



## ISSUES ON APPEAL

Respondent's Notice of Appeal filed on August [REDACTED] 2021, provides:

Respondent appeals the entirety of the ALJ's final decision, including but not limited to the Decision on Issues 1-17 (comprising Paragraphs 129-148), Remedies (Paragraph 149-153), Order/Judgment/Decree Paragraphs 1-16, all underlying facts and conclusions in support thereof, with the sole exception of Findings of Fact 431-438, and earlier orders in the case adverse to Respondent.

In addition, and without waiving any other specific appeal rights, Respondent expressly notices for appeal the ALJ's decision to reconsider her prior summary judgment order on the statute of limitations, the expansion of the statute of limitations to three years instead of one, the ALJ's decisions on issues outside the scope of the petition and outside the ALJ's jurisdiction, the ALJ's decisions regarding expert qualifications, and numerous erroneous evidentiary rulings (including but not limited to denial of Respondent's motions in limine and exclusion of testimony from Respondent's expert).

In short, Respondent's Notice of Appeal challenges the findings and decisions for which Respondent was not the prevailing party.

## STANDARD OF REVIEW

SHROs review the Office of Administrative Hearing's ALJs' findings and decisions on appeal in accordance with 20 U.S.C. § 1415(g), 34 C.F.R. § 300.514, and N.C. Gen Stat. § 115C-109.9. A SHRO "shall make an independent decision" after conducting an "impartial review of the findings and decision." 20 U.S.C. § 1415(g). "Due weight" should be afforded to the administrative proceedings before the ALJ. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982).

The Fourth Circuit Court of Appeals has construed the "due weight" requirement, ruling that when findings of fact are "regularly made," they are entitled to be considered *prima facie* correct, akin to the traditional sense of permitting a result to be based on such fact-finding, but not requiring it."

*Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 105 (4<sup>th</sup> Cir. 1991). When interpreting the standard by which to determine whether factual findings are “regularly made and entitled to *prima facie* correctness.” *Doyle*, 953 F.2d at 105, the Fourth Circuit “ha[s] typically focused on the *process* through which the findings were made.” *J.P. v Cnty. Sch. Bd. of Hanover Cnty.*, 516 F.3d 254, 259 (4<sup>th</sup> Cir. 2008). Irregularly made factual findings are those that “are reached through a process that is far from the accepted norm of a fact-finding process.” *Cnty. Sch. Bd. of Henrico v Z.P.*, 399 F.3d 298, 305 (4<sup>th</sup> Cir. 2005) (internal quotation marks omitted). Irregular findings “are not entitled to deference.” *Id.* “After giving the administrative fact-findings such due weight, if any, the district court then is free to decide the case on the preponderance of the evidence, as required by the statute.” *Id.*

Of course, if the ALJ has erred in her decisions as a matter of law, the reviewing person can reverse her decision without any constraints.

State law grants subject matter jurisdiction to the Office of Administrative Hearings (OAH) to hear due process hearings in special education matters. N.C.G.S § 115C-109.6. An Administrative Law Judge (ALJ), acting as the Impartial Hearing Officer (IHO) presides over the hearing and issues a written decision with findings of fact and conclusions of law. N.C.G.S. § 115C-109.6(f). An aggrieved party may appeal the ALJ’s findings and decision to the State Board within 30 days after receiving notice of the ALJ’s decision. N.C.G.S. § 115C-109.9(a). State law provides that the State Board shall appoint a SHRO who “shall conduct an impartial review of the findings and decision” of the ALJ, and “shall make an independent decision upon completion of the review.” *Id.*

Now, having reviewed the records received in connection with this case, the Review Officer for the State Board of Education independently and impartially offers the following Findings of Fact, Conclusions of Law and Decision in accordance with 20 U.S.C. § 1415(g), 34 C.F.R. § 300.514, N.C.

Gen. Stat. § 115C-109.9, and the *Policies Governing Services for Children with Disabilities*, NC Policies 1504-1.12.

### **BURDEN OF PROOF**

The Petitioners, being the complaining parties, have the burden of proof to show by a preponderance of evidence that Respondent denied [REDACTED] a free appropriate public education. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); N.C. Gen. Stat. § 150B-34(a).

### **FINDINGS OF FACT**

1. On February [REDACTED], 2020, the Petitioners filed a Petition for a Contested Case Hearing (the “Petition”) against the Wake County Public School System (the “WCPSS” or the “Board”) alleging that the Respondent violated the Individuals with Disabilities Act (as amended, the “IDEA”) and North Carolina state law as set forth in N.C. Gen. Stat. §§ 115C-109.6 *et seq.*
2. Respondent filed its Response to the Petition on March [REDACTED], 2020.
3. On March [REDACTED], 2020, Respondent filed a Motion to Continue Hearing. The ALJ granted the Motion to Continue on March [REDACTED], 2020.
4. On March [REDACTED], 2020, the Parties filed a Joint Protective Order. On the same day, the ALJ issued the Protective Order for the production of certain confidential personnel records and information.
5. On April [REDACTED], 2020, the Parties filed a Joint Notice of Mediation notifying the ALJ that mediation would be held on April [REDACTED], 2020.
6. On April [REDACTED], 2020, the ALJ issued an Amended Scheduling Order scheduling the Due Process Hearing to start on June [REDACTED], 2020. On the same day, the ALJ issued a Notice of Prehearing Conference for June [REDACTED], 2020.

