

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 EDC 08808

<p>█ by and through his custodian █ and █ Petitioner,</p> <p>v.</p> <p>Wake County Board Of Education and The Wake County Public School System (WCPSS) Respondent.</p>	<p><b>FINAL DECISION</b></p>
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THIS MATTER was heard before the undersigned Honorable Stacey Bawtinheimer, Administrative Law Judge Presiding, on the following dates: February 14 -17, February 20 – 24 and March 8 – 9, 2017.

After considering a hearing on the merits held on the above mentioned dates, arguments from counsel for both parties, all documents in support of or in opposition to the parties' motions, all documents in the records including the Proposed Decisions as well as all stipulations, admissions, and exhibits, the Undersigned concludes that the Wake County Board of Education ("Respondent," "WCPSS," and/or "Wake County Schools") denied Petitioner █ a free and appropriate public education ("FAPE") during his 2014-2015, 2015-2016 school years by unilaterally increasing special education services. Thereby restricting his access to his nondisabled peers; by failing to include necessary supplemental aids and services; and by denying Petitioners meaningful participation in the Least Restrictive Environment ("LRE") discussions. On all other claims, the Undersigned concludes that Respondent provided Petitioner █ a FAPE.

**Appearances of Counsel**

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For Respondent: Carolyn A. Waller  
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**Witnesses**

For Petitioners: [REDACTED] Ph.D.  
[REDACTED] Ph.D.  
[REDACTED] Petitioner *mother*

For Respondent: [REDACTED] School Psychologist Conducted 2013 and 2015 Psychoeducational Evaluations  
[REDACTED] 2<sup>nd</sup> Grade Regular Education Teacher 2014-2015 School Year  
[REDACTED] 2<sup>nd</sup> Grade Special Education Teacher 2014- 2015 School Year  
[REDACTED] [REDACTED] 2015-2016 School Year  
[REDACTED] Senior Director for Policy and Fiscal Compliance for Special Education Services

**Exhibits**

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

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

The following exhibits were received into evidence during the hearing:

Petitioners' Exhibits Nos. 1, 19, 27, 29 (pp. 380-384; 397-399; 408-410; 412-413), 31 (p. 646), 36(99. 1110-1111), 53, 58, 65, 67, 84 (from timestamp 33.0034.34 and 48.25-55.03), 85 (pp. 1954-55, 1959-62, 1985-1990, 2065-2067; 2074, 2078-2080) and 87 (pp. 2116-2199) (hereinafter Pet. Ex. 1, Pet. Ex. 2, etc.).

Respondents' Exhibits Nos. 3 (pages 12-117), 12, 13 (172, 177-179, 334-335; 355-375), 14 (pages 479-540), 15 (pages 576-578), 41 (pages 1511-1552), and 60-81 (hereinafter Resp. Ex. 1, Resp. Ex. 2, etc.).

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

### **Procedural Background**

1. On November 24, 2015, [REDACTED] and [REDACTED] filed a Petition for a Contested Case Hearing against the Wake County Public Schools System ("WCPSS") alleging that Respondent failed to timely identify and evaluate all of [REDACTED]'s needs, failed to develop appropriate IEPs as required by federal and state law, and failed to provide a FAPE in the LRE for the 2013-2014, 2014-2015 and 2015-2016 school years.

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

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

4. This Tribunal on May 3, 2016 denied Petitioner's Motion to Compel but further ordered that, "[i]f [REDACTED] and [REDACTED] provided Respondent with permission no later than May 2, 2016, Respondent shall videotape [REDACTED] in each of the classroom settings addressed in the motion and submit copies of those videotapes to Petitioners no later than May 16, 2016."

5. Petitioners provided Respondent the requisite permission on May 2, 2016. On June 3, 2016, almost three (3) weeks after this Tribunal ordered Respondent to submit copies of the videos to Petitioners, WCPSS provided multiple videos, which took place over a two-day period. Contrary to the Court's Order, the Petitioners asserted that the videos do not contain footage of *all* of [REDACTED]'s school settings.

6. On July 14, 2016, the Honorable Augustus B. Elkins entered an order granting Respondent's Motion for Partial Dismissal based on the statute of limitations. Judge Elkins dismissed all claims and causes of action arising before November 24, 2015.<sup>1</sup>

7. On June 30, 2016, WCPSS filed a Motion for Sanctions against Petitioners requesting that Dr. [REDACTED] be excluded from testifying in this matter for allegedly violating Judge Elkins' Order from May 3, 2016. Petitioners filed its Response to WCPSS' Motion for

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<sup>1</sup> This Order was amended multiple times to clarify the language setting the relevant time-period. On November 11, 2016, Petitioners filed a Motion to Amend the August 22, 2016 Order granting WCPSS' Motion for Partial Dismissal. The final amended order, dismissing all claims and causes of action arising or occurring prior to November 24, 2014 with prejudice was entered on February 6, 2017, by the Honorable Stacey B. Bawtinheimer, to whom this case had been reassigned.

Sanctions notifying Judge Elkins that WCPSS had clearly violated his Order by failing to provide the required videos by May 16, 2016 and failing to record ██████ in all educational settings.

8. While these Motions for Sanction were pending, on July 20, 2016 Petitioners filed a Motion requesting a Stay-Put Order as WCPSS had notified Petitioners that it had reassigned ██████ from his neighborhood base school to a school that housed a regional ██████ program and thus, Petitioners contended, changed ██████'s educational setting without conducting an IEP meeting.

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

- a. The first Order denied in part and granted in part WCPSS' Motion for Sanctions "...prohibiting any and all testimony and evidence from ██████ occurring at any time on June 8, 2016 after entry upon ██████..." and,
- b. The second Order granted Petitioners' Motion to Compel Stay-Put and ordering "... ██████ shall remain at ██████ during the pendency of this matter."

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

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

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

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

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

## ISSUES

The relevant time periods for this case are November 24, 2014 through November 24, 2015, all claims prior to November 24, 2014 were dismissed by Order dated July 14, 2016. Stip. 11. For the 2014-2015 school year, claims are limited to the period from November 24, 2014 to June 30, 2015 (the end of the school year). Claims related to the 2015-2016 school year are limited to the period from July 27, 2015<sup>2</sup> (beginning of the school year) to November 24, 2015.

The Undersigned has defined the remaining issues for hearing as follows:

1. Whether Respondent denied ██████ a FAPE during the 2014-15 or 2015-16 school years<sup>3</sup> by not placing him in his Least Restrictive Environment (“LRE”), by failing to ensure access to the general curriculum, and/or failing to determine that ██████ could not be educated satisfactorily in the general education classroom with the use of supplementary aids and services;
2. Whether procedural violations related to the LRE determinations caused more than *de minimis* educational harm.
3. Whether those failures amounted to predetermination that denied Petitioners meaningful participation in the IEP decision related to the LRE.
4. Whether Respondent denied ██████ FAPE by failing to implement ██████’s math goals during either of the 2014-15 or 2015-16 school years.

### Burden of Proof

The U.S. Supreme Court has held, in administrative due process hearings under the IDEA, the burden of proof falls upon the party seeking relief. *Schaffer v. Weast*, 126 S. Ct. 528, 531 (2005). Additionally, North Carolina law states that actions of local boards of education are presumed to be correct and “the burden of proof shall be on the complaining party to show the contrary.” N.C. Gen. Stat. § 115C-44(b). The burden of proof in this case is by a preponderance of the evidence. N.C. Gen. Stat. § 150B-34. Black’s Law Dictionary defines preponderance as denoting “a superiority of weight or outweighing.” The finder of fact cannot properly act upon the weight of evidence in favor of the one having the onus, unless it overbears, in some degree, the weight upon the other side. The Petitioners, being the complaining party, have the burden of proof to show by a preponderance of evidence that Respondent did not provide ██████ with a free appropriate public education. Petitioners acknowledged this fact in the Final Pre-Trial Order Conference, entered on March 1, 2017.

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<sup>2</sup> ██████ is on a year-round calendar.

<sup>3</sup> As noted earlier, the relevant statutory period includes portions of each school year. The time periods at issue for this hearing were November 24, 2014 to June 30, 2015 (the “2014-15 school year”) and July 27, 2015 to November 24, 2015 (the “2015-16 school year”).

## FINDINGS OF FACT AND STIPULATIONS OF FACT

Prior to the hearing, the parties agreed to Stipulations of Fact in the Order on the Final Pre-Trial Conference (“Order on Pre-trial”) filed on February 20, 2017. To the extent that Stipulations are not specifically stated herein, the Stipulations of Fact in the Order on Pre-Trial are incorporated fully herein by reference.

The Stipulations of Fact are referred herein a Stip. 1, Stip. 2, etc. For cohesiveness and brevity, the Stipulation of Facts are intertwined and incorporated within the Undersigned’s Findings of Fact to the extent possible. For clarity, the Undersigned has noted in brackets (“[ ]”) the relevant IEPs and time frames within same stipulations and removed the phrase “It is stipulated that.” The Jurisdictional, Party and Legal Stipulations are incorporated in the Conclusions of Law *infra*.

This Order incorporates and reaffirms all findings of fact and conclusions of law contained in previous Orders entered in this litigation.

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

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

### ***General Findings***

#### Overview

1. The parents’ primary concern in this case is the inclusion of ██████ in the general education classroom, and his access to and involvement in the full general education curriculum. Petitioners repeatedly requested that ██████ be educated in the general education classroom with his nondisabled peers. Stip. Ex. 33, p. 184 (12/19/13 IEP meeting).<sup>4</sup> A secondary and related concern is the implementation of ██████’s IEP math goals. The Petitioners contend that the failure to

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<sup>4</sup> Respondent acknowledged this request in its Response to the Petition: ¶3 - “Since ██████ arrival in the district at the start of his 1st grade year, Petitioners have consistently expressed opposition to any suggestion by members of the ██████ IEP team that perhaps he would make more progress or be better served in a more restrictive environment.”; ¶ 11 - “██████ parents were opposed to ██████ spending time in a special education environment”; ¶ 18 - Petitioners were resistant to the idea that ██████ needed additional time in a separate setting. . . . [and] wanted him exposed to the regular education environment and to have socialization with his nondisabled peers.”;

implement ██████'s math goals impacted his ability to access and make progress in the general education math class.

2. The Undersigned finds that since ██████'s enrollment, WCPSS has emphasized restricting rather than promoting ██████'s inclusion with nondisabled peers. This pattern began in the first grade with the reluctance to facilitate inclusion by the Exceptional Children (“EC”) teacher Ms. ██████ and Principal ██████. This sentiment abated somewhat in the second grade where the EC teacher, Ms. ██████ and regular education teacher, Ms. ██████ informally collaborated to modify the regular education curriculum to make it more accessible to ██████ in the general education setting. Had this collaboration been formalized and a daily supplemental aid/service in ██████'s IEP, ██████ might have experienced more success, but even with limited collaboration, ██████ made academic and socialization progress during his second grade year.

3. This stopped in the third grade when Ms. ██████ was reassigned as his special education teacher. At the beginning of the 2015-2016 school year, Ms. ██████ began collecting data for a more restrictive placement rather than assisting with integration. Without collaborative assistance from the special education teacher, the third grade general education teacher, Ms. ██████ could not make sufficient modifications to the regular education curriculum to accommodate ██████'s needs. The partial lack of collaboration during the second grade year and the complete lack of collaboration during the third grade year, sabotaged ██████'s inclusion in the general education academic setting, especially math, as well as his access to his nondisabled peers. During both school years, WCPSS unilaterally increased his special education services delivery in math and language arts.

4. Also, a major concern in this case is WCPSS' failure to identify ██████'s severe/profound hearing loss in his right ear during his entire first grade year. Due to ██████'s significantly higher achievement testing and adaptive behavior scores, the accuracy of the 2013 and 2015 cognitive testing is questionable. Although the school psychologist testified that the IQ instrument was suitable for intellectually impaired students, there was no validation that this particular test was appropriate for hearing impaired students. ██████'s misdiagnosed hearing impairment impacted every aspect of his educational programming before and during the statutory period.

5. In analyzing this case, the Undersigned is bound by the Supreme Court and Fourth Circuit precedent which requires that a disabled student must be educated with his nondisabled peers unless: 1. the disabled *would not receive an educational benefit* from mainstreaming; or 2. any marginal benefit from mainstreaming would be *significantly outweighed* by benefits that could feasibly be obtained *only* in the special education classroom; or 3. the student is *disruptive* in the general education classroom.<sup>5</sup> This educational benefit must be appropriate to ██████'s unique needs/circumstances and not necessarily be on grade level.<sup>6</sup>

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<sup>5</sup> *Hartmann by Hartmann v. Loudoun Cnty Bd. Of Educ*, 118 F. 3d 996, 1001 (4<sup>th</sup> Cir. 1997) (emphasis added).

<sup>6</sup> *Andrew F., ex rel. Joseph F. v. Douglas City School District*, RE-1, 137 S. Ct. 988 (2017).

6. Since no evidence was offered that proved [REDACTED] was disruptive in the general education classroom, only the first two categories are applicable.<sup>7</sup> The Respondent does not dispute, and the preponderance of the evidence proved, that [REDACTED] received educational benefit from inclusion in the regular education classroom. However, the Respondent argued that [REDACTED] would have made “more progress” from the special education setting, but failed to elaborate more progress in what. His IEP goals or common core curriculum?

7. During the applicable time, Respondent’s actions marginalized what educational benefit [REDACTED] could receive from the regular education classroom because the Respondent failed to provide the necessary supplemental aids/services to allow [REDACTED] the full benefit of inclusion and unilaterally withdrew him from his regular math instruction. Despite this, Respondent’s witnesses testimony and the educational records support that [REDACTED] received educational benefit from his inclusion and he made progress appropriate to his unique circumstances.

#### WITNESSES AT HEARING

8. Petitioners called two expert witnesses [REDACTED] PhD and [REDACTED] Ed.D., BCBA.

[REDACTED] *Ph.D.*

9. Dr. [REDACTED] was qualified as an expert in special education, inclusive education of students with low incidence disabilities, special education teacher training and support for students with low incidence disabilities, educational placement of students with low incidence disabilities, IEP development for students with low incidence disabilities and curriculum adaptation for students with low incidence disabilities. Tr. p. 119:22-120:6. Dr. [REDACTED] has impressive credentials as evidenced by her CV. Pet. Ex. 51. She has a Doctorate degree in Educational Psychology and a Masters of Education in Special Education. She has published one book on inclusion strategies for teachers, 16 peer reviewed journal articles, two book chapters on issues pertaining to inclusion for students with low-incidence disabilities, and has seven pending publications. She has presented at thirty-one national conferences; nine state and regional conferences, and twenty local conferences on inclusion issues and curricular adaptations. The Office of Special Education Programs (“OSEP”) has funded a \$1,250,000.00 grant to her and she has been awarded numerous grants and contracts for other educational research and projects. Since 2006, Dr. [REDACTED] has taught undergraduate, graduate, and doctoral students on issues pertaining to assessments and inclusion of students with low incidence disabilities at the Universities of Kansas, Northern Arizona, and California, Davis.

10. The Undersigned found Dr. [REDACTED] to be credible, extremely knowledgeable about inclusion but notes that the IDEA preference for mainstreaming is not the same as her philosophy that all disabled children should be educated in the regular education classroom. The Undersigned is not bound by “best practices,” but by the IDEA and legal precedence in the U.S. Supreme Court, Fourth Circuit Court of Appeals, and North Carolina appellate courts. With this in mind, the Undersigned weighed her testimony accordingly.

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<sup>7</sup> [REDACTED]’s occasional frustration and task avoidance in the regular education class did not rise to the level of disruptive behavior anticipated by *Hartmann*.

██████████ *Ed.D., BCBA*

11. Dr. ██████████ was qualified as an expert in inclusive practices for students with intellectual disabilities and research-based behavior and academic supports for students with intellectual disabilities. Tr. p. 428:24-429:3. Dr. ██████████ received her Doctorate in Education from Florida State University in Exceptional Student Education: Inclusion, Autism Spectrum Disorders, Early Intervention in 2007. She has a Masters from the University of Florida in Exceptional Student Education: Emotional Disturbance and Intellectual Disabilities. She is also a Board-Certified Behavior Analyst.

Dr. ██████████ is currently an associate professor at Winthrop University and teaches undergraduate and graduate courses in special education, supervises student interns, and conducts research. She has been employed in school settings as an exceptional student education teacher and inclusion specialist.

Dr. ██████████ has written three books, two book chapters, twelve peer reviewed journal articles, two manuals on issues pertaining to behavioral supports and interventions, co-teaching, inclusion, and other educational topics. Pet. Ex. 67.

She has also presented at over twenty-three national or international conventions, thirty-six state and local conferences on co-teaching, behavioral interventions and supports in inclusive settings for disabled students. Dr. ██████████ has been awarded numerous grants ranging from \$2,000.00 to \$155,000.00 for educational research and projects.

12. The Undersigned found Dr. ██████████ credible and extremely knowledgeable about behavior and academic supports for disabled students in the regular education classroom. Dr. ██████████ shared Dr. ██████████ philosophy that all disabled students could be successfully integrated in the regular education setting. To the extent that Dr. ██████████ testimony relied on “best practices” the Undersigned’s decision must be based on what’s appropriate under the law and her testimony was weighed accordingly.

██████████ *mother of* ██████████

13. Petitioner ██████████ mother of ██████████ was the sole fact witness presented by Petitioners. Even though, as the mother of ██████████ she has an explicit and implicit bias for the best interests of ██████████ the Undersigned found ██████████ credible and reliable in her testimony.

*Respondent’s Witnesses*

14. Respondent in their case-in-chief presented testimony from ██████████ the school psychologist at ██████████ s primary 2<sup>nd</sup>

grade general education teacher; [REDACTED] [REDACTED] s 2<sup>nd</sup> grade special education teacher; [REDACTED] [REDACTED] s primary 3<sup>rd</sup> grade general education teacher; and [REDACTED] Senior Director for Policy and Fiscal Compliance in the Special Education Services department of the Wake County Public School System.

15. Except as otherwise stated herein and with respect to Ms. [REDACTED] decisions pertaining to the cognitive testing and psycho-educational evaluations, overall the Undersigned found the witnesses' testimonies consistent with the educational records and afforded them the applicable deference due their positions.

### **[REDACTED] S DISABILITY, EDUCATIONAL HISTORY, AND INDIVIDUAL CIRCUMSTANCES UP TO NOVEMBER 24, 2014<sup>9</sup>.**

#### **[REDACTED] s Disabilities**

16. At the initiation of this case, [REDACTED] was an eight (8) year old student who had received special education services since age 3. Tr. 588:11-13 (testimony of Petitioner [REDACTED]) He has [REDACTED] intellectual disability (mild), Hirschsprung's disease; receptive, expressive, pragmatic/social language delays and unilateral hearing loss in the right ear (discovered in September 2014). (Stip. Exs. 18, 73), Tr. 584:20-21 (testimony of Petitioner [REDACTED]) Pet. Ex. 1.

17. Although no medical provider testified, Petitioner [REDACTED] described Hirschsprung's disease as a condition in which the ganglion cells of the colon are missing, and the colon fails to contract and release to move waste along. [REDACTED] had surgery at two and a half weeks of age to remove portions of his colon. Tr. 584:21-585:6. [REDACTED] continued to have symptoms of Hirschsprung's disease that included lack of bowel control resulting in leakage and pain, ultimately [REDACTED] was fitted with a [REDACTED] bag.<sup>10</sup> Tr. 590:4-5; 590:910; Stip. Ex. 11, p. 12. The Undersigned finds that Petitioner [REDACTED] s historical account to be credible and consistent with educational records and Respondent's also provided adult assistance as needed, at [REDACTED] [REDACTED] to assist with [REDACTED] s medical needs. Stip. Ex. 9, p. 54.

18. Petitioner [REDACTED] s date of birth is [REDACTED] and that his father is Petitioner [REDACTED] and his mother is Petitioner [REDACTED] Stip. 12.

19. [REDACTED] resides within the jurisdiction of the Wake County Public School System. Stip. 13.

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<sup>8</sup> Ms. [REDACTED] married and changed her last name to [REDACTED] during the pendency of this case. For clarity, because the documents in this case refer to her as "Ms. [REDACTED]" this order will do so as well.

<sup>9</sup> On February 6, 2017, based on the statute of limitations, this Tribunal entered an order granting Respondent's Motion for Partial Dismissal, dismissing all claims and causes of action arising before November 24, 2014. Events prior to November 24, 2014 are relevant to this order but any violations of FAPE are outside the statutory period.

<sup>10</sup> [REDACTED] wears his [REDACTED] bag in school and he has three bathroom breaks in his schedule when his aide removes its contents. Stip. Ex. 86. The [REDACTED] bag is worn under his clothes and there was no evidence of it in the videos viewed at the hearing.

20. Petitioner [REDACTED] is heavily involved at [REDACTED]’s school and in the community. She spends multiple days per week volunteering at [REDACTED]’s school, Tr. p. 1065:20-25. She is also a member of several local committees, including Advocates for Inclusive Education, Tr. p. 1222:4-5, and the Wake County Public School System Special Education Advisory Council, Tr. p. 1222:16-22.

21. [REDACTED] is a “child with a disability” as that phrase is defined in IDEA. Stip. 14.

