No. 18-1591

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., *et al.*,

Petitioners,

v.

CECIL COUNTY PUBLIC SCHOOLS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Over thirty years ago, in *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), this Court held that entitlement to a substantive remedy under the IDEA, *i.e.* private school tuition reimbursement, must be predicated upon a finding that the placement offered to the student by the local school district was inappropriate. Absent such a finding, "a hearing officer may do nothing more than order a school district to comply with the Act's various procedural requirements." *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 754 n. 6, 197 L. Ed. 2d 46 (2017). This case raises the question whether, contrary to this Court's precedent, a hearing officer, pursuant to 20 U.S.C. § 1415(f)(3)(E)(ii)(II), may find a denial of a free appropriate education and award a substantive remedy, *i.e.* placement in a private school, solely because the school district violated the IDEA's procedural safeguards as they relate to parental participation in the decision making process or whether the procedural violation must affect the student and/or parents' substantive rights before a substantive remedy may be awarded.

LIST OF PARTIES/ CORPORATE DISCLOSURE STATEMENT

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.

Cecil County Public Schools or the Board of Education of Cecil County is a body politic and corporate created by Maryland law. No publicly held company owns 10% or more of the Board of Education of Cecil County.

RELATED CASES

- *R.F. by & through E.F. v. Cecil Cty. Pub. Sch.*, No. 18-1780, United States Court of Appeals for the Fourth Circuit. Judgment entered March 25, 2019.

- *R.F. by & through E.F. v. Cecil Cty. Pub. Sch.*, No. ADC-17-2203, United States District Court for the District of Maryland. Judgment entered June 21, 2018.

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INTRODUCTION

Under the Individuals with Disabilities Education Act (IDEA), children with educational disabilities are entitled to the development and implementation of an individualized educational program (IEP) which includes individualized educational goals and specialized educational services and accommodations that are reasonably calculated to enable the child to make progress in light of the child's unique circumstances. R.F. is a child with an educational disability entitled to receive a free appropriate public education (FAPE) under the IDEA. 20 U.S.C. § 1400(d). R.F. and her parents now seek review of the decision of the Fourth Circuit which, in pertinent part, denied their claim that Cecil County Public Schools (CCPS) "significantly impeded" R.F.'s parents' opportunity to participate in decisions relating to the development of R.F.'s IEP when (1) CCPS unilaterally altered the setting in which some of R.F.'s IEP services would be offered and (2) when CCPS destroyed the raw data used to compile R.F.'s progress reports before R.F.'s parents had the opportunity to review them.[1]

1. R.F.'s parents further allege that CCPS made a second unilateral change to R.F.'s placement in March 2017. However, this issue was neither raised in R.F.'s parents' initial Due Process Hearing Request, R.F.'s parents' Complaint in U.S. District Court, nor in the parties' briefing of cross summary judgment motions in U.S. District Court. Having failed to raise this issue at the initial due process hearing and during judicial review in U.S. District Court, the issue was not preserved for review before the Fourth Circuit and has not been preserved for review by this Court.

STATEMENT OF THE CASE

A. Legal Background

In exchange for funds to educate students with disabilities, the IDEA imposes substantive requirements on the educational programs and services provided to students with disabilities. 20 U.S.C. § 1412. The central mechanism for providing students a FAPE under the IDEA is the IEP, a document that describes a child's unique needs and the plan for meeting those needs. *See Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017). The group of individuals charged with developing an IEP for students with disabilities, the IEP team, includes a student's parents and school-based staff. 20 U.S.C. § 1414(d)(1)(B). The IDEA and its implementing regulations confer upon the parents of students with disabilities certain procedural rights, including the right to examine educational records and participate in meetings related to the identification, evaluation, and educational placement of their child. 20 U.S.C. § 1415(b); 34 C.F.R. § 300.322.

Parents of students with disabilities may seek to enforce their rights or the rights of their children under the IDEA by requesting a due process hearing. 20 U.S.C. § 1415(f). Due process complaints generally involve the allegation of a substantive failure to provide a student a FAPE. 20 U.S.C. § 1415(f)(3)(E)(i). However, parents may also raise procedural violations as the basis for finding a deprivation of a FAPE. 20 U.S.C. § 1415(f)(3)(E)(ii). Specifically, § 1415(f)(3)(E)(ii) provides, *inter alia*, that a hearing officer "***may***" determine a deprivation of FAPE has occurred if procedural inadequacies "significantly impeded the parents' opportunity to participate in the

decisionmaking process regarding the provision of a free appropriate public education." (emphasis added).

Courts determining that a violation of FAPE has occurred may "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). "[E]quitable considerations are relevant in fashioning relief" and relief is to be fashioned in an effort to achieve the principal aim of the IDEA, which is providing disabled students with "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." *Burlington,* 471 U.S. at 367, 374 (citing 20 U.S.C. § 1400(c)). Procedural violations which do not result in a substantive deprivation of FAPE, including those involving interference with parental participation, justify no more than an order directing a school district to comply with the Act's procedural requirements in the future. *See Fry*, 137 S. Ct. at 754 n. 6.

B. Factual Background

R.F. has been diagnosed with severe autism spectrum disorder and a rare genetic disorder called HIVEP2. Pet. App. C at 88. HIVEP2 is extremely rare and has unknown long-term consequences. *Id.* At the time of her diagnosis, R.F. was one of only two individuals in the world diagnosed with this condition and very little is known about the ability of individuals with HIVEP2 to perform activities of daily living, process information, or to understand and express language. *Id.*[2] Educational professionals have not

2. Given the rarity of R.F.'s condition, R.F.'s parents' representation in the Pet. at 8 that "Benedictine is a nonpublic school which specializes in working with children with multiple disabilities like R.F." is at best misleading and has no support in the record.

been able to obtain a measure of R.F.'s IQ. Pet. App. C at 89. R.F. exhibits complex disruptive behaviors which are difficult to control and she "becomes aggressive throughout the day and during transitions (e.g. from the classroom to the gym) by grabbing people, pulling hair, biting, and placing her mouth on others." *Id.* R.F. has expressed no recognizable speech other than the word "Mommy" which she occasionally uses toward her mother at home. Pet. App. C at 90.

