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STATE OF NORTH CAROLINA

IN THE OFFICE OF ADMINISTRATIVE HEARINGS 16 EDC 00625, 16EDC04763

COUNTY OF WAKE

by and through . parents and and Petitioner,	FINAL DECISION
v.	
Wake County Board of Education and the Wake County Public School System Respondent.	

THIS MATTER was heard before the undersigned Administrative Law Judge Stacey B. Bawtinhimer, presiding, on the following dates: August 16 - 18, October 10 - 14, 20, 21 and 28, 2016 at the Office of Administrative Hearings in Raleigh, North Carolina.

After hearing the evidence presented and considering the written and oral arguments of counsel, the Undersigned is of the opinion that Respondent ("Wake County Schools," "Respondent," and/or "WCPSS") committed a procedural violation with respect to the Report which denied the Petitioners meaningful participation at an IEP meeting but that procedural violation did not result in educational harm to Petitioner For all other claims, the Undersigned has determined that the Respondent did not deny Petitioner For all other claims, the public education.

APPEARANCES

For Petitioners:

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For Respondents:

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Raleigh, NC 27602-1151

For Petitioners:

Petitioner

Petitioner

For Respondents:

EXHIBITS ADMITTED INTO EVIDENCE

The following Stipulated Exhibits were received into evidence on the second day of hearing:

Stipulated Exhibits: 1 – 37 (hereafter Stip. Ex. 1, Stip. Ex. 2, etc.)

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

Petitioners' Exhibits: 2 (pages 1-12 only), 9, 10, 15, 16, 19, 20, 30, 32, 40 (pages 415420 only), 75 (pages 76, 85-105, 142, 152, 154, 183, 274 only), 75A, 90, 92-94, 101, 102, 104, 106-113, 115-117, 154 (page 243 only), 157, 158, 192, 193 (pages 3and 5 only), 232, 235, 236, 245, 256 (pages 1 and 2, 's e-mail only), 259, 270, 271, 274, 296-312, 321, 322, 323, 328334, 336-340, 344, 346, 347, 350, 352, 353, 355, 357, 359-365, 384, 387 (pages 1-7 only), 390, 392, 393, 417, 418, 420 and 423. (hereafter Pet. Ex. 2, Pet. Ex. 9, etc.)

Respondent's Exhibits: 39 (pages 25-34 only), 40, 41, 55, 56, 61-65, 67, 68, 69 (pages 643-648 only), 70, 71 (pages 81-83, 133-134, 148-151, 171-172, 434-436, 482-483 only), 72 (pages 126, 141, 162 only), 77, 78 (pages 2329, 2364, 2395, 2479, 2522, 2600, 2616-2617, 2647, 2650-2651, 2657, 2694, 2713-2714 only) and 80. (hereafter Res. Ex. 39, Res. Ex. 40, etc.)

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

PROCEDURAL BACKGROUND

1. Petitioners initially filed a Petition for a Contested Case Hearing pro se on October 3, 2014 ("October 2014 Petition"). The October 2014 Petition raised one claim, that Respondent

had failed to provide "sufficient supports that teach or provide the opportunity for our son [and to acquire the necessary functional skills to obtain FAPE." The October 2014 Petition was declared insufficient by order of this Tribunal on October 14, 2014.

- 2. On November 4, 2014, Petitioners filed a 37-page addendum to the October 2014 Petition ("November 2014 Addendum"), with several additional claims and requested remedies. Thus amended, the October 2014 Petition was accepted as sufficient.
- 3. Petitioners took a voluntary dismissal of the October 2014 Petition on January 15, 2015.
- 5. Petitioners filed Petition No. 16-EDC- 4763, on May 10, 2016. This Petition raised claims related to an alleged failure of Respondent to provide Petitioners with copies of a document generated by an outside consultant who observed at a school. Petitions 16-EDC-0625 and 16-EDC-4763 were consolidated for hearing by order of Chief Administrative Law Judge Mann on June 13, 2016.
- 6. Respondent moved to dismiss portions of the consolidated Petitions prior to hearing. After a hearing, the Undersigned entered an Order on August 12, 2016, granting in part and denying in part, Respondent's Motion. Specifically, the Undersigned dismissed all claims relating to the time period prior to January 15, 2015, that were not raised in the original October 2014 Petition, as amended. This included dismissal of all claims arising between November 4, 2014, and January 15, 2015, with the exception of claims raised in the May 2016 Petition.
- 7. Thus, prior to the start of hearing, the operative limitations period was deemed to include:
 - a. Claims raised in the October 2014 Petition, as amended, that arose between October 3, 2013, and November 4, 2014;
 - b. Claims raised in the January 2016 Petition that arose between January 15, 2015, and withdrawal from the Wake County Public Schools in August 2015;
 - c. Claims raised in the May 2016 Petition, excluding claims regarding the alleged withholding of the Report. Although the alleged withholding of the Report occurred more than one year prior to the filing of the May 2016 Petition, Petitioners claimed that an exception to the statute of limitations applied to this claim because the Respondent deliberately withheld the full Report.
- 8. At the close of Petitioners' case, Respondent made a second Partial Motion to Dismiss pursuant to N.C.G.S. §1A-1, Rule 41(b). After hearing the arguments of the parties and reviewing the evidence presented by Petitioners, the Undersigned entered an Order dated October 25, 2016, dismissing the following portions of Petitioners' claims:

- a. All claims regarding the denial of a free and appropriate public education ("FAPE") for the 2013-2014 school year, other than those related to behavior and communication/social issues;
- b. All claims related to Extended School Year Services ("ESY");
- c. All claims regarding parental participation in the IEP and/or BIP process in both the 2013-2014 and 2014-2015 school years, other than the claim related to the withholding of statements 's full report; and,
- d. All claims related to reimbursement for private services obtained by Petitioners.

ISSUES REMAINING AFTER RULING ON RESPONDENT'S MOTIONS TO DISMISS

- 1. Whether Respondent provided with a FAPE from October 3, 2013 through the end of the 2013-2014 school year, specifically with regard to communication/social skill issues, behavior goals, behavior intervention plans, and implementation thereof;
- 2. Whether Respondent violated parents' rights to participation in the IEP process by withholding the full copy of an observation report by developed in March 2014, and if so, whether this violation led to a denial of FAPE; and,
- 3. Whether Respondent provided with a FAPE during the 2014-2015 school year, except for the time period of November 4, 2014 January 15, 2015, which is excluded due to the applicable statute of limitations.

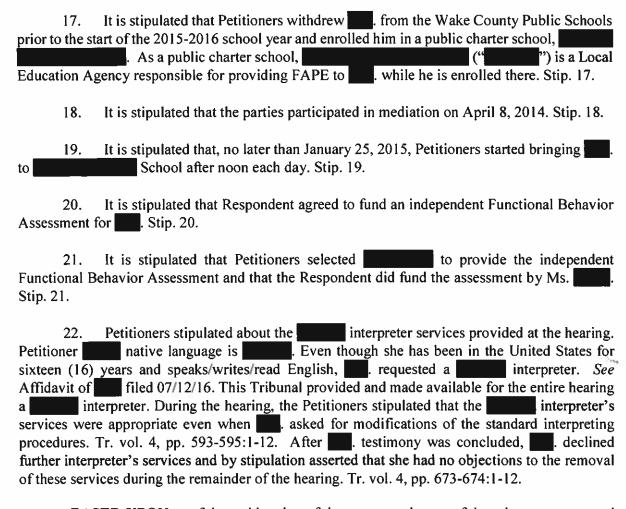
BURDEN OF PROOF

Petitioners acknowledged in the Order on the Final Pre-Trial Order Conference entered on August 17, 2016 that they have the burden of proof in this contested case. The standard of proof is by a preponderance of the evidence. See Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 62 (2005); N.C. Gen. Stat. § 150B-34(a). Black's Law Dictionary defines preponderance as denoting "a superiority of weight or outweighing." The finder of fact cannot properly act upon the weight of evidence in favor of the one having the onus, unless it overbears, in some degree, the weight upon the other side. North Carolina statutory law states that actions of local boards of education are presumed to be correct and "the burden of proof shall be on the complaining party to show the contrary." N.C. Gen. Stat. § 115C-44(b). The Petitioners, being the complaining party, have the burden of proof to show by a preponderance of evidence that Respondent did not provide with a free appropriate public education.

STIPULATIONS

- 1. It is stipulated that the Petitioners and Respondent named in this action are properly before this Tribunal, and that this Tribunal has personal jurisdiction over them. Stip. 1.
- 2. It is stipulated that the Petitioners and Respondent named in this action are correctly designated. Stip. 2.

It is stipulated that Petitioner is domiciled within the boundaries of Wake County. Stip. 3. It is stipulated that as the party seeking relief, the burden of proof for this action lies with Petitioner. See Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 62 (2005). Stip. 4. It is stipulated that the Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq. and implementing regulations, 34 C.F.R. Parts 300 and 301. N.C. Gen. Stat. § 115C-109.6(a) controls the issues to be reviewed. Stip. 5. 6. It is stipulated that the IDEA is the federal statute governing education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Parts 300 and 301. Stip. 6. 7. It is stipulated that Respondent is a local education agency receiving monies pursuant to the IDEA. Stip. 7. 8. It is stipulated that the controlling state law for students with disabilities is N.C. Gen. Stat. Chapter 115C, Article 9 and the corresponding state regulations. Stip. 8. 9. It is stipulated that the Petitioners, as the party requesting the hearing, may not raise issues at the hearing that were not raised in the due process petition. Stip. 9. 10. It is stipulated that the remedy sought by Petitioners in this matter is compensatory education services. Stip. 10. It is stipulated that Petitioner 's date of birth is 11. , and that his father is Petitioner and his mother is Stip. 11. 12. IDEA. Stip. 12. has been determined eligible for services under IDEA, with 13. It is stipulated that a primary area of eligibility of " ." Stip. 13. It is stipulated that was enrolled in the Wake County Public Schools from 2008 14. until August 2015. Stip. 14. 15. School, a Wake County elementary school, for the 2013-2014 school year. Stip. 15. 16. School, a Wake County elementary school, for the 2014-2015 school year. Stip. 16.