7. On May █, 2020, Petitioners filed a Motion for Leave to Amend the Petition, which was granted by the ALJ on May █, 2020.
8. On May █, 2020, Petitioners filed the Amended Petition, alleging:
  - a) The WCPSS failed to offer █ a FAPE in the least restrictive environment;
  - b) The WCPSS failed to employ appropriate placement procedures and predetermined █'s placement, unnecessarily removing █ from her nondisabled peers;
  - c) The WCPSS failed to develop and implement substantively and procedurally appropriate IEPs;
  - d) The WCPSS failed to provide █ with the appropriate and necessary related services;
  - e) The WCPSS failed to consider providing █ with appropriate supplemental aids and services to enable her to be educated with her nondisabled peers in the general education classroom;
  - f) The WCPSS failed to comply with the procedural and substantive requirements of the IDEA, significantly impeding █'s parents' participation in the provision of FAPE to █ resulting in educational harm to █ and causing a loss of educational benefit;
  - g) The WCPSS failed to timely and properly evaluate █ in conformity with the IDEA to understand █'s present levels of performance and gather information related to █'s disability-related behaviors that were impeding her learning;

- h) The WCPSS failed to provide ██████'s parents with proper notice of the decisions made regarding the provision of FAPE to ██████ and misrepresented information about ██████'s educational programming and the use of seclusion and restraint;
  - i) The WCPSS failed to utilize research-based interventions with ██████ to address her disability-related behaviors and failed to develop an appropriate BIP for ██████
  - j) The WCPSS inappropriately included seclusion on ██████'s BIP and inappropriately utilized seclusion and restraint against ██████ as punishment;
  - k) The WCPSS failed to follow the requirements set forth in Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act prohibiting discrimination on the basis of a person's disability; and
  - l) The WCPSS failed to follow the requirements set forth in the IDEA.
9. On May ██████, 2020, the ALJ issued a Notice of Definite Hearing Date Voided (Due to Amended Petition). The ALJ then reissued an Order Setting Due Process Hearing to start on June ██████, 2020.
10. On May ██████, 2020, the Parties filed a Joint Motion to Continue the Due Process Hearing.
11. On May ██████, 2020, Respondent filed its Response to Petitioners' Amended Petition.
12. On June ██████, 2020, the Parties jointly filed a Motion for Scheduling Order.
13. On June ██████, 2020, the ALJ adopted the Parties' Proposed Scheduling Order Setting Due Process Hearing to start on August ██████, 2020.
14. On June ██████, 2020, the ALJ issued an Amended Scheduling Order delaying the due date

for dispositive motions until June █, 2020.

15. That same day, the Parties filed a Joint Motion to Amend the Scheduling Order. On June █, 2020, the ALJ issued a Second Amended Scheduling order setting the date for dispositive motions as July █, 2020.
16. On June █, 2020, Petitioners filed a Motion to Compel Discovery. Respondent filed its response on June █, 2020.
17. On July █, 2020, the Tribunal denied Petitioners' Motion to Compel Discovery.
18. On July █, 2020, Petitioners filed their Motion for Partial Summary Judgment. Respondent also filed a Motion for Partial Summary Judgment.
19. On July █, 2020, Petitioners filed a Rule 60 Motion to correct a clerical error. This Motion was granted by the Tribunal on July █, 2020.
20. On July █, 2020, Petitioners filed their Response to Respondent's Motion for Partial Summary Judgment.
21. On July █, 2020, Respondent filed its Response to Petitioners' Motion for Partial Summary Judgment.
22. On July █, 2020, Petitioners filed a Motion for Leave to File a Reply to Respondent's Response to Petitioners' Motion for Partial Summary Judgment. That same day, the Tribunal denied Petitioners' Motion for Leave to File a Reply.
23. On August █, 2020, the Parties filed a Second Joint Motion for Consent Protective Order which was adopted by this Tribunal.
24. On August █, 2020, Petitioners filed a Motion to Sequester Witnesses which was granted at the beginning of the hearing.
25. On August █, 2020, the Parties filed a Joint Motion to Continue the Due Process

Hearing until August █, 2020. That same day, the Tribunal granted the Parties' Motion to Continue.

