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OFFICE OF ADMIN HEARINGS

STATE OF NORTH CAROLINA | IN THE OFFICE OF ADMINISTRATIVE HEARINGS

COUNTY OF CHATHAM | 14 EDC 08542

[redacted] a minor, by and through his parents, [redacted] and [redacted] Petitioners, v. [redacted] School, Respondents.	**FINAL DECISION**

THIS MATTER was heard on June 22 - 26, June 29 -30, July 1 – 2, July 6 – 8, and July 21 – 22, 2015, before the Honorable Sidney S. Eagles, Jr., Temporary Administrative Law Judge, Office of Administrative Hearings for the State of North Carolina (OAH), presiding in Raleigh, North Carolina. The undersigned, in his discretion with consent of all counsel, allowed Respondent to file an amended brief by October 16, 2015 and extended the date for final decision to October 23, 2015.

APPEARANCES

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Petitioner [redacted] a minor, did not attend the hearing. Student's mother, Petitioner [redacted] and Student's father, Petitioner [redacted] were present on each day of the hearing. Cotton Bryan, Principal of [redacted] School, and Ms. Deedee Nachman, President of the Board of Director of [redacted] School, were present on substantially all days of the hearing. North Carolina Department of Public Instruction and the North Carolina State Board of Education were dismissed as Respondents by Order of Dismissal, dated May 28, 2015.

EXHIBITS

For the Petitioners, Exhibits 1-3, 4 (pp. 74, 77-79 & 82-83), 5-8, 10, 11 (pp. 105-106), 12-41, 43-58, 60-75, 77, 78 (pp. 864-868, 880-884, 891-894, 910, 915-917, 919-920, 923-927, 937-943, 947-950, 953-959, 963-968, 979-992), 79-80, 81 (pp. 1039-1043), 82-86, 87 (pp. 1069 & 1071), 88 (pp. 1072-1079 & 1081), 89-111, 114-115, 116 (pp. 1193-1202), 118-124, 128-129, 130 (pp. 130-3), 131, 133-136, 138, 140-146, 147 (pp. 147-1 - 147-24), 148-149, 151-153, 155, 157-159, 162, 165, 176-180, 181A, 181B, and 182.

WITNESSES

Called by Petitioners

1. Kathi Shaw
2. Bryan Matthews
3. Lawrence Smiley
4. Terri Hayes
5. Carol Ann Hudgens
6. Jennifer Anne Diliberto, Ph.D.
7. Jann Shepard, M.Ed.
8. Kimberley Moody
9. Sonja Younger
10. Anna Thrower
11. Ashleigh Lalley
12. Cotton Bryan
13. Alexander Herzing
14. Kathleen St. Lawrence
15. [redacted] Sr.
16. [redacted]

Called by WCS

1. Donna Huff
2. Amy Elizabeth Odom
3. Cotton Bryan

I. ISSUES

A. Petitioners' Issues

The Petitioners contend that the contested issues to be heard and determined in this administrative due process proceeding are as follows.

a) Did [redacted] School (hereinafter "WCS") deny Student a "free appropriate public education" (FAPE) by not providing Student with services that were comparable to the services set forth in Student's Individualized Educational Plan (IEP), which was developed and implemented during the 2012-13 school year by the Pocono Mountain School District (PMSD), which is located in the State of Pennsylvania?

b) Did WCS deny Student a FAPE by not providing Student with specially designed instruction and accommodations (including note taking, access to homework, access to a separate and small environment for testing, extra-time on tests, and extra-time to complete assignments) that were necessary to address

Student's unique needs in order for him to have an opportunity to be involved and make progress in the general education curriculum for 8th Grade?

c) Did WCS fail to provide Student's education records in a timely manner in response to requests made by Parents?

d) Should WCS have convened an IEP meeting on November 1, 2013, without Parents' participation and after Parents communicated with school officials about that meeting?

e) Did WCS violate the IDEA, the Federal Regulations and NC Special Education Law by failing to timely report on Student's progress on the goals and objectives set forth in the PMSD IEP?

f) Did WCS deny Student a FAPE by not providing him the opportunity to make any meaningful progress by failing to timely provide Student with supplementary aids and services in regular education classrooms?

g) Did WCS deny Student a FAPE by not providing him the opportunity to make any meaningful progress by failing to provide Student with any one or more of the services identified below:

i) Failing to timely provide assistive technology, including a laptop, a Livescribe pen, or Speech-to-Text software?

ii) Failing to provide Student with sufficient training so that Student could effectively use assistive technology?

iii) Failing to provide Student with Speech and Language services in a total school environment, such as "push-in" services?

iv) Failing to provide Student with "pull-out" Speech and Language services with regular frequency for a specific amount of time?

v) Failing to provide Occupational Therapy in total school environment, such as "push-in" services?

vi) Failing to provide "pull-out" Occupational Therapy services with regular frequency for a specific amount of time?

h) Did WCS deny Student a FAPE by not providing him the opportunity to make any meaningful progress by failing to provide Student with Transition Planning services?

i) Did WCS deny Student a FAPE by not providing him the opportunity to make any meaningful progress by failing to provide prior written notice with respect to requests made by Parents for specially designed instruction, related services and accommodations, or any of them?

j) Did WCS deny Student a FAPE by not providing him the opportunity to make any meaningful progress by failing to present FORM DEC-5, or otherwise extend an offer of a FAPE for the 2013-14 school year, or any portion thereof?

k) Did WCS deny Student a FAPE by disenrolling Student before the end of the 2013-14 school year, and thereby changing Student's placement without a hearing or due process of law?

l) Did WCS deny Parents the right to meaningfully participate in the development of an IEP for Student by reason of any one or more of the acts or omissions identified below:

i) Failing to provide Parents with prior written notice with respect to their requests for specially designed instruction, related services, and accommodations, or any one of the foregoing?

ii) Failing to provide Parents with access to, or copies of, Student's educational records upon parental request therefore?

iii) Retaliating against Student and Parents, or either of them, based on a prior due process proceeding in 2003 against the Wake County School District.

iv) Convening an IEP meeting on November 1, 2013, without Parents' participation and after Parents communicated with school officials about that meeting?

B. WCS's Issues

The WCS contends that the contested issues to be heard in this due process hearing are as follows:

a) Whether [redacted] School provided RS with a free appropriate public education during the time he attended the school, including services comparable to those described in his IEP from the Pocono Mountain School District?

b) Whether [redacted] School followed the appropriate procedures for considering an evaluation for RS and attempting to develop, adopt and implement a new IEP for him pursuant to the North Carolina Policies Governing Services for Children with Disabilities?

c) Whether RS was entitled to receive special education and related services after December 2, 2013 when he was no longer attending [redacted] School?

d) Whether application of North Carolina's one-year statute of limitations for claims under the IDEA limits those claims to the time period between November 1, 2013 (one year prior to the filing of the Petition) and December 2, 2013 (the last day RS attended [redacted] School)?

e) Whether Petitioners' claim for the cost of a private placement should be reduced or denied for failure to comply with the requirement for prior notice to the school?

II. PROCEDURAL BACKGROUND

On October 31, 2014, [redacted] a minor (Student.), by and through his mother, [redacted] (Mother), and his father, [redacted] Sr. (Father) (collectively, Parents) filed Petitioners' Request for a Contested Case Hearing (Special Education).

On or about November 17, 2014, WCS [redacted] School (WCS) filed its Response to Petition for Contested Case Hearing.

On November 21, 2014, WCS NC Department of Public Instruction (DPI) and NC State Board of Education (State Board of Education) filed a Motion to Dismiss on multiple grounds, including that the Office of Administrative Hearings (hereinafter "OAH") lacked subject matter jurisdiction and Petitioners had failed to state a claim on which relief can be granted.

On November 24, 2014, Petitioners filed a Notice of Partial Voluntary Dismissal of Petition against DPI and the State Board of Education, without prejudice.

On or about December 3, 2014, Steven Wyner of Wyner Law Group, PC filed a Motion to Appear Pro Hac Vice on behalf of Petitioners.

On January 21, 2015, OAH issued an Order for Admittance of Out-of-State Counsel, admitting Mr. Wyner to practice pro hac vice for the sole purpose of appearing on behalf of Petitioners in this proceeding.

On or about December 23, 2014, [redacted] School filed a Motion to Dismiss on grounds that the Petition failed to state a claim upon which relief can be granted, failed to establish eligibility for services, and asserting the applicable statute of limitations; that Motion was denied by Order, dated February 19, 2015.

On March 12, 2015, OAH issued an Order appointing Court of Appeals Chief Judge (Ret.) Sidney S. Eagles, Jr., as a Temporary Administrative Law Judge in this matter.

On March 19, 2015, Petitioners filed their Prehearing Conference Statement.

On March 20, 2015, Petitioners filed a Motion for Leave to File First Amended Petition for a Contested Case (Special Education), seeking, inter alia, to reinstate DPI and the State Board of Education as Respondents in this matter; that

Motion was granted on April 7, 2015. The First Amended Petition was filed and served on April 9, 2015.

On or about April 23, 2015, DPI and the State Board of Education filed a Motion to Dismiss on grounds that OAH lacked subject matter jurisdiction and Petitioners had failed to state a claim on which relief can be granted. After a telephonic hearing, DPI and the State Board were dismissed, with prejudice by Order of Dismissal, dated May 28, 2015.

Discovery commenced in late December 2014. Multiple discovery motions were filed by the parties, but the only Discovery Order was issued on June 9, 2015. That Discovery Order, inter alia, ordered [redacted] to file and serve its Response to First Amended Petition in a Contested Case (Special Education) (which had been filed on or about April 10, 2015). On June 12, 2015, [redacted] served its Response to the First Amended Petition.

Pursuant to multiple motions and Orders, the hearing date was extended without objection to June 22, 2015 for good cause. The case was heard on June 22 - 26, June 29 -30, July 1 – 2, July 6 – 8, and July 21 – 22, 2015. The Joint Order on Final Prehearing Conference was filed on August 5, 2015.

Pursuant to multiple motions and Orders, the parties have been ordered to submit their respective Closing Briefs and [Proposed] Decisions on or before the close of business on September 24, 2015, and the date for OAH to issue a final decision has been extended to October 14, 2015. *See* Order Granting Petitioners' Third Motion to Enlarge Time to File Closing Briefs and [Proposed] Final Decisions; and, Regarding Format of Closing Briefs and [Proposed] Final Decisions; Order Granting Petitioners' Fourth Motion to File Closing Briefs and [Proposed] Final Decisions. With consent of the parties, the undersigned allowed Respondents to file an amended brief not later than October 16, 2015 and extended the date for final decision to October 23, 2015.

III. FINDINGS OF FACT

A. Stipulated Facts

1. Student was born in [redacted] and at the time of this hearing was fifteen years of age.

2. Student is diagnosed with [redacted] and is eligible to receive special education and related services under the eligibility categories of Specific Learning Disability (SLD) and Speech Impairment (SI).

3. During the 2008-09 school year, when [redacted] was in 3rd Grade, he was made eligible for special education and related services under the category of Specific Learning Disability; and Mother participated in the development of an IEP and consented to his receiving special education and related services, while Student was enrolled in Wake County Public School System in the State of North Carolina.

4. During the 2009-10 school year, Student continued to be eligible to receive special education and related services while attending A.B. Combs Elementary School in the Wake County Public Schools.

5. During the 2010-11 and the 2011-12 school years, Student was homeschooled by his Parents.

6. During the 2012-13 school year, Student attended public school in the Pocono Mountain School District (PMSD) in the State of Pennsylvania.

7. During the 2012-13 school year, Student received special education and related services under an IEP developed for him in the PMSD.

8. At the commencement of the 2013-14 school year, on August 20, 2013, Student transferred to, enrolled in, and commenced attending 8th Grade classes, at [redacted] School, located in Chatham County, North Carolina, with a current IEP that was in effect in a public school district in Pennsylvania.

