**STATE OF NORTH CAROLINA**

**BEFORE A STATE HEARING REVIEW OFFICER FOR THE STATE BOARD OF EDUCATION PURSUANT TO G.S. 115C - 109.9**

***Student*, by parent, *Parent***
Petitioner

v.

**T.D., Director Corporation for Effective Schooling, d/b/a KHS Heights School**
Respondent

**DECISION**

**09 EDC 2329**

This is an appeal of the Decision of Administrative Law Judge Joe L. Webster issued on December 22, 2009.

The records of the case received for review included:

1. Three (3) days of transcripts of the hearing.
2. The Official Record of the case issued by the Office of Administrative Hearings; which included the Decision of Judge Webster, motions, written arguments, procedural documents, orders, and correspondence concerning the case.
3. One (1) volume (loose-leaf notebook) of Petitioners' Exhibits.
4. One (1) volume (loose-leaf notebook) of Respondent's Exhibits,
5. Additional written arguments submitted by both parties to the Review Officer.

The hearing of this case was held before Administrative Law Judge Joe L. Webster on October 26-27 and November 3, 2009. The hearing was held in Durham, North Carolina.

Appearances:
For Petitioner - *Parent*, *pro se*; 308 County Seat Drive, Hillsborough, NC 27278
For Respondent - Phil S. Adkins; Adkins Law Group, P.O. Box 52393, Durham, NC 27717

To provide a document that does not have personally identifiable information regarding the Petitioner and/or for convenience, the following will be used to refer to the parties:

For the Child/Petitioner - *Student*; the child
For Parent/Petitioner - *Parent*; Petitioner
For Respondent - Respondent; KHS School; LEA

**WITNESSES**

For Petitioners: K.B., Ph.D.
C.S.B., Ed.D.
*Parent*

For Respondent: A.B.
D.G.
*Student*
T.D.
W.S.
C.S.

## EXHIBITS

**Petitioner's Exhibits**

1 parent agenda and meeting notes, 1/11/07; notes from meeting, T.D. and *Parent*
2 e-mails between *Parent*, Cook, and T.D. re outstanding assignments, 4/15/07 - 5/8/07
3 correspondence re: summer make-up work in math
4 IEP Team meeting minutes, 8/22/07
5 Stanford 10 test results, spring and fall 2007
6 e-mails and notes, 9/6/07 - 12/12/07; work samples; 1st quarter 7th grade progress report, 9/18/07; 3rd quarter 7th grade progress report, 2/18/08
7 1st quarter 7th grade progress report, 9/25/07; e-mails, 9/27/07 - 4/21/08; tutor notes, 1/08
8 e-mails, 9/28/07 - 10/1/07; web page, NC Extended Content Standards; EOG test report, 2007; parent agenda and meeting notes, 10/12/07
9 4th quarter 6th grade narratives and student assessment report; IEP, 2/6/07 - 2/5/08; IEP progress report, 10/07 - 12/07; IEP Team minutes, annual review, IEP 22/6/08 - 2/5/09; prior written notice, 2/6/08
10 e-mails, 12/11/07 - 12/12/07; IEP Team meeting minutes, 12/21/07; letter, Mitchell to *Parent*, not dated
11 e-mails re assistive technology reevaluation, 2/24/08 - 3/10/08; functional behavioral assessment position paper, NCDPI; behavior intervention plan; KHS schedule of discipline referrals; discipline referral, 12/18/07
14 KHS response to complaint, 4/21/08
15 IEP Team meeting minutes and prior written notice, 4/25/08
16 e-mails re request for educational records, 5/28/08 - 5/29/08
17 incident report, Sinatra, 5/28/08
18 e-mails re make-up EOG tests, 6/18/08 - 8/26/08
19 report of testing irregularity and fax confirmation to B.C., 7/28/08
20 letter, Moyer and McManus to T.D. re EOG tests, 11/6/08
21 letter, T.D. to Saliwanchik-Brown, 1/12/09
22 "State gets tough on charter schools," *The News & Observer*, 1/11/08
23 Summary of the *Parent* case and other documents, 4/20/09
24 DPI web page, Office of Charter Schools FAQ
25 KHS Charter School application, Section III, page 1, and Section IV, page 3; KHS Self-Study, page 11
26 KHS web page, student application forms, admission standards
27 curriculum vitae, Cheryl Saliwanchik-Brown, 8/30/09
28 summary of expenses incurred and anticipated

**Respondent's Exhibits**

1 complaint to NCDPI, 3/26/08
2 letter, Watson to T.D. and *Parent*, 5/30/08
3 e-mails re tutoring schedule, 7/11/08 - 8/1/08
4 letter, Moyer and McManus to T.D., 10/15/08
5 letter, D.S. to B.C., 6/23/08, request for grading retest, with attached documents
6 e-mails re tutoring, 1/12/09 - 4/7/09; letter, Garland and Watson to T.D. and *Parent*, 4/17/09
7 report of psycho educational evaluation, D.B. and Donnelly, 5/6/08 - 6/11/08
8 speech/language pathology diagnostic report, McDonald-Bell, 8/15/08 and 9/15/08
10 invitation to conference/prior notice, 10/5/07; IEP Team meeting minutes, 10/24/07; prior written notice, 10/23/07
11 IEP Team meeting minutes, 12/21/07; prior written notice, 12/22/07; letter, Mitchell to *Parent*, not dated
13 IEP, 2/6/07 - 2/5/08
14 invitation to conference/prior notice, 2/4/08; IEP Team meeting minutes, 2/6/08; prior written notice, 2/6/08; IEP annual review, 2/6/08 - 2/5/09
15 invitation to conference, 4/25/08; IEP Team meeting minutes, 4/25/08; other supporting documentation
16 *Student*'s Progress at KHS, Stanford 10 tests
17 Admission Policies at Other Charter Schools; 3226, Academic Standards and Promotion for Grades 3, 5, and 8, Durham Public Schools; other documents re promotion
19 report card, 4th quarter 7th grade, 6/08
20 e-mails, A.B., 11/13/07 - 1/23/08
21 log of EC services for *Student*, 10/29/07 - 4/11/08
22 e-mails between *Parent* and T.D., 11/28/07 - 3/5/08
23 e-mails between *Parent* and Burke, 2/25/08 - 5/9/08
24 e-mails between Deffinbaugh and *Parent*, 4/7/08; other e-mails, 4/7/08 - 1/23/09

## ISSUES

In a Prehearing Order filed on October 26, 2009, the parties did not agree on the issues, with each party stating different issues.

The Petitioner contended that the issues were:

1. Respondent failed to provide the Petitioner a Free and Appropriate Education due to the following:
   - Failure to provide special education services in conformity with Petitioner's IEP, as evidenced by DPI findings of non-compliance.
   - Failure to provide accommodations on and non-compliant in the handling of state mandated end of grade examinations as evidenced by DPI findings of non-compliance.
   - Failure to provide reevaluation of special education needs at least once every three years, and upon request of the parent.
   - Failure to provide speech/language services.

- Failure to conduct a Functional Behavior Assessment and develop and implement a Behavioral Intervention Plan.
- Failure to ensure access to, and to provide instruction based on, the NC standard course of study at grade level, and
- Failure to provide parent access to education records, and a list of education records maintained or used by the LEA, within 45 days of written request.

2. Respondent's failure to provide Petitioner with a Free and Appropriate Public Education (FAPE) resulted in substantial deprivation of educational benefit.
3. Respondent's carelessness in the provision of appropriate educational services to the Petitioner caused significant psychological and emotional damage.
4. Petitioner is entitled to reimbursement for costs incurred and/or anticipated as a result of Respondent's failure to provide FAPE.

The Respondent contended that the issues were:

1. Except for the deficiencies already determined in the petitioner's complaint to DPI, did Respondent fail to comply with any other rules or regulations pertaining to special education?
2. If so, did the deficiencies in KHS's handling of the Petitioner's education cause the Petitioner to fail to get FAPE?
3. Did Petitioner's Mother's comments to her children about the incompetence of the KHS Staff interfere with the Respondent's educational efforts for Petitioner?
4. Did Petitioner's failure to permit Respondent to provide the number of compensatory hours for Petitioner ordered by DPI estop her from seeking monetary damages for Respondent's failure to provide compensatory services?

**The ALJ in his Decision did not state what the issues were. The Review Officer will attempt to address all of the contended issues that relate to the Individuals with Disabilities Education Improvement Act (IDEA). Several are obviously outside the purview of a due process complaint brought under IDEA and corresponding state law, for which neither the ALJ or Review Officer have any authority.**

## PRELIMINARY STATEMENT

Judge Webster's decision was appealed by Respondent on January 21, 2010, and the undersigned was appointed as Review Officer that day. The parties were provided a Request for Written Arguments on January 22, with Written Arguments due on February 11. The Decision was to be completed on February 20, within the 30 day timeline established by 34 CFR 300.515(b) and the Policies Governing Services for Children with Disabilities, NC 1504-1.16(b).

In a somewhat unusual move, the parties, with the concurrence of the ALJ, agreed that some of the testimony of witnesses would be used for two different cases. The Petitioner had filed two concurrent cases against the Respondent with regard to her two children. The companion, or second case, is 09 EDC 2328. The parties were the same for both cases, and were being heard back-to-back by the same ALJ. The child involved in each case was different and there were slightly different issues. Both ALJ Decisions were appealed and assigned to this Review Officer. It was necessary

for the Review Officer to check some portions of the transcripts of the companion case to compile this decision.

Standard of Review by the State Review Officer

The review of this case is in accordance with the provisions of G.S. 115C-109.9 and the Policies Governing Services for Children with Disabilities, NC 1504-1.15. The standard of review that must be used by the Review Officer for the State Board of Education is found in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The Supreme Court held that due weight shall be given to the state administrative proceedings. In *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991), the Fourth Circuit explained *Rowley's* instruction that "due weight" be given to state administrative hearings. *Doyle* reviewed a product of Virginia's two-tiered administrative system. The court first noted, "By statute and regulation the reviewing officer is required to make an independent decision . . .." *Doyle*, 953 F.2d at 104 The court held that in making an independent decision, the state's second-tier review officer must follow the "accepted norm of fact finding."

