

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
09 EDC 2329

Student, by Parent)
Parent,)
Petitioner,)
v.)
T.D., DIRECTOR, ABC CHARTER)
SCHOOL)
Respondent)

FINAL DECISION

THE ABOVE-ENTITLED MATTER was heard before the undersigned Administrative Law Judge, Joe L. Webster on October 26, October 27 and November 3, 2009 in Durham, North Carolina.

APPEARANCES

For the *Students*:
Parent

For the Respondent:
Phil S. Adkins
Adkins Law Group
PO Box 52393
Durham, NC 27717

EXHIBITS

PETITIONER'S EXHIBITS

ABC Charter SCHOOL'S EXHIBITS

WITNESSES

PETITIONER

Ken Benedict, Ph.D., *Parent*

ABC Charter School

Ms. A.B., D.M.G., *Student's sibling*, T.D., W.S., Ms. C.S.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at this hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making these findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate facts for judging credibility, including , but not limited to, the demeanor of the witnesses, any interest, bias or prejudice the witness may have, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case including but not limited to the verbal statements at the IEP meetings, the IEP documents, the DEC 5/Prior Written Notices, and any and all other competent and admissible evidence.

FINDINGS OF FACT

1. *Parent of Student (Student)* and at all times relevant to this action have resided in Durham or Orange Counties, North Carolina. *Student's* date of birth is ***, 1993. There is no dispute about whether *Student* qualifies for special education services due to his Specific Learning Disabilities in Reading (315.0), Writing (315.2) and Mathematics (315.1) pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*
2. Respondent, ABC Charter School is a local educational agency receiving monies pursuant to IDEA and is the local educational authority responsible for developing IEPs for *Student* Pursuant to NCGS Section 115c-238.2A et Seq. the State of North Carolina chartered the ABC Charter School to operate a 6-12 grade school in Durham, North Carolina. Respondent is a public independent charter school that is not a part of the Durham Public School system but is accountable to the State Board of Public Education and Department of Public Instruction for purposes of ensuring compliance with applicable laws and the provision of its charter. Respondent is a Local Educational ("LEA") for the purposes of the Individuals with Disabilities Act of 2004 ("IDEA"), 20 USC 1400 *et seq.* and as such is required to provide special educational services to disabled children attending ABC Charter School.
3. Through his *Parent*, *Student* filed a petition for a contested case hearing in the Office of Administrative Hearings on March 31, 2009. The petition contains, among other allegations, that *Student* had been denied a free, appropriate education for the 2007-2008 school year.
4. Prior to attending Respondent, *Student* had attended public schools in Wake and Durham counties. He had completed the fifth grade at ABC Elementary School, a part of the Durham Public School System ("DPS") where the school had completed an Individualized Education Plan ("IEP").
5. In the summer of 2006, *Student* and his sister attended the sixth grade at X Middle School, a part of DPS. *Parent* became dissatisfied with the special education department at X Middle School because, among other things, they had a sibling in a self-contained class.

6. *Parent* researched charter schools, including Respondent and visited the school in October, 2006 with her children. She transferred both children to ABC Charter School on ***, 2006. *Parent* discussed *Student's* learning disabilities and special education needs with Respondent and shared a copy of *Student's* IEP with ABC Charter School staff. *Parent* was assured by T.D., ABC Charter School Director, that ABC Charter School staff would be able to provide the individualized education required to meet *Student's* educational needs. (Tr. 09 EDC 2328 Vol. 1, pp. 163-164). *Parent* moved her residence from northern to southern Durham County to shorten the commute to ABC Charter School in March 2007.
7. Respondent provided special education services to *Student* during the 2006-2007 school years, and he made progress enough to be promoted to the seventh grade at Respondent.
8. During the early summer of 2007, *Parent* asked Respondent's Director, T.D. to schedule an IEP meeting before school started to review *Student's* placement and familiarize *Student's* new classroom teachers with her learning disabilities.
9. Independent of *Parent's* request, Ms. C.S., *Student's* special education teacher, met informally with Respondent's sixth and seventh grade teachers to discuss *Student's* and other special needs students to determine appropriate student placements for the 2007-2008 school year. (Tr. 09 EDC 2328 Vol. 3, p. 737, line 18 - p. 738, line 5).
10. On August 22, 2007, Respondent held an IEP meeting for *Student* several days prior to the beginning of the school year.
11. *Parent* was very involved in the meeting, wanted to review the previous year's IEP goals and engaged in lively discussions about *Student's* problems and the teacher's plans regarding *Student* (Resp. Ex. 4, IEP Team meeting minutes dated 8/22/07)
12. *Parent* testified that, in response to concerns she had raised about *Student's* education shortly after enrolling *Student* at ABC Charter School, T.D. stated to *Parent*, "just let him fail." (Tr. Vol. 1, p.111, line 13) Respondent's Response to the Petition (No. 16) stated that "T.D. told *Student's Parent* that sometimes a student can learn a life lesson from failure."
13. *Student's* 4th quarter Student Assessment Report (SAR, dated June 2007) stated that he "met the majority of his goals as outlined in his IEP" which was for the 2/6/07 – 2/5/08 period. (Pet. Ex. 9, p. 1) Subsequent progress reports and decisions, however, indicated that he had met not any of those goals, and goals were continued in their entirety, without modification to the subsequent IEP dated 2/6/08 – 2/5/09. Ms. C.S. testified that she had "made a mistake," that "probably the verb (was) wrong" and that "he 'made progress toward' the majority of his goals." (Trs. Vol. 3, p. 628, line 6 and p. 627, lines 7-8)
14. Upon the suggestion of T.D. (Pet. Ex. 3, p.5, email from T.D. to *Parent*), *Parent* requested that an IEP Team Meeting be scheduled prior to the start of the 07-08 school year. The purpose of this meeting was to talk with the seventh grade teachers about what the issues were with *Student* and what needed to be done in order to make sure that the seventh grade year was successful. (Tr. Vol. 1, p. 112)

15. The IEP Team Meeting was scheduled on August 22, 2007. Specific math and writing needs and the fact that *Student* had failed his sixth grade math EOG were discussed. (Tr. Vol. 1, pp. 229-230, lines 23-10 and Pet. Ex. 4)

16. *Student* was assigned to the higher level of two seventh grade math classes. Respondent's witnesses testified that *Student* was placed in the pre-algebra math class because *Parent* did not want *Student* and *Student's* sister in the same math class, and that this was discussed and decided at the IEP meeting on August 22, 2007. However, nothing in the IEP minutes indicate that this was discussed or agreed upon. (Pet. Ex. 4 and Tr. Vol. 3, pp. 613-614). *Parent* agreed to purchase a math workbook *Student* would be using in the 7th grade. Ms. A.B. explained her approach to teaching *Student*, allowing him to write freely without worrying about grammar and later requiring better punctuation (Resp. Ex. 4, IEP Team meeting minutes dated 8/22/07).

17. Approximately four or five weeks into the school year, *Parent* complained to Respondent's Director, T.D., that Respondent was not addressing the IEP goals and EC services were not being provided that been discussed at the August 22, 2007 meeting. *Parent* shared these concerns verbally and via email with D.S., EC Coordinator, and Ms. C.S., EC Teacher. D.S. testified that *Parent* requested EC schedules at least two or three times, and further testified that both he and *Parent* requested them from Ms. C.S. but that they were not produced. Tr. Vol. 3, p. 631.