9. The last day that Student physically attended classes at [redacted] School was December 2, 2013.

10. The 21 accommodations and specially designed instruction provisions of the PMSD IEP are good teaching practices, none of which are burdensome for a school to perform. Hearing Tr. vol. 3, 653, June 24, 2015.

B. Findings of Fact

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the undersigned makes the following findings of fact and conclusions of law. In making the findings of fact, the undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witnesses, any interests, bias, or prejudice the witnesses may have, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witnesses testified, whether the testimony of the witnesses is reasonable, and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony of the witnesses and the entire record in this proceeding, the undersigned makes the following Findings of Fact:

1. Prior to being made eligible for special education during the 2008-09 school year (SF 3), Student was twice denied eligibility. Parents then obtained private evaluations in order to obtain a diagnosis and initiate special education services. Hearing Tr. vol. 10, 2212-2213, July 6, 2015.

2. During the 2012-13 school year, Father remained in the family home in North Carolina and continued his employment, while Mother and Parents' two sons relocated to Pennsylvania. Hearing Tr. vol. 9, 1846-1847, July 2, 2015.; Stipulated Facts (SF) 5 & 6.

3. The IEP developed for Student by PMSD was based on a comprehensive assessment conducted by PMSD. P. Exh. 22, at 348; Stipulated Fact (SF) 7.

4. Wanting the family to be reunited, on January 9, 2013, Mother submitted a lottery application to WCS for Student's admission to 8th grade at WCS for the 2013-14 school year. The application provided notice that Student attended a "PA public school," and he had an "IEP (Exceptional Children Individual Education Plan)." After Mother accepted the WCS offer of admission, Ms. Kathi Shaw (WCS' Receptionist & Admissions Assistant) provided her with contact information for WCS' Exceptional Children Director, Lawrence "Buddy" Smiley. P. Exh. 4 at 74, 82-83; Hearing Tr. vol. 1, 59-64, June 22, 2015.

5. On August 1, 2013, PMSD mailed Student's educational records to WCS, including his 7th Grade Report Card, the results of his performance on the Pennsylvania System of School Assessment Exam Spring 2013 (PSSA), Medical records, special education records, including IEP documents, as well as the PMSD Evaluation Report (Educational File). P. Exh. 8 at 97,99; P. Exh. 12 at 111-112. On or about August 12, 2013, PMSD mailed the same Educational File to Parents that it had mailed previously to WCS. P. Exh. 8 at 99-100.

6. On August 15, 2013, Lawrence Smiley (WCS' Special Education Director) took WCS' copy of Student's Educational file with him to a meeting with a Special Education Teacher, Nancy Kueffer at Chapel Hill – Carrboro City Schools. Upon learning the next day that he had left Student's confidential "paperwork" with Ms. Kueffer, Mr. Smiley directed her to "shred" it; Parents were not notified of his decision. P. Exh. 10 at 102; Hearing Tr. vol. 2, 231-233, June 23, 2015.

7. On August 17, 2013, Father wrote Kathleen M. Fanelli, Ph.D., the Principal and Special Education Supervisor at the PMSD school that Student previously attended, noting that it appeared the Educational File sent to parents did not include the most current version of Student's IEP. He requested that she send the final IEP

document to WCS. P. Exh. 12 at 111-112.On August 19, 2013, Dr. Fanelli emailed Ms. Kathi Shaw and Parents copies of Student's "most current IEP," dated June 4, 2013 (June 2013 IEP), and a Speech/Language Progress Report. P. Exh. 14 at 114-115, 123-166; 167. Ms. Shaw then forwarded the "most current IEP," to Mr. Smiley, Kathleen St. Lawrence (WCS' Exceptional Children's Facilitator), and Christopher Beeson (WCS IT Director and Special Education Teacher). P. Exh. 14 at 115.

8. On August 21, 2013, Ms. St. Lawrence emailed Amy Odom, a speech language pathologist, who was not employed by WCS but was working as an independent contractor for WCS without a written contract. Ms. St. Lawrence asked Ms. Odom to review Student's PMSD IEP with respect to Student's speech and language services. Hearing Tr. Vol. 12, 2672, July 8, 2015. Ms. St. Lawrence by email characterized Student's IEP as a "bear to read," noting it was 51 pages in length. P. Exh. 75 at 793. Ms. St. Lawrence later testified that the IEP was well written. Hearing Tr. vol. 8 at 1727, July 1, 2015. Ms. Odom testified she was working for WCS under an oral contract. Hearing Tr. vol. 12, 2672-2673, July 8, 2015.

9. On numerous occasions starting in August of 2013, the Parents sought to ensure WCS had Student's complete Educational File, inquiring repeatedly about whether the documents had been received and forwarding digital copies to school personnel. P. Exh. 15 at 168-183; 192-201; 205-216; 220-227 and 230; P. Exh. 17 at 238-239; P. Exh. 20 at 245; P. Exh. 21 at 298-347. On August 22, 2013, responding to a request from Father to confirm that WCS had received all PMSD documents, Mr. Smiley declined to email Father copies of the Educational File in WCS' possession, stating there was no need to do so because Parents were copied on Dr. Fanelli's email. Mr. Smiley proposed to convene an IEP meeting on August 27, 2013. P. Exh. 17 at 236-237.

10. On August 22, 2013, Father asked Ms. Shaw via email to confirm WCS' receipt of Student's Educational Record. He also indicated that Parents were open to attending an IEP meeting on August 27, 2013. He wrote that he would like WCS to transfer the PMSD IEP to WCS' standard IEP forms, and provide him with a copy a few days before the meeting. P. Exh. 17 at 238-239. No IEP meeting or informal meeting was held on August 27, 2013. Hearing Tr. vol. 9, 1850, July 2, 2015. The school never sent a formal invitation to an IEP meeting. Hearing Tr. vol. 9, 1850, July 2, 2015. On September 7, 2013, Dr. Fanelli emailed Mr. Bryan stating that when she had spoken to Mr. Smiley, he was in possession of the PMSD "psychological evaluation . . . and the IEP that was signed last June." P. Exh. 22 at 348L. On September 9, 2013, Dr. Fanelli again emailed Student's "latest IEP" and "psychological evaluation" to Ms. St. Lawrence. P. Exh. 24 at 351 and P. Exh. 26 at 455.

11. Up until August 23, 2015, Mr. Smiley maintained to Parents that WCS has never received Students' complete Educational File. In a later email, he informed Parents that he owed them a "big apology" because he "figured out what happened to the missing pages." P. Exh. 17 at 240-241. Parents were subsequently informed that Mr. Smiley was responsible for the shredding of the Educational File that PMSD mailed to WCS on August 1, 2015. Hearing Tr. vol. 2, 233, June 23, 2015.

12. On August 27, 2013, Ms. St. Lawrence sent an email to Terri Hayes, a DPI consultant, requesting advice regarding the process for creating a new IEP for an out-of-state student. Ms. Hayes responded the same day that the process was the same as an initial referral for special education, stating that WCS had to go through the "entire process . . . referral, and eligibility to determine eligibility for NC." P. Exh. 123 at 1289.

13. In her position with DPI, Ms. Hayes was at all relevant times responsible for ensuring that charter schools and traditional schools in the region for which she

was responsible were following the state and federal special education policy. Her duties included accepting phone calls from Parents and EC directors and EC coordinators at charter schools, and providing technical support to those schools. Hearing Tr. vol. 2, 274-275, June 23, 2015. Ms. Hayes testified that she told WCS' EC coordinator the rules and procedures governing students with out-of-state IEPs. *Id.* at 275-276. Ms. Hayes testified that when a student transfers in from another state, a "transition meeting" is convened within the first week of school (or "as quick as possible") with the IEP team and the Parents to review the student's paperwork, including the out-of-state IEP, "to determine what are comparable services. The IEP team determines that." *Id.* at 285-286. She testified that DPI would not recommend an informal meeting with the school principal and special education director in lieu of an IEP meeting to determine comparable services; and although there is no written policy concerning when to hold the "transition meeting;" DPI would not recommend waiting four months to do so; the IEP team members would be provided with a copy of the out-of-state IEP at the transition meeting; the IEP team could adopt the out-of-state IEP; the IEP team could accept evaluations from another state or choose to do their own evaluations, and that decision would not be made by the special education director. *Id.* at 286-289.

14. Ms. Hayes also testified that she had experience with students entering charter schools and LEAs with out-of-state IEPs, and that she had responded to an email from Ms. St. Lawrence informing her to treat the student the same as an initial referral. *Id.* at 277; P. Exh. 123 at 1289. Ms. Hayes testified a student with an out-of-state IEP was to be treated as an initial referral because "the law - - the policy changed that whenever a student comes from out of state you do the same thing for a student if the student was in state, and we call that an initial process." *Id.* at 277-278. Ms. Hayes identified NC DPI Policy 1503-4.4 as the policy applicable to IEPs for children who transfer from another state. *Id.* at 278, 280. Ms. Hayes also testified

that she had several telephone calls with Ms. St. Lawrence concerning WCS' obligation to provide FAPE, including comparable services, because the two of them "had a discussion about since they were a school and they had small class sizes, and sometimes the accommodations that students bring from other states, comparable services may not mean the same thing that was in another state, and it all depends on the class size and the size of the school." *Id.* at 280-281. Ms. Hayes did not remember discussing the services that Student had received under his out-of-state IEP. *Id.* at 281-282.

15. On August 30, 2013, Ms. Odom emailed Parents notifying them that she would be providing Speech and Language services to Student in a separate setting from Student's regular education classroom. P. Exh. 76 at 796. The PMSD IEP called for SLP services to be provided in both the regular education classroom as well as a separate setting. P. Exh. 14 at 151. A log of services indicates Ms. Odom provided instruction on topics not included in the PMSD IEP, such as "idioms" and "initiating conversation." R. Exh. 57 at 1; P. Exh. 14 at 133. The log shows no work on "pragmatics," despite it being an explicit area of instruction in the PMSD IEP. R. Exh. 57 at 1; P. Exh. 14 at 133. The treatment log also shows that Ms. Odom only began working with Student on "irony" as of October 9, 2013. R. Exh. 57 at 1. Five of eight short term goals in SLP included "irony." P. Exh. 14 at 146-147. The log shows no indications of services being provided in the classroom or observation occurring in the classroom. R. Exh. 57 at 1. Further, Ms. Odom testified that she had no specific recollection of classroom observations of student, nor had she made a written memorandum of any such observations. Hearing Tr. vol. 12, 2577-2578, July 8, 2015.

16. On September 4, 2013, Amy Odom logged first her SLP session with Student. September 4, 2013, is the date in Student's IEP that PMSD indicated that

services would commence for the 2013-2014 school year. That date was also PMSD's first day of school for that year. P. Exh. 14 at 151.

17. On September 5, 2013, Mr. Smiley informed Parents that WCS did not have copies of documents identified in Father's August 17th letter to Dr. Fanelli (i.e., "replacement copies (for the hard copies we lost")), and that those documents had not been attached to an August 23, 2013 email from Parents. P. Exh. 19 at 244. Also, on September 5, 2013, Father again sent the Evaluation Report at Mr. Smiley's request. P. Exh. 19 at 243-245. Father also informed Mr. Smiley that that IEP "can be implemented as it stands." *Id.* Parents viewed the PMSD IEP as a good starting point for development of a North Carolina IEP. P. Exh. 39 at 478. Jann Shepard, an expert in the field of special education, testified that the provisions of the PMSD IEP appeared to contain all information necessary for a North Carolina IEP. Hearing Tr. vol. 3, 606, June 24, 2015.

18. On September 10, 2013, Ms. Huff conducted the first Occupational Therapy session for the child three weeks into the school year. The session was conducted in a "pull-out" setting. R. Exh. 55. On September 10, 2013, Ms. Huff emailed Mother, noting Student appeared to be having trouble with stairs. P. Exh. 77 at 809.

19. On September 11, 2013, Ms. Hankins acknowledged in an email to Father that Ms. Younger does not provide study guides for her tests and that they are open-note assessments. P. Exh. 77 at 811.

