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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 03825

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

INTRODUCTORY PARAGRAPH

THIS MATTER was heard before Administrative Law Judge Stacey B. Bawtinhimer on October 4 – 7, November 16 – 18, November 28 – 30, and December 1, 2016 at the Office of Administrative Hearings in Raleigh, North Carolina.

Petitioner [redacted] filed a Petition for a Contested Case Hearing ("Petition") in the Office of Administrative Hearings on behalf of her son, [redacted] on April 15, 2016, alleging, *inter alia*, that the Wake County Public School System (hereinafter "WCPSS, Wake County Schools, or Respondent") violated the procedural and substantive requirements of the Individuals with Disabilities Improvement Act ("IDEA"), its implementing regulations, and state law, thus denying her son [redacted] a free and appropriate public education ("FAPE") in the least restrictive environment ("LRE").

After considering a hearing on the merits held on the above-mentioned dates, arguments from counsel for both parties, all documents in support of or in opposition to the parties' motions, and all documents in the record as well as all stipulations, admission, and exhibits, it appears to the Undersigned that Respondent violated the IDEA, its implementing regulations, and state law, thus denying [redacted] a free and appropriate public education in the least restrictive environment, and the Petitioner [redacted]'s meaningful participation in the IEP process and judgment is for Petitioners on some, but not all, of the issues raised in this contested case.

APPEARANCES

For Petitioners:

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WITNESSES

For Petitioners:

[redacted], [redacted]
[redacted], Ph.D.
[redacted] L.P.N.
[redacted], MA, CCC-SLP
[redacted][1], Ph.D., [redacted]
[redacted], R.N., P.N.P.
[redacted], Ed.D.
[redacted], [redacted]'s [redacted] Teacher
[redacted], OTR/L
[redacted], M.D.
[redacted], M.D.

For Respondent:

[redacted], Senior Administrator WCPSS
[redacted], Case Manager, LEA
[redacted], School Psychologist
[redacted], MA, CCC-SLP
[redacted], MS, OTR/L
[redacted], MA, CCC-SLP
[redacted], OTR/L
[redacted], Ed.D.
[redacted], Senior Administrator WCPSS
[redacted], R.N.
[redacted], R.N.

[1] Petitioner [redacted] is referred to in portions of the transcript as [redacted] or Dr. [redacted]

EXHIBITS

The following Stipulated Exhibits were received into evidence at the start of the hearing:

Stipulated Exhibits Nos. 1-55 (hereafter Stip. Ex. 1, Stip. Ex. 2, etc.)

The following exhibits were received into evidence during the course of the hearing:

Petitioners' Exhibits 1-5, 7 (pp.97-99), 16 (pp.496-497), 17, 29-38 (hereafter Pet. Ex. 3, Pet. Ex. 4, etc.).

Respondents' Exhibits 3, 4, 15, 18, 19, 21-23, 25, 35 (pp. 412-415), 37-39, 43-45 (hereafter Resp. Ex. 1, Resp. Ex. 2, etc.).

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

PROCEDURAL BACKGROUND

Petitioners filed a Petition for a Contested Case Hearing on April 15, 2016. The Petition raised claims related to the provision of a free, appropriate public education to [redacted], a preschool student, through his evaluation and eligibility determination and the 2015-16 school year up to the date of the Petition.

At the start of the hearing, Petitioners made an oral motion *in limine* to limit the evidence in the case to evidence existing at the time of the Petition. Subject to a qualification by Respondent's counsel that Respondent intended to present some evidence of discussions of academic progress that occurred after the Petition was filed, which the Undersigned approved, the motion *in limine* was granted. However, it was also noted that to the extent that the Respondent had information prior to the due process filing and the Resolution Meeting which may have impacted their decision regarding the provision of School Nurse Services and avoided this contested case hearing, the Undersigned finds very relevant to the proceedings.

At the close of Petitioners' case, Respondent made an oral Partial Motion to Dismiss pursuant to N.C.G.S. § 1A-1, Rule 41(b). The Undersigned also raised *sua sponte* a jurisdictional issue regarding claims about the transportation personnel. After hearing arguments of the parties and reviewing the evidence presented by Petitioners, the Undersigned entered an Order dated December 2, 2016 dismissing the following portions of Petitioners' claims:

1. Claims regarding the training of transportation personnel and implementation of transportation as a related service;

2. Claims regarding the appropriateness of the gross motor IEP goals; and,

3. All claims regarding the implementation of the related services of speech and physical therapy.

REMAINING ISSUES

Competing sets of Issues for Hearing were proposed by the parties on the first day of hearing. Based on the presentations of the parties during the hearing, and subject to the December 2, 2016 Order dismissing certain claims, the Undersigned defines the remaining issues in, order of priority, to be determined as follows:

I. Whether Petitioners met their burden of demonstrating that Respondent failed to offer [redacted] a FAPE by determining that he did not require School Nurse Services ("School Nurse Services Issue") as a related service in the IEP meetings held on April 29, 2015, July 17, 2015, and February 2, 2016;

II. Whether Petitioners met their burden of demonstrating that Respondent denied [redacted] a FAPE by placing him in a Developmental Delay program in a separate preschool setting ("Placement Issue") for the 2015-16 school year; and,

III. Whether Petitioners met their burden of demonstrating that Respondent denied [redacted] a FAPE between April 16, 2015 and April 15, 2016 by offering substantively and procedurally inappropriate Individualized Education Plans with respect to: the IEP goals, excluding gross motor goals, ("Goals Issue"); the provision of direct instead of support occupational therapy as a related service ("OT Issue"); the failure to conduct an assistive technology/augmentative communication evaluation and a functional behavior assessment ("FBA") (collectively the "Evaluation Issue"); the sufficiency of the progress monitoring ("Progress Monitoring Issue"); and the denial of Extended School Year services ("ESY Issue").

BURDEN OF PROOF

Petitioners acknowledged in the Order on the Final Pre-Trial Conference entered on October 4, 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

The parties proposed an Order on the Final Pre-Trial Conference, which was approved and filed in the Office of Administrative Hearings on October 4, 2016. The Order was amended by stipulation of the parties on February 13, 2017.

The parties stipulated to the following Jurisdictional, Party, and Legal 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.

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

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

4. 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. The IDEA and implementing regulations and N.C. Gen. Stat. § 115C-109.6(a) control the issues to be reviewed.

5. 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.

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

7. 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.

8. 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 unless the other party agrees otherwise. 20 U.S.C. § 1415(f)(3)(B).

The parties stipulated to the following Factual Stipulations:

9. It is stipulated that Petitioner [redacted]'s date of birth is [redacted] and that his father is [redacted] ([redacted]) and his mother is Petitioner [redacted] ([redacted]). It is further stipulated that Petitioner [redacted] was [redacted]) years old at the time of the filing of this petition.

10. It is stipulated that [redacted] resides with his mother and father at [redacted], in County, North Carolina.

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

12. It is stipulated that Petitioner [redacted] is domiciled within the boundaries of the Wake County Public School System ("WCPSS").

13. It is stipulated that [redacted] has been determined eligible for services under the IDEA under the category [redacted].

14. It is stipulated that [redacted] has been diagnosed with [redacted], [redacted], [redacted] and [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted].

15. It is stipulated that the Wake County Public School System (WCPSS) convened an Initial IEP Referral meeting on March 3, 2015.

16. It is stipulated that the WCPSS administered a Preschool Multidisciplinary Assessment to [redacted] on April 8, 2015.

17. It is stipulated that the WCPSS deemed [redacted] eligible to receive special education services in the category of [redacted] on April 29, 2015.

18. It is stipulated that the IEP Team developed [redacted]'s Initial IEP on April 29, 2015, effective from June 12, 2015, through April 28, 2016.

19. It is stipulated that an Addendum IEP Meeting was held on July 17, 2015.

20. It is stipulated that [redacted] attended preschool at [redacted] Elementary School for the 2015-16 school year.

21. It is stipulated that [redacted] served as [redacted]'s teacher during the 2015-16 school year.

22. It is stipulated that an Addendum IEP Meeting was held on February 2, 2016.

23. It is stipulated that a Reevaluation/Amendment IEP Meeting was held on March 3, 2016.

24. It is stipulated that the Petition for Contested Case Hearing at 16 EDC 03825 was filed in the Office of Administrative Hearings on April 15, 2016.

In addition to the factual stipulations above, certain admissions were requested during discovery. Those that were admitted are listed below. Where the parties agreed that the content of the admission was relevant to the hearing issues and admissible into evidence, the admissions have been converted to stipulations. Where the parties did not agree, the content of the admissions has been included solely as a record of those admissions rather than as stipulations.

25. It is stipulated that prior to the April 29, 2015, IEP meeting, [redacted] expressed her preference for [redacted].

26. It is stipulated that discussion of placement in the Regular Early Childhood Program setting was not reflected in the April 29, 2015 meeting minutes.

27. It is stipulated that [redacted] was not raised or discussed at the April 29, 2015 meeting.

28. It is stipulated that on July 17, 2015, ': s IEP Team determined that would receive six months of nursing services on a trial basis and that various sources of information would be reviewed.

29. It is stipulated that Respondent did not request any additional documentation from 's physicians regarding 's nursing needs between July 17, 2015, and February 2, 2016.

30. It is stipulated that Respondent did not seek any direct input from 's parents regarding 's nursing needs between July 17, 2015, and February 1, 2016.

31. It is stipulated that the WCPSS did not invite to the IEP Meeting held on February 2, 2016.

32. It is stipulated that the February meeting was the first time Ms. raised the issue of needing more "appropriate" materials to teach with central office staff.

33. It is stipulated that 's IEP Team did not share any "[h]ome health nursing documentation and input, physician documentation, [or] teacher observation and input" with Petitioner prior to the IEP Meeting held on February 2, 2016.

34. It is stipulated that no member of the IEP Team, other than , , , , and Petitioner , commented or provided input on whether they thought continued to require nursing services at the IEP Meeting held on February 2, 2016.

35. It is stipulated that received only four (4) sessions of speech/language therapy during the first (1st) reporting period of the 2015-16 school year.

36. It is stipulated that received only four (4) sessions of speech/language therapy during the second (2nd) reporting period of the 2015-16 school year.

37. It is stipulated that received only six (6) sessions of physical therapy during the first (1st) reporting period of the 2015-16 school year.

38. It is stipulated that received only six (6) sessions of physical therapy during the second (2nd) reporting period of the 2015-16 school year.

39. It is stipulated that during the 2015-16 school year, whenever 's regular nurse was unavailable and was unable to supply a substitute nurse for , was unable to attend school.

40. It is stipulated that was absent from school on August 25, 2015.

41. It is stipulated that was absent from school on September 3, 2015.

42. It is stipulated that was unable to attend school on September 3, 2015, due to lack of nursing coverage.

43. It is stipulated that Petitioner emailed on September 7, 2015, to ask for suggestions to prevent from missing additional school days due to a lack of nursing coverage.

44. It is stipulated that was absent from school on January 30, 2016.

45. It is stipulated that 's nurse, as of July 22, 2016, administered three (3) medications during the school day.

The following were admitted during discovery but are considered irrelevant, inadmissible, or otherwise not suitable for stipulation by one of the parties.

46. Respondent admitted in discovery that the records provided in response to Petitioner 's record request dated February 19, 2016, did not contain any documentation of the "[h]ome health nursing documentation and input, physician documentation, teacher observation and input, and parental observation/input" that the IEP Team agreed to collect at the IEP Meeting held on July 17, 2015.

47. Respondent admitted in discovery that the physicians' orders provided in response to Petitioner 's record request dated February 19, 2016, were not signed by any physicians.

48. Respondent admitted in discovery that Petitioner attended the Resolution Meeting held on May 4, 2016 ("Resolution Meeting") without an attorney.

49. Respondent admitted in discovery that served as the LEA Representative at the Resolution Meeting.

50. Respondent admitted in discovery that at the Resolution Meeting an offer of OT services was given at one session a week for twenty minutes.

51. Respondent admitted in discovery that during the Resolution Meeting, Ms. stated the nursing data had been reviewed.

52. Respondent admitted in discovery that during the Resolution Meeting, Ms. stated the IEP Team had a discussion about 's need for nursing services and used the data as the basis of its discussion and decision.

53. Respondent admitted in discovery that during the Resolution Meeting, Petitioner asked Respondent for the nursing data that had been reviewed.

54. Petitioners admitted in discovery that Respondent offered to place at either or for Developmental Disabilities at the IEP Meeting held on May 17, 2016, and the Resolution Meeting held on May 4, 2016. Petitioners admitted in discovery that Petitioners declined placing at

either [redacted] or [redacted] due to the locations of the schools and Respondent's unwillingness to provide transportation to and from the before and after school programs.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the stipulations of record, 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.

Summary of the Case

1. [redacted] is a medically fragile, [redacted]-year-old [redacted] student who has a great smile and always seems happy. Tr. 911:16. His [redacted] teacher described him as having a "sweet personality" and "easygoing." Tr. 911:15, 17. [redacted] is well known throughout [redacted] Elementary School. His personality is his greatest strength; he is a "rock star in our school." Tr. 911:18-21 ([redacted] testimony). His smile just attracts people. Tr. 911:24.

2. [redacted]'s sunny disposition belies his serious medical issues.

3. When the petition was filed [redacted] was [redacted] years old. Stip. #9. He was and currently is diagnosed with [redacted], [redacted], [redacted] and [redacted], [redacted], [redacted], [redacted] ([redacted]), [redacted], and [redacted]. Stip. ## 9, 14.

4. [redacted] is a rare genetic disorder which comes with a host of medication conditions and affects 1 in 125,000 births. Tr. 984:24-25, 985:3 ([redacted] testimony). Perhaps "once in a career" a pediatrician would treat a child with this rare genetic disorder. Tr. 984:25-985:2.

5. In addition, it is uncontested that [redacted] has a "complicated medical history" and has the comorbid disorders of multiple [redacted], [redacted] of undetermined origin [redacted], [redacted] and allergies to [redacted], and [redacted]. Stip. Exs. 7, 12, 18, & 24 (all "Summaries of Assessments Information" in his IEPs). [redacted] is on multiple medications, and followed by various specialists including ophthalmology, pulmonology, neurology, nutrition, Ear Nose and Throat Specialist, urology, orthopedics, genetics, dermatology, infectious disease, and immunology. Stip. Ex. 27, p. 126.

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[2] [redacted]. explained that [redacted], [redacted], and [redacted]s are a fancy set of terms for a "[redacted]." Tr. 373:15-19. [redacted] wears a medic alert bracelet because of his [redacted]. Tr. 374:14-18; Tr. 997:5-15.

6. [redacted] initially received Early Intervention Services ("Early Intervention") through Part C of the IDEA, including in-home physical therapy one to two sessions per week, occupational therapy ('OT") one session per week for sixty minutes duration each session, speech language therapy one session per week, and community based rehabilitative services one session per week. [redacted] also received feeding therapy through a speech language pathologist once every two weeks. Stip. Ex. 5, p. 12.

7. Prior to enrolling in Wake County School's preschool, the Early Intervention Services provided [redacted] thirty-five (35) hours of a private duty nurse, in addition to respite care, to attend to his significant medical needs. Stip. Ex. 5, p. 13. When he transitioned to Wake County Schools, these nurse services were removed. Wake County Schools did not recommend or conduct a medical evaluation prior to removing nurse services.

[redacted]'s Evaluations

8. On March 3, 2015, the Preschool Assessment IEP Team met to determine whether to evaluate [redacted] Stip. Ex. 2, p. 3. The team decided to conduct the following evaluations: vision, hearing, academic achievement, mental ability, behavioral/emotional skills, perceptual development, processing development, developmental history, speech/language, visual motor integration, eye/hand coordination, fine and gross motor, and adaptive behavior[3]. Stip. Ex. 4, p. 9. [redacted] signed a Consent for Evaluations on March 3, 2015. Stip. Ex. 4. p. 9. An occupational evaluation was not conducted by WCPSS rather the IEP Team adopted the OT evaluation completed by Ms. [redacted] in January 27, 2015. Stip. Ex. 27, Stip. Ex. 29, p. 148. The OT issue is addressed on pages 54-57 in this Decision. The IEP team also did not discuss a medical evaluation for his nurse related services. Stip. Exs. 1-5. The failure to conduct a medical assessment is discussed *infra.*

9. Petitioners contend that Respondent failed to conduct complete evaluations of [redacted] to fully determine his communication, behavioral, and educational needs. Stip. Exs. 1-10. Despite evidence [redacted] was non-verbal, WCPSS failed to conduct an Assistive Technology Assessment ("AT") or an Augmentative Communication Assessment. Stip. Exs. 1-10. The IEP documents from [redacted]'s Initial Referral IEP meeting on March 3, 2015, did not include any discussion of conducting an Assistive Technology Assessment or an Augmentative Communication Assessment[4]. Stip. Exs. 1-5. Despite reporting [redacted]'s attention was a concern, WCPSS failed to conduct an FBA of [redacted] Stip. Exs. 1-10.

10. The evaluations at issue in this case are: 1. the speech-language valuation to the extent that an assistive technology evaluation was not conducted; 2. the occupational evaluation

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[3] The Petitioners did not contest the appropriateness of the functional visual and learning medium assessment and mobility/gross motor assessment conducted by [redacted] and [redacted] respectively. Stip. Ex. 30, p. 153; 29, pp. 149-50.

[4] [redacted] is nonverbal and Petitioners complain that the Respondent failed to conduct an assistive technology evaluation or an augmentative communication evaluation. For purposes of this decision, because the assistive technology evaluation would have evaluated [redacted]'s needs for augmentative communication devises, reference to an assistive technology evaluation includes the augmentative communication component.

with respect to the provision of direct occupational therapy; and 3. The FBA because of ': attentional issues.

11. As indicated in the psychological evaluation, had delays in his cognitive development, with skills primarily in the range and some skills scattered up to . Stip. Ex. 29, p. 144. In particular, exhibited a variable attention span, which was consistent with his results on the Behavior Assessment System for Children, Second Addition. Stip. Ex. 29, pp. 144-45.

12. The speech language evaluation conducted by WCPSS speech therapist, , indicated that was not yet pointing to named pictures, identifying common objects or consistently following routine commands. Stip. Ex. 29, p. 146. could produce some vocalizations, indicate his desire to continue preferred activity through actions/gestures, and imitate clapping and waving. Stip. Ex. 29, p. 147. Overall, had significantly delayed language comprehension and production skills and was demonstrating skills in the 10 to 11-month range. Stip. Ex. 29, p. 147.

13. Based on the battery of evaluations conducted, exhibited global developmental delays, with skills clustering between the seven and ten-month age range. Stip. Ex. 29, p. 150. The evaluation team recommended a learning environment with minimal distractions and consistent adult support for daily activities, opportunities for repetition and basic cause/effect activities, exaggerated modeling, and instruction in basic play skills, along with several related services. Stip. Ex. 29, pp. 151-52.

14. The team also collected information from 's pediatrician since birth, Dr. , who completed a form indicating 's diagnosis, his current medications, and described how 's conditions impact him educationally as follows: "This condition has far reaching impacts on [ ]'s strength, attention, and learning ability as well as his ability to be physically active. He will need many accommodations in school to provide optimal learning." He also listed "limited physical mobility," "limited cognitive/learning skills/developmental delays," and "limited fine motor skills" as adversely impacting in the educational setting. Stip. Ex. 51, p.1.

15. attended Elementary School ("") beginning on or about August 3, 2015. Tr. 1138: 8-10. He was assigned to 's , separate Developmental Delayed classroom for the 2015-2016 school year. There was one teacher and two teaching assistants in this classroom at the start of the year and up to 12 students. Tr. 902:23-903:6; Tr. 74:3-10. (testimony).

SCHOOL NURSE SERVICES

16. The primary issue in this case is the provision of School Nurse Services as a related service in 's IEP. "School Nurse Services" are services provided by a qualified school nurse. 34 C.F.R. 300.34(c) (13).

17. On April 16, 2015, , M.D. signed a WCPSS Medical Information sheet which started the preschool nurse referral process. Stip. Ex. 51. Medical orders were already

in place for Early Intervention nurse services. A signed physician's order is mandatory for the provision of nurse services. Tr. 2244:1-16 ([redacted] testimony).

Medical Services for Evaluating a Student's Medical Care Needs

18. A "medical service" is available as a related service for diagnostic or evaluation purposes. NC Policy 1500-2.28(a) 34 C.F.R. 300.34(c)(5). These are "services provided by a licensed physician to determine a child's medically related disabilities that results in the child's needs for special education and related services. 20 U.S.C. 1401(26); 34 C.F.R. 300.34(c)(5) (emphasis added). WCPSS did not use a licensed physician to determine [redacted]'s need for nurse services. Instead, WCPSS relied exclusively on the determination of a Wake County Human Services nurse that nurse services were unnecessary. Ms. [redacted] did not provide an evaluation report documenting her assessment of [redacted]'s medical needs or communications with his medical providers, parents or WCPSS staff.

19. Determination of [redacted]'s educational needs were not made by a team of qualified professionals and the parent. 20 U.S.C. 1414(b)(4)(A). A copy of the nurse evaluation report was not given to the parent as required by 20 U.S.C. 1414(b)(4)(B). WCPSS relied on the information from one person to determine eligibility and educational need and did not draw upon information from a variety of sources including parent input, information about the child's physical condition and ensure that information obtained from all these sources was documented and carefully considered. 20 U.S.C. 1414(b)(4)&(5); 34 C.F.R. 300.302(c)(i)&(ii).

Nurse Services and Medical Assessments in Wake County Schools

20. In the Wake County Public Schools, when a one-to-one nurse are necessary for a child to attend school, the school system contracts with an outside private nursing agency to bring a nurse into the school for that child. Tr. 2401:17-20.

21. Wake County Schools has over 110 students with g-tubes, and some of them do not require nurse services. Tr. 2421:12-17. There are five students with supplemental oxygen needs who use a pulse oximeter, and some of them require nurse services. Tr. 2422:18-2423:11.

22. At the time of the hearing, forty (40) students in Wake County Schools had one-to-one nurses. Tr. 2401:17-22.

23. According to the Respondent, when nurse services and delegation of nurse services are issues for a student with an IEP, the final decision regarding School Nursing Services and/or School Health Services is supposed to be made by the IEP team, with input and recommendations from the medically fragile nurse. Tr. 2255:23-2256:7; Tr. 2430:13-15.

24. Wake County Schools contracts with Wake County Human Services ("WCHS") for nurse assessments. Tr. 2459:9-22.

25. [redacted], R.N. is employed by WCHS and provides preschool nurse assessments for Wake County Schools. Tr. 2393:16-19. Although she frequently attends IEP meetings and conducts assessments relied upon by the IEP Teams in these meetings, Ms.

[redacted] testified that the WCPSS has not provided her with any training in IEP development. Tr. 2319:20-23.

26. Ms. [redacted] did not provide an evaluation report about her determination that School Nurse Services were unnecessary for [redacted] Ms. [redacted]'s recommendation was the only source of information used by WCPSS to deny School Nurse Services to [redacted]

Distinction Between School Nurse Services and School Health Services

27. Although this case was initially about School Nurse Services it has morphed into a case about "School Health Services" too. School Health Services are services that may be provided by either a qualified school nurse or other qualified person. *34 C.F.R. § 300.34(c)(13).* Both are related services under the IDEA for the provision of medical care.

28. School Nurse Services cannot be delegated to school staff whereas School Health Services can either be provided by a nurse or other qualified staff. *Id.* In either event, the IEP team determines whether school nurse or health services are related services necessary for a student to receive a FAPE. That determination must be made first.

29. Once the IEP team has physician's orders for nurse services, then the IEP team along with the parent determines what related service is applicable, either School Nurse Services or School Health Services. If the IEP team chooses School Nurse Services, then a licensed nurse must provide the medical care. Delegation of medical tasks is not at issue when School Nurse Services is a related service.

30. If, however, the IEP team along with the parent chooses School Health Services, then the school nurse can either provide the medical services or delegate them to qualified school staff.

31. When a school nurse delegates School Nurses Services, then she unilaterally changes the type of related service from School Nurse Services to School Health Services. This is a decision that only the IEP team along with the parent and a team of qualified professionals can make.

32. In its case-in-chief, WCPSS argued that the delegation decision is the nurse's independent professional responsibility which doesn't require a doctor's authorization. Tr. 2420:210; 2243:14-25. This argument would preclude the involvement of [redacted]'s treating physicians and medical providers who were opposed to delegation. With this argument, the Respondent avoids the statutory requirement that a medical service evaluation be provided by a licensed physician. The Respondent blurred the difference between School Nurse and School Health Services by asserting that the nurse's authority for this delegation derived from the Nurse Practice Act. A school nurse has no authority under the IDEA to unilaterally change a related service in a child's IEP.

33. With its delegation argument, the Respondent has "opened the door" for School Health Services as a related service in this case even though School Health Services was not pled in the Petition and is not mentioned in any of the IEP documents. If School Health Services are deemed inappropriate by the IEP team, then by default, the delegation of nursing services can be at issue in the provision of School Health Services. The Undersigned contends that the IEP team never identified School Health Services as a related service in any of [redacted]'s IEPs and should not

be given that opportunity now for the first time in this contested case as a defense of the Respondent's actions. To the extent it must be addressed, relevant facts are reviewed on pages 3436.

School Nurse Services During the 2015-2016 School Year

34. During the 2015-2016 school year, based on the July 17, 2015 IEP from August 3, 2015 through February 2, 2016, [redacted] attended [redacted] with a private duty nurse. The nurse, [redacted], was provided by the nursing agency [redacted] and had previously worked with [redacted] in this home since September 2014. Tr. 218:14-18; 259:13-15. Ms. [redacted] is an LPN. Tr. 218:5-7.

