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OFFICE OF ADMINISTRATIVE HEARINGS
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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
16 EDC 00625, 16EDC04763

[redacted] by and through . parents [redacted] and [redacted] Petitioner, v. Wake County Board of Education and the Wake County Public School System Respondent.	**FINAL DECISION**

THIS MATTER was heard before the undersigned Administrative Law Judge Stacey B. Bawtinhimer, presiding, on the following dates: August 16 - 18, October 10 - 14, 20, 21 and 28, 2016 at the Office of Administrative Hearings in Raleigh, North Carolina.

After hearing the evidence presented and considering the written and oral arguments of counsel, the Undersigned is of the opinion that Respondent ("Wake County Schools," "Respondent," and/or "WCPSS") committed a procedural violation with respect to the [redacted] Report which denied the Petitioners meaningful participation at an IEP meeting but that procedural violation did not result in educational harm to Petitioner [redacted]. For all other claims, the Undersigned has determined that the Respondent did not deny Petitioner [redacted]. a free and appropriate public education.

APPEARANCES

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WITNESSES

For Petitioners: Petitioner [redacted].
Petitioner [redacted]

For Respondents: [redacted]

EXHIBITS ADMITTED INTO EVIDENCE

The following Stipulated Exhibits were received into evidence on the second day of hearing:

Stipulated Exhibits: 1 – 37 (hereafter Stip. Ex.1, Stip. Ex. 2, etc.)

The following exhibits were received into evidence during the course of the hearing. The page numbers referenced are the "bate stamped" numbers.

Petitioners' Exhibits: 2 (pages 1-12 only), 9, 10, 15, 16, 19, 20, 30, 32, 40 (pages 415420 only), 75 (pages 76, 85-105, 142, 152, 154, 183, 274 only), 75A, 90, 92-94, 101, 102, 104, 106-113, 115-117, 154 (page 243 only), 157, 158, 192, 193 (pages 3and 5 only), 232, 235, 236, 245, 256 (pages 1 and 2, 's e-mail only), 259, 270, 271, 274, 296-312, 321, 322, 323, 328334, 336-340, 344, 346, 347, 350, 352, 353, 355, 357, 359-365, 384, 387 (pages 1-7 only), 390, 392, 393, 417, 418, 420 and 423. (hereafter Pet. Ex. 2, Pet. Ex. 9, etc.)

Respondent's Exhibits: 39 (pages 25-34 only), 40, 41, 55, 56, 61-65, 67, 68, 69 (pages 643-648 only), 70, 71 (pages 81-83, 133-134, 148-151, 171-172, 434-436, 482-483 only), 72 (pages 126, 141, 162 only), 77, 78 (pages 2329, 2364, 2395, 2479, 2522, 2600, 2616-2617, 2647, 2650-2651, 2657, 2694, 2713-2714 only) and 80. (hereafter Res. Ex. 39, Res. Ex. 40, etc.)

These exhibits have been retained as part of the official record of this contested case.

PROCEDURAL BACKGROUND

1. Petitioners initially filed a Petition for a Contested Case Hearing *pro se* on October 3, 2014 ("October 2014 Petition"). The October 2014 Petition raised one claim, that Respondent

had failed to provide "sufficient supports that teach or provide the opportunity for our son [ ] to acquire the necessary functional skills to obtain FAPE." The October 2014 Petition was declared insufficient by order of this Tribunal on October 14, 2014.

2. On November 4, 2014, Petitioners filed a 37-page addendum to the October 2014 Petition ("November 2014 Addendum"), with several additional claims and requested remedies. Thus amended, the October 2014 Petition was accepted as sufficient.

3. Petitioners took a voluntary dismissal of the October 2014 Petition on January 15, 2015.

4. Petitioners filed Petition No. 16-EDC-0625, through counsel, on January 14, 2016. The Petition attached and incorporated the October 2014 Petition and November 2014 Amendment, and raised new claims regarding the provision of a free, appropriate public education to . through the end of the 2014-2015 school year.

5. Petitioners filed Petition No. 16-EDC- 4763, on May 10, 2016. This Petition raised claims related to an alleged failure of Respondent to provide Petitioners with copies of a document generated by an outside consultant who observed . at school. Petitions 16-EDC-0625 and 16-EDC-4763 were consolidated for hearing by order of Chief Administrative Law Judge Mann on June 13, 2016.

6. Respondent moved to dismiss portions of the consolidated Petitions prior to hearing. After a hearing, the Undersigned entered an Order on August 12, 2016, granting in part and denying in part, Respondent's Motion. Specifically, the Undersigned dismissed all claims relating to the time period prior to January 15, 2015, that were not raised in the original October 2014 Petition, as amended. This included dismissal of all claims arising between November 4, 2014, and January 15, 2015, with the exception of claims raised in the May 2016 Petition.

7. Thus, prior to the start of hearing, the operative limitations period was deemed to include:

a. Claims raised in the October 2014 Petition, as amended, that arose between October 3, 2013, and November 4, 2014;

b. Claims raised in the January 2016 Petition that arose between January 15, 2015, and withdrawal from the Wake County Public Schools in August 2015;

c. Claims raised in the May 2016 Petition, excluding claims regarding the alleged withholding of the Report. Although the alleged withholding of the Report occurred more than one year prior to the filing of the May 2016 Petition, Petitioners claimed that an exception to the statute of limitations applied to this claim because the Respondent deliberately withheld the full Report.

8. At the close of Petitioners' case, Respondent made a second Partial Motion to Dismiss pursuant to N.C.G.S. §1A-1, Rule 41(b). After hearing the arguments of the parties and reviewing the evidence presented by Petitioners, the Undersigned entered an Order dated October 25, 2016, dismissing the following portions of Petitioners' claims:

a. All claims regarding the denial of a free and appropriate public education ("FAPE") for the 2013-2014 school year, other than those related to behavior and communication/social issues;

b. All claims related to Extended School Year Services ("ESY");

c. All claims regarding parental participation in the IEP and/or BIP process in both the 2013-2014 and 2014-2015 school years, other than the claim related to the withholding of [redacted]'s full report; and,

d. All claims related to reimbursement for private services obtained by Petitioners.

ISSUES REMAINING AFTER RULING ON RESPONDENT'S MOTIONS TO DISMISS

1. Whether Respondent provided [redacted]. with a FAPE from October 3, 2013 through the end of the 2013-2014 school year, specifically with regard to communication/social skill issues, behavior goals, behavior intervention plans, and implementation thereof;

2. Whether Respondent violated [redacted] parents' rights to participation in the IEP process by withholding the full copy of an observation report by [redacted] developed in March 2014, and if so, whether this violation led to a denial of FAPE; and,

3. Whether Respondent provided [redacted]. with a FAPE during the 2014-2015 school year, except for the time period of November 4, 2014 – January 15, 2015, which is excluded due to the applicable statute of limitations.

BURDEN OF PROOF

Petitioners acknowledged in the Order on the Final Pre-Trial Order Conference entered on August 17, 2016 that they have the burden of proof in this contested case. The standard of proof is by a preponderance of the evidence. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); N.C. Gen. Stat. § 150B-34(a). Black's Law Dictionary defines preponderance as denoting "a superiority of weight or outweighing." The finder of fact cannot properly act upon the weight of evidence in favor of the one having the onus, unless it overbears, in some degree, the weight upon the other side. North Carolina statutory law states that actions of local boards of education are presumed to be correct and "the burden of proof shall be on the complaining party to show the contrary." N.C. Gen. Stat. § 115C-44(b). The Petitioners, being the complaining party, have the burden of proof to show by a preponderance of evidence that Respondent did not provide [redacted] with a free appropriate public education.

STIPULATIONS

1. It is stipulated that the Petitioners and Respondent named in this action are properly before this Tribunal, and that this Tribunal has personal jurisdiction over them. Stip. 1.

2. It is stipulated that the Petitioners and Respondent named in this action are correctly designated. Stip. 2.

3. It is stipulated that Petitioner [redacted] is domiciled within the boundaries of Wake County. Stip. 3.

4. It is stipulated that as the party seeking relief, the burden of proof for this action lies with Petitioner. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Stip. 4.

5. It is stipulated that the Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.* and implementing regulations, 34 C.F.R. Parts 300 and 301. N.C. Gen. Stat. § 115C-109.6(a) controls the issues to be reviewed. Stip. 5.

6. It is stipulated that the IDEA is the federal statute governing education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Parts 300 and 301. Stip. 6.

7. It is stipulated that Respondent is a local education agency receiving monies pursuant to the IDEA. Stip. 7.

8. It is stipulated that the controlling state law for students with disabilities is N.C. Gen. Stat. Chapter 115C, Article 9 and the corresponding state regulations. Stip. 8.

9. It is stipulated that the Petitioners, as the party requesting the hearing, may not raise issues at the hearing that were not raised in the due process petition. Stip. 9.

10. It is stipulated that the remedy sought by Petitioners in this matter is compensatory education services. Stip. 10.

11. It is stipulated that Petitioner [redacted]'s date of birth is [redacted], and that his father is Petitioner [redacted] ([redacted] and his mother is [redacted] ([redacted]). Stip. 11.

12. It is stipulated that [redacted]. is a "child with a disability" as that phrase is defined in IDEA. Stip. 12.

13. It is stipulated that [redacted]. has been determined eligible for services under IDEA, with a primary area of eligibility of "[redacted]." Stip. 13.

14. It is stipulated that [redacted]. was enrolled in the Wake County Public Schools from 2008 until August 2015. Stip. 14.

15. It is stipulated that [redacted]. attended [redacted] School, a Wake County elementary school, for the 2013-2014 school year. Stip. 15.

16. It is stipulated that [redacted]. attended [redacted] School, a Wake County elementary school, for the 2014-2015 school year. Stip. 16.

17. It is stipulated that Petitioners withdrew [redacted]. from the Wake County Public Schools prior to the start of the 2015-2016 school year and enrolled him in a public charter school, [redacted]. As a public charter school, [redacted] ("[redacted]") is a Local Education Agency responsible for providing FAPE to [redacted]. while he is enrolled there. Stip. 17.

18. It is stipulated that the parties participated in mediation on April 8, 2014. Stip. 18.

19. It is stipulated that, no later than January 25, 2015, Petitioners started bringing [redacted]. to [redacted] School after noon each day. Stip. 19.

20. It is stipulated that Respondent agreed to fund an independent Functional Behavior Assessment for [redacted]. Stip. 20.

21. It is stipulated that Petitioners selected [redacted] to provide the independent Functional Behavior Assessment and that the Respondent did fund the assessment by Ms. [redacted]. Stip. 21.

22. Petitioners stipulated about the [redacted] interpreter services provided at the hearing. Petitioner [redacted] native language is [redacted]. Even though she has been in the United States for sixteen (16) years and speaks/writes/read English, [redacted]. requested a [redacted] interpreter. *See* Affidavit of [redacted] filed 07/12/16. This Tribunal provided and made available for the entire hearing a [redacted] interpreter. During the hearing, the Petitioners stipulated that the [redacted] interpreter's services were appropriate even when [redacted]. asked for modifications of the standard interpreting procedures. Tr. vol. 4, pp. 593-595:1-12. After [redacted]. testimony was concluded, [redacted]. declined further interpreter's services and by stipulation asserted that she had no objections to the removal of these services during the remainder of the hearing. Tr. vol. 4, pp. 673-674:1-12.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge ("ALJ") makes the following Findings of Fact. In making these Findings of Fact, the ALJ has weighed the evidence presented 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 witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case including, but not limited to, verbal statements at the IEP meetings, the IEP minutes, the IEP documents, the DEC 5/Prior Written Notices, and all other competent and admissible evidence.

FINDINGS OF FACT

Based upon the stipulations of record and the preponderance of the admissible evidence, the Undersigned finds as follows:

General Findings:

1. This Order incorporates and reaffirms the findings of fact contained in previous Orders entered in this litigation.

2. At the initiation of this case, [redacted]. was an [redacted] year old student with [redacted] who had received special education services since preschool. His cognitive ability was assessed by the Respondent in 2010 and a private psychologist hired by the Petitioners in 2012. Both evaluations found his cognitive ability to fall in the [redacted] range, which qualifies as a [redacted]. Stip. Ex. 1, pp. 5-7; P's Ex. 157.

3. Petitioners [redacted].[1] and [redacted]. are very involved parents who have spent significant time and effort seeking appropriate services and treatment for their son. They were active participants at all of [redacted] IEP meetings. FoF. ##7, 8 (October 25, 2016 Order).