20. On September 11, 2013, Ms. St. Lawrence emailed Carol Ann Hudgens, Consultant for Dispute Resolution, Exceptional Children Division, NC Department of Public Instruction, requesting advice concerning the delivery of "comparable services" to Student. P. Exh. 40 at 463.

21. On September 12, 2013, Ms. St. Lawrence emailed to Parents the first formal invitation to an IEP meeting for Student, to be held on September 19, 2013. Student was not invited. P. Exh. 31 at 454.

22. On September 13, Student's teachers met without Parents to discuss Student's IEP. P. Exh. 77 at 819. Ms. St Lawrence testified that Mr. Smiley met with them individually regarding providing comparable services. P. Exh. 29 at 460-462; P. Exh. 33 at 466; Hearing Tr. Vol. 8, 1733-1734, July 1, 2015.

23. On September 13, 2013, Ms. St. Lawrence emailed Parents informing them that she did receive the PMSD Evaluation Report and the current IEP. P. Exh. 77 at 819. She informed Parents that it was a very well written report and most informative. *Id.* She also stated that Student's teachers had received and are implementing the IEP to the best of their ability. *Id.*

24. On September 16, 2013, Ms. Katy Hankins, a WCS Special Education Teacher, emailed Father, and indicated Student was still missing notes from Social Studies in the first communication of homework to the Parents by Ms. Hankins. P. Exh. 77 at 824.

25. On September 17, 2013, Ms. Huff conducted the first touch key typing session with Student. R. Exh 55.

26. On September 17, 2013, Father expressed concerns in an email to Ms. Hankins about Student's missing homework assignments, continued lack of support for his handwriting needs, and lack of support for assistive technology. P. Exh. 77 at 831.

27. On September 17, 2013, Mr. Bryan wrote an email to Father and Mother, about a meeting he had with Student's PE teacher, Bryan Matthews. "I informed him of the challenges [Student] is experiencing in PE, and he will make adjustments once they resume physical activity." P. Exh. 77 at 829.

28. On September 18, 2013, Father accepted Principal Bryan's proposal for a "non-IEP meeting" on September 19, 2013 without the IEP team. P. Exh. 41 at 494. On September 19, 2013, Father and Mother met with Mr. Smiley and Mr. Bryan in an informal setting. P. Exh. 44. No IEP meeting was held. During this meeting, Mr. Smiley stated that a LiveScribe pen had been ordered for Student and acknowledged no "speech to text" software had been ordered yet. P. Exh. 44.

29. On September 20, 2013, a month into the school year, Ms. St. Lawrence provided Student's IEP to outside contractors and related service providers Amy Odom, Speech Language Pathologist, and Donna Huff, Occupational Therapist, who both had already met with the child several times. P. Exh. 24 at 351.

30. On September 20, 2013, Mr. Beeson emailed Parents regarding the creation of an online homework portal for Student. P. Exh. 77 at 837. This homework portal served as the basis of numerous parent complaints. See, e.g., P. Exh. 77 at 842; P. Exh. 78 at 873.

31. On September 22, 2013, Father responded to an email from Ms. Hankins about Student taking tests in a separate setting, directing her to follow the IEP and have Student take tests in a separate setting. P. Exh. 77 at 842.

32. On September 23, 2013, Ms. Hankins emailed Ms. Hughes regarding the accommodation of a separate setting for quizzes and tests in Student 's IEP, and reminded her that all assessments require a separate setting. P. Exh. 77 at 845.

33. On September 24, 2013, Katy Hankins transmitted through email an update on Student's first science test. The message stated "all students are permitted and encouraged to use their classroom notes to answer the test questions." P. Exh. 77 at 852.

34. On September 24, 2013, Ms. Huff and Mr. Beeson setup a typing program for Student during a "pull-out" OT session. Student demonstrated the Livescribe pen for Ms. Huff. R. Exh. 55.

35. On October 1, 2013, Mother informed WCS that Student would be absent from school due to an upper respiratory infection. A doctor's note was provided. P. Exh. 88.

36. On October 3, 2013, WCS provided "speech to text" software to Student. P. Exh. 78 at 893.

37. On October 5, 2013, Ms. Hudgens emailed DPI Ms. Hayes regarding parental consent and comparable services provided by WCS to Student. Ms. Hudgens inquired if WCS is "positioned to take a firm stand with parent." P. Exh. 69 at 647.

38. As of October 5, 2013, Student's grade report indicates he received a D+ in social studies, F in Science, B+ in Language Arts, A+ in Chorus, F in Math, COM in PE and COM in art. P. Exh. 86. [redacted] characterized the "F" grade on Student's report card in Math as "alarming." Hearing Tr. vol. 3, 673, June 24, 2015.

39. Mr. Matthews testified that he graded based on the individual abilities of Student. Hearing Tr. vol. 1, 119, June 22, 2015. Student's grade in PE, however, should have been based upon the curriculum, and any significant modifications or accommodations should have been noted on Student's report card or grade reports. Hearing Tr. vol. 3, 669, June 24, 2015. The grade report showed no such notation as to modifications or accommodations. P. Exh. 86. NC Policies Governing Services for Children with Disabilities (NC DPI Policies) 1500-2.1(d) defines adapted physical education as "instruction in physical education that is designed on an individual basis specifically to meet the needs of a child with a disability. NC DPI Policy 1500-2.1(c) provides "modified physical education is appropriate for a child who can participate in the general physical education program with accommodations or modifications. These modifications can include changing rules, equipment, time limits, etc. It can also include supports such as a sign language interpreter." Ms. Shepard testified that adapted physical education is a direct service, unless its

delivery is to be consultative, meaning that a specialist will be consulting with a regular educator. Hearing Tr. vol. 3, 631, June 24, 2015. Student's IEP did not indicate adaptive physical education would be consultative. P. Exh. 14 at 151. Mr. Matthews testified physical education was being provided first without consultation of any physical education specialist, then in consultation with an adapted physical education specialist. Hearing Tr. vol. 1, 105-108, June 22, 2015. Mr. Matthews testified that he modified the general education curriculum for Student in his class. See, e.g., Hearing Tr. vol. 3, 100-101;139-140, June 24, 2015.

40. On October 8, 2013, Mr. Smiley pulled out Student during his regular math period to work with him one-on-one in Math. P. Exh. 80 at 1036. An email sent by Father to Mr. Smiley questions the decision to pull Student out of his regular math class. *Id.* He also noted that no syllabi had been received by the Parents for math. *Id.* at 1036.

41. On October 8, 2013, Student requested of Ms. Huff that they practice the use of the Livescribe pen during his "pull-out" OT session. They did not practice with the Livescribe pen that day or in any subsequent OT session. R. Exh 55.

42. On October 11, 2013, WCS sent Parents via email an "Update from SLP." P. Exh. 78 at 917. On October 16, 2013, WCS sent Parents via email an "OT Update." P. Exh. 78 at 928.

43. On October 16, 2013, Mr. Smiley sent a letter to Ms. Hudgens, requesting a facilitator. It states that Parents had been through Due Process before and "seem to resent or not understand the fact that we have to reconsider eligibility at all,""[a]lmost all communication so far . . . is strained," and that "[m]any, many accommodations were built into the Pennsylvania IEP that they are expecting us to mirror in our IEP." Mr. Smiley asked about mediation "before even the first IEP team meeting." P. Exh. 78 at 893. P. Exh. 51 at 548.

44. Ms. Shepard testified that provisions pertaining to accommodations in an IEP regarding classroom assessments pertain to those a student "may require to demonstrate the greatest level of performance." She also testified accommodations in an IEP for standardized tests are aimed at "obtain[ing] the best performance from the student." Hearing Tr. vol. 3, 627-628, June 24, 2015.

Ms. Shepard testified that IEP goals "are to be derived from the needs that have been demonstrated by student." Hearing Tr. vol. 3, 629, June 24, 2015. Ms. Shepard testified that the issuance of progress reports on IEP goals should be "closely aligned to regular education as possible," meaning written progress reports should be produced when grades are posted or interim grade reports are given. Hearing Tr. vol. 3, 630, June 24, 2015. Ms. Shepard testified that the accommodations and modifications in the PMSD IEP were intended to be implemented in Student's regular classroom. Hearing Tr. vol. 3, 645, June 24, 2015. Ms. Shepard testified that in her professional opinion she believed the accommodations and modifications in the PMSD IEP were all "necessary and appropriate" to Student's education based on the goals and objectives in the IEP. Additionally, Ms. Shepard testified the accommodations were necessary to have meaningful access to participate and make progress in the general education curriculum due to his number of learning disabilities and associated needs. Hearing Tr. vol. 3, 653-654, June 24, 2015.

45. On October 16, 2013, WCS invited Parents to an IEP meeting on October 28, 2015. P. Ex. 46 at 511.

46. On October 21, 2013, the Assistive Technology Training Log shows that Student "rehearsed note-taking strategies with the Livescribe pen" and "setup homework template for daily homework planner." P. Exh. 130-3.

47. On October 21, 2013, Mr. Smiley sent email to Carol Ann Hudgens, NC DPI and wrote, "Thank you for arranging the last facilitation request. I would like to discuss with you in person 'due process and how to avoid it.'" P. Exh. 46 at 525.

48. In late October of 2013, Ms. Hudgens and Ms. Hayes met with Mr. Smiley and LEA and Mr. Bryan to discuss provision of services by WCS to Student and IEP development. Hearing Tr. vol. 2, 343-344, June 23, 2015.

49. On October 22, 2013, Patricia Hurlman, an adapted physical education specialist providing services for WCS, released an "Adapted Physical Education Report," indicating Student could be served with Modified PE as opposed to Adapted PE. P. Exh. 84 at 1050. Ms. Hurlman was performing services for WCS pursuant to an oral contract. Hearing Tr. vol. 13, 2831, July 21, 2015.

50. On October 24, 2013, WCS and Ms. Carolyn McMath entered into an agreement for Ms. McMath to provide consulting services on special education services and accommodations to be provided to Student. P. Exh. 103. The Parents were not consulted with regarding the WCS decision to engage Ms. McMath's services. Hearing Tr. vol. 5, 1263, June 26, 2015; Hearing Tr. vol. 6, 1315-1316, June 29, 2015.

51. On October 25, 2013, the Assistive Technology Training Log shows Student "reviewed use of the Livescribe pen, (1) proficiency on homework template, rehearsed note-taking skills, organization in Google drive." P. Exh. 130-133.

52. On October 25, 2013, Ms. McMath submitted an invoice to WCS for services provided regarding Student. P. Exh. 177.

53. On October 25, 2013, Mother emailed Mr. Smiley and Mr. Bryan, expressing concerns that WCS is not communicating information about Student's performance to Parents, and asking that any information on that performance be shared with Parents before the upcoming IEP meeting on October 28, 2013. P. Exh. 52 at 550.

54. On October 28, 2013, the first formal IEP meeting regarding was held with WCS staff and Father. P. Exh. 73. The team agreed to include the DPI facilitator in the next meeting. P. Exh. 73. WCS questioned the date of the PMSD Evaluation Report. *Id.* at 782. Ms. St. Lawrence said the PMSD IEP is the active IEP and acknowledged consulting with DPI regarding the matter. *Id.* at 734. In response to Father's questions regarding the 90-day timeline WCS was seeking to meet regarding development of his son's IEP. Mr. Bryan responded "We have a directive from DPI and we will be following that directive; we're not going to be insubordinate to that directive." *Id.* at 734. Father responded that he is not asking WCS to be insubordinate, but "I'm asking you to educate me." Mr. Bryan responded, "I will not be doing that." *Id.* at 734-735.

55. Ms. Shepard testified that in her expert opinion that meetings without parents should be rare, if ever. Further that "communication and trust is essential. The parents are the experts. They are the ones that know the child. They should be present." She added that if a facilitated meeting had been held, it made her even more "cautious of the fact that I needed to make sure that I had the involvement of the parent." Hearing Tr. vol. 3, 674-690, June 24, 2015. Ms. Shepard testified that it was possible for parents to give partial consent to an IEP where there are differences between parents and other IEP team members. Hearing Tr. vol. 3, 664-667, June 24, 2015.