26. On August █, 2020, the Tribunal denied Petitioners' Motion for Partial Summary Judgment and granted Respondent's Motion for Summary Judgment dismissing Petitioners' claims prior to February █, 2019.
27. On August █, 2020, Respondent filed a Partial Motion to Dismiss Petitioners' ADA and Section 504 claims which was granted at the start of the hearing on August █, 2021.
28. Before the hearing on August █, 2020, Respondent filed a Motion in Limine to exclude several of Petitioners' exhibits as well as to prevent testimony on the exhibits. Oral arguments were made that morning by both Parties before the Tribunal. The ALJ reserved ruling on the Motion since it was not clear how the evaluations would be used. Ultimately, during the testimonies of Petitioners' expert witnesses, the May █, 2020 Informal Dynamic Social Comm. and Pragmatic Language Assessment and Recommendations (Pet. Ex. 29) and the May █, 2020 Psychoeducational (Pet. Ex. 30) evaluation were admitted. However, the July █, 2020 Occupational Therapy Evaluation (Pet. Ex. 31) was excluded,
29. On August █, 2020, the Parties filed a Final Proposed Pre-Trial Order.
30. The initial hearing in this matter encompassed ten (10) days of hearings, from August █, █, and █, and September █, █, 2020.
31. At the close of Petitioners' Case-in-Chief on September █, 2020, Respondent moved to dismiss portions of Petitioners' case pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. The Tribunal denied Respondent's Motion.

32. During the due process hearing, Petitioners orally made a Motion for Reconsideration regarding the granting of Respondent's Motion for Partial Summary Judgment.
33. On October █, 2020, the Tribunal granted Petitioners' Motion for Reconsideration and allowed Petitioners to present evidence as to whether the Petitioners knew or should have known about how CPI techniques, restraint, seclusion, and "time-in" were actually used within the BIPs prior to February █, 2019, and to present evidence on the appropriateness of the restraints and seclusions prior to February █, 2019, if the statute of limitations is not applicable.
34. The hearing on the reconsideration issue was held on October █ and █, 2020.
35. Pursuant to the Post Hearing Order entered on October █, 2020, the Parties filed their respective exhibits with verifications, exhibits officially noticed, and the stipulated exhibits on October █, 2020.
36. Volumes 1-6 of the transcripts were received on October █ and █ 2020. The remainder of the transcripts were received from March █ through █ 2021.
37. Petitioners filed a Motion to Exclude Evidence Exhibits A-X on April █ 2021 because Respondent had not produced these documents during discovery.
38. After seeking clarification of whether Petitioners had renewed their Motion to Compel these documents and being advised that they had not, Petitioners' Motion to Exclude was denied on April █ 2021.
39. Both Parties filed their Proposed Final Decisions on May █ 2021.
40. On June █ 2021, the Final Decision deadline was extended from July █ 2021 to July █ 2021 by Chief Administrative Law Judge Julian Mann.
41. The █th Grade Report Card, Stipulated Exhibit 33, was inadvertently not filed in the

record with the other Stipulated Exhibits and this mistake was corrected on July [REDACTED] 2021.

42. During a review of the extensive record, the Parties were asked to provide supplemental information regarding certain evidence and additional legal authority.

The Parties responded on July [REDACTED], 2021.

43. The record thereafter was closed.

44. The Final Decision was issued on July [REDACTED] 2021.

45. On August [REDACTED] 2021, Respondent filed its Notice of Appeal described above.

46. On August [REDACTED] 2021, the undersigned State Hearing Review Officer (“SHRO”) was appointed to review the Decision. The records of the case received for review were contained on one (1) CD and 2 flash drives of the extensive Official Record.

47. At the time, North Carolina was one of eight (8) of states that has a “two-tier system” of administrative dispute resolution under the IDEA prior to each party filing a court action. Lisa Lukasik, *Special-Education Litigation: An Empirical Analysis of North Carolina’s First Tier*, 118 W. Va. L. Rev. 735, 745 (2016).

48. On September [REDACTED] 2021, the undersigned received via electronic submission Petitioners’ Written Arguments (“POB”) and Respondent Board’s Written Arguments to State Review Officer (“ROB”).

49. Prior to the hearing, the ALJ granted the Board’s partial motion for summary judgment, limiting the time period to be considered in the due process hearing from February [REDACTED] 2019 through February [REDACTED] 2020. That order was based on the facts presented to the ALJ at the time that Petitioners knew or should have known of the factual basis for their older claims at the time those claims arose, and that Petitioners could not show

any exception to the statute of limitations.

50. During the hearing, certain testimony was presented raising questions of material fact concerning whether ██████'s Parents indeed knew or should have known of the issues they complained about and whether there was evidence to support any of the statutory exceptions to North Carolina's one-year statute of limitations. The ALJ reasonably determined that the credibility of the EBS teacher, ██████████, was a key factor for granting reconsideration. As indicated in the ALJ's Findings of Fact, the ALJ reasonably found that Mr. ██████'s credibility ultimately undermined much of WCPSS' case.

