No. _____

In the
Supreme Court of the United States

R.F., a minor child, by and through
her PARENTS and next friends, E.F. and H.F.;
E.F.; H.F., on their own behalves,
Petitioners,

v.

CECIL COUNTY PUBLIC SCHOOLS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case raises the question of whether, pursuant to 20 U.S.C. § 1415(E)(ii),[1] a hearing officer may find a denial of a free appropriate education solely because the school district's violations of the Act's procedural safeguards "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child," or whether the parents must prove separately and additionally that the child was denied a free appropriate education or deprived of educational benefit as a matter of fact.

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[1] 20 U.S.C. § 1415(E)(ii) provides that, for procedural issues, a hearing officer may find that a child did not receive a free appropriate education "only if the procedural inadequacies (I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of education benefits.

PARTIES TO THE PROCEEDING

R.F. is a minor child, E.F. and H.F. are her parents and next friends. R.F., E.F. and H.F were plaintiffs-appellants in the proceedings below.

Cecil County Public Schools, D'Ette Devine, Superintendent, and Sarah Farr, Director of Special Education, were the defendants/appellees in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner R.F., by and through her parents and next friends, E.F and H.F.; E.F. and H.F. on their own behalves, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published at 919 F.3d 237 (4th Cir. 2019), and is reprinted in the Pet. App. A. The opinion of the United States District Court for the District of Maryland is unpublished but available at WL 3079700 (D. Md. June 21, 2018). It is reprinted at Pet. App. B. The written decision of the administrative law judge of the Maryland Office of Administrative Hearings is unpublished but can be found at the Maryland Department of Education's website at www.marylandpublicschools.org/programs/pages/special-education/FSDR/HearingDecisions. It is reprinted at Pet. App. C.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 25, 2019. Pet. App. A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and its implementing regulations at 34 C.F.R. § 300 *et seq.*, require school

districts to provide students with a free appropriate public education (FAPE) and in doing so comply with IDEA procedural requirements, including allowing for parent participation in the IEP process.

INTRODUCTION

Under the Individuals with Disabilities Education Act (IDEA), children with disabilities are entitled to a free appropriate public education (FAPE). 20 U.S.C. § 1400(d). R.F. is a child with a disability and is entitled to receive a FAPE. R.F. and her parents seek review of a decision by the Fourth Circuit Court of Appeals denying their claim that Cecil County Public Schools (CCPS) denied R.F. a FAPE when it violated the Act's required procedures so as to significantly impede R.F.'s parents' opportunity to participate in decisions related to developing R.F.'s educational program and the provision of a FAPE. The specific procedural violations recognized by the Fourth Circuit, the district court and the Administrative Law Judge were (1) on one occasion CCPS changed R.F.'s educational program without consulting with or providing notice about the changes to R.F.'s parents, and (2) CCPS destroyed objective data collected on R.F.'s performance and progress, depriving R.F.'s parents access to her complete educational records. Further, although not addressed in the Fourth Circuit's decision, the undisputed evidence shows that (1) on multiple occasions CCPS changed R.F.'s educational program without consulting with or providing notice about the changes to R.F.'s parents; (2) CCPS failed to hold IEP meetings to review and revise R.F.'s IEP when R.F.'s program rendered her unable to make

progress toward her academic and behavioral goals; (3) CCPS failed to review and revise R.F.'s Behavioral Intervention Plan when R.F.'s program caused her behaviors to become more challenging, interfering, and disruptive; and that (4) CCPS predetermined R.F.'s educational program prior to the December 2016 IEP meeting and merely documented the changes that CCPS had previously made to R.F.'s program outside of the IEP process and without the parents' participation, consent, or knowledge.

STATEMENT OF THE CASE

I. Legal Background

Recognizing that millions of children with disabilities were either excluded from school entirely or receiving an inadequate education, Congress passed P.L. 94-142, 89 Stat. 773 (1975), the Education for All Handicapped Children Act (EAHCA) of 1975. 20 U.S.C. § 1400(c)(2). The Act was renamed the Individuals with Disabilities Education Act (IDEA) in 1990. Pub. L. No. 101-476, § 901, 104 Stat. 1103 (1990). The IDEA, 20 U.S.C. § 1400 *et seq*., requires state and local education agencies to assure that eligible children with disabilities receive a "free appropriate public education" (FAPE) and that the rights of children with disabilities and their parents are protected. § 1400(d)(1)(A)-(B). The "primary vehicle" through which a FAPE is delivered is the child's individualized education program (IEP). *Honig v. Doe*, 484 U.S. 305, 311 (1988).

Congress understood the fundamental partnership between parents and schools in the educational process, and so it drafted the Act so as to require schools to include parents as equal members of the IEP team responsible for the development, review, and amendment of a child's educational program. § 1414(d)(1)(B). In addition, Congress set forth extensive requirements for parental participation in all the decisions affecting their child's educational program. Parent consent is required before a school district can conduct any evaluation of the child or initiate special education services. § 1414(a)(1)(D). Parents have a right to examine their child's educational records and participate as equal members of the IEP team that develops and/or revises the IEP. § 1415(b)(1). A school district must notify parents in writing in advance any time it proposes to initiate a change or refuses to change the child's educational program. § 1415(b)(3). Schools are required to provide periodic reports to parents of the child's progress toward IEP goals, § 1414(d)(1)(A)(i)(III), and conduct an IEP meeting *with the parents* to review and revise the child's IEP if the child is not making expected progress toward those goals. § 1414(d)(4)(A)(ii). If parents are dissatisfied with their child's educational program, they have the right to seek mediation and administrative and judicial review. § 1415(e) and (f) and (i)(2).

The courts have long recognized the critical role parents play in educational planning—particularly for students with IEPs. The Act first came under the review of this Court in *Bd. of Educ. v. Rowley*. 458 U.S. 176, 187 (1982), wherein the Court established a two-

part test to determine whether a school district had offered a FAPE. First, did the school comply with the procedures set forth in the Act in developing the student's IEP? Second, was the IEP "reasonably calculated to enable the child to receive educational benefits?" *Id*. at 206-07. Thus, the Court established that FAPE not only requires that the IEP be substantively adequate, but also that the school district meet procedural compliance in its development. While *Rowley* focused its attention primarily on the substantive aspect of the FAPE inquiry (because the Act's definition tended more "towards the cryptic rather than the comprehensive." *Id*. at 188), the Court also recognized the critical role of the Act's Procedural Safeguards in assuring the provision of a FAPE stating

> when the elaborate and highly specific procedural safeguards embodied in 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid.

Id. at 205.

The Court further noted the importance of adherence to the procedural requirements of the Act stating, "adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content of the IEP." *Id.* at 206. Among the panoply of procedural requirements of the Act is parental participation in the development of the IEP. § 1414(d)(1)(B)(i).

More specifically, the *Rowley* Court noted the Act's emphasis on parent participation stating "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process … as it did upon the measurement of the resulting IEP against a substantive standard." *Id.* at 205-06. In subsequent decisions, this Court has continued to recognize the Act's emphasis on parent involvement. See *Burlington Sch. Comm. v. Dept. of Educ. of Massachusetts*, 471 U.S. 359, 368 (1985)("the Act emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness."); *Honig* at 308 ("the Act establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children."); *Schaffer v. Weast*, 546 U.S. 49, 53 (2005)("Parents and guardians play a significant role in the IEP process."); *Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 2000 (2007)("IDEA accords parents additional protections that apply throughout the IEP process."); *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2495(2009)("IDEA affords parents substantial procedural safeguards."); *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017)(The Act contemplates that development of the child's IEP will be a "fact-intensive exercise [that] will be informed not only by the expertise of school officials, but also by input of the child's parents."). It is against this backdrop that the instant case presents.

II. Factual Background

R.F., who was seven years old when this case began, is now a ten-year-old child with a disability as defined under the IDEA. 20 U.S.C. § 1401(3). She began receiving special education and related services when she was two years old through Cecil County Public Schools (CCPS) Infants and Toddlers Program. CCPS and R.F.'s parents collaboratively developed IEPs for R.F. when she was in pre-kindergarten (2014-2015 school year) and kindergarten (2015-2016 school year). R.F. is identified as having multiple disabilities, including autism. Her disabilities impact her education in numerous areas, and she presents with challenges in communication, aggressive behaviors toward peers and school personnel, and delays in fine motor coordination, gross motor coordination, social skills, peer relations, and toileting. R.F. cannot communicate verbally and instead, uses a communication device called a Nova Chat.[2]

R.F. attended kindergarten at Chesapeake City Elementary School during the 2015-2016 school year. In the Spring 2016, the school team met to develop an IEP for R.F. which would be implemented during the following school year (first grade - 2016-2017). CCPS also conducted a Functional Behavior Assessment (FBA) to assess the causes of R.F.'s significant behavioral challenges and, based on it, developed a Behavior Intervention Plan (BIP) which was appended

[2] A Nova Chat is an electronic device similar to an iPad with which the individual presses a picture, or a symbol, or a word, etc. and the device verbalizes the corresponding word or phrase.

to R.F.'s IEP. At the IEP meeting, R.F.'s parents expressed their concerns that R.F.'s needs were not met in the public school program, and they asked for R.F. to be placed at the Benedictine School for her first-grade year. Benedictine is a nonpublic school which specializes in working with children with multiple disabilities like R.F.'s. The CCPS team refused the parents' request and instead decided that R.F. would attend a program that, at the time of the meeting, did not exist.

The IEP team met again in July 2016, and informed R.F.'s parents at that time that R.F.'s placement for first grade would be at Gilpin Manor Elementary School (GMES), a CCPS school. R.F.'s IEP specified that she would attend general education classes for 14 hours and 35 minutes per week, with the rest of her week, 16 hours and 55 minutes, spent in the "Intensive Communication Support Classroom" (ICSC), a self-contained special education classroom, where R.F. would be the only student in the class. The family did not believe this program was appropriate for R.F. or would meet her needs, but they agreed to give it a chance. However, within three weeks of the start of the 2016-2017 school year, CCPS recognized that the program was not appropriate and unilaterally changed R.F.'s educational program by reducing her time in the general education setting and increasing her time in the ICSC. This change was made by CCPS without an IEP meeting and without notice to, or input from, R.F.'s parents. Consequently, instead of spending less than 17 hours outside of general education classes, as was specified on the IEP and as communicated to R.F.'s parents, R.F. spent approximately 26 hours per week

in the ICSC, where she was the only student in the class.

R.F. spent her entire day in the ICSC except for when she attended specials (music, art, media) in the general education classroom (30 minutes per day) and when she received speech therapy (one hour and 40 minutes per week), occupational therapy (one hour per week), and physical therapy (one hour per week). All of R.F.'s therapies were provided one-on-one. Because R.F. was the only student in the ICSC, she was isolated from her peers more than 90% of her day. Due to the inappropriate programming R.F. was provided, she increasingly engaged in many more inappropriate behaviors; e.g., hitting, biting, kicking, hair-pulling, and flopping to the ground.

At no point during the first half of the year did CCPS take any steps to meet in order to discuss or to remedy the fact that R.F.'s needs and programming were fundamentally different than what had been understood as of the last IEP meeting. Instead, it took until December 16, 2016, for CCPS to hold an IEP meeting, and this was only held due to the request made by R.F.'s parents after they became aware that R.F.'s program had been changed. At the meeting, R.F.'s mother stated that R.F. had not made progress, that her behaviors had worsened, that she received no benefit from the general education classes, and that the self-contained class was not appropriate for her because she was isolated from other children. R.F.'s mother asked the IEP team to place R.F. at the Benedictine School or another nonpublic placement where she could be educated in a class with other

children, where the program was more specialized, and where the staff were highly trained to address R.F.'s specific educational and behavioral needs. CCPS refused the request. Instead, the school documented the pre-determined program it had initiated and implemented months before, merely revising R.F.'s IEP to reflect its prior unilateral decision. As such, as of December 2016, the school's offer consisted of the same services and the same ineffective BIP that had caused R.F.'s behaviors to worsen over the past few months, with over 90% of her day spent in the ICSC where she made no academic progress and was isolated from her peers.

III. Proceedings Below

A. Administrative Hearing. R.F.'s parents filed a complaint for a due process hearing on January 17, 2017. Said complaint challenged the school's procedural failures that resulted in the parents being excluded from any meaningful participation in R.F.'s educational planning. Substantively, the complaint alleged that R.F. had regressed academically and her behaviors were interfering with her progress. Additionally, it alleged that R.F.'s programming and placement at GMES were inappropriate.

An administrative hearing was held before an Administrative Law Judge for five days spanning March 10 to April 4, 2017. Pet. App. C at 85. Prior to the hearing, the classroom teacher was served with a subpoena *duces tecum* to bring to the hearing all of the data required by the IEP which he had collected and relied upon to assess R.F.'s progress. The teacher appeared without the subpoenaed data and stated that

he had destroyed R.F.'s IEP data, contrary to CCPS policy requiring that all data and educational records be maintained for two years. The teacher claimed he was not aware of the school system policy, and further admitted that he had destroyed the data because someone else seeing it could possibly perceive it differently than he had. Pet. App. C at 153; Pet. App. F at 247.

R.F.'s teacher also admitted that the school had changed R.F.'s program in September without holding an IEP meeting or consulting with R.F.'s parents. Pet. App. F at 245-46. The ALJ found that this was a violation of the Act's procedures. Pet. App. C 161-162. During the hearing, it was further revealed that, after the December 2016 IEP meeting, CCPS had changed R.F.'s educational program *a second time*, again without holding an IEP meeting or notifying R.F.'s parents, and was not following the IEP as written. Although R.F.'s amended December 16, 2016 IEP stated that she would be in the general education setting for 30 minutes per day for specials only (art, media, or music), it was revealed that CCPS had once again unilaterally changed R.F.'s educational program and she was back in at least one general education class for academics. Pet. App. F at 248-250.

In her findings of fact, the ALJ found that R.F. had not made <u>any</u> progress toward her academic goals or toward her behavior goals. Pet. App. 122, ¶¶ e and f. Although it was acknowledged that R.F.'s program was not appropriate for her from the very start of the school year and that she did not make progress on her academic and behavioral goals, the ALJ did not address

the procedural violation that CCPS committed when it failed to act on R.F.'s demonstrated lack of progress. Other than the IEP meeting that had been requested by R.F.'s parents in December 2016, CCPS never convened any other IEP meeting, even though the Act required it to meet to address her lack of progress or challenging behaviors. 20 U.S.C. § 1414(d)(4)(A)(ii). Additionally, the ALJ found that the BIP did not address R.F.'s many challenging behaviors and that they continued to interfere with her progress in school. Yet the ALJ held that CCPS' failure to review or revise the BIP was not a violation of the Act's procedures, even though the ALJ described R.F.'s behaviors as "immensely disconcerting to everyone involved." Pet. App. C at 170.

Despite her findings that R.F. had not made any progress toward her academic goals or toward her behavior goals, the ALJ, nevertheless, found that R.F. had made progress appropriate in light of her circumstances. Pet. App. C at 176. Although the ALJ acknowledged that CCPS had committed multiple procedural violations, she decided that the violations had not impeded R.F.'s access to a FAPE. Pet. App. C at 163.

B. District Court. R.F. and her Parents filed a complaint with the District Court on August 31, 2017, to challenge the ALJ's decision. The parties filed cross motions for summary judgment. By consent of the parties, the case was decided by a Magistrate Judge. In a decision dated June 21, 2018, the Magistrate Judge granted CCPS' Motion For Summary Judgment and denied R.F.'s motion. *See* Pet. App. B at 82. R.F.

noted her appeal of the district court's decision on July 9, 2018.

C. Fourth Circuit. Oral argument before the Fourth Circuit took place January 29, 2019. The Fourth Circuit's opinion was issued on March 25, 2019. *See* Pet. App. A. The Fourth Circuit upheld the decision of the district court and the ALJ. Although the Fourth Circuit acknowledged that CCPS had violated the Act's procedures and R.F. had made no progress toward her academic and behavioral goals, and only "incremental progress" toward other goals, the Fourth Circuit held that this was enough to meet this Court's substantive standard for an IEP as set forth in *Endrew F.*

REASONS FOR GRANTING THE WRIT

The courts of appeals are split among themselves and within themselves on how to address procedural violations that significantly impede parents' opportunity to participate in the decision-making process concerning the provision of a FAPE. The inconsistency in decisions on this issue has reached the extent that it has led one commentator to note the "astonishing degree of judicial disarray concerning the consequence of procedural error." Jon Romberg, *The Means Justify the Ends: Structural Due Process In Special Education Law.*, 48 HARV. J. LEGIS. 415, 419 (2011). As discussed *supra*, this Court has consistently emphasized the importance of parent participation in the IEP process, yet the lower courts have struggled to understand how to determine when, or even whether, impeding parents' participation rights results in a denial of a FAPE. The well-developed set of facts and

the undisputed procedural violations this case presents make it an excellent case for this Court to resolve an issue that affects millions of children with disabilities and thousands of school districts.

I. The Courts of Appeal are in Disarray Over Whether a Violation of the IDEA's Procedures that Significantly Impedes Parents' Opportunity To Participate In The Decisionmaking Process Regarding The Provision of a FAPE Constitutes a Denial of a FAPE.

Notwithstanding this Court's consistent recognition of the importance of procedural compliance and parent participation in the development of a child's IEP, the Circuit Courts have been exquisitely inconsistent in their treatment of procedural violations. When Congress amended the IDEA in 2004, Pub. L. 108-446, 118 Stat. 2647 (2004), it included a new section, § 1415(f)(3)(E)(ii), in an apparent attempt to bring some clarity to the relationship between a procedural violation and a denial of FAPE. Section 1415(f)(3)(E) "Decision of a Hearing Officer" reads as follows:

> (i) In General. Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.
>
> (ii) Procedural Issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a

> free appropriate public education only if the procedural inadequacies-
> (I) impeded the child's right to a free appropriate public education;
> (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
> (III) caused a deprivation of educational benefits.

The plain meaning of § 1415(f)(3)(E)(ii) is that, by including the word "or," any one of the enumerated procedural violations may in itself constitute a denial of FAPE. However, the Circuits continue to remain split over when and to what extent a procedural violation that significantly impedes parent participation in the decision-making process can constitute a denial of FAPE. Thus, guidance from this Court is desperately needed to ensure that the goals of the Act are accurately and equitably applied.

Since *Rowley,* there has been a split among the Circuit Courts as well as within the Circuits themselves. In *Heldman v. Sobol*, 962 F.2d 148, 155 (2nd Cir. 1992), the Court held that "procedural rights in and of themselves, form the substance of IDEA… [and] Congress intended to create procedural rights the violation of which constitute injury in fact." However, in *Sch. Bd. of Collier Cty, Fla v. K.C.*, 285 F.3d 977, 982 (11th Cir. 2002), the Eleventh Circuit held a court must determine whether a procedural violation deprived the

student of a FAPE and that a procedural violation alone does not entitle a party to relief. Not long after this Court's decision in *Rowley*, the Fourth Circuit held that under *Rowley*, "failures to meet the Act's procedural requirements are adequate grounds by themselves for holding that the school failed to provide James a FAPE." *Hall by Hall v. Vance Cty Bd. of Educ.,* 774 F.2d 629, 635 (4th Cir. 1985). Subsequent decisions by the Fourth Circuit followed its holding in *Hall.* See *Hudson v. Wilson*, 828 F.2d 1059 (4th Cir. 1987), and *Bd. of Educ. of Cabell Cty v. Dienelt*, 843 F.2d 813, 815 (4th Cir. 1988). However, a different panel of the Fourth Circuit later held that a school district's refusal to consider the parents' private reports, though a procedural violation, did not deny the student a FAPE because "a violation of a procedural requirement of the IDEA … must actually interfere with the provision of a FAPE before the child and/or his parents would be entitled to reimbursement relief." *DiBuo v. Bd. of Edu. of Worcester Co.*, 309 F.3d 184, 190-91 (4th Cir. 2002).

In *W.G. v. Bd. of Trustees of Target Range Sch. Dist.,* 960 F.2d 1479, 1487 (9th Cir. 1992), the Ninth Circuit held that "Target Range failed to provide R.G. with a FAPE by failing to comply with the specified procedures for preparing the IEP." Subsequent to *W.G.*, the Ninth Circuit held that failure to provide parents with the student's relevant records interfered with the parents' participation in the IEP process, *Amanda J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 891-93 (9th Cir. 2001), and failure to include the child's private school teacher on the IEP Team and make sufficient efforts to ensure parent participation at the IEP meeting denied the student a FAPE. *Shapiro v.*

Paradise Valley Unified Sch. Dist. No. 69, 317 F.3d 1072, 1076-78 (9th Cir. 2003).

However, in a 2005 decision, a three-judge panel of the Ninth Circuit wrote three separate opinions in which each offered a different position on the effect of a procedural violation in relation to a FAPE. See *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634 (9th Cir. 2005).[3] At issue in *M.L.* was whether failure to include a general education teacher on the IEP Team constituted a procedural violation that resulted in a denial of a FAPE. *Id.* at 636. Judge Alarcón opined that the violation was a *per se* denial of FAPE. *Id.* at 650. Judge Gould's separate opinion concurred that failure to include the general education teacher on the IEP Team was a procedural defect, but did not agree that it was a *per se* denial of a FAPE. *Id.* at 651. Rather, Judge Gould wrote that the school's violation must be assessed for "harmlessness," and whether it resulted in a loss of educational opportunity. *Id.* at 656. Judge Gould concluded that failure to include the general education teacher on the IEP Team did result in a loss of educational opportunity. In his dissenting opinion, Judge Clifton agreed with Judge Gould that a procedural violation is not a *per se* denial of FAPE, but disagreed that failure to include the general education teacher on the IEP Team resulted in any loss of educational opportunity. *Id.* at 658.

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[3] Although the Court's decision in *M.L.* is dated January 14, 2005, the case was originally decided in November 2004, 387 F.3d 1101 (9th Cir. 2004) and later amended. Thus, the Court's opinion predates the July 1, 2005, implementation of the 2004 Amendments to the IDEA.

In *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001), the Court held that "a procedural violation of the IDEA is not a *per se* denial of a FAPE" and that such a violation will "constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents." However, the Court went on to note that "[s]ubstantive harm occurs when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process." *Id. See also Woods v. Northport Pub Sch. Bd. of Educ.,* 487 F. App'x 968 (6th Cir 2012)(finding substantive harm resulted when the "parents were denied meaningful participation in the IEP process when they were not given access to certain testing protocols.") Similarly, the Third Circuit, relying on *Knable,* held that a procedural violation that significantly impedes the parents' participation rights is a substantive denial of a FAPE and ordered tuition reimbursement and other relief. *Sch. Dist. of Phila v. Kirsch*, 722 F. App'x 215 (3rd Cir. 2018)(unpublished). (Notably, the Third Circuit's holding in *Kirsch* contradicts its prior holding in *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3rd Cir. 2010) where the court followed the Fourth Circuit's holding in *DiBuo v. Bd. of Educ.,* 309 F.3d 184, 190 (4th Cir. 2002), stating "a violation of a procedural requirement of the IDEA (or one of its implementing regulations) must actually interfere with the provision of a FAPE.")

Consistent with the holdings in *Knable* and *Kirsch*, the Second Circuit, citing to § 1415(f)(3)(E)(ii), reaffirmed its holding in *Heldman*, stating

> [e]ven when an IEP itself is not deficient, parents may seek reimbursement for a unilateral placement if the State fails to afford them certain procedural safeguards. Of particular importance here, the IDEA requires States to provide parents with the "opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child."

T.K. v. New York City Dep't of Educ., 810 F.3d 869, 875 (2nd Cir. 2016). At issue in *T.K.* was the school's refusal to discuss, during the IEP meeting, bullying the student had been subjected to at school and how that impacted her education. *Id.* at 874. The court held that "[d]enying L.K.'s parents the opportunity to discuss bullying during the creation of L.K.'s IEP not only potentially impaired the substance of the IEP, but also prevented them from assessing the adequacy of their child's IEP." *Id.* at 877. Parents have information about the child which is critical to the development and monitoring of the IEP which schools simply do not have. *See Amanda J. ex rel Annette J. v. Clark Cnty Sch.*, 267 F.3d 877, 891 (9th Cir. 2001)("because they observe their children in a multitude of different situations, [parents] have a unique perspective of their child's special needs."). When the parents' participation rights are seriously infringed, important information is excluded from the IEP, rendering it incomplete and inadequate.

> "Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA.

> An IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed."

Amanda J. at 892. The IEP is a tool which parents must be able to use "to monitor and enforce the services that their child is to receive." *M.C. v. Antelope Valley Union H.S. Dist.*, 858 F.3d 1189 1198 (9th Cir. 2017). But that tool is taken from the parents when they are denied participation in the development and monitoring of their child's IEP. A reviewing court, including an Administrative Law Judge, has neither the expertise nor the authority to evaluate the substantive appropriateness of an IEP in which parent input has been significantly limited. *See Rowley* at 206 (admonishing courts not to "substitute their own notions of sound educational policy for those of the school authorities which they review."). The *Rowley* Court underscored the important role of the Act's procedural safeguards, noting "adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content of the IEP." *Id.* at 206.

Although the word "or" in § 1415(f)(3)(E)(ii) establishes that any one of the enumerated procedural violations may in itself constitute a denial of FAPE, several circuits treat "or" as "and" and hold that any violation that significantly impedes the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE is not a denial of FAPE unless one of the other two specified violations is present. See *R.P. ex rel. R.P. v. Alamo*

Heights Indep. Sch. Dist., 703 F.3d 801, 810 (5th Cir. 2012) citing *Adam J. ex rel. Robert J. v. Keller Independent School District*, 328 F.3d 804, 812 (5th Cir. 2003)("procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of educational opportunity."); *M.B. v. Hamilton Southeastern Sch.*, 668 F.3d 851, 862 (7th Cir. 2011) ("M.B. was not substantively affected by any procedural errors, and it is the parents' burden to convince this court otherwise."); and *Urban v. Jefferson Cty Sch Dist.*, 89 F.3d 720, 727 (10th Cir. 1996)("Because the District's procedural violation did not amount to a substantive deprivation, however, there was no violation of Gregory's right to an appropriate education.)

Long before § 1415(f)(3)(E)(ii) was included in the 2004 Amendments to the IDEA, the First Circuit and the Eighth Circuit Courts of Appeals had adopted language similar to the statutory provision. See *Roland M. v. Concord Sch. Comm.,* 910 F.2d 983, 994 (1st Cir. 1990)("Before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits."); and *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 656 (8th Cir. 1999) "Procedural deficiencies in the development of a child's IEP warrant rejecting the IEP only if they compromised the pupil's right to an appropriate education, seriously hampered the parent's opportunity to participate in the formulation process, or caused a deprivation of educational benefits ."). The

use of the word "or" in both of these cases establishes that any one of the identified procedural violations could constitute a denial of a FAPE, just as stated in § 1415(f)(3)(E)(ii).

As the above illustrates, the Courts of Appeals are split in every direction possible on whether a FAPE is denied when procedural violations significantly infringe on the parents' opportunity to participate in the IEP process for their child. The 2004 Amendments to the IDEA have provided no clarity for the courts. Thus, there are four Courts of Appeals (First, Second, Eighth, and Ninth) which have held that it is a denial of a FAPE when a procedural violation significantly impedes the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE; four Courts (Fifth, Seventh, Tenth, and Eleventh) which hold that a procedural violation alone cannot be a denial of FAPE; two Courts (Third and Fourth) which have issued contradictory opinions; and two Courts (Third and Sixth) which hold that a procedural violation must cause substantive harm, but also find that significantly impeding the parents' participation causes substantive harm. Additionally, one cannot forget *M.L. v. Federal Way Sch. Dist.* in which the three judges each wrote different opinions.

II. The Fourth Circuit Misstated and Misinterpreted Section 1415(f)(3)(E) Which Resulted In Legal Error.

A. The Fourth Circuit redrafted the statute which altered the plain meaning and effect of the statute.

The plain meaning of § 1415(f)(3)(E)(ii) is that procedural violations can be of three different types. It would be redundant to require parents to have to prove a denial of a FAPE or loss of educational opportunity in addition to part II of the statute. The Fourth Circuit's holding ignores the plain meaning of the statute. The Court held that for an ALJ to find that a procedural violation resulted in a denial of a FAPE under § 1415(f)(3)(E)(ii)(II),

> [a]n ALJ must answer *each* of the following in the affirmative… (1) whether the plaintiffs "alleg[ed] a procedural violation," (2) whether that violation "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child, " *and* (3) whether the child "did not receive a [FAPE]" as a result.

Pet. App. A at 21-22 (emphasis added).

Instead of quoting § 1415(f)(3)(E)(ii) as written, the Fourth Circuit, in what may be attempted judicial legislation, redrafted the statute, misstating it and altering its effect. The Fourth Circuit not only reframed, conflated, and reordered the language of the statute, but even more consequentially, substituted the

word "and" for the word "or," changing its meaning and intent. Whereas § 1415(f)(3)(E)(ii) reads

> (ii) In matters alleging a procedural violation, a hearing officer may find that *a child did not receive a free appropriate public education* only *if* the procedural inadequacies-
>
> (I) impeded the child's right to a free appropriate public education;
>
> (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; *or*
>
> (III) caused a deprivation of educational benefits[,]

(emphasis added), the statute does not state that a procedural violation which "significantly impeded the parents' opportunity to participate in the decisionmaking process" must also be found to deny a FAPE "as a result," which is what the Fourth Circuit held. It states that an ALJ "may find that a child did not receive a free appropriate public education only if the procedural inadequacies - (II) significantly impeded the parents' opportunity to participate in the decisionmaking process." The statute includes the word "or," which shows that significantly impeding the parents' participation rights stands alone as a procedural inadequacy that may give rise to a determination that the child did not receive a FAPE.

Thus, the Fourth Circuit misstated the statute which led it to an inaccurate interpretation.

The Fourth Circuit's interpretation essentially eviscerates § 1415(f)(3)(E)(ii), giving it no effect. The Fourth Circuit's decision is no different than it would have been had Congress not included § 1415(f)(3)(E)(ii) in the 2004 Amendments to the Act. The court noted the similarity between its decision in the present case and its holding in a case that predated the 2004 Amendments. See Pet. App. A at 24-25 (comparing its decision in *DiBuo ex rel. DiBuo v. Bd. Of Educ.*, 309 F.3d 184, 191 (4th Cir. 2002)). Based on the above misstatement of the statute, the Fourth Circuit erroneously upheld the district court's holding, stating that "although CCPS violated the IDEA in some procedural respects, we affirm because it did not deny R.F. a FAPE." Pet. App. A at 28.

B. The Fourth Circuit erroneously held that CCPS' procedural violations did not impede parental participation in the IEP process.

Relying on its misstatement of § 1415(f)(3)(E)(ii), the Fourth Circuit first held that parental participation was not impeded when CCPS unilaterally changed R.F.'s educational program, because the change "was in line with their expressed wishes." Pet. App. A at 23. R.F.'s parents never asked that R.F. spend more time in the ICSC where she was isolated from other children and was not making progress. Nothing in the record supports this finding by the Court. Rather, R.F.'s parents requested that she be placed at the Benedictine School where she could be with other children similar

to her and where staff are specially trained to work with children like R.F. The Court also reasoned that "R.F.'s parents did eventually have an opportunity to participate in decisions about R.F.'s placement when her mother attended the December 2016 IEP meeting." *Id.* The Court ignored the fact that in the December 2016 IEP meeting, CCPS only documented what it had predetermined and implemented months before. Predetermination of a child's educational program significantly impedes parent participation. *Spielberg v. Henrico Cty. Pub. Schs.*, 853 F.2d 256, 259 (4th Cir. 1988)(predetermination of a child's educational program is a denial of a FAPE because it "violates the spirit and intent of the [IDEA], which emphasizes parental involvement."). Further, the Court's ruling completely ignores the undisputed fact that CCPS continued to change R.F.'s educational program after the December 2016 IEP without holding IEP meetings and without parent input. Pet. App. F at 248-50.

Next, the Court held that deliberately destroying R.F.'s educational records, including data collected on R.F.'s progress, did not significantly impede the parents' participation because "R.F.'s parents could still view summaries of the data in [the teacher's] quarterly reports." Pet. App. A at 24. The Fourth Circuit overlooked the fact that the teacher's summaries were his interpretation of the data and that he testified he had deliberately destroyed the raw data so that no one else could see it and possibly interpret it differently. Pet. App. F at 247.

Further, the Fourth Circuit failed to recognize that failure to hold an IEP meeting when a child is not

making expected progress, and failure to review and revise a BIP when the child's behaviors worsen and increasingly interfere with her education, also impede parent participation. The Fourth Circuit's failure to hold that the multiple procedural violations perpetuated by CCPS did not impede the parents' right to participation in the IEP process for their child is likely the result of the Court's misstatement of the statute, which led it to misinterpret its meaning and effect.

C. The Fourth Circuit's statement that there is no relief under the Act for procedural violations is legal error.

The Fourth Circuit also erred in stating that an ALJ may not grant any relief for a procedural violation that does not also deny the child a FAPE other than an order to the school district to comply with the Act's procedures. *Id.* at 20. The IDEA grants a reviewing court, and by extension a hearing officer, broad discretion to "grant such relief as the court determines is appropriate," § 1415(i)(2)(C)(iii). This Court has stated "that equitable considerations are relevant in fashioning relief." *Burlington Sch. Comm. v. Dept. of Educ. of Massachusetts*, 471 U.S. 359, 374 (1985). The Fourth Circuit's authority for its holding was a footnote in *Fry v. Napoleon Community Schs.*, 137 S. Ct. 743, 754 n.6 (2017), *see* Pet. App. A at 22, a case in which the issue before this Court was exhaustion of administrative remedies under the IDEA and did not implicate procedural inadequacies at all. This footnote was not the Court's holding and is not controlling. It can hardly be considered equitable relief for a court to

be limited to only an admonition of "don't do it again," for repeated violations of the Act's procedures and denial of parents' participation rights, as this case presents. Unfortunately, the Fourth Circuit's reasoning and holding in this case has been relied upon again in a recent Fourth Circuit decision. *E.S. v. Smith*, (Decided May 24, 2019), *see* Pet. App. E. In *E.S.*, the court held that a school district's predetermination of a child's educational program, though a procedural violation that impeded the parents' right to participate, was not a denial of a FAPE because the violation was "harmless error." Pet. App. E at 243. The Fourth Circuit's decision is in direct conflict with its prior holding in *Spielberg*. Additionally, R.F.'s case has been used by at least one Hearing Officer to deny any relief to parents. *See* Pet. App. D. Even though the Hearing Officer found that the school district's procedural violations had significantly impeded the parents' participation rights, he held "they are not entitled to any relief." Pet. App. D at 239, 1 and 2.

The Circuit Courts are in need of guidance from this Court to address this very narrow issue, which affects so many. Without a clear understanding of the implications of procedural violations that significantly impede parents' participation rights, the parent participation envisioned by the Act and repeatedly recognized in this Court's decisions will depend on the Circuit in which the child resides, and the Circuits will continue to be inconsistent in their application of the statute. Further, without being held accountable for lack of procedural compliance, school districts have no incentive to comply with the Act's procedures.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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