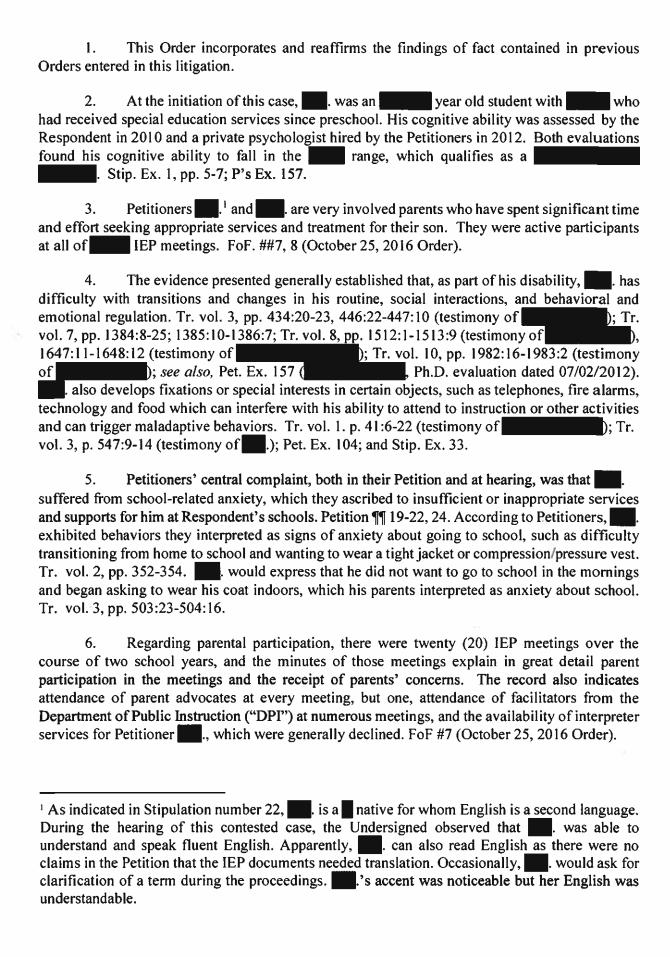


BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge ("ALJ") makes the following Findings of Fact. In making these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

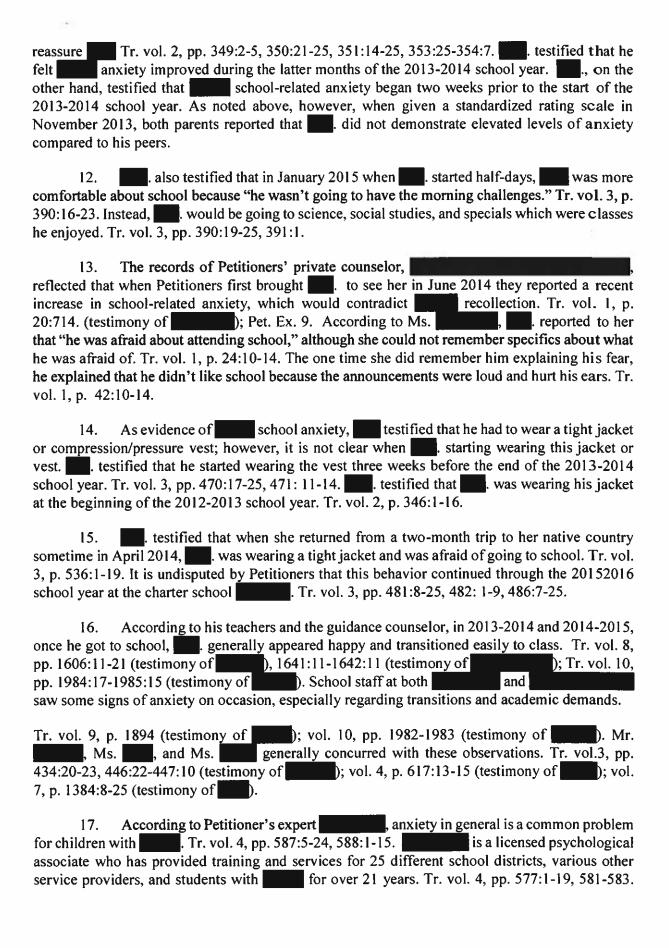
FINDINGS OF FACT

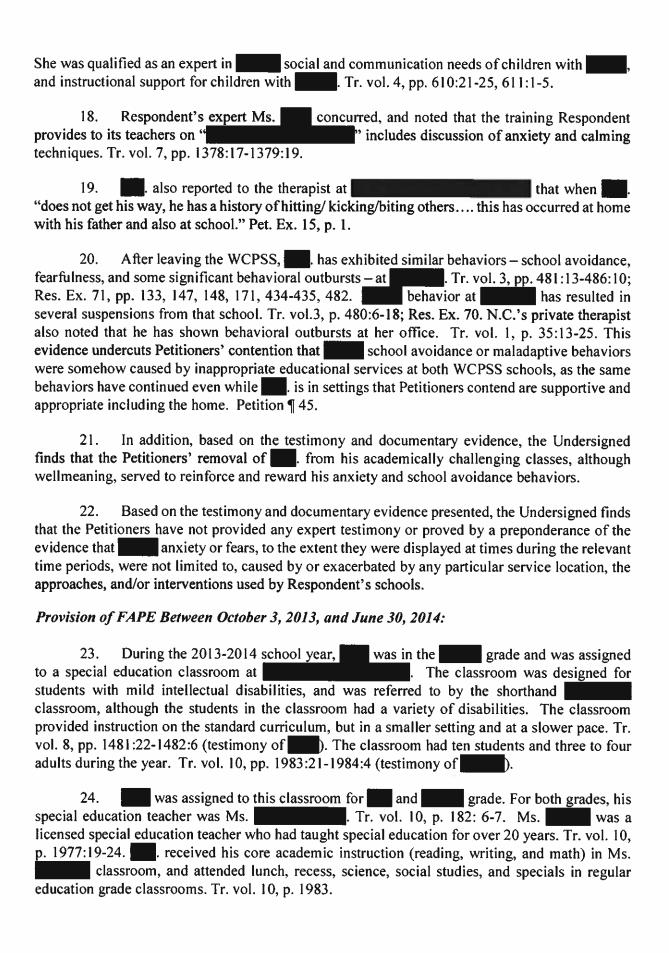
Based upon the stipulations of record and the preponderance of the admissible evidence, the Undersigned finds as follows:

General Findings:

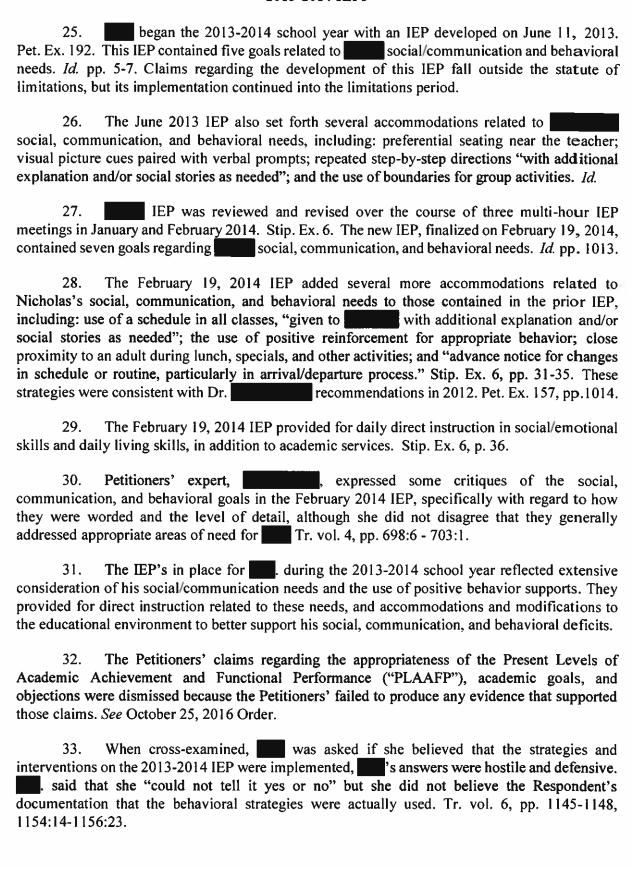


- 7. The IEP meetings were lengthy and "[t]hey could be contentious and emotional." Tr. vol. 3, p. 393:5-9.
- 8. As presented in the hearing, the following is a non-exhaustive list of exhibits evincing parent participation: Stip. Exs. 2, 4-10, 12-19 (reference the presence of parent advocates at the IEP meetings); Stip. Exs. 4, 5, 6, 10, 11 and 13 (referencing the presence of DPI facilitators); Stip. Exs. 7, 8, & 9 (referencing the presence of interpreters); Stip. Ex. 2, p. 3 (parent shares research with team, team also accepts parent input from prior emails); Stip. Ex. 5, p. 6 (parent information, including concerns, included in IEP); Stip. Ex. 6, pp. 7 & 11 (parent proposals adopted into IEP); Stip. Ex. 15 (team agrees to schedule more time for social stories); Stip. Ex. 7 (BIP updated to include immediate verbal praise and earning special jobs as proposed by parent); and Pet. Exs. 19, 20, &40. Parent also presented parent concerns at almost every meeting, often in writing. Exhibits submitted by Petitioners communicating written parental concerns to school staff. Pet. Exs. 321, 322, 323, 328, 329, 330, 331, 332, 333, 334, 336, 337, 338, 339, 340, 344, 346, 347, 350, 352, 353, 355, 357, 359, 360, 361, 362, 363, 364, 365. FoF #8 (October 25, 2016 Order).
- 9. The Petitioners' proposed exhibit list in the Pre-trial Order contained forty-six (46) emails/communications of the "parent concerns." Pre-Trial Order, pp. 8-9. Forty-four (44) of which were dated within February 2014 to October 2015. See Pre-Trial Order (filed August 17, 2016).





