STATE OF NORTH CAROLINA

BEFORE A STATE HEARING REVIEW OFFICER
FOR THE STATE BOARD OF EDUCATION
PURSUANT TO N.C. GEN. STAT. § 115C-109.9

[redacted], *by and through her parent,* [redacted], *and* [redacted] *independently,* Petitioners, v. CHARLOTTE-MECKLENBURG SCHOOLS BOARD OF EDUCATION, Respondent.	**DECISION** 18 EDC 00359

This **DECISION** resolves Petitioners' appeal of the Final Decision – Order of Dismissal issued in the above-captioned matter by Administrative Law Judge (ALJ) Selina Malherbe on April 18, 2018.

APPEARANCES:

For Petitioner-Appellants: Stacey M. Gahagan, THE GAHAGAN LAW FIRM, P.L.L.C., 3326 Durham Chapel Hill Blvd. Suite 210-C, Durham, NC 27707, stacey@gahaganlaw.com.

For Respondent-Appellee: Andre F. Mayes, Andre F. Mayes, CHARLOTTE-MECKLENBURG SCHOOLS, 600 E. Fourth Street, 5th Floor, Charlotte, NC 28202, andre.mayes@cms.k12.com.

THE RECORDS, received by the Undersigned on April 27, 2018, for review in connection with this appeal, include:

1. A letter signed by William J. Hussey, Director, Exceptional Children Division, and dated April 24, 2018, providing "formal notice of . . . appointment as State Hearing Review to review . . . 18 EDC 00359," the above-captioned case;

2. A "Certification" form indicating that "the attached (electronic file) [is] a true copy of the Official Record . . . in the case 18 EDC 00359;

3. An "Official Record Index Sheet" captioned 18 EDC 00359;

4. A CD labeled with a handwritten designation as the "Official Record SEALED," captioned "18 EDC 00359 [redacted] by and through her parent [redacted] v. Charlotte-Mecklenburg Schools Board of Education," and affixed with a mailing label containing the Undersigned's name and address; and

5. Papers representing printed copies of much of the material also contained on the CD labeled as the "Official Record" in this case.

The Undersigned also received via email on May 7, 2018, as requested, Written Arguments on Appeal from both Petitioners and Respondent.

REFERENCES utilized to provide a document that does not contain personally identifiable information regarding the Petitioners and/or for convenience include the following:

For the Petitioner child:	[redacted] or the child
For the Petitioner father:	[redacted] father, Petitioner, or parent
For the Respondent:	Respondent or CMS

ISSUES ON APPEAL:

Petitioners' Notice of Appeal broadly challenged "all the findings and decisions in the Final Decision – Order of Dismissal issued in the above-captioned matter by the Honorable Administrative Law Judge Selina Malherbe on April 18, 2018." Having reviewed that decision, the entire record, and the parties' Written Arguments on Appeal, the undersigned identifies two specific issues for resolution on appeal:

1. Whether the ALJ erred in dismissing Petitioners' Petition for a Contested Case Hearing for lack of subject matter jurisdiction based on the conclusion Petitioners knew or should have known about the actions that formed the basis of their complaint prior to January 18, 2017, and were thus barred from seeking relief by North Carolina's one-year statute of limitations, N.C. Gen. Stat. § 115C-109.6(b); and

2. Whether the ALJ erred in dismissing Petitioners' Petition for a Contested Case Hearing for lack of subject matter jurisdiction based on the conclusion that no exception to North Carolina's one-year statute of limitations and the IDEA's two-year statute of limitations applies in this case. *See* N.C. Gen. Stat. § 115C-109.6(b) and (c)(ii) and 34 C.F.R. §§ 300.507(a)(2) and 300.511(f)(2).

PRELIMINARY STATEMENT on the Standard of Review:

The undersigned's review of the findings and decisions subject to appeal is in accordance with the provisions of 20 U.S.C. § 1415(g), 34 C.F.R. § 300.514, N.C. Gen. Stat. § 115C-109.9, and North Carolina's *Policies Governing Services for Children with Disabilities*, NC Policies 1504-1.15.

Under these procedures, the Review Officer must render an "independent decision" following impartial review of the entire record, giving "due weight" to the administrative proceedings before the administrative law judge. *Board of Education v. Rowley*, 458 U.S. 176, 207 (1982); *see also Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991) (evaluating a decision flowing from Virginia's two-tiered administrative process).

The Fourth Circuit Court of Appeals interprets this "due weight" requirement to mean that "findings of fact by the hearing officers in cases such as these are entitled to be considered *prima facie* correct, akin to the traditional sense of permitting a result to be based on such fact-finding, but not requiring it." *Doyle*, 953 F.2d at 105; *see also J.P. v. County School Board of Hanover County*, 516 F.3d 254, 259 (4th Cir. 2008) ("In this circuit, we interpret *Rowley*'s 'due weight' requirement to mean that the findings of fact made in the state administrative proceedings must 'be considered *prima facie* correct.'" (citing *Doyle*, 953 F.2d at 105)).

To determine whether factual findings were "regularly made and entitled to *prima facie* correctness," *Doyle*, 953 F.2d at 105, "our cases have typically focused on the *process* through which the findings were made," *J.P.*, 516 F.3d at 259 (emphasis in original). Factual findings are *ir*regularly made "if they are reached through a process that is far from the accepted norm of a fact-finding process." *County School Board v. Z.P.*, 399 F.3d 298, 305 (4th Cir. 2005) (internal quotation marks omitted).

Findings of fact are not irregularly made simply because a hearing officer finds one party's witnesses to be more credible than another's on a disputed point. Review Officers "who . . . ha[ve] not seen or heard [witnesses] testify," generally must defer to ALJs, or hearing officers, on questions of credibility because "hearing officer[s] . . . *ha[ve]* seen and heard the witness[es] testify." *Doyle*, 953 F.2d at 104 (emphasis added).

Findings of fact may be irregularly made, however, if they are unsupported by an independent review of the record evidence considered in its entirety. *See Carlisle Area Sch. V. Scott*, 62 F.3d 520, 529-30 (3rd Cir. 1995).

In other words, the amount of deference appropriate in a particular case may vary depending upon the process employed to find the facts and the thoroughness of each finding. *See, e.g., Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995). When determining the degree of deference to be given a hearing officer's findings, a particularly important factor is the thoroughness with which they were reached. *Capistrano*, 59 F.3d at 891 ("The amount of deference accorded the hearing officer's findings increases where they are 'thorough and careful.'").

When a reviewing tribunal does not adhere to factual findings in the administrative proceeding, "it is obliged to explain why." *M.M. v. School Dist. of Greenville County*, 303 F.3d 523 (4th Cir. 2002).

Now, having reviewed the records received in connection with this case, including the Certified Official Record, the Review Officer for the State Board of Education independently and impartially offers the following Findings of Fact in accordance with 20 U.S.C. § 1415(g), 34 C.FR § 300.514, N.C. Gen. Stat. § 115C-109.9, and the *Policies Governing Services for Children with Disabilities*, NC Policies1504-1.12:

FINDINGS OF FACT

This statement of factual findings offers relevant facts in three parts: (1) general background and procedural-history facts, (2) background facts pertinent to the first issue on appeal regarding the

ALJ's dismissal of Petitioner's claims under North Carolina's one-year statute of limitations, and (3) background facts pertinent to the second issue on appeal regarding the ALJ's conclusion that no exception to North Carolina's and the IDEA's statutes of limitation applies.

GENERAL BACKGROUND AND PROCEDURAL HISTORY:

1. Petitioner [redacted] is a child diagnosed with Autism Spectrum Disorder, Generalized Anxiety Disorder, Depressive Disorder, and Academic or Educational Problem who attended CMS for over a decade from 2005 through 2015, through elementary, middle, and part of high school, until CMS informed her father that CMS was not prepared to deal with [redacted], *see* Affidavit of [ ] ¶ 38, and referred [redacted] to [redacted] Behavioral Health Center or [redacted] Hospital following [redacted] in-school suicide threat, *see* Respondent's Memorandum in Opposition to Petitioners' Partial Motion for Summary Judgment, Exhibit E.

2. "During her enrollment in CMS, [redacted] was never identified as a child with a disability under the Individuals with Disabilities Education Act ("IDEA")." Respondent's Response to Petition for Contested Case Hearing, ¶ 6.

3. During her enrollment in CMS, CMS never evaluated [redacted] under either the IDEA or Section 504. Affidavit of [redacted] ¶ 52.

4. During her enrollment in CMS, CMS never convened an IDEA referral meeting for [redacted] Affidavit of [redacted] ¶ 51.

5. During her enrollment in CMS, beginning in elementary school, [redacted] "began exhibiting problem behaviors, expressing suicidal ideations, and crying in school due to anxiety about school." Affidavit of [ ] ¶ 4.

6. [redacted]'s parents began providing therapy for [redacted] outside of school when she was 8 years old; [redacted] also began experiencing migraines about this time. Affidavit of [ ] ¶ 8.

7. [redacted] began exhibiting self-injurious behaviors in 4th grade at CMS, and her incidents of crying at school and anxiety about school increased in 5th grade at CMS. Affidavit of [redacted] ¶¶ 9 & 10.

8. During [redacted]'s enrollment in CMS in middle school, her migraines worsened and became more frequent; her anxiety and crying increased; she was hospitalized several times; and her grades declined. Affidavit of [redacted] ¶¶ 13-15 and Petitioners' Written Arguments on Appeal p. 5.

9. During [redacted]'s enrollment in CMS in middle school, she made suicide threats at school and CMS required [redacted]'s parents to remove her from school and have her assessed by a psychologist or psychiatrist before CMS would allow [redacted] to return to school, but CMS did not convene a referral meeting for [redacted] or initiate its own evaluation procedures under the IDEA. Affidavit of [redacted] ¶¶ 16-17.

10. When [redacted] was in seventh grade, in the 2011-2012 school year, CMS acknowledged (relying on [redacted]'s parents privately obtained evaluation) [redacted]'s diagnosed disabilities, including migraines, severe anxiety, severe depression, and oppositional defiant disorder, and determined that [redacted] had "behavior that is severe or frequent enough to interfere with student's learning," "the behavior interferes with the learning of others," and "traditional supports/interventions/consequences have not worked" to address the symptoms of [redacted]'s recognized disabilities. Respondent's Revised Motion for Summary Judgment, Exhibit A.

11. On October 16, 2012, CMS determined, given the impact of [redacted]'s diagnosed disabilities on her learning, that she was eligible for a Section 504 plan under Section 504 of the Rehabilitation Act. Respondent's Revised Motion for Summary Judgment, Exhibit A, Bates p. 7.

12. The IDEA, the federal law at the foundation of the Petition at issue, is not the same as Section 504 of the Rehabilitation Act, the legislation under which Respondent developed a 504 plan. The IDEA imposes different responsibilities on schools, and it creates different rights in children with disabilities. Notably, for example, the IDEA imposes on schools a duty to develop – for each child with a disability who is eligible under the Act – an individualized educational program (IEP) designed to meet the unique needs of each eligible child and to provide each eligible child with educational benefit in the least restrictive environment. *See* 20 U.S.C. § 1412(a)(4)-(5). A 504 Plan, like the one Respondent developed for A.B. to satisfy Section 504 of the Rehabilitation Act, is not an IEP, and it does not fulfil the requirements of the IDEA. The IDEA creates in each eligible child a right to an IEP and to information about administrative procedural safeguards available to them to secure that right in a timely manner. *See id* at 1412(a)(6); 20 U.S.C. § 1415. Section 504 does *not* require an IEP or give a child the right to information about the administrative procedural safeguards available to them under the IDEA.

13. After CMS determined that [redacted] was eligible for a 504 plan, [redacted] sent an email to CMS sharing with CMS an email from [redacted]'s private psychologist, Dr. M[redacted]

14. In [redacted]'s email to CMS, [redacted] stated that he "would like to discuss these topics from Dr. M[redacted] at [[redacted]'s] 504 meeting tomorrow." Petitioner's Motion for Summary Judgment, Exhibit 13.

