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OFFICE OF ADMINISTRATIVE HEARINGS
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STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 EDC 05966

[redacted] by and through his parents, [redacted] and [redacted] Petitioner, v. Durham Public Schools Board Of Education Respondent.	**FINAL DECISION**

THIS MATTER was heard before the undersigned Honorable Melissa Owens Lassiter, Administrative Law Judge Presiding, in Durham, North Carolina on February 16, February 17, February 18 March 14, March 15, March 16, March 17, March 18, July 6, July 7, July 8, July 21, August 29, and August 30, 2016. On February 14, 2017, the parties jointly agreed that the undersigned would issue and mail the Final Decision in this case to the parties on or before March 7, 2017.

APPEARANCES

For Petitioners: Stacey M. Gahagan, Tammy Kom, Gahagan Law Firm, PLLC, 3326 Durham Chapel Hill Blvd., Suite 210-C, Durham, NC 27707; Ann M. Paradis, Law Office of Ann Paradis, 1135 Kildaire Farm Road, Suite 200, Cary, NC 27511

For Respondent: Stephen G. Rawson, Benita M. Jones, Eva B. DuBuisson, Tharrington Smith LLP, 150 Fayetteville Street, Suite 1800, Raleigh, NC 27602

ISSUES

1. Whether Respondent provided [redacted] a FAPE in the LRE from November 27, 2014, through June 12, 2015?

2. Whether [redacted]'s May 20, 2015 IEP is reasonably calculated to provide [redacted] a FAPE in the LRE?

3. Whether Respondent provided [redacted] a FAPE in the LRE from June 13, 2015 through August 13, 2015?

4. If Respondent denied [redacted] a FAPE in the LRE, whether the private placement chosen by the Petitioners is appropriate?

5. If the Tribunal finds that Respondent failed to provide or offer [redacted] a FAPE in the LRE, what "appropriate relief," including but not limited to tuition reimbursement, are the Petitioners entitled to as a remedy?

BURDEN OF PROOF

Petitioners acknowledged in the Order on the Final Pre-Trial Conference entered on February 16, 2016 that they have the burden of proof in this contested case. The standard of proof is by a preponderance of the evidence. See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); N.C. Gen. Stat. § 150B-34(a). Black's Law Dictionary defines preponderance as denoting "a superiority of weight or outweighing." The finder of fact cannot properly act upon the weight of evidence in favor of the one having the onus, unless it overbears, in some degree, the weight upon the other side.

North Carolina statutory law states that actions of local boards of education are presumed to be correct, and "the burden of proof shall be on the complaining party to show the contrary." N.C. Gen. Stat. § 115C-44(b). Petitioners, being the complaining party, have the burden of proof to show by a preponderance of evidence that Respondent did not provide [redacted] with the opportunity for a free appropriate public education and, if necessary, that Petitioners' proposed private placement is appropriate.

EXHIBITS ADMITTED INTO EVIDENCE

Stipulated Exhibits Nos. 1-9 (hereafter S.1, S.2, etc.)

Petitioners' Exhibits Nos. 3, 4, 17-19, 22-23, 25, 27, 30-31, 36, 38-39, 45-52, 55, 61-62, 69, 71-76, 78-80, 88, 89-91, 105-108, 110-113. (hereafter P.3, P.4, etc.)

Respondents' Exhibits Nos. 1-20 (hereafter R.1, R.2, etc.)

WITNESSES

For Petitioners: [redacted] (mother), [redacted]. (father[redacted], Ph.D., [redacted], Ph.D., [redacted]

For Respondents: [redacted], Ed.D., [redacted], [redacted], [redacted], Ph.D., [redacted], [redacted], Ph.D.

STIPULATIONS BY THE PARTIES

The parties proposed an Order on the Final Pre-Trial Conference, which was approved and filed in the Office of Administrative Hearings on February 16, 2016.

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

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

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

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

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

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

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

8. It is stipulated that the Petitioners, as the party requesting the hearing, may not raise issues at the hearing that were not raised in the due process petition unless the other party agrees otherwise. 20 U.S.C. § 1415(f)(3)(B).

9. It is stipulated that, an Order entered by Administrative Law Judge Augustus B. Elkins II on January 6, 2016, stated: "Respondent's Motion for Partial Summary Judgment should be granted, and the issues for hearing in the Petition at OAH Docket No. 15 EDC 5966 limited to claims arising after November 26, 2014."

10. It is stipulated that Petitioner [redacted]'s date of birth is June 8, 2006 and that his father is Petitioner [redacted] ([redacted].) and his mother is Petitioner [redacted] ([redacted]). It is further stipulated that Petitioner [redacted] was [redacted] ([redacted]) years old at the time of the filing of this petition.

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

12. It is stipulated that Petitioner [redacted] is domiciled within the boundaries of the Durham Public Schools ("DPS").

13. It is stipulated that [redacted] has been determined eligible for services under the IDEA, and [redacted]'s May 9, 2014 IEP Team determined that [redacted] met the eligibility criteria for [redacted] as his primary eligibility category.

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

15. It is stipulated that an IEP meeting was held on August 21, 2014.

16. It is stipulated that [redacted] made academic, communication, social progress, and functional growth during the 2014-15 school year.

17. It is stipulated that an IEP meeting was held on May 20, 2015, to conduct an annual review of [redacted]'s IEP and develop an IEP for [redacted] to be implemented beginning June 13, 2015, through June 12, 2016.

18. It is stipulated that the Petition for Contested Case Hearing in 15 EDC 05966 was filed in and accepted by the Office of Administrative Hearings on August 13, 2015.

19. It is stipulated that any documents produced by the school district in discovery including, but not limited to, IEPs, email correspondence, data sheets, and meeting notes, and the 2009 DPS Inclusion Study, identified as Petitioners' Proposed Exhibit 17 and the May 12, 2012 Schollmeyer Report, identified as Petitioners' Proposed Exhibit 24, are self-authenticated.

FINDINGS OF FACT

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

Procedural Background

1. At the time of filing, Petitioner [redacted] was a nine-year-old student residing with his parents, Petitioners [redacted] and [redacted]., in Durham County, North Carolina. [redacted] has been diagnosed with [redacted], [redacted], [redacted], [redacted][1], and other [redacted].

2. [redacted] has been determined eligible for services under the IDEA with [redacted] as his primary eligibility category.

3. On June 13, 2014, [redacted]'s IEP team conducted an annual review and developed an IEP for the upcoming 2014-15 school year (hereafter "June 2014 IEP").[2] Petitioners [redacted] and [redacted]. requested mediation regarding the placement decision

[1] While the fact of this diagnosis was stipulated, the correctness of the diagnosis is disputed among the speech pathologists in this case. (Tr. Vol. XIII, 2274-76). The undersigned is not qualified to make a determination on the diagnosis, but will make findings as to the educational impact of [redacted]'s speech difficulties. "The IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe [the child's] multiple disabilities." *Heather S. v. Wisconsin,* 125 F.3d 1045, 1055 (7th Cir. 1997).

[2] The June 13, 2014 IEP meeting is outside the relevant time period for this case, and is cited solely for background information. No substantive decisions or procedural issues from this meeting will be considered as part of this order.

memorialized in the June 2014 IEP. On July 22, 2014, the parties attended mediation, and agreed to a modification of ’s service delivery plan within the IEP.

4. On August 21, 2014, ’s IEP team reconvened for the purpose of amending the June 2014 IEP to reflect the agreement reached at the mediation.[3]

5. On November 14, 2014, Petitioners filed a petition for contested case hearing (hereafter the “2014 Petition”) for the stated purpose of preserving claims during ongoing settlement negotiations.

6. On November 26, 2014, the parties entered into a settlement agreement resolving the 2014 Petition. The settlement agreement contained a release of all claims arising prior to the agreement. Pursuant to the Settlement Agreement, ’s placement was changed from Separate to Resource, as Respondent agreed to allow to spend a minimum of 205 minutes with his non-disabled peers in the general education classroom. (Stip. Exs. 1, 2, 3)

7. On May 20, 2015, ’s IEP team convened to conduct an annual review and develop an IEP for the upcoming 2015-16 school year (hereafter “May 2015 IEP”).

8. On August 13, 2015, Petitioners filed a new petition for contested case hearing (hereafter the “2015 Petition”), challenging the program received during the 2014-15 school year, and the proposed program for the 2015-16 school year. Petitioners claimed that Respondent failed to provide a free appropriate public education (FAPE) in the LRE, and failed to follow the requirements set forth in the Individuals with Disabilities Education Act (IDEA), and North Carolina state law by violating the procedural and substantive requirements of the IDEA and state law, and thus, denying a free and appropriate public education in the LRE. The Petition also included claims related to the 2014 Petition.

9. Petitioners sought the remedy of providing an educational placement, at a minimum of 220 minutes per day, in the regular education classroom with supplemental time in the resource room, and not place in the self-contained classroom. Petitioners requested Respondent instruct by modifying the regular education curriculum. Petitioners also sought additional speech and occupational therapy related services, and compensatory educational services. In the alternative, Petitioners requested the remedy of either “[placement] in a mutually-agreed upon private placement where can be educated with his non-disabled peers.” (Pet. 21.)

10. On September 16, 2015, Petitioners requested a continuance to resolve ongoing discovery disputes between the parties. By Order dated September 23, 2015, Administrative Law Judge Augustus B. Elkins granted a continuance until November 17,

[3] The August 21, 2014 IEP meeting is outside the relevant time period for this case, and is cited solely for background information. No substantive decisions or procedural issues from this meeting will be considered as part of this order, except that the resulting IEP was active during the relevant time period and its content is relevant to the determination of this case.

2015. On October 30, 2015, Petitioners requested a second continuance to allow their expert time to observe [redacted] in his then-current educational placement. On November 3, 2015, Administrative Law Judge Elkins granted the continuance, and rescheduled the hearing to begin on January 19, 2016.

11. Approximately three months after filing the Petition, Petitioners withdrew [redacted] from the Durham Public Schools, and unilaterally placed him at [redacted], a private school.