18. Toward the end of September, *Student* began to develop self-esteem and self-confidence issues which *Parent* contends was a result of his academic challenges and lack of support, ultimately leading to a deep hatred for school and resultant behavior problems. *Student* also contends that this impeded his education. *Student* had not exhibited defiant or oppositional behaviors in any prior school year. *Student*. Ms. A.B. testified that "he was not a behavior problem" in the sixth grade. (Tr. Vol. 1, p.90, lines14-16) Ms. D.G., regular classroom math teacher, noted in emails that during the first five weeks of the 07-08 year, *Student* "had a great attitude" and that he was "working hard" (Pet. Ex. 6, pp. 1, 3) in spite of the fact that he was failing. (Pet. Ex. 6, p. 4) Ms. A.B., regular classroom humanities teacher, noted in the first mid-quarter progress report that *Student* was well behaved, respectful, motivated, participative and that he worked hard. (Pet. Ex. 7, p. 1)

19. Mr. W.S. recommended "as part of the grievance procedure" that *Parent* discuss these concerns with "if not T.D. then after that the chairman of the Board" who was, at the time, Mr. Phil Adkins Mr. W.S. was not aware at that time that Mr. Phil Adkins was the brother-in-law of T.D. (See 09 EDC 2328 Tr. Vol., p. 630)

20. *Parent* met with T.D. and Mr. R.M., ABC Charter School's Middle School Director, on October 12, 2007 to discuss these concerns. (Pet. Ex. 8, p. 6) *Parent* testified that T.D. admitted that putting *Student* in the higher level math class was an error on the part of the teaching team. (Tr. Vol. 1, p.120) *Student* was subsequently moved into the lower level Math inclusion class where EC services were available.

21. On December 11, 2007 Parent wrote to Mr. Adkins regarding her concerns. (Pet. Ex. 10, p. 2)
22. On December 21, 2007, Mr. Phil Adkins, Mr. W.S. and Mr. R.M. met with *Parent* to hear her concerns. Mr. Phil Adkins provided the Court with Stipulations of Testimony, entered on the 28th day of August, 2009, regarding his involvement with ABC Charter School prior to his resignation from the Board in March 2008, and specifically this meeting with *Parent*. Mr. Phil Adkins stipulated that he thought that it was reasonable to get *Parent* an EC schedule, and notify her of changes to that schedule, and directed Mr. R.M. to provide a written schedule as soon as possible. At that meeting, *Parent* also requested further explanation and clarification of progress on yearlong IEP goals.
23. Ms. D.G., *Student's* 7th grade math teacher provided him with a calculator (T. Vol. 1, p. 169, lines 20-24, provided him a 7th grade workbook (Tr. Vol. 2, p. 271, lines 3-13), worked with him on Study Island to improve his math skills (Tr. Vol. 2, p. 271, lines 14-21) and created a system to send his work home to his *Parent* (Tr. Vol. 2, p. 2767. Ms. D.G., *Student's* 7th grade math teacher provided him with a calculator (Tr. Vol, lines 4-14). Ms. D.G. also testified that *Student* was capable of doing the work, but had a problem with his motivation to work. (Trs. Vol. 2, p. 272, lines 20-23; p. 273, lines 18-20; Tr. Vol. 1, p. 205, Lines 2-9).
24. Ms. A.B., *Student's* seventh grade language arts teacher testified that she modified *Student's* class work, modified the directions, read directions to *Student*, broke assignments into steps, and modified tests, requiring him to answer fewer questions. (Tr. Vol. 1, p. 201-204).
25. Ms. A.B. also testified that she was definitely aware that *Student* had difficulty in expressive language. (Tr. Vol. 1, p. 201).
26. Ms. C.S. testified that she had provided some EC services, both in class and pull out classes for *Student* in the first five weeks of school, but had not documented those services (Tr. Vol. 3, p. 593, line 20). She did not provide in class services in math for the first five weeks (Tr. Vol. 2, 275, lines 3-5). She also taught *Student* in a literacy class (Tr. p. 594, line 21-p. 595, line 9). The classroom teachers corroborated Ms. C.S. (Tr. Vol. 1, p. 202, line 25- p. 204, line 2; Vol. 2, p. 275, lines 6-25).
27. *Parent* told *Student* and his sister, that the Respondent's staff, and particularly, Ms. C.S., was incompetent, which adversely affected *Student's* attitude towards his teachers. *Student* often refused to go to Ms. C.S.'s office for services. (Tr. Vol. 2, p. 341, line 24 – p.342, line 21).
28. None of the teachers or staff thought his behavior warranted a behavioral assessment. (Tr. Vol. 1, p. 206, line 15-p. 207, line 2; Vol. 2, p. 329, line 24-p. 330, line 4; Vol. 3, p. 394, lines 5-14; Vol. 3, p. 477, line 21-p. 478, line 4)
29. *Parent* demanded Respondent hold another IEP Team meeting which Respondent did in October of 2007. *Parent* was frustrated, was aggressive, combative and demeaning towards ABC Charter School's staff. (Tr. Vol. 2, p. 345 lines 2-16, Vol. 2 p. 368, line 14 – p. 369, line 1). She also challenged Ms. D.G. by telling her that she wasn't doing the right thing by just letting

Student write freely without worrying about grammar, composition or punctuation and by allowing him to just get his thoughts down and enjoying the task. Tr. Vol. 2, page 349, lines 6-12)

30. In the second quarter of the 2007-2008 school years *Parent* sent an e-mail to Mr. Phil Adkins, the Chairman of Respondent's Board of Directors as well as the attorney for the school. (Pet. Ex., e-mail dated 12/12/07).

31. On or about December 12, 2007, T.D. directed *Student's* teachers that they did not have to respond to *Parent's* e-mails that were accusatory or demeaning, but to continue to provide information she requested. (Tr. Vol. 2, p. 390, line 12- p. 391, line 8).

32. In response to *Parent's* complaint, Mr. Adkins convened a meeting on 12/12/07 between himself, *Parent*, D.S., the Respondent's Director of Special Education, and R.M. Respondent's Assistant Principal. Mr. Adkins did not disclose that T.D. was his brother-in-law, but dealt with the problems *Parent* identified with the provision of *Student's* special education services.

33. In the meeting, Mr. Adkins offered to have an objective outside neutral person evaluate her complaints, but Mr. R.M. rejected that option. (Pet. Ex. 10 meeting minutes, p. 2).

34. Mr. Adkins directed the staff to provide *Parent* with a schedule of special education services. (Pet. Ex. 10, meeting minutes, p. 3).

35. On January 4, 2008, Ms. C.S. provided in a letter to Mr. R.M., which was provided to *Parent* the written EC Service Delivery Schedule and IIP Progress Report for the period from October 2007 to December 2007. (Pet. Ex. 10, p.9).

36. *Student's* IEP Progress Report dated December 2007 indicated that *Student* had not 'mastered' any of the IEP benchmarks had made "good progress" on three, and had made some or no progress on the remaining twelve. (Pet. Ex. 9, p. 12)

37. *Student's* IEP was reviewed on February 6, 2008. At the Annual Review meeting it was decided "to continue/extend last year's IEP with one or two revisions since minimal progress was made." (Pet. Ex. 9, p. 13)

38. On February 24, 2008, *Parent* sent Mr. W.S. an email inquiring about Section 11.C of *Student's* recent IEP. She noted that "there is a question which states "Does student have behavior(s) that impede his/her learning or that of others. We checked (and have always checked) 'no' yet all the feedback I get from Ms. C.S., Ms. A.B., and Ms. D.G. consistently state that it is his very behaviors that impede their ability to educate him." Mr. W.S. responded by stating that "the behaviors addressed in (this) IEP section are primarily for those students that are certified as Behaviorally Emotionally Disabled (Assaultive, Injurious) and who require behavior intervention plans. (Pet. Ex. 11)

39. Training materials provided by the Department of Public Instruction (DPI), Exceptional Children (EC) Division in response to the Complaint discussed below in III.25 stated that "For

any student whose behavior is impeding his/her learning, regardless of disability category, the IEP team must address the behavior either through an annual goal (what the student will learn), a behavior intervention plan (interventions/instruction adults provide on behalf of the student) or both.”

