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STATE OF NORTH CAROLINA

COUNTY OF FORSYTH

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
18 EDC 06837

QC by and through her parents KC and MC Petitioner, v. Winston-Salem /Forsyth County Schools Board of Education Respondent.	**FINAL DECISION**

THIS MATTER was heard before the presiding undersigned Administrative Law Judge Stacey B. Bawtinhimer on the following dates: March 27–29 and April 1–4, 2019, at the Office of Administrative Hearings in Raleigh, North Carolina.

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 record including the Proposed Decisions, supplemental documentation, as well as all stipulations, admissions, and exhibits, the Undersigned concludes that the Winston-Salem/Forsyth County Schools Board of Education ("Respondent," "School Board," or "WS/FCS")) violated the Individuals With Disabilities Education Act ("IDEA") and its implementing regulations, significantly impeded the Petitioners' ("Petitioner(s)", or "Parent(s)") rights to participate in the decisionmaking process regarding the provision of a free appropriate public education to Petitioner Q.C., and denied Q.C. a free appropriate public education in the least restrictive environment.

APPEARANCES

For Petitioners: Stacey M. Gahagan
Corey Frost
Gahagan Paradis, P.L.L.C.
3326 Durham Chapel Hill Boulevard, Suite 210-C
Durham, North Carolina 27707

For Respondent: Maura O'Keefe
David Noland
Tharrington Smith, L.L.P.
150 Fayetteville Street, Suite 1800
Raleigh, North Carolina 27602

WITNESSES

For Petitioners:
Dr. Ann Turnbull, Expert Witness
Petitioner M.C, Father of Q.C.
Jessica Sizemore, Independent Speech Pathologist
William Overfelt, Expert Witness
Petitioner K.C., Mother of Q.C.
Martha Chamberlin, Teaching Assistant at Knollwood Baptist Through-the-Week School ("Knollwood")
Shanée Howell, Parent Advocate
Mary "Kelsey" Frazier, Teacher at Forsyth Country Day School ("FCDS")
Ashley Clark, Director of the Johnson Academic Center FCDS
Amanda Maki, Q.C.'s One-on-One Aide at FCDS

For Respondent:
Lindsay Uldrick, Special Education Teacher at Whitaker Elementary School
Melissa Fisch, Former Teacher at Knollwood and Teaching Assistant at Whitaker Elementary School ("Whitaker")
Jeanne Brooker, Speech/Language Pathologist for WS/FCS
Barbara Kibler, Teacher at Whitaker
Sharon Creasy, Principal at Whitaker
Sue Ellen Bennet, Teacher at FCDS
Dr. Patricia Fisk-Moody, WS/FCS' EC Program Director

EXHIBITS

ADMITTED EXHIBITS:

The following exhibits were received into evidence during the course of the hearing. The page numbers referenced are the "Bates stamped" numbers. The admitted exhibits have been retained as part of the official record of this contested case and given the appropriate weight in this Final Decision.

Stipulated Exhibits ("Stip. Ex."): 1-51, 53-59.[1]

Petitioners' Exhibits ("Pet. Ex."): 2-5, 6 (historical purposes), 7-9, 11, 13, 15, 17-18, 20, 22-25, 26 (illustrative purposes), 27 (illustrative purposes), 30, 32-34, 37, 40-42, 45-50, 52-53, 55-60, 62, 64, 72, 77-78, 80.

[1] Stipulated Exhibit 52 was originally admitted into the record but later stricken from the record because some of the information contained in the exhibit was inaccurate. Stipulated Exhibit 59, the 2018-2019 Whitaker Elementary School calendar, was filed through Supplemental Documentation on August 13, 2019.

Respondent's Exhibits ("Resp. Ex."): 3 (pp. 44-45, 51-54, 120-21), 4 (pp. 707-09), 5 (pp. 752-54, 763-65, 786-87), 10, 14, 18-24 (official notice), 25 (1296-97), 27, 28.

EXHIBITS NOT ADMITTED:

Petitioners' Supplemental Exhibits 82-86, 87, and 88 were not admitted into evidence.

Respondent's Exhibits A-D filed on August 13, 2018, in Response to Petitioners' Submission of Supplemental Information were not filed as exhibits to the hearing nor admitted as such. *See* Order Denying Petitioners' Motion to Strike (filed 08/15/2018).

OTHER DOCUMENTS:

Transcript volumes 1 through 7 were received and have been retained in the official record of this case.

Any documents produced by the Parties in discovery, including, but not limited to, IEPs, email correspondence, datasheets, and meeting notes are self-authenticated. Stip. 74.

All pleadings filed with the Office of Administrative Hearings on the matter associated with Docket No. 18 EDC 06837 are self-authenticated. Stip. 75.

All informal discovery responses served on either Party are self-authenticated. Stip. 75.

The North Carolina Department of Instruction's *Policies Governing Services for Children with Disabilities* is self-authenticated. Stip. 76.

ISSUES

The Undersigned identified the issues for hearing as follows:

1. Whether Respondent failed to comply with the procedural and/or substantive requirements of the IDEA at any time between November 9, 2017 through November 9, 2018, and if so, what appropriate relief should this Tribunal award Petitioners?

2. Whether Respondent significantly impeded Q.C.'s Parents' meaningful participation in the IEP process by predetermining Q.C.'s placement in the separate setting causing Q.C. educational harm, and if so, what appropriate relief should this Tribunal award Petitioners?

BURDEN OF PROOF

Petitioners acknowledged in the Prehearing Order entered on March 19, 2018, that they have the burden of proof in this contested case. Stip. 7. The standard of proof is by a preponderance of the evidence. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); N.C. Gen. Stat. § 150B-34(a). North Carolina provides that actions of local boards of education are presumed to be correct and "the burden of proof shall be on the complaining party to show the contrary." N.C.

Gen. Stat.§ 115C-44(b). The Petitioners, being the complaining party, have the burden of proof to show by a preponderance of evidence that Respondent did not provide Q.C. with a free appropriate public education ("FAPE") and denied her Parents meaningful participation in the IEP process by predetermining Q.C.'s placement in the separate setting, thus causing Q.C. educational harm.

PROCEDURAL BACKGROUND

1. On November 9, 2018, Petitioners K.C. and M.C. filed a Petition for a Contested Case Hearing in the Office of Administrative Hearings against WS/FCS. In the Petition, Petitioners alleged WS/FCS failed to:

a) Offer Q.C. a FAPE in the least restrictive environment;
b) Develop and implement substantively and procedurally valid Individualized Education Programs ("IEPs") for Q.C.;
c) Employ adequate identification, classification, and placement procedures with respect to Q.C.;
d) Properly address Q.C.'s documented disabilities and academic issues;
e) Properly evaluate Q.C. and employ proper evaluative procedures;
f) Provide a substantively appropriate school placement to Q.C.;
g) Properly consider Q.C.'s need for related services;
h) Properly consider Q.C.'s need for Extended School Year ("ESY") services;
i) Comply with the procedural requirements of the IDEA, which resulted in educational harm, denial of parental participation, or the loss of educational benefit to Q.C.;
j) Follow the requirements set forth in the IDEA; and,
k) Follow the requirements of the North Carolina State law as set forth in N.C. Gen. Stat. §§ 115C-109.6 *et seq.*

2. As remedy, Petitioners asked for placement in an appropriate private school, compensatory special education and related services, evaluations, reimbursement for any expenses incurred as a result of Respondent's failure to provide FAPE including, but not limited to, the costs and expenses incurred for Q.C. to attend any private therapies, and the tuition and all associated costs and expenses, including transportation and adult assistance incurred for Q.C. to attend the private school.

3. On November 21, 2018, the Undersigned issued an Order Setting Hearing and General Pre-Hearing Order scheduling the Due Process Hearing to start on January 2, 2019.

4. Respondent filed its Response to the Petition on December 5, 2018.

5. On December 3, 2018, this Tribunal issued an Order of Reassignment, reassigning the case to Administrative Law Judge Randall May. The case was subsequently reassigned to the Undersigned on February 1, 2019.

6. On December 12, 2018, Respondent filed a Motion to Continue Hearing. This Tribunal granted the Motion to Continue on December 19, 2018. On January 11, 2019, the Parties filed a Joint Motion for a Definite Scheduling Order. The Parties proposed the hearing take place

from March 27, 2019, through April 5, 2019. This Tribunal issued the Consent Scheduling Order on February 1, 2019.

7. On January 15, 2019, the Parties filed a Joint Motion for Consent Protective Order. On January 18, 2019, this Tribunal issued the Protective Order for the production of certain confidential information, including medical records. Additional Protective Orders were issued on February 8, 2019, for the production of confidential personnel records, and on March 13, 2019 to govern access by Petitioners' expert witnesses to confidential and sensitive student information during classroom observations.

8. On February 8, 2019, Petitioners filed a Motion to Compel Discovery, requesting this Tribunal compel Respondent to allow Petitioners' expert witness to conduct observations at Whitaker Elementary School ("Whitaker") and the Readiness Program at South Fork Elementary School ("South Fork") in the WS/FCS. Respondent filed its Response to Petitioners' Motion to Compel on February 14, 2019.

9. On February 15, 2019, Petitioners filed a Motion to Quash Subpoenas and Motion for Protective Order, requesting this Tribunal enter a Protective Order barring Respondent from conducting any further formal discovery related to FCDS. Respondent filed its Response to Petitioners' Motion to Quash on February 21, 2019.

10. On February 20, 2019, Petitioners filed a Motion to Sequester Witnesses.

11. On March 1, 2019, this Tribunal entered an Order Granting in Part Petitioners' Motion to Compel, ordering Respondent allow Petitioners' expert to observe the classroom settings but not to speak with school staff with the exception of perfunctory administrative tasks.

12. On March 1, 2019, this Tribunal entered an Order Denying Petitioners' Motion to Quash Subpoenas.

13. On March 1, 2019, Petitioners filed a Motion for Summary Judgment. Respondent filed its Response on March 11, 2019. Petitioners' Motion for Summary Judgment was denied on March 26, 2019.

14. On March 5, 2019, Respondent filed a Motion to Compel Release of Records, requesting this Tribunal enter an order directing FCDS to produce all records requested by Respondent in its second subpoena.

15. On March 8, 2019, Respondent filed a Motion for Mediated Settlement Conference. On the same day, this Tribunal denied Respondent's Motion as mediated settlement conferences do not apply to IDEA impartial due process hearings. Petitioners filed a Response to Respondent's Motion on March 11, 2019.

16. On March 13, 2019, Respondent filed a Motion to Transfer Venue, requesting the portion of the hearing constituting its case-in-chief be held in Forsyth County, rather than Wake County. On March 27, 2019, this Tribunal entered an Order Denying Respondent's Motion to

Change Venue as untimely but accommodations for off-site testimony were made for the Parties' witnesses.

17. On March 20, 2019, Respondent filed a Motion *in Limine*, requesting an order precluding expert testimony from Petitioners' expert witnesses regarding the appropriateness of Q.C.'s private placement.