12. On December 18, 2015, Administrative Law Judge Elkins entered an Order continuing the hearing on the merits until February 9, 2016 to allow Petitioners time to file a Reply to Respondent's Response to Petitioners' Cross-Motion for Partial Summary Judgment.

13. On January 6, 2016, Administrative Law Judge Augustus B. Elkins dismissed Petitioner's claims that the November 26, 2014 Settlement Agreement be voided due to allegations of fraud and misrepresentation by entering Summary Judgment for Respondent. That Order also limited claims in this contested case to claims arising after November 26, 2014.

Educational Assessments

14. In February 2014, as part of the re-evaluation process, Petitioners sought an independent educational evaluation by Dr. [redacted]. (Tr. Vol. III, 490; Tr. Vol. IV, 629; R.2 at 10).

15. Dr. [redacted] evaluated [redacted] using the following sources of information: review of records, parent interview, teacher interviews, classroom observation, and standardized assessments including the Wechsler Nonverbal Scale of Ability, Woodcock Johnson Tests of Achievement (3rd edition) and Adaptive Behavior Assessment System (2nd edition). (R.2 at 10). She noted in observing and working with [redacted] that he required constant redirection, encouragement, and repetition of instructions, and that he exhibited significant inattention and distractibility. (R.2 at 14). Her results indicated a Full Scale IQ of [redacted], and that [redacted]'s various achievement scores fell in the [redacted] percentile range, meaning that among 1000 same-age peers, 999 of those peers would rank ahead of [redacted] (R.2 at 14-15; Tr. Vol. III, 493).

16. Dr. [redacted] concluded that [redacted]'s cognitive and academic skills were extremely low, and that his overall presentation was consistent with [redacted]. (R.2 at 17). She recommended that [redacted] would need "intensive and extensive interventions," that he would likely need "a great deal of one on one instruction," and that he would benefit from shortened work periods, breaks, opportunities for movement, hands-on activities, specialized seating, and instruction in social situations. (R.2 at 18-19). Petitioners did not provide the results of this assessment to Durham Public Schools. (Tr. Vol. V, 701).

17. In April 2014, DPS school psychologist [redacted] also conducted an educational evaluation of [redacted] Ms. [redacted] evaluated [redacted] using a review of records and standardized assessments including the Differential Abilities Scales (2nd edition), the Woodcock-Johnson Tests of Achievement (3rd edition), and the Adaptive Behavior Assessment System (2nd edition). Her results were strikingly similar to Dr. [redacted]'s. [redacted]'s General Conceptual Ability score (similar to an IQ score) was [redacted], and his achievement scores again fell in the [redacted] percentile range. (R.1 at 3,5; Tr. Vol. XIV, 2467).

18. Ms. [redacted] concluded that [redacted] presented with "extremely low general intellectual functioning," and that he met criteria for [redacted]. (R.1 at 7). Throughout her evaluation, she also noted [redacted]'s difficulties with attention and distractibility, his need for redirection, and his limited adaptive behavioral skills. (R.1 at 3-5).

19. The results of these evaluations indicate that, as he began the 2014-15 school year in August 2014, [redacted] was performing far below his same-age peers, and that he had substantial academic and functional deficits that would require intensive interventions for him to make educational progress. He specifically would need constant redirection and repetition of instructions, in part due to his significant inattention and distractibility. (R.2 at 14; R.1 at 3-5)

20. At hearing, Petitioner [redacted] alleged that the educational evaluation results were not meaningful, in part because they lacked genetic testing or brain scans (Tr. Vol. IV, 676, 689). Similarly, Petitioners' experts opined that the educational assessments were not normed for students with significant [redacted]. (Tr. Vol. III, 311)

21. However, the undersigned finds that these assessments are appropriate and valid, and that the results are an accurate description of [redacted] at the time of the assessment. This finding is based on credible testimony from Respondents' psychology expert Dr. [redacted] [redacted]. Dr. [redacted] was the only licensed psychologist to testify in the hearing. She opined that the assessments were in fact normed for students with [redacted] (Tr. Vol. XII, 2174, 2185). This finding is also based on the general consistency between the assessment results and the anecdotal reports of teachers and staff who worked with [redacted] Ms. [redacted] reported that [redacted] was one of the lowest functioning students in the special education classroom (Tr. Vol. XI, 1873), while Ms. [redacted] echoed his struggles with academics, attention, and work completion (Tr. Vol. XII, 2035)

22. Three speech-language evaluations were entered into the record, one from 2011 and two from 2014. (P.23, P.30, P.31). These evaluations were largely consistent with each other, and demonstrated that [redacted] had substantial delays in speech and language development. None of the evaluations recommended [redacted] for assistive technology or augmentative communication services. The only major discrepancy among the evaluations was that [redacted] evaluation indicated that [redacted] had [redacted] of speech. (P.30 at 2). However, [redacted] [redacted], the only witness with speech-language credentials who had actually worked with and evaluated [redacted], credibly rebutted [redacted] evaluation. [redacted] opined that [redacted]'s speech difficulties did not match the generally accepted characteristics of [redacted]. (Tr. Vol. XIII, 2274-76)

23. Irrespective of whether [redacted] actually has [redacted], these evaluations indicated that [redacted]'s speech and language abilities were in the range of the [redacted] percentile among same-age peers, that he had consistent articulation errors including initial and final consonant deletion, and that his speech and language difficulties impacted his ability to participate in his education. They all recommended speech therapy. (P.23 at 1-2; P.30 at 1-3; P.31 at 1-3)

24. Further, while [redacted] has established speech difficulties, his scores on the nonverbal portions of his educational evaluations (the Wechsler Nonverbal Test and the Special Nonverbal Composite of the DAS-II) were not substantially different than his achievement scores on verbal portions of the tests. (R.1 at 3; R.2 at 14-15; Tr. Vol. XII, 2189-90). This suggests that his communication difficulties are not obscuring a greater intellectual capacity than he has shown in evaluations and in school.

25. Petitioners' expert Dr. [redacted] opined at hearing that [redacted] should have received an assistive technology evaluation in order to determine his need for assistive technology in the classroom. (Tr. Vol. V, 863). However, Dr. [redacted] did not conduct any type of speech evaluation on [redacted] (Tr. Vol. VI, 1026). It is also uncontested that [redacted] did not use assistive technology at home, or in his current private placement. (Tr. Vol. VI, 1070; Tr. Vol. VI, 925)

26. Neither of the DPS evaluations nor the private speech evaluation from 2014 recommended assistive technology, or indicated any basis for further evaluation on that subject. This is particularly notable that the private therapist working with [redacted] is also the Durham Public Schools' assistive technology coordinator. Given that person's dual role, the fact that she did not recommend assistive technology is compelling. (Tr. Vol. XIII, 2263). Both the school-based and private therapists shared a concern that assistive technology might hinder [redacted]'s speech development. (Tr. Vol. XIII, 2265). Finally, there are no evaluations or other evidence to establish that [redacted] requires assistive technology to benefit from his special education services.

27. Based on the foregoing, the undersigned finds that Petitioners did not present sufficient evidence that [redacted] required assistive technology or even an assistive technology evaluation. Further, the decision on whether to evaluate is a procedural issue which, even if inappropriate, is not the basis for relief if it did not interfere with [redacted]'s receipt of educational benefit, which will be addressed below.

The August 2014 IEP

28. The operative IEP during the 2014-15 school year was first developed at an IEP meeting on June 13, 2014.[4]

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[4] As noted earlier, the June 2014 IEP is referenced for historical purposes only. Any claims related to that IEP meeting or the IEP as drafted or implemented prior to November 26, 2014 are barred by the January 6, 2016 summary judgment order.

29. Following mediation, the IEP team reconvened on August 21, 2014 (before the start of the 2014-15 school year), for the purpose of amending the IEP to reflect the mediation agreement regarding service delivery and placement. The team modified service delivery to transfer 15 minutes of math instruction and 30 minutes of reading instruction from the special education classroom to the regular education classroom. This modification resulted in a change of educational placement from the "Separate" (0-39% of school day spent with non-disabled students) to "Resource" (40-79% of school day spent with nondisabled students). The team also modified the IEP to reflect the service delivery of speech as a Related Service. The service delivery of speech services was modified to: (1) fourteen sessions of 15 minutes each, per reporting period, to be delivered in the general education classroom and (2) seven times for 60 minutes each, per reporting period, in the therapy room. (S.1 at 1; S.2 at 18-19).[5]

30. The mediation agreement apparently did not address the Present Levels or goals in the IEP. Petitioners did not request, at the August 21, 2014 IEP meeting, modifications to the Present Levels and Goals categories drafted in the June 2014 IEP, that had yet to be implemented. (S.3 at 1; Tr. Vol. XI, 1799)

31. The August 2014 IEP contained nine academic and functional goals related to speech/language, math, reading, writing, work completion and adapted physical education. [redacted] was working on counting, recognizing number sets, writing letters and numbers, identifying kindergarten sight words, identifying letter sounds, completing work in given time frames, improving his fitness and locomotion, increasing his verbal output, improving his articulation, and stating his basic personal information. Each goal contained specific benchmarks that further defined the expected tasks and progress. (S.2 at 4-14)

32. There is no evidence that the Petitioners communicated any objection, before this litigation, regarding any information or lack of information in the Present Levels or to any of the Goals. Petitioner [redacted]. agreed during his testimony at hearing that the Goals in the August 2014 IEP were appropriate goals for [redacted] to be working on. (Tr. Vol. IV, 555-59)

33. Witnesses for both parties agreed, while using different terminology, that adequately drafted Present Levels and IEP goals share certain characteristics or elements as noted below:

a. Present Levels of performance should be based on various data sources, including teacher observations, progress monitoring data, evaluations, and parent input. Present Levels should adequately illustrate the student's current abilities in the area of focus as understood by the IEP team.