51. On October █ 2020, the Tribunal granted Petitioners' Motion for Reconsideration and allowed the Parties to present any additional evidence as to whether the Petitioners knew or should have known about how CPI techniques, restraint, seclusion, and "time-in" were used prior to February █ 2019. If the statute of limitation was found not applicable to those claims, the Parties were afforded an opportunity to present evidence on the appropriateness of the implementation of the restraints and seclusions prior to February █ 2019.

52. Petitioners presented additional evidence on the issue in two days of supplemental hearings. Respondent presented no further evidence other than entering several exhibits.

53. Having reviewed all the evidence and testimony from the hearing, including the supplemental exhibits and testimony, the ALJ addressed the limitations issue on reconsideration.

54. The ALJ reasonably found, pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, that there

were questions of material fact as to whether the Petitioners knew or should have known about the use of restraint and seclusion prior to February █ 2019. Accordingly, the ALJ reversed her prior Order Granting Respondent Motion for Partial Summary Judgment, denying WCPSS Partial Summary Judgment on that particular issue.

55. Accordingly, claims regarding the implementation of the student's BIPs prior to February █ 2019, were now at issue in the hearing.

56. Correspondingly, the ALJ's Findings in her Decision started at the beginning of █s █rd grade year at █.

57. Additionally, although the appropriateness of the IEPs developed prior to February █ 2019, were not at issue, the ALJ appropriately allowed presentation of and referenced, facts regarding those IEPs for context and historical purposes only.

58. The December 2017 BIP is substantially similar to subsequent BIPs developed prior to the last BIP created in January 2020. Accordingly, the ALJ appropriately copied the December 2017 BIP into her Decision for the implementation issue prior to February █ 2019, for historical purposes, and as a helpful reference to certain contents of all other BIPs prior to the creation of the January █ 2020 BIP.

59. The Parties agreed to Jurisdictional, Party, and Legal Stipulations and Factual Stipulations in a Proposed Pre-Trial Order, which was approved and filed in the Office of Administrative Hearings (the "OAH") on August █ 2020. To the extent that Stipulations are not specifically stated herein, the Stipulations of Fact in the Order on Pre-Trial are incorporated fully by reference.

60. To the extent the Findings of Fact contain conclusions of law, or the Conclusions of

Law are findings of fact, they should be considered without regard to their given labels.

61. The ALJ carefully considered the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding.
62. The ALJ's findings of fact were "regularly made" and they are entitled to be considered *prima facie* correct.
63. The ALJ has appropriately thoughtfully and carefully weighed the evidence presented and has assessed the credibility of the witnesses by taking into account appropriate factors for determining credibility, such as: the demeanor of the witnesses; any interests, bias, or prejudice the witnesses may have; the opportunity of the witnesses to see, hear, know and remember the facts or occurrences about which the witnesses testified; whether the testimony of the witnesses is reasonable; and whether the testimony is consistent with other believable evidence in the case, including verbal statements at IEP meetings, IEP meeting minutes, IEP documents, Prior Written Notices, and all other competent and admissible evidence.
64. The Board admits that "It is true that school staff used the phrase 'time out' to mean 'seclusion' when each has its own statutory definition." ROB at 5.
65. Again, on this score, the Board admits "While the ALJ may correctly have identified that the staff could have been clearer in their explanations, ..."
66. The Board concedes in the final paragraph of its opening brief "While by no means perfect, the programming at [REDACTED] ROB at 34.
67. Unless specifically countermanded herein and with the exception noted in the

paragraph below, this SHRO finds, on the issues before him in this review, that the Findings of Fact in Judge Bawtinhimer's Decision are an accurate recitation of the relevant, material facts as presented at the hearing and in the evidence before the administrative Tribunal.

68. At the bottom of page 47 of the Decision, there appears to be a misnumbering of the Findings of Fact. This numerical error in no way detracts from the painstaking attention to detail of the ALJ concerning the extensive record before her and to the overall quality of her Decision.

69. The Fourth Circuit has held that "[IDEA] hearing officers operate under tight time constraints--in non-expedited cases, a written opinion must be issued within 45 days after a request for a due process hearing is received. [citation omitted] .... Under these circumstances, hearing officers (who have no state-provided law clerks or clerical support) cannot be expected to craft opinions with the level of detail and analysis we expect from a district judge. By rejecting the hearing officer's opinion in this case for lack of detail, the district court improperly held the hearing officer to a standard not dictated by statute or case law and one which ignored the constraints under which an IDEA hearing officer operates." *J.P.*, 516 F.3d at 263. Although the hearing officer's decision in *J.P.* was quite short, the Fourth Circuit has held that "our case law has never suggested that any particular level of detail is required in the hearing officer's decision. If anything, our case law suggests that the level of detail required of a hearing officer is relatively low." *Id.* at 262.

70. By way of contrast to the hearing officer in *J.P.*, the ALJ's Decision is 105 pages, single-space. Accordingly, the hearing officer's decision is entitled to a presumption

of correctness. The odd typographical error is entirely expected.