22. [REDACTED] has been determined eligible for services under IDEA, with a primary area of eligibility of [REDACTED] and a secondary area of eligibility of Other Health Impairment. Stip. 15.

### **[REDACTED]’s Strengths**

23. The staff who worked with [REDACTED] during the relevant statutory period have described [REDACTED] as sweet, carefree, happy-go-lucky, energetic, and personable. Tr. 1448:5-7; 1622:1-2; His strengths also include his positive attitude, his memory for sight words, and his love of reading. Tr. 1448:10, 15-16; Stip. Ex. 97, p.626. His areas of greatest need include comprehension, higher order thinking, and generalization. Tr. 1448:17-18; 1622:10-14; 1726:8.

24. On the IEP’s prior to the statutory period, the IEP teams reported [REDACTED]’s strengths as: “[REDACTED] is generally a very happy social child. He loves being around other children and is well-liked by his peers. He is eager to please his teachers and has a great sight word knowledge base.” Stip. Exs. 23, p. 112; 31, p. 161; 37, p. 218; 43, p. 255. “He also enjoys working on reading and math apps on the iPad.” Stip. Ex. 43, p. 255.

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

### **Relevant School Staff and Administration**

26. [REDACTED] first enrolled in the Wake County Public Schools on August 19, [REDACTED] after moving to Wake County from [REDACTED]. Stip. 16.

27. [REDACTED] has attended [REDACTED] (“[REDACTED] [REDACTED]” a WCPSS elementary school, from August 19, [REDACTED] to the present. Stip. 17; *see also*, Stip. Ex. 11.

28. During first grade, [REDACTED]’s regular education teacher was [REDACTED] and his special education was [again] teacher [REDACTED].

29. On November 26, 2011, [REDACTED] was in the second grade at [REDACTED] his regular education teacher was [REDACTED] and his special education teacher was [REDACTED] Stip. 18.

30. From the beginning of the 2011-2012 school year through November 25, 2011, [REDACTED] was in the third grade at [REDACTED] his regular education teacher was [REDACTED] and his special education teacher was [REDACTED] Stip. 19.

31. Tara [REDACTED] has served as [REDACTED]'s assistant since his arrival at [REDACTED] [REDACTED] [primarily for his medical needs with his [REDACTED] bag]. Stip. 20. She also provided support in the classroom.

32. [REDACTED] provides [REDACTED] with speech-language services. Stip. 21.

33. [REDACTED] is the principal of [REDACTED] Stip. 22.

34. [REDACTED] and [REDACTED] are Senior Administrators in WCPSS' Special Education Services. Stip. 23.

35. [REDACTED] is the WCPSS school psychologist who conducted both the 2013 and the 2015 psychoeducational evaluations of [REDACTED] Stip. 24.

36. [REDACTED] is a year-round school and [REDACTED] has consistently attended as a Track 4 student. Stip. 25.

### **[REDACTED] IEP Kindergarten**

37. In [REDACTED] as a kindergartner, [REDACTED] received special education services within the general education classroom and was fully included with his nondisabled peers. Stip. 14, 15; Stip. Ex. 4, p. 37. All academics were provided in the regular education classroom and, according to [REDACTED] made progress in every academic area, including reading and math while in this placement. Tr. 590:10-12; 592:5-593:18 Stip. 30; Stip. Ex. 4.

38. [REDACTED] received special education services in [REDACTED] and had a current IEP dated April 12, 2013 ["2013 [REDACTED] IEP"] when he arrived in Wake County. Stip. 29.

### **2013-2014 SCHOOL YEAR [REDACTED] GRADE**

39. The service delivery in [REDACTED]'s April 12, 2013 IEP ["2013 [REDACTED] IEP"] for the academic year was:

Type of Service	Sessions Per	Time Per Session	Hours Per Week	Location of Services
Academics	5 per week	5.6 hr.	28 hrs. and 0 min.	Regular Ed Setting - Inclusion
Specials [PE, Library, Music, Computer]	6 per week	0.5 hr.	3 hrs. and 0 min.	Regular Ed Setting - Inclusion
Speech/Language Therapy	2 per week	30 min.	1 hr. and 0 min.	Special Ed Setting
Occupational Therapy	2 per week	30 min.	1 hr. and 0 min.	Special Ed. Setting
Physical Therapy	1 per week	30 min.	0 hrs. and 30 min.	Special Ed. Setting

Stip. 30, *see also* Stip. Ex. 4.

### Enrollment in Wake County Schools

40. [REDACTED] moved to Wake County, North Carolina in August [REDACTED], and enrolled in the WCPSS on August 19, [REDACTED] Stip. 16.

41. Prior to the move to North Carolina, Petitioner [REDACTED] testified that she sent records to [REDACTED] the admissions person at [REDACTED] [REDACTED] Tr. 595:20-21; all of [REDACTED]'s IEPs, his cumulative file, every assessment, and everything she had ever received from his school that a new school would find appropriate, Tr. 595:3-6.; and a letter and a PowerPoint presentation. Tr. 596:1-21; Stip. Ex. 142.

42. Also prior to enrollment, Petitioner [REDACTED] called and spoke with [REDACTED] a resource teacher at [REDACTED] [REDACTED] to provide her with information. Tr. 597:17-22 (testimony of [REDACTED])

43. [REDACTED] was the only student with [REDACTED] at [REDACTED] [REDACTED] Tr. 708:2-3 (testimony of Petitioner [REDACTED]) None of [REDACTED]'s general education teachers, [REDACTED] [REDACTED] [REDACTED] and [REDACTED] [REDACTED] had ever taught a student with [REDACTED] [REDACTED] Tr. 706: 22-23 (testimony of [REDACTED]) Tr. 1447:23-25 (testimony of [REDACTED]) Tr. 1941:18-24 (testimony of [REDACTED])

### August 30, 2013 IEP Meeting for Comparable Services

44. During [REDACTED]'s initial IEP meeting in WCPSS for comparable services on August 30, 2013, the IEP team reviewed his academic and functional strengths, and reported that he could

read up to 90 percent of Kindergarten sight words; read short, predictable sight word books, write his name independently, is easygoing and thrives on praise, loves using an iPad, and could rote count to 20. Tr. 604:18 to 605:7; Stip. Ex. 11, p. 61.

45. Although he was just starting first grade and WCPSS had not conducted evaluations, Respondent noted that [REDACTED] “is working below grade level.” Tr. 604:25 to 605:1; Stip. Ex. 11, p. 64.

46. An IEP meeting was held on August 30, 2013, [“August 2013 IEP Meeting”] at which [REDACTED]’s IEP team took the following actions and made the following decisions:

- a) officially placed [REDACTED] in special education program;
- b) initiated the initial evaluation process;
- c) obtained consent from [REDACTED] to conduct the agreed upon evaluations [Stip. Ex. 12];
- d) determined that comparable services in Physical Therapy were 2x a month for 30 minutes each session;
- e) determined that comparable services for Occupational Therapy were 8x a reporting period for 30 minutes each session;
- f) determined that comparable services for Speech/Language Therapy was 16x a reporting period for 30 minutes;
- g) rejected the same level of special education services reflected in the TN IEP [Stip. Ex. 4] [in the regular education classroom];
- h) agreed to special education services in a special education setting, 32x a reporting period for 45 minutes each session; and agreed to provide [REDACTED] with Adult Assistance as needed for support [and his medical needs].

Stip. 31 Special Education in Services; *see also*, Stip. Ex. 9, pp. 54-55; Stip. Ex. 10, pp. 58-59. (emphasis added)

47. [REDACTED]’s IEP team did not develop a new IEP at the August 30, 2013 IEP meeting. Stip. 32.

48. Both [REDACTED] and [REDACTED] attended the August 30, 2013 IEP meeting and received a copy of the Prior Written Notice and the Minutes. Stip. 33; Stip. Exs. 9 & 10.

#### *First Official Change in Least Restrictive Environment (“LRE”)*

49. Respondent changed [REDACTED]’s service delivery without changing goals, without developing a new IEP, and without conducting evaluations. Stips. 30, 31 and 32; Stip. Ex. 9. The team rejected the level of special education services reflected in the [REDACTED] IEP as provided in the general education classroom, instead agreeing to special education, in a special education setting, of 32 times a reporting period for 45 minutes per session. Stip. 31.

50. Although the Respondent said it was relying on classroom performance to make the decision to change [REDACTED]'s service delivery, no data was provided to show what his performance actually was. Tr. 178:17.

51. Over the objection of [REDACTED]'s parents, Respondent then provided "pull-out" special education services to [REDACTED] to work on his IEP goals. Tr. 179:2-4; Stip. Ex. 9; Tr. 177:19-25; Tr. 602:4-6; Stip. Ex. 9, 54.

52. This was a substantive violation because the Respondent changed service delivery and related services without conducting evaluations first. However, this violation is outside the statutory period.

### **2013 PSYCHOLOGICAL EVALUATION**

53. Among the stipulated exhibits entered into evidence are numerous evaluations of [REDACTED] including a psychological evaluation, a speech language evaluation, an occupational therapy evaluation, and an assistive technology evaluation from 2013; and a psychological evaluation, a speech language evaluation, a functional listening assessment, and a motor screening from 2015. Stip. Exs. 16, 18, 20, 21, 73, 74, 76, 77.

#### *Psychoeducational Evaluations and Impact of Undiagnosed Hearing Impairment*

54. Two psychological evaluations were conducted by the WCPSS, the first in 2013 when [REDACTED] arrived from [REDACTED] (September/October 2013) and the second as part of a reevaluation at the end of his [REDACTED] grade year (June 2015). Stip. Exs. 16, 76. [REDACTED] academic scores especially in math dropped dramatically in the reevaluation. Petitioner's expert witnesses disagreed with the WCPSS school psychologist as to the reason for the significant decline in [REDACTED]'s achievement scores from September 2013 to June 2015.

55. School psychologist [REDACTED] conducted both evaluations. Ms. [REDACTED] has worked as a school psychologist for approximately seventeen (17) years, including fifteen (15) in the Wake County Public Schools. Tr. p. 1614:25-1615:2, 1616:17-21.

#### *History of Undiagnosed Severe/Profound Hearing Loss in Right Ear*

56. At time of his 2013 psycho-educational evaluation, Ms. [REDACTED] was unaware of [REDACTED]'s profound hearing impairment. She and all the other evaluators relied on an inaccurate audiological screening. The initial audiological screening conducted on September 23, 2013 stated that [REDACTED] had "normal hearing at this time in the right ear" and was "cleared for testing. Stip. Ex. 15, pp. 74-75. This was a mistake. [REDACTED]'s right internal auditory canal was malformed from birth and he was profoundly deaf in his right ear, the one which had been cleared for testing. Stip. Ex. 90, p. 587; Stip. Ex. 48.

57. This mistake was discovered one year later after his completion of the first grade during an audiological evaluation requested by the parents. Stip. Ex. 140, p. 2389. On the

09/30/2014 “evaluation, he demonstrated **normal hearing in Left ear and had Severe/Profound hearing loss in the Right ear.**” Stip. Ex. 140, p. 2389 (emphasis in original).

58. According to WCPSS Lead [REDACTED], “the [09/30/2014] evaluation was the result of a parent request for an auditory processing evaluation” not a DEC 7 or routine hearing monitoring. Stip. Ex. 140, p. 2386. Ms. [REDACTED] admitted that the WCPSS audiologist’s actions were incorrect and that she should have “recommended a full audiological” evaluation. Stip. Ex. 140, p. 2386, *see generally* pp. 2385-2390. On the audiology screening form, the audiologist did not check the section which referred the parent to the WCPSS’ “testing center for a comprehensive (free) hearing evaluation...”. Stip. Ex. 15, p. 74. Stip. Ex. 15, p. 75.

59. All IEPs prior to October 20, 2014 failed to note this severe/profound hearing loss. *See* Stip. Exs. 4, 23, 37, & 43.

60. “Luckily,” according to [REDACTED] in her March 27, 2015 email, the parent “does not appear to be aware of this conflict in information.” Stip. Ex. 140, p. 2389. Ms. Lafeve was concerned that [REDACTED] had missed “large amounts of instruction during this period as a result of his hearing loss because teachers did not know to accommodate for it.” Stip. Ex. 140, p.2390. In the email, Ms. [REDACTED] reassured [REDACTED] that there is “no audiological data” documenting the educational impact of this mistake. Stip. Ex. 140, pp. 2385-2388.

61. [REDACTED] testified that they were not aware of this conflict in information about the WCPSS audiological screening or the concern regarding potential loss of instruction until they received the district’s emails as part of the discovery process in this contested case. Tr. 860:21-861:2.

62. School personnel were aware. [REDACTED] reported that: “Linda [REDACTED], and [REDACTED] [Senior Administrators for WCPSS] and I are continuing to review all data and information available to provide continued support to the school as they move forward with determining appropriate programming and services for [REDACTED] Stip. Ex. 140, p. 2389.

63. The IEP team reconvened on October 20, 2014 and noted for the first time [REDACTED]’s hearing loss.

64. The parents’ ability to meaningfully participate in IEP discussions about the educational impact of this audiological screening mistake was negated because they were not informed of the concern regarding potential loss of instruction until they received the district’s emails as part of the discovery process in this case. Tr. 860:21861:2.

65. Of most concern to the Undersigned is that, although WCPSS coordinating EC teacher raised this issue among WCPSS staff including Senior Administrators, this potential loss of instruction because of the diagnosis delay was not discussed at any subsequent IEP meetings nor were the parents’ privy to “all the data and information” purportedly reviewed by WCPSS staff. *See* Stip. Exs. 52, 56, 63, 71, 95, 194 (IEPs’ minutes).

66. At the last IEP meeting on November 13, 2015, [REDACTED] provided her list of concerns which noted “no mention is made of the inaccurate audiology screening” or the deprivation in

educational benefits. Stip. Ex. 105, p. 806. The Undersigned finds that the potential loss of instruction due to this misdiagnosed hearing impairment, although prior to the relevant time periods, does impact the validity of the subsequent educational decisions and evaluations.

### 2013 Psychoeducational Assessment

67. Ms. ██████ admitted that she was aware that ██████ failed his newborn hearing screening prior to the 2013 testing. Tr. 1679:9-12. Nevertheless, other than closer seating, Ms. ██████ did not alter or modify ██████'s testing to accommodate or account for his hearing loss. Tr. 1692:3-21.

68. Respondent presented no evidence that the impact of ██████'s hearing impairment was considered when choosing testing instruments for either the 2013 or 2015 evaluation.

69. ██████ was given the Differential Ability Scales (“DAS”) – Early Years Upper Battery to assess cognitive functioning. Ms. ██████ selected this assessment because it is a test instrument that is cited as appropriate for students with mild intellectual disabilities and included students with mild and moderate intellectual disabilities in the norming sample. Tr. 1625:20-1626:7.

70. Although Ms. ██████ testified that students with mild intellectual disabilities were included in the 79 students within the norming sample for the DAS, she did not know whether the norming sample included students with profound hearing loss, significant speech-language impairments, or ██████. Tr. 1682:22-1683:14.

71. On the DAS, ██████'s verbal reasoning ability standard score (“SS”) was 77; his nonverbal reasoning score was 67; and his overall General Conceptual Ability (“GCA”) score was a 61. Stip. Ex. 16, p. 79.

72. Ms. ██████ did admit that nonverbal IQ tests were appropriate for students with hearing loss. Tr. p. 1681:1-7.

73. Although she did not note this on her 2013 Evaluation, Ms. ██████ testified that the 2013 achievement scores were probably inflated because of the limited item set. Tr. pp. 1630:17-1631:5.

74. A review of her “Summary and Recommendations” section in the 2013 evaluation reveals the inconsistency of this testimony. In this section, Ms. ██████ writes [a]cademic skills were better developed, falling in the average range for reading skills and below average range for math and writing skills. This *academic profile is consistent* with strengths and weaknesses evidenced in the classroom setting.” Stip. Ex. 16, p. 83 (emphasis added).

75. Although Ms. ██████ agreed that non-verbal IQ tests are appropriate for students with hearing loss (Tr. 1681:17-20), and that ██████ performed better on his psychological evaluation in 2013 on matrices and subtests that evaluated his nonverbal reasoning through his perception and application of relationships among abstract figures (Tr. 1684:14-22), she did not use a nonverbal assessment, even in the alternative, for ██████ in 2015.

76. In 2013, Ms. ██████ noticed that ██████'s test results could have been impacted by his fine and gross motor skills deficits, yet she failed to communicate these concerns to the IEP team because ██████ was not receiving Occupational Therapy services at that time and it was her belief that those concerns would be addressed by the professional who assessed occupational therapy. Tr. pp. 1686:4-1687:13.

77. The Undersigned is very concerned that neither the IEP team nor Ms. ██████ revisited this anomaly or the appropriateness of the cognitive testing once ██████'s hearing impairment was finally diagnosed. Moreover, the Senior WCPSS Administrators were sufficiently concerned about the impact of educational loss to raise the issue with the Lead Audiologist.

78. Although this was significant violation of FAPE to not conduct a full audiological assessment, it was before the applicable period. It does, however, cast doubt on the appropriateness of all subsequent decisions at the November 2014 IEP meeting and thereafter.

79. For this reason and because of the 2013-2015 Kaufman scores discussed *infra*, ██████'s cognitive testing is viewed with skepticism.

80. Ms. ██████ also conducted the Kaufman Test of Educational Achievement ("KTEA-II") Second Edition, which she testified was appropriate in part again because the normative sample included students with mild and moderate intellectual disabilities. Tr. p. 1628:220.

81. Ms. ██████ did not testify whether the KTEA-II included students with profound hearing loss, significant speech language impairments, or ██████ in the norming sample.

82. On the 2013 evaluation, Ms. ██████ noted that "[d]espite short attention, span, impulsivity and developmental difficulties, [██████] appeared to put forth good effort on task, therefore, the results of this evaluation are deemed to be a fairly accurate and reliance estimate of his current level of functioning at this age." Stip. Ex. 16, p. 78.

83. ██████ scored in the average range in reading composite (SS 92) and decoding composite (SS 93). Stip. Ex. 16, p. 81. An average standard score is 85-115. Stip. Ex. 16, p. 80.

84. He also scored in the average range in the subcategories of letter and word recognition (SS 102), reading comprehension (SS 85), math computation (SS 87), written expression (SS 87), phonological awareness (SS 86), and nonsense word decoding (SS 87). Stip. Ex. 16, p. 81.

85. █████ scored below average in the subcategories of math concepts and applications (SS 74), spelling (SS 81) and composites of math (SS 78), written expression (SS 83), and sound-symbol (SS 84)<sup>11</sup>.

86. Both Ms. █████ █████'s first grade teacher, and █████ completed the Vineland -II rating scales. Stip. Ex. 16, p. 82. Ms. █████'s scores were significantly lower than █████'s in all skill areas. Stip. Ex. 16, p. 82 (compare Teacher Rating to Parent Rating). █████'s academic achievement in all areas were significantly higher than his adaptive functioning rating by both his teacher and parent. Stip. Ex. 16, p. 81, 82. In his adaptive functioning composite, █████ showed consistent strength in his written communication skills and interpersonal relationships but overall a low adaptive rating especially in motor skills. Stip. Ex. 16, pp. 81-82.

87. In summary, █████ scored in the average range in 2 of 5 global categories (reading composite and decoding composite) and in 6 of 8 sub categories (letter and word recognition, reading comprehension, math computations, written expression, phonological awareness, and nonsense word decoding). He attained a very high score in letter and work recognition, and an average score overall in reading comprehension. Stip. Ex. 16, p. 81; Tr. 180:12-181-1.

88. Based on this evaluation, █████'s academic skills significantly exceeded his cognitive ability. Tr. 1688:3-6; Stip. Ex. 16.

89. Ms. █████ failed to comment in her report or her testimony why █████'s achievement standard scores ranged between 13 to 41 points higher than his General Conceptual Ability. *Compare* Stip. Ex. 16, p. 81 to p. 79.

90. Any discussions regarding this anomaly are not reflected in the November 7, 2013 IEP minutes or thereafter. Stip. Ex. 25.

91. Within one year, █████'s academic achievement scores fell from -4 to -39 points, most significantly in math. *Compare* Stip. Ex. 16 (9/26/13) to Stip. Ex. 48 (9/30/14).

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<sup>11</sup> The below average standard score of 84 for sound-symbol composite appears inaccurate because the subcategories of phonological awareness (SS 86) and nonsense work decoding (SS 87) are average.

## **Audiology Evaluation September 2014**

92. In December 2013, [REDACTED]'s private developmental therapist, [REDACTED], observed him at school and recommended that [REDACTED] be assessed for auditory processing delay. Tr. 835:1-3. In September 2014, [REDACTED] informed [REDACTED] the school speech language pathologist and his special education teacher, that she had concerns about a possible central auditory delay. Tr. 835:4-7. A comprehensive assessment conducted on September 30, 2014 revealed that [REDACTED] was severely/profoundly deaf in his right ear, a fact the district had failed to determine in September 2013 because the audiologist had switched the headphones during the screening. Stip. 49; Stip. Ex. 48.

## **November 7, 2013 IEP Meeting**

93. [At the November 7, 2013 IEP meeting,] [REDACTED]'s eligibility was changed to Intellectual Disability as a primary area, and Other Health Impaired as a secondary area. Stip. 34.

