data Collection and Student/Teacher review); Pre-vocational (Teacher Observations, Data Collection, student/teacher review); and Adaptive Behavior (nothing specified); Academics-Math Calculation and Math Problem Solving (Data Collection, Work Samples, and Monthly Progress Monitoring); Academics-Reading Fluency (Teacher Records); and Academics-Reading Comprehension (Data Collection, Teacher Observations, and Monthly Progress Monitoring). (EX. 4).

73. At the time of the writing of this IEP, parent A.W. continued to be concerned in the areas of M.W.'s counting ability, social skills and social interactions, and comprehension.

74. The IEP contained present levels of performance for all areas of need, including social/emotional behaviors, noting M.W. enjoying caring for lesser-abled peers and respecting rules. She often got upset when others don't follow rules. She participated well and showed high interest in classroom activities. She sometimes struggled with regulating emotions when upset or being corrected. She became anxious if she believed she had broken a rule, believing others would "talk about it."

75. The academic and social/emotional goals are different in the IEP for September 21, 2018 to September 21, 2019, versus those in EXS. 8 and 9. The goals, and objectives, also changed during the course of the 6th grade year.

PROGRESS MONITORING REPORTS FOR THE 6TH GRADE

76. During M.W.'s 6th grade year, it was anticipated that M.W.'s would meet her IEP goals by the end of the operative IEP. (Ex. 36).

77. During the first reporting period of the 6th grade year, M.W. was making progress on annual goal 1, regarding her handwriting and spatial organization of her classwork, with "good improvement with her handwriting when she takes her time and puts in her best effort." In the second reporting period, she received a rating of 60%, and substantially improved. For reporting period 3, A.W. was not as interested in occupational therapy activities, rushing through to move on to her next class, resulting in more mistakes. She achieved a rating of 70%. For the fourth reporting period, she made improvement in sizing and spacing, when writing. One objective was changed (practicing fasteners on clothing) and was noted at a 50% rating.

78. In M.W.'s IEP written for the period of September 21, 2018 to September 21, 2019, the social/emotional behavioral goal changed, reading, as follows:

Goal - Given specifically designed instruction in self-regulation strategies such as deep breathing, visualization, self-talk, or use of an emotional thermometer, supported by structured practice and academic feedback, M.W. will use targeted strategies to maintain emotional and behavioral regulation and express feelings or emotions using socially accepted conventions for her age, 4 of 5 opportunities, as measured by teacher observation, data collection, and student/teacher review of behavior on a weekly basis.

79. In M.W.'s IEP written for the period of September 21, 2018 to September 21, 2019, the pre-vocational goal somewhat changed, reading, as follows:

Goal - Given personal, classroom, and school wide expectations for following directions, completing and turning in work, and maintaining attention to task, M.W. will comply with stated expectations for each environment, 4 of 5 opportunities with fewer than 2 reminders or prompts, as measured by teacher observation, data collection, and student/teacher review of expectations and performance observations once each week over 36 academic weeks.

80. In M.W.'s IEP written for the period of September 21, 2018 to September 21, 2019, the adaptive behavior goal changed, reading, as follows:

Goal - Given skills based instruction, supported by structured practice and teacher modeling, M.W. will use self-regulation strategies for turn-taking and tuning out distractions while participating in transitions, group instruction, and independent work, as measured by work samples showing work completed, review of the classroom behavior support system, and data collection for prompts or cues needed to achieve targeted behaviors, with accuracy at 90% or better for 4 of 5 school days over a 36 week academic period.

81. During the reporting periods of the 6th grade year, M.W. made progress on annual goal 2 (social/emotional behavioral), regarding self-regulation strategies. In the first reporting period, she was “beginning to self-regulate her emotions with less prompting from adults.” During the second reporting period, she was much clearer in expression of frustrations, and in more appropriate ways, than the first of the year. For reporting period 3, she made slow but steady progress. In the fourth reporting period, she improved with deep breathing and controlling of emotional outbursts. She achieved an 80% rating.

82. During the reporting periods of the 6th grade year, M.W. progressed on annual goal 3 (pre-vocational) – regarding expectations for following directions, completing classwork, and maintaining attention to task. In the first reporting period, she participated well in small group settings and did well in the general education setting, as well. In the second reporting period, she had good participation in a group setting and a greatly improved ability to follow rules and expectations. In reporting period 3, she made slow but steady progress. In the fourth reporting period, she continued to improve, requiring little or no prompts to do her work.

83. During the reporting periods of the 6th grade year, M.W. progressed on annual goal 4 (adaptive behavior), regarding self-regulation for turn-taking, tuning out distractions, group instruction and independent work. In the first reporting period, she required prompting

and supports for frequent interruptions when frustrated but made “a lot” of progress since the most recent IEP meeting. During the second reporting period, A.W. was noted to love to help others and had increased her ability to work independently without disruption. In reporting period 3, she made slow but steady progress. In the fourth reporting period, she made “continual progress.” She achieved a 100% rating on the particular objective of hand-raising prior to talking.

84. During the reporting periods of the 6th grade year, M.W. progressed on annual goal 5, regarding one-digit calculations with number lines and anchor charts. In the first reporting period, she was still working on regrouping and borrowing for subtraction, but “showed growth, having mastered addition with the use of a number line.” In the second reporting period, she made steady improvement and was more excited about math than previously. In reporting period three, she made slow but steady progress. In the fourth reporting period, A.W. was doing a “good job applying her knowledge in addition and subtraction,” and achieved a 90% rating on the objective of subtracting one-digit numbers.

85. During the first reporting period of the 6th grade year, M.W.’s annual goal 6, regarding two-step math problems, was to begin to be worked on “in the coming week.” The goal was just starting to be worked on due to the lack of foundational skills, and because M.W. was still requiring prompts and corrections, but she was able to begin problems successfully. In reporting period three, she made slow but steady progress. In the fourth reporting period, A.W. could do a “few one-step math word problems,” and during the month of May showed she could do two-step problems when the problems were read by the teacher.

86. During the reporting periods of the 6th grade year, M.W.’s annual goal 7, regarding reading, M.W. was working toward the goal, with slight improvement being shown since a recent IEP meeting. In the second reporting period, she was doing well, especially in

preferred topics and one-on-one instruction. In reporting period 3, she made slow but steady progress. In the fourth reporting period, A.W. was able to read 80.5 words per minute on grade level (6th grade), and she achieved a 90% rating on the objective of decoding unknown words.

87. During the first reporting period of the 6th grade year, M.W.'s annual goal 8, regarding narrative texts, was just having begun to be worked on, but she showed a high level of interest and persistence. In the second reporting period, M.W. showed proficiency when answers were explicitly in the text but had more challenges when she had to use contextual clues. In reporting period 3, she made slow but steady progress. In the fourth reporting period, she made good progress in all areas, including achieving an 80% rating on the objective of decoding unfamiliar words.

88. During the 6th grade year, M.W. experienced overall growth in every area. In the second reporting period, M.W. was dealing better with disappointment and non-preferred activities. Her active imagination and engrossment in specific topics sometimes caused her to be off-track from the task at hand. In the third reporting period, she made slow but steady progress and was trying very hard to please her teachers. In the fourth reporting period, she improved on being able to successfully remain in the general education classroom for Science and Social Studies.

89. M.W.'s IEP for the period of April 2, 2019 to April 2, 2020, lists goals (and the method of evaluation) for each, in the following areas of need: Fine Motor Skills (Teacher Observations and Data Collection); Social/Emotional Behavior (Teacher Observations and Data Collection and Student/Teacher review); Pre-vocational (Teacher Observations, Data Collection, student/teacher review); Adaptive Behavior (Teacher Observations and Data Collection); Academics-Math Calculation and Math Problem Solving

(Data Collection, Work Samples, and Monthly Progress Monitoring); Academics-Reading Fluency (Teacher Observations and Data Collection); and Academics-Reading Comprehension (Data Collection, Teacher Observations, and Monthly Progress Monitoring. (Ex. 7).

90. At that time of the IEP meeting, parent A.W. was concerned in the areas of M.W.'s counting ability and math, with parent A.W. stating that "this has always been a hard area for her." Parent A.W. remained concerned with M.W.'s social emotional development, stating that M.W. is "growing into a teenager and is very moody at times." The IEP further notes that parent A.W. had stated that M.W. has been diagnosed with oppositional defiance disorder and as intellectually disabled, by Dr. John Kupfner.

91. The present levels of performance showed that M.W. fidgeted, talked out of turn, was impulsive, and had difficulty waiting her turn. She maintained a high level of interest in classes, "almost always" participated, usually brought supplies to class, and was doing "her best to complete classroom and homework assignments."

92. The academic goals and objectives are different in the IEP for April 2, 2019 to April 2, 2020, versus those from the IEP written for September 21, 2018. For example, in math calculation, the accuracy requirement decreased by 10% and an instructional objective was added, making use of a "number line." The accuracy level was decreased for other areas, as well. A new instructional objective was also added for reading fluency.