Recently in North Carolina, Judge Osteen further interpreted this requirement of *Rowley* and *Doyle*. *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, Memorandum Opinion and Order 1:05CV818 (M.D.N.C. November 18, 2008). A State Review Officer (SRO) must follow the same requirements as the courts. The SRO must consider the findings of the ALJ as to be *prima facie* correct if they were regularly made. An ALJ's findings are regularly made if they "follow the accepted norm of fact-finding process designed to discover the truth."

Having reviewed the records of the case, the Review Officer for the State Board of Education independently makes Findings of Fact and Conclusions of Law in accordance with 20 U.S.C. 1415(g); 34 CFR §300.532; G.S. 115C-109.9; and the *Policies Governing Services for Children with Disabilities*, NC 1504-1.15.

The Review Officer finds that most of the ALJ's findings are taken almost verbatim from either the Respondent's or Petitioner's Proposed Decisions. While the majority of the Facts appear to be regularly made, some of the facts are not relevant to the issues. A few do not correspond with the testimony and exhibits. Those that do not correspond with the testimony and exhibits are addressed in this Decision. The Review Officer will comment on only those ALJ's findings that are misleading or do not correspond with the testimony and exhibits. This will keep this decision from being too lengthy. With these few exceptions, the Review Officer's Findings of Fact are consistent with those of the ALJ, although often stated in a slightly different manner. The Review Officer has, in some instances, consolidated the information from testimony and exhibits into a reduced number of Facts. The Review Officer has also added a few Findings of Fact supported by the record, but not among those in those of the ALJ. Those added are in **bold** type. Those added do change the overall impression one gets when reading all the Facts.

The Review Officer Conclusions of Law are not totally consistent with those of the ALJ. Many are stated differently but are supported by IDEA, Federal Regulations, and state law. Some necessary conclusions have been added. The Conclusions reached by the Review Officer on some of the issues vary considerably from those of the ALJ.

## STIPULATIONS

The Prehearing Order dated October 26, 2010 included attached stipulations. The parties stipulated to the following:

1. Petitioner attended KHS beginning on October 31, 2006, the first day of the second quarter, through the end of the 2007-08 school year. *Parent* moved from northern Durham County to southern county to shorten the commute to KHS.
2. The Petitioners' IEP did not indicate he had behaviors that impeded his learning. Respondent did not perform a functional behavior assessment or create a behavior intervention plan for Petitioner.
3. Respondent has always allowed Petitioner to use a computer and calculator.
4. The Petitioner was given a seventh grade math workbook at the beginning of seventh grade which he worked on for the first five weeks of the school year in his Pre-algebra Math Class.
5. Petitioner did not perform well in the first five weeks. He was thereafter removed to the EC Inclusion Math Class.
6. On February 29, 2008 *Parent* sent an e-mail to D.S., Respondent's EC Coordinator requesting an Assistive Technology/Occupational Therapy reevaluation for Petitioner. She followed up that request on March 4. Respondent did not perform that reevaluation. Petitioner's mother asked W.S. in that e-mail if she needed to contact the Center to schedule those.
7. On March 31, 2008 Petitioner's mother, *Parent*, filed a complaint with the North Carolina Department of Public Instruction (DPI) alleging that the Respondent had failed to provide both her children *Student* and *Student* with a free appropriate education. The complaint and report of the DPI investigation were made a part of the records of this case.
8. On April 25, 2008, Petitioner's mother requested Petitioner's IEP be modified to allow him to have a private tutor provide one-on-one assistance each afternoon for the rest of the school year. Respondent agreed to Petitioner's mother's request.
9. On May 28, 2008 the Petitioner's mother sent an e-mail to T.D., the Respondent requesting 1) copies of all grade book records substantiating all mid-quarter and final grades that Petitioner had received, and 2) a list of the types and location of records maintained. T.D. and D.S., the EC Coordinator for the respondent acknowledged receipt of this request but did not provide the Petitioner's mother with a list or the grade books. Respondent had provided Petitioner's EC records on February 29, 2008 and cumulative records sometime in March 2008. For each student, Respondent maintains a cumulative file and an EC file if the student qualifies for special education services. Petitioner's mother did not renew her request for the petitioner's teacher's grade books.
10. On May 30, 2008 DPI, by letter, made a report of its investigation. DPI found KHS to be non-compliant. DPI ordered KHS to conduct EC training for its staff, convene an IEP meeting to develop a compliant IEP for *Student* and provide 50 hours of compensatory special education services to *Student* by August 15, 2008.
11. Respondent did not convene a facilitated IEP meeting for *Student.*

12. On June 10, 2008, *Parent* provided a schedule for the compensatory special education services that would not permit KHS to complete the provision of the 50 hours of services by August 15, 2008.
13. The Respondent provided 12 hours of compensatory special education services pursuant to Petitioner's schedule from June 16 - June 27. Respondent provided return transportation for Petitioner for each of those two-hour sessions.
14. Petitioner's mother provided transportation for Petitioner to take the EOG retest on June 12, 2008.
15. Petitioner did not attend the two hour session scheduled for July 16, 2008 and did not attend any of the next nine scheduled sessions from July 28 - August 15, 2008.
16. On July 28, 2008 Petitioner's mother orally informed Respondent that she had purchased a home in Orange County, North Carolina and would be moving on Monday, August 4, 2008. In an e-mail dated August 1, 2008, she stated that it did not make sense to continue the compensatory services for just one more week.
17. Petitioner enrolled in S. Middle School in Orange County, North Carolina for the 2008-09 school year and made no attempt to come back to Respondent's school.
18. Neither Petitioner nor Respondent attempted to schedule the remainder of the compensatory special education services until January 2009.
19. On November 6, 2008, DPI, Division of Accountability Services sent a letter indicating that Respondent was non-compliant in using appropriate testing accommodations as outlined in Petitioner's IEP and in handling student tests.
20. On January 12, 2009, DPI instructed Respondent to schedule tutoring sessions to provide the remaining compensatory services. Beginning January 12, 2009, Jessica Reininger contacted *Parent* three times via e-mail concerning scheduling the compensatory services. *Parent* responded via e-mail on January 20, 2009 indicating that within the next few weeks *Student* would most likely be attending a therapeutic boarding school and that reintroducing him to the environment that led to his psychological and emotional issues would not be in his best interest.
21. On April 17, 2009, DPI sent a letter to Respondent indicating that it had provided the training for its staff, did not hold the IEP meeting because Petitioner had moved to Orange County ad did not need to provide the remaining compensatory special education services given that Petitioner's mother declined KHS's offer of January 12, 2009. DPI indicated that KHS was relieved of its remaining obligations to Petitioner and that the case was closed.
22. The 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 Education/Department of Public Instruction for purposes of ensuring compliance with applicable laws and the provision of its charter.

To the extent that the Findings of Facts may contain Conclusions of Law, or that the Conclusions of Law may include Findings of Fact, they should be so considered without regard to the given labels. The Review Officer concurs with and uses many of the ALJ's Facts. To produce a Decision that is not too lengthy and more readable, some of the ALJ's Facts have been consolidated, reduced, or eliminated. Those eliminated are usually recitations of testimony, redundant, or those that have no bearing on the issues of the case.

## FINDINGS OF FACT

1. *Parent* is the mother of *Student* and at all times relevant to this action has resided in either Durham or Orange County, North Carolina. There is no dispute about whether *Student* qualifies for special education services due to his specific learning disabilities pursuant to the Individuals with Disabilities Education Improvement Act (IDEA). 20 U.S.C. § 1400 *et seq.*

2. The Respondent is a local education agency (LEA) receiving funds pursuant to IDEA and was responsible for providing special education to *Student* pursuant to Article 9, Chapter 115C, of the North Carolina General Statutes. The Respondent is a public independent charter school and an LEA for the purposes of IDEA, and as such is required to provide special educational services to disabled children attending KHS.

3. *Student* was enrolled in KHS from October 2006 through June 2008. At the time of the hearing, *Student* was 15 years old.

4. Petitioner filed a petition for a Due Process Hearing in the Office of Administrative Hearings on April 1, 2009. The petition alleges that *Student* had been denied a free appropriate public education (FAPE) for the 2007-08 school year. The hearing was held in Durham, North Carolina before Administrative Law Judge Joe L. Webster on October 26-27 and November 3, 2009.

5. Prior to attending KHS, D.R had attended public schools in Durham County. He had completed the fifth grade at Easley Elementary School, a part of the Durham Public School System (DPS) where he had been served with an Individualized Education Plan (IEP) based on his needs as a child with a learning disability.

6. At the beginning of the 2006-07 school year, *Student* and his sister *Student* attended the sixth grade at C. Middle School, a part of DPS. *Parent* became dissatisfied with the special education department at C. because, among other things, *Student* was assigned to a self-contained class.

7. *Parent* researched charter schools, including KHS and visited the school in October 2006 with her children. She transferred both children to KHS on October 31, 2006. *Parent* discussed *Student*'s learning disabilities and special education needs with Respondent and shared a copy of *Student*'s IEP with KHS staff. *Parent* was assured that KHS staff would be able to provide the individualized education required to meet *Student*'s educational needs. (09 EDC 2328 Tr. Vol. 1, pp. 163-164) *Parent* moved her residence from northern to southern Durham County to shorten the commute to KHS in March 2007.

8. Respondent provided special education services to *Student* as a sixth-grader during the 2006-2007 school year. He was promoted to the seventh grade at KHS.

9. On August 22, 2007, at *Parent*'s request, the Respondent held an IEP meeting for *Student* This was several days prior to the beginning of the school year. *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 teachers' plans regarding *Student* (Resp. Ex. 4, IEP Team meeting minutes dated 8/22/07) 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) 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, and Pet. Ex. 4)

10. *Parent* testified that, in response to concerns she had raised shortly after enrolling *Student* at KHS, T.D. stated to *Parent*, "just let him fail." (Tr. Vol. 1, p. 111, 13) Respondent's Response to the Petition (No. 16) stated, "T.D. told Petitioner's mother that sometimes a student can learn a life lesson from failure."