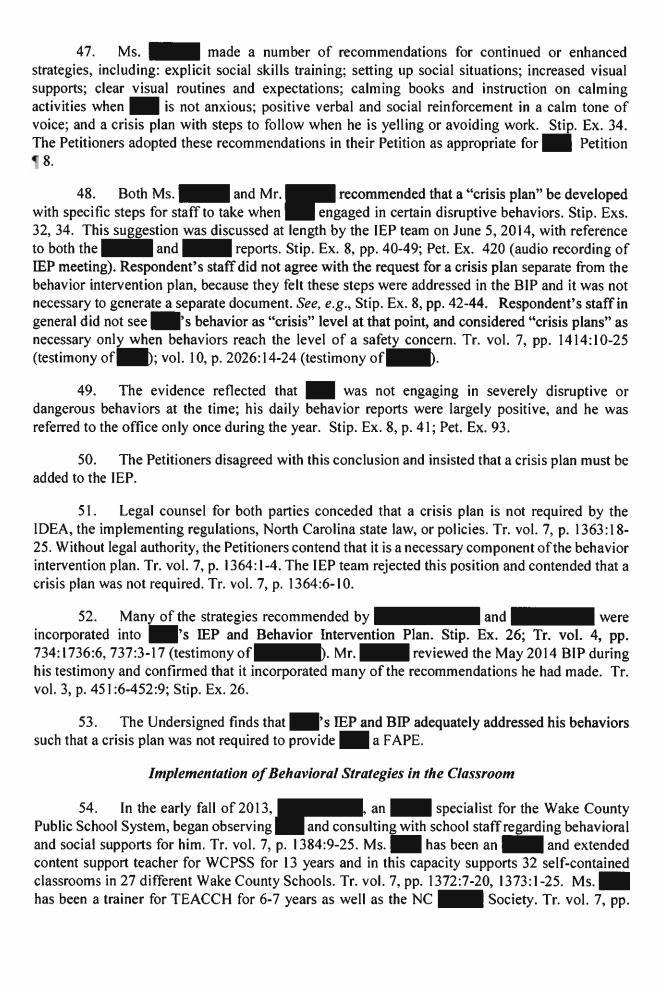
2013-2014 IEPs

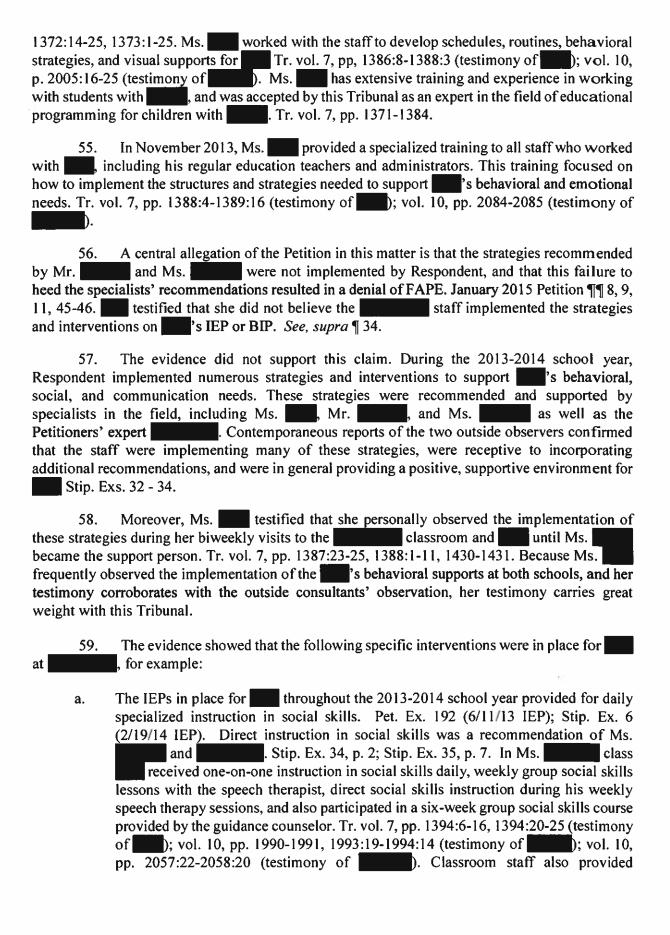


34. The testimony established, and the Undersigned finds, that series is IEP's, as they were revised from time to time by his IEP team, were implemented by school staff at Elementary. The testimony established, and Petitioners did not produce evidence to contradict, that the special education and related services described in the IEP's were provided to vol. 10, pp. 1996:12-2001:12 (testimony of pp. 1996:12-2001), 2054-2057 (testimony of pp. 1996:12-2001).					
2013-2014 Behavior Intervention Plans					
35. On October 10, 2013, IEP team developed a Behavior Intervention Plan ("BIP"). Stip. Ex. 1, p. 4-5. The BIP was drafted with input from the school counselor, psychologist, Petitioners, teachers, and service providers. Stip. Ex. 1, p. 5. This BIP provided interventions including a written schedule, the use of choices, the use of "first, then" statements, social stories, and practice time for new social skills. Id. The BIP also provided specific rewards for positive behaviors. Id. This plan was reviewed and slightly revised by the IEP team on November 15, 2013. Stip. Ex. 25, p. 2.					
36. steachers implemented his Behavior Intervention Plan throughout the 20132014 school year. Tr. vol. 10, pp. 2013:14-2024:2 (testimony of testimony of testimony of testimony).					
37. Between November 15, 2013, and February 19, 2014, five (5) IEP meetings were held, each lasting several hours. Although the IEP team intended to review the BIP further during this period, reviewing and revising the IEP took so much time that they were not able to get to the BIP. Tr. vol. 10, pp. 2006:1-14, 2024:3-9 (testimony of '); Stip. Ex. 3, p. 15. In April 2014, Petitioners and Respondent participated in mediation, at which they developed some agreed-upon revisions to the BIP. Stip. Ex. 7, p. 1. These revisions and others were made to the BIP at another IEP meeting on May 8, 2014. Stip. Ex. 7; Stip. Ex. 26.					
38. Although the BIP was not completely revised by the IEP team until May 2014, most of the strategies added in May were in use in the classroom for most of the 2013-2014 school year. Tr. vol. 10, pp. 2013:14-2024:12 (testimony of vol. 7, pp. 1420:18-1424:16 (testimony of vol. 7).					
39. Petitioners did not substantially challenge the appropriateness of the May 2014 BIP as written, other than Ms. 's critique that she would have preferred it include a specific reference to a calming strategy she endorses called the "five-point scale," rather than the general reference it contains to calming strategies for					
40. Although the five-point scale was utilized by the school staff, neither the Petitioners nor their expert can dictate or veto what educational strategies must be on the IEP or BIP.					

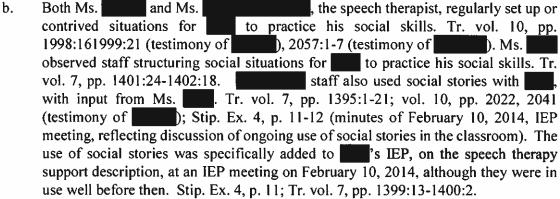
Input From Outside Consultants

Respondent hired to observe and make suggestions regarding his educational program. Tr. vol. 3, pp. 423:23-424:6 (testimony of program); vol. 10, p. 2114:1-15 (testimony of program). Although not tendered by either party as an expert witness in this matter, Mr. is a consultant with many years of experience and expertise in the area of programming for students with the has worked nationally and internationally for 41 years with both the Lovaas and TEACCH methodologies, taught children with peer a behavioral specialist with WCPSS, and an pecialist for the North Carolina Department of Public Instruction. Tr. vol. 3, pp. 421:4-25, 422:1-7. His opinions carried weight with the Petitioners, with the other experts in this case, and with this Tribunal.
42. Mr. reviewed academic and behavioral data, observed across multiple educational settings at special education file. Tr. vol. 3, p. 423:5-13. Mr. spent approximately six hours at Elementary School on March 27, 2014. Tr. vol. 3, pp. 402:11, 405:10-13.
described his observation as positive, and said the core elements of the program were in place for when he observed. Tr. vol. 3, p. 442:7-12. Mr. confirmed that recommended strategies including the use of social stories, a schedule, choices, and practice time were all present when he observed. Tr. vol. 3, p. 448:11-15. Mr. noted that perseverative behavior of touching objects, in particular, had improved while at Ex. 33. He viewed his recommendations as only minor adjustments to a generally solid program. Tr. vol. 1, p. 35:21-24. Mr. testified that he has worked in Respondent's schools for many years and, in his experience, the Respondent's staff are capable of carrying out any recommendations he makes. Tr. vol. 3, p. 450:7-14. A summary of Mr. recommendations was shared with the parents, and his input was discussed by the IEP team. See, e.g., Stip. Ex. 7, pp. 38-45.
44. In addition to Mr. , at the request of Petitioners , an specialist from the North Carolina Department of Public Instruction, came to during May 2014. Stip. Ex. 34. Ms. drafted a report of her observations and recommendations which was shared with Petitioners and reviewed and discussed by the IEP team at an IEP meeting on June 5, 2014. Stip. Ex. 8, pp. 40-49.
45. Ms. a board certified behavior analysis, did not testify for either party but her report was relied upon extensively by both sides and in the testimonies of Mr. and and and .
46. Ms. 's report notes that "[t]he team at has successfully implemented many of 's recommendations into ['s] environment." Stip. Ex. 34. She specifically reported observing the use of a daily schedule, with places to check off each activity; teachers reviewing the checklists with him in each class and providing appropriate preparation prior to a new activity; the use of a behavior reinforcement system; the use of noncontingent sensory breaks; and the use of visual supports. <i>Id.</i> She also noted that his teacher and aide approached him in a positive and caring manner. <i>Id.</i>