PROGRESS MONITORING REPORTS FOR THE 7TH GRADE

93. During M.W.'s 7th grade year, it was anticipated that she would meet her IEP goals by the end of the operative IEP; except for annual goal 3 (reading fluency) in reporting periods 3 and 4, which she mastered. (Ex. 37).

94. The COVID-19 pandemic resulted in no data being available for the fourth reporting period.

95. During the first three reporting periods of the 7th grade year, M.W. made progress on annual goal 1, regarding her handwriting and spatial organization of her classwork, though she did have some issues with frustration when the occupational therapist pointed out mistakes. The new objective of practicing clothing items began during the third reporting period, with M.W. making good progress.

96. In M.W.'s IEP written for the period of April 2, 2019 to April 2, 2020, the social/emotional goal fundamentally stays the same, and the following objective was added:

Objective - In 36 weeks M.W. will use modeled strategies [to] self-regulate her behavior for a duration of 90-minute intervals throughout the school day, in 4 out of 5 trials with 100% accuracy over 36 weeks of instruction.

97. In M.W.'s IEP written for the period of April 2, 2019 to April 2, 2020, the pre-vocational goal fundamentally stays the same, and the following objective was added:

Objective - In 36 weeks, M.W. will follow directions across a variety of settings with 100% accuracy on 4 out of 5 opportunities as evidenced by teacher data collection and teacher observation.

98. In M.W.'s IEP written for the period of April 2, 2019 to April 2, 2020, the adaptive behavior skills goal fundamentally stays the same, and the following objective was added:

Objective - In 36 weeks M.W. will self-regulate and take turns with her peers with 100% accuracy on 4 out of 5 opportunities as evidenced by teacher data collection and teacher observations.

99. During the first three reporting periods of the 7th grade year, M.W. made progress on annual goal 2 (social/emotional behavioral) – self-regulating strategies – having exhibited appropriate behaviors and no incidents; she achieved a rating of 90% for the noted

short-term instructional objective of using appropriate behavior. During the second and third reporting period, M.W. had some difficulty, disrupting class by laughing and joking with classmates, but she was still making progress toward the goal. During that time, she went to her teacher to ask whether lunch was a more appropriate time to laugh and joke with her friends.

100. During the first three reporting period of the 7th grade year, M.W. made progress on annual goal 3 (pre-vocational) – following directions, completing work and staying on task – achieving a rating of 90% for the noted short-term instructional objective. In reporting period one, she occasionally argued, but was compliant when asked to correct mistakes. In reporting period three, she was more willing to correct mistakes without arguing.

101. During the first three reporting periods of the 7th grade year, M.W. made progress on annual goal 4 (adaptive behavior skills) – using self-regulation for turn-taking while transitioning and during group and independent work. In the first reporting period, she achieved a rating of 90% for the noted short-term instructional objective; though it's similarly noted, as elsewhere, that she sometimes got overexcited when interacting with peers. During reporting period three, she mastered turn-taking.

102. During the first three reporting periods of the 7th grade year, M.W. made progress on annual goal 5 – math calculation. In the first reporting period, she achieved a rating of 90% for the noted short-term instructional objective. However, during reporting period 3, M.W. needed extra prompting and support for math as she had developed a dislike for the number line when subtracting.

103. During the first two reporting periods of the 7th grade year, M.W. made progress on annual goal 6 – math word problems – with a rating of 60% for the noted short-

term instructional objective. However, during reporting period 3, she did need to be slowed when doing math word problems and did not progress as much.

104. During the first two reporting periods of the 7th grade year, M.W. made progress on annual goal 7 – reading fluency – achieving a rating of 90% for the noted short-term instructional objective. As of reporting period 3, she had met the objective of decoding words on grade level.

105. During the first three reporting periods of the 7th grade year, M.W. made progress on annual goal 8 – reading comprehension – achieving a rating of 80% for the noted short-term instructional objective.

OTHER DOCUMENTATION

106. For the 2019 school year, M.W.'s classwork reflects that she is progressing.

107. 2018 Social/Emotional Checklists from both of M.W.'s general education teachers, on which her present levels of performance for social/emotional behaviors were based, reflect that M.W. was somewhat immature, did not always perform in the way of a regular peer, and required some additional assistance getting started on her assignments. However, all in all, she behaved comparably to her peers, and would be in the average category for most of these dynamics.

108. The 2018 Social/Emotional Checklist from her special education teacher, Mr. Buchanan, is not as positive, noting some of the behaviors M.W. is known to exhibit – difficulty in turn-taking, disturbing others in class, having difficulty expressing her feelings, and crying easily. But it also noted positives consistent with those the general education teachers noted – being interested in class and usually bringing supplies.

ZACHARY BUCHANAN – M.W.’S 6TH GRADE SPECIAL EDUCATION TEACHER

109. M.W.’s 6th Grade year was 2018-2019. She attended North Middle School.

110. Mr. Zachary Buchanan served as M.W.’s 6th grade Special Education teacher from the beginning of the school year (August of 2018), until Mr. Buchanan resigned, leaving his employment with LCS, in February of 2019.

111. Mr. Buchanan obtained an Associate’s in Science in Teaching, from Pellissippi State Community College, in May of 2016, and graduated from Tennessee Tech University in the spring of 2018, earning a Bachelor’s in Science in Teaching.

112. During his studies at Tennessee Tech, he served as an educational assistant/paraprofessional in a CDC classroom, for over one year. He also student taught in a classroom that included 6 disabled students.

113. In May of 2018, Mr. Buchanan was interviewed, by Ms. Melanie Amburn, the LCS Special Education Supervisor, and was hired to be a Special Education teacher at North Middle School, for the 2018-2019 school year.

114. In June of 2018, Mr. Buchanan passed the Praxis exam, including the test category of Special Education: Core Knowledge and Sever to Profound Applications.

115. At the time Mr. Buchanan interviewed for a position with the Respondent in May of 2018, the following were true –

- a. He was working toward his Master’s degree in Special Education at Tusculum University, having enrolled in the program in the Summer of 2018, immediately after receiving his undergraduate degree;
- b. He was licensed to teach Kindergarten through 5th Grade;
- c. He did not have an endorsement to teach Special Education; and

c. He was working toward a provisional Special Education endorsement to his elementary education license.

116. Ms. Amburn was aware of all the items listed in paragraph 13 when she interviewed Mr. Buchanan.

117. In order to procure the provisional endorsement, Mr. Buchanan needed to obtain a letter from Tusculum University verifying both his enrollment in their Master's program for Special Education, and that he would be assigned a mentor who had a Special Education endorsement. Thereafter, the Tennessee Department of Education would be the entity to officially approve Mr. Buchanan for a provisional endorsement.

118. Mr. Buchanan did not obtain any such letter from Tusculum University.

119. At the time of his hiring, Mr. Buchanan did not know that a letter from Tusculum University was required in order to secure the provisional endorsement.

120. Ms. Amburn was not aware that Mr. Buchanan had not obtained the requisite letter until some unspecified time after his hire.

121. Ms. Amburn did not follow-up to see whether Mr. Buchanan obtained the letter.

122. Ms. Amburn advised Mr. Buchanan that he would need to have passed the Praxis test (a requirement for a teacher's license) and be pursuing his Master's degree in Special Education in order to be hired as a Special Education teacher at North Middle School.

123. Ms. Amburn did not specify to Mr. Buchanan the necessity of the requisite letter from Tusculum University.

124. North Middle School provided Mr. Buchanan with support, as a new teacher, including involvement from a compliance specialist (who assisted with M.W.'s IEP) and other special education teachers who helped him with data collection and ensured other duties

were being properly performed. This included a teacher mentor board and an individual mentor, Ms. Tracy Fritts, with whom his classroom shared a wall.

125. The teachers, and staff, often helped one another to fulfill their duties.

126. Ms. Lisa Henry and Ms. Janice Goodwin served as paraprofessionals in Mr. Buchanan's classroom.

127. Ms. Henry was of the opinion that Mr. Buchanan was too young, and not experienced enough, for the teaching position. Ms. Henry believed Mr. Buchanan to be more interested in a position in school administration, something he spoke about aspiring to, than teaching.

128. During the first semester of Mr. Buchanan's role as a Special Education teacher, Ms. Henry and Ms. Janice Goodwin met with Ms. Melanie Amburn, the LCS Special Education Supervisor, to discuss concerns about Mr. Buchanan's teaching.

129. The meeting took place at a local restaurant and lasted between one and two hours. Ms. Henry raised issues with Ms. Amburn such as Mr. Buchanan not having a regular schedule of organization or routine, that he would leave the classroom (with the paralegals to oversee the students) to "hang out" in the office, that he did not believe anyone should walk M.W. to her general education classes, that he was not diligent about Aimsweb testing, that he did not secure medication for a student, and that he had no medication log to track medication administration.