94. The Prior Written Notice from that meeting reflects the following decisions:

- a. changed [REDACTED]'s area of eligibility from Developmentally Delayed to Intellectual Disability as primary with Other Health Impaired as secondary;
- b. developed a new IEP;
- c. determined an iPad was not required but could be accessed as a strategy;
- d. agreed to provide a special chair through the physical therapy department for use in the classroom and during speech/language therapy;
- e. added additional occupational therapy goals requested by Petitioners;
- f. after proposing an increase in special education services in a special education setting for two hours, when Petitioners expressed disagreement with this amount, the IEP team agreed to provide special education services, 36x a reporting period for 60 minutes each session;
- g. and the team agreed to provide Petitioners with daily correspondence regarding [REDACTED]'s day and skills he may be working on.

Stip. 34; *see also*, Stip. Exs. 23, 24, & 25. (emphasis added)

95. Both [REDACTED] and [REDACTED] attended the November 7, 2013 IEP meeting and received a copy of the Prior Written Notice and the Minutes. Stip. 36; Stip. Ex. 25.

96. During the November 7, 2013 IEP meeting, the IEP team increased time in a separate special education setting again over the parent objections. *See* Stip. Ex. 34. Initially, Respondent proposed an increase to two (2) hours per session but when the parents objected,

Respondent instead increased the number of sessions from 32 to 36 per reporting period<sup>12</sup>, and increased the length of session times from 45 minutes to 60 minutes. Stip. 34; Stip. Ex. 23, p. 126.

97. Petitioner █████ inquired about an inclusion specialist. Stip. Ex. 25, p. 136; Tr. 714:2-4. The minutes to this meeting reflect that when █████ inquired about an inclusion specialist, █████'s special education teacher “explained to mom that Wake County does not have an inclusion specialist.” Stip. 34; *see also*, Stip. Ex. 25.

98. Also, reflected in the minutes is that █████ the assistant vice-principal, explained to the parents that “it was at the discretion of the school to say whether inclusion can or cannot be provided.” Stip. Ex. 25, p. 137; Tr. 713:11-13.

99. An IEP team is required to justify the reason for any removal from nondisabled peers by explaining “why the services cannot be delivered with nondisabled peers with the use of supplemental aids and services.” Stip. Ex. 23, p. 128. Respondent included the following statement as a justification for removing █████ from his nondisabled peers: “█████ is working below grade level in all academic areas and requires direct instruction in a small group setting to meet his academic needs.” *Id.*

100. According to Dr. █████ this justification does not address why services cannot be delivered with nondisabled peers with the use of supplementary aids and services, nor is the justification an appropriate reason to remove █████ from his nondisabled peers. Tr. 184:9-16. Dr. █████ described how special education is a service under IDEA, special education is not a place, that IEP goals can be implemented in any location, and that the goals as written in the November 8, 2013 IEP could have been implemented in the general education classroom using systematic instruction and embedded instruction strategies. Tr. 182:19-23; Tr. 194:15-18.

101. At that time Petitioner █████ provided the team with an educators’ manual entitled “*Supporting the Student with █████ in Your Classroom*” by the █████ Association of Western Michigan. Tr. 709:20-710:2. The manual contains general information about █████ people first language, strategies and tips for math, language arts, social skills, and fostering peer relationships in the classroom. Tr. 710:308. █████ provide the manual to all of █████ teachers at █████ █████ Tr. 709:23-25.

102. However, no one followed up with █████ to see how the information could be used. Tr. 710:25-711:1 Parents were advised at the November IEP meeting the “push-in services were not an option due to budgets staffing and requirements.” Tr. 719:5-11 (testimony of █████)

103. Although his IEP called for 36 sessions of resource per each 9-week reporting period, █████ received resource services daily which averaged 44 times per reporting period. Tr. 715:25-716:1.

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<sup>12</sup> A reporting period is usually 9 weeks. Tr. 715:6. The average number of days for a “track period” at █████ █████ a year round school, is 44 days. *su* Stip. 27 and Stip. 26.

## December 19, 2013 IEP Meeting

104. A third IEP meeting was held on December 19, 2013 ["December 2013 IEP"] to discuss parent concerns, and that those concerns were: to review accommodations at a future time, to review the amount of time [REDACTED] is removed from the general education classroom, and to review when [REDACTED] is pulled from the classroom. Stip. 37; *see also*, Stip. Exs. 31, 32 & 33; Tr. 718:16-24. Tr. 719:20-720:1.

105. The purpose for the IEP meeting on the Invitation to Conference for the December 19, 2013 IEP meeting was "Discuss parent concerns." Stip. 38; *see also*, Stip. Ex. 30.

106. The purpose of the IEP meeting on December 19, 2013 did not include a review of [REDACTED]'s IEP goals, and [REDACTED]'s goals were in fact not reviewed or modified at this meeting. Stip. 39; *see also*, Stip. Exs. 30, 31, & 32.

107. Although the increase in service delivery time resulted in a different placement for [REDACTED] the new placement was not reflected on his IEP. Stip. Ex. 31, p. 177. The LRE justification statement was the same as the previous IEP even though the time doubled. *Compare* Stip. Ex. 23, p. 128 *with* Stip. Ex. 31, p. 177.

108. In Dr. [REDACTED] opinion, this is not an appropriate reason to double [REDACTED]'s time removed from nondisabled peers as there is research that students working below grade level can participate fully, nor is it appropriate to remove [REDACTED] from his nondisabled peers to increase his rate of progress or provide specialized instruction. Tr. 255:19-256:24; Tr. 256:4-9. Rather, the IEP could be implemented in the general education classroom as it was written. Stip. Ex. 31; Tr. 257:10-19.

109. Dr. [REDACTED] opined that the team opted to remove [REDACTED] from the general education classroom to receive special education services because they were unsure of how to provide academic instruction to [REDACTED] in the general education classroom. Tr. 258:5-9.

110. The team refused to clarify the supplemental aids and supports, and instead agreed for the special education teacher to amend them, and for them to be discussed at a later meeting. Tr. 721:7-10; Stip. Ex. 32, p. 181.

111. During [REDACTED]'s first grade year in [REDACTED] [REDACTED] he was removed every day during math. Stip. Ex. 137, p. 2350-2351; Tr. 261:12-14. As a result, there is no evidence in the schedule that [REDACTED] was receiving instruction on math Common Core Curriculum. Tr. 261:21-24 (testimony of [REDACTED]).

112. Both [REDACTED] and [REDACTED] attended the December 19, 2013 IEP meeting and received a copy of the Prior Written Notice and the Minutes. Stip. 40; Stip. Ex. 32.

113. Although the December 2013 IEP indicated that [REDACTED] would receive specialized instruction in academics 36 times reporting period, once again, he was removed every day of the

reporting period which ranged from 40-51 days. *See* Stip. 27. This removal was inconsistent with his IEP and these removals continued into the 2014-2015 and 2015-2016 school years. Tr. 262:12-21.

### **June 13, 2014 IEP Meeting**

114. A fourth IEP meeting was held, at parent request, on June 13, 2014 [“June 2014 IEP Meeting”] to address parent concerns, including a review of [REDACTED]’s accommodations. Stip. 41; *see also*, Stip. Exs. 36, 38, 39, p. 242; Tr. 265:17-18.

#### *Teacher Collaboration Issue and Change in LRE*

115. At the June 13, 2014 IEP meeting, there was an extensive discussion about collaboration between the general education and the resource teachers with an agreement to meet once a week, and include [REDACTED], [REDACTED]’s aide. This was not documented in the Prior Written Notice for the meeting. *See* Stip. Ex. 38; Tr. 773:18-774:4.

116. Even though [REDACTED]’s goals were not discussed (Stip. 42), Respondent again raised increasing the time that [REDACTED] was segregated from his non-disabled peers despite that this was not the purpose of the meeting. Stip. Ex. 39, p. 243; Tr. 265:8-11; Stip. Ex. 38, p. 239.

117. At the June 2014 IEP meeting, the LEA representative, Principal [REDACTED] commented about what the difference is between “modifying and changing”, the regular education curriculum and gave the opinion that regular education teachers cannot change what is being taught. Stip. Ex. 39, p. 243. Dr. [REDACTED] testified that Mr. [REDACTED] was not correct, rather, the purpose of an IEP is to individualize instruction including changing what is taught to meet an individual student’s needs. Tr. 266:16-22.

118. [REDACTED] attended the June 13, 2014 IEP meeting and received a copy of the Prior Written Notice and the Minutes. Stip. 43; Stip. Ex. 38.

#### *Progress in First Grade*

119. [REDACTED]’s final report card for the 2013-2014 school year indicates [REDACTED] received a 3 (“Proficient”) in Social Studies, Visual Arts, Music, and Healthful Living, and received a 2 (“Approaching Proficiency”) in the areas of Science, and received a 1 (“Non-Proficient”) in English-Language Arts and Mathematics. It is further stipulated that [REDACTED] received a 3 (“Meets expectations”) in Conduct and received a 2 (“Inconsistently meetings expectations”) in Work Habits. Stip. 44; *see also*, Stip. Ex. 41.

120. Based on [REDACTED]’s educational records, even though he was below grade level, he made “noticeable academic progress.” Stip. Ex. 41, p. 252 (1<sup>st</sup> Grade Report Card regular teacher [REDACTED] comments). The regular education teacher noted that: “[i]t has been amazing to watch [REDACTED]’s progress this school year. He is working hard to make gains in both his academic areas as well as his social areas. Keep up the hard work, [REDACTED]” Stip. Ex. 41, p. 252.

121. He also made consistent progress on almost all his IEP goals. Stip. Ex. 47 (IEP Progress Report).

122. None of the IEPs during his first grade year noted that his behavior was disruptive in the regular education classroom. *See* Stip. Exs. 23, 31, 37.

### 2014-2015 SCHOOL YEAR SECOND GRADE

123. [REDACTED] was assigned to [REDACTED] regular education classroom at the parent's specific request for his second grade year. Tr. 776:21-22. Ms. [REDACTED] classroom had more than twenty (20) students in it during the 2014-2015 school year. Tr. 1439:16-18. Ms. [REDACTED] testified that she provided [REDACTED] with instruction in all core academics along with science and social studies. Tr. 1440:7-11. [REDACTED] also traveled with his non-disabled peers to specials, which included music, physical education, computer lab, media center, and art. Tr. 1441:25-1442:3; 1536:23-1537:7.

124. Ms. [REDACTED] had been a teacher for nine (9) years. She received a Bachelor's degree in Elementary Education and is licensed in elementary education K-6, with a pre-K add-on. She had experience teaching students with disabilities in the regular education classroom. Tr. 1435:24-1437:1. In addition to her training and experience, Ms. [REDACTED] presented as a knowledgeable and dedicated teacher who worked closely with [REDACTED] in the general education classroom and collaborated with the special education teacher Ms. [REDACTED] to the best of her ability. Ms. [REDACTED] was highly credible to the Undersigned and her testimony was afforded proper deference.

125. [REDACTED] [REDACTED] is a year round school and [REDACTED] has consistently attended as a Track 4 student. Stip. 25.

126. Track 4 track-in periods for the 2014-2015 school days contained the following amount of scheduled instructional days:

- a) Reporting Period 1: 44 full school days; 1 early release day
- b) Reporting Period 2: 40 full school days; 2 early release days
- c) Reporting Period 3: 40 full school days; 3 early release days
- d) Reporting Period 4: 51 full school days

Stip. 27.

127. During the 2014-2015 school year, [REDACTED] also received two hours of direct specialized instruction on his IEP goals in a special education resource classroom from [REDACTED]

128. Ms. [REDACTED] has a Bachelor's degree and a Master's degree in Special Education. Tr. 1713:22-1714:6. She has an "add on" certification related to mentally handicapped students. Tr.

1714:7-10.<sup>13</sup> Her licensure is in the categories of learning disabilities and intellectual disabilities. Tr. 1714:13-14. She has been teaching students with mild intellectual disabilities for all twenty years of her teaching career. Tr. 1714:15-18. She has specific experience teaching students with [REDACTED] Tr. 1724:19-20. The Undersigned found Ms. [REDACTED] testimony credible and reflective of her sincere attempts to assist with [REDACTED] inclusion to the best of her ability.

129. [REDACTED] schedule was changed several times during the school year. While he generally received instruction on his IEP goals in the special education setting with Ms. [REDACTED] at times when his non-disabled peers received core academic instruction from Ms. [REDACTED] he continued to receive core academic instruction in the general education classroom as well. *Compare* Pet. Ex. 19 *with* Stip. Ex. 109.

130. According to Ms. [REDACTED] changes were made to the schedule to ensure that [REDACTED] was present in her classroom for core academic instruction at times when he was most likely to be successful accessing that material. Tr. 1479:5-1480:13. These changes also changed the amount of special education service delivery.

#### **August 11, 2014 IEP Meeting**

131. The first IEP meeting of the 2014-2015 school year was held on August 11, 2014, IEP meeting [“August 2014 IEP Meeting”] to discuss parent concerns. Stip. 45; *see also*, Stip. Ex. 42.

132. [REDACTED] attended the August 11, 2014 IEP meeting and received a copy of the Prior Written Notice and the Minutes. Stip. 46; *see also*, Stip. Exs. 44 & 45.

133. The purpose of the IEP meeting on August 11, 2014 did not include a review of [REDACTED] goals, and [REDACTED] goals were not reviewed or modified at this meeting. Stip. 47; *see also*, Stip. Ex. 42-45.

134. The Prior Written Notice from the August 11, 2014 IEP meeting [“August 2014 IEP”] indicates [REDACTED] IEP team made the following decisions:

- a) discussed the parent’s concerns regarding collaboration between the regular education and special education teacher and agreed that collaboration would occur informally and approximately every two weeks;
- b) rejected [REDACTED] request that collaboration between the regular education and special education teachers be added to [REDACTED] IEP; and
- c) updated [REDACTED] present levels of performance to reflect more current assessment information.

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<sup>13</sup> The Undersigned is aware that this term is no longer used in education, but includes it to accurately reflect the actual certification possessed by Ms. [REDACTED]

Stip. 48; *see also*, Stip. Ex. 44. (emphasis added)

*Collaboration Issue Discussed*

135. At the meeting the team discussed collaboration between the regular education and special education teacher, and decided that the collaboration would occur informally approximately every two weeks but would not be added to the IEP. Stip. 48; Stip. Ex. 44. Dr. ██████ testified that without it being in the IEP there was no guarantee collaboration will occur. Tr. 497:8-12. This foreshadowed what happened in the 2015-2016 school year.

136. Although the team agreed to informal collaboration, Dr. ██████ saw no evidence of the informal collaboration purportedly held approximately every two weeks between the regular education and general education teachers, or that they were receiving support from a collaborative teaching relationship. Tr. 269:6-10; Tr. 270:1-3.

137. According to Dr. ██████ the purpose of planned collaboration between the regular education and special education teacher is to identify learning outcomes and learning strategies to support a disabled student in general education instruction so that those who are responsible for instruction know what and how to do it. Tr. 270:4-12 (testimony of ██████)

138. There is quite a bit of research, including research conducted by Dr. ██████ to support the importance and effectiveness of planned collaboration. Tr. 270:13-20. Planned collaboration between the special and regular education teacher is a supplemental aid and service that can be added to the IEP. Tr. 270:2125, Tr. 271:1-7.

139. The Undersigned finds that planned collaboration is appropriate for ██████ practicable for his teachers to implement, and that it should be a supplemental aid/service on all his IEPs.

140. The team also discussed data collection at the August 11, 2014 IEP meeting. The minutes noted that Mr. ██████ stated that “data is not written down but can be articulated.” Stip. Ex. 45, p. 278.

141. Dr. ██████ testified that to make timely decisions about the effectiveness of instruction, data needs to be written and graphed. Tr. 272:22-273:1 (testimony of ██████) Without hard data, there’s a risk that teachers will continue ineffective practices as teachers have poor sense of what a student’s progress really is. Tr. 273:1-7.

142. According to Dr. ██████ teachers who take data have much better information to make decisions, and made much more timely decisions for their students. Tr. 273:7-14.

143. Although ██████ testified she took data, she destroyed it at the end of the 2014-2015 school year. Tr. 1796:18-1797:5 (destroyed math goal data); Tr. 1803:8-14 (destroyed data end of school year); Tr. 1811:13-1812:2 (destroyed reading and writing data); Tr. 1798: 14-23 (destroyed data used for present levels).

144. The Undersigned agrees that systematic data collection is important to monitor [REDACTED]'s progress or lack thereof and that this data should be shared with the IEP team and the parents. Ms. [REDACTED] destroyed data, which would have been helpful in determining [REDACTED]'s educational progress, and the appropriateness of his inclusion.

145. Ms. [REDACTED] never analyzed or collected any data on [REDACTED] rate of progress during the 2014-2015 school year. Tr. 1801:5-25.

#### *Goals not Tied to Common Core*

146. At the August 11, 2014 IEP meeting, the parents asked that [REDACTED]'s IEP goals be tied to the Common Core standards. Tr. 794:10-14; Tr. 801:9-15; Stip. Ex. 45, 278.

147. According to his IEPs, [REDACTED] was being educated on the general education curriculum, and the curriculum was derived from the Common Core standards. Tr. 802:17-803:2.

148. [REDACTED] paid for and provided the team with a goal database that tied IEP goals to the Common Core standards. Tr. 795:13-15. There is research supporting the benefits of tying IEP goals to grade level standards, and it would have been both practicable and appropriate for [REDACTED]'s IEP Team to tie his goals to grade level content. Tr. 274:4-11; Tr. 274:20-23 (testimony of [REDACTED]).

149. At the meeting, [REDACTED]'s IEP team refused to change his goals at this meeting, as they felt that since he was below grade level, his goals were remedial and should not be tied to the second grade level content. Stip. 47; Tr. 795:16-20. All of [REDACTED]'s IEP's indicated he was on Common Core Curriculum during the statutory period.

150. Even though Petitioners and their expert contend that the IEP goals must be tied to the Common Core, Petitioners have cited no statutory requirement and the Undersigned has found no statutory or regulatory requirement that the IEP goals must be tied to grade level standards.

151. The IEP requires that the Present Levels of Academic and Functional Performance ("Present Levels") describe how the student's disabilities *affects his involvement in the general curriculum*. Special education is specially designed instruction to meet the unique needs of [REDACTED] 20 U.S.C. § 1401 (29). IEP goals are to ensure [REDACTED] access to the general education curriculum.

#### *September 30, 2014 Severe/Profound Hearing Loss Discovered in Right Ear*

152. An audiological screening was conducted by a WCPSS audiologist [at parent request] on September 30, 2014 that indicated [REDACTED] had normal hearing in his left ear, profound hearing loss in his right ear, that he was cleared for school-based testing, recommended preferential seating, and referred [REDACTED] for an ENT examination. Stip. 49; *see also*, Stip. Ex. 48 (emphasis added) and Evaluation Section *supra*.

## October 20, 2014 IEP Meeting<sup>14</sup>

153. The second IEP meeting for the 2014-2015 school year was held on October 20, 2014, and it was the annual review meeting for ██████'s IEP. Stip. 50.

154. At the October 20, 2014 IEP meeting, the IEP Team updated the parent's vision for ██████'s future, his present levels of performance, and reviewed and finalized the draft goals to develop a new IEP. *See* Stip. 56. Both ██████ and ██████ attended the October 20, 2014 annual review IEP meeting ["October 2014 IEP Meeting"] and received a copy of the Prior Written Notice and the Minutes. Stip. 51; *also*, Stip. Exs. 51 and 52.

155. On the October 20, 2014 IEP ["October 2014 IEP"], the team marked "Yes" in response to the question, "Is ██████ deaf or hard of hearing." Stip. 52; *see also*, Stip. Ex. 50, p. 291.

156. At the October 20, 2014 Annual Review IEP meeting, no team member proposed, and the team did not complete, a Communication Plan Worksheet for a Student Who is Deaf or Hard of Hearing. Stip. 53; *see also*, Stip. Ex. 51.

157. At the October 20, 2014 Annual Review IEP meeting, no team member proposed, and the team did not discuss the possible inclusion of a Support Description for Audiology Services. Stip. 54; *see also*, Stip. Ex. 51.

158. The Undersigned also finds after reviewing the applicable IEP documents and materials that at this meeting no one from WCPSS discussed with the parents the potential gaps in ██████'s education because of the undiagnosed hearing loss.

159. A speech therapist did not attend ██████'s October 20, 2014 IEP meeting. Stip. 55; *see also*, Stip. Exs. 50, 51, & 52.

160. The failure to complete these documents were not within the statutory purview, but there were procedural violations. Respondent's failure to address the undiagnosed hearing loss and potential impact on ██████'s education, however, persisted throughout the statutory period.

### *Special Education be Provided During Specials*

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<sup>14</sup> While the October, 2014 IEP was active during the relevant statutory period, the substantive decisions, procedural issues or violations at the October, 2014 IEP meeting are referenced for historic information only.

161. The parents again expressed their concerns about the amount of time ██████ was being pulled out of general education and wanted to ensure he had appropriate instruction in general education to the maximum extent possible. Stip. Ex. 50. The parents wanted special education to supplement, not replace general education. Stip. Ex. 50, p. 290. Dr. ██████ agreed that special education should not replace general education. Tr. 329:16-25; Tr. 330:1-2.