18. On March 26, 2019, Respondent filed a Second Motion *in Limine*, requesting an order precluding testimony from Petitioners' expert witness Dr. Turnbull regarding her classroom observations in the WS/FCS, as Dr. Turnbull, unaware of the Order, inadvertently spoke with school staff beyond perfunctory administrative tasks. On April 1, 2019, this Tribunal determined that Dr. Turnbull's conversations with school staff were in the presence of Dr. Fisk Moody and otherwise did not prejudice Respondent; therefore, the Undersigned issued an Order granting in part and denying in part Respondent's Motion *in Limine*. The Undersigned did not consider in the Findings of Fact any verbal communications between Dr. Turnbull and school staff.

19. On March 26, 2019, Respondent filed a Motion to Seal, requesting this Tribunal seal public access to certain exhibits received from FCDS. This Tribunal granted the Motion to Seal on the same day.

20. On March 27, 2019, this Tribunal orally granted Petitioners' Motion to Sequester Witnesses.

21. At the close of Petitioners' case in chief on Tuesday, April 2, 2019, Respondent moved to dismiss pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. This Tribunal denied Respondent's Motion in its entirety.

22. On July 19, 2019, the case was reopened after the Undersigned advised the Parties that she was ruling in favor of Petitioners and needed additional information from Petitioners regarding speech/language and transportation reimbursement amounts, Extended School Year ("ESY") entitlement under a Private Services Plan ("PSP") and asked that the Petitioners cite relevant exhibits in support of all reimbursement amounts.

23. Petitioners filed Supplemental Documentation, Supplemental Petitioners' Exhibits 82-86, and a Brief in Support of ESY on July 26, 2019. Petitioners Supplemental Exhibits 82-86 were not originally marked exhibits, and not discussed or admitted during Petitioners' case in chief.

24. A Second Order for Additional Supplemental Document from the Parties was filed on July 30, 2019 seeking from the Petitioners reconciliation of Petitioners' reimbursement amounts in Petitioners Exhibits 34 and 36, and a second flash drive with video exhibits (to be filed with Clerk). In addition, Petitioners were asked to cite to information within the record as to when: 1. Petitioners were made aware that Q.C.'s regular and special education teachers were tracking her behaviors; 2. Respondent disclosed the existence of the Behavior Tracking Sheets (Stip. Ex. 38); and 3. Respondent showed or gave copies of the Behavior Tracking Sheets to the Parents or their legal counsel.

25. In the Second Order Respondent was given until August 9, 2019, to respond (later extended to August 16, 2019) to respond to Petitioners' supplemental document and arguments. Respondent was also asked to provide the names of the "Parent" and "Preschool Teacher" who completed the Vineland Adaptive Behavior Rating Scales in the Psychological Evaluation. Respondent was asked the same three questions as Petitioners about the Behavior Tracking Sheets. Respondent was also asked to submit alternative remedies, including compensatory education, for the Undersigned's consideration.

26. The Final Decision deadline was extended accordingly to August 23, 2019.

27. Although Petitioners' Exhibits 49, 50, 52, 53, and 55 (videos) had been admitted during Petitioners' case in chief, Petitioners did not provide two flash drives containing those exhibits to the Clerk's office. Petitioners filed an additional flash drive with these video exhibits on August 1, 2019.

28. Upon a Second Order for Additional Supplementation from the Parties, Petitioners filed Amended Supplemental Documentation and Supplemental Petitioners Exhibits 87 and 88 on August 2, 2019. Petitioners Supplemental Exhibits 87 and 88 were not originally marked exhibits, and not discussed or admitted during Petitioners' case in chief.

29. After receipt of Petitioners' Supplemental Documentation, Respondent requested and was granted an extension to respond to August 15, 2019. Respondent filed its Response on August 13, 2019 with Exhibits A, B, C, and D attached. Respondent's Supplemental Exhibits A, B, C, and D were not originally marked exhibits, and not discussed or admitted during Respondent's case in chief.

30. Because it had been inadvertently left out of the record, the Parties had agreed during the July 30, 2019 phone conference to stipulate to and file the 2018-2019 Whitaker Elementary School calendar as Stipulated Exhibit 59. Stipulated Exhibit 59 was filed on August 13, 2019.

31. On August 15, 2019, Petitioners moved to strike Respondent's Exhibits A, B, C, and D from the records as those exhibits had not been marked exhibits, discussed, or admitted during Respondent's case in chief. The Undersigned denied Petitioners' motion because these exhibits were submitted for demonstrative purposes according to Respondent's legal counsel and were not offered as evidence.

32. In fairness to both Parties, any supplemental or responsive exhibits filed in support or defense of the Undersigned's Orders dated July 19 or July 30, 2019, which were not originally marked, discussed, and admitted exhibits, will not be received into evidence for determination of this Final Decision.

33. Petitioners sought leave to Reply to Respondent's submissions and leave was granted for Petitioners to reply by 12:00 noon on August 21, 2019. Petitioners timely filed their Reply in which they denied that Respondent was prejudiced by the Petitioners' supplemental exhibits.

34. Stipulated Exhibit 59 was admitted into evidence on August 23, 2019, then the record was closed.

FINDINGS OF FACT

Stipulations of Fact

At the start of the hearing in this matter, the Parties agreed to Jurisdictional, Party, Legal, and Factual Stipulations in a proposed Pre-Trial Order, which was approved and filed in the Office of Administrative Hearings on March 27, 2019. Stipulations are referenced as "Stip. 1," "Stip. 2," Stip. 3," etc. To the extent that the Stipulations are not specifically stated herein, the Stipulations of Fact in the Order on the Pre-Trial Conference are incorporated fully herein by reference.

Two additional post-hearing stipulations were filed on June 11, 2019 and are referenced as "Post-Hearing Stips. 1 and 2." The Parties also identified corrections to the hearing transcripts and listed the corrections in the Post-Hearing Stipulations. These corrections and Post-Hearing Stipulations are incorporated herein by reference.

Prior Orders

Unless specifically contradicted herein, this Final Decision incorporates and reaffirms all Findings of Fact and Conclusions of Law contained in previous Orders entered in this contested case.

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 makes the following Findings of Fact. In making these Findings of Fact, the Undersigned 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, biases, or prejudices the witnesses 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, IEP meeting minutes, IEP documents, and all other competent and admissible evidence.

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

Q.C.'s Unique Circumstances and Special Needs

1. Q.C.[2] described by her Father M.C. as "a sweet, kind, beautiful child that loves life in a way that I have never seen before and overcomes challenges every day with a bravery and like a courage that I just – I'm in awe of it every day". Tr. vol. 2, p. 316:13-17. K.C. echoed her husband's description of Q.C. and added that "[s]he thrives on positive reinforcement." Tr. vol. 3, p. 584:10-16. Others described her similarly. Tr. vol. 2, p. 484:2-4 (her private speech therapist also described Q.C. as "social, happy, eager to please, and hard-working"); Tr. vol. 6, p. 1154:9-12 ("very outgoing" according to Regular Education Teacher Kibler); Tr. vol. 5, p. 934:17-22 ("very social" "very happy" according to EC Teacher Uldrick).

2. Q.C. is also a student diagnosed with Down syndrome. Whitaker had never served a student with Down syndrome prior to Q.C.'s enrollment, nor had her private schools. Tr. vol. 2, p. 373:3-12.

3. In the videos and photos admitted into evidence, Q.C. is a cute, blond haired, petite child with characteristic facial features of a child with Down syndrome. *See* Pet. Exs. 30 (iMessages from K.C. and Ms. Fisch with photos), 50, 52, 53 (videos from FCDS). Even though Q.C. was older than her peers at FCDS, because of her petite frame, she was indistinguishable in size. Pet. Exs. 50, 53.

4. Q.C. has been served through Early Intervention Services for developmental delays and she continued to need an IEP once she transitioned to preschool. Stip. Ex. 35. Through Early Intervention Services, she had been provided speech/language services, physical therapy, and occupational therapy. Stip. Ex. 35.

5. She was six (6) years old when she was enrolled in kindergarten at Whitaker Elementary School. Stip. 1, 3. It is uncontested that Q.C. had academic deficits and was below grade level. Stip. 36; Stip. Ex. 36 (Psychological Evaluation). Q.C. required speech/language services because of her articulation, expressive, and receptive language deficits. Stips. 45-49. Q.C. also had fine motor skills deficits and her visual-motor integration skills were at the first percentile. Stip. Ex. 36, p. 196.

6. Although Q.C. had many developmental delays, she had average non-verbal intelligence (standard score of 101). Stip. 35. Her preschool teachers and Mother K.C. rated her socialization skills as low average with standard scores of 86 and 84, respectively. Stip. 37. At her former preschool Knollwood, she interacted well with her peers and they accepted her despite her disabilities. Her preschool teacher, Ms. Fisch, wrote to K.C. that "Q.C. has been a great addition to our class…this class just loves her." Pet. Ex. 30, p. 194 (iMessage from Ms. Fisch).

7. Q.C. has low muscle tone and because of this, she needed back support during circle time, and she would get tired and lie down sometimes in the afternoon. Even before Q.C.'s IEP

[2] Q.C. is referenced in various exhibits and testimony by her actual name, Q, Q., QC, and Q.C. The Undersigned has amended each reference to the minor Petitioner as Q.C. for consistency purposes. Bracketing these amendments makes the content of the exhibits and testimony difficult to read, therefore, these changes are not bracketed.

was developed by Respondent, through observation EC Teacher Uldrick recognized that "afternoons were rough for her" and "she was very tired in the afternoon." Tr. vol. 5, p. 949:17-19. Q.C.'s fine motor deficits made it difficult for her to use scissors and to write, but these difficulties could be accommodated.

8. Q.C. did not have disruptive behaviors while she was at Knollwood nor when she went to Forsyth Country Day School ("FCDS") after her brief stay at Whitaker. Her 2015, 2016, and September 2018 IEPs documented that Q.C. did not have behaviors which impeded her education or the education of her peers. *See* Stip. Exs. 11, 16, 24.

9. Because of her strong social skills, Q.C. was not only capable of learning from her nondisabled peers, but also benefited from learning alongside them. *See, e.g.,* Tr. vol. 1, p. 79:23-80:5 (Testimony of Dr. Turnbull noting socialization skills are a "major strength" for Q.C. and this "can really be capitalized upon in general education classes in terms of interacting with typical peers, modeling peers, learning from peers . . . "); Stip. Ex. 55, p. 361 (classroom observation from August 31, 2018, noting [Q.C.] "mimicked play that she saw going on around her."); Pet. Ex. 78, p. 628 (statement from Ms. Chamberlin noting "[Q.C.]'s behavior improved as she observed and mimicked behaviors of her peers . . . [Q.C.] was also paired with another student and benefitted from cooperative learning"); Pet. Ex. 80 (progress report from Knollwood reporting "[Q.C.] responded to peer influence when transitioning and would sit in circle time meeting for small amounts of time"); Tr. vol. 4, p. 657:11-18 (Testimony of Ms. Chamberlin that Q.C. mimicked her peers, and the use of peer modeling "was probably my best way of getting [Q.C.] to do what I needed her to do.").

10. However, at the October 2018 IEP Meeting, Principal Creasy was skeptical about the benefits of Q.C. learning among her nondisabled peers; she asked, "how do we know that Q.C. has learned by modeling?" Stip. Ex. 31, p. 146.