130. Ms. Amburn told Mr. Buchanan about the meeting but did so in some manner of confidence to prevent animus between Mr. Buchanan and the paraprofessionals with whom he worked, daily.

131. After that meeting, a medication and toileting chart were kept, and Mr. Buchanan was in the classroom more often.

132. While she did not always “click” with Mr. Buchanan, Ms. Goodwin’s reaction to Mr. Buchanan was not the same as Ms. Henry’s.¹⁷

133. Ms. Henry did not hold Ms. Judy Bonnell, M.W.’s previous Special Education teacher, in high regard.

134. While Ms. Henry had no issues with Ms. Brown before Ms. Brown became the special education teacher, she believed Ms. Brown changed, at that point, and did not treat students well, on two occasions. One, when she raised her voice at a student for kicking her under a table. And two, when Ms. Brown had a disagreement with M.W., resulting in M.W. having called Ms. Brown a liar.

135. Ms. Goodwin “clicked” with Ms. Henry.

136. While not as well as with Ms. Henry, Ms. Goodwin “clicked” with Ms. Brown.

137. Mr. Buchanan left his employment with LCS in late February of 2019.

138. No issues were ever reported to Ms. Amburn regarding Ms. Brown’s teaching or her interaction with students.

139. Ms. Sandy Stewart is the resource class teacher at North Middle School, having served in that capacity since May of 2014. Ms. Stewart has been a Special Education teacher for 24 years. She holds a Professional Teaching License and has endorsements in the areas of Elementary (K-8), Special Education Modified (K-12), Special Education “Comp” (K-12), and PreK-4. (EX. 18).

140. Ms. Stewart worked closely with Mr. Buchanan and Ms. Brown – her classroom was located next to theirs. Ms. Stewart never had concerns about either Mr.

¹⁷ No testimony was elicited from Ms. Goodwin regarding the meeting at which Ms. Henry and Ms. Amburn were also present.

Buchanan or Ms. Brown, and she was not aware of any issue with either of them having mistreated a student.

141. Ms. Stewart assisted both Mr. Buchanan and Ms. Brown, showing them how to conduct Aimsweb testing, including assistance with filling out the associated paperwork.

142. In the area of math, other children in M.W.'s class, who received the same mathematics instruction from Mr. Buchanan, did not, in progress reports, show regression.

LESLEY BROWN – M.W.'S 6TH GRADE SPECIAL EDUCATION TEACHER

143. Ms. Brown obtained a Bachelor's degree in Business, from the University of Tennessee, in 1983. She obtained a Master's degree in Banking and Finance, from Louisiana State University, in 1988. She obtained a Master's in Elementary Education, from the University of Tennessee, in 2006. (Ex. 5).

144. Ms. Brown held a Tennessee Apprentice Teacher License from June 5, 2006 to August 31, 2018, with endorsements of Elementary (K-8) and Special Education Modified (K-12).

145. Ms. Brown also held an Interim Type D license, which included endorsements for Elementary (K-8) and Special Education Modified (K-12). The effective date of this license is unknown.

146. Ms. Brown obtained a Practitioner Teacher license on September 1, 2018, with endorsements of Elementary (K-8), Special Education Modified (K-12), and Special Education "Comp" (K-12).

147. Ms. Brown previously held a Practitioner's License in Tennessee, prior to the license she obtained on September 1, 2018.

148. Ms. Brown applied for a position as a paraprofessional, with the Respondent, in 2012. While her hire date is unclear, Ms. Brown worked for the Respondent in that capacity for a number of years.

149. After Mr. Buchanan left his employment with LCS, Ms. Lesley Brown became M.W.'s Special Education teacher for the remainder of the 6th grade year.

150. On one occasion, during her time as M.W.'s teacher, M.W., when entering school, stepped on the foot of either Ms. Brown or Ms. Goodwin. Ms. Brown made M.W. apologize for having done so. The interaction made M.W. upset.

151. At some point in that day, M.W., being upset, rocked back and forth in her chair, cried, and hyperventilated. Ms. Brown offered to take M.W. to the nurse or principal's office, which she typically did if M.W. became upset to such a degree.

152. On the day of this event, M.W. ate lunch, in the cafeteria, with Ms. Brown. Ms. Brown tried to talk to M.W., during that lunch, to work through the issues that caused the behavior.

153. To the extent this lunch constituted discipline, the testimonial evidence in this matter presents no other such instances.

154. When picked up from school that day, M.W.'s face was red, as if she had been crying. She became hysterical, screaming and yelling, after getting in the car with parent A.W.

155. Documents relative to a student's reevaluation are generated from a computer program called Easy IEP.

156. Documents entitled "Use of Public Benefits" and "Notice of Procedural Safeguards," both in Ex. 22, are examples of documents that contain parent A.W.'s

handwritten name, which name was written by LCS employees to show that LCS gave parent A.W. a copy of the documents.

157. At some unknown time – the form is undated – a vocational competencies document, for the 7-12 grade, was filled out, regarding M.W.

158. The document contains questions comparing a student to peers, in items such as cooperation with teachers, following directions, appropriate behavior with peers, and beginning/resuming work on time.

159. All of the IEPs in evidence, all of which were agreed to by parent A.W., reflect that the IEP team concluded no extended school year (ESY) was needed.

REEVALUATION FOR ELIGIBILITY

160. The Woodcock Johnson test can be used to measure progress, or to determine present levels of performance in an IEP, in the areas of reading, writing, and math. It can also be given in order to determine appropriate programming (i.e., helping plan for the instruction of a child for a given day or week, for instance). It can further be used as an evaluative tool in determining eligibility for Special Education services.

161. On September 18, 2019, a meeting was held to discuss M.W.'s triennial reevaluation. Parent A.W. attended, and acknowledged that she had received a notice of procedural safeguards on that same date.

162. Parent A.W. did not sign paperwork giving LCS permission to conduct any assessments for a reevaluation.

163. On September 24, 2010, parent A.W. contacted LCS, by email, agreeing to several assessments offered at the reevaluation meeting of September 18, 2019. These assessments included the Woodcock Johnson IV test.

164. One portion of a Woodcock Johnson IV test (Letter Word ID) was administered on September 24 or 25, 2019.

165. On September 25, 2019, parent A.W. sent an email to Mr. Patrick Bethel, then principal at North Middle School, asking that no more testing be done with M.W. “with the school psychologist or anyone else until we have come to an agreement with her re-evaluation.”

CLAIMS PRESENTED BY THE PETITIONERS

Petitioners present the following 8 claims, which are taken (largely verbatim) from their PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW,¹⁸ filed on November 6, 2020:

1. Respondent denied M.W. a free appropriate public education (FAPE) when it failed to design appropriate Individualized Education Plans (IEPs) based on the information the Respondent had notice of in the “snapshot” of time the IEPs were designed.

2. Respondent denied M.W. a FAPE when it allowed unqualified teachers to implement M.W.’s Special Education IEPs.

3. Respondent denied M.W. a FAPE when it violated the *Endrew F.* standard and failed to provide M.W. an educational program reasonably calculated to enable her to progress appropriately in light of M.W.’s circumstances.

4. Respondent denied M.W. a FAPE when it failed to provide parent A.W. with critical information in order for her to effectively participate in the design of her child’s IEPs.

5. Respondent denied M.W. a FAPE when it refused to conduct the comprehensive evaluation on M.W., which parent A.W. requested before the October 5, 2019, reevaluation deadline.

¹⁸ Petitioners’ pre-trial brief, filed June 9, 2020, states the following three claims, only: 1) Violation of Least Restrictive Environment (LRE) Requirements; 2) Denial of FAPE with Unqualified Teachers; and 3) Denial of FAPE with Inappropriate IEPs. Petitioners’ AMENDED COMPLAINT PURSUANT TO 20 U.S.C. § 1415(b)(6) & (7), filed January 2, 2011, does not allege a violation of LRE. Therefore, no LRE issues were considered, herein. 20 U.S.C. § 1415(f)(3)(B).

6. Respondent denied M.W. a FAPE when it failed to adequately monitor the IEP progress of M.W. with objective data (i.e., probes and test results) as opposed to subjective data (i.e., teacher opinions).

7. Respondent denied M.W. a FAPE when it failed to modify M.W.'s IEPs to address the "behavioral issues" the district recorded that M.W. was exhibiting over a number of school years.

8. Respondent denied M.W. a FAPE when it, through misrepresentation falsified the educational record of M.W. to conceal that the district had not provided parent A.W. with required notices, had not performed required monitoring, and had not timely conducted reevaluation and other required IDEA tasks.

CONCLUSIONS OF LAW AND ANALYSIS

The U.S. Supreme Court held in *Schaffer v. West*, 546 U.S. 49 (2005) that the burden of proof in a due process hearing, brought pursuant to the IDEA, is on the party "seeking relief." Thus, when a parent files a due process complaint, the parent bears the burden of proof, or burden of persuasion, in the due process hearing. Specifically, "the party challenging the IEP . . . bears] the burden of proving by a preponderance of the evidence that the IEP devised by the school is inappropriate." *L.H. v. Hamilton Cty. Dep't of Educ.*, 900 F.3d 779, 790 (6th Cir. 2018). In the instant case, the Petitioners clearly bear the burden of proof.