56. On October 30, 2013, Ms. Hankins emailed Student's Parents an invitation to a telephonic IEP meeting on November 1, 2013, at 12:30 p.m. P. Exh. 135. On October 30, 2013, Ms. Hudgens emailed WCS and Parents to inform them that Ms. Diliberto was not available on November 1, 2013 as a facilitator. P. Exh. 56 at 574.

57. On October 30, 2013, Ms. Diliberto sent email to WCS . She stated, "I just wanted to pass along the info from the NC DPI Policies about transfer students. Carol Ann Hudgens from NC DPI sent this info passed on my quest [*sic*] from

Monday's meeting. I did email her back to clarify if services can be provided without signatures. . . . Buddy, Carol Ann is choosing not to include this in her email. . . ." P. Exh. 27 at 457.

58. On or about October 31, 2013, Ms. McMath met with WCS staff and advised WCS regarding services and accommodations that the school should offer to provide Student. P. Exh. 128.

59. On October 31, 2013, Ms. St. Lawrence sent email to Dr. Fanelli requesting the name of someone at PMSD she could contact to request a complete special education file and educational file for Student. P. Exh. 27 at 456.

60. On October 31, 2013, Mr. Smiley emailed Parents a message stating "As per our arrangement in the meeting of 10/28/2013 we have agreed to a telephone conference tomorrow at 12:30 PM." P. Exh. 79 at 997.

61. On November 1, 2013, at 9:32 a.m., Ms. Hankins emailed Mr. Lawrence and stated that Ms. McMath "told us that if the parent cancels on the day of the meeting that we are allowed to have the meeting without the parent." P. Exh. 133-1.

62. On November 1, 2013, at 9:50 a.m., Father emailed Ms. Diliberto, Mr. Bryan, Mr. Smiley and Ms. St. Lawrence. In the message, Father noted that DPI's appointed facilitator, Ms. Diliberto, would not be available for a November 1, 2013 and asked that the telephonic IEP meeting be "reconsidered." P.Exh. 60 at 581.

63. On November 1, 2013, at 10:11 a.m., Ms. Diliberto emails Mr. Smiley, Mr. Bryan and Parents, asking they keep her "posted regarding the status of today's phone conference." P. Exh. 78 at 991-992.

64. On November 1, 2013, at 11:38 a.m., Mr. Smiley sent email to Father and informed him of WCS' intent to meet without the DPI facilitator, stating "we would like to continue the meeting at 12:30 pm as planned. We have the opportunity to complete at least the DEC 1 while discussing eligibility in the DEC 3." P. Exh. 61

at 584. On November 1, 2013, at 12:12 p.m., Father sent an email to Mr. Bryan and Mr. Smiley in response to Mr. Smiley's 11:38 a.m. email. Father stated that "[a] phone conference as proposed for today will not afford opportunity to address these high priority matters as they seem to require." P. Exh. 61 at 583-584. WCS held an IEP meeting without the Parents. P. Exh. 79 at 1000.

65. On November 1, 2013, at 1:05 p.m., Mother emailed Mr. Bryan, Mr. Smiley and Ms. Diliberto, indicating it was Parents' expectation that meetings would not be held "void of the facilitator." P. Exh. 79, at 1001.

66. On November 1, 2013, at 4:07 p.m., Mr. Smiley emailed Student's Parents documents developed at the November 1, 2013 IEP Team meeting held without the Parents' participation, including an executed DEC 1 (Special Education Referral), an executed DEC 3 (Eligibility Determination), and draft DEC 5 (Prior Written Notice). P. Exh. 79 at 999. At 4:23 p.m., Mr. Smiley emailed Parents and Ms. Diliberto a copy of an invitation to conference (DEC 1) for November 12, 2013, a student invitation to conference, a draft DEC 4 and a "Crosswalk" comparison of services in the PMSD IEP and the ones in the attached DEC 4. P. Exh. 79 at 1000.

67. On November 4, 2013, the Assistive Technology Training Log shows Student worked on his homework template and took a "diagnostic typing assessment," on which he achieved "47/48 wpm." P.Exh. 130-3.

68. On November 4, 2013, Father emailed Mr. Bryan to express concerns about "loud and agitated" verbal arguments during his son's SLP sessions between Ms. Hankins and another student. Father also states Student told him that Ms. Odom is working concurrently with another group of students while she is supposed to be providing services to Student. P. Exh. 79 at 1002. On November 4, 2013, Mr. Bryan emailed Father in response to parental concerns about verbal arguments in front of Student and SLP services. Mr. Bryan stated that he asked Mr. Smiley to "clarify" Ms. Odom's provision of SLP services to Student. On November 4, 2013, Ms.

Diliberto, in an email to Mr. Smiley, Ms. St. Lawrence and Mr. Bryan, gave advice to WCS about the 90-day timeline. She stated that the 90 days begins with the DEC 1. She also states that she spoke with Mother and "cut her off a little because I felt she was yelling at me on the phone" P. Exh. 65 at 625.

69. On November 4, 2013, Ms. Diliberto sent email to Carol Ann Hudgens, stating, "I cannot get them to agree to a meeting time and they keep stating that an IEP meeting is not needed because there is already an existing IEP. All they want is for the school to implement the Pennsylvania IEP and not come together as a team to complete appropriate paper work. Any suggestion???" P. Exh. 646.

70. On November 4, 2013, the Record Inspection Log for Student shows Mr. Smiley accessing Student's educational file. It is the only entry. P. Exh. 176.

71. On November 5, 2013, Mr. Bryan emailed Father and stated that Student's SLP sessions would no longer overlap with lunch bunch, a program aimed at improving childrens' social skills, and that assistive technology training would be provided to Student by Mr. Beeson during the portion of the period that Student does not have SLP services. P. Exh. 79 at 1003.

72. November 5, 2013, Ms. Hudgens wrote to Ms. Hayes, NC DPI, stating "Ok ... the parent will not provide consent. The school is stuck between no consent and comparable services. Just wondered if they are positioned to take a firm stand with parent." P. Exh. 69 at 647.

73. On November 6, 2013, Ms. Hankins states in an email to Student's general education teachers that Student's final grades should be marked as "incomplete." P. Exh. 87.

74. On November 7, 2013, Petitioners' legal counsel sent email to the school and was also contacted by the WCS's legal counsel by return email. *Id.* On November 8, 2013, Carol Ann Hudgens sent email to the Parents and WCS notifying that she would cancel the facilitator for the November 12th meeting. She stated that

"[f]acilitation is an informal dispute resolution process. Now that attorneys are being consulted, a new request for facilitation will need to be completed should those services be needed in the future." *Id.*

75. On November 8, 2013, Mr. Lawrence told Ms. Hurlman via email that "[w]hatever you do please do not contact the Parents. . . . We could really use someone who could come during the school day. Do you know anyone?" P. Exh. 84 at 1054.

76. On November 13, 2013, Mr. Smiley wrote in an email to Mr. Bryan, listing a number of conditions to be met for WCS to implement comparable services to the PMSD IEP. The conditions include an "[a]greement to move forward in good faith and not complain formally or informally about past issues." Mr. Bryan sent email response to Mr. Smiley stating, "the list makes good sense to me.....I have no new word from our lawyer today....I will relay any news I receive..." P. Exh. 71 at 652

77. On November 13, 2013, Ms. Huff suggested pulling Student from lunch to make up an OT session. P. Exh. 79 at 1013.

78. On November 25, 2015, Student made a handwritten note indicating that Mr. Smiley had suggested that the LiveScribe pen had "unbenfitial values" [*sic*] and said Student was being derelict with his homework template. P. Exh. 85. Student subsequently had an anxiety attack due to concerns about his school performance. Hearing Tr. vol. 10, 2181, July 6, 2015. Student's Math, Science, English and Social Studies teachers testified that they did not recall Student ever using the LiveScribe pen in their classrooms. Hearing Tr. vol. 4, 763, 813, 917, June 25, 2015; Hearing Tr. vol. 8, 1598, July 1, 2015.

79. On November 25, 2013, the Assistive Technology Training Log shows WCS staff checked in on Student's homework template, and that he "did not use the homework template as assigned. The document also indicates a conversation was held on the LiveScribe pen. P. Exh. 130-3.

80. On December 2, 2013, Mr. Beeson and Mr. Smiley held the fifth training session with Student on the LiveScribe pen. P. Exh. 129. Mr. Smiley spent a significant time on the phone discussing another student while in Student's presence. *Id.* While talking to Student, he spent a significant portion of the time discussing matters of no educational benefit to Student. *Id.* Mr. Smiley also informed Student that he needed to make up fourteen missing assignments. *Id.* On December 2, 2013, the Assistive Technology Training Log shows Student had a "brief conversation" with WCS staff on his "usage and implementation of technology due to pressing academic needs." P. Exh. 130-3.

81. On December 2, 2013, after school and while at home in the afternoon, Student experienced a panic attack. Hearing Tr. vol. 9, 1932, July 7, 2015. During the attack he fell down the stairs and was injured. Hearing Tr. vol. 11, 2279, July 7, 2015. On December 3, 2013, Student was examined by an Urgent Care doctor. Hearing Tr. vol 11, 2280, July 7, 2015. From December 3, 2013, through December 10, 2013, Mother sent emails to WCS, notifying the school that Student will not attend school on each of those days. As per school policy, the notifications from Mother were sent to Student's advisor Ashleigh Lalley, as well as Mr. Bryan. P. Exh. 72 at 659 – 662

82. On December 4, 2013, Ms. Hankins emailed Mr. Herzing, Student's English teacher, stating that "so I don't have to write the quiz from today into the email, when he returns to class, I will give him you reading check quiz. (I called it a reading comprehension check since I didn't give them a week notice.) ..." P. Exh. 72 at 653.

83. On December 11, 2013, Mother sent email to Mr. Bryan informing, "[redacted] remains unable to attend. Further discussion regarding [redacted] attendance need to be forwarded through the attorney for [redacted] School and [Student's]

attorney, Mr. Adams." Mr. Bryan forwarded that same email to WCS staff. P. Exh. 72 at 663.

84. December 2, 2013, was the last day Student physically attended WCS. His Parents stopped sending him due to their concerns of harassment from school staff and WCS's failure to implement or develop an IEP. Hearing Tr. vol. 9, 1917-1921, July 2, 2015; Hearing Tr. 13, 2917, July 21, 2015; P. Exh. 79 at 1009; P Ex 72 at 659-660.

85. On December 18, 2013, Mr. Bryan sent a letter to Student's Parents, notifying them that Student had accumulated 6 or more unexcused absences. P. Exh. 89. Mr. Bryan testified that WCS never contacted a social worker or the Wake County District Attorney regarding the absences. Hearing Tr. vol. 13, 2913, July 21, 2015.

86. On January 8, 2014, WCS acknowledged Mother's submission of a lottery application for Student's brother, [redacted] Following the lottery, WCS did not notify the Parents [redacted]s successful acceptance for enrollment. P. Exh. 114 at 1188 – 1192.

87. On January 16, 2014, WCS transmitted through counsel proposed DEC forms 1, 3, 4, and 6. P. Exh. 149.

88. On January 17, 2014, the Parents received a letter dated December 20, 2013 from Mr. Bryan, informing them that Student had accumulated in excess of 10 unexcused absences. The letter was carbon copied to the Chatham County District Attorney's office. No meeting was held to determine if Student's absences were a manifestation of his disability. P. Exh. 90 at 1087-1091.

89. On or about February 24, 2014, Anna Thrower, a WCS staff member, contacted DPI about when to withdraw Student. The message denoted that the matter was "VERY URGENT . . . JUST DID THERE [*sic*] LOTTERY!!!!]." Walter Raif, a Support Analyst for DPI, responded in an email to Ms. Thrower, directing her to "call me directly." P. Exh. 92 at 1094.