11. Throughout making this decision, the Undersigned recognizes that during the relevant period, Q.C. was a six year-old child, albeit with significant developmental delays, who was enrolled in kindergarten.

12. When Q.C. began kindergarten at WS/FCS, based on her unique circumstances and prior success among her nondisabled peers at the Knollwood preschool setting, Q.C. had been able to access the general education classroom with appropriate supplemental aids and supports.

WITNESSES

Credibility of Witnesses

13. The Undersigned determined the credibility of the witnesses[3] in this case based on any inconsistencies in the record and the witnesses' testimony as well as the Undersigned's observations of each witness' demeanor, voice inflection, tone, hesitation in responding to questions, facial features, body language, as well as any leading nature in the question and the

[3] *See also* description of credibility basis in statement starting as the "Based Upon" paragraph on page 8.

witnesses' interactions with legal counsel. The transcript of the hearing cannot record these mannerisms of witnesses.

14. In this case, as in all others, the Undersigned has not indicated in the record to legal counsel how she intended to rule on the credibility of the witnesses. Occasionally in hearings the Undersigned has noted on the record when a witness significantly and routinely delays answering a question. There is no legal authority requiring that an administrative law judge, or any judge, make any credibility determinations on the record or advise legal counsel on how the administrative law judge intends to rule on the credibility of witnesses.

15. Even though this Final Decision may incorporate language from the Parties' respective Proposed Final Decisions, credibility determinations are made independently from any proposals by the Parties. The Undersigned notes that legal counsel of both Parties also heard and/or observed each witness testify.

A. Petitioners' Witnesses

16. Petitioners called two expert witnesses, Ann Turnbull, Ph.D. and William Overfelt, BCSA. Petitioners also called Q.C.'s Mother K.C. and Father M.C., Jessica Sizemore, M.A., CCC/SLP, Martha Chamberlin, Shanée Howell, Kelsey Frazier, Ashley Clark, and Amanda Maki.

1. Ann Turnbull, Ph.D. - *Tr. vol. 1, pp. 35-242; vol. 2 pp 250-310.*

17. Dr. Ann Turnbull was qualified in the areas of special education, inclusion of students with low incidence disabilities, inclusive instruction, educational policy, family partnerships, and advocacy, collaborative teaming of IEP teams and general education teachers, teacher training and support, IEP development, evaluation of students with disabilities, and positive behavior support.

18. Dr. Turnbull earned her Bachelor of Science in Special Education from the University of Georgia. Pet. Ex. 56, p. 456. Dr. Turnbull earned her Master of Education from Auburn University in special education. Pet. Ex. 56, p. 456. Dr. Turnbull earned her Doctor of Education in Special Education from the University of Alabama. Pet. Ex. 56, p. 456. Dr. Turnbull has published over thirty (30) books, over fifty (50) chapters, and over two hundred twenty-five (225) peer-reviewed journal articles, all of which focus on educating students with significant disabilities. Pet. Ex. 56, p. 456-488. Dr. Turnbull is a co-author of a leading textbook that "prepares general education teachers to teach students with disabilities." Dr. Turnbull has presented at hundreds of conferences and workshops on developmental disabilities and the core principles of the IDEA. Pet. Ex. 56, p. 489-542; *see also* Tr. vol. 1, p. 41:1-2. Dr. Turnbull has received multiple awards over the course of her career, including the Lifetime Achievement Award from the American Association on Intellectual and Developmental Disabilities. Pet. Ex. 56, p. 456-57.

19. Dr. Turnbull's education and background qualified her to offer her expert opinion about the areas in which she was qualified as an expert by the Tribunal. Pet. Ex. 56. Dr. Turnbull had direct contact with Q.C. and her family as part of gathering information to form the basis of her opinions about Q.C.'s educational programming and her preparation to testify on Q.C.'s behalf.

Tr. vol. 1, pp. 47:10-15. Dr. Turnbull reviewed Q.C.'s educational record. Tr. vol. 1, pp. 47:17-23.

20. Dr. Turnbull did not observe Q.C. in the public school setting, but she observed Q.C.'s educational environments at Whitaker, including the general education and special education classrooms, and the Readiness Program at South Fork Elementary School—the program to which Respondent had assigned Q.C. *See* Tr. vol. 1, pp. 47:14-15, 173:14-21, 182:12-16. Due to the refusal of the private school to allow observations by either party, Dr. Turnbull did not observe Q.C. in her classroom at Forsyth Country Day School ("FCDS"). Tr. vol. 2, p. 298:1-3. However, Dr. Turnbull did view the numerous videos provided by FCDS of Q.C. in the classroom interacting with peers and/or her one-on-one aide during the school day. Tr. vol. 1, pp. 47:18-20, 222:2-3.

21. Despite not having observed Q.C. in the public school environment, and only viewing videos from FCDS, the Undersigned found Dr. Turnbull to be credible[4] and knowledgeable about Q.C.'s unique circumstances and disabilities based on her review of Q.C.'s educational records, evaluations, meeting with Q.C. and her parents, and observations of Q.C. in the videos provided by FCDS. Tr. vol. 1, p. 47:10-20. As Dr. Turnbull was a credible expert witness, her testimony will be given weight throughout this Final Decision.

22. Respondent did not offer any expert testimony in response to the expert opinions of Dr. Turnbull.

2. William Overfelt, M.A., Ed.S., BCBA - *Tr. vol. 3, pp. 505-579 (via speakerphone & Skype).*

23. Mr. Overfelt was qualified as an expert in the areas of behavior assessment and intervention for student behaviors, including Functional Behavior Assessments ("FBAs"), Behavior Intervention Plans ("BIPs"), Applied Behavior Analysis ("ABA"), Positive Behavior Intervention Systems ("PBIS"), and developing appropriate, measurable behavior goals.

24. Mr. Overfelt earned his Bachelor of Science in Interdisciplinary Studies with concentrations in international studies and special education from East Tennessee State University in 2002. Pet. Ex. 57, p. 544. Mr. Overfelt earned his Master of Arts in Teaching with a concentration in special education from Western Carolina University in 2006 and his Education Specialist Degree in Special Education Administration from Western Carolina University in 2009. Pet. Ex. 57, p. 544. Mr. Overfelt also earned his Master of Arts in Liberal Studies from the University of North Carolina at Greensboro in 2013. *Id.*

[4] Dr. Turnbull did briefly speak with Respondent staff while conducting court-ordered observations with Dr. Fisk-Moody. After questioning Dr. Turnbull, the Undersigned found that Dr. Turnbull unknowingly violated the parameters of this Tribunal's order regarding observations by asking questions of and engaging in dialogue with staff, as she had not been provided the order in advance of the observations. *See* Tr. vol. 1, pp. 154:17-172:23 (for the full discussion of this issue) after questioning by both Parties and the Undersigned, the Undersigned finds that the exchange did not impact Dr. Turnbull's creditability. However, any information Dr. Turnbull gleamed from these conversations, not otherwise in the record, was not considered in this Final Decision.

25. Mr. Overfelt completed his Professional Graduate Certificate in Applied Behavior Analysis from the Florida Institute of Technology in 2008 and is a Board Certified Behavior Analyst ("BCBA"). Pet. Ex. 57, p. 544. Mr. Overfelt also currently holds a North Carolina Professional II Teaching License in the areas of Exceptional Children's Program Administration and Special Education. Pet. Ex. 57, p. 545.

26. Mr. Overfelt's professional experience includes working as teacher, autism specialist, and behavior specialist in Buncombe County Schools; serving as Assistant Director of Exceptional Children's Programs and Behavior Coordination for Henderson County Schools; teaching courses in assessment of exceptional children and behavior management at the University of North Carolina at Asheville and East Tennessee State University; and working as a behavior specialist at the First Resource Center. Tr. vol. 3, pp. 509:25-513:1.

27. Mr. Overfelt has worked with children with Down syndrome in both group homes and in classroom environments as a teacher, administrator, and consultant. Tr. vol. 3, p. 513:14-19.

28. Mr. Overfelt was the only Board Certified Behavior Analyst to testify and the only witness with specialized knowledge in the behavioral needs of children with Down syndrome having worked with them in multiple settings.

29. The Undersigned found Mr. Overfelt to be credible and knowledgeable about Q.C.'s unique circumstances and disabilities based on his review of Q.C.'s educational record and review of the videos provided by FCDS. The Undersigned noted that Mr. Overfelt did not personally observe Q.C. in any classroom setting other than the FCDS videos, but that he did have access to Respondent's Behavior Tracking Sheets and FCDS' behavior data. Mr. Overfelt was a credible expert witness, and his testimony will be given weight as applicable in this Final Decision.

30. Respondent did not offer any expert testimony in response to the expert testimony of Mr. Overfelt.

3. Q.C.'s Parents

31. The Undersigned found Q.C.'s Parents, Petitioners M.C. (father) and K.C., (mother) to be credible, even though, as Q.C.'s parents, they have explicit and implicit biases for the best interests of Q.C. Petitioners M.C. and K.C. clearly had high expectations for Q.C.'s academic and functional achievement. Their vision for Q.C.'s educational environment and for her to be included to the maximum extent possible with her nondisabled peers differed significantly from Respondent's view of what would be an appropriate educational programming for Q.C.

32. Respondent agreed that Petitioners "rightly seek for [Q.C.] to be included with her nondisabled peers to the maximum extent appropriate," Resp. Pro. Dec. ¶16, p. 17, but on the other hand Respondent complained that Petitioners were unreasonable to seek 100% inclusion. The reasonableness or unreasonableness of Petitioners' position is for the IEP Team to determine once full inclusion has been tried, not for Respondent to completely discount as a possibility, especially in Q.C.'s early elementary school years.

a. M.C. ("Q.C.'s Father")- *Tr. vol. 2, pp. 316-416.*

33. Petitioner M.C. testified about his experience with WS/FCS during the relevant time period, his vision for Q.C. was for her to be included in the regular classroom with her nondisabled peers.