15. Dr. M[redacted]'s February 19, 2013, email, which was attached to [redacted]'s email to CMS, stated: "We understand that with [[redacted]'s] specific diagnoses, [redacted] qualifies as OHI and is eligible for an IEP – Is tutoring covered by an IEP? Is there something that is covered by IEP that can benefit her?" Petitioner's Motion for Summary Judgment, Exhibit 13.

16. "OHI" or "Other Health Impaired" is one of the categories specified in the IDEA through which a child with a disability may become eligible for special education and related services as detailed in an IEP. 20 U.S.C. § 1401(3)(A) (defining a "child with a disability" for purposes of the IDEA to include a child with "other health impairments" who needs special education and related services); 34 C.F.R. § 300.8(c)(9) (defining "other health

impairment' for purposes of eligibility under the IDEA to include children who have "limited strength, vitality or alertness" due to chronic or acute health problems).

17. An IEP for children qualifying as OHI is available under the IDEA, *see* U.S.C. §§ 1412(a)(3)-(4), 1414(d); it is not available through Section 504.

18. Respondent's hand-written notes contained in [redacted]'s educational record and dated "2/25," with no year specified, state the following: "OHI - Medical disability that limits her strength, vitality, or alertness." Respondent's Revised Motion for Summary Judgment, Exhibit C, Bates p. 2.

19. CMS held a 504 meeting regarding [redacted], on February 26, 2013, and CMS's notes of that meeting reflect that participants discussed some of Dr. M[redacted]'s suggestions, but CMS's February 26, 2013, meeting notes are silent with respect to Dr. M[redacted]'s suggestion that [redacted] qualifies as OHI under the IDEA and is eligible for an IEP and they do not acknowledge CMS's "2/25" notation about OHI. Respondent's Revised Motion for Summary Judgment, Exhibit C, Bates p. 19.

20. The record on appeal contains nothing, other than the hand-written acknowledgement dated "2/25," to indicate what, if anything, Respondent did in response to [redacted]'s request to discuss Dr. M[redacted]'s assertion that [redacted] qualified for OHI eligibility and an IEP.

21. The record on appeal contains no evidence that CMS provided, or "gave," to Petitioners, the notices required by the IDEA following CMS's recognition that [redacted]'s disabilities impacted her learning at school or following [redacted]'s request to discuss Dr. M[redacted]'s determination that [redacted] "qualifies as OHI and is eligible for an IEP." *See* 34 C.F.R. § 300.504(a) (requiring that "*a copy* of the procedural safeguards available to the parents of the child with a disability must be ***given to the parents***" once per school year and on a number of other specified occurrences, including when upon a "parent request for evaluation" for eligibility for an IEP) (emphasis added) and 34 C.F.R. § 300.503(b) (requiring that "***[w]ritten*** notice . . . ***must be given to the parents of a child with a disability*** a reasonable time ***before*** the public agency . . . [r]efuses to initiate . . . the identification, evaluation, or educational placement of the child," and that "notice required under . . . this section ***must*** include – (1) a description of the action proposed or refused by the agency; (2) an explanation of why the agency proposes or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (4) a statement that the parents of the child with a disability have protection under the procedural safeguards of this part . . .; (5) sources for parents to contact to obtain assistance in understanding the provisions of this part; (6) a description of other options the IEP Team considered and the reasons why those options were rejected; and (7) a description of other factors that are relevant to the agency's proposal or refusal") (emphasis added); *see also* 20 U.S.C. § 1415(c)(1) (same).

22. Although CMS continually maintained a 504 Plan for [redacted] following the October 16, 2012, determination of eligibility under that provision of the Rehabilitation Act, [redacted]'s challenges at school and interruptions in her education continued to escalate.

23. [redacted]'s challenges at school culminated on November 4, 2015, when [redacted] was in 10th grade, in an incident that [redacted] characterizes as [redacted]'s "attempted . . . suicide at school," Affidavit of [redacted] ¶ 36, and that CMS characterizes as a "high risk for suicide" requiring "intake with [redacted] Behavioral Health Center or [redacted] Hospital," Respondent's Revised Motion for Summary Judgment, Exhibit E.

24. Following [redacted]'s November 4, 2015, in-school suicide attempt or action indicating a "high risk for suicide," depending upon whether Petitioners or Respondent describes the incident, [redacted] remained in the hospital through November 10, 2015.

25. The assistant principal of [redacted]'s school contacted [redacted]'s father and told him that he needed to plan for [redacted] to attend school elsewhere because the school was not prepared to "deal with" [redacted] Affidavit of [redacted] ¶ 38. CMS does not refute this sworn statement in its argument or its filings.

26. CMS did not (not before or after referring [redacted] to [redacted] Behavioral Health Center or [redacted] Hospital and not before or after telling [redacted] to plan for [redacted] to attend school elsewhere) refer [redacted] for an evaluation to determine if she qualified for special education and related services under the IDEA that might enable the school to "deal with" [redacted] and her diagnosed disabilities such that she could realize educational benefit in the least restrictive environment at school.

27. Upon release from the hospital, [redacted] remained at home until December 27, 2015, when [redacted] enrolled her, in accordance with the instruction of [redacted]'s assistant principal, in a school outside CMS. Affidavit of [redacted] ¶¶ 38-50.

28. While she was at home, [redacted]'s parents took [redacted] for a full psychological evaluation where she was diagnosed with Autism Spectrum Disorder, Major Depressive Disorder, and Generalized Anxiety Disorder. *See* Petitioners' Partial Motion for Summary Judgment, Exhibit 1, p. 25.

29. In May 2016, Petitioners informed CMS of [redacted]'s diagnosis of Autism Spectrum Disorder and of [redacted]'s enrollment in a non-CMS school. Affidavit of [redacted] ¶ 17; Respondent's Written Arguments on Appeal, ¶ 12, p. 2.

30. In January 2018 [redacted] visited an attorney about the circumstances described in the Petition at the foundation of this case. Affidavit of [redacted] ¶ 54.

31. On January 22, 2018, Petitioners filed a Petition for a Contested Case Hearing (Special Education) ("Petition") alleging that Respondent failed to:

    a. Find [redacted] eligible for special education services under the IDEA;
    b. Offer [redacted] a FAPE in the least restrictive environment;
    c. Develop substantively and procedurally valid Individualized Education Programs (IEPs) for [redacted];

d. Provide a substantively appropriate school placement to [redacted];
e. Properly identify all suspected areas of disability for [redacted];
f. Properly address [redacted]'s documented disabilities and academic issues;
g. Employ adequate identification, classification, and placement procedures with respect t[redacted];
h. Properly evaluate [redacted]. and employ proper evaluative procedures;[1]
i. Provide a substantively appropriate school placement to [redacted];
j. Properly consider [redacted]'s need for related services;
k. Properly consider[redacted].'s need for Extended School Year (ESY);
l. Follow the requirements set forth in the IDEA; and
m. Follow the requirements of the North Carolina state law as set forth in N.C. Gen. Stat. §§ 115C-109.6 *et seq*.

See Petition p. 1.

32. On February 9, 2018, Respondent filed (1) its Response to Petition for Contested Case Hearing and (2) a Motion to Dismiss with a request for attorneys' fees.

33. Respondent's Response to Petition for a Contested Case Hearing denied that CMS had violated the IDEA and asserted, most essentially, as follows:

a. "Since the allegations in their entirety are outside of the statutory time frame and the jurisdiction of this court, Respondent does not respond to any individual allegations in the Petition;"
b. "During her enrollment at CMS, [redacted] was never identified as a child with a disability under the Individuals with Disabilities Education Act ("IDEA");" and
c. "[redacted] was found eligible under and protected by Section 504 of the Rehabilitation Act of 1973 because of a non-IDEA disability."

Response to Petition for Contested Case Hearing ¶¶ 5, 6, & 7.

34. Respondent's Motion to Dismiss asserted, essentially, that "The Office of Administrative Hearings lacks jurisdiction over issues occurring more than one year prior to the filing of the Petition due to the statute of limitations and, thus lacks jurisdiction regarding any of the alleged issues in the Petition, all of which occurred prior to January 22, 2017." It then requested "that this court dismiss the Petition in its entirety." Respondent's Motion to Dismiss ¶¶ 9 & 10.

35. Respondent's Motion to Dismiss also asserted that the Petitioners' Petition was "baseless" and without "legal foundation," that "Petitioner and Petitioner's attorney unwisely filed an

[1] In the Petition itself, Petitioners designated two of CMS's alleged failings with a (g). As a result, this particular alleged failure *and* the one immediately preceding it in the list on page 1 of the Petition are both designated (g). This Decision, unlike the Petition, does *not* duplicate the (g) designation. As a result, this list of CMS's alleged failings may appear at first glance to include one more alleged failure than does the Petition itself, but that is not the case. This Decision simply gives each alleged failure its own letter designation without duplicating the (g) designation for two points.

unmeritorious and untimely Petition that lacks evidentiary support," and that "Respondent respectfully seeks attorney's fees." Respondent's Motion to Dismiss ¶¶ 13 & 14.

36. On February 22, 2018, Administrative Law Judge Stacey Bawtinhimer entered an Order Denying Respondent's Motion to Dismiss and Request for Attorney's Fees. The ALJ found and concluded, *inter alia*, as follows:

    a. "In the Petition, Petitioners alleged IDEA violations, specifically Child Find violations, for the contested time period from the 2011-2012 school year through the date of the Petition." 2/22/18 Order ¶ 2.
    b. Despite Respondent's awareness of [redacted]'s disabilities, "Petitioners alleged Respondent never convened a referral meeting to determine whether [redacted] was eligible for services under the IDEA." 2/22/18 Order ¶ 4.
    c. "Instead, Petitioners alleged that Respondent informed Petitioners that [redacted]'s parents needed to plan for [redacted] to attend school elsewhere because the school was not prepared to deal with [redacted]' 2/22/18 Order ¶ 9.
    d. "Respondent contends '[redacted]. was found eligible under and protected by Section 504 of the Rehabilitation Act of 1973 because of a non-IDEA disability.' The Undersigned [referencing ALJ Bawtinhimer] is unaware of any disabilities that are identified specifically as 'non-IDEA.'" 2/22/18 Order ¶ 11.
    e. '[redacted]'s Section 504 Eligibility Determination Worksheet, which respondent attached as an exhibit to its filed Response, specifically identifies disabilities for which [redacted], or any child with a disability, could be deemed eligible under the IDEA." 2/22/18 Order ¶ 12.
    f. Respondent moved for dismissal of Petitioners' claims based on Respondent's contention that "[a]ll of the alleged actions forming the basis of the Petition occurred prior to January 22, 2017 – one year from the date of the Petition in this matter." 2/22/18 Order ¶14 (quoting Mot. Dismiss ¶ 4).
    g. "Merely because an alleged action occurs outside of North Carolina's one-year statute of limitations does not automatically make claims regarding those actions time-barred." 2/22/18 Order ¶ 15.
    h. "When the Petitioners 'knew' or 'should have known' about the procedural and substantive violations of the IDEA committed by the Respondent is what triggers the statute of limitations, not the date Petitioners withdrew [redacted] from Respondent's schools or filed the Petition." 2/22/18 Order ¶ 16.
    i. "'The IDEA's statute of limitations is an affirmative defense rather than a jurisdictional prerequisite,' *M.G. v. N.Y.C. Dep't of Educ.*, 15 F. Supp. 3d 296, 304 (S.D.N.Y. 2014); therefore, Respondent has the burden of proving that the statute of limitations bars Petitioners' claims. *See, e.g., Bano v. Union Carbide Corp.*, 361 F.3d 696, 710 (2d Cir. 2004). . . . Respondent's burden includes 'showing when the cause of action accrued.' *Bano*, 361 F.3d at 710." 2/22/18 Order ¶ 20.
    j. "Respondent has not met its burden of 'showing when the cause of action accrued.'" And "Respondent did not provide *any* argument that Petitioners 'knew or reasonably should have known about the alleged action that forms the basis of the petition' at any earlier date than January 28, 2018." 2/22/18 Order ¶ 22 (emphasis in original).

k. "Respondent simply counted back one year from the date the Petition was filed an alleged that the appropriate statute of limitations is January 22, 2017. Mot. Dismiss ¶ 4. This is not sufficient to show when the cause of action accrued or to meet Respondent's burden to establish whether the affirmative defense even applies, especially in a Child Find case." 2/22/18 Order ¶ 24.

l. "Therefore . . . Petitioners have alleged sufficient facts to invoke subject matter jurisdiction on their allegations from the 2011-2012 school year through the present. . . . Respondent's Motion to Dismiss is denied. 2/22/18 Order ¶ 26.

m. "Respondent also seeks attorneys' fees." 2/22/18 Order ¶ 17.

n. "Here, taking the facts alleged in the Petition as true, Petitioners have raised a plausible Child Find claim. Already, Respondent has provided evidence to this Court that it was on notice of [redacted]'s possible eligibility under the IDEA even if Respondent believed [redacted] to have a 'non-IDEA disability.' The Undersigned [referencing ALJ Bawtinhimer] has grave concerns that Respondent is alleging Petitioners filed an 'unmeritorious and untimely Petition that lacks any evidentiary support,' Mot. Dismiss ¶ 14, in an attempt to chill parents of children with disabilities – as well as their attorneys – from asserting their rights under the IDEA for fear of incurring an undisclosed amount of attorneys' fees." 2/22/18 Order ¶ 28.

o. "At this point in the litigation, Respondent has not met its burden to demonstrate Petitioners' claim is 'frivolous' and filed for an 'improper purpose.'" 2/22/18 Order ¶ 29. As such, "the Undersigned [referencing ALJ Bawtinhimer] will deny Respondent's request for attorney's fees as this point." 2/22/18 Order ¶ 30.

