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OFFICE OF ADMINISTRATIVE HEARINGS
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STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
18 EDC 04980

[redacted] by and through her parent [redacted] Petitioner, v. Durham Public Schools Board of Education and North Carolina State Board of Education Respondent.	**FINAL DECISION**

THIS MATTER was heard by the undersigned Administrative Law Judge Stacey Bawtinhimer on October 23-31, 2018 at the North Carolina Office of Administrative Hearings, Courtroom B, located at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Petitioners, [redacted] and [redacted] asserted that Respondent Durham County Public Schools ("Respondent DPS", "Durham Public Schools", and/or "DPS") denied [redacted] a free and appropriate public education ("FAPE") by failing to properly evaluate and identify her as a student with special needs as required under the Individuals with Disabilities Education Act ("IDEA"). Petitioner [redacted] also asserted that Respondent DPS impeded her meaningful participation in the IEP process because of DPS's contractual requirements for independent evaluators, which Petitioners contend exceeded the agency criteria and conditions allowed under the IDEA, specifically federal regulation 34 C.F.R. § 300.502(e)(1 & 2) as well as *NC Policy* 1504-1.3.

With respect to the North Carolina State Board of Education ("Respondent State Board", "State Board", and/or "SBE"), Petitioner [redacted] contends that the State Board sanctioned the illicit contractual provisions of DPS and failed to ensure that she was afforded meaningful participation in the IEP process as required by the procedural protections of the IDEA.

After considering a trial 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, all documents in the record including the Proposed Final Decisions, Supplemental Proposed Final Decisions, as well as all stipulations, admissions, and exhibits, the Undersigned concludes that Durham Public Schools committed procedural violations with respect to the evaluation and [redacted]s process which denied [redacted]s meaningful participation in the IEP process. However, because [redacted] was ultimately found ineligible for services under IDEA, these procedural violations did not substantively violate [redacted]s right to a FAPE.

With respect to the IEE Contract, the Undersigned finds that the conditions in the Limited Relationship Provision did not comply with the State agency criteria for IEEs and denied [redacted] meaningful participation in the IEP process and other procedural safeguards afforded by the IDEA.

The Undersigned also concludes that Petitioners did not have standing to appeal the findings of the State Board of Education with respect to the IEE Contract. Despite the lack of Petitioners' standing, as required by NC Policy 1501-10.2, the State Board "set aside" the closing of the State Complaint because the subject matter of the State Complaint overlapped with this contested case. Based on this Final Decision and new factual information from this contested case, the State Board must reconsider its original Findings and Corrective Action Plan with respect to DPS' Contract Provisions and Practices which violate the State agency criteria and procedural safeguards found in the IDEA.

APPEARANCES

For Petitioners:

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For Respondent DPS:

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For Respondent SBE:

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ISSUES

1. Whether Durham Public Schools evaluated [redacted] in all suspected areas of disability, in particular, Autism and Specific Learning Disability (the "Suspected Disability Claim") and whether the evaluation process was appropriate (the "Evaluation Claim")?

2. Whether Durham Public Schools appropriately determined that [redacted] was not eligible for special education and related services at the August 15, 2017 IEP meeting (the "Eligibility Claim")?

3. Whether Durham Public Schools' Limited Relationship Provision included in the IEE Contracts significantly impeded [redacted]s right to participate in the decision-making process regarding the provision of a FAPE to [redacted] or otherwise violated Petitioners' procedural safeguards (the "IEE Contract Claim")?

4. Whether the North Carolina State Board of Education significantly impeded [redacted]s right to participate in the decision-making process regarding the provision of a FAPE to [redacted] by sanctioning Durham Public Schools' actions related to the IEE Contract or otherwise interfered with Petitioners' procedural safeguards (the "State Complaint Claim")?

PROCEDURAL HISTORY

The Petition for Contested Case Hearing at 18 EDC 4980 was filed in and accepted by the Office of Administrative Hearings ("OAH") on August 14, 2018. (Stip. 81) Previously on May 18, 2017 (17 EDC 3372) and June 6, 2018 (18 EDC 3427), Petitioners had filed two other contested case petitions which they voluntarily dismissed without prejudice. The June 8, 2018 Petition was subsequently refiled and attached to the Petition currently before this Tribunal. Both Respondents SBE and DPS filed motions to dismiss on August 29 and August 30, 2018, respectively. After reviewing the Petitioners' Responses filed on September 10, 2018, Respondent DPS's motion was denied in its entirety. Respondent SBE was denied in part, however, dismissal was granted on the issues pertaining to the appeal and investigation process of the State Complaint.

Additional dispositive motions for summary judgment and cross motions were filed by all Parties on October 8, 2018. After reviewing the motions, briefs, responses, affidavits, and exhibits, the Undersigned found there were no genuine issues of material fact regarding the claim that DPI unnecessarily delayed the provision of requested independent educational evaluations and DPS's motion was granted, in part. All other motions were denied on October 23, 2018.

At the hearing, without objection, Petitioners' moved to sequester witnesses and this motion was granted. Respondent then made a Motion *in Limine* to exclude the testimony of the witnesses from the charter school, which was granted, in part. The [redacted] Charter School ("[redacted]") teacher was allowed to testify about [redacted]s academic and functional performance at the beginning of the 2017-2018 school year and [redacted]s progress during the period she attended [redacted] Evidence regarding [redacted] eligibility determination and IEP documentation was not allowed because it was based primarily on the independent educational evaluations. Because [redacted] cancelled the IEP meeting scheduled for July 13, 2018, the IEP Team at DPS was not afforded an opportunity to review these IEEs which may or may not have changed DPS' original eligibility determination.

Petitioners then presented their case-in-chief, after which Respondent DPS moved for involuntary dismissal under Rule 41(b). The Undersigned declined dismissal, as permitted by Rule 41(b), until the close of all evidence. Respondents DPS and SBE presented their cases and the hearing was adjourned on October 31, 2018.

The record remained open until all verified admitted exhibits had been submitted to the Undersigned to be filed in the record, the completion of the transcripts, and upon the submission of Proposed Final Decisions. The Parties submitted Proposed Final Decisions on January 7, 2019.

After all of this was completed, the record was initially to be closed on January 7, 2019. However, on January 3, 2019, the Undersigned filed Notice of Intention to Take Official Notice of Facts and allowed the parties until January 14, 2019, to file any written objections. No objections were filed.

Subsequently, on February 7, and March 11, 2019, the Parties were ordered to submit Supplemental Proposed Final Decisions. The supplemental proposals and responses were filed on February 21, 22, and March 4, 7, 15, 2019. On March 11, 2019, the Parties were ordered to provide additional legal memoranda and evidentiary references. All of the Parties filed additional memoranda on March 15, 2019. The record was closed on March 15, 2019. The Parties consented to an extension of the Final Decision deadline to April 15, 2019. Herein now is the written Final Decision of this proceeding.

WITNESSES

For Petitioners:

Petitioner and mother of
Ph.D., Independent Psychologist
M.S., CCC-SPL, Independent Speech Pathologist
Ph.D., BCBA, Expert Witness
" M.S., OTR/L, Independent Occupational Therapist
EC Teacher Charter School

For Respondent DPS:

M.D., Expert Witness
Ph.D., Lead Psychologist DPS
Assistant Principal
Elementary School
EC Facilitator Middle School
OTR/L, DPS Occupational Therapist
School Counselor
Ed.D., EC Director DPS

For Respondent SBE:

NCDPI Section Chief Dispute Resolution
NCDPI Consultant Dispute Resolution

EXHIBITS

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

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

Stipulated Exhibits ("Stip. Ex."): 1-103.

Petitioners' Exhibits ("Pet. Ex"): 1, 8, 10 (p. 157), 13 (pp. 287, 295-299, 305, 311, 313-14, 320 21, 326-27, 329-30, 333-34, 341-42, 349, 359, 364) 16 (pp. 381, 382, 385-389), 17 (pp. 119-20), 34 & 35 (for illustrative purposes only), 36-38, 39 (copyrighted material under seal) 40; DPS Ex. 17 (pp. 119, 120, 157).

Respondent DPS Exhibits ("DPS Ex."): 1, 2 (pp. 17-40), 6-13, 15, 16 (pp. 88-89, 93), 17 (pp. 100-103, 105, 107, 108), 17 p. 379 admitted, but not for truth of matter asserted)

Respondent SBE Exhibits ("SBE Ex."): 1-10

Stipulations Regarding Documents

Any documents produced by any Party in discovery including, but not limited to, IEPs, email correspondence, data sheets, and meeting notes are self-authenticated. (Stip. 82)

All pleadings filed with the Office of Administrative Hearings on the matter associated with Docket No. 18 EDC 4980 are self-authenticated. (Stip. 83)

The North Carolina Department of Instruction's *Policies Governing Services for Children with Disabilities* ("*NC Policies*")[1]is self-authenticated. (Stip. 84)

Other Documents

Transcript volumes 1 through 8 ("Tr. vol. [number], p. [number]: line [number]") were received on December 12, 2018 and have been retained in the official record of this case.

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[1] SBE Ex. 3, *NC Policies* was last amended 2018; however, the prior edition, amended 2014, includes the same SBE requirements for public agency criteria for initial evaluations as contained in this Supplemental Proposed Decision. Therefore, the requirements contained herein were in effect for both the 2016-2017 and 2017-2018 school years. *See North Carolina Policies Governing Children with Disabilities*, amended 2014, https://ec.ncpublicschools.gov/policies/nc-policies-governing-services-for-children-with-disabilities/policies-children-disabilities.pdf.

BURDEN OF PROOF

Petitioners acknowledged, in the Prehearing Order entered on March 19, 2018, that they have the burden of proof in this contested case. The burden of proof is by a preponderance of the evidence. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); N.C.G.S. § 150B-34(a).

North Carolina provides 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.G.S. § 115C-44(b). The Petitioners, being the complaining party, have the burden of proof to show, by a preponderance of evidence, that Respondents denied [redacted] a free appropriate public education and [redacted] meaningful participation in the IEP process.

In reviewing a special education contested case decision, an administrative law judge "may not substitute their own notions of sound educational policy for those of the school authorities which they review." *Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982) Although deference is due to school authorities, to the extent that Petitioners had met their burden during their case-in-chief, Respondents are expected to offer "cogent and responsive explanations for their decisions ...". *Endrew F. v. Douglas County School District* RE-1, 137 S. Ct. 988, 1002 (2017).

OFFICIALLY NOTICED FACTS

After an opportunity to be heard, and without objection, Official Notice was taken of the following facts:

1. Petitioners filed three contested case petitions: 17 EDC 3372 ("May 2017 Petition") (filed 5/18/17, voluntarily dismissed without prejudice 5/21/17), 18 EDC 3427 ("June 2018 Petition") (filed 6/6/18, voluntarily dismissed without prejudice 6/12/18), and 18 EDC 4980 ("August 2018 Petition") (filed 8/14/18 incorporated 18 EDC 3427). These documents are contained in the electronic records of the Office of Administrative Hearings.

2. The contents of the 17 EDC 3372 Petition related to the Petitioner [redacted]s assertions regarding the alleged bullying and its educational impact on [redacted] during the 2016/2017 school year, specifically during the period before the June 6, 2017 Referral Meeting.

3. During the IEE process on February 16, 2018, all claims prior to May 22, 2017 were released by settlement of the issues raised in the 17 EDC 3372 Petition, except for the "special education referral and eligibility process for Student beginning with the parent's written request dated May 22, 2017." (*See* Stip. 9)

SUMMARY OF FINAL DECISION[2]

This case began because, like any responsible parent, [redacted] wanted a safe learning environment for her daughter, [redacted] a bright but socially awkward and anxious girl. Because of negative peer interactions, actual and/or perceived, and anxiety about a particular teacher, (Ms. [redacted] [redacted]s anxiety spiked during the last quarter of her fifth grade year. There was a simple solution, accommodate [redacted]s severe, but episodic, anxiety by moving [redacted] out of Ms. [redacted] class for the last five weeks of the school year. Instead, the school Principal, more concerned about EOG procedures, "drew the first line in the sand" by refusing the move.

During that time, [redacted] requested a comprehensive evaluation to determine if [redacted] qualified for an IEP or Section 504 Plan. However, [redacted] already qualified for a Section 504 Plan. DPS responded to [redacted]s referral request for an IEP and conducted evaluations. The evaluations did not comply with the *NC Policies* and were perfunctory. Afterwards, DPS held the Eligibility Determination Meeting. [redacted] claimed that DPS predetermined that [redacted] did not qualify for an IEP. DPS' school psychologist admitted such when she recommended in her evaluation report, prepared prior to the IEP meeting, that [redacted] simply needed continuation of classroom accommodations and access to the counselor, which were accommodations already on [redacted]s Section 504 Plan.

Petitioner also argued that DPS should have suspected autism as a potential eligibility category. However, the Undersigned finds that there were no "clear signs" that [redacted] might be autistic especially since her own treating child psychiatrist had not suspected autism and her other diagnoses sufficiently explained her behaviors.

During the Eligibility Meeting, DPS did make procedural errors. The IEP Team relied on invalid behavior rating scales and interventions which were not scientific, research-based. This denied [redacted] a right to meaningfully participate in the IEP process.

In the meanwhile, except for that episodic period at the end of fifth grade, [redacted]s Section 504 Plan accommodations were working well. During her sixth grade, [redacted] continued to have some issues, but overall, she was doing better and able to access her general education with curriculum accommodations.

Dissatisfied with the Eligibility Determination, [redacted] filed the first of three due process petitions. She also requested independent educational evaluations ("IEEs"). DPS agreed to the IEEs. As a result, [redacted] withdrew her first due process case. This is when the IEE Contract issue arose.

Prior to this case, DPS had an IEE Contract. Sometime between June and December 2017, DPS added the "Limited Relationship Provision" to its IEE Contract. This new provision contained conditions which were unrelated to the IEE process and not part of the State Board's agency criteria. The Limited Relationship Provision controlled the independent evaluator's ability to

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[2] After the primarily findings, this Final Decision is divided into four sections. Sections 1 through 4 correspond to the four Issues in this case. The Conclusions of Law also follow the same format after the preliminary jurisdictional and legal standards are discussed.

confer with third parties, including attorneys, and prohibited the independent evaluator from acting as an expert witness in any future contested case, such as this one.

DPS argued that the Limited Relationship Provision was necessary to define the scope of the independent evaluator's business relationship with it. But, the actual reason was because of the litigiousness of parents and their refusal to discuss concerns face-to-face with the EC Director Dr. [redacted] One of [redacted]s independent evaluators refused to sign the revised IEE Contract even though, in the past, she had signed IEE Contracts with DPS. When DPS agreed to the IEEs, [redacted] was not provided a copy of the IEE Contract. The State Board found this practice noncompliant, as does the Undersigned, because the parent was not informed of all of DPS' agency criteria.

The IEE Contract and the evaluation procedures contained therein allowed DPS to control the IEE process and events thereafter. The most egregious was that the IEE Contract was used by Dr. [redacted] as a pretext for manipulating the contents of the IEE reports after the final reports were issued. After every final IEE report was circulated to the parties, Dr. [redacted] contacted the independent evaluator by phone to discuss the contents, asked them to talk to additional school staff, and/or "suggested" changes in the report. These changes were not corrections of typos or factual errors. These conversations occurred outside an IEP Meeting and excluded [redacted]s parents. Even if these were merely "suggestions" as Dr. [redacted] claimed, this was highly inappropriate and again significantly impeded [redacted]s meaningful participation in the IEP process.

In April of her sixth grade school year, while the IEEs were still being conducted, a State Complaint was filed by all the advocacy groups and most of the private petitioners' attorneys in North Carolina about DPS' IEE Contract provisions and practices. Through the Exceptional Children Department ("NCDPI"), the State Board found many areas of noncompliance but found the Limited Relationship Provision compliant because it did not violate the *NC Policies*.

North Carolina does not have a process for appealing a State Complaint decision. Petitioners contested findings in this present case. As this was a systemic complaint, not an individual complaint filed by Petitioners, their standing was tenuous at best. Standing to file a contested case against the State Board is determined by the specific facts of each case, not automatic. Even if Petitioner lacked standing, because the State Board had not closed the State Complaint and this contested case raised the same subject matter, NCDPI, "set aside" the complaint proceedings. Based on the information presented at the hearing and misrepresentations made by DPS in their Responses to NCDPI, the Undersigned finds that the Limited Relationship Provision imposed conditions outside of agency criteria and significantly violated [redacted]s meaningful participation in the IEE process as well as her other procedural safeguards.

But, despite all these procedural violations, looking at the evidence at every possible angle, the Undersigned finds that Petitioners did not prove that [redacted]s disabilities adversely affected her education such that she required special education. Had Petitioners been able to use the independent evaluators as expert witnesses, they may have been able to meet their burden. This case exemplifies how, when in equipoise, the use of an independent evaluator as an expert witness may have balanced the "playing field" as the Supreme Court intended.

FINDINGS OF FACTS

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

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

Introductory Section: General Findings

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. Unless specifically contradicted herein, this Order incorporates and reaffirms all findings of fact and conclusions of law contained in previous Orders entered in this litigation.

3. An ALJ need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993).

Stipulations of Fact

4. At the start of the hearing in this matter, the Parties agreed to Jurisdictional, Party, Legal Stipulations, and Factual Stipulations in a proposed Prehearing Order, which was approved and filed in the Office of Administrative Hearings on October 16, 2018. Stipulations are referenced as "Stip. 1," "Stip. 2," "Stip. 3," etc. To the extent that Stipulations are not specifically stated herein, the Stipulations of Fact in the Prehearing Order are incorporated fully herein by reference.

5. In addition, the Undersigned incorporates by reference fully herein the Parties' Stipulated Timeline filed on October 22, 2018.

Petitioners' Witnesses

6. In their case in chief, Petitioners presented six witnesses: Petitioner [redacted] Dr. [redacted] and, one expert witness, Dr. [redacted]

mother of

7. Petitioner is s mother. It is clear from the record and from her testimony that she has strongly advocated for her daughter and was knowledgeable about the IEP process and her rights. She indicated that two of her other children were eligible for IEPs as speech/language impaired (Tr. vol. 2, pp. 321:23-322:2) The historical information that she shared was helpful to this Tribunal. However, was, at times, argumentative on cross-examination, and some of her testimony about specific interactions and communications with the school district was inconsistent with documentation in the case or contradicted by her own testimony on cross-examination. As DPS made many procedural violations throughout this proceeding, was justifiably upset about DPS' actions during the eligibility and independent evaluation process.

Expert Witness: Ph.D., B.C.B.A.

8. Dr. is a special education professor at the University of Virginia. He was qualified as an expert in the evaluation of students with disabilities, special education eligibility for students with learning disabilities, autism, and behavioral and emotional disabilities, positive behavioral interventions and supports, evidence-based practices for students with learning disabilities, autism and behavioral and emotional disabilities, Functional Behavioral Assessments ("FBA") and Behavioral Intervention Plans ("BIP"), IEP development, and special education in general. (Tr. vol. 4, pp. 670:20-671:3; 680:4-5; 682:12-25)

9. Prior to his testimony, Dr. reviewed all three IEEs which were completed during the latter part of the 2017-2018 school year. The independent neuropsychologist diagnosed with autism and dyslexia in May 2018. During direct examination, he did not distinguish whether his opinion was formulated from the educational records available to the August 2017 Eligibility Team or from the combination of s educational records and the IEEs. Since Dr. testified that he reviewed all the documents, he would have known of s autism diagnosis prior to forming his expert opinion.

10. Unlike the Eligibility Team, Dr. opinion about s eligibility category was based, in part, on the IEEs. His opinion about the appropriateness of the Eligibility Determination was viewed in hindsight and based on new information unavailable at the time of the Eligibility Meeting. Had he only reviewed the records available to the IEP Team, his testimony would have been more compelling. But this was not teased out during his testimony and inevitably Dr. opinion would have been influenced by the IEEs.

11. Also, Dr. failed to communicate with s child psychiatrist, pediatrician, and clinical psychologist, before asserting that all three of them missed an autism diagnosis. His readiness to claim that s medical providers misdiagnosed without even reviewing the medical records and/or conferring with them was troubling, especially since a child psychiatrist is trained to diagnose autism.

12. Dr. [redacted] also expressed strong opinions about [redacted]s history during his direct examination, which were revealed on cross-examination to be unsupported by the documentation he had reviewed. For example, Dr. [redacted] testified about "remarkable consistency" throughout [redacted]s elementary school records (Tr. vol. 4, pp. 690:21-691:6; 692:4-9) but then revealed that he had only reviewed documents from second grade and late fifth grade, with no review of documents from third grade, fourth grade, or the first half of fifth grade. (Tr. vol. 4, pp. 733:4-10; 746:19-747:4; 747:17-748:7) There were numerous points in which Dr. [redacted] admitted on cross-examination to having limited information about important features of [redacted]s history leading up to her referral. (Tr. vol. 4, pp 737:22-25) (no contextual knowledge of teacher turnover during fifth grade) 738:9-11 (no knowledge regarding attendance late in fifth grade); 739:18-20 (no knowledge regarding [redacted]s private treatment)).

13. Dr. [redacted] knowledge and experience in the field of special education is extensive, and his general testimony about special education and evaluation procedures were helpful to this Tribunal. However, Dr. [redacted] never met [redacted] never observed her, never evaluated her; and, there were gaps in the information provided to Dr. [redacted] all of which diminished the weight of his testimony.

Independent Evaluators

14. In general, the Undersigned would expect that the parent's private evaluator who had conducted an IEE to testify as an expert witness in a due process case. Petitioners had to subpoena all the independent evaluators to testify at the hearing. In this case, because of the IEE Contract terms, Petitioners' legal counsel was unable to communicate independently with the independent evaluators before the hearing. Petitioners could not hire any of them to testify as experts. Two of the independent evaluators ([redacted] and [redacted] hired their own legal counsel to protect their interests with respect to the IEE Contract.

15. DPS EC Director, Dr. [redacted] testified that the IEE Contract provisions were put in place to safeguard the independence of the evaluators from either of the parents' or DPS' influence. This independence can be a double-edged sword. Hearing officers may find the independent evaluators more credible than hired experts or school evaluators if the independent evaluators are so unbiased.

16. In fact, based on DPS' position, the independent evaluators who signed DPS' IEE Contract should have no bias, vested interest, or prejudice. I do not believe, however, that DPS intended this effect on the independent evaluator's credibility, but I have given the independent evaluators in this case, more weight than school personnel where there was conflicting testimony. Moreover, DPS did not challenge any of the independent evaluator's conclusions or recommendations, except to the extent that the IEEs were not available to the Eligibility Team in August 2017. Therefore, the contents of the IEEs were uncontested.

17. The Undersigned found the independent evaluators credible. Since Dr. [redacted] was responsible for the creation of the IEE Contract, to the extent that her testimony conflicts with that of the independent evaluators, their testimony was given greater weight.

18. With respect to the IEEs, as the information in the IEEs was unavailable at the August 2017 Eligibility Meeting, the IEEs were not considered in determining the appropriateness of the eligibility decision. The IEEs were, however, used to determine the appropriateness of how DPS conducted their own evaluations for the Eligibility Meeting, and DPS' evaluations were found wanting.

Ph.D.

19. Dr. conducted a comprehensive neuropsychological IEE of in January, February, March, and April of 2018. (Stip. 60; Stip. Exs. 41 & 42) Dr. had conducted IEEs in other school districts, but this was the first for DPS.

20. Because of the IEE Contract, Dr. testified as a fact witness, and her opinions were afforded weight, but not as an expert witness.

21. Dr. earned her Doctorate in Clinical Psychology from the University of North Carolina at in 2004. (Tr. vol. 3, pp. 396:24–397:7) Dr. also earned her Masters Degree in Clinical Psychology. (Tr. vol. 3, pp. 396:24–397:7)

22. During her evaluation, Dr. interviewed evaluated during multiple sessions, reviewed s educational records, conferenced with both Drs. and as well as communicated with s teachers through the use of rating scales and later in person at a June 8, 2018 conference. My only criticism of Dr. evaluation is that she did not personally talk to any of s medical providers or observe in the school setting.

23. DPS did not contest the contents of Dr, evaluation and diagnoses. However, Dr. did insist that Dr. meet with school staff after issuing her final report because her evaluation report was "not balanced" and she had not observed in the school setting. After being asked by Dr. to "balance" her report, Dr. made notable revisions. (*Compare* Stip. Ex. 41 *to* Stip. Ex 42)

24. While on the stand, Dr. was visibly uncomfortable and occasionally her hands were shaking, especially when discussing her interactions with respect to Dr. and the IEE Contract. She was cautious with her responses and would often pause because she "didn't want to violate the terms of her contract." The Limited Relationship Provision in the IEE Contract noticeably affected the candor of her testimony.

25. The Undersigned found Dr. credible, especially since Dr. conducted the most comprehensive evaluation of and testified despite her stated concerns about breaching her contract and legal repercussions. The Undersigned does note that all of Dr. work with came after the educational decisions at issue in this case. Her testimony was given weight as it pertained to DPS evaluation process and IEE Contract.

M.S., CCC-SPL[3]

26. Ms. conducted an independent speech/language evaluation of on April 19, 2018. (Stip. 64; Stip. Ex. 40) As part of her evaluation, Ms. received feedback from s math, science, social studies, and English/Language Arts ("ELA") teachers. These same teachers completed the controversial BASC-3 rating scales in August 2017 and again in February-March 2018. Ms. did not observe in the school setting.

27. Ms. is a speech-language pathologist. She earned her Master's Degree in 1998 from . (Tr. vol. 3, p. 500:8-10) Ms. also received training in the area of assessment for informal pragmatic language. (Tr. vol. 3, pp. 500:25–501:3)

28. Ms. work experience includes working for a school system, working at Duke University Medical Center, and working in private practice. (Tr. vol. 3, p. 500:10-14)

29. Ms. has conducted IEEs in DPS before and signed contracts with DPS for that purpose, but these contracts did not contain the Limited Relationship Provision. She asked that DPS remove one clause from the Limited Relationship Provision about not providing future services to and DPS complied with her request.

30. After her final report was issued to DPS and on April 30, 2018, Dr. asked Ms. to speak with DPS' lead speech therapist. Ms. indicated that she would, but that she would not change her report.

31. Because of the Limited Relationship Provision in the IEE Contract, Ms. was represented by her attorney during her testimony. (Tr. vol. 3, p. 498:19-23)

32. Despite Ms. disparaging remarks about some of her interactions with Dr. the Undersigned found Ms. to be credible and knowledgeable about s pragmatic language deficits. Since DPS did not contest her evaluation results or offer an opposing speech therapist's testimony, Ms. testimony was given weight where applicable.

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[3] The DPS attempted to discredit Ms. by pointing to emails Ms. wrote after she issued her final report, even though Dr. did not contest that she received Ms. completed evaluation on April 30, 2018. (Tr. vol. 7, p. 1298:2-5) Dr. claimed Ms. June 2018 emails to s mother "clearly diverted from the focus of and an evaluation that could benefit her" despite the fact that all the emails were sent months *after* the evaluation was completed. (Tr. vol. 7, p. 1264:20-24; DPS Ex. 16, pp. 88-89, 90, 93) Dr. acknowledged on cross-examination that any communication Ms. had in June of 2018 with s mother "would be irrelevant to her report." (Tr. vol. 7, p. 1298:12-16)

M.S., OTR/L

33. conducted an independent occupational therapy ("OT") evaluation of on February 12, 2018. (Stip. 59; Stip. Exs. 38 & 39) As part of her evaluation, she reviewed the 2014 and 2017 OT evaluations and observed in her math class, science class, and during class transitions.

34. Ms. is a licensed occupational therapist and she earned her Master's Degree from University in 2011. (Tr. vol. 5, p. 774:17-19)

35. Ms. has worked as an occupational therapist at A ("") since 2011. (Tr. vol. 5, p. 774:19-22) Currently, Ms. serves as the Executive Director and Co-owner of (Tr. vol. 5, p. 774:24-25) At Ms. conducts evaluations and provides services to children with a wide variety of diagnoses, including children with sensory processing disorder and autism. (Tr. vol. 5, p. 775:2-10)

36. Ms. has conducted IEEs in DPS and other LEAs. DPS' prior contracts did not contain the Limited Relationship Provision. After Ms. issued her final report, Dr. asked Ms. to change verbiage in her initial report, which she did. (*Compare* Stip. Ex. 38 *to* 39)

37. Occupational therapy was a minor issue in this contested case with respect to eligibility. However, Ms. testimony was important with respect to the IEE Contract Claim and appropriateness of DPS' occupational therapy evaluation. Moreover, the Undersigned found Ms. to be credible and knowledgeable about s sensory needs.

Other Witness: - Special Education Teacher

38. was s special education teacher at the Charter School ("in Durham, North Carolina from approximately mid-July 2018, during s transition, until mid-September 2018.

39. Ms. testified to s significant progress while at but had not worked with since her IEP was completed on September 26, 2018. (Tr. vol 5, pp. 845:9-847:23)

40. Even when taking into account s transition to a new school, Ms. observations contrasted with the descriptions of DPS staff with respect to the severity of s academic and functional deficits at the end of her 2017-2018 school year. Deficits which on June 8, 2018, DPS staff told Dr. had "significantly improved." The Undersigned found her testimony credible and consistent with the 2018 BASC-3 rating scales in Dr. report. Ms. testimony was given greater weight as to s overall functioning than the inconsistent accounting of s teachers in June 2018.

Durham Public Schools' Witnesses

41. Respondent presented six witnesses in its case in chief: one expert - [redacted] M.D., and six fact witnesses - [redacted] Ph.D., [redacted] and [redacted] Ed.D. Notably, none of [redacted]s teachers testified at the hearing.

Expert Witness: [redacted] ***M.D.***

42. Dr. [redacted] is a private adult and child psychiatrist who works primarily with students with anxiety and/or autism. She is board certified in general psychiatry and in child and adolescent psychiatry. (Tr. vol. 5, p. 871:12-16) She was qualified as an expert witness in the diagnosis and assessment of psychiatric needs and treatment of children and adolescents with anxiety and autism, (Tr. vol. 5, pp. 869:8-11; 882:10-12) Dr. [redacted] was knowledgeable about the specific areas of eligibility relevant to this case, and the Undersigned found her testimony in that regard both credible and helpful.

43. Notably, Dr. [redacted] did not take any extreme or absolutist positions, acknowledging the parts of [redacted]s records that might indicate autism even while concluding that those aspects of the record were subtle and outweighed by the evidence in the record inconsistent with autism. (Tr. vol. 5, p. 889:10-21) Her testimony was bolstered by the fact that her opinion was based on the information available to the Eligibility Team in August 2017. (Tr. vol. 5, p. 889:4-21) Similar to Petitioner's expert witness, the weight of Dr. [redacted] testimony was diminished by the facts that she never communicated with [redacted]s parents, never met [redacted] never observed [redacted] and never evaluated [redacted]

[redacted] ***Ph.D.***

44. Dr. [redacted] is the lead school psychologist for Durham Public Schools. In addition to supervising the psychologist who conducted [redacted]s evaluation in July 2017 and reviewing records as part of his duties as lead psychologist, Dr. [redacted] had knowledge of this case because he served as the school psychologist after DPS's evaluating psychologist ([redacted] resigned. Dr. [redacted] participated in phone conferences with Drs. [redacted] and [redacted] He also attended the June 8, 2018 conference.

45. The Undersigned found Dr. [redacted] to be a credible witness as he was honest, even to the detriment of the DPS' case. (*See, e.g.*, Tr. vol. 5, pp. 949:23-950:1) (testifying because there were academic concerns noted in [redacted]s file, he "would have looked at [S]LD. . . . that's just a given") Moreover, he testified that, except for factual or typo errors, it was inappropriate to ask independent examiners to revise their reports. (Tr. vol. 5, p. 977:3-6)

46. However, Dr. [redacted] was not familiar with all of [redacted]s educational records. (*See, e.g.*, Tr. vol. 5, pp. 966:23 – 967:12) (testifying he did not review any MTSS materials or data collected—only what was reported in the eligibility and referral paperwork—and it is "a normal

part of the process to use the MTSS system," but he did not know if it had been used in this case)

47. While the Undersigned found Dr. [redacted] credible, his testimony was not especially helpful with regards to [redacted]s unique needs, since he was not personally familiar with [redacted], had never evaluated [redacted] or communicated with [redacted] Moreover, he did not participate in the Referral or Eligibility Meetings. Where relevant, due to his specialized knowledge and experience, Dr. [redacted] testimony was given deference under N.C.G.S. § 150B-34, but not as an expert witness.

[redacted]

48. [redacted] is the Assistant Principal at [redacted] Elementary School and has served in that capacity since 2015. (Tr. vol. 6, p. 993:11)

49. When [redacted] was in fifth grade, Ms. [redacted] attended some of [redacted]s Section 504 Meetings as well as met with [redacted]s mother on several occasions. (Tr. vol. 6, p. 994:5-17)

50. Ms. [redacted] testified that [redacted] overall had a "good year" in fifth grade. (Tr. vol. 6, p. 994:20-24) However, her assessment of [redacted]s fifth grade year was contradicted by the fact that, by the end of that year, DPS had to develop a Behavior Intervention Plan and Crisis Plan for [redacted] which are not generally indicators of a successful school year.

51. The Undersigned did not find Ms. [redacted] testimony particularly helpful since Ms. [redacted] did not teach or evaluate [redacted] Moreover, Ms. [redacted] conclusion that [redacted] just "seemed like a happy kid" during her fifth grade year, was inconsistent with the overall record and the fact that Ms. [redacted] without her Principal's approval, felt [redacted]s anxiety was significant enough to warrant moving her to a different homeroom teacher. (Tr. vol. 6, p. 994:20-24)

[redacted]

52. [redacted] is the exceptional children's facilitator for DPS. Ms. [redacted] earned her Bachelor's Degree in Special Education and Master's Degree from the University of [redacted] with a Bachelor's of Science in curriculum and instruction. (Tr. vol. 6, p. 1011:18-21)

53. Ms. [redacted] has served as exceptional children's facilitator for two years. (Tr. vol. 6, pp. 1011:24–1012:1) As an exceptional children's facilitator, Ms. [redacted] duties included coaching special education teachers regarding their instructional strategies, working on compliance, and serving as the local education agency representative at meetings. (Tr. vol. 6, p. 1012:4-7) Ms. [redacted] participates in IEP meetings multiple times per day. (Tr. vol. 6, p. 1012:8-9)

54. Ms. [redacted] had never met or spoken to [redacted] and only observed her once before the Eligibility Meeting. (Tr. vol. 6, pp. 1029:19–1030:9) Due to her lack of specific knowledge of [redacted] the Undersigned did not find Ms. [redacted] testimony helpful with regards to the issues in this case. The Undersigned also notes that Ms. [redacted] attended the Legal Meeting in May 2017 and was aware of Petitioners' first due process petition prior to the Eligibility Meeting.

55. was the staff occupational therapist for DPS. Ms. conducted the occupational therapy evaluation of in 2017.

56. Ms. earned her Bachelor of Science in occupational therapy from State University. (Tr. vol. 6, p. 1049:3-4) Ms. is a licensed occupational therapist in North and . (Tr. vol. 6, p. 1049:6-7)

57. Ms. has worked for DPS since 2003. (Tr. vol. 6, 1049:20-21) Later in this decision, the Undersigned notes concerns about the quality of Ms. occupational therapy report, but otherwise, her testimony was a minor part of the case given the lack of occupational therapy concerns at issue.

58. was the school counselor at Middle School. Of all DPS witnesses in the case, Ms. was the most knowledgeable and spent the most time working with during the 2017-2018 school year. She also attended the Legal Meeting in May 2017 and was aware of the May 2017 Petition.

59. Her testimony indicated that she cared for Ms. 's answers to questions from both counsel and the Undersigned were honest and forthright, including acknowledgement of times in which she had made inappropriate comments via e-mail regarding (Tr. vol. 6, p. 1156:15

60. -22) (concerned that s report of bullying day after eligibility meeting might be ploy "to prove us wrong")

61. Although Ms. appeared genuinely interested in s welfare, she indicated that was overreactive and overprotective during the 2017-2018 school year. Despite this, Ms. still continued to counsel through March 2018. Thereafter, counseling was removed from s Section 504 Plan. Prior to the March 2018 Section 504 Plan Meeting, Ms. did express concerns about s mental health and that she was uncomfortable counseling because of (Tr. vol. 6, p. 1182:7-13)

62. Unlike the other core teachers who completed the BASC-3 scales at the beginning of the 2017-2018 school year, Ms. refused to complete occupational therapy teacher rating scales during that time because she did not know well enough.

63. To her credit, Ms. was the only person from DPS at the June 8, 2018 meeting with Dr. to acknowledge still had functional problems at the end of her sixth grade year.

64. During the 2017-2018 school year, Ms. [redacted] was placed in the difficult position of mediating between her employer and [redacted] Ms. [redacted] provided the "reassurance" and "positive guidance" during her counseling sessions with [redacted] which allowed [redacted] to be "heard" and gave "her courage" to return to the classroom and face her peers in a more constructive manner. All things that [redacted] said were necessary for [redacted] to succeed in the classroom. (*See* Stip. Ex. 34, p. 153) (mother interview dated 6/9/17) [redacted] seemed appreciative of Ms. [redacted] counseling sessions with [redacted] and indicated that this counseling had helped [redacted] Ms. [redacted] testimony was given the most weight of all of Respondent's witnesses as she was the pivotal person during [redacted]s sixth grade year for the Section 504 Plan implementation.

[redacted] [redacted] Ed.D.

65. Dr. [redacted] [redacted] is the Executive Director for Exceptional Children's Programs for the DPS. Dr. [redacted] has served in this capacity for eight years. (Tr. vol. 7, p. 1213:2-3)

66. Dr. [redacted] earned her Bachelor's Degree in special education from [redacted] State University and a Master's Degree in school administration from [redacted] University. (Tr. vol. 7, p. 1211:5-10) Dr. [redacted] also obtained a degree from [redacted] State University focusing on specific learning disabilities and behavior disorders. (Tr. vol. 7, p. 1211:10-12) Dr. [redacted] earned her Doctoral Degree in educational leadership from [redacted] State University in 2009. (Tr. vol. 7, p. 1211:13-15)

67. Dr. [redacted] work experience included serving as a special education teacher, special education coordinator, and working at a private school, the Hill Center. (Tr. vol. 7, pp. 1211:25–1212:23)

68. The Undersigned notes that Dr. [redacted] was called as a fact witness in this case and that she had no direct involvement with [redacted]s IEP Team—Dr. [redacted] did not attend any IEP or Section 504 Plan meetings, Dr. [redacted] did not administer any evaluations to [redacted] and she did not observe [redacted] Therefore, the Undersigned accepted Dr. [redacted] repeated testimony applauding all the actions of the IEP Team in her role as EC Director—not as an expert witness. The Undersigned did not find Dr. [redacted] testimony very helpful or compelling as she was not overtly involved in any decision making with respect to [redacted]s evaluation process, Eligibility Determination, or Section 504 Plan.

69. Dr. [redacted] primary involvement in this case, pertained to the IEE Contract Claim. Dr. [redacted] was responsible for the revisions in the IEE Contract which included the Limited Relationship Provision in Exhibit A, Scope of Professional Services Agreement. Dr. [redacted] claimed that the Limited Relationship Provision was necessary to ensure the independence of the evaluators. This is inconsistent with the fact that prior to June 2017, this provision was not evidenced in DPS's IEE Contracts.

70. Perhaps the most egregious inconsistency in Dr. [redacted] testimony concerned the State Complaint. Dr. [redacted] testified that she reviewed DPS' response to the State Complaint. (Tr. Vol 7, p. 1314:15-17) In the State Complaint, DPS stated that any changes in the independent evaluators were "not due to suggestions … by DPS." (SBE Ex. 8, p. 9; Ex. 9, p. 154) This assertion

was discredited by the testimony of the three independent evaluators and seriously impacted Dr. [redacted] credibility to the Undersigned.

State Board of Education's Witnesses

[redacted]

71. [redacted] is the Section Chief at the North Carolina Department of Public Instruction ("NCDPI") of the State Board of Education ("SBE"). Ms. [redacted] earned her Bachelor's of Science in elementary education and Master's Degree in special education. (Tr. vol. 7, p. 1341:14-17) Ms. [redacted] also has a degree in educational supervision and supervision administration. (Tr. vol. 7, p. 1341:14-17)

72. Ms. [redacted] experience included serving as a special education teacher, assistant principal, instructional supervisor, and dispute resolution consultant for NCDPI. (Tr. vol. 7, pp. 1341:21–1342:7)

73. As a dispute resolution consultant, Ms. [redacted] responds to phone calls from parents and local educational agencies ("LEAs") involving disputes regarding the provision of services to students with disabilities, coordinated the facilitated IEP program, investigated State complaints, and coordinated activities for the parent advisory council. (Tr. vol. 7, pp. 1342:15–1343:10)

74. As Section Chief, Ms. [redacted] duties include supervising the monitoring system, which she called the "mechanism for ensuring that the policies and regulations are followed by the local educational agencies." (Tr. vol. 7, p. 1343:11-15)

75. Ms. [redacted] testimony highlighted how a systemic State complaint cannot address the fact-specific issues in an individual student complaint.