Under the IDEA, schools that receive federal funds for education must provide every disabled student with a "free appropriate education" (FAPE). *Somberg v. Utica Community Schools*, 908 F.3d 162, 170 (6th Cir. 2018); 20 U.S.C. § 1412(a)(1)(A). In developing educational programs and determining appropriate services for those students through an IEP, school districts must comply with the substantive and procedural requirements of the IDEA and state Special Education law. *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 102 S. Ct. 3034 (1982). Procedural violations generally concern "the preparation of an IEP." *Somberg*, at 171 (citing *Rowley*, at 3051). "Substantive violations concern the substance of the IEP;

namely, whether the school has provided ‘an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.’” *Id.* (quoting *Endrew F. ex. Rel. Joseph F. v. Douglas Cty. Sch. Dist.* 137 S. Ct. 988, 1001 (2017)). Parents are not entitled to relief for minor procedural violations, alone. Technical procedural violations do not render an IEP invalid. *Dong v. Board of Educ. of Rochester Community Schs.*, 197 F.3d 793, 800 (6th Cir. 1999).

A determination of whether a student received FAPE must be based on substantive grounds. 20 U.S.C. § 1415(f)(3)(E)(i). When a procedural violation is alleged, an administrative law judge can only find a FAPE violation if a procedural violation “(I) impeded the child’s right to FAPE; (II) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the parent’s child; or (III) caused a deprivation of educational benefit.” 20 U.S.C. § 1415(f)(3)(E)(ii)(I) – (III). Only procedural violations that result in substantive harm constitute a denial of FAPE and justify relief. *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 764 (6th Cir. 2001) (procedural violations must cause substantive harm and constitute denial of FAPE to be actionable); see also *Bd. of Educ. of Fayette County, Ky. v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007).

APPROPRIATENESS OF IEPs

Petitioners’ claim 1 is that LCS denied M.W. a FAPE because it did not provide an appropriate IEP for M.W.¹⁹ The IEPs in question, in chronological order, are those identified in EXs. 8, 9, 4, and 7. The IDEA, at 20 U.S.C. § 1414(d)(1)(A), requires that an IEP include, among other things: (1) a statement of the child’s present levels of performance; (2) a

¹⁹ Petitioners, in their PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, cite to “300.347(a)(2)” in support of this claim. Presumably, the Petitioners intended to cite to 34 C.F.R. 324(b). Other than a cite to *Endrew F.*, no additional law is cited in support of this claim.

statement of measurable annual goals; (3) a statement of the special education and related services and supplementary aids and services to be provided to the child that, to the extent practicable, are based on peer-reviewed research; (4) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in nonacademic and extracurricular activities; and (5) a statement of how the child's parents will be regularly informed of their child's progress. These "are requirements by which the adequacy of an IEP is to be judged, although minor technical violations may be excused." *Cleveland Heights-University Heights City Sch. Dist. v. Boss*, 144 F.3d 391, 398 (6th Cir. 1998). The Petitioners have failed to carry their burden of proof on this claim.

The United States Supreme Court modified the test to determine whether an IEP substantively provided FAPE under the IDEA in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). For a district to substantively offer FAPE, an IEP must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Id.* at 999. An IEP should be "construed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Id.* With a child for whom progressing smoothly through the regular curriculum is not a reasonable prospect, the IEP "need not aim for grade-level advancement," but should be appropriately ambitious, including challenging objectives. *Endrew F.*, at 1000.

When determining the appropriateness of an IEP, "[a]ny review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Endrew F.*, at 999. An IEP is a snapshot in time. *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3rd Cir. 1993). Thus, the appropriateness of an IEP must be viewed by "what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." *Id.*

Here, the IEPs in place addressed M.W.'s educational needs through goals, services, and accommodations to address her identified deficit areas of fine motor skills; social/emotional behavior; pre-vocational skills; adaptive behavior skills; and academics – math calculation, math problem solving, reading fluency, and reading comprehension. The Respondent considered M.W.'s individual circumstances in developing an IEP that was reasonably calculated to enable her to make appropriate progress.

The starting point for determining the appropriateness of an IEP is determining the child's unique needs. To determine those unique needs, M.W.'s IEP team considered multiple sources of data from multiple persons to determine her present levels of performance for the development of the IEPs in question. The IEP team members obtained and reviewed information from medical providers/records, teacher observations, parent observations, and data collection (classwork, Aimsweb testing results, Woodcock Johnson results, and other information from comprehensive evaluations done in 2013-2014 and 2016).

The Petitioner's expert, David Rostetter, Ed.D., testified that the IEP was not sufficient, in part, because the Petitioner has had a number of evaluations over her years at LCS, resulting in different eligibilities.²⁰ Particularly, Dr. Rostetter notes that despite M.W. having started her education at LCS in kindergarten, she was not determined to be intellectually disabled until 2016 (the 4th grade). This, according to Dr. Rostetter, evidences that the Respondent inappropriately evaluated and therefore incorrectly determined M.W.'s eligibility for Special Education disabilities, up until 2016.

Assuming, *arguendo*, that Dr. Rostetter is correct – that LCS did not appropriately evaluate M.W. until 2016 – such a determination would be outside of the two-year statute of

²⁰ The Respondent's experts both testified that the IEPs were legally appropriate.

limitations provided by the IDEA. That limitations period is found at 20 U.S.C. § 1415, and states, as follows:

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint

20 U.S.C. § 1415(f)(3)(C).

While there are two statutory exceptions to the limitations period, also located at 20 U.S.C. § 1415, there is no proof that either exception applies to M.W.'s eligibility determinations through 2016.²¹

The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

20 U.S.C. § 1415(f)(3)(D).

Additionally, parent A.W. was aware of her ability to ask for additional evaluations if she was of the opinion that those the Respondent conducted were not appropriate. She did so as early as 2014, due to M.W.'s ADHD diagnosis, by her own medical provider, which diagnosis was taken into account by the Respondent and added as a form of eligibility.²²

²¹ Petitioners point to the lack of Mr. Buchanan's licensure as providing an exception to the statute of limitations. However, Petitioners have shown no nexus between Mr. Buchanan's licensure issues and the items about which Petitioners complain that fall outside the limitations period.

²² No Independent Educational Evaluation (IEE), as contemplated by 34 C.F.R. § 300.502(b), has ever been requested to be performed at the Respondent's expense.

Moreover, even if the Respondent had been incorrect in its prior evaluations, Dr. Rostetter testified that the 2016 evaluation, which resulted in her being determined to be intellectually disabled, was correct and done in accordance with the IDEA. Therefore, from that point forward, any alleged issues with IEPs would not have been based on M.W.'s pre-2016 eligibilities.

Therefore, it is **CONCLUDED** that the Petitioners have failed to meet their burden of proof, on Claim 1, to show the IEPs in question were not substantively appropriate, were not designed with M.W.'s unique needs in mind, were not reasonably calculated to enable her to make progress appropriate in light of her circumstances, and that they were not appropriately ambitious, including challenging objectives – thereby denying M.W. a FAPE.

QUALIFICATIONS OF ZACHARY BUCHANAN AND LESLY BROWN

Petitioners' claim 2 is that Respondent denied M.W. a FAPE by allowing an unqualified teacher to implement her IEPs.²³ Respondent argues, in its PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, that the Respondent did not follow Tennessee policies relative to Mr. Buchanan and Ms. Brown having taught M.W.; that M.W.'s progress deteriorated during their time as teachers; and that A.W. not being made aware of their licensure status "significantly interfered" with A.W.'s right to effectively participate in the IEP process. The Petitioners have carried their burden of proof to show that Mr. Buchanan having taught M.W., without the appropriate endorsements, is a procedural violation of the IDEA, and that it significantly impeded parent A.W.'s opportunity to participate in the decision-making process regarding the provision of FAPE to M.W., thereby also constituting a substantive violation of the IDEA. The Petitioners have not carried their burden of proof to

²³ Petitioners, in their PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, cite to "(300.505 [Parental consent])" in support of this claim. Presumably, Petitioners intended to cite to 34 C.F.R. § 300.300. No other law is cited to support the claim.

show that Mr. Buchanan having taught M.W. constituted a substantive violation of the IDEA by way of causing a deprivation of educational benefit.

Petitioners first argue that Respondent did not follow Tennessee Department of Education (TDOE) policies 1) requiring, pursuant to the Every Student Succeeds Act, 20 U.S.C. §§ 6312, 20-days-notice to be provided to parents if a teacher does not meet applicable state licensure requirements at the grade level(s) and subject area(s) in which the teacher has been assigned; and 2) a policy that “Special Education teachers [must] have taught full time as a Special Education teacher for at least one year preceding their Special Education Assignment.” To the extent these are simply policies, they are not law. Therefore, the failure to follow either does not constitute a procedural violation of the IDEA. Likewise, to the extent the Respondent may have committed a violation of another federal law (e.g., the Every Student Succeeds Act), it is questionable whether such a violation would constitute a procedural violation of the IDEA, *per se*.