[5] As noted earlier, this IEP meeting is cited for historical purposes only. Any claims related to the procedures or substantive decisions at this time other than the content of the IEP itself, which remained active into the relevant time period, are barred by the January 6, 2016 summary judgment order.

b. Goals should set objectives for the development of targeted skills that are defined in scope, include appropriate conditions for performance and measurable skills and tasks, and are achievable within one year in the judgment of the IEP team. (Tr. Vol. II, 55, 219-220; Tr. Vol. V, 862; Tr. Vol. IX, 1508, 1510; Tr. Vol. XI, 1883).

34. There was conflicting testimony at hearing regarding whether the Present Levels and Goals in the August 2014 IEP met these expectations. Multiple witnesses who taught [redacted] during that 2014-2015 school year opined that the Goals in the IEP addressed [redacted]'s needs, and included the expected elements described above. They also thought the Present Levels described in the IEP drew from various data sources, and adequately illustrated [redacted]'s current abilities. Respondent's witnesses believed the Goals in this IEP were task-oriented, measurable, and included benchmarks that further defined the tasks and expected performance. (Tr. Vol. XI, 1883; Tr. Vol. IX, 1509, 1512; Tr. Vol. XIV, 2480). The fact that goals are not written with a particular formula preferred by certain experts is not evidence that they are inappropriate.

35. Furthermore, a common sense review of the content of the IEP revealed that these Present Levels and Goals provided an adequate description of [redacted]'s current level of performance and goals that were understandable, defined in scope, and measurable such that a trained professional educator could implement such goals effectively.

36. Based on the preponderance of the evidence, including the documents themselves and the testimony at hearing, the undersigned finds that the Present Levels and Goals were adequately drafted and substantively appropriate for [redacted]

37. The section of the IEP devoted to supplementary aids and services, including accommodations and modifications, listed that [redacted] required consistent redirection, supervision to assist with participation, incremental rewards, and adapted curriculum. (S.2 at 15). The instructions related to this section of the IEP noted that the list should include supplementary aids and services that will be provided in general education classes, non-academic services and activities, and special education classes. (S.2 at 15)

38. Petitioners argued that "consistent redirection" and "incremental rewards" were not "supplemental aides and services" that either supported [redacted]'s teachers, or provided [redacted] a means of participating in his respective classroom. Petitioner's Exhibits 48-51 included a small sampling of "redirection data" taken by teachers [redacted], [redacted], and [redacted] to document [redacted]'s progress on the functional goal that [redacted] would "complete skill-level math, reading and writing assignments in 3 out of 5 situations." (P. Ex. 48-51). Petitioner's Exhibit No. 49 showed Ms. [redacted] redirected [redacted] ninety (90) times in a twenty (20) minute period on August 27, 2014, one hundred six (106) times in a twenty (20) minute period on September 2, 2014, eighty-seven" (87) times in a twenty (20) minute period on September 19, 2014, ninety-six (96) times in a twenty (20) minute period on November 21, 2014, and ninety-eight (98) times in a ten (10) minute period on November 24, 2014. (P. Ex. 49; R. Ex. 16 at 74; Tr. Vol I, 177)

39. Petitioner's expert, Dr. [redacted], opined that Respondent's practice of redirecting [redacted], and collecting data of those redirections was ineffective, and showed the poor quality of instruction delivered to [redacted] (Tr. Vol. I, 173, 179). Dr. [redacted], Petitioner's expert, similarly opined that Respondent's redirection data was meaningless, and lacked integrity and fidelity, as a data source, because [redacted]'s teachers never defined the criterion for the teachers' "redirections" of [redacted] (Tr. Vol. VI, 874-878)

40. The redirection data by itself certainly raises questions regarding the quality of educational instruction [redacted] received from Ms. [redacted], Ms. [redacted], and Ms. [redacted]. Specifically, Petitioner's Exhibits 48-51 themselves failed to define the criterion for the "redirections," how the "redirections" were given, and the conditions under which the "redirections" were given to [redacted] As such, it was difficult to discern if any two teachers had a common concept of a "redirection." (Tr. Vol. VI, 874)

41. However, the redirection data was only a small part of the data Respondent collected to monitor [redacted] progress in each teacher's classroom, and must be viewed in combination with all other data collected on [redacted], such as teachers' observations, (S. 5), [redacted]'s work samples, therapy notes, and teachers' formal/informal assessments of [redacted]'s actual performance in class. (S. 5) For example, Stipulated Exhibit 4 (Form DEC4), an amendment to the August 2104 IEP, consisted of notes by [redacted]'s teachers regarding [redacted]'s actual progress on his August IEP goals, including the goal addressed in Petitioner's Exhibits 48-51.

42. Although Petitioners argued that these "redirection practices" by [redacted]'s teachers detrimentally impacted [redacted]'s ability to demonstrate his abilities, Petitioners failed to present competent evidence demonstrating how the redirection practice detrimentally impacted [redacted]'s demonstration of his abilities (1) by number of minutes daily, (2) by subject matter, or (3) by identifying the specific abilities of [redacted] which were negatively impacted. Neither did Petitioners present credible evidence of a specific remedy, such as a number of compensatory hours, [redacted] should receive to compensate for his missed instruction time caused by Respondent's "redirection practices."

43. In contrast, Respondent showed that it provided a 1:1 aide, i.e. a licensed special education teacher, to support O.V in the general education classroom, even though the IEP did not require a 1:1 aide. The 1:1 aide supported [redacted] during the 45 minutes of general education reading and math instruction required by the IEP. Dr. [redacted] opined that a special education teacher accompanying a student to the general education classroom, as a 1:1 aide, is the most robust and comprehensive supplementary aid or service possible, because the teacher can modify, adapt, and supplement to meet the student's needs "in the moment" on any given day. (Tr. Vol. X, 1525).

44. The supplementary aids and services listed in the IEP, which include additional supervision, consistent redirection, adapted curriculum, and incremental rewards (S.2 at 15) are aligned with the student's needs as described in the Present Levels. At hearing, Respondent's witnesses described how [redacted] actually received other additional supports, beyond those described in the IEP, that would be considered

supplementary aids or services. These services included a magnet board for letters to assist in writing, other manipulatives, and computer use, (Tr. Vol. XII, 2050), as well as the 1:1 support from a licensed special education teacher. While it would have been ideal if these supports had been listed in the IEP, the August 2014 IEP, as drafted, contained the statutorily required information.

45. Based on her experience in working with IEP teams, Dr. [redacted], Respondent's expert, would not expect the IEP team to list every single accommodation, modification, or supplemental service that they provide to the student on a day-to-day basis, because teachers must have:

> the ability to be flexible enough to seize a-- teaching moment is the term that we usually use. You can go in with a lesson plan, and we train teachers on how to construct them. And most special education teachers will tell you they've never carried out a lesson plan the way they wrote it because they have to be positioned to seize the teachable moment or to reinforce or to repeat something multiple times.

(Tr. Vol. XIV, 2480-2484). [redacted] believed that failing to capture certain supplementary aids and services was not inappropriate where the student, [redacted], was receiving those aids and services. (Tr. Vol. XIV, 2484).

46. In [redacted]'s opinion, [redacted]'s IEP seemed to be:

> an appropriate, mechanism that has dynamic dimensions to it that allows the system--or the teaching team to adjust and to anticipate how this child [[redacted]] can be worked with across physical settings while retaining a primary identification with a highly specialized teacher.

(Tr. Vol. XIV, 2483-84).

47. There was no testing information included in the August 2014 IEP, because [redacted] was in second grade at the time, and therefore, was not subject to the statewide assessment program. (Tr. Vol. X, 1527)

48. Under the August 2014 IEP's service delivery section, [redacted] received Adapted Physical Education in the gym for 45 minutes twice per week, Daily Living Skills in the special education classroom for 30 minutes five times per week, Math in the special education classroom for 60 minutes five times per week, Math in the general education classroom for 15 minutes five times per week, Reading in the special education classroom for 45 minutes five times per week, Reading in the General Education classroom for 30 minutes five times per week, and writing in the special education classroom for 35 minutes five times per week. (S.2 at 18)

49. [redacted] also received 30 minutes of occupational therapy in the general education classroom once per week, 30 minutes of occupational therapy in the therapy room once per week, 20 minutes of physical therapy in the special education classroom

ten times per year, 15 minutes of speech/language therapy in the general education classroom 14 times per reporting period (approximately nine weeks), and 60 minutes of speech/language therapy in the therapy room seven times per reporting period. (S.2 at 19)

50. Based on a 390-minute school day, under this IEP, [redacted] spent approximately 52% of his day with non-disabled peers, and 48% in special education settings (the special education classroom or therapy rooms), which represents a Resource placement under the percentages indicated on the IEP form developed by the North Carolina Department of Public Instruction.

51. In the LRE justification statement on the IEP, the IEP team noted its reason for removing [redacted] from non-disabled peers for part of his day as follows:

> [[redacted]]'s foundational level of function in all academic areas as well as his limited communication skills, in addition to requiring consistent prompting and redirection necessitate specially designed instruction in a small group setting with additional supports.

(S.2 at 20). Based on the assessment information available to the IEP team, [redacted]'s history and current levels of functioning, this was an appropriate justification for removing [redacted] from his non-disabled peers for parts of the day to focus on core academics.

52. The August 21, 2014 IEP reflected appropriate service delivery, in both amount and settings designed to meet [redacted]'s individual needs, and provided the intensive instruction and support [redacted] needed, while providing access to non-disabled peers for significant portions of his day. The information provided in the IEP supported the decision to remove [redacted] from his non-disabled students for portions of the day to focus on [redacted]'s academic areas of greatest need. The 45-minute compromise regarding instruction on core academics in a general education setting with a 1:1 special education teacher assisting provided a further opportunity to examine whether [redacted] could be successful in a general education environment with substantial individualized support.

53. Irrespective of Petitioners' above contentions that Respondent failed to provide [redacted] a free appropriate education, the parties had already **stipulated** that [redacted] made academic, communication, social progress, and functional growth during the 201415 school year under the August 2014 IEP. At hearing, both Petitioners acknowledged, unequivocally, that [redacted] made progress during the 2014-15 school year. (Tr. Vol. III, 505; Tr. Vol. IV, 717, 722). Thus, any technical flaws that may have existed in the IEP did not prevent [redacted] from benefitting from the educational program as agreed to in mediation, and as described in the August 2014 IEP.