34. The Undersigned found M.C.'s testimony to be corroborated by the testimonies of Respondent's witnesses. *Compare, e.g.,* Tr. vol. 2, p. 401:24-25 (Testimony of M.C. that no one stopped him and K.C. from leaving the October 1, 2018 IEP meeting), *with* Tr. vol. 6, p. 1329:12-17 (Testimony of Principal Creasy that she did not try to stop M.C. and K.C. from leaving the meeting); Tr. vol. 2, p. 370:10-14 (Testimony of M.C. that the school did not ask his permission to remove Q.C. from her regular education class for thirty (30) minutes every day beginning on Q.C.'s third day of school), *with* Tr. vol. 5, p. 1016:21-23 (Testimony of Ms. Uldrick that she did not get permission from Q.C.'s parents prior to removing her from her regular education class); Tr. vol. 2, p. 393:11-16 (Testimony of M.C. that the school-based members of the IEP team did not respond after he expressed his vision that Q.C. be educated alongside her nondisabled peers), *with* Tr. vol. 6, p. 1299:3-7 (Testimony of Principal Creasy that she did not respond when M.C. opened the meeting by expressing his vision for Q.C.).

b. K.C. ("Q.C.'s Mother") - *Tr. vol. 3, pp. 583-636; vol. 4, pp. 685-690.*

35. Petitioner K.C. confirmed and supplemented M.C.'s testimony.

36. The Undersigned found K.C.'s testimony to be corroborated by Q.C.'s educational record and the testimonies of other witnesses. *Compare* Tr. vol. 3, pp. 613:23-614:7 (Testimony of K.C. that the school-based members of the IEP team rolled their eyes and shrugged their shoulders whenever M.C. offered a suggestion at the October 1, 2018 IEP meeting), *with* Tr. vol. 4, pp. 672:16-673:6 (Testimony of Ms. Howell that she observed the school-based members of the IEP team rolling their eyes and showing disengagement at the October 1, 2018 IEP meeting); *compare* Tr. vol. 3, p. 603:4-14 (Testimony of K.C. regarding her phone conversation with Principal Creasy before the October 1, 2018 IEP meeting), *with* Tr. vol. 6, p. 1291:7-18 (Testimony of Principal Creasy providing a similar recollection of the conversation); Tr. vol. 4, pp. 687:25-689:8 (Testimony of K.C. that she created a handout describing Q.C.'s needs and passed it out at the September 11, 2018 IEP meeting), *with* Stip. Ex. 26, p. 122 (minutes noting K.C. passed out the handout).

37. Both Parents were strong advocates for Q.C. and credible witnesses, their testimonies will be given weight throughout this Final Decision.

4. Jessica Sizemore, M.A., CCC/SLP - *Tr. vol. 2, pp. 480-496 (via speakerphone).*

38. Jessica Sizemore is a private speech pathologist at Speechcenter, Inc who provided speech therapy to Q.C. from October 2017 to December 2018. Pet. Exs. 4, 5, 6; Tr. vol. 2, p. 483:2-8.

39. Ms. Sizemore earned her Masters' Degree in Speech and Hearing Sciences from

the University of North Carolina at Greensboro. Tr. vol. 2, pp. 482:25-483:1.

40. Ms. Sizemore was familiar with Q.C.'s unique circumstances and disabilities. Ms. Sizemore conducted a speech/language evaluation of Q.C. on October 4, 2017 (Pet Ex. 3) and provided Q.C. with speech/language therapy for over a year. Pet. Exs. 4, 5, 6.

41. The Undersigned found Ms. Sizemore to be credible and knowledgeable about Q.C.'s unique circumstances with respect to her speech/language deficits. As Ms. Sizemore was a credible witness, her testimony will be given weight as it relates to Q.C.'s speech/language needs.

5. Martha Chamberlin - *Tr. vol. 4, pp. 647-664 (via speakerphone).*

42. Martha Chamberlin was one of Q.C.'s teachers at Knollwood Baptist Through-the-Week Preschool ("Knollwood") who co-taught Q.C. from January 2018 – June 2018.

43. Ms. Chamberlin earned her Bachelor's Degree in Education and Psychology. Tr. vol. 4, p. 650:4.

44. Ms. Chamberlin was familiar with Q.C.'s unique circumstances and disabilities. Ms. Chamberlin poignantly described Q.C., her needs, and how Q.C. presented in the preschool environment. *See, e.g.*, Tr. vol. 4, p. 650:20-24 (describing Q.C. as a loving child with Down syndrome, but who was "high functioning" and responded well to positive reinforcement); *id.* at 651:12-13 (describing Q.C.'s strengths as forming positive relationships with her peers); *id*. at 651:24-652:1 (describing Q.C.'s weaknesses, including difficulty with fine motor skills); *id*. at 652:12-15, 657:11-18 (explaining Q.C. learned from mimicking her peers and her peers provided tutoring and encouragement to Q.C., which helped her follow directions); *id*. at 653:13-15 (explaining Q.C. would sometimes lie on the floor if she were tired); *id*. at 657:23-658:2 (describing how Q.C. benefitted from cooperative learning); *id.* at 653:8-10 (explaining Q.C. often became tired around 12:30 p.m. and would lose focus). Ms. Chamberlin's observations of Q.C. were similar to those of Ms. Fisch, who was Q.C.'s co-teacher at Knollwood during the same period.

45. The Undersigned acknowledges that Ms. Chamberlin has no formal training in special education but finds Ms. Chamberlin to be credible and knowledgeable about Q.C.'s unique circumstances and disabilities. As Ms. Chamberlin was a credible witness, her testimony will be given weight as applicable.

6. Shanée Howell - *Tr. vol. 4, pp. 665-675 (via speakerphone).*

46. Shanée Howell attended the October 1, 2018, IEP Meeting as an advocate for Petitioners.

47. Ms. Howell is the Executive Director of Applied Family Services in Winston-Salem. Tr. vol. 4, p. 668:2-3.

48. The Undersigned found Ms. Howell to be credible and her testimony will be given

weight with regard to the occurrences and conversations at the October 2018 IEP Meeting.

7. Mary "Kelsey" Frazier - *Tr. vol. 4, pp. 706-767 (via speakerphone and Skype).*

49. Mary "Kelsey" Frazier is Q.C.'s lead teacher at Forsyth Country Day School ("FCDS"). Tr. vol. 4, p. 709:12-13.

50. Ms. Frazier completed a Bachelor's Degree in Child Development at Meredith College and holds a Birth to Kindergarten teaching license. Tr. vol. 4, pp. 708:25-709:2.

51. Ms. Frazier's experience teaching students with disabilities was during her student teaching when she taught in a Title 1 blended classroom where half of the students had IEPs. Tr. vol. 4, p. 711:4-9,

52. Although Ms. Frazier was not a special education teacher, in her classroom she was able to successfully integrate Q.C. with her nondisabled peers.

53. The Undersigned found Ms. Frazier to be credible and her testimony will be given weight where applicable.

8. Ashley Vaugh Clark - *Tr. vol. 4, pp. 706-767 (via speakerphone and Skype).*

54. Ashley Vaugh Clark is the Director of the Johnson Academic Center at FCDS.

55. Ms. Clark completed a Bachelor's Degree in Special Education from Greensboro College. Tr. vol. 4, p. 773:4-5. Ms. Clark holds a certification in the Wilson Reading Program. *Id.* at 773:11-12.

56. Ms. Clark has worked in the field of special education for eighteen (18) years, including three years as a teacher at the Piedmont School and fifteen (15) years as a language development specialist and Director of the Johnson Academic Center at FCDS. Tr. vol. 4, p. 774:1-6. As part of her responsibilities, Ms. Clark hires and supervises one-on-one aides/shadows that work with students at FCDS. *Id.* at 775:1-3.

57. Ms. Clark supervised Amanda Maki, Q.C.'s one-on-one aide. *Id.* at 774:21-23. As Ms. Maki's supervisor, Ms. Clark was knowledgeable about Q.C.'s behaviors in the classroom and reviewed the initial behavior data collected by Ms. Maki. Tr. vol. 4, p. 775:12-14. While Q.C. has been at FCDS, Ms. Clark has not had to provide Ms. Maki with any additional support. *Id.* Moreover, Ms. Clark did not have any concerns about Q.C.'s behaviors at FCDS. Tr. vol. 4, p. 776:2-5.

58. The Undersigned found Ms. Clark to be credible and her testimony will be given weight as applicable.

9. Amanda Maki - ***Tr. vol. 4, pp. 812-861 (via speakerphone and Skype).***

59. Amanda Maki is Q.C.'s shadow at FCDS. Tr. vol. 4, p. 16-22. She has a Bachelor's Degree in Psychology. Tr. vol. 4, p. 814:16-18.

60. Prior to working at FCDS, Ms. Maki was employed by WS/FCS as an assistant in a CORE 1 program, a kindergarten classroom, and a third grade class. Tr. vol. 4, p. 814:19-25. The CORE 1 classroom is a self-contained classroom that serves students with IEPs who cannot be served in the regular education setting. Tr. vol. 4, p. 815:1-15.

61. Ms. Maki was familiar with Q.C.'s unique circumstances and disabilities. Ms. Maki spoke at length about Q.C., her needs, her academic capabilities, and progress while at FCDS. *See, e.g.,* Tr. vol. 4, pp. 826:23-827:2 (explaining Q.C.'s lack of core strength and need for a chair to help her sit during circle time); *id*. at 828:12-19 (describing when Q.C. needs to use headphones); 831:16-21 (explaining Q.C. likes to be independent and the support she needs when transitioning from recess); *id*. at 832:23-833:19 (describing Q.C.'s ability to identify letters and how she supports Q.C. when she gets tired); *id*. at 837:5-21 (explaining Q.C. has mastered all of her IEP goals); *id*. at 850:2-23 (describing Q.C.'s improvement in her social skills since coming to FCDS); *id.* at 851:2-15 (describing Q.C.'s improvement in her ability to count, write letters, follow directions, identify a story plot, and participate in class).

62. The Undersigned found Ms. Maki to be credible and knowledgeable about Q.C.'s unique circumstances and disabilities. Her testimony about Q.C.'s behaviors corroborated that of the Petitioners, Ms. Chamberlin, Ms. Frazier, and Ms. Clark. As Ms. Maki was a credible witness, her testimony will be given weight as applicable. When weighing Ms. Maki's testimony, the Undersigned factored in that Ms. Maki has a psychology degree and former experience teaching disabled students in WS/FCS.

B. <u>Respondent's Witnesses</u>

63. The Respondent presented testimony from the following fact witnesses: Lindsay Uldrick, Melissa Fisch, Jeanne Brooker, Barbara Kibler, Sharon Creasy, Sue Ellen Bennet, and Patricia Fisk-Moody, Ed.D.

64. The Respondent did not present testimony from any expert witness in response to the testimonies of Petitioners' experts.

65. Although Respondent, a local educational "agency," did not proffer any expert witness testimony, the Undersigned must still give due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the Respondent. N.C.G.S. §150B-34(a). Respondent, however, did not establish that any of its witnesses had any specialized knowledge and expertise about the inclusion and/or behavioral requirements of students with Down syndrome.

1. Patricia Fisk-Moody, Ed. D. - *Tr. vol. 7, pp. 1368-1451.*

66. Dr. Patricia Fisk-Moody is the Exceptional Children's Program Director for WS/FCS.

67. Dr. Fisk-Moody earned her Bachelor's Degree in Liberal Arts, her Master's Degree in Special Education, and her Doctorate Degree in Educational Leadership. *See* Pet. Ex. 14, p. 909 (Dr. Fisk-Moody's CV). She holds licensure in the following areas: Superintendent, Principal, Exceptional Children's Program Administrator, and Cross Categorical. *See id*.

68. No evidence was provided as to Dr. Fisk-Moody's specialized knowledge and/or expertise about the supplemental aids and supports necessary for appropriate inclusion of a student with Down syndrome in the regular classroom.

69. Dr. Fisk-Moody observed Q.C. once briefly but otherwise did not meet or interact with Q.C. Dr. Fisk-Moody did attend the October 2018 IEP meeting in her role as a Respondent Senior Administrator. *See* Stip. Ex. 29, p. 132. Additionally, Dr. Fisk-Moody accompanied Dr. Turnbull, as the representative of the Respondent, during her tours of Whitaker and the self-contained program at South Fork. Tr. vol. 1, pp. 165:23-1; 167:8-11; 182:12-13 (Testimony of Dr. Turnbull).