11. *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 few goals. The goals were continued in their entirety, without modification in the subsequent IEP dated 2/6/08 – 2/5/09. C.S. testified that she had made a mistake, that the verb was wrong. He made progress toward rather than met the majority of his goals. (Tr. Vol. 3, p. 628, 6; p. 627, 7-8)

12. *Student* was assigned to the higher level of two seventh grade math classes. Respondent's witnesses testified that Petitioner 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. D.G. and C.S. stated clearly that the decision to put *Student* in pre-algebra was made by *Parent* (Tr. Vol. 2, p. 287, 7-9; p. 306, 3-5 and p. 328, 5-8) Nothing, however, in the IEP minutes indicate that this was discussed or agreed upon. (Pet. Ex. 4; Tr. Vol. 2, p. 294 and Tr. Vol. 2, pp. 613-614) *Parent* agreed to purchase a math workbook *Student* would be using in the 7th grade. 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)

**13. There was testimony that the KHS staff often followed *Parent*'s wishes, just to have a working relationship with her. D.G. testified that *Parent* was very abusive in meetings, making D.G. afraid to buck her. Because she was yelled at, laughed at, ridiculed and abused, D.G. felt that in order to have a working relationship, it was best to follow *Parent*'s wishes. Having a working relationship with parents is essential for a child's success. (Tr. Vol. 2, p. 325, 7-18)**

14. Approximately four or five weeks into the school year, *Parent* complained to Respondent's Director, T.D., that the staff was not addressing the IEP goals and the EC services discussed at the August 22, 2007 meeting were not being provided. *Parent* shared these concerns verbally and via email with D.S., EC Coordinator, and 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 C.S. but that they were not produced. (Tr. Vol. 3, p. 631) C.S. testified that she did provide a schedule of services to *Parent* It was just not broken down into the date and time arrangement wanted by *Parent* (Tr. Vol. 3, p. 622, 21-25)

15. Toward the end of September, *Student* began to develop what *Parent* claims to be self-esteem and self-confidence issues. *Parent* contended that this was a result of his academic challenges and lack of support, ultimately leading to a deep hatred for school and resultant behavior

problems. She also contends that this impeded his education. *Student* had not exhibited defiant or oppositional behaviors in any prior school year. He was not a behavior problem in the sixth grade at KHS. (Tr. Vol. 1, p. 90, 14-16) 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 in spite of the fact that he was failing. (Pet. Ex. 6, pp. 1-4) A.B., the regular classroom humanities teacher, noted in the first mid-quarter progress report that *Student* was well behaved, respectful, motivated, participative and worked hard. (Pet. Ex. 7, p. 1)

16. D.G., *Student*'s 7th grade math teacher provided him with a calculator (T. Vol. 1, p. 169, 20-24), provided him a 7th grade workbook (Tr. Vol. 2, p. 271, 3-13), worked with him on Study Island to improve his math skills (Tr. Vol. 2, p. 271, 14-21), and created a system to send his work home to his mother. (Tr. Vol. 2, p. 276) D.G. also testified that *Student* was capable of doing the work, but had a problem with his motivation to work. (Tr. Vol. 2, p. 272, 20-23; p. 273, 18-20; Tr. Vol. 1, p. 205, 2-9)

17. A.B., *Student*'s seventh grade language arts teacher modified *Student*'s class work, modified the directions, read directions to *Student*, and broke assignments into steps. She also modified his tests, requiring him to answer fewer questions. (Tr. Vol. 1, p. 201-204). **A.B. also was definitely aware that *Student* had difficulty in expressive language. (Tr. Vol. 1, p. 201 and Tr. Vol. 3, p. 566, 18-21) A.B. found *Student* to be very capable, but insecure about his capabilities. He understood things. He made a game out of trying to avoid work and his effort was not what it should have been. She also found that he was very effective in using stalling tactics that would waste time so he couldn't be productive. (Tr. Vol. 3, p. 573, 4-18)**

18. C.S. 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, 20) She did not provide in class services in math for the first five weeks. (Tr. Vol. 2, 275, 3-5) She also taught *Student* in a literacy class. (Tr. pp. 594 - 595) The classroom teachers corroborated that C.S. did provide these services. (Tr. Vol. 1, pp. 202-204; Vol. 2, p. 275, 6-25) **It was this failure to document that caused DPI to find that the Respondent was non-compliant, ordering 50 hours of compensatory education. C.S. testified that she continued to provide both in-class and pull-out special education services for *Student* for the remainder of the year, with improved documentation.**

19. *Parent* told *Student* and his sister *Student* that much of the Respondent's staff, particularly C.S., was incompetent. This adversely affected *Student*'s attitude towards his teachers. *Student* often refused to go to C.S.'s office for services. (Tr. Vol. 2, pp. 341-342) This type of communication from *Parent* to her children helped poison their attitude toward learning at KHS and made implementing an IEP very difficult for teachers and administrators.

20. *Parent* demanded that KHS hold another IEP Team meeting in October of 2007. In the IEP meeting of October 24, 2007, *Parent* was frustrated, aggressive, combative and demeaning towards Respondent's staff. She attacked teachers because of how they wanted to educate *Student* (Tr. Vol. 2, p. 345, 2-16; Vol. 2 pp. 368 - 369). She also challenged A.B. 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 put his thoughts down and enjoying the task. Tr. Vol. 2, p. 349, 6-12)

21. *Parent* continually sent e-mails to Respondent's teachers questioning schedule changes, grading, and the decisions made concerning her children. Many of these e-mails were accusative, derogatory, and demeaning. She often ambushed teachers, usually early in the morning with an unscheduled meeting to put teachers on the spot. (Tr. Vol. 2, p. 384, 1-2) Because *Parent* was so contentious, many of the teachers became very concerned. (Tr. Vol. 2, p. 389, 2-8)

22. Because of the flurry of acrimonious e-mails from *Parent* to KHS staff members, 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, pp. 390 - 391) T.D. testified that he told his staff that they were no longer obligated to respond to comments or questions that belittled them or questioned their professional responsibilities. (Tr. Vol. 2, p. 414, 1-4)

23. On January 4, 2008, C.S. provided the written EC Service Delivery Schedule and IEP Progress Report for the period October 2007 to December 2007. (Pet. Ex. 10, p. 9). The Progress Report 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)

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

25. **The February 6, 2008 IEP had many technical irregularities. It did not have proper statements of: a) present levels of academic achievement and functional performance, b) measurable annual objectives, and c) *Student*'s participation in extracurricular and nonacademic activities. The IEP also did not include a statements of the initial transition components required by the *Policies* NC 1503-4.1(b), for *Student* had turned 14. (Resp. Ex. 14)**

26. **The prior notice (DEC 5) in the February 6 IEP did not include the content required by 34 CFR 300.503 and the *Policies* NC 1504-1.4(b). These require that prior notice be provided that includes the actions taken and options rejected, including reasons.**

27. **The February 6 IEP also indicated that *Student* did not exhibit behaviors that impede learning. This was checked on the form, even though most teachers had stated openly that he did exhibit such behaviors.**

28. On February 24, 2008, *Parent* sent W.S. an e-mail inquiring about *Student*'s recent IEP. She noted that there is a question that states, "Does student have behavior(s) that impede his/her learning or that of others." It was checked "no" yet the feedback from C.S., A.B. and D.G. consistently state that his behaviors that impede their ability to educate him. W.S. responded by stating that the behaviors addressed in this IEP section are primarily for those students that are Behaviorally Emotionally Disabled (Assaultive, Injurious) and who require behavior intervention plans. (Pet. Ex. 11) He felt that *Student*'s behaviors could be handled by classroom management and that a Functional Behavior Assessment was not needed. (Tr. Vol. 2, p. 469, 13-16) C.S., however, in testimony stated that *Student* did exhibit behaviors that would have led to a behavioral assessment at very end of the school year. (Tr. Vol. 3, p. 634, 9-15) There is no indication that either she or the IEP Team requested a Functional Behavior Assessment.

29. None of the teachers or staff thought *Student*'s behavior warranted a behavioral assessment. (Tr. Vol. 1, pp. 206-207; Vol. 2, pp. 329-330; Vol. 3, p. 394; Vol. 3, pp. 477-478)

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

31. On February 29, 2008 *Parent* requested via telephone, and again on March 4 via email, that an Assistive Technology reevaluation be scheduled. (Pet. Ex. 11) Petitioner had not received an Assistive Technology evaluation since May 13, 2004. 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." (09 EDC 2328 Tr. Vol. 3, pp. 659-662)

32. On March 4, 2008, *Parent* sent an e-mail to 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)

33. On March 4, 2008, 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. (Pet. Ex. 11, e-mail from W.S., March 4, 2008) *Parent* responded with possible dates and a query about having her private psychologist perform the testing. (Pet. Ex. 11, e-mail from *Parent*, March 10, 2008) **There was no follow-up on these requests for reevaluation, nor was a DEC 2 offered.**

34. 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 that DR 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)
(Resp. Ex. 1)

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

36. On May 30, 2008, DPI ordered Respondent to comply by or before August 15, 2008 with a corrective action plan that included:

a. Conduct training for EC and administrative staff before the start of the 2008-09 school year in developing legally compliant IEPs;

b. Convene an IEP meeting to develop a compliant IEP with the required components; and

c. Provide 50 hours of compensatory special education services to the student at a time and location mutually agreeable to the school and the parents. If the student misses three consecutive sessions without providing notice within 12 hours before canceling the session, the school is relieved of its responsibility. (Resp. Ex. 2)

37. On April 25, 2008, *Parent* stopped by 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 a private tutor for the remainder of the school year. *Parent*'s request was supported by the IEP Team and the February 6 IEP was amended. The Prior Notice (DEC 5) was signed by *Parent*, W.S., T.D., C.S., D.G., and A.B.. (Pet. Ex. 15) *Parent* did not request Respondent pay for the tutor, nor did Respondent offer to pay for a tutor.