71. Unless specifically overridden herein, this SHRO adopts the Findings of Fact, Conclusions of Law and affirms the relief awarded by the ALJ in her Decision, incorporating them herein by this reference. This SHRO also makes the additional findings, adds the following analysis pertaining to this review and draws the supplementary conclusions of law below.

#### **ADDITIONAL FINDINGS, ANALYSIS & CONCLUSIONS OF LAW**

Under IDEA and its regulations, each party has the right to findings of fact and a decision. 34 C.F.R. 300.509(a)(5). Whether directly or after a hearing officer's decision at the administrative level, each party has the right to bring a civil action in a state or federal court, which has the authority to "grant the relief that the court determines to be appropriate" [34 C.F.R. 300.512(b)(3). Emphasis supplied.] In Burlington Sch. Committee v. Dept. of Educ. of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996 (1985), the Court held that under IDEA a court has broad authority to fashion appropriate relief to realize the purposes of IDEA, considering all equitable factors.

Since Burlington, the Office of Special Education Programs ("OSEP") and certain courts have stated that a hearing officer has the same broad authority as a court to grant any such appropriate relief under IDEA.

In Cocares v. Portsmouth Sch. Dist., 18 IDELR 461, 462-3 (U.S.D.C. NH 1991), the Court held that given the importance that IDEA places on the protections afforded by the administrative process,

the hearing officer's authority to award relief, including compensatory education, must be coextensive with that of the court. The Court went on to state that to find otherwise "would make 'the heart of the [Act's] administrative machinery, its impartial due process hearing' less than complete." S-1 by and through P-1 v. Spangler, 650 F.Supp. 1427, 1431 (M.D.N.C. 1986, *vacated as moot*, 832 F.2d 294 (4<sup>th</sup> Cir. 1987), quoting Madecke v. School Bd. of Pinellas County, 762 F.2d 912, 919 (11<sup>th</sup> Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986).

See, also, *Stancourt v. Worthington City Sch. Dist.*, 841 N.E.2d 812, 830-831 (Ohio Ct. App. 2005): "Because a due process hearing is quasi-judicial in nature and consists of a hearing resembling a judicial trial, we conclude that a hearing officer in such a proceeding is vested with implied powers similar to those of a court."

The hearing before the ALJ occurred over 12 days, with numerous witnesses, whose testimony constituted well over 2,000 pages of transcript. The ALJ also reviewed over 100 documentary exhibits. The ALJ issued a thorough 105-page, single-space decision.

The ALJ's Decision includes extensive Findings of Fact. In her Decision, the ALJ correctly framed the issues, and the positions of the parties. She extensively cited to the transcript and the exhibits in detailing the educational program proposed for the student by the Board, describing the instructional techniques used at [REDACTED] and the method by which the student would receive instruction in specific areas. She comprehensively reviewed the student's educational needs and the proposed services for the student at [REDACTED]. She stated the ways in which the [REDACTED] Program was appropriate and met the student's educational needs.

The ALJ also made express findings concerning witness credibility and weight. Among other things, she summarized the various IEP meetings and the parties' familiarity with the educational programs at [REDACTED] and [REDACTED]. She expressly held that the Board's expert witness, Dr. [REDACTED], "had no first-

hand knowledge of the teaching methods particular to ██████ which were in the EBS classroom at ██████  
██████ Decision at 23.

Further, the ALJ found that “[w]hile Dr. ██████ is credible and highly qualified as a psychiatrist, her testimony was based on conversations with Mr. ██████ therapy notes; and documents from ██████s cumulative education record and EC file. She had never met ██████ did not speak with ██████s current or former treating psychiatrist, did not even review all available neuropsychological evaluations or gather information about the therapies ██████ had received prior to her testimony. The primary purpose of her testimony was to opine that ██████ had been misdiagnosed as bipolar, an issue not before this Tribunal. She also speculated that medication changes could have contributed to the escalation in ██████s behaviors. Dr. ██████ testimony will be given appropriate weight in this decision regarding those issues.” Decision at 23-4.

The SHRO agrees with counsel for the Board that Dr. ██████ testimony captured in the offer of proof at the hearing should have been allowed by the ALJ for the reasons presented. *See, e.g.*, ROB 18-21. However, after considering the offer of proof and the Board’s well formulated arguments, the SHRO declines the invitation to overturn the ALJ’s findings and conclusions for the following reason. In weighing the respective testimony of these 2 experts, the SHRO notes, importantly, that key impediments still attach to the opinions of Dr. ██████ namely that Dr. ██████ had never met the student, did not speak to the student’s current or former treating psychiatrist, did not even review all available neuropsychological evaluations, etc., as described above. Accordingly, the SHRO finds the expert testimony of the Petitioners’ expert more compelling.

The ALJ articulated reasons as to why she favored one expert over another. For example, in assessing the “considerable” weight to be afforded to Dr. ██████ one of the Petitioners’ 3 expert witnesses, the ALJ provided a cogent and compelling rationale for her position, including that “Dr.