4. The evidence presented generally established that, as part of his disability, [redacted]. has difficulty with transitions and changes in his routine, social interactions, and behavioral and emotional regulation. Tr. vol. 3, pp. 434:20-23, 446:22-447:10 (testimony of [redacted]); Tr. vol. 7, pp. 1384:8-25; 1385:10-1386:7; Tr. vol. 8, pp. 1512:1-1513:9 (testimony of [redacted]), 1647:11-1648:12 (testimony of [redacted]); Tr. vol. 10, pp. 1982:16-1983:2 (testimony of [redacted]); *see also,* Pet. Ex. 157 ([redacted], Ph.D. evaluation dated 07/02/2012). [redacted]. also develops fixations or special interests in certain objects, such as telephones, fire alarms, technology and food which can interfere with his ability to attend to instruction or other activities and can trigger maladaptive behaviors. Tr. vol. 1. p. 41:6-22 (testimony of [redacted]); Tr. vol. 3, p. 547:9-14 (testimony of [redacted].); Pet. Ex. 104; and Stip. Ex. 33.

5. Petitioners' central complaint, both in their Petition and at hearing, was that [redacted]. suffered from school-related anxiety, which they ascribed to insufficient or inappropriate services and supports for him at Respondent's schools. Petition ¶¶ 19-22, 24. According to Petitioners, [redacted]. exhibited behaviors they interpreted as signs of anxiety about going to school, such as difficulty transitioning from home to school and wanting to wear a tight jacket or compression/pressure vest. Tr. vol. 2, pp. 352-354. [redacted]. would express that he did not want to go to school in the mornings and began asking to wear his coat indoors, which his parents interpreted as anxiety about school. Tr. vol. 3, pp. 503:23-504:16.

6. Regarding parental participation, there were twenty (20) IEP meetings over the course of two school years, and the minutes of those meetings explain in great detail parent participation in the meetings and the receipt of parents' concerns. The record also indicates attendance of parent advocates at every meeting, but one, attendance of facilitators from the Department of Public Instruction ("DPI") at numerous meetings, and the availability of interpreter services for Petitioner [redacted]., which were generally declined. FoF #7 (October 25, 2016 Order).

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[1] As indicated in Stipulation number 22, [redacted]. is a [redacted] native for whom English is a second language. During the hearing of this contested case, the Undersigned observed that [redacted]. was able to understand and speak fluent English. Apparently, [redacted]. can also read English as there were no claims in the Petition that the IEP documents needed translation. Occasionally, [redacted]. would ask for clarification of a term during the proceedings. [redacted].'s accent was noticeable but her English was understandable.

7. The IEP meetings were lengthy and "[t]hey could be contentious and emotional." Tr. vol. 3, p. 393:5-9.

8. As presented in the hearing, the following is a non-exhaustive list of exhibits evincing parent participation: Stip. Exs. 2, 4-10, 12-19 (reference the presence of parent advocates at the IEP meetings); Stip. Exs. 4, 5, 6, 10, 11 and 13 (referencing the presence of DPI facilitators); Stip. Exs. 7, 8, & 9 (referencing the presence of interpreters); Stip. Ex. 2, p. 3 (parent shares research with team, team also accepts parent input from prior emails); Stip. Ex. 5, p. 6 (parent information, including concerns, included in IEP); Stip. Ex. 6, pp. 7 & 11 (parent proposals adopted into IEP); Stip. Ex. 15 (team agrees to schedule more time for social stories); Stip. Ex. 7 (BIP updated to include immediate verbal praise and earning special jobs as proposed by parent); and Pet. Exs. 19, 20, &40. Parent also presented parent concerns at almost every meeting, often in writing. Exhibits submitted by Petitioners communicating written parental concerns to school staff. Pet. Exs. 321, 322, 323, 328, 329, 330, 331, 332, 333, 334, 336, 337, 338, 339, 340, 344, 346, 347, 350, 352, 353, 355, 357, 359, 360, 361, 362, 363, 364, 365. FoF #8 (October 25, 2016 Order).

9. The Petitioners' proposed exhibit list in the Pre-trial Order contained forty-six (46) emails/communications of the "parent concerns." Pre-Trial Order, pp. 8-9. Forty-four (44) of which were dated within February 2014 to October 2015. *See* Pre-Trial Order (filed August 17, 2016).

10. Petitioners did not introduce any evidence that [redacted]. bore a diagnosis of anxiety or had been medically treated for anxiety.[2] On multiple standardized evaluations during and prior to 2013-2014, both Petitioners and his teachers reported that [redacted]. did not demonstrate elevated levels of anxiety compared to his peers. In November and December 2013, WCPSS re-evaluated [redacted]. in the areas of behavior, emotional, and social needs. On a Behavior Assessment System for Children, Second Edition (BASC-2), based on ratings by [redacted] general education and special education teachers and his parents, [redacted] anxious behaviors were rated in the "average" range by all raters. Stip. Ex. 22, p. 6; Stip. Ex. 23, p. 4. The only behavioral symptoms endorsed by his parents in the "clinically significant" range were "withdrawal" and "attention problems." Stip. Ex. 23, pp. 3-4. Except for the area of social skills, his parents also rated his adaptive behaviors in the "average" range compared to his peers. *Id.* These ratings were consistent with the findings of the 2012 private psychological evaluation provided to the school by Petitioners, which likewise reported, based on parent ratings, that [redacted]. "scored in the average range with respect to displaying anxiety-based behaviors." Pet. Ex. 157, p. 6.

11. Petitioners' testimony about when [redacted]. did and did not demonstrate anxiety about school was conflicting and somewhat inconsistent with the documentary evidence. [redacted]'s testimony about his concerns regarding [redacted] anxiety was poignant and credible. Tr. vol. 2, p. 351:14-21. [redacted]. testified that he first saw these behaviors during [redacted] first grade year because of the "different dynamics" of a bigger school, push out to science and social studies, and newer challenges for [redacted]. to stay on task and "counter his distractions." Tr. vol. 2, p. 349:1-16. With the new principal at [redacted], these behaviors continued into second grade and [redacted]. would have to

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[2] Petitioners' expert [redacted] testified that she was "sure" [redacted]. "has an anxiety disorder," but acknowledged that "I was not diagnosing him." Tr. vol. 4, p. 615:9-14.

reassure [redacted] Tr. vol. 2, pp. 349:2-5, 350:21-25, 351:14-25, 353:25-354:7. [redacted]. testified that he felt [redacted] anxiety improved during the latter months of the 2013-2014 school year. [redacted]., on the other hand, testified that [redacted] school-related anxiety began two weeks prior to the start of the 2013-2014 school year. As noted above, however, when given a standardized rating scale in November 2013, both parents reported that [redacted]. did not demonstrate elevated levels of anxiety compared to his peers.

12. [redacted]. also testified that in January 2015 when [redacted]. started half-days, [redacted] was more comfortable about school because "he wasn't going to have the morning challenges." Tr. vol. 3, p. 390:16-23. Instead, [redacted]. would be going to science, social studies, and specials which were classes he enjoyed. Tr. vol. 3, pp. 390:19-25, 391:1.

13. The records of Petitioners' private counselor, [redacted], reflected that when Petitioners first brought [redacted]. to see her in June 2014 they reported a recent increase in school-related anxiety, which would contradict [redacted] recollection. Tr. vol. 1, p. 20:714. (testimony of [redacted]); Pet. Ex. 9. According to Ms. [redacted], [redacted]. reported to her that "he was afraid about attending school," although she could not remember specifics about what he was afraid of. Tr. vol. 1, p. 24:10-14. The one time she did remember him explaining his fear, he explained that he didn't like school because the announcements were loud and hurt his ears. Tr. vol. 1, p. 42:10-14.

14. As evidence of [redacted] school anxiety, [redacted] testified that he had to wear a tight jacket or compression/pressure vest; however, it is not clear when [redacted]. starting wearing this jacket or vest. [redacted]. testified that he started wearing the vest three weeks before the end of the 2013-2014 school year. Tr. vol. 3, pp. 470:17-25, 471: 11-14. [redacted]. testified that [redacted]. was wearing his jacket at the beginning of the 2012-2013 school year. Tr. vol. 2, p. 346:1-16.

15. [redacted]. testified that when she returned from a two-month trip to her native country sometime in April 2014, [redacted]. was wearing a tight jacket and was afraid of going to school. Tr. vol. 3, p. 536:1-19. It is undisputed by Petitioners that this behavior continued through the 20152016 school year at the charter school [redacted]. Tr. vol. 3, pp. 481:8-25, 482: 1-9, 486:7-25.

16. According to his teachers and the guidance counselor, in 2013-2014 and 2014-2015, once he got to school, [redacted]. generally appeared happy and transitioned easily to class. Tr. vol. 8, pp. 1606:11-21 (testimony of [redacted]), 1641:11-1642:11 (testimony of [redacted]); Tr. vol. 10, pp. 1984:17-1985:15 (testimony of [redacted]). School staff at both [redacted] and [redacted] saw some signs of anxiety on occasion, especially regarding transitions and academic demands.

Tr. vol. 9, p. 1894 (testimony of [redacted]); vol. 10, pp. 1982-1983 (testimony of [redacted]). Mr. [redacted], Ms. [redacted], and Ms. [redacted] generally concurred with these observations. Tr. vol.3, pp. 434:20-23, 446:22-447:10 (testimony of [redacted]); vol. 4, p. 617:13-15 (testimony of [redacted]); vol. 7, p. 1384:8-25 (testimony of [redacted]).

17. According to Petitioner's expert [redacted], anxiety in general is a common problem for children with [redacted]. Tr. vol. 4, pp. 587:5-24, 588:1-15. [redacted] is a licensed psychological associate who has provided training and services for 25 different school districts, various other service providers, and students with [redacted] for over 21 years. Tr. vol. 4, pp. 577:1-19, 581-583.

She was qualified as an expert in [redacted] social and communication needs of children with [redacted], and instructional support for children with [redacted]. Tr. vol. 4, pp. 610:21-25, 611:1-5.

18. Respondent's expert Ms. [redacted] concurred, and noted that the training Respondent provides to its teachers on "[redacted]" includes discussion of anxiety and calming techniques. Tr. vol. 7, pp. 1378:17-1379:19.

19. [redacted]. also reported to the therapist at [redacted] that when [redacted]. "does not get his way, he has a history of hitting/ kicking/biting others.... this has occurred at home with his father and also at school." Pet. Ex. 15, p. 1.

20. After leaving the WCPSS, [redacted]. has exhibited similar behaviors – school avoidance, fearfulness, and some significant behavioral outbursts – at [redacted]. Tr. vol. 3, pp. 481:13-486:10; Res. Ex. 71, pp. 133, 147, 148, 171, 434-435, 482. [redacted] behavior at [redacted] has resulted in several suspensions from that school. Tr. vol.3, p. 480:6-18; Res. Ex. 70. N.C.'s private therapist also noted that he has shown behavioral outbursts at her office. Tr. vol. 1, p. 35:13-25. This evidence undercuts Petitioners' contention that [redacted] school avoidance or maladaptive behaviors were somehow caused by inappropriate educational services at both WCPSS schools, as the same behaviors have continued even while [redacted]. is in settings that Petitioners contend are supportive and appropriate including the home. Petition ¶ 45.

21. In addition, based on the testimony and documentary evidence, the Undersigned finds that the Petitioners' removal of [redacted]. from his academically challenging classes, although wellmeaning, served to reinforce and reward his anxiety and school avoidance behaviors.

22. Based on the testimony and documentary evidence presented, the Undersigned finds that the Petitioners have not provided any expert testimony or proved by a preponderance of the evidence that [redacted] anxiety or fears, to the extent they were displayed at times during the relevant time periods, were not limited to, caused by or exacerbated by any particular service location, the approaches, and/or interventions used by Respondent's schools.

Provision of FAPE Between October 3, 2013, and June 30, 2014:

23. During the 2013-2014 school year, [redacted] was in the [redacted] grade and was assigned to a special education classroom at [redacted]. The classroom was designed for students with mild intellectual disabilities, and was referred to by the shorthand [redacted] classroom, although the students in the classroom had a variety of disabilities. The classroom provided instruction on the standard curriculum, but in a smaller setting and at a slower pace. Tr. vol. 8, pp. 1481:22-1482:6 (testimony of [redacted]). The classroom had ten students and three to four adults during the year. Tr. vol. 10, pp. 1983:21-1984:4 (testimony of [redacted]).

24. [redacted] was assigned to this classroom for [redacted] and [redacted] grade. For both grades, his special education teacher was Ms. [redacted]. Tr. vol. 10, p. 182: 6-7. Ms. [redacted] was a licensed special education teacher who had taught special education for over 20 years. Tr. vol. 10, p. 1977:19-24. [redacted]. received his core academic instruction (reading, writing, and math) in Ms. [redacted] classroom, and attended lunch, recess, science, social studies, and specials in regular education grade classrooms. Tr. vol. 10, p. 1983.

2013-2014 IEPs

25. [redacted] began the 2013-2014 school year with an IEP developed on June 11, 2013. Pet. Ex. 192. This IEP contained five goals related to [redacted] social/communication and behavioral needs. *Id.* pp. 5-7. Claims regarding the development of this IEP fall outside the statute of limitations, but its implementation continued into the limitations period.