70. Overall the Undersigned found Dr. Fisk-Moody to be a credible witness, but she did waiver in her responses about the least restrictive environment during cross-examination to the point that the Undersigned had to ask her for clarification. *See* Tr. vol. 7, pp. 1442:20-1443:20; 1444:12-1447:5 (on cross-examination first admitting, then denying, that Q.C. could be served in the general education classroom with supplemental aids and supports); Tr. vol. 7, p. 1452:7-13 (admitting in response to the Undersigned's question that, but for Q.C.'s behaviors, Q.C. could be served in the regular education classroom with supplemental aids and supports).

71. Dr. Fisk-Moody testified as an agent of the Winston-Salem/Forsyth County Board of Education (the "School Board") and was able to speak directly to the policies and customary practices employed by the School Board. As previously noted, and discussed below in this Final Decision, the Undersigned found Dr. Fisk-Moody to be credible and gave her testimony weight as applicable.

2. Sharon Creasy - *Tr. vol. 6, pp. 1272-1333 (via speakerphone and Skype).*

72. Sharon Creasy is the Principal of Whitaker and had been for five years prior to this hearing. Tr. vol. 6, p. 1274:10-14. She has been in education for approximately 20 years. Tr. vol. 6, p. 1275: 21.

73. Principal Creasy has a Bachelor's Degree in Political Science and History, a Master's in Information and Library Science, and a Master's in School Administration, with a concentration in Technology. Tr. vol. 6, p. 1275:6-11.

74. Principal Creasy testified that she was familiar with kindergarten curriculum but has never taught in a regular or special education classroom and, prior to her administrative duties at Whitaker, she had served as a media coordinator/librarian. Tr. vol. 6, p. 1311:10-21.

75. Despite her many years in the education field, prior to her position at Whitaker, Principal Creasy had not attended very many IEP meetings. Tr. vol. 6, p. 1275:16-20.

76. Principal Creasy had limited experience with children with Down syndrome and that was only in the high school setting, not at the kindergarten or elementary school level. Tr. vol. 6, p. 1276:16-20.

77. Principal Creasy first encountered Q.C. at the May 2018 kindergarten screening but she knew before that screening that Q.C. was a child with Down syndrome and had been enrolled in Whitaker. Tr. vol. 6, p. 1276:5-14. Principal Creasy participated in both the September and October 2018 IEP Meetings as the LEA Representative. Stips. 52, 62.

78. Petitioners accused Principal Creasy of stating at the October 2018 IEP meeting: "That placement [at Whitaker] would have never been accepted had we known she [Q.C.] had Down syndrome." Tr. vol. 2, p. 398:1-5. During her testimony when she had an opportunity to deny saying this statement, Principal Creasy was not asked by Respondent to respond or deny that she said it.

79. None of Respondent's other witnesses asked about this statement could recall but Ms. Kibler appeared to agree that she did make the statement. Tr. vol. 6, pp. 1198:23-1199: ("I don't – yes, but I don't --- what I think she was saying…"); Tr. vol. 5, pp. 1004:20-1005:1 (Ms. Uldrick did not recall); Tr. vol. 5, p. 1103:10-20 (Ms. Brooker did not recall). Petitioners' advocate testified that "Principal Creasy said they wouldn't have let her in without knowing first – had they known that she had a disability." Tr. vol. 4, p. 673:12-23.

80. Although she acted as the LEA representative for Respondent, Principal Creasy did not have as "fulsome an understanding of the IDEA and associated procedures would be for an LEA representative." *See* Tr. vol. 6, pp. 1310:1-11; 1315:12-1316:4; Resp. Pro. Dec. p. 19, ¶ 20 (quote from Respondent's Proposed Decision).

81. Principal Creasy's testimony frequently did not align with the documentary evidence in the case or her recollection of events was unsubstantiated from the record or other testimony. *Compare, e.g.*, Tr. vol. 6, p. 1285:11-20 (explaining the IEP team discussed several options for Q.C.'s service delivery at the September 2018 IEP Meeting), *with* Stip. Ex. 26 p. 123 (minutes from September 2018, IEP Meeting reporting Ms. Holtzclaw suggested 240 minutes before Principal Creasy decided on 300 minutes); Tr. vol. 6, p. 1288:3-7 (claiming she was surprised when she received the letter from Q.C.'s Parents following the September 2018 IEP Meeting in which the Parents expressed their disagreement with Q.C.'s placement), *with* Stip. Ex. 26, pp. 122-23 (noting a number of disagreements between the school-based members of the IEP Team and Q.C.'s Parents); *with* Tr. vol. 6, pp. 1189:20-1190:11 (Ms. Kibler testified that she was not shocked or surprised because she understood Parents did not want Q.C. in a separate classroom); Tr. vol. 6, p. 1338:11-19 (claiming that, going into the October 2018 IEP Meeting,

she believed Q.C. would remain at Whitaker and continue receiving instruction in Ms. Uldrick's resource room), *with* Tr. vol. 2, p. 396:21-25 (Testimony of M.C. that during the October 2018 IEP Meeting, Principal Creasy reminded him that Q.C. was no longer assigned to Whitaker).

82. As the school principal, Principal Creasy acted as an agent of the School Board. As the Respondent's agent, Principal Creasy's representations to Petitioners and school staff were considered party admissions. *See Farrell v. Transylvania County Board of Education,* 175 N.C. App. 689 (N.C. Ct. App. 2006) (principals, superintendents, and special education directors entitled to public official immunity as agents of the school board).

83. During most of her testimony, Principal Creasy was frowning and her demeanor was dour.

84. Principal Creasy made several misrepresentations to Petitioner including the requirements for a one-on-one aide to the Petitioner's as detailed *infra* in these Findings.

85. For these reasons and others detailed below, the Undersigned did not find Principal Creasy credible.

3. Lindsay Mathe Uldrick - *Tr. vol. 5, pp. 920-1047.*

86. Lindsay Uldrick was Q.C.'s special education teacher at Whitaker, including serving Q.C. one-on-one in her resource classroom during the week Q.C. was removed from her nondisabled peers for 300 minutes a day.

87. Ms. Uldrick has served as a special education teacher for 16 years. Tr. vol. 5, pp. 921:22-922:6. No information was provided about her educational background or her experience serving students with Down syndrome. Because of this, it was not evident that Ms. Uldrick had any specialized knowledge or expertise about the inclusion needs of a student with Down syndrome.

88. During the 2018-2019 school year, in addition to Q.C., Ms. Uldrick served approximately 30 students eligible for special education services, ranging from kindergarten to fourth grade, primarily in the resource room. Tr. vol. 5, p. 922:7-15. Ms. Uldrick has served students at Whitaker in various settings, including in her resource room and in general education classrooms, through various methods, including conducting observations of accommodations to providing direct instruction (in both the special education and general education settings). Tr. vol. 5, pp. 922:24-923:15. Ms. Uldrick attended 40-50 IEP meetings a year and had extensive experience participating in IEP meetings. Tr. vol. 5, p. 958:6-8.

89. Ms. Uldrick participated in the May 2018 IEP Meeting with Petitioner M.C. as well as both the September 2018 and October 2018 IEP Meetings. Despite her extensive participation in IEP meetings, Ms. Uldrick failed to give Petitioners appropriate notice via an Invitation to Conference for the May 2018 IEP Meeting and did not advise the IEP Team to delay discussions about placement until after the development of the IEP goals.

90. During cross-examination, Ms. Uldrick admitted some of the statements in her sworn affidavit were false. *See, e.g.*, Tr. vol. 5, p. 996:4-12 (testifying she had never contacted Patsy Barrett, the school psychologist who administered Q.C.'s psychological evaluation, prior to the September 2018 IEP Meeting, despite saying she had contacted Ms. Barrett in her affidavit); *id*. at 1039:17-22 (admitting she had no personal knowledge of whether other staff members provided Q.C. with one-on-one assistance despite claiming Q.C. received such assistance from other staff members in her affidavit). These admissions diminished Ms. Uldrick's credibility.

91. Moreover, Ms. Uldrick's failure to disclose to the Parents the existence and contents of the Behavior Data Sheets affected her credibility.

4. Melissa Whitley Fisch - *Tr. vol. 5, pp. 1062-1087 (via speakerphone).*

92. Melissa Fisch was one of Q.C.'s teachers at Knollwood from January 2018 to June 2018. Tr. vol. 5, pp. 1065:17-1066:7. For 21 years she was employed as a preschool teacher at Knollwood. Tr. vol. 5, pp. 1064:23-1065:4. Since July 2018, Melissa Fisch has been employed by Respondent as a teacher assistant ("TA") at Whitaker.

93. Ms. Fisch has an Education Degree from Meredith College for Birth to Second Grade. Tr. vol. 5, p. 1065:12-16.

94. Although Ms. Fisch had firsthand knowledge about Q.C.'s behavioral and educational needs, having just taught her for six months and at Q.C.'s last school prior to enrollment at Whitaker, Respondent did not invite her to either the September or October 2018 IEP Meetings. Although there was no evidence at the hearing, Ms. Fisch along with Ms. Chamberlin completed the teacher rating scale for the Vineland Adaptive Behavior Scales prior to her employment with Respondent. Resp. Response ¶ E, p. 15. Otherwise, there was no evidence that Respondent even used Ms. Fisch, with her extensive knowledge of Q.C., as a resource for any of Q.C.'s educational planning and support.

95. When Petitioners asked for Ms. Fisch to be involved in both the September and October 2018 IEP Meetings, Principal Creasy would say "I – you know, I'm not sure that would be much help. I'm not sure how successful that was [at Knollwood]." Tr. vol. 4, p. 696:2:11 (Testimony of Howell).

96. Ms. Fisch's testimony conflicted with her previous written statements regarding Q.C. and her Parents. *Compare, e.g.*, Tr. vol. 5, p. 1080:11-1081:2 (testifying she did not want to talk with Q.C.'s Parents about her new job as a teacher assistant at Whitaker and was not enthusiastic about M.C.'s request to place Q.C. in her class), *with id*. at 1086:14-1087:5 (reading an email she sent to Q.C.'s Parents offering to "help with [sic] any way with any conversations with the school system or Whitaker").

97. Because Ms. Fisch had just been hired by Respondent in July 2018 and the events pertaining to Q.C.'s educational planning coincided with this, it is understandable that Ms. Fisch would be conflicted in her further involvement with Q.C.'s education without first obtaining permission from her new employer.

98. Overall Ms. Fisch's testimony about Q.C.'s behaviors at Knollwood was consistent with her co-teacher Ms. Chamberlin's, however, Ms. Fisch tended to focus more on the negative aspects. Her recalcitrant testimony was clearly influenced by the conflict of interest caused by her recent employment with Respondent. To the extent her testimony was consistent with Ms. Chamberlin and her written communications with the Petitioners, it was found credible and given appropriate weight.

