

A. Procedural Issues

1. Petitioners, the *Student* (), by and through his parents, the Mother and the Father, filed a contested case petition on December 2, 2002, alleging that the Wake County Board of Education ('the board') violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, North Carolina General Statutes § 115C-116 and Article 3 of Chapter 150B of the General Statutes.

2. The petition for contested case hearing filed in this matter is the second petition filed by the Parents against the board. The first petition, in which the Parents alleged the *Student* was not making adequate progress, was filed in May, 2001 and was successfully mediated by Administrative Law Judge Augustus B. Elkins, II on August 17, 2001. As a result of this mediation, the parties entered into a settlement agreement in which Petitioners agreed to file a notice of dismissal with prejudice and to release all claims and potential claims related to the *Student's* educational program up until that time. R. Ex. 3. In exchange, the board agreed to the following:

- a. For the remainder of the 2001-2002 school year, the board would provide the *Student* with:
 - i. tutoring in a phonics-based reading program;
 - ii. language arts instruction in a resource classroom; and
 - iii. instruction in a Curriculum Assistance class.

b. For the remainder of the 2001-2002 school year, the board would place an additional instructional staff member in the *Student's* social studies and science classes.

c. The board would provide the *Student* with a complete speech and language evaluation.

d. During the 2002 summer recess, the board would provide the *Student* with 15 tutoring sessions in a phonics-based reading program. *Id.*

3. In regard to the current petition filed December 2, 2002, the parties stipulated to the following issues:

a. Whether the board fully complied with its obligation pursuant to the August 17, 2001 settlement agreement to provide the *Student* with 15 75-minute tutoring sessions in a phonics-based reading program during the 2002 summer recess; T. I, 17-18; and

b. Whether the board failed to properly implement the *Student's* IEP from August 2, 2002, until December 5, 2002, and if so, whether that failure constituted a denial of a free appropriate public education for the *Student*. *Id.*

4. In addition to the two issues stipulated to above, the Parents also identified two additional

issues that are related to the settlement agreement:

a. Whether the August 17, 2001 settlement agreement between the parties preserved Petitioners' right to proceed with actionable claims regarding prospective implementation of the 2001-2002 IEP, supplemental services in the 2002 summer session and future free appropriate public education services for the *Student*;¹ T. 1, 19; and

b. Whether the board denied a free, appropriate, public education to the *Student* during the 2002 summer recess.

5. Apart from the provision of the tutoring services during the 2002 summer recess, the Mother testified that she is satisfied that the board has met all of its obligations pursuant to the settlement agreement. T. I, 103.

6. The Mother testified that the 2002-2003 IEP was a good program for the *Student* and Petitioners are not challenging the appropriateness of the *Student*'s special education program. T. 1, 130-31.

7. The undersigned ruled on March 6, 2003, that the Parents' claim for compensatory damages be dismissed with prejudice; that the issues presented during the hearing be limited to those that developed prospectively from August 17, 2001; and that the parties be precluded from challenging procedural or substantive issues surrounding the development of the 2001-2002 IEP or the provision of educational services prior to August 17, 2001.

8. On June 24, 2003, the undersigned ruled that Petitioners bear the burden of proof in this proceeding.

B. Substantive Issues

9. The *Student* lives with his parents, Petitioners Mr. and Mrs. *Parent* in Raleigh, North Carolina. The *Student* entered the Wake County Public School System ('WCPSS') as a kindergartner and has been continuously enrolled since that time. At the time of the hearing, the *Student* was a seventh grade student at *** Middle School. T. III, 546. By all accounts, he is a pleasant, social and well-liked young man who is popular with his peers. *See, e.g.*, T IV, 940; T. V, 1043 and 1164-65; T. VI, 1266.

10. The *Student* first qualified for services in the special education program in November 1998 when he was a third grader at *** Elementary School. T I, 178; T. IV, 945-47. At that time, he qualified as specific learning disabled in reading, written expression, and mathematics calculation with discrepancies between his ability scores and his achievement scores that were "quite large": a

¹ The board concedes that the August 17, 2001 settlement agreement has no impact on the Parents' ability to bring claims that developed prospectively from the date of execution of the settlement agreement. T.I, 19.

24-point discrepancy in reading, a 25-point discrepancy in written expression, and a 25-point discrepancy in mathematics. T. IV, 945-947.

11. The *Student* was reevaluated in January and February 2001 while attending fifth grade at *** Elementary School. R. Ex. 10. The results of that testing indicated that over the course of the previous two and a half years since the *Student* was initially identified, the *Student* made substantial improvements in all areas of concern. The gains he made in mathematics were such that he no longer qualified as learning disabled. T. IV, 946; R. Ex. 10. In written expression, the gap between his achievement score and his ability score was reduced from a 25-point discrepancy to a 16-point discrepancy. He made similar gains in reading, closing the gap from a 24-point discrepancy to a 15-point discrepancy. T. IV, 947; R. Ex. 10.

12. Test results from the 2001 psychological evaluation conducted on the *Student* also indicate that he has a verbal I.Q. of 85, a performance I.Q. of 95, and a full scale I.Q. of 89. R. Ex. 10. This places the *Student* in the low average range of intelligence. T. IV, 948.