162. At the annual review meeting for ██████'s IEP on October 20, 2014, the team made the following decisions and took the following actions:

- a. developed a new IEP;
- b. updated student's strengths and parent's vision for the future;
- c. reviewed the results of the WCPSS audiological evaluation;
- d. updated his present levels of performance;
- e. reviewed and finalized the draft goals;
- f. reviewed and modified classroom and testing accommodations;
- g. responded to ██████'s request for modifications to the CASE 21 assessment;
- h. rejected the parent's request for adult assistance during book club;
- i. maintained the same level of service delivery for ██████'s special education services;
- j. decreased the amount of Occupational Therapy sessions from 8x a reporting period for 30 minutes, to 6x a reporting period for 30 minutes;
- k. maintained Speech/Language Therapy sessions in a special education setting at 24x per reporting period for 15 minutes;
- l. added Speech/Language Therapy session in the regular education environment at 7x per reporting period for 15 minutes;
- m. decreased the amount of Physical Therapy Sessions on the Support Description from 2x per reporting period to 1x a reporting period; and
- n. rejected the parent's request that special education services in the special education setting be scheduled at times when ██████ would otherwise be in specials and recess and not when he is scheduled for core academics.

Stip. 56; *see also*, Stip. Ex. 50-52. (emphasis added)

163. The team rejected several parent requests that special education services be scheduled at times when ██████ would otherwise be in specials and recess and not when he is scheduled for core academics. Stip. 56; Stip. Ex. 51. Tr. 805:5-10.

164. Contrary to the parent's request that ██████ receive more access to the general education classroom, the IEP team maintained the same level of service delivery for ██████'s academic special education services at 36 sessions per reporting period for a total of 2 hours. Stip. 56, Stip. Ex. 50 & 51.

165. In [REDACTED]'s October 2014 IEP, the justification statement<sup>15</sup> for removing him from his non-disabled peers states that:

166. [REDACTED] is working below grade level in all academic areas and requires direct, intense, and explicit instruction if a small group setting at his instrucitonal [sic] level. He works at a slower pace than his peers and requires teacher prompting and assistance in order to make progress. A small group setting is also needed to minimize distratcitons [sic].

Stip. Ex. 50, p. 305. (emphasis added)

167. Neither the need for direct, intense and explicit instruction in a small group setting, or working a slower pace explains why [REDACTED]'s services cannot be delivered with nondisabled peers with the use of supplemental aids and services as it is possible to use embedded instruction in which direct, systematic instruction is taught in the ongoing context and routines of the general education classroom, according to Dr. [REDACTED] Tr. 365:10-366:1 (testimony of [REDACTED])

168. The only recommendation for [REDACTED]'s hearing loss in his right ear was preferential seating. Tr. 836:1; Stip. Ex. 55, p. 330. The Petitioners showed videos of [REDACTED] in the regular education classroom. In one video, the Undersigned observed [REDACTED] sitting perpendicular, 3-4 feet from the front wall of the regular education classroom with his good ear facing the wall and deaf ear facing the teacher and his peers.

169. During instruction from the general education teacher, [REDACTED]'s aid spoke in his left [hearing] ear preventing him from hearing the teacher. Stip. Ex. 143, 01:36:46-01:42:52; Tr. 487:7-15. His right ear faces the teacher if she is in the middle of the classroom. As a result, his seating needs to change based on the activity and where the teacher is and so that she can point to something or present a visual. Tr. 493:15-23. His seating with his deaf ear to his peers is a concern if he is engaged in a discussion with them as he would not be able to hear as well. Tr. 494:1-6.

170. During the hearing the Undersigned inquired whether or not the video shows [REDACTED]'s preferential seating. Counsel for Respondent admitted, "I don't know that you can tell where he is sitting on the video." Tr. 489:20-23.

171. Additionally, prior to the IEP meeting on October 20, 2014, [REDACTED] was sitting on the right side of the classroom where his right ear, his deaf ear, faced the teacher. Tr. 1523:22-25.

172. From Dr. [REDACTED] observation of the videos, [REDACTED] wanted to interact with his peers and they wanted to interact with him but the instruction in the general education classroom was not set up for that. Stip. Ex. 144, 57:58-59:55; Tr. 478:19-21; Tr. 484:8-14.

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<sup>15</sup> This is the same exact rationale provided in the October 20, 2014 and the December 3, 2014 IEPs *including typographical errors* indicating the statement was just carried over from IEP to IEP with no thought and analysis on the issue. *Compare* Stip. Ex. 50, p. 305, Stip. Ex. 103, p. 788 *with* Stip. Ex. 57, p. 351; Tr. 391:8-12.

173. The instruction in the special education classroom was not connected to what was going on in the general education classroom, and did not provide [REDACTED] with the opportunity to learn how to stay focused and attend to his work by working independently. Tr. 480:8-11 & 480:14-22. [REDACTED] could be more independent and successful in the general education classroom if he was pre-taught concepts and vocabulary before a lesson. Tr. 481:7-12 (testimony of [REDACTED]). There was no planning for generalization. Tr. 481:13. The work [REDACTED] did in math seemed easy for him but it could be made more challenging. Tr. 496:3-4; Tr. 496:11-19. There was no instruction that could not be provided in the general education classroom. Tr. 496:11-19.

***Testimonial evidence of informal collaboration and classwork accommodations during the Second-grade 2014-2015 School Year***

*Math Instruction*

174. Based on the provision of supplementary aids/services and modified assignments in [REDACTED]'s IEP for math, [REDACTED] believed [REDACTED] was receiving math instruction in the general education classroom. Tr. 827:18-828:1; Stip. Ex. 57, p. 346-347.

175. [REDACTED] did not receive direct or formal second grade math instruction in the general education setting during the 2014-2015 school year. Tr. 1480:14-19; Tr. 1599:10-14.

176. During [REDACTED]'s second grade year he was removed from the general education classroom for all of math and portions of language arts. Pet. Ex. 19; Stip. Ex. 109; Tr. 280:15-24. As a result, [REDACTED] only received math instruction in the special education classroom. Tr. 281:3-4; Stip. Ex. 141, p. 2437; Tr. 352:19-21; Stip. Ex. 141, p. 2438; Tr. 353:13-19.

177. He did not receive instruction on the math Common Core curriculum. Tr. 352:22-353:3. [REDACTED]'s removal from the general education classroom during instruction in core academic areas to receive special education services was not appropriate, necessary, or helpful for [REDACTED]. Tr. 281:5-10 (testimony of [REDACTED]).

*Change in LRE Math Instruction*

178. [REDACTED] received one hour of specialized instruction outside of the general education setting every day in math after his schedule was changed in the 2014-2015 school year although his IEP required 35 minutes of specialized instruction in math for 36 sessions per quarter. Tr. 1599:16-19; Stip. Ex. 50. There was no IEP meeting held prior to this substantial increase in specialized instruction outside of the general education setting. This was a substantive and procedural violation but outside of the statutory period.

179. The Respondent unilaterally altered [REDACTED]'s service delivery for math instruction in the special education classroom without convening an IEP meeting or advising the parents about this decision.

180. As a result, Petitioners had no meaningful participation in this LRE decision. This pattern of unilateral pull-out from regular education classes and the extension of special education sessions beyond the IEP service delivery continued during the 2015-2016 school year.

181. Ms. ██████ testified that his schedule at the start of the year had allowed him to receive some instruction in math with his non-disabled peers, but his needs in math were so significant that his schedule was altered to maximize his general education time in areas where he was more successful. Tr. 1479:5-1480:13.

182. Ms. ██████ did review with ██████ math prompt sheets and other assignments that she or Ms. ██████ made or homework sheets that had been sent home and returned completed. Tr. 1526:14-1527:9.

### *Implementation of Math Goals*

183. According to the 2014-2015 IEP Progress Reports, four of his seven math goals were not worked on during the 12/19/14 and 3/27/15 reporting periods for the December 2014 IEP. Stip. Ex. 60, pp. 395 & 399; Stip. Ex. 79, pp. 525 & 528. Even though ██████ was unilaterally pulled out of regular education for extra special education in math, all of his math goals were not being implemented.

184. Ms. ██████ provided instruction on ██████'s math goals in the special education resource classroom. She did not work on every goal in every quarter of the school year, but she did work on each goal by the end of the year, with one exception regarding shapes. Stip. Ex. 79; Tr. 1743:22-1744:8. Ms. ██████ indicated that some of the goals required mastery of the previous goal—for example, she did not feel it would be helpful for ██████ to begin learning subtraction until he had mastered addition. Tr. 1742:8-17. In addition, some of the early goals took a very long time to master, which in her judgment required delaying instruction on some of the other goals. Tr. 1743:4-14; Tr. 1745:6-9.

185. While Ms. ██████ did not reach the “shapes” goal by June 2015, the goal was worked on at the start of the 2015-16 school year before the end of the annual IEP timeframe. Stip. Ex. 87, p. 558.

186. One other portion of a goal that Ms. ██████ did not reach during the 2014-15 school year was related to subtraction with regrouping. Because ██████ did not master single-digit subtraction, which by definition does not provide opportunities for regrouping, he was unable to progress to regrouping by the end of the school year. Regrouping was only one aspect of a multi-part goal, the rest of which Ms. ██████ taught ██████. Stip. Ex. 50, p. 294.

187. Ultimately, ██████ mastered 2 of these 4 math goals at the end of the IEP. Ms. ██████'s professional judgment on when and how to work on ██████'s math goals is due deference in light of her experience and expertise. Respondent's failure to timely implement all ██████'s math goals was not a denial of FAPE to ██████ but did negatively affect his performance in the math trial in May 2015.

## December 2, 2014 IEP Meeting

188. A third IEP meeting was held on December 2, 2014 [“December 2014 IEP Meeting”] and the Invitation to Conference indicated the purpose of the meeting was to “[d]iscuss and/or develop, review, and/or revise your child’s IEP.” Stip. 57; *see also*, Stip. Ex. 54.

189. At the December 2, 2014 IEP meeting, the team did not review or modify any of the present levels of performance or goals on the IEP. Stip. 58; *see also*, Stip. Exs. 55 & 57.

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

191. Although the meeting was convened to review and revised the IEP, the team did not review or modify any of the present levels of performance or goals on the IEP even though there were four or five math goals that [REDACTED] did not work on at all. Stip. 57; Stip. Ex. 54; Stip. Ex. 60; Tr. 338:4-20. Due to the failure to implement the goals, in Dr. [REDACTED] opinion, the IEP team should have reviewed the math goals to determine the reason why the goals were not implemented. Tr. 339:10-21.

192. In response to the question, “Does [REDACTED] have behavior(s) that impede his/her learning or that of others,” the IEP team indicated “no” on the December 2, 2014, IEP [“December 2014 IEP”]. Stip. 60; *see also*, Stip. Ex. 57, p. 337.

193. In response to the question, “Is [REDACTED] deaf or hard of hearing,” the IEP team indicated “yes” on the December 2, 2014 IEP. Stip. 61; *see also*, Stip. Ex. 57, p. 337.

194. At the December 2, 2014 IEP meeting, no team member proposed, and the team did not complete, a Communication Plan Worksheet for a Student Who is Deaf or Hard of Hearing. Stip. 62; *see also*, Stip. Exs. 55 & 57.

195. At the December 2, 2014 IEP Meeting no WCPSS proposed or discussed the gaps in [REDACTED]’s educational services because of the undiagnosed hearing loss.

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

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

Stip. 63; *see also*, Stip. Ex. 55. (emphasis added)

197. At the December 2, 2014 IEP meeting, no team member proposed, and the team did not discuss, assistive technology devices or services. Stip. 64; Stip. Exs. 55-57.

198. The academic supplemental aids, supports, modifications, and/or accommodations in the December 2, 2014, IEP were neither reviewed nor modified. Stip. 65; Stip. Exs. 55-57.

199. At the December 2, 2014, IEP meeting, no team member proposed, and the team did not discuss, the addition of an audiology related services support description. Stip. 66; Stip. Exs. 55-57.

200. Neither an occupational therapist nor a physical therapist attended [REDACTED]'s December 2, 2014, IEP meeting. Stip. 67; Stip. Exs. 54-57.

201. The service delivery in [REDACTED]'s December 2, 2014 IEP was:

<b>Type of Service</b>	<b>Sessions Per</b>	<b>Time Per Session</b>	<b>Location of Services</b>
Math	36 per reporting period	35 min.	Special Ed. Setting
Reading	36 per reporting period	45 min.	Special Ed. Setting
Writing	36 per reporting period	40 min.	Special Ed. Setting
Speech/Language Therapy	24 per reporting period	15 min.	Special Ed. Setting
Speech/Language Therapy	7 per reporting period	15 min	Regular Ed. Setting
Occupational Therapy	6 per reporting period	30 min.	Special Ed. Setting
Physical Therapy	1 per reporting period	Unidentified amount of time	Regular Ed. Setting

*Parents Request Special Education Be Provided During Specials*

202. Petitioners requested that █████ remain in his core academic classes (math, language arts), receive pull-out special education instruction during “specials” such as physical education, music, and art. Stip. Ex. 56.

203. The request was denied as the school based members of the team indicated that █████ had behaviors indicative of frustration from long periods of instruction that impeded his learning that justified his removal from his nondisabled peers. Stip. Ex. 55, p. 330; Tr. 357:20-358:8. His teacher did not provide any data on frustration, or even describe █████’s frustration. Tr. 823:25-824:6. It was not the parents’ expectation that █████ have long periods of instruction, and he had an accommodation in his IEP for movement activities. Tr. 825:4-5; Tr. 825:15-826:17; Stip. Ex. 57, p. 345-348. No changes were made to the IEP to address frustration, nor did the team agree to take any data or evaluate the issue in any way. Tr. 830:8-14.

204. According to Dr. █████ frustration was not an appropriate reason to reject the parents’ proposal to provide special education at times when he would not miss core academics in the general education classroom as there are steps the IEP team should take to address his needs without removal. Tr. 358:9-24. Specifically, the team should have revised █████’s goals to address the frustration observed by the school team. Tr. 363:2-24.

205. The Undersigned finds that █████’s frustration was not seen in the videos and there was no documentation in the educational records or in testimony that his behavior disrupted the regular education class or that could not have been addressed by modifying the regular curriculum to his ability level. Petitioners’ request to pull █████ out of nonacademic courses instead of Common Core curriculum was a sensible solution and would also be appropriate for compensatory education.

**March 24, 2015 IEP Meeting**

206. A fourth IEP meeting was held on March 24, 2015 [“March 2015 IEP Meeting”], and the Invitation to Conference indicates the purpose of the meeting was “Discuss special education for initial review and/or reevaluation determination.” The team did in fact agree to conduct an evaluation to determine present level of academic achievement and developmental needs, and whether any addition or modifications to special education and/or related services are needed to meet measurable annual goals and participation in the general curriculum. *See* Stip. 69; *see also*, Stip. Exs. 61- 64.

207. █████ attended the March 24, 2015 IEP meeting [“March 2015 IEP”] and received a copy of the Prior Written Notice and the Minutes. Stip. 70; Stip. Exs. 62 & 63.

208. At the March 24, 2015 IEP meeting, the team agreed to the following components for the evaluation:

- a) Informal anecdotal observations of speaker FM system;
- b) Data collection on math trial in general education;
- c) Formal assessments in the following areas: adaptive behavior; audiological; educational; motor screening; otological evaluation; psychological; social developmental history; speech/language evaluation; functional listening assessment; and HI test.

Stip. 71; *see also*, Stip. Ex. 64, p.415.

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

#### *Unilateral Removal from Regular Math Class*

210. During ██████'s second grade year he was removed from the general education classroom for all of math and portions of language arts. Pet. Ex. 19; Stip. Ex. 109; Tr. 280:15-24. As a result, ██████ only received math instruction in the special education classroom. Tr. 281:3-4; Stip. Ex. 141, p. 2437; Tr. 352:19-21; Stip. Ex. 141, p. 2438; Tr. 353:13-19. He did not receive instruction in the math Common Core curriculum. Tr. 352:22-353:3.

211. ██████ was completely removed from general education math instruction when Ms. ██████ raised concerns that ██████ was returning to math instruction during the independent study portion of the class without the benefit of the general education instruction. Tr. 1478:18-22. This decision was not consistent with his IEPs' service delivery nor made during any IEP meeting during the 2014-2015 school year. Stip. Exs 43, 44, 50, 51, 55, 57, 70, 71 (math instruction setting in both special and general education).

212. ██████'s removal from the general education classroom during instruction in core academic areas to receive special education services was not appropriate, necessary, or helpful for ██████. Tr. 281:5-10 (testimony of ██████).

213. Ms. ██████ testified that ██████ received one hour of specialized instruction outside of the general education setting every day in math after his schedule was changed in the 2014-2015 school year although his IEP required 35 minutes of specialized instruction in math for 36 sessions per quarter. Tr. 1599: 16-19; Stip. Ex. 50.

214. There was no IEP meeting held prior to this substantial increase in specialized instruction outside of the general education setting. This is an additional 25 minutes for each class. For an average reporting period of 44 days. *See* Stip. 27.

215. This change of service delivery for ██████ was inappropriate as it also denied his parents the right to parental participation especially in light to their repeated requests to have ██████'s time in the general education classroom increased. Tr. 283:2-16.

216. ██████ did not receive significant portions of second grade math instruction in the general education setting during the 2014-2015 school year, because of this unauthorized pull-out. Tr. 1480:14-19; Tr. 1599:10-14.

217. Both the October 20, 2014 and the facilitated November 14, 2015 IEPs contain the same exact justification for removal of ██████ from the general education classroom including typos. Tr. 474:23-475:1; *Compare* Stip. Ex. 50, p. 305 *with* Stip. Ex. 103 p. 788.

218. Dr. ██████ testified that if the school wanted to increase ██████'s time in special education that the rationale would be because he's making more progress in the special education classroom, and that even with appropriated research-based supports in place in the general education classroom, he is not making progress. Tr. 475:18-23.

219. Respondent provided no cogent and responsive evidence that he was *actually making* more progress in the special education classroom only that they *thought he would*.

220. Principal ██████ undermined the inclusion of ██████ in regular education by his rejection of a formal collaboration plan between Ms. ██████ and Ms. ██████ and said "it is not a specific day and time but that it is done. Data is not written down but can be articulated." Stip. Ex. 45, p. 278.

221. Principal ██████ "explained that to the parents that the elementary school schedule is very tight and trying to find that perfect time to pull him out so that he will not be missing his general education classes is very difficult." Stip. Ex. 33, pp. 184-185. He also stated at a later meeting that "regular education cannot change what is being taught." Stip. Ex. 37, p. 39.

222. Principal ██████'s opinion was noted that ██████ "really needs increased time/services in special education" and that the "staff believe he could be served by increasing his special education services, especially in the special education setting." Stip. Ex. 141, p. 2440; p. 2436. The best placement for ██████ was ID-Mild in Principal ██████'s opinion. Stip. Ex. 141, p. 2436.

223. ██████ did not have an ID-Mild classroom and prior to the hearing, WCPSS sought to move ██████ to another school with an ID-Mild classroom. *See* Order dated August 5, 2016 and Pet's Motion to Compel Stay-Put dated July 20, 2016.

### *Math Trial*

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

225. As part of the mainstreaming math trial, █████ would receive thirty (30) minutes of math instruction in the general education classroom followed by fifteen (15) minutes of review of the general education math instruction in the special education classroom. Stip. 72; *see also*, Stip. Ex. 63.

226. The team also agreed to conduct data collection on a “math trial” in the general education classroom. Stip. Ex. 64, p. 415.

227. When Respondent conducted a general education math trial in May 2015, although Ms. █████'s special education teacher, was present in the classroom and took notes on behavior and response to instruction, there is no evidence that she and the general education teacher were co-planning and co-teaching the content together. There was also no evidence of support strategies so that █████ could be successful during the time he was receiving math instruction in the general education classroom. Thus, the math trial was a placement without support. Tr. 459:9-18 (testimony of █████)

228. Prerequisite skills, such as how to use a ruler, were not taught to █████ before the math trial because those were skills a student was expected to know. Stip. Ex. 95, p. 618; *see also* Tr. 1795:8-11 (testimony of █████ that she never pre-taught requisite skills for math trial).

229. As █████ did not receive instruction on an IEP goal to learn to measure prior to the math trial, and materials were not sent home in advance of the lessons to prepare him, Respondent failed to ensure █████'s success in the trial. Tr. 504:19-505:17. As it appears Respondent was trying to prove █████ could not be successful, it pre-determined the outcome of the math trial. Tr. 510:5-8.

230. Dr. █████ testified that the premise and implementation of the math trial, especially since the supplemental aids and support were not being used, was not appropriate to see if █████ should be receiving more time in the regular education classroom. Tr. 462:22-464:21.

231. Other than the pre and post testing, there is no evidence of any data collection. The minutes noted that █████ staff stated we “are not looking for growth.” Stip. Ex. 63. Yet, they still used pre and post testing to justify their conclusions that █████ failed the inclusion trial.

232. Also, later at the October 2015 IEP meeting, █████'s “failure” in the math trial was justification for a more restrictive setting. The October 2015 IEP minutes noted that “Ms. █████ said the results of the pre and post testing did not indicate [█████] was successful in understanding and functioning in the regular education math class.” Stip. Ex. 96, p. 618.

233. If the IEP team wanted a general education trial, it is perplexing to the Undersigned why, when math was █████'s weakest subject, they chose to conduct it during the regular education math class without adequate supports.

