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OFFICE OF ADMINISTRATIVE HEARINGS
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STATE OF NORTH CAROLINA

COUNTY OF LEE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
17 EDC 03684

[redacted] by and through his guardian [redacted] Petitioner, v. Lee County Schools Board of Education Respondent.	**FINAL DECISION**

THIS MATTER was heard before the Honorable Stacey B. Bawtinhimer, Administrative Law Judge ("ALJ") presiding, on the following dates: August 21-25, 29, 30, September 1, 13, 14, 18-22, 27 -29, October 5 and 12, 2017 at the Lee County School Board Offices, 106 Gordon Street, Sanford, North Carolina and/or the Office of Administrative Hearings in Raleigh, North Carolina.

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 Decisions, as well as all stipulations, admissions, and exhibits, the Undersigned concludes that the Lee County Schools Board of Education ("Respondent," "LCS," and/or "Lee County Schools") violated the IDEA, its implementing regulations, and state law, thus denying [redacted] a free and appropriate public education ("FAPE"), and judgment is Ordered for Petitioners on some but not all claims.

APPEARANCES

For Petitioners:

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For Respondent: Rachel B. Hitch
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ISSUES

I. **Whether any of Petitioner's claims prior to June 1, 2016 are barred by the one-year statute of limitations and, if not, whether Lee County Schools denied [redacted] a free and appropriate public education during that time?**

II. **Whether Lee County Schools denied [redacted] a free and appropriate public education during the remainder of the 2016/2017 school year?**

III. **If applicable, what remedies should be awarded to compensate Petitioners?**

WITNESSES

For Petitioners: [redacted] Petitioner
[redacted] M.A., B.C.E.T.,[2] Expert Witness
[redacted] D., Expert Witness

For Respondent: [redacted] 2nd and 4th Grade EC Teacher
[redacted] 3rd Grade EC Teacher
[redacted] 3rd Grade Reg. Ed. Teacher
[redacted] Former EC Lead/Compliance Teacher
[redacted] 2nd Grade Reg. Ed. Teacher
[redacted] 1st Grade Reg. Ed. Teacher
[redacted] M.A., Expert Witness, Subcontract Employee with LCS
[redacted] M.Ed., CCC/SLP, Speech Pathologist
[redacted] M.A., School Psychologist, Rebuttal Witness

EXHIBITS

The following exhibits were received into evidence during the course of the hearing. The page numbers referenced are the "bate-stamped" numbers without the added "000s" (i.e., p. 00077 is p. 77).

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[1] Ms. Nicholas withdrew as legal counsel for Respondent after the contested case hearing for personal reasons.

[2] LCS staff erroneously referred to Ms. [redacted] as a "private psychologist" and/or "psychologist" in some of the educational records. (*See* Stip. Exs. 19, 24, and 27) Ms. [redacted] private educational evaluations (Stip. Exs. 33 and 35), given to LCS at the December 2015 and January 2017 IEP meetings, indicated that she is a Master's level Board-Certified Educational Therapist, not a psychologist.

Stipulated Exhibits ("Stip. Ex."): 1 (historical purposes), 2 (historical purposes), 4, 6-9, 13 (historical purposes), 14 (historical purposes), 16, 17, 19, 21-24, 26-35, 37, 38, 40, 41, 44, 46-50 (pp. 167-186), 52

Petitioners' Exhibits ("Pet. Ex."): 1, 5, 10, 12, 17, 19, 31, 33, 35, 38, 39, 53, 55, 57, 62-64, 67, 92, 95, 96, 99-101, 120, 132, 151, 157-160

Respondent's Exhibits ("Resp. Ex."): 1, 5, 6, 11, 13-15, 18-20, 22, 25, 26, 31, 39, 40, 44-46, 49, 52, 72, 74, 82 (p. 535), 84, 89 (pp. 739-760), 91 (pp. 810-817), 92 (p. 851), 93 (867, 869-871, 889, 897), 95 (pp. 902,910, 912-914, 917,918,922, 924, 925, 927, 932, 935, 937, 939, 940, 942, 945, 947), 96 (pp. 1026–27), 102, 115, 122, 133 (pp. 1246–58, 1260–62, 1264, 1512–15) 145 (pp. 2440–41), 148, 372, 373, 374, 375

Motion Hearing Exhibits: D1-D19, E1-E3

Official Notice: Pet. Ex. 135; 34 CFR 300.307(a)(3); *Handbook on Parents' Rights* (2008) (pp. 4, 12, 13); OSEP Guidance 2011- *No Delay or Deny for RtI, Memorandum of Understanding*; United States Department of Education *Letter to Baus* (2/23/2015).

Offer of Proof: Off. Stip. Ex. 3, Off. Stip. Ex. 5

The North Carolina Department of Instruction's *Policies Governing Services for Children with Disabilities* ("*NCDPI Policies*") is self-authenticated. (Stip. 60)

Any documents produced by the school district in discovery including, but not limited to, IEPs, email correspondence, data sheets, and meeting notes, are self-authenticated. (Stip. 58)

All pleadings filed with the Office of Administrative Hearings on the matter associated with Docket No. 17 EDC 03684 are self-authenticated. (Stip. 59)

PROCEDURAL BACKGROUND

The procedural background of this contested case is particularly significant because of a number of document production issues that arose which necessitated reconsideration of a prior decision and partially reopening of Petitioners' case-in-chief. Unfortunately, the emphasis of the procedural aspects of litigating the due process petition overshadowed the ultimate issue – was [redacted] denied a free and appropriate public education ("FAPE").

On June 1, 2017, Petitioner [redacted] filed a Petition for a Contested Case Hearing against the Lee County Schools ("LCS") alleging that Respondent failed to: (a) offer [redacted] a FAPE; (b) develop and implement substantively and procedurally valid Individualized Education Programs ("IEPs") for [redacted] (c) provide a substantively appropriate school placement to [redacted] (d) employ adequate placement procedures; (e) properly evaluate [redacted] and employ proper evaluative procedures; (f) properly consider [redacted]s need for related services; (g) properly consider [redacted]s need for Extended School Year ("ESY") services; (h) follow the requirements set forth in the IDEA; and (i) follow the requirements of North Carolina State law as set forth in N.C. Gen. Stat. §§ 115C-109.6, *et seq.*

On June 7, 2017, the Honorable Augustus Elkins issued an Initial Order scheduling the Due Process Hearing to start on July 19, 2017. Respondent filed its Response to the Petition on June 16, 2017.

On June 22, 2017, LCS filed its first Motion for a Continuance primarily on the basis that Respondent needed additional time to conduct the deposition of [redacted] Petitioners filed a Response in Opposition to Respondent's Motion for a Continuance. This Tribunal granted Respondent's Motion on June 22, 2017.

This Tribunal issued a Notice of Definite Hearing Date on June 27, 2017, setting the first date of hearing on August 8, 2017. This Tribunal issued an Order of Reassignment on July 24, 2017, reassigning the case to the Undersigned.

On July 18, 2017, Petitioners filed a Motion for Entry of Protective Order. On July 28, 2017, this Tribunal issued the Protective Order for LCS's employee personnel records.

On July 21, 2017, Petitioners filed a Motion to Compel Discovery. On July 28, 2017, Respondent also filed a Response to Petitioners' Motion to Compel. On August 4, 2017, Respondent filed its own Motion to Compel Discovery. This Tribunal issued an Order Denying Petitioners' and Respondent's Motions to Compel on August 18, 2017.

On August 1, 2017, the parties filed a Joint Motion for Definite Scheduling Order. This Tribunal issued a Notice of Definite Hearing Date setting the first date of hearing on August 21, 2017.

On August 7, 2017, prior to the hearing, Respondent filed a Partial Motion to Dismiss, Motion to Strike, and Motion for Partial Summary Judgment. Petitioners filed a Response to Respondent's Partial Motion to Dismiss, Motion to Strike, and Motion for Partial Summary Judgment on August 18, 2017.

On August 7, 2017, Petitioners filed their Motion for Summary Judgment. Respondent filed a Response to Petitioners' Motion for Summary Judgment on August 18, 2017.

The hearing began on August 21, 2017, and multiple motions - Respondent's Motion to Dismiss, Respondent's Motion for Summary Judgment, Petitioners' Motion for Partial Summary Judgment, Petitioners' Motion in Limine, were heard and decided on that day. (Tr. vol. 1) The Undersigned orally decided the dispositive motions (Tr. vol. 1, pp. 35-36, 43, 48, 54, 55, 59, 64, 75, 91, 104, 105 (reserved), 117, 147, 184 (reserved)), and those rulings were memorialized in a written Order dated September 8, 2017. The Undersigned reserved ruling on dismissal of private school placement as a remedy, and Petitioners' Motion in Limine.

Upon receipt of additional documents during the exhibit exchange, Petitioners orally made a Motion in Limine to exclude any evidence and testimony that the Respondent attempted to introduce which was not timely provided to Petitioners in accordance with the IDEA, the rules of discovery, and the scheduling order. (Tr. vol. 1, p. 161:15-25) The Petitioners were asked which, if any, of the approximately 100 emails and documents not timely produced had prejudiced them with respect to

the dispositive motion decisions. (Tr. vol. 1, pp. 4-185:2) In addition, Petitioners sought to exclude Respondent's exhibits which had not been provided in compliance with the exhibit exchange deadline, and which contained documents not produced in discovery such as lesson plans, notes, progress monitoring, fidelity checks, data collection, staff training documentation, and emails. (Tr. vol. 1, pp. 185: 3-201:19)

As remedy, Respondent agreed to stipulate to the authenticity of the lessons plans, emails, notes, fidelity checks, program training, and any documents in Respondent's exhibits which Petitioners contended had not been properly produced. (Tr. vol. 1, p. 202:7-18)

Respondent had previously stipulated to Petitioners' use of Resp. Ex. 137, since all of the contents of this exhibit had not been produced in discovery. (Tr. vol. 5, pp. 1012:5-1016:22)

On September 8, 2017, this Tribunal issued a written Order granting Respondent's Motions to Dismiss and Summary Judgment, in part, and denying Petitioners' Partial Motion for Summary Judgment and Respondent's Motion to Strike, ruling that:

> BASED ON the oral arguments and the Undersigned's review of the pleadings, depositions, and other discovery on file, together with the parties' respective motions for partial summary judgment with affidavits, the Respondent has shown that there is no genuine issue as to any material fact and that the Respondent is entitled to a judgment as a matter of law on Petitioners' claims with respect to an occupational therapy evaluation of [redacted] the implementation speech therapy services; and claims related to Respondent's provision of counseling and psychological services. IT IS HEREBY ORDERED that summary judgment is GRANTED to the Respondent on these claims and they are DISMISSED WITH PREJUDICE.
>
> FURTHERMORE, genuine issues of material fact remain with regard to whether LCS provided [redacted] a FAPE from October 27, 2015 to June 1, 2017, including the appropriateness of the integration of [redacted]s speech and reading goals, whether the speech therapist provided reading instruction, the appropriateness of [redacted]s progress monitoring, and private school placement as a remedy. IT IS HEREBY ORDERED that Respondent's Motion for Summary Judgment on these claims and any other remaining claims is DENIED.
>
> With respect to Petitioners' Partial Motion for Summary Judgment of the denial of FAPE, there remains a genuine dispute of material fact with regard to whether LCS provided [redacted] a FAPE and whether LCS predetermined [redacted]s placement at the June 8, 2016 IEP meeting. The Petitioner's Motion for Partial Summary Judgment is DENIED on the FAPE and predetermination issues.

Petitioners withdrew any claims for reimbursement of private speech therapy, and Ms. [redacted] attendance at IEP meetings. (Tr. vol. 5, p. 1009:4-25)

Ultimately all claims prior to June 6, 2016 were dismissed, including the "child find" claims.

After closure of Petitioners' case, Respondent's witnesses disclosed the existence of numerous documents which also had not been produced by Respondent during discovery. Petitioners had moved to compel these documents, but had been advised by Respondent that they were nonexistent.

During the hearing, progress monitoring documents were referenced in testimony by LCS's staff, which had not been produced as part of [redacted]s educational record or in response to discovery requests. (Tr. vol. 5, pp. 1010:5-1017:14)

In addition, Respondent's legal counsel had inadvertently failed to forward other pertinent documents which were relevant to the Petitioners' claims.

After reviewing, *in camera,* privileged communications between Respondent's legal counsel and Respondent's Exceptional Children's ("EC") Director, The Undersigned concluded that Respondent's legal counsel did not act improperly, and this was simply a communication snafu caused by the electronic transfer of voluminous records.

Petitioners also requested that the Undersigned review some redacted documents produced by the Respondent. The Undersigned determined that some of these documents had been improperly redacted by the Respondent. A complete summary and listing of these documents are found in Motion Exhibits D1-D19 and E1-E3. Of most significance was the email of [redacted] (D-11) ("[redacted] Email") which was improperly redacted (D-10).

In [redacted] Email, the Respondent's EC Lead Teacher/Compliance Specialist wrote:

> Please make sure you have a separate artic [articulation] goal for [redacted]. **I realize that this may be news to you as the county has typically had a ton of artic [articulation] goals integrated withing [sic] reading goals, and to my knowledge, CO has not begun spreading this information with SLPs...but** his artic issues are most likely related to his LD [learning disabled] reading, as he had artic issues before becoming eligible SLD [specific learning disabled].
>
> Really, what should have happened, at his reeval [reevaluation] meeting, a SI [speech impaired] worksheet would have been presented, because he was currently SI and the SLD worksheet should have also been reviewed. The team should then have had a conversation about eligibility for both and discussed if one was "related" to the other. He most likely would have meet [sic] SLD and SI and had a primary and secondary area. **This is also a problem the county is in a very bad habit of-automatically flipping kids to related service and not even really discussing it at the meeting which in turn leads to integrated goals that should not be integrated. [redacted] did speak to this in a previous email, but again to my knowledge, in depth conversations may not have taken place with all SLPs [speech language pathologists], which is why I am trying to make sure all that**

> **I work with know and understand this and start thinking about it.... I see that the habit is hurting us.**
>
> (D-10 & D-11) (redactions in bold).

This Tribunal issued an Order Upon Reconsideration of Respondent's Motion to Dismiss on September 6, 2017, stating:

> BASED ON a review of the unredacted document, the Undersigned has RECONSIDERED her previous decision granting Respondent's Motion to Dismiss all of Petitioners' claims prior to June 1, 2016. The Undersigned now GRANTS Respondent's Motion to Dismiss Petitioners' claims prior to the October 27, 2015 IEP meeting and DENIES Respondent's Motion to Dismiss Petitioners' claims from June 1, 2016 to October 27, 2015. Although this issue was not decided by summary judgment, had summary judgment been reconsidered, viewing the facts in the light most favorable to the Petitioners, the result would have been the same.
>
> MOREOVER, IT IS ALSO ORDERED, that because of the Respondent's improper nondisclosure, Petitioners may reopen their case in chief only as to the substantive and procedural appropriateness of the October 27, 2015 IEP as it related to [redacted]s reading disability. Because Petitioners have presented sufficient evidence with respect to the appropriateness of the January 22, 2016 [IEP], as it is essentially the same as the June 8, 2016 IEP except for placement, no additional evidence is necessary with respect to the January 22, 2016 IEP.

At the close of Petitioner's case-in-chief on August 29, 2017, LCS filed a Motion to Dismiss pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. This Tribunal denied, in part, and granted, in part, LCS's Motion. The Undersigned dismissed Petitioners' claims regarding: private tutoring reimbursement; assistive technology evaluation and services; speech language evaluation of [redacted] and, private school placement as a remedy with the caveat that this dismissal of this remedy does not prevent the Respondent from contracting with a private school for the provision of educational services to [redacted] or as an alternative if LCS is unable to provide compensatory educational services. The Undersigned denied Respondent's Motion as to any other claims.

After the testimony of [redacted] [redacted] Respondent's EC Lead Teacher/Compliance Specialist (drafter of D-11) on September 19, 2017, the Undersigned inquired if anyone had spoken to her about the redacted email Exhibits (D-10 & D-11) or given her a copy of the email. Ms. [redacted] indicated that she had spoken with both of Respondent's legal counsel the week before. Respondent objected to any questions about this communication based on hearsay and attorney-client privilege. Since Ms. [redacted] was no longer employed by LCS or an agent of LCS at the time of the communications, the Undersigned asked Respondent to prepare written arguments to support its hearsay and attorney-client privilege objections.

Prior to filing written arguments the following day, on September 20, 2017, Respondent made an oral motion for the Undersigned to recuse herself from the case because of personal bias, which was denied.

On September 20, 2017, Petitioners filed Written Argument regarding a statement made by [redacted] which had been originally redacted by Respondent in D-10 (*compare* D-11), and whether Ms. [redacted] statement should be considered a party admission pursuant to Rule 801(d) of the North Carolina Rules of Evidence. Respondent also filed Written Argument with respect to this issue on September 25, 2017. Both parties also filed respective briefs on Attorney-Client Privilege.

In its brief on Attorney-Client Privilege, Respondent argued that Ms. [redacted] written comments in D-11 were privileged. Ultimately, after receipt of written arguments, the Undersigned concluded that the communications with Ms. [redacted] and Respondent's counsel immediately prior to her testimony about the redacted email were attorney-client privileged because she had been an agent of LCS at the time the email was drafted.

Respondent filed an additional brief on the question of whether an email composed by a former LCS's employee about past events in the district constituted an admission by a party opponent. Respondent's legal counsel later clarified that it was their position that Ms. [redacted] was an agent of LCS, and her comments during her employment regarding the actions of LCS's staff were party admissions, but, based on *Sledge v. Wagoner*, 250 N.C. 559 (1959), it was still inadmissible hearsay. The Undersigned's findings and conclusions with respect to the [redacted] Email and statute of limitations issues are discussed *infra* in the Conclusions of Law.

BURDEN OF PROOF

As the party requesting the hearing, Petitioner has the burden of proof by a preponderance of the evidence. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

The appropriateness of a student's educational program is decided on a case-by-case basis, in light of the individualized consideration of the unique needs of the child. *Hendrick Hudson Bd of Educ. v. Rowley*, 458 U.S. 176 (1982).

Under *Rowley*, the Board is required first to comply with the procedure set forth in the IDEA in developing an IEP; and second, to provide a disabled student with education instruction that is uniquely designed to meet the student's needs though an IEP that is reasonably calculated to enable him to receive education benefit. *See Rowley*, 458 U.S. at 176. If both requirements are met, "the State has complied with the obligations imposed by Congress and the court can require no more." *Id.* at 207.

FINDINGS OF FACT AND STIPULATIONS OF FACT

Prior to the hearing, the parties agreed to Stipulations of Fact in the Order on the Final Pre-Trial Conference ("Order on Pre-Trial Conference") filed on August 23, 2017. To the extent that Stipulations are not specifically stated herein, the Stipulations of Fact in the Order on Pre-Trial Conference are incorporated fully herein by reference.

The Stipulations of Fact are referred herein as "Stip. 1," "Stip. 2," etc. For cohesiveness and brevity, the Stipulation of Facts are intertwined and incorporated within the Undersigned's Findings of Fact to the extent possible. For clarity, the Undersigned has noted in brackets ("[ ]") the relevant IEPs and timeframes within same stipulations, and removed the phrase "It is stipulated that:" before each stipulation. The jurisdictional, party, and legal stipulations are incorporated in the Conclusions of Law.

This Order incorporates and reaffirms all Findings of Fact and Conclusions of Law contained in previous Orders entered in this litigation.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, exhibits received and admitted into evidence, the Proposed Final Decisions, and the entire record in this proceeding, the undersigned Administrative Law Judge ("ALJ") makes the following Findings of Fact.

In making these Findings of Fact, the ALJ has weighed the evidence presented and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know, and remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case, including, but not limited to, verbal statements at IEP meetings, the IEP minutes, the IEP documents, the DEC 5/Prior Written Notices, and all other competent and admissible evidence.

PARTIES

1. Petitioner [redacted]s date of birth is [redacted], and his grandmother, Petitioner [redacted] is his legal guardian. Petitioner [redacted] was [redacted] years old at the time of the filing of this petition. (Stip. 8)

2. Near the end of [redacted]s first grade school year in [redacted]. (Stip. 9)

3. [redacted], [redacted] had lived with [redacted] On [redacted], [redacted] (Stip. 10)

4. [redacted] is a "child with a disability" as that phrase is defined in IDEA. (Stip. 11)

5. [redacted] is domiciled within the boundaries of the Lee County Schools ("LCS"), and Petitioners reside in Lee County, North Carolina. (Stips. 12 & 13)

6. In the third grade, [redacted] was determined eligible for services under the IDEA. (Stip. 14)

7. Respondent is a local educational agency as defined by IDEA and responsible for providing [redacted] a FAPE.

WITNESSES

8. Petitioners called two expert witnesses, [redacted] M.A., B.C.E.T. and [redacted] Ph.D., as well as Petitioner [redacted] as the sole fact witness.

Petitioners' Expert Witnesses

[redacted] M.A., Board-Certified Educational Therapist ("B.C.E.T.")

9. [redacted] was tendered and qualified in the areas of learning disabilities in reading and dyslexia, the evaluation and assessments of students with learning disabilities in reading and dyslexia, as a literacy consultant evaluating curriculum used by school districts, and the training of teachers of students with learning disabilities in reading and dyslexia, but with the caveat that she does not teach the curriculum herself. (Tr. vol. 2, p. 268:8-16)

10. Ms. [redacted] earned her Bachelor's of Arts degree in Psychology and Sociology from the University of Connecticut and Master's of Arts degree in Educational Psychology from the University of Connecticut. (Pet. Ex. 157) Ms. [redacted] is a Board-Certified Member of the Association of Educational Therapists. (Pet. Ex. 157)

11. Since 2002, Ms. [redacted] has served as the director of [redacted] Therapy Associates, a private clinical practice that serves clients from preschool to adulthood with learning problems. (Pet. Ex. 157) Since 2009, Ms. [redacted] has served as an adjunct faculty member teaching graduate level courses in the Language and Literacy Program at Simmons College, where she "work[s] in the area of reading research, which is about curriculum and about structured language and about reading instruction, about reading acquisition, and about identifying reading disability early." (Tr. vol. 6, p. 1040:21-25); (Pet. Ex. 157) Ms. [redacted] experience also includes teaching students with learning disabilities in both the regular education and resource classrooms in middle schools (Pet. Ex. 157); teaching at the Hill Center and writing the phonology curriculum, as well as teacher training materials for the Hill Center (Tr. vol. 2, p. 229:20-23); and, serving as a consultant for various school districts, the Office of Oversea Schools for the U.S. Department of State, and the North Carolina Department of Public Instruction. (Tr. vol. 2, pp. 219:14-18, 222:23-223:2; 232:25–233:2); (*see* Pet. Ex. 157)

12. Ms. [redacted] is especially knowledgeable in the area of learning disabilities in reading and dyslexia. Ms. [redacted] has co-authored a book about dyslexia, *Basic Facts About Assessment of Dyslexia: Testing for Teaching* (Pet. Ex. 157, p. 948), which is cited in the "North Carolina Dyslexia Topic Brief." (Pet. Ex. 110, p. 618) Ms. [redacted] has given many professional presentations regarding the education of children with learning disabilities in reading and dyslexia. (Pet. Ex. 157, pp. 944–47) (Presentations include; "Understanding Dyslexia," "Assessment of Dyslexia," "Basic Facts about Dyslexia," "Talking to Students about Dyslexia," and "Diagnosis and Remediation of Dyslexia and Reading Disorders.") Ms. [redacted] has completed the two-day overview of Wilson Reading System (Tr. vol. 2, pp. 226:25–227:1), and is trained in Orton-Gillingham reading methodology. (Tr. vol. 2, p. 237:10-11)

13. Ms. [redacted] is qualified to administer all educational assessments and trains graduate students in assessment, in addition to teaching courses on assessment internationally and domestically. (Tr. vol. 2, pp. 233:22–234:6)

14. Ms. [redacted] demonstrated she was current on the latest scientifically-based research and instructional strategies that affect educating students with disabilities with needs similar to those of [redacted]s. Ms. [redacted] education and professional experience qualified Ms. [redacted] to offer her expert opinion about the areas in which she was qualified as an expert. (Pet. Ex. 157)

15. Ms. [redacted] was the only reading specialist to evaluate [redacted] and she has been intimately involved in most of the IEPs at issue in this case. The Undersigned found Ms. [redacted] to be credible and knowledgeable about learning disabilities in reading and dyslexia, and in particular [redacted] Her expert testimony was given weight throughout this Final Decision.

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

16. [redacted] Ph.D., was tendered and qualified in the area of curricula for teaching students with learning disabilities in reading and dyslexia. (Tr. vol. 3, p. 486:19-22) Although Dr. [redacted] has been qualified in other cases before this Tribunal by the Undersigned and other ALJs as an expert in a much broader scope, Petitioners did not tender her in any other area. This limited her expert testimony to issues regarding reading curriculum.

17. Dr. [redacted] earned her Bachelor's of Arts degree in Elementary Education from the University of North Carolina at Greensboro, Master's of Education degree in Special Education from Duke University, and Doctorate in Child Development and Special Education from the University of North Carolina at Greensboro. (Pet. Ex. 158, p. 949) Dr. [redacted] has served as a Reading Consultant for the North Carolina School Improvement Project and Department of Public Instruction since 2000. (Pet. Ex. 158, p. 951); (Tr. vol. 3, p. 527:14-22)

18. While affiliated with the Department of Neurology, Section of Neuropsychology with the Bowman School of Medicine, Winston Salem, North Carolina, Dr. [redacted] has done extensive research on reading disabilities, early intervention, dyslexia, and instructional methodology. (Pet. Ex. 158, pp. 954-957) Dr. [redacted] has been an Educational Consultant; and since 1985, Dr. [redacted] has been a reading disabilities consultant and teacher trainer to both public and private schools in North Carolina and other states. (Pet. Ex. 158, p. 951) Dr. [redacted] has taught graduate level and doctorate courses on reading disabilities. (Pet. Ex. 158, p. 952)

19. Dr. [redacted] has presented locally, nationally, and internationally on dyslexia, reading disabilities, early intervention, and remediation programs (over 40 selected presentations). (Pet. Ex. 158, pp. 954-957) Dr. [redacted] has received multiple grants related to the education of students with learning disabilities in reading and dyslexia. (Pet. Ex. 158, pp. 953) (Listing multiple grants in the area of "Behavioral Definition and Subtyping of Dyslexia.") Dr. [redacted] has published chapters in books related to the education of students with learning disabilities in reading and dyslexia. (Pet. Ex. 158, p. 957) (Chapters include, "Neuropsychological prediction of reading disabilities," "Neurobehavioral definition of dyslexia," and "The development of reading skills in poor readers: Educational implications.") Dr. [redacted] co-authored a book about dyslexia with Ms. [redacted] *Basic Facts About Assessment of Dyslexia: Testing for Teaching.* (Pet. Ex. 158, p. 957) Dr. [redacted] has published many journal articles about the education of students with learning disabilities in reading and dyslexia. (Pet. Ex. 158, pp. 957–958) (Articles include, "Early identification of children at risk for reading disabilities," "Effects of instruction on beginning reading skills in children at risk for reading disability," and "Separate verbal memory and naming deficits in attention deficit disorder and reading disability.") Dr. [redacted] has also worked with the

North Carolina Department of Public Instruction regarding the issue of extended school year services for children with specific learning disabilities. (Tr. vol. 3, p. 497:14-17)

20. Dr. [redacted] is knowledgeable in the area of curricula for students with learning disabilities in reading and dyslexia. Dr. [redacted] is trained in Orton-Gillingham methodology. (Tr. vol. 3, pp. 480:22–481:2) Dr. [redacted] is also trained in the Language! program and provided training to teachers in Language! (Tr. vol. 3, p. 482:1-6, 17-20) Dr. [redacted] has used the Wilson Reading System "extensively in working with students with severe reading problems," and has "supervised and done fidelity checks on FUNdations in several school systems." (Tr. vol. 3, p. 482:10-13) Dr. [redacted] worked with Barbara Wilson, who created the Wilson Reading System, to help "develop the Master's in Teaching program at Simmons College, which was designed to train teachers in how to understand and provide appropriate instruction and assessment to students who had language based reading disabilities." (Tr. vol. 3, pp. 483:2-11, 484:20-21) Dr. [redacted] worked with Barbara Wilson on the development of the Word Identification and Spelling Test. (Tr. vol. 3, p. 483:12-14) Dr. [redacted] also is trained in Letterland, provided training in Letterland in several counties, and conducted a three-year research study of the implementation of Letterland in a school in Florida. (Tr. vol. 3, p. 485:20-21)

21. Dr. [redacted] demonstrated she was current on the latest scientifically-based research and instructional strategies that affect educating students with disabilities with needs similar to those of [redacted]s. Dr. [redacted] education and professional experience qualified Dr. [redacted] to offer her expert opinion about the areas in which she was qualified as an expert. (Pet. Ex. 158)

22. In order to prepare for her testimony, Dr. [redacted] reviewed [redacted]s educational record from LCS. (Tr. vol. 3, pp. 487:4-7, 488:9-10, 490:3-4) Dr. [redacted] reviewed the progress monitoring information collected by LCS and analyzed it to determine whether [redacted] was making progress on his IEP goals. (Tr. vol. 3, pp. 502:17–503:20) Dr. [redacted] also reviewed the progress monitoring information provided by LCS to analyze and evaluate the instructional strategies utilized by [redacted]s instructors.

23. The Undersigned found Dr. [redacted] to be credible and extremely knowledgeable about [redacted]s unique circumstances and learning disabilities in reading. Dr. [redacted] credibility was bolstered when she disagreed with Ms. [redacted] as to the appropriateness of some of the January 2017 IEP goals. Although Dr. [redacted] expert testimony would have been helpful to the Undersigned in areas other than curricula, she was not tendered in any other capacity. However, based on her specialized knowledge, her lay opinions can be considered under Rule 701 of the N.C. Rules of Evidence, N.C.G.S. § 8C-1. As an ongoing consultant and trainer for the North Carolina Department of Public Schools' ("NCDPI") School Improvement Program, NCDPI has recognized her expertise which further accentuated her credibility to the Undersigned. During her testimony, Dr. [redacted] was a credible expert witness, and her opinions as a lay person were also helpful to the Undersigned. Dr. [redacted] testimony was given great weight throughout this Final Decision.

Respondent's Witnesses

24. Respondent presented testimony from one expert witness, [redacted] [redacted] Respondent also presented testimony from [redacted]s teachers, Lead EC Teacher/Compliance Specialist, speech pathologist, and a rebuttal witness, [redacted] [redacted]

M.A.

25. Respondent tendered as an expert in IEP development for students with reading disabilities; knowledge of reading curricula; connection between speech and reading; identifying, evaluating, placement and provisions of FAPE for students with learning disabilities in reading; and, interpretation of educational testing for students with learning disabilities in reading. (Tr. vol. 17, p. 3489:1-8)

26. Ms. was only qualified as an expert in IEP development which included development of present levels, goals, and placement for students with reading disabilities. (Tr. vol. 17, p. 3537:8-13; 20-23)

27. has a Bachelor's of Arts degree in Mentally Handicapped and a Master's in Special Education/Learning Disability K-12/Behavior. (Resp. Ex. 373) She is a licensed special education teacher pursuant to the HOUSSE process. (Tr. vol. 17, pp. 3521:7-3522:4; 3522:22-3523) (Resp. Ex. 374)

28. Ms. has been employed with LCS in various capacities: resource teacher 1998-2002; EC Lead Teacher 2002-2016; and subcontractor for service plans for privately placed students in LCS from 2016 to present. (Tr. vol. 17, pp. 3453-3458)

29. Ms. has not: conducted any formal research on teaching reading to students with dyslexia, published any books, spoke at any international conferences on dyslexia or any national conferences on dyslexia, been published in a peer reviewed journal, worked in a district other than the LCS, taught any graduate level classes in IEP development, presented at a NCDPI conference or any conference in the State of North Carolina other than within the LCS. (Tr. vol. 17, pp. 3502:1-17, 3504:17-19, 3518:22-3519:6)

30. The entirety of Ms. expert testimony was based on the training she received from NCDPI, the advice she gave to Lee County Schools during her tenure, and her experience working with students with disabilities. (Tr. vol. 17, pp. 3502:24-3503:5)

31. Ms. testified beyond her expert qualification about research in reading disabilities, the connection of speech and reading, and reading curriculum. Because Ms. did not demonstrate specialized knowledge in these areas of research (Tr. vol. 17, pp. 3502:1-17, 3504:17-19, 3518:22-3519:6) and was not trained in the curriculum (Tr. vol. 17, pp. 3497:9-18, 3498:3-14, 3504:9-16, 3505:16-18), the Undersigned gave her testimony no deference on those topics. Ms. opinion that reading programs do not have to be delivered with fidelity further demonstrated her misunderstanding about the importance of program integrity, especially with severely reading disabled students. (Tr. vol. 19, p. 3938:6-11)

32. At times during her testimony, Ms. was unable to separate her experience as a parent of a child with a disability. The Undersigned noted Ms. began to cry as she testified about her son's struggles with reading and his attendance at N.C. State University which resulted in the court taking a break from testimony. (Tr. vol. 17, pp. 3468:5-3469:5) Ms. testified about her informal observations of [when she was her son's EC teacher rather than answering to her professional observations of Ms. as s teacher. (Tr. vol. 18, pp. 3620:3-3621:16) Ms. credibility was compromised by her unprofessional demeanor on the stand and her current employment as a subcontractor with Lee County Schools. (Tr. vol. 17, p. 3493:3-

7) However, as an educator, her testimony was given deference in areas where she demonstrated specialized knowledge.

Respondent's Fact Witnesses

M.Ed., CCC-SLP

33. has been employed as a speech-language pathologist with LCS since 1997. (Tr. vol. 18, p. 3107) She has a Master's of Education in Communication Science Disorders with the clinical competence Certification in Speech Pathology. (Tr. vol. 15, p. 3107)

34. Ms. was s speech therapist. She first screened in 2014 and has provided speech therapy to at all times from October 2015 through the filing of the Petition. Ms. also conducted a speech-language evaluation of on October 26, 2015. (Stip. Ex. 32)

35. Ms. was the only speech therapist to evaluate s speech and language needs; however, her evaluation of was incomplete. (Stip. Ex. 31) According to her speech-language evaluation, Ms. reported that: "s language, voice, and fluency skills are within normal limits at this time." (Stip. Ex. 32, p. 113)

36. Ms. did not assess s vocabulary, grammar, phonology, voice, or fluency (Pet. Ex. 160), and Ms. despite testifying to the contrary, failed to produce any evidence that she actually assessed in these areas after being given an extended opportunity to do so by the Undersigned. (Tr. vol. 16, p. 3297:2-12) There was significant conflicting testimony regarding the assessments administered to Ms. only conducted an articulation evaluation when she testified there was a connection to articulation and phonology. (Tr. vol. p. 16, 3346:24-3347:2) Ms. testified that she did not think it would be important to conduct a language assessment of despite known concerns with s reading. (Tr. vol. 16, p. 3346:4-18) Ms. claimed that she assessed whether had a phonological disorder, but there was no evidence of this assessment in the record. (Tr. vol. 16, pp. 3293:19-3295:16) Later in her testimony, she testified that she had assessed s phonological processes on the Goldman Fristoe; however, when asked which part of the Goldman Fristoe, Ms. indicated one could "take that Goldman Fristoe and convert it to the Kaufman and look at tests of phonological processes," but she admitted that she did not actually convert the Goldman Fristoe to the Kaufman. (*compare* Tr. vol. 16, p. 3347:8-9, 11-13 *with* Tr. vol. 16, p. 3348:4-8)

37. Ms. repeatedly testified that s articulation disorder impacted his spelling, writing, and reading, yet was unable to cite any research to support her position. (Tr. vol. 16, pp. 3290:16–3291:4) Based on her unsupported position, Ms. testified that she viewed Ms. statement that s "artic[ulation] issues are most likely not related to his LD reading [sic] as he had artic issues before becoming eligible as LD," as merely Ms. opinion. (Tr. vol. 16, p. 3313:21-25) According to Ms. the delay in providing with specialized instruction in reading was merited because LCS was "teasing out how his articulation errors were affecting his reading and spelling and writing." (Tr. vol. 16, p. 3314:2-10) Confusingly, Ms. testified the "read aloud" accommodation put in s IEP related to concerns about "his speech [affecting] how he was reading the math problems out loud," and the modified grading was added "because of—we didn't want the speech—him to be negatively scored or graded based on speech errors for writing or reading or spelling." (Tr. vol. 16, pp. 3349:20-3350:7, 20-23) Ms.

testified all the modifications in the October 2015 IEP (Stip. Ex. 8) were solely related to s speech needs. (Tr. vol. 16, p. 3351:5-11)

38. Ms. acknowledged that Ms. position as an EC Lead Teacher/ Compliance Specialist included making sure that Ms. was "being compliant and to tell us thing that we needed to improve on or correct or that we needed to include in our paperwork and in our meetings and in our services provided." (Tr. vol. 16, p. 3310:3-9) However, when being questioned about the directives provided in Ms. un-redacted email (D-11) Ms. disregarded Ms. directives as being based on "some of [Ms.] personal opinions . . . [and] she did not have the speech background and expertise that [Ms. did." (Tr. vol. 16, p. 3310:14-17)

39. Ms. credibility was seriously impacted by the questionable accuracy of her reports/assessments as well as her unsupported and often changing testimony. s speech evaluation report repeatedly referred to with feminine pronouns. Ms. dismissed these repeated errors as "typos." (Stip. Ex. 32) (Tr. vol. 16, pp. 3301:10-23, 3302:13-17) She only recommended small group therapy and never suggested the IEP team even consider individual therapy. (Tr. vol. 16, p. 3302:20-25) Ms. stated that the thoroughness of the screenings and evaluations she conducted for was comparable to what she did for other students, but her Joliet 3-Minute Speech and Language Screening provided to Petitioners documented that Ms. did not screen in the areas of vocabulary, grammar, phonology, voice, or fluency. (Pet. Ex. 160) (Tr. vol. 16, pp. 3326:7-16; 3297:2-12) Ms. testified those portions of the screening and her accompanying notes were missing but failed to produce the missing documents even when given a second opportunity to do so by the Undersigned. Ms. first testified that she had administered portions of the Goldman Fristoe test; however, when questioned about the presence, or absence, of any notes on the protocols she administered, Ms. then stated she may not have made any notations on the test protocol, which would have made it impossible for anyone reviewing the protocol to confirm. (Tr. vol. 16, pp. 3305:2-13, 3306:4-7) Ms. testified that her understanding that the "notes on protocols, [were] not, . . . fully up to [Petitioners' counsel's] estimate of par," however, the protocols Petitioners received failed to contain any of the notes Ms. originally testified would be present, and no additional protocols were produced. (Tr. vol. 16, p. 3326:22-23) After previously testifying that she had assessed s language abilities, Ms. stated she "was not required to give a language evaluation" because "[the IEP team] didn't really discuss a language evaluation." (Tr. vol. 16, p. 3327:3-4) According to Ms. she was working on instructional sight word lists with but her therapy notes are devoid of any evidence to support this testimony. (Tr. vol. 16, p. 3360:7-10) Although Ms. testified that she was "in contact with the RtI team and [s] classroom teacher and Ms. . . . [and] either the assistant principal and the principal, . . . they meet regularly to-- every couple of weeks or so to progress monitor, and so I was in contact with the team" (Tr. vol. 16, pp. 3315:20-3316:6), upon response to further questions on cross-examination, Ms. indicated she "probably misspoke about [progress monitoring every two weeks in RtI] . . . [and she was] not exactly sure how often the team met." (Tr. vol. 16, p. 3317:4-17) Ms. later clarified that she did not meet with the RtI team and had no notes from the "contacts" she had with the RtI team members. (Tr. vol. 16, p. 3318:15-25) Ms. stated that she checked in with s RtI team twice between September 18, 2015 and October 26, 2015, yet sent an email (D-1) to Ms. questioning in which areas was being provided intervention. (Tr. vol. 16, p. 3345:3-12)

40. Ms. [redacted] was the only speech pathologist to testify, and her specialized knowledge as a speech pathologist was given deference with respect to speech therapy and articulation disorders, but not to reading instruction or remediation.

Respondent's Other Fact Witnesses

[redacted] ***Former EC Lead Teacher/Compliance Specialist***

41. [redacted] former EC Lead Teacher/Compliance Specialist[3] for LCS, testified on behalf of Respondent. Ms. [redacted] was subpoenaed by both parties and a reluctant witness. Initially, she was nervous and somewhat hostile, but this subsided as her testimony progressed. Ms. [redacted] purposefully did not interact with Petitioners' legal counsel, Petitioner, LCS's legal counsel, or school administration staff except when being questioned.

42. Overall, Ms. [redacted] was not particularly helpful to Respondent's case. Her testimony did not appear vindictive - it was simply responsive to the questions. Although she did backtrack somewhat from her comments in the [redacted] Email (D-11) during direct examination, the Undersigned found her credible.

43. Both [redacted] and [redacted] were Lead Teachers for LCS, but their testimonies diverged on key issues.

44. Ms. [redacted] has a Bachelor's degree in Psychology and a Master's in Post-Secondary Educational Psychology. (Tr. vol. 11, pp. 2263-2264)

45. Ms. [redacted] has a North Carolina teaching license for special education K through 12. (Tr. vol. 11, p. 2265)

46. Ms. [redacted] was an exceptional children teacher in Lee County Schools for five years before she resigned mid-July 2017 and went to work for [redacted] County Schools. (Tr. vol. 11, pp. 2265, 2278)

47. Ms. [redacted] was a trainer for the Language! program, trainer for Reading Research to Classroom Practice (Spring 2016), and a trainer for Dyslexia Delegates (through DPI). (Tr. vol. 11, pp. 2265-2267, 2276)

48. Ms. [redacted] recommended that the articulation goals[4] be separate from the reading goals in the January 2017 IEP. (D-11) (Tr. vol. 11, pp. 2280:14-2282:2)

49. Ms. [redacted] testified that "at the time" they left the January 2016 IEP meeting, she thought the combined goals were appropriate. (Tr. vol. 13, pp. 2495:25-2496:3) But, that "now," based on her additional experience, she did not know. (Tr. vol. 13, p. 2496:4-17) Ms. [redacted] agreed that the Present Level in the January 2016 IEP did not have baseline data for the

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[3] According to Ms. [redacted] the terms "EC Lead Teacher" and "Compliance Specialist" are interchangeable. (Tr. vol. 12, p. 2405:5-6)

[4] The articulation goals are referenced as either "articulation goals" or "speech goals." [redacted]s articulation deficits were only in the sound productions of /th/, /r/, /l/ blends, and /r/ blends. (Stip Ex. 32, p. 112)

goals. (Tr. vol. 13, pp. 2498, 2501, 2504, 2506) (No baseline data on the IEP.); (Tr. vol. 13, pp. 2516:24-2517:1)

50. Per Ms. [redacted] placement tests should be used to group students in the reading remediation programs. (Tr. vol. 12, p. 2431:1-12) (Testimony of [redacted]

51. Also, according to Ms. [redacted] the goals drive the service delivery not the type of reading remediation program. (Tr. vol. 13, p. 2508:12-14)

52. As NCSIP coordinator, it was Ms. [redacted] responsibility to review the fidelity charts. (Tr. vol. 13, p. 14-16) After reviewing Ms. [redacted] fidelity charts for [redacted]s Language! instruction, Ms. [redacted] admitted that Ms. [redacted] did not teach the Language! or the FUNdations programs with fidelity during the 2016-2017 school year. (Tr. vol. 13, pp. 2458-2468)

LCS Teachers

53. [redacted]s teachers also testified at the hearing. They agreed that the IEPs were appropriate, [redacted]s reading programs were fully implemented, and that [redacted] made progress during the RtI process. [redacted]s teachers seemed fond of [redacted] and [redacted] as well as concerned about [redacted]s education. The Undersigned finds that the teachers' testimony was genuine, but not persuasive, and contradictory to their own fidelity documentation and progress monitoring data.

Respondent's Rebuttal Witness

[redacted] [redacted] ***M.A., School Psychologist***

54. Respondent's rebuttal witness, Mr. [redacted] [redacted] worked as a school psychologist in LCS. He has Master's Degrees in Psychology and School Psychology, as well as an Educational Specialist Certification in School Psychology. (Tr. vol. 20, pp. 4017-4018)

55. Annually, Mr. [redacted] conducted 75-100 evaluations for students being considered for special education and related services, attended numerous IEP meetings, and participated on all the RtI teams in his assigned schools. (Tr. vol. 20, pp. 4019-4020)

56. As rebuttal to Petitioners' expert testimony that [redacted] should have been referred for an evaluation at the end of his first-grade year, Mr. [redacted] testified that [redacted] should not have been referred at that time because of the [illegible] . (Tr. vol. 20, pp. 4023:15-19, 4024:24–4025:4, 4025:12-15, 4028:23-4029:3)

57. Mr. [redacted] testimony was solely based upon a RtI progress report, Ms. [redacted] evaluations, and LCS's psychological evaluation of [redacted] (Tr. vol. 20, p. 4035:20-25) During cross-examination, Mr. [redacted] demonstrated he was not sufficiently familiar with [redacted] his educational programming, or his educational record. (Tr. vol. 20, p. 4030:1-3) (testifying he never met [redacted] (Tr. vol. 20, p. 4032:20–25) (testifying he did not review [redacted]s RtI plans to determine their appropriateness or the notes from RtI meetings); (Tr. vol. 20, p. 4035:5-9) (testifying he thought Ms. [redacted] November 2015 evaluation was conducted " [illegible] " (Tr. vol. 20, p. 4041:11-17) (testifying he did not speak to any of [redacted]s teachers about [redacted] and the [illegible])

58. Most significantly, Mr. [redacted] testimony was not supported by any written documentation by [redacted]s teachers or any other documentation in [redacted]s educational record.

59. When [redacted] specifically asked at the January 2016 IEP meeting why the referral was delayed, *none* of LCS's teachers or administrators even suggested that it was delayed because of [redacted] For the first time, at hearing, Respondent asserted this rationale.

60. Because Mr. [redacted] testimony was speculative and uncorroborated by any written documentation, the Undersigned gave it little weight.

[redacted]s EDUCATIONAL BACKGROUND AND INITIAL REFERRAL

61. [redacted] has been enrolled in the LCS since kindergarten. (Stip. 15) He is currently in the fourth grade and has attended [redacted] Elementary School ("[redacted] (Stip. 16)

62. [redacted]s teachers in the LCS were:

School Year	Grade	Regular Ed.	Special Ed.
2015-2016	Second Grade	[redacted]	[redacted]
2016/2017	Third Grade	[redacted]	[redacted]
2017/2018	Fourth Grade	[redacted]	[redacted]

(Stip. 17)

63. In kindergarten, all of [redacted] general education students, including [redacted] began in Tier 1 of the Response to Intervention ("RtI") process, a general education program designed to provide intervention for students struggling academically.

64. During his first and second grade years, [redacted] continued in Tier 2 of the RtI process.

65. [redacted] testified that she complained about [redacted]s reading deficits during his participation in the RtI process.

66. According to [redacted] [redacted]s teachers discouraged her from seeking an evaluation until the third grade.

67. [redacted]s teachers testified that they had told [redacted] and [redacted] that they could refer [redacted] anytime despite his involvement in the RtI process.

68. [redacted] M.Ed., CCC-SLP conducted routine speech language screenings of [redacted] on February 13, 2015 (Stip. 18) and September 4, 2015. (Stip. 19) (Stip. Ex. 31)

69. [redacted] had noticeable articulation errors for /t/, /r/, and /l/ blends. (Stip. Ex. 31) No other dysfluencies in language were noted in Ms. [redacted] evaluation. (Stip. Ex. 31)

70. Ms. [redacted] did not recommend any additional evaluations or speech therapy for any language deficits.

[redacted]s Participation in Respondent's Response to Intervention ("RtI")

71. Response to Intervention ("RtI") is a general education program. (Tr. vol. 20, p. 4043:1316) (Testimony of [redacted] Data and interventions are used during the RtI process to assist the RtI team to determine if an evaluation is needed for special education services and what evaluations to conduct. (Tr. vol. 20, pp. 4021: 12-25, 4022:1) (Testimony of [redacted] Although the RtI team is a separate team from the IEP team, the IEP team receives RtI data from the RtI team and determines whether to evaluate for special education eligibility. (Tr. vol. 18, p. 3681:20-24) (Testimony of [redacted] Students are identified as to whether they are likely to have enduring reading problems over time by looking at interventions through the RtI process. (Tr. vol. 18, p. 3609:1-4) (Testimony of [redacted]

72. During first-grade, [redacted] participated in Tier 2 of Respondent's RtI program for reading using the Letterland reading curriculum. (Tr. vol 19, p. 1802:8-11) His Tier 2 Intervention Plan dated November 5, 2014 had one goal for reading: "[i]n three weeks, [redacted] will read 4 nonsense words (whole word read) in 1 minute." (Pet. Ex. 95, p. 509) The concerns listed for reading intervention were fluency, phonics, decoding, and comprehension. *Id.* The Letterland program was used and progress monitored by mClass. *Id.* [redacted] [redacted]s mother, signed the reading Intervention Plan on November 5, 2014. *Id.*

73. At the end of first grade, despite interventions, [redacted]s mClass DIBELS ("Developmental Reading Assessment") composite score declined to the "Intensive" level, far below grade level. (Pet. Ex. 5, p. 26)

74. In the second-grade, [redacted] continued in Tier 2 intervention for reading, phonemic awareness, phonics, fluency, and comprehension. (Pet. Ex. 96, p. 510) Curriculum progress monitoring was done by weekly DORF and DIBELS' testing. (Pet. Ex. 96, p. 510) A plan review meeting was held on November 24, 2015. (Pet. Ex. 96, p. 511)

75. During his second and third grade school years, [redacted]s beginning, middle, and end of year ("BOY," "MOY," and "EOY") DIBELS' scores remained on the Intensive level, far below grade level. (Pet. Ex. 5, p. 26)

76. The IEP team reviewed [redacted]s lack of progress in the RtI Intervention progress at the October 2015 IEP meeting and subsequent IEP meetings. (Eligibility Determination - Stip. Ex. 7, p. 146) (Initial Speech IEP - Stip. Ex. 8, pp. 17, 19); (Prior Written Notice Initial Speech IEP - Stip. Ex. 9, p. 30); (December 1, 2015 reevaluation meeting documents - Stip. Ex. 13, p. 36)

77. Although [redacted]s teachers testified that [redacted] and [redacted] were told that, even though [redacted] was in RtI intervention for reading, they could request an evaluation anytime, there was no written documentation of that communication in any of the educational records.

78. However, the December 1, 2015 IEP meeting did document Ms. [redacted] (LEA Representative and Principal) misrepresentation that: "[redacted] had been meeting his goals through the RtI program since the first grade." (Stip. Ex. 14, p. 38) Although the LEA representative told Petitioners at the December 2015 Reevaluation meeting that [redacted] had made progress in the RtI program, the day before the meeting on November 30, 2015, [redacted] had been moved from Tier 2 to Tier 3.

79. Also, at the December 2015 meeting, instead of using the alternative research-based procedure for determining specific learning disability ("SLD") eligibility, the IEP team insisted on a psychological evaluation of [redacted] before it conducted the eligibility meeting for SLD.

80. Petitioners' expert, Ms. [redacted] advised the IEP team that a psychological evaluation was not required for a specific reading disability determination. The IEP meeting minutes noted that Ms. [redacted] "[s]ent an email about the state guidelines which says that we do not need an IQ or cognitive testing and that [redacted] needs to begin receiving services now." (Stip. Ex. 14, p. 38)

81. The Undersigned agrees with Petitioners that IQ testing was not required because Respondent already had alternative research-based procedures for determining if [redacted] was specific learning disabled in reading. IQ testing is not required for alternative research-based procedures for determining whether a child has a SLD under federal law. 34 C.F.R. § 300.307(a)(1) & (2)

82. However, an LEA may use State criteria for determining whether a child has a SLD. 34 C.F.R. § 300.307(b). NC Policy 1503(11) for Eligibility Determination of SLD described two methods for SLD determination: 1) discrepancy, and 2) alternative research-based ("RtI"). NCDPI Policy required screenings, and evaluation for either method includes a psychological evaluation. NC Policy 1503(11)(i)(J) An IQ test however is to be included only "as appropriate when using RtI." NC Policy 1503(11)(i)(J) Respondent's staff misinterpreted NC Policy 1503(11) to require an IQ test when the RtI method was used for SLD eligibility.

83. [redacted] through her expert, was aware of this procedural violation, yet failed to timely contest it.

84. Contrary to LCS's assertion at the December 2015 IEP meeting that [redacted] was making progress in the RtI program, at the January 2016 IEP Meeting, Respondent documented that [redacted] had not met his Tier 2 goals and had been moved to Tier 3 on November 30, 2015. (Stip. Ex. 14, p. 38); (Stip Ex.16, p. 42)

85. The January 2016 IEP team documented that "intervention strategies have not been successful in closing the gaps for [redacted] in the area of reading" and that "[c]urrent testing data supports the need for additional support in all areas of reading and spelling." (Stip. Ex. 16, p. 45) The December 2015 IEP team already knew this because the day before that meeting (November 30, 2015), [redacted] was moved to Tier 3.

86. The IEP meeting minutes from the January 21, 2016 IEP meeting documented that the IEP "[t]eam discussed that intervention strategies have not been successful and he needs additional support in all access of reading and spelling." (Stip. Ex. 19, p. 71) Ms. [redacted] shared that [redacted] performed below grade level in his most recent mClass testing. (Stip. Ex. 19, p. 71)

87. [redacted] and her reading specialist "advocated for phonics with decodable texts with a highly trained teacher for one hour a day." (Stip. Ex. 19, p. 72)

88. Respondent's mClass testing and [redacted]s RtI programs evidenced that [redacted] needed specially designed instruction well before the January 21, 2016 IEP meeting.

89. [redacted] testified that each Tier level should only take 4-6 weeks before moving to the next Tier. Therefore, once [redacted] was in Tier 2, if he did not progress within 6 weeks, he should have been moved to Tier 3. All three Tiers should take no more than at most 24 weeks if the child is not progressing.

90. [redacted] is on the year-round calendar. Each school year starts in July and ends in June, with four intercessions of 3-4 weeks duration. (*see* Resp. Ex. 375) [redacted] was on Tier 2 his whole first grade year. If you assume that during his second-grade school year, he started Tier 2 interventions on November 5, 2014, he should have only been in Tier 2 for 4-6 weeks which would end by January 15, 2015 (intercession excluded). (Pet. Ex. 95) If he was moved to Tier 3 on January 15, 2015, then by February 26 or March 4, 2015 (4-6 weeks later), Respondent should have sought [redacted]s consent to evaluate. However, Respondent did not seek consent for an evaluation to determine if [redacted] was eligible as SLD. Respondent's justification for this lapse is that, despite his DIBELS first grade EOY score, [redacted] should not have been evaluated at that time because his [illegible] . (Tr. vol. 20, pp. 4020-25; 4029: 1-3) (Testimony of [redacted]

91. At the January 21, 2016 IEP meeting, [redacted] noted that "it has taken too long to address [redacted]s needs and it shouldn't be 6 months before he is in the 3rd grade that he gets help." (Stip. Ex. 19, p. 71) [redacted] also "requested further information about how and why it took so long for his needs to be addressed." (Stip. Ex. 19, p. 74) (IEP minutes) No one from LCS suggested that the delay in [redacted]s evaluation was due to their concerns about the educational impact on [redacted] because of the [illegible] resulting from [illegible] or did anyone from LCS explain why "it had to take a parent referral for [redacted] to get tested and receive help," when LCS had a statutory duty to seek [redacted]s consent to evaluate [redacted] (Stip. Ex. 19, p. 74)

92. This is an example of the misuse of the RtI progress discussed in the United States Department of Education, Office of Special Education Programs ("OSEP"), OSEP Guidance 2011 – *No Delay or Deny for RtI, Memorandum of Understanding. See also,* United States Department of Education, Office of Special Education Programs, *Letter to Baus* (2/23/2015).

93. School psychologist, Randal [redacted] testified as a rebuttal witness for Respondent solely to rebut Petitioners' experts' opinion that [redacted] should have been evaluated at the end of his first-grade year. Mr. [redacted] did not speak to any of [redacted]s teachers about their impressions of the educational impact of the [illegible] of [redacted]s [illegible] (Tr. vol. 20, p. 4041:11-17) Mr. [redacted] opinion was also based on his inaccurate understanding that Ms. [redacted] 2015 Evaluation was conducted "a month after the [illegible] " (Tr. vol. 20, p. 4035:5-9) The Undersigned gave Mr. [redacted] testimony little weight because he was not sufficiently familiar with [redacted]s overall educational profile, and he had never met [redacted] never reviewed [redacted]s education records except for [redacted] evaluations and the psychological evaluation, and did not review [redacted]s RtI plans or any notes from RtI meetings. (Tr. vol. 20, pp. 4030:1-3, 4035:5-9, 20-25)

94. Respondent's expert, Ms. [redacted] also speculated why the RtI team did not seek an evaluation for special education eligibility. (Tr. vol. 20, p. 4028:10-19) (Testimony of [redacted] (Tr. vol. 18, p. 3702:21-25; 3704:3-4) (Testimony of [redacted] One of the factors that would have been considered by the RtI team would have been the [illegible] of [redacted] [redacted]. (Tr. vol. 18, p. 3703:3-25) (Testimony of [redacted] Respondent failed to produce any RtI team meeting notes, minutes, or documentation that this [illegible] was a factor in their decision not to seek evaluation.

95. Respondent expert's speculations are not supported by the record or by any testimony from the actual RtI members or IEP members. Moreover, there is *absolutely no documentation* on any of ▇s records from any source that his reading deficits were caused or exacerbated by

96. Even assuming that Respondent delayed referral because of this reason, ▇s third grade school year started July 2015. In this scenario, by the end of August 2015, 4-6 weeks after the first day of school with no intercession (Resp. Ex. 375), Respondent should have sought Petitioners' consent for an evaluation to determine eligibility as SLD but did not.

97. RtI is a general education process, not special education, so this Tribunal has no jurisdiction for reviewing the appropriateness of the RtI procedures used by LCS. The Undersigned is not reviewing the appropriateness of the RtI procedures except in the context that the RtI process is an alternative method for SLD referral. 34 C.F.R. 300.307(a)(2)

98. A child's response to scientific, research-based intervention can be an alternative process for determining if a child should be evaluated for an SLD. 34 C.F.R. § 300.307(a)(2) If, prior to a referral, a child has not made adequate progress in RtI (34 C.F.R. § 300.309(c)(1) or (2)), "a public agency *must promptly* require parental consent to evaluate the child to determine if the child needs special education and related services. 34 C.F.R. § 300.309(c) (Emphasis added) This must be done within the requisite timelines, unless extended by mutual consent of the child's parents and groups of qualified professionals. 34 C.F.R. § 300.309(c)(2) Under NC Policies, the LEA must propose to conduct an initial evaluation and obtain informed consent with prior written notice provided to the parent consistent with procedural notice requirements of NC Policy 1504-1.4 and 1504-1.5.

99. During ▇s first-grade year and his second-grade year, at his initial speech eligibility determination meeting, at his initial IEP meeting, at the subsequent eligibility meeting, and in the Prior Written Notices for any of these meetings, Respondent failed to provide prior written notice advising Petitioner that Respondent had to obtain her informed consent to evaluate ▇ or to extend the RtI process.

100. The RtI process cannot be used to delay ▇s identification as a student with a disability. (Tr. vol. 10, p. 2051:8-13) (Testimony of ▇ regarding 2011 and 2015 OSEP Guidance Letters); (Pet. Ex. 135) (Letters that the RtI process cannot be used to delay or deny timely evaluations of students who do not or are minimally responding to interventions.); *See also*, 34 C.F.R. § 300.309(c)(1). There was no documentation that the RtI team members met or that Petitioners were invited to attend the RtI meetings. (Tr. vol. 11, p. 2250:19-23) (Testimony of ▇ (Tr. vol. 20, p. 4040:16-17) (Testimony of ▇ regarding RtI meeting and parent participation.); (*See also*, Pet. Ex. 96; and D-3) Respondent cited ▇s progress on his RtI goals as a rationale for not referring ▇ for an evaluation when, in fact, Respondent increased ▇s intensity to a Tier 3. (Stip. Ex. 13, pp. 36-38)

101. During their testimonies, ▇s teachers appeared to sincerely believe that ▇ was making educational progress through the RtI process. Either LCS's staff misunderstood how to administer the RtI or purposefully used it to delay ▇s evaluation for special education.

102. The Undersigned finds it is the former, that [redacted]s teachers used the same program at the same level of intensity for all the students in the RtI process regardless of their needs. [redacted] and his peers were not given placement tests, the students started at the first unit of each level and moved through the levels at the same time. When [redacted] did not progress, the steps were simply repeated without a determination of the program's effectiveness. None of the programs were implemented with fidelity. It was a "one size fits all" method of instruction.

103. Serious questions remain with respect to Respondent's use of RtI to delay referral and capacity to properly implement the research-based reading instructions in its schools based on the evidence in this case. Although the Undersigned is concerned that LCS's RtI program may also be used to delay evaluations of [redacted]s peers and similarly situated students, that global issue is not before this Tribunal.

2014-2015 SCHOOL YEAR: FIRST GRADE

Initial Referral for Speech Evaluation

104. A referral IEP meeting was held on September 18, 2015 ("Referral meeting"). (Stip. 20) (Stip. Exs. 1, 2, 3, historical purposes only)

105. [redacted] admitted she received a *Handbook on Parent's Rights* at the Referral meeting.

106. [redacted] thought that [redacted]s reading deficits would be evaluated and later addressed when the initial IEP was developed.

107. LCS sought permission to conduct the following evaluations of [redacted] - social appraisal, speech/language evaluation, and observation - on the DEC 2 from the September 18, 2015 IEP meeting. (Stip. 22) LCS did not seek permission to conduct a reading evaluation.

108. Speech pathologist, [redacted] conducted the Speech Language Evaluation of [redacted] on October 26, 2015. (Stip. 21) (Stip. Ex. 32) She administered the Goldman Fristoe Test of Articulation ("GFTA-2") to determine his articulation deficits. (Stip. Ex. 32) She screened his voice, articulation, and fluency using the Joliet Speech and Language Screen. Ms. [redacted] did not conduct a comprehensive language evaluation of [redacted]s vocabulary, grammar, or phonology. (Pet. Ex. 160) (Tr. vol. 16, p.3297:2-12)

2015-2016 SCHOOL YEAR: SECOND GRADE

October 27, 2015 IEP Meeting

109. An Initial Eligibility IEP Meeting was held on October 27, 2015 ("October 2015 IEP meeting"). (Stip. 23) (Stip. Ex. 9)

110. LCS deemed [redacted] eligible to receive special education services in the category of Speech Impaired ("SI") on October 27, 2015. (Stip. 24) (Stip. Exs. 7, 8, & 9)

111. The IEP dated October 28, 2015 – October 27, 2016 ("October 2015 Speech IEP"), reported the following Present Level of Academic and Functional Performance ("Present Level") for [redacted]

[is a cooperative, friendly student. He is currently functioning below grade level in reading and on grade level in math in the regular classroom. He received the following grades for 1st quarter of 2nd grade: English Language Arts 75, Spelling 77, Math 80. On his 1st grade quarterly assessments he received a 28 for reading, a 94 for math, and a 99 for grammar. Grammar and math were read aloud. For mclass testing, he is at a level E (red) which is below grade level. He is currently in tier 2 of the Response to Instruction (RtI) process for reading and writing. [is very social and makes friends easily. He loves to share his thoughts and ideas with his teachers and classmates. [exhibits multiple speech errors which draw negative attention to his speech when he is sharing his thoughts and ideas and answering questions in the classroom. Speech evaluation results show that he exhibits errors for /th/, /r/, /r/ blends and /l/ blends. He was stimulable for correct productions of /th/ in isolation and /l/ blends in words following cues and modeling during the evaluation. He was not stimulable for /r/. [needs to improve his productions of these sounds so that he can better communicate across settings.

(Stip. 25) (Stip. Ex. 8, p. 19)

112. The 2015 Speech IEP included one (1) functional goal for

Given a visual cue, [will currently produce /r/ in words and /th/ and /l/ blends in reading with 80% accuracy during 3 therapy sessions.

(Stip. 26) (Stip. Ex. 8, p. 19)

113. Progress toward the annual goal was to be measured by progress reports and "SLP therapy notes/data" (Stip. Ex. 8, p. 20), and progress was to be reported to the parent by report cards and interim progress reports on regularly scheduled reporting dates of LCS. (Stip. Ex. 8, p. 26)

114. No academic goals were on the October 2015 Speech IEP.

115. Ms. did not indicate at the IEP meeting, or in her 2015 Speech Evaluation, that s articulation disorder impacted his reading, spelling, or writing.

116. The 2015 Speech IEP included the following supplemental aids, supports, modifications, and accommodations: modified grading (as needed), preferential seating (Language Arts), read aloud, preferential seating (math), and preferential seating (science/social studies). (Stip. 27) (Stip. Ex. 8, p. 21)

Service Delivery

117. The October 2015 Speech IEP provided specially designed instruction of speech twelve (12) times a reporting period for 15-minute sessions in the speech room. (Stip. 28)

118. The 2015 Speech IEP provided for quarterly assessments, mClass testing with accommodations of math-read aloud and small group (0-7 students). (Stip. Ex. 8, p. 24)

119. The IEP Team justified the "regular" education setting and removal of from his nondisabled peers because, "[d]ue to s articulation impairment, he needs time away from the regular classroom in a small group or 1 on 1 setting to drill and practice correct tongue placement and sound productions." (Stip. Ex. 8, p. 26)

Extended School Year ("ESY")

120. The IEP team at the October 2015 Speech IEP meeting did not discuss s eligibility for Extended School Year ("ESY") services or complete the ESY worksheet. (Stip. Ex. 8, p. 26)

121. Respondent's rationale for its ESY decision was not documented on the Prior Written Notice ("PWN") for the October 2015 IEP meeting. (Stip. Ex. 9)

122. Respondent's documentation corroborated s testimony that ESY was not discussed at the October 2015 IEP meeting.

123. Even though this claim exceeded the statute of limitations, Respondent failed to give proper Prior Written Notice of its decision about ESY; therefore, this claim was not time barred.

124. Dr. and both testified that required ESY services because of the severity of his reading deficits, and that he was harmed by the lack of ESY services.

125. ESY was also not discussed for the subsequent January 2016, June 2016, or August 2016 IEP meetings.

126. Respondent's failure to review s eligibility for ESY at the October 2015 IEP meeting and subsequent IEP meetings were procedural violations which harmed

127. Although thought that s reading deficits would be evaluated and later addressed at the 2015 October Speech IEP meeting, by the end of that IEP meeting, knew that s reading deficits had not been addressed.

128. Since Respondent did not address s reading deficits at the 2015 October Speech IEP meeting, on October 28, 2015, provided a written request for the LCS to evaluate to identify any problems with his reading skills. (Stip. 29) (Stip. Ex. 44)

129. As of October 28, 2015, by her written request for LCS to evaluate s reading skills, admitted she was aware that the October 2015 IEP did not address s reading deficits, yet failed to timely contest the October 2015 IEP.

130. Even though may not have understood the RtI process and her right independently of that process to request an evaluation, as of October 28, 2015, she knew that Respondent had not evaluated in reading.

131. Other than the ESY claim, Petitioners' claims for Respondent's substantive and procedural denials of FAPE based on the October 2015 Speech IEP are time barred.

November 3, 2015 Private Educational Evaluation ("2015 Educational Evaluation")

132. On November 3, 2015, Petitioner contracted with Ms. to conduct an educational evaluation of (Stip. Ex. 33) LCS did not conduct its own education evaluation and instead relied exclusively on Ms. educational evaluation ("2015 Educational Evaluation"). (Stips. 30 & 33)

133. Prior to the evaluation, Ms. reviewed "all the school records, report cards, progress reports, and previous evaluations of which she had requested from the school district. (Pet. Ex. 39) (Tr. vol. 2, p. 271:12-13)

134. Ms. conducted the following assessments of Peabody Picture Vocabulary Test, Fourth Edition ("PPVT-4"); Comprehensive Test of Phonological Processing, Second Edition ("CTOPP-2"); Word Identification and Spelling Test ("WIST"); Test of Word Reading Efficiency, Second Edition ("TOWRE-2"); Gray Oral Reading, Fifth Edition ("GORT-5"); Woodcock Johnson Tests of Achievement, Third Edition ("WJ-III"). (Stip. Ex. 33)

135. On the Peabody Picture Vocabulary Test, which measures receptive or listening vocabulary and is "widely used in research as a proxy for IQ," scored in the average range. (Tr. vol. 2, pp. 276:11-13, 277:2-3) (Testimony of (Stip. Ex. 33, p. 115)

136. also scored in the average to superior range in the math subtests of the Woodcock Johnson. (Stip. Ex. 33, pp. 117–18)

137. s scores on the Comprehensive Test of Phonological Processing test (Stip. Ex. 33, p. 115) indicated, ".] has low phonological awareness indicating weak phonological processing, indicating the likelihood of a reading problem, dyslexia." (Tr. vol. 2 279:11-13) On the Word Identification and Spelling Test (Stip. Ex. 33, p. 116), s scores were "very, very low . . . in word identification, spelling, literacy index and sound-symbol or phonics knowledge." (Tr. vol. 2, p. 280:6-12) Ms. noted: "These findings are the same as the progress monitoring findings from the district. They're just normed testing, clinical individual testing." (Tr. vol. 2, p. 280:6-12) (Testimony of

138. also scored below average on the Test of Word Reading Efficiency which measures decoding and fluency, and the Gray Oral Reading Test. (Stip. Ex. 33, p. 116); (*see also* Tr. vol. 2, pp. 280:13–281:2) (Testimony of discussing the Test of Word Reading Efficiency); (Tr. vol. 2, p. 281:2-8) (Testimony of discussing the Gray Oral Reading Test)

139. Dr. confirmed that the assessments in Ms. November 2015 evaluation were "appropriate based on s needs that were identified in his educational record." (Tr. vol. 3, p. 487:8-10, 13)

140. Ms. diagnosed with dyslexia based on his "weak phonological processing, weak decoding, weak spelling, [and] weak reading." (Tr. vol. 2, p. 294:8-10) (Testimony of (Stip. Ex. 33, p. 117)

141. Ms. [redacted] explained:

> He also had significant speech and language problems, articulation, and I noted the sounds that were problematic. And he had difficulty repeating multisyllabic words, which is a language issue and can also be . . . an expressive language issue and can be phonological. But he has trouble sequencing the sounds in order in those words. And I saw a lot of . . . misspeaking in multisyllabic words. Students with reading—with speech and language difficulties often go on to have literacy problems.