In the unreported case of *Damian J. v. Sch. Dist. of Philadelphia*, Civil Action No. 06-3866, 2008 WL 191176 (E.D. Penn. Jan. 22, 2008), a Pennsylvania Federal District Court found a denial of FAPE in a case that involved the allegation of an unqualified classroom teacher. In that case, the court relied on both 20 U.S.C § 1401, and a companion Pennsylvania law, requiring that special education teachers be “highly qualified,” which term included certain licensure requirements. *Damian J.*, at *3.

While the IDEA no longer contains the “highly qualified” requirement,²⁴ it does, pursuant to 20 U.S.C. § 1415(a)(14)(A), require that the state educational agency (SEA) establish and maintain qualifications for special education teachers. The SEA, the Tennessee

²⁴ The highly qualified language, and its definition, were struck by a 2015 amendment (Pub. L. 114-95 § 9214(d)(1)).

Department of Education (TDOE), has done so through TENN. COMP. R. & REGS. 0520-02-03-.11(1), which requires that “[a]ll educators shall hold a valid Tennessee educator license with an endorsement covering the work assignment as provided in T.C.A. Title 49, Chapter 5.”²⁵ TDOE also allows a teacher to obtain a provisional Special Education endorsement, to teach Special Education, through:

(a) submitting a recommendation for the educator preparation provider verifying:

1. Enrollment in a program of study for additional endorsement in the special education endorsement area; and
2. An assurance that the educator will be assigned a mentor who is endorsed in the special education endorsement area.

TENN. COMP. R. & REGS. 0520-02-03-.11(8)(a)(1) – (2).

Ms. Brown had a Special Education endorsement, which qualified her, under the IDEA, to teach Special Education. Mr. Buchanan had neither a Special Education endorsement nor a provisional Special Education endorsement when teaching M.W.’s special education class. He likewise did not have an endorsement to teach beyond the 5th grade. Therefore, his having taught M.W. Special Education, in 6th grade, constitutes a procedural violation of the IDEA.

In *Damian J.*, despite finding that the teacher was not qualified, the court did not term the violation a procedural violation of the IDEA. Instead, the court focused on the substantive question of whether the teacher caused a denial of “a meaningful educational benefit,”²⁶ ultimately finding a denial of FAPE. The court noted a long list of items to support its conclusion (failures of most things imaginable regarding a Special Education student), which it is unnecessary to recount, here.

²⁵ Tenn. Code Ann. Title 49, Chapter 5 adds no substance to the regulation, as it relates to this case.

²⁶ The case was decided after *Rowley* but before *Endrew F.*

There are arguably a few ways in which Mr. Buchanan is somewhat similar to the teacher in *Damian J.*; however, even those similarities can be distinguished in Mr. Buchanan's favor. While Mr. Buchanan did not have the required endorsement to teach special education, he had met all the substantive requirements to attain a provisional endorsement. But both he and the Respondent simply failed to follow up to see that the requisite letter was provided, by Tusculum University, to the TDOE, which should have resulted in a provisional license being granted by TDOE. And while Mr. Buchanan, similar to the teacher in *Damian J.*, had no prior experience as a teacher, he did have experience as a paraprofessional, in a CDC class, for over one year and had also student-taught in a class that included disabled students.

There are also more substantial differences between the teacher in *Damian J.* and Mr. Buchanan. Mr. Buchanan was supported in a number of different ways by the Respondent, including involvement from a compliance specialist (who assisted with M.W.'s IEP) and other special education teachers helping with data collection and ensuring other duties were being properly performed. Mr. Buchanan had a teacher mentor board and an individual mentor, Ms. Tracy Fritts, whose room was next door to Mr. Buchanan's. It was commonplace for Special Education teachers, and staff, at North Middle School to routinely work together to help one another fulfill their duties. And while Mr. Buchanan, like any new teacher, had shortcomings, he was never disciplined or determined, by his management, or a seasoned special education teacher, Ms. Stewart, to be failing to meet expectations.²⁷

²⁷ While Ms. Henry testified about ways in which she believed Mr. Buchanan to have fallen short, this testimony was almost entirely uncorroborated. Ms. Henry's testimony was also largely uncorroborated regarding her recollection of a disagreement between Ms. Brown and M.W., in which she believed Ms. Brown to have acted inappropriately. Further findings, as to that event, are found *infra*, at fn. 37. Ms. Henry further testified that Mr. Buchanan told her, on one occasion, there was no need for a paraprofessional to walk M.W. to a general education class. Mr. Buchanan disputed having made the statement. The IEP in question (EX. 4) did require special education services to be

Similar to the parent in *Damian J.*,²⁸ Petitioners argue that M.W.’s progress deteriorated during the time Mr. Buchanan and Ms. Brown taught M.W. For the reasons discussed in the Progress, Monitoring, and Modification of IEPs section *infra*, at pp. 43-50, the Petitioners have failed to meet their burden of proof to show a lack of progress due to either Mr. Buchanan or Ms. Brown’s teaching.

That leaves the question of whether A.W.’s participation in the decision-making process was substantially impeded due to not being aware that Mr. Buchanan did not have endorsements to teach special education or 6th grade. While A.W. was otherwise an informed, active member of the IEP team, in all respects, she was deprived the opportunity to raise the issue of whether Mr. Buchanan should have been allowed to teach M.W. Special Education, in the 6th grade. This did not provide her the due opportunity to participate in the decision-making process for M.W.’s education.

Therefore, it is **CONCLUDED** that the Petitioners have met their burden, on claim 2, to show that Mr. Buchanan having taught M.W., without the appropriate endorsements, is a procedural violation of the IDEA,²⁹ and that it significantly impeded parent A.W.’s

provided *in the general education setting*. Even assuming Mr. Buchanan did tell Ms. Henry there was no need for a paraprofessional to walk M.W. to a general education class, this does not show that Special Education services were not provided in the general education setting.

²⁸ The specific allegations in *Damian J.* were failure to implement the student’s IEP and inappropriate physical restraints.

²⁹ Petitioners also pled violations of 42 U.S.C. § 1983, but provided no citation to law, or argument, in support thereof. Federal courts in the District of Columbia and Florida have established a four-part test to determine whether an IDEA violation constitutes a violation of 42 U.S.C. § 1983. *Walker v. Dist. of Columbia*, 157 F.Supp.2d 11 (D.D.C. 2001); *J.P.M. v. Palm Beach County Sch. Bd.*, 916 F.Supp.2d 1314 (S.D. Fla. 2013). While not binding, this test provides persuasive authority under which to evaluate an alleged violation of 42 U.S.C. § 1983. *Inter alia*, the test requires a showing that “exceptional circumstances exist” such that the school’s conduct that violated the IDEA was “persistently egregious,” and that the school had a custom or practice that constituted “the moving force” behind the IDEA violation. To the extent that a claim under 42 U.S.C. § 1983 can be brought in this administrative proceeding, for exhaustion purposes or otherwise, Petitioners have not met the requirements of the four-part test. Therefore, no violation of 42 U.S.C. § 1983 is found.

opportunity to participate in the decision-making process regarding the provision of FAPE to M.W., thereby also constituting a substantive violation. However, it is **CONCLUDED** that the Petitioners have failed to meet their burden of proof, on claim 2, to otherwise show that Mr. Buchanan and Ms. Brown's qualifications resulted in a denial of FAPE.

PROGRESS, MONITORING, AND MODIFICATION OF IEPs

Petitioners' claims 3, 6, and 7 are all interrelated.³⁰ Petitioners argue, in their PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, in claim 3, that M.W. was denied a FAPE because she failed to make enough progress beginning in the 3rd grade, and that by the 6th grade she was making no academic progress or was regressing. Petitioners also assert that M.W. was denied a FAPE because the Respondent neither appropriately monitored nor modified M.W.'s IEPs, in claims 6 and 7, respectively. Petitioners have failed to meet their burden to prove any of these claims.

The due process complaint having been first filed on October 1, 2019, the statute of limitations period would begin on October 1, 2017. M.W.'s 5th grade year began in August of 2017. Therefore, a determination about whether appropriate progress was made prior to her 5th grade year would fall outside of the statute of limitations. This includes the unfortunate reality of a drop in an overall score, from 87 to 70, on a general intelligence assessment – the Woodcock Johnson test – from 2013 to 2016.

The "IDEA does not require that a school either maximize a student's potential or provide the best possible education at public expense. The statute only requires that a public school provide sufficient specialized services so that the student benefits from his education."

³⁰ Petitioners, in their PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, cite to *Andrew F.* in support of these claims. No additional law is cited in support of the argument.