37. Also on February 22, 2018, Chief Administrative Law Judge Julian Mann issued an Order of Reassignment reassigning this case from ALJ Bawtinhimer to the Honorable ALJ Selina Malherbe.

38. On February 23, 2018, Respondent filed a Motion for Reconsideration of ALJ Bawtinhimer's February 22, 2018, Order Denying Respondent's Motion to Dismiss.

39. On February 26, 2018, the parties held a telephone conference with newly presiding ALJ Malherbe and formerly presiding ALJ Bawtinhimer, the ALJ who issued the initial Order Denying Respondent's Motion to Dismiss. *See* Order Denying Respondent's Motion for Reconsideration. In this telephone conversation, which was not transcribed, "Judge Bawtinhimer explained the documents submitted by Respondent from Section 504 meetings were insufficient to establish that Petitioners had notice of the decisions. Judge Bawtinhimer further explained that a Prior Written Notice from an IEP referral meeting, which Petitioners' alleged did not exist, would suffice." Petitioners' Written Arguments on Appeal, p. 8-9.

40. On February 28, 2018, ALJ Bawtinhimer DENIED Respondent's Motion for Reconsideration while emphasizing that "[a]ll other matters will be decided by the presiding administrative law judge." Order Denying Respondent's Motion for Reconsideration.

41. On March 29, 2018, Petitioners filed a Motion for Partial Summary Judgment alleging there were no genuine issues of material fact that:

    a. Respondent failed to comply with the Child Find requirements of the IDEA;
    b. Respondent failed to offer [redacted] a FAPE; and
    c. The statute of limitations did not apply to Petitioners' claims.

42. On April 2, 2018, Respondent filed a Motion for Summary Judgment and Memorandum of Law in Support.

43. On April 3, 2018, Respondent filed a Revised Motion for Summary Judgement and Memorandum of Law in Support alleging that there were no genuine issues of material fact that:

    a. Petitioners' claims are outside the statute of limitations;
    b. [redacted] was not a student with a disability who was in need of specially designed instruction when she was a student at CMS; and
    c. [redacted]'s father did not give Respondent notice that he would seek reimbursement for [redacted]'s private school tuition.

44. On April 10, 2018, ALJ Malherbe held a hearing on both parties' motions for summary judgment.

45. On April 18, 2018, ALJ Malherbe entered a Final Decision – Order of Dismissal, dismissing all of Petitioner's claims because:

    a. ALJ Malherbe determined that North Carolina's one-year statute of limitations barred Petitioners' claims because, according to the Final Decision, Petitioners knew or should have known about CMS's actions alleged to violate the Act prior to January 18, 2017, *see* N.C. Gen. § 115C-109.6(b) and Final Decision ¶ 6, and
    b. ALJ Malherbe determined that neither exception to North Carolina's one-year statute of limitations applied in this case because no argument was made about the first exception and because ALJ Malherbe determined that "[t]he preponderance of the evidence in this case, supports a determination that Respondent did not withhold information from the parents that is required under State or Federal law," *see* N.C. Gen. § 115C-109.6(c) and Final Decision ¶¶ 4 & 5.

46. On April 23, 2018, Petitioner filed a Notice of Appeal seeking review of "all the findings and decisions in the Final Decision—Order of Dismissal issued in the above-captioned matter by the Honorable Administrative Law Judge Selina Malherbe on April 18, 2018."

47. On April 27, 2018, the undersigned received a FedEx package from the Public Schools of North Carolina. This package contained the following:

a. A letter signed by William J. Hussey, Director, Exceptional Children Division, and dated April 24, 2018, providing "formal notice of . . . appointment as State Hearing Review to review . . . 18 EDC 00359," the above-captioned case;
b. A "Certification" form indicating that "the attached (electronic file) [is] a true copy of the Official Record . . . in the case 18 EDC 00359;"
c. An "Official Record Index Sheet" captioned 18 EDC 00359;
d. A CD labeled with a handwritten designation as the "Official Record SEALED," captioned "18 EDC 00359 [redacted] by and through her parent [redacted] v. Charlotte-Mecklenburg Schools Board of Education," and affixed with a mailing label containing the undersigned's name and address; and
e. A stack of paper that appears to be printed copies of material also contained on the CD labeled as the "Official Record" in this case.

48. On April 27, 2018, the Undersigned requested that both Petitioners and Respondent submit on or before May 7, 2018, exceptions to and/or written arguments concerning the matters presented for review by or through Petitioner's Notice of Appeal of ALJ Malherbe's April 18, 2018, Final Decision—Order of Dismissal.

49. On May 7, 2018, both Petitioners and Respondent submitted Written Arguments on Appeal to the Undersigned via email.

BACKGROUND FACTS RELATED TO THE ALJ'S DETERMINATION THAT NORTH CAROLINA'S ONE-YEAR STATUTE OF LIMITATIONS ON DUE PROCESS COMPLAINTS BARS PETITIONERS' CLAIM:

50. The ALJ determined that Petitioners' claims are barred by North Carolina's one-year statute of limitations because the ALJ determined that "the greater weight of the evidence presented shows that the parents knew or should have known about the actions prior to January 18, 2017, that formed the basis of their complaint." Final Decision ¶ 6.

51. The Final Decision does not identify a date upon which Petitioners knew or should have known of the actions that formed the basis of their complaint other than to state that the date was "prior to January 18, 2017."

52. The Final Decision does not identify what evidence in the record demonstrated Petitioners had or should have had the knowledge required to trigger the statute of limitations.

53. ALJ Bawtinhimer informed the parties, in a telephone conference associated with Respondent's motion to consider her denial of Respondent's motion to dismiss based on the statute of limitations, that Respondent could produce evidence of the date it had complied with the notice requirements of the IDEA – specifically the prior written notice of its decision to refuse consideration or evaluation for special education services – in order to demonstrate when Petitioners' knew or should have known of the actions forming the basis of the complaint in this case. *See* Petitioners' Written Arguments on Appeal, p. 8-9.

54. The Final Decision identifies three facts from the record to support the decision. All three facts are found in Paragraph 6 and are related to Petitioners actions, rather than the

Respondent's actions. None of the three facts reflect evidence that Respondent satisfied (on any day) the notice requirements of the IDEA as ALJ Bawtinhimer stated would suffice to trigger the statute of limitations. The three facts are:

a. "Petitioner unilaterally withdrew [redacted] from Respondent in December 2015 and placed [redacted] in a medical treatment facility in [redacted]."
b. "In May 2016, Petitioner informed Respondent that Petitioner had received a diagnosis for Autism and was receiving treatment in [redacted]"
c. "Currently, [redacted] is a parentally-placed private school student who is enrolled in the online program at [redacted] University's Independent Study Program and [redacted] Community College's dual enrollment program."

Final Decision ¶ 6.

55. The Final Decision offers no explanation (and cites to no authority) to demonstrate how the three facts specified establish that Petitioners knew or should have known – prior to January 18, 2017 – about the actions of Respondent that formed the basis of the violations alleged in the Petition, to the extent that the ALJ determined that these facts so establish.

56. Petitioners and Respondent agree that North Carolina's one-year statute of limitations provides as follows:

> "[T]he party shall file a petition . . . that sets forth an alleged violation that occurred not more than one year before the party knew or reasonably should have known about the alleged action that forms the basis of the petition."
>
> N.C. Gen. Stat. § 115C-109.6(b)

57. Petitioners and Respondent disagree about whether the evidence before the ALJ on the parties' motions for summary judgment demonstrates that Petitioners knew or reasonably should have known about the alleged action underlying the Petition's alleged violations more than a year prior to the filing of the petition.

58. Petitioners and Respondent also disagree about whether the statutory language requires that Petitioners "knew or reasonably should have known," within a year of filing, that the alleged action *amounts to a violation* of the IDEA, or whether it simply requires that Petitioners "knew or reasonably should have known" about the events as they transpired, *regardless of whether they knew or reasonably should have known that those actions were potentially violative of the IDEA*. The Final Decision on appeal does not address this disagreement between the parties or make clear which understanding it applies.

59. Petitioners' Written Arguments on Appeal assert: "The ALJ incorrectly concluded Petitioners knew or should have known about the actions that formed the basis of their complaint prior to January 18, 2017," and thus the ALJ erred in dismissing Petitioners' complaint on that basis. Petitioners' Written Arguments on Appeal, p. 14.

60. Respondent's Written Arguments on Appeal assert: "Respondent met its burden of demonstrating no dispute of material fact regarding Petitioner[s'] failure to timely file the Petition for Contested Case Hearing within the one-year period" because "Petitioner knew or should have known about the alleged actions that formed the basis of the due process complaint . . . more than one year before the filing." Respondent's Written Arguments on Appeal, ¶¶ 10 & 11, p. 4.

61. The facts are not clear regarding when Respondent contends Petitioners "knew or reasonably should have known" of the actions forming the basis of the alleged violations identified in their Petition. In Respondent's Written Arguments on Appeal, Respondent asserts that Petitioners knew of the basis of the complaint when Respondent "fail[ed] to identify and evaluate [redacted] for IDEA services from September through November 2015." Respondent's Written Arguments on Appeal, p. 4 ¶ 11. In oral arguments before the ALJ on the motion at issue, Respondent argued that Petitioners "knew or reasonably should have known" of the actions forming the basis of the alleged violations at one of three instances: (1) at each annual 504 meeting, or (2) when Petitioners removed [redacted] from CMS schools following CMS's designation of her as a "high risk of suicide" at school, or (3) when Petitioners took [redacted] to be privately evaluated and learned that she had an Autism Spectrum Disorder. Transcript p. 29, lines 24-25, and 20, lines 1-23.

62. Petitioners, on the other hand, contend that they "knew or reasonably should have known" of the actions forming the basis for the alleged IDEA violations for the first time in January 2018 when they met with an attorney and realized the statutory obligations CMS failed to fulfill and the injuries associated with those failures. Affidavit of [redacted] ¶ 54.

63. The evidence and argument Petitioners offer to demonstrate that they did not know and should not have known of the violations forming the basis of their Petition until after they met with an attorney in January 2018 overlap with that offered to demonstrate applicability of the "withholding" exception to the relevant statute of limitations that applies when the "local educational agency withhold[s] information from the parent that was required under State or federal law to be provided to the parent." N.C. Gen. Stat. § 115C-109.6(c)(ii); *see also* 20 U.S.C. § 1415(f)(3)(D)(ii).