90. On February 3, 2014, WCS released its lottery results, excluding [redacted] from the sibling lottery and including him in the general lottery of applicants to the school. P. Exh. 115.

91. On February 18, 2014, Ashleigh Laleigh, Student's 8th grade advisor, directed Student's general education teachers via email to "override the grade that [Student] has for your class in T2, and enter it as 'INC'. P. Exh. 97. On February 20, 2014, Mr. Smiley sent an email to Ms. Huff, telling her to "NOT send home any progress reports for [Student] at this time. Kathleen will print them out and place them in his file." P. Exh. 99 at 1110. On February 28, 2014, Mr. Smiley directed Ms. Hankins through email to stop communicating with Student's Parents. P. Exh. 100 at 1111. On March 5, 2014, Ms. Thrower wrote Mr. Bryan in an email to confirm that Student's withdrawal date was to be December 3, 2013. P. Exh. 100 at 1111. On March 6, 2014, Mr. Bryan sent a letter to Student's Parents, informing them that WCS was withdrawing Student from school. P. Exh. 94 at 1100.

92. On March 11, 2014, the Chatham County District Attorney's office sent a letter to Student's Parents regarding his absences to WCS. P. Exh. 96. No charges were filed against the Parents under North Carolina's truancy laws. Hearing Tr. vol. 11, 2300, July 7, 2015.

93. On April 16, 2015, Ms. St. Lawrence states in an email to herself that Student was to be recorded as withdrawn from WCS on CECAS and to be coded as "moved" on December 3, 2013. P. Exh. 95 at 1103L.

Based on the foregoing Findings of Fact, the undersigned makes the following Conclusions of Law.

IV. CONCLUSIONS OF LAW AND FINAL DECISION

A. IDEA Background; IDEA Basics; and IDEA Definitions

Congress enacted in 1975 the Education for All Handicapped Children's Act (which is now titled the Individuals with Disabilities Education (Improvement) Act,

20 U.S.C. §§ 1400 *et seq.* (IDEA)), to make public education available to children with disabilities. 20 U.S.C. § 1400(c)(2). *Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 206-207 (1982) (Rowley).

The IDEA is intended "to ensure that all children with disabilities have available to them a free appropriate public education . . .designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. §1400(d)(1)(A); N.C. Gen. Stat. § 115C-106.2(a); NC DPI Policy 1500-1.1(a). Among other things, the IDEA is also intended "to ensure that the rights of children with disabilities and Parents of such children are protected." 20 U.S.C. § 1400(d)(1)(B); N.C. Gen. Stat. § 115C-106.2(a); NC DPI Policy 1500-1.1(b).

The provisions of NC DPI Policy 1500 *et seq.* "(1) Apply to all public agencies within the State that are involved in the education of children with disabilities, including (i) the State educational agency (SEA). (ii) Local educational agencies (LEAs), including charter schools. (iii) Other State agencies and schools (such as the department of Health and Human Services and State schools for children with deafness or children with blindness). (iv) State and local juvenile and adult correctional facilities; and (2) apply to each public agency in the State that provides special education and related services to children with disabilities, regardless of whether that agency is receiving funds under Part B of the IDEA." NC DPI Policy 1500-1.2

The term "local educational agency" includes a charter school. N.C. Gen. Stat. § 115C-106.3(11)(b).

The term "free appropriate public education" (FAPE) means special education and related services that have been provided at public expense under public supervision and direction, that meet the standards of the state educational agency, that are provided in an appropriate preschool, elementary school or secondary school

of education, and that are provided in conformity with the student's IEP. 20 U.S.C. § 1401(9); G.S. § 115C-106.3(4); NC DPI Policy 1500-2.13.

"The term 'special education' means specially designed instruction at no cost to Parents to meet the unique needs of a child with a disability, including – (A) instruction conducted in the classroom, in the home, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education." 20 U.S.C. § 1401(29); N.C. Gen. Stat. § 115C-106(20); NC DPI Policy 1500-2.34.

"The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services, designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children." 20 U.S.C. § 1401(29); N.C. Gen. Stat. § 115C-106.3(18); NC DPI Policy 1500-2.28.

The term 'specially designed instruction' means "adapting, as appropriate, to the needs of an eligible child under these Policies, the content, methodology, or delivery of instruction-- (i) To address the unique needs of the child that result from the child's disability; and (ii) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children." NC DPI Policy 1500-2.34(b)(3).

The term "educational services" means the necessary instructional hours per week in form and format as determined by the child's IEP team and consistent with

federal and State law, related services included in a child's IEP, and behavior interventions service to the extent required by federal law. N.C. Gen. Stat. 115C-106.3(3a).

The IDEA requires states and local education agencies to guarantee procedural safeguards for children with disabilities (between the ages of 3 and 21) and their Parents in the provision of a "free appropriate public education" (FAPE). 20 U.S.C. §§ 1401(9), 1412(a)(1), and 1415(a).

A principal procedural safeguard is the formulation and implementation of an "individualized education program" (IEP) for each child. 20 U.S.C. §§ 1401(14), 1412(a)(1) and 1412(a)(4), 1414(d)(1)(A) – 1414(d)(3), and 1414(d)(5)(e) and (f); NC DPI Policy 1503-4.1. Every child with a disability must have an IEP prepared and implemented by the local education agency. 20 U.S.C. §§ 1414(d)(1) and (2); NC DPI Policy 1503-4.1.

An IEP is a written statement that is "developed, reviewed and revised" in a meeting composed of the student's Parents; at least one of the child's regular education teachers; at least one special education teacher; an LEA representative; and at the election of either the school or the Parents, "other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate" 20 U.S.C. §§ 1414(d)(1)(A)(i), (B), and (C); NC DPI Policy 1503-4.1(a).

In addition to identifying the child's present level of academic achievement, the IEP must include; measurable academic and functional goals that are designed to meet the child's needs "to enable the child to be involved in and make progress in the general education curriculum; a statement of the "special education and related services, and supplementary aids and services" that the school will provide to the child, including program accommodations or modifications, or supports for school personnel that will be provided for the aforesaid purpose; an explanation of the

extent to which a child will not participate with nondisabled children in the regular class; accommodations for State and district wide assessments, and whether the child will take an alternate assessment; and, the date upon which services and accommodations will begin, including the frequency, location and duration of those services and accommodations. 20 U.S.C. §§ 1414(d)(1)(A)(i)(I), (IV), (V), and (VI); NC DPI Policy 1503-4.1(a).

The IEP team must consider "special factors," including whether the child's behavior impedes the child's learning or that of others; and, whether the child needs assistive technology devices and services. 20 U.S.C. §§ 1414(d)(3)(B)(i), and (v); NC DPI Policy 1503-5.1.

"The term 'assistive technology device' means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain or improve functional capabilities of a child with a disability." 20 U.S.C. § 1401(1); NC DPI Policy 1500-2.2.

"The term 'assistive technology services' means any service that directly assists the child with a disability in the selection, acquisition, or use of an assistive technology device," including: evaluating the child's needs; purchasing, leasing, maintaining, repairing or replacing the assistive technology device; coordinating other therapies, interventions or services with such devices such as those associated with existing education; training or technical assistance for a child's teachers, service providers or Parents. 20 U.S.C. § 1401(2); NC DPI Policy 1500-2.3.

Informed parental consent is required before preplacement evaluations, reevaluations, and before the LEA provides special education and related services. 20 U.S.C. § 1414(a)(1)(D)(i); 34 C.F.R. §§ 300.300; NC DPI Policies 1500-2.5 and 1503-1(a) and (b). An LEA may not use a parent's refusal to consent to one service or activity as grounds for denying any other service or activity. 20 U.S.C. §§ 1414(a)(1)(D), 1414(c); 34 C.F.R. 300.300(d)(3); NC DPI Policy 1503(d)(2).

The LEA must provide "prior written notice" whenever it proposes or refuses to initiate or change the identification, evaluation, educational placement, or the provision of FAPE to the child. 20 U.S.C. § 1415(b)(3)(A) and (B). The notice must include, inter alia: a description of the action proposed or refused by the LEA; an explanation of why the agency proposes or refuses to take the action; a description of each evaluation procedure, assessment, record, or report the LEA used as a basis for the proposed or refused action; a description of other options considered by the IEP Team and the reason why those options were rejected; and, a description of the factors that are relevant to the LEA's proposal or refusal. 20 U.S.C. § 1415(c); N.C. Gen. Stat. § 1115C-109.5; NC DPI Policy 1504-1.4 IDEA and North Carolina's concomitant statutes provide that "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114; N.C. Gen. Stat. § 115C-106.3(10); N.C. Gen. Stat. § 115C-107.2(b)(2); N.C. Gen. Stat. § 115C-107.6(d) (LEA responsibility); NC DPI Policy 1501-3.1.

The term "supplementary aids and services" means aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate ..." 20 U.S.C. § 1401(33); 34 CFR § 300.42; NC DPI Policy 1500-2.36

B. <u>IDEA Controls When State Law Conflicts with Federal Law</u>

State and local educational agencies bear primary responsibility for formulating and implementing educational programs for children with disabilities

under the IDEA. However, the IDEA "imposes significant requirements to be followed in the discharge of that responsibility." Rowley, *supra* at 183. Because WCS is operated pursuant to a Charter granted by the North Carolina State Board of Education (SBE) (P Exh. 151), it must meet the standards established by the SBE through the Department of Public Instruction (DPI), "which in turn must meet or exceed the IDEA's minimum requirement." *G ex rel. RG v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 304 (4th Cir. 2003). Consequently, neither the SBE nor the DPI can diminish the rights or remedies afforded to children with disabilities and their Parents, or the obligations imposed upon the SBE, DPI and WCS.

The Memorandum of Understanding (MOU) between the North Carolina Office of Administrative Hearings (OAH), and the SBE through the DPI (P. Exh. 157), is mandated by N.C. Gen. Stat. § 115-109(j) "to ensure compliance with statutory and regulatory procedures and timelines applicable under the IDEA to due process hearings and to hearing officers' decisions, and to ensure the parties' due process rights to a fair and impartial hearing. This memorandum of understanding shall be amended if subsequent changes to IDEA are made." G.S. 115C-109.6(j).

C. Legal Standard for Determining FAPE

"[A] court's inquiry in suits brought under [the IDEA] is twofold. First, has the State complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed through the [IDEA's] procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." *Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 206-207 (1982) (Rowley).

Notwithstanding the Rowley Court's emphasis on the importance of compliance with the procedure requirements, the IDEA as amended in 2004 now

provides that a procedural violation will constitute a denial of FAPE, only if the procedural inadequacies: (1) impeded the child's right to a FAPE; (2) significantly impeded the Parents' opportunity to participate in the decision making process regarding the provision of FAPE to the Parents' child; or, (3) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii).

D. IDEA Violations

1. Failure to Consult Parents in Delivery of Comparable Services. NC DPI Policy 1503-4.4(f) provides:

> IEPs for children who transfer from another State. If a child with a disability (who has a current IEP that was in effect in a previous public agency in another State) transfers to an LEA in North Carolina, and enrolls in a new school, the new LEA (in consultation with Parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new LEA –
>
> (1) Conducts an evaluation pursuant to NC 1503-2.5 through NC 1503-2.6 (if determined to be necessary by the new LEA); and
>
> (2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in NC 1503-4.1 through NC 1503-5.1. (emphasis added)

Pursuant to NC DPI Policy 1503-4.4(f), WCS had a duty to provide FAPE including comparable services in consultation with Parents. Comparable services includes special education and related services.

Comparable services should have been provided in consultation with Parents or the IEP Team should have been convened "as quickly as possible" to decide what comparable services WCS offered. Hearing Tr., vol. 2, 286-289, June 23, 2015; Hearing Tr., vol. 6, 1354-1355.