76. The Undersigned found Ms. [redacted] experience impressive and her testimony credible.

[redacted]

77. [redacted] is the dispute resolution consultant for the North Carolina Department of Public Instruction.

78. Ms. [redacted] earned her Bachelor's Degree in criminal justice from [redacted] State University, Master's Degree in education from V[redacted] University, and a Master's Degree in school administration from [redacted] State University. (Tr. vol. 8, p. 1422:5-8)

79. Ms. [redacted] experience included serving as a special education teacher, assistant principal, and senior administrator. (Tr. vol. 8, pp. 1422:10–1433:15)

80. Ms. [redacted] testimony corroborated Ms. [redacted] prior testimony. The Undersigned found Ms. [redacted] testimony credible, but somewhat redundant.

Relevant Time Period of Referral and Eligibility Determination

81. The "relevant time period," with respect to what the IEP Team knew or should have suspected before the Eligibility Determination Meeting, was from [redacted]s enrollment in kindergarten to August 15, 2017.

82. Prior to the relevant time period, DPS was deemed to know or should have known about [redacted]s unique circumstances as documented in the referral and eligibility documents as well as all information contained in [redacted]s educational records, including, but not limited to her prior eligibility as specific learning disabled in reading, the private 2014 OT Evaluation, communications from [redacted] as well as communications provided by [redacted] from [redacted]s medical/mental health providers.

83. The Eligibility Team did not know about [redacted]s subsequent diagnoses of Autism, Dyslexia, Moderate Pragmatic Language Impairment, and Unspecified Lack of Coordination made by the independent evaluators. The fact another LEA, [redacted] determined [redacted] eligible for an IEP did not automatically invalidate DPS' decision that [redacted] was eligible for a Section 504 Plan, but not an IEP, in August 2017.

Parties

[redacted]

84. Petitioner [redacted]s [redacted] is [redacted], and her mother is Petitioner [redacted] (Stip. 10)

85. [redacted] was twelve (12) years old at the time this Petition was filed. (Stip. 11)

86. During the relevant time period, [redacted] was domiciled, and [redacted] within the boundaries of the Durham Public Schools in Durham County, North Carolina. (Stips. 12 & 13)

[redacted]s Disabilities

87. During the relevant time period, [redacted] had been diagnosed with Anxiety Disorder, Attention Deficit Hyperactivity Disorder-Combined ("ADHD"), and Sensory Processing Disorder. (Stip. Ex. 2, p. 5) She was also on medication and received therapeutic services from Dr. [redacted] *Id.*

88. In the second grade (December 2013) [redacted] had an IEP for a specific learning disability in reading and she received small group instruction in reading (e.g. decoding and other phonic skills) and was later exited in September 2014. (Stip. Ex. 41, p. 210)

89. After [redacted] was exited from DPS' Exceptional Children's program in 2014 and through the 2017-2018, [redacted] was a qualified individual with a disability that entitled her to a Section 504 Plan.

90. After the Eligibility Determination in Spring of the 2017-2018 school year, in May 2018 [redacted] was diagnosed with Autism and Dyslexia by Dr. [redacted] during an independent educational evaluation. (Stip. Ex. 41) In April 2018, [redacted] was also diagnosed with Moderate Pragmatic Language Impairment and, in February 2018, with Unspecified Lack of Coordination. (Stip. Ex. 40)

91. According to the Special Education Referral, even though [redacted] was very bright and above grade level academically, she had "struggles in school with social issues, anxiety, and sensory issues." (Stip. Ex. 2, p. 5)

92. [redacted] exhibited a number of unusual behaviors and stylized dress because of her disabilities. In 2014, [redacted]s parents reported to a private occupational therapist that [redacted] had significant sensory-seeking behavior and would seek out touch, touching objects as well as her crotch (masturbation), wiping her mouth and nose on her sleeves, and mouthing inedible objects. (Stip. Ex. 31, p. 141) This report was available to the Eligibility Team.

93. The Eligibility Team knew or should have known about [redacted]s sensory issues and her unique style of dress.

94. At the hearing, [redacted] described how [redacted] dressed throughout elementary school and into middle school. [redacted] testified that "[[redacted] has textual issues with the texture of clothing, cannot tolerate zippers or buttons, pants have to be loose and soft, shirts without any bumps or texture, socks without bumps, wears crocs of different colors. (Tr. vol. 2, p. 211:4-22) This was corroborated by Dr. [redacted] (Stip. Ex. 41, p. 211) ("unique style of dress and was highly repetitive in her dress across sessions")

95. [redacted] also recounted how [redacted]s sensory seeking behaviors affected her in the school setting. [redacted] would adjust her crotch in public, wipe her mouth and her nose on her sleeves, spit on her sleeves, spit on her fingers and then wipe them on her clothes. She went through a phase of chewing on her clothing where it would cause holes and the sleeves would hang long because of the chewing. She would "put things in her mouth that don't belong." According to [redacted] these behaviors have caused children to tease and pick on and make fun of her because it's just not acceptable to others and they don't understand it. (Tr. vol. 2, p. 215:1-16)

96. Because of the manifestations of her disabilities, [redacted] was teased by her peers and sometimes bullied. [redacted] also misperceived social interactions as bullying when it was not. Whether actual bullying or [redacted]s misperceptions, everyone agreed that [redacted]s anxiety spiked during the latter part of [redacted]s fifth grade year (2016-2017).

97. is the of and was, , a resident of Durham County during the relevant time period. Because had requested an evaluation to determine whether qualified for a Free Appropriate Public Education ("FAPE") pursuant to the IDEA or Section 504 of the Rehabilitation Act of 1973, was subject to the procedural safeguards of both Section 504 and the IDEA.

Respondents

Durham County Public Schools ("DPS")

98. Respondent Durham County Public Schools is a local educational agency ("LEA") required by the Individuals with Disabilities Education Act ("IDEA") to provide eligible students with disabilities a free and appropriate public education ("FAPE"). (Stip. 5)

99. DPS receives federal assistance and is required by Section 504 of the Rehabilitation Act ("Section 504") to provide qualified students with appropriate accommodations to enable them to receive a FAPE.

North Carolina State Board of Education (State Board")

100. Respondent North Carolina State Board of Education ("State Board") is the state educational agency ("SEA") required to ensure that LEAs, like Durham County Schools, comply with the procedural and substantive requirements of the IDEA.

101. On behalf of the State Board, the Exceptional Children's Division of the North Carolina Department of Public Instruction ("NCDPI") implements the requirements of the IDEA, including the investigation and resolution of State complaints.

Educational Overview of s School Settings

102. was enrolled in the DPS at Elementary School (" from kindergarten through her grade year (2016-2017). (Stips. 14 & 16) is a year-round school and follows the non-traditional school calendar.

103. attended grade at Middle School (" beginning July 17, 2017, through the end of the 2017-2018 school year. (Stip. Ex. 93) is also a year-round school which follows the non-traditional school calendar. (Stip. Ex. 93)

104. Prior to the IEP meeting rescheduled for July 13, 2018, was enrolled in School for Children (" a public school located in Durham, North Carolina, for the grade. (Stip. 15) developed an IEP for on September 26, 2018. was attending at the time of the hearing.

SECTION 1: THE SUSPECTED DISABILITY AND EVALUATION CLAIMS

ISSUE I Whether Durham Public Schools evaluated [redacted] in all suspected areas of disability, in particular, Autism and Specific Learning Disability (the "Suspected Disability Claim") and whether the evaluation process was appropriate (the "Evaluation Claim")?

1. The first issue is whether DPS properly evaluated [redacted] in all suspected areas of disability before the Eligibility Meeting in August 2017. This issue is two-part: (1) what were the suspected disabilities, and (2) did DPS properly evaluate [redacted] for these suspected disabilities.

2. In order to determine if DPS evaluated [redacted] in all suspected areas, the Undersigned must look at what DPS knew, should have known, or suspected prior to the Eligibility Meeting.

A. The Suspected Areas of Disability

3. The IDEA defines "a child with a disability" as a child with a disabling condition which adversely affects the child's academic and/or functional performance and, as a result, requires specially designed instruction. The analysis for IDEA eligibility is three pronged; the first of which requires a disabling condition. It is uncontested that [redacted] had several disabling conditions, anxiety, ADHD, and sensory processing deficits.

4. Although any one of these disabilities may have qualified [redacted] for a Section 504 Plan, they alone are insufficient for an IEP. [redacted]s disabilities must also have met the other two prongs: have an adverse effect on her educationally and require specially designed instruction.

5. A review of the [redacted]s educational records, parents' concerns, and [redacted]s unique circumstances help determine what DPS should have suspected as areas of disability for [redacted] by the time of the Eligibility Meeting held on August 15, 2017.

1. [redacted]s Disabilities, Parent Concerns, and Unique Circumstances Prior to the Eligibility Meeting in August 2017

a. Existing Disabling Conditions and Past Eligibility

6. Pursuant to a parent referral on May 22, 2017, a Referral Meeting was held on June 6, 2017, to determine potential eligibility categories and the evaluation process.

7. Prior to the Referral Meeting, [redacted] had been diagnosed with Anxiety Disorder, Attention Deficit Hyperactivity Disorder - Combined ("ADHD"), and a Sensory Processing Disorder, but she had not been diagnosed within the Autism Spectrum ("AU").

b. 2013 IEP for Specific Learning Disability ("SLD") in Reading

8. Previously in 2013, in her second grade year, [redacted] was identified as Specific Learning Disabled ("SLD") and found eligible for an IEP because of her reading deficits.

9. The 2017 Referral Team acknowledged that [redacted] had an IEP for SLD but did not consider SLD as a suspected area of disability at the initial Referral Meeting. However, after the subsequent evaluations showed more than a 15-point discrepancy, SLD was reviewed as a potential eligibility category at the subsequent Eligibility Meeting (Stip. Ex 9)

10. The 2013 IEP documents and evaluations contained information about [redacted]s academic and functional performance prior to and during her second grade year.

11. In second grade, [redacted] had not been formally diagnosed with any disabilities but since the first grade had been seeing Dr. [redacted] for "generalized anxiety related concerns." (Stip. Ex. 29, p. 132)

12. Because her reading level was below grade level in the second grade, [redacted] was referred to the Exceptional Children's program "through SAP[4] due to concerns in the areas of phonemic awareness, fluency, reading comprehension, and word identification skills." (Stip. Ex. 29, p. 131) The SAP Interventions had not been successful and [redacted] remained below grade level in reading. (Stip. Ex. 29, p. 131)

13. Despite her reading deficits, [redacted]s full scale intelligence ("IQ") on the Weschler Intelligence Scale for Children Fourth Edition ("WISC-IV") was a standard score of 114 (82% high average). (Stip. Ex. 29, p. 133) Her achievement testing in reading on the Woodcock-Johnson III ("WJ-III") was in the average range compared to her same-age peers

14. Even though [redacted]s reading achievement scores were average, she did have more than a 15-point discrepancy between her achievement and ability in all academic areas. (Stip. Ex. 29, p. 135) She did not qualify based on the discrepancies, but she was found eligible because her reading assessments were below grade level.

15. In 2013, DPS' psychoeducational evaluation also reported that [redacted] was "At-Risk" "with regard to Learning Problems in that [redacted] 'almost always' has *spelling* problems." (Stip. Ex. 29, p. 135) (emphasis added)

16. Spelling continued to be a parent concern at the Referral and Eligibility Meetings in 2017.

17. The 2013 psychoeducational evaluation also reported that [redacted] had behavioral issues. [redacted]s second grade teacher reported distracting, off-task behavior, and a tendency to persevere and worry. (Stip. Ex. 29, p.132)

18. Functionally, [redacted] had deficits on the Behavior Assessment System for Children, Second Edition ("BASC-2"). [redacted]s general education second grade teacher reported "Clinically Significant" scores in internalizing problem, anxiety, and somatization. (Stip. Ex. 29, p. 134).

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[4] SAP was not defined the hearing but appeared to be a Multi-Tiered Intervention. In any event, the 2013 IEP was not developed because of a parent referral.

19. "Clinically Significant" scores suggest a high level of maladjustment. (Stip. Ex. 29, p. 134) "At-Risk" scores "identify a problem that may not be severe enough to require formal treatment but may require careful monitoring." (Stip. Ex. 29, pp. 134-135)

20. At that time, herself reported Clinically Significant scores in the areas of attention problems and hyperactivity and At-Risk concerns in anxiety. (Stip. Ex. 29, pp. 136-136)

21. Although it was referenced during the hearing, the IEP developed during the 2013-2014 school year was not entered into evidence.

22. s functional behavior, especially her anxiety and somatization, continued to be primary concerns at the time of the Referral and Eligibility Meetings.

c. 2014 Private Occupational Evaluation and Diagnosis of Sensory Processing Disorder

23. On April 11, 2014, subsequent to the 2013 IEP, but before being exited from the Exceptional Children's program, a private occupational therapist diagnosed with Sensory Processing Disorder. Private occupational therapy was recommended but not school-based services. (Stip. Ex. 31)

24. At that time, s parents reported that she had significant sensory-seeking behavior and would seek out touch, touching objects as well as her crotch, wiping her mouth and nose on her sleeves, and mouthing inedible objects. (Stip. Ex. 31, p. 141)

25. had been referred for an OT evaluation by her therapist, Dr. because of s "sensory-seeking behaviors, hyper-vigilance and anxiety." (Stip. Ex. 31, p. 38) was reported to have sensory defensiveness (fear, discomfort, anxiety) with respect to her environment. Sensory defensiveness in the tactile system including some distress with grooming, sensitivity to clothing textures and fit, difficulty with some food textures, and difficult standing close to others (e.g. in line). (Stip. Ex. 31, p. 140) She also had auditory defensiveness to loud sounds and auditory distractibility with background noise as well as overly awareness of smells in the environment. (Stip. Ex. 31, p. 141)

26. Her classroom teacher reported in the 2014 OT that is "bothered by new situations, lacks confidence with new activities, fidgets with materials, [] is in constant motion in her seat…[and has] difficulty with reading and spelling." (Stip. Ex. 31, p. 140)

27. On a positive note, during the 2014 OT evaluation, her parents reported that "make[s] friends easily and to have no difficulty sharing, playing cooperatively, making eye contact, and turn-taking." (Stip. Ex. 31, p. 139) At the hearing, disputed the accuracy of her report about s social engagement.

28. Although did not easily tolerate changes in classroom routines, her parents reported that "she keeps her backpack and desk space organized and has good work skills except

for needing reassurance to work independently." (Stip. Ex. 31, p. 140) Organizational skills became more of a problem in the fourth and fifth grades.

29. The 2014 OT evaluator determined that s most significant areas of difficulty were sensory modulation in most areas (sensory defensiveness), self-regulation in both the physiological and the emotional/behavioral areas, and sensory seeking behaviors. (Stip. Ex. 31, p. 144) had definite differences in tease/smell sensitivity, seeking sensation, auditory filtering, and probable difference in tactile sensitivity. (Stip. Ex. 31, p. 145)

30. s sensory issues continued throughout her enrollment in Durham Public Schools and through her seventh grade at

31. provided DPS with this private OT evaluation "many times" and it was available to the 2017 Referral and Eligibility Teams. (Tr. vol. 2, p. 216:9-11)

d. Exit from EC Services in 2014 and Development of Section 504 Plan

32. was reevaluated by DPS on September 11, 2014 and found ineligible for special education because she scored in the average range on her reading achievement scores and was reading on grade level. (Stip. Ex. 32, p. 147)

33. Even though all her achievement scores (except passage comprehension) were still discrepant from her ability, and even lower than her 2013 achievement scores, was exited from the EC program. (Stip. Ex. 32) No further inquiry was made as to s spelling deficits, or "Clinically Significant" functional issues.

34. A Section 504 Plan was purportedly developed after she was exited from EC services, but the earliest Section 504 Plan offered into evidence at the hearing was dated in May 2017.

e. Formal Diagnoses of Anxiety Disorder and ADHD Combined on April 7, 2015

35. After was exited from EC services on April 7, 2015, she was diagnosed by child psychiatrist, M. M.D. with Unspecified Anxiety Disorder and Attention Deficit Hyperactivity Disorder Combined Type ("ADHD-Combined"). (Stip. Ex. 33) was put on a medication regimen at home to address her ADHD and Anxiety. (Stip. Ex. 33)

36. Dr. continued treating throughout her enrollment in Durham Public Schools.

37. Although there was no formal diagnosis, also reported that had Obsessive Compulsive Disorder ("OCD") tendencies which manifested as skin picking which may have been related to her anxiety. (Stip. Ex. 33)

38. According to Dr. [redacted] [redacted]s ADHD impacted her processing of information due to decreased concentration and distractibility, and [redacted]s anxiety also affected her ability to concentrate. (Stip. Ex. 33) These disabilities qualified her for a Section 504 Plan.

2. Fourth Grade (2015-2016) and Fifth Grade (2016-2017) School Years

39. Other than some isolated negative peer interactions reported by [redacted] no evidence was produced as to any additional parent concerns during [redacted]s fourth grade school year.

40. [redacted]s therapy with Dr. [redacted] continued during the 2016-2017 school year and during the following summer. (Stip. Ex. 36, p. 156) [redacted] received weekly counseling from Dr. [redacted] and her parents met with Dr. [redacted] bi-weekly. (Stip. Ex. 20, p. 94)

41. Based on references in the 2018 Independent Education Evaluations, it appears that [redacted] continued therapy with Dr. [redacted] through, at least, the remainder of the 2017-2018 school year. (Stip. Exs. 40, p. 193; 41, p. 210)

42. [redacted] also continued to be treated by her child psychiatrist and pediatrician through the 2017-2018 school year.

a. Bullying Issues at [redacted] Elementary School

43. Because of her social awkwardness and inappropriate social behavior, during her elementary school years at [redacted] [redacted] had, on occasion, been "bullied" or at least she "perceived" that she was bullied by her peers. Regardless of whether there was actual bullying, perceived bullying, or even disability-related bullying, [redacted] was clearly affected by her negative peer interactions as elementary school progressed.

44. [redacted] social participation and peer interactions had been affected by her disabilities throughout elementary school to some degree. However, her anxiety spiked during the latter part of her fifth grade year (2016-2017) at [redacted]

45. This spike in anxiety was due to two factors: (1.) the lack of supervision and management in one of her classrooms (Ms. [redacted] class); and, (2.) the increased amount of peer ostracism based on [redacted] maladaptive social behaviors.

46. During [redacted]s fifth grade year, the Parties disagreed about what constituted "bullying" and its severity. Bullying was not defined by either Party nor was DPS' policy regarding school bullying introduced into evidence.

47. However, there is a legal definition of bullying. Pursuant to N.C.G.S. § 115C-407.15 bullying is defined as:

> bullying and harassing behavior to a student or school employee is any pattern or gestures or written, electronic or verbal communications that take place on school property and that: (1) places a student in actual and reasonable fear of harms to his

person or property; or (2) creates a hostile environment by substantially interfering with or impairing a student's educational performance. "hostile environment" means that the victim subjectively views the conduct as bullying or harassing behavior and the conduct is objectively severe or pervasive enough that a reasonable person would agree that it is bullying or harassing behavior.

48. DPS' position was that other students simply made "mean" comments to due to her "quirkiness" and, because of her social awkwardness, was sometimes the instigator.

49. Because of s odd behavior and manner of dress, she was an easy target for her peers.

50. often volunteered in s fifth grade class and was at because all four of her children were enrolled there. (Tr. vol. 2, pp. 223-224, 321:23-322:2) Based on her observations, described the bullying as much more severe than DPS represented.

51. testified that "had been bullied at but fifth grade was – had become a nightmare where she was just relentlessly bullied, teased, taunted, hair pulled, kicked, knocked down, and nothing was being done. I had reached out to the assistant principal, the principal, and nothing was being stopped." (Tr. vol. 2, p. 225:15-20)

52. Problems with teacher staffing in s classroom during the 2016-2017 school year contributed to this hostile environment. s original teacher left before Christmas and the class had a substitute for two weeks. Subsequently, Ms. was hired for s homeroom class. (Tr. vol. 3, pp. 572-573) Ms. taught for a couple of months then went on leave and at the end of the 2016-2017 school year, she resigned.

53. had complained about the lack of teacher supervision in s classes and, in particular Ms. class, which believed contributed to the bullying incidences.

54. According to it was Ms. classroom environment which highly stressed to the point that she was "picking her skin" and "had picked all the skin off her toes; requiring antibiotics." (Tr. vol. 2, pp. 226-229)

55. At the end of her fifth grade school year, s anxiety was "the worst it had ever been." (Tr. vol. 2, p. 229:6-9) s medical providers supported a change in classrooms. (*See* Dr. letter (Stip. Ex. 51); Dr. letter (Stip. Ex. 52)); (Tr. vol. 2, p. 229-231) Drs. and recommended a change of classrooms but did not recommend homebound placement.

56. During that time, without prior approval from her Principal, Assistant Principal arranged for to go to Ms. class for two weeks instead of Ms. class. (Tr. vol. 3, pp. 573-574)

57. In that setting, made substantial improvement in her anxiety. described her as "thriving." (Tr. vol. 3, p. 575:1-17) This substantiated s assertion that the classroom

placement and classroom management styles significantly impacted [redacted]s anxiety. (Tr. vol. 3, pp. 578-579)

58. [redacted] reported that when [redacted] was moved to another Ms. [redacted] classroom, she was able to learn." (Tr. vol. 2, pp. 227:15-228:22)

59. In early May 2017, [redacted] requested a meeting to address [redacted]s classroom schedule and to permanently put [redacted] in a different homeroom than Ms. [redacted]. (Tr. vol. 6, p. 999:13-19; vol. 2, pp. 229-231)

b. Section 504 Plan Reviewed Because of Bullying

60. In response to [redacted]s request, DPS convened a Section 504 meeting on May 9, 2017 to review the Section 504/ADAAA Accommodation Plan ("Section 504 Plan) and to discuss [redacted]s scheduling concerns. (Stip. Ex. 17)

61. Regardless of whether [redacted] was actually bullied, perceived herself being bullying, or the bullying was not disability-related, [redacted]s spike in anxiety triggered DPS' obligation to ensure that she received FAPE under her existing Section 504 Plan. (*See Office of Civil Rights' Dear Colleague Letter: Responding to Bullying of Students with Disabilities*, 64 IDELR 115 (October 21, 2014))

62. At the May 9, 2017 Section 504 Plan meeting, [redacted] talked about [redacted]s difficulty with Ms. [redacted] as her teacher, that she was "bullied relentlessly, and she was fearful of Ms. [redacted] class and the classroom at this point." (Tr. vol. 2, p. 233:12-15)

63. Unbeknownst to [redacted] Assistant Principal [redacted] had moved [redacted] to Ms. [redacted] homeroom without Principal [redacted] prior approval. When Ms. [redacted] returned from her medical leave, Principal [redacted] planned to move [redacted] back to Ms. [redacted] homeroom. (Tr. vol. 6, p. 999:20-25)

64. In attendance at the May 9, 2017 Section 504 Plan Reevaluation Meeting were Principal [redacted] Assistant Principal [redacted] several other school staff, [redacted] and Dr. [redacted] (Stip. Ex. 17)

65. During that meeting, [redacted] reported that [redacted] "was trying to get herself expelled from school and that she makes comments of hurting herself." (Tr. vol. 2, p. 233: 16-24; Stip. Ex. 17, p. 8).

66. [redacted] insisted that [redacted] not return to Ms. [redacted] classroom during the remainder of the 2017-2017 school year.

67. Principal [redacted] denied [redacted]s request because "of the coding and internal registration/assignment (for lack of a better word) of students who are about to begin EOG testing." (Stip. Ex. 11, p. 85) EOG testing procedures apparently required that students remain in their assigned homeroom classes. This one decision was a pivotal point in this case.

68. Had Principal [redacted] been flexible with respect to [redacted]s classroom placement, it is doubtful that this case would have been filed. Instead, thousands of dollars and valuable time has been expended in due process. Also, during this time, Principal [redacted] required that [redacted] be escorted by administrative staff when she came to visit [redacted] (Tr. vol. 3, p. 589:11-14)

69. This caused a hardship on [redacted] because three of her children attended [redacted] Soon after Principal [redacted] decision about this classroom placement and [redacted]s mandatory escort by staff, [redacted] filed her first contested case petition and the Parties went to their respective "corners."

70. When Principal [redacted] refused to change [redacted]s classroom, [redacted] kept [redacted] at home "because the school did not make a safe learning environment for her." (Tr. vol. 3, p. 583:4-8) Except for EOG testing and a field trip, [redacted] missed five weeks of school at the end of her fith grade year. (Tr. vol. 3, pp. 586:25-587:1)

71. [redacted] explained that she kept [redacted] at home during that time because "[[redacted] was so fearful there was no safe place for her to be" and "because the school did not make a safe learning environment for her." (Tr. vol. 2, p. 254:8-13; vol. 3, p. 583:4-8)

*c. **Section 504 Plan Accommodations***

72. Even though ultimately, [redacted] was not found eligible for an IEP in August 2017, she still qualified for a Section 504 Plan.

73. The appropriateness of the Section 504 Plan and/or implementation was not before the Undersigned, nor does this Tribunal have jurisdiction over violations of the Rehabilitation Act of 1973.

74. However, the Section 504 Plan was relevant to the extent that the accommodations were sufficient to provide [redacted] a FAPE without the need for an IEP.

75. According to her May 9, 2017 Section 504 Plan, [redacted] received the following general accommodations:

> Alternative Teaching Strategies – Schedule accommodations are indicated in the BIP
> Alternative Teaching Strategies – Kickband, hand fidget usage
> Alternative Teaching Strategies – Frequent movement breaks
> Alternative Teaching Strategies – Preferential seating
> Alternative Teaching Strategies – Modified homework according to therapy schedule
> Communication – Teacher will communicate with parent via telephone and/or e-mail
> Organization/Management – Student will have preferential seating and teacher will modify homework, as needed
> Support Services – Use of code to alert school staff to the level of distress

Support Services – BIP in place – please refer to it for additional supports
Support Services – Access to school counselor

(Stip. Ex. 21, p. 99)

76. [redacted] also received classroom testing accommodations, state testing accommodations, and district/local testing accommodations. (Stip. Ex. 21, pp. 99–100)

77. The Section 504 Team noted [redacted]s "*spelling* deficits prevent[ed] her written work from having a comprehensive flow." (Stip. Ex. 18, p. 88) (emphasis added)

78. The Section 504 Team acknowledged that [redacted] has the impairments of Sensory Processing Disorder, Anxiety Disorder, and ADHA which she "demonstrate[s] learning/classroom performance difficulties as related to the diagnosed impairments." (Stip. Ex. 18, p. 89) Her anxiety made [redacted] "fearful of entering the classroom due to relentless bullying: impacting her ability to focus and engage in school. SPD: Movement and loud noises, being bumped or touched, or any commotion prevents [redacted] from being able to focus and engage in school. ADHD: Combined type – Creates a lack of focus in classroom settings that impedes her ability to receive information." (Stip. Ex. 18, p. 88)

79. The Section 504 Team concluded that [redacted]s diagnosed disabilities impaired her "thinking", "concentration", and "learning/academic performance." (Stip. Ex. 18, p. 89)

80. Although the Section 504 Team answered "yes" that the "need for special education services [had] been considered through the IDEA process," it had not. (Stip. Ex. 18, p. 89)

81. At the May 9, 2017 meeting, the Section 504 Team agreed to conduct a Functional Behavior Assessment ("FBA"), create a Behavior Intervention Plan ("BIP"), develop a Crisis Plan, and "tighten" up the Section 504 Plan to address her anxiety. (Stip. Ex. 17, p. 85)

82. The Section 504 Team scheduled to reconvene on May 11, 2017 to finish the 504 Plan.

83. At the May 11th Section 504 team meeting, Principal [redacted] reviewed the "non-approved chain of events with prior teacher shifting" and made clear that, although they could agree to a modified schedule, [redacted] would still be in Ms. [redacted] class for lunch, recess, and math/science." (Stip. Ex. 19, p. 93)

84. Assistant Principal [redacted] testified that after the May 11th meeting, while in the office, [redacted] specifically stated that "This is not going to work. She's just not going to come." (Tr. p. 1001:14-18)

85. Shortly thereafter, [redacted] rejected the agreed-upon schedule and communicated that she would not send [redacted] to school under the current plan. (Tr. vol. 6, pp. 1000:19-1001:18) The school made arrangements for work to be sent home and for [redacted] to come into school to take her end of grade tests. (Stip. Ex. 23, p. 109) (Tr. vol. 3, pp. 583:4-6; 584:13-16)

86. Another Section 504 Meeting was scheduled on May 15, 2017[5] with [redacted] and Ms. [redacted] "to finalize the eligibility documents and devise Plan/BIP." (Stip. Ex. 19, p. 93)

d. Functional Behavior Assessment ("FBA"), Behavioral Intervention Plan ("BIP"), and Crisis Plan in the Section 504 Plan

87. Addendum Section 504 Plan meetings were held on May 30 and 31, 2017 to review the FBA, BIP and Crisis Plan. (Stip. Ex. 21)

88. According to the FBA, [redacted] "avoid[ed] her homeroom class" causing her to miss fifteen to twenty minutes of class three to five times per week. (Stip. Ex. 48, p. 283)

89. The FBA hypothesized that due to [redacted]s "previous history with peers in her homeroom class . . . [redacted] anticipate[d] the negative peer interactions that ha[d] occurred in the past." The FBA reported "[t]he noise level within the class also effects [redacted] The FBA also reported the behavior affected [redacted] at "various times of day" and was most likely to occur during "all activities." (Stip. Ex. 48)

90. The FBA noted that [redacted]s behaviors were related her "social," "communication," and "sensory processing" skill deficits and occurred in response to "not allowing the student to have or do something they [sic] want," "change in routine," "beginning her morning," and during "independent, large group, and small group work."(Stip. Ex. 48)

91. These maladaptive behaviors also occurred when [redacted] wanted to escape the situation in Ms. [redacted] class by going to Ms. [redacted] class where she would "complete her assignments." (Stip. Ex. 48) When [redacted] was not permitted to leave, she would "ask to call home" or "ask[] to see Mrs. [redacted] or Mr. [redacted] (Stip. Ex. 48). At times, the FBA noted that [redacted] "picked her arms during conversation with adults." (Stip. Ex. 48) The FBA agreed to collect data for one week and reconvene on May 22, 2017. (Stip. Ex. 48, p. 286)

92. Based on the FBA, on May 31, 2017, the DPS developed and implemented a Behavior Intervention Plan ("BIP") for [redacted] Stip. Ex. 44. The BIP also included a Crisis Plan that recognized the impact of [redacted]s disabilities, specifically her social and communication deficits, sensory processing issues, and anxiety, on her behavior. (Stip. Ex. 44, pp. 266–67)

93. The Crisis Plan reported:

> Anxiety can present for [redacted] at any point throughout the day. [redacted] has made comments at home that relate to wanting to die and referencing a helpless and defeated purpose. She can engage in intense skin picking, which is at times reflective of obsessive compulsive behaviors and hurts her body resulting in medical treatment. When unable to manage her feelings and have control over situations, [redacted] can present in a verbally aggressive manner that can be

[5] All claims prior to May 22, 2017 with respect to the Section 504 Plan had been resolved by DPS and Petitioners.

misunderstood as her being confrontational when in fact, she is struggling to express herself and gain a sense of control. It is extremely important that [is able to talk to someone about what has triggered her response. Furthermore, [needs to feel that she has been fully heard. An additional response can include [fleeing/leaving (escape response). Any location that is really loud or unstructured can be overwhelming for [which directly impacts her sensory processing. Examples of such locations include the gym and cafeteria. When this aspect of her functioning is triggered, [can present with the above responses. Touch is also a sensory processing trigger for Although she can tolerate hugs and a firm touch (i.e., on the shoulder) by her teachers, [is unable to tolerate any touch from her peers. Also due to her sensory processing disorder, certain textures, to include food and clothing, can also trigger [Scents, including perfumes/colognes can also exacerbate [s presentation. This too is related to her sensory processing disorder.

(Stip. Ex. 44, p. 266.)

94. The Crisis Plan included protocol for removing to a "calm environment, with low lighting, so that she [could] de-escalate," trying to provide deep pressure through a hug or shoulder rub, offering the opportunity to draw in order to "self-regulate," then asking her explain what happened. (Stip. Ex. 44, p. 267). The Crisis Plan also included instruction with on "healthy coping skills," "identify[ing] what aided her in reducing her crisis/unmanaged distress" to "help her recall and utilize these in future occurrences." (Stip. Ex. 44, p. 267)

95. The BIP was reviewed on May 31, 2019, but there were only seven (7) school days remaining, but "it [was] highly recommended that it [be] reviewed and revised at the beginning of the 2017-18 school year (6th grade)." (Stip. Ex. 44, p. 267)

e. First Due Process Petition

96. After Principal refused to change s classroom, on May 18, 2017, filed her first due process petition, 17 EDC 3372 ("May 2017 Petition"), against DPS. This was the first of three contested case petitions (May 2017, June 2018, and August 2018) filed by (*See* Officially Noticed Fact No. 1; Stip. Ex. 23)

97. The May 2017 Petition focused mainly on the bullying incidences and s dissatisfaction with DPS' response to them. (*See* Officially Noticed Fact No. 2) served the Superintendent of DPS, not the EC Director. Soon thereafter, Dr. was made aware of the May 2017 Petition. (*See* Officially Noticed Fact No. 2; (Stip. Ex. 23)

98. As remedy in her May 2017 Petition, requested that DPS evaluate to determine if she qualified for special education services under the IDEA.

99. In her May 2017 Petition, did not indicate that she suspected may be autistic or request an evaluation to determine if was eligible for special education services under the category of autism.

f. Intervening Legal Meeting Held on May 30, 2017 with Dr. [redacted] and School Staff

100. After the first due process petition was filed, a meeting was held on May 30, 2017 (the "Legal Meeting") with Dr. [redacted] and select school staff from [redacted] (Stip. Ex. 23)

101. By that time, the May 2017 Petition had already been withdrawn. (Stip. Ex. 23) In attendance were Dr. [redacted] Mrs. [redacted]. [redacted] (Elementary ECP Director), Dr. [redacted]. [redacted] (District 504 Coordinator/Intervention and Support Liaison), Ms. [redacted]. [redacted] (School-based 504 Coordinator/Counselor), Mr. [redacted]. [redacted] (Principal), Ms. [redacted]. [redacted] (ECP Facilitator), and Ms. [redacted]. [redacted] (School Psychologist). (Stip. Ex. 23)

102. On direct examination, Dr. [redacted] testified that her first involvement with [redacted] and her family was when [redacted] emailed her about the IEE request in September 2017. However, after prodding on cross-examination, Dr. [redacted] admitted that she was aware of [redacted]s complaints by the time of the Legal Meeting held on May 2017. (Tr. vol. 7, pp. 1218-1219)

103. The Legal Meeting Team was aware that [redacted] had voluntarily dismissed her May 2017 Petition and they speculated as to why – "general desire to withdraw? Working with a lawyer now?" (Stip. Ex. 23)

104. After the meeting, Dr. [redacted] was to "keep those present today abreast of developments…". (Stip. Ex. 23, p. 110) Although Dr. [redacted] did not attend the Referral and Eligibility Meetings, Ms. [redacted] and School Psychologist [redacted] did. Psychologist [redacted] would later recommend in her psychoeducational evaluation that [redacted] continue to receive "supports through her classroom teachers and/or school counselor as needed." (Stip. Ex. 37, p. 176)

105. That afternoon Dr. [redacted] attended the Section 504 Plan meeting with [redacted]s parents. (Stip. Ex. 24, p. 114)

106. The Section 504 Plan's annual review meeting was scheduled for August 28, 2017 but held instead on September 12, 2017 at [redacted] (Stip. Exs. 24 & 26)

2. Parent Written Referral for Eligibility Determination

107. After she filed the May 2017 Petition, in a separate letter dated May 22, 2017 to Dr. [redacted] [redacted] requested that "DPS conduct a comprehensive evaluation ["Evaluation Request"] on [her] daughter [[redacted] to determine whether she was a child with a disability under the IDEA and what types of services or specially designed instruction that she actually requires under 504 and/or IDEA." (Stip. Ex. 54, p. 299) [redacted] did not request evaluation of any specific eligibility categories.

108. In her Evaluation Request, [redacted] also did not indicate that she suspected [redacted] may be autistic or request an evaluation to determine if [redacted] was eligible for special education services under the category of autism.

109. In her written referral, [redacted] indicated that she wanted an IEP for [redacted] to "maximize her potential." (Stip. Ex. 11, pp. 52-53)

110. On May 25, 2017, [redacted] received an Invitation to Conference to start the eligibility process. A Referral Meeting was scheduled for June 6, 2017, at 1:00 p.m.

111. The same day, [redacted] voluntarily dismissed without prejudice her May 2017 Petition. There was no Resolution Meeting because the May 2017 Petition was dismissed on the fifth school day after being filed. (*See* Officially Noticed Fact No. 1)

a. Academic and Functional Performance End of Fifth Grade and Beginning of Sixth Grade

112. On May 25, 2017, [redacted] received an Invitation to Conference to start the eligibility process. A Referral Meeting was scheduled for June 6, 2017, at 1:00 p.m. Moreover, the Section 504 Team continued to amend her Section 504 Plan to address [redacted]s anxiety issues, even though [redacted] was absent from school.

i. End of Fifth Grade 2016-2017 School Year at [redacted] Elementary

113. Functionally, [redacted] struggled with her anxiety and peer interactions during the last quarter of the fifth grade. Her anxiety spiked while in Ms. [redacted] classroom and abated when she was reassigned to another class.

114. Her functional performance was episodic during this period depending on her classroom placement. Petitioners assert that [redacted] absence from school evidenced the adverse effect of her disabilities on her functional performance.

115. This Tribunal has no authority over classroom placement or personnel decisions and could not order DPS to permanently remove [redacted] from Ms. [redacted] class.

116. [redacted]s medical providers supported a change in classrooms but did not recommend homebound placement.

117. When DPS refused to permanently remove [redacted] from Ms. [redacted] class, [redacted] chose to voluntarily keep [redacted] at home during the last five weeks of school, but [redacted] did go on the class field trip and participated in EOGs. (Tr. vol. 3, pp. 586:25-587:1)

118. Despite missing twenty-three days of school, [redacted] maintained passing grades in all her classes and EOG's.

119. [redacted] was "above grade level academically." (Stip. Ex. 2, p. 5) Her final fifth grade report card indicated that she "meets all standards" in every academic area, including reading, writing, language, math, science, social studies, as well as her specials such as music and art. (Stip. Ex. 96, p. 535) She also "consistently" demonstrated functional skills such as taking responsibility

for learning, respecting peers and adults, following directions, completing work on time, participating in class activities, and collaborating effectively with peers. (Stip. Ex. 96, p. 535)

120. There were documented concerns about [redacted]s spelling. Even though the Section 504 Plan contained no accommodations for spelling errors, there was no evidence that her grades were adversely affected by her spelling.

121. Petitioners did not present any evidence to contradict the fifth grade report card, and the Undersigned finds it is an accurate statement of [redacted]s performance at that time.

ii. Beginning of 6th Grade 2017-2018 School Year at [redacted] Middle School

122. On July 17, 2017, [redacted] began her [redacted] grade school year at [redacted] Middle School. (Stip. Ex. 9) Academically, [redacted] was very successful in the first month of sixth grade.

123. At the time of the Eligibility Meeting on August 15, 2017, [redacted] had near-perfect grades in Social Studies (four 100s and one 80 out of five graded assignments), Math (three 100s and one 88 out of four graded assignments), Science (four 100s and one 90 on five graded assignments), and Environment & Natural Resources (six 100s and two 88s on eight graded assignments, along with perfect weekly participation grades), and solid grades in Language Arts (two 100s and two 80s on four graded assignments, with one assignment missing). (DPS Ex. 2, pp. 24, 25, 28, 32 & 36)

124. [redacted] reported that she was "happy with the number of friends she has," though she "sometimes has problems getting along with other kids." (Stip. Ex. 37, p.175)

125. [redacted] was the school counselor responsible for implementing the counseling portion of [redacted]s Section 504 Plan while at [redacted] Ms. [redacted] was familiar with [redacted]s functional needs because she had attended the Referral and Eligibility Meetings. According to Ms. [redacted] although [redacted] continued to need her Section 504 Plan accommodations and had some peer interaction issues, her functional performance was significantly better than in the fifth grade.