38. **At the time of the April 25, 2008 IEP meeting, it was well understood that *Student*'s behavior was having a direct impact on his education. The teachers had repeatedly told *Parent* that behavior was a problem, yet nothing was being done. No behavioral objectives were included in the IEP. There was no action taken to perform a Functional Behavior Assessment. No DEC 2 form was provided to gain consent to do the assessment, nor was prior notice given that the Respondent was refusing to provide the Functional Behavior Assessment.**

39. **At the time of the April 25, 2008 IEP meeting, there was still an assistive technology evaluation yet to be conducted. *Parent* had specifically requested one on March 4 and the Respondent had agreed that the evaluation would be done. Nothing had happened yet. This was the first IEP meeting subsequent to the request. No DEC 2 form was provided to gain consent to evaluate, nor was prior notice given that the Respondent was refusing to provide the assistive technology evaluation.**

**40. The April 25, 2008 IEP had many technical irregularities. It did not have proper statements of: a) present levels of academic achievement and functional performance, b) measurable annual objectives, and c) *Student*'s participation in extracurricular and nonacademic activities. The IEP also did not include a statements of the initial transition components required by the *Policies* NC 1503-4.1(b), for *Student* had just turned 14.**

**41. The prior notice (DEC 5) in the April 25 IEP did not include the content required by 34 CFR 300.503 and the *Policies* NC 1504-1.4(b). These require that prior notice be provided that includes the actions taken and options rejected, including reasons.**

42. On May 29, 2008, *Parent* e-mailed W.S. with a copy to T.D. asking for disciplinary files and copies of all grade book records substantiating all mid-quarter and final grades that *Student*

and *Student* had received. She also requested the types and location of records maintained by KHS. (Pet. Ex. 16, e-mail from *Parent* dated May 29, 2009)

43. 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 W.S. dated June 2, 2008).

44. Prior to *Parent*'s request, W.S. had copied *Student*'s special education file and provided it to *Parent* (09 EDC 2328 Tr. Vol. 1, p. 242, 3-13) The school secretary, Mrs. Vargas, had provided copies of DR's cumulative file to CR. (09 EDC 2328 Tr. Vol. 1, p. 242, 14-21)

45. 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. (09 EDC 2328 Tr. Vol. 1, pp. 242-243 and p. 244, 11-17)

46. On May 6, 2008, *Parent* retained Dr. K.B., 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 KHS and to obtain updated information pertaining to *Student*'s psycho-educational and psychological status. (Tr. Vol. 1, p. 13) Dr. K.B. did not solicit any information from the Respondent for his evaluation of *Student* Normally, in performing a psycho-educational assessment, he would obtain information from the student's classroom teachers, but he did not do so in this case because of a request from *Parent* (Tr. Vol. 1, p. 55, 14-25) *Parent* also did not inform the Respondent that she was obtaining this evaluation, nor did she request an independent educational evaluation.

47. Dr. K.B. testified on *Parent*'s behalf as an expert in psycho-educational testing. Dr. K.B.'s report of Psycho-educational Evaluation (Resp. Ex. 7), showed that *Student* was a child of superior potential or ability but that the discrepancies in achievement testing scores led evaluators to believe that he was learning disabled. (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 95$^{th}$ percentile. On the digit span, which measures working memory, and coding, which predicts processing speed, Petitioner scored in only the fifth (5$^{th}$) and ninth (9$^{th}$) percentiles, respectively. (Tr. Vol. 1, pp. 22-23)

48. Dr. K.B. 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 Dr. K.B. recommended an updated speech-language evaluation be conducted. (Tr. Vol. 1, pp. 24-25)

49. Dr. K.B. 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. K.B. further testified that a Functional Behavior Assessment and Behavior Intervention Plan would have been an appropriate step in addressing *Student*'s behavior issues. (Tr. Vol. 1, p. 33)

50. Dr. K.B. recommended *Student* undergo speech-language testing. 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, 12-18) Furthermore, he testified that it was reasonable for KHS to have relied on the previous report. (Tr. Vol. 1, p. 51, lines 7-11) *Student*'s previous evaluation performed by the DPS School psychologist in October 2006 was utilized by the IEP Team to develop *Student*'s IEP at KHS. (Resp. Ex. 7). Dr. K.B. noted that, based on this testing, *Student* did not meet ability-achievement discrepancy criteria. KHS utilized other aspects of the report to continue *Student*'s eligibility for EC services. (Resp. Ex. 7, p. 3)

51. Dr. K.B. 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, 11-19), and that A.B.'s approach to teaching *Student* writing was appropriate. (Tr. Vol. 1, p. 60, 10-24)

52. Dr. K.B. recommended some additional accommodations for *Student*, such as teacher's notes, study guides, foolproof 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 a word processor and spell checker.

53. Dr. K.B. recommended a tutor during the summer and referral to a medical doctor for evaluation of medication for ADD. He also 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 could learn a lifetime of success from academic failure. (Tr. Vol. 1, p. 38) Dr. K.B. testified that he believed that it would not be in the Petitioner's best interest for him to return to KHS for tutoring, and recommended against it. (Tr. Vol. 1, p. 43, 21-22)

54. Dr. K.B. testified that it was clear that *Student* knew that he could do better in school. In explaining some of the good results on the tests used by Dr. K.B., *Student* indicated that, "if I had been my other self, I would not have done any of this." *Student* explained that he knew he could do better, but didn't give his full effort at KHS. (Tr. Vol. 1, pp. 63 - 64, and p. 66, 8-13)

**55. Dr. K.B. testified that *Student*'s level of intelligence contributed to the defenses he used. He was sophisticated, planful, and at a great risk of acting out in sneaky ways. (Tr. Vol. 1, p. 46, 18-23) He also testified that *Parent* was losing control over his behavior during the school year 2008-09. (Tr. Vol. 1, pp. 69-70) He stated that *Student* was certainly capable of controlling his behavior. (Tr. Vol. 1, p. 90, 7-11)**

56. Dr. K.B. testified that *Student* was frustrated at home, with both his sister and his mother. (Tr. Vol. 1, p. 57, 23-25 – p. 58, 1-10) Dr. K.B. opined that if *Parent* had told *Student* that the staff at KHS was incompetent that it would have given *Student* permission not to work hard and be disrespectful of teachers. It would also give *Student* another reason not to invest in the schooling process. (Tr. Vol. 1, pp. 58 - 60) Dr. K.B. was aware that at *S. Student* was sleeping in class, (Tr. Vol. 1, p. 67, 12-22) and that *Parent* had lost disciplinary control over *Student* (Tr. Vol. 1, p. 69, 23 - p. 70, 6) Dr. K.B. 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, 21-24)

57. Normally, Dr. K.B., 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, 24 - p. 49, 12 and p. 55, 5-7) He got

information from *Parent* about problems at KHS, *Student*'s tutor (09 EDC 2328 Tr. Vol. 1, p 58, 18-21) and read the DPI reports of its investigation of *Parent*'s complaint about KHS. (09 EDC 2328 Tr. Vol. 1, p. 37, 18-25)

58. On August 15, 2008 and September 11, 2008, Dr. Connie McDonald-Bell, Certified Speech and Language Pathologist, conducted a comprehensive language/auditory processing evaluation. She 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 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) Dr. K.B. testified that test scores determined by Dr. McDonald-Bell showed a rather staggering degree of difference given *Student*'s ability scores. He testified that speech-language therapy would have been beneficial. (Tr. Vol. 1, p. 26)

59. At no time prior to hiring Drs. D.B. and McDonald-Bell, did *Parent* request the school perform new psycho-educational or speech-language diagnostic testing. (09 EDC 2328 Tr. Vol. 2, p. 310, 11-23; p. 312, 21-23)

60. KHS staff members stated that *Parent* had often expressed her reluctance to have *Student* evaluated, even going back to the initial interview for enrollment in October 2006. Further evaluations of *Student* had been discussed informally with *Parent* on several occasions. In the IEP meeting of October 23, 2007, *Parent* stated that she had asked for a psychological evaluation the previous year and the evaluation never happened. She did not renew her request during this meeting. OT services were also discussed, yet there is no indication that an OT evaluation was deemed necessary. (Resp. Ex. 10, IEP meeting minutes p. 3) An OT screening was conducted but no results were introduced. (Tr. Vol.2, p 514, 3-10) The Respondent, however, never requested that *Parent* provide consent to perform any evaluation during the period *Student* was enrolled at KHS.

61. During the week of May 21, 2008, *Student*'s Math End-of-Grade (EOG) Test was administered without the "mark in book" accommodation that was specified in the *Student*'s IEP. (Resp. Ex. 15) *Student* actually was given the choice to mark in his test booklet, but he chose to mark the bubbles on the answer sheet.

**62. *Student* took the regular EOG Test rather than the EXTEND2 Test. The IEP Team had recommended EXTEND2 for it would allow the use of a calculator and was simpler and shorter. *Parent* refused and insisted that the regular EOG test be administered. D.G. testified that this was very painful to her because she knew that *Student* would not be successful on the regular test. (Tr. Vol. 2, p. 280, 9 - p. 28, 3)**

63. On June 10, 2008, Respondent re-tested *Student* and sent the re-test to the Regional Test Coordinator, B.C., for grading. The Respondent's testing coordinator, L.V., testified that she placed *Student*'s re-test in an envelope with other student's tests, sealed the envelope and personally mailed the envelope to B.C.. (09 EDC 2328 Tr. Vol. 1, pp. 123-124)

64. The evidence shows that Respondent contacted Ms. B.C. only to learn that the re-tests had apparently been lost. Respondent offered to re-test *Student*, but the offer was refused. (09 EDC 2328 Resp. Ex. 4). *Parent* presented no evidence that anyone at KHS intentionally misplaced or lost the re-test. The loss of the test was never fully explained by Respondent or The Regional Test Coordinator.