The undersigned notes that while a meeting of some of Student's teachers to discuss comparable services was held on September 13, 2013, Parents were not consulted with regarding comparable services. Hearing Tr., vol. 4, 821, June 25,

2015; Hearing Tr., vol. 4, 904-905, June 25, 2015. WCS also unilaterally decided on a number of ad hoc services and instead only notified Parents of comparable services being offered. *See, e.g.*, Hearing Tr., vol. 1, 206-214, June 22, 2015. P Exh 80 at 1036-1038; P. Exh. 29 at 460-462; P. Exh. 33 at 466; Hearing Tr. Vol. 8, 1733-1734, July 1, 2015.

WCS procedurally violated NC DPI Policy 1503-4.4(f) and IDEA by failing to consult with the parents on comparable services.

2. Parent Participation: WCS Denied FAPE by Convening a November 1, 2013 IEP Team Meeting Without Parents.

By holding an IEP Team meeting on November 1, 2013, over the objections of the Parents, WCS denied Parents the right to participate and deprived student of FAPE. The core of the Individuals with Disabilities in Education Act (IDEA), is the "cooperative process that it establishes between Parents and schools." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005). The IEP process is the "central vehicle for this collaboration." *Id.*

The IEP team, which includes the student's Parents, is responsible for making decisions concerning that student's education, therefore it is essential that the student's Parents be allowed to meaningfully participate in the IEP process. *Id.* at 53; 20 U.S.C. § 1414(d)(1)(B).

The Fourth Circuit Court of Appeals recognized that parental participation is an "important means of ensuring state compliance with the Act." *Hall by Hall v. Vance Cnty. Bd. of Educ.*, 774 F.2d 629, 634 (4th Cir. 1985). In *Hall*, the court held that the consistent district's failures to inform Parents of their procedural rights and safeguards were considered "adequate grounds by themselves for a holding that the school failed to provide FAPE." *Id.* at 635. *See also*, *Board of Educ. of Cabell County v. Dienelt,* 843 F.2d 813, 815 (4th Cir.1988) (local education authority failed to consult Parents in the development of IEP resulted in procedural violation and a

denial of FAPE); *Hudson v. Wilson*, 828 F.2d 1059, 1063 (4th Cir.1987) ("procedural noncompliance can by itself support a finding that a child has not been provided with a FAPE").

Here, the District denied Petitioner FAPE by intentionally holding an IEP meeting without Petitioner's Parents, even after the Parents expressed reservations and requested that the meeting be rescheduled for November 12, 2013, so that the DPI facilitator could continue assisting the team. P. Exh. 61 at 583-584.

Consistent with *Hall*, this procedural violation substantively prevented Parents from participating in the development of an IEP for Student. Therefore, Student was denied FAPE.

3. WCS Failed to Timely Develop an IEP for Student

Under NC DPI Policy 1503-2.2, WCS was obligated to develop an IEP within 90 days of receiving notices of Student's IEP.

WCS had chosen August 20, 2013 as the date for the initial referral to be on the "conservative side." Hearing Tr., vol. 13, 2771, July 21, 2015. That meant that a full and individual evaluation had to be conducted; "[e]valuations must be conducted, eligibility determined, and for an eligible child, the IEP developed, and placement completed with 90 days of a written referral." NC DPI Policy 1503-2.2. Mr. Bryan, the LEA Representative at the facilitated IEP meeting held on October 28, 2013, and the IEP Team insisted to Father that another IEP meeting be convened on November 1, 2013 at which time Father would be expected to indicate whether he would or would not sign the DEC 1 presented to him at the end of that meeting. P. Exh. 73.

Mr. Bryan also testified that as of November 12, 2013, he was aware that WCS "would not meet that 90 day mark." Hearing Tr., vol. 13, 2876, July 21, 2015. Mr. Bryan's testimony admits that he knew that WCS failed to comply with the 90-day timeline, constituting a procedural violation of IDEA.

4. Failure to Provide Comparable Services.

a. Failure to Provide Comparable Assistive Technology Services. NC DPI Policy 1500-2.2 defines an "assistive technology device" as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability." Further, assistive technology services include not only supplying a child with assistive technology, but training children, faculty and parents with the technology, as well as coordinating the technology's use with other therapies, interventions, services and education programs. NC DPI Policy 1500-2.3.

In this case, the evidence presented shows that WCS failed to timely provide comparable assistive technology services. The PMSD IEP called for a number of assistive technologies to bolster Student's potential. These included supplying Student with a laptop computer, calculator, Livescribe pen, text-to-speech software, and graph paper. P. Exh. 14 at 134; 148-151. WCS failed to provide these assistive technologies in a timely fashion to Student, and further did not fully implement those technologies in the classroom. (see, e.g., P. Exh. 44, P. Exh. 78 at 953, Hearing Tr. vol. 12, 2547-2548, July 8, 2015, Hearing Tr. vol. 12, 2687, July 8, 2015, Hearing Tr. vol. 4, 763, June 25, 2015, Hearing Tr. vol. 8, 1598, July 1, 2015, Hearing Tr. vol. 8, 1641, July 1, 2015.) Further, the record shows that WCS failed to substantively support Student's use of these technologies. Testimony at trial showed that some of the support staff at WCS were themselves unaware of how to use the technology, let alone support Student's use of assistive technology. (see, e.g., Hearing Tr. vol. 8, 1641, July 1, 2015, P. Exh. 85, Hearing Tr. vol. 11, 2459, July 7, 2015, P. Exh.

77 at 837, Hearing Tr. vol. 5, 1046-1048, June 22, 2015, P. Exh. 77 at 842; P. Exh. 78 at 873).

b. Failure to Provide Specially Designed Instruction

North Carolina defines the phrase "specially designed instruction" as:

... adapting, as appropriate, to the needs of an eligible child under these Policies, the content, methodology, or delivery of instruction--

> (i) To address the unique needs of the child that result from the child's disability; and
> (ii) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. NC DPI Policy 1500-2.34(b)(3).

Evidence presented by the Petitioners shows the heightened importance of the specially designed instruction which was created in the PMSD IEP, if for no other reason than the unique nature of Student's disability. P Exh 21 at 20-22, 25-29, and at 337-39. WCS presented testimonial evidence (generally conclusory in nature) in an effort to show that WCS provided services comparable to the PMSD IEP, but the undersigned finds that testimony not persuasive. For example, the undersigned notes that Mr. Smiley, who testified on behalf of WCS, insisted that WCS provided comparable services to the PMSD IEP yet the evidence presented by the Petitioners shows that Mr. Smiley had ordered the PMSD IEP to be shredded mere days after receiving it. P. Exh. 10 at 102. This is a violation of NC DPI Policy 1505-2.15. The Court does not accept WCS's conclusory contentions that it provided comparable services when the evidence showed that WCS did not reduce those comparable services to writing until months after Student first began

attending WCS and concurrently declined to follow or implement the PMSD IEP provided by Parents.

5. Failure to Provide Prior Written Notice

WCS had a duty to provide Parents with prior written notice of any proposal, or refusal, to initiate or change the identification, evaluation, or educational placement of the child or provision of FAPE to the child. NC DPI Policy 1504-1.4(a). That policy also required WCS to include the following content pursuant to NC DPI Policy 1504-1.4(b):

> (b) Content of notice. The notice required under paragraph (a) of this section must include--
>
> (1) A description of the action proposed or refused by the LEA;
>
> (2) An explanation of why the LEA proposes or refuses to take the action;
>
> (3) A description of each evaluation procedure, assessment, record, or report the LEA used as a basis for the proposed or refused action;
>
> (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
>
> (5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
>
> (6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
>
> (7) A description of other factors that are relevant to the LEA's proposal or refusal.

On August 22, 2013, i.e., the second day of school at WCS, Father requested that the substance of the PMSD IEP be transferred to WCS' IEP forms. P Exh 17 at

238. WCS did not respond and did not comply. At the October 28, 2013 IEP meeting, Father made a similar request. P Exh 17 at 237-238. WCS did not comply with that second request.

On November 1, 2013, Mr. Smiley sent Parents two emails. The first email included a signed copy of Special Education Referral DEC 1, signed by the IEP team, and email copies of DEC 1, an Eligibility Determination DEC 3, a Summary of Evaluation/Eligibility Worksheet-Special Learning Disability DEC 3, a Discrepancy/Alt to Discrepancy Model DEC 3-SLD, a Summary of Evaluation/Eligibility Worksheet-Speech/Language Impaired DEC 3, and a copy of a signed Prior Written Notice DEC 5. P Exh 64 at 603-624.

The DEC 5 does not include the information that WCS was obligated to provide pursuant to NC DPI Policy 1504-1.4(b)(1)-(3) with respect to WCS' refusal to include the accommodations, services and specially designed instruction that Father had requested be taken from the PMSD IEP and included in the WCS' IEP.

However, shortly thereafter, Mr. Smiley sent another email transmitting among other things a Revised Draft DEC 4 (P Exh 147 at 147-1–147-24), and Crosswalk (P Exh 63 at 587, 590-602). Mr. Smiley did not include a prior written notice DEC 5.

Mr. Bryan testified that WCS did not incorporate all of the PMSD IEP provisions into the WCS IEP draft forms. Hearing Tr., vol. 13, 2852-2853, July 21, 2015. To understand the situation, Father would have been required to spend several hours comparing the Revised Draft Dec 4 (P Exh 147 at 147-1–147-24), with the PMSD IEP (P Exh 14 at 123-166) to ascertain which services, accommodations and specially designed instruction were not included in the Revised Draft DEC 4.

The WCS IEP, which Parents received via email on January 16, 2014, includes a DEC 4, but does not include a prior written notice DEC 5 with the

information required by NC DPI Policy 1504(b)(1)-(3). P Exh 149 at 149-1 – 149-44.

WCS' Response to the First Amended Petition, filed on June 12, 2015, does not include any such information either. Indeed, WCS argued that it had previously provided the prior written notice required by NC DPI Policy 1504(b)(1)-(3), and therefore, it was not required to provide such prior written notice claiming that it had previously done so. The undersigned concludes that WCS did not provide the required notice, and therefore violated NC DPI Policy -1504.

6. Failure to Provide Access to Student's Educational Records.

WCS committed another procedural violation of the IDEA by failing to timely obtain for Parents' use Student's Educational File. N.C. Gen. Stat. §115C-109.3(a) provides that "[e]ach local educational agency shall provide an opportunity for Parents of a child with a disability to examine all records relating to that child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to that child." N.C. Gen. Stat. §115C-109.3(b) further provides that the "[l]ocal educational agencies may release the records of a child with a disability only as permitted under State or federal law."

FAPE is defined as including "special education and related services that . . . meet the standards of the State educational agency." 20 U.S.C.A. § 1401(a)(18)(B). Federal law establishes a "minimum baseline of educational benefits that states must offer students with disabilities." *G ex rel. RG v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 303 (4th Cir. 2003). A school in this state must meet the standards established by the governing state educational agency, "which in turn must meet or exceed the IDEA's minimum requirement." *Id.* at 304. States can also set higher standards of educational services to special education students. *Id.* at 303.

This case bears some similarity to *Cavanagh v. Grasmick*, in which Parents alleged that the school committed a procedural violation by failing to maintain student-teacher ratios as mandated by state statute. *Cavanagh v. Grasmick*, 75 F. Supp. 2d 446, 471 (D. Md. 1999). The Fourth Circuit noted that even if the school committed a procedural violation that Parents had the burden of showing that the procedural violation resulted in a substantive denial of FAPE. *Id.* at 473. Though the court in *Cavanagh* found no substantive violation, the case at hand is distinguishable in that WCS' procedural violation of shredding Student's educational records, *inter alia*, resulted in a substantive denial of FAPE.

Mr. Smiley knowingly directed Ms. Keuffer to shred Student's educational records which he left while at Ms. Keuffer's office. P. Exh. 10 at 102. Not only did Mr. Smiley direct destruction of the documents, he also had compromised the confidentiality of Student's educational records by removing them from the premises of the WCS campus and leaving them at another school which had no legal authority to access Student's educational records and no legitimate educational interest in having access to them. *See* Hearing Tr. vol. 8, 1701, July 1, 2015.