5. Barbara Kibler - *Tr. vol. 6, pp. 1117-1261.*

99. Barbara Kibler is a regular education teacher at Whitaker Elementary School. Ms. Kibler served as Q.C.'s kindergarten teacher during her brief tenure at Whitaker.

100. Ms. Kibler has taught a total of 41 years, 22 years of which were in WS/FCS. She has taught kindergarten for 15 years. Tr. vol. 6, pp. 1121:11-1122:1. She is licensed K-6 in North Carolina and is a national board-certified childhood generalist. Tr. vol. 6, p. 1123:7-16.

101. During her teaching career, Ms. Kibler has served students with a range of disabilities. Tr. vol. 6, p. 1121:13-24. However, prior to Q.C., she served only one preschool aged child with Down syndrome about 23 years ago at a private preschool. Tr. vol. 6, p. 1216:8-13, 17-19. Prior to Q.C.'s assignment to her class, she had never taught a student with Down syndrome in a public school setting. Tr. vol. 6, p. 1216:20-23.

102. Principal Creasy stated to M.C. that she assigned Q.C. to Ms. Kibler's class because Ms. Kibler had "extensive experience teaching students with Down syndrome." Tr. vol. 2, pp. 338:22-23; 339:25-340:5 (Testimony of M.C.). This was the first of several misrepresentations and omissions made by Respondent's agents to Petitioners.

103. Ms. Kibler's recollection of some events differed from the documentary evidence in the record or the testimony of other witnesses, *see, e.g.,* Tr. vol. 6, pp. 1219:8-1220:3 (claiming she and Ms. Uldrick implemented the use of a visual schedule and visual cues with Q.C. despite there being no mention of such strategies in any of the IEP documents from the September 11, 2018 meeting); *id.* at 1224:13-1225:4 (claiming she provided Q.C. with headphones despite never documenting it in Q.C.'s educational records or her affidavit).

104. In some respects, but not all as indicated below, the Undersigned found Ms. Kibler to be a credible witness and her testimony will be given the appropriate weight where applicable and corroborated with other evidence.

6. Sue Ellen Bennet - *Tr. vol. 6, pp. 1338-1349.*

105. Sue Ellen Bennet is a kindergarten teacher at FCDS. Ms. Bennet is a licensed kindergarten through sixth grade teacher with a Spanish endorsement. Tr. vol. 6, p. 1347:8-14. She taught kindergarten in New Hanover County schools for 12 years and kindergarten at FCDS for 5 years. Tr. vol. 6, pp. 1346:20-1347:5.

106. Like Respondent's school staff, Ms. Bennet had no experience working with students diagnosed with Down syndrome. Tr. vol. 6, p. 1349:20-21. Unlike Respondent's staff, she also had no experience working with students with developmental delays or intellectual disabilities. Tr. vol. 6, p. 1349:14-19.

107. As part of the FCDS' application process, Q.C. visited Ms. Bennet's classroom on October 10, 2018, from 8:30 a.m. to 3:00 p.m. Tr. vol. 6, p. 1351:10-15. Prior to this visit, Ms. Bennet did not know anything about Q.C. except that she was a child with Down syndrome. Tr vol. 6, p. 1349:10-11.

108. Ms. Bennet's observations about Q.C.'s school readiness and appropriateness for admission at FCDS were not favorable to Petitioners as documented by the Student Visitor Feedback Form she completed. Resp. Ex. 3, pp. 44-45; *see also* Tr. vol. 6, pp. 1353-1355. But during the morning Q.C. did make successful transitions and was "quite engaged" blending "very well with the students during the time she was in the Spanish class." Tr. vol. 6, p. 1356:5-13.

109. Although initially, like Respondent's staff, Ms. Bennet did not believe that Q.C. would be successful in a regular education classroom, she admitted that her initial impression was wrong and that Q.C. did well with her nondisabled peers at FCDS.

110. The Undersigned found Ms. Bennet to be a credible witness, and her testimony will be given weight where applicable.

7. Jeanne Brooker, MA/CCC-SLP - *Tr. vol. 5, pp. 1089-1112 (via speakerphone).*

111. Jeanne Brooker has served as a speech-language pathologist for Respondent since 2001. Tr. vol. 5, p. 1091:1-7. She has a State license from North Carolina Board of Examiners for Speech and Language Pathologist and Audiologist and is a member of the American Speech-Hearing-Language Association. Tr. vol. 5, p. 1091:16-25. Ms. Brooker's duties, as a speech-language pathologist at Whitaker, are to assess and treat, as needed, students that have been identified as speech-language impaired. Tr. vol. 5, p. 1092:1-6. She was the only one who said something positive about Q.C. at the September 2018 IEP Meeting. Tr. vol. 2, p. 362:4-12 (describing her "like a light in kind of the negativeness of the meeting").

112. However, Ms. Brooker's speech/language evaluation was defective in several respects. She failed to interview Q.C.'s Parents even though she typically does interview the parents prior to conducting an evaluation; and she also failed to observe Q.C. in the educational setting even though both of these are required by the NC Policies. Tr. vol, 5 pp. 1104: 17-19; 1112: 7-25. The Undersigned finds that while Ms. Brooker's speech-language evaluation of Q.C. should have complied with the NC Policies and been more detailed, despite these omissions her evaluation results were not contested by Petitioners.

113. Ms. Brooker did not contest the testimony of Petitioners' speech pathologist that Q.C. needed speech therapy during the summer or the appropriateness of the private speech services provided by Petitioners' speech pathologist.

114. As Respondent's employee, Ms. Brooker served as the scribe for the IEP minutes at both the September and October 2018 IEP Meetings.

115. The Undersigned found Ms. Brooker to be a credible witness, although Ms. Brooker had a limited recollection of the discussions at the September 2018 and October 2018 IEP Meetings. *See, e.g.*, Tr. vol. 5, p. 1097:20-25 (Testimony of Ms. Brooker that she could not recall how the September 2018 IEP Meeting began aside from what the minutes say); *id*. at 1107:20-22 (Testimony of Ms. Brooker that she could not recall the basis for why Q.C. needed 300 minutes of specially designed instruction every day); *id*. at 1102:22 (Testimony of Ms. Brooker that she could only "vaguely" recall the discussion at the October 2018 IEP meeting about Q.C.'s ability to learn by peer modeling).

116. The Undersigned found Ms. Brooker credible. As Ms. Brooker had a limited recollection of the events giving rise to this action, her testimony will be given the appropriate weight where applicable.

Overview of Timeline and Definitions of Terms

117. During this period, Petitioners have resided at 1836 Buena Vista Road, in Winston-Salem, North Carolina. Stip. 6.

118. Q.C. was enrolled in Winston-Salem/Forsyth County Schools ("WS/FCS") in August 2015 and found eligible for special education services in the category of Developmental Delay ("DD"). Stips. 7, 9, & 10.

119. During Q.C.'s initial enrollment in WS/FCS, two IEPs were developed, the April 24, 2015 IEP, duration dates of 04/24/2015 to 04/12/ 2016 ("April 2015 IEP"), and the Annual Review IEP on March 24, 2016, duration dates 03/25/2016 to 03/13/2017 ("March 2016 IEP"). Stip. Exs. 11 & 16.

120. The IEP teams reported in both the April 2015 and March 2016 IEPs that Q.C. **did not have "behaviors that impede her learning or that of others**," and that Q.C. had special communication needs. Stip. 11, 17; Stip. Exs. 11, 16 (emphasis added).

121. The April 2015 IEP had five academic and functional goals, two of which were behavior goals related to staying on task and following directions. Stip. Ex. 11. No supplemental aids, supports or assistive technology were included in the April 2015 IEP to allow Q.C. to access the general curriculum. Stip. 12.

122. The March 2016 had eight IEP goals, one of which involved "staying in activities with peers and engage in reciprocal play with peers," two were academic goals, and five goals were for speech/language. Stip. Ex. 16; Stip. 18. No supplemental aids, supports or assistive technology were included in the March 2016 IEP to allow Q.C. to access the general curriculum. Stip. 19.

123. The April 2015 and March 2016 IEPs placed Q.C. in a separate special education preschool class at the Special Children's School for 320 minutes a session, 5 sessions a week.

Stips. 13, 14, 20, 21. Speech/language therapy, as a related service, was to be delivered 12 sessions per reporting period for 30-minute sessions. Stips. 13, 20; Stip. Exs. 11, 16.

124. Although Q.C.'s developmental delays affected her ability to interact with her peers, both the April 2015 and March 2016 IEPs did not indicate that Q.C. had any disruptive behaviors. Stip. Exs. 11, 16.

125. According to the March 2016 IEP, Q.C. was "quiet" and independent with bathroom routines. Stip. Ex. 16, p. 59.

126. Because the March 2016 IEP again placed Q.C. in the Special Children's School, a separate school, where she had started to exhibit changes in her behavior, such as verbal outbursts, arm flapping, a regression in her toileting skills, and demanding to be fed, Tr. vol. 2, p. 318:13-25, her Parents opted to continue her enrollment in a private preschool program. Stip. 22.

127. The March 2016 IEP expired on March 13, 2017. Stip. 23.

128. Even though, Q.C. was still eligible for special education services while in a private preschool, a Private Services Plan ("PSP") was not developed.

129. Instead of receiving speech therapy from Respondent, from October 2017 through January 2019, Petitioners paid for private speech therapy services at Speechcenter, Inc.

130. Q.C. attended several preschools prior to kindergarten. From January 2018 to June 2018, Q.C. attended Knollwood Baptist Preschool ("Knollwood") a private preschool (Stip. 26), in a regular preschool setting with all nondisabled peers.

131. After her Parents submitted a "School Choice" request on March 9, 2018, Q.C. was assigned to their first choice at Whitaker Elementary School ("Whitaker"). Resp. Ex. 27.

132. According to the School Choice form, there were five schools within Q.C.'s attendance Zone 6 for kindergarten to fifth grade students. Resp. Ex. 27. The form noted that "[s]tudents will be assigned to their first choice to the extent possible []" but "Students enrolled in some exceptional children programs will be assigned to the appropriate school offering that program." Resp. Ex. 27, p. 2. To the extent a parent requests reassignment for a student with an IEP specifying a particular EC program, that student will be assigned to the school in the attendance zone that offers that program. Tr. vol. 7, p. 1376:4-12 (Testimony of Dr. Fisk-Moody). Whitaker had regular and resource placement options but does not have a separate, self-contained setting. Whereas, South Fork Elementary School ("South Fork"), the Parents' second school choice, did have a separate, self-contained classroom.

133. Prior to her sixth birthday (DOB: 04/24/2012) on April 17, 2018 Q.C.'s mother K.C. emailed Dr. Fisk-Moody regarding Q.C.'s re-enrollment in WS/FCS and asked for the development of an IEP (the "April 17, 2018 Referral"). Pet, Ex. 9, p. 134.

134. Q.C. attended a kindergarten screening held on May 22, 2018, at Whitaker (the "Kindergarten Screening"). Stip. Ex. 41. After the Kindergarten Screening, EC Teacher Uldrick asked to speak further with M.C. about Q.C.'s educational needs. Without prior notice, this

conversation became an Initial Evaluation/Reevaluation Meeting (the "May 2018 Initial Evaluation/Reevaluation Meeting"). Stip. 28; Stip. Exs. 17-21.