35. According to [redacted]'s treating physicians and medical providers, nurse services is a medical necessity for [redacted] Tr. 304:24-305:36 ([redacted] testimony).

36. On days when Nurse [redacted] was unable to be present, [redacted] was supposed to send a substitute nurse. When a substitute nurse was not available, [redacted] did not attend school. Tr. 882:10-12.

37. Nurse [redacted] would arrive at [redacted]'s home in the morning and would check his physical condition, including his temperature, pulse, blood pressure, and oxygen saturation. Tr. 232:2-233:23. On certain days, due to time constraints, she had to conduct this initial check upon arrival at [redacted]. Tr. 219:5-6. The results of this check were recorded on her daily nursing notes. Tr. 231:8-232:2.

38. Nurse [redacted] rode school transportation to [redacted] with [redacted] each day. She reported that she would ensure his nose and air way were clear and check his oxygen equipment. Tr. 219:10-23.

39. While [redacted] was at school, Nurse [redacted] monitored [redacted]'s nasal congestion, administered oxygen if needed, gave him his medicines, fed him via g-tube, and changed him. Tr. 221:9-23.

40. Initial assessments were done at the start of each day, and checks at nap time, which was expected for a nurse to do. Tr. 2284:5-10, 2286:1-5 ([redacted] testimony).

41. Nurse [redacted] was not responsible for his instruction, and typically sat at a distance and out of [redacted]'s sight while he was receiving instruction in centers or during circle time. Tr. 223:25-224:6; 225:7-13.

42. Nurse [redacted] maintained daily notes regarding [redacted]'s activities, needs, and services throughout the day. Tr. 242:24-243:8. These notes were the main source of information used by the WCHS nurse in making recommendations regarding [redacted]'s needs for medical support during the school day. Tr. 2287:2-5. Nurse [redacted] agreed that it was important that she record all the medical tasks she performed for [redacted] Tr. 274:21-23.

43. The daily notes were kept on a form, which included the date, the results of the initial status check, and a detailed description of ☐'s day. Typically, the notes report activities with times denoted, with entries occurring at intervals as small as ten (10) minutes and as long as ninety (90) minutes or so, with the long intervals generally associated with nap time. Pet. Ex. 17.

44. For example, the September 29, 2015 entry's description section reads as follows:

> 0830 On transport car heading to school. 0900 Arrived to School. 0915 Bell rings, morning announcements. 0930 In class, morning introduction with sing a long song. 0945 Center time with blocks. Diaper changed. Walked through halls with TA. 1030 Group time at smart board with activities. 1200 Outside recess on playground. 1030 lunch time, wash hands, PO feed ate 2 oz, administered 105 ml of formula via pump x 30 minutes, heated well. 1300. Diaper changed, client on cot for nap/rest, O2 portable tank on and connected via NC at ½ L O2 sat. monitor on and attached to probe on great toe. All alarms on. 1345. Administered meds pgt + 15 ml flush. 1430 client up and awake, alert. Diaper changed. 1500. PO feed atee 3oz + administered meds 15 ml. 1530 Dismissal from School. On cab headed to clients home. 1600. Arrived to client's home. Pet. Ex. 17, p. 570.

45. The daily notes generally contain the status check information from the initial check at the start of the day and from a status check during ☐'s nap. Tr. 271:12-20. Nurse ☐ testified that she was "assessing him all throughout the day" and would do "spot checks" often, although these assessments were not necessarily documented in her notes. Tr. 243:13; 251:9-10.

46. Nurse ☐ administered ☐ three (3) medications during the school day through his g-tube. Stip. #45. These medications changed frequently, at least monthly. Tr. 227:823 (☐ testimony).

47. Based on the records and witness testimony, ☐'s medical care needs during school hours included g-tube feedings, medication administration and assessments, pulse oximetry checks, supplemental oxygen and ongoing physical assessments. Tr. 1002:21-1003:5; 1068:161069:7; Stip. Ex. 43; Stip. Ex. 44; Tr. 243:13, 251:9-10.

48. Except for the physical and medication assessments, which are not delegable, according to the WCHS nurses each of these other tasks were delegable based on the nature of the procedures and ☐'s specific medical needs. Tr. 2317:6-15; 2432:24-2433:3; 2445:9-12.

49. The main concern from ☐'s medical providers was not the g-tube and oxygen administration but was the issue of ongoing assessment of ☐ Tr. 425:21-23; 435:11-13; 1060:38. ☐'s treating medical providers expressed that they would not be comfortable with a trained layperson providing ☐'s care in school. Tr. 74:15-18; 426:1-7; 1155:19-25. Petitioners ☐ and ☐ shared this concern as does the Undersigned as explained *infra*. Tr. 1185:10-12.

INITIAL PRESCHOOL REFERRAL PROCESS AND NURSE REFERRAL

50. Since ☐ was transitioning from the Early Intervention Services (Part C of the IDEA) to preschool services, WCPSS began the initial referral process for determining whether ☐ was eligible for special education services under Part B of the IDEA on March 3, 2015. Stip. # 15.

51. On March 3, 2015, a referral meeting was held with the Petitioners and WCPSS to discuss educational programs in Wake County Schools, evaluations, and transition from Early Intervention. Stip. Ex. 2, p. 3.

52. In attendance were [redacted] [redacted], LEA Case Manager; [redacted], BirthKindergarten/Special Education Teacher; [redacted] [redacted], [redacted]'s private nurse; and [redacted]'s parents, [redacted] and [redacted] Stip. Ex. 3, p. 6. The preschool IEP Team recorded on the initial "Special Education Referral" form that [redacted] had a "complex medical history, been diagnosed with [redacted] Syndrome along with other medical diagnoses, and that [redacted] requires supplemental oxygen by nasal cannula during sleep, is fed via g-tube...". Stip. Ex. 5, p. 14.

53. At this meeting, the preschool assessment team noted in the minutes that "[[redacted]] is receiving oxygen when he sleeps. [redacted] currently receives nursing services 5 days a week for 7 hours a day." Stip. Ex. 3, p. 6.

54. The preschool assessment IEP team also met to determine whether to evaluate [redacted] Stip. Ex. 2, p. 3. The team decided to conduct the following evaluations: vision, hearing, academic achievement, mental ability, behavioral/emotional skills, perceptual development, processing development, developmental history, speech/language, visual motor integration, eye/hand coordination, fine and gross motor, and functional behavior. Stip. Ex. 4, p. 9. [redacted] signed a consent for these evaluations. Stip. Ex. 3, p. 6.

55. The preschool IEP team did <u>not discuss</u> or determine that [redacted] would also be medically evaluated regarding his need for School Nurse Services as a related service. There was no evidence presented that [redacted] was asked to sign a consent for such medical services.

Initial Nurse Contact

56. Despite the fact that the IEP team did not agree to medically evaluate [redacted] for nurse services, on April 14, 2015, WCPSS referred [redacted]'s case to WCHS for this evaluation which in this case was conducted exclusively by Ms. [redacted]. Stip. Ex. 50, p. 435.

57. During her involvement with [redacted]'s assessment and the subsequent IEP meetings, Ms. [redacted] maintained contemporaneous encounter notes ("Encounter Notes") regarding her interaction with [redacted], WCPSS, WCHS staff and the Petitioners. Stip. Ex. 50. Her Encounter Notes chronologically documented the process of the School Nursing Service referral, communications with the parents, IEP members, WCHS/WCPSS nursing staff as well as her involvement in [redacted]'s IEP and Pre-IEP meetings.

58. As part of the medically fragile nursing team assessment, Ms. [redacted] reviewed [redacted]'s medical file, which was approximately two inches thick. Tr. 2257:6-21. She then spoke with Petitioner [redacted] by phone regarding [redacted]'s medical needs. She did not consult with any of [redacted]'s treating medical providers at that time. Tr. 2325:17-25.

59. Ms. [redacted] testified to the process that she uses in order to assess a child's medical needs when the child is presented for entry into the WCPSS preschool program: "I gather the medical data that is provided to me. And then I also—so I do view all medical records. But I

also—the parents are probably the most essential part because we are performing the daily cares that would occur in school that—they mimic the home care." Tr. 2249:12-16.

60. Ms. [redacted] testified that she then prepares care plans and draft orders: "I do look at the medical records. I do either a telephone call with the parent or I do a home visit. And I do draft care plans based on the information I receive." Tr. 2251:3-7.

61. Ms. [redacted] testified that she drafts care plans and physician's orders before the IEP eligibility meetings, and that the plans and orders are subject to change depending on what the IEP team decides. Tr. p. 2252:5-8. The physician's order form includes a statement that the nursing duties would be delegated and the only variance in these orders are in the specific medical procedures and medications. Stip. Exs. 43-46.

April 23, 2015 Home Visit

62. On April, 23 2015 Ms. [redacted] met with [redacted] at her home for a "home visit" which had been scheduled on April 14th. Stip. Ex. 50, p. 435. Ms. [redacted] and [redacted] RN (another medically fragile nurse), discussed [redacted]'s needs with Petitioner [redacted] and the private nurse, specifically [redacted]'s medical needs and diagnoses, his oxygen saturations, bulb suctioning, allergies, digestive issues, hives, gravity bolus feedings, g-tube and mini button dislodgement procedure. Stip. Ex. 50, p. 435.

63. During the home visit, Ms. [redacted] explained that school staff would be doing the medical procedures and how the staff would be trained. Stip. Ex. 50, p. 435. Ms. [redacted] predetermined that [redacted] would not receive School Health Services as a related service. Her explanation included the "process of obtaining physicians orders for g-tube, suction, oxygen and then the process of training school and transportation staff." Stip. Ex. 50, p. 435. [redacted] signed consents so that Ms. [redacted] could contact [redacted]'s physicians which she did not do at that time.[5]

64. Ms. [redacted] also testified that she described delegation to [redacted] at the home visit, which is her practice. Tr. 2250:13-16

65. Her Encounter Notes, document that Ms. [redacted] communicated to [redacted] that if [redacted]'s g-tube dislodged the "introducer [to reinsert g-tube] would not be used at school, staff will be instructed to insert button with lubricant but without introducer; also explained that school staff not allowed to inflate balloon." Stip. Ex. 50, p. 435. Ms. [redacted] also explained the "process of obtaining physician orders for g-tube, suction, oxygen and then the process of training school and transportation staff." *Id.* If there was a medical emergency, school staff would call the parent or 911. *See* Stip. Exs. 43, 44, 45, & 46.

66. To the extent that Ms. [redacted]'s Encounter Notes were taken contemporaneously and before her involvement in this litigation, the Undersigned gives more weight to this documentation than Ms. [redacted]'s testimony. Furthermore, Ms. [redacted]'s testimony was impeached by several witnesses including a WCPPS witness.

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[5] Interesting to note that the WCHS physician did not sign off on any of these Orders. *See* Stip. Exs. 43 ([redacted]), 44 ([redacted]), 45 ([redacted]), 46 ([redacted]).

Eligibility Meeting: April 29, 2015 IEP Meeting

67. The operative IEP during the 2015-16 school year was first developed at an IEP meeting on April 29, 2015 ("April 2015 IEP"). Stip. Ex. 7, p. 19.

68. The meeting was attended by case manager [redacted], regular education teacher [redacted], [redacted], [redacted], speech pathologist [redacted], physical therapist [redacted], occupational therapist [redacted], visual impairment teacher [redacted], school psychologist [redacted], and WCHS nurse Ms. [redacted]. Stip. Ex. 8, p. 40.

69. The team reviewed the evaluation results and determined that [redacted] demonstrated significant developmental delays, would require maximum support and consistency, and would require support from several different related service providers. Stip. Ex. 9, p. 42. Petitioners had received the evaluations prior to the meeting and did not have any questions at the meeting. Stip. Ex. 9, p. 41; Tr. 68:19-21.

70. The team found [redacted] eligible for special education services in the area of Other Health Impairment. It was noted that the developmental effects of [redacted]'s [redacted] had an adverse effect on his educational performance and [redacted] required specially designed instruction. Stip. Ex. 9, p. 41.

71. [redacted] understood from her prior encounter with Ms. [redacted] that School Nurse Services would not be provided at school and asked that the IEP team readdress having a nurse at school for [redacted] Stip. Ex. 50, p. 435.

72. During the meeting, Ms. [redacted] reviewed her assessment of [redacted]'s medical needs and recommended that he did not require nursing as a related service in order to access his special education services. Stip. Ex. 20, p. 95; Stip. Ex. 50, p. 437. No evaluation report was provided. [redacted] stated that she understood that he did not qualify for nursing as a related service. Stip. Ex. p, p. 42; Tr. 1178:21-1179:2.

73. At the end of the IEP meeting, [redacted] asked about possibility of having a private nurse, via Medicaid, in the classroom. Ms. [redacted] indicated that she would communicate with WCPSS nurse [redacted] Stip. Ex. 50, p. 435.

74. Ms. [redacted] documented in her Encounter Notes dated May 20, 2015 that in a telephone conversation with Ms. [redacted] that [redacted] stated "<u>that nursing services provided are related to the contract with the school system for liability purposes</u>. Student's case can be done by training staff." Stip. Ex. 50, p. 435 (emphasis added).

75. Ms. [redacted] also documented that on May 4, 2015, she: "explained to mom that <u>nursing services in the school are to be provided via contract with school related to liability</u>. She further documented that she "[e]xplained to [redacted] that student's care could be trained to school staff and therefore student did not need nursing as a related service." Stip. Ex. 50, p. 435 (emphasis added).

76. The Prior Written Notice ("PWN") developed following the Eligibility meeting did not contain notice of the decision regarding School Nursing Services or discussions about delegated nurse services which would have been School Health Services. Stip. Ex. 8, p. 37.

77. The April 2015 IEP documents including the Prior Written Notice are devoid of any consideration of School Health Services although this is what Ms. [redacted] had actually recommended. See Stip. Exs. 7; 8, p. 37; 9.

78. No one from WCPSS explained to [redacted] the differences between School Nurse Services and School Health Services, especially that nurse services could not be delegated in School Nurse Services.

[redacted], M.D. June 19, 2015 Letter

79. Regarding the denial of School Nurse Services, [redacted] communicated with [redacted]. Tr. 1185:10-15; 1351:1-4. Based on those communications, [redacted] contacted [redacted]'s physician, [redacted] [redacted], M.D. who has been [redacted]'s pediatrician since shortly before birth, about providing a letter to the IEP team describing his opinion on the nurse issue. Tr. 806:20807:11; 1185:16-23.

80. [redacted] provided a letter to the IEP Team from Dr. [redacted]. Stip. 16, p. 70, Stip. Ex. 34; Tr. 990:14-22, 1026:9-11. In his June 19, 2015 letter, Dr. [redacted] recommended that [redacted] receive nurse services during the school day "as there [were] concerns on [his] part in regards to lay personnel having the skill and training required to assess his respiratory status and need for oxygen titration based on both pulse oximetry measurements and clinical assessment." Pet. Ex. 34; Tr. 991:13-22 ([redacted] testimony).

81. On June 23, 2015 WCPSS preschool services team forwarded Dr. [redacted]'s letter to Ms. [redacted] and for the first and only time, she contacted Dr. [redacted] and discussed his concerns. Tr. 2269:8-15; Stip. Ex. 50, pp. 435-436.

82. Prior to her receipt of Dr. [redacted]'s letter[6], Ms. [redacted] admitted that she did not contact any of [redacted]'s medical providers to seek their input regarding whether [redacted] required School Nurse Services as a related service. Tr. p2325:17-25. According to Ms. [redacted], Dr. [redacted] only concern was about pathogen exposure which had not been previously discussed. T. 2269:4-6, 2269:14-15, 2270:1-2, 2270:25-2271:1.

83. Contrary to Ms. [redacted]'s assertions to the IEP team, Dr. [redacted] testified that he did not express that his only concern was about pathogen exposure and that [redacted] should only have nurse services to get through the cold and flu season. Tr. 991:15-17. Dr. [redacted] testified that, during the summer of 2015, an individual from the WCPSS contacted him to discuss [redacted]'s needs. Tr. 991:3-8 ([redacted] testimony). During this conversation, Dr. [redacted] testified that he did not express that [redacted]'s need for a nurse would only be temporary. Tr. 991:9-11. Dr. [redacted] also did not recommend [redacted] only receive nurse services for six (6) months. Tr. 991:12-14.

[6] Dr. [redacted] refused to sign the Physicians Orders for delegation and wrote a second letter dated March 15, 2016 urging WCPSS to provide School Nurse Services to [redacted] Pet. Ex. 2. The contents of his second letter and Dr. [redacted] expert witness testimony about [redacted]'s needs for nurse services are on pages27-31 of this Decision.

84. Ms. [redacted] testified that nothing about her conversations with Dr. [redacted] changed her analysis of the "delegability" of the medical care tasks [redacted] required. Tr. 2271:2-5; 2268:21-23.

85. However, later on July 2, 2015 in a conversation with Dr. [redacted], her supervisor at WCHS, about Dr. [redacted]'s letter, Dr. [redacted] stated "that the doctor is the expert opinion and that he is more aware of student's status." Stip. Ex. 50, p. 436.

86. This was communicated to WCPSS and in light of Dr. [redacted]'s letter, the IEP team scheduled another meeting to review the nurse services decision before [redacted] would begin to attend school. Tr. 1353:23-1354:22.

87. The Undersigned agrees that the treating physicians of [redacted] are the experts as to his medical status and their opinions about his medical care needs carry greater weight with this Tribunal than that of the WCHS and WCPSS nurses because these nurses testified that they have had not much, if any, experience treating a student with [redacted].

Pre-IEP Meetings of Ms. [redacted] and WCPSS Staff on July 2 and July 9, 2015

88. Before the official July 17 IEP meeting, WCPSS staff had several "Pre-IEP" meetings.

89. A week later, on July 2, 2015, Ms. [redacted] spoke with Ms. [redacted] and together they proposed three options: 1. providing [redacted] with nursing as a related service; 2. providing [redacted] with nursing as a related service for six (6) months; and, 3. placing [redacted] at the [redacted], a different Developmental Day Center like [redacted], Stip. Ex. 50, p. 436.

90. On July 9, 2015, Ms. [redacted] and [redacted] met again this time also in attendance were [redacted], [redacted] to discuss [redacted]'s need for School Nurse Services as a related service in light of Dr. [redacted]'s letter. Tr. 2271:24-2272:2 ([redacted] testimony); Stip. Ex. 50, p. 436. The Pre-IEP team decided on a "proposal" to provide School Nurse Services as a related service to [redacted] for a six (6) month period which would allow observation of [redacted] through the cold and flu season to see his response to pathogen exposure. Tr. 1384:14-25; 2272:232273:1; Stip. Ex. 50, p. 436.

91. In her Encounter Notes, Ms. [redacted] documented that: "All in agreement that nursing [sic] as a related service for 6 mos [sic] with the allowance for school nurse to assess nursing notes from home health, pulmonologist, pediatrician and parent input to better understand student's needs and assess the need to continue with nursing at the end of 6 mos [sic]." Stip. Ex. 50, p. 436. WCPSS contends that no final decisions for the IEP were made at this meeting. Tr. 1385:1-11; 2272:12-16. The Undersigned finds that final decisions regarding the removal of School Nurse Services were made at their Pre-IEP meetings. After their Pre-IEP meeting WCPSS staff decided to schedule an IEP meeting with the parents. Stip. Ex. 50, p. 436.

Official IEP Meeting July 17, 2015

92. On July 17, 2015, the IEP Team met again to discuss [redacted]'s need for School Nurse Services. Stip. Exs. 12, 13, 14, 15, 16.

93. Six (6) individuals attended the IEP Meeting on July 17, 2015: Ms. [redacted], Ms. [redacted], Ms. [redacted], Ms. [redacted], Petitioner [redacted] and [redacted]. Of these six (6) people, four (4) people had previously decided on the proposal to present the team. Tr. 2348:15-18 ([redacted] testimony).

94. [redacted] attended this meeting along with [redacted] a representative from the private nursing agency who acted as an advocate for [redacted] and [redacted] Tr. 1097:4-8; 2273:10-13. Ms. [redacted] shared a concern about potential emergencies at school and advocated for School Nurse Services. Tr. 2274:16-22.

95. Again, Ms. [redacted] did not provide a written report to the IEP team about her decision for a six-month trial period.

96. At the July 17, 2015 IEP meeting, Ms [redacted] indicated that her assessment of the "delegability" of [redacted]'s medical care at school had not changed, and once again, she "[e]xplained to all present that procedures required by student could be delegated to school staff." Stip. Ex. 50, p. 436.

97. However, in light of Dr. [redacted]'s letter, the team proposed a six-month trial period ("the Six-Month Trial") in which [redacted] would receive School Nurse Services as a related service. Tr. 1355:3-8; 2349:21-25; Stip. Ex. 13, p. 62. The purpose of the trial period was to observe his medical care needs in a school setting through the cold and flu season and gather data on whether he needed a full-time nurse to provide his care in school. Tr. 1354:23-1355:8.

98. Ms. [redacted] testified that the IEP Team also discussed providing [redacted] with nursing as a related service without the six (6) month limitation, Tr. 2349:21-25; however, neither the PWN nor the meeting minutes document any consideration of School Nurse Services as a related service <u>without</u> the six (6) month limitation. Stip. Exs. 13, 14.

99. Contrary to Ms. [redacted]'s testimony, Ms. [redacted] admitted that only the six (6) month proposal was discussed at the July 17, 2015 IEP Meeting, the other two options considered at the two Pre-IEP meetings were not raised. Tr. 1418:20-1419:4.

100. [redacted] and Ms. [redacted] agreed with the proposal for the six-month trial period. Tr. 1186:19-25; Tr. 2276:4-6.

101. A follow-up meeting was scheduled for February 2016. Prior to that meeting, Ms. [redacted] would review physician input, parent input, nurse input, teacher input, and the nurse's daily notes to help determine [redacted]'s medical tasks at school and whether they were delegable. Stip. Ex. 12, p. 56; Stip. Ex. 50, p.436; Tr. 2276:21-2277:3, 2278:11-15.

102. Despite the IEP team's decision to obtain additional input from various sources, Ms. [redacted] testified that, contrary to the IEP team's decision, that she had <u>no intention</u> of

reviewing any additional medical documentation during the six-month period. Tr. 2355:2-12 (emphasis added). Ms. [redacted] testified that she did not explain to the IEP Team that she did not intend to contact any of [redacted]'s medical providers during the six (6) month period unless she personally felt it was necessary. Tr. p. 2255:13-16. (*emphasis added*).

103. Even though School Nurse Services were added as a related service, the IEP team failed to include it on the IEP service delivery. Stip. Ex. 12, p. 55.

Six-Month Trial Period

104. During the meeting on July 17, 2015, the IEP Team determined [redacted] would receive School Nurse Services as a related service for six months. The IEP states: "During this time, preschool nurse to review: home health nursing documentation and input, physician documentation, teacher observation and input, and parental observation/input." Stip. Ex. 12, p. 56.

105. Respondent's witness, Ms. [redacted], testified to the importance of collecting data from different sources in conducting an assessment of whether medical needs can be delegated to UAP. Tr. 2453:17-19.

106. During this six months, it is undisputed that:

- Ms. [redacted] visited [redacted]'s classroom just four (4) times. Stip. Ex. 50, pp. 436-438.
- No school nurse, or any other individual from the WCPSS, contacted Petitioner [redacted] or [redacted]'s father to seek any input regarding [redacted]'s nursing needs. Stip. # 30.
- No school nurse, or any other individual from the WCPSS, requested any additional documentation from [redacted]'s physicians regarding [redacted]'s nurse needs. Stip. # 30.

107. [redacted]'s private nurse [redacted] testified that no WCPSS school nurse spoke with her specifically about [redacted]'s medical needs or her nurse notes. Tr. 247:10-14, 248:5-7.

108. Ms. [redacted]'s Encounter Notes indicated her notations about Nurse [redacted]'s interactions with [redacted] in the classroom, his oral intake following surgery, [redacted]'s recent bout with hand, foot, and mouth disease, and [redacted]'s spitting up during feeding. Stip. Ex. 50, p. 437; Tr. 282:20.284:5; 2284:22-2285:3. Ms. [redacted] also spoke with a substitute nurse during one visit, Tr. 2288:8-12, and received home reports through Ms. [redacted]'s nurse notes. Tr. 280:10281:14; 2278:24.

109. Ms. [redacted] testified that she mainly reviewed the daily nurse notes throughout the trial period and leading up to the February 2016 review meeting. Tr. 2286:24-2287:1. According to her, these notes gave her the "best possible picture" of [redacted]'s medical needs at school. Tr. 2287:2-5, Tr. 2282:10-14, 2284:15-21. She admitted that she did not contact any of [redacted]'s medical providers during the trial period. Tr. 2302:22-25.

110. Although Ms. [redacted] testified that [redacted] did not have any medical concerns during the trial period, her Encounter Notes documented that [redacted] had: vomited two times during feedings, was recovering from tonsillectomy and adenoidectomy, his oxygen was increased, he had had emesis and nasal drainage, gagged during g-tube feeding such that it had to be turned off, was recovering from hand, foot, and mouth disease. Stip. Ex. 50, pp. 436-37. She did not document that he had also had been hospitalized for pneumonia and had to be on continuous oxygen for about a week. Tr. 821:2-3.