64. Because the facts of this case bring it within the "withholding" exceptions to the statutes of limitation in 20 U.S.C. § 1415(f)(3)(C) & (D) and N.C. Gen. Stat. § 115C-109.6(b) & (c), and because the satisfaction of this exception means that North Carolina's "one-year restriction . . . shall not apply to a parent," even if the parent otherwise "knew or reasonably should have known" of the basis of their petition, N.C. Gen. Stat. § 115C-109.6(c), the Undersigned turns to the applicable "withholding" exception and does not resolve the parties' disagreement regarding when Petitioners "knew or reasonably should have known" about the alleged action that forms the basis of the Petition.

BACKGROUND FACTS RELATED TO THE ALJ'S DETERMINATION THAT NEITHER EXCEPTION TO NORTH CAROLINA'S ONE-YEAR STATUTE OF LIMITATIONS APPLIES IN THIS CASE:

65. The Final Decision states that "[t]he preponderance of the evidence supports the conclusion that neither of the two exceptions that would override the one-year restriction in this case are applicable." Final Decision ¶ 7. The Undersigned reverses this conclusion and finds and concludes that the second of the two enumerated exceptions, the "withholding" exception, applies in this case.

66. The Final Decision resolves the first exception, stating "[n]o argument was made that the local educational agency made misrepresentations to Petitioner that prevented the filing of a due process petition." Final Decision ¶ 4.

67. The Final Decision rejects application of the second exception, stating as follows:

> The Undersigned [referencing ALJ Malherbe] is persuaded by the reasoning found in *El Paso Independent School Dist. v. Richard R.*, 567 F. Supp. 2d 918 (W.D. Tex. 2008). In that case the court found that the second exception refers to the procedural safeguards and prior written notice requirements found in IDEA and its regulations, and not to any substantive information regarding services or the student's educational progress. *Id.* 942-44. The preponderance of the evidence in this case, supports a determination that the Respondent did not withhold information from the parents that is required under State or Federal law.
>
> Final Decision ¶ 5.

68. Petitioners and Respondent agree that there are two exceptions to North Carolina's one-year statute of limitations as follows:

> The one-year restriction in subsection (b) of this section shall not apply to a parent if the parent was prevented from requesting the hearing due to (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the petition, or (ii) the local educational agency's withholding of information from the parent that was required under State or federal law to be provided to the parent.
>
> N.C. Gen. Stat. § 115-109.6(c). *See also* 20 U.S.C. § 1415(f)(3)(D) (enumerating the same exceptions in federal law).

69. Petitioners and Respondent disagree about whether the second exception enumerated in N.C. Gen. Stat. § 115-109.6(c) applies in this case.

70. Petitioners' Written Arguments on Appeal on this issue assert: "The ALJ incorrectly concluded the exceptions to the statute of limitations did not apply." Petitioners' Written Arguments on Appeal p. 17.

71. Respondent's Written Arguments on Appeal on this issue assert: "Petitioner also failed to establish that either exception to the one-year statute of limitations applies to the instant case." Respondent's Written Arguments on Appeal ¶ 13.

72. Respondent's Written Arguments on Appeal make no other reference to or argument about either exception to the one-year statute of limitations, although one additional statement at paragraph 6, arguably (though not expressly) touches on the alleged facts relevant to the second exception.

73. In Petitioners' Written Arguments on Appeal, Petitioners support their position that the ALJ incorrectly concluded neither exception to the one-year statute of limitations applies in this case with the following essential arguments:
    a. The second exception based upon Respondent's "withholding of information from the parent that was required under State or federal law to be provided to the parent" applies. *See* Petitioners' Written Arguments on Appeal p. 17 - 20.
    b. Respondent withheld from Petitioners in this case two pieces of information that State and federal law require "to be provided to the parent." *Id.*
    c. Respondent withheld (1) a copy of the IDEA's procedural safeguards available to parents of a child with a disability, and (2) prior written notice (PWN) of its refusal to identify or evaluate [redacted] to determine whether she is eligible for special education and related services through an IEP under the IDEA. *Id.*
    d. State and federal law require Respondent to give parents a copy of IDEA's procedural safeguards and to provide prior written notice of refusals to identify or evaluate.
    e. Thus, Respondent withheld information from the parents in this case that was required by State and federal law to be provided to them, triggering the second exception to the one-year statute of limitations and rendering that limitations period inapplicable in this case. *Id.*

74. After an independent and comprehensive review of all materials contained in the record on appeal, the overwhelming weight of the evidence supports a finding that CMS withheld from Petitioners, and failed to deliver at any time, a copy of the IDEA's procedural safeguards, which are referred to in North Carolina as "The Parents' Rights Handbook," or by the full title, "Parent Rights and Responsibilities: NC Notice of Procedural Safeguards."

75. After an independent and comprehensive review of all materials contained in the record on appeal, the overwhelming weight of the evidence supports a finding that CMS withheld, and failed to deliver at any time, a copy of the IDEA's required prior written notice of its refusal to identify or evaluate [redacted] to determine whether she is eligible for special education and related services through an IEP under the IDEA.

76. There is no state or federal decision interpreting North Carolina's "withholding" exception to establish whether a school system's failure to provide (1) a copy of the IDEA's procedural safeguards (a.k.a. "The Parents' Rights Handbook) and/or (2) prior written notice (PWN) of its refusal to identify or evaluate a child with a disability satisfies that exception, to North Carolina's one-year statute of limitations.

77. In resolving this appeal, the Undersigned considered carefully North Carolina's special education goals and policies and makes its findings in the context of North Carolina's educational policy objectives.

78. Considering first CMS's failure to deliver to Petitioners a copy of the IDEA's procedural safeguards as required by federal law, the Final Decision is not clear regarding whether the ALJ found that CMS withheld a copy of the IDEA's procedural safeguards (a.k.a. "The Parents' Rights Handbook"). Although the Final Decision concludes that the second exception to the one-year statute of limitations does not apply, the Final Decision does not make any expressed findings on the *evidence* that might support that conclusion. The language of the Final Decision on this point is quoted above at paragraph 67.

79. The overwhelming weight of the evidence supports a finding that CMS failed to meet its federal and State obligation to provide Petitioners with a copy of the IDEA's procedural safeguards at any time -- including after CMS initially acknowledged [redacted] as a "child with a disability" whose disability interfered with her learning in fall 2012, *and* including after [redacted] asked that the school discuss Dr. M[redacted]'s questions in connection with his assertion that [redacted] "qualifies as OHI and is eligible for an IEP" under the IDEA in February 2013, *and* including after CMS determined somehow that [redacted] did not require special education through "the IDEA process or medical need" in September 2015.

80. Petitioners stated in their Written Arguments on Appeal that Respondent has never – including through the date of the submission of Petitioners' Written Arguments on Appeal on May 7, 2018 – given Petitioners' a copy of the IDEA's procedural safeguards. *See* Petitioners' Written Arguments on Appeal, p. 18; *see also* Transcript pgs. 18:23-19:2, 36:2-17, 47:23-48:4 (stating the same in oral argument before the ALJ).

81. Respondent remained silent in its Written Arguments on Appeal (and at oral argument before the ALJ) about whether CMS gave Petitioners a copy of *the IDEA's* procedural safeguards.

82. Respondent's Written Arguments on Appeal include a single paragraph that may reference this obligation (or may not as the writing is not clear). This paragraph states: "At each 504 meeting, Petitioner received procedural safeguards that set forth his rights as a parent of a student with a disability. Petitioner also received annual notices at the start of each school year regarding the rights of students with disabilities under the IDEA." Respondent's Written Arguments on Appeal ¶ 6.

83. This single paragraph, without explanation, in the written arguments on appeal contains factual ambiguity in both points expressed. An independent, comprehensive review of the record resolves both ambiguities; neither the procedural safeguards allegedly provided "at each 504 meeting" *nor* the "annual notices" described by Respondent satisfy the IDEA's specific procedural requirements. Respondent's assertions about these items in the context of this appeal are misleading.

84. The ambiguity about provision of procedural safeguards "at each 504 meeting" is this: Respondent does not state whether, at each 504 meeting, Respondent gave to Petitioners a copy of the procedural safeguards available to them *under Section 504* or a copy of the procedural safeguards available to Petitioners under the IDEA. *See* Respondent's Written Arguments on Appeal ¶ 6. And nowhere in the record did respondent offer as an exhibit or otherwise provide a copy of what Respondent indicates it provided to Petitioners "at each 504 meeting," meaning there is no *evidence* in the record to clarify this ambiguity.

85. As stated above, rights and responsibilities under Section504 and under the IDEA are not the same. The differences are significant in the context of this issue on appeal. The procedural safeguards under the IDEA are unique and offer children with disabilities and their parents more elaborate protections than do the procedural safeguards under Section 504. *Cf. e.g.,* "Parent Rights and Responsibilities: NC Notice of Procedural Safeguards" (July 2016) (containing the *State*-created document comprised of plain-language and graphic explanations of the procedures to which parents are entitled under the IDEA, including clear descriptions of the administrative process Petitioners now employ to assert the rights at issue in this case) *with* "CMS Section 504 Handbook: General Information for Parents and Guardians" (revised August 2016) (containing a *district*-level document offering explanations of matters governed by Section 504, which specifically do *not* contain any information about the IDEA's procedural protections at issue in this case and instead identify a "grievance procedure" offering "internal resolution" of disputes with complaints resolved by school-system personnel and are given initially to the school principal but remain *silent* about the external review procedures available through the IDEA where concerns about a school system's non-compliance with IDEA's procedures are heard by non-school arbiters including administrative law judges, mediators, or investigators of State Complaints, depending on which external review process a parent selects under the IDEA).

86. Relevant differences regarding the procedural safeguards available to parents under the IDEA as compared to Section 504 are also found through a review of the implementing regulations under each piece of legislation. *Cf. e.g.,* 34 C.F.R. §§ 300.300 through 300.540 (offering a sampling of the IDEA regulations setting forth specific requirements for districts to follow when identifying a child with a disability, evaluating a child, developing an IEP, etc., *and* requiring districts to satisfy requirements to give prior written notice, with specified content and explanation on a specified timeline, to parents before proposing or refusing to change the identification, evaluation, or educational placement of the child or any provision of FAPE, *and* offering parents elaborate *external* review procedures in instances in which they are concerned that their child's school has not satisfied the requirements of the IDEA) *with* 34 C.F.R. § 104.36 (illustrating that Section 504 only requires "notice" – not necessarily written – with respect to actions regarding the identification, evaluation, or educational placement and does not include specific procedures or timelines).

87. The IDEA's procedural safeguards at a minimum "must include a full explanation of all of the procedural safeguards available . . . relating to – (1) independent educational evaluations, (2) prior written notice, (3) parental consent, (4) access to education records;

(5) opportunity to resolve complaints through the due process complaint and State complaint procedures – including (i) the time period in which to file a complaint; (ii) the opportunity for the agency to resolve the complaint; and (iii) the difference between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures; (6) the availability of mediation; (7) the child's placement during the pendency of any due process complaint; (8) procedures for students who are subject to placement in an interim alternative educational setting; (9) requirements for unilateral placement by parents of children in private schools at public expense; (10) hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations; (11) State-level appeals (if applicable in the State); (12) civil actions, including the time period in which to file those actions; and (13) attorneys' fees." 34 C.F.R. § 300.504(c).

88. Notably, the present appeal and the ALJ's issuance of the Final Decision on review are both procedural safeguards that are available *only under the IDEA* and *not* under Section 504. Neither the Office of Administrative Hearings nor the Undersigned has jurisdiction over complaints about Section 504 plans. *See* N.C. Gen. State. § 150B-1(e)(5); *see also* Transcript p. 39, line 12 (offering a statement by the ALJ recognizing that she "d[idn't] have jurisdiction over 504"). In other words, a parent who receives notice of procedural safeguards *under Section 504*, but not notice of procedural safeguards under the IDEA would not have received notice of the right to the procedures enabling this review or of any limitations imposed upon it.

89. To resolve whether Respondent "with[held] information from the parent that was required under State or federal law to be provided to the parent" under 20 U.S.C. § 1415(f)(3)(D)(ii) and N.C. Gen. Stat. § 115C-109.6(c)(ii), it is essential to know whether Respondent provided *the IDEA's* procedural safeguards, or whether Respondent withheld those and provided instead Section 504's procedural safeguards.