R.F. has significant neuromuscular deficits including low muscle tone and reduced muscle strength. *Id.* R.F.'s reduced muscle strength impacts her ability to stand, walk, and to ascend and descend stairs. *Id.* R.F. wears pull-up diapers and requires adult assistance to use a toilet. Pet App. C at 90. R.F. has a short attention span and is often distracted or uninterested in academic instruction. *Id.* R.F. has displayed the loss of previously acquired skills when ill. Pet App. C at 89.

R.F. began receiving services through the MSDE Infants and Toddlers program when she was two years old. *Id.* During the 2014-2015 school year, R.F. attended half-day kindergarten and during the 2015-2016 school year R.F. attended full-day kindergarten. Pet. App. C at 90-91.

In spring of 2016, CCPS ordered assessments of R.F. in reading, mathematics, written language, intellectual/cognitive functioning, speech and language, functional/adaptive performance, fine and gross motor skills, and emotional/social/behavioral development. Pet. App. C at 94. In addition, CCPS conducted a functional behavioral assessment and developed a behavioral intervention plan

(BIP) for R.F. which was appropriate to address her needs. *Id.* R.F.'s BIP was developed utilizing the Prevent, Teach, Reinforce methodology (PTR), an evidence-based model appropriate for students with severe autism like R.F. Pet. App. C at 149. The PTR methodology involves the identification of the primary interfering behavior and is designed to develop strategies to eliminate that behavior. Pet. App. C at 150.

On May 25, 2016, an IEP meeting attended by R.F.'s mother was held to develop an IEP for R.F., who would be attending first grade during the 2016-2017 school year. Pet. App. C at 98. R.F.'s IEP team created a comprehensive IEP for R.F. which placed her in the general education setting 14 hours and 35 minutes per week and outside the general education setting 16 hours and 55 minutes per week. Pet. App. C at 103-104. R.F.'s mother objected to the IEP and advocated against placing R.F. in classes with her nondisabled peers. *Id.* Instead, R.F.'s mother requested that R.F. be placed at the Benedictine School, a private day school for children with disabilities, at CCPS' expense. Pet App. at 105. CCPS rejected R.F.'s mother's request for a private placement. *Id.*

CCPS created an Intensive Communication Support Classroom (ICSC) at Gilpin Manor Elementary School in which to implement R.F.'s IEP during the 2016-2017 school year. Pet. App. C at 111. CCPS hired Mr. K. to provide educational services to R.F. in the ICSC and generalized support throughout the school day. *Id.* Although it was CCPS' intention that other children would also receive instruction in the ICSC, R.F. was the only student in the ICSC between the beginning of the school year and October 2016. *Id.* In October 2016, another student began

receiving instruction in the ICSC in the afternoon and in February 2017 another student began attending the ICSC with R.F. *Id.*

During the 2016-2017 school year, R.F. was provided access to her nondisabled peers during music, art, and gym, during walks between classes with her peers, during recess, during field trips, during walks around school to be greeted by other students, and sometimes when a student would come to have lunch with her in the ICSC. Pet. App. C at 111-112. At the beginning of the 2016-2017 school year, R.F. had difficulty staying seated and quiet in the general education classroom during academic subjects. *Id.* R.F. also experienced difficulty walking between classrooms for instruction, as she would often drop to her knees in the hallway and refuse to standup. *Id.* Due to these interfering behaviors and their impact on R.F.'s ability to access her instruction, Mr. K. began providing R.F. with more instruction in the ICSC. *Id.* R.F. was able to concentrate for longer in the ICSC and providing R.F. more instruction in the ICSC avoided interfering behaviors which were encountered during classroom transitions. *Id.* Mr. K. still attempted to take R.F. to general education classes as much as possible. *Id.* However, there is no dispute that Mr. K. unilaterally undertook the decision to increase the amount of instruction that R.F. received in the ICSC without convening an IEP meeting.

On December 16, 2016, R.F.'s mother attended an IEP meeting where R.F.'s IEP team discussed R.F.'s distractibility and her lack of attention to instruction. Pet. App. C at 115. The IEP team considered observation reports and classroom performance data in determining

to amend R.F.'s IEP to increase the amount of instruction R.F. would receive in the ICSC. Pet. App. C at 116-117.[3]

Mr. K. collected data on progress towards the goals and objectives on R.F.'s IEP. Pet. App. C at 118. Mr. K. destroyed the raw data sheets after he compiled R.F.'s quarterly progress reports. *Id.* Although Mr. K. was not aware, CCPS' policy required the retention of the data sheets for two years. *Id.*[4]

R.F. "made progress toward achieving some of the goals on her IEP during the 2016/2017 school year." Pet. App. C at 118. R.F. did not make progress on the behavior and academic goals on her IEP during the 2016-2017 school year. Pet. App. at 122.

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3. R.F.'s parents contend that "[d]ue to 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." Pet. at 9. Contrary to R.F.'s parents' allegation the undisputed factual findings of the ALJ indicate that "Mr. K. began providing R. more instruction in the ICSC so she did not have to walk to the general education classroom and because she was better able to focus and remain attentive for longer periods in the ICSC classroom." Pet. App. C at 112.

4. R.F.'s parents did not dispute during summary judgment proceedings in this matter in U.S. District Court, the ALJ's finding that Mr. K. did not destroy the data sheets for any nefarious purpose. Pet. App. C at 153.