65. On October 15, 2008, the DPI Accountability Division wrote to T.D. stating that pursuant to an investigation, KHS 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)

66. On November 6, 2008, the DPI Accountability Division found KHS 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 Dr. Sarah McManus. (Pet. Ex. 20)

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

**68. The Respondent scheduled or made available a total of 32 hours of compensatory special education services pursuant to *Parent*'s schedule from June 16 - 27, 2008. *Student* did not attend the two hour session scheduled for July 16 and did not attend any of the nine scheduled sessions from July 28 - August 15. (Stipulations) *Student* attended only 12 hours of the 32 hours made available. Thus, the Respondent actually failed to provide only 18 of the mandated hours.**

69. On July 28, 2008, *Parent* telephoned W.S. indicating she was discontinuing the compensatory services because she was moving to Orange County and *Student* would not be attending KHS for the 2008-09 school year. (Resp. Ex. 3, Enclosure 3, e-mail dated August 1, 2008). *Parent* cancelled the last three weeks of tutoring.

70. Neither *Parent* nor Respondent attempted to reschedule the remaining hours of compensatory services until notified by DPI that the compensatory education must still be provided. On January 12, 2009, Ms. *Student*, EC Teacher for KHS, wrote to *Parent* offering to provide the balance of the compensatory services that had been ordered by DPI as part of the Corrective Action Notice from the Complaint. *Student* did not propose a location nor did KHS offer to provide transportation. (Resp. Ex. 6, e-mail dated January 12, 2009)

71. *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. She declined the offer and gave her explanation why the offer was declined. The e-mail stated that within the next weeks *Student* would 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 KHS Heights. (Resp. Ex. 6, *Parent* e-mail dated January 20, 2009)

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

73. 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. The Respondent, however, was no longer obligated to conduct an IEP meeting because *Student* had moved to another county and *Parent* had declined the offer to complete the compensatory education services. (Resp. Ex. 6)

74. S. 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)

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

76. *Parent* contends that *Student* was unable to overcome the behavioral issues related to his lack of self-esteem and self-confidence in learning caused by KHS's failure to provide EC services and FAPE. Therefore, *Student* transferred in May 2009 to ABC Academy in **, TN. This is a private therapeutic boarding school that specializes in addressing behavioral issues in learning disabled children. **No evidence was ever introduced that *Student*'s behavioral issues and self confidence issues were caused by anything that KHS did or did not do in connection with its provision of EC services and FAPE.**

77. ***Parent* testified that she did not like C.S., *Student*'s special education teacher, and alleged that she had intentionally tried not to provide special education services. (09 EDC 2328 Tr. Vol. 1, p. 255, 7-12). *Parent* likewise did not trust other members of the staff. Testimony was received that *Student* had actually told A.B. that "Well, I don't have to do it because my mom says you don't know what you're talking about anyway." (Tr. Vol. 1, p. 222, 20 - 22) W.S. and *Student* both stated that *Student* told them that *Parent* told her that she did not have listen to or cooperate with C.S.. (09 EDC 2328 Tr. Vol. 3, p. 689, 4-6; p. 701, 10-15; p. 725, 19-22) This definitely affected both *Student* and *Student* in school as well as C.S.'s relationship with them. (09 EDC 2328 Tr. Vol. 3, p. 754, 16-22) *Parent*, on numerous occasions stated that she did not trust C.S. and many others of the staff and administration at KHS.**

78. During testimony, all members of the KHS staff uniformly stated that *Student* had received a Free and Appropriate Education at KHS during his seventh grade year.

79. **No expert testimony was introduced regarding whether of nor the Respondent provided FAPE. The only expert for the Petitioner was Dr. K.B., who testified only with regard to evaluations. The only other person (beside *Parent*) who testified for the Petitioner regarding FAPE was Dr. B., who was *Parent*'s sister. Dr. B.'s expertise is in the area of at-risk**

**students and had no expertise in special education. She had never been involved in developing IEP's for children with special needs.**

80. *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.

81. *Student* had a private tutor from 2007-09. *Parent* spent and is claiming Respondent should reimburse her $2,817.50 for private tutoring for the 2007-08 school year

82. The Respondent was unable to provide or make available 18 hours of compensatory special education services ordered by DPI, but for unexplained reasons *Parent* is claiming reimbursement for 93 hours at $35.00 an hour, a total of $3,255.00. She does not explain how she arrived at the 93 hours, nor did she present any evidence of the prevailing value of compensatory services.

83. *Parent* is requesting reimbursement for *Student*'s Pyscho-educational testing and therapy in the amount of $4,180.00

84. *Parent* moved from Durham County to Orange County at a cost of $1,831.00, half of which *Parent* has requested that KHS reimburse.

85. *Parent* has requested reimbursement of legal fees of $250.00, although *Parent* represented herself in this Petition.

86. *Parent* has requested reimbursement for Private School Tuition from ABC Academy for the period May 25, 2009 to September 30, 2009 in the amount of $25,800.00.

87. *Parent* has requested reimbursement for an oral language evaluation in the amount of $870.00.

88. *Student* has not received any speech-language services, but *Parent* has requested reimbursement for speech-language therapy in the amount of $2,975.00.

89. *Parent* has requested various due process expenses, including expert witness fees, lost work time and office supplies in the amount of $5,455.18.

90. Judge Webster issued a Final Decision on December 22, 2009, stating:

> 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 year, the Respondent provided *Student* a FAPE in accordance with the IDEA. Respondent is ordered to pay to Petitioner $1,050.00 for compensatory special education tutorial services.

91. The Petitioner filed Notice of Appeal of the ALJ's Decision on January 21, 2010. The appeal was filed in accordance with G.S. 115C-109.9 with the Exceptional Children Division of the North Carolina Department of Public Instruction.

92. The undersigned was appointed as Review Officer on January 21, 2010. A Request for Written Arguments was sent to the parties on January 22. Written Arguments were received from the Petitioner on February 11, 2010. The Respondent chose not to submit Arguments.

Based on the Findings of Fact, the Review Officer for the State Board of Education makes Conclusions of Law independently of those of the ALJ. As explained in the Conclusions, they are not totally consistent with those of the ALJ. A few are essentially the same, but many utilize law not included in the ALJ's Decision. Those added are consistent with IDEA, state law, federal regulations, state policies, and court interpretations. The Review Officer makes the following:

## CONCLUSIONS OF LAW

1. The Office of Administrative Hearings and the Review Officer for the State Board of Education have jurisdiction over this case pursuant to Chapters 115C, Article 9 of the North Carolina General Statutes; NC 1500 *Policies Governing Services for Children with Disabilities*; the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq.; and IDEA's implementing regulations, 34 C.F.R. Part 300.

2. IDEA was enacted to "ensure that all children with disabilities have available to them a Free Appropriate Public Education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. §1400(d)(1)(A), IDEA; the implementing federal regulations, 34 C.F.R. Part 300; G.S. 115C - Article 9; and NC 1500 *Policies Governing Services for Children with Disabilities*. All these provisions have specific procedures that an LEA must follow in making FAPE available.

3. Respondent charter school is a local education agency receiving monies pursuant to 20 U.S.C. § 1400 et seq. and the agency responsible for providing educational services to students enrolled in KHS. The Respondent is subject to the provisions of applicable federal and state laws and regulations, specifically 20 U.S.C. § 1400 et seq.; 34 C.F.R. Part 300; G.S. 115C, Article 9; and the North Carolina *Policies*, NC 1500. These acts and regulations require the Respondent to provide FAPE for those children in need of special education.

4. *Student* is a child with a disability for the purposes of IDEA, 20 U.S.C. § 1400 *et seq.* and a child with special needs within the meaning and definition of G.S. 115C-106.3(1). *Student* was enrolled in KHS during a portion of the period relevant to this controversy. Being classified as learning disabled, *Student* is entitled to a free appropriate public education (FAPE) from the charter school.

5. G.S. §§115C, 109.6 - 109.9 and the *Policies* (NC 1504, 1.8 - 1.16) provide the guidelines to be used in the hearing and administrative review process. The hearing by the ALJ and review by this Review Officer are required to be conducted in accordance with these provisions.

6. A free appropriate public education (FAPE) that must be made available to all eligible children is defined by IDEA, 20 U.S.C. §1401(9):

FREE APPROPRIATE PUBLIC EDUCATION - The term 'free appropriate public education' means special

> education and related services that -
> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program required under section 614(d).

7. A free appropriate public education has also been defined as that which provides a child with a disability with personalized instruction and sufficient support services to enable the student to benefit from the instruction provided. The individualized educational program (IEP) must be reasonably calculated to enable the child to receive benefits. *Board of Education v. Rowley*, 458 U.S. 176 (1982); *Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990).

8. In *Schaffer v. Weast*, 546 U.S. 49 (2005), the Supreme Court decided that parents who challenge educational decisions made by schools have the burden of proof in due process hearings. Thus, the Petitioner has the burden to show by a preponderance of evidence that the Respondent did not offer *Student* a FAPE. For the reasons set forth in the following, the Petitioner has met this burden for the time period April 1, 2008 until the end of the 2007-08 school year.

9. As the petition for the due process hearing was filed on April 1, 2009, any actions taken by Respondent prior to one year before that date are beyond the one year statute of limitations set forth in G.S. 115C - 109.6(b):

> Notwithstanding any other law, the party shall file a petition under subsection (a) of this section that includes the information required under IDEA and that sets forth an alleged violation that occurred not more than one year before the party knew or reasonably should have known about the alleged action that forms the basis of the petition.