126. Overall the consensus was that [redacted]s sixth grade year had started well, that [redacted] was advocating well for herself, and she had already used a "peer agreement" when she had had a negative peer interaction. (Stip. Ex. 27, p. 123)

3. Referral Meeting – June 6, 2017

127. Concurrent with the revisions and implementation of her Section 504 Plan, the IEP referral and eligibility process began for [redacted]

128. The IEP Referral Meeting was held on June 6, 2017 ("Referral Meeting"). (Stip. 17)

129. In attendance at the Referral Meeting were: Ms. [redacted] (Special Education Teacher), [redacted] (School Psychologist), [redacted] (fifth grade homeroom teacher), [redacted] (counselor), [redacted] (Occupational Therapist), and [redacted] (Stip. 18)

130. Although [redacted]s disabilities qualified her for Section 504 Plan accommodations, merely being disabled does not guarantee her an IEP under the IDEA.

131. A "child with a disability," as defined by the IDEA, requires both a disabling condition and adverse effect on the student's academic and/or functional performance such that specially designed instruction is needed.

132. There are many fourteen categories for disabling conditions under the IDEA, but those relevant to this case are Specific Learning Disability ("SLD"), Autism ("AU"), Serious Emotional Disability ("SED"), and Other Health Impaired ("OHI").

133. At no time prior to or during the Referral Meeting did [redacted]s child psychiatrist, pediatrician, clinical psychologist or her parents say or even suggest that [redacted] might be autistic.

134. The Referral Form reported a number of reasons for referral/areas of concern including *spelling*, self-concept, peer relationships-socially awkward, peer acceptance, fearful/anxious and medical diagnoses of ADHD, Anxiety Disorder, and Sensory Processing Disorder. (Stip. 19) (emphasis added)

135. Lead School Psychologist [redacted] testified that the first thing he looks at during the referral process are the "referral concerns … and what documentation there is regarding those concerns." (Tr. vol. 5, p. 942:14-19) According to Dr. [redacted] classroom assessments, group assessments, and regular education interventions are "very valuable" documentation. (Tr. vol. 5, p. 942:20-25)

136. The Referral Form reported the Section 504 Plan accommodations as the instructional practices/interventions implemented to address area(s) of concern and the outcomes. (Stip. 20)

137. Since spelling was a parent concern and reason for referral, during the IEP Team's discussions, Ms. [redacted] responded to [redacted]s concerns about spelling and handwriting by saying that "[[redacted]s] *spelling* is inconsistent" but that she did not remember the letter reversals in the classroom. (Stip. Ex. 6, p. 16) (emphasis added)

138. None of the IEP documents from the Referral Meeting or the Eligibility Determination mentioned autism as a suspected disability.

139. Even if DPS should have considered the autism category, that alone does not mean [redacted] would have automatically been entitled to an IEP. Likewise, just because [redacted] may have had learning disabilities, other health impairments or serious emotional disabilities, did not mean she met the eligibility requirements for special education.

140. The Referral Form accurately reported in the summary of what was learned about from the review of existing data that: "[is a very bright student who is above grade level academically. [has *struggles in school with social issues, anxiety, and sensory issues*. [has a 504 plan that includes classroom and state testing accommodations." (Stip. 25) (emphasis added)

141. The Referral Form reported the following description of observations by teachers, related service providers, and administrators:

> [has the ability to make friends. She has difficulty with textures. [prefers distance to physical touch. Sensitivity to noise impacts [causing her to shut down and retreat behaviorally. [seeks the approval of adults and peers, she needs reassurance and guidance in social setting. She is very empathetic. However, at times she may be part of conflict. Certain people trigger her, particularly those with whom she has had negative previous interactions, resulting in an explosive response, in which [will leave the room and cry.

(Stip. 23)

142. At that time, had not been diagnosed with autism by her psychiatrist, clinical psychologist or pediatrician. Nor had any of these medical/mental health providers suggested that may be within the autism spectrum even though they had managed her care for many years.

143. Because of the issues about s anxiety in Ms. class, before the Referral Meeting, had recently provided letters to the school system from s child psychiatrist, . M.D. (Stip. Ex. 51 dated 5/8/17), and clinical psychologist Dr. (Stip. Ex. 53 dated 5/10/17), and pediatrician, Dr. . M.D. (Stip. Ex. 52 dated 5/9/17).

144. All of these letters supported a change in classrooms because of s anxiety and ADHD symptoms, not because of autism. (Stip. Exs. 51, 52. & 53)

145. Again, on June 5, 2017, just before the Referral Meeting, Dr. wrote that s "anxiety level has increased over the past month due to circumstances within her classroom and she has been absent from school as a result… her anxiety is at a level that makes it difficult for her to remain in the school setting and benefit from instruction." (Stip. Ex. 55) Based on this communication, s anxiety appeared to be the dominant concern.

146. s anxiety continued to be the dominant concern when she transferred to

a. No Evidence That Autism was "Suspected"

147. What the IEP Team knew and should have "suspected" is highly fact specific for each case.

148. The IEP Team did not consider autism during the Eligibility Meeting, nor did [redacted] request them to do so.

149. A formal diagnosis of autism spectrum is not required for autism eligibility.

150. In this particular case, none of the student's medical/mental health providers suspected autism. The providers were at the time actively treating [redacted] and writing letters on behalf of [redacted] supporting a change in the classroom because of anxiety.

151. The Undersigned is not going to hold school staff to a higher standard than medical/mental health professionals, especially when one was a child psychiatrist.

152. In this decision, the Undersigned, however, is not opining that a student must first be medically diagnosed autistic to be "suspected" of being eligible in the autism category.

153. To be determined eligible in the disability category of autism a child must demonstrate at least three of the four characteristics of (1) impairment in communication, (2) impairment in social interaction, (3) unusual response to sensory experiences and (4) restrictive, repetitive, or stereotypic patterns of behavior, interests, and/or activities. NC 1503-2.5(d)(1)(ii)(A-D).

154. Petitioners argued that [redacted] met all four categories. DPS agreed that [redacted] may have had sensory issues and some impairment in social interactions but that she failed to exhibit the characteristic of impairmentive communication or stereotypic, ritualistic pattern of behavior.

155. The combination of [redacted]s existing diagnoses, ADHD, Anxiety Disorder, and Sensory Processing Disorder, manifested similar behaviors as autism. Her deficits in sensory processing explained her unusual responses to sensory experience and clothing choices. Her anxiety in peer interactions affected her social interactions. Both her anxiety and ADHD could affect her communication.

156. Dr. [redacted] Petitioners' expert, opined that [redacted]s diagnoses at the time—Sensory Processing Disorder, Anxiety Disorder, and ADHD—were "fragmented" and could better be accounted for with a diagnosis of autism spectrum disorder. (Tr. vol. 4, p. 686:6-16)

157. However, Dr. [redacted] did not opine as to how the manifestations of [redacted]s existing diagnoses would differ with an autism diagnosis.

158. Dr. [redacted] admitted there were counter indications of autism in [redacted]s' records.

159. Although during his testimony, Dr. [redacted] emphasized the importance of observation of the student and collecting data in the environment to validate functional skills; Dr. [redacted] relied on no such data to decide that [redacted] should have been diagnosed as autistic. (Tr. vol. 4, p. 743: 9-16)

160. When Dr. [redacted] reviewed the 2013 psychoeducational and 2014 OT evaluations, he acknowledged that the documents also indicated that [redacted]s functioned well in the classroom based on the notations that: "Teachers report that [redacted] enjoys helping out in the classroom, gets along well with her peers (Stip. Ex 29, p. 131); during classroom observations "[redacted] "quietly found a peer to compete a shared reading exercise with," and under behavior observations, [redacted] "was very sociable." (Tr. vol. 4, pp. 733:11-734:7)

161. When asked on cross-examination, where in the observations in the 2013 evaluation did he see her "pervasive social difficulties," Dr. [redacted] indicated that they didn't collect any systematic data on behavior, as a result he could conclude [redacted] had social deficits. (Tr. vol. 4, p. 734:8-17)

162. And the BASC-2 teacher's report, parents' report, and [redacted]s self report did not report any "At-Risk" areas in her social skills. (Tr. vol. 4, pp. 734:18-735:8) Petitioners did not challenge the validity of the BASC-2 scores.

163. The private occupational therapist reported in her 2014 OT Evaluation (Stip. Ex. 31) that during one hour forty-five-minutes that she observed [redacted] in-school: "[redacted] interacted age-appropriately with the therapist and peers" both verbally and nonverbally. (Tr. vol. 4, p. 735:21-25) The 2014 OT Evaluation also documented that [redacted]s parents reported that [redacted] participated easily in conversation, made friends easily, had no difficulty sharing, had no difficulty playing cooperatively, had no difficulty making eye contact, and had no difficulty turn-taking. (Tr. vol. 4, pp. 735:21-736:23)

164. [redacted]s clinical psychologist, Dr. [redacted] who counseled [redacted] weekly, reported in October 2015 that [redacted] overreacts sometimes in social situations with her peers and needs reassurance to connect with others. (Stip. Ex. 50, pp. 292-293) Even though she lacks confidence in social settings, Dr. [redacted] noted that "[w]hen in a more confident mode, [redacted] is an excellent problem-solver with incredible recall of experience and of visual input. ...She is kind, loving and generous. Her capacity for empathy is remarkable and she is quite perceptive." (Stip. Ex. 50, p. 293) According to Dr. [redacted] "[[redacted] very much wants to have good friends and cherishes those relationships." (Stip. Ex. 50, p. 293) Dr. [redacted] comments do not support [redacted] was impaired in social interaction.

165. On May 10, 2017, a month before the Referral Meeting, Dr. [redacted] wrote that: "Though [redacted] present as socially young without awareness of some aspects of social wherewithal, in contrast, she is more attuned and empathic than imaginable." (Stip. Ex. 53, p. 297) [redacted]s interpersonal discord eclipsed her many strengths according to Dr. [redacted] (Stip. Ex. 53, p. 297)

166. Like [redacted]s child psychiatrist, both [redacted]s clinical psychologist and pediatrician focused on [redacted]s anxiety as the primary disabling condition.

167. Moreover, in Spring 2018, the Petitioners' independent evaluator, Ms. [redacted] observed [redacted] in the classroom setting and noted no concerns about her peer interactions or class participation. (*See* Stip. Ex. 38)

168. Dr. [redacted] a board certified child psychiatrist testified she would "wonder about the possibility of autism but not think Oh, yeah, this is clearly autism." (Tr. vol. 5, p. 890:14-21) Instead, [redacted]s presentation was subtle, not obvious to Dr. [redacted] (Tr. vol. 5, p. 890:17-21) Dr. [redacted] agreed with Dr. [redacted] that [redacted]s symptoms could all be explained by [redacted]s other diagnosis of ADHD, Anxiety, and Sensory Processing Disorder. (Tr. vol. 5, pp. 890:22-891:1) The fact that none of [redacted]s providers had previously suspected autism, including her treating child psychiatrist, made Dr. [redacted] question an autism diagnosis (Tr. vol. 5, p. 891:13-20)

169. Ms. [redacted] [redacted]s special education teacher at [redacted] focused on [redacted]s "anxiety around the social context surrounding academics" which would cause her anxiety to "compound very quickly." (Tr. vol. 5, pp. 835:5-836:2-10) Even though by that time, [redacted] had been formally diagnosed as autistic, according to Ms. [redacted] it was [redacted]s anxiety that "would just steal her ability to thrive," not her autism. (Tr. vol. 5, p. 836:11-15)

170. At hearing, no evidence was presented by [redacted]s treating providers that they suspected a diagnosis of autism prior to the August 2017 Eligibility IEP meeting. Even after Dr. [redacted] diagnosed [redacted] with autism in May 2018, no evidence was produced that any of [redacted]s treating providers concurred with that diagnosis.

171. Even if DPS should have considered eligibility under the autism category, that alone does not mean [redacted] would have automatically been entitled to an IEP. Likewise, just because [redacted] may have had learning disabilities, other health impairments or serious emotional disabilities, does not mean she had met the eligibility requirements for special education.

172. The Undersigned finds that based on the preponderance of the evidence that there were inconsistencies in some of [redacted]s functional skills, but there were no "clear signs" at the time of the Referral or Eligibility Meetings that would have triggered an Eligibility Determination under the category of autism.

173. The Undersigned finds there were documented parent and teacher concerns about [redacted]s spelling deficit and that there were "clear signs" at the referral meeting that SLD was a suspected area of disability.

B. The Evaluations Conducted by DPS Did Not Comply with *NC Policies* for Eligibility Determinations in OHI, SED, and SLD.

174. DPS must conduct evaluations in accordance with the *North Carolina Policies*. NC 1500-2.11(a).

175. At the Referral Meeting, the IEP Team decided to conduct evaluations:

> to determine if her anxiety, ADHD. and sensory processing disorder impact her access to the general education curriculum and requires specially designed instruction. The team is requesting all evaluations required for consideration of the Serious Emotional Disability and Other Health Impairment: interventions,

behavioral/emotional evaluation, communication evaluation, educational evaluation, hearing screening, vision screening, observations, psychological evaluation including intellectual, social/developmental history, medical evaluation, and occupational therapy evaluation.

(Stip. 29)

176. The Prior Written Notice reported that the IEP Team acknowledged that: "[has had difficulties this school year due to her anxiety, ADHD, and sensory processing disorder and the team needs to determine if those diagnoses have an adverse effect on her educational performance that require specially designed instruction. (Stip. 30)

177. The IEP Team knew that spelling was a specific parent concern and had been reported as inconsistent by s teacher. This knowledge triggered the IEP to evaluate for specific learning disabilities at least in the areas of reading and writing. Ultimately, DPS did evaluate for suspected SLP because of her discrepant achievement scores found during her educational evaluation.

1. Procedural and Substantive Deficits in DPS' Evaluation Process

178. The evaluation process started in June 2017 at the end of s fifth grade year at Elementary School and continued into August 2017, the beginning of s sixth grade at Middle School. The 90-day deadline for completion of eligibility was August 20, 2017.

179. s first day at school for the 2017-18 school year at Middle School was July 17, 2017. (Stip. 32)

180. had ten (10) sixth-grade teachers, but only the four core teachers, (ELA), (math), (science), and (homeroom, discovery, & social studies), completed BASC-3 rating scales for DPS. These same teachers later completed in BASC-3 for the independent evaluator in 2018. (Stip. 33)

181. After the June Referral Meeting, completed a BASC-3 rating scale, but Ms. refused to complete the behavior rating scales because "she did not have time to do so" since she had resigned her teaching position. (Tr. vol. 2, pp. 271:15-272:6)

182. None of s sixth grade teachers had previously taught and they were not familiar with s unique needs in August 2017.

183. Also, of note, none of s fifth or sixth grade teachers testified at the hearing.

184. When conducting evaluations, the Eligibility Determination process must adequately evaluate the parent's referral concerns, known disabilities, and suspected disabling conditions.

185. Petitioners contend that DPS' evaluations were perfunctory, based on invalid rating scales, and otherwise procedural defective. The Undersigned agrees that the evaluations were procedurally defective.

186. None of DPS' evaluators personally interviewed [redacted] about her concerns about [redacted]s academic and functional performance prior to completing their evaluation reports. (Tr. vol. 2, pp. 278:20-23 (psychologist); 281:2-5 (OT); 282:9-12 (speech therapist))

187. There were defects in the psychoeducational evaluation, occupational evaluation, and speech evaluation. In addition, none of the interventions used for the Eligibility Determination were scientific, research-based as required by *NC Policies*.

a. DPS' 2017 Psychoeducational Evaluation

188. The DPS psychologist [redacted] [redacted] conducted a psychological evaluation of [redacted] in July and August of 2017. (Stips. 35 & 36; Stip. Ex. 37)

189. Like her previous psychoeducational evaluations in 2013 and 2014, [redacted] scored average or above average in all academic areas. (*See* Stip. Ex. 37 *compared to* Stip. Exs. 29 & 32)

190. Likewise, her cognitive ability, a full scale IQ standard score of 120, was in the very high range. (*See* Stip. Ex. 37, p. 167 *compared to* Stip. Exs. 29 & 32)

191. Overall based on the 2017 Psychoeducational Evaluation, [redacted] was on grade-level and progressing academically in all areas, except on the spelling subtest for "written spelling, of dictated words" which was a standard score of 85 (low average). (Stip. Ex. 37, p. 170)

192. Although Psychologist [redacted] indicated in her report that she interviewed [redacted] [redacted] testified that Ms. [redacted] did not personally interview her for this evaluation. (Tr. vol. 2, p. 283:9-12) Based on the evaluation itself, it appears that Ms. [redacted] simply repeated information contained in the Multi-Tiered System of Support ("MTSS") Confidential Social/Developmental History form (Stip. Ex. 34).

i. Invalidity of the August 2017 BASC-3 Rating Scores

193. Behavior rating scales are required for the eligibility categories of Autism ("AU") and Serious Emotional Disability ("SED"). NC 1503-2.5(c)(1) and NC 1503-2.5 (d)(5)(i)(K) respectively. They are not required for the categories of Other Health Impaired ("OHI") or Specific Learning Disability ("SLD"). *See* NC 1503-2.5(d)(1) (5)(10)(i)&(11)(i).

194. An adaptive behavior evaluation refers primarily to the effectiveness with which the individual generally meets the standards of personal independent and social responsibility expect of his/her age and cultural group. NC 1500-2.11(b). The behavior rating scales are part of the adaptive behavior assessment because they demonstrate the extent to which the student is able to function independently and satisfactory meet the cultural imposed demands of person and social responsibility. NC 1500-2.11(b)(i)&(ii).

195. Since the IEP Team decided to use the BASC-3 rating scores as part of [redacted] behavior/emotional evaluation (Stip. Ex. 4, p. 9), DPS must comply with the instructions provided by the producer of the test. NC 1503-2.5(c)(1)(iii).

196. Even though not required for OHI and SLD categories, the Eligibility Team also relied on the teachers' BASC-3 scores, for eligibility determination in those categories. (*See* Eligibility Worksheets Stip. Exs. 7, 8, & 9)

197. [redacted] completed the BASC-3 rating scale on June 7, 2017, immediately after the bullying incidences in April/May 2017. When evaluated in 2017, although [redacted] was achieving academically, based on [redacted]s BASC-3 scores, [redacted] was "At Risk" for hyperactivity and internalizing problems, and "Clinically Significant" for anxiety, depression, and withdrawal. (Stip. Ex. 37, p. 172)

198. [redacted]s fifth grade Crisis Plan and BIP also reported that she had severe anxiety. Her anxiety had been a concern since the second grade.

199. When previously evaluated in 2013 and 2014, according to her second grade teacher, [redacted] was "At-Risk" for learning problems and "Clinically Significant" for anxiety and somatization. (Stip. Ex. 37, p. 164)

200. None of the teachers or staff at [redacted] Elementary School completed behavior rating scales for the August 2017 Evaluation even though they had worked with [redacted] during her entire fifth grade school year.

201. DPS justified their decision to use [redacted]s sixth grade teachers because [redacted] was promoted to middle school for sixth grade during the 90-day eligibility period, and the 90-day deadline was approaching.

202. In preparation for an Eligibility Meeting in cases such as this, DPS' Lead School Psychologist Dr. [redacted] testified that he would have interviewed teachers from both grades and the student's parents as well as reviewed all the information they had collected. (Tr. vol. 5, p. 945:15-25)

203. When asked about his preference in a similar situation where the teachers had limited experience with a student before completing rating scales, according to Dr. [redacted] his preference is to go back and interview previous teachers, especially if you've got a summer in between there." (Tr. vol. 5, p. 953: 23-2)

204. After teaching [redacted] for less than three weeks, on August 2, 9, and 11, 2017, [redacted]s core teachers, Ms. [redacted] (ELA), Ms. [redacted] (Science), Mr. [redacted] (Social Studies), and Ms. [redacted] (Math), each completed a BASC-3. (Stip. Ex. 37)

205. According to Dr. [redacted] in order for the BASC-3 scores to be valid, the test publisher of the BASC-3 "recommends that the respondents have daily contact with the student

for at least a month. And if it's two or three times a week they have contact with the student, then they should have six to eight weeks of experience with the student." (Tr. vol. 5, p. 952:20-25)

206. As of August 2017, none of [redacted]s sixth-grade teachers had worked with [redacted] for the requisite period of time for valid BASC-3 scores.

207. Dr. [redacted] concurred with Dr. [redacted] that the August 2017 BASC-3 reports were invalid because they failed to comply with the guidelines required by the publisher. Although other fifth grade teachers could have completed the BASC-3 scores in compliance with the testing criteria, none of them did.

208. DPS did not explain why [redacted]s fifth grade teachers could not complete the BASC.

209. School Psychologist [redacted] did not note in her psychoeducational evaluation that the 2017 BASC-3 scores were invalid even though, according to Dr. [redacted] she was purportedly a competent psychologist. Psychologist [redacted] observed [redacted] on three separate occasions (August 7, 9 & 11, 2017) and reported no behavior concerns. (Stip. Exs. 7, 8, & 9)

210. DPS acknowledged that the rating scales did not comply with the testing procedures but justified using these scores because the 90-day deadline would expire if they waited the appropriate time period. Moreover, Ms. [redacted] the teacher with the most experience with [redacted] had resigned at the end of the 2016-2017 school year and said she did not have time to complete the rating scale.

211. According to DPS the decision to have the sixth grade teachers complete the BASC-3 rather than [redacted]s fifth grade teachers was necessitated by the limited options available at that time.

212. At the Eligibility Meeting, [redacted] complained about the accuracy of the sixth grade teachers' BASC-3 scores.

213. DPS admittedly failed to conduct the BASC-3 consistent with the "instructions provided by the producer of the assessments" in violation of NC 1503-2.5(c)(1)(v). The Undersigned finds that 2017 BASC-3 scores were invalid, not reliable and violated NC 1503-2.5(c)(1)(iii).

214. The invalidity of these scores was accentuated by the same teachers' subsequent scores in March 2018. (Stip. Ex. 41, p. 209) The results were remarkably different. (*Compare* Stip. Ex. 41 *to* 37)

215. Once [redacted]s teachers had taught her for the requisite period of time, their scores on the rating forms significantly changed. For example, when comparing the scores on the Internalizing Problems Composite/Scale, the difference is apparent:[6]

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[6] Scores marked with one asterisk (*) are in the At-Risk range. Scores marked with two asterisks (**) are in the Clinically Significant range.

Scale/Composite	*August 2017*				*Spring 2018*			
	[redacted]	[redacted]		[redacted]	[redacted]	[redacted]		[redacted]
Internalizing Problems	**55**	**54**	**56**	**54**	**86****	**88****	**70****	**77****
Anxiety	52	54	49	47	75**	75**	61*	64*
Depression	53	61*	61*	45	68**	77**	68*	65*
Somatization	57	43	53	67*	98**	94**	71**	90**

(Stip. Exs. 41, 42)

216. DPS argued that any information in the IEEs were irrelevant to the Eligibility Determination because that information was not available to the IEP Team in August 2017. The Undersigned agrees that it would be improper to apply, in hindsight, information not available during the Eligibility Determination. However, the BASC-3 scores from the independent neuropsychological evaluation are relevant because they highlight the significant difference between the August 2017 and Spring 2018 scores, a period of time which according to DPS, [redacted]s functional performance had improved.

217. Respondent did not contest the accuracy of any of the Independent Educational Evaluations including the BASC-3 rating scales in Dr. [redacted] evaluation. Nor did any of teachers testify to refute the accuracy of their rating scores taken in March 2018 versus their August 2017 scores.

218. It is undisputed that the IEP Team used invalid 2017 BASC-3 scores when determining eligibility. (*See* Prior Written Notice - Stip. Ex. 11)

219. The IEP team relied, in part, on the invalid BASC-3 scores to find [redacted] ineligible for OHI (Stip. Ex. 7, pp. 21, 27) and SED (Stip. Ex. 8, pp. 33, 37-38). Even though not required for SLD eligibility, the BASC-3 scores also factored into their finding that [redacted] was ineligible under the SLD category. (Stip. Ex. 9, p. 45).

2. Related Services - Occupational Therapy and Speech/Language Therapy

a. 2017 Occupational Therapy Evaluation

220. As part of the evaluation process, DPS conducted an occupational therapy evaluation of [redacted] on July 21, 2017 ("2017 OT Evaluation"). (Stip. 38)

221. Occupational therapy ("OT") is a related service which assists a student to participate in and benefit from special education. 20 U.S.C. § 1401(26); N.C.G.S. § 115C-106.3 (18). 34 C.F.R. § 300.34(c)(6); N.C. Policy 1500-2.28(c)(6).

222. Petitioners challenged the validity of the OT evaluation because the evaluator failed to review work samples, obtain a teacher sensory questionnaire, and failed to review the private 2014 OT evaluation.

223. The 2017 OT evaluation was conducted by [redacted] (Stip. 39) According to Ms. [redacted] although spelling was a reason for referral (Stip. Ex. 6, p. 16), [redacted] was mostly concerned about [redacted]s letter reversals and sensory processing. (Tr. vol. 6, p. 1089:13:19)

224. Although Ms. [redacted] was evaluating [redacted] because of spelling errors, she did not review any of [redacted]s work samples. (Tr. vol. 6, p. 1076:22-24)

225. Ms. [redacted] also evaluated [redacted]s sensory issues, but, she failed to take a teacher questionnaire about [redacted]s sensory skills issues. Instead, she asked [redacted] to complete the adolescent self-sensory profile. (Tr. vol. 6, p. 1082:9-11).

226. Upon examination by the Undersigned, Ms. [redacted] admitted that she typically gets a teacher questionnaire when she conducts an OT evaluation. (Tr. vol. 6, p. 1095:10-22)

227. The 2017 OT Evaluation failed to refer to the 2014 Private OT evaluation except to note that [redacted] mentioned it. (Stip. Ex. 35)

228. As part of an initial evaluation, the IEP Team or another qualified professional must review existing evaluation data on the student. NC 1503-2.6(a).

229. In the 2014 Private OT Evaluation, the private evaluator reported that [redacted] had definite differences in taste/smell sensitivity, auditory filtering, and seeks sensory categories and probable difference in tactile sensitivity. (Stip. Ex. 31, p. 145)

230. With respect to the school setting, these areas of difficulty affected focused attention for work, academics, and tolerances for change in routines, confidence for new activities, planning ahead, and making choices. (Stip. Ex. 31, p. 144)

231. On March 7, 2018, [redacted] was observed by an independent evaluator, [redacted] Ms. [redacted] noted that [redacted] was an attentive and active participant in class discussion. Ms. [redacted] testified that [redacted] demonstrated organizational awareness, including maintaining a clean and organized locker, packing her materials up at the end of class, and preparing for the next class by unpacking her materials unprompted. (Tr. vol. 6, p. 820:2-18) Ms. [redacted] report further indicates that [redacted] transitioned from one class to another in a manner similar to her same-age peers. (Stip. Ex. 16, p. 68; Stip. Ex. 39, p. 191)

232. Through maturity and private OT services, [redacted] may have overcome some of her sensory deficits listed in the 2014 OT evaluation. Ms. [redacted] report did state that she still had sensory avoidance issues, but Ms. [redacted] failed to explain how [redacted]s sensory avoidance tendencies impacted her in the school setting. (Stip. Ex. 36, p. 155)

233. The IEP Team determined that [redacted] also did not qualify for OT because she had no visual-motor integration needs and because she met three out of four quadrants in the sensory profile, and no concerns were reported at sensory needs in the school setting. (Stip. 48)

234. During her testimony, Ms. [redacted] did not refute the deficiencies in her OT evaluation.

235. The remedy for the OT procedural violations would be to order another evaluation or an independent OT evaluation. DPS had already agreed to an independent occupational evaluation. The independent OT evaluation found that [redacted] did not need direct occupational services in the school setting. (Stip. Ex. 38 & 39)

236. The Section 504 Plan already provided accommodations for [redacted]s sensory needs in the classroom setting. So, despite the procedural violations, there was no evidence of substantive harm.

b. Speech/Language Evaluation

237. As part of the Eligibility Determination, DPS conducted a speech/language evaluation of [redacted] on July 28, 2017 (the "2017 Speech/Language Evaluation"). (Stip. 41) DPS evaluated [redacted] to determine if [redacted] needed speech/language as a related service.

238. The speech/language evaluation was conducted by [redacted] (Stip. 42)

239. Speech/language therapy is specially designed instructions and can be a separate eligibility category or a related service. The Eligibility Team were not requested by [redacted] and did not consider eligibility for the speech/language category.

240. When Petitioners filed their contested case, Petitioners knew that [redacted] had been diagnosed with a language impairment. Moreover, [redacted] was familiar with this eligibility category because two of her other children had IEPs for articulation issues. Since Petitioners failed to raise speech/language as a suspected disability in their Petition, the Undersigned will only consider whether it was properly evaluated as a related service.

241. Without a parent excuse, Ms. [redacted] did not attend the Referral Meeting or the Eligibility Meeting. Ms. [redacted] also did not interview [redacted] to determine [redacted]s concerns about [redacted]s language issues. These are both procedural violations because they violate the NC Policies.

242. Although she did not attend the Eligibility Meeting, in her report, Ms. [redacted] predetermined that [redacted] did not need speech services by her definitive statement "I do not recommend services for language." (Stip. Ex. 36, p.102)

243. No alternative speech therapist attended the Eligibility Meeting, yet still, the Team adopted her recommendation. (Stip. 11)

244. Again, as with the OT evaluation, the remedy for this procedurally defective speech/language evaluation would be to order another evaluation, but an independent speech/language evaluation had already been completed on April 19, 2018 by [redacted] M.S., CCC-SLP (Stip. Ex. 40)

245. The independent speech language evaluator explored [redacted]s pragmatic language skills more intensively than DPS. (*Compare* Stip. Ex. 40 *to* Stip. Ex. 36)

246. Unlike DPS's speech therapist, Ms. [redacted] took histories from both school-based providers and [redacted]s parents. (Stip. Ex. 40, p. 193)

247. The parental areas of concerns were similar in both evaluations --poor organization skills, poor spelling, social relationships in school and being accepted by peers. (Stip. Exs. 36 & 40)

248. The most significant concern of [redacted] was [redacted]s lack of "understanding what people mean by what they say," a pragmatic language deficit. (Stip. Ex. 40, p. 194)

249. Speech Therapist [redacted] conducted both standardized and non-standardized assessments. Similar to the DPS evaluation results, [redacted] scored in the average range on all the standardized tests. (Stip. Ex. 40)

250. DPS' teaching staff, the school counselor, and her mother all recognized [redacted]s difficulties with peer interactions which appeared to have been exacerbated by the increasing social demands of the higher elementary school grades and middle school.

251. [redacted]s functional communication had been listed as a skill deficit on the Crisis Plan in May 2017.

252. [redacted]s teachers described her as being at or above grade level in all academic areas except for "participating in small group projects," "making and keeping friends during downtime," "struggling with peer relationships during class." (Stip. Ex. 40, pp. 200-201)

253. According to Ms. [redacted] [redacted] was unable to accurately read the clinician's eye gaze and intentions in 100% of attempts," and [redacted] had remarkable weakness in this foundational skill." (Stip. Ex. 40, p. 197)

254. Ms. [redacted] diagnosed [redacted] with a Moderate Impairment of Pragmatic Language because, as of sixth grade, [redacted] had not mastered age appropriate skills of reading nuanced and abstract social situation, reading non-verbal communication, reading contextual cues in different environments, "think[ing] with her eyes" or following eye gaze to gain social information and read social situations, particularly in group settings. [redacted] lacked comprehension and expression of her own internal states and that of others, insight into how she is perceived by others, and self-regulation across different settings. (Stip. Ex. 40, p. 201) (Stip. Ex. 40, p. 202)

255. According to Ms. [redacted] many of these functional communication skills are developed in typical peers by the age of three and four-year olds. (Stip. Ex. 40, p. 203). Moreover, "[t]hese skills are all expected skills at the middle school level and assist a person to navigate the socially-laden academical environment of school." (Stip. Ex. 40, pp. 202-203) (emphasis omitted from original)

256. Overall, Speech Therapist [redacted] determined that [redacted] fell in the category of a "Nuance-Challenged, Socially Anxious Social Communicator." (Stip. Ex. 40, p. 201) [redacted]s anxiety compounds her social communication and makes it more difficult for her to read "non-verbal cues which can make her vulnerable to bullying and to misperceiving other's behaviors towards her as bullying when that is not the intention." (Stip. Ex. 40, p. 201) (emphasis from original omitted)

257. In reviewing her results, Ms. [redacted] noted that [redacted]s "strong receptive and expressive language skills can be a *smokescreen* for deeper social comprehension difficulties" and that the social communication disability that Ms. [redacted] found [redacted] to exhibit *"tends to be invisible, to peers, as well as to school professionals and adults."* (Stip. Ex. 40, p. 201) (emphasis added)

258. Speech Therapist [redacted] recommended targeted treatment either in a "1:1 treatment session with a trained clinician, in a supported dyad with another peer, or in a small group, also working on similar goals as well as enhanced academic support in these areas of underlying weakness." (Stip. Ex. 40, p. 203)

259. During [redacted]s sixth grade year, DPS provided counseling, peer mediation, and academic support which appeared sufficient to address [redacted]s functional needs in the school setting. After her evaluation, Ms. [redacted] provided [redacted] with 1:1 private speech services. As a remedy, Petitioners seek reimbursement of Ms. [redacted] speech therapy. Ms. [redacted] did not, however, testify or report in her evaluation that 1:1 speech services were necessary for [redacted] to receive a FAPE.

260. DPS did not evaluate [redacted] for eligibility in the category of speech/language, nor did Petitioners allege this a violation in their 2018 Petition. Instead, in her June 2018 Petition, [redacted] focused on the categories of Autism and Specific Learning Disability. Because it was not raised in the Petition, the Undersigned does not raise it now except to note in future eligibility meetings, speech/language eligibility might be a consideration.

261. Since ultimately [redacted] was not eligible for an IEP she was not eligible for related services of OT or speech.

3. Procedural Violations

262. The Undersigned finds that DPS did not properly evaluate [redacted] and the use of these invalid evaluations during the Eligibility Determination process were procedural violations that significantly impeded [redacted]s ability to participate in the IEP Process.

263. The remedy for this would be to order DPS to conduct new evaluations or pay for independent evaluations. As DPS has already agreed to IEEs at public expense and these evaluations have been completed, the next step would be to reconvene the Eligibility Team. This remedy is also unavailable because [redacted] was enrolled in another LEA before the rescheduled Eligibility Team meeting.

264. Moreover, even if DPS had properly evaluated [redacted] and found her disabled under one of the categories, Petitioners must still prove that the disabling condition adversely affected [redacted]s educational performance and she required special education. So, for the purposes of deciding whether the Eligibility Determination was appropriate, the Undersigned assumes, *arguendo*, that [redacted] was eligible under each of the disabling conditions and will examine Petitioners' evidentiary proffer with respect to the next two prongs.

SECTION 2: THE ELIGIBILITY DETERMINATION CLAIM

ISSUE II Whether Durham Public Schools appropriately determined that [redacted] was not eligible for special education and related services at the August 15, 2017 IEP Meetings (the "Eligibility Claim")

A. Eligibility IEP Meeting August 15, 2017

1. With the evaluations, observations, and interventions completed, an Initial Eligibility IEP Meeting was held on August 15, 2017. (Stip. 42)

2. The following individuals attended the August 15, 2017, IEP Meeting:

[redacted]	LEA Representative
[redacted]	Special Education Teacher
[redacted]	School Psychologist
[redacted]	[redacted]s mother
[redacted]	[redacted]s father
[redacted]	Counselor
[redacted] (partially)	Occupational Therapist
[redacted]	Regular Education Teacher

(Stip. 43)

3. The regular education teacher, [redacted] had taught [redacted] for four (4) weeks. (Stip. Ex. 93) There is no documentation that the special education teacher, Ms. [redacted] ever met [redacted] prior to this IEP meeting.

4. The IEP Team considered [redacted]s eligibility in the following categories at the August 15, 2017 IEP Meeting: Other Health Impairment ("OHI"), Serious Emotional Disability ("SED"), and Specific Learning Disability ("SLD"). (Stip. 44)

5. Ultimately, the Eligibility Team determined that [redacted] did not meet any of the eligibility categories and was not entitled to special education or related services. (Stip. 45)

6. [redacted]s parents objected to this decision. (Stip. 46)

7. The Eligibility Teams' decision was defective because it was based on the evaluations discussed above, but also on interventions, which were not scientific, research-based. Moreover, the meeting, the IEP Team did not review any of [redacted]s work samples.

1. Eligibility Categories

a. Other Health Impairment Category ("OHI")

8. To be determined eligible in the disability category of other health impairment, a child must have a chronic or acute health problem resulting in one or more of the following:

(A) Limited strength;
(B) Limited vitality;
(C) Limited alertness, including heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment.

9. The disability must:

(A) Have an adverse effect on educational performance, and
(B) Require specially designed instruction.

NC 1503.2.5(d)(10).

10. The Prior Written Notice, with respect to OHI, explained that "[[redacted]s] ADHD [was] not impacting her progress in the general education classroom because information collected on the BASC-3 filled out by her mother and teachers reported no At-Risk or Clinically Significant concerns with attention problems or study skills." (Stip. Ex. 11, p. 51)

11. Through the Prior Written Notice, DPS admitted that its decision to deny [redacted]s eligibility under OHI was based, in part, on the invalid BASC-3 results.

12. Eligibility Determination under OHI also requires the use of two scientific, research-based interventions.

13. DPS did not use any scientific, research-based intervention. Instead, DPS relied on the Section 504 Plan and behavior tracking sheets created by [redacted]s teachers. (Stip. Ex. 7, p. 18) DPS relied on these interventions in making its determination that [redacted] was not eligible under the category of OHI (Stip. Ex. 7, pp. 26-27) as well as SED and SLD.

14. With respect to ADHD, although [redacted] was medically diagnosed with ADHD and anxiety which affected her ability to concentrate, DPS decided that [redacted]s "health problems do not have [an] impact [on] her ability to access the general education curriculum and make positive educational progress." (Stip. Ex. 7, p. 27)

15. As a result, the IEP Team determined her ADHD did not adversely affect her educational performance. They did not address whether [redacted] required specifically designed instructions, the third prong for eligibility.

16. DPS' decision was inconsistent with its prior determination that [redacted]s ADHD did impair her academically such that she required a Section 504 Plan.

b. Serious Emotional Disability ("SED" or "ED") Category

17. In order to qualify for special education services in the category of Serious Emotional Disability, a student must exhibit:

a. An inability to make educational progress that cannot be explained by intellectual, sensory health factors;
b. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
c. Inappropriate types of behavior or feelings under normal circumstances;
d. A general pervasive mood of unhappiness or depression; or
e. A tendency to develop physical symptoms or fears associated with personal or school problems.

18. Additionally, the condition must be exhibited:

a. Over a long period of time; and
b. To a marked degree.

NC 1503-2.5(d)(5)

19. With respect to the SED category, the IEP Team determined that [redacted] "has exhibited some of the noted concerns over a long period of time, [but] concerns were not reported to a *marked degree*." (Stip. Ex. 11, p. 51) (emphasis added)

20. In addition, the "[c]oncerns [were] not reported across home and her various classes nor are they consistently reported to be displayed at a *significant level*. In addition, some of [redacted]s concerns may have been in response to transitory issues, such as bullying." (Stip. Ex. 11, p. 51) (emphasis added)

21. [redacted] did corroborate that [redacted] tolerates things at school better than home; "when she gets home and it was time for her to go to bed, she'd almost break down and – and all of it would come rushing out." (Tr. vol. 2, p. 202:16-19) According to [redacted] [redacted]s anxiety "at home it was much, much worse…" than in the school setting. (Tr. vol. 2, p. 202:25)

22. Moreover, the independent neuropsychological evaluation, [redacted] described significant disorganized habits not seen in the school setting. (Stip. Ex. 40, pp. 210-211)

23. Regardless of inconsistencies in the home and school environments, DPS based, almost entirely, the Eligibility Determination for SED on the flawed teacher BASC-3 rating scales. (Stip. Ex. 8, pp. 37-38)

24. The SED Eligibility Worksheet included the same interventions, as did the OHI and SLD worksheets, which were not scientific, research-based interventions. (Stip. Ex. 8, p. 28) DPS relied on these interventions in making its determination that [redacted] was not eligible under the category of SED. (Stip. Ex. 87, pp. 37-38)

25. Because [redacted] did not meet the first prong for SED eligibility, DPS did not address the other two prongs -- whether her anxiety had an adverse effect on her educational performance such that she required specially designed instruction. (Stip. Ex. 8, p. 38)

c. Specific Learning Disability ("SLD") Category

26. Despite documented parent and teacher concerns about [redacted]s spelling, she was not initially referred for the category of Specific Learning Disability. Only after the psychoeducational evaluation established discrepancies in her ability and achievement, did the Eligibility Team consider this category.

27. [redacted] achieved adequately for State-approved, grade-level standards in all academic areas, except for spelling which was not age appropriate.

28. Her spelling deficits were not the result of other factors, influences, or lack of appropriate instruction. Interventions were referenced on this SLD Eligibility Worksheet, but these interventions (BASC-3 & Section 504 Plan) were not scientific, research-based interventions for specific learning disabilities.