The 2014-15 School Year

54. [redacted] was assigned to [redacted] second grade general education classroom for the 2014-15 school year and split his time between her class and [redacted]'s special education classroom. (Tr. Vol. XI, 1940-41)

55. From early in the year, [redacted] showed reluctance to enter the general education classroom. (S.4 at 4; Tr. Vol. XIII, 2295-96). He was often found crouched on the floor with his head down, (Tr. Vol. XII, 2060), or shut down sitting with chair turned away from the teacher (Tr. Vol. XIII, 2291). [redacted] did not engage with instruction in the general education classroom, or with his peers in that setting. (Tr. Vol. XIII, 2291). In order to be successful in that setting, [redacted] required a completely different curriculum and set of activities than the other students in the room. (S.9 at 4; Tr. Vol. XII, 2073; Tr. Vol. XI, 1927)

56. By contrast, [redacted] was generally eager to transition to Ms. [redacted]'s special education classroom. (Tr. Vol. XII, 2041; Tr. Vol. XIII, 2295). [redacted] was more engaged, more attentive, more productive, more social, and more verbal in the special education classroom. (Tr. Vol. IX, 1484; Tr. Vol. XII, 2041-42; Tr. Vol. XIII, 2289-90; Tr. Vol. XIII, 2319). The team's data sheets also indicated that [redacted] required far fewer redirections in the special education classroom. (R.15 at 11-13; R.16 at 3-11)

57. Petitioner [redacted] described Ms. [redacted]'s classroom as a "dark room," (S.9 at 4), and Petitioners' experts opined that there were low expectations in that room (Tr. Vol. I, 201). However, staff who had observed Ms. [redacted] working with students in her room opined that Ms. [redacted]'s room was "a very positive classroom and very academically rich," (Tr. Vol. IX, 1487), "extremely positive and rigorous," (Tr. Vol. IX, 1487-88), and "pure light." (Tr. Vol. XIII, 2321)

58. [redacted]'s IEP team began taking data at the start of the 2014-15 school year in accordance with the goals on the August 2014 IEP. Individualized data collection sheets were created reflecting [redacted]'s goals and benchmarks, and permitting longitudinal data collection on his performance. (R.15 at 1-13; R.16 at 1-20). Additional information was gathered in anecdotal notes, which provided greater context for the numerical data. (R.16 at 36-95)

59. Data was collected throughout the year on [redacted]'s various goals and objectives. For specific academic and functional tasks, teachers recorded [redacted]'s success rate over total trials for each day that data were taken. (E.g. R.15 at 8). For [redacted]'s work completion goal, the teacher recorded how much work [redacted] completed that day in the categories of "all, more than half, half, less than half, or none." They also recorded the number of redirections required for [redacted] to complete his work. (E.g. R.15 at 11). The types of redirection varied from visual to verbal to physical depending upon [redacted]'s need. (Tr. Vol. XII, 2057). Based on these data and notes, the undersigned finds that [redacted] received specialized instruction on his IEP goals consistent with the requirements of his IEP.

60. Members of [redacted]'s IEP team and Petitioners met throughout the school year to discuss [redacted]'s programming and performance. Staff had informal conversations with Petitioner [redacted] on numerous occasions. (Tr. Vol. XIII, 2348). In addition to the two IEP meetings in August 2014 and May 2015, various members of the IEP team met in scheduled parent-teacher conferences with Petitioners five times over the course of the

year— September 24, 2014, October 28, 2014[6], December 4, 2014, February 4, 2015, and March 18, 2015. (S.4 at 1-8). Staff shared progress monitoring data with Petitioners before these meetings, and explained at the meetings when necessary. (Tr. Vol. XIII, 2044).

61. During these meetings, Petitioners were also able to hear how [redacted] was being instructed. As noted in the Prior Written Notice from the August 21, 2014 IEP meeting, the team discussed that [redacted]'s core academic time in the general education setting (30 minutes of reading and 15 minutes of math) would be delivered "with a co-teaching model." (S.1 at 1). However, the meeting minutes used the term "inclusion" to describe the general education time rather than "co-teaching." (S.3 at 1). The August 2014 IEP did not reference a co-teaching model, as IEPs typically do not include specific teaching methodologies.

62. The September 24, 2014 parent-teacher conference minutes indicated that [redacted] was receiving co-teaching at that time. (S.4 at 2). The minutes to the May 2015 IEP meeting indicated that the special education teacher in the general education classroom was "teaching [[redacted]] one on one, because of where he is academically" and that, in her view, "it was not co-teaching" at that point. (S.9 at 3)

63. The testimony at hearing revealed that the individual teachers and other witnesses at hearing did not share a universal or common definition of the term "co-teaching." Petitioners pointed to deposition testimony from teachers who were not called to testify indicating that they had not "co-taught" [redacted] In contrast, during the hearing, Respondent's witnesses explained that there were multiple ways to co-teach, and that one-on-one support for a student while the other teacher teaches the full class is one such model. (Tr. Vol. IX, 1535, 1539; Tr. Vol. XII, 2063)

64. Respondent also presented evidence of six co-teaching models involving various levels of support that were shared with teachers in an EC Department newsletter in 2013. (R.10 at 1-4). This publication, written by the DPS EC Department, included co-teaching models that would fit the model described by [redacted]'s teachers, i.e., the general education teacher instructing the whole group, and the special education teacher providing direct instruction to [redacted] (R.10 at 1, 4)

65. It is undisputed that during [redacted]'s academic time in the general education setting, both a regular and special education teacher were present, with the special education teacher generally working directly with [redacted] within the regular education classroom. The May 2015 IEP meeting minutes also indicated that, at least by the end of the year, the special education teacher was generally working one on one with [redacted] The 1:1 special education teacher did not regard as "co-teaching," because [redacted]'s

[6] The minutes from this meeting are dated September 24, 2014 as well, but the parties do not dispute that the date is a mistake. The minutes from the actual September 24 meeting indicate that the next meeting would take place October 28, 2014.

academic skills were so far below those of his peers, that individual instruction was required. (S.9 at 3)

66. Despite confusion and imprecision in the use of the term "co-teaching" by various staff members, the documentary evidence and testimony indicated that the team attempted to co-teach [redacted], that academic necessity prompted the one-on-one teaching, and that the one-on-one model employed in this case technically met the definition of "co-teaching" as promulgated by the district.

67. Most importantly, [redacted]'s IEP did not require "co-teaching." It required only that [redacted] receive specialized instruction from a special education teacher within the regular education classroom for those time periods. (S.2 at 18). This service was provided throughout the year.

68. There is no dispute that [redacted] made progress across all domains during the 2014-15 school year. The parties stipulated to his academic, communication, and social progress and functional growth. At a December 2014 parent-teacher conference, Petitioner [redacted] stated that "the team is on the right track and [[redacted]] is much better from the beginning of the year." (S.4 at 6). At a March 2015 parent-teacher conference, Ms. [redacted] shared that [redacted] had made "leaps and bounds." (S.4 at 8). Testimony at trial from Petitioners and Respondent was similarly conclusive that [redacted] made progress during the 2014-15 school year. (Tr. Vol. IV, 505; Tr. Vol. V, 717,722; Tr. Vol. XI, 1874-75)

69. However, there is dispute regarding the source of [redacted]'s progress—specifically, whether the added time in the general education classroom with a 1:1 special education teacher produced more or less progress, than [redacted]'s time in the special education classroom with Ms. [redacted].

70. As an initial matter, relative performance in two different settings does not necessarily indicate which of those settings primarily caused [redacted]'s improved performance. (Tr. Vol. X, 1545-46)

71. Further, the two settings described by school staff were substantially different. (Tr. Vol. XIV 2472). In the general education classroom, [redacted] generally worked one-on-one with a special education teacher on material that was a much lower-level and often completely different than the work [redacted]'s nondisabled peers were doing. (Tr. Vol. X, 1485, 1540; Tr. Vol. XII, 2063). In the special education classroom, [redacted] still required substantial adult support. He more often worked independently, in groups with other students, and his IEP goals were generally integrated into the class' activities rather than practiced in isolation. (Tr. Vol. X, 1546; Tr. Vol. XI, 1899). As a result, direct comparisons between the numerical data sets from each setting should be made cautiously.

72. Petitioners argued that analyzing the available empirical data from the beginning of the school year to the end of the school year showed that even if [redacted] experienced a downward trend on one goal in the general education classroom, his accuracy rate was still almost fifty percent (50%) higher than in the self-contained classroom on the same goal. (P. Exs. 45-47; Tr. Vol. V, 789, 799) While Petitioners'

witnesses claimed that the data showed that [redacted] made greater progress in the general education setting, none of Petitioners' witnesses had conducted any actual analysis of the data. (Tr. Vol. III, 295; Tr. Vol. V, 732)

73. Dr. [redacted] opined that there was "simply not enough data to make any decisions with," (Tr. Vol. I, 146), and that statistical analysis would be "invalid" due to the small sample size. (Tr. Vol. III, 296) Yet, she still concluded, based solely on that data, that [redacted] had made more progress in the general education classroom. (Tr. Vol. I, 148, 153).

74. [redacted]'s performance data showed higher completion percentages on tasks in the general education classroom than in the special education classroom. (R.15 at 113; R.16 at 120). However, the absolute numbers may only reflect different levels of adult support. To evaluate progress or improvement, the trend of the data in each setting is actually more informative.

75. Respondent's cross-examination of Petitioner [redacted] established that [redacted]'s overall performance on specific objectives in each classroom setting showed [redacted] made no improvement over time within the general education classroom, but made substantial improvement over time in the special education classroom. (Tr. Vol. V, 737-746). Specifically, a comparison of [redacted]'s data regarding accurate responses on his first math and first reading Goals from August to December 2014, and from January to May 2015, showed slight decreases in performance in the general education setting over time (75.9% to 71% in reading, 57.3% to 55.4% in math), while indicating substantial improvement in special education (39.75% to 51.5% in reading, and 42.4% to 58.4% in math).