90. Because the "IDEA's statute of limitations is an affirmative defense rather than a jurisdictional prerequisite," *M.G. v. N.Y.C. Dep't of Educ.*, 15 F. Supp. 3d 296, 304 (S.D.N.Y. 2014), Respondent has the burden (as the party asserting the defense) of proving that the statute of limitations bars Petitioners' claims, *see Bano v. Union Carbide Corp.*, 361 F.3d 696, 710 (2d Cir. 2005) (explaining that the party seeking to dismiss claims bears the burden to affirmatively establish that relief is barred by the limitations period).

91. Respondent failed to specifically assert or to provide any evidence that it gave *the IDEA's* procedural safeguards to Petitioners as required by federal law "at each 504 meeting" (or at any other time).

92. The totality of the evidence in the record indicates that CMS withheld, by failing to affirmatively provide, the IDEA's procedural safeguards from Petitioners. CMS withheld this information even when IDEA issues arose in discussions in connection with 504 meetings. *See, e.g.*, Findings of Fact ¶¶ 14-15, 19-20 (offering findings related to the record

evidence on Petitioners' attempt to raise A.B.'s eligibility for an IEP under the IDEA at a 504 meeting).

93. Respondent also stated in its Written Arguments on Appeal, arguably to suggest that Respondent satisfied its obligation under the IDEA to give a copy of the IDEA's procedural safeguards to each parent of a child with a disability, that "Petitioner also received annual notices at the start of each school year regarding the rights of students with disabilities under the IDEA." Respondent's Written Arguments on Appeal ¶ 6.

94. Respondent does not offer any explanation of this statement on appeal. And Respondent does not identify any citation to any record evidence to demonstrate how this "annual notice" satisfies the federal obligation that "[a] copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents" at specified times, 34 C.F.R. § 300.504(a), and "must include a full explanation of all of the procedural safeguards available . . . relating to (1) independent educational evaluations, (2) prior written notice, (3) parental consent, (4) access to education records; (5) opportunity to resolve complaints through the due process complaint and State complaint procedures – including (i) the time period in which to file a complaint; (ii) the opportunity for the agency to resolve the complaint; and (iii) the difference between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures; (6) the availability of mediation; (7) the child's placement during the pendency of any due process complaint; (8) procedures for students who are subject to placement in an interim alternative educational setting; (9) requirements for unilateral placement by parents of children in private schools at public expense; (10) hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations; (11) State-level appeals (if applicable in the State); (12) civil actions, including the time period in which to file those actions; and (13) attorneys' fees," 34 C.F.R. § 300.504(c).

95. In oral argument before the ALJ on the parties' motions for summary judgment, Respondent did not argue that CMS had, in fact, given a copy of the IDEA's procedural safeguards to Petitioners.

96. Instead, in oral argument before the ALJ on the parties' motions for summary judgment, Respondent made an argument that Respondent abandoned on appeal. Respondent argued that CMS fulfilled its responsibility under the IDEA to give a copy of IDEA's procedural safeguards to parents of children with disabilities by sending an annual letter to *all* CMS families telling *all* families where they can find "certain annual notices" in an online "Parent-Student Handbook, on the Parents' page under the Resources link." *See* Affidavit of Dr. T[redacted], Exhibit B; Transcript p. 35:7-17.

97. Copies of the 2014 and 2015 annual letters that Respondent argued before the ALJ would satisfy its federal and State obligation to give a copy of the IDEA's procedural safeguards to parents of children with disabilities appear in the record as an unpaginated attachment to the Affidavit of Dr. T[redacted], attached as Exhibit B to Respondent's Revised Motion for Summary Judgment. The 2015 letter states in full as follows:

Dear PHS Parent:

At the beginning of each academic year, Charlotte-Mecklenburg Schools is required, pursuant to federal regulations and state law, to provide students and their parents with certain annual notices. These notices, along with more detailed information, may be found in the 2015-2016 Parent-Student Handbook at www.cms.k12.nc.us, on the Parents page under the Resources link. In this handbook you will find the following required notices:

- Student Records: Family Educational Rights and Privacy Act (FERPA)
- Protection of Pupil Rights Amendment
- Non-Discrimination: Title VI of the Civil Rights act of 1964; Title IX of the Education Amendments of 1972; The Rehabilitation Act of 1973 (Section 504); and the Americans with Disabilities Act of 1990 (ADA)
- Students with Disabilities: Individuals with Disabilities Act (IDEA)
- Homeless Students: McKinney-Vento Homeless Assistance Act
- Student Health: Influenza and Meningococcal Diseases
- Student Health: Human Papillomavirus
- North Carolina Safe Surrender Law
- Asbestos Hazard Emergency Response Act
- Use of Pesticides
- Student Restraint/Seclusion/Isolation
- Student Discipline
- Free or Reduced School Lunch
- Harassment & Bullying

For information on parent/student appeal procedures, see CMS Board Policy JILAA at www.cms.k12.nc.us. For information on parental information for Title I Schools, see www.cms.k12.nc.us search Title I. For information regarding advanced courses, see www.cms.k12.nc.us search Curriculum and Instruction.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,
Tracey Harrill, Principal

98. This letter does not satisfy the requirements of 20 U.S.C. §§ 1415(a)-(b), and (d) or 34 C.F.R. §§ 300.504(a) and (c).

99. The IDEA requires that "a copy of the procedural safeguards available to the parents of the child with a disability *shall be given to the parents"* at least once annually and on other specified occasions including "upon initial referral or parent request for evaluation" and

"upon the first occurrence of the filing of a complaint" under the Act. 20 U.S.C. § 1415(d)(1)(A) (emphasis added); *see also* 34 C.F.R. § 300.504(a) (same).

100. A school district does "not meet its obligation in § 300.504(a) by simply directing a parent to the Web site. Rather a public agency must still offer parents a printed copy of the procedural safeguards notice." 71 Fed. Reg. 46693 (2006).

101. "Posting the procedural safeguards notice on a public agency's Web site is clearly optional and for the convenience of the public and *does not replace the distribution requirements in the Act.*" *Id.* (emphasis added); *see also* 34 C.F.R. § 300.504(b) (providing that a "public agency *may* place a current copy of the procedural safeguards notice on its Internet Web site if a Web site exists") (emphasis added).

102. Further, the IDEA requires that "[t]he procedural safeguards notice must include a full explanation of all of the procedural safeguards available . . . relating to (1) independent educational evaluations, (2) prior written notice, (3) parental consent, (4) access to education records; (5) opportunity to resolve complaints through the due process complaint and State complaint procedures – including (i) the time period in which to file a complaint; (ii) the opportunity for the agency to resolve the complaint; and (iii) the difference between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures; (6) the availability of mediation; (7) the child's placement during the pendency of any due process complaint; (8) procedures for students who are subject to placement in an interim alternative educational setting; (9) requirements for unilateral placement by parents of children in private schools at public expense; (10) hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations; (11) State-level appeals (if applicable in the State); (12) civil actions, including the time period in which to file those actions; and (13) attorneys' fees," 34 C.F.R. § 300.504(c).

103. North Carolina policy, like the federal law, also requires that "[a] copy of the procedural safeguards available to the parents of a child with a disability *must be given to the parents*" at least once annually and on other specified occasions including "upon . . . a parent request for evaluation." NC Policies 1504-1.5(a).

104. North Carolina policy, like the federal law, also requires that the notice must contain specified information, including "a full explanation of all of the procedural safeguards available under [NC Policy] relating to (1) independent educational evaluations, (2) prior written notice, (3) parental consent, (4) access to educational records, (5) opportunity to present and resolve complaints through the due process hearing and state complaint procedures, including (1) the time period in which to file a complaint or petition for a due process hearing; (ii) the opportunity for the agency to resolve the complaint or petition for due process hearing issues; and (iii) the difference between the petition for due process hearing and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures, (6) the availability of mediation; (7) the child's placement during the pendency

of due process hearing; (8) procedures for students who are subject to placement in an interim alternative educational setting; (9) requirements for unilateral placement by parents of children in private schools at public expense; (10) hearings on petitions for due process hearings, including requirements for disclosure of evaluation results and recommendations; (11) civil actions, including the time period in which to file those actions; and (12) attorneys' fees." N.C. Policies 1504-1.5(c).

105. The "annual notices" letter referenced by Respondent on appeal and quoted in full above in paragraph 97, does not include the "full explanation of all procedural safeguards available" as required by 34 C.F.R. § 300.504(c) and NC Policies 1504-1-5(c); it incorrectly identifies the name of the legislation as the "Individuals with Disabilities Act;" it makes *no* mention *any* "procedural safeguards available to parents;" and although the "annual notices" state that additional information may have been posted in other documents at various links separately accessed through a website indicated, exercising an option to post procedural safeguards on a website "does *not* replace the distribution requirement under the Act," *see* 71 Fed. Reg. 46693 (2006) (emphasis added).

106. The "annual notices" letters, even if one assumes for purposes of argument that Respondent could produce evidence that Petitioner received them as asserted (which it has not done in the record on appeal), do not satisfy Respondent's federal obligation to give "a copy of the procedural safeguards available to parents" with a "full explanation of all of the procedural safeguards available" to Petitioners. And thus they do not support Respondent's contention that it did not "withhold[] information from the parent that was required under State or federal law to be provided to the parent" such that the one-year statute of limitations could bar Petitioners' claim.

107. Respondent's withholding notice of the IDEA's procedural safeguards as required by federal law denied Petitioners relevant information to which they were entitled and that prevented them from requesting a hearing or even knowing that the hearing procedure was available to them.

108. The Final Decision on review cites a single case, *El Paso Independent School Dist. V. Richard R.*, 567 F. Supp. 2d 918, 945 (2008), to support its conclusion that the "withholding" exception does not apply in this case.

109. This case, *Richard R.*, interprets Texas's one-year statute of limitations and Texas's "withholding of information" exception. It does not support the ALJ's conclusion under the facts presented in the record on appeal. It supports the Petitioners' position and this Decision.

110. The Final Decision correctly recognizes that *Richard R.* "found that the second exception refers to the procedural safeguards and prior written notice requirement found in the IDEA and its regulations." Final Decision ¶ 5.

111. *Richard R.* involved a situation, like one in the present appeal, in which the school system "failed to provide [the child with a disability] with procedural safeguards . . . and

with notice of its refusal to evaluate" and instead limited the child to various adjustments to a 504 plan rendering the "withholding" exception to the State's one-year statute of limitations applicable and preventing State's one-year limitation from barring petitioners' claims. *See Richard R.*, 567 F. Supp. 2d, at 949 (and throughout on pages 944-49).

112. After acknowledging the proper relevance of *Richard R.*, however, the Final Decision failed to apply it to the *evidence* in this case. The Final Decision makes no finding on the facts necessary to resolve the question of whether Respondent provided the procedural safeguards and prior written notices required in this case. A review of those facts as they are presented in the record on appeal overwhelmingly establishes that Respondent failed to provide both the notice of IDEA's procedural safeguards, *see* Findings of Fact ¶¶ 78-107 above, and prior written notice, *see* Findings of Fact ¶¶ 116-144 below.

113. On the notice of procedural safeguards, *Richard R.* states plainly that when a school withholds delivery of the IDEA's procedural safeguards to a student's parents, the school "denie[s] them the knowledge necessary to request a due process hearing. As a consequence, the IDEA directs that this Court 'shall not apply' the [state] one-year statute of limitations to [the student's] claims." *Id.* at 945.

114. Because this is exactly what occurred in this case, the Undersigned was unable to discern, without any additional findings or conclusions in the Final Decision, how the ALJ determined that a contrary result should occur here. An independent and comprehensive review of the record finds that it should not.

115. Just as the *Richard R.* court held that a school system's withholding delivery of the IDEA's procedural safeguards to a student's parents "denied them the knowledge necessary to request a due process hearing," Respondent's withholding delivery of the IDEA's procedural safeguards to [redacted]'s parents "denied them the knowledge necessary to request a due process hearing." Thus, just as the *Richard R.* court held that as a consequence, "the IDEA directs that [the] Court 'shall not apply' the [state] one-year statute of limitations to [the student's] claim," the Undersigned finds that "the IDEA directs that [the Undersigned] 'shall not apply' the [state] one-year statute of limitations to s] claim." The second exception to these one-year limitations periods applies in both cases.

116. Turning to the second asserted "withholding of information from the parent that was required under State or federal law to be provided to the parent," these findings now consider Respondent's failure to provide prior written notice ("PWN") to Petitioners.

117. After an independent and comprehensive review of the entire record on appeal, the Undersigned determines that the overwhelming weight of the evidence supports a finding that CMS also withheld, by failing to deliver at any time, the required Prior Written Notice ("PWN") of its refusal to refer [redacted] for evaluation for IDEA eligibility and to determine whether she required special education and related services.

118. The Final Decision is not clear regarding whether the ALJ found that CMS withheld PWN from Petitioners. Although the Final Decision concludes that the second exception to the one-year statute of limitations does not apply, the Final Decision does not make any expressed findings on the *evidence* that might support that conclusion. The language of the Final Decision on this point is quoted above at paragraph 67.

119. The overwhelming weight of the evidence supports a finding that CMS failed to meet its federal and State obligation to provide Petitioners with PWN at any time after [redacted] asked in February 2013 that the school discuss Dr. M[redacted]s questions in connection with his assertion that [redacted] "qualifies as OHI and is eligible for an IEP" under the IDEA, *see* Findings of Fact ¶¶ 13-21 above, *or* at any time after Respondent acknowledged that [redacted] was a child with a disability whose disabilities adversely impacted her learning, *see* Findings of Fact ¶¶ 10-11, *or* even after it stated that it had concluded [redacted] did not need special education through "the IDEA process," *see* Findings of Fact ¶¶ 129, *or* even after Petitioners informed Respondent of [redacted]'s Autism diagnosis in May 2016, *see* Findings of Fact ¶¶ 28-29.

120. Respondent remained silent in its Written Arguments on Appeal about whether CMS provided PWN to Petitioners.

121. Respondent's Written Arguments on Appeal include a single paragraph that may reference this obligation (or may not as the writing is not clear). This paragraph states: "At each 504 meeting, Petitioner received procedural safeguards that set forth his rights as a parent of a student with a disability. Petitioner also received annual notices at the start of each school year regarding the rights of students with disabilities under the IDEA." Respondent's Written Arguments on Appeal, p.2, ¶ 6.

122. This single paragraph, without explanation, in the written arguments on appeal contains factual ambiguity in both points expressed. An independent, comprehensive review of the record resolves both ambiguities; neither the procedural safeguards allegedly provided "at each 504 meeting" *nor* the "annual notices" described by Respondent satisfy the IDEA's requirement that Respondent provide PWN.

123. PWN is by definition *individualized* to a particular child with a disability. And neither the alleged notices provided "at each 504 meeting" nor the "annual notices" sent to all "PHS parents" are alleged to have been individualized to [redacted] And nothing available in the record on appeal provides evidence that these alleged notices were individualized to

124. The IDEA requires PWN as follows:

> "[w]ritten notice . . . ***must be given to the parents of a child with a disability*** a reasonable time *before* the public agency . . . [r]efuses to initiate . . . the identification, evaluation, or educational placement ***of the child,***" and "notice required under . . . this section ***must*** include – (1) a description of the action proposed or refused by the agency; (2) an explanation of why the agency proposes

or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (4) a statement that the parents of the child with a disability have protection under the procedural safeguards of this part . . .; (5) sources for parents to contact to obtain assistance in understanding the provisions of this part; (6) a description of other options the IEP Team considered and the reasons why those options were rejected; and (7) a description of other factors that are relevant to the agency's proposal or refusal." 34 C.F.R. § 300.503(b) (emphasis added); *see also* 20 U.S.C. § 1415(c)(1) (same).

125. In other words, the IDEA required Respondent to provide PWN to Petitioners, including specific data considered and the reasons justifying the matter upon which notice is provided, *before* finalizing a refusal to identify or evaluate [redacted] for eligibility under the IDEA.

126. North Carolina law imposes a similar requirement. *See* N.C. Gen. Stat. §. 115C-109.5 and N.C. Policies 1504-1.4.

127. In this case in October 2012, CMS withheld PWN to explain why it refused to identify or evaluate [redacted] as it initially acknowledged that [redacted] was a child with a disability that impacted her learning. *See* Finding of Fact ¶¶ 10-11.

128. Again in February 2013, CMS withheld PWN as it refused to identify or evaluate [redacted] after [redacted] requested CMS to address Dr. M[redacted]'s statement that [redacted] "qualifies as OHI and is eligible for an IEP," in essence identifying [redacted] as eligible, in Dr. M[redacted]'s opinion, for special education under the IDEA. *See* Finding of Fact ¶¶ 13-21.

129. Again in September 2015, one month before CMS told [redacted] that it was not prepared to "deal with" [redacted], CMS withheld PWN as it determined "through the IDEA process or medical need" that [redacted] did not need special education. *See* Respondent's Revised Motion for Summary Judgment, Exhibit C, Bates p. 56.

130. In November 2015, when [redacted] engaged in behavior at school that CMS determined was a "high risk of suicide," CMS withheld PWN to explain why it refused to evaluate [redacted] and instead referred [redacted] outside of CMS schools and told [redacted]'s father that CMS could not "deal with" [redacted] *See* Finding of Fact ¶¶ 23-25.

131. Even as of the date of Petitioners' Written Arguments on Appeal in May 2018, four months after Petitioners made plain through filing this Petition that [redacted]. seeks evaluation for potential special education through CMS, CMS failed to provide PWN to explain why it refuses to refer [redacted] for evaluation for eligibility under the IDEA. *See* Petitioners' Written Arguments on Appeal, p. 20.

132. Petitioners assert that because CMS withheld, and failed to provide, a PWN, Petitioners do not know why or how CMS reached its decision to refuse to refer [redacted] for

evaluation for eligibility for special education and related services under the IDEA; Petitioners do not know what data or expertise, if any, informed that refusal; and Petitioners do not know the rationale for that refusal or whether any of these things might implicate their rights under the IDEA.

133. Further, since no PWN documenting refusal has issued, it remains possible (though unlikely given the position taken by CMS in this case) that CMS has *not* refused, but is instead substantially out of compliance with the IDEA's timelines for referral for evaluation.

134. The only case cited in the Final Decision, *El Paso Independent School Dist. V. Richard R.*, 567 F. Supp. 2d 918, 946-48 (2008), does not support the conclusion reached in the Final Decision.

135. *Richard R.* found that because the school district failed to provide written notice of its refusal to evaluate, the state's one-year statute of limitations did not apply to bar a student's Child-Find claim, just as Petitioners' argue should be the case here. *See Richard R.* 567 F. Supp. 2d, at 946-48.

136. Although abandoned on appeal, Respondent previously argued that it did not need to comply with the IDEA's particular requirements regarding provision of prior written notice because the Respondent assigned . to a 504 Team and that team filled out a form and responded "yes" to this question: "has the need for special education services been ruled out through the IDEA process or medical need?" *See* Respondent's Revised Motion for Summary Judgment, Exhibit C, Bates p. 56. Respondent suggested, in oral argument before the ALJ, that because [redacted]'s parents did not object to this form as completed, they consented to the conclusion that "the need for special education services has been ruled out through the IDEA process or medical need." *See* Transcript, p. 51:14-53:5.

137. *Richard R.* addressed a similar argument to the one Respondent abandoned on appeal. The court stated the issue as follows: "the question before the Court is whether parental consent . . . given following a school district's failure to provide IDEA safeguards, relieves the school district of its obligation to provide the parent with notice of its refusal to evaluate the child." *Richard R.*, 567 F. Supp. at 947. The court resolved the issue as follows: "Based on the plain text of the IDEA, the Court finds it does not." *Id. Richard R.* then explained this resolution in detail. *Id.*

138. *Richard R.* ultimately concluded: "the Court finds no support in the extant case law or federal regulations to support [the school's] position. Federal law in this regard is clear; whether parents agree to the refusal or not, local educational agencies must comply with their IDEA responsibility to provide written notice upon their refusal to evaluate a child for special education services." *Id.* at 947-48.

139. Under the authority cited in the Final Decision, Respondent's now-abandoned argument that Petitioners waived their IDEA right to receipt of PWN from Respondent fails. The facts of this case parallel those in *Richard R* on this issue. The school in *Richard*

R. presented two essential facts, (1) the student's acceptance of "modifications to 504 accommodations, additional tutoring, and attendance at Saturday tutoring camps" and (2) a notation on a form that "special education testing is not warranted at this time," to argue that the school was not required to provide PWN to the student. Respondent here presents two similar facts, (1) [redacted]'s acceptance of 504 accommodations, including tutoring and (2) a notation "yes" in response to a question asking whether special education had been ruled out "through the IDEA process," to argue that CMS was not required to satisfy the IDEA's obligation to provide PWN to [redacted] Just as the Court in *Richard R.* rejected this argument on the facts before it, the Undersigned rejects this argument on the facts presented here. "Federal law in this regard is clear; whether parents agree to the refusal or not, local educational agencies must comply with their IDEA responsibility to provide written notice upon their refusal to evaluate a child for special education services." *Id.* at 947-48.

140. In considering Respondent's abandoned argument regarding the "yes" notation in response to the question "has the need for special education services been ruled out through the IDEA process or medical need," *see* Respondent's Revised Motion for Summary Judgment, Exhibit C, Bates p. 56, the Undersigned notes Petitioners reliance upon this *same* document and the circumstances surrounding it to support a different point.

141. Petitioners argue that, through this "yes" form, CMS "falsely" misrepresented the "IDEA process" as possible of resolution without the required notices. Petitioners argue that the "IDEA process" cannot be resolved unless CMS complies with the notices requirements imposed upon it by the Act. When CMS indicated "yes" that the "IDEA process" had resolved that [redacted] did not need special education without first providing the required notices that would explain the steps taken and evidence considered in that process, CMS made it impossible for Petitioners to know of the wrongs associated with that undisclosed "IDEA process" for purposes of the statute of limitations. Transcript p. 13-15.

142. Petitioners ultimately assert that a declaration of resolution of eligibility under the IDEA through the word "yes" on a non-IDEA form to which Petitioners do not object does not satisfy the detailed notice requirements of the IDEA itself.

143. It is irrelevant that Petitioners do not allege that Respondent did not deliberately hide or *intentionally* withhold PWN from Petitioners. A withholding need not be "intentional" to have the effect of exempting a parent of a child with a disability from the statute of limitations. *See, e.g., Regional Sch. Dist. Unit No. 51 v. Doe*, 920 F. Supp. 2d 168, 197-98 (D. Me. 1013) (adopting magistrate judge recommendation) (ruling that the exception to a statutory limitations period for "withholding of information" under 20 U.S.C. § 1415(f)(3)(D) of the IDEA does not require intentionality on the part of the school). The withholding must only be of information to which the parents are entitled under State or federal law, as is the case with PWN. *See* N.C. Gen. Stat. § 115C-109.6(c)(ii) (stating that the exception requires only "withholding of information from the parent that was required under State or federal law to be provided to the parent" and nothing further); *see also Regional Sch. Dist. Unit No. 51*, at 198 ("[W]hat matters is whether the District

failed to provide the parents required safeguards, not whether . . . any failure to do so was based upon its good-faith [mistake].").

144. In the end, a thorough, independent, and comprehensive review of the entire record reveals that Respondents withheld, by failing to deliver as required by State and federal law, two pieces of information to which Petitioners were entitled: (1) a copy of the IDEA's procedural safeguards with a "full explanation of all procedural safeguards available," and (2) the prior written notice of its refusal to identify or evaluate, along with the data considered and reasons for reaching that refusal.

145. A thorough, independent, and comprehensive review of the entire record reveals that the facts of this case parallel the facts of the single case cited in the Final Decision on appeal, *Richard R.*

146. This authority cited in the Final Decision supports by analogy a finding that these facts satisfy the second exception to North Carolina's one-year statute of limitations. *See also R.M.M. v. Minneapolis Pub. Schs.*, 70 IDELR 64 (D. Minn. June 27, 2017) (finding the statute of limitations inapplicable for two reasons: (1) the first evidence of the school district providing the parents a copy of the relevant procedural safeguards was within the applicable timeframe; and (2) the procedural safeguards provided to the parents failed to include the requisite information).

147. North Carolina recognizes that the IDEA's Child Find obligation is of paramount importance and can change the trajectory of a child's life.

148. This obligation requires school districts to identify, locate, and evaluate all children with disabilities within their jurisdiction, regardless of the severity of their disability, and make FAPE available to all those who qualify for services under the IDEA. 20 U.S.C. §§ 1412(a)(3), 1412(a)(1)(A); 34 C.F.R. § 300.111(a).

149. Child Find is one of the key responsibilities and obligations of school systems to advance the "goal of the State" to serve "*all* children with disabilities who reside in North Carolina" and provide them with "appropriate educational opportunity." NC Policies 1500-1.1 (emphasis added).

150. North Carolina policies have as their purpose, *inter alia*, to ensure "that *all* children with disabilities, ages three through 21, have available to them free appropriate public education that *emphasizes special education and related services designed to meet their unique needs* and prepare them for further education, employment, and independent living" and to ensure "that the rights of children with disabilities and their parents are protected." NC Policies 1500-1.1 (emphasis added).

151. The procedural safeguards, including those Respondent withheld in this case, are in place to enable parents to participate in their child's education and to review decisions of the school system about whether their child may ultimately be identified and evaluated

under the IDEA for eligibility purposes and access to the special education and related services available under the Act.

152. This obligation is so important that parents in North Carolina are not required to request an evaluation; the school system's obligation is an affirmative one whenever the state has reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. *See* NC Policies 1503-2.1.

153. The goals and purposes of North Carolina's implementation of the IDEA, particularly the Child Find obligation, would be diminished by a finding that a school system's failure to comply with the procedural requirements of the IDEA, leaving parents without information to which they are entitled, did not fall within the "withholding information from parents" exception to the State's statute of limitations.

154. The goals and purposes of North Carolina's implementation of the IDEA are served by finding that a school system's withholding of the IDEA's procedural safeguards (a.k.a. "The Parents' Rights Handbook") and PWN of refusals to evaluate for purposes of Child Find fall within the second exception to the State's one-year statute of limitations.

155. This finding encourages North Carolina's school systems to fully satisfy their IDEA obligations, even in the early stages of Child Find, when the outcome of that process still enables the State to meet its goal of serving "all" children with disabilities with an appropriate education including, when necessary, special education and related services designed to meet their unique needs.

Based on the foregoing Findings of Fact, the undersigned State Hearing Review Officer makes the following:

CONCLUSIONS OF LAW

1. The North Carolina Office of Administrative Hearings and the State Hearing Review Officer for the State Board of Education have jurisdiction over this case pursuant to Chapter 115C, Article 9, of the North Carolina General Statutes; NC Policies 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. To the extent that the Findings of Fact contain Conclusions of Law or that the Conclusions of Law are Findings of Fact, they should be considered without regard to their given labels.

3. Any issue not expressly identified in Petitioners' Notice of Appeal and advanced by the parties before the Undersigned is not properly before this Tribunal and cannot be resolved by this State Hearing Review Officer. *See E.L. ex rel. G.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 975 F. Supp. 2d 528, 535 n.8 (M.C.N.C. 2013) (stating that "under North Carolina law state review officers review only the issues specifically appealed"), *aff'd sub nom E.L. ex rel. Lorsson v. Chapel Hill-Carborro Bd. of Educ.*, 773 F.3d 509, 516 (4th Cir. 2014) (affirming that "the

review officer had jurisdiction to review only those findings and decisions *appealed*") (emphasis in original).

4. 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).

5. Respondent is a local education agency receiving monies pursuant to 20 U.S.C. § 1400 et seq. and the agency responsible for providing educational services in Wake County, North Carolina. 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. § 300 et seq.; N.C. Gen. Stat. 115C-106 et seq.; *Policies Governing Services for Children with Disabilities* NC Policies 1500 et seq. These acts and regulations require the Respondent to satisfy the IDEA's procedural safeguards and provide FAPE for those children in need of special education residing within its jurisdiction.

6. The IDEA requires that local educational agencies, school systems, provide certain information to parents of children with disabilities. Two of these required information disclosures – one requiring school systems to provide to parents a copy of the IDEA's procedural safeguards and another requiring school systems to provide to parents of children with disabilities prior written notice of a refusal to identify or evaluate their child for eligibility under the IDEA – are relevant here.

7. The IDEA requires that "*a copy* of the procedural safeguards available to the parents of the child with a disability must be ***given to the parents***" once per school year and on a number of other specified occurrences, including upon a "parent request for evaluation" or "upon the first occurrence of the filing of a complaint." *See* 34 C.F.R. § 300.504(a) (emphasis added); *see also* 20 U.S.C. § 1415(d)(1)(A) (same).

8. This required notice of the IDEA's procedural safeguards must be written "in an easily understood manner," and "shall include a full explanation of the [IDEA] procedural safeguards," including all statutory and administrative provisions relating to: "(A) independent educational evaluation; (B) prior written notice; (C) parental consent; (D) access to educational records; (E) the opportunity to present and resolve complaints, including (i) the time period in which to make a complaint, (ii) the opportunity for the agency to resolve the complaint, (iii) the availability of mediation; (F) the child's placement during pendency of due process proceedings; (G) procedures for students who are subject to placement in an interim alternative educational setting; (H) requirements for unilateral placement by parents of children in private school at public expense; (I) due process hearings, including requirements for disclosure of evaluation results and recommendations; (J) State-level appeals (if applicable in that State); (K) civil actions, including the time period in which to file such actions; and (L) attorneys' fees." 20 U.S.C. § 1415(d)(2).

9. North Carolina also requires school systems to provide notice of the IDEA's procedural safeguards. This State offers an expressed policy that is nearly identical to the language of the

IDEA, stating that "[a] copy of the procedural safeguards available to the parents of a child with a disability *must be given to the parents*" at least once annually and on other specified occasions including "upon . . . a parent request for evaluation" and "upon receipt of the first petition for due process hearing . . . in a school year." NC Policies 1504-1.5(a) (emphasis added).

10. North Carolina's requirement that procedural safeguards be provided to parents of children with disabilities also requires school systems to include particular details in this required disclosure, including "a full explanation of all of the procedural safeguards available under [NC Policy] relating to (1) independent educational evaluations, (2) prior written notice, (3) parental consent, (4) access to educational records, (5) opportunity to present and resolve complaints through the due process hearing and state complaint procedures, including (i) the time period in which to file a complaint or petition for a due process hearing; (ii) the opportunity for the agency to resolve the complaint or petition for due process hearing issues; and (iii) the difference between the petition for due process hearing and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures, (6) the availability of mediation; (7) the child's placement during the pendency of due process hearing; (8) procedures for students who are subject ot placement in an interim alternative educational setting; (9) requirements for unilateral placement by parents of children in private schools at public expense; (10) hearings on petitions for due process hearings, including requirements for disclosure of evaluation results and recommendations; (11) civil actions, including the time period in which to file those actions; and (12) attorneys' fees." N.C. Policies 1504-1.5(c).

11. The IDEA further requires that school systems provide to parents of children with disabilities what is commonly known as "prior written notice" or "PWN" of any decision to refuse to initiate identification or evaluation of a child suspected of having a disability. The Act provides: "***Written notice*** . . . *must be* ***given*** *to the parents of a child with a disability* a reasonable time ***before*** the public agency . . . [r]efuses to initiate . . . the identification, evaluation, or educational placement of the child," and that "notice required under . . . this section ***must*** include – (1) a description of the action proposed or refused by the agency; (2) an explanation of why the agency proposes or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (4) a statement that the parents of the child with a disability have protection under the procedural safeguards of this part . . .; (5) sources for parents to contact to obtain assistance in understanding the provisions of this part; (6) a description of other options the IEP Team considered and the reasons why those options were rejected; and (7) a description of other factors that are relevant to the agency's proposal or refusal." 34 C.F.R. § 300.503(b) (emphasis added); *see also* 20 U.S.C. § 1415(c)(1) (same).

12. North Carolina law, like the IDEA, also requires school systems to "***provide prompt written notice*** to parents whenever that agency proposes to initiate or change *or refuses to initiate or change* (i) the identification, evaluation, or educational placement of a child, or (ii) the provision of a free appropriate public education to a child with a disability. *The local educational agency shall document that all required notices have been sent to and received by parents.*" N.C. Gen. Stat. § 115C-109.5(a) (emphasis added).

13. North Carolina's PWN requirement, like the federal PWN requirement, also requires that PWN include specific information for parents. North Carolina law requires, at a minimum, that when school systems give PWN, it "shall contain all of the following information: (1) A description of the action proposed or refused by the local educational agency. (2) An explanation of why the local educational agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action. (3) A statement that the parent of a child with a disability has protection under the procedural safeguards of this Article and IDEA and, if this notice is not the initial referral for evaluation, the means by which a copy of the procedural safeguards may be obtained. (4) Sources for parents to contact to obtain assistance in understanding this Article and IDEA. (5) A description of other options considered by the IEP team and the reason why those options were rejected. (6) A description of the factors that are relevant to the local educational agency's proposal or refusal. (7) Any other information required to be included by the IDEA." *Id.* at 115C-109.5(b).

14. Both the IDEA and North Carolina law also contain statutes of limitations, and a local educational agency's duty to provide a copy of the IDEA's procedural safeguards and to give prior written notice implicate the applicability of those limitations provisions to parents.

15. The IDEA's statutory limitations period provides as follows:

> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.
>
> 20 U.S.C. § 1415(f)(3)(C).

16. The IDEA's statute of limitations provision expressly allows two exceptions. First, the statute of limitations "shall not apply *to a parent*" if a parent was prevented from requesting a due process hearing due to "specific misrepresentations by the local education agency that it had resolved the problem forming the basis of the complaint." 20 U.S.C. § 1415(f)(3)(D)(i); *see also* 34 C.F.R. § 300.511(f)(1). Second, the statute of limitations "shall not apply *to a parent*" where a parent failed to exercise their right to a due process hearing on account of "the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent." 20 U.S.C. § 1415(f)(3)(D)(ii); *see also* 34 C.F.R. § 300.511(f)(2).

17. North Carolina exercised its authority under the IDEA to establish its own statute of limitations for administrative proceedings initiated under the Act. This State's statute of limitations provides as follows:

> [T]he party shall file a petition . . . that includes the information required under IDEA and that sets forth an alleged violation that occurred not more than one year before the party

knew or reasonably should have known about the alleged action that forms the basis of the petition.

N.C. Gen. Stat. § 115C-109.6(b).

18. North Carolina's state-specific statute of limitations also contains two express exceptions like those found in the IDEA. North Carolina explicitly provides that this State's "one-year restriction . . . *shall not apply to a parent* if the parent was prevented from requesting the hearing due to (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the petition, or (ii) the local educational agency's withholding of information from the parent that was required under state or federal law to be provided to the parent." N.C. Gen. Stat. § 115C-109.6(c).

19. The exceptions to the statutory limitations periods in both the IDEA and under North Carolina law apply exclusively *to parents*. Parents depend upon schools for accurate and necessary information regarding their children's education. Schools, by comparison, enjoy an information and experience advantage when implementing the laws and regulations governing education of children with disabilities. Schools undertake the privilege of educating over time many children, including many children with disabilities educated and served under the IDEA; schools engage in this opportunity repeatedly and hold considerable institutional experience. Parents, on the other hand, may have only a single child with a disability who is entering public school and interacting with the IDEA and relevant State law for the first time with no prior exposure or experience in education law or policy. Both State law and the IDEA recognize this and offer *parents* exceptions to statutory limitations periods that allow parents to hold schools accountable for their IDEA obligations without statutory time barriers in cases where schools failed to accurately and timely produce information required of them by State and federal law. The IDEA's and North Carolina's statutes of limitation expressly provide that they "shall not apply to parents" who are prevented from requesting a hearing due to a school system's "misrepresentations" or "withholding of information . . . required . . . to be provided to the parent." *See* 20 U.S.C. § 1415(f)(3)(D); N.C. Gen. Stat. § 115C-109.6(c).