13. In May, 2001, reading specialist Ms. P conducted a Diagnostic Reading Report on the *Student*. This diagnostic test included the Woodcock Diagnostic Reading Battery. T. III, 625; R. Ex. 9. The results from this testing identified rapid automatic naming difficulties for the *Student* in the “poor” and “below average” ranges. T. III, 687. Ms. P explained that rapid automatic naming is “the ability to recall things quickly and rapidly.” It is not a trait that can be taught but is an innate part of a person’s neurological processes. T. III, 684. The *Student* also demonstrated weaknesses in fluency, decoding, and phonological awareness, three areas affected by rapid automatic naming. T. III, 688. Ms. P explained that these demonstrated weaknesses highlight the importance of pacing the *Student*’s instruction. T. III, 689-90.

14. Having a rapid automatic naming deficiency does not mean the *Student* cannot learn to read. In fact, the *Student can* read. At the time of the hearing, the *Student*’s independent reading level – his ability to read on his own with no one providing any assistance – was at the fifth grade level and his instructional reading level – the level of reading that teachers can successfully use with the *Student* during instruction – was at the sixth or seventh grade level. T. VI, 1400-01.

15. As Ms. P explained in her testimony, the fact that the *Student* has rapid automatic naming deficiencies is important because it indicates that in order for the *Student* to learn to read, he requires instruction that is more specific and systematic. T. III, 690-91. Ms. P also explained that he requires “a lot of repetition of material such as front-loaded vocabulary.” R. Ex. 37.

16. Front-loaded vocabulary is a strategy used to expose students to vocabulary or material contained in a lesson prior to delving into the substantive aspects of the lesson itself. Ms. P explained that “front-loaded vocabulary means looking at a passage or something the student is going to be exposed to. Based on what you know about your experience with students, what you know about that student, what is the material, the vocabulary I need to pull out, teach that student, make sure and expos[e] them to it before we start.” T. III, 726.

17. Since May, 2001, the *Student* has received one-on-one tutoring in Corrective Reading. T.I, 104; T. VI, 1368. Corrective Reading uses the strategy of front-loaded vocabulary. T. III, 726.

18. Corrective Reading is a phonics-based reading program designed for children with learning disabilities and attention deficit disorders -- for “academically stubborn children who are presented with information but it just doesn’t soak in.” T. VI, 1365. It is particularly helpful for children who do not learn to read easily because it is a very sequential program that constantly “regrooms” the student on information just learned. Ms. K, the *Student*’s reading tutor in May 2001 and during the 2002-2003 school year, explained: “[W]e may cover something today and tomorrow, and then we’ll go back and revisit stuff from weeks ago, lessons ago. It never assumes that it’s rock solid. So you’re always going back, filling in those gaps, touching on it again, reminding the children of this. It may be off the burner for a week, maybe two weeks, but then eventually it will come right back up. . .It’s presented enough times that eventually it starts to settle and it starts to stay.” *Id.*

19. Ms. P testified that the Corrective Reading program is a good fit for the *Student* because it is very systematic and it requires the tutor to teach to mastery before moving on to the next lesson. T. III, 691. Ms. K explained that “throughout the program, there are mastery tests and if a student does not pass a mastery test, the program requires them to go back and retrain and review the material and to test again until the student achieves mastery. The benefit to this type of system is that it ensures that the student is not “building on a faulty foundation.” T. VI, 1366.

20. Ms. P testified that the *Student* is a good part-to-whole learner. T. III, 741. What this means is that “he can take the pieces of something and put it together and then understand the big picture.” *Id.* The Corrective Reading program is a part-to-whole approach, which is another indicator that this program is a good match for the *Student*. T. III, 742.

21. Beginning in January 2003, the *Student* also began receiving instruction in *Great Leaps*, a reading program specifically geared toward increasing speed and fluency in reading. T. VI, T. VI, 1360 and 1385. This program is also designed to teach to mastery and is a good fit for the *Student*. T. III, 691.

22. In May 2002, Ms. P had a second opportunity to test the *Student* on the Woodcock Diagnostic Reading Battery. T. III, 661; R. Ex. 5 and 6. In comparing his performance on these two tests in May 2001 and May 2002, the *Student* made a dramatic gain in phonologic awareness, jumping from grade level 3.4 to grade level 16.8. T. III, 665; R. Ex. 6. This gain is important because phonologic skills are the foundation of reading and “the skills of phonemic awareness, which is a subset of phonological awareness, is . . . something that children who are struggling as readers do not have or do not have developed.” T. III, 667-69. Ms. P testified that the fact that the *Student* made such large gains in this area is very promising for the *Student* in terms of his capacity to continue to progress in his reading skills. *Id.*

23. The *Student* made other gains from May 2001 to May 2002 as well. He made progress in his total reading skills, in reading comprehension, and in oral comprehension. T. III, 663; R. Ex. 6. In the four categories that tested the *Student*’s ability to read independently, he made gains across the

board: letter word identification, word attack skills, reading comprehension, and passage comprehension. These gains are evidence that the *Student* made progress in his independent reading level – “material that was previously too difficult for him is now material he can read on his own.” T. III, 664.