111. WCPSS stipulated that no one from Wake County Schools sought any direct input regarding [redacted]'s nursing needs from Petitioner [redacted] or [redacted]'s father prior to the meeting held on February 2, 2016. Stip. # 30; Tr. 59:16-21, 60:9-11 ([redacted] testimony), Tr. 2355:23-2356:3, 2381:6-8 ([redacted] testimony). Ms. [redacted] testified that she "d[id]n't know that [she] asked directly" for Petitioner [redacted]'s input regarding whether [redacted] required nursing services. Tr. 2324:2123.

112. WCPSS stipulated that it did not seek any direct input from [redacted]'s medical providers regarding [redacted]'s need for nurse services during the six (6) month time period. Stip. #29, Tr. 415:23-416:2, 426:9-17 ([redacted] testimony); Tr. 559:9-24 ([redacted] testimony), Tr. 992:14-19 (testimony of [redacted]); Tr. 1059:3-6 ([redacted] testimony); Tr. 2302:22-23, 2381:9-10 ([redacted] testimony). WCPSS abdicated this responsibility to Ms. [redacted].

113. Respondent admitted in discovery that the records provided in response to Petitioner [redacted]'s record request dated February 19, 2016, did not contain any documentation of the "[h]ome health nursing documentation and input, physician documentation, teacher observation and input, and parental observation/input" that the IEP Team agreed to collect at the IEP Meeting held on July 17, 2015. Res. Adm. #46.

Additional Pre-IEP Meetings: January 21, 2016 and February 2, 2016

114. On January 21, 2016, prior to the February 2, 2016, IEP meeting, several members of [redacted]'s IEP Team met, again without Petitioner [redacted], to discuss [redacted]'s need for School Nurse Services. Stip. Ex. 50, p. 437; Pet. Ex. 7, pp. 97-99; Tr. 1388:2-9, 2300:22-2300:2 ([redacted] testimony).

115. Ms. [redacted] testified that she shared her recommendation that [redacted]'s nurse needs can be delegated to staff at the meeting on January 21, 2016. Tr. 2300:10-24. Ms. [redacted] also testified that no final decisions were made at this meeting. Tr. 1388:2-13; Tr. 2301:2.

116. Ms. [redacted]'s own notes impeached her testimony and revealed WCPSS' decision to remove School Nurse Services prior to the meeting:

> Met with teacher, Ms [redacted]; senior admin, Ms. [redacted]; Ms. [redacted], RN, [redacted] RN, Ms. [redacted] RN and ST and VI for student. Discussed student's medical needs and the ability to delegate to staff with care plans, md orders and school nurse involvement. Teacher with some reservations related to staffing of the room and student's multiple needs. Ms. [redacted] states she would be able to recommend extra staff in room. Teacher reassured that extensive training would take place to ensure

competency of tasks that will need to be provided to student. Scheduled IEP for February 2, invite to go to parents. Stip. Ex. 50, p. 437.

117. A few hours prior to the official IEP meeting, Ms. [redacted] admitted that she met with Mr. [redacted], the Principal of [redacted] Elementary and LEA Representative, to discuss her assessment of [redacted]'s medical needs and conclusion that School Nurse Services could be delegated. Tr. 2376:23-2377:6. Principal [redacted] reviewed email correspondent between Ms. [redacted] and himself but could not recall the Pre-IEP meeting scheduled hours prior to the official IEP meeting. Tr. 2114-2118:11.

IEP Meeting February 2, 2016

118. At the February 2, 2016, IEP meeting, WCPSS announced it was removing School Nurse Services for [redacted] Stip. Ex. 19, p. 89. Through its contract WCHS nurse, WCPSS predetermined [redacted] would not receive School Nurse Services before the February 2, 2016 IEP meeting. WCPSS provided no evaluation report.

119. According to Ms. [redacted] she simply provided her recommendation to the team that [redacted] did not require School Nurse Services and the team accepted her decision. Tr. 2303:813 ([redacted] testimony). [redacted] testified that, without discussion, Ms. [redacted] informed the team that [redacted] would no longer receive nurse services. Tr. 820:17-23 (L.P testimony.) The WCPSS staff did not review any documentation upon which Ms. [redacted]'s statements were based and accepted her decision *carte blanche*. Tr. 830:24-831:6 ([redacted] testimony).

120. WCPSS did not invite Nurse [redacted] to either the pre-meeting on January 21, 2016, or the IEP meeting on February 2, 2016. Stip. # 31; Tr. 248:14-16 ([redacted] testimony). Nurse [redacted] had served as [redacted]'s nurse nearly every day at school and since September 2014. Tr. 218:16–18. Respondent did not seek any input from Ms. [redacted] about [redacted]'s nursing needs prior to the February 2, 2016, IEP meeting. Tr. 248:17-249:19 ([redacted] testimony).

121. No one from WCPSS informed Petitioner [redacted] that it was her responsibility to invite Ms. [redacted] to the February 2, 2016, IEP Meeting to enable Ms. [redacted] to discuss [redacted]'s nursing needs and have her input considered by the IEP Team. Tr. 815:10-12 ([redacted] testimony).

122. Prior to the IEP meeting, [redacted]'s teacher and teacher assistants had expressed reservations about meeting [redacted]'s nursing needs to Ms. [redacted]. Tr. 250:5-16.

123. Ms. [redacted], [redacted]'s teacher, was the only individual who attended the February 2, 2016, IEP meeting who interacted with [redacted] every day in an educational setting. Prior to the February 2, 2016, IEP meeting, [redacted] and Ms. [redacted], discussed [redacted]'s medical needs, and Ms. [redacted] expressed reservations about performing delegated medical procedures. Stip. # 50.

124. During the IEP meeting, Ms. [redacted] did not comment or provide any input on whether she thought [redacted] continued to require School Nurse Services. Stip. # 35; Tr. 2304:21-25 (testimony of [redacted] stating "I don't know that I heard anybody else speak" at the IEP Meeting other than herself and Ms. [redacted]).

125. [redacted] vociferously advocated for [redacted]'s ongoing need for School Nurse Services, yet, WCPSS did not include any evidence of [redacted]'s concerns, advocacy, or reasons for her position in the minutes. Stip. Ex. 20. The IEP Team merely recorded in the Prior Written Notice: "It is to be noted that Ms. [F] disagrees with this decision." Stip. Ex. 19, p. 89.

126. The only evidence of discussion of whether [redacted] required nurse services was Ms. [redacted] explaining to the IEP Team "how a delegation of nursing [sic] services would look in the classroom and who would be responsible for those services." Stip. Ex. 20, p. 95; Tr. 1194:251195:3. Ms. [redacted] reviewed the delegation process and the training process for staff.[7] Tr. 2304:13-14; Stip. Ex. 20, p. 95. Ms. [redacted] reviewed the draft orders for [redacted]'s medical care at school, and changes were made based on [redacted]'s input. Tr. 2304:15-17, 2305:6-8; Stip. Ex. 50, p. 437.

127. The Prior Written Notice ("PWN") confirmed that the IEP Team did not rely on any "evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action." Stip. Ex. 19, p. 91.

128. The PWN failed to include any "explanation" of the team's decision to remove School Nursing Services; instead, the PWN only documented that "[t]he IEP team met today to discuss removing nursing services." Stip. Ex. 19, pp. 89 – 93; Tr. 561:17-20 (Dr. [redacted] testifying "there [was] no documentation that nursing [was] being stopped). The IEP and PWN did not include any references to School Health Services as a related service. Stip. Exs. 18&19. The LEA representative Principal [redacted] admitted that School Health Services should have been included with the other related services on the IEP. Tr. 2120:3-25.

129. It is undisputed that Ms. [redacted]'s initial decision did not change during the interim period between her first contact with Petitioners on April 5, 2015 until her last at the February 2, 2016 IEP meeting. Even when presented with letters from [redacted]'s treating physicians and medical care providers, Ms. [redacted] decision did not waiver.

130. Because of the Petitioners' transition concerns, the WCPSS determined that the decision to remove nursing services would not take effect until March 7, 2016 in order to allow the family to make appropriate arrangements for [redacted]'s before- and after-school care. Tr.1198:715; 1392:11-24.

Follow up to February 2 IEP Meeting

131. After the IEP meeting, Ms. [redacted]'s draft orders were shared with [redacted]'s medical providers, [redacted], M.D.; [redacted], RN, PNP; [redacted], M.D.; [redacted], M.D. Tr. 2307:8-17; Stip. Exs. 43-46. The orders stated "School Based Public Health Nurse to teach designated staff..." followed by the medical care regimen. Tr. 1011:7-19; 2437:1219; Stip. Exs. 43, p.422; 44, p.424; 45, p. 425; 46, p. 426. Without a signed physician's order, WCPSS nurse staff cannot perform and, therefore, cannot delegate any medical tasks. Tr. 2244:116 ([redacted] testimony).

[7] There was no evidence proffered by the Respondent that school staff were ever trained to perform [redacted]'s medical procedures prior to or after the February 2, 2016 IEP meeting.

132. The physician's orders do not clearly indicate which "school staff" would be administering the medical care described on each order. Tr. 2342:19-2343:8 ([redacted] testimony).

133. WCPSS did not obtain a signed physician's order and plan of treatment from Drs. [redacted] or [redacted]. Stip. Exs. 45 & 46. Dr. [redacted] testified he "had concerns about signing [the physician's order] because [he] did not feel that some of the sections of this document were appropriate for [him] to sign." Tr. 1000:21-24.

134. Two of the four orders returned were signed by Pediatric Nurse Practitioner [redacted] and Dr. [redacted] without any modification except for the spelling of Dr. [redacted]'s first name. Tr. 2309:17-20; Stip. Ex. 43; Stip. Ex. 44; Tr. 1075:2-1076:21. Both Nurse [redacted] and Dr. [redacted] testified that they had no concerns about the orders because they thought [redacted]'s nursing services would continue. Tr. 2309:1-2; 1061:1-1062:4.

135. Nurse [redacted] signed a physician's order and plan of treatment on February 3, 2016. Stip. Ex. 43. At the time of her signing, Nurse [redacted] testified that she understood the document to be providing for "someone to be able to feed through [redacted]'s gastrostomy tube at school." Tr. 428:4-5. Nurse [redacted] explained "[i]t's not the actual task of feeding through the tube that's a concern." Tr. 428:6-7.

136. Nurse [redacted] testified: "The administration through a feeding tube can be delegated. It's the assessment following that administration in a patient like [redacted] . . . because he has a history of difficulty with his airway and aspiration as well as decreased oxygenation related to those things, when you give a patient like that a feeding through a gastrostomy tube, what you're doing is putting food into the stomach that can potentially cause reflux. It can potentially cause him to get some of the reflux contents into his lungs and aspirate. That's why he needs further assessment." Tr. 444:23-445:13.

137. Nurse [redacted] testified if she had understood the physician's order and plan of treatment to mean [redacted] would no longer receive School Nurse Services, she would not have signed it. Tr. 428:8-11.

138. Furthermore, Nurse [redacted] testified that when she signed the physician's order and plan of treatment, she "had no reason to think that [Ms. [redacted]] wouldn't be there with [the school staff]." Tr. 444:1-4.

139. On March 16, 2016, Nurse [redacted] wrote a letter that [redacted] gave to WCPSS clarifying her position that [redacted] needed School Nurse Services. Pet. Ex. 3.

140. No one from the WCPSS contacted Nurse [redacted] to review or revoke her previous physician's order after receiving her letter. Tr. 2366:3-13 ([redacted] testimony).

141. Dr. [redacted] signed a physician's order and plan of care on February 3, 2016. Stip. Ex. 44.

142. When Dr. [redacted] received the order from the WCPSS, she "understood it to be what the oxygen orders were for him at school. . .. [she] knew that he had a nurse with him at

school, and so [she] just thought it was so that they would have orders for her at school." Tr. 1061:1-6 ([redacted] testimony).

143. Dr. [redacted] testified that at the time of signing the order, she thought [redacted]'s nurse would continue to administer the oxygen and "it didn't occur to [her] that it would be passed off to a teaching assistant or a secretary to take care of his oxygen requirements." Tr. 1061:18-1 062:4; 1076:21-25.

144. No one from WCPSS contacted Dr. [redacted] from February 3, 2016, through April 4, 2016. Tr. 1083:10-16 ([redacted] testimony).

145. No one from the WCPSS contacted Dr. [redacted] to revoke her previous physician's order after receiving Dr. [redacted]'s April 4, 2016 letter which stated [redacted] still needed School Nurse Services. Tr. 1083:17-22 ([redacted] testimony).

146. At the hearing, Dr. [redacted] and Pediatric Nurse Practitioner [redacted] stated that they would not have signed the orders if they had understood that the care would be delegated instead of provided by a qualified nurse. Tr. 1061:20-25; Tr. 428:8-11. Dr. [redacted] specifically admitted she hadn't noticed that particular language in the order when she signed it. Tr. 1062:1-2. The Undersigned finds that explanation credible and sincere especially when these providers sent follow up letters soon thereafter explaining that School Nurse Services were necessary and were willing to testify to this effect.

Letters from [redacted]'s Treating Medical Providers Regarding WCPPS' Decision to Deny School Nurse Services

147. Based on the records and witness testimony, [redacted]'s medical care needs during school hours included g-tube feedings, medication administration, pulse oximetry checks, supplemental oxygen and ongoing assessments. Tr. 1002:21-1003:5; 1068:16-1069:7; Stip. Ex. 43; Stip. Ex. 44; Tr. 243:13, 251:9-10.

148. Except for the medical assessments, according to the county nurses, Ms. [redacted] and Ms. [redacted], each of these tasks was delegable based on the nature of the procedures and [redacted]'s specific medical needs. Tr. 2317:6-15; 2432:24-2433:3; 2445:9-12.

149. The main concern from [redacted]'s medical providers was the issue of ongoing assessment of [redacted] Tr. 425:21-23; 435:11-13; 1060:3-8. Multiple witnesses expressed that they would not be comfortable with a trained layperson providing [redacted]'s care in school. Tr. 4:15-18; 426:1-7; 1155:19-25. Petitioner [redacted] and [redacted] shared this concern. Tr. 1185:10-12.

150. Pediatric Nurse Practitioner [redacted], Dr. [redacted], and Dr. [redacted], [redacted]'s medical providers, wrote letters recommending [redacted] receive nursing services, which [redacted] provided to the WCPSS on April 15, 2016. Pet. Exs. 2, 3, 4, 5.

151. Nurse Practitioner [redacted] wrote on March 16, 2016 recommending [redacted] receive nursing services. Pet. Ex. 3. She stated: "To the casual observer, [[redacted]] looks great and is an absolute delight. . .. However, [[redacted]]'s health is very fragile. Subtle changes in his respiratory status can quickly lead to oxygen desaturation and requirement for supplemental oxygen. Any

alteration in his GI comfort and tolerance of feedings can lead to vomiting, which can then lead to aspiration, which can cause pneumonia and a quick decline in [ ]'s ability to exchange oxygen effectively. It is very possible that such subtle medical issues could go unnoticed by a layperson until they become a health crisis." Pet. Ex. 3, p. 4.

152. No one from the WCPSS followed up with Pediatric Nurse after receiving her letter. Tr. 429:11-14.

153. A separate letter was provided by , RN, Clinical Manager, of Pediatrics, which described 's nurse's responsibilities throughout the day. Pet. Ex. 4. Nurse explained 's nurse "continuously assess his work of breathing and spot check his oxygen saturations every 4 hours to determine his need for supplemental oxygen," "monitor his oxygen saturation continuously and provide him with supplemental oxygen via nasal cannula when he is asleep during nap time in school to maintain his oxygen saturations >90%," "provide other interventions such as chest physiotherapy, as needed medications, and oral/nasal suctioning in order to maintain ease of respirations," "provide oral feedings following his feeding therapy regimen," monitor 's tolerance to nutrition via gastronomy tube, "assess him for any signs or symptoms of aspiration and provide interventions such as oral or nasal suctioning as needed to keep his airway clear," "administer his medications via his gastronomy tube and monitor his tolerance of medications," "monitor his activities and interactions to ensure his safety and prevent his gastronomy tube from dislodgement or causing injury." Pet. Ex. 4.

154. His medical providers agreed that the letter from Nurse was an accurate representation of the nursing services and they expected to be provided these survives throughout the school day. Tr. 414:6-10 (testimony); Tr. 992:8-13 (testimony); Tr.1055:8-11 (testimony).

155. Nurse also testified that Nurse letter was an accurate representation of the services she provided at the school. Tr. 230:1-2. Pediatric Nurse wrote: "I also firmly believe that the presence of a consistent professional caregiver at each of [ ]'s appointments has greatly enhanced [ ]'s progress and current success overall." Pet. Ex. 3, p. 3. Nurse testified that "because [ ] has the caregivers in place that he does, including the nurse that accompanies him, his prognosis has been better than expected." Tr. 421:13-15.

156. 's pediatrician, Dr. , wrote a second letter dated March 15, 2016 recommending receive nursing services during the school day. Pet. Ex. 2. Dr. wrote:

> [ ] needs to have a nurse with him at all times, because of the complexity of his medical problems, and the very real possibility that his condition can change suddenly (as has happened many times in the past). It takes a trained eye to notice when he is having symptoms that could progress rapidly to a dangerous health crisis. . .. Because he is nonverbal, it is easiest to see negative symptoms if the person caring for him knows him very well and is with him on a consistent basis. Having several different caregivers throughout the day would place him at risk, in my opinion. If/when he does become sick, the symptoms need to be noticed quickly and communicated to his parents and his medical caregivers in a very timely fashion to minimize the change of him having a negative outcome. Pet. Ex. 2.

157. Dr. [redacted] wrote: "In the past, [[redacted]] has been somewhat 'unstable' at times in regards to his airway (he has a history of multi-level airway collapse), and he certainly could have a tendency to have a rapid deterioration in his respiratory status with an adverse feeding incident, an episode of reflux/aspiration, or even a simple viral illness or cold." Pet. Ex. 2.

158. Dr. [redacted] testified [redacted] is "at a higher risk for complication" because [redacted] "has a propensity to change quickly and because we know he has a history of an unstable airway." Tr. 997:8-15.

159. No one from the WCPSS followed up with Dr. [redacted] after March 15, 2016, regarding his letter. Tr. 998:10-12 ([redacted] testimony).

160. Dr. [redacted] also wrote a letter dated April 4, 2016 recommending [redacted] continue to receive School Nurse Services during the school day. Pet. Ex. 5.

161. Dr. [redacted] wrote:

> [[redacted]] requires close attention to his airway obstruction that worsens with colds. His symptoms can change abruptly. He has required admission to the Pediatric Intensive Care Unit due to the severity of these symptoms. His sleep apnea requires him to have oxygen with sleep. He continues to intermittently have difficulty maintaining oxygen saturation during the day as well. This requires reassessment of his symptoms and vitals to determine the flow of oxygen necessary to maintain his saturation. Nurses are critical to this reassessment and care. Pet. Ex. 5.

162. No one from the WCPSS followed up with Dr. [redacted] regarding her letter. Tr. 1063:3-7 ([redacted] testimony).

163. Other than Ms. [redacted]'s conversation with Dr. [redacted] about his June 19, 2015 letter, no one from WCPSS contacted [redacted]'s medical providers at any time about these subsequent letters.

164. Similar to her statement regarding Dr. [redacted]'s June 19, 2015, letter, Ms. [redacted] demonstrated her unwillingness to consider input from [redacted]'s medical providers when she testified the letters subsequently provided by [redacted]'s medical providers contained no new information of which she was not already aware. Tr. 2310:14-18 (discussing Dr. [redacted]'s letter dated March 15, 2016), 2312:15-18 (discussing Ms. [redacted]'s letter).

165. On cross-examination, Ms. [redacted] admitted that, in fact, the letters from [redacted]'s medical providers did contain new information. For example, Ms. [redacted]'s letter identified the number of times [redacted] was hospitalized during the calendar year of 2015. Pet. Ex. 3.

166. Also on cross-examination, Ms. [redacted] testified that she did not know how many times [redacted] had been hospitalized in 2015 prior to receiving the letter. Tr. 2366:18-21. Ms. [redacted] testified the number of hospitalizations was "important information." Tr. 2366:23.

167. The Petitioners provided these letters from [redacted]'s treating medical providers to WCPSS before they filed due process and they were available for review at the subsequent Resolution Meeting held on May 4, 2016.

168. At the July 17, 2015 IEP meeting, WCPSS reversed temporarily its decision about School Nurse Services. After that meeting, the Petitioners did not file due process about the placement or other purported IDEA violations. Had WCPSS ultimately agreed at the February 2, 2016 IEP meeting or at the Resolution Meeting to the inclusion of School Nurse Services as a related service for [redacted], it is doubtful this case would have proceeded to a full hearing.

Expert Witnesses' Testimonies that [redacted] Required School Nurse Services

169. At the contested case hearing, three of [redacted]'s treating medical providers, [redacted], M.D.; [redacted], M.D.; and [redacted], RN, PNP, testified and were qualified as expert witnesses. An overview of their testimony is that: [redacted] required nurse services as a related service to access his education, Tr. 429:15-19 ([redacted] testimony); Tr.1000:25-1001:22 ([redacted] testimony), Tr. 1066:1-22 ([redacted] testimony); and that [redacted]'s medical needs could not be delegated to unlicensed assistive personnel (UAP). Tr. 425:17-426:8 ([redacted] testimony); Tr. 989:2-7 (testimony of [redacted] testimony), Tr. 1065:10-25 ([redacted] testimony "I do feel like it needs to be somebody who has medical knowledge and can assess and react.").

170. [redacted]'s medical condition can be life threatening. In 2015 [redacted] was admitted to the pediatric intensive care unit on three (3) occasions, admitted to the emergency room on two (2) occasions, and had forty-six (46) outpatient visits to the children's hospital. Pet. Ex. 3, p. 4; Tr. 422:17-22 (testimony of [redacted]).

171. Petitioners' expert, Dr. [redacted], was qualified in the area of pediatric medicine. Tr. p. 984:8-13. Dr. [redacted] received his Bachelor's of Science in biology from UNC and his Doctor of Medicine from Vanderbilt University. Pet. Ex. 32. Dr. [redacted] completed a residency in pediatrics at Vanderbilt University. Pet. Ex. 32. Dr. [redacted] is licensed to practice medicine in North Carolina. Tr. 983:9-10 ([redacted] testimony). Dr. [redacted] is Board Certified in General Pediatrics, Tr. 983:9-10, and has worked as a pediatrician for nineteen (19) years. Tr. 983:14 ([redacted] testimony). At the time of his testimony, Dr. [redacted] worked as a partner physician at [redacted] Pet. Ex. 32.
172. Dr. [redacted] testified that [redacted]'s "major need is the need for ongoing assessment of his medical status" because "[[redacted]] can change very quickly." Tr. 1004:9-12. With regards to [redacted]'s feeding through a G-tube, Dr. [redacted] warned that "there's a risk that food can come back up and that he can aspirate and can have a sudden change in his respiratory status." Tr. 1004:2022. Dr. [redacted] had consistently worked with [redacted] since [redacted] was about one (1) week old. Tr. 984:16-20 ([redacted] testimony).

173. Dr. [redacted] testified to the importance of having consistent care for "patients like [redacted] who have complicated medical situations," Tr. 996:1-22, and that if [redacted] has "one nurse that takes care of him, [the nurse is] much better able to learn the subtleties of the changes in his status." Tr. 996:12-15.

174. Dr. [redacted] noted that: "[[redacted]] often requires oxygen, and the amount of oxygen that he requires is not always the same—it will change at times when he is ill, and the required amount of oxygen can and will change quickly at times. He needs a professional, trained, familiar nurse in place to be able to recognize when this needs to be adjusted, especially during times of illness." Pet. Ex. 2.

175. [redacted] uses a pulse oximeter machine. Tr. 998:13-14 ([redacted] testimony). Dr. [redacted] testified that pulse oximeter machines are "somewhat prone to error and misinterpretation," and "there are often times when the oxygen level will come up lower than it truly is because the machine is not detecting the patient's heart rate." Tr. 998:17-999:3.

176. Moreover, he testified that the number read by the pulse oximeter is not "the only thing that we rely on in determining somebody's respiratory status" and "you have to also evaluate the patient themselves because even . . . in a person with a normal oxygen level, sometimes they can show other signs of respiratory compromise before the oxygen level actually eventually decreases." Tr. 999:4-16.

177. Because [redacted]'s pulse oximeter machine did not always register correctly, the individual monitoring [redacted]'s oxygen levels could not solely rely on the number displayed on the machine and must also monitor and assess [redacted]'s condition. Tr. 250:17-252:9 ([redacted] testimony).

178. Dr. [redacted] concluded that "potentially the decision that could be made by an unlicensed personnel could result in his life being in danger." Tr. 989:5-7.

179. [redacted]'s medical doctors ordered the nursing care provided to [redacted] by Ms. [redacted], and therefore the nursing care provided by Ms. [redacted] was a medical necessity for [redacted] Tr. 304:24-305:3 ([redacted] testimony). Ms. [redacted] attended [redacted]'s medical appointments and provided valuable input to [redacted]'s medical providers regarding [redacted]'s current health status. Tr. 226:5-227:10, 228:2-18 ([redacted] testimony); Tr. 419:8-16, 444:12-444:19 ([redacted] testimony); Tr. 996:23-997:4 ([redacted] testimony); Tr. 1060:9-14 ([redacted] testimony).

[redacted] [redacted], M.D. Pediatric Pulmonology Fellow, [redacted]'s Treating Pulmonologist since February 5, 2014.