As a result of WCS' procedural violations, the development and implementation of Student's IEP was significantly delayed. Duplicate copies of his educational records had to be requested from PMSD, but WCS did not make any further request for records until October 31, 2013. P. Exh. 27 at 456. Given the protracted difficulty in developing an IEP for Student, the Court can, and here does, draw a clear connection between the unlawful and undisclosed destruction of a part of Student's Records, particularly an IEP to which WCS is required to provide Comparable Services, as discussed herein, and a substantive denial of FAPE.

7. Procedural Violations Constitute a Substantive Denial of FAPE

The United States Supreme Court, in its instructive ruling on how Courts must determine whether a student had received FAPE, identified IDEA's procedural

safeguards as the procedure that protects students. *Westchester County v. Rowley*, 458 U.S. 176, 208-209 (1982) (Rowley)

"Entrusting a child's education to state and local agencies does not leave the child without protection. Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies

. . . and in the formulation of the child's individual educational program." (emphasis added) As the U.S. Senate Report states:

'The Committee recognizes that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome. By changing the language [of the provision relating to individualized educational programs] to emphasize the process of parent and child involvement and to provide a written record of reasonable expectations, the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child.' S.Rep., at 11–12, U.S. Code Cong. & Admin.News 1975, p. 1435.

See also S.Conf.Rep.No.94–445, p. 30 (1975); 34 CFR § 300.345 (1981). As this very case demonstrates, parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the [IDEA]. (footnote omitted) (emphasis added) Board of Educ. of Hendrick Hudson Central School Dist., *Westchester County v. Rowley*, 458 U.S. 176, 208-209 (1982) (Rowley)

North Carolina law provides that a hearing officer may find that a child did not receive FAPE based on a procedural violation, only if the procedural inadequacies (i) impeded the child's right to FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the

provision of FAPE to the parent's child; or (iii) caused a deprivation of educational benefit." NC DPI Policy 1504-1.14.

The Fourth Circuit Court of Appeals has recognized that a procedural violation may also constitute a substantive violation and denial of FAPE.

"We have no doubt that a procedural violation of the IDEA (or one of its implementing regulations) that causes interference with the parents' ability to participate in the development of their child's IEP will often actually interfere with the provision of a FAPE to that child." *DiBuo ex rel. DiBuo v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d 184, 191 (4th Cir. 2002).

Here, the evidence clearly establishes that WCS impeded the parents' participation regarding the provisions of IDEA on more than one occasion. Parents cannot participate if they are not present at meetings. Parents were not invited, and therefore did not attend the "comparable services" meeting that the teachers held on September 13, 2013. P. Exh. 77 at 819; P. Exh. 29 at 460-462; P. Exh. 33 at 466; Hearing Tr. Vol. 8, 1733-1734, July 1, 2015. Parents also did not attend the November 1, 2013 IEP meeting. P. Exh. 79 at 999. Mr. Smiley opined that it would have been "administratively inconvenient" to teachers to reschedule the meeting – arrangements had been made to cover the classes of teachers, who were IEP team members. Hearing Tr. vol. 1, 172, June 22, 2013. Administrative inconvenience is not an affirmative justification to holding an IEP meeting without a parent. *See, e.g.*, 34 C.F.R. Part 300, Appendix A; *Sanford School Committee v. Mr. L.*, 2001 WL 103544 (D. Me. 2001); *A.M. v. Fairbanks N. Star Borough Sch. Dist.*, No. 3:05-CV-179 TMB, 2006 WL 2841054, at *3 (D. Alaska Sept. 29, 2006); *Ms. M. ex rel. K.M. v. Portland Sch. Comm.*, No. CIV 02-169-P-H, 2003 WL 21180814, at *20 (D. Me. May 20, 2003).

These procedural violations may, individually and respectively, constitute an impediment to Student's right to FAPE, a significant impediment to Parent's

involvement in the decision making process, or a deprivation of educational benefit. When taken together these procedural violations satisfy the standards set forth in NC DPI Policy 1504-1.14.

The undersigned views these several, continued procedural violations not in isolation, but as part of an overall process. It would be a miscarriage of justice if the undersigned, for example, were to find a denial of FAPE in the event that a simple procedural violation occurred but was later cured. In turn, justice requires the undersigned to view a series of violations, which a school did not cure, as one continuous situation and not a series of separate, relatively minor, individual violations. The undersigned views WCS's continued and systemic procedural violations as a whole and accordingly finds and concludes that WCS has violated NC DPI Policy 1504-1.14 and denied FAPE to Student.

8. Disenrollment Without a Manifestation Determination

WCS's decision to dis-enroll student without a manifestation determination constitutes a substantive denial of FAPE. Though ostensibly acting in technical compliance with state regulations, WCS violated IDEA.

In a letter dated December 20, 2013, Mr. Bryan provided notice that Student had accumulated excessive unexcused absences, and the consequences thereof, including notifying the "District Attorney's Office, consistent with N.C. compulsory attendance laws." P Exh 90 at 1087; N.C. Gen. Stat. § 115C-378(a). In a letter dated March 6, 2014, Mr. Bryan provided notice to Parents that WCS was "withdrawing" Student from school due to excessive absences. P Exh 94 at 1100. North Carolina has a Ten Day Rule, which provides that a student, who has accumulated more than ten consecutive days of unexcused absences, is to be withdrawn from school. P Exh 181 at 22-23 (School Attendance Manual for 2013-14).

State and Federal Law, however, provide that a special education student's placement shall <u>not</u> be changed due to a violation of a code of student conduct until

a "manifestation determination" has been made as to whether the conduct in question was caused by or had a direct and substantial relationship to the child's disability. 20 U.S.C. § 1415(k)(1)(E)(i); and, NC DPI Policy 1504-2.1(e). The "manifestation determination" must be held with ten school days of any decision to change the child's placement. WCS' Charter incorporates the Federal Law. P Exh 151 (WCS' Charter) at 151-6. WCS did not provide timely notice of a "manifestation determination," and did not conduct one. Instead, WCS simply took steps to remove Student entirely. P. Exh. 91 at 1092; P. Exh. 95 at 1103.

In a case of first impression, a U.S. District Court for the Eastern District of Pennsylvania held that disenrollment constituted a change in placement on facts similar to this case. *R.B. ex rel. Parent v. Mastery Charter Sch.*, 762 F. Supp. 2d 745, 752-753, 758 (E.D. Pa. 2010) *aff'd sub nom. R.B. v. Mastery Charter Sch.*, 532 F. App'x 136 (3d Cir. 2013) (Mastery Charter School). The student in Mastery Charter School was a special education student, who had been unilaterally dropped from enrollment pursuant to a state law like the N.C. Ten Day Rule. *Id.* at 762. No "manifestation determination" was considered or held, and because the "disenrollment was unilateral, it occurred without the informed consent of [p]arent." *Id.* at 750.

The District Court reasoned that "any change in a special education child's placement must comply with the procedural safeguards—regardless of what outcome state or local laws might dictate for a special education student's non-disabled peers." *Id.* at 758. To the extent that IDEA conflicts with state law, IDEA prevails under the Supremacy Clause of the Constitution. *Id.* at 762. Holding that the disenrollment was a change in placement, the Mastery court stated "[n]o change in placement seems quite so serious nor as worthy of parental involvement and procedural protections as the termination of placement in special education." *Id.* at 759 (citation omitted) Moreover, at the time the charter school improperly

disenrolled the student, "it was—pursuant to its charter and state law—responsible for providing a FAPE to [the student]; and as the party that effected the allegedly unlawful change in placement during the pendency of judicial proceedings, that responsibility continues." *Id.* at 760-761.

Disciplinary removal of a student with a disability is a change in placement, which "may require a school to evaluate the student, conduct a team meeting, propose an alternate special education plan, and provide special education services pending an agreed upon placement." *Id.* at 759. Similarly, "like graduation, indefinite suspension, or expulsion, the unilateral disenrollment of a special education student, which results in the absolute termination of a child's special education program . . . is a change in placement. *Id.* at 759-760 (quoting *Cronin v. Bd. of Educ.*, 689 F.Supp. 197 (S.D.N.Y. 1988)).

Further, the WCS decision to disenroll Student was made as a pretext to avoid WCS's duties under state and federal law. WCS failed to follow the proper procedures under state law for disenrolling Student. P. Exh. 181 at 25; N.C. Gen. Stat. § 115C-378(f); Hearing Tr. vol. 13, 2912, July 21, 2015. Because Student's disenrollment was ostensibly precipitated by his chronic absenteeism, WCS had an "affirmative duty to respond to the absences—potentially caused by [Petitioner's] disability—through educational intervention." Mastery Charter School, 762 F. Supp. 2d at 760.

For these reasons, the undersigned concludes that WCS substantially violated 20 U.S.C. § 1415(k)(1)(E)(i) and NC DPI Policy 1504-2.1(e), thereby denying Student FAPE.

a. Educational Benefit

In *MM ex rel. DM v. Sch. Dist. of Greenville Cnty*, the Fourth Circuit notes that an IEP, in order to be appropriate, "must contain statements concerning a disabled child's level of functioning, set forth measurable

annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 527 (4th Cir. 2002). An IEP is sufficient if it is "reasonably calculated to enable the child to receive educational benefits." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 207, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690 (1982). When considering whether an IEP constitutes FAPE, the student's educational progress should be considered. *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, at 532. (*citing* to Rowley at 207 n. 28; observing that "achievement of passing marks and advancement from grade to grade" are an "important factor in determining educational benefit"). In addition to IDEA's requirement that the state provide each student with some educational benefit, the student must be placed in the least restrictive environment to achieve the FAPE. *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004). The disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate." *Id.* (*citing to* 20 U.S.C. § 1412(a)(5)(A)).

Though the Fourth Circuit has held that a court should not "second guess the judgment of education professionals," this applies when a "procedurally proper IEP has been formulated." *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir.1990). A court still has the "obligation to determine as a factual matter whether a given IEP is appropriate." *Cnty. Sch. Bd. of Henrico Cnty., Virginia v. Z.P. ex rel. R.P.*, 399 F.3d 298, 307 (4th Cir. 2005) (fact finder is not required to conclude that IEP is appropriate especially where Parents' evidence tends to show that because of the "nature and severity of [student's] problems, the IEP would not provide [student] with an educational benefit.) The IDEA gives

Parents the "right to challenge the appropriateness of a proposed IEP," and courts or agencies hearing IDEA challenges are "required to determine independently whether a proposed IEP is reasonably calculated to enable the child to receive educational benefits." *Id.* As noted earlier, in the Fourth Circuit, "it is possible for a school district's failure to abide by the IDEA's procedural requirements to constitute an adequate basis for contending that the district has failed to provide a disabled child with a FAPE." *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, at 533. (*citing to Board of Educ. v. Dienelt*, 843 F.2d 813, 815 (4th Cir.1988).