24. Ms. P has also had two occasions to assess the *Student*'s fluency through two Great Leaps assessments, the first in June of 2001 and the second in February 2003. T. III, 672; R. Exs. 11 and 12. In comparing his scores from June 2001 to February 2003, the *Student* has “not only increased his speed [in reading], but he improved his accuracy.” T. III, 674; R. Exs. 11 and 12.

25. In responding to the *Student*'s demonstrated needs in reading and writing, the *Student*'s IEP team at Middle School A developed an extensive special education program for the *Student*. No other learning disabled student at Middle School A receives the same level of services as those received by the *Student*. T. V, 1156; T. VI, 1309.

26. The IEP at issue in this contested case hearing was developed in March and April 2002. R. Ex. 1. All parties agree that the *Student*'s special education program is well-structured and appropriate for his needs. T. I, 130-31. T. V, 1156-57.

27. To assist him with his reading goal, the *Student* receives direct one-on-one tutoring in Corrective Reading four times a week from Ms. K, a reading tutor with 14 years of experience in teaching children to read using the Corrective Reading program. T. VI, 1352.

28. The *Student* is the only learning disabled student at Middle School A who receives direct, one-on-one tutoring in Corrective Reading. T. V, 1154-55.

29. The purpose of these tutoring sessions is to work with the *Student* on his reading skills, primarily with his decoding, phonics, and comprehension. Essentially, the goal is to teach him to read better and more quickly. T. VI, 1353-54.

30. From August 2002 until mid-October, 2002, Ms. K met with the *Student* exclusively during fourth period for 45-50 minutes. T. VI, 1403-04. In October 2002, Ms. K and the *Student* decided to extend the tutoring sessions into fifth period as well. By extending the time, the *Student* now receives approximately 60 minutes of instruction in Corrective Reading, allowing him to complete a Corrective Reading lesson most days. T. VI, 1417-18 and 1433-34. Prior to that time, it was common for the *Student* to need two days to cover one lesson. T. VI, 1416-17.

31. Both parties agree that the *Student*'s one-on-one tutoring with Ms. K during the 2002-2003 school year is neither a component of the *Student*'s IEP nor a required service pursuant to the settlement agreement, but is in fact a supplemental service the board is providing voluntarily. T. I, 172-73; T. IV, 992-93.

32. At the start of the 2002-2003 school year, the *Student* began level C in Corrective Reading. T.VI, 1370. This is the final stage of Corrective Reading and contains 125 lessons. T. VI, 1373. Level C is more challenging than earlier levels because it contains more expository reading and more difficult vocabulary. Ms. K testified that to be successful in level C, the student must have a “certain level of maturity” about them because level C is more in-depth. “You have to be able to read about trees for 25 minutes. . . and not every child, particularly if they have a special need, can hang onto that, can keep the concept and not be totally amused because it’s some character doing. . .funny, silly things the whole time. . . You have to have a maturity level to roll into C that perhaps is not required in B1, and definitely not in A. A and B is. . .all frolic. It’s hard work disguised as frolic.” T. VI, 1372.

33. Many children have difficulty generalizing the material they learn in level C and it becomes necessary to switch to another program or to supplement with another program for a few months until the student demonstrates the necessary level of preparedness for level C. T. VI, 1372. This was not necessary for the *Student*. At the start of the 2002-2003 school year, the *Student* demonstrated a readiness to begin level C and has made steady progress through the program. As of April 22, 2003, the *Student* had worked through 84 of the 125 lessons. T. VI, 1369-73.

34. Level C is the final level in the Corrective Reading program. T. VI, 1387. Ms. K testified that she works with the *Student* not only in the materials contained within the Corrective Reading book but also spends time with the *Student* on outside materials. This strategy is designed to encourage the *Student* to apply the skills he has learned to use his textbooks and other materials. T. VI, 1387-89. On some days, they may spend the day playing a game. From the *Student*’s perspective, the day may appear simply “game day.” *Id.* However, Ms. K will pick a game that neither of them have played before that requires the *Student* to read the directions – to manipulate his knowledge base and apply it to a real world situation. The *Student* will learn that what he has learned is not just isolated instruction, but that he can use what he has learned in the real world – in the classroom, at home, when he is playing, etc. *Id.*

35. During the five-month period from October 2002 until April 2003, the *Student* improved his independent reading level – his ability to read on his own with no one providing any assistance – from the third grade level to the fifth grade level. In addition, he improved his instructional reading level – the level of reading that teachers can successfully use with the *Student* during instruction – from the fifth grade level to the sixth or seventh grade level. T. VI, 1400-1401.

36. According to the *Student*’s May 2001 and 2002 evaluations, the *Student* is relatively weak in the area of reading fluency. R. Ex. 5, 6 and 9. Ms. P explained that “fluency is anything you do with ease. We walk fluently, because we just glide along. And on a particular day when I stumble, I’m not fluent in my walking . . .Fluent reading is . . . when you’re able to pick up a text and it just happens. In other words, you don’t have to stop. You keep going and get meaning from what you’re reading.” T. III, 635.