██████████ had direct contact with ██████████ and her family as part of gathering information to form the basis of her opinions about ██████████'s educational programming and her preparation to testify on ██████████'s behalf. Dr. ██████████ reviewed ██████████'s educational record. In addition, Dr. ██████████ observed ██████████ virtually at ██████████ ██████████" Decision at 19. "The [ALJ] found Dr. ██████████ to be credible and knowledgeable about ██████████'s unique circumstances and disability based on her review of ██████████'s educational records, evaluations, meeting with ██████████ and her parents, and observing ██████████ in her private placement." *Id.*

Mr. ██████████ was clearly a critical witness for the Board. Concerning the ALJ's finding that "Mr. ██████████'s creditability was questionable and ultimately undermined much of WCPSS' case" (Decision at 10), the ALJ provided substantial reasoning, citing frequently to the record:

"Mr. ██████████ testimony frequently did not align with the documentary evidence in the case, conflicted with his previous testimony, or his recollection of events was unsubstantiated from the record or other testimony. *Compare* Tr. vol. 8, 1578:23-1579:4 (Mr. ██████████ testifying ██████████ received social skills instruction with all EBS II students) *with* Tr. vol. 8, 1586:19-1587:9 (Mr. ██████████ testifying he did not provide social skills materials in discovery) *and* 1619:10-15 (Mr. ██████████ testifying he does not have data on when a particular strategy was used with ██████████ *compare* Tr. vol. 8, 1633:22-1634:6 (Mr. ██████████ testifying in cafeteria incident video ██████████ would have jumped in the air but he would not have lifted her) *with* Pet. Ex. 78 (Video of ██████████ being restrained and lifted by Mr. ██████████ *compare* Tr. vol. 8, 1547:5-12 (Mr. ██████████ did not have an individual schedule) *with* Tr. vol. 8, 1549:1-7 (Mr. ██████████ testifying he wrote ██████████ a personalized schedule). Tr. vol. 8, 1571:11-16, 1572:11-13 (Testifying ██████████ was secluded on November ██████████ 2017, but it was not reported on the Google Form); *compare* Tr. vol. 7, 1485:15-1486:5 (Mr. ██████████ testifying he showed ██████████'s parents the seclusion room prior to ██████████ beginning ██████████ grade) *with* Tr. vol. 8, 1534:12-1535:12 (Mr. ██████████ equivocating on cross about showing ██████████'s parents the seclusion room and saying he was unable to remember when he showed it to them but that it was part of standard procedure)...

For these reasons, as well as his demeanor during his testimony, Mr. ██████████ was not credible as a fact witness; nor was his testimony credible regarding ██████████'s educational programming, the policies, and practices employed in the WCPSS for students assigned to the EBS program, CPI techniques or when the use of restraint and seclusion is necessary.

Mr. ██████████ testimony was not bolstered or rehabilitated by WCPSS' other witnesses from ██████████ WCPSS central office, or by its expert witness.

Mr. ██████████ was admonished twice to answer questions during his cross-examination. See Tr. vol. 8, pp. 1555:19-1556:15; 1566:17-1567:11. It was his testimony which caused the [ALJ] to reconsider previously dismissed claims. His lack of credibility cast doubt on WCPSS entire case. He is perhaps the only witness in a special education contested case hearing that the [ALJ] has questioned his creditability on the record. Tr. vol. 8, p. 1644:305.

Except in the few occasions where his testimony was corroborated with documentary evidence, the [ALJ] gave it little or no weight.”

Decision at 24-25.

The ALJ found that Respondent’s witnesses, other than Mr. [REDACTED] were credible but lacked the degree of specific knowledge pertaining to the material issues at hand possessed by the Petitioners’ witnesses. *See, generally, POB* at 32-36. Accordingly, the ALJ appropriately gave greater weight to the Petitioners’ witnesses and their respective positions. It should be noted that “credibility” when used of the Respondent’s witnesses other than Mr. [REDACTED] is used by the ALJ in the same sense as that utilized by the Fourth Circuit in the [REDACTED] case:

“We find nothing improper or unusual in the hearing officer's statement that he found all witnesses credible. As we understand it, the statement simply means that the hearing officer determined that all of the witnesses believed what they told the hearing officer. That is, the statement reflects the hearing officer's view that, for example, the School Board's witnesses believed [REDACTED] made progress under the 2004 IEP and thus were not lying when they testified to that effect, and the parents' witnesses similarly believed [REDACTED] regressed under the 2004 IEP and thus were not lying when they testified to that effect. The hearing officer's belief that all of the witnesses were testifying about the facts as the witnesses perceived them to be does not mean, as the district court concluded, that the hearing officer must have accepted as true "disparate, sometimes dramatically opposed, recitations of fact." J.A. 1829. It means only that the hearing officer could not dispose of the case by branding the witnesses of one side or the other as dissemblers unworthy of belief, and that the hearing officer was therefore required to decide whether he found the School Board's evidence or the parents' evidence to be more persuasive.”