76. The numerical data taken in this case, while extensive, is subject to interpretation, and does not on its own establish which educational setting was more effective for [redacted] Information based on direct observations from staff who worked with [redacted] is critical to fully understanding his academic and functional performance in school.

In other words, numerical data alone does not define academic, social, or functional progress.

77. Based on consistent testimony from the people who worked with [redacted] in school every day, it is clear that the hallmarks of progress for [redacted]—greater attention and engagement, increased social interaction and verbal output, and increased independence—were present in the special education classroom. (Tr. Vol. IX, 1484; Tr. Vol. XII, 2041-42; Tr. Vol. XIII, 2289-90; Tr. Vol. XIII, 2319). Whereas, in the general education classroom, [redacted] was disengaged from peers, often refused to do work, and did not verbalize nearly as much. (Tr. Vol. IX, 1485; Tr. Vol. XII, 2060; Tr. Vol. XIII, 2291).

78. At hearing, Petitioners were unable to provide any anecdotal testimony about [redacted]'s performance in the school setting for two reasons. First, neither Petitioners nor their experts observed [redacted] during the 2014-15 school year. Second, Petitioners did not call any school staff to testify at hearing. In contrast, Respondent showed there was

more than sufficient data and other information on which the IEP team could make decisions. Dr. [redacted]'s general assessment was that [redacted]'s August 2014 IEP was appropriate in two ways:

> One, it touched on multiple needs of the child based on assessment data that was available, and it formulated reasonable goals that one would hope to work towards within the year that the child would be in the program. And I should say it also provides for the opportunity to interact with typically developing peers in a main-streamed approach, meaning you are streamed into the main when you have the skills and when you have the privilege and when you can be successful, but you're not going to be kept in this classroom down the hall with no contact with typically developing peers.

(Tr. Vol. XIV, 2454, 2479)

79. Combining the data, anecdotal notes from teachers, discussions from parent-teacher conferences, and testimony from people who saw [redacted] daily in the educational environment, the undersigned finds that the preponderance of the evidence established that [redacted] made substantial progress on his IEP goals during the 2014-15 school year, and that he received educational benefit from instruction in the special education classroom, while struggling with core academics in the general education setting with 1:1 support from a licensed special education teacher.

80. To the extent there were any procedural flaws in the design or provision of special education services to [redacted] during the 2014-15 school year, such flaws did not interfere with [redacted]'s receipt of educational benefit. There is no question that [redacted] made progress under the 2014-15 IEP. ***The May 2015 IEP***

81. The team scheduled an IEP meeting for [redacted]'s required annual review on May 20, 2015. Respondent provided drafts of IEP documents to Petitioners before the meeting. (Tr. Vol. XI, 1916).

82. The day before the IEP meeting, members of the IEP team met to prepare for the meeting. According to Dr. [redacted], pre-meetings are a typical practice in Durham Public Schools for the purposes of reviewing data and observations, discussing potential proposals, and preparing draft goals. (Tr. Vol. IX, 1473-74). The team did not make final decisions about service delivery or educational placement at this meeting. (Tr. Vol. XI, 1915-16; Tr. Vol. XII, 2068)

83. At the May 20, 2015 IEP meeting, the team discussed each portion of the IEP, reviewing [redacted]'s strengths, parent concerns, Present Levels and corresponding goals, supplementary aids and services, service delivery, and educational placement. (S.9 at 1-4)

84. A comparison of the August 2014 IEP and the May 2015 IEP showed that the Present Levels were updated with current information, while carrying over relevant information from the previous IEP. (S.2 at 3-13; S.7 at 4-17; Tr. Vol. XIV, 2516)

85. Goals on which [redacted] had made progress were updated to address the next relevant skill or to extend the current skill to a higher level of achievement. For example, [redacted]'s math goal moved from counting and skip counting to addition, while his writing goal moved from writing letters and numbers to writing dictated words. (S.2 at 6,7; S.7 at 9,11)

86. The new goals were appropriately aligned with the information in the Present Levels of performance. (Tr. Vol. XIV, 2481). Even in cases where the goal addressed a new skill not mentioned in the Present Level, the new goal clearly built on the previous goal. For example, in the new Goal addressing addition, the Present Level of performance set forth data regarding [redacted]'s counting and skip-counting abilities, two foundational skills whose mastery would naturally be followed by the teaching of basic addition, just as the IEP goal required. (Tr. Vol. XIV, 2215-16)

87. The team then discussed supplementary aids and services, which were updated with a greater variety of supports than had been present in the August 2014 IEP. These supports were individualized, and matched to each setting [redacted] would attend. For non-academic settings such as Lunch, Recess, and Music/Art, [redacted] would receive teacher prompting along with verbal preparation for transitions. For core academic courses where he needed more support, [redacted] would receive the following course-specific aids and accommodations: extended time and chunking of assignments in Math, extended time, independent level books, and high interest books on his reading level in Reading; and dictation to scribe, visual models, and extended time in Writing. (S.7 at 19). These supports were aligned with [redacted]'s recorded needs and sufficient to enable him to access the relevant setting.

88. A discussion of the state testing program followed. Because [redacted] was entering the third grade, he would have to take State assessments. Based on [redacted]'s demonstrated needs and his low academic level, the IEP team determined that [redacted] should take the Extend1 version of the tests rather than the EOG. Witnesses for both parties acknowledged that the Extend1 was the appropriate assessment for [redacted] (Tr. Vol. VII, 1192; Tr. Vol. XI, 1923)

89. The team held a lengthy discussion of service delivery. After the team proposed increasing [redacted]'s time in the special education classroom for core academics, Petitioner [redacted] objected. [redacted] articulated her desire to keep the 1:1 instructional time in the general education classroom that had been in place during the 2014-15 school year. She stated she was focused primarily on communication, and that "she didn't care about reading, writing, or math." (S.9 at 3)

90. The team discussed [redacted]'s progress in each setting and their respective interpretations of the progress monitoring data and their personal observations. [redacted]'s private occupational therapist, who attended the meeting with Petitioner [redacted], also participated in the discussion. School staff members communicated their concerns that the greater rigor in 3rd grade would be a significant problem for [redacted] in the general education classroom, especially considering the substantial gap that already existed between [redacted] and other students in that setting. (S.9 at 3-4)

91. In the end, the team decided to increase ’s time in the special education classroom in his core academic areas of Reading, Writing, and Math. He would spend the remainder of his day with non-disabled students. Petitioner objected to this decision. (S.9 at 3-4)

92. Based on the preponderance of evidence in the record, needed specialized, individualized instruction from a trained special education teacher to make progress on his IEP goals. (Tr. Vol. XIV, 2459). He required significant redirection and repetition of instructions and supports, and an environment that addressed his inattention and distractibility (R.2 at 14; R.1 at 3-5); all of which received in Ms. ’s special education classroom (Tr. Vol. XI, 1870). Exposure to higher content, via his presence in the general education classroom, will not benefit nearly as much as specialized instruction in a setting that reduces distractions, and provides the direct, individualized instruction that needs. (Tr. Vol. XIII, 2430)

93. The service delivery as captured in the IEP describes receiving 75 minutes of math instruction in the special education classroom, 90 minutes of reading instruction in the special education classroom, 45 minutes of writing instruction in the special education classroom, and 30 minutes of study skills in the special education classroom, representing roughly 62% of his school day. Each of these would be delivered five times per week. (S.7 at 21)

94. The IEP also described OT services for 30 minutes once a week in the special education classroom and 630 minutes per quarter (21 sessions of 30 minutes) of speech services. Because the speech-language services were provided in varied locations—general education, special education, therapy room, lunch and recess (Tr. Vol. XIII, 2289)—it is impossible to get an exact calculation of the amount of time spent with, or removed from, his nondisabled peers for related services. Taking that uncertainty into account, and averaging these numbers over the nine-week quarter yields an additional 10-20 minutes (roughly 3-5% of the school day) away from non-disabled students each day.

95. Based on these numbers and the related services in the IEP, would receive 65-67% of his school day in the special education classroom or therapy room, and 33-35% of his school day with non-disabled students, which represents a “Separate” educational placement.

96. Petitioners presented testimony regarding a discrepancy between the service delivery recorded in the minutes and the service delivery recorded on the IEP—the IEP lists 90 minutes of math instruction in the special education classroom, while the minutes reflect a decision of 75 minutes for math. (Tr. Vol. VIII, 1308-10). Testimony was inconclusive as to which of these was correct, as there were technical issues that led to the loss of the online IEP system during the May 20, 2015 IEP meeting. This question may have contributed to the confusion. Nonetheless, the 15 minute difference in time in the EC setting versus the general education setting represented only a 4% change in the distribution of minutes.

97. Even accepting the delivery schedule in the meeting minutes, [redacted] would spend approximately 61-63% of his day in the EC setting and 37-39% in the general education setting, which is still a "Separate" placement. Even if this discrepancy would have led to a technical change in the placement label from "Separate" to "Resource," the difference between 60% and 61% of the instructional day with non-disabled peers is *de minimis* with respect to [redacted]'s actual educational program. To the extent there was an error here, it was marginal and did not affect educational placement in any meaningful way.

98. Petitioners presented extensive expert testimony regarding the least restrictive environment, largely arguing that students with low-incidence disabilities do not benefit from placement in special education classrooms. (Tr. Vol. I, 79, 152). However, in expressing their opinions, Petitioners' experts, particularly Dr. [redacted], took positions contrary to federal and state law.

a. Dr. [redacted] opined that IEP teams are required to attempt regular education placements before moving to more restrictive placements. (Tr. Vol. II, 264). Yet, guidance from the federal government establishes the opposite. *Letter to Cohen*, 25 IDELR 516 (OSEP, August 6, 1996); (Tr. Vol. XIII, 2436).

b. Dr. [redacted] also opined that the IDEA made no mention of the "continuum of alternative placements," (Tr. Vol. VII, 1226), yet federal regulations and state policies use that exact phrase to describe a *requirement* for school districts. 34 CFR 300.115(a) ("Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services."); (Tr. Vol. XIII, 2434). These objectively incorrect positions diminish Dr. [redacted]'s overall credibility as an expert witness.

99. The "placement" section of the IEP, as promulgated by the North Carolina Department of Public Instruction is, in the end, simply a calculation of minutes in various settings that were previously decided in the "service delivery" section of the IEP. (Tr. Vol. X, 158889). The question of the final label for the student's placement (regular, resource, or separate) is less important than the appropriateness of the individual decisions on where and how the student will be educated in specific educational areas, such as math, reading, or social skills.

100. The IEP team specifically attempted, for a full year, to provide core academic instruction to [redacted] in the general education setting with substantial accommodations, aids, and services, but [redacted] was not successful.

101. Respondent presented substantial evidence, and the undersigned finds, that the specific decisions made regarding where [redacted] would receive particular educational services and instruction were appropriate based on the data and observations of [redacted]'s teachers, and therefore, the educational placement was appropriate.

102. Finally, the IEP team addressed Extended School year services (ESY). The record includes a worksheet that the team completed during its discussion of ESY. (S.8 at 1). That worksheet indicated that the team reviewed teacher notes, student performance, collected data, and therapy notes as it considered eligibility. The team decided that there was no evidence of regression during breaks, that [redacted] did not exhibit any emerging critical skills that were at risk of loss without ESY services, and that any educational benefit [redacted] had received in the 2014-15 school year was not significantly jeopardized without the provision of ESY services.

103. Petitioners' expert Dr. [redacted] opined that [redacted] needed ESY services, because [redacted]'s IEP team reported that [redacted] "continues to need support" in speech and language, "is in need of constant repetition . . . to make progress in math . . . and he is showing emerging skills with putting spaces between words . . ." (S. 7 at 4, 9, 17) Yet, Dr. [redacted] gave no specific basis for this opinion, and she was not familiar with the standards for ESY eligibility in North Carolina to any level of detail. (Tr. Vol. VII, 1235-37). Without providing any basis for her opinion, Dr. [redacted]'s testimony lacks credibility on this point.

104. Petitioners did not present any evidence that [redacted] regressed in instruction during breaks, or that [redacted] exhibited emerging critical skills that would be lost or significantly jeopardized without continued instruction during the summer months. Specifically, no teacher, speech language pathologist or occupational therapist who had worked with [redacted] opined that [redacted] required E.S.Y. services.

105. The preponderance of the evidence established that, at the May 20, 2015 IEP meeting, the IEP team fully discussed each required part of the IEP, and [redacted]'s parent, who was also accompanied by a private occupational therapist, had substantial participation in the process. The fact that the team ultimately disagreed with [redacted]s parent is not evidence of predetermination. The fact that Respondent's staff met the previous day to discuss [redacted]s data, and draft portions of the IEP is also not proof of predetermination by itself. Nevertheless, Petitioners failed to present sufficient evidence showing that they were denied substantial participation in the IEP process, and thus, failed to meet their burden on that point.

106. Like the August 2014 IEP, the May 2015 IEP reflected an appropriate delivery of special education services in both amount and setting. Given the evidence the IEP team gathered regarding [redacted]'s lack of success during the 45 minutes of core academic instruction [redacted] received in the general education environment during the 201415 school year, [redacted]'s success in the special education classroom, and the increased rigor of the 3rd grade curriculum, the IEP team was justified in increasing [redacted]'s time in the special education classroom for core academic subjects. The IEP still maintained that [redacted] would spend a substantial portion of his day with non-disabled students.

2015-16 School Year

107. Before the beginning of the 2015-16 school year, Petitioners filed the present petition, and invoked "stay-put," thereby requiring that [redacted] would continue to receive 45 minutes of academic instruction in the general education setting with a 1:1 special education teacher supporting him.

108. [redacted]'s academic performance during the 2015-16 school year was not among the issues for hearing, and therefore was not the subject of significant testimony. The one report presented from this time showed that the general education classroom continued to be a struggle for [redacted], while Ms. [redacted]'s special education classroom continued to be a place of success and progress for him. (R.18 at 1-3). This information supports the team's determination at the May 2015 IEP meeting that [redacted] would benefit from moving that academic instruction time into the special education classroom.

109. On September 28, 2015, Petitioners [redacted]. and [redacted] provided Respondents written notice of their intent to enroll [redacted] in a private school, and seek tuition reimbursement from DPS. (Pet'rs Resp. Opp'n Resp't's Mot. Partial Summ. J. and CrossMot. Partial Summ. J. Ex. 13.) On or around November 9, 2015, Petitioners withdrew [redacted] from the Durham Public Schools, and enrolled him at a private school, [redacted]. (Tr. Vol. IV, 661)

110. [redacted] School offers a hands-on, multisensory approach and defined curriculum "to appeal to all types of learners." (Tr. Vol. VI, 896, 897, 899) The [redacted] model allows for multi-age group settings. (Tr. Vol. VI, 896, 897) The [redacted] model was originally designed, and the materials created, based on the founder's work with students with mental disabilities. (Tr. Vol. VI, 897)

111. While [redacted]'s teacher from [redacted] did not testify at the contested case hearing, the Head of the [redacted], [redacted], did. Ms. [redacted] explained that at [redacted], [redacted] has his "own individualized works," and is permitted to work on a lesson that is appropriate for his development and needed for his individualized progress, because the [redacted] concept provides for each student to work on different content at different times. (Tr. Vol VI, 907)

112. [redacted] noted that [redacted]'s teacher uses both the built-in materials associated with a [redacted] Curriculum (i.e., metal insets to strengthen the pincer grasp, help students form letters the correct way, and learn geometrical shapes) (Tr. Vol VI, 919), as well as materials and "works," or "any assignment or activity," designed by the individual teacher to support a student's individual needs. (Tr. Vol VI, 918) [redacted] works independently, in groups with non-disabled peers, and with the assistance of supplemental aids and services including visual supports, such as a timer and checklist of tasks. (Tr. Vol. VI, 922)

113. Ms. [redacted] explained that [redacted]' approach to redirecting [redacted] appropriately, incorporated the premise that should [redacted] require several reminders on a particular task. [redacted]'s "teacher may choose a different task or assignment for [[redacted]] to

work on since [he is] having trouble staying on the one that [the teacher] had assigned first." (Tr. Vol. VI, 906)

114. Further, [redacted] described how [redacted]'s teachers designed a plan to meet [redacted]'s unique needs, thus allowing him to progress through the entire [redacted] academic curriculum working in a classroom with his non-disabled peers. (Tr. Vol VI. 913, 914) While [redacted] is permitted to work on a particular assignment as long as is needed for him to complete the assignment, due to the supports available to [redacted], it does not take him multiple days to complete assignments. (Tr. Vol. VI, 914)

115. Ms. [redacted] occasionally observed [redacted]'s classroom for brief periods of time, but was unable to speak definitively regarding [redacted]'s skill level or his progress in that classroom. (Tr. Vol. VI, 916, 930). She explained that the school did not believe [redacted] was ready to move on to the [redacted] grade, and that he would be repeating the [redacted] grade in the 2016-17 school year. (Tr. Vol. VI, 954)

116. [redacted] provided progress reports to Petitioners to monitor [redacted]'s progress, and provided Petitioners an individualized profile of [redacted] that was individually tailored to [redacted]'s strengths, weaknesses, and areas of progress. (Tr. Vol VI, 905, 906) However, Ms. [redacted] did not present any progress monitoring data at hearing exhibiting [redacted]'s performance at [redacted] as [redacted] does not appear to keep such data. (Tr. Vol. VI, 956-958).

117. At hearing, Ms. [redacted] provided a limited number of work samples as an Exhibit. These samples showed [redacted]'s activities in coloring, counting, single-digit addition, copying letters and words, and possibly some basic vocabulary (P. 89 at 17701795). However, because [redacted]'s teacher from [redacted] did not testify at hearing, no meaningful context regarding [redacted]'s samples was provided.

118. Witnesses for Petitioners confirmed that [redacted] does not provide the related services, such as speech therapy and occupational therapy, that [redacted] received from the Durham Public Schools. Instead, Petitioners have contracted a private occupational therapist to visit [redacted] at [redacted] once a week. [redacted]'s teachers work with his private therapist to provide necessary modifications or accommodations. (Tr. Vol. VI, 912, 913, 924-925, 1110, 1113)

119. Both of Petitioners' experts conducted observations of [redacted] in the [redacted] setting. It is notable, however, that both observations took place during the one time each week when [redacted]'s private occupational therapist was working with [redacted] individually in the classroom. (Tr. Vol. VI, 1022; Tr. Vol. VII, 1105)

120. Based on an Order from the undersigned, Dr. [redacted] and Dr. [redacted] conducted a joint observation of [redacted] on April 20, 2016, more than five months after [redacted] had transferred to [redacted]. Dr. [redacted]'s contemporaneous observation notes identified significant concerns regarding the [redacted] program, including that [redacted] appeared to have a workspace separate from his classmates where he spent most of his time in the classroom. Dr. [redacted] thought that the little peer interaction [redacted] had, seemed contrived by

the teaching assistant, and the other students did not treat [redacted] as a peer. She observed [redacted] spend over an hour coloring by himself. [redacted]'s teacher did little direct instruction with [redacted], and was unable to get much work out of him when she did work with him. (R.12 at 1-9)

121. On rebuttal, Dr. [redacted] disagreed with Dr. [redacted]'s interpretation of the events, though the underlying facts were not in dispute. (Tr. Vol. XIV, 2543-44). Dr. [redacted] did not provide any written summary of her April 20, 2016th observations at hearing.

122. Based on the evidence presented regarding the [redacted] program, it is noteworthy that the issues Petitioners complained about regarding Respondent's program were even more present at [redacted]. While Petitioners criticized Respondent's progress monitoring data, [redacted] provided no data at all. While Petitioners criticized Respondent's individual education plan and lesson plans for [redacted], no written plan was presented from [redacted] other than general testimony that such plans existed. While Petitioners criticized Respondent's teachers' training, there is no evidence that the [redacted] instructor had any experience or training at all in working with students with disabilities, let alone students with challenges as substantial as [redacted]'s. While Petitioners criticized the number of redirections provided by Respondent's staff, Dr. [redacted] counted much higher rates of verbal redirection by the [redacted] teacher during her observation in April 2016. (R.12 at 6).

123. Based on the few work samples provided from [redacted], [redacted] continued working on the same skills he had been working on when he left DPS, including counting, single-digit addition, copying short words from models, cut-and-paste activities, and basic vocabulary. (P.89 at 1170-1795). Further, [redacted] had already deemed [redacted] unready to move on to the next grade level (Tr. Vol. VI, 954), which calls into question Petitioners' assertion that [redacted] made academic or functional progress at Pinewoods.

124. Other than Petitioners' witnesses' general testimony regarding [redacted]'s progress, there is little to no evidence that [redacted] benefitted from, or made progress in the [redacted] program. Records and testimony established that [redacted] requires substantial individual support, direct instruction, and repetition of skills in a structured environment. By nature, a [redacted] program is relatively unstructured, generally self-paced, and self-determined by the student. There was no evidence establishing that [redacted]'s teacher had any specific training regarding how to work with him. The scant evidence of [redacted]'s teacher's direct instruction of [redacted] showed insufficient time spent instructing [redacted], ineffective techniques, and a lack of meaningful assignments.

CONCLUSIONS OF LAW

Based on the above Findings of Fact, the undersigned concludes as follows:

General Legal Framework

1. The Office of Administrative Hearings has jurisdiction over this contested case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and

the Individuals with Disabilities Education improvement Act (IDEA), 20 U.S.C. § 1400 et seq. and its implementing regulations, 34 C.F.R. §§ 300 and 301. N.C. Gen. Stat. § 115C109.6(a) controls the issues to be reviewed. 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. The IDEA is the federal statute governing the education of students with disabilities.

3. Respondent DPS is the local education agency (LEA) receiving funds pursuant to the IDEA.

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

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

6. The appropriateness of a student's educational program is decided on a case-by-case basis in light of the individualized consideration of the unique needs of the child. *See Hendrick Hudson Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). Under *Rowley*, the Board is required first to comply with the procedures set forth in the IDEA in developing an IEP, and second, to provide a disabled student with educational instruction that is uniquely designed to meet the student's needs through an IEP that is reasonably calculated to enable him to receive educational benefit. *See Rowley*, 458 U.S. at 176. If both requirements are met, "the State has complied with the obligations imposed by Congress and the courts can require no more." *Id.* at 207.

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

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

9. "[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)

Least Restrictive Environment

10. In addition to IDEA's requirement that the state provide each student with some educational benefit, the student must be placed in the least restrictive environment (LRE) appropriate for the student to achieve educational benefit. *See, e.g., A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004); *MM ex rel. DM v. Sch. Dist. of Greenville County*, 202 F.3d 523, 526 (4th Cir. 2003).

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

12. Mainstreaming is not required where (1) the disabled child would not receive an educational benefit from mainstreaming into a regular class; (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting; or (3) the disabled child is a disruptive force in a regular classroom setting. *Hartmann*, 118 F.3d at 1001; *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 879 (4th Cir.1989); Federal Register, Vol. 71, No. 156, §§ 300.115 & 300.116, August 14, 2006, Rules and Regulations.

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

14. The LRE requirement creates a presumption in favor of mainstreaming. "The fact that the provision only creates a presumption, however, reflects a congressional judgment that receipt of such social benefits is ultimately a goal subordinate to the requirement that disabled children receive educational benefit." *Hartmann,* 118 F.3d at 1002. As such, academic benefit takes primacy over social benefit if the two goals are in conflict. (Tr. Vol. XIV, 2447)

Procedural Errors

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

IDEA, the school district has fulfilled its statutory obligations. *Burke County Bd. of Educ. v. Denton,* 895 F.2d 973, 982 (4th Cir.1990).

16. In addition, state law dictates that "the decision of the administrative law judge shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." N.C. Gen. Stat. § 115C-109.6(f).

Professional Judgment and Deference to Educators

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

18. 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)

Issues for Hearing

Whether Respondent provided [redacted] a FAPE in the LRE from November 27, 2014, through June 12, 2015?

19. This issue involves whether the operative IEP during the relevant time period (the August 2014 IEP) was appropriate as drafted, including whether it placed [redacted] in the LRE, and whether that IEP was implemented properly.

20. Based on Judge Elkins' summary judgment order, any claims related to the August 21, 2014 IEP meeting and the development of the August 2014 IEP are barred, and cannot be the basis for any relief.

21. Substantial evidence in the record established that [redacted] had extensive academic and functional needs that required substantial support and specialized instruction in a setting designed to meet his needs. He required intensive, direct, individualized instruction in a smaller, less distracting setting to make progress in his core academics.

22. A preponderance of the evidence presented at hearing showed that the August 2014 IEP was appropriate as drafted. The evidence presented demonstrated that the information required to be in the IEP was present and accurate, the goals were appropriate based on [redacted]'s documented abilities and needs, the supplementary aids and services were sufficient to support [redacted]'s access to his educational environment, the

service delivery was balanced between mainstreaming and intensive special education supports for core academics, and the placement reflected a mediated compromise between Respondent's assessment of ’s least restrictive environment and Petitioners' assessment.

23. Findings of Fact 54-80 and other evidence in the record established that the IEP team implemented the August 2014 IEP appropriately. The evidence presented showed that received the services described in the IEP, he received instruction in the various goals from appropriate staff in appropriate settings, and the team conducted adequate progress monitoring.

24. Based on Findings of Fact 68 and 75-80, Stipulation 16, and other evidence in the record, clearly received meaningful educational benefit under the August 2014 IEP. The fact that the parties stipulated to progress across multiple domains supports this conclusion, as do Petitioners' direct admissions of progress during testimony.

25. While the district is not required to show progress to establish that the IEP was appropriate as drafted, this undisputed progress makes it very difficult for Petitioners to establish that the IEP was inappropriate as drafted or that there was a denial of FAPE associated with the August 2014 IEP and the 2014-15 school year. *See M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 532 (4th Cir. 2002) (stating that "courts should endeavor to rely on objective factors, such as actual educational progress, in order to avoid substituting our own notions of sound educational policy for those of the school authorities which we review") (internal quotation marks omitted).

26. Based on the foregoing, the undersigned concludes that received an opportunity for a free and appropriate public education in the least restrictive environment from November 27, 2014 through June 12, 2015.

Whether ’s May 20, 2015 IEP is reasonably calculated to provide a FAPE in the LRE?

27. The preponderance of the evidence presented at hearing proved that the May 2015 IEP was reasonably calculated to provide a meaningful educational benefit. First, the IEP contained all of the statutorily required information. Second, the Present Levels were updated and accurate, and the goals were aligned with the Present Levels and appropriate for at the time. Third, the supplementary aids and services were sufficient to support ’s access to his educational environment. Fourth, the service delivery was appropriate in amount and setting, and the placement was consistent with the service delivery plan.

28. The IEP team increased ’s service time in the special education in place of ’s core academic time in the general education classroom after was not successful in the general education classroom during the 2014-2015 school year. The IEP team's decision to increase special education service time in the special education classroom was justified by teacher observations, anecdotal notes, numerical data, and the team's understanding of ’s strengths and needs.

29. More restrictive settings are appropriate where the "nature or severity of the disability" prevents satisfactory education in regular education settings with appropriate supports. *See* 20 U.S.C. § 1412(a)(5). Here, as a result of his disability, [redacted] was an extremely low-functioning student who was already years behind his same-age peers. After a yearlong attempt by school staff, [redacted] was unable to access core academic instruction in the general education setting effectively, even with the maximum support of a 1:1 special education teacher.

30. The preponderance of the evidence at hearing established that, at least for his core academics such as reading, writing and math, [redacted] "would not receive an educational benefit from mainstreaming into a regular class," and that "any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting." *Hartmann*, 118 F.3d at 1001. Therefore, the May 2015 IEP reflected [redacted]'s least restrictive environment.

31. Based on Findings of Fact 31, 55, 65-66, 71, 77, and 79 and other evidence in the record, the modifications to the general education classroom activities and assignments that would have been necessary for [redacted] to access such activities and assignments meaningfully, would have rendered [redacted]'s curriculum entirely distinct from that of his non-disabled peers. In this sense, [redacted]'s circumstances are very similar to those described by the Fourth Circuit in *Hartmann*:

> Mark's situation is similar to the one we faced in *DeVries,* 882 F.2d 876. In upholding Fairfax County's decision not to place Michael DeVries in Annandale High School, the court observed not only that Michael would derive virtually no academic benefit from the regular classroom, but also that his work would be at a much lower level than his classmates and that he would in effect "simply be monitoring classes." *Id.* at 879. Here the hearing officer made an identical finding, concluding that Mark "did not participate in the regular curriculum, but was provided his own curriculum." Mark's special education teacher in Loudoun County explained, "Mark needs a completely different program.... His skills have to be taught in a different way, in a different sequence, and even a different group of skills ... from what his typical functioning peers are learning."

Hartmann, 118 F.3d at 1001-02.

32. Based on testimony from those who worked with [redacted] in the regular education classroom, [redacted] did not participate in the regular curriculum, but was provided his own curriculum. His work was at a much lower level than his classmates, and he was in effect, simply monitoring those classes. These considerations were appropriate in placing [redacted] in a more restrictive environment for his core academic instruction.

33. While an IEP team is not required to place a student in the general education setting and see him fail before attempting a more restrictive placement, prior experience in the general education setting is strongly indicative of a student's capacity to be successful in that setting. In this case, the IEP team attempted to educate [redacted] in

core academics in the general education setting with maximum support (a one-on-one licensed special education teacher) for a full year. The preponderance of the evidence showed that [redacted] was not successful and did not benefit from core academic instruction in that setting during that year. That experience confirmed the existing evidence of [redacted]'s need for direct instruction in a smaller setting with consistent redirection and repetition, and justified the decision to remove that 45 minutes of general education time from [redacted]'s IEP for the 2015-16 school year.