180. [redacted]'s pulmonologist Dr. [redacted] received her Bachelor's of Science in biology from the University of Notre Dame and her Doctor of Medicine from the University of Maryland School of Medicine. Tr. 1050:22-24. Dr. [redacted] completed a residency in pediatrics at Johns Hopkins University, Tr. 1050:25-1051:1, and completed a Pediatric Pulmonology Fellowship at UNC. Tr. 1051:2-3. At the time of her testimony, Dr. [redacted] worked as an Associate Professor of Pediatrics and Director of the [redacted] at UNC. Tr. 1051:5-7.

181. When she testified, [redacted] had been one of Dr. [redacted]'s primary patients for approximately one (1) year, during which time Dr. [redacted] consistently worked with [redacted] Tr. p. 1052:15-22. Dr. [redacted] treated [redacted]'s pulmonary needs, including obstructive and central sleep apnea and managing [redacted]'s need for oxygen with respiratory illnesses. Tr. 1052:23-1053:5.

182. Dr. [redacted] testified that the person performing medical procedures for [redacted] must be someone with medical knowledge and who can "assess and react" to what [redacted] needs not just call 911. Tr. 1065:14-15. Someone who can "assess his symptoms is important" because he could look fine, "then end up intubated in the intensive care unit, sick enough that we are talking about end of life decisions." Tr. 1066:9-16.

, R.N., P.N.P. Certified Pediatric Nurse Practitioner 's Pediatric Nurse for Gastroenterology

183. 's pediatric nurse practitioner, , testified by phone. Nurse was qualified in the area of in pediatric nursing. Tr. 412:13-18. Ms. received her Bachelor's of Science in Nursing and Master's of Science in Nursing with a specialization in the Pediatric Nurse Practitioner Program from the University of North Carolina at Chapel Hill ("UNC"). Pet. Ex. 31. Nurse is a certified pediatric nurse practitioner. Pet. Ex. 31. Nurse has worked as a certified pediatric nurse practitioner for eleven (11) years. Tr. 411:21-21. At the time of her testimony, Nurse worked as a pediatric nurse practitioner within the division of gastroenterology at UNC Children's Hospital, a position she had held for five (5) years. Pet. Ex. 31. As part of her position with UNC Children's Hospital, Nurse specifically co-directed the UNC Feeding Team, which required her to "become very well versed in [the] care and subsequent best outcomes" of medically fragile children like Pet. Ex. 31.

184. has been a patient of Nurse 's since February 5, 2014. Tr. 412:20-21. Nurse has consistently worked with from February 5, 2014, through the time of the hearing. Tr. 412:20-21. She testified 's nursing needs could not be delegated to a layperson. Tr. 425:17-19. Nurse explained that while a layperson could feed , the layperson would not be able to assess "the aftereffects of the feeding and whether or not [ ] had any difficulty with potential aspiration, potential difficulty with digestion or oxygen saturation." Tr. 426:1-8.

185. Nurse testified of the importance that the side effects of 's medications, including dizziness, fever, difficulty walking and moving, nausea/vomiting, diarrhea, edema in extremities, tremors, bronchospasm, hypertension, seizures, and flushing, be monitored by a licensed nurse. Tr. 416:25-418:5; *See also* Pet. Ex. 3. is on several potent medications Bethanechol (for GI motility) and Neurontin (for pain). Tr. 417:11-23. Neurontin can have neurological side effects and Bethanechol can have side effects of bronchospasm and seizures that can lead to aspiration. Tr. 417:15-23. A licensed nurse would be able to assess all the side effects and "be aware of the half-life of the drugs, effective initiation time." Tr. 417:24-25 (testimony).

186. Nurse corroborated Nurse s' testimony and testified that, because his medications change frequently, she has to continually assess his vital signs, behavior, bowels for any adverse side effects or allergic reactions. Tr. 227:8-23; 22232:3-25; 296:15-22 (testimony).

187. Pediatric Nurse Practitioner testified to the importance of 's nurse recognizing "subtle changes in a kid who otherwise looks great." Tr. 420:16-421:15. See also Tr. 423:23-424:14 (testimony of describing why 's specific needs require School Nursing Services).

188. Nurse provided an example of a situation where "subtle medical issues could go unnoticed by a layperson until they become a health crisis:" and that " could have an episode of vomiting, appear normal, but may have aspirated. A subtle change that a layperson may not notice "is a slight decrease in his activity level, a slight increase in his respiratory rate, or just looking at him and knowing, because you've been taught assessment and you know because you're trained, that the kid doesn't look good." Tr. 421:21-422:14.

189. Nurse [redacted], described how she constantly monitored and assessed [redacted]'s medical needs throughout the school day. Tr. 219:25-220:23, 221:9-222:6, 223:17-224:9. Nurse [redacted]'s duties throughout the school day included administering oxygen to [redacted], clearing [redacted]'s nasal passages, assessing any reactions to medications, feedings via mouth and G-tube, monitoring [redacted] for signs of respiratory distress, monitoring any changes in [redacted]'s skin, face, mood, and behavior, Tr. 221:11-222:6; and administering medications to [redacted] Tr. 227:11-13. *See also* Tr. 231:20-244:5 (testimony of [redacted] describing her nursing notes); Tr. 245:11-246:8 (testimony of [redacted] describing monitoring [redacted]'s oxygen during nap time); Tr. 246:14-18 (testimony of [redacted] describing suctioning [redacted]).

190. Dr. [redacted] testified: "[W]hat I've seen in the time that I've known [redacted] is that . . . he has showed up in clinic looking normal, you know, his usual self. But then when a pulse oximeter is put on him he is satting (phonetic) very low and then can quickly get into respiratory trouble. And . . . it's not always enough just to put the oxygen on him. You need to be able to react and assess and change for him so that he doesn't end up in the hospital." Tr. 1057:1-8.

191. No medical doctors testified on behalf of WCPSS.

192. WCPSS did not seek an independent evaluation of [redacted] by any licensed physicians to determine whether he required School Nurse Services.

193. Both Drs. [redacted] and [redacted] testified in person. Tr. 982:2, 1048:7 ([redacted] 2 hours of testimony); 1049:1, 1087:23 ([redacted]'s 1-hour testimony). The fact that these busy medical professionals and experts in pediatric and pulmonary medicine left their practices and other patients to testify on behalf of [redacted] lends credibility to their testimony that [redacted] needs school nurse services and is weighed heavily by the Undersigned. The Undersigned finds compelling that Drs. [redacted] and [redacted] both testified that delegating nurse services to a lay person could potentially harm [redacted] and be life threatening. Pediatric Nurse Practitioner [redacted]'s phone testimony is equally compelling. Each of these medical providing had been treating [redacted] for most of his short life; they are specialists in their respective fields, and have no prejudice or bias except for the well-being and safety of a medically fragile child.

194. The Undersigned agrees with Dr. [redacted]'s characterization that removing the School Nurse Services was a "high stake decision" and that "[t]his is a child's life...and it's not just someone who's going to get a bad cold if something goes wrong at school ... this is life or death." Tr. 645:1, 646:16-25. ([redacted] Testimony).

195. The Undersigned finds each of the medical providers qualified and accords greater weight to the testimony of [redacted]'s treating medical providers in light of their specialized knowledge of [redacted]'s medical condition and ongoing need for assessment.

Failure to Replace School Nurse Services with School Health Services

196. WCPSS appears to either assert that a school nurse can delegate School Nurse Services or in the alternative, that the IEP team, at some point, offered School Health Services even though School Health Services as a related service was not mentioned at all in any of the IEP documents in this case.

197. In the medical field once a physician orders nurse services, the nurse can delegate when appropriate without further authorization. Tr. 2420:2-10. At that point, the delegation decision is the nurse's independent professional responsibility. Tr. 2243:14-25. A doctor's only recourse to prevent delegation would be to withdraw the order underlying the medical care entirely, since a nurse cannot provide the medical care at all absent an order from a doctor. Tr. 2244:1-4.

198. In the school setting, an IEP Team's authorization is required for a nurse to delegate medical tasks. That authorization is provided by the IEP team's decision to provide School Health Services rather than School Nurse Services.

199. None of [redacted]'s IEPs included School Health Services as a related service. None of the Prior Written Notices documented that the IEP team had chosen School Health Services.

200. Nor is there any evidence that the various IEP Teams discussed adding School Health Services as a related service for [redacted] Tr. 832:12-14 ([redacted] testimony).

201. Ms. [redacted] testified that nursing as a related service in an IEP does not only mean the child will have a private duty nurse, but can also be "the implementation of a care plan for a student with a chronic illness." Tr. 2446:24-2447:9.

202. [redacted] required supplemental oxygen and G-tube feedings to access his education. Tr. 2447:24-2448:8. Ms. [redacted] testified [redacted]'s needs for supplemental oxygen and G-tube feedings would be covered under nursing as a related service in [redacted]'s IEP. Tr. 2448:9-11.

203. Ms. [redacted] testified related services on an IEP could include School Health Services. Tr. 2469:7-9. Ms. [redacted] was not aware that School Health Services were a related service. Tr. 2321:10 ("School Health Service is not a related service.") ([redacted] testimony).

204. In order to provide School Nursing Services or School Health Services to a student, WCPSS requires that a physician's order, signed by the physician, be in place. Tr. 1015:1-6 (The Court and counsel for Respondent discussing the WCPSS' requirements).

Delegation of Nurse Services Under the Nurse Practice Act

205. To the extent that School Health Services is even at issue in this contested case, then the Undersigned must consider if the weight of the evidence supports that [redacted]'s medical tasks cannot be delegated.

206. Once a school nurse has a physician order and the IEP team first determines that School Health Services is the appropriate related service, then a school nurse can delegate the medical tasks to qualified school staff. If the IEP decides that School Nurse Services are the appropriate related service for a student, even though a nurse may have independent delegation authority outside a school setting based on the Nurse Practice Act, a school nurse cannot delegate medical tasks for that student's care to unlicensed staff.

207. In North Carolina nursing is an independent and comprehensive profession governed by the North Carolina Board of Nursing and various state statutes. Tr. 2235:4-17; Tr. 2403:7-24; Tr. 2415:7-10; Resp. Ex. 44, p.1.

208. Nurses have authority to delegate certain medical tasks to other people, including Unlicensed Assistive Personnel (UAP) such as staff members in a school. Tr. 2236:3-9. Delegation in North Carolina is governed by state statute and guidance promulgated by the Board of Nursing, which is authorized by statute to adopt rules and regulations regarding the practice of nursing. See N.C. Gen. Stat. § 90-171.23. Tr. 2406:2-7; Tr. 2407:17-2408:1.

209. Delegation to a UAP is permitted when the following criteria are all met: the task (1) frequently recurs in the daily care of a client or group of clients; (2) is performed according to an established sequence of steps; (3) involves little to no modification from one client care situation to another; (4) may be performed with a predictable outcome; (5) does not inherently involve ongoing assessment, interpretation, or decision making which cannot be logically separated from the procedure(s) itself; and (6) does not endanger the client's life or well-being. Stip. Ex. 53, p. 469.

210. Multiple witnesses for both parties described the key feature delineating the appropriateness of delegation as being, in effect, whether or not the task will require the UAP to exercise medical judgment. Tr. 435:11-13; 2237:5-7; 2411:8-16; 2416:8-13.

211. The Board of Nursing provides a "Decision Tree" to guide nurses in making delegation decisions. Stip. Ex. 53, p. 469. Analysis of delegation must address each of the individual medical tasks a patient may need. In certain situations, some tasks may be delegable while others may not. Tr. 2247:22-2248:3.

212. The Board of Nursing's "Decision Tree" might have been helpful for this IEP team members in their decision making process, however, there is no evidence that the IEP team was provided a copy of this "Decision Tree" at any of the IEP meetings. Nor is there any documentation in the records or minutes of the meetings that the school nurses discussed the use of this Decision Tree for this purpose.

Failure to Implement Nursing Services

213. The WCPSS failed to implement [redacted]'s School Nurse Services on his July 17, 2015, IEP with fidelity. Stip. # 39.

214. Throughout the 2015-16 school year, when the WCPSS did not provide a substitute nurse to [redacted] when his usual nurse was unavailable, [redacted] was forced to stay home from school, missing valuable instructional time and placing a burden on his parents. Stip.#39. See also Tr. 598:6-20 ([redacted] testimony).

215. Dr. [redacted] testified that Petitioner [redacted] was "the one responsible for finding a replacement [nurse], and if she could not find a replacement that [[redacted]] would have to stay home." Dr. [redacted] testified "that is just unacceptable and [a] highly unprofessional practice." Tr. 598:620.

216. WCPSS is ultimately responsible for ensuring a substitute nurse is available when [redacted]'s usual nurse is absent.

217. WCPSS substituted a safety assistant for the nurse to ride with [redacted] on the school transport at the February 2, 2016 IEP meeting. Stip. Ex. 18, p. 83. According to the special transportation services description, the safety assistant is necessary for "adult assistance", to assist with oxygen, to observe and assess student's medical needs." Stip. Ex. 18, p. 83. (emphasis added).

218. Since School Nurse Services are required as a related service to assess [redacted]'s medical needs, School Nurse Services will also be required during transportation and at any other school activity.

Stay-Put School Nurse Services

219. As the date on which the new IEP would go into effect approached, [redacted] requested additional time to make arrangements for [redacted]'s care. Tr. 1110:21-1111:5; Tr. 1198:20-25. The team agreed in a March 3, 2016 IEP meeting to extend nursing as a related service through March 24, 2016, which was the last day before [redacted] tracked out for three weeks. Stip. Ex. 25, p.121; Tr. 1199:1-10.

220. During the three-week track out period following March 24, 2016, Petitioners filed the instant petition and invoked stay put. [redacted] has received nursing as a related service throughout the pendency of the hearing process.

II. PLACEMENT ISSUE

221. WCPSS operates 142 special education preschool classrooms[8] across the county. Tr. 1331:23; *see* Pet. Ex. 37. These classrooms are embedded within the County's various elementary schools. Tr. 1331:24; Tr. 1333:16-25.

222. The continuum of alternative placements for preschoolers in Wake County, from least restrictive to most restrictive is: itinerant services delivered in the child's natural environment (home or daycare), Regular Early Childhood Program ("RECP") part-day or full-day, separate classroom part-day or full-day, hospital. Tr. 1330:11-1331:18; Tr. 1442:1-14.

223. The RECP placement is defined in the IEP continuum of alternative placements as at least 50% of children enrolled in a class are nondisabled and do not have an IEP. Whereas a Separate placement includes less than 50% nondisabled children. Stip. Exs. 7, p. 29; 12, p. 57; 18, p. 84; 24, p. 116.

224. For three-year-old students who are eligible for special education services but whose least restrictive environment is determined to be an RECP, WCPSS has contracted with various private Developmental Day[9] centers to provide seats for those children. Tr. 1333:2-15. WCPSS presently has contracts with six private Developmental Day centers around the county.

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[8] WCPSS also has blended preschool classrooms in elementary schools funded by Title I. Tr. 1332:4-8. These classrooms are open only to four-year-old students in their final year of preschool. Tr. 1436:17-1437:8; Tr. 1489:211490:6.

[9] The terms Developmental Day and Developmental Delay were confusing to the Undersigned and apparently to the Petitioners also. Developmental Day is a RECP placement. Developmental Delay is a subcategory of classrooms available in the Separate placement.

students" and students with disabilities, and they appreciated the "inclusion aspect of the program." Tr. 37:13-17. *See also* Tr. 383:7-18 (describing students with a range of abilities at).

232. Because this was an inclusion program, the parents expressed their preference for to attend to , Case Manager for Preschool Special Education Services, Office of Early Learning. Stip. Ex. 5, p. 14; Tr. 39:7-8 (testimony), Tr. 386:1525 (Petitioner testimony). Throughout the IEP process, had consistently expressed her preference for to attend , an inclusive Developmental Day center. Stip. Ex. 5, p. 14; Tr. 39:7-8 (testimony), Tr. 386:15-25 (testimony). Even prior to the IEP Meeting held on April 29, 2015, expressed her desire for to attend . Stip. Ex. 5, p. 14; Tr. 39:7-8 (testimony), Tr. 386:22-25 (testimony).

233. The April 29, 2015 IEP documented that based on his significant developmental delays, his need for maximum support and consistency, and his need for support from several related service providers, IEP the team determined that he required a full-day special education program, and determined that a separate setting was appropriate for him. Stip. Ex. 9, p. 42; Stip. Ex. 7, p. 129; Stip. Ex. 8, p. 37.

234. Despite knowing of 's interest in an inclusive setting, the IEP Team did not even discuss White Plains or any RECP placement during the April 29, 2015, IEP meeting. Stip. # 27; Tr. 44:14-16.

235. Respondent admitted that despite Petitioners' expressed preference, the IEP team did not discuss or any other inclusive placement during the IEP meeting. Tr. 1545:515. However, WCPSS justified its oversight because the Petitioners did not request or mention an inclusive placement at the meeting. Tr. 1179:12-15. The IEP was projected on a screen at the meeting while the team discussed the placement section of the IEP and ultimately selected a separate setting. Tr. 1686:9-14. The IEP section regarding placements considered by the IEP team does not have any boxes checked. Stip. Ex. 7, p. 29.

236. testified she did not recall a discussion about "accessing the general curriculum." Tr. 398:24-399:1. testified: "If a discussion about typically developing peers had come up, I would have remembered and been very vocal." Tr. 401:11-13.

237. testified that he did not recall "the IEP team discuss[ing] any other inclusive placements with [him] at the meeting," Tr. 44:14-16, nor "discuss[ing] placing in a regular preschool class with non-disabled peers." Tr. 57:1-3.

238. According to school-based members of the IEP team, they were aware of the Petitioners' preference and had considered an inclusive placement for Tr. 1521:10-20; Tr. 1762:1-8; Tr. 1843:8-13. Individual team members identified different areas of concern related to 's ability to meaningfully access an RECP setting. These reasons included:

> Mobility issues related to his ability to safely and effectively navigate a regular classroom with typical peers running around him;

Tr. 1333:10-12. The centers typically have higher student-to-teacher ratios, up to 12:1, and contain a mix of typically developing and IDEA-eligible students. Tr. 1334:13-1335:1; Tr. 1336:23-25; Tr. 1449:11-23.

225. [redacted] ("[redacted]") is a contract Developmental Day center for WCPSS and a RECP placement.

226. Respondent contends that although the number of seats in Developmental Day centers is limited and may affect school assignment decisions, WCPSS does not make educational placement decisions based on the availability of seats in the private Developmental Day centers. Tr. 1337:21-1338:6.

227. Separate classrooms are designed for different levels and types of needs, and include Developmental Delay, Low Incidence, and Structured Teaching (designed for students with autism) classrooms. Tr. 1332:16-23. Embedding these classrooms within elementary schools purportedly allows for greater inclusion of the students in those programs. Tr. 1333:21-25.

228. Developmental Delay classrooms are designed for students with substantial educational needs who cannot be satisfactorily served in the general education setting. They typically have no more than 12 students, with one classroom teacher and two teacher assistants.

Tr. 1336:20-22. Low Incidence classrooms are designed for students with even greater needs, and typically have no more than 8-9 students with one classroom teacher and two teacher assistants. Tr. 1349:4-10.

229. Because WCPSS failed to discuss and complete the IEP section entitled Section VI: Continuum of Alternative Educational Placements[10], the Petitioners did not understand and were uninformed as to all the preschool placements options. It is uncontested that the IEP Teams failed to complete Section VI in all of the IEPs in this case before deciding on a Separate placement for [redacted] Stip. Exs. 7, p. 29; 12, p. 57; 18. p. 84; 24. p. 116.

Predetermination of Placement

230. During the transition process, [redacted] contacted WCPSS to arrange an opportunity to visit preschool classes for [redacted] and WCPSS only recommended that the parents tour preschool programs that were separate classrooms. Tr. 789:23-790:21 ([redacted] testimony); Tr. 1408:3-6 ([redacted] testimony).

231. On their own initiative, the parents researched and toured [redacted], the inclusive placement they learned of through friends. Tr. 76:20-21 ([redacted] testimony),382:25-383:2 ([redacted] testimony). [redacted] testified that during this visit, he observed a range of "typically developing

[10] According to IEP Section VI. Continuum of Alternative Educational Placements:

> "Educational placement is determined by calculating the amount of time the student is with nondisabled peers. Regular Early Childhood Program ("RECP") is at least 50% of children enrolled in a class are nondisabled and do not have an IEP. A Special Education Program ("Separate") class includes less than 50 percent nondisabled children." Stip. Exs. 7, p. 29; 12, p. 57; 18. P. 84; 24. P. 116.

Safety concerns related to his small stature, limited mobility, and dependence on medical equipment, which would be a challenge in any classroom but far more so in a classroom with more students and fewer staff;

Limited attention span, which would require a high-level of individualized attention and would be exacerbated by a larger class size with a more active and noisy population;

Global developmental delays, which would require a high intensity of intervention, significant modification of class activities, and constant repetition. Tr. 1524:21527:1; Tr. 1762:7-15; Tr. 1843:14-19; Tr. 1844:22-1845:1

239. Many of these reasons were discussed during the IEP meeting, but these reasons were not explicitly linked to the IEP's decision not to place [redacted] in an inclusive setting. Stip. Ex. 9, p. 42.

240. The members of [redacted]'s initial IEP Team had previously placed students in RECP settings. In [redacted]'s case, however, the decision regarding [redacted]'s placement, WCPSS contends, was not a close call. Tr. 1686:15-22; Tr. 1846:20-24. Multiple team members indicated that a Developmental Delay classroom was likely the best setting for [redacted] given his needs. Tr. 1349:421; Tr. 1544:9-11.

241. Concerns about meeting [redacted]'s extensive needs were not unique to [redacted] or WCPSS staff. [redacted] also explored private school options for [redacted] Tr. 1208:23-1209:2. Of the three private schools that she contacted, two indicated that they could not meet [redacted]'s needs. Tr. 1209:18-25. The third school indicated that it did not have room for [redacted] in the upcoming year and therefore did not conduct an evaluation to determine if they could meet [redacted]'s needs. Tr. 1209:12-17

242. At the April 2015 IEP meeting, the IEP Team failed to record any alternative placements considered where the IEP instructions indicated: "Check all alternative placements." Stip. Ex. 7, p. 29. [redacted] testified that the failure was a "clerical error." Tr. 1540:12. WCPSS made 3 clerical errors.

243. The PWN failed to document the IEP Team's refusal to consider any placements other than a "PK-Separate Class" for [redacted] Stip. Ex. 8, p. 37-38.

244. [redacted]'s IEP Team predetermined [redacted]'s placement in the Developmentally Delay separate classroom setting, where he had no access to nondisabled peers. Stip. ## 25, 26, 27; Stip. Ex. 7, p. 29; Stip. Ex. 8, p. 37-38; Tr. 387:1-3, 398:24-399:5, 401:11-13, 401:19-403:11, 402:1120, (Petitioner [redacted] testimony); Tr. 44:14-16, 57:1-7 ([redacted] testimony); 507:23-509:16, 527:2024, 528:25-529:3, 542:6-13, 557:5-11, 599:3-4, 600:13-603:14, ([redacted] testimony).

245. The IEP Team failed to explain to [redacted] that [redacted]'s placement in the separate setting precluded him from attending [redacted]. Tr. 387:1-3, 401:19-403:11 ([redacted] testimony), Tr. 57:4-7 ([redacted] testimony). [redacted] testified that no one at the meeting told her or [redacted] that [redacted] could not attend [redacted]. (r. 387:1-3. No one explained that [redacted]'s placement in a preschool separate setting had any connection to [redacted]'s assignment at [redacted], nor that [redacted]'s placement would "preclude involvement with typically developing peers." Tr. 401:19-403:11.

testified that he did not recall anyone at the IEP meeting explaining that the designation of a separate placement precluded from attending an inclusive preschool program. Tr. 57:4-7.

246. Following the IEP Meeting, reminded , Case Manager for Preschool Special Education Services, Office of Early Learning of her expressed preference for to attend . Tr. 402:11-17.

247. Also following the April 29, 2015 IEP Meeting, asked Ms. how she could note the parents' preference for 's preschool placement. Tr. 792:11-24; Tr. 402:1117 (testimony). Despite 's repeated communications regarding her preference for an inclusive setting, Ms. expressed surprise to that she even had a preference for 's placement. Tr. 792:11-793:12 (testimony)

248. Ms. informed that needed to send 's IEP to to determine whether could meet the conditions of 's IEP. Tr. 793:5-12 (testimony). Ms. did not inform that the placement the IEP Team had just chosen for precluded him from attending . Tr. 793:13-16 (testimony).

249. During her testimony, Ms. said she had spoken with prior to and after the April 29, 2015 IEP Meeting. Tr. 1601:25-1602:20. She could not remember the conversation with about space availability that occurred before the Eligibility Meeting, however, but after the Eligibility Meeting, Ms. recalled that informed her that they did not have enough space for Tr. 1602:7-20.

250. At the Eligibility Meeting, WCPSS had denied School Nurse Services as a related service on 's IEP. The IEP team's decision to deny School Nurse Services impacted space availability for at .

251. However, during the conversation with , Ms. did not even inform that Ms. had already spoken with about Tr. 1603:20-23. On direct examination Ms. testified that she had spoken with staff and that had concerns about possible safety issues, not about space availability. Tr. 1522:2-9. This inconsistency in her testimony cast doubt on Ms. 's credibility.

252. Following the IEP Meeting, followed Ms. 's directions and contacted . Tr. 794:2-7 (Petitioner testimony); Pet. Ex. 16, p. 496-97. Only at that point did learn that the placement selected on 's IEP meant that was not eligible to attend . Tr. 794:4-7 (Petitioner testimony).

253. Ms. admitted that in Wake County Schools a preschool child's access to an inclusive placement is not determined by goals, Tr. 1516:1 (Gross- testimony); rather, it is determined by the resources available at the Developmental Day programs. *See, e.g.*, Tr. 1516:9-11, 1522:4-7, 1641:8-13 (Gross- testimony). Tr. 1335:5-17, 1336:25-1337:2, 1345:22-1346:9, 1425:14-20, 1449:20-23 (testimony). apparently did not have the staff or resources to serve without School Nurse Services.

254. Despite the fact that [redacted]'s IEP Team previously determined he would to be placed in the separate setting, at the Resolution Meeting[11], [redacted], Senior Administrator for WCPSS, offered to place [redacted] in an inclusive preschool placement (either at the [redacted] or the [redacted]). Tr. 803:17-804:7 ([redacted] testimony). These placements were not logistically feasible for the Petitioners. Tr. 77:4-12, 77:24-78:1. This comports with the WCPSS established practice of changing the placement of a student—without changing the goals in the IEP—from a segregated setting to an inclusive setting. *See e.g.*, Tr. 1516:1 (Gross-[redacted] testimony) (testifying placement is not driven by goals).

[redacted], Ed.D.

255. Petitioners' expert, Dr. [redacted][12], was qualified without objection in the areas of special education, school and community inclusion of students with low incidence disabilities, inclusive instruction, educational policy, family partnerships and advocacy, collaborative teaming of IEP teams and teachers who work with low incidence disabled children, teacher training and support, IEP development, and positive behavior support. Tr. 486:16-25.

256. Dr. [redacted] earned her Bachelor of Science in Special Education from the University of Georgia. Pet. Ex. 29, p. 756. Dr. [redacted] earned her Master's of Education from Auburn University in special education. Pet. Ex. 29, p. 756. Dr. [redacted] earned her Doctor of Education in Special Education from the University of Alabama. Pet. Ex. 29, p. 756. Dr. [redacted] has published over thirty (30) books, over fifty (50) chapters, and over two hundred twenty-five (225) peer reviewed journal articles, all of which focus on educating students with significant disabilities. Tr. 477:6-15; Pet. Ex. 29, p. 762-86. Dr. [redacted] is a coauthor of a leading textbook that "prepares general education teachers to teach students with disabilities," which includes a chapter on "other health impairments." Tr. 477:18-22. Dr. [redacted] has presented at hundreds of conferences and workshops on the core principles of the IDEA. Tr. 479:13-17; Pet. Ex. 29, p. 788838. Dr. [redacted] has received over thirty (30) million dollars of grant funding from the U.S. Department of Education. Tr. 479:25-480:8. Dr. [redacted] has received multiple awards over the course of her career, including the Lifetime Achievement Award from the Council for Exceptional Children. Tr. 480:21-481:11; Pet. Ex. 29, p. 756-57.

257. Dr. [redacted] is a professor *emerita* at the University of Kansas, where she served as a professor in the Department of Special Education. Tr. 481:12-17, Pet. Ex. 29, p. 756. As part of her teaching responsibilities, Dr. [redacted] taught courses on preparing general education teachers to teach students with disabilities in inclusive settings and developing trusting partnerships between families and professionals. Tr. 481:14-482:5. Dr. [redacted] has consulted with school districts in multiple states, including North Carolina, on issues related to family partnerships, positive behavior support, and inclusive practices. Tr. 483:13-22. Dr. [redacted] was on the faculty of the University of North Carolina at Chapel Hill in the 1970's[13] and taught there for 8 years special education courses with an emphasis on mainstreaming. Tr. 475:5-11.

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[11] The Resolution Meeting was held on May 4, 2016. Unlike mediation negotiations, discussions during a Resolution Meeting are not confidential.

[12] Dr. [redacted] CV is 83 pages long and her expertise in special education was not disputed by Respondent.

[13] In the 1970's, Dr. [redacted] and her husband, along with Senator [redacted] helped draft North Carolina's special education statute (the "Creech Act"). Tr. 475:21-24.

258. Dr. [redacted] demonstrated she was current on the latest research, polices, and governing principles regarding the IDEA and the guidance that affects educating students with disabilities like [redacted] Tr. 487:3-506. Dr. [redacted]'s education and background qualified her to offer her expert opinion about the areas in which she was qualified as an expert by this Tribunal. Pet. Ex. 29. Dr. [redacted] had direct contact with [redacted] and his family as part of gathering information to form the basis of her opinions about [redacted]'s educational programming and her preparation to testify on [redacted]'s behalf. Tr. 483:24-484:3. Dr. [redacted] reviewed [redacted]'s educational record. Tr. 484:4-8. Dr. [redacted] was a credible expert witness who proved knowledgeable about the issues to which she testified.

259. Dr. [redacted] testified that the "transition from early intervention to preschool" "is critical." Tr. 507:5-9. Dr. [redacted] testified that she did not see that an "open process" occurred for [redacted]'s transition to preschool. Tr. 507:10-15. Dr. [redacted] testified there was no "creative brainstorming on what it would take to make [redacted] happen," [redacted] was not represented at the IEP meeting, and that she did not see evidence of many of the "research-based practices for transition." Tr. 507:16-22.

260. Dr. [redacted] testified that the WCPSS predetermined [redacted]'s placement in the separate setting. Dr. [redacted] testified: "I think from the outset it was decided that [[redacted]] would go to the special class and that students with his extent of disability could not be appropriately supported in a general education classroom." Tr. 528:25-529:3. Dr. [redacted] further testified that understood [redacted]'s IEP team made his placement decision "outside of the [IEP] meeting," and that it was "absolutely not" appropriate to do so. Tr. 542:6-13.

261. Dr. [redacted] testified that the record demonstrated Petitioner [redacted] provided "clear notification" to the WCPSS that she and [redacted] "wanted to have [[redacted]] in an inclusive setting"; yet, Petitioner [redacted], a research psychologist, "did not understand at the meeting that a placement decision was made." Dr. [redacted] stated that "if Dr. [redacted]. did not understand . . . then there [was] a major, major problem with family-professional partnership and with collaborative teaming." Tr. 507:23-509:16. *See also* Tr. 600:13-603:14 (Dr. [redacted] testifying about the myriad ways the WCPSS predetermined [redacted]'s educational plan).

262. Dr. [redacted] testified that "it was consistent . . . in all the documents that when Dr. [redacted]. [[redacted]] made recommendations they typically were—or frequently, very frequently, they were not accepted." Tr. 527:20-24.

263. Further, Dr. [redacted] testified she "saw no indication that [the parents] were an equal member of the education team . . .." Tr. 599:3-4.

264. Ms. [redacted]—[redacted]'s special education teacher—attended the February 2, 2016, IEP meeting in two capacities: as a special education teacher and a regular education teacher. Stip. Ex. 19, p. 92. Because of this, Dr. [redacted] testified that she "did not see any evidence that anyone was coming from a regular education perspective." Tr. 557:5-11.

Least Restrictive Environment

265. The "Continuum of Alternative Educational Placements" portion of Respondent's chosen IEP documents states: "Check all alternative placements considered by the team." Stip. Ex.

7, p. 29.

> The IEP document also instructs the IEP Team: "If the student will be removed from his/her nondisabled peers for any part of the day (general education classroom, [redacted]cademic services and activities), explain why the services cannot be delivered with nondisabled peers with the use of supplemental aids and services." Stip. Ex. 7, p. 29. Respondent admitted that failed to properly complete the Least Restrictive Environment (Placement) portions of all of [redacted]'s IEPs. *See* Stip. Ex. 7, p. 26.

266. The IEP Team determined [redacted] required just one (1) accommodation during the service or activity "Other": "[[redacted]] should only be provided a pureed consistency for all foods." Stip. Ex. 7, p. 26.

267. The IEP Team failed to adequately consider the use of supplementary aids and services. Stip. Ex. 7, p. 26; Tr. 131:7-11 (Dr. [redacted] testimony). In fact, the IEP team could not even define what supplementary aids and services were. *See, e.g.,* 1534:6-8 (Gross-[redacted] testimony).

268. The PWN failed to document the IEP Team's refusal to provide supplemental aids/services, accommodation/modifications, or assistive technology to [redacted] in his classes. Stip. Ex. 8, p. 37-38.

269. [redacted], [redacted]'s speech-language pathologist from the Children Developmental Services Agency ("CDSA"), testified that she provided Early Interventions services to [redacted] Tr. 316:9-317:25. Ms. [redacted] testified that [redacted] utilized a number of communication tools while she served him, including a communication board for the PECS, interactive books, a shape sorter, and a voice output device. Tr. 321:22-325:3, 326:7-18.

270. Dr. [redacted] testified that she "did not see any evidence in the minutes that there was any discussion of what it would take supplementally for [[redacted]] to be successful in the general ed class, and [she] did not see anything on the IEP that was considered." Tr. 528:21-24.

271. Moreover, Dr. [redacted] testified that [redacted] was excluded from the general education classroom due to his extensive need for supports the general education class just could not provide; yet, his teacher from his separate classroom reported she did not have the appropriate materials for [redacted] to learn in her class either. Dr. [redacted] testified: "This is a class designed for students with needs along [[redacted]'s] lines. I mean how it could not have the appropriate materials is very puzzling." Tr. 570:7-571:16.

[redacted], Ph.D

272. Petitioners' other education expert, [redacted] was qualified in the areas of special education, inclusive education of children with low incidence disabilities, teacher training and support for teaching of children with low incidence disabilities, speech and hearing services, assistive technology, augmentative or alternative communication methods, and IEP development. Tr. 103:18-104:2.

273. Dr. [redacted] earned her Bachelor's of Science and Master's of Science in Speech and Hearing Sciences from the University of South Alabama. Pet. Ex. 33, p. 846. Dr. [redacted] earned her Doctor of Philosophy in Special Education from the University of Florida. Pet. Ex. 33, p. 846. Dr. [redacted] focused her Ph.D. on students with severe disabilities, and the topic of her dissertation was specifically on young children with significant developmental delays. Tr. 97:2298:4.

274. At the time of her testimony, Dr. [redacted] worked as a research assistant professor in the Department of Psychiatry at the University of Florida. Pet. Ex. 33, p. 846. As part of position, Dr. [redacted] worked with the Center for Autism and Related Disabilities, where she provided professional development to anybody working with individuals who have autism and related disabilities, individual assistance to individuals with autism and related disabilities and their caregivers, and technical assistance to school systems. Tr. 90:2-13. Dr. [redacted]s duties included advising school districts regarding how to best educate students with autism and related disabilities. Tr. 98:9-21.

275. Dr. [redacted] has taught courses including Children and Youth with Multiple Disabilities, Teachers and Learners in the Inclusive School, Assessment in Early Childhood Special Education. Pet. Ex. 33, p. 852-53. Dr. [redacted] has also taught graduate level courses on augmentative and alternative communication and assistive technology. Tr. 91:3-15; Pet. Ex. 33, p. 852-53. As part of her teaching duties with the University of Florida, Dr. [redacted] trained special education teachers how to develop IEPs and attends IEP meetings. Tr. 96:7-19.

276. Dr. [redacted] has authored or coauthored fifteen (15) publications, submitted manuscripts, and manuscripts. Pet. Ex. 33, p. 851-52; Tr. 92:9-93:4, 93:5-16. Dr. [redacted] has presented at multiple conferences. Pet. Ex. 33, p. 849-50; Tr. 94:3-8. Dr. [redacted] has received multiple leadership and professional development grants in support of her work, including a grant from the Office of Special Education Programs for $800,000. Tr. 94:9-20; Pet. Ex. 33, p. 854.

277. Dr. [redacted] has worked as a certified speech and language pathologist and certified audiologist. Tr. 95:20-24. At the time of her testimony, Dr. [redacted] maintained her certification as a speech and language pathologist. Tr. 95:25-96:2.

278. Dr. [redacted] reviewed [redacted]'s evaluations, assessments, IEPs and corresponding documents, and record of Early Intervention Services. Tr. 98:22-99-13.

279. Dr. [redacted] education and background qualified her to offer her expert opinion about the failure of the WCPSS to adequately consider and offer [redacted] placement in the LRE, the inappropriateness of [redacted]'s Present Levels and goals, insufficiency of the WCPSS' progress monitoring methods, and the WCPSS' failure to consider and conduct evaluations and implement communication method and tools. Tr. 103:18-104:2. Dr. [redacted] was a credible expert witness who proved knowledgeable about the issues to which she testified.

280. Dr. [redacted] testified that the Least Restrictive Environment (Placement) portion of [redacted]'s IEP did not "adequately address the supports and services that [[redacted]] would need." Tr. 131:7-11.

281. [redacted]'s special education teacher, Ms. [redacted], testified that "[LRE] is when a child is able to be in an environment where he can be successful doing the things that he or she is able to do without a lot of—a lot of like adult help, physical help, assistance." Tr. 688:17-20.

282. The IEP Team did not list any additional services or activities, such as lunch, recess, assemblies, media center, or field trips. Stip. Ex. 7, p. 26.

283. Despite [redacted]'s significant medical needs, the IEP Team did not even list a single accommodation that he might need during the school day. Stip. Ex. 7, p. 26.

284. Even though [redacted] is nonverbal, the IEP Team determined, without conducting an Assistive Technology evaluation or even discussing such an evaluation, [redacted] did not require any assistive technology for any portion of his day. Stip. Ex. 7, p. 26.

285. Respondent also failed to properly complete the "[redacted]cademic Services and Activities" portion of the IEP. Despite not listing any [redacted]cademic services and activities in the "General Education Program Participation" section of [redacted]'s IEP, the IEP Team recorded the following response: "No [redacted]cademic Services are required." Stip. Ex. 7, p. 28.

286. In the "Continuum of Alternative Educational Placements" section of [redacted]'s IEP, the IEP Team failed to check any preschool placement as a consideration for [redacted] Stip. Ex. 7, p. 29.

287. The IEP Team recorded the following response to justify why services could be delivered with nondisabled peers with the use of supplemental aids and services:

> [[redacted]] is diagnosed with [redacted] which impacts his ability to navigate his environments, complete age appropriate early learning tasks, indicate his wants and needs, participate in self-care tasks, and follow directions. This impacts his ability to fully function within regular classroom environments without extensive support in a separate setting designed to meet his needs. Stip. Ex. 7, p. 29.

288. Dr. [redacted] testified that none of the challenges used to justify [redacted]'s exclusion from the general education environment were "sufficient reason" to prohibit him from being educated with his non-disabled peers (i.e., not being able to navigate the environment, not being able to complete age-appropriate tasks, not being able to indicate wants and needs, not being able participate in self-care tasks, and not following instructions). Tr. 137:21-138:5.

No Access to Nondisabled Peers

289. Although, according to Respondent, WCPSS' preschool classrooms were within elementary schools for greater inclusion, Mr. [redacted], principal of [redacted] Elementary, testified [redacted]'s class did not participate in music, art, or physical education with nondisabled kindergarten students due to scheduling issues. Tr. 2125:3-2126:7.

290. Dr. [redacted] testified to the stark separation of disabled children from their nondisabled peers: "[T]here was no evidence" [redacted]'s "class had any participation in anything at

the school. They didn't go to the lunchroom. They didn't play on the same playground. They didn't use the same bathroom." Tr. 533:19-22.

291. Dr. [redacted] testified that the fact that there was no general education preschool classroom at [redacted]'s school was "a system failure." Tr. 531:17-24.

292. Dr. [redacted] testified that she concluded [redacted] was not provided a free appropriate public education by the WCPSS. Tr. 603:15-604:12.

293. Ms. [redacted], [redacted]'s nurse, described the manner in which students with disabilities were segregated from non-disabled students on the playground: non-disabled students would gather around the fence containing the students with disabilities and watch them. Tr. 252:13-253:13. See also Tr. 2128:22-2129:1 ([redacted] testimony). Dr. [redacted] testified that in reviewing Ms. [redacted] deposition describing the separation of children with disabilities on the playground, she "had never seen a fenced-in playground so the kids with disabilities did not have access to the same playground as other kids without disabilities." Tr. 520:2-12.

294. Petitioners' experts Dr. [redacted] and Dr. [redacted] indicated their belief that [redacted] could be educated in an inclusive placement. Tr. 133:3-5; Tr. 529:16-18. The Undersigned notes concern regarding the rigidity of their positions against the separate setting: Dr. [redacted] expressly testified that, in her view, a separate setting was never appropriate, Tr. 132:2-7, except in the case where students display extreme behaviors that disrupt the education of other students, Tr. 161:1223, while Dr. [redacted]'s examples of when such a setting might be appropriate were limited to students with contagious diseases and intractable behavior problems. Tr. 622:17-23. There was no recognition of a potential academic need for a separate setting, a justification which has been accepted by federal courts for many years. *E.g., Hartmann by Hartmann v. Loudoun County Bd. of Educ.,* 118 F.3d 996, 1001-1002 (4th Cir. 1997*); DeVries by DeBlaay v. Fairfax County School Bd.,* 882 F.2d 876, 879 (4th Cir. 1989).

295. When the placement decision was made in April 29, 2015, [redacted] presented as a medically fragile child, small in stature, with limited mobility. The Undersigned appreciates why the IEP team decided not to place [redacted] in an inclusive setting at that time, especially when School Nurse Services were denied. However, [redacted] has no access to nondisabled students in the elementary school according to the School Principal and this is due to administrative convenience. The Undersigned finds that this is not consistent with the LRE of the IDEA.

GOAL ISSUE

296. At the April 29, 2015 IEP meeting, IEP team developed an Individualized Education Plan for [redacted] which included seven goals across four areas: communication, motor, vision, and play. Stip. Ex. 7, pp. 21-25. The goals closely tracked the parents' concerns as provided by Petitioners during the meeting. Stip. Ex. 7, p. 19-20; Tr. 63:18-24, 64:14-23, 65:10-66:2, 66:11-24. However, the Petitioners contested the appropriateness of these goals.

The Play and Vision Goals

297. The Petitioners assert that [redacted]'s IEP goals and Present Levels of Functional Achievement and Academic Performance ("Present Levels") were inaccurate, meaningless, and

lacked any baseline data from which the IEP Team could develop appropriate goals and measure ': progress on those goals. *See* Petition. Although Petitioners had general complaints about all the goals, the Petitioners main focus were the communication goals as they pertained to . Since the gross motor goal issue had been dismissed, the remaining goals were play and vision were consistent with 's identified needs in those areas

298. Petitioners' experts, Dr. and Dr. , testified regarding this concern about the accuracy of the present levels as well as how the goals were written. Tr. 116:22-117:5; Tr. 516:8-24. While Dr. and particularly Dr. have impressive credentials, the Undersigned notes that neither had performed any sort of evaluation or spent any meaningful time with Dr. had never met at all, had never evaluated him, and had never spoken with school staff who served him. Tr. 162:2-13. Dr. had spent only 45 minutes with him a few days before her testimony. Tr. 604:23-605:4. In spite of their credentials, this lack of familiarity with significantly reduces the probative value of the experts' testimony on 's present levels and goals.

299. Further, the IDEA does not include a required format for IEP goals. Dr. criticisms of the IEP goals largely amounted to a desire that they follow a particular format with specific verbs, Tr. 151:7-21, 152:7-11, and a concern that some of the goals were too low, Tr. 153:6-8. Dr. testified very little about the IEP goals. Tr. 516:8-24; Tr. 517:18-518:2. School staff who actually worked on the goals with felt that the goals were appropriate. Tr. 921:15-922:7; Tr. 923:7-18; Tr. 1758:10-16; Tr. 1848:4-7; Tr. 1935:12-14.

300. Moreover, neither of the Petitioner's experts were qualified in the category of visual impairment; therefore, the Undersigned gives deference to the expertise of the visually impaired teacher and her development of 's vision goals.

301. Dr. testified it was "inappropriate" for 's IEP team to refuse to include a social goal on his IEP, but also testified that he demonstrated strength in "the social area" which showed "tremendous potential of him being a functioning member of society." Tr. 527:8-18. It is undisputed that 's social skills were a strength for him as he was interactive and attentive to his peers. The Undersigned finds that there was no evidence proffered that the lack of social goal caused educational harm.

302. Finally, the Undersigned notes that a common-sense review of the play and vision goals indicates that, while they may not be model goals, they are clear, task-oriented, measurable, and consistent with 's identified needs as described by his parents and by the IEP team in his evaluations and present levels of performance.

ASSISTIVE TECHNOLOGY ("AT") EVALUATION ISSUE

303. WCPSS did not conduct an assistive technology evaluation. The Respondent rationalized the reasons why the team did not conduct an assistive technology evaluation during the initial eligibility process was because, per parent report and observation, was not consistently imitating or using pictures to make choices outside of private speech therapy. Tr. 1780:3-10.

304. Wake County Schools' speech pathologist [redacted], thought it was more appropriate to use a total communication approach to explore different methods of communication and gain more data on [redacted]'s communication skills and needs. Tr. 1780:11-19.

305. [redacted]'s related service providers at [redacted] also observed that [redacted] did not yet have the foundational skills to benefit from an assistive technology evaluation. Tr. 1882:131883:11; 1904:1-1905:15.

306. According to the Petitioners, at the initial referral meeting on March 3, 2015, the IEP team did not even discuss the possibility of an AT evaluation. Petitioner [redacted] and [redacted] both testified that they did not recall the IEP Team at the referral meeting discussing conducting either an Augmentative Communication Evaluation or an Assistive Technology Evaluation. Tr. 389:813 (Petitioner [redacted] testimony), Tr. 49:16-21 ([redacted] testimony). [redacted] testified that the IEP Team did not seek his or [redacted]'s consent to conduct either evaluation. Tr. 49:23-25. In addition, [redacted] testified that had she been asked, "[she] would have been very much in favor of doing those evaluations." Tr. 389:14-17.

307. Dr. [redacted] testified that an Assistive Technology Assessment would have been "absolutely essential" for the transition meeting from Early Intervention to preschool. Tr. 513:1719.

308. Dr. [redacted] testified that she "would have expected there to be" an Assistive Technology Evaluation or an Augmentative Communication Evaluation because either or both "would have provided information about how . . . [[redacted]] would access the curriculum." Tr. 108:917.

309. Ms. [redacted] testified [redacted] would benefit from access to a communication system. Tr. 1458:24-1459:1. Ms. [redacted] testified she was responsible for ensuring preschool classrooms have appropriate materials. Tr. 1459:2-4. Ms. [redacted] testified [redacted] was using "simple high tech communication systems like a BIGmack and pictures and objects" before he started school in the WCPSS. Tr. 1459:17-21.

310. However, at school [redacted]'s teacher failed to utilize any communication system with [redacted] Tr. 62:13-15 ([redacted] testimony). Nurse [redacted] testified [redacted]'s teachers did not utilize a communication board (Tr. 258:22-23), nor did she observe [redacted]'s teachers using picture cards with [redacted] during the 2015-16 school year. Tr. 257:7-14.

311. Ms. [redacted] testified that she did not "use a picture or choice board with [redacted] at all" because it was "too abstract for him to use." Tr. 700:4-8.

312. Dr. [redacted] testified that "there was no sense of permeation of a total communication plan," and that [redacted]'s providers and teachers were using different approaches, limiting his progress. Tr. 584:25-585:6. In reviewing the deposition testimony of Ms. [redacted], Dr. [redacted] testified that Ms. [redacted] admission that there was no communication system and that she had never used picture cards with [redacted], was a "fundamental flaw of the IEP development and the IEP implementation." Tr. 596:22-597:13. Dr. [redacted] testified to "the lack of teacher competence on the fundamental assistive technology," in opining about Ms. [redacted] testimony that she "ha[d] no idea" what assistive technology was. Tr. 597:19-598:1.

Communication Goals and Augmentative Communication Technology

313. ■'s needs in the area of communication included both expressive and receptive communication skills. Stip. Ex. 29, pp. 24. He was not yet consistently following routine commands, identifying common objects or pictures, or consistently imitating sounds, all of which are foundational communication skills that are necessary to successfully access the educational environment. Stip. Ex. 7, p. 21; Tr. 1359:9-24; 1360:10-1361:1; 1361:19-1362:8; 1362:9-1363:2.
314. In ■'s Present Level for communication on his April 29, 2015, IEP, Petitioners asserted that WCPSS inaccurately reported ■ was "not yet identifying common objects or pictures." Stip. Ex. 7, p. 21.

315. Provider summary notes recorded January 14, 2015, stated: "He is increasing communication expression using PECS strategies to locate familiar symbols in a field of four or six. He continues to access communication board and remove picture independently for voluntary exchange." Res. Ex. 19, p. 1.

316. The WCPSS preschool assessment team observed ■ in his home on April 17, 2015, and documented ■ could identify common objects, demonstrated by an exercise wherein ■ pointed to the picture of a baby out of a field of nine (9) pictures in a large book. Stip. Ex. 33, p. 165.

317. ■, WCPSS speech/language pathologist, testified the Present Level for ■'s communication goal "should have included information about the picture exchange." Tr. 1799:14-22.

318. Petitioners' expert Dr. ■ testified that ■'s Present Level in his April 29, 2015, IEP did not accurately represent "[■'s] ability to communicate at that time." Tr. 117:35.
319. Early Intervention speech-pathologist, Ms. ■, testified that ■'s Present Levels inaccurately reported ■ was unable to identify pictures and objects, because ■ had been able to do so when Ms. ■ worked with him. Tr. 337:20-25. Nurse ■ also testified to ■'s ability to point or gesture to an object on the page Nurse ■ was reading. Tr. 255:21-256:5.