20. When such an exception to either the federal or the State statute of limitations applies, that limitations period "shall not apply to parents," allowing them to pursue claims that otherwise may be beyond the IDEA's two-year limitation period and/or North Carolina's one-year limitation period.

21. The second exception to the State and federal statutes of limitation is at the heart of this case.

22. This "withholding" exception provides that in North Carolina, the "one-year restriction . . . shall not apply to a parent if the parent was prevented from requesting a hearing due to . . . the local educational agency's withholding of information from the parent that was required under State or federal law to be provided to the parent." N.C. Gen. Stat. § 115C-109.6(c). The second exception under the IDEA provides that the IDEA's two-year restriction "shall not apply to a parent if the parent was prevented from requesting the hearing due to . . . the local educational agency's withholding of information from the parent that was required under this part [20 U.S.C. § 1411 et seq.] to be provided to the parent." 20 U.S.C. § 1415(f)(3)(D).

23. As identified above, State and federal law require school systems to provide to parents two pieces of information relevant to this Decision: (1) a copy of the IDEA's procedural safeguards written "in an easily understood manner" with a "full explanation" of those safeguards, *see* Conclusions of Law ¶¶ 7-10, and (2) prior written notice of refusals to identify or evaluate a child with a disability for eligibility for special education under the IDEA, *see* Conclusions of Law ¶¶ 11-13.

24. The IDEA and North Carolina law require local educational agencies, school systems, to provide parents with "a copy of procedural safeguards" at least once a year, or upon occurrence of one of the following events (among others): (1) upon initial referral or parental request for evaluation or (2) upon the filing of a complaint or petition for due process under the IDEA. *See* 20 U.S.C. § 1415(d)(1)(A).

25. Notably, this duty to give notice of procedural safeguards makes no exception for children with disabilities who may also be entitled to and receiving accommodations under Section 504 of the Rehabilitation Act. This duty is without exception.

26. Also notably, this duty to give a copy of the IDEA's procedural safeguards written in "an easily understood manner" and with a "full explanation" of those safeguards cannot be satisfied indirectly through generic reference to a website upon which this information may be posted along with other information. A school district does "not meet its obligation in § 300.504(a) by simply directing a parent to the Web site. Rather a public agency must still offer parents a printed copy of the procedural safeguards notice." 71 Fed. Reg. 46693 (2006).

27. "Posting the procedural safeguards notice on a public agency's Web site is clearly optional and for the convenience of the public and *does not replace the distribution requirements in the Act.*" *Id.* (emphasis added); *see also* 34 C.F.R. § 300.504(b) (providing that a "public agency *may* place a current copy of the procedural safeguards notice on its Internet Web site if a Web site exists") (emphasis added).

28. "Had Congress not intended to reduce the complexities of the IDEA into a form that parents could easily access and take advantage of, there would be no reason for the IDEA to require the states to offer parents an exhaustive explanation of procedural safeguards, written in the language of the parents, and 'written in an easily understandable manner.'" *Richard R.*, 567 F. Supp. 2d, at 948 (quoting 20 U.S.C. § 1415(d)(2)).

29. "Implicit within these detailed requirements is a recognition that reasonable individuals might not comprehend either their administrative or judicial rights in the event that a local educational agency violated its obligation to provide notice of IDEA procedural safeguards." *Id.*

30. The local educational agency's duty to provide an actual copy of the IDEA's procedural safeguards containing specific information offered in an "easily understandable manner" to parents of children with disabilities is significant in determining the applicability of the relevant statute of limitations.

31. When schools *comply* with this obligation to provide to parents a copy of the IDEA's procedural safeguards written in an "easily understandable manner" with "full explanation" of those safeguards, the simple act of giving parents a copy of these procedural safeguards triggers the statute of limitations, and they "commence without disturbance." *Richard R.*, 567 F. Supp. 2d, at 945. "Regardless of whether parents later examine the text of these safeguards to acquire actual knowledge, that simple act suffices to impute upon them constructive knowledge of their various rights under the IDEA." *Id.*

32. On the other hand, "in the absence of some other source of IDEA information, a local educational agency's withholding of procedural safeguards would act to prevent parents from requesting a due process hearing to administratively contest IDEA violations until such time as an intervening source apprised them of their rights." *Richard R.*, 567 F. Supp. 2d, at 945.

33. When a school system fails to provide to parents a copy of the IDEA's procedural safeguards in the manner required by the Act, it withholds information from parents that is necessary for them to have the knowledge they need to request a due process hearing. *Id.* As a consequence, the "withholding of information" exception to the IDEA's and State's statute of limitations is triggered and the law directs that the statutes of limitations "shall not apply" to bar the parents' claim. *Id.*

34. The record on appeal in this case offers no evidence that CMS complied with its statutory and regulatory obligation to provide to Petitioners with a copy of the IDEA's procedural safeguards at any time through the date Petitioners submitted their Written Arguments on Appeal on May 7, 2018.

35. CMS was required by the IDEA and North Carolina law to provide Petitioners with a copy of the IDEA's procedural safeguards at least once annually and specifically (1) upon initial referral or parent request for evaluation and (2) upon receipt of the first petition for due process filed in a school year. This means that CMS was likely required by the IDEA and North Carolina law to provide Petitioners with a copy of the IDEA's procedural safeguards *at a minimum* (1) in September 2012 when CMS required [redacted]'s parents to have [redacted] assessed by a psychologist or psychiatrist before permitting [redacted] to return to school and when Petitioners complied with that request receiving a diagnoses of migraines, severe anxiety, severe depression, and oppositional defiant disorder, creating what may have been the initial referral as a child with a disability; (2) in February 2013 when [redacted] asked, in writing, to discuss [redacted]'s qualification as OHI for special education through an IEP, essentially requesting evaluation special education under the designation OHI to obtain an IEP; and (3) in January 2018, when Petitioners filed their first petition for due process in the 2017-2018 school year. CMS withheld the IDEA's procedural safeguards at each instance. *See* Findings of Fact 10-30.

36. Petitioners had no other source to secure the information CMS was required to provide under its obligation to give Petitioners a copy of the IDEA's procedural safeguards in an "easily understandable manner." The record before the Undersigned contains [redacted]'s affidavit stating that Petitioners had no direct, actual knowledge of the information contained in the IDEA's procedural safeguards until Petitioners met with an attorney in January 2018. Affidavit of [redacted] ¶¶ 53 & 54. Respondent points to *no* documentation that Petitioners had any other source

to give them the information the IDEA requires school systems to provide. An independent review of the record discloses no documentation that Petitioners had any other source to give them the information the IDEA requires school systems to provide through its obligation to provide notice of the IDEA's procedural safeguards until Petitioners met with their attorney in 2018.

37. CMS's asserted inclusion of the IDEA's procedural safeguards on a website with a variety of other school resources, many that have nothing to do with the requirements of the IDEA (including resources about such things as asbestos hazards), does not satisfy its plain obligation to give parents "a printed copy of the procedural safeguards notice." *See* 71 Fed. Reg. 46693 (2006).

38. Because CMS failed to give a copy of the IDEA's procedural safeguards to petitioner at any of the times required by the Act, and because Petitioners had no other source of IDEA information until they met with an attorney in January 2018, the IDEA and North Carolina law direct that the IDEA's two-year limitation and the State's one-year limitation "shall not apply" to Petitioners due to CMS's "withholding of information from the parent that was required by State or federal law to be provided to the parent."

39. CMS also withheld the IDEA's and North Carolina law's required PWN following its refusal to identify or evaluate for purposes of receiving special education under the IDEA.

40. The IDEA and North Carolina law require local educational agencies, school systems, to provide parents with "written notice . . . a reasonable time *before* the LEA . . . [r]efuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to a child." *See* Conclusions of Law ¶¶ 11-12. The content of this required notice is detailed and specific, including the evaluations and data considered in reaching the refusal as well as the reasons for the refusal. *See* Conclusions of Law ¶¶ 11 & 13.

41. Notably, this duty to give PWN makes no exception for children with disabilities who may also be entitled to and receiving accommodations under Section 504 of the Rehabilitation Act. This duty is without exception.

42. Also notably, this duty to give PWN cannot be waived by a parent through consent to the refusal at issue: "Federal law in this regard is clear; whether parents agree to the refusal or not, local educational agencies must comply with their IDEA responsibility to provide written notice upon their refusal to evaluate a child for special education services." *Richard R.*, 567 F. Supp. 2d at 947-48.

43. Providing prior written notice in such cases "allows the parent time to fully consider the change and determine if he/she has additional suggestions, concerns, questions, and so forth." *Letter to Lieberman*, Office of Special Education and Rehabilitative Services (Aug. 15, 2008).

44. When a school system fails to provide parents with prior written notice in the manner required by the IDEA and State law, it withholds information from parents that is necessary for them to have the knowledge they need to request a due process hearing. As a consequence, the

"withholding of information" exception to the IDEA's and State's statute of limitations is triggered and the law directs that the statutes of limitations "shall not apply" to bar the parents' claim. *See Richard R.*, 567 F. Supp. 2d at 947-48.

45. The record on appeal in this case offers no evidence that CMS complied with its statutory and regulatory obligation to provide to Petitioners with prior written notice of its refusal to identify or evaluate [redacted] through the date Petitioners submitted their Written Arguments on Appeal on May 7, 2018.

46. CMS was likely required by the IDEA and North Carolina law to provide Petitioners with prior written notice of its refusal to identify or evaluate [redacted] at a minimum (1) in February 2013 when [redacted] asked to discuss [redacted]'s qualification as OHI and eligibility for an IEP and CMS refused to refer [redacted] for an evaluation in response to this request; (2) in September 2015 when CMS asserted at a 504 meeting that [redacted] did not require special education but refused to provide prior written notice of the associated decision to refuse special education services, (3) in November 2015 when CMS instructed [redacted] to find another school outside CMS for [redacted] because CMS determined that it was not prepared to "deal with" [redacted] and her disabilities yet refused to evaluate [redacted] to determine if she required special education or related services that might enable CMS to "deal with" her at school. *See* Findings of Fact ¶¶ 13-26 & 113-115. CMS withheld the prior written notice at each instance. *See* Findings of Fact ¶¶ 114 & 127-144.

47. A school system's failure to provide prior written notice as required by the IDEA and State law are "withholdings" under the second exception to the IDEA's and a state's SOL. *See Richard R.* at 947.

48. Because Respondent failed to provide notice of IDEA's procedural safeguards and prior written notice of its refusal to identify or evaluate [redacted], the "withholding" exception to the IDEA's and the state's SOL prevents application of the limitations periods to Petitioners in this case. Their claims are not barred by either North Carolina's nor the IDEA's statute of limitations.

49. No issue on the merits of Petitioners' underlying claims was raised before the Undersigned. The Undersigned makes no finding and reaches no conclusion on any issue other than the applicability of the relevant statutes of limitations to Petitioners' claims.

Based on the foregoing Findings of Fact and Conclusion of Law, the undersigned Hearing Review Officer for the North Carolina Board of Education makes the following:

DECISION

The FINAL DECISION issued by Administrative Law Judge Selina Malherbe on 18 April 2018, is **REVERSED** and this case is **REMANDED** for further proceedings.

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. Gen. Stat. § 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.

This the 27th day of May, 2018.

/s/ Lisa Lukasik
Lisa Lukasik
Review Officer

CERTIFICATE OF SERVICE

The foregoing DECISION was served on the Petitioner and the Respondent by **E-mail and ordinary U.S. Mail,** addressed as follows:

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Attorney for Respondent

The foregoing DECISION was served on the Petitioners, North Carolina Department of Public Instruction, Dispute Resolution Consultant, Office of Administrative Hearings, and the Charlotte-Mecklenburg Schools Board of Education via **ordinary U.S. mail,** addressed as follows:

William J. Hussey
Director, Exceptional Children's Division
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Petitioner
by and through her parent.

Tersea King
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Dr. Clayton M. Wilcox
Superintendent
Charlotte-Mecklenburg Schools
Board of Education
P.O. Box 30035
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This the 27th day of May, 2018.

/s/ Lisa Lukasik
Lisa Lukasik
Review Officer