Nack ex rel. Nack v. Orange Cty. Sch. Dist., 454 F.3d 604, 613 (2006) (quoting *Fort Zumalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997) (citing *Rowley*, 102 S. Ct. at 3049; *A.W. By and Through N.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163-164 (8th Cir. 1987)). The IEP must only be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, at 999. Furthermore, the IDEA “guarantees access to education – not that a child will achieve a particular outcome.” *Barney v. Akron Bd. of Educ.*, 763 Fed.Appx. 528, 533 (6th Cir. 2019). With respect to annual goals, the IDEA only requires that a child’s IEP be revised, “as appropriate, to address any lack of expected progress.” 20 U.S.C. § 1414(d)(4)(A)(ii)(I).

It must be said, here, that the Petitioners provided no proof of what manner, or type, of progress should have been made by M.W. during the time covered by the statute of limitations, but simply argue that not enough progress was made, primarily relying on the evolution of her educational experience from her kindergarten year through 2016. This is insufficient to show a denial of FAPE. *J.B. by and through Belt v. Dist. of Columbia*, 325 F.Supp.3d 1, 9 (D.D.C. 2018) (“Limited academic progress does not *ipso facto* signal a violation of the IDEA.”).³¹ It is also curious that no request, by the Petitioners, was made to attend extended school year (a program for students who regress during the school year or who would regress so much during the summer that they would not be able to catch up the following year), as contemplated by 34 C.F.R. § 300.106, during the time period covered by the statute of limitations, if indeed no progress, or a true regression, were evident. The Respondent’s experts both testified that M.W. made progress, appropriate given M.W.’s circumstances, on her IEP goals during the time covered by the applicable statute of

³¹ The *J.B.* court also notes that neither does uneven progress necessarily equate to a violation of the IDEA.

limitations, as borne out by her IEP progress monitoring reports, classwork examples, and, on the whole, Aimsweb and Woodcock Johnson data.³² Little to no countervailing testimony, or other evidence, was introduced by Petitioners.

As to what progress should be reasonably expected, Dr. McCook credibly testified that M.W., due to her disabilities, has not developed “automaticity” in math – the ability to simply know and remember, for example, that $2+2=4$. Instead, M.W. has to add the numbers together. This inhibits her ability to do multi-step problems, or to solve problems in a timed setting, such as on Aimsweb probes. He further testified that the lack of automaticity will likely cause M.W. to continue to fall further behind as time progresses and the content becomes more difficult. Additionally, Dr. McCook credibly testified that, as with any person, because math is not her strong suit, M.W. appears to avoid working most diligently in that area. Moreover, Dr. McCook credibly testified that due to M.W.’s ADHD, not unexpectedly, she has difficulty paying attention and following multi-step directions. Similar to math, not performing well with multi-step directions may result in less motivation to participate in learning that requires that discipline. This is not to say that the Respondent does not have the obligation to continue to help M.W. overcome these hurdles, but it does inform the discussion about what expectations should be, in terms of progress. Therefore, the Petitioners failed to meet their burden of proof to show M.W.’s progress, during the time captured by the statute of limitations, constituted a FAPE violation.

Dr. Rostetter testified about observations he made, regarding M.W.’s general education setting, when he visited M.W.’s school in February of 2020. He was of the opinion that, in the general education setting, there was no adaptation of the curriculum to

³² Dr. McCook also testified that there was no evidence, through progress monitoring reports, that other students in M.W.’s math instructional group regressed during Mr. Buchanan’s tenure.

accommodate M.W.'s needs, and that the paraprofessionals failed to properly support and assist M.W. in that setting. There are two main issues with this testimony. One, these events transpired after the filing of the due process hearing and do not necessarily answer what services were provided, on an ongoing basis, during the time captured by the statute of limitations. And second, M.W. has performed better in these settings, academically, than she does in the subjects for which her placement is in the Special Education classroom. Other than Dr. Rostetter's testimony concerning his observations, no proof was provided to challenge M.W.'s progress in the general education setting subjects (Social Studies and Science).

In any event, albeit not as much as one could hope, and not in each and every category at each successive step,³³ the proof does show that M.W. made progress within the time captured by the IDEA's statute of limitations. This is evidenced by progress monitoring reports, Woodcock Johnson test scores, Aimsweb probes,³⁴ and classroom work samples, as discussed throughout this Order.

Petitioners also argue that LCS did not adequately monitor M.W.'s progress because it used "teacher opinions" instead of test results. The thrust of this argument concerns missing Aimsweb information from the 6th grade year. In some instances, either the test probes and/or some of the scoresheets are missing. For some of those periods, either graphs, charts, or progress monitoring reports show results for which there are not both test probes and scoresheets. But, even taking things in the light most favorable to the Petitioners (only

³³ Ms. Oliver testified that when you are evaluating whether progress was made, you may see a child make gains, plateau, and even take a step back. But that what you are looking for is an overall growth line.

³⁴ Math calculation is the area in which progress was least made, per Aimsweb and Woodcock Johnson scores. As previously noted, progress in math problem solving was not quantifiable, by Aimsweb scores, due to the language in the math problem solving goals.

considering instances in which both probes and scoresheets are available), overall, in the majority of instances, both the probes and scoresheets are available.

There are two IEPs written for the 6th grade year (August of 2018 through May of 2019). The first was written for the period of September 27, 2017 through September 27, 2018 (covering one or two months of the 6th grade year) and the second for the remainder of the 6th grade year (September 21, 2018 through September 21, 2019). Only the IEP written for the period of September 27, 2017 through September 27, 2018 specifically references using Aimsweb test data for progress monitoring. And this IEP covered only one or two months (August and September) of the 6th grade school year. The IEP makes specific mention of Aimsweb data in two places – in the areas of reading fluency (128 words “as measured by monthly reading probes”) and math calculation (“32 points on an eight-minute math test”). In those areas, Aimsweb information is not in the record for August and September for reading fluency, and not in the record for August for math calculation.

While it is troubling that documentation of some of the probes are missing from the record, two important points undercut the Petitioners’ argument. One, specific references to Aimsweb test data are made for only one or two months (August and September of 2018). More importantly, there were many ways in which the IEPs indicated progress was to be measured, in addition to any way in which Aimsweb information was to be used. These included teacher observations, monthly progress monitoring reports, teacher-made tests, and classroom work samples. And there is no evidence that these other means weren’t employed, or citation to any law showing them to otherwise be insufficient metrics. In light of the foregoing, Petitioners have failed to meet their burden of proof to show that the Respondent’s monitoring of M.W.’s progress with her IEP constituted a denial of FAPE.

Petitioners further argue that the Respondent did not appropriately modify M.W.'s IEP, for her academic and social/emotional behavioral goals. However, the proof shows there were appropriate modifications made to the IEPs in both academic and behavioral areas of need.

As to academic goals, as reflected by the Aimsweb³⁵ chart, *supra*, the goals remained the same from the IEP written for January 19, 2017 to October 5, 2017 and the IEP written for September 27, 2017 to September 27, 2018. To reflect her progress, and to better target her areas of need, the goals were then changed in the following IEP (written for September 21, 2018 to September 21, 2019). In reading fluency, the goal changed from 128 words at 80% to 110 words, on 4th grade level, at 90%. In reading comprehension, the goal changed from 80% to 90%, on a grade level between 2.5-3.1. In math calculation/computation, the goal changed from 32 points to 90% 4 out of 5 times, with the added support of a number line and anchor chart, and then further changed, downward, for the following IEP (written for April 2, 2019 to April 2, 2020) to 80%. Similarly, in math problem solving, the original goal of 80% changed (in the IEP written for September 27, 2017 to September 27, 2018) to 90% in the following IEP (written for September 21, 2018 to September 21, 2019) and then downward to 80% on grade level 2 for the IEP written for April 2, 2019 to April 2, 2020.

Social/emotional behavioral goals were also modified, over time, becoming successively more specific and targeted. For example, the social/emotional behavior goal changed (from the IEP written for January 19, 2017 to October 5, 2017 to the IEP written for September 21, 2018 to September 21, 2019) from improving “social/emotional behaviors to a more appropriate and functional level,” mastering the objective (following directions with one

³⁵ The goals being listed in the Aimsweb chart are not meant to suggest that Aimsweb probes were the only way in which the goals were to be measured. As indicated throughout the IEPs in evidence, and as discussed herein, there were many ways in which M.W.'s academic progress was measured.

verbal prompt) to 80%, to using specific strategies such as “deep breathing, visualization, and self-talk.” And another specific objective – “using modeling strategies to self-regulate her behavior for . . . 90-minute intervals, with 100% accuracy” – was added in the IEP written for April 2, 2019 to April 2, 2020. Similarly, changes were also made, between these IEPs, for both pre-vocational and adaptive behavior skills, which areas also included ways in which to address M.W.’s behavioral issues. The unrebutted progress monitoring reports evidence progress was made in these areas.