135. The Invitation to Conference for the May 2018 Initial Evaluation/Reevaluation Meeting dated May 22, 2018, was handed to M.C. the same day as the meeting and did not give the Parents 10-day written notice of the meeting. Stip. Ex. 20. K.C. did not attend the meeting even though she was listed on the Reevaluation Form ("DEC 7"). Stip. Ex. 20.

136. The May 2018 Reevaluation Form noted that there were "[n]o concerns about behavior." Stip. Ex. 20, p. 81. The May 2018 IEP Team decided to conduct formal assessments and did not develop an IEP that day or consider eligibility for Extended School Year ("ESY") services. Stip. Ex. 20, pp. 83 & 84.

137. As of the first day of kindergarten August 27, 2018 (Stip. 40), the evaluation process had not been completed and Q.C. did not have an IEP in place.

138. Approximately three weeks after school started, an IEP meeting for the reevaluation review and eligibility determination was held on September 11, 2018 (the "September 2018 Reevaluation/Annual Review IEP Meeting"). Stip. 51; Stip. Exs. 22-26.

139. At the September 2018 Reevaluation/Annual Review IEP Meeting, an IEP was developed with initial duration dates of 09/12/2018 to 09/10/2019, which placed Q.C. in the separate setting for 300 minutes per session, five sessions a week (the "September 2018 IEP"). Stip. 58; Stip. Ex. 24.

140. The September 2018 IEP Team determined that Q.C. was eligible for services under the IDEA in the category of Intellectual Disability-Mild ("ID-MILD"). Stip. 53. Although the Prior Written Notice indicated that the continuation of the Developmental Delay ("DD") category was refused (Stip. Ex. 25, p. 117), according to the IEP Minutes and Summary of Evaluation/Eligibility Worksheet, the IEP Team did not discuss continuation of Q.S.'s eligibility as Developmentally Delayed even though she was still within the age range (three through 7 years old) for that category. *See* Stip. Exs. 23, 26.

141. Like the April 2015 and March 2016 IEPs, the September 2018 IEP noted that Q.C. **did not have behaviors that impede her learning or that of others**, that Q.C. had special communication needs, and that Q.C. was not eligible for extended school year ("ESY") services. Stip. Ex. 24 (emphasis added).

142. At the September 2018 IEP Meeting, Q.C.'s Parents objected to the self-contained placement and asked for a one-on-one assistant so that Q.C. could remain at Whitaker in the regular classroom setting with her nondisabled peers because Whitaker did not have a separate setting. Stip. Ex. 26, p. 121.

143. Implementation of the September 2018 IEP was delayed from September 12th to September 21st to allow Q.C.'s Parents to observe the self-contained placements at South Fork and Sherwood Elementary Schools. Stip. 53; Stip. Ex. 26, p. 126.

144. Soon after the IEP meeting on September 13, 2018, the Parents' wrote to Respondent's staff (Pet. Ex. 13) about the inappropriateness of Q.C.'s separate placement. Pet. Ex. 13. In response, the IEP Team reconvened on October 1, 2018, for an addendum IEP (the "October 2018 Addendum IEP Meeting") to address the Parents' concerns about placement. Stip. 61; Stip. Ex. 31.

145. Prior to the October 2018 Addendum IEP Meeting, on September 17, 2018, WC/FCS administrators and Whitaker staff met to discuss the Parents' request for Q.C. to have a one-on-one assistant (the "September 17 Administrative Meeting"). Pet. Ex. 64. The Parents were not invited and not aware of this meeting.

146. After that meeting on September 18, 2018, EC Case Manager Melanie Holtzclaw requested a "Change in Student School Assignment" for Q.C. from Whitaker to South Fork, which was granted on September 19, 2018, by Sam Dempsey, the EC Director for WS/FCS at that time. Stip. Ex. 50.

147. On September 19, 2018, EC Director Sam Dempsey notified Q.C.'s Parents that Q.C.'s school assignment was changed to the Readiness Program at South Fork starting September 19th (the "September 19 Reassignment Letter"). Pet. Ex. 15.

148. In response to the Parents' September 13, 2019 letter, another IEP meeting was held the October 1, 2018 IEP (the "October 2018 IEP Meeting") and it began at 9:01 a.m. At this meeting, once again the Parents asked for a one-on-one assistant to aid Q.C. in the regular education setting, but due to statements made by Principal Creasy and disagreements about Q.C.'s placement discussed *infra*, the Parents left the meeting at 10:48 a.m. The Parents advised the IEP Team that they were placing Q.C. in a private program and would seek reimbursement.

149. Unbeknownst to the Parents, after a phone conference with Sam Dempsey, the IEP Team continued the IEP meeting without the Parents for another four hours until 3:07 p.m. Stip. Ex. 31, pp. 138, 147. None of the school-based members of the IEP Team notified or even attempted to notify the Parents that, after they left, the LEA Representative had subsequently decided to continue the meeting in their absence.

150. The October 1, 2018 IEP developed after the Parents left had duration dates of 10/12/2018 to 09/10/2019 (the "October 2018 IEP"). Q.C.'s placement remained in the self-contained setting, but the number of minutes was reduced to 245 minutes per session, some goals were added, existing goals edited, speech/language services remained the same. and the ESY determination was to be held by May 1, 2019. Stip. Ex. 32.

151. In November 2018, Q.C. was enrolled in Forsyth Country Day School ("FCDA"), a private preschool, and began attending classes there with all nondisabled peers in a regular setting.

Factors Relevant to Q.C.'s Behaviors and Placement in a Regular Classroom with Nondisabled Peers

Q.C.'s Behaviors *Before* and *After* Her Attendance at Whitaker Elementary School

152. Although Q.C. had academic deficits these could be accommodated in the regular classroom, her behaviors at Whitaker were the primary reason that she was segregated from her nondisabled peers. Tr. vol. 7, p. 1452:7-13 (Admission of Dr. Fisk-Moody). Before and after Q.C. attended Whitaker, Q.C. could access the regular classroom curriculum alongside nondisabled students.

1. Q.C.'s Behaviors at Knollwood Before Attending Whitaker

153. Prior to attending Whitaker from January 2018 to June 2018, Q.C. attended Knollwood from 9:00 a.m. to 1:00 p.m. Stip. 26; Tr. vol. 4, p. 653:1-5. There were two teachers and eleven students in Q.C.'s classroom. Tr. vol. 4, p. 652:16-23. None of the other students were disabled. Tr. vol. 4, p. 652:19-21. All of Q.C.'s nondisabled peers successfully transitioned to kindergarten. Tr. vol. 4, p. 653:21-23. Seven were assigned to attend kindergarten with Q.C. at Whitaker. Tr. vol. 4, p. 654:17-22.

154. Melissa Fisch was Q.C.'s preschool co-teacher with Martha Chamberlin at Knollwood.[5] Tr. vol. 4, p. 650:15-17 (Testimony of Chamberlin). Although Ms. Fisch was not one of Petitioners' witnesses, both she and Ms. Chamberlin testified similarly about Q.C.'s behaviors at Knollwood, which was Q.C.'s educational placement the 6-month period immediately prior to her attendance at Whitaker. Mmes. Fisch and Chamberlin also jointly completed the teacher portion of the Vineland Adaptive Behavior Rating Scales. Resp. Response to Pet. Supp. Doc. p. 15.

155. In July 2018, Ms. Fisch was employed by Respondent as a teaching assistant ("TA") in one of the kindergarten classes at Whitaker. Until then, Ms. Fisch had had a good relationship with Q.C. and been supportive of Q.C.'s enrollment in kindergarten, even the point of offering to help her Parents in "any way possible" to ensure that Q.C. got the "right fit" educationally. Tr. vol. 5, pp. 1086:13-1087:3. After Respondent hired her as a TA, Ms. Fisch stopped communicating with the Petitioners and their advocate, Shanée Howell.

a. *Q.C.'s Lead Teacher Testified that Q.C. Was Not Disruptive*

156. Ms. Chamberlin was Q.C.'s teacher in her preschool class at Knollwood. Ms. Chamberlin described Q.C. as a loving, "highly functioning [student] for Down syndrome." Tr. vol. 4, p. 650:18, 22. Q.C. responded well to positive reinforcement. Tr. vol. 4, p. 650:20-21.

157. Q.C. was the third student with Down syndrome that Ms. Chamberlin had taught and the "highest functioning." Tr. vol. 4, p. 651:2-4. Ms. Chamberlin did not have any specific formal training for teaching students with Down syndrome, but she educated herself by reading

[5] Ms. Chamberlin testified in Petitioners' case in chief. Ms. Fisch testified for Respondent.

about such students and looking for ways to help them in her class. Tr. vol. 4, p. 651:5-9.

158. According to Ms. Chamberlin, Q.C. had "positive relationships" with her nondisabled peers in her classroom, enjoyed different centers in the classroom, and enjoyed all music activities. Tr. vol. 4, p. 651:10-14. Q.C. was able to independently go to the centers without support. Tr. vol. 4, p. 651:15-18.

159. Q.C. also had noticeable fine motor and speech deficits. Tr. vol. 4, p. 651:19-21. After reading about the best way to work with children with Down syndrome, because of Q.C.'s fine motor deficits, Ms. Chamberlin recognized that such activities were difficult for Q.C. so she gave Q.C. spring-loaded scissors. Tr. vol. 4, pp. 651:24-652:9.

160. Q.C. exhibited some distracting behaviors at Knollwood such as lack of attention, trouble sitting up during circle time, crawling under the table and under her desk, getting out of her seat, and difficulty with transitions. Pet. Ex. 80. The main difficulty with Q.C.'s behavior usually happened around 12:30 p.m. By that time, Q.C. would be tired and want to lie down on the floor or crawl under a table but had no other negative behaviors. Tr. vol. 4, pp. 653:8-17; 659:12-18. Otherwise, Q.C. had "excellent relationships with all the children" planning on attending Whitaker the 2018-2019 school year. Tr. vol. 4, p. 654:23-25.

161. In Ms. Chamberlin's classroom, Q.C. never exhibited behaviors that Respondent's school staff swore in their affidavits that she did such as throwing instructional materials, putting materials and objects in her mouth, licking other students, yelling at staff, taking/ripping/coloring on other students' instructional materials, drinking out of a toilet, or attempting to strangle other students. Tr. vol. 4, pp. 658:23-659:19.

162. Because Q.C. was not on grade level and had other needs, Ms. Chamberlin was supportive of Q.C. receiving special education services, speech and occupational therapy in the public school system. Tr. vol. 4, p. 654:1-16. Ms. Chamberlin's testimony corroborated her September 16, 2018 letter[6] in support of a classroom assistant as a supplemental support for Q.C. because, although Q.C. could be "stubborn" at times, she benefited from observing and mimicking her peers, peer interaction, and cooperative learning. Pet. Ex. 78; *see* Tr. vol. 4, pp. 656-658. Ms. Chamberlin believed that Q.C. could be successful in the regular education classroom with pull-out services for her special needs and a one-on-one aide. Tr. vol. 4, p. 658:22-25; Pet. Ex. 78.