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

35. As stated in *In re: Student with a Disability*, 107 LRP 51357 (Ala. SEA 2006):

> [t]he Petitioner's criticisms of the Child's program consisted chiefly of opinion evidence offered by witnesses who had done little, if any, actual testing or even extended observation of the Child. Although perhaps useful in some broad sense to an understanding of instructional methodologies, their findings regarding the Child were not the product of an actual evaluation of the Child as much as they were general observations, impressions, and statements of personal pedagological [sic] preferences and philosophies.

In re: Student with a Disability, 107 LRP 51357 (Ala. SEA 2006).

36. Similarly here, Petitioners' experts clearly preferred particular pedagogical methods, and held a particular educational philosophy. However, their lack of direct knowledge of [redacted], his needs, and the circumstances and environment of his public education render their opinions of limited value in resolving this matter. Further, general criticisms of special education classrooms nationwide, or even district-wide within DPS, have little bearing on the appropriateness of [redacted]'s educational placement, especially when both Petitioners and their experts have never been in the special education classroom at [redacted] Elementary to observe the instruction [redacted] received there.

37. The preponderance of the evidence at hearing demonstrated that [redacted]'s service delivery plan, including specific settings for specific areas of instruction, was designed to meet [redacted]'s individual needs.

38. Based on Findings of Fact 81-92 and 105-106 and other evidence in the record, Petitioners were full participants in the IEP process, and decisions by the IEP team were not predetermined. A preponderance of the evidence established that the IEP team shared progress monitoring data with the parents throughout the year, and met in formal parent-teacher conferences five times. The record clearly showed that the IEP team and Petitioner [redacted] engaged in an extended discussion of [redacted]'s needs during the May 20, 2015 IEP meeting, including a lengthy back-and-forth about (1) what the data showed about [redacted]'s performance in the regular and special education classrooms, (2)

Petitioner [redacted]'s preference for inclusion over academic instruction, (3) how [redacted] would be instructed, etc. Additional time in the general education setting was also discussed and considered during such meeting. The fact that the team ultimately disagreed with the parents did not indicate either predetermination or a denial of meaningful participation.

39. In addition, "while a school system must not finalize its placement decision before an IEP meeting, it can, and should, have given some thought to that placement." *Doyle v. Arlington County Sch. Bd*., 806 F.Supp. 1253, 1262 (E.D.Va.1992), *aff'd* 39 F.3d 1176 (4th Cir. 1994). The fact that members of the IEP team met the day before the annual May 20, 2015 review is not a violation. Petitioners presented no evidence beyond speculation and unfounded inference that the IEP team made final decisions before the May 20, 2015 meeting. As such, Petitioners failed to prove that the May 20, 2015 placement decision was predetermined.

40. Based on the foregoing, the May 20, 2015 IEP was developed consistent with required procedures, and was substantively appropriate as it was reasonably calculated to provide [redacted] with a free and appropriate public education in his least restrictive environment.

41. Given that the resulting IEP was reasonably calculated to provide [redacted] a meaningful benefit, and that it reflected his least restrictive environment, any procedural errors in the development of the IEP did not interfere with the provision of FAPE, and must be considered harmless. *See A.K.*, 484 F.3d at 684.

Whether Respondent provided [redacted] a FAPE in the LRE from June 13, 2015 through August 13, 2015?

42. This issue was entirely related to whether the IEP team appropriately decided that [redacted] was not eligible for Extended School Year services. Extended School Year ("ESY") services are only necessary to ensure FAPE "when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." *M.M. v. District of Greenville County*, 303 F.3d 523 (4th Cir. 2002).

43. The North Carolina Department of Public Instruction's Policies Governing Services for Children with Disabilities, Policy (2014), NC 1501.24 provides further clarity 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.

NC 1501-2.4; *See also* 20 U.S. C. 1412(a)(1), 34 CFR 300.106.

44. Based on Findings of Fact 102-106 and other evidence in the record, the IEP team met its procedural requirements by appropriately considering the criteria and information related to those criteria, and made a substantively appropriate decision. The burden was on Petitioners to demonstrate that [redacted] actually required ESY services in order to receive a FAPE, according to the criteria set forth in the law. *See Dibuo v. Worcester Co*, 309 F.3d 184, 187-189 (4th Cir 2002) (where Petitioners' expert opinions and testimony at hearing did not establish that the student was eligible for ESY, the IEP team's failure to appropriately consider ESY did not interfere with the provision of FAPE).

45. The Court in *M.M. v. District of Greenville County*, 303 F.3d 523 (4th Cir. 2002) explained that:

> The mere fact of likely regression is not a sufficient basis, because all students, disabled or not, may regress to some extent during lengthy breaks from school. ESY Services are required under the IDEA only when such regression will substantially thwart the goal of 'meaningful progress.' M.M., 303 F.3d at 538.

46. Here, Petitioners did not meet their burden of demonstrating by a preponderance of the evidence that [redacted] could not make meaningful progress without the provision of ESY services. In fact, Petitioners failed to present any evidence at all that [redacted] required ESY services, other than general opinions by experts who had not even evaluated [redacted]

47. There was sufficient evidence in the record that Respondent exercised the proper procedures in considering ESY services for [redacted] and did so in an appropriate manner. There was also ample information in the record to support the substantive decision of the IEP team that [redacted] was not eligible for ESY services from June 13, 2015 through August 13, 2015.

48. As the Court in *Tice v. Botetourt County Sch. Bd*., 908 F.2d 1200, 2017 (4th Cir. 1990) explained:

> [O]nce a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals. Tice, 908,F.2d at 1200, 1207 (citing *Rowley*, 458 U.S. at 20708, 102 S.Ct. at 3051-52). Neither the district court nor this court should disturb an IEP simply because we disagree with its content. Rather, we must defer to educators' decisions as long as an IEP provided the child 'the basic floor of opportunity that access to special education and related services provides.' Id. at 201, 102 S.Ct. at 3048.

See *Tice,* 908 F.2d at 1207. As the Court in *Tice* ruled, the undersigned in this case will not second-guess the professional judgment of the Respondent's educators in determining that [redacted] was not eligible for ESY services.

49. Because ESY services are the only services that are at issue during the period from June 13, 2015 through August 13, 2015, the undersigned concludes that Respondent did not fail to offer [redacted] a free appropriate public education during this period.

If Respondent denied [redacted] a FAPE in the LRE, whether the private placement chosen by the Petitioners is appropriate?

50. The appropriateness of a unilateral private placement is a subsequent consideration that requires the Petitioners to first establish that the program offered by the Respondent was legally insufficient. *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 324 (4th Cir. 2009). Based on Conclusions of Law 1-48, Petitioners have failed to make this threshold showing, and therefore, the undersigned need not address the issue of private placement.

51. Nevertheless, because this undersigned received evidence regarding the issue of the private placement, and made factual Findings of Fact related thereto, the undersigned will make provisional Conclusions of Law regarding this issue.

52. For reimbursement to be available, Petitioners must prove that their unilateral private placement is appropriate to meet the student's needs. *See M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 324 (4th Cir. 2009).

53. Based on Findings of Fact 99-107 and other evidence in the record, Petitioners have failed to present substantial evidence that the [redacted] program was appropriate to meet [redacted]'s unique needs. Petitioners presented no educational plans from [redacted], and no progress monitoring data from [redacted]. Petitioners did not call [redacted]'s teacher at [redacted], who would be in the best position to speak to his abilities and progress or lack thereof, to testify. With only general testimony from the Head of [redacted], and conflicting expert testimony about observations totaling only a few hours of [redacted]'s entire academic year to rely on, the undersigned cannot conclude that Petitioners have met their burden on this issue.

54. The lack of related services provided at [redacted] contributes to its inappropriateness. [redacted] received weekly occupational therapy, monthly physical therapy, and speech therapy 2-3 times per week in the Durham Public Schools. Petitioners' own expert, Dr. [redacted], recommended daily speech therapy for [redacted] Yet at [redacted], [redacted] received occupational therapy once a week and speech therapy once a month.

55. To the extent that a decision on this issue is required, the undersigned concludes that the private placement at [redacted] was not an appropriate placement for [redacted]

Other Issues

56. 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.

FINAL DECISION

1. Petitioners failed to meet their burden to prove that Respondent failed to provide [redacted] a free appropriate public education for the 2014-15 school year or the 2015 summer, or offer [redacted] a free appropriate public education for the 2015-16 school year.

2. The IEPs developed on August 21, 2014 and May 20, 2015 offered [redacted] a free appropriate public education in his least restrictive environment.

3. Even if Petitioners had met their burden that Respondent failed to offer [redacted] a free appropriate public education, Petitioners failed to show that they had a legal claim for reimbursement for the private program, because Petitioners failed to show that the private program was appropriate.

4. Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that all of Petitioners' claims are DISMISSED WITH PREJUDICE.

NOTICE

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

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

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

This the 21st day of February, 2017. ML

Melissa Owens Lassiter
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:

Stacey M Gahagan
Attorney At Law
stacey@gahaganlaw.com
Attorney For Petitioner

Tammy H Kom
Attorney At Law
tammy@lscnc.org
Attorney For Petitioner

Ann M Paradis
Attorney At Law
ann@annparadislaw.com
Attorney For Petitioner

Bill Elvey
NC Department of Public Instruction
due_process@dpi.nc.gov
Affiliated Agency

Eva Blount DuBuisson
Tharrington Smith, LLP
eva@tharringtonsmith.com
Attorney For Respondent

Stephen Rawson
Tharrington Smith, LLP
srawson@tharringtonsmith.com
Attorney For Respondent

This the 21st day of February, 2017.

AH

Anne M Hollowell
Legal Specialist
Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6700
Telephone: 919-431-3000