STATE OF NORTH CAROLINA

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

[redacted] *by and through* [redacted] *parent,* [redacted]	)	
	)	
PETITIONERS,	)	
v.	)	**DECISION**
	)	
Wake County Public School System Board of Education,	)	17 EDC 08781
	)	
RESPONDENT.	)	
	)	

This **DECISION** resolves Petitioners' August 28, 2018, appeal of the Honorable Administrative Law Judge Stacey B. Bawtinhimer's July 31, 2018, Final Decision in the above-referenced matter and her March 27, 2018, dismissal of certain claims raised by Petitioners in a March 27, 2018, Order Granting, in Part, Respondent's Motion to Dismiss Pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b).

The July 31, 2018, Final Decision is **AFFIRMED IN PART and REVERSED IN PART**, and the March 27, 2018, Order Granting, in Part, Respondent's Motion to Dismiss Pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) is **AFFIRMED IN PART and REVERSED IN PART and REMANDED.**

The July 31, 2018, Final Decision is **AFFIRMED** on the following issues:

- Whether an independent review of the record taken as a whole supports the Final Decision's dismissal of Petitioners' claim that the May 2017 IEP denied [redacted] a FAPE based on the IEP's expression of present levels of academic and functional performance. *See infra*, Findings of Fact, pgs. 168-70, and Conclusions of Law, pgs. 218-19.
- Whether an independent review of the record taken as a whole supports the Final Decision's dismissal of Petitioners' claim that the May 2017 IEP denied [redacted] a FAPE based on the IEP's expression of academic and functional goals. *See infra*, Findings of Fact, pgs. 168-70, and Conclusions of Law, pgs. 218-19.
- Whether an independent review of the record taken as a whole supports the Final Decision's dismissal of Petitioners' claim that the May 2017 IEP failed to offer [redacted] a FAPE based on its failure to include a transition plan. *See infra*, Findings of Fact, pgs. 168-70, and Conclusions of Law, pgs. 218-19.
- Whether an independent review of the record taken as a whole supports the Final Decision's dismissal of Petitioners' claim that Respondent predetermined [redacted]s

placement in a Resource setting. *See infra*, Findings of Fact, pgs. 170-79, and Conclusions of Law, pgs. 219-20.

The July 31, 2018, Final Decision is **REVERSED** on the following issues:

- Whether an independent review of the record taken as a whole supports the Final Decision's dismissal of Petitioners' claim that the May 2017 IEP denied [redacted] a FAPE based on its failure to incorporate any accommodation to support [redacted]s need for a small-class, small-school setting in the general-education environment. *See infra*, Findings of Fact, pgs. 123-68, and Conclusions of Law, pgs. 215-18.
- Whether an independent review of the record taken as a whole supports the Final Decision's conclusions regarding whether the May 2017 IEP offered [redacted] a FAPE, whether [redacted] Academy is an appropriate private placement, and whether [redacted] acted unreasonably throughout the IEP process. *See infra*, Findings of Fact, pgs. 179-97, and Conclusions of Law, pgs. 220-27.

The March 27, 2018, Order is **AFFIRMED** on the following issues:

- Whether an independent review of Petitioners' evidence as it appears in the record as of the time Respondent made its oral Rule 41(b) motion supports the ALJ's determination that Petitioners failed to offer sufficient evidence to meet their burden of production on claims that the May 2017 IEP denied [redacted] a FAPE based on the following:
  - Respondent's refusal to consider SLD eligibility for [redacted]
  - The IEP's failure to include end-of-year services;
  - Respondent's refusal to conduct a Functional Behavioral Assessment ("FBA") or to develop a Behavior Intervention Plan ("BIP");
  - The IEP's failure to include math and/or reading goals;
  - The IEP's failure to include appropriate related services, including direct occupational therapy; and
  - Respondent's refusal to allow parent participation.

  See infra, Findings of Fact, pgs. 197-204, and Conclusions of Law, pgs. 227-29.

The March 27, 2018, Order is **REVERSED and REMANDED** on the following issues:

- Whether an independent review of Petitioners' evidence as it appears in the record at the time Respondent made its oral Rule 41(b) motion supports the ALJ's determination that Petitioners failed to offer sufficient evidence to meet their burden of production on claims that the May 2017 IEP denied [redacted] a FAPE based on the following:
  - The IEP's failure to include family and/or individual counseling and/or parent training;
  - The IEP's failure to include appropriate supplementary aids and services (with the exception of an accommodation regarding class size in general-education classes);

- Respondent's refusal to fully evaluate [redacted] and
- Respondent's procedural violations other than predetermination of placement.

See infra, Findings of Fact, pgs. 197-99 & 204-13, and Conclusions of Law, pgs. 227-33.

APPEARANCES:

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

For Respondent-Appellee: Stephen Rawson and Maura K. O'Keefe, THARRINGTON SMITH, L.L.P., 150 Fayetteville Street, Suite 1800, Raleigh, NC, 27602, srawson@tharringtonsmith.com and mokeefe@tharringtonsmith.com.

THE RECORDS, received by the Undersigned for review in connection with this appeal, include the following:

1. On August 30, 2018, the Undersigned received two documents via email from Danyelle Sanders, Program Assistant NCDPI-Exceptional Children Division: (1) a scanned copy of a letter dated August 29, 2018, from William J. Hussey, Director NCDPI-Exceptional Children Division, stating that it "constitute[s] formal notice of [the Undersigned's] appointment as State Hearing Review Officer" in the above-captioned matter, and (2) a scanned copy of Petitioners' Notice of Appeal with a date stamp that appears to have been manually marked over rendering the date indicated by the date stamp unclear to the Undersigned.

2. On September 4, 2018, the Undersigned received two FedEx packages from the Public Schools of North Carolina. These packages contained un-numbered and un-bound sheets of paper with printed material on both sides of many, but not all, sheets. These sheets of paper appeared to be copies of some of the transcript pages from the hearing in the above-referenced matter and copies of some of the documents filed throughout the pendency of the same. One of these packages also contained an envelope with a note reading, "I included the disc because some of the documents did not print properly so I wanted to ensure you had everything. T. King." This envelope contained a USB drive labeled with a sticker "17 EDC 08781." This package did not contain all the records in this case. For example, the entirety of Volume VI of the Transcript was missing from both the printed pages delivered and the electronic material provided on the USB drive labeled "17 EDC 08781."

3. On September 21, 2018, the Undersigned received via electronic submission Petitioners' Written Arguments on Appeal[1] and Respondent's Written Arguments on Appeal to State Hearing Review Officer.

4. On October 15, 2018, the Undersigned received via encrypted email from Teresa King, Dispute Resolution Consultant NCDPI-Exceptional Children Division, Volume VI of the Transcript of the hearing in the above-captioned matter.

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

For the Petitioner child:	[redacted] Petitioner, or the child
For the Petitioner guardian:	[redacted] Mother, or Petitioner
For the Respondent:	Respondent or WCPSS

ISSUES ON APPEAL:

Petitioners' Notice of Appeal identified the following matters for review:

> (1) The findings and decisions in the Final Decision issued in the above-referenced matter by the Honorable Administrative Law [ALJ] Judge Stacey B. Bawtinhimer on July 31, 2018; and
> (2) The dismissal of certain claims raised by Petitioners by the Order Granting, in Part, Respondent's Motion to Dismiss Pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b), issued on March 27, 2018.

Petitioners' Written Arguments on appeal stated the "Issues on Appeal" as follows:

I. The Administrative Hearing was inconsistent with the requirements of due process, and Petitioners were denied the opportunity for a fair hearing.

   A. The ALJ was not impartial during the hearing.

   B. The ALJ inappropriately reviewed *sua sponte* the Mediation Results Form and Settlement Agreement filed in a separate case.

II. The ALJ disregarded facts and evidence presented and the ALJ's findings and conclusions were improperly made.

   A. The ALJ's credibility determinations were irregularly made and should be overturned.

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[1] Petitioners' September 21, 2018, submission was formally captioned, "Petitioners Written Arguments on Respondent's Appeal of the Final Decision in 17-EDC-08781." This caption contains a mistake. Respondent did not submit an appeal in this case. Only Petitioners submitted an appeal. The Undersigned modified the title of the submission in this finding for clarity and to avoid confusion on the nature of the appeal itself.

B. The ALJ inappropriately relied upon the opinions of individuals who had never evaluated or taught [redacted] over individuals who had direct experience working with and evaluating [redacted]

C. The ALJ's analysis of the deference that should have been afforded to the educators and the program offered by [redacted] Academy – a school that was not even at issue in this case – was arbitrary and capricious.

D. The ALJ inappropriately relied upon retrospective testimony that the placement proposed by the WCPSS would have provided additional or different services not included in the IEP.

E. The ALJ incorrectly dismissed several of Petitioners' claims in the Order Granting, in Part, Respondent's Motion to Dismiss Pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b), issued on March 27, 2018.

F. The ALJ inappropriately dismissed Petitioners' claims in the Final Decision.

Petitioners' Written Arguments, p. 4

Respondent's Written Arguments on Appeal "interpret[] the issues on appeal as follows:"

1. Should the ALJ's determination that Petitioners failed to meet their burden of production on all claims dismissed in the Rule 41(b) order dated March 27, 2018, be overturned?

2. Should the ALJ's determination that the May 2017 IEP offered [redacted] the opportunity for a free appropriate public education be overturned?

3. Should the ALJ's determination that the Petitioners' unilateral private placement was not appropriate be overturned?

(Respondent's Written Arguments, p. 3)

The Undersigned, having considered the issues as expressed by the parties in the Notice of Appeal and in the Written Arguments on Appeal in conjunction with the record evidence and testimony as it appears in the hearing transcript, summarizes the issues presented on appeal as follows:

1. Does an independent review of the record, taken as a whole, support the ALJ's July 31, 2018, Final Decision on the following issues:

    a. Whether Respondent denied [redacted] a FAPE by failing to develop a substantively and procedurally appropriate IEP at the May 2017 IEP meeting when it:

        - Refused to incorporate an accommodation of small-class, small-school setting in the general-education environment;

- Failed to express present levels of academic and functional performance with sufficient specificity;
- Failed to express appropriate functional and academic goals;
- Refused to offer a transition plan to support [redacted]s transition from a private [redacted] school to a public high school; and
- Predetermined [redacted]s placement in a Curriculum Assistance Class (Resource Setting) for 90 minutes per day with no non-disabled peers for all of her specially designed instruction and for additional "Break Card" time as needed?

b. Whether [redacted] Academy was an appropriate private placement for [redacted] and whether the equities favor tuition and transportation reimbursement to Petitioners, if Respondent denied [redacted] a FAPE?

2. Does an independent review of the record, taken as a whole, support the ALJ's March 27, 2018, Order Granting, in Part, Respondent's Motion to Dismiss Pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) on the following issue:

a. Whether Petitioners offered sufficient evidence to meet their burden of production on their claims that Respondent developed a procedurally and substantively inappropriate IEP for [redacted] at the May 2017 IEP meeting when it refused the following:
   - Math and/or reading goals;
   - Related services, including direct occupational therapy;
   - Related services, including family and/or individual counseling and parent training;
   - Extended school-year services;
   - A Functional Behavioral Assessment or development of a Behavioral Intervention Plan;
   - SLD as an eligibility category;
   - Appropriate supplementary aids and services (with the exception of a class-size or sensory-sensitive classroom accommodation in general-education classes);
   - To permit parental participation (except with respect to placement); and
   - To fully evaluate [redacted]

PRELIMINARY STATEMENT on the Standard of Review:

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

Under these procedures, the Review Officer must render an "independent decision" following impartial review of the entire record, giving "due weight" to the administrative proceedings before the administrative law judge. *See Board of Education v. Rowley*, 458 U.S. 176, 205-06 (1982);

see also Doyle v. Arlington County School Board, 953 F.2d 100 (4th Cir. 1991) (evaluating a decision flowing from Virginia's two-tiered administrative process).

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

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

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

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

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

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

FINDINGS OF FACT

This statement of factual findings offers relevant facts in four parts: (1) preliminary findings on the Petitioners' identification of irregularity in the factual findings contained in the Final Decision of the ALJ; (2) material background, procedural-history, and witness-credibility facts; (3) background facts pertinent to Petitioners' appeal of issues resolved in the July 31, 2018, Final Decision in this matter; and (4) background facts pertinent to the Petitioners' appeal of the issues

resolved in the March 27, 2018, Order Granting, in Part, Respondent's Motion to Dismiss Pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b).

PRELIMINARY FINDINGS ON PETITIONERS' IDENTIFICATION OF IRREGULARITY IN THE FACTUAL FINDINGS CONTAINED IN THE FINAL DECISION:

1. The Petitioners assert on appeal that "[t]he Administrative Hearing was inconsistent with the requirements of due process, and Petitioners were denied the opportunity for a fair hearing," in part because:

    a. "[t]he ALJ was not impartial during the hearing," Petitioners' Written Arguments, p. 4, and

    b. "[t]he ALJ disregarded facts and evidence presented and the ALJ's findings and conclusions were improperly made," Petitioners Written Arguments, p. 4.

2. Respondent asserts on appeal that the ALJ's decision was "thorough and detailed," Respondent's Written Arguments, p. 1, and that the ALJ's factual determinations "are not to be disturbed on appeal," Respondent's Written Arguments, p. 12.

3. An independent review of the record evidence taken in its entirety demonstrates that Petitioners are correct. The Final Decision "disregarded facts and evidence presented," *see* Petitioners Written Arguments, p. 4, resulting in factual findings, including many of the credibility findings, that are contrary to the documentary record evidence. *See, e.g, infra* ¶¶ 216-615.

4. Those "who . . . ha[ve] not seen or heard [witnesses] testify," generally must defer to ALJs, or hearing officers, on questions of credibility because "hearing officer[s] . . . ha[ve] seen and heard the witness[es] testify." *Doyle v. Arlington Cty. Sch. Bd.*, 953 F.2d 100, 104 (4th Cir. 1991).

5. Review Officers in North Carolina nonetheless have an obligation to perform an impartial review, including an impartial review of factual findings, and to render an independent decision. *See* N.C. Gen. Stat. § 115C-109.0(a) ("The Review Officer shall conduct an impartial review of the *findings* and decision appealed under this section. The Review Officer conducting this review shall make an independent decision upon completion of the review.") (emphasis added).

6. Findings of fact, including findings on witness credibility, may be rejected following this independent review if they are unsupported by the record evidence considered in its entirety, particularly when they are contrary to documentary evidence contained in the record. *See Carlisle Area Sch. V. Scott*, 62 F.3d 520, 529-30 (3rd Cir. 1995).

7. As the Fourth Circuit recognized in *Doyle,* findings of fact by a hearing officer enjoy presumptive validity when they are "'made in a regular manner and *with evidentiary support,*'" not when they are contrary to record evidence. *Doyle v. Arlington Cty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991) (emphasis added).

8. When a reviewing tribunal does not adhere to factual findings in the administrative proceeding, "it is obliged to explain why." *M.M. v. School Dist. of Greenville County*, 303 F.3d 523 (4th Cir. 2002) (citing *Doyle*, 953 F.2d at 105).

9. To satisfy the Undersigned's obligation to "explain why" this Decision does not adhere to many of the findings below, this Decision focuses on the discrepancies most significant to the resolution of this appeal.[2] *See, e.g., infra* ¶¶ 216-826.

10. As a general matter, the Undersigned observed that many of the erroneous factual findings mirror the proposed findings drafted by Respondent and submitted by Respondent on June 15, 2018, in Respondent's Proposed Final Decision.

11. Notably, all eighteen (18) of the ALJ's credibility findings include content taken nearly verbatim from the proposed findings drafted by Respondent and submitted on June 15, 2018, in Respondent's Proposed Final Decision. *Compare* Final Decision, pgs. 9 – 13 and Respondent's Proposed Final Decision, pgs. 16 – 20.

12. The ALJ did not, however, express an opinion in open court about the credibility of the witnesses or about the nature of her final decision following closing arguments. *See* Tr. pgs. 1201-1212.

13. The record considered in its entirety is silent regarding any basis upon which the Respondent (or the Petitioners) might have predicted how the ALJ interpreted or resolved issues of witness credibility or the evidence on the remaining issues in the case prior to drafting and submitting proposed findings for the ALJ's consideration.

14. With nothing in the record to indicate how the ALJ intended to rule on the credibility of the witnesses or on remaining issues in the case, the ALJ issued an Order for Proposed Final Decisions on May 22, 2018, stating "the Parties are ordered to file Proposed Final Decisions on or before June 15, 2018." Order for Proposed Final Decisions dated 5/22/18.

15. On June 15, 2018, Respondent filed a 59-page Respondent's Proposed Final Decision, proposing findings of fact and conclusions of law to support a final decision in Respondent's favor on all remaining issues and finding all of Petitioners' witnesses of diminished credibility. *See* Respondent's Proposed Final Decision.

16. Also on June 15, 2018, Petitioners filed a 71-page Petitioners' Proposed Decision, proposing findings of fact and conclusions of law to support a final decision in Petitioners' favor on all remaining issues and finding all of Petitioners' witnesses credible. *See* Petitioners' Proposed Decision.

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[2] After the Undersigned observed a pattern of errors, the Undersigned undertook an evaluation of each finding for record accuracy. This extensive and particularized review uncovered more errors than are detailed in this Decision. This Decision details the errors most central to the substantive issues on which reversal results. The Undersigned recognizes, however, that when a Final Decision contains so many record errors, the cumulative effect of those errors casts doubt on the soundness of the decision as a whole.

17. On July 31, 2018, the ALJ issued the Final Decision in this case, finding in Respondent's favor on all issues, finding all of Petitioners' witnesses of diminished credibility, and adopting many findings from Respondent's Proposed Final Decision. *See* Final Decision, p. 62.

18. Requesting and adopting proposed findings and decisions is a common practice and does not on its own render an ALJ's factual findings improper or irregularly made.

19. Regardless of their source or inspiration, however, all findings adopted by the ALJ and included in a Final Decision, including the credibility findings, must find support in the evidentiary record considered in its entirety.[3] *See, e.g., Carlisle Area Sch. v. Scott*, 62 F.3d 520, 529-30 (3rd Cir. 1995).

20. In this case, they do not. *See, e.g., infra passim.*

21. For purposes of this Decision, the Undersigned finds the material facts to be as follows.

MATERIAL BACKGROUND, PROCEDURAL-HISTORY, AND WITNESS-CREDIBILITY FACTS:

Material Background

22. The parties stipulated that Petitioner [redacted] was born on [redacted], and she was [redacted] ([redacted]) at the time the Petition at issue in this appeal was filed. Order on the Final Pre-Trial Conference, March 19, 2018, p. 2, Initial Stipulations ¶ 9.

23. The parties stipulated that [redacted] is a "child with a disability," as that phrase is defined in the IDEA, and is eligible for services under the IDEA. Order on the Final Pre-Trial Conference, March 19, 2018, pgs. 2 – 3, Initial Stipulations ¶¶ 10 – 11.

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[3] On appeal, Respondent complimented the Final Decision as "thorough and detailed," *see* Written Arguments on Appeal to State Hearing Review Officer p. 1, and emphasized that the ALJ "laid out in great detail *her* assessment of each witness's credibility," *id.* at 12 (emphasis added). Respondent thus argued that the Undersigned should and must defer to those findings because the ALJ had the advantage of hearing the testimony first hand such that her determinations flowed from a typical fact-finding process designed to discover the truth. But the credibility findings largely originate in *Respondent's* Proposed Final Decision. And Respondent offered no record evidence, other than the findings themselves, to support the credibility determinations it drafted or to support its assertions that these were *the ALJ's* assessments, established *by the ALJ* through a typical fact-finding process. The Undersigned cannot determine from the record *on what basis* Respondent determined that *the ALJ* had diminished Petitioners' witnesses' credibility other than Respondent's general position that Respondent should prevail, and Petitioners should not. The record taken as a whole suggests that the credibility findings were conceived by Respondent as an advocate and subsequently adopted by the ALJ nearly verbatim, rather than originating with the ALJ and *then* being drafted by Respondent for adoption by the ALJ. This is not a criticism of Respondent's counsel. Attorneys must provide zealous advocacy for their clients' positions. *See* NORTH CAROLINA RULES OF PROFESSIONAL RESPONSIBILITY, Preamble 0.1 *A Lawyer's Responsibility* ("As a representative of clients, a lawyer performs various functions. ... As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."), *and* Rule 1.3, Comment 1 *Diligence* ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). Both parties, including Respondent, were ordered to submit a proposed decision without guidance about its content. *See* Order for Proposed Final Decisions dated 5/22/18 *and* Order Granting Joint Motion to Extend Final Decision dated 5/3/18. Both complied.

24. The parties stipulated that [redacted] is diagnosed with the following disabilities:

    a. Autism Spectrum Disorder (ASD),
    b. Unspecified Anxiety Disorder,
    c. ADHD, Primarily Inattentive Presentation,
    d. Specific Learning Disorder with Impairment in Math,
    e. Specific Learning Disorder with Impairment in Reading, and
    f. Developmental Coordination Disorder (Dysgraphia).

    Order on the Final Pre-Trial Conference, March 19, 2018, p. 6, Initial Stipulations ¶ 47.

25. The parties stipulated that [redacted] and her mother, [redacted] are domiciled within the boundaries of the Wake County Public School System. Order on the Final Pre-Trial Conference, March 19, 2018, p. 3, Initial Stipulations ¶¶ 11 & 12.

26. The parties stipulated that [redacted] was enrolled in Respondent School System (WCPSS) from kindergarten, in 20[redacted], through part of [redacted] grade, until March 2016. Order on the Final Pre-Trial Conference, March 19, 2018, p. 3, Initial Stipulations ¶¶ 14 & 15.

27. The parties stipulated that [redacted]s parents removed [redacted] from WCPSS at the end of her [redacted] grade year in March 201[redacted] and enrolled her in [redacted] Academy for [redacted] a [redacted] school, from March 2016 through July 28, 2017. Order on the Final Pre-Trial Conference, March 19, 2018, p. 3, Initial Stipulations ¶¶ 15 & 16.

28. At [redacted] Academy for [redacted] students attend academic classes,[4] participate in individual and family therapy, and experience a small-class setting with an average of six (6) to eight (8) students per class. *See* Tr. p. 123:19-21.

29. When [redacted] exited the WCPSS in March 2016, the Student Profile in her IEP stated she was "an intelligent student who is *able* to meet grade level expectations," but was not. *See* Pet. Exh. 15, Bates p. 137 (quoting [redacted]s March 2016 WCPSS IEP, Student Profile) (emphasis added).

30. At the time [redacted]s parents removed her from Respondent's schools in March 2016, [redacted] demonstrated the following performance:

    - [redacted] had earned a Level 1 (the lowest score) on her most recent End of Grade test in Math. Pet. Exh. 15, Bates p. 137.
    - [redacted]s most recent complete math grade (in the first semester of her [redacted] grade year) was an F. Pet. Exh. 15, Bates p. 137.
    - [redacted]s then-current math grade (in the spring semester of her [redacted] grade year at the time of her removal) was an F. Pet. Exh. 15, Bates p. 137.[5]

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[4] [redacted] Academy ("[redacted] is the name of the academic educational program at [redacted] Academy for [redacted]

Notably, although [redacted]s current *overall* grade in Math was an F when she left WCPSS, [redacted] recently had been removed from her larger general education classroom "to receive small group support in . . . mathematics," Pet. Exh. 15, p. 153, and her grade in math improved in this small-group (Resource) setting, *see* Pet. Exh. 15, p. 137 (noting

- When she left the WCPSS in the spring of her [redacted] grade year, [redacted] was performing "below grade level in the area of math;" in fact, she was performing at "just below the 5th grade level." Pet. Exh. 15, Bates p. 143.
- [redacted]s "deficits in math affect[ed] her in the general education setting." Pet. Exh. 15, Bates p. 143.
- [redacted] had also earned a Level 1 (the lowest score) on her most recent End of Course test in Reading. Pet. Exh. 15, Bates p. 137.
- [redacted]s most recent complete language arts grade (in the first semester of her [redacted] grade year) was a C. Pet. Exh. 15, Bates p. 137.
- [redacted]s then-current language arts grade (in the spring semester of her [redacted] grade year at the time of her removal) was a D. Pet. Exh. 15, Bates p. 137.
- When she left the WCPSS in the spring of her [redacted] grade year, she was "struggl[ing] in the area of writing," and her "lack of sentence structure, writing organization, and illegible hand writing, [made] it difficult to understand what she [was] trying to convey in writing." Pet. Exh. 15, Bates p. 142.
- [redacted]s "deficits in writing affect[ed] her across the general education curriculum." Pet. Exh. 15, Bates p. 142.

31. [redacted]s academic performance improved during her time at [redacted] Academy for [redacted] from March 20[redacted] through July 20[redacted].

- By the time [redacted] was preparing to return to WCPSS from the [redacted] Academy for [redacted] Respondent noted that [redacted] "is an intelligent student" *and* that "[s]he loves to learn and the academic world is one where she feels more secure and confident." Stip. Exh. 1, Bates p. 1 (Proposed IEP for [redacted] from 4/22/1[redacted] through 4/21/1[redacted]).
- [redacted]s math grade improved from an F when she left WCPSS in March 20[redacted], *see* Pet. Exh. 15, Bates p. 137, to an A- in February 2017, *see* Stip. Exh. 1, Bates p. 1.
- [redacted] advanced in math from performance at a fourth-grade level when she left the WCPSS in Spring 20[redacted], *see* Pet. Exh. 15, Bates p. 143, to performance at just behind a ninth-grade level when she began the new school year in Fall 20[redacted], *see* Tr. p. 327:1-8 *and* Pet. Exh. 4, Bates p. 15 (recognizing that [redacted] would require summer school to completely "close that gap" and put her performance squarely at grade level at the start of the coming year).
- [redacted]s language arts grade improved from a D when she left WCPSS in March 20[redacted], *see* Pet. Exh. 15, Bates p. 137, to a B+ in February 20[redacted], *see* Stip. Exh. 1, Bates p. 1.
- [redacted] advanced in writing from showing deficits in fundamentals like using appropriate sentence structure when she left the WCPSS in Spring 2016, *see* Pet. Exh. 15, Bates p. 142, to earning an 88 in English and successfully completing a written assignment for an Academic Fair when she began the new school year in Fall 2017, *see* Pet. Exh. 4, Bates p. 15; *see also* Tr. p. 327:1-8 and 332:8-17

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that after [redacted] was "temporarily . . . moved to a Resource Math class," [redacted] was "very successful" and began "earning an A"). Ultimately, in March 2016, WCPSS concluded that [redacted] "requires small group instruction to complete her work, strengthen her social skills and organize herself in order to meet grade level expectation." Pet. Exh. 15, p. 153.

(recognizing that although [redacted] made writing progress, she began the year below grade level).

32. [redacted]s attendance at [redacted] Academy for [redacted] is not at issue in this case; all parties agree that [redacted] Academy for [redacted] was an appropriate educational environment for [redacted] and that the educational strategies utilized at [redacted] Academy for [redacted] enabled [redacted] to find success and turn her education around.

    - [redacted] testified that [redacted] her daughter, was "successful at [redacted] Academy." Tr. p. 69:18 – 20 (testimony of [redacted]
    - Ms. [redacted] [redacted]s primary therapist at [redacted] Academy for [redacted] testified that [redacted] had been "so successful in our learning environment." Tr. p. 137:21-22 (testimony of [redacted]
    - Respondent's expert witness and an employee of Respondent as the "team lead for Wake Count's autism team," Tr. p. 739:21-22, testified that when [redacted] was at [redacted] Academy for [redacted] "she was doing quite well," and "was doing very well in math." Tr. p. 828:4-8 (testimony of [redacted]
    - Respondent's witness and an employee of Respondent as a "senior administrator for the Autism and Extended Content Standards Team," Ms. [redacted] testified that [redacted] "made some really good progress," especially "really good progress in her social skills," at [redacted] Academy for [redacted] and that the [redacted] Academy for [redacted] educational plan had "been successful" for [redacted] Tr. p. 954:14-21 and p. 955:17-20 (testimony of [redacted]
    - Counsel for Respondent acknowledged that "We're not denying that she made progress at [redacted] It's great." Tr. p. 657:12-13 (argument of Respondent's Counsel).[6]

33. The parties' disputes over [redacted]s prior education with Respondent WCPSS and over her parents' choice to remove her from Respondent WCPSS in March 2016 in search of services and supports to put [redacted]s education back on track were settled. Order on the Final Pre-Trial Conference, March 19, 2018, p. 2, Initial Stipulations ¶ 8 ("All claims arising prior to May 1, 2017 have been released by a prior settlement agreement and are outside the jurisdiction of this Tribunal.")

34. [redacted]s planned *return* to WCPSS following just over a year at [redacted] Academy for [redacted] a [redacted] school, *is* at issue in this case.

35. [redacted] and her mother, [redacted] began to prepare for [redacted]s return home and to WCPSS in February or March 2017. Tr. p. 63:5 – 15 (testimony of [redacted]

[6] And the parties expressly stipulated that "[a]ll claims arising prior to May 1, 2017, have been released by a prior settlement agreement and are outside the jurisdiction of this Tribunal." Order on the Final Pre-Trial Conference, March 19, 2018, p. 3, Initial Stipulations ¶ 8.

36. The IEP developed for [redacted] in May 2017 as [redacted] prepared to "return[] to live at home and to WCPSS," *see* Stip. Exh. 2, Bates p. 17, lies at the heart of Petitioners' Petition for a Contested Case Hearing and this appeal.

37. Petitioner [redacted] s mother, and Respondent WCPSS began the process of "returning [redacted] to live at home and to WCPSS," *see* Stip. Exh. 2, Bates p. 17, in March 2017. *See also* Petitioners' Exh. 22, Bates p. 169 (email from WCPSS to [redacted] regarding setting up a new IEP for [redacted]

38. The record reflects that both Respondent and Petitioners appreciated and agreed that the transition from [redacted] Academy for [redacted] (a private, [redacted] school, where [redacted] "hit the reset button" and found success) to Respondent WCPSS (a public, traditional school system, where [redacted] previously experienced failure) was a significant transition.

    - Respondent's expert, Dr. [redacted] testified that the transition from [redacted] Academy for [redacted] to the WCPSS was a "pretty dramatic change." Tr. p. 784:5.
    - Respondent's administrator, Ms. [redacted] repeatedly acknowledged that this was "big transition," Tr. pgs. 966:14, 984:6, 996:18, and 1023:10.
    - Respondent's counsel acknowledged in his opening statement that at [redacted] Academy for [redacted] [redacted] "had found a way to hit the reset button, and she was headed back in the right direction. So as she's transitioning, she's going to have a lot of needs." Tr. p. 22:7-10.
    - Petitioners' expert, Dr. [redacted] agreed that a transition plan to facilitate a successful re-entry into WCPSS from [redacted] Academy for [redacted] "absolutely would be important" as "the two environments would be completely different." Tr. p. 495:3-5.

39. Despite this agreement, the IEP team did not resolve transition services at the May 2017 IEP meeting, and it did not include transition services or supports in [redacted] s IEP as she returned to WCPSS after her turnaround at [redacted] Academy for [redacted] *See* Order on the Final Pre-Trial Conference, March 19, 2018, p. 6, Initial Stipulations ¶ 60 ("The IEP Team did not complete a Transition Plan at the May 19, 2017 IEP Meeting"); Tr. p. 103:8-14 (testimony of [redacted]

40. In the weeks leading up to the May 2017 IEP meeting, Petitioners faced three notable challenges created by Respondent's choices as they worked to prepare for [redacted] s "big transition," *see* Tr. p. 996:14 (testimony of Respondent's employee recognizing this was a "big transition"):

    (1) Respondent WCPSS unilaterally refused to meet at the first-scheduled IEP meeting (in April), even though [redacted] was present and ready to go, because Respondent's attorney was not present;

    (2) Respondent WCPSS failed to timely honor [redacted] s request to visit prospective WCPSS schools for [redacted] and

(3) Respondent WCPSS delayed its response to [redacted]s request to visit prospective WCPSS schools for [redacted] such that representatives from [redacted] Academy for [redacted] could not visit at all.

41. Attempts to schedule a meeting to develop an IEP for [redacted]s "big transition," Tr. p. 996:14 (testimony of Respondent's expert), from [redacted] Academy for [redacted] "to WCPSS," Stip. Exh. 2 Bates p. 17 (May 2017 IEP), began on March 21, 2017. On that date [redacted] a Senior Administrator for Special Education Services with WCPSS, initiated dialogue regarding [redacted]s anticipated IEP. She emailed [redacted] stating, "I would like to offer an IEP meeting to create a new plan based on [[redacted]s] development over the past year. ... [and] to address her needs for the next school year." Petitioners' Exh. 22, Bates p. 169; *see also* Tr. p. 64:9-23 ([redacted] testimony).[7]

42. On March 23, 2017, Petitioner [redacted] responded to Ms. [redacted] and indicated she would be "happy to schedule an IEP meeting" to develop [redacted]s IEP for the coming school year. Petitioners' Exh. 22, Bates p. 169 (3/23/17 email from [redacted] to [redacted]

43. In her March 23, 2017, email, Petitioner [redacted] also expressed that she and representatives from [redacted] Academy for [redacted] wanted to visit "potential public school options" to determine "appropriate fit for [redacted] in their opinion;" [redacted] also stated that she would plan to "have representation from [redacted] Academy be an active participant . . . in developing a successful new IEP plan for [redacted] *Id.* (emphasis added).

44. Courts recognize the importance of including the child's then-current educators, and other professionals with knowledge of the child, in developing a new IEP for that child. In fact, "the district acts at its peril when it fails to invite professionals with knowledge of the child's disability." MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE 5:4 (3rd ed. 2008 + 2015 supplement).

45. [redacted] wanted representatives of the [redacted] Academy for [redacted] where [redacted] had turned her education around, to participate in "developing a successful new IEP plan" for [redacted] so they could "make recommendations to the IEP team on our behalf." *See* Petitioners' Exh. 22, Bates p. 169 (3/23/17 email from [redacted] to [redacted] *and* Petitioners' Exh. 22, Bates p. 168 (4/5/17 email from [redacted] to Ms. [redacted]

46. The parties stipulated that [redacted]s March 23, 2017, email response requested "a list of suggested WCPSS high schools that would be appropriate for [redacted] Order on the Final Pre-Trial Conference, March 19, 2018, p. 7, Initial Stipulations ¶ 54; *see also* Petitioners' Exh. 22, Bates p. 169; Tr. pgs. 64:11-25 & 65:1-23 ([redacted] testimony).

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[7] The Undersigned offers this historical fact and the historical facts that follow as context to understand the May 2017 IEP at issue and to contextualize findings in the Final Decision that are critical of [redacted]s pre-May 2017 choices, *see* Final Decision ¶¶ 301 & 304, but ignore Respondent's choices over that same period. The Undersigned notes that the parties recognized and stipulated to facts occurring prior to May 1, 2017, as relevant and necessary to contextualize the issues that arose after May 1, 2017, *See, e.g.* Order on the Final Pre-Trial Conference, March 19, 2018, pgs. 3-6, Initial Stipulations ¶¶ 9, 14-16, 18, and 19-51, even though Petitioners raise no claim regarding these events that occurred prior to May 2017.

47. Twelve days after [redacted]s first request to visit potential WCPSS high schools that would be appropriate for [redacted] on April 4, 2017, Ms. [redacted] replied to [redacted] acknowledging that "input and information from you and the staff at [redacted] Academy that will assist in developing an appropriate IEP for [redacted] will be crucial," but also clarifying that "while we would be happy to provide information about options and talk to their staff in preparation for the meeting, [redacted] Academy cannot unilaterally select or refuse which particular program or school in WCPSS is appropriate for [redacted] Petitioners' Exh. 22, Bates p. 168-69 (4/4/17 email from Ms. [redacted] to [redacted]

48. This April 4, 2017, email failed to respond to [redacted]s request that Respondent identify possible WCPSS placements for [redacted] or to address [redacted]s request to visit those potential placements. *See id.*

49. The next day, on April 5, 2017, [redacted] replied to Ms. [redacted] and communicated as follows:

> Thank you for responding - we along with [redacted] Academy are available April 19 and 21 to attend IEP meeting. Please let me know if either of those days works for you. If not, we will check our schedules and propose alternative dates.
>
> Regarding the staff at [redacted] Academy, it was not my intention to convey the staff would "unilaterally select or refuse which particular program or school in WCPSS is appropriate for [redacted] However, the staff would like to come and visit any schools or programs that may be proposed for [redacted] They will make recommendations to the IEP team on our behalf. Please let me know when those visits can be arranged, as the scheduling of the IEP meeting will need to happen after they have had a chance to visit.
>
> I would like to remain "in the loop" for the scheduling of the visits in case I could join them or, at least, review information online about the schools.
>
> Petitioners' Exh. 22, Bates p. 168 (4/5/17 email from [redacted] to Ms. [redacted]

50. In this April 5, 2017, email [redacted] again expressed the need for school visits, stating "the staff would like to come and visit any schools or programs that may be proposed for [redacted] They will make recommendations to the IEP team on our behalf. Please let me know when those visits can be arranged, *as the scheduling of the IEP meeting will need to happen after they have had a chance to visit.*" *Id.* (emphasis added).

51. Eleven days after this second expressed request to visit WCPSS schools that would be appropriate for [redacted] Ms. [redacted] replied to [redacted] on April 16, 2017, indicating that she "would like to set the meeting for Friday, April 21 @ 9 or 10:00," but again remaining silent regarding [redacted]s ongoing request to tour the programs and schools WCPSS might propose for [redacted] Petitioners' Exh. 22, Bates p. 168 (4/16/17 email from Ms. [redacted] to [redacted]

52. The next day, on April 17, 2017, [redacted] accepted the April 21, 2017, 10:00 AM meeting time. Petitioners' Exh. 22, Bates p. 167 (4/17/17 email from [redacted] to Ms. [redacted]

53. On April 18, 2017, Ms. [redacted] sent to [redacted] via email "Invitations for you and [redacted] to attend an April 21, 2017, IEP meeting. Petitioners' Exh. 22, Bates p. 167 (4/18/17 email from Ms. [redacted] to [redacted] *see also* Stip. Exh. 1 (proposed IEP indicating a 4/21/17 IEP date).

54. Again, however, on April 18, 2017, with only three days remaining before the now-scheduled IEP meeting, Ms. [redacted] provided no response regarding [redacted]s ongoing request to tour the programs and schools WCPSS might propose for [redacted] *Id.*

55. The parties stipulated that [redacted] requested the opportunity to tour any suggested WCPSS high schools with staff members from [redacted]s [redacted] school, [redacted] Academy for [redacted] prior to the IEP meeting scheduled for April 21, 2017. Order on the Final Pre-Trial Conference, March 19, 2018, p. 7, Initial Stipulations ¶ 54; *see also* Petitioners' Exh. 22, Bates p. 169; Tr. pgs. 64:11-25 & 65:1-23 ([redacted] testimony).

56. While Ms. [redacted] had acknowledged that [redacted] Academy's input would be "crucial" in developing an appropriate IEP for [redacted] and that WCPSS would be "happy" to "provide information about options" in "preparation for the meeting," Ms. [redacted] failed to identify a list of potential programs or schools within WCPSS that might be appropriate for [redacted] in advance of the IEP meeting scheduled for April 21, 2017, and she did not "provide information" or arrange any tours for [redacted] or staff from [redacted] Academy prior to the April 21, 2017, meeting date. *See* Petitioners' Exh. 22, Bates pgs. 167 – 170 *and* Tr. p. 65:7-25 & 66:1-4 ([redacted] testimony).

57. On April 19, 2017, two days before the scheduled April 21, 2017, IEP meeting, Ms. [redacted] sent to [redacted] a "draft IEP for [redacted]s] meeting on Friday," Petitioners' Exh. 22, p. 167 (4/19/17 email from Ms. [redacted] to [redacted]

58. This April 19, 2017, email did not identify a list of potential WCPSS programs or schools that might be appropriate for [redacted] or come with an invitation to tour or visit any program or school. *Id.*

59. This draft IEP sent on April 19, 2017, however, did contain the following notation at the top of each page: "School: [redacted] High." Stip. Exh. 1, Bates pgs. 1 – 17 (identifying [redacted] High as [redacted]s school on each page of the proposed IEP).

60. On April 21, 2017, Petitioners appeared for the IEP meeting as scheduled by Respondent WCPSS.

61. Petitioners had coordinated the availability of one of [redacted]s then-current educators from [redacted] Academy for [redacted] for the IEP meeting on April 21, 2017, at 10:00 AM. *See* Petitioners' Exh. 22, Bates p. 168 (4/5/17 email from [redacted] to Ms. [redacted]

62. Additionally, Petitioners arranged to bring with them to the IEP meeting a former special education teacher, Ms. [redacted] to serve as [redacted]s advocate at the meeting. *See* Petitioners' Exh. 23, Bates p. 189 (acknowledging Ms. [redacted] presence on April 21, 2017, in a 4/27/17 email from [redacted] to [redacted]

63. WCPSS refused to go forward with the IEP meeting on April 21, 2017. Petitioners' Exh. 23, Bates p. 189 (4/27/17 email from [redacted] to [redacted]

64. Ms. [redacted] explained in a subsequent email to [redacted] that "district staff will not proceed with IEP meetings with Ms. [redacted] without representation for the district. ... Had we known in advance of Ms. [redacted] attendance, we would have arranged for our attorney to be present and the meeting would have proceeded as planned." Petitioners' Exh. 23, Bates p. 189 (4/27/17 email from [redacted] to [redacted]

65. Nothing in North Carolina's Policies provides that school systems should unilaterally cancel IEP meetings in instances where parents bring a lay person who is a former special education teacher as an advocate.

66. Nothing in North Carolina's Policies requires (or suggests) that IEP meetings must include the presence of school system attorneys in cases where parents bring lay people who are former special education teachers to those meetings as an advocate on behalf of the child.

67. North Carolina's Policies make plain that "[t]he goal of the State is to provide appropriate educational opportunity *to all children with disabilities* who reside in North Carolina ... [and] [t]o ensure that *the rights of children with disabilities and their parents are protected.*" *See* NC Policies 1500-1.1 (emphasis added).

68. North Carolina's Policies do not offer a goal to ensure that district staff have legal representation present prior to going forward with development of an IEP to which a child with disabilities and her parents are entitled under the law.

69. North Carolina recognizes, as the United States Supreme Court has recognized, that the "core of the statute" is "the cooperative process that it establishes *between parents and schools*," not between parents and attorneys for schools or between parents and schools only when those schools have legal representation present. *See Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (emphasis added).

70. On April 27, 2017, after having unilaterally cancelled the April 21, 2017, IEP meeting, Respondent sent an email to [redacted] and offered to re-schedule that IEP meeting on any of six dates spanning from May 2, 2017, through May 19, 2017. Pet. Exh. 23, Bates p. 189 (4/27/17 email from Ms. [redacted] to [redacted]

71. On April 27, 2017, Respondent also identified for the first time several schools that might be considered for [redacted] stating:

[redacted] HS is [redacted]s] base school and [redacted] HS is another school for your consideration. Both of these schools have specific supporting staff and programs for students with autism. The school does have specialty schools that are application based and also not assigned by the IEP team. Examples of some of these schools ... are: [redacted] Leadership Academy, [redacted] and [redacted] College and Career Academy. If you would like us to arrange for visits to any of these programs, please let us know.

Pet. Exh. 23, Bates p. 189 (4/27/17 email from Ms. [redacted] to [redacted]

72. [redacted] replied to Ms. [redacted] April 27, 2017, email and agreed to re-schedule the previously cancelled IEP meeting on May 19, 2017; [redacted] also agreed, again, to have someone from [redacted]s [redacted] school, [redacted] Academy for [redacted] available for the re-scheduled IEP meeting. Petitioners' Exh. 23, Bates p. 188 (5/3/17 email from [redacted] to Ms. [redacted]

73. In early May 2017, [redacted] reached out to Dr. [redacted] an educational consultant who had assisted [redacted] in placing [redacted] in [redacted] Academy for [redacted] the private boarding school where [redacted] recovered her success after struggling in her former WCPSS placement, and on May 2, 2017, [redacted] entered into a contract with Dr. [redacted] to assist her in evaluating private schools that might be appropriate for [redacted] closer to their home in Wake County. *See* Tr. pgs. 188:12-25 (testimony of [redacted] on direct examination) and 381:12 – 382:9 (testimony of [redacted] on cross examination).

74. [redacted] reached out to Dr. [redacted] about alternatives to the public schools at this time because "Wake County was taking so long to schedule the IEP meetings to try to build my confidence in what they could do that it was getting really late to make a decision for S.'s schooling. And as it was, May 2 was really late for any school and I needed to have something in plan. ... [W]e did not look at any private school until June." Tr. p. 382: 4 – 9 (testimony of [redacted] on cross examination).

75. Parents are permitted to investigate private schools and even enroll their child in private school while still considering the options presented by the school district in good faith, all without losing their ability to seek relief for the school district's failure to provide a FAPE. *See, e.g., In re: Student with a Disability*, 14-025, 114 LRP 23151 (N.Y. State Educational Agency April 30, 2014) (holding that parents' "pursuit of a private placement [is] not a basis for denying their [request for] tuition reimbursement, even assuming ... that the parents never intended to keep [the student] in public school") (quoting *C.L.*, 744 F.3d at 840).

76. The ALJ stated, after the close of Petitioners' evidence at the hearing, "I don't think it's unreasonable for a parent if they're not sure if the school is going to offer an appropriate IEP to look at other options." Tr. p. 707:6-9. The ALJ informed Petitioners' counsel that while she could "discuss that if you wish, . . . I don't think it's unreasonable to be looking at other options at the end of the school year so I don't believe her behavior in that respect, unless something else is shown to me, rises to the level of being unreasonable." Tr. p. 707:10-15; *see also* Tr. p. 714:17-24. *But see* Final Decision ¶¶ 302-04 (implying, contrary to the ALJ's expressed belief in open court at the close of Petitioners' case, in the section of the Final

Decision designated "Reasonableness of Petitioner [redacted]s Actions," that [redacted]s relationship with Mr. [redacted] [redacted] the educational consultant, and [redacted]s consideration of private schools were evidence of unreasonableness).

77. On May 3, 2017, [redacted] sent an email to Ms. [redacted] with three specific communications.

78. First, [redacted] expressly invited Respondent to speak directly to [redacted]s teachers and/or administrators at the [redacted] school in advance of the re-scheduled IEP meeting "to prepare for the meeting." Petitioners' Exh. 23, Bates p. 188 (5/3/17 email from [redacted] to Ms. [redacted]

79. [redacted] stated: "If it would be helpful to the WCPSS to prepare for the meeting, I am willing to give you permission to speak with someone from [redacted] directly about [[redacted]s] transition needs prior to the meeting." *Id.*

80. Second, on May 3, 2017, [redacted] notified Respondent that "the draft [IEP sent two days before the cancelled April 21, 2017, IEP meeting] did not address some of [[redacted]s] known needs," noting that the [redacted] Academy for [redacted] "input would be helpful" on those needs. Petitioners' Exh. 23, Bates p. 188 (5/3/17 email from [redacted] to Ms. [redacted]

81. Third, on May 3, 2017, [redacted] continued her quest to visit programs or schools proposed for [redacted] She wrote in an email to Ms. [redacted] "I would also like to arrange to visit some of the schools that you suggested. Could you please let me know how to go about arranging to do that?" Petitioners' Exh. 23, Bates p. 189 (5/3/17 email from [redacted] to Ms. [redacted]

82. On May 5, 2017, Ms. [redacted] replied to each of these three communications.

83. On the first two points, Ms. [redacted] indicated that she accepted [redacted]s invitations and would act on them. Ms. [redacted] stated that someone would "obtain a release" and that "someone will contact [redacted] [redacted] Academy for [redacted] prior to the IEP meeting." Petitioners' Exhibit 23, Bates p. 188 (5/5/17 email from Ms. [redacted] to [redacted]

84. On the third point, Ms. [redacted] stated: "In regards to the school visits please send me the name of the schools you are interested in visiting and the dates. The visits will be facilitated by me or someone from our office." Petitioners' Exhibit 23, Bates p. 188 (5/5/17 email from Ms. [redacted] to [redacted]

85. Ms. [redacted] and Respondent then failed to obtain a release or otherwise secure [redacted]s "willing permission" to allow Respondent to speak with [redacted]s educators at [redacted] Academy for [redacted] prior to the May 17, 2017 IEP meeting. Tr. p. 388:4-8 ([redacted]s testimony).

86. Nonetheless, Respondent's employee and expert witness, Dr. [redacted] [redacted] "spoke[] 'extensively' with [redacted] academic director, [redacted] about the school and [redacted]s supports and needs." Respondent's Written Arguments on Appeal to State Hearing Review Officer, p. 5.

87. Additionally, three of Respondent's employees, [redacted] and Dr. [redacted] visited [redacted] Academy for [redacted] prior to the May 2017 IEP "to gain information about the program." Order on the Final Pre-Trial Conference, March 19, 2018, p. 6, Initial Stipulations ¶ 51.

88. And the Director of [redacted] Academy for [redacted] Ms. [redacted] phoned into the May 2017 IEP meeting on behalf of Petitioners and provided substantive information regarding effective accommodations and supports for [redacted] *See* Stip. Exh. 4, Bates p. 36 (Respondent's Minutes of the 5/19/17 IEP meeting); *see also* March 27, 2018, Order, Finding of Fact ¶ 3 ("Also on behalf of Petitioners, [redacted] i] [redacted] academic director at [redacted] Academy, participated by telephone for approximately thirty (30) minutes of the meeting.").

89. Ms. [redacted] one of Respondent's employees, however, testified that when she called the [redacted] Academy for [redacted] about [redacted] without a release from [redacted] s parents, no one from the [redacted] Academy for [redacted] discussed [redacted] s therapeutic or educational information with her. Ms. [redacted] testified that the Director of [redacted] Academy for [redacted] (Ms. [redacted] said, "Oh, I can't talk to you," without explaining the reason. *See* Tr. p. 872:13-25 (testimony of [redacted] *see also* 388:2-23 (testimony of [redacted]

90. Ms. [redacted] and Respondent also failed to facilitate timely visits for the schools [redacted] indicated she would like to visit.

91. On May 8, 2017, eleven days before the second-scheduled IEP meeting, [redacted] sent an email to Ms. [redacted] in which she identified [redacted] High School and the [redacted] College and Career Academy as schools she would like to visit. *See* Petitioners' Exh. 23, Bates p. 187 - 88 (5/8/17 email from [redacted] to Ms. [redacted]

92. She also explained, "[a]t both schools, I would want to talk with the principals, teachers, and special education to get a better idea of what their programs have to offer. I would also like to visit during the time when school is in session." *Id.* She again explained, "I would like to visit the schools prior to the IEP meeting scheduled on the 19th. I am available this week or next. Please provide me with times and dates and I can arrange my schedule accordingly." *Id.*

93. Ms. [redacted] failed to respond for a full week. *See* Petitioners' Exh. 23, Bates p. 187 (5/15/17 email from Ms. [redacted] to [redacted]

94. Nonetheless, on May 9, 2017, still with no school visits scheduled, Petitioners re-enrolled [redacted] in Respondent WCPSS in anticipation of her return to school there. *See* Pet. Exh. 32, Bates p. 216 (presenting an email from Respondent's employee in student assignment to Ms. [redacted] and others stating that "they re-enrolled on 5/9/17").

95. On May 15, 2017, at 9:04 PM at night, with only three days remaining before the scheduled IEP meeting, Ms. [redacted] replied to [redacted] without identifying a day or time upon which [redacted] could visit and tour either of the specified potential schools. Petitioners' Exh. 23, Bates p. 187 (5/15/17 email from Ms. [redacted] to [redacted]

96. Instead, Ms. [redacted] stated that one of the schools previously identified as a potential placement "is under construction" such that "we cannot schedule a tour." *Id.* She then asked [redacted] to "Please provide me with a day and time this week that you can tour [redacted] HS, meet with the principal and special education staff." *Id.*

97. [redacted] replied the next morning stating, "When I wrote to you on May 8, 2017, I anticipated hearing from you much sooner to try and schedule these visits. Unfortunately, at this late date I cannot rearrange my schedule to visit any of the schools except on Thursday. As you know, I have requested from the beginning for the staff from [redacted] Academy for [redacted] to visit the schools with me; it is quite unlikely that they will be able to arrange their schedules on such short notice." Petitioners' Exh. 23, Bates p. 187 (5/16/17 email from [redacted] to Ms. [redacted] [redacted] then expressed, "[i]f we can arrange for the visits on Thursday, I would like to try to see these two schools before the meeting. It is my understanding [redacted] College and Career Academy is currently operating at a temporary location – would it be possible to visit that location?" *Id.*

98. Ms. [redacted] replied that evening (5/16/17 at 5:26 PM) stating:

> [redacted] HS is available to meet with you on Thursday morning at 8:15 until 8:45. At this time you will be able to meet with the [sic] Megan Lane, Special Education Department Chairperson. School does not start until 8:45. … Another option would be to meet with Ms. Lane from 10:15 to 11:30. The principal will be available to briefly speak with you during transition time but Ms. Lane should be able to answer all your questions and give you a tour.
>
> [redacted] Academy is under construction and students are not in session.
>
> Petitioners' Exh. 23, Bates p. 186 (5/16/17 email from Ms. [redacted] to [redacted]

99. [redacted] replied within an hour, at 6:18 PM on May 16, 2017. She wrote:

> Based on your email, it seems that my visit would be so limited that it would fail to meet the entire purpose of the request. I was under the impression that I would be allowed to do more than watch students during a transition and speak with one designated person in the office or on the phone. I will just read what is available on the website. If I need additional information, I will call the people you identified and ask any follow up questions.
>
> I will look forward to seeing you on Friday at the meeting.
>
> Petitioners' Exh. 23, Bates p. 186 (5/16/17 email from [redacted] to Ms. [redacted][8]

[8] Despite (1) this documentation in the Official Record (and the parties' stipulation) that Respondent failed to honor timely requests by Petitioners to observe and visit potential school assignments for [redacted] and (2) that when Respondent offered a visit, it was to *one* school, not "several," with 3 days remaining before the re-scheduled IEP meeting despite Petitioners' repeated requests over weeks, the Final Decision credited Respondent with arranging tours and visits at "several" schools. *See* Final Decision ¶ 254. The Final Decision failed to recognize context or to identify any of the

100. Three days later, on May 19, 2017, the IEP meeting to create [redacted]s new IEP occurred.

101. According to the meeting minutes, recorded by [redacted] an employee of Respondent, the following were present at the May 19, 2017, IEP meeting:

a. [redacted] LEA Rep [an employee of Respondent]
b. [redacted] Regular Ed. [an employee of Respondent]
c. [redacted] Special Ed. [an employee of Respondent]
d. [redacted] [an employee of Respondent]
e. [redacted] [an employee of Respondent]
f. [redacted] [an employee of Respondent]
g. Maura O'Keefe [an attorney for Respondent]
h. [redacted] mother]
i. [redacted] [a former special education teacher present at the request of [redacted]s mother to assist her in advocating for [redacted]

See Stip. Exh. 4, Bates p. 35 (Respondent's Minutes of the 5/19/17 IEP Meeting); *see also* Tr. p. 84:13-14 (Testimony of [redacted] identifying [redacted] Order on the Final Pre-Trial Conference, March 19, 2018, p. 7, Initial Stipulations ¶ 56 (identifying [redacted] Sherry, Bethea, [redacted] and [redacted] as employees of Respondent and identifying Maura O'Keefe as Respondent's attorney at the time of the 5/19/17 IEP meeting).

102. The list of attendees at the May 2017 IEP meeting reflects the provisions of the IDEA at 20 U.S.C. § 1414(d)(1)(B), except with regard to the inclusion of Respondent's attorney.

"several" schools it found that WCPSS "provide[d] opportunities for [redacted] to tour and visit." Final Decision ¶ 254. The Final Decision cited to the Respondent's meeting minutes of the May 17 IEP meeting to support this finding. The meeting minutes do not support a finding that Respondent provided opportunities for [redacted] to visit "several" schools. Respondent's meeting minutes provide in relevant part: "Ms. [redacted] explained she . . . set up a time for [redacted] to go and visit and speak with the principal at *one* particular location." Stip. Exh. 4, Bates p. 40 (emphasis added). Respondent's meeting minutes also document a not-yet-fulfilled offer to make arrangements for a prospective visit and observation: "Ms. [redacted] offered to coordinate a visit and observation for [redacted] at [redacted] and Ms. [redacted] is going to work with administrators there to secure permission from the other parents for [redacted] to observe." Stip. Exh. 4, Bates p. 41. A review of the record considered in its entirety found no evidence that Respondent arranged visits at "several" schools *prior* to the May 2017 IEP meeting; instead, Respondent arranged *one* brief visit at one school on short notice. And a review of the record considered in its entirety found no evidence that Respondent arranged a "visit and observation" at *any* schools *after* the May 2017 IEP meeting. Subsequent to the May 2017 IEP meeting, Respondent arranged a single meeting between [redacted] and a curriculum assistance teacher at [redacted] High School. That meeting failed to provide a "visit and observation" as promised because Respondent arranged this meeting at a time when no students were in in the building. *See* Tr. pgs. 109:20 – 110:11 (recognizing that [redacted] never got "the opportunity to tour any of the Wake County public schools and observe classes in session" and that when she met with a curriculum assistance teacher at [redacted] High School, "there was not one single student in the entire building"). An independent review of the record failed to find evidence that "[i]n fact, Respondent did provide opportunities for [redacted] to tour and visit several potential school assignments for [redacted] as asserted in the Final Decision at Finding of Fact 254.

103. Nothing in the IDEA, its regulations, North Carolina law, or North Carolina policy provides that school systems should include their attorneys in IEP meetings, especially when the children with disabilities and/or their parents do not have an attorney with them.

104. While nothing expressly makes it unlawful for school systems to require the presence of their attorneys at IEP meetings, North Carolina policy and the IDEA itself expressly prohibit this practice at resolution meetings, unless the child with a disability is also represented by an attorney.[9] *See, e.g.,* 20 U.S.C. 1415(f)(1)(B); 34 C.F.R. 300.510; N.C. Gen. Stat. § 1215C-109.7; NC Policies 1504-1.11(a)(1)(ii) (providing that at resolution meetings the participants "*[m]ay **not** include an attorney of the LEA* unless the parent is accompanied by an attorney") (emphasis added).

105. More generally, North Carolina views the "core of the statute," as does the United States Supreme Court, to be "the cooperative process that it establishes *between parents and schools*," not between parents and attorneys for schools or between parents and schools only when those schools have an attorney present. *See Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (emphasis added).

106. [redacted] Director of Learning and Support at [redacted] Academy for [redacted] called into the May 19, 2017, IEP meeting on behalf of Petitioners at 10:10 AM, ten minutes after it started, and spent 30 minutes identifying the "interventions [redacted] [redacted] Academy for [redacted] found to be effective." Stip. Exh. 4, Bates p. 35 - 36 (Respondent's Minutes of the 5/19/17 IEP Meeting); *see also* March 27, 2018, Order, Finding of Fact ¶ 3 ("Also on behalf of Petitioners, [redacted] i] [redacted] academic director at [redacted] Academy, participated by telephone for approximately thirty (30) minutes of the meeting.").

107. Other than [redacted] Ms. [redacted] was the only person in the May 19, 2017, IEP meeting who had ever worked with [redacted] in an educational setting. *See* Tr. pgs. 265:23-266:6 (stating the understanding that Ms. [redacted] "actually taught" [redacted] *see also* Stip. Exh. 4, Bates pgs. 35-36.

108. None of the individuals at this IEP meeting who were employed by the Respondent had ever spoken with, taught, served, or evaluated [redacted] *See, e.g.,* Tr. p. 1059:13-16 (offering the testimony of [redacted] an occupational therapist employed by Respondent who attended [redacted]s IEP meeting, that she did "not remember [redacted] at all . . . and was not able to access her through our EASi IEP system to try to recall what – who she was"); 857:2-5 (offering the testimony of [redacted] a school psychologist and team lead employed by Respondent who also attended [redacted]s IEP meeting, "I've never met [redacted] 1120:24 – 1121:1 (offering the testimony of [redacted] who was not at the IEP meeting, but who served as Respondent's expert witness at the hearing, that "I have not" ever "met or observed [redacted] and 1098:18-20 (offering the testimony of [redacted] a former autism support teacher with Respondent WCPSS who testified at the hearing,

[9] Resolution meetings are meetings required in the IDEA's dispute-resolution process within 15 days of a parent's petition for a due process hearing; "The purpose of the meeting is for the parent of the child to discuss the issues and facts in the due process petition so that the LEA has the opportunity to resolve the dispute that is the basis of the [parent's] due process petition." NC Policies 1504-1.11(a)(2).

that she "do[es]n't think" she has "ever met [redacted] and "do[es]n't recall" having "ever met [redacted]

109. The IDEA invites school systems (and parents), in their discretion, to include in IEP meetings "other individuals who have knowledge or special expertise regarding the child." 20 U.S.C. § 1414(d)(1)(B)(vi).

110. Although [redacted] had attended WCPSS from kindergarten through eighth grade, Respondent did not include any of the WCPSS employees who had taught or provided services to [redacted] as participants in the May 19, 2017, IEP meeting.

111. Petitioners arranged to include by telephone one of [redacted]s then-current educators, Ms. [redacted] from [redacted] Academy for [redacted] to share her knowledge and expertise regarding [redacted] *See, e.g.*, Petitioners' Exh. 23, Bates p. 188 (5/3/17 email from [redacted] to Ms. [redacted]

112. Respondent's minutes of the May 19, 2017, IEP meeting, characterize the contributions of Ms. [redacted] the Director of Teaching and Learning at the [redacted] Academy for [redacted] and the sole contributor to that meeting, other than [redacted]s mother, who had experience teaching and working with [redacted] as recommending the following accommodations and supports that the [redacted] Academy for [redacted] employed with [redacted] and "found to be effective:"

a. "[S]he recommended a small classroom setting to address [redacted]s sensory needs."
b. "She said this would need to be a sensory-friendly environment and would enable her to continue with academic rigor while her sensory needs are being addressed."
c. "Ms. [redacted] stated sounds and lights can be an issue for [redacted] and she may need space around her from peers and lower-level lighting."
d. "She further stated [redacted] has not needed any sensory tools (i.e. weighted items or fidgets) *most recently* but that they may be needed during this transition."
e. "Ms. [redacted] said it is important for [redacted] to work on relationship skills with teachers."[10]

Stip. Exh. 4, Bates p. 36 (Respondent's Minutes of the 5/19/17 IEP Meeting) (emphasis added).

[10] The Undersigned recognizes that Respondent's meeting minutes note that Ms. [redacted] also identified a handful of other interventions that were effective for [redacted] (e.g., extra time, reminder down, reminders to work on legible writing, taking breaks when nee executive function support, organizational support, social competence support) during the May 19, 2017, IEP meeting. *See* Stip. Exh. 4, Bates p. 35-36 (Respondent's Minutes of the 5/19/17 IEP Meeting). Those additional interventions are not specified in this finding to focus this Decision on the facts most relevant to the issues upon which this Decision reverses the Final Decision.

113. After hearing from Ms. [redacted] the IEP Team "finalized the DEC 7[11] and moved onto the DEC 3[12] and the Autism worksheet," according to the IEP Meeting Minutes recorded by Respondent. *Id.* at Bates p. 37.

114. In finalizing the "DEC 7 re-evaluation process" the IEP team "review[ed] and accept[ed] outside testing the parents presented to the IEP team." *Id.* at Bates p. 35.

115. The evaluations considered were those provided by [redacted]s parents at Petitioners' private expense. *See* Tr. p. 45:19-20 (explaining that [redacted] paid for the OT evaluation considered) and Tr. p. 55:6-7 (explaining that [redacted] paid for the psychological evaluation considered); *see also* Order on the Final Pre-Trial Conference, Initial Stipulations, p. 7, ¶ 57 (recognizing that after reviewing the privately provided evaluations that [redacted] provided, Respondent's documentation reported that "the WCPSS did not require any additional data" to determine [redacted]s eligibility, present levels, special education, or related services); Stip. Exh. 2 (recognizing in the IEP that the evaluations considered were those provided to Respondent by [redacted] and that Respondent relied on those privately provided evaluations and determined that it did not need to conduct its own assessments to complete [redacted]s IEP); Tr. pgs. 82:22 – 83:19 *and* 92:4-7 (testimony of [redacted] that WCPSS refused to assess [redacted]s present needs and relied on the information provided by Dr. [redacted] and Ms. [redacted]

116. The parties stipulated that [redacted] received diagnoses of Autism Spectrum Disorder (ASD), Unspecified Anxiety Disorder, ADHD, Primarily Inattentive Presentation, Specific Learning Disorder with Impairment in Math, Specific Learning Disorder with Impairment in Reading, and Developmental Coordination Disorder (Dysgraphia) in a Psychological Evaluation conducted by Dr. [redacted] of the Center for Research, Assessment, and Treatment Efficacy in June 2016. Order on the Final Pre-Trial Conference, March 19, 2018, p. 4, Initial Stipulations ¶ 28.

117. The parties stipulated that Dr. [redacted] evaluation was a private evaluation, not one conducted by Respondent. Order on the Final Pre-Trial Conference, March 19, 2018, p. 7, Initial Stipulations ¶ 53.

118. The parties stipulated that Dr. [redacted] conducted the following assessments prior to issuing her conclusions about and diagnoses of [redacted]

a. WISC-V;
b. D-KEFS Color-Word Inference Test;
c. Trailmaking Test;
d. Rey-Osterrieth Complex Figure Test;
e. Grooved Pegboard Test;
f. CTOPP-2;
g. WJ-JV;

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[11] The DEC 7 is the form for "Reevaluation." *See* https://ec.ncpublicschools.gov/policies/forms/statewide-forms (identifying NC's special education forms and providing links to blank forms).

[12] The DEC 3 is the form for "Eligibility Determination." *See* https://ec.ncpublicschools.gov/policies/forms/statewide-forms (identifying NC's special education forms and providing links to blank forms).

h. Gray Oral Reading Test, Fifth Edition (GORT-5);
i. Minnesota Multiphasic Personality Inventory – Adolescent (MMPI-A);
j. Million Adolescent Clinical Inventory (MACI);
k. Sentence Completion Test;
l. Achenbach Youth Self-Report (AYSR);
m. Achenbach Child Behavior Checklist (ACBC);
n. Revised Child Anxiety and Depression Scale (RCADS);
o. Vanderbilt ADHD Diagnostic Parent Rating Scale (VADPRS);
p. Behavior Rating Inventory of Executive Function (BRIEF);
q. Children's Yale-Brown Obsessive-Compulsive Scale (CY-BOCS);
r. ADOS-2;
s. SRS-2;
t. Australian Scale for Asperger's Disorder;
u. Autism Diagnostic Observation Schedule – Second Edition (ADOS-2) – Module 4.

Order on the Final Pre-Trial Conference, March 19, 2018, p. 4, Initial Stipulations ¶ 29.

119. The parties stipulated that both Petitioners and Respondent "accepted the private evaluation conducted by Dr. [redacted] and used the information from her evaluation." Order on the Final Pre-Trial Conference, March 19, 2018, p. 7, Initial Stipulations ¶ 53.

120. Petitioner also secured a private Occupational Therapy evaluation following removal from WCPSS at the end of eighth ([redacted]) grade and while transitioning to [redacted] Academy for [redacted] in April 2016. *See* Stip. Exh. 15, Bates p. 117-122 (Occupational Therapy Initial Evaluation).

121. The parties stipulated that both Petitioners and Respondent also "accept[ed] and review[ed]" Petitioners' private Occupational Therapy evaluation in connection with the May 19, 2017, IEP Meeting. *See* Stip. Exh. 5, Bates p. 45 (Prior Written Notice).

122. After reviewing these evaluations, the IEP Team chose not to conduct any of its own evaluations and instead determined that WCPSS "did not require any additional data to determine continued eligibility for special education and related services, present levels of academic achievement, or whether any additions or modifications to [redacted]s special education and/or related services were needed to meet measurable annual goals and *participate in the general curriculum*." Order on the Final Pre-Trial Conference, March 19, 2018, p. 7, Initial Stipulations ¶ 57 (emphasis added); *see also* Stip. Exh. 8, Bates p. 58 (DEC 7 re-evaluation form). This completed the DEC 7, re-evaluation form.

123. WCPSS then moved to the DEC 3, eligibility determination form, and determined that [redacted] was "eligible for special education services in the categories Autism (primary) and Other Health Impairment (secondary)," *see* Order on the Final Pre-Trial Conference, March 19, 2018, p. 7, Initial Stipulations ¶ 59; *see also* Stip. Exh. 11, Bates p. 72 (Eligibility Determination Form).

124. The form does not identify Specific Learning Disability as an eligibility category. *Id.* And, despite [redacted]s diagnoses of specific learning disabilities in math and reading in the

psychological evaluation considered by the team, *see* Stip. Exh. 14, Bates pg. 108 (diagnosing [redacted]s specific learning disabilities in math and reading), Respondent's IEP meeting minutes do not reflect any consideration of Specific Learning Disability as an eligibility category, *see* Stip. Exh. 4, Bates pgs. 35-43. And the May 19, 2017, IEP does not include any goals in math or reading, *see* Stip. Exh. 4, Bates p. 17-34.

125. After completing these forms, the participants in the May 19, 2017, meeting developed the IEP Respondent ultimately offered to [redacted] as she transitioned from the [redacted] Academy for [redacted] back to the WCPSS.

126. Respondent asserts that the May 2017 IEP provides essentially the same goals (with updates), supports, and accommodations as were provided at [redacted] Academy for [redacted] and that to conclude that this IEP was not adequate to provide [redacted] a FAPE would be a "problem" as it would "tell the public schools that they cannot rely on information coming from the prior educational system," Tr. p. 639:10-13 (argument of Respondent's attorney); Stip. Exh. 4, Bates pgs. 41 (Respondent's IEP meeting minutes).

127. Petitioners, [redacted]s teachers, [redacted]s service providers, and [redacted]s evaluator assert that this IEP does *not* provide the same critical supports and accommodations as [redacted] Academy for [redacted] and that it is *not* sufficient to provide [redacted] a FAPE. Petitioner [redacted] explained at the IEP meeting that she perceived the May 2017 IEP to be similar to [redacted]s prior IEP *with Respondent* WCPSS rather than to the [redacted] Academy for [redacted] educational plan. *See* Stip. Exh. 4, Bates p. 41. [redacted]s teachers, service providers, and evaluator all emphasized [redacted]s need for a small-class, small-school environment in regular, general-education classes in distinguishing the May 2017 IEP [which did not include accommodations to meet this need] from the [redacted] Academy for [redacted] educational plan [which did meet this need].

a. Ms. [redacted] the Director of Teaching and Learning at [redacted] Academy for [redacted] explained at the IEP meeting itself that she recommended "a small classroom setting to address [[redacted]s] sensory needs." Stip. Exh. 4, Bates p. 36; *see also* Stip. Exh. 22, Bates p. 154-55 (providing Ms. [redacted] written "Academic Recommendations" and "Recommended Interventions" which include "a smaller classroom with approximately a 1:12 or smaller teacher-student ratio" and a "[s]mall classroom setting"). This recommended accommodation was provided at [redacted] Academy for [redacted] but is not included in the May 17, 2017, IEP. *See See* Stip. Exh. 2, Bates p. 17-33.
b. [redacted] Academy for [redacted] documented [redacted]s need for the "universal" accommodation of small-class environment in both its LEAD Assessments for [redacted] and its Individualized Academic Plan. *See* Stip. Exh. 20, Bates pgs. 150 - 52. Again, a small-classroom setting was provided at [redacted] Academy for [redacted] but this accommodation is not included in the May 17, 2017 IEP. *See* Stip. Exh. 2, Bates p. 17-33.
c. [redacted] Academy for [redacted] documented [redacted]s need for a "[s]mall classroom environment" and a "[s]ensory [f]riendly classroom environment" with "[r]elationship [b]ased teaching" in its Student Intervention Plan for [redacted] *See* Stip. 21, Bates p. 153. Again, this small-classroom environment was provided at [redacted] Academy for [redacted] but is not included in the May 17, 2017, IEP. *See* Stip. Exh. 2, Bates p. 17-33.

d. Ms. [redacted] therapist from [redacted] Academy for [redacted] testified that she "recommended that [redacted] enter an environment that more closely mirrored [its] environment because she had been so successful in [its] learning environment, so small classroom size, relationship based multimodal teaching" for all classes. Tr. p. 137:20-25. Ms. [redacted] also testified that a "traditional public high school" without accommodations to meet [redacted] unique need for a small-class setting risked "overstimulation due to the large size of the school, high numbers of students in classrooms, and transition time between classrooms." Tr. pgs. 140:19-141:3.

e. Dr. [redacted] the expert who evaluated [redacted] and whose evaluation formed the basis of the May 19, 2017 IEP, testified that she "recommended smaller classrooms and a lower student to teacher ratio" for [redacted] "in general," not for one period per day. Tr. p. 254:12-15. She also testified that in [redacted] case, "a smaller classroom environment with a smaller student to teacher ratio" would be "where I feel like their needs are." Tr. p. 287:13-18. Dr. [redacted] also testified that the May 19, 2017 IEP did not address all of [redacted] needs that were addressed in her report. Tr. pp. 306:21-307:3.

f. Ms. [redacted] [redacted] English teacher in her current private placement, testified that [redacted] "needs access to her teachers, she needs small size, and I think she needs to feel really safe and secure so that her anxiety will decrease because I think that the anxiety gets in the way sometimes." Tr. p. 338:1-4.

128. Although they did not participate in the May 19, 2017, IEP meeting or testify at the hearing, [redacted] *s former WCPSS teachers from* [redacted] [redacted] *Middle School,* [redacted] *s immediately prior placement within Respondent WCPSS, also recognized that* [redacted] *"require[ed]" a smaller setting "to complete her work, strengthen her social skills and organize herself in order to meet grade level expectations." See* Pet. Exh. 15, Bates p. 153 (stating in [redacted] s March 16, 2016, IEP that [redacted] "requires small group instruction to complete her work, strengthen her social skills and organize herself in order to meet grade level expectations").

129. [redacted] s former WCPSS teachers at [redacted] [redacted] Middle School also recognized and documented that [redacted] s math performance improved when she was "temporarily moved" to a smaller setting in a Resource Math class. *See* Pet. Exh. 15, Bates p. 137 (stating in [redacted] s March 16, 2016, IEP that when [redacted] was "temporarily moved to a Resource Math class," she was "very successful" and was "earning an A"); *see also* Tr. pgs. 40:19 – 41:4 ([redacted] testimony).