320. The communication goals addressed following simple directions, locating a familiar named object from a choice of two, imitating actions, sounds, and words during play and structured activities, and imitating a gesture/sign, word/word approximation, and/or pointing to an object/picture to make requests. Stip. Ex. 7, pp. 21-22. These goals are consistent with ■'s identified needs in this area.

321. The preschool assessment, conducted in April 2015, reported contradictory assessment information within the same paragraph: "[■] is not yet identifying common objects," and "He is reported to use pictures to make activity choices . . .." Stip. Ex. 29, p. 146.

322. Neither ■'s Summary of Evaluation/Eligibility Worksheet from the spring of 2015, nor ■'s IEP, including the summarized assessment portion or his Present Level for communication, included any mention of ■'s use of an augmentative communication device,

even though the WCPSS knew [redacted] used Picture Exchange Communication System ("PEC") to communicate. *Compare* Res. Ex. 19, p. 1, *with* Stip. Ex. 7, pp. 19-21, Stip. Ex. 34.

323. Dr. [redacted] testified that she did not know why the assistive technologies [redacted] used in Early Intervention, including PECS and a voice output system, were not "brought forward to [his] IEP." Tr. 517:8-14.

324. Dr. [redacted] testified that "the weakest part of the IEP [was] the communication" goals. Dr. [redacted] testified [redacted]'s goal to "imitate sounds" was "so broad that it [was] hard to know the extent to which it [would be] implemented." Dr. [redacted] testified she would have wanted a goal that was "much more specific" and "related to assistive technology." Tr. 516:8517:5. Dr. [redacted] further testified that she "did not see any evidence of how [[redacted]'s] goals" were tied to his related services. Tr. 524:6-10.

325. Dr. [redacted] stated that the IEP Team's determination that [redacted] did not "require [] assistive technology and/or services for any of [his] communication goals" was inappropriate because [redacted] already utilized "alternate and augmented forms of communication" in the past. Tr. 120:4-18. See also Tr. 338:2-4 (Ms. [redacted] stating it would have been "appropriate to add" the information that [redacted] previously "participate[d] in pictures and some voice output device"). Further, Dr. [redacted] stated that had [redacted]'s Present Levels been informed by that information, "it could [have] paint[ed] a different picture for the present level." Tr. 120:4-18.

326. Petitioners also argued that several of the goals addressed skills that [redacted] had already acquired or surpassed. Petitioners contended that the Early Intervention Services speech/language therapist, [redacted], had successfully introduced [redacted] to a Picture Exchange Communication System ("PECS") before he started pre-school. Tr. 322:1-9. [redacted] also stated that [redacted] was already activating some cause and effect toys in her OT sessions by pushing with his whole hand. Tr. 759: 7-19.

327. The IEP team was apparently aware of Ms. [redacted]'s work with [redacted] The multidisciplinary assessment records that [redacted] was reported to use pictures to make activity choices during his speech therapy sessions, Stip. Ex. 29, p. 146, and the parents had reported to members of the IEP team that PECS system was something [redacted] was using specifically during speech therapy but was not using in other settings such as at home. Tr. 1747:12-18.

328. Members of the IEP team did not see evidence of this skill when evaluating [redacted] Tr. 1747:14-15. [redacted]'s teacher and related service providers at school, once [redacted] began attending, also did not see him exhibit this skill. Tr. 921:15-18; Tr. 1905:8-14; Tr. 1906:5-13.

329. [redacted]'s early intervention speech-pathologist, Ms. [redacted], testified that she "[did not] recall anyone specifically reaching out to [her]" from the WCPSS to request her input on [redacted]'s communication needs (Tr. 335:11-21), even though she directly served [redacted] for the year and half prior to [redacted] entering the WCPSS (Tr. 317:2-3), and even though she possessed direct knowledge of [redacted]'s needs and abilities, including his extensive use of alternate or augmented communication devices and tools. Tr. 319-335. See also Tr. 254:5-10, 254:11-14, 254:21-255:20 ([redacted] testimony describing [redacted] using a voice output button and picture communication system during early intervention speech therapy).

330. Although the Early Intervention speech pathologist and Nurse [redacted] used a communication board with [redacted], Petitioners were not using this communication system in the home environment. Tr. 1747:15-18.

331. In school, [redacted] struggled to use an object-based communication system, which was paired with photographs of the objects to provide association and build toward a picture exchange.

Tr. 922:8-20; Tr. 1901:13-1902:7. Staff at [redacted] did not see the skills needed to use a PECS. Tr. 1940:9-14.

332. Ms. [redacted] agreed that children sometimes exhibit a skill in one setting but not in others. Tr. 343:6-11; 343:21-344:5. Generalization is an important aspect of early education. Tr. 343:12-14.

333. According to Ms. [redacted], in April 2015 [redacted] was not yet exhibiting the foundational skills of sustained attention, imitation, and the ability to associate meaning with a picture that are required in order to successfully use a PECS. Tr. 1748:7-23.

334. Even Dr. [redacted] admitted that if [redacted] had not mastered a foundational communication skill, it would be appropriate for the IEP team to continue working on that skill. Tr. 168:2-5.

335. The Undersigned finds both Ms. [redacted] and Ms. [redacted] to have been credible witnesses with significant personal experience with [redacted] The one-on-one therapy model under which they worked with [redacted], however, is substantially different from that used in the school setting, and the differences between the settings may account for much of the disparity between their work with [redacted] and the school's. Tr. 1879: 2-22; 2015:5-18. Both Ms. [redacted] and Ms. [redacted] acknowledged this possibility. Tr. 343:3-11; 762:9-17.

336. The Undersigned finds that, even if [redacted] were using a PECS appropriately during one-on-one sessions with the Early Intervention provider and Nurse [redacted], his goals related to object identification and choice-making were still appropriate in light of the fact that he was not generalizing these skills in the school setting. However, WCPSS should have conducted an assistive technology evaluation to determine which augmentative communication devises could have been integrated in the classroom so that [redacted] could generalize those skills.

Speech Progress

337. [redacted] failed to make progress in his ability to communicate using assistive technology from the April 29, 2015 IEP meeting through the end of the 2015-16 school year. *See, e.g.*, Tr. 62:5-9 ([redacted] testimony); Tr. 1141:22-1142:2 ([redacted] testimony).

338. [redacted] testified he "[did not] see really any noticeable difference in terms of communication, his word generation. He ha[d] a lot of the same sounds that he did in April." Tr. 62:5-9. See also Tr. 1141:22-1142:2 ([redacted] testimony).

339. Ms. [redacted] testified that she would "collaborate with the speech therapist about the goals for a child's IEP," once per year, "[u]sually when it comes down to an annual review." Tr. 698:2-4.

340. Ms. [redacted] directly contradicted herself regarding her knowledge of [redacted]'s speech goals. Ms. [redacted] testified in her deposition that she "[did not] know what [[redacted]'s] [speech goals] exactly were." Tr. 709:24-710:2 ([redacted] testimony). At the hearing, Ms. [redacted] testified that she knew what his goals were "[w]hat's written on the IEP." Tr. 709:1-2.

341. Dr. [redacted] further testified that she "[did not] see high expectations for communication reflected . . . in the IEP goals." Dr. [redacted] opined that "often when there are children with complicated medical situations their medical needs trump their instructional needs," and there are "low expectations about what they can learn." Tr. 587:6-14.

342. During the 2015-2016 school year, [redacted] regressed in his communication abilities. Ms. [redacted] testified that when [redacted] entered the WCPSS, he could "choose from a field of four to six pictures with approximately 90 percent accuracy," and at the end of the 2015-16 school year in the WCPSS, [redacted] "was only able to choose pictures from a field of two, and it was inconsistent." Tr. 338:24-339:5.

343. [redacted] testified [redacted] "had a couple of sign language signs starting the school year. He would do like 'all done' and 'more.' And by the end of the school year he wasn't really doing 'more' anymore." Tr. 1141:22-1142:2.

344. Nurse [redacted] testified that over the 2015-16 school year, she observed "no change in [[redacted]'s] communication" abilities. Tr. 258:24-4.

345. Although [redacted]'s communication goals as written may have been sufficient, because they were not integrated with augmentative communication devises, [redacted]'s communication ability regressed during the 2015-2016 school year. The Undersigned finds that WCPSS' failure to conduct an assistive technology evaluation to determine the appropriate augmentative communication device for [redacted]'s communication needs violated [redacted]'s right to a free and appropriate public education.

FUNCTIONAL BEHAVIORAL ASSESSMENT ISSUE

346. Even though the WCPSS reported on [redacted]'s April 29, 2015, IEP, that [redacted] "ha[d] behavior(s) that impede[d] his [] learning or that of others," Stip. Ex. 7, p. 20, the WCPSS failed to conduct an FBA of [redacted] Stip. Exs. 1-10.

347. Petitioner [redacted] testified she did not "recall hearing of [an FBA] at [the time of the April 29, 2015, IEP meeting]." Tr. 396:25-397:5. [redacted] testified he did not "recall a specific conversation" at the April 29, 2015, IEP meeting about the IEP Team conducting an FBA of [redacted] Tr. 52:13-15.

348. Dr. [redacted] testified that the evidence presented in [redacted]'s record indicated "his attention span qualified" as a behavior that impeded his learning, and that the IEP team should

have conducted an FBA and developed a Behavior Intervention Plan (BIP) at the February 2, 2016, IEP meeting to address those needs. Tr. 567:2-13.

349. Respondent's witness, Ms. [redacted], testified that the behaviors that impede his learning or that of others are ones that "interrupt the classroom," or "disturb other children," "for example like throwing things, mainly aggressive behaviors." Tr. 688:12-14. Ms. [redacted] failed to include attention-related behaviors as a part of her definition.

350. The Undersigned finds that most three-year-old children have some attentional problems especially when they have not been exposed to the classroom structure. The Undersigned finds that it was reasonable for WCPSS not to conduct a FBA while [redacted] was transitioning from home to preschool. Even if this was a procedural error, the Petitioners have failed to produce any evidence that this caused [redacted] any educational harm.

OCCUPATIONAL THERAPY ("OT") ISSUE

351. Petitioners contend that [redacted]'s IEP Team did not properly or adequately consider direct OT services for [redacted], nor did the IEP Team provide notice to Petitioner [redacted] of its decision.

352. Petitioner [redacted] testified that at the April 29, 2015, IEP meeting, the IEP Team discussed providing OT in a support description rather than as a direct service (Tr. 448:9-16); however, the PWN from the meeting does not document the IEP Team's decision to reject direct OT services. Stip. Ex. 8. [redacted] testified the IEP Team's decision "was conveyed to [her]" as "what he need[ed]," and "was left at that." Tr. 449:19-21. She testified direct services were "brought up as . . . an alternative that wasn't being pursued." Tr. 452:5-7.

353. Petitioners' expert, [redacted], was qualified as an expert in pediatric occupational therapy. Tr. 731:18-19. Ms. [redacted] received her Bachelor's of Science in Occupational Therapy from Ohio State University. Ms. [redacted] received her Master's Degree in Health Science from the State University of New York at Stony Brook. Pet. Ex. 30, p. 841. Ms. [redacted] also obtained certifications in neuro-developmental treatment and advanced neuro-developmental treatment in occupational therapy. Pet. Ex. 30, p. 841. Ms. [redacted] worked as an occupational therapist with school districts in New Jersey, Minnesota, and New York. Tr. 729:2-4; Pet. Ex. 30, p. 840. Ms. [redacted] has served as a member of IEP teams in the role of occupational therapist and service coordinator. Tr. 729:5-16.

354. At the time of her testimony, Ms. [redacted] was a licensed occupational therapist in North Carolina. Pet. Ex. 30, p. 841. Ms. [redacted] had worked as a pediatric occupational therapist for since 1975. Tr. 728:22-24. The majority of Ms. [redacted]'s experience as an occupational therapist was working with children from birth to six (6) years old. Tr. 729:24-25. Ms. [redacted] worked as a pediatric occupational therapist in North Carolina from 2008 through the time of the hearing. Pet. Ex. 30, p. 839.

355. Ms. [redacted] was familiar with [redacted]'s occupational therapy needs, as she had conducted multiple evaluations of [redacted]'s occupational therapy needs, beginning when [redacted] was five (5) months old. Tr. 731:1-13.

356. Ms. [redacted] also conducted the Early Intervention Occupational Therapy Evaluation of [redacted] on January 27, 2015 which was used by the WCPSS IEP team in the occupational therapy decision. Stip. Ex. 27; *see* Stip. Ex. 29 (Preschool Multidisciplinary Assessment).

357. In her evaluation Ms. [redacted] indicated that [redacted] could manipulate objects using a lateral pinch and three finger grasp. Stip. Ex. 29, p. 148; Tr. 1825:5-11. He could also use two hands together to clap and manipulate larger objects. Stip. Ex. 29, p. 148; Tr. 1825:112-15. His skills for arm and hand use clustered between seven and ten months. Stip. Ex. 29, p. 148; Tr. 1826:5-15.

358. At that time, Ms. [redacted] noted that "[[redacted]] exhibits low muscle tone throughout. [redacted] also has mild to moderate decrease in extension due to contractures at the PIP joint on his left hand at the 4th and 5th digit, and on his right hand at the 3rd, 4th, and 5th digit. He demonstrates hyperextension at the MCP joint of all fingers, and throughout his wrist. He sees an orthopedist for his hands." Stip. Ex. 27, p. 127. "Based on the PDMS-2 assessment [[redacted]] scored in the <1%ile for the grasping subtest and in the 3rd percentile for visual motor integration subtest, with age equivalences of 6 month and 11 months." Stip. Ex. 27, p. 128.

359. Ms. [redacted] testified [redacted]'s hands had physical deformities. Tr. 736:1-14.

360. Ms. [redacted]'s OT evaluation was adopted by WCPSS' preschool assessment team. Stip. Ex. 29, p. 148. WCPSS did not conduct its own OT evaluation and, instead, incorporated Ms. [redacted]'s OT evaluation in the Preschool Multidisciplinary Assessment. Stip. Ex. 29, p. 147. Based on her evaluation, Ms. [redacted] recommended [redacted] receive skilled occupational therapy one (1) time per week for sixty (60) minutes because she "felt he needed the expertise of an occupational therapist to help him develop his fine motor skills, his dexterity, his strength so that he could improve in those areas." Tr. 741:11-22; Stip. Ex. 27, p. 128.

361. WCPSS instead provided support OT as a related service instead of direct OT. The Petitioners contested the appropriateness of the provision of OT as a supportive related service rather than direct services in light of Ms. [redacted]'s evaluation and recommendations. Stip. Ex. 18, p. 86.

362. At the time of his OT Evaluation, [redacted] was receiving Early Intervention occupational therapy services for one (1) sixty (60) minute session per week. Tr. 733:5-10 ([redacted] testimony). As [redacted]'s Early Intervention therapist Ms. [redacted] testified that she worked on the following with [redacted]: "fine motor skills, fine motor strengthening, dexterity, weight bearing through the shoulder girdle to give [[redacted]] more core strength," "sensory issues, use of bilateral skills, crossing midline." Tr. 733:13-16. Tr. 733:17. Ms. [redacted] testified she worked on hand strengthening exercises with [redacted] Tr. 733:24-25. Ms. [redacted] testified to [redacted]'s sensory needs, and explained [redacted] "explore[d] a lot of things with his mouth, with his hands" because his vision is compromised. Tr. 734:1-12.

363. Ms. [redacted] testified [redacted] made progress during the time that she served him at this level of intensity: "His hand function improved. His strength improved. . .. [H]e developed—starting to develop a pincer grasp. He developed a good lateral grasp. He was able to play with more toys. He could close lids. He was starting to string large string with the beads." Tr. 734:1419.

364. Ms. [redacted] testified as to the importance of developing a pincer grasp: "For functional movement, for any kind of skills for a child as they're developing, they need to develop that pincer grasp in order to . . . do writing, to do switches, to do any kind of cause and effect toy, to do buttons." Tr. 735:7-12.

365. The two WCPPS occupational therapists who provided support OT were of the opinion that a related service support description was the best fit for [redacted]'s needs. According to [redacted], the occupational therapist who served on [redacted]'s assessment team and initial IEP team, a related service description is the appropriate delivery for occupational therapy services where there is not a large deficit between a child's fine motor development and other cognitive skills. Tr. 1816:6-10. The support description allows the occupational therapist to support the teacher in providing the child with the proper exposure to and repetition of fine motor skills and to continue to monitor the child's fine motor development. Tr. 1816: 6-12. Direct services are needed when the teacher is not able to meet the child's fine motor needs, or when a student has a large deficit between his fine motor skills and his other developmental abilities and needs an occupational therapist to address that deficit. Tr. 1816:17-20. [redacted], the occupational therapist who worked with [redacted] at [redacted], agreed regarding this the distinction between related services and direct services. Tr. 2017:19-2018:3.

366. During Ms. [redacted]'s observation of [redacted] she concluded that his fine motor skills were commensurate with his global functioning. Tr. 1825:18-1826:4. Based on this observation, Ms. [redacted] concluded that a related service support description was more appropriate than direct services because it would provide [redacted] with exposure, repetition, and structure in his day to continue to grow in his fine motor skills. Tr. 1829:4-8. Ms. [redacted] agreed that the related services model was more appropriate than direct services for [redacted] given that his motor skills were consistent with his overall cognitive delays. Tr. 2023:7-18.

367. Witnesses for the WCPSS testified that [redacted]'s cognitive ability precluded him from receiving direct OT services because his inferior intelligence only warranted support services. Tr. 1815:11-14 ([redacted] testimony that "[i]f fine motor or sensory motor is a huge deficit, that student is going to get more services that a student that has more of a flat profile"), 1867:16-21 ([redacted] testimony that "[she] look[s] for deficits" and "[did not] feel that [redacted] had a deficit"); Tr. 1873:17-22 ([redacted] testimony).

368. In addition to a child's cognitive ability, WCPSS occupational therapist, Ms. [redacted], testified that she considers a child's placement when determining the level of occupational therapy services, they will receive. Tr. 1866:6-10.

369. [redacted]'s service logs for occupational therapy did not demonstrate [redacted] made progress from August 2015 through April 2016. Tr. 2069:16-18, 2070:23-2071:1 ([redacted] testimony).

370. Ms. [redacted] testified [redacted] required direct occupational therapy services to access his education. Tr. 741:23-25. She opined that [redacted] should have received direct occupational therapy services at least once a week for thirty to forty-five (30-45) minutes. Tr. 781:11-782:1.

371. Based on WCPSS' adoption of Ms. [redacted]'s Occupational Therapy Evaluation as part of the Preschool Multidisciplinary Assessment process and because Ms. [redacted] had directly

worked with [redacted] as an OT, the Undersigned finds that Ms. [redacted]'s expert testimony is credible and gives higher weight than that of the WCPSS occupational therapists. She testified that [redacted] should have had direct OT once a week for 30-45 minutes a session. The Undersigned finds that WCPSS failed to provide [redacted] a FAPE by not including direct OT as a related service. Because Ms. [redacted] gave of range of session length between 30-45 minutes, the Undersigned finds that 40 minutes is appropriate per session. Based on the 2015-2016 Year-Round Multi-Track Calendar (Pet. Ex. 38) from August 3, 2015 to April 15, 2016, [redacted] is owed twenty-five sessions, 40 minutes each session of compensatory direct occupational therapy.

EXTENDED SCHOOL YEAR ("ESY") ISSUE

372. Petitioners contend that during the IEP Meeting held on April 29, 2015, IEP Team failed to properly consider extended school year services ("ESY") for [redacted] According to the IEP minutes, ESY was discussed at the April 29, 2015 IEP meeting, however, [redacted] testified that the meeting minutes were incomplete with regard to that discussion because in addition to regression, the IEP team considered whether [redacted] was on the verge of a critical life skill. Tr. 1551:3-14; Stip. Ex. 9, p. 42.

373. While team members had limited memories about the ESY discussion, Tr. 1792:1215; Tr. 1855:17-1856:6; the Respondent contends that based on [redacted]'s evaluations, no critical emerging skill had been identified, nor was there any evidence that any such skills might be at a risk of loss if [redacted] did not receive ESY. Tr. 1551:15-22.

374. The IEP meeting minutes reflect the Team's explanation of ESY to Petitioner [redacted] as "[e]xtended school year was explained. [[redacted]] is not eligible to receive special education services at this time as there is no documentation of regression of skills." Stip. Ex. 9, p. 42. The IEP Team did not explain to the Petitioners that the IEP team had to also consider whether "the benefits [[redacted]] gains during the regular school year will be significantly jeopardized if [[redacted]] . . . is not provided with an educational program during extended breaks from instruction" or "[[redacted]] is demonstrating emerging skill acquisition ("window of opportunity") that will be lost without the provision of an educational program during extended breaks from instruction." Stip. Ex. 29, pp. 148, 150; Tr. 57:14-19 (W.Y testimony); *see*, NC Policy 1501-2.4(b)(ii) &(iii).

375. The IEP Team also did not discuss whether the benefits [redacted] gained during Early Intervention might be significantly jeopardized if [redacted] was not provided with ESY services. Tr. 784:23-785:2 ([redacted] testimony).

376. The Petitioners asserted that the IEP Team failed to adequately consider ESY services for [redacted] despite evidence of emerging skill acquisition in several areas. Stip. Ex. 29, pp. 147, 148, 150.

377. Both the Preschool Multidisciplinary Assessment ("PMA") of [redacted] in preparation for his Initial IEP and testimony at the hearing identified emerging skills. *See* Stip. Ex. 29, pp. 148, 150 (emerging walking and inferior pincher grasp; use of two hands to manipulate objects); Tr. 1768:13-23 (beginning walking is a critical life skill) ([redacted] Testimony); and, Tr. 114:8-16 (use of symbol to communicate) ([redacted] Testimony). [redacted]'s evaluators identified several emerging skills including walking and specific fine motor skills. Stip. Ex. 29, pp. 148, 150.

378. The regression or the emerging of skills are not the only two issues which the IEP team must consider for ESY purposes. The IEP team must also consider whether the skills lost through regression could be relearned within a reasonable time. NC 1501-2.4(b)(ii). With respect to emerging skill acquisition ("window of opportunity"), the IEP team must determine if that emerging skill "will be lost without the provision of an educational program during extending breaks from instruction." NC 1501-2.4(b)(iii). Along with the emerging skill consideration, it does not appear that the IEP team considered whether the skills lost through regression could be regained. The Petitioners also did not address these issues and failed to offer any evidence that ': s skills could not be relearned within a reasonable time or that his emerging skills would be lost because of the lack of ESY.

379. The Respondent committed a procedural violation by failing to comply with the ESY requirements. Based on the 2015-2016 Year-Round Multi-Track Calendar, there were only three weeks of track-out break that summer. Pet. Ex. 38.

380. Despite this procedural violation, the Petitioners have failed to prove by a preponderance of the evidence that could not recoup regressed skills or that his emerging skills would be lost without ESY during that brief track-out period; therefore, there was no educational harm with respect to this procedural violation.

PROGRESS MONITORING ISSUE

381. Petitioners contend that 's teachers failed to adequately monitor 's progress.

382. Ms. described her and her TA's method of collecting data: "I ask especially my TAs just to pick a day that they want to do the goal, just random . . .," and collection frequency "was done randomly so that, you know, at least once a week on a goal; sometimes maybe once a month . . .." Tr. 572:1-21 (testimony).

383. Ms. testified about her practices in recording 's ability to achieve certain skills. Ms. testified that much of her data failed to include how many opportunities was given on tasks, or the times could not complete a task. Ms. admitted, "[T]he data is not written in here." Tr. 692:3-695:10. In addition, Ms. testified that she did not collect data on the goals for which another teacher also worked with Tr. 697:12-22, 702:19-23, 703:13-19.

384. Dr. testified that Ms. 's method of data collection was inappropriate. Tr. 572:22-24. Dr. testified that Ms. 's data collection failed to include benchmarks, task analysis, and daily lessons on 's goals. She testified she was "shocked" because Ms. 's practice was "so far from acceptable." Tr. 572:1-574:17. Ms. , collected largely anecdotal data on 's goals. Stip. Ex. 37.

385. Dr. went on to describe the "systematic" approach to progress monitoring necessary to ensure a student is learning. Tr. 573:9-581:4.

386. Dr. testified that "data are absolutely essential to making instructional decision and to reporting progress, to know if the IEP is being implemented. We don't know based

on ten to twelve data points a year." Tr. 593:17-22. She continued: "[D]ata charting has been recognized as research-based practice for . . . probably 15-20 years, so this isn't like something new that came up two years ago." Tr. 595:15-18.

387. Dr. [redacted] reviewed the data collected by [redacted]'s speech-language therapist, [redacted] and testified that "it was disturbing in . . . several ways," and that there was no evidence in the data of systematic instruction. Stip. Ex. 41; Tr. 582:20-584:10.

388. Ms. [redacted] testified that she thinks it is important to take measurable data to determine if a child is making progress. Tr. 1473:14-17.

389. Dr. [redacted] opined that certain goals, such as following direction given cues, "one would think [[redacted]] would have opportunity to practice daily and perhaps multiple times during the day." Tr. 127:19-128:8. [redacted]'s teacher only collected data on that goal a total of thirteen (13) occasions between August 2015 and May 2016. Stip. Ex. 37.

390. Ms. [redacted] reported [redacted]'s "progress ha[d] been limited." Stip. Ex. 20:94-95. Other school staff acknowledged [redacted]'s progress to be incremental and inconsistent. Tr. 856:5-17; Tr. 2037:17-2038:5. Nonetheless, school staff testified to discernible progress in multiple areas. Tr. 845:3-6; Tr. 852:25-853:4; Tr. 855:5-10; Tr. 1892:1-1893:7; Tr. 1893:17-1894:22; Tr. 1897:211898:2; Tr. 1899:15-21; Tr. 2022:14-22; Tr. 2023:20-23; Tr. 2025:10-2026:1; Tr. 2026:9-16.

391. Progress was also documented in the records, for example:

> [redacted] went from walking 25 feet with a walker in September 2015 to walking 200 feet with no assistance in March 2016, improved from working on his balance on level surfaces in September 2015 to climbing up and down steps in March 2016. Stip. Ex. 35, p. 177; Resp. Ex. 25, p. 266.
>
> [redacted] was unable to use eye gaze to look at and then reach for a preferred object among two choices in September 2015, but was doing so consistently in March 2016. Stip. Ex. 35, p. 177; Resp. Ex. 25, p. 266.
>
> [redacted] exhibited an inability to attend to activities other than circle time in September 2015, but by March 2016 could sustain visual attention to preferred tasks for over a minute. Stip. Ex. 35, p. 177; Resp. Ex. 25, p. 266.
>
> [redacted] was only "beginning to engage briefly" with a few toys with adult facilitation in September 2015. By March 2016, he was independently selecting preferred toys from a box and playing with them as well as imitating play based on adult models. Stip. Ex. 35, p. 178; Resp. Ex. 25, p. 267.

392. Ms. [redacted] also used Teaching Strategies GOLD ("TSG") as an assessment of various skill areas. Some of the identified skill areas, such as "Follows Directions," adhere closely to [redacted]'s IEP goals. *E.g.* Resp. Ex. 22, p. 244. The TSG is administered three times a year and demonstrates a child's progress and how he or she compares to a typically developing child of the same age. Tr. 932:8-12; Tr. 934:18-935:6; Tr. 967:13-18.

393. In the Fall 2015 TSG assessment, [redacted] was assessed at a Level "Not Yet" for the skill of Following Directions. Tr. 934:18-22; Resp. Ex. 21, p. 239. By Winter 2015, he had achieved a Level 1, and by Spring 2016, he had achieved a Level 2. Tr. 934:23-25; Tr. 935:4-6; Resp. Ex. 21, p. 239; Resp. Ex. 23, p. 249. Other basic skills showed similar growth. *Compare* Resp. Ex. 21 and 23.

394. The Undersigned finds that, although these assessments are not directly related to his IEP goals, they are useful in assessing [redacted]'s progress during the year.

395. Ms. [redacted] kept daily logs regarding [redacted]'s day, including activities he engaged in and his level of engagement. Stip. Ex. 36. She and the TAs also took data specific to [redacted]'s IEP goals on data sheets specific to the goals. Stip. Ex. 37.

396. Ms. [redacted] did not keep data on the goals that were integrated with related services, leaving that progress monitoring to the related service providers. Tr. 697:5-15. The related service provider logs indicate that data were kept regarding the IEP goals specific to each service. Stip. Ex. 38; Stip. Ex. 39; Stip. Ex. 40; Stip. Ex. 41.

397. The IEP goal data kept by Ms. [redacted] and the teaching assistants was sporadic and did not always indicate information necessary to connect the anecdotal entries to the goal expectations. E.g. Stip. Ex. 37, p. 311. This lack of systematic data collection limits the value of the information collected. Tr. 574:4-16.

398. However, Petitioners' expert Dr. [redacted] admitted that other sources of data are useful for assessing progress, including teacher observations, parent input, and related service logs. Tr. 185:18-25. Ms. [redacted] testified that she relied on these additional information sources as well as her data to assess [redacted]'s progress. Tr. 929:12-15; Tr. 954:8-12.

399. [redacted], Compliance Director for Special Education Services, admitted that the data collection in this case was not ideal. Tr. 2159:19-2160:6; Tr. 2184:15-17. She explained, however, that there was sufficient data across various sources for professionals working with [redacted] to be able to make appropriate decisions regarding his education. Tr. 2160:6-9; Tr. 2184:232185:6. The Undersigned finds Ms. [redacted]'s testimony credible, particularly in light of her willingness to acknowledge weaknesses in the data collection practices of the team. As progress monitoring has become a recurrent theme in these contested cases, the Undersigned is reassured that WCPSS is working to remedy this deficiency.

400. The Undersigned finds that, although the data collection was not as consistent or systematic as might be hoped, the full array of information available to the team through the various data collection sources, including staff observations on a daily basis, was sufficient to support the team's educational and instructional decisions in [redacted]'s case.

STAY-PUT

401. As the date on which the new IEP would go into effect approached, [redacted] requested additional time to make arrangements for [redacted]'s care. Tr. 1110:21-1111:5; Tr. 1198:20-25. The team agreed in a March 3, 2016 IEP meeting to extend School Nurse Services as a related service

through March 24, 2016, which was the last day before [redacted] tracked out for three weeks. Stip. Ex. 25, p.121; Tr. 1199:1-10.

402. During the three-week track out period following March 24, 2016, Petitioners filed the instant petition and invoked stay put. [redacted] has received School Nurse Service throughout the pendency of the hearing process.

CONCLUSIONS OF LAW

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. 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).

Jurisdictional

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

5. The Petitioners and Respondent named in this action are correctly designated and have been properly noticed of this hearing.

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

7. The IDEA is the federal statute governing the education of students with disabilities.

8. The WCPSS is the local education agency (LEA) receiving funds pursuant to the IDEA.

9. The controlling state law for students with disabilities is N.C. Gen. Stat. § 115C, Article 9 and the corresponding state regulations.

General Legal Framework

10. 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.

11. The IDEA contains a number of critical, procedural safeguards to provide notice to parents of decisions regarding their children and "an opportunity [for parents] to object to those decisions." *G. ex rel. R.G. v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 299 (4th Cir. 2003) (quoting *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 527 (4th Cir. 2002) (internal citation omitted)). Should the LEA fail in its obligations under the IDEA, parents are afforded the right to file a due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6).

Procedural Errors

12. 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).

13. A child is denied a FAPE when an IEP Team commits a procedural violation that "result[s] in some loss of educational benefit or opportunity" and is not "simply . . . a harmless error." *A.K. ex rel. J.K. v. Alexandria City Sch.*, 484 F.3d 672, 684 (4th Cir. 2007); *see also Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2000) ("[A] school district's failure to comply with the procedural requirements of the Act will constitute a denial of FAPE only if such violation causes substantive harm to the child or his parents."). Only when the court finds that the "procedural violation has resulted in such substantive harm, and thus constituted a denial of [the child's] right to a FAPE, may [it] 'grant such relief as the court determines is appropriate.'" *Knable*, 238 F.3d at 764 (citing 20 U.S.C. § 1415(e)(2)).

14. A substantive procedural violation is one that "seriously infringe[s] the parents' opportunity to participate in the IEP formulation process," *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992) (citations omitted), or causes the child to lose any educational opportunity, *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990).

15. 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).

16. 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 participation 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).

17. A substantive procedural violation is one that "seriously infringe[s] the parents' opportunity to participate in the IEP formulation process," *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992) (citations omitted), or causes the child to lose any educational opportunity, *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990).

18. "Multiple procedural violations [] may cumulatively result in the denial of FAPE even if the violations considered individually do not." *L.O. v. N.Y.C. Dep't of Educ.*, No. 15-1019, at *18 (2d Cir. 2016) (internal quotation marks omitted) (quoting *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 190 (2012)).

Parental Participation

19. Parents must be afforded the opportunity to participate in the IEP meeting. 34 C.F.R. §300.322(a). N.C.G.S. §115C-109.3(a) guarantees the parent the right "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to that child."

20. A denial of meaningful participation by the parent, including predetermination by the IEP team, is a procedural violation. *See, e.g., Hanson ex. rel. Hanson v. Smith*, 212 F.Supp.2d 474, 486 (D. Md. 2002).

21. The IDEA's procedural requirements are purposefully designed to ensure that parents can meaningfully participate in the process of developing an IEP for their child. *See Rowley*, 458 U.S. at 205–06 ("It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.").

22. Parents are denied their right to meaningfully participate in the development of their child's IEP when a school district predetermines the child's placement prior to an IEP meeting. *See Spielberg v. Henrico Cnty. Public Sch.*, 853 F.3d 256 (4th Cir. 1988) (finding the school district's decision to change a student's placement before the IEP meeting violated the Education for All Handicapped Children Act, the predecessor to the IDEA); *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014) ("Predetermination occurs when a state makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team.").

23. Prior to an IEP Meeting, members of the IEP Team may engage in "informal or unscheduled conversations," "conversations on issues such as teaching methodology, lesson plans, or coordination of service provision," and "preparatory activities . . . to develop a proposal or

response to a parent proposal that will be discussed at a later meeting." *See* 34 C.F.R. § 300.501(b)(3). However, "any pre-formed opinion the state might have must not obstruct the parents' participation in the planning process." *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014) (citation omitted).

24. "To avoid a finding of predetermination, there must be evidence the [school district] has an open mind and might possibly be swayed by the parents' opinions and support for the IEP provisions they believe are necessary for their child." *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014) (citing *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 858 (6th Cir. 2004)). A school district may weaken a claim of predetermination by providing sufficient evidence that the IEP team considered multiple placements, *see A.E. v. Westport Bd. of Educ.*, 463 F. Supp. 2d 208, 213 (D. Conn. 2006), or that the IEP team made changes to the IEP at the meeting in response to the parents' input, *see, e.g.*, *T.P. ex rel S.P. v. Mamaroneck Union Free Sch.*, 554 F.3d 247, 253 (2d Cir. 2009). There was evidence presented at hearing that WCPSS would not be swayed by [redacted]'s parents' opinions, and WCPSS did not have an open mind with regard to [redacted]'s placement.

25. A child is denied a FAPE when an IEP Team commits a procedural violation that "result[s] in some loss of educational benefit or opportunity" and is not "simply . . . a harmless error." *A.K. ex rel. J.K. v. Alexandria City Sch.*, 484 F.3d 672, 684 (4th Cir. 2007); *see also Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2000) ("[A] school district's failure to comply with the procedural requirements of the Act will constitute a denial of FAPE only if such violation causes substantive harm to the child or his parents."). Only when the court finds that the "procedural violation has resulted in such substantive harm, and thus constituted a denial of [the child's] right to a FAPE, may [it] 'grant such relief as the court determines is appropriate.'" *Knable*, 238 F.3d at 764 (citing 20 U.S.C. § 1415(e)(2)).

26. A substantive procedural violation is one that "seriously infringe[s] the parents' opportunity to participate in the IEP formulation process," *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992) (citations omitted), or causes the child to lose any educational opportunity, *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990).

Prior Written Notice to Parents

27. The IDEA requires that the Prior Written Notice include:

> a description of the action proposed or refused by the agency;
>
> an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
>
> a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by

which a copy of a description of the procedural safeguards can be obtained;

sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

a description of other options considered by the IEP Team and the reason why those options were rejected; and

a description of the factors that are relevant to the agency's proposal or refusal. 20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b).

28. Regardless of whether all team members agree to the change, the agency must provide notice as it "allows the parent time to fully consider the change and determine if he/she has additional suggestions, concerns, questions, and so forth." *Letter to Lieberman*, Office of Special Education and Rehabilitative Services (Aug. 15, 2008).

Appropriateness of the IEP

29. School districts are not charged with providing the best program, but only a program that is designed to provide the child with an opportunity for a free appropriate public education. *Rowley*, 458 U.S. at 189-90. 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).

30. 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.").

31. "[T]he [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).

Least Restrictive Environment

32. In addition to IDEA's requirement that the state provide each student with some educational benefit, the student must be placed in the least restrictive environment (LRE) appropriate for the student to achieve educational benefit. *See, e.g., A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004); *MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 526 (4th Cir. 2003).

33. The IDEA requires that "[i]n determining the educational placement of a child with a disability, *including a preschool child with a disability*, each public agency must ensure that the

placement decision . . . [i]s made in conformity with the LRE provisions of this subpart, including 34 C.F.R. 300.114 through 34 C.F.R. 300.118. 34 C.F.R. § 300.116 (emphasis added).

34. "To comply with the IDEA, a school district must make available a full continuum of placements to meet each disabled child's individual needs. 34 C.F.R. § 300.115(a). This continuum must include alternative placements *and* "make provision of supplementary services . . . to be provided in conjunction with regular class placement." 34 C.F.R. § 300.115(b) (emphasis added). As a recipient of IDEA funds, the WCPSS was required to first consider educating [redacted] in the regular educational environment with the use of supplementary aids and services.

35. The Fourth Circuit in *DeVries v. Fairfax County School Board* emphasized that the mainstreaming of children with disabilities is "not only a laudable goal but is also a requirement of the Act" and adopted the *Roncker* standard. *DeVries*, 882 F.2d. at 879 (citing *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) (requiring a court to "determine whether the services which make that placement [at a segregated facility] superior could be feasibly provided in a nonsegregated setting")).

36. "In short, a student with disabilities must be placed 'in the least restrictive environment that will provide the child with a meaningful educational benefit.'" *H.L. v. Downingtown Area Sch. Dist.*, No. 14-3678, 2015 WL 3621853, at *7 (3d Cir. June 11, 2015) (citing *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 556–57 (3d Cir. 2010)).

37. If "a school 'has given no serious consideration to including the child in a regular class with . . . supplementary aids and services and to modifying the regular curriculum to accommodate the child, then it has most likely violated' the LRE requirement." *H.L.*, 2015 WL 3621853, at *3 (citing *Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1216 (3d Cir. 1993)).

38. Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. § 300.115(a). Under the IDEA, children with disabilities are to be educated with children who are not disabled only "to the maximum extent appropriate." *Hartmann*, 118 F.3d at 1001; 20 U.S.C. § 1412(a)(5)(A).

39. The school district may consider "[s]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment . . . *only if* the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2)(ii) (emphasis added).

40. A child may not be "removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum." 34 C.F.R. § 300.116(e). Nor may a school district rely solely on the following factors when determining a child's placement: category of disability; severity of disability; configuration of delivery system; availability of educational or related services; availability of space; and administrative convenience. *OSEP Memorandum 95-9*. The only inclusive preschool options available for children turning three (3) in the WCPSS is in one of six (6) developmental day programs; however, the WCPSS has an established practice of denying a child placement in an inclusive setting in a

developmental day program if the program indicates that it does not have the resources to serve the child.

41. Mainstreaming is not required where (1) the disabled child would not receive an educational benefit from mainstreaming into a regular class; (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting; or (3) the disabled child is a disruptive force in a regular classroom setting. *Hartmann*, 118 F.3d at 1001; *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 879 (4th Cir.1989).

42. Districts are not required to attempt a mainstream setting before placing a child in a more restrictive setting. *See Letter to Cohen*, 25 IDELR 516 (OSEP, August 6, 1996).

43. The LRE requirement creates a presumption in favor of mainstreaming. The IDEA clearly articulates a presumption that disabled children will not be segregated from their nondisabled peers and will be educated in the least restrictive environment ("LRE"):

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(5)(A); *see* 34 C.F.R. § 300.114(a).

44. The least restrictive environment provision of the IDEA "sets forth a 'strong congressional preference' for integrating children with disabilities in regular classrooms," rather than placing the child in a "segregated environment." *Oberti*, 995 F.2d at 1214 (3rd Cir. 1993); *see also Devries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876, 879 (4th Cir. 1989) ("The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the Act's mandate.").

45. "The fact that the provision only creates a presumption, however, reflects a congressional judgment that receipt of such social benefits is ultimately a goal subordinate to the requirement that disabled children receive educational benefit." *Hartmann,* 118 F.3d at 1002. As such, academic benefit takes primacy over social benefit if the two goals are in conflict.

46. A district that does not operate a regular preschool program is not required to initiate one simply in order to create an LRE opportunity for a disabled child. According to 34 C.F.R. § 300.552, a child is to be educated in the school that he or she would otherwise attend if not disabled unless the IEP for that child requires some other placement. The commentary to this regulation provides:

> Public agencies that do not operate programs for nondisabled children are not required to initiate such programs to satisfy the requirements regarding placement in the LRE

embodied in Sections 300.550–556. For these public agencies, some alternative methods for meeting the requirements include:

- Providing opportunities for participation (even part time) of preschool children with disabilities in other preschool programs operated by public agencies (such as Head Start);

- Placing children with disabilities in private school programs for nondisabled preschool children or private preschool programs that integrate children with disabilities and nondisabled children; and

- Locating classes for preschool children with disabilities in regular elementary schools.

- In each case the public agency must ensure that each child's placement is in the LRE in which the unique needs of that child can be met, based on the child's IEP, and meets all of the other requirements of Sections 300.340– 300.350 and Sections 300.550–300.556.

34 C.F.R. § 300.552, Note (1996). *See also Dear Colleague Letter*, 58 IDELR 290 (OSESP, February 29, 2012).

47. Further, while medically fragile students have the same rights to LRE as any other student with a disability, student safety and the risk of harm is a critical consideration in determining the least restrictive environment appropriate for a student. *See* 34 C.F.R. 300.552(d) (stating that the public agency must ensure that "[i]n selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs"); *Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ.*, 397 F.3d 77, 93 (2d Cir. 2005) ("Congress did not intend to exclude from consideration any subject matter—including safety concerns—that could interfere with a disabled child's right to receive a free appropriate public education.").

IEP Goals

48. An Individualized Education Program (IEP) is "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with" the IDEA. 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320(a).

49. The IEP is "[t]he primary vehicle for implementing" the IDEA. *Honig*, 484 U.S. at 311. The IEP is "[p]repared at meetings between a representative of the local school district, the child's teacher, the parents or guardians, and, whenever appropriate, the disabled child," and the IEP "sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives." *Id.*

50. "[A]n IEP must provide a child with more than minimal, trivial progress." *O.S. v. Fairfax Cnty. Sch.*, 804 F.3d 354, 359 (4th Cir. 2015). "'[T]he door of public education must be opened in a meaningful way.'" *M.W. ex rel. S.W. v. N.Y.C. Dept. of Educ.*, 725 F.3d 131,143 (2nd

Cir. 2013) (quoting *P. ex rel. Mr. & Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 119 (2d Cir. 2008)).

51. The IDEA requires that every IEP contain "[a] statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum," "[a] statement of measurable annual goals," and a description of "[h]ow the child's progress toward meeting the annual goals . . . will be measured." 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320(a)(1)–(3). In addition, the IDEA requires that the goals developed are individualized, and target the unique needs of the child. 20 U.S.C. §§ 1401(29), 1414(d)(1)(A); 34 C.F.R. § 300.39(a)(1); N.C. Policy §§ 1500-2.34(a)(1), 1503-4.1(a).

52. A "well-written IEP goal must pass the 'stranger' test[:] Could a stranger to the IEP goal be able to implement the goal, be able to implement the assessment of student's progress on the goal, and be able to determine whether the student's progress was satisfactory"? *Mason City Comm. Sch. Dist.*, 46 IDELR 148, 106 LRP 51522 (SEA IOWA 2006).

53. Goals that are vague or generally immeasurable are contrary to the IDEA and fail to provide a FAPE to a student. See e.g., *Independent Sch. Dist. No. 701 v. J.T.*, 45 IDELR 92, pp. 3, 7, 2006 WL 517648 (D. Minn. 2006) (an IEP's statement that a student would "improve his functional academic skills from a level of not completing assignments independently to a level of being able to read, write and do basic math skills independently" was too vague to permit measurement of the student's progress); *Anchorage Sch. Dist.*, 51 IDELR 230 (SEA AK 2008), aff'd, 54 IDELR 29 (D. Alaska 2009) (the Hearing Officer determined that the lack of clear, measurable goals in a child's IEP precluded an objective measurement of the child's progress).

54. "The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need." *Los Angeles Unified Sch. Dist.*, 110 LRP 34448 (SEA CA 2010) (citing 34 C.F.R. § 300.320(a)(2)(i)-(ii)(2006); 34 C.F.R. part 300, App. A, Q.1 (2006)).

Implementation of IEPs

55. "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." *Houston Ind. School Dist. V. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

Evaluations

56. The IDEA mandates that the initial evaluation to determine if a child is a child with a disability "must consist of procedures—(I) To determine if the child is a child with a disability . . . ; and (II) To determine the educational needs of the child." 20 U.S.C. § 1414(a)(1)(C)(i); 34 C.F.R. § 300.301; N.C. Policy 1503-2.2.

57. The evaluation must be sufficiently comprehensive to identify all of the child's special education needs, whether or not commonly linked to the disability category in which the child has been identified. 20 U.S.C. §§ 1414(b)(1)-(3), 1412(a)(6)(B); 34 C.F.R. § 300.304. The

evaluation must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information." 20 U.S.C. § 1414(b); 34 C.F.R. § 300.304.

58. Where a child's behavior impedes the child's learning, the IEP Team must "consider the use of positive behavior interventions and supports, and other strategies, to address that behavior." 34 C.F.R. § 300.324(a)(2)(i).

RELATED SERVICES

59. An IEP must include "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child . . . (aa) to advance appropriately toward attaining the annual goals; (bb) to be involved in and make progress in the general education curriculum . . . and to participate in extracurricular and other nonacademic activities; and (cc) to be educated and participate with other children with disabilities and nondisabled children." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). The IDEA defines related services as "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education." 34 C.F.R. § 300.34(a). These services include "speech-language pathology and audiology services, psychological services, [and] physical and occupational therapy." 34 C.F.R. § 300.34(a).

Medical Services and School Nursing Services

60. If a child has a medical related disability that impacts a child's need for special education and related services, then "medical services" for diagnostic/assessment purposes can be a related service. 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34(b)(5); NC Policy 1500 (b)(5). This "medical service' must be provided by a licensed physician. *Id.* (emphasis added)

61. A "medical service" is available as a related service for diagnostic or evaluation purposes. NC Policy 1500-2.28(c)(5); 34 C.F.R. § 300.34(c)(5). These are "services provided by a licensed physician to determine a child's medically related disabilities that results in the child's needs for special education and related services. 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34(c)(5) (emphasis added). WCPSS did not use a licensed physician to determine [redacted]'s need for nurse services. Instead, WCPSS relied exclusively on Ms. [redacted]'s determination that nurse services were unnecessary. Ms. [redacted] did not provide an evaluation report. Determination of the child's educational needs shall be made by a team of qualified professionals and the parent. 20 U.S.C. § 1414(b)(4)(A). A copy of the evaluation report must be given to the parent. 20 U.S.C. § 1414(b)(4)(B). To determine eligibility and educational need, each public agency must draw upon information from a variety of sources including parent input, information about the child's physical condition and ensure that information obtained from all these sources is documented and carefully considered. 20 U.S.C. § 1414(b)(4)&(5); 34 C.F.R. § 300.302(c)(i)&(ii).

62. The federal regulations under the IDEA include "School Nurse Services" and "School Health Services" as related services. These are "health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP." 34 CFR § 300.34(c)(13).

63. The distinction between the two is that School Nurse Services must be provided by a qualified school nurse, while School Health Services may be provided by either a qualified school

nurse or the nurse can delegate these tasks to other qualified person. *Id.* In effect, School Nurse Services are necessary in an IEP only when the specific medical care needed to allow a student to access their special education services are *required* to be provided by a qualified nurse rather than trained staff.

64. Because School Nurse Services and School Health Services are related services, the IEP team retains final decision making authority over whether a student's individualized needs include School Nurse Services or School Health Services. *See* 34 CFR § 300.34; 34 CFR § 300.320. Once School Nurse Services is chosen by the IEP Team, the nurse loses any authority over delegation of medical tasks.

65. It is not enough that a parent or child may be more comfortable with the presence of a nurse as opposed to another trained individual; in order for a qualified nurse to be necessary, the child must *require* nursing services in order to access special education services during the school day. *See, e.g., Gwinnett Cnty. Sch. Dist.*, 64 IDELR 92 (Ga. SEA 2013) ("Though Plaintiff presented evidence that he is perhaps more comfortable at a school where the clinic is staffed by a school nurse rather than a clinic worker, no evidence was presented that his medical needs require access to a school nurse or that the provision of nursing services as part of his IEP is necessary in order for Plaintiff to receive a FAPE."); *Sto-Rox Sch. Dist.*, 26 IDELR 71 (Pa. SEA 1997) (holding that child with multiple disabilities did not require one-to-one nursing services in order to receive an educational benefit and noting testimony from his private duty nurse that she only helped him with daily living activities and there was no evidence of respiratory difficulties requiring nursing intervention).

School Health Services and Nurse Delegation Authority

66. Once the IEP team chooses School Health Service, a school nurse can delegate medical tasks without IEP team approval.

67. Pursuant to its statutory authority, the Board of Nursing has adopted regulations governing the practice of nursing. Under those regulations, "[t]he repetitive performance of a common task or procedure which does not require the professional judgment of a registered nurse or licensed practical nurse shall not be considered the practice of nursing for which a license is required." 21 NCAC 36.0221(b). This provision allows for delegation to unlicensed personnel. *See also* 21 NCAC 36.0224(i)(3-4).

68. "Tasks may be delegated to an unlicensed person which: (1) frequently recur in the daily care of a client . . .; (2) are performed according to an established sequence of steps; (3) involve little or no modification from one client-care situation to another; (4) may be performed with a predictable outcome; and (5) do not inherently involve ongoing assessment, interpretation, or decision-making which cannot be logically separated from the procedure(s) itself." 21 NCAC 36.0221(b).

69. The regulations require that "[c]lient-care services which do not meet all of these criteria shall be performed by a licensed nurse." 21 NCAC 36 .0221(b).