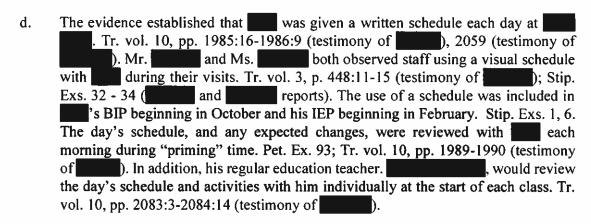




instruction to in how to handle social situations as they came up. Tr. vol. 7, p. 1404:1-17 (testimony of the second situations as they came up. Tr. vol. 7, p. 1404:1-17 (testimony of the second situations as they came up. Tr. vol. 7, p. 1404:1-17 (testimony of the second situations as they came up. Tr. vol. 7, p. 1404:1-17 (testimony of the second situations as they came up. Tr. vol. 7, p. 1404:1-17 (testimony of the second situations as they came up. Tr. vol. 7, p. 1404:1-17 (testimony of the second situations as they came up. Tr. vol. 7, p. 1404:1-17 (testimony of the second situations as they came up. Tr. vol. 7, p. 1404:1-17 (testimony of the second situations as they came up. Tr. vol. 7, p. 1404:1-17 (testimony of the second situations as they came up. Tr. vol. 7, p. 1404:1-17 (testimony of the second situations as they came up. Tr. vol. 7, p. 1404:1-17 (testimony of the second situations as they came up. Tr. vol. 7, p. 1404:1-17 (testimony of the second situations as the second situation situation situations as the second situation situat

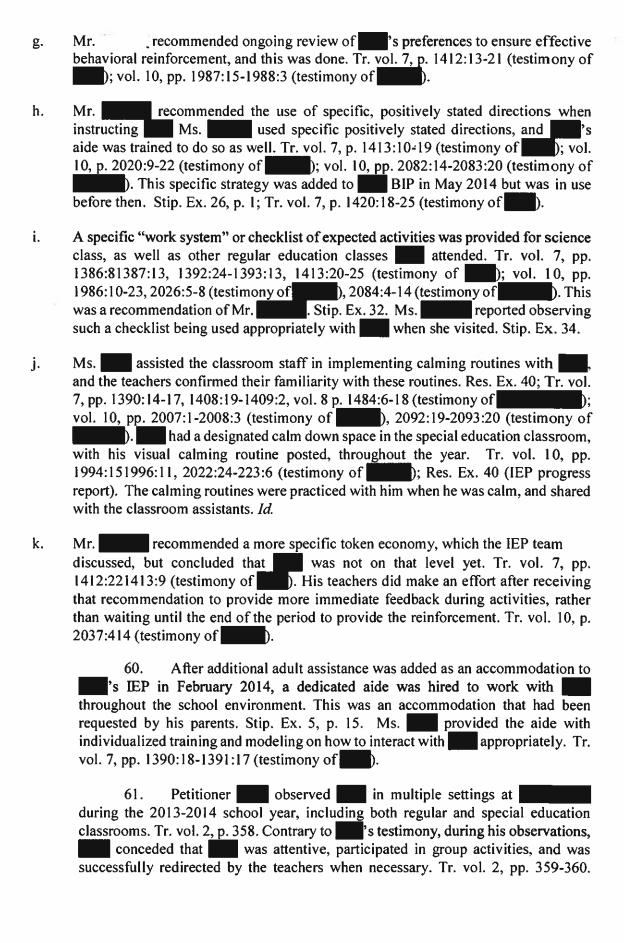


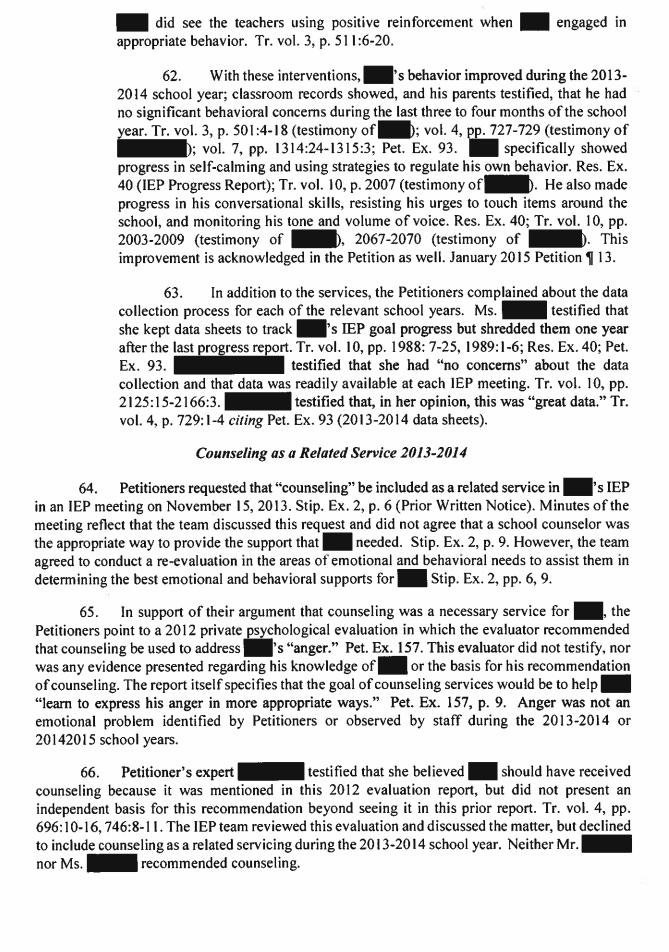
c. The provision of a visual, written daily schedule, and assistance in reviewing and referring to the schedule, was supported by all specialists involved. testified that was not primed with a classroom schedule of his activities. Tr. vol. 6, pp. 1146:16-1147:24.