130. [redacted] Academy for [redacted] teachers also saw [redacted] s math performance improve in its small-classroom environment. *See* Stip. Exh. 19, Bates p. 140 – 46 (offering [redacted] s progress reports from [redacted] Academy, [redacted] s academic provider at [redacted] Academy for [redacted] recognizing that [redacted] improved in math from an F at Respondent WCPSS to a C- in the first quarter at [redacted] Academy for [redacted] to a B+ in the second quarter there, and finally to an A- in the third quarter in [redacted] Academy for [redacted] small-classroom setting).

131. Ms. [redacted] [redacted] s then-current primary therapist, explained [redacted] s need for small-class environment accommodations to enable her to make educational progress and avoid disruptive dysregulation as follows:

Q [by Petitioners' counsel]: Why was a small class size deemed to be important for [redacted]

A: For [redacted] there is [sic] a few reasons why, one being her sensory integration needs. The more people in a small room, the more difficulty [redacted] is going to have in regulating her physical and emotional states, creating an inability to retain and process information as well as to assist in her relationship building skills.
[redacted] is on the autism spectrum and requires some more support around her social/emotional growth and learning and does much better when she has a teacher who can pay more attention to the relationships building aspects. . . .

Q: Would you describe [redacted]s] behaviors when she is dysregulated as primarily external?

A: Yes.

Q: What does that look like normally?

A: External dysregulation for [redacted] looks like yelling, crying, ripping up papers, moving – throwing books off desks. She has even at one point eaten a piece of paper. . . .

Tr. pgs. 138:20 – 139:16.

132. [redacted] had shown this dysregulation in the large-class setting at Respondent WCPSS prior to her removal to attend [redacted] Academy for [redacted] *See* Pet. Exh. 43, Bates p. 296 (noting behaviors of "crying, significant frustration, withdrawal, task avoidance, social difficulties" at [redacted]s prior public-school placement).

133. Because the May 2017 IEP did not include any accommodations within [redacted]s general-education classes to, *inter alia*, meet [redacted]s need for small-class, small-school setting to enable her to "retain and process information" such that she could make meaningful academic progress without dysregulating and "yelling, crying, ripping up papers . . . throwing books off desks . . . [or] eat[ing] paper," *see, e.g.* Tr. pgs. 138:20 – 139:16, [redacted]s teachers, therapists, and evaluators concluded that the May 2017 IEP was not appropriate for [redacted] and was not "the same" as the educational plan at [redacted] Academy for [redacted]

134. Petitioners expressed to Respondent the following deficiencies in the May 19, 2017 IEP prior to and during the May 19, 2017, meeting:

a. Prior to the May 19, 2017, IEP meeting, on May 3, 2017, [redacted] informed Respondent in an email that the draft IEP "did not address some of [redacted]s] known needs" and offered to "give [Ms. [redacted] permission to speak with someone from [redacted] Academy for [redacted] directly" for insight about that. Pet. Exh. 23, Bates p. 188 (email from [redacted] to [redacted] dated 5/3/17).

b. On the day of the IEP meeting, May 19, 2017, and during the IEP meeting itself, according to *Respondent's* minutes of that meeting, [redacted] [redacted]s mother, expressly objected to the IEP as follows:

1. "After the IEP was finalized . . . [redacted] expressed great concern that the large school setting is not going to work for [redacted] and further stated that the goals are [redacted] goals and are not WCPSS goals."
2. [redacted] "said . . . the document is not strong enough to meet her needs."
3. [redacted] "said the IEP doesn't have enough support."
4. [redacted] "expressed that she did not perceive the IEP developed today to be different from [redacted]s] prior IEP at [redacted] [redacted] the school from which [redacted] was removed following her failure to meet grade-level expectations despite her agreed-upon ability to do so.
5. [redacted] "said the goals are goals that are going to be implemented only in the CA class."
6. [redacted] "stated she feels that [redacted] does need academic goals."

Stip. Exh. 4, Bates pgs. 36 & 41 (Minutes recorded by Respondent of the 5/19/17 IEP meeting).

c. Also during the May 19, 2017, IEP meeting, again according to *Respondent's* minutes of that meeting, [redacted]s advocate, Ms. [redacted] reiterated concerns multiple times about the IEP's failure to include any accommodation to address [redacted]s need for small-class environment:

I. "Ms. [redacted] inquired how [redacted]s] need for a small class size is going to be addressed since [redacted] states that is what she needs."
II. "Ms. [redacted] stated that [redacted] said she needs a small class."
III. "Ms. [redacted] explained . . . the autism support program at [redacted] High School [which is *not* included in [redacted]s IEP][13] . . . and [explained] that it is her job to help make a large environment small. Ms. [redacted] explained that she still is concerned about [redacted] coming back to WCPSS and it does not compare to what she is receiving at [redacted]

Stip. Exh. 4, Bates pgs. 40.

d. During the May 19, 2017, IEP meeting, [redacted] also specifically "stated that she is not accepting the IEP." *Id.*

135. Although Respondent's meeting minutes reflect that Respondent told [redacted] that if "we left something out we can certainly meet again," *see* Stip. Exh. 4, Bates p. 41, and although [redacted] identified omissions in the IEP, *see* Stip. Exh. 4, Bates pgs. 35-41, Respondent failed to re-convene an IEP meeting to address the concerns [redacted] expressed at the May 19, 2017, IEP meeting. Order on the Final Pretrial Conference, Stipulation ¶ 85 ("The WCPSS has not

[13] *See* Stip. Exh. 2, Bates pgs. 17-34 (the May 2017 IEP).

attempted to convene an IEP Meeting since May 19, 2017"); *see also* Tr. p. 197:15-24 (Testimony of [redacted] that Respondent failed to re-convene an IEP meeting to address concerns raised about the 5/17/19 IEP).

136. Respondent's meeting minutes also reflect that Respondent offered to coordinate a visit and observation for [redacted] at [redacted] High School, the school to which Respondent had assigned [redacted] and that appeared on the Draft and Final IEP document. Stip. Exh. 4, Bates p. 41.

137. On May 24, Respondent sent an email to [redacted] stating that it was "trying to set up a time for us to observe a CA/Social skills class and for you to speak with the autism support teacher" at [redacted] High school. Pet. Exh. 24, Bates p. 194 (email from [redacted] to [redacted] dated 5/24/17).

138. [redacted] replied immediately and arranged to visit [redacted] for a tour and observation. *Id.* at Bates pgs. 193-94 (email exchange between [redacted] and [redacted] making arrangements for the date and time of [redacted]s visit and tour of [redacted] High School).

139. On June 2, 2017, [redacted] visited [redacted] High School. At that "visit," however, [redacted] "did not get to tour or observe any in-session classes" as she had expected. Tr. p. 109:23-24 (testimony of [redacted] Instead, "[t]he only thing [redacted] did do" was go "to [redacted] High School and me[e]t with the autism curriculum assistance teacher in her classroom, just sort of a one-on-one quick conversation." Tr. p. 109:23-25 & 110:1-2 (testimony of [redacted]

140. Despite trying to make arrangements for a visit when students were in session, "there was not one single student in the entire building from what I could tell" when [redacted] visited on June 2. Tr. p. 110:7-11 (testimony of [redacted]

141. [redacted] spread her efforts and concretely explored other options for [redacted] – both within and beyond the WCPSS.

142. [redacted] considered four ([redacted]) WCPSS schools other than [redacted] High School, including some recommended by Ms. [redacted] and [redacted] considered four (4) private options identified by the same educational consultant, Dr. [redacted] who worked with Petitioners to find the [redacted] Academy for [redacted] Tr. p. 189:12-21 (testimony of [redacted]

143. The parties stipulated that the IEP team informed [redacted] that school assignment to a particular school was not an IEP team decision. *See* Order on the Final Pre-Trial Conference, March 19, 2018, p. 12, Initial Stipulations ¶ 77.

144. The parties also stipulated that the IEP team informed [redacted] that she could request a transfer through the Office of Student Assignment and the "team [would] communicate the parent's request to the office of student assignment." *See* Order on the Final Pre-Trial Conference, March 19, 2018, p. 12, Initial Stipulations ¶ 78.

145. On June 14, 201[redacted], [redacted] submitted a transfer request through the Office of Student Assignment, seeking a transfer from [redacted] High School to [redacted] High School where

there is a lower teacher-student ratio (although it is a slightly larger school overall). Tr. p. 112:6-22 (testimony of [redacted] explaining why she requested a transfer from [redacted] High School to [redacted] High School); *see also See* Order on the Final Pre-Trial Conference, March 19, 2018, p. 12, Initial Stipulations ¶ 79.

146. The parties stipulated that [redacted]s request to transfer [redacted] to [redacted] High School explained that she was "[l]ooking to transfer to a school program . . . where the options for [[redacted]s] education needs might be more fitting." *See* Order on the Final Pre-Trial Conference, March 19, 2018, p. 12, Initial Stipulations ¶ 79.

147. Contrary to its representation to [redacted] that the IEP team would "communicate the parent's request to the office of student assignment," *see* Order on the Final Pre-Trial Conference, March 19, 2018, p. 12, Initial Stipulations ¶ 78, the IEP team failed to contact the office of student assignment about [redacted]s transfer request, *see* Tr. p. 107:3-5 ([redacted] testimony).

148. On June 16, 2017, Respondent denied [redacted]s transfer request. *See* Pet. Exh. 32, Bates p. 216 (email stating, "the transfer was submitted on June 14, and . . . I denied the transfer on June 16, 2017"); *see also* Order on the Final Pre-Trial Conference, March 19, 2018, p. 12, Initial Stipulations ¶ 80.

149. [redacted] simultaneously explored private options. [redacted] began visiting private schools for the first time in June, Tr. p. 382:4-9 (testimony of [redacted] on cross examination), at the same time as she sought a transfer to [redacted] High School within Respondent's school system, *see* Tr. p. 112:6-22 (testimony of [redacted] explaining why she requested a transfer from [redacted] High School to [redacted] High School); *see also See* Order on the Final Pre-Trial Conference, March 19, 2018, p. 12, Initial Stipulations ¶ 79.

150. The private options proved easier for [redacted] to visit and tour. Not only did [redacted] visit four private options recommended by Dr. [redacted] but [redacted] toured them as well. Tr. p. 190:10-13 (testimony of [redacted]

151. Of the private options [redacted] considered, [redacted] determined that [redacted] Academy was the most appropriate fit based on the recommendations of [redacted]s teachers at [redacted] Academy for [redacted] about [redacted]s learning needs. Tr. p. 190:14-20 (testimony of [redacted]

152. [redacted] met with administrators at [redacted] Academy, and "discussed options for [[redacted] Pet. Exh. 25 Bates p. 198 (email from [redacted] to administrators at [redacted] Academy dated 6/12/17).

153. The typical process for admission at [redacted] Academy required prospective students to visit the school for several days to evaluate whether the prospective student would be a good fit for admission. Tr. p. 191:7-15 (testimony of [redacted]

154. Because at this point it was so late in the private-school admissions cycle, the typical process for admission would not work for [redacted] Classes had already ended for the year at [redacted] Academy. Summer classes in math were available, but they were so individualized

that they would not be a good indicator of "how [redacted] might fare . . . socially" at the school. Stip. Exh. 25, Bates p. 196 (email from [redacted] Academy to [redacted]s parents about concerns regarding the "subject of [redacted] and her visit").

155. [redacted] Academy considered having [redacted] visit on the first few days of school at the start of the school year, but all realized that option would not work because the visit is "just a visit, not a guarantee" of admission. Stip. Exh. 25, Bates p. 196 (email from [redacted] Academy to [redacted]s parents). If [redacted] Academy determined [redacted] was not a good fit and denied her admission after a visit at the start of the academic year, that would leave Petitioners "high and dry at the start of the school year which is not where anyone wants to be." *Id.*

156. [redacted] Academy thus worked to create a compromise "visit" that might not be "ideal," but "given the time of year and [redacted]s] unique profile," would be the "best solution . . . that is both fair to [redacted] and the teachers," enabling [redacted] Academy to evaluate over the remaining month of summer whether [redacted] Academy would be an appropriate placement for [redacted] Pet. Exh. 25, Bates p. 196 (email from [redacted] to [redacted]s parents).

157. On the evening of June 14, 201[redacted], on the heels of [redacted]s submission of her transfer request with WCPSS, [redacted] Academy proposed "asking [redacted] art teacher . . . if [redacted] could come to one (or more) of her Saturday morning art classes . . . taught at [the teacher's] house." Pet. Exh. 25, Bates p. 196 (email from [redacted] to [redacted]s parents). "The classes [were] small (4 or 5 students)" with a "classroom dynamic." *Id.* Because the art teacher was "very familiar with the [redacted] student body," she would be in a "unique position to assess how [redacted] might fare when faced with the real thing." *Id.*

158. [redacted] ultimately exercised that option and engaged in two summer art classes, traveling back and forth from [redacted] Academy for [redacted] over two weekends to attend these classes with the [redacted] Academy art teacher, through which [redacted] Academy could determine whether it would offer admission to [redacted] Tr. p. 191-92 (testimony of [redacted]

159. The Director of [redacted] Academy personally observed [redacted] during one of her visits to these art classes. Tr. p. 192:3-5 (testimony of [redacted]

160. On July 6, 2017, having heard nothing further from Respondent regarding any attempt to re-convene the IEP meeting to address her concerns, and having been denied by Respondent in her attempt to transfer [redacted] to a school within WCPSS with a lower teacher-student ratio, [redacted] followed up with the principal at [redacted] High School, the school to which Respondent assigned [redacted] as follows:

> I attended an IEP meeting on May 19, 2017, for my daughter, [redacted] who is currently enrolled in your school. At the meeting, the IEP Team refused to consider my input, and developed an inappropriate IEP for [redacted] At the meeting, I explicitly told the IEP Team I was rejecting the IEP, and I gave very specific reasons for my decision. Since that time, the IEP Team has not met to revisit the IEP. Because there is no appropriate program in place for [redacted] I am going to

enroll [redacted] in private school, and seek tuition reimbursement from the WCPSS. Thank you.

Pet. Exh. 33, Bates pgs. 218-19 (email from [redacted] to [redacted] the Principal of [redacted] High School).

161. Respondent failed to convene an IEP meeting following [redacted]s email dated July 6, 2017. *See e.g.*, Pet. Exh. 33, Bates p. 218 (email exchange between Respondent's employees [redacted] and [redacted] the principal of the school to which Respondent assigned [redacted] acknowledging that he received notice of [redacted]s rejection of the 5/19/17 IEP and of her intent to enroll [redacted] in a private school for which she would seek reimbursement); Tr. p. 197:15 - 24 (Testimony of [redacted] that Respondent failed to re-convene an IEP meeting to address concerns raised in her 7/6/17 email).

162. Instead, Respondent "did not respond" to [redacted] Pet. Exh. 33, Bates p. 218 (email from [redacted] to [redacted] dated 1/19/18); *see also* Order on the Final Pre-Trial Conference, Initial Stipulations, ¶ 84 ("Mr. [redacted] did not respond to Petitioner [redacted]s email.").

163. Principal [redacted] the principal of the school to which [redacted] was assigned by Respondent, explained "I did not respond back because after talking with the IEP team the plan seemed sound." Pet. Exh. 33, Bates p. 218 (email from [redacted] to [redacted] dated 1/19/18).

164. Respondent's explanation for its failure to respond to [redacted]s July 6, 2017, email misleads.

165. Despite Principal [redacted] statement that he spoke "with the IEP team," *see* Pet. Exh. 33, Bates p. 218 (email from [redacted] to [redacted] dated 1/19/18), he did not.

166. It is possible, though not demonstrated through record evidence, that Principal [redacted] spoke with *select members* of [redacted]s IEP team, but he did *not* speak with the whole team.

167. No IEP meeting was commenced. *See* Order on the Final Pre-Trial Conference, Initial Stipulations ¶ 83 ("The WCPSS has not attempted to convene an IEP Meeting since May 19, 2017.").

168. And the record evidence reflects Principal [redacted] failed to speak with [redacted] and Ms. [redacted] both of whom were members of the IEP team. *See* Stip. Exh. 2, Bates p. 31 (identifying [redacted] and Ms. [redacted] as members of [redacted]s IEP team).

169. [redacted] was a member of the IEP Team as required by the IDEA, 20 U.S.C. § 1414(d)(1)(B)(i), as [redacted]s parent.

170. Principal [redacted] never spoke with her about her concerns or intentions after receipt of her July 6, 2017, email. *See* Tr. p. 199:16 – 25 & 200:1 – 3 (testimony of [redacted] indicating that she was "part of the IEP team" and "did not" hear from Principal [redacted] after she sent her July 6, 2017, email). Principal [redacted] in fact, acknowledged, "I did not respond back to her." Pet. Exh. 33, Bates p. 218 (email from [redacted] to [redacted] dated 1/19/18).

171. Respondent's employee Ms. [redacted] is identified on the May 2017 IEP as a member of the IEP Team, serving as the LEA Representative. Stip. Exh. 2, Bates p. 31 (May 2017 IEP).

172. [redacted] did not speak with Ms. [redacted] either, about the issues identified in [redacted]s July 2017 email. *See* Pet. Exh. 28, Bates p. 205 (email from [redacted] to [redacted] an employee at [redacted] High School, the school to which Respondent assigned [redacted] dated July 31, 2017, in which [redacted] indicated a lack of knowledge about [redacted]s July 6, 2017, email regarding her enrollment decision and offered to "send her an email to inquire about her intentions for enrollment").

173. Instead, Principal [redacted] communicated with Ms. [redacted] about [redacted]s July 6, 2017, email *after* Petitioners filed the Petition at issue in this case. Pet. Exh. 33, Bates p. 219 (email from [redacted] to [redacted] dated January 18, 2018 – over *six months* after [redacted]s July 6, 2017, email to [redacted] – asking [redacted] whether he had "receive[d] such an email" from [redacted] or whether he had "[spoken] to [redacted] regarding this matter" acknowledging [redacted] had no idea whether [redacted] had sent and/or [redacted] had received the July 6, 2017, email).

174. The record evidence shows that Respondent did not speak "with the IEP team" or convene a meeting of the IEP team to address and resolve [redacted]s objections to the May 2017 IEP offered for [redacted]

175. The record is silent regarding who, if anyone, Principal [redacted] spoke with regarding [redacted]s IEP, and the record is silent regarding what, if anything, those unnamed others may have said.

176. The record reflects that no one from Respondent WCPSS replied to [redacted]s July 6, 2017, email.

177. On August 24, 2017, [redacted] began school in a private placement, [redacted] Academy, where she had been able to tour the school, talk with teachers and administrators, visit a [redacted] Academy teacher's summer art class, and address her sensory and social needs with a small-class setting in a small-school environment with a low teacher-student ratio and close teacher-student relationships. *See supra* ¶¶ 150-59 & *infra* ¶¶ 941-45.

178. On December 29, 2017, Petitioners filed the Petition for a Contested Case Hearing in this case expressing, *inter alia*, the following concerns with the March 17, 2017, IEP, and seeking reimbursement for [redacted]s private placement:

a. "[D]espite the recommendation from the representative from [redacted] Academy that [redacted] required a small classroom setting, the IEP Team refused to include this modification on [redacted]s IEP" in the general-education setting. Petition p. 15, ¶ 147.
b. The IEP limited any accommodation for small class size to "her curriculum assistance class. There was no explanation provided for how [redacted]s need for small classes would be address[ed] the remaining seventy-five percent (75%) of the school day." Petition p. 15, ¶ 144.

c. "When completing the Least Restrictive Environment (LRE) justification statement on [redacted]s IEP, the IEP Team failed to provide any explanation for *why* [redacted]s services could not be delivered with nondisabled peers with the use of supplemental aids and services, and simply reported: '[redacted] will be removed from her non-disabled peers to receive small group support in organizational skills, writing, and social skills based on her documented needs.'" Petition p. 15, ¶ 150 (emphasis in original).
d. "The supplemental aids, supports, modifications, and accommodations listed by the IEP Team were insufficient to meet [redacted]s needs." Petition p. 15, ¶ 146.
e. "The IEP Team . . . discussed multiple supplemental aids and services that [redacted] required, but did not include them in the IEP, including regular check-ins throughout the day and the opportunity for [redacted] to visit the autism support teacher's classroom." Petition p. 15, ¶ 148.
f. The "five (5) IEP goals for [redacted] . . . failed to address [redacted]s unique circumstances." Petition p. 14, ¶ 137.
g. The "IEP Team refused to develop *any* math or reading goals for [redacted] Petition p. 14, ¶ 138 (emphasis in original).
h. "Though the IEP Team acknowledged it did not have enough information about [redacted]s math and reading skills, the IEP Team did not consider whether additional evaluations or data were needed to determine [redacted]s present levels of academic achievement and developmental needs." Petition p. 14, ¶ 140.
i. "The Present Levels for the IEP goals contained no baseline information against which to measure [redacted]s progress on IEP goals." Petition p. 14, ¶ 143.
j. "Despite [redacted]s diagnosis of dysgraphia and the fact that she currently received direct occupational therapy services, the IEP Team did not even consider providing [redacted] with direct occupational therapy services." Petition p. 15, ¶ 151.
k. "Though [redacted] has been diagnosed with anxiety disorder, OCD, and depression, the IEP Team did not consider including counseling or psychological services as related services." Petition p. 15, ¶ 152.
l. "Despite [redacted]s pragmatic language weaknesses, the IEP Team did not consider providing [redacted] with speech/language therapy as a related service." Petition p. 16, ¶ 154.

179. Upon receipt of this detailed Petition for a Contested Case Hearing, Respondent did not re-convene the IEP Team to determine whether any of [redacted]s identified concerns could be resolved. Instead, Respondent "adamantly maintained" that the May 2017 IEP was appropriate for [redacted] *See* Response to Petition for Contested Case Hearing, p. 12-13.

180. Petitioners challenge the IEP rejected in May 2017 and seek reimbursement for [redacted]s alternative placement. *See* Petition for a Contested Case Hearing.

Procedural History

181. Petitioners filed the Petition at issue in this appeal on December 29, 2017. In the Petition, Petitioners asserted their objections to the May 2017 IEP and identified the following violations of the IDEA, its implementing regulations, and State law:

a. "The WCPSS failed to offer [redacted] a FAPE."
b. "The WCPSS failed to develop a substantively and procedurally appropriate IEP."
c. "The WCPSS failed to develop an IEP that was reasonably calculated to enable [redacted] to make appropriate progress in light of her circumstances."
d. "The WCPSS failed to make decisions with respect to [redacted] based on her unique needs."
e. "The WCPSS failed to adequately consider evaluative and progress monitoring data when determining a placement for [redacted]"
f. "The WCPSS failed to evaluate [redacted] in conformity with the IDEA."
g. "The WCPSS failed to evaluate in all areas, including, but not limited to, all academic and cognitive areas and all areas regarding [redacted]s need for related services."
h. "The WCPSS failed to employ proper identification, evaluation, and placement procedures."
i. "The WCPSS repeatedly failed to meet the requirement of providing [redacted] with an appropriate continuum of alternative placements."
j. "The WCPSS failed to adequately consider ESY for [redacted] and summarily determined she was ineligible for such services without sufficient discussion."
k. "The WCPSS failed to employ appropriate placement procedures by predetermining [redacted]s placement."
l. "The WCPSS failed to consider or provide [redacted] with adequate related services, including, but not limited to, occupational therapy, counseling, psychological services, and parent training."
m. "The WCPSS failed to properly document or record [redacted]s Present Levels in a manner that reflected the full composite of data of [redacted]s progress, or lack thereof, that was available to the IEP team. The Present Levels did not provide any measurable baseline data against which to measure the goals or benchmarks. Rather than utilize the data available to the team, or collect data through informal assessments *before* school started, the IEP team adopted present levels that included unquantifiable terms like 'great strides' and 'great progress' to establish a baseline."

Petition, pgs. 17-18 (emphasis added).

182. On January 22, 2018, Respondent filed a Response to the Petition, asserting that "[t]he Board adamantly maintains that it developed an appropriate IEP for [redacted] during the May 19, 2017, IEP meeting. … Moreover, the Board remains confident that [redacted]s IEP could have been – and still can be – implemented at [redacted]s base school or another District school to ensure she receives the academic and emotional supports she needs." Response to Petition for Contested Case Hearing, p. 12-13.

183. On February 2, 2018, Petitioner filed a Motion to Continue the hearing date, which was granted on February 9, 2018.

184. A Notice of Definite Hearing Date set the first day of the hearing on March 19, 2018.

185. On February 9, 2018, the parties filed a Joint Motion for Entry of Protective Order.

186. On February 12, 2018, this case was reassigned to ALJ Stacey Bawtinhimer. *See* Order of Reassignment dated 2/12/18.

187. On February 21, 2018, the ALJ granted the parties' Joint Motion for a Protective Order covering certain confidential information including information related to medical, therapeutic, educational, social, behavioral, and other related services from [redacted] Academy for [redacted]

188. On March 6, 2018, Petitioners filed a Motion for Partial Summary, asking the ALJ to determine that Respondent "committed substantive and procedural violations that resulted in substantive harm." Petitioners' Motion for Partial Summary Judgement, p. 21.

189. On March 15, 2018, Respondent filed Respondent's Response in Opposition to Petitioners' Motion for Partial Summary Judgment, asserting that a "hearing is necessary to determine these disputed facts and how the law applies to them." Respondent's Response in Opposition to Petitioners' Motion for Partial Summary Judgement, p. 15.

190. On March 19, 2019, the hearing in this case commenced.

191. Petitioners presented testimony from five (5) witnesses:

Petitioner [redacted] s mother
[redacted] Ph.D., [redacted] s evaluating psychologist
[redacted] s primary therapist at [redacted] Academy for [redacted]
[redacted] s current teacher and an administrator at [redacted] Academy
[redacted] Ed.D., BCBA, expert witness

192. On March 21, 2018, Petitioners closed their case-in-chief, and Respondent made an oral Motion to Dismiss pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure, *see* Tr. p. 618:3-4 (statement of Respondent's counsel).

193. On that same date following argument of the parties, the ALJ stated her decision on Respondent's Motion to Dismiss pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure in open court, granting Respondent's motion in part and denying it in part. *See* Tr. pgs. 712-14.

194. The ALJ specified the issues that "remain[] substantively in this case are the present levels and the goals that are in the IEP, not the reading and math goals, however. The small class size is an accommodation. Predetermination of placement as far as least restrictive environment, and that includes parental participation. And there's a question about the

transition plan, so for purposes of a 41(b) I'm not going to dismiss those claims. Any questions about my ruling? I'm also not going to dismiss at this time the appropriateness of [redacted] or the parent's participation or good faith at this point."

195. On March 22-23 & 26, 2018, Respondent presented five (5) witnesses:

[redacted] WCPSS Psychologist, Expert Witness
[redacted] WCPSS Autism Support Program Lead
[redacted] WCPSS Occupational Therapist
[redacted] former WCPSS Autism Support Program teacher
[redacted] Ph.D., Expert Witness

196. On March 26, 2018, the parties offered closing arguments. Tr. pgs. 1165 – 1212.

197. The ALJ did not express an opinion in open court about the credibility of the witnesses or about the nature of her final decision following closing arguments. Tr. pgs. 1201-1212. Instead she stated that the parties' proposed orders would be due within 30 days of receipt of the transcripts, without indicating what the proposed orders should find or conclude. Tr. p. 1211.

198. On March 27, 2018, the ALJ entered a written Order on Respondent's March 21, 2018, oral motion to dismiss under Rule 41(b), stating:

> The remaining issues in the case following this Order as defined by the Undersigned are as follows:
>
> a. Whether the May 19, 2017 IEP was substantively appropriate for [redacted] based on the present levels of academic and functional performance, the functional and academic goals, exclusion of the accommodation of a cap on the number of students in the regular education classes,[14] the service delivery in the IEP, and the exclusion of a transition plan to support [redacted]s transition from a private [redacted] school to a public school;
> b. Whether Respondent violated the procedural requirements of the IDEA by predetermining [redacted]s placement in the resource setting; and,
> c. If Respondent denied [redacted] a free and appropriate public education, whether the unilateral private placement selected by the parent, [redacted] Academy, was appropriate and the equities favored private tuition and transportation reimbursement to Petitioners.

[14] This Order *changes* the ALJ's expression of the central issue in this case *from* the ALJ's initial understanding of this issue, expressed in open court on March 21, immediately following Petitioners' presentation of their case in chief, as "small class size" (that might vary in configuration and number of students depending on other variables and accommodations present in each classroom) as an "accommodation" *to* an expression of this issue as described by Respondent to be whether "exclusion of the accommodation *of a cap* on the number of students in the regular education classes" renders the May 19, 2017, IEP substantively inappropriate. Neither Petitioners nor their witnesses sought or proposed a specified class-size cap. *See infra* ¶¶ 651-67. Both Petitioners and their witnesses emphasized that the configuration of each class, including the actual number of students appropriate to create a small-class environment, would vary depending on other factors and circumstances in each room. *See infra* ¶¶ 651-60.

Order Granting, in Part, Respondent's Motion to Dismiss Pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b), p. 6.

199. Two months later, on May 22, 2018, still with nothing in the record to indicate how the presiding ALJ had intended to rule on the credibility of the witnesses or on the remaining issues in the case, the ALJ issued an Order for Proposed Final Decisions, stating "the Parties are ordered to file Proposed Final Decisions on or before June 15, 2018." Order for Proposed Final Decisions dated 5/22/18.

200. On June 15, 2018, Petitioners filed a 71-page Petitioners' Proposed Decision, finding all of Petitioners' witnesses *credible* and proposing findings of fact and conclusions of law to support a final decision in Petitioners' favor on all remaining issues. *See* Petitioners' Proposed Decision.

201. Also on June 15, 2018, Respondent filed a 59-page Respondent's Proposed Final Decision, finding all of Petitioners' witnesses of *diminished credibility* in some aspect of their testimony and proposing findings of fact and conclusions of law to support a final decision in Respondent's favor on all remaining issues. *See* Respondent's Proposed Final Decision.

202. Nearly a month later, on July 13, 2018, the ALJ invited the parties to submit additional written arguments on whether she could consider *sua sponte* a document that had not been introduced by either party during the course of the litigation, a Settlement Agreement from prior litigation between the parties. *See* Order for Discretionary Supplemental Written Argument or Modified Stipulation 8.

203. The ALJ's July 13, 2018, Order for Discretionary Supplemental Written Argument or Modified Stipulation 8 quoted language from the document the ALJ *sua sponte* reviewed and asked that the parties authorize her consideration of that language even though neither party introduced it during the course of the hearing, neither party asked the ALJ to re-open evidence in the case nearly four (4) months after the close of evidence on March 26, 2018, and neither party raised a claim or defense based upon the document (or the specific language contained within it) that the ALJ *sua sponte* considered.

204. On July 23, 2018, Petitioners objected to the ALJ's *sua sponte* review of a Settlement Agreement from prior litigation that had not been introduced or raised by either party in the current litigation, and Petitioners emphasized that the ALJ's consideration of such material for the first time *after the close of evidence* in this case implicated Petitioners' due process rights. *See* Petitioners' Supplemental Written Arguments, pgs. 2-6.

205. On July 23, 2018, Respondent affirmed the ALJ's *sua sponte* consideration of the Settlement Agreement from prior litigation that had not been introduced or raised by either party in the current litigation, and Respondent asserted that such consideration was permissible. *See* Respondent's Supplemental Written Arguments Regarding Judicial Notice, pgs 1-2.

206. On July 31, 2018, the ALJ issued the 63-page Final Decision in this case,[15] incorporating Respondent's proposed credibility findings, diminishing (as Respondent offered in Respondent's Proposed Final Decision) the credibility of *all* Petitioners' witnesses in some capacity, and finding in Respondent's favor on all remaining issues. *See* Final Decision, p. 62.

Witness Credibility

207. The ALJ's Final Decision rests on preliminary witness-credibility determinations. *See* Final Decision, pgs. 9 – 13.

208. All of Petitioners' fact witnesses had personal knowledge of and/or experience teaching, evaluating and/or serving [redacted]

a. Petitioners' witness [redacted] was [redacted]s then-current English teacher and an administrator at [redacted] Academy, and she "work[ed] with" [redacted] "[e]very day" in English class and in other school settings. Tr. p. 322:2 – 323:7 ([redacted] testimony).

b. Petitioners' witness [redacted] served as [redacted]s "primary therapist" at [redacted] Academy for [redacted] "for about a year," and in that time she "worked with [redacted] in individual and family therapy as well as social skills practice and group therapy." Tr. pgs. 123:24 – 124:4 ([redacted] testimony).

c. Petitioners' witness [redacted] a psychologist, met and evaluated [redacted] in June 2016 at the [redacted] Academy for [redacted] Tr. p. 232:18-23 ([redacted] testimony).

d. Petitioners' witness [redacted] is [redacted]s mother who has been involved in [redacted]s education throughout [redacted]s life. Tr. p. 36:4-16 ([redacted] testimony).

209. Petitioners' expert witness, [redacted] also met with [redacted] at her current educational placement, [redacted] Academy, and spoke with her about her educational experiences. Pet. Exh. 43, Bates p. 296; *see also* Tr. p. 538:16-17 ([redacted] testimony). Dr. [redacted] also spent a day at

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[15] The Final Decision included findings referencing the Settlement Agreement considered *sua sponte* by the ALJ and despite no party introducing it as evidence and despite no party raising a claim or defense related to it. The Final Decision characterized this outside-the-record document as including "comprehensive release language," but noted that "it will not be cited in this matter," Final Decision ¶ 6, before asserting that the Undersigned "interpret[s] the Parties' release stipulation as a comprehensive release such that any and all claims prior to May 1, 2017 that the *Petitioners* 'knew or should have known about' have been released, including any compensatory education claims for reading and math." *Id.* (emphasis added). Petitioners made no claim in this case for compensatory education in reading and math for periods prior to May 1, rendering it unclear why the ALJ reached outside the Official Record to render this finding. It is also unclear why the ALJ rendered this finding as if the release applied only against Petitioners and not also against Respondent. The parties' stipulated that *all claims* – whether made by Petitioners or by Respondent – that arose prior to May 1 were released. *See* Order on the Final Pretrial Conference, Initial Stipulations, ¶ 8 ("All claims arising prior to May 1, 2017 have been released by a prior settlement agreement and are outside the jurisdiction of this Tribunal.").

[redacted] Academy for [redacted] and observed [redacted] in several classes there. *See* Pet. Exh. 43, Bates pgs. 296-99; Order on the Final Pre-Trial Conference, Initial Stipulations, ¶ 51.

210. None of Respondent's witnesses had any personal knowledge of [redacted] (or experience teaching, evaluating, serving, meeting, or talking with her). One (1), however, had observed [redacted] without interacting or speaking with her while [redacted] attended [redacted] Academy for [redacted]

a. Respondent's witness [redacted] a former autism support teacher employed with Respondent WCPSS, had no memory of ever meeting [redacted] she testified as follows:

> Q [by Petitioners' counsel]: Do you recall if you've ever met [redacted]
>
> A [by [redacted] I don't think so. I don't recall, as a definite answer.
>
> Tr. p. 1098:18-20 ([redacted] testimony).

b. Respondent's witness and employee, [redacted] an occupational therapist who appeared for the originally scheduled April 2017 IEP meeting that was unilaterally cancelled by Respondent and who attended the IEP meeting ultimately held in May 2017, Stip. Exh. 4, Bates p. 35, testified that she did "not remember [redacted] at all or the meeting and was not able to access her through our EASi IEP system to try to recall what – who she was." Tr. p. 1059:13-16 ([redacted] testimony).

c. Respondent's witness and employee, [redacted] a school psychologist who attended [redacted]s May 2017 IEP meeting, acknowledged that "I've never met [redacted] Tr p. 857:2-5 ([redacted] testimony).[16]

d. Respondent's witness and employee, [redacted] an autism support program lead who attended [redacted]s May 2017 IEP meeting, not only had never met [redacted] she also had "not observe[d]" [redacted] Tr. p. 997:3.

e. Respondent's expert witness, [redacted] testified as follows on direct examination:

> Q [by Respondent's counsel]: Dr. [redacted] specifically about this case, just for the record, have you met or observed [redacted]
>
> A: I have not.
>
> Tr. p. 1120:24 – 1121:1.

211. Respondent had the opportunity to include first-person knowledge of [redacted] in the IEP-development process through its own evaluations and/or from its own teachers and service providers who had taught [redacted] throughout the more than eight years [redacted] attended

[16] Dr. [redacted] however, *observed* [redacted] without interacting or speaking with her, in classes at [redacted] Academy for [redacted] Order on the Final Pre-trial Conference, pgs. 6-7, ¶ 51.

Respondent's schools. *See* Order on the Final Pre-Trial Conference, Initial Stipulations, p. 3, ¶¶ 14-15 (recognizing that [redacted] attended Respondent WCPSS from kindergarten through part of eighth ([redacted]) grade from 2007 through March 2016).

212. Respondent declined to conduct its own evaluations of [redacted] *see* Order on the Final Pre-Trial Conference, Initial Stipulations, p. 7, ¶ 57 (recognizing that Respondent reported that "WCPSS did not require any additional data to determine continued eligibility for special education and related services" or to ensure [redacted] was able to "participate in the general curriculum").

213. Respondent also declined to engage participation by those within WCPSS who had personal knowledge of and familiarity with [redacted] *See* Order on the Final Pre-Trial Conference, Initial Stipulations, p. 3, ¶¶ 14-15 (recognizing that [redacted] attended Respondent WCPSS from kindergarten through part of eighth ([redacted]) grade from 2007 through March 2016); Stip. Exh. 2, Bates p. 31; Stip. Exh. 4, Bates p. 35 (identifying individuals present for the May 2017 IEP meeting as not including any of [redacted]s former WCPSS teachers or service providers).

214. The ALJ nonetheless found all of Respondent's witnesses fully credible, including on the appropriateness of the May 2017 IEP to meet [redacted]s unique needs that result from her disability.

215. The ALJ found all of Petitioners' witnesses to be of diminished credibility in some aspect of their testimony.

216. The factual underpinnings upon which many of the ALJ's credibility findings lie are unsupported by and/or are contrary to evidence contained in the documentary records admitted into evidence and the transcript considered in its entirety.

217. In other words, many of the facts embedded within the credibility findings cannot be reconciled with the Official Record.

218. Review Officers "who . . . ha[ve] not seen or heard [witnesses] testify," generally must defer to ALJs, or hearing officers, on questions of credibility because "hearing officer[s] . . . ha[ve] seen and heard the witness[es] testify." *Doyle v. Arlington Cty. Sch. Bd.*, 953 F.2d 100, 104 (4th Cir. 1991).

219. Review Officers in North Carolina, however, have an obligation to perform an impartial review of not only the decision of the ALJ, but also the *findings* of the ALJ, and Review Officers must ultimately make an "independent decision" based on that comprehensive impartial review. N.C. Gen. Stat. § 115C-109.9(a) ("The Review Officer shall conduct an impartial review of the *findings* and decision appealed under this section. The Review Officer conducting this review shall make an independent decision upon completion of the review.") (emphasis added).

220. Findings of fact, including findings on witness credibility, may be rejected as irregularly made if they are unsupported by an independent review of the record considered in its entirety,

particularly when the findings are contrary to documentary evidence contained in the record. *See Carlisle Area Sch. V. Scott*, 62 F.3d 520, 529-30 (3rd Cir. 1995).

221. As the Fourth Circuit recognized in *Doyle,* findings of fact by a hearing officer enjoy presumptive validity when they are "'made in a regular manner and *with evidentiary support,*'" not when they are contrary to the record evidence. *Doyle v. Arlington Cty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991) (emphasis added).

222. When a reviewing tribunal does not adhere to factual findings in the administrative proceeding, "it is obliged to explain why." *M.M. v. School Dist. of Greenville County*, 303 F.3d 523 (4th Cir. 2002) (citing *Doyle,* 953 F.2d at 105).

223. Review Officers may properly reject factual findings when those findings do not comport with the "weight of the evidence" or when a "rational basis" justifies departing from the hearing officer's findings. *See D.B. v. Craven Cty. Bd. of Educ.*, 210 F.3d 360 (4th Cir. 2000) (unpublished decision); *see also Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659, 663 n* (4th Cir. 1998); *Wittenberg v. Winston-Salem/Forsyth County Bd. of Educ.*, 2008 WL 11189389 (M.D.N.C. 2008).

224. If the "only explanation" for a Review Officer's rejection of an ALJ's factual findings offers nothing more than a summative paragraph asserting concerns with an ALJ's findings without record evidence, this may be inadequate. *See R.S. v. Board of Dir. Of Woods Charter Sch. Co.*, 2019 WL 1025630 (M.D.N.C. 2019) (Slip. Op.).

225. On the other hand, when a Review Officer presents a "reasoned analysis that provides a rational basis for departing from the ALJ's decision . . . because many of the findings of the ALJ 'were inconsistent with the record or not relevant,'" a district court may give deference to the findings and conclusions of the Review Officer rather than the ALJ. *See D.B. v. Craven Cty. Bd. of Educ.*, 210 F.3d 360 (2000) (unpublished decision).

226. In this case, the record evidence is so compelling, and of "the nature and quality that [] require[s]" departure from the ALJ's factual determinations, that the Undersigned departs from many findings of the ALJ. *See County Sch. Bd. of Henrico Cty., Va. V. Z.P.*, 399 F.3d 298, 306 (4th Cir. 2008) (finding in a single-tiered administrative process, unlike North Carolina's two-tiered administrative process, that a district court erred in rejecting findings of a hearing officer in part because the conflicting evidence in the case was "simply not of the nature or quality that would *require* the hearing officer to accept" the school's witnesses over the parents' witnesses) (emphasis added).

227. The ALJ's credibility findings in the Final Decision in this case largely mirror the proposed credibility findings drafted by Respondent and submitted by Respondent on June 15, 2018, in Respondent's Proposed Final Decision.

228. All eighteen (18) of the ALJ's credibility findings contain content taken nearly verbatim from the proposed findings drafted by Respondent and submitted on June 15, 2018, in

Respondent's Proposed Final Decision. *Compare* Final Decision, pgs. 9 – 13 and Respondent's Proposed Final Decision, pgs. 16 – 20.

229. Requesting and adopting proposed findings and decisions is a common practice and does not on its own render an ALJ's credibility determinations improper.[17]

230. Regardless of their source or inspiration, however, all findings adopted by the ALJ and included in a Final Decision must find support in the evidentiary record considered in its entirety.[18]

231. In this case, they do not.

232. Reviewing the credibility findings in the July 31, 2018, Final Decision, in the context of the evidence as it appears in the record, exposes fundamental factual flaws – flaws unrelated to subjective characteristics that might be gleaned from seeing or hearing a witness testify in person, but flaws in the objective accuracy of facts embedded within the credibility findings.

233. The credibility findings contain embedded factual errors that misstate the record evidence.

234. The credibility findings contain embedded factual errors that rely on snippets of testimony taken out of context, leading to inferences that are not supported by a review of the testimony considered as a whole and that are contrary to other documentary evidence in the record.

235. The credibility findings fail to scrutinize all witnesses by the same standards on the same issues.

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[17] The Fourth Circuit has recognized that IDEA hearing officers – "who operate 'under tight time constraints,' typically without the same level of staff support as federal courts – 'cannot be expected to craft opinions with the level of detail and analysis . . . expect[ed] from a district judge.'" *See R.S. v. Board of Dir. Of Woods Charter Sch. Co.*, 2019 WL 1025930, *4 (M.D.N.C. 2019) (citing *J.P. ex rel. Peterson v. Cty. Sch. Bd. of Hanover Cty., Va.*, 516 F.3d 254, 263 (4th Cir. 2008).

[18] On appeal, Respondent complimented the Final Decision as "thorough and detailed," *see* Written Arguments on Appeal to State Hearing Review Officer p. 1, and emphasized that the ALJ "laid out in great detail *her* assessment of each witness's credibility," *id.* at 12 (emphasis added). Respondent thus argued that the Undersigned should and must defer to those credibility findings because the ALJ had the advantage of hearing the testimony first hand such that her determinations flowed from a typical fact-finding process designed to discover the truth. To support this argument, however, Respondent offered no record support for the factual assertions embedded within the credibility findings, beyond the findings themselves, to demonstrate that they flowed from a typical fact-finding process. And Respondent failed to acknowledge that the findings largely originated in Respondent's Proposed Final Decision, *not* in determinations expressed initially by the ALJ herself. The ALJ gave no indication during the hearing that it was *her* assessment that the Petitioners' witnesses lacked credibility, and the ALJ gave no indication at the close of the hearing or in the Order for Proposed Decisions about how she intended to rule. The Undersigned cannot determine from the record *on what basis* Respondent decided to draft credibility findings diminishing Petitioners' witnesses' credibility other than Respondent's general position that Respondent should prevail, and Petitioners should not. This is especially so because the factual assertions embedded in the credibility findings are contrary to record evidence, and the ALJ herself did not express such findings on the record.

236. Ultimately, a number of the findings and assertions – both on witness credibility and on other material facts – are wrong.[19] A sampling of such fundamental errors includes the following:

a. The Final Decision finds that Respondent's expert witness, Dr. [redacted] **was** "received as an expert in educational planning for students with autism," citing the transcript at page 751, lines 5-8. Final Decision, p. 11, ¶ 24; *see also* Respondent's Proposed Final Decision ¶ 13.

I. This is incorrect. Dr. [redacted] was **not** received as an expert in educational planning for students with autism. The Final Decision is wrong. *See* Tr. p. 751:5-8 (expressly ruling that [redacted] "will **not** be received as an expert in educational planning for students with autism") (emphasis added).[20]

b. The Final Decision finds that Petitioners' "Petition was not presented as an 'inclusion [LRE] case.'" Final Decision, Findings of Fact, ¶ 181 (citing to the transcript at pages 814:4-817:6).

I. This is incorrect. This statement is contradicted by both documentary and testimonial evidence in the record. *See, e.g.,* Petition for a Contested Case Hearing (Special Education), p. 15, ¶¶ 150, 149, & 144; *See* Tr. pgs. 799:21-24 *and* 813:24-814:3.

II. The Petition initiating this case identifies inclusion as an issue. It alleges as follows: "When completing the Least Restrictive Environment (LRE) justification statement on [redacted]s IEP, the IEP Team failed to provide any explanation for *why* [redacted]s services could not be delivered with nondisabled peers with the use of supplemental aids and services, and simply reported: '[redacted] will be removed from her non-disabled peers to receive small group support in organizational skills, writing, and social skills based on her documented needs.'" *See* Petition for a Contested Case Hearing (Special Education), p. 15, ¶¶ 150, 149, & 144.

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[19] Neither this finding nor this Decision identifies all the factual errors in this decision. The number of errors, including those detailed in this Decision and those not specifically detailed, raise doubt about the soundness of the Final Decision as a whole. This is especially so because many of errors reflect misunderstanding associated with "the heart of this case" regarding inclusion in the general-education setting and "whether these services can be provided in the general education setting." *See* Tr. p. 814:1-3 (clarifying that this *is* an inclusion case after the ALJ and Respondent expressed confusion about that and stating that the "heart of this case is whether these services can be provided in the general education setting as the parent requested").

[20] Although the Final Decision incorrectly extended the expertise of Respondent's witness, Dr. [redacted] beyond her credentials, the ALJ did the *opposite* with respect to Petitioners' expert, Dr. [redacted] during the hearing. After having already received Petitioners' expert as an inclusion expert, the ALJ seemed confused and asserted that Petitioners' expert witness, Dr. [redacted] was "**not** an inclusion expert in this case," Tr. p. 810:23-24 (emphasis added), and that there was "no specific evidence as far as there being no research about segregating students with autism in this case," Tr. p. 811:17-19. This was incorrect. Dr. [redacted] **was** received as an inclusion expert, and specific evidence about segregation of students with autism **was** presented. The Court was wrong on both points. Dr. [redacted] **was** received *without any objection* as an expert on inclusion practices for children with autism. Tr. p. 453:10-454:15. And Dr. [redacted] **did** testify about research on segregating students with autism. Tr. p. 520:17 – 521:9. The ALJ resolved her confusion about Dr. [redacted] expertise before the close of evidence, however, and the Final Decision recognized Dr. [redacted] expertise in inclusive practices for children with autism.

III. The Petition initiating this case asserts, *inter alia*, that Respondent violated the IDEA through its failure to offer a FAPE in the LRE when "The WCPSS repeatedly failed to meet the requirement of providing [redacted] with an appropriate continuum of alternative placements." *See* Petition for a Contested Case Hearing (Special Education), p. 17, ¶ 9.

IV. Even before Petitioners filed their Petition, at the May 2017 IEP meeting, Petitioners raised inclusion concerns. One of *Respondent's* witnesses, who was also a member of [redacted]s IEP Team, acknowledged in her testimony that she understood that this case was about access to "regular education" with nondisabled peers. *See* Tr. p. 799:21-24 (offering testimony by Dr. [redacted] in which she stated that "regular education" was the "aspect of [[redacted]s] day" about which Petitioners were most concerned, particularly with respect to class-size accommodations that would allow her to remain in the regular-education setting, and acknowledged that there was "[p]retty extensive" discussion about this at the May 2017 IEP meeting).

V. At the hearing itself, when the question of inclusion arose, Petitioners' counsel was clear in confirming that inclusion is an issue at "the heart of this case" and that Petitioners raised the question of "whether these services can be provided in the general education setting as the parent requested." Tr. p. 813:24-814:3.

VI. The ALJ briefly recognized Petitioners claims regarding inclusion in the least restrictive environment when she acknowledged on the record that the central issue in this case is "[*w]hether these services can be provided in the general education setting* in a small – in small classes." Tr. p. 814:4-6 (emphasis added). The Final Decision's contrary assertion is wrong.

c. The Final Decision finds that Petitioner [redacted] "did not allow school staff to communicate directly with the private therapeutic school staff," Final Decision, p. 2.

I. This is also incorrect. This statement is contradicted by the documentary evidence in the record; by the testimony of Respondent's staff (Ms. [redacted] and Dr. [redacted] who visited [redacted] Academy for [redacted] "the private therapeutic school," and spoke directly with educators there; by the Director at the "private therapeutic school" who called into the May 2017 IEP meeting and communicated directly with Respondent's staff at [redacted]s request without any objection by [redacted] and by subsequent findings in the Final Decision itself. The Final Decision is wrong.

II. The documentary evidence in the record reflects that Petitioner [redacted] *offered in writing* permission for Respondent to communicate with [redacted]s private-school teachers in an email in advance of the May 2017 IEP meeting. *See* Pet. Exh. 23, Bates p. 188 ("If it would be helpful to the WCPSS to prepare for the meeting, I am willing to give you permission to speak with someone from [redacted] directly about [[redacted]s] transition needs prior to the meeting.").

III. Respondent's employee and member of [redacted]s IEP Team, Dr. [redacted] testified: "So I went to [redacted] and I … met with the staff at [redacted] Academy for [redacted] where they gave us an overview of the school. I also met with [redacted] who was the – lead teacher I think was her role. And she talked to

me pretty extensively about the overview of the school, the supports that [redacted] needed." Tr. p. 757:13-22.

IV. Respondent's employee and member of [redacted]s IEP Team, [redacted] also testified that she visited [redacted] Academy for [redacted] where she communicated with the private therapeutic school staff. Tr. p. 949:21-24 (testimony of Ms. [redacted] that she went to "visit [redacted] Academy").

V. The Parties stipulated that "[redacted] and Dr. [redacted] (for WCPSS) . . . visited [redacted] to gain information about the program." Order on the Final Pretrial Conference, Initial Stipulations ¶ 51.

VI. Respondent's Written Arguments on Appeal emphasize that Respondent's employee and expert witness at the hearing, [redacted] "spoke 'extensively' with Ms. [redacted] [of [redacted] Academy for [redacted] about their programming for [redacted] during a visit prior to the May 2017 IEP meeting. *See* Respondent's Written Arguments on Appeal, p. 26.

VII. Respondent explained in Respondent's Written Arguments on Appeal that "The IEP team had appropriate information on which to base its decisions," p. 23, and that this information included "input from [redacted]s educators" at [redacted]s private school, and observations of [redacted] by Respondent's staff while [redacted] was in her private placement at that private school. Respondent's Written Arguments on Appeal, p. 23.

VIII. At Petitioners' request, [redacted] the Academic Director of Learning and Support at [redacted]s "private [redacted] school," called into the May 2017 IEP and communicated directly with all IEP Team members, including both [redacted] and Respondent's employees, without any objection by [redacted] *See* Stip. Exh. 4, Bates p. 35-36 (recognizing in Respondent's May 2017 IEP meeting minutes that "At 10:10 a.m., [redacted] Director of Learning & Support, from [redacted] called into the meeting. . . . and share[d] interventions [redacted] found to be effective").

IX. The Final Decision itself recognizes that "three WCPSS staff members . . . visited [redacted] Academy to obtain information about the program and observe [redacted] in March 2017, before the May 2017 IEP meeting. Final Decision ¶ 86.[21]

X. A factual assertion that [redacted] "did not allow" such interaction and communication is contradicted by the record evidence and is wrong.

237. This Decision does not itemize all of the erroneous factual findings in the Final Decision.

238. In the immediately following findings this Decision offers the "rational basis" in the record evidence to depart from some of the Final Decision's most notable factual errors in its credibility findings, particularly regarding the parties' experts, Petitioner [redacted] and the psychologist who evaluated [redacted] considering first Petitioners' witnesses and next Respondent's witnesses.

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[21] This finding, however, is only partially correct. While three (3) of Respondent's employees visited [redacted] Academy for [redacted] the record evidence reflects that *only one (1)* of those employees observed [redacted] *See, e.g.*, Order on the Pretrial Conference, Initial Stipulations, ¶ 51.

Petitioners' Witnesses

239. Petitioners offered five (5) witnesses:

- Dr. [redacted] Ed.D., BCBA,
- Dr. [redacted] Ph.D.,
- [redacted]
- [redacted] and
- [redacted] (Petitioner and [redacted]s mother).

240. The ALJ found 100% of Petitioners' witnesses to be of diminished credibility in some aspect of their testimony. *See* Final Decision pgs. 9 – 11.

241. A review of the record as a whole, giving particular attention to the documentary evidence, demonstrates that all of Petitioners' witnesses were fully credible on the matters about which they testified.

242. The Undersigned rejects the ALJ's findings that Petitioners' witnesses are of diminished credibility; those findings contain embedded factual assertions that are unsupported by, and contradicted by, the evidence in the record.

243. The immediately following findings resolve the record evidence regarding the credibility of Dr. [redacted] (Petitioners' expert), Dr. [redacted] ([redacted]s private evaluator), [redacted] ([redacted]s primary therapist at [redacted] Academy for [redacted] [redacted] ([redacted]s English Teacher and an administrator at [redacted] Academy), and [redacted] ([redacted]s mother).

Dr. [redacted]

244. Dr. [redacted] Ed.D, BCBA, was admitted as an expert witness in the following areas:

a. Inclusive practices for students with autism spectrum disorder;
b. Positive behavior intervention supports for students with disabilities;
c. Applied behavior analysis;
d. Functional behavioral assessments and behavior intervention plans;
e. Co-teaching;
f. IEP development;
g. Progress monitoring;
h. Multi-tiered system of support for students with disabilities; and
i. Evidence-based practices for students with autism spectrum disorders.

Tr. pg. 454:4-13.

245. Respondent did not object to "any of the areas in which [Dr. [redacted] was] asked to be received as an expert." Tr. p. 453:12-14. The following relevant exchange took place after Petitioners' counsel tendered Dr. [redacted] as an expert:

Mr. Rawson [counsel for Respondent]: No objection, Your Honor.

The Court: No objection to any of the areas in which she's being asked to be received as an expert?

Mr. Rawson: No objections.

246. Dr. [redacted] holds three relevant degrees: a B.Ed. from the University of Florida (1995) in exceptional student education/emotional disturbance and intellectual disabilities, a M.Ed. from the University of Florida (1996) in exceptional children education/emotional disturbance and intellectual disabilities, and an Ed.D. from Florida Atlantic University (2007) in exceptional student education/inclusion, autism spectrum disorders, early intervention. Pet. Exh. 39, Bates p. 252 (Dr. [redacted] CV).

247. Dr. [redacted] has spent over two decades working in, with, and around elementary and secondary schools and teachers, collaborating in efforts to effectively educate children with disabilities. *Id.*

248. Dr. [redacted] has been a certified teacher in Florida, Tr. p. 446:14-17, and for four years she served as an Exceptional Student Education Teacher / General Education Teacher at Sunshine Elementary School in Florida. Pet. Exh. 39, Bates p. 253 (Dr. [redacted] CV).

249. Dr. [redacted] has worked as an Inclusion Specialist at A.D. Henderson Laboratory School where she "[p]rovided support facilitation and co-teaching in inclusive classrooms," "[d]elivered effective teaching workshops to staff members," "[f]acilitated the child study process, administered ESE screenings, and coordinated IEP development." Pet. Exh. 39, Bates p. 253 (Dr. [redacted] CV).

250. Dr. [redacted] has served as a Beginning Teacher Supervisor with Florida Atlantic University's Accelerated Introduction to Teaching program where she supervised beginning teachers in Florida. Pet. Exh. 39, Bates p. 253 (Dr. [redacted] CV).

251. Dr. [redacted] has served as the Associate Director of the Florida Atlantic University Center for Autism and Related Disabilities where she "provided support to schools, community groups, and families to help them meet the needs of individuals with autism across the life span." Tr. p. 446:8-13; *see also* Pet. Exh. 39, Bates p. 252 (Dr. [redacted] CV).

252. Dr. [redacted] is a board-certified behavior analyst who "implement[s] principles of applied behavior analysis and support[s] others who are doing the same." Tr. p. 446:12-23. In this capacity Dr. [redacted] does "work around functional behavior assessment and behavior intervention planning and implementing in natural settings using A[B]A principles." Tr. p. 446:24-25 and 447:1.

253. Dr. [redacted] now lives in Matthews, North Carolina, and serves as an assistant professor of special education at Winthrop University. Pet. Exh. 39, Bates p. 252 (Dr. [redacted] CV). She has held this position since 2007. *Id.*

254. In her role as an assistant professor of special education, Dr. [redacted] serves as the program director for the university's undergraduate special education programs. She also serves as the project director for the university's Winthrop Think College Program, "a fully inclusive post-secondary program for individuals with intellectual and developmental disabilities ages 18 and over." Pet. Exh. 39, Bates p. 252 (Dr. [redacted] CV).

255. She instructs future teachers at both the undergraduate and graduate level in the following relevant courses:

SPED 281: Introduction to Special Education
SPED 293: ABA Intervention: Learners with Autism Spectrum Disorders
SPED 392: Severe Disabilities Practicum
SPED 382: Characteristics of Intellectual Disabilities and ASD
SPED 390: Field Experience in Special Education
SPED 391: Assessment in Special Education
SPED 202: Supporting the Student with a Disability in the General Education Classroom
SPED 401: Professional Ethics in Special Education
EDUC 401: Internship I: Understanding Contextual Factors
EDUC 402: Internship II: Assessment and Instruction
EDUC 475: Internship in Reflective Practice
SPED 510: Positive Behavioral Interventions and Supports for the Classroom Teacher
SPED 575: Educational Procedures for Students with Mental Disabilities and Severe Disabilities
SPED 585: Methods of Teaching Students with ID, LD, EBD, and ASD
EDUC 610: Teaching Exceptional Learners in Inclusive Settings
SPED 610: Positive Behavior Interventions and Support
SPED 671: Advanced Assessment in Special Education
WPDC 595: Teaching Students with ASD in Inclusive Classrooms
WPDC 595: ABA Teaching in Inclusive Classrooms

Pet. Exh. 39, Bates p. 253-4 (Dr. [redacted] CV).

256. Dr. [redacted] has published three (3) books on educating children with autism spectrum disorders. Her most recent book, published in 2017 by Brooks Publishing, is titled Behavioral Support for Students with Autism Spectrum Disorders. Pet. Exh. 39, Bates p. 254 (Dr. [redacted] CV); *see also* Tr. p. 445:5-14.

257. Dr. [redacted] explained that "the purpose of writing that book was to help practitioners understand how to implement multi-tiered systems of support using evidence-based practices

to address the needs of students on the autism spectrum primarily in inclusive settings, but in any setting for that matter." Tr. p. 445:8-14.

258. Dr. [redacted] has contributed chapters to two (2) other books in addition to the three (3) books she authored on her own. Dr. [redacted] chapter in Professional Development in School Research offered strategies "to improve the academic achievement of middle-school students (including those with special needs) by instituting school-wide co-teaching" and utilizing a "university-school partnership." Pet. Exh. 39, Bates p. 254 (Dr. [redacted] CV). Dr. [redacted] chapter in Blended Curriculum in the Inclusive K-3 Classroom provided strategies for "organizing the inclusive classroom for grades K-3." Pet. Exh. 39, Bates p. 254 (Dr. [redacted] CV).

259. Dr. [redacted] has published fourteen (14) articles and two (2) manuals, on topics relevant to her areas of identified expertise including on "[s]upporting students with autism spectrum disorders in inclusive settings." *See* Pet. Exh. 39, Bates p. 254-56 (Dr. [redacted] CV); *see also* Tr. p. 445:15-19.

260. Dr. [redacted] has delivered over 70 presentations relevant to her areas of identified expertise at various conferences, institutes, and conventions internationally, nationally, and locally, including presentations on "Using Positive Behavioral Interventions and Supports to Help Students Who Are Wired Differently Succeed in Inclusive Classrooms" and "Research-Based Interventions to Help Students who are Wired Differently Succeed in Inclusive Classrooms." *See* Pet. Exh. 39, Bates p. 256-63 (Dr. [redacted] CV); Tr. pgs. 445:21-25 and 446:1-2.

261. Dr. [redacted] "research agenda focuses primarily on trying to eliminate the divide between the research to practice implementation . . . using evidence-based practices to promote inclusion of students with autism spectrum disorders and other disabilities using multitiered systems of support, behavior analysis, PBIS, those kinds of things." Tr. p. 447:3-9.

262. As an assistant professor, in addition to her own teaching and scholarship, Dr. [redacted] reviews relevant research and scholarship from across the globe through her service as a Member of the Editorial Review Board for four (4) journals publishing special education scholarship nationally and internationally. She currently serves as a Member of the Editorial Review Board for:

- *Special Education, Research, Policy, and Practice*;
- *Journal of the American Academy of Special Education Professionals*;
- *Intervention in School and Clinic*; and
- *International Journal of Inclusive Education.*

Pet. Exh. 39, Bates p. 264 (Dr. [redacted] CV).

263. Dr. [redacted] also remains an active leader in a variety of non-profit organizations associated with special education and special educators. She serves as the current President of the South Carolina CEC Division on Autism and Developmental Disabilities, a position she has held since 2015. *See* Pet. Exh. 39, Bates p. 264-65 (Dr. [redacted] CV).

264. Dr. [redacted] further engages in consulting work with school districts, "primarily" in North Carolina, on a regular and as-needed basis. Tr. p. 438:1-2. As she explained in her testimony, "I consult with some districts on a regular basis and other districts on an as-needed basis to address specific issues." Tr. p. 437:21-25.

265. Dr. [redacted] has received a number of honors and awards recognizing her achievements in education, research, and service. Pet. Exh. 39, Bates p. 267 (Dr. [redacted] CV).

266. Although Dr. [redacted] has extensive experience working *with* public schools, serving as a teacher and administrator, training public school teachers, and consulting with school systems in North Carolina on special education issues, Dr. [redacted] has *not* developed an extensive practice serving as an expert in due process litigation. In fact, Dr. [redacted] testified that she has served as an expert witness only once before the appeal under consideration here. Tr. p. 549:6 (Dr. [redacted] testimony on cross examination).

267. Dr. [redacted] explained why she has served as an expert witness in special education hearings only once before as follows:

> Q [by Respondent's counsel]: This is not your first time testifying in a special education hearing, is it?
>
> A [by Dr. [redacted] No, I testified one time before. ***I would much rather be on the side of helping schools than sitting here, to be honest.***
>
> Tr. p. 549:4-8 (emphasis added).[22]

268. The ALJ found, as does the Undersigned, that Dr. [redacted] is not only "very knowledgeable in her areas of expertise;" but also "had specific knowledge about [redacted] Final Decision p. 9, Finding of Fact ¶ 12.

269. Dr. [redacted] reviewed [redacted]s educational records including [redacted]s IEPs, her evaluations, and work samples. Tr. pg. 449:14-19; *see also* Pet. Exh. 43, Bates p. 294-99 (reports prepared by Dr. [redacted]

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[22] Following this exchange, the Court interrupted Respondent's cross examination of Dr. [redacted] to ask Respondent's counsel whether the one other case in Dr. [redacted] over-twenty-year career in which Dr. [redacted] served as an expert witness "was . . . the [redacted] case." Tr. p. 549:15-16. Respondent's counsel responded, "I – that is my recollection, Your Honor." Tr. p. 549:17-18. Neither Respondent's Counsel, nor the Court, offered any explanation of why the "[redacted] case" is relevant to this one. Neither Respondent's Counsel nor the Court asked Dr. [redacted] whether they were correct in speculating about the one instance in which Dr. [redacted] previously testified as a witness. Neither Respondent's Counsel nor the Court shared any insight about why "[redacted] case" should be considered in the context of Dr. [redacted] testimony here. The record reflects no relevance in the Court's and Respondent's Counsel's shared recollection that Dr. [redacted] previously testified in the "[redacted] case," and the record reflects no relevance in the Court's and Respondent's Counsel's shared recollection regarding the "[redacted] case" to the credibility of Dr. [redacted] in the current matter. The relevance of the exchange quoted here is that on cross examination about the one instance in which Dr. [redacted] previously testified, Dr. [redacted] expressed a preference for being a professional educator "on the side of helping schools" as opposed to being an expert witness in litigation.

270. Dr. [redacted] observed [redacted]s educational settings and met with [redacted]s teachers twice — once at [redacted] Academy for [redacted] and once at [redacted] Academy. Tr. pg. 449:10-13; *see also* Pet. Exh. 43, Bates p. 294-99 (reports prepared by Dr. [redacted]

271. Dr. [redacted] "observed [[redacted] at the [redacted] Academy for [redacted] ([redacted] on March 29, 2017. [She] observed [[redacted] in physical education, math, snack, and history. She also observed a training for staff on the overall therapeutic framework used at [redacted] and met with the executive director ([redacted] (Academic Director), and [redacted] (therapist) to ask specific questions about the program and [[redacted]s growth over the past year." Pet. Exh. 43, Bates p. 297 ([redacted] Academy for [redacted] Observational Report prepared by Dr. [redacted]

272. Dr. [redacted] spent a day at [redacted] Academy on March 12, 2018, where she met with [redacted]s English teacher early in the day, went on a tour, and met with the English teacher and school administration for a question and answer session at the end of the day. Pet. Exh. 43, Bates p. 294 ([redacted] Academy Observation Report prepared by Dr. [redacted] Tr. p. 538:25 – 539:1 - 19.

273. Although Dr. [redacted] did not observe [redacted] in a classroom at [redacted] Academy, Dr. [redacted] met individually with [redacted] and had a brief conversation with [redacted] during her visit to [redacted] Academy. Tr. pg. 449:12-13. Dr. [redacted] observation report states as follows regarding this conversation: "When I met with [redacted] she indicated that she feels that [redacted] Academy is meeting her needs because the teachers provide detailed instruction for assignments and explain the material in a way that she can understand. [redacted] wants to succeed and is appreciative of the individualized instruction and support she receives at [redacted] Academy." Pet. Exh. 43, Bates p. 296 ([redacted] Academy Observation Report prepared by Dr. [redacted]

274. Dr. [redacted] wrote two reports based on her review of [redacted]s educational records, her observations of [redacted] her conversation with [redacted] and her conversations with [redacted]s teachers and administrators at [redacted] Academy for [redacted] and [redacted] Academy. *See* Pet. Exh. 43; Tr. p. 20-24.

275. Dr. [redacted] extensive, relevant educational background, experience in public schools, research and peer-reviewed scholarship, consulting with public schools (including with North Carolina's public schools), training of future teachers, etc., and her knowledge of [redacted] qualify her as an expert in this case in the areas in which she was received:

a. Inclusive practices for students with autism spectrum disorder;
b. Positive behavior intervention supports for students with disabilities;
c. Applied behavior analysis;
d. Functional behavioral assessments and behavior intervention plans;
e. Co-teaching;
f. IEP development;
g. Progress monitoring;
h. Multi-tiered system of support for students with disabilities; and
i. Evidence-based practices for students with autism spectrum disorders.

Tr. pg. 454:4-13.

276. Despite this extensive, relevant professional expertise and individual knowledge about [redacted] the ALJ found that "Dr. [redacted] credibility in this hearing was diminished by several aspects of her testimony." Final Decision, p. 9, Finding of Fact ¶ 13.

277. These asserted bases for diminished credibility were not expressed at the hearing; they appeared for the first time in Respondent's Proposed Final Decision; and they are not supported by an independent review of the Official Record considered as a whole.

278. The ALJ identified the following three aspects of Dr. [redacted] testimony as diminishing of her credibility:

> (1) "Dr. [redacted] repeatedly applied assumptions and perceptions that she had about public schools in general to this specific IEP without any personal knowledge or experience with the high school or IEP team members in question," Final Decision, p. 9, Finding of Fact ¶ 13;
> (2) "Dr. [redacted] opined that the entirety of the proposed IEP was inappropriate and would acknowledge only two appropriate supports: preferential seating and extended time," Final Decision, p. 9, Finding of Fact ¶ 14; and
> (3) "[A]lthough IEP implementation is not at issue in this case, Dr. [redacted] repeatedly surmised that the District would not, and could not, implement the IEP at issue," Final Decision, p. 10, Finding of Fact ¶ 15.

279. These expressed "diminishing" credibility findings are not based on characteristics about the witness's demeanor; instead, the expressed points of "diminishing" credibility contain factual assertions about the content of testimony and documentary evidence offered. Such factual assertions can be reviewed on appeal through a review of the transcript and related documentary evidence.

280. These findings asserting factual bases for diminishing Dr. [redacted] credibility based on her testimony are addressed one at a time in the following paragraphs.

281. The first asserted discrediting "fact" in the Final Decision, that "Dr. [redacted] repeatedly applied assumptions and perceptions that she had about public schools in general to this specific IEP without any personal knowledge or experience with the high school or IEP team members in question," is flawed for multiple reasons.[23]

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[23] This finding, that "Dr. [redacted] repeatedly applied assumptions and perceptions that she had about public schools in general to this specific IEP without any personal knowledge or experience with the high school or IEP team members in question," originates in the Proposed Decision offered by Respondent. *Compare* Respondent's Proposed Decision, p. 17, ¶ 8 (stating "Dr. [redacted] repeatedly applied assumptions and perceptions that she had about public schools in general to this specific IEP without any personal knowledge or experience with the high school or IEP team members in question") with Final Decision p. 9, Finding of Fact ¶ 13 (also stating "Dr. [redacted] repeatedly applied assumptions and perceptions that she had about public schools in general to this specific IEP without any personal knowledge or experience with the high school or IEP team members in question").

282. To evaluate the inaccuracy in this factual finding, the Undersigned breaks it down into four discrete points of error:

- first, the error in the assertion that the testimony cited reflects repetition;
- second, the error in the assertion that Dr. [redacted] lacked "any personal knowledge or experience with the high school or IEP team members in question;"
- third, the error in the assertion that Dr. [redacted] "applied assumptions and perceptions … to this specific IEP;" and
- finally, the error in the implication created through the overall assertion.

283. First, the assertion that Dr. [redacted] "repeatedly" applied any "assumptions and perceptions" to this specific IEP is not supported by an independent review of the record taken as a whole or by the specific authority offered in this Finding of Fact. The sole piece of record evidence offered to support this entire finding is a citation to the following sentence in Dr. [redacted] extensive testimony:

> I often see that these students are left to either be homeschooled or go to private schools because we don't have structures like that in place in a lot of public schools.
>
> Tr. p. 530:9-12.

284. This record evidence, the statement of Dr. [redacted] at lines 9 through 12 on page 530, does not support an assertion that Dr. [redacted] "repeatedly" applied "assumptions and perceptions" to this IEP.

285. Rather than repeating any assumption or perception and applying it to this IEP, this sentence in Dr. [redacted] testimony makes a single summative observation based on Dr. [redacted] extensive experience, *see supra* ¶¶ 244-65, over a decades-long career with many public schools. It does not make any assertion about this specific IEP.

286. The Undersigned's independent review of the record in its entirety, and of the parties' written arguments on appeal, found no record evidence to support the assertion of "repeated[]" – or any single instance of – improper application of "assumptions and perceptions" to this IEP as stated in Finding of Fact 13.

287. Instead, Dr. [redacted] asserted: "I don't think it's fair to assume [] at all." Tr. p. 579:25-580:6.

288. When Dr. [redacted] was specifically invited by Respondent's counsel on cross examination to apply an assumption about what the "professional educators" would do in this case, Dr. [redacted] refused as follows:

> Q [by Respondent's counsel]: And is it fair to assume that a professional educator would apply the same judgment that the [redacted] folks are?

A [by Dr. [redacted] No. I don't think it's fair to assume that at all. I've been in schools a long time to know that teachers can interpret things in 80 different ways if we're not specific.

Tr. p. 579:25 – 580:6.

289. An independent review of record does not support, and affirmatively contradicts, the "finding" that Dr. [redacted] "repeatedly" applied "assumptions and perceptions" to this IEP.[24]

290. The remainder of Finding of Fact 13 is also incorrect on the substantive points embedded within it as well as in its overall implication. The following paragraphs review each embedded point and the overall implication one at a time.

291. The substance of Finding of Fact 13 is incorrect when it asserts that Dr. [redacted] did not have "any personal knowledge or experience with the high school or IEP team members in question." *See* Final Decision p. 9, Finding of Fact ¶ 13.

292. The record reflects Dr. [redacted] *did* have knowledge of and experience with "IEP team members in question" and she *did* have knowledge of the Respondent's high school, including knowledge of the programs generally available there and of the services and supports specifically provided for implementation for [redacted] through her IEP.

293. Dr. [redacted] had knowledge of and experience with "IEP team members in question," members of [redacted]s May 2017 IEP Team.

294. The record evidence reflects that Dr. [redacted] personally met and spoke with multiple members of [redacted]s May 2017 IEP Team, and she reviewed documentary material not only provided by [redacted] but also created and provided by Respondent's employees on [redacted]s IEP Team.

295. The IEP Team included [redacted] and six employees of Respondent, including Ms. [redacted] (LEA Representative), Ms. [redacted] (Regular Education Teacher), Ms. [redacted] (Special Education Teacher), Ms. [redacted] (Special Education Teacher), Ms. [redacted] (Occupational Therapist), and Ms. [redacted] (Psychologist). Stip. Exh. 2, Bates p. 31.

296. Dr. [redacted] met and spoke with [redacted] a required member of the IEP Team pursuant to 42 U.S.C. § 1414(d)(1)(B)(i).