234. For purposes of LRE, the manner in which the math trial was implemented and progress monitored had no credibility to the Undersigned and carried no weight in this decision

except to prove that the [REDACTED] staff wanted [REDACTED] to fail in the regular math education setting and did not understand how to implement inclusion properly.

### June 2015 Reevaluation Results

235. In June 2015, Respondent conducted another psychoeducational evaluation of [REDACTED] Stip. Ex. 76. The psychoeducational evaluation, again conducted by school psychologist Ms. [REDACTED] included an observation in the special education setting and an observation in a one-on-one setting (i.e., her testing session), but it did not include an observation of [REDACTED] in the general educational setting. Stip. 75; Stip. Ex. 76.

236. Dr. [REDACTED] testified that the failure to observe [REDACTED] in the general education classroom was not appropriate as observation in each setting is necessary to understand [REDACTED]'s strengths and support needs. Tr. 370:15-23.

237. In the 2015 psychoevaluation Ms. [REDACTED] noted that “[c]omprehensive data collection and benchmark assessments have indicated that [REDACTED] has made progress in areas of academic development; however, particular concerns remain with his difficulty writing to convey thoughts.” Stip. Ex. 76, p. 456.

238. The 2015 Kaufman scores, however, did not reflect academic progress.

239. Again during the 2015 evaluation, Ms. [REDACTED] indicated on her 2015 report that [REDACTED] “put forth good effort on tasks; therefore, the results of this evaluation are deemed to be fairly accurate and reliable estimate of his current level of functioning at this age.” Stip. Ex. 76, p. 458.

240. Although Mrs. [REDACTED] agreed that non-verbal IQ tests are appropriate for students with hearing loss (Tr. 1681:17-20), and that [REDACTED] performed better on his psychological evaluation in 2013 on matrices and subtests that evaluated his nonverbal reasoning through his perception and application of relationships among abstract figures (Tr. 1684:14-22), she did not use a nonverbal assessment, even in the alternative, for [REDACTED] in 2015.

241. [REDACTED] took the DAS-II again in 2015, but at a higher age level on the instrument, which introduced different tasks and expectations. His GCA score was a 56, which was within the confidence interval of his previous score of 61 and therefore not a statistically significant difference per Ms. [REDACTED] Stip. Ex. 76, pp. 459-60; Tr. 1649:3-22.

242. [REDACTED] also administered the Kaufman, 3rd edition (“KTEA-III”) in 2015. Because the test had been re-normed, Ms. [REDACTED] testified that the scores on the re-normed assessment will tend to be lower than the scores on the previous assessment. Tr. 1650:8-22. The broad average range for standard scores was still scored between **85 to 115**. Stip. Ex. 76, p. 460 (emphasis in original). Ms. [REDACTED] noted on the 2015 report that “[s]cores between the two tests should be cautiously compared.” Stip. Ex. 76, p. 460.

243. ██████'s scores on the KTEA-III in 2015 were, in fact, substantially lower in math computations 53(-34), math concepts & applications 57 (-17), math composite 78 (-23), and written language composite 64 (-19), and written expression 48 (-39) than his KTEA-II scores from 2013. *Compare* Stip. Ex. 76, pp. 460-61 to Stip. Ex. 16, p. 81.

244. Although ██████'s score in spelling increased 2 points to 83, ██████'s 2015 scores in reading were lower than the 2013 testing, reading composite 81 (-9), letter and word recognition 84 (-18), reading comprehension 81 (-4), but still close to the average range. Stip. Ex. 76, p. 460.

245. The 2013 anomaly reappears during the 2015 evaluation where some achievement scores are 25 to 28 points higher than his General Conceptual Ability. Stip. Ex. 76, p. 459, 460.

246. Again, neither the IEP team nor Ms. ██████ comment on this significant discrepancy during subsequent IEP meetings in the 2015-2016 school year.

247. Except for ██████'s rating on the practical composite, ██████'s adaptive behavior assessment ratings were also higher than his GCA in 2015. Stip. Ex. 76, p. 459, 462.

248. Now that Ms. ██████ knew ██████ was hearing impaired, she did not consider conducting a nonverbal IQ test or educational testing with accommodations in spite of a drop of two standard deviations for ██████ between the Kaufman II in 2013 and the Kaufman III in 2015. Ms. ██████ conceded that this significant drop in achievement scores was not normal. Tr. 1701:23-1702:5.

249. Ms. ██████'s credibility was also weakened by her admissions that she “cut and pasted” her recommendations from internet articles to support the findings in her 2015 psychological evaluation, having only read “portions” of the article she cited. Tr. 1704: 13-22.

250. Additionally, Ms. ██████ admitted that she also based her recommendations from an internet article on a website called education.com (Tr. 1705:11-15) that she did not even cite in the evaluation (Tr. 1707: 13-15), and that she cut and pasted ██████'s recommendations from that article (Tr. 1706:11-15) too.

251. Ms. ██████ did admit that this drop in achievement scores was abnormal and normally, the Undersigned would give deference to the school psychologist but not in this case. Tr. vol. 10, pp. 1701: 23-1702:5.

### *Drop in Achievement Scores*

252. Dr. ██████ testified that there were only two possible explanations for significant drop in ██████'s achievement scores—a traumatic brain injury or poor instruction. Tr. p. 293:24-294:6. Dr.

253. The Undersigned notes that even though Drs. ██████ and ██████ both have experience with these assessments through their academic work, though they are not psychologists. Dr. ██████ has her Ph.D. in Education Psychology.

254. Dr. [REDACTED] opined that the drop in [REDACTED]'s educational achievement scores from 2013 to 2015 as measured on the Kaufman were directly related to [REDACTED]'s removal from core instruction and academic discourse occurring in the general education classroom, as well as the watered down curriculum in the special education classroom. Tr. 295:12-24. As a result, Respondent failed to provide [REDACTED] an adequate instruction in the EC classroom. Tr. 296:4-5.

255. Dr. [REDACTED] also opined that lack of access to the general curriculum was the likely cause. Tr. p. 439:9-14.

256. Dr. [REDACTED] also discussed the decline in [REDACTED]'s scores on the Kaufman achievement scores between 2013 and 2015. She noted a decline in all scores except for spelling. Tr. 437:13-16. In reviewing notes from a meeting with the school psychologist and Petitioner [REDACTED] which indicate in part "The tests demands are very different between the two tests. The recent test has greater demands for focus and skill level because of the age," Dr. [REDACTED] testified that although the demands of the two tests are different, she does not think that is a sufficient rationale for the decline in scores as [REDACTED] would have been developing and learning more advanced skills as he aged over the past two years between the tests. Stip. Ex. 83; Tr. 441:7-14. She would have used the data to examine what has happened to discuss what impacted the significant decrease in his scores. Tr. 439:6-8. However, the IEP team did not discuss the reason for the decline at the next IEP in which the scores were reviewed. Tr. 439:25-430:6.

257. Neither party offered evidence as to the educational impact of [REDACTED]'s undiagnosed hearing loss.

258. [REDACTED]'s hearing loss was not timely identified, and hearing accommodations not in place until March 2015. WCPSS assumed that due to the presence of his one-to-one aid, and the "significant amount of pull-out," that [REDACTED] did not need any accommodations to facilitate his independence from his aid, hear his teacher, and communicate with his peers. How this variable affected his achievement testing is unknown.

259. [REDACTED]'s drop of two standard deviations on subtests between the KTEA-II and KTEA-III, the drop in scores, especially in math achievement, coupled with the unauthorized pull out from regular education math core curriculum during 2013-2014 and 2014-2015 school years bolsters Drs. [REDACTED] and [REDACTED] theories that the decline was caused by lack of instruction.

260. The Undersigned questions the validity of the cognitive evaluations in the record and whether they accurately reflected [REDACTED]'s abilities and were an appropriate source of information for the IEP teams in making decisions about [REDACTED]'s educational programming and service delivery. WCPSS failed to provide a cogent and responsive explanation for the drop in the achievement scores or discrepancy between the cognitive testing and achievement scores.

261. [REDACTED]'s scores on both the Kaufman Achievement Test and DAS decreased since 2013, some 1 to 2 standard deviations lower and some more than 2 standard deviations lower. Tr. 293:9-14; 293:19-22. Dr. [REDACTED] believed that was a dramatic decrease in academic ability in just

two years. Tr. 293:22-23. Most likely, the decrease could be explained by inadequate instruction. Tr. 293:24-294:6 (testimony of ██████)

262. Even though ██████ scores on the Kaufman decreased since 2013, he still managed to score an 81 in reading comprehension. Stip. Ex. 76, p. 460. As the average range is 85 to 115, ██████ was very close to achieving average in reading comprehension. Tr. 295:4-11.

263. According to the school psychologist, Ms. ██████ admitted that “standardized assessments are not the best measurement of abilities for students who are not like their typically developing peers. These tests are not growth measures. Progress monitoring of curriculum-based skills will provide more insight.” Stip. Ex. 141, p. 2441.

### *Data Collection*

264. Dr. ██████ testified that in her review of ██████'s educational record she had a very difficult time finding any measurable or objective data for him in spite of the requirement for it in the IDEA, and the fact that collection of data is a research based practice. Tr. 175:3-13.

265. Respondent historically did not use data in making decisions for ██████ including the decisions to change his service delivery for academics. Tr. 174:24-175:3. This was very troubling to Dr. ██████ who noted that the IDEA states at least 20 times that educators need to use research based practices to make decisions including the use of data. Tr. 175:513.

266. Counsel for Respondent argued in her opening argument that “██████ is not making progress at anywhere near the rate we feel he could” but proffered no data to support this statement during the hearing. Tr. 73:1-2.

267. Respondent has made this argument since the beginning of the 2013-2104 school year. Ms. ██████ statements about this is noted in the December 2013 IEP minutes: she was “not seeing the progress with ██████ that she would like to see and that is why she would like to continue seeing [██████] as much as possible in the smaller [EC] setting;” Stip. Ex. 33, p. 184.

268. Dr. ██████ opined after reviewing his IEP progress report from December 19, 2014 through September 30, 2015 that she did not find any evidence that what ██████ is receiving in the special education setting is having a “tremendous impact on his educational outcomes.” Tr. 466:1-4.

269. If the team is recommending more time in special education, Dr. ██████ would expect to see more critical-based measurement data resulting in positive results that cannot be attained in the general education classroom. However, the progress reports contain mostly

comments that [REDACTED] constantly needs more and more prompting. To her, that is a teacher issue, not a student issue. Tr. 466:5-12.

270. According to Principal [REDACTED] staff believes he could be served by “increasing his special education services, especially in special education setting,” Stip. Ex. 141, p. 2436, “regularly needs increased time/services in special education,” Stip. Ex. 141, p. 2440, “best placement for [REDACTED] is I.D.-mild,” Stip. Ex. 141, p. 2436.

271. [REDACTED] the Senior Administrator, asked Ms. [REDACTED] what she would do for a nondisabled student who is in the red or yellow zone, and Ms. [REDACTED] replied that she would give more interventions in the classroom and conduct progress monitoring to see if the interventions worked. Stip. Ex. 141, p. 2438. This data collection was exactly what Drs. [REDACTED] and [REDACTED] recommended.

272. Respondent offered no data, only speculation, to prove that the interventions, in the regular education classroom, were not working for [REDACTED] or that [REDACTED] could make more academic progress in the special education setting.

#### **Teacher Collaboration During 2014-2015 School year**

273. Dr. [REDACTED] and Dr. [REDACTED] both emphasized the importance of teacher collaboration as a supplementary aid or service, Tr. p. 270:13-25; Tr. p. 467:1-5, which Mrs. [REDACTED] and Mrs. [REDACTED] were in fact doing, Tr. p. 1457:12-25; Tr. p. 1458:4-10; Tr. p. 1725:10-12. Dr. [REDACTED] admitted on cross-examination that she did not know how much [REDACTED]’s teachers were collaborating, Tr. p. 532:10-12. Nor was it clear to the Undersigned, except that for the 2014-2015 school there was some collaboration and it was successful.

274. Ms. [REDACTED] testified that she collaborated extensively with Ms. [REDACTED] with respect to [REDACTED]’s instruction. At the start of the school year, they met on a weekly basis to discuss [REDACTED]’s progress, areas of weakness, and how to modify work for him. Tr. p. 1457:12-25. Over the course of the school year, these meetings became less formal, but they continued to discuss [REDACTED]’s needs and collaborate on modification of his work. Tr. p. 1458:4-10; Tr. p. 1725:10-12.

275. To ensure that [REDACTED] was accessing the standard course of study, Ms. [REDACTED] and Ms. [REDACTED] reviewed the county’s pacing guide for standards. Certain “bold standards” for each quarter were identified by the county as priority standards. Ms. [REDACTED] would ask for the bold standards from Ms. [REDACTED] each quarter to ensure that [REDACTED] was receiving instruction in those standards. Tr. pp. 1509:22-1511:1; 1588:7-1589:5.

276. Testimony from Ms. [REDACTED] and Ms. [REDACTED] showed, that, while focused on foundational skills, [REDACTED]’s IEP goals were remedial in order to support the second-grade standard course of study. Tr. 1482:25-1483:3; 1728:25-1729:9. For example, the second-grade reading standards include identifying the main idea and details of a passage, *see* Stip. Ex. 50, pp. 29293 and Resp. Ex. 13, pp. 355, 361-63, while the math standards include addition, subtraction, telling time and exchanging money, *see* Stip. Ex. 50, pp. 293-94 and Resp. Ex. 13, pp.334-35.

277. Ms. [REDACTED] involved [REDACTED] in her classroom's typical activities and used guided questioning, prompting, and scaffolding to help him access the activities and participate. Tr. 1454:4-20. Ms. [REDACTED] testified that [REDACTED] was receiving instruction in the general curriculum in her classroom, Tr. 1510:20-1511:4, 1611:23-1612:7, and communications from Mrs. [REDACTED] to [REDACTED] supported her testimony. Resp. Ex. 72, p.1.

278. This was also corroborated by Ms. [REDACTED] statement to Ms. Russell, that she was modifying most of [REDACTED]s work. Stip. Ex. 141, pp.2436-2438.<sup>16</sup>

279. Ms. [REDACTED] also collaborated with Ms. [REDACTED] the speech-language pathologist, to provide support to [REDACTED] regarding vocabulary. For example, when teaching story elements, Ms. [REDACTED] noted that [REDACTED] did not understand the concepts of problem and solution. In addition to employing modeling and examples to teach [REDACTED] Ms. [REDACTED] received a workbook and ideas from Ms. [REDACTED] to teach [REDACTED] this concept. Tr. 1459:8-1450:16.

280. Per the supplemental aids/services in his IEP, Ms. [REDACTED] modified [REDACTED]s assignments in the general education classroom extensively. Tr. 1452:5-13; Tr. p. 1474:6-23.

281. In reviewing [REDACTED]s second-grade work samples, Dr. [REDACTED] found some really good attempts by [REDACTED]s regular education teacher Ms. [REDACTED] to modify work, but he would have benefited from more collaboration with the special education teacher to improve modifications and accommodations to support [REDACTED]s learning. Stip. Ex. 130, p. 2020; Tr. 276:4-14. However, there is no evidence of collaboration between the special education and the regular education teacher in modifying [REDACTED] work. Tr. 276:22-25.

282. Dr. [REDACTED] did not see evidence of collaboration between the special and the general education teachers, and between the related service providers and the general education or special education teachers. Tr. 466:17-22. As a result, Dr. [REDACTED] formed the impression that special education is delivered only in the pull-out session without any special education supports being delivered in the general education setting. Tr. 466:22-25. Collaboration is a supplemental aid and support that should be included in [REDACTED]s IEP. Tr. 467:1-5.

283. [REDACTED] received instruction in science and social studies with Ms. [REDACTED] as well. He was more successful in these content-based classes because the focus was on learning facts and details rather than foundational skills. Tr. 1471:16-1472:8. [REDACTED] was participating in these classes with his non-disabled peers with some accommodation. He also participated in various specials, including music, physical education, computer lab, media center and art, with his nondisabled peers. Tr. 1441:20-1442:3.

284. Ms. [REDACTED] modified [REDACTED]s assessments to meet his needs. Where other students would complete multiple choice or short answer response questions, [REDACTED]s assessments would be

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<sup>16</sup> Stip. Ex. 141 is a copy of [REDACTED] notes of comments made by various school personnel during Ms. Russell's interview for preparation of WCPSS' defense of the State Complaint. Tr. Vol. 11, pp.; 2022:11-2023:8. This document often impeached the testimony of school witnesses and it is used by the Undersigned primarily when there are discrepancies between in the educational records and the testimony at hearing with the participants' responses to the WCPSS' Senior Administrator.

more hands-on. For example, with respect to a science unit on states of matter, [REDACTED]'s assessment was a cut and paste activity in which he identified examples of solids and liquids. Ms. [REDACTED] went over the assessment individually with [REDACTED] after completion to address areas of weakness in [REDACTED]'s comprehension. Tr. 1473:12-1475:21; Stip. Ex. 130, p. 2022-24.

285. In addition, most of his instruction in the general education classroom had to be provided one-on-one but this was not problematic because [REDACTED]'s aide was already with him in the regular classroom. Stip. Ex. 141, p.2437.

286. [REDACTED] was seated strategically within the classroom to ensure that he was near peers who were willing and able to help him. [REDACTED]'s nondisabled peers in the 2014-15 school year was particularly good about working with him and teaching him. Tr. 1514:19-23.

287. Overall, although not perfect, [REDACTED]'s regular and special education teachers along with his related service providers informally collaborated and with this supplemental aid, [REDACTED] able to effectively access the general education curriculum and be successfully integrated with his nondisabled peers.

#### *Language Arts Instruction*

288. [REDACTED]'s report card from second-grade shows that he worked on reading and writing skills in Ms. [REDACTED] class. Specifically, [REDACTED] worked on recalling and communicating details from a story, blending sounds in CVC words, identifying story elements, and answering questions about texts, and writing simple sentences. Stip. Ex. 50, p. 531. [REDACTED]'s report card also shows that he worked on math topics aligned with his IEP goals, including double-digit addition, counting by 5's, identifying and valuing coins, measurement, and subtraction. Stip. Ex. 50, p. 531. Many of the skills and topics listed in the report card comments not only align with IEP goals, but also align with the general curriculum standards for second-grade. See Resp. Ex. 13, pp. 334-335, 355-375.

289. [REDACTED]'s reading center assignments were modified from what his peers were doing. He received more manipulatives and other structural supports. Tr. p. 1484:2-6. For certain writing activities in centers, [REDACTED]'s work was scaffolded to support his creation of complete sentences. He would stamp sight words using alphabet stamps, then write the words, then use the words in sentences. Tr. p. 1484:25-1485:7.

290. Ms. [REDACTED] also used peer grouping and peer support for [REDACTED] Tr. 1514:4-23. This strategy aligns with recommendations made by Petitioners' expert Dr. [REDACTED] Tr. 468:10-14.

291. Ms. [REDACTED] testified that while she typically received work samples for her special education students to review, she received very few work samples regarding [REDACTED] from his special education teacher and felt that she "was producing more work at those meetings (with Ms. [REDACTED] and asking her for feedback than (his special education teacher) was giving to (her)" Tr. 1566: 16-1567:10.

292. Ms. ██████ admitted that she never assisted Ms. ██████ in implementing or planning to use ██████'s accommodations in the general education classroom. Tr. 1822:21- 1823:5 (testimony of ██████). Yet, all of ██████'s IEP included modified assignments as an accommodation in math and language arts. Stip. Exs. 31, p. 161. 37, p. 218.

293. Also, due to ██████'s expressive communication difficulties, ██████ had difficulty providing verbal responses. As a result, he would have benefitted from reading comprehension modifications such as word banks or pictures that do not rely on his verbal ability to answer. Tr. 277:1-17 (testimony of ██████). Based on ██████'s reading ability, he would have much more to say had he been given communication supports to answer reading comprehension questions. Tr. 277:18-21 (testimony of ██████). These kinds of supports are practicable to provide as they could easily be developed in a minute or less. Tr. 277:22-273-3.

### **Progress 2014-2015 School year**

294. Despite these difficulties, Ms. ██████ admitted during the 2014-2015 school year that ██████ "did grow in many ways. He was able to demonstrate more independence." Stip. Ex. 141, p. 2436.

295. His aide agreed that "[a]bsolutely. He is more confident. He doesn't require use of the card prompts for making decisions as he did last year. He's more independent." Stip. Ex. 141, p. 2441.

296. The Undersigned finds that Ms. ██████ and ██████ made an exceptional effort to informally collaborate among themselves with little or no administrative support.

297. Over the course of the statutorily relevant period, Petitioner ██████ reported that ██████ made educational progress. Tr. 1250:11-13; Stip. Ex. 55, p. 330 ["Parents feel like [██████] has made significant growth this year."]. The IEP team has noted that "[a]lthough he has made progress towards his IEP goals, [██████] is working significantly below grade level in all academic areas." Stip. Ex. 91, p. 597. testimony from school staff indicated that ██████'s progress was slow, Tr. 1801:1-4.

298. The IEP team also speculated without supporting data that he could have made more progress with additional special education services in the special education classroom, Tr. 1941:10-13

299. Notably, many of the specific supplementary aids and services proposed by Petitioners' experts were already being employed by ██████'s teachers. For example, Dr. ██████ proposed including task analysis, which is when tasks are "broken down into sequential steps," where students "learning the first step, second step, third step and so on." Tr. 421:24-422:9, 463:21. Ms. ██████ described a very similar process in her teaching. Tr. 1718:24-1719:2; Resp.