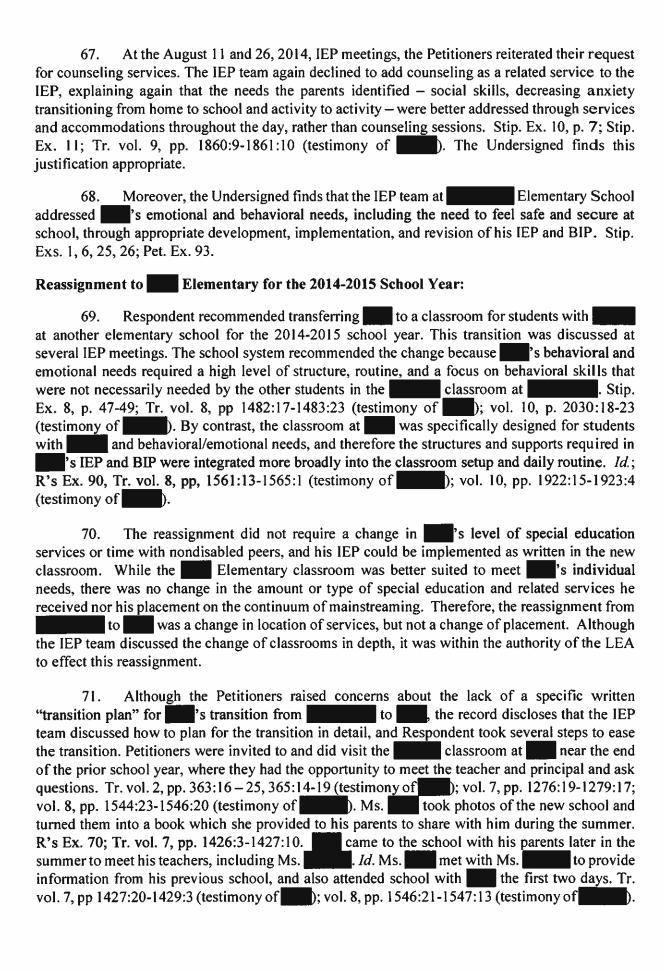


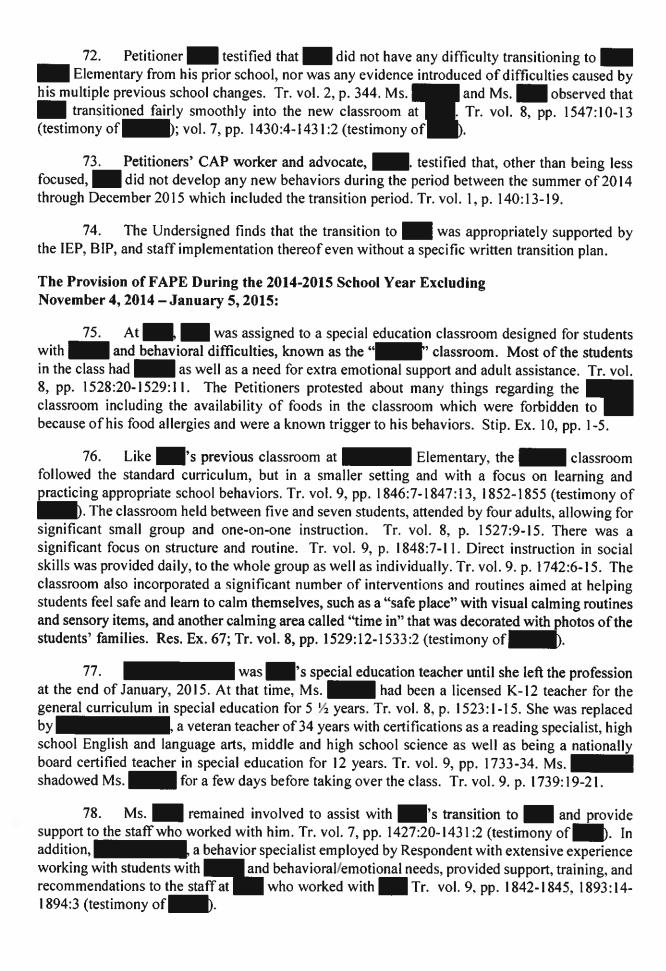
- e. In addition to the visual schedule, was provided visual symbols to prevent touching objects, visual routines for practicing social interactions, and other visual rule cards at Tr. vol. 10, pp. 2005:16-25, 2020:23-25 (testimony of), 2064-2066 (testimony of), 2085, 2097-98 (testimony of); Stip. Ex. 34 (observations). Beginning in early fall, Ms. assisted classroom staff in developing visuals for , and observed them being used, including clear visual routines. Tr. vol. 7, pp. 1389:2-7, 1406:22-1407:10. confirmed that he saw visual cues used with when he observed him in the classroom at Tr. vol. 3, p. 497:1-12.
- f. Mr. recommended the use of graphic organizers for writing assignments. 's teachers provided graphic organizers both before and after Mr. results 's visit.

