Joe D. Walters
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FILED
2017 AUG 25 AM 11: 13
OFFICE OF ADMIN HEARINGS

August 23, 2017

Office of Administrative Hearings
State of North Carolina
6714 Mail Service Center
Raleigh, NC 27699-6714

Re: 15 EDC 08808

Dear Sirs:

Enclosed is a copy of the Decision of the Hearing Review Officer for the State Board of Education for the case: [redacted] by and through his custodian [redacted] and [redacted] v. Wake County Board of Education and the Wake County Public School System (15 EDC 08808).

Sincerely,

Joe D. Walters
Review Officer

enc. Decision

**STATE OF NORTH CAROLINA** **BEFORE A STATE HEARING REVIEW**
**OFFICER**

**FOR THE STATE BOARD OF EDUCATION**
**PURSUANT TO G.S. 115C - 109.9**

[redacted] **by and through his custodian** [redacted] **and** [redacted]
Petitioner

v.

**Wake County Board of Education and the Wake County Public School System**
Respondent

**DECISION**

**15 EDC 08808**

FILED
2017 AUG 25 AM 11: 14
OFFICE OF ADMIN HEARINGS

This is an appeal of the Decision issued by Administrative Law Judge (ALJ) Stacey B. Bawtinhimer on June 26, 2017. The eleven day hearing for this case was held on February 14 - 17, 20 - 24, and March 8 - 9, 2017. Both parties appealed Judge Bawtinhimers' Decision on July 26 and the State Review Officer (SRO) was appointed on July 28, 2017. The Review was conducted pursuant to the provisions of N.C.G.S. 115C – 109.9.

The records of the case received for review were:

1. Two large boxes containing ALJ Records: ALJ Decision; Petition; Motions and Responses; ALJ Scheduling; ALJ Orders; Correspondence; Eleven (11) numbered Transcripts of the Hearing; One (1) Transcript of a Hearing on Petitioners' Motion to Compel; Stipulated Exhibit; Exhibits from both parties; Proposed Decisions; and miscellaneous records of the case.
2. The Eleven (11) numbered Transcripts of the Hearing were also received via electronic means.
3. Written Arguments from the parties.

**Appearances:**

For Petitioners: Ann M. Paradis, The Law Office of Ann Paradis, 301 Kilmayne Drive, Suite 102, Cary, NC 27511; Stacey M. Gahagan, Gahagan Law Firm P.L.L.C., 3326 Durham Chapel Hill Blvd., Suite 210-C, Durham, NC 27707

For Respondents: Carolyn A. Waller and Stephen G. Rawson, Tharrington Smith, L.L.P., 150 Fayetteville Street, Suite 1800, PO Box 1151 Raleigh, NC 27602-1151

For convenience and privacy, the following are used in this Decision to refer to the parties:

For the Student/Petitioner - [redacted]; Student
For Parents/Petitioners - [redacted], Mother; [redacted], Father; Petitioners
For Respondent - Respondent; Wake County Public Schools; WCPSS; LEA

## WITNESSES

For Petitioners:

[redacted] Petitioner mother

For Respondent:

[redacted] School Psychologist, Conducted 2013 and 2015 Psychoeducational Evaluations

[redacted] 2nd Grade Regular Education Teacher 2014-15 School Year

[redacted] 2nd Grade Special Education Teacher 2014-15 School Year

[redacted]; 3rd Grade Regular Education Teacher 2015-16 School Year

[redacted]; Senior Director for Policy and Fiscal Compliance for Special Education Services

## EXHIBITS ADMITTED INTO EVIDENCE

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

Stipulated Exhibits: 4, 7, 9-11, 15-18, 20-21, 23-25, 27, 29-45, 47-52, 54-58, 60-64, 70-74, 76-80, 83, 85-97, 101-105, 108, 109 (pp. 909, 910, 967, 1038), 113 (pp. 1107, 1130-1137, 1143, 1149, 1159, 1161, 1214, 1227), 115, 124 (pp. 1699, 1700, 1722), 130 (pp. 2022-2024, 2028-2029), 131, 134, 136 (pp. 2243-2244, 2257-2279), 137, and 140-147 *(hereinafter Stip. Ex. 1, Stip. Ex, 2, etc.)*

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

Petitioners' Exhibits: 1, 19, 27, 29 (pp. 380-384; 397-399; 408-410; 412413), 31 (p. 646), 36(99. 1110-1111), 53, 58, 65, 67, 84 (from timestamp 33.0034.34 and 48.25-55.03), 85 (pp. 1954-55, 1959-62, 1985-1990, 2065-2067; 2074, 2078-2080) and 87 (pp. 2116-2199) *(hereinafter P. Ex. 1, P. Ex. 2, etc.)*

Respondent's Exhibits: 3 (pp. 12-117), 12, 13 (172, 177-179, 334-335; 355-375), 14 (pp. 479-540), 15 (pp. 576-578), 41 (pp. 1511-1552), and 60-81 *(hereinafter R. Ex. 1, R. Ex. 2, etc.)*

## ISSUES

There was never a final agreement on the issues. There were 91 numbered issues in the original Petition, many not being IDEA issues or outside the time period of the statute of limitations. At the time of the beginning of the hearing there was no agreement on the issues nor was there a Pre-Trial Order. Upon direct order from the ALJ, the parties finally did submit a Pre-Trial order on the fifth day of the eleven-day hearing February 20, 2017. Even though this Pre-Trial Order had agreed upon witness lists, exhibits and a long list of stipulations, it did not have a list of agreed upon issues. Each party has its own list of issues. There were some similarities in the lists, but they were certainly different.

On March 1, 2017 following the end of the Petitioners' case-in-chief, the ALJ issued an Order Granting, Deferring, and Denying a Motion to Dismiss made by the Respondent. Within the Order, the ALJ stated what were to be the remaining issues:

a) Whether Respondent denied [redacted] a FAPE during the 2014-15 or 2015-16 school year by not placing him in his Least Restrictive Environment by failing to ensure access to the general curriculum and failing to determine that [redacted] could not be educated satisfactorily in the general education classroom with the use of supplementary aids and services.
b) If the answer to (a) is "yes," whether procedural violations related to the LRE determinations caused more than *de minimis* educational harm.
c) If the answer to (a) is "yes," whether those failures amounted to a predetermination that denied Petitioners meaningful participation in the IEP decision related to LRE; and,
d) Independent of issues in (a) through (c), whether the Respondent denied [redacted] a FAPE by failing to implement [redacted] math goals during either of the 2014-15 or 2015-16 school years.

In her Final Decision The ALJ worded these slightly differently, but these remained as the issues for the ALJ's Final Decision:

a) Whether Respondent denied [redacted] a FAPE during the 2014-15 or 2015-16 school years3 by not placing him in his Least Restrictive Environment ("LRE"), by failing to ensure access to the general curriculum, and/or failing to determine that [redacted] could not be educated satisfactorily in the general education classroom with the use of supplementary aids and services;
b) Whether procedural violations related to the LRE determinations caused more than *de minimis* educational harm.
c) Whether those failures amounted to predetermination that denied Petitioners meaningful participation in the IEP decision related to the LRE.
d) Whether Respondent denied [redacted] FAPE by failing to implement [redacted] math goals during either of the 2014-15 or 2015-16 school years.

On appeal, the SRO finds that the ALJ's determination of the issues remaining was consistent with the allegations; facts introduced at the hearing; and the Order Granting, Deferring, and Denying a Motion to Dismiss.

## PROCEDURAL BACKGROUND

1. On November 30, 2015, [redacted] and [redacted] filed a Petition for a Contested Case Hearing against the Wake County Public Schools System alleging that Respondent failed to timely identify and evaluate all of [redacted] needs, failed to develop appropriate IEPs as required by federal and state law, and failed to provide a FAPE in the LRE for the 2013-14, 2014-15 and 2015-16 school years. The date on the Petition was November 24, 2015 but was not filed with the Office of Administrative Hearings (OAH) until November 30. The ALJ, as well as both parties, consistently used the November 24 date throughout these proceedings. To avoid confusion, the SRO will also do so.

2. This case was initially scheduled for hearing on January 14, 2016, but the case was continued five (5) times at the requests of the parties, primarily on the basis that both parties were actively engaging in discovery. See Order dated February 10, 2017 describing history of continuances. The hearing finally began February 14, 2017.

3. On December 18, 2015, Petitioners' counsel made an initial request to compel entry upon land of [redacted].

4. The ALJ on May 3, 2016 denied Petitioner's Motion to Compel but further ordered that, "[i] f[redacted] and [redacted] provided Respondent with permission no later than May 2, 2016, Respondent shall

videotape [redacted] in each of the classroom settings addressed in the motion and submit copies of those videotapes to Petitioners no later than May 16, 2016."

5. Petitioners provided Respondent the requisite permission on May 2, 2016. On June 3, 2016 WCPSS provided multiple videos, which took place over a two-day period. The Petitioners asserted that contrary to the Court's Order, the videos did not contain footage of all of [redacted] school settings.

6. On July 14, 2016, the Honorable Augustus B. Elkins entered an order granting Respondent's Motion for Partial Dismissal based on the statute of limitations. Judge Elkins dismissed all claims and causes of action arising before November 24, 2015.

7. This Order was amended multiple times to clarify the language setting the relevant time-period. On November 11, 2016, Petitioners filed a Motion to Amend the August 22, 2016 Order granting WCPSS' Motion for Partial Dismissal. The final amended order, dismissing all claims and causes of action arising or occurring prior to November 24, 2014 with prejudice, was entered on February 6, 2017 by the Honorable Stacey B. Bawtinhimer, to whom this case had been reassigned.

8. On June 30, 2016, WCPSS filed a Motion for Sanctions against Petitioners requesting that [redacted] be excluded from testifying in this matter for violating Judge Elkins' Order from May 3, 2016. Petitioners filed its Response to WCPSS' Motion for Sanctions notifying Judge Elkins that WCPSS had clearly violated his Order by failing to provide the required videos by May 16, 2016 and failing to record [redacted] in all educational settings. While these Motions for Sanction were pending, on July 20, 2016 Petitioners filed a Motion requesting a Stay-Put Order as WCPSS had notified Petitioners that it had reassigned [redacted] from his neighborhood base school to a school that housed a regional Intellectually Disabled Mild ("ID-Mild") program and thus, Petitioners contended, changed [redacted] educational setting without conducting an IEP meeting.

9. Oral arguments on both the Motion for Sanctions and the Motion to Compel Stay-Put were held on August 1, 2016. On August 5, 2016, Judge Elkins issued two orders:

a. The first Order denied in part and granted in part WCPSS' Motion for Sanctions"...prohibiting any and all testimony and evidence from [redacted] occurring at any time on June 8, 2016 after entry upon [redacted]..." and

b. The second Order granted Petitioners' Motion to Compel Stay-Put and ordering "... [redacted] shall remain at [redacted] during the pendency of this matter."

10. On August 15, 2016, Petitioners filed a Motion for Summary Judgment indicating, among other things, that WCPSS failed to respond to 42 averments in the initial Petition or issue a general denial. This was denied on September 7, 2016.

11. The hearing was then set to begin February 14, 2017. On January 23, 2017 the matter was reassigned to the ALJ Stacey B. Bawtinhimer by Chief Administrative Law Judge Julian Mann, III.