10. This review, therefore, is limited to the last few months of the 2007-08 school year. Except for the compensatory education, the Respondent was not a party in any actions subsequent to the end of the 2007-08 school year. The review must be limited to the time period after April 1, 2008. The Petitioner never presented evidence that the one-year restriction in G.S. 115C - 109.6(b) would not apply:

> The one-year restriction in subsection (b) of this section shall not apply to a parent if the parent was prevented from requesting a hearing because of (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the petition, or (ii) the local educational agency's withholding of information from the parent that was required under State or federal law to be provided to the parent.
> G.S. 115C - 109.6(c)

11. The bulk of Petitioners complaints pertain to actions of the Respondent prior to April 1, 2008. Most of the testimony and exhibits also pertain to that time period. As the ALJ failed to recognize this, many of his findings and conclusions are not relevant.

12. There was no evidence whatsoever that *Parent* was ever prevented from requesting a hearing. There were no misrepresentations made by the Respondent concerning the resolution of a problem. While it is true that *Parent* made arguments that she did not agree with much that the Respondent was doing, no information was withheld. She received extensive information and was

heavily involved in planning *Student*'s educational program. *Parent* did not present convincing evidence that G.S. 115C-109.6(c) is satisfied and the one-year restriction does not apply.

13. *Parent* had ample opportunity to file the petition for a hearing much sooner, for it was clear that she was not satisfied with the education being provided. As early as October 2007 and throughout most of the 2007-08 school year, she was continually expressing her opinion that FAPE was not being provided. She "knew" or reasonably "should have known" about the actions being taken by Respondent to educate *Student*

14. *Parent* was very well informed about her rights, yet she still waited about nine (9) months after the Respondent no longer served *Student* to file this petition. *Parent* made the decision not to file sooner, and cannot place the blame on anyone else. By doing so, she limited any examination of Respondent's actions to the last several months of the 2007-08 school year, specifically from April 1, 2008 onward. All other actions of the Respondent occurred prior to the one-year time frame established by North Carolina law. During most of the time period covered by the petition April 1, 2008 - April 1, 2009, the Respondent was not involved in actions related to *Student* At the beginning of the 2008-09 school year, he was enrolled in a school operated by another LEA.

15. The modified schedule requested by *Parent* in the IEP meeting on April 25, 2008 was implemented for the remainder of the school year and is within the one-year limit. *Parent* wanted *Student* released for private tutoring in the afternoon and the Respondent agreed to this request. *Parent*'s request, made in the due process petition, for reimbursement of the cost of the tutoring is not supported by the law. In the meeting on April 25, *Parent* did inform the Respondent that she was dissatisfied with the education being provided by the Respondent, but there is no record of her notifying the Respondent that she expected the Respondent pay for the private tutoring. Even if the Respondent had not been providing FAPE, and the evidence is not conclusive on that issue, she satisfied only part of the notice requirement. The requirement is set forth in *School Committee of the Town of Burlington v. Dept. of Education*, 471 U.S. 359 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), and *Forest Grove v. T.A.*, 129 S.Ct. 2484 (2009). This concept has been codified in 20 U.S.C §1412(a)(10)(C):

> (ii) If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.
> (iii) Limitation on reimbursement -The cost of reimbursement described in clause (ii) may be reduced or denied if -
>
> > (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
> > (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa).

16. *Parent* did not actually remove *Student* from KHS. He still attended KHS. His day was modified to allow the private tutoring that supplemented, not replaced, his educational program

at KHS. While the private tutoring is not technically in a private elementary or secondary school, the Petitioner is still purchasing private educational services. Whether those private services meet all the requirements of *Burlington, et al.* is a moot issue, for the required notice was not provided.

17. The requirement is clear. *Parent* would have had to notify the Respondent that she was enrolling *Student* in private schooling because of a failure to provide FAPE, and that she was requesting that the Respondent pay for the private schooling. She did express her dissatisfaction with the education *Student* was receiving, but even during the hearing she made no argument that the required notice was provided. Modifying *Student*'s schedule did not deprive him of FAPE, nor is there any requirement to reimburse the Petitioner for the private afternoon tutoring.

18. The February 6, 2008 IEP that was still being implemented subsequent to April 1, and its April 25 amendment, were flawed in that they were not developed in conformance with 34 CFR 300.320; 34 CFR 300.320-328; and the *Policies* NC 1503-4.1. Although it appears that the IEP was drafted to provide *Student* with an individualized plan to enable him to make progress toward reasonable goals, the IEP lacked too many of the required components and/or statements. Lacking some of the required components sometimes can be a minor procedural error. This IEP had too many deficiencies. As the IEP forms the very basis of a child's special education program to provide FAPE, not having an IEP that contains the requirements of law can be a denial of FAPE.

19. The IEP of February 6, 2008 and the amendment on April 25 had a serious fault. It was known to all that *Student* had behaviors that impeded his learning, yet the IEP stated that he did not. *Parent* had earlier expressed her concerns about this but behavior had never been addressed. The IEP Team should have either developed behavior goals for the IEP or performed a Functional Behavior Assessment. Instead, they ignored the behavior. That the Team had done this earlier in the school year, prior to the one-year limit, is immaterial. The April 25 IEP clearly falls within the one-year time frame. The Team is required to conduct evaluations to determine the content of the IEP, including behavioral components. 34 CFR 300.304(b)(1)(ii) This was a clear denial of FAPE.

20. At the time of the April 25, 2008 IEP meeting, there was a pending request for an assistive technology evaluation. It had been agreed upon that one would be conducted. The Team at this meeting should have either provided a DEC 2 to get consent for testing or provided prior notice that the testing was being denied. 34 CFR 300(c); 34 CFR 300.503(a)(2)

21. The IEP Team had been relying on a previous evaluation in 2006 that had not recommended that speech-language be addressed. This is normally a reasonable thing to do, but in this instance it was not reasonable. When members of the IEP Team are aware that there is a problem, there is an affirmative obligation to obtain the necessary data to determine how to meet the child's needs. A.B. testified that she knew that *Student* had difficulty in expressive language. (Tr. Vol. 1, p. 201 and Vol. 3, p. 566) There is nothing in the record that she actually brought this up in an IEP meeting, even though she had the obligation. An expressive language difficulty would necessitate a speech-language evaluation to determine the child's needs and the content of the IEP. Certainly by April 25, 2008 this issue should have been addressed. It is interesting to note that the Petitioner's privately obtained speech-language evaluation in August 2008 found *Student*'s expressive and expressive language to be among his most serious disabilities. After failing to deal with this issue throughout most of the 2007-08 school year, the IEP Team had a final opportunity to initiate this evaluation on April 25. They did not do so.

22. The IEP of February 6, 2008 and the amendment on April 25 had another procedural error. While a DEC 5, Prior Notice form was provided, it did not include the content required by 34 CFR 300.503 and the *Policies* NC 1504-1.4(b). These require that prior notice be provided that includes the actions taken and options rejected, including reasons. While this procedural error by itself may not been sufficient to deny FAPE, at some point the procedural errors accumulate to be sufficient to deny FAPE.

23. If there is a procedural violation of the IDEA, it must be determined whether the procedural violation either (1) resulted in the loss of an educational opportunity for the child, or (2) deprived the child's parents of the right to meaningfully participate in the development of the child's IEP. *M.M. ex rel. D.M. v. Sch. Dist. of Greenville County*, 303 F.3d 523 (4th Cir. 2002). In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefit. 20 U.S.C. 1415(f)(3)(e).

24. G.S. 115C-109.8 provides that in matters alleging a procedural violation, the hearing officer may find that a child did not receive FAPE only if the procedural inadequacies either impeded the child's right to FAPE, significantly impeded the parents opportunity to participate in the decision making process, or caused a deprivation of educational benefits. The Petitioner has met the burden of showing that the child was deprived of educational benefit and that these flawed IEPs denied FAPE.

25. A problem of communication existed between *Parent* and KHS staff. *Parent* often would, through e-mail, request that certain things be done such as conduct an evaluation or change parts of the IEP. She would then express her displeasure because her wishes were not followed. IDEA requires that decisions such as these be made by the IEP Team in a meeting. This is one of the core processes mandated by IDEA. No EC Director, EC teacher, administrator, or parent can unilaterally make such changes. Granted, KHS should have convened an IEP meeting to consider the parent's requests, yet the Team met frequently enough throughout 2007-08 to be able to deal with most of these requests. Why these requests were usually ignored was never explained. *Parent* usually did not renew her requests in the IEP meetings that followed soon after she made an e-mail request.

26. While there was a claim by the Petitioner that the Respondent did not provide appropriate grade-level instruction based on the North Carolina Standard Course of Study, the evidence does not support this. A child's program must provide access to the curriculum for a particular grade level. If, however, a child needs extensive remediation, some instruction must of necessity use materials normally below that grade level for the child to achieve success. This does not mean that the appropriate grade-level curriculum was not being accessed. There was no denial of FAPE because of the level of instruction provided *Student*

27. The Petitioner made claims that a certain test, an assistive technology evaluation, had not been administered in over three years. There is no requirement in 34 CFR 300.301-306 that a certain test be administered on a regular basis. The requirement is that there must be a reevaluation at least every three years to determine if a child continues to be a child with a disability and to determine the child's needs. Neither *Parent* nor the IEP Team had requested a reevaluation in the

one-year time period covered by this review. Even if there had been a request for reevaluation, determining which tests to administer is the responsibility of the IEP Team.

28. The Petitioner also made claims that she was denied access to *Student*'s records and a list of records maintained, as required by 34 CFR 300.613 and 300.616. While she was never given the list, the evidence shows that she was granted access and copies of records several times in a timely fashion. There certainly was no showing that *Student* was denied FAPE because of any denial of records, nor was there any showing that *Parent*'s opportunity to participate in the decision making process was impeded. As with many of the other issues, the Petitioner seemed to forget that she had the burden of proof to show that *Student* was denied FAPE. Simply stating a fact, such as not being given a list, fails to meet that burden.