C. Proceedings Below

i. Administrative Hearing

On January 17, 2017, R.F.'s parents filed a Due Process Complaint with the Maryland Office of Administrative Hearings (OAH). Pet. App. C at 84. On February 20, 2017, a telephone prehearing conference was held and after a lengthy discussion the presiding administrative law judge (ALJ) determined the issues for hearing were: (1) whether R.F. was denied a FAPE during the 2015-2016 and 2016-2017 school years, (2) whether CCPS failed to offer R.F. an IEP which would provide her FAPE for the 2016-2017 school year, and (3) what, if any, relief is appropriate. Pet. App. C at 86.

A five-day administrative hearing was held on March 10, 22, 28, 29 and April 4, 2017. Pet. App. C at 85. On May 3, 2017, the ALJ issued a seventy-page decision setting forth detailed findings of facts and conclusions of law. Pet. App. C. The ALJ noted that at the hearing, R.F. parents failed to introduce evidence regarding the 2015-2016 school year, withdrew their request for compensatory education, and during closing arguments did not request any finding regarding the 2015-2016 school year. Pet. App. C. at 132. For this reason, the ALJ determined that any claim regarding the 2015-2016 school year was waived. *Id.* The ALJ ultimately determined that, during the 2016-2017 school year, CCPS committed a violation of the IDEA's procedural requirements when CCPS staff unilaterally increased the amount of time R.F. was instructed in the ICSC without notifying R.F.'s parents. Pet App. C at 176. However, the ALJ found that, despite the procedural violation, CCPS offered R.F. a FAPE during the 2016-

2017 school year. *Id.* Finally, the ALJ determined that the IEP and placement created and implemented for R.F. during the 2016-2017 school year was "reasonably calculated to offer the Student a free appropriate public education appropriate to her circumstances." Pet. App. C at 187. Based on the foregoing, the ALJ denied R.F.'s parents' request for an order directing R.F.'s placement at the Benedictine School at public expense. *Id.*

ii. Judicial Review in the U.S. District Court

R.F.'s parents filed a complaint in the U.S. District Court for the District of Maryland on August 4, 2017, alleging violations of the IDEA, Section 504 of the Rehabilitation Act of 1973, and 42 U.S.C. § 1983. Pet. App. B at 42. On October 13, 2017, the court dismissed R.F.'s parents' claims against Superintendent D'Ette Devine and Director of Special Education Sarah Farr who had been named in their official capacities. In addition the court dismissed R.F.'s parents' § 1983 claim. *See id.* at 43. The parties were afforded the opportunity to conduct discovery but none was undertaken. *See id.* At the conclusion of the period allotted for discovery, the parties filed cross motions for summary judgment which relied exclusively on the record of the administrative hearing. *See id.* at 43-44. Importantly during the parties' briefing of their cross summary judgment motions, R.F.'s parents conceded that all 111 findings of fact set out in the ALJ's decision were undisputed, except for the ALJ's finding that the behavioral intervention plan developed for R.F. was appropriate to address her problem behaviors. *See id.* at 32-33. In a decision dated June 21, 2018, granted CCPS' Motion for Summary Judgment as to all remaining claims and denied R.F.'s parents' motion. *See id.* at 82.

iii. Appeal to the Fourth Circuit

On July 9, 2018, R.F.'s parents noted an appeal of U.S. District Court's decision. After receiving the parties' briefs and oral argument, the Fourth Circuit upheld the decision of the U.S. District Court in an opinion issued March 25, 2019. Pet. App. A. On the issue of parental participation, the Court found that although CCPS had violated R.F.'s parents' right to participate in the IEP process when it unilaterally determined to increase the amount of instruction R.F. received in the ICSC and by destroying raw data related to R.F.'s progress, "neither constitutes a significant impediment" to the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child as required by 20 U.S.C. § 1415(f)(3)(E)(ii)(II). Pet. App. A at 22-25.

REASONS FOR DENYING THE PETITION

A. There Is No Circuit Split

In a pure attempt to manufacture a conflict among the federal circuits on the issue of whether certain procedural violations under the IDEA constitute a denial of FAPE, the Petitioners improperly read "disarray" and inconsistency into federal circuit court jurisprudence. In Petitioners' view, there is a circuit split on this issue and the federal circuits fall into following five distinct categories:

1) Petitioners contend that the First, Second, Eighth, and Ninth Circuits "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." Pet., at 22.

2) Petitioners characterize the Fifth, Seventh, Tenth, and Eleventh Circuits as holding "that a procedural violation alone cannot be a denial of FAPE." *Id.*

3) Petitioners claim that the Third and Fourth Circuits "have issued contradictory opinions." *Id.*

4) The Third and Sixth Circuits, according to Petitioners, "hold that a procedural violation must cause substantive harm." *Id.*

5) Petitioners' fifth category is *M.L. v. Federal Way School Dist.*, 394 F.3d 634 (9th Cir. 2005), in which "three judges each wrote different opinions." *Id.*

Contrary to Petitioners' narrow, inflexible characterization, the state of the law on the impact of procedural violations of the IDEA is not in disarray and does not fall into five separate categories. Rather, each of the circuits employ the same overall flexible approach which focuses on the impact of procedural violations on the rights of students and/or parents – i.e., substantive harm. Understandably, a flexible approach may yield different results depending on the facts and circumstances of each case. However, the various circuit courts' statements of the legal standard governing the impact of procedural violations are in harmony with each other and within each circuit itself.

To be clear, federal courts do not view the IDEA's procedural requirements as a game of "gotcha" – awarding reimbursement for costly private placements as a consequence of mere technical violations of the IDEA. Rather, the flexible approach taken by courts is informed by the two-step process articulated by this Court in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206–07, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690 (1982). Specifically, in *Rowley,* this Court instructed that the analysis of a school district's liability for violations of the IDEA involves two questions which must be answered in the affirmative: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.*[5] As will be seen below, *Rowley* is the starting point for the federal circuit courts' analysis of procedural violations.