The Petitioners, in their PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, argue, citing Dr. Rostetter’s testimony, that a behavioral assessment should have been performed, a behavioral intervention plan should have been prepared, and/or that behavioral intervention class should have been used.³⁶

The IDEA provides requirements, regarding behavioral issues, in relationship to their severity, as follows:

Although, for “a child whose behavior impedes the child's learning,” the school district must “*consider* the use of positive behavioral interventions and supports, and other strategies, to address that behavior[.]” 20 U.S.C. § 1414(d)(3)(B)(i) (emphasis added), there is no requirement that the IEP include a behavior plan or goal *unless* a child has been removed from school for misconduct that is a manifestation of the child's disability. *See* 34 C.F.R. § 300.530(d)(1)(ii) (“[a] child with a disability who is removed from the child's current placement [for disciplinary reasons, for possessing a weapon or drugs, or for inflicting serious bodily injury on another] must ... [r]eceive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.”).

Kornblut v. Hudson City Sch. Dist. Bd. of Educ., No. 5:14-cv-1986, 2015 WL 5159082, at *10 (N.D. Ohio September 2, 2015).

³⁶ Again, no citation to law is made in support of the argument.

While M.W. does have issues with behavior that can impede her learning, the evidence provided³⁷ at the hearing of this matter³⁸ does not show that such issues have resulted in disciplinary measures, much less that M.W. has exhibited behavior that rises to the level of those noted, above, for removal. And, as previously addressed, M.W.'s IEPs in evidence do contain social-emotional behavior goals that were modified, according to her progress, over time. Like other areas of deficit, LCS should continue to monitor and modify the IEP for M.W.'s behavioral issues. And while the IEPs could have been more robust in the area of behavioral issues, the Petitioners' proof does not preponderate to show the IEPs in evidence to be insufficient to deal with M.W.'s behavior issues. In light of the foregoing, the Petitioners have failed to meet their burden of proof to show a denial of FAPE due to lack of modifications to M.W.'s IEPs.

Therefore, it is **CONCLUDED** that the Petitioners have failed to meet their burden of proof, on claims 3, 6, and 7, to show that M.W.'s progress, monitoring of progress, or modifications to her IEP constituted a denial of FAPE.

³⁷ There are three different versions of events for a certain day on which M.W. was very upset during the day. The testimony suggested that there were emails relating to this incident, but they were not provided at the hearing. Regarding the day in question, while Ms. Henry's testimony is similar to that of A.W.'s, A.W. had personal knowledge only of the time when she dropped off and picked up M.W. In the end, the tribunal does not glean enough from the facts presented, during this hearing, to do anything further regarding the events of that day.

³⁸ On May 14, 2019, the Petitioners filed a complaint with the United States Department of Education's Office of Civil Rights (OCR). In a letter dated November 8, 2019, the OCR made findings relative to its investigation. The document was moved into evidence, without objection, as Ex. 43. While some of the information contained in that exhibit bears on the incident discussed in fnts. 27 and 37, Petitioners made no use of the contents of EX. 43, for impeachment purposes or otherwise.

PROVIDING INFORMATION

Petitioners' claim 4 is that LCS denied FAPE by not providing "critical information in order for [parent A.W.] to effectively participate in the design of [M.W.'s] IEP." The Petitioners begin by pointing to a collection of 25 documents to assert this claim, as follows:

1. October 10, 2017 "Invite to Meeting"
2. October 24, 2017 "Invite to Meeting"
3. Document 22 "Midterm Progress Report"
4. Document 30 "Midterm Progress Report" dated February 5, 2019.
5. Document 33 "Midterm Progress Report" dated August 11, 2019
6. Document 36 "Invite to Meeting" on August 29, 2019
7. Document 37 "Parent Info for Reevaluation, not returned"
8. Document 42 "response section to the September 10, 2019, meeting invite"
9. Document 43 "District Observation" on September 18, 2019
10. Document 44 "Note Re Invite for Meeting with School Psychologist"
11. Document 48 "Invitation to a Meeting on September 23, 2019"
12. Document 50 "Classroom Observation Form" (Blank)
13. Document 51 "Parent Reevaluation Form" (Blank)
14. Document 52 "Special Education Teacher Observation Form" (Blank)
15. Document 56 "Contact Log"

The Petitioners then reference "Documents 57-78," followed by a Woodcock Johnson test administered in September of 2019, and then refer to a vocational competencies document for 7th-12th grade. Lastly, Petitioners reiterate their argument regarding the alleged falsification of educational records, referenced in the PETITIONER'S MOTION TO REOPEN THE PETITIONERS' CASE IN CHIEF.

The problems with these assertions are legion. First, out of these documents, only Documents 50, 51, and 52 were entered into evidence. Therefore, it is difficult to conceive of how the tribunal can make any informed decision about the utility of any of these documents; whether they are educational records that should have been provided and, if so, whether the failure to provide them would constitute a substantive violation of the IDEA. Second, from the transcript, it is apparent that documents 58-72 were created after the filing of the due process complaint was filed. While the Petitioners' counsel, in passing at the hearing date of August 17, 2020, stated that the documents should have been provided as supplemental discovery, no request for discovery sanctions was ever filed by the Petitioners relative to these documents. Lastly, Petitioners reference documents that were the subject of a MOTION TO REOPEN THE PETITIONERS' PROOF, based on the assertion that many documents had been falsified by the Respondent – that motion was denied by ORDER DENYING PETITIONERS' MOTION TO REOPEN PROOF, entered on September 15, 2020. While the motion was denied, EXS. 20 and 22 do contain a number of documents, the authenticity of which A.W. contested during the August 17, 2020, hearing date. For these reasons, only documents 50, 51, and 52 (EX. 21); EXS. 20 and 22; the Woodcock Johnson test from September of 2019; and the vocational competencies document for 7-12 grade (EX. 20) will be considered.

Documents 50-52 (EX. 21) are blank documents entitled "Classroom Teacher Observation," "Parent Information for Reevaluation" (listing a date of October 4, 2019), and "Special Education Teacher Observation." Melanie Amburn, the Respondent's Special Education Supervisor, credibly testified that documents relative to a student's reevaluation are generated by the Easy IEP computer program. She further testified that the system will populate the student's name, and, after the form is filled out, by hand, it is then "embedded within the summary evaluation report." In other words, these blank forms are just that –

blank forms. Petitioners' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW suppose that the documents, or at least Document 51, is proof that no observations of M.W.'s Special Education teachers were performed. However, the form speaks for itself – it is not a form that one would fill out after observing a teacher, but instead is a form filled out by the Special Education teacher relative to the student. Based on Ms. Amburn's testimony, clearly explaining what these blank documents represent, and a simple read of the documents themselves, Petitioners' argument regarding these documents is determined to be without merit.

EXS. 22 and 20 contain several documents, the authenticity of which A.W. contested during her testimony on August 17, 2020. However, the testimony failed to establish that any of these documents were not authentic. For example, the first of these documents, in EX. 22, is a form entitled "Use of Public Benefits of Insurance Notice Documentation." While testifying that her signature did appear on the document, parent A.W. questioned whether the signature was authentic because someone else had handwritten her name on the document, elsewhere. Ms. Sandy Stewart credibly testified that the teacher fills in the parent's name on this form to show to whom the form was delivered. A read of the document confirms Ms. Stewart's testimony, and rebuts any notion that the document is not authentic. The same is true regarding the document entitled "Notice of Procedural Safeguards," in EX. 22. A.W. testified that she questioned the authenticity of other documents, in EXS. 20 & 22, due to the lack of other people having signed the document, a date having been changed and someone else initialing that date change, someone else having dated a document, and different colors of ink being used by different signatories. Anyone can have a difficult time remembering if they placed a signature on any one of a large collection of documents from years past. Therefore, it is not surprising that parent A.W. may not remember whether she signed these documents.

But it is altogether different, several years in hindsight, to raise issues regarding whether a document is authentic, for the reasons A.W. gave. In short, the testimony failed to establish that any of these documents were not authentic.

Petitioners contend that a Woodcock Johnson test, from September of 2019, was done without A.W.'s permission, and that the results were never provided to A.W., alleging violations of 20 U.S.C. § 1415(b)(1) & (3), which provide that parents have the right to examine all of the child's records, and that prior written notice should be given in certain circumstances. Schools are required to provide notice to parents of reevaluations to be conducted, and the procedure to be used. 20 U.S.C. § 1414(b)(1). On September 18, 2019, the parties participated in a meeting regarding the reevaluation process. The Academic Achievement Woodcock Johnson IV was discussed as one assessment to be performed. On September 24, 2019, parent A.W. sent an email to Respondent, advising that she agreed to have several assessments performed, including the Academic Achievement Woodcock Johnson IV. On either September 24 or 25, 2019,³⁹ one portion of the Academic Achievement Woodcock Johnson IV was administered to A.W. (Letter Word ID). Without a particular date or time of the test being administered being shown, the tribunal is not in a position to determine whether parent A.W. had revoked her permission for the test to be given prior to its administration. Therefore, Petitioner has failed to meet its burden to show that the assessment given violated the IDEA.