 Tr. vol. 7, pp. 1411:19-1412:12 (testimony of testimony of testimon

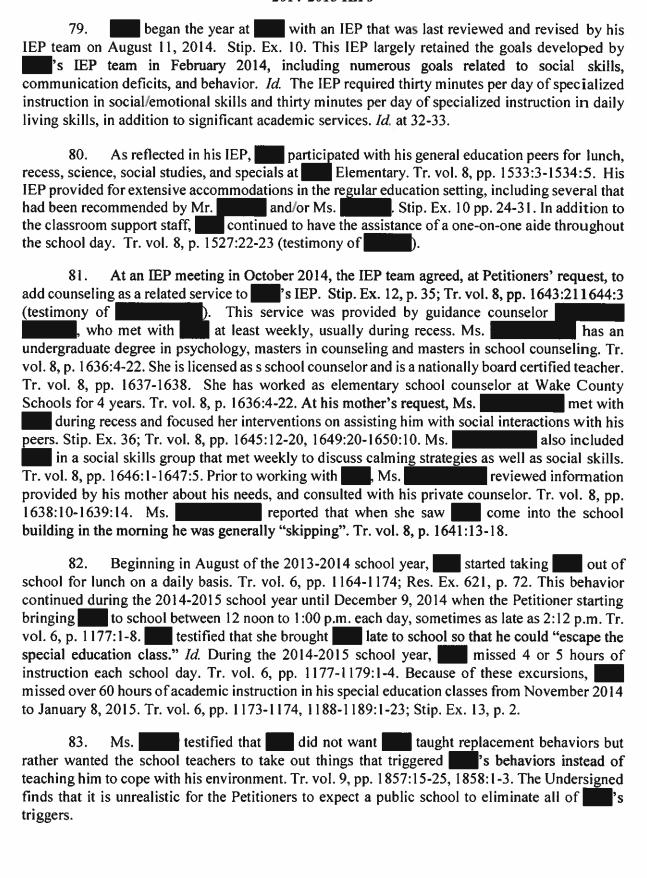


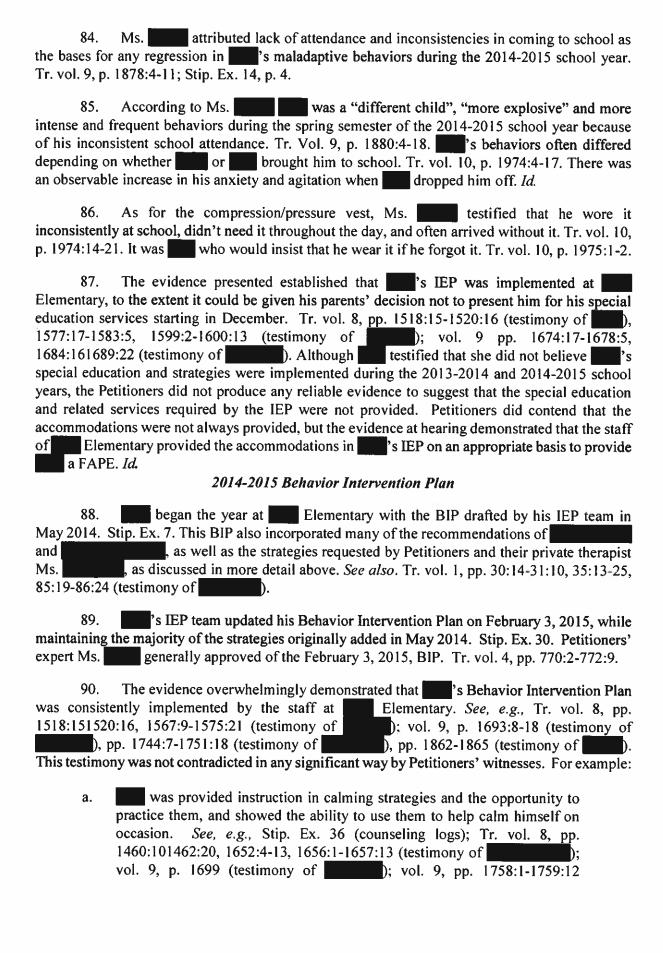




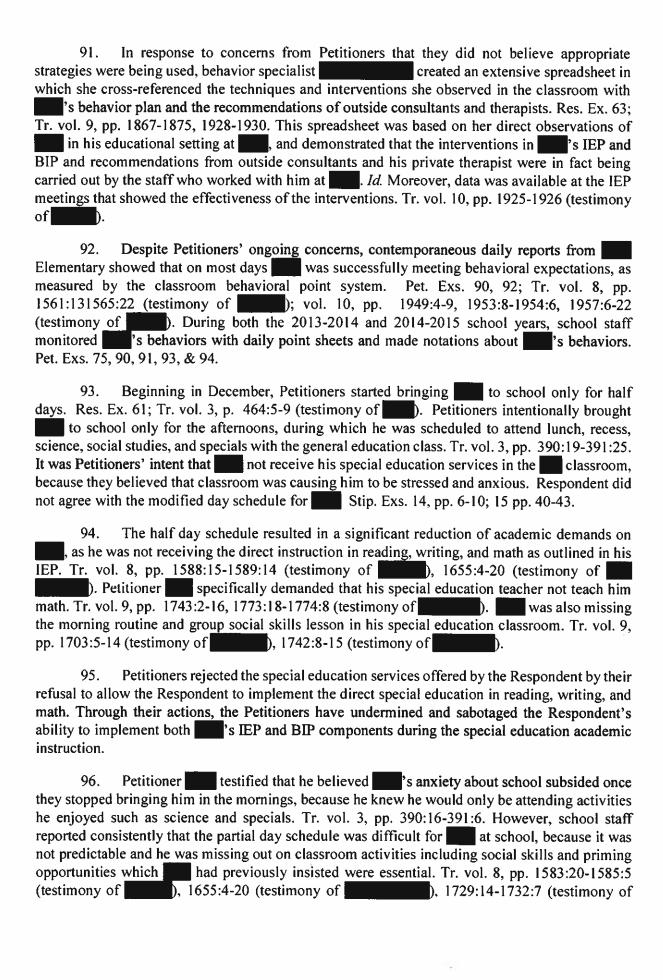


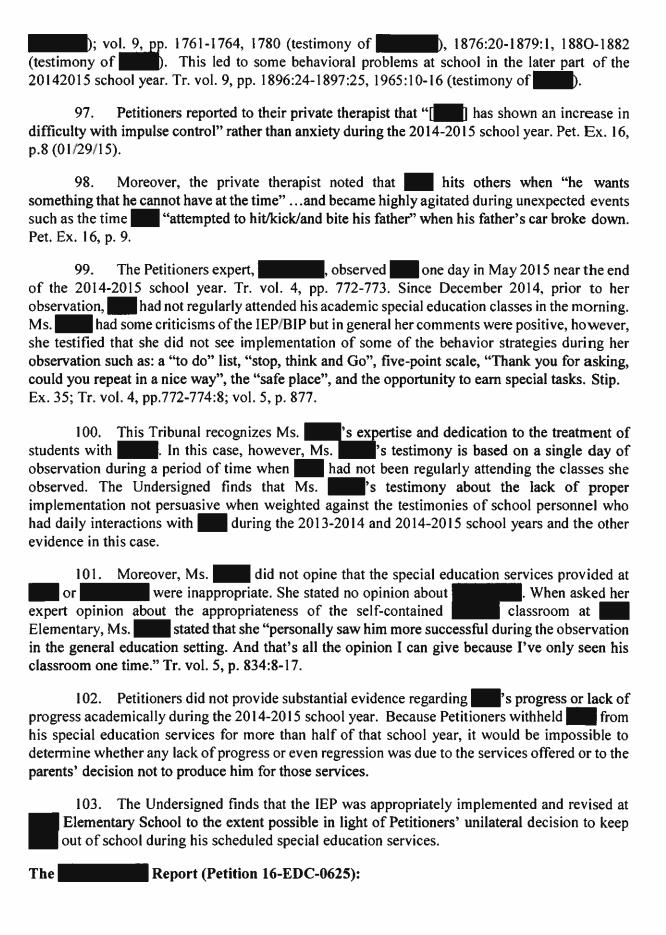
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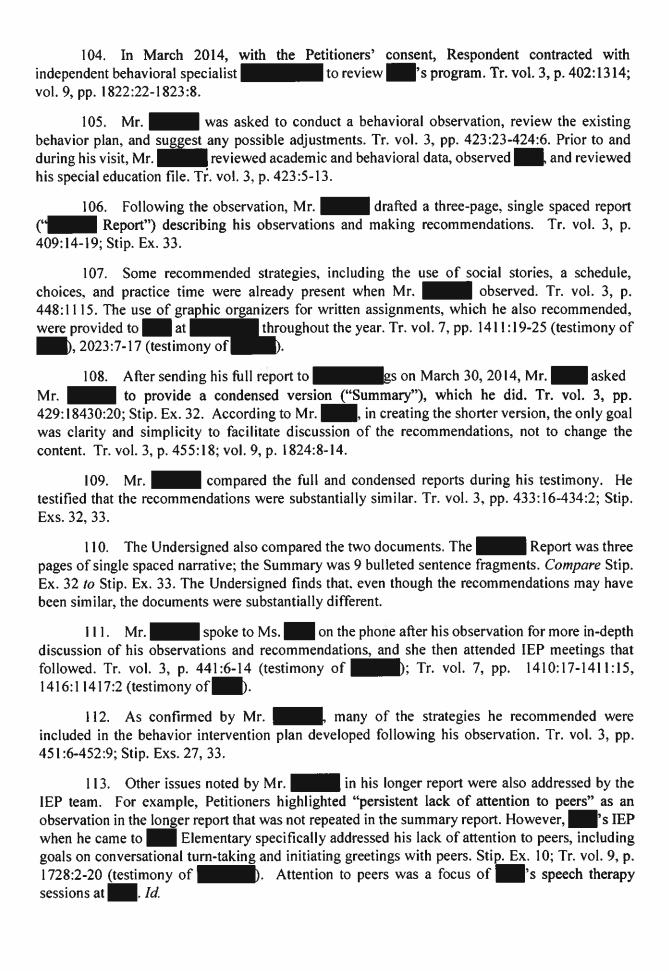


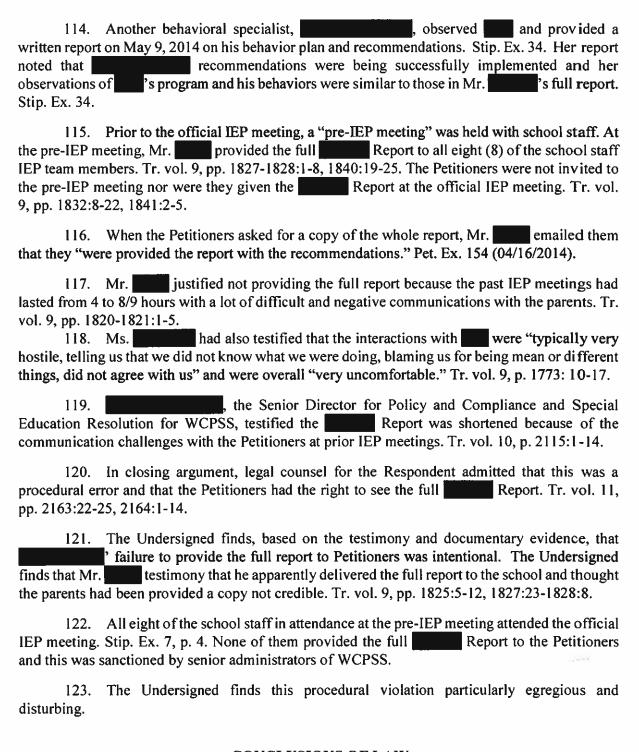


- b. was also provided with an individualized visual schedule, with a place for him to check off each activity as he completed it. Tr. vol. 4 pp. 648:2-9, 654:17-25 (testimony of pp. 1534:6-23 (testimony of pp. 1534:6-23 (testimony of pp. 1756:3-23, 1764:1-1767:14 (testimony of pp. 1756:
- c. Speech therapist provided speech therapy services and support to at at . Ms. has been a licensed speech pathologist for 20 years, 13 of which were at Wake County Schools. Tr. vol. 9, p. 1672:3-
 - 20. Ms. provided therapy to weekly, in addition to consulting with other staff who worked with him. Tr. vol. 9, pp. 1674:17-1677:15. In her therapy sessions, Ms. focused on helping learn and use expected behaviors in the classroom and self-regulate his behaviors. Tr. vol. 9, pp. 1678:23-1678:5; Res. Ex. 41. Ms. testimony and contemporaneous notes indicated that made some progress in being able to identify expected behaviors and use learned behavioral strategies in classroom situations, and regulating the tone and volume of his voice. Tr. vol. 9, pp. 1695:13 1697:1, 1699:16-20.
- d. The classroom at Elementary provided daily instruction in social skills in a small group setting. Tr. vol. 8, pp. 1549:18-1550:18 (testimony of), vol. 9, p. 1742:8-15 (testimony of). In addition to the group social skills lesson, multiple witnesses confirmed that classroom staff worked with one-on-one on social skills instruction, through the use of social stories and other techniques. Tr. vol. 8, pp. 1633:14-1634:3 (testimony of); vol. 9, pp. 1747:1-1748:4, 1751:21-1752:20, 1756:12-23, 1760:4-1761:9 (testimony of); vol. 4, p. 648:17-20 (testimony of); vol. 9, pp. 1883-1884 (testimony of). was also provided weekly social skills instruction from his speech therapist. Tr. vol. 9, pp. 1674:17-1677:15.









CONCLUSIONS OF LAW

General Legal Framework:

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

- 2. This Order incorporates and reaffirms the conclusions of law contained in its previous Orders entered in this litigation.
- 3. Petitioners have the burden of proof by a preponderance of the evidence on all issues pending in this matter. Suggestions, innuendoes, assumptions, and personal beliefs, without competent documentation evidence and testimony, are insufficient to meet this burden.
- 4. It was stipulated that the Petitioners and Respondent named in this action are properly before this Tribunal, and that this Tribunal has personal jurisdiction over them.
- 5. It was stipulated that the Petitioners and Respondent named in this action are correctly designated.
- 6. It was stipulated that Petitioner is domiciled within the boundaries of Wake County.
- 7. It was stipulated that as the party seeking relief, the burden of proof for this action lies with Petitioner. See Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 62 (2005).
- 8. It was stipulated that the Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq. and implementing regulations, 34 C.F.R. Parts 300 and 301. N.C. Gen. Stat. § 115C-109.6(a) controls the issues to be reviewed.
- 9. It was stipulated that the IDEA is the federal statute governing education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Parts 300 and 301.
- 10. It was stipulated that Respondent is a local education agency receiving monies pursuant to the IDEA.
- 11. It was stipulated that the controlling state law for students with disabilities is Gen. Stat. Chapter 115C, Article 9 and the corresponding state regulations.
- 12. It was stipulated that the Petitioners, as the party requesting the hearing, may not raise issues at the hearing that were not raised in the due process petition.
- 13. As the party requesting the hearing, the burden of proof lies with Petitioners and the standard of proof is by a preponderance of the evidence. See Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 62 (2005). Actions of local board of education are presumed to be correct and Petitioners' evidence must outweigh the evidence in favor of the Board's decisions. See N.C.G.S. § 115C-44(b).
- 14. The appropriateness of a student's educational program is decided on a case-by-case basis, in light of the individualized consideration of the unique needs of the child. See Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). Under Rowley, the Board is required first to comply with the procedures set forth in the IDEA in developing an IEP, and second, to provide a

disabled student with educational instruction that is uniquely designed to meet the student's needs through an IEP that is reasonably calculated to enable him to receive educational benefit. See Rowley, 458 U.S. at 176. If both requirements are met, "the State has complied with the obligations imposed by Congress and the courts can require no more." Id. at 207.

- 15. School districts are not charged with providing the best program, but only a program that is designed to provide the child with an equal opportunity for a free appropriate public education. Rowley, 458 U.S. at 189-90; 20 IDEA §1400(c)(1) (2004). The modest Rowley standard requires that a Board offer children with disabilities a basic floor of opportunity and some educational benefit; a district is not required to maximize a student's educational performance. See e.g. Rowley, 458 U.S. at 188-89 (1982); A.B. ex rel. D.B. v. Lawson, 354 F.3d 315, 319 (4th Cir. 2004).
- 16. The public school district satisfies this test if it provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 980 (4th Cir. 1990) (quoting Rowley, 458 U.S. at 203); see also, Hudson v. Wilson, 828 F.2d 1059, 1063 (4th Cir. 1987) (underscoring the notion that a free and appropriate education "does not mean that a local school board must provide the most appropriate education for each child.").
- 17. "The [IDEA] does not require the 'furnishing of every special service necessary to maximize each handicapped child's potential." Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1997) (quoting Rowley, 458 U.S. at 199-200). The IDEA further requires states to implement certain procedures to ensure that disabled children and their parents receive procedural safeguards with regard to the provision of a free appropriate public education. 20 U.S.C. § 1415(a). These rights include the right "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child....". 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(a).
- 18. A school district's failure to provide educational testing data to parents violates the procedural requirements of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 14001487 ("IDEA" or "Act"). ...and... prevents parents from meaningfully participating in the creation of an individualized education program ("IEP"), thereby denying their child a free appropriate public education ("FAPE") under the IDEA. See generally, MM v. Lafayette School Dist., 767 F. 3d 842 (9th Cir. 2014).
- 19. The Supreme Court has long recognized, since Rowley, that parental participation is an important means of ensuring state compliance with the Act. *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 634(4th Cir. 1985), *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990), *Indep. Sch. Dist. Number 283 v. S.D.*, 88 F.3d 556, 562 (8th Cir.1996), *Doe v. Ala. State Dep't. of Educ.*, 915 F.2d 651, 662 (11th Cir.1990).
- 20. A procedural violation rises to the level of denying a FAPE when the violation significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE. 20 U.S.C. § 1415(f)(3)(E)(ii)(b). Participation includes the ability "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child. 20 U.S.C. § 1415(b)(1)(A).

21. Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA. An IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed. *Amanda J. ex rel. Annette J. v. Clark Cnty. School*, 267 F. 3d 877, 881-882 (9th Cir. 2001).

Procedural Errors:

- 22. For a procedural defect in the development of an IEP to entitle a claimant to relief, the defect must result in a loss of educational benefit and not simply be a harmless error. See A.K. ex rel. J.K. v. Alexandria City Sch. Bd., 484 F.3d 672, 684 (4th Cir. 2007). To the extent that the procedural violations do not actually interfere with the provision of FAPE, these violations are not sufficient to support a finding that a district failed to provide a FAPE. Gadsby v. Grasmick, 109 F.3d 940, 956 (4th Cir. 1997). If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations. Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir.1990).
- 23. In addition, state law dictates that "the decision of the administrative law judge shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." N.C. Gen. Stat. § 115C-109.6(f). "In matters alleging a procedural violation, the hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (i) impeded the child's right to a free appropriate public education; (ii) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or (iii) caused a deprivation of educational benefits." N.C.G.S. 115C-109.8(a).

Crisis Plan as a Behavioral Support and/or Part of a Behavior Intervention Plan:

- 24. The IDEA does not require the use of a specific written "behavior intervention plan" except in cases of a disciplinary change in placement. See 1415(k)(1)(F); 34 C.F.R. § 300.324(a)(2)(i); Lessard v. Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 25 (1st Cir. 2008) ("The IDEA only requires a behavioral plan when certain disciplinary actions are taken against a disabled child."). Rather, the statute requires that the IEP team "consider the use of positive behavior interventions and supports" for a "child whose behavior impedes the child's learning or that of others." 20 U.S.C. § 1414(d)(3)(B). There is no requirement that every behavioral response or strategy be reduced to a written plan. See Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1338 (10th Cir. 2015), cert. granted, 137 S. Ct. 29, 195 L. Ed. 2d 901 (2016); Park Hill Sch. Dist. v. Dass, 655 F.3d 762, 766-67 (8th Cir. 2011); Lessard v. Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 26 (1st Cir. 2008); Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett, 440 F.3d 1007, 1011 (8th Cir. 2006).
- 25. When asked by this Tribunal to provide legal authority for the Petitioners' proposition that the IDEA required an emergency or "crisis plan" in the BIP, Petitioners failed to produce any applicable legal authority. Tr. vol. 7, pp. 1361:6-1364:18.
- 26. Both legal counsel agreed that the IDEA does not require the creation of written "crisis" or "emergency" plans as part of an IEP. See generally, supra.

Professional Judgment and Deference to Educators:

- 27. The professional judgment of teachers and other school staff is an important factor in evaluating an IEP. "Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment." Hartmann, 118 F.3d at 1001. See also Rowley, 458 U.S. at 207 (stating that "courts must be careful to avoid imposing their view of preferable educational methods upon the States"). The "IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parents." Lawson, 354 F.3d at 328.
- 28. In addition, "a reviewing court should be reluctant indeed to second-guess the judgment of education professionals... we must defer to educators' decisions as long as an IEP provided the basic floor of opportunity that access to special education and related services provides." *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 2017 (4th Cir. 1990) (citations and quotation marks omitted).

Petitioners' Spoliation/Missing Evidence Claims:

- 29. Petitioners assert that was denied a FAPE when Respondent shredded monitoring data, failed keep monitoring data on 's progress, and destroyed other evidence that supported Petitioners' claims. Petitioners did not contest the provision of progress reports to the parents and included the progress reports in their exhibits. See Pet. Exs. 106-113, 115-117.
- 30. Neither the Family Educational Rights and Privacy Act (FERPA) or the IDEA require school districts to maintain the type of anecdotal notes that Ms. described. FERPA specifically exempts "records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record" from the definition of education records. 34 C.F.R. § 99.3. The IDEA's definition of "education records" is identical to that of FERPA. 34 C.F.R. § 300.611(b). Therefore, the records that Ms. described are not records to which Petitioners were entitled or the LEA was required to maintained once progress reports had been distributed.
- 31. IDEA does not expressly require the Respondent to maintain records of the kind described by Ms. in her testimony. To the extent that the destruction of these records constitutes a procedural violation, Petitioners have not met their burden of providing that the violation impeded the 's right to a FAPE, significantly impeded or 's opportunity to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefit. 20 U.S.C. §1415(f)(3)(e).
- 32. In addition, there was "constant communications" between the parents and the school staff both through face-to-face meetings, emails, and the daily point sheets such that any gaps in the IEP/BIP progress monitoring did not inhibit the parents from meaningful participation. See Endrew F. v. Douglas County School District, 798 F.3d 11329 (10th Cir. 2015). Moreover, the Petitioners' own expert concluded that the school staff kept "great data."

Implementation of IEPs and BIPs:

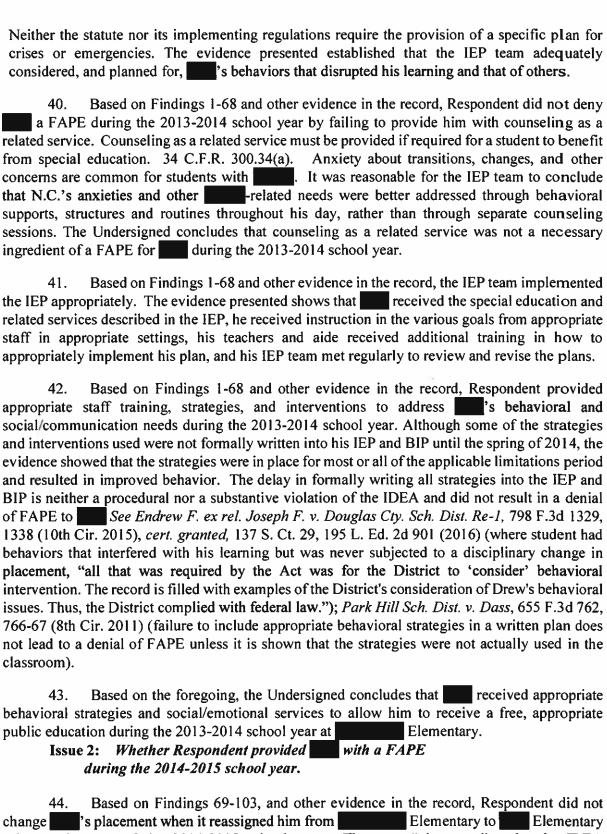
33. Petitioners have not proved by a preponderance of the evidence that the Respondent failed to implement substantial or significant provisions of the IEP and/or BIP. In the alternative, even if Petitioners had established that the Respondent failed to implement some portion of IEP/BIP, in examining a claim that an LEA failed to implement an IEP, the Fifth Circuit has stated that:

"to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of the IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's but it still holds those agencies accountable for material failures and for providing disabled child a meaningful educational benefit." *Houston Ind. School Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), *cert. denied*, 531 U.S. 817 (2000); *see also J.P.* ex rel. Peterson v. County School Bd. of Hanover Co., Va., 447 F.Supp.2d 553 (E.D. Va. 2006), *vacated on other grounds*, 516 F.3d 254 (4th Cir. 2008).

34. Even if Respondent failed to implement some portions of 's IEP and/or BIP, Petitioners have not shown that it was more than a *de minimis* failure.

Issue 1: Whether Respondent provided with a FAPE between October 3, 2013, and the end of the 2013-2014 school year.

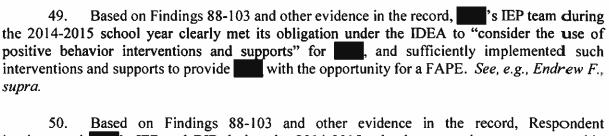
- 35. This issue involves whether the operative IEP during the relevant time period, including the BIP, appropriately addressed 's behavioral and social/communication needs, and whether that IEP was implemented properly.
- 36. All other claims regarding the appropriateness of the 2013-2014 IEP were dismissed in the October 25, 2016 Order.
- 37. Based on Findings 1-68, and other evidence in the record, and is disability manifested in behavioral and social/communication deficits. These needs were properly addressed during the 2013-14 school year with interventions such as positive reinforcement, clear routines and visual schedules, direct instruction in social skills, and assistance from trained staff in learning to regulate his own emotions and behaviors. It is the property addressed the use of positive behavioral supports, both through discussion at meetings and by seeking and incorporating the recommendations of Ms. It is the property addressed during the recommendations of Ms. It is the property addressed during the recommendations of Ms. It is the property addressed during the recommendations of Ms. It is the property addressed during the recommendations of Ms. It is the property addressed during the recommendations of Ms. It is the property addressed during the recommendations of Ms. It is the property addressed during the recommendation of Ms. It is the property addressed during the recommendation of Ms. It is the property addressed during the recommendation of Ms. It is the property addressed during the recommendation of Ms. It is the property addressed during the recommendation of Ms. It is the property addressed during the recommendation of Ms. It is the property addressed during the recommendation of Ms. It is the property addressed during the recommendation of Ms. It is the property addressed during the recommendation of Ms. It is the property addressed during the recommendation of Ms. It is the property addressed during the recommendation of Ms. It is the property addressed during the recommendation of Ms. It is the property addressed during the recommendation of Ms. It is the property addressed during the recommendation of Ms. It is the property addressed during the recommendation of Ms. It is the property addressed during the recommendation of Ms. It is the property addressed during the recommendation of Ms. It is the property address
- 38. Based on Findings 1-68, and other evidence in the record, the IEP and Behavior Intervention Plan developed for by his IEP team, and updated by his IEP team throughout the 2013-2014 school year, were reasonably calculated to enable him to make educational progress by accommodating and addressing his behavioral and social/communication needs.
- 39. Based on Findings 48-53, the failure to provide with a written "crisis plan" during either school year at issue was neither a procedural nor a substantive violation of the IDEA.



44. Based on Findings 69-103, and other evidence in the record, Respondent did not change so so placement when it reassigned him from Elementary to Elementary prior to the start of the 2014-2015 school year. The term "placement" under the IDEA encompasses "the 'mainstreaming' ideal of the LRE requirement" but does not include "the precise physical location where a disabled student is educated." AW ex rel. V. Fairfax Cty. Sch.

- Bd., 372 F.3d 674, 681 (4th Cir. 2004). The classroom at Elementary was a selfcontained special education classroom of similar size, following the same curriculum, and allowing for the same level of mainstreaming received at Elementary. Furthermore, the amount and type of special education and related services provided in his IEP remained the same. Therefore, the reassignment was a change in location but not a change in placement.
- Based on Findings 69-103, and other evidence in the record, Respondent met the requirements of the IDEA with regard to the planning and execution of Elementary to Elementary. The IDEA does not require a separate written transition plan for transitions from one school to another. The only requirement for a transition plan refers to the transition from school to post-secondary activities. See generally 34 C.F.R. 300.320; see also Park Hill Sch. Dist. v. Dass, 655 F.3d 762, 766 (8th Cir. 2011); Lessard v. Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 26 (1st Cir. 2008) ("We conclude, without serious question, that the district court did not err in finding that the absence of either a transition or behavioral plan did not constitute a procedural defect within the meaning of the IDEA."). Sie IEP team appropriately considered how the move between schools might impact him, and took sufficient steps to ease any fears or anxiety the change might cause him.
- throughout the 2014-2015 school year, as revised from time to time by his IEP team, were reasonably calculated to provide with the equal opportunity to make meaningful and more than "de minimis" educational progress. Each IEP contained several goals related to social/communication and behavioral needs, based on sufficient data and input from a variety of sources. The IEP's provided for daily direct instruction in social/emotional skills and daily living skills, and sufficient related services to allow to receive an educational benefit. 's IEPs clearly provided "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 980 (4th Cir. 1990) (quoting Rowley, 458 U.S. at 203); see generally, OS ex rel. Michael v. Fairfax County School Bd., 804 F.3d 354 (4th Cir. 2015) (all three phrases, "educational benefit," "some educational benefit" or a "meaningful educational" benefit, refer to the same standard).
- 47. Any lack of educational progress made by during the 2014-2015 school year cannot be fairly ascribed to Respondent, given his parents' failure to present him for core academic instruction for most of the school year.
- 48. Based on Findings 75-103 and other evidence in the record, the Behavior Intervention Plans in place for during the 2014-2015 school year, as revised from time to time by his IEP team, provided appropriate accommodations, supports, and strategies to address behavioral needs.

The Supreme Court is currently reviewing the level of progress required for disabled students to receive a FAPE. Endrew F. v. Douglas County School District RE-1,798 F. 3d 1329 (10th Cir. 2015), cert. granted, 137 S.Ct. 29 (2016); see, transcript of Oral Argument at 53:3-4, 58:3-22, Endrew, No. 15-827(Jan. 11, 2017) (Justices Ruth Bader Ginsburg and Elena Kagan's references to the "some bite" standard for progress.). Based on either the meaningful, more than "de minimis," or "some bite" standards discussed by the Supreme Court, the Undersigned concludes that N.C. has been provided a FAPE based under any of the three standards.

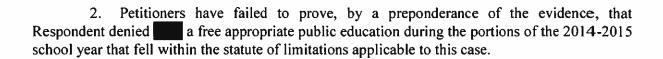


- Based on Findings 88-103 and other evidence in the record, Respondent implemented implemented is IEP and BIP during the 2014-2015 school year to the extent reasonably possible, given his parents' failure to present him for instruction for a large portion of the school year. The evidence presented shows that received the special education and related services described in the IEP, he received instruction in the various goals from appropriate staff in appropriate settings, his special education providers collaborated with his regular education teachers to ensure appropriate modification and accommodation in the regular education classroom, his teachers and aide received additional training in how to appropriately implement his plan, and his IEP team met regularly to review and revise the plans
- Based on Findings 88-103 and other evidence in the record, the staff who worked with at Elementary were appropriately trained and had the resources necessary to provide the services and supports in his IEP. Furthermore, Respondent implemented sufficient strategies and interventions to address 's behavioral and social/communication needs during the 2014-2015 school year. With these services in place, was provided the opportunity to receive educational benefit. See Rowley, 458 U.S. at 176.
- 52. Based on the foregoing, the Undersigned concludes that Respondent provided with a free, appropriate public education during the 2014-2015 school year.

Issue 3: Whether Respondent Denied a FAPE by failing to disclose the full Report in a timely manner.

- 53. Parents of a child receiving special education services have a right to access records concerning their child's services, including evaluations and other reports. See N.C.G.S. § 115C109.3.
- 54. Counsel for Respondent, and Respondent's representative at the hearing, acknowledged that Petitioners had a right to review the longer report by and that failing to provide it to them upon request was a procedural error. Based on this acknowledgement and Findings 104-123, the Undersigned concludes that the Respondent's intentional failure to provide a copy of the full Report to Petitioners at, or prior to, the IEP meeting and, thereafter, violated the parents' rights to meaningful participation in the IEP process.
- 55. 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; or, (ii) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (iii) caused a deprivation of educational benefits." N.C.G.S. 115C-109.8(a).

56. However, "[a] procedural violation will not support a cognizable claim unless the parent can show the procedural violation actually interfered with the child's FAPE." Singletary v. Dep't of Health & Human Servs./NC Infant Toddler Program, 502 F. App'x 340, 342 (4th Cir. 2013).					
57. 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. <i>Burke County Bd. of Educ. v. Denton,</i> 895 F.2d 973, 982 (4th Cir.1990).					
58. In light of the fact that "'s behavior improved in the last few months at Elementary, and in light of earlier conclusions regarding s's receipt of FAPE at both and Elementary Schools, the Undersigned concludes that the failure to provide the full Report did not impede s's right to a FAPE or cause a deprivation of educational benefits even though it did impede the parents' right to examine all relevant records with respect to the evaluation/observation of and meaningful participation in the IEP process. 34 C.F.R. § 300.603(a); MM v. Lafayette School Dist., 767 F.3d 842 (9th Cir. 2014).					
59. The actions of Senior Administrator and the other school staff in the pre-IEP meeting seriously undermined the integrity of the collaborative IEP process.					
60. To ignore such behavior sets a dangerous precedent and invites similar behavior especially when this activity was initiated and condoned by senor administrative staff.					
61. Even though the communications with the Petitioners were challenging, the Respondent cannot justify its failure to comply with the procedural mandates of the IDEA by blaming the parents.					
62. Unfortunately, in light of the Undersigned's earlier conclusion that received a FAPE at both and Elementary Schools despite the Respondent's failure to disclose the full Report, there is no remedy available for the Petitioners under the IDEA for this procedural violation.					
THEREFORE , the Undersigned finds and holds that there is sufficient evidence in the records to properly and lawfully support the Conclusions of Law cited above.					
FINAL DECISION					
BASED upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:					
1. Petitioners have failed to prove, by a preponderance of the evidence, that Respondent denied a free appropriate public education during the portions of the 2013-2014 school year that fell within the statute of limitations applicable to this case.					



- 3. Respondent developed IEP's, including Behavior Intervention Plans, during the relevant time periods that were reasonably calculated to provide with a free, appropriate public education, and implemented those plans to the extent possible when presented him for school.
- 4. Respondent committed a procedural violation of the IDEA by failing to disclose the full Report to Petitioners prior to the May 2014 IEP meeting, but although this procedural violation impeded the parents' meaningful participation in the IEP process, it did not result in a denial of a free and appropriate public education to and this Tribunal has no remedy to award under the IDEA.
- 5. Petitioners have failed to carry their burden of proof on all issues and accordingly, Petitioners are not entitled to relief in this special education contested case.

IT IS HEREBY ORDERED that all of Petitioners' claims are DISMISSED WITH PREJUDICE.

NOTICE

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

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C106.1 et seq.) and particularly N.C.G.S. §§ 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section."

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

IT IS SO ORDERED

Stacey Bice Bawtinhimer Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 30th day of January, 2017.



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