Occupational Therapy ("OT") as a Related Service

70. Occupational therapy means services provided by a qualified occupational therapist which "includes improving, developing, or restoring functions impaired or lost through illness, injury, or deprivation" and "improving ability to perform tasks for independent functions if functions are impaired" and "preventing, through early intervention, initial or further impairment or loss of function." 34 C.F.R. § 300.34(c)(6)(i)&(ii)(A-C).

71. The Respondent contends that the provision of direct occupational therapy services is contingent upon commensurable cognitive ability. However, the Respondent's witnesses failed to show any justification for this position. The *North Carolina Policies Governing Services for Children with Disabilities* do not support the Respondent's position. Instead, the definition of Motor Evaluation does not list cognitive testing as an area to be assessed for motor evaluations by physical therapist or occupational therapists. NC Policy 1500-2.11(b)(9). Similarly, the IDEA and its regulations do not limit provision of occupation therapy in this manner. 20 IDEA 1401(26); 34 C.F.R. § 300.34(c)(6).

Extended School Year ("ESY") Services

72. Under the IDEA, "[e]xtended school year services must be provided only if a child's IEP Team determines, on an individual basis . . . that the services are necessary for the provision of FAPE to the child." 300 C.F.R. § 300.106(a)(2).

73. The Fourth Circuit has found that "ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." *MM ex rel. DM*, 303 F.3d at 537–38. Where a child is transitioning from Part C to Part B, and turns three (3) during the summer, the school district must provide ESY "if needed by a particular child to receive FAPE." *Letter to Anonymous*, 22 IDELR 980 (OSEP 1995).

74. The IDEA requires that "[e]ach public agency must ensure that extended school year services are available as necessary to provide FAPE." 34 C.F.R. § 300.106(a).

75. Extended school year services are "special education and related services that (1) are provided to a child with a disability (i) beyond the normal school year of the public agency; (ii) in accordance with the child's IEP; and (iii) at no cost to the parents of the child; and (2) meet the standards of the SEA." 34 CFR § 300.106(b)

76. The standards of the SEA in North Carolina are provided in the North Carolina Policies Regarding Services for Children with Disabilities, Section NC 1501-2.4(b)(2), which states that a student qualifies for ESY based on:

> Whether the student regresses or may regress during extended breaks from instruction and cannot relearn the lost skills within a reasonable time; or

Whether the benefits a student gains during the regular school year will be significantly jeopardized if he or she is not provided with an educational program during extended breaks from instruction; or

Whether the student is demonstrating emerging critical skill acquisition ("window of opportunity") that will be lost without the provision of an educational program during extended breaks from instruction.

77. It is incumbent upon the party with the burden of proof to show, through evidence or testimony, that a student requires ESY as defined by the relevant standards of the SEA noted above.

Professional Judgment and Deference to Educators

78. 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.

79. 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).

LEGAL CONCLUSIONS ON ISSUES FOR HEARING

ISSUE 1: Whether Petitioners met their burden of demonstrating that Respondent failed to offer [redacted] a FAPE by determining that he did not require School Nurse Services ("School Nurse Services Issue) as a related service in the IEP meetings held on April 29, 2015 and February 2, 2016.

School Nurse Services Issue

80. In this case, the IEP team failed to conduct a medical service to determine [redacted]'s medical needs. Instead the IEP team deferred to a contract nurse with Wake County Human Services to evaluate [redacted]'s medical needs. Ms. [redacted] is not a licensed physician and had no authority evaluating what related services [redacted] needed for his medically related disability under the IDEA.

81. A licensed physician must determine a child's medically related disabilities that results in the child's needs for special education and related services. WCPSS did not use a licensed physician to determine [redacted]'s need for School Nurse Services. Instead, WCPSS relied exclusively on Ms. [redacted]'s determination that School Nurse Services were unnecessary. Ms. [redacted] was not qualified to determine what medical related services were necessary for [redacted] to receive a

FAPE. Moreover, Ms. [redacted] failed to provide an evaluation report to the parents and IEP team. The educational need for related services must be determined from variety of sources including parent input, information about the child's physical condition not just one person. The Respondent did not ensure that information obtained from all these sources was documented and carefully considered.

82. The testimonies of his treating medical providers were overwhelming that [redacted] needed School Nurse Services.

83. After the IEP Team unilaterally predetermined that School Nurse Services were unnecessary related services for [redacted], these same medical providers sent letters stating that [redacted] needed skilled nurse services.

84. Respondent did not offer any rebuttal physician testimony that School Nurse Services as a related service was not necessary for [redacted]

85. Moreover, the IEP team in this case chose School Nurse Services, not School Health Services. School Health Services was never mentioned at any of the IEP team meetings or documented in any of the IEP documents.

86. Since the IEP team chose School Nurse Services as the appropriate related service for [redacted], delegation of medical tasks is not relevant. The medical tasks must be provided by a school nurse.

87. The Respondent committed many procedural and substantive violations with respect to the School Nurse Services issue.

88. Based on Findings 16-220 and other evidence in the record, Substantively, the Respondent failed to provide medical services as a related service, failed to include School Nurse Service as a related service on the April 29. 2015 and February 2, 2016 IEPs' service delivery plans. Respondent failed to properly evaluate [redacted]'s medical needs. School Nurse Services as a related service was not properly considered ay the April 29, 2015 or February 2, 2016 IEP meetings.

89. Based on Findings 16-220 and other evidence in the record , the Respondent committed many procedural violations are that it failed to adequacy provide the Petitioners notice of its decisions in the Prior Written Notices about School Nurse Services; failed to explain the difference between School Nurse and School Health Services; predetermined that [redacted] would not receive School Nurse Services; predetermined that the medical tasks would be delegated, and deprived the Petitioners of meaningful participation in the IEP process.

90. The IEP team failed to comply with the agreement at the July 17, 2015 IEP meeting with respect to the Six Month Trial, e.g. to collect and review additional physician input, parent input, medical documentation, and home health nurse input. The WCHS nurse charged with this responsibility testified that she had no intention of reviewing any additional information. Respondent's position was that School Health Services was the appropriate related service, however, the IEP team did not include School Health Services on the IEPs despite Respondent's position that [redacted]'s needed such services and the nurse's recommendation that such services be

provided by school staff trained for that purpose. In addition, the Prior Written Notice did not note the refusal to provide School Nurse Services as a related service. These errors constitute procedural violations.

91. Based on Findings 16-220 and other evidence in the record, any procedural violations occurring at the April 29, 2015 meeting with respect to ☐'s medical needs must be considered harmless as to ☐ because the IEP team's decision regarding school nursing services at the April 29, 2015 meeting was never implemented. Petitioners asked for the issue to be reconsidered and provided a letter from ☐'s pediatrician in support of School Nurse Services for ☐ The nurse communicated with the physician. The IEP team reconvened and proposed a six-month trial period with school nursing services to better understand ☐'s needs in a school setting, a proposal with which Petitioner ☐ agreed. These events cured the deletion of School Nurse Services as a related service and rendered harmless that particular substantive violation as to ☐ The Undersigned will not punish Respondent for revisiting and changing its decision based on new information, especially when the change occurred before ☐ even began attending school.

92. However, the procedural violations regarding School Nurse Services from the Eligibility Meeting and predetermination that School Nurse Services were not necessary without meaningful parent input and proper medical evaluation began at the April 14, 2015 referral and continued to the February 2, 2016 IEP meeting which constitutes a practice or pattern of the Petitioners meaningful participation in the IEP process, which rises to the level of a substantive violation.

93. The February 2, 2016 IEP decision to refuse continuation of School Nurse Services as a related service violated ☐'s right to a FAPE.

94. Based on Findings 16-220 and other evidence in the record, the IEP team's decision on February 2, 2016 to remove School Nursing Services from the IEP was not justified by the evidence before the team and not appropriate to meet ☐'s demonstrated medical needs at school.

95. Although the IEP team is supposed to maintain final decision-making authority over the provision of related services such as School Nursing Services and School Health Services, the IEP team abdicated this authority to the WCHS nurse.

96. Based on Findings 16-220 and other evidence in the record, the IEP team did predetermine the nursing decision. The fact that staff members met to discuss the issue before formal IEP meetings is evidence of predetermination, and the record shows that the IEP meeting itself involved no discussions of nursing with the parent or opportunity for the parent to provide input. Instead, the parent was simply told that School Nurse Services would not be a related service.

97. In light of ☐'s unique medical needs, the Undersigned is extremely concerned in this case that Respondent's staff did not collaborate with ☐'s medical providers immediately before the meetings to remove School Nursing Services from the IEP. The Respondent's reliance on a WCHS nurse who had no training in the IEP process and failed to provide the IEP team any written report is also worrisome.

98. The IEP team did not have frank and detailed discussions with the parents about ■'s medical needs, did not independently evaluation his medical needs, and failed to explain to Petitioners the difference between School Nurse Services and School Health Services.

99. Contrary to Respondent's assertions, School Health Services were never discussed by the IEP team or documented in any of the IEP documents. If in fact the IEP team did choose School Health Services, it is not included on either the April 29, 2015 IEP or the February 2, 2016 IEP. This is, again, a procedural violation. Although Petition made no claims regarding the lack of School Health Services on either IEP, the Respondent has raised this as an issue when it used the Nurse Practice Act as a defense. The implication of Nurse Practice Act and Decision Tree were not explained to the Petitioners or discussed at any of the IEP meetings. To the extent the School Health Services should have been discussed in the alternative, the Respondent's denial the Petitioner ■ meaningful participation in the decision making process of choosing School Health Services.

100. Based on the foregoing and the Conclusions of Law, the Undersigned concludes that Respondent did deny ■ a FAPE with respect to the decisions regarding School Nursing Services and denied Petitioner ■ meaningful participation in the decision making process.

101. Prior to filing due process and at the Resolution Meeting, the Respondent had opportunities to reconvene the IEP team and add School Nurse Services as a related service, but did not. In opening statement, the WCPSS' attorney stated that this is a case primarily about nurse services. The Undersigned agrees that, although other issues were raised in the Petition, this was a case about the provision of School Nurse Services. Had the Respondent again reconsidered its decision on School Nurse Services at the February 2, 2016 IEP meeting or the Resolution Meeting, this contested case hearing could have been avoided.

ISSUE 2: Whether Petitioners met their burden of demonstrating that Respondent denied ■ a FAPE by placing him in a Developmental Delay program in a separate preschool setting ("Placement Issue") for the 2015-16 school year.

Placement Issue

102. This issue involves whether Respondent adhered to appropriate procedures in placing ■ and whether that decision was substantively appropriate with regard to the Least Restrictive Environment provisions of the IDEA.

103. It also appears that the Respondent's predetermination that School Nurse Services would not be a related service on ■'s IEP affected the availability of a placement at ■ ■.

104. As a procedural matter, based on Findings 221-295 and other evidence in the record, while members of the IEP team were aware of Petitioner ■'s preference for an RECP placement at ■, Respondent committed a procedural violation regarding parental participation when it failed to explicitly discuss the Petitioner's preference during the April 29, 2015 Eligibility Meeting.

105. Like most parents of preschoolers transitioning from Part C of IDEA to Part B, this was the Petitioners first experience with IEP development and placement issues. LEAs are supposed to ensure a seamless transition between these Parts. 34 C.F.R. §§ 303.209(a)(1)(3)(ii) & 303.211(b)(6)(ii).

106. Instead, the Respondent failed to explain the continuum of preschool placement options available and the differences between the RECP and separate placements. Within that context, Respondent failed to further explain the three classroom options within the Separate setting placement.

107. Based on Findings 221-295 and other evidence in the record, the Undersigned concludes that this procedural violation did significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to [redacted] in the least restrictive environment. The Respondent also failed to note on all the IEPs the placement options which had been discussed and ultimately chosen. It is also disturbing that WCPSS Senior Administrative Staff stated that the goals do not drive preschool placement and that it can be changed after the fact without revising the goals.

108. Although the procedural violation did deny the parent's meaningful participation, the procedural violation would still be harmless to the child if the educational placement selected by the team was, substantively, [redacted]'s least restrictive environment. *See MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 534 (4th Cir. 2002) ("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.").

109. Based on Findings 221-295, and other evidence in the record, [redacted] had specific needs with respect to accessing his education that included measures to guarantee his physical safety, measures to provide appropriate medical care, measures to remove distractions related both to materials and other students, and intensive individual instruction to address a lack of the most foundational skills needed to access a public education. [redacted] needed a smaller setting with additional adult support and materials and activities modified to his level and significantly different than those accessed by his typically developing peers. More restrictive settings are appropriate where the "nature or severity of the disability" prevents satisfactory education in regular education settings with appropriate supports. *See* 20 U.S.C. § 1412(a)(5). Here, the evidence indicates that, without the related service (School Nurse Services), [redacted]'s needs met this standard, and these concerns were appropriate considerations for the IEP team.

110. However, the IEP team ability to adequately consider the continuum of placement options available for [redacted] was thwarted by WCPSS' predetermination that School Nurse Services were not needed.

111. Based on Findings 221-295 and other evidence in the record, WCPSS denial of School Nurse Services contaminated any placement considerations to the point the IEP team could not fully consider whether [redacted]'s needs could be met in a RECP Developmental Day center like [redacted]. Furthermore, the WCPSS' willingness to place [redacted] at another Developmental Day center supports Petitioner [redacted] assertion that there was a lesser restrictive environment available for [redacted]

112. Based on testimony at the hearing, it is clear that Petitioners and their experts are advocates for full inclusion of students with disabilities. Irrespective of the philosophical positions of the parties and whether Respondent could choose to reconfigure resources to expand inclusion opportunities, federal regulations under the IDEA not only provide for, but require, the availability of special education classrooms to meet the individual needs of students with disabilities.

113. The Undersigned notes that although the Respondent has embedded the separate classrooms in regular elementary schools, [redacted] had no meaningful interaction with nondisabled students at lunch, playground, or at specials (because of scheduling according to Principal [redacted]).

114. Based on the foregoing, the Undersigned concludes that the full day program in the separate setting may have been the least restrictive environment appropriate for [redacted] during this initial transitional phase primarily for safety reasons, however, the IEP team's conclusion that a full day separate setting was the least restrictive environment was tainted based on its predetermination of that placement and the denial of School Nurse Services which might have supported a lesser restrictive environment.

115. Therefore, the Undersigned concludes that the separate setting was not the least restrictive environment appropriate for [redacted], the procedural violation regarding consideration of the RECP setting at the Eligibility Meeting did impede [redacted]'s right to a free appropriate public education, and procedural violation also impeded Petitioner [redacted]'s right to meaningful participation in the placement decision process.

ISSUE 3: Whether Petitioners met their burden of demonstrating that Respondent denied [redacted] a FAPE between April 16, 2015 and April 15, 2016 by offering a substantively and procedurally inappropriate Individualized Education Plans with respect to: the provision of direct instead of support occupational therapy as a related services ("OT Issue"); failure to conduct necessary evaluations such as an FBA and an assistive technology/augmentative communication evaluation ("Evaluation Issue"); the remaining IEP goals ("Goals Issue"), the sufficiency of the progress monitoring ("Progress Monitoring Issue"); and the denial of Extended School Year services ("ESY Issue").

116. This issue involves a number of claims regarding specific portions of the IEP, including the adequacy of the evaluations conducted ("Evaluation Issue"), the adequacy of the present levels and the remaining IEP goals ("Goals Issue"), the adequacy of the supplementary aids and services, the provision of occupational therapy ("OT Issue"), and progress monitoring ("Progress Monitoring Issue"). Specific issues regarding School Nurse Services and Placement, which would otherwise also fall within this issue, have been addressed separately in Issues 1 and 2.

117. Based on Findings 296-345 and other evidence in the record, the evaluations conducted by the WCPSS were not sufficiently comprehensive to identify all of [redacted]'s special education needs. The WCPSS failed to use a variety of assessment tool and strategies to gather relevant functional, and academic information about [redacted]'s education needs with respect to assistive technology evaluation. The Undersigned concludes that the IEP team denied [redacted] a FAPE

by not conducting an assistive technology to determine his augmentative communication needs during the 2015-16 school year and integrating those devices with his communication goals.

118. Based on Findings 346-350 and other evidence, the Undersigned concludes that the Petitioners failed to meet their burden and prove by a preponderance of the evidence that a FBA was necessary for ██ to receive a FAPE.

119. Based on Findings 351-371 and other evidence, the Undersigned concludes that Respondent did not conduct its own OT evaluation but instead adopted the Early Intervention OT Evaluation except for the service delivery recommendations. Because the Respondent relied on the Early Intervention OT Evaluation, it should have included direct OT services as a related service in ██'s IEP. In her evaluation, Ms. ██ recommended 1 time a week sixty-minute session, however, when she testified she recommended 1 time a week for 30-45 minutes' session. ██ failed to make progress on his fine motor skills during the period from August 2015 to April 15, 2016. Respondent denied ██ a FAPE by not providing direct OT services and owes ██ compensatory OT for the school weeks from August 3, 2015 to April 15, 2016.

120. Based on Findings 296-302, 313-345and other evidence in the record, the Undersigned concludes that the Petitioners failed to meet their burden and prove by a preponderance of the evidence that the Present Levels of Academic Achievement and Functional Performance were inadequate to describe ██'s level of functioning. Minor discrepancies regarding ██'s skills at that time supported the descriptions written into the IEP prior to his enrollment.

121. Based on Findings 313-345 and other evidence in the record, the remaining IEP goals, except for the integration of an augmentative communication device in his communication goals, were appropriate given ██'s individual needs. ██'s needs were broad and deep, and the IEP goals focused on the specific skills he would need in multiple critical areas in order to successfully access his education both in preschool and upon entry into Kindergarten. Other than the integration of augmentative communication devise in the communication goals, the goals were specific, task-oriented, and measurable.

122. Based on the Findings of Fact and other evidence in the record, with the exception of the School Nurse Services issue, the lack of specific supplementary aids and services listed in the IEP did not deprive ██ of educational benefit. Many of the supplementary aids and services that ██ would need to access his education were incorporated into the structure and practice of the Developmental Delay classroom at ██████████ School and thus were not needed as part of the IEP of any student in that classroom. In addition, testimony supported that many other supports that would ordinarily be listed in the IEP were provided to ██ as needed to support his educational progress. *See J.P. v. Enid Pub. Sch.*, No. CIV-08-0937-HE, 2009 WL 3104014, at *8 (W.D. Okla. Sept. 23, 2009) (finding IEPs appropriate despite lack of certain services because "[m]any of the services that plaintiffs point to as lacking from the IEP document were actually provided by the District"). At most, this is a harmless procedural violation.

123. A plan reasonably calculated to provide some educational benefit, evidence of progress supports a conclusion that the IEP is appropriate. *See M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 532 (4th Cir. 2002) (stating that "courts should endeavor to rely on objective factors, such as actual educational progress, in order to avoid substituting our own

notions of sound educational policy for those of the school authorities which we review") (internal quotation marks omitted).

124. Based on Findings 381-400 and other evidence in the record, [redacted] made incremental but meaningful progress on many of his IEP goals, except for fine motor skills and his communication skills with respect to the use of assistive technology. This progress supports the overall appropriateness of the IEP, except in areas of fine motor and augmentative communication.

125. Based on the Findings of Fact and other evidence in the record, other than the Conclusions discussed above, the IEPs in place for [redacted] during the relevant period were reasonably calculated to provide [redacted] with an opportunity to meaningful educational progress. [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). The related services were also sufficient except for the use of related service support description instead of direct services for occupational therapy.

126. Based on the Findings of Fact and other evidence in the record, Respondent implemented the IEP with fidelity. Witnesses from the school staff credibly testified regarding their efforts to work with [redacted] on his IEP goals, provide necessary accommodations and supports, and meet his individualized needs. Any failures in implementation, including provision of related services and lack of nursing coverage causing a few absences, were *de minimis* and did not impact the provision of FAPE to [redacted] However, it is the Respondent's ultimate responsibility to provide a substitute nurse when his usual nurse is absent and arrangements must be made to ensure nursing coverage.

127. Based on Findings 381-400 and other evidence in the record, while Respondent's progress monitoring could certainly have been better, it was sufficient to allow for appropriate educational planning for [redacted] and did not result in a denial of FAPE. Respondent indicated that it plans to provide additional training for its staff as to evidence based progress monitoring procedures.

128. Finally, based on Findings 372-380 and other evidence in the record while Respondent failed to discuss ESY services during the April 29, 2015 IEP meeting and this is a procedural violation, Petitioners presented no evidence to show that [redacted] actually required ESY services under the criteria set forth in the North Carolina regulations. Specifically, Petitioners presented no evidence of regression during breaks from instruction, no evidence that [redacted] could not relearn the lost skills within a reasonable time, and no evidence that emerging critical skills would be lost without the provision of ESY services. The Undersigned therefore concludes that Petitioners have failed to meet their burden with regard to their ESY claims. *See Dibuo v. Worcester Co*, 309 F.3d 184, 187-189 (4th Cir 2002) (where Petitioners' expert opinions and testimony at hearing did not establish that the student was eligible for ESY, the IEP team's failure to appropriately consider ESY did not interfere with the provision of FAPE).

129. As the appropriateness of the IEP and related services, the Undersigned concludes that Respondent had failed to provide [redacted] a FAPE by: 1. not conducting an assistive technology evaluation and integrated assistive technology with his communication goals, and 2. not including direct occupational therapy services. Petitioners have not met their burden of demonstrating that

the IEPs offered by Respondent, or the implementation thereof, were inappropriate as any of the other goals, ESY Issue, Progress Monitoring Issue, and the Evaluation Issue with respect to a FBA.

Cumulative Procedural Violations

130. Respondent admits it committed numerous procedural violations in this case.

131. Respondent failed: to complete the continuum of placement sections of all the IEPs; failed to provide sufficient Prior Written Notices about placement decisions, the School Nurse Services decisions, and direct Occupational Therapy decision; failed to include School Nurse Services on the service delivery plan on the July 17, 2015 IEP; To the extent applicable, failed to include School Health Services on the April 29, 2016 and February 2, 2016 IEPs as a related service and in the service delivery sections; failed to properly consider and document ESY discussions, held Pre-IEP meetings, and predetermined IEP services. All of these procedural violations cumulatively significantly impeded the Petitioners meaningful participation in the IEP process.

132. The cumulative effect of these numerous procedures violated [redacted]'s right to a FAPE and his parents' meaningful participation in the IEP decision making process such that relief should be granted.

Other Issues

133. To the extent that this Order does not expressly rule on any other claims raised in the Petition, the Undersigned concludes that Petitioners did not meet their evidentiary burden to establish any right to relief under those claims.

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. Respondent failed to provide [redacted] a FAPE when it denied School Nurse Services in the February 2, 2016 IEP in both the classroom and during transportation to/from school;

2. Respondent denied the Petitioners meaningful participation when it predetermined that School Nurse Services would not be a related service for [redacted] from April 29, 2015 to February 2, 2016, but [redacted] was not harmed from July 17, 2015 to February 2, 2016 because the Respondent reversed its July 17, 2015 decision; therefore, relief is not awarded for that period;

3. Respondent committed numerous procedural violations as well as predetermined placement with respect to the placement decision in the separate preschool classroom which substantively denied the Petitioners meaningful participation in the placement decision and denied [redacted] a FAPE;

4. Respondent failed to provide [redacted] a FAPE when it failed to conduct an assistive technology evaluation and to integrate augmentative communication devices with his communication goals;

5. Respondent denied [redacted] a FAPE when it failed to provide direct occupational therapy services; and,

6. Respondent committed numerous procedural violations as described above, that violated [redacted]'s right to a free appropriate public education, substantively violated Petitioner [redacted]'s meaningful participation in the decision-making process regarding the provision of a free appropriate public education to her child, and caused a deprivation of educational benefits to [redacted]

7. Petitioners have failed to meet their burden to prove that Respondent denied [redacted] a FAPE with respect to: failing to conduct an FBA, Progress Monitoring, ESY and appropriateness of the other goals in the April 29, 2015, July 17, 2015 and February 2, 2016 IEP's.

IT IS HEREBY ORDERED THAT:

1. The Respondent shall provide School Nurse Services as a related service and include it on the IEP Service Delivery and provide School Nurse Services during transportation and at all school related activities;

2. The Respondent shall convene an IEP meeting to afford the Petitioner [redacted] meaningful participation in the determination of the Least Restrictive Environment for [redacted]'s placement in light of the inclusion of School Nurse Services as a related service:

3. The Respondent shall conduct an assistive technology evaluation to determine what augmentative communication devices are needed and integrate those communication devices in [redacted]'s IEP and convene an IEP meeting to modify [redacted]'s communication goals accordingly;

4. The Respondent shall provide twenty-five (25) sessions of compensatory direct 1:1 occupational therapy services in the amount of one time a week, forty-minute duration for each session to compensate for direct OT not delivered during the period of August 3, 2015 to April 15, 2016.

5. Because of the numerous procedural violations, Respondent shall provide training to its preschool staff on IEP development, Placement considerations, Prior Written Notices, ESY determinations, and Progress Monitoring.

6. The Petitioners are prevailing party on the issues of School Nurse Services, Placement, Assistive Technology Evaluation, and Occupational Therapy.

IT IS FURTHER ORDERED THAT:

7. The Petitioner has failed to carry its burden of proof on the all other remaining claims and those are **DISMISSED WITH PREJUDICE.**

8. The Respondent is prevailing party on those claims.

IT IS SO ORDERED.

NOTICE OF APPEAL RIGHTS

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

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

Inquiries regarding 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.

This the 13th day of March, 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 13th day of March, 2017.

LG

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