29. In addition, for a disability in reading, writing and/or math, the disability must have an adverse effect on educational performance and require specially designed instruction.

30. Further, the IDEA regulations emphasize the importance of school-based observation of academic performance in determining eligibility for a specific learning disability. 34 C.F.R. § 300.310 (requiring, during consideration of specific learning disability, observations in the student's classroom and review of classroom performance data from prior to referral).

31. Interventions are important information for the IEP Team according to DPS lead psychologist (Tr. vol. 5, p. 943:1-5) and "very valuable" information. (Tr. vol. 5, p. 942:14-25) (Testimony of Dr. [redacted]

32. Dr. [redacted] admitted that for spelling concerns under the SLD identification, "you would normally see an intervention specific to spelling." (Tr. vol. 7, p. 1225:18-25) Even though spelling was a documented parent concern in the Referral (Stip. Ex. 3, p. 3), based on Dr. [redacted] understanding, spelling was not an area of concern for the "school team" until after they found the 15-point discrepancies. (Tr. vol. 7, p. 1226:2-5, *but see,* Stip. Ex. 6, p. 16 (Ms. [redacted] noted [redacted]s spelling was inconsistent)

33. Dr. [redacted] further admitted that, had it been a concern, "typically, you would see difference interventions specific to the Specific Learning Disability, the academics." (Tr. vol. 7, p. 1226:9-1)

34. Dr. [redacted] testified that the Multi-Tiered System of Support ("MTSS") was a normal part of the intervention process for SLD. (Tr. vol. 5, pp. 966:20-967:10)

35. After the Referral Meeting, on June 9, 2017, [redacted] did complete an "MTSS Confidential Social/Developmental History (MTSS Form 9)." (Stip. Ex. 34) However, this was the only documentation in the record regarding any MTSS intervention and it was a parent history form, not an intervention.

36. None of the IEP Teams reviewed any writing samples at either the Referral or Eligibility Meetings.

37. Without reviewing any writing samples, the school psychologist wrote in her psychological evaluation that "[redacted]s spelling did not impact her ability to write clear understandable sentences." Stip. Ex. 37, p. 170

38. Stipulated Exhibit 49 was the only writing sample produced at the hearing.

39. In 2013, [redacted] was eligible under the category of SLD because of her decoding deficits. [redacted] had repeatedly expressed her concerns about [redacted]s spelling (encoding). Spelling was a parent concern in the second grade and continued to be a parent concern at the June 8, 2017 Referral Meeting. (Stip. Ex. 2, p. 3)

40. The samples below are from November 2017; therefore, they may not be completely indicative of [redacted]s spelling and grammatical errors deficits in the fifth grade.

Socal Studys

In Socal Studys It all Started when I needed a Pencil So I asked **[redacted]**[7] (she very nice but I think she reacted because of **[redacted]** for a penicl she said yes shure. So she gave me a penicl, so then after a little **[redacted]** asked if She would take the penicl back as if it was So diScuSting if she did, So She No. Mr. Besly asked **[redacted]** if she would sit next to me and then she did all she Could to not like she sat diagnal from me then was Force to Sit neXt to me and over now and then Shed look at me weard like she was dicsusted Math_then in Math a girl was force to sit next to me agian. (No the same person, but she haS been mean befor) So She Sat on the ege of the Chair to stay away from me & I tried to help her with Something and she looked like it was so scary that I was Near her.

[7] These are typed versions of [redacted]s handwritten paragraphs. Please refer to Stip. Ex. 49 for the actual handwritten samples. The names of the other students have been redacted.

Report Submitted by: [redacted]

(Stip. Ex. 49, p. 287 dated November 16, 2017)

we Were leaving because the [redacted] had Just rung & **[redacted]** shuved me forward hard & I just ignored him I didn't relly see him do it but He came out from behind where I was Pushed & He Smerked, then I keep walking out & he Kicked Me in the leg it didn't heart but I lost balinc a little (I didn't fall). I yelled & Said **[redacted]** why did you do that"? He anserd "do what? I didn't do enything." then I Said "that was Just Rude." & keep walking to rodotics.

[redacted]
Nov 21 2017

(Stip. Ex. 49, p. 290 dated November 21, 2017)

41. When confronted with the spelling and grammatical errors in these writing samples, DPS' legal counsel speculated that [redacted] may have been stressed when writing these because she wrote them after a disciplinary incident. DPS' lead psychologist debunked this argument.

42. When asked to look at Stip. Ex. 49, Dr. [redacted] stated that the work samples in Stip. Ex. 49 "look[ed] better than what I recollect …". (Tr. vol. 5, p. 985:4-11)

43. [redacted] testified that [redacted]s spelling was "much worse" than shown on Stip. Ex. 49. (Tr. vol. 4, pp. 664:16-665:6)

44. At the June 8, 2018 meeting with Dr. [redacted] DPS staff recognized the importance of reviewing work samples. The teachers provided Dr. [redacted] work samples which were sent around the table. (Tr. vol. 5, p. 984:8-14)

45. Based on these work samples and teacher's reports, Dr. [redacted] had "a general impression that her spelling was awful…". (Tr. vol. 5, p. 984:14-15)

46. Because [redacted]s regular education teacher ([redacted] had only taught [redacted] for a few weeks, she had little or no knowledge about [redacted]s academic functioning other than her past grades and EOG scores at the time of the Eligibility Meeting. The special education teacher ([redacted] had never met or taught [redacted]

47. Dr. [redacted] admitted that the category of Specific Learning Disability is the most difficult area presented in this case and that he could have "changed his mind" as to identification under SLD. (Tr. vol. 5, p. 984:4-7)

48. With respect to the SLD category, DPS admitted that [redacted] did not achieve adequately for her age or State-approved grade-level standards in mathematics calculation, reading comprehension, reading fluency skills, basic reading skills, and written expression. (Stip. Ex. 9, pp. 48-49)

49. [redacted] had more than a 15-point negative discrepancy between her ability and achievement in written expression (16 points), basic reading skills (28 points), reading fluency skills (28 points), reading comprehension (28 points), and mathematics calculation (24 points). (Stip. Ex. 9, p. 49)

50. The SLD Eligibility Worksheet included the same inappropriate interventions. (Stip. Ex. 9, p. 40) DPS relied on these interventions in making its determination that [redacted] was not eligible under the category of SLD. (Stip. Ex. 9, pp. 48-49)

51. On the Prior Written Notice, DPS wrote about [redacted]s discrepancies between her very high range ability and achievement scores in written expression basic reading, reading fluency, reading comprehension, and math calculation, but the IEP Team did not document in the SLD Eligibility Worksheet that [redacted]s spelling was low average (85 standard score). (*See* Stip. Ex. 9, p. 43 *and* Stip. Ex. 37, p. 170)

52. Despite meeting the criteria for SLD, the Eligibility IEP Team determined that [redacted] was not eligible under the category of SLD because it did not adversely affect her performance, she was meeting age- and grade-level standard and did not require specially designed instruction. (Stip. 47; Stip. Ex. 11, p. 51)

53. DPS argued that, even if [redacted] was disabled, she achieved commensurate with her nondisabled peers.

54. However, there were no accommodations on [redacted]s Section 504 Plan for spelling errors. Either the teachers unilaterally chose to accommodate this deficit so that it did not affect either her grades or there was a school-wide accommodation for all students for spelling errors.

55. DPS argues that one low subtest score was insufficient for [redacted] to qualify for special education in spelling, which is true. But, as evidenced by Dr. [redacted] evaluation, there were other test instruments available other than the Woodcock-Johnson Tests of Achievement. [redacted] had taken this achievement test on three separate occasions. (*See* Stip. Exs. 29 (3rd Ed.), 32 (4th Ed.), & 37 (4th Ed.))

56. The decoding composite, reading fluency composite and orthographic processing composite of the Kaufman Test of Education Achievement 3rd Edition (KTEA-3) was available to the school psychologist to determine if [redacted] had any spelling issues. (*See* Stip. Ex. 41, pp. 214-215) All of these composite scores were significantly discrepant from [redacted]s cognitive ability, but more importantly, well below age expectations. (Stip. Ex. 41, pp. 214-215) [redacted] ranked 13th percentile on the decoding composite, 19th percentile on the reading fluency composite, and 10th percentile on the orthographic processing composite. (Stip. Ex. 41, p. 215) Again her lowest subtest score was a standard score of 78 in spelling (7th percentile). (Stip. Ex. 41, p. 215)

57. At a minimum, DPS should have further evaluated [redacted]s spelling (encoding) since it was a repeated parental concern and a documented reason for referral.

58. On the Eligibility Determination Form (DEC 3) for SLD, DPS acknowledged that [redacted] was learning disabled and that it had an adverse effect on her education performance (Stip. Ex. 10, p. 50), but denied that [redacted] required specially designed instruction. (Stip. Ex. 10, p. 50)

59. Petitioners presented no expert testimony as to what specially designed instruction [redacted] required at that time.

60. Dr. [redacted] independent evaluation recommended multisensory programs. (*See* Stip. Ex. 41, pp. 229-230). Because of the IEE Contract, Dr. [redacted] could not testify as an expert witness or give her opinion.

61. Ms. [redacted] wrote in her independent speech evaluation that [redacted] would "benefit from systematic instructions targeting [ ] social cognitive and executive function skills" and enhanced academic support." Stip. Ex. 40, pp. 203 & 207) But like Dr. [redacted] Ms. [redacted] could not give an expert opinion because of the IEE Contract.

62. Even if [redacted] was eligible under all the disabling conditions, AU, OHI, SED, and SLD, and they all adversely affected her educationally, Petitioners offered no evidence to prove the third prong, that [redacted] required specially designed instruction.

63. Without this evidence, Petitioners cannot meet their burden of proof that DPS denied [redacted] a free and appropriate public education in violation of the IDEA.

B. Procedural Violations

64. At the end of the Eligibility Meeting on August 15, 2017, the IEP Team determined [redacted] was not eligible for special education services in SED, OHI, and SLD. (Stip. 46)

65. The Undersigned finds that DPS committed numerous procedural violations in conducting the evaluations and improperly relied on these evaluations and interventions which were not scientifically research-based during the Eligibility Meeting.

66. In summation, DPS made numerous procedural violations in the evaluation and eligibility determination processes. These violations were remedied, in part, by the IEEs.

67. However, procedural violations alone are not sufficient for a denial of FAPE. There must be a substantive violation of a child's right to a FAPE or significant impediment of a parent's meaningful participation in the IEP process.

68. DPS' use of evaluations and interventions which violated *NC Policies* for Eligibility Determinations, significantly impeded [redacted]s meaningful participation in the IEP process.

C. No Substantive Denials of FAPE to [redacted]

69. Assuming *arguendo* that as of August 15, 2017, [redacted] did meet the criterion for the eligibility categories of AU, OHI, SED, and SLD, Petitioners would still have to prove the other two prongs for eligibility: (1) that the disabling condition adversely affected [redacted]s educational performance; and, (2) that [redacted] needed specially designed instruction.

70. Petitioners presented some evidence that [redacted]s functional performance was adversely affected by her lack of self-regulation and anxiety. At most, this adverse effect was episodic during the end of the fifth grade. Petitioners claimed that [redacted]s inability to attend school during the last five weeks was evidence of the adverse effect, yet, [redacted] explained that she pulled [redacted] out of school during this time because it was not a "safe learning environment" because of the "bullying." While bullying can rise to the level of a substantial FAPE violation, Petitioners have waived that claim. (Tr. vol. 2, p. 370:1-6)

71. Assuming even further that as of August 15, 2017, Petitioners were able to prove both the first and second prongs for all four categories of AU, OHI, SED, and SLD, Petitioners presented no evidence that [redacted] needed specially designed instruction.

72. Without evidence of the need for specially designed instruction, Petitioners cannot meet their burden of proof by a preponderance of the evidence that DPS denied [redacted] a FAPE.

73. Were the case to end here, the Undersigned would have ordered DPS to redo the evaluations or pay for independent evaluations. In addition, the Undersigned would have also ordered DPS to conduct scientific, research-based interventions.

74. Then, after completion of these evaluations and interventions, DPS would have been ordered to reconvene the Eligibility Meeting to determine if [redacted] qualified for special education under the IDEA.

75. However, the independent evaluations have already been conducted. The expectations of both Parties were that after the IEEs were completed, the IEP Team would reconvene to revisit its prior Eligibility Determination. This did not happen.

76. An IEP Meeting scheduled for June 8, 2018, was rescheduled to July 13, 2018, because Dr. [redacted] wanted Dr. [redacted] to meet with school personnel. This is discussed in Section 3, *infra*.

77. Before the July 13, 2018 meeting, [redacted] enrolled [redacted] in [redacted] another LEA who then took responsibility for [redacted]s eligibility under its IDEA.

D. Adequacy of the Section 504 Plan Accommodations

78. If the accommodations in [redacted]s Section 504 Plan, including the Crisis Plan and BIP, were sufficient for [redacted] to access the general education and make educational progress, then an IEP would not be necessary.

79. So the next question that must be addressed is whether the Section 504 Plan sufficiently accommodated [redacted]s disabilities during the 2017-2018 school year and allowed her to access her education? If so, despite all the procedural violations, substantively [redacted] would not need an IEP and; therefore, not have been denied a FAPE.

80. Prior to, throughout, and after the IDEA eligibility process, [redacted] was eligible for a Section 504 Plan under the Rehabilitation Act of 1973 because she had a disabling condition which affected a major life activity. [redacted]s Section 504 Plan did not include specially designed instruction but did have numerous accommodations for [redacted]s anxiety, sensory issues, and functional communication.

81. According to DPS, [redacted]s spike in anxiety and negative peer interactions were anomalies exclusive to the end of the 2016-2017 school year. In addition, classroom staffing and structure played a decisive role in accentuating [redacted]s anxiety.

82. While [redacted] continued to require accommodations for her anxiety during the 2017-2018 school year, it was significantly less. As evidenced by the reduction in counseling visits, sick days, and "calling home."

83. With the Section 504 Plan accommodations, [redacted] was able to access the general education curriculum and make positive educational progress.

84. In addition, [redacted] had been able to make positive progress in her functional social skills and communications due to the counselor's interventions.

85. Even if DPS school staff should have evaluated [redacted] in the category of autism, Petitioners presented no evidence that the Section 504 Plan accommodations were insufficient to address [redacted]s autism symptoms in August 2017.

86. The Section 504 Plan accommodations were similar to Dr. [redacted] recommendations for addressing [redacted]s autism.

87. Even Ms. [redacted] conceded that [redacted]s social communication needs did not necessarily mean 1:1 treatment with a speech pathologist, rather these needs could be addressed "in a supported dyad with another peer, or a small group also working on similar goals." (Stip. Ex. 40, p. 203)

88. The availability of a school counselor as a "point person" for [redacted] who could help her process her behavior as it impacted her peers and suggest alternative options, was like the recommendations of Ms. [redacted] to address [redacted] as of then undiagnosed, Moderate Social Pragmatic Communication Disorder. Although [redacted] had not progressed to small group participation, her social communication needs were being supported by her Section 504 Plan.

1. *Effectiveness of Section 504 Plan During [redacted]s Fifth Grade School Year*

89. According to school staff, the Section 504 Plan accommodations had been successful and continued to be successful throughout the remainder of [redacted]s fifth grade year at [redacted]

90. At the Referral Meeting and during her testimony, [redacted] did not contest that the Section 504 Plan had successfully accommodated [redacted]s anxiety such that she could function in the school environment.

91. During the hearing, [redacted] admitted that during fifth grade year, [redacted] did well academically, had good grades, had strong test scores, and worked well in class most of the time. (Tr. vol. 4, pp. 638:7-639:10)

92. During her fifth grade year, [redacted] had some fluctuations in her quarterly grades, but overall, [redacted] was on grade level in her classes and on all her local and State assessments. (Stip. 22; Stip. Ex. 2, p. 5)

93. Other than a remark by [redacted] that she "believed" [redacted] was allowed to repeat quizzes and she was not sure if [redacted] was allowed to repeat tests for extra points. Petitioners presented no evidence that [redacted]s grades and/or State assessment data were invalid for either the fifth or sixth grades. (Tr. vol. 3, pp. 568)

94. There were no accommodations on the Section 504 Plan for spelling errors, but Petitioners presented no evidence that [redacted]s spelling deficits affected her academically.

2. *Effectiveness of Section 504 Plan During [redacted]s Sixth Grade School Year*

95. Another Section 504 Plan meeting was held on September 12, 2017, with the sixth-grade team members and [redacted] to review the accommodations and answer any questions about the plan. (Stip. Ex. 27)

96. At the September 2017 Section 504 Plan meeting, [redacted]s organization issues were discussed. [redacted] [redacted]s ELA teacher, acknowledged that "[redacted] takes the longest and is often the last to pack up." (Stip. Ex. 27, p. 124) [redacted] School Based Coordinator and [redacted]s counselor, added that "[redacted] is looking around at others during this time." (Stip. Ex. 27, p. 124)

97. The District Section 504 Coordinator, Dr. [redacted] stated that, based on Ms. [redacted] feedback, that "[redacted] then needs more support beyond that Tier 1" and discussed the core study skills and organizational group being offering for all sixth graders next quarter. (Stip. Ex. 27, p. 124)

98. The Section 504 Team discussed whether counseling support was still needed and agreed to leave that accommodation in place. (Stip. Ex. 27, pp. 124-125)

99. With respect to the Behavior Intervention Plan, [redacted] admitted that the "BIP [was] not needed anymore because the issues [were] not to the previous degree." (Stip. Ex. 27, p. 125)

100. When asked if the Crisis Plan was still needed, [redacted] replied that she did not know because "it [was] fine right now," but that she would ask Dr. [redacted] (Stip. Ex. 27, p. 125; Tr. vol. 3, p. 596:9-20)

101. The Section 504 Team meeting adjourned with the understanding that [redacted] would contact Dr. [redacted] for any feedback by September 19, 2018. (Stip. Ex. 27, p. 126) There was no evidence tendered by either party as to Dr. [redacted] feedback on the Crisis Plan.

102. The primary goal of the Section 504 Plan was to keep [redacted] in school rather than allowing her to avoid uncomfortable social or sensory situations. (*See* Stip. Ex. 19, 93)

103. To accomplish that goal, counseling had been added in May 2017 (Stip. Ex. 19).

104. The Section 504 Plan accommodations were implemented. Ms. [redacted] documented twenty-five (25) counseling sessions from July 21, 2017, to March 5, 2018. (Stip. Ex. 94) Because of [redacted]s progress, counseling was deleted from the Section 504 Plan in March 2018. (*See* Stip. Ex. 28) Like other students, [redacted] continued to have access to the school counselor, as needed.

105. During the 2017-2018 school year, [redacted] was absent twelve (12) times, seven (7) for illness and five (5) for medical appointments. (Stip. Ex. 92, p. 512) She had no absences during the first quarter. (Stip. Ex. 92, p. 512) The majority of her absences occurred during the last two quarters of school with five (5) each. (Stip. Ex. 92, p. 512)

106. In addition to her absences, [redacted] "signed out" early twenty (20) times for illnesses and once for a doctor's appointment. (Stip. Ex. 92)

107. There were seven (7) written notes from [redacted] to [redacted] through November 7, 2017 requesting assistance. (Stip. Ex. 95; Tr. vol. 2, pp. 317:16-318:2)

108. After counseling was deleted in March, the next communication from [redacted] about any peer issues at school was on May 29, 2018, when a student accidentally yelled in [redacted]s ear. (Pet. Ex. 13, p. 359)

109. In addition, the Section 504 Plan allowed [redacted] to call [redacted] from school to help her find strategies so she could go back to the class. (Tr. vol. 2, p. 322:5-15) These calls were not documented but appeared to have been numerous. (Tr. vol. 2, p. 323:5-15)

110. The Section 504 Plan emphasized communication between home and school.

111. [redacted] emailed Ms. [redacted] and school staff when something at school made [redacted] anxious. Not all these incidences were peer related.

112. [redacted]s emails began on the second day of school, July 18, 2018. [redacted] stated that in gym class, kids were making derogative comments like "ooh, ooh. ooh and people didn't want to go near her because [redacted] was diseased and cooties." (Tr. vol. 2, pp. 319:8-10; 318:22-319:14; Pet. Ex. 13, p. 287)

113. [redacted] emailed school staff, mainly Ms. [redacted] sixteen (16) times about negative peer interactions during the 2017-2018 school year. These emails averaged about once a month during the Fall semester. (Pet Ex. 13, pp. 287 (July 18), 297-298 (August 27); pp. 312 & 314 (November 15 & 20); p. 320 (December 20); p. 312 (January 10, 2018); p. 328 (January 31, 2018)) Twice, [redacted] separately emailed about [redacted]s anxiety about non-peer related issues; a science project (dissecting a goat's eye) and fire drills. (Pet. Ex. 13, pp. 326, 327)

114. [redacted] emailed most frequently in February 2018. (Pet. Ex. 13, pp. 287, 297-298, 312 (2/6 -poked with pencil; 2/8 – called fat, slow, stupid; 2/14 pushed from behind)) There were no incidences in March or April which required [redacted] to contact school staff. On May 29, 2018, a student yelled in [redacted]s ear which bothered her. (Pet. Ex. 13, p. 359) [redacted] acknowledged that the student did not intentionally yell at [redacted] that it was an accident. (Pet. Ex. 13, p. 359) The last reported incident was on June 8th when [redacted] left school early because kids were generally "not nice to her, saying "cruel things, and "unkind things." (Pet. Ex. 13, p. 364.) June 8, 2018 was also the original date of the rescheduled IEP meeting and the day [redacted] filed her June 2018 Petition.

115. Ms. [redacted] and other school staff were responsive to [redacted]s emails and her concerns. [redacted] conveyed her appreciation several times for their assistance. (Pet. Ex. 13, pp. 320, 328, 329, & 348)

116. By April/May 2018, [redacted] had already applied to [redacted] (Tr. vol. 2, 186:9-14) She was notified by [redacted] sometime in July before the rescheduled IEP meeting that [redacted] had been accepted.

117. During the sixth grade, incidences of negative peer interactions occurred less frequently and [redacted] was learning coping strategies, rather than avoidance tactics.

118. Overall, based on the notes from the meeting and her testimony, [redacted] appeared to be doing well with the accommodations in her Section 504 Plan and [redacted] appeared satisfied with that level of services.

3. Beginning of [redacted]s Seventh Grade at [redacted]

119. At the beginning of [redacted]s seventh grade year at [redacted] her teachers observed [redacted]s instances of high anxiety, social dysfunction, and disorganization which was also documented in DPS' Eligibility Determination. (Tr. Vol. 5, p. 831) (Testimony of [redacted]

120. According to Ms. [redacted] at that time, [redacted]s social dysfunction at [redacted] was more serious than DPS' file made it sound. (Tr. vol. 5, p. 831:16-25)

121. Even though [redacted] was now eligible under the autism category, Ms. [redacted] descriptions of [redacted] focused on [redacted]s anxiety, not her autism. She described [redacted] as very anxious, often not making eye contact while talking, fidgets, not aware of her body, feels clumsy, struggled to find right way to sit and right place to sit, would carry all her stuff, and had a hard time managing her backpack and stuff. (Tr. vol. 5, p. 835:7-25)

122. According to Ms. [redacted] [redacted] used language of "feeling disorganized" when she felt like something was not working and something's not normal; then she would start to feel anxious and her anxiety would "compound very quickly." (Tr. vol. 5, p. 836: 2-10)

123. Ms. [redacted] described [redacted]s anxiety was a "thief" and would just steal her ability to thrive." (Tr. vol. 5, p. 836:11-15)

124. Prior to the development of an IEP on September 26, 2018, [redacted] used accommodations similar to [redacted]s Section 504 Plan.

125. By the time the IEP was developed, [redacted] was functioning well using these accommodations.

4. [redacted]s IEP at [redacted]

126. On July 25, 2018, [redacted] began attending [redacted] School for Children, another public LEA which now became responsible for continuing the eligibility process since it had not been completed while [redacted] was enrolled in DPS. (Stip. 68)

127. Based on the IEEs and, in part, on DPS' Eligibility Worksheets, the [redacted] IEP Team determined on August 13, 2018, that [redacted] was eligible for services in the area of autism. The IEP was not developed until a month later on September 26, 2018, after [redacted] conducted its own interventions and observations. (Tr. vol. 5, pp. 829, 838:20-24)

128. Information about whether [redacted] considered Section 504 eligibility or adopted [redacted]s Section 504 Plan was not presented at the hearing.

129. Petitioners claimed [redacted] development of IEP proved that DPS' August 2017 Eligibility Determination violated [redacted]s right to FAPE. The Undersigned rejects this assumption. Many factors may have motivated [redacted] to develop an IEP for [redacted] rather than revise her existing Section 504 Plan. First, [redacted] staff knew [redacted] was unhappy with DPS and probably knew that she had filed due process because DPS did not find [redacted] eligible for an IEP. The [redacted] IEP Team had the IEEs which were not available to the Eligibility Team in August 2017. Moreover, DPS had not previously conducted a neuropsychological evaluation which was one of the IEEs available to [redacted]

130. Even with this information, [redacted] did not automatically develop an IEP for [redacted] During the one-month delay from the eligibility determination, [redacted] conducted additional assessments and interventions/observations. According to [redacted]s [redacted] teacher, Ms. [redacted] at the time the IEP was finally developed late September 2018, [redacted] was functioning

well. (Tr. vol. 5, pp. 843-846)

131. If DPS denied [redacted] a FAPE, she would be entitled to compensatory education. Although permitted, Petitioners did not introduce any evidence from the [redacted] EC teacher about [redacted]s need for compensatory education of related services.

SECTION 3: THE IEE CONTRACT CLAIM

ISSUE III Whether Durham Public Schools' Limited Relationship Provision included in the IEE Contracts significantly impeded [redacted]s right to participate in the decision-making process regarding the provision of a FAPE to [redacted] or otherwise violated Petitioners' procedural safeguards (the "IEE Contract Claim")?

1. While the IEEs were in process, a State Complaint was filed contesting DPS' IEE Contract provisions and practices. Although many of the issues were the same and two of the IEE Contracts were for evaluators in this case, Petitioners were not parties to the State Complaint.

2. The Undersigned agrees with NCDPI's Letter of Findings on all issues except for its findings of compliance for Contract Provision 3, the Limited Relationship Provision, and its failure to substantiate DPS' Practice 4, DPS' practice of requesting evaluators to change their reports.

3. In this Section 3, the Undersigned independently reviews the Limited Relationship Provision, the specific facts pertaining to the provision of a FAPE to [redacted] not as a "systemic complaint."

4. This review involves facts not known to NCDPI when corrective action was ordered, and the Undersigned is not bound to those findings with respect to IEE Contract provisions or practices.

A. Parental Request for Independent Educational Evaluations (the "IEEs")

5. During the August 2017 Eligibility Meeting, [redacted]s parents requested the following independent neuropsychological, speech/language, and occupational therapy evaluations.

6. because they disagreed with DPS' evaluations. (Stip. Ex. 13, p. 60) [redacted] was instructed to write to Dr. [redacted] about her request for the IEEs. Later on September 6, 2017, [redacted] emailed Dr. [redacted] requesting the independent evaluations. (Stip. Ex. 57, p. 302)

7. In her referral request, [redacted] also wanted the independent evaluators "to have the same opportunity to observe [[redacted] at school." (Stip. Ex. 57, p. 302)

8. At first, DPS refused to allow the independent evaluators to observe in the

classroom, but after legal counsel's interventions, the observations were approved. These in-school observations became an issue after the evaluation reports were completed because Dr. [redacted] failed to observe in the school setting.

9. [redacted]s right to request an independent education evaluation at public expense is one of the procedural safeguards afforded parents by the IDEA and falls under "Subpart E – Procedural Due Process Procedures for Parent and Children," the same section which contains contested case hearing procedural safeguards.

10. Once [redacted] requested the IEEs, DPS had a choice – (1) either file a due process complaint to show that its evaluations were appropriate; or (2) ensure that an independent evaluation were provided at public expense.[8] DPS did not file due process.

11. DPS agreed to [redacted]s request for the IEEs at public expense.

12. In fact, Dr. [redacted] testified during her tenure at DPS, that DPS had never requested a due process hearing and had always granted the parents' request for an IEE. (Tr. vol. 7, p. 1238:21-25)

13. Moreover, according to Dr. [redacted] independent evaluations are "extremely valuable, provide "additional information on a student that can potentially help us look at the student differently," can bring "peace of mind to a parent because there's some kind of trust relationship on where we don't agree," and have "always been a positive thing." (Tr. vol. 7, pp. 1236:11-1237:1)

14. On September 25, 2017, Dr. [redacted] Dr. [redacted] and [redacted]s mother participated in another telephone conference to discuss her request for IEEs in particular the neuropsychological evaluation. (Stip. 52; Stip. Ex. 63, p. 321)

15. On October 12, 2017, Dr. [redacted] agreed to allow the independent evaluators to observe [redacted] in school as part of the evaluation process. (Stip. 53)

16. Even though DPS had not conducted a neuropsychological evaluation of [redacted] on October 26, 2017, Dr. [redacted] asked [redacted]s mother to provide the name of the neuropsychologist she wished to conduct the IEE. (Stip. 54)

B. The Initial Evaluators Requested and DPS' IEE Contract

17. In her response, dated September 18, 2017 approving the IEEs, Dr. [redacted] listed qualified evaluators in the community. (Stip. Ex. 59) [redacted] was on the list and was the provider chosen by [redacted] to conduct the independent occupational therapy evaluation. (Stip. Ex. 38)

18. Dr. [redacted] did not limit [redacted]s choices to only the evaluators on the list, she also informed [redacted] that "[i]f you prefer an individual who is not on the list, please contact me with the

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[8] 34 C.F.R. § 300.502(b)

name and address so we can confirm the individual's qualifications." (Stip. Ex. 59, p. 305)

19. Furthermore, according to Dr. [redacted] if [redacted]s evaluator was qualified and both [redacted] and the selected evaluator consented to perform the IEE, the only remaining obstacle was for Dr. [redacted] to "make financial arrangement" and then her office would "notify [redacted] when the evaluator(s) receives a statement authorizing payment of the evaluation." (Stip. Ex. 59, p. 306)

20. Dr. [redacted] did not state any additional criteria in her September 18, 2017 letter to [redacted] Moreover, she did not mention that an IEE Contract was required or the contents of that contract.

21. When she approved [redacted]s IEE request, Dr. [redacted] failed to provide [redacted] with a copy of the IEE Contract which contained DPS' agency criteria required for the qualifications of independent examiners and the process for conducting an IEE.

22. In its findings of noncompliance for the State Complaint, NCDPI found that DPS' failure to provide parents a copy of the IEE Contract was a procedural violation of the IDEA in that it denied the parent's informed consent of all agency criteria. (Stip. Ex. 103, p. 593; Stip. 77)

23. After the IEE approval, from September 18 through November 2017, there were numerous emails and phone conferences between [redacted] and Dr. [redacted] about the IEEs. (Stip. Ex. 63, pp. 318-332) Emails in October 2017 indicated that attorneys for [redacted] and the school board were still involved. (Stip. Ex. 63, p. 321)

24. Dr. [redacted] was aware that [redacted] had filed due process in May 2017 and, soon after, had withdrawn her May 2017 Petition. (Stip. Ex. 23) At the Legal Meeting held on May 30, 3017, Dr. [redacted] had speculated that Petitioners might have an attorney. As of October 2017, she knew definitively. (Stip. Ex. 23)

25. This litigation and [redacted]s disagreements with DPS' evaluations and Eligibility Determination along with [redacted]s refusal to meet Dr. [redacted] face-to-face appears to have contributed to the creation of the Limited Relationship Provision.

26. On November 10, 2017, [redacted]s parents initially requested the following individuals to conduct the IEEs: Dr. [redacted] (neuropsychological), [redacted] A [redacted] (occupational therapy), and [redacted] (speech/language). (Stip. Timeline filed October 22, 2018; Stip. Ex. 63, p. 318)

27. The first time there was any reference to the existence of the IEE Contract was on December 4, 2017, when Dr. [redacted] mentioned in an email to [redacted] that she was sending the "contracts to the private evaluators." (Stip. Ex. 66, p. 344) [redacted] was not given a copy of the contract at that time nor made aware of any agency criteria in that contract.

28. [redacted] asked for a copy of the IEE Contract on December 5, 2017, but she was not provided a copy of any contract until January 12, 2018. (*See* Stip. Ex. 68, p. 346; DPS Ex. 13; Stip. Ex. 69)

29. On December 22, 2018, Dr. [redacted] notified [redacted] that [redacted] of [redacted] had refused to sign the IEE Contract. (*See* Stip. Ex. 64, pp. 333-341 (emails between Dr. [redacted] and [redacted] Ms. [redacted] refused to conduct the IEE because of the contract terms. (Stip. Ex. 67) Ms. [redacted] wanted all four clauses of the Limited Relationship Provision removed from the IEE Contract but DPS refused. (*See* DPS Ex. 1, p. 7) There was no evidence that Dr. [redacted] provided [redacted] a copy of the IEE Contract at this time either.

30. Dr. [redacted] testified that she did not have any concerns about [redacted] qualifications to perform the speech/language evaluation. (Tr. vol. 7, p. 1334:1)

31. Unlike the previous IEE Contract signed by Ms. [redacted] in May 2017 (Stip. Ex. 87), the revised IEE Contract contained the Exhibit A – "Scope of Professional Services Agreement" with the "Limited Relationship Provision." (Stip. Ex. 86)

32. Dr. [redacted] testified that the DPS had not been specifically asked to change this provision of the contract which precluded the independent evaluator from serving as an expert witness, even though [redacted] noted on her contract that she objected to that provision. (DPS Ex. 1, p. 7; Tr. vol. 7, p. 1328:21-22)

33. [redacted] providers, like the [redacted] providers, had previously conducted IEEs in Durham Public Schools and their earlier IEE contracts did not contain Limited Relationship Provision. (*See* SBE Ex. 9, pp. 173-178 (DPS's Ex. 3C - [redacted] Contact signed June 7, 2017 with no Limited Relationship Provision); pp. 195-200 (DPS Ex. 3F - [redacted] Contract signed June 12, 2017 with no Limited Relationship Provision))

34. Both Ms. [redacted] and Ms. [redacted] had been qualified to conduct IEEs in DPS prior to the inclusion of the Limited Relationship Provision. Dr. [redacted] had conducted IEEs in North Carolina LEAs, but not DPS. According to Dr. [redacted] DPS' IEE Contract was the only contract she had signed with the Limited Relationship Provision.

35. [redacted] received an incomplete copy of Ms. [redacted] contract and a complete copy of Dr. [redacted] contract on January 12, 2018. (DPS Ex. 13; Stip. Ex. 69)

C. DPS' "Contract for Performing Independent Evaluation Services" (the "IEE Contract")

36. Ultimately, the following individuals conducted the IEEs: Dr. [redacted] (neuropsychological), [redacted] for [redacted] (occupational therapy), and [redacted] (speech/language). (Stip. 55; Stip. Exs. 38, 39, 40, 41, & 42)

37. DPS required all the independent evaluators to sign the IEE Contract. The IEE Contract was labeled "Contract for Performing Independent Evaluation Services." (Stip. Exs. 83, 84, & 85)

38. On December 4, 2017, Dr. [redacted] provided contracts to the designated evaluators which outlined DPS' agency criteria for an IEE. (*See* Stip. Ex. 83, 84, 85, & 86; Stip. 56)

39. [redacted] signed the contract on December 6, 2017. (Stip. 57)

40. Dr. [redacted] signed the contract on December 15, 2017. (Stip. 58)

1. Agency Criteria Defined by IDEA

41. The IDEA regulations define "agency criteria" as follows:

> (1) If an independent education evaluation is at public expense, the criteria under which the evaluation is obtained including the location of the evaluation and the qualifications of the examiner must be the same criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent evaluation.
>
> (2) Except for the criteria described in paragraph (e)(1) of this section, a public agency *may not impose conditions* or timelines related to obtaining an independent educational evaluation at public expense.

34 C.F.R. § 300.502 (emphasis added).

42. According to this regulation, DPS' criteria for an IEE must be the same criteria used by DPS' evaluators and no additional conditions may be imposed.

43. DPS did not dispute that, as a local education agency ("LEA"), it must use the same agency criteria as the State educational agency ("SEA"), The SEA' "agency criteria" for an IEE are in the *NC Policies*. (*See* SBE Supp. Pro. Dec.)

2. Limited Relationship Provision

44. The controversial provision of the IEE Contract is Exhibit A - "Scope of Professional Services Agreement." It is the final section of Exhibit A, the Limited Relationship with the Parties ("Limited Relationship Provision") that is most relevant to this matter.

45. The Limited Relationship Provision stated:

> Provider agrees to perform the duties as described above and understands that the purpose of this IEE is to assist the IEP team in answering the questions identified in Paragraph 1 above. *To that end* [the IEE], Provider agrees that the scope of its involvement with this student and his education with DPS is limited to the items identified in this Agreement[] and will not be further involved in this matter *without the express written consent of both the Parents and DPS.* This includes the following:

a) Beyond the scope of this agreement, Provider shall not serve as a consultant for either *party,* including any further relationship as a consultant, evaluator, or health care provider for [redacted][9]

b) Provider will not agree to serve as a witness or expert witness in any future dispute between the *parties*.

c) Provider will not speak with any attorney, consultant, or third party regarding this student, without the express consent of both *parties.*

d) In the event Provider is subpoenaed for deposition or testimony, Provider agrees to communicate simultaneously with both *parties* and shall not speak substantively with either *party* in anticipation of Provider's deposition or testimony.

(Stip. Ex. 83, p. 471 ¶ 4) (emphasis added)

46. At due process, Petitioners objected to the Limited Relationship Provision which they assert impeded [redacted]s parents' ability to meaningfully participate in the decision-making process by limiting their ability to work with the evaluators and allowing DPS to manipulate the evaluation process. (Stip. Exs. 83, 84, 85)

47. Petitioners also contended that this contract provision was purposefully designed to impede parents' participation in the IEP process as well as their ability to advocate for their children's needs in a due process hearing and have access to an expert witness.

48. The IEE Contract states that it is for "independent consulting services…". (Stip. Exs. 83, p. 466; 84, p. 471; & 85, p. 479) Except, as noted, all the IEE contracts contained the same contractual terms for an IEE; however, the types of the independent evaluations were different, i.e. speech/language, occupational therapy, and neuropsychological.

49. Other than Ms. [redacted] contract, wherein Dr. [redacted] agreed to allow Ms. [redacted] to provide private therapy services beyond the scope of the agreement, all the contracts contained the same Limited Relationship Provision. (*Compare* Stip. Ex. 85 *to* Stip. Exs. 83 & 84)

50. Had DPS not conceded to Ms. [redacted] request, she would have been the second independent speech/language evaluator to reject the IEE Contract. This would have required Dr. [redacted] to ask [redacted] for a third independent speech/language evaluator.

51. It is important to note that although the "express written consent of both the Parents and DPS" was required for any further involvement of the independent evaluators, the "Parents" were not "parties" to the contact. The parties to the IEE Contract were Durham Public Schools

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[9] Ms. [redacted] was [redacted]s second choice of speech/language evaluators. Unlike [redacted] who asked for removal of all the Limited Relationship Provision, Ms. [redacted] requested only the removal of subparagraph (a), which was done. (*See* Stip. Ex. 85, p. 485)

and the Provider[10], in this case, Ms. [redacted] with [redacted] Dr. [redacted] and Ms. [redacted] (*See* Stip. Ex. 83, 84, & 85)

52. [redacted]s parents were not even aware of the IEE Contracts existence until after it was signed by two of the evaluators ([redacted] and [redacted]

53. Clauses (a) through (d) require the written consent of both the Parents and DPS, otherwise, the Provider "shall not serve as a consultant … evaluator, or health care provider for [redacted] "will not agree to serve as a witness or expert witness in any future dispute between the *parties*," "will not speak with any attorney, consultant, or third party regarding the student," and if "subpoenaed for deposition or testimony" will communicate simultaneously with both *parties* and not speak substantively with either *party* in anticipation of Provider's deposition or testimony." (Stip. Ex. 83, p. 471)

54. The "parties" referenced in these clauses are not the signatory "parties" to the contract, DPS and the Provider. Instead, the "parties" appear to be the parent and DPS. The parent who had no knowledge or input in the creation of these terms. The independent evaluator would not have known that the parent had not agreed to these terms.

55. Prior to December 2017, the Limited Relationship Provision was not included in DPS' IEE contracts. (*Compare* SBE Ex. 8, pp. 55-59 (December 4, 2017 contract signed on February 23, 2018) *and* SBE Ex. 9, pp. 179-184 (December 4, 2017 contract signed December 6, 2017) *to* SBE Ex. 8, pp. 55-49 (Ex. 3F – May 31, 2017 contract signed on June 12, 2017) *and* SBE Ex. 9, pp. 168-172 (April 11, 2017 contract signed on April 11, 2017))

56. Petitioners assert that through these provisions, DPS imposed agency criteria upon the independent evaluators that differed from the criteria DPS used when its own evaluators evaluated students.

57. The State Board in its Supplemental Proposed Final Decision listed all the State Educational Agency criteria ("SEA Criteria") for initial evaluations performed by LEAs in general and specifically for Autism Spectrum Disorder, Other Health Impaired, Emotional Disability, and Specific Learning Disability. LEAs must follow the SEA's Criteria. Any IEE Contract must comply with the SEA Criteria and cannot impose any additional conditions with respect to obtaining the IEE. (*See* State Board's Supp. Pro. Fin. Dec.)

58. DPS argued that these "portions of the IEE contract [were] related to the business relationship between DPS and the independent evaluator, and future actions by the evaluator outside of the provision of the IEE, [were] not 'agency criteria' and do not impose conditions related to obtaining the IEE." (DPS Supp. Pro. Fin. Dec. p. 5, Concl. of Law # 3)

59. The Undersigned disagrees that the Limited Relationship Provision only related to the business relationship between DPS and the independent evaluators. This provision did impose conditions on [redacted]s ability to obtain an IEE and constrained the future actions of the independent

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10 The IEE Contract calls the independent evaluator, the "Provider". The Undersigned uses the term interchangeably.

evaluator[11] with respect to the child and parent's procedural safeguards.

60. DPS mandated that all independent evaluators sign the IEE Contract. An independent evaluator, who was otherwise qualified, was not permitted to conduct an independent evaluation. Although DPS agreed to delete subparagraph a (future private health care services) for Ms. [redacted] acceptance of the remainder of the Limited Relationship Provision was peremptory for conducting an IEE.

a. The Purported Purpose of the Limited Relationship Provision

61. The purported purpose of the Limited Relationship Provision was explained in the contract itself.

62. According to the IEE Contract, the "purpose" of the Limited Relationship Provision was to "assist the IEP team in answering the question identified in Paragraph 1." (Stip. Exs. 83, p. 470; 84, p. 476; & 85, p. 484)

63. Paragraph 1 stated that the purpose was "to determine if [[redacted] has a diagnosis that required the provision of special education and related services." (Stip. Exs. 83, p. 470; 84, p. 476; & 85, p. 484) This purpose had nothing to do with the business relationship between DPS and the Provider.

64. Subsequent paragraphs define the scope of the IEE and process used for completing the IEE. (*See* Stip. Exs. 83, pp. 470-471, subpara. 2 & 3; Stip. Ex. 84, pp. 476-477, subpara. 2 & 4; & 85 p. 484-485, subpara. 2 & 3)

65. Only Dr. [redacted] contract included an additional subparagraph with respect to [redacted]s request for a "neuropsychological examination." (Stip. Ex. 84, p. 476, subpara. 3) That subparagraph was distinct from the other IEE Contracts and included that: "Provider also agrees that observations across school setting will also be completed as part of this evaluation, and Provider retains the professional independence to determining the scope of the educational observations it will conduct." (Stip. Ex. 84, p. 476, subpara. 3) This observation requirement was later used to reschedule the June 8, 2018 IEP meeting as discussed *infra*.

66. In its Proposed Final Decision, DPS argued that the contract served several purposes which were:

> The contract provided clarity and transparency for the evaluator. (Tr. vol. 7, p. 1239:3-6) (Testimony of [redacted] The provisions limiting the evaluator's activities after the evaluation were intended to keep the process independent from influence unrelated to the student's current educational needs. (Tr. vol. 7, p. 1243:4-6) (Testimony of [redacted] It also protected the evaluator from other considerations or

[11] The Limited Relationship Provision could also be construed as a restraint of trade on the Provider's business. This Tribunal has no jurisdiction over any contractual violations. Such matters are the appropriate for scrutiny of the evaluators' licensing associations and civil contract actions.

influences "so they can focus on the core of the work that's being asked and complete the evaluation independently and not feel pressure, influence to serve in any kind of advocate kind of capacity for not just the parent, but for the district; that they can truly enter and engage in this process focusing on evaluating independently, as an independent source. (Tr. vol. 7, p. 1244:16-24) (Testimony of [redacted]

(Resp. Pro. Dec. ¶124, p. 2)

67. Dr. [redacted] testified that "a big purpose" of the contract was "to protect the evaluator so that they can focus on the core of the work that's being asked and complete the evaluation independently and not feel pressure, influence to serve in any kind of advocate kind of capacity for not just the parent, but for the district." (Tr. vol. 7, p. 1244:16-24) This position is patronizing. DPS is not responsible for the protection of the evaluator, a licensed professional.

68. DPS also argued that the IEE Contract was necessary to ensure the "independence" of the private evaluators. (Tr. vol. 7, pp. 1279:15–1281:6)

69. Under the "Obligation of Provider" section, the IEE Contract designated the provider as a "school official for purposes of carry out the evaluation…". (Stip. Ex. 83, p. 466, subpara. 12)

70. The State Board found DPS' school official designation of the independent evaluator in violation of the IEE requirements in that the evaluator was not independent.

71. DPS appeared to be more concerned about the evaluators' future relationship with the parent rather than the evaluator's future relationship with DPS.

72. Dr. [redacted] testified to her concern that an evaluator may see the independent evaluation as an opportunity to drum up future business with the parent; yet, Dr. [redacted] confirmed there was no prohibition in the contract to prevent the independent evaluator from conducting future evaluations for the DPS for which the DPS "pay[s] them for their services." (Tr. vol. 7, pp. 1279:15–1281:6)

73. Moreover, Dr. [redacted] stated that she was not concerned that the prospect of a longstanding relationship with the DPS with the possibility of conducting multiple independent evaluations would skew the perspective of the evaluator, contents of the evaluations, or the recommendations given by the evaluator. Yet, she was concerned that having an additional relationship with the parent could skew the perspective of the evaluator, the contents of the evaluation, and the evaluator's recommendations. (Tr. vol. 7, pp. 1282:13–1283:3) The Undersigned finds this illogical as the potential for a long-term steady flow of income would be much greater from the Durham Public Schools than from a parent. Moreover, the contract allowed DPS to "skew" the contents of the evaluations as evidenced by Dr. [redacted] interference after the Final Reports were issued.

74. This position also raises several questions. What if the independent evaluator was already providing private services, such as speech or occupational therapy, at the time of the IEE

request and the parent's ability to continue those services after the IEE? In that situation, the evaluator would not meet agency criteria for an IEE even though that evaluator would be more knowledgeable about the child than a randomly chosen evaluator. Also, what if the evaluator was already consulting with the parent's attorney or advocate prior to the IEE? Per the contract provision, that relationship would have to be severed.

75. The Undersigned rejects the assumption without a contract prohibiting future consultative or therapy work with the student or family that an independent evaluator "is entering th[e] process with the belief or assumption that it's going to drum up business or result in additional income." (Tr. vol. 7, p. 1245:3-14)

76. Contrary to Dr. [redacted] testimony, the Undersigned prefers to assume the independent evaluators will conduct themselves in a professional and ethical manner without this prohibition in the contract. The licensing boards of the independent evaluators are responsible for determining if their actions are ethical, not Durham Public Schools.

77. Moreover, to the extent that the independent evaluator may become biased because of an existing or future relationship with the child, at due process, the trier-of-fact must weigh the credibility of the evaluator; it is not DPS' obligation to ensure that the evaluator has no undue influence or bias.

b. *The Real Purpose of the Limited Relationship Provision*

78. Dr. [redacted] explained that the "big reason" for the revisions was due to "litigation, attorney involvement, most specifically over the past several years, how that has really so significantly changed the landscape of our world and how we used to work together." (Tr. vol. 7, p. 1242:5-8) Dr. [redacted] also explained that the contract was necessary because parents were not communicating with her face-to-face and were instead requiring that information to be sent to them in an email. (Tr. vol. 7, pp. 1242:9–1243:6; 1276:14–1279:14)

79. As noted previously, the Limited Relationship Provision was added sometime between June and December 2017. Coincidentally, this was after [redacted]s first due process petition and the Legal Meeting, but before the IEE Contracts with [redacted]s independent examiners.

80. Based on Dr. [redacted] admissions, the Limited Relationship Provision was added for the purpose of controlling attorney involvement and special education litigation.

81. This provision was sufficiency daunting to Dr. [redacted] and Ms. [redacted] that they felt compelled to hire legal counsel because of the IEE Contract.

82. As evidenced at the hearing, this provision accomplished its purpose. It controlled the Petitioners' ability to access the independent examiners, had a "chilling" effect on the examiners' testimonies, interfered with Petitioners' access to expert testimony, and overall impacted the trier-of-fact's access to relevant expert testimony.

83. The Undersigned finds that the Limited Relationship Provision was purposefully designed to control litigation and attorney involvement in special education matters. This contradicts DPS' obligated to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a FAPE including the right to IEEs and due process.

3. Dr. [redacted] Communications with Evaluators After Issuance of Their Final Reports

a. [redacted] [redacted] After Issuance of OT Report

84. After Dr. [redacted] received Ms. [redacted] report, Dr. [redacted] asked Ms. [redacted] to speak to DPS' Lead Occupational Therapist. Dr. [redacted] Ms. [redacted] and [redacted] [redacted] DPS Lead Occupational Therapist, participated in a phone conference to discuss the Final OT Report. (Stip. 63)

85. During the phone conference, Dr. [redacted] suggested that Ms. [redacted] make changes in her terminology and ordering of her recommendations. (Stip. Ex. 39)

86. Before having this phone conversation, Dr. [redacted] admitted that she knew that Ms. [redacted] had already gathered information about [redacted] in the school setting, observed [redacted] at school, and collected information from [redacted]s teacher about her functioning in school. (Tr. vol. 7, pp. 1291:9–1292:2)

87. Yet, Dr. [redacted] still accused Ms. [redacted] of failing to comply with the IEE Contract in her email: "According to the contract, the offer to schedule a meeting to review results should have been for DPS and the parent." Dr. [redacted] then included a cut and paste of the contract provision. (Stip. Ex. 81, pp. 458-59; Tr. vol. 5, pp. 789:18–790:7) Despite this evidence, Dr. [redacted] testified that she never had any conversations with Ms. [redacted] about violating the contract. (Tr. vol. 7, pp. 1252:25–1253:3)

88. Upon review of the testimony and documentary evidence, the Undersigned does not accept Dr. [redacted] explanation that including the contract terms in the email was solely meant as "a reminder" about "the importance of getting information from parent and school." (Tr. vol. 7, pp. 1293:21–1294:9) Ms. [redacted] as a licensed occupational therapist, had already received information from the school sufficient to form her professional judgment about [redacted]s need for occupational therapy services.

89. After speaking with Dr. [redacted] Ms. [redacted] issued a "revised" independent evaluation on March 29, 2018. (Stip. Ex. 39) In the revised evaluation report, Ms. [redacted] changed the word "recommendations" to "considerations." (*Compare* Stip. Ex. 38, p. 7 *to* Stip. Ex. 39, p. 7) DPS' staff evaluators are allowed to make recommendations in their evaluation reports and not required to label the recommendations as considerations.

90. Ms. [redacted] also rearranged her recommendations and reworded them "Considerations based upon IEE: 2. Additional Community or outpatient occupational therapy

may be considered for [redacted] to further address sensory differences…". (*Compare* Stip. Ex. 38, pp. 7-8 *to* Stip. Ex. 39, pp. 7-8)

91. [redacted] discovered Dr. [redacted] communications with Ms. [redacted] after Ms. [redacted] sent her the revised report on March 30, 3018. (Pet. Ex. 16)

b. Ms. [redacted] After Issuance of Speech/Language Final Report

92. From February 24 to March 23, 2018, Dr. [redacted] had email and verbal conversations with Ms. [redacted] regarding the IEE and the contract terms. (*See* Stip. Ex. 72, pp. 355-380)

93. Ultimately, based on these communications, subparagraph (a) was removed from the Limited Relationship Provision and Ms. [redacted] signed the IEE Contract on March 30, 2018. (Stip. Ex. 85) It is not clear in the record when [redacted] received a copy of Ms. [redacted] contract, but Petitioners assert that [redacted] received it on May 9, 2018. (*See* Pet. Supp. Legal Memo. p. 4)

94. On April 19, 2018, [redacted] conducted a speech/language evaluation of [redacted] (Stip. 63; Stip. Ex. 40)

95. Ms. [redacted] diagnosed [redacted] with "Moderate Social (Pragmatic) Communication Disorder." (Stip. Ex. 40)

96. On June 5, 2018, Ms. [redacted] sent the Petitioners and Dr. [redacted] her final report. (Stip. Ex. 78)

97. Soon thereafter on June 7, 2018, Dr. [redacted] asked Ms. [redacted] to talk to her about the recommendations in her final report, but Ms. [redacted] declined as the evaluation process had been completed. (DPS Ex. 16, pp. 88-90)

98. [redacted] did not find out about Dr. [redacted] communications with the other independent evaluators Ms. [redacted] and Dr. [redacted] until after they had issued their revised reports on March 30, 3018 and June 5, 2018, respectively. (Stip. Ex. 78; Pet. Ex. 16)

c. Dr. [redacted] After Issuance of Final Neuropsychological Report

99. Dr. [redacted] began her evaluation on January 22, 2018. (Stip. 60; Stip. Ex. 41) Her evaluation continued through April 2018 and her report was not provided to the DPS and [redacted] until May 29, 2018. (Stip. Ex. 41 - dates of evaluation: 1/22/18, 1/30/18, 2/5/18, 2/15/18, 2/20/18, 4/12/18, & 4/30/18)

100. Because of [redacted]s request for a neuropsychological evaluation, Dr. [redacted] IEE Contract included a requirement to observe "across school settings." (Stip. Ex. 84, p. 476, subpara. 3)

101. After five sessions with [redacted] on March 21, 2018, Dr. [redacted] spoke with Drs. [redacted] and [redacted] about a potential Autism diagnosis for [redacted] based on her preliminary evaluation

results. (Stip. 60)

102. During that conversation, Dr. [redacted] asked what criteria was required for an autism evaluation. Drs. [redacted] and [redacted] admitted that they discussed the criteria for autism but did not tell Dr. [redacted] that DPS required four (4) hours of observation for autism eligibility. (Tr. vol. 5, p. 979:11-24 (Testimony of [redacted] Tr. vol. 7, p. 1313:5-23 (Testimony of [redacted]

103. If in-school observations were so important to DPS, this conversation it would have been the perfect time for Dr. [redacted] to discuss scheduling of the in-school observations with Dr. [redacted] especially since DPS required four hours of observations for the autism eligibility.

104. Dr. [redacted] comprehensive evaluation was conducted from January 22, 2018 to April 30, 2018. (Stip. Ex. 41) During her office sessions, Dr. [redacted] conducted behavioral observations and numerous psychoeducational testing. She reviewed all available records provided by DPS. However, DPS failed to provide all records. Dr. [redacted] also obtained BASC-3 rating scales, autism spectrum rating scales, and adaptive behavior assessments from [redacted] and all four of [redacted]s core teachers. (Stip. Ex. 41, pp. 1, 220, 221, 224, 225, 226, & 227)

105. Ultimately, Dr. [redacted] diagnosed [redacted] with Specific Learning Disorder with impairment in reading (315.00) because of [redacted]s deficit in word reading accuracy, reading fluency, and poor spelling. (Stip. Ex. 41, p. 229) According to Dr. [redacted] this combination of deficits was "captured by with the clinical term of Dyslexia, particularly [redacted]s poor decoding, word recognition, and poor spelling." (Stip. Ex. 41, p. 229)

106. Dr. [redacted] also diagnosed [redacted] with Autism Spectrum Disorder (299.00). (Stip. Ex. 41, p. 229)

107. Based on these diagnoses, Dr. [redacted] recommended that the IEP Team review [redacted]s eligibility in the potential areas of eligibility of Specific Learning Disabled and Autism. (Stip. Ex. 41, p. 229)

108. Because of Dr. [redacted] report, the June 8, 2018 IEP meeting was canceled. Instead, Dr. [redacted] arranged the IEP Team, without the parents, to meet with Dr. [redacted] to give her more "balanced" information to include in a revised report.

4. DPS' Cancellation of the Previously Scheduled June 8, 2018 IEP Meeting

109. On May 29, 2018, Dr. [redacted] notified [redacted]s mother that "all of the evaluations [she] requested through the IEE process [were] completed and in hand." (Stip. Ex. 76, p. 431) Dr. [redacted] provided an Invitation to Conference for a meeting on June 8, 2018, "to review the reports/results and consider the impact on [redacted]s educational needs." (Stip. Exs. 14 & 76)

110. On May 31, 2018, [redacted] confirmed that they would be able to attend the meeting scheduled for June 8, 2018. (Stip. Ex. 76, p. 431)

111. On June 5, 2018, after the meeting was confirmed, Dr. [redacted] canceled the IEP meeting to provide for the school district to meet with the independent evaluators. (Stip. Ex. 78, p. 449)

112. Even though all evaluators had submitted their final reports, which Dr. [redacted] deemed completed on May 29, 2018, Dr. [redacted] claimed the meeting was being canceled because "[a]ll components of the evaluations *and contracts* ha[d] not been completed." (Stip. Ex. 78, p. 443) (emphasis added)

113. [redacted]s mother repeatedly asked Dr. [redacted] not to cancel the meeting as the independent evaluators were already scheduled to attend the meeting, she had already arranged for childcare so she could attend, and she reminded Dr. [redacted] that the process to obtain services for [redacted] began almost a year earlier. (Stip. Ex. 78, pp. 437–48) [redacted]s mother informed Dr. [redacted] of her hope that [redacted] could receive services over the summer and shared her concern that DPS had already predetermined [redacted]s ineligibility since Dr. [redacted] was proposing the IEP Team reconvene over a month later. (Stip. Ex. 78, p. 443; Tr. vol. 2, 368:1-19) (Testimony of [redacted] regarding her eagerness to have the IEP meeting and, hopefully, arrange for [redacted] to receive Extended School Year services that summer)

a. The IEP Meeting Was Cancelled to Allow DPS Staff to Meet with Dr. [redacted]

114. Dr. [redacted] testified that she rescheduled the June 8th meeting[12] because Dr. [redacted] had not complied with the contract and observed [redacted] in the school setting. [redacted] argued that this was merely a pretense.

115. Dr. [redacted] accused Dr. [redacted] of failing to comply with the contract and demanded that Dr. [redacted] meet with the teachers to gather information from school personnel. Even though, Dr. [redacted] had already collected three different sets of teacher rating scales: Autism Rating Scales, Adaptive Behavior Assessments System, and The Behavior Assessment System for Children, Third Edition. (Stip. Ex. 42; Tr. vol. 3, p. 419:11-16)

116. Dr. [redacted] confirmed that it was not a standard practice of DPS to require independent evaluators to meet with school personnel to gather additional information after they had submitted their final reports. (Tr. vol. 7, pp. 1322:21–1323:2)

117. Dr. [redacted] admitted that her actions of asking to meet with the evaluators after the reports were submitted were unique to [redacted]s case because Dr. [redacted] had not observed [redacted] in the school setting as required by the IEE Contract. (Tr. vol. 7, p. 1325:20-24)

118. Dr. [redacted] attempted to blame the canceling of the June 8, 2018 IEP meeting because the parents had previously requested observations by the independent evaluators. Dr. [redacted] testified

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[12] On June 8, 2018, [redacted] filed her second contested case Petition asking that [redacted] be found eligible under the categories of autism and specific learning disabilities. (Officially Noticed Fact 1; *see also*, June 8, 2018 Petition attached to August 14, 2018 Petition) [redacted] later withdrew her June 8 Petition and it was refiled with this current petition.

that: "[t]here was no time to do an observation at that point." (Tr. vol. 7, pp.1323:9-1324:1) Dr. [redacted] admitted that she never asked [redacted] if she still wanted the observation prior to canceling the meeting, even though [redacted] "was pretty adamant that she wanted to meet on June 8th to have the eligibility meeting." (Tr. vol. 7, p. 1324:2-14) Dr. [redacted] also admitted that she never actually told [redacted] that the reason she now claimed for canceling the meeting was because [redacted] had originally asked for observations. (Tr. vol. 7, p. 1325:1-3) Dr. [redacted] confirmed in responding to the Undersigned, that [redacted] had not complained to Dr. [redacted] that Dr. [redacted] had not completed an observation. (Tr. vol. 7, p. 1336:14)

119. Although in-school observations were agency criteria for IEEs for the eligibility categories of AU, SLD, OHI, and SED,[13] Dr. [redacted] timing was suspicious to [redacted]

120. However, Dr. [redacted] explanation was reasonable to the Undersigned. Dr. [redacted] explained that she did not immediately review Dr. [redacted] lengthy report upon receipt but shortly thereafter when meeting with Dr. [redacted] she noticed that Dr. [redacted] had not talked to school folks or observed in the school setting. (Tr. vol. 7, pp. 1254:14-1255:8)

121. Dr. [redacted] acknowledged that she felt like she had "dropped the ball" and should have "caught that quicker than [she] did." (Tr. vol. 7, p. 1255:1-8) Because of this, Dr. [redacted] canceled the June 8 meeting with the IEP Team and scheduled a meeting with school staff and Dr. [redacted]

122. On June 5, 2018, Dr. [redacted] emailed Dr. [redacted]

> After full review of your report, I noticed that there is a good deal of information from the parent embedded throughout (which is great), but it does not appear that you spoke with select school staff in order to receive information regarding the student's performance at school and to obtain any other school-based information that may be helpful in the IEE. Since this is included in the contract for the IEE, *I would like this information to be sought and included* in your evaluation/report of the student.

(Pet. Ex. 10) (emphasis added)

b. Dr. [redacted] Revisions to Her Initial Final Report

123. Dr. [redacted] testified that due to the concerns that she suspected existed "about the bias in the report, that [she] may have been biased too heavily towards the parents and not considering of the school's perspective or point of view," she included a statement to document that she understood "the difference between clinical diagnosis of dyslexia and school classification" and "the different criteria used for purposes of determining child's eligibility for specialized instruction, targeting reading . . . through an IEP." (Tr. vol. 3, pp. 451:18–452:5)

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13 NC 1503-2.5(5)(i)(H); (10)(i)(E) & (11)(i)(H).

124. Dr. [redacted] testified that she felt the need to tell Dr. [redacted] that her diagnoses would not change because "they were reporting that [redacted] was doing fine in reading," but this would not change Dr. [redacted] diagnosis of dyslexia. (Tr. vol. 3, p. 417:2-25)

125. Dr. [redacted] used the terms of the contract in order to arrange a meeting between the DPS and Dr. [redacted] without [redacted]s parents. (Tr. vol. 7, p. 1299:1-13)

126. When discussing Dr. [redacted] perspective that she had not adhered to the contract because the report contained too much information from the parent, Dr. [redacted] explained the steps she took to gather information from the DPS (i.e., collecting rating scales from seven (7), eight (8) teachers, talking with Dr. [redacted] talking with Dr. [redacted] yet, "I did not interpret that item, you know, correctly, according to the Durham Public Schools. And I may not have." (Tr. vol. 3, p. 413:4-18)

127. Dr. [redacted] explained her response to Dr. [redacted] assertion that she had violated the contract "So I said I am – so I will talk with whomever you want [me to]. The last thing I want to do is A, violate my contract; B, not produce a report that is ---you know." (Tr. vol. 3, p. 414:1-4))

128. Dr. [redacted] changed her initial final report because: "I didn't want to be in violation of my contract. I had put an extremely large amount of time into this report. . . . You know, the last thing I want to do is not get paid." (Tr. vol. 3, p. 415:3-7) "I didn't want issues to arise post, again, that I – I somehow failed to meet the demands of the contract." (Tr. vol. 3, pp. 415:25–416:2)

129. Dr. [redacted] added a disclaimer regarding her dyslexia diagnosis in response to the concerns raised that she was not complying with her contract - "I wanted that section added, again, in part to reflect my desire to be impartial and to let . . . the school know I was, you know, considering everything and understanding . . . where they were coming from as well, as best as I could." (Tr. vol. 3, p. 452:13-17) "[Her] goal is really to try to meet the demands of this contract …". (Tr. vol. 3, p. 488)

130. On behalf of DPS' EC Department, Dr. [redacted] met with Dr. [redacted] and school district staff on June 8, 2018. Dr. [redacted] purposefully did not attend. Despite her requests, [redacted] was not allowed to attend the meeting. (Stip. Ex. 78, pp. 437–40)

131. At the meeting, the teachers made statements that were contrary to the information reported when they completed the BASC-3 forms. In the meeting, the teachers portrayed [redacted] as a "typical[ly] developing sixth grader." (Tr. vol. 3, pp. 428:6–429:2)

132. Even the school counselor, Ms. [redacted] challenged the other teachers that they should provide correct information about [redacted]s social and sensory issues, [redacted]s socially inappropriate behavior of putting her hand in pants or up her shirt during classroom time, and students teasing [redacted] about her behaviors. (Tr. vol. 3, pp. 429:3–430:7)

133. Dr. [redacted] identified, as an example of the contradictions was Ms. [redacted] verbal report that [redacted] was performing well in math class and worked well in groups with her

previous rating scale that [redacted] engaged in "purposeless and repetitive behaviors" such as "being fascinated with parts of objects; lining things up; twirling, spinning or banging objects; and focusing on one subject for too much time." (Tr. vol. 3, pp. 442:4–444:2)

134. By the end of the meeting, Dr. [redacted] *still* did not have an understanding of the contradictions between the verbal reports provided by the teachers on June 8, 2018, and the information they all independently reported when completing the rating scales. (Tr. vol. 3, p. 431:3-14)

135. The Undersigned accepts Dr. [redacted] explanation that: "[b]ehavior rating scales provide difference information, the standardized quantified scores from the BASC versus the qualitative perceptual observational information from the teachers." (Tr. vol. 7, p. 1300:3-7)

136. Had Dr. [redacted] observed [redacted] in the school setting, these contradictions could have been explained. This exemplifies why the observations were so important. Especially when the IEE was performed for the purpose of determining how [redacted]s disabilities adversely affected [redacted] in the school setting, not at home or in a clinic.

137. After meeting with school personnel, on June 13, 2018, Dr. [redacted] issued an amended report. (Stip. Ex. 42)

138. Dr. [redacted] did not change her ultimate diagnoses but did reorder her diagnoses and acknowledged the difference between a clinical diagnosis versus a special education eligibility determination. She also includes information gleaned from the teachers at the June 8th meeting. (*Compare* Stip. Ex. 41 *to* Stip. Ex. 42)

139. [redacted] was understandably frustrated at the delay of the IEP Meeting as she had hoped that the IEP Team would find [redacted] eligible for an IEP and for Extended School Year services during the summer intermission.

140. The Undersigned recognizes that DPS had expended considerable resources in obtaining the neuropsychological evaluation ($5,000.00) and that observations were a specific requirement in Dr. [redacted] IEE Contract. Had [redacted] been previously made aware of this contract criteria and its' significance, perhaps she would have agreed with rescheduling the IEP.

141. Since the school year was over and Dr. [redacted] had missed her opportunity to observe [redacted] in the school setting, it is unclear why the teachers could not have expressed their concerns about [redacted]s academic performance or improvement in her performance at the IEP meeting.

142. On June 21, 2018, DPS invited [redacted]s parents to attend an IEP meeting to take place on July 13, 2018. (Stip. 66)

5. [redacted]s Enrollment in [redacted] Charter School Another LEA

143. During the IEE process, in April/May 2018, [redacted] began looking for alternative placements for [redacted]

144. This would have been around the time that [redacted] became privy to the IEE Contract provisions and the filing of the State Complaint.

145. On July 11, 2018, [redacted] informed DPS that [redacted] was enrolled in a public charter school and was no longer enrolled in DPS. (Stip. 67) [redacted] cancelled the July 13, 2018 IEP Meeting.

146. Because of this cancellation, the IEP Team did not have a chance to review the IEEs or to revisit its Eligibility Determination. After [redacted]s enrollment at the [redacted] DPS was no longer responsible for providing her a FAPE; that responsibly shifted to [redacted]

D. The IEE Contract Imposed Conditions on the Independent Evaluators that were Not Imposed on DPS Evaluators

147. The IEE Contract imposed conditions on the independent evaluators that were not imposed on DPS' evaluators

1. DPS Evaluators Can Serve the Child After Completion of the Evaluation

148. The IEE Contract prohibited the independent evaluator from further consulting with [redacted] in any manner, without any time restriction.

149. DPS does not restrict its own employees, who have evaluated a child with a disability, from further serving that child. If [redacted] had been deemed eligible for services, Ms. [redacted] would have provided her occupational therapy services as the only occupational therapist at [redacted] (Tr. vol. 6, p. 1070:10-20) Ms. [redacted] testified the DPS does not put any limits on her relationships with parents or school staff. (Tr. vol. 6, pp. 1094:2 –1095:2)

2. DPS Evaluators Can Serve as Expert Witnesses

150. Sections (b) through (d) of Paragraph 4 of the contract would prohibit the independent evaluator from serving as a witness or expert witness in any future dispute between the parties (DPS and [redacted]s parents); from speaking with any attorney, consultant, or third party regarding [redacted] without the express consent of both parties; and require the independent evaluator to communicate simultaneously with both parties in the event the evaluator is subpoenaed for deposition or testimony and not speak substantively with either party in anticipation of the evaluator's deposition or testimony.

151. Dr. [redacted] admitted that DPS does not place this restriction on its own evaluators. (Tr. vol. 7, p. 1329:19) Further, DPS employees allowed to speak with the school attorney without being subpoenaed. (Tr. vol. 7, p. 1330:9-11) DPS evaluators do not have to be subpoenaed to testify. Ms. [redacted] was not subpoenaed to testify. (Tr. vol. 6, p. 1094:4-9) Ms. [redacted] was given

the opportunity to meet with an attorney to prepare to testify in the due process hearing which the independent evaluator is not allowed to do unless both DPS and s legal counsel were present. (Tr. vol. 6, p. 1070:18-24)

3. Other Negative Consequences of the IEE Contract

152. The Limited Relationship Provision had other negative consequences on the Petitioners' procedural safeguards.

a. The Contract Allowed DPS to Interfere with the Parent's Selection of the Independent Evaluator

153. Originally, s parents requested that the speech/language IEE be conducted by (Tr. vol. 2 361:8 – 21) (Testimony of regarding original selection of to conduct the evaluation and Dr. asking her to choose a third person due to contract issues with Ms.

154. DPS did not inform s parents that Ms. did not meet agency criteria to conduct the speech/language IEE or that she exceeded the cost limits. Ms. was qualified, available, and willing to conduct the independent evaluation; however, she was not willing to sign the contract provided by DPS as written. (DPS Ex. 1)

155. DPS had previously contracted with Ms. in 2017 to provide an independent evaluation using an IEE Contract that did not include the Limited Relationship Provision, yet the DPS refused to change the problematic provisions in the revised IEE Contract. (*See* DPS Ex. 1)

156. s parents were forced to choose a different provider to conduct the speech/language IEE due to the addition of the Limited Relationship Provision in the IEE Contract. (Tr. vol. 2, p. 361:8 – 11)

b. The Contract Term is Perpetual

157. Although Dr. described this limitation as only excluding attorneys from the "specific process of the educational evaluation" (Tr. vol. 7, pp. 1246:21–1247:6), the Undersigned does not read the contract so limited. To the contrary, the contract, as written, prohibits the independent contractor from ever speaking with an attorney without the express consent of both DPS and the s parents. (Stip. Ex. 84, pp. 477-78)

158. Dr. the representative of the DPS that signed the contracts with Dr. Ms. and Ms. offered conflicting testimony as to when the terms of the contract ended. (*See, e.g.*, Tr. vol. 7, p. 1284:24-25 ("We put a date at the end of the contract because no contract is without an end termination date."); Tr. vol. 7, p. 1285 (identifying April 30, 2018, as the end date of the contract per Stip. Ex. 84, p. 473); Tr. vol. 7, pp. 1285:24–1286:2 ("My understanding is that the restrictions are in relation to the IEE process. . . . So while the IEE is going on, there wouldn't be communication with attorneys as stipulated in that section."); Tr. vol. 7, p. 1286:11-17 (testifying that she did not know if the contract continued in perpetuity); Tr. vol.

7, pp. 1286:19–1287:1 (testifying "No, not necessarily. I mean yes, it would extend after. Yes." in response to whether the portion of the contract prohibiting the evaluator for serving as a consultant continued after the end term of the contract))

159. Although the actual parties to the contract were the DPS and the independent evaluator, the parent was significantly impacted by its terms. Dr. [redacted] testified that if a parent receives a copy of the contract and has concerns about the terms, Dr. [redacted] would be willing to change the terms of the contract *at parent request*. (Tr. vol. 7, pp. 1275:14–1276:9) Dr. [redacted] could not answer the Undersigned's question as to how the parent would know he/she could request such a change. (Tr. vol. 7, p. 1336:2-10)

E. The Independent Evaluators and DPS' Expert Witness Testified About Their Concerns with the Limited Relationship Provision

1. Dr. [redacted] Concerns

160. Dr. [redacted] testified that—prior to this contract—she had never been asked to sign a contract that prohibited her from consulting with the family, speaking with attorneys, or testifying, unless subpoenaed, after she completed an independent evaluation. (Tr. vol. 3, pp. 456:3–23; *see also,* Tr. vol. 4, pp. 810:3–19 (Testimony of Ms. [redacted] that she had begun receiving more contracts with these prohibitions and had been asking for modifications "to be able to better support the family that we were being asked to . . . work with.")

161. Dr. [redacted] also testified that she had never before had to retain an attorney to represent her when she conducted an independent educational evaluation. (Tr. vol. 3, pp. 456:24–457:1)

162. Dr. [redacted] repeatedly explained her concern for breaching the contract. "My goal in all of this was to be compliant . . . my goal was not to ruffle feathers, not comply with my contract. So, you know, I – I went along." (Tr. vol. 3, p. 411:7-10)

163. Dr. [redacted] explained it was her concern "that [her] compliance with the contract would be challenged or that [she] would be called into question given that Dr. [redacted] had to subsequently ask me to talk to school personnel and my kind of misinterpretation" that she felt it was necessary to hire an attorney "in case any issues came up, again, that placed me in a position where [she] was . . . being sued or otherwise." (Tr. vol. 3, pp. 489:24–490:17)

2. Ms. [redacted] Concerns

164. Ms. [redacted] testified that she had never had another school staff call her and ask her to change her "recommendations" to "considerations." (Tr. vol. 3, p. 825:19)

165. Ms. [redacted] testified that when she had completed IEEs in the past, she performed "as a completely independent evaluation," but after talking with Dr. [redacted] and Ms. [redacted] she wanted to be "very clear in what [she] was saying was school-based and what was outpatient-based." Ms. [redacted] felt it would be "out of line of [her] professional opinion if [she] didn't also

indicate that outpatient services were also indicated because it was an independent evaluation." (Tr. vol. 5, p. 781:13-22)

3. Ms. [redacted] Concerns

166. Ms. [redacted] explained the contract initially provided to her by the DPS for [redacted]s IEE "included a limited relationship with the parties' clause which [she] felt compromised the . . . potential independence of [her] evaluation." (Tr. vol. 3, p. 505:9-15)

167. Ms. [redacted] explained that she spoke with Dr. [redacted] regarding her concerns about the contract and Dr. [redacted] "agreed to eliminate one part of that [clause] but kept the other three parts of that [clause], which did not sit well with me. But in the interest of moving forward, I decided to move forward and sign the contract." (Tr. vol. 3, p. 505:16-22)

168. Ms. [redacted] explained the Limited Relationship Provision limited her independence by limiting her ability to earn income as an independent provider by working for [redacted]s family in the future and limiting her ability to communicate with all of the people involved in [redacted]s care. (Tr. vol. 3, p. 507:5-22)

169. Ms. [redacted] explained that she "saw that it placed the family at a disadvantage if they were in a situation of having to do due process." (Tr. vol. 3, p. 507:18-22)

170. Ms. [redacted] said that the contract was unusual in that it "stipulated every single step of the process." (Tr. vol. 3, p. 505:23-2).

4. DPS' Expert Dr. [redacted] Concerns

171. The DPS' expert, Dr. [redacted] also testified that she, and others in her private practice, contracted with the [redacted] Public School System ([redacted]) to conduct independent educational evaluations. (Tr. vol. 5, p. 922:18-1) Neither she nor anyone else in her office have been prohibited from conducting additional independent evaluations in the future for the [redacted] or, obviously, from acting as an expert witness. (Tr. vol. 5, p. 922:15) These were not conditions necessary to conduct an IEE, at least not in [redacted] County Schools.

F. IEE Contract Controlled Independent Evaluators Access to [redacted]s Records

172. Dr. [redacted] records were subpoenaed by DPS. (Tr. vol. 3, p. 463:19-23) She provided a copy of all the records that she reviewed, which were originally provided by DPS, in response. (Tr. vol. 3, p. 419:1-4) In these records, DPS did not provide Dr. [redacted] with [redacted]s Functional Behavior Assessment, Behavior Intervention Plan, or Crisis Plan. (Tr. vol. 3, pp. 444:9–449:2) (Testimony of Dr. [redacted] as she reviewed these documents for the first time on the witness stand)

173. Dr. [redacted] also testified that, although she understood [redacted] "had been given the WISC recently," she did not recall seeing a report on the WISC. (Tr. vol. 3, p. 465:16-18) Dr. [redacted] also testified that she did not recall seeing any BASC rating scale after what was given

"in 2013, 2012." (Tr. vol. 3, p. 468:9-16) ("I did not have in my documentation anywhere that it had been given more recently than that or any of the assessments.")

174. Dr. [redacted] also did not have any evidence of "the Feifer" or "the Beery-Buktenica" being completed by the school. (Tr. vol. 3, p. 468:22-2)

175. DPS also failed to provide Ms. [redacted] with [redacted]s complete records, including [redacted]s BIP and Crisis Plan. (Tr. vol. 3, p. 511:3-6)

176. Dr. [redacted] provided [redacted]s mother with behavior rating scales to distribute to [redacted]s teacher, (Tr. vol. 2, 353:13-23) yet Dr. [redacted] directed school staff to collect the rating scales [redacted]s mother distributed, which would be destroyed, and Dr. [redacted] decided which teachers would complete the rating scales. (Tr. vol. 7, pp. 1289:5-25, 1290:24–1291:3) Dr. [redacted] testified that she "didn't feel it was appropriate for the parent to determine who she would give the rating scales to." (Tr. vol. 7, p. 1291:6-8)

177. Dr. [redacted] explained the impact on her of not being allowed to have contact with the family after the evaluation because she typically offers to continue sharing the "wealth of information" she has about the child and will consult with the family as they make decisions regarding services and dealing with this new diagnosis. (Tr. vol. 3, pp. 493:5–494:2)

G. All Independent Educational Evaluations at Public Expense Must Comply with Agency Criteria and Follow the *NC Policies*

178. The purpose of the IEEs was to provide additional information about whether [redacted]s disabilities adversely affected her educationally such that she was eligible for special education services. Communications with school staff and in-school observations were necessary to determine how [redacted]s disabilities were impacting her educationally in the school setting.

179. Even [redacted] recognized that observations were necessary because she specifically asked that the independent evaluators be allowed to observe in the [redacted]s classes.

180. Later, [redacted] complained about the cancellation of the June 8, 2018 IEP meeting because of Dr. [redacted] insistence that Dr. [redacted] speak with [redacted]s core teachers that day. Dr. [redacted] had failed to observe [redacted]s performance in the classroom setting. While the timing was unfortunate, this was not an unreasonable request. The June 8th meeting was discussed previously.

181. The eligibility category of autism was not suspected at the time of the original eligibility meeting but was in March 2018 based on Dr. [redacted] phone conversations with Drs. [redacted] and [redacted] Autism eligibility also requires observations across settings to assess academic and functional skills, but not four hours of observation. NC 1503-2.5 (1)(i)(C).

182. In fact, despite having rating scales, Dr. [redacted] had not observed [redacted] in the school setting which was criteria required for both school evaluators and private evaluators for determining eligibility under both specific learning disability and autism. Observation within the school setting is a requirement of an evaluation conducted by a school employee. It is also required

for an IEE being conducted for eligibility purposes.

183. In-school observations of [redacted] were particularly important because, according to her educational records and [redacted]s testimony, [redacted] presented differently in the home setting versus the school setting.

184. At home, [redacted] reported the following about [redacted]s behaviors:

During the last few weeks of the fifth grade, "[a]t home, [redacted] engaged in excessive hair pulling...". (Stip. Ex. 41, p. 210)

[redacted] is also "highly disorganized at home" requiring her mom to clean her room regularly and fills garbage bags of paper and stuff. (Stip. Ex. 41, p. 210)

[redacted] reported to Dr. [redacted] that [redacted] "continues to require assistance with showering and brushing her hair ... [and] displays some repetitive motor movements, and/or possible tics." (Stip. Ex. 41, p. 211)

185. There was no evidence that the IEP Team knew about these behaviors which [redacted] reported to Dr. [redacted]

186. Although [redacted]s testimony minimized [redacted]s ability to make friends, [redacted] reported to Dr. [redacted] that [redacted] "does have a few friends with whom she interacts outside of school." (Stip. Ex. 41, p. 211)

187. Because of this inconsistent manifestation of [redacted]s known disabilities, it was reasonable for DPS to require observations in the school setting. Simply being disabled is not sufficient for eligibility; the disabling condition must adversely affect the child's academic or functional performance in the school setting, not just at home.

188. Dr. [redacted] had both an obligation to insure the integrity of the IEE and DPS' investment in it.

189. Had Dr. [redacted] observed [redacted] in the school setting, these contradictions between the teachers' BASC-3 scores and their accounts of [redacted]s academic functioning could have been explained.

190. This exemplifies why in-school observations were so important.

H. The IEE Contract allowed DPS to manipulate [redacted]s evaluation reports by requesting that the independent examiners to change their final evaluation reports.

191. According to Dr. [redacted] it would be inappropriate to ask someone to change their report unless it was a factual error. (Tr. vol. 5, p. 977:3-6)

192. Two of the three evaluators issued amended reports after speaking with Dr. [redacted]

193. Ms. [redacted] is the only evaluator who did not issue an amended report. Notably, after Ms. [redacted] sent Dr. [redacted] her final report on April 30, 2018, Dr. [redacted] asked Ms. [redacted] to speak with the lead Speech Language Pathologist (SLP) for the DPS, who had never worked with or evaluated [redacted] and Dr. [redacted] about her recommendations in her final report. (Tr. vol. 3, p. 508:3-19) Ms. [redacted] explained that she had reached out to school personnel prior to completing her report and, while she was willing to participate in a phone call to discuss her findings, she was unwilling to make changes to her report as the evaluation process had been completed. (Tr. vol. 3, pp. 508:22-509:6)

194. Ms. [redacted] initial report included a list of "Recommendations." (Stip. Ex. 38, pp. 183–84) Ms. [redacted] then issued a revised report that included a list of "Considerations," rather than "Recommendations." (Stip. Ex. 39, pp. 191–92)

195. Dr. [redacted] asked Ms. [redacted] to change the language in her original occupational therapy report from "recommendations" to "considerations because this was more in line with IEE terminology." (Pet. Ex. 16, pp. 381-82)

196. When [redacted]s mother asked Ms. [redacted] why the wording on the report was changed, Ms. [redacted] explained: "My reports include recommendations however DPS preferred me to us [sic] considerations and suggestions to be more in line with IEE terminology." (Stip. Ex. 73, p. 417)

197. On June 13, 2018, after meeting with various DPS staff on June 8, 2018, Dr. [redacted] also issued an amended report. (*Compare* Stip. Ex. 41 *with* Stip. Ex. 42)

198. All changes to the reports were designed to weaken the recommendations and findings of the independent evaluators and include information from teachers minimizing [redacted]s needs to support a finding of ineligibility.

199. The Undersigned agrees with Dr. [redacted] that, other than factual or typographical errors, it was inappropriate for Dr. [redacted] to ask the independent examiners to revise their reports or change the terminology. The IEE Contract empowered this inappropriate intervention.

I. Other Effects of the IEE Contract on [redacted]s Due Process Safeguards

a. Interference with Petitioners' Access to Expert Witnesses

200. DPS argued that, as evidenced by the hearing, the IEE Contract did not prevent the Petitioners from presenting expert witness testimony.

201. While it was true that Petitioners were able to offer expert testimony, the IEE Contract did prevent the Petitioners from obtaining an expert witness who had evaluated [redacted]

obtained teacher rating scales and was able to conduct in-school observations. The IEE Contract overtly affected the credibility and weight of the Petitioners' expert witness' opinions.

202. Petitioners' expert witness would not have been allowed to observe in the school setting without court order.

203. DPS does not allow a private evaluator hired by the parents to observe in the school setting. (Tr. vol. 7, pp. 1389:16-1390:6)

204. Only independent evaluators who sign the contract are permitted to observe. (Tr. vol. 7, pp. 1390:7-1390:6)

205. Outside private evaluations must also meet the same criteria as an independent evaluation to be considered by DPS' IEP team. (Tr. vol. 7, p. 1395:3-21; Pet. Ex. 9, pp. 75-77)

206. In this case, in-school observations were required for every eligibility category.

207. Parents are given the choice of having an independent evaluator subject to the Limited Relationship Provision to have any observations in the school setting. (Tr. vol. 7, pp. 1390:14-1392:24)

208. Pursuant to the terms of the IEE Contract, none of the independent evaluators were permitted to testify as expert witnesses. They did, however, testify for Petitioners as fact witnesses.

209. Ms. [redacted] testified that she was not aware that "an independent expert witness in the person is directly correlated to parents not being able to prevail in due process." (Tr. vol. 7, pp. 1392:19-1393:8)

210. The North Carolina Rules of Evidence prevent "fact witnesses" from testifying as an "expert witness." Only a witness qualified as an expert by knowledge, skill experience, training, or education, may testify in the form of an opinion. N.C.G.S.§ 8C-1, Rule 702. Expert witnesses may also testify on an ultimate issue to be decided by the trier-of-fact, however, fact witnesses may not. N.C.G.S. § 8C-1, Rule 704.

211. Dr. [redacted] was not qualified as an expert witness. When asked on direct examination if the IEP Team should have "suspected autism," she testified that "[i]n my opinion, they should have done an investigation, more – more exploration of the causes of the symptoms." (Tr. vol. 3, p. 449:1-5) She was cautious not to say that school staff should have suspected autism.

212. It was undisputed that Petitioners bore the burden of proof by a preponderance of the evidence.

213. The evidence in this case was equipoise. Had Dr. [redacted] been able to testify as an expert witness, her testimony might have "tipped the scale" in favor of the Petitioners.

214. This is exactly why the IDEA allows for independent evaluations at public expense – to "level the playing field."

215. DPS' IEE Contract took away the parents' ability to effectively oppose DPS' evaluations.

216. In addition, the IEE Contract interfered with this Tribunal's access to an independent expert's opinion on whether [redacted]s disabling condition(s) adversely affected her educationally and her need for specialized instruction. Without opposing expert testimony, the Undersigned must give deference to DPS' decisions as educators.

217. DPS disingenuously argued that had Petitioners asked, they might have agreed to allow the independent evaluators to testify as experts. But since Petitioners did not ask, they should not now complain about it. The parent was not a party to this contract and it is not the parent's responsibility to ask permission of an LEA to use the parent's own evaluator as an expert witness.

218. Due to the contract, [redacted]s parents were prevented from communicating with the independent individuals who evaluated their daughter prior to their testimony at the due process hearing.

219. Ultimately, the contract interfered with, not just [redacted]s meaningful participation at the IEP Meeting, but also with her ability to participate fully in the due process hearing regarding the denial of a FAPE to their daughter.

b. Interference With This Tribunal's Access to Relevant Expert Witness Testimony

220. The IEE Contract controlled many things: the IEE process, the future conduct of the independent evaluators, the evaluators participation at the contested case hearing, and this Tribunal's Access to relevant expert witness testimony.

221. The IEE Contract essentially "bought the silence" of the independent evaluators who could have been valuable witnesses at the hearing.

222. DPS' IEE Contact implies that an administrative law judge cannot weigh the credibility of independent evaluators who act as expert witnesses. An IEE counterbalances the school's evaluation, but that does not mean it is given equal weight by a judge.

223. A judge understands that the independent evaluator is selected by the parent and that the parent is unlikely to select an unsympathetic evaluator. The judge also understands that a school evaluator is an employee of the school system and most likely dependent on his/her paycheck.

224. When the independent evaluators did testify, the contract interfered with the independent evaluators' candor at the hearing. Both independent evaluators [redacted] and [redacted] testified that they feel compelled to hire attorneys to protect their interest. At times, Dr. [redacted] was literally shaking when discussing the contract terms.

225. Even if DPS did not anticipate this result, the effects of the Limited Relationship Provision were chilling and obvious during the hearing.

SECTION 4: THE STATE COMPLAINT CLAIM

ISSUE IV Whether the North Carolina State Board of Education significantly impeded [redacted]s right to participate in the decision-making process regarding the provision of a FAPE to [redacted] by sanctioning Durham Public Schools' actions related to the IEE Contract or otherwise interfered with Petitioners' procedural safeguards (the "State Complaint Claim")?

1. While Petitioners' IEEs were pending, on April 6, 2018, the following individuals with the affiliated organizations filed a State complaint alleging systemic violations related to improper contractual restrictions placed on evaluators across North Carolina: Stacey Gahagan, The Gahagan Law Firm, PLLC; Elizabeth Sydnor, Sydnor Law Firm, PLLC; [redacted] Story, Advocates for Children's Services Legal Aid of North Carolina; Tammy Kom, Legal Services for Children of North Carolina; Stephanie Klitsch, Council for Children's Rights; Virginia Fogg, Disability Rights of North Carolina; Ann Paradis, Paradis Law Firm; and Jane Wettach, Duke University School of Law Children's Law Clinic (the "Complainants"). (Stips. 70-72)) (SBE Ex. 4)

2. The Complainants represented most of the advocacy groups and child/parent's attorneys in North Carolina.

3. On April 24, 2018, the same Complainants filed another State complaint alleging systemic violations of the IDEA related to IEEs by DPS. (Stip. 73)

4. Eventually, on May 1, 2018, the State complaints were consolidated into State Complaint No. 17-090 (collectively the "State Complaint"). (Stip. 75)

5. The Complainants complained that certain contract provisions in the IEE Contract, specifically the Limited Relationship Provision, and DPS' four practices pertaining to IEEs violated the IDEA. (Stip. 72 – Contract Provisions ## 1-5; Stip. 74 – Practices ## 1-4)

6. Relevant to this contested case were DPS' practices of: (1) not giving parents a copy of the contract, unless requested; therefore, a parent would be unaware of the provisions and limitation of the contract; and (2) requesting independent evaluators to change the language in their report, specifically, requesting evaluators to change "Recommendations" section to be titled "Considerations and Suggestions." (Stip. 74 – Practices ## 1 & 4)

7. Petitioners' [redacted] and [redacted] were not complainants in either State Complaint. It is not clear why not. Perhaps, Petitioners did not want to get personally involved since, at that time, they were waiting on the results of the IEEs.

8. However, certain factual allegations were directly related to Petitioners' involvement with DPS' IEE practices and the Limited Relationship Provision in the IEE Contract.

9. Moreover, at all relevant times, Petitioners resided in Durham County, [redacted] attended Durham County Schools, and [redacted] had requested IEEs which were subject to the IEE Contract terms. As were many other similarly situated students with disabilities and their parents who resided in Durham County, attended Durham Public Schools and had the right to request an IEE.

10. On behalf of the State Board, the Exceptional Children's Division of the Department of Public Instruction ("NCDPI") investigates any procedural violations alleged in the State Complaint and follow up with a request for corrective action to remedy those procedural violations. (Tr. vol. 7, p. 1348: 1-8)

11. NCDPI's findings with respect to the DPS' contract provisions and practices not only affected Durham Public School students, it also affected all disabled students seeking IEEs because NCDPI's is responsible to insuring LEA compliance with the IDEA. NCDPI's Letters of Finding provide guidance for all North Carolina LEAs because the Letters are NCDPI's interpretation of LEA compliance with the IDEA.

12. It essentially would be the State Board's guidance statement about IEE Contract provisions and practices, including whether independent evaluators could act as expert witnesses.

13. The State complaint process can be used by Petitioners to enforce a due process hearing decision. 34 C.F.R. § 300.152(c)(3; NC 1501-10.2(c)(3).

14. NCDPI has dual roles in the State complaint process: (1) issue findings and corrective actions; and, (2) enforce due process decisions.

A. Investigation by NCDPI of a Systemic State Complaint

15. The Compliance Section of NCDPI took the investigation of this State Complaint very seriously because of the issues and entities involved.

16. At the time of the State Complaint, there were no students named; therefore, NCDPI looked at the complaint as a "systemic complaint". (Tr. vol. 7, p. 1353:10-21) The investigator had general allegations but was not aware of the specific facts pertaining to [redacted] and her IEEs or any other particular student.

17. A systemic complaint is a complaint that alleges that a public agency has a policy, practice, or procedure that is applicable to a particular group or category or similarly situated children. (SBE Ex. 1, p. 6)

18. If a systemic complaint identifies specific children as part of a class, category, or similarly situated children, the Exceptional Children's Division will review all relevant information regarding the named children. (SBE Ex. 1, p. 7)

19. Ms. [redacted] oversaw the State complaint process for State Complaint No. 17-090. (Tr. vol. 7, pp. 1353:22–1355:2) Ms. [redacted] was assigned to investigate the State Complaint at issue in this case and Ms. [redacted] worked with Ms. [redacted] to resolve the State Complaint No. 17-090. (Tr. vol. 7, pp. 1361:21–1362:6; vol. 8, p. 1426:19-21)

20. When investigating and resolving State complaints, NCDPI follows the federal regulations specific to the IDEA, as well as the *North Carolina Policies Governing Services for Students with Disabilities* and Article IX of the North Carolina statute regarding services for students with disabilities. (Tr. vol. 7, p. 1349:2-6)

21. In addition to federal and State law, NCDPI also follows the procedures outlined in the *Formal State Complaint Procedures Handbook*. (Tr. vol. 7, pp. 1350:21–1351:4; SBE Ex. 1)

22. NCDPI determined it would investigate the two state complaints together. (Stip. 76)

23. As part of the State complaint process, DPS submitted initial and revised responses (the "Responses"), which Dr. [redacted] reviewed prior to their submission to NCDPI. (Tr. vol. 7, p. 1314:24-25) Both Drs. [redacted] and [redacted] were listed as "knowledgeable persons" in DPS' Responses. (SBE Exs. 8, p. 13; 9, p. 159)

24. The State Complaint Procedures do not require the public agency to give to the complainants a copy of the agency response, however, a copy of the response was available, upon request. (See SBE Supp. Evid. Ref. pp. 1 & 4; Stip. Ex. 1)

25. DPS was not required to provide Complainants with a copy of either Response and did not. (See DPS Supp. Legal Memo. p. 1)

26. Ms. [redacted] reviewed the documents to see if there was a practice or a policy which would potentially create difficulty with a parent obtaining an IEE. She was looking to "determine whether it was in alignment with the policies." (Tr. vol. 7, p. 1363:10-15)

27. When investigating the State Complaint, NCDPI did not specifically investigate [redacted] and her parents' situation as they were not specifically named as complainants. (Tr. vol. 7, pp. 1372:24–1373:12) (Testimony of [redacted]

28. Because individual students were not named, NCDPI did not conduct any individual interviews or conduct an on-site visit. (Tr. vol. 7, p. 1380:18-24)

B. NCDPI's Letter of Findings Regarding IEE Contract Provisions

29. On June 18, 2018, NCDPI issued its Letter of Findings and Corrective Action Plan. (SBE Ex. 10)

1. Findings that IEE Contract Provisions 1, 2, 5, & 5 Were Noncompliant

30. DPI found noncompliant all but one of the five challenged IEE Contract Provisions. (See Stip. 77- Contract Provisions 1, 2, 4 & 5) The one compliant contract provision, and the one finding contested in this Petition, was:

> The DPS contract explicitly forbids the examiner ("Provider") from further working with the parents or the child, including conducting further evaluations of the child, providing any services to the child, and serving as expert witnesses for the parents.
>
> (Stip. 77- Contract Provision 3)

31. Contract Provision 3 was essentially the Limited Relationship Provision in the IEE Contract.

32. NCDPI found that Contract Provisions 1 and 2 were noncompliant because they interfered with the evaluator's independence because the independent examiner was treated as a "school official". (Stip. 77 – Contract Provisions 1&2)

33. In its contract, DPS even called the independent evaluators as a "school official" in Contract Provisions 1 and 2. NCDPI found the IEE Contract Provisions number 1 and 2, which allowed the independent evaluator to act as "school official," were noncompliant because a school employee cannot conduct an independent evaluation. (Stip. 77 - Contract Provisions 1&2) NCDPI found that:

> What separates this evaluation form the evaluation conducted by an employee is the "independent" requirement. NC Policies state the evaluator cannot be an employee of the LEA; therefore, the evaluator cannot be considered a school official.
>
> (Stip. 77- Contract Provisions 1&2)

34. The IEE Contract Provision 4 was also found noncompliant. Provision 4 required that the independent evaluator adhere to DPS policies with respect to records and confidentiality of student information.

35. The consent of both the parent and DPS was required before the independent evaluator could release student records to a third party.

36. Moreover, the independent evaluator was required to "maintain an access log delineating date, time, agency, and identify of the individual accessing student records who was not in the direct employ of the Provider." (Stip. 77 – Contract Provision 4))

37. Of note, even if the parent gave the evaluator consent to release their child's records to a third party, the Provider's access log would allow DPS to monitor who the Provider gave the student records.

38. NCDPI also found Contract Provision 4 noncompliant because the Provider is an independent evaluator and not required to follow DPS' policies about student records. (Stip. 77 – Contract Provision 4)

39. According to NCDPI, Contract Provision 5 impeded the parent's meaningful participation in the IEP meeting and other interpretative meetings. (Stip. 77- Contract Provision 5)

40. Contract Provision 5 prohibited attorneys, advocates, or other third parties from participating in meetings between the independent evaluator and parent. (Stip. 77 - Contract Provision 5)

41. NCDPI found that the "parent has the right to include someone else, including an advocate, attorney, or third party to assist in understanding the results…". (Stip. 77 - Contract Provision 5) Otherwise, "the parent may be prohibited from meaningful participation in the IEP meeting where the results must be discussed and considered." (Stip. 77 Contract Provision 5)

42. Ms. [redacted] explained that the provisions in the contract, which addressed the records and confidentiality part of the provider and required the evaluation to adhere to DPS policies, established a "quasi-employee relationship that created a problem with the evaluation truly being independent." (Tr, vol. 7, p. 1365:19-24)

43. The overarching theme of the noncompliant contract provisions was that, through the contract terms, DPS imposed conditions which controlled the IEE process and established a quasi-employee relationship with the independent evaluator.

44. According to Ms. [redacted] any of the restrictions in the contract would have to be imposed on the evaluators from the school district. (Tr. vol. 7, p. 1404:24-1405:3) That was not the case as discussed in Section 3, *supra.*

45. These contract provisions were not agency criteria related to an independent evaluation, but rather "conditions" controlling the IEE process, a parental safeguard, and the parent's meaningful participation in the IEP process.

46. NCDPI found that IEE Contract Provisions 1, 2, 4, and 5 were noncompliant. These were the same provisions contained in IEE Contracts used by DPS with the independent examiners selected by [redacted] to conduct IEEs of [redacted]

47. NCDPI's findings that these provisions of the IEE Contract support the Undersigned's findings in Section 3, that the purpose of the IEE Contract and Limited Relationship Provision was to impede the independence of the evaluator and Petitioners' right to an IEE.

2. Finding That Limited Relationship Provision Was Compliant

48. However, NCDPI found Complaint Provision 3 which forbade the examiner from further working with the parents or the child, including conducting further evaluations of the child, providing any services to the child, and serving as expert witnesses for the parents. (Stip. 77-

Contract Provision 3). The Letter of Findings provided the following explanation as to why this provision was compliant:

> When referencing "agency criteria" in the IEE policy, the federal regulations (comment section on page 46690) explain that the IEE must meet the agency criteria that the LEA uses when it initiates an evaluation. This includes reviewing existing data, input from parents, and conducting an evaluation using a variety of assessment tools and strategies to gather functional, developmental, and academic information about the child. Furthermore, the agency criteria should include the purpose of an evaluation, which is either for initial eligibility or reevaluation. The IEE must be conducted for one of the same purposes and should not go beyond the purpose for which the evaluation is intended. By ensuring the IEE aligns with the agency criteria, the LEA has a right to specify the scope of professional services to allow the evaluator to fulfill the intended purpose of the evaluation. Unless the agency criteria allow evaluations to be initiated and conducted for the purpose of providing an expert witness or involves speaking with third parties, including advocates and attorneys, the LEA may impose conditions within the agency criteria to insure the evaluator only performs the duties required. **Therefore, provision number 3 is found compliant.**

(Stip. 77) (bold in original) (italics added)

49. In its explanation, NCDPI has paraphrased the comment to the federal regulation.

50. In its whole comment, the U.S. Department of Education declined to add language in the regulations about the scope of the evaluation "because an IEE must meet the agency criteria that the public agency uses when it initiates an evaluation consistent with §300.502(e)." Federal Register vol. 71, No. 156, p. 46690 (August 14, 2006).

51. The Limited Relationship Provision goes beyond agency criteria and imposes additional conditions which must be agreed to before conducting the IEE.

52. The State Board's agency criteria for initial evaluations and independent evaluations are found in the *North Carolina Policies*. (SBE Ex. 3; *see also* SBE Supp. Pro Dec. pp. 2-9)

53. As a local educational agency in North Carolina, DPS is bound by the State Board's agency criteria and cannot impose additional conditions even if the regulation is silent on that condition.

54. Ms. [redacted] testified that the regulations were "silent on expert witness... [a]nd there is not direct policy related to expert witness so they're neither compliant or noncompliant, really, to be perfectly honest. There's not a regulation here that they would have been in violation of." (Tr. vol. 7, p. 1367:21;1368:9)

55. Ms. [redacted] explained that she reviewed the *NC Policies* and the IDEA as to the use of the independent evaluator as an expert witness and that they "do not speak to expert witnesses." (Tr. vol. 8, pp. 1439:12-1440:7)

56. NCDPI's focus was to "ensure that there is no contract language in there that would form a barrier to a parent accessing and IEE." (Tr. vol. 7, p. 1370:13-15)

57. According to Ms. [redacted] whether an "independent evaluator can turn down a contract at any time based on any issue" also "played into DPI's thought processes about what issues are truly a barrier and we looked at those directly related to other policies." (Tr. vol. 7, p. 1370:19-25)

58. Only parents risk the chance that their selected independent examiner will decline to conduct an IEE based on the Limited Relationship Provision. The school evaluator is not subject to the Limited Relationship Provision, and it is unlikely that a school evaluator will decline to conduct an evaluation requested by his/her employer.

59. When DPS tried to force independent evaluators to adhere to DPS' policies, NCDPI found this action noncompliant as it was "go[ing] beyond what otherwise the evaluator would have to follow." (Stip. 77- Contract Provision 4)

60. Ms. [redacted] testified that any of the restrictions in the contract would have to be imposed on the evaluators from the school district. (Tr. vol. 7, p. 1404:24-1405:3) The hearing evidenced that was not the case.

61. As discussed in Section 3, using the Limited Relationship Provision DPS imposed conditions on the independent evaluators which also went "beyond what otherwise the evaluator would have to follow."

62. Contract Provision 3 was even worse than Contract Provision 4 in that it goes beyond even the IEE process. Provision 3 prohibits the independent evaluator from providing further services, conducting further evaluations, or serving as expert witness are services when the IEE has been completed. This prohibition was completely outside the IEE process and inappropriate.

63. NCDPI determined that the contact language limiting the evaluator's ability to serve as an expert witness in the future did not affect the parent's ability to obtain an IEE. Because the *NC Policies* does not "talk about what happens in the future." (Tr. vol. 8, p. 1444:4-15)

64. Ms. [redacted] explained that agency criteria is "specific to obtaining the IEE" and Contract Provision 3 does not conflict with the agency criteria because the *NC Policies* pertaining to IEEs only apply "at the time the parent requests the IEE." (Tr. vol. 8, p. 1444:10-15)

65. As discussed in Section 3 of this decision, Contract Provision 3 was "specific to obtaining an IEE;" it was a precondition for an IEE. If the independent evaluator refused to agree to its terms, they could not conduct the IEE.

66. The parents were unaware of these conditions which did affect, at least one of their choice of evaluators. Moreover, as this provision was essentially a "restraint of trade," independent evaluators would be justified in refusing to agree to its terms.[14]

67. During their investigation, Ms. [redacted] and NCDPI staff were unaware of the true purpose of Contract Provision 3 as discussed in Section 3 *supra*.

68. Based on the comprehensive record before the Undersigned, which was not available during NCDPI's investigation, the Undersigned must respectably disagree with NCDPI's findings regarding the Limited Relationship Provision (Contract Provision 3).

69. Contrary to NCDPI' findings, the Undersigned finds that DPS' Limited Relationship Provision contravenes the procedural safeguards of the IDEA because it imposes conditions unnecessary and unrelated to the IEE process and inhibits the parent's ability to prove a violation of their child's right to a FAPE.

3. Other Consequences of the Limited Relationship Provision Unknown to NCDPI During the State Complaint Investigation

70. The Limited Relationship Provision will not only limit the pool of independent evaluators, it will limit the parents' ability to obtain a private evaluation which meets agency criteria.

71. DPS only allows independent examiners who sign the IEE Contract to observe in the school setting. (Tr. vol. 7, pp. 1390:7-1390:6) This would preclude observation by any private evaluator hired by the parent. (Tr. vol. 7, pp. 1389:16-1390:6)

72. Outside evaluations must also meet the same criteria as the independent evaluations to be considered by an IEP team. (Tr. vol. 7, p. 1395:3-21; Pet. Ex. 9, pp. 75-77)

73. Any private evaluation[15] that is obtained by a parent at private expense is also not reimbursable by the school system if they do not meet agency criteria. (Tr. vol. 7, p. 1395:17-25)

74. In-school observations are required for initial evaluations and reevaluation in all eligibility determinations. NC 1503-2.5(d)(1-14).

75. Parents are given the choice of having an independent evaluator subject to the Limited Relationship Provision with no future services (expert witness or otherwise) if the parents wish to have any observations in the school setting. (Tr. vol. 7, pp. 1390:14-1392:24)

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[14] The Undersigned does not have jurisdiction over contract law; however, the Limited Relationship Provision does place restrictions of the independent evaluator's future business. Contracts in "restraint of trade" are against public policy and unenforceable unless they are reasonable. *See* Restatement (Second) of Contracts § 186(1)(1981). This issue would have to be raised in a different forum by the independent evaluators and, perhaps, their licensing boards.

[15] A private evaluation is a parentally funded evaluation, not an IEE at public expense.

76. According to Ms. [redacted] based on NCDPI's interpretation of Contract Provision 3, a DPS' evaluator should not be permitted to speak with an attorney or advocate at any time or to serve as an expert witness in any subsequent dispute. (Tr. vol. 7, pp. 1401:24-1402:1)

77. As evidenced during the hearing, DPS' school evaluators were not subject to Contract Provision 3.

78. In a contested case hearing, a DPS' school evaluators did not have to qualified as expert witnesses because State and federal require the hearing officer to give deference to the school's evaluators and their decisions. Such deference is not given to independent evaluators.

79. NCDPI was not aware of the ramifications of its findings regarding the Limited Relationship Provision. Ms. [redacted] testified that she was not aware that "an independent expert witness in the person is directly correlated to parents not being able to prevail in due process." (Tr. vol. 7, pp.1392:19-1393:8)

80. Based on the North Carolina Rules of Evidence, only an expert witness can give expert opinion testimony in a contested case proceeding. In this case, because of the Limited Relationship Provisions, the independent evaluators were only fact witnesses who could not give expert witness opinions about the appropriateness of DPS' Referral and Eligibility Determinations.

81. Petitioners did have an expert witness, Dr. [redacted] but his expert opinion was given little weight, in part, because he had not observed [redacted] in the school setting. Based on DPS' policy, private evaluators must sign the IEE Contract with the Limited Relationship Provision for in-school observations.

82. A parent may prevail on procedural violations without an expert witness, but expert witness testimony is required to prove most substantive violations of the IDEA. Procedural violations, alone, are insufficient to prove a denial of FAPE.

83. As evidenced in this case, the opinions of the independent evaluators as expert witnesses for the Petitioners may have tipped the scale in their favor.

B. NCDPI's Findings Regarding DPS' Practices

1. DPS' Practice of Not Giving Parents Copy of the IEE Contract (Practice 1) Was Found Noncompliant

84. DPI found only one of the four DPS' Practices noncompliant. Only Practices 1 and 4 are relevant to this matter. (Stip. 77 – Practices 1-4)

85. DPS' Practice 1 was that DPS did not give parents a copy of the contract, unless requested.

86. According to NCDPI, Practice 1 was noncompliant because the parent could be unaware of the provisions and limitations of the IEE Contract. DPI found that "[s]ince the contract and scope of professional services is not provided to the parent; the parent is not informed of all agency criteria" (Stip. 78)

87. The Undersigned has also found this noncompliant in Section 3 because the IDEA mandates that, when the IEE is approved, the LEA must give all agency criteria to the parent along with a list of potential examiners. The parent may not even know the existence of the IEE Contract. The parent does not have to ask the LEA to give them a copy of the agency criteria.

88. In this case, [redacted] did not know about the IEE Contract until her first speech/language evaluator refused to conduct the IEE because of the contract terms. Only after repeated requests did DPS finally give [redacted] a copy of two of the IEE Contracts.

2. DPS' Practice of Requesting Independent Evaluators to Change their Final Reports (Practice 4) Was Unsubstantiated

89. NCDPI could not substantiate Practice 4 that "DPS had requested independent evaluators to change the language in their reports, specifically, requesting evaluators to change "Recommendations" section to be titled "Considerations and Suggestions." (Stip. 78) NCDPI's conclusion was reasonable at the time since no evidence was provided to NCDPI about this practice other than the Complainant's accusations and DPS' denials.

90. In its Responses, DPS stated that they "do not exercise editorial control over independent evaluator's reports." (SBE Ex. 8, pp. 8-9; SBE Ex. 9, p. 154)

91. DPS' Responses further stated that any changes to an evaluator's report "have been made at the evaluator's discretion, not due to suggestions or requirements by the DPS." (SBE Ex. 8, p. 9; SBE Ex. 9, p. 154) (emphasis added) This was not true.

92. At the hearing, Dr. [redacted] admitted that she discussed the evaluations with all the independent evaluations and suggested to two evaluators, Dr. [redacted] and Ms. [redacted] that they should change "Recommendations" to "Suggestions" and reorder some of the contents of their reports.

93. The Undersigned has already found that Dr. [redacted] "suggestions" were inappropriate and violated the independence of the evaluators.

C. Pending Corrective Action Plan and Intervening Due Process Petition on the Same Subject Matter as the State Complaint

94. NCDPI required DPS to revise the IEE Contract. (Stip. 79) A copy of the proposed revision was attached to DPS' documents in its Motion for Summary Judgment. The status of the revised contract is unclear. NCDPI indicated that, pending the outcome of this hearing, the revised contract has not yet been approved.

95. Notably in its Corrective Action directive (Stip. 79), NCDPI did not order the DPS to contact the independent examiners who had already signed the problematic contract and attempt to resolve the issues in the contract that NCDPI found to be noncompliant; therefore, any contracts already signed remained in place, including the contracts signed for [redacted]s IEEs.

96. Dr. [redacted] initially testified that she could not recall if, the DPS issued revised contracts to the three (3) evaluators in this case after the NCDPI found portions of the contract noncompliant. (Tr. vol. 7, p. 1333:1-3) Later, she testified the DPS had not issued new contracts to these evaluators. (Tr. vol. 7 p. 1333:14-16)

97. To the extent that any of the provisions in the revised IEE Contract, previously submitted by DPS or any subsequent revisions, are inconsistent with the decision of this Tribunal, those provisions are inappropriate and violate federal and State law.

98. NCDPI issued the Complaint Investigation Final Report ("Letter of Finding") on June 18, 2018 (Stip. 77) but corrective action was still pending when this due process case was filed.

99. Upon issuance, NCDPI did not give Complainants a copy of its Letter of Findings with the Corrective Action, nor is it required by the *NC Policies* or the *Formal State Complaint Procedures*. (SBE Supp. Evid. Ref. pp. 1-2) Later on June 18, 2018, upon request from the Complainants, a copy of the Letter of Findings was given to the Complainants. (SBE Ex. 10, p. 1)

100. DPS also did not give Complainants a copy of the Letter of Findings with the Corrective Action and was not required to by the *NC Policies* or the *Formal State Complaint Procedures*. (DPS Supp. Memo. p. 1)

101. Because of the "intensity of the complaint," every dispute resolution consultant reviewed Ms. [redacted] findings and "weighed in on it for content." (Tr. vol. 8, p. 1428:22-25) Then the Letter of Findings was reviewed by Ms. [redacted] Department Head; William Hussey, EC Director; and Dr. Pitre-Martin. (Tr. vol. 8, p. 1428:15-21)

102. The Complainants did not appeal NCDPI's Findings of Fact and Corrective Action Plan as currently there are no appeal procedures in North Carolina for State complaints.

103. Corrective action had not been completed in this complaint because, even though the Petitioners were not the same complainants, the same subject matter had been contested in their due process case.

104. According to the Department Head Ms. [redacted] because the issues were the same DPI was "required to set [the complaint] aside." (Tr. vol.7 p. 1371-1372:18)

105. Ms. [redacted] affirmed that this contested case was the only reason that the State Complaint was "still open". (Tr. vol. 7, p. 1373:13-18)

106. Otherwise, because the Petitioners were not the same Complainants in the State Complaint No. 17-090, it would not have been affected. (SBE Supp. Evid. Ref. p. 6)

107. Had the State Board not been named as a Party in this contested case, the State Board would not have known that the Petitioners in their due process Petition had alleged the same subject matter as the subject matter raised by the Complainants in the State Complaint No. 17-090. (SBE Supp. Evid. Ref., p. 6)

108. It is not clear how the State Board would have been made aware that the Petition contained the same subject matter as a pending State Compliant even if the Parties had been the same as there appears to be no mechanism for notification in these situations.

109. Even though the subject matter is the same in the Petition and State Complaint was "set aside," it is also not clear if the State Board will be bound by this Tribunal's decision because the Petitioners and Complainants are different. (DPS Supp. Memo. p. 2; SBE Supp. Evid. Ref. p. 6)

110. The State Board advised that it will review the outcome of the due process case and either close the complaint or proceed with the investigation and issue another letter of findings. (SBE Supp. Evid. Ref. p. 6)

111. Also, according to the State Board, if DPS fails to comply with this Tribunal's decision and Petitioners' file a State complaint, the State Board, through the EC Division of DPI, would issue corrective action directing DPS to comply with this Tribunal's decision. (SBE Supp. Evid. Ref. p. 7)

112. Moreover, if DPS fails to implement the corrective action, SBE, through EC Division of DPI, could issue sanctions. (SBE Supp. Evid. Re. p. 7)

113. According to Ms. [redacted] NCDPI is still in the process of closing the complaint. At the time of her testimony, (October 31, 2018) DPS' corrective action has not been approved pending the outcome of this due process case. (Tr. vol. 8, pp. 1441:23-1442:5)

114. The Petitioners inclusion of the State Board in the Petition served two purposes; first, it put the State Board on notice that the Petition contained the same subject matter as the pending State Complaint; and, second, it stopped completion of the Corrective Action Plan so that NCDPI could have additional information about the IEE Contract Provisions and DPS' Practices. As such, the due process case acted as a *de facto* preliminary injunction.

CONCLUSIONS OF LAW

GENERAL OVERVIEW

A. Jurisdictional, Party, and Legal Stipulations

1. The Petitioners, [redacted] by and through her parent, [redacted] Respondent Durham Public Schools Board of Education, and Respondent North Carolina State Board of Education, are properly before this Tribunal, and this Tribunal has personal jurisdiction (Stip. 1) and subject jurisdiction over them.

2. 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, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). (Stip. 2)

3. The Office of Administrative Hearings has jurisdiction over claims relating to the identification, evaluation, educational placement, or provision of a free appropriate public education ("FAPE") 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. Part 300 *et seq.*; 20 U.S.C. §1415 and N.C. Gen. Stat. § 115C-109.6(a) control the issues to be reviewed. (Stip. 3)

4. The IDEA is the federal statute governing the education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Part 300 *et seq.* (Stip. 4)

5. The controlling State law for students with disabilities is Chapter 115C, Article 9 of the North Carolina General Statutes. (Stip. 7)

6. [redacted] and her mother were residents of Durham County, North Carolina during the period relevant to this controversy. [redacted] was a child with "suspected" disabilities for the purposes of 20 U.S.C. § 1400 *et seq.* and N.C. Gen. Stat. § 115C-106 *et seq.*

7. [redacted] the parent of [redacted] was entitled to the procedural safeguards and the right to meaningful participation in the IEP process while [redacted] was being evaluated for eligibility for specially designed instruction under the IDEA.

8. [redacted] as a qualified handicapped person pursuant to the Section 504 of the Rehabilitation Act of 1973, required reasonable accommodations to participate in elementary and secondary education. 29 U.S.C. § 794(a); 34 C.F.R. § 104.3(l). [redacted] has a physical or mental impairment which substantially limits one or more major life activities. 34 C.F.R. § 104.3(k).

9. Durham Public Schools Board of Education ("DPS") is a local education agency ("LEA") receiving funds pursuant to the IDEA (Stip. 5) and is the LEA responsible for providing educational services in Durham County, North Carolina.

10. Durham Public Schools is subject to the provisions of applicable federal and State laws and regulations, specifically 20 U.S.C. § 1400 *et seq.*; 34 C.F.R. § 300 *et seq.*; and N.C. Gen. Stat. 115C-106 *et seq.* DPS must comply with State policies and procedures established by the SEA. 20 U.S.C. § 1413(a)(1). These State policies are entitled the *Policies Governing Services for Children with Disabilities* ("*NC Policies*"). These acts, regulations and policies require the DPS to provide FAPE for those children in need of special education residing within its jurisdiction.

11. Durham Public Schools is also a local educational agency receiving federal funds and responsible for providing a FAPE through reasonable accommodations for all qualified handicapped students under Section 504 of the Rehabilitation Act of 1973 and its supporting regulations. 29 U.S.C. § 794(a).

12. Respondent North Carolina State Board of Education ("State Board" or "SBE") is a State educational agency ("SEA") receiving monies pursuant to the IDEA. (Stip. 6) The SEA is "primarily responsible for the State supervision of public elementary schools and secondary schools." 34 C.F.R. § 300.41; *see also,* 20 U.S.C. § 1412(a) (11) (describing the SEA's responsibility for general supervision).

13. This Tribunal has subject matter jurisdiction over the subject matter raised in a pending State complaint if it contains the same subject matter that is also raised in a contested case petition. 34 C.F.R. § 300.152; NC 1501-10.2(c).

14. 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); NC 1504-1.12(d); (Stip. 8).

15. The Undersigned does not have jurisdiction over the issues pertaining to DPS which have been previously released by the Petitioners. On February 16, 2018, the Petitioners released:

> any and all legal or administrative proceedings, claims, grievances, lawsuits, liabilities, demands, actions or causes of action of any kind or character whatsoever, including claims for expenses, compensation, attorneys' fees and costs, whether at law or equity, known or unknown, which Parent may now have or which may hereinafter accrue relating to Student's educational services during the 2016-2017 school year, including but not limited to claims arising under Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and the Individuals with Disabilities Education Act with the following exception:
>
> This release does not apply to potential IDEA claims arising on or after May 22, 2017, specifically related to the special education referral and eligibility process for Student beginning with the parent's written request dated May 22, 2017.
>
> (Stip. 9)

B. Professional Judgment and Deference to Educators

16. 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 by Hartman v. Loudoun Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997); *see also Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 207, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690 (1982) (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." *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 328 (4th Cir. 2004).

17. The Undersigned acknowledges that she may not substitute her "own notions of sound educational policy for those of the school authorities" whose decisions are under scrutiny. *Rowley*, 458 U.S. at 206, 102 S. Ct. at 3051, 73 L. Ed. 2d at 690.

18. Where those educational decisions were sound and the educators "offered a cogent and responsive explanation" for their decisions, the Undersigned afforded them deference. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1002, 197 L. Ed. 2d 335 (2017). Not all educational decisions made by DPS' educators and met this criterion.

C. Applicable Statutes

A. The Individuals with Disabilities Education Act ("IDEA")

a. Primary Purpose of IDEA

19. The primary purpose of the IDEA is:

> to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and
>
> To ensure that the rights of children with disabilities and parents of such children are protected.
>
> IDEA, 20 U.S.C.§ 1400(d)(A)&(B).

20. In their policies, procedures, and contractual relationships with independent examiners, both DPS and the State Board must comply with the mandated purpose of IDEA, that is, to protect the procedural and substantive rights of children with disabilities and their parents.

21. "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 999, 197 L. Ed. 2d at 335.

b. IDEA Does Not Have a Maximizing Standard

15. [redacted] indicated that she wanted an IEP in order for [redacted] to "maximize her potential." (Stip. Ex. 11, pp. 52-53) The purpose of an IEP is not to maximize a student's potential.

16. The IDEA ensures that disabled students receive a free and appropriate public education, not that they reach their "full potential." The IDEA does not have a maximizing standard. Prior to 2006, North Carolina special education law had a maximizing standard that each disabled child "has an opportunity to his/her full potential." N.C. Gen. Stat. § 115C-106 (repealed 2006).

17. The Undersigned acknowledges that based on [redacted]s above average (120) to superior (141) IQ scores, that she has a lot of educational potential. However, this Tribunal does not have authority to order DPS, under either State or federal law, to provide [redacted] with an education to maximize her potential.

c. IDEA's Procedural Safeguards for Disabled Students and Their Parents

19. As recipients of federal assistance, both the State Board and DPS must establish and maintain procedures to ensure that children with disabilities and their parents are guaranteed the procedural safeguards with respect to the provision of a free and appropriate public education by such agencies. 20 U.S.C. § 1415(a).

20. The State Board is responsible for ensuring that DPS "meet[s] the educational standards of the State Educational agency" and for "establish[ing] and maintain[ing] procedures . . . to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education." 20 U.S.C. §§ 1412(11)(A)(ii)(II); 1415(a).

21. The State Board must monitor all LEAs to determine their compliance with Article 9 and the IDEA. N.C.G.S. § 115C-107.4(a).

22. DPS must have policies, procedures, and programs that are consistent with the State policies and procedures. 20 U.S.C. § 1415(a)(1). The State Board must ensure that DPS establishes, maintains, and implements procedural safeguards that protect the rights of the disabled child and his/her parents. NC 1504-1.1.

23. During a due process hearing, Petitioners have the right to present evidence and confront cross-examine and compel the attendance of witnesses. 20 U.S.C.§ 1415(h).

24. Parental procedural safeguards include IEEs §1415 (b), impartial due process hearings §1415(f) & (k), and appeals §1415(g).

25. Due process hearings have their own procedural safeguards, such as, the right to be accompanied and advised by counsel and by individuals with specialized knowledge or training with regard to the problems of the children with disabilities. 20 U.S.C. § 1415 (h)(i).

26. The State complaint process is an alternative to due process more so for procedural violations than substantive violations. NC 1501-10.1. Complainants in a State complaint do not have the right to compel or cross-examine witnesses. However, complainants can submit evidence if they desire, but are not required.

d. Procedural Violations of the IDEA

27. The Supreme Court held in *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley* that "a court's inquiry" first requires the determination of whether the "[LEA] complied with the procedures set forth in the [IDEA], [a]nd second," whether the "[IEP] developed through the [IDEA's] procedures [is] reasonably calculated to enable the child to receive educational benefits[.]" *Rowley*, 458 U.S. 207, 102 S. Ct. at 3051, 73 L. Ed. 2d at 690.

28. 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)).

29. 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); N.C.G.S. § 115C-109.6(a).

30. A child is denied a FAPE when the IEP Team commits procedural violations that "(I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii). The procedural violations must "result in some loss of educational benefit or opportunity" and "cannot simply be 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.").

31. Interference with parental participation rights is clearly a procedural violation. 20 U.S.C. § 1415(f)(3)(E)(ii); N.C.G.S. § 115C-109.8.

32. 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)).

33. 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), "the enforcement of the IEP," *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1198 (9th Cir. 2017), *cert. denied sub nom., Antelope Valley Union High Sch. Dist. v. M.C. ex rel. M.N.*, 138 S. Ct. 556, 199 L. Ed. 2d 437 (2017), or causes the child to lose any educational opportunity, *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990).

34. 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, 102 S. Ct. at 3034, 73 L. Ed. 2d 690 ("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."); *see also* 34 C.F.R. § 300.322(a); N.C.G.S. § 115C-109.3(a).

35. The Fourth Circuit has not opined about whether cumulative procedural violations can deny FAPE, but the Second Circuit has held that "[m]ultiple procedural violations [] may cumulatively result in the denial of FAPE even if the violations considered individually do not." *L.O. ex rel. K.T. v. N.Y.C. Dep't of Educ.*, 822 F.3d 95, 109 (2nd Cir. 2016) (*quoting R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 190 (2012)) (internal quotation marks omitted).

e. Substantive Violations Required for a Denial of FAPE

36. In an Order for Supplemental Legal Memorandum, Petitioners and DPS were asked to brief the question of "If [redacted] was not denied a free and appropriate public education under the IDEA, but [redacted] was denied meaningful participation in the IEP and/or IEE Process, would [redacted] still be entitled to a remedy?"

37. DPS' position was that [redacted] would not be entitled to a remedy based on Fourth Circuit precedent. (DPS Second Supp. Legal Memo. filed March 15, 2019) According to DPS, the Court in *DiBuo* addressed this very question "[w]hether a procedural violation of the IDEA can support a finding that a school district failed to provide a disabled child with a FAPE when the procedural violation did not actually interfere with the provision of a FAPE to that child. The answer to this question, under well-established circuit precedent, is no." *DiBuo ex rel. DiBuo v. Bd. of Educ. of Worcester Cty.*, 309 F.3d 184, 190 (4th Cir. 2002) (emphasis in original). *See also Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir.1990) (no relief granted where the procedural violations complained of had no impact on whether plaintiff-student's IEP adequately assured him of a FAPE). The Court in *DiBuo* went on to describe that:

> We have no doubt that a procedural violation of the IDEA (or one of its implementing regulations) that causes interference with the parents' ability to participate in the

development of their child's IEP will often actually interfere with the provision of a FAPE to that child . . . . But *often* is not the same as *always*.

DiBuo, 309 F.3d at 191 (emphasis in original).

38. Specifically, the Court in *DiBuo* instructed the district court on remand, if the district court accepted the finding that the student was not substantively entitled to the service at the heart of the parental participation dispute—the IEP team had not discussed ESY eligibility in the IEP meeting—then "the district court must enter judgment in favor of the School District." Id. at 192. Accordingly, DPS concluded that a school district may fulfill its statutory obligations in spite of technical violations of the IDEA.

39. On the other hand, Petitioners countered that DPS' multiple procedural violations were not harmless error and, even if [redacted] was not denied a FAPE, these procedural violations caused substantive harm to her parent, [redacted] (Pet. Second Supp. Legal Memo. filed March 16, 2019) Petitioners cite the Ninth Circuit case, *M.C. v. Antelope Valley Union High School District, 858 F.3d 1189* (9th Cir. 2017), as support of their position that "[redacted] was forced to incur unnecessary legal fees" due to DPS' procedural violations. The *M.C.* case is distinguishable to this case because in M.C. the parent was forced to incur legal fees because they were not aware of the actual status of services being provided to their child. Only after the school district's witnesses testified on the first day of the due process hearing was the parent made aware that the services in the IEP had been changed. *M.C.*, F.3d at 1195-96. Yet, *M.C.* did opine that "[p]rocedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA." *M.C.*, F.3d at 1195 (*citing Amanda J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001)).

40. The Undersigned concludes that DPS' procedural violations did "undermine the very essence of the IDEA." Through the testimony of its EC Director, DPS admitted that the purpose of the Limited Relationship Provision was to control parents' litigiousness in special education matters.

41. However, while this decision was being drafted, the Fourth Circuit Court of Appeals answered the Undersigned's question previously posed to the Parties.

42. According to the Fourth Circuit to establish a substantive violation of the IDEA, an administrative law judge must answer affirmatively these three questions:

(1) whether the plaintiffs alleged a procedural violation;
(2) whether the violation significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child; and,
(3) whether the child did not receive a FAPE as a result.

R.F. v. Cecil County Public Schools, ___F.3d___No. 18-1780, 2019 WL 1319830, *8 (4th Cir. 2019)(*citing* § 1415(f)(3)(E)(ii)(II)).

50. "Unless an ALJ determines that a procedural violation denied the child a FAPE, the [ALJ] may only order compliance with the IDEA's procedural requirements and cannot grant other forms of relief." *Id.*

51. Even if the procedural violation does not cause a denial of FAPE to the child, the IDEA specifically states that "[n]othing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with the procedural requirements under this section." 20 U.S.C. § 1415(f)(3)(F); *see also,* N.C.G.S. § 115C-109.8(b). Therefore, contrary to DPS' assertion, the administrative law judge does have authority to order DPS to comply with the IDEA but cannot grant other forms of relief.

2. Section 504 of the Rehabilitation Act of 1973 ("Section 504")

54. It was undisputed that [redacted] qualified for a Section 504/ADAAA Accommodation Plan ("Section 504 Plan") and DPS provided accommodations through her Section 504 Plan. (Stip. Ex. 21)

55. The Americans with Disabilities Act ("ADA") was amended in 2008 by the ADA Amendment Act ("ADAAA") which lowered the 504 eligibility threshold. The ADAAA rejected the notion that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled." Moreover, a health condition need not prevent or severely or significantly restrict a major life activity in order to be "substantially limiting". 42 USC § 12101 (b)(4); 28 C.F.R. § 35.108(d)(1)(v).

56. A person with a high level of academic success, like [redacted] may nevertheless be substantially limited in one or more major life activities including reading, writing, speaking or learning because of the additional time or efforts he or she must spend to read, write, speak or learn compared to most people in the general population. 34 C.F.R.§ 35.108(d)(3)(iii).

57. Following the passage of the ADAAA, districts could no longer consider the ameliorative effects of mitigating measures, such as medication, when determining whether an impairment substantially limits a major life activity. 42 U.S.C. § 12102 (4)(E)(i); 28 C.F.R. § 35.108(d)(1)(viii); *see also, Dear Colleague Letter*, 58 IDELR 79 (OCR 2012); *and, Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Educ. of Children with Disabilities*, 67 IDELR 189 (OCR 2015).

58. The ADAAA provides that an impairment that is *episodic* or in remission is still a disability if it would substantially limit a major life activity when active. 42 U.S.C. § 12102 (4)(D); 28 C.F.R. § 35.108(d)(1)(iv)(emphasis added).

59. A student may qualify for a Section 504 Plan but not be eligible for an IEP. If a student was found eligible for an IEP, the IEP can also be used to fulfill the accommodation requirements of Section 504. The Department's Section 504 regulations provide that implementation of an IEP developed in accordance with IDEA is one means of providing Section 504 FAPE services. 34 C.F.R. § 104.33(b)(2).

60. This Tribunal does not have jurisdiction over violations of Section 504. N.C.G.S. § 150B-1(e)(5). However, the implementation of the Section 504 Plan was relevant in this case because it provided [redacted] with accommodations sufficient to provide her a free and appropriate public education without the necessity of an IEP.

61. Petitioners claim that the Section 504 Plan was insufficient to address [redacted]s anxiety and that DPS should have evaluated her for other suspected disabling conditions under the IDEA.

62. This Tribunal does have jurisdiction over violations of the IDEA, its implementing regulations, State law, and the *NC Policies*.

63. Because [redacted] was being evaluated to determine if she was eligible for an Individualized Education Program under the Individuals with Disabilities Education Act as amended, she and her mother, [redacted] was subject to the procedural safeguards afforded by the IDEA.

3. "Child Find" Obligation Under Section 504 and IDEA

64. State and federal laws require local public school districts to identify, classify and provide a free and appropriate public education ("FAPE") to children with disabilities. 20 U.S.C. § 1412. School districts have an affirmative and continuing obligation to identify and evaluate students reasonably suspected of a disability under the IDEA and Section 504 of the Rehabilitation Act.

65. This duty is known as the district's "Child Find" obligation. *See D.K. v. Abington School Dist.*, 696 F.3d 233, 249 (3rd Cir. 2012); 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111.

66. A school's failure to comply with Child Find may constitute a procedural violation of the IDEA. *D.A. ex rel. Latasha A. v. Houston Indep. School Dist.*, 629 F. 3d 450, 453 (5th Cir. 2010).

SECTION 1: THE SUSPECTED DISABILITY AND EVALUATION CLAIMS

ISSUE I Whether Durham Public Schools evaluated [redacted] in all suspected areas of disability, in particular Autism and Specific Learning Disability (the "Suspected Disability Claim") and whether the evaluation process was appropriate (the "Evaluation Claim")?

67. The issue of whether DPS properly evaluated [redacted] in all suspected areas of disability in particular Autism and Specific Learning Disabled is two-part.

68. Petitioners assert that DPS failed to assess [redacted] for all areas of suspected disability which deprived the IEP Team of critical evaluative information about her unique needs as an autistic child. Plus, Petitioners contend that the evaluations were defective.

A. IDEA's Three-Part Definition of a "Child with a Disability"

69. The IDEA has a three- part definition of a "child with a disability" which is: (1) the child has a disabling condition; (2) this disability *adversely affects* the child educational performance in the general curriculum; and, (3) the child *needs special education designed instruction* to access the general curriculum. 34 C.F.R. § 300.304 (emphasis added); NC 1503-2.5.

70. As such, it is not enough to prove that [redacted] has a disabling condition, Petitioners must prove, by a preponderance of the evidence, the other two prongs for her eligibility for an IEP which are: an adverse educational affect and the need for specially designed instruction. Both academic achievement and functional performance may affect a child's educational performance in age-level and State-approved, grade-level standards. 20 U.S.C. § 1414(a)(1)(C)(i)(II)& (b)((2)(A).

71. In addition, the LEA must assess the child in all "suspected disabilities" and use valid assessments which are "administered in accordance with any instructions provided by the producer of such assessments." 20 U.S.C. § 1414(b)(3)((B)&(C); 34 C.F.R.§ 300.304(c)(1)(iii); *see* NC 1503-2.1 *through* 1503-3.5.

A. [redacted]s "Suspected" Areas of Disability

72. Even if a child is eligible for a Section 504 Plan, for purposes of IDEA eligibility, an LEA is required to evaluate the educational needs of a child with a disability including *functional*, developmental, and academic information. 20 U.S.C. § 1414(a)(1)(C)(i)(II) & (b)((2)(A).

73. However, the LEA must know what areas to evaluate. According to the IDEA, the LEA must assess the child in all "suspected disabilities" and use valid assessments which are "administered in accordance with any instructions provided by the producer of such assessments." 20 U.S.C. § 1414(b)(3)((B)&(C); 34 C.F.R. § 300.304(c)(1)(iii); NC 1503-2.5(c)(V).

74. The LEA's Child Find obligation is always triggered when a parent requests an evaluation to determine IDEA eligibility.

75. The IEP Team making the evaluation and eligibility decisions at the June 6 and August 15 IEP meetings can only be held to the information reasonably available to them at the time. "It would simply not be fair" to judge the team's decisions "based on later assessments of a student's needs at a later point in time." *Schaffer ex rel. Schaffer v. Weast*, 554 F.3d 470, 477 (4th Cir. 2009) (citations and quotation marks omitted); *see also Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999); *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 762 (3rd Cir. 1995).

76. At issue is what were [redacted]s "suspected" disabilities at the time of the Referral and Eligibility Meetings in June/August 2017, not what was suspected after the completion of the independent evaluations in Spring 2018.

77. The Undersigned cannot view this issue in hindsight based on the IEE information. Rather, the Undersigned must consider what the IEP Team knew, should have known, or should have "suspected" at the time of the Referral and Eligibility meetings.

a. *Parental Referral for Eligibility Evaluation*

78. An LEA "is deemed to have knowledge that [a] child may suffer from a disability where 'the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency . . . that the child is in need of special education and related services.'" *Sch. Bd. of City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 942 (*quoting* 20 USC § 1415(k)(5)(B)).

b. *Child Displays Symptoms of a Disability*

79. The Child Find obligation is also triggered when the school district is aware of the child's disability-related issues. *See, e.g.*, *Horne ex rel. R.P. v. Potomac Preparatory Pub. Charter Sch.*, 209 F. Supp. 3d 146, 158 (D.D.C. 2016).

80. A disability is also "suspected" when the district has notice that the child has displayed symptoms of that disability. *Timothy O. v. Paso Robles Unified School Dist.*, 822 F.3d 1105 (9th Cir. 2016).

c. *Informed Suspicions of Parent*

81. The "informed suspicions of parents, who may have consulted outside experts" may trigger the Child Find requirement to assess, even if the school district disagrees with the parent's suspicions. *Id.* at 1120 (*quoting Pasatiempo by Pasatiempo v. Aizawa*, 103 F.3d 796, 802 (9th Cir. 1996)).

d. *Informed Suspicions of Outside Experts*

82. The "informed suspicions of outside experts" may trigger Child Find. *Id.*

83. Parents and teacher observations and/or complaints that [redacted] displayed symptoms of autism in or out of the classroom would be sufficient to trigger Child Find. *Id.* at 1120-1121.

B. "Clear Signs" that Specific Learning Disability Was a Suspected Disability

84. To prove a procedural violation of Child Find, when there is no written parent concern, the parents "must show that school officials overlooked *clear signs* of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate." *Id.* at 942–43 (emphasis added) (*quoting Bd. of Educ. of Fayette Cnty., Ky. v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007)).

85. Based on the educational records alone, it is uncontested that at the time of the Referral Meeting [redacted] had expressed her concerns about [redacted]s spelling. The Referral Team documented this in writing on the Referral Form. (Stip. Ex. 2, p. 3)

86. DPS should have "suspected" [redacted] had a spelling deficit which might have entitled her to eligibility under the category of Specific Learning Disability.

87. Based on the Findings of Fact, stipulations, sworn testimony, and other evidence in the record, the Undersigned concludes that there were "clear signs" that [redacted] was suspected of a Specific Learning Disability ("SLD") at the time of the Referral Meeting and that [redacted] as well as school staff, had expressed concerns about her spelling.

88. However, the Undersigned concludes that, although DPS did not initially consider evaluating [redacted] under the suspected area of SLD despite the parent's documented concerns, DPS rectified this mistake at the Eligibility Meeting. Therefore, even this was a procedural violation at the Referral Meeting, [redacted] was not harmed because the IEP Team cured this procedural violation at the Eligibility Meeting.

C. No "Clear Signs" that Autism Was a Suspected Disability

89. On the other hand, [redacted] had not expressed in writing any concern that [redacted] might be autistic. Neither [redacted] nor any of [redacted]s treating providers including her child psychiatrist, indicated to DPS that they suspected autism.

90. According to both expert witnesses, a review of [redacted]s educational records indicated that the inconsistencies in [redacted]s social skills and behavior were such that [redacted]s existing diagnoses, even if fragmented aspects of autism, could reasonably be categorized under OHI and/or SED. Here, the information before the IEP Team in June 2017 did not show "clear signs" of potential eligibility under the category of autism.

91. While there were various diagnoses that made it possible that autism could be a concern, the holistic picture of [redacted] at that time argued strongly against such suspicion. Specifically, [redacted] was well known to be empathetic, had a record of making and having friends, and did not have obvious communication impairments. [redacted] did not exhibit obvious limited interests or stereotypic. [redacted] did wear stereotypic clothing but [redacted] testified that this was due to her sensory disorder. At most, as DPS' expert witness, a child psychiatrist, Dr. [redacted] testified the signs of autism were "subtle."

92. The testimony of Petitioners' witnesses, other than Dr. [redacted] supported DPS' position. [redacted] [redacted] testified that [redacted]s presentation of a pragmatic social-communication disorder was nuanced and would be "invisible" to peers and professional staff. Dr. [redacted] testified that she was not surprised that [redacted]s private providers failed to diagnose [redacted] with autism because high-functioning individuals like [redacted] are difficult to diagnose. (Tr vol. 3, p. 492:4-11)

93. The Undersigned also places great weight on the fact that multiple private professionals, including a pediatrician (Dr. [redacted] psychologist (Dr. [redacted] and a child psychiatrist (Dr. [redacted] working with [redacted] had apparently never raised concerns about an autism diagnosis.

94. [redacted]s behaviors were easily explained by her existing diagnoses of Anxiety, ADHD, and Sensory Processing Disorder. While these three diagnoses can be comorbid in students with autism, Dr. [redacted] testified that she treats patients who have those three diagnoses but are not autistic. The mere presence of these three diagnoses does not mean that there were "clear signs" of autism.

95. The Undersigned concludes that the Petitioners failed to prove, by a preponderance of the evidence, that there were "clear signs" that DPS should have suspected that [redacted] was autistic at the time of the Referral or Eligibility Meeting. DPS did not violate [redacted]s right to a free and appropriate public education by failing to suspect autism.

96. Moreover, as explained below, even if autism should have been suspected and [redacted] was, in fact, autistic, Petitioners failed to meet the other two prongs required for eligibility.

B. DPS Did Not Appropriately Evaluate [redacted] for Eligibility

1. State Agency Criteria for Initial Evaluations

97. Once a LEA suspects or is requested to evaluate a child for a disability, the evaluation must use a variety of standard or reliable methods. 20 U.S.C.§ 1414(b)(3)(A).

98. In conducting an initial evaluation, DPS must comply with federal and State law along with the *North Carolina Policies* (the "SEA agency criteria"). In accordance with State and federal law, the North Carolina Department of Public Instruction ("DPI") issued *Policies Governing Children with Disabilities*. *See* SBE Ex. 3, *Policies Governing Children with Disabilities* ("*NC Policies*")[16]

99. An independent evaluator who conducts an IEE at public expense must also comply with the SEA agency criteria in the *NC Policies*.

100. For an initial evaluation of each eligibility category, there are specific requirements in the *NC Policies*. Pursuant to the authority in IDEA, the State Board has adopted mandatory policies for initial evaluations conducted by LEAs.

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[16] The *NC Policies* were last amended 2018. The prior edition, amended 2014, included the same SBE requirements for public agency criteria for initial evaluations as contained in this Supplemental Proposed Decision. The State Board noted that SBE Ex. 3 contained the public agency criteria which was in effect for both the 2016-2017 and 2017-2018 school years. *See North Carolina Policies Governing Children with Disabilities*, amended 2014, https://ec.ncpublicschools.gov/policies/nc-policies-governing-services-for-children-with-disabilities/policieschildren-disabilities.pdf.

101. The LEA must comply with the SEA agency criteria. Hereinafter, the terms SEA agency criteria and LEA agency criteria are synonymous.

a. General SEA Criteria for Evaluations

102. When conducting every evaluation, the State Board requires LEAs to comply with *NC Policies*. NC 1503-2.5 (a)-(d); *see* SBE Ex. 3, *NC Policies*, pp. 65-67.

103. The State Board requires LEAs that suspect a child may be a child with a disability to provide in writing the reason for referral, addressing the specific presenting concerns and the child's current strengths and needs. NC 1503-2.1; *see* SBE Ex. 3, *NC Policies*, p. 64. DPS failed to address [redacted]s specific concerns about [redacted]s spelling and social issues during the evaluation process.

104. With limited exceptions, the State Board requires LEAs to conduct evaluations, determine eligibility, and for an eligible child, develop an Individualized Education Program ("IEP") and complete placement within 90 days of receipt of a written referral; and the IEP team must determine if the child is a child with a disability under NC 1500-2.4, and the educational needs of the child. NC 1503-2.2(c), (d) & (e).

105. The State Board requires LEAs to provide notice to the parents of a child with a disability, in accordance with *NC Policies*, section 1504-1.4, that describes any area in which the LEA proposes to conduct an evaluation. NC 1503-2.5(a). DPS as an LEA in North Carolina is subject to every requirement of the *NC Policies*.

106. LEAs must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining: (i) whether the child is a child with a disability under NC 1500-2.4; and (ii) the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities). NC 1503-2.5(b)(1).

107. DPS must ensure that assessments and other evaluation materials used to assess a child are administered in accordance with any instructions provided by the producer of the assessments. NC 1503-2.5(c)(1)(v). In conducting the psychological evaluation, DPS' lead psychologist admitted that DPS' psychologist failed to administer the BASC-3 in accordance with the producer's instructions.

108. DPS must ensure that assessments and other evaluation materials used to assess a child are used for the purposes for which the assessments or measures are valid and reliable. NC 1503-2.5(c)(1)(iii). The BASC-3 rating scales obtained by DPS were invalid and not reliable.

109. LEAs must ensure that assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired

sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure). NC 1503-2.5(c)(3). DPS failed to appropriately evaluate [redacted]s sensory issues and failed to adequately evaluate [redacted]s spelling and social deficits.

110. LEAs must ensure that assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided. NC 1503-2.5(c)(7). DPS did not ensure that relevant information was available to the IEP Team with respect to [redacted]s adaptive behavior and functional needs.

111. LEAs must conduct a full and individualized evaluation of a child's needs before any action is taken with respect to determining eligibility for special education. NC 1503-2.5(d). DPS failed to conduct an appropriate psychological evaluation of [redacted] before decisions were made at the eligibility meeting.

112. The State Board requires LEAs to conduct a full and individual initial evaluation (including progress monitoring data) in accordance with *NC Policies*, sections 1503-2.4 through 1503-2.7, before the initial provision of special education and related services to a child with a disability. NC 1503-2.2(A); *see* SBE Ex. 3, *NC Policies*, p. 65.

b. Required Screenings and Evaluations for the Disability Categories

i. Autism Spectrum Disorder

113. Assuming that DPS should have "suspected" autism as an eligibility category, DPS evaluations for autism would have had to comply with the *NC Policies*. The following are required screenings and evaluations in determining eligibility in the area of Autism Spectrum Disorder:

> (1) Hearing screening;
> (2) Vision screening;
> (3) Observation across settings, to assess academic and functional skills;
> (4) Summary of conference(s) with parents or documentation of attempts to conference with parents;
> (5) Social/developmental history;
> (6) Educational evaluation;
> (7) Adaptive behavior evaluation;
> (8) Psychological evaluation;
> (9) Speech-language evaluation which includes, but is not limited to, measures of language semantics and pragmatics; and
> (10) An assessment using an appropriate behavior rating tool or an alternative assessment instrument that identifies characteristics associated with autism spectrum disorder.
>
> NC 1503-2.5(d)(1)(i); *See* SBE Ex. 3, *NC Policies*, p. 67.

114. DPS' failed to properly conduct the adaptive behavior evaluation because the BASC-3 rating scales were invalid.

ii. Other Health Impairment

115. The following screenings and evaluations are required for in determining eligibility in the area of Other Health Impairment:

> (1) Hearing screening;
> (2) Vision screening;
> (3) Two scientific research-based interventions to address academic and/or behavioral skill deficiencies and documentation of the results of the interventions, including progress monitoring documentation;
> (4) Summary of conference(s) with parents or documents of attempts to conference with parents;
> (5) Observation across settings, to assess academic and functional skills;
> (6) social/developmental history;
> (7) Educational evaluation; and
> (8) Medical evaluation.
>
> NC 1503-2.5(d)(10)(i); *see* SBE Ex. 3, *NC Policies*, p. 72.

116. DPS violated the evaluation procedure for OHI. DPS did not conduct any scientific, researched-based interventions to address [redacted]s behavioral skill deficiencies.

iii. Serious Emotional Disability

117. The following screenings and evaluations are required for determining eligibility in the area of Serious Emotional Disability:

> (1) Hearing screening;
> (2) Vision screening;
> (3) Two scientific research-based interventions to address behavioral/emotional skill deficiency and documentation of the results of the interventions, including progress monitoring documentation;
> (4) Summary of conference(s) with parents or documentation of attempts to conference with parents;
> (5) Communication evaluation;
> (6) Review of existing data;
> (7) Social/developmental history'
> (8) Observation across settings, to assess academic, functional and behavioral skills;
> (9) Educational evaluation;
> (10) Psychological evaluation, to include an intellectual evaluation; and
> (11) Behavioral/emotional evaluation which may include a behavior/emotional skills rating.
>
> NC 1503-2.5(d)(5)(i); *see* SBE Ex. 3, *NC Policies*, p. 69.

118. DPS violated the evaluation procedures for SED because it failed to conduct two scientific research-based interventions and appropriately progress monitor. DPS also failed to conduct an appropriate behavioral/emotional evaluation because the BASC-3 rating scales were invalid.

iv. Specific Learning Disability

118. The State Board allows LEAs to use two methods in determining eligibility in the disability category of Specific Learning Disability:

(1) One method is the use of a discrepancy, which may result in the use of an alternative to the discrepancy analysis,[17] obtained by calculating a discrepancy between achievement (as measured by the educational evaluation) and measured ability (as measured by the intellectual evaluation) of at least 15 points. Subscale, subtest, factor or other scores used to estimate intellectual functioning may not be used to determine a discrepancy.

(2) The other method is the use of a process based on scientific research-based interventions (RtI) and the evaluation data (i.e., progress monitoring data) documenting the child's response to scientific research-based instruction. Based on a preponderance of the data, including the child's achievement level and rate of progress, the IEP Team must determine that the child needs resources beyond what can reasonably be provided in general education.

NC 1503-2.5(d) (11); *see* SBE Ex. 3, *NC Policies*, p. 72.

119. It is uncontested that [redacted] met the criteria for SLD based on her discrepancy between her achievement and her ability. Moreover, her teachers and DPS' lead psychologist admitted that her spelling did not meet grade or age-level standards.

120. Using either method, the SBE requires LEAs to perform the following screenings and evaluations in determining eligibility in the area of Specific Learning Disability:

(1) Hearing screening;
(2) Vision screening (far and near acuity);
(3) Speech/language screening;

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17 When the parent and team of qualified professionals, including at least one person qualified to conduct individual diagnostic examinations, determine that a discrepancy of fewer than 15 points is not an accurate reflection of the student's academic functioning, the team must document other sources of evidence to support an eligibility determination. The sources of evidence may include, but are not limited to, the following: other formal or informal assessment measures; classroom performance; pre- and post-data from required research-based interventions; or a pattern of strengths and weaknesses not reflected in the student's performance on standardized cognitive and/or achievement measures. NC 1503-2.5(d) (11); *see* SBE Ex. 3, *NC Policies*, p. 72.

(4) Two scientific research-based interventions to address academic skill deficiencies and documentation of the results of the interventions, including progress monitoring data;
(5) Summary of conference(s) with parents or documents of attempts to conference with parents;
(6) Review of existing data (for RtI, include documentation of problem-solving process);
(7) social/developmental history;
(8) Observation across settings to assess academic and functional skills;
(9) Educational evaluation, including nationally normed and criterion-referenced assessments, as appropriate when using RtI; and
(10) Psychological evaluation, to include an intellectual evaluation, as appropriate when using RtI.

NC 1503-2.5(d)(11)(i); *see* SBE Ex. 3, *NC Policies*, pp. 72-73.

121. DPS admitted that it failed to conduct two scientific, research-based interventions with progress monitoring. DPS also admitted that it did not take or review any RtL data as it normally would have for the SLD category.

122. Even though not required for the SLD category, DPS also used the invalid BASC-3 rating scales in its eligibility determination

123. To be determined eligible in the disability category of Specific Learning Disability, the criteria in subsections (1), (2), (3) and (4) below must be met:

(1) The child does not achieve adequately for the child's age, intellectual development or to meet State-approved grade-level standards in one or more of the following areas when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards:

a. Listening comprehension;
b. Oral expression;
c. Written expression;
d. Basic reading skills;
e. Reading fluency skills;
f. Reading comprehension;
g. Mathematics calculation; or
h. Mathematics problem solving.

(2) (i) The child does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified above in paragraph (1) when using a process based on the child's response to scientific, research-based intervention **or** (ii) the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group

to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with *NC Policies*, section 1503-2.5(d)(11)(i).

(3) The disability must not be the primary result of:

a. Sensory deficits;
b. Motor deficits;
c. Intellectual disability;
d. Emotional disability;
e. Environmental influences;
f. Cultural factors;
g. Economic influences;
h. Lack of appropriate instruction in reading or math; and/or
i. Limited English proficiency.

(4) The disability must have an adverse effect on educational performance and require specially designed instruction.

NC 1503-2.5(d)(11)(ii); *see* SBE Ex. 3, *NC Policies*, p. 73.

119. Even though [redacted] was still able to meet State approved grade-level standards in all academic areas, the evidence proved that [redacted] did not make sufficient progress to meet age and grade level standards in spelling,

120. The adverse educational effect of [redacted]s learning disability is discussed under Section 2 below.

2. Procedural Violations in the Evaluation Process

121. DPS made a number of procedural violations during its evaluation process for all the eligibility categories.

122. As remedy for these procedural evaluations, the Undersigned could order that DPS redo the evaluations or pay for independent evaluations. DPS has already paid for three independent evaluations.

123. Petitioners have proved by a preponderance of the evidence and through admission of the DPS that there were procedural violations in DPS' evaluation process which denied [redacted] meaningful parental participation at the Eligibility IEP Meeting. However, despite these procedural violations, Petitioners must still prove that [redacted] was eligible for special education and denied a free and appropriate public education.

SECTION 2: THE ELIGIBILITY CLAIM

ISSUE II Whether DPS appropriately determined that [redacted] was not eligible for special education and related services at the August 15, 2017 IEP meeting (the "Eligibility Claim")?

124. The State Board's policies dictate the evaluation and eligibility requirements for all categories of disabling conditions.

A. The Three Pronged Inquiry for Eligibility Under the IDEA

126. Eligibility for special education services under the IDEA is a three pronged inquiry.

Prong 1: [redacted] Must Have a Disabling Condition

127. First, [redacted] must meet one of the fourteen disability categories. Each eligibility category has different requirements for screening and evaluations for eligibility determination. NC 1503-2.5(d). The LEA must conduct a full and individualized evaluation of a child's needs before any action is taken with respect to determining eligibility for special education. NC 1503-2.5(d).

Prong 2: [redacted]s Disabling Condition(s) Must Adversely Affect Her Educational Performance

128. The second prong requires that the disability "adversely affect [the child's] educational performance." 34 C.F.R. § 300.8(c)(1–13).

129. The IDEA does not specifically define "educational performance", however, the Office of Special Education Programs (OSEP) has provided guidance on the term. "In determining whether a child's impairment adversely affects educational performance, the multidisciplinary team must consider non-academic as well as academic areas." *Letter to Pawlisch,*[18] 24 IDELR 959 (OSEP March 6, 1996).

125. OSEP has also clarified that students with high intelligence may still require an IEP:

> [S]tudents who have high cognition, have disabilities and require special education and related services are protected under the IDEA and its implementing regulations. . .. [A] child with Asperger's Syndrome could be considered under the disability category of autism and the individualized evaluation would address the special education and related services needs in the affective areas, social skills, and classroom behavior, as appropriate.
>
> *Letter to Anonymous*, 55 IDELR 172 (OSEP Jan. 13, 2010).

[18] The Undersigned recognizes that the U.S. Department of Education ("OSEP") and Office of Civil Rights ("OCR") letters are merely interpretative guidance and not binding authority. 20 U.S.C. § 1406(e)(1).

Prong 3: [redacted] *Must Require Specially Designed Instruction to Access the General Curriculum*

117. Even if [redacted] had all the disabling conditions in controversy and they all adversely affected her educationally, to meet their burden, Petitioners must still prove that [redacted] required special instruction.

B. The Eligibility Determinations Based on Disability Category

1. Autism Spectrum Disorder

126. In addition to being autistic based on the evaluations under NC 1503-2.5(d)(1), to be determined eligible in the disability category of autism, a child must demonstrate at least three of the four following characteristics:

(1) Impairment in communication;
(2) Impairment in social interaction;
(3) Unusual response to sensory experiences; and
(4) Restricted, repetitive, or stereotypic patterns of behavior, interests, and/or activities.

NC 1503-2.5(d)(1)(ii); *see* SBE Ex. 3, *NC Policies*, p. 67.

127. To be determined eligible in the disability category of autism, the disability must have an adverse effect on educational performance and require specially designed instruction. NC 1503-2.5(d)(1)(iii); *see* SBE Ex. 3, *NC Policies*, p. 67.

128. The Undersigned has already concluded that autism was not a suspected area of disability, but if, upon review of this case, it is found that the IEP Team should have evaluated [redacted] in the autism category, the evaluation would not have complied with *NC Policies* with respect to the invalid BASC-3 scores and DPS' failure to use scientific, research-based interventions.

129. Even despite this procedural violation, Petitioners were only able to prove that, at best, manifestation of [redacted]s autism adversely affected her education "episodically". The accommodations in her Section 504 Plan were sufficient to provide her a FAPE without the need for an IEP.

130. Moreover, Petitioners failed to meet the third prong and presented no evidence that [redacted] required specially designed instruction due to her autism diagnosis.

2. Other Health Impairment

131. In addition to the evaluations required in NC 1503-2.5(d)(10)(i), for the disability category of other health impairment eligibility, a child must have a chronic or acute health problem resulting in one or more of the following:

(1) Limited strength;
(2) Limited vitality;
(3) Limited alertness, including heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment.

NC 1503-2.5(d)(10)(ii); see SBE Ex. 3, *NC Policies*, p. 72.

132. To be determined in the disability category of other health impairment eligibility, the disability must have an adverse effect on educational performance and require specially designed instruction. NC 1503-2.5(d)(10)(iii); *see* SBE Ex. 3, *NC Policies*, p. 72.

133. DPS failed to comply with the agency criteria for OHI eligibility in that the BASC-3 scores were invalid, and the interventions were not scientific, research-based.

134. However, school-based observational data and corroborative subsequent observations by the independent evaluators, clearly indicated that [redacted] was engaged in class and was able to have positive interactions with peers. She was maintaining high grades, making positive educational progress, and accessing the general curriculum without difficulty. Because [redacted] was "able to access the general education curriculum with general education support," she did not meet the criteria for Other Health Impairment.

135. Based on the evidence in the record, the Undersigned defers to the professional educators who made this decision. [redacted]s health-related needs were being addressed through a Section 504 Plan, and the weight of the evidence supports a conclusion that, at the start of sixth grade, her health conditions did not have an adverse impact on her educational performance and she did not require specialized instruction. The Undersigned concludes that the IEP Team correctly determined that [redacted] was not eligible under the category of OHI.

136. Moreover, even if Petitioners proved that [redacted]s OHI adversely affected her educationally, Petitioners failed to prove by a preponderance of the evidence that [redacted] required specially designed instruction. The Undersigned concludes that the Section 504 Plan was sufficient to accommodate [redacted]s academic and functional needs.

3. Serious Emotional Disability

137. In addition to the evaluations required in NC 1503-2.5(d)(5)(i), to be determined eligible in the disability category of emotional disability:

(1) One of the following characteristics must be exhibited:

a. An inability to make educational progress that cannot be explained by intellectual, sensory, or health factors;
b. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
c. Inappropriate types of behavior or feelings under normal circumstances;

d. A general pervasive mood of unhappiness or depression; or
e. A tendency to develop physical symptoms or fears associated with personal or school problems.

(2) Additionally, the condition must be exhibited:

a. Over a long period of time; and
b. To a marked degree.

NC 1503-2.5(d)(5)(ii); *see* SBE Ex. 3, *NC Policies*, pp. 69-70.

138. The disability must have an adverse effect on educational performance and require specially designed instruction. NC 1503-2.5(d)(5)(iii); *see* SBE Ex. 3, *NC Policies*, p. 70.

139. The evidence in the hearing supported the Eligibility Team's determination. The only example of emotional concerns to a "marked degree" related to the episode in May 2017. [redacted] did not attend school by parent choice because of the class schedule and [redacted]s safety concerns, not because of her emotional issues.

140. There was no significant evidence of emotional concerns reported before Spring 2017. It was generally agreed that once [redacted] went to middle school in August 2017, there were very few emotional concerns present and the Section 504 Plan sufficiently addressed what concerns there were.

4. Specific Learning Disability

141. DPS' lead psychologist admitted that the category of Specific Learning Disability was the most difficult eligibility category presented in this case. Because [redacted] was performing at a high level academically at the time of the Referral Meeting on June 6, 2017, the IEP Team did not even identify SLD as a category for evaluation. However, upon receiving the results of her psychological evaluation, the Team recognized that [redacted] exhibited significant discrepancies between her high General Ability Index ("GAI") and almost all areas of achievement, although those areas still fell within the average range.

142. It is uncontested that [redacted] had the requisite discrepancy between her ability and achievement in all areas and that her spelling was below grade and age-level.

143. However, a discrepancy alone does not qualify a student for special education services. As described above, there must be evidence that the student "does not achieve adequately" and "does not make sufficient progress," and that the disability has an adverse effect on educational performance and requires specially designed instruction to address it. Thus, the IEP team must review [redacted]s educational performance to determine whether there is reason to qualify her under the category of Specific Learning Disability.

144. While [redacted] clearly has the relevant discrepancies in reading, math, and writing in large part due to her high GAI score, the weight of the evidence in the record does not support qualification under the category of Specific Learning Disability as of August 2017. Her grades

were excellent, her engagement in class was high, and she was not reported to have any difficulty learning material in the general education curriculum. As the team reported on the SLD worksheet, "[d]ata does not indicate she requires specially designed instruction as she does not display a need for instruction beyond that which can be provided within the general education environment."

145. Of particular importance in this analysis, the burden of proof is on Petitioners. In this case-in-chief, Petitioners presented no evidence that existed in August 2017, other than ▇s score discrepancy, to support her eligibility in the category of Specific Learning Disability. They presented no testimony from anyone who taught ▇ no evidence of work samples, no grade reports showing weaknesses in particular areas. There is simply not enough evidence on which to conclude that ▇ should have qualified as SLD in any particular area.

146. Even if ▇s spelling adversely affected her educationally, Petitioners presented no evidence of what specially designed instruction was needed.

SECTION 3: THE IEE CONTRACT CLAIM

ISSUE III **Whether Durham Public School's Limited Relationship Provision included in the IEE Contracts significantly impeded ▇s right to participate in the decision-making process regarding the provision of a FAPE to ▇ or otherwise violated Petitioners' procedural safeguards (the "IEE Contract Claim")?**

147. Since ▇ disagreed with DPS' evaluations, she was entitled to independent evaluations at public expense. 34 C.F.R. § 300.502 (b)(1).

148. An independent education evaluation ("IEE") at public expense is one of the procedural safeguards afforded parents by the IDEA and falls under Subpart E – Procedural Due Process Procedures for Parent and Children.

A. Petitioners' Standing to Contest the Terms of the IEE Contract

149. DPS challenged Petitioners' standing to contest the IEE Contract under the IDEA. DPS argued that Petitioners had no right to contest the terms of the IEE Contract because they were not parties.

150. Although Petitioners were not signatories on the IEE Contract but the contract terms, itself, named them as "parties." Petitioners were also affected by the terms of the contract because the IEE Contract contained DPS' criteria for the IEEs.

151. Moreover, Petitioners were not contesting all the terms in the IEE Contract only the Limited Relationship Provision which imposed other conditions on the independent evaluator's ability to conduct an IEE.

152. An IEE must meet the same criteria used by the school district in its evaluation "to the extent those criteria are consistent with the parent's right to an independent educational evaluation." 34 C.F.R. § 300.502(e)(1). These criteria must be the same criteria the school district

uses when it initiates an evaluation; the school district ***cannot impose other conditions on the independent evaluator***. 34 C.F.R. § 300.502(e)(2) (emphasis added).

153. DPS must have in effect policies, procedures, and programs that are consistent with the State policy and procedures established under NC 1501-1.1 through NC 1501-12.6 and NC 1501-12.8 through NC 1501-14.5. NC 1502-2; 20 U.S.C. § 1413(a)(1); 34 C.F.R.§ 300.201.

154. [redacted] had a statutory right to be informed of DPS' criteria when Dr. [redacted] approved [redacted]s choice of independent evaluators. 34 C.F.R. § 300.502(a)(2).

155. DPS must comply with the State Board's agency criteria. 34 C.F.R. § 300.502(e)(1). The State Board's agency criteria for an IEE was the same as its criteria for an initial evaluation, as detailed in Section 2 when discussing the *NC Policies* for initial evaluations.

156. DPS' Limited Relationship Provision imposed other conditions on the independent evaluators which were well outside the State Board's agency criteria in violation of 34 C.F.R. § 300.502(e)(2).

157. Petitioners have standing to challenge the "other conditions" found in the IEE Contract because there were inconsistent with the State Board's agency criteria, were inconsistent with [redacted]s right to an IEE, and impacted [redacted]s other procedural safeguards under the IDEA.

158. The Fifth Circuit Court of Appeals addressed an IEE's requirement to meet Louisiana public schools' agency criteria. *Seth B. v. Orleans Parish School Board*, 810 F.3d 961, 978 (5th Cir. 2016) (IEE must comply with extensive Louisiana criteria in Bulletin 1508).

159. In its decision, the Fifth Circuit addressed how the Supreme Court emphasized IDEA's procedural safeguards and that the parent's right to an IEE is "essential to the statutory scheme." *Seth B.*, 810 F.3d at 978 (citing *Bd. Of Educ. v. Rowley*, 458 U.S. 176, 205, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982)) ("When [IDEA's] elaborate and highly specific procedural safeguards . . . are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid.").

160. Through the procedural safeguards, Congress sought to "giv[e] parents and guardians a large measure of participation at every stage of the administrative process. *Rowley*, 458 U.S. at 205, 102 S. Ct. at 3050, 73 L.Ed. at 690.

161. The purpose of the IEE Contract was to provide alternative independent evaluation information of [redacted]s educational needs which would have been used during the subsequent IEP meeting to review DPS' original eligibility determination. Moreover, the IEE Contract contained agency criteria and conditions which were directly related to Petitioners' procedural safeguards under the IDEA.

B. Statutory Purpose of an IEE

162. An IEE is a procedural safeguard designed to protect the rights of [redacted] and [redacted] not DPS.

163. According to the Fifth Circuit, "[t]he right to an IEE at public expense serves these purposes, both because it enables parents to genuinely and consequentially take part in the IDEA process and because it allows them to introduce additional and different data into that process, informing its ultimate outcomes." *Seth B.*, 810 F.3d at 978.

164. If, after IEEs are completed, the adverse eligibility determination is not resolved by the parties in a subsequent eligibility meeting, the parent can request a contested case hearing for an administrative law judge to determine the ultimate outcome. 20 U.S.C. §1415(f).

165. Congress has legislated the central components of due process hearings. *See* 20 U.S.C. §§ 1415(b)(7); 1415 (f); 1415 (g); 1415(h); 1415(i). Yet, Congress never explicitly stated which party should bear the burden of proof at IDEA hearings. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 54, 126 S. Ct. 528, 533, 163 L. Ed. 2d 387 (2005).

166. Congress appeared to have "presumed that if the Act's procedural requirements are respected, parents will prevail when they have legitimate grievances." *Schaffer,* 546 U.S. at 60-61, 126 S. Ct. at 536, 163 L. Ed. 2d at 387.

167. In addition to the IEE procedural safeguard, Congress added other procedural safeguards to assist parents in due process hearings. School districts must respond to a complaint in writing with the same information as required in a Prior Written Notice, § 1415(c)(20(B)(i); parties must disclose evaluations and recommendations they intend to rely upon, § 1415(f)(2); State authorities must organize hearings in a way that guarantees parents and children the procedural protections of the Act, § 1415(a); and, parents may recover attorney's fees if they prevail, § 1415(i).

168. The United States Supreme Court ruled that the parent bore the burden of proof in an IDEA hearing. Yet, even then, the Supreme Court assumed "very few cases [would] be in evidentiary equipoise." *Schaffer*, 546 U.S. at 58, 126 S. Ct. at 535, 163 L. Ed. 2d at 287.

169. When the Supreme Court assigned parents the burden of proof, they also explained the significance of parents' right to an IEE as an essential procedural safeguard:

> School districts have a natural advantage in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them .... [Parents] have the right to an independent educational evaluation of the[ir] child....

The regulations clarify this entitlement by providing that a:

> parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." 34 CFR § 300.502(b)(1) (2005). IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.
>
> *Schaffer,* 546 U.S. 49, 60–61, 126 S. Ct. 528, 163 L. Ed. 2d 387.

170. According to DPS, in its Response to the State Complaint, "[n]othing in this language suggests that the district should be responsible for paying for the parents' planned expert witness to evaluate the child." (SBE Ex. 9, p. 149)

171. DPS argued to NCDPI and the Undersigned that *Schaffer's* discussions regarding IEEs were merely *dicta* and not binding because the sole issue in *Schaffer* was the allocation of the burden of proof, not the parent's right to use the independent evaluator as an expert witness.

172. The dissent in *Schaffer* recognized that parents are at a disadvantage and asserted that the burden should be on the school district because the school districts are the "party with the "bigger guns' also has better access to information, greater expertise." *Schaffer*, 546 U.S. at 67, 126 S. Ct. at 540, 163 L. Ed. 2d at 387 (Ginsburg, J. dissenting). The school also has "better access to relevant information, greater control over the potentially more persuasive witnesses . . . ." *Id.*, 546 U.S. at 64, 126 S. Ct. at 538, 163 L. Ed. 2d at 387.

173. The factors cited by the *Schaffer* dissent were the same reasons that the majority opined that the IEE would help balance the expertise between the parties. The Supreme Court did not limit the use of the independent evaluator's expertise at just IEP meetings.

C. Agency Criteria for IEEs in North Carolina

174. Independent evaluations must meet the same criteria as the LEA's own evaluations. The LEA's evaluations must meet the State Board's criteria. *See N.C. Policies* and State Board's Supplemental Proposed Decision. As this was an initial evaluation, the IEE must meet the agency criteria that the LEA uses when it initiates an evaluation. 34 C.F.R. § 300.502(e)(1).

175. Once a parent requests an IEE, the LEA must provide "information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations." 34 C.F.R. § 300.502(a)(2).

176. DPS provided a list of evaluators, but DPS did not provide [redacted] with the DPS' criteria for independent evaluations when [redacted] requested the IEEs. This information was provided after-the-fact, when issues arose about the contracts, and only after [redacted] asked for copies of the IEE Contracts.

177. An IEE means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child. 34 C.F.R. § 300.502(a)(2)(3)(i).

178. In essence, the independent evaluator cannot be a school official or employee.

179. According to 34 C.F.R. § 300.502(c), the results of the IEE must be considered by DPS if it meets agency criteria. This does not mean that the IEP Team has to agree with the independent evaluation.

180. Agency criteria is defined in 34 C.F.R. § 300.502(e):

> (3) If an independent education evaluation is at public expense, the criteria under which the evaluation is obtained including the location of the evaluation and the qualifications of the examiner must be the *same criteria that the public agency* uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent evaluation.
>
> (4) Except for the criteria described in paragraph (e)(1) of this section, a public agency may *not impose conditions or timelines* related to obtaining an independent educational evaluation at public expense.
>
> 34 C.F.R. § 300.502(e) (emphasis added).

181. In the regulation, criteria "includes" the location and examiner's qualifications and must be the same criteria that the public agency uses when it initiates an evaluation.

182. DPS argued that the contractual terms contested in this case "did not impose conditions to obtaining the IEE itself, were not agency criteria, and did not violate regulations." (DPS Supp. Pro Fin. Dec. pp. 4-5, para. 23.; *citing* Tr. vol. 8, p. 1443:14-19; Tr. vol. 7, pp. 1367:19-20; 1376:14-15)

183. The plain language of 34 C.F.R. § 300.502 (c)(2) states that DPS may not impose *any conditions* other than the agency criteria.

184. The guidance published by OSEP "has consistently affirmed the plain language of the regulations and reiterated that school districts may not impose conditions, timelines, or other limitations on parents' access to an IEE." *Gresham-Barlow Sch. Dist.* at 4 (*citing Letter to Thorne* (OSEP Feb. 5, 1990); *see, e.g., Letter to Petska* (OSEP Sept. 10, 2001); *Letter to Anonymous* (OSEP Jan. 4, 2010).

185. Other examples of such conditions or timelines that have been addressed in prior cases or OSEP guidance include licensing requirements, geographical limitations, deadlines for completion of the evaluation, and refusals to contract with providers due to previous advocacy roles. *See Cloverleaf Local Schools,* 71 IDELR 204 (OSEP 2017) (approving criteria that required

independent evaluator to have state licensure, liability insurance, a background check, and references, to abide by a cost cap, and to work within 50 miles of the district); *Letter to Petska*, 35 IDELR 191 (OSEP 2001) (disapproving of criteria that block examiners with professional associations or activities or a history of testifying as expert witnesses for parents or that require examiners to have recent public school experience); *Letter to Wessels*, 16 IDELR 735 (OSEP 1990) (disapproving of policy prohibiting observations during independent evaluation if school evaluator was permitted to observe); *Letter to LoDolce*, 50 IDELR 106 (OSEP 2007) (disapproving of criteria that prohibited independent evaluator from using age and grade level scores in evaluation reports); *Letter to Anonymous*, 20 LRP 2383 (OSEP 1993) (permitting a requirement of in-state evaluators if sufficient evaluators are available and the parent has the opportunity to prove extenuating circumstances).

186. In August 2018, OSEP issued yet another advisory letter regarding IEEs. *Letter to Anonymous*, 118 LRP 35315 (OSEP Aug. 23, 2018) ("[I]t would be inconsistent with the right of a parent to have an IEE considered by the public agency for a public agency to limit an independent evaluator's access in a way that would deny the independent evaluator the ability to conduct an evaluation in a way that meets agency criteria. Such criteria would include the amount of time that the independent evaluator spends with the child.").

187. When confronted with the ambiguity in § 300.502(e) as to what constitutes agency criteria, the Fifth Circuit looked to the U.S. Department of Education's interpretations. *Seth B. v. Orleans Parish School Board*, 810 F. 3d 961, 974 (5th Cir. 2016) (citing *Belt v. EmCare, Inc.*, 444 F.3d 403, 408 (5th Cir. 2006) ("If [a] regulation is ambiguous, the agency's interpretation . . . is controlling unless plainly erroneous or inconsistent with the regulation."); *But cf. Rose v. Lundy*, 455 U.S. 509, 517, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982) (ambiguous statutes should be interpreted according to statutory purposes).

188. According to the Fifth Circuit, in the Department's comments on § 300.502(e), the Department explained that IEE must meet substantive requirements applicable to school-conducted evaluations:

> We do not believe it is necessary to add language to the regulations regarding the review of existing data, input from the child's parents, the scope of the evaluation, or the instruments used to evaluate the child, *because an IEE must meet the agency criteria that the public agency uses when it initiates an evaluation* . . . . Similarly, [the IDEA regulations] provide[] that an evaluation conducted by a public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability . . . . *These requirements also apply to an IEE conducted by an independent evaluator, since these requirements will be a part of the agency's criteria.*
>
> *Seth B.*, 810 F. 3d at 974; *citing Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities,* 71 Fed. Reg. 46,540, 46,690 (Aug. 14, 2006) (emphasis added).

189. Based on the "clear text of the regulation," the IEE in *Seth B.* had to substantially comply with the extensive requirements in the Louisiana Bulletin 1508, the State-mandated evaluation criteria for learning disabilities. *Seth B.* at 966.

190. The Fifth Circuit found this explanation consistent with IDEA's underlying purposes for an IEE. *Id.* at 974. The statutory purpose of an IEE is to ensure protection of the rights of children with disabilities and their parents. 20 U.S.C. § 1400(d)(B).

191. According to *Seth B.*, the Sixth Circuit in *P.R. v. Woodmore Local School District,* recognized that the "object" of the IEE regulations "is to afford Parents an opportunity to challenge and the School District to defend the appropriateness of its Evaluation in an impartial hearing." *Seth B.*, 810 F. 3d at 970 (per curiam) (*citing P.R. v. Woodmore Local School District,* 256 Fed. Appx. 751 (6th Cir. 2007)).

192. When DPS conducts an evaluation, whether initial or a reevaluation, it is bound to conduct the evaluations consistent with the *North Carolina Policies*. The *NC Policies* require an evaluator to be qualified and conduct the evaluation in certain ways, such as interviewing the parent, observations, obtaining behavior rating scales, conducting the evaluation in accordance with the test producer's instructions., etc.

193. Any other criteria or conditions placed on IEEs which negatively affect the parent's procedural safeguards are also inconsistent with the IDEA.

194. Criteria and conditions with respect to the independent evaluator's future activities as an advocate or expert witness are unrelated to an examiner's ability to conduct an IEE.

195. A school district's criteria prohibiting IEE examiners, who have a history of acting as an expert witness against public schools, from qualifying as independent examiners were inconsistent with a parent's right to an IEE. *Letter to Petska,* 35 IDELR 191 (OSEP 2001) Likewise, "[c]riteria prohibiting an IEE examiner's association with private schools, organizations that advocate the interests of parents, organization that advocate particular instructional approaches in the area of educating children with disabilities" are also unrelated to an examiner's ability to conduct an IEE. *Id.*

196. Another example of unacceptable agency criteria relevant to this case is agency criteria which prohibits independent evaluators from making a recommendation about a child's IEP if it allows its own evaluators to make such recommendations. *Letter to LoDolce*, 50 IDELR 106 (OSEP 2007). DPS' evaluators made recommendations in their evaluations. *See* Stip. Ex. 31, p. 145; Stip. Ex. 36, p. 162; Stip. Ex. 37, p. 176 ([redacted] recommended [redacted] "continue to receive supports through her classroom teachers and/or school counselor as needed...")

197. Yet, in this case, Dr. [redacted] specifically told Ms. [redacted] that independent evaluators should make suggestions not recommendations in the IEE.

D. Parent's Right to an Independent Expert Opinion

198. A parent's right to a publicly funded IEE has endured since the Department of Education first implemented the IDEA and throughout reauthorization of the IDEA in 1990, 1997, and 2004. 34 C.F.R. § 300.503 (1983); *see* Education of the Handicapped Act Amendments of 1990, Pub.L. No. 101-476, 104 Stat. 1103 (1990); Individuals with Disabilities Education Act Amendments of 1997, Pub.L. No. 105-17, 111 Stat. 37 (1997); Individuals with Disabilities Education Improvement Act of 2004, Pub.L. No. 108-446, 118 Stat. 2647 (2004).

199. Congress sought to protect the parent's right to an IEE when it enacted 20 U.S.C. § 1406(b):

> The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this title that-
>
> violates or contradicts any provision of this title; or
>
> procedurally or substantively lessens the protections provided to children with disabilities under this title, as embodied in regulation in effect on July 20, 1983 . . . . .

20 U.S.C. § 1406(b).

200. According to the Eleventh Circuit, the Supreme Court has recognized that states must reimburse parents for the cost of an IEE in order to ensure that parents can exercise their right to an independent expert opinion, which is an essential procedural safeguard. *Phillip C. ex rel. A.C. v. Jefferson County Bd. of Educ.*, 701 F.3d 691, 697 (11th Cir. 2012).

201. The right to a publicly financed IEE guarantees meaningful participation throughout the development of the IEP. *Id.*, 701 F.3d at 698. *See also Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct., 592, 98 L. Ed. 2d 686 (1988) ("Congress repeatedly emphasized . . . the necessity of parent participation in both the development of the IEP and any subsequent assessments of its effectiveness").

202. The Undersigned agrees with the Eleventh Circuit's interpretation of *Schaffer* which is that: "the parental right to an IEE is not an end in itself; rather, it served the purpose of furnishing parents with the independent expertise and information they need to confirm or disagree with an extant, school-district-conducted evaluation." *T.P. ex rel. T.P. v. Bryan County School Dist.*, 792 F.3d 1284, 1293 (11th Cir. 2015) (internal citations omitted).

203. School districts are not permitted to place any restrictions on IEEs that impede the parents' access to an IEE or diminish the independence of the examiner. *See Gresham-Barlow Sch. Dist. 10J*, 113 LRP 22781 (Or. SEA May 10, 2013).

204. An IEE is a procedural safeguard under the IDEA which affords parents meaningful participation in the IEP process. It is not a procedural safeguard for DPS to manipulate through contractual terms to avoid litigation and attorney involvement.

205. When disagreements arise between parents and schools over the provision of FAPE, "[b]y the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement." *Endrew F.*, 137 S. Ct. at 993, 197 L. Ed. 2d at 335.

206. Reading both the Supreme Court's decision in *Schaffer* and *Andrew F.* in unison, by the time any dispute reaches Court, parents should also have a complete opportunity to bring the expertise and judgment of independent evaluators on areas of disagreement. The IEE is designed to provide substantive information about the child's educational needs and assist the parent in meaningful participation in the IEP process, and, if necessary, assist the parent in meaningful participation in due process.

207. An IEE may also be necessary to assist the hearing officer to make meaningful decisions in a contested case hearing. That is why Congress granted hearing officers the ability to order an IEE at public expense during a hearing. 34 C.F.R. § 300.502(d).

208. The opposing party's consent is not required for the other party's use of the IEE as evidence at the hearing. Either party can introduce the IEE at the due process hearing. 34 C.F.R. § 300.502(c)(2).

209. The Limited Relationship Provision required both parties' consent to allow the independent evaluator to testify as an expert witness. DPS argued that exclusion of the independent evaluators from testifying as expert witnesses, without both party's consent, would guarantee impartiality of the evaluator.

210. The more likely result is that the party, normally the LEA, adverse to the opinions of the independent evaluator will not consent to the evaluator being used by the opposing party, usually the parent, as an expert witness.

211. Only if the IEE was favorable to the LEA would the parent refuse to consent to the independent evaluator being used as an expert witness.

212. But, even so the LEA does not need the independent evaluator as an expert witness because it employs its own evaluators who can review and explain the IEE results in a hearing.

213. If the parent is only allowed to use the independent evaluator as a "fact witness," the evaluator could not give expert opinion testimony.

214. The North Carolina Rules of Evidence prevent "fact witnesses" from testifying as an "expert witness." Only a witness qualified as an expert by knowledge, skill experience, training, or education, may testify in the form of an opinion. N.C.G.S. § 8C-1, Rule 702. Expert witnesses may also testify on an ultimate issue to be decided by the trier-of-fact which "fact witnesses" may not. N.C.G.S. § 8C-1, Rule 704.

215. An IEE is primarily the parent's tool to challenge the LEAs evaluation and decisions based on the results of the LEA's evaluation.

216. DPS does not have to guarantee the impartiality of the independent evaluator. The IEP Team must consider the IEE in its deliberations, but not necessarily agree with the evaluator's conclusions or recommendations. 34 C.F.R. § 300.502(c)(1); NC 1504-1.3(c)(1).

217. Nor does DPS have to guarantee the independent evaluator's impartiality to act as an expert witness. The administrative law judge weighs the credibility of expert witnesses.

218. Even the U.S. Department of Education declined a request to "regulate the testimony of experts at a due process hearing because "such determinations are made on a case-by-case basis in light of the specific facts of each case." Federal Register vol. 71, No. 156, p. 46691.

219. Hearing officers as the designated trier-of-fact under the Act are in the best position to determine whether expert testimony should be admitted and what weight, if any, should be accorded that expert testimony." *Id.* State evidentiary standards govern whether the testimony is relevant, reliable, and based on sufficient facts and data. *Id.*

220. The actual purpose of the Limited Partnership Provision was to control litigation in special educations matters, not to ensure the impartiality of the independent evaluator. The Undersigned concludes as a matter of law that the Limited Partnership Provision was improper and inconsistent with IDEA's ultimate goal of protecting the rights of disabled children and their parents.

221. The Undersigned finds that parents should not be punished for seeking legal representation and advocating for the rights of their children by the school district putting in place a contract designed to restrict their right to an evaluation, that is independent of the school district, with an independent evaluator who could serve as an expert witness or advocate on behalf of the family in the future.

222. The provisions in the contract directly contradicted the Supreme Court's decision in *Schaffer*, which explained the parents' right to an IEE "was to ensure parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion." *Schaffer*, 546 U.S. at 60–61, 126 S. Ct. at 536, 163 L. Ed. 2d at 387.

223. Furthermore, DPS' Limited Partnership Provision impermissibly left Petitioner unable "to challenge the government without a realistic opportunity to access the necessary evidence, [and] without an expert with the firepower to match the opposition." *Id.*

224. The IEE is not "an end in itself," it provides the parents with the independent expertise at IEP meetings, and, if necessary in due process. *See T.P.*, 792 F.3d at 1293.

225. The parent's right to an IEE was not a "privilege" to be granted at the LEA's discretion. *Seth B.* at 978. In this case, DPS' Limited Partnership Provision imposed inappropriate

conditions for an IEE for the purpose of which was to intentionally thwart the parents' ability to challenge DPS' Eligibility Determinations in due process.

226. DPS has failed to offer a cogent and responsive explanation for the Limited Partnership Provision in its IEE contract and this provision is inappropriate and violates the IDEA.

SECTION 4: THE STATE COMPLAINT CLAIM

ISSUE IV Whether North Carolina State Board of Education significantly impeded [redacted]s parents' right to participate in the decision-making process regarding the provision of a FAPE to [redacted] by sanctioning Durham Public Schools' actions related to IEEs or otherwise interfered with Petitioners' procedural safeguards (the "State Complaint Claim")?

231. The Petitioners' standing to challenge DPS' IEE Contract does not automatically entitle them to standing to challenge the SBE's Letter of Findings regarding the IEE Contract.

232. The Petitioners were not complainants in State Complaint No. 19-080 and do not have the right to appeal NCDPI's findings and order of compliance.

A. State Board's Responsibilities Under the IDEA With Respect to LEAs

233. The SEA is responsible for general supervision of LEAs and for ensuring each educational program for children with disabilities administered within the State meet the educational standards of the SEA. NC 1501-9.1(a); 20 U.S.C. §§ 1412(a) (11), 1416; 34 C.F.R. § 300.149

234. The State Board is responsible for ensuring that DPS establishes, maintains, and implements procedural safeguards that meet the requirements of NC 1504-1.1 through 1504-2.7. NC 1504-1.1; 20 U.S.C. § 1415 (a); 34 C.F.R. § 300.500. Each public agency (SEA and LEA) is responsible for ensuring effective implementation of procedural safeguards for children with disabilities served by the public agency. NC 1501-9.2; 20 U.S.C. §§ 1412(a) (11), 1415(a); 34 C.F.R. § 300.150.

B. Claims Against State Board

235. Petitioners claim that the State Board, through the EC Division of the Department of Public Instruction, failed to correct the problematic provisions in the IEE Contract, resulting in a denial of parental participation to [redacted]s parents. (Petitioners Pro. Dec. p. 63, ¶366) Also, Petitioners claim that NCDPI's findings were contrary to the IDEA, its implemental regulations, and state law." (Pet. p. 12, ¶82)

236. Specifically, Petitioners challenged NCDPI's findings that the "Limited Relationship Provision" was compliant because NCPDI found that "the LEA has a right to specify the scope of professional services to allow the evaluator to fulfill the intended purpose of the evaluation." (Pet. p. 12, ¶83)

237. Petitioners also complained that NCDPI violated the IDEA when it found compliant the IEE Contract terms which limited the evaluator from further working with [redacted] or her parents and requiring the examiner to communicate simultaneously with both parties. (Pet. p. 12, ¶83)

238. In support of the State Board's liability in this case, Petitioners cite the Fourth Circuit Court of Appeal's case, *Gadsby by Gadsby v. Gramick*, 109 F.3d 940, 953 (4th Cir. 1997).[19]

239. According to Petitioners, the Fourth Circuit stated that the SEA is "ultimately responsible for the provision of a free appropriate public education to all of its students and may be held liable for the state's failure to assure compliance with IDEA." *Gadsby*, 109 F.3d at 953.

240. The Fourth Circuit did acknowledge that, under 20 U.S.C. § 1412(6) (1997), the SEA was responsible for assuring that the requirements of IDEA are carried out. The current statute also requires the SEA to "ensur[e] that the requirements of IDEA are met and that all educational programs for children with disabilities in the State, including all such programs administered by any other State agency or local agency … meet the educational standards of the State educational agency." 20 U.S.C. 1412(a)(11)(A) (2004).

241. Because of the SEA's delineated responsibilities under IDEA, the Fourth Circuit held that the SEA *could* be liable for a denial of FAPE depending on the particular circumstances of the case but was *not necessarily always* liable for an LEAs failure to provide a FAPE. *Gadsby*, 109 F.3d at 955-956 (emphasis added).

242. Accordingly, this Tribunal must consider all relevant factors in determining the relative responsibility and, if applicable, liability of the State Board in this particular case.

1. *The State Complaint Process*

243. The IDEA requires that each SEA adopt written procedures for resolving any complaint, including a complaint filed by an organization or individual from another State, that meets the requirements of §300.153 by—

> (i) Providing for the filing of a complaint with the SEA; and
> (ii) At the SEA's discretion, providing for the filing of a complaint with a public agency and the right to have the SEA review the public agency's decision on the complaint[.]

34 C.F.R. § 300.151(a)(1).

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19 This case was decided before the 2004 reauthorization of the IDEA and the issue was whether the SEA was responsible for a portion of private tuition reimbursement as mandated by 20 U.S.C. § 1414(d)(1) (1990), a "stop-gap" measure, Congress included under which the SEA is ultimately responsible for noncompliance with IDEA which required the SEA to pay for special education and services that the LEA was either unable or unwilling to fund. *Gadsby* at 954.

244. Where the SEA finds a failure to provide appropriate services, the SEA *must* address: "(1) the failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and (2) appropriate future provision of services for all children with disabilities." 34 C.F.R. § 300.151(b).

245. The State Complaint process is an option available to parents who dispute the appropriateness of the public education provided by an LEA. 34 C.F.R. §§ 300.151-153. This process does not afford the aggrieved party any appeal rights for an adverse decision.

246. The procedures for filing a State complaint are set forth in *NC Policies* and *State Complaint Procedures*. *See* SBE Ex. 3, *NC Policies;* SBE Ex. 1, *State Complaint Procedures.*

247. Within 60 days after a complaint is filed, the SEA must take certain actions, including: completing an on-site investigation, if deemed necessary by the SEA; "[r]eview all relevant information and make an independent determination"; and "[i]ssue a written decision to the complainant." 34 C.F.R. § 300.152(a). In the written decision, the SEA must address each allegation in the complaint and include findings of fact and conclusions and the reasons for the SEA's final decision. 34 C.F.R. § 300.152(a)(5).

248. The State Complainants were not parties in this due process action. The Undersigned has already dismissed any claims about the State Board for the investigation of the State Complaint; therefore, NCDPI followed proper procedures when it investigated and issued a final report on the State Complaints submitted by Complainants in April 2018. The Complainants and DPS were given opportunities to provide supplemental information and documentation, the EC Division analyzed everything that was provided and issued a final report within the sixty-day timeline.

a. NCDPI Has No Appeal Procedures for a State Complaint

249. This Tribunal has no jurisdiction under the IDEA, State law, or administrative procedure to adjudicate an appeal of the State Board's final decision in a State complaint. The IDEA and its implementing "regulations neither prohibit nor require the establishment of procedures to permit an LEA or other party to request reconsideration of a State complaint decision." 71 Fed. Reg. 46540, 46607 (2006).

250. The U.S. Department of Education "chose[ ] to be silent in the regulations about whether a State complaint decision may be appealed because [it] believe[s] States are in the best position to determine what, if any, appeals process is necessary to meet each State's needs, consistent with State law." 71 Fed. Reg. 46540, 46607.

251. The State Board conceded that, at this time, North Carolina does not provide a mechanism for appealing a State complaint. (Tr. vol. 1, p. 142:8-11)

252. In the alternative, Petitioners claim that they can appeal the State Complaint based on the U.S. Department of Education statement that:

> [I]f after the SEA's final decision is issued, a party who has the right to request a due process hearing (that is, the parent or LEA) and who disagrees with the SEA's decision may initiate a due process hearing, provided that the subject of the State complaint involves an issue about which a due process hearing can be filed and the two-year statute of limitations for due process hearings (or other time limit imposed by State law) has not expired.

71 Fed. Reg. 46540, 46607 (2006).

253. The Department did not clarify if a parent, who was not one of the original complainants, could file due process against the SEA after the issuance of the SEA's final decision.

254. That clarification is not necessary in this case, because Petitioners had over grounds for challenging NCDPI's findings.

b. The Pending State Complaint Contained the Same Subject Matter as the Contested Case Petition

255. The federal regulations provide another alternative to a parent, who was not an original complainant, to challenge the findings in a State complaint proceeding.

256. If a written State complaint is received that is also the subject of a due process hearing or contains multiple issues of which one or more are part of a due process hearing, the State must "set aside" any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. 34 C.F.R. § 300.152(1); NC 1501-10.2(c)(1).

257. Any other issues in the complaint that are not a part of the due process action must be resolved in accordance with the timeline and State complaint procedures. 34 C.F.R. § 300.152(2); NC 1501-10.2(c)(1).

258. Both the contested case Petition and State Complaint contained the same subject matter that is: the propriety of the DPS' Limited Relationship Provision and DPS' practice of prohibiting independent evaluators from communicating with third parties or acting as expert witnesses. See Stip. 72 (Contract Provision 3)

259. Based on what little guidance there is on this topic, being a "party" to a State complaint does not appear to be a prerequisite to challenging the "subject matter" of the SEA's final decision in a State complaint as long as the State complaint process has not closed.

260. Petitioners were not "parties" to the State Complaint, but Petitioners were members of a class which would be affected by the outcome of the State Complaint. They were residents of Durham County, [redacted] attended Durham County Schools, and [redacted] requested IEEs which were subject to the IEE Contract provisions and DPS' practices at issue in State Complaint No. 19-070.

261. It is unclear how the State Board would have known about the overlapping subject matter if the State Board had not been named as a Respondent.

262. Petitioner must serve a copy of the Petition with the person designated by the State Board under G.S. 115C-107.2(b)(9). N.C.G.S. § 115C-109.6(h). Both parties must simultaneously serve a copy of all pleadings, agreements, and motions to the designated person. N.C.G.S. § 115C-109.6(h).

263. The State Board has developed a contested case petition form to be used by parents when filing a contested case at OAH. N.C.G.S. § 115C-109.6.

264. The petition form does not ask petitioners to indicate if there is an overlapping State complaint which has the same subject matter as in the petition. *See* https://ec.ncpublicschools.gov/parent-resources/dispute-resolution/due-process-hearings/h-06e.pdf.

265. Nor does the State complaint form ask whether there is a pending contested case petition on the same subject matter. *See* https://ec.ncpublicschools.gov/parent-resources/dispute-resolution/formal-state-complaints/formal-state-complaint-form.pdf.

266. Unless the designated person is required to read every petition and State complaint to determine any overlapping subject matter, it is not clear how the State Board would know to "set aside" the State Complaint. Since there are no rules or NC Policies pertaining to such notification, determining such conflicts would be haphazard.

267. Nevertheless, in this case, the Parties agreed that the State Board was mandated to "set aside" the pending State complaint until the conclusion of this hearing. 34 C.F.R. § 300.152(c)(1); NC 1501-10.2(c)(1).

268. Neither the federal regulation nor the NC Policies require that the "parties" be the same in both the petition and State complaint, only that the subject matter be the same for "set aside" purposes.

269. The "parties" only have to be the same if the issue had previously been decided in a due process hearing for the due process hearing decision to be binding on that issue for the same parties. 34 C.F.R. § 300.152(c)(2); NC 1501-10.2(c)(2). This was not the situation here.

270. In the present case, the State Complaint has been "set aside". The question remains, however, if the Undersigned's decision is binding on the State Board or, if after conclusion of the hearing, the State Board will resume the State complaint process and simply adopt its prior findings.

271. Here the State Board has already investigated and issued a final decision in its Findings of Fact and Corrective Action Plan. The only matter still pending is completion of the Corrective Action Plan.

272. There was no evidence provided to prove that the NCDPI investigator or State Board knew that these particular Petitioners, [redacted] and [redacted] were involved in the State Complaint until after the due process petition was filed.

273. Even if Petitioners have standing to challenge the findings in the State Complaint and can prove those findings violate the IDEA, that does not mean that Petitioners can hold the State Board liable for DPS' inappropriate actions.

274. Petitioners argued that the State Board's sanctioning of DPS' Limited Relationship Provision and IEE practices significantly impeded [redacted]s right to participate in the decision-making process regarding the provision of a FAPE to [redacted] The Undersigned disagrees.

275. The State Board's findings with respect to the IEE Contract provisions and practices occurred after completion of all the IEEs. Petitioners have failed to prove a nexus between the State Board's findings and DPS' prior actions with respect to obtaining the independent evaluations.

276. In the alternative, Petitioners argued that the State Board sanctioning of the Limited Partnership Provision denied them access to the independent evaluators as expert witnesses during the due process hearing.

277. Again, Petitioners failed to prove a nexus between the State Board's findings with respect to the availability of the evaluators as expert witnesses. Moreover, once the Petition notified the State Board about the overlapping subject matter, the State Board was not sanctioning any of DPS' actions, rather the State Complaint process temporarily on hold.

278. In light of evidence in this hearing, which was not available to the NCDPI investigator during the State complaint process, the State Board may choose to revise its findings regarding Contract Provision 3 and Practice 4.

279. Because this was a systemic complaint, the NCDPI investigator was not privy to the specific facts in this contested case, i.e. [redacted] refusal to sign new contract, the real purpose of the Limited Relationship Provision, and Dr. [redacted] misrepresentations about her communications to the independent evaluators about changing the language in their reports due to the contract terms. Such factual findings would undoubtedly have influenced NCDPI's ultimate findings and corrective action.

280. The Undersigned respectfully disagrees with the State Board's findings on this subject matter. As explained more fully in Section 3 supra, the Undersigned concludes that the Limited Relationship Provision was an improper condition for the IEE Contract and the practice of prohibiting independent evaluators from acting as expert witnesses violated Petitioners' procedural safeguards under IDEA.

281. Moreover, the Undersigned is concerned that, unless the parents agree, similar contract provisions which prohibit independent evaluators from acting as expert witnesses will

promote the filing of more contested case petitions for the sole purpose of obtaining a court ordered IEE which would not be subject to these contract terms.

282. When finalizing its Corrective Action in State Complaint No. 17-090, the State Board should reconsider its Letter of Findings in light of the additional facts cited in this Final Decision which were not otherwise available to the NCDPI investigator.

OTHER ISSUES:

283. As a remedy, Petitioners sought reimbursement of private speech/language therapy. In their Petition, Petitioners did not raise speech/language impairment as a suspected area of disability; therefore, Petitioners have no claim for reimbursement of speech/language therapy as compensatory special education.

284. Speech/language therapy can also a related service pursuant to an IEP. Petitioners failed to prove [redacted]s eligibility for an IEP which would have included speech/language therapy as a related service. As a result, Petitioners are also not entitled to reimbursement of speech/language therapy as a compensatory related service.

285. 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 on those claims.

BASED ON THE FOREGOING, the Undersigned hereby finds proper authoritative support of the Conclusions of Law noted above, and the Undersigned hereby **ORDERS**:

FINAL DECISION

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

1. Petitioners failed to meet their burden of proof regarding the Suspected Disability Claim. The IEP Team did not overlook clear signs of autism. Petitioners did meet their burden regarding the procedural inappropriateness of the evaluations process in the Evaluation Claim, but failed to prove a substantive violation of a FAPE for [redacted]

2. Petitioners failed to meet their burden of proof regarding the Eligibility Claim. The IEP Team appropriately determined that [redacted] was not eligible for special education services and that her Section 504 Plan provided appropriate accommodations sufficient to provide her with a FAPE.

3. Petitioners met their burden of proof regarding the IEE Contract Claim. The Limited Relationship Provision in the IEE Contract and DPS' practice of not permitting independent evaluators to act as expert witnesses impeded [redacted]s meaningful participation in the IEP process and violated the other procedural safeguards under the IDEA with respect to due process. To their detriment, Petitioners were not allowed to use the independent evaluators as expert witnesses in their contested case.

4. With respect to the State Complaint Claim, Petitioners did not have standing to appeal NCDPI's Letter of Findings and Corrective Action. Moreover, even if they had, there was no mechanism in place to pursue an appeal and this Tribunal does not have jurisdiction to mandate the State Board to develop such procedures, although the Undersigned recommends that they do just that. Despite this, the State Board was required to "set aside" the pending State Complaint because the same subject matter was contested in the due process Petition before this Tribunal. The Undersigned decided that DPS' Limited Relationship Provision (Contract Provision 3) and DPS' IEE practice (Practice 4) violated the IDEA. In light of this Final Decision and the evidence from this hearing, the State Board should reconsider its Letter of Findings and Corrective Action Plan. Even if the Petitioners did have standing to file a Petition against the State Board, the Petitioners have not met their burden, by a preponderance of the evidence, that the State Board's findings, regarding DPS' Contract Provision 3 and DPS Practice 4, denied [redacted] a FAPE or [redacted]s meaningful participation in the IEP process.

IT IS HEREBY ORDERED THAT:

1. DPS is the prevailing Party on the Suspected Disability Claim;

2. Although, ultimately DPS prevailed on the Evaluation and Eligibility Claims, due to DPS' numerous procedural violations with respect to these claims, DPS is not granted prevailing party status on these claims, nor are Petitioners;

3. With respect to the IEE Contract Claim, DPS is prohibited from requiring an independent evaluator to sign a contract with the Limited Relationship Provision or any similar language in the IEE Contract. The Limited Partnership Provision or similar language in any outstanding IEE contracts between DPS and independent evaluators are violative of the IDEA. DPS is to advise all independent evaluators, who have entered into IEE contracts with this prohibited language and the parents of disabled children being independently evaluated pursuant to these IEE Contracts, that the Limited Partnership Provision is to be severed from the contract and have been found not to be agency criteria and, instead, are conditions which violate the IDEA, federal regulations, State law, and the *NC Policies*;

4. The Petitioners are prevailing parties as to the IEE Contract Claim with respect to DPS;

5. With respect to the State Board Claim, in light of this Final Decision, the Undersigned respectively requests that the State Board reconsider its Letter of Findings and Corrective Action Plan in State Complaint No. 19-070;

6. The Undersigned makes no determination as to prevailing party status with respect to the State Complaint Claim except to note that Petitioners have exhausted their administrative remedies but failed to prove any substantive denial of FAPE to [redacted] by the State Board; and,

7. All other of Petitioners' claims not otherwise dismissed are **DISMISSED WITH PREJUDICE.**

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 dismissal.

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

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

IT IS SO ORDERED.

This the 11th day of April, 2019.

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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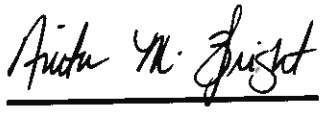
This the 11th day of April, 2019.



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