The ALJ was mindful not to succumb to the temptation of improperly substituting her own views concerning appropriate education to those of the professional educators:

“The professional judgment of teachers and other school staff is an important factor in evaluating an IEP. “Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.” *Hartmann by Hartmann v. Loudon Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997).

A judge may not substitute her “own notions of sound educational policy for those of the school authorities” whose decisions are under scrutiny.” Rowley, 458 U.S. at 206-07 (stating that “courts must be careful to avoid imposing their view of preferable educational methods upon the States”).”

Decision at 81.

As the Fourth Circuit has repeatedly affirmed, in IDEA cases so long as the administrative hearing officer’s findings are “regularly made,” they should be considered prima facie correct. *A.B. v. Lawson*, 354 F.3d 315, 325 (4th Cir. 2004) (quoting *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991)); *J.P. v. County School Board of Hanover*, 516 F.3d 254, 258-59 (4th Cir. 2008); *Z.P.*, 399 F.3d at 306-07. In this case, there is no question that the ALJ’s detailed findings were regularly made. She allowed the parties to call all the witnesses they chose. She herself was engaged and involved in the hearing, asking her own questions of a number of witnesses. She kept the hearing focused and allowed the parties to summarize their respective factual legal and positions in legal briefs; and she issued a detailed, thoroughly cited written decision. *Cf. J.P.*, 516 F.3d at 260 (“[T]he hearing officer conducted a proper hearing, allowing the parents and the School Board to present evidence and make arguments, and the hearing officer by all indications resolved the factual questions in the normal way, without flipping a coin, throwing a dart, or otherwise abdicating his responsibility to decide the case.”).

The Fourth Circuit has further underscored that in reviewing administrative findings, courts must have due regard for the Hearing Officer’s opportunity personally to hear the testimony and assess the weight and credibility of the witnesses. *See Doyle*, 953 F.2d at 104-05; *A.B.*, 354 F.3d at 327-28; *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1000-01 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998); *M.M. v. School Dist. of Greenville County*, 303 F.3d 523, 538 (4th Cir. 2002); *J.H. v. Henrico County Sch. Bd.*, 395 F.3d 185, 197; *Z.P.*, 399 F.3d at 306-07. Indeed, that Court often has reversed district courts that had overturned administrative decisions after reweighing the evidence or facts. *See, e.g.*,

*Hartmann*, 118 F.3d at 1000-01; *M.M.*, 303 F.3d at 538; *A.B.*, 354 F.3d at 332; *J.H.*, 395 F.3d at 197; *Z.P.*, 399 F.3d at 309; *J.P.*, 516 F.3d at 262.

Respecting the assessments of the hearing officer/ALJ who personally heard all the testimony is particularly important where – as here – the opinions of expert witnesses are involved. See *A.B.*, 354 F.3d at 327-28. As one district court aptly stated, “[f]aced with such contradictory testimony, the fact-finder, who has the advantage of hearing the witnesses, is in the best position to assess credibility.” *Montgomery County Board of Education v. Hunter*, 84 F. Supp. 2d 702, 706 (D. Md. 2000) (citation omitted).

It is clear under IDEA that a hearing officer’s findings do not cease to be regularly made simply because they do not talk specifically about the testimony of each and every witness of one side or the other. As the Fourth Circuit said in response to such an argument in *A.B.*, “The ALJ carefully considered the views of [the student’s] experts . . . , implicitly finding them unconvincing while crediting the contrary views of [the school district’s] experts.” 354 F.3d at 327-28. And in *Z.P.*, the Fourth Circuit wrote that its earlier decision in *Doyle*, “does not require the hearing officer to explain in detail its reasons for accepting the testimony of one witness over that of another.” 399 F.3d at 306. (Emphasis added, but italics in original).

This same issue was squarely addressed by the Court in *Brown*:

Though the Hearing Officer did not explicitly state that she found Brown’s witnesses to be more credible than those of the School Board or refute the School Board’s evidence, *such an explanation is not required by IDEA or applicable case law*. Furthermore, *it is implicit in the Hearing Officer’s decision that she considered the evidence before her and found Brown’s evidence to be more persuasive on some points and the School Board’s evidence to be more persuasive on others*. It is not for this Court to question or judge the credibility determinations of the Hearing Officer who actually heard and evaluated the testimony presented. . . .

. . . [Furthermore,] *it would be impossible for the Hearing Officer to have discussed all of the factual evidence presented in the record when rendering her decision*. Thus it was entirely appropriate for the

Hearing Officer to focus on the facts that were most relevant in reaching her ultimate conclusions. Thus, the Court finds that the Hearing Officer's consideration of the evidence and testimony presented was sufficient to afford her findings the deference required under *Rowley* and *Doyle* and, accordingly, this Court will take the findings of the Hearing Officer as prima facie correct.