12. On February 10, 2017, Judge Bawtinhimer granted Petitioners' Motion to Suppress Expert Testimony for Respondent's late disclosure of expert witnesses. The order specifically barred expert testimony from [redacted].

13. Subsequently, on February 16, 2017 Judge Bawtinhimer also granted Respondent's Motion to Suppress Expert Testimony for Petitioners' late disclosure of expert witnesses. The order specifically barred expert testimony from [redacted]

14. The hearing began on February 14, 2017 and ended on March 9, 2017, encompassing eleven (11) days of hearing.

15. On March 1, 2017 following the end of the Petitioners' case-in-chief, the ALJ issued an Order Granting, Deferring, and Denying a Motion to Dismiss made by the Respondent. The ALJ's Order stated:

> 1. Respondent's motion to dismiss under Rule 41(b) is Granted as to any and all claims other than those specifically defined in Conclusion of Law 19, and those claims are Dismissed with Prejudice.
> 2. Respondent's motion to dismiss is Denied as to the issues specifically defined in Conclusion of Law 19.
>
> Conclusion of Law 19 states that the remaining issues in this case following this Order, as defined by the Undersigned, are as follows:
>
> a) Whether Respondent denied [redacted] a FAPE during the 2014-15 or 2015-16 school year by not placing him in his Least Restrictive Environment by failing to ensure access to the general curriculum and failing to determine that [redacted] could not be educated satisfactorily in the general education classroom with the use of supplementary aids and services.
>
> b) If the answer to (a) is "yes," whether procedural violations related to the LRE determinations caused more than *de minimis* educational harm.
>
> c) If the answer to (a) is "yes," whether those failures amounted to a predetermination that denied Petitioners meaningful participation in the IEP decision related to LRE; and,
>
> d) Independent of issues in (a) through (c), whether the Respondent denied [redacted] a FAPE by failing to implement [redacted] math goals during either of the 2014-15 or 2015-16 school years.

16. Judge Bawtinhimer issued her Final Decision on June 26, 2017. She incorporated all the preliminary orders in her final decision.

17. Both parties appealed Judge Bawtinhimer's decision on July 26, 2017 and the undersigned State Review Officer was appointed on July 28, 2017.

## THE ALJ DECISION

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Petitioners met their burden of proof, by a preponderance of the evidence, that Respondent failed to ensure [redacted] was placed in the LRE and had access to the general education curriculum during both the 2014-2015 and 2015-2016 school years as follows:
   a) Respondent removed [redacted] from the regular education classroom for special education services an additional 8 sessions for each of the 4 reporting periods within the relevant timeframe during the 2014-2015 and 2015-2016 school years;
   b) Respondent unilaterally removed [redacted] from all the math and part of the language arts regular education classes during the 2014-2015 school year;
   c) Respondent unilaterally removed [redacted] from the regular education classrooms during the 2015-2016 school year which amounted to less than 30% of the school day with his nondisabled peers, a de facto self-contained placement.
   d) Respondent predetermined, without an IEP team meeting, these changes in [redacted] access to his nondisabled peers and regular curriculum thereby denying meaningful parental participation in this decision making process related to LRE; and,
   e) Respondent failed to include necessary supplemental aids/services so that [redacted] could be educated satisfactory in the general education classroom during both the 2014-2015 and 2015-2016 school years, but that this failure caused more than *de minimis* educational harm only for the 2015-2016 school year.
2. Petitioners are prevailing party on all issues above except for 1(e) where Petitioners only prevailed on the 2015-2016 school year and Respondent prevailed on the 2014-2015 school year.
3. Petitioners proved by a preponderance of evidence that Respondent failed to implement all of [redacted] math goals during the 2014-2015 school year, but did not prove educational harm; therefore, Respondent did not deny [redacted] a FAPE during the 2014-2015 school and Respondent prevails on this issue.
4. Petitioners failed to meet their burden with respect to the math goals implementation for the 2015-

2016 school year. Respondent implemented [redacted] math goals during the 2015-2016 school year and are prevailing party on this issue.

5. Respondent is prevailing party of all claims dismissed by prior Orders of this Tribunal.
6. With respect to the LRE in the November 2015 IEP, Petitioners failed to meet their burden and Respondent failed to provide a cogent and responsive explanation as to the appropriateness of the increased 40 minutes of special education services because all relevant unique circumstances were not considered by the IEP team, i.e., the impact of [redacted] undiagnosed hearing impairment and the inconsistencies in the psychoeducational evaluations.

IT IS HEREBY ORDERED THAT:

7. Respondent shall provide compensatory tutoring in the regular education content areas missed during the 2014-2014 and 2015-2016 school years as outlined in paragraphs 10 and 11 below.
8. Respondent will include daily collaboration between the regular education and special education teachers as a supplemental aid/service on [redacted] IEP. Respondent is to document and maintain data about the effectiveness of this collaboration as well as the modifications in [redacted] regular education classrooms. A mutually agreeable independent inclusion expert is to be retained at public expense to assist with [redacted] regular education inclusion and to oversee the data monitoring for one school year, or less if agreed by the parties, to determine the effectiveness of this inclusion, need for additional accommodations, and implementation of all existing accommodations.
9. Respondent will conduct inclusion training with the [redacted] staff from the either the independent inclusion specialist or an inclusion specialist from the North Carolina Department of Instruction.
10. To determine the appropriate placement and LRE, the following is needed: 1. an independent psychoeducational evaluation at public expense by a psychologist trained and experienced in evaluating children with hearing impairments; this evaluator needs to use cognitive and achievement testing appropriate for students with [redacted] disabilities, have access to [redacted] teachers, service providers, and parents, observe [redacted] on multiple occasions in all settings, communicate openly with the WCPSS and parents as equal participants; 2. a mutually agreeable inclusion specialist at public expense to review [redacted] records, observe [redacted] in the classroom, conduct teacher/staff/ service providers/parents interviews, and make recommendations for supplemental aids/services and their implementation and progress monitoring with data collection the inclusion program, train staff and supervise the implementation of inclusion for sufficient time for data to be collected regarding its effectiveness for a period of no more than 1 year after the start of implementation, parents and WCPSS have equal access to inclusion specialist, communicate openly with the WCPSS and parents as equal participants; 3. After completion of the evaluations, the IEP team will convene with the independent evaluator, inclusion specialist, related service providers, parents and school staff to review the evaluation results, develop an IEP with the appropriate level of inclusion as recommended by the inclusion specialist and independent evaluator. During the one-year duration period of this IEP, with the inclusion specialist's supervision, the IEP team will monitor, with research based data collection, [redacted] educational and social benefits as well as determine his rate of progress. The parties may revise the IEP by mutual agreement during this one-year period.
11. Because [redacted] was denied access to the math Common Core and may overall have gaps in his educational foundation because of his undiagnosed hearing impairment, the IEP team along with the independent evaluator and inclusion specialist are to develop a compensatory education plan for the missed instruction during the 2014-2015 and 2015-2016 school years to be implemented during the ESY, track out periods, and specials. This plan should be based on [redacted] rate of learning. If the team cannot agree as to the amount of compensatory education, then the independent evaluators determination shall be binding. In addition, the scheduling of compensatory services must be mutually agreement to both parties.

IT IS FURTHER ORDERED THAT:

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

## THE APPEAL

Both parties filed a Notice of Appeal on July 26, 2017 and the undersigned was appointed on July 28 as the State Review Officer (SRO) to conduct the review. Each party appealed specific items in the ALJ's decision:

The Petitioners' appeal was for the following:

1. The Office of Administrative Hearings May 3, 2016 denial of Petitioner's Motion to Compel Defendant's to allow an Entry upon Land for the purpose of conducting observations of [redacted] in the educational environment;
2. The Office of Administrative Hearings September 7, 2016 order denying Petitioner's Motion for Summary Judgment;
3. The Office of Administrative Hearings February 6, 2017 dismissal of all claims and causes of action arising before November 24, 2014;
4. The Office of Administrative Hearings March 1, 2017 dismissal of all claims related to the appropriateness of the IEP goals and present levels of performance;
5. The Office of Administrative Hearings June 26, 2017 Final Decision in regards to Paragraph # 4 which concludes that "Petitioners failed to meet their burden with respect to the math goals implementation for the 2015-2016 school [year]. Respondent implemented [redacted] math goals during the 2015-2016 school year and are prevailing party on this issue;" and
6. The Office of Administrative Hearings June 26, 2017 Final Decision "that any remaining claims of Petitioners are DISMISSED WITH PREJUDICE."

The Respondent's appeal was for the following:

1. Respondent appeals the ALJ's final decisions 1(a-e), 2, and 6, and orders for relief 7-11 in the Final Decision dated June 26, 2017, as well as the underlying findings of fact and conclusions of law relied upon by the ALJ in reaching the final decisions and orders for relief being appealed.
2. Further, Respondent expressly appeals any findings of fact or conclusions of law that address matters that were not expressly identified in the March 1, 2017 Order as having survived Respondent's Rule 41(b) motion, dismissed as outside the statute of limitations by the Order dated July 14, 2016 (as subsequently amended February 6, 2017), not properly plead in the Petition, dismissed by the Order dated March 1, 2017, or identified by the ALJ in open hearing as issues that were not before her.
3. Respondent also appeals the ALJ's Order dated February 10, 2017 granting Petitioners' Motion to Suppress the expert testimony of [redacted] Respondent also appeals the ALJ's use of evidence admitted solely for historical purposes in finding substantive or procedural violations by the Board.
4. Finally, Respondent appeals the evidentiary rulings by the ALJ that permitted Petitioners to present testimony or admit documentary evidence regarding matters that were dismissed as outside the statute of limitations by the Order dated July 14, 2016 (as subsequently amended February 6, 2017), were not properly plead in the Petition, or were identified by the ALJ in open hearing as issues that were not before her, as well as evidentiary rulings in which the ALJ did not allow the Board to present testimony or evidence in response to what Petitioners were permitted to present.

The SRO is limited in that he can review only that which was appealed and made an attempt to do so. As both parties have appealed those parts of the ALJ's decision unfavorable to each, the review by the SRO of necessity encompasses most of that decision.

## STANDARD OF REVIEW

The standard of review that must be used by the Review Officer for the State Board of Education is found in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The Supreme Court held that due weight shall be given to the state administrative proceedings. In *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991), the Fourth Circuit explained *Rowley's* instruction that "due weight" be given to state administrative hearings. The court noted, "By statute and regulation the reviewing officer is required to make an independent decision . . .." *Doyle*, 953 F.2d at 104. The court held that in making an independent decision, the state's second-tier review officer must follow the "accepted norm of fact finding."

North Carolina's District Court Judge Osteen interpreted this requirement of *Rowley* and *Doyle*. *Wittenberg v. Winston-Salem/Forsyth County Board of Education, Memorandum Opinion and Order* 1:05CV818 (M.D.N.C. November 18, 2008) A State Review Officer (SRO) must follow the same requirements as the courts. The SRO must consider the findings of the ALJ as to be *prima facie* correct if they were regularly made. An ALJ's findings are regularly made if they "follow the accepted norm of fact-finding process designed to discover the truth." The SRO finds that the ALJ's facts conform to this requirement, with many of them included in this Decision.

## SRO PRELIMINARY STATEMENT

The SRO finds that the ALJ's decisions and orders related to the statue of limitations in this case are consistent with IDEA and the Laws of North Carolina. *See* 20 U.S.C. §1415(f)(3)(C) and N.C.G.S. 115C-109.6(b). As the Petitioners showed none of the exceptions that were provided in N.C.G.S. 115C-109.6(c) that would extend the time period beyond one (1) year, the relevant time period for this case was for the one year time period prior to their petition on November 24, 2015. The Petitioners, on appeal, attempted to make a showing that there were exceptions. Their arguments were not persuasive. Only substantive and procedural claims during the one-year time period prior to November 24, 2015 are covered by this review.

The ALJ allowed significant testimony from school years 2013-14 and 2014-15. This was prior to the time period covered by this case. The ALJ, following repeated objections from the Respondent that testimony was outside the applicable time frame, clearly expressed that it was only being allowed for historical reasons. Significant testimony, therefore, was admitted that did not pertain the claims from the original petition nor did it pertain to the issues in the Pre-Trial Order. The SRO estimates that as much as one-third to one-half of the testimony was not relevant to the issues arising during the time period of the case. Granted, some of this testimony was informative from a historical perspective, but most was irrelevant. From the perspective of the SRO, the ALJ's conclusions were impacted by substantive evidence provided in some of this "historical" information. This is contrary to her order on February 6, 2017, dismissing all claims arising or occurring prior to the one-year period. Interestingly, the Final Decision at the end did not appear to be influenced by the irrelevant findings and conclusions.

The SRO, therefore, purposefully ignores and will not comment on those ALJ facts that pertain to the time period prior to November 24, 2014. The exception being a few historical facts needed to understand the background of the case.

The ALJ had an extraordinarily large number of Facts (374) and Conclusions (107). The SRO choses to have far fewer Facts and Conclusions. Time limitations imposed on the SRO for conducting this Review do not allow commenting on those omitted.

The SRO feels compelled to comment on the credibility of the witnesses at the hearing The ALJ lists each in her Findings, and provides a statement regarding credibility. The SRO accepts the ALJ's impressions, but still has some reservations concerning two of the witnesses: [redacted] and Petitioner [redacted]. These two willfully defied a Order of an Administrative Law Judge initially assigned to the case. Their noncompliance with the judge's order was not the result of a misunderstanding, but an act of deliberate defiance. Sanctions were imposed, yet the Administrative Law Judge stopped short of instituting contempt proceedings. (*See* Order dated August 5, 2016). The actions of these two witnesses affect their credibility.

**Having reviewed the records of the case**, the Review Officer for the State Board of Education independently makes Findings of Fact and Conclusions of Law in accordance with 20 U.S.C. 1415(g); 34 CFR §300.514; N.C.G.S. 115C-109.9; and the *Policies Governing Services for Children with Disabilities*, NC 1504-1.15. Most of the facts in this Decision conform to some of those determined by the ALJ. The SRO finds that most of the ALJ's facts (though lengthy) were regularly made and are consistent with the evidence introduced in the hearing. As stated previously, a very large number of the ALJ's facts related to issues outside the time period covered by the statute of limitations and had no bearing on the issues. The ALJ admitted significant testimony for historical reasons, stating openly in the hearing that the facts from that testimony were only for that purpose. She, however, made findings pertaining to these historical facts in her Decision. It appeared, to the SRO, that some of these historical facts affected her decision. These facts were ignored and purposefully omitted by the SRO. (A few are included, purely for historical reasons in order to understand the issues of the case)

Prior to the hearing, the parties agreed to Stipulations of Fact on February 20, 2017. There was a total of 84 Stipulated Facts listed. To list them in this decision would be burdensome and unnecessarily lengthen this decision. The Stipulations of Fact in the Pre-Trial are incorporated fully herein by reference. Those relevant to this decision are intertwined and incorporated within the Findings of Fact to the extent possible.

To the extent that Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

## FINDINGS OF FACT

1. [redacted] is an eight (8) year-old student who at the time of the hearing was enrolled in the [redacted] of the Wake County Public School System. Since age three (3), [redacted] has received special education services. T. p. 588. He has [redacted] He has receptive, expressive, pragmatic/social language delays and unilateral hearing loss in the right ear (Stip. Exs. 18, 73), T. p. 584; p. Ex. 1.

2. The parents' primary concern in this case is the inclusion of [redacted] in the general education classroom, and his access to and involvement in the full general education curriculum. Petitioners repeatedly requested that [redacted] be educated in the general education classroom with his nondisabled peers. Stip. Ex. 33, p. 184. A secondary and related concern is the implementation of [redacted] IEP math goals. The Petitioners contend that the failure to implement [redacted] math goals in the general education classroom impacted his ability to access and make progress in his educational program.

3. Petitioner [redacted] is heavily involved at [redacted] school and in the community. She spends multiple days per week volunteering at [redacted] school, T. p. 1065. She is also a member of several

local committees, including [redacted], and the [redacted] T. p. 1222.

4. [redacted] has been determined eligible for services under IDEA, with a primary area of eligibility of [redacted] and a secondary area of eligibility of [redacted] Stip. 15.

5. The staff that worked with [redacted] has described [redacted] as sweet, carefree, happy-go-lucky, energetic, and personable. T. pp.1448, 1622. His strengths include his positive attitude, his memory for sight words, and his love of reading. T. p. 1448. Stip. Ex. 97, p. 626. His areas of greatest need include comprehension, higher order thinking, and generalization. T. pp. 1448, 1622, 1726.

6. On the IEPs within the statutory period, the IEP teams reported [redacted] strengths as being a friendly boy who gets along well with his peers. He likes to participate with his peers especially when playing games, reading books, and listening to stories. He is eager to learn and likes flashcards and iPad apps. He works hard to complete assignments and follow school and classroom rules. Stip. Ex. 50, p. 290; Stip. Ex. 57, p. 336. [redacted] is an outgoing student who is well liked by his peers. Reading is a relative strength for he loves to read and is interested new books. He is gaining confidence with independence. Stip. Ex. 88, p. 560.

7. [redacted] first enrolled in the Wake County Public Schools in August 2013 after moving to Wake County from Tennessee. Stip. Ex. 16. He has attended [redacted] a WCPSS school, from August 19, 2013 to the present. Stip. 17; Stip. Ex. 11. During the time period covered by this case, [redacted] was in the second and third grades. Stip. 18 and 19.

8. In Tennessee as a kindergartner, [redacted] received both academic and special education services within the general education classroom but was not fully included with his nondisabled peers. [redacted] testified that he was fully included even though his IEP stated that he received math instruction in a resource setting. He also received Speech/Language Therapy, Occupational Therapy, and Physical Therapy in a special education setting. Stip. 14, 15; Stip. Ex. 4. According to [redacted], [redacted] made progress in every academic area, including reading and math while in this placement. T. pp. 590, 592-93; Stip. 30; Stip. Ex. 4.

9. Although his IEP indicated that he would be fully included for the 2013-14 school year, his IEP of April 12, 2013 (just before moving to North Carolina) had a very clear statement: "[redacted] learns best with small group setting. His developmental delay can best be met in the special needs classroom, but will be attending class with his peers in a kindergarten classroom with an assistant." Stip. Ex. 4. The Tennessee school did not have a chance to fully implement this IEP, for [redacted] enrolled in Wake County in August 2013.

10. Following enrollment in the WCPSS, [redacted] was placed in a resource setting for part of the school day. His program remains substantially the same at the time of the hearing. He is currently in a "stay-put" situation.

11. During the relevant time period for this case, [redacted] has been in Track 4 of the school's year-round program. Track 4 track-in periods for the 2015-2016 school days contained the following amount of scheduled instructional days:

Reporting Period 1: 46 full school days; 2 early release days
Reporting Period 2: 38 full school days; 1 early release day
Reporting Period 3: 41 full school days; 3 early release days
Reporting Period 4: 51 full school days
Stip. 26.

12. Although the Petitioners admit that he had made progress since enrolling in Wake County, they have never been satisfied with his program. The Petitioners have repeatedly requested that [redacted] be educated in the general education classroom with his nondisabled peers. They envision nothing less than full inclusion in the general education program as acceptable.

13. Two psychological evaluations have been conducted by WCPSS, the first in 2013 when [redacted] arrived from Tennessee (September/October 2013) and the second as part of a reevaluation at the end of his 2nd grade year (June 2015). Stip. Exs. 16, 76. In both his performance indicated that he was eligible for the classification of [redacted]. There is no disagreement between the parties on this eligibility.

14. In the reevaluation in 2015 [redacted] academic scores, especially in math, dropped dramatically. Petitioner's expert witnesses disagreed with the WCPSS school psychologist as to the reason for the significant decline in [redacted] achievement scores from September 2013 to June 2015. Neither were that convincing, but the evaluation results do indicate that in most academic areas [redacted] scores did decline. Both parties, however, agree that [redacted] made academic progress during this period.

15. A hearing or audiological issue was present from the time [redacted] initially enrolled in Wake County. The parents knew of the significant hearing loss from birth. P. Ex. 1. Mistakes were made in the 2013 hearing screening that did not discover [redacted] hearing loss in one ear. The parents reviewed the hearing screening results in an IEP meeting along with other team members. The parents had to know that the hearing screening was flawed, for they had knowledge of the hearing problem since soon after [redacted] birth. P. Ex. 1. There is nothing in the record that they brought this to the attention of school officials. It was not until the parents requested an audiological evaluation during 2014 that it was known to school officials that [redacted] had normal hearing in the left ear and severe/profound hearing loss in the right ear. Stip. Ex. 140. At the IEP meeting on October 20, 2014 the team instituted preferential seating accommodations but took no further actions, for there was no indications that it affected his ability to access the educational program. The preferential seating provision was consistently included in subsequent IEPs. The issues concerning the failure to detect [redacted] hearing problem until the Fall of 2014 were outside the time period of this case and are not issues to be decided.

16. The Petitioners provided no data or expert testimony that [redacted] loss of hearing in one ear adversely affected his ability to access the educational program. During the time period of this case, the Respondent had accommodations in place, specifically preferential seating. From a historical perspective, however, these earlier events give a clearer picture of [redacted] and the struggles he has had.

17. It was of concern to the ALJ that there may have been some potential loss of instruction because of the mistakes made by the Respondent's staff with regard to the hearing issue, even though it did occur outside the relevant time period. *See* ALJ findings 65 and 66.

18. The Petitioners, in testimony, made a claim that the Psychoeducational Assessments in both 2013 and 2015 were flawed because the psychologist made no accommodations for [redacted] hearing loss, other that closer seating. T. pp. 1679, 1692. The same psychologist conducted both 2013 and 2015 evaluations using instruments that needed a verbal response, knowing that [redacted] has hearing loss. She knew of the hearing loss from a records review of the hospital discharge summary at the time of his birth listed the hearing loss. P. Ex. 1; T. p. 1679. At the beginning of the evaluation process she learned that [redacted] could hear and understand directions for he responded appropriately to the sample verbal questions before the formal testing was administered. She made the professional judgment that the verbal tests she had chosen were appropriate. T. pp. 1700-01.

19. While the psychologist did admit that nonverbal IQ tests were appropriate for students with hearing loss, the Petitioners made no attempt to show that the verbal tests were inappropriate for a child with normal hearing in one ear. T. p. 1681. The psychologist acknowledged in the 2015 evaluation that '[redacted] could respond to non-complex questions without visual support." Stip. Ex. 76. This indicates that a nonverbal instrument is not needed.

20. The psychologist includes the usual disclaimers in her evaluation reports, such as the evaluation provides only a snapshot of his functioning on a given day. She, however, clearly states that the evaluations are fairly accurate and reliable estimates of his current levels of functioning. Stip. Exs. 16, 76.

21. On October 20, 2014 an IEP meeting was held for the purpose of the annual review. Stip. 50. While the actions of the team at this meeting are outside the relevant time period for this case, the IEP developed in this meeting was active for a small portion of the relevant statutory period.

22. The October 20, 2014 IEP provided an accommodation for [redacted] hearing loss in his right ear with preferential seating. T. p. 836; Stip. Ex. 55, p. 330. The Petitioners showed videos of [redacted] in the regular education classroom in 2016, during preparations for the hearing in this case. Though well outside the time period of this case, the Petitioners maintained that it may be indicative of the Respondent's implementation of the needed accommodation. The same accommodation, preferential seating has been in place since October 2014. In one video, [redacted] was observed sitting at an angle, maybe 4 feet from the front wall of the regular education classroom with his good ear sometimes facing the wall and deaf ear facing the teacher and his peers. During instruction from the general education teacher, [redacted] aide appeared to speak his left [hearing] ear that may have prevented him from hearing the teacher. Stip. Ex. 143; T. p. 487. His right ear sometimes faces the teacher if she is in the middle of the classroom. Although this video is clearly outside the relevant time period, it may indicate that the accommodations have not been implemented with fidelity.

23. During the implementation of the October 2014 IEP that was in effect for a portion of this case, [redacted] stated that the instruction in the special education classroom did not appear to be connected to what was going on in the general education classroom, and did not provide [redacted] with the opportunity to learn how to stay focused and attend to his work by working independently. T. p. 480. She believes [redacted] could be more independent and successful in the general education classroom if he was pre-taught concepts and vocabulary before a lesson. T. p. 481. [redacted] maintains that there was no planning for generalization. T. p. 481.

24. Both Dr. [redacted] maintained throughout their testimony that there was no instruction needed by [redacted] that could not be provided in the general education classroom. They stated numerous times that the resource room did not need to be a component of [redacted] program. Most of the testimony of Petitioners' two experts appeared to be focused on the need for full inclusion for all students. Their testimony was philosophical in nature rather than focused specifically on [redacted]. They also critiqued the data in the record. In testimony, they made many inferences and assumptions, for the data they wanted to see was not in the record maintained by WCPSS or introduced by the Petitioners during the hearing. Neither of these experts had any first-hand knowledge of [redacted] classroom experiences. Their first-hand knowledge was confined to only a few hours observing [redacted] in his home setting. While the ALJ appeared to place great weight in the testimony of these two "expert witnesses," the SRO is less inclined. Their opinions related to [redacted] daily classroom schedule, teacher activities, and teacher decisions were based primarily on conjecture and assumptions.

**December 2, 2014 IEP**

25. An IEP meeting was held on December 2, 2014. This was the first meeting during the relevant time period. The Invitation to Conference indicated the purpose of the meeting was to discuss and/or develop, review, and/or revise the child's IEP. Stip. 57; Stip. Ex. 54. From the parents' perspective, the purpose of the meeting was their request that [redacted] remain in his core academic classes (math, language arts) and receive pull-out special education instruction during "specials" such as physical education, music, and art. Stip. Ex. 56.

26. The school-based members of the IEP team also indicated that [redacted] had behaviors indicative of frustration from long periods of instruction that may be impeding his learning that justified his removal from his nondisabled peers. Stip. Ex. 55, p. 330; T. pp. 357-58. His teachers, however, did not provide parent requested data on frustration. T. pp. 823-24. It was not the parents' expectation that [redacted] should have long periods of instruction, and he had an accommodation in his IEP for movement activities. T. pp. 825-26; Stip. Ex. 57, p. 345-348. No changes were made to the IEP to address frustration. T. 830.

27. Both [redacted] and [redacted] attended the December 2, 2014 IEP meeting and received a copy of the Prior Written Notice and the Minutes. Stip. 59, Stip. Exs. 55, 56.

28. In response to the question, "Does [redacted] have behavior(s) that impede his/her learning or that of others," the IEP team indicated "no" on the IEP Stip. 60; Stip. Ex. 57, p. 337.

29. In response to the question, "Is [redacted] deaf or hard of hearing," the IEP team indicated "yes" on the December 2, 2014 IEP. Stip. 61; Stip. Ex. 57, p. 337. There was, however no significant discussion regarding the hearing loss and no team member, including parents, proposed any change in his previous accommodation of preferred seating. Stip. 62; Stip. Exs. 55, 57.

30. The IEP team denied the parents' request to maintain [redacted] in the core academic classes and pull him out of "specials" for his special education instruction. The school-based members provided many reasons, among them being how much [redacted] enjoyed the specials and his ability to make progress in those activities. It was also more difficult for him to make meaningful progress in the core academics, especially math and reading comprehension. Stip. Ex. 55.

31. The Prior Written Notice from the IEP meeting on December 2, 2014, indicates the team made the following decisions:

a) Added adult assistance in extra-curricular activities [i.e., book club]; and
b) Rejected the parent's request that special education services in the special education setting be scheduled at times when [redacted] would otherwise be in specials and recess and not when he is scheduled for core academics.

Stip. 63; Stip. Ex. 55.

32. The team did not review or modify any of the present levels of performance or goals that were brought forth from the October IEP. Also, the academic supplemental aids, supports, modifications, and/or accommodations in the IEP were neither reviewed nor modified from those in the previous IEP. Stip. 65; Stip. Exs. 55-57.

33. The service delivery in [redacted] December 2, 2014 IEP was:

| Type of Service | Sessions | Time | Location of Service |
|---|---|---|---|
| Math | 36 per Reporting Period | 35 min. | Special Ed. Setting |
| Reading | 36 per Reporting Period | 45 min. | Special Ed. Setting |
| Writing | 36 per Reporting Period | 40 min. | Special Ed. Setting |
| Speech/Language Therapy | 24 per Reporting Period | 15 min. | Special Ed. Setting |
| Speech/Language Therapy | 7 per Reporting Period | 15 min. | Regular Ed. Setting |
| Occupational Therapy | 6 per Reporting Period | 30 min. | Special Ed. Setting |
| Physical Therapy | 1 per Reporting Period | unidentified | Regular Ed. Setting |
| Stip. 68; Stip. Ex. 57 | | | |

**March 24 IEP Meeting**

34. An IEP meeting was held on March 24, 2015. The Invitation to Conference indicates the purpose of the meeting was "Discuss special education for initial review and/or reevaluation determination." The team agreed to conduct an evaluation to determine present level of academic achievement and developmental needs and determine if any addition or modifications to special education and/or related services are needed to meet measurable annual goals and participation in the general curriculum. Stip. 69; Stip. Exs. 61- 64.

35. [redacted] attended the March IEP meeting and received a copy of the Prior Written Notice and the Minutes. Stip. 70; Stip. Exs. 62 & 63.

36. The team the team agreed to the following components for the evaluation:
   a) Informal anecdotal observations of speaker FM system;
   b) Data collection on math trial in general education;
   c) Formal assessments in the following areas: adaptive behavior; audiological; educational; motor screening; otological evaluation; psychological; social developmental history; speech/language evaluation; functional listening assessment; and HI test. Stip. 71; Stip. Ex. 64, p.415.

37. The purpose of the March 24, 2015 IEP meeting did not include a review and update to the IEP, and the team in fact did not review or modify the IEP. Stip. 73; Stip. Ex. 61, 62.

**Removal from Regular Education Classroom**

38. During the spring of 2015 (the exact date not clear) [redacted] teachers changed his times of attending the EC classroom. They did not change the service delivery in his IEP. The effect was that [redacted] began receiving most of his math instruction in the resource room rather than in the regular classroom. P. Ex. 19; Stip. Ex. 109; T. p. 280. T. pp. 281, 352-53; Stip. Ex. 141, pp. 2437-38.

39. The change in [redacted] daily schedule when his special education teacher raised concerns that [redacted] was returning to math instruction in the regular classroom during the independent study portion of the class without the benefit of the general education instruction. T. p. 1478. She also testified that [redacted] needed more direct, intense instruction in math. This decision was consistent with his IEP's

service delivery, for no change was made in the time away from the regular classroom. Stip. Exs. 43, 44, 50, 51, 55, 57, 70, 71.

40. There was an allegation that [redacted] received one hour of specialized instruction in math outside of the general education setting every day after his schedule was changed, although his IEP authorized 35 minutes of specialized instruction in math. The Petitioners based their allegation on the testimony of the special education teacher who said clearly that from 10:00 to 11:00 he would be in the EC classroom. She did not say that that time period in the EC classroom was devoted to math instruction. T. p. 1599; Stip. Ex. 50. This is an "artful" interpretation of the testimony and conjecture on the part of Petitioners. The conjecture is based partially on the fact that during that one hour period, 10:00 to 11:00, the regular education teacher had scheduled math with the remainder of students. T. p. 280. There was no evidence or testimony from [redacted] teachers concerning which subjects were taught in the EC setting during that time period. [redacted] was in the EC setting for math, reading and writing. Stip. Ex. 57. The facts in the record do not support this allegation.

41. There was no IEP meeting, nor was one necessary, prior to this change in [redacted] schedule regarding when and where he received instruction. Neither the service delivery nor any other part of the IEP was altered. Changes in a schedule, as long as it does not change the IEP, are the prerogative of the LEA.

42. This one misinterpretation formed the basis of much of the ALJ's Decision, for the ALJ repeatedly stated that this was a unilateral change to one hour of specialized instruction in math outside the general education setting. (*See* ALJ Facts 175, 176, 210-214.) The ALJ repetitively used such terms as unilateral removal, unauthorized removal, and complete removal from general education. These were taken directly from the Petitioners' Proposed Final Order and reflect artful interpretation and wordsmithing by the Petitioners. The actual record does not support these findings.

**Respondents Rationale for Using Special Education Settings**

43. The Respondent's rationale for using special education settings and not providing full inclusion in the general education classroom was consistent in all IEPs and was essentially the same as in testimony:

> [redacted] is working below grade level in all academic areas and requires direct, intense, and explicit instruction in a small group setting at his instructional level, He works at a slower pace than his peers and requires teacher prompting and assistance in order to make progress. A small group setting is also needed to minimize distractions. Stip. Ex. 50, p. 305; Stip. Ex. 103 p. 788.

44. The Petitioners and their experts repeatedly stated that the Respondent did not have a sufficient reason to remove [redacted] from the general education setting without a lot of explicit data. The SRO is not totally convinced by the Petitioners' arguments on this issue. The Respondent during testimony offered a cogent and responsive explanation for most of their decisions, as required by *Endrew F.* (*Endrew F. v. Douglas County School District RE-1*, _U.S. _, March 22, 2017) Usually, the only thing lacking was the extensive and explicit data that the Petitioners wanted. Such data is not required by IDEA.

45. In objecting to decisions not to adhere to their wishes to have full inclusion of academic areas in the regular classroom, the Petitioners placed great emphasis on the opinion of [redacted], for he definitely believed that the best placement for [redacted] was an [redacted] classroom. Stip. Ex. 141, p. 2436. He also stated that [redacted] really needs increased time/services in special education and that the staff believe he could be served by increasing his special education services, especially in the special education setting." Stip. Ex. 141, pp. 2436, 2440.

46. [redacted] also served as the LEA representative in the IEP meetings. Stip. Exs. 50, 103. While he voiced his opinions, he did not persuade the remainder of the IEP team to incorporate his preference for an [redacted] self-contained classroom. Stip. Exs. 56, 95. There is nothing in the record to substantiate the Petitioners' allegation that the Respondent has decided or is contemplating placement of [redacted] in an [redacted] self-contained classroom. Any individual, including a principal, can have their own opinion regarding special education, just as the parents have clearly voiced in this case. The opinion of one staff member did not translate into corresponding actions of the Respondent.

**The Math Trial in Spring 2015**

47. At the March 2015 IEP meeting, the IEP team discussed that data should be collected during a 2-3 week trial period to determine whether [redacted] should spend more time in the general education setting. Stip. Ex. 55, p. 330; Stip. Ex. 56, p. 334. A mainstreaming trial for math was conducted for two weeks in May 2015. Stip. 74.

48. As part of the mainstreaming math trial, [redacted] would receive thirty (30) minutes of math instruction in the general education classroom followed by fifteen (15) minutes of review of the general education math instruction in the special education classroom. Stip. 72; Stip. Ex. 63. This was a mutually agreed upon deviation from the IEP.

49. According to [redacted], there is no evidence that resource teacher and general education teacher were co-planning and co-teaching the content together. She testified that there was also no evidence of support strategies so that [redacted] could be successful during the time he was receiving math instruction in the general education classroom. T. 459.

50. Prerequisite skills, such as how to use a ruler, were not taught to [redacted] before the math trial, even though the trial concerned measurement. Stip. Ex. 95, p. 618; T. p. 1795. [redacted] did not receive instruction on an IEP goal to learn to measure prior to the math trial, and materials were not sent home in advance of the lessons to prepare him. According to [redacted], the Respondent failed to ensure [redacted] success in the trial. T. pp. 504-05. It was her opinion that the Respondent was trying to prove [redacted] could not be successful and pre-determined the outcome of the math trial by not provided the necessary supports for the trial. T. p. 510.

51. The implementation of the math trial was not an issue before the ALJ or this SRO. Instruction in math, however, is a central issue for the case. The Respondent, later at the October 2015 IEP meeting, used [redacted] "failure" in the math trial as one of the justifications to possibly seek a more restrictive setting. Stip. Ex. 95. This appears to be only one of several actions by the Respondent that the Petitioners claimed had "predetermination" clearly written on it. The Petitioners maintained that this trial indicates that the staff either wanted [redacted] to fail in the regular math education setting or did not understand how to implement strategies to mainstream a child in a regular education classroom.

**June 2015 Reevaluation**

52. The ALJ included a number of facts (28) pertaining to the reevaluation results obtained in June 2015. There were no issues pertaining to the reevaluation that survived the ALJ's Order Granting, Deferring, and Denying, in Part, Respondent's Rule 41(b) Motion to Dismiss that was issued on March 1, 2017. Most of these facts, therefore, are not relevant to the surviving issues.

53. When the psychologist was conducting observations of [redacted] as part to this evaluation, she observed in the special education setting and not in the regular education classroom. This is a minor procedural error, for observations are to be made in all settings. Stip. Ex. 76.

54. Because of [redacted] known hearing loss, as part of the reevaluation he had both an Otological Examination by an ENT and a Functional Listening Assessment by an Audiologist. It was confirmed that the hearing loss in his right ear was congenital but verified that [redacted] was an excellent listener using his left ear in both quiet and in the presence of background noise. Stip. Ex. 92.

55. In comparing the 2013 and 2015 standardized testing results, there were many unexplained differences. The Petitioners' experts stated that the psychologist did not adequately explain these differences to the parents and IEP. The psychologist, during testimony, acknowledged that there were differences that she could not explain. The experts, not being psychologists, only gave speculation as to the cause of the differences. It is not a procedural error to be unable to comprehend and fully understand the changes that occur in a child's functioning over a period of time.

56. Although the ALJ questions the validity of the cognitive evaluations, there is insufficient information in the record reach the conclusion that the evaluations performed are not reliable estimates of [redacted] performance. There are, however, still questions about [redacted] performance that need to be answered.

**Data Collection**

57. The Petitioners, especially their experts, raised many questions about the data, or lack thereof, that the Respondent should be maintaining.

58. [redacted] testified that in the review of [redacted] educational record it was difficult to find measurable or objective data that the IEP team used in making decisions. T. pp. 175, 466. It was clear that the Respondent's teachers did not collect or maintain the type of data preferred by Petitioners' experts. Both were from an ABA background, so their point of view was if detailed ABA type data was not collected, analyzed, and maintained then the Respondent would not be able to make effective decisions. IDEA does not require the extensive data collection and maintenance about which the Petitioners' experts testified at length.

59. Respondent's teachers did collect data and utilize it for progress monitoring with regards to IEP goals. This included classroom assessments, anecdotal records, and student worksheets. Most of this was not maintained over time, even destroyed at the end of a school year. As the hearing in this case was almost two years after the relevant time period, it is unrealistic that significant data would still exist that had not been incorporated in progress reports and report cards.

**Teacher Collaboration**

60. Collaboration between a student's regular and special education teachers was an issue that received a lot of testimony. It is a necessity to unsure the success of a student's progress towards IEP goals. It is appropriate, though not always required, to include collaboration as a supplemental aid/ support in a child's IEP. Petitioners' experts testified that, in [redacted] case, it should be clearly spelled out in the IEP. T. p. 467.

61. The Petitioners' experts emphasized the importance of teacher collaboration as a supplementary aid or service, T. pp. 270, 467. In reviewing [redacted] work samples, [redacted] found some really good attempts by [redacted] regular education teacher in the second grade to modify work, but she asserted that [redacted] would have benefited from more collaboration with the special education teacher to improve modifications and accommodations. Stip. Ex. 130, p. 2020; T. pp. 276, 466. [redacted] admitted on cross-examination that she did not know how much [redacted] teachers were collaborating, T. p. 532.

62. There is evidence that [redacted] work was modified in the general education classroom and accommodations provided. Reading center assignments were modified from what his peers were doing. He received more manipulatives and other structural supports. T. p. 1484. For certain writing activities in centers, [redacted] work was scaffolded to support his creation of complete sentences. T. p. 1484-85. Much of this was done by the individual teachers and not as a result of collaboration.

63. Testimony from teachers clearly showed that they were in fact collaborating during 2014-15. T. pp. 1457-58, 1725. The collaboration was informal, not recorded or included in the IEPs, but did enable [redacted] to access the general education curriculum and be integrated with his nondisabled peers.

64. There was no comparable testimony about collaboration among teachers regarding the 2015-16 school year that was within the relevant time period. Each teacher appeared to be acting independently. The special education teacher testified that she did not assist with modifications and accommodations in the general education classroom, and that she never visited in the general education classroom during the relevant time period. T. pp. 1955, 1961

**The October 2015 IEP Meeting**

65. On October 19, 2015, the IEP team conducted [redacted] annual review. Both parents attended the facilitated October Annual Review IEP meeting and received a copy of the Prior Written Notice and the Minutes. Stip. 76, 77; Stip. Exs. 93, 94, 95.

66. Prior to the meeting, the team provided a draft IEP and evaluation reports to the parents. T. p. 964. The parents brought written comments on the draft to the IEP meeting and following the meeting provided those written notes to the team, T. pp. 970, 1243, Stip. Ex. 89. The parents also provided multiple pages of written concerns that had been prepared for the meeting, T. p. 1242. P. Ex. 105.

67. The team first completed the reevaluation process and considered eligibility questions. It then proceeded to review and revise the IEP. Stip. Ex. 94, 95. The team also reviewed data including the results of the math trial.

68. The team was not able to complete the entire annual review during the four-hour meeting. T. p. 1982. There was extensive conversation about the evaluations and the parents asked many questions throughout. T. pp. 1983-84. The team compared [redacted] performance from his second-grade year to the start of his third-grade year. T. pp. 1985-86. The team did not reach the portions of the IEP related to goals, supplementary aids and services, or service delivery. T. p. 1239.

69. At the end of the scheduled time, there was a proposal to adopt the draft IEP goals as written, for the IEP currently in force was expiring. The parent did not agree, but the LEA Representative agreed to adopt the proposal, contingent upon reconvening the team within three weeks to finish the review process. T. p. 1986.

70. The service delivery in [redacted] October 2015 IEP was:

| Type of Service | Sessions Per | Time Per Session | Location of Services |
|---|---|---|---|
| Math | 36 per reporting period | 35 min. | Special Ed. Setting |

| | | | |
|---|---|---|---|
| Reading | 36 per reporting period | 45 min. | Special Ed. Setting |
| Writing | 36 per reporting period | 40 min. | Special Ed. Setting |
| Speech/Language Therapy | 16 per reporting period | 30 min. | Special Ed. Setting |
| Occupational Therapy | 3 per reporting period | 30 min. | Special Ed. Setting |
| Occupational Therapy RSSD | 3 per reporting period | Unidentified amount of time | Regular Ed. Setting |
| Physical Therapy RSSD | 1 per reporting period | Unidentified amount of time | Regular Ed. Setting |
| Audiology - RSSD | Unidentified Number of Sessions | Unidentified amount of time | Regular Ed. Setting |

Stip. 79; Stip. Ex. 97.

**The 2015-16 School Year**

71. [redacted] generally received instruction on his IEP goals in the special education classroom with the special education teacher while the regular classroom teacher class covered core academic subjects in her classroom. T. pp. 1898-99. He also participated in specials. T. p. 1943.

72. When instructing [redacted], the regular classroom teacher would have to read instructions to him, then break them apart, simplify the vocabulary, and either draw or model the expected action. She also used peers as models. T. p. 1890. There were supplemental aids and accommodations in [redacted] IEPs. *See* Stip. Exs. 57, pp. 345-48; 97, pp. 638-42. He received modified assignments. The teacher testified that she shortened assignments, reduced the amount of text on pages, and allowed [redacted] different modes of communicating what he knew, such as drawing. T. p. 1936.

73. The regular classroom teacher followed the county pacing guide regarding the state standards in her classroom. T. p. 1895; Stip. Ex. 113, pp. 1131-37. Among the math standards that she taught her class in the fall of 2015 were those relating to shapes, multiplication, and division. Stip. Ex. 113, p.1131-37; T. pp. 1895-96. Among the language arts standards that she taught her class in the fall of 2015 were those relating to answering questions based on a text, determining the main idea of a text, and recounting details. Stip. Ex. 113, pp. 1214, 1227. [redacted] accessed grade level work and standards through morning work, word of the day, his writing journal, independent reading time, math prompt, and science and social studies instruction. T. pp.1897-99.

74. Additional evidence of [redacted] accessing work associated with the state standards for the third-grade general education classroom appears in the communication notebook. R. Ex. 14, pp. 495 (spelling); 497 (multiplication); 525 (vocabulary); 529 (multiplication); R. Ex. 3, pp. 58 (social studies); 61 (narrative writing); 68 (multiplication); 76 (nonfiction reading); 79 (geometry). He

would normally be doing the same types of activities that his nondisabled peers were doing, but scaffolded to his instructional level or using his IEP accommodations or modified assignments. T. p. 1926.

75. [redacted] report card from third-grade also shows that he was working on third-grade standards in the regular education classroom. The comments to the first and second quarter indicate work on the human body, shapes, multiplication, writing paragraphs, and moon phases. Stip. Ex. 134, p. 2241. Each of these subjects was part of the third-grade curriculum. T. p. 1931.

76. During math journal prompts in the regular education classroom, [redacted] was not able to read and understand the prompt independently. He was accommodated by having instructions read to him and broken down into smaller steps. T. p. 1927.

77. The third-grade teacher in the regular classroom testified that in some cases she simply could not modify an assignment to a level [redacted] could access. T. p. 1937. There is no evidence that the special education teacher assisted with assignment modification. Modified assignments for all academic courses were an accommodation on the IEP throughout the relevant time period of the case in the 2015-16 school year. Stip. Ex. 57, pp. 345-48; Stip. Ex. 97, pp. 638-42; Stip. Ex. 103, pp. 780-86.

78. During [redacted] third grade year [redacted] schedule included instruction in the special education setting at some times when the regular class was involved in math and language arts instruction. Stip. Ex. 131; Stip. Ex. 113, p. 1107; T. pp. 285-88; Stip. Ex. 86. One result was that [redacted] primarily received math instruction in the special education classroom. This was consistent with the service delivery in his IEP as no additional time was allotted to the special education setting. The teachers, instead, were focused on providing more intense direct instruction in those areas where [redacted] was having the most problems, math and language arts. This does not require an IEP team decision, for it is an administrative change in the time of day certain types of instruction are provided.

79. The Petitioners objected throughout [redacted] tenure at [redacted] to removal of [redacted] from the regular classroom during the times when instruction was being provided in math and language arts. During the hearing, the Petitioners focused on this issue at length. The facts they attempted to show during the hearing are an "artful" interpretation of the record, including testimony of previous witnesses. The actual facts in the record do not support their interpretation. Those parts of the record used by the Petitioners (Stip. Ex. 131; Stip. Ex. 113, p. 1107; T. pp. 285-88; Stip. Ex. 86) do not show what the Petitioners claim. It is only through conjecture and making many assumptions that one could reach their conclusions.

80. The ALJ, however, accepted the Petitioners "artful" interpretation. This appeared to be one of the primary bases for her Final Decision.

**November 2015 IEP Meeting**

81. As the IEP team had agreed to reconvene following the October meeting, the team met on November 13, 2015 to complete the annual review of the IEP. Stip. 80; Stip. Ex. 101. Both parents attended this meeting and received a copy of the Prior Written Notice and the Minutes. Stip. 81; Stip. Exs. 102 & 104.

82. Prior to the meeting, the team had incorporated into a new draft IEP some of [redacted] handwritten comments about goals, accommodations, etc. that she had submitted at the end of the October IEP meeting. T. p. 1989; Stip. Ex. 89.

83. As some teachers had noticed difficulties with attention and frustration the team added a goal related to on-task behavior. Stip. 82; Stip. Ex. 103, p. 778. There was, however, no indication that this "behavior" was disruptive to the classroom or his nondisabled peers.

84. During testimony, there was disagreement about the supplementary aids and services included in the IEP. Several testifying for the LEA stated that the IEP included appropriate supplementary aids and services. T. pp. 1672, 1941. The Petitioners' experts disagreed, and testified that the supplementary aids and services were not sufficient. Although the ALJ gave more weight to the Petitioners' experts, the SRO is not persuaded that either party was totally correct.

85. The team still had difficulty completing its review within the three and one-half hours that had been scheduled. T. p. 1989. As the meeting approached its end time, the team still needed to review the supplementary aids and services section of the IEP as well as service delivery and educational placement. T. p.1990.

86. With twenty or thirty minutes left before the end time for the meeting it was proposed that the parent select which section of the IEP that was more important to review immediately, and that the other section would be reviewed at a follow-up meeting. T. pp. 1990-91. The parents indicated that the review of service delivery was more urgent than the supplementary aids and services. T. p. 1991; P. Ex. 84, pp. 94-97.

87. During discussion of service delivery, the special education teacher, who since 2013 had advocated for a more restrictive setting, proposed increasing [redacted] specialized math instruction from thirty-five (35) to sixty (60) minutes and his specialized reading instruction from forty-five (45) to sixty (60) minutes in a special education setting. T. p. 1995. This would be an additional forty (40) minutes of specialized instruction during which time [redacted] would not be with his nondisabled peers.

88. The service delivery proposed in the November 2015 IEP was:

| Type of Service | Sessions Per | Time Per Session | Location of Services |
|---|---|---|---|
| Math | 36 per reporting period | 60 min. | Special Ed. Setting |
| Reading | 36 per reporting period | 60 min. | Special Ed. Setting |
| Writing | 36 per reporting period | 40 min. | Special Ed. Setting |
| Speech/Language Therapy | 16 per reporting period | 30 min. | Special Ed. Setting |
| Occupational Therapy | 3 per reporting period | 30 min. | Special Ed. Setting |
| Occupational Therapy RSSD | 1 per reporting period | Unidentified amount of time | Regular Ed. Setting |

| | | | |
|---|---|---|---|
| Physical Therapy RSSD | 1 per reporting period | Unidentified amount of time | Regular Ed. Setting |
| Audiology - RSSD | Unidentified Number of Sessions | Unidentified amount of time | Regular Ed. Setting |

Stip. 84; Stip. Ex. 103

89. Petitioner [redacted] disagreed with [redacted] continuing to receive specialized instruction in the special education classroom, and proposed that [redacted] receive all of his specialized instruction within the general education classroom. T. 1996. She proposed that the special education teacher push-in to the general education classroom to provide special education services in that environment. T. p. 2002.

90. Even though the parents' disagreed, the Principal as LRE Representative decided that the increased special time was appropriate for [redacted]. The Principal had advocated for a more restrictive LRE since [redacted] initial transfer into the school. T. pp. 2009-10; Stip. Ex. 104.

91. Soon after this meeting, the Petitioners filed the instant petition on November 30, 2015 and partially invoked stay-put related to service delivery. Since the filing of the petition, [redacted] goals have been updated, but his service delivery has remained at the level of the October 2017 IEP during the pendency of this case.

**Evidence of Academic Progress During the 2015-16 School Year in Regular Education Class**

92. Progress reports from September 30, 2015 indicated that [redacted] received instruction in his IEP goals during the first two months of the 2015-16 school year. All his IEP goals had either been mastered or consistent progress was being made towards mastery. Stip. Ex. 87, pp. 552-59.

93. [redacted] Third Grade Report Card indicated that he met expectations for his science, social studies, music, healthful living, visual arts, and inconsistently met expectations for language arts and math. Stip. Ex. 134, p. 240. [redacted] work habits and conduct met expectations. Stip. Ex. 134, p. 240.

94. In an SES Literacy Observation dated September 7, 2015, it was noted that in the general education classroom with adult assistance supports, [redacted] was able to state and write three facts about an article he read about muscles. Moreover, with accommodations of dictation, visual checklist, and adult support, he was able to write the sentence with correct spelling. Stip. Ex. 85, pp. 548-49.

95. The literacy teacher, in the SES Literacy Observation, recommended that: [redacted] would benefit from a highly structured approach to teaching comprehension strategies and how and when to apply these strategies to build comprehension skills." She made no conclusions about the classroom setting where this could be done. Stip. Ex. 85, p. 549.

96. [redacted] regular classroom teacher in the third grade testified that [redacted] obtained greater academic benefit from his time in the special education setting than his time in the general education setting and would have benefitted from additional time in the special education classroom during his third-grade year, T. pp. 1940-41.

97. The Respondent has produced no detailed data, of the type requested by the Petitioners, to support their opinions. Likewise, the Petitioners have only provided opinions that [redacted] would not have greater benefit from the special education setting.

98. The parents were convinced that their two years experience in [redacted] School indicated that the Respondent was moving consistently toward the more restrictive setting

advocated by the principal, although the Respondent had never officially proposed such a placement. The parents also had never experienced any movement by the Respondent toward more inclusionary practices. The IEP decision in November 2017, to increase special education services, was (in their minds) a clear indication of movement toward that "slippery slope." They immediately filed for due process.

99. In its proposal for increasing [redacted] time in the special education setting, Respondent has not convinced the ALJ or this SRO that the marginal benefit that [redacted] received in the regular education setting was outweighed by the benefits he could only obtain in the special education setting. Neither party has provided clear data or evidence to support either more inclusion or more use of the special education setting. Most of the testimony on this issue was speculation and assumptions based on philosophical differences concerning special education held by parents and school staff.

100. Based on [redacted] success in the regular education classroom during his second grade year, and his successes during the first months of his third grade year, [redacted] is able to make educational progress in a regular classroom when given sufficient supplemental aids and supports. He also experienced success in the special education setting. He will probably continue to make academic progress at a rate much lower that his non-disabled peers, but the evidence shows that he can make more than *de minimis* progress. When considering his needs, however, full inclusion may not be the best option for [redacted]

101. Although not a proper issue for the hearing, one matter received considerable attention, resulting in ALJ findings and conclusions. The issue was the structural problem in [redacted] IEPs. The IEPs consistently stated a number of special education sessions in academic areas that was less than the number of days in the reporting periods. For example: The reporting periods ranged from 38 - 51 days (*See* Stip. 26), while the service delivery in the IEPs were for 36 sessions. (See Stip. 68, 79, 84). Several teacher's daily schedules were introduced, but these did not specifically address [redacted] service delivery. Only one piece of evidence was introduced that actually referred to [redacted] daily schedule at one point in the school year. Stip. Ex. 86. There was testimony that the daily schedule changed several times. It was not possible to determine from the records exactly how many actual pull-out sessions were in a reporting period. Testimony of Respondent's staff was not clear regarding the number of actual pull-out sessions. Testimony of Petitioners included extensive speculation. This issue, however, was not in the initial petition and was not properly before the ALJ and SRO.

**Written Arguments to SRO Subsequent to ALJ Decision:**

102. On July 28, 2017 the SRO requested Written Arguments concerning the ALJ's Final Decision.

103. On August 16, 2017 both parties submitted lengthy Written Arguments. There were no surprises as both were consistent with their proposed hearing decisions. Each party did point out specific errors made by the ALJ in her Final Decision. Both sets of arguments were helpful to the SRO in completing this Decision.

## CONCLUSIONS OF LAW

The SRO agrees with the ALJ's references to the applicable law. Most of the following paragraphs reference the same provisions, though some are stated or arranged differently. The SRO, however, disagrees with the application of some of these legal principles to the facts of the case.

**General Legal Framework**

1. The Office of Administrative Hearings and the Review Officer for the State Board of Education have jurisdiction over this case pursuant to Chapters 115C, Article 9 of the North Carolina General Statutes; NC 1500, *Policies Governing Services for Children with Disabilities*; the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 *et seq.*; and IDEA's implementing regulations, 34 C.F.R. Part 300.

2. IDEA was enacted to "ensure that all children with disabilities have available to them a Free Appropriate Public Education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. §1400(d)(1)(A), IDEA; the implementing federal regulations, 34 C.F.R. Part 300; N.C.G.S. 115C - Article 9; and NC 1500, *Policies Governing Services for Children with Disabilities*. All these provisions have specific procedures that a LEA must follow in making FAPE available.

3. The Respondent is a local education agency receiving funds pursuant to 20 U.S.C. §1400 et seq. and the agency responsible for providing educational services to students in Wake County. NV is a child with a disability and was being served by the Respondent's schools during the time period relevant to this controversy. The Respondent is subject to the provisions of applicable federal and state laws and regulations, specifically 20 U.S.C. §1400 et seq.; 34 C.F.R. Part 300; N.C.G.S. 115C, Article 9; and the North Carolina *Policies*, NC 1500. These acts and regulations require the Respondent to provide FAPE for those children in need of special education.

4. N.C.G.S. 115C-109.6-109.9 and NC 1504-1.12 - 1.17 provide the guidelines to be used in the hearing and administrative review process. The hearing by the ALJ and review by this Review Officer must be conducted in accordance with these provisions.

5. The IDEA requires states to provide FAPE to eligible children and to implement certain procedures to ensure that those children and their parents receive procedural safeguards with regard to the provision of a FAPE. 20 U.S.C. § 1415(a).

6. 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). In *Schaffer v. Weast*, 546 U.S. 49 (2005), the Supreme Court decided that those who challenge educational decisions made by schools have the burden of proof in due process hearings. Thus, the Petitioners have the burden to show by a preponderance of evidence that the Respondent did not provide FAPE, did not provide a placement in the LRE, and that did not allow a meaningful opportunity for NV's parents to participate in the process. Suggestions, innuendoes, speculations, assumptions, and personal beliefs are insufficient to meet this burden. For the reasons set forth in the following, the Petitioners have not met their burden regarding most issues but not others.

7. In *Hendrick Hudson Dist. Bd. Of Ed. v. Rowley*, 458 U.S. 176 (1982) the Supreme Court established both procedural and substantive tests to evaluate compliance with the IDEA:

> First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Acts' procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. *Id* at 207.

8. The basic concepts of the *Rowley* decision were upheld by the Supreme Court during the time of this controversy. *Endrew F. v. Douglas County School District RE-1*, __ U.S. __, March 22, 2017.

> A hearing conducted under IDEA is not "an invitation to the courts to substitute their own notions of sound educational policy for those of chosen school authorities which they review." (Quoting *Rowley* 458 U.S. at 206.) *Id.*

9. The Court's new guidance goes further:

> At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. At the time any dispute reaches a hearing, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. An ALJ or SRO may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions. *Endrew F. v. Douglas County School District RE-1*, __ U.S. __, March 22, 2017.

10. Now, since *Endrew F.*, the SRO interprets the standard that must be applied to this case:
    a. Has the LEA complied with the procedural requirements of IDEA? *i.e.*: Parental Involvement and Input; Parental Notifications; IEP developed in accordance with state law; LRE requirements; etc.
    b. Has an IEP been developed that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances?
    c. Have the decisions made been based on the application of expertise and the exercise of judgment by school authorities?
    d. Have school authorities offered a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances?

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

12. The appropriateness of a student's educational program and placement on the continuum of services required by IDEA is decided on a case-by case basis, in light of the individualized consideration of the unique needs of the child, not in comparison to his typically developing peers. *See Hendrick Hudson Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). Decisions about whether N.V. should be placed in a general education classroom should not be based on a comparison of him to his typically developing peers in the regular education classroom.

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

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

15. "[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**

16. In addition to IDEA's requirement that the state offer each student an opportunity for a FAPE, the student must be placed in the least restrictive environment ("LRE") appropriate for the student to access that opportunity. *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). 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 should 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).

17. The IDEA expresses a presumption that to the "maximum extent" appropriate, children with disabilities will be educated with, and not removed from, their non-disabled peers:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(5)(A) (emphasis added); *see* 34 C.F.R. § 300.114(a)(2)(ii). *(Emphasis added).*
>
> A child may not be removed from education in age-appropriate regular classrooms *solely* because of needed modifications in the general education curriculum. 34 C.F.R. § 300.116.

18. The Fourth Circuit in *DeVries v. Fairfax County School Board* emphasized that the mainstreaming of children with disabilities is "not only a laudable goal but is also a requirement of the Act" and adopted the *Roncker* standard. 882 F.2d 876, 879 (4th Cir. 1989) (citing *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) (requiring a court to "determine whether the services which make that placement [at a segregated facility] superior could be feasibly provided in a non-segregated setting"). The least restrictive environment provision of the IDEA "sets forth a 'strong congressional preference' for integrating children with disabilities in regular classrooms," rather than placing the child in a "segregated environment." *Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1214 (3d Cir. 1993); *see also Devries*, 882 F.2d at 879 ("The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the Act's mandate.").

19. A school district is not required to attempt a general education classroom setting before placing a child in a more restrictive setting. *See Letter to Cohen*, 25 IDELR 516 (OSEP, August 6, 1996). The LRE requirement creates a presumption in favor of placing students with disabilities in general education classes. The fact that this provision only creates a presumption, however, reflects a congressional judgment that receipt of such social benefits of being with nondisabled peers is ultimately a goal subordinate to the requirement that disabled children receive educational benefit. *Hartmann,* 118 F.3d at 1002. Academic benefit takes primacy over social benefit if the two goals are in conflict.

**Application of the Legal Principles to the Case**

20. In their Petition the Petitioners contested the increased pull-out time from the regular education setting and invoked stay-put. During the hearing, however, Petitioners sought full inclusion in the regular education setting for all regular and special education instruction. This was emphasized by their full inclusion experts, who are not in favor of IDEA's requirement to provide a continuum of services. That continuum starts with full inclusion in the regular classroom with

nondisabled peers and moves toward more restrictive settings in order to meet the needs of individual children.

21. The primary issue to be decided in this case is not full inclusion but whether the Respondent's increased pull-out from the regular education classroom into a more restrictive setting was justified.

22. Placement in the general education classroom is not required where: (1) the disabled child would not receive an educational benefit from attending a regular class; or (2) any marginal benefit from that attendance 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).

23. Applying these concepts, the evidence showed that:

a. [redacted] did receive educational benefit in the general education classroom, and that he made some educational progress as evidenced by progress reports and report cards, even though he was not able to work at grade-level;

b. [redacted] did need direct instruction in basic math skills and reading comprehension in order for him to access the general curriculum. To a very limited extent, this may have outweighed the marginal benefit from being in the regular classroom where the other students had math skill levels and reading comprehension far beyond those possessed by [redacted].

c. [redacted] was not a disruptive force in the regular classroom.

24. [redacted] was placed in the least restrictive environment (2 hours of special education) during the relevant portion of the 2014-15 school year. The IEP resource placement of two hours in the special education setting was appropriate to ensure that [redacted] could access the general curriculum. This was not challenged by the Petitioners until filing of their petition over two years after the resource placement was first initiated, although they had ample opportunity to do so.

25. While it is true that much of [redacted] instruction was below grade level, the weight of the evidence supports a finding that the instruction was aligned with the relevant grade-level standards. He had access to the general curriculum both in core subjects and in various specials, including music, physical education, computer lab, media center, and art with his non-disabled peers in the general education classroom.

26. Based on the evidence, it is uncontested that [redacted] received educational benefit in light of his circumstances from being in the general education classroom with nondisabled peers. Receiving specially designed instruction in the special education class also ensured his access to the general education program.

27. The record shows that the Respondent did, on several occasions, change the times that teachers provided instruction to [redacted] in several subjects, primarily math and language arts. During the hearing the Petitioners attempted, but failed to show, that this changed the service delivery specified in the IEPs. These changes were made by [redacted] teachers who provided, at the hearing, reasonable and cogent explanations. Although the Petitioners objected to this alteration in teachers' daily schedules, such administrative changes are within the purview of school officials as long as it is consistent with the IEP. This issue formed the basis of many of the Petitioners' allegations. The Petitioners built their arguments on "artful" interpretations of the facts. Their arguments were filled with conjecture and required one to make many assumptions that were not in the record. The ALJ,

however, did accept the Petitioners' arguments and based a substantial portion of her decision on them. The SRO, however, finds that the Petitioners did not show that the Respondent failed to provide FAPE when teachers changed the time instruction was provided during the school day.

28. The Respondent may have increased the number of special education sessions from 36 times per reporting period to as much as 44 times, or 8 additional sessions per reporting period during the 2014-15 and 2015-16 school years. (*See* Fact 101). Testimony indicated that teachers adhered to the same daily schedule throughout a reporting period. (If a reporting period had 44 days of instruction and the IEP Service Delivery Plan authorized only 36 pull-out sessions, the Respondent actually added 8 pull-out sessions during that reporting period without IEP team approval.) This inconsistency between what was in the service delivery plan in [redacted] IEPs and the actual number of days in the reporting periods may have amounted to a unilateral removal of [redacted] from the regular education setting without parent participation. During the hearing in this case, the Respondent did not present a "cogent and responsive explanation" for the extra pull-out sessions. These were actions outside the IEP process and could have been a substantive violation of [redacted] rights regarding LRE and a procedural violation of his parents' rights to meaningful participation.

29. The violations in 28 above, however, were not mentioned in the initial Petition in this case. There are 91 specific allegations in the Petition. Reading them in an attempt most favorable to the Petitioners, one can not find this particular allegation. These violations appeared to be "discovered" in preparation for the hearing. The Petition was never amended to cover these allegations and there is nothing in the record to substantiate that the Respondent agreed to allow this issue to be included. This issue, therefore, was not properly before the ALJ and should not have been heard. The applicable law is:

> Subject matter of hearing: The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise. 20 U.S.C. 1415(f)(3)(B)
>
> *Subject matter of due process hearings.* The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under § 300.508(b), unless the other party agrees otherwise. 34 C.F.R. 200.511(d)
>
> The party requesting the hearing may not raise issues that were not raised in the petition unless the other party agrees otherwise. N.C.G.S. 115C-109.6(b)

30. Regardless of the provisions in Conclusions 29 above, and assuming that this issue was properly before the ALJ, the Petitioners still did not show that the harm were more than *de minimis*.

31. During the IRP meeting in November 2015 the Respondent proposed an increase in the time spent in the special education setting. Although not a large increase, the Respondent during both the IEP meeting and the hearing did not present a "cogent and responsive explanation" of why [redacted] special education time was increased in the proposed IEP. It was this action that precipitated this hearing. As [redacted] has been in stay-put since the filing of the petition and Petitioners have agreed on changes in his objectives during stay-put, there has been no harm to [redacted] by the Respondent's proposal to increase the time spent in a special education setting.

32. Although Petitioners' experts testified extensively as to the research support for full inclusion, there are limitations to that research. [redacted] acknowledged that the research reports cited in the experts' testimony described many limitations to the studies.

33. IDEA specifies that special education programs should be based on peer-reviewed research to the extent practicable. This does not mean that IEP teams must adopt the methodology with the greatest body of research. 71 Fed. Reg. at 46665. This also does not mean that relying on this

research trumps the need to provide instruction based on the needs of the individual child. The central tenant of IDEA is that "the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *Endrew F.*, 137 S. Ct. at 1001.

34. The ALJ, in several statements in her Decision, referred to the possible loss of education because of the undiagnosed hearing loss in 2013. This is definitely outside the relevant time period of this case, although the ALJ seemed to believe that the effects linger. The SRO disagrees, for the Respondent provided the modification of preferred seating since 2014. Subsequent evaluations have also confirmed that [redacted] hearing is excellent in one ear and that he has excellent listening skills. The Petitioners have provided no evidence, only speculation, that [redacted] lost any educational opportunity because of his hearing problem. Being outside the relevant time period, this was not an issue properly before the ALJ or SRO.

35. Collaboration between regular and special education teachers as a supplementary service consumed hours of testimony. Collaboration was not listed in any of the IEPs. The evidence shows that appropriate collaboration did take place during the 2014-15 time period of this case but was insufficient during the 2015-16 time period. Collaboration is necessary to insure that all teachers are working toward specific IEP goals and to make certain that a child does have instruction designed for their specific needs and aligned with the school's curriculum. The Petitioners failed to show that any harm caused by the insufficient collaboration was more than *de minimis*.

36. IDEA does not require the listing in the IEP of all possible supplementary aids and services provided by teachers in their classrooms. Teachers are expected to provide them, as needed, for all children. Failure to provide a needed supplementary aid or service for a child with special needs can readily be interpreted to be a failure to provide FAPE - whether or not it may have been listed in the IEP. "Best Practice," however, would be to list those necessary for the specific child as "reminders" to teachers in planning instruction to meet the individual child's needs.

37. The SRO disagrees with the conclusion of the ALJ that collaboration must be listed in the IEP. This would not be a procedural violation.

38. The IEP team during the relevant period in the 2014-15 and 2015-16 school years did accept parental input during the meetings. The team, however, may not have given enough consideration to whether [redacted] could be satisfactorily educated in the general education classroom with the appropriate supplementary services. Likewise, the parents did not give enough consideration to [redacted] need for some intense and structured specifically designed instruction. Although allowing the parents to state their preferences and discussing those preferences, the remainder of the team was focused primarily on the need for special education services in a more restrictive setting. The Petitioners, with their inclusive philosophy, had reason to be concerned.

39. At the November 2015 IEP meeting, Petitioners really had no choice. They were told to choose between the consideration of service delivery or supplemental aids/services. There was no reason why the meeting could not be continued. Forcing the parents to choose between service delivery and supplemental aids/services was a procedural violation that impacted parental participation, yet there was no showing of more than *de minimis* harm.

40. Predetermination prior to IEP meetings was alleged by the Petitioners. The Petitioners have not met their burden to show that this procedural violation occurred with regard to the decisions made in the IEP meetings. It is well understood that a school system must not finalize its decisions before an IEP meeting. *Doyle v. Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D.Va.1992), *aff'd* 39 F.3d 1176 (4th Cir. 1994).

41. Comments by an EC teacher and the principal expressing their opinions on [redacted] LRE do not necessarily support that predetermination happened, even though they expressed preference for placement in an ID-Mild self-contained classroom. Having a particular educational philosophy, as these staff members obviously did, does not automatically equate to predetermination. These staff members are not the IEP team, even though they were influential members of that team and the principal served as the LEA Representative. The parents had every right to be concerned, especially since consensus was not reached in IEP meetings and the LEA Representative was forced to make the decision for the team. Yet, it is speculation that placement decisions were predetermined. Having the burden in this case, the Petitioners failed to show that predetermination actually occurred.

42. Predetermination, however, did occur in another form as mentioned previously. (*See* Fact 101, Conclusion 28). This would be a form of predetermination and a procedural violation interfering with parents' participation in decisions affecting [redacted] To what extent that it otherwise affected [redacted] progress or the provision of FAPE is undetermined. This predetermination is probably the most significant of Respondent's procedural violations. It, however, was not properly before the ALJ and not an issue in this case. (See Conclusion 29).

43. Although not specifically stated as such, it appeared that the Respondent argued that the marginal benefit [redacted] made in the regular class was outweighed by the benefits that were obtained in the separate special education class. The Petitioners argument seemed to be that [redacted] could benefit only in the regular classroom and that any special education needed could be provided in that setting. Neither party give convincing evidence to support their arguments. The Petitioners provided no evidence, only speculation and the testimony of two "experts" who had never observed [redacted] in any classroom. The Respondent did provide some data, though it was minimal, and also relied on a certain amount of speculation regarding [redacted] ability to make progress in either the regular or special education setting. The Respondent, however, did give explanations regarding their decisions, though those explanations may fall somewhat short of the "cogent and responsive" explanations specified by *Endrew F., supra.*

44. Following the ALJ's partial dismissal. one issue was severed and remained separate and apart from the other issues. This was whether FAPE was denied by failure to implement the [redacted] math goals during the relevant time period.

45. [redacted] progress reports show that some math goals were not worked during every reporting period. Instruction related to some math goals never appeared to even begin. There, however, is no legal obligation to work on every IEP goal in every reporting period of the school year. IEPs are designed for a full year, and certain goals may be written sequentially and introduced at the appropriate point in the school year as long as the plan is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. Respondent's failure to address all goals during each reporting period is not a failure to implement the IEP.

46. The record does show that [redacted] did not work on some math goals in the regular classroom, but did so in the special education setting. The parents' clear expectation was that instruction concerning all math goals was to be in the regular classroom and this is the basis of their claim. As far as goals are concerned, it is not the setting that determines whether a goal is taught or attained. The setting is a separate LRE issue.

47. The Fourth Circuit put it succinctly: "the failure to perfectly execute an IEP does not necessarily amount to the denial of a free, appropriate public education. However . . . the failure to implement a material or significant portion of the IEP can amount to a denial of FAPE." *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 484 (4th Cir. 2011).

48. It is clear that the Respondents execution of [redacted] IEPs was far from perfect, yet the Petitioners failed to show that rose to the level of a denial of FAPE.

49. In this case the Petitioners have asked for full inclusion. They have shown that [redacted] received educational and social benefit from attending the regular education classes and he was not a disruptive force, but not necessarily that full inclusion was the appropriate placement. More specifically, the Petitioners' failed to show that Respondent's use of the pull-out special education setting was not appropriate. Having the burden, this is what they were required to show. Actions of school boards are presumed to be correct and as long as the Respondent provides a cogent and responsive explanation of their decisions that shows that the IEP is reasonably calculated to enable the child to make progress that is appropriate in light of his circumstances. NC.G.S. 115C-44(b), *Endrew F. v. Douglas County School District RE-1*, __ U.S. __, March 22, 2017. Although the SRO is convinced that the Respondent could have done more, he is not convinced that the Respondent failed to provide FAPE during the relevant time period of this case.

50. With regard to proving that procedural violations of IDEA would be a denial of FAPE, the Petitioner must be able to show that the procedural error resulted 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 v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990).

51. Specific state law also addresses procedural violations that may result in a denial of FAPE. N.C.G.S. 115C-109.8(a) states:

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

52. During the hearing, the Petitioners showed several procedural violations. These violations involve some actions of the Respondent that impeded the parents' opportunity to participate in the decision-making process and the psychologist's failure to observe in all settings. The most significant, however, were not during the relevant time period or were not in the Petitioners' initial Petition. As such, these are not proper issues to be decided. For the minor procedural violations that were proper issues to be decided, the Petitioners failed to show any of procedural inadequacies from N.C.G.S. 115C-109.8(a) or the cases cited in Conclusion 50 above. Any harm done was *de minimis* and did not result in a failure to provide FAPE.

53. The record demonstrates clearly and extensively that the Petitioners were given the opportunity to participate in the planning and development of [redacted] educational program. They did indeed avail themselves of that opportunity. The Petitioners failed to meet their burden of showing that the Respondent denied them that opportunity.

54. The Respondent presented sufficient evidence of successful implementation of [redacted] IEP and evidence of [redacted] progress. That evidence was in the form of data maintained by the teachers and specialists implementing the program. The data, however, maintained by the Respondent did not meet the preferences of the parents and their experts. Those experts clearly expressed a preference not only for more data, but data collected in a certain manner. This is understandable for they have backgrounds in ABA types of methodology. These methodologies evolved from a highly clinical

setting and require extensive data collection efforts that are difficult in a public school classroom. Neither IDEA nor state law requires provides guidance on the maintenance of detailed data of the type the Petitioners wanted to see. IDEA was written by Congress to be intentionally vague regarding the nature of information maintained by school to show progress under an IEP.

55. In passing IDEA, Congress chose not to place a heavy paperwork burden on teachers during the time they were working directly with children and rejected the requirement for extensive data collection. Data must be maintained, but the LEA can decide how and what type of data to maintain. No data maintenance system is perfect, but the data maintained by the Respondent was usable to determine program implementation and educational progress.

56. The SRO is of the opinion that the Respondent needs to make significant improvements in data collection, analysis, and maintenance, but cannot reach the conclusion that Respondent failed to meet federal and state law requirements with regards to data.

57. Finally, the SRO concludes that the Petitioners have not meet their burden with regard to their allegations. Interestingly, the Petitioners took the approach that if they made an allegation based on conjecture, speculation, or opinion then the burden shifts to the Respondent. This would be a reversal of the requirement that the Petitioners have the burden. An allegation supported by indisputable facts would indeed require a rebuttal, but first those facts must be introduced. Upon close examination of hearing record, the Petitioners introduced very few indisputable facts.

## DECISION

The SRO partially upholds and reverses the ALJ Decision:

1. Those ALJ Orders and Decisions made prior to the ALJ's Final Decision are upheld.
2. The statutory time frame for this case is the one-year time period prior to November 24, 2015. The Petitioners did not show that one of the exceptions in N.C.G.S. 115C-109.6(c) applies to the case.
3. Petitioners failed to show that the Respondent did not provide FAPE for [redacted] simply because the Respondent did not provide full inclusion in all academic subjects in the regular classroom.
4. While the Respondent failed to provide a cogent and responsive explanation as to the appropriateness of the increased 40 minutes of special education services in the proposed November 2015 IEP, the Petitioners failed to show that the October 2015 IEP in place at that time did not provide FAPE.
5. The Petitioners failed to show that [redacted] educational placement during the relevant time period of this case was not the LRE.
6. The Petitioners failed to show that any procedural violations of the Respondent caused more than *de minimis* harm.
7. Petitioners failed to prove that the Respondent failed to implement [redacted] math goals during the relevant time period of this case.

This the 23 rd day of August 2017

Joe D. Walters
Review Officer

## NOTICE

Any party aggrieved by this Decision may institute a civil action in state court within 30 days after receipt of this Decision as provided in N.C.G.S. 115C-109.9 or file an action in federal court within 90 days as provided in 20 U.S.C. §1415. Please notify the Exceptional Children Division, North Carolina Department of Public Instruction, in writing of such action so that the records for this case can be forwarded to the court.

I hereby certify that this Decision has been duly served on the Petitioners and Respondent by electronic and U.S. Mail, addressed as follows:

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This the 23 rd day of August 2017

Joe D. Walters
Review Officer