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5. Furthermore, this Court has described the remedies available under the IDEA as equitable in nature, such that a parent may only be entitled to reimbursement upon a finding of substantive harm. *See Florence Cty. Sch. Dist. Four v. Carter By & Through Carter*, 510 U.S. 7, 15–16, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993) (stating that as to the court's authority to "grant such relief as the court determines appropriate" under the IDEA, "equitable considerations are relevant in fashioning relief") (citing *Burlington*, 471 U.S. at 374). Recently, this Court stated that "[w]ithout finding the denial of a FAPE, a hearing officer may do nothing more than order a school district to comply with the Act's various procedural requirements, *see* § 1415(f)(3)(E)(iii)—for example, by allowing parents to "examine all records" relating to their child, § 1415(b)(1)." *Fry*, 137 S. Ct. at 754 n.6. Thus, "a court in IDEA litigation may provide a substantive remedy only when it determines that a school has denied a FAPE" and "[w]ithout such a finding, that kind of relief is (once again) unavailable under the Act." *Id.* at 754, n.7.

The flexible approach is also consistent with the permissive nature of 20 U.S.C. § 1415(f)(3)(E)(ii), which states:

> 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.

20 U.S.C. § 1415(f)(3)(E)(ii) (emphasis added). The approach taken by all of the federal circuits appreciates the ***potential*** impact of procedural inadequacies and examines the facts and circumstances of each case to determine if there was an adverse effect constituting a denial of FAPE flowing from the procedural violation. Indeed, as each of the federal circuits recognize, the subsections of 20 U.S.C. § 1415(f)(3)(E)(ii) provide the grounds upon which a hearing officer ***may*** find a deprivation of FAPE on the basis of procedural violations. No court has turned section 1415's "may" into "shall." A broad view of the federal circuit court jurisprudence on the impact of procedural violations reveals the harmony

amongst and within the circuits and compels that the Petitioners' arbitrary categories inaccurately portraying a circuit split be rejected.

First, Second, and Eighth Circuits[6]

The First, Second, and Eighth Circuits do not stand apart from any other circuits' analysis of whether procedural violations amount to a substantive denial of FAPE. Rather, these circuits employ the same flexible approach as each other circuit.

Faced with the question of whether "certain procedural defects in the formation of [an] IEP were so severe as to render it infirm[,]" the First Circuit in *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990), sought to "limn the guideposts." *Id.* at 994. Specifically, the court noted that while "[c]ourts must strictly scrutinize IEPs to ensure their procedural integrity . . . [s]trictness, however, must be tempered by considerations of fairness and practicality: procedural flaws do not automatically render an IEP legally defective." *Id.* Thus, "[b]efore 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." *Id.*

The Second Circuit also employs a flexible approach to procedural violations of the IDEA and rejects a per se rule so that not every procedural violation will amount to a denial of FAPE. In *T.K. v. New York City Dep't of Educ.*, 810

6. The Ninth Circuit will be addressed separately below.

F.3d 869, 875 (2d Cir. 2016), the Second Circuit examined the requirements of § 1415(f)(3)(E)(ii) and stated that "[n]ot every violation of these procedural safeguards rises to the level of a denial of FAPE . . . [r]ather, the violations must 'significantly impede[]' the parents participation rights, 'impede[] the child's right to a [FAPE],' or 'cause[] a deprivation of educational benefits.'" *Id.* (citing 20 U.S.C. § 1415(f)(3)(E)(ii)). Even further, the court, relying on the equitable considerations discussed by this Court in *Carter* and *Burlington*,[7] rejected the premise that "every denial of a FAPE based on the violation of procedural safeguards or the substantive inadequacy of the IEP necessarily support[s] a claim for tuition reimbursement." *Id.* Thus, the Second Circuit requires that before parents may be entitled to reimbursement, "parents must articulate how a procedural violation resulted in the IEP's substantive inadequacy or affected the decision-making process." *R.B. v. New York City Dep't of Educ.*, 689 F. App'x 48, 52 (2d Cir. 2017) (citing *A.M. v. N.Y.C. Dep't of Educ.*, 845 F.3d 523, 535 (2d Cir. 2017)).

The Eighth Circuit's approach is also not as narrow as Petitioners contend. Rather, the Eight Circuit's flexible approach examines whether the procedural violation "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." *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 656 (8th Cir. 1999) (citing *Indep. Sch. Dist. No. 283 v. S.D. by J.D.*, 88 F.3d 556, 562 (8th Cir. 1996)); *see also Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d

7. *See* footnote 5, *supra*.

1007, 1011 (8th Cir. 2006) ("After reviewing the record, we conclude that, although [student's] IEP was not perfectly executed, the District did not compromise [student's] right to an appropriate education or deprive him of educational benefits."); *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 804–05 (8th Cir. 2011) ("If a school district fails to comply with IDEA procedures, however, the IEPs that result from the violation are not necessarily invalid. Rather, '[a]n IEP should be set aside only if [the] procedural inadequacies 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.'") (citing *Renollett*, 440 F.3d at 1011).

Third/Sixth Circuit

Petitioners include the Third Circuit in their third category (contradictory opinions) and fourth category (requiring substantive harm). Not only is the Third Circuit internally consistent, but the Third Circuit is in harmony with the other federal circuit courts. Specifically, Petitioners contend that the Third Circuit in *Sch. Dist. of Philadelphia v. Kirsch*, 722 F. App'x 215 (3d Cir. 2018) contradicted its earlier opinion in *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59 (3d Cir. 2010). *See* Pet., at 18. That is simply not the case. In *C.H.*, the Third Circuit, in articulating the standard for evaluating procedural violations, looked to decisions in the Sixth, Fifth, and Fourth Circuits along with the IDEA's implementing regulations and stated that "[i]n some cases, a procedural violation *may* rise to the level of a denial of a FAPE . . . [h]owever, '[a] procedural violation of the IDEA is not a per se denial of a FAPE; rather, a school district's

failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents.'" *C.H.*, 606 F.3d at 66 (citing cases). "Under the implementing regulations, substantive harm occurs only if the preponderance of the evidence indicates that . . . the procedural inadequacies (i)[i]mpeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of the educational benefit." *Id.* at 67 (citing 34 C.F.R. § 300.513(a)(2)).

Rather than stray from its earlier articulation of the standard for analyzing procedural violations, the Third Circuit in *Kirsch* expressly adopted its earlier statement in *C.H.*:

> A procedural violation of the IDEA may be considered the denial of a FAPE "entitling the plaintiff to compensatory education or tuition reimbursement ... 'only if such violation causes substantive harm to the child or his parents.' " *C.H.,* 606 F.3d at 66 (quoting *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001) (remaining citations omitted)). Substantive harm exists where the School District's violation of the IDEA "significantly imped[es] the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child." *Id.* at 67 (quoting 34 C.F.R. § 300.513(a)(2)).

Kirsch, 722 F. App'x at 221–23. Thus, far from being internally inconsistent, the Third Circuit employed the same legal standard for analyzing procedural violations in *C.H.* and *Kirsch* – a standard that allows flexibility to make a FAPE determination on a case-by-case basis. *Compare C.H.*, 606 F.3d at 68 ("The District Court reasoned that these procedural violations, to the extent they occurred, did not rise to the level of the denial of a FAPE. We agree."), *with Kirsch*, 722 F. App'x at 223 (finding that the district significantly impeded the parents' opportunity to participate, which resulted in a denial of FAPE); *and D.B. v. Gloucester Twp. Sch. Dist.*, 489 F. App'x 564 (3d Cir. 2012) (holding that school district committed a procedural violation that denied student a FAPE when it developed the student's IEP without parental input).

Additionally, the Third Circuit's approach follows the framework of 20 U.S.C. § 1415(f)(3)(E)(ii). *See J.T. ex rel. A.T. v. Dumont Pub. Sch.*, 533 F. App'x 44, 48–49 (3d Cir. 2013) (examining subsections (I)-(III) of 20 U.S.C. § 1415(f)(3)(E)(ii) and rejecting plaintiffs' argument that "purely procedural violations are actionable under IDEA" as "plainly incorrect" because the "IDEA makes procedural violations actionable 'only if' the requirements of subsection (I), (II), or (III) are met"); *Colonial Sch. Dist. v. G.K. by & through A.K.*, 763 F. App'x 192, 197 (3d Cir. 2019) ("A procedural flaw is not actionable so long as it does not affect the student's right to a free appropriate public education, significantly impede the parents' right to participation, or cause a deprivation of benefits . . . Here, the record supports the District Court's conclusion that the alleged procedural flaws do not meet that high standard.") (referencing 20 U.S.C. § 1415(f)(3)(E)(ii)).

The Sixth Circuit's flexible approach focusing on substantive harm is also rooted in this Court's two-part test in *Rowley* and the three bases for finding substantive harm articulated in § 1415(f)(3)(E)(ii). In *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 764 (6th Cir. 2001), the Sixth Circuit looked to *Rowley* in stating that "we must determine whether [the school district] has violated the procedural requirements of the IDEA" and "[e]ven if we conclude that [the school district] did not comply with the Act's procedural requirements, such a finding does not necessarily mean that the [parents] are entitled to relief." The court rejected a "per se" approach and explained that "[s]ubstantive harm occurs when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process[,]" and "procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity also will constitute a denial of a FAPE under the IDEA." *Id.* at 765-66. This approach is clearly consistent with the flexible approach undertaken by other circuits and the factors articulated in § 1415(f)(3)(E)(ii).[8] Neither the Sixth Circuit nor the Third Circuit stand alone.

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8. The Sixth Circuit's articulation of the standard for analyzing procedural violations of the IDEA in *Knable* is cited with approval both in subsequent Sixth Circuit cases and in the Third, Fourth, Fifth, Seventh, Ninth, and Tenth Circuits. *See Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 854 (6th Cir. 2004) ("A finding of procedural violations does not necessarily entitle appellants to relief. Only if a procedural violation has resulted in substantive harm, and thus constitutes a denial of a FAPE, may relief be granted.") (citing *Knable, supra); Woods v. Northport Pub. Sch.*, 487 F. App'x 968, 976 (6th Cir. 2012) (stating that "mere 'technical deviations will not render an IEP invalid.'") (citing *Deal*, *supra*); *Gibson v. Forest Hills*

Fourth Circuit

Petitioners describe the Fourth Circuit as internally inconsistent. Pet. At 22. To this end, Petitioners argue that the Fourth Circuit's decision in *DiBuo v. Bd. of Educ. of Worcester Co.*, 309 F. 3d 184 (4th Cir. 2002) departed from the Fourth Circuit's earlier rulings, most notably in *Hall by Hall v. Vance Cty Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985), where the Fourth Circuit stated that failures to meet the [IDEA's] procedural requirements are adequate grounds by themselves for holding that the school failed to provide [student] a FAPE." *See* Pet., at 16. However, the Fourth Circuit reconciled it earlier decision in *Hall*, and *DiBuo* remains the guidepost for the Fourth Circuit and

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Local Sch. Dist. Bd. of Educ., 655 F. App'x 423, 439 (6th Cir. 2016) ("Under our precedent, a procedural violation of the IDEA does not result in a denial of a FAPE unless a child or parent can prove that the 'procedural violation has resulted in substantive harm.' Substantive harm occurs when a procedural violation seriously infringes upon a party's participation in the IEP process, or when a defect in an IEP 'result[s] in the loss of educational opportunity.'") (citing *Deal* and *Knable*, *supra*); *see also C.H.*, 606 F.3d at 66–67(approving the legal standard articulated by the Sixth Circuit but distinguishing the factual circumstances in *Knable*); *MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 534–35 (4th Cir. 2002) (same); *Adam J.,* 328 F.3d at 812 n.23 (formally adopting the Sixth Circuit's approach in *Knable*); *Stanek v. St. Charles Cmty. Unit Sch. Dist. No. 303*, 783 F.3d 634, 642 (7th Cir. 2015) (citing *Knable* for the rule that a procedural violation must cause the student to lose an educational opportunity); *M.L.*, 394 F.3d at 654 n.6 (J. Gould concurring) (citing *Knable* for the case-by-case, harmless error inquiry conducted by the Sixth Circuit); *Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116, 1126–27 (10th Cir. 2008) (citing *Knable* with approval but distinguishing its facts). Such broad acceptance of the flexible standard severely undermines Petitioners' claim that exclusive categories exist among the federal circuits.

beyond for the flexible approach to evaluating procedural violations of the IDEA.

Since *Hall*, the Fourth Circuit clarified its earlier holding and harmonized it with the flexible approach to procedural violations. In *Gadsby by Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997), the court explained its earlier holding in *Hall*, stating that "[w]e have previously held that the failure to comply with IDEA's procedural requirements, such as the notice provision, ***can*** be a sufficient basis for holding that a government entity has failed to provide a free appropriate public education." (emphasis added) (citing *Hall*, 774 F.2d at 635). "However, to the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate public education." *Gadsby*, 109 F.3d at 956; *see also Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir.1990) (not awarding reimbursement where violation of IDEA notice requirement did not affect development of child's IEP or provision of free appropriate public education).

In *DiBuo*, the court further clarified that "our holding in *Hall* does not mean that violation of a procedural requirement of the IDEA (or one of its implementing regulations), in the absence of a showing that the violation actually interfered with the provision of a FAPE to the disabled child, constitutes a sufficient basis for holding that a government entity failed to provide that child a FAPE." *DiBuo*, 309 F.3d at 190. The Fourth Circuit concluded that "under our circuit precedent, a violation of a procedural requirement of the IDEA (or one of its

implementing regulations) must actually interfere with the provision of a FAPE before the child and/or his parents would be entitled to reimbursement relief[.]" *Id.* at 190-91. In so finding, the court squarely rejected the very approach that Petitioners ascribe to *Hall* – "that the 'actual interference' requirement of *Gadsby* is *always* satisfied when a procedural violation of the IDEA (or one of its implementing regulations) causes interference with the parents' ability to participate in the IEP process" – i.e., the "per se" approach to analyzing procedural violations. *Id.* at 191 (emphasis added). No circuit, including the Fourth Circuit, falls into this category, and thus the Fourth Circuit is not internally inconsistent.[9]

Fifth/Seventh/Tenth/Eleventh Circuit

Petitioners describe the Fifth, Seventh, Tenth, and Eleventh Circuits as holding that a "procedural violation

9. The Fourth Circuit's decision in *DiBuo* clearly articulated the flexible approach to analyzing the impact of procedural violations: "We have no doubt that a procedural violation of the IDEA (or one of its implementing regulations) that causes interference with the parents' ability to participate in the development of their child's IEP will often actually interfere with the provision of a FAPE to that child . . . But *often* is not the same as *always*." *Id.* This approach has not only been endorsed by the Fourth Circuit in recent cases (including the instant case), but by other circuits as well. *See T.B., Jr. by & through T.B., Sr. v. Prince George's Cty. Bd. of Educ.*, 897 F.3d 566, 573–74 (4th Cir. 2018) ("A 'mere technical contravention of the IDEA' that did not 'actually interfere with the provision of a FAPE' is not enough. *DiBuo*, 309 F.3d at 190. Rather, the procedural violation must have caused substantive harm.") (internal citations omitted), *cert. denied sub nom. T.B., Jr. ex rel. T.B., Sr. v. Prince George's Cty. Bd. of Educ.*, 139 S. Ct. 1307, 203 L. Ed. 2d 415 (2019); *see also C.H.*, 606 F.3d at 66–67; *Adam J.*, 328 F.3d at 811–12; *M.L.*, 394 F.3d at 654 (J. Gould concurring).

alone cannot be a denial of FAPE." Pet., at 22. Petitioners' characterization is impermissibly narrow and blatantly disregards the flexible approach articulated by these courts in which procedural violations ***may*** result in a denial of FAPE under certain circumstances, consistent with the other federal circuits.

As the Petitioners acknowledge, the Fifth Circuit employs a flexible approach, expressly guided by the Fourth Circuit's decision in *DiBuo. See Adam J.,* 328 F.3d at 812 n.23 (formally adopting the Fourth Circuit's approach in *DiBuo*); *see also R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 810 (5th Cir. 2012) (stating that "procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity" (citing *Adam J.,* 328 F.3d at 812); *E. R. by E. R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 766 (5th Cir. 2018) (same).

Similarly, the Seventh Circuit does not apply an inflexible per se rule to procedural violations as Petitioners suggest. Rather, the Seventh Circuit applies the flexible approach to procedural violations which considers impact of the procedural violation on the students and/or parents substantive rights. *See Bd. of Educ. v. Ross,* 486 F.3d 267, 276 (7th Cir. 2007) ("The failure of the plan to discuss transition is, however, a procedural flaw, not a substantive one: no one would be complaining about the language of the plan if the District had in fact been providing transitional services to [the student]. The important question is therefore whether the District failed to give [the student] something to which she was entitled."); *M.B. ex rel. Berns v. Hamilton Se. Sch.*, 668 F.3d 851, 860 (7th Cir. 2011) (stating that "procedural defects do

not necessarily indicate that a child has been denied a free appropriate public education; only those defects that 'result in the loss of educational opportunity' deny a child a FAPE.") (citing *Hjortness ex rel. Hjortness v. Neenah Joint Sch. Dist.*, 507 F.3d 1060, 1065 (7th Cir. 2007)); *Stanek v. St. Charles Cmty. Unit Sch. Dist. No. 303*, 783 F.3d 634, 641–42 (7th Cir. 2015) ("To state a claim under IDEA [parents] needed to allege that the District denied them the procedural rights that IDEA guarantees to parents, including participation in meetings and access to records, . . . and that the District's actions caused [student] to lose an educational opportunity").

Following suit, the Tenth Circuit squarely rejected a form over substance approach to evaluate procedural violations and consistently required a showing of substantive harm. *See Urban by Urban v. Jefferson Cty. Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996) ("Technical deviations from the requirements of section 1401(a)(20), such as the failure to include a statement of transition services, do not render an IEP entirely invalid; to hold otherwise would 'exalt form over substance.'") (citing *Doe v. Defendant I,* 898 F.2d 1186, 1190 (6th Cir. 1990)); *see also Sytsema ex rel. Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1313 (10th Cir. 2008) (stating that "this court must determine whether the procedural error resulted in 'substantive harm to the child or his parents'; 'deprive[d] an eligible student of an individualized education program'; or 'result[ed] in the loss of [an] educational opportunity.'") (citing *Knable,* 238 F.3d at 765–66).

The Eleventh Circuit also squarely rejected a per se rule and instead considered the impact of a procedural violation under the IDEA. *See Doe v. Alabama State*

Dep't of Educ., 915 F.2d 651, 662 (11th Cir. 1990) ("Because the notice deficiencies in this case had no impact on the Does' full and effective participation in the IEP process and because the purpose of the procedural requirements was fully realized in this case, we agree with the district court that there has been no violation in this case which warrants relief.");[10] *Weiss by Weiss v. Sch. Bd. of Hillsborough Cty.*, 141 F.3d 990, 994 (11th Cir. 1998) ("In evaluating whether a procedural defect has deprived a student of a FAPE, the Court must consider the impact of the procedural defect, and not merely the defect *per se.*"); *see also Sch. Bd. of Collier Cty., Fla. v. K.C.*, 285 F.3d 977, 982 (11th Cir. 2002) (same); *L.M.P. on behalf of E.P. v. Sch. Bd. of Broward Cty., Fla.*, 879 F.3d 1274, 1278 (11th Cir. 2018) ("Only procedural violations that cause a party substantive harm will entitle plaintiffs to relief.").[11]

10. Of note, the Eleventh Circuit in *Doe* went out of its way to reconcile the Fourth Circuit's decisions in *Hall* and *Tice* by pointing out that in both decisions, the Fourth Circuit found that the students and/or parents suffered "demonstrable harm" and thus the Fourth Circuit's approach is internally consistent in requiring substantive harm for a procedural violation to be actionable. *Id.*

11. The Eleventh Circuit has expressly acknowledged that this approach is rooted in the two-prong test articulated in *Rowley. See Phyllene W. v. Huntsville City Bd. of Educ.*, 630 F. App'x 917, 919 (11th Cir. 2015) (With respect to the first prong, a procedurally defective IEP does not automatically result in a violation of the IDEA. Rather, in order to determine whether a procedurally defective IEP has deprived a student of a FAPE, the court must also consider the impact of the defect, which is encompassed in the second prong.") (internal citations omitted). Also, the Eleventh Circuit looks to 20 U.S.C. § 1415(f)(2)(E)(ii) for the bases for finding when a procedurally defective IEP violates the IDEA. *See id.* at 919 n.2 (finding that a "procedurally defective IEP violates that IDEA

There is no marked difference between the Fifth, Seventh, Tenth, and Eleventh Circuit's articulation of the legal standard governing the impact of procedural violations and those of any other circuits. Petitioners' attempt to cabin these circuits into the proposed second category – one which is characterized by a per se rule – is plainly inconsistent with the state of the law nation-wide.

Ninth Circuit

Petitioners point to the Ninth Circuit, and in particular its decision in *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 637 (9th Cir. 2005), *cert. denied Fed. Way Sch. Dist. v. M.L.*, 545 U.S. 1128, 125 S. Ct. 2941, 162 L. Ed. 2d 867 (2005), as emblematic of the intra and inter-circuit disarray that they see in courts' analysis of the effect of procedural violations on the provision of FAPE under the IDEA. Pet., at 17. According to Petitioners, *M.L.* stands for the proposition that a procedural violation need not be linked to substantive harm in order to be actionable – i.e., a structural, inflexible, *per se* rule. *See id.* However, even in *M.L.*, the majority drew a connection between the procedural violation at issue and the substantive harm to the child, noting that the "failure to include at least one regular education teacher, standing alone, is a structural defect that prejudices the right of a disabled student to receive a FAPE." *M.L.*, 394 F.3d at 648. Specifically, in that case, despite the district's contention that the student would not likely have been placed in an

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when it: (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.").

integrated classroom, the record reflected that the student had previously been directed to be placed in a regular kindergarten classroom, he attended a regular pre-school classroom for three years, and he was initially placed in a regular education classroom at the district. *See id.* Thus, the court found that "[i]n light of these facts, the record supports an inference that it was possible that M.L. would be placed in a regular education classroom" and "[s]o long as this was a possibility, participation of a regular education teacher in the IEP team was required by the IDEA." *Id.* In short, the majority found that the record contained evidence linking the procedural violation to at least an inference that the student suffered harm.

In *R.B., ex rel. F.B.v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932 (9th Cir. 2007), the Ninth Circuit re-examined *M.L.* and explained:

> Although each member of the *M.L.* panel wrote separately, that case did not alter our standard for reviewing procedural errors in IDEA cases. Two members of the panel analyzed whether the procedural violation resulted in a lost educational opportunity. *M.L.,* 394 F.3d at 652 (Gould, J., concurring), 658 (Clifton, J., dissenting). As the narrower opinion joining in the judgment for the *M.L.* appellants, Judge Gould's concurrence is the "controlling opinion". *See Center for Fair Public Policy v. Maricopa County,* 336 F.3d 1153, 1161 (9th Cir.2003) (citing *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1976)). Judge Gould's concurrence merely clarifies that, where a procedural violation

> does not result in a lost educational opportunity for the student, the violation is "harmless error" because it does not deny the student a FAPE. *M.L.*, 394 F.3d at 651–52 (Gould, J., concurring).