(Tr. vol. 2, p. 274:13-21)

142. The *NC Dyslexia Topic Brief* confirms that speech and language deficits can be a symptom of dyslexia in a child but not the cause. (Pet. Ex. 110, pp. 611–12)

143. Ms. [redacted] recommended additional daily instruction for [redacted] commensurate with what is cited in the research explaining, "an extra hour per day of instruction, in addition to 90 minutes of regular instruction, is needed to close the gap for students who are behind in reading skill development." (Stip. Ex. 33, p. 119)

144. Ms. [redacted] also recommended [redacted] "obtain a follow-up educational evaluation in one year's time to monitor progress and to be sure the gap between his reading level and his grade level is closing. Progress should be measured by an increase in standard scores." (Stip. Ex. 33, p. 119)

145. Ms. [redacted] confirmed there is "widespread confirmation in reading research" regarding "the role of early intervention and additional direct instruction, not a 'wait and see approach,' to help students who are behind in early literacy skills." (Tr. vol. 2, p. 284:8-18) (Referring to recommendation number 3 from her evaluation.) (Stip. Ex. 33, p. 119) (Tr. vol. 3, p. 487:20-23) (Testimony of Dr. [redacted] in support of Ms. [redacted] recommendation that [redacted] "needs intensive ongoing instruction sufficient to close the gap.")

146. Ms. [redacted] opined that based on her intake information and review of [redacted]s educational record, LCS had taken a "wait and see" approach in evaluating and addressing [redacted]s dyslexia. (Tr. vol. 2, pp. 286:21–287:5)

147. Despite Ms. [redacted] invitation on her report to discuss her educational report, no one from LCS contacted her to discuss her report before or after the IEP meeting. (Tr. vol. 2, p. 293:15-17)

148. The Undersigned finds Ms. [redacted] 2015 Educational Evaluation report, including Ms. [redacted] findings and recommendations, credible, especially considering Respondent adopted Ms. [redacted] 2015 Evaluation in its entirety without its own separate educational evaluation. Moreover, Respondent offered no testimony to rebut the accuracy of Ms. [redacted] 2015 Educational Evaluation or the subsequent 2016 Educational Reevaluation.

December 1, 2015 IEP Meeting

149. An IEP meeting was held on December 1, 2015 ("December 2015 IEP"). (Stip. 31) (Stip. Exs. 13, 14, & 52)

150. The IEP team convened to discuss [redacted]s request for evaluations and the private evaluation conducted by Ms. [redacted] (Stip. Exs. 13, 14)

151. The Reevaluation ("DEC 7") reported LCS would collect the following data without formal assessment: psychological including an intellectual, observation, and near vision. (Stip. 32) (Stip. Exs. 13, 14 & 52)

152. Ms. [redacted] explained to the team that a discrepancy was not needed to identify [redacted] as specific learning disabled and "talked at length about the educational harm delaying would cause [redacted] (Tr. vol. 2, pp. 312:20–313:16); (*See also,* Tr. vol. 2, p. 314:9-14) (Testimony of [redacted] expressing her concern to the IEP team that the instruction needed to be "happening immediately.")

153. With respect to [redacted]s reading deficits, the IEP documents indicated that LCS was addressing [redacted]s reading needs through RtI (Stip. Exs. 13 & 14) and had moved him to the Tier 3 level the day before the December 2015 IEP meeting. (Tr. vol. 11, pp. 2163:21–2164:7) (Testimony of [redacted] about misrepresentation to the parents about Rtl progress.)

154. Despite Respondent's actions, as of December 1, 2015, [redacted] knew that Respondent had not developed an IEP for [redacted]s reading deficits; any claims regarding the December 1, 2015 IEP meeting are time barred.

155. [redacted] did not know that LCS failed to implement the RtI program with fidelity, but the Undersigned has no jurisdiction over the implementation of this general education program.

156. LCS did not respond to [redacted]s request for a reading evaluation, and did not independently evaluate [redacted]s reading deficits.

157. LCS did not reimburse [redacted] the cost of Ms. [redacted] 2015 Educational Evaluation. Respondent relied exclusively on Ms. [redacted] 2015 Educational Evaluation and did not conduct its own educational evaluation, and instead, incorporated Ms. [redacted] at the January 2016 IEP meeting. (Tr. vol. 18, pp. 3644-3648) (Testimony of [redacted] citing inclusion of recommendations numbered 2, 4, 5, 6, 7, 10, & 15 from the 2015 Educational Evaluation (Stip. Ex. 33))

158. Because LCS failed to adequately evaluate [redacted]s educational needs, LCS shall reimburse Petitioner the costs associated with this evaluation in the amount of $950.00. (Stip. 33) (Pet. Exs. 100, 528)

January 21, 2016 IEP Meeting

159. After the psychological evaluation, an IEP Meeting was held on January 21, 2016. (Stip. 34) (Stip. Exs. 16, 17, & 19)

160. Petitioners contend that the January 2016 IEP violated the IDEA, because procedurally, LCS failed to determine eligibility for speech as a disability category; and, substantively, that the IEP's present levels, goals, and progress monitoring were inappropriate.

Present Level of Academic and Functional Performance ("Present Level")

161. The IEP dated January 22, 2016 – January 21, 2017 ("January 2016 IEP") reported the following Present Level for [redacted]

> [redacted] is a happy, friendly [redacted] grade student who enjoys learning. [redacted] is a student with dyslexia. According to recent psychological testing, [redacted]s] General Intellectual Ability (GIA) was in the average range with weaknesses in the areas of phonological processing and oral vocabulary skills. On private educational testing completed in November, weaknesses in phonological awareness, spelling, word identification, reading accuracy, reading fluency and reading comprehension were rated in the very poor, poor or below average range. On the middle of year m/class reading assessment, [redacted] scored a 27 on reading fluency with the goal being a 72. This was a slight increase from a 25 at the beginning of the year. On the accuracy portion of the assessment, he scored a 79 with the goal being a 96. This decreased from an 83 at the beginning of the year. His book level remained at a level E (.7-.9). The goal for the middle of the year is an L (2.5-2.9). Weaknesses in reading decoding, comprehension and spelling are impacting [redacted]s ability to be successful in the regular education setting. [redacted] began speech services in October 2015. He has improved his productions of /th/ at the beginning of words in sentences and reading during structured speech activities. He needs to continue to improve his productions of /th/ in all positions of words, /r/ and /r/ blends.

(Stip. 35) (Stip. Ex.17, p. 48)

162. The only reading, spelling, and fluency present levels referenced in this Present Level was: "[o]n private educational testing completed in November, weaknesses in phonological awareness, spelling, word identification, reading accuracy, reading fluency and reading comprehension were rated in the very poor, poor or below average range." (Stip. Ex. 17, p. 48)

163. This Present Level does not specifically describe what [redacted] can or cannot do with respect to reading and spelling, his current academic functioning, or provide a baseline for measurement of the reading or spelling goals.

Reading/Speech Goals

164. The January 2016 IEP included the following four (4) reading/speech goals and one (1) spelling goal for [redacted]

1. Using *correct speech sound productions*, [redacted] will verbally identify 80% of the words presented to him from an instructional sight word list on 3 out of 4 occasions ["Reading/Speech Goal 1"].
2. Given direct instruction in word families and identifying 'chunks' in words, [redacted] will decode both real and nonsense words *using correct speech productions* with 80% accuracy ["Reading/Speech Goal 2"].
3. Given direct instruction in single consonant and short vowels sounds, [redacted] will decode these *using correct speech productions* with 80% accuracy ["Reading /Speech Goal 3"].

4. Given an instructional and decodable level story, [will read it *using correct speech sound productions* and answer basic comprehension questions in written form with 80% accuracy ["Reading/Speech Goal 4"].

5. Given weekly spelling list associated with research based reading program, [will generate written sentences containing proper spacing and correct spelling on 4 out 5 trials ["Spelling Goal"].

(Stip. 36) (Stip. Ex. 17, pp 48, 50, 52, and 54) (Emphasis added)

165. The January 2016 IEP's Reading/Speech Goals 2-4 were progress monitored by "work samples" and "teacher data." (Stip. Ex. 17, pp. 51, 53, 55) Reading/Speech Goal 1 was progress monitored by "quarterly sight words check" and "teacher data." (Stip. Ex. 17, p. 49)

166. At 80% accuracy, as written, both the EC teacher and speech pathologist would monitor progress on the combined Reading/Speech goals.

167. The Reading/Speech goals combined reading mastery with correct speech sound production.

168. The January 2016 IEP included the following supplemental aids, supports, modifications, and accommodations for language arts, math, and science/social studies: preferential seating, 3-5 minute breaks every 20 minutes on tests, small group setting (0-7 students) for tests. In addition, received modified assignments/homework & grading, mark in book in his language arts class. (Stip. 37) (Stip. Ex. 17 p. 58)

Service Delivery

169. s service delivery in his January 21, 2016 IEP was:

Specialized Instruction	Session Length	Frequency	Location
Reading	60 minutes	5/week	EC Classroom
Writing	30 minutes	5/week	EC Classroom

(Stip. 38) (Stip. Ex. 17, p. 61)

170. The service delivery for speech therapy as a related service was 12 sessions a reporting period for 15-minute session duration in the speech room. (Stip. Ex. 17, p. 61)

171. s placement in the January 2016 IEP was "resource." (Stip. 39) (Stip. Ex. 17, p. 62)

Change in Eligibility from Speech Impaired to Specific Learning Disabled

172. At the January 2016 IEP meeting, without considering all suspected areas of disabilities, LCS changed s eligibility category from Speech Impaired ("SI") to Specific Learning Disabled ("SLD"). (Stip. 40) LCS failed to complete a speech-language eligibility worksheet before exiting from speech as a disability category and switching his speech into a related service.

173. The category of SI is the only disabling condition which can be either a separate eligibility category or a related service.

174. According to Respondent's EC Lead Teacher/Compliance Specialist, Ms. [redacted] had "just started noticing that a lot of time the students who were moving from speech-impaired to--generally when they moved to SLD we were not having that speech-impaired worksheet at the table." (Tr. vol. 11, p. 2283:1-4) (Testimony of [redacted]

175. Although Respondents' speech-language pathologist, [redacted] denied that speech eligibility documentation was necessary, Respondent's EC Lead Teacher/Compliance Specialist admitted that LCS failed to complete the eligibility worksheet for continued speech/language as a primary or secondary disability category. (D-11)

176. Even if [redacted] was eligible in SI as a secondary category, s. [redacted] and [redacted] testified that speech services would be the same whether classified as a "related service" or eligibility category.

177. Petitioner relied on [redacted] Email to show harm and a pattern of violations. This was a procedural violation, however, as the services remained the same and Petitioner did not claim that the speech services were substantively inappropriate. Petitioner failed to show any harm that resulted to [redacted] from this procedural violation.

Appropriateness of Combined Reading/Speech Goals

178. Petitioners challenged the appropriateness of the Present Level, Reading/Speech Goals, and progress monitoring in the January 2016 IEP.

179. Petitioners' expert, [redacted] attended the January 2016 IEP meeting by phone and soon thereafter received a copy of the IEP from [redacted]

180. The appropriateness of the combination of speech and reading goals became the primary substantive issue with respect to the January 2016 IEP and subsequent June and August 2016 IEPs.

181. Respondent referred to the combined speech and reading goals (Reading/Speech Goals 1-4) as "goals[s] which are integrated with related service" of speech. Speech, as a related service, was integrated with the four Reading/Speech Goals but not the Spelling Goal. (*See* Stip. Ex. 17, pp. 48, 50, 52; *compared to,* p. 54)

182. The October 2015 Speech IEP had a separate speech goal without speech as an integrated related service. The January 2016 IEP had combined Reading/Speech Goals with speech integrated as related service but no separate speech goal. (*Compare* Stip. Ex. 8 *to* Stip. Ex. 17 *and* Pet. Ex. 1)

183. Ms. [redacted] justified the combination of reading and speech goals because [redacted]s articulation disorder impaired [redacted]s ability to read. LCS's expert, Ms. [redacted] agreed with Ms. [redacted] justification for combining the Reading/Speech Goals, although she was not qualified in this area. Respondent's explanation for the combined Reading/Speech Goals appeared to be that [redacted]s articulation disorder was related to his reading disability.

184. Both of Petitioners' experts disagreed with [redacted] and [redacted] opinions, as did Respondent's EC Lead Teacher/Compliance Specialist, Ms. [redacted]

185. Ms. [redacted] testified that "at the time" they left the January 2016 IEP meeting, she thought the combined reading and speech goals were appropriate (Tr. vol. 13, pp. 2495:25-2496:3); but that "now," based on her additional experience, did not know. (Tr. vol. 13, p. 2496:4-17) She agreed that the Present Level in January 2016 did not have baseline data for the goals. (Tr. vol. 13, pp. 2498, 2501, 2504, 2506, 2516:24-2517:1) (No baseline data on the IEP.)

186. EC Lead Teacher/Compliance Specialist, Ms. [redacted] disagreed with the combination of reading and writing goals in the [redacted] Email. In her email, she later recommended a separate articulation goal for [redacted] because LCS has a practice of integrating "a ton of artic goals" within reading goals, and [redacted]s articulation issues were "most likely not related to his LD reading because "he had artic[ulation] issues before becoming eligible SLD." (D-11)

187. Speech is a functional goal (Stip. Ex. 8, p. 19), not an academic goal like reading, writing, or spelling. (Stip. Ex. 17, pp. 48, 50, & 52)

188. Ms. [redacted] testified that the January 2016 IEP Reading/Speech Goals were inappropriate because the reading goals were combined with speech goals.

189. Dr. [redacted] testified that in her "51 years of working with special ed[ucation] students" as a reading specialist, she did not recall ever seeing reading goals like these" (Tr. vol. 3, p. 491:4-18), and some of these goals she simply "could not understand." (Tr. vol. 3, p. 493) (Testimony of [redacted]

190. A goal which conflated speech production, articulation capability with the ability to recognize words correctly, was inappropriate. (Tr. vol. 3, p. 491:16-25) (Testimony of [redacted] Many students cannot correctly articulate every sound within a word, but can perfectly, accurately read that word. (Tr. vol. 3, p. 491: 19-25) (Testimony of [redacted]

191. Moreover, Reading/Speech Goal 1 focused entirely on an instructional sight word list which was "never appropriate to focus instructional time and effect on basically words – lists of high frequency words" for a student with serious decoding problems and was counterproductive. (Tr. vol. 3, p. 492:10-24) (Testimony of [redacted]

192. Reading/Speech Goal 2 was inappropriate because, part of it, Dr. [redacted] "frankly just [could not] understand at all" (Tr. vol. 3, p. 493: 18-19), and chunking was not an appropriate starting point for decoding. (Tr. vol. 3, p. 493: 3-15)

193. Reading/Speech Goals 3 and 4 again conflated decoding with correct speech production. (Tr. vol. 3, p. 494:18-22)

194. Dr. [redacted] could not understand Reading/Speech Goal 4 because there was "no such thing as a decoding level story," and "instructional level stories are different from decodable stories." (Tr. vol. 3, p. 494:9-17) Answering "basic comprehension questions in written form" was inappropriate because it is not a written expression goal but a comprehension goal. (Tr. vol. 3, pp. 494:18-495:1) (Testimony of [redacted]

195. The only objection Dr. [redacted] had with the Spelling Goal was that written sentences should not be the primary and only way to evaluate spelling, but otherwise, she was "delighted" to see that the spelling lists would be associated with the research-based reading programs. (Tr. vol. 3 p. 495:10-20) Dr. [redacted] also recommended the additional of a separate writing goal. (Tr. vol. 3, p. 495:18-20)

196. A fluency goal was not added until the August 2016 IEP meeting, which Dr. [redacted] opined was not appropriate because fluency was one of [redacted]s major problems that had been identified before the January 2016 IEP. (Tr. vol. 3, p. 496:3-19)

197. The whole area of phonological awareness was left out of the goals which was of critical importance. (Tr. vol. 3, p. 496:23-25) (Testimony of [redacted]

198. [redacted] and her reading expert, Ms. [redacted] were both aware of the context of the January 2016 IEP goals, either during the development or soon after the IEP meeting.

199. Respondent failed to provide a cogent and reasonable explanation of its practice of combining reading and speech goals. One which LCS fortunately stopped at the January 2017 IEP pursuant to Ms. [redacted] admonishment.

200. However, as Ms. [redacted] was [redacted]s consultant before and after the January 2016 IEP, [redacted] would have been aware that the Reading/Speech goals were inappropriate, yet she failed to timely contest the January 2016 IEP.

Progress Monitoring of Combined Reading and Speech Goals

201. Ms. [redacted] was concerned that combined goals would be difficult to properly progress monitor, but Ms. [redacted] testified that the combined goals would be monitored by the EC teacher and the speech pathologist. (Tr. vol. 18, p. 3568:14-19) The speech pathologist was supposed to monitor errors in speech that [redacted] made while reading. (Tr. vol. 11, p. 2311:5-10) (Testimony of [redacted] There was no evidence that this was done.

202. Respondent failed to conduct accurate progress monitoring on [redacted]s IEP goals, as there were parts within each goal solely designed for the speech therapist and parts solely designed for the EC teacher to record progress or lack thereof, yet the IEP goals as written required that the skills be combined in order to demonstrate mastery. (Tr. vol. 9, p. 1776:5-9) (Testimony of [redacted] that Ms. [redacted] did not work with her on the combined speech and reading goals while [redacted] was in the classroom, "so not to take up that instructional time."); (Tr. vol. 9, p. 1805:7-13) (Testimony of [redacted] that she did not indicate whether [redacted] could use correct speech sound productions when identifying words as written in his IEP because, "it wouldn't have been his fault if he had mispronounced it."); (Tr. vol. 9, p. 1818:14-17) (Testimony of [redacted] that she did not "mark off for his speech sound productions" when assessing his word accuracy on the second and third goals.); (Tr. vol. 16, pp. 3378:5-3379:2) (Testimony of [redacted] that she was unable to identify four instructional sight word lists on which [redacted] could correctly identify the words with correct speech sounds.); (Tr. vol. 16, p. 3380:14-23) (Testimony of [redacted] that the LCS "did not penalize [[redacted] if he did not use correct speech sounds" as written in [redacted] IEP goals.)

203. Ms. [redacted] was unable to identify a single IEP goal that combined reading and speech that was implemented as written and progress monitored as written in [redacted]s 2016 IEPs. (Tr. vol. 19, pp. 3380:16-3381:8)

204. Ms. [redacted] was unable to identify a single IEP goal that combined reading and speech that was mastered as written in the 2016 IEPs. (Tr. vol. 19, p. 3381:9-19)

205. Any claims pertaining to the appropriateness of the January 2016 IEP, except for ESY, have been found time barred. This is not true for implementation and progress monitoring of the January 2016 IEP. [redacted] failed to timely contest the January 2016 IEP Present Level and Reading/Speech goals; however, Respondent's failure to monitor and implement the January 2016 IEP, as well as the ESY issue, remained viable claims for this contested case.

206. [redacted] and her expert were unaware that the January 2016 IEP would not be properly progress monitored or implemented from January 2016 until the IEP was revised in January 2017.

June 8, 2016 Addendum IEP Meeting

207. LCS reviewed and concluded at the subsequent June and August 2016 IEP meetings that the Reading/Speech goals were still appropriate. Therefore, the appropriateness of Present Level and the Reading/Speech goals for the June 2016 and August 2016 IEP's were issues within the statute of limitations.

208. These were the same goals found inappropriate and not properly monitored in the January 2016 IEP.

209. An Addendum IEP Meeting was held on June 8, 2016 ("June 2016 IEP") to discuss [redacted]s concerns about [redacted]s progress and his academic needs. (Stip. Ex. 22, p. 801) (Stip. 41)

210. With respect to the June 2016 IEP, Petitioners again contested the appropriateness of the Present Level and Reading/Speech goals which were initially developed at the January 2016 IEP meeting, as well as the lack of ESY services.

211. In addition, Petitioners now challenged the appropriateness of the reduction of services as a predetermination of placement when the Reading/Speech goals were not revised.

212. The inappropriateness of the Present Level and Reading/Speech goals has already been addressed *supra* in this Final Decision and the Findings of Fact with respect to that issue are applicable to the June 2016 and August 2016 IEPs.

213. The June 2016 IEP fell within the one-year statute of limitations, and all claims about procedural and substantive violations of FAPE by the IEP team in developing the June 2016 IEP remained viable.

214. Even though Petitioner requested more reading remediation, a full 90 minutes, the June 2016 IEP team reduced [redacted] services from a "resource" to "regular" education setting. (Stip. Ex. 23) (Stip. 42) (Stip. Ex. 17)

215. [redacted]s service delivery for his special education in his June 8, 2016 IEP was reduced to:

Specialized Instruction	Session Length	Frequency	Location
Reading	45 minutes	5/week	EC
Writing	30 minutes	3/week	EC

(Stip. 43) (Stip. Ex. 17)

216. The service delivery for speech, as a related service delivered in the speech room by the speech therapist, remained the same. (Stip. 43) (Stip. Ex. 17)

217. The IEP team changed [redacted]s placement because, "[p]rogress was reviewed in all areas of sight words, word recognition, reading, accuracy, reading comprehension, and spelling sentences," and "[redacted] had made progress in all areas." (Stip. Ex. 21, p. 77)

218. While, although mastery of sound productions was necessary for mastery of each Reading/Speech goal, no speech progress monitoring was available at the June 2016 IEP meeting to provide evidence that [redacted] made any progress with the sound productions set out in his Reading/Speech goals. (Tr. vol. 13, p. 2528) (Testimony of [redacted]

219. Respondent predetermined the decision to reduce [redacted]s services at the June 2016 IEP. Respondent reduced the service delivery for reading from 60 minutes to 45 minutes, and writing services were reduced from 5 times a week to 3 times a week.

220. Petitioners contend that the service delivery was reduced to accommodate the existing administration of the Language! program, not [redacted]s needs.

221. Respondent denied predetermination of placement, however, the circumstantial evidence supported LCS's predetermination of the "regular" education placement.

222. The Language! program is used by LCS for all third-grade students at [redacted] (Tr. vol. 13, p. 2526:7-11) (Testimony of [redacted]

223. The Language! program can be implemented in 45 or 90-minute segments. LCS implemented the Language! program in 45 minutes. Although Respondent denied that the service delivery was reduced for administrative convenience, it seemed coincidental that the reduction in [redacted]s reading service delivery coincided with Respondent's Language! program implementation, especially when Petitioners were requesting an increase in service delivery.

224. Moreover, the fact that the Language! program was used for every third grader at [redacted] corroborated the predetermination.

225. Placement must be based on the IEP pursuant to 34 C.F.R. § 300.116(b)(2). It is undeniable that no goals changed on the June 2016 IEP, and the goals should drive the service delivery, not administrative convenience. (Tr. vol. 13, p. 2508:12-14) (Testimony of [redacted]

226. Respondent explained that the placement was changed from "resource" to "regular" because [redacted] made so much progress on his combined Reading/Speech goals. (Tr. vol. 9, p. 1755:1-4) (Testimony of [redacted] However, Respondent used inaccurate and misleading graphs as evidence of [redacted]s progress. (Tr. vol. 9, p. 1761:9-12, 21-25)

227. LCS's actual progress monitoring indicated that [redacted] had not made progress but remained on the Intensive level on DIBELS. [redacted] was on the most severe level of reading difficulty which required the most Intensive level of instruction. (Pet. Ex. 5) (Tr. vol. 3, pp. 504:24-505:4)

228. Because Respondent failed to provide a cogent and reasonable explanation about the reduction of services in light of [redacted]s continuation of the Intensive DIBELS' level of instruction, decreasing his service delivery was inappropriate. (Tr. vol. 3, p. 503:11-20) (Testimony of [redacted] (Tr. vol. 2, p. 370:12-20) (Testimony of [redacted] The only logical explanation for Respondent's decision is that the service delivery was predetermined and reduced for administrative convenience.

229. Respondent's predetermination of placement violated [redacted]s right to a FAPE and [redacted]s right to meaningful participation in the IEP process.

230. Also, again without discussion or data, Respondent determined that [redacted] did not qualify for ESY services. (Stip. Exs. 21 & 22); (Tr. vol. 2, p. 353:20-25) (Testimony of [redacted]

231. Respondent violated the procedural requirements of the IDEA when it predetermined placement in the "regular" setting and failed to properly consider ESY. Moreover, Respondent's failure to revise the inappropriate Reading/Speech goals substantively violated [redacted]s right to a FAPE.

2016-2017 SCHOOL YEAR: THIRD GRADE

August 28, 2016 IEP Meeting

232. Based upon her continued concerns about [redacted]s lack of reading progress, [redacted] requested another IEP meeting, which was held on August 28, 2016 ("August 2016 IEP"). (Stip. Ex. 23); (Stip. 44)

233. Before denying an increase in services, the IEP team recapped all discussions made at the June 2016 IEP meeting and the progress [redacted] made prior to the August 2016 IEP meeting. (Stip. Ex. 23, p. 84)

234. At that meeting, Respondent's staff reassured [redacted] that [redacted] was making appropriate progress, and that his reading programs had been and were still being implemented with fidelity. (Stip. Exs. 23 & 24)

235. Ms. [redacted] was [redacted]s regular education teacher at the August 2016 IEP meeting, and she provided the IEP team her evidence of [redacted]s academic progress. However, any documentary evidence provided by Ms. [redacted] should be given little value, as she "just tried to find evidence to show that [redacted] had grown as a reader and a learner." (Tr. vol. 7, p. 1460:20-22)

236. Contrary to Ms. [redacted] evidence, based on Respondent's DIBELS testing of [redacted] he remained on the Intensive level throughout his third-grade year. (Pet. Ex. 5)

Fluency Goal

237. An additional fluency goal was added, but all the other Reading/Speech Goals, Spelling Goal, and Present Levels remained the same. (Stip. Ex. 23)

238. The new fluency goal was:

> When given phrases or sentences on his reading level, [will increase his fluency to 70 words with no more than 2 errors in four out of five trials by his next annual review ["Fluency Goal"].

(Stip. Ex. p. 56)

239. The Fluency Goal was progress monitored by "student work samples (fluency chart)" and "teacher observations with data." (Stip. Ex. 17, p. 57)

240. At the August 2016 IEP Meeting, the IEP Team also added the following accommodation in math and science/social studies to s IEP: "[w]hen doing written assignments, will not be penalized for spelling." (Stip. 45)

241. The IEP team did not discuss ESY at this meeting. (Tr. vol. 2, p. 390:7-8)

Refusal to Increase Service Delivery

242. Even with the addition of a new Fluency Goal, s placement remained "regular."

243. s educational record reflected that at the August 2016 IEP meeting, again requested that s services be increased. (Tr. vol. 2, p. 376:9-11) (Testimony of that she requested at this meeting, and "at every meeting," for to receive additional instructional time.); (Tr. vol. 4, pp. 674:17-675:8)(Testimony of that the IEP team refused to increase s services even though it was proposed by Ms. (Stip. Ex. 23, p. 84) (PWN from the August 2016 meeting reflecting the IEP team's denial of an increase in services despite a request by Ms.

244. The August 2016 IEP team misleadingly reported that stated at the June 2016 IEP meeting: "[s social well-being was being diminished," and used this statement to justify a reduction in services; however, actually made that statement in reference to s embarrassment that he could not read, and that he had been inappropriately placed with peers who did not share needs similar to his own. (Tr. vol. 4, pp. 676:6-677:23) (Testimony of

245. Ms. testified that in response to the request for more services, the team reported his "accuracy is fine," had made "so much progress ... more than a grade level rate of change," and therefore it was "unethical to pull him out." (Tr. vol. 2, pp. 375:25-376:3) (Pet. Ex. 101)

246. Ms. explained to the IEP team that these statements were not true based on their own data - remained at an "Intensive level and still at a beginning first grade level." (Tr. vol. 2, pp.376:4-5; 384:20-22) (Testimony of that was not progressing above grade level expectations as reported during the meeting.); (Tr. vol. 2, p. 385:15-16) (Testimony of that she expressed her disagreement with the reports of progress to the team, "as [she] looked at the decoding and fluency data from the district.")

247. Dr. [redacted] opined that LCS should have increased the amount of [redacted]s service delivery. (Tr. vol. 3, p. 507:22-23) (Testifying that "[g]iven his continued deficits, [redacted] certainly needed greater intensity of instruction.")

248. According to the records, LCS refused to increase his time because it was important for [redacted] to receive reading instruction in the regular education classroom; yet, the testimonial evidence showed that throughout the course of the 2016-17 school year, [redacted] received very little reading instruction in the regular education classroom and received instruction from an unlicensed teaching assistant. (Tr. vol. 9, p. 1672:19-4) (Testimony of [redacted] that an unlicensed tutor provided instruction to [redacted] on grammar and vocabulary.); (D-19); (Tr. vol. 7, p. 1341:15-18) (Ms. [redacted]s regular education teacher, testified that she did not have any books on tape for [redacted] to access science and social studies text.)

249. According to Ms. [redacted] [redacted] missed her class during spelling, morning work, and silent reading. (Tr. vol. 7, p. 1437:21-25)

250. Ms. [redacted] testified that [redacted] worked with an unlicensed tutor during small group reading instruction from July 2016 through January 2017. (Tr. vol. 7, p. 1452:21-25)

December 16, 2016 Private Educational Reevaluation

251. In December 2016, [redacted] contracted with Ms. [redacted] to conduct a private educational reevaluation of [redacted]s reading deficits. (Stip. Ex. 35) The reevaluation cost was $600.00. (Pet. Ex. 100, p. 534)

252. To determine [redacted]s academic progress, Ms. [redacted] conducted a second private educational evaluation of [redacted] on December 16, 2016 ("2016 Educational Reevaluation"). (Stip. 46)

253. Based on the standard scores in the 2016 Educational Reevaluation, [redacted] did not make progress and remained significantly impaired in all measures, except in his ability to memorize high-frequency words. (*Compare* Stip. Ex. 33, *with* Stip. Ex. 35); (*See also,* Tr. vol. 2, pp. 400:23–401:1) (Testimony of [redacted] that [redacted] "made no progress in reading, spelling, phonics knowledge, reading rate, reading fluency. He made absolutely no progress. He has had significant regression in math."); (Tr. vol. 3, p. 580:17-19) (Testimony of [redacted] describing [redacted]s progress as "minimal, primarily related to his acquisition of sight words" and was not "sufficient to put him on a trajectory to be a competent reader.")

254. The Undersigned finds the December 2016 Educational Reevaluation credible and necessary to determine [redacted]s academic progress in reading. (*See* Tr. vol. 3, p. 517:22) (Testimony of [redacted] that the assessments conducted by Ms. [redacted] in December of 2016 were appropriate based on [redacted]s needs as identified in his educational record.); (Tr. vol. 3, p. 522:8-9) (Testimony of [redacted] that the recommendations included were appropriate for [redacted] (Tr. vol. 3, p. 518:3-6) (Testimony of [redacted] that that standard scores are "the gold standard of progress" and "considered the most reliable measures of progress."); (Tr. vol. 3 580:7-8) (Testimony of [redacted] that DPI's guidance recommends school districts use standard scores to monitor a student's progress.)

255. As with the initial evaluation, no one from LCS contacted Ms. [redacted] to discuss her reevaluation report. (Tr. vol. 2, p. 402: 3-5) Moreover, at the January 2017 IEP meeting, LCS incorporated the results and recommendations of the 2016 Educational Reevaluation into the January 2017 IEP.

256. [redacted] testified that she did periodically receive progress monitoring reports, however, the progress monitoring for the Fall of 2016 provided in [redacted]s educational record was blank. (Pet. Ex. 10)

257. Other than the 2016 Educational Reevaluation and DIBELS' composite score, there was no credible progress monitoring of [redacted]s academic progress.

Implementation of June 2016, August 2016, and January 2017 IEP's

258. Although Respondent had assured Petitioner during the 2016-2017 school year and argued at the hearing that [redacted]s January 2016, June 2016, August 2016, and January 2017 IEPs had been implemented with fidelity and properly progress monitored, the evidence proved otherwise.

259. Ms. [redacted] was [redacted]s third-grade EC teacher and responsible for implementation of the June 2016, August 2016, and January 2017 IEPs.

260. Although Ms. [redacted] was nervous, wringing her hands and bouncing her right knee during her entire testimony, she answered truthfully to all questions, even those which were averse to Respondent's position. The Undersigned found her testimony credible.

261. Ms. [redacted] admitted during cross-examination that [redacted] did not receive the specially designed instruction called for in his IEPs for at least 25% of the 2016-2017 school year. (Tr. vol. 15, pp. 3002:2-9 (no instruction provided between July 13 and July 25 -8 school days); 3006:8-13 (no instruction provided September 12-16 - 5 school days); 3019:19-24 (unsure if there was a substitute provided when she was absent on October 27, because she is only given a substitute "[i]f there are enough in the county"); 3021:22-25 (no instruction on November 4, 2016 due to CogAT practice); 3024 (no instruction December 9-15 -5 school days); 3028:2-6 (unsure if a substitute was provided on January 13, 2017); 3030:4-6 (no instruction due to quarterly assessments - 5 school days); 3030:11-15 (unsure if she had a substitute on April 28, 2017); 3030:21-3031:6 (confirming her absences on May 4, 5, 12, and 15, 2017); and, 3031:7-11 (no additional instruction provided after May 19, a period of 14 school days))

262. As NCSIP coordinator, it was Ms. [redacted] responsibility to review the fidelity charts. (Tr. vol. 13, p. 14-16) After reviewing Ms. [redacted] fidelity charts for [redacted]s Language! and FUNdations' instruction, Ms. [redacted] admitted that Ms. [redacted] did not teach the Language! or the FUNdations programs with fidelity during the 2016-2017 school year. (Tr. vol. 13, pp. 2458-2468)

263. Dr. [redacted] opined that if all the programs listed by LCS in the minutes from the August 2016 IEP meeting were being combined (i.e., Language! Letterland, Recipe for Reading, and another unidentified Orton-Gillingham program), "it would be impossible to have full fidelity." (Tr. vol. 3, pp. 513:22-23; 578:15-16) (Dr. [redacted] explaining that combining programs, even programs that are Orton-Gillingham based, "can be very confusing to a student who is already having trouble learning those skills."); (Tr. vol. 3, p. 578:23-24) (Testimony of Dr. [redacted] that

while some reading programs can be combined, "[t]he examples that were given in [s] IEP [were] not in [her] opinion correct examples of combining programs.")

264. LCS utilized the Language! program with from July 2016 through January 2017. (Tr. vol. 2, p. 373:15-18; Tr. vol. 3, p. 548:24-25) The Language! program has two models: the 90-minute model and the 45-minute model. With either model, the teacher must cover all the steps in each lesson. (Tr. vol. 3, p. 547:2-8) Dr. explained that the 45-minute model is designed to complete a unit in 20 instructional days. (Tr. vol. 3, p. 546:20-21)

265. The skills covered in Book A of the Language! program included: "short vowel words as far as . . . decoding . . . It doesn't even get into consonant blends [or] diagraphs." (Tr. vol. 3, pp. 547:22–548:1) (Testimony of Dr. By third-grade, had been receiving instruction on the "beginning letter sound associations for consonants and short vowels and putting those together into very simple one syllable words" because he had been working on the Letterland curriculum for the last four years since kindergarten. (Tr. vol. 11, pp. 2199:17-2200:8; Tr. vol. 3, p. 551:13-14) (Testimony of Dr. regarding the beginning units of FUNdations starting with CVC words.)

266. The Language! program was not an appropriate program for because it "is a complete English language arts curriculum" that includes the areas of s weaknesses (i.e., word reading skills, reading fluency, and phonemic awareness), but it also includes the other components of an English language arts curriculum (e.g., writing, grammar), and is "intellectually, cognitively able to learn that kind of information in the general ed[ucation] classroom." (Tr. vol. 3, p. 549:1-11) (Testimony of Without the full 90 minutes each day, was moving so slowly through this program, which includes specialized instruction in areas that he does not need, that "it really slows down [his] word reading skill development, which is what he needs." (Tr. vol. 3, p. 549:12-15)

267. was not receiving instruction in the Language! program with fidelity. (Tr. vol. 2, p. 374:13-25) (Testimony of that IEP team members identified at least four different research based curricula for s specially designed instruction.); (Tr. vol. 3, p. 547:9-18) (Testimony of analyzing Ms. lesson plans for October and November 2016 and opining—at this pace— s class would "not be halfway through Book A in a year," even though the Language! program guidelines indicate Book A should be completed in its entirety in 120 instructional days.); (Resp. Exs. 11, 13, & 14); (Tr. vol. 11, p. 2198:17-20) (Testimony of regarding the absence of any evidence that time was made up when Ms. was absent.)

268. Ms. admitted she failed to provide with specially designed instruction individualized to his unique needs. (Tr. vol. 15, p. 3027:11-21) (Testimony of that she did not work on specific skills with students based on their individual needs.); (D-14); (Tr. vol. 11, p. 2198:4-13) (Testimony of that she saw no attempt to differentiate instruction within each grade level group.); (Tr. vol. 15, pp. 3025:11–3026:16) (Testimony of that there was no evidence in her lesson plans that she retaught a lesson that only one-third of her students mastered.)

269. Ms. admitted she did not collect data on the goals written in the IEP, and never collaborated with Ms. to determine if was able to achieve any of his Reading/Speech goals with correct speech sounds. (Tr. vol. 15, pp. 2980:21–2983:9) (Testimony of that she only collected data twice on s first IEP goal, four times on the second goal, and did not collect

data on the third goal.); (Tr. vol. 15, p. 2984:16-19) (Testimony of confirming her compilation of data does not reference any data collection on s fluency goal.)

270. Ms. s third-grade regular education teacher, also admitted the lack of collaboration with Ms. (Tr. vol. 9, p. 1659:19-25) (Ms. confirmed that she "never looked in his folder [from Ms. his E.C. teacher]" and, therefore, she "just know[s] that they were working on the goals to meet the IEP.") Ms. was unfamiliar with the FUNdations program, what level was working on in FUNdations, or what skills he was being retaught by Ms. Draughn the second half of the year. (Tr. vol. 9, p. 1660:3-17)

271. Respondent failed to introduce corroborating documentation supportive of Ms. testimony regarding the implementation of s IEP through supplemental aids and services, modifications, and accommodations in the general education class. (Tr. vol. 9, p. 1656:18-24) (Testimony of to the absence of typed work, modified social studies or science work, or graphic organizers in Resp. Ex. 89.)

272. did not receive IEP progress monitoring or progress reports from July to December 2016. (Tr. vol. 4, pp. 698:16-699:4) (Testimony of

273. The instruction LCS provided to from January 2016 through December 2016 "clearly [had] not been sufficient in order to move him significantly toward the goal of becoming an accurate reader, much less a fluent reader." (Tr. vol. 3, p. 522:2-4) (Testimony of

274. s EC teacher and LCS's EC Lead Teacher/Compliance Specialist admitted that s January 2016, June 2016, and August 2016 and January 2017 IEPs were not implemented.

275. Such a material failure to implement s IEP was *per se* educational harm. (Tr. vol. 10, pp. 2058:25–2059:3) (Testimony of regarding the amount of time there is no instruction planned or recorded in Ms. lesson plans in Ex. D-14.); (Tr. vol. 10, p. 2060:8-13) (opining about "the lack of instruction per instructional days" as reported in Ms. lesson plans in D-14.)

January 5, 2017 IEP Meeting

276. On January 5, 2017, s IEP Team convened to develop s Annual Review IEP ("January 2017 IEP Meeting"). (Stip. 47) (Pet. Ex. 1) (Stip. Exs. 26 & 27)

277. Ms. attended this IEP meeting. (Tr. vol. 2, p. 402:18-19)

278. Considering the past IEP controversies, service delivery and implementation remained key concerns of Petitioners.

279. At the January 2017 IEP Meeting, Ms. his regular education teacher for the 2016-2017 school year, discussed with the IEP team that she "had not seen his reading testing data and was not aware of the severity of his reading level." (Tr. vol. 2, p. 417:5-7)

280. LCS inappropriately used multiple programs with (Stip. Ex. 26 p. 92); (Tr. vol. 2, p. 422:16-19) (Ms. noting all the different programs reported in the PWN that LCS was using with

281. Prior to the development of the January 2017 IEP, no one conducted accurate progress monitoring on [redacted]s IEP goals. (Tr. vol. 15, p. 2971:2-4) (Testimony of [redacted] that she did not assess [redacted]s speech sound productions when he read sight words, though this was part of his goal.); (Tr. vol. 15, p. 2984:12-15) (Testimony of [redacted] that she only gave [redacted] dictated sentences, and [redacted] did not generate written sentences.)

282. Overall, however, the January 2017 IEP was very different from the January 2016 IEP and more ambitious. (*Compare* Pet. Ex. 1 *with* Stip. Ex. 17) Reading and speech goals were not combined. None of the academic goals were combined with functional goals or integrated with speech as a related service. The present levels in the January 2017 IEP were more specific and the goals more ambitious.

283. Despite this, Ms. [redacted] testified that all the goals were too ambitious and still inappropriate.

284. According to Dr. [redacted] the goals in the January 2017 IEP were, in general, more clearly defined, but they were still not designed to meet [redacted]s unique needs. (Tr. vol. 3, pp. 522:18-23, 526:2-4)

285. The January 2017 IEP reported the following Present Level for [redacted]

> [redacted] actively participates in small group reading instruction. He shows a strength in oral expression and volunteers to share his thoughts daily. Functionally, [redacted] is able to read 79 out of 100 of the second 100 FRY words. On the CORE high frequency word survey his instructional level was on list four. When dictated letter sounds in isolation, [redacted] is able to identify short vowel and consonant sounds with 100% accuracy. When identifying consonant and short vowel sounds in isolation on the CORE phonics survey, [redacted] is able to identify 25 out of 26 sounds. He said /y/ for short u. He also read 14 out of 15 consonant vowel consonant (CVC) words. [redacted] read seven out of ten consonant blends with short vowels. On classroom assessments, [redacted] read 80% of real and nonsense CVC words in the last three out of four trials. On the words that he missed, [redacted] often confused the short vowel sound or the last sound in nonsense words. On the CORE phonemic awareness test, [redacted] was able to correctly segment 8 out of 15 words. When words contained consonant blends, [redacted] would leave out of a sound. When given the CORE phonological segmentation test, [redacted] scored a 4 out of 5 on sentences into words, a 6 out of 8 on words into syllables, and an 8 out of 10 on words into phonemes. That places [redacted] on a strategic level on all of those skills. On words into phonemes, he missed the last two words that required him to identify consonant blends. When progress monitored on fluency phrases in the Language! Program, [redacted] read 49 words with 0 errors, 52 words with 4 errors, 63 words with 0 errors, and 57 words with 0 errors. Given the same texts on his second reading, [redacted] read 63 words with 3 errors, 55 words with 0 errors, 75 words with 3 errors, 62 words with 2 errors, and 80 words with 0 errors. All the fluency passages included both high frequency words and short vowel words with consonant blends. When orally read text, [redacted] is able to answer basic comprehension questions in written form with 80% accuracy or above on the last five times he was progress monitored in the Exceptional Children's Classroom. [redacted] has learned to restate the question in his answer and form a complete sentence with proper sentence mechanics. When independently

reading text, [is able to answer comprehensions with above 80% accuracy on text that is between a 220 and 240 lexile level. This includes both written and multiple choice questions. By working with [on his phonological awareness, decoding, and spelling skills [,] we will address his fluency and comprehension. On both standardized and classroom based assessments, [continues to show deficits in reading. Therefore, he continues to need individualized instruction in order to make gains within the general education curriculum.

(Stip. 48) (Pet. Ex. 1, p. 4)

286. Ms. testified that neither Ms. nor Ms. discussed concerns raised in Ms. January 3, 2017 email regarding the inappropriateness of integrating s articulation goals within his reading goals with the January 2017 IEP team. (Tr. vol. 10, pp. 2057:14-23, 2058:2-6); (D-10); (D-11)

287. Nevertheless, the reading and articulation goals were not combined in the January 2017 IEP. The January 2017 IEP included the following six (6) reading goals for

1. When shown short vowel sounds with diagraphs in isolation, [will read the words with 95% accuracy by his next annual review date ["Reading Goal 1"].
2. When shown consonant vowel consonant words, [will read the words with 95% accuracy by his next annual review date ["Reading Goal 2"].
3. When shown words with the suffix s in isolation, [will read the words with 80% accuracy by his next annual review date ["Reading Goal 3"].
4. When shown short vowel words with consonant blends in isolation, [will read words with 80% accuracy by his next annual review date ["Reading Goal 4"].
5. When participating in phonemic awareness drills, [will increase his fluency to 80 words per minute with no more than 2 errors by his next annual review date ["Reading Goal 5"].
6. When participating in phonemic awareness drills and given a passage on his independent level, [will read an[d] answer five comprehension questions that can be found within the text with 80% accuracy by his next annual review date ["Reading Goal 6"].

(Stip. 49) (Pet. Ex. 1, p. 4)

288. The January 2017 IEP included the following articulation goal for

When reading aloud a 5-6 sentence paragraph, [will correctly produce /r/ and /l/ consonant blends, /th/ and /r/ with 80% accuracy during 3 therapy sessions ["Speech Goal"].

(Stip. 49) (Pet. Ex. 1, p. 4)

289. Unlike the January 2016 IEP, the Reading Goals 1-6 and Speech Goal in the January 2017 IEP were separated.

290. Moreover, none of the Reading Goals were integrated with speech as a related service. (Pet. Ex. 1, p. 5)

291. [redacted]s functional Speech Goal for articulation was to be implemented in the speech therapy room and monitored exclusively by the speech pathologist. (Pet. Ex. 1, pp. 6, 14)

292. [redacted]s Reading Goals 1-6 were to be implemented in the EC classroom and monitored by the EC teacher. (Pet. Ex. 1, p. 13)

293. The January 2017 IEP reported the following Present Level in Writing for [redacted]

> [redacted] has strong communication skills and is able to relay information orally. On weekly spelling tests, [redacted] is able to write a dictated sentence using proper mechanics and spacing. [redacted] is able to spell the words taught that week within a sentence. [redacted] has difficulty generating sentences independently. Throughout the week, when writing his spelling words in sentences, [redacted] avoids the task. He will strike up a conversation with the adults in the room or often complain of headaches or being tired. [redacted] will verbally express that he does not want to write or review his words because he will also have to do it at home. [redacted] is able to spell CVC words with 100% accuracy in isolation. On weekly spelling tests, [redacted] is able to spell short vowel words with consonant diagraphs with 90% accuracy or above. When spelling the same words within a sentence or when given them as a review word, he will often confuse the vowel or leave out a consonant letter within a blend. [redacted] is able to memorize how to spell high frequency words for weekly tests. When using those same words in a sentence or paragraph, he will often swap the letters. For example[,] they is thye or he will spell them phonetically such as said is sed. At the beginning of the year, [redacted] got a raw score of 6 or a grade equivalent of 1.2 on his spelling inventory for the Language! [sic] program. When writing paragraphs, [redacted] is able to complete graphic organizers. He will put his thoughts or ideas in the proper spaces. He is able to use text or a word wall to spell words correctly. [redacted] struggles to turn the graphic organizers into a paragraph. His sentences all begin with the same word, typically whatever the subject matter is of the text (for example, I or sharks). He often forgets to space his words within a paragraph and his letters are larger. [redacted] does not include adjectives or prepositional phrases in his sentences. When doing grammar tasks in the small group setting, [redacted] is able to diagram sentences, identify parts of speech, and recognize subject/verb agreement. However, he does not always apply the same rules to his writing. He will leave off an s for plural nouns or singular verbs. [redacted] continues to need individualized instruction in writing in order to make gains within the general education curriculum.

(Stip. 50) (Pet. Ex. 1, p. 7)

294. The January 2017 IEP included the following writing goals for [redacted]

1. When given short vowel words with diagraphs in isolation, [redacted] will spell the words with 95% accuracy by his next annual review date ["Writing Goal 1"].

2. When given consonant vowel consonant words, [redacted] will spell the words with 95% accuracy by his next annual review date ["Writing Goal 2"].

3. When given words with the suffix s in isolation, [redacted] will spell the words with 80% accuracy by his next annual review date ["Writing Goal 3"].

4. When given short vowel words with consonant blends in isolation, [redacted] will spell words with 80% accuracy by his next annual review date ["Writing Goal 4"].

(Stip. 51) (Pet. Ex. 1, pp. 7-8)

295. None of these Writing Goals were integrated with speech. (Pet. Ex. 1, p. 7)

296. The EC teacher was to implement and monitor the Writing Goals in the EC classroom. (Pet. Ex. 1, p. 13)

297. The January 2017 IEP included many more supplemental aids, supports, modifications, and accommodations in the regular education classroom. (Stip. 52) (Pet. Ex. 1, p. 13)

298. [redacted]s service delivery in his January 2017 IEP was:

Specialized Instruction	Session Length	Frequency	Location
Reading	45 minutes	5/week	EC Classroom
Writing	30 minutes	5/week	EC Classroom

(Stip. 53) (Pet. Ex. 1, p. 13)

299. The service delivery of speech as a related service remained at 15-minute session duration, but frequency was reduced to ten times a reporting period in the speech room. (Stip. 53) (Pet. Ex. 1, p. 14)

300. Despite the creation of ten (10) new academic goals, [redacted] remained in the "regular" placement.

301. The IEP team's justification for the "regular" education placement was:

> [has a diagnosis of dyslexia and shows deficits in basic reading, reading fluency, reading comprehension, and written expression. [also exhibits a weakness in articulation. In order to help close the gap in his areas of weaknesses, needs individualized instruction that cannot be delivered in the general education classroom.

(Pet. Ex. 1, p. 15)

302. The "regular" placement was inappropriate and appeared predetermined. LCS failed to provide a cogent and reasonable explanation for maintaining s "regular" placement in light of his lack of progress and the addition of ten (10) new academic goals.

303. Based on the standard scores on the 2016 Educational Reevaluation, made minimal progress that was not "sufficient to put him on a trajectory to be a 'competent reader.'" (Tr. vol. 3, p. 580:13-19) (Testimony of

304. LCS improperly used the Text Readings and Comprehensive ("TRC") broad score on the DIBELS as evidence of s progress. The TRC is extremely unreliable, and the various levels are unstable indicators. (Tr. vol. 3, pp. 597-600:4) (Testimony of Because of s good thinking skills and his prediction skills with high frequency words, he scored higher on the TRC. However, unless his phonemic decoding problems are remediated, he will not become a proficient reader. (Tr. vol. 3, pp. 603-610) (Testimony of

305. The IEP goals were inappropriate because even if met all of his IEP goals, he would still be working on reading skills at a beginning first grade level by the middle of fourth grade. (Tr. vol. 2, pp. 4114:25–4115:3) (Testimony of that the team is assuming it will take to the middle of fourth grade to master the early reading skill of spelling CVC words.); (Tr. vol. 3, p. 524:10-14)(Testimony of regarding her concern of "how slowly [is moving through the continuum of decoding skills" and ending the IEP with skills that are the "beginning of first grade."); (Tr. vol. 2, p. 408:18-20) (Testimony of that the first four goals are for to learn skills taught at the "beginning of first grade, probably the first month of first grade instruction—and they reference the initial phonics pattern for early reading instruction.")

ESY

306. Despite the need for ten (10) new goals and s lack of progress, he was not found eligible for ESY because, according to the PWN, is a year-round school, and has not shown regression over the three-week intercession. (Stip. Ex. 26, p. 93) The IEP team did not consider whether had emerging skills which might also have qualified him for ESY. (Stip. Ex. 26)

307. Ms. testified that the team decided to gather data and consider s eligibility for ESY at a later time, yet the IEP team failed to mark the box on the ESY eligibility form to indicate "Eligibility Under Consideration." (Tr. vol. 16, pp. 3385:17-3386:10)

Implementation of the January 2017 IEP

308. Ms. [redacted] admitted she did not administer a baseline test to [redacted] to determine which skills he knew prior to starting at Lesson 1, Unit 1—even though this was an essential element in implementing the program with fidelity according to the Language! training. (Tr. vol. 11, p. 2197:9-19) (Testimony of Dr. [redacted] referring to the assessment test as "critical for determining where students should start instruction in the Language! program."); (Tr. vol. 12, p. 2431:1-12) (Testimony of [redacted] that placement tests should be used.)

309. Based on Ms. [redacted] lesson plans, there was no documentation that all the students in [redacted]s group, including [redacted] mastered any of the skills in the Language! program. (D-14); (Tr. vol. 11, p. 2198:4-13) (Dr. [redacted] testified that she saw no attempt to differentiate instruction within each grade level group.)

310. According to Ms. [redacted] LCS only uses three research-based reading programs, Letterland, Language! and FUNdations. (Stip. Ex. 26, p. 92) LCS uses "the programs we have in place. We are not required to have research-based programs. We are required to have specially designed instruction. The program will not drive the IEP goals." (Stip. Ex. 30, p. 108) (IEP minutes documenting Ms. [redacted] comments.)

311. The IEP team chose FUNdation as the methodology to use for [redacted]s reading remediation program. (Stip. Ex. 26, p. 92) [redacted] had unsuccessfully participated in the Letterland and Language! programs.

312. No other reading programs were considered other than what LCS had already used unsuccessfully.

313. LCS changed [redacted]s reading program to FUNdations in January 2017, without conducting any type of assessment or placement test and placed him in a class with other students who all started over in the first-grade book at Lesson 1, Unit 1. (Tr. vol. 15, p. 3028:12-14)((Testimony of [redacted] regarding her January 2017 lesson plans); (Res. Ex. 5); (Tr. vol. 15, p. 3034:4-12) (Testimony of [redacted] that she did not provide any assessment prior to beginning the FUNdations program to determine [redacted]s level.); (Tr. vol. 9, pp. 1835-1836:6)(Testimony of [redacted] that based on her self-training on the FUNdations' CD, it was OK to start in Level 1 in the first grade FUNdations curriculum, even though [redacted] had started Level 1 in the first grade Letterland curriculum the year before.)

314. Both of Petitioners' experts testified this was inappropriate.

315. Ms. [redacted] testified it was inappropriate to use the FUNdations for grades K or 1 with [redacted] because "[t]hat would guarantee he would remain behind the regular curriculum at first grade." Ms. [redacted] testified that she informed the IEP team this instructional plan was inappropriate for [redacted] as "[h]e's now toward the end of third-grade." (Tr. vol. 2, p. 424:1-6)

316. During the IEP meeting, Ms. [redacted] blurted out her frustration: "If you want me to teach with fidelity, I will teach FUNdations grade 1, lesson 1 tomorrow using the first-grade kit." (Tr. vol. 2, p. 423:21-24) (Testimony of [redacted] to Ms. [redacted] excited utterance during the IEP meeting.); (Tr. vol. 2, p. 429:11-13) (Testimony of [redacted] regarding the documents from the February 2017 IEP meeting during which Ms. [redacted] reported she was, in fact, using FUNdations Level 1 despite [redacted] and Ms. [redacted] ongoing objections.)

317. [redacted] testified it was her understanding from Ms. [redacted] that [redacted] would be taught a FUNdations lesson early in the day, and then retaught the same lesson later in the day, even though [redacted] was in the second half of his third-grade year. (Tr. vol. 4, pp. 712:12-713:11) (Pet. Ex. 65) (note from Ms. [redacted] regarding a double dose of FUNdations)

318. LCS failed to provide [redacted] with his specially designed instruction as designated by his January 2017 IEP. (Tr. vol. 15, p. 2998:7-21) (Testimony of [redacted] that every day a teacher assistant sat with, but did not instruct [redacted] as he worked independently, and Ms. [redacted] taught another class, and this was part of [redacted]s daily specially designed instruction.)

319. LCS did not collect data on [redacted]s new reading goals. According to the data documented by Ms. [redacted] she only collected data four (4) times on the first reading goal (Tr. vol. 15, pp. 3034:24-3035:7); twice on the second reading goal (Tr. vol. 15, p. 3035:8-17); once for the third reading goal (Tr. vol. 15, p. 3036:13-15); and no progress monitoring recorded on [redacted]s remaining reading goals (Tr. vol. 15, p. 3036:16-25).

320. Ms. [redacted] only collected data four (4) times on [redacted]s first spelling goal (Stip. Ex. 41); once on [redacted]s second and third spelling goals (Tr. vol. 15, p. 3038:1-11); and no progress monitoring collected on [redacted]s fourth spelling goal (Tr. vol. 15, p.3038:12-16).

321. Ms. [redacted] testified that [redacted] was removed from her class during small group reading instruction every day during the second half of the year because his time was increased in the EC classroom. (Tr. vol. 7, pp. 1431:22-1432:1) Yet, the service delivery on [redacted]s IEP only reflected a change of an additional 30 minutes of instruction in writing twice a week—not a change that would result in [redacted] missing small group reading instruction every single day. *(Compare* Stip. 54 *with* Stip. 44)

322. There are fourteen (14) units in the first-grade curriculum of FUNdations, and based on the pace of the lessons in Ms. [redacted] lesson plans, the class will likely complete "half way through the first-grade curriculum, which for a student who is now in fourth grade is a significant way to go." (Tr. vol. 3, pp. 551:20-552:1) (Testimony of [redacted] discussing Resp. Exs. 5, 15, 22) Based on Ms. [redacted] lesson plans, she stopped teaching at Unit 7, as Dr. [redacted] predicted, which is halfway through the first-grade curriculum. (Resp. Exs. 25 & 26)

323. Respondent asserted at hearing that [redacted] "was on a trajectory to make greater growth…" and continually referred to the summary chart of DIBELS data for support. (Tr. vol. 1, p. 139:17-21) Dr. [redacted] debunked this theory and explained that it is "not sensible" to attempt to compare the movement between the levels for [redacted] and his peers functioning on grade level because, "[t]he levels—the movements between levels is not at equal intervals." (Tr. vol. 3, p. 596:22-24) Dr. [redacted] explained the composite score is the most reliable indicator of [redacted]s overall needs, which remained on the Intensive level; whereas, the TRC portion of the DIBELS is "extremely unreliable" and with "very unstable indicators." (Tr. vol. 3, pp. 597:18-598:12); (Tr. vol. 2, p. 387:2-7) (Ms. [redacted] testifying that working on short vowels and consonant vowel consonant words and closed syllable with consonant blends was not progress from the January 2016 IEP meeting and reiterating, "[t]his is beginning first grade reading work with short vowels, consonant blends."); (Tr. vol. 2, p. 388:4-10) (Ms. [redacted] testifying there was no data to support the statement "if [redacted] continued to make progress at the same rate that he had made as of August 2016 that he would be on grade level by the end of elementary school if sustained.")

324. Ms. [redacted] opined it was false and misleading, based on the DIBELS' data, for LCS to report that [redacted] was progressing above grade level expectations. (Tr. vol. 2, pp. 384:23-24, 385:2-3)

325. Ms. [redacted] opined that contrary to what was reported to [redacted] by the IEP team, [redacted] would not be "on grade level or very close to grade level by the end of his elementary school career . . . He was not closing the gap. The gap was getting bigger." (Tr. vol. 2, pp. 385:20; 386:7) (Ms. [redacted] disagreeing with the statement from Ms. [redacted] recorded in the minutes that LCS's "data reflects that the goals specific to his deficits are progressing at a higher than normal or grade level expectation."); (Tr. vol. 4, pp. 659:10-660:12) (Testimony of [redacted] confirming [redacted] scored a 1 on his Beginning of Grade (BOG) Assessment for third-grade.); (Res. Ex. 148) (Document reporting [redacted]s BOG score.)

326. Ms. [redacted] admitted that [redacted] did not make progress in reading while at LCS. (*See, e.g.*, Tr. vol. 15, pp. 2955:5–2956:25) (Testimony of [redacted] comparing [redacted]s performance on R-18 and R-89 between February and May 2017, that [redacted] did not make progress and actually regressed on his fluency scores.); (Tr. vol. 15, p. 2970:16-23) (Testimony of [redacted] that [redacted] was reading at a first grade level in August 2016 and continued to read at a first grade level in December 2016); (Tr. vol. 15, p. 3095:7-16) (Testimony of [redacted] that the discrepancy between [redacted] and his nondisabled peers either remained the same or increased between the end of second grade and the middle of third grade referring to Pet. Ex. 5 for DORF Accuracy and DORF Fluency.)

327. The January 2017 IEP minutes documented that Ms. [redacted] asked for 90 minutes of language instruction implemented with fidelity. (Stip. Ex. 27, p. 97) The January 2017 IEP meeting's PWN initially noted this request to "increase daily service time" and that the "team refused to increase service delivery." (Stip. Ex. 27, pp. 92-93) These notations were struck through on the final version of the PWN. (*See* crossed out phrases on Stip. Ex. 27, pp 92-93)

SUBSEQUENT IEP MEETINGS

February 7, 2017 IEP Meeting

328. An IEP Meeting was held on February 7, 2017, but the parties were unable to resolve their differences and mediation was requested. (Stip. 54) (Stip. Ex. 30, p. 110)

May 24, 2017 IEP Meeting

329. On May 11, 2017, LCS sent Petitioner [redacted] an Invitation to Conference to attend an IEP Meeting on May 24, 2017. (Stip. 55)

330. The EC Director, Ms. [redacted], canceled the May 24, 2017 IEP Meeting. (Stip. 56)

REMEDIES FOR FAPE VIOLATIONS

331. To determine what is appropriate and ambitious for each child, the IEP Team must gather and analyze all the information at its disposal to determine a child's "individual circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 998, 580 U.S. ___, ____ (Mar. 22, 2017).

332. [redacted] is a child with average intelligence, but his reading and writing skills are well below grade level. (Stip. Ex. 34); (Tr. vol. 14, p. 2762:4-8) (Testimony of [redacted] regarding the first grade Lexile level of the reading passages she provided to [redacted]

333. An appropriate program would aim to close the gaps in [redacted]s reading deficits. LCS's ambitious goals in the January 2017 IEP aspired to this standard but fell short of the mark.

334. To gain the skills to read and write on grade level, [redacted] needs to be educated on the Wilson Reading System in a very small group or one-on-one setting by a highly trained and skilled teacher who has completed the ten-day Wilson Reading System training. (Tr. vol. 3, p. 560:12-25) (Testimony of [redacted] [redacted] is "so far behind at this point, that is what is going to be required in order to move him forward so that there's a hope of him being able to read at least accurately with some degree of fluency before he gets to high school." (Tr. vol. 3, pp. 560:25-561:4) (Testimony of [redacted] Dr. [redacted] further opined that, even making the changes she suggested, this process would take "years" before [redacted] could read on grade level. (Tr. vol. 3, p. 561:10-14)

335. The new documents, which were previously withheld by Respondent prior to Dr. [redacted] original testimony, only substantiated her concerns about LCS's competency in the following ways: (1) the new DIBELS data "confirmed that there was evidence from the very beginning of difficulties with basic word reading skills that are consistent with dyslexia or a specific language based reading difficulty;" (2) "the intervention plans were woefully inadequate and did in no way address his basic word reading problems;" and, (3) in her opinion, "Lee County Schools simply does not have the skills at this point to make appropriate decisions about programs to use for intervention plans" or how to implement those plans "for a student with [redacted]s level of difficulty." (Tr. vol. 11, p. 2203:4-22) (Testimony of [redacted]

336. There was an obvious lack of understanding in LCS, including from Respondent's own expert, about the difference between a speech language disorder and a speech articulation disorder. (*See, e.g.*, Tr. vol. 11, p. 2172:3-8) (Testimony of [redacted] as to the absence of evidence "that a person who has difficulty with articulation, that that impacts his reading, his basic reading and spelling difficulties. I think that would be a misunderstanding of the relationship between articulation and reading and spelling."); (Tr. vol. 11, p. 2172:9-14) (Testimony of [redacted] advising of the need for training to any IEP team members with this misunderstanding.); (Tr. vol. 9, p. 1774:19-20)(Testimony of [redacted] that the combined goals were appropriate "[b]ecause in order to identify the words, he needs to say the speech sounds correctly."); (Tr. vol. 15, pp. 3043:25–3046:4) (Testimony of [redacted] on cross-examination acknowledging that the example she identified on direct examination in Respondent's Exhibit 91 of [redacted] misspelling the /th/ sound in a word was the singular example throughout the exhibit, and there were multiple examples of [redacted] spelling the sound correctly throughout the exhibit.); (Tr. vol. 12, pp. 2426:6-2427:18) (Testimony of [redacted] confirming [redacted] was flipped from the speech eligibility category to speech as a related service even though "[h]e still met the eligibility" for speech as an eligibility category.)

337. There was also a lack of understanding in LCS as whether it was appropriate to combine reading and articulation goals. It was the opinion of Ms. [redacted] that the "county is in a very bad habit of [ ] automatically flipping kids to related service and not even really discussing it at the meeting, which in turn leads to integrated goals that should not be integrated." (Tr. vol. 12, pp. 2432:6-2; 2419:12-14) (Testimony of [redacted] (Tr. vol. 13, pp. 2687:3-4, 2690:17-19) (Counsel for Respondent stating Ms. [redacted] was "an agent" of LCS.); (Tr. vol. 12, p. 2421:10-16) (Testimony of [redacted] that she had "the authority to instruct special education service providers to comply with the law."); (Tr. vol. 12, pp. 2419:23-2420:5) (Testimony of [redacted] explaining "we had heard different information," and "there had not been a clear distinction made" regarding the integrating of goals in the district.); (Tr. vol. 12, pp. 2424:13-2425:14) (Testimony of [redacted] reporting "I don't think we had any clear-cut resolve on that . . ..")

338. Respondent did not understand how to collect data for progress monitoring or what constituted reliable, objective measures. (*See, e.g.*, Tr. vol. 2, p. 432:20-25) (Testimony of [redacted] regarding her communications with the IEP team about the "need for a valid normed measure for progress monitoring."); (Tr. vol. 2, p. 445:13-19) (Testimony of [redacted] describing the unnormed CORE Phonics survey for kindergarten and first grade literacy skills inappropriately used by the team to progress monitor [redacted] in third-grade.); (Stip. Ex. 38) (CORE Phonics Survey); (Tr. vol. 2, p. 447:2-16) (Testimony of [redacted] discussing Stip. Exs. 40 and 41, i.e., the progress monitoring for Ms. [redacted] class and the absence of "reliable, valid measures" being used, and the absence of raw data in [redacted]s educational record to support the document provided to Petitioner [redacted] (Tr. vol. 3, pp. 554:25-555:8) (Testimony of [redacted] regarding the misleading and inappropriate use of the CORE Phonics survey results as a baseline in the present level.); (Tr. vol. 15, pp. 2946:25–2947:15))(Testimony of [redacted] that she was not trained to administer any portion of the DIBELS Next or mClass, yet she used the DIBELS Next for progress monitoring on [redacted]s IEP goals.); (Tr. vol. 15, p. 2950:6-8) (Testimony of [redacted] that she has never received training in how to compute oral reading fluency for a child.); (Tr. vol. 15, p. 2952:1-10) (Testimony of [redacted] that she has never received training in how to administer the MASI-R or the CORE assessment, even though she testified to using these to assess [redacted]s progress on his IEP goals.); (Tr. vol. 15, pp. 2952:19–2953:17) (Testimony of [redacted] that she had read the instructions for administering the MASI-R, yet she did not follow the instructions when administering to [redacted] or calculating his score on the assessment.); (Tr. vol. 15, p. 3046:5-21) (Testimony of [redacted] clarifying that she did not administer any of the mClass testing to [redacted] nor review the underlying data from the TRC, even though she testified on direct examination that she used these tools for progress monitoring for [redacted]s IEP goals.)

339. Respondent based decisions on administrative convenience, rather than [redacted]s unique needs. (*See, e.g.*, Stip. Ex. 30, p. 108) (Meeting minutes documenting Ms. [redacted] statement that "we have to use programs we have in place...."); (Tr. vol. 2, p. 433:2-22) (Testimony of [redacted]

340. Despite knowing of [redacted]s concerns with [redacted]s educational programming, Respondent never sent anyone to [redacted]s IEP meetings who had training in any program that would address his needs. Even Respondent's expert, [redacted] who appeared to be the highest trained person in LCS, was never called in to consult on [redacted]s IEP, or to develop an appropriate program.

341. With appropriate instruction, [redacted] is capable of making progress in the academic deficits identified on the 2016 Educational Reevaluation. (Tr. vol. 3, p. 521:1) (Testimony of [redacted]

342. Even assuming *arguendo* that Respondent did implement the Letterland, Language!, and FUNdations programs with fidelity during [redacted]s RtI and IEP implementation periods, [redacted] did not make progress despite these intensive interventions. At the end of third grade, [redacted] remained on the most severe intensive level.

343. Dr. [redacted] opined that [redacted] needs a reading program provided with fidelity because "it's critical that we do not do anything instructionally that confuses him." (Tr. vol. 3, p. 514:5-7) Everything needs to be "very, very clear and consistent" for [redacted] so he "can get the practice he needs to develop automaticity and fluency." (Tr. vol. 3, p. 514:20-23) The Wilson Reading System ("WRS") would be the most appropriate program for [redacted] of all the programs available at this point. (Tr. vol. 3, p. 516:4-5) (Testimony of [redacted]

344. In order to appropriately remediate [redacted] requires a tutor with Level 1 training in the Wilson Reading System. (Tr. vol. 11, p. 2251:6-15) (Testimony of [redacted]

345. [redacted]s reading tutor must be supervised through a mentor at least once per month in order to ensure fidelity, as well as have ongoing training. (Tr. vol. 11, pp. 2251:16-2252:3) (Testimony of [redacted] (*See also,* Tr. vol. 3, p. 590:6-14) (Testimony of [redacted] regarding the importance of ongoing training and coaching over time.); (Tr. vol. 2, pp. 237:25-238:7) (Testimony of [redacted] regarding the importance of training, mentoring, and support when implementing a new curriculum.)

346. The supervising mentor must be trained in the Wilson Reading System and have experience using WRS with a student like [redacted] (Tr. vol. 11, p. 2252:6-12); (*See also,* Tr. vol. 2, pp. 224:11–225:12) (Testimony of [redacted] describing the difference between Wilson Reading System and Wilson FUNdations.)

347. [redacted] requires daily tutoring sessions for a minimum of one hour per day, in addition to the instruction [redacted] already receives in the regular education classroom. (Tr. vol. 11, p. 2253:4-8) (Testimony of [redacted]

348. Dr. [redacted] explained "[i]t becomes increasingly difficult . . . to get kids to be fluent readers the longer you wait for instruction to start. And the window of opportunity for accuracy is kindergarten through third grade." In her experience, and based on peer-reviewed research, while most children can become reasonably accurate, "[t]hey just don't become fluent very easily, and that impacts their reading ability for the rest of their lives." (Tr. vol. 3 521:13-20) (citing supporting research: J.K. Torgeson et al., "Preventing Reading Failure in Young Children with Phonological Processing Disabilities," 91 *Journal of Educational Psychology* 579-93 (1999); J.K. Torgeson, et al., "Intensive Remedial Instruction for Children with Severe Reading Disabilities: Immediate and Long-term Outcomes from Two Instructional Approaches," 34 *Journal of Learning Disabilities* 33-58 (2001))

349. Depending on how quickly [redacted] responds to interventions, he will require remediation through the remainder of elementary school and middle school. (Tr. vol. 11, p. 2253:9-22) (Testimony of [redacted]

350. If LCS cannot contract with an appropriately trained tutor and mentor, as an alternative, [redacted] requires private placement with a curriculum appropriate for students with severe reading disabilities, small group or one-on-one instruction, and highly trained teachers that are coached. (Tr. vol. 2, pp. 562:13-563:1) (Testimony of [redacted] (*See also,* Tr. vol. 2, p. 231 :9-10) (Testimony of [redacted] regarding the importance of implementing reading programs with fidelity.); (Tr. vol. 3, pp. 534:16-21, 535:7-10) (Testimony of [redacted] regarding the necessity of a teacher receiving appropriate training.); (Tr. vol. 3, pp. 565:25–566:4) (Testimony of [redacted] that "balanced literacy" is "a belief system that is not based on any scientific research. There is absolutely no indication that there is any other way to teach students who have difficulty learning basic word reading skills without incorporating systematic phonics.")

351. Specifically, in the event LCS cannot contract with an appropriately trained tutor and mentor, The [redacted] Center is a private school that would be appropriate for [redacted] with the caveat there may be others that meet the same criteria in the area. (Tr. vol. 3, p. 563:6-8) (Testimony of [redacted]

CONCLUSIONS OF LAW

Based on the above Findings of Fact, relevant laws, and legal precedent, the Undersigned concludes as follows:

General Legal Framework

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

2. This Order incorporates and reaffirms the Conclusions of Law contained in the previous Orders entered in this litigation.

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

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

5. The controlling State law for students in North Carolina with disabilities is in N.C. Gen. Stat. §§ 115C, Article 9.

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

7. The Petitioners and Respondent named in this action are correctly designated and were properly noticed of this hearing.

8. The Petition for Contested Case Hearing at 17 EDC 03684 was filed in and accepted by the Office of Administrative Hearings on June 1, 2017. (Stip. 57) All of Petitioners' claims prior to June 1, 2016 fell outside the one-year statute of limitations, however, some of these otherwise time-barred claims met the statutory exceptions as discussed below.

9. As the party requesting the hearing, the burden of proof lies with Petitioners and the standard of proof is by a preponderance of the evidence. *See Schaffer ex rel. Schaffer v. Weast,* 546 U.S. 49, 62 (2005). Actions of local board of education are presumed to be correct and Petitioners' evidence must outweigh the evidence in favor of the Respondent's decisions. *See* N.C.G.S. § 115C-44(b) (Stip. 2)

10. [redacted] and [illegible] were residents of Lee County during the period relevant to this controversy. [redacted] is a child with a disability for the purposes of 20 U.S.C. § 1400 *et seq.* and N.C. Gen. Stat. § 115C-106 *et seq.* The IDEA was enacted to "ensure that all children with disabilities have available to them a Free Appropriate Public Education ("FAPE") that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A).

11. Respondent is a local education agency ("LEA") receiving monies pursuant to 20 U.S.C. § 1400 *et seq.*, and is the local education agency responsible for providing educational services in Lee County, North Carolina. Respondent is subject to the provisions of applicable federal and state laws and regulations, specifically 20 U.S.C. § 1400 *et seq.*; 34 C.F.R. § 300 *et seq.*; and N.C. Gen. Stat. 115C-106 *et seq.* Respondent thus had an obligation under the IDEA to provide [redacted] a FAPE.

12. Respondent is also subject to the *Policies Governing Services for Children with Disabilities* ("*NCDPI Policies*") developed by the North Carolina Department of Public Instruction ("NCDPI"), the State Education Agency (SEA"). These policies interpret the IDEA and regulations requirements for Respondent to provide FAPE for those children in need of special education residing within its jurisdiction. The *NCDPI Policies* are not agency regulations or rules as defined by the North Carolina Administrative Procedure Act. *See* N.C. Gen. Stat. § 150B-2(8a)(c).

PRELIMINARY EVIDENTIARY MATTER

Hearsay Comments in [redacted] Email (D-11)

13. During the hearing, an evidentiary issue arose regarding the admissibility of hearsay comments contained in [redacted] [redacted] email dated January 3, 2017 to school staff.

14. When the email was drafted, Ms. [redacted] was one of LCS's EC Lead Teacher/Compliance Specialists. The [redacted] Email referred to decisions made at the January 2016 IEP meeting, decisions yet to be made at the upcoming January 5, 2017 IEP meeting, and

ongoing/continuing actions of LCS about the combination of articulation/reading goals and "flipping kids to related service" for speech. (D-11)

15. Respondent contends that Ms. [redacted] comments in the [redacted] Email were inadmissible hearsay because they were a narrative of past decisions made at the January 2016 IEP meeting with respect to eligibility and the combined articulation and reading goals. *Sledge v. Wagoner*, 250 N.C. 559, 563, 109 S.E.2d180, 184 (1959) (*quoting* the "well settled rule" as stated in *Hubbard v. Southern R.R. Co.,* 203 N.C. 675, 678, 166 S.E. 802, 804). Extrajudicial declarations of past occurrence by an agent are inadmissible to establish either fact of agency or its nature and extent, such statements being regarded as hearsay and offered for the purpose of proving truth of factual matters therein asserted. *Sledge*, 250 N.C. at 562, 109 S.E.2d at 183.

16. In her January 2017 email, Ms. [redacted] commented about the ongoing, not past, practices of LCS which had been in effect during the development of [redacted]s IEPs in January 2016 and January 2017. She stated what the "county *has* typically" been doing with articulation and reading goals, the county's "very bad habit of – automatically flipping kids to related services…which in turn *leads* to integrated goals that should not be integrated," and this "habit *is* hurting us." (D-11) (Emphasis added)

17. Ms. [redacted] comments about decisions to be made at the January 2017 IEP meeting were not hearsay and, in fact, Respondent followed Ms. [redacted] instruction and developed separate speech and reading goals. As eligibility was not at issue during the January 2017, her comments regarding speech as an eligibility category or related service were not relevant.

18. Respondent conceded that Ms. [redacted] was an agent of LCS at the time of her email, and the Undersigned concludes that LCS's practices described in the [redacted] Email were ongoing. As such, her admissions that LCS had a practice or policy of improperly combining reading and articulation goals and flipping kids into speech as a related service instead of an alternative eligibility category, were party admissions by LCS and not inadmissible hearsay.

19. Moreover, Ms. [redacted] testified at the hearing about her statements in her email about Respondent's practices. Her sworn testimony about the contents of the email were not inadmissible, extrajudicial hearsay statements. Through its agent, LCS admitted that it inappropriately combined reading and articulation goals in [redacted]s January 2016, June 2016, and August 2016 IEPs.

20. Even without the inclusion of the [redacted] Email, the Undersigned concludes that Petitioners offered sufficient evidence to prove by a preponderance of evidence that LCS procedurally and substantively violated [redacted]s right to a FAPE.

21. LCS's practice and policies described in the [redacted] Email may also have violated other students' rights, however, that inquiry is not within the preview of the Undersigned.

STATUTE OF LIMITATIONS

I. Whether any of Petitioner's claims prior to June 1, 2016 are barred by the one-year statute of limitations and, if not, whether Lee County Schools denied [redacted] a free and appropriate public education during that time?

22. Because of the various Orders in this case, to avoid confusion, the Undersigned readdresses the factual basis for dismissal of some claims which occurred prior to June 1, 2016.

23. Whether the Petitioners' claims prior to June 1, 2016 are barred by the one-year statute of limitations requires an inquiry of what [redacted] "knew" or "should have known" about the Respondent's actions that formed the basis of the Petition.

24. The IDEA contains a number of critical, procedural safeguards to provide notice to parents of decisions regarding their children, and "an opportunity [for parents] to object to those decisions." *G. ex rel. R.G. v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 299 (4th Cir. 2003) (*quoting, MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 527 (4th Cir. 2002) (internal citation omitted)).

25. 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)

26. Under the IDEA, a parent or public agency must file a due process complaint "within 2 years of the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows." 20 U.S.C. § 1415(f)(3)(C)

27. North Carolina has an explicit one-year statute of limitations for filing due process petitions. N.C.G.S. § 115C-109.6(b) The statute specifically states that "[n]notwithstanding any other law, the party shall file a petition under subsection (a) of this section that includes the information required under IDEA and that sets forth an alleged violation that occurred not more than one year before the party *knew or reasonably should have known* about the alleged action that forms the basis of the petition." N.C. Gen. Stat. § 115C-109.6(b) (Emphasis added)

28. "An IDEA claim accrues 'when the parents *know of the injury* or the event that is the basis of their claim.'" *Richards v. Fairfax Cnty. Sch. Bd.*, 798 F.Supp. 338, 341 (E.D. Va. 1992), *aff'd* 7 F.3d 225 (4th Cir. 1993) (Emphasis added) (*quoting, Hall v. Knott Cnty. Bd. of Educ.*, 941 F.2d 402, 408 (6th Cir. 1991)). The relevant inquiry is whether Petitioners "possess[ed] sufficient facts about the harm done to [W.H.]" (i.e., the inappropriate placement and improper services delivered to W.H.). *Nasim v. Warden Md. House of Corr.*, 64 F.3d 951, 955 (4th Cir. 1995); *accord R.R. ex rel.*, 338 F.3d at 332 (*quoting, Richards*, 798 F.3d at 341).

29. When a court examines the application of the statute of limitations, "any inquiry . . . requires a highly factual determination as to when the parent 'knew or should have known' of the violations that formed the basis of the complaint. Such a factual analysis will necessarily require a review of the administrative record." *Swope v. Central York Sch. Dist.*, 796 F. Supp. 2d 592, 604 (M.D. Pa. 2011).

30. Because of Respondent's failure to properly disclose documents in discovery, Petitioners were given a second chance to withstand dismissal of some of their untimely claims. (*See* Reconsideration Order)

31. Based on the Findings of Fact, stipulations, sworn testimony, admissions, and other evidence in the record, [redacted] knew prior to June 1, 2016 that Respondent failed to develop an appropriate IEP for [redacted]s reading disability on October 27, 2015.

32. Based on the Findings of Fact, stipulations, sworn testimony, admissions, and other evidence in the record, [redacted] knew on or before December 1, 2015, based on her expert's advice, that IQ testing was not required for SLD eligibility.

33. IQ testing was not required in the alternative research-based procedures for determining whether a child has a SLD. 34 C.F.R. § 300.307(a)(1) & (2) An LEA may use State criteria for determining whether a child has a SLD. 34 C.F.R. 00.307(b) NC Policy 1503(11) for Eligibility Determination of SLD described two methods for SLD determination: 1) discrepancy, and 2) Alternative research-based ("RtI"). NCDPI Policy required screenings and evaluation for either method includes a psychological evaluation. NC Policy 1503(11)(i)(J) An IQ test however is to be included only "as appropriate when using RtI." NC Policy 1503(11)(i)(J) Respondent's staff misinterpreted NC Policy 1503(11) to require an IQ test when the RtI method was used to SLD eligibility. Petitioner, through her expert, was aware of this procedural violation, yet failed to timely contest it.

34. Even though [redacted] was not aware of the [redacted] Email (D-11) and Respondent's policies, she did have independent knowledge of Respondent denial of FAPE to [redacted] prior to June 1, 2016.

35. Based on [redacted]s admission and the expert testimony of Ms. [redacted] [redacted] also knew that the combination of reading and speech goals in the January 2016 IEP were inappropriate.

36. Based on the Findings of Fact, stipulations, sworn testimony, admissions, and other evidence in the record, the Undersigned concludes that, based on [redacted]s admissions at the hearing and other evidence in the record, [redacted] knew, prior to June 1, 2016, Respondent had procedurally and substantively denied [redacted] a FAPE with respect to these issues:

1. Requirement of IQ testing at the December 1, 2015 Reevaluation Meeting;
2. Inappropriateness of the October 28, 2015 IEP; and,
3. Inappropriateness of January 22, 2016 IEP, but not implementation.

37. Not all claims prior to June 1, 2016 were time barred. Claims which [redacted] did not and could not have known of Respondent's actions withstood the statute of limitations. These were Respondent's failure to: complete the eligibility worksheet for speech impaired category; give Petitioners mandatory statutory notice of its Extended School Year ("ESY") and Independent Educational Evaluation ("IEE") decisions; and, misrepresentation to Petitioners that the January 22, 2016 IEP was implemented and progress monitored with fidelity.

Procedural Violations of FAPE

38. State law dictates that "the decision of the administrative law judge shall be made on substantive grounds based on a determination of whether the child received a free and appropriate education." N.C. Gen. Stat. § 115C-109.6(f) "In matters alleging a procedural violation, the hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (i) impeded the child's right to a free appropriate public education; (ii) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (iii) caused a deprivation of educational benefits." N.C. Gen. Stat. § 115C-109.8(a); 20 U.S.C. § 1415(f)(3)(E)(ii)

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

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

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

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

43. 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)); *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990).

44. A substantive procedural violation is also 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).

45. Respondent committed several procedural violations prior to June 1, 2016 which resulted in a denial of FAPE to [redacted] and [redacted]s meaningful participation in the IEP process. Others, albeit procedural violations, did not cause educational harm to [redacted] or meaningfully impact [redacted]s participation.

Failure to Complete Speech Impaired ("SI") Eligibility Worksheet

46. Although Respondent's failure to complete the SI eligibility worksheet survived dismissal based on the statute of limitations, Petitioner must still prove that the violation denied [redacted] a FAPE or [redacted]s meaningful participation in the IEP process.

47. Based on the Findings of Fact, stipulations, testimony and other evidence, Petitioners have failed to prove by a preponderance of the evidence that this procedural violation was substantively harmful to either [redacted] or [redacted] therefore, the Undersigned dismisses Petitioners' claim that Respondent committed a substantive violation of the IDEA by its failure to complete the SI worksheet.

48. If this is still an ongoing practice of LCS, it may violate other students' rights to a FAPE, but that is not an issue before the Undersigned.

Extended School Year ("ESY") Decision at January 2016 IEP Meeting

49. Respondent failed to provide statutory notice to [redacted] of its Extended School Year ("ESY") decision in the January 2016 IEP. "[O]nly the failure to supply statutorily mandated disclosures can toll the statute of limitations. In other words, plaintiffs can satisfy [the statute of limitations] exception only by showing that the school failed to provide them with a written notice, explanation, or form specifically required by the IDEA statutes and regulations." 20 U.S.C. § 1415(f)(3)(D)(ii); *D.K. v. Abington School Dist.* 696 F.3d 233 (3d Cir. 2012).

50. The Undersigned concludes that Respondent failed to provide the statutorily required Prior Written Notice with respect to ESY services, and that Petitioners' claims for ESY are not barred by the statute of limitations.

51. Respondent also failed to provide the statutorily required PWN's for the June 2016 and August 2016 IEP meeting which is addressed during discussion of these IEPs.

Implementation and Progress Monitoring of January 2016 IEP

52. There is a high threshold for the misrepresentation exception under the IDEA. "We agree that the high threshold articulated by the district courts reflects a proper interpretation of subsection (i)." *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 245 (3d Cir. 2012), *citing* 20 U.S.C. § 1415(d)(1)(A)(i). An expression of mere optimism about progress is not sufficient to toll the

statute of limitations, the school staff must have intentionally misled or intentionally deceived [redacted] *D.K. v. Abington Sch. Dist.*, 696 F.3d at 245-246.

53. Respondent misrepresented to Petitioners that its staff were implementing the January 2016 IEP with fidelity and that [redacted] was making progress when LCS's staff knew, based on its mClass/DIBELS testing, that this was not true. In addition to the Beginning, Middle and End of Year (BOY, MOY, EOY) testing (Pet. Ex. 5, p. 26), LCS administered the DIBELS testing an additional ten (10) times during the school year. (Pet. Ex. 5, p. 27) [redacted] remained on the Intensive level throughout this entire time.

54. The Undersigned also concludes that Respondent failed to implement the January 2016 IEP with fidelity, that LCS's teachers egregiously misstated his progress considering his mClass DIBELS' scores, and that because of these misrepresentations, Petitioners' claims as to the implementation of the January 2016 IEP were not time barred.

2015 Private Educational Evaluation

55. Prior to determining eligibility in the disability category for Specific Learning Disabled ("SLD") for either the discrepancy or RtI method, the Respondent must conduct an "educational evaluation which includes nationally normed and criterion-referenced assessments." NC Policy 1503-2.5(d)(11)(i)(I); *See also,* 20 U.S.C. §§ 1414(b)(1)-(3), 1412(a)(6)(B) & (7); 34 CFR § 300.304.

56. Furthermore, Respondent was required to evaluate [redacted] in all suspected areas of disability and failed to conclude its own educational evaluation for determining the category of Specific Learning Disabled. 34 C.F.R. §§ 300.301, 300.306, 300.307 On October 28, 2015, Petitioners requested an educational evaluation of [redacted] to identify any reading deficits.

57. An LEA fails to offer the student a FAPE where it fails to sufficiently identify the student's present levels of functional performance and include the corresponding goals required to address the student's identified needs. 20 U.S.C. § 1414(d)(1)(A); 34 CFR 300.320(a)

58. Respondent is required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information that may assist in determining the content of the child's individualized education program. 20 U.S.C. § 1414(b)(2)(A) Respondent must also use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 20 U.S.C. § 1414(b)(2)(C)

59. Prior to the January 2016 IEP meeting, Respondent had sufficient evidence to evaluate [redacted]s reading deficits based on the data collected in the RtI materials, yet chose to delay the IEP's development by requesting unnecessary IQ testing.

60. Respondent failed to conduct an educational evaluation, and instead, adopted Petitioners' private educational evaluation exclusively as its own educational evaluation. Respondent did not contest the validity of any of the assessments or insist on conducting its own educational evaluation. Respondent did not provide Petitioners the reasons for refusing reimbursement in the December 2015 Prior Written Notice or thereafter when [redacted] requested reimbursement of the private educational evaluation. (Stip. Ex. 52) Moreover, even at the hearing,

Respondent has never disputed the results and most of the recommendations contained in the private evaluation.

61. Even though the 2015 Educational Evaluation claim fell outside the one-year statute of limitations, because Respondent failed to give Petitioner proper notice in its PWN (Stip. Ex. 52) of its obligation to conduct an educational evaluation and its wholesale adoption of Petitioners' private 2015 educational evaluation, this claim survived and Petitioners are entitled to $950.00 to pay for the 2015 Educational Evaluation.

Speech Impaired Eligibility Worksheet

62. [redacted] was not aware of Respondent's practice of flipping kids from speech eligibility into speech as a related service. However, Petitioners did not contest the appropriateness of the speech services, and [redacted]s speech services remained the same either way it was classified. As such, Petitioners failed to show any educational harm.

63. Since Respondent's failure to complete the SI eligibility worksheet was a procedural violation for which Petitioners failed to prove any educational harm, it should be dismissed.

All Other Claims Prior to June 1, 2016

64. All other of Petitioners' claims prior to the one-year statute of limitation not already disposed of are hereby dismissed.

II. Whether Lee County Schools denied [redacted] a free and appropriate public education during the remainder of the 2016-2017 school year?

Free and Appropriate Public Education

65. A school district is required to offer each student with a disability a free appropriate public education ("FAPE") through an Individualized Education Plan ("IEP") that conforms to the requirements of the IDEA and State standards. 20 U.S.C. § 1412(a)(1)(A); 20 U.S.C. § 1401(9) The IEP is "the centerpiece of the statute's education delivery system for disabled children." *Honig* v. *Doe*, 484 U. S. 305, 311 (1988).

66. "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

67. "An IEP is not a form document. It constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew F.* 137 S. Ct. at 999, *citing,* 20 USC §§ 1414 (d)(1)(A)(i)(I) -(IV), (d)(3)(A)(i)-(iv).

68. While not dispositive, evidence of actual progress (or the lack thereof) is relevant to a determination of whether a challenged IEP was reasonably calculated to confer some educational benefit." *M.S. ex rel. Simchick,* 553 F.3d 315, 326-27 (4th Cir. 2009).

69. If the IEP is developed in compliance with the procedures set forth in the IDEA and is reasonably calculated to enable the student to make educational progress appropriate in light of the child's circumstances, "the State has complied with the obligations imposed by Congress and the courts can require no more." *Rowley*, 458 U.S. at 207.

70. School districts are not charged with providing the best program, but only a program that is designed to provide the child with an opportunity for a free appropriate public education. *Rowley*, 458 U.S. at 189-90. A district is not required to maximize a student's educational performance. *See e.g., Rowley*, 458 U.S. at 188-89 (1982); *A.B. ex rel. D.B. v. Lawson,* 354 F.3d 315, 319 (4th Cir.2004).

71. "[T]he [IDEA] does not require the 'furnishing of every special service necessary to maximize each handicapped child's potential.'" *Hartmann v. Loudoun County Bd. of Educ.,* 118 D.3d 996, 1001 (4th Cir. 1997) (*quoting Rowley*, 458 U.S. at 199-200).