Petitioners also argue the documentation should have been made available to them, citing 20 U.S.C. § 1415(b)(1), which provides a parent the right to examine all records

³⁹ The Summary Reevaluation Report (EX. 41) shows the test was performed on September 24, 2019, but does not specify a time. The emails exchanged between Mr. Patrick Bethel (principal at North Middle School) and parent A.W. (EX. 19) indicate the test was administered on September 25, 2019, but does not specify a time.

relating to a child. Parent A.W. testified that she was not provided the documentation regarding the test. Respondent's expert, Ms. Suzanne Oliver, testified it was in the educational record of M.W. To the extent it was never made available to parent A.W., which is not clear from the proof, Petitioners would still have to show substantive harm as a result. The main difficulty in doing so is that it appears, according to EX. 2, that while a meeting of October 4, 2019, was held, at which M.W.'s IEP was to be discussed, parent A.W. declined to have any discussion regarding the IEP. This meeting is one at which A.W. could have reasonably expected to see these test results. Instead, parent A.W. chose to invoke her right to a stay-put status, causing the prior IEP to remain in effect. And there is nothing else in evidence showing that parent A.W. ever otherwise requested to see the test documentation. In the end, no substantive argument has been made by Petitioners to show that a failure to provide the document significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to M.W., or caused a deprivation of educational benefit. Therefore, no substantive violation is found.

The vocational competencies document for 7-12 grade, which Petitioner references in their PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, is located in EX. 20. It is a one-page document, with questions such as comparing a student to peers, in items such as cooperation with teachers, following directions, appropriate behavior with peers, and beginning/resuming work on time. Similar checklists are noted as having been filled out for M.W.'s IEPs in evidence, in order to ascertain present levels of performance. Petitioner's PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW argue that testing M.W., a 5th grader, by using a checklist denoted for use in Grades 7-12 caused substantive harm.⁴⁰ There

⁴⁰ Petitioners do not argue that this document was not made available to parent A.W., though the document is referenced in the section regarding the Petitioners claim about the lack of "critical information" being provided.

are at least two problems with the argument. One, the form is undated, and no testimony was elicited to show that it was administered when M.W. was in the 5th grade. And two, no testimony was elicited to show why this form would be inappropriate, in any event. A read of the form does nothing to suggest the answer to such a question would have been in the affirmative. In short, no showing of substantive harm has been made regarding this document.

For the foregoing reasons, it is **CONCLUDED** that Petitioners have failed to meet their burden of proof, on claim 4, to show that the Respondent denied FAPE by not providing information allowing A.W. to effectively participate in the design of M.W.'s IEP.

COMPREHENSIVE REEVALUATION

Petitioners' claim 5 is that Respondent denied M.W. a FAPE when it refused to conduct a comprehensive evaluation on M.W., which parent A.W. requested before the October 5, 2019, reevaluation deadline.⁴¹ The original due process complaint, filed on October 1, 2019, was based on the triennial reevaluation. The Petitioners AMENDED COMPLAINT PURSUANT TO 20 U.S.C. § 1415(b)(6) & (7), filed on January 2, 2020, does not raise this issue. Therefore, it is **CONCLUDED** that claim 5 is not properly before the tribunal. 20 U.S.C. § 1415(f)(3)(B).

⁴¹ While no particular date is referenced, the proof shows that this would have been sometime between September 18, 2019, and October 5, 2019.

FALSIFICATION OF RECORDS

Petitioners' claim 8 is that Respondent denied M.W. a FAPE due to falsified records, arguing that Ms. Stewart knowingly falsified M.W.'s records, by administering tests on M.W. and then writing Ms. Brown's name on the test to make it appear that Ms. Brown had conducted the test. The record is clear that Ms. Stewart assisted both Mr. Buchanan and Ms. Brown in different ways. This included Ms. Stewart showing them how to administer Aimsweb testing, and assisting with the associated paperwork. It is also clear that the staff at North Middle School often worked together to teach and care for the children in their charge. Petitioners' attempt to ascribe an ulterior motive to such assistance is unfounded. This claim is without merit. Therefore, it is **CONCLUDED** that Petitioners have failed to meet their burden of proof on claim 8.

CONCLUSION

Petitioners have failed to meet their burden of proof on all claims, except for a portion of claim 2, as set forth above. Therefore, Petitioners are only entitled to a remedy for that portion of claim 2.

REMEDY

The Petitioners have proven both a procedural and substantive violation of FAPE, regarding Mr. Buchanan's having taught M.W. Special Education, in the 6th grade. Specifically, Mr. Buchanan's teaching, without the proper endorsements, significantly impeded parent A.W.'s ability to participate in the decision-making process regarding the provision of FAPE to M.W. However, the Petitioners failed to meet their burden of proof to show that Mr. Buchanan having taught M.W. constituted a substantive violation of the IDEA by way of causing a deprivation of educational benefit.

Therefore, the Respondent shall do the following:

1. Provide adequate training to District and School personnel, who have the responsibility for hiring Special Education teachers, on TDOE's requirements for such hires; and
2. Create a checklist with all of the applicable TDOE requirements, appending all necessary documentation to the checklist. The checklist shall be reviewed, and signed, by personnel who are ultimately responsible for making any new hires, including, but not limited to, the Special Education Supervisor, the Principal, and the head of human resources, or comparable department, to show their agreement that the hire comports with applicable TDOE regulations.

It is so **ORDERED**.

This FINAL ORDER entered and effective this the **23rd day of December, 2020**.



PHILLIP R. HILLIARD
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the **23rd day of December, 2020**.



STEPHANIE SHACKELFORD, DIRECTOR
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

NOTICE OF FILING PROCEDURES

Due to the COVID-19 pandemic, APD has changed its filing procedures. Until further notice, filings should be made by **email** to APD.Filings@tn.gov or by **facsimile** to 615-741-4472. Paper filings should only be made by mail if a litigant has no access to either email or facsimile. If you are filing by email, documents should be saved in PDF format prior to filing. Each document to be filed must be a separate PDF. Only one filing method should be used. Please name PDFs for filing in the following format:

“APD CASE NUMBER YOUR NAME ABBREVIATED NAME OF DOCUMENT BEING FILED AGENCY NAME”

NOTICE OF APPEAL PROCEDURES

REVIEW OF FINAL ORDER

The Administrative Judge's decision in your case in front of the **Tennessee Department of Education**, called a Final Order, was entered on **December 23, 2020**. If you disagree with this decision, you may take the following actions:

1. **File a Petition for Reconsideration:** You may ask the Administrative Judge to reconsider the decision by filing a Petition for Reconsideration. Mail to the Administrative Procedures Division (APD) a document that includes your name and the above APD case number, and states the specific reasons why you think the decision is incorrect. The APD must **receive** your written Petition no later than 15 days after entry of the Final Order, which is **January 7, 2021**.

The Administrative Judge has 20 days from receipt of your Petition to grant, deny, or take no action on your Petition for Reconsideration. If the Petition is granted, you will be notified about further proceedings, and the timeline for appealing (as discussed in paragraph (2), below) will be adjusted. If no action is taken within 20 days, the Petition is deemed denied. As discussed below, if the Petition is denied, you may file an appeal no later than **February 22, 2021**. See TENN. CODE ANN. §§ 4-5-317 and 4-5-322.

2. **File an Appeal:** You may appeal the decision in federal or state court within 60 days of the date of entry of the Final Order, which is no later than **February 22, 2021**, by:

(a) filing a Petition for Review "in the Chancery Court nearest to the place of residence of the person contesting the agency action or alternatively, at the person's discretion, in the chancery court nearest to the place where the cause of action arose, or in the Chancery Court of Davidson County," TENN. CODE ANN. § 4-5-322; or

(b) bringing a civil action in the United States District Court for the district in which the school system is located, 20 U.S.C. § 1415.

The filing of a Petition for Reconsideration is not required before appealing. See TENN. CODE ANN. § 4-5-317. A reviewing court also may order a stay of the Final Order upon appropriate terms. See TENN. CODE ANN. §§ 4-5-322 and 4-5-317.

STAY

In addition to the above actions, you may file a Petition asking the Administrative Judge for a stay that will delay the effectiveness of the Final Order. A Petition for stay must be **received** by the APD within 7 days of the date of entry of the Final Order, which is no later than **December 30, 2020**. See TENN. CODE ANN. § 4-5-316.

FILING

To file documents with the Administrative Procedures Division, use this address:

Secretary of State
Administrative Procedures Division
William R. Snodgrass Tower
312 Rosa L. Parks Avenue, 8th Floor
Nashville, TN 37243-1102

**IN THE MATTER OF:
M.W., THE STUDENT AND A.W., THE
STUDENT'S PARENT V. LOUDON COUNTY
SCHOOL DISTRICT**

APD CASE No. 07.03-191508J

NOTICE OF APPEAL PROCEDURES

Fax: (615) 741-4472