R.B., 496 F.3d at 938 n.4.

In the years following *M.L.*, the Ninth Circuit relied more on Judge Gould's concurring opinion and earlier Ninth Circuit precedent which is clearly in harmony with the approaches of the majority of other circuits which have "consistently rejected *per se* IDEA structural arguments, and instead have adopted case-by-case, harmless error inquiries." *M.L.*, 394 F.3d at 655 (J. Gould concurring); *see also id.* at 655 n.6 (citing cases from the Fifth, Fourth, Tenth, Sixth, Eleventh, Seventh, Eighth, and First Circuits employing the same standard); *see R.B.*, *supra*; *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 909 (9th Cir. 2009) (stating that "[p]rocedural flaws in the IEP process do not always amount to the denial of a FAPE" and "[o]nce we find a procedural violation of the IDEA, we must determine whether that violation affected the substantive rights of the parent or child"); *see also K.D. ex rel. C.L. v. Dep't of Educ., Hawaii*, 665 F.3d 1110, 1122–23 (9th Cir. 2011) ("Procedural violations may be harmless if they do not 'result[ ] in a loss of educational opportunity or significantly restrict parental participation.'") (citing *L.M.*, 556 F.3d at 910); *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1124 (9th Cir. 2016) ("While some procedural violations of the IDEA may be harmless, such errors constitute a denial of a free appropriate public education if they seriously impair the parents' opportunity to participate in the

IEP formulation process, result in the loss of educational opportunity for the child, or cause a deprivation of the child's educational benefits."). Quite clearly, this is the same standard employed nation-wide and is consistent with the framework of 20 U.S.C. § 1415(f)(2)(E)(ii). The Ninth Circuit is no outlier, as the Petitioners contend.

B. The Decision Below Does Not Misinterpret the Statute

R.F.'s parents contend in support of their Petition that the Fourth Circuit misconstrued and misapplied 20 U.S.C. § 1415(f)(3)(E)(ii)(II) in determining that CCPS' interference with R.F.'s parents' right to participate in the IEP process did not result in a deprivation of FAPE. Specifically, R.F.'s parents allege that the Fourth Circuit misread § 1415(f)(3)(E)(ii) as conjunctively requiring a finding that (1) the school district "significantly impeded the parents' opportunity to participate in the decisionmaking process" and (2) that the child was deprived of a FAPE as a result. Pet. at 20-24. However, in making this argument, R.F.'s parents ignore that the Fourth Circuit clearly stated in its opinion that "[o]ur analysis here starts and ends with" the determination that CCPS' violation had not "significantly impeded" R.F.'s parents opportunity to participate in the IEP process. Pet. App. A at 22.

While R.F.'s parents advanced the argument in the Fourth Circuit that the unilateral change in the amount of instruction R.F. received in the ICSC and the destruction of the raw data regarding R.F.'s progress constituted the basis for finding that CCPS had "significantly interfered" with R.F.'s parents right to participate in the IEP process,

the Fourth Circuit rejected R.F's parents' argument stating "[w]e hold that neither constitutes a significant impediment to parental participation on these facts." Pet. App. A at 22. The facts on which this determination turned were (1) that altering R.F.'s placement to provide more instruction in ICSC actually offered R.F. more special education services, (2) providing R.F. more instruction outside the general education environment was in accord with R.F.'s mother's previous objection that R.F.'s IEP included too much instruction with nondisabled peers, and (3) R.F.'s parents did ultimately have the opportunity to provide input into R.F.'s IEP when an IEP meeting was held in December 2016. Pet. App. A at 23. In sum, the Fourth Circuit was, on these facts, unable to conclude that CCPS' interference with R.F.'s parents' participation rights was a significant enough to constitute a substantive violation of the IDEA that could be cured by the requested remedy of a private placement. Pet. App. A at 23-24.

On the issue of Mr. K's destruction of the raw data collection sheets, the Fourth Circuit noted that although this violated Board policy it did not constitute a violation of the IDEA. Pet App. A at 24. The Fourth Circuit further noted that the quarterly progress reports compiled using the data sheets were available to R.F.'s parents and therefore their destruction did not significantly interfere with R.F.'s parents' participation rights. *Id.* It was on these the facts and not a misapplication of § 1415(f)(3)(E)(ii), as R.F.'s parents have asserted, that the Fourth Circuit determined that CCPS had not "significantly impeded R.F.'s parents' participation rights when it changed R.F.'s placement and destroyed raw data of R.F.' progress." Pet. App. A at 25.

CONCLUSION

It is abundantly clear that there is no conflict among the federal circuits on the issue of whether certain procedural violations under the IDEA constitute a denial of FAPE. Petitioners' strained view of the federal jurisprudence on this matter does not reflect the overarching approach taken by courts to analyze procedural violations of the IDEA– one that is flexible, examines the facts and circumstances of each case, is rooted in the equitable nature of remedies under the IDEA, and that focuses on the substantive harm to the rights of students and parents. There is no compelling reason to grant the Petition in this case because the federal circuits have not been "exquisitely inconsistent" nor are they in disarray as Petitioners claim. Pet. at 14. None of the federal circuit courts have employed an inflexible per se rule and none read section 1415's "may" as "shall." The circuit courts appear in harmony with each other, within themselves, with the command of the IDEA, and with this Court's view of the IDEA's remedies as equitable in nature. That Petitioners are dissatisfied with the outcome reached by the Fourth Circuit does not create a conflict among the circuits on the applicable legal standard governing the impact of procedural violations of the IDEA. Furthermore, the Fourth Circuit applied the well-settled legal standard for evaluating whether procedural violations of the IDEA amount to a substantive denial of FAPE and thus did not misinterpret 20 U.S.C. § 1415(f)(3)(E)(ii) as Petitioners assert. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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