29. The only record she was ever denied was a teacher's grade book, although she was given sufficient explanations of how grades were determined. She wanted the grade book solely to berate and criticize the teacher for changing assigned grades. That she disagreed with the grade change is immaterial. The teacher's explanations concerning the grade change were adequate, even though *Parent* refused to accept them. There is some dispute as to whether or not a grade book is indeed an educational record under FERPA. There are two concepts in FERPA that may actually conflict. Educational records are records maintained by an educational agency directly related to a student, but this does not include records that are kept in the sole possession of the maker. 34 CFR 99.3 If the grade book is kept in the sole possession of the teacher, the grade book may not be an educational record. The Supreme Court recently had an opportunity to clarify this apparent conflict but chose not to do so In *Owasso Independent School District v. Falvo*, the Court said, "Even assuming the teacher's grade book is an educational record -- a point the parties contest and one we do not decide here ----" 534 U.S. 426 (2002) In this instance, any minor procedural violation that may have been committed was certainly not a denial of FAPE. It did not deprive *Student* of any educational benefit, nor did it impede *Parent*'s opportunity to participate in the decision process.

30. Due to a complaint filed with DPI and the resulting investigation, DPI mandated certain actions be taken by the Respondent. While the bulk of the complaint report pertained to actions taken prior more than one year before the filing of the due process petition, the actions taken to comply with the corrective actions mandated by DPI do fall within the one-year period. One requirement was to hold an IEP meeting to correct the deficiencies of the February 6 IEP. Another was to provide staff training on IEP development. DPI was satisfied with the actions taken, but DPI had also mandated compensatory education be provided to *Student*

31. DPI required that *Student* be provided 50 hours of compensatory education. The ALJ found that the Respondent must provide reimbursement for 30 hours of compensatory education, without explaining how that number was determined. Of the 50 hours of compensatory education ordered by DPI, the Respondent completed or made available 32 hours before the August 15, 2008 date established by DPI, leaving a total of 18 (not 30) hours. A major reason the hours made available were not completed was the Petitioner's own schedule for the compensatory education and the failure of the child to attend some sessions. As the Respondent was unable to provide some of the hours because of the Petitioner's lack of cooperation, the Respondent has no obligation to provide those hours what were made available but not attended. The Respondent still had an obligation to provide the 18 hours of compensatory education that were not made available. The Respondent did not attempt a reasonable follow-up after August to provide these services. The

Respondent has the responsibility to either provide the compensatory education or reimburse the Petitioner for an equal number of hours that Petitioner has already purchased. Since it has been some time since the Petitioner has received services from the Respondent, reimbursement is the preferred option.

32. The Petitioner sought reimbursement for a privately obtained psycho-educational evaluation and a speech-language evaluation. Under certain circumstances, the Petitioner has the right to independent educational evaluations at public expense. In this instance, however, the Petitioner presented no credible reason why the Respondent should provide reimbursement for the psycho-educational evaluation. *Parent* did not request an independent evaluation in accordance with 34 CFR 300.502 and the *Policies* NC 1504-1.3. The Petitioner is not entitled to reimbursement for the psycho-educational evaluation. As explained previously in these conclusions, the Respondent does have responsibility to reimburse the Petitioner for the speech-language evaluation.

33. The Petitioner sought reimbursement for a privately obtained psychotherapy for *Student* The need for psychotherapy could have just as easily been caused by problems in the home that were admitted by the Petitioner. The Petitioner did not meet the burden of proof that this should be the responsibility of the Respondent.

34. Although this need not be addressed because it was before the one-year time limitation in this case, the communications and actions by the Petitioner for most of the school year made it very difficult for the school staff to provide the necessary services to *Student* It is unfortunate, but *Parent*'s own actions destroyed any trust that had existed with Respondent's staff. *Parent* was domineering and intimidating during IEP Team meetings and in conversations with teachers. *Parent*'s e-mails to Respondent's staff were often accusatory and demeaning. When the staff responded, she was often not satisfied or disagreed with the answer or explanation. *Parent* also told *Student* that Respondent's staff and, particularly C.S., were incompetent. The record, however, shows that the Respondent's staff tried to act professionally despite *Parent*'s actions. *Parent*'s own actions clearly interfered with KHS's efforts to provide an appropriate education for *Student*

35. Another issue, testing irregularities, consumed far too much time at the hearing. There were testing irregularities on *Student*'s EOG test during the spring of 2008, but there was no evidence introduced to show how this denied FAPE.

36. The Petitioner placed much emphasis on the findings and conclusions of DPI with regard to the Complaint filed by Petitioner and the report of testing irregularities. While these may be accepted as "facts," they cannot be accepted as proof that FAPE was denied. The burden was on the Petitioner to show that the errors and noncompliance issues found by DPI actually denied FAPE to *Student* The Petitioner did not even attempt this effort, supposedly assuming that the errors and noncompliance themselves amounted to a denial of FAPE. G.S. 115C-109.8 provides that the hearing officer may find that a child did not receive FAPE only if the inadequacies either impeded the child's right to FAPE, significantly impeded the parents opportunity to participate in the decision making process, or caused a deprivation of educational benefits. Assuming that an error committed by Respondent denied FAPE to *Student* is contradictory to the requirement of law.

37. An IEP Team's determination is normally entitled to substantial deference. With regard to the decisions of the Team in April and June of 2008, the Review Officer cannot support its

actions. In *Hendrick Hudson Dist. Bd. Of Ed. v. Rowley*, 458 U.S. 176, 206 (1982), the Court said that one must defer to these decisions as long as a procedurally proper IEP has been formulated and the child is provided the basic floor of opportunity. This was reinforced by the Fourth Circuit in *Tice v. Botetourt County School Board*, 908 F.2d 1200 (4th Cir. 1990). One should be reluctant to second-guess the judgment of educational professionals simply because one disagrees with them. The Review Officer in this case is not second-guessing the Team. Instead it has been found that the Team did not produce procedurally proper IEPs as required by law and did not conduct the evaluations required by law. The Review Officer, therefore, cannot defer to the IEP Team's decisions in this case because those decisions were clearly flawed and not made in accordance with the law. The Review officer, therefore, finds that under the standard set by *Rowley* the Respondent failed to provide FAPE to *Student* during the last several months of the 2007-08 school year.

38. The Petitioner has requested reimbursement for many items beyond the scope of items that can be decided in an IDEA petition. Costs involved in moving, legal fees, witness fees, psychotherapy, anticipated costs, and reimbursement for employment time lost are not within the purview of issues that can be decided by an ALJ or Review Officer.

## DISCUSSION

*The intent of this section is to provide some insight into the Review Officer's reasoning. It incorporates some elements of both the Facts and Conclusions and is not intended to be a substitute for either.*

Initially there appeared to be many issues presented in this case. Many, however, are not within the purview of a complaint filed pursuant to IDEA, and thus outside the authority of the ALJ and Review Officer. The Petitioner is basically claiming the Respondent failed to provide FAPE because of a failure to provide services in accordance with the IEP and that certain related services were never provided because of a failure to properly evaluate *Student.* Procedural errors were claimed with regard to access to records and testing.

The bulk of the testimony and evidence submitted in this case dealt with procedural errors, most of which were minor and did not result in a denial of educational opportunity or FAPE. The Petitioner, at great length, presented evidence that certain things happened but failed to show that they were procedural errors under IDEA, or if they were procedural errors under IDEA, failed to show that these minor errors resulted in a denial of FAPE. The hearing, which lasted four days, could have been reduced dramatically. The majority of the remedies sought by the Petitioner also were totally outside the scope of remedies allowed under IDEA. As the Petitioner acted *pro se* during this proceeding, this could possibly explain some of the problems that an ALJ or Review Officer would have with her case.

As the petition for the due process hearing was filed on March 31, 2009, any actions taken by Respondent prior to one year before that date are beyond the one year statute of limitations set forth in G.S. 115C - 109.6(b). Thus the scope of this review is limited to the time period April 1, 2008 - April 1, 2009. In reality, except for the compensatory education issue, the Respondent was not a party to any actions subsequent to the end of the 2007-08 school year. For the majority of the one-year time period covered by this petition, the Petitioner was enrolled in another LEA. The

Respondent was not involved in any actions taken by the other LEA, and cannot be held responsible for FAPE issues during the 2008-09 or 2009-10 school years.

The Petitioner never argued nor did she present evidence that the one-year restriction in G.S. 115C - 109.6(b) would not apply:

> The one-year restriction in subsection (b) of this section shall not apply to a parent if the parent was prevented from requesting a hearing because of (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the petition, or (ii) the local educational agency's withholding of information from the parent that was required under State or federal law to be provided to the parent.
> G.S. 115C - 109.6(c)

There was no evidence whatsoever that *Parent* was ever prevented from requesting a hearing. There were no misrepresentations made by the Respondent concerning the resolution of a problem and no substantive information was withheld. While it is true that *Parent* made arguments that she did not understand the grade change at the end of the first quarter in the fall of 2007 for *Student* (Companion case 09 EDC 2328), no information was withheld. That she was not provided one teacher's grade book is insignificant and only a very minor procedural error, certainly not one that denied FAPE. The evidence shows that *Parent* really was not denied the information she wanted. She just would not accept the explanations given, nor did she agree with what the teacher had done. She did not even argue that she was denied substantive information in this case. This is not enough to hold that the one-year restriction does not apply.

*Parent* was well informed about her rights, and knew that she could have requested a hearing prior to this one. The Respondent did nothing that prevented *Parent* from initiating a hearing much sooner. The Petitioner waited almost nine months after withdrawing *Student* from Respondent's school to request a hearing. She did not effectively use the timely resolution process that was envisioned by IDEA and state law.

The bulk of Petitioners complaints, testimony, and exhibits pertain to actions of the Respondent prior to April 1, 2008. As the ALJ failed to recognize this, many of his findings and conclusions are not relevant. The following paragraphs discuss the actions and events subsequent to April 1, 2008.