163. The Undersigned found Ms. Chamberlin to be a credible, unbiased witness. Her testimony regarding Q.C.'s behaviors among her nondisabled peers supported Petitioners' argument that Q.C. was not disruptive to her peers in the regular education classroom setting and benefited from the lesser restrictive placement.

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[6] Ms. Chamberlin's letter was not provided to the October 2018 IEP Team.

b. ***Q.C.'s Co-Teacher Ms. Fisch Also Testified Q.C. Was Not Disruptive***

164. Ms. Fisch co-taught Q.C.'s preschool class at Knollwood where she had taught for 21 years. Tr. vol. 5, p. 1065:1-16.

165. Ms. Fisch agreed that Q.C. was not on grade level academically, but that she benefited socially and emotionally from placement with her nondisabled peers. Tr. vol. 5, p. 1069:6-24.

166. Ms. Fisch stated that Q.C.'s "overall behavior was good." Tr. vol 5, p. 1070:5. Her moments of defiance presented as "sitting down" or "refusing to transition." Tr. vol. 5, p. 1070:5-12. Transition times and large group time could be difficult but were manageable. Tr. vol. 5, p. 1070:13-22.

167. While with her nondisabled peers, Ms. Fisch testified, and had previously documented in her progress note, that Q.C. made progress in her "social-emotional development, and her fine motor skills improved as well." Tr. vol. 5, pp. 1073:18-1074; *see also,* Pet. Ex. 80. Moreover, with appropriate support and redirection, Q.C. was able to maintain or extend her attention span. Tr. vol. 5, p. 1085:6-13.

168. Ms. Fisch agreed with Ms. Chamberlin that Q.C. should be integrated into a regular classroom with pull-out special education services. Tr. vol. 5, pp. 1075:22-1076:8.

169. After learning that Q.C. had registered at Whitaker, Ms. Fisch offered to Petitioners, more than once, that she was "happy to go and help with any talks about her progress and so on to ensure the right fit." Tr. vol. 5, p. 1077:3-18. Ms. Fisch even emailed Petitioners that Q.C.:

> has been such a blessing to me. I am so grateful that your family has entered my life… We [Martha Chamberlin and I] will continue thinking of options for Q.C.'s future education. I know the right fit is going to happen. Please *let us know if we can help with any way with any conversations with the school system or Whitaker*.
>
> Tr. vol. 5, pp. 1986:13-1087:3 (emphasis added).

170. Ms. Fisch sent this email to let Q.C.'s Parents know that she "enjoyed Q.C. being in my class." Tr. vol. 5, p. 1087:3-5.

171. Although Ms. Fisch had had a positive and supportive relationship with Q.C. and her Parents, in July 2018 after being hired by Respondent, Ms. Fisch stopped responding to the Petitioners' written communications. Tr. vol. 5, p. 1080:3-11.

172. In mid-August, she did answer a phone call from M.C. and agreed for him to ask Principal Creasy if Q.C. could be moved into her kindergarten class. Tr. vol. 5, pp. 1080:12-1081:5. Soon thereafter, Principal Creasy emailed Ms. Fisch that she had denied M.C.'s request. Tr. vol. 5, p. 1085:7-8; Pet. Ex. 80.

173. The Undersigned finds that both Ms. Chamberlin and Ms. Fisch were credible about Q.C.'s behaviors in the regular education preschool setting. Both teachers had valuable information to share with Respondent about Q.C.'s academics needs, fine motor deficits, and most importantly how to effectively redirect her when she had transitional difficulties and off-task behaviors.

174. Based on a preponderance of the evidence from January 2018 to June 2018, the Undersigned finds that Q.C. could be educated among her nondisabled peers, benefited more than marginally from that non-segregated placement, and was not a disruptive force in the regular preschool education setting.

2. Q.C.'s Behaviors at Forsyth Country Day School ("FCDS") After Whitaker

175. Respondent contested the appropriateness of Q.C.'s placement at FCDS and the appropriateness of Q.C.'s private preschool placement is further addressed *infra* in this Final Decision on pages 79-83. The purpose of reviewing FCDS at this juncture is to address the credibility of Respondent's assertions that Q.C. was disruptive in the regular education classroom and, therefore, could not be educated in a lesser restrictive environment even with supplemental aids and supports.

176. Before proceeding to the events relevant to the development of the IEPs and placement decision, a review of Q.C.'s behaviors in a different private school placement *after* her attendance at Whitaker sheds light on the appropriateness of Respondent's actions before and during the placement determination. The actions of FCDS' staff during Q.C.'s transition exemplified how to effectively transition Q.C. into a new educational setting.

177. The Undersigned is cognizant that this information could not have been considered by the September or October IEP Teams. This information, however, corroborated the Petitioners' argument that Q.C. normally did not have the disruptive behaviors claimed by Whitaker's staff. Q.C.'s behaviors both at Knollwood and at FCDS contradicted the behavior data collected by teachers Uldrick and Kibler and also raised questions about the credibility of this data.

178. Mary Kelsey Frazier was Q.C.'s teacher at FCDS. Although Ms. Frazier had no prior experience teaching students with Down syndrome, like Ms. Chamberlin, prior to Q.C. coming into her class, Ms. Frazier pulled scholarly articles about different ways to teach students with Down syndrome and how to respond to their behaviors. Tr. vol. 4, pp. 711:10-12; 711:20-712:3; *see* Pet. Ex. 40.

179. Before Q.C.'s first day at FCDS, "the teachers and Q.C.'s Parents met to strategize on how best to introduce Amanda Maki [her one-on-one aide] and Q.C. into the classroom seamlessly -- this was their goal." Tr. vol. 4, p. 724:7-15.

180. In Q.C.'s class, there were 12 students aged 5 to 6 years old with a teacher, a teaching assistant, and Q.C.'s one-on-one aide. Tr. vol. 4, pp. 713:3-16. Q.C. was 6 years old when she enrolled in FCDS.

181. At FCDS, Q.C. participated in large and small group activities the whole day. Tr. vol. 4, pp. 720:2-12 Behavioral strategies consistently used by her teachers were visual cues,

positive reinforcement, a sticker chart, and social stories. Pet. Exs. 41, 42; Tr. vol. 4, pp. 720:13-16; 721:18-21. These behavioral strategies proved effective with Q.C. Tr. vol. 4, p. 722:5-9. With a supportive chair for Q.C.'s lack of muscle tone, she was able to sit in circle time indefinitely. Tr. vol. 4, p. 725:12-21.

182. Respondent's witnesses testified that they too used similar strategies but were unsuccessful. The consistency of the implementation of Respondent's efforts was not evident in the Behavior Data Sheets or through the testimonies of teachers Uldrick and Kibler.

183. Ms. Frazer and Q.C.'s aide collaborated daily. Tr. vol. 4, pp. 725:24-726:1. As the school year progressed, Q.C.'s dependency on her aide appeared to be fading. The week Q.C.'s aide was absent, Q.C. participation aligned with the other kids during each part of the day to the extent that Ms. Frazier only had to monitor her if she needed extra support. Tr. vol. 4, p. 723:5-11.

184. Q.C. did have some behaviors at FCDS from December 2018 to the end of behavior data collection. A review of Ms. Maki's anecdotal notes and her notes sent home to Petitioners (Pet. Ex. 47) revealed that Q.C. manifested several inappropriate behaviors including the following:

> On December 3, 2018, during a lesson on writing numbers Q.C. "ha[s] to be moved to a chair to think and not disrupt others learning." Pet. Ex. 7, at 36.
>
> February 1, 2019, Q.C. sat on a table upon arrival to the classroom and when asked to get off, started jumping on tables. Pet. Ex. 8, at 113.
>
> On February 3, 2018, she threw mulch and pushed three times. Pet. Ex. 8, at 94.
>
> On February 11, 2018, she "kicked friend." Pet. Ex. 8, at 98.

185. Q.C. was also noncompliant once and needed redirection on several occasions:

> January 29, Q.C. was noncompliant by playing with her shirt and taking off her shoes. Pet. Ex. 8, at 107.
>
> On February 1, 2019, during whole-group instruction, Q.C. got up two times and had to be guided back. Pet. Ex. 8, at 113. The same day, she would not stand in line "without touching things." Pet. Ex. 8, at 114.
>
> On February 11, she put her hands in pants and laid down in the bathroom. Pet. Ex. 8, at 474.

186. With respect to these behaviors, Ms. Maki testified that now "we had gotten to where there was [sic] very few interventions needed from me." Tr. vol. 4, p. 834:2-10.

187. The Undersigned acknowledges that Q.C. had a limited number of behaviors at FCDS during 4 days from December 2018 to the end of the 2018-2019 school year, but there were no disruptive behaviors which prevented her from being educated with her nondisabled peers.

188. Based on a preponderance of the evidence, the Undersigned finds that Q.C. could be educated among her nondisabled peers at FCDS, benefited more than marginally from that non-segregated placement, and was not a disruptive force in the regular education setting.

189. Prior to being enrolled in Whitaker, while at Knollwood, Q.C. was able to be educated with her nondisabled peers, benefited more than marginally from that placement, and was not a disruptive force in the classroom. Also, WS/FCS had previously acknowledged twice in Q.C.'s 2015 and 2016 IEPs that Q.C. did not have behaviors which impeded her education or that of others. Stip. Exs. 11,16. Her behavior at Knollwood was consistent with this finding.

190. Similarly, after her attendance at Whitaker, at FCDS, Q.C. again was able to be educated with her nondisabled peers, benefited more than marginally from that placement and was not a disruptive force in a regular classroom setting. This suggests that Q.C.'s behavior during the seventeen (17) days she attended Whitaker was an anomaly.

191. In summation, the Undersigned finds, by a preponderance of the evidence, that *before* her enrollment at Whitaker and *after* her attendance at Whitaker, with consistently implemented, appropriate supplemental aids and supports including a one-on-one aide, Q.C. could be successfully mainstreamed in the regular education setting with her nondisabled peers.

3. The Respondent's Reasons for Segregating Q.C. From Her Nondisabled Peers

192. So, if Q.C. could be mainstreamed with her nondisabled peers before and after her attendance at Whitaker, why did Respondent place Q.C. is a segregated separate placement for 300 minutes a day at the September IEP Meeting, then later 245 minutes a day at the October IEP Meeting?

193. Petitioners argued that Respondent predetermined Q.C.'s placement in a separate setting either because she was a student with Down syndrome, according to a statement made by Principal Creasy, or because her disabilities required too much support such as a one-on-one aide, or a combination of both. Regardless of the actual reason, a separate setting automatically precluded Q.C.'s continuation at Whitaker since Whitaker did not have a separate classroom. Tr. vol. 2, p. 334:18-25.

194. At the beginning of both the September and October 2018 IEP Meetings, Principal Creasy expressed her disagreement with Q.C.'s assignment to Whitaker. According to Petitioners, at the September 2018 IEP Meeting, Principal Creasy started the meeting by saying "I have real concerns with Q.C. in this setting. This isn't working." Tr. vol. 2, p. 345:8-15 (Testimony of M.C.). Later at the October 2018 IEP Meeting, when M.C. requested that Q.C. go to the school [Whitaker], