STATE OF NORTH CAROLINA

BEFORE A STATE HEARING REVIEW OFFICER
FOR THE STATE BOARD OF EDUCATION
PURSUANT TO G.S. 115C - 109.9

[redacted] by and through his guardian, [redacted]
Petitioner

v.

Lee County Schools Board of Education
Respondent

DECISION

17 EDC 03684

[redacted]

This is an appeal of the Decision issued by Administrative Law Judge (ALJ) Stacey B. Bawtinhimer on February 28, 2018. The case was heard on August 21-25, 29, 30, September 1, 13, 14, 18-22, 27-29, and October 5 and 12, 2017. The hearing was held at the Lee County School Board offices in Sanford, North Carolina and the Office of Administrative hearings in Raleigh, North Carolina.

The records of the case received for review were:

One (1) CD which contained the OAH Official Record: The ALJ Decision; 21 Transcripts; Stipulated Exhibits; Petitioner's Exhibits; Respondent's Exhibits; Exhibits entered on ALJ's Order; Many Motions by both parties; Numerous Arguments; and several Orders by the ALJ.

Appearances:

For Petitioner: Stacey M. Gahagan, Gahagan Law Firm P.L.L.C., 3326 Durham Chapel Hill Blvd., Suite 210-C, Durham, NC 27707

Tammy H. Kom, Legal Services for Children of North Carolina, 3326 Durham Chapel Hill Blvd., Suite 210-C, Durham, NC 27707

For Respondent: Rachel B. Hitch, Schwartz & Shaw, P.L.L.C 19 West Hargett Street, PO Box 2350, Raleigh, NC 27602

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

For the Student/Petitioner - [redacted] Student
For Guardian - [redacted] Grandmother
For Respondent - Lee County Schools; LCS

ISSUES

The Petition in the case included many allegations of failure by LCS that resulted in denying [redacted] a free appropriate public education. The Petition had 193 enumerated claims which were summarized by the Petitioner into 21 specific allegations. The parties in the Pre-Trial Order stated that the issues were:

Petitioner's Proposed Contested Issues for Hearing:

1. Whether Respondent failed to comply with the procedural requirements of the IDEA at any time between July 1, 2013, through June 6, 2017.
2. Whether Respondent denied [redacted] a free appropriate public education at any time between July1, 2013, through June 1, 2017.
3. If the Tribunal finds Respondent failed to comply with the procedural requirements of the IDEA or denied [redacted] a free appropriate public education at any time during the period from July 1, 2013, through June 1, 2017, what appropriate relief should this Tribunal award Petitioner?

Respondent's Proposed Contested Issues for Hearing:

1. Whether Respondent failed to comply with the procedural requirements of the IDEA between June 1, 2016, through June 1, 2017.
2. Whether Respondent denied [redacted] a free appropriate public education between June 1, 2016, through June 1, 2017.
3. If the Tribunal finds Respondent denied [redacted] a free appropriate public education during the period from June 1, 2016, through June 1, 2017, what appropriate relief should this Tribunal award Petitioner?
4. Whether Petitioner's Claims Prior to June 1, 2016 are foreclosed by the one-year statute of limitations.

The ALJ determined that the Issues were:

1. Whether any of Petitioner's claims prior to June 1, 2016 are barred by the one-year statute of limitations and, if not, whether Lee County Schools denied [redacted] a free and appropriate public education during that time.
2. Whether Lee County Schools denied [redacted] a free and appropriate public education during the remainder of the 2016/2017 school year?
3. If applicable, what remedies should be awarded to compensate Petitioner?

WITNESSES

For Petitioner:

[redacted] Petitioner
[redacted] M.A., B.C.E.T.
[redacted] Ph. D.

For Respondent:

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

EXHIBITS

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

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

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

Motion Hearing Exhibits: D1-D19, E1-E3

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

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

PROCEDURAL BACKGROUND

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

The Petitioner contended that the Respondent failed to provide FAPE and filed a petition for a contested case (special education) with North Carolina's Office of Administrative Hearings (OAH). OAH appointed Administrative Law Judge (ALJ) Stacey Bice Bawtinhimer to hear the case. The Hearing began on August 21, 2017. It was completed on October 12, 2018 encompassing a total of 20 days.

The procedural background of this case is quite involved and significant. The ALJ discusses the procedural background at length in her Decision. (*ALJ Final Decision*, pp. 3-8) It is incorporated herein by reference. There were many document production issues. Document production issues consumed many hours of the hearing, prolonging a relatively simple case into a hearing that lasted 20 days.

Document production issues resulted in reconsideration by the ALJ of a decision made early in the case and partially reopening of Petitioner's case-in-chief. The ALJ expressed her frustration: "Unfortunately, the emphasis of the procedural aspects of litigating the due process petition overshadowed the ultimate issue - was [redacted] denied a free and appropriate public education (FAPE)." (*ALJ Final Decision*, p. 3)

The ALJ determined that it was necessary to make several procedural decisions and issue orders during the hearing. These were clearly enumerated in her Final Decision. (*ALJ Final Decision*, pp. 3-8). These decisions and orders were deemed necessary by the ALJ to insure that the hearing was conducted in accordance with Federal and North Carolina law. The undersigned SHRO finds that the procedural decisions and orders were indeed necessary, with one exception. The SHRO finds that the rationale for reopening the Petitioner's case-in-chief was not sufficient, especially since it extended the case several days and the evidence obtained during this reopening was outside the statue of limitations for the case. It was harmless error, however, for the evidence introduced during the reopening of the Petitioner's case-in-chief appeared to have no impact on the ALJ's Final Decision and definitely had no impact on this SHRO's decision. It was, instead, an inconvenience. The parties had to endure several additional days of testimony that was not necessary for a decision in the case.

On September 20, 2017, the Respondent made an oral motion for the ALJ to recuse herself from the case because of personal bias. It was denied. The SHRO did have a concern in this regard, for the ALJ did, on August 31, make an inappropriate comment regarding one of Respondent's teachers. "I am disliking Ms. [redacted] more and more." T. Vol. 8, p. 1584. This was the day before Ms. [redacted] testified, but due to sequestration, she was not present. During Ms. [redacted] testimony the ALJ was very polite. The remark was certainly inappropriate, but did not appear to have any effect on the hearing.

The transcripts and evidentiary record contained no evidence of personal bias. The ALJ did, however, during the hearing and definitely in her Final Decision, appear to have a predisposition to favor certain methodologies for teaching remedial reading. It is not clear that this actually had an impact on the ALJ's Final Decision. The SHRO, therefore, finds that there was insufficient reason for the ALJ to recuse herself. Also, there was insufficient evidence to determine that due process was not afforded to both parties.

Following the 20-day hearing with extensive testimony and the introduction of many exhibits, ALJ Bawtinheimer issued a Decision on February 28, 2018. The ALJ incorporated and reaffirmed all Findings of Fact and Conclusions of Law contained in previous Orders entered in this contested case. In her Final Decision, the ALJ dismissed some claims in the petition but determined that the Petitioner had met its burden to show that the Respondent failed to provide FAPE to [redacted]

On March 29, 2018 the Respondent, using the established procedures under North Carolina Law, submitted a timely appeal to the State Board of Education for review of the ALJ's Final Decision by a State Hearing Review Officer (SHRO). The undersigned SHRO was appointed on March 29, 2018 and immediately requested Written Arguments from the parties concerning the ALJ's Decision. Those Written Arguments were due on April 23. On April 9, 2018 the Respondent requested additional time to submit the arguments. The SHRO granted an extension of time, with arguments now due on May 7, 2018. The date of May 18, 2018 was established as the date for completion of the review. Arguments were received on May 7, 2018.

STANDARD OF REVIEW

The State Hearing Review Officer must render an independent decision, giving "due weight" to the administrative proceedings before the administrative law judge. *Board of Education v. Rowley*, 458 U.S. 176 (1982). Findings of fact by hearing officers are entitled to be considered *prima facie* correct if they are regularly made. An ALJ's findings are regularly made if they "follow the accepted norm of fact-finding process designed to discover the truth." *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991).

When reviewing an appeal of an ALJ's decision, the SHRO may only review the specific issues complained of by the parties. *E.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 975 F. Supp. 2d 528, 535 (M.D.N.C. 2013) The Respondent appealed the Final Decision of the ALJ. As the ALJ's Final Decision incorporated and reaffirmed all Findings of Fact and Conclusions of Law contained in previous Orders, the review encompasses the entire record.

This SHRO finds that the ALJ's Findings of Fact in her Decision were regularly made and adopts and incorporates many of them in this Decision. Many of the ALJ's facts were detailed recitations of testimony, unnecessary for reaching a decision. These are summarized, if relevant, or disregarded. The ALJ had a total of 351 enumerated facts and 129 conclusions. For the purpose of brevity and a clearer understanding of the issues in this review, the SHRO has chosen to significantly reduce the number of enumerated facts, consolidating and summarizing the facts. References to the transcript and exhibits are not always included, for many of the following facts are summarizations from many sources in the record. Only facts necessary for reaching a decision are included in this Decision.

While the ALJ's facts were regularly made, the SHRO does not accept that all of the ALJ's conclusions are regularly made. The ALJ places great weight on the testimony of Petitioner's experts. That may be acceptable, but when those experts testify well beyond their areas of expertise, the ALJ should have been more discerning. Some ALJ conclusions relied heavily on such testimony. The SHRO, therefore, does question the validity of a few of those conclusions.

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

The SHRO makes the following:

FINDINGS OF FACT

1. This case involves the provision of a Free Appropriate Public Education (FAPE) for [redacted] The parties agreed that [redacted] was eligible under IDEA to receive FAPE from the Respondent. (Stip. 11)

2. Near the end of [redacted]s first grade school year in April 2015, his [redacted] fter his [redacted] has lived with [redacted] and on [redacted] (Stip. 9, 10)

3. [redacted] and [redacted] reside in Lee County, North Carolina. (Stip. 12, 13) [redacted] was [redacted] years old at the time of filing of the petition and was in enrolled at the Respondent's [redacted] Elementary School. (Stip. 8)

4. On August 23, 2017 the parties agreed to Stipulations of Fact in the Order on the Final Pre-Trial Conference. To the extent that Stipulations are not specifically stated herein, the Stipulations of Fact from the Pre-Trial Conference are incorporated fully herein by reference.

5. The ALJ, in her Final Decision, included over 8 pages (Findings of Fact 8 - 60) presenting information about the various witnesses and their credibility. These are not included herein. The SHRO accepts these facts with regard to the ALJ's personally interacting with the witnesses and assessing their credibility during the hearing. The SHRO, however, does not fully accept the ALJ's reported high credibility of the two "expert" witnesses for the Petitioner. These two witnesses, Ms. [redacted] and Dr. [redacted] are very knowledgeable but the SHRO has reservations regarding some of their testimony. They testified at length about what teachers should be doing in the classroom, yet neither of them are teachers or licensed to teach. Many years previously, each had taught in the public schools for short periods of time. Ms. [redacted] last experience in a public school classroom was in 1999. Dr. [redacted] last public classroom experience was in 1970! Actual experience in implementing the teaching programs they advocate is just as important as conducting research and writing books and journal articles. Both of these experts are primarily engaged as consultants. Although both provide workshops for teachers, they do not include demonstrations of actual teaching or directly implementing the concepts they encourage teachers to use.

6. Another issue with both of these experts is that they are advocates of a single methodology to use in teaching reading to children who are learning disabled, even though they are not qualified to be teachers or qualified to teach using the methodology Throughout their testimony they focused on using only one methodology. As an example, Ms. [redacted] stated, "None of these goals reference clearly sequenced phonics . . ." (T. vol. 2, p. 340) All their recommendations were for this one methodology. One could possibly surmise, when reading their testimony, that they were representatives of the company that publishes and makes the methodology available. Both were very critical of any use of other methodologies, even though others are available and could be used with equal or possibly better results. In the SHRO's opinion, a true "expert" is not an expert or advocate for a single methodology, but is knowledgeable about many methodologies and will explain the many alternatives available. Only then should they express a preference.

7. Early in the hearing Ms. [redacted] made this statement that affected the SHRO's interpretation of much of her testimony: "This seems to focus on memorization of sight words. I don't know what that means." T. vol. 2, p. 339 She was supposed to be a reading expert. Later, Dr. [redacted] in cross examination did admit that there are many words that do not adhere to the rules of phonics and have to be memorized as sight words. (T. vol. 3, p. 573)

8. In addition, the ALJ allowed each, but especially Dr. [redacted] to testify at length as experts outside their areas of expertise, especially in the area of IEP development. An example is a statement that Dr. [redacted] made that "the IEP is inappropriate as written." (T. vol. 3, p. 507) Dr. [redacted] is not an expert in IEP development. This is but one example of this expert testifying beyond her area of expertise. The ALJ stated very clearly that she gave great weight to Dr. [redacted] testimony throughout the Final Decision. (*ALJ Final Decision*, p. 12: 23)

9. For these reasons, the SHRO has serious reservations regarding some of the testimony of Ms. [redacted] and Dr. [redacted] The SHRO considers much of their testimony to be the testimony of a layperson rather than an expert.

10. This case originated with a petition filed by [redacted] on June 1, 2017. North Carolina has a one-year statue of limitations. The applicable statue:

N.C.G.S. 115C-109.6. Impartial due process hearings.

(b) Notwithstanding any other law, the party shall file a petition under subsection (a) of this section that includes the information required under IDEA and that sets forth an alleged violation that occurred not more than one year before the party knew or reasonably should have known about the alleged action that forms the basis of the petition. The issues for review under this section are limited to those set forth in subsection (a) of this section. The party requesting the hearing may not raise issues that were not raised in the petition unless the other party agrees otherwise.

(c) 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.

11. The period of time covered by the petition is from June 1, 2016 to June 1, 2017, unless one of the exceptions in N.C.G.S. 115C-109.6 apply. The Petitioner literally spent days during the hearing providing information attempting to substantiate their claim that both of the exceptions apply. The following Facts (12 - 38) provide a brief summary of the evidence. *[Note: In the ALJ's Final Decision there over 100 detailed facts regarding this issue, most of which are not relevant.]*

12. [redacted] began experiencing some academic problems during the first grade (school year 2014-15). The Respondent requested and received permission from his mother, [redacted] to begin interventions in the RtI process. At that time [redacted] was notified that she could request, in writing, an evaluation to determine if [redacted] had a disability. (T. 21, pp. 4070-71)

13. Response to Intervention (RtI) is a general education program. Its purpose is to provide general education interventions to students who are struggling. (T. vol. 20, p. 4043) An RtI team develops a plan for the interventions. Data and interventions are also used during the RtI process to assist the RtI team to determine if an evaluation is needed for special education services and what evaluations to conduct. (T. vol. 20, pp. 4021-22) Many students achieve success through the interventions and are never referred for possible identification to receive special education services. Although the RtI team is a separate team from the IEP team, the IEP team receives data from the RtI team and often determines whether to evaluate for special education eligibility. (T. vol. 18, p. 3681)

14. [redacted]s RtI interventions began in November 2014. The interventions were in the area of reading, using the Letterland program. (P. 95; T. vol. 19, p. 1802) At the end of first grade, despite interventions, [redacted]s reading was below grade level. (P. 5)

15. In the second-grade, RtI interventions were continued for reading, phonemic awareness, phonics, fluency, and comprehension. (P. 96) Curriculum progress monitoring was done by weekly. His scores remained below grade level. (P. 5)

16. [redacted] and later [redacted] were given progress monitoring information regarding [redacted]s RtI interventions. The Petitioner made an attempt during the hearing to show that the Respondent provided misinformation to [redacted] concerning [redacted]s progress in the RtI interventions. [redacted]s progress was indeed minimal. DIBELS (Developmental Reading Assessment) was used for progress monitoring the interventions. He did show progress in certain areas of reading as indicated by his scores on some subtests on the DIBELS. His composite score on the DIBELS, however, remained well below grade level. [redacted] admitted several times during testimony that she knew this information but did not fully understand until she later obtained the services of a reading consultant in November 2015. The Petitioner also argued and the ALJ cited an exhibit (Stip. 14) as evidence of the Respondent misleading [redacted] (ALJ Final Decision, Finding of Fact 78) This exhibit was not an entered exhibit for the facts therein. It was entered only for historical purposes.

17. The Respondent had sufficient information early in the 2015-16 school year that [redacted] could possibly have a learning disability in reading and should be evaluated to make that determination. For reasons not fully explained in all the evidence and testimony in this case, the Respondent failed to act until December 2015.

18. Based on speech difficulties, [redacted] was referred for evaluation in the fall of 2015. His evaluation and eventual eligibility was in the area of speech. An IEP team met on October 27, 2015. The team identified [redacted] as Speech Impaired (SI). An initial IEP was developed and special education services in the area of speech began on October 28. (Stip. 8)

19. Although the grandmother, [redacted] had expressed numerous times that [redacted] was having reading difficulties and may possibly have dyslexia, no action was taken at the October 27 IEP meeting to address his difficulties in reading. There had been no diagnosis of dyslexia. [redacted] had only a layperson's understanding and was expressing her opinion.

20. [redacted] knew at the October 27, 2015 IEP meeting that [redacted] was being identified only as speech impaired and that reading difficulties were not being addressed. She also received the required Prior Written Notice following the meeting that had no indication that the IEP team was addressing [redacted]s reading difficulties. (Stip. 9)

21. The Prior Written Notice following the October IEP meeting clearly stated that if [redacted] disagreed with the action taken that she was entitled to the due process rights that are described in the *Handbook on Parents' Rights*. Further, it was clearly stated in the *Handbook* that the deadline for filing a due process petition was one year from the receipt of the notice. (Stip. 9)

22. [redacted] acknowledged that she had received a copy of the *Handbook on Parents' Rights*, knew that [redacted]s reading problems were not being addressed, and knew that she must make a written referral if she wanted the IEP team to evaluate [redacted] for other disabilities. (T. vol. 5, pp. 990-92)

23. [redacted] knowing her rights, failed to act. She did not file a petition for a due process hearing until June 2017.

24. On October 28, 2015, shortly after the IEP meeting on October 27, 2015 [redacted] formally referred [redacted] for testing to determine if he needed special education to address his reading difficulties. (Stip.44)

Private Educational Evaluation, 11/3/2015

25. Soon after the October IEP meeting [redacted] consulted a reading specialist and diagnostician, [redacted] [redacted] Ms. [redacted] performed a private educational evaluation on November 3, 2015. (Stip. 33) Ms. [redacted] did indeed find that [redacted] had a moderate to severe reading disorder. She found that [redacted] displayed a pattern of weaknesses characteristic of a specific learning disability and he was not performing adequately in reading, spelling and writing. She also diagnosed [redacted] with dyslexia, a language-based specific learning disability which affects reading, spelling and writing. (Stip. 33; T. vol.2, pp. 274, 294)

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

27. On the Peabody Picture Vocabulary Test, which measures receptive or listening vocabulary and is "widely used in research as a proxy for IQ," [redacted] scored in the average range. (T. vol. 2, pp. 276-77; Stip. 33)

28. [redacted] also scored in the average to superior range in the math subtests of the Woodcock Johnson. (Stip. 33)

29. [redacted]s scores on the Comprehensive Test of Phonological Processing test (Stip. 33) indicated, "[redacted] has low phonological awareness indicating weak phonological processing, indicating the likelihood of a reading problem, dyslexia." (Tr. vol. 2, p. 279) On the Word Identification and Spelling Test (Stip. Ex. 33, p. 116), [redacted]s scores were "very, very low . . . in word identification, spelling, literacy index and sound-symbol or phonics knowledge." (T. vol. 2, p. 280) Ms. [redacted] noted: "These findings are the same as the progress monitoring findings from the district. They're just normed testing, clinical individual testing." (T. vol. 2, p. 280)

30. [redacted] also scored below average on the Test of Word Reading Efficiency which measures decoding and fluency, and the Gray Oral Reading Test. (Stip. 33, p. 116; T. vol. 2, pp. 280–82)

31. Ms. [redacted] in her educational evaluation, made extensive recommendations. She recommended additional daily instruction for [redacted] commensurate with what is cited in the research explaining, "an extra hour per day of instruction, in addition to 90 minutes of regular instruction, is needed to close the gap for students who are behind in reading skill development." (Stip. 33)

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

33. Ms. [redacted] confirmed there is "widespread confirmation in reading research" regarding "the role of early intervention and additional direct instruction, not a 'wait and see approach,' to help students who are behind in early literacy skills." (T. vol. 2, p. 284; Stip. Ex. 33)

34. Ms. [redacted] educational evaluation was provided to the Respondent's IEP team the day prior to a reevaluation meeting of the IEP team.

35. The Petitioner did not request reimbursement for her privately obtained evaluation. A claim for reimbursement did not even arise until the hearing, almost two years after the evaluation.

December 2015 IEP Meeting

36. Following up on [redacted]s formal request to conduct further testing of [redacted] a reevaluation meeting was held by the IEP meeting on December 1, 2015. The IEP team accepted the educational evaluation that had been conducted by Ms. [redacted] and made the decision to conduct a reevaluation of [redacted] Based on the required evaluations for the category of Learning Disabled in NC 1503-2.5(d)(11)(i)(J), the team determined that a cognitive evaluation was needed.

37. The Petitioner and her advocate, Ms. [redacted] contended that a psychoeducational evaluation was unnecessary, for the Respondent already had sufficient information to make a determination concerning [redacted] possible learning disability. [There was extensive oral argument on this issue several times during the hearing. (T. vol. 6. pp. 1084-87; T. vol. 13, pp. 2484-88, 2648; T. vol. 15, pp. 2871-77) In comments during the hearing, the ALJ opined that NC 1503-2.5(d)(11)(i)(J) requires the psychoeducational evaluation. In her Final Decision, she reverses herself, finding that the evaluation is not required. (ALJ Final Decision, pp. 20, 57)]

38. Except for the decision to conduct a psychoeducational evaluation, no other action was taken by the IEP team on December 1, 2015. Despite her arguments for immediate identification of [redacted] as learning disabled at the December 1 IEP meeting, [redacted] knew that the Respondent had not developed an IEP for [redacted]s reading deficits. The ALJ correctly held that any claims regarding the December 1, 2015 IEP meeting are time barred.

Psychoeducational Evaluation, 12/11/2015

39. A psychoeducational evaluation was conducted by the Respondent on December 11, 2015. In conducting the psychoeducational evaluation, the psychologist administered seven subtests from the Woodcock-Johnson Fourth Edition, Tests of Cognitive Ability (WJ-IV Cog). [redacted]s general cognitive ability and general intellectual ability both fall within the average range. He also demonstrates average fluid reasoning, short-term working memory, processing speed, long-term retrieval, and visual processing. He scored a low average on the phonological subtest, and a very low score on the oral vocabulary task of the WJ-IV. (Stip. 34)

IEP Meeting 1/21/2016 and IEP dated 1/22/2016

40. An IEP meeting was held on January 21, 2016. (Stip. 34) (Stip. 16, 17, & 19) Using the alternative to discrepancy model, the team determined [redacted]s eligibility as learning disabled in reading. An IEP was developed to provide services. The team, without explanation, did not include speech impaired as a second area of disability. Instead, the speech services from the October 2015 IEP were changed to a related service. There were no changes in the speech services.

41. The IEP that was in effect when the petition was filed was the IEP of January 22, 2016. That IEP was relatively unchanged except for amendments in June and August 2016. This IEP, therefore, forms the basis of analysis for FAPE for a portion of the period covered by this case.

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

a. Using correct speech sound productions, [redacted] will verbally identify 80% of the words presented to him from an instructional sight word list on 3 out of 4 occasions.
b. Given direct instruction in word families and identifying 'chunks' in words, [redacted] will decode both real and nonsense words using correct speech productions with 80% accuracy.
c. Given direct instruction in single consonant and short vowels sounds, [redacted] will decode these using correct speech productions with 80% accuracy.
d. Given an instructional and decodable level story, [redacted] will read it using correct speech sound productions and answer basic comprehension questions in written form with 80% accuracy.
e. Given weekly spelling list associated with research based reading program, [redacted] will generate written sentences containing proper spacing and correct spelling on 4 out 5 trials.

(Stip. 36; Stip. 17)

43. The Reading/Speech goal (a) was progress monitored by "quarterly sight words check" and "teacher data." Reading/Speech Goals (b-d) were progress monitored by "work samples" and "teacher data." (Stip. 17) Both the EC teacher and speech pathologist would monitor progress on the combined Reading/Speech goals. (T. vol. 9, p. 1804)

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

45. Service delivery in the January 2016 IEP was: Reading for 60 minutes, five times each week in the EC classroom; Writing for 30 minutes, five times each week in the EC classroom; Speech as a related service for 15 minutes, 12 sessions each reporting period in the speech room. (Stip. 17)

46. [redacted]s placement in the January 2016 IEP was "resource." (Stip. 39; Stip. 17)

47. At the January 2016 IEP meeting LCS changed [redacted]s eligibility category from Speech Impaired ("SI") to Specific Learning Disabled ("SLD"). (Stip. 40) The IEP team did not complete a speech-language eligibility worksheet before exiting [redacted] from speech as a disability category and switching his speech to a related service.

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

49. Ms. [redacted] Respondent's EC Lead Teacher/Compliance Specialist, stated that she was beginning to notice that a lot of time when students were being moved from SI to SLD, IEP teams were not using a SI worksheet during IEP meetings. (T. vol. 11, p. 2283)

50. Respondents' speech-language pathologist, [redacted] [redacted] testified that speech eligibility documentation was not necessary in this situation. Even if [redacted] was eligible in SI as a secondary category, Ms. [redacted] and Ms. [redacted] both testified that speech services would be the same whether classified as a "related service" or eligibility category.

51. During the hearing the appropriateness of the combination of speech and reading goals was one of the Petitioner's primary concerns with respect to the January 2016 IEP and subsequent IEPs for June and August 2016.

52. The initial October 2015 Speech IEP had a separate speech goal. The January 2016 IEP had combined Reading/Speech Goals with speech integrated as related service but no separate speech goal. (Stip. 8; Stip. 17) Respondent's explanation for the combined Reading/Speech Goals appeared to be that [redacted]s articulation disorder was related to his reading disability.

53. Both of Petitioner's experts testified at length that it was inappropriate to combine reading and speech goals (or as they both used the term, conflate). Their argument was based primarily on the fact that speech has functional goals, unlike the academic goals for reading, writing and spelling. Petitioner's experts were not qualified in the area of speech, yet they gave extensive "expert" testimony regarding speech goals.

54. The primary reason the Petitioner's experts claimed that the January 2016 IEP goals were inappropriate was because reading goals were combined with speech goals. There was very little effort to show that IEP goals were inappropriate for other reasons. Dr. [redacted] testified at length that the IEP goals were inappropriate. Yet, her testimony had questionable credibility in this regard. She purposefully misread a goal claiming it inappropriate, stating there is "no such thing as a decoding level story." The goal used the expression, "instructional and decodable level story" that had been recommended by Petitioner's other expert, Ms. [redacted] (T. vol. 3, p. 494) Ms. [redacted] had recommended including that expression when goals were being drafted during the IEP meeting. (Stip. 19) Dr. [redacted] also criticized goals because the goals included such things as "instructional sight word lists," because this was incompatible with her preferred methodology. (T. vol. 3, p. 492)

55. Ms. [redacted] the EC Lead Teacher/Compliance Specialist also did not like the combination of reading and writing goals. She was concerned that combined goals would be difficult to properly progress monitor, but Ms. [redacted] testified that the combined goals would be monitored by

the EC teacher and the speech pathologist. (T. vol. 18, p. 3568) The speech pathologist was supposed to monitor errors in speech that [redacted] made while reading. (T. vol. 11, p. 2311)

56. Ms. [redacted] later recommended a separate articulation goal for [redacted] In an email, she brought to the attention of the speech-language pathologist that LCS has a practice of integrating "a ton of artic goals" within reading goals, and [redacted]s articulation issues were "most likely not related to his LD reading because "he had artic[ulation] issues before becoming eligible SLD." (D-11)

57. The Petitioner's focus on this relatively unimportant email (D-11) consumed days at the hearing. It was not even relevant to the issues to be decided. Significant hearing time was wasted focusing on this email. It probably extended the hearing by at least three (3) or four (4) days.

58. Ms. [redacted] was [redacted]s consultant before, during, and after the meeting during which the January 2016 IEP was developed. Ms. [redacted] attended the January 2016 IEP meeting by phone and soon thereafter received a copy of the IEP from [redacted] If the IEP's combined Reading/Speech goals were considered inappropriate by Ms. [redacted] [redacted] would have been made aware. [redacted] however, failed to timely contest the January 2016 IEP. It was not until the hearing that the integrated goals became an issue. The petition for the contested case did not include this as an issue.

59. Respondent failed to provide a cogent and reasonable explanation of its practice of combining reading and speech goals. LCS subsequently stopped combining these goals.

60. Petitioner relied on the practice of combining reading and speech goals and [redacted] email in in an attempt to show harm and a pattern of procedural violations. The speech services, however, remained the same and Petitioner never claimed that the speech services were inappropriate. The Petitioner failed to show any harm that resulted to [redacted] from this supposedly procedural violation.

61. The January 2016 IEP did not have a fluency goal. Dr. [redacted] opined that this was not appropriate because fluency was one of [redacted]s major problems that had been identified before the January 2016 IEP. (T. vol. 3, p. 496)

62. In the opinion of Dr. [redacted] the whole area of phonological awareness was left out of the IEP goals, which was of critical importance. (T. vol. 3, p. 496)

June 2016 IEP Meeting and IEP Addendum

63. An IEP Meeting was held on June 8, 2016 to discuss [redacted]s concerns about [redacted]s progress and his academic needs. (Stip. 22; Stip. 41)

64. Most of the meeting was devoted to [redacted]s dissatisfaction with [redacted]s progress. The EC teacher presented graphs and data in an attempt to show that [redacted] was making some, though minimal progress. The Petitioner claimed that this presentation was misleading. (T. vol. 9, p. 1761) The EC teacher, using DIBELS test data, focused on one subtest while ignoring the remainder of the subtests and the composite score. The DIBELS composite scores indicated that [redacted] had been and was still on the most severe level of reading difficulty, which required the most intensive level of instruction. (P. 5) (T. vol. 3, pp. 504-05) This data showed that [redacted] was making minimal, possibly trivial, progress in reading. His reading was still below grade level. The gap between [redacted] and his non-disabled peers was increasing rather than decreasing.

65. Without any discussion recorded in the minutes, the June 2016 IEP team made no ESY changes from the January IEP which had indicated that [redacted] did not qualify for ESY services. There was no mention of ESY in a Prior Written Notice. (Stip. 21; Stip. 22)

66. The IEP team made no changes to the goals that were in the IEP from January 2016, but did change the service delivery and placement.

67. The Petitioner requested more reading remediation, a full 90 minutes each day as recommended by Ms. [redacted] The 2016 IEP team, instead, reduced [redacted] services. Reading was reduced to 45 minutes, five times a week in the EC classroom. Writing remained unchanged at 30 minutes, three times a week in the EC classroom. Speech as a related service also remained unchanged at 15 minutes, 12 sessions each reporting period in the speech room. Using North Carolina's LRE formula, the reduction in EC reading actually resulted in a change from a "resource" to "regular" education setting. (Stip. 23; Stip. 17)

68. The IEP team's rationale for changing [redacted]s placement was because the team had reviewed progress in all areas of sight words, word recognition, reading accuracy, reading comprehension, and spelling sentences. "[redacted] had made progress in all areas." (Stip. 21)

69. The Petitioner claimed that the Respondent predetermined the decision to reduce [redacted]s services at the June 2016 IEP. The Petitioner contended, without evidence, that the service delivery was reduced to accommodate the existing administration of the Language! program instead of [redacted]s needs. The Language! program is used by LCS for all third-grade students at [redacted] (T. vol. 13, p. 2526)

70. The Language! program can be implemented in 45 or 90-minute segments. LCS implemented the Language! program in 45 minutes. Although Respondent denied that the service delivery was reduced for administrative convenience, the ALJ thought it coincidental that the reduction in [redacted]s reading service delivery coincided with Respondent's Language! program implementation.

71. Placement must be based on the IEP pursuant to 34 C.F.R. § 300.116(b)(2). It is undeniable that no goals changed on the June 2016 IEP, and the goals should drive the service delivery, not administrative convenience. (T. vol. 13, p. 2508)

August 2016 IEP Meeting and Addendum to IEP

72. Because of her continued concerns about [redacted]s lack of reading progress, [redacted] requested another IEP meeting, which was held on August 28, 2016. At the meeting, Respondent's staff reassured [redacted] that [redacted] was making appropriate progress, and that his reading programs had been and were being implemented. (Stip. 23; Stip. 24)

73. At the August 2016 IEP meeting, [redacted] again requested that [redacted]s services be increased. (T. vol. 2, p. 376); (T. vol. 4, pp. 674-75; Stip. 23) Ms. [redacted] testified that in response to the request for more services, the team reported that [redacted] had made "so much progress ... more than a grade level rate of change." (T. vol. 2, pp. 375-76; Pet.101) This was misleading, as [redacted] certainly needed greater intensity of instruction.

74. The Respondent's IEP team members refused to increase [redacted]s time in EC reading because they stated that it was important for [redacted] to receive reading instruction and be exposed to the language rich environment in the regular education classroom. Yet, the testimonial evidence showed that [redacted] received very little reading instruction in the regular education classroom. According to Ms. [redacted] his regular third-grade teacher, [redacted] was pulled out of her class during spelling, morning work, and silent reading. (T. vol. 7, p. 1437)

75. At the August IEP meeting the team amended the current IEP, adding an additional fluency goal, but all the other Reading/Speech Goals, Spelling Goal, and Present Levels remained the same.

(Stip. 23) The Fluency Goal was to be progress monitored by "student work samples (fluency chart)" and "teacher observations with data." (Stip. 17)

76. At the August IEP meeting the team also amended the current IEP by adding an accommodation in math and science/social studies: "when doing written assignments, [redacted] will not be penalized for spelling." (Stip. 45)

77. The IEP team did not discuss ESY at August 2016 meeting. (T. vol. 2, p. 390)

December 2016 Private Educational Reevaluation

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

79. Based on the standard scores in the 2016 Educational Reevaluation, [redacted] did not make progress and remained significantly impaired in all measures, except in his ability to memorize high-frequency words. (*Compare* Stip. 33, *with* Stip. 35) Ms. [redacted] testified that [redacted] made no progress in reading, spelling, phonics knowledge, reading rate, reading fluency. He had significant regression in math." (T. vol. 2, pp. 400–01) Interpreting these results, Dr. [redacted] described [redacted]s progress as "minimal, primarily related to his acquisition of sight words" and was not "sufficient to put him on a trajectory to be a competent reader." (T. vol. 3, p. 580)

80. Later, at a January 2017 IEP meeting, LCS incorporated the results and recommendations of Dr. [redacted] 2016 Educational Reevaluation into the January 2017 IEP.

January 2017 IEP Meeting and IEP

81. On January 5, 2017, [redacted]s IEP Team met to conduct [redacted]s Annual Review and to develop a new IEP. (Stip. 47; Stip. 26; Stip. 27; P. 1)

82. The Petitioner and her advocate, Ms. [redacted] expressed concern regarding service delivery and implementation during the past year and wanted service delivery to increase. Also the Petitioner requested that [redacted] get a double dose of EC reading instruction each day, more specifically to teach the same session twice each day. According to the minutes of the meeting and the Prior Written Notice, the team agreed to this substantial increase in reading instruction. (Stip. 26; 27) The IEP, however, did not include an increase in service delivery. (P. 1) There was no evidence in the record that reading instruction was increased as specified by the Prior Written Notice.

83. During the January 2017 IEP meeting the Petitioner and her advocate attempted to explain that in their opinion it was inappropriate to use multiple programs with [redacted] (Stip. 26; T. vol. 2, p. 422) This was consistent with the Petitioner's argument concerning the use of a specific program or methodology throughout the hearing.

84. The January 2017 IEP was very different from the previous IEPs with present levels of performance being more specific and the goals more ambitious. (*Compare* P. 1 *with* Stip. 17) Reading and speech goals were not combined and none of the reading goals were integrated with speech as a related service.

85. During the IEP meeting the Petitioner and her advocate, Ms. [redacted] stated their opinion that the goals were too ambitious. Ms. [redacted] later testified that the goals, though an improvement over those in the 2016 IEP, were still not appropriate. Dr. [redacted] also testified that the new goals were still not designed to meet [redacted] unique needs. (T. vol. 3, pp. 522, 526)

86. The January 2017 IEP included the following reading goals for [redacted]

a. When shown short vowel sounds with diagraphs in isolation, [redacted] will read the words with 95%

accuracy by his next annual review date.

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

P. 1)

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

a. When given short vowel words with diagraphs in isolation, [redacted] will spell the words with 95% accuracy by his next annual review date.
b. When given consonant vowel consonant words, [redacted] will spell the words with 95% accuracy by his next annual review date.
c. When given words with the suffix s in isolation, [redacted] will spell the words with 80% accuracy by his next annual review date.
d. When given short vowel words with consonant blends in isolation, [redacted] will spell words with 80% accuracy by his next annual review date.

(P. 1)

88. The January 2017 IEP included the following speech goal for [redacted]

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

(P. 1)

89. [redacted]s reading and writing goals were to be implemented in the EC classroom and monitored by the EC teacher. His functional speech goal for articulation was to be implemented in the speech therapy room and monitored exclusively by the speech pathologist. (P. 1)

90. The January 2017 IEP included many more supplemental aids, supports, modifications, and accommodations in the regular education classroom. (Stip. 52; P. 1)

91. Service delivery in the January 2017 IEP was: Reading for 45 minutes, five times each week in the EC classroom; Writing for 30 minutes, five times each week in the EC classroom; Speech as a related service for 15 minutes, 10 sessions each reporting period in the speech room. (Stip. 53; P. 1)

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

93. The Petitioner claimed that the "regular" placement in the IEPs since June 2016 was inappropriate and appeared predetermined. During the hearing, the Respondent failed to provide a cogent and reasonable explanation for maintaining [redacted]s "regular" placement in light of his lack of progress and the addition of new academic goals.

February 7 and May 24, 2017 IEP Meetings

94. An IEP Meeting was held on February 7, 2017. There was much argument and discussion with very little agreement between the Petitioner and LCS members of the IEP team. The parties were unable to resolve their differences. The meeting ended with no action taken. (Stip. 30)

95. An unsuccessful attempt was made by Respondent to hold an IEP meeting in May, 2017.

96. There was no claim that the Respondent had denied or failed to allow Parental participation in this contested case. (T. vol. 5, p. 959) There was substantial evidence that the Petitioner actively participated in all aspects of [redacted]s educational program.

Implementation and Progress Monitoring of IEPs

97. Evidence of appropriate implementation and progress monitoring was simply not provided. While the Respondent introduced a significant amount of information, including work samples, lesson plans, teacher schedules, scores on tests, and teacher testimony, the record presents only an inconsistent attempt to implement [redacted]s IEP. Certainly the information was not sufficient to satisfy the Petitioner.

98. Teachers testified that they had provided progress reports to [redacted] but [redacted] testified that she could not remember receiving anything with the title "progress report." There is very little in the record to show that progress was monitored as specified in each IEP. Whether this evidence exists is unclear, for the Respondent was not allowed to enter many documents because of a failure to timely produce them. With no documentation to show regular progress monitoring of [redacted]s progress on IEP goals, one has to conclude that regular progress monitoring was not performed adequately.

99. IDEA and state law provide little guidance with regard to the data that should maintained to show progress, just that the LEA must maintain data necessary to record a child's progress toward goals. That progress must be reported to the parent or guardian at regular intervals and certainly at the end of reporting periods as determined by the LEA. The law is also silent with regards to the data that must be collected to monitor progress.

100. The Petitioner repeatedly made the allegation that the data to show progress must be standardized and any test used must be normed. Petitioner's experts disregarded data such as work samples, teacher-made tests, or teacher observations. Yet, these are types of data collected and maintained by teachers and are certainly useful to assess a child's progress toward specific goals. [redacted] testified that she did periodically receive this data. (T. vol. 4, p. 678; T. vol. 5, p. 873)

101. Ms. [redacted] in the IEP January 2017 IEP meeting, presented information reflecting that [redacted] had been progressing at a higher than normal or grade level expectation on the goals specific to his deficits. (Stip. 27) Data shows that, to the contrary, [redacted] would not be on grade level or very close to grade level by the end of his elementary school career. He was not closing the gap. The gap was getting bigger. (T. vol. 2, pp. 385-86; T. vol. 15, pp. 2955-56, 2970, 3095)

102. The combined Reading/Speech goals that were in the 2016 IEPs were supposed to be jointly monitored by the both the EC teacher and the speech pathologist. There, however, was no evidence that this was done.

103. The Petitioner argued extensively that the programs used to implement [redacted]s IEP were not taught with fidelity by LCS's teachers. ALJ also made numerous findings in this regard. Although fidelity was not even mentioned in the Petitioner's petition, implementing a specific methodological program with fidelity became the central tenant in the Petitioner's case.

104. The Petitioner made a determined effort in the hearing to emphasize methodology. More effort was put into methodological concerns than the individual needs of [redacted] It almost seemed like the hearing was "hijacked," with methodology and the implementation of the preferred programs of Petitioner's experts becoming the focus. [redacted] and his individual needs were not even considered in much of the testimony. The ALJ appeared to enable the Petitioner in taking the hearing off-track.

105. Very little relevant testimony and evidence was entered by the Respondent to demonstrate that [redacted]s IEP was actually being implemented by LCS teachers. Collaboration between the regular classroom teacher and special education providers appeared to be nonexistent. Very little evidence was introduced regarding supplemental aids and services, modifications, and accommodations that were in the IEP.

106. There was extensive testimony regarding the Petitioner's claim that the Respondent misrepresented [redacted] progress by improperly used the Text Readings and Comprehensive (TRC) broad score on the DIBELS as evidence of [redacted]s progress. (T. vol. 2, pp. 384, 385; T. vol. 3, p. 596) The Petitioner's experts claimed that this is misrepresentation and falsely reports progress. Dr. [redacted] claimed that the TRC is extremely unreliable and the various levels are unstable indicators. (T. vol. 3, pp. 597-600) She indicated that the TRC should not have been added to DIBELS in North Carolina, because it was included at the insistence of balanced-literacy proponents. She implied that she is not in favor of balanced-literacy. (T. vol. 3, p. 600) A balanced-literacy program uses both whole language and phonics. The goal of a balanced literacy program is to include the strongest elements of each.

107. Petitioner's experts do not accept the TRC as a valid measure of reading performance. Instead, they insisted that only the composite score on the DIBELS could be used. That score showed that [redacted] remained in the intensive category, indicating no progress had been made. (This disagreement concerning the use of the TRC score has its roots in the ongoing controversy concerning reading programs, pitting those who advocate a phonics approach against those who advocate a balanced-literacy approach.)

108. The Respondent's use of the DIBELS subtest scores is not misrepresentation, for these scores are recognized by North Carolina as being useful in assessing reading comprehension. It was certainly not intentional or knowing misrepresentation. Just because the Petitioner believes that an assessment of a student is wrong does not rise to a specific misrepresentation. (*W.H. v. Schuykill Valley Sch. Dist.*, 954 F. Supp. 2d 315, (E.D. Pa. 2013)

109. Assuming, *arguendo*, that [redacted] actually did not make progress, Respondent's statement that he did make good progress does not amount to a misrepresentation given that the actual opinion of the educators on [redacted]s IEP teams believed, and still believe (to the point of testifying under oath) that [redacted] has made good progress. *W.H. supra.* At the end of third grade, [redacted] had increased six levels on the Reading Text Reading Comprehension (TRC) and was nearly at grade level on that important reading measure (according to [redacted]s teachers). See P. 5

110. Based on the standard scores in the December 2016 Evaluation, [redacted] did not make progress and remained significantly impaired in all measures, except his ability to memorize high-frequency words. (*Compare* Stip. 33 *with* Stip. 3)

111. Progress monitoring was sporadic, inconsistent, and did not always follow the prescribed progress monitoring dictated by the IEP. Throughout the time covered by this review, data was not collected in such a fashion to effectively monitor [redacted]s progress. Even though the progress monitoring was not done effectively, the progress monitoring that was done using standardized tests did show that [redacted] was making little or minimal progress. Whether this was caused by ineffective implementation of the IEP was not clearly shown.

112. Dr. [redacted] also asserted that because of [redacted]s good thinking skills and his prediction skills with high frequency words, he scored higher on the TRC. Based on her opinion, his phonemic

decoding problems must be remediated. Otherwise, she claimed that he will not become a proficient reader. (T. vol. 3, pp. 603-10)

113. Ms. [redacted] and Ms. [redacted] testified that the IEP goals were inappropriate because even if [redacted] met all of his IEP goals, he would still be working on reading skills at a beginning first grade level by the middle of fourth grade. (T. vol. 2, pp. 4114–15) Yet, that is the level of his reading skills as determined by Ms. [redacted]'s own tests. Their arguments were inconsistent and confusing.

114. There is no requirement to specify the program or methodology to be used in the IEP. At the January 2017 IEP meeting the IEP team chose to use FUNdation as the program to use for [redacted]s reading remediation program. (Stip. 26) [redacted] had participated in the Letterland and Language! programs previously, although the teachers did not restrict themselves to just those programs. All these programs are based on the Orton-Gillingham methodology.

115. Prior to the IEP teams determining that FUNdations would be used following the January 2017 meeting, no assessment was conducted to determine where [redacted] should be placed in the program. Ms. [redacted] the third grade EC teacher, placed him in the first-grade book at Lesson 1, Unit 1. (T. vol. 15, pp. 3028, 3034) Both of Petitioner's experts were not qualified to teach the FUNdations program, yet they testified that Ms. [redacted] use of the program at the first grade level was inappropriate. (T. vol. 2, p. 424)

116. There are fourteen (14) units in the first-grade curriculum of FUNdations. Dr. [redacted] testified that based on the pace of the lessons in Ms. [redacted] lesson plans, [redacted] will likely complete "half way through the first-grade curriculum, which for a student who is now in fourth grade is a significant way to go." (T. vol. 3, pp. 551-52) Based on Ms. [redacted] lesson plans, at the end of the school year she stopped teaching at Unit 7, as Dr. [redacted] predicted. This is halfway through the first-grade curriculum in FUNdations. (R. 25; R. 26)

117. [redacted] testified it was her understanding from the IEP meeting and that [redacted] would be taught a FUNdations lesson early in the day, and then retaught the same lesson later in the day. The minutes of the meeting and the Prior Written Notice collaborates this. (T. vol. 4, pp. 712-13; Stip. 26; 27)

118. FUNdations, as well as Letterland and Language!, are described as "research-based" programs. IDEA requires LEA's to use "researched-based" or "peer-reviewed" programs to the extent practicable. 20 U.S.C. § 1414(d)(1)(A)(i)(IV) The law, however, does not require that the IEP list any program as the methodology to be used for a child. See 20 U.S.C. § 1414(d)(1)(A)(ii)(I) (stating that the IDEA shall not be construed to require "that additional information be included in a child's IEP beyond what is explicitly required in this section")

119. There also is nothing in the law that requires an LEA to use a single research-based or peer-reviewed program or that an LEA cannot combine elements of several programs. The focus of IDEA is not to use any specific program, but to develop a unique individualized program tailored to meet the needs of the specific child.

120. The Respondent incorporated numerous teaching techniques, including many of those preferred by the Petitioner and her experts. This does not mean that the IEP is inappropriate, as long as the child made progress and/or the LEA is able to give a cogent and reasonable explanation for its decision.

Extended School Year Decisions

121. The January 2016 IEP indicated that [redacted] was not eligible for ESY. No amplifying information was provided. There was no Prior Written Notice entered as an exhibit.

122. ESY was not on the agenda at either of the IEP meetings in June or August 2016. ESY was not discussed during either of these IEP meetings. The required Prior Written Notice was provided to Petitioner following both meetings, but ESY is not mentioned in either one.

123. At the January 2017 meeting the IEP team discussed extended school year. [redacted] Elementary is a year round school without an extended break between sessions. As [redacted] does not show regression over the three-week intercessions, the team did not feel that ESY was appropriate. ESY, however, may be appropriate over a long summer break. (Stip. 26) An ESY worksheet was completed and the team made the determination by checking all three factors "no." (R. 102) Except for checking the items on the ESY worksheet, there is no record that the team considered whether [redacted] had emerging skills that might also have qualified him for ESY. (Stip. 26; Stip. 27) The Prior Written Notice states that ESY was refused. The IEP indicated that [redacted] was not eligible for ESY. (Stip. 26; P. 1)

124. To determine that a student is eligible for ESY services, the IEP team must determine that ESY services are necessary to provide FAPE by considering:

a. Whether the student regresses or may regress during extended breaks from instruction and cannot relearn the lost skills within a reasonable time; or
b. Whether the benefits a student gains during the regular school year will be significantly jeopardized if he or she is not provided with an educational program during extended breaks from instruction; or
c. Whether the student is demonstrating emerging critical skill acquisition ("window of opportunity") that will be lost without the provision of an educational program during extended breaks from instruction.

(NC 1501-2.4)

125. The Petitioner made an extensive argument that ESY was necessary. The argument, however, was not based on the considerations in NC 1501-2.4 The Petitioner's experts, instead, argued that [redacted] was so far behind that ESY was needed to help him close the gap with his nondisabled peers (T. vol. 10, p. 2042), and that it does not make sense to lose a block of time that could be used to work toward closing the gap in reading skills. (T. vol. 3, p. 525)

126. It is not clear that "being far behind his peers" or "using a block of time to close a gap" is the same as the criteria in NC 1501- 2.4. Certainly, the Petitioner never made any argument using the criteria in NC 1501- 2.4 as justification for the ESY argument.

CONCLUSIONS OF LAW

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

2. The specific North Carolina provisions for the hearing process and any subsequent appeals are found in N.C.G.S. 115C §§109.6 - 109.9, and the *North Carolina Policies Governing Services for Children with Disabilities*, NC 1504-1.8 - 1.15.

3. IDEA was enacted to "ensure that all children with disabilities have available to them a Free Appropriate Public Education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20

U.S.C. §1400(d)(1)(A), IDEA; the implementing federal regulations, 34 C.F.R. Part 300; N.C.G.S. 115C - Article 9; and NC 1500, *Policies Governing Services for Children with Disabilities*. All these provisions have specific procedures that a LEA must follow in making FAPE available.

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

5. Actions of local board of education are presumed to be correct and Petitioner's evidence must outweigh the evidence in favor of the Board's decisions. See N.C.G.S. 115C-44(b). In *Schaffer v. Weast*, 546 U.S. 49 (2005), the Supreme Court decided that those who challenge educational decisions made by schools have the burden of proof in due process hearings. Thus, the Petitioner has the burden to show by a preponderance of evidence that the Respondent did not provide FAPE. Suggestions, innuendoes, speculations, assumptions, and personal beliefs are insufficient to meet this burden. For the reasons set forth in the following, the Petitioner has met the burden regarding some issues but not others.

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

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

7. The basic concepts of the *Rowley* decision were recently upheld by the Supreme Court. In *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017) the Court held:

> A hearing conducted under IDEA is not "an invitation to the courts to substitute their own notions of sound educational policy for those of chosen school authorities which they review." (Quoting *Rowley* 458 U.S. at 206.) *Id.*
>
> At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. At the time any dispute reaches a hearing, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. An ALJ or SRO may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions.

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

9. School districts are not charged with providing the best program, but only a program that is designed to provide the child with an opportunity for a free appropriate public education. *Rowley*,

458 U.S. at 189-90. A district is not required to maximize a student's educational performance. See *Rowley*, 458 U.S. at 188-89 (1982); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir.2004).

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

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

12. With regard to proving that procedural violations of IDEA would be a denial of FAPE, the Petitioner must be able to show that the procedural error resulted in a loss of educational benefit and not simply be a harmless error. See *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 684 (4th Cir. 2007). To the extent that the procedural violations do not actually interfere with the provision of FAPE, these violations are not sufficient to support a finding that a district failed to provide a FAPE. *Gadsby v. Grasmick*, 109 F. 3d 940, 956 (4th Cir. 1997). If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations. *Burke County v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990).

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

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

Statue of Limitations Claim

14. North Carolina has an explicit one-year statute of limitations for filing due process petitions. N.C.G.S. § 115C-109.6(b) and (c) specifically states that:

> (b) Notwithstanding any other law, the party shall file a petition under subsection (a) of this section that includes the information required under IDEA and that sets forth an alleged violation that occurred not more than one year before the party *knew or reasonably should have known* about the alleged action that forms the basis of the petition." *(Emphasis added)*
>
> (c) 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. *(Emphasis added)*

15. The Petition in this case was filed on June 1, 2017. Whether the Petitioner's claims prior to June 1, 2016 are requires an inquiry of what [redacted] "knew" or "should have known" about the Respondent's actions that formed the basis of the Petition.

16. Based on the Findings of Fact, stipulations, sworn testimony, [redacted]s admissions during the hearing, and other evidence in the record, [redacted] knew prior to June 1, 2016 that the Respondent had denied [redacted] a FAPE by failing to evaluate [redacted] in the area of reading disability and develop an appropriate IEP for that disability on October 27, 2015. The evidence shows that [redacted] probably met the requirements for identification as Specific Learning Disabled prior to the October 2015 IEP meeting. The Petitioner admitted knowing this but did not act within the time period established by North Carolina law to protect [redacted]s rights.

17. The SHRO agrees with the ALJ that the failure to complete the eligibility for speech-impaired category was not barred, for this January 2016 decision extended through subsequent June and August IEPs. This was a procedural error regarding the IEP in place at the time the Petition was filed. This procedural error, however, proved harmless for [redacted] was not deprived of any educational benefit. The Respondent continued the speech-impaired services from the October IEP as a related service. North Carolina allows speech impaired to be either an identified category or a related service. Though the SHRO believes that [redacted] should have identified in both categories, SLD and SI, there was no failure to provide services for SI.

18. The Petitioner knew prior to June 1, 2016 that the Respondent was combining reading and speech goals in the January 2016 IEP. Whether this was inappropriate or not was not clearly established by the conflicting testimony. Even if these were inappropriate, the Petitioner failed to act within the time period established by North Carolina law to protect [redacted]s rights. These goals continued in the June and August 2016 IEP's, which were in place during the relevant time period. The Petitioner failed to show that combining goals in this manner would deny FAPE during the time period covered by the IEPs. The Petitioner, however, did show that progress monitoring of these combined goals may not have been done properly. *(This is discussed later in these conclusions in a section that pertains to progress monitoring.)*

19. The Petitioner knew prior to June 1, 2016 that the IEP of January 2016 was not being implemented effectively. As this is the IEP in effect when the Petition was filed, the claim regarding implementation after June 1, 2016 must be examined. (*This issue is discussed later in these conclusions in a section pertaining to IEP implementation.)*

20. The ALJ found that the failure to provide notice of the denial of ESY following the January 2016 IEP meeting was not time barred. The SHRO disagrees. No Prior Written Notice for the January 2016 IEP meeting was entered into the record of the case. [redacted] however, was found to be not eligible for ESY. This is clearly checked on IEP form. Based on the Petitioner's own testimony, she was aware of this but took no action to protect [redacted]s rights prior to the current petition. The ESY claim, however, for the remaining IEPs falls within the statutory time period.

21. The Petitioner has not met the burden of showing that either of the exceptions to the one-year statute of limitations applies. All of Petitioner's claims prior to June 1, 2016 fell outside the one-year statute of limitations and are time-barred.

ESY Claims

22. The IDEA requires that students with disabilities receive special education and related services beyond the typical school day and the typical school year when those services are necessary to provide the student with FAPE. 34 CFR 300.106(a)(1)

23. The IEP team appeared to consider only the regression-recoupment analysis: ESY services are necessary when a child will experience significant regression in the absence of an educational program and the time it will take to relearn the skills is excessive. The team never appeared to consider that [redacted] might have emerging skills that would be jeopardized, for regression alone is not a sufficient determiner of the need for ESY. See, *e.g., JH v. Henrico County Schools*, 42 IDELR 199 (4th Cir. 2005); and *MM v. Sch. Dist. of Greenville County*, 37 IDELR 183 (4th Cir. 2002)

24. Though the team may have properly indicated in Prior Written Notices and/or IEP documents that [redacted] was not eligible for ESY, the analysis to determine eligibility was flawed. Merely checking boxes on a form without conducting the proper analysis resulted in an arbitrary denial of ESY services and a denial of FAPE.

25. The Respondent's sole justification for denying ESY at the January 2017 IEP meeting was that [redacted]s elementary school was a year-round school. ESY was therefore considered inappropriate by the IEP team. Attendance at a year-round school does not negate Respondent's statutory duty to consider the criteria for ESY for [redacted] This was a denial of FAPE.

26. There is nothing in the law that prescribes when an ESY decision must be made, but it is clear that an ESY decision must be made at least once each year. When the IEP team amends the IEP at a different meeting from the meeting during which it determines the extent of the ESY services, the district does not commit a procedural violation. The IDEA does not mandate that the ESY determination be made at a specific time. *Pachl v. School Bd. of Indep. School Dist. No. 11*, 42 IDELR 264 (D. Minn. 2005), *aff'd*, 46 IDELR 1 (8th Cir. 2006)

Privately Obtained Evaluations

27. The ALJ also found that the Respondent did not give the Petitioner the mandatory statutory notice regarding Independent Educational Evaluation (IEE) decisions. There is nothing in the record, until the filing of the Petition, to substantiate that the Petitioner ever requested an Independent Educational Evaluation or reimbursement for one privately obtained. The Respondent used the data from the Petitioner's privately obtained evaluations, but this is not relevant to a claim for a required reimbursement for an IEE.

28. The Petitioner failed to show that reimbursement is required. The SHRO, however, agrees with the ALJ that equitable considerations be used regarding reimbursement for the December 2016 privately obtained evaluation. The Respondent did have notification that this evaluation was going to be performed, and did utilize the results. The Respondent was also relieved of the necessity of conducting one. It is only fair to provide reimbursement.

IEP Goals and Progress monitoring

29. A district must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017)

30. To satisfy the substantive requirement of FAPE, the educational programming of a student must be "appropriately ambitious in light of the circumstances" of the child. *Endrew F.* "Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." *Id.* at 99 *(emphasis in original)*

31. "Appropriate progress" was not defined by the Court in *Endrew F.* The Court stated the absence of a "bright-line" rule defining "appropriate progress" should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.

32. A reviewing court should be reluctant to second-guess the judgment of education professionals when reviewing the substantive appropriateness of a procedurally-compliant IEP. *MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 532 (4th Cir. 2002). In fact, courts "should not disturb an IEP simply because [they] disagree with its content." *MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 532 (4th Cir. 2002) Instead, courts are obliged to defer to educators' decisions as long as an IEP provided the child FAPE. *Id.*

33. IDEA requires each IEP to contain "a statement of the child's present levels of academic achievement and functional performance, including...how the child's disability affects the child's involvement and progress in the general education curriculum." 34 CFR § 300.320

34. The present levels of academic achievement and functional performance serve as a baseline for both developing goals and monitoring a child's progress toward those goals. While the Petitioner argued at length that present levels and progress monitoring should utilize only qualitative data, IDEA does not require this. In an "ideal" world, quantitative data can easily be collected and maintained. The school classroom is far from "ideal." The classroom is not a laboratory or clinic where strict controls can be utilized and data collected efficiently. Teachers must rely on professional observation, thus obtaining data that is often more qualitative than quantitative. IDEA and state law recognize this limitation on data collection.

35. The present levels of academic achievement and functional performance in all relevant IEPs, while not always stated in terms that the Petitioner preferred, did accurately reflect [redacted]s performance. The present levels were utilized by the IEP team to develop goals based on [redacted]s identified needs.

36. The present levels of performance and goals in all relevant IEPs reflected [redacted]s needs and were reasonably calculated to allow [redacted] to make progress. Petitioner's primary complaint concerning these appeared to be that they were not written in the manner that Petitioner and her advocate preferred. Even though not written as the Petitioner considered the optimum manner, the present levels of performance and goals were sufficiently measurable to reasonably gauge [redacted]s progress. See *Bridges v. Spartanburg Cnty. Sch. Dist. Two*, 57 IDELR 128 (D.S.C. 2011)

37. The performance data maintained by the Respondent certainly did not meet the preferences of the Petitioner and her experts. Those experts clearly expressed a preference not only for more data, but data in the form of standardized test scores. Neither IDEA nor state law requires or provides guidance on the maintenance of detailed data of the type the Petitioner's experts wanted to see. IDEA was written by Congress to be intentionally vague regarding the nature of information maintained by school to show progress under an IEP.

38. In passing IDEA, Congress chose not to place a heavy paperwork burden on teachers during the time they were working directly with children and rejected the requirement for extensive data collection. Data must be maintained, but the LEA can decide how and what type of data to maintain. The SHRO is of the opinion that the Respondent needs to make significant improvements in data collection, analysis, and maintenance, but cannot reach the conclusion that Respondent failed to meet federal and state law requirements with regards to data.

39. No data maintenance system is perfect, but SHRO determines that the data maintained by the Respondent was insufficient to determine if [redacted]s program was effectively implemented and to determine the progress [redacted] was making toward the attainment of IEP goals.

40. Progress monitoring refers to a systematic, frequent collection of individual performance data. Periodic reports on the progress the child is making toward meeting the annual goals will be provided concurrent with the issuance of report cards. NC 1503-4.1(a)(3)(ii)

41. A difference of opinion about the appropriate way to monitor the progress of a student's IEP goals is not sufficient to establish denial of FAPE.

42. The progress monitoring was not optimum. The Respondent could have done better, but this does not necessarily deny FAPE. The data maintained and reported by Respondent did indicate that [redacted] was making minimal, or possibly trivial progress toward IEP goals.

43. Though putting considerable effort in the attempt, the Petitioner did not meet the burden of showing that the goals in the IEP's of January 2016, June 2016, August 2016 and January 2017 were deficient and that they were not reasonably calculated to enable [redacted] to make progress.

44. There is no requirement in IDEA that a child makes progress as expected, even though the goals of an IEP may be designed to enable that progress. Yet, [redacted] did not make appropriate progress in light of his circumstances.

Predetermination

45. The Petitioner alleged predetermination prior to IEP meetings. The Petitioner has met the burden showing that this procedural violation occurred with regard to the decisions made at the June 2016, August 2016, and January 2017 IEP meetings. Decisions were made regarding ESY and change in placement that were predetermined. It is well understood that a school system must not finalize its decisions before an IEP meeting. *Doyle v. Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D.Va.1992), *aff'd* 39 F.3d 1176 (4th Cir. 1994).

46. The predetermination of ESY services was discussed previously in these conclusions.

47. LCS predetermined the [redacted]s placement at the June 2016 IEP meeting and continued doing so in the August 2016 and January 2017 meetings. It was obvious that there was nothing the Petitioner or her advocate could have said, or any data that could be produced could have changed the IEP team's decision. *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (citing *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 858 (6th Cir. 2004). The minutes of the meeting on June 8, 2016 (Stip. 22) indicates that there was no discussion at all prior to the decision.

48. The ALJ correctly determined that the predetermined decision to decrease [redacted]s services was inappropriate due to his minimal progress. The evidence shows that [redacted] is severely impaired and needs more, rather than less specialized instruction.

49. Respondent violated the procedural requirements of the IDEA when it predetermined placement in the "regular" setting. The Respondent failed to provide a cogent and reasonable explanation for the reduction of services in light of [redacted]s trivial progress. Decreasing his service delivery was inappropriate and a denial of FAPE.

IEP Implementation

50. It is clear that the Respondent's execution of [redacted]s IEPs was far from perfect. The Fourth Circuit put it succinctly: "the failure to perfectly execute an IEP does not necessarily amount to the denial of a free, appropriate public education. However . . . the failure to implement a material or significant portion of the IEP can amount to a denial of FAPE." *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 484 (4th Cir. 2011).

51. "A material failure occurs when the services a school provides to a disabled child fall significantly short of the services required by the child's IEP." *Van Duyn v. Baker Sch. Dist.*, 481 F.3d 770, 780 (9th Cir. 2007). In order to find a "material failure," the child does not have to "suffer demonstrable educational harm in order to prevail"; "[h]owever, the child's educational progress, or lack of it, may be probative of whether there has been a significant shortfall in the services provided." Id.

52. The Petitioner did show that [redacted]s IEPs were not effectively implemented and that there was a failure to implement portions of the IEPs. Probably most noteworthy was the failure to increase the reading instruction that was specified in the Prior Written Notice dated January 5, 2017 that was provided to Petitioner following the January 2017 IEP meeting. The IEP team had agreed to significantly increase [redacted]s reading instruction. This was never implemented by the Respondent and was a significant failure to provide FAPE. (*Emphasis added*)

53. Continuing to provide inadequate services that prevent the child from progressing is tantamount to a denial of FAPE. See e.g., *District of Columbia Pub. Sch.*, 49 IDELR 267 (SEA DC 2008) (noting that a student's present levels of performance remained stagnant for several years); *Unionville-Chadds Ford Sch. Dist.*, 47 IDELR 280 (SEA PA 2007) (finding that a district should have addressed a child's reading deficiencies when it became apparent that the student was not making any progress).

54. Even if Respondent did not predetermine the [redacted]'s placement, the "regular" placement was still inappropriate because of [redacted]s circumstances and the information available to the IEP teams at the time the June 2016, August 2016 and January 2017 IEPs were written. [redacted] required more specialized instruction and a more restrictive placement to make appropriate academic progress.

55. Not all the Respondent's educational decisions regarding the implementation of IEPs met the *Endrew F.* criterion or were sound decisions in light of [redacted]s severe reading disability and historic lack of progress.

56. When a dispute over FAPE occurs the Court may fairly expect that school officials to be able to offer a cogent and responsive explanation for their decisions. *Endrew F.* With regards to the implementation of [redacted]s IEPs and his failure to make progress in light of his circumstances, the Respondent did not offer a cogent and responsive explanation.

IEP Implementation and Methodology

57. A school district is not required to offer and implement the particular program and services preferred by a parent. See *Rowley*, 458 U.S. at 207."IDEA cannot and does not promise "any particular [educational] outcome.'" *Endrew F.*, 137 S. Ct. at 998 (quoting *Rowley*, 458 U.S. at192). Questions of methodology must be left to the school district. See *Rowley*, 458 U.S. at 208.

58. The IDEA does not require schools to include specific methods it intends to use in the IEP. "[I]t is evident that the IDEA envisions the IEP as an agreed-to general framework of a child's educational program that provides schools with a certain degree of flexibility ..." *Ms. M. v. Falmouth School Department*, 847 F3d 19 (1st Cir. 2017)

59. IDEA requires every IEP to contain a statement of the special education services based on peer-reviewed research to the extent practicable. IDEA does not require the IEP to disclose a specific educational methodology nor does it require that IEP teams must adopt the methodology preferred by the Petitioner and/or the Petitioner's advocate. 20 U.S.C. § 1414(d)(1)(A)(i)(IV); See also 20 U.S.C. § 1414(d)(1)(A)(ii)(I) (stating that the IDEA shall not be construed to require "that additional information be included in a child's IEP beyond what is explicitly required in this section").

60. Using special education programs based on peer-reviewed research does not mean that relying on this research trumps the need to provide instruction based on the needs of the individual child. The central tenant of IDEA is that "the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *Endrew F.*, 137 S. Ct. at 1001.

61. There is no requirement in the IDEA to use a particular methodology with "fidelity" or "exclusively". *A.G., et al. v. Bd. of Educ. of the Arlington Cent. Sch. Dist.*, 69 IDELR 210, 117 LRP 11582 (S.D.N.Y. 2017) (finding that school provided FAPE to student with dyslexia when the school provided instruction in the Wilson Reading Method as part of its balanced-literacy approach, and finding that the IDEA did not require the school system to use the Wilson Reading Method with fidelity or exclusively).

62. The Supreme Court cautioned courts about substituting their own notions of sound educational policy for those of the school authorities which they review. *Endrew F.*, 137 S.Ct. 988, 1001 (2017). Consistent with that direction, the district court in *A.G., supra* deferred to the professional educators' judgment pertaining to the appropriateness of the balanced-literacy approach for the student. (Affirming the hearing officer's finding that the multisensory approach used by the district met the student's needs in reading, decoding and encoding, despite testimony offered by the parent's witness that dyslexia required exclusive and "strict application of the Orton-Gillingham method for reading instruction").

63. The due process petition includes no allegation concerning the implementation of a reading program with fidelity. Fidelity was not even mentioned in the initial Petition in this case. There are 193 enumerated allegations in the Petition. Reading them in an attempt most favorable to the Petitioner, one cannot find this particular allegation. This issue appeared to be "discovered" in preparation for the hearing. The Petition was never amended to cover this allegation and there is nothing in the record to substantiate that the Respondent agreed to allow this issue to be included. This issue, therefore, was not properly before the ALJ and should not have been heard. The applicable law is:

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

64. The issue of implementing a reading program with fidelity was a central tenant in Petitioner's case at the hearing. Implementing an IEP with fidelity has legal merit. Implementing an IEP that is reasonably calculated to enable a child to make progress in light of the child's circumstances would indeed provide FAPE. (*Endrew F. Supra)* This, however, was not the primary emphasis of the Petitioner's arguments on this issue. The Petitioner, instead, argued that a specific methodological program must be implemented with fidelity in order to provide FAPE. Such an argument does not recognize one of the most important requirements of IDEA, that a program must be individualized to meet the needs of the specific child.

65. Neither [redacted]s educational record nor evidence introduced at the hearing justified a holding that in order for [redacted] to make progress in learning to read that there must be a complete and exclusive application of the Wilson or other Orton-Gillingham based methodology. See *A.G., Supra*

66. The ALJ erred when she stated that Respondent's teachers were not trained and/or knowledgeable about remedial programs and she would give their testimony no deference. What the ALJ should have stated is that those teachers were not knowledgeable or trained with regards to a specific methodology, the Wilson or other Orton-Gillingham based methodologies. The ALJ allowed the Petitioner to alter this case into one primarily about the Petitioner's preferred methodology.

67. This SHRO categorically rejects the concept that implementing a canned methodological program with fidelity takes priority over developing a unique program based on the needs of a unique child. To illustrate the lack of individualization in a canned program implemented with fidelity, one of the Petitioner's experts testified that the program must be taught in either 45 or 90 minutes each day and that the program has a fixed number of lessons to be completed in a certain time frame. If a teacher does not follow the guidelines provided by the developer or publisher of the program, the teacher is not teaching the program with "fidelity." The argument focused on program requirements, not [redacted]s needs. This certainly is not the individualization required by IDEA.

Summary of Conclusions Regarding FAPE

68. The Respondent failed to provide FAPE to [redacted] for the one-year time period prior to the filing of the Petition in this case. Specifically the Respondent failed to appropriately implement the relevant IEP's, did not properly make decisions regarding ESY, and predetermined placement by reducing the amount of specialized reading instruction.

69. Although the IDEA cannot and does not promise any particular outcome, *Endrew F.*, 137 S. Ct. at 998 (quoting *Rowley*, 458 U.S. at 192), progress is expected to be more than *de minimis.*

70. "Progress through [the education] system is what our society generally means by an 'education,' [a]nd access to an 'education' is what the IDEA promises," *Endrew F.*, 137 S. Ct. 999 (citing *Rowley*, 458 U.S. 176, 203). Therefore, "[a] student offered an educational program providing 'merely more than *de minimis* progress from year to year can hardly be said to have been offered an education at all." *Id.* at 1001.

71. While not dispositive, evidence of actual progress (or the lack thereof) is relevant to a determination of whether an LEA provided FAPE. *M.S. ex rel. Simchick*, 553 F.3d 315, 326-27 (4th Cir. 2009). The evidence is clear. [redacted] did indeed make minimal or trivial progress.

72. Respondent did not offer a "cogent and responsive explanation" (required by *Endrew F.*) for the decisions not to provide [redacted] with more specialized instruction in light of his circumstances.

Appropriate Remedies

73. Granting relief for compensatory education is an appropriate remedy for the Respondent's failure to provide FAPE. The compensatory education, however, awarded by the ALJ was excessive.

74. Compensatory education is a form of equitable relief that can be granted. It is not defined by IDEA or state law. The courts have not been consistent in determining these awards, with each court appearing to reach its own conclusions as to the extent and nature of the awards.

75. It is reasonable to provide [redacted] a year of extra specialized tutoring or instruction in reading to compensate for the lack of sufficient specialized instruction provided by the Respondent. It is also reasonable to require ESY services during intercession periods for at least one year.

76. For maximum benefit to [redacted] these specialized services must be coordinated with instruction being provided in the Respondent's classroom. For this reason, the ALJ's requirement that compensatory services be done solely by a private contracted individual is not appropriate.

77. The ALJ erred in requiring that the compensatory instruction must involve a specific methodology. The only requirement that is logical is that the methodology be reasonably compatible with that used by Respondent's EC teacher.

78. The following Decision spells out the compensatory award in more detail.

DECISION

The Final Decision of the ALJ is upheld in part and reversed in part:

1. This Decision covers the one-year time period preceding the filing of the Petition by the Petitioner. The Petitioner did not prove that the exceptions to the statue of limitations apply.
2. The Petitioner did not meet their burden of proof that the goals in the IEP's of June 2016, August 2016, and January 2017 were not reasonably calculated to provide a FAPE for [redacted]
3. The Petitioner met the burden of proof that the placements in the IEP's of June 2016, August 2016, and January 2017 were not appropriate and were predetermined. It was clear that [redacted] was in need of more intensive interventions, yet the Respondent decreased his specialized instruction in June 2016 and refused to increase the specialized instruction in subsequent IEP's. The Respondent, therefore, did not provide FAPE.
4. The SHRO concurs with the ALJ that the statue of limitations barred Petitioner's claim that the January 2016 IEP, in effect for a short period covered by this case, was not appropriate.
5. The Petitioner met the burden of proof that the Respondent did not effectively implement the relevant IEP's during the time period of this case, thereby not providing FAPE.
6. The Respondent, at the hearing, did not provide a cogent and responsive explanation for the decision not to increase the specialized instruction for [redacted] during the time period of this case, nor did the Respondent provide a cogent and responsive explanation for not effectively implementing the relevant IEP's.
7. The Petitioner met the burden of proof that the Respondent's decisions regarding ESY were not appropriate.
8. The ALJ erred in determining that the Respondent failed to reimburse the Petitioner for an Independent Educational Evaluation conducted in December 2015.
9. The ALJ made an equitable decision to award reimbursement for the Petitioner's privately obtained educational evaluation in December 2016.
10. On all other issues and claims not covered by the preceding paragraphs, the Petitioner failed to meet the burden of proof.
11. The ALJ erred in providing a remedy that was excessive. The ALJ's remedy also precludes the Respondent from being involved (except for funding) in providing the compensatory education and coordinating the compensatory education with [redacted]s school program. It also improperly includes a requirement for a specific program and/or methodology. The Remedy is modified as follows:
    a. The Respondent shall reimburse the Petitioner for the privately obtained educational evaluation in December 2016.
    b. The Respondent shall provide compensatory education in the form of reading instruction in a one-on-one setting with a licensed teacher with training and experience in remedial reading for a minimum of five (5) hours each week for a period of one (1) year. The services shall be provided at [redacted]s school or at a location convenient for the Petitioner. It is preferable that that the compensatory services be provided daily, but the Petitioner may modify this to accommodate family needs.

c. The compensatory education teacher is to be mutually chosen by the Petitioner and Respondent, and can be a staff member of the Respondent or externally contracted. If there is no mutual agreement regarding the teacher, the Petitioner can choose. All costs, including necessary transportation for [redacted] shall be the responsibility of the Respondent.

d. There is no requirement that a specific program or methodology be used for the compensatory education. There is, however, nothing that precludes doing so.

e. The Respondent shall provide ESY services at a minimum of ten (10) hours each week during intersession periods for a period of one year. The IEP team must develop a plan for those services based on [redacted]s needs just before scheduled breaks between sessions.

f. As soon as practicable, following receipt of this decision, the Respondent shall engage an independent outside evaluator to conduct an educational evaluation. This evaluator shall be mutually chosen by the parties and shall exclude any evaluator who has previously conducted an evaluation of [redacted] This evaluator must be available to participate in an IEP meeting to develop a new IEP for [redacted]

g. As soon as practicable, following the educational evaluation in the previous paragraph, the Respondent shall develop a new IEP for [redacted] There is no requirement that the IEP prescribe a specific program or methodology to be used for reading instruction, although the Respondent may choose to do so.

h. The IEP team, in addition to developing the IEP, shall monitor the compensatory services and attempt to coordinate those services with [redacted]s school program to increase the benefit to [redacted] The intent is to try to enable [redacted] to close the gap with his nondisabled peers.

i. In the alternative, should the Respondent and Petitioner agree, the Respondent can enroll and pay for a private education program of the Petitioner's choice for a period of one (1) year. The Respondent shall pay reasonable transportation costs for [redacted] to access this private educational program. Should this alternative be chosen, no other compensatory education must be provided.

12. This decision does not preclude a negotiated settlement between the parties. The SHRO is of the opinion that a negotiated settlement would still be the best solution, as it has been since the case was initiated and proposed by the ALJ on many occasions. The SHRO encourages both parties to make a good-faith attempt.

This the 17 th day of May 2018

Joe D. Walters
Review Officer

NOTICE

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

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

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This the 17 th day of May 2018

Joe D. Walters
Review Officer