37. To respond to the *Student*’s demonstrated weakness in fluency, Ms. K began working with the *Student* in the *Great Leaps* program in January 2003. T. VI, 1360. Prior to beginning this

program, she specifically requested training in *Great Leaps* so she could work with the *Student* in the program. T. VI, 1384 and 1409. This program is a 15-minute daily program specifically targeted toward improving speed and fluency. *Id.* Lessons are timed lessons that students must read with 100% accuracy in one minute or less before they are permitted to “leap” to the next lesson. T. VI, 1382-84. Adding the *Great Leaps* program increased the length of the tutoring session from 60 minutes to a total of 75-80 minutes.

38. The *Student* enjoys *Great Leaps* and demonstrates confidence in his abilities. T. VI, 1379. After 27 lessons in the program, he had made 13 leaps. T. VI, 1377.

39. By April 22, 2003, the *Student* had met all of the short-term objectives contained in his IEP reading goal, including his fluency goals. T. VI, 1435; *see also* R. Ex. 1. He is internalizing rules of grammar and syntax and demonstrates an interest in learning them. T. VI, 1431. He demonstrates an appreciation for the value of reading. T. VI, 1429.

40. To assist the *Student* in the reading comprehension goal contained in his IEP, the *Student* is enrolled in a literacy integration class. T. V, 1164.

41. The *Student*'s literacy integration class includes a group of twelve students and is taught in a resource setting. T. V, 1167-68. The purpose of this class is to improve the students' reading comprehension. T. V, 1168. During this period, the *Student* often reads aloud to the class and is read to by Ms. L.T. and by other students. T. V, 1169. He also had an opportunity to teach the class for one period to expose him to public speaking, and he did “phenomenally.” T. V, 1170.

42. As part of his reading comprehension goal, the *Student*'s IEP contains short-term objectives in both narrative and expository text. R. Ex. 1. The *Student*'s focus for narrative text was learning to identify the plot, the conflict, the solution, the characters, theme, and the setting. T. V, 1185. In contrast, his focus for expository text was learning to identify the main ideas, important facts and details, sequencing events, drawing conclusions, identifying cause-and-effect relationships, making inferences, and drawing on previous knowledge to assist him in his ability to absorb the material. *Id.*

43. The *Student* performed well in his literacy integration class, consistently receiving As. He demonstrates strength in both listening and reading comprehension and has adopted strategies to assist him in learning to retain the information that he reads. T. V, 1233-36.

44. The *Student*'s has also demonstrated improvement in his reading stamina. At the beginning of the year, there were times when he would become frustrated because he was unable to read a passage fluently, had difficulty staying on track, or would read “choppy.” T. V, 1236-37. Through the course of the year, the *Student* has become more confident. He enjoys the challenge of reading and recognizes that everyone makes mistakes on occasion. He is able to self-correct without embarrassment and he is able to accept positive changes and criticism from his peers. T. V, 1238-39. He demonstrates his ability to generalize the skills he has learned with Ms. K in Corrective Reading by incorporating them into his reading with Ms. L.T. T. V, 1242.

45. In addition to literacy integration, once a week the *Student* receives 50 minutes of direct, one-on-one instruction in reading comprehension with Ms. J., special programs department chair at Middle School A. Ms. J. has a masters degree in special education with an emphasis in learning disabilities. T. IV, 933. She has been at Middle School A for 20 years, the last three as department chair. T. IV, 935-36.
46. During the *Student's* weekly session with Ms. J., Ms. J. and the *Student* review stories and vocabulary that were a part of his Corrective Reading lessons earlier in the week. T. IV, 930-31. The *Student* is the only student who Ms. J. provides one-on-one instructional services to on a regular basis. T. IV, 930-31; T. V, 1154.
47. Both parties agree that the *Student's* weekly session with Ms. J. is neither a component of the *Student's* IEP nor a required service pursuant to the settlement agreement but is in fact a supplemental service the board is providing voluntarily. T. I, 175.
48. To assist the *Student* in the writing goal contained in his IEP, the *Student* is enrolled in a writing class, also taught by Ms. L.T.. Although there are five other students in the classroom with the *Student* at the same time, the *Student* is the only student receiving instruction in writing. T. V, 1172 and 74.
49. The *Student* is the only learning disabled student at Middle School A to receive direct one on-one instruction in writing. T. V, 1155-56.
50. The *Student* has consistently received As in his writing class. T. V, 1221.
51. In the spring of 2002, at the time the IEP was written, the *Student* struggled with written expression. He was able to articulate his thoughts and ideas, but he had difficulty putting those ideas on paper. T. V, 1186-87. As a result of these difficulties, the *Student's* writing goal focused on learning to use graphic organizers to learn to write clear and coherent five-paragraph essays that include "a topic sentence and supporting details, sentences that include subjects, verbs, capitalization and punctuation used accurately, using reference materials such as dictionaries or Thesauruses to spell and extend his vocabulary, and use proofreading and editing skills with teacher assistance to find and correct any errors." T. V, 1187; R. Ex. 1.
52. Ms. L.T. testified that during the first semester of 2002, the focus of the *Student's* writing class was "to get him comfortable with formats and the writing process." T. V, 1172. Time was spent in learning how to write introductions, conclusions, body paragraphs, topic sentences, and supporting details. T. V, 1172-73. During the second half of the year, the focus shifted to helping the *Student* apply what he learned the first half of the year and transferring the skills to other academic areas. In general, this manifested in the *Student's* working on larger projects in his science and math classes. T. V, 1173-74.
53. At the time of the hearing, the *Student* had demonstrated significant progress in his writing skills. When writing a sentence, he no longer limits himself to simple subject-verb sentences. His