The actions in an IEP meeting on April 25 clearly fell within the one-year time limitation. This was the implementation of the modified schedule requested by *Parent.* The Respondent agreed to the request to modify *Student*'s schedule. In this due process complaint, *Parent* is asking for reimbursement for that tutoring. In order for reimbursement to be ordered, *Parent* would have to show that the requirements of *Burlington* have been satisfied. That requirement is clear. She would have to notify the Respondent that she was enrolling *Student* in private schooling because of a failure to provide FAPE, and that she was requesting that the Respondent pay for the private schooling. In the meeting on April 25, *Parent* did inform the Respondent that she was dissatisfied with the education being provided by the Respondent, but there is no record of her notifying the Respondent that she expected the Respondent pay for the private tutoring. Even during the hearing, the Petitioner made no argument that the required notice was provided. Modifying *Student*'s schedule did not deprive her of FAPE, nor is there any requirement to reimburse the Petitioner for the private afternoon tutoring.

The April 25, 2008 IEP meeting actually resulted in an amendment to the previous February 6 IEP. Though the meeting obviously was brief, the acts or failure to act at this meeting clearly come within the one-year time period covered by this review. Though both parties did not put forth much effort into examining this meeting during the hearing, it actually was a very important meeting. Without this meeting there was little that transpired that fell within the one-year time period.

The April 25, 2008 IEP was flawed in that it was not developed in conformance with 34 CFR 300.320 and the Policies NC 1503-4.1 in that it did not have proper statements of: 1) present levels of academic achievement and functional performance, 2) measurable annual objectives, and 3) *Student*'s participation in extracurricular and nonacademic activities. The IEP also did not include a statements of the initial transition components required by the *Policies* NC 1503-4.1(b), for *Student* had just turned 14. The DPI investigation also found these flaws in the IEP. As the IEP forms the very basis of a child's special education program to provide FAPE, not having an IEP that contains the requirements of law is a denial of FAPE. In this instance, it deprived *Student* of education.

The IEP of April 25, 2008 had another procedural error. While a DEC 5, Prior Notice form was provided, it did not include the content required by 34 CFR 300.503 and the *Policies* NC 1504-1.4(b). These require that prior notice be provided that includes the actions taken and options rejected, including reasons. This procedural error by itself may not been sufficient to deny FAPE. At some point, however, the procedural errors accumulate to be sufficient to deny FAPE.

The most serious error committed by the IEP Team on April 25 was a failure to correct a known flaw in the IEP. It was known by all that *Student* had behaviors that impeded his learning. The Team had been ignoring this for most of the 2007-08 school year. While those prior actions did not fall within the one-year limit, the actions on April 25 did. The Team kept in place an IEP that stated that there were no behaviors that impede learning. The Team should have addressed *Student*'s behavior in this IEP, either developing behavior goals or performing a Functional Behavior Assessment. It is difficult to understand why the Team did not address *Student*'s behavior. The EC teacher even testified that she saw the need for a Functional Behavior Assessment towards the end of the school year.

Another serious lapse occurred with regard to determining *Student*'s needs. There was a pending assistive technology evaluation in the spring of 2008 that had been requested and agreed upon. No DEC 2 form was provided to the Petitioner to get consent to evaluate, nor was an evaluation ever performed. Had the Team elected not to perform the evaluation, it was required to provide prior notice. 20 U.S.C. 1415(b)(3); 34 CFR 300.503; 115C-109.5; and the *Policies* NC 1504-1.4 No Prior Notice (DEC 5 form) was provided to the Petitioner. This was a serious procedural error, for the Respondent has an affirmative obligation to perform the necessary evaluations to determine the services to be provided to the child. In the alternative, prior notice should have been provided. This procedural error caused *Student* to be deprived of education and deprived the parent of meaningful participation, a clear denial of FAPE.

There was also the need for a speech-language evaluation, certainly by the spring of 2008. One of the teachers testified that she was aware of an expressive language difficulty. The EC

Coordinator and trained EC teacher either knew or should have recognized this difficulty also, for it is within their expertise. They may not have the expertise to diagnose the real nature of the problem, but they certainly should have recognized that there was problem in this area that needed to be addressed. Why they failed to do so was not made clear. Failing to properly evaluate *Student* to determine the services he needed is a denial of FAPE. The Petitioner's privately obtained speech-language evaluation in August 2008 highlights this error. *Student*'s expressive and receptive language difficulties were among his most serious disabilities and had probably existed for some time.

As stated in the Conclusions section, the Petitioner placed much emphasis on the findings and conclusions of DPI with regard to the Complaint filed by Petitioner and the report of testing irregularities. While these findings may be true, they alone cannot be accepted as proof that FAPE was denied. The burden was on the Petitioner to show that the errors and noncompliance issues found by DPI actually denied FAPE to *Student*. The Petitioner did not even attempt this effort, supposedly assuming that the errors and noncompliance themselves amounted to a denial of FAPE.

Although the Respondent satisfactorily completed the mandated corrective actions with regard to staff training, the Respondent never completed the 50 hours of compensatory education that DPI had ordered. Of the 50 hours of compensatory education ordered, the Respondent completed or made available 32 hours before the August 15, 2008 date established by DPI. The Respondent cannot be held responsible for the scheduled hours that D.R, did not attend. While part of the reason the remaining hours were not completed was the Petitioner's own schedule for the compensatory education, the Respondent still had an obligation to provide the remaining 18 hours of compensatory education that were not made available. The Respondent did not attempt a reasonable follow-up after August to provide these services, only attempting to do so in January 2009 after DPI directed that the services still be provided. That the Petitioner, in January 2009, found that the now offered services were inconvenient is immaterial. The Petitioner is still entitled to the compensatory education services. The Respondent has the responsibility to either provide the compensatory education or reimburse the Petitioner for an equal number of hours that Petitioner has already purchased. Since it has been some time since the Petitioner has received services from the Respondent, reimbursement is the preferred option.

The Petitioner privately purchased a psycho-educational evaluation in May 2008. She did not request an independent evaluation in accordance with 34 CFR 300.502 and the *Policies* NC 1504-1.3 As the Petitioner never requested this psycho-educational evaluation and the evaluation could have been performed by the Respondent, there is no obligation to reimburse Petitioner for this examination.

There were problems with administering *Student*'s EOG examination in the spring of 2008, necessitating a retest. Retesting was performed on June 10, 2008, but the retest was somehow lost in mailing it to the Regional Testing Coordinator. It was not clear exactly what happened to the retest. The Petitioner, however, failed to show how this testing irregularity denied FAPE.

The Petitioner has requested reimbursement for many items beyond the scope of items that can be decided in an IDEA petition. Such things as costs involved in moving, legal fees, witness fees, therapeutic care, damages for psychological and emotional distress, anticipated costs, and

reimbursement for employment time lost are not within the purview of issues that can be decided by an ALJ or Review Officer. IDEA and State Law strictly limit the available remedies to those related to FAPE. Damages, as such, cannot be awarded.

Within the time period beginning one year prior to the filing of the due process petition, the Respondent failed to provide FAPE because of these actions/inactions:

1. The Respondent failed to address *Student*'s behavior in the IEP of April 25, 2008. The IEP should have included objectives regarding behavior or the Team should have performed a Functional Behavior Assessment.
2. The Respondent failed to perform the assistive technology evaluation that had been agreed upon in the spring of 2008.
3. *Student* had expressive language difficulties that were recognized by at least one teacher. No speech-language evaluation was conducted to determine how to address this problem.
4. There were multiple procedural irregularities with the IEP of April 25, 2008.
5. The Respondent did not provide or make available 18 hours of compensatory education mandated by DPI.

It is not difficult to determine that FAPE was not provided as set forth above. Deciding what remedies to order is more difficult because the Petitioner is no longer enrolled in Respondent's school. Because of its failure to provide FAPE, it is reasonable that:

1. The Respondent provide reimbursement for a Functional Behavior Assessment. The evidence shows that the subsequent LEA attended by *Student* did perform such an assessment. It is reasonable that Respondent reimburse that entity for the cost, for it should have already been performed by the Respondent.
2. The Respondent perform the assistive technology evaluation that had been agreed upon in the spring of 2008, or provide reimbursement for this evaluation.
3. The Respondent reimburse the Petitioner for the speech-language evaluation privately obtained in August 2008.
4. The Respondent has the responsibility to either provide 18 hours of compensatory education or reimburse the Petitioner for an equal number of hours that Petitioner has already purchased. Since it has been some time since the Petitioner has received services from the Respondent, reimbursement is the preferred option.

These are all special education services denied to *Student* by the Respondent. Thus the Respondent has an obligation to provide these services now or provide reasonable reimbursement for the services that have been provided subsequently.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned enters the following:

## DECISION

The Review Officer holds that:

1. The majority of the Petitioner's arguments and facts concern actions taken by the Respondent prior to the one-year limit in G.S. 115C-109.6(b). The Petitioner did not present convincing evidence that the one-year limit should be waived. As the petition was filed on April 1, 2009, actions of the Respondent prior to April 1, 2008 are not covered by this Decision. Respondent, however, denied FAPE to *Student* subsequent to April 1, 2008 as explained in the previous Conclusions.

2. The Respondent denied FAPE by not performing a Functional Behavior Assessment and developing a Behavior Improvement Plan subsequent to April 25, 2008. The Respondent must reimburse the entity that subsequently paid for a Functional Behavior Assessment for *Student*

3. The Respondent failed to provide FAPE by not performing an assistive technology evaluation subsequent to April 25, 2008. The Respondent must now provide this evaluation or provide reimbursement for this evaluation.

4. The Respondent denied FAPE by not performing a speech-language evaluation subsequent to April 25, 2008. The Respondent must reimburse the Petitioner for the speech-language evaluation of August 2008.

5. The Respondent must provide 18 hours of compensatory education or reimburse the Petitioner for an equal number of hours that Petitioner has already purchased.

6. The Respondent has no obligation to pay for the Petitioner's private school tuition, private tutoring, private psychological evaluations, private speech-language services, or psychotherapy.

7. The Respondent has no obligation to reimburse the Petitioner for moving expenses, legal fees, witness fees, and reimbursement for employment time lost. These are not within the purview of issues that can be decided by an ALJ or Review Officer. IDEA and State Law strictly limit the available remedies to those related to FAPE.

This the 17 th day of February 2010.

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Joe D. Walters
Review Officer

## NOTICE

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