72. The IDEA requires that every IEP contain "[a] statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum," "[a] statement of measurable annual goals," and a description of "[h]ow the child's progress toward meeting the annual goals . . . will be measured." 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320(a)(1)–(3) The commentary to the federal regulations interprets these requirements to "ensure that progress toward achieving a child's annual goals can be *objectively monitored and measured.*" 71 Fed. Reg. 46664 (Emphasis added)

73. The IDEA requires school districts to review and revise a disabled "child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved." 34 C.F.R. 300.324(b)(1)(i) To make this determination, the IDEA mandates school districts to measure and periodically report each "child's progress toward meeting the annual goals." 34 C.F.R. 300.320(a)(2) – (3) "Any lack of expected progress toward the annual goals" in the IEP triggers the school district's responsibility to revise the IEP to address such lack of progress. 34 C.F.R. 300.324(b)(1)(ii)(A)

74. Failing to revise the IEP and continuing to provide inadequate services that prevent the child from progressing is tantamount to a denial of FAPE. *See e.g., District of Columbia Pub. Schs.*, 49 IDELR 267 (SEA DC 2008) (noting that a student's present levels of performance remained stagnant for several years); *Unionville-Chadds Ford Sch. Dist.*, 47 IDELR 280 (SEA PA 2007) (finding that a district should have addressed a child's reading deficiencies when it became apparent that the student was not making any progress); and *Department of Educ., State of Hawaii,* 47 IDELR 238 (SEA HI 2007) (criticizing the ED's decision to continue an ineffective reading program despite the student's lack of progress over a three-year period).

Research-Based Methodology in IEPs

75. The IDEA requires that the IEP contain "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child." 20 U.S.C. § 1414(d)(1)(A)(i)(IV)

76. "[N]either the text of the IDEA nor the IDEA regulations provide much guidance as to the effect of § 1414(d)(1)(A)(i)(IV)'s peer-reviewed research provision. *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 276 (3d Cir. 2012).

77. However, the federal regulations do provide some clarity, specifically stating that this provision "does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. The final decision about the special education and related services, and supplementary aids and services that are to be provided to a child must be made by the child's IEP Team based on the child's individual needs." 71 Fed. Reg. 46540, 46665 (2006)

78. While research on populations of similar students may be informative, the north star of educational planning remains the unique needs of the individual student. *See, Endrew F.*, 137 S.Ct. at 1001 (stating that "the adequacy of the IEP turns on the unique circumstances of the child for whom it was created").

Professional Judgment and Deference to Educators

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

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

81. Based on North Carolina's Administrative Procedure Code, the Undersigned must give deference to school board employees based on their "demonstrated knowledge and expertise of the agency with respect to the facts and inferences within the specialized knowledge of the agency." N.C. Gen. Stat. § 150B-34(a)

82. LCS's staff had minimum training in the implementation of the research-based reading programs as evidenced in their inability to implement the programs with fidelity. Moreover, Respondent's expert was not qualified as an expert in the reading remediation of a student like [redacted] The ALJ was unable to defer to Respondent's educators or expert because they failed to demonstrate specialized knowledge or expertise with respect to reading remediation of a severely reading disabled student.

83. 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. Where those educational decisions were *sound* and the educators "offered a *cogent and responsive explanation*" for their decisions, *Endrew F.*, 137 S. Ct. at 1002 (Emphasis added), the Undersigned afforded them deference. Not all the Respondent's educational decisions met the *Endrew F.* criterion or were sound decisions in light of [redacted]s severe reading disability and historic lack of progress.

Appropriateness of June 2016, August 2016, and January 2017 IEPs

84. The U.S. Supreme Court in *Endrew F.* held that the IDEA requires an "educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," that the IEP must be based on evaluation information, the unique needs of the child and the information available to the IEP team at the time the IEP is written. *Endrew F.*; *See also, S.H. v. Fairfax Cty. Bd. of Educ.*, 875 F. Supp. 2d 633, 640 (E.D. Va. 2012) (*citing* 20 U.S.C. § 1414(d)(3)(A) - (d)(3)(B)(i)) ("In developing the IEP, the IEP team considers the strengths of the child; parental concerns; the results of testing and other evaluations of the child; and the academic, developmental, and functional needs of the child.)

85. "The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians... Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Endrew F.* 137 S. Ct. 988. (internal citations omitted)

86. "The IEP must aim to enable the child to make progress...to [pursue] academic and functional advancement." *Id.*

87. The IEP must provide an "'appropriate education, not one that provides everything that might be though desirable by loving Parents.'" *R.B. ex rel. D.B. v. New York City Dep't of Educ.*, 603 F. App'x 36 (2d Cir. 2015) (*quoting, Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 132 (2d Cir. 1998)).

88. Based on the Findings of Fact, stipulations, party admissions and other evidence in the record, the Undersigned concludes as a matter of law that, based on [redacted]s circumstances and the information available to the IEP teams at the time the IEPs were written, the Present Levels, goals, and educational placement in the June 2016 and August 2016 IEPs were not reasonably calculated to provide [redacted] a FAPE.

89. Petitioners asserted that Respondent changed [redacted]s educational placement from "resource" to "regular" for the convenience of administering the Language! program. All of Respondent's staff in attendance at the June 8th IEP meeting denied that this was the reason or that placement decision was predetermined. However, the circumstantial evidence supported

Petitioners' predetermination claim. Likewise, Respondent's subsequent refusal to increase service delivery from the "regular" placement at the January 2017 IEP, despite the significant increase and revisions to [redacted]s IEP goals, supported Petitioners' claims that the "regular" placement was predetermined. (Stip. Ex. 26) (stricken phrases about increasing services)

90. Even if Respondent did not predetermine the "regular" placement for administrative convenience, the "regular" placement was still inappropriate because, based on [redacted]s circumstances and the information available to the IEP teams at the time the June 2016 and August 2016 IEPs were written, [redacted] required a more restrictive placement than "regular" to make appropriate academic progress.

91. Based on the Findings of Fact, stipulations, sworn testimony, party admissions and other evidence in the record, the Undersigned concludes as a matter of law that Petitioners have proved by a preponderance of the evidence that, based on [redacted]s circumstances and the information available to the IEP teams at the time the IEP was written, the educational placement and some of the goals in the January 2017 IEP were not reasonably calculated to provide [redacted] a FAPE. Despite the significant increase in goals, Respondent failed to give a cogent and rationale for maintaining the "regular" education placement. Based on [redacted]s circumstances and the information available to the IEP teams at the time the January 2017 IEP was written, [redacted] required a more restrictive placement than "regular" to make appropriate academic progress.

Implementation of January 2016, June 2016, August 2016, and January 2017 IEPs

92. A material failure to implement an IEP violates the IDEA. *See, Sumter County School Dist. 17 v. Heffernan,* 642 F. 3d 478, 484 (4th Cir. 2011). "A party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of the IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Houston Ind. School Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).

93. A material failure to implement an IEP occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and those required by the child's IEP. *See, Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J,* 502 F.3d 811, 822 (9th Cir.2007), *Holman v. Dist. of Columbia* 153 F. Supp. 3d 386, 390 (D.D.C. 2016), *Colon-Vazquez v. Dept.of Educ. of Puerto Rico*, 46 F. Supp. 3d 132, 144 (D.C. Puerto Rico 2014), *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000), *Neosho R-V Sch. Dist. v. Clark,* 315 F.3d 1022, 1027 n.3 (8th Cir. 2003).

94. The Fourth Circuit has further recognized that the court cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit. *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 484 (4th Cir. 2011) (the district's provision of only seven of the 15 hours of ABA therapy required by the IEP, and evidence that neither the lead teacher nor the aides understood the teaching methods called for in the IEP constituted a material failure to implement); *See, Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J*, 502 F.3d 811 (9th Cir. 2007) (school's provision of five hours of math instruction rather than 8-10 hours called for in the IEP constituted a material implementation failure, but the absence of social stories in one class and the misuse of those stories

in another class did not constitute failure to implement the student's behavior management plan); *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268 (D.D.C. 2013) (Courts applying the significant-provision standard articulated in *Sumter* "have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.") (*quoting*, *Wilson v. Dist. of Columbia*, 770 F.Supp.2d 270, 275 (D.D.C. 2011)).

95. An IEP is regularly progress monitored to determine its effectiveness. According to NC Policy 1500-2.11(b)(13), "[p]rogress monitoring refers to a systematic, frequent collection of individual performance data. The measures are repeated over time and charted for the purposes of documenting and quantifying rates of improvement, and to evaluate the effectiveness of the instruction."

96. Based on Findings of Fact, stipulations, sworn testimony, party admissions, and other evidence in the record, Petitioners have proved by a preponderance of the evidence that, with respect to the January 2016, June 2016, August 2016, and January 2017 IEPs, Respondent failed to implement with fidelity the research-based reading programs (Language! and FUNdations, respectively), and failed to appropriately progress monitor the goals on the IEPs.

2016 Private Educational Reevaluation

97. During the implementation of the January 2016 IEP, Respondent misrepresented [redacted]s academic progress in reading and failed to properly implement the research-based reading programs (Language!) associated with this IEP.

98. Per her recommendation in the 2015 Educational Reevaluation, Petitioners' expert reevaluated [redacted] one year later on December 16, 2016. Based on its results, [redacted] had not made adequate progress. The 2016 Educational Reevaluation also supported more intensive services than the "regular" education placement preferred by Respondent. The IEP team relied on the 2016 Educational Reevaluation results to develop the present levels and goals in his January 2017 IEP. (Stip. Ex. 26, p. 93)

99. Ms. [redacted] 2016 Educational Reevaluation was the only comprehensive measure of [redacted]s progress. Its results and most of its recommendations were incorporated by the IEP team in the development of the January 2017 IEP and change in curriculum.

100. Although this is not a traditional IEE reimbursement claim, based on the broad equitable remedies afforded an ALJ, the Undersigned concludes that Respondent shall pay $650.00 to [redacted] for the 2016 Educational Reevaluation.

Extended School Year ("ESY")

101. As discussed previously, Petitioners have proved by a preponderance of the evidence that Respondent failed to provide appropriate notice of its ESY decisions in the January 2016, June 2016, and August 2016 IEPs.

102. Respondent also failed to complete the ESY Eligibility worksheet for the January 2017 IEP.

103. The *North Carolina Department of Public Instruction's Policies Governing Services for Children with Disabilities* (Stip. 60) Policy 1501.24 provides further clarify on ESY eligibility, stating that a student is eligible for ESY services where there is evidence that, without such services during an extended break in instruction:

(i) the student may regress and be unable to relearn the lost skills within a reasonable time, or

(ii) the benefits a student has gained during the regular school year will be significantly jeopardized by the extended break, or

(iii) the student is demonstrating an emerging critical skill that will be lost.

N.C. 1501-2.4; *See also,* 20 U.S.C. § 1412(a)(1); 34 C.F.R. § 300.106

104. Respondent's sole justification at the January 2017 IEP meeting for denying [redacted] ESY was that [redacted] was a year-round school. Attendance at a year-round school may be a consideration in determining ESY, but that still does not negate Respondent's statutory duty to consider the criteria for ESY for [redacted] and other special needs students in year-round schools.

105. Petitioners' expert opinions and testimony established that [redacted] was eligible for ESY, and Respondent failed to offer any evidence to the contrary. *Compare, Dibuo v. Worcester Co.*, 309 F.3d 184, 1870198 (4th Cir. 2002). Failure to provide [redacted] with ESY services would thwart the goal of meaningful progress for [redacted] *M.M. v. District of Greenville County*, 303 F.3d 523, 538 (4th Cir. 2002).

106. Based on the Findings of Fact, stipulations, sworn testimony, party admissions, and other evidence in the record, the IEP team violated the procedural requirements and failed to appropriately consider the criteria and information related to ESY services. Petitioners have proved by a preponderance of the evidence that [redacted] needed ESY because of his lack of progress and emerging critical skills in reading; therefore, Respondent's failure to provide ESY services denied [redacted] a FAPE.

REMEDIES

III. If applicable, what remedies should be awarded to compensate Petitioners?

107. The IDEA confers "'broad discretion' on the court when fashioning an appropriate remedy." *M.S. ex rel Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 325 (4th Cir. 2009) (*quoting, Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1996)).

108. "Courts fashioning discretionary equitable relief under the IDEA must consider all relevant factors . . . ." *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 16 (1993).

109. Compensatory education is one form of appropriate relief available under the IDEA. *See e.g., G. ex rel. R.G. v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 308–09 (4th Cir. 2003). "[C]ompensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

110. Appropriate relief also includes prospective placement in a private school. *See e.g., Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275 (11th Cir. 2008) (prospectively awarding the student with placement in a private school); *Sabatini v. Corning-Painted Post Area Sch. Dist.*, 78 F. Supp. 2d 138 (W.D.N.Y. 1999) (granting preliminary injunction requiring school district to pay for private placement).

111. In *Draper*, the Eleventh Circuit found:

> A prospective injunction that requires a placement in a private school is appropriate "beyond cavil" when an educational program "calling for placement in a public school [is] inappropriate." *Burlington*, 471 U.S. at 370, 105 S.Ct. at 2002. "[A] disabled student is not required to demonstrate that he cannot be educated in a public setting. Under [the Act], the relevant question is not whether a student could in theory receive an appropriate education in a public setting but whether he will receive such an education." *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 248–49 (3d Cir.1999).

Draper, 518 F.3d at 1285.

112. Courts may also order the school district to take specific actions, such as requiring the school district to conduct evaluations, hire consultants, develop an IEP, and implement an IEP. *See e.g., K.I. v. Montgomery Publ. Schs.*, 805 F. Supp. 2d 1283, 1299 (ordering the school district to evaluate the child and develop a new IEP); *P. ex rel. Mr. and Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 123 (2d Cir. 2008) (upholding the hearing officer's mandate that the school district retain an inclusion consultant for a year and complete an FBA as the remedy appropriately addressed the problems with the IEP).

113. When determining the award, "the hearing officer may not delegate his authority to a group that includes an individual specifically barred from performing the hearing officer's functions." *Bd. of Educ. of Fayette Cnty., Ky. v. L.M.*, 478 F.3d 307, 317 (6th Cir. 2007) (*quoting, Reid v. Dist. of Columbia*, 401 F.3d 516, 526 (D.C. Cir. 2005)); *See also, M.S. v. Utah Sch. Deaf & Blind*, 822 F.3d 1128, 1136 (reversing the lower court's decision to remand the issue of the child's placement to the IEP Team because "[a]llowing the educational agency that failed or refused to provide the covered student with a FAPE to determine the remedy for that violation is simply at odds with the review scheme set out at § 1415(i)(2)(C)).

Appropriateness of Compensatory Services

114. As with reimbursement for the costs of private school, a parent-plaintiff seeking compensatory services must first establish that his child was denied a FAPE. *See G. ex rel R.G. v. Fort Bragg* Dependent Schools, at 309; *See also, C.G. ex rel. A.S. v. Five Town Comm. Sch. Dist.*, 513 F.3d 279, 290 (1st Cir. 2008) ("compensatory education is not an automatic entitlement; rather it is a discretionary remedy for nonfeasance or misfeasance in connection with the school system's obligations under the IDEA").

115. If the parent succeeds in showing that his child has been denied a FAPE, then compensatory services may be appropriate. *Id.* "[C]ompensatory education involves discretionary, prospective relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure of a given period of time to provide a FAPE to a student." *G. ex rel R.G.*, 343 F.3d at 309.

116. The same standards governing a district's provision of FAPE govern as to the appropriateness of compensatory services. *See e.g., Kelsey v. District of Columbia*, 85 F.Supp.3d 327, 336 (D.C. Mar. 30, 2015) (affirming state hearing officer's discounting of expert opinion of plaintiff's expert, who suggested compensatory relief designed to maximize the student's educational outcome, as opposed to the standard under the IDEA that would enable the child to receive educational benefits).

117. Based on the Findings of Fact, stipulations, sworn testimony, party admissions, and other evidence on the record, Petitioners have proved by a preponderance of the evidence that [redacted] is entitled to a level of compensatory education and intensive reading remediation that the Respondent does not currently use and cannot provide without contracting with a sufficiently trained outside provider.

118. Dr. [redacted] Petitioners' expert on curricula, made specific recommendations for compensatory education. Dr. [redacted] opined that [redacted] initially needs a Level 1 tutor ("Tutor") trained in the Wilson Reading System ("WRS") to provide the WRS for one hour each day during the school days, weekends, and school breaks. The Tutor's training requirements may change as [redacted] progresses though the WRS. Dr. [redacted] opined that this level of tutoring services would be needed throughout [redacted]s middle school years. The Undersigned is reluctant to order that period of services, but will order three (3) years of the WRS unless [redacted] completes the WRS earlier than three years.

119. This Tutor should be mentored at least monthly by reading specialist (the "Reading Specialist") with comparable experience and training as Dr. [redacted] or Ms. [redacted] Respondent shall contract with a mutually agreeable Tutor and Reading Specialist to pay for all materials, travel expenses, hourly rate, and other necessary costs associated with the reading remediation. Dr. [redacted] shall be consulted to determine the appropriateness of the Tutor and Reading Specialist's qualifications and experience. If Dr. [redacted] is unavailable, the parties shall agree to a mutually agreeable reading specialist who is sufficiently trained and experienced in the Wilson Reading System and reading remediation of severely reading disabled students like [redacted]

120. In addition to the WRS, [redacted] should receive language arts instruction with sufficient accommodations and supports for his reading deficits as recommended by the Reading Specialist and Tutor.

121. Since more than one year has passed since the 2016 Educational Reevaluation, an updated educational evaluation in [redacted]s academic needs should be concluded to determine [redacted]s present levels and academic needs. This educational evaluation may be conducted by Ms. [redacted] or a mutually agreeable reading specialist with comparable training and experience. Since [redacted] will be entering middle school, now an assistive technology evaluation needs to be considered by the IEP team.

122. Once the evaluations are complete, all parties should have at least ten (10) business days to review them prior to the scheduling of an IEP meeting. Respondent shall notify [redacted] the Tutor, and Reading Specialist of the proposed dates for the IEP meeting in sufficient time to ensure their participation. Respondent shall pay for all costs (including travel and hotel expenses) of the Tutor's and Reading Specialist's attendance which may, at their option, be by telephone or Skype.

123. A draft IEP shall be provided to all participants at least five (5) business days before the IEP meeting. It is expected that the Tutor and Reading Specialist will propose and assist the IEP team with the revisions of the IEP present levels, goals, and all other components. Any proposals by the Tutor and Reading Specialist shall be documented in the minutes and Prior Written Notice of the IEP meeting.

124. The IEP team shall determine a reasonable performance rate for [redacted]s reading remediation and develop the IEP goals and service delivery accordingly. Respondent shall provide reading remediation during the intercessions, holiday breaks, and weekends pursuant to the recommendations of the Reading Specialist and Tutor. Respondent's teachers shall coordinate with the Tutor and Reading Specialist to support [redacted]s access to grade level curriculum using assistive technology, accommodations, and/or other appropriate aides in the regular education classroom.

125. If Respondent is unable or unwilling to contract with a Tutor and Reading Specialist within forty-five (45) calendar days of the date of service of this Final Decision, Respondent is ordered to pay for two (2) years of private school placement that is consistent with Dr. [redacted] and Ms. [redacted] recommendations, along with private instruction over the holiday and summer breaks. The private school placement shall be [redacted]s "stay put" placement in the event of dispute of its appropriateness.

126. If the Tutor or Reading Specialist terminate their contract with Respondent, Respondent shall have twenty (20) calendar days to contract with a new provider.

127. Respondent shall provide compensatory tutoring for any lapse in services.

128. If during the implementation of this Final Decision, Respondent terminates the compensatory services for more than forty-five (45) calendar days, or is unable/unwilling to contract with an alternative Tutor or Reading Specialist, Respondent shall pay for private school placement for two (2) years, or the remainder of the three (3) years of compensatory education, whichever amount of time is less.

Other Issues:

129. 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 met their burden of proof, by a preponderance of the evidence, showing Respondent failed to provide [redacted] a FAPE from January 2016 through the date of the Petition by its failures to:

a) implement material portions of [redacted]s January 2016, June 2016, August 2016, and January 2017 IEPs;

b) develop a substantively and procedurally appropriate IEP at the June 2016, August 2016, and January 2017 IEP Meetings, resulting in a denial of FAPE to [redacted] and,

c) provide Petitioners with adequate Prior Written Notices regarding the ESY and IEE decisions, substantively denying Petitioners meaningful participation in the IEP process.

2. Petitioners are prevailing parties on the claims in paragraph 1, and Respondent is the prevailing party on all other issues and claims.

3. Petitioners have failed to meet their burden by a preponderance of the evidence on all other issues and claims in this matter, and those claims shall be **DISMISSED WITH PREJUDICE.**

IT IS HEREBY ORDERED THAT:

1. Respondent shall reimburse Petitioners for all costs incurred in obtaining the two private educational evaluations conducted by Ms. [redacted]

In accordance with Conclusions of Law numbered 117-128:

2. Respondent shall provide compensatory services for [redacted] and develop an IEP as described in Conclusions of Law numbered 117-128.

3. Respondent shall contract for compensatory services for an independent, mutually agreed-upon Tutor with Level 1 Wilson training in the Wilson Reading System, who is supervised through mentoring by a Reading Specialist at least once per month and receives ongoing training, and has experience working with a student with [redacted]s level of reading difficulty. The compensatory services shall be daily (including weekends) for a minimum of one hour per session in a one-on-one setting. The compensatory services will continue for three (3) years;

4. During each summer, intercession, or other extended break from school, the private tutoring and mentoring described in Paragraph 3 of this section shall be provided in a one-on-one setting for a minimum of three (3) years;

5. If Respondent is unable to timely contract with the Tutor and Reading Specialist as provided in this Order, or Respondent finds that private school placement is a more feasible alternative to private tutoring services, Respondent shall place [redacted] in a mutually agreed-upon private program where [redacted] will receive instruction from a highly trained, coached teacher using the Wilson Reading System or Orton-Gillingham methodology in a small group or one-on-one setting for a minimum of two (2) years;

6. If the private school placement option is implemented, during each summer, intercession, or other extended break from the private school placement, Respondent shall place [redacted] in a private program where [redacted] will receive instruction from a highly trained, coached teacher using the Wilson Reading System or Orton-Gillingham methodology in a small group or one-on-one setting for a minimum of two (2) years;

7. Because of the significant time lapse between the 2016 Educational Reevaluation and this Order, Respondent shall provide for an independent comprehensive evaluation of [redacted]s educational needs by a mutually agreeable evaluator with similar experience and expertise as Ms. [redacted] prior to the development of the IEP for the private compensatory services or private school, whichever is applicable;

8. Respondent shall pay for all costs associated with the compensatory services, including private school placement if applicable, as well as any transportation expenses for [redacted] to attend the tutoring sessions and/or private program(s);

9. Because of the numerous procedural violations, Respondent shall provide training to its staff on IEP development, progress monitoring, and data collection.

IT IS RECOMMENDED, BUT NOT ORDERED, based on Respondent's delay in seeking consent from Petitioner [redacted] because of its misunderstanding of the RtI process, and failure to implement research-based interventions with fidelity, that Respondent seek training from NCDPI for its staff in these areas.

NOTICE OF APPEAL RIGHTS

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

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

Inquiries regarding further notices, time lines, and other particulars should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina prior to the required close of the appeal filing period.

IT IS SO ORDERED.

This the 28th day of February, 2018.

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 28th day of February, 2018.

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