Although the IDEA does not require that a state provide the best education possible, "Congress did not intend that a school system could discharge its duty under the [Act] by providing a program that produces some minimal academic advancement, no matter how trivial." *Cnty. Sch. Bd. of Henrico Cnty., Virginia v. Z.P. ex rel. R.P.*, 399 F.3d 298, 300 (4th Cir. 2005) (*citing to Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

Indeed, with grades being one measuring stick for academic advancement, Student failed to gain an academic benefit from his time at WCS. P. Exh. 86; P. Exh. 6. The record here shows that from 2012 to 2015 Student's performance in Reading and Math have progressively decreased as described below.

i. Reading – Generally: Student's overall reading decreased from the 65th percentile when he was tested by PMSD in 2012 to the 30th percentile when he was tested in 2015. *Compare* Woodcock Johnson Test of Achievement, Third Edition (WJ III) assessment administered by Gail A. Brown, M.A., Certified School Psychologist from PMSD in 2012 (Brown), P Exh. 21 at P 330, *with* Gray Oral Reading Tests-5 (Gort-5)

assessments administered by Aaron Hervey, Ph.D., Board Certified Clinical Neuropsychologist from Attention and Memory Centers, North Carolina Neuropsychiatry in 2015 (Hervey), P Exh. 118 at P 1265. Additionally, in the Sping of 2013, Student scored "proficient" in overall reading on the 2013 Pennsylvania System of School Assessment (PSSA) exam. P Exh. 7 at P 96.

ii. Reading Comprehension: Student's reading comprehension decreased from the 48th percentile when he was tested by PMSD in 2012 to the 39th percentile when he was tested in 2015. *Compare* Brown WJ III Assessment, P Exh. 21 at P 330, *with* Hervey Gort-5 Assessment, P Exh. 118 at P 1265.

iii. Math – Generally: Student's broad math scores decreased from the 21st percentile when he was tested by PMSD in 2012 to the 12th percentile when he was tested in 2015. *Compare* Brown WJ III Assessment, P Exh. 21 at P 330, *with* Hervey WJ III Assessment. P Exh. 118 at P 1265.

iv. Math Calculation: Student's calculation scores slightly decreased from the 11th percentile when he was tested by PMSD in 2012 to the 10th percentile when he was tested in 2015. *Compare* Brown WJ III Assessment, P Exh. 21 at P 330, *with* Hervey WJ III Assessment, P Exh. 118 at P 1265.

v. Math – Applied Problems: Student's applied problems score decreased from the 50th percentile when he was tested by PMSD in 2012 to the 26th percentile when he was tested in 2015. *Compare* Brown WJ III Assessment, P Exh. 21 at P 330, *with* Hervey WJ III Assessment, P Exh. At P 1265.

The evidence supports the conclusion that the decline in performance was attributable to both procedural and substantive violations of state and federal law.

9. Statute of Limitations.

Federal law "determines accrual of a federal action, even if the statute of limitations is borrowed from state law." *Richards v. Fairfax Cnty. Sch. Bd.*, 798 F. Supp. 338, 340 (E.D. Va. 1992) *aff'd sub nom. Richards v. Fairfax Cnty.*, 7 F.3d 225 (4th Cir. 1993). The general rule under federal law is that an IDEA claim accrues "when the Parents know of the injury or the event that is the basis for their claim" whether or not they know the "injury is actionable" *Id.* at 341. The injury, which allows a parent to bring suit, occurs when there is a "faulty IEP or a disagreement over the educational choices that a school system has made for a student." *R.R. ex rel. R. v. Fairfax County School Board*, 338 F.3d 325, 332 (4th Cir. 2003); *See* 20 U.S.C. § 1415(b)(6) (stating that Parents can bring a claim "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child"). Specifically, a claim accrues when a parent "reject[s] the proposed IEP as inadequate" or "withdraws [student] from the public school system because it [is] at that time that [the student is] entitled to initiate a due process hearing or an administrative appeal." *R.R. ex rel. R. v. Fairfax County School Board,* 338 F.3d at 332-333.

Here, Petitioners' claim accrued when Petitioners' Parents withdrew Petitioner from school on December 2, 2013. It was at that time when it became clear that Petitioners' Parents were entitled to initiate a due process hearing or an administrative appeal. Petitioner filed suit against WCS on November 1, 2014,

which was less than one year from the accrual date. Accordingly, Petitioners' claim is within the statute of limitations and all actions by WCS remain actionable.

Even if Petitioners' claim accrued prior to December 2, 2013, N.C. Gen. Stat. § 115C-109.6 provides that the one year statute of limitations "shall not apply to a parent if the parent was prevented from requesting the hearing due to (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." N.C. Gen. Stat. § 115C-109.6 (c).

Here, WCS consistently represented to Petitioners that WCS was providing comparable services and seeking to develop an IEP for Student. See, e.g., P. Exh. 77 at 819. As such, to the extent the statute of limitations would apply here, N.C. Gen. Stat. § 115C-109.6 (c) allows exceptions which are applicable in this case. Accordingly, Petitioners' claims are not barred by the applicable Statute of Limitations.

10. OAH Has No Jurisdiction Over Confidentiality of Records

The record contains significant testimony and evidence regarding confidentiality of records and alleged violations of both the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g, et. seq., and through it, the North Carolina Policies Governing Children with Disabilities. The North Carolina Policies Governing Services for Children with Disabilities appear to incorporate the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g, throughout. NC DPI Policies 1505-2.15, 1505-2.2, 1505-2.3, 1505-2.6. It is the conclusion of the undersigned that OAH currently lacks the jurisdiction to rule on these matters, but that to the extent any such alleged violations regarding confidentiality of records are subject to administrative exhaustion requirements under the IDEA, they have been exhausted.

Compensatory Education

The IDEA offers compensatory education as a "remedy for the harm a student suffers while denied a FAPE." *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011). Compensatory education is an equitable remedy that seeks to make up for "educational services the child should have received in the first place," and "aims to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Id.* When a public school "fails to provide an adequate education in a timely manner, a placement in a private school may be appropriate." *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1285 (11th Cir. 2008) (*citing to Loren F. ex rel. Fisher v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003). A district court has the power to "grant such relief as [it] determines is appropriate," 20 U.S.C.A. § 1415(i)(2)(C)(iii), in light of a school system's failure to provide educational benefit to a disabled student. This language confers "broad discretion" in fashioning an appropriate remedy. *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 325 (4th Cir. 2009).

Once a denial of FAPE has been established, it is a "rare case" in which an award of compensatory education is not appropriate. *Draper* at 1497. The U.S. Eleventh Circuit Court of Appeals has commented on whether placement in a public school is appropriate by stating that the question is not whether a student can "receive an appropriate education in a public setting but whether he will receive such an education." *Draper*, 518 F.3d at 1285 (emphasis added).

In *Draper*, the Circuit Court ordered the school district to pay for the student's tuition at a private school as prospective compensatory education as a result of the district's denial of FAPE. *Draper*, 518 F.3d at 1275. The court in *Draper* stated that the IDEA does not "require compensatory awards of prospective education to be inferior to awards of reimbursement" and it does not "relegate families who lack the resources to place their children unilaterally in private schools to shouldering the

burden of proving that the public school cannot adequately educate their child before those Parents can obtain a placement in a private school." *Id.* at 1286. It is well established that an "award of reimbursement for the expenses of a private school is allowed under the Act when the private placement is appropriate for the student and an educational program at a public school has been inadequate." *Id.* at 1285. Further, Parents have a right, under the IDEA, to make "some unilateral decisions concerning their child's education after a school system has violated the Act." *Draper*, at 1287 (*citing to Florence Cnty. Sch. Dist. Four v. Carter By & Through Carter*, 510 U.S. 7, 8 (1993) (reaffirming the parental right of unilateral withdrawal as recognized in Burlington.) The *Draper* court recognized that had the student's family placed their child in a private school that an award of reimbursement would be appropriate and if the Court could not prospectively award compensatory education in the form of placement at a private school then "the student would be worse off with an award of prospective education than he would be with a retroactive award for the same violations." *Id.* Courts are therefore empowered to use "broad discretion to fashion appropriate equitable relief." *Id. See also M.S. ex rel. Simchick*, at 325.

In *G ex rel. RG v. Fort Bragg Dependent Sch.*, the Fourth Circuit stated: "we agree with every circuit to have addressed the question that the IDEA permits an award of [compensatory education] in some circumstances." *G ex rel. RG v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 309 (4th Cir. 2003) (emphasis added). Additionally, the Fourth Circuit recognizes that "compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student." *Id.* The Fourth Circuit has also recognized that compensatory education provides services "prospectively to compensate for a past deficient program." *Id.* The Fourth Circuit made it clear that compensatory education may be awarded for IDEA violations and the remedy will

not be limited to the time period following the parent's first objection to the proposed IEP. *Id.*

If a school system "cannot meet its burden of providing an appropriate education in a public school setting, it must then fund the cost of a private school." *Hanson ex rel. Hanson v. Smith,* 212 F. Supp. 2d 474, 482 (D. Md. 2002). In *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 681 (4th Cir. 2007) (*Alexandria city School Board*), the Fourth Circuit found that a school district failed to offer FAPE for failure to identify an appropriate placement for the student in his IEP. Though the district had determined that a private day school would be appropriate for the student, it did not identify which private day school would best meet the student's needs. *Id.* Among other things, the student was diagnosed with semantic pragmatic learning disorder with characteristics of a nonverbal learning disability. *Id.* At 675. The student attended a public school until the seventh grade when he no longer felt safe at the school as a result of being teased and assaulted by other students. *Id.* The parents then enrolled the student in an out-of-state residential school. *Id.* At a subsequent IEP meeting, the school district proposed a private day school placement. Parents determined that none of the local private schools were appropriate for their child and in fact, in some cases, would be detrimental. The parents determined that the out-of-state residential school was the appropriate school to meet their child's specialized needs. On remand, the district court found that the placement at the out-of-state facility was appropriate and the parents were entitled to reimbursement for tuition, transportation costs, and reasonable attorneys' fees. *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 544 F. Supp. 2d 487, 491 (E.D. Va. 2008).

Petitioner has asked for compensatory education services in academic remediation for: mathematics, language arts, transitioning, executive functioning; speech and language therapy; occupational therapy; physical therapy or adapted

physical education; assistive technology education; college bound assessments; assistive technology: hardware and software; psychological counseling: student, parent, and family; regular education and accommodations of SDIs, and special mater and legal compliance.

Alternatively, Petitioners requested that the undersigned order WCS to fund (not reimburse, but directly fund) not less than three (3) hours per day of private educational instruction and related services, in areas of Student's academic, physical, social and emotional deficits, to be provided five (5) days per week, for forty-two (42) weeks per year, by properly credentialed or licensed providers at prevailing hourly market rates in the community where such services are provided, without any contribution by any insurance held or available to Parents or Student, until Student graduates from high school with a diploma. Parents request that they be authorized by the undersigned to select the providers and make decisions within the confines listed above, in their discretion, as to what services should be provided to Student and when those services should be provided. The costs to be reimbursed are limited to costs reasonably necessary to guarantee the Student educational benefits which are reasonable to Student's situation and his abilities.

The equitable remedy sought is not an unreasonable one. WCS remains legally responsible to provide Student with special education and related services. Student has suffered a deprivation of educational benefits for the 2013-14, 2014-15, and the current 2015-16 school years as a direct result of a very substantial number of procedural and substantive denials of FAPE for which WCS is responsible. The equitable remedy sought by Parents is approved as part of the undersigned's order in its discretion.

The record reflects that Parents withdrew Student amid concerns that he was gaining no educational benefit from WCS. Further, the record reflects, as discussed *supra*, that these concerns were justified. Student also suffered significant

deterioration during his time at WCS. As such, Student is entitled to compensatory education.

11. The Respondent violated both the procedural and substantive requirements of the IDEA and corresponding state law resulting in harm to Petitioners.

12. The Petitioners are entitled to compensatory education and it is ordered.

13. Petitioners are the prevailing parties for the purposes of the award of attorneys' fees and litigation costs.

14. The Respondent failed to develop an IEP according to the requirements of the Act, and those failures resulted in the denial of a free and appropriate public education. *Hall v. Vance County Bd. of Education*, 774 F.2d 629. (4th Cir. 1985

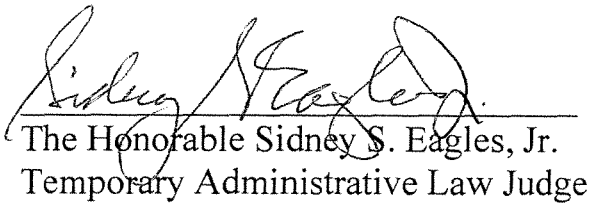
NOTICE OF APPEAL RIGHTS

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this decision.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq.)* and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section."

Inquiries regarding the State Board's designee, further notices and/or additional time lines should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina.

This is the 22nd day of October, 2015.



The Honorable Sidney S. Eagles, Jr.
Temporary Administrative Law Judge

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This the 22nd day of October, 2015.

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