Exh. 75. p. 1 [“For [redacted] to learn best, skills need to [be] broken down, taught explicitly at a concrete level, with multiple practice opportunities.”]; *see* Findings of Fact 80, 105, 106.

300. Similarly, Dr. [redacted] proposed that the grade-level standards should be reviewed to prioritize learning objectives, a modification that she “always recommend[s] for a student with intellectual disability who’s accessing the Common Core.” Tr. 445:14-24; 470:3-6. As part of their collaborative process, Mrs. [redacted] and Mrs. [redacted] identified the key “bold” standards from the curriculum map for [redacted] to focus on. Tr. 1509:22-1511:1; 1588:7-1589:5.

301. With these supplemental aides and classwork modifications, [redacted] reflected positively on the 2014-15 school year, saying that “the year with Ms. [redacted] and Ms. [redacted] was phenomenal.” Stip. Ex. 83, p. 546.

302. On August 26, 2014, a month into the school year, [redacted] wrote an e-mail to the staff saying that she was “extremely satisfied with the instruction and support [redacted] is receiving this year from Mrs. [redacted] and Mrs. [redacted].” Resp. Ex. 63; Tr. 1099:4-9.

303. Later in the year, following an audiological observation that was shared with the parents, [redacted] wrote to Mrs. [redacted] that the audiologist had spoken to her and had many positive comments about [redacted]’s “seating, interaction and participation in the classroom,” as well as about Mrs. [redacted] herself. Resp. Ex. 69, p.3; Tr. p. 1154:11-15. Mrs. [redacted] responded that she was exposing [redacted] to second-grade curriculum while also meeting him at his level. Resp. Ex. 69, p.3.

304. During her observation, the audiologist independently noted that [redacted] was “attentive, reacted appropriately, engaged even when appeared not visually attending answered questions correctly.” Stip. Ex. 58, pp 354-355.

### 2015-2016 SCHOOL YEAR THIRD GRADE

305. From the beginning of the 2015-2016 school year through November 25, 2015, [redacted] was in the third-grade at [redacted]. His regular education teacher was [redacted] Birch [sic] (aka [redacted] [redacted] and his special education teacher was [redacted] [his former first grade special education teacher]. Stip. 19.

306. At the time of her testimony, Ms. [redacted] had been a teacher for twenty-nine (29) years, almost twenty of which had been in Wake County. Tr. 1885:6-14. She has a Bachelor’s degree in Education and is licensed from Pre-K to 6th grade. Tr. 1885:17-20. In her twenty-nine years as a teacher, she has taught students with disabilities but **never** a child with [redacted] Tr. 1885:21-23.; 1941:19-21. (emphasis added) Unlike Ms. [redacted] Ms. [redacted] has **not been trained** on how to teach a child with [redacted] or intellectual disabilities. Tr. 1941:22-24; 1941:25-1942:6. (emphasis added)

307. At the beginning of the 2015-2016 school year, on September 21, 2015, Ms. [redacted] completed a form entitled “Data Collection Form for Least Restrictive Environment” in which the [redacted] [redacted] school staff, excluding the parents, were considering moving [redacted] from a resource to

a separate service delivery and changing him from Common Core to Extended Common Core curriculum.” Tr. 296-297:20; 298:19-24 (testimony of [REDACTED] reviewing form contents). The parents discovered this form in [REDACTED]’s records after the contested case had been filed. Tr. 302:5-23. It had not been produced by the Respondent in response to Petitioners’ discovery requests. Tr. 302:14-15.

308. This form supports Petitioners’ concern that Respondent wanted to place [REDACTED] in a self-contained classroom and remove him from the Common Core Curriculum to the Extended Content Curriculum.

309. At the beginning of the 2013-2014 school year, Ms. [REDACTED] had already formed her professional opinion that [REDACTED] should spend as much time in the special education setting as possible. She “explained to the parents that in her professional opinion that she is not seeing the progress with [REDACTED] that she would like to see and that is why she would like to continue seeing [REDACTED] as much as possible in the smaller setting.” Stip. Ex. 33, p. 184.

310. Again, Respondent provided no data to support their position that [REDACTED] would progress more academically in the special education setting.

#### ***Lack of Teacher Collaboration 2015-2016 school Year***

311. Unlike the 2014-2015 school year, there was no physical evidence or testimony of collaboration between Ms. [REDACTED] the special education teacher, and other regular education teachers, or that Ms. [REDACTED] modified [REDACTED]’s assignments in the regular classroom (modified assignment in math and language arts as well as all specials was required by [REDACTED]’s IEP). Stip. Ex. 56, p. 334; Tr. 362:15-363:1. There was never anything provided to the parents indicating the teachers were collaborating, and no changes were made to the IEP for formal collaboration.

#### ***Removal from General Education Classroom for Math and Language Arts***

312. During [REDACTED]’s third grade year he was removed from the general education classroom for all of math and portions of language arts. Stip. Ex. 131; Stip. Ex. 113, p. 1107; Tr. 285:5-23; Stip. Ex. 86; Tr. 286:17-288:3. As a result, [REDACTED] only received math instruction in the special education classroom. Tr. 287:25-288:3. The removal from the general education classroom during instruction in core academic areas to receive special education services is not appropriate nor authorized by his IEP. Tr. 288:4-8 (testimony of [REDACTED] review of the work samples showed no evidence that he was working on Common Core state standards. Tr. 288:9-15. The regular education class was doing modeling, regrouping, and division; whereas, [REDACTED] was doing very different work including learning about coins, telling time, counting, and doing single digit addition. Tr. 289:6-10.

313. [REDACTED] did not receive instruction in reading and language arts between 9:30 a.m. and 10:50 a.m. every day of the 2015-2016 school year. Tr. 1942:14-19.

314. [REDACTED] only received 2 hours of whole group instruction a week in the general education setting during the 2015-2016 school year as the only whole group instruction that [REDACTED] received in the general education setting during the 2015-2016 school year was 30 minutes during science and social studies on Tuesday, Wednesday, Thursday, and Friday of each week. Tr. 1944:5-9.

315. In fact, Ms. [REDACTED] never came into [REDACTED]'s general education class (Tr. 1955: 3-5) and neither Ms. [REDACTED] nor Ms. [REDACTED] tried to utilize push-in services in the general education setting during the 2015-2016 school year. Tr. 1961: 12-14. Ms. [REDACTED] testified that [REDACTED] could not access the content of her general education classroom because the level of what she was teaching was different than what Ms. [REDACTED] was teaching. Tr. 1965:5-10.

316. Since [REDACTED] was supposed to be on the Common Core, Dr. [REDACTED] would have “prioritize learning objectives within a unit of instruction” as a modification so that if [REDACTED] is not able to master every objective, his teachers can provide the necessary amount of explicit instruction, repeated practice, and visual supports for a shorter, smaller unit of information that [REDACTED] can retain, use, and apply. Tr. 445:14-24. These learning objectives would still be aligned with the Common Core. Tr. 445:25-446:2. The work of prioritizing learning objectives is done through weekly or even daily collaboration between a special education and a general education teacher by the general education teacher pinpointing the most essential elements of a unit, and the special education teacher identifying what would be most meaningful and productive for [REDACTED] considering his unique strengths and needs. Tr. 446:5-21.

317. Track 4 track-in periods for the 2015-2016 school days contained the following amount of scheduled instructional days:

- a) Reporting Period 1: 46 full school days; 2 early release days
- b) Reporting Period 2: 38 full school days; 1 early release day
- c) Reporting Period 3: 41 full school days; 3 early release days
- d) Reporting Period 4: 51 full school days

Stip. 26.

318. [REDACTED] generally received instruction on his IEP goals in the special education classroom with Ms. [REDACTED] while Ms. [REDACTED] class covered core academic subjects in her classroom. Tr. p. 1898:15:1899:1. He also participated in specials. Tr. p. 1943:17-18.

319. When instructing [REDACTED] Ms. [REDACTED] would have to read instructions to him, then break them apart, simplify the vocabulary, and either draw or model the expected action. She also used peers as models. Tr. p. 1890:11-17. These were supplemental aids and accommodations in [REDACTED]'s IEPs. *See* Stip. Exs. 57, pp. 345-348; 97, pp. 638-642.

320. Ms. [REDACTED] followed the county pacing guide regarding the state standards in her classroom. Tr. p. 1895:10-13; Stip. Ex. 113, p. 1131-37. Among the math standards that she taught her class in the fall of 2015 were those relating to shapes, multiplication, and division. Stip. Ex. 113, p.1131-37; Tr. p. 1895:20-1896:5. Among the language arts standards that she taught her

class in the fall of 2015 were those relating to answering questions based on a text, determining the main idea of a text, and recounting details. Stip. Ex. 113, pp. 1214, 1227.

321. ██████ accessed these standards in Ms. ██████ class. Tr. pp. 1897:18-20, 1898:1014. ██████ also accessed grade level work and standards in Ms. ██████ classroom through morning work, word of the day, his writing journal, independent reading time, math prompt, and science and social studies instruction. Tr. pp.1898:20-1899:1.

322. ██████ received third-grade spelling homework each week. Tr. p. 1934:19-23.

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

324. ██████'s report card from third-grade also shows that he was working on third-grade standards in Ms. ██████ classroom. The comments to the first and second quarter indicate work on the human body, shapes, multiplication, writing paragraphs, and moon phases. Stip. Ex. 134, p. 2241. Each of these subjects was part of the third-grade curriculum. *e.g.* Tr. p. 1931:3-5, 10-12.

325. In general, when in Ms. ██████ class, he would be doing the same types of activities that his nondisabled peers were doing, but scaffolded to his instructional level or his IEP accommodation or modified assignment. Tr. p. 1926:19-25.

326. With respect to his math journal prompts in Ms. ██████ class, ██████ was not able to read and understand the prompt independently. Per the IEP accommodations, he needed to have the instructions read to him and broken down into smaller steps. Tr. p. 1927:19-22.

327. Ms. ██████ also modified ██████'s assignments, per his IEP accommodations, to make them more accessible to him. She shortened assignments, reduced the amount of text on pages, and allowed him different modes of communicating what he knew, such as drawing. Tr. p. 1936:18-23.

328. In some cases, Ms. ██████ simply could not modify an assignment to a level ██████ could access. Tr. 1937:17-21. Again there is no evidence that Ms. ██████ assisted Ms. ██████ with assignment modification even though modified assignments for all academic courses was an accommodation on his IEPs during this time and previously. *See* Stip. Ex. 57, pp. 345-348; Stip. Ex. 97, pp. 638-642; Stip. Ex. 103, pp. 780-786.

329. Progress reports from September 30, 2015 indicate that ██████ received instruction in his IEP goals, specifically including all of his math goals, during the first two months of the 2015-16 school year. Stip. Ex. 87, pp. 552-559. *e.g.*, Resp. Ex. 3, pp. 95, 99-101, 111-113, 115.

***No Evidence Of More Benefits In Special Ed Than General Ed***

330. According to Ms. [REDACTED] [REDACTED] obtained greater academic benefit from his time in the special education setting than his time in the general education setting, Tr. 1940:14-20, and would have benefitted from additional time in the special education classroom during his third-grade year, Tr. 1941:10-13.

331. The Undersigned notes that without collaboration and support from Ms. [REDACTED] Ms. [REDACTED] did an exceptional job including [REDACTED] in her regular educational classroom. Ms. [REDACTED] however, had no prior experience or education for integrating a student with [REDACTED] s disabilities and did not maintain any data of [REDACTED] s progress in the special education classroom; therefore, her opinion that [REDACTED] benefited more from the special education setting is not entitled to deference and carried little weight with the Undersigned.

**OCTOBER 19, 2015 IEP MEETING**

332. On October 19, 2015, the IEP team convened to conduct [REDACTED] s annual review. The team had attempted to schedule the meeting in September, but a requested DPI facilitator was not available and the meeting had to be rescheduled. Tr. 963:18-22.

333. The Invitation to Conference for the IEP meeting held on October 19, 2015, indicated the purpose was “to discuss the evaluation results to determine eligibility for special education and related services, to discuss and/or develop, review and/or revise the IEP, to discuss placement, to discuss the results of the math trial, and to conduct the annual review of [REDACTED] s IEP.” Stip. 76; *see also*, Stip. Ex. 93.

334. Both [REDACTED] and [REDACTED] attended the October 19, 2015 Annual Review IEP meeting [“October 2015 IEP Meeting”] and received a copy of the Prior Written Notice and the Minutes. Stip. 77; Stip. Exs. 94 & 95.

335. The October 19, 2015 Annual Review IEP [“October 2015 IEP”] meeting was facilitated by [REDACTED]. Stip. 78; Stip. Exs. 94-97.

336. The service delivery in [REDACTED] s October 2015 IEP was:

Type of Service	Sessions Per	Time Per Session	Location of Services
Math	36 per reporting period	35 min.	Special Ed. Setting
Reading	36 per reporting period	45 min.	Special Ed. Setting
Writing	36 per reporting period	40 min.	Special Ed. Setting

Speech/Language Therapy	16 per reporting period	30 min.	Special Ed. Setting
Occupational Therapy	3 per reporting period	30 min.	Special Ed. Setting
Occupational Therapy - RSSD	3 per reporting period	Unidentified amount of time	Regular Ed. Setting
Physical Therapy – RSSD	1 per reporting period	Unidentified amount of time	Regular Ed. Setting
Audiology – RSSD	Unidentified number of sessions	Unidentified amount of time	Regular Ed. Setting

Stip. 79; Stip. Ex. 97.

337. Prior to the meeting, the team provided a draft IEP to the parent for review along with evaluation reports. Tr. 964:8-15. [REDACTED] brought written comments on the draft to the IEP meeting. Tr. 970:19-25.

338. The team first completed the reevaluation process and considered eligibility questions. It then proceeded to review and revise the IEP through the annual review. Stip. Ex. 94, 95.

339. During the meeting the team reviewed data including the results of the math trial to justify a more restrictive setting.

340. The team was not able to complete the entire annual review during the four-hour meeting. Tr. 1982:13-25. There was extensive conversation about the evaluations and the parent asked questions throughout. Tr. 1983:19-1984:2. The team compared [REDACTED]'s performance from his second-grade year to the start of his third-grade year. Tr. 1985:23-1986:1. The team did not reach the portions of the IEP related to goals, supplementary aids and services, or service delivery. Tr. 1239:9-10.

341. At the end of the scheduled time, there was a proposal to adopt the draft IEP goals as written. Tr. 1986:2-17. The parent did not agree, but Principal [REDACTED] determined that the goals were appropriate. The team agreed to reconvene within three weeks to finish the review process. Tr. 1986:7-11.

342. Also at the end of the meeting, █████ provided her written notes on the IEP to the team, Tr. 1243:11-20, and submitted multiple pages of written concerns that she had prepared for the meeting, Tr. 1242:1-10. Pet. Ex. 105.

#### NOVEMBER 13, 2015 IEP MEETING

343. A second IEP meeting was held on November 13, 2015 [“November 2015 IEP Meeting”], to complete the annual review of the IEP. Stip. 80; *see also*, Stip. Ex. 101.

344. Prior to the meeting, the team had incorporated some of █████’s handwritten comments that she had submitted at the end of the October IEP meeting into a new draft. Tr. 1989:1-3.

345. Both █████ and █████ attended the November 13, 2015 [“November 2015 IEP”] Annual Review IEP meeting and received a copy of the Prior Written Notice and the Minutes. Stip. 81; Stip. Exs. 102 & 104. No physical therapist attended the November 13, 2015, IEP meeting. Stip. 83.

346. The only testimony regarding this meeting from participants came from Jacqueline (“Jacki”) Russell and Petitioner █████

347. Ms. █████ is the senior director for policy and fiscal compliance in WCPSS’ Special Education Services department, Tr. 1974:25-1975:4, and has served in various administrative roles within Special Education Services for almost twenty (20) years, Tr. 1976:20-22. She has extensive experience in special education as a speech pathologist, Tr. 1977:5-10, and special education administrator. In addition to her qualifications, Ms. █████’s testimony regarding the November 2015 meeting was consistent with the audio recordings later played from that meeting.

348. The first concern in █████’s note “re: 11/13/2015 Meeting” was █████’s hearing impairment. Pet. Ex. 105. was █████’s hearing impairment. Previously this was also of concern to Ms. Russell and other Senior Administrators of WCPSS. There was no discussion at the IEP meeting or subsequent meetings about the impact of █████’s undiagnosed hearing impairment and the potential gaps in █████’s education due to his teachers not knowing to make accommodations.

349. In response to the question on the November 13, 2015 IEP, “Does █████ have behavior[s] that impede his/her learning or that of others,” the IEP team answered “yes.” Stip. 82; *see also*, Stip. Ex. 103, p. 769.

350. In recognition of █████’s difficulties with attention and frustration the team added a goal related to on-task behavior. Stip. 82; Stip. Ex. 103, p. 778. There was no indication that this “behavior” was disruptive to the classroom or his nondisabled peers.

351. Rather from her interactions with █████ and her review of the videos of him in the general and special education classroom, Dr. █████ noted █████’s positive behaviors in the general education setting which she opined was due to his history of inclusion. He knows the social rules

in the classroom: he remained quiet, he did his best to remain focused on his work, he is receptive to feedback, he engages in long periods of individualized instruction when required to do so.

352. In working directly with him at his home, Dr. ██████ testified that he willingly engaged in work she presented to him, and was compliant. She also noticed his extensive expressive communication difficulties that make it difficult for unfamiliar listeners to understand him. Tr. 431:25-432:21. She described his behavior in the general education classroom “as exceptional.” Tr. 492:1-2. Based on the videos displayed at the hearing, the Undersigned concurs with her description.

353. The team still had difficulty completing its review within the scheduled timeframe. Tr. 1989:14-17. As the meeting approached its end time, the team still needed to review the supplementary aids and services section of the IEP as well as service delivery and educational placement. Tr. 1990:10-20.

354. With twenty or thirty minutes left before the end time for the meeting, ██████ proposed that the parent select which section of the IEP she felt was more important to review immediately, and that the other would be reviewed at a follow-up meeting. Tr. 1990:12-1991:3.

355. ██████ indicated that she felt the review of service delivery was more urgent than the supplementary aids and services. Tr. 1991:19-23; Pet. Exh. 84, 33:00-34:34.

356. Ms. ██████ school psychologist, and ██████ testified that the IEP included appropriate supplementary aids and services for ██████ Tr. 1941:5-7; 1672:19-25. Ms. ██████ indicated that no set of supplementary aids and services would be sufficient for ██████ to be successful on core academics in the general education classroom. Tr. 1673:23-1674:10. The Undersigned gives little weight to Ms. ██████ who is a school psychologist with no classroom teaching experience. ██████ even though a Senior Administrator for WCPSS, was a speech pathologist for the bulk of her classroom experience and more deference is given to Drs. ██████ and ██████ as to the appropriateness of supplemental aids and services and ██████'s ability to be integrated with his nondisabled peers.

357. During discussion of service delivery, ██████ who since 2013 had advocated for a more restrictive setting, proposed increasing ██████'s specialized math instruction from thirty-five (35) to sixty (60) minutes and his specialized reading instruction from forty-five (45) to sixty (60) minutes, for an additional forty (40) minutes of specialized instruction. Tr. 1995:15-22. She recommended that these services be provided in a special education setting.

358. The service delivery in ██████'s November 2015 IEP was:

Type of Service	Sessions Per	Time Per Session	Location of Services
Math	36 per reporting period	60 min.	Special Ed. Setting

Reading	36 per reporting period	60 min.	Special Ed. Setting
Writing	36 per reporting period	40 min.	Special Ed. Setting
Speech/Language Therapy	16 per reporting period	30 min.	Special Ed. Setting
Occupational Therapy	3 per reporting period	30 min.	Special Ed. Setting
Occupational Therapy -RSSD	3 per reporting period	Unidentified amount of time	Regular Ed. Setting
Physical Therapy – RSSD	1 per reporting period	Unidentified amount of time	Regular Ed. Setting
Audiology – RSSD	Unidentified number of sessions	Unidentified amount of time	Regular Ed. Setting

Stip. 84; Stip. Ex. 103.

359. Petitioner ██████ disagreed with ██████ continuing to receive specialized instruction in the special education classroom, and proposed that ██████ receive all of his specialized instruction within the general education classroom. Tr. 1996:12-14. She proposed that Ms. ██████ push-in to the general education classroom to provide special education services in that environment. Tr. 2002:20-22.

360. On the other hand, ██████'s speech/language pathologist, ██████ stated that the best thing for his functional speech would be to be with his nondisabled peers. Tr. 966:8-15.

361. Despite the parents' disagreement, Principal ██████ who had advocated at ██████'s initial transfer for more segregation, decided that the increased special education delivery time was appropriate for ██████ Tr. 2009:24-2010:3 (testimony of ██████; see also Stip. Ex. 104.

362. Petitioners filed the instant petition on November 24, 2015 and partially invoked stay-put related to service delivery. ██████'s goals have been updated, but his service delivery has remained at two total hours during the pendency of this litigation.

***Evidence of Academic Progress During 2015-2016 School Year in Regular Education Class***

363. In her Literacy Observation dated September 7, 2015, ██████ noted that in the general education classroom with adult assistance and sentence start supports, ██████ was able to state and write three facts about an article he read about muscles. Stip. Ex. 85, p. 548. Moreover, with accommodations of dictation, visual checklist, and adult support, he was able to write the sentence with correct spelling. Stip. Ex. 85, pp. 548-549.

364. Although Ms. ██████ recommended that “[██████] would benefit from a highly structured approach to teaching comprehension strategies and how and when to apply these strategies to build comprehension skills,” she did not conclude that this instruction could only be done in the special education classroom. Stip. Ex. 85, p. 549.

365. Progress reports from September 30, 2015 indicated that ██████ received instruction in his IEP goals, during the first two months of the 2015-16 school year and that, all his other IEP goals had either been mastered or had consistent progress towards mastery. Stip. Ex. 87, pp. 552-559.

366. According to his Third Grade Report Card, ██████ met expectations for his science, social studies, music, healthful living, visual arts, and inconsistently met expectations for language arts and math. Stip. Ex. 134, p. 240. During all reporting periods, ██████'s work habits and conduct met expectations. Stip. Ex. 134, p. 240.

367. Ms. ██████ testified that ██████ obtained greater academic benefit from his time in the special education setting than his time in the general education setting, Tr. 1940:14-20, and would have benefitted from additional time in the special education classroom during his third-grade year, Tr. 1941:10-13.

368. Although Ms. ██████ did an exemplary job trying to modify ██████'s work without assistance from Ms. ██████ she is not a special education teacher and there is no data to support her opinion; therefore, the Undersigned accords Ms. ██████ testimony that ██████ obtained greater academic benefit from the special education setting during the 2015-2016 school year little weight.

369. In informal communications regarding an investigation into Petitioners' state complaint in the summer of 2015, Principal Rob ██████ indicated that he believed a separate, ID-Mild classroom would be appropriate for ██████ Stip. Ex. 141, p. 2436.

370. Mr. ██████ statements were corroborated by the “Data Collection Form” dated September 2015 used by the WCPSS team to assist with gathering data for an IEP team to use when considering a change in a student's placement” to a more restrictive setting.” Tr. 296:14-18. Not surprisingly, no school staff member testified regarding the document and even though the document was disclosed during discovery, the Petitioners were unable to lay a proper foundation for its admission, but this data was mentioned in Stip. Ex. 141 and no doubt the NCDPI is aware of this form.

371. Although it is uncontested that WCPSS were careful not to verbally or in writing propose a separate setting for ██████ Tr. 1246:9-25, the pattern down that slippery slope was evident.

372. Based on ██████'s success with inclusion during his second grade school year, the Undersigned finds that he is able to make educational progress when given sufficient supplemental aids/supports especially teacher collaboration. However, the Undersigned is not convinced that full inclusion is the best option for ██████

373. As to the proposal for increasing [REDACTED]'s time in the special education setting, Respondent has not convinced the Undersigned that the marginal benefit, according to Respondent, that [REDACTED] received in the regular education setting was outweighed by the benefits he could only obtain in the special education setting. Respondent has provided no data or evidence other than speculation by a regular education teacher, Ms. [REDACTED] and a school psychologist whose psychoeducational testing is questionable. Respondent offered only speculation on this issue.

374. Much needs to be done to determine an appropriate setting for [REDACTED]

### CONCLUSIONS OF LAW

Based on the above findings of fact and relevant laws and legal precedent, the Undersigned concludes as follows:

#### ***General Legal Framework***

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

2. This Order incorporates and reaffirms the Conclusions of Law contained in the previous Orders entered in this litigation.

3. As the party requesting the hearing, the burden of proof lies with Petitioners and the standard of proof is by a preponderance of the evidence. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Actions of local board of education are presumed to be correct and Petitioners' evidence must outweigh the evidence in favor of the Board's decisions. *See* N.C.G.S. § 115C-44(b). Stip. 2.

4. The Petitioners and Respondent named in this action are properly before this Tribunal, and this Tribunal has personal jurisdiction over them.

5. The Petitioners and Respondent named in this action are correctly designated and have been properly noticed of this hearing.

6. The Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §1400 *et seq.* and implementing regulations, 34 C.F.R. Parts 300 and 301. The IDEA and implementing regulations and N.C. Gen. Stat. § 115C-109.6(a) control the issues to be reviewed.

7. The IDEA is the federal statute governing the education of students with disabilities. The federal regulations promulgated under the IDEA are codified at 34 C.F.R. Parts 300 and 301.

8. The controlling state law for students with disabilities in N.C. Gen. Stat. §§ 115C, Article 9 and the corresponding state regulations.

9. The 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).

10. Respondent is a local education agency receiving monies pursuant to 20 U.S.C. § 1400 *et seq.* and is the local education agency responsible for providing educational services in Wake County, North Carolina. Respondent is subject to the provisions of applicable federal and state laws and regulations, specifically 20 U.S.C. § 1400 *et seq.*; 34 C.F.R. § 300 *et seq.*; and N.C. Gen. Stat. 115C-106 *et seq.* Respondent is also subject to the *Policies Governing Services for Children with Disabilities* developed by the State Education Agency. These acts and regulations and policies require the Respondent to provide FAPE for those children in need of special education residing within its jurisdiction.

11. ██████████ and his parents were residents of Wake County during the period relevant to this controversy. ██████████ is a child with a disability for the purposes of 20 U.S.C. § 1400 *et seq.* and N.C. Gen. Stat. § 115C-106 *et seq.* Respondent thus had an obligation under the IDEA to provide ██████████ a FAPE.

12. The IDEA recognizes that disabilities of all types – physical and cognitive, mild and extreme – are “a natural part of the human experience and in no way diminish [] the right of individuals to participate or contribute” in all aspects of society, including education. *See* 42 U.S.C. § 1400(c)(1).

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

14. The appropriateness of a student’s educational program and placement on the continuum is decided on a case-by case basis, in light of the individualized consideration of the unique needs of the child, not in comparison to his typically developing peers. *See Hendrick Hudson Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). Decisions about whether ██████████ should be placed in a general education classroom should not be based on a comparison of him to his typically developing peers in the regular education classroom. *Accord* Tr. 452:13-22 (testimony of ██████████)

15. “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's

circumstances.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-I*, 137 S. Ct. 988, 999 (2017).

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

17. If the IEP is developed in compliance with the procedures set forth in the IDEA and is reasonably calculated to enable the student to make educational progress appropriate in light of the child’s circumstances, “the State has complied with the obligations imposed by Congress and the courts can require no more.” *Rowley*, 458 U.S. at 207.

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

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

### **Least Restrictive Environment**

20. In addition to IDEA’s requirement that the state offer each student an opportunity for a FAPE, the student must be placed in the least restrictive environment (“LRE”) appropriate for the student to access that opportunity. *See, e.g., A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004); *MM ex rel. DM v. Sch. Dist. of Greenville County*, 202 F.3d 523, 526 (4th Cir. 2003). Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. § 300.115. Under the IDEA, children with disabilities should be educated with children who are not disabled only “to the maximum extent appropriate.” *Hartmann*, 118 F.3d at 1001; 20 U.S.C. § 1412(a)(5)(A).

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

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(5)(A) (emphasis added); *see* 34 C.F.R. § 300.114(a); OSEP memorandum 959, 21 IDELR 1152 (OSEP 1994).

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

23. The school district may consider “[s]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment . . . *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)(ii) (emphasis added).

24. A child may not be “removed from education in age-appropriate regular classrooms *solely* because of needed modifications in the general education curriculum.” 34 C.F.R. § 300.116 (emphasis added).

25. The IDEA further requires that each IEP “must include” a “statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program of modifications or supports for school personnel that will be provided to enable the child . . . (iii) [t]o be educated and participate with . . . nondisabled children in the activities described in this section.” 34 C.F.R. § 300.320(a)(4).

26. The LRE requirement has been interpreted to create a presumption in favor of placing students with disabilities in general education classes<sup>17</sup>. “The fact that the provision only creates a presumption, however, reflects a congressional judgment that receipt of such social benefits is ultimately a goal subordinate to the requirement that disabled children receive educational benefit.” *Hartmann*, 118 F.3d at 1002. Academic benefit takes primacy over social benefit if the two goals are in conflict.

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<sup>17</sup> Districts are not required to attempt a general education classroom setting before placing a child in a more restrictive setting. *See Letter to Cohen*, 25 IDELR 516 (OSEP, August 6, 1996).

27. In the Petition, Petitioners contested the increased pull-out time from the regular education setting and invoked stay-put. During the hearing, however, Petitioners sought full inclusion in the regular education setting for all regular and special education instruction.

28. The issue before this ALJ is not full inclusion but whether the increased pull-out from the regular education classroom was justified.

29. Placement in the general education classroom is not required where: (1) the disabled child would not receive an educational benefit from attending a regular class; or (2) any marginal benefit from that attendance would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting; or (3) the disabled child is a disruptive force in a regular classroom setting. *Hartmann*, 118 F.3d at 1001; *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 879 (4th Cir.1989) (underlining added).

30. Petitioners proved by a preponderance of the evidence that █████ benefited academically and socially from attending the regular classes and that █████ was not a disruptive force in the regular classroom setting.

31. Respondent sought to rebut regular education inclusion but presented no evidence that █████ was a disruptive force in the regular classroom setting. Respondent's allusions to █████'s frustration and attention in the regular education was not sufficient to the Undersigned to prove that █████ was a disruptive student. Many students are frustrated with novel work and █████ was easily redirected to task.

32. Since the testimonial and evidentiary proved that █████ received educational benefit in the regular classes, for exclusion, Respondent had to offer evidence that █████ received only marginal benefit from the regular education setting and that this marginal benefit that was significantly outweighed by the benefits *solely* available in the special education classroom.

33. Respondent offered no evidence to prove that █████ received only marginal benefit from the regular education classroom inclusion and offered only conjecture and speculation that █████ would have made significantly more progress solely available in the special education classroom.

### **Research-Based Methods**

34. The IDEA requires that the IEP contain "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child." 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

35. "[N]either the text of the IDEA nor the IDEA regulations provide much guidance as to the effect of § 1414(d)(1)(A)(i)(IV)'s peer-reviewed research provision. *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 276 (3d Cir. 2012).

36. However, the federal regulations do provide some clarity, specifically stating that this provision “does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. The final decision about the special education and related services, and supplementary aids and services that are to be provided to a child must be made by the child's IEP Team based on the child's individual needs.” 71 Fed. Reg. 46540, 46665 (2006).

37. While research on populations of similar students may be informative, the north star of educational planning remains the unique needs of the individual student. *See Endrew F.*, 137 S.Ct. at 1001 (stating that “the adequacy of the IEP turns on the unique circumstances of the child for whom it was created”).

### **Professional Judgment and Deference to Educators**

38. The professional judgment of teachers and other school staff is a critical factor in evaluating an IEP. “Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.” *Hartmann*, 118 F.3d at 1001. *See also Rowley*, 458 U.S. at 207 (stating that “courts must be careful to avoid imposing their view of preferable educational methods upon the States”). The “IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parents.” *Lawson*, 354 F.3d at 328.

39. In addition, “a reviewing court should be reluctant indeed to second-guess the judgment of education professionals . . . we must defer to educators’ decisions as long as an IEP provided the basic floor of opportunity that access to special education and related services provides.” *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 2017 (4<sup>th</sup> Cir. 1990) (citations and quotation marks omitted).

40. The Undersigned acknowledges that she may not substitute her “own notions of sound educational policy for those of the school authorities” whose decisions are under scrutiny. *Rowley*, 458 U. S., at 206. Where those educational decisions were *sound* and the educators “offered a cogent and responsive explanation” for their decisions, *Endrew F.*, 137 S. Ct. at 1002, the Undersigned afforded them deference. Not all the Respondent’s educational decisions met this criterion.

### ***Procedural Violations***

41. For a procedural defect in the development of an IEP to entitle a claimant to relief, the defect must result in a loss of educational benefit and not simply be a harmless error. *See A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 684 (4th Cir. 2007). To the extent that the procedural violations do not actually interfere with the provision of FAPE, these violations are not sufficient to support a finding that a district failed to provide a FAPE. *Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997). If a disabled child received (or was offered) a FAPE in spite of a

technical violation of the IDEA, the school district has fulfilled its statutory obligations. *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir.1990).

42. In addition, state law dictates that “the decision of the administrative law judge shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.” N.C. Gen. Stat. § 115C-109.6(f). Procedural violations are presumed harmless unless those violations “(i) impeded the child's right to a free appropriate public education; (ii) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or (iii) caused a deprivation of educational benefits.” N.C.G.S. § 115C-109.8.

### **Matters Not Before this Tribunal**

43. Numerous elements of Petitioners’ case-in-chief are not before the Undersigned as part of this final decision.

44. Petitioners attempted to raise during their case-in-chief several issues that were not properly plead in the Petition or were outside the jurisdiction of this Tribunal. These issues included, but were not limited to, the appropriateness of IEP goals, the implementation of the IEP, the implementation of the math trial, and the composition of various IEP teams and other procedural matters.

45. As noted earlier, numerous issues that were presented in the Petition were dismissed at the close of Petitioners’ case-in-chief for lack of sufficient evidence. Those issues included the substantive appropriateness of the IEPs; alleged procedural violations related to evaluations, eligibility, conduct of IEP meetings, and development of the IEP; the IEP team’s data collection; parental participation in the IEP process, except as it pertains to Issues *infra*; and implementation of the IEPs.

46. In their case-in-case Petitioners also alleged that ██████’s goals were defective because they were not aligned with the Common Core curriculum. Petitioners offered no legal authority for their argument that ██████’s goals must be aligned with the Common Core curriculum. The Undersigned previously dismissed all substantive violations of the appropriateness of the IEP goals. For clarity, Petitioner’s challenge that they are not properly aligned with the Common Core was included in that Rule 41(b) dismissal.

47. Individual special education means specially designed instruction that adapts the content, methodology or delivery of instruction to *ensure the disabled child access* (not alignment) to the general curriculum so that the child can meet the educational standards of the public agency. 34 C.F.R. § 300.39(b)(3)(ii); 20 U.S.C. § 1401(29). Whether the delivery of the special services ensured ██████ access to the general curriculum, however, is still at issue. As indicated *infra* the Undersigned finds it was not.

48. Respondent's failure to diagnose ██████'s severe/profound hearing loss in his right ear is outside the statutory period, however, this serious substantive violation along with other evaluation inconsistencies, impacted the validity of the cognitive testing and future programming during both relevant school years.

49. The above described issues, and any other that were not specifically and properly plead in the Petition, are not before the Undersigned in this final decision and will have no further part in this decision.<sup>18</sup>

### ISSUES FOR DECISION

**Whether Respondent denied ██████ a FAPE during the 2014-15 or 2015-16 school year by not placing him in his Least Restrictive Environment, by failing to ensure access to the general curriculum, and failing to determine that ██████ could not be educated satisfactorily in the general education classroom with the use of supplementary aids and services.**

*Whether ██████ Was Placed in the LRE for the 2014-2015 and 2015-2016 School Years by failing to ensure access to the general education curriculum?*

#### *2014-2015 IEP's Placement*

50. Based on Findings of Fact 1-25, 123-304, other Findings and evidence in the record, in the IEP service delivery ██████ was placed in the least restrictive environment (2 hours of special education) during the relevant portion of the 2014-15 school year (November 24, 2014 to June 30, 2015). However, this placement was unilaterally changed by Respondent. *See infra*, Concls. of Law 55- 67.

#### *██████ Benefited Educationally and Socially in the General Education Class*

51. Even though ██████ was not on grade level in his regular classes, ██████ received educational benefit appropriate for his circumstances from his inclusion in the regular education classroom with his nondisabled peers. This educational benefit was more than marginal and these benefits were not significantly outweighed by the benefits which could solely be obtained from the special education classroom.

52. The IEP resource placement of two hours in the special education setting for remedial purposes was appropriate to ensure that ██████ could access the general curriculum.

53. In the special education classroom, ██████ received instruction in math that addressed elements of the standards for second grade math, including addition, subtraction, skip counting, and shapes. He also received instruction in language arts that addressed elements of the standards for second grade language arts, including identifying the main idea and details of texts. While it

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<sup>18</sup> Because these issues were not appropriately raised or were dismissed after Petitioners' case-in-chief, the Undersigned has not made findings of fact and will not make conclusions of law regarding these issues.

is true that much of [REDACTED]'s instruction was below grade level, the weight of the evidence supports a finding that the instruction was aligned with the relevant grade-level standards. He also received instruction in various specials, including music, physical education, computer lab, media center and art, with his non-disabled peers in the general education classroom.

54. Based on Findings of Fact 123-182, other Findings and evidence in the record, [REDACTED] had access to the general curriculum in other subjects as well during the 2014-2015 and 2015-2016 school years. He received instruction in science and social studies along with his nondisabled peers in the general classroom. He also participated in specials with his non-disabled peers. It is uncontested based on the evidence that [REDACTED] received appropriate educational benefit in light of his circumstances from inclusion in the regular education classes that could not be obtained in the special education classroom and that the specially designed instruction in the special education class ensured his access to the general education program.

*WCPSS Unilaterally Increased [REDACTED]'s Special Education Service Delivery During the 2014-2015 and 2015-2016 School Years*

55. Based on Findings of Fact 178-182, other Findings and evidence in the record, within a couple of weeks into the 2014-2105 school year, WCPSS began unilaterally increasing his special education service delivery for math from thirty-five (35) minutes to one hour;<sup>19</sup> thereby, excluding [REDACTED] from his general education math class and nondisabled peers for 2,200 additional minutes for the remainder of the 2014-2015 school year. Tr. 1599:16-19; Stip. Ex. 50. This was a unilateral change in [REDACTED]'s access to his nondisabled peers and violated [REDACTED]'s right to a FAPE in the LRE.

56. In addition, WCPSS increased the number of sessions from 36 times per reporting period to approximately 44 times per reporting period, or 8 additional sessions per reporting period during the 2014-2015 and 2015-2016 school years for a total of additional 1,120 minutes<sup>20</sup> away from his nondisabled peers. Stip. 27; Stip. Ex. 109, p. 19; Stip. Ex. 50, p. 303; Stip. Ex. 57, p. 350.

57. [REDACTED] was excluded from his nondisabled peers and regular math class for a total of approximately 92 hours<sup>21</sup> during the 4 reporting periods at issue within the 2014-2105 and 2015-2016 school years.

58. Although the entire 2014-2015 and 2016-2016 school years are not within the statutory period, during each school year, [REDACTED] was excluded from regular math instruction and nondisabled peers for approximately 184 instructional hours.

59. Unilateral removal of [REDACTED] from the regular education setting for an additional 92 hours without parent participation is both a significant substantive violation of [REDACTED]'s right to a FAPE education in the LRE and his parents' rights to meaningful participation in this decision during the relevant timeframe of the 2014-2015 school year.

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<sup>19</sup> 60 minutes - 35 min = 25 minutes x 88 (2 reporting periods at 44 sessions each) = 2,200 minutes

<sup>20</sup> 8 sessions/reporting period x 2 = 16 sessions x 35 minutes/session = 560 minutes

<sup>21</sup> 2,200.00 minutes + 560 minutes = 2,760 minutes ÷ 60 minutes/hour = 46 hours

60. Because the EC and regular education class schedules for the 2014-2015 school year were not proffered as evidence, the Undersigned was unable to determine if [REDACTED]'s placement changed from resource to separate by this increase in service delivery. Regardless, this increase in special education did further restrict his access to non-disabled peers.

61. A comparison of [REDACTED]'s class schedule with his 3<sup>rd</sup> grade regular education teacher Ms. [REDACTED] schedule along with the testimony of Ms. [REDACTED] demonstrated that [REDACTED] spent 30% or less of the day with his nondisabled peers during the 2015-2016 school year. *See* Stip. Exs. 86 & 113. This constitutes a self-contained placement.<sup>22</sup>

62. WCPSS' actions outside the IEP process violated [REDACTED]'s right a FAPE in LRE and the Petitioners' right to meaningful participation in those decisions. Thus, [REDACTED] did not have access to his regular second and third grade math instruction per his IEPs and was not educated in the LRE with his nondisabled peers during either school year. Tr. 1480:14-19; Tr. 1599: 10-14.

63. While Petitioners' experts testified extensively as to the research support for full inclusion, there are limitations to that research which were acknowledged by Dr. [REDACTED] and described in the same papers they cited during their testimony.

64. In addition, while academic research on relevant student populations should support educational decision-making, the IDEA does not require IEP teams to adopt the methodology with the greatest body of research. 71 Fed. Reg. at 46665. Rather, the central tenet of judicial review under the IDEA is that "the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *Andrew F.*, 137 S. Ct. at 1001.

65. While full inclusion of *all* disabled children, regardless of the severity of their disabilities is a worthy goal, it is not yet the law.

66. During his third grade year, all of [REDACTED]'s math instruction, except for a math prompt, was provided in the special education classroom. The EC teacher during the 2015-2016 school year did not testify at the hearing and there was no evidence that [REDACTED] received any math instruction that addressed elements of the third grade math Common Core standards. The regular education teacher speculated that [REDACTED] may have received some math Common Core in the exceptional classroom. Since [REDACTED] was on Common Core curriculum, there is no evidence that the specially designed instruction ensured him access to that curriculum. Rather, the failure to provide access to the Common Core curriculum is consistent with the EC teacher and Principal's opinions that [REDACTED] should be on the Extended Content curriculum. Failure to provide math Common Core instruction during the 2<sup>nd</sup> and 3<sup>rd</sup> grades virtually guaranteed that [REDACTED] would be placed on Extended Content curriculum at a later date.