26. The June 2013 IEP also set forth several accommodations related to [redacted] social, communication, and behavioral needs, including: preferential seating near the teacher; visual picture cues paired with verbal prompts; repeated step-by-step directions "with additional explanation and/or social stories as needed"; and the use of boundaries for group activities. *Id.*

27. [redacted] IEP was reviewed and revised over the course of three multi-hour IEP meetings in January and February 2014. Stip. Ex. 6. The new IEP, finalized on February 19, 2014, contained seven goals regarding [redacted] social, communication, and behavioral needs. *Id.* pp. 1013.

28. The February 19, 2014 IEP added several more accommodations related to Nicholas's social, communication, and behavioral needs to those contained in the prior IEP, including: use of a schedule in all classes, "given to [redacted] with additional explanation and/or social stories as needed"; the use of positive reinforcement for appropriate behavior; close proximity to an adult during lunch, specials, and other activities; and "advance notice for changes in schedule or routine, particularly in arrival/departure process." Stip. Ex. 6, pp. 31-35. These strategies were consistent with Dr. [redacted] recommendations in 2012. Pet. Ex. 157, pp.1014.

29. The February 19, 2014 IEP provided for daily direct instruction in social/emotional skills and daily living skills, in addition to academic services. Stip. Ex. 6, p. 36.

30. Petitioners' expert, [redacted], expressed some critiques of the social, communication, and behavioral goals in the February 2014 IEP, specifically with regard to how they were worded and the level of detail, although she did not disagree that they generally addressed appropriate areas of need for [redacted] Tr. vol. 4, pp. 698:6 - 703:1.

31. The IEP's in place for [redacted]. during the 2013-2014 school year reflected extensive consideration of his social/communication needs and the use of positive behavior supports. They provided for direct instruction related to these needs, and accommodations and modifications to the educational environment to better support his social, communication, and behavioral deficits.

32. The Petitioners' claims regarding the appropriateness of the Present Levels of Academic Achievement and Functional Performance ("PLAAFP"), academic goals, and objections were dismissed because the Petitioners' failed to produce any evidence that supported those claims. *See* October 25, 2016 Order.

33. When cross-examined, [redacted] was asked if she believed that the strategies and interventions on the 2013-2014 IEP were implemented, [redacted]'s answers were hostile and defensive. [redacted]. said that she "could not tell it yes or no" but she did not believe the Respondent's documentation that the behavioral strategies were actually used. Tr. vol. 6, pp. 1145-1148, 1154:14-1156:23.

34. The testimony established, and the Undersigned finds, that [redacted]'s IEP's, as they were revised from time to time by his IEP team, were implemented by school staff at [redacted] Elementary. The testimony established, and Petitioners did not produce evidence to contradict, that the special education and related services described in the IEP's were provided to [redacted] Tr. vol. 10, pp. 1996:12-2001:12 (testimony of [redacted]), 2054-2057 (testimony of [redacted]).

2013-2014 Behavior Intervention Plans

35. On October 10, 2013, [redacted] IEP team developed a Behavior Intervention Plan ("BIP"). Stip. Ex. 1, p. 4-5. The BIP was drafted with input from the school counselor, psychologist, Petitioners, [redacted] teachers, and service providers. Stip. Ex. 1, p. 5. This BIP provided interventions including a written schedule, the use of choices, the use of "first__, then __" statements, social stories, and practice time for new social skills. *Id.* The BIP also provided specific rewards for positive behaviors. *Id.* This plan was reviewed and slightly revised by the IEP team on November 15, 2013. Stip. Ex. 25, p. 2.

36. [redacted]s teachers implemented his Behavior Intervention Plan throughout the 20132014 school year. Tr. vol. 10, pp. 2013:14-2024:2 (testimony of [redacted]), 2087:13-2095:18 (testimony of [redacted]).

37. Between November 15, 2013, and February 19, 2014, five (5) IEP meetings were held, each lasting several hours. Although the IEP team intended to review the BIP further during this period, reviewing and revising the IEP took so much time that they were not able to get to the BIP. Tr. vol. 10, pp. 2006:1-14, 2024:3-9 (testimony of); Stip. Ex. 3, p. 15. In April 2014, Petitioners and Respondent participated in mediation, at which they developed some agreed-upon revisions to the BIP. Stip. Ex. 7, p. 1. These revisions and others were made to the BIP at another IEP meeting on May 8, 2014. Stip. Ex. 7; Stip. Ex. 26.

38. Although the BIP was not completely revised by the IEP team until May 2014, most of the strategies added in May were in use in the classroom for most of the 2013-2014 school year. Tr. vol. 10, pp. 2013:14-2024:12 (testimony of [redacted]; vol. 7, pp. 1420:18-1424:16 (testimony of [redacted]).

39. Petitioners did not substantially challenge the appropriateness of the May 2014 BIP as written, other than Ms. [redacted]'s critique that she would have preferred it include a specific reference to a calming strategy she endorses called the "five-point scale," rather than the general reference it contains to calming strategies for [redacted]. Tr. vol. 4, pp. 745:13-746:11. The five-point scale was one of multiple calming strategies used by [redacted] staff throughout the year as they implemented [redacted]'s BIP. Tr. vol. 7, pp. 1389:17-1390:17 (testimony of [redacted]).

40. Although the five-point scale was utilized by the [redacted] school staff, neither the Petitioners nor their expert can dictate or veto what educational strategies must be on the IEP or BIP.

Input From Outside Consultants

41. In March 2014, in response to Petitioners' ongoing concerns about [redacted]'s behavior, Respondent hired [redacted] to observe [redacted] and make suggestions regarding his educational program. Tr. vol. 3, pp. 423:23-424:6 (testimony of [redacted]); vol. 10, p. 2114:1-15 (testimony of [redacted]). Although not tendered by either party as an expert witness in this matter, Mr. [redacted] is a consultant with many years of experience and expertise in the area of programming for students with [redacted]. He has worked nationally and internationally for 41 years with both the Lovaas and TEACCH methodologies, taught children with [redacted], been a behavioral specialist with WCPSS, and an [redacted] specialist for the North Carolina Department of Public Instruction. Tr. vol. 3, pp. 421:4-25, 422:1-7. His opinions carried weight with the Petitioners, with the other experts in this case, and with this Tribunal.

42. Mr. [redacted] reviewed academic and behavioral data, observed [redacted] across multiple educational settings at [redacted], and reviewed his special education file. Tr. vol. 3, p. 423:5-13. Mr. [redacted] spent approximately six hours at [redacted] Elementary School on March 27, 2014. Tr. vol. 3, pp. 402:11, 405:10-13.

43. Mr. [redacted] described his observation as positive, and said the core elements of the program were in place for [redacted] when he observed. Tr. vol. 3, p. 442:7-12. Mr. [redacted] confirmed that recommended strategies including the use of social stories, a schedule, choices, and practice time were all present when he observed. Tr. vol. 3, p. 448:11-15. Mr. [redacted] noted that [redacted]'s perseverative behavior of touching objects, in particular, had improved while at [redacted]. Stip. Ex. 33. He viewed his recommendations as only minor adjustments to a generally solid program. Tr. vol. 1, p. 35:21-24. Mr. [redacted] testified that he has worked in Respondent's schools for many years and, in his experience, the Respondent's staff are capable of carrying out any recommendations he makes. Tr. vol. 3, p. 450:7-14. A summary of Mr. [redacted]'s recommendations was shared with the parents, and his input was discussed by the IEP team. *See, e.g.*, Stip. Ex. 7, pp. 38-45.

44. In addition to Mr. [redacted], at the request of Petitioners [redacted], an [redacted] specialist from the North Carolina Department of Public Instruction, came to [redacted] to observe [redacted] during May 2014. Stip. Ex. 34. Ms. [redacted] drafted a report of her observations and recommendations which was shared with Petitioners and reviewed and discussed by the IEP team at an IEP meeting on June 5, 2014. Stip. Ex. 8, pp. 40-49.

45. Ms. [redacted], a board certified behavior analysis, did not testify for either party but her report was relied upon extensively by both sides and in the testimonies of Mr. [redacted] and [redacted].

46. Ms. [redacted]'s report notes that "[t]he team at [redacted] has successfully implemented many of [redacted]'s recommendations into [[redacted]'s] environment." Stip. Ex. 34. She specifically reported observing the use of a daily schedule, with places to check off each activity; teachers reviewing the checklists with him in each class and providing appropriate preparation prior to a new activity; the use of a behavior reinforcement system; the use of noncontingent sensory breaks; and the use of visual supports. *Id.* She also noted that his teacher and aide approached him in a positive and caring manner. *Id.*

47. Ms. [redacted] made a number of recommendations for continued or enhanced strategies, including: explicit social skills training; setting up social situations; increased visual supports; clear visual routines and expectations; calming books and instruction on calming activities when [redacted] is not anxious; positive verbal and social reinforcement in a calm tone of voice; and a crisis plan with steps to follow when he is yelling or avoiding work. Stip. Ex. 34. The Petitioners adopted these recommendations in their Petition as appropriate for [redacted] Petition ¶ 8.

48. Both Ms. [redacted] and Mr. [redacted] recommended that a "crisis plan" be developed with specific steps for staff to take when [redacted] engaged in certain disruptive behaviors. Stip. Exs. 32, 34. This suggestion was discussed at length by the IEP team on June 5, 2014, with reference to both the [redacted] and [redacted] reports. Stip. Ex. 8, pp. 40-49; Pet. Ex. 420 (audio recording of IEP meeting). Respondent's staff did not agree with the request for a crisis plan separate from the behavior intervention plan, because they felt these steps were addressed in the BIP and it was not necessary to generate a separate document. *See, e.g.*, Stip. Ex. 8, pp. 42-44. Respondent's staff in general did not see [redacted]'s behavior as "crisis" level at that point, and considered "crisis plans" as necessary only when behaviors reach the level of a safety concern. Tr. vol. 7, pp. 1414:10-25 (testimony of [redacted]); vol. 10, p. 2026:14-24 (testimony of [redacted]).

49. The evidence reflected that [redacted] was not engaging in severely disruptive or dangerous behaviors at the time; his daily behavior reports were largely positive, and he was referred to the office only once during the year. Stip. Ex. 8, p. 41; Pet. Ex. 93.

50. The Petitioners disagreed with this conclusion and insisted that a crisis plan must be added to the IEP.

51. Legal counsel for both parties conceded that a crisis plan is not required by the IDEA, the implementing regulations, North Carolina state law, or policies. Tr. vol. 7, p. 1363:18-25. Without legal authority, the Petitioners contend that it is a necessary component of the behavior intervention plan. Tr. vol. 7, p. 1364:1-4. The IEP team rejected this position and contended that a crisis plan was not required. Tr. vol. 7, p. 1364:6-10.

52. Many of the strategies recommended by [redacted] and [redacted] were incorporated into [redacted]'s IEP and Behavior Intervention Plan. Stip. Ex. 26; Tr. vol. 4, pp. 734:1736:6, 737:3-17 (testimony of [redacted]). Mr. [redacted] reviewed the May 2014 BIP during his testimony and confirmed that it incorporated many of the recommendations he had made. Tr. vol. 3, p. 451:6-452:9; Stip. Ex. 26.

53. The Undersigned finds that [redacted]'s IEP and BIP adequately addressed his behaviors such that a crisis plan was not required to provide [redacted] a FAPE.

Implementation of Behavioral Strategies in the Classroom

54. In the early fall of 2013, [redacted], an [redacted] specialist for the Wake County Public School System, began observing [redacted] and consulting with school staff regarding behavioral and social supports for him. Tr. vol. 7, p. 1384:9-25. Ms. [redacted] has been an [redacted] and extended content support teacher for WCPSS for 13 years and in this capacity supports 32 self-contained classrooms in 27 different Wake County Schools. Tr. vol. 7, pp. 1372:7-20, 1373:1-25. Ms. [redacted] has been a trainer for TEACCH for 6-7 years as well as the NC [redacted] Society. Tr. vol. 7, pp.

1372:14-25, 1373:1-25. Ms. [redacted] worked with the staff to develop schedules, routines, behavioral strategies, and visual supports for [redacted] Tr. vol. 7, pp, 1386:8-1388:3 (testimony of [redacted]); vol. 10, p. 2005:16-25 (testimony of [redacted]). Ms. [redacted] has extensive training and experience in working with students with [redacted], and was accepted by this Tribunal as an expert in the field of educational programming for children with [redacted]. Tr. vol. 7, pp. 1371-1384.

55. In November 2013, Ms. [redacted] provided a specialized training to all staff who worked with [redacted], including his regular education teachers and administrators. This training focused on how to implement the structures and strategies needed to support [redacted]'s behavioral and emotional needs. Tr. vol. 7, pp. 1388:4-1389:16 (testimony of [redacted]); vol. 10, pp. 2084-2085 (testimony of [redacted]).

56. A central allegation of the Petition in this matter is that the strategies recommended by Mr. [redacted] and Ms. [redacted] were not implemented by Respondent, and that this failure to heed the specialists' recommendations resulted in a denial of FAPE. January 2015 Petition ¶¶ 8, 9, 11, 45-46. [redacted] testified that she did not believe the [redacted] staff implemented the strategies and interventions on [redacted]'s IEP or BIP. *See, supra* ¶ 34.

57. The evidence did not support this claim. During the 2013-2014 school year, Respondent implemented numerous strategies and interventions to support [redacted]'s behavioral, social, and communication needs. These strategies were recommended and supported by specialists in the field, including Ms. [redacted], Mr. [redacted], and Ms. [redacted] as well as the Petitioners' expert [redacted]. Contemporaneous reports of the two outside observers confirmed that the staff were implementing many of these strategies, were receptive to incorporating additional recommendations, and were in general providing a positive, supportive environment for [redacted] Stip. Exs. 32 - 34.

58. Moreover, Ms. [redacted] testified that she personally observed the implementation of these strategies during her biweekly visits to the [redacted] classroom and [redacted] until Ms. [redacted] became the support person. Tr. vol. 7, pp. 1387:23-25, 1388:1-11, 1430-1431. Because Ms. [redacted] frequently observed the implementation of the [redacted]'s behavioral supports at both schools, and her testimony corroborates with the outside consultants' observation, her testimony carries great weight with this Tribunal.

59. The evidence showed that the following specific interventions were in place for [redacted] at [redacted], for example:

a. The IEPs in place for [redacted] throughout the 2013-2014 school year provided for daily specialized instruction in social skills. Pet. Ex. 192 (6/11/13 IEP); Stip. Ex. 6 (2/19/14 IEP). Direct instruction in social skills was a recommendation of Ms. [redacted] and [redacted]. Stip. Ex. 34, p. 2; Stip. Ex. 35, p. 7. In Ms. [redacted] class [redacted] received one-on-one instruction in social skills daily, weekly group social skills lessons with the speech therapist, direct social skills instruction during his weekly speech therapy sessions, and also participated in a six-week group social skills course provided by the guidance counselor. Tr. vol. 7, pp. 1394:6-16, 1394:20-25 (testimony of [redacted]); vol. 10, pp. 1990-1991, 1993:19-1994:14 (testimony of [redacted]); vol. 10, pp. 2057:22-2058:20 (testimony of [redacted]). Classroom staff also provided

instruction to [redacted] in how to handle social situations as they came up. Tr. vol. 7, p. 1404:1-17 (testimony of [redacted]).

b. Both Ms. [redacted] and Ms. [redacted], the speech therapist, regularly set up or contrived situations for [redacted] to practice his social skills. Tr. vol. 10, pp. 1998:161999:21 (testimony of [redacted]), 2057:1-7 (testimony of [redacted]). Ms. [redacted] observed staff structuring social situations for [redacted] to practice his social skills. Tr. vol. 7, pp. 1401:24-1402:18. [redacted] staff also used social stories with [redacted], with input from Ms. [redacted]. Tr. vol. 7, pp. 1395:1-21; vol. 10, pp. 2022, 2041 (testimony of [redacted]); Stip. Ex. 4, p. 11-12 (minutes of February 10, 2014, IEP meeting, reflecting discussion of ongoing use of social stories in the classroom). The use of social stories was specifically added to [redacted]'s IEP, on the speech therapy support description, at an IEP meeting on February 10, 2014, although they were in use well before then. Stip. Ex. 4, p. 11; Tr. vol. 7, pp. 1399:13-1400:2.

c. The provision of a visual, written daily schedule, and assistance in reviewing and referring to the schedule, was supported by all specialists involved. [redacted] testified that [redacted] was not primed with a classroom schedule of his activities. Tr. vol. 6, pp. 1146:16-1147:24.

d. The evidence established that [redacted] was given a written schedule each day at [redacted]. Tr. vol. 10, pp. 1985:16-1986:9 (testimony of [redacted]), 2059 (testimony of [redacted]). Mr. [redacted] and Ms. [redacted] both observed staff using a visual schedule with [redacted] during their visits. Tr. vol. 3, p. 448:11-15 (testimony of [redacted]); Stip. Exs. 32 - 34 ([redacted] and [redacted] reports). The use of a schedule was included in [redacted]'s BIP beginning in October and his IEP beginning in February. Stip. Exs. 1, 6. The day's schedule, and any expected changes, were reviewed with [redacted] each morning during "priming" time. Pet. Ex. 93; Tr. vol. 10, pp. 1989-1990 (testimony of [redacted]). In addition, his regular education teacher. [redacted], would review the day's schedule and activities with him individually at the start of each class. Tr. vol. 10, pp. 2083:3-2084:14 (testimony of [redacted]).

e. In addition to the visual schedule, [redacted] was provided visual symbols to prevent touching objects, visual routines for practicing social interactions, and other visual rule cards at [redacted]. Tr. vol. 10, pp. 2005:16-25, 2020:23-25 (testimony of [redacted]), 2064-2066 (testimony of [redacted]), 2085, 2097-98 (testimony of [redacted]); Stip. Ex. 34 ([redacted] observations). Beginning in early fall, Ms. [redacted] assisted classroom staff in developing visuals for [redacted], and observed them being used, including clear visual routines. Tr. vol. 7, pp. 1389:2-7, 1406:22-1407:10. [redacted] confirmed that he saw visual cues used with [redacted] when he observed him in the classroom at [redacted]. Tr. vol. 3, p. 497:1-12.

f. Mr. [redacted] recommended the use of graphic organizers for writing assignments. [redacted]'s teachers provided graphic organizers both before and after Mr. [redacted]'s visit. Tr. vol. 7, pp. 1411:19-1412:12 (testimony of [redacted]); vol. 10, p. 2094:16-24 (testimony of [redacted]). This strategy was added to [redacted]'s BIP in May 2014, but was in use well before then. *Id.*; Stip. Ex. 26, p. 1.

g. Mr. , recommended ongoing review of [redacted]'s preferences to ensure effective behavioral reinforcement, and this was done. Tr. vol. 7, p. 1412:13-21 (testimony of [redacted]); vol. 10, pp. 1987:15-1988:3 (testimony of [redacted]).

h. Mr. [redacted] recommended the use of specific, positively stated directions when instructing [redacted] Ms. [redacted] used specific positively stated directions, and [redacted]'s aide was trained to do so as well. Tr. vol. 7, p. 1413:10-19 (testimony of [redacted]); vol. 10, p. 2020:9-22 (testimony of [redacted]); vol. 10, pp. 2082:14-2083:20 (testimony of [redacted]). This specific strategy was added to [redacted] BIP in May 2014 but was in use before then. Stip. Ex. 26, p. 1; Tr. vol. 7, p. 1420:18-25 (testimony of [redacted]).

i. A specific "work system" or checklist of expected activities was provided for science class, as well as other regular education classes [redacted] attended. Tr. vol. 7, pp. 1386:81387:13, 1392:24-1393:13, 1413:20-25 (testimony of [redacted]); vol. 10, pp. 1986:10-23, 2026:5-8 (testimony of [redacted]), 2084:4-14 (testimony of [redacted]). This was a recommendation of Mr. [redacted]. Stip. Ex. 32. Ms. [redacted] reported observing such a checklist being used appropriately with [redacted] when she visited. Stip. Ex. 34.

j. Ms. [redacted] assisted the classroom staff in implementing calming routines with [redacted], and the teachers confirmed their familiarity with these routines. Res. Ex. 40; Tr. vol. 7, pp. 1390:14-17, 1408:19-1409:2, vol. 8 p. 1484:6-18 (testimony of [redacted]); vol. 10, pp. 2007:1-2008:3 (testimony of [redacted]), 2092:19-2093:20 (testimony of [redacted]). [redacted] had a designated calm down space in the special education classroom, with his visual calming routine posted, throughout the year. Tr. vol. 10, pp. 1994:151996:11, 2022:24-223:6 (testimony of [redacted]); Res. Ex. 40 (IEP progress report). The calming routines were practiced with him when he was calm, and shared with the classroom assistants. *Id.*

k. Mr. [redacted] recommended a more specific token economy, which the IEP team discussed, but concluded that [redacted] was not on that level yet. Tr. vol. 7, pp. 1412:221413:9 (testimony of [redacted]). His teachers did make an effort after receiving that recommendation to provide more immediate feedback during activities, rather than waiting until the end of the period to provide the reinforcement. Tr. vol. 10, p. 2037:414 (testimony of [redacted]).

60. After additional adult assistance was added as an accommodation to [redacted]'s IEP in February 2014, a dedicated aide was hired to work with [redacted] throughout the school environment. This was an accommodation that had been requested by his parents. Stip. Ex. 5, p. 15. Ms. [redacted] provided the aide with individualized training and modeling on how to interact with [redacted] appropriately. Tr. vol. 7, pp. 1390:18-1391:17 (testimony of [redacted]).

61. Petitioner [redacted] observed [redacted] in multiple settings at [redacted] during the 2013-2014 school year, including both regular and special education classrooms. Tr. vol. 2, p. 358. Contrary to [redacted]'s testimony, during his observations, [redacted] conceded that [redacted] was attentive, participated in group activities, and was successfully redirected by the teachers when necessary. Tr. vol. 2, pp. 359-360.

did see the teachers using positive reinforcement when engaged in appropriate behavior. Tr. vol. 3, p. 511:6-20.

62. With these interventions, 's behavior improved during the 2013-2014 school year; classroom records showed, and his parents testified, that he had no significant behavioral concerns during the last three to four months of the school year. Tr. vol. 3, p. 501:4-18 (testimony of); vol. 4, pp. 727-729 (testimony of); vol. 7, pp. 1314:24-1315:3; Pet. Ex. 93. specifically showed progress in self-calming and using strategies to regulate his own behavior. Res. Ex. 40 (IEP Progress Report); Tr. vol. 10, p. 2007 (testimony of). He also made progress in his conversational skills, resisting his urges to touch items around the school, and monitoring his tone and volume of voice. Res. Ex. 40; Tr. vol. 10, pp. 2003-2009 (testimony of), 2067-2070 (testimony of). This improvement is acknowledged in the Petition as well. January 2015 Petition ¶ 13.

63. In addition to the services, the Petitioners complained about the data collection process for each of the relevant school years. Ms. testified that she kept data sheets to track 's IEP goal progress but shredded them one year after the last progress report. Tr. vol. 10, pp. 1988: 7-25, 1989:1-6; Res. Ex. 40; Pet. Ex. 93. testified that she had "no concerns" about the data collection and that data was readily available at each IEP meeting. Tr. vol. 10, pp. 2125:15-2166:3. testified that, in her opinion, this was "great data." Tr. vol. 4, p. 729:1-4 *citing* Pet. Ex. 93 (2013-2014 data sheets).

Counseling as a Related Service 2013-2014

64. Petitioners requested that "counseling" be included as a related service in 's IEP in an IEP meeting on November 15, 2013. Stip. Ex. 2, p. 6 (Prior Written Notice). Minutes of the meeting reflect that the team discussed this request and did not agree that a school counselor was the appropriate way to provide the support that needed. Stip. Ex. 2, p. 9. However, the team agreed to conduct a re-evaluation in the areas of emotional and behavioral needs to assist them in determining the best emotional and behavioral supports for Stip. Ex. 2, pp. 6, 9.

65. In support of their argument that counseling was a necessary service for , the Petitioners point to a 2012 private psychological evaluation in which the evaluator recommended that counseling be used to address 's "anger." Pet. Ex. 157. This evaluator did not testify, nor was any evidence presented regarding his knowledge of or the basis for his recommendation of counseling. The report itself specifies that the goal of counseling services would be to help "learn to express his anger in more appropriate ways." Pet. Ex. 157, p. 9. Anger was not an emotional problem identified by Petitioners or observed by staff during the 2013-2014 or 20142015 school years.

66. Petitioner's expert testified that she believed should have received counseling because it was mentioned in this 2012 evaluation report, but did not present an independent basis for this recommendation beyond seeing it in this prior report. Tr. vol. 4, pp. 696:10-16, 746:8-11. The IEP team reviewed this evaluation and discussed the matter, but declined to include counseling as a related servicing during the 2013-2014 school year. Neither Mr. nor Ms. recommended counseling.

67. At the August 11 and 26, 2014, IEP meetings, the Petitioners reiterated their request for counseling services. The IEP team again declined to add counseling as a related service to the IEP, explaining again that the needs the parents identified – social skills, decreasing anxiety transitioning from home to school and activity to activity – were better addressed through services and accommodations throughout the day, rather than counseling sessions. Stip. Ex. 10, p. 7; Stip. Ex. 11; Tr. vol. 9, pp. 1860:9-1861:10 (testimony of [redacted]). The Undersigned finds this justification appropriate.

68. Moreover, the Undersigned finds that the IEP team at [redacted] Elementary School addressed [redacted]'s emotional and behavioral needs, including the need to feel safe and secure at school, through appropriate development, implementation, and revision of his IEP and BIP. Stip. Exs. 1, 6, 25, 26; Pet. Ex. 93.

Reassignment to [redacted] Elementary for the 2014-2015 School Year:

69. Respondent recommended transferring [redacted] to a classroom for students with [redacted] at another elementary school for the 2014-2015 school year. This transition was discussed at several IEP meetings. The school system recommended the change because [redacted]'s behavioral and emotional needs required a high level of structure, routine, and a focus on behavioral skills that were not necessarily needed by the other students in the [redacted] classroom at [redacted]. Stip. Ex. 8, p. 47-49; Tr. vol. 8, pp 1482:17-1483:23 (testimony of [redacted]); vol. 10, p. 2030:18-23 (testimony of [redacted]). By contrast, the classroom at [redacted] was specifically designed for students with [redacted] and behavioral/emotional needs, and therefore the structures and supports required in [redacted]'s IEP and BIP were integrated more broadly into the classroom setup and daily routine. *Id.*; R's Ex. 90, Tr. vol. 8, pp, 1561:13-1565:1 (testimony of [redacted]); vol. 10, pp. 1922:15-1923:4 (testimony of [redacted]).

70. The reassignment did not require a change in [redacted]'s level of special education services or time with nondisabled peers, and his IEP could be implemented as written in the new classroom. While the [redacted] Elementary classroom was better suited to meet [redacted]'s individual needs, there was no change in the amount or type of special education and related services he received nor his placement on the continuum of mainstreaming. Therefore, the reassignment from [redacted] to [redacted] was a change in location of services, but not a change of placement. Although the IEP team discussed the change of classrooms in depth, it was within the authority of the LEA to effect this reassignment.

71. Although the Petitioners raised concerns about the lack of a specific written "transition plan" for [redacted]'s transition from [redacted] to [redacted], the record discloses that the IEP team discussed how to plan for the transition in detail, and Respondent took several steps to ease the transition. Petitioners were invited to and did visit the [redacted] classroom at [redacted] near the end of the prior school year, where they had the opportunity to meet the teacher and principal and ask questions. Tr. vol. 2, pp. 363:16 – 25, 365:14-19 (testimony of [redacted]); vol. 7, pp. 1276:19-1279:17; vol. 8, pp. 1544:23-1546:20 (testimony of [redacted]). Ms. [redacted] took photos of the new school and turned them into a book which she provided to his parents to share with him during the summer. R's Ex. 70; Tr. vol. 7, pp. 1426:3-1427:10. [redacted] came to the school with his parents later in the summer to meet his teachers, including Ms. [redacted]. *Id.* Ms. [redacted] met with Ms. [redacted] to provide information from his previous school, and also attended school with [redacted] the first two days. Tr. vol. 7, pp 1427:20-1429:3 (testimony of [redacted]); vol. 8, pp. 1546:21-1547:13 (testimony of [redacted]).

72. Petitioner [redacted] testified that [redacted] did not have any difficulty transitioning to [redacted] Elementary from his prior school, nor was any evidence introduced of difficulties caused by his multiple previous school changes. Tr. vol. 2, p. 344. Ms. [redacted] and Ms. [redacted] observed that [redacted] transitioned fairly smoothly into the new classroom at [redacted]. Tr. vol. 8, pp. 1547:10-13 (testimony of [redacted]); vol. 7, pp. 1430:4-1431:2 (testimony of [redacted]).

73. Petitioners' CAP worker and advocate, [redacted]. testified that, other than being less focused, [redacted] did not develop any new behaviors during the period between the summer of 2014 through December 2015 which included the transition period. Tr. vol. 1, p. 140:13-19.

74. The Undersigned finds that the transition to [redacted] was appropriately supported by the IEP, BIP, and staff implementation thereof even without a specific written transition plan.

The Provision of FAPE During the 2014-2015 School Year Excluding November 4, 2014 – January 5, 2015:

75. At [redacted], [redacted] was assigned to a special education classroom designed for students with [redacted] and behavioral difficulties, known as the "[redacted]" classroom. Most of the students in the class had [redacted] as well as a need for extra emotional support and adult assistance. Tr. vol. 8, pp. 1528:20-1529:11. The Petitioners protested about many things regarding the [redacted] classroom including the availability of foods in the classroom which were forbidden to [redacted] because of his food allergies and were a known trigger to his behaviors. Stip. Ex. 10, pp. 1-5.

76. Like [redacted]'s previous classroom at [redacted] Elementary, the [redacted] classroom followed the standard curriculum, but in a smaller setting and with a focus on learning and practicing appropriate school behaviors. Tr. vol. 9, pp. 1846:7-1847:13, 1852-1855 (testimony of [redacted]). The classroom held between five and seven students, attended by four adults, allowing for significant small group and one-on-one instruction. Tr. vol. 8, p. 1527:9-15. There was a significant focus on structure and routine. Tr. vol. 9, p. 1848:7-11. Direct instruction in social skills was provided daily, to the whole group as well as individually. Tr. vol. 9. p. 1742:6-15. The classroom also incorporated a significant number of interventions and routines aimed at helping students feel safe and learn to calm themselves, such as a "safe place" with visual calming routines and sensory items, and another calming area called "time in" that was decorated with photos of the students' families. Res. Ex. 67; Tr. vol. 8, pp. 1529:12-1533:2 (testimony of [redacted]).

77. [redacted] was [redacted]'s special education teacher until she left the profession at the end of January, 2015. At that time, Ms. [redacted] had been a licensed K-12 teacher for the general curriculum in special education for 5 ½ years. Tr. vol. 8, p. 1523:1-15. She was replaced by [redacted], a veteran teacher of 34 years with certifications as a reading specialist, high school English and language arts, middle and high school science as well as being a nationally board certified teacher in special education for 12 years. Tr. vol. 9, pp. 1733-34. Ms. [redacted] shadowed Ms. [redacted] for a few days before taking over the class. Tr. vol. 9. p. 1739:19-21.

78. Ms. [redacted] remained involved to assist with [redacted]'s transition to [redacted] and provide support to the staff who worked with him. Tr. vol. 7, pp. 1427:20-1431:2 (testimony of [redacted]). In addition, [redacted], a behavior specialist employed by Respondent with extensive experience working with students with [redacted] and behavioral/emotional needs, provided support, training, and recommendations to the staff at [redacted] who worked with [redacted] Tr. vol. 9, pp. 1842-1845, 1893:14-1894:3 (testimony of [redacted]).

2014-2015 IEPs

79. [redacted] began the year at [redacted] with an IEP that was last reviewed and revised by his IEP team on August 11, 2014. Stip. Ex. 10. This IEP largely retained the goals developed by [redacted]'s IEP team in February 2014, including numerous goals related to social skills, communication deficits, and behavior. *Id.* The IEP required thirty minutes per day of specialized instruction in social/emotional skills and thirty minutes per day of specialized instruction in daily living skills, in addition to significant academic services. *Id.* at 32-33.

80. As reflected in his IEP, [redacted] participated with his general education peers for lunch, recess, science, social studies, and specials at [redacted] Elementary. Tr. vol. 8, pp. 1533:3-1534:5. His IEP provided for extensive accommodations in the regular education setting, including several that had been recommended by Mr. [redacted] and/or Ms. [redacted]. Stip. Ex. 10 pp. 24-31. In addition to the classroom support staff, [redacted] continued to have the assistance of a one-on-one aide throughout the school day. Tr. vol. 8, p. 1527:22-23 (testimony of [redacted]).

81. At an IEP meeting in October 2014, the IEP team agreed, at Petitioners' request, to add counseling as a related service to [redacted]'s IEP. Stip. Ex. 12, p. 35; Tr. vol. 8, pp. 1643:211644:3 (testimony of [redacted]). This service was provided by guidance counselor [redacted], who met with [redacted] at least weekly, usually during recess. Ms. [redacted] has an undergraduate degree in psychology, masters in counseling and masters in school counseling. Tr. vol. 8, p. 1636:4-22. She is licensed as s school counselor and is a nationally board certified teacher. Tr. vol. 8, pp. 1637-1638. She has worked as elementary school counselor at Wake County Schools for 4 years. Tr. vol. 8, p. 1636:4-22. At his mother's request, Ms. [redacted] met with [redacted] during recess and focused her interventions on assisting him with social interactions with his peers. Stip. Ex. 36; Tr. vol. 8, pp. 1645:12-20, 1649:20-1650:10. Ms. [redacted] also included [redacted] in a social skills group that met weekly to discuss calming strategies as well as social skills. Tr. vol. 8, pp. 1646:1-1647:5. Prior to working with [redacted], Ms. [redacted] reviewed information provided by his mother about his needs, and consulted with his private counselor. Tr. vol. 8, pp. 1638:10-1639:14. Ms. [redacted] reported that when she saw [redacted] come into the school building in the morning he was generally "skipping". Tr. vol. 8, p. 1641:13-18.

82. Beginning in August of the 2013-2014 school year, [redacted] started taking [redacted] out of school for lunch on a daily basis. Tr. vol. 6, pp. 1164-1174; Res. Ex. 621, p. 72. This behavior continued during the 2014-2015 school year until December 9, 2014 when the Petitioner starting bringing [redacted] to school between 12 noon to 1:00 p.m. each day, sometimes as late as 2:12 p.m. Tr. vol. 6, p. 1177:1-8. [redacted] testified that she brought [redacted] late to school so that he could "escape the special education class." *Id.* During the 2014-2015 school year, [redacted] missed 4 or 5 hours of instruction each school day. Tr. vol. 6, pp. 1177-1179:1-4. Because of these excursions, [redacted] missed over 60 hours of academic instruction in his special education classes from November 2014 to January 8, 2015. Tr. vol. 6, pp. 1173-1174, 1188-1189:1-23; Stip. Ex. 13, p. 2.

83. Ms. [redacted] testified that [redacted] did not want [redacted] taught replacement behaviors but rather wanted the school teachers to take out things that triggered [redacted]'s behaviors instead of teaching him to cope with his environment. Tr. vol. 9, pp. 1857:15-25, 1858:1-3. The Undersigned finds that it is unrealistic for the Petitioners to expect a public school to eliminate all of [redacted]'s triggers.

84. Ms. [redacted] attributed lack of attendance and inconsistencies in coming to school as the bases for any regression in [redacted]'s maladaptive behaviors during the 2014-2015 school year. Tr. vol. 9, p. 1878:4-11; Stip. Ex. 14, p. 4.

85. According to Ms. [redacted] [redacted] was a "different child", "more explosive" and more intense and frequent behaviors during the spring semester of the 2014-2015 school year because of his inconsistent school attendance. Tr. Vol. 9, p. 1880:4-18. [redacted]'s behaviors often differed depending on whether [redacted] or [redacted] brought him to school. Tr. vol. 10, p. 1974:4-17. There was an observable increase in his anxiety and agitation when [redacted] dropped him off. *Id.*

86. As for the compression/pressure vest, Ms. [redacted] testified that he wore it inconsistently at school, didn't need it throughout the day, and often arrived without it. Tr. vol. 10, p. 1974:14-21. It was [redacted] who would insist that he wear it if he forgot it. Tr. vol. 10, p. 1975:1-2.

87. The evidence presented established that [redacted]'s IEP was implemented at [redacted] Elementary, to the extent it could be given his parents' decision not to present him for his special education services starting in December. Tr. vol. 8, pp. 1518:15-1520:16 (testimony of [redacted]), 1577:17-1583:5, 1599:2-1600:13 (testimony of [redacted]); vol. 9 pp. 1674:17-1678:5, 1684:161689:22 (testimony of [redacted]). Although [redacted] testified that she did not believe [redacted]'s special education and strategies were implemented during the 2013-2014 and 2014-2015 school years, the Petitioners did not produce any reliable evidence to suggest that the special education and related services required by the IEP were not provided. Petitioners did contend that the accommodations were not always provided, but the evidence at hearing demonstrated that the staff of [redacted] Elementary provided the accommodations in [redacted]'s IEP on an appropriate basis to provide [redacted] a FAPE. *Id.*

2014-2015 Behavior Intervention Plan

88. [redacted] began the year at [redacted] Elementary with the BIP drafted by his IEP team in May 2014. Stip. Ex. 7. This BIP also incorporated many of the recommendations of [redacted] and [redacted], as well as the strategies requested by Petitioners and their private therapist Ms. [redacted], as discussed in more detail above. *See also*. Tr. vol. 1, pp. 30:14-31:10, 35:13-25, 85:19-86:24 (testimony of [redacted]).

89. [redacted]'s IEP team updated his Behavior Intervention Plan on February 3, 2015, while maintaining the majority of the strategies originally added in May 2014. Stip. Ex. 30. Petitioners' expert Ms. [redacted] generally approved of the February 3, 2015, BIP. Tr. vol. 4, pp. 770:2-772:9.

90. The evidence overwhelmingly demonstrated that [redacted]'s Behavior Intervention Plan was consistently implemented by the staff at [redacted] Elementary. *See, e.g.*, Tr. vol. 8, pp. 1518:151520:16, 1567:9-1575:21 (testimony of [redacted]); vol. 9, p. 1693:8-18 (testimony of [redacted]), pp. 1744:7-1751:18 (testimony of [redacted]), pp. 1862-1865 (testimony of [redacted]). This testimony was not contradicted in any significant way by Petitioners' witnesses. For example:

a. [redacted] was provided instruction in calming strategies and the opportunity to practice them, and showed the ability to use them to help calm himself on occasion. *See, e.g.*, Stip. Ex. 36 (counseling logs); Tr. vol. 8, pp. 1460:101462:20, 1652:4-13, 1656:1-1657:13 (testimony of [redacted]); vol. 9, p. 1699 (testimony of [redacted]); vol. 9, pp. 1758:1-1759:12

(testimony of); vol. 9, p. 1866:10-24 (testimony of). There were designated places for him to go when he needed to calm down, and he was instructed and assisted in using these places. R's Ex. 67; Tr. vol. 8, pp. 1529:19-25, 1535:22-1539:21, 1632:22-1633:13 (testimony of); vol. 9, pp. 1767:24-1768:19 (testimony of); vol. 10, pp. 1938-1940, 1944 (testimony of). Classroom staff utilized some of the calming strategies recommended by 's private counselor Ms. . Tr. vol. 1, pp. 30:14-31:10 (recommended the use of visual schedules); p. 35:13-25 (used deep breathing as a calming technique); Tr. vol. 1 pp. 85:19-86:24 (used social stories such as "Tucker Turtle").

b. was also provided with an individualized visual schedule, with a place for him to check off each activity as he completed it. Tr. vol. 4 pp. 648:2-9, 654:17-25 (testimony of); vol. 8, pp. 1534:6-23 (testimony of); vol. 8, pp. 1641:5-10 (testimony of); vol. 9, pp.1756:3-23, 1764:1-1767:14 (testimony of); Res. Exs. 55-56. He also had a special visual routine to guide him through his morning arrival. Tr. vol. 8, pp. 1542:11-1543:18; Res. Ex. 67, p. 417. As at his previous school, at he was provided with "work systems" or individual checklists for different activities during the day. Tr. vol. 8, pp. 1540:8-1541:13.

c. Speech therapist provided speech therapy services and support to at . Ms. has been a licensed speech pathologist for 20 years, 13 of which were at Wake County Schools. Tr. vol. 9, p. 1672:3-

20. Ms. provided therapy to weekly, in addition to consulting with other staff who worked with him. Tr. vol. 9, pp. 1674:17-1677:15. In her therapy sessions, Ms. focused on helping learn and use expected behaviors in the classroom and self-regulate his behaviors. Tr. vol. 9, pp. 1678:23-1678:5; Res. Ex. 41. Ms. testimony and contemporaneous notes indicated that made some progress in being able to identify expected behaviors and use learned behavioral strategies in classroom situations, and regulating the tone and volume of his voice. Tr. vol. 9, pp. 1695:13 – 1697:1, 1699:16-20.

d. The classroom at Elementary provided daily instruction in social skills in a small group setting. Tr. vol. 8, pp. 1549:18-1550:18 (testimony of), vol. 9, p. 1742:8-15 (testimony of). In addition to the group social skills lesson, multiple witnesses confirmed that classroom staff worked with one-on-one on social skills instruction, through the use of social stories and other techniques. Tr. vol. 8, pp. 1633:14-1634:3 (testimony of); vol. 9, pp. 1747:1-1748:4, 1751:21-1752:20, 1756:12-23, 1760:4-1761:9 (testimony of); vol. 4, p. 648:17-20 (testimony of); vol. 9, pp. 1883-1884 (testimony of). was also provided weekly social skills instruction from his speech therapist. Tr. vol. 9, pp. 1674:17-1677:15.

91. In response to concerns from Petitioners that they did not believe appropriate strategies were being used, behavior specialist [redacted] created an extensive spreadsheet in which she cross-referenced the techniques and interventions she observed in the classroom with [redacted]'s behavior plan and the recommendations of outside consultants and therapists. Res. Ex. 63; Tr. vol. 9, pp. 1867-1875, 1928-1930. This spreadsheet was based on her direct observations of [redacted] in his educational setting at [redacted], and demonstrated that the interventions in [redacted]'s IEP and BIP and recommendations from outside consultants and his private therapist were in fact being carried out by the staff who worked with him at [redacted]. *Id.* Moreover, data was available at the IEP meetings that showed the effectiveness of the interventions. Tr. vol. 10, pp. 1925-1926 (testimony of [redacted]).

92. Despite Petitioners' ongoing concerns, contemporaneous daily reports from [redacted] Elementary showed that on most days [redacted] was successfully meeting behavioral expectations, as measured by the classroom behavioral point system. Pet. Exs. 90, 92; Tr. vol. 8, pp. 1561:131565:22 (testimony of [redacted]); vol. 10, pp. 1949:4-9, 1953:8-1954:6, 1957:6-22 (testimony of [redacted]). During both the 2013-2014 and 2014-2015 school years, school staff monitored [redacted]'s behaviors with daily point sheets and made notations about [redacted]'s behaviors. Pet. Exs. 75, 90, 91, 93, & 94.

93. Beginning in December, Petitioners started bringing [redacted] to school only for half days. Res. Ex. 61; Tr. vol. 3, p. 464:5-9 (testimony of [redacted]). Petitioners intentionally brought [redacted] to school only for the afternoons, during which he was scheduled to attend lunch, recess, science, social studies, and specials with the general education class. Tr. vol. 3, pp. 390:19-391:25. It was Petitioners' intent that [redacted] not receive his special education services in the [redacted] classroom, because they believed that classroom was causing him to be stressed and anxious. Respondent did not agree with the modified day schedule for [redacted] Stip. Exs. 14, pp. 6-10; 15 pp. 40-43.

94. The half day schedule resulted in a significant reduction of academic demands on [redacted], as he was not receiving the direct instruction in reading, writing, and math as outlined in his IEP. Tr. vol. 8, pp. 1588:15-1589:14 (testimony of [redacted]), 1655:4-20 (testimony of [redacted]). Petitioner [redacted] specifically demanded that his special education teacher not teach him math. Tr. vol. 9, pp. 1743:2-16, 1773:18-1774:8 (testimony of [redacted]). [redacted] was also missing the morning routine and group social skills lesson in his special education classroom. Tr. vol. 9, pp. 1703:5-14 (testimony of [redacted]), 1742:8-15 (testimony of [redacted]).

95. Petitioners rejected the special education services offered by the Respondent by their refusal to allow the Respondent to implement the direct special education in reading, writing, and math. Through their actions, the Petitioners have undermined and sabotaged the Respondent's ability to implement both [redacted]'s IEP and BIP components during the special education academic instruction.

96. Petitioner [redacted] testified that he believed [redacted]'s anxiety about school subsided once they stopped bringing him in the mornings, because he knew he would only be attending activities he enjoyed such as science and specials. Tr. vol. 3, pp. 390:16-391:6. However, school staff reported consistently that the partial day schedule was difficult for [redacted] at school, because it was not predictable and he was missing out on classroom activities including social skills and priming opportunities which [redacted] had previously insisted were essential. Tr. vol. 8, pp. 1583:20-1585:5 (testimony of [redacted]), 1655:4-20 (testimony of [redacted]), 1729:14-1732:7 (testimony of

); vol. 9, pp. 1761-1764, 1780 (testimony of), 1876:20-1879:1, 1880-1882 (testimony of). This led to some behavioral problems at school in the later part of the 20142015 school year. Tr. vol. 9, pp. 1896:24-1897:25, 1965:10-16 (testimony of).

97. Petitioners reported to their private therapist that "[ ] has shown an increase in difficulty with impulse control" rather than anxiety during the 2014-2015 school year. Pet. Ex. 16, p.8 (01/29/15).

98. Moreover, the private therapist noted that hits others when "he wants something that he cannot have at the time" ...and became highly agitated during unexpected events such as the time "attempted to hit/kick/and bite his father" when his father's car broke down. Pet. Ex. 16, p. 9.

99. The Petitioners expert, , observed one day in May 2015 near the end of the 2014-2015 school year. Tr. vol. 4, pp. 772-773. Since December 2014, prior to her observation, had not regularly attended his academic special education classes in the morning. Ms. had some criticisms of the IEP/BIP but in general her comments were positive, however, she testified that she did not see implementation of some of the behavior strategies during her observation such as: a "to do" list, "stop, think and Go", five-point scale, "Thank you for asking, could you repeat in a nice way", the "safe place", and the opportunity to earn special tasks. Stip. Ex. 35; Tr. vol. 4, pp.772-774:8; vol. 5, p. 877.

100. This Tribunal recognizes Ms. 's expertise and dedication to the treatment of students with . In this case, however, Ms. 's testimony is based on a single day of observation during a period of time when had not been regularly attending the classes she observed. The Undersigned finds that Ms. 's testimony about the lack of proper implementation not persuasive when weighted against the testimonies of school personnel who had daily interactions with during the 2013-2014 and 2014-2015 school years and the other evidence in this case.

101. Moreover, Ms. did not opine that the special education services provided at or were inappropriate. She stated no opinion about . When asked her expert opinion about the appropriateness of the self-contained classroom at Elementary, Ms. stated that she "personally saw him more successful during the observation in the general education setting. And that's all the opinion I can give because I've only seen his classroom one time." Tr. vol. 5, p. 834:8-17.

102. Petitioners did not provide substantial evidence regarding 's progress or lack of progress academically during the 2014-2015 school year. Because Petitioners withheld from his special education services for more than half of that school year, it would be impossible to determine whether any lack of progress or even regression was due to the services offered or to the parents' decision not to produce him for those services.

103. The Undersigned finds that the IEP was appropriately implemented and revised at Elementary School to the extent possible in light of Petitioners' unilateral decision to keep out of school during his scheduled special education services.

The Report (Petition 16-EDC-0625):

104. In March 2014, with the Petitioners' consent, Respondent contracted with independent behavioral specialist [redacted] to review [redacted]'s program. Tr. vol. 3, p. 402:1314; vol. 9, pp. 1822:22-1823:8.

105. Mr. [redacted] was asked to conduct a behavioral observation, review the existing behavior plan, and suggest any possible adjustments. Tr. vol. 3, pp. 423:23-424:6. Prior to and during his visit, Mr. [redacted] reviewed academic and behavioral data, observed [redacted], and reviewed his special education file. Tr. vol. 3, p. 423:5-13.

106. Following the observation, Mr. [redacted] drafted a three-page, single spaced report ("[redacted] Report") describing his observations and making recommendations. Tr. vol. 3, p. 409:14-19; Stip. Ex. 33.

107. Some recommended strategies, including the use of social stories, a schedule, choices, and practice time were already present when Mr. [redacted] observed. Tr. vol. 3, p. 448:1115. The use of graphic organizers for written assignments, which he also recommended, were provided to [redacted] at [redacted] throughout the year. Tr. vol. 7, pp. 1411:19-25 (testimony of [redacted]), 2023:7-17 (testimony of [redacted]).

108. After sending his full report to [redacted]gs on March 30, 2014, Mr. [redacted] asked Mr. [redacted] to provide a condensed version ("Summary"), which he did. Tr. vol. 3, pp. 429:18430:20; Stip. Ex. 32. According to Mr. [redacted], in creating the shorter version, the only goal was clarity and simplicity to facilitate discussion of the recommendations, not to change the content. Tr. vol. 3, p. 455:18; vol. 9, p. 1824:8-14.

109. Mr. [redacted] compared the full and condensed reports during his testimony. He testified that the recommendations were substantially similar. Tr. vol. 3, pp. 433:16-434:2; Stip. Exs. 32, 33.

110. The Undersigned also compared the two documents. The [redacted] Report was three pages of single spaced narrative; the Summary was 9 bulleted sentence fragments. *Compare* Stip. Ex. 32 *to* Stip. Ex. 33. The Undersigned finds that, even though the recommendations may have been similar, the documents were substantially different.

111. Mr. [redacted] spoke to Ms. [redacted] on the phone after his observation for more in-depth discussion of his observations and recommendations, and she then attended IEP meetings that followed. Tr. vol. 3, p. 441:6-14 (testimony of [redacted]); Tr. vol. 7, pp. 1410:17-1411:15, 1416:11417:2 (testimony of [redacted]).

112. As confirmed by Mr. [redacted], many of the strategies he recommended were included in the behavior intervention plan developed following his observation. Tr. vol. 3, pp. 451:6-452:9; Stip. Exs. 27, 33.

113. Other issues noted by Mr. [redacted] in his longer report were also addressed by the IEP team. For example, Petitioners highlighted "persistent lack of attention to peers" as an observation in the longer report that was not repeated in the summary report. However, [redacted]'s IEP when he came to [redacted] Elementary specifically addressed his lack of attention to peers, including goals on conversational turn-taking and initiating greetings with peers. Stip. Ex. 10; Tr. vol. 9, p. 1728:2-20 (testimony of [redacted]). Attention to peers was a focus of [redacted]'s speech therapy sessions at [redacted]. *Id.*

114. Another behavioral specialist, [redacted], observed [redacted] and provided a written report on May 9, 2014 on his behavior plan and recommendations. Stip. Ex. 34. Her report noted that [redacted] recommendations were being successfully implemented and her observations of [redacted]'s program and his behaviors were similar to those in Mr. [redacted]'s full report. Stip. Ex. 34.

115. Prior to the official IEP meeting, a "pre-IEP meeting" was held with school staff. At the pre-IEP meeting, Mr. [redacted] provided the full [redacted] Report to all eight (8) of the school staff IEP team members. Tr. vol. 9, pp. 1827-1828:1-8, 1840:19-25. The Petitioners were not invited to the pre-IEP meeting nor were they given the [redacted] Report at the official IEP meeting. Tr. vol. 9, pp. 1832:8-22, 1841:2-5.

116. When the Petitioners asked for a copy of the whole report, Mr. [redacted] emailed them that they "were provided the report with the recommendations." Pet. Ex. 154 (04/16/2014).

117. Mr. [redacted] justified not providing the full report because the past IEP meetings had lasted from 4 to 8/9 hours with a lot of difficult and negative communications with the parents. Tr. vol. 9, pp. 1820-1821:1-5.

118. Ms. [redacted] had also testified that the interactions with [redacted] were "typically very hostile, telling us that we did not know what we were doing, blaming us for being mean or different things, did not agree with us" and were overall "very uncomfortable." Tr. vol. 9, p. 1773: 10-17.

119. [redacted], the Senior Director for Policy and Compliance and Special Education Resolution for WCPSS, testified the [redacted] Report was shortened because of the communication challenges with the Petitioners at prior IEP meetings. Tr. vol. 10, p. 2115:1-14.

120. In closing argument, legal counsel for the Respondent admitted that this was a procedural error and that the Petitioners had the right to see the full [redacted] Report. Tr. vol. 11, pp. 2163:22-25, 2164:1-14.

121. The Undersigned finds, based on the testimony and documentary evidence, that [redacted]' failure to provide the full report to Petitioners was intentional. The Undersigned finds that Mr. [redacted] testimony that he apparently delivered the full report to the school and thought the parents had been provided a copy not credible. Tr. vol. 9, pp. 1825:5-12, 1827:23-1828:8.

122. All eight of the school staff in attendance at the pre-IEP meeting attended the official IEP meeting. Stip. Ex. 7, p. 4. None of them provided the full [redacted] Report to the Petitioners and this was sanctioned by senior administrators of WCPSS.

123. The Undersigned finds this procedural violation particularly egregious and disturbing.

CONCLUSIONS OF LAW

General Legal Framework:

1. To the extent the Findings of Fact contain conclusions of law, or the Conclusions of Law are findings of fact, they should be considered without regard to their given labels.

2. This Order incorporates and reaffirms the conclusions of law contained in its previous Orders entered in this litigation.

3. Petitioners have the burden of proof by a preponderance of the evidence on all issues pending in this matter. Suggestions, innuendoes, assumptions, and personal beliefs, without competent documentation evidence and testimony, are insufficient to meet this burden.

4. It was stipulated that the Petitioners and Respondent named in this action are properly before this Tribunal, and that this Tribunal has personal jurisdiction over them.

5. It was stipulated that the Petitioners and Respondent named in this action are correctly designated.

6. It was stipulated that Petitioner [redacted] is domiciled within the boundaries of Wake County.

7. It was stipulated that as the party seeking relief, the burden of proof for this action lies with Petitioner. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

8. It was stipulated that the Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.* and implementing regulations, 34 C.F.R. Parts 300 and 301. N.C. Gen. Stat. § 115C-109.6(a) controls the issues to be reviewed.

9. It was stipulated that the IDEA is the federal statute governing education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Parts 300 and 301.

10. It was stipulated that Respondent is a local education agency receiving monies pursuant to the IDEA.

11. It was stipulated that the controlling state law for students with disabilities is [redacted] Gen. Stat. Chapter 115C, Article 9 and the corresponding state regulations.

12. It was stipulated that the Petitioners, as the party requesting the hearing, may not raise issues at the hearing that were not raised in the due process petition.

13. As the party requesting the hearing, the burden of proof lies with Petitioners and the standard of proof is by a preponderance of the evidence. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Actions of local board of education are presumed to be correct and Petitioners' evidence must outweigh the evidence in favor of the Board's decisions. *See* N.C.G.S. § 115C-44(b).

14. The appropriateness of a student's educational program is decided on a case-by-case basis, in light of the individualized consideration of the unique needs of the child. *See Hendrick Hudson Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). Under *Rowley*, the Board is required first to comply with the procedures set forth in the IDEA in developing an IEP, and second, to provide a

disabled student with educational instruction that is uniquely designed to meet the student's needs through an IEP that is reasonably calculated to enable him to receive educational benefit. *See Rowley*, 458 U.S. at 176. If both requirements are met, "the State has complied with the obligations imposed by Congress and the courts can require no more." *Id.* at 207.

15. School districts are not charged with providing the best program, but only a program that is designed to provide the child with an equal opportunity for a free appropriate public education. *Rowley*, 458 U.S. at 189-90; 20 IDEA §1400(c)(1) (2004). The modest *Rowley* standard requires that a Board offer children with disabilities a basic floor of opportunity and some educational benefit; a district is not required to maximize a student's educational performance. *See e.g. Rowley*, 458 U.S. at 188-89 (1982); *A.B. ex rel. D.B. v. Lawson,* 354 F.3d 315, 319 (4th Cir. 2004).

16. The public school district satisfies this test if it provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir. 1990) (quoting *Rowley*, 458 U.S. at 203); *see also, Hudson v. Wilson*, 828 F.2d 1059, 1063 (4th Cir. 1987) (underscoring the notion that a free and appropriate education "does not mean that a local school board must provide the *most* appropriate education for each child.").

17. "The [IDEA] does not require the 'furnishing of every special service necessary to maximize each handicapped child's potential.'" *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997) (quoting *Rowley*, 458 U.S. at 199-200). The IDEA further requires states to implement certain procedures to ensure that disabled children and their parents receive procedural safeguards with regard to the provision of a free appropriate public education. 20 U.S.C. § 1415(a). These rights include the right "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child....". 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(a).

18. A school district's failure to provide educational testing data to parents violates the procedural requirements of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 14001487 ("IDEA" or "Act"). ...and... prevents parents from meaningfully participating in the creation of an individualized education program ("IEP"), thereby denying their child a free appropriate public education ("FAPE") under the IDEA. *See generally, MM v. Lafayette School Dist.*, 767 F. 3d 842 (9th Cir. 2014).

19. The Supreme Court has long recognized, since Rowley, that parental participation is an important means of ensuring state compliance with the Act. *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 634(4th Cir. 1985), *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990), *Indep. Sch. Dist. Number 283 v. S.D.*, 88 F.3d 556, 562 (8th Cir.1996), *Doe v. Ala. State Dep't. of Educ.*, 915 F.2d 651, 662 (11th Cir.1990).

20. A procedural violation rises to the level of denying a FAPE when the violation significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE. 20 U.S.C. § 1415(f)(3)(E)(ii)(b). Participation includes the ability "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child. 20 U.S.C. § 1415(b)(1)(A).

21. Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA. An IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed. *Amanda J. ex rel. Annette J. v. Clark Cnty. School,* 267 F. 3d 877, 881-882 (9th Cir. 2001).

Procedural Errors:

22. For a procedural defect in the development of an IEP to entitle a claimant to relief, the defect must result in a loss of educational benefit and not simply be a harmless error. *See A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 684 (4th Cir. 2007). To the extent that the procedural violations do not actually interfere with the provision of FAPE, these violations are not sufficient to support a finding that a district failed to provide a FAPE. *Gadsby v. Grasmick,* 109 F.3d 940, 956 (4th Cir. 1997). If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations. *Burke County Bd. of Educ. v. Denton,* 895 F.2d 973, 982 (4th Cir.1990).

23. In addition, state law dictates that "the decision of the administrative law judge shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." N.C. Gen. Stat. § 115C-109.6(f). "In matters alleging a procedural violation, the hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (i) impeded the child's right to a free appropriate public education; (ii) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or (iii) caused a deprivation of educational benefits." N.C.G.S. 115C-109.8(a).

Crisis Plan as a Behavioral Support and/or Part of a Behavior Intervention Plan:

24. The IDEA does not require the use of a specific written "behavior intervention plan" except in cases of a disciplinary change in placement. *See* 1415(k)(1)(F); 34 C.F.R. § 300.324(a)(2)(i); *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 25 (1st Cir. 2008) ("The IDEA only requires a behavioral plan when certain disciplinary actions are taken against a disabled child."). Rather, the statute requires that the IEP team "consider the use of positive behavior interventions and supports" for a "child whose behavior impedes the child's learning or that of others." 20 U.S.C. § 1414(d)(3)(B). There is no requirement that every behavioral response or strategy be reduced to a written plan. *See Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. Re-1,* 798 F.3d 1329, 1338 (10th Cir. 2015), *cert. granted,* 137 S. Ct. 29, 195 L. Ed. 2d 901 (2016); *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762, 766-67 (8th Cir. 2011); *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 26 (1st Cir. 2008); *Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006).

25. When asked by this Tribunal to provide legal authority for the Petitioners' proposition that the IDEA required an emergency or "crisis plan" in the BIP, Petitioners failed to produce any applicable legal authority. Tr. vol. 7, pp. 1361:6-1364:18.

26. Both legal counsel agreed that the IDEA does not require the creation of written "crisis" or "emergency" plans as part of an IEP. *See generally, supra.*

Professional Judgment and Deference to Educators:

27. The professional judgment of teachers and other school staff is an important factor in evaluating an IEP. "Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment." *Hartmann,* 118 F.3d at 1001. *See also Rowley,* 458 U.S. at 207 (stating that "courts must be careful to avoid imposing their view of preferable educational methods upon the States"). The "IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parents." *Lawson*, 354 F.3d at 328.

28. In addition, "a reviewing court should be reluctant indeed to second-guess the judgment of education professionals . . . we must defer to educators' decisions as long as an IEP provided the basic floor of opportunity that access to special education and related services provides." *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 2017 (4th Cir. 1990) (citations and quotation marks omitted).

Petitioners' Spoliation/Missing Evidence Claims:

29. Petitioners assert that [redacted] was denied a FAPE when Respondent shredded monitoring data, failed keep monitoring data on [redacted]'s progress, and destroyed other evidence that supported Petitioners' claims. Petitioners did not contest the provision of progress reports to the parents and included the progress reports in their exhibits. *See* Pet. Exs. 106-113, 115-117.

30. Neither the Family Educational Rights and Privacy Act (FERPA) or the IDEA require school districts to maintain the type of anecdotal notes that Ms. [redacted] described. FERPA specifically exempts "records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record" from the definition of education records. 34 C.F.R. § 99.3. The IDEA's definition of "education records" is identical to that of FERPA. 34 C.F.R. § 300.611(b). Therefore, the records that Ms. [redacted] described are not records to which Petitioners were entitled or the LEA was required to maintained once progress reports had been distributed.

31. IDEA does not expressly require the Respondent to maintain records of the kind described by Ms. [redacted] in her testimony. To the extent that the destruction of these records constitutes a procedural violation, Petitioners have not met their burden of providing that the violation impeded the [redacted]'s right to a FAPE, significantly impeded [redacted] or [redacted]'s opportunity to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefit. 20 U.S.C. §1415(f)(3)(e).

32. In addition, there was "constant communications" between the parents and the school staff both through face-to-face meetings, emails, and the daily point sheets such that any gaps in the IEP/BIP progress monitoring did not inhibit the parents from meaningful participation. *See Endrew F. v. Douglas County School District,* 798 F.3d 11329 (10th Cir. 2015). Moreover, the Petitioners' own expert concluded that the school staff kept "great data."

Implementation of IEPs and BIPs:

33. Petitioners have not proved by a preponderance of the evidence that the Respondent failed to implement substantial or significant provisions of the IEP and/or BIP. In the alternative, even if Petitioners had established that the Respondent failed to implement some portion of [redacted]'s IEP/BIP, in examining a claim that an LEA failed to implement an IEP, the Fifth Circuit has stated that:

> "to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of the IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's but it still holds those agencies accountable for material failures and for providing disabled child a meaningful educational benefit." *Houston Ind. School Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), *cert. denied,* 531 U.S. 817 (2000); *see also* J.P. ex rel. Peterson v. County School Bd. of Hanover Co., Va., 447 F.Supp.2d 553 (E.D. Va. 2006), *vacated on other grounds*, 516 F.3d 254 (4th Cir. 2008).

34. Even if Respondent failed to implement some portions of [redacted]'s IEP and/or BIP, Petitioners have not shown that it was more than a *de minimis* failure.

Issue 1: ***Whether Respondent provided [redacted] with a FAPE between October 3, 2013, and the end of the 2013-2014 school year.***

35. This issue involves whether the operative IEP during the relevant time period, including the BIP, appropriately addressed [redacted]'s behavioral and social/communication needs, and whether that IEP was implemented properly.

36. All other claims regarding the appropriateness of the 2013-2014 IEP were dismissed in the October 25, 2016 Order.

37. Based on Findings 1-68, and other evidence in the record, [redacted]'s disability manifested in behavioral and social/communication deficits. These needs were properly addressed during the 2013-14 school year with interventions such as positive reinforcement, clear routines and visual schedules, direct instruction in social skills, and assistance from trained staff in learning to regulate his own emotions and behaviors. [redacted]'s IEP team clearly considered the use of positive behavioral supports, both through discussion at meetings and by seeking and incorporating the recommendations of Ms. [redacted], Mr. [redacted], and Ms. [redacted].

38. Based on Findings 1-68, and other evidence in the record, the IEP and Behavior Intervention Plan developed for [redacted] by his IEP team, and updated by his IEP team throughout the 2013-2014 school year, were reasonably calculated to enable him to make educational progress by accommodating and addressing his behavioral and social/communication needs.

39. Based on Findings 48-53, the failure to provide [redacted] with a written "crisis plan" during either school year at issue was neither a procedural nor a substantive violation of the IDEA.

Neither the statute nor its implementing regulations require the provision of a specific plan for crises or emergencies. The evidence presented established that the IEP team adequately considered, and planned for, ': s behaviors that disrupted his learning and that of others.

40. Based on Findings 1-68 and other evidence in the record, Respondent did not deny a FAPE during the 2013-2014 school year by failing to provide him with counseling as a related service. Counseling as a related service must be provided if required for a student to benefit from special education. 34 C.F.R. 300.34(a). Anxiety about transitions, changes, and other concerns are common for students with . It was reasonable for the IEP team to conclude that N.C.'s anxieties and other -related needs were better addressed through behavioral supports, structures and routines throughout his day, rather than through separate counseling sessions. The Undersigned concludes that counseling as a related service was not a necessary ingredient of a FAPE for during the 2013-2014 school year.

41. Based on Findings 1-68 and other evidence in the record, the IEP team implemented the IEP appropriately. The evidence presented shows that received the special education and related services described in the IEP, he received instruction in the various goals from appropriate staff in appropriate settings, his teachers and aide received additional training in how to appropriately implement his plan, and his IEP team met regularly to review and revise the plans.

42. Based on Findings 1-68 and other evidence in the record, Respondent provided appropriate staff training, strategies, and interventions to address 's behavioral and social/communication needs during the 2013-2014 school year. Although some of the strategies and interventions used were not formally written into his IEP and BIP until the spring of 2014, the evidence showed that the strategies were in place for most or all of the applicable limitations period and resulted in improved behavior. The delay in formally writing all strategies into the IEP and BIP is neither a procedural nor a substantive violation of the IDEA and did not result in a denial of FAPE to *See Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. Re-1,* 798 F.3d 1329, 1338 (10th Cir. 2015), *cert. granted,* 137 S. Ct. 29, 195 L. Ed. 2d 901 (2016) (where student had behaviors that interfered with his learning but was never subjected to a disciplinary change in placement, "all that was required by the Act was for the District to 'consider' behavioral intervention. The record is filled with examples of the District's consideration of Drew's behavioral issues. Thus, the District complied with federal law."); *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762, 766-67 (8th Cir. 2011) (failure to include appropriate behavioral strategies in a written plan does not lead to a denial of FAPE unless it is shown that the strategies were not actually used in the classroom).

43. Based on the foregoing, the Undersigned concludes that received appropriate behavioral strategies and social/emotional services to allow him to receive a free, appropriate public education during the 2013-2014 school year at Elementary.

Issue 2: ***Whether Respondent provided with a FAPE during the 2014-2015 school year.***

44. Based on Findings 69-103, and other evidence in the record, Respondent did not change 's placement when it reassigned him from Elementary to Elementary prior to the start of the 2014-2015 school year. The term "placement" under the IDEA encompasses "the 'mainstreaming' ideal of the LRE requirement" but does not include "the precise physical location where a disabled student is educated." *AW ex rel. v. Fairfax Cty. Sch.*

Bd., 372 F.3d 674, 681 (4th Cir. 2004). The classroom at [redacted] Elementary was a selfcontained special education classroom of similar size, following the same curriculum, and allowing for the same level of mainstreaming [redacted] received at [redacted] Elementary. Furthermore, the amount and type of special education and related services provided in his IEP remained the same. Therefore, the reassignment was a change in location but not a change in placement.

45. Based on Findings 69-103, and other evidence in the record, Respondent met the requirements of the IDEA with regard to the planning and execution of [redacted]'s move from [redacted] Elementary to [redacted] Elementary. The IDEA does not require a separate written transition plan for transitions from one school to another. The only requirement for a transition plan refers to the transition from school to post-secondary activities. *See generally* 34 C.F.R. 300.320; *see also Park Hill Sch. Dist. v. Dass*, 655 F.3d 762, 766 (8th Cir. 2011); *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 26 (1st Cir. 2008) ("We conclude, without serious question, that the district court did not err in finding that the absence of either a transition or behavioral plan did not constitute a procedural defect within the meaning of the IDEA."). [redacted]'s IEP team appropriately considered how the move between schools might impact him, and took sufficient steps to ease any fears or anxiety the change might cause him.

46. Based on Findings 75-103 and other evidence in the record, the IEPs in place for [redacted] throughout the 2014-2015 school year, as revised from time to time by his IEP team, were reasonably calculated to provide [redacted] with the equal opportunity to make meaningful and more than "de minimis" educational progress.[3] Each IEP contained several goals related to [redacted]'s social/communication and behavioral needs, based on sufficient data and input from a variety of sources. The IEP's provided for daily direct instruction in social/emotional skills and daily living skills, and sufficient related services to allow [redacted] to receive an educational benefit. [redacted]'s IEPs clearly provided "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir. 1990) (quoting *Rowley*, 458 U.S. at 203); *see generally, OS ex rel. Michael v. Fairfax County School Bd.*, 804 F.3d 354 (4th Cir. 2015) (all three phrases, "educational benefit," "some educational benefit" or a "meaningful educational" benefit, refer to the same standard).

47. Any lack of educational progress made by [redacted] during the 2014-2015 school year cannot be fairly ascribed to Respondent, given his parents' failure to present him for core academic instruction for most of the school year.

48. Based on Findings 75-103 and other evidence in the record, the Behavior Intervention Plans in place for [redacted] during the 2014-2015 school year, as revised from time to time by his IEP team, provided appropriate accommodations, supports, and strategies to address [redacted]'s behavioral needs.

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[3] The Supreme Court is currently reviewing the level of progress required for disabled students to receive a FAPE. *Endrew F. v. Douglas County School District RE-1*,798 F. 3d 1329 (10th Cir. 2015), *cert. granted,* 137 S.Ct. 29 (2016); *see,* transcript of Oral Argument at 53:3-4, 58:3-22, *Endrew,* No. 15-827(Jan. 11, 2017) (Justices Ruth Bader Ginsburg and Elena Kagan's references to the "some bite" standard for progress.). Based on either the meaningful, more than "de minimis," or "some bite" standards discussed by the Supreme Court, the Undersigned concludes that N.C. has been provided a FAPE based under any of the three standards.

49. Based on Findings 88-103 and other evidence in the record, [redacted]'s IEP team during the 2014-2015 school year clearly met its obligation under the IDEA to "consider the use of positive behavior interventions and supports" for [redacted], and sufficiently implemented such interventions and supports to provide [redacted] with the opportunity for a FAPE. *See, e.g., Endrew F., supra.*

50. Based on Findings 88-103 and other evidence in the record, Respondent implemented [redacted]'s IEP and BIP during the 2014-2015 school year to the extent reasonably possible, given his parents' failure to present him for instruction for a large portion of the school year. The evidence presented shows that [redacted] received the special education and related services described in the IEP, he received instruction in the various goals from appropriate staff in appropriate settings, his special education providers collaborated with his regular education teachers to ensure appropriate modification and accommodation in the regular education classroom, his teachers and aide received additional training in how to appropriately implement his plan, and his IEP team met regularly to review and revise the plans

51. Based on Findings 88-103 and other evidence in the record, the staff who worked with [redacted] at [redacted] Elementary were appropriately trained and had the resources necessary to provide the services and supports in his IEP. Furthermore, Respondent implemented sufficient strategies and interventions to address [redacted]'s behavioral and social/communication needs during the 2014-2015 school year. With these services in place, [redacted] was provided the opportunity to receive educational benefit. *See Rowley*, 458 U.S. at 176.

52. Based on the foregoing, the Undersigned concludes that Respondent provided [redacted] with a free, appropriate public education during the 2014-2015 school year.

Issue 3: ***Whether Respondent Denied [redacted] a FAPE by failing to disclose the full [redacted] Report in a timely manner.***

53. Parents of a child receiving special education services have a right to access records concerning their child's services, including evaluations and other reports. *See* N.C.G.S. § 115C109.3.

54. Counsel for Respondent, and Respondent's representative at the hearing, acknowledged that Petitioners had a right to review the longer report by [redacted] [redacted] and that failing to provide it to them upon request was a procedural error. Based on this acknowledgement and Findings 104-123, the Undersigned concludes that the Respondent's intentional failure to provide a copy of the full [redacted] Report to Petitioners at, or prior to, the IEP meeting and, thereafter, violated the parents' rights to meaningful participation in the IEP process.

55. In matters alleging a procedural violation, the hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (i) impeded the child's right to a free appropriate public education; or, (ii) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (iii) caused a deprivation of educational benefits." N.C.G.S. 115C-109.8(a).

56. However, "[a] procedural violation will not support a cognizable claim . . . unless the parent can show the procedural violation actually interfered with the child's FAPE." *Singletary v. Dep't of Health & Human Servs./NC Infant Toddler Program*, 502 F. App'x 340, 342 (4th Cir. 2013).

57. If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations. *Burke County Bd. of Educ. v. Denton,* 895 F.2d 973, 982 (4th Cir.1990).

58. In light of the fact that [redacted]'s behavior improved in the last few months at [redacted] Elementary, and in light of earlier conclusions regarding [redacted]'s receipt of FAPE at both [redacted] and [redacted] Elementary Schools, the Undersigned concludes that the failure to provide the full [redacted] Report did not impede [redacted]'s right to a FAPE or cause a deprivation of educational benefits even though it did impede the parents' right to examine all relevant records with respect to the evaluation/observation of [redacted] and meaningful participation in the IEP process. 34 C.F.R. § 300.603(a); *MM v. Lafayette School Dist.,* 767 F.3d 842 (9th Cir. 2014).

59. The actions of Senior Administrator [redacted] and the other school staff in the pre-IEP meeting seriously undermined the integrity of the collaborative IEP process.

60. To ignore such behavior sets a dangerous precedent and invites similar behavior especially when this activity was initiated and condoned by senor administrative staff.

61. Even though the communications with the Petitioners were challenging, the Respondent cannot justify its failure to comply with the procedural mandates of the IDEA by blaming the parents.

62. Unfortunately, in light of the Undersigned's earlier conclusion that [redacted] received a FAPE at both [redacted] and [redacted] Elementary Schools despite the Respondent's failure to disclose the full [redacted] Report, there is no remedy available for the Petitioners under the IDEA for this procedural violation.

THEREFORE, the Undersigned finds and holds that there is sufficient evidence in the records to properly and lawfully support the Conclusions of Law cited above.

FINAL DECISION

BASED upon the foregoing **FINDINGS OF FACT** and **CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that:

1. Petitioners have failed to prove, by a preponderance of the evidence, that Respondent denied [redacted] a free appropriate public education during the portions of the 2013-2014 school year that fell within the statute of limitations applicable to this case.

2. Petitioners have failed to prove, by a preponderance of the evidence, that Respondent denied [redacted] a free appropriate public education during the portions of the 2014-2015 school year that fell within the statute of limitations applicable to this case.

3. Respondent developed IEP's, including Behavior Intervention Plans, during the relevant time periods that were reasonably calculated to provide [redacted] with a free, appropriate public education, and implemented those plans to the extent possible when [redacted]'s parents presented him for school.

4. Respondent committed a procedural violation of the IDEA by failing to disclose the full [redacted] Report to Petitioners prior to the May 2014 IEP meeting, but although this procedural violation impeded the parents' meaningful participation in the IEP process, it did not result in a denial of a free and appropriate public education to [redacted] and this Tribunal has no remedy to award under the IDEA.

5. Petitioners have failed to carry their burden of proof on all issues and accordingly, Petitioners are not entitled to relief in this special education contested case.

IT IS HEREBY ORDERED that all of Petitioners' claims are **DISMISSED WITH PREJUDICE.**

NOTICE

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 Final Decision.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C106.1 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 further notices, time lines, and other particulars should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina prior to the required close of the appeal filing period.

IT IS SO ORDERED

This the 30th day of January, 2017. B

Stacey Bice Bawtinhimer
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 30th day of January, 2017.

A

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