769 F. Supp. 2d at 939-40 (citations omitted; emphasis added).

Though the ALJ here did not discuss all 2,000 pages of transcript, her Decision discussed a good bit of it.

While to her credit she did, the ALJ did not have to explain why she credited the Petitioners' witnesses over the Respondent's. IDEA does not require that the hearing officer expressly parse the testimony of every witness and explain why she rejects it. *A.B.*, *Z.P.*, and *R.T.* are cases where the court agreed a hearing officer could make adverse credibility determinations on an implicit basis.

In sum, the ALJ's findings far exceed this Circuit's requirements for detail and content. The ALJ need not cite to every scrap of testimony that supports her factual conclusions, nor discuss every one that does not.

For example, the Fourth Circuit in *J.P. v. County School Bd. of Hanover*, 516 F.3d 254, 259 (4th Cir. 2008), determined that the hearing officer's decision was sufficient. Review of that decision shows that the hearing officer there cited to no evidence at all. It was truly "bare bones," while the ALJ's decision here contains extensive discussion, heavily cited to the record.

If the decision fails to include or adequately explain some necessary finding – something which the SHRO in no way suggests – then the appropriate course of action would be to remand to the ALJ to amplify or clarify her findings. *J.H. v. Henrico County School Board*, 326 F.3d 560, 568-69 (4th Cir. 2003); *J.H. v. Henrico County School Board*, 395 F.3d 185, 197 (4th Cir. 2005); *Fairfax County School Board v. Knight*, 1:05cv459 (E.D. Va. Sept. 19, 2005); *Brian S. v. Vance*, 86 F. Supp. 2d 538 (D. Md. 2000), rev'd on other grounds sub nom. *Schaffer v. Weast*, 243 F.3d 540 (4th Cir. 2001); *S.H. v. Fairfax*

*County Public School Board*, No. 1:11-cv-128, at 1 (E.D. Va. Nov. 28, 2011) (order remanding case to hearing officer “for clarification of his decision”). While State law does not expressly require nor prohibit SHROs from remanding cases to ALJs, SHRO’s have such inherent authority.

Respondent’s evidence and the testimony of its witnesses were not persuasive to the ALJ – who had the opportunity to hear it firsthand, observe the witnesses’ demeanor, and weigh the evidence.

### **DECISION**

Accordingly, the SHRO upholds the decisions of the ALJ, the Petitioners having met their burden on all issues. .

ENTER: 5/13/2022

*John Robinson*

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John V. Robinson, Review Officer

## NOTICE

Any party aggrieved by this Decision may institute a civil action in state court within 30 days after receipt of this Decision as provided in N.C. Gen. Stat. § 115C-109.9 or file an action in federal court within 90 days as provided in 20 U.S.C. § 1415. Please notify the Exceptional Children Division, North Carolina Department of Public Instruction, in writing of such action so that the records for this case can be forwarded to the Court.

This 13<sup>th</sup> day of May, 2022.

*John Robinson*

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John V. Robinson, Review Officer

**CERTIFICATE OF SERVICE**

The foregoing DECISION was served on the attorneys for Petitioners and the attorneys for the Respondent via E-mail on May 13, 2022, addressed as follows:

**Stacey M. Gahagan**  
The Gahagan Law Firm, P.L.L.C.  
[sgahagan@ncgplaw.com](mailto:sgahagan@ncgplaw.com)  
*Attorney for Petitioners*

**Stephen Rawson**  
Tharrington Smith, L.L.P.  
[srawson@tharringtonsmith.com](mailto:srawson@tharringtonsmith.com)  
*Attorney for Respondent*

The foregoing DECISION was served on the Petitioners, North Carolina Department of Public Instruction, Dispute Resolution Consultant, Office of Administrative Hearings, and the Wake County Public Schools Board of Education via **regular U.S. mail**, addressed as follows:

Sherry Thomas  
Director, Exceptional Children’s Division  
North Carolina Department of Public Instruction  
6356 Mail Center  
Raleigh, NC 27699-6356

Teresa King  
Dispute Resolution Consultant  
Exceptional Children Division’  
NC Department of Public Instruction  
6356 Mail Service Center  
Raleigh, NC 27699-6356

Office of Administrative Hearings  
State of North Carolina  
6714 Mail Service Center  
Raleigh, NC 27699-6714

Dr. James Merrill  
Superintendent  
Wake County Public School System  
Board of Education  
5625 Dillard Drive  
Raleigh, NC 27518

This 16<sup>th</sup> day of May, 2022

*John Robinson*

\_\_\_\_\_  
John V. Robinson, Review Officer

cc: Teresa King, [Teresa.King@dpi.nc.gov](mailto:Teresa.King@dpi.nc.gov) & [Due\\_Process@dpi.nc.gov](mailto:Due_Process@dpi.nc.gov)