writing is more descriptive, more detailed. T. V, 1203. His use of punctuation and capitalization is more appropriate. T. V, 1204. His use of sentence structure is more sophisticated. *Id.* He learned proofreading strategies and expresses interest in implementing those strategies. T. V, 1214. At the beginning of the year, the *Student's* writing was more of a "skeleton" and he needed Ms. L.T.'s assistance to add substance and interest. As he grew more comfortable with the rules of structure and format, he began adding the details himself without prompting. Ms. L.T. then began introducing him to more sophisticated writing through the use of phrases, clauses, and extended vocabulary, and he responded well to that information. T. V, 1217.

54. The *Student's* IEP also includes assistance for the *Student* with science and math, his two core academic classes in which he is in a regular education classroom. R. Ex. 1. The *Student* receives direct one-on-one instruction in a Curriculum Assistance class, a class specifically designed to assist special education students with their regular education program. T. VI, 1309; T. IV, 927.

55. The *Student* is the only learning disabled student at Middle School A who receives one-on-one instruction in a curriculum assistance setting. T. V, 1154.

56. Curriculum assistance provides students with an opportunity to work on their study skills and organizational skills, and to review material first presented in the regular education classroom and to receive homework assistance. *Id.* Ms. J. testified that It is also a common place for the modifications contained on a student's IEP to be implemented. T. IV, 928.

57. Ms. Mc, the *Student's* curriculum assistance instructor, meets daily during fourth period with the *Student's* science and math teachers to ensure that she knows how the *Student* has performed that day, what homework he has been assigned, if there are any projects in which the *Student* may need her assistance and whether there are any other concerns she needs to address. T. VI, 1330. She also works in conjunction with Ms. L.T. to provide assistance to the *Student* on larger projects. T. V, 1178-79.

58. Ms. Mc works with the *Student* on his organizational goal through the use of a daily agenda. T. VI, 1336-37. The *Student* uses his agenda every day, in which he writes down his science and math homework. When the *Student* arrives in curriculum assistance, Ms. Mc checks the *Student's* agenda to ensure it accurately reflects his assignment. T. VI, 1337. She also checks the *Student's* binder each day to ensure that all of his papers are in order and put in the correct place. *Id.* at 1338.

59. In addition to the daily agenda, Ms. Mc personally maintains a daily assignment and performance sheet. This sheet goes home with the *Student* every day for his parents to review. It includes all assignments, any problems the *Student* had in school that day, and all up coming quizzes and tests. T. VI, 1342-44.

60. Ms. Mc also assists the *Student* with utilizing learned study skills and implements the modifications contained in the *Student's* IEP when appropriate. T. VI, 1339

61. The *Student's* IEP contains modifications to be used when necessary for instructing the *Student* in his regular education classes - i.e., science and math. R. Ex. 1. Those modifications are "read aloud," "extended time," and "modified assignments." *Id.*
62. "Modified assignments" is a modification that a student may receive for a variety of reasons and may be appropriately implemented using a variety of strategies, based on the individual student's needs. T III, 717-18.
63. Modifying assignments may be a strategy used to help a student feel success by being able to complete an assignment. It may be used because a student may have difficulty completing an entire assignment but is able to demonstrate an understanding of the concept being taught in a shortened assignment. The purpose of modifying the *Student's* assignments was to separate the measurement of the *Student's* knowledge of the subject matter from the measurement of his output. T. III, 717-18; *see also* T. IV, 982-83.
64. On July 22, 2002, the *Student's* IEP team met to discuss the upcoming school year and the IEP goals and modifications. T. V, 1031. At that meeting, it was decided that the *Student's* math assignments would be modified by his parents, and The Mother indicated her consent to that arrangement. T. IV, 985-86; *see also* T. V, 1031-33; R. Ex. 42.
65. At a later IEP meeting on October 9, 2002, The Mother expressed concern that she did not feel comfortable modifying his math assignments. T. VI, 1341. To respond to her concerns, the team decided to alter the manner in which this modification was being implemented in math. After that meeting, all modifications to math assignments were done by Ms. Mc, the *Student's* curriculum assistance instructor. T. IV, 987-88; *see also* T. V, 1042, T. VI, 1341.
66. As a result of this change, the *Student* usually completes his math homework during curriculum assistance, where it is modified by Ms. Mc. If the *Student* is unable to complete the modified assignment during that period, he takes it with him to complete at home. T. V, 1042.
67. The *Student's* parents never expressed concern regarding the manner in which the *Student's* science homework was being modified, either at the July 22, 2002 IEP or at any later meeting. *Id.*; *see also* T. VI, 1272.
68. "Extended time" is a modification that is beneficial for children who have difficulty processing information. For example, they may be able to read material independently, but they have not yet achieved automaticity, so it takes them longer to get through the material. This modification also may be beneficial for someone with rapid automatic naming difficulties because the person requires more time to access what they know. T. III, 718-19.
69. At the July 22, 2002 IEP meeting, the *Student's* IEP team decided that the *Student* would use his curriculum assistance class for any extended time he required to complete his work. T. V, 1035; *see also* R. Ex. 42. Petitioners have never raised any concern regarding the manner in which the "extended time" modification has been implemented for the *Student*. T. V, 1039.

70. “Read aloud” is a modification that is used to ensure the student understands the content of the material he is being asked to read. T. III, 713-716. There are several ways in which this modification may be implemented, depending on the needs of the particular student. A teacher may choose to provide the student with material to be read independently that is at the student’s independent reading level. Another option is for a student to identify those words he does not know before he begins working on an assignment or test. For some students who cannot read, it may be appropriate to read everything to them. *Id.*

71. At the July 22, 2002 IEP meeting, the *Student*’s IEP team decided that the “read aloud” modification should be implemented the same as the “extended time” modification: if the *Student* is in need of read aloud, he is provided the opportunity to have a test or quiz read to him during his curriculum assistance class. As a result, the *Student* would take all quizzes and tests in his science and math classroom with the other students. T. V, 1033-35. However, if he did not have an opportunity to complete the quiz or test, or did not understand all of the material, he would take the quiz or test to curriculum assistance where Ms. Mc would provide additional time and would read aloud all of the material to him in which he needed assistance.

72. At the October 9, 2002 IEP meeting, the Parents expressed concern with the manner in which the “read aloud” modification was being implemented. The Mother testified that she believed that the only way in which the “read aloud” modification can be appropriately implemented is for the student to be pulled out of the regular classroom and read the test or quiz by an instructor at that time. She did not believe it was ever appropriate to implement this modification during the curriculum assistance class. T. I, 233-36. As a result her concerns, immediately following this meeting, the *Student* began to be pulled out of his class during tests and quizzes and the test would be read to him in a separate setting. T. VI, 1272-73. Ms. L.T. began reading his science tests to him and Ms. J. read his math tests. T. V, 1037; T. VI, 1272-73.

73. The first time the *Student* was pulled out of his science class to be “read aloud” a quiz was on October 22, 2002. This was the first test or quiz that Ms. TS, the *Student*’s science teacher, gave to her class after the October 9 IEP meeting. T. VI, 1274.

74. The first time the *Student* was pulled out of his math class to be “read aloud” a quiz was on October 18, 2002. T. VI, 1344.

75. There was never any discussion at the October 9, 2002 IEP meeting, or any other IEP meeting, in which the Parents expressed the view that the *Student* must be read every piece of material that is introduced to him, whether it be in the form of a reading assignment, homework, in-class work, quiz, or test. T. V, 1033-34.

76. In implementing the *Student*’s “read aloud” modification, the teachers did not read to the *Student* every in-class assignment, every homework assignment, every quiz, or every test. Testimony from several witnesses for Respondent testified that such an approach would be detrimental to the *Student*. Ms. P testified that the goal for the *Student* is to learn to read independently but felt that if

everything is read to the *Student*, then he would be denied the opportunity to practice his reading and it would have a detrimental effect on him because it would not provide him an opportunity to build his reading stamina. T. III, 714-16. Reading stamina is an important skill, particularly in the context of end-of-grade examinations, where a student is required to sit and read a two-page passage. *Id.*

77. Jeff Larson, Senior Administrator and Compliance Officer with the Special Education Department of the Wake County Public School System, testified that over-modifying the read aloud provision could cause an over-dependence on the modification. This over-dependence would create an unfair disadvantage for the student when it comes to performing on the end-of-grade examination when the student is not permitted to have the test read to him. T. IV, 796-97.

78. It is also important to read every day to a child who has a learning disability in reading. This is very different from the purpose of the “read aloud” modification contained on some IEPs. Reading aloud to a student with a disability in reading provides an opportunity to the student by expanding their knowledge base, building their vocabulary, exposing them to points of view, and building comprehension skills. T. III, 719. In contrast, the purpose of the read aloud modification on an IEP is designed to ensure that the student comprehends what is written on the assignment or test on the paper in front of him. T. III, 721-22.

79. Through the assistance of his curriculum assistance class and his modifications, the *Student* made adequate progress in his science and math classes. Ms. S., the *Student*’s math teacher, testified that the *Student* is an average student in math, that he is able to keep up with the work and he has never had a problem with getting behind. T. V, 1043-44. As is common with seventh graders, the *Student*’s effort in her class fluctuates with his interest in the subject matter. T. V, 1046-47.

80. During the first quarter of the 2002-2003 school year, the *Student* earned a C in math. T. V, 1048. During the second quarter, he earned a D, and for the semester, he earned a C. *Id*; see also R. Ex. 17. Ms. S. testified that in terms of the *Student*’s performance on tests and quizzes, he performed better during the first quarter, prior to the change in how his “read aloud” modification was being implemented. T. V, 1056.

81. Ms. S. testified that she did not believe the changes made to the manner in which the “read aloud” modification was altered for the *Student* the second quarter had any demonstrated benefit for him. Rather, she expressed the view that the change was detrimental to him because the *Student* was depending on the person reading to him rather than relying on what he knows and attempting to work the problems. T. V, 1057-58.

82. Ms. J. also expressed concern with the changes made to the manner in which the read aloud modification was being implemented. Ms. J. explained that by pulling the *Student* out of the classroom for every test and quiz and reading every portion of those tests and quizzes to him, the *Student* is not being encouraged to become independent in his reading. T. V, 1153.

83. Ms. TS, the *Student*’s science teacher, testified that the *Student* seems to enjoy science. Much of her class is geared toward lab work, and Ms. TS testified that the *Student* has excellent lab

partners, two of whom are among her top students, and all of whom are very friendly, polite, and nice students who work well together. T. VI, 1267-68. Ms. TS also stated that the *Student* has been able to keep up with his work, has not missed any assignments, and is performing well. T. V, 1269-70.

84. Ms. TS testified that the *Student's* performance in her class is very sporadic. He has some grades that are very good, and others that are poor. T. VI, 1279. Overall, the *Student* has maintained a C average in her class. *Id*; *see also* R. Ex. 17.

85. Ms. TS testified that she saw no change in the *Student's* performance after the "read aloud" modification was altered for the *Student* during the second quarter of the 2002-2003 school year. T. VI, 1279-80; *see also* R. Ex. 22, 23, and 24.

86. The *Student's* IEP team has been very responsive to his needs, meeting regularly to assess his progress and make changes to his IEP if appropriate. T. VI, 1309.

87. The August 17, 2001 settlement agreement entitled the *Student* to 15 75-minute tutoring sessions during the 2002 summer session. R. Ex. 3; T. I, 116. If the *Student* were to receive these services five days a week, he would receive tutoring sessions for a total of three weeks. T. I, 116.

88. At the May 20, 2002 IEP meeting, the *Student* was offered a tutoring program in Corrective Reading as he had received the previous summer and throughout the previous school year. T. I, 115-16; T. III, 729.

89. The Mother decided on May 20, 2002 that the *Student* would participate in the tutoring agreed to under the settlement agreement. T. I, 129.

90. At the time of the May 20, 2002 IEP meeting, the *Student* had already taken end-of-grade examinations and his results were communicated to administrators at Middle School A the morning of the 20th. T. VI, 1313. The *Student* received a level III in math and a level II in reading. This information was passed on to Ms. D. at the IEP meeting later that day.

91. At this May 20, 2001 IEP meeting, the *Student* was given the option of attending the Summer Voyager Program. T. III, 729. It was explained to The Mother at the May 20, 2002 IEP meeting that Summer Voyager was offered to all students who did not receive a III on their end-of-grade tests and that it was designed to provide assistance in reading and math. T. I, 113.

92. The Summer Voyager program ran for four weeks, from June 13 to July 12 and went from 8:00 to 1:30. R. Ex. 44; T. I, 119; T. IV, 844.

93. The Mother testified that she was given the option of having the *Student* participate in Summer Voyager and to schedule the *Student's* tutoring to begin after the Summer Voyager program ended at 1:30. T. I, 116.

94. Summer 2002 was the first time that WCPSS offered Summer Voyager. It included both a math and reading component. The reading component was designed to increase the reading comprehension of the students attending. T. VI, 1282. It did not include any instruction geared specifically toward the end-of-grade examinations. T. VI, 1283.
95. It was explained to the Mother that Summer Voyager was not a special education program or service. T. I, 113.
96. The Mother understood that Summer Voyager was not a flexible program inasmuch as students were required to attend both the math and reading portions of the program. In addition, the Mother testified that Wake County Public Schools did not have the flexibility to modify the program in any way. T. I, 113-14; *see also* T. VI, 1285.
97. Summer Voyager was a program purchased by WCPSS in part as a result of research demonstrating its success at increasing the reading level of students. T. VI, p 1283-84. It was a “boxed” curriculum with no room for flexibility. Angela Davis, site administrator for Summer Voyager at Middle School A during the summer of 2002, testified that “as far as the curriculum was concerned, it was straight out of the box, and the teachers were instructed to do exactly what was told in their instruction books and manuals. . . It was very rigid.” T. VI, 1284-85.
98. Summer Academy was a voluntary program. After results came in from the end-of-grade testing in May 2002, a letter went to every parent whose child did not score a level III or IV on the end-of-grade examinations, stating that as a result of their child not scoring at level III or IV, “your child has an invitation to attend Summer Academy.” T. VI, 1286. Parents at Middle School A were properly informed that this program was voluntary and some parents opted for their child to participate in an alternative form of instruction rather than attend summer academy. T. VI, p 1287-88. Parents were informed that attendance at Summer Voyager was not a prerequisite to their child progressing to the next grade. *Id.*
99. Also at the May 2002 IEP meeting, the *Student’s* IEP team determined that he was not eligible for Extended School Year Services (ESY). The *Student’s* grandmother and regular attendee at the *Student’s* IEP meetings, testified that she and her daughter, the Mother, were not interested in the *Student* receiving ESY services during the 2002 summer session but were interested in the *Student* attending Summer Voyager and to continue with his reading tutor. T. II, 459. The grandmother understood that the tutor was a service provided pursuant to the settlement agreement and was not an ESY program. She also understood that Summer Voyager was not a special education program and not an ESY program. T. II, 456-59.
100. The Mother initially had decided on May 20th to accept the school system’s offer to provide the *Student* with the summer tutoring sessions, T. I, 129. She later changed her mind and declined these offers. The Mother testified that once she enrolled the *Student* in the Summer Voyager program she was no longer interested in the *Student* receiving tutoring as well because it would extend his school day from 1:30 until 3:00. T. I, 118.

CONCLUSIONS OF LAW

1. The IDEA, 20 U.S.C. § 1400 *et seq.*, is the federal statute governing education of students with disabilities. The federal regulations promulgated under the IDEA are codified at 34 C.F.R. Parts 300 and 301.
2. The controlling state law for students with disabilities is Chapter 115C, Article 9 of the North Carolina General Statutes, and the corresponding state regulations, including sections 1501-1541 of the State Procedures Governing Programs and Services for Children with Disabilities.
3. The *Student* is a student with a disability for purposes of the IDEA and corresponding State law. He is identified as learning disabled in reading and written expression.
4. Respondent is required under federal and state law to make special education and related services available to the *Student* and to offer him a free appropriate public education (FAPE) as that term is defined under the IDEA, and state procedures.
5. In addition, North Carolina requires respondent to provide the *Student* a sound basic education commensurate with that given other students. *Leandro v. State of North Carolina*, 346 N.C. 336, 488, S.E.2d 949 (1997); *Harrell v. Wilson County*, 58 N.C. 260 (1982); N.C. Gen. State Ch. 115C, Art. 9.
6. Petitioners bear the burden of demonstrating that Respondent failed to provide the *Student* with a free appropriate public education.
7. Petitioners failed to carry their burden in demonstrating that the board failed to comply with its obligation pursuant to the August 17, 2001 settlement agreement to provide the *Student* with 15 tutoring sessions during the 2002 summer recess. The reason these services were not provided during the 2002 summer recess was because the Mother declined the board's offer to provide the *Student* with these services.
8. Petitioners have failed to carry their burden in demonstrating that Respondent denied the *Student* an opportunity for a free appropriate public education by not properly implementing the *Student's* IEP from August 17, 2002, until December 5, 2002. To successfully bring a claim that Respondent did not adequately implement the *Student's* IEP from August 2, 2002 until December 5, 2002, Petitioner must demonstrate that Respondent failed to implement substantial or significant provisions of the IEP. *DiBuo v. Board of Education*, 309 F.3d 184 (4th Cir. 2002); *see also Board of Education of Montgomery County v. Brett Y.*, 1998 U.S. App. LEXIS 13702, 36 (4th Cir. 1998); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).
9. While the board may not have implemented the IEP as the Parents would have liked, Petitioners failed to carry their burden in demonstrating that the manner in which the IEP was implemented violated the IDEA or comparable state law.

10. Violations of a student's IEP do not amount to a denial of a free appropriate public education unless the evidence supports a finding that the student suffered some significant harm as a result of the violation. *DiBuo v. Board of Education*, 309 F.3d 184 (4th Cir. 2002); *see also Board of Education of Montgomery County v. Brett Y.*, 1998 U.S. App. LEXIS 13702, 36 (4th Cir. 1998). The evidence in this case does not indicate the *Student* was significantly harmed by the manner in which his IEP was implemented.

11. The manner in which the IEP was implemented did not constitute a denial of a free appropriate public education for the *Student*.

12. The 2002-2003 IEP was an appropriate educational program for the *Student*. The *Student's* educational program was extremely individualized. As a result of this highly-individualized program, the *Student* has performed well, making significant gains in all areas.

13. Petitioners have failed to demonstrate Respondent had any obligations pursuant to the IDEA or comparable state law to provide the *Student* with any special education services during the 2002 summer session and as such, have failed to demonstrate that he was denied an opportunity for a free appropriate public education during the 2002 summer session.

DECISION

Petitioners have the burden of proof in this contested case. It is hereby ordered that Petitioners failed in their burden of proof to show that Respondent failed to provide FAPE.

NOTICE

In order to appeal this Final Decision, the person seeking review must file a written notice of appeal with the North Carolina Superintendent of Public Instruction. The written notice of appeal must be filed within thirty (30) days after the person is served with a copy of this Final Decision. G. S. § 115C-116(h) and (i).

This the 19th day of September, 2003.

Beryl E. Wade
Administrative Law Judge