40. *Parent* testified that the IEP Team at Partnership Academy developed a Behavior Intervention Plan (BIP) for *Student* in January 2009 to address some of the same behaviors that were present in the 07-08 year at ABC Charter School. (Tr. Vol. 1, p. 123)

41. On February 29, 2008 *Parent* requested via telephone conversation, and again on March 4, 2008 and March 10, 2008 via email, that an Assistive Technology reevaluation be scheduled. (Pet. Ex. 11). *Student* had not received an Assistive Technology evaluation since May 13, 2004. Mr. W.S. testified that these requests for reevaluation were not followed up on, nor was a DEC 2 offered, because he believed “this was more a conversation than a request.” (See 09 EDC 2328 Trans. Vol. 3, pp. 659-662)

42. *Parent* continually sent e-mails to Respondent’s teachers questioning schedule changes and grading.

43. On March 4, 2008, *Parent* sent an e-mail to Mr. W.S. “officially” requesting:

- a. Assistive Technology re-evaluation for *Student* and his sister;
- b. “Teacher notes” be added to the IEP for *Student* and his sister;
- c. Each of *Student*’s teachers provide *Parent* every week with a list of daily assignments, homework, projects and scheduled tests and quizzes. (Pet. Ex. 11, e-mail from *Parent* dated March 4, 2008).

44. On March 4, 2008, Mr. W.S. responded to *Parent* offering to conduct the Assistive Technology Testing through the school’s psychologist or occupational therapist and to hold an IEP meeting earlier than the annual review scheduled for mid-April, 2008. (Id, e-mail from Mr. W.S. dated March 4, 2008). *Parent* responded with possible dates and a query about having her private psychologist perform the testing. (Id, e-mail from *Parent* dated March 10, 2008). Neither party followed up on the Assistive Technology Testing for *Student*.

45. On or about March 26, 2008, *Parent* filed a complaint against Respondent with the North Carolina Department of Public Instruction, Exceptional Children Division (“DPI”). *Parent* alleged *Student* had not received a Free and Appropriate Public Education (“FAPE”) because Respondent had failed to provide:

- a. sufficient, appropriate education to make progress toward Annual Goals and short-term objectives as outlined in DEC 4, Section IV,
- b. services as outlined in the DEC 4, Section V.B. “Anticipated Frequency and Location of Services.”

- c. parental feedback regarding progress towards annual goals in DEC 4, Section VI and the North Carolina Policies Governing Services for Children with Disabilities (NC 1503-4.1)(a)(3)iii
(Res. Ex. 1)
46. On April 21, 2008, Respondent sent its reply to *Parent's* complaint to DPI. (Pet. Ex. 14).
47. On April 25, 2008, *Parent* stopped by Mr. W.S.'s office unannounced and requested that *Student* be permitted to leave school at 12:30 p.m. beginning on April 30, 2008 so that he could meet one-on-one with her private tutor for the remainder of the school year. *Parent's* request was supported by the IEP team and Prior Notice (DEC 5, 2 of 2) was signed by *Parent*, Mr. W.S., T.D., Ms. C.S., Ms. D.G., and Ms. A.B. (Pet. Ex. 15).
48. *Parent* complained that Respondent's admissions policy violated the Charter School Act. Respondent admitted *Student* without any problem or conditions and promoted him to the eighth grade after he completed some summer work.
49. On May 28 and 29, 2008, *Parent* e-mailed Mr. W.S. with a copy to T.D., and asked Respondent for disciplinary files for JR and *Student* and requested the "types and location of records maintained" by Respondent. (Pet. Ex. 19, e-mail from *Parent* dated May 24, 2009).
50. On May 29, 2008, *Parent* e-mailed T.D. renewing her request to review JR and *Student's* records. (Pet. Ex. 16, e-mail from *Parent* dated May 29, 2008).
51. Mr. W.S. replied on June 2, 2009 asking *Parent* to call him to discuss options to fulfill Respondent's obligations to *Student*. (Pet. Ex. 16, e-mail from Mr. W.S. dated June 2, 2008).
52. Sometime prior to *Parent's* request, Mr. W.S. had copied *Student's* Special Education file and provided it to *Parent*. (*Student's sibling's* Tr. Vol. 1, p. 242, lines 3-13) and the school secretary, MRS. V., had provided copies of *Student's* cumulative file to *Parent*. (*Sibling's* Tran. Vol 1, p. 242, lines 14-21).
53. The only records regarding *Student* Respondent did not provide *Parent* were the grade books which Respondent's counsel had advised Respondent it did not have to provide. (*Student's sibling's* Tr. Vol. 1, p. 242, line 22 – p. 248, line 12 and p. 244, lines 11-17).
54. *Parent* admitted that she did not like Ms. C.S., *Student's* special education teacher, and that she had intentionally tried not to provide special education services to *Student's sibling*. (*Student's sibling's* Tr. Vol. 1, p. 255, lines 7-12). *Parent* complained to DPI that after she filed her complaint, Ms. C.S. continued her intentional and negligent disregard of the IDEA, NCLB Act, and North Carolina DPI statutes, policy and procedure through failure to provide accommodations for both *Student's sibling*. and *Student* in administering 2008 state mandated end of grade examinations. (Resp. Ex. 22, e-mail to Mr. Hudson dated 9/29/2008). She also demanded Respondent's staff "be found guilty" of intentional destruction of, or in the

alternative, gross misconduct and negligence in handling of official student records. (*Student's sibling*. Resp. Ex. 22, p 2 of e-mail to Mr. Hudson dated 9/29/08)

55. On May 6, 2008, *Parent* retained *Student*. Ken Benedict, a licensed psychologist from the Center for Psychology and Education in Chapel Hill, NC, to conduct a comprehensive psycho-educational on her son due to concerns about the delivery of EC Services at ABC Charter School and to obtain updated information pertaining to (*Student's*) psycho-educational and psychological status. (Tr. Vol. 1, p.13)

56. Dr. Kenneth Benedict testified on *Parent's* behalf as an expert in psycho-educational testing. *Parent* retained Dr. Benedict because she was concerned Respondent was not providing special education services effectively. Dr. Benedict testified that his review, as outlined his Report of Psycho-educational Evaluation (Resp. Ex. 7), showed that the *Student* "was a child of superior potential or ability" but "that the levels of discrepancies ... he made on achievement testing led (the evaluators) to believe ... that he was quite learning disabled ... (and) struggling with issues of attention." (Tr. Vol. 1, pp. 16-17) The WISC-IV showed a 41 point discrepancy among composite scores between ability and achievement, significantly surpassing the NC Department of Public Instruction guidelines that a minimum of a 15 point discrepancy would qualify a child for EC services. On Matrix Reasoning, "which measures abstract thinking ability, particularly with visual information," *Student* scored in the 95th percentile. On the digit span, which measures working memory, and coding, which predicts processing speed, *Student* scored in only the fifth (5th) and ninth (9th) percentiles, respectively. (pp. 22-23) Dr. Benedict testified that he was "suspicious that there were signs of oral language pathology" and that he consequently administered the Wide Range of Memory and Learning test, "a good screen of (a student's) oral language skills." As a result of the findings from this Speech-Language Screening (NC Policy 1500-2.11(b)(15)) Dr. Benedict recommended an updated speech/language evaluation be conducted." (Tr. Vol. 1, p. 24-25.) Dr. Benedict testified that he "would predict a great degree of frustration in a student with this profile" and that this often can "lead to behavioral issues." (Tr. Vol. 1, pp. 29-30) Dr. Benedict further testified that a Functional Behavior Assessment and Behavior Intervention Plan "would have been an appropriate step, a useful step" in addressing *Student's* behavior issues. (p. 33) Dr. Benedict found *Student's* IEP for the period from 4-08 to 4-09 addressed the main areas of academic underachievement, but recommended development of sub-goals and measurements. He recommended *Student* undergo speech/pathology testing (which had not been previously recommended by the DPS psychologist), that the IEP team develop concrete sub-goals and means of measurement and the addition of sub goals (Resp. Ex. 7, pp. 12-14). Dr. Benedict also testified that the previous evaluation performed by DPS in 2006 did not recommend a speech/language assessment be performed or speech/language services be provided. (Tr. Vol 1, p. 55, lines 12-18). Furthermore, he testified that it was reasonable for ABC Charter School to have relied on the previous report. (Tr. Vol. 1, p. 51, lines 7-11) 58. *Student's* previous evaluation performed by DPS School psychologist in October, 2006 was information the IEP team utilized to develop *Student's* IEP's at Respondent school. (Resp. Ex. 7). The psychologist noted that *Student* no longer met ability-achievement discrepancy criteria, but ABC Charter School utilized other aspects of the report to continue *Student's* eligibility for EC services (Resp. Ex. 7, p. 3).

57. *Student* had previously been tested by the DPS School psychologist in October, 2006 which was the information the IEP team utilized to develop *Student's* IEP's at Respondent school. (Resp. Ex. 7). The psychologist noted that *Student* no longer met ability-achievement discrepancy criteria, but ABC Charter School utilized other aspects of the report to continue *Student's* eligibility for EC services (Resp. Ex. 7, p. 3).

58. Dr. Benedict testified that the IEP for the period February 08-February 09 addressed the main areas of *Student's* academic weaknesses (T. Vol.1, p. 54, lines 11-19), and that Ms. A.B.'s approach to teaching *Student* writing was appropriate. (Tr. Vol. 1, p. 60, lines 10-24)

59. Dr. Benedict recommended some additional accommodations for *Student*: teacher's notes, study guides, fool-proof communication system between school and parent, spell checker and access to audio books. For tests, he recommended permission to ask for clarification of words, off-the-clock breaks, oral examinations and access to word processor and spell checker.

60. Dr. Benedict recommended a tutor during the summer and referral to a medical doctor for evaluation of medication for his ADD. Dr. Benedict testified that he "would predict a great degree of frustration in a student with this profile" and that this often can "lead to behavioral issues." (Trans. Vol. 1, pp. 29-30) Dr. Benedict further testified that a Functional Behavior Assessment and Behavior Intervention Plan "would have been an appropriate step, a useful step" in addressing *Student's* behavior issues. (Tr. Vol. 1, pp. 29- 33) Dr. Benedict testified that based on his Report that the last evaluation of *Student's* language occurred in 2001 when a CELF-3 had been administered. Tr. Vol. 1, p. 78. lines 22-24). Dr. Benedict testified that he did not believe that letting *Student* fail would be an appropriate strategy to addressing his learning and language disabilities, and that he had never encountered any data based or peer reviewed research that would show that children with learning disabilities can learn a lifetime of success from academic failure. (Tr. Vol. 1, p. 38) Dr. Benedict testified that he believed that it would not be in the *Student's* best interest for him to return to ABC Charter School for tutoring, and recommended against it. (Tr. Vol. 1, p. 43, lines 21-22)

61. Benedict also highlighted comments that *Student* made that he could do better in school and, "if I had been my other self, I would not have done any of this" explaining *Student* knew he could do better, but didn't give his full effort at ABC Charter School . (Tr. Vol. 1, p. 63, line 1- p. 64, line 21 – p. 66 lines 8-13). Dr. Benedict testified that *Student* was frustrated at home, with his sister and his *Parent* (Tr. Vol. 1, p. 57, lines 23-25 – p. 58, lines 1-10). Dr. Benedict opined that if *Parent* had told *Student* that the staff at ABC Charter School was incompetent that it would have given *Student* permission not to work hard. (Tr. Vol. 1, p. 58, lines 23- p. 60, line 9). Dr. Benedict was aware that at X Middle School *Student* was sleeping in class. (Tr. Vol. 1, p. 67, lines 12-22) and *Parent* had lost disciplinary control over *Student* (Tr. Vol. 1, P. 69, line 23 – p. 70, line 6). Dr. Benedict also testified that *Student* was not stigmatized by his being a special needs student, but rather because he was adopted and was Russian. (Tr. Vol. 1, p. 77, lines 21-24). Dr. Benedict also testified that, in his 6th grade year at ABC Charter School, *Student* was not a behavior problem and had a satisfactory year. (Tr. Vol. 1, p. 90, lines 12-20).

62. Normally, Dr. Benedict, in performing a psycho-educational assessment, would obtain information from the student's classroom teachers. He did not follow the same process in

performing the assessment on *Student* (Tr. Vol. 1, p. 48, line 24-p.49, line 12-p.55, lines 5-7). He got information from *Parent* about problems at ABC Charter School, *Student's* tutor (*Student's sibling's* Tr. Vol. 1, p 58, lines 18-21) and read the DPI reports of its investigation of *Parent's* complaint about ABC Charter School. (*Student's sibling's* Tran. Vol. 1, p. 37, lines 18-25).

63. On August 15, 2008 and September 11, 2008, Dr. Connie McDonald-Bell, Certified Speech and Language Pathologist, conducted a comprehensive language/auditory processing evaluation in accordance with **NC Policy 1500-2.11(b)(16)**, which found *Student's* receptive and expressive language skills to be below the third (3rd) percentile in most measures on the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF-4) test, ranging from a test age equivalency of approximately eight (8) to nine (9) years. Dr. McDonald-Bell found *Student* had deficits in receptive and expressive language skills, especially when language is idiomatic and social in nature. Dr. McDonald-Bell made a number of recommendations to address *Student's* speech/language problems including language intervention to teach him strategies, rules and techniques. She also recommended that teachers speak more slowly and the he have extra time on exams. She recommended use of “Inspiration” and “Write Outloud” software. (Resp. Ex. 8). (Resp. Ex. 8)

64. Dr. Benedict testified that test scores determined by Dr. Connie McDonald-Bell showed a “rather staggering degree of difference” given the *Student's* ability scores. He testified that speech/language therapy would have been beneficial. (Tr. Vol. 1, p. 26)

65. Prior to reading the DPI report and hearing *Parent's* complaints, Dr. Benedict had a good impression of ABC Charter School's Special Education Department and had actually referred students to ABC Charter School. (Tr. Vol. 1, p. 50, lines 1-18).

66. At no time prior to hiring Drs. Benedict and McDonald-Bell, did *Parent* request the school perform new psycho-educational or speech/language diagnostic testing. (*Student's sibling*. Tr. Vol. 2, p. 310, lines 11-23; p. 312, lines 21-23).

67. *Parent* did not request Respondent pay for the tutor, nor did Respondent offer to pay for a tutor.

68. *Parent* did not request a psycho-educational evaluation or a behavioral assessment and signed the IEP documentation without protest. (Resp. Ex 13; Trans. Vol 1, p. 148, line 5-p. 149, line 8)

69. *Parent* expressed her opposition to testing her children. W.S., ABC Charter School's Exceptional Children's Supervisor of Special Programs, testified that in the spring of 2008, *Parent* indicated she was opposed a retesting her daughter. Mr. W.S. testified that he had one or two conversations with *Parent* about retesting *Student's sibling*. Mr. W.S. informed *Parent* that ABC Charter School had a new psychologist on board and that he would like or the team would like to pursue some testing on *Student's sibling*. In response, *Parent* stated, “Oh, no, we're not going to play that game. She may in fact test out and you wouldn't be providing her any services.” (*Student's sibling*. Tr. Vol. 3, p. 566) Mr. W.S. also testified that at the April 14, 2008

IEP meeting, the notes indicate that “Mr. W.S. discussed and made note to parent that J. would be looking at a three year reevaluation upon return meeting on 09//05/08.” (*Student’s sibling* Tr. Vol. 3, p. 567.) Mr. W.S. testified that he did not believe *Parent* was officially requesting a speech evaluation of her daughter and that ABC Charter School was relying upon the 2003 IEP. Mr. W.S. testified further that at no time during the 2007-2008 school years did Mr. R.M. ask for a psychological educational evaluation of her daughter, and that would have required the signing of a DEC 2. (*Student’s sibling*. Tr. Vol. 3, p. 567-568). Nor did *Parent* provide Respondent a copy of either report.

70. Dr. Cheryl Saliwanchik-Brown and Educational Consultant with the University of Maine Institute for the Study of Students at Risk, testified that “children with unaddressed learning disabilities act out behaviorally (Tr. Vol. 1, p. 97) and that, based on her research and teaching experience, students have “acted out behaviorally because they felt unsupported in their education.” (p. 98) ABC Charter School provided no Speech/Language evaluations or therapy in the two school years that *Student* attended ABC Charter School.

71. During the week of May 21, 2008, *Student’s* Math end-of-grade (EOG) examination was administered without the “mark in book” accommodation that was specified in the *Student’s* IEP (DEC 4, Page 4 of 4.) (Resp. Ex. 15)

72. On May 28, 2008, *Parent* sent an email to Mr. W.S., referencing Page 20 of the *Handbook on Parent’s Rights*, Opportunity to Examine Records, requesting “copies of all grade book records substantiating all mid-quarter and final grades that (*Student*) had received” and “a list of the ‘types and location of records maintained.’” T.D. Mr. R.M., Mr. Phil Adkins and Ms. C.S. were copied on the email request. T.D. acknowledged that he received the email but stated that he did not respond to the request to examine records because it was a “two page email” and “he doubt(ed) very seriously that (he) read it line for line.” (*Student’s sibling*. Tr. Vol. 2, pp. 436-441 and *Student’s sibling*. Pet. Ex. 19)

73. Mr. W.S. replied on June 2, 2009 asking *Parent* to call him to discuss options to fulfill Respondent's obligations to *Student’s sibling*. (Pet. Ex. 19, e-mail from Mr. W.S. dated June 2, 2008).

74. Prior to *Parent’s* request of May 28 or 29, 2008, Mr. W.S. had copied *the Sibling’s* Special Education file and provided it to *Parent*. (Tr. Vol. 1, p. 242, lines 3-13) and the school secretary, MRS. V., had provided copies of *Student’s sibling’s* cumulative file to *Parent*. (Tr. Vol. 1, p. 242, lines 14-21)

75. On May 30, 2008, DPI issued a report of its investigation of *Parent’s* complaints against the Respondent. (Resp. Ex. 2).

76. DPI found that Respondent was non-compliant in the following areas:

- a. Failure to implement the student’s IEP, and
- b. Failure to develop IEPs for the student with the required components. (Resp. Ex2)

77. On October 15, 2008, the DPI Accountability Division wrote to T.D. stating that pursuant to an investigation, ABC Charter School “failed to properly provide accommodations” and that “scores for the students on the tests in question must be removed from the students’ permanent records and all accountability databases.” (Resp. Ex. 4)

78. On November 6, 2008, the DPI, Accountability Division, found ABC Charter School to be “non-compliant in using appropriate accommodations as outlined in students’ IEPs” and “non-compliant in the handling of student tests.” DPI also concluded that Respondent had completed the necessary corrective actions steps required in the letter dated October 15, 2008 from *Student*. Sarah McManus. (Pet. Ex. 20)

79. January 12, 2009, Ms. J.R., recently qualified EC Teacher for ABC Charter School, wrote to *Parent* offering to provide the balance of the compensatory services that had been ordered by the DPI/EC Division as part of the Corrective Action Notice from the Complaint. Ms. J.R. did not propose a location nor did ABC Charter School offer to provide transportation. *Parent* responded by stating that she did not feel that, under the past and present circumstances, this would be in the *Student’s* best interest. (Resp. Ex. 6, pp. 5-7, emails between Ms. J.R. and *Parent*, January 12-20, 2009)

80. *Student* contends *Student* was unable to overcome the behavioral issues related to his lack of self-esteem and self confidence in learning caused by ABC Charter School’s failure to provide EC Services and FAPE. Therefore, *Student* transferred in May 2009 to a private therapeutic boarding school that specializes in addressing behavioral issues in learning disabled children. The undersigned cannot find as a fact by the preponderance of the evidence or as a matter of law that *Student’s* behavioral issues and self confidence issues were caused by anything that ABC Charter School did or did not do in connection with its provision of EC services and FAPE.

81. Pursuant to discussion with D.S., *Parent* created and provided a schedule for Respondent to provide the 50 hours of compensatory special education services mandated by DPS over the summer of 2008. (Resp. Ex. 3, e-mail dated June 8, 2008 and “Enclosure 1”). The schedule *Parent* proposed provided for only 34 hours of compensatory services before school started in August.

82. On July 28, 2008, *Parent* telephoned Mr. W.S. indicating she was discontinuing the compensatory services because she was moving to Orange County and *Student* would not be attending ABC Charter School. (Resp. Ex. 3, Enclosure 3, e-mail dated August 1, 2008). *Parent* cancelled the last three weeks of tutoring.

83. Neither *Parent* nor Respondent attempted to reschedule the remaining 30 hours of compensatory services until Respondent, pursuant to directions from DPI, contacted *Parent* on January 12, 2009 offering to provide services to *Student*. (Resp. Ex.6, e-mail from *Student’s* sibling dated January 12, 2009).

84. *Parent* sent an email to Respondent declining the offer and giving her explanation why the offer was declined. The email stated, “within the next weeks, *Student* will most likely be

attending a therapeutic boarding school in order to address not only his learning and language disabilities but issues related to his self-esteem and self confidence, both of which were severely damaged by the demeaning “just let him fail” treatment he received at ABC Charter School...” (Resp. Ex. 6, *Parent* e-mail dated January 20, 2009).

85. *Parent* enrolled *Student* at X Middle School in Orange County, North Carolina in August, 2008. Though *Parent* had the benefit of the reports of Drs. Benedict and McDonald-Bell, she did not request that X Middle School modify *Student's* IEP until December, 2008. Nor did she ever request a behavioral assessment. (Tr. Vol. 1, p. 157, line 6-p. 160, line 17).

86. On April 17, 2009, DPI wrote Respondent indicating it had complied with the corrective actions outlined in the May 30, 2008 letter except for providing the compensatory special education services and conducting an IEP meeting, but that Respondent was no longer obligated to conduct an IEP because *Parent* had moved to another county and she had declined the offer to complete the compensatory education tutorial services. (Resp. Ex. 6).

87. *Parent* complained that Respondent's admissions policy violated the Charter School Act. Respondent admitted *Student* without any problem or conditions and promoted him to the eighth grade after he completed some summer work.

88. While *Student* was attending X Middle School, he brought a knife to school, was suspended and placed in an alternative school. (Tr. Vol. 1, p. 71, lines 11-19). He got himself kicked out of Stanback (Tr. Vol. 1, p. 193, lines 5-6).

89. X Middle School did not perform a behavioral assessment for *Student* (Tr. Vol. 1, p. 70, lines 7-21) and did not make a finding that *Student* had a behavioral disability on his IEP. (Tr. Vol. 1, p. 72, lines 3-16) but should have (Tr. Vol. 1, p. 88, line 10 – p. 89, line 2).

90. *Parent* complained that Respondent's admissions policy violated the Charter School Act.

91. Respondent admitted *Student's sibling* without any problem or conditions. (Tr. Vol. 1, p. 187, lines 19-21), and promoted her to the seventh and eighth grades without any problem or conditions. (Tr. Vol. 1, p. 188, lines 6-8).

92. *Parent* admitted that she did not like Ms. C.S., *the Sibling's* special education teacher, and alleged that she had intentionally tried not to provide special education services to *the Sibling*. (Tran. Vol. 1, p. 255, lines 7-12). *Parent* complained to DPI that after she filed her complaint, Ms. C.S. continued her intentional and negligent disregard of the IDEA, NCLB Act, and North Carolina DPI statutes, policy and procedure through failure to provide accommodations for both *the Sibling* and *Student* in administering 2008 state mandated end of grade examinations. (Resp. Ex. 22, e-mail to Mr. H., dated 9/29/2008). She also demanded Respondent's staff "be found guilty" of intentional destruction of or in the alternative gross misconduct and negligence in handling of official student records. (Resp. Ex. 22, p 2 of e-mail to Mr. H. dated 9/29/2008.)

93. T.D., the Director of ABC Charter School, testified that the lack of a 7th grade EOG test result would not adversely affect *Student's sibling's* education or to graduate from high school. (*Student's sibling's* Tr. Vol. 2, p. 353, line 24 - p. 354, line 12).
94. *Student* had a private tutor from 2007-2009. *Parent* spent and is claiming Respondent should reimburse her \$2,817.50 for private tutoring for the 2007-2008 school year.
95. Respondent was unable to provide 30 hours of compensatory special education services ordered by DPI and *Parent* is claiming reimbursement for 93 hours at \$35.00 an hour; a total of \$3,255.00.
96. *Parent* is requesting reimbursement for *Student's* Psycho-educational testing and therapy in the amount of \$4,180.00
97. *Parent* moved from Durham County to Orange County at a cost of \$1,831.00, half of which *Parent* has requested that ABC Charter School reimburse.
98. *Parent* has requested reimbursement of legal fees of \$250.00, but *Parent* represented herself in this Petition.
99. *Parent* has requested reimbursement for Private School Tuition for the period May 25, 2009 to September 30, 2009 in the amount of \$25,800.00.
100. *Parent* has requested reimbursement for an oral language evaluation in the amount of \$870.00.
101. *Parent* has requested reimbursement for Speech/language therapy in the amount of \$2,975.00.
102. *Parent* has requested various due process expenses, including expert witness fees, lost work time and office supplies in the amount of \$5,455.18.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Chapters 150B and 115C of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and implementing regulations, 34 C.F.R. Part 300.
2. To the extent that the findings of facts contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels. *Bonnie Ann F. v. Callahan Independent School Board*, 835 F.Supp. 340 (1993).
3. *Students* have the burden of proof in this case. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed. 2d 387 (2005). The *Student* has the burden of proof by preponderance or a greater weight of the evidence regarding the issues enumerated above. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight,

or outweighing.” The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbears, in some degree, the weight upon the other side.

4. *Student* is a child with a disability pursuant to N.C. Gen. Stat. § 115C-106.3 and is entitled to receive a free appropriate public education (FAPE) pursuant to the IDEA, 20 U.S.C. § 1412, 34 C.F.R. 300.121, and the North Carolina General Statutes and the North Carolina Procedures Governing Programs and Services for Children with Disabilities.

5. *Student* is entitled to the preparation and implementation of an Individualized Education Program (IEP) as a consequence of being identified as a child with special needs. The IDEA requires an education plan likely to produce progress, not regression or trivial educational advancement. *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985). *Geis v. Board of Education of Parsippany-Troy Hills*, 774 F.2d 575 (3d Cir. 1985). The floor of educational benefit cannot be so low as to allow the child to squander his untapped potential for learning. “Trivial education advancement” is insufficient to satisfy the requirement for a FAPE. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1998), *cert denied*, 488 U.S. 1030 (1989).

6. In *Board of Education v. Rowley*, 458 US 176 (1982) the Supreme Court established both a procedural and a substantive test to evaluate a state’s compliance with the IDEA. Quoting from the Court, “First has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Acts’ procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” A determination that the District has failed either test is sufficient to support a determination that it did not provide an appropriate program. *Hacienda La Puente Sch. Dist. Of L.A. v. Honig*, 976 F.2d 487 (9th Cir. 1992).

7. Several factors are examined to determine whether an IEP provides FAPE. Consideration must be given to whether the program is individualized on the basis of the student’s assessment and performance; whether the services are provided in a coordinated and collaborative manner; whether positive academic and non-academic benefits are demonstrated; and, whether the program is administered in the least restrictive environment.

8. *Student* must demonstrate that a procedural violation of the IDEA must interfere with Respondent's provision of a FAPE to JR in order to prevail. (*Gadsby v. Grosnick*, 109 F.3d 940 (4th Cir. 1997).

9. Respondent satisfies the requirement to provide *Student* a FAPE when it provides personalized instruction with sufficient support services to permit *Student's sibling* to benefit educationally from that instruction. The "instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act, and if the child s being educated in the regular classrooms of the public education system should be reasonable calculated to enable the child to achieve passing marks and advance from grade to grade. (*Board of Education v. Rowley*, 458 US 176 (1982). Since Rowley courts

have ruled consistently that the IDEA guarantees a basic floor of opportunity for an education and that to provide FAPE an IEP must be reasonably calculated to provide meaningful educational benefit but necessarily the best educational possible.

10. The undersigned finds as a matter of law that Respondent did not provide a FAPE during the first five (5) weeks of the 2007-2008 school year. While there was testimony that some EC services were provided *Student* during this period, there was not documented evidence teachers provided *Student* modifications or accommodations outlined in *Student's* IEP during the five week period. As to the remainder of the School year the undersigned finds as a matter of law, that while Respondent's provision of educational services to *Student's sibling* may not have been what *Parent* thought it should have been, it met the standard of Rowley and did not deny *Student* a FAPE. Although, the IDEA requires that "states must provide specialized instruction and related services sufficient to confer some educational benefit upon the handicapped child," it does not require the furnishing of every special service necessary to maximize each handicapped child's potential." *Hartmann v. Loudoun County Bd. Of Educ.*, 118 F.3d 996 (4th Cir 1997). Moreover, there is no requirement that Respondent offer special education in the exact manner or scope as requested by the parent.

11. Department of Public Instruction requested that ABC Charter School try to schedule the remaining compensatory services which it did in January, 2009. *Parent* declined the services and Department of Public Instruction determined that Respondent had fully complied with the corrective plan. The compensatory services DPI ordered by DPI would have replaced the hours of special education services DPI found Respondent had failed to provide *Student* for five weeks during the 2007-2008 school year. Nevertheless, the undersigned finds that with respect to these compensatory tutorial services, *Student* is the *Student* herein whose interest is paramount, and should not be denied the opportunity to obtain tutoring even at this point in time. While Respondent admits that it had other procedural violations other than those occurring during the first five weeks of the 2007-2008 school year with respect to implementing *Student's* IEP, the undersigned finds as a matter of law that these violations viewed individually and collectively do not amount to a deprivation of FAPE for *Student*. I find as a matter of law that both Respondents and *Parent* bare some responsibility for many of the deficiencies in *Student's* educational benefits received while at ABC Charter School . The record is replete with communications between the parties, including numerous emails which mostly serve to deepen the hostility between *Parent* and those charged with implementing *Student's* IEP. *Parent* expressed to *Student* and *Student's sibling*. her dislike for Ms. C.S., *Student's* special education teacher in particular and her dislike for ABC Charter School in general, and this contributed to an impossible teaching atmosphere for *Student* at ABC Charter School. *Student* could not reach his full potential if he received confirmation from his *Parent* that he did not have to attend class and do his best. Notwithstanding *Parent's* abandonment of 30 of the 50 hours of compensatory services, *Student* is entitled to receive 30 hours of tutorial services. Therefore, monetary compensation in the amount of \$1,050.00 for 30 hours of compensatory services at the rate \$35.00 per hour shall be awarded to *Student*. The IDEA permits a Court to "grant such relief as the court determines is appropriate." 20 U.S.C. §1415(i)(2)(e)(iii). The undersigned finds this amount to be reasonable and appropriate to remedy any educational deficits brought about Respondent's failure to provide a FAPE to *Student* for the five week period in the 2007-2008 school years. Other than this five week period, the undersigned finds as a matter of law that

Student did not satisfy her burden of proving by a preponderance of the evidence that *Student* was denied a FAPE at ABC Charter School during the 2007-2008 school year.

12. The IDEA does not permit parents to recover compensatory or punitive damages *Hall v. Vance County Bd. Of Educ.*, 774 F.2d 629 (4th Cir. 1985); *Sellers v. School Board* F3d (4th Cir. 1998)

13. *Student* is not entitled to attorney fees pursuant to 20 U.S.C. §1415 (2000) as she represented herself and is not an attorney.

14. *Student* is not entitled to reimbursement for expert witness fees for Dr. Benedict and Connie McDonald-Bell. Dr. Benedict. *Arlington v. Murphy*, 548 U.S. 291 (2006).

15. As to the costs of evaluations obtained by *Parent*, the undersigned finds that under the specific facts of this case, *Parent's* failed to notify ABC Charter School that she planned to retain Dr. Benedict and McDonald if ABC Charter School did not provide such testing. Absent, a finding that ABC Charter School neglected to timely perform such evaluations after a proper request and was given an opportunity to choose the evaluators, the undersigned cannot find as a matter of law that *Student* is entitled to reimbursement for the costs of the evaluations. *Parent* didn't even provide a copy of the Report to the Respondent which, in addition, was conducted after *Student* had transferred to another school.

16. *Parent* is not entitled to reimbursement for *Student's* tuition at the Residential Therapeutic School he is attending during the 2009-2010 school year. *Student* failed to prove that ABC Charter School failed to provide *Student* a FAPE for other than the first five week period of the school year, which does not justify corrective action on the part of Respondent other than tutorial services. *Student* attended X and an alternative school while receiving psychological counseling from Dr. Benedict. *Student* was able to control his behavior, yet as *Parent* candidly admits, got himself thrown out of X Middle School. *Student* failed to prove that ABC Charter School caused *Student's* continued misbehavior that resulted in her placing him in the Residential Therapeutic School.

17. DPI addressed each allegation contained within *Parent's* complaint and made a determination of what remedy should be enforced against Respondent for the procedural violations. DPI made no findings and cited no deficiencies on Respondent's part relating to ABC Charter School's failure to conduct additional psychological evaluations of *Student* or whether Respondent must provide these evaluations as a part of the corrective action plan DPI imposed upon Respondent. While not bound by DPI's decision, an agency's decision is to be given appropriate weight as North Carolina law gives great deference to an agency's interpretation of a law it administers. *Dept. Of Health and Human Servs.*, 143 N.C. App. 470, 475, 546 S.E. 2d 177, 181 (2000) Moreover, this court is required to give appropriate deference to the decisions of professional educators. "The task of education belongs to the educators who have been charged by society with that critical task... [and] federal courts must accord due weight to state administrative proceedings." *Springer by Springer v. Fairfax County Sch. Bd.*, 134 F3d 659, 663 (4th Cir. 1998)

18. *Student* is not allowed to recover for moving expenses because they are compensatory not related education expenses.

19. *Student* cannot recover for *Parent's* lost time at work while she represented *Student*. Lost time at work has long been considered an inconvenience associated with litigation, but not compensable as damages. Furthermore, lost time would be compensatory, not traditional educational expenses that this court could award if it found Respondent had failed to deliver a FAPE.

20. *Student* cannot recover office supplies, photocopying charges, postage or parking as they are not included as costs of court in NCGS§7A-305.

21. *Student* is not entitled to recover reimbursement for Speech language therapy. The undersigned finds as a matter of law that *Student* has not proven that this therapy was required in order to assist *Student* to receive a FAPE while at ABC Charter School.

22. With the exception of proving that Respondent failed to provide a FAPE for a five week period in the 2007-2008 school years, *Student* failed to carry her burden to show the court that the procedural errors of which she complains interfered with Respondent's provision of a FAPE to *Student's* sibling (*Gadsby v. Grosmick, 109 F3d 940 (4th Cir. 1997)*). The undersigned finds that all other procedural violations alleged by *Student*, including the procedural violations set forth below (a-e) to be either without merit or de minimis as a matter of law:

- a. *Student* alleged that Respondent's admissions policy violated North Carolina State law, but Respondent admitted *Student* without any problems or conditions.
- b. *Student* alleged that Respondent failed to conduct a behavioral assessment for *Student* because his behavior was interfering with his academic performance. Yet the evidence shows that *Student* could control his behavior and chose not to do homework and school work. The teachers testified that *Student's* behavior was typical of 7th graders and could be dealt with through typical class room management techniques. Even after *Parent* received Dr. Benedict's report indicating *Student* had behavioral conditions, she herself did not request that X Middle School staff perform a behavioral assessment until December, 2008. Respondent provided *Student* the opportunity for education and worked with *Parent* and *Student* to improve his behavior. He chose not to work in class or to do his homework. Accordingly, his lack of performance at ABC Charter School is not due to Respondent's failure to provide EC services. In spite of DPI's "Functional Behavior Assessment – Position Paper, DPI did not require Respondent to obtain a behavioral assessment for *Student*."
- c. *Student* alleged that Respondent erroneously placed *Student* in 7th grade pre-algebra for the first 5 weeks of his 7th grade year. Respondent presented compelling evidence that *Parent* insisted that *Student* was capable of doing the work and that he be placed in 7th grade pre-algebra despite teacher's concerns.

When *Parent* complained to T.D. Respondent placed *Student* in a differential 7th grade math class and finished with a C in mathematics for the 2007-2008 school years. (Resp. Ex. 19). Moreover, this placement of *Student* did not contribute to *Student's* behavior issues or did it contribute to a denial of FAPE.

- d. Failure to timely provide *Student's* EC schedule to *Parent* did not affect the Respondent's delivery of services, only frustrated *Parent* in her attempt to monitor Respondent's provision of services to *Student*.
- e. Failure to give required accommodations to *Student* on one EOG, and to appropriately handle the "retest" of *Student* with respect to mailing by a secure method, did not deny *Student* a FAPE.

23. It is imperative that educators and parents work together for the benefit of students who have disabilities. Unfortunately, *Parent's* own actions destroyed the trust that had existed between her and Respondent's staff. The Respondent's testimony demonstrated that *Parent* was domineering and intimidating during IEP team meetings and in conversations with teachers. *Parent's* e-mails to ABC Charter School's staff were often accusatory and demeaning and when the staff responded to *Parent*, she was often not satisfied or disagreed with the answer or explanation. *Parent* told *Student* and *Student's* sibling that Respondent's staff and, particularly Ms. C.S., were incompetent. *Parent's* attitude prompted T.D. to advise his staff in the late second quarter that they did not have to respond to demeaning e-mails from *Parent*, but to act professionally and respond to requests for information *Parent* needed. Indeed, Respondent's staff acted professionally despite *Parent's* repeated accusations and overt suspiciousness.

22 The North Carolina General Assembly assigned responsibility for conducting special education due process hearings to the Office of Administrative Hearings (OAH). The OAH conducts those hearings arising out of the IDEA and State law in accordance with N.C.G.S. § 115C-109.6 *et seq.* and N.C.G.S. § 150B-23 *et. seq.* There is also a Memorandum of Understanding between the North Carolina State Board of Education, through the Department of Public Instruction, Exceptional Children Division and the North Carolina Office of Administrative Hearings.

23 "The IDEA specifically provides for two approaches to administrative challenges. A parent is entitled to "an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f)(1)(A). If the state elects to allow the local educational agency to conduct the due process hearing, it must provide for an appeal to the state educational agency. *Id.* § 1415(g)(1). If the due process hearing is held by the state, no appeal is required. The former system is often referred to as a two-tiered system, while the latter is known as a one-tiered system." *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

24 "North Carolina has adopted a modified two-tier system, in which both levels are conducted by the State." Neither IDEA nor the federal regulations contemplate a situation in which a hearing conducted by the state will be appealed to the state. Therefore, in North Carolina, in which the hearing is conducted by the state and appealed to a state review official,

the state review official's decision is considered the official position of the state educational agency. *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

25 A court must try to give meaning to all provisions of a statute and additionally to consider the intent of the legislature when creating the statute. *Wilkins v. North Carolina State University*, 178 N.C. App. 377, 379, 631 S.E.2d 221, 223 (2006). A court should not construe a statute in such a way that renders part of it meaningless. *Id.* at 380-81, 631 S.E.2d 224. Policy reasons for passing the statute as well as the history of the legislation are also helpful when interpreting. *Electric Supply Co. of Durham, Inc. v. Swain Electric Co., Inc.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294-95 (1991).

27. In accordance with N.C.G.S. § 150B-34, the administrative law judge shall make a decision that contains findings of fact and conclusions of law and return the decision to the agency for a final decision. Harmonizing the provisions of § 150B with § 115C so as “not rendering any part of them meaningless,” and in light of the above cited case law, should a decision in special education matters be appealed to a state review officer (who renders the official position of the state education agency), then N.C.G.S. § 150B-36 shall apply. This is further consistent with Paragraph 8 of the Memorandum of Understanding which states: “The decision of the review officer is limited to whether the evidence presented at the OAH hearing supports the findings of fact and conclusions of law and whether the conclusions of law are supported by and consistent with 20 USC § 1415, 34 CFR §§ 300 and 301; GS 115C; the Procedures; and case law. The review officer must also consider any further evidence presented to him or her in the review process.”

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that with the exception of failing to provide *Student* a FAPE for a five week period during the 2007-2008 school years, the Respondent provided *Student* a FAPE in accordance with the IDEA. Respondent is ordered to pay to *Student* \$1,050.00 for compensatory special education tutorial services.

NOTICE

In accordance with the Individuals with Disabilities Education Act (as amended by the Individuals with Disabilities Education Improvement Act of 2004) and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights.

In accordance with 20 U.S.C. § 1415(f) the parents involved in a complaint “shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.” A decision made in a hearing conducted pursuant to (f) that does not have

the right to an appeal under subsection (g) may bring civil action in State court or a district court of the United States. *See* 20 U.S.C. § 1415(i).

In accordance with 20 U.S.C. § 1415(g) “if the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in the hearing may appeal such findings and decision to the State educational agency.” The State educational agency shall conduct an impartial review of the findings and decision appealed. In accordance with 20 U.S.C. § 1415(h) “any party to a hearing conducted pursuant to subsection (f) . . . , or an appeal conducted pursuant to subsection (g) shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children disabilities; (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses; (3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and, (4) the right to written, or, at the option of the parents, electronic findings of fact and decisions.”

Under North Carolina’s Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq.*) and particularly N.C.G.S. § 115C-109.9, “any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 (a contested case hearing). . . may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices.” The State Board, through the Exceptional Children Division, shall appoint a Review Officer who shall conduct an impartial review of the findings and decision appealed.

“North Carolina has adopted a modified two-tier system, in which both levels are conducted by the State.” Neither IDEA nor the federal regulations contemplate a situation in which a hearing conducted by the state will be appealed to the state. Therefore, in North Carolina, in which the hearing is conducted by the state and appealed to a state review official, the state review official’s decision is considered the “official position of the state educational agency.” *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

The decision of the review officer is limited to whether the evidence presented at the OAH hearing supports the findings of fact and conclusions of law and whether the conclusions of law are supported by and consistent with 20 USC § 1415, 34 CFR §§ 300 and 301; GS 115C; the Procedures; and case law. In accordance with N.C. Gen. Stat. § 150B-36 the decision of the Administrative Law Judge shall be adopted unless it is demonstrated that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The review officer must also consider any further evidence presented in the appeal process.

In accordance with N.C. Gen. Stat. § 150B-36 each finding of fact contained in the Administrative Law Judge’s decision shall be adopted unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the Administrative Law Judge to evaluate the credibility of witnesses. For each finding of fact not adopted, the reasons for not adopting the finding of fact and the evidence in the record relied upon shall be set forth separately and in detail. Every finding of fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial review. For each

new finding of fact that is not contained in the Administrative Law Judge's decision, the evidence in the record relied upon shall be set forth separately and in detail establishing that the new finding of fact is supported by a preponderance of the evidence in the official record.

Inquiries regarding further notices and time lines should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina.

IT IS SO ORDERED.

This is the _____ day of December, 2009.

Joe L. Webster
Administrative Law Judge