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[24] The Undersigned recognizes that at the close of her testimony, on re-cross examination by Respondent's counsel, Dr. [redacted] expressed a personal "assumption" based on her reading of [redacted]s educational records. Dr. [redacted] explained because [redacted] Academy for [redacted] documented in its reports that [redacted] made progress in writing and "there was no indication that she was making any regression in her writing, so *I* would assume that she wasn't." Tr. p. 611:16-18 (emphasis added). This "assumption" that [redacted] did not regress in writing at [redacted] Academy for [redacted] based on a review of progress reports from [redacted] Academy for [redacted] was her own. Dr. [redacted] did *not* impose any "assumption" that [redacted] made progress in writing at [redacted] Academy for [redacted] on any of Respondent's employees. Others reached the same conclusion about [redacted]s writing progress on their own, and Dr. [redacted] personal "assumption" was consistent with the opinions of all who testified and with the documentary evidence in the record. *See supra* ¶¶ 31-32.

297. Dr. [redacted] discussed [redacted]s educational background and needs with [redacted] and Dr. [redacted] reviewed documentation provided by [redacted] *See* Pet. Exh. 43, Bates p. 296 (stating in a report prepared by Dr. [redacted] that she "reviewed [redacted]s educational records, met with [redacted] and talked with [redacted]s mother," [redacted] and describing some of what Dr. [redacted] learned in conversation with [redacted]

298. This knowledge of and experience with [redacted] reflects, contrary to the assertion in Finding of Fact 13, "personal knowledge of . . . [an] IEP Team member[] in question."

299. Dr. [redacted] also met with at least one of Respondent's employees who was also an IEP Team member, [redacted] (Special Education Teacher), when Dr. [redacted] and "school district representatives," visited [redacted] Academy to gain information about the program there. *See* Tr. p. 538:23-539:2 ([redacted] testimony that she toured [redacted] "with the school district representatives"); Tr. p. 987:15-20 ([redacted] testimony that she was one of the school-district representatives to toured [redacted] Academy and that she met [redacted]s "educational consultant" there).

300. This knowledge of and experience with Ms. [redacted] and potentially other "school district representatives," while touring [redacted] Academy, reflects, contrary to the assertion in Finding of Fact 13, "personal knowledge" of an "IEP Team member[] in question."

301. Dr. [redacted] also reviewed educational records, including records prepared by Respondent's employees on [redacted]s IEP Team and WCPSS publications describing Respondent's special education programs, to gain the perspective of Respondent's employee-members of [redacted]s IEP Team. *See, e.g.*, Stip. Exh. 43, Bates p. 296 (offering Dr. [redacted] statement that "I have reviewed [redacted]s educational records"); Tr. p. 449:14-15 (stating that [redacted] reviewed the IEPs Respondent prepared for [redacted] Tr. p. 525 (recognizing that Dr. [redacted] reviewed Respondent's Prior Written Notice); Tr. p. 534 (recognizing that Dr. [redacted] reviewed Respondent's special education program descriptions). This reflects, again, contrary to the assertion in Finding of Fact 13, "knowledge [of] . . . IEP Team members in question."

302. Finding Dr. [redacted] of diminished credibility on the basis that she did not have "any personal knowledge or experience with ... IEP team members in question" is not supported by the record. It is affirmatively refuted by the evidence in the record taken as a whole.[25]

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[25] The Undersigned recognizes that in diminishing Dr. [redacted] credibility for failing to have adequate knowledge of Respondent on this record evidence, ALJ holds Petitioners' expert witness, Dr. [redacted] to a different standard than that of Respondent's witnesses – both expert and fact. Dr. [redacted] familiarity with Respondent's schools and programs comes from her review of documentation published by Respondent, her review of [redacted]s educational record from her years in Respondent's schools, her review of the work product created by [redacted]s IEP Team members regarding [redacted]s IEP, and her conversations with WCPSS employees, [redacted] and [redacted] For the ALJ to find this level of familiarity as insufficient to give her credible knowledge of Respondent's program, but at the same time to find *all of Respondent's witnesses to be fully credible* on [redacted]s unique needs arising from her disabilities even though they had never met, taught, or evaluated [redacted] and relied exclusively on a review of documents, one impersonal observation of [redacted] and information provided by others to develop some knowledge of her educational needs, is contradictory. It indicates an application of a different standard to Dr. [redacted] as compared to Respondent's witnesses.

303. The record reflects that Dr. [redacted] had personally met and shared relevant experience with at least two (2) members of the IEP Team, and it also reflects that she reviewed [redacted]s educational records, including those produced by IEP Team members. Through these personal interactions and document reviews, she gained knowledge of and experience with the "IEP team members in question."[26]

304. The record reflects that Dr. [redacted] also had knowledge of the high school "in question" in this case, including knowledge of the facts relevant to the primary issue in this case, the relevant programs generally available at that high school, and the services and supports specifically made available to [redacted] at that high school through the proposed IEP.

305. Dr. [redacted] had knowledge of the key fact relevant to the "primary judiciable issue" in this case,[27] whether the May 2017 IEP denied a FAPE in the LRE to [redacted] when it failed to offer any accommodations to address Petitioners' need for a small-class, small-school setting in the regular-education environment.

306. Dr. [redacted] testimony reflects knowledge of class size in the regular-education classes at [redacted] High School, which the Undersigned infers is the high school "in question" (though that is not entirely clear on the official record);[28] and her knowledge on this key fact was the

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[26] The record contains no basis upon which the Final Decision could fairly diminish Dr. [redacted] credibility on the possibility that she had not had personal interaction with *every* member of the IEP team (acknowledging that the Record reflects that she *did* have personal interaction with at least two members of the IEP team) while leaving all of Respondent's witnesses' credibility in tact even though *none* of them had *any* personal interaction of *any* sort with the subject of the May 2017 IEP, [redacted] whose unique needs caused by her disabilities form the substance of this appeal. Petitioners argue on appeal that the ALJ demonstrated bias against Petitioners through her application of different standards to Petitioners' witnesses as compared to Respondent's witnesses. *See infra* ¶¶ 586-92.

[27] The Final Decision recognized "the primary judiciable issue" in this case to be one related to the size of [redacted]s regular-education classes. *See* Final Decision, p. 3.

[28] In an email to [redacted] after Respondent unilaterally cancelled the April 2017 IEP meeting and prior to the May 2017 IEP meeting, Respondent identified five possible school placements for [redacted]s consideration: [redacted] High School, [redacted] High School, [redacted] Leadership Academy, [redacted] and [redacted] College and Career Academy. *See* Pet. Exh. 23, Bates p. 189. Petitioners independently considered five public schools (including one not identified by Respondent): "[redacted] High School, [redacted] High School, [redacted] High School, recommended by [redacted] and [redacted] – [redacted] College – it's a public school, and [redacted] and the Wake the [redacted] – the Wake County – the [redacted] Community High School." Tr. p. 189:16-21. Petitioners expressed to Ms. [redacted] an interest in visiting two potential placements: [redacted] High School and [redacted] College and Career Academy. *See* Pet. Exh. 23, Bates p. 188. At the May 2017 IEP meeting, Petitioners expressed interest in a school placement other than [redacted] High and the IEP team discussed a "list of schools," *see* Stip. Exh. 4, Bates p. 40. Respondent ultimately asserted that "school assignment to a particular school within WCPSS was not an IEP team decision," Order on the Final Pretrial Conference, Initial Stipulations, ¶ 77. Respondent's employees on [redacted]s IEP Team, however, agreed to assist Petitioners' effort to transfer [redacted] to a school other than [redacted] ([redacted] High School) by "communicat[ing] the parent's request to the office of student assignment." Order on the Final Pretrial Conference, Initial Stipulations, ¶ 78. In June 2017, Petitioners requested a transfer to [redacted] High School because "the options for [[redacted]s] education might be more fitting" there, but Respondent's employees on [redacted]s IEP Team failed to follow through, and Respondent denied Petitioners' transfer request. Order on the Pretrial Conference, Initial Stipulations, ¶¶ 79 & 80. The draft IEP prepared by Respondent in April 2017 as well as the final IEP offered to Petitioners in May 2017 identified "[redacted] High School" as [redacted]s assigned school. Despite multiple school assignments in consideration before, during, and after the May 2017 IEP meeting, the Undersigned infers, based on the identification of [redacted] High School in the draft and final IEP at issue, that the Final Decision intended [redacted] High School to be considered the school "in question," even though Respondent

same as the evidence provided by Respondent regarding those class sizes; and it is the same as the ALJ's findings regarding those class sizes.

307. Dr. [redacted] testimony acknowledges a regular-education class size of approximately 30 students at [redacted] High School. *See* Tr. pgs. 593:19-23.

308. Respondent's discovery responses acknowledged the same average number of students (approximately 30) in regular-education classes at [redacted] High School, the high school "in question." *See* Email dated 2/23/2018 at 10:31 a.m. from Stephen Rawson, counsel for Respondent (offering information responsive to Petitioners' discovery requests and recognizing that in regular education classes "[c]lass sizes vary widely, but the average approaches 30 students").

309. The ALJ also acknowledged, without objection from either party, a typical regular-education class size of approximately 30 students. *See* Tr. p. 117 ("I believe 30 students was the class size . . . with a minimum of maybe 20 students, but most of the classes were 30 students.").

310. Dr. [redacted] had the same knowledge as Respondent and the ALJ regarding the number of students in a typical regular-education class at [redacted] High School, a fact critical to the "primary judiciable issue," Final Decision, p. 3, in this case.

311. Dr. [redacted] also had knowledge of the relevant programs generally available at the high school "in question."[29]

312. Dr. [redacted] written report reflects that she reviewed the Respondent's materials on the programs and resources available for children with disabilities at its high schools, including the one to which Respondent assigned [redacted]

313. Dr. [redacted] reviewed a Wake County Public School System publication titled, "Special Education Services Program / Service Descriptions."

314. Dr. [redacted] was asked on direct examination whether she reviewed materials specific to Respondent, notably the "Special Education Services Program / Services Descriptions," and she answered affirmatively as follows:

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asserted at the IEP meeting that the May 2017 IEP could be implemented at any WCPSS high school. *See* Stip. Exh. 4, Bates p. 41 ("Ms. [redacted] explained that the IEP team just developed an IEP that WCPSS can implement in a WCPSS school.").

[29] While Dr. [redacted] had not taught at or observed a class within the specific high school to which Respondent assigned [redacted] neither had Respondent's expert, Dr. [redacted] and the ALJ did not find Dr. [redacted] lack of teaching or observation at the specific high school to which Respondent assigned [redacted] to create a "lack of personal knowledge or experience" that would undermine Dr. [redacted] credibility. This makes it unlikely – unless the ALJ applied a different standard in evaluating the credibility of Petitioners' expert witness as compared to Respondent's expert witness as Petitioners assert on appeal – that the lack of physical presence in [redacted]s assigned school is what underlies the assertion in Finding of Fact 13 that Dr. [redacted] did not have "personal knowledge or experience with the high school."

Q [by Petitioners' Counsel]: Dr. [redacted] have you had a chance to review this exhibit [Stipulated Exhibit 27, a Wake County Public School System publication titled "Special Education Services Program / Service Descriptions"]?

A [by Dr. [redacted] Yes.

Tr. p. 534:9-15.

315. Dr. [redacted] also had knowledge of programs and services specifically *made available to* [redacted] at the high school to which Respondent assigned [redacted]

316. Dr. [redacted] reviewed [redacted]s educational records, including the May 19, 2017, IEP at issue in this appeal; the Respondent's minutes of the May 19, 2017, IEP meeting; [redacted]s immediately prior IEP with Respondent WCPSS from March 2016; and other related documents included in [redacted]s educational records. *See* Pet. Exh. 43, Bates pgs. 298-99 (documenting in Dr. [redacted] report her analysis "[b]ased on [her] review of the educational records" and of "the differences between what had been provided during her years in public school vs. the supports and services she receives at [redacted] that impacted the progress" [redacted] made at [redacted]

317. While Dr. [redacted] did not have a physical presence at the high school to which Respondent assigned [redacted] Dr. [redacted] developed personal knowledge of that school through a review of Respondent's published materials about its programs and through a review of the specific accommodations and services offered to [redacted] at that school in her May 2017 IEP as well as through interaction with Respondent's employees when Dr. [redacted] visited [redacted] Academy with them. The erroneous finding to the contrary thus does not diminish Dr. [redacted] credibility.

318. The substance of Finding of Fact 13 is also incorrect in that it mischaracterizes Dr. [redacted] extensive experience, *see supra* ¶¶ 235-66, and her ability to place this case in a broader context as applying "assumptions and perceptions that she had about public schools in general to this specific IEP," *see* Final Decision, Findings of Fact ¶ 13.

319. As noted above, Dr. [redacted] *declined* to apply assumptions to "professional educators" in this case when invited to do so on cross examination, explaining that, based on her experience over "a long time" in public schools, she appreciates that "teachers can interpret things in 80 different ways" such that Dr. [redacted] doesn't think it's fair to "assume." Tr. p. 580:3-6.

320. The record evidence taken as a whole demonstrates that Dr. [redacted] was familiar with and knowledgeable about *both* the circumstances of this particular IEP *and* similar circumstances involving children with disabilities throughout the state, nation, and world. *See supra* ¶¶ 246-65 (offering an overview of Dr. [redacted] research and experience in special education involving children with autism and related disabilities) and ¶¶ 268-74 (offering an overview of Dr. [redacted] familiarity with [redacted]s educational background and needs).

321. Finding of Fact 13 in the Final Decision has it backward. Dr. [redacted] testimony does not impose knowledge and experience about public schools generally on this IEP; instead, the opposite is true.

322. Dr. [redacted] connected her particular knowledge of Respondent's specific actions in this case to her extensive expertise on special education practices, including to her expertise on inclusion practices regarding children with autism, across the state, nation, and world. In this manner, she placed Respondent's specific actions in a larger context.

323. In the statement made on page 530, lines 9 through 12 (which is offered as the sole evidence to support this factual finding), Dr. [redacted] stated: "And I often see that these students are left to either be homeschooled or go to private schools because we don't have structures like that in place in a lot of public schools." Tr. pg. 530:9-12.

324. The "structures like that" referenced in this out-of-context quote appear in the testimony immediately prior, where Dr. [redacted] explained that "students that have similar traits as [redacted] . . . will thrive when given exposure to the general ed classes if only they had these supports put in place where they had reduced student-teacher ratio, had really good positive relationships with their teachers, weren't afraid to demonstrate areas of weakness and really feel supported." Tr. p. 530:3-8.

325. Reading lines 9 through 12 on page 530 in the context of the lines immediately preceding them, Dr. [redacted] expressed that she "often see[s] that these students [students "that have similar traits as [redacted] are left to either be homeschooled or go to private schools because we don't have structures like that [such as "reduced student-teacher ratio, ... [and] really good positive relationships with ... teachers"] in place in a lot of public schools." *See* Tr. pg. 530:9-12 and 530:2-12.

326. In other words, the undisputed factual circumstances in this case – that Respondent refused to offer reduced teacher-student ratios in general education classes with additional accommodations to facilitate positive teacher-student relationships such that [redacted]s left Respondent WCPSS for a private school – is a pattern Dr. [redacted] has seen "over and over again" with other children with disabilities who have "similar traits as [redacted] and are "left to be homeschooled or go to private schools" because "a lot of public schools," like Respondent, do not offer "structures like" reduced teacher-student ratios or building close relationships with teachers. *See id.*

327. On cross examination by Respondent's counsel, Dr. [redacted] clarified how she was using her expertise to contextualize [redacted]s particular experience with Respondent:

> Here's how I want to clarify what I'm saying. I don't want to say that students like [redacted] [students with multiple, significant disabilities who require small-class setting accommodations to access the general academic curriculum but who have the ability to succeed, and even thrive, in general-education classrooms with those accommodations] could never be in a public school setting. I think all student should be able to be served in a public school setting. The way that our existing structure is for students who are able to access the general ed curriculum but need the level of support [redacted] needs ***I have yet to see provided in a public school setting***.

> And so does it have to be a small school? Not necessarily, if you can provide a small teacher-student ratio, if you can work on relationship building between teacher and student, if you can provide training to the teachers on all of the needs of the students in the class, not just the special ed teacher receiving the training, but the general ed teacher, and if you can really use a variety of the evidence-based practices to deliver instruction in the classroom.
>
> What happens a lot of times is those things aren't in place. The students start failing so the parents, you know, either get them tutors or put them in private schools. And if you take a student and put them in a one-on-one setting or in a really small setting where they can have those needs, they're going to thrive. And why wouldn't you do that? You're not just going to let your student fail.
>
> Tr. p. 553:24 – 554:23 (emphasis added).

328. Respondent's witnesses acknowledged that Respondent, like other public-school systems with which Dr. [redacted] has worked over the course of her decades-long career in special education, has *not* offered a small-class setting as an accommodation for a student in general education classes. Ms. [redacted] testified, for example, as follows:

> Q [by Petitioners' counsel]: Have you ever – have you ever included small class size as an accommodation for a student in general education settings?
>
> A [by Respondent's witness [redacted]: Small class size for a student for all of their –
>
> Q: general education classes, yes.
>
> A: Not to my knowledge. I don't believe I have.
>
> Tr. p. 1005:6-13 ([redacted] testimony).

329. Dr. [redacted] testimony, on page 530 in lines 9-12, reflects her expertise on inclusive practices and places Respondent's actions in this case in the context of her broad experience – not the opposite.

330. In continuing testimony just beyond that cited in support of Paragraph 13 of the Final Decision, Dr. [redacted] also testified that based on her experience, research, and expertise, the reality reflected in this case *can* be corrected and that public educators, expressly including this *specific* Respondent, are "**100 percent capable**" of providing the requested accommodations in the general-education classroom in the public-school setting, allowing [redacted] and other students with traits similar to [redacted] to remain in public schools in inclusive classrooms with their nondisabled peers. Tr. pg. 530:13-15; *see also, e.g.*, MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE 3:16 (3rd ed. 2008 + 2015 Supplement); *Durbrow v. Cobb Cty. Sch. Dist.*, 887 F.3d 1182 (11th Cir. 2018); *R.L. v. Miami-Dade Sch. Bd.*, 757 F.3d 1173 (11th Cir. 2014); *Gellert v. D.K. Pub. Sch.*, 435 F.Supp. 2d 18, 26 (D. D.C. 2006).

331. Having considered the entire record, including a review of the sole piece of record evidence offered to support this finding of fact, the finding that Dr. [redacted] "repeatedly applies assumptions and perceptions that she had about public schools in general to this specific IEP" is in error and without support in the record, and it thus does not diminish Dr. [redacted] expert credibility.

332. Finding of Fact 13 is also in error because the inference necessary to connect Finding of Fact 13 with the record evidence offered in its support (the statement of Dr. [redacted] on page 530 in lines 9 through 12) is unfounded and affirmatively contradicted on this record.

333. The specific finding of fact extrapolated from Dr. [redacted] statement in lines 9 through 12 on page 530 of the transcript is, as already noted, that "Dr. [redacted] repeatedly applied assumption and perceptions that she had about public schools in general to this specific IEP without any personal knowledge or experience with the high school or IEP Team members in question." Final Decision p. 9, Finding of Fact ¶ 13.

334. The evidence offered to support Finding of Fact 13, as detailed above, is Dr. [redacted] statement that "a lot of public schools" don't have structures like reduced student-teacher ratios in general education classes leaving students who need this support "to either be homeschooled or go to private schools." *See* Finding of Fact ¶ 13 *and* Tr. pg. 530:2-12.

335. To extrapolate from Dr. [redacted] statement that "a lot of public schools" don't have structures like reduced student-teacher ratios in general education classes and students who need that support leave for homeschool or private school, Tr. p. 530:9-12, the finding that Dr. [redacted] "repeatedly applied assumptions and perceptions that she had about public schools in general to this specific IEP," *implies* that this specific high school and this specific IEP Team are *not* like the public schools referenced in Dr. [redacted] statement.

336. In other words, reading Finding of Fact 13 together with the evidence offered to support it *implies* that this specific high school and this specific IEP Team *did* have structures like reduced teacher-student ratios in general-education classes and that students like [redacted] did *not* leave to be homeschooled or attend private schools. This implication wrong and unfounded. It is affirmatively contradicted.

337. The record is replete with evidence from *Respondent's* witnesses and *Respondent's* documentary evidence that Respondent, in fact, refused a reduced teacher-student ratio in general-education classes as an accommodation in [redacted]s IEP. *See, e.g.*, Stip. Exh. 2 (the May 2017 IEP); Stip. Exh. 4 (Respondent's meeting minutes of the May 2017 IEP meeting); Stip. Exh. 5 (Respondent's Prior Written Notice).

338. In fact, as recognized above, Respondent's senior administrator for its autism and extended-content standards team, Ms. [redacted] *see* Tr. p. 928:17-19 ([redacted] testimony), acknowledged that Respondent not only rejected an accommodation for small-class setting in the general-education classroom as an accommodation *for* [redacted] *in this case*, but also that she had no knowledge of *any* circumstance for *any* student in which Respondent had *ever* included

small-class setting as an accommodation in general-education classes. *See* Tr. p. 1005:6-13 ([redacted] testimony).

339. The record is also replete with evidence from *Respondent's* witness testimony and *Respondent's* documentary evidence that Respondent offered [redacted] a reduced teacher-student ratio exclusively in a segregated Curriculum Assistance class for 90 minutes per day outside the general-education program. *See, e.g.,* Stip. Exh. 2 (the May 2017 IEP); Stip. Exh. 4 (Respondent's minutes of the May 2017 IEP meeting).

340. In the IEP offered to [redacted] in the year immediately prior to the one at issue in this appeal, Respondent justified *removing* [redacted] from her non-disabled peers *because* she "requires small group instruction." Pet. Exh. 15, Bates p. 153 ([redacted]s 3/16/2016 IEP from Respondent WCPSS). [redacted]s March 16, 2016, IEP states as follows:

> **VII. If the student will be removed from his/her nondisabled peers for any part of the day (general education classroom, nonacademic services and activities), explain why the services cannot be delivered with nondisabled peers with the use of supplemental aids and services.** . . .
>
> [redacted] will be removed from her non-disabled peers to receive small group support. . . . She requires small group instruction to complete her work, strengthen her social skills and organize herself in order to meet grade level expectations.
>
> *Id.*

And in the IEP at issue in this case, [redacted]s May 19, 2017, IEP, Respondent again justified *removing* [redacted] from her non-disabled peers *because* she has "documented needs" for "small group support." Stip. Exh. 4, Bates p. 30 ([redacted]s 5/19/2017 IEP from Respondent WCPSS). [redacted]s May 2017 IEP states as follows:

> **VII. If the student will be removed from his/her nondisabled peers for any part of the day (general education classroom, nonacademic services and activities), explain why the services cannot be delivered with nondisabled peers with the use of supplemental aids and services.** . . .
>
> [redacted] will be removed from her non-disabled peers to receive small group support in organizational skills, writing, and social skills based on her documented needs.
>
> Stip. Exh. 2, Bates p. 30.

341. In North Carolina, each IEP "must include," *inter alia,* [a]n explanation of the extent, if any, to which the child will not participate with nondisabled children" in the general-education curriculum supported by "special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable" along with "program modifications or supports for school personnel." NC Policies 1503-4.1(4) & (5).

342. A statement that [redacted] "requires small group instruction" or has "documented needs" for "small group support" does not *explain why* such instruction and support "cannot be delivered with nondisabled peers with the use of supplemental aids and services." *See* Stip. Exh. 2, Bates p. 30. It instead recognizes that Respondent, like other school systems with which Dr. [redacted] has worked and/or consulted, has provided small-group instruction only in segregated settings, even though such school systems are "100 percent capable" of offering such instruction in general-education classrooms as an accommodation for children with disabilities, like [redacted] who need it. *See* Tr. pgs. 524:17-22 (offering testimony indicating that this statement in the IEP reflects *Respondent's* apparent "assumption" that reduced teacher-student ratios are available only in segregated settings) *and* 530:13-18 (offering Dr. [redacted] testimony emphasizing that public-school systems are "100 percent capable" of providing such accommodations in the general-education setting).[30]

343. Recognizing that *Respondent's* witnesses acknowledge that [redacted] High School, the school to which Respondent assigned [redacted] did *not* offer "structures like" reduced student-teacher ratios in general-education setting and that this specific high school offered [redacted] those "structures" only in segregated classrooms, Dr. [redacted] statement acknowledging that "a lot of public schools" also fail to offer "structures like that" to other children with disabilities is *not* an assumption imposed improperly on Respondent, but it is instead a demonstration of Dr. [redacted] expertise and her ability to put the particular issues presented in this case in a larger context.

344. Finding of Fact 13 closes with this assertion: "Dr. [redacted] also was not familiar with WCPSS's Autism Support Program, but still opined that academic supports provided through that program were inappropriate." Final Decision p. 9, Finding of Fact ¶ 13.

345. This sentence, unlike most sentences in the credibility findings of the Final Decision, did not originate in the Respondent's Proposed Final Decision.

346. This sentence introduces a red herring; it is also factually incorrect.

347. The factual assertion that Dr. [redacted] "was not familiar with WCPSS' Autism Support Program" introduces a red herring because WCPSS' Autism Support Program is not incorporated into the May 2017 IEP in whole or in part. *See* Stip. Exh. 2, Bates pgs. 16-31 (May 2017 IEP).

348. While Respondent's minutes of [redacted]s IEP meeting reflect that one of Respondent's employees "explained" the "autism support program" at the May 2017 IEP meeting, *see* Stip. Exh. 4, Bates p. 40, Respondent failed incorporate that Autism Support Program into the May

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[30] Dr. [redacted] testified, as noted above, that there is no reason to segregate [redacted] (or other students with traits similar to [redacted] from nondisabled peers simply because they require reduced teacher-student ratios. In Dr. [redacted] expert opinion Respondent is "100 percent capable" of providing this accommodation in general-education classes with nondisabled peers, Tr. p. 530:13-18, and the private placement selected by Petitioners – [redacted] Academy – offers reduced teacher-student ratios, with an average of nine or ten students per class, in inclusive settings for all of its students. Tr. p. 316:9-11. It can be done.

2017 IEP itself, and the May 2017 IEP does not mention WCPSS' Autism Support Program. *See* Stip. Exh. 2, Bates pgs. 16 – 31.

349. Respondent's Autism Support Program is *not* one of the programs or services made available to [redacted] in the IEP at issue in this case. *See* Stip. Exh. 2, Bates pgs. 16 – 31.

350. Under the facts of this case, the Autism Support Program cannot be implied in the IEP based on a statement about it in Respondent's meeting minutes. Petitioners' specifically requested components of the Autism Support Program to be included in [redacted]s IEP, but Respondent rejected those requests.

351. For example, Petitioners requested supports to address [redacted]s behavioral challenges, such as an FBA (Functional Behavioral Assessment) and a BIP (Behavior Improvement Plan), *see* Petition for Contested Case Hearing, p. 14 & 8, both of which are expressly included as components of Respondent's Autism Support Program, *see* Stip. Exh. 27, Bates p. 186 (stating that the specially designed instruction for students with Autism Support includes having a "Functional Behavioral Assessment and Behavior Intervention Plan (FBA/BIP) in place").

352. Respondent refused both an FBA and a BIP in [redacted]s May 2017 IEP despite that both are identified as components of the Autism Support Program. *See, e.g.,* Stip. Exh. 2 (offering the May 2017 IEP which contains no FBA or BIP); Tr. p. 107 (stating that Ms. [redacted] refused at the May 2017 IEP meeting to put a BIP in place because "we would wait and see … before we do anything"); Tr. p. 530:20-25 (stating that [redacted]s IEP team did include a BIP or an FBA in the IEP process).

353. In other words, Respondent not only excluded the Autism Support Program *as a whole* from the IEP, Respondent also omitted particular components of that program that were relevant to concerns raised by Petitioners.

354. When [redacted]s parents had to make a choice about where to enroll [redacted] they had to rely on the IEP as it was written, not as Respondent's witnesses might verbally embellish it with descriptions of additional or different services not offered in the IEP itself. *See, e.g., C.F., by his parents, R.F. and G.F. v. N.Y.C. Dep't of Educ.*, 746 F.3d 68, 80 (2nd Cir. 2014); *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 185-88 (2nd Cir. 2012) ("Retrospective evidence that materially alters the IEP is not permissible.").

355. "Parents are entitled to rely on the IEP for a description of the services that will be provided to their child." *P.K. v. New York Dep't of Educ. (Region 4),* 526 Fed. App'x 135, 141 (2nd Cir. 2013).

356. In reviewing parents' challenges to the appropriateness of an IEP, "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan, not a retrospective assessment of how that plan would have been executed." *K.L. v. New York City Dep't of Educ.*, 530 Fed. App'x 81, 87 (2nd Cir. 2013).

357. The IEP at issue in this case does not reference or incorporate Respondent's Autism Support Program. *See* Stip. Exh. 2, Bates pgs. 16 – 31.[31] The Final Decision's finding focused on Dr. [redacted] review of that program is thus unnecessary and misleading.

358. Additionally, the Final Decision's finding regarding Dr. [redacted] knowledge of WCPSS' Autism Support Program is unsupported by the record.

359. Neither the Final Decision nor Respondent's Written Arguments on Appeal offer record evidence to support the finding that "Dr. [redacted] ... was not familiar with WCPSS's Autism Support Program." There is none.

360. To the contrary, the record evidence supports a finding that Dr. [redacted] *was* familiar with WCPSS's Autism Support Program, and she could (and did) evaluate whether the supports that would be provided through WCPSS's Autism Support Program were contained in [redacted]s IEP; they were not. *Compare* Stip. Exh. 2 ([redacted]s May 2017 IEP) *with* Stip. Exh. 27 (Respondent's published description of the Autism Support Program); *see also* Tr. p. Tr. 534:9 - 535:9 (testimony of [redacted] on this topic).

361. The transcript offers the following exchange:

> The Court: Ms. Gahagan, we're on Stipulated Exhibit 27?
>
> [Stipulated Exhibit 27 is Respondent's documentation of its "Special Education Services Program/Service Descriptions," including Autism Program/Service Descriptions and Autism Support Teacher Program/Service Descriptions. *See* Stip. Exh. 27, Bates p. 185-86).]
>
> Ms. Gahagan: Yes.
>
> By Ms. Gahagan:
>
> Q: Dr. [redacted] have you had a chance to review this document?
>
> A: Yes.
>
> * * * *
>
> Q: And do you see the specially – in the third column, the specially designed instruction that's included for students in this program?

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31 To this point, Respondent indicated that [redacted]s IEP could be implemented at *any* of Respondent's high schools – even high schools at which the Autism Support Program was not available – confirming Respondent's understanding that the Autism Support Program available at [redacted] High School was not included in this IEP. *See* Order on the Final Pre-Trial Conference, Initial Stipulations, ¶¶ 76-77 (recognizing that Respondent told [redacted] that school assignment was not an IEP team decision, that the IEP could be implemented in a WCPSS school, including one other than [redacted] where its Autism Support Program was operational, and recognizing that [redacted] could request a transfer to a WCPSS school other than [redacted] and that the IEP team would communicate that request to the office of student assignment).

A: The third – oh, yes. I was thinking that was the second column, that's why I was confused, but yes.

Q: Did [redacted]s IEP have all of these supports in place as written?

A: No. Like I said before, she didn't have an FBA or a BIP.

Tr. pgs. 534:9 - 535:9.

362. The assertion in Finding of Fact 13 that Dr. [redacted] "was not familiar with WCPSS's Autism Support Program," is contradicted by the record evidence. Dr. [redacted] had reviewed Respondent's descriptions of that program and appropriately compared Respondent's published offerings to the actual offering in [redacted]s IEP. *See* Tr. 534:9 - 535:9.[32]

363. Additionally, Dr. [redacted] description of the Curriculum Assistance class associated with the Autism Support Program, a class at issue in this case, as one that meets outside the general-education classroom is *the same* as Respondent's description of that program.

364. In other words, Dr. [redacted] familiarity with the Autism Support Program was sufficient to give her the same material understanding of the relevant portion of the program as Respondent's witnesses/employees had.

365. The factual underpinnings upon which Finding of Fact 13 relies to diminish Dr. [redacted] credibility are refuted by the record evidence considered in its entirety. Thus, the first finding identified in the Final Decision as a basis upon which to diminish Dr. [redacted] credibility was irregularly made without evidentiary support in the record considered as a whole.

366. The second reason the Final Decision relied on to diminish Dr. [redacted] credibility appears at Finding of Fact 14. This finding also originates in Respondent's Proposed Final Decision and provides in full as follows:

> Second, Dr. [redacted] opined that the entirety of the proposed IEP was inappropriate and would acknowledge only two appropriate supports: preferential seating and extended time. Tr. vol. 3, pp. 608:5-609:3. When questioned by the Undersigned, Dr. [redacted] admitted that the IEP was "broadly" appropriate. Tr. vol. 3, p. 606:18023 [typo in original]. Given the rarity that any IEP would be faulty in all aspects, and the fact that, on its face, the proposed IEP in this case has numerous reasonable and appropriate components beyond the accommodations of preferential seating and

[32] The Undersigned also recognizes that the ALJ did not require Respondent's expert to have personal familiarity with Respondent's Autism Support Program in order to retain full credibility, and as such, Petitioners assert that the ALJ applied a different standard to Petitioner's expert as compared to Respondent's expert. Respondent's expert testified that her experience with Curriculum Assistance classes was in the Durham Public Schools, not in Respondent WCPSS. Tr. p. 1108:6-12. Her experience with Respondent WCPSS was that in in Wake County "one of the things that sometimes happen[ed] to students with autism [was] that there [was] a tendency to be – to think, okay, well, I can put this kid in a corner with a worksheet and that makes them happy because they don't have to interact." Tr. p. 1132:8-13.

extended time, this calls into question Dr. [redacted] objectivity as an expert witness in evaluating a special education program. Moreover, her testimony appeared contradictory because the IEP was essentially the same educational plan provided by [redacted] Academy, which Dr. [redacted] opined was appropriate.

Final Decision p. 9, Finding of Fact ¶ 14.

367. Finding of Fact 14, like Finding of Fact 13, conveys erroneous factual assertions and implications. Unpacking these factual errors leaves Dr. [redacted] credibility intact. These factual errors are most readily recognized by (1) acknowledging the testimony identified as the source for Finding of Fact 14 and (2) recognizing the factual mistakes / misunderstandings embedded within Finding of Fact 14 overall.

368. As a preliminary matter, however, the Undersigned observed that the Final Decision itself is inconsistent on this finding. While Paragraph 14 finds that Dr. [redacted] "opined that the entirety of the proposed IEP was inappropriate and would acknowledge only two appropriate supports," the Final Decision emphasized the *opposite* on page 2.

369. On page 2 of the Final Decision, in the "Summary of Decision," the Final Decision asserts, without citation, that "[t]he Petitioners' expert . . . conceded that the IEP broadly 'hit the mark.'"

370. Dr. [redacted] testimony cannot be both undermining of her credibility because she "opined that the entirety of the IEP was inappropriate," *see* Final Decision, ¶ 14, and also supportive of the appropriateness of the IEP because Dr. [redacted] testimony "conceded" that the IEP overall "hit the mark," *see* Final Decision, p. 2.

371. Paragraph 14 is also internally inconsistent. Its opening assertion, that Dr. [redacted] "opined that the entirety of the proposed IEP was inappropriate," and its closing implication, that Dr. [redacted] opined that the "IEP would be faulty in all aspects," are contradicted between these expressions with a statement acknowledging that Dr. [redacted] recognized that "the IEP was 'broadly' appropriate."

372. Again, the Final Decision contradicts itself. Dr. [redacted] testimony cannot be both undermining of her credibility because she "opined that the entirety of the IEP was inappropriate" and "faulty in all aspects," *see* Final Decision, ¶ 14, but also supportive of the appropriateness of the IEP because Dr. [redacted] testimony "admitted" that the "the IEP was 'broadly' appropriate," s*ee id.*

373. To the extent Finding of Fact 14 persists in declaring that Dr. [redacted] testimony undermines her credibility because she took a position that "the entirety of the proposed IEP was inappropriate," *see* Final Decision, ¶ 14, that statement is contradicted by the record evidence.

374. Finding of Fact 14 begins with an apparent paraphrase of Dr. [redacted] testimony from pages 606 and 608-09 of the transcript and states as follows:

Second, Dr. [redacted] opined that the entirety of the proposed IEP was inappropriate and would acknowledge only two appropriate supports: preferential seating and extended tine. Tr. vol. 3, pp. 608:5 – 609:3. When questioned by the Undersigned, Dr. [redacted] admitted that the IEP was 'broadly' appropriate. Tr. vol. 3, p. 606:18023.[33]

375. The transcript at page 606 lines 18-23, offered as record support for Finding of Fact 14, is irrelevant and provides in full as follows:

> [Line 18 on page 606 begins in the middle of a question by Petitioners' counsel.]
>
> . . . supports that was in place for [redacted] or sensory friendly environment?
>
> A [by Dr. [redacted] No, neither is. And there could have been sensory accommodations put in, but there wasn't.
>
> Q: You were also asked about medications. And I'm sorry, I'm going to have you flip back to Stipulated . . .
>
> Tr. p. 606:18-23.

376. The transcript at pages 608 to 609 in the lines cited by Finding of Fact 14 is relevant and provides as follows:

> The Court: I do have a couple questions Dr. [redacted]
>
> **EXAMINATION** 1:56 p.m.
>
> By the Court:
> Q: Was there anything in the May 19, 2017, IEP that you thought appropriate? Do you need to – it's Stipulated Exhibit 2.
>
> A [by Dr. [redacted] Honestly, I think that the goals that they had there are getting to appropriateness if they could have done one of two things, either make them more specific or break them down into benchmarks. So I don't think they're off the mark in the – in the broad stroke of what they were trying to address.
>
> And the accommodations that they have on there, yes, she does need preferential seating. Some of those – she does need extra time. I think those things are all appropriate. I just don't – I just don't think that those are – it's a comprehensive enough of a plan for her to be successful.
>
> Q: Is that mainly because it's not in a small classroom setting?

[33] Page 606 of the transcript does not contain 18023 lines, and the Undersigned interpreted this expression to indicate lines 18 through 23 on page 606.

A: No. I think that's just one piece of it. I mean I don't see any evidence of using practices that we know will support her.[34]

377. Dr. [redacted] also explained in her testimony how the IEP could contain some "basic," appropriate accommodations in the general education classroom, but nonetheless be inappropriate for [redacted] as a whole. Dr. [redacted] testified, for example:

> My interpretation [of the support "[redacted] was going to receive throughout the school day based on the supplemental aids and services in this IEP"] is she would have some very basic accommodation in the general ed classroom such as preferential seating, some modified assignments, extended time, the typical things that you see, but that anything related to her unique needs, related to her disability, was going to be provided in a separate setting.
>
> . . . . I would say that is not what [redacted] needs. [redacted]. – it has been documented through her work at [redacted] Academy that one of the reasons why she was so successful there was because all of her supports were integrated throughout her entire day. All of her teachers collaborated ongoing, multiple times a week to identify the supports that she needed and to make sure they were embedded throughout her entire day.
>
> To think you can just pull her into this isolated setting and give her all the skills that she needs and then throw her back out into these large classes in gen ed without providing any training to the gen ed teachers, any co-teaching situations where they could meet her needs on a more individualized basis as had been provided in her previous setting, to me is setting her up for failure.

Tr. p. 518:11 – 519:8.

Dr. [redacted] explained further as follows:

> One of the things that came across very clear was that she needed small group setting. Now, some might say well, in high school our classes were 30 – they contain 30 students and she needs to be in the gen ed classroom because cognitively those are the classes she should be receiving.
>
> But there is nothing to say that we couldn't make special sections of those classes so that it was either co-taught to reduce the teacher-student ratio or her classes happen to be 12 students instead of 30 students. You know, there's nothing to say that she couldn't have that small class size within the context of a larger high school if the team was willing to be creative in how they were going to deliver those supports.
>
> Q [by Petitioner's counsel]: And in your opinion would that have been important to include in her IEP?

---

[34] Because this testimony – and her testimony in other instances – does not indicate that Dr. [redacted] determined that the May 2017 IEP was "faulty in all aspects," the contrary finding expressed in Finding of Fact 14 and relied upon to undermine Dr. [redacted] credibility is unsupported by the record evidence.

A: Yes, because that was part of the reason why she had failed previously is that she would flounder in the general ed setting.

Tr. p. 521:14 – 522:7.

378. Dr. [redacted] testimony reflects a nuanced understanding of [redacted]s needs and of the IEP offered to accommodate those needs in Respondent's schools. The Final Decision's re-characterization of her testimony in Finding of Fact 14 does not accurately represent its substance.

379. The misunderstanding embodied by Finding of Fact 14, although underlying all aspects of this finding, is especially apparent in the final sentence in this finding.

380. The final sentence of Finding of Fact 14 asserts that Dr. [redacted] "testimony appeared contradictory because the IEP was essentially the same educational plan provided by [redacted] Academy, which Dr. [redacted] opined was appropriate."[35]

381. An assertion that the May 2017 IEP offered by Respondent to [redacted] was "essentially the same educational plan provided by [redacted] Academy" misses and/or ignores *the central issue at the "heart of this case,"* Tr. p. 814, and in doing so demonstrates a misunderstanding of the Petition for a Contested Case Hearing and the record evidence. *See infra* ¶¶ 718-48.

382. To understand the factual error in this finding (used to undermine Dr. [redacted] credibility) that the May 2017 IEP "was essentially the same educational plan provided by [redacted] Academy," an understanding of the educational plan at [redacted] Academy is required.

383. [redacted] Academy for [redacted] recorded [redacted]s educational plan in multiple documents. [redacted] Academy for [redacted] developed the following:

- A LEAD assessment to specify supports necessary "to help address students' individualized learning and classroom needs," Tr. p. 130:7-21 ([redacted] testimony explaining the LEAD assessments which are available at Stip. Exh. 20, Bates p. 150-52);
- An Individualized Academic Plan, or IAP, for [redacted] *see* Stip. Exh. 18, Bates p. 136-39; and
- A Master Treatment Plan that specified support and services offered in connection with [redacted]s primary therapist at [redacted] Academy for [redacted] *see* Stip. Exh. 17, Bates p.127 - 35.

[35] The Undersigned recognizes that this is the second (of two) sentences in the credibility findings regarding Dr. [redacted] that was not taken from Respondent's Proposed Final Decision. The Undersigned also notes that while this finding asserts that the AIP and May 2017 IEP were "essentially the same" without any caveat, *See* Final Decision ¶ 14, the Final Decision later acknowledges key distinctions, including that the May 2017 IEP failed to include "wrap-around services and small class size," *see* Final Decision ¶ 78.

384. The LEAD assessment "is a document that [the [redacted] Academy for [redacted] academic team puts in place to help address students' individualized learning and classroom needs." *See* Stip. Exh. 20, Bates p. 152 and Tr. p. 130:7-21 ([redacted] testimony explaining Stip. Exh. 20).

385. The Individualized Academic Plan is, as its name indicates, an academic plan tailored to the needs of the individual to whom it is assigned.

386. The Master Treatment Plan for [redacted] identified a "Master Problem List" along with specific behaviors associated with those problems that impacted [redacted]s educational success; it also identified intervention strategies designed to address the problematic behaviors and to support [redacted]s progress toward specified goals and objectives. *See* Stip. Exh. 17, Bates p. 127-35.

387. The educational plan (including the LEAD assessments, the IAP, and the Master Treatment Plan) at [redacted] Academy for [redacted] provided multiple supports, services, and accommodations that were ***not*** included in the IEP Respondent offered to [redacted] in May 2017. *Compare* Stip. Exhs. 19 & 20, Bates pgs. 147-152, *with* Stip. Exh. 2, Bates pgs. 16-33.

388. This portion of this Decision focuses on Respondent's omission in the May 2017 IEP of any accommodation to meet [redacted]s need for a small-class setting in regular-education classes because that accommodation is at the heart of this case. *See infra* ¶¶ 736-40 (identifying and contextualizing additional accommodations offered by [redacted] Academy for [redacted] in [redacted]s regular-education classes that Respondent omitted from the May 2017 IEP offered to [redacted]

389. [redacted]s LEAD assessment from May 2017, the time the IEP at issue was being developed, allowed her teachers and service providers to select from a continuum of classroom interventions for [redacted] including interventions designated as "intensive," "targeted," "universal," and "no intervention needed." *See* Stip. Exh. 20, Bates p. 152.

390. The LEAD assessment portion of the educational plan provided by [redacted] Academy expressly recognized that [redacted] received a number of "universal" and "targeted" supports to address her learning and classroom needs, *see* Stip. Exh. 20, Bates p. 152, in addition to the "accommodation, learning styles, and modifications" and "goals" specified in the IAP. *See* Stip. Exh. 19, Bates p. 147 – 149 ([redacted] Academy for [redacted] January 6, 2017, IAP for [redacted][36]

391. [redacted]s LEAD assessment from May 2017 recognized, *inter alia*, that [redacted] required "universal" interventions to include "a small learning environment with multi-modal instruction," and it stated that [redacted] "benefits from the structure and design of [that] classroom and does not require additional interventions" beyond small-class environment with multi-modal instruction to support her learning in the classroom. Stip. Exh. 20, Bates p. 152.

392. That same LEAD assessment allowed [redacted]s teachers at [redacted] Academy for [redacted] to select, *if appropriate*, "no intervention needed," and it allowed them to specify, *if appropriate*,

[36] Notably for purposes of this credibility finding, however, both the IAP and the LEAD assessment from [redacted] Academy for [redacted] provided that [redacted] required a "small classroom setting" (as stated in the IAP at Stip. Exh. 19, Bates p. 148) and a "small learning environment" (as stated in the LEAD assessment at Stip. Exh. 20, Bates p. 152).

that [redacted] "requires no intervention and is able to be successful in a regular classroom environment." Stip. Exh. 20, Bates p. 152. But [redacted]s teachers and service providers at [redacted] Academy for [redacted] did *not* determine that [redacted] was ready to enter a regular classroom environment without the accommodation of a "small learning environment with multi-modal instruction." *Id.; see also* Stip. Exh. 4, Bates p. 35-36 (offering in Respondent's meeting minutes that Ms. [redacted] the "Director of Learning & Support" at [redacted] Academy for [redacted] explained to the IEP team at the May 2017 meeting that "she recommended a small classroom setting to address [redacted]s] sensory needs"); Tr. p. 137:20-25 (offering Ms. [redacted]s primary therapist at [redacted] Academy for [redacted] testimony that "[w]e recommended that [redacted] enter an environment that more closely mirrored our environment ... so small classroom size, relationship based multimodal teaching" . . . "for all of her classes").

393. Because [redacted]s teachers and service providers at [redacted] Academy for [redacted] recommended a "small learning environment with multi-modal instruction" and a "small classroom setting to address [redacted]s] sensory needs," Stip. Exh. 20, Bates p. 152, *and* Stip. Exh. 4, Bates p. 36, they did *not* choose "no intervention needed" on [redacted]s LEAD assessment and instead *did* identify the "universal" support of "a small learning environment with multi-modal instruction" as necessary to meet [redacted]s "learning" needs. Stip. Exh. 20, Bates p. 152; *see also infra* ¶¶ 639-60, 743, & 757-69 (recognizing testimony affirming this documented need for a small-class setting).

394. The May 19, 2017, IEP, offered by Respondent to [redacted] ignored this general-education "universal" support specified in [redacted]s LEAD assessment at [redacted] Academy for [redacted] *Compare* Stip. Exh. 2, Bates pgs. 16-33 *with* Stip. Exh. 20, Bates p. 152. Thus, the May 2017 IEP was *not* "essentially the same" as the educational plan provided by [redacted] Academy.

395. Just as the LEAD assessments from [redacted] Academy for [redacted] specified a "small learning environment with multi-modal instruction" as an accommodation, the IAP at [redacted] Academy for [redacted] specified, under the heading of "Accommodation, Learning Styles, and Modifications," a "Small classroom setting" for [redacted] Stip. Exh. 19, Bates p. 148 and Stip. Exh. 18, Bates p. 137.

396. The May 19, 2017, IEP offered by Respondent to [redacted] ignored the "Small classroom setting" support specified in [redacted]s IAP at [redacted] Academy for [redacted] and the LEAD Assessments at [redacted] Academy for [redacted] rendering it different from the educational plan at [redacted] Academy for [redacted] on an accommodation at the heart of this case.

397. The Academic Director – Learning Support at [redacted] Academy for [redacted] drafted a separate "summary of recommendations" developed by the "academic team for [redacted]s] transition" to explain the essential components of [redacted]s educational plan at [redacted] Academy for [redacted] This summary of recommendations opened with "Academic Recommendations" explaining that "[redacted] benefits from a smaller classroom with approximately a 1:12 or smaller teacher-student ratio," and closed with "Recommended Interventions," expressly including "Small classroom setting." Stip. Exh. 22, Bates p. 154-55.

398. The May 2017 IEP offered by Respondent to [redacted] ignored this recommendation presented in the LEAD assessments, Individualized Academic Plan, and summary of recommendations from [redacted] Academy for [redacted] even though it was *also* explained *during the IEP meeting* by Ms. [redacted] Academic Director – Learning Support, at [redacted] Academy for [redacted] as a necessary accommodation for [redacted] and was expressed as a concern *during the IEP meeting* by [redacted]s mother, [redacted] *See* Stip. Exh. 4, Bates p. 36 & (recognizing in Respondent's minutes of the May 2017 IEP meeting that Ms. [redacted] "recommended a small classroom setting to address [[redacted]s] sensory needs" and that [redacted] "expressed great concern that the large school setting is not going to work for [redacted]

399. The May 2017 IEP offered by Respondent to [redacted] ignored the general-education, small-classroom setting component of [redacted]s educational plan at [redacted] Academy for [redacted] even though [redacted]s March 2016 IEP with Respondent WCPSS also acknowledged that [redacted] "requires small group instruction to complete her work, strengthen her social skills and organize herself in order to meet grade level expectations." Pet. Exh. 15, Bates p. 153 ([redacted]s March 2016 IEP with Respondent WCPSS).

400. Without an identified accommodation in [redacted]s May 2017 IEP specified to provide [redacted] a small-class setting with multi-modal instruction in the general-education classroom, [redacted] High School, the school identified on the May 2017 IEP, did *not* otherwise offer a reduced teacher-student ratio or small-class setting in general-education classes as a "universal" support for all students.

401. The average number of students per class at [redacted] Academy for [redacted] is "**between six and eight students.**" Tr. p. 123:19-21 (testimony of [redacted] the primary therapist at [redacted] Academy for [redacted] (emphasis added).

402. The average number of students per class at [redacted] High School, the school to which Respondent assigned [redacted] on the May 19, 2017, IEP, approaches "**30**," *see* Email dated 2/23/18 from Respondent's counsel (responding to discovery requests and affirming that "the average" regular-education class size "approaches 30 students") (emphasis added); *see also* Tr. p. 117:1-14 (offering the Court's expressed "understanding of [Petitioners'] position is that the petitioners wanted a small class size" that Petitioners specifically sought "class size in each of the regular ed classes be small" with a size at least "smaller classes than 30 students" and acknowledging that "most of the classes were 30 students" at the school to which Respondent assigned [redacted]

403. Because the May 2017 IEP offered to [redacted] failed to provide, *inter alia,* the small-class setting that [redacted]s then-current educators included in her educational plan at [redacted] Academy for [redacted] the IEP was not "essentially the same" as the educational plan at [redacted] Academy for [redacted]

404. Although Petitioners presented expert testimony on the significant difference between a regular-education class of approximately thirty (30) students and one of approximately six (6) to eight (8) students for a child with [redacted]s particular constellation of diagnosed disabilities, *see, e.g.,* Tr. p. 527:15 – 530:19, even a lay person, like [redacted]s mother, appreciated that a school

day full of general-education classes of six to eight students is not "essentially the same" as a school day full of general-education classes of approximately thirty students – especially for a student who has known sensory and social challenges as symptoms of her diagnosed disabilities – and she requested small-class setting as an accommodation, *see* Tr. p. 102:14-17.

405. The ALJ understood, to some extent, that Respondent's refusal to offer a small-class, small-school setting in general education classrooms was a central issue in this case. In her Final Decision, she asserted that "[t]he primary judicable issue is whether [redacted] needed a cap on the number of students in her general education classes."[37] Final Decision p. 3.

406. To assert that the "the IEP was essentially the same educational plan provided by [redacted] Academy" without acknowledging that the IEP omitted this key support that was included in the educational plan at [redacted] Academy for [redacted] small class setting in general-education classes, overlooks the "primary judicable issue" in this case. *See* Final Decision, p. 3 (acknowledging that the general-education class-size issue is the "primary judicable issue" in this case).

407. Because the IEP offered by Respondent and the educational plan at [redacted] Academy for [redacted] were *not* "essentially the same" on the "primary judicable issue" in this case, there is no contradiction in Dr. [redacted] opinion that the educational plan provided at [redacted] Academy for [redacted] was appropriate for [redacted] and that the IEP offered by Respondent was not.

408. Dr. [redacted] expert opinion, unlike Finding of Fact 14, recognized the significance of this distinction, the distinction "at the heart of this case." *see* Tr. p. 814, between the educational plan at [redacted] Academy for [redacted] and the educational plan offered at Respondent's [redacted] High School.

409. The remaining sentence in Finding of Fact 14 states as follows: "Given the rarity that any IEP would be faulty in all aspects, and the fact that, on its face, the proposed IEP in this case has numerous reasonable and appropriate components beyond the accommodations of preferential seating and extended time, this calls into question Dr. [redacted] objectivity as an expert witness evaluating a special education program." This sentence relies on the incorrect premise that Dr. [redacted] testified that this IEP was "faulty in all respects." She did not so testify. *See supra* ¶¶ 376-78. When the premise is false, the conclusion that follows it is not sound.[38]

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[37] The Undersigned recognizes that Petitioners did not request a universal "cap" on the number of students in her general-education classes; Petitioners made a more nuanced and flexible request; Respondent mischaracterized and misunderstood Petitioners' request as one for a universal "cap," and the ALJ's Final Decision reflects the same mischaracterization and misunderstanding. *See infra* ¶¶ 627-67. The Final Decision acknowledges, however, that "No member of the IEP Team – including [redacted] and her advocate – ever suggested there be any specific cap set on the number of students in any of [redacted]s classes." Final Decision p. 38, Finding of Fact ¶ 208. The Final Decision nonetheless asserts, contrary to the record evidence, that "a small class size accommodation would only have meaning if it specified a maximum size for classes, [and] the Undersigned [meaning the ALJ] interprets the request to be for a capped class size." *Id.* Changing the recommendations of Petitioners' witnesses and misstating them as a request for a capped class size is erroneous and a misstatement of the record evidence. *See infra* ¶¶ 627-826.

[38] The Final Decision repeats this error again at Paragraph 152 of the Final Decision, where it is again incorrect for the same reasons. *See* Final Decision ¶ 152 (finding in error that "Petitioners' expert testified on direct examination that the IEP was completely inappropriate"). Dr. [redacted] did not testify that the May 2017 IEP was "completely inappropriate" or "faulty in all respects." *See, e.g.*, Volume 3 of the transcript (containing Dr. [redacted] testimony and

410. The factual underpinnings upon which Finding of Fact 14 relies to diminish Dr. [redacted] credibility are inconsistent with the record evidence considered in its entirety. Thus, this second finding identified in the Final Decision as a basis upon which to diminish Dr. [redacted] credibility was irregularly made without evidentiary support in the record considered as a whole.

411. Finding of Fact 15, like Findings of Fact 13 and 14, also fails to align with the record evidence and fails to provide any basis upon which to diminish Dr. [redacted] expert credibility.

412. Finding of Fact 15 provides as follows:

> Third, although IEP implementation is not an issue in this case, Dr. [redacted] repeatedly surmised that the District would not, and could not, implement the IEP at issue. *See, e.g.,* Tr. vol. 3, p. 518:23-519:1 (testimony that the collaboration and embedded support present at [redacted] Academy would not happen at [redacted] High school. and thus.[39] would "set[] her up for failure"). Dr. [redacted] expectation that the District would fail to implement the IEP is substantively irrelevant and limits the credibility of her testimony as to the appropriateness of the plan as written.

413. This Finding misrepresents Dr. [redacted] actual testimony. The record evidence demonstrates the *opposite* of the assertion made in Finding of Fact 15. Dr. [redacted] affirmatively testified that Respondent and other public-school systems were "100 percent capable" of implementing the accommodations necessary to allow [redacted] and students with traits similar to hers to be successful. *See* Tr. p. 530:13-18 ([redacted] testimony).

414. The single record citation – Transcript page 518, beginning at line 23, and continuing through Transcript page 519, line 1 – offered to support Finding of Fact 15 provides as follows:

> integrated throughout her entire day. All of her teachers collaborated ongoing, multiple times a week to identify the supports that she needed and make sure they were embedded throughout her entire day.
>
> Tr. p. 518:23 – 519:1 ([redacted] testimony).

415. This citation, taking into account the testimony contained within it, fails to support of the finding for which it is offered.

416. Nothing in this testimony indicates that Dr. [redacted] "repeatedly" surmised anything. Nothing in this testimony indicates that Dr. [redacted] "surmised" that "the District would not, and could not, implement the IEP at issue" as asserted in the Final Decision at Finding of Fact 15.

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failing to produce results in Dr. [redacted] testimony indicating that the May 2017 IEP was "completely inappropriate" or "faulty in all respects," does produce one result for "completely inappropriate," but that phrase was uttered in another context *by the Court*, not by Dr. [redacted] regarding the May 2017 IEP).

[39] This punctuation, though errant, is as it appears in the Final Decision.

There is no substantive connection between this testimony and the assertion for which it is offered as support.

417. Even when this small snippet of testimony is read in its larger context, it does not support the proposition for which it is offered. The larger context provides as follows:

> Q [by Petitioners' counsel]: And looking at the supplemental aids and services, and that starts on Bates stamp 23,[40] have you had a chance to review these supplemental aids and services?
>
> A [by Dr. [redacted]: Yes.
>
> Q: And in your opinion, what kind of support was [redacted] going to receive throughout the school day based on the supplemental aids and services in this IEP?
>
> A: My interpretation of this is she would have some very basic accommodation in the general ed classroom such as preferential seating, some modified assignments, extended time, the typical things that you see, but that anything related to her unique needs, related to her disability, was going to be provided in a separate setting.
>
> And I don't know if this is my time to comment on that, so I will comment on that until someone yells at me for commenting on that. But I would say that is not what [redacted] needs. [redacted] – it has been documented through her work at [redacted] Academy that one of the reasons why she was so successful there was because all of her supports were integrated throughout her entire day. All of her teachers collaborated ongoing, multiple times a week to identify the supports that she needed and make sure they were embedded throughout her entire day.
>
> To think that you can just pull her into this isolated setting and give her all the skills that she needs[41] and then throw her back out into these large classes in gen ed without providing any training to the gen ed teachers, any co-teaching situations where they meet her needs on a more individualized basis as has been provided in her previous setting, to me is setting her up for failure.
>
> Tr. pgs. 518:4 – 519:8 ([redacted] testimony).

418. This testimony does not, contrary to the assertion in Finding of Fact 15, address whether Respondent would or could implement the IEP as written. Instead, this testimony offers Dr. [redacted] expert opinion that supplemental aids and services written into [redacted]s IEP beginning at Bates page 23, including supports "such as preferential seating, some modified assignments,

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[40] Bates stamp 23 references that page in Stipulated Exhibit 2, which is the IEP at issue in this case, [redacted]s May 2017 IEP.

[41] The May 2017 IEP required all of [redacted]s specially designed instruction in organizational skills, writing, and social skills to take place in a smaller, *segregated* Curriculum Assistance class apart from her nondisabled peers for 90-minutes per day, *see* Stip. Exh. 2, Bates p. 30, and did not incorporate any of this instruction into the general-education classroom; instead, *in the general education classroom*, the May 2017 IEP offered, as Dr. [redacted] testified, only "basic" accommodations such as preferential seating, extended test time, testing in a separate room, teacher notes and a break card, and modified assignments, *see, e.g.*, Stip. Exh. 2, Bates p. 25; *see also infra* ¶ 738.

extended time, the typical things that you see," *even if fully implemented by Respondent*, are insufficient to meet her needs in the general-education setting. *See* Tr. pgs. 518:4 – 519:8.

419. In fact, contrary to the assertion made in Finding of Fact 15, Dr. [redacted] testified, when asked directly, that Respondent is "100 percent capable" of implementing appropriate accommodations for [redacted]

> Q [by Petitioners' counsel]: And in your opinion, is that something that the public schools are capable of putting into place?
>
> A [by Dr. [redacted] 100 percent capable; we need to be more creative.
>
> Q: And is it your opinion based on the documents that you reviewed of the programs in Wake County that Wake County is capable of putting them into place?
>
> A: Yes.
>
> Tr. p. 530:13-18 ([redacted] testimony).

420. The factual underpinning upon which Finding of Fact 15 relies to diminish Dr. [redacted] credibility is refuted by the record evidence offered to support it and by the record evidence considered in its entirety. Thus, this third finding identified in the Final Decision as a basis upon which to diminish Dr. [redacted] credibility fails scrutiny following an independent review of the evidence in the record considered in its entirety.

421. A review of the documentary record along with Dr. [redacted] actual testimony finds Dr. [redacted] fully credible without any diminishment.

422. As the Final Decision initially recognized, Dr. [redacted] is "very knowledgeable in her areas of expertise" and she also "had specific knowledge about [redacted] *See* Final Decision, Finding of Fact ¶ 12.

Dr. [redacted]

423. Petitioners introduced Dr. [redacted] ("Dr. [redacted] as a fact witness, not an expert witness.

424. Dr. [redacted] performed – in June 2016 – a psychological evaluation of [redacted] that was relied upon by Respondent in May 2017 to develop and finalize the IEP at issue in this case. *See* Stip. Exh. 14, Bates pgs. 87 – 115 (the June 2016 evaluation of [redacted] performed by Dr. [redacted] Tr. p. 232:19 (Dr. [redacted] testimony that she evaluated [redacted] "in June of 2016").

425. Dr. [redacted] earned her B.A. in psychology from the University of North Carolina at Chapel Hill with highest honors, and she earned her M.S. in Psychology and her Ph.D. in Clinical Psychology from the University of Georgia. Pet. Exh. 38, Bates p. 242.

426. Dr. [redacted] has over 10 years' experience with assessment and treatment of children. Pet. Exh. 38, Bates p. 242-43. In her current position, as a Licensed Psychologist at CReATE Clinical, Inc., in [redacted] NC, she provides "data-driven and research-based psychological and psychoeducational testing services to children and adolescents enrolled in various private schools, treatment centers, and therapy programs in Western North Carolina." Stip. Exh. 38, Bates p. 242.

427. Dr. [redacted] has received numerous grants for her research, Stip. Exh. 38, Bates pgs. 245-46, has considerable research and administrative experience, Stip. Exh. 38, Bates p. 247-48, has published over a dozen manuscripts, Stip. Exh. 38, Bates pgs. 248-49, and has delivered approximately two dozen presentations, Stip. Exh. 28, Bates pgs. 250-51.

428. Dr. [redacted] applied her extensive knowledge and skill to her June 2016 psychological evaluation of [redacted] and Petitioners called her as a witness to testify about the process she used to evaluate [redacted] *see, e.g.,* Tr. pgs. 232:24 – 235:14, to explain the results of her evaluation, *see, e.g.,* Tr. pgs. 235:19 – 259:24, and to review the recommendations she had at the time she evaluated [redacted] *see, e.g., id.*

429. The evidence contained in the record supports the Final Decision's determination that "Dr. [redacted] evaluation report, and her testimony regarding the evaluation process and the report" is "comprehensive and credible." *See* Final Decision, p. 10, ¶ 17.

430. The ALJ made no credibility findings about Dr. [redacted] in open court at the close of the hearing in this case prior to requesting proposed decisions from the parties, and the ALJ expressed no guidance regarding how she evaluated the credibility of witnesses (or how she intended to rule on the substantive issues in the case) in her Order requiring submission of Proposed Final Decisions from the parties "on or before June 15, 2018." *See* Tr. p. 1211:3-16; Order for Proposed Final Decisions dated May 22, 2018.

431. The credibility findings about Dr. [redacted] that appear in the Final Decision draw from the proposed credibility findings offered by Respondent in Respondent's Proposed Final Decision. *Compare* Final Decision, p. 10, Finding of Fact ¶ 18 *with* Respondent's Proposed Final Decision, p. 18, ¶ 9.

432. Despite finding Dr. [redacted] essential testimony to be "comprehensive and credible," the Final Decision criticized Dr. [redacted] testimony and credibility for two reasons that are unsupported by the evidence contained in the record.

433. First, the Final Decision critiqued Dr. [redacted] as follows: "Dr. [redacted] refused to answer Respondent's questions about whether a class size cap was necessary for [redacted] to achieve academically, which was a primary issue in this case. This evasiveness and unwillingness to answer questions central to Petitioners' case implied that her expert opinion, if given, would not have been favorable to Petitioners. As the only independent evaluator of [redacted] in this case, Dr. [redacted] lay testimony, albeit reluctantly given on this issue, was given weight by the Undersigned." Final Decision, p. 10, Finding of Fact ¶ 19.

434. The Final Decision offered no citation to the record to support this finding. Respondent's Proposed Final Decision offered no record citation to support this finding. Respondent's Written Arguments on Appeal offer no record citation to support this finding.

435. The Undersigned conducted a search of Dr. [redacted] testimony for the word "cap," for the phrase "class size," and for the phrase "class size cap." Each of these searches produced zero results. Dr. [redacted] was not asked about a "cap" or about "class size" or about a "class size cap." The finding that she was evasive in response to questions about such things thus finds zero support in the record.

436. It is likely that Dr. [redacted] was not asked about a "cap" or about a "class size cap," because *she did not recommend one*, *see* Stip. Exh. 14, Bates pgs. 87-115, and whether such a thing was necessary was *not* "a primary issue" or a "question[] central" in Petitioners' case. The Final Decision mis-understood Petitioners' case and the questions central to it. *See infra* ¶¶ 627-80.

437. On the "primary issue," *as it was raised by Petitioners*, Dr. [redacted] affirmed her "academic recommendations, . . . including like a recommendation for, you know, a smaller classroom environment with a smaller teacher to student ratio." Tr. p. 252:12-15; *see also, e.g.*, Tr. p. 286:20-24 (Dr. [redacted] agreeing that she recommended a "smaller classroom environment with a small [teacher-student] ratio" in her June 2016 evaluation); Tr. p. 287:5-21 (Dr. [redacted] reiterating that she wrote in her report that [redacted] would "likely respond optimally in a smaller classroom environment with a small teacher to student ratio" and "that was my recommendation for her" and explaining that "a smaller classroom environment with a smaller student to teacher ratio" was what [redacted]s "needs" were); Tr. p. 288:3-11 (Dr. [redacted] explaining that while [redacted] might not be "completely incapable" of learning in another setting, "it was not [her] impression . . . that a larger classroom environment would be a good match for her learning needs, especially with the autism spectrum disorder and the anxiety"). And she clarified that she recommended that smaller classroom environment for all of [redacted]s classes "in general," not for merely "one class period a day." Tr. p. 254:12-15.

438. The finding in the Final Decision that "implie[s]" that Dr. [redacted] testimony on the "primary issue" in this case "would not have been favorable to Petitioners" based upon the errant finding that Dr. [redacted] refused to answer questions about a "class size cap" is incorrect. Dr. [redacted] recommendation and testimony that [redacted] "needs" a "smaller classroom environment" with a "smaller student to teacher ratio" is consistent with Petitioners' contention throughout the IEP process.

439. Ultimately, the Final Decision's finding that Dr. [redacted] was evasive in response to questions about "a class size cap" finds zero support in the record. Dr. [redacted] was not asked questions about a "class size cap." And *even if* Dr. [redacted] *had been* asked such questions, class-size-cap questions are irrelevant to the issues raised by Petitioners because Petitioners did not seek a universal class-size cap. That expression of the issue embodies a misunderstanding of Petitioners' evidence and of the testimony of the only expert qualified on evidence-based practices for children with autism. *See infra* ¶¶ 627-80.

440. The Final Decision also critiqued Dr. [redacted] because "on cross examination" she "repeatedly refused to answer questions that were appropriate subjects for questioning by the Respondent's counsel" and "[h]er excuse was that she was acting as a 'fact' witness, not as an 'expert' witness." Final Decision, p. 10, Finding of Fact ¶ 18.

441. The record supports the finding that Dr. [redacted] was a "fact" witness and not an "expert" witness in this case.

442. The record does *not* support that she "repeatedly refused to answer questions that were appropriate subjects for questioning by the Respondent's counsel." The Undersigned reviewed each of the transcript pages offered to support this finding. While Dr. [redacted] expressed discomfort when asked for her opinion beyond the scope of her June 2016 evaluation, she answered each question without refusal. *See, e.g.,* Tr. pgs. 281:16 – 282:7 (expressing, in response to a question about how new grades from spring 2017 would impact her 2016 analysis of [redacted]s test scores, discomfort "as a fact witness" in giving a response because "that goes beyond the purview of what the referral for that evaluation is," but nonetheless answering the question and explaining, "I guess what I can say is that, you know part of conducting the evaluation process there – there likely were areas in which she was doing well in academics. … Nevertheless, you know, the scores continued to indicate a learning disability in these specific areas"); Tr. p. 289:1-17 (stating, in response to a question inviting speculation about changes in [redacted]s management of emotions and social needs and inviting speculation about the impact such changes might have on [redacted]s current needs, that "I have to be – again, I'm a fact witness so I have to be careful about going outside the evaluation too much . …So, I think – you know, I guess I feel like it's outside the purview of the evaluation and in the context that I saw her in to be able to state to what degree I expected that to happen or – or to any type of pace," but nonetheless expressing her view "I expected that it might be a relatively slow process"); Tr. p. 292:25 – 307:3 (stating, in response to an initial question asking for an on-the-fly evaluation of whether the recommendations in a document Dr. [redacted] had not previously read were consistent with the recommendations she made in her June 2016 evaluation, that "I can read it, but I don't feel comfortable stating whether it's part of my evaluation findings just because I feel like that's moving into the realm of expert witness, and I'm just here as a fact witness about my evaluation," and then answering, without hesitation, an extensive series of questions asking for comparison of documents created subsequent to Dr. [redacted] June 2016 evaluation with the 2016 evaluation itself before clarifying on re-direct that while there were consistencies between the new documents presented to her an her June 2016 recommendations, the new documents were *not* "comprehensive of the needs . . . identified in the report" and that ultimately even if [redacted] receives *all* of the accommodations identified in the May 2017 IEP at Stipulated Exhibit 2, it is *not* consistent with her recommendations as presented in her June 2016 evaluation).

443. Dr. [redacted] discomfort about answering questions beyond the scope of her June 2016 evaluation is consistent with the fact that Dr. [redacted] had not been updated about [redacted]s progress since that June 2016 evaluation, had not re-evaluated [redacted] had not reviewed the draft IEP proposed by Respondent in April 2017, had not reviewed final IEP offered by Respondent in May 2017 or re-evaluation [redacted] prior to her testimony in March 2018. *See, e.g.,* Tr. p. 292:1-3.

444. As a result, Dr. [redacted] "struggle[ed] with" questions that demanded that she stray from her 2016 report and offer opinions about [redacted]s current needs or the May 2017 IEP. Tr. p. 306:25. Nonetheless, she did her best to answer those questions. She did not "repeatedly refuse" – or even once refuse – to answer them; instead, she answered all of them to the best of her knowledge and ability, despite discomfort.[42]

445. Because the record supports the finding that "Dr. [redacted] evaluation report, and her testimony regarding the evaluation process and the report" is "comprehensive and credible," Final Decision, Finding of Fact, ¶ 17, and because the critiques of Dr. [redacted] are without support in the record evidence, Dr. [redacted] remains fully credible in all of her testimony.

[redacted] and [redacted]

446. Petitioners introduced as witnesses two educators who had worked with [redacted]

- [redacted]s primary therapist at [redacted] Academy for [redacted] and
- [redacted]s English teacher at [redacted] Academy and an administrator at [redacted] Academy.

447. The Final Decision recognized that both Ms. [redacted] and Ms. [redacted] were credible in the areas about which their testimony is most essential to the issues raised on appeal.

448. The Final Decision recognized that [redacted] "was very knowledgeable about [redacted] and [redacted] Academy, and the [ALJ] found her testimony in those areas credible." Final Decision, Findings of Fact, ¶ 20; *see also* Respondent's Proposed Final Decision, ¶ 10 (same).

449. The Final Decision recognized that [redacted] "was knowledgeable and credible regarding the programming offered at [redacted] Academy." Final Decision, Findings of Fact, ¶ 21; *see also* Respondent's Proposed Final Decision, ¶ 11(same).

450. The ALJ made no credibility findings about either Ms. [redacted] or Ms. [redacted] in open court at the close of the hearing in this case prior to requesting proposed decisions from the parties, and the ALJ expressed no guidance regarding how she evaluated the credibility of witnesses (or how she intended to rule on the substantive issues in the case) in her Order

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[42] The Final Decision also critiqued Dr. [redacted] based "[h]er excuse" that she was "acting as a 'fact' witness, not as an 'expert' witness," *without allowing Dr.* [redacted] *to explain what she meant through that language. See* Final Decision, p. 10, ¶ 18. The refusal to permit Dr. [redacted] to explain "what [she] meant" when she expressed concern about "acting as a 'fact' witness, not as an 'expert' witness" undermines the critique of that expression. *See* Tr. p. 307:4-12. Petitioners' counsel invited Dr. [redacted] to explain that what she meant by distinguishing between her role as a "fact" witness as opposed to an "expert" witness as follows: "Dr. [redacted] you've said multiple times during your testimony that you're struggling as a fact witness. Can you explain what you mean by that?" Tr. p. 307:4-6. Respondent objected to this question as irrelevant, and the ALJ sustained that objection. Tr. p. 307:4-12. Dr. [redacted] was not permitted by the court to "explain what [she] mean[t]" when she said she was "struggling" as a fact witness with questions that asked for her opinion about materials or matters arising subsequent to her June 2016 evaluation. Tr. p. 307:4-12.

requiring submission of Proposed Final Decisions from the parties "on or before June 15, 2018." *See* Tr. p. 1211:3-16; Order for Proposed Final Decisions dated May 22, 2018.

451. The credibility findings about Ms. [redacted] and Ms. [redacted] that appear in the Final Decision are nearly identical to the proposed credibility findings offered by Respondent about [redacted] in Respondent's Proposed Final Decision. *Compare* Final Decision, p. 10-11, Finding of Fact ¶¶ 20 & 21 *with* Respondent's Proposed Final Decision, ¶¶ 10 & 11.

452. Despite recognizing the credibility of both Ms. [redacted] and Ms. [redacted] on essential matters within their personal knowledge and expertise, the Final Decision nonetheless critiqued the credibility of both on other details. *See* Final Decision, Findings of Fact, ¶¶ 20 & 21; *see also* Respondent's Proposed Final Decision, ¶¶ 10 & 11 (same).

453. Because the Final Decision recognized that Ms. [redacted] and Ms. [redacted] were credible in the areas about which their testimony is most essential to the issues raised on appeal, this Decision does not detail the evidence on the asserted bases for diminishing their credibility on other details.

454. An independent review of the record considered in its entirety finds that both Ms. [redacted] and Ms. [redacted] had personal knowledge of [redacted] and her needs through their professional training and experience and through their work with her in educational settings; they were credible in their testimony about their experience with her and her educational needs as well as about the programs within which they taught.

[redacted]

455. [redacted] is [redacted] mother. Tr. p. 36:4-5.

456. The ALJ made no credibility findings about [redacted] in open court at the close of the hearing in this case prior to requesting proposed decisions from the parties, and the ALJ expressed no guidance regarding how she evaluated the credibility of witnesses (or how she intended to rule on the substantive issues in the case) in her Order requiring submission of Proposed Final Decisions from the parties "on or before June 15, 2018." *See* Tr. p. 1211:3-16; Order for Proposed Final Decisions dated May 22, 2018.

457. The credibility findings about [redacted] that appear in the Final Decision are nearly identical to the proposed credibility findings offered by Respondent in Respondent's Proposed Final Decision. *Compare* Final Decision, p. 11, Finding of Fact ¶ 22 *with* Respondent's Proposed Final Decision, pgs. 18-19, ¶ 12.

458. In the section of the Final Decision captioned "Credibility of Witnesses," the Final Decision provides the following regarding [redacted]

> [redacted] is the mother of [redacted] Her concerns for [redacted] was [sic] apparent throughout her testimony. [redacted] shared useful information about the [redacted] Academy program and her decision process regarding [redacted]s education. However, during her

testimony, [redacted] repeatedly made statements that were either incorrect or exaggerated and later had to be corrected. Tr. vol. 2 p. 384:6-14 (stating as fact that IB classes at [redacted] High School were smaller, then admitting that she had no factual basis for that statement); Tr. vol. 2 pp. 386:4-8, 387:18-388:1 (claiming she gave specific feedback ahead of the IEP meeting, then acknowledging she did not do so); Tr. vol. 1, pp. 101:11-102:4 (stating as fact that the IEP team removed a statement from the draft IEP "[b]ecause they can't offer it" then acknowledging that "[t]hey did not state that. That is my assumption"). [redacted]s testimony about the May 2017 IEP meeting was often contrary to documentation from the meeting and testimony of every other attendee of the IEP meeting who testified. At times, [redacted] was argumentative during cross-examination. Although cross-examination is understandably frustrating, [redacted]s demeanor undercut her credibility as a witness.

Final Decision, p. 11, Finding of Fact ¶ 22.

459. The Final Decision at Finding of Fact 22 makes three fact-based credibility assertions, assertions that rely on testimonial and documentary evidence, to undermine [redacted]s credibility. It offers record evidence to support one of them. It offers no record evidence to support the other two.

460. An independent review of the entire official record, including an independent review of all record citations offered in the Final Decision at Finding of Fact 22, produces no support for any of the undermining assertions, and [redacted]s credibility remains intact on those points.

461. The first assertion in the Final Decision's Finding of Fact 22 is that [redacted]s testimony is of diminished credibility because she "repeatedly made statements that were either incorrect or exaggerated and later had to be corrected." Ironically, this is the very error within Finding of Fact 22.

462. The Final Decision offers three record citations to support this assertion.

463. Reviewing each citation offered in the Final Decision in its full context and in connection with other documentary evidence in the record refutes that [redacted] "repeatedly made statements that were either incorrect or exaggerated and later had to be corrected."

464. Each citation identified to discredit [redacted] is addressed one by one in the following paragraphs.

465. The first record reference identified in Finding of Fact 22 to discredit [redacted] points to lines 6 to 14 on page 384 of the transcript – a segment of Respondent's cross examination of [redacted] The full context for this transcript reference is as follows (with the lines cited by the Final Decision in bold text):

By Mr. Rawson [Respondent's counsel]:

Q: You also mentioned yesterday, I believe, that you separately applied for a transfer to [redacted] High School; is that correct?

A [by Petitioner [redacted] Correct.

Q: And that the reason was, and I think this is a quote, "where the options for her education needs might be more fitting"?

A: Correct.

Q: You do recognize that [redacted] is actually larger than [redacted] correct?

A: I do, by 200 students, but the student-teacher ratio is smaller.

Q: And I believe you testified yesterday by one student, correct?

A: One student is one student.

Q: So the classes at [redacted] you would admit, are largely the same size as [redacted]?

A: They could be. But they also have the IB program where the classes are smaller, and it could have been an option for her to attend.

Q: And you do realize that transferring to [redacted] does not put her in the IB program, correct?

A: No, but it's an option.

Q: And do you know for a fact that the IB classes are smaller?

A: I don't have statistics, no.

Q: And you're aware that [redacted] does not have the autism support program [redacted] has, correct?

A: No, that's not true, because I do believe that they do have an autism special teacher at that school. And I know that firsthand from a friend who had an autistic boy there.

Tr. p. 383:13 – 384:20 ([redacted] testimony on cross examination by Respondent's counsel).

466. Reliance on this testimony as a basis to undermine [redacted]s credibility as "incorrect or exaggerated" is misplaced for several reasons.

467. First, whether [redacted] could secure a spot in the IB program at [redacted] High School with its lower teacher-student ratio is not at issue in this case. It is a red herring.

a. Respondent denied [redacted]s request to transfer to [redacted] after the school-system members of [redacted]s IEP Team failed to follow through on their representation that they would notify the transfer office of [redacted]s request.[43] *See* Pet. Exh. 32, Bates p. 216 (email from Respondent stating "the transfer was submitted on June 14, and I . . . denied the transfer on June 16, 2017"); Order on the Final Pre-Trial Conference, March 19, 2018, p. 12, Initial Stipulations ¶ 78; Tr. p. 107:3-5 ([redacted] testimony).

b. [redacted] did not appeal Respondent's denial of her request to transfer to [redacted] High School. Order on the Final Pre-Trial Conference, March 19, 2018, p. 12, Initial Stipulations ¶ 80.

468. Second, [redacted]s reason for requesting a transfer to [redacted] – to realize a lower student-teacher ratio with smaller class sizes for [redacted] – reflects *consistency* in [redacted]s position throughout the IEP-development process and throughout this litigation. It does not suggest she is "incorrect or exaggerated." *Compare* Stip. Exhs. 18, 20, & 22 (recognizing in the IAP, LEAD assessments, and recommended interventions from [redacted] Academy for [redacted] which were available to the IEP team in advance of the IEP meeting, that [redacted] required small-class sizes and that she was not ready to enter a regular education classroom without that (and other) accommodations) *with* Stip. Exh. 4, Bates p. 36 & 41 (also acknowledging in Respondent's IEP meeting minutes that Ms. [redacted] "recommended a small classroom setting" and [redacted] "expressed great concern" about the "large school setting" at the May 2017 IEP meeting, emphasizing that [redacted] required "small class sizes" to address her sensory issues) *with* Petition for a Contested Case Hearing (Special Education), p. 15-16, ¶¶ 144, 147, 157, 160 (also identifying in the Petition for a Contested Case that small class size was a concern underlying Petitioners' objection to the May 2017 IEP); *with* Tr. p. 106:11-17; 117:1-20 (continuing to express the request for small-class setting as an accommodation to enable [redacted] to access her education in regular-education classrooms at the due process hearing).

469. Further, that [redacted]s mother does not possess a "statistic[]" regarding the number of children present within each class in the IB program at [redacted] High School does not make her "incorrect or exaggerated" in testifying that "classes are smaller" in that IB program.

a. A statistic regarding class size in [redacted] High School's IB program is a data point *Respondent* should have access to or be able to calculate.

b. Respondent failed to offer any *evidence* or data on class size in [redacted] High School's IB program.

c. Other than [redacted]s testimony, based on her understanding as a parent and not based on a "statistic[]," the record is substantively silent regarding class sizes in the IB program at [redacted] High School.

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[43] Respondent told [redacted] that it would communicate her transfer request to the office of student assignment, *see* Order on the Pretrial Conference, Initial Stipulations, ¶ 78, but it did not, *see* Tr. p. 107:3-5.

d. Thus, the record contains no basis, no *evidence*, upon which to find that [redacted] is "incorrect or exaggerated" regarding her understanding of class sizes in the IB program at [redacted] High School.

470. Finally, the Final Decision inaccurately states in its parenthetical re-imagining the relevant transcript testimony that, through this testimony, [redacted] "stat[ed] as fact that IB classes at [redacted] High School were smaller, then admit[ed] that she had no factual basis for that statement." This is an inaccurate re-imagining of this transcript testimony.

a. [redacted] communicated her understanding that IB-program classes at [redacted] are smaller than non-IB classes; but [redacted] did *not* state that she had "no factual basis" for holding that impression, as the Final Decision incorrectly finds.

b. Respondent's counsel, unlike [redacted] used the word "fact" in his cross-examination questioning, asking [redacted] "do *you know* for a ***fact*** that the IB classes are smaller?" Tr. p. 383:13 – 384:20 (emphasis added).

c. [redacted] limited the scope of her answer to statistical facts, stating: "I don't have ***statistics***." Tr. p. 383:13 – 384:20 (emphasis added).

d. [redacted] did not testify that she "didn't have" any other, non-statistical pieces of information, "facts," to support her understanding.

e. Acknowledging that she did not "have statistics" regarding class sizes in the IB program at [redacted] High School, does not mean [redacted] had "no factual basis" for her impression that IB classes at [redacted] High School are smaller than other classes. Respondent jumped to that conclusion for purposes of its Proposed Final Decision, but the testimony itself, taken in context of the record as a whole, does not support this leap.

f. There are multiple means through which a parent may develop an understanding, and collect "facts," about class size within the IB program at [redacted] High School without "statistics" on that matter from Respondent.

I. A parent might collect information about a school and its class sizes by talking with other parents who have children in the relevant program in an attempt to learn from others' lived experiences. The record reflects that [redacted] had spoken with other parents of children with autism who had experience at [redacted] High School.

II. A parent might collect information about a school and its class sizes by visiting and observing classes. The record reflects that [redacted] had worked to do this prior to the IEP meeting at issue.

III. A parent might collect information about a school and is class sizes by studying information available on websites that compile information to assist parents in evaluating schools. The record also reflects that [redacted] had considered information from websites while exploring potential schools for her daughter.

471. Acknowledging that [redacted] had no *statistic* to support her understanding that IB-program classes at [redacted] High School are smaller than non-IB classes at that school does not mean that she had "no factual basis" for that understanding. And it does not make her understanding "incorrect or exaggerated," especially when the record is *silent* with respect to actual data and provides no evidence contrary to [redacted]s expressed understanding.

472. [redacted]s testimony means precisely what [redacted] said: That [redacted] had "no statistic" on [redacted] High School's IB-program class size. To assert anything more is an exaggeration of the record evidence.

473. The second record reference that the Final Decision offers to discredit [redacted] is a citation to pages 386 through 388 of the Transcript. Final Decision, p. 11, ¶ 22.

474. The transcript on these pages offers another exchange during Respondent's cross examination of [redacted] This exchange explores whether [redacted] provided feedback to Respondent prior to the May 2017 IEP meeting.

475. The Final Decision asserts that the testimony reflected in these transcript pages discredits [redacted] because [redacted] "claim[ed] she gave specific feedback ahead of the IEP meeting, then acknowledge[ed] she did not do so." Final Decision, p. 11, ¶ 22.

476. The IDEA does not require parents to offer specific feedback to school systems in advance of IEP meetings. In fact, the IDEA does not require parents to identify specific concerns *at* IEP meetings in order to preserve such concerns for review through due process. The United States Office of Special Education Programs emphasized that imposing such a requirement is inconsistent with the IDEA and its implementing regulations. *See* Letter to Dowaliby, 38 IDELR 14 (OSEP 2002); Letter to Zimberlin, 34 IDELR 150 (OSEP 2000).

477. The United States Office of Special Education Programs explained that a "requirement that issues be raised at a PPT meeting before they can be addressed at a due process hearing establishes *impermissible* notice and exhaustion burdens [on parents] *inconsistent with* the Individuals with Disabilities Education Act (IDEA) and its implementing regulations." Letter to Dowaliby, 38 IDELR 14 (OSEP 2002) (emphasis added).

478. Although it was not required and it would be inconsistent with the IDEA to impose such a requirement, the documentary evidence in the record reflects that [redacted] gave feedback to Respondent ahead of the IEP meeting about [redacted]s disabilities and the unique educational needs they created.

479. [redacted] provided their privately obtained evaluative information, and Respondent acknowledged that it relied on this information in developing [redacted]s IEP. This evaluative

information contained pages of feedback regarding [redacted]s diagnoses and educational needs. *See* Order on the Pre-Trial Conference; Initial Stipulations, p. 7, ¶ 53 (stipulating that the IEP Team accepted [redacted]s privately obtained evaluation and "used the information from her evaluation" to complete necessary forms at the IEP meeting); Stip. Exh. 14, Bates p. 87-115 (the privately obtained June 2016 psychological evaluation conducted by Dr. [redacted] provided by [redacted] to Respondent, and detailed in initial Stipulations at Paragraphs 28 – 47); Stip. Exh. 15, Bates p. 117-22 (the privately obtained April 2016 Occupational Therapy evaluation provided by [redacted] to Respondent for use in developing [redacted]s May 2017 IEP).

480. The information [redacted] provided to the team in advance of the IEP meeting was so comprehensive that Respondent determined it did not need to conduct any additional evaluations or do any additional assessment to draft an appropriate IEP. *See* Order on the Pre-Trial Conference, Initial Stipulations, p. 7, ¶ 57 ("WCPSS did not require any additional data to determine continued eligibility for special education and related services, present levels of academic achievement, or whether any additions or modifications to [redacted]s special education and/or related services were needed to meet measurable annual goals and participate in the general curriculum"); Stip. Exh. 8, Bates p. 58 (stating in the DEC 7, Reevaluation, that "NO additional assessment or data are needed" because "[t]he IEP team determined that available information is sufficient to determined continued eligibility and how to best meet [[redacted]s] needs at this time"); Stip. Exh. 1, Bates p. 1-2 (incorporating in the draft IEP data taken directly from the Psychological Testing "provided by Center for Research Assessment, and Treatment Efficacy," the testing privately obtained by [redacted] and provided by [redacted] to Respondent in advance of the IEP meeting); *see also* Stip. Exh. 14, Bates p. 87-115 (the privately obtained Report of Psychological Evaluation prepared by the Center for Research Assessment, and Treatment Efficacy" incorporated into the draft and final IEPs at issue in this case).

481. After Respondent utilized the initial feedback provided by [redacted] to draft an IEP for [redacted] provided *additional* feedback in an email dated May 3, 2017 – 16 days before the May 19, 2017, IEP meeting. *See* Pet. Exh. 23, Bates p. 188 (email from [redacted] to [redacted] dated May 3, 2017, offering feedback on Respondent's draft IEP).

482. In this email dated May 3, 2017, [redacted] informed Respondent that the draft IEP did not address some of [redacted]s known needs, and she invited Respondent to communicate with [redacted]s then-current teachers to learn more about those needs. [redacted] wrote as follows:

> . . . . If it would be helpful to the WCPSS to prepare for the meeting, I am willing to give you permission to speak with someone from [redacted] [[redacted] Academy for [redacted] directly about [[redacted]s] transition needs prior to the meeting. I know the draft that you sent was not complete, but I still think their input would be helpful, as **the draft did not address some of [[redacted]s] known needs**. . . .
>
> Pet. Exh. 23, Bates p. 188 (emphasis added).

483. The record contains no evidence that Respondent followed up with [redacted] after receiving this feedback to seek additional information from [redacted] or to secure a release to speak directly

with someone from [redacted] Academy for [redacted] *See* Tr. p. 388:7-8 (offering [redacted]s testimony that she was "never contacted to get that willing permission").

484. The documentary record demonstrates that [redacted] offered comprehensive information and feedback to Respondent about [redacted]s needs prior to the May 2017 IEP meeting, although this was not required of her under the IDEA.

485. Nothing in the transcript on the pages cited in the Final Decision (386-88) refutes the documentary record evidence that [redacted] offered this information to Respondent in advance of the May 2017 IEP meeting.[44]

486. Instead, within the transcript pages cited in the final decision, [redacted] *corrected* Respondent's counsel's mischaracterization of the relevant documentary evidence.

a. Respondent's counsel asked [redacted] the following question on cross examination: "But **you didn't provide <u>any</u> feedback ahead of the meeting**, correct?" Tr. p. 386:4-5 (emphasis added).

b. [redacted] then corrected Respondent's counsel, stating "I did, actually."

487. After being corrected by [redacted] Respondent's counsel then *changed* his question and asked something different: "You suggested revisions to the draft?" Tr. p. 386:7-8.

a. Without her written communications in front of her, [redacted] stated:

> I made some – I did. Actually, I noted that there were no academic goals in there, and I asked her that – *I specifically expressed that if she obtained written permission from me that she could contact anyone at* [redacted] *Academy to get more input into* [redacted]*s IEP*, that she was more than welcome to give them the draft and have them complete or mark or note as needed.
>
> Tr. p. 386:8-14 (emphasis added).

b. Although [redacted] did not have the benefit of seeing her May 3, 2017, email at the time Respondent's counsel cross-examined her with this question, [redacted]s recollection was similar to what her May 3, 2017, email offered. That email stated, as recognized above: "If it would be helpful to the WCPSS to prepare for the meeting, *I am willing to give you permission to speak with someone from* [redacted] *[*[redacted] *Academy for* [redacted] *directly about [*[redacted]*s] transition needs prior to the meeting*. I know the draft that you sent was not complete, but I still think *their input would be helpful, as the draft did not address some of [*[redacted]*s] known needs*." Pet. Exh. 23, Bates p. 188 (emphasis added).

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[44] The Final Decision may – without saying so – be attempting to undermine [redacted]s credibility because the May 3, 2017, email does not use the words "academic goals," but instead uses the words "known needs." But that is not stated in the finding, and there is nothing discrediting, incorrect, or exaggerated about the word choices [redacted] used to offer feedback to Respondent in advance of the May 19, 2017, IEP meeting. *See* Pet. Exh. 23, Bates p. 188.

488. After eliciting testimony from [redacted] about an email without that email in front of her, Respondent's counsel *then* asked [redacted] to look at Petitioners' Exhibit 23, and, again, re-phrased his question: "So *that* is my question. This does not specify your concern about academic goals." Tr. p. 387:18-19 (emphasis added).

489. This question, whether [redacted] "specif[ied] [a] concern about academic goals" in a specific email of many exchanged between the parties, Tr. p. 387:18-19, is different from the question [redacted] initially answered in which she was asked to confirm that she "didn't provide any feedback ahead of the meeting," Tr. p. 386:4-5 (emphasis added).

490. The answer to the former question, therefore, has no relation to the answer to the latter question. Different questions often require different answers. This is not discrediting.

491. One might observe – although the Final Decision's findings did not – that the vocabulary [redacted] used in her May 3, 2017, email providing feedback to Respondent about its draft IEP meeting ("known needs") was different than the vocabulary she used when asked on cross examination to recall it out-of-context ("academic goals"). [redacted]s word-choice on cross examination makes sense on the record evidence, and "academic goals" should have been understood as one of [redacted]s "known needs" by those familiar with [redacted]s educational records.

a. [redacted]s May 3, 2017, email used the words "known needs" to describe what was missing in the draft IEP, *see* Pet. Exh. 23, Bates p. 188.

b. Her testimony nearly a year later on March 20, 2018, during cross examination without the relevant email in front of her, used the words "academic goals." *See* Tr. p. 386:8-9.

c. Although the words "academic goals" do not appear in [redacted]s May 3, 2017 email, they appear in multiple other places, including in verbal statements made to the IEP Team at the IEP meeting, *see* Stip. Exh. 4, Bates p. 36 (recognizing in Respondent's IEP meeting minutes that [redacted] "stated she feels that [[redacted] does need academic goals"), in [redacted]s Petition for a Contested Case Hearing, *see* Petition for a Contested Case Hearing, p. 13, ¶131 (using the words "academic goals"), and in [redacted]s conversations with Respondent, *see, e.g.,* Tr. p. 93:16 – 96:1 (recognizing in [redacted]s testimony that she communicated to Respondent not only her belief that [redacted] would need academic goals in the IEP, but also Ms. [redacted] statement that [redacted] would need academic goals in the larger setting).

d. [redacted] also testified that she "thought there was an e-mail that talked about academic goals specifically." *See* Tr. p. 387:15-16.

e. But [redacted] acknowledged that her May 3, 2017, email did not include the words "academic goals." *See* Tr. p. 387:15 – 388:1. She further acknowledged that the words "known needs" in her May 3, 2017, email "could mean anything," *see* Tr. p. 387:15 – 388:1, particularly to an uninformed reader.[45]

[45]To those familiar with [redacted]s educational record, like both Respondent and [redacted] it should have been apparent that [redacted]s "known needs" included "need" for "academic goals" in math and language arts, making the use of the words

492. Given that [redacted] acknowledged that her May 3, 2017, email did not include the words "academic goals," one might argue that the parenthetical in Paragraph 22 of the Final Decision imprecisely intended to communicate the narrow point – without saying so directly – that [redacted] recalled under cross examination on March 20, 2018, that she gave feedback in *a May 3, 2017, email using the words* "academic goals," and later had to acknowledge that she didn't use the words "academic goals" *in the email dated May 2017*, but instead used those words at the IEP meeting itself on May 17, 2017, in her Petition for a Contested Case Hearing filed on December 29, 2017, and in her testimony on March 20, 2018, and possibly in another email or writing that Respondent did not introduce to her during cross examination.

493. If this narrower point was the intended critique of [redacted] as "exaggerated or incorrect," then the Final Decision could have communicated that.

494. The Undersigned finds no basis upon which to infer that this unstated narrower point *was* what was intended in the Final Decision for two reasons. First, the Final Decision could have, but did not express, the narrower point. Second, a single variance in word choice, mixing words that could hold similar meaning to a layperson under the facts of this case, nearly a year after an email was written and at a time when the email was not in front of her does not discredit – especially when [redacted] acknowledged the variance in word choice as soon as she observed it under cross examination.

495. Considering in its entirety the evidence contained in the Official Record on Appeal, [redacted] provided to Respondent substantial information and feedback in advance of the IEP meeting. [redacted] provided at private expense the evaluation material considered by the IEP team and incorporated in part into the IEP. This evaluation material contained specific and detailed information about [redacted]s educational needs, including information about the need for academic

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"known needs" as inclusive of "academic goals" understandable. [redacted]s "need" for an "academic goal" in math previously had been recognized and documented by Respondent; [redacted]s March 2016 IEP included an "academic goal" in math; and that March 2016 IEP was included in [redacted]s educational records with Respondent. *See* Pet. Exh. 15, Bates pgs. 137-54 (March 2016 IEP). Additionally, a review of the evaluations provided by [redacted] to Respondent in advance of the IEP meeting documented for Respondent in advance of that meeting that [redacted]s "known needs" included a need for "academic goals."

Those evaluations stated:

> Academically, [redacted] has a history of increasing difficulties in math-related performance since middle elementary school and this has been identified by both parents and teachers. Her struggles in math have continued despite efforts to provide support. [redacted]s current pattern of math scores indicates considerable weakness in math calculation. Consistently, [redacted]s] parents report that she has historically struggled with the learning, remembering, and retrieval of basic math facts. This is consistent with evidence processing deficits including weaknesses in executive functions and cognitive proficiency skills as well as visual spatial processing weaknesses for [redacted] Further [redacted]s] calculation-related skills (i.e., subtest and cluster scores are significantly discrepant from her estimated cognitive abilities. Taken together, [redacted]s] current math scores and associated processing deficits indicate a ***Specific Learning Disorder, with impairment in math*** (math calculation). Her scores strongly indicate **need for academic support in math**.
>
> Stip. Exh. 14, Bates p. 108 (bold and Italics in original; underlining and bold added for emphasis).

supports in reading and math, *see, e.g.,* Stip. Exh. 17 (Privately obtained Master Treatment Plan provided to Respondent in advance of the May 2017 IEP meeting); Stip. Exh. 15 (Privately obtained Occupational Therapy Evaluation provided to Respondent in advance of the May 2017 IEP meeting); Stip. Exh. 14 (Privately Obtained Psychological Evaluation provided to Respondent in advance of the May 2017 IEP meeting); Stip. Exh. 18 (Privately obtained Individualized Academic Plan provided to Respondent in advance of the May 2017 IEP meeting); Stip. Exh. Order on the Pretrial Conference, Initial Stipulations, ¶ 53. [redacted] offered written feedback on Respondent's draft IEP in an email in advance of the IEP, expressly noting that the proposed IEP failed to address some of [redacted]s "known needs," *see* Pet. Exh. 23, Bates p. 188; [redacted] invited Respondent in writing in an email in advance of the IEP meeting to reach out to [redacted]s then-current teachers for additional information and feedback about the needs Respondent's proposed IEP failed to address, *see id.* It is inconsistent with the evidence in the record to discredit [redacted] as if she did not "g[i]ve specific feedback ahead of the IEP meeting," *see* Final Decision, Finding of Fact ¶ 22, especially when a requirement that she do so would be contrary to the purposes of the IDEA. *See* Letter to Dowaliby, 38 IDELR 14 (OSEP 2002); Letter to Zimberlin, 34 IDELR 150 (OSEP 2000).

496. The documentary evidence in the record contradicts the Final Decision's critique of [redacted]s credibility on the basis that she "claim[ed] she gave specific feedback ahead of the IEP meeting, then acknowledge[ed] she did not do so," Final Decision, p. 11, ¶ 22.

497. [redacted]s credibility is bolstered, rather than diminished, by her willingness to provide information and feedback about [redacted]s unique needs related to her disabilities and about the special education, services, and supports required to meet those needs. A review of the record taken in its entirety establishes that her testimony was not "incorrect or exaggerated" on this point.[46]

498. The final citation offered in Finding of Fact 22 to discredit [redacted] references a portion of the transcript, "Tr. vol. 1, pp. 101:11-102:4," that was redacted at Respondent's request and thus does not appear in the record on appeal.

499. The parenthetical in the Final Decision attributes a quotation to [redacted] at pages 101:11-102:4 of the transcript that does not appear on those pages in the Official Record on Appeal as it was submitted to the Undersigned.

500. The parenthetical adopted in the Final Decision asserts that [redacted] "stat[ed] as fact that the IEP team removed a statement from the draft IEP '[b]ecause they can't offer it' then acknowled[ed] that '[t]hey did not state that. That is my assumption.'" Final Decision p. 11, ¶ 22.

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[46] The Undersigned recognizes the contrast between [redacted]s generous sharing of information in advance of the May 2017 IEP meeting — including her provision of [redacted]s private educational evaluation, [redacted]s private occupational evaluation, and access to [redacted]s successful private schools and educators — and Respondent's failure to respond to [redacted]s repeated requests for information about and access to Respondent's proposed public-school placements for [redacted] before that IEP meeting.

501. There is no evidence in the record that [redacted] stated that the IEP team removed anything from the IEP "[b]ecause they can't offer it." The evidence in the record contradicts any such finding.

a. The record reflects that Respondent's counsel objected to a redacted statement because Respondent's counsel interpreted the redacted statement to indicate that, according to Respondent's counsel, [redacted] "*implied* that the team stated that they didn't offer this." *See* Tr. p. 101:11-25 (statement of Respondent's counsel) (emphasis added).

b. Respondent's counsel did not indicate at the hearing that [redacted] *expressed* or "stated" what was redacted "as fact." *See* Tr. p. 101:11-25 (statement of Respondent's counsel). Instead, at the hearing, Respondent's counsel indicated that the redacted testimony "implied" as much. This is different.

c. In the un-redacted testimony surrounding the redacted portion, [redacted] affirmatively expressed that her redacted testimony did *not* communicate "as fact" that the school-system members of the IEP team said they "can't offer" anything. *See* Tr. p. 101:11 – 102:4.

d. Prior to Respondent's objection to her testimony, [redacted] testified "no, [the IEP team] did *not*" discuss the action addressed in the redacted testimony. *See* Tr. p. 101:11 – 102:4.

e. After Respondent objected on the basis that [redacted] had "implied that the team stated" something, [redacted] again testified, "[t]hey did not state that." *See* Tr. p. 101:11 – 102:4.

502. The cited exchange appears in the transcript as follows:

> Q [Petitioners' counsel]: Why did the IEP team decide to remove the statement that was in the draft about [redacted] preferring small group instruction?
>
> A: [redacted]
>
> Q: Did the IEP team discuss removing that statement from the draft?
>
> A: Actually, no, they did not.
>
> Mr. Rawson: Your Honor, based on that secondary answer I'd ask to strike the previous one where it was implied that the team stated they didn't offer this.
>
> The Court: Ms. Gahagan?
>
> Ms. Gahagan: I can ask her to clarify.
>
> The Court: Motion to strike granted.

A: They did not state that. That is my assumption that they wouldn't – were not willing to come up with any placement for a small classroom because they didn't have it to offer.

Tr. p. 101:11 – 102:4.[47]

503. The re-configuration of this testimony in paragraph 22 of the Final Decision is not accurate. The quotation attributed to [redacted] in paragraph 22 of the Final Decision – "[b]ecause they can't offer it" – does not appear in the transcript on the pages cited, possibly due to redaction at the request of Respondent and possibly due to an error in the creation of this finding of fact.

504. The transcript reflects that [redacted] *twice* testified – both before and after Respondent's objection – that the IEP team had *not* discussed or stated anything regarding the removal of the reference to small-group instruction, the subject of the dialogue on the transcript page cited, from Respondent's draft of [redacted]s IEP.[48]

505. Once she realized Respondent's confusion, [redacted] worked to clarify. In any event, there is no record evidence that [redacted] made the statement attributed to her in paragraph 22.[49]

506. The Undersigned found no falsehoods in her review of [redacted]s testimony.

507. The Final Decision at paragraph 22 offers an additional assertion – without any citation to record evidence – that purports to diminish [redacted]s credibility. It states: "[redacted]s testimony about the May 2017 IEP meeting was often contrary to documentation from the meeting and testimony of every other attendee of the IEP meeting who testified."

508. The Undersigned's review of the record did not find evidence that [redacted]s testimony was "often contrary to documentation."

509. [redacted] was the only member of [redacted]s IEP team who had taught, worked with, interacted with, supported, and/or engaged with [redacted] Her testimony, particularly on the issue at the heart of this case, small-class setting, was consistent with not only the documentary evidence in this

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[47] [redacted]s "assumption" about Respondent's unwillingness to offer small-class size as an accommodation in the general-education setting is consistent with Respondent's employee's testimony that to her knowledge Respondent had *never* offered a small-class size accommodation in the general-education setting. *See* Tr. p. 1005: 6-11(stating "Not to my knowledge. I don't believe I have" ever included "small class size as an accommodation for a student in general education settings").

[48] The Undersigned recognizes that the relevant language appearing in the Final Decision is identical to the language proposed in Respondent's Proposed Final Decision. *Compare* Final Decision, p. 11, ¶ 22 *with* Respondent's Proposed Final Decision, p. 19, ¶ 12.

[49] There is no basis in the record upon which the Undersigned can review evidence that was excluded from the record on appeal. The Undersigned acknowledges that it is possible that these words – "because they can't offer it" – would have appeared in the record on appeal if Respondent had not requested that portions of the transcript be redacted. The Undersigned also acknowledges that it is possible that these words – "because they can't offer it" – would *not* have appeared in the record if Respondent had not requested that portions of the transcript be redacted. The Undersigned reviews what does appear without speculation on what doesn't.

case, but also the testimony of other witnesses who had taught, worked with, interacted with, supported and/or engaged with [redacted]

510. [redacted] expressed concern about [redacted]s IEP because, *inter alia*, Respondent failed to offer any accommodations to address [redacted]s need for a small-classroom setting in the general-education curriculum. *See* Stip. Exh. 4, Bates p. 40-41.

511. Ample documentary evidence supports that concern, even though Respondent's employees on the IEP team did not agree with it, including:

a. [redacted]s prior IEP with Respondent dated March 2016 stated that [redacted] "requires small group instruction to complete her work, strengthen her social skils and organize herself in order to meet grade level expectations," *see* Pet. Exh. 15, Bates p. 153;

b. [redacted]s then-current IAP with [redacted] Academy for [redacted] included under the heading "Accommodation, Learning Styles, and Modifications" the accommodation of "[s]mall classroom setting," *see* Stip. Exh. 18, Bates p. 137;

c. [redacted]s then-current LEAD assessments with [redacted] Academy for [redacted] provided the "universal" support of "small learning environment with multi-modal instruction," *see* Stip. Exh. 20, Bates p. 150; Stip. Exh. 21, Bates p. Bats p. 153 (also offering the "universal" support of "[s]mall classroom environment" in [redacted]s Student Intervention Plan at [redacted] Academy for [redacted]

d. The Academic Recommendations drafted by [redacted]s then-treating therapists and educators included a "Recommended Intervention" of "[s]mall classroom setting," as well as an "Academic Recommendation" of "a smaller classroom with a 1:12 or smaller teacher-student ratio," *see* Stip. Exh. 22, Bates p. 154-55; and

e. Respondent's meeting minutes, drafted by Respondent's employee, [redacted] recognized that Ms. [redacted] the "Director of Learning & Support" at [redacted] Academy for [redacted] called into the IEP meeting and "recommended a small classroom setting to address [[redacted]s] sensory needs," *see* Stip. Exh 4, Bates p. 35-36.

512. Ample testimony from non-IEP team members who knew and/or taught [redacted] supports that testimony, including testimony from:

a. [redacted] [redacted] [redacted]s therapist at [redacted] Academy for [redacted] *see, e.g.*, Tr. p. 140:19 – 141:3 (identifying concern about placing [redacted] in a "traditional high school" without accommodations to meet [redacted]s unique need for "small classroom size, relationship based multimodal teaching" because [redacted] risked "overstimulation[50] due to

[50] Overstimulation for [redacted] appears as "yelling, crying, ripping up papers, moving – throwing books off desks. . . . eat[ing] a piece of paper." Tr. p. 138:20 – 139:16. [redacted] exhibited such symptoms of overstimulation in her large classroom setting at her prior placement at Respondent WCPSS. *See* Pet. Exh. 43, Bates p. 296 (identifying the "behavioral challenges that [[redacted]. . . displayed in the public-school setting" to include "crying, significant frustration, withdrawal, task avoidance, social difficulties"); Pet. Exh. 17, Bates p. 157 (identifying behavioral concerns for [redacted]

the large size of the school, high numbers of students in classrooms, and transition time between classes");

b. [redacted]s English teacher, *see, e.g.*, Tr. p. 338:1-4 (explaining that [redacted] "needs access to her teachers, she needs small size, and I think she needs to feel really safe and secure so that her anxiety will decrease");

c. Dr. [redacted] the psychologist whose evaluation formed the basis of the May 2017 IEP, *see, e.g.*, Tr. pgs. 254:12-15 and 287:13-18 (stating that she "recommended smaller classrooms and a lower student to teacher ratio" in general, not just for one period per day, and testifying that in [redacted]s case, "a smaller classroom environment with a smaller student to teacher ratio" would be "where I feel like their needs are"); and

d. Dr. [redacted] who met [redacted] and had a conversation with her after evaluating her educational records and observing her in classes, *see, e.g.*, Tr. p. 521:14-16 ("One of the things that came across very clear was that she needed small group setting.").

513. The Undersigned's review of the record also did not find evidence that [redacted]s testimony was contrary to the "testimony of every other attendee of the IEP meeting who testified," except, as expected, [redacted]s testimony is sometimes different from the testimony of Respondent's employees who were also at the IEP meeting on the very questions at the heart of the dispute between Petitioners and Respondent and that form the basis of Petitioners' Petition for a Contested Case Hearing.[51]

514. [redacted]s testimony was consistent with the documented expression of the one other person who participated in the IEP meeting who also knew [redacted] Although this "attendee[] of the IEP meeting" did not testify at the due process hearing, her contributions to the IEP meeting and otherwise are reflected in documentary evidence in the record. *See* Stip. Exh 4, Bates p. 35-36 and Stip. Exh. 22, Bates p. 154-55.

515. The Respondent's IEP meeting minutes, at Stipulated Exhibit 4, and Ms. [redacted] written "summary of recommendations," at Stipulated Exhibit 22, demonstrate that Ms. [redacted] an attendee of the May 2017 IEP meeting who knew [redacted] through her work at [redacted] Academy for [redacted] but who did not testify in the hearing, provided input to the IEP team that was consistent with [redacted]s request for a small-class setting as an accommodation in the May 2017 IEP. *See, e.g.*, Stip. Exh. 4, Bates p. 36 (reflecting in Respondent's IEP meeting minutes that Ms. [redacted] "recommended a small classroom setting to address [[redacted]s] sensory needs" just as [redacted] requested at the meeting, in her Petition, in her Petition for a Contested case, and in

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at [redacted]s last public-school placement, to include lack of motivation, bullying, lack of progress); Tr. p. 107:9-12 (expressing concern about behavior in the traditional public-school classroom without small-setting supports and identifying those behaviors as "a meltdown, breakdown in the regular classroom when she was overwhelmed, uncomfortable . . .").

[51] The Undersigned recognizes that the ALJ's failure to provide record citations supporting her findings in this context does not, on its own, render the finding irregular. Without any guidance in the Final Decision or from Respondent about where in the record this finding might find record support, the Undersigned reviewed the entire record on this factual matter.

this appeal); Stip. Exh. 22, Bates p. 154-55 (reflecting Ms. [redacted] "summary of recommendations" upon [redacted]s transitioned away from [redacted] Academy for [redacted] to her next educational setting and including "Academic Recommendations of "a smaller classroom" setting and "Recommended Interventions" of "[s]mall classroom setting").[52]

516. Respondent's Proposed Final Decision contains the same language as appears in the Final Decision, Respondent's Proposed Final Decision p. 19, ¶ 12, but it also does not offer any citation to record evidence that might support the assertion that [redacted]s testimony was "often" contrary to documentation or other witnesses.

517. Respondent's Written Arguments on Appeal also do not offer any reference to record evidence to support this factual assertion.

518. [redacted]s testimony on these points was credible in light of the record evidence considered in its entirety.

519. The Final Decision concludes Finding of Fact 22 with this assertion: "Although cross-examination is understandably frustrating, [redacted]s demeanor undercut her credibility as a witness."

520. The Undersigned cannot evaluate [redacted]s demeanor.

521. Petitioners assert on appeal that the record reflects that the ALJ was not impartial and demonstrated "prejudice against Petitioners" in a variety of ways including through: (1) the ALJ's "commentary" in the Final Decision that disparaged [redacted] and attributed a "deceptive, malicious, intent to her actions;" (2) the ALJ's *sua sponte* decision to review a settlement agreement between Petitioners and Respondent in a separate case and then to incorrectly interpret that agreement against Petitioners; and (3) the manner in which the ALJ conducted the administrative hearing that rendered it inconsistent with due process. *See* Petitioners' Written Arguments on Appeal pgs. 12-14.

522. With respect to improper "commentary" in the Final Decision demonstrating alleged "prejudice against Petitioners," Petitioners point to statements found in three locations in the Final Decision: statements in Paragraph 65, statements on page 3, and statements at Paragraph 148.

523. Paragraph 65 in the Final Decision is not on point.

524. Page 3 of the Final Decision contains a portion of the ALJ's "summary of decision" that is void of record citations. Three examples of "commentary" about [redacted] on this page stand out as disconnected from the facts as they appear in the record. These three examples include

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[52] Ms. [redacted] also shared [redacted]s opinion that [redacted] required academic goals in a larger setting and communicated that to Respondent during the May 2017 IEP meeting through a text exchange with [redacted] *See* Tr. p. 93:16 – 96.1 (stating that [redacted] communicated to the IEP Team at [redacted]s May 2017 IEP meeting that she exchanged texts with Ms. [redacted] about academic goals in which Ms. [redacted] expressed her opinion that [redacted] "would still require goals in a large setting").

assertions about [redacted]s purported "belie[fs]," "want[s]," and "prefer[ences]" that do not square with the record evidence.

525. Page 3 of the Final Decision asserts, for example, that "[redacted] refused to believe that WCPSS could implement the May 2017 IEP as written."

526. The record considered in its entirety does not support this "commentary" regarding [redacted]s "belief." The record considered in its entirety reflects the opposite.

a. While asserting on page 3 that [redacted] "refused to believe that WCPSS could implement the May 2017 IEP as written," the Final Decision later acknowledged that "IEP implementation is not an issue in this case." *See* Final Decision, p. 10, ¶ 15.

b. [redacted] did not challenge whether "WCPSS could implement the May 2017 IEP as written;" Petitioners challenged whether the May 2017 IEP contained sufficient services and supports to satisfy the IDEA and provide FAPE in the LRE *even if it was implemented in full as it was written. See* Petition for a Contested Case Hearing (Special Education).

c. Neither the documentary nor testimonial evidence indicates that, without raising it as an issue, [redacted] "refused to believe" that Respondent could not or would not implement the May 2017 IEP, *as it was written.*[53]

d. To the contrary, [redacted] employed an expert who testified on her behalf that Respondent was "100% capable" of implementing the services and supports, including those written in [redacted]s IEP along with others not included, that [redacted] required to access the general-education curriculum and meet grade-level expectations. Tr. p. 530:13-19.

e. [redacted]s expert explained more concretely on cross examination that the accommodations specified in the IEP *would* be implemented and she stated, for example, "she has preferential seating, *that's going to be implemented* in the general

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[53] The Undersigned recognizes that [redacted] incorporated the word "implement" into some of her testimony during the hearing, especially on cross examination when Respondent's counsel *replaced* [redacted]s expression, Tr. p. 429:20-22, with the word "implement." The record as a whole, however, demonstrates that [redacted]s concern was that implementing the IEP as it was drafted, *without additional supports* offered at [redacted] Academy for [redacted] and recommended by [redacted]s educators, would yield the same results as [redacted]s prior IEP with Respondent WCPSS and would *not* allow her to realize the goals specified. [redacted] explained that she "rejected the IEP" because "there was no support." Tr. p. 108:15. She explained that without sufficient support in place, the IEP failed to provide a plan on *how* it would enable [redacted] to be successful in achieving the goals specified, particularly during the regular day (outside the segregated Curriculum Assistance class). *Id.; see also* Tr. p. 91:1-4. Although [redacted] eventually used the word "implementation," *see, e.g.,* Tr. p. 431:16, her testimony in context shows that she was using that term as a lay person, not an attorney, to express her concern that Respondent's employees drafting [redacted]s IEP "don't even know my child" and do not appreciate [redacted]s needs such that the resulting IEP did not contain the supports necessary to meet those needs. *See* Tr. p. 429:20 – 431:17. The record considered in its entirety establishes that [redacted]s concern was that this IEP did not contain sufficient supports to enable [redacted] to realize success on the goals specified in her IEP, *not* that [redacted] did not believe Respondent would honor its offer to provide [redacted] the supports identified, such as preferential seating in her regular-education classes and segregated special education, for example. *See, e.g., infra* ¶¶ 708-45 (documenting the record evidence on Petitioners' concerns about insufficient supports in the regular-education setting).

ed classroom," but "*that wasn't the point.* ... The point ... is we don't have the most essential supports in place [in the IEP] to begin with." Tr. p. 591:15-21 (emphasis added).

527. [redacted] alleged in her Petition and presented documentary and testimonial evidence that *even if* Respondent implemented the May 2017 IEP as it was written, that *full implementation* of the IEP as written would not provide FAPE. *See* Petition for a Contested Case Hearing (Special Education).

528. Petitioners challenged the IEP based on what it *omitted*, not based on what was included and would have been implemented if the IEP had been accepted. *See* Petition for a Contested Case Hearing (Special Education).

529. While [redacted] testified that she thought Respondent refused to offer a small-class setting accommodation in regular-education classes because Respondent "didn't have it to offer," *see* Tr. p. 102:3-4, this does not mean that [redacted] "refused to believe" that Respondent couldn't implement what *was* included in the IEP. To the contrary, her expert testified on her behalf that Respondent *could* implement additional *omitted* accommodations, including those necessary to create a small-class environment within the general-education setting. *See* Tr. pg. 530:13-15.

530. Also in the "commentary" contained in the "summary of decision" on Page 3 of the Final Decision, the Final Decision asserts, without citation to the record, that [redacted] "basically wanted another safe 'bubble' environment."

531. The Final Decision on page 3 includes the word bubble in quotation marks indicating it had been expressed by [redacted] as what [redacted] wanted. It was not.

a. The Undersigned searched the transcript of [redacted]s testimony for the word bubble. It does not appear. [redacted] did not express that she wanted a bubble environment. [redacted] instead sought specific accommodations recommended by [redacted]s successful educators. *See* Petition for a Contested Case Hearing (Special Education).

b. The Undersigned searched the entire transcript for the word bubble. That search produced only one result. The word attributed to [redacted] on page 3 of the Final Decision was instead used by one of Respondent's employees, Dr. [redacted]. *See* Tr. p. 845:23-24 (Dr. [redacted] testimony).[54]

532. Page 3 of the Final Decision also asserts that "[a]lthough Petitioners may have preferred a nurturing, small class size environment .... a 'warm and fuzzy' environment is not a statutory requirement or guideline for ... consideration."

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[54] But no witness other than Dr. [redacted] used this word in testimony at the hearing, and it does not appear in the documentary record in this context. An independent review of the record in its entirety leaves no impression that [redacted] had ever used this word.

533. The phrase, warm and fuzzy, like the word, bubble, is presented on page 3 of the Final Decision in quotation marks indicating a witness used those words. A search of the transcript produced no result for warm and fuzzy. No witness, not [redacted] and not any other witness, offered testimony that [redacted] preferred or sought a warm-and-fuzzy environment.

534. This commentary on Page 3 re-characterizing the evidence regarding [redacted]s need for a small-class, small-school setting with close teacher-student relationships as a "prefe[rence]" for a "warm and fuzzy" environment distorts [redacted]s position and defies the evidence. *See infra* ¶¶ 627-826 (offering findings on [redacted]s need for a small-class, small-school setting with close teacher-student relationships).

a. Even [redacted]s prior teachers in Respondent WCPSS recognized that [redacted] "require[ed]" these accommodations "to meet grade level expectations," not merely as a "preference." Pet. Exh. 15, Bates p. 153.

b. In [redacted]s last IEP with Respondent WCPSS, [redacted]s IEP Team documented that [redacted]s disabilities impact her learning such that she "requires small group instruction . . . in order to meet grade level expectation." Pet. Exh. 15, Bates p. 153 (acknowledging in [redacted]s March 2016 IEP with Respondent WCPSS that [redacted] "requires small group instruction to complete her work, strengthen her social skills and organize herself to meet grade level expectations").

535. Further, the "commentary's" emphasis on the fact that a "warm and fuzzy" environment is not a statutory requirement or guideline misses the point.

a. The federal statute (IDEA) requires states to provide each eligible child with special education, or "specially designed instruction, at no cost to parents, to meet the *unique needs* of the child with a disability," 20 U.S.C. § 1401(29) (emphasis added), and related services, or "developmental, corrective, and other supportive services . . . as are required to assist a child with a disability to benefit from special education," 20 U.S.C. § 1401(26), in the least restrictive environment, which requires that "to the maximum extent appropriate, children with disabilities shall be educated with children who are not disabled," and segregation of children with disabilities may "occur[] only when the nature of the disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily," 20 U.S.C. § 1412.

b. The federal regulations reiterate the obligation to provide eligible children with disabilities specially designed instruction to meet the child's unique needs, supported by necessary related services, in the least restrictive environment to the maximum extent possible, even if this requires use of additional supplementary aids and services. *See, e.g.*, 34 C.F.R. § 300.39 (special education); 34 C.F.R. § 300.34 (related services); 34 C.F.R. § 300.114 (least restrictive environment).

c. North Carolina Statutes confirm the same commitment. *See, e.g.*, N.C. Gen. Stat. § 115C-106.3(20) (special education); N.C. Gen. Stat. § 115C-106.3(18) (related services); N.C. Gen. Stat. § 115C-106.3(10) (least restrictive environment).

d. North Carolina Policies also affirm this broad commitment to educate children with disabilities by meeting the "unique needs of the child." *See, e.g.,* N.C. Policies 1500-2.23(a)(1) (special education); N.C. Policies1500-2.27(a) (related services); N.C. Policies 1500-2.20 (least restrictive environment).

e. And the North Carolina Constitution provides in Article 1, the Declaration of Rights, that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."

f. Thus, although Petitioners in this case seek specific accommodations, including a small-class setting with close teacher-student relationships, and not a warm-and-fuzzy environment, it does not matter that those words do not appear as an expressed statutory or regulatory requirement when such accommodations are necessitated by the unique needs created by [redacted]s particularly complex set of disabilities to enable her to access her education and receive a FAPE in the LRE.

536. Page 3 of the Final Decision attributes to [redacted] various "beliefs," "wants," and "preferences" that are not supported by the record evidence and that indicate misunderstanding of the record evidence regarding the impact of [redacted]s multiple disabilities on her ability to access the general-education setting.

537. The Final Decision at Paragraph 148 (the final portion of "commentary" in the Final Decision alleged by Petitioners to reflect prejudice against them) provides as follows:

> The Undersigned finds it difficult to believe that [redacted] was unaware of [redacted]s academic deficit prior to the May 2017 IEP meeting, especially since: [redacted] consulted weekly with [redacted] Academy staff; her expert witness observed [redacted] in March 2017; and her educational consultant (also a psychologist) was actively involved since [redacted]s initial placement at [redacted] Academy.

538. In context, the "academic deficit" referenced in this paragraph likely means a language arts and/or math deficit.

a. In Paragraph 146, immediately prior to the paragraph highlighted by Petitioners as reflecting prejudice, the Final Decision found as follows: "As of May 19, 2017, the IEP team had no information to support that, in addition to academic supports, [redacted] needed special education in math and reading. Only later, based on [redacted] pre-assessments, did it first become evident that [redacted] was a grade level behind in academics."

b. This Paragraph 146 suggests that [redacted] pre-assessment identified areas in which [redacted] was a "grade level behind" or had "academic deficits."

c. [redacted] performed "preassessments" at the start of the school year. Tr. p. 332:11-18.

d. [redacted] performed "below grade level" on the language arts preassessment. *See* Tr. p. 332:11-18; *see also* Pet. Exh. 8, Bates pgs. 49-56 ([redacted] Academy's Literature Pre-Assessment of [redacted] Pet. Exh. 4, Bates p. 18 ([redacted] Academy's Upper School English Progress Plan and Semester Report indicating that [redacted] scored "B" or "Below Grade Level" on a number of writing, grammar, reading, and literary analysis skills).

e. [redacted] performed at MNR or "Mastered and NOT Retained" on introductory algebra tasks. *See* Pet. Exh. 4, Bates p. 20 ([redacted] Academy's Mathematics Progress Plan and Semester Report indicating that [redacted] scored a "MNR" or "Mastered and NOT Retained" on a number of introductory algebra tasks).

f. [redacted] Academy placed [redacted] in 9th grade, rather than 10th grade, based on these pre-assessments, and [redacted] still began somewhat behind in math. Tr. p. 327:7-8 ([redacted] testimony).

539. To the extent that the commentary about [redacted] in Paragraph 148 of the Final Decision means what the finding in Paragraph 146 suggests it means, then it is contrary to the record evidence. [redacted] **was** aware of [redacted]s "academic deficit" in math and language arts. [redacted] affirmatively presented those deficits to Respondent prior to *and* during the May 2017 IEP meeting.

540. [redacted] affirmatively acknowledged, and even introduced, evidence of [redacted]s math challenges and [redacted]s need for special education in math through [redacted]s prior IEP with Respondent WCPSS, through the private educational evaluation she provided to Respondent in advance of the May 2017 IEP meeting, and through her request for academic goals in the IEP meeting itself.

a. [redacted]s 2016 IEP with Respondent WCPSS, which was included in [redacted]s educational record available to Respondent prior to the May 2017 IEP meeting, expressly recognized that [redacted] *required special education in math.* It stated in the section of the IEP on "Anticipated Frequency and Location of Specially Designed Instruction" that [redacted] required "specially designed instruction" in "Math" in "5 session(s)/wk" for "50 min/session" in a "Special Education" placement. *See* Pet. Exh. 15, Bates p. 151.

b. [redacted]s most recent educational evaluation, provided to Respondent in advance of the May 2017 IEP meeting by [redacted] (and accepted by Respondent as sufficient without further evaluation by Respondent) evaluated [redacted]s academic achievement using the Woodcock-Johnson Tests of Achievement – Fourth Edition (WJ-IV) and concluded that [redacted] performed in "the 17th percentile" indicating that "when averaged across the areas of basic sight-word reading, spelling, and mathematics, [[redacted]s] overall academic skills *are below the level expected based on her age and intellectual abilities.*" Stip. Exh. 14, Bates p. 98 (emphasis added). This evaluation ultimately concluded that [redacted]s "*weaknesses in math calculation qualify her for diagnosis of Specific Learning Disability in Mathematics.*" Stip. Exh. 14, Bates p. 100 (emphasis added). And it determined that [redacted] "*will require some academic support to help meet her potential.*" Stip. Exh. 14, Bates p. 101 (emphasis added).

c. This evaluation, which was privately obtained by [redacted] and provided to Respondent in advance of the May 2017 IEP meeting for use in development of the IEP, stated that [redacted]s "*math skills are a particular area of concern and will require support and intervention.*" Stip. Exh. 14 Bates p. 112 (emphasis added). And it made plain that [redacted] "will benefit from ***specialized instruction*** due to her weaknesses with learning disabilities, fine motor coordination difficulties, and inattention." Stip. Exh. 14, Bates p. 112 (emphasis added). It also recommended "**[r]egular tutoring** in math, and in language-arts based subjects as needed." Stip. Exh. 14, Bates p. 114 (emphasis added).

d. [redacted] requested academic goals in math during the May 2017 IEP meeting and Respondent's meeting minutes reflect that "[[redacted] stated she feels [[redacted] **does** need academic goals." Stip. Exh. 4, Bates p. 36 (emphasis added). [redacted] explained in her testimony that she communicated this to the IEP Team after exchanging text messages with Ms. [redacted] with [redacted] Academy for [redacted] *See* Tr. p. 93:16 – 96.1 (stating that [redacted] communicated to the IEP Team at [redacted]s May 2017 IEP meeting that she exchanged texts with Ms. [redacted] about academic goals in which Ms. [redacted] expressed her opinion that [redacted] "would still require goals in a large setting").

541. [redacted] affirmatively acknowledged, and even introduced, evidence of [redacted]s language arts / writing challenges and her need for special education through [redacted]s prior IEP with Respondent WCPSS, through the private educational evaluation she provided to Respondent in advance of the May 2017 IEP meeting, and through her request for academic goals in the IEP meeting itself.

a. [redacted]s 2016 IEP with Respondent WCPSS, which was included in [redacted]s educational record available to Respondent prior to the May 2017 IEP meeting, expressly recognized that [redacted] *required special education in writing*. It stated in the section of the IEP on "Anticipated Frequency and Location of Specially Designed Instruction" that [redacted] required "specially designed instruction" in "Writing" in "22 session(s) / rep pd" for "40 min/session" in a "Regular Education" placement. *See* Pet. Exh. 15, Bates p. 151.

b. [redacted]s most recent educational evaluation, provided to Respondent in advance of the May 2017 IEP meeting by [redacted] (and accepted by Respondent as sufficient without further evaluation by Respondent) evaluated [redacted]s academic achievement using the Woodcock-Johnson Tests of Achievement – Fourth Edition (WJ-IV) and concluded that [redacted] performed in "the 17th percentile" indicating that "when averaged across the areas of basic sight-word reading, spelling, and mathematics, [[redacted]s] overall academic skills are *below the level expected based on her age and intellectual abilities.*" Stip. Exh. 14, Bates p. 98 (emphasis added). This evaluation ultimately affirmed [redacted]s prior diagnosis of "Specific Learning Disability in Reading," concluding that [redacted] "*continues to meet criteria for a Specific Learning Disability in Reading.*" Stip. Exh. 14, Bates p. 100 (emphasis added). It also identified a "motor-executive type of writing problem (*dysgraphia*)." Stip. Exh. 14, Bates p. 100 (emphasis added). And it determined that [redacted] "*will require some academic support to help meet her potential.*" Stip. Exh. 14, Bates p. 101 (emphasis added).

c. This evaluation ultimately concluded that [redacted] "will benefit from ***specialized instruction*** due to her weaknesses with learning disabilities, fine motor coordination difficulties, and inattention." Stip. Exh. 14, Bates p. 112 (emphasis added). It also recommended **"[r]egular tutoring** in math, and in language-arts based subjects as needed." Stip. Exh. 14, Bates p. 114 (emphasis added).

d. [redacted] requested academic goals in writing during the May 2017 IEP meeting; Respondent's meeting minutes reflect that "[[redacted] stated she feels [[redacted] **does** need academic goals." Stip. Exh. 4, Bates p. 36 (emphasis added). [redacted] explained in her testimony that she communicated this to the IEP Team after exchanging text messages about [redacted]s need for academic goals with Ms. [redacted] Academic Director at [redacted] Academy for [redacted] *See* Tr. p. 93:16 – 96.1 (stating that [redacted] communicated to the IEP Team at [redacted]s May 2017 IEP meeting that she exchanged texts with Ms. [redacted] about academic goals in which Ms. [redacted] expressed her opinion that [redacted] "would still require goals in a large setting").

542. The Final Decision's characterization of or "commentary" about [redacted] on Page 3 and in Paragraph 148 distorts the evidence contained in the Official Record.

543. In addition to the instances of "commentary" in the Final Decision that Petitioners assert reflect the ALJ's "prejudice against Petitioners," Petitioners also contend that the ALJ demonstrated prejudice against Petitioners and denied Petitioners the right to a fair hearing through her "*sua sponte* review of a confidential settlement agreement entered into in a completely separate matter." Petitioners' Written Arguments on Appeal, p. 13.

544. Petitioners explained:

> Prior to filing the current due process petitioner, Petitioners filed a Petition for Contested Case Hearing, Docket Number 17-EDC-0953, against the WCPSS. The parties resolved 17-EDC-0953 through a confidential settlement agreement. Petitioners filed a Notice of Voluntary Dismissal with Prejudice of 17-EDC-0953 on April 10, 2017. After OAH closed 17-EDC-0953, the WCPSS filed the Resolution Form and Settlement Agreement ("Settlement Agreement") to the docket.
>
> In the current case, the parties agreed to the following stipulation: "All claims arising prior to May 1, 2017 have been released by a prior settlement agreement and are outside the jurisdiction of this Tribunal." Stip. 8. Neither party, nor the ALJ, raised any issue with the terms of this stipulation during the due process hearing. Neither party included the Settlement Agreement as an exhibit. Respondent did not raise the release of claims in the Settlement Agreement as a defense during the hearing.
>
> On July 13, 2018—nearly four months after the hearing concluded—the ALJ issued an Order for Discretionary Supplemental Written Argument or Modified Stipulation 8. In the Order, the ALJ wrote that "questions have arose [sic] about the admissibility *sua sponte* about the Release of Claims, paragraph number 5, in the Resolution Form and Settlement

Agreement (the "Settlement Agreement") filed on April 11, 2017 in . . . 17 EDC 0953." The Order quoted the release language contained in the Settlement Agreement and invited the parties to either file written arguments on whether the ALJ can *sua sponte* take Official Notice of the specific language of the Settlement Agreement, or modify their original Stipulation 8 to include the entire Release of Claims language in the Settlement Agreement. On July 23, 2018, Petitioners . . . object[ed]. . . . and Respondent . . . argu[ed] the ALJ had proper authority to *sua sponte* review the Settlement Agreement.

545. The Official Record reflects that Petitioners are correct on the procedural events asserted. After the hearing in this matter concluded, but prior to issuance of the Final Decision, the ALJ *sua sponte* reviewed a document outside this Official Record (the Settlement Agreement in a separate case); the ALJ made a post-hearing request for arguments from the parties about her *sua sponte* review of material outside the record in this case; the parties' offered responses to that request; Petitioners opposed the ALJ's post-hearing review of beyond-the-record materials while Respondent endorsed it; and the Final Decision includes confusing findings about matters not raised by either Respondent or Petitioners in the current case.

546. Petitioners contend that "the ALJ did not request a redacted copy of the Settlement Agreement so she could view *only* the release language," making it likely that the ALJ "reviewed other parts of the Agreement—if only to find the paragraph containing the release language sought." Petitioners Written Arguments on Appeal, p. 13. Notably, Petitioners contend that "the paragraph immediately preceding the Release detailed the terms of the monetary settlement from the previous case." *Id.*

547. The Official Record on Appeal does not contain any evidence that ALJ requested a redacted copy of the Settlement Agreement; it also does not contain any evidence about the proximity of the monetary terms of the out-of-the-record settlement to the release of claims. It contains only Petitioners' argument. Respondent's Written Arguments on Appeal are silent on these factual matters.

548. The Official Record on Appeal does demonstrate, however, that (1) Petitioners did not raise any claim that arose prior to May 1, 2017, and (2) Respondent did not raise the release of claims in the beyond-the-record Settlement Agreement as a defense in this case. There appears no basis in the Official Record that would require the ALJ to re-open evidence in the case after the hearing closed and review a document not implicated by the facts of this case or raised by either party.

549. Petitioners also asserted, *inter alia*, on appeal that the ALJ's credibility findings, *in toto*, were "improperly made" because the manner in which the ALJ conducted the administrative hearing was inconsistent with due process rending the results of that hearing, including the credibility findings, improper.

550. In this regard, Petitioners not only asserted, *inter alia*, that "[t]he ALJ was not impartial during the hearing" and that "[t]he ALJ inappropriately reviewed *sua sponte* the Mediation Results Form and Settlement Agreement filed in a separate case," as noted *supra*, but also that

"[t]he ALJ disregarded facts and evidence presented and the ALJ's findings and conclusions were improperly made." Petitioners' Written Arguments on Appeal p. 4.

551. Petitioners support these assertions with multiple arguments, including:

a. that the findings in the Final Decision do not reflect the record evidence,

b. that the ALJ's conduct throughout the hearing denied Petitioners the opportunity for a fair hearing,

c. that the "ALJ refused to allow Petitioners to present evidence on all the information available to the IEP Team at the May 2017 IEP meeting,"

d. that "the ALJ unfairly used Petitioner [redacted]s contract" with Dr. [redacted] against her despite having expressed to the parties during a recess that "she did not consider [redacted]s contract with Dr. [redacted] to be evidence of predetermination" because she "understood parents' need to explore private options" and "did not need to hear additional evidence on this issue," and

e. that "the ALJ prevented Dr. [redacted] a fact witness, from explaining why she understood she was prevented from answering opinion questions."

See Petitioners Written Arguments on Appeal, pgs. 9-14

552. The factual underpinnings of Petitioners' arguments find evidentiary support in the Official Record.

553. But recognizing that the Final Decision got facts wrong, restricted Petitioners' presentation of some segments of evidence, refused to allow Dr. [redacted] to explain her answers as a fact witness, and contradicted herself on [redacted]s relationship with Dr. [redacted] does not mean the ALJ held prejudice or bias against Petitioners.

554. The ALJ made no express suggestion that she held bias against Petitioners; instead, she affirmatively complimented counsel for *both* parties at the close of the hearing. *See* Tr. p. 1211:21-25. She stated: "I'm finally getting you in shape for these cases. I bet you could go to other judges and do the excellent job that you've done before me, so well done. You should be pleased with your counselors that you have representing you. They've done an excellent job." *Id.*

555. The factual assertions embedded in Finding of Fact 22 and relied upon to undermine [redacted]s credibility, however, are without evidentiary support considering the record evidence in its entirety. [redacted]s testimony was consistent with documentary evidence contained in the record; it was consistent with the testimony of other witnesses who worked with [redacted] and it was *not* "incorrect or exaggerated." Thus, on these factual matters, [redacted] remained fully credible.

Respondent's Witnesses

556. Respondent offered five witnesses at the hearing in this case: [redacted] Respondent's Autism Team Lead and expert witness; [redacted] Respondent's Senior Administrator for Autism and Extended Content Standards; [redacted] Respondent's expert witness; [redacted] Respondent's Special Education Teacher; and [redacted] Respondent's Special Education Teacher.

557. 100% of the ALJ's credibility findings regarding Respondent's witnesses originate in Respondent's Proposed Final Decision.

558. The ALJ found, as Respondent proposed, 100% of Respondent's witnesses to be credible without any diminishment. *See* Final Decision pgs. 11 – 13; *see also* Respondent's Proposed Final Decision pgs. 19-20.

559. The ALJ found, as Respondent proposed, that Respondent's witnesses who were also Respondent's employees (Ms. [redacted] Ms. [redacted] Ms. [redacted] and Ms. [redacted] were entitled to "substantial deference" or "significant deference" pursuant to N.C. Gen. Stat. § 150B-34(a). *See* Final Decision, pgs. 11-13, ¶¶23-26 and 28-29; Respondent's Proposed Final Decision, pgs. 19-20, ¶¶ 13-14 and 16-17.

560. North Carolina General Statute section 150B-34(a), within the North Carolina Administrative Procedures Act, provides as follows with respect to decisions of administrative law judges:

> The administrative law judge shall
> - decide the case based on the preponderance of the evidence,
> - ***giving due regard to the demonstrated knowledge and expertise of the agency*** with respect to facts and inferences ***within the specialized knowledge of the agency***.
>
> N.C. Gen. Stat. § 150B-34(a) (emphasis added).

561. North Carolina General Statute section 150B-2(1a), also within the North Carolina Administrative Procedures Act, defines "**agency**" as "any agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. **A local unit of government is <u>not</u> an agency**." N.C. Gen. Stat. § 150B-2(1a) (emphasis added).

562. Respondent Wake County Public School System is a local, not a state, unit of government. *See, e.g.*, N.C. Gen. Stat. §§ 115C-5(1)-(6), -35, and -69; *see also* N.C. Gen. Stat. § 115C-2 (incorporating the definition of "agency" found in "G.S. 150B-2" into Chapter 115C, Elementary and Secondary Education, of the North Carolina General Statutes).

563. The North Carolina Court of Appeals recently affirmed: "Local school boards and local school administrative units are local governmental units, and, as such, are not 'agencies'" for purposes of the Administrative Procedure Act. *Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cty. Bd. of Educ.*, 236 N.C. App. 207, 215, 763 S.E.2d 288, 295 (2014).

564. Nowhere does the Final Decision (or Respondent's Proposed Final Decision) or either party's Written Arguments on Appeal identify *how* N.C. Gen. Stat. § 150B-34(a) applies to Respondent's employees (who are employees of a local, not state, unit of government) to require "substantial" or "significant" deference.

565. Petitioners did not object on appeal to the ALJ's application of 150B-34(a) deference to Respondent's employee's witnesses.

566. The United States Supreme Court in *Endrew F. v. Douglas Cty. Sch. Dist.*, ____ U.S. ____ (2017), recently reiterated the level of deference the IDEA expects with respect to educator witnesses.

567. Generally speaking, courts ought not "substitute their own notions of sound educational policy for those of the school authorities which they review," *Endrew F. v. Douglas Cty. Sch. Dist.*, ____ U.S. ____ (2017) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1985)).

568. Instead, courts give educators "deference . . . based on the application of expertise and the exercise of judgment by school authorities." *Id.* "By the time any dispute reaches the court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement," and a "reviewing court may fairly expect those authorities to be able to offer 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 [her] circumstances." *Id.*

569. Respondent's witnesses who were also school system employees are entitled to deference as provided in *Endrew F.*

570. The findings in the Final Decision regarding Respondent's witnesses, particularly Respondent's expert witnesses, contain errors that have nothing to do with their expertise or exercise of judgement within their areas of specialized knowledge.

571. In the following paragraphs, this Decision addresses problems with the regularity of the credibility findings on Respondent's two expert witnesses, Dr. [redacted] and Dr. [redacted]

Dr. [redacted]

572. The Final Decision incorrectly found, as Respondent proposed, that [redacted] "was received as an expert in educational planning for students with autism." Final Decision, ¶¶ 10(b) and 24; *see also* Respondent's Proposed Final Decision, p. 19, ¶ 13.

573. The Final Decision cites (and Respondent's Proposed Final Decision cites) to the Transcript at page 751, lines 5-8, to support the finding that [redacted] was received as an expert in educational planning for students with autism. Final Decision, p. 11, ¶ 24; *see also* Respondent's Proposed Final Decision, p. 19, ¶ 13.

574. The transcript at the pages cited in the Final Decision (and in Respondent's Proposed Final Decision) provides the ***opposite*** of what is asserted in the factual finding (and in the proposed factual finding). It provides as follows:

> The Court: She will be received as an expert on psychological and educational evaluations. She will **not** be received as an expert in educational planning for students with autism.
>
> Tr. p. 751:5-8 (emphasis added).

575. The record evidence contradicts and refutes Findings of Fact 10(b) and 24 in the Final Decision.

576. The ALJ properly refused to receive Dr. [redacted] as an expert in educational planning for children with autism. On voir dire, Dr. [redacted] acknowledged while reviewing her CV that she had only minimal experience, training, or knowledge in that area. The transcript provides as follows:

> Q: I'm Stacey Gahagan, and I represent [redacted] and her family. Dr. [redacted] you – I just want to go over a couple of things in your CV. So your Ph.D. is in psychology, but your dissertation was unrelated to educational programming for students with autism, correct?
>
> A: Correct.
>
> Q: And it's not related to – it actually wasn't related to psychological and educational evaluations either, correct?
>
> A: My dissertation?
>
> Q: Yes.
>
> A: No, it was not.
>
> Q: And the articles that you listed on your CV, they're not related to educational programming for students with autism either, correct?
>
> A: Correct.
>
> Q: And they're also not related to psychological or educational evaluations?

A: Correct.

*****

Q: . . . You've never taught any graduate level classes in educational planning for students with autism, have you?

A: I have not.

Q: And according to your CV, you've never worked in any district other than Wake County Public Schools, correct?

A: Correct.

Q: And according to your CV, your classroom training with children with disabilities was always in segregated classes; is that correct?

A: No, it's not.

Q: Can you show me on your CV where your training was not in a self-contained class at Bridges or in an AU class?

A: So when I worked at Brentwood during my internship, I was the school psychologist for the whole school. It specifically had classes for children with autism, but it also had classes for children in cross-categorical, pre-K. I did not list this on my CV, but that was part of my training.

Q: But as far as what's reflected on your CV; is that correct?

A: That is correct.

Q: And that other experience was during your internship; is that correct?

A: That's correct.

Tr. p. 745:7 – 747:5.

Dr. [redacted] further acknowledged a lack of engagement in professional conferences in this area or other training or knowledge related to educational programming for high school children with autism or [redacted] in particular as follows:

Q: And according to your CV, you've never presented at any conferences, correct?

A: That is true.

Q: Have you had any training in IEP development?

A: Through Wake County Schools, yes.

Q: Have you had any training in developing educational programming for high school students?

A: I have worked in high schools, yes.

Q: Just to be clear, so my question is have you had any training in developing educational programming for high school students besides merely working in a high school?

A: No.

Q: And you've never taught any graduate or undergraduate level courses on educational programming for high school students?

A: No.

Q: You've never evaluated [redacted] correct?

A: I have not.

Q: And you've never taught [redacted]

A: I have not.

Q: And you're not nationally board certified in school counseling, correct?

A: I'm not a school counselor.

Q: And you're not a board certified behavior analyst?

A: No.

Q: And you're not trained in applied behavior analysis.

A: No.

Tr. p. 748:22 – 749:24.

577. Given this lack of relevant research, training, and teaching in educational planning for high school children with autism or with [redacted] in particular, it makes sense that Dr. [redacted] contrary to the assertions in Findings of Fact 10(b) and 24, was not received as an expert in educational planning for students with autism. *See* Tr. p. 751:5-8.

578. [redacted] was not recognized as an expert in educational planning for students with autism. The finding to the contrary in the Final Decision is wrong.

579. The effect of this factual error in the Final Decision at Paragraphs 10(b) and 24 corrupts the Final Decision as a whole. The initial factual error is exacerbated because the Final Decision subsequently relies on Dr. [redacted] testimony to support *other* findings *as if she were an expert* on the subject of those subsequent findings, when, in fact, she was not.

580. The incorrect finding in the Final Decision at Paragraphs 10(b) and 24 that [redacted] *"was* received as an expert in educational planning for students with autism" led the ALJ to rely upon Dr. [redacted] *non*-expert testimony *over* the testimony of Petitioners' expert who *was*, in fact, properly admitted without objection as an expert in that area, to decide disputed questions on matters related to educational planning for [redacted] a child with autism. *See, e.g.*, Final Decision, Findings of Fact ¶¶ 169, 228, and 292.

581. When compared to Dr. [redacted] who had written and published three (3) books on educating children with autism, had contributed and published relevant chapters in two (2) additional books, had published fourteen (14) relevant articles and two (2) relevant manuals, had delivered over seventy (70) relevant presentations at various conferences, institutes, and conventions locally, nationally, and internationally, and who remains an active leader in a variety of relevant non-profit organizations and who remains a teaching academic offering courses to future teachers and administrators including one titled "Teaching Students with ASD [Autism Spectrum Disorders] in the Inclusive Classroom," *see* Pet. Exh. 39, it is plain that Dr. [redacted] did not have expertise in the area of educational planning for students with autism.

582. The counter-factual credibility finding that Dr. [redacted] was "an expert in educational planning for students with autism" undermines the Final Decision as a whole.

Dr. [redacted]

583. Respondent's second expert witness, Dr. [redacted] was received as an expert in "special education math instruction" and "academic support in math for mainstream special education students." Tr. p. 1120:14-18.

584. The ALJ found Dr. [redacted] to be a "knowledgeable and credible witness" without any diminishment. *See* Final Decision ¶ 27.

585. On appeal Petitioners assert that "[t]he ALJ arbitrarily held Petitioners' witnesses and Respondent's witnesses to different standards on the same issues." *See* Petitioners' Written Arguments on Appeal, p. 15.

586. One example of an instance in which Petitioners' assert that the ALJ "arbitrarily held Petitioners' and Respondent's witnesses to different standards on the same issues" is with the credibility assigned to Dr. [redacted] compared to that assigned to Petitioners' expert, Dr. [redacted]

See also supra ftn. 26 (identifying another example of the Final Decision's application of different standards to the parties' witnesses on the same issues).

587. Petitioners' Written Arguments on Appeal contrast the ALJ's choice to diminish the credibility of Petitioners' expert (on a mistake of record facts) for an erroneously asserted lack of familiarity with the particular high school, IEP Team members, and Autism Support Program[55] at issue in this case, with the ALJ's choice to ignore Respondent's expert's, Dr. [redacted], admitted lack of familiarity with the same things when evaluating Dr. [redacted] credibility in this case.

588. Petitioners are correct that the ALJ diminished (incorrectly on a mistake of record facts) Petitioner's sole expert, Dr. [redacted] because the ALJ errantly found Dr. [redacted] had no "personal knowledge or experience with the high school or IEP team members in question" and "was not familiar with WCPSS' Autism Support Program,"[56] but still opined about the appropriateness of services and supports provided through that program. *See* Final Decision ¶ 13; *see also supra* ¶¶ 291-317 (demonstrating the factual error in this finding with respect to Dr. [redacted]

589. Petitioners are also correct that the ALJ ignored the evidence that Respondent's expert, Dr. [redacted] had no "personal knowledge or experience with the high school or IEP Team members in question" and "was not familiar with WCPSS' Autism Support Program,[57] but still opined" about the appropriateness of the academic supports provided through that program, including the curriculum assistance classroom.

590. Dr. [redacted] testimony is silent regarding any personal knowledge or experience with [redacted] High School, the likely high school "in question" in this case; her testimony is also silent regarding any personal knowledge of any of the IEP team members in question. And a review of the documentary evidence in this case yields no evidence that Dr. [redacted] had personal knowledge or experience with either [redacted] High School or any of the members of [redacted]s IEP team.

591. Despite this fact, and despite that the ALJ, in adopting the proposed credibility findings offered by Respondent, identified lack of personal knowledge and experience with the high school and IEP members "in question" as a diminishing characteristic in evaluating Petitioners' expert, the Final Decision ignores such lack of personal knowledge and experience in evaluating Respondent's expert, Dr. [redacted]

592. There is no basis in the record for this distinction in treatment.

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[55] Notably, the Autism Support Program about which the ALJ was concerned is *not* provided to [redacted] in the IEP at issue in this case. *See* Stip. Exh. 2, Bates pgs. 16-33 (May 2017 IEP). Focus on it is thus something of a red herring. The Undersigned addresses it here because the ALJ considered familiarity with this program in evaluating expert credibility.

[56] Again, the Autism Support Program about which the ALJ was concerned is *not* provided to [redacted] in the IEP at issue in this case. *See* Stip. Exh. 2, Bates pgs. 16-33 (May 2017 IEP). Focus on it is thus something of a red herring. The Undersigned addresses it because the ALJ considered familiarity with this program in evaluating expert credibility.

[57] Again, the Autism Support Program about which the ALJ was concerned is *not* provided to [redacted] in the IEP at issue in this case. *See* Stip. Exh. 2, Bates pgs. 16-33 (May 2017 IEP). Focus on it is thus something of a red herring. The Undersigned addresses it because the ALJ considered familiarity with this program in evaluating expert credibility.

593. The Record on Appeal contains Dr. [redacted] CV at Respondent's Exhibit 16. It does not reflect any personal knowledge or experience with [redacted] High School, the members of [redacted]s IEP team, or Respondent's Autism Support Program.

594. Dr. [redacted] currently works as a Teaching Assistant Professor. *See* Resp. Exh. 16, Bates p. 576.

595. Dr. [redacted] previously worked in both Respondent WCPSS and in the Durham Public Schools, a school system adjacent to, but distinct from, WCPSS *See* Resp. Exh. 16, Bates p. 576.

596. Dr. [redacted] CV reflects that her only experience with Respondent WCPSS was nine years ago, between 2003 and 2010, as a "Coordinating Teacher." *See* Resp. Exh. 16, Bates p. 576.

597. The record contains no evidence that Dr. [redacted] responsibilities as a "Coordinating Teacher" with Respondent WCPSS between 2003 and 2010 included work with the "IEP team members in question" or with the Autism Support Program or Curriculum Assistance class at [redacted] High School, the high school "in question."

598. Although Dr. [redacted] had experience with *Durham* Public Schools' Curriculum Assistance classrooms twenty years ago, between 1993 and 1998, the record contains no evidence that this Durham Public Schools experience gave her experience with the WCPSS's current Autism Support Program or Curriculum Assistance class, the high school, [redacted] "in question," or "the IEP team members in question" in this case. *See* Resp. Exh. 16, Bates p. 576.

599. Dr. [redacted] distinguished her experience as a "Coordinating Teacher" with the *Wake* County Public Schools from her work with a Curriculum Assistance class in the *Durham* Public Schools during direct examination by Respondent's counsel as follows:

> A [by Dr. [redacted] . . . .Then for seven years I worked for Wake County, and I was their – it was called coordinating teacher, but I was essentially the administrator for the entire district who supported – I wasn't an administrator technically, but I worked in the central office, and I was the person who supported K through 12 mathematics instruction for the special education department.
>
> So I did trainings for high school teachers, middle school teachers, elementary school teachers. I also pushed into classrooms. I also was sometimes called on to provide information about my interpretation of students' needs, appropriateness of classroom instruction.
>
> I spent a lot of energy working with secondary teachers to help these that improved their mathematics instruction, so ---
>
> Q [by Respondent's counsel]: What experience do you have with curriculum assistance classes?

A: I taught for five – I guess four years I was at [redacted] High School. I was the curriculum assistance instructor. So I spent a lot of time in that, and then when I was at Durham School of the Arts, I was department chair, and I oversaw the curriculum assistance classes.

600. Dr. [redacted] testimony about her experience as a Coordinating Teacher with Respondent WCPSS omitted any connection to any curriculum assistance class or Autism Support Program at [redacted] High School; instead Dr. [redacted] testified that her experience as a Coordinating Teacher was with "K through 12 mathematics instruction for the special education department."

601. Dr. [redacted] testimony about her experience with "curriculum assistance classes" identified only non-WCPSS schools – [redacted] High School (within the Durham Public Schools) and the Durham School of the Arts (within the Durham Public Schools).

602. Although Dr. [redacted] ultimately "opined" about the merits of segregated curriculum assistance classes to provide academic support for [redacted] in WCPSS's current Autism Support Program and endorsed them, Tr. p. 1136:1, arguably based on her experience twenty years ago with similarly named classes in the Durham Public Schools, she identified no basis for knowledge about those classes in Respondent WCPSS.

603. Accepting Dr. [redacted] testimony without diminished credibility for lack of "personal knowledge or experience" with the WCPSS high school, Autism Support Program, or IEP Team members treated Dr. [redacted] more favorably than Petitioners' expert on the same topic.[58]

604. Notably, Dr. [redacted] described her experience with autistic students in Respondent WCPSS very differently than Respondent's current employees described their experience with autistic students in their autism support program (and in a way that does not sound like Dr. [redacted] description of Curriculum Assistance classes in Durham Public Schools as a "little safe space where you have an ally"), Tr. p. 1136:1.

605. Dr. [redacted] described her experience with autistic students in Respondent WCPSS as follows:

> A [by Dr. [redacted] So one of the things that I came across a lot when I was working, you know, K-12 in Wake County was that one of the things that sometimes happens to students with autism is that there's a tendency to be – to think, okay, well, I can put this kid in a corner with a worksheet and that makes them happy because they don't have to interact.

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[58] Petitioner's expert, Dr. [redacted] had more extensive experience in schools outside [redacted] High School than did Dr. [redacted], but Dr. [redacted] also affirmatively demonstrated knowledge of and personal experience with members of the IEP team in question, WCPSS's Autism Support Program, and the specific offerings [redacted] High School proposed for [redacted] in her May 2017 IEP. *See supra* ¶¶ 291-317. And Dr. [redacted] understanding of each was consistent with the understanding of Respondent's witnesses as reflected through their testimony. *Id.*

> And it can look like the student is progressing in their mathematics, but what they're doing is playing to a double-sided strength/weakness. You know, I could set in a corner and I can do worksheets and get them done and check it off, and that's not authentic math instruction.
>
> Tr. p. 1132:8-18.

606. That Dr. [redacted] testimony created a distinction between her experience with Respondent WCPSS's instruction of children with autism as "put[ting] this kid in a corner with a worksheet" and her experience with Durham Public Schools' "curriculum assistance classes" as "safe little spaces where you have an ally." These conflicting descriptions of her experience with children with autism in Wake County Public Schools and her experience with curriculum assistance spaces in Durham Public Schools affirm what is reflected on Dr. [redacted] C.V.

607. The record contains no evidence that Dr. [redacted] had any "personal knowledge of or experience with" [redacted]s IEP Team members, [redacted] High School, or with Respondent WCPSS' Autism Support Program.

608. Unlike Dr. [redacted] who specifically reviewed Respondent's published materials on Respondent's Autism Support Program, *see* Tr. pgs. 534:9 - 535:9, Dr. [redacted] testified that the "basis of [her] knowledge in this case" was that she "reviewed files." Tr. p. 1121:1-4. She described the files she reviewed to include "the psychological profile, and then . . . the work provided from [redacted] Academy." Tr. p. 1121:5-9. She explained that she "read or skimmed through all the exhibits to see if they were pertinent to math, and then [she] tried to read everything that had anything about math on it." Tr. p. 1121:9-12.

609. Dr. [redacted] did not testify or otherwise indicate that she reviewed any published materials on the programs available at [redacted] High School, the high school "in question." A search of Dr. [redacted] testimony for Stipulated Exhibit 27, a copy of WCPSS's "Special Education Services Program and Service Description," including the description of the "Autism Support" program produced no results. And Stipulated Exhibit 27 does not contain material specifically "pertinent to math" and does not have "anything about math on it." *See* Stip. Exh. 27, Bates pgs. 185-86.

610. To discredit Petitioners' expert, Dr. [redacted] based on asserted lack of personal knowledge or experience with the high school "in question" (despite the record evidence to the contrary, *see supra* ¶¶ 304-17) without also discrediting Dr. [redacted] on this measure applies different standards regarding credibility to Petitioners' expert as compared to Respondent's experts.

611. To discredit Petitioners' expert, Dr. [redacted] based on asserted lack of personal knowledge or experience with the IEP members "in question" (despite the record evidence to the contrary, *see supra* ¶¶ 293-303) without also discrediting Dr. [redacted] on this measure applies different standards regarding credibility to Petitioners' expert as compared to Respondent's experts.

612. To discredit Petitioners' expert, Dr. [redacted] based on asserted lack of personal knowledge or experience with Respondent's Autism Support Program (despite the record evidence to the

contrary, *see supra* ¶¶ 313-14 & 347-64) without also discrediting Dr. [redacted] on this measure applies different standards regarding credibility to Petitioners' expert as compared to Respondent's experts.

613. Petitioners argue on appeal that this application of a different, higher, standard to Petitioners' expert witness compared to Respondent's expert witness suggests bias against Petitioners.

614. The Undersigned cannot interpret the ALJ's motive from this evidence in the Official Record.

615. Having "explained why," *see M.M. v. School Dist. of Greenville Cty.*, 303 F.3d 523 (4th Cir. 2002) (citing *Doyle*, 953 F.2d at 105), this Decision does adhere to the Final Decision's findings that assert, based on factual errors, diminishment of Petitioners' witnesses credibility and having offered a "rational basis" for departing from those findings as inconsistent with the record evidence factual matters, *see D.B. v. Craven Cty. Bd. of Educ.*,, 210 F.3d 360 (4th Cir. 2000), this Decision now turns to the substantive issues presented.

616. The following findings first address the substantive issues presented by the appeal of the July 31, 2018, Final Decision; they then address the substantive issues presented by the appeal of the March 27, 2018, Order Granting, In Part, Respondent's Motion to Dismiss Pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b).

BACKGROUND FACTS REGARDING PETITIONERS' APPEAL OF THE ISSUES RESOLVED IN THE JULY 31, 2018, FINAL DECISION:

617. Petitioners' Notice of Appeal identified an appeal of "[t]he findings and decisions in the Final Decision issued in the above-referenced matter by the Honorable Administrative Law Judge Stacey B. Bawtinhimer on July 31, 2018."

618. The issue(s) resolved in that July 31, 2018, Final Decision are stated differently at different points within it.

619. The Final Decision initially states that "The question before the Undersigned is, as of May 19, 2017, could [redacted] be provided a free an appropriate public education in a public high school setting?" Final Decision, p. 2.

620. The Final Decision subsequently states the issues presented for resolution as follows:

a. Whether the May 19, 2017, IEP was substantively appropriate for [redacted] based on the present levels of academic and functional performance, the functional and academic goals, exclusion of the accommodation of a cap on the number of students in the regular education classes, the service delivery in the IEP, and the exclusion of a transition plan to support [redacted]s transition from a private [redacted] school to a public high school.

b. Whether Respondent violated the procedural requirements of the IDEA by predetermining [redacted]s placement in the resource setting; and

c. If Respondent denied [redacted] a free appropriate public education, whether the unilateral private placement selected by the parent, [redacted] Academy, was appropriate, and whether the equities favored private tuition and transportation reimbursement to Petitioners.

Final Decision, p. 5.

621. The Final Decision's initial expression of the matters for resolution at the hearing in the above-captioned case is not supported by the record evidence. Both Petitioners and Respondent agree that Respondent *could* provide [redacted] a free appropriate public education in a public high school setting.

a. Petitioners' expert testified, for example, that in her expert opinion Respondent was "100 percent capable" of putting into place the kinds of supports and accommodations that [redacted] requires. Tr. p. 530:13-19 (testimony of Petitioners' expert, Dr. [redacted]

b. Respondent's minutes of the May 2017 IEP meeting reflect that Ms. [redacted] Respondent's LEA Representative at that meeting stated that [redacted]s IEP "can be implemented in a WCPSS school." Stip. Exh. 4, Bates p. 41.

622. Petitioners did not raise an implementation issue in the Petition for a Contested Case Hearing. *See* Petition for a Contested Case Hearing.

623. The Final Decision's second expression of the matters for resolution more accurately expresses the issues presented by the record taken as a whole. The parties disagree about whether the May 2017 IEP *as developed and written* offered [redacted] a FAPE in a public high school, not about whether Respondent *could* offer FAPE in a public high school *in the abstract*. *See* Tr. p. 713:9 – 714:19 (providing the ALJ's oral expression of the issues reserved for resolution following Respondent's oral Rule 41(b) motion to dismiss at the close of Petitioners' evidence).

624. The Final Decision ultimately stated, regardless of how the issues were understood, "all of Petitioners' claims are **DISMISSED WITH PREJUDICE**." Final Decision, p. 62.

625. The following findings in this section of this Decision reflect the evidence contained in the Official Record on each of the sub-issues identified on page 5 of the July 31, 2018, Final Decision under the following headings: (A) the general education class- and school-setting issue, (B) other remaining issues regarding the substantive appropriateness of the May 2017 IEP, (C) the predetermination of placement / least restrictive environment issue, and (D) the private-placement issue.

*(A) **The General-Education Class- and School-Setting Issue***

626. The general-education class- and school-setting issue is characterized by the ALJ as "the primary judicable issue" in this case, *see* Final Decision, p. 3, and by Petitioners as at "the heart of this case," Tr. p. 814:1-3, and by Respondent as "the single central complaint here about this IEP if you really boil down everything," Tr. p. 662:20-22.

627. Despite the agreed-upon significance of this issue, the general-education class- and school-environment issue is muddied by mischaracterization and misunderstanding in the Final Decision.[59]

628. The Final Decision asserted "significant ambiguity" about Petitioners' request for accommodations to address [redacted]s need for a small-class, small-school setting. Final Decision ¶ 204 (acknowledging perceived "significant ambiguity" on this issue); *see also* Respondent's Proposed Final Decision ¶ 118 (also acknowledging, in language identical to that offered in the Final Decision, Respondent's proposed "significant ambiguity" about Petitioners' request for accommodations to address [redacted]s need for a small-class and small-school setting).

629. A review of the Official Record considered in its entirely finds clarity and consistency in Petitioners' request for accommodations to address [redacted]s need for a small-class, small-school setting.

630. Petitioners made consistent requests for accommodations to address class- and school-setting needs. *See infra* ¶¶ 644-60.

631. Petitioners presented comprehensive documentary records and witness testimony to support the necessity of such accommodations to enable her to remain in the general-education classroom with her nondisabled peers and receive educational benefit from the instruction offered there. *See infra* ¶¶ 648-60.

632. Petitioners hired an expert to explain academic research supporting multiple evidence-based practices, depending upon other circumstances in each regular-education classroom, that could meet [redacted]s need for a small-class, small-school setting within a large public high school. *See infra* ¶¶ 650-58.

633. Petitioners evidence that [redacted]s unique and complex symptoms of her multiple disabilities required a small-class, small-school setting in regular-education classrooms demanded that Respondent consider an accommodation that Respondent had *never* offered or provided to *any* student previously. *See* Tr. p. 1005:6-13 (offering Respondent's employee's acknowledgment that to her knowledge accommodations to create a small-class, small-school setting in general-education classrooms had never been offered to any student in the WCPSS).

634. Considering and trying something new can be uncomfortable and challenging. Respondent demonstrated discomfort and misunderstanding when presented with Petitioners' evidence of

[59] The Final Decision's key findings on this issue were taken nearly verbatim from Respondent's Proposed Final Decision. *Cf.* Final Decision, Findings of Fact ¶¶ 202-37 *with* Respondent's Proposed Final Decision ¶¶ 116-41.

[redacted]s need for a small-class, small-school setting in general-education classrooms. Respondent resisted the evidence Petitioners offered in support of this need and expressed ambiguity about it. *See supra* ¶¶ 626-28 and *infra* ¶¶ 660-70.

635. The Final Decision adopted Respondent's perceived "significant ambiguity" about this claim just as it adopted all of its key findings on this issue nearly verbatim from Respondent's Proposed Final Decision. *Cf.* Final Decision, Findings of Fact ¶¶ 202-37 *with* Respondent's Proposed Final Decision ¶¶ 116-41.

636. The immediately following findings identify the unambiguous evidence on this issue.

637. Petitioners demonstrated that accommodations to provide a small-class, small-school setting in [redacted]s regular-education classes were necessary due to [redacted]s unique and complex symptoms (including particular sensory sensitivities and social-emotional challenges) presented by her multiple diagnosed disabilities (including Autism Spectrum Disorder; Unspecified Anxiety Disorder; ADHD, Primarily Inattentive Presentation; Specific Learning Disorder with impairment in math; Specific Learning Disorder with impairment in reading; and Developmental Coordination Disorder (Dysgraphia)). *See* Order on the Pre-Trial Conference, p. 6, Stipulation ¶ 47 (specifying [redacted]s diagnosed disabilities).

638. Dr. [redacted] the psychologist who performed the psychological evaluation upon which the IEP Team relied in developing the May 2017 IEP, explained that [redacted]s unique combination of disabilities made her needs more complex than those of a typical child with an autism spectrum disorder, stating: "I think her learning related difficulties and the anxiety related difficulties that she shows go beyond what is typically, you know, seen in an autism spectrum disorder and require additional specialized intervention, which I think I note in the summary it makes her case a little bit more complex or her needs more complex." Tr. p. 258:13-18 ([redacted] testimony) (emphasis added). "Her particular symptoms are more prominent than what you just see in a diagnosis of autism." Tr. p. 254:24 – 255:1 (emphasis added).

639. Despite these "more complex" and "more prominent" needs, "[i]t is important to note that [[redacted] is a very intelligent and capable young adolescent who has the potential to perform . . . with the appropriate degree of . . . academic supports." Stip. Exh. 14, Bates p. 107 (Dr. [redacted] evaluation). [redacted] is an "intelligent student" who can meet grade-level expectations. Pet. Exh. 15, Bates p. 137 ([redacted]s March 2016 IEP with Respondent WCPSS).

640. Because [redacted] is a "very intelligent and capable young adolescent," Stip. Exh. 14, Bates p. 107, who can meet grade-level expectations, Pet. Exh. 15, Bates p. 137 ([redacted]s March 2016 IEP with Respondent WCPSS), she belongs in the regular-education classroom with her nondisabled peers. But Respondent's regular-education classes typically include approximately 30 students per class, and [redacted]s "more complex" and "more prominent" symptoms of her disabilities cause her to become dysregulated by sensory overstimulation in environments like Respondent's 30-student regular-education classes preventing her from "retain[ing] and process[ing] information" and eliminating her ability to receive the benefits of that instruction. Tr. pgs. 138:20 – 139:2.

641. [redacted]s dysregulation caused by overstimulation in large-class, large-school settings "go[es] beyond what is typically, you know, seen in an autism spectrum disorder," Tr. p. 258:13-18. In [redacted] this appears as "yelling, crying, ripping up papers, moving – throwing books off desks. … eat[ing] a piece of paper." Tr. p. 138:20 – 139:16. [redacted] exhibited such symptoms of overstimulation in her large classroom setting at her prior placement at Respondent WCPSS, including "crying, significant frustration, withdrawal, task avoidance, social difficulties." Pet. Exh. 43, Bates p. 296; *see also* Pet. Exh. 17, Bates p. 157 (identifying behavioral concerns for [redacted] at [redacted] [redacted]s last public-school placement, to include lack of motivation, bullying, lack of progress); Tr. p. 107:9-12 (expressing concern about behavior in the traditional public-school classroom without small-setting supports and identifying those behaviors as "a meltdown, breakdown in the regular classroom when she was overwhelmed, uncomfortable . . .").

642. This dysregulation caused by overstimulation in Respondent's large-class, large-school settings, is in part why, despite her considerable intelligence, [redacted] scored at the lowest level on her end-of-grade tests and was earning an F in math and a D in language arts when she departed Respondent WCPSS in March 2016, *see* Pet. Exh. 15, Bates p. 137, and it explains in part why she was able to turn her education around at [redacted] Academy for [redacted] where she received all of her academic instruction in a small-class, small-school setting, Tr. p. Tr. p. 137:20-25.

643. Petitioners offered evidence of [redacted]s unique, "more complex," need for small-class-, small-school-setting accommodations in regular-education classrooms and of their requests for such accommodations in multiple places, including:

a. in the materials provided to Respondent in advance of the May 2017 IEP meeting,
b. at the May 2017 IEP meeting,
c. in their Petition for a Contested Case Hearing, and
d. through the testimony and documentary evidence offered by their witnesses at the hearing.

644. Petitioners, through [redacted]s evaluators and educators, identified the following class- and school-setting needs in documents included in [redacted]s educational records and available to Respondent *in advance of the May 2017 IEP meeting.*

a. [redacted]s educational records, available to Respondent in advance of the May 2017 IEP meeting, included [redacted]*s prior IEP with Respondent WCPSS*, dated March 2016.
    I. In this March 2016 IEP, [redacted]s former teachers and special educators with Respondent WCPSS expressly recognized that [redacted] "**requires** small group instruction to complete her work, strengthen her social skills and organize herself in order to meet grade level expectations." Pet. Exh. 15, Bates p. 153 ([redacted]s March 2016 IEP with Respondent WCPSS, [redacted]s IEP at the time she left WCPSS for [redacted] Academy for [redacted] (emphasis added).[60]

[60] Respondent did not include any of [redacted]s prior WCPSS teachers in the May 2017 IEP or as witnesses at the hearing in this matter.

b. [redacted]s educational records, available to Respondent in advance of the May 2017 IEP meeting, included [redacted]s then-current IAP (Individualized Academic Plan) from [redacted] Academy for [redacted]

I. [redacted]s then-current IAP from [redacted] Academy for [redacted] identified "[s]mall classroom size" as one of the "Accommodation[s], Learning Styles and Modifications" provided to [redacted] at [redacted] Academy for [redacted] Stip. Exh. 18, Bates p. 137.

c. [redacted]s educational records, available to Respondent in advance of the May 2017 IEP meeting, included [redacted]s LEAD Assessments from [redacted] Academy for [redacted]

I. [redacted]s LEAD Assessments from [redacted] Academy for [redacted] stated that [redacted] found success with "universal" support of "small learning environment with multi-modal instruction" and rejected an alternative option that [redacted] "required no intervention" to be "successful in a regular classroom environment." Stip. Exh. 20, Bates p. 150.

d. [redacted]s educational records, included a "summary of recommendations" from the Director of [redacted] Academy for [redacted]

I. This "summary of recommendations" from the Director of [redacted] Academy for [redacted] emphasized in its opening overview of "Academic Recommendations" that [redacted] "benefits from a smaller classroom with approximately a 1:12 or smaller teacher-student ratio" and that she would be "best served in a small school where she can be supported and challenged depending on the goal she is working towards" and that closed with "Recommended Interventions" including "[s]mall classroom setting." Stip. Exh. 22, Bates pgs. 154-55.

e. [redacted]s educational records, available to Respondent in advance of the May 2017 IEP meeting, included Petitioners' privately obtained educational evaluation from June 2016 that the IEP Team relied upon in drafting the May 2017 IEP.

I. This evaluation recommended "[b]ased on [redacted]s] history and current evaluation," that [redacted] would "benefit most from continued placement in a nurturing and structured academic setting with therapeutic support, such as a specialized boarding school like [redacted] and that [redacted] "will likely respond optimally in a smaller classroom environment with a small student: teacher ratio." Stip. Exh. 14, Bates pgs. 109 & 112.

645. According to Respondent's meeting minutes, Petitioners emphasized [redacted]s class- and school-setting needs for which they requested accommodations *at the May 2017 IEP* meeting as follows:

a. Petitioners requested a **small-classroom setting** in [redacted]s general-education classes as an accommodation to address [redacted]s unique sensory and social needs and to enable her to remain in the general-education classroom, despite her disabilities, with her nondisabled peers.

I. Respondent's minutes of the May 2017 IEP meeting acknowledge that *at the meeting* [redacted]s then-current educator, Ms. [redacted] "recommended a

small classroom setting to address [redacted]s] sensory needs," *see* Stip. Exh. 4, Bates p. 36 & 40;

II. Respondent's minutes of the May 2017 IEP meeting acknowledge that *at the meeting* [redacted] "inquired how [redacted]s] need for a small class size is going to be addressed since [redacted] states that is what she needs," *see* Stip. Exh. 4, Bates p. 36 & 40; and

III. Respondent's minutes of the May 2017 IEP meeting acknowledge that *at the meeting*, Ms. [redacted] a former special education teacher who served as [redacted]s parent advocate at the May 2017 IEP Meeting, reiterated that "[redacted] said she needs a small class," *see* Stip. Exh. 4, Bates p. 36 & 40.

b. Petitioners also raised a **small-school setting**, as an accommodation to address [redacted]s unique sensory and social needs and to enable her to remain in the general-education classroom, despite her disabilities, with her nondisabled peers. They highlighted her successful experience at [redacted] Academy for [redacted] a small boarding school, as enabling her to turn her education around after floundering in a large-school environment in Respondent WCPSS, *see* Pet. Exh. 15, Bates p.137.

I. Respondent's meeting minutes of the May 2017 IEP meeting acknowledged that [redacted] expressed, *at the meeting*, "great concern that the large-school setting is not going to work for [redacted] that [redacted] "felt it is important to note" that [redacted]s current setting at [redacted] Academy for [redacted] "is a small, [redacted] school," *see* Stip. Exh. 4, Bates pgs. 37-38 and

II. Respondent's meeting minutes of the May 2017 IEP meeting acknowledged that [redacted] asked how Respondent's proposed emotional-regulation strategies "will take place in a large school," *see* Stip. Exh. 4, Bates pgs. 37-38.

646. Petitioners alleged *in their Petition for a Contested Case Hearing* that they had presented evidence of [redacted]s need for a small-class, small-school setting at the IEP meeting and that the May 2017 IEP's failure to provide any accommodations to address that need formed part of the basis for [redacted]s rejection of that IEP.

a. The Petition for a Contested Case Hearing asserts that "[redacted]s mother requested the IEP Team place [redacted] in a school with **small class sizes** based on the recommendation of [redacted] Academy," and it asserts that "the IEP Team rejected her request." Petition for a Contested Case Hearing ¶ 157 (emphasis added).

b. The Petition for a Contested Case Hearing asserts that [redacted] made a "request for a **small school**" and that the IEP Team represented that this request "would be communicated to the Office of Student Assignment," although the IEP Team refused to resolve it as a matter outside the team's authority and the Office of Student Assignment chose to assign [redacted] to a large school. Petition for a Contested Case Hearing ¶ 158 (emphasis added).

647. Petitioners' documentary evidence and witnesses testimony affirmed *at the hearing on the Petition for a Contested Case Hearing* what Petitioners had presented to Respondent on this issue before, during, and shortly after the May 2017 IEP meeting – that, consistent with the

recommendations of [redacted]s evaluator and educators, [redacted] found success in a small-class setting in a small-school environment at [redacted] Academy for [redacted] (after "floundering" in the large-class and large-school environment in Respondent WCPSS)[61] and that [redacted] requested accommodations to address her need for a small-class, small-school environment as she planned her return to WCPSS.

648. Petitioners' *documentary* evidence of a need for small-class and/or small-school setting accommodations included, *inter alia*, the following documents that also had been provided to Respondent prior to the May 2017 IEP meeting:

a. [redacted] presented [redacted]s prior IEP with Respondent WCPSS, dated March 2016, which expressly recognized that [redacted] "requires small group instruction to complete her work, strengthen her social skills and organize herself in order to meet grade level expectations." Pet. Exh. 15, Bates p. 153 ([redacted]s March 2016 IEP with Respondent WCPSS, [redacted]s IEP at the time she left WCPSS for [redacted] Academy for [redacted] (emphasis added).

b. [redacted] presented [redacted]s then-current IAP (Individualized Academic Plan) from [redacted] Academy for [redacted] that identified "[s]mall classroom size" as one of the "Accommodation[s], Learning Styles and Modifications" provided to [redacted] at [redacted] Academy for [redacted] Stip. Exh. 18, Bates p. 137.

c. [redacted] presented [redacted]s LEAD Assessments from [redacted] Academy for [redacted] that stated that [redacted] found success with "universal" support of "small learning environment with multi-modal instruction" and that rejected the assertion that [redacted] "required no intervention" to be "successful in a regular classroom environment." Stip. Exh. 20, Bates p. 150.

d. [redacted] presented a "summary of recommendations" from the Director of [redacted] Academy for [redacted] that emphasized in its opening overview of "Academic Recommendations" that [redacted] "benefits from a smaller classroom with approximately a 1:12 or smaller teacher-student ratio" and that she would be "best served in a small school where she can be supported and challenged depending on the goal she is working towards" and that closed with "Recommended Interventions" including "[s]mall classroom setting." Stip. Exh. 22, Bates pgs. 154-55.

e. [redacted] presented the privately obtained educational evaluation that the IEP Team relied upon in drafting the May 2017 IEP that recommended that "[b]ased on [redacted]s] history and current evaluation" [redacted] would "benefit most from continued placement in a nurturing and structured academic setting with therapeutic support, such as a

[61] Dr. [redacted] testified that "we do have evidence that when she was in larger class sizes in the public school she was on a downward spiral foundering," Tr. p. 592:21-23, before her parents removed her from Respondent WCPSS and placed her in [redacted] Academy for [redacted] a small-class, small-school environment where she turned her education around. [redacted]s large-class, large-school performance is reflected in her most recent IEP with Respondent WCPSS, reflecting a failing grade in math, a D in language arts, and scores of 1, the lowest possible score, on end-of-course tests. *See* Pet. Exh. 15, Bates p. 137.

specialized boarding school like [redacted] that [redacted] "will likely respond optimally in a smaller classroom environment with a small student: teacher ratio." Stip. Exh. 14, Bates pgs. 109 & 112.

649. Petitioners offered witnesses at the hearing to assist them in explaining this documentary evidence through testimony, including, *inter alia*, the following:

a. Petitioners' expert witness on inclusion and evidence-based practices for students with autism, Dr. [redacted] testified, *inter alia*: "One of the things that came across very clear was that [redacted] *needed* small group setting." Tr. p. 521:14-16 (emphasis added).

b. [redacted]s evaluator, Dr. [redacted] testified, *inter alia*: "I ... assess a student and say where I feel like their *needs* are. ... In [redacted]s] case, I felt like it was a smaller classroom environment with a smaller student to teacher ratio." Tr. p. 287:13-18 (emphasis added).

c. [redacted]s former therapist at [redacted] Academy for [redacted] testified, Ms. [redacted] *inter alia*: "We recommended that [redacted] enter an environment that more closely mirrored our environment because she had been so successful in our learning environment, so small classroom size, relationship based multimodal teaching" for "all of her classes." Tr. p. 137:20-25.

d. [redacted]s current English teacher at [redacted] Academy, Ms. [redacted] testified, *inter alia*: "She – the small size is really important. I mean every student is different, but [redacted] does fit the profile of the kind of student that we can easily serve at [redacted] because she *needs* access to her teachers, she *needs* small size, and I think she needs to feel really safe and secure so that her anxiety will decrease because I think that the anxiety gets in the way sometimes of her showing what she can do." Tr. pgs. 337:23 – 338:4 (emphasis added).

650. Petitioners witnesses also explained, however, that [redacted]s need for a small-class, small-school setting does *not* equate to a simple "numbers game." *See* T. p. 592:20.

651. Instead, Petitioners witnesses made clear that this recommended accommodation required consideration of multiple potential evidence-based practices, depending upon other variables in the classroom and in the school at large, that could be offered and implemented to satisfy [redacted]s need for a small-class, small-school setting.

652. Petitioners witnesses testified that no single accommodation approach would be appropriate across *all* classrooms in the regular-education high-school setting. They testified that circumstances matter.

653. Petitioners' expert on, *inter alia,* inclusion and evidence-based practices for children with autism, Dr. [redacted] explained that a small-class setting as an accommodation for a child with disabilities could be accomplished through a variety of strategies, including:

a. by providing co-teachers in a large class,
b. by reducing the number of students in some sections,
c. by using strategies to build relationships between teachers and students, and/or
d. by otherwise getting creative about how to offer supports and teacher training using evidence-based practices.

Tr. p. 521:14-522:2.

654. Petitioners' expert on, *inter alia,* inclusion of children with autism, Dr. [redacted] explained as follows:

a. "One of the things that came across very clear was that [redacted] needed small group setting. Now, some might say well, in high school our classes were 30 – they contain 30 students and she needs to be in the gen ed classroom because cognitively those are the classes she should be receiving. But there's nothing to say we couldn't make special sections of those classes so that [1] it was either co-taught to reduce the teacher-student ratio or [2] her classes happen to be 12 students instead of 30 students. You know, there's nothing to say that she couldn't have that small class size within the context of a larger high school if [3] the team was willing to be creative in how they were going to deliver those supports." Tr. p. 521:14-522:2 (emphasis added).

b. "I don't think that we couldn't do this in a class of 30 if we had the appropriate amount of supports in place, meaning [1] do we have two teachers in the room, [2] are we using strategies to build relationships between the student and her teachers, [3] are we using evidence-based teaching practices. . . Did I feel confident after reading her IEP that that's what she was going to have if she was in a large setting in a high school? No." Tr. p. 593:19 – 594:4.

655. Petitioners' expert on, *inter alia,* inclusion of children with autism *and* [redacted] explained that a small-school environment could be established within a larger-school without shrinking the physical size of the school structure or the total number of students in the building overall by using appropriate supports to create a small-school dynamic in a larger setting.

656. Petitioners' expert explained that [redacted]s need for small-school setting could be accomplished through many of the same strategies as would support her need for a small-class environment. Dr. [redacted] the only witness received as an expert on inclusion and evidence-based practices for children with autism, suggested the following strategies:

a. Providing a small teacher-student ratio across the curriculum;
b. Working on relationship building between teacher and student;
c. Providing training to *regular-education* teachers, not just special-education teachers, on the needs of the students; and
d. Implementing a variety of evidence-based practices to deliver instruction in the classroom.

See Tr. p. 554:7-14 (emphasis added).

657. In other words, by creating within each general-education classroom a small-class dynamic within the larger-school building, [redacted]s need for a small-school experience could be accommodated. Dr. [redacted] an expert on inclusion of children with autism, explained:

> And does it have to be a small school? Not necessarily, [1] if you can provide a small teacher-student ratio, [2] if you can work on relationship building between teacher and student, [3] if you can provide training to the teachers on all of the needs of the students in the class, not just the special ed teacher receiving the training, but the general ed teacher, and [4] if you can really use a variety of the evidence-based practices to deliver instruction in the classroom.
>
> Tr. p. 554:7-14 (testimony of Dr. [redacted]

658. [redacted] similarly clarified her request for accommodations to support [redacted]s need for a small-school setting. She explained:

> I was asking them to assign [redacted] to a school that would be able to accommodate a small class size, not size of the school, but just availability of her general education classes to be at a smaller student-teacher ratio.
>
> Tr. p. 106:13-16 (testimony of [redacted]

659. Petitioners' witnesses affirmatively explained, eliminating any ambiguity, that although [redacted] required a small-class setting in small-school environment, a specific, singular numeric cap on all classes or on the size of the school was *not* required or appropriate given the variety of circumstances that must be taken into account in evaluating what would be appropriate from class to class in a public-school setting.

a. Dr. [redacted] Petitioners' expert (who, as noted, was also the only qualified expert in this area) on inclusion of children with autism in classrooms with their nondisabled peers, testified that establishing small-class, small-school setting was *not* a "numbers game" and that the appropriate size of the class would depend on whether there were co-teachers in the classroom, whether teachers were trained in and employed strategies to build teacher-student relationships, and whether teachers utilized evidence-based instructional practices. *See, e.g.*, Tr. pgs. 592:18-593:3, 521:20-522:2, and 524:23-25 (testimony of Dr. [redacted]

b. Ms. [redacted] [redacted]s therapist at [redacted] Academy for [redacted] also testified that one "can't answer" the question of what specific number of students per class would be appropriate to create the "small class" environment necessary to address [redacted]s needs because *"[t]here's a lot more factors besides just simply number* of students – peer culture, the ability of teachers" that must be considered in determining the appropriate class size. Tr. pgs. 171:12-18 (testimony of Ms. [redacted] (emphasis added).

c. [redacted] – like Dr. [redacted] and Ms. [redacted] – also explained in her testimony that one can't set in advance or in the abstract a specific number of students as universally appropriate to accommodate [redacted]s need for a small-class setting because the number would "*depend[] on the class*" as "*every class is different.*" Tr. p. 425:4-7 (testimony of [redacted] (emphasis added).

d. [redacted]s educational records reflect, *inter alia,* the following:

I. that [redacted] "required," *see* Pet. Exh. 15, Bates p. 153 ([redacted] March 2016 IEP), a small-group setting to meet grade-level expectations, *see* Pet. Exh. 15, Bates p. 153 ("[redacted] requires small group instruction . . . in order to meet grade level expectations"); *see also, e.g.,* Tr. p. 521:14-16 ("One of the things that came across very clear was that she *needed* small group setting.").

II. that [redacted] had not had success in larger classrooms without accommodations specifically designed to meet this need for a small-class setting, *see* Pet. Exh. 15, Bates p. 137 (acknowledging [redacted]s then-current weak (a "D" at 63% in language arts) and failing (an "F" at 56% in math) grades in large, regular-education classrooms at Respondent WCPSS prior to [redacted]s removal to [redacted] Academy for [redacted] *see also, e.g.,* Tr. p. 424:22-25 (offering testimony from [redacted] explaining that her "experience is that [redacted] has not" developed relationships with teachers or found success in classes of 25);

III. that [redacted] had been successful in small-class and small-school settings, *see id.* (acknowledging that when Respondent WCPSS moved [redacted] to a smaller Resource class for math temporarily [redacted] was "very successful" in that smaller class, earning an "A," even though she had been failing in the larger regular-education class, earning an "F" with a 56%); *see also* Stip. Exh. 19, Bates p. 140 (recognizing that [redacted] improved to an A- her grade in integrated math in the small-class setting by the third quarter at [redacted] Academy for [redacted] and

IV. that [redacted]s most recent evaluation (and the one relied upon to develop the May 2017 IEP at issue), provided that "[b]ased on her history and current evaluation," [redacted] "would likely respond optimally in a small classroom environment with a small student to teacher ratio," *see* Stip. Exh. 14, p. 109 & 112 ([redacted]s [redacted] Evaluation).

e. Petitioners' counsel explained the evidence supporting their position in response to a question by the ALJ after closing arguments – emphasizing again that Petitioners did not contend that a particular class-size cap would be appropriate in all of her classes or that Petitioners were asking for a specific class-size cap:

> The Court: (interposing) I'm asking what – in this hearing what was established by the evidence of class size cap that would be needed for her to make progress in Wake County Schools?

> Ms Gahagan [Petitioners' counsel]: I don't think that a particular class size cap was established during the hearing. **We don't contend that it was or that we were asking for a particular class size cap.**
>
> And I think it's very much what Mr. Rawson said. I mean part of what Dr. [redacted] said is there are ways – if you don't want to do a cap size, then you put – there are other supports you put in place, like you put co-teaching so that it divides a 30 to 1 ratio into a 15 to 1 student to teacher ratio, so – and recognizing that there may be different ways to go about doing that, but what was offered in that program was not appropriate.
>
> Tr p. 1205:24 – 1206:14 (emphasis added).

660. Despite the clarity in Petitioners' presentation of their case (1) that [redacted] had a documented need for accommodations to create a small-class, small-school setting in the regular-education classroom and (2) that multiple strategies to meet that need could be appropriate depending on other variables in each classroom and in the school at large, the Final Decision and Respondent perceived "significant ambiguity" about Petitioners' requests, *see* Final Decision ¶ 204 ("It should be noted at the outset that there was significant ambiguity in the record about what, precisely, Petitioners were interested in with regard to this accommodation."); *see also* Respondent's Proposed Final Decision, ¶ 119 (same).

661. Contrary to the evidence and argument presented by Petitioners, the Final Decision misstated and mischaracterized Petitioners' request as one for a "specified [] maximum size for classes" and "for a capped class size." *See* Final Decision ¶ 207; *see also* Respondent's Proposed Final Decision ¶ 119 (same).

662. The Final Decision declared, in language identical to that contained in Respondent's proposed decision, but contrary to the documentary evidence and witness testimony offered by Petitioners, "that a small class size accommodation would only have meaning if it specified a maximum size for classes" and that "the Undersigned interprets the request to be for a capped class size." Final Decision ¶ 207; Respondent's Proposed Final Decision ¶ 119 (same).

663. Respondent and the Final Decision persisted in this misunderstanding of Petitioners' accommodations request even though both acknowledged that "[n]o member of the IEP team – including [redacted] and her advocate – ever suggested there be any specific cap set on the number of students in [redacted]s classes." Final Decision, ¶ 208; Respondent's Proposed Final Decision, ¶ 120.

664. It does not make sense to "interpret [Petitioners'] request to be for capped class size," while simultaneously recognizing that Petitioners never suggested or asked that "there be any specific cap set on the number of students in [redacted]s classes."

665. Although both Respondent and the Final Decision recognized that Petitioners "never suggested there be any specific cap set on the number of students in [redacted]s classes," both justified dismissal of Petitioners' request for accommodations to meet [redacted]s need for small-class, small-school setting because "the weight of the evidence supports the Board's position

that [redacted] did not require a class size cap as an accommodation in her IEP." *See* Final Decision ¶ 237; Respondent's Proposed Final Decision ¶ 141 (same).

666. The weight of the evidence supported a "position that [redacted] did not require a class size cap as an accommodation in her IEP" because Petitioners *did not contend*, and thus did not present evidence, that a particular "class-size cap" would be appropriate in all of [redacted]s general-education classes. *That was not the issue.*

667. The Final Decision also determined, ironically,[62] that even if [redacted] *did* require a class-size cap as an accommodation in the general-education curriculum, Respondent met that need by offering her a segregated Resource or Curriculum Assistance classroom (with "zero" nondisabled classmates, *see* Tr. p. 1092) for specialized instruction "in a smaller setting . . . among 12 or fewer students" for 90 minutes each day and by giving her access to that segregated Resource (Curriculum Assistance) setting "any time during the day that she may *need* it via the break-card accommodation." Final Decision ¶ 215 (emphasis added); *see also* Respondent's Proposed Final Decision ¶ 127 (same). *This also misses the issue.*

668. This small-class, small-school setting issue, as presented by Petitioners, was *not* about whether a single class-size cap was required across all of [redacted]s classes, and it also was *not* about the appropriateness of the segregated Resource (Curriculum Assistance) classroom proposed for 90 minutes of [redacted]s social/emotional skills, organizational/study skills, and writing instruction per day plus any "break card" time needed.

669. Instead, the issue presented by Petitioners *was* whether the May 2017 IEP failed to offer FAPE when it failed to offer any accommodation(s) to address her need for a small-class, small-school environment *within* [redacted]*s general-education classrooms* that would allow [redacted] to *remain there* with her non-disabled peers throughout her general-education instructional time, receiving educational benefit.

670. A corollary to that issue, on the evidence in this case, is whether it was appropriate to address this need through a "break card" that would require [redacted] to segregate herself and abandon her general-education instruction with non-disabled peers to a segregated, disabled-students-only Resource (Curriculum Assistance) classroom "any time during the day that she

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[62] If, as the Final Decision and Respondent assert, [redacted] presented insufficient evidence to demonstrate a need for a small-class setting in order to access the general-education curriculum, then the break-card accommodation is unnecessary/irrelevant in this context. If [redacted] doesn't require a small classroom setting, then she doesn't need a break card to allow her to leave her larger regular-education classes and access the smaller, though segregated, resource setting. If, on the other hand, she does require a small-class setting (achieved through any of a variety of means depending on the circumstances in the classroom) to enable her to address the challenges presented by her disabilities and remain in the general-education curriculum (as the weight of the evidence demonstrates), then this accommodation to abandon general education through a break card requiring her to *leave* her regular-education classes misses the point. Petitioners' argument is that [redacted] *shouldn't have to abandon her regular education*, leaving her regular-education classes to access the accommodations she requires in a segregated setting. Petitioners' argument is that accommodations to meet this need are required *within* the regular-education classroom. The Final Decision misses the substance of Petitioners' objection to the May 2017 IEP when it asserts, in the alternative, that Respondent addresses [redacted]s need for such accommodations by offering them in a segregated Resource/Curriculum Assistance class.

may *need* it." *See* Final Decision ¶ 215 (emphasis added); *see also* Respondent's Proposed Final Decision ¶ 127 (same).

671. One possible accommodation that Respondent could have offered, but did not, to address [redacted]s need for a small-class, small-school setting *within the general-education curriculum* with nondisabled peers could have been to create a small section of a *particular* class based, *see* Tr. p. 521:20 – 522:2 ([redacted] testimony identifying a variety of ways in which Respondent WCPSS could satisfy [redacted]s need for a small-class setting, including creating a smaller section of a particular class).

672. But Respondent did not offer to create small section for any of [redacted]s regular-education classes and, according to WCPSS's "Senior Administrator Autism & Extended Content Standards (ACES) Team," Resp. Exh. 18, Bates p. 580, Ms. [redacted] Respondent has *never* offered that to *any* child. *See* Tr. p. Tr. p. Tr. p. 1005:6-13.

673. The record contains *no* evidence that Respondent offered any of the other evidence-based accommodations recommended by Dr. [redacted] to meet [redacted]s need for small-class and/or a small school setting. Respondent did not offer a co-teaching model in a regular-education classroom with a larger number of students; Respondent did not offer to create smaller sections for instruction in any regular-education classes; Respondent did not offer to implement any small-group instruction strategies within a larger regular-education class; and Respondent did not offer training for regular-education teachers on [redacted]s needs, and/or on implementing evidence-based strategies to facilitate stronger teacher-student relationships in [redacted]s classes.

674. None of these possible accommodations appear in the May 2017 IEP and none are reflected as having been offered in Respondent's minutes of that meeting. *See* Stip. Exh. 2, Bates pgs. 16-33 (May 2017 IEP) and Stip. Exh. 4, Bates pgs. 35-44 (Respondent's minutes of the May 2017 IEP meeting).

675. Respondent does not suggest or argue that the "break card" accommodation, which *is* included in the May 2017 IEP, does "not remove[] [redacted] from education in age-appropriate regular classrooms solely because of needed modifications." *See* 34 C.F.R. § 300.116(e) ("In determining the education placement of a child with a disability ... each public agency must ensure that ... [a] child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.").

676. To the contrary, the "break card" does just that. It requires [redacted] to leave the general-education curriculum and regular-education classroom to access a small setting as an accommodation in a segregated Resource / Curriculum Assistance classroom. *See* Final Decision ¶ 215; *see also* Respondent's Proposed Final Decision ¶ 127.

677. The Final Decision recognizes that: "WCPSS staff explained their proposal that [redacted] would receive her specialized instruction in a smaller setting during her Curriculum assistance class among 12 or fewer students, and that she would have access to that small setting any time

during the day that she may *need* it via the break-card accommodation." Final Decision ¶ 215 (emphasis added); *see also* Respondent's Proposed Final Decision ¶ 127.

678. While the Final Decision correctly recognizes that Petitioners "never suggested there be any specific cap set on the number of students in [redacted]s classes," *see* Final Decision ¶ 237; Respondent's Proposed Final Decision ¶ 141 (offering the identical sentence to that quoted from the Final Decision at Paragraph 237), the Final Decision *incorrectly* concludes that this fact supports a decision adverse to Petitioners on the general-education class- and school-setting issue.

679. Additionally, while the Final Decision correctly recognizes that [redacted] would be allowed to leave her general-education classes and "come back [to the segregated Autism Support program class] any time during the day to access a smaller setting for whatever it is that they need," Final Decision ¶ 243, the Final Decision *incorrectly* concludes that this fact supports a decision adverse to Petitioners on the general-education class- and school-setting issue.

680. Because the Final Decision did not directly resolve the small-class, small-school setting issue *as it was raised*, this Decision considers it for the first time.

681. The issue is whether the May 2018 IEP failed to offer FAPE when it failed to offer any small-class, small-school setting accommodations *in* [redacted]*s regular-education classrooms*, but instead required [redacted] to abandon her regular education to access a small setting in a segregated Resource / Curriculum Assistance classroom, using a "Break Card."

682. Because the ALJ failed to accurately address this issue, the ALJ could not have accurately determined whether the May 2017 IEP was sufficient to offer [redacted] a FAPE on this point. *See Gellert v. D.C. Pub. Schs.*, 435 F. Supp. 2d (D. D.C. 2006) ("[W]ithout addressing the main point of contention between the parties – namely whether Wilson could accommodate Jesse's need for a small class size and related services – the Hearing Officer could not have accurately determined whether Jesse could receive FAPE at Wilson. Therefore, his conclusion that 'DCPS offers a program . . . that is reasonably calculated to provide educational benefits and can implement the student's IEP,' 'deserves little deference,' and is not supported by the record.") (citations omitted).

683. This Decision next proceeds on Petitioners' general-education class- and school-setting issue *as it was raised* as follows:

- First it reviews the evidence of [redacted]s need for class- and school-setting accommodations to allow her to remain in the general-education classroom with her non-disabled peers such that she could benefit from educational instruction there,
- Next it identifies Respondent's arguments regarding [redacted]s need for class-setting and school-environment accommodations in the general-education curriculum, and
- Finally it presents findings, based on all the evidence contained in the Official Record in its entirety, to resolve the question, as it was raised, regarding whether [redacted]s May 19, 2017, IEP failed to offer FAPE when it failed to include accommodations *within*

her general-education classes to support her need for a small-class, small-school setting.

The General-Education Class- and School-Setting Issue:
Evidence of [redacted]s Need for Accommodations in General-Education Classes

684. "Education cannot be appropriate if the class size is too large. ... Courts have required school districts to maintain a set teacher-student ratio ... in order to satisfy individual children's needs." MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE 3:16 (3rd ed. 2008 + 2015 supplement).

685. Where the evidence supports that a student requires a "small-class" setting and a "controlled environment" in order to benefit from educational instruction, the IDEA requires school systems to provide accommodations to meet those needs. *See Gellert v. D.K. Public Schs.*, 435 F. Supp. 2d 18, 26 (D. D.C. 2006) (concluding that a student's IEP and placement "were inappropriate for failure to take into account [the student's] need for a small class size and quiet controlled environment").

686. Where the evidence supports a student's need for reduced teacher-student ratios in the general-education classroom, the IDEA requires school systems to provide accommodations to meet that need, and it allows families to be reimbursed for private-school expenses and reasonable attorneys' fees when school systems fail to provide such accommodation. *See, e.g., id.* (requiring a school system to reimburse a family for private-school expenses and reasonable attorneys' fees when that school system failed to include in a students' IEP any accommodations to address the student's need for a reduced teacher-student ratio); *Colin K. v. Schmidt*,715 F.2d 1, 6 (1st Cir. 1983) (requiring a ratio of less than 10 to 1); *McGovern v. Howard Cty. Pub. Schs.*, 35 IDELR 153 (D. Md. 2001 (stating that if a reduced teacher-student ratio is needed for appropriate education, it must be included in the IEP, but finding no need in this case).

687. Courts have also held that large schools, even with support structures in place, are inappropriate based on the unique needs of a particular child. *See R.L. v. Miami-Dade Sch. Bd.*, 757 F.3d 1173 (11th Cir. 2014) (affirming the district court ruling that a large school could not be appropriate, even with support structures in place, for a child with Asperger Syndrome, ADHD, gastrointestinal reflux disease, obsessive-compulsive behavior, and other disabilities prone to anxiety and being overwhelmed in crowded spaces when that student experienced behavior problems, vomiting, and muscle tics after being moved to a large high school with 3600 students).

688. School systems do not always require court order before providing such accommodations; some school systems have offered small-class size as an accommodation on their own initiative to children whose disabilities necessitate it. *See Durbrow v. Cobb Cty. Sch. Dist.*, 72 IDELR 1 (11th Cir. 2018) (recognizing that a school system had been accommodating a child with ADHD with small class sizes pursuant to his 504 Plan from 3rd through 11th grade).

689. All educators, treating therapists, and psychologists in this case who had met, taught, or evaluated [redacted] including [redacted]s former teachers from within Respondent WCPSS, recommended small-class and/or small-school environment accommodations to address [redacted]s unique set of diagnosed disabilities and enable her to make progress in the general-education curriculum.[63]

690. Petitioners presented documentary and testimonial evidence that [redacted] required accommodations in her general-education classrooms to address her unique need for a small-class setting and a controlled environment due to sensory and social challenges caused by her diagnosed disabilities.

691. Petitioners presented documentary evidence of this need prior to the May 2017 IEP meeting. *See supra* ¶ 644.

692. Petitioners expressed this need verbally at the May 2017 IEP meeting. *See supra* ¶ 645.

693. But Respondent failed to offer any accommodations to address this need in the May 2017 IEP. *See infra* ¶¶ 672-74.

694. [redacted] expressly objected to the May 2017 IEP for failure to include any accommodation to address [redacted]s need for a small-class, small-school environment. *See, e.g., supra* ¶¶ 143 & 645.

695. This objection began at the May 2017 IEP meeting itself. *See, e.g., supra* ¶¶ 143 & 645.

696. One example of [redacted]s objection to the May 2017 IEP for its failure to incorporate small-class, small-school environment accommodations arises in [redacted]s explanation to Respondent that she objected to the May 2017 IEP because "she did not perceive the IEP developed today [May 19, 2017] to be different from [redacted]s prior IEP at [redacted] in 2016. *see* Stip. Exh. 4, Bates p. 41 (Respondent's IEP meeting minutes).

697. Understanding this objection requires an understanding not only of the May 2017 IEP, but also of [redacted]s last IEP (March 2016) at [redacted] ([redacted]s prior placement with Respondent WCPSS) and of [redacted]s educational plan at [redacted] Academy for [redacted] (the school [redacted] attended at the time of the May 2017 IEP meeting). It also requires understanding of [redacted]s educational performance history both at [redacted] and at [redacted] Academy for [redacted] The immediately following findings offer the record evidence on these contextual matters.

698. [redacted] attended Respondent WCPSS for more than eight (8) years from kindergarten in August 2007 through most of eighth ([redacted]) grade in March 2016. *See* Order on the Final Pre-Trial Conference, March 19, 2018, Initial Stipulations ¶¶ 14 & 15.

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[63] Only witnesses who had *never met* [redacted] asserted that [redacted] did not need such accommodations or claimed, without research support, that kids, including [redacted] would be deemed a "loser," *see* Tr. p. 1140:5-7, if Respondent provided accommodations to address [redacted]s need for small-class size in the regular-education classroom.

699. [redacted]s parents unilaterally removed [redacted] from Respondent WCPSS toward the end of her eighth ([redacted]) grade year in March 2016. *See* Order on the Final Pre-Trial Conference, March 19, 2018, Initial Stipulations ¶¶ 14 & 15.

700. At the time [redacted]s parents removed her from Respondent WCPSS in March 2016, [redacted] was attending "[redacted]" Pet. Exh. 15, Bates p. 137 ([redacted]s March 2016 IEP with Respondent WCPSS noting her school assignment as [redacted]

701. At the time [redacted]s parents removed her from Respondent WCPSS in March 2016, [redacted] was not meaningfully benefitting from her education at [redacted]

a. Despite being "an intelligent student who is able to meet grade level expectations," Pet. Exh. 15, Bates p. 137 ([redacted]s March 2016 IEP with Respondent WCPSS), [redacted] scored a Level 1, the lowest level, on her most recent End of Grade assessments in both math and reading, and she had an F in her math class and a D in her language arts class. *Id.*

b. Dr. [redacted] testified that in [redacted]s [redacted] public-school placement with "larger class sizes" without "adequate support," "she was on a downward spiral floundering." Tr. p. 592:20 – 593:3.[64]

c. [redacted] explained that her "experience is that [redacted] has *not*" developed relationships with teachers or found success in classes of 25, like she had at [redacted] Tr. p. 424:22-25 (emphasis added);

d. Even Respondent's expert recognized and testified that "with that support that [redacted] was receiving" [redacted] "was not doing well across the board." Tr. p. 827:21 – 828:1 ([redacted] testimony).

702. Although the March 2016 IEP in place at the time [redacted]s parents removed her from Respondent WCPSS is *not* at issue in this appeal, understanding Petitioners' objections to the May 2017 IEP on the basis that [redacted] "did not perceive the IEP developed today [May 19, 2017] to be different from [redacted]s prior IEP at [redacted] in 2016 requires understanding of that March 2016 IEP.

703. At the time [redacted]s parents removed [redacted] from Respondent WCPSS in March 2016, Respondent's IEP for [redacted] included the following classroom environment and structure in a traditional public-school setting:

a. Regular, general-education classes of typical size (25 to 30 students) and structure for 40% to 79% of the school day, and

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[64] Dr. [redacted] also recognized the likelihood that "*if* we had the appropriate amount of supports in place," [redacted] "could be educated in a public school setting in a large class *with the supports in place*." Tr. p. 593:19 – 594:4 (emphasis added). "*General ed classrooms that are effectively – that effectively utilize evidence-based practices provide small group instruction for all students.*" Tr. p. 524: 23-25 (emphasis added). These accommodations and evidence-based practices, however, were not included in [redacted]s May 2017 IEP, and based on [redacted]s May 2017 IEP, "[d]id [Dr. [redacted] feel confident . . . that's what she was going to have . . .? No." Tr. p. 593:19 – 594:4.

b. A segregated, smaller "resource" class (14 or fewer students) for the remainder of the school day.

See Pet. Exh. 15, Bates p. 153 (recognizing in [redacted]s March 2016 IEP with Respondent WCPSS that [redacted] had a segregated resource placement through which "[[redacted] will be removed from her non-disabled peers to receive small group support in organizational skills, social skills, and mathematics" and recognizing that [redacted] would have access to general education classes with her nondisabled peers for 40% to 79% of the school day).[65]

704. At the time [redacted]s parents removed [redacted] from Respondent WCPSS in March 2016, [redacted]s IEP offered the following accommodations and supports in [redacted]s general-education classes of 25 to 30 students each:

a. testing accommodations, including testing in a separate room with a small group, marking answers in the test book, and 50% extended time on tests and quizzes;
b. modified assignments;
c. graphic organizers;
d. access to a computer, typewriter, or word processor for written assignments; and
e. preferential seating.

Pet. Exh. 15, Bates pgs. 147 - 49 (reflecting accommodations in social studies, science, math, and language arts). *See also* Tr. pgs. 41:22 – 43:25.[66]

705. At the time [redacted]s parents removed [redacted] from Respondent WCPSS in March 2016, [redacted]s IEP offered the following specialized instruction for implementation in [redacted]s resource or

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[65] Other than the IEP's recognition that [redacted] had begun her math "resource" placement three weeks prior to the date of the IEP (March 16, 2016), it is unclear in the record exactly *how long* Respondent served [redacted] through the special education and related services framework (large general education classes with various accommodations and supports in place for most of the day with limited time in a segregated resource classroom with a reduced teacher-student ratio and specialized instruction in areas of need) documented in this IEP. The record reflects that it was long enough for it to be remembered as "the IEP" framework at [redacted] serving [redacted] when she was removed. According to Respondent's meeting minutes, Petitioner explained to Respondent at May 2017 IEP meeting that "she did not perceive the IEP developed today to be different from [[redacted]s] prior IEP at [redacted] Stip. Exh. 4, Bates p. 41. Additionally, while [redacted] was "admitted" to [redacted] Academy for [redacted] on March 14, 2016, *see* Stip. Exh. 17 (Master Treatment Plan), it is not clear from the record evidence when [redacted] *began attendance* there. The Individualized Academic Plan for [redacted] Academy for [redacted] (through [redacted] Academy) is dated January 6, 2017, *see* Stip. Exh. 18. [redacted] testified that [redacted] "left for [redacted] Academy after – at the same time of this document." Tr. p. 38:3-4.

[66] The Undersigned recognizes that neither the IEP from March 2016, [redacted]s last year at Respondent WCPSS prior to attending [redacted] Academy for [redacted] nor [redacted]s placement at [redacted] Academy for [redacted] is at issue in this appeal. This factual history nonetheless remains relevant in part because Petitioners specifically objected to the May 2017 IEP at issue in this appeal on the general-education class-size/structure issue for the reason that it was not meaningfully different from the March 2016 IEP that failed to produce meaningful educational benefit for [redacted] As a result, understanding this issue on class size/structure before the Undersigned in this appeal, requires understanding not only the content not only of the presently disputed IEP from May 2017 but also the content of the IEP that was in place when [redacted] left Respondent WCPSS following [redacted]s failure to receive educational benefits, despite her capacity as "an intelligent student who is able to meet grade level expectations."

segregated classroom to provide "small group support in organizational skills, social skills, and mathematics:"

- Organizational/Study Skills, 5 sessions/week, 50 minutes/session
- Social/Emotional Skills, 1 session/week, 20 minutes/session
- Math, 5 sessions/week, 50 minutes/session

Pet. Exh. 15, Bates p. 151 ([redacted]s March 2016 IEP); *see also* Tr. p. 44:1-21.

706. With these accommodations, supports and specialized instruction available in her then-current IEP, even Respondent's expert witness recognized that [redacted] "was not doing well across the board." Tr. p. 827:24 – 828:1 ([redacted] testimony). Respondent's expert witness, Dr. [redacted] testified that "with that support that [redacted] was receiving" [redacted] "was not doing well in math. But she was also not doing well across the board." Tr. pgs. 827:21 – 828:1.

707. Respondent understood that the fact that [redacted] was "not doing well across the board" was the reason "why the parents moved her to [redacted] Academy . . . because generally her functioning had declined." Tr. p. 828:1-2 ([redacted] testimony).

708. [redacted] explained to Respondent at the May 2017 IEP meeting that one of the reasons she objected to the May 2017 IEP was because "she did not perceive the IEP developed today [May 19, 2017] to be different from [[redacted]s prior IEP at [redacted] in 2016. *see* Stip. Exh. 4, Bates p. 41 (Respondent's IEP meeting minutes).

709. With respect to components of the IEP relevant to the general-education class- and school-environment issue, [redacted] was correct that Respondent's May 2017 IEP was "not" very "different from [[redacted]s prior IEP at [redacted] in 2016.

710. Regarding the overall structure of [redacted]s school day and [redacted]s educational placement along the continuum of alternative placements, the March 2016 IEP and the May 2017 IEP offered identical placements, an identical range of time in larger regular-education classes with non-disabled peers, and an identical range of time in a segregated, small-class "Resource" setting in which North Carolina Policy requires 14 or fewer students under the circumstances presented here. *See* NC Policies 1508-3; *see also* Stip. Exh. 27, Bates p. 185-86. The following table offers a direct comparison of the placement decision:

Comparison of placement decision in [redacted]s March 2016 IEP compared to her May 2017 IEP:

	March 2016 IEP Pet. Exh. 15, Bates p. 153	May 2017 IEP Stip. Exh. 2, Bates p. 30.
Placement Decision	Resource – 40% - 79% of the day with non-disabled peers	Resource – 40% - 79% of the day with non-disabled peers

711. Regarding [redacted]s segregated "Resource" time, the May 2017 IEP and March 2016 IEP offered specially designed instruction in that setting in nearly identical subjects (Social/Emotional Skills, Writing, and Organizational/Study Skills) in a nearly identical setting, the Special Education "Resource" setting, for nearly an identical amount of time each day (100 minutes per typical day in the March 2016 IEP and 90 minutes per typical day in the May 2017 IEP).

There are three slight distinctions in the segregated time provided in these two IEPs.

First, the March 2016 IEP *also* offered specially designed instruction in an additional subject, Math, but Respondent removed specially designed instruction in Math from the May 2017 IEP over [redacted]s objection.

Second, the March 2016 IEP offered *most* of [redacted]s specially designed instruction in the Special Education "Resource" classroom (Social/Emotional Skills, Organizational/Study Skills, and Math), but it offered [redacted]s specially designed instruction in writing in an integrated setting in the regular education classroom with nondisabled peers. The May 2017 IEP reversed course on writing and removed that instruction from the regular-education classroom and placed it in the segregated "Resource" setting. Thus, the May 2017 IEP offered *all* of [redacted]s specially designed instruction, rather than *most* of [redacted]s specially designed instruction, in a segregated setting in the Special Education "Resource" classroom, and it offered *none* of this specially designed instruction in a regular-education classroom with nondisabled peers.

Finally, while the March 2016 IEP and the May 2017 IEP proposed segregating [redacted] from her non-disabled peers for nearly identical amounts of time each day, they differed by approximately 10 minutes per typical school day. The March 2016 IEP segregated [redacted] for two 50-minute "sessions" each day, combining for 100 total minutes of segregation each day (with an additional 40-minute segregated "session" once a week for specially designed instruction on social/emotional skills). The May 2017 IEP segregated [redacted] for one 30-minute "session," one 15-minute "session," and one 45-minute "session" each day, combining for 90 total minutes per school day.

The following table offers a direct comparison.

Comparison of the type and location of the specially designed instruction offered in [redacted]s March 2016 IEP and her May 2017 IEP, with the identical types and locations of this specially designed instruction in **bold** font:

Type of Specially Designed Instruction	March 2016 IEP *Frequency & Location* of Specially Designed Instruction Pet. Exh. 15, Bates p. 151	May 2017 IEP *Frequency & Location* of Specially Designed Instruction Stip. Exh. 2, Bates p. 28-29.
Social / Emotional Skills	1 session(s)/wk 40 min/session **Special Education**	5 session(s)/wk 30 min/session **Special Education**
Writing	22 session(s)/rep pd 40 min/session Regular Education	5 session(s)/wk 15 min/session Special Education
Math	5 session(s)/wk 50 min/session **Special Education**	None.
Organizational / Study Skills	5 session(s)/wk 50 min/session **Special Education**	5 session(s)/wk 45 min/session **Special Education**

712. Regarding the particular accommodations and supports available *in the general education classroom* of approximately 25 to 30 students (at [redacted] and approximately 30 students (at [redacted] the March 2016 IEP and the May 2017 IEP offered similar types of accommodations and supports.

Neither the March 2016 IEP nor the May 2017 IEP offered any accommodation designed to meet [redacted]s need for a small-class setting *within the larger regular-education classroom*. Both provided a small-class setting, through a reduced teacher-student ratio, only in a segregated "Resource" / Curriculum Assistance setting.

The May 2017 IEP *added* an accommodation not present in the March 2016 IEP, providing [redacted] with a "break card (take space)" for use in the regular-education setting. Respondent's witnesses explained that this "break card (take space)" would allow [redacted] to *leave* the regular-education classroom (of approximately 30 students) and go to the segregated Resource classroom (with a required reduced teacher-student ratio) any time she felt needed it.

Petitioners expressed concern about this "break card (take space)" accommodation in connection with [redacted]s need for a small-class setting because it required [redacted] to *abandon and interrupt* her regular-education classrooms to address her need for a small-class setting and did not facilitate her ability to remain *included and integrated* in those classrooms.

The May 2017 IEP also removed accommodations that would have allowed [redacted] to "mark[] in book" and use a "computer / typewriter / word processor."

Other accommodations (preferential seating, modified assignments, scheduled extended time, and testing in a separate room – small group) are identical in both IEPs.

The following table offers a direct comparison of the general-education accommodations offered to [redacted] in her March 2016 IEP and May 2017 IEP.

Comparison of the "supplemental aids, supports, modifications and/or accommodations" offered in the general-education setting, using the science class as an example, in [redacted]s March 2016 IEP compared to her May 2017 IEP, with the identical accommodations in **bold** font:

	March 2016 IEP Science Pet. Exh. 15, Bates p. 148-49	May 2017 IEP Science Stip. Exh. 2, Bates p. 25.
Accommodations Identified to Facilitate Inclusion in the General Education Science Curriculum	**—Preferential seating** —Student marks in book —Computer / typewriter / word processor **—Modified assignments** **—Scheduled Extended Time** **—Testing in a Separate Room – Small Group**	**—Preferential seating** **—Modified assignments** **—Scheduled Extended Time** **—Testing in a Separate Room – Small Group** —Other ["copy of teacher notes – break card (take space)"]

713. Notably, at the time [redacted]s parents removed [redacted] from Respondent WCPSS in March 2016, Respondent's then-current IEP team, comprised of educators who knew [redacted] and had experience working with her in school, expressly recognized that [redacted] "*requires small group instruction* to complete her work, strengthen her social skills and organize herself in order to meet grade level expectations" in the academic curriculum. Pet. Exh. 15, Bates p. 153 ([redacted]s March 2016 IEP) (emphasis added); *see also* Tr. p. 44:10-22.

714. In fact, even prior to the March 2016 IEP, [redacted] had been "temporarily moved to a Resource Math class" giving her access to a smaller, though segregated, setting in that subject. Pet. Exh. 15, Bates p. 137 ([redacted]s March 2016 IEP); *see also* Tr. pgs. 40:4 – 41:4 (testimony of [redacted] Notably, in this small setting [redacted]s performance improved, and she began making progress within a few short weeks. Tr. p. 39:7-40:4 (noting that while [redacted] was failing in math in the large classroom setting, she made progress, was more proactive, and began to volunteer in class when she was temporarily moved to a smaller "resource" class in math for three weeks).

715. Nonetheless, the IEP offered to [redacted] at that time, like the May 2017 IEP, failed to offer any accommodations to create a small-class environment in the regular-education classroom,

making small-class setting available only in a segregated "Resource" class where North Carolina policy requires a reduced-teacher student ratio. *See* NC Policies 1508-3.

716. In their application for admission to [redacted] Academy for [redacted] Petitioners noted that the IEP in place at Respondent WCPSS was "useless." *See* Stip. Exh. 17, Bates p. 127 ("From online application: . . . IEP is useless at school.").

717. In contrast to both the March 2016 IEP and the May 2017 IEP offered by Respondent, [redacted] Academy for [redacted] offered a different approach to [redacted]s general-education program.

718. [redacted]s Individualized Academic Plan (IAP) at [redacted] Academy for [redacted] unlike [redacted]s March 2016 or May 2017 IEP with Respondent, offered a small-school setting with a reduced teacher-student ratio *across the curriculum, including in regular-education classrooms.* [redacted] Academy for [redacted] unlike [redacted]s March 2016 or May 2017 IEP with Respondent, did not require [redacted] to leave her general-education classes to access a small-class, small-school environment. Those supports were integrated into [redacted]s general-education curriculum at [redacted] Academy for [redacted].[67]

719. [redacted] Academy for [redacted] developed an Individualized Academic Plan, *see* Stip. Exh. 18, and LEAD assessments, *see* Stip. Exh. 20, to document the overall educational plan offered to [redacted] it also offered a Master Treatment Plan that specified support and services offered by [redacted]s primary therapist, *see* Stip. Exh. 17.

720. The Individualized Academic Plan, or IAP, offered at [redacted] Academy for [redacted] identified specific "accommodation, learning styles, and modifications" across the curriculum as follows:

- Learning Style strengths: visual, kinesthetic, and auditory learning and learns will in discussion-based, multi-modal instruction based classrooms.
- Regular check-ins with school academic staff to support transition and needs noted above and below.
- ***Small classroom setting***
- Support specific to Autism Spectrum Disorder: social cues and peer/teacher relationship building; Flexible thinking support
- Self-regulation breaks throughout the day to manage sensory regulation
- Occupational support services
- Specific support in subjects of Learning Disability (Math, Reading).

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67 [redacted] Academy for [redacted] educational environment, unlike in the educational environment offered by Respondent in either the March 2016 or the May 2017 IEP, also embedded additional support in her areas of need (sensory awareness, social-emotional skills, and organization) *across the curriculum*; it offered "very strong relationships between teacher and student;" it offered teachers who were "very familiar with the needs" of their students; it offered teachers who knew what [redacted] "needed in order to be able to learn better;" and it offered teachers who were able to address "coping strategies and things like that that [redacted] might need to maintain low anxiety levels." *See* Tr. p. 45:1-12. [redacted] Academy for [redacted] also offered a variety of related services to [redacted] including occupational therapy, social skills classes, training therapy, individual therapy, family therapy, and animal therapy. Tr. p. 58:3-15.

Stip. Exh. 18, Bates p. 137 (emphasis added).

721. [redacted] Academy for [redacted] LEAD assessments required [redacted]s teachers and service providers to specify the appropriate level of classroom supports and interventions for [redacted] to facilitate her learning, executive functioning, awareness, and discipline on a scale ranging from "intensive" supports and interventions needed, to "universal" supports and interventions needed, to "no intervention needed." *See* Stip. Exh. 20.

722. [redacted] Academy for [redacted] LEAD assessments culminated in a Student Intervention Plan that identified interventions for [redacted] in three categories: Intensive,[68] Targeted,[69] and Universal. There were no areas in which [redacted] had "no intervention needed." *See* Stip. Exh. 21, Bates p. 153.

723. The "Universal" interventions provided by [redacted] Academy for [redacted] were "universal" in that they were provided *in all classes across the curriculum.*

724. The "Universal" supports provided in all of [redacted]s classes across the curriculum were documented in [redacted]s Student Intervention Plan as follows:

- **Small classroom environment**
- Sensory Friendly classroom environment
- Relationship Based Teaching
- Metacognition
- Daily use of Academic Planner
- Integrated Team Approach
- Mindfulness

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[68] The Intensive interventions provided to [redacted] at [redacted] Academy for [redacted] and documented in [redacted]s Student Intervention Plan were provided in non-classroom time, as was possible at the [redacted] school, and they included the following:

- Weekly Occupational Therapy sessions to address Executive Functioning in the areas of time management, flexibility, task completion, and organization of tasks and materials
- Weekly Occupational Therapy sessions to address Social Skills in regards to flexibility, nonverbal cues, understanding tone, and empathy
- Weekly Individual Therapy Sessions to process Social-Emotional Integration

Stip. Exh. 21, Bates p. 153.

[69] The Targeted interventions provided to [redacted] at [redacted] Academy for [redacted] and documented in [redacted]s Student Intervention Plan included the following:

- Weekly check-ins with Learning Support Team to integrate goals and interventions developed in Occupational and Individual Therapy Sessions
- Daily study skills support for completion of homework assignments
- Sensory Integration Support
- Positive Behavioral Support
- Individualized personal organizational system
- One-on-one support for Math and Writing needs

Stip. Exh. 21, Bates p. 153.

- Multi-modal instruction

Stip. Exh. 21, Bates p. 153 (emphasis added).

725. [redacted] succeeded in the educational program at [redacted] Academy for [redacted] with these universal supports in place. She turned her education around and reaped benefits from the instruction provided, raising her grade in math from an F at Respondent WCPSS to an A- in the third quarter at [redacted] Academy for [redacted] and raising her grade in language arts from a D at Respondent WCPSS to a B+ in the third quarter at [redacted] Academy for [redacted] *See supra* ¶ 31 *and* Order on the Final Pretrial Conference, p. 6, Stipulation ¶ 50 (parties' stipulation to [redacted]s third-quarter grades); Stip. Exh. 19, Bates p. 140 ([redacted]s [redacted] Third Quarter Progress Report).

726. Respondent acknowledged that the educational program at [redacted] Academy for [redacted] with these universal supports in place across the curriculum succeeded in allowing [redacted] to realize educational benefits from the instruction provided. *See supra* ¶ 32.

- Respondent's expert witness and an employee of Respondent as the "team lead for Wake Count's autism team," Tr. p. 739:21-22, testified that when [redacted] was at [redacted] Academy for [redacted] "she was doing quite well," and "was doing very well in math." Tr. p. 828:4-8 (testimony of [redacted]
- Respondent's witness and an employee of Respondent as a "senior administrator for the Autism and Extended Content Standards Team," Ms. [redacted] testified that [redacted] "made some really good progress," especially "really good progress in her social skills," at [redacted] Academy for [redacted] and that the [redacted] Academy for [redacted] educational plan had "been successful" for [redacted] Tr. p. 954:14-21 and p. 955:17-20 (testimony of [redacted]
- Counsel for Respondent acknowledged that "We're not denying that she made progress at [redacted] It's great." Tr. p. 657:12-13 (argument of Respondent's Counsel).

727. When Petitioners and Respondent prepared for [redacted]s return home and to Respondent's schools following her time at [redacted] Academy for [redacted] both knew of (and acknowledged) [redacted]s history of failure in the general-education curriculum at Respondent WCPSS at the time [redacted] left Respondent WCPSS in March 2016, and both knew of (and acknowledged) the remarkable turnaround and success [redacted] realized in the general-education curriculum at [redacted] Academy for [redacted]

728. In light of this recognition and acknowledgement, Respondent's witness, [redacted] emphasized that the [redacted] Academy for [redacted] plan was "the most critical information because it's the most current information," Tr. p. 955:24-25, when creating a new IEP that would allow [redacted] to access and make progress within the general-education curriculum with Respondent WCPSS.

729. Respondent's witnesses recognized that [redacted]s IAP and LEAD assessments with [redacted] Academy for [redacted] had been successful, Tr. p. 955:17-20, and that when "a plan is in place and

has been working" it "wouldn't be in a student's best interest" to "depart from it substantially" because "you want to use what's working, what's been successful." Tr. p 956:7-11.

730. But Respondent then failed to incorporate the unique services and supports [redacted] Academy for [redacted] integrated into the general-education classroom that had not previously been offered or available to [redacted] in Respondent's schools.

731. A comparison between the March 2016 IEP, May 2017 IEP, and the educational plan at [redacted] Academy for [redacted] illustrates why Petitioners objected to the May 2017 IEP as too similar to the March 2016 IEP and as not incorporating the general-education accommodations [redacted]s teachers and evaluators identified as critical to her success at [redacted] Academy for [redacted]

732. The source of Petitioners' concern on this issue is *not* on the types services and supports available in a segregated setting. The segregated services and supports offered by Respondent and [redacted] Academy for [redacted] fall largely into the same general categories (although [redacted] Academy for [redacted] *also* offered those services and supports in the integrated setting, and Respondent did not).

733. The "primary judicable issue" in this case, *see* Final Decision, p. 2, and the reason [redacted] expressed concern that the May 2017 IEP was too similar to the [redacted] [redacted] IEP that failed [redacted] *see* Stip. Exh. 4, Bates p. 41, involves the services and supports offered in the *inclusive* setting, those offered in the general-education classroom. On this, issue, Respondent's March 2016 ([redacted] [redacted] and Respondent's May 2017 IEP have little in common with [redacted] Academy for [redacted] educational plan. This is where the heart of the matter lies.

734. Dr. [redacted] Respondent's expert, acknowledged in her testimony that she realized Petitioners were most concerned at the May 2017 IEP meeting about the regular-education setting as opposed to the segregated setting. *See, e.g.,* Tr. p. 799:21-24 (recognizing that "regular education" was the "aspect of [[redacted]s] school day" about which [redacted] "was most concerned").

735. The immediately following paragraphs first acknowledge what the Official Record reflects on the similarities between the Respondent's segregated services and supports and [redacted] Academy for [redacted] segregated services and supports; they next identify what the Official Record reflects on the *lack* of similarity between Respondent's integrated general-education services and supports and [redacted] Academy for [redacted] integrated general-education services and supports.

736. [redacted] Academy for [redacted] offered out-of-class, segregated, therapy and support in the same general categories as Respondent offered in March 2016 and May 2017. But [redacted] Academy for [redacted] also offered support in math (like the March 2016 IEP, and unlike the May 2017 IEP) as well as several "targeted" interventions addressing sensory integration and positive behavioral support (unlike both the March 2016 and May 2017 IEPs), *see* Stip. Exh. 21, Bates p. 153. The following table illustrates the comparison in the overlapping categories of segregated therapy and support:

Comparison of the overlapping categories of specially designed instruction offered outside the academic classroom in [redacted]s March 2016 IEP, May 2017 IEP, and [redacted] Academy for [redacted] Student Intervention Plan:

Type of Specially Designed Instruction	March 2016 IEP *Frequency & Location* of Specially Designed Instruction Pet. Exh. 15, Bates p. 151.	May 2017 IEP *Frequency & Location* of Specially Designed Instruction Stip. Exh. 2, Bates p. 28-29.	[redacted] Academy for [redacted] Stip. Exh. 21, Bates p. 153.
Social / Emotional Skills	1 session(s)/wk 40 min/session Special Education	5 session(s)/wk 30 min/session Special Education	—Weekly OT sessions to address Social Skills in regard to flexibility, nonverbal cues, understanding tone, and empathy —Weekly Individual Therapy Sessions to process Social-Emotional Integration —Weekly check-ins with Learning Support Team to integrate goals and interventions developed in Occupational and Individual Therapy Sessions
Writing	22 session(s)/rep pd 40 min/session Regular Education	5 session(s)/wk 15 min/session Special Education	—Targeted one-on-one support for Writing needs
Math	5 session(s)/wk 50 min/session Special Education	None.	—Targeted one-on-one support for Math needs
Organizational / Study Skills	5 session(s)/wk 50 min/session Special Education	5 session(s)/wk 45 min/session Special Education	—Weekly Occupational Therapy sessions to address Executive Functioning in the areas of time management, flexibility, task completion, and organization of tasks and materials —Daily study skills support for completion of homework assignments —Individualized personal organization system

737. [redacted] Academy for [redacted] also offered supplemental aids, supports, modifications and accommodations in all of [redacted]s academic classes *across the curriculum*. In the general-education curriculum, the most notable distinctions appear between the [redacted] Academy for [redacted] educational program and Respondent WCPSS's educational program as offered in the May 2017 IEP.[70] The following table offers a comparison between the March 2016 IEP, the May 2017 IEP, and the educational plan at [redacted] Academy for [redacted]

Comparison of the "supplemental aids, supports, modifications and/or accommodations" offered in the general academic setting, using the science class as an example in [redacted]s March 2016 IEP and May 2017 IEP and all academic classes from [redacted] Academy for [redacted]

	March 2016 IEP Science Pet. Exh. 15, Bates p. 148-49.	May 2017 IEP Science Stip. Exh. 2, Bates p. 25.	[redacted] Academy for [redacted] Stip. Exh. 21, Bates p. 153 (Stud. Int. Plan). Stip. Exh. 18, Bates p. 137 (IAP).
Accommodations Identified to Facilitate Inclusion in the General Education Science Curriculum	—Preferential seating —Student marks in book —Computer / typewriter / word processor —Modified assignments —Scheduled Extended Time —Testing in a Separate Room – Small Group	—Preferential seating —Modified assignments —Scheduled Extended Time —Testing in a Separate Room – Small Group —Other ["copy of teacher notes – break card (take space)"]	—Self-regulation breaks throughout the day to manage sensory regulation —Specific support in subjects of Learning Disability (Math, Reading) —Regular check-ins with academic staff to support transition and needs noted —**Small classroom setting** (on Individualized Academic Plan) and **small classroom environment** (on Student Intervention Plan) —Support specific to Autism Spectrum Disorder: social cues and peer/teacher relationship building; Flexible thinking skills support —Sensory Friendly classroom environment —Relationship-based teaching —Metacognition —Use of Academic Planner —Integrated Team Approach —Mindfulness —Multi-modal instruction

738. On the issue of accommodating [redacted]s need for small-class, small-school setting in the general-education curriculum, [redacted] Academy for [redacted] offered and provided small-class setting *across the curriculum* in all of [redacted]s general-education classes at all times; Respondent WCPSS did not.

739. Respondent did not offer or provide small-class setting in March 2016 or in May 2017. On this issue at the heart of the case, the May 2017 IEP was more like the March 2016 IEP at [redacted] than it was like the educational plan at [redacted] Academy for [redacted]

740. Significantly, in both March 2016 at [redacted] and in May 2017 in the IEP at issue in this appeal, even when [redacted] was otherwise included in the general-education classroom, Respondent still required [redacted] to be segregated for testing "in a separate room" to access the "small group" she required.

741. All of the witnesses who knew [redacted] and her *unique, individual* needs agreed that the "universal" support of having a small classroom environment, a sensory friendly classroom environment, relationship-based teaching, multimodal instruction, and an integrated team approach across the curriculum at [redacted] Academy for [redacted] was a key component to her academic turnaround.

742. All witnesses who knew [redacted] and her *unique, individual* needs recommended a small-class setting *across the curriculum* as she transitioned back to traditional public schools to assist her in managing the sensory, social-emotional, and organizational challenges. For example:

a. [redacted]s therapist at [redacted] Academy for [redacted] Ms. [redacted] testified that as [redacted] transitioned from [redacted] Academy for [redacted] to her next school placement she should "enter an environment that more closely mirrored our environment" to include "small classroom size, relationship based multimodal teaching" across the curriculum "for all of her classes." Tr. p. 137:11-25 ([redacted] testimony).

b. Ms. [redacted] explained that small class size was necessary for several reasons, including to address [redacted]s "sensory integration needs." Tr. p. 138:22-23. "The more people in a small room, the more difficulty [redacted] is going to have in regulating her physical and emotional states, creating an inability to retain and process information." Tr. p. 138:23 – 139:1.

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[70] Respondent's counsel acknowledged that the "Accommodations, Learning Styles, and Modifications" provided in [redacted]s Individualized Academic Plan were *not* incorporated into the *draft* IEP prepared in advance of the May 2017 IEP meeting, with one exception. Respondent's counsel took the position that the "Break Card" accommodation in the May 2017 IEP that would enable [redacted] to leave her regular-education classes whenever she needed to access a small setting was the equivalent of the "self-regulation breaks throughout the day to manage sensory regulation" as appeared in [redacted] Academy for [redacted] Individualized Academic Plan. Tr. pgs. 72:13 – 75:3. The "Accommodations, Learning Styles, and Modifications" provided in [redacted]s Individualized Academic Plan also were not incorporated in to the *final* May 2017 IEP, as noted above.

[71] This list compiles the most relevant accommodations identified on the LEAD Assessment / Student Intervention Plan *and* the IAP from [redacted] Academy for [redacted] some accommodations (e.g., small-class setting/environment) appear on both; other accommodations appear on only one document or the other.

c. Ms. [redacted] explained that she could not recommend a traditional public-school classroom without accommodation to address these needs because [redacted] would suffer "overstimulation due to the large size of the school" and "high numbers of students in classrooms." Tr. p. 140:19-25.

d. Ms. [redacted] also testified that small-class setting was necessary to "assist in [redacted]s] relationship building skills." Tr. p. 139:1-2. [redacted] "is on the autism spectrum and require[s] some more support around her social/emotional growth and learning and does much better when she has a teacher who can pay more attention to relationship building aspects" because that can facilitate "turning in assignments and asking for help as needed." Tr. p. 139:3-8 (emphasis added).

e. Ms. [redacted] further testified that in her experience with [redacted] at [redacted] Academy for [redacted] a small, private, therapeutic school with wraparound services and supports, [redacted] had struggled in her "larger" "P.E. class [which] had up to 12 students," and [redacted] was "far more successful in classrooms with fewer students," particularly "during periods of time when there were closer to six students as opposed to eight" students per class. Tr. p. 170:15-171:11.

f. Dr. [redacted] Petitioners' expert on inclusion practices for students with autism, testified after meeting [redacted] that "[o]ne of the things that came across very clear was that she needed small group setting." Tr. p. 521:14-16 (emphasis added). Dr. [redacted] further explained, as did Ms. [redacted] that "we had evidence that when she's in a small setting with . . . relationships with her teachers and with peers . . . , she excelled and she did well. We also had the same information that the counter was true when she wasn't in those kind of environments." Tr. p. 528:8-13.

g. Ms. [redacted] [redacted]s teacher and administrator at [redacted] Academy, testified that [redacted] "needs access to her teachers, she needs small size, and I think she needs to feel really safe and secure so that her anxiety will decrease." Tr. p. 337:22 - 338:4 (emphasis added).

h. Dr. [redacted] the psychologist whose June 2016 evaluation of [redacted] formed the basis for the IAP at [redacted] Academy for [redacted] and the May 2017 IEP, provided a written recommendation that [redacted] "will likely respond optimally in a smaller classroom environment with a small student: teacher ratio," Stip. Exh. 14, Bates p. 112, and she explained this written recommendation in her testimony as a "need" as follows: "I ... assess a student and say where I feel like their *needs* are. ... In that case, I felt like it was a smaller classroom environment with a smaller student to teacher ratio." Tr. p. 287:13-18 (emphasis added).

i. Dr. [redacted] also clarified that [redacted]s need for a small-class setting was *not* limited to "one class period a day," but it extended to all of [redacted]s classes in the general-education curriculum, testifying that she "recommended smaller classrooms and a lower student to teacher ratio . . . *in general*," not just for "one class period per day." Tr. p. 254:12-15 (emphasis added).

743. And all agreed that the successful educational plan at [redacted] Academy for [redacted] was "the most critical information" regarding [redacted]s needs as she transitioned back to WCPSS, *see* Tr. p. 955:12-25 ([redacted] testimony), and that it was an "appropriate starting point for Respondent's development of an IEP for [redacted] as it reflected the most updated information regarding [redacted]s needs, specific goals, and success with a variety of instructional strategies and interventions," *see* Final Decision ¶ 100, *and* Respondent's Proposed Final Decision ¶ 48 (proposing, as the Final Decision ultimately found, that the IAP constituted "an appropriate starting point" for development of the May 2017 IEP).

744. With this context, Petitioners' concern that the May 2017 IEP looked too much like the March 2016 IEP, which had been unsuccessful, and not enough like the [redacted] Academy for [redacted] educational plan, which had been successful, becomes plain.

745. [redacted]s objection to the May 2017 IEP because, *inter alia*, "she did not perceive the IEP developed today [May 19, 2017] to be different from [[redacted]s] prior IEP at [redacted] [redacted] in 2016, Stip. Exh. 4, Bates p. 41 (Respondent's IEP meeting minutes), emphasizes Petitioners' concern that the May 2017 IEP, like the March 2016 IEP, offered small-class, small-school setting accommodations *only* in a segregated setting and failed to include any small-class, small-school setting accommodations across the curriculum in regular-education classes.

746. Recognizing this documentary evidence establishes, contrary to the findings in the Final Decision, that the May 2017 IEP proposed by Respondent was ***not*** "essentially the same as the educational plan provided by [redacted] Academy" on the issue at the heart of this case. *See* Final Decision ¶ 14 (discrediting Petitioner's expert witness on the incorrect factual premise that "the [May 2017] IEP was essentially the same educational plan provided by [redacted] Academy").

747. Instead, as [redacted] stated at the May 2017 IEP meeting, in terms of placement, special education, and general-education accommodations, the May 2017 IEP proposed by Respondent looked more like the March 2016 IEP that failed [redacted] a year earlier than the then-current [redacted] Academy Plan under which [redacted] succeeded.

748. Having outlined the evidence presented on [redacted]s need for small-class, small-school environment accommodations and clarified the context for [redacted]s objection based on the similarities between the unsuccessful March 2016 IEP and the proposed May 2017 IEP, this Decision now turns to Respondent's response to that evidence on appeal.

The General-Education Class- and School-Setting Issue: Respondent's Position

749. Respondent contested Petitioners' evidence on [redacted]s need for small-class and/or small school setting accommodations in three ways in its Written Arguments on Appeal:

a. First, Respondent embraced the misunderstanding of this issue reflected in the Final Decision that because "not one of Petitioners' own witnesses would commit to a

specific class size," Petitioners' claim fails, Respondent's Written Arguments on Appeal, p. 35.

b. Second, Respondent argued that "[t]o prove that a student requires small class size as an accommodation, a parent must bring specific evidence that the student *needs* that accommodation," Respondent's Written Arguments on Appeal, p. 35 (emphasis in original), but a "parent or provider's *suggestion* that small class size *may* help a student, *or mere preference* for small class size, does not render the accommodation necessary or appropriate," *id.* at 35-36 (emphasis added).

c. Finally, Respondent asserted that even though it did not believe [redacted] "needed" a class-size cap, "the IEP Team recognized the value of providing [redacted] a safe space and small setting at times during her day," Respondent's Written Arguments on Appeal, p. 36. Respondent argued that it supported this "value" by "providing [redacted] access to the smaller CA classroom throughout her school day, whenever she *needed* additional support" via the Break Card accommodation, Respondent's Written Argument on Appeal, p. 37 (emphasis added).

750. Respondent also argued *at the hearing* (although Respondent abandoned this argument on appeal) that a small-class setting accommodation in an inclusive, regular-education classroom would have "the significant potential to be [a] detriment" to [redacted] *see* Tr. p. 1173:15-20, because it would "disable" her, *see* Tr. p. 1173:20, and stigmatize all students within that classroom – both children without disabilities and children with disabilities – as having "the L sign, the loser sign" attached to them, *see* Tr. p. Tr. p. 1140:507.

751. None of Respondent's positions on this issue find support in the Official Record considered in its entirety.

752. The following findings identify the record evidence on each of Respondent's positions one at a time.

753. Respondent's first position on appeal – that Petitioners' sought a maximum class-size cap and failed to specify what that cap might be, justifying Respondent's refusal to offer a class-setting accommodation and defeating Petitioners' claim – reflects a misunderstanding of the recommendations made on [redacted]s behalf and of the evidence on this issue. It does not respond to the issue *as it was raised.* It creates a straw man. *See supra* ¶¶ 626-83.

754. Respondent's second position – that Petitioners made only a "suggestion" or indicated a "mere preference" for small-class, small-school setting accommodations, and did not identify a "need" for such accommodations – fails on the facts.[72]

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[72] Respondent contradicts itself on this point. Respondent implicitly acknowledged [redacted]s "need" for small-class setting in its explanation of the "break card" accommodation as one that would enable [redacted] her to segregate herself from larger regular-education classes with her non-disabled peers to access a segregated "small setting" with her disabled peers, in Respondent's words, "whenever she *needed*" that support. *See* Respondent's Written Arguments on Appeal p. 36-37.

755. The evidence demonstrates [redacted]s need for accommodations to create a small-class, small-school setting. And Respondent knew that.

756. Dr. [redacted] Respondent's expert witness and autism team lead, who had "never met" [redacted] relied on documentation to learn about [redacted]s needs. She acknowledged that "[t]here was *no* documentation that said [redacted] did not *need* a small setting." Tr. p. 857:8-9 (emphasis added). Dr. [redacted] also acknowledged that "the only place . . . [she] observed [redacted] functioning successfully was in a small setting." Tr. p. 857:10-13. Dr. [redacted] had *never* observed [redacted] function successfully in a larger setting, and the documentary record demonstrated that [redacted] had *not* performed successfully in a large setting with Respondent WCPSS. *See* Pet. Exh. 15, Bates p. 137.

757. Respondent's employees who taught and served [redacted] under her last IEP with Respondent WCPSS recognized that [redacted] "*requires* small group instruction . . . to meet grade level expectations." *See* Pet. Exh. 15, Bates p. 153 (March 2016 IEP) (emphasis added).

758. [redacted]s unique combination of disabilities made "her needs more complex" than those of a typical child with autism, and [redacted]s "more complex" needs "require" additional interventions. Tr. p. 258:13-18 ([redacted] testimony). Dr. [redacted] explained: "[H]er learning related difficulties and the anxiety related difficulties that she shows go beyond what is typically, you know, seen in an autism spectrum disorder and *require* additional specialized intervention, which I think I note in the summary it makes her case a little bit more complex or her needs more complex." Tr. p. 258:13-18 ([redacted] testimony) (emphasis added)

759. All those who knew, taught, treated, or served [redacted] expressed their position, based on their personal knowledge of [redacted] and her unique combination of disabilities that [redacted] requires small-class and/or small-school setting in order to make progress in the general-education curriculum.

760. [redacted]s then-current educators at [redacted] Academy for [redacted] recognized [redacted]s need for a small-class setting and *rejected* the assertion that [redacted]s unique combination of disabilities "required no intervention" on class size to be "successful in a regular classroom environment." Stip. Exh. 20, Bates p. 150.

761. Those educators offered and recommended in [redacted]s Individualized Academic Plan and LEAD assessments the accommodation of "small classroom size," Stip. Exh. 18, Bates p. 137, and "small learning environment with multi-modal instruction," Stip. Exh. 20, Bates p. 150.

762. The Academic Director, [redacted] called into [redacted]s May 2017 IEP on Petitioners' behalf and expressed her recommendation that [redacted] receive a "small classroom setting to address [[redacted]s] sensory *needs*." Stip. Exh. 4, Bates p. 36 (Respondent's meeting minutes) (Emphasis added).

763. [redacted]s primary therapist at [redacted] Academy for [redacted] Ms. [redacted] testified: "We recommended that [redacted] enter an environment that more closely mirrored our environment

because she had been so successful in our learning environment, so small classroom size, relationship based multimodal teaching" for "all of her classes." Tr. p. 137:20-25.

764. [redacted]s current English teacher at [redacted] Academy, Ms. [redacted] testified: "She – the small size is really important. I mean every student is different, but [redacted] does fit the profile of the kind of student that we can easily serve at [redacted] because she *needs* access to her teachers, she *needs* small size, and I think she needs to feel really safe and secure so that her anxiety will decrease because I think that the anxiety gets in the way sometimes of her showing what she can do." Tr. pgs. 337:23 – 338:4 (emphasis added).

765. Dr. [redacted] who conducted the primary evaluation relied upon by the May 2017 IEP team, provided a written recommendation that [redacted] "will likely respond optimally in a smaller classroom environment with a small student: teacher ratio," Stip. Exh. 14, Bates p. 112, and she explained this written recommendation in her testimony as a "need" as follows: "I ... assess a student and say where I feel like their *needs* are. ... In that case, I felt like it was a smaller classroom environment with a smaller student to teacher ratio." Tr. p. 287:13-18 (emphasis added).

766. Dr. [redacted] the only expert in this case on the inclusion of children with autism in the regular-education setting and the only expert in this case who had met [redacted] testified unequivocally: "One of the things that came across very clear was that she *needed* small group setting." Tr. p. 521:14-16 (emphasis added).

767. Respondent's own witnesses acknowledged that [redacted]s then-current Individualized Academic Plan, the plan that Respondent used as "the basis for drafting [redacted]s] IEP," included small class sizes as a "*necessary* accommodation." Tr. p. 1004:10-13 (affirming in Ms. [redacted] testimony that the individualized academic plan that Respondent used "as the basis for drafting [redacted]s] IEP" included small class sizes as a "*necessary* accommodation") (emphasis added).

768. The May 2017 IEP implicitly acknowledges that [redacted]s need for a small-class setting when it documented that [redacted] "will be removed from her non-disabled peers to receive *small group support* . . . based on her documented *needs*." Stip. Exh. 2, Bates p. 30 (emphasis added).

769. Respondent's argument that Petitioners expressed a mere "preference" or "suggestion" for small-class setting reflects a misunderstanding of [redacted]s unique needs and is belied by this evidence.

770. Dr. [redacted] succinctly explained as follows about "the Wake County Public Schools' understanding" of [redacted]s needs: "Well, I would say sadly it appears – it's pretty evident in the documents that they don't understand her unique needs related to the various disabilities that she has presented with." Tr. p. 454:21-24.

771. Respondent parsed the statements of witnesses and highlighted words like "benefit" and "optimal" and "recommended" to argue that [redacted]s need for small-class, small-school setting accommodations should be considered a preference, not a necessity.

772. While some witnesses expressed not only that [redacted] needed small-class, small-school setting accommodations, but also that a small-class and/or small-school setting "would benefit" [redacted] or would be "optimal[]" for [redacted] this does not alter the evidence presented that this setting was *necessary* given [redacted]s unique, "more complex," combination of disabilities.

773. When something is necessary for a child with a disability to make meaningful progress, it is, of course, "optimal" that the child have access to it, and it is expected that the child "would benefit" from it. These are not mutually exclusive observations.

774. In Respondent's Written Arguments on Appeal, Respondent asserted that "Respondent's witnesses testified clearly that there was just no evidence that [redacted] required a small class size, or a class size cap, to succeed." Respondent's Written Arguments on Appeal, p. 36.[73]

775. That Respondent's witnesses did not recognize or appreciate evidence that *was* presented does not mean it does not exist. Respondent's employees did not "understand [[redacted]s] unique needs related to the various disabilities that she has presented with." Tr. p. 454:21-24. They had never met, taught, served, or evaluated her. *See supra* ¶ 210.

776. Respondent's Written Arguments on Appeal also asserted two additional points as potential support for Respondent's theory that Petitioners' presented a mere "preference," rather than a "need," for small-class and/or small-school setting accommodations: (1) Respondent asserted (out of context) that [redacted]s evaluator, Dr. [redacted] "acknowledged that there was no evidence that [redacted] could not succeed in a larger classroom." Respondent's Written Arguments on Appeal, p. 36. (2) Respondent asserted that [redacted] "performed better" in a class of 16 students at [redacted] Academy ([redacted]s current placement). Respondent's Written Arguments on Appeal.

777. Neither of these points supports Respondent's theory that [redacted] presented a "mere preference" or "suggestion," rather than a "need," for small-class, small-school setting accommodations.

778. Respondent cited to two lines in the Transcript at page 288 to support its assertion that Dr. [redacted] "acknowledged that there was no evidence that [redacted] could not succeed in a larger classroom," Respondent's Written Arguments on Appeal, p. 36. On those two lines, Dr.

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[73] Notably, Respondent's witnesses had never taught, served, evaluated, or even met [redacted] *See supra* ¶ 210. They had no experience with the uniquely complex needs created by [redacted]s particularly challenging combination of disabilities, *see, e.g.*, Tr. p. 258:13-18 ([redacted] testimony) ("I think her learning related difficulties and the anxiety related difficulties that she shows go beyond what is typically, you know, seen in an autism spectrum disorder and require additional specialized intervention, which I think I note in the summary it makes her case a little bit more complex or her needs more complex."). Although after observing or watching [redacted] for part of a single day in a small-class setting at [redacted] Academy, Dr. [redacted] testified that she did not see evidence that [redacted] could not succeed in a larger setting, Dr. [redacted] failed to testify *how* [redacted]s success in a *small* setting was persuasive to her regarding whether she could succeed in a different, larger setting, especially in light of the documentary evidence that she had not been successful in a larger setting in Respondent WCPSS, *see supra* ¶¶ 29-30. And Dr. [redacted] who was not an expert on inclusion practices for children with autism, failed to recognize (contrary to the only expert on the inclusion of children with autism, Dr. [redacted] that [redacted] would require particularized supports and accommodations in a larger setting in order to realize success there.

[redacted] said, "Yeah, I mean – so no, she's not incapable of learning in a larger classroom environment. But to the. . . ." Tr. p. 288:1-2.

779. Reviewing these two lines from Respondent's counsel's cross-examination of Dr. [redacted] in fuller context renders their meaning clearer:

> A [By Dr. [redacted] . . . I said that she "will likely respond optimally in a smaller classroom environment with a small student [to] teacher ratio." I mean that was my recommendation for her.
>
> You know, it's – I'm careful about my reporting in reports because I don't necessarily say exactly what will or will not happen or what someone is incapable of because, you know, I think that's an impossible thing to say.
>
> The best I can do is *assess a student and say where I feel like their* ***needs*** *are* and how they are potentially going to respond in the best type of learning environment. And in that case, I felt like it was *a smaller classroom environment with a smaller teacher to student ratio.*
>
> Q: [By Respondent's Counsel]: So at the time you evaluated her, it was your recommendation that she would benefit from smaller classes?
>
> A: Yes.
>
> Q: But that does not necessarily extend that she is incapable of learning in larger groups?
>
> Ms. Gahagan [Petitioners' Counsel]: Objection, asked and answered.
>
> The Court: Overruled. You may answer.
>
> A: Yeah, I mean – so no, she's not incapable of learning in a larger classroom environment. But to the extent that – I don't know that – *there are very few people we could say that they're completely incapable of doing anything.*
>
> So I guess I would say yes, that's true; she's not incapable of learning, but *a larger classroom environment – it was* ***not*** *my impression in the evaluation that a larger classroom environment would be a good match for her learning* ***needs***, especially with the autism spectrum disorder and the anxiety.
>
> Tr. pgs. 287:5 – 288:11 (emphasis added).

780. Considering the two lines cited by Respondent in context, Dr. [redacted] affirmatively testified that [redacted]'s "needs" were such that a larger classroom environment would <u>not</u> be a good match her, although Dr. [redacted] refused to testify that [redacted] would be "completely incapable" of learning "anything" – as opposed to nothing – in that setting.[74]

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[74] Respondent also relied *at the hearing* on a misunderstanding of the relevant law to make an argument analogous to its argument on appeal that [redacted] did not "need" small-class / small-school setting accommodations. At the hearing, Respondent mis-framed this issue in its opening arguments as follows:

781. Dr. [redacted] the only expert on inclusion of children with autism reminded that "we do have evidence that when she was in larger class sizes in the public school she was on a downward spiral floundering," Tr. p. 592:21-23; she was performing below grade level, earning an F in math and a D in language arts, Pet. Exh. 15, Bates p. 137.

782. The United States Supreme Court recently clarified the *level* of educational benefit an IEP must offer to satisfy the IDEA. The Court rejected a school district's argument that an IEP is sufficient "so long as it is 'reasonably calculated to provide *some* benefit, as opposed to *none*.'" *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 998 (2017).

783. The Court emphasized that "[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created," *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 1001 (2017).

784. Respondent's argument that the IEP it offered to [redacted] in May 2017 was appropriate because [redacted] would not be "completely incapable" of learning *something* in a larger setting without small-class, small-school accommodations, *see* Tr. p. 287:5 – 288:11, despite her history of below-grade-level performance in such settings, *see* Pet. Exh. 15, Bates p. 137, runs afoul of the lesson of *Endrew F.*

785. That [redacted] might learn *something*, as opposed to *nothing*, in a larger setting is insufficient under the IDEA. Instead, "the progress contemplated by the IEP must be appropriate in light of the child's circumstances. ... A focus on the particular child is at the core of the IDEA. The instruction offered must be '*specially* designed' to meet a child's '*unique* needs' through an '[*i*]*ndividualized* education program.'" *Endrew F.*, 137 S. Ct. at 999 (emphasis in original).

786. The facts in *Endrew F.* loosely parallel those at issue here. Endrew, like [redacted] is a child with autism and additional disabilities who attended local public schools for a number of years with inadequate progress. *See id.* at 996. Endrew's parents, like [redacted]s parents, became dissatisfied with their child's lack of progress. Although Endrew, like [redacted] displayed a number of strengths, he still "exhibited multiple behaviors that inhibited his ability to access learning in the classroom." *Id.* Endrew would "scream in class, climb over furniture and other students, and occasionally run away from school. He was afflicted by severe fears of commonplace

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> Petitioners have a very heavy burden here that if they are going to make the claim that [redacted] needs small classes – 6 to 1, 12 to 1, not clear – but she needs small classes for every single part of her day, *they're going to have to prove that* [redacted] *cannot learn in any sort of larger setting, no matter what the supports are*, that she literally cannot benefit in a room of 25 if she's got other supports in place.
>
> Tr. p. 26:3-10 (emphasis added).

This characterization of this issue and of Petitioners' burden is wrong. While Petitioners do carry the burden of proof, that burden does not require them to demonstrate that [redacted] "cannot learn in *any sort of larger setting, no matter what the supports are*." Tr. p. 26:3-10. Petitioners' burden is much more specific. Petitioners need only prove by a preponderance of the evidence that *the specific supports offered in the May 2017 IEP* were insufficient to provide FAPE in the LRE in the placement offered in that IEP. Respondent abandoned this errant legal theory on appeal, and it is not addressed further in this Decision.

things." *Id.* Like Endrew, when [redacted] left the public schools she had behavioral challenges that included "significant noncompliance and meltdowns that consisted of shouting out, crying, throwing herself on the floor, and some mild aggression," Pet. Exh. 43, Bates p. 298, and like Endrew's "fears of commonplace things," [redacted] had a "phobia of fruit," Pet. Exh. 43, Bates p. 298. When Endrew's school system presented Endrew with a proposed IEP that in the parents' view was "pretty much the same as his past ones," Endrew's parents removed him to a specialized private school where within months "Endrew's behavior improved significantly, permitting him to make a degree of academic progress that had eluded him in public school." *Endrew F.*, 137 S. Ct. at 997. Similarly, [redacted]s parents removed [redacted] from Respondent WCPSS after feeling frustrated by lack of progress with Respondent WCPSS and placed her at [redacted] Academy for [redacted] where she turned her education around and improved her behavior. *See supra* ¶¶ 716 & 725-29. The dispute in *Endrew F.*, like the dispute in this case, arose when Endrew, like [redacted] planned a *return* to public schools after recovering educational success in a private setting. On Endrew's return, "Endrew's parents considered the IEP no more adequate than the one proposed [previously], and rejected it. They were particularly concerned that the stated plan . . . did not differ meaningfully from the plan in his [prior] IEP, despite the fact that his experience at [the private school] suggested that he would benefit from a different approach." *Id.* [redacted]s parents, like Endrew's parents, similarly contend that [redacted]s May 2017 IEP is not meaningfully different from her unsuccessful March 2016 IEP – the one that resulted below-grade-level performance, a failing grade in math, and a D in language arts – and that it does not include strategies deployed by the successful private school and recommended by [redacted]s educators and service providers. *See supra* ¶¶ 737-45. In *Endrew F.*, the school system argued, like Respondent argues here, that the IEP offered was sufficient to allow Endrew to make *some* progress, as opposed to none. In other words, the school district in *Endrew F.* argued that Endrew wasn't completely incapable of learning anything under the program offered in the IEP at issue. The Court held that such *de minimis* progress was insufficient to satisfy the FAPE requirement of IDEA.

787. Respondent's argument that [redacted] would not be "completely incapable" of learning "anything," as opposed to nothing, in a larger setting fails to provide "cogent and responsive explanation" for refusing small-class setting accommodations in the May 2017 IEP – just as the school system's argument in *Endrew F.* that Endrew's IEP allowed him to realize "*some* benefit as opposed to *none*" also failed. *See Endrew F.*, 137 S. Ct. at 998 & 1001 (explaining and rejecting Respondent's argument and noting that a reviewing court may "fairly expect" educational authorities to "be able to offer 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").

788. Respondent's Written Arguments on Appeal also contend that [redacted] did not "need" a small-class and/or small-school setting because [redacted] Academy,[75] the private placement selected by Petitioners after they rejected the May 2017 IEP, moved [redacted] to a math class with 16 students in a placement where her other classes had an average of 9 or 10 students, *see* Tr. p. 316:9-14 (stating that the average class size at [redacted] Academy is 9 or 10 students)).

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75 [redacted] Academy is a small school with only 136 students in *all* grades from kindergarten through 12th grade. *See* Tr. p. 316:5-8 ([redacted] testimony).

789. Respondent failed to explain in its Written Arguments on Appeal *how* having one general-education class of 16 students with the remaining general-education classes having an average of 9 or 10 students per class at a small school (compared to the approximately 30 students per class in all general-education classes at a large school as offered in the IEP at issue) defeats Petitioners' evidence of [redacted]s "need" for a small-class and/or small-school setting.

790. That most of [redacted]s classes at [redacted] Academy contain an average of 9 to 10 students and that she has one class comprised of 16 students is consistent with the evidence *as it was presented* on [redacted]s unique need for a small-class, small-school setting accommodation.

791. The evidence indicated, contrary to Respondent's and the Final Decision's fundamental misunderstanding, that [redacted]s need for small-class, small-school setting did *not require* a universal, pre-determined, numeric cap that would be the same in all of [redacted]s general-education classes, regardless of the particular circumstances in each class.

792. The evidence indicated that in cases where the small-class, small-school setting accommodation would be implemented by a reduced teacher-student ratio, the precise ratio appropriate to meet [redacted]s need would vary according to the particular circumstances, supports, and other variables present in each classroom.

793. Ms. [redacted]s primary therapist at [redacted] Academy for [redacted] explained that "peer culture" is one of the variables relevant in determining the precise number of students appropriate to satisfy [redacted]s need for small-class, small-school setting in a particular classroom. Tr. p. 171:16-18 (stating that "[t]here's a lot more factors besides just simply number of students – the peer culture, the abilities of the teachers").

794. [redacted] Academy moved [redacted] *to* a 16-student math class *from* a math class with a lower number of students because the peer culture in the 16-student class (the "larger" class) was *quieter* and less challenging to [redacted]s sensory sensitivities than in the smaller class.

795. Ms. [redacted] explained that "when [redacted] first came at [redacted] . . . And she was in a class with a lot of people who were very loud and talked a lot. And I got the sense that she was uncomfortable and that her voice was getting drowned out a little. And so I did move her into actually what's a larger class but a quieter class. . . She's been doing well with the sensory part. I haven't noticed any major angst around sensory issues at our school at all." Tr. p. 327:16-25; *see also* Tr. p. 3281-4 (stating that the size of the "larger class" is 16 students).

796. In other words, one of the particular circumstances in the 16-person math class, the "peer culture" of *quieter* students, made that slightly larger setting (but still considerably smaller than the approximately 30-person classes offered by Respondent) more appropriate than the nine- or ten-person "very loud" class to address [redacted]s sensory sensitivities.

797. [redacted] Academy's movement of [redacted] to a 16-person math class with a quieter peer culture does not diminish the evidence that [redacted] has complex sensory and social needs that require small-class setting accommodations.

798. [redacted] Academy's movement of [redacted] to a 16-person math class with quieter students (and [redacted]s successful performance in that classroom) illustrates – just as Dr. [redacted], the only expert on inclusion and evidence-based practices for students with autism, testified – that the requested small-class setting accommodation may be realized through a variety of classroom configurations, depending on variable circumstances. And as Ms. [redacted] explained, those variables include the "peer culture," in each classroom.

799. Respondent's third position on the class- and/or school-setting issue – that even though Respondent does not believe [redacted] "needed" a class-size cap, "the IEP Team recognized the value of providing [redacted] a safe space and small setting at times during her day" and supported this "value" by "providing [redacted] access to the smaller CA [Curriculum Assistance] classroom throughout her school day, whenever she *needed* additional support" via the Break Card accommodation, Respondent's Written Arguments on Appeal, p. 36-37 (emphasis added) – again reflects misunderstanding of this issue as Petitioners presented it.

800. Petitioners assert that the May 2017 IEP failed to provide FAPE when it failed, *inter alia*, to provide class- and/or school-setting accommodations *within* the regular-education classroom.

801. The "break card" accommodation, as Respondent represented it to [redacted] at the May 2017 IEP meeting and as Respondent's witnesses described it at the hearing, requires [redacted] to *leave* the regular-education classroom when she "need[s]" the small-class environment available in the segregated Resource / "Curriculum Assistance" classroom.

802. Recognizing the "value" of a "small setting," but requiring [redacted] to abandon her regular-education classes to access that "valu[able]" setting when "*needed*," *see* Respondent's Written Arguments on Appeal, p. 36-37 (emphasis added), misses the point.

803. Rather than diminishing the evidence of [redacted]s need for small-class, small-school setting accommodations, Respondent's Break-Card argument implicitly affirms that need by recognizing that [redacted] will "need[]" access to a small setting throughout the day as she attends her regular-education classes.

804. The Break-Card argument does not undermine the affirmative evidence that [redacted] "needs" and "requires" small-class, small-school accommodations to make meaningful progress in the general-education curriculum.

805. Respondent offered an additional theory – a theory subsequently abandoned on appeal – that the small-class setting accommodation requested by Petitioners is generally undesirable because it would disadvantage [redacted] and stigmatize all students within it as having "the L sign, the loser sign," *see* Tr. p. 1140:507. Respondent presented no data or research to support this theory at the hearing. And it is affirmatively contradicted by the recommendations of [redacted]s evaluating psychologist, the expert witness on inclusive practices for children with autism, and

[redacted]s current and former teachers. It has no merit on the evidence in this case. Because this argument was abandoned on appeal, it receives no further attention here.[76]

806. Dr. [redacted] the only expert on inclusive practices for children with autism testified regarding research on the effectiveness of inclusive settings with integrated supports for children with autism as well as on the comparatively ineffectiveness of segregated special education for children with autism. Dr. [redacted] specifically explained as follows:

> Yeah. Well, we have a ton of research on the ability of students with autism spectrum disorders and other disabilities for that matter to generalize learned skills. So we know that if we teach skills in isolation, the likelihood of a student being able to generalize that across different contexts is not as high as if you teach the skills within the situations themselves.
>
> So knowing that, and knowing what we've seen with [redacted] being able to have success when they – when those supports are integrated into the natural setting, it would have made much more sense for her not to be expected to generalize something from a separate context to these broader contexts in general education that she's already going to be overwhelmed with the amount of content and class size and peer pressures and all those things that go in with high school.
>
> Tr. p. 520:17 – 521:9.

807. Not only did the only expert on educating children with autism testify that [redacted] should not be "expected to generalize something from a separate [Curriculum Assistance] context to these broader contexts in general education," but also the evaluation relied upon by Respondent to draft the May 2017 IEP recognized that "[d]ue to her history of having limited success with outpatient psychotherapy, it may be difficult for her to generalize what she learns in traditional weekly therapy sessions to her real-world environment." Stip. Exh. 14, Bates p. 109.

808. An independent review of the record considered in its entirety yields ample evidence to support [redacted]s unique need for small-class, small-school setting accommodations, *see supra*

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[76] Dr. [redacted] Respondent's expert in mathematics instruction, testified about the subjective experience of students in inclusive small settings. Dr. [redacted] stated that she would not recommend small classes in inclusive settings because, in her view, "[t]rust me; high school kids know. You know, kids would walk into the class with the – you know, the L sign, the loser sign sometimes," Tr. p. 1140:507. Respondent then argued that "you've heard affirmative evidence from the school's witnesses that it had the significant potential to be detriment to [redacted] . . . [and] you did not want to disable [redacted] by placing her in that environment." Tr. p. 1173:16-20 (closing arguments). In contrast to Respondent's argument that *integrated* small-class settings would be "disable[ing]" and impose "the L sign, the loser sign" on all their students, Dr. [redacted] stated her personal view that she "love[s]" small classes in *segregated* settings, like in the curriculum assistance classes in which she taught in the Durham Public Schools, because they become, at least in Dr. [redacted] opinion based on her experience in the Durham Public Schools, a "little safe space where you have an ally." *See* Tr. p. 1136:1. Dr. [redacted] failed to identify any research to support her view that small *integrated* settings generate negative stigmas associated with "the L sign, the loser sign" and that small *segregated* settings are "little safe space[s] where you have an ally." Dr. [redacted] failed to explain *how* the small segregated settings avoid "the L sign, the loser sign," stigma that in her view "high school kids" impose on small inclusive settings. Dr. [redacted] did not explain what she believed, intuitively, caused the differing perceptions of small settings when they are offered only in segregated settings for children with disabilities as opposed to when they are offered in inclusive settings for both children with disabilities and for children without disabilities.

¶¶ 626-745, and Respondent's arguments on appeal reflect a misunderstanding of that evidence and fail to undermine or contradict it, *see supra* ¶¶ 749-807.

The General Education Class- and School-Setting Issue: Final Findings

809. The Final Decision on appeal failed to confront and resolve the class- and school-environment issue presented by Petitioners and instead addressed a straw-man claim about imposition of a maximum, fixed class-size cap across all classes.

810. Petitioners sought a small-class, small-school setting to accommodate [redacted]s unique and "more complex" needs that "go beyond what is typically, you know, seen in an autism spectrum disorder and require additional specialized intervention." Tr. p. 258:13-18 (offering the testimony of Dr. [redacted] the psychologist whose evaluation was relied upon by Respondent in drafting the contested May 2017 IEP).

811. Petitioners offered evidence that this small-class, small-school setting accommodation could appropriately be realized in a variety of ways, depending upon other circumstances and supports at the school overall and in each particular class to which [redacted] would be assigned. *See supra* ¶¶ 652-60.

812. Petitioners evidence demonstrated that the "specialized intervention" of small-class, small-school setting required to accommodate [redacted]s uniquely "complex" needs could be realized, depending on the other circumstances in a particular course, through any of the following means: implementation of a co-teaching model in a class with a larger number of students; creation of a small section with a reduced number of students (the specific size of which would depend upon a variety of variables including, for example, peer culture, teacher training, classroom lighting, spacing, and acoustics, availability of sensory supports, etc.); implementation of strategies to build closer and stronger teacher-student relationships; provision of teacher training using evidence-based practices; and/or getting creative about how to offer supports using evidence-based practices. Tr. pgs. 521:14 – 522:2, 593:19 – 594:4, 554:7-14, 137:18-25, 170:15-171:11, 425:4-7, and *supra* ¶¶ 652-60.

813. According to the only expert on inclusion and evidence-based practices for children with autism, Dr. [redacted] Respondent failed to appreciate the complexity of [redacted]s unique needs or the research-based methods to accommodate those needs. Tr. pgs. 454:21-24 ("[T]hey don't understand her unique needs related to the various disabilities that she has presented with.") and 460:5-10 ("[T]here was a lot of information that was ignored or not considered that would definitely make a difference in meeting her needs that was not included in the IEP. . . .").

814. 100% of those who knew [redacted] – including [redacted]s evaluators, teachers (both those from Respondent WCPSS and from [redacted]s private placements), and family – recommended small-class setting for [redacted] and acknowledged that she required that accommodation. *See supra* ¶¶ 647-60.

815. 100% of the witnesses who had met, taught, served, or evaluated [redacted] recommended small-class, small-school setting in *all* of [redacted]s classes throughout the school day. *See supra* ¶¶ 647-60.

816. Only Respondent's witnesses who had never taught [redacted] had never provided services or support to [redacted] and had never evaluated [redacted] misunderstood the evidence[77] that [redacted] required a small-class setting to accommodate her uniquely "more complex" needs. *See supra* ¶¶ 210.

817. Petitioners refused the May 2017 IEP offered by Respondent because, *inter alia*, it failed to address [redacted]s "more complex" needs by failing to offer *any* of the possible small-class, small-school accommodations recommended by 100% of [redacted]s educators, therapists, and evaluators in *any* of [redacted]s general-education classes such that [redacted] could remain in the inclusive setting with her non-disabled peers and "make progress appropriate in light of [her] circumstances." *See Endrew F.*, 137 S. Ct. at 1002.

818. Where the evidence supports that a student, like [redacted] who is protected by the IDEA requires a "small-class" setting and a "controlled environment" in order to benefit from educational instruction, the IDEA requires school systems to provide accommodations to meet those needs. *See Gellert v. D.K. Pub. Schs.*, 435 F. Supp. 2d 18, 26 (D. D.C. 2006) (concluding that a student's IEP and placement "were inappropriate for failure to take into account [the student's] need for a small class size and quiet controlled environment").

819. If a student requires a small-school placement in order to make progress and receive a FAPE, the school district must place the student in a small school. *See, e.g., R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1190–91 (11th Cir. 2014) (finding the school district's placement of a child with autism and ADHD in his local public school inappropriate due to the student's sensory-management, anxiety, stress, and reading-comprehension challenges); *C.D. ex rel. H.B. v. N.Y.C. Dep't of Educ.*, 15-CV-2177, at 32 (E.D.N.Y. 2016) (finding where the school district placed the student in a community school despite recommendations that he required a small school setting "inappropriate since it rolled the dice on school size").

820. "For many children with disabilities, the educational placement is an important aspect of their IEP that will determine whether or not there is a reasonable chance they will 'benefit educationally' from any instruction they receive in that placement. This is particularly true for children . . . whose disabilities cause them to have particular sensitivities to their environment." R.L., 757 F.3d at 1190.

821. [redacted]s "more complex" needs arising from unique sensitivities to her environment caused by her particular combination of disabilities required small-class, small-school setting accommodations in her regular-education classes throughout her school day. *See supra* ¶¶ 637-60.

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[77] Respondent's witnesses relied on [redacted]s success in a small setting at [redacted] Academy for [redacted] to conclude that she would be successful in a large setting in a traditional public school upon her return to school there, despite that [redacted] had failed in Respondent's large setting previously. There is no logic in concluding that because [redacted] was successful in a small setting at [redacted] Academy for [redacted] she would now be successful in a large setting at Respondent WCPSS. This argument presents a causal fallacy.

822. Respondent "sadly" "d[id]n't understand [redacted]s] unique needs related to the various disabilities that [redacted] presented with." Tr. p. 454:21-24. Respondent's misunderstanding led to "a lot of information that was ignored or not considered that would definitely make a difference in meeting her needs that was not included in the IEP," Tr. p. 460:4-9, and resulted in Respondent offering a lower teacher-student ratio only in a 90-minute, *segregated* Curriculum Assistance class with no non-disabled peers. *See* Stip. Exh. 2, Bates pgs. 16-33 (the May 2017 IEP).

823. Respondent refused to offer any reduction in the teacher-student ratio in any *general-education* classroom. And Respondent refused or declined to consider any of the options available to accommodate [redacted]s unique, "more complex," need for a small-class, small-school setting to allow her to remain in the regular-education classroom with her nondisabled peers and make meaningful progress there as she is cognitively able to do with appropriate accommodations. *See* Stip. Exh. 2 (the May 2017 IEP); Stip. Exh. 4 (Respondent's minutes of the May 2017 IEP meeting).

824. The evidence contained in the official record considered independently and in its entirety demonstrates that the omission of any accommodation to meet [redacted]s need for small-class, small-school environment accommodations in the regular-education setting result in an inappropriate IEP that fails to offer [redacted] a FAPE in the LRE.

825. Misunderstanding of the small-class, small-school setting issue led to erroneous and/or confused findings in the Final Decision on *other* issues in the case, particularly on the predetermination of placement issue and the private-school placement issue. *See, e.g.*, Final Decision ¶ 187 (finding on the predetermination of placement issue that "[redacted]s repeated reference to smaller settings and [redacted] Academy's recommendation for smaller classes ... bolstered the team's proposal for specialized instruction in the pull-out setting," without recognizing that Petitioners' request for small-class, small-school setting accommodations focused on the *inclusive* setting, not the segregated, pull-out setting); Final Decision ¶ 189 (finding on the placement issue that "On multiple occasions during the meeting, [redacted] or her advocate inquired as to how the IEP team was taking into account [redacted] Academy's recommendation of smaller classes. Each time, team members explained their awareness of the issue and discussed ways that they proposed in which the Autism Support Program would address those needs, and how the proposed Curriculum Assistance class would address those needs," without recognizing that their proposals required [redacted] to segregate herself from the general-education classroom in order to access this small-class accommodation which was the *opposite* of Petitioners' request for an accommodation *within* the inclusive setting); Final Decision ¶¶ 305-09 (supporting a determination that Petitioners' actions were unreasonable because they rejected the May 2017 IEP even though the IEP team "discussed the supports available 'to make a bigger environment small,'" without recognizing that all small-setting supports offered were available only in a segregated setting and that no such supports were offered or available in the inclusive, general-education setting as [redacted] required).[78]

[78] It also led to the creation of straw men that suggest a basis for undermining Petitioners' case where no such basis exists. *See, e.g., supra* ¶¶ 661-69 and Final Decision ¶ 190 (finding that "[a]t no point during the meeting did [redacted] request that [redacted]s service delivery be provided entirely in the general education setting" (without recognizing that

826. This Decision next addresses three additional issues regarding the substantive appropriateness of the May 2017 IEP (other than its failure to include accommodations for small-class, small-school setting), before turning to the predetermination of placement and private-school placement issues most impacted by the Final Decision's misunderstanding of the small-class, small-school setting issue, acknowledging that the Final Decision's treatment of those issues was adversely impacted by lack of understanding of the "primary judicable issue" in this case. *See* Final Decision, p. 3 (recognizing that the "primary judicable issue" in this case has to do with the size of [redacted]s learning environment).

(B) Other Issues Regarding the Substantive Appropriateness of the May 2017 IEP

827. Petitioners argue on appeal that in addition to denying [redacted] a FAPE by failing to incorporate an accommodation of small class and/or small-school setting in the general-education environment, Respondent also denied [redacted] a FAPE when it (1) failed to express [redacted]s present levels of academic and functional performance with sufficient precision in the May 2017 IEP, (2) failed to express appropriate functional and academic goals in the May 2017 IEP, and (3) failed to offer any transition plan to support [redacted]s transition from a private [redacted] school to a public high school. Petitioners further argue that the Final Decision incorrectly dismissed Petitioners' claims on these failures.

828. The IDEA defines an IEP as a "written statement for each child with a disability that is developed, reviewed, and revised . . . and that includes" the following:

> I. a statement of the child's present levels of academic achievement and functional performance, including —
> (aa)how the child's disability affects the child's involvement in the general education curriculum; . . .
>
> II. a statement of measurable annual goals, including academic and functional goals, designed to —
> (aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general-education curriculum; and
> (bb)meet each of the child's other educational needs that result from the child's disability[.]
>
> . . .
>
> IV. a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practical, to be provided to the child, or on behalf of the child, and a statement of the

placing [redacted] *entirely* in the general-education setting was not the issue – though Petitioners' expert explained that it could have been considered if Respondent had offered appropriate supports in that setting) and ignoring that [redacted] requested that *when* [redacted] *was* in the inclusive setting (as opposed to when she was segregated) that services and supports be *embedded within that general-education setting*).

program modifications or supports for school personnel that will be provided for the child —

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurriculuar and other nonacademic activities; and

(cc)to be educated and participate with other children with disabilities and nondisabled children in the activities describe in this paragraph[.]

20 U.S.C. § 1414(d)(1)(A).

829. Where transition services become necessary for children with disabilities to be educated and participate in new academic environments, transition services must be included in IEPs in order to satisfy the IDEA's supplementary aids and services requirement. *See R.E.B. v. State of Hawaii Dep't of Ed.*, 870 F.3d 1025 (9th Cir. 2017), *reh'g granted, opinion withdrawn sub nom. R.E.B. on behalf of J.B. v. Hawaii Dep't of Educ.*, 770 Fed. Appx. 796 (9th Cir. 2019) (unpublished).

830. On the IEP's expression of present levels of academic and functional performance, the Final Decision determined that "[w]hile they certainly could have included additional information, they included the statutorily required information, and there was sufficient information to allow for the writing of appropriate IEP goals." Final Decision, Conclusion ¶ 45, p. 58. Further, "any deficiencies in the present level[s] were harmless." Final Decision, Conclusion ¶ 46, p. 59.

831. On the IEP's expression of academic and functional goals, the Final Decision determined that the IEP was appropriate because "[t]he goals targeted identified areas of need that witnesses for both sides described, and did so in a measurable way that was reasonably calculated to allow [redacted] to make progress in light of her circumstances." Final Decision, Conclusion ¶ 47, p. 59.[79]

832. On the IEP's failure to include transition services and supports, the Final Decision determined that "there is no legal requirement for a transition plan for a student of [redacted]s age, [and] even if such a legal requirement could be implied, the services and supports described in the IEP were sufficient such that a formal transition plan was not required for [redacted] Final Decision, Conclusion ¶ 50, p. 59. Further, the Final Decision concluded that "the lack of a transition plan, even if required, must be considered harmless." Final Decision, Conclusion ¶ 51, p. 60.

833. While one could reach different determinations on the evidence presented in this case, an independent review of the entire official record turns up sufficient evidence to "permit" the Final Decision's conclusion on Petitioners' substantive challenges regarding the present levels, academic and functional goals, and lack of transition plan in the May 2017 IEP.

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[79] Petitioners' claims about math and/or reading goals were dismissed in the March 27, 2018, Order resolving Respondent's oral Rule 41(b) motion at the close of Petitioners' evidence. *See infra* ¶¶ 1036-40.

834. This Decision next turns to the remaining issues resolved in the July 31, 2018, Final Decision: The Predetermination of Placement / LRE Issue and the Private Placement Issue.

(C) The Predetermination of Placement / Least Restrictive Environment Issue

835. Petitioners assert that Respondent "predetermined that [redacted] would receive all of her specially designed instruction during a 90-minute Curriculum Assistance class at [redacted] High School." Petitioners' Written Arguments on Appeal, p. 40.

836. Petitioners explain that because Respondent predetermined that [redacted] would receive "all of her specially designed instruction during a 90-minute Curriculum Assistance class," Respondent effectively predetermined [redacted]s placement in a "Resource" setting — segregated from her nondisabled peers for at least 90 minutes each day (more than 20% of the school day). *Id.*

837. Petitioners further argue that when Respondent predetermined a "Resource" placement and "refused to consider providing [redacted] additional support throughout her day" that would enable her to remain in the regular-education setting, *id.*, Respondent prevented [redacted] from accessing a less restrictive environment in a "Regular" placement through which she would spend at least 80% of her school day with her nondisabled peers.[80]

838. This predetermination issue implicates both placement and inclusion or LRE (least restrictive environment) concerns; the ALJ stated, as she retained this issue following Respondent's oral Rule 41(b) motion to dismiss, that she considered these two concerns to be "the same issues," explaining that "placement and least restrictive environment as far as I'm concerned are the same issues." Tr. p. 714:7-8.

839. On this issue, then, "what remains substantively in this case . . . [is] predetermination of placement as far as least restrictive environment." Tr. p. 714:9-13.

840. The IDEA requires educators to include parents as participants in development of an IEP for their child. 20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. § 300.322(a); *see also* N.C. GEN. STAT. § 115C.109.3(a).

841. When educators predetermine a child's placement, educators deny parents' right to participate meaningfully in the development of their child's IEP. *See Spielberg v. Henrico Cty. Pub. Sch.*, 853 F.3d 256 (4th Cir. 1988).

842. In this case, Respondent prepared an IEP in advance of the unilaterally cancelled April 2017 IEP meeting. *See* Stip. Exh. 1 (Respondent's draft IEP).

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[80] Respondent WCPSS designates a placement as "Resource" when a child protected by the IDEA will spend only "40% - 79% of the day with nondisabled peers." Stip. Exh. 2, Bates p. 30. Respondent WCPSS designates a placement as "Regular" when a child protected by the IDEA will spend "80% or more of the day with nondisabled peers." *Id.*

843. Respondent's draft IEP, *see* Stip. Exh. 1, Bates p. 14, contained the same placement designation, "Resource" with 90 minutes of segregated instruction, as the final May 2017 IEP at issue in this appeal, *see* Stip. Exh. 2, Bates p. 30.

844. Preparation for an IEP meeting, however, does not constitute predetermination. And schools may (and should) give thought to the development of a student's IEP prior to an IEP meeting, including thinking about what the school believes will be the best placement for a child, so long as they come to the IEP meeting with an open mind.

845. Petitioners contend that Respondent failed to come to the meeting with an open mind about [redacted]s placement because Respondent refused to consider integrating any specially designed instruction in [redacted]s regular-education classes with additional supports and instead fixed [redacted]s placement as in "Resource." *See* Petitioners' Written Arguments on Appeal, p. 40.

846. The Final Decision sidesteps Petitioners' principle argument on this issue.

847. Rather than considering the question as Petitioners presented it, the Final Decision determined that there was no predetermination because (1) Petitioners' agreed that *some* amount of segregated instruction could be appropriate (and didn't object to a Curriculum Assistance Class *in its entirety*), *see, e.g.,* Final Decision ¶ 171; (2) Petitioners were successful in adding writing as one of the areas of instruction included within the specified 90 minutes that [redacted] would spend in a segregated Resource setting, *see, e.g.,* Final Decision ¶ 185; and (3) Petitioners failed, according to the Final Decision (and Respondent), to make their objection to [redacted]s placement sufficiently clear to Respondent at the May 2017 IEP meeting, *see, e.g.,* Final Decision ¶¶ 186 & 195.

848. On the first two bases expressed in the Final Decision to support a conclusion that Respondent did not predetermine placement, the Final Decision avoids the issue as Petitioners presented it; on the third basis – that Petitioners did not make their objection clear at the IEP meeting – the record contradicts the finding and the finding itself creates troubling due process implications "inconsistent with" the IDEA. *See* Letter to Dowaliby, 38 IDELR 14 (OSEP 2002).

849. First, in focusing on the fact that *some* segregated instruction was appropriate (while avoiding the questions of (1) whether precisely 90-minutes of *segregated* instruction was required and (2) whether *any* of [redacted]s specially designed instruction could be incorporated into the inclusive setting) the Final Decision missed the point.

850. Petitioners agreed that *some* segregated instruction could be appropriate.[81] The issues raised by Petitioners were (1) *how much* of [redacted]s otherwise-agreed-upon specially designed

[81]The ALJ found, as reflected in the IEP, that "the IEP Team agreed on . . . 30 minutes of social/emotional skills, 45 minutes of organizational/study skills, and 15 minutes of writing" specialized instruction. Final Decision, Finding of Fact, ¶ 162. The ALJ then recognized that although the parties agreed on the quantity of specialized instruction required, the parties disagreed about "the *location* of services." Final Decision, Finding of Fact, ¶ 163 (emphasis added). In the section of the Final Decision designated "SERVICE DELIVERY," then, the Final Decision then highlighted evidence on the appropriateness of *some segregated* social skills instruction, without addressing the

instruction *must be segregated*[82] and (2) whether *any* specially designed instruction could be integrated throughout the school day in regular-education classes with additional supports (e.g. a small-class, small-school setting) in place.

851. The premise that *some* segregated, specially designed instruction is appropriate does not logically support a conclusion that of *all* of [redacted]s specially designed instruction is appropriately segregated in a 90-minute segregated Curriculum Assistance class.

852. The evidence in the record, considered in its entirety, establishes that while [redacted] may benefit from *some* segregated social-skills instruction, she also requires *some* integrated social-skills instruction, *see* Tr p. 308:19 – 309:3 (offering the testimony of Dr. [redacted] the psychologist whose evaluation of [redacted] was relied upon by the IEP team that "I recommended both" separate social skills instruction with a therapist or psychologist *and* integrated instruction with "frequent practice and exposure opportunities in a real life setting"); Stip. Exh. 14, Bates p. 111 (stating in Dr. [redacted] report that "building appropriate interpersonal skills needs to be an integral part of *everyday activities*") (emphasis added); Stip. Exh. 14, Bates p. 112 (stating in Dr. [redacted] report that "[v]erbal cueing and visual cueing should be used to remind [redacted] to use the skills she is learning in [segregated] group/individual therapy *in [integrated] real world situations*").

853. The record evidence also establishes more generally that, given her unique circumstances, her specialized instruction (including that offered in writing and organizational/study skills as well as some of her social/emotional skills instruction) should be integrated in the regular-education setting. *See, e.g.*, Stip. Exh. 14, Bates p. 109 (providing in [redacted]s evaluation that based on her "limited success with outpatient" support, it may be "difficult for [redacted] to generalize what she learns . . . to her real-world environment"); Stip. Exh. 14, Bates p. 112 (providing in [redacted]s evaluation on organizational/study skills that "[s]tructure and consistency are important," and use of written schedules and advance preparation for transitions and changes "should be set up so that it fits within the classroom and school setting"); Tr. pgs. 520:17-521:9 & 519:2-8 (stating that [redacted] should *not* be "expected to generalize something from a separate context to these broader contexts in general education" and that offering specialized instruction exclusively in a segregated setting as proposed is "setting [redacted] up for failure"); Tr. p. 518:19 – 519:1 (stating that "one of the reasons why [redacted] was so successful at [redacted] Academy for [redacted] was because all of her supports were integrated throughout her entire day. . . . embedded throughout her entire day").[83]

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evidence in favor of *inclusion* for writing instruction and organizational/study skills instruction and without addressing the evidence that [redacted] required *some integrated* social/emotional skills instruction as well.

[82] Both parties agreed that [redacted] required specially designed instruction in social/emotional skills, organizational/study skills, and writing. The focus for purposes of this issue is on the agreed-upon areas of special education. Petitioners also sought academic goals and special education in math, and Respondent refused. That disputed area (math) was dismissed on Respondent's oral Rule 41(b) motion to dismiss.

[83] To support a contrary finding, the Final Decision relied upon the views of Respondent's witnesses (none of whom had never met, taught, evaluated, or served [redacted] about how [redacted] would respond to the particular instruction and intervention offered. *See* Final Decision, Findings of Fact, ¶

854. Second, focusing on Petitioners' ability to add specially designed instruction in writing in the 90 minutes of segregated Curriculum Assistance time specified in the May 2017 IEP does not address the predetermination issue *as Petitioners' raised it.*

855. Respondent offered specially designed instruction in three areas in the final May 2017 IEP: social/emotional skills (30 minutes/day, five days per week), writing (15 minutes per day, five days per week), and organizational/study skills (45 minutes per day, five days per week). *See* Stip. Exh. 2, Bates p. 28-29.

856. The Final Decision highlights that specialized instruction in writing was not predetermined because Petitioners requested that instruction at the May 2017 IEP meeting and Respondent added it to the instruction made available in the segregated Curriculum Assistance Class.

857. Even with the addition of specially designed instruction in writing, Respondent kept the aggregate *time* designated for all of [redacted]s special education the *same* – 90 minutes – and the *location* designated for [redacted]s specially designed instruction the *same* – a segregated "Resource" classroom. *Cf.* Stip. Exh. 1, Bates pgs. 13-14 *and* Stip. Exh. 2, Bates pgs. 28-30; *see also* Petitioners Written Arguments on Appeal.

858. "Adding" special education in writing thus left the "Resource" *placement* the *same* as was identified in advance of the IEP meeting and reflected in the April 2017 draft. *See* Stip. Exh. 1, Bate p. 14. Respondent simply re-allocated time originally assigned to organizational/study skills and social/emotional skills such that the total removal from nondisabled peers remained at 90 minutes, even after writing was added.

859. By requiring 90 minutes of segregated, specialized instruction – even when the content of that instruction changed – Respondent left the impression that, regardless of substance, it had determined that [redacted] must be *segregated* for *precisely* 90 minutes per day and that something *less* than (or more than) 90 minutes of segregation was not an option.

860. Respondent's employee, Ms. [redacted] testified that she didn't recall considering inclusion of [redacted]s specially designed instruction in general-education setting at the May 2017 IEP meeting, stating that "we talked about [Curriculum Assistance,]" but "I don't think we talked specifically about trying to do that instruction in a general education class." Tr. p. 1025:19-21.

861. Another of Respondent's employees, Dr. [redacted] on the other hand, acknowledged "pretty extensive" discussion of [redacted]s concern about regular education, but did not recall whether [redacted]s request for additional supports (e.g. small-class setting) in the regular education classroom had a connection to [redacted]s concern that all of [redacted]s work toward her goals through specially designed instruction would occur only in the segregated Curriculum Assistance Class. Tr. p. 799:11-24 (acknowledging "pretty extensive" discussion about regular education in connection with small-class setting accommodations) & 804:18-20 (expressing a lack of recollection about whether anyone objected to providing special education exclusively in the segregated Curriculum Assistance Class).

862. On the April 2017 draft IEP, Respondent documented its reason "why" [redacted]s specially designed instruction "cannot be delivered with nondisabled peers with the use of supplemental aids and services" as follows: "[redacted] will be *removed* from her non-disabled peers *to receive small-group support*. . . . She prefers[84] small group instruction to complete her work, strengthen her social skills and organize herself in order to meet grade level expectations." Stip. Exh. 1, Bates p. 14 (emphasis added).

863. On the final May 2017 IEP at issue, Respondent documented its reason "why" [redacted]s specially designed instruction "cannot be delivered with nondisabled peers with the use of supplemental aids and services as follows: "[redacted] will be *removed* from her non-disabled peers *to receive small group support* . . . based on her documented needs." Stip. Exh. 2, Bates p. 30 (emphasis added).

864. In other words, Respondent explained on [redacted]s IEP that [redacted]s specially designed instruction could not be delivered in the inclusive general-education setting *because* [redacted] needed small-group support for that instruction.

865. Respondent did not explain *why* it could not offer a small-setting accommodation in [redacted]s regular-education classes.

866. Respondent did not offer a small-setting accommodation in regular-education classes to enable [redacted] to remain in an inclusive setting, making progress toward grade-level expectations, with integrated special education. Tr. p. 1005:6-13 (recognizing, according to Respondent's witness' recollection, that Respondent had *never* offered such an accommodation to *any* student).

867. Respondent did not appreciate the evidence on [redacted]s needs and on the relationship between small-class setting and her ability to remain included *within* the regular-education setting. *See supra* ¶¶ 660-76.

868. When [redacted] [redacted]s mom, expressed concern at the May 2017 IEP meeting that all of [redacted]s goals (and implicitly the specially designed instruction offered support [redacted] in realizing those goals) would be addressed "only in the CA class," Respondent replied that "the modifications and accommodations will be implemented in all settings." *See* Stip. Exh. 4, Bates p. 41.

869. When Petitioners raised a concern about how [redacted]s "need for a small class size is going to be addressed since [redacted] states that is what she needs," Respondent commented that the segregated "Curriculum Assistance class would be a smaller setting." Stip. Exh. 4, Bates p. 40 (Respondents May 2017 IEP meeting minutes).

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[84] [redacted]s prior IEP with Respondent recognized that [redacted] "requires" small-group support to make educational progress, *see* Pet. Exh. 15, Bates p. 153, and [redacted]s teachers, therapists, and educators recognized that [redacted] "needs" a small-class setting, *see, e.g., supra* ¶¶ 755-68. The record evidence, considered in its entirety, refutes Respondent's characterization of [redacted]s need for a small-class, small-school setting as a "preference" in this draft and elsewhere. *See supra* ¶¶ 629-826.

870. It is not consistent to state that *all* of [redacted]s "modifications and accommodations will be implemented in *all* settings," and also to assert that accommodations to address [redacted]s "need for small class size" will *only* be offered in the segregated "Curriculum Assistance class." *See* Stip. Exh. 4, Bates pgs. 40 & 41.

871. The May 2017 IEP failed to offer small-class setting accommodations in the regular-education classroom, and it offered [redacted]s specially designed instruction exclusively in the segregated "Resource" / Curriculum Assistance class. *See* Stip. Exh. 2, Bates pgs. 16-33.

872. While some segregated social/emotional skills instruction with a therapist or psychologist was appropriate for [redacted] the record evidence, considered in its entirety, does *not* support Respondent's refusal to consider including *any* of [redacted]s specially designed social/emotional skills instruction, organizational/study skills instruction, or writing instruction in the regular-education setting. *See supra* ¶¶ 852-53 *and infra* ¶¶ 873-90.

873. The record presents no meaningful evidence that [redacted]s specially designed instruction in writing, for example, should or must be segregated and that additional supports provided in the regular-education classroom would not permit that instruction to be integrated in a less restricted setting. In fact, Respondent integrated this specially designed instruction in [redacted]s immediately prior IEP with Respondent. *See* Pet. Exh. 15, Bates p. 151.

874. The record evidence demonstrates that, given [redacted]s unique circumstances, this specially designed instruction should have been integrated in the regular-education setting, *see supra* ¶ 853, as it was in [redacted]s prior placement with Respondent WCPSS, Pet. Exh. 15, Bates p. 151, as her specially designed instruction was at [redacted] Academy for [redacted] *see supra* ¶ 737, and as this instruction is at [redacted] Academy, *see infra* ¶¶ 928-45, enabling the IEP Team to consider a "Regular" placement rather than a "Resource" placement as Respondent assigned to [redacted]

875. While some may continue to believe that segregation of children with disabilities is better for such children, the IDEA rejects that premise. The IDEA provides that public educators "must ensure that . . . to the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled; and . . . removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes *with the use of supplementary aids and services* cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2) (emphasis added).

876. "In determining the education placement of a child with a disability ... each public agency must ensure that ... [a] child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum." 34 C.F.R. § 300.116(e).

877. The IDEA explains that before the enactment of the IDEA, "the educational needs of millions of children with disabilities were not being met because[, *inter alia*,] . . . the children were excluded . . . from being educated with their peers." 20 U.S.C. § 1400(c)(2)(B). Since the enactment of the IDEA, "[a]lmost 30 years of research and experience has demonstrated

that the education of children with disabilities can be made more effective by . . . ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible." 20 U.S.C. § 1400(c)(5)(A) (emphasis added).

878. Even where *some* segregated special education is appropriate, as may have been appropriate here, this does not mean that *all* special education must be segregated or that it is appropriate to offer an accommodation (e.g., small setting) exclusively in a segregated setting. Instead, the IDEA requires that school systems "ensure that . . . *to the maximum extent appropriate*, children with disabilities . . . are educated with children who are nondisabled," 34 C.F.R. § 300.114(a)(2) (emphasis added), and given "access to the general education curriculum in the regular classroom to the maximum extent possible." 20 U.S.C. § 1400(c)(5)(A) (emphasis added).

879. After determining, contrary to the weight of the evidence in the record, that all of [redacted]s social-skills instruction, organizational/study skills instruction, and writing instruction should be segregated, the Final Decision then directly addressed whether "the IEP team predetermined [redacted]s educational placement" in a "Resource" setting. Final Decision, Findings of Fact ¶ 180; *see also* Respondent's Proposed Final Decision ¶ 170.

880. The Final Decision demonstrated misunderstanding of Petitioners' claim by determining that "arguments against the provision of special education services in the CA classroom did not appear to arise until well into the hearing itself, and that this petition was not presented as an 'inclusion' case." Final Decision, Findings of Fact ¶ 181; Respondent's Proposed Final Decision, ¶ 171 (same).

881. This finding is incorrect. *See, e.g., supra* ¶ 236 (tracing Petitioners' inclusion concerns).

882. The Final Decision further asserted that Respondent could not have predetermined [redacted]s placement because Petitioners were not sufficiently clear about the alternative placement they sought, finding that "An IEP team cannot credibly be accused of refusing to consider other options when other options are not proposed." Final Decision, Finding of Fact, ¶ 195; Respondent's Proposed Final Decision, ¶ (same).

883. In tension with its finding that Petitioners failed to present options for Respondent's consideration, the Final Decision also found that "[o]n *multiple occasions during the meeting* [redacted] or her advocate *inquired* as to *how* the IEP team was taking into account [redacted] Academy's recommendation of smaller classes . . . and allow her to *access* typically sized *general education classes*." Final Decision, ¶ 189.

884. Petitioners' counsel unambiguously clarified that this is an "inclusion case:" "I think it is actually at the heart of this case is whether these services can be provided *in the general education setting* as the parent requested." Tr. p. 814:1-2 (emphasis added).

885. [redacted] also unambiguously expressed "concerns" at the IEP May 2017 meeting that "they were using a curriculum assistance class for 90 minutes a day to put her in to try to teach her organization and social skills and other things they deemed as a goal," and she testified that

"specifically ask[ed] how they planned to implement this *into the regular day*." Tr. p. 90:23 – 91:3 (emphasis added).

886. [redacted] testified that Ms. [redacted] one of Respondent's employees, missed or avoided her question about implementing this instruction in the inclusive setting "into the regular day" and instead emphasized again that "[s]he will learn it in curriculum assistance." Tr. p. 91:3-4.

887. Respondent's meeting minutes confirm that [redacted] expressed concern that [redacted]s work on her goals, work supported through her specially designed instruction, was restricted exclusively to the Curriculum Assistance class rather than being incorporated into the inclusive, regular-education, setting. They document that at the May 2019 IEP meeting, after [redacted] rejected the IEP, [redacted] "said the goals are goals that are going to be implemented *only* in the CA class." Stip. Exh. 4, Bates p. 41 (emphasis added).

888. Respondent's minutes of the May 2017 meeting also acknowledge that when [redacted] pressed the team about how [redacted]s "need for a small class size is going to be addressed since [redacted] states that is what she needs," Stip. Exh. 4, Bates p. 40, Ms. [redacted] ignored any concern about incorporating small-class size into the regular education environment and stated that "her Curriculum Assistance class would be a smaller setting." Stip. Exh. 4, Bates p. 40.

889. Dr. [redacted] one of Respondent's employees who as also a member of [redacted]s IEP team, testified that [redacted] raised concerns about including [redacted]s services and supports in the regular education setting; Dr. [redacted] testified that [redacted] was *most* concerned about the inclusive, "regular education," setting with nondisabled peers, but she failed to appreciate the relationship between small-class setting accommodations in the regular-education environment and "Resource" versus "Regular" placement. *See* Tr. p. 799:21-24 (offering testimony by Dr. [redacted] in which she stated that "regular education" was the "aspect of [[redacted]s] day" about which Petitioners were most concerned at the May 2017 IEP meeting).[85]

890. Although [redacted] testified that she raised concerns about lack of inclusion in the regular-education classroom at the IEP meeting, and although Respondent's meeting minutes document that she raised concern about Respondent's decision to keep [redacted]s work toward her goals isolated in "only in the CA class," *and* although Dr. [redacted] testified that [redacted] raised regular education as the "aspect of [[redacted]s] day" about which she was most concerned, the Final Decision found [redacted]s testimony to be unsupported and chose to "credit[]" Respondent's employees, "Ms. [redacted] and Dr. [redacted] rather than [redacted] about whether [redacted] expressed inclusion concerns at the meeting. *See* Final Decision, Findings of Fact ¶ 193; Respondent's Proposed Final Decision ¶ 183 (same).

891. In this manner, the Final Decision penalized [redacted] for Respondent's misunderstanding[86] and failure to hear/receive [redacted]s concerns, even though requiring parents to have raised

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[85] Another of Respondent's employees, however, testified that "we talked about CA [Curriculum Assistance]. I don't think we talked specifically about trying to do that instruction in a general ed class," despite [redacted]s expressed concerns about regular education. Tr. p. 1025:19-21.

[86] Respondent was represented by counsel at the May 2017 IEP meeting. Petitioners were not. Petitioners brought a former special education teacher to help communicate about [redacted]s concerns and [redacted]s needs; they arranged for

specific concerns at an IEP meeting is "inconsistent with the Individuals with Disabilities Education Act" and imposes "impermissible notice and exhaustion burdens" on them. *See* Letter to Dowaliby, 38 IDELR 14 (OSEP 2002) (stating that a "requirement that issues be raised at a PPT meeting before they can be addressed at a due process hearing establishes *impermissible* notice and exhaustion burdens [on parents] *inconsistent with* the Individuals with Disabilities Education Act (IDEA) and its implementing regulations") (emphasis added).

892. The Final Decision offers no record support for Finding of Fact 193. The identical finding in Respondent's Proposed Final Decision also offers no record support. And Respondent's written arguments on appeal provide no evidence on this assertion.

893. It is difficult to determine whether or how a more accurate understanding of [redacted]s needs and Petitioners' claim would have impacted the relevant findings and conclusions on the Predetermination of Placement / Least Restrictive Environment Issue.

894. Misunderstanding about [redacted]s need for small-class, small-school setting accommodations, *see supra* ¶¶ 626-69, combined with misunderstanding about Petitioners' presentation of this case as "an 'inclusion case,'" *see supra* ¶¶ 875-92, led to factual findings that are contradicted by the record evidence considered in its entirety. These mistaken factual findings undermine this portion of the Final Decision.

895. Respondent may have had an open mind, in the abstract, about whether some of [redacted]s specially designed instruction could be included in the regular-education setting with additional supports (e.g., small-class setting) in place, but Respondent's employees failed to understand [redacted]s need for such integrated supports and instruction and failed to consider Petitioner's requests and [redacted]s teachers' expressions of need for them. *See* Tr. pgs. 454:21-24 and 460:1-10 ([redacted] testimony).

896. Respondent persisted in this misunderstanding well beyond the May 2017 IEP meeting. Respondent persisted in this misunderstanding even after receiving the Petition for a Contested Case Hearing raising an inclusion concern. *See* Petition for a Contested Case Hearing (Special Education), p. 15, ¶ 150.

897. Respondent persisted in this misunderstanding even after Petitioners' witnesses and counsel unambiguously clarified at the hearing that inclusion *is* at "the heart" of this case. *See, e.g.,* Tr. p. 814:1-3.

898. The lack of understanding manifested, in practical effect, as a closed mind regarding whether some placement other than "Resource" with 90 minutes in a Curriculum Assistance

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[redacted]s educator, Ms. [redacted] from [redacted] Academy for [redacted] to call into the meeting to communicate about her concerns and [redacted]s needs; and they provided Respondent with extensive documentary materials in advance of the meeting, including a privately obtained psychoeducational evaluation, an occupational therapy evaluation, prior IEPs, and [redacted]s then-current educational records, including an Individualized Academic Plan, Student Intervention Plan, and Master Treatment Plan. Petitioners worked hard to assist Respondent in understanding through educators and educational records.

class could be accomplished through provision of small-class setting accommodations in [redacted]s regular-education classes.

899. The ALJ incorporated Respondent's misunderstanding and critiqued Petitioners, explaining that "when a parent has a month to review a draft IEP and participates in a five- or six-hour IEP meeting without making her objection to the proposed program clear, Petitioner has not established that the team predetermined the result." Final Decision, ¶ 195; Respondent's Proposed Final Decision, ¶ 185.

900. The Final Decision criticized Petitioners because Petitioners did not make "their objection to the proposed program clear" enough for Respondent in advance of or during the IEP meeting. *See* Final Decision, ¶ 195; Respondent's Proposed Final Decision, ¶ 185. This criticism effectively created a "requirement that issues be raised at [an IEP] meeting" before they can be objectively addressed, without penalty to Petitioners, at a due process hearing. Such an obligation "establishes *impermissible* notice and exhaustion burdens [on parents] *inconsistent with* the Individuals with Disabilities Education Act (IDEA) and its implementing regulations." *See* Letter to Dowaliby, 38 IDELR 14 (OSEP 2002) (emphasis added).

901. Setting aside the misunderstandings embedded in the findings on the predetermination issue, an independent review of the record in its entirety yields some evidence to "permit" the ALJ's determinative finding on this issue, that Respondent did not predetermine placement in the May 2017 IEP.

902. For example, on both the draft April 2017 IEP and on the final May 2017 IEP, Respondent was required to "[c]heck all alternative placements considered," and Respondent checked both "Regular" and "Resource." *See* Stip. Exh. 1, Bates p. 14 *and* Stip. Exh. 2, Bates p. 30.

903. Assuming Respondent did consider the "alternative placements" of "Regular" setting and "Resource" setting, even though Ms. [redacted] testified that "I don't think we talked specifically about trying to do that instruction in a general education class," Tr. p. 1025:19-21, and Dr. [redacted] could not recall whether anyone objected to providing special education exclusively in a segregated setting, Tr. p. 804:18-20, there was no predetermination.

904. A finding, based on boxes checked in the draft and final IEP at issue, that placement was not predetermined does *not* mean that the placement selected, "Resource," satisfies the LRE requirement.

(C) The Private Placement Issue

905. The Final Decision denied tuition reimbursement to the Petitioners after concluding that the May 2017 IEP offered FAPE to [redacted] that [redacted] Academy "is an inappropriate placement," *see* Final Decision, p. 61 ¶ 59, and that even if "had Petitioners prevailed in their case, the [ALJ] would have been inclined to reduce private tuition reimbursement," *see* Final Decision, p. 61 ¶ 66.

906. School systems may be required to reimburse parents for the cost of a private school placement as follows:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private . . . secondary school without the consent or referral by the public agency, a court or a hearing officer may *require* the agency to reimburse the parents for the cost of that enrollment *if* the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment *and* that the private placement is appropriate.
>
> 34 C.F.R. § 300.148(c) (emphasis added).

907. The Supreme Court has explained that a school system may be required to reimburse a parent for the private placement of a child with a disability when (1) the IEP proposed by the school system was inappropriate and (2) the private school placement was appropriate to meet the child's needs. *Sch. Comm. Of the Town of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 370-71 (1985).

908. "A parental placement may be found to be appropriate . . . even if it does not meet the State standards that apply to education provided by the SEA and LEAs." 34 C.F.R. § 300.148(c).

909. There are only a few limitations that might reduce or deny such reimbursement when it is otherwise justified based on the school system's failure to propose an appropriate IEP and the appropriateness of the private placement. Of relevance to this case, "[t]he cost of reimbursement . . . may be reduced or denied . . . [u]pon a judicial finding of unreasonableness with respect to actions taken by the parents." 34 C.F.R. § 300.148(d)(3).

910. As the Supreme Court recognized in *Burlington,* however, when parents demonstrate that a school system failed to offer a free appropriate public education to a child with a disability, "it seems clear beyond cavil that 'appropriate' relief" should avoid an "empty victory." *Burlington*, 471 U.S. at 370-71.

911. The Final Decision determined that Petitioners are not entitled to reimbursement for [redacted]s placement in [redacted] Academy because (1) Respondent's May 2017 IEP offered FAPE, *see* Final Decision, Conclusion of Law, p. 60, ¶ 52; (2) [redacted] Academy is an inappropriate placement, *see* Final Decision, Conclusion of Law, p. 61, ¶ 59; and (3) even if the May 2017 IEP failed to offer FAPE and [redacted] Academy was appropriate, Petitioners' actions were "disingenuous," *see* Final Decision, Conclusion of Law, p. 61, ¶ 65.

912. Each of these determinations is incorrect on, and contradicted by, the evidence contained in the record when considered in its entirety.

913. The immediately following findings reflect an independent review of the entire official record on each of these three determinations.

914. First, Respondent's May 2017 IEP failed to offer FAPE. *See supra* Findings of Fact ¶ 824 *and infra* Conclusions of Law ¶¶ 21-39.

915. The May 2017 IEP was inappropriate and failed to offer FAPE at least on the basis that Respondent refused to consider accommodating [redacted] as she "require[d]" in a small-class, small-school setting. *See* Pet. Exh. 15, Bates p. 152 (recognizing in Respondent's own records, [redacted]s March 2016 IEP, that [redacted] "requires small group instruction . . . in order to meet grade level expectations).

916. Additionally, the March 27, 2018, Order on Respondent's oral Rule 41(b) motion improperly dismissed Petitioners' claims that the May 2017 IEP denied [redacted] a FAPE based on the IEP's failure to include family and/or individual counseling and/or parent training; the IEP's failure to include appropriate supplementary aids and services (beyond class-size in the general-education setting); Respondent's refusal to fully evaluate [redacted] and Respondent's procedural violations other than predetermination of placement. *See infra* Findings of Fact ¶¶ 1041-61 and *infra* Conclusions of Law ¶¶ 102-09.

917. Second, [redacted] Academy is an appropriate placement.

918. Although Petitioners bear the burden of demonstrating that their private placement is appropriate, they need not demonstrate that it was perfect.

919. A parent's placement is deemed appropriate when it meets the standard of being "reasonably calculated to enable [the student] to receive educational benefits." *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 364 (2nd Cir. 2006), *rev'd on other grounds*, 694 F.3d 167 (2nd Cir. 2012). A private placement meets this standard if it is "likely to produce progress, not regression." *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2nd Cir. 1998). In evaluating the appropriateness of a private placement, reviewing courts should consider the "totality of the circumstances." *Frank G.*, 459 F.3d at 364.

920. To demonstrate [redacted] Academy's appropriateness, this Decision initially focuses on the two issues Petitioners identified as at the "heart" of their case. Both of these issues center on Petitioners' concern that Respondent's May 2017 IEP failed to integrate key services and supports *into* [redacted]*s general-education classes and curriculum*. Instead, they required [redacted] to exit the regular-education setting and separate herself from her nondisabled peers to receive special education and to access a small-class / small-school environment accommodation.

921. The issues Petitioners specified as at the "heart" of the case included: (1) whether [redacted]s special education could be *integrated into her general-education classrooms* rather than (or in addition to) being offered in a segregated Curriculum Assistance class where [redacted] would have no non-disabled peers and (2) whether [redacted]s sensory and social/emotional needs could be accommodated *across the curriculum, including in her general-education classrooms*, through a small-class, small-school setting accommodation rather than limiting this accommodation exclusively to the segregated Curriculum Assistance classroom with no non-disabled peers.

922. Respondent acknowledged that [redacted] had a need for special education, and Respondent agreed to provide [redacted] with special education in the May 2017 IEP, but Respondent refused to provide any of that special education in an integrated setting and instead provided it exclusively in a segregated Curriculum Assistance/Resource setting. *See* Stip. Exh. 2, Bates pgs. 28-30 (providing in the May 2017 IEP specialized instruction in social/emotional skills, organizational/study skills, and writing offered only in a segregated "special," Resource, setting outside regular education).

923. Respondent also acknowledged that [redacted]s disabilities would, at least on occasion, trigger a "need" for a small-class setting while [redacted] was in a large, regular-education class, but Respondent did not offer a small-class setting accommodation within [redacted]s regular-education classes, *see* Stip. Exh. 2, Bates p. 16-33, and instead provided access to a segregated "smaller CA [Curriculum Assistance] classroom throughout her school day" via a "Break Card" that enabled [redacted] to remove herself from her regular-education classes "whenever she *needed* additional support," *see* Respondent's Written Arguments on Appeal, pgs. 36-37 (emphasis added).

924. When confusion arose at the hearing regarding Petitioners' challenge to the IEP based on its failure to offer special education and small-setting support *within* the regular-education setting, Petitioners clarified these critical issues as follows:

> The Court: And inclusion is not an issue in this case.
>
> Ms. Gahagan [counsel for Respondent]: I think it is actually *at the heart of this case is whether these services can be provided in the general education setting as the parents requested.*
>
> The Court: Whether these services can be provided in the general education setting in a small – in small classes, not completely in a general education setting. It was smaller classes in the regular education setting as an accommodation.
>
> Ms. Gahagan: That's accurate. *But it's in a general education setting, that they don't have to be provided in a segregated setting.* That's the – that was the heart of what Dr. [redacted] testified about.
>
> ****
>
> Ms. Gahagan: What [redacted] asked for at the IEP meeting was *how this was going to be supported in the general education class*, and the answer was the [segregated] curriculum assistance class. That was what the answer was. *She consistently asked for the support* ***in the general education classroom.***
>
> The Court: Right. And you can have ---
>
> Ms. Gahagan: (interposing) And Dr. [redacted] ---

The Court: (interposing) You can have support in the general education classroom. You can have generalization in a general education classroom.

Ms. Gahagan: And what Dr. [redacted] testified to was that the idea of having a curriculum support class and learning skills and then somehow learning to generalize them, that there is no research to support that, that that is – of all the methods, that is the least effective. And she testified to that yesterday so ---

The Court: (interposing) Let's focus on the appropriateness of this IEP. . . . The issue in this case as it stands now is the appropriateness of the IEP. The curriculum assistance is a small part of the appropriateness of the IEP.

We haven't even gotten – I mean you're talking about that now, but we haven't even gotten to your argument about the present level and the goals yet. That's what I'm most interested in is the appropriateness of the IEP. Placement is a very small part of it.

Whether or not it could be implemented in a small class size is an issue, but the focus of this case initially was not whether or not she should be pulled out completely for curriculum assistance. The focus of this case when it started was *small class size*.

Ms. Gahagan: *And Your Honor, that continues to be the accommodation that we think she needs. But it was a very big part of the case of what supports that she needed besides the small size.*

****

Ms. Gahagan: *It's our perspective that [the issue] was whether those supports could be provided* ***in the general education setting***.

Tr. p. 813:24 – 817:20 (emphasis added). *See also* Petitioner for a Contested Case Hearing, p.15 (identifying inclusion / LRE claims in the Petition).

925. While Petitioners accepted that *some* amount of segregated time for special education in [redacted]s IEP could be appropriate, Petitioners objected to Respondent's *inflexible assignment of 90 minutes* of segregated special education each day, *see* Petitioners' Written Arguments on Appeal, p. 40-41, *without meaningfully considering whether some of that special-education instruction could be integrated into [redacted]s the regular-education classes* and without considering whether the small-class setting accommodations recommended by [redacted]s educators and described by Dr. [redacted] in her testimony might reduce the amount of time [redacted] appropriate to segregate [redacted] from her nondisabled peers. *See supra* ¶¶ 835-74.

926. Petitioners were focused on ensuring that [redacted]s special education and supports were integrated into [redacted]s regular-education classes because [redacted] had previously "flounder[ed]" in regular education in Respondent's schools (and, for example, was performing at only a 4th-grade level in math as an [redacted]-grade student – having made only 4 years of progress in math after 8 years in school with Respondent) *without* special education in social/emotional and

organizational skills and small-class setting embedded within her regular-education classes. *See supra* ¶¶ 26-30.

927. And Petitioners realized that [redacted] made meaningful, significant progress in regular education at [redacted] Academy for [redacted] (and, for example, accelerated her progress in math such that she advanced from a 4th-grade level when she arrived at [redacted] to an [redacted]-grade, introductory algebra, level upon arrival at [redacted] Academy – having made 4 years of progress in math in just over one year in school at [redacted] *see supra* ¶¶ 538) when special education *was* integrated across the curriculum, including in regular-education classes, and when her regular-education classes offered a small-class / small-school setting. *See supra* ¶ 737.

928. [redacted] Academy's educational program addressed both of these inclusion concerns at the "heart" of Petitioners challenge to the May 2017 IEP: (1) it integrated social/emotional and organizational skills instruction *within the regular-education classroom, see, e.g.,* Tr. p. 339:9 - 340:1; and (2) it offered a small-class and small-school environment *in all regular-education classrooms, see, e.g.,* Tr. p. 316:5-14.

929. [redacted] s English teacher and an administrator at [redacted] Academy, ("Ms. [redacted] testified that [redacted] Academy does not have segregated special education classrooms; instead, [redacted] Academy only admits students with disabilities when the school can make necessary accommodations within the school's regular-education classes.

930. When asked, "how do you address the needs of the students that have disabilities," Ms. [redacted] explained:

> So we make accommodations within our classrooms. If a – you know, we especially follow – if students have had any kind of psychological testing that's in their file, we will follow all the recommended accommodations for those. ...
>
> But it's pretty much done within the classroom, what their needs are. And we look closely at that testing before they're admitted to make sure that the accommodations are things that we can do. But we do it within the classroom.
>
> Tr. p. 339:9 - 340:1.

931. Ms. [redacted] s English teacher and administrator at [redacted] Academy, testified regarding how social/emotional skills instruction is embedded into the regular-education curriculum at [redacted] Academy as follows:

> There's a couple of things that we do. [1] For one thing, a couple of the teachers including myself are trained in Michelle Garcia Winner's social thinking curriculum. And we have taught and reminded our teachers of that at our teacher – when we have teacher meetings. And so we then kind of *use this approach in our classrooms every day to guiding our students into social awareness.* ... [2] We also have every year spent time typically on Fridays, although one year it was a Thursday, *had sort of a period a week dedicated to some aspect of social/emotional learning*, usually around a theme.

Tr. p. 318:15 – 319:10 (emphasis added).

932. On cross examination, Ms. [redacted] reiterated when asked whether [redacted] Academy was teaching [redacted] "strategies, tools, and methods to regulate her emotions" as follows:

> So in – in a really small school, there's – that's – that kind of instruction becomes *part of the culture*. So there isn't a class on regulating your emotions, but we all as a faculty and sort of our training as teachers in dealing with emotions do have language to use. ... So there isn't a class on regulating your emotions, but we as a faculty do try to – as part of our culture try to instruct students on managing their emotions.

Tr. p. 353:2-15.

933. [redacted] Academy individualizes this social-skills instruction for [redacted] throughout the school day including, for example, as follows:

> One of her challenges is knowing or appropriately responding out loud. So she has sometimes said inappropriate comments out loud, which I've had to coach her a little bit into, you know, it's one thing to think that, but maybe that's a moment where we shouldn't say it out loud.
>
> * * * *
>
> . . . I coach her through thinking about how what she said might have made her friends around her feel and how really ultimately if she wants them to be her friends she needs to think about not saying those comments out loud.

Tr. p. 323:16 – 324:3.

934. Dr. [redacted] the only expert in this case on inclusive practices for students with autism spectrum disorders, described the inclusive social-skills instruction at [redacted] Academy succinctly after having visited that school and met with [redacted] there. She explained: "Social skills instruction is embedded within the ongoing instructional and non-instructional routines using a Social Thinking framework," Pet. Exh. 43, Bates p. 294, and she expressed her expert opinion that [redacted] Academy, including this integrated instruction, is an appropriate placement for [redacted] *see* Pet. Exh. 43, Bates p. 296.

935. Ms. [redacted] also explained how organizational-skills, attention-to-detail, and study-skills instruction is embedded into regular-education classes, including with one-on-one support for [redacted] as necessary in regular-education classes:

a. "[A]t [redacted] we provide a lot of structure for her and so that has not impacted her as much as I think it could at other schools. ... I haven't noticed it affect her performance because we've really worked with her to stay organized. ... [W]e all sign her planner every day so she comes home every day with a very comprehensive list of everything that she needs to do, and that has really helped. ... And also one of our follow-ups for her is to break down bigger assignments into smaller chunks for her. ... And so that is

one way that we help her is that we make sure her planner every day is clearly written the steps she needs to do to finish her homework and get those long projects done." Tr. p. 324:18 – 325:21.

b. "[S]he *has* received instruction on both organization and attention to detail," Tr. p. 356:12-13, and "[s]he receives it *within the context of the classroom* but one on one," Tr. p. 356:25 – 357:1 (emphasis added).

936. Ms. [redacted] provided an example of one-on-one support as follows: "If I notice that she is unorganized or she's lost something, then I or another teacher will sit down with her one on one and help her to organize, and the same thing for attention to detail." Tr. p. 357:1-4.

937. When confusion about this individualized instruction arose on cross examination, Ms. [redacted] clarified as follows: "So I guess one thing that's confusing for [redacted] is that the instruction is – it is integrated into the study skills – *all the skills are integrated into each class.* So no, we do not have a separate class for study skills. ... [W]e also do one session during orientation on it. But then after that *it's, again, integrated into our classes.*" Tr. p. 357:24 – 358:9.

938. [redacted] Academy does not label this integrated classroom instruction and support on social/emotional and organization skill as "special education," and the IDEA does not require [redacted] Academy to label this specially designed instruction as "special education." Nonetheless, it is individualized for [redacted] based on her unique needs, and it is intentionally updated following conferences with [redacted] [redacted]s teachers, and her family. Following such conferences, teachers "all have in writing" what adjustments will be made to [redacted]s individualized instruction, and [redacted] Academy will "make sure it's written very clearly." Tr. p. 325:9-12.

939. [redacted] Academy does not label the "writing" expressing the specialized instruction and support to be provided to [redacted] as an IEP, and the IDEA does not require [redacted] Academy to have an IEP. Nonetheless, after each conference when the individualized instructional plans and supports are written, teachers "get that as a list that [they're] then held accountable to following up on." Tr. p. 325:15-17.

940. Not only does [redacted] Academy offer specialized instruction in social/emotional skill and organizational skill *within regular-education classes* as recommended for [redacted] and as sought by Petitioners, but [redacted] Academy also provides the small-class, small-school environment recommended for [redacted] by all of her teachers, services providers, and evaluators. *See* Tr. p. 316:5-14.

941. Ms. [redacted] testified that the average class size at [redacted] is 9 to 10 students, although one of [redacted]s classes with a "quieter" peer culture has 16 students, Tr. p. 316:5-14, and the whole-school population from Kindergarten through 12th Grade includes only 136 students, Tr. p. 316:5-14.

942. With fewer students per class and Social Thinking frameworks embedded into the instruction and culture in all classes, [redacted] Academy created the small-school environment

and "trusting atmosphere for [redacted] Pet. Exh. 43, Bates p. 295, as had been recommended by Dr. [redacted] the psychologist who conducted [redacted]s most recent evaluation, and as had been implemented in her successful prior setting at [redacted] Academy for [redacted]

943. [redacted] Academy's small-class, small-school environment matches the recommendations not only of [redacted]s evaluator, Dr. [redacted] *see* Tr. p. 287:13-18, but also the recommendations of [redacted]s former teachers at Respondent's schools, *see* Pet. Exh. 15, Bates p. 153 (stating that [redacted] "requires small group instruction to . . . meet grade level expectations"), [redacted]s former educators at [redacted] Academy for [redacted] *see* Stip. Exh. 4, Bates p. (stating a recommendation for "small classroom setting to address [[redacted]s] sensory needs"), and [redacted]s former primary therapist, *see* Tr. p. 137:20-25 (stating a recommendation for "small classroom size, relationship based multimodal teaching").

944. Ms. [redacted] affirmed that [redacted]s need for a small-class, small-school setting made [redacted] Academy's environment and instructional program particularly appropriate for her: "I think it's a very appropriate school for [[redacted] She – the small size is really important. I mean every student is different, but [[redacted] does fit a profile of the kind of student that we can easily serve at [redacted] because she needs access to her teachers, she needs small size, and I think she needs to feel really safe and secure so that her anxiety will decrease." Tr. p. 337:22 - 338:4.

945. In addition to integrating individualized academic, organizational, and social/emotional support instruction within regular-education classes with the small-class, small-school environment (which had been refused by Respondent), [redacted] Academy also provided within that regular-education classroom the more traditional accommodations also offered by Respondent's May 2017 IEP, including preferential seating, testing accommodations, opportunities to take breaks, and graphic organizers for planning. *See* Pet. Exh. 43, Bates p. 294-96.

946. With these supports in place across the curriculum, [redacted] made progress academically and functionally at [redacted] Academy. *See, e.g.*, Tr. p. 544:4-15 (testimony of [redacted] that based on her observations and [redacted]s reports, [redacted] appeared to be successful and "motivated to engage in academic instruction"); Tr. p. 335:15 – 336:15 (testimony of [redacted] that [redacted] has made "a lot of academic progress" at [redacted] Academy, including that [redacted] has "emerging mastery in . . . [various] categories that before she was below grade level," "progress in her writing skills," and "[s]he's also advocating for herself a lot more"); Tr. p. 545:6-10 (testimony of [redacted] that [redacted] Academy staff discussed "that they're starting to see [[redacted] volunteer and participate at a much higher level than when she first came to the school"); Tr. p. 365:10-17 (testimony of [redacted] that [redacted]s anxiety has decreased).

947. Dr. [redacted] the only expert on the inclusion of students with autism spectrum disorder, documented in her [redacted] Academy Observation report following her visit to that school to meet with teachers and administrators and to speak with [redacted] that [redacted] has "adjusted well to the school and the support structure provided" and is making progress in all areas – academic and functional. Pet. Exh. 43, Bates p. 294.

a. [redacted] had shown resistance to instructional supports initially, but she was becoming comfortable with them at [redacted] Academy. For example, "[redacted] was somewhat resistant to using a word process[or] at the beginning of the year, but she is using a word processor to type more often now after being encouraged to do so by her teachers. This helps eliminate some of the barriers she faces related to her difficulties with handwriting (dysgraphia)." Pet. Exh. 43, Bates p. 294.

b. Through [redacted] Academy's Social Thinking problem-solving approach, "[redacted] interacts positively with her peers in her classes, and is gradually putting herself in more social situations outside of the classroom context (e.g. during lunch and study hall)." Pet. Exh. 43, Bates p. 295.

c. "Due to the consistent structure of the school day, very clear expectations, opportunities to take breaks when she needs them, accommodations for testing . . ., preferential seating . . ., academic success resulting from individualized instruction tailored to her present abilities and learning profile, and a culture in the school that encourages self-advocacy, [redacted] has been able to maintain emotional regulation and meet academic, behavioral, and social expectations throughout the school day. She is able to ask questions if she needs help understanding content or assignment expectations, advocate for specific accommodations (e.g. more time, breaks, visual supports), and she raises her hand to answer questions in class." Pet. Exh. 43, Bates p. 295.

d. "[redacted] is experiencing academic success in all areas." Pet. Exh. 43, Bates p. 295.

e. "[redacted] does *not* have behavioral challenges that she once displayed in the public-school setting (e.g. crying, significant frustration, withdrawal, task avoidance, social difficulties). It is clear that this is *because the environment and support structure provided at* [redacted] *Academy* is similar to the supports provided at [redacted] Pet. Exh. 43, Bates p. 296 (emphasis added).

948. Dr. [redacted] the only expert on inclusion practices for students with autism, testified that the May 2017 IEP was *in*appropriate for [redacted] in part due to its failure to integrate social/emotional and organizational skill instruction into the regular-education setting and in part due to its failure to include small-class setting accommodations to meet [redacted]s documented needs. *See, e.g.*, Tr. p. 518:10 – 524:25. Dr. [redacted] testified, on the other hand, that [redacted] Academy *is* an appropriate placement for [redacted] in part because it *does* offer these critical instructional supports and services to allow [redacted] to remain in a general-education classroom with her nondisabled peers rather than to be segregated apart from her nondisabled peers. Tr. p. 542:10 – 546:20.

949. The Final Decision expressly identified three factual bases as specific support for its contrary conclusion that [redacted] Academy was not an appropriate placement for [redacted]

a. "[redacted] had substantial identified needs in social / emotional skills and organizational skills, and [redacted] offered no intentional, structured plan or program to support those needs," *see* Final Decision, Conclusions of Law, p. 61 ¶ 58;

b. [redacted] Academy "lacked appropriately trained and licensed staff to comprehensively address" [redacted]s social / emotional and organizational needs, *see* Final Decision, Conclusions of Law, p. 61 ¶ 58; and

c. Petitioners provided no "evidence of progress in these areas of needs during [redacted]s time at [redacted] Final Decision, Conclusions of Law, p. 61 ¶ 58.

950. These findings are contradicted by the record evidence considered in its entirety.

951. [redacted] Academy offered an intentional, structured program to support [redacted]s social/emotional and organizational needs. *See supra* ¶¶ 930-45.

952. [redacted] Academy had teachers who were trained to address [redacted]s social/emotional needs. *See supra* ¶ 931.

953. And Petitioners provided evidence of [redacted]s progress at [redacted] Academy. *See supra* ¶ 946-47.

954. [redacted] Academy remains an appropriate placement for [redacted] where [redacted] made progress both academically and functionally, *see, e.g., supra* ¶¶ 919-948 *and* Pet. Exh. 43.

955. Because the May 2017 IEP offered by Respondent was inappropriate and denied [redacted] a FAPE, and because [redacted] Academy was appropriate to meet [redacted]s needs, [redacted] was entitled to reimbursement for her private-school tuition, *see Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 370-71 (1985), unless – as the ALJ found – [redacted]s parents acted unreasonably in placing her in [redacted] Academy, *see* 34 C.F.R. § 300.148(d)(3).

956. The Final Decision concluded that [redacted] "appeared to have" acted unreasonably by predetermining "placement in a private program *before* the May 19, 2017 IEP meeting." *See* Final Decision, p. 61, ¶ 61 (emphasis added).

957. Petitioners, including [redacted] did not act unreasonably or predetermine placement in a private program prior to the May 19, 2017, IEP meeting.

958. Courts have denied reimbursement to parents and children with disabilities when public school systems fail to provide the child with an appropriate IEP and the private placement selected by the parents is appropriate when, for example, parents fail to notify the school system of their dissatisfaction with their child's IEP at all, *see, e.g., M.C. v. Voluntown Bd. of Educ.*, 226 F.3d 60, 68 (2d Cir. 1999) *and* 34 C.F.R. § 300.148(d)(1), or for further example, parents refuse to cooperate in the development of the IEP and prevent it from being developed, *see, e.g., C.G. and B.S. v. Fire Town Cmty. Sch. Dist*, 513 F.3d 279, 287-89 (1st Cir. 2008) *and* 34 C.F.R. § 300.148(d)(2).

959. Petitioners in this case did *not* fail to notify the school system of their dissatisfaction with the IEP; [redacted] expressed her dissatisfaction with Respondent's draft if the May 2017 IEP in advance of the IEP meeting in an email to Ms. [redacted] *see* Pet. Exh. 23, Bates p. 188 (5/3/17 email from [redacted] to Respondent, Ms. [redacted] [redacted] expressed her dissatisfaction with the proposed IEP at the May 2017 IEP meeting itself, and she rejected the IEP at that meeting as well, *see* Stip. Exh. 4, Bates p. 41; and [redacted] sent an email to [redacted]s school principal in July affirming that she had rejected the May 2017 IEP and expressly notifying him that she would

place [redacted] in a private placement and seek reimbursement, *see* Pet. Exh. 33, Bates p. 218-19 (email from [redacted] to Respondent, [redacted] but Respondent did not respond to [redacted]s objection, *see supra* ¶¶ 161-76.

960. [redacted] extended considerable effort (and monetary resources) to assist Respondent in understanding [redacted]s needs and the basis for her objections before, during, and after the May 2017 IEP. [redacted] brought a former special education teacher with her to the originally scheduled (but unilaterally cancelled by Respondent) April 2017 IEP meeting to assist her in communicating effectively with Respondent about [redacted]s needs and about her concerns with the draft IEP, *see supra* ¶¶ 60-63; [redacted] again brought a former special education teacher to the re-scheduled May 2017 IEP meeting to assist her in communicating effectively with Respondent about [redacted]s needs and about her objections to the proposed IEP, *see* Stip. Exh. 4, Bates p. 35; [redacted] also asked [redacted]s then-current educator, Ms. [redacted] to join the May 2017 IEP meeting by phone to assist [redacted] in explaining the accommodations and supports, including those not included in the draft IEP, that [redacted] Academy for [redacted] found successful and recommended for [redacted] as she transitioned out of her successful placement at [redacted] Academy for [redacted] back to Respondent WCPSS, *see supra* ¶ 106; [redacted] allowed Respondent's employees to observe [redacted] at [redacted] Academy for [redacted] in that successful learning environment and to speak with [redacted]s educators there to assist them in understanding the services and supports that had worked for [redacted] *see* Tr. pgs. 757:13-2 & 949:21-24, Order on the Final Pretrial Conference, Initial Stipulations ¶ 51, Respondent's Written Arguments on Appeal, pgs. 23 & 26; and [redacted] provided Respondent with her privately obtained psychological evaluation and with her privately obtained occupational therapy evaluation, *see supra* ¶¶ 115-22.

961. Petitioners continued to invest in securing an appropriate IEP that offered [redacted] a FAPE in the LRE even after Respondent unilaterally cancelled the first-scheduled IEP meeting without notice, *see supra* ¶¶ 70-72 & 77-140 & 142-48.

962. Petitioners agreed to re-schedule that meeting a second time to accommodate Respondent's decision to include its attorney in [redacted]s IEP meeting, despite that Petitioners did not have an attorney attend the meeting on their behalf. *See supra* ¶¶ 63072.

963. Petitioners continued to cooperate a second time, on short notice, by again taking time away from work, arranging to have a former special education teacher not employed by Respondent attend the IEP meeting, and arranging to have an educator from [redacted] Academy for [redacted] participate in the second-scheduled meeting. *See supra* ¶¶ 101-07.

964. Petitioners also accepted Respondent's choice to have their attorney participate in [redacted]s IEP meeting, despite that neither [redacted] nor [redacted] had an attorney present to represent them at that meeting. *See* Stip. Exh. 4, Bates p. 35 (identifying the attendees at the meeting to include Respondent's attorney and reflecting no legal representation for Petitioners).

965. Petitioners encouraged Respondent to review information about [redacted]s disabilities, needs, and successful accommodations, and they shared with Respondent considerable information Petitioners had obtained independently, including evaluations (psychological and occupational

therapy), educational records from [redacted]s private placement, and input from [redacted]s private educators and therapists. *See supra* ¶¶ 106-22.

966. [redacted] re-enrolled [redacted] in Respondent WCPSS and continued to explore public school options on her own, even though Respondent failed to facilitate visits of public-school options with [redacted]s educators from [redacted] Academy for [redacted] as Respondent had promised. *See* Pet. Exh. 32, Bates p. 216 (presenting an email from Respondent's employee in student assignment to Ms. [redacted] and others stating that "they re-enrolled on 5/9/17").

967. Petitioners' persistence in trying to find an appropriate public placement even *after* the May 2017 IEP meeting led Petitioners to [redacted] High School, and [redacted] completed and submitted a transfer request to Respondent's Office of Student Assignment in *June 2017,* reflecting an *ongoing effort* to find an appropriate public placement, with a lower teacher-student ratio in general-education classes, that might be a "better fit" for [redacted]s educational needs. *See* Order on the Final Pre-Trial Conference, March 19, 2018, p. 12, Initial Stipulations, ¶ 79.

968. Petitioners demonstrated interest in securing an appropriate education for [redacted] within the WCPSS through their efforts before, during, and after the initially scheduled and subsequently re-scheduled IEP meetings.

969. That Petitioners also worked to cover their bases and identify another private placement, as the summer progressed does not mean that Petitioners *predetermined* that [redacted] would attend a private school. *See, e.g.*, Tr. pgs. 707:6-12 & 714:20-22.

970. The Final Decision nonetheless implies that (1) Petitioners' relationship with an educational consultant made their actions unreasonable because that relationship suggested to the ALJ that Petitioners had predetermined placement in a private setting and (2) that Petitioners "have resources available to them" and should have employed private providers more extensively than they did to assist Respondent in developing an appropriate IEP for [redacted] *See* Final Decision, Findings of Fact, p. 50, ¶¶ 302 & 304.[87]

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[87] The Undersigned notes that the ALJ relied upon Respondent's employee's testimony (Dr. [redacted] testimony) rather than on Petitioners' own testimony or on documentary evidence in the record, to establish the reason Petitioners objected to the May 2017 IEP. This reliance was misplaced and crumbles under the weight of the evidence provided by Petitioners to demonstrate that substantive and procedural violations of the IDEA yielding an inappropriate IEP that failed to offer FAPE to [redacted] formed the basis of their objection to the May 2017 IEP. Despite this, the ALJ – without any explanation for her particular selection – identified one (of multiple) reasons articulated *by one of Respondent's employees* as the source of [redacted]s basis for objecting to the May 2017 IEP. The reason as "found" by the ALJ through Respondent's employee's testimony was that [redacted] "simply 'didn't trust that Wake County would provide these services to her child." Final Decision, Findings of Fact, p. 50, ¶ 311 (citing Dr. [redacted] testimony at Tr. p. 805:18-19). This reason makes no sense. And it isn't correct. Petitioners never identified an implementation concern or complaint prior to filing the Petition for a Contested Case Hearing, in the Petition for a Contested Case Hearing, or during the hearing itself. Simply put: Petitioners did *not* challenge the May 2017 IEP based on a concern about whether Respondent could or would implement it. Petitioners hired an expert who testified to the opposite -- that Respondent *could* implement the IEP as well as additional services and supports [redacted] required. The ALJ's reliance on Respondent's employee's mistaken understanding of Petitioners' claims as a basis to find Petitioners unreasonable (and thus undeserving of reimbursement for their private placement) crumbles under the weight of evidence provided

971. Petitioners' relationship with an educational consultant was not unreasonable.

972. Petitioners did not sign a contract with an educational consultant to assist them in finding and evaluating potential placements for [redacted] until *after* Respondent unilaterally cancelled the [redacted]s originally scheduled IEP meeting in April 2017 without advance notice to Petitioners. Tr. p. 381:16-17.[88]

973. After Respondent's unilateral cancellation of [redacted]s initial IEP meeting, on May 2, 2017, Petitioners reached out for assistance to the same educational consultant who had assisted them in finding [redacted] Academy for [redacted] because "it was getting late to make a decision for [redacted]s schooling" and Petitioners "needed to have something in plan." Tr. p. 382:3-9.

974. [redacted] was correct; it was "getting late" to have a plan for [redacted]s education, and it wasn't unreasonable to begin exploring other options after Respondent unilaterally cancelled Petitioners' April 2017 IEP meeting without notice. The ALJ acknowledged as much at the hearing. *See, e.g.*, Tr. pgs. 707:6-12 & 714:20-22; *see also* Petitioners' Written Arguments on Appeal, p. 10-11 (explaining that the ALJ expressed her view off-the-record to the parties that "she did not consider Petitioner [redacted]s contract with Dr. [redacted] to be evidence of predetermination. Alighted with the case law on this issue, the ALJ explained that she understood parents' need to explore private options, this was not indicative of predetermination to her, and she did not need to hear additional evidence on this issue").

975. Further, although [redacted] entered into a contract with an educational consultant in May 2017, Petitioners "did not look at any private schools until June" – *after* Respondent failed to offer a FAPE at the May 2017 IEP meeting. Tr. p. 382:3-9.

976. [redacted] did not apply to or gain admission to any private school until *after* Respondent failed to offer a FAPE at the May 2017 IEP meeting.

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by Petitioners themselves on their concerns about substantive and procedural violations of the IDEA that resulted in an inappropriate IEP that failed to offer FAPE to [redacted]

[88] The Final Decision finds that [redacted] contacted this consultant, Dr. [redacted] [redacted] in February 2017, but the Final Decision fails to recognize the evidence that when [redacted] communicated with Dr. [redacted] in February 2017, [redacted] was "consulting with Dr. [redacted] *on* [redacted]*s current status with* [redacted] *Academy*." Tr. p. 379:23-24 (emphasis added). At that time, [redacted] "had weekly phone calls with [redacted] [redacted]s primary therapist at [redacted] Academy for [redacted] to discuss [redacted]s current week report. And Dr. [redacted] would join [those] conversations maybe every six to eight weeks. And that particular time frame was just another conversation between the three of [them] discussing where [redacted] was." Tr. p. 379:23 – 380:23. Although [redacted] testified that this conversation eventually included some back and forth about [redacted]s "next move," the purpose of the call was to address [redacted]s "current week report." Additionally, when the conversation turned to [redacted]s "next move," the participants "talked about public school, and we talked about private school, and we really didn't make any decisions. ... But in our conversation he did mention that he had recently placed a child back in Wake County who went to public school, and he was trying to remember the name. It turns out it was [redacted] which is a middle school. ... I did mention a couple of local private schools. ... And the ones mentioned are not a fit for [redacted] and we did not look at them." Tr. p. 379:23 – 380:23. Only later (in May 2017) did [redacted] learn that Dr. [redacted] could not assist her in finding a public-school placement in Wake County "[b]ecause [she] asked him originally to help [her] with trying to identify a public school that he might be able to investigate and see if it might be something appropriate for [redacted] And he told[her] that he . . . only contracts to look into private options." Tr. p. 189:6-10.

977. In June 2017, [redacted] Academy informed [redacted]s parents that they could *not* "guarantee admission" *even if* [redacted] could arrange a visit. *See* Stip. Exh. 25, Bates p. 196 (email from [redacted] Academy to [redacted]s parents).

978. Petitioners did not enroll [redacted] in a private school until *July* 2017 – *after* the May 2017 IEP meeting *and after* Respondent denied their application to transfer to a "better fit" within respondent WCPSS. *See* Pet. Exh. 1, Bates p. 1 (Enrollment Form).

979. After having signed a contract with an educational consultant in May 2017, while beginning to consider private options, [redacted] continued to work on her own to find an appropriate education for [redacted] within Respondent WCPSS.

980. [redacted] re-enrolled [redacted] in Respondent WCPSS on May 9, 2017, evidencing an intent to re-enroll in WCPSS by *literally* doing just that – re-enrolling in WCPSS. *See* Pet. Exh. 32, Bates p. 216 (presenting an email from Respondent's employee in student assignment to Ms. [redacted] and others stating that "they re-enrolled on 5/9/17").

981. [redacted] then explored *both* public and private options. [redacted] assessed four (4) WCPSS schools other than [redacted] High School, the school to which Respondent assigned [redacted] *See* Tr. p. 189:12-21.

982. And on June 14, 2017, nearly a month after the May 2017 IEP meeting and well after signing a contract with an educational consultant, [redacted] demonstrated her *continued* commitment to finding an appropriate education for [redacted] within Respondent WCPSS by applying for a transfer from [redacted] High School to [redacted] High School, another school *within* Respondent WCPSS with a lower teacher-student ratio than at [redacted] High School, "where the options for [[redacted]s] education needs might be more fitting." *See* Order on the Final Pre-Trial Conference, March 19, 2018, p. 12, Initial Stipulations, ¶ 79.

983. While Petitioners continued to work to secure an appropriate placement with an appropriate IEP well into June, Respondent did not. Despite its promise to the contrary at the May 19, 2017, IEP meeting, Respondent failed to contact its Office of Student Assignment about [redacted]s transfer request, *see* Order on the Final Pre-Trial Conference, March 19, 2018, p. 12, Initial Stipulations, ¶ 78, *and* Tr. p. 107: 305.

984. Respondent denied Petitioners' transfer request within two days of its submission on June 16, 2017, *see* Pet. Exh. 32, Bates p. 216.

985. Respondent failed to re-convene an IEP meeting to address any of the concerns raised at the IEP meeting or to talk about what, specifically, attracted Petitioners to [redacted] High School and made it "more fitting" for [redacted] Respondent failed to re-convene an IEP meeting to discuss whether it could incorporate [redacted] High School's "more fitting" attributes into [redacted]s IEP at [redacted] High School, the school to which it assigned [redacted] or *another* high school to which it might recommend [redacted] seek a second transfer. *See, e.g.,* Tr. p. 197:15-24.

986. While [redacted] was re-enrolling and applying for (and ultimately being denied) a transfer within WCPSS to find a placement within Respondent WCPSS "where the options for [redacted] education needs might be more fitting," see Order on the Final Pre-Trial Conference, March 19, 2018, p. 12, Initial Stipulations, ¶ 79, [redacted] also began a dialogue about arranging a visit with [redacted] Academy, a school identified by her educational consultant as a good fit to meet [redacted] needs as she left the [redacted] school in [redacted] *See* Stip. Exh. 25, Bates p. 196 (email from [redacted] Academy to [redacted] parents).

987. But Petitioners could not have unreasonably determined that [redacted] would attend [redacted] Academy prior to the May 2017 IEP meeting because [redacted] had not yet been offered admission to [redacted] Academy at that time. In fact, [redacted] still had not been offered admission in mid-June, a month after that meeting. She was only beginning to arrange a visit. *Id.* She ultimately would not learn of [redacted] admission until the following month, *July* 2017.

988. Parents, like [redacted] are permitted to investigate private schools and even *enroll* their child in private school while still considering the options presented by the public-school district in good faith. *See, e.g., In re: Student with a Disability*, 14-025, 114 LRP 23151 (N.Y. State Educ. Agency, April 30, 2014) (finding the equitable considerations weighted in favor of the parents because the parents "acted reasonably under the circumstances of this case," despite the fact that the parents had already signed an enrollment contract and provided a deposit to reserve a spot for their child in the private school, noting that the contract allowed the parents to withdraw their child without financial penalty other than forfeiture of the initial deposit).

989. In this case, [redacted] did not enroll *or even visit* a private school until June 2017—*after* Respondent failed to offer an IEP that accommodated [redacted] needs. And [redacted] began visiting private schools while still exploring public options through her transfer request.

990. Contrary to her conclusion in the Final Decision, the ALJ recognized the reasonableness and propriety of Petitioners' actions with respect to their private consultant *during the hearing*.

991. The ALJ stated, "I don't think it's unreasonable for a parent if they're not sure if the school is going to offer an appropriate IEP to look at other options. . . . I don't think it's unreasonable to be looking at other options at the end of the school year, so I don't believe her behavior in that respect, unless something else is shown to me, rises to the level of being unreasonable." Tr. p. 707:6-12 (recognizing that Petitioners' actions were reasonable at the close of Petitioners' testimony when the relevant evidence about Petitioners' relationship with its educational consultant and their search for an appropriate placement for [redacted] was already in evidence); *see also* Tr. p. 714:20-23 (reflecting the ALJ's recognition at the hearing that "I don't think it's unreasonable for a parent to look at other options if they're concerned about the appropriateness of the document being developed to serve the child.").

992. Petitioners assert in their Written Arguments on Appeal that the ALJ reiterated, during a break in the hearing, her on-the-record representation that she did not perceive Petitioners to be unreasonable in exploring all possible options for [redacted] They described the following exchange during a break in the hearing shortly after the ALJ sustained Petitioners' objection to Respondent's cross examination of [redacted] on Dr. [redacted] involvement:

> [T]he ALJ indicated to the parties that she did not consider Petitioner [redacted]s contract with Dr. [redacted] [the educational consultant] to be evidence of predetermination. Aligned with the case law on this issue, the ALJ explained that she understood the parents' need to explore private options, this was not indicative of predetermination to her, and she did not need to hear additional evidence on this issue.
>
> Petitioners' Written Arguments on Appeal, p. 10.

993. Petitioners further explained:

> While this conversation is not documented on the transcript, the absence of any additional testimony, documentary evidence, or other arguments by either party illustrates this was the parties understanding regarding this issue. After the break, Respondent did not attempt to ask any additional question regarding Dr. [redacted] and Petitioners did not attempt to rehabilitate [redacted]s mother on this issue. Even though Respondent had included Dr. [redacted] contract as a proposed exhibit, Respondent did not attempt to enter the exhibit to ensure the contract was part of the administrative record. Neither party addressed the issue in its Proposed Decision.
>
> Petitioners' Written Arguments on Appeal, p. 10-11.

994. The record evidence considered in its entirety demonstrates that Petitioners did not "predetermine" a private placement for [redacted] prior to the May 2017 IEP meeting; [redacted]s contract with an educational consultant did nothing to deter her from persisting in her efforts to secure an appropriate education for [redacted] within Respondent WCPSS. [redacted] acted reasonably under the circumstances.

995. Additionally, nothing about the level of private information and service provided by Petitioners to Respondent supports a finding that Petitioners unreasonably predetermined, in advance of the May 2017 IEP meeting, that [redacted] would not attend a public school.

996. Petitioners deployed extensive human and monetary resources to assist Respondent in developing an appropriate IEP for [redacted] nothing in the IDEA or North Carolina law or policy required them to do this.

997. In fact, in an effort to secure an appropriate IEP from Respondent, Petitioners *twice* – once for the April 2017 IEP meeting that Respondent unilaterally cancelled without notice and once for the re-scheduled IEP meeting in May 2017 – retained a private advocate (a former special education teacher) and one of [redacted]s private educators at [redacted] Academy for [redacted] to communicate to Respondent *at the IEP meeting* in first-person dialogue, *inter alia*, the significance of the draft IEP's failure to include any accommodation to support [redacted]s need for small-class setting in regular-education classes.

998. Petitioners retained these individuals to provide first-person oral expressions of [redacted]s need for this accommodation in the May 2017 IEP even though Petitioners had already provided privately obtained *documentary* evidence of that need.

999. For the ALJ to suggest that Petitioners should have hired *additional* private personnel to further assist Respondent in developing an appropriate IEP to provide a FAPE to [redacted] is inconsistent with North Carolina Law.

1000. In North Carolina, the State, not private practitioners or private citizens, holds the duty to "guard and maintain" each child's right to a sound basic education. N.C. CONST., Art. 1, § 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.").

1001. In North Carolina, the State values provision of *free* appropriate public education, and our State Board of Education is authorized to "set standards for the education of children with disabilities that are higher than those required by the IDEA." N.C. GEN. STAT. § 115C-106.2(c).

1002. North Carolina's special education laws policies emphasize that FAPE must be "provided at *public* expense, under *public* supervision and direction, and *without charge*" to parents. N.C. Gen. Stat. § 115C-106.3(4) (emphasis added); N.C. Policies 1500-2.13(a) (emphasis added).

1003. The IDEA itself, of course, requires that the education required by the Act be "free" and appropriate public education. 20 U.S.C. 1401(9); 34 C.F.R. 300.17.

1004. The Final Decision determined, however, that Petitioners "had resources available to them," but "failed to use them constructively" to assist Respondent in developing an appropriate IEP that would provide a FAPE to [redacted] Final Decision, Finding of Fact, ¶ 303.

1005. This finding not only shifted the burden to Petitioners to bear the cost of developing a FAPE for [redacted] but it also has no record support.

1006. The record is silent about what resources the Final Decision wanted Petitioners to use. There is no evidence in the record about [redacted]s parents' income or about any special access to grant funding or prop bono or community-service support that [redacted] the child, or her parents might have possessed.

1007. The record reflects that Petitioners privately paid for and generously provided to Respondent information from private evaluators, educators, and therapists. *See supra* ¶¶ 106-22.

1008. That Respondent refused to incorporate supports identified by Petitioners' privately obtained evaluator, educators, and therapists into the May 2017 IEP, *see supra, e.g.,* ¶ 737, does not mean Petitioners failed to use "resources available to them" "constructively."

1009. And there is *no* evidence that Petitioners' had any *additional* "resources available to them."

1010. Petitioners acted consistently with an intention to enroll [redacted] in Respondent WCPSS and Respondent recognized that in the May 2017 IEP. *See* Stip. Exh. 2, Bates p. 17 (recognizing that [redacted] would be "returning to live at home and *to WCPSS*").

1011. Petitioners' actions were reasonable.

1012. Because the May 2017 IEP failed to offer FAPE in the LRE, [redacted] Academy is appropriate, and Petitioners acted reasonably, *see, e.g,* Tr. pgs. 707 & 714, Petitioners should be entitled to private tuition and transportation reimbursement, *see Sch. Comm. Of the Town of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 370-71 (1985).

BACKGROUND FACTS REGARDING PETITIONERS' APPEAL OF THE MARCH 27, 2018, ORDER GRANTING, IN PART, RESPONDENT'S MOTION TO DISMISS PURSUANT TO N.C. GEN. STAT. § 1A-1, RULE 41(B):

1013. Petitioners' Notice of Appeal appealed "[t]he dismissal of certain claims raised by Petitioners by the Order Granting, in Part, Respondent's Motion to Dismiss Pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b), issued on March 27, 2018."

1014. Petitioners explained in their Written Arguments on Appeal that "[t]he ALJ incorrectly dismissed the following claims" in its Order Granting, in Part, Respondent's Motion to Dismiss Pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b), issued on March 27, 2018:

a. The need for math and/or reading goals;
b. Related services including direct occupational therapy,
c. Related services including family and/or individual counseling, and parent training;
d. The appropriateness of all supplementary aids and services with the exception of the accommodation of a class size cap for general education classes;
e. The provision of extended school year services;
f. Conducting a functional behavioral assessment or developing a behavioral intervention plan;
g. Failure to fully evaluate;
h. SLD eligibility category determination;
i. Parental participation except with respect to placement; and
j. Any procedural claims other than predetermination of placement.

Petitioners' Written Arguments, p. 26.

1015. Rule 41(b) provides in relevant part:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the

plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

N.C. Gen. Stat. § 1A-1, Rule 41(b).

1016. Rule 52 provides in relevant part as follows:

(a) Findings. –

1. In all actions tried upon the facts without a jury or with an advisory jury, the court *shall* find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.
2. Findings of fact and conclusions of law are *necessary . . . as provided by Rule 41(b). . . .*
3. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

****

(c) Review on appeal. – When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment, or a request for specific findings.

N.C. Gen. Stat. § 1A-1, Rule 52 (emphasis added).

1017. "If the trial court grants a defendant's motion for involuntary dismissal, [s]he must make findings of fact and failure to do so constitutes reversible error." *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999) (citing *Graphics, Inc. v. Hamby*, 48 N.C. App. 82, 89, 268 S.E.2d 567, 571 (1980) ("The requirement that findings of fact be made is mandatory, and the failure to do so is reversible error.")); *see also Bauman v. Woodlake Partners, LLC*, 199 N.C. App. 441, 445-46, 681 S.E.2d 819, 822023 (2009) (citing *Graphics, Inc. v. Hamby* and reiterating that "[t]he requirement that findings of fact be made is mandatory, and the failure to do is reversible error"); *see generally* 28 N.C. Index 4th Trial § 579, "Duty to make findings of fact and conclusions of law on Rule 41(b) dismissals," (2019).

1018. "Such findings are intended to aid the appellate court by affording it a clear understanding of the basis of the trial court's decision, and to make definite what was decided for purposes of res judicata and estoppel. Finally, the requirement of findings should evoke care on the part of the trial judge in ascertaining the facts." *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999) (citations omitted).

1019. If a trial court fails to make specifically enumerated findings in separately numbered paragraphs, but offers relevant findings in paragraph form, and only one outcome is possible under those facts, "[t]he absence of such separately-stated findings of fact ... does not, even if

erroneous, invariably necessitate a grant of appellate relief. Instead, the critical factor in determining whether an alleged error necessitates a new trial or some other form of relief is the extent to which 'this Court is unable to determine the propriety of the order unaided by findings of fact explaining the reasoning of the trial court.'" *Bauman v. Woodlake Partners, LLC,* 199 N.C. App. 441, 446, 681 S.E.2d 819, 823 (2009) (quoting *Hill,* N.C. App. At 518, 520 S.E.2d at 800).

1020. The ALJ's March 27, 2018, Order Granting, in Part, Respondent's Motion to Dismiss Pursuant to N.C. Gen. Stat. § 1A(1), Rule 41(b), dismissed 10 of Petitioners' claims after making 15 findings of fact and 12 conclusions of law.

1021. The ALJ's March 27, 2018, Order Granting, in Part, Respondent's Motion to Dismiss Pursuant to N.C. Gen. Stat. § 1A(1), Rule 41(b), arguably made specific findings of fact on 6 of the 10 claims dismissed. It made no specific findings of fact on 4 of the claims dismissed.

1022. The March 27, 2018, Order found, on three of the claims dismissed, that Petitioners' evidence *was* sufficient to show a procedural violation of the IDEA or an affirmative refusal by Respondent as follows:

a. Petitioners "presented sufficient evidence to show a procedural violation regarding consideration of eligibility under the SLD category," *see* March 27, 2018, Order, Finding of Fact ¶ 6; and
b. Petitioners "presented sufficient evidence to show a procedural violation regarding consideration of extended school year services ("ESY")," *see* March 27, 2018, Order, Finding of Fact ¶ 10.
c. Petitioners evidence showed that Respondent decided "not to conduct a Functional Behavioral Assessment ("FBA") or develop a Behavior Intervention Plan ("BIP")." *see* March 27, 2018, Order, Finding of Fact, ¶ 11.

1023. The March 27, 2018, Order, dismissed these claims, however, because the ALJ also found that Petitioners showed *in*sufficient evidence of educational harm as follows:

a. The March 27, 2018, Order found that despite the showing of a procedural violation in Respondent's failure to consider the SLD eligibility, "Petitioners presented no specific evidence of educational harm related to this issue so it must be dismissed." March 27, 2018, Order, Findings of Fact ¶ 6.
b. And despite the showing of a procedural violation in Respondent's failure to consider ESY, "Petitioners' evidence was insufficient to prove educational harm related to this issue." March 27, 2018, Order, Findings of Fact ¶ 10.
c. And with respect to the FBA and BIP, Petitioners "presented insufficient evidence that the IEP team's decision not to conduct a Functional Behavioral Assessment ("FBA") or develop a Behavior Intervention Plan ("BIP") resulted in any educational harm to [redacted] *see* March 27, 2018, Order, Findings of Fact, ¶ 11.

1024. In other words, on the Respondent's failures to appropriately consider the SLD eligibility category and ESY services as well as on Respondent's failure to conduct an FBA or develop a

BIP, then, the ALJ found sufficient evidence of the claim, but dismissed for lack of evidence regarding educational harm.

1025. Petitioners assert on appeal, however, that they in fact "presented sufficient evidence of educational harm" on each of these issues as follows:

a. Regarding Respondent's failure to consider [redacted]s eligibility in the SLD category, Petitioners assert that they offered sufficient evidence of educational harm through their expert who testified to the impact of the team's failure to consider [redacted]s eligibility in the SLD category. *See* Petitioners' Written Arguments, p. 32-33 (citing Tr. pgs. 483:8-484:2 & 490:2-22).
b. Regarding Respondent's failure to appropriately consider ESY, Petitioners assert that they "presented sufficient evidence of educational harm" in the evidence that "Petitioners were forced to continue [redacted]s enrollment [through the summer] in a more restrictive setting, [redacted] Academy, a residential school located hours away from her home – though she was ready to leave the school and return home." *See* Petitioners Written Arguments, p. 28.
c. Regarding Respondent's failure to conduct an FBA or develop a BIP, Petitioners note that the IEP team acknowledged that [redacted] had behaviors that impeded her learning or that of others, but it did not discuss providing a functional behavioral assessment to determine if [redacted] would benefit from a behavior intervention plan. *See* Stip. Exh. 4 (reflecting in the IEP meeting minutes no discussion of either an FBA or BIP). Petitioners also highlight testimony from their expert, Dr. [redacted] *See* Petitioners' Written Arguments, p. 29-30.

1026. The evidence cited by Petitioners on educational harm flowing from Respondent's failure to appropriately consider the SLD eligibility category and ESL services as well as through the failure to conduct an FBA or develop a BIP is, in fact, contained in the Official Record on Appeal.

1027. Respondent argued on appeal that the standard of review on a decision resolving a Rule 41(b) motion requires "the same level of deference" as is owed in a review of a hearing officer's final decision following a full hearing.

1028. Petitioners made no argument regarding the specific standard of review in an appeal of a hearing officer's decision on a Rule 41(b) motion.

1029. North Carolina's appellate courts, in appeals of involuntary dismissals under Rule 41(b) outside the special education context, have held that:

> "On appeal of a Rule 41(b) dismissal, this Court determines whether *any* evidence supports the findings of the trial judge, notwithstanding the existence of evidence to the contrary." *Beck v. Beck*, 175 N.C. App. 519, 523, 624 S.E.2d 411, 414 (2006) (citation omitted). If the trial court's findings of fact are supported by the evidence and those findings support the court's conclusions of law, they are binding on

appeal. *Id.* "The trial court's conclusions of law, however, are completely reviewable." *Id.* (citation and brackets omitted).

Estate of Johnson v. Johnsonow, 796 S.E.2d 799 (N.C. Ct. App. 2016) (emphasis added).

1030. Stated another way:

> [T]he standard of review on appeal from a judgment entered by a trial judge sitting without a jury is whether there was competent evidence to support the trial court's findings of fact and whether the trial court's conclusions of law were proper in light of such facts. *Chemical Realty Corp. v. Home Fed'l Savings & Loan,* 84 N.C. App. 27, 37, 351 S.E.2d 786, 792 (1987). The trial court's factual findings in such a proceeding are treated in the same manner as a jury verdict and are conclusive on appeal if they are supported by the record evidence. *Hunt v. Hunt,* 85 N.C. App. 484, 488, 355 S.E.2d 519, 521 (1987). A trial court's conclusions of law, however, are reviewable *de novo. Wright v. T & B Auto Sales, Inc.*, 72 N.C. App. 449, 325 S.E.2d 493, 495 (1985)."
>
> *Bauman v. Woodlake Partners, LLC*, 199 N.C. App. 441, 445-46, 681 S.E.2d 819, 822-23 (2009).

1031. In the special-education context, following a *full* hearing, a Review Officer must give "due weight" to the administrative proceedings before the administrative law judge. *See Board of Education v. Rowley*, 458 U.S. 176, 207 (1982); *see also Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991) (evaluating a decision flowing from Virginia's two-tiered administrative process).

1032. The Fourth Circuit Court of Appeals has interpreted this "due weight" requirement to mean that "findings of fact by the hearing officers in cases such as these are entitled to be considered *prima facie* correct, akin to the traditional sense of permitting a result to be based on such fact-finding, but not requiring it." *Doyle*, 953 F.2d at 105; *see also J.P. v. County School Board of Hanover County*, 516 F.3d 254, 259 (4th Cir. 2008).

1033. Petitioners demonstrated that the evidence contained in the record on appeal supports findings contrary to those made by the ALJ in her March 27, 2018, Order, regarding the educational harm flowing from Respondent's failures to appropriately consider the SLD eligibility category and ESY services and regarding the consequences of Respondent's failure to conduct an FBA or develop a BIP.

1034. But some evidence in the record on appeal also arguably "*permits*" the findings made by the ALJ regarding the educational harm flowing from Respondent's failures to appropriately consider the SLD eligibility category and ESY services and regarding the consequences of Respondent's failure to conduct an FBA or develop a BIP, even though the evidence does not *require* such findings.

1035. The Undersigned thus leaves undisturbed on appeal the findings and conclusions contained in the March 27, 2018, Order regarding Respondent's failures to appropriately consider the SLD eligibility category and ESY services and regarding the consequences of Respondent's failure to conduct an FBA or develop a BIP.

1036. The March 27, 2018, Order, on three additional involuntarily dismissed claims (Respondent's refusal to offer math and/or reading goals, to offer direct occupational therapy, and to allow parental participation (except with respect to placement)), made vague findings of fact that do not specially "'explain[] the reasoning of the trial court,'" *Bauman v. Woodlake Partners, LLC*, 199 N.C. App. 441, 446, 681 S.E.2d 819, 823 (2009) (quoting *Hill*, N.C. App. At 518, 520 S.E.2d at 800), or particularly "aid the appellate court by affording it a clear understanding of the basis of the trial court's decision," *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999) (citations omitted), to determine that Petitioners presented "insufficient" evidence to survive Respondent's Rule 41(b) motion as follows:

a. Regarding Respondent's refusal to offer math and/or reading goals, the ALJ found in conclusory fashion that "Petitioners' evidence that [redacted] required math goals and/or reading goals was insufficient." March 27, 2018, Order, Findings of Fact ¶ 8.
b. Regarding Respondent's refusal to offer direct occupational therapy, the ALJ found that "Petitioners did not present any witness qualified to testify about [redacted]s need for direct occupational therapy," and therefore "Petitioners presented insufficient evidence to prove that [redacted] required direct occupational therapy rather than support occupational therapy." March 27, 2018, Order, Findings of Fact ¶ 9.
c. Regarding Respondent's refusal to allow parental participation (except with respect to placement), the ALJ found generally that "[redacted] and a parent advocate, [redacted] attended the meeting. . . . Also on behalf of the Petitioners, [redacted] academic director at [redacted] Academy, participated by telephone for approximately thirty (30) minutes of the meeting." March 27, 2018, Order, Findings of Fact ¶ 3. The ALJ further found that "[redacted]s testimony established that she and Petitioners' advocate provided input throughout the meeting, some of which was adopted by the IEP team." March 27, 2018, Order, Findings of Fact ¶ 7.

1037. Petitioners assert on appeal, however, that they in fact presented sufficient evidence to state a claim on each of these issues as follows:

a. Regarding Respondent's refusal to offer math and/or reading goals, Petitioners argue (on pages 34-35 of their Written Arguments on Appeal) that there was sufficient evidence in the record that [redacted] required math and reading goals because:
    I. Dr. [redacted] who performed the only educational evaluation considered by the IEP team, diagnosed [redacted] with specific learning disabilities in both math and reading, *see* Stip. Exh. 14, pgs. 108;
    II. Dr. [redacted] further identified [redacted]s "need for academic support in math" and recommended "academic support for language-arts based subjects," *see* Stip. Exh. 14, pgs. 108;
    III. Respondent adopted Dr. [redacted] evaluation containing these diagnosed specific learning disabilities in math and reading and containing recommended

academic support in both areas, *see* Stip. Exh. 14, Bates pg. 108, yet elected not to conduct any additional testing *or* to provide services to address [redacted]s "need for academic support in math," *see* Stip. Exh. 2, Bates pgs. 16-33;

IV. [redacted]s immediately prior IEP with Respondent WCPSS included math goals and daily math instruction in a separate setting, *see* Pet. Exh. 15, pgs. 143-44 & 151;

V. [redacted]s current placement ([redacted] Academy) conducted assessments of [redacted] discovered that [redacted] was performing below grade level (including in math and reading), *see* Tr. p. 332:11-18; Pet. Exh. 43, Bates p. 295;[89]

VI. Petitioners' expert, Dr. [redacted] testified that [redacted] required math and reading goals:

1. Dr. [redacted] testified that information contained in [redacted]s educational record documented [redacted]s difficulties with math calculation, reading accuracy, and abstract comprehension, *see* Tr. p. 502:7-18;
2. She testified that evidence in [redacted]s educational record, including in her evaluations, her prior academic performance, and her need for individualized support, demonstrated that [redacted] needed academic goals in reading and math, *see* Tr. p. 516:3 – 518:2;
3. She specifically opined that [redacted]s IEP should have included a goal to address her reading needs, *see* Tr. pgs. 532:9-11 & 517:22-25);
4. She specifically opined that it was not appropriate for the IEP team to refuse to include any math goals, *see* Tr. p. 517:19-21; and
5. She further specifically opined that [redacted] required specially designed instruction in math, *see* Tr. p. 523:6-11.

b. Regarding Respondent's refusal to offer direct occupational therapy, Petitioners argue that there was sufficient evidence in the record that [redacted] required direct occupational therapy as a related service in the May 19, 2017, IEP because:

I. the evidence shows that on the date of the IEP meeting, "[redacted] was receiving direct occupational therapy once a week" at her then-current placement and [redacted]s discharge plan from that treatment protocol included ongoing "Occupational Therapy," *see* Petitioners' Written Arguments on Appeal, p. 28 *and* Stip. Exh. 17, Bates p. 128 (incorporating direct occupational therapy in [redacted]s Master Treatment Plan at [redacted] Academy for [redacted] and recommending "Occupational Therapy" following [redacted]s discharge from [redacted] Academy for [redacted] and;

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[89] When evaluating an IEP for its appropriateness, a court may consider evidence of what happened during the period the IEP would be in effect, even if that evidence post-dates the creation of the IEP when it may shed light on whether the IEP was reasonable when it was promulgated. *See Z.B. v. District of Columbia*, 888 F.3d 515, 524 (D.C. Cir. 2018) (explaining that "evidence that post-dates the creation of an IEP is relevant to the inquiry to whatever extent it sheds light on whether the IEP was objectively reasonable at the time it was promulgated") (internal quotation marks omitted); *McLean v. District of Columbia*, No. 17-CV-01299 (APM) (D.D.C. Aug. 30, 2018) (explaining the hearing officer "should have considered evidence of what happened in th4e fall of the next school year, while the [contested] IEP remained in effect," rather than just evidence from the two months after the IEP was developed).

II. Dr. [redacted] Petitioners' expert on evidence-based practices for children with autism, testified that the supports provided at [redacted] Academy for [redacted] "should still be provided to her in her next setting," *see* Tr. p. 563:3-4).

c. Regarding Respondent's refusal to allow parental participation (except with respect to placement), Petitioners argue that "the ALJ did not include any specific findings of fact regarding whether Petitioners met their burden of proof to demonstrate that [redacted]s mother was denied her right to parental participation except with respect to placement," *see* Petitioners' Written Arguments on Appeal, p. 33. Petitioners also argue that the "ALJ's decision to divide the predetermination claims into multiple issues, and only allow the narrow issue of predetermination of placement to go forward, was arbitrary." *Id.* Petitioners contend that the evidence presented supports a claim that "[redacted]s mother was denied her right to parental participation during the *entire* May 2017 IEP meeting," *id.*, because, *inter alia*, Respondent did not come to the IEP meeting with an open mind regarding [redacted]s removal from the regular-education curriculum to a Curriculum Assistance class for 90 minutes each day, despite that allocations regarding the use of the specified 90-minutes within the Curriculum Assistance class changed slightly, *see id.* at 40-41.

1038. The Petitioners demonstrated that evidence contained in the Official Record on Appeal supports findings contrary to those made by the ALJ in her March 27, 2018, Order, regarding Respondent's refusal to offer math and/or reading goals, to offer direct occupational therapy, and to allow parental participation (except with respect to placement).

1039. But some evidence in the record on appeal also arguably "*permits*" the findings made by the ALJ regarding Respondent's refusal to offer math and/or reading goals, to offer direct occupational therapy, and to allow parental participation (except with respect to placement), even though the evidence does not *require* such findings.

1040. The Undersigned thus leaves undisturbed on appeal the findings and conclusions contained in the March 27, 2018, Order regarding Respondent's refusal to offer math and/or reading goals, to offer direct occupational therapy, and to allow parental participation (except with respect to placement) – despite that they fail to adequately "'explain[] the reasoning of the trial court,'" *Bauman v. Woodlake Partners, LLC,* 199 N.C. App. 441, 446, 681 S.E.2d 819, 823 (2009) (quoting *Hill,* N.C. App. At 518, 520 S.E.2d at 800), or "afford[] . . . a clear understanding of the basis of the trial court's decision," *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999) (citations omitted).

1041. On the remaining four (4) claims dismissed by the March 27, 2018, Order, on Respondent's Rule 41(b) motion (Respondent's refusal to offer family and/or individual counseling or parent training, to offer appropriate supplementary aids and services, and to fully evaluate, as well as Respondent's procedural violations other than parental participation), the ALJ made *no specific findings of fact,*[90] and instead issued a *single* summary *conclusion of law* that Petitioners failed to meet their burden of proof on all of these claims as follows:

[90] The Undersigned recognizes that the ALJ incorporated the parties' pre-trial stipulations into her March 27, 2018, Order in her first finding of fact. Even this, however, does not compensate for the lack of specific findings of fact on

a. Regarding Respondent's refusal to offer family and/or individual counseling and/or parent training, the ALJ made no particular factual findings, but concluded in a single, large summary conclusion "that Petitioners have failed to meet their burden of proof" on variety of claims including those associated with the refusal to offer family and/or individual counseling and/or parent training. March 27, 2018, Order, Conclusion of Law ¶ 10.

b. Regarding the appropriateness of supplementary aids and services (with the exception of the accommodation regarding class size in general education classes) the ALJ made no particular factual findings, but concluded in a single large summary conclusion "that Petitioners have failed to meet their burden of proof" on a variety of claims including those associated with Respondent's refusal to offer such aids and services. March 27, 2018, Order, Conclusion of Law ¶ 10.

c. Regarding Respondent's failure to fully evaluate, the ALJ again made no specific factual findings, but concluded in a single, large summary conclusion "that Petitioners have failed to meet their burden of proof" on a variety of claims including those associated with the refusal to fully evaluate. March 27, 2018, Order, Conclusion of Law ¶ 10.

d. Regarding Respondent's procedural violations other than parental participation, the ALJ again made no specific factual findings, but concluded in a single, large summary conclusion "that Petitioners have failed to meet their burden of proof" on a variety of claims including "any procedural claims other than predetermination of placement." March 27, 2018, Order, Conclusion of Law ¶ 10.

1042. "The requirement that findings of fact be made is mandatory, and the failure to do so is reversible error," *Graphics, Inc. v. Hamby,* 48 N.C. App. 82, 89, 268 S.E.2d 567, 571 (1980), especially when the failure to make such findings leaves the reviewing court "unable to determine the propriety of the order unaided by findings of fact explaining the reasoning of the trial court." *Bauman v. Woodlake Partners, LLC,* 199 N.C. App. 441, 446, 681 S.E.2d 819, 823 (2009) (citing *Hill,* N.C. App. At 518, 520 S.E.2d at 800). The factual findings required under Rule 41(b) are "intended to aid the appellate court by affording it a clear understanding of the basis of the trial court's decision, and to make definite what was decided for purposes of res judicata and estoppel." *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999) (citations omitted).

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these claims because the parties' pre-trial stipulations do not address Respondent's refusal to offer family and/or individual counseling and/or parent training, the appropriateness of supplementary aids and services (with the exception of the accommodation regarding class size in general education classes), Respondent's failure to fully evaluate, or Respondent's other procedural violations. A review of those the parties' pre-trial stipulations, in addition to the text of the March 27, 2018, Order, thus leaves the Undersigned "unable to determine the propriety of the order" without the required "findings of fact explaining the reasoning of the trial court" on these claims. *See Hill,* 135 N.C. App. at 518, 520 S.E.2d at 800.

1043. Additionally, "the requirement of findings should evoke care on the part of the trial judge in ascertaining the facts." *Hill*, 135 N.C. App. at 517, 520 S.E.2d at 800.

1044. A reviewing court must defer to the trial court's factual findings, but when there are no factual findings, the reviewing court is left to review the trial court's conclusions of law de novo. *Bauman v. Woodlake Partners*, 199 N.C. App. 441, 445, 681 S.E.2d 819, 824 (2009).

1045. Petitioners assert on appeal that the ALJ's failure to find facts on each of these four (4) issues (Respondent's refusal to offer family and/or individual counseling or parent training, Respondent's failure to offer appropriate supplementary aids and services, Respondent's failure to fully evaluate, and Respondent's procedural violations other than parental participation) entitles Petitioners to relief on each of these claims because the Official Record on Appeal demonstrates that they presented sufficient evidence to state a claim on each of these issues as follows:

a. On Respondent's refusal to offer family and/or individual counseling or parent training, Petitioners recognized that "[t]he ALJ did not include any Findings of Fact in the 41(b) Order regarding . . . family and/or individual counseling and parent training." Petitioners' Written Arguments on Appeal, p. 28. Petitioners further argued that the following evidence in the Official Record supports their claim that Respondent violated [redacted]s right to FAPE by refusing these related services in [redacted]s May 2017 IEP:

I. The only educational evaluation considered by the IEP team, Petitioners' privately obtained evaluation performed by Dr. [redacted] expressly recommended individual therapy, family therapy, and parent-skills training, *see* Stip. Exh. 14, pgs. 109-11 (recommending that [redacted] "should continue to participate in individual psychotherapy," that "skills such as social initiation skills, conversational skills, conflict resolution skills and self-monitoring strategies ... should be addressed in individual and group therapy," that "[f]amily therapy will also be an important component of [[redacted]s] treatment," and that a "family therapy and parent-skills component is also recommended to help [[redacted]s] parents learn how to respond more effectively to her more challenging emotions and behaviors at home");

II. [redacted] was receiving individual and family therapy pursuant to her Master Treatment Plan in her then-current placement, [redacted] Academy for [redacted] to support her progress on long-term goals and short-term objectives associated with symptoms of her autism, *see* Stip. Exh. 17, pgs. 135 (providing "Family Therapy (Face-to-face) 1 time(s) per 6-8 weeks; Family Therapy (Telephonic) 1 time(s) per week; . . . Individual Therapy 2 time(s) per week");

III. [redacted]s discharge plan from [redacted] Academy for [redacted] recommended "[w]eekly individual and family therapy" after discharge, *see* Stip. Exh. 17, Bates p. 128;

IV. Petitioners' witness, [redacted] who served as [redacted]s "primary therapist" at [redacted] Academy for [redacted] and "worked with [redacted] in individual and family therapy," Tr. pgs. 123:24 – 124:4, recommended that [redacted] receive counseling after she left [redacted] Academy for [redacted] "to have supports in her social/emotional learning and growth," Tr. p. 139:21-25 ([redacted] testimony); and

V. Petitioners' expert witness, Dr. [redacted] testified that [redacted] continued to require the services and supports that she received at [redacted] Academy for [redacted] as she left that setting and returned to a non-residential placement, Tr. p. 563:3-17 (Dr. [redacted] testimony).

b. On Respondent's failure to offer appropriate supplementary aids and services, Petitioners highlighted evidence, including expert testimony, regarding the insufficiency of the supplementary aids and services offered in the May 2017 IEP as well as evidence, including expert testimony, of [redacted]s need for additional supplementary aids and services (beyond the small-class / small-school setting accommodation addressed above) that would have rendered the IEP more appropriate and consistent with Dr. [redacted] recommendations in the privately obtained evaluation adopted by Respondent. *See* Petitioners' Written Arguments on Appeal, pgs. 36-37. Petitioners noted, *inter alia*, that:

I. Dr. [redacted] the only expert on inclusion and evidence-based practices for children with autism, testified that the supplemental aids and services in the May 2017 IEP were inappropriate to allow [redacted] access to the general education curriculum and make progress towards her IEP goals, *see* Tr. p. 521:10-13;
II. Dr. [redacted] also specified some of the supplemental aids and services (in addition to small-class, small-school environment) that were necessary in, but absent from, the May 2017 IEP, including peer-support strategies, training for general-education teachers, and supports for [redacted]s learning disabilities, *see* Tr. p. 519:12 – 520:12; and
III. Dr. [redacted] in the evaluation relied upon by Respondent to draft the May 2017 IEP, recommended supplemental aids and services (beyond small-class setting) that Respondent did not consider including in that IEP, such as positive behavioral approaches with clearly defined consequences, a written schedule to prepare in advance for transitions and changes, a school-home notebook or agenda that would be signed by both [redacted]s teachers and her parents to increase clear communication, and access to teachers for assistance in determining sequential step and timelines for longer assignments, papers, and projects. *See* Stip. Exh. 14, Bates pgs. 112-14.

c. On Respondent's failure to fully evaluate [redacted] Petitioners recognized that "the ALJ did not include any specific Findings of Fact regarding whether Petitioners met their burden of proof to demonstrate that the WCPSS failed to fully evaluate [redacted] Petitioners' Written Arguments on Appeal p. 31. Petitioners further argued that the IDEA requires Respondent to have "'a fully developed IEP in place at the start of the

school year,'" *see* Petitioners Written Arguments on Appeal, p. 30 (quoting *L.M. ex rel. G.M. v. Willingboro Twp. Sch. Dist.*, No. 16-3672 (June 12, 2017) and citing 20 U.S.C. §§ 1401(9)(D), 1412(a)(1), and 1414(d)(2) (stating that "*At the beginning of each school year*, each local educational agency, State educational agency, or other State agency, as the case may be, *shall* have in effect, for each child with a disability … an individualized education program" as defined by the Act) (emphasis added), and that Respondent cannot escape its responsibility to offer a fully developed IEP by waiting to have teachers "evaluate the student's skill levels in the classroom during the school year," *see* Petitioners' Written Arguments on Appeal, p. 30 (quoting *L.M.*, No. 16-3672 and citing *Methacton Sch. Dist. v. D.W. and R.W., on behalf of G.W.* No. 16-2582 (E.D. Pa. 2017)). Petitioners argue that the following evidence in the Official Record supports their claim that Respondent's failure to fully evaluate [redacted] yielded an IEP that failed to offer FAPE to [redacted] at the start of the school year:

I. The May 2017 IEP failed to offer goals in math and/or reading and failed to offer any special education in math and/or reading, *see* Stip. Exh. 2, Bates pgs. 16-33, despite that [redacted]s current educational evaluation identified specific learning disabilities in math and reading and recommended academic support in those areas, *see* Stip. Exh. 14, Bates p. 108, and [redacted]s then-current (successful) educational plan included individual support in math and reading, *see* Stip. Exh. 19, Bates p. 148;
II. The May 2017 IEP failed to offer direct occupational therapy services, *see* Stip. Exh. 2, pgs. 16-33, despite that [redacted]s then-current (successful) educational plan included direct occupational therapy services, *see* Stip. Exh. 21, Bates pgs. 153, and despite that [redacted]s "discharge planning" recommended "Occupational Therapy" following [redacted]s discharge from such treatment at [redacted] Academy for [redacted] *see* Stip. Exh. 17, Bates p. 128;
III. Despite recommendations regarding [redacted]s need for goals, supports, and/or special education in math, reading, and occupational therapy, Respondent refused to offer any such goals, supports, and/or special education, *see* Stip. Exh. 2, Bates pgs. 16-33;
IV. And despite Respondent's refusal to offer goals, services, and/or or special education in areas in which [redacted]s evaluators as well as current and prior educators recommended goals, services, and/or supports, Respondent refused to conduct any additional assessments prior to the start of the school year to support its refusals, *see, e.g.*, Final Decision, Finding of Fact ¶ 134, and instead it relied upon opinions of staff members who had never taught or evaluated [redacted]
V. Without conducting additional assessments, Petitioners' assert that Respondent failed to appreciate and could not appropriately address all of [redacted]s areas of need in the IEP proposed for [redacted] by Respondent, *see* Tr. p. 526:14-21 (offering testimony from Dr. [redacted] that "[w]hen you're developing an IEP, you should be developing an IEP that addresses all the areas and needs of the student"); Tr. p. 523:17-25 (offering testimony from Dr. [redacted] that it would have been possible and appropriate to assess [redacted]s occupational therapy needs prior to the beginning of school as this would "inform any goals she would need in that

area and any supports and interventions she might need to be successful in her academics to address her occupational therapy needs");

VI. [redacted]s current placement ([redacted] Academy) conducted assessments to determine [redacted]s present levels of academic performance in math and "discovered early on that [redacted] was performing below grade level in math," *see, e.g.,* Tr. p. 327:1-8; Pet. Exh. 4, Bates p. 15 (recognizing that [redacted] would require summer school to "close that gap" and put her performance squarely at grade level at the start of the coming year); Pet. Exh. 43, p. 295;[91]

VII. North Carolina's IEP form directs that the IEP should "[i]nclude current academic and functional performance, behaviors, social/emotional development, other relevant information, and how the student's disability affects his/her involvement and progress in the general curriculum," *see, e.g.,* Stip. Exh. 2, Bates p. 21;

VIII. Without fully evaluating [redacted] in her areas of need (most notably in math, reading, and occupational therapy), Petitioners assert that Respondent could not develop appropriate present levels of academic performance because Respondent did not know what, exactly, [redacted] could perform and rejected [redacted]s documentation and assertion that [redacted] needed "academic goals," *see* Stip. Exh. 4, Bates p. 36 (reflecting in Respondent's meeting minutes that [redacted] expressed to the IEP team that "she feels that [redacted] does need academic goals").

d. On Respondent's procedural violations other than parental participation, Petitioners again recognized that "the ALJ did not include any specific Findings of Fact regarding whether Petitioners met their burden of proof to demonstrate any other procedural claims other than predetermination of placement," *see* Petitioners' Written Arguments on Appeal, pgs. 33-34. Petitioners then asserted that dismissing select procedural claims is inappropriate because "the IEP must be reviewed as a whole, rather than in separate parts," *see* Petitioners Written Arguments on Appeal, p. 34. And by dismissing *some* Petitioners' proven procedural claims (notably those regarding

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[91] Confusingly, rather than finding that Respondent, like [redacted] Academy, should have recognized [redacted]s need for assessment in math based on the information provided by Petitioners, the ALJ implied that [redacted]s mother was responsible for Respondent's failure to conduct those assessments. The ALJ stated in her Final Decision that "[t]he Undersigned finds it difficult to believe that [redacted] was unaware of [redacted]s academic deficit prior to the May 2017 IEP meeting," *see* Final Decision, Findings of Fact ¶ 148. This finding makes no sense in light of the documentary evidence that [redacted] obtained and provided to Respondent information *prior to* and *during* the May 2017 IEP (1) documenting [redacted]s specific learning disabilities in math and reading (along with a host of additional disabilities) in a privately obtained evaluation, *see, e.g.,* Stip. Exh. 14, (2) recognizing that [redacted] received individual support in academic areas in her then-current educational plan, *see, e.g.,* Stip. Exh. 19, Bates p. 148, and (3) documenting that [redacted] had received special education in math and writing in her prior IEP with Respondent WCPSS, *see* Pet. Exh. 15. It also makes no sense in light of the fact that, according to *Respondent's* IEP meeting minutes, [redacted] emphasized at the May 2017 IEP meeting itself that [redacted] "*does* need academic goals," *see, e.g.,* Stip. Exh. 4, Bates p. 36 (reflecting in Respondent's meeting minutes that [redacted] expressed to the IEP team *at the May 2017 IEP meeting* that "she feels that [redacted] does need academic goals") (emphasis added). In other words, the record reflects that [redacted] *was* aware of [redacted]s academic deficits prior to the May 2017 IEP meeting, and she did her best to communicate that reality to Respondent through privately obtained evaluations and recommendations as well as through her own voice at the IEP meeting, but Respondent failed to act on the information provided by Petitioners and conduct its own assessments and evaluations prior to the start of the school year, despite rejecting Petitioners' requests for goals, services, and/or special education in [redacted]s areas of academic need.

consideration of extended school-year services and eligibility under the SLD category based on an asserted lack of educational harm), while retaining only the procedural issue of predetermination of placement in isolation, the ALJ prevented consideration of the *cumulative effect* of multiple procedural violations on [redacted]s ability to participate in IEP development and on [redacted]s educational opportunity. *Id.* p. 27.

1046. In Respondent's Written Arguments on Appeal, Respondent made no argument that the March 2018, Order made factual findings that "'explain[] the reasoning of the trial court,'" *Bauman v. Woodlake Partners, LLC,* 199 N.C. App. 441, 446, 681 S.E.2d 819, 823 (2009) (quoting *Hill,* N.C. App. At 518, 520 S.E.2d at 800), or "aid the appellate court by affording it a clear understanding of the basis of the trial court's decision," *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999) (citations omitted), prior to dismissing Petitioners' claims related to Respondent's refusal to offer family and/or individual counseling or parent training, Respondent's failure to offer appropriate supplementary aids and services, Respondent's failure to fully evaluate, and/or Respondent's procedural violations other than parental participation.

1047. Instead, Respondent offered *its* best factual explanation for the ALJ's dismissal of Petitioners' claims arising from Respondent's refusal to offer family and/or individual counseling or parent training, Respondent's failure to offer appropriate supplementary aids and services, Respondent's failure to fully evaluate, and Respondent's procedural violations other than parental participation as follows:

a. Regarding Respondent's refusal to offer family and/or individual counseling or parent training, Respondent argued on appeal that "Petitioners did not present any substantive evidence whatsoever on the issues of [redacted]s need for counseling as a related service or [redacted]s need for parent training." Respondent's Written Arguments on Appeal, p. 17; *but see, e.g.,* Stip. Exh. 14, Bates pgs. 109-11 (offering "Specific Treatment Recommendations" in Petitioners' privately obtained evaluation that was adopted by the IEP team and entered into evidence in the hearing that include "individual therapy . . . combined with role-modeling and more hands-on approaches," and "family therapy and [a] parent-skills component" to "help [[redacted]s parents learn how to respond more effectively to her more challenging emotions and behaviors at home, and to help [[redacted] learn to communicate with her family more effectively," and specifically stating that [redacted] "should continue to participate in individual psychotherapy," "[f]amily therapy will also be an important component of [[redacted]s] treatment") *and* Stip. Exh. 17, Bates p. 128 (recommending in [redacted]s Master Treatment Plan from [redacted] Academy for [redacted] also entered into evidence, in the "Discharge Planning" section, ongoing "[w]eekly individual and family therapy") *and* March 27, 2018, Order (making no finding regarding the evidence and testimony Petitioners presented on [redacted]s need for individual and family counseling or on parent training).

b. Regarding Respondent's failure to offer appropriate supplementary aids and services, Respondent argued on appeal that "Petitioners presented little evidence that the supplementary aids and services in the IEP were inappropriate, relying on Dr. [redacted] testimony" and further argued "Dr. [redacted] credibility was diminished" such that "the

ALJ clearly did not credit Dr. [redacted] testimony on this point." *See* Respondent's Written Arguments on Appeal; *but see, e.g, supra* ¶¶ 244-422 (finding Dr. [redacted] fully credible) *and* March 27, 2018, Order (making no finding diminishing Dr. [redacted] credibility on the claims and issues considered at that time) *and* Stip. Exh. 14, Bates pgs. 113-14 (offering "Specific Treatment Recommendations" in Petitioners' privately obtained evaluation that was adopted by the IEP team and entered into evidence that include a variety of supplementary aids and services recommended for [redacted] that Respondent failed to consider or include in [redacted]s IEP).

c. Regarding Respondent's failure to fully evaluate, Respondent argued that "[redacted] was eligible for special education services[] and received an IEP to support her needs" and "there can be no question" that Petitioners "fail[ed] to present evidence regarding [redacted]s need for math or reading services." *See* Respondent's Written Arguments on Appeal, p.20; *but see, e.g.,* Stip. Exh. 14, Bates p. 108 (offering in Petitioners' privately obtained evaluation that was adopted by the IEP team containing diagnoses of "Specific Learning Disorder, with impairment in math (math calculation)" and "Specific Learning Disorder with impairment in Reading (reading accuracy)" and recommending "need for academic support in math" and "academic support for language-arts based subject areas") *and* Stip. Exh. 4, Bates p. 36 (reflecting in Respondent's meeting minutes that [redacted] expressed to the IEP team that "she feels that [redacted] does need academic goals") *and* Stip. Exh. 18, Bates p. 137 (recognizing in [redacted]s Individualized Academic Plan at [redacted] Academy for [redacted] that one of the "Accommodation[s] ... and Modifications" that [redacted] received was "specific learning support in subjects of Learning Disability (Math, Reading)").

d. Regarding Respondent's procedural violations other than parental participation, Respondent argued on appeal that "the universe of procedural claims is nearly infinite," that the Order "carefully defined" any possible remaining procedural claims, and that "there is no evidence to support additional procedural claims." Respondent's Written Arguments on Appeal, p. 22; *but see, e.g.,* March 27, 2018, Order, Findings of Fact ¶¶ 6 & 10 (finding "sufficient evidence to show a procedural violation regarding consideration of eligibility under the SLD category" and "sufficient evidence to show a procedural violation regarding consideration of extended school year services" before dismissing those procedural claims, but offering no other "careful definition" of any other procedural claim prior to dismissing it).

1048. Rule 41(b) relief is appropriate only when "upon the facts and the law the plaintiff has shown no right to relief." N.C. Gen. Stat. § 1A-1, Rule 41(b).

1049. "If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)," N.C. Gen. Stat. § 1A-1, Rule 41(b), requiring that "the court *shall find the facts specially*," N.C. Gen. Stat. § 1A-1, Rule 52(a).

1050. "The requirement that findings of fact be made is mandatory, and the failure to do so is reversible error," *Graphics, Inc. v. Hamby,* 48 N.C.App. 82, 89, 268 S.E.2d 567, 571 (1980), unless the reviewing court is able to identify the "reasoning of the trial court" and "determine

the propriety of the order" based on findings contained in a summary paragraph rather than "separately-stated findings," *Bauman v. Woodlake Partners*, 199 N.C. App. 441, 446, 681 S.E.2d 819, 823 (2009), and/or the "Plaintiff was not entitled to relief under any theory" based on the facts contained in the record, *Bauman,* N.C. App. at 447, 681 S.E.2d at 823-24; *see also generally* 28 N.C. Index 4th Trial § 579, "Duty to make findings of fact and conclusions of law on Rule 41(b) dismissals" (2019).

1051. The March 27, 2018, Order did not "find the facts specially," *see* N.C. Gen. Stat. § 1A-1, Rule 52(a), before dismissing Petitioners' claims arising from Respondent's refusal to offer family and/or individual counseling or parent training, Respondent's failure to offer appropriate supplementary aids and services, and Respondent's failure to fully evaluate.

1052. The March 27, 2018, Order in this case, *unlike* the order in *Bauman,* does not otherwise contain a summary paragraph offering findings of relevant facts that lead to a single conclusion under the law.

1053. A review of the record in this case, *unlike* the record in *Bauman*, does *not* establish that "Plaintiff was not entitled to relief under any theory" arising from the critical facts giving rise to the legal claims asserted.

1054. Petitioners presented evidence sufficient to support a claim on these matters, and a review of the record in this case, *like* in *Hill*, leaves the Undersigned unable to determine the propriety of the dismissal or the reasoning for it. *See Hill v. Lassiter*, 135 N.C. App. 515, 518, 520 S.E.2d 797, 800 (1999)

1055. Because the ALJ did not "find the facts specially," *see* N.C. Gen. Stat. § 1A-1, Rules 41(b) & 52(a), on Petitioners claims arising from Respondent's refusal to offer family and/or individual counseling or parent training, Respondent's failure to offer appropriate supplementary aids and services, and Respondent's failure to fully evaluate, the conclusions on those claims are "completely reviewable," *Estate of Johnson v. Johnsonow*, 796 S.E.2d 799 (N.C. App. 2016), "de novo," *Bauman v. Woodlake Partners*, 199 N.C. App. 441, 445, 681 S.E.2d 819, 824 (2009).

1056. The March 27, 2018, Order's dismissal of Petitioners claims arising from Respondent's refusal to offer family and/or individual counseling or parent training, Respondent's failure to offer appropriate supplementary aids and services, and Respondent's failure to fully evaluate, was in error; it was unexplained and contrary to evidence presented by Petitioners and contained in the Official Record.

1057. The March 27, 2018, Order also did not "find the facts specially," *see* N.C. Gen. Stat. § 1A-1, Rule 52(a), before dismissing Petitioners' "procedural claims other than predetermination of placement."

1058. Most significantly, the March 27, 2018, Order failed to identify *what* procedural claims – beyond those otherwise resolved separately in the Order – might fall into the vague category of "procedural claims other than predetermination of placement" to be dismissed.

1059. As Respondent recognized on appeal, "the universe of procedural claims is nearly infinite," *see* Respondent's Written Arguments on Appeal, p. 22, making the task of discerning *what*, exactly, the ALJ dismissed through her vague conclusion dismissing all "procedural claims other than predetermination of placement" impossible.

1060. Petitioners did not appear, however, to have raised a procedural claim beyond those otherwise identified as specifically retained or dismissed, making it even more unclear to what this conclusion of law refers.

1061. To the extent that the March 27, 2018, Order purports to dismiss an unspecified procedural claim, it is in error. Without any identification of the procedural claim or claims dismissed through this legal conclusion, it is impossible to review it or them on appeal without guesswork. The Undersigned declines to engage in that guesswork.

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

CONCLUSIONS OF LAW

1. The North Carolina Office of Administrative Hearings and the State Hearing Review Officer for the State Board of Education have jurisdiction over this case pursuant to Chapter 115C, Article 9, of the North Carolina General Statutes; NC Policies 1500 *Policies Governing Services for Children with Disabilities*; the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et seq.; and IDEA's implementing regulations, 34 C.F.R. Part 300. (*See* Order on the Final Pre-Trial Conference, March 19, 2018, p. 2, Initial Stipulations ¶¶ 3, 4 & 6).

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

3. Any issue not expressly identified in Petitioners' Notice of Appeal and advanced by the parties before the Undersigned is not properly before this Tribunal and cannot be resolved by this State Hearing Review Officer. *See E.L. ex rel. G.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 975 F. Supp. 2d 528, 535 n.8 (M.C.N.C. 2013) (stating that "under North Carolina law state review officers review only the issues specifically appealed"), *aff'd sub nom E.L. ex rel. Lorsson v. Chapel Hill-Carborro Bd. of Educ.*, 773 F.3d 509, 516 (4th Cir. 2014) (affirming that "the review officer had jurisdiction to review only those findings and decisions *appealed*") (emphasis in original). (*See* Order on the Final Pre-Trial Conference, March 19, 2018, p. 2, Initial Stipulations ¶ 7, agreeing also that Petitioners "may not raise issues at the hearing that were not raised in the due process petition").

4. IDEA was enacted to "ensure that *all* children with disabilities have available to them a Free Appropriate Public Education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A) (emphasis added).

5. The IDEA recognizes that "[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society." 20 U.S.C. § 1400(c)(1).

6. Through the IDEA, Congress expressed that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1).

7. North Carolina recognizes, as did Congress, that now over "30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by... having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible." 20 U.S.C. § 1400(c)(5).

8. In North Carolina, our General Assembly expressly provided that "the State Board of Education may set standards for the education of children with disabilities that are *higher than* those required by the IDEA" to meet our State's expectations. N.C. Gen. Stat. § 115C-106.2(c) (emphasis added).

9. In North Carolina, our State goal "is to provide *full educational opportunity* to all children with disabilities who reside in the State." N.C. Gen. Stat. § 115C-106.1.

10. Respondent is a local education agency receiving monies pursuant to 20 U.S.C. § 1400 et seq. and the agency responsible for providing educational services in Wake County, North Carolina. (Order on the Final Pre-Trial Conference, March 19, 2018, p. 2, Initial Stipulations ¶ 5).

11. The Respondent is subject to the provisions of applicable federal and North Carolina laws and regulations, specifically 20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300 et seq.; N.C. Gen. Stat. 115C-106 et seq.; *Policies Governing Services for Children with Disabilities* NC Policies 1500 et seq.

12. The applicable federal and North Carolina laws and regulations require the Respondent to satisfy the IDEA's procedural safeguards and provide a free appropriate public education (FAPE) in the least restrictive environment (LRE) for those children in need of special education residing within its jurisdiction.

13. [redacted] is a child with disabilities who lives in [redacted] County, North Carolina, and is protected by the IDEA and State laws protecting children with disabilities, specifically 20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300 et seq.; N.C. Gen. Stat. 115C-106 et seq.; *Policies Governing Services for Children with Disabilities* NC Policies 1500 et seq.

14. The applicable federal and state laws require Respondent, WCPSS, to satisfy the IDEA's procedural safeguards and provide [redacted] a child with a disability living within Respondent's jurisdiction, a FAPE in the LRE.

15. The mechanism by which the IDEA requires Respondent to provide a FAPE in the LRE is an IEP – a document that describes the child's unique needs and the state's plan for meeting those needs. *See Endrew F. ex re. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) ("The IEP is the centerpiece of the [IDEA's] education delivery system for disabled children."), 20 U.S.C. § 1412(a)(4), 20 U.S.C. § 1401(9), 20 U.S.C. § 1412.

16. The IDEA requires Respondent to develop, review, and revise and IEP for [redacted] that describes [redacted]s unique needs and the State's plan for meeting those needs through provision of a FAPE in the LRE. *See Endrew F. ex re. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017), 20 U.S.C. § 1412(a)(4), 20 U.S.C. § 1401(9), 20 U.S.C. § 1412.

17. "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created," *Endrew F. ex re. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017) and "every child should have the chance to meet challenging objectives," *id. at* 1000.

18. As stipulated, Petitioners and the Respondent are "properly before this Tribunal, and this Tribunal has personal jurisdiction over them." Order on the Final Pre-Trial Conference, March 19, 2018, p. 2, Initial Stipulations ¶ 1.

19. The following Conclusions of Law first resolve the issues on appeal from the July 31, 2018, Final Decision and then resolve the issues on appeal from the March 27, 2018, Rule 41(b) Order Granting, In Part, Respondent's Motion to Dismiss Pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b).

CONCLUSIONS OF LAW REGARDING PETITIONERS' APPEAL OF THE ISSUES RESOLVED IN THE JULY 31, 2018, FINAL DECISION

20. The Conclusions of Law on the issues on appeal from the Final Decision of the ALJ proceed under the following headings: The general education class- and school-setting issue, other issues regarding the substantive appropriateness of the May 2017 IEP, the predetermination of placement issue, and the private-placement issue.

The General Education Class- and School-Setting Issue

21. The general education class- and school-setting issue raises the following question for decision on appeal: Does an independent review of the record considered in its entirety support the Final Decision's dismissal of Petitioners' claim that the May 19, 2017, IEP denied [redacted] a FAPE based on its failure to incorporate any accommodation to support [redacted]s need for a small-class, small-school setting in the general-education environment?

22. It does not.

23. "Education cannot be appropriate if the class size is too large. ... Courts have required school districts to maintain a set teacher-student ratio ... in order to satisfy individual children's needs." MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE 3:16 (3rd ed. 2008 + 2015 supplement).

24. Where the evidence supports that a student requires a "small-class" setting and a "controlled environment" in order to benefit from educational instruction, the IDEA requires school systems to provide accommodations to meet those needs and provide a FAPE. *See Gellert v. D.K. Public Schs.*, 435 F. Supp. 2d 18, 26 (D. D.C. 2006) (concluding that a student's IEP and placement "were inappropriate for failure to take into account [the student's] need for a small class size and quiet controlled environment").

25. Where the evidence supports a student's need for reduced teacher-student ratios in the general-education classroom, the IDEA requires school systems to provide accommodations to meet that need, and it allows families to be reimbursed for private-school expenses and reasonable attorneys' fees when school systems fail to provide such accommodation. *See, e.g., id.* (requiring a school system to reimburse a family for private-school expenses and reasonable attorneys' fees when that school system failed to include in a students' IEP any accommodations to address the student's need for a reduced teacher-student ratio); *Colin K. v. Schmidt*,715 F.2d 1, 6 (1st Cir. 1983) (requiring a ratio of less than 10 to 1); *McGovern v. Howard Cty. Pub. Schs.*, 35 IDELR 153 (D. Md. 2001) (stating that if a reduced teacher-student ratio is needed for appropriate education, it must be included in the IEP, but finding no need in this case).

26. Courts have also held that large schools, even with support structures in place, are inappropriate based on the unique needs of a particular child. *See R.L. v. Miami-Dade Sch. Bd.*, 757 F.3d 1173 (11th Cir. 2014) (affirming the district court ruling that a large school could not be appropriate, even with support structures in place, for a child with Asperger Syndrome, ADHD, gastrointestinal reflux disease, obsessive-compulsive behavior, and other disabilities prone to anxiety and being overwhelmed in crowded spaces when that student experienced behavior problems, vomiting, and muscle tics after being moved to a large high school with 3600 students).

27. School Systems must provide a FAPE to children with disabilities in the least restrictive environment, including them in the general-education curriculum with their nondisabled peers "to the maximum extent possible." *See* 20 U.S.C. § 1400(c)(5)(A).

28. The IDEA provides that public educators "must ensure that . . . to the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled; and . . . removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2).

29. "In determining the education placement of a child with a disability ... each public agency must ensure that ... [a] child with a disability is not removed from education in age-appropriate

regular classrooms solely because of needed modifications in the general education curriculum." 34 C.F.R. § 300.116(e).

30. The IDEA explains that before the enactment of the IDEA, "the educational needs of millions of children with disabilities were not being met because[, *inter alia*,] . . . the children were excluded . . . from being educated with their peers." 20 U.S.C. § 1400(c)(2)(B). Since the enactment of the IDEA, "[a]lmost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by . . . ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible." 20 U.S.C. § 1400(c)(5)(A) (emphasis added).

31. [redacted] is a "very intelligent" child who is capable of grade-level progress in the regular-education curriculum. Stip. Exh. 14, Bates p. 107; Pet. Exh. 15, Bates p. 137; *supra* ¶¶ 29 & 641.

32. Due to her particularly complex symptoms of multiple disabilities, however, [redacted] does not make meaningful progress in the regular-education setting in a large-class, large-school environment. *See supra, e.g.*, ¶¶ 30, 642-60, 690-827.

33. [redacted] requires small-class, small-school setting accommodations in the regular-education setting to remain in that inclusive environment and benefit from educational instruction there. *See supra, e.g.*, ¶¶ 31, 642-60, 690-827.

34. Small-class, small-school setting accommodations may be appropriately provided through multiple evidence-based strategies. *See supra, e.g.*, ¶¶ 657-60.

35. Respondent refused to offer or provide any of the evidence-based small-class, small-school setting accommodations in its regular-education classrooms. *See supra, e.g.*, ¶¶ 673-77.

36. Respondent required [redacted]s *removal* from the regular-education setting to access any form of small-group support. *See supra, e.g.*, ¶¶ 673-77.

37. Respondent provided a small-class, small-school setting accommodation only in a segregated "Resource" / Curriculum Assistance class and required [redacted] to leave her regular-education classes using a "Break Card" to access that accommodation when necessary. *See supra, e.g.*, ¶¶ 675-79 & 799-808.

38. Respondent also required [redacted] to leave the regular-education setting for all of her specially designed instruction because her "documented needs" required small-group support for that instruction. *See supra, e.g.*, ¶¶ 711-12; *see also* Stip. Exh. 2 (the May 2017 IEP).

39. An independent and objective review of the official record considered in its entirety demonstrates that Respondent's refusal to provide [redacted] small-class, small-school setting accommodation(s) in the regular-education environment to allow her to remain in the least restrictive environment and benefit from the instruction provided there was inappropriate and violated [redacted]s right to a FAPE in the LRE.

40. The Final Decision misunderstood and avoided the class- and school-environment issue as it was presented by Petitioners and instead resolved a straw-man claim not raised by Petitioners. *See supra, e.g.,* ¶¶ 626-82.

41. Because the Final Decision failed to address the issue raised, the Undersigned resolved it for the first time on appeal. *See supra, e.g.,* ¶¶ 682-824.

42. All of the findings in this Decision are incorporated in support of this conclusion resolving this issue at the heart of Petitioners' original complaint and of this appeal.

Other Issues Regarding the Substantive Appropriateness of the May 2017 IEP

43. The remaining issues regarding the substantive appropriateness of the May 2017 IEP (issues of substantive appropriateness other than the small-class, small-school setting issue) raise the following question for decision on appeal: Does an independent review of the record considered in its entirety find sufficient evidence to affirm the dismissal of Petitioners' claims that Respondent denied [redacted] a FAPE when it (1) failed to express [redacted]s present levels of academic and functional performance with precision in the May 2017 IEP, (2) failed to express clear functional and academic goals in the May 2017 IEP, and (3) failed to offer any transition plan to support [redacted]s transition from a private [redacted] school to a public high school?

44. It does.

45. The IDEA defines an IEP as a "written statement for each child with a disability that is developed, reviewed, and revised . . . and that includes" the following:

> (I) a statement of the child's present levels of academic achievement and functional performance, including —
> (aa)how the child's disability affects the child's involvement in the general education curriculum; . . .
>
> (II) a statement of measurable annual goals, including academic and functional goals, designed to —
> (aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general-education curriculum; and
> (bb) meet each of the child's other educational needs that result from the child's disability[.]
>
> . . .
>
> (IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practical, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child —

(aa) to advance appropriately toward attaining the annual goals;
(bb) to be involved in an make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurriculuar and other nonacademic activities; and
(cc)to be educated and participate with other children with disabilities and nondisabled children in the activities describe in this paragraph[.]

20 U.S.C. § 1414(d)(1)(A).

46. Additionally, where transition services become necessary for children with disabilities to be educated and participate in new academic environments, transition services must be included in IEPs in order to satisfy the IDEA's supplementary aids and services requirement. *See R.E.B. v. State of Hawaii Dep't of Ed.*, 870 F.3d 1025 (9th Cir. 2017), *reh'g granted, opinion withdrawn sub nom. R.E.B. on behalf of J.B. v. Hawaii Dep't of Educ.*, 770 Fed. Appx. 796 (9th Cir. 2019) (unpublished).

47. On the IEP's expression of present levels of academic and functional performance, the Final Decision determined that "[w]hile they certainly could have included additional information, they included the statutorily required information, and there was sufficient information to allow for the writing of appropriate IEP goals." Final Decision, Conclusion ¶ 45, p. 58. Further, "any deficiencies in the present level[s] were harmless." Final Decision, Conclusion ¶ 46, p. 59.

48. On the IEP's expression of academic and functional goals, the Final Decision determined that the IEP was appropriate because "[t]he goals targeted identified areas of need that witnesses for both sides described, and did so in a measurable way that was reasonably calculated to allow [redacted] to make progress in light of her circumstances." Final Decision, Conclusion ¶ 47, p. 59.[92]

49. On the IEP's failure to include transition services and supports, the Final Decision determined that "there is no legal requirement for a transition plan for a student of [redacted]s age, [and] even if such a legal requirement could be implied, the services and supports described in the IEP were sufficient such that a formal transition plan was not required for [redacted] Final Decision, Conclusion ¶ 50, p. 59. Further, the Final Decision concluded that "the lack of a transition plan, even if required, must be considered harmless." Final Decision, Conclusion ¶ 51, p. 60.

50. While the Undersigned may have reached different conclusions on the evidence presented in this case, an independent review of the entire official record turns up sufficient evidence to "permit" the most essential findings reached to support the Final Decision's conclusion on Petitioners' substantive challenges regarding the present levels, academic and functional goals, and lack of transition plan in the May 2017 IEP.

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[92] Petitioners' claims about math and/or reading goals were dismissed in the March 27, 2018, Order resolving Respondent's oral Rule 41(b) motion at the close of Petitioners' evidence. *See supra* Findings of Fact ¶¶ 1036-40.

The Predetermination of Placement and Least Restrictive Environment Issue

51. The predetermination of placement and LRE issue raises the following question for decision on appeal: Does an independent review of the record considered in its entirety find sufficient evidence to support the Final Decision's determination that Respondent did not predetermine [redacted]s placement in a "Resource" setting?

52. It does.

53. Petitioners assert that Respondent predetermined [redacted]s placement in a "Resource" setting when it "predetermined that [redacted] would receive all of her specially designed instruction during a 90-minute Curriculum Assistance class at [redacted] High School." *See supra, e.g.*, ¶¶ 835-38.

54. The IDEA requires educators to include parents as participants in development of an IEP for their child. 20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. § 300.322(a); *see also* N.C. GEN. STAT. § 115C.109.3(a).

55. When educators predetermine a child's placement, educators deny parents' right to participate meaningfully in the development of their child's IEP. *See Spielberg v. Henrico Cty. Pub. Sch.*, 853 F.3d 256 (4th Cir. 1988).

56. In this case, Respondent prepared an IEP in advance of the unilaterally cancelled April 2017 IEP meeting. *See* Stip. Exh. 1 (Respondent's draft IEP).

57. Respondent's draft IEP, *see* Stip. Exh. 1, Bates p. 14, contained the same placement designation, "Resource" with 90 minutes of segregated instruction, as the final May 2017 IEP at issue in this appeal, *see* Stip. Exh. 2, Bates p. 30.

58. Preparation for an IEP meeting, however, does not constitute predetermination. And schools may (and should) give thought to the development of a student's IEP prior to an IEP meeting, including thinking about what the school believes will be the best placement for a child, so long as they come to the IEP meeting with an open mind.

59. Petitioners contend that Respondent failed to come to the meeting with an open mind about [redacted]s placement because Respondent refused to consider integrating any specially designed instruction in [redacted]s regular-education classes with additional supports and fixed [redacted]s placement as in "Resource." *See supra, e.g.*, ¶¶ 855-66.

60. Both the draft April 2017 IEP and the final May 2017 IEP identify both "Regular" and "Resource" settings as alternatives considered for [redacted] *See* Stip. Exh. 1, Bates p. 14 *and* Stip. Exh. 2, Bates p. 30. This offers a basis upon which to determine, as the Final Decision did, that Respondent did not predetermine a "Resource" placement, despite its failure to consider including any of [redacted]s specially designed instruction in the regular-education setting.

The Private-Placement Issue

61. The private-placement issue raises the following question for decision on appeal: Does an independent review of the record considered in its entirety support the Final Decision's findings that (1) the May 2017 IEP offered a FAPE to [redacted] in the LRE, (2) [redacted] Academy is an inappropriate private placement, and (3) [redacted] unreasonably predetermined placement in a private setting.

62. It does not.

63. School systems may be required to reimburse parents for the cost of a private school placement as follows:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private . . . secondary school without the consent or referral by the public agency, a court or a hearing officer may *require* the agency to reimburse the parents for the cost of that enrollment *if* the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment *and* that the private placement is appropriate.
>
> 34 C.F.R. § 300.148(c) (emphasis added).

64. The Supreme Court has explained that a school system may be required to reimburse a parent for the private placement of a child with a disability when (1) the IEP proposed by the school system was inappropriate and (2) the private school placement was appropriate to meet the child's needs. *Sch. Comm. Of the Town of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 370-71 (1985).

65. "A parental placement may be found to be appropriate . . . even if it does not meet the State standards that apply to education provided by the SEA and LEAs." 34 C.F.R. § 300.148(c).

66. There are only a few limitations that might reduce or deny such reimbursement when it is otherwise justified based on the school system's failure to propose an appropriate IEP and the appropriateness of the private placement. Of relevance to this case, "[t]he cost of reimbursement . . . may be reduced or denied . . . [u]pon a judicial finding of unreasonableness with respect to actions taken by the parents." 34 C.F.R. § 300.148(d)(3).

67. As the Supreme Court recognized in *Burlington,* however, when parents demonstrate that a school system failed to offer a free appropriate public education to a child with a disability, "it seems clear beyond cavil that 'appropriate' relief" should avoid an "empty victory." *Burlington*, 471 U.S. at 370-71.

68. The Final Decision determined that Petitioners are not entitled to reimbursement for [redacted]s placement in [redacted] Academy because (1) Respondent's May 2017 IEP offered FAPE, *see* Final Decision, Conclusion of Law, p. 60, ¶ 52; (2) [redacted] Academy is an inappropriate placement, *see* Final Decision, Conclusion of Law, p. 61, ¶ 59; and (3) even if the May 2017

IEP failed to offer FAPE and [redacted] Academy was appropriate, Petitioners' actions were "disingenuous," *see* Final Decision, Conclusion of Law, p. 61, ¶ 65.

69. Each of these determinations is incorrect on, and contradicted by, the evidence contained in the record when considered in its entirety.

70. First, Respondent's May 2017 IEP failed to offer FAPE. *See supra* Findings of Fact ¶¶ 627-825 & Conclusions of Law ¶¶ 21-42.

71. The May 2017 IEP was inappropriate and failed to offer FAPE at least on the basis that Respondent refused to consider accommodating [redacted] as she "require[d]" in a small-class and/or small-school setting. *See* Pet. Exh. 15, Bates p. 152 (recognizing in Respondent's own records, [redacted]s March 2016 IEP, that [redacted] "requires small group instruction . . . in order to meet grade level expectations).

72. Additionally, the March 27, 2018, Order on Respondent's oral Rule 41(b) motion improperly dismissed Petitioners' claims that the May 2017 IEP denied [redacted] a FAPE based on the IEP's failure to include family and/or individual counseling and/or parent training; the IEP's failure to include appropriate supplementary aids and services (beyond class-size in the general-education setting); Respondent's refusal to fully evaluate [redacted] and Respondent's procedural violations other than predetermination of placement. *See supra* ¶¶ 1041-61.

73. Second, [redacted] Academy is an appropriate placement.

74. Although Petitioners bear the burden of demonstrating that their private placement is appropriate, they need not demonstrate that it was perfect. A parent's placement is deemed appropriate when it meets the standard of being "reasonably calculated to enable [the student] to receive educational benefits." *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 364 (2nd Cir. 2006), *rev'd on other grounds*, 694 F.3d 167 (2nd Cir. 2012). A private placement meets this standard if it is "likely to produce progress, not regression." *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2nd Cir. 1998). In evaluating the appropriateness of a private placement, reviewing courts should consider the "totality of the circumstances." *Frank G.*, 459 F.3d at 364.

75. [redacted] Academy's educational program for [redacted] overcame two central deficiencies in the May 2017 IEP: [redacted] Academy integrated [redacted]s specially designed instruction on social/emotional skills and organizational/study skills *into her general-education classrooms* rather than offering them exclusively in a segregated class where [redacted] would have no non-disabled peers, and [redacted] Academy accommodated [redacted]s need for a small-class, small-school setting *across the curriculum, including in her general-education classrooms*, rather than limiting this accommodation exclusively to a segregated classroom with no non-disabled peers. *See supra, e.g.*, ¶¶ 921-48 & 954.

76. In addition to integrating individualized academic, organizational, and social/emotional support instruction within regular-education classes with the small-class, small-school environment (which had been refused by Respondent), [redacted] Academy also provided within

that regular-education classroom the more traditional accommodations also offered by Respondent's May 2017 IEP, including preferential seating, testing accommodations, opportunities to take breaks, and graphic organizers for planning. *See* Pet. Exh. 43, Bates p. 294-96.

77. With these supports in place across the curriculum, [redacted] made progress academically and functionally at [redacted] Academy. *See, e.g.*, Tr. p. 543:23 – 544:5 (testimony of [redacted] that based on her observations and [redacted] Academy's reports, [redacted] appeared to be "thriving in that environment" and "motivated to engage in academic instruction"); Tr. p. 335:15 – 336:15 (testimony of [redacted] that [redacted] has made "a lot of academic progress" at [redacted] Academy, including that [redacted] has "emerging mastery in . . . [various] categories that before she was below grade level," "progress in her writing skills," and "[s]he's also advocating for herself a lot more"); Tr. p. 545:6-10 (testimony of [redacted] that [redacted] Academy staff discussed "that they're starting to see [redacted] volunteer and participate at a much higher level than when she first came to the school"); Tr. p. 365:10-17 (testimony of [redacted] that [redacted]s anxiety has decreased).

78. Dr. [redacted] the only expert on the inclusion of students with autism spectrum disorder, documented in her [redacted] Academy Observation report following her visit to that school to meet with teachers and administrators and to observe [redacted] that [redacted] has "adjusted well to the school and the support structure provided" and is making progress in all areas – academic and functional. Pet. Exh. 43, Bates p. 294.

    a. [redacted] had shown resistance to instructional supports initially, but she was becoming comfortable with them at [redacted] Academy. For example, "[redacted] was somewhat resistant to using a word process[or] at the beginning of the year, but she is using a word processor to type more often now after being encouraged to do so by her teachers. This helps eliminate some of the barriers she faces related to her difficulties with handwriting (dysgraphia)." Pet. Exh. 43, Bates p. 294.
    b. Through [redacted] Academy's Social Thinking problem-solving approach, "[redacted] interacts positively with her peers in her classes, and is gradually putting herself in more social situations outside of the classroom context (e.g. during lunch and study hall)." Pet. Exh. 43, Bates p. 295.
    c. "Due to the consistent structure of the school day, very clear expectations, opportunities to take breaks when she needs them, accommodations for testing . . ., preferential seating . . ., academic success resulting from individualized instruction tailored to her present abilities and learning profile, and a culture in the school that encourages self-advocacy, [redacted] has been able to maintain emotional regulation and meet academic, behavioral, and social expectations throughout the school day. She is able to ask questions if she needs help understanding content or assignment expectations, advocate for specific accommodations (e.g. more time, breaks, visual supports), and she raises her hand to answer questions in class." Pet. Exh. 43, Bates p. 295.
    d. "[redacted] is experiencing academic success in all areas." Pet. Exh. 43, Bates p. 295.
    e. "[redacted] does *not* have behavioral challenges that she once displayed in the public-school setting (e.g. crying, significant frustration, withdrawal, task avoidance, social difficulties). It is clear that this is *because the environment and support structure*

provided at [redacted] *Academy* is similar to the supports provided at [redacted] Pet. Exh. 43, Bates p. 296 (emphasis added).

79. Dr. [redacted] the only expert on inclusion practices for students with autism, testified that [redacted] Academy *is* an appropriate placement for [redacted] in part because it offers the critical instructional supports and services necessary to allow [redacted] to remain in a general-education classroom with her nondisabled peers making educational progress. *See, e.g., supra* ¶ 948; Pet. Exh. 43, Bates p. 294-95.

80. [redacted] Academy is an appropriate placement for [redacted] where [redacted] made progress both academically and functionally. *See* Pet. Exh. 43, Bates p. 296.

81. Petitioners, including [redacted] did not act unreasonably or predetermine placement in a private program prior to the May 19, 2017, IEP meeting.

82. Courts have denied reimbursement to parents and children with disabilities when public school systems fail to provide the child with an appropriate IEP and the private placement selected by the parents is appropriate when, for example, parents fail to notify the school system of their dissatisfaction with their child's IEP at all, *see, e.g., M.C. v. Voluntown Bd. of Educ.*, 226 F.3d 60, 68 (2d Cir. 1999) *and* 34 C.F.R. § 300.148(d)(1), or for further example, parents refuse to cooperate in the development of the IEP and prevent it from being developed, *see, e.g., C.G. and B.S. v. Fire Town Cmty. Sch. Dist*, 513 F.3d 279, 287-89 (1st Cir. 2008) *and* 34 C.F.R. § 300.148(d)(2).

83. Parents, like [redacted] however, are permitted to investigate private schools and even *enroll* their child in private school while still considering the options presented by the public-school district in good faith. *See, e.g., In re: Student with a Disability*, 14-025, 114 LRP 23151 (N.Y. State Educ. Agency, April 30, 2014) (finding the equitable considerations weighted in favor of the parents because the parents "acted reasonably under the circumstances of this case," despite the fact that the parents had already signed an enrollment contract and provided a deposit to reserve a spot for their child in the private school, noting that the contract allowed the parents to withdraw their child without financial penalty other than forfeiture of the initial deposit).

84. Petitioners in this case did *not* fail to notify the school system of their dissatisfaction with the IEP; [redacted] expressed her dissatisfaction with Respondent's draft if the May 2017 IEP in advance of the IEP meeting in an email to Ms. [redacted] *see supra* Findings of Fact ¶¶ 78-80; [redacted] expressed her dissatisfaction with the proposed IEP at the May 2017 IEP meeting itself, and she rejected the IEP at that meeting as well, *see* Stip. Exh. 4, Bates p. 41; and [redacted] sent an email to [redacted]s school principal in July affirming that she had rejected the May 2017 IEP and expressly notifying him that she would place [redacted] in a private placement and seek reimbursement, *see supra* Findings of Fact ¶ 160 and Stip. Exh. 25, but Respondent did not respond to [redacted]s objection, *see supra* Findings of Fact ¶¶ 161-76.

85. Petitioners persisted in trying to find an appropriate public placement *even beyond* the May 2017 IEP meeting; this persistence led Petitioners to [redacted] High School; and [redacted] completed and submitted a transfer request form to Respondent's Office of Student

Assignment in *June 2017,* reflecting an *ongoing effort* to find an appropriate public placement, with a lower teacher-student ratio in general-education classes, that might be a "better fit" for [redacted]s educational needs. *See* Stip. Exh. 24, Bates pgs. 178-82 ([redacted]s transfer request and Respondent's denial of that request).

86. That Petitioners also worked to cover their bases and identify a private placement, as the summer progressed does not mean that Petitioners *predetermined* that [redacted] would attend a private school.

87. Petitioners did not sign a contract with an educational consultant to assist them in finding and evaluating potential placements for [redacted] until *after* Respondent unilaterally cancelled the [redacted]s originally scheduled IEP meeting in April 2017, Tr. p. 381:16-17, and "it was getting late" to put together a "plan" for [redacted] Tr. p. 382:3-9.

88. Although [redacted] entered into a contract with an educational consultant in May 2017, Petitioners "did not look at any private schools until June" – *after* Respondent failed to offer a FAPE at the May 2017 IEP meeting. Tr. p. 382:3-9.

89. Petitioners did not enroll [redacted] in a private school until *July* 2017 – *after* the May 2017 IEP meeting *and after* Respondent denied their application to transfer to a "better fit" within respondent WCPSS. *See* Pet. Exh. 1, Bates p. 1.

90. Petitioners could not have unreasonably determined that [redacted] would attend [redacted] Academy (or another private school) prior to the May 2017 IEP meeting because [redacted] had not yet been offered admission to [redacted] Academy (or another private school) at that time. In fact, [redacted] did not learn of her admission until *July* 2017 – after the May 2017 IEP meeting and after Respondent had already denied [redacted]s transfer request within Respondent WCPSS.

91. Contrary to her conclusion in the Final Decision, the ALJ recognized the reasonableness and propriety of Petitioners' actions with respect to their private consultant *during the hearing.*

92. The ALJ the ALJ stated, "I don't think it's unreasonable for a parent if they're not sure if the school is going to offer an appropriate IEP to look at other options. . . . I don't think it's unreasonable to be looking at other options at the end of the school year, so I don't believe her behavior in that respect, unless something else is shown to me, rises to the level of being unreasonable." Tr. p. 707 (recognizing that Petitioners' actions were reasonable at the close of Petitioners' testimony when the relevant evidence about Petitioners' relationship with its educational consultant and their search for an appropriate placement for [redacted] was already in evidence); *see also* Tr. p. 714 (reflecting the ALJ's recognition at the hearing that "I don't think it's unreasonable for a parent to look at other options if they're concerned about the appropriateness of the document being developed to serve the child.").

93. The record evidence considered in its entirety demonstrates, as the ALJ recognized during the hearing, that Petitioners did not act unreasonably or "predetermine" a private placement for [redacted] prior to the May 2017 IEP meeting.

94. Throughout the IEP development process and beyond, Petitioners acted consistently with an intention to enroll [redacted] in Respondent WCPSS. Petitioners shared extensive diagnostic and educational information with Respondent to assist it in understanding [redacted]s disabilities and educational needs in anticipation of [redacted]s "return[] ... to WCPSS." *See* Stip. Exh. 2, Bates p. 17. Petitioners allowed Respondent to visit [redacted]s private placement, speak with teachers and administrators there, and observe [redacted] Petitioners encouraged Respondent to speak with [redacted]s successful educators to gain information about [redacted]s known needs. Petitioners scheduled, prepared for, and attended an IEP meeting in April 2017 that Respondent cancelled without notice. Petitioners re-scheduled, prepared for, and attended a 5-plus hour IEP meeting in May 2017. [redacted] brought a former special education teacher to that meeting to assist her in communicating with Respondent about [redacted]s educational needs. She arranged to have one of [redacted]s successful educators to phone into the IEP meeting to communicate about Stip. Exh. 4 Bates pgs. 35-36. Petitioners *literally* re-enrolled in Respondent WCPSS on May 9, 2017. *See* Pet. Exh. 32, Bates p. 216 (presenting an email from Respondent's employee in student assignment to Ms. [redacted] and others stating that "they re-enrolled on 5/9/17"). And Petitioners continued to seek an appropriate placement for [redacted] within Respondent WCPSS, applying for a transfer to a school that might be a "better fit" for [redacted] in mid-June 2017, after the May 2017 IEP meeting failed to produce an IEP that offered a FAPE in the LRE and while simultaneously engaging in a search for an appropriate private placement. [redacted]s IEP Team failed to follow through with the Office of Student Assignment as it had promised, and Respondent denied Petitioners' transfer request.

95. [redacted] acted reasonably under the circumstances.

96. Because the May 2017 IEP failed to offer FAPE, because [redacted] Academy is an appropriate placement, and because Petitioners acted reasonably, Petitioners are eligible for tuition and transportation reimbursement.

97. All of the findings in this Decision are incorporated in support of this conclusion.

CONCLUSIONS OF LAW REGARDING PETITIONERS' APPEAL OF THE MARCH 27, 2018, ORDER GRANTING, IN PART, RESPONDENT'S MOTION TO DISMISS PURSUANT TO N.C. GEN. STAT. § 1A-1, RULE 41(B)

98. This appeal involves, in part, a Decision granting relief to Respondent under Rule 41(b) of the Federal Rules of Civil Procedure.

99. Petitioners' Notice of Appeal identified an appeal of "[t]he dismissal of [ten] claims raised by Petitioners by the Order Granting, in Part, Respondent's Motion to Dismiss Pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b), issued on March 27, 2018."

100. Rule 41(b) provides in relevant part:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the

ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

N.C. Gen. Stat. § 1A-1, Rule 41(b).

101. Rule 52 provides in relevant part as follows:

(a) Findings. –

4. In all actions tried upon the facts without a jury or with an advisory jury, the court *shall* find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.
5. Findings of fact and conclusions of law are *necessary . . . as provided by Rule 41(b)*. . . .
6. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

****

(c) Review on appeal. – When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment, or a request for specific findings.

N.C. Gen. Stat. § 1A-1, Rule 52 (emphasis added).

102. "If the trial court grants a defendant's motion for involuntary dismissal, [s]he must make findings of fact and failure to do so constitutes reversible error." *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999) (citing *Graphics, Inc. v. Hamby,* 48 N.C. App. 82, 89, 268 S.E.2d 567, 571 (1980) ("The requirement that findings of fact be made is mandatory, and the failure to do so is reversible error.")); *see also Bauman v. Woodlake Partners, LLC,* 199 N.C. App. 441, 445-46, 681 S.E.2d 819, 822023 (2009) (citing *Graphics, Inc. v. Hamby* and reiterating that "[t]he requirement that findings of fact be made is mandatory, and the failure to do is reversible error"); *see generally* 28 N.C. Index 4th Trial § 579, "Duty to make findings of fact and conclusions of law on Rule 41(b) dismissals," (2019).

103. "Such findings are intended to aid the appellate court by affording it a clear understanding of the basis of the trial court's decision, and to make definite what was decided for purposes of res judicata and estoppel. Finally, the requirement of findings should evoke care on the part of the trial judge in ascertaining the facts." *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999) (citations omitted).

104. If a trial court fails to make specifically enumerated findings in separately numbered paragraphs, but offers relevant findings in paragraph form, and only one outcome is possible under those facts, "[t]he absence of such separately-stated findings of fact ... does not, even if erroneous, invariably necessitate a grant of appellate relief. Instead, the critical factor in determining whether an alleged error necessitates a new trial or some other form of relief is the extent to which 'this Court is unable to determine the propriety of the order unaided by findings of fact explaining the reasoning of the trial court.'" *Bauman v. Woodlake Partners, LLC,* 199 N.C. App. 441, 446, 681 S.E.2d 819, 823 (2009) (quoting *Hill,* N.C. App. At 518, 520 S.E.2d at 800).

105. The ALJ's March 27, 2018, Order Granting, in Part, Respondent's Motion to Dismiss Pursuant to N.C. Gen. Stat. § 1A(1), Rule 41(b), dismissed ten (10) of Petitioners' claims after making 15 findings of fact and 12 conclusions of law.

106. The ALJ's March 27, 2018, Order Granting, in Part, Respondent's Motion to Dismiss Pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b), arguably made specific findings of fact on six (6) of the ten (10) claims dismissed. It made no specific findings of fact on four (4) of the claims dismissed.

107. On the six claims dismissed for which the March 27, 2018, Order made findings of fact – (1) Respondent's refusal to consider SLD eligibility, (2) the IEP's failure to include end-of-year services, (3) Respondent's refusal to conduct a FBA or to develop a BIP, (4) the IEP's failure to include math and/or reading goals, (5) the IEP's failure to include appropriate related services, including direct occupational therapy, and (6) Respondent's refusal to allow parent participation (except with respect to placement) – the record offers sufficient evidence upon which to permit the findings and conclusions reached.

108. On the remaining four claims dismissed by the March 27, 2018, Order, on Respondent's Rule 41(b) motion – (1) Respondent's refusal to offer family and/or individual counseling or parent training, (2) Respondent's refusal to offer appropriate supplementary aids and services, (3) Respondent's refusal to fully evaluate, and (4) Respondent's procedural violations other than parental participation – the ALJ made *no specific findings of fact,* and instead issued a *single* summary conclusion of law that Petitioners failed to meet their burden of proof on all of these claims. *See* March 27, 2018, Order, Conclusion of Law ¶ 10.

109. "The requirement that findings of fact be made is mandatory, and the failure to do so is reversible error," *Graphics, Inc. v. Hamby,* 48 N.C. App. 82, 89, 268 S.E.2d 567, 571 (1980), especially when the failure to make such findings leaves the reviewing court "unable to determine the propriety of the order unaided by findings of fact explaining the reasoning of the trial court." *Bauman v. Woodlake Partners, LLC,* 199 N.C. App. 441, 446, 681 S.E.2d 819, 823 (2009) (citing *Hill,* N.C. App. At 518, 520 S.E.2d at 800).

110. The basis for the March 27, 2018, dismissal of these claims is unspecified and an independent review of Petitioners evidence as it appears in the official record finds sufficient evidence to support a claim on each of these issues as follows:

a. On Respondent's refusal to offer family and/or individual counseling or parent training, the ALJ did not include any Findings of Fact in the 41(b) Order, and the following evidence in the Official Record supports Petitioners' claim that Respondent violated [redacted]s right to FAPE by refusing these related services in [redacted]s May 2017 IEP:

(I) The only educational evaluation considered by the IEP team, Petitioners' privately obtained evaluation performed by Dr. [redacted] expressly recommended individual therapy, family therapy, and parent-skills training, *see* Stip. Exh. 14, pgs. 109-11 (recommending that [redacted] "should continue to participate in individual psychotherapy," that "skills such as social initiation skills, conversational skills, conflict resolution skills and self-monitoring strategies ... should be addressed in individual and group therapy," that "[f]amily therapy will also be an important component of [[redacted]s] treatment," and that a "family therapy and parent-skills component is also recommended to help [[redacted]s] parents learn how to respond more effectively to her more challenging emotions and behaviors at home");

(II) [redacted] was receiving individual and family therapy pursuant to her Master Treatment Plan in her then-current placement, [redacted] Academy for [redacted] to support her progress on long-term goals and short-term objectives associated with symptoms of her autism, *see* Stip. Exh. 17, pgs. 135 (providing "Family Therapy (Face-to-face) 1 time(s) per 6-8 weeks; Family Therapy (Telephonic) 1 time(s) per week; . . . Individual Therapy 2 time(s) per week");

(III) [redacted]s discharge plan from [redacted] Academy for [redacted] recommended "[w]eekly individual and family therapy" after discharge, *see* Stip. Exh. 17, Bates p. 128;

(IV) Petitioners' witness, [redacted] who served as [redacted]s "primary therapist" at [redacted] Academy for [redacted] and "worked with [[redacted] in individual and family therapy," Tr. pgs. 123:24 – 124:4, recommended that [redacted] receive counseling after she left [redacted] Academy for [redacted] "to have supports in her social/emotional learning and growth," Tr. p. 139:21-25 ([redacted] testimony); and

(V) Petitioners' expert witness, Dr. [redacted] testified that [redacted] continued to require the services and supports that she received at [redacted] Academy for [redacted] as she left that setting and returned to a non-residential placement, Tr. p. 563:3-17 (Dr. [redacted] testimony).

b. On Respondent's failure to offer appropriate supplementary aids and services (other than small-class, small-school setting accommodations), ALJ did not include any Findings of Fact in the 41(b) Order, and the following evidence in the Official Record supports Petitioners' claim that Respondent violated [redacted]s right to FAPE by refusing such services in [redacted]s May 2017 IEP:

(I) Dr. [redacted] the only expert on inclusion and evidence-based practices for children with autism, testified that the supplemental aids and services in the May 2017 IEP were inappropriate to allow [redacted] access to the general education curriculum and make progress towards her IEP goals, *see* Tr. p. 521:10-13;

(II) Dr. [redacted] also specified some of the supplemental aids and services (in addition to small-class, small-school environment) that were necessary in, but absent from, the May 2017 IEP, including peer-support strategies, training for general-education teachers, and supports for [redacted]s learning disabilities, *see* Tr. p. 519:12 – 520:12; and

(III) Dr. [redacted] in the evaluation relied upon by Respondent to draft the May 2017 IEP, recommended supplemental aids and services (beyond small-class setting) that Respondent did not consider including in that IEP, such as positive behavioral approaches with clearly defined consequences, a written schedule to prepare in advance for transitions and changes, a school-home notebook or agenda that would be signed by both [redacted]s teachers and her parents to increase clear communication, and access to teachers for assistance in determining sequential step and timelines for longer assignments, papers, and projects. *See* Stip. Exh. 14, Bates pgs. 112-14.

c. On Respondent's failure to fully evaluate [redacted] the ALJ did not include any Findings of Fact in the 41(b) Order, and the following evidence in the Official Record supports their Petitioners' claim that Respondent violated [redacted]s right to FAPE by refusing to fully evaluate [redacted] prior to finalizing her May 2017 IEP:

(I) The May 2017 IEP failed to offer goals in math and/or reading and failed to offer any special education in math and/or reading, *see* Stip. Exh. 2, pgs. 16-33, despite that [redacted]s current educational evaluation identified specific learning disabilities in math and reading and recommended academic support in those areas, *see* Stip. Exh. 14, p. 108, and [redacted]s then-current (successful) educational plan included individual support in math and reading, *see* Stip. Exh. 19, p. 148;

(II) The May 2017 IEP failed to offer direct occupational therapy services, *see* Stip. Exh. 2, pgs. 16-33, despite that [redacted]s then-current (successful) educational plan included direct occupational therapy services, *see* Stip. Exh. 21, pgs. 153, and despite that [redacted]s "discharge planning" recommended "Occupational Therapy" following [redacted]s discharge from such treatment at [redacted] Academy for [redacted] *see* Stip. Exh. 17, Bates p. 128;

(III) Despite recommendations regarding [redacted]s need for goals, supports, and/or special education in math, reading, and occupational therapy, Respondent refused to offer any such goals, supports, and/or special education, *see* Stip. Exh. 2, Bates pgs. 16-33;

(IV) And despite Respondent's refusal to offer goals, services, and/or or special education in areas in which [redacted]s evaluators as well as current and prior educators recommended goals, services, and/or supports, Respondent refused to conduct any additional assessments prior to the start of the school year to support its refusals, *see, e.g.,* Final Decision, Finding of Fact ¶ 134;

(V) Without conducting additional assessments, Respondent failed to appreciate and could not appropriately address all of [redacted]s areas of need in the IEP proposed for [redacted] by Respondent, *see* Tr. p. 526:14-21 (offering testimony from Dr. [redacted] that "[w]hen you're developing an IEP, you should be developing an IEP that addresses all the areas and needs of the student"); Tr. p. 523:17-25 (offering testimony from Dr. [redacted] that it would have been possible and appropriate to assess [redacted]s occupational therapy needs prior to the beginning of school as this would "inform any goals she would need in that area and any supports and interventions she might need to be successful in her academics to address her occupational therapy needs");

(VI) [redacted]s current placement ([redacted] Academy) conducted assessments to determine [redacted]s present levels of academic performance in math and "discovered early on that [redacted] was performing below grade level in math," *see, e.g.,* Tr. p. 332:11-18; Pet. Exh. 43, Bates p. 295;

(VII) North Carolina's IEP form directs that the IEP should "[i]nclude current academic and functional performance, behaviors, social/emotional development, other relevant information, and how the student's disability affects his/her involvement and progress in the general curriculum," *see, e.g.,* Stip. Exh. 2, Bates p. 21;

(VIII) Without fully evaluating [redacted] in her areas of need (most notably in math, reading, and occupational therapy), Respondent could not develop appropriate present levels of academic performance because Respondent did not know what, exactly, [redacted] could perform and rejected [redacted]s documentation and assertion that [redacted] needed "academic goals," *see* Stip. Exh. 4, Bates p. 36 (reflecting in Respondent's meeting minutes that [redacted] expressed to the IEP team that "she feels that [redacted] does need academic goals").

d. On Respondent's procedural violations other than parental participation, the ALJ did not include any Findings of Fact in the 41(b) Order, and it failed to specify what, if any, claims would be covered by this dismissal, leaving the scope of the dismissal to guesswork, which the Undersigned declines to perform.

111. The March 27, 2018, Order's dismissal of Petitioners claims arising from Respondent's refusal to offer family and/or individual counseling or parent training, Respondent's failure to offer appropriate supplementary aids and services, and Respondent's failure to fully evaluate, was in error; it was unexplained and contrary to evidence presented by Petitioners and contained in the Official Record.

112. The March 27, 2018, Order also did not "find the facts specially," *see* N.C. Gen. Stat. § 1A-1, Rule 52(a), before dismissing Petitioners' "procedural claims other than predetermination of placement."

113. Most significantly with respect to the dismissal of "procedural claims other than predetermination of placement," the March 27, 2018, Order failed to identify *what* procedural claims – beyond those otherwise resolved separately in the Order – might fall into the category of "procedural claims other than predetermination of placement" to be dismissed.

114. To the extent that the March 27, 2018, Order purports to dismiss an unspecified procedural claim, it is in error. Without any identification of the procedural claim or claims dismissed through this legal conclusion, it is impossible to review it or them on appeal without guesswork. The Undersigned declines to engage in that guesswork.

115. No other IDEA issue other than those expressly resolved herein was raised before the Undersigned. The Undersigned makes no finding and reaches no conclusion on any issue not specified herein.

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

DECISION

The July 31, 2018, Final Decision, is AFFIRMED in part and REVERSED in part, and the March 27, 2018, Order Granting, in Part, Respondent's Motion to Dismiss Pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) AFFIRMED in part and REVERSED in part and REMANDED.

The July 31, 2018, Final Decision is **AFFIRMED** on the following issues:

- Whether an independent review of the record taken as a whole supports the Final Decision's dismissal of Petitioners' claim that the May 2017 IEP denied [redacted] a FAPE based on the IEP's expression of present levels of academic and functional performance.
- Whether an independent review of the record taken as a whole supports the Final Decision's dismissal of Petitioners' claim the May 2017 IEP denied [redacted] a FAPE based on the IEP's expression of academic and functional goals.
- Whether an independent review of the record taken as a whole supports the Final Decision's dismissal of Petitioners' claim that the May 2017 IEP failed to offer [redacted] a FAPE based on its failure to include a transition plan.
- Whether an independent review of the record taken as a whole supports the Final Decision's dismissal of Petitioners' claim that Respondent predetermined [redacted]s placement in a Resource setting.

The July 31, 2018, Final Decision is **REVERSED** on the following issues:

- Whether an independent review of the record taken as a whole supports the Final Decision's dismissal of Petitioners' claim that the May 2017 IEP denied [redacted] a FAPE based on its failure to incorporate any accommodation to support [redacted] s need for a small-class, small-school setting in the general-education environment.
- Whether the May 2017 IEP offered [redacted] a FAPE, whether [redacted] Academy is an appropriate private placement, and whether [redacted] acted unreasonably throughout the IEP process.

The March 27, 2018, Order is **AFFIRMED** on the following issues:

- Whether an independent review of Petitioners' evidence as it appears in the record at the time of Respondent's oral Rule 41(b) motion supports the Final Decision's determination that Petitioners failed to offer sufficient evidence to meet their burden of production on claims that the May 2017 IEP denied [redacted] a FAPE based on the following:
  - Respondent's refusal to consider SLD eligibility for [redacted]
  - The IEP's failure to include end-of-year services;
  - Respondent's refusal to conduct a Functional Behavioral Assessment ("FBA") or to develop a Behavior Intervention Plan ("BIP");
  - The IEP's failure to include math and/or reading goals;
  - The IEP's failure to include appropriate related services, including direct occupational therapy; and
  - Respondent's refusal to allow parent participation.

The March 27, 2018, Order is **REVERSED and REMANDED** on the following issues:

- Whether an independent review of Petitioners' evidence as it appears in the record at the time of Respondent's oral Rule 41(b) motion supports the Final Decision's determination that Petitioners failed to offer sufficient evidence to meet their burden of production on claims that the May 2017 IEP denied [redacted] a FAPE based on the following:
  - The IEP's failure to include family and/or individual counseling and/or parent training;
  - The IEP's failure to include appropriate supplementary aids and services (with the exception of an accommodation regarding class size in general-education classes);
  - Respondent's refusal to fully evaluate [redacted] and
  - Respondent's procedural violations other than those specifically identified in the Order.

NOTICE

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

This the [redacted] day of August, 2019.

/s/ Lisa Lukasik
Lisa Lukasik
Review Officer

CERTIFICATE OF SERVICE

The foregoing DECISION was served on the attorneys for Petitioner and the attorneys for the Respondent via E-mail on August 8, 2019, addressed as follows:

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Attorney for Respondent

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

Sherry Thomas
Director, Exceptional Children's Division
North Carolina Department of Public Instruction
6356 Mail Center
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Office of Administrative Hearings
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Petitioner [redacted]
By and through her parent [redacted]
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Dr. James Merrill
Superintendent
Wake County Public School System
Board of Education
5625 Dillard Drive
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This the [redacted] day of August, 2019.

Lisa Lukasik /s/
Lisa Lukasik
Review Officer

Cc: Teresa King, Teresa.King@dpi.nc.gov