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<sup>22</sup> Continuum of Placement:

Regular 80% or more a day with nondisabled peers.  
Resource 40%-79% a day with nondisabled peers  
Self-contained 39% or less with nondisabled peers  
*See* Stip. Exs. 60, p. 351; 97, p. 646; 103, p. 788.

67. With respect to language arts, however, the regular education teacher testified that ██████ did receive instruction in language arts that addressed elements of the standards for third grade language arts, including narrative writing and nonfiction reading. While it is true that much of ██████'s instruction was below grade level, the weight of the evidence supports a finding that his instruction aligned with the Common Core grade-level standards for language arts.

68. Based on Findings of Fact 114-304, 305-374, other Findings, the above conclusions and other evidence in the record, the team did not present a “cogent and responsive explanation” of why ██████'s special education time had to be increased especially since no data was offered to prove that ██████'s special education ensured him access to math Common Core curriculum. As a result, ██████ would be entitled to compensatory education for that period as well as the additional 8 sessions of special education every reporting period during the statutory period.

69. The regular education classes held approximately 20 students so removal of one student from the regular education setting would not equate to an hour for hour equivalence in compensatory education. Petitioners have offered no evidence or expert testimony about the appropriate amount of compensatory education to remedy ██████'s removal from the regular education classroom during the 2015-2016 school year or for the additional 8 sessions of special education services each reporting period for both school years. Because reviewing courts loathe erroneous fact finding, the Undersigned refuses to guess what is the proper amount of compensatory education.

70. As to the appropriateness of the increase in special education services at the November 2015 IEP meeting, unanswered questions remain for the IEP team to consider with respect to ██████'s appropriate placement for the November 2015 IEP such as: the gaps in ██████'s educational services because of his undiagnosed hearing impairment, the appropriateness of the cognitive testing, and the reason for his significant declines in academic achievement.

***Whether the IEP team failed to determine that ██████ could not be educated satisfactorily in the general education classroom with the use of supplementary aids and services.***

*2014-2015 School Year*

71. The IEP team's decisions regarding supplementary aids and services at the October 2014 IEP meeting are outside the statute of limitations and therefore are not before the Undersigned. Allowing a challenge to the appropriateness of those decisions simply because that IEP remained in place during a portion of the relevant statutory window would render the one year statute of limitations set by N.C.G.S. § 115C-109.6(b) meaningless and would create a *de facto* variable statute of limitations of between one and two years for claims related to the content of the IEP based on whenever the most recent annual review prior to the start of the relevant statutory period occurred.

72. Based on Findings of Fact 174-177, other Findings, and evidence in the record, the supplementary aid and service of collaboration time for the regular and special education teachers should have been included in the December 2014 IEP, and this failure was a procedural violation.

However, the testimony evidenced that the special and regular education teachers collaborated to provide [REDACTED] meaningful inclusion in the regular education classroom and that he received educational benefit from mainstreaming; therefore, this violation was harmless error for the 2014-2015 school year.

73. Based on Findings of Fact, various stipulations, and other evidence in the record, the remainder of the meetings during the 2014-15 school year did not address educational placement. The discussions at those meetings regarding *when* [REDACTED] would receive his specialized instruction during the school day relates to access to his nondisabled peers and the general education curriculum, not educational placement.

74. Except for the teacher collaboration mentioned above, during the 2014-15 school year, the weight of the evidence supports a finding that the IEP team appropriately considered and implemented various supplementary aids and services to support [REDACTED]'s access to general education classes. For example, the team added movement breaks, an FM system and adult assistance during a morning book club with non-disabled peers to the existing list of aids and services.

#### *2015-2016 School Year*

75. Unlike the 2014-2015 school year, this year no voluntary teacher collaboration occurred. This exemplifies why inclusion of teacher collaboration was necessary in [REDACTED]'s IEP. [REDACTED]'s regular education teacher Ms. [REDACTED] could not adequately modify [REDACTED]'s regular education classroom without assistance from the EC teacher Ms. [REDACTED] which was not voluntarily forthcoming. Had formal teacher collaboration been included in [REDACTED]'s IEPs for the 2015-2016 school year, Ms. [REDACTED] would have been required to provide assistance.

76. Based on Findings of Fact 115-177, 305-374, other Findings and evidence in the record, [REDACTED] did *not* have appropriate supplemental aids and services to provide him access to the general curriculum in the regular education class with his nondisabled peers during the relevant portion of the 2015-2016 school year (July 27, 2015 to November 24, 2015) because the Respondent failed to include teacher collaboration as a supplemental service in the IEP.

#### **Whether procedural violations related to the LRE determinations caused more than *de minimis* educational harm?**

77. The Undersigned concluded that the IEP teams during the relevant period in the 2014-2015 and 2015-2016 school years failed to appropriately consider whether [REDACTED] could be satisfactorily educated in the general education classroom with the supplementary services of teacher collaboration since implementation of modified assignments could not be effectuated in the regular education setting without the collaboration of the EC and regular education teachers.

78. Because informal teacher collaboration between the EC and regular education teacher was provided during the 2014-2015 school, the Undersigned finds that there was no educational harm and hence no denial of FAPE to [REDACTED] during that school year.

79. Also ██████'s educational placement for the 2014-15 school year was determined at the October 2014 IEP meeting, which is outside the statute of limitations. No procedural violations related to the development of the October 2014 IEP, to the extent evidence might support their existence, fall within the relevant statutory timeframe.

80. Based on Findings of Fact 16-25, 53-55, 114-304, other Findings, various stipulations and evidence in the record, additional procedural violations related to the LRE determination occurred from November 24, 2014 through the end of the 2014-15 school year. The IEP team should have discussed with the Petitioners, the concern about educational harm during the period of ██████'s undiagnosed hearing loss. Failure to discuss this significant issue denied Petitioners' meaningful participation in the IEP decision making process. Until this was addressed, it should have been raised at subsequent meetings the remainder of that school year and the 2015-2016 school year.<sup>23</sup>

81. The Respondent also failed to complete the Communication Plan Worksheet and to consider audiology as a related service at the December 2, 2014 IEP meetings. Stip. 62; Stip. Ex. 55; and Stip. 66. Although these were procedural errors, the Petitioners failed to meet their burden and prove educational harm to ██████

82. Based on Findings of Fact 332-342, other Findings, various stipulations and evidence in the record, there were no procedural violations related to LRE at the October 2015 IEP meeting, as that meeting did not reach review of educational placement and therefore no change was made to ██████'s placement. Petitioners made no argument that maintaining the service delivery and placement adopted in draft IEP after the meeting was a procedural violation. Rather, Petitioners only challenged the adoption of the new goals without discussion, which is not related to the issue of Least Restrictive Environment as this issue for hearing is defined. To the extent that the decision to adopt the draft IEP without discussion of certain portions of the IEP at the meeting might constitute a procedural violation, Petitioners presented no evidence to show that the decision, which left those provisions in effect for fewer than twenty school days, caused any educational harm. Considering the short timeframe, the Undersigned concludes that any harm which could be established would still be *de minimis*.

83. Based on Findings 343-362, other Findings, various stipulations and evidence in the record, there were procedural violations related to the LRE determination at the November 2015 IEP meeting.

84. During the 2015-2016 school year, the IEP team failed to add teacher collaboration as a supplemental service on the October or November 2015 IEPs.

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<sup>23</sup> To the extent that there was some discussion at the November 2014 meeting regarding expanding service delivery time in the special education classroom, it was not formally proposed and was not adopted.

85. The Undersigned rejects Respondent's argument that "the parents concurred in the postponement of the discussion about [REDACTED]'s supplementary aids and service, therefore, there could be no procedural violation about the supplemental aids/services."

86. At the November 2015 IEP meeting, Petitioners had no choice, they were told to choose between service delivery or supplemental aids/services. Failure to discuss and add teacher collaboration on the November 2015 IEP was a substantive violation for [REDACTED] as detailed in Conclusions of Law *supra* and forcing the parents to choose between service delivery or supplemental aids/services was a procedural violation which seriously impacted parental participation.

**Whether those failures amounted to predetermination that denied Petitioners meaningful participation in the IEP decision related to LRE?**

87. Because the Undersigned concluded that [REDACTED] was denied a FAPE since he did not have access to the general curriculum during 2015-2016 school year, a decision on whether this failure amounted to unlawful predetermination is required for that school year.

88. In addition, "while a school system must not finalize its placement decision before an IEP meeting, it can, and should, have given some thought to that placement." *Doyle v. Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D.Va.1992), *aff'd* 39 F.3d 1176 (4<sup>th</sup> Cir. 1994).

89. During the IEP process, parents and staff should have the opportunity to "fully air their respective opinions." *Andrew F.*, 137 S. Ct. at 993.

90. The Undersigned agrees with Respondent that, generally, comments by certain staff members about their opinions on [REDACTED]'s least restrictive environment does not necessarily support predetermination. However, these comments were made by [REDACTED]'s special education teacher and the Principal who was also the LEA Representative responsible for assuring funding of [REDACTED]'s educational plan. Principal [REDACTED] and EC teacher [REDACTED] made clear their preference for a self-contained placement since [REDACTED]'s initial IEP meeting. Granted these individuals did not compose the entire IEP team but as the Principal was called upon twice at both the October and November 2015 IEP meetings to "break the tie," the Petitioners were justified in their concern about his predisposition.

91. Similarly, the completion of a worksheet for self-contained placement by the same EC teacher Ms. [REDACTED] supports a finding of predetermination. Again, the Principal and EC teacher are only two members of the IEP team and although they made clear their preference for a self-contained placement since [REDACTED]'s initial IEP, they did not constitute the entire IEP team. A separate educational placement or Extended Content curriculum was never officially proposed or discussed by the team at either the October or November 2015 IEP meeting.

92. Even though the team did not officially change [REDACTED]'s placement to self-contained at the IEP meetings, WCPSS did unilaterally change [REDACTED]'s placement to self-contained by pulling him from the regular education classroom for more special education services than allocated in the

IEP service delivery. ██████ was in a *de facto* self-contained placement during his 2015-2016 school year.

93. The parents were only able to “fully air their respective opinions” and “objections and suggestions” about what the Petitioners knew. Prior to the facilitated November 2015 IEP meeting, the placement had already been changed. Respondent predetermined and denied meaningful parental participation in this *de facto* change of placement prior to the November 2015 IEP meeting without their knowledge.

94. The appropriateness of the IEP team’s decision to add twenty-five (25) minutes of math instruction and fifteen (15) minutes of reading instruction in the special education classroom in November 2015 was a moot point because the placement had already been unilaterally changed.

95. Before determining additional special education services, the IEP team must consider all of ██████’s unique needs which they did not do. The IEP team failed to consider important factors about ██████’s unique circumstances, such as; the educational loss from his undiagnosed hearing impairment, the appropriateness of the cognitive testing, the reason for the significant decline in academic achievement, and formal teacher collaboration for the modification of his assignments in the regular education classroom. The appropriateness of the additional pull-out time proposed in the November 2015 IEP is dependent on a comprehensive review and discussion of these issues.

96. The Petitioners asked for full inclusion, yet had also agreed that some pull out was appropriate in past IEPs. Petitioners have proved by a preponderance of the evidence that ██████ received educational and social benefit from attending the regular education classes and he was not a disruptive force, but not necessarily that full inclusion was appropriate.

97. Although not specifically stated as such, but it appeared that the Respondent argued that the marginal benefit ██████ made in the regular class was outweighed by the benefits which were obtained in the special education class. But Respondent failed to provide a cogent and responsive explanation as to how these benefits could *only* be delivered in a special education class and how they *significantly outweighed* the benefit from regular education attendance. Speculations that ██████ “was not making the progress we’d like to see” without supporting evidence and data is insufficient to rebut the educational and social benefits ██████ received from his inclusion in the general education classroom with his nondisabled peers.

98. The failure of WCPSS’ audiologist to conduct a full audiological evaluation in September 2013 is not within the statutory period. However, the impact of this loss of instruction due to this undiagnosed hearing impairment was relevant during the statutory period and was a topic of discussion between Senior Administrators and school staff. Instead of finding it “lucky” that the parents were unaware of this conflict, WCPSS should have included the Petitioners in these discussions at that time and during the relevant IEPs.

99. These gaps in [REDACTED]'s education and the inconsistencies of his cognitive and achievement testing, should have been raised by WCPSS staff at the IEP meetings because these were circumstances unique to [REDACTED] and his educational planning. This obligation continued into the 2015-2016 school year.

100. The question remains: What is the appropriate placement in the LRE for [REDACTED]

**Whether Respondent denied [REDACTED] a FAPE by failing to implement [REDACTED]'s math goals during either of the 2014-15 or 2015-16 school years?**

101. "Given the relatively limited scope of a state's obligations under the IDEA . . . the failure to perfectly execute an IEP does not necessarily amount to the denial of a free, appropriate public education. However . . . the failure to implement a material or significant portion of the IEP can amount to a denial of FAPE." *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 484 (4th Cir. 2011).

102. Based on [REDACTED]'s 2014-2015 Progress Reports during the reporting periods of 12/19/14 and 03/27/15, four of [REDACTED]'s seven math goals were not worked on during this time. Part of this period fell outside the statutory. Despite not working on them, at the expiration of the IEP, [REDACTED] had mastered two of them.

103. There is no legal obligation to work on every IEP goal in every quarter of the school year. IEPs are designed for a full year, and certain goals may be written sequentially and introduced at the appropriate point in the school year as long as the plan is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *See Wells Ogunquit Community Sch. Dist.*, 36 IDELR 204 (Me. SEA 2002) ("Throughout the hearing, the parents emphasized that what they perceived as the school's failure to implement every goal/objective in the IEP immediately and consistently throughout the year violates the IDEA. This is not so. Goals and objectives should be understood as destinations toward which the year's work was aimed."); *Westfield School District*, 114 LRP 29531 (WI SEA 2009) ("There is nothing in state or federal law that requires a district to address every benchmark included in a student's IEP each marking period.").

104. Based on Findings of Fact 178-187, other Findings, and evidence in the record, Respondent implemented intermittently all of [REDACTED]'s math goals during the relevant portions of the 2014-2015 school year. Four of the seven math goals were not implemented during second and third reporting periods, but were for the first and last reporting periods. Only the third reporting period was within the statutory period. [REDACTED] mastered two of these four math goals and made inconsistent progress on the other two. Any failure to reach a particular goal or portion of a goal during the 2014-2015 school year relates more to perfect execution of the IEP than a material failure to implement the IEP.

105. Based on Findings of Fact 305-374, other Findings, and evidence in the record, Respondent implemented [REDACTED]'s math goals during the 2015-2016 school year. [REDACTED] received instruction on his math IEP goals from [REDACTED] in the special education classroom. Progress

reports indicate updates on his progress during the first quarter of the 2015-2016 school leading into the October 2015 meeting.

106. Based on Finding of Fact 305-374, other Findings, and evidence in the record, Respondent implemented ██████'s math goals in the four weeks of school between the October 2015 IEP meeting and the filing of the Petition. While Respondent would not be expected to have substantial data regarding these goals, or even to have assessed every single goal in the first four weeks, evidence in the record supports a finding that ██████ received instruction on these goals during this timeframe. Further, even if Respondent did not work on every goal in the first four weeks of the IEP, that would not represent a material failure to implement the goals.

#### *Other Issues*

107. To the extent that this Order does not expressly rule on any other claims raised in the Petition, the Undersigned concludes that Petitioners did not meet their evidentiary burden to establish any right to relief on those claims and they are dismissed with prejudice.

**THEREFORE**, the Undersigned finds and holds that there is sufficient evidence in the records to properly and lawfully support the Conclusions of Law cited above.

#### FINAL DECISION

**BASED** upon the foregoing **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that:

1. Petitioners met their burden of proof, by a preponderance of the evidence, that Respondent failed to ensure ██████ was placed in the LRE and had access to the general education curriculum during both the 2014-2015 and 2015-2016 school years as follows:

- a) Respondent removed ██████ from the regular education classroom for special education services an additional 8 sessions for each of the 4 reporting periods within the relevant time frame during the 2014-2015 and 2015-2016 school years;
- b) Respondent unilaterally removed ██████ from all the math and part of the language arts regular education classes during the 2014-2015 school year;
- c) Respondent unilaterally removed ██████ from the regular education classrooms during the 2015-2016 school year which amounted to less than 30% of the school day with his nondisabled peers, a *de facto* self-contained placement.
- d) Respondent predetermined, without an IEP team meeting, these changes in ██████'s access to his nondisabled peers and regular curriculum thereby denying meaningful parental participation in this decision making process related to LRE; and,

e) Respondent failed to include necessary supplemental aids/services so that █████ could be educated satisfactory in the general education classroom during both the 2014-2015 and 2015-2016 school years, but that this failure caused more than *de minimis* educational harm only for the 2015-2016 school year.

2. Petitioners are prevailing party on all issues above except for 1(e) where Petitioners only prevailed on the 2015-2016 school year and Respondent prevailed on the 2014-2015 school year.

3. Petitioners proved by a preponderance of evidence that Respondent failed to implement all of █████ math goals during the 2014-2015 school year, but did not prove educational harm; therefore, Respondent did not deny █████ a FAPE during the 2014-2015 school and Respondent prevails on this issue.

4. Petitioners failed to meet their burden with respect to the math goals implementation for the 2015-2016 school. Respondent implemented █████s math goals during the 2015-2016 school year and are prevailing party on this issue.

5. Respondent is prevailing party of all claims dismissed by prior Orders of this Tribunal.

6. With respect to the LRE in the November 2015 IEP, Petitioners failed to meet their burden and Respondent failed to provide a cogent and responsive explanation as to the appropriateness of the increased 40 minutes of special education services because all relevant unique circumstances were not considered by the IEP team, i.e., the impact of █████s undiagnosed hearing impairment and the inconsistencies in the psychoeducational evaluations.

**IT IS HEREBY ORDERED THAT:**

7. Respondent shall provide compensatory tutoring in the regular education content areas missed during the 2014-2014 and 2015-2016 school years as outlined in paragraphs 10 and 11 below.

8. Respondent will include daily collaboration between the regular education and special education teachers as a supplemental aid/service on █████s IEP. Respondent is to document and maintain data about the effectiveness of this collaboration as well as the modifications in █████s regular education classrooms. A mutually agreeable independent inclusion expert is to be retained at public expense to assist with █████s regular education inclusion and to oversee the data monitoring for one school year. or less if agreed by the parties, to determine the effectiveness of this inclusion, need for additional accommodations, and implementation of all existing accommodations.

9. Respondent will conduct inclusion training with the [REDACTED] staff from either the independent inclusion specialist or an inclusion specialist from the North Carolina Department of Instruction.

10. To determine the appropriate placement and LRE, the following is needed: 1. an independent psychoeducational evaluation at public expense by a psychologist trained and experienced in evaluating children with hearing impairments; this evaluator needs to use cognitive and achievement testing appropriate for students with [REDACTED]'s disabilities, have access to [REDACTED]'s teachers, service providers, and parents, observe [REDACTED] on multiple occasions in all settings, communicate openly with the WCPSS and parents as equal participants; 2. a mutually agreeable inclusion specialist at public expense to review [REDACTED]'s records, observe [REDACTED] in the classroom, conduct teacher/staff/ service providers/parents interviews, and make recommendations for supplemental aids/services and their implementation and progress monitoring with data collection the inclusion program, train staff and supervise the implementation of inclusion for sufficient time for data to be collected regarding its effectiveness for a period of no more than 1 year after the start of implementation, parents and WCPSS have equal access to inclusion specialist, communicate openly with the WCPSS and parents as equal participants; 3. After completion of the evaluations, the IEP team will convene with the independent evaluator, inclusion specialist, related service providers, parents and school staff to review the evaluation results, develop an IEP with the appropriate level of inclusion as recommended by the inclusion specialist and independent evaluator. During the one-year duration period of this IEP, with the inclusion specialist's supervision, the IEP team will monitor, with research based data collection, [REDACTED]'s educational and social benefits as well as determine his rate of progress. The parties may revise the IEP by mutual agreement during this one year period.

11. Because [REDACTED] was denied access to the math Common Core and may overall have gaps in his educational foundation because of his undiagnosed hearing impairment, the IEP team along with the independent evaluator and inclusion specialist are to develop a compensatory education plan for the missed instruction during the 2014-2015 and 2015-2016 school years to be implemented during the ESY, track out periods, and specials. This plan should be based on [REDACTED]'s rate of learning. If the team cannot agree as to the amount of compensatory education, then the independent evaluators determination shall be binding. In addition, the scheduling of compensatory services must be mutually agreement to both parties.

**IT IS FURTHER ORDERED THAT:**

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

**IT IS SO ORDERED.**

NOTICE

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

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C106.1 et seq.) and particularly N.C.G.S. §§ 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may **appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board** under G.S. 115C107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section."

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

This the 26th day of June, 2017.



Stacey Bice Bawtinhimer  
Administrative Law Judge

## CERTIFICATE OF SERVICE

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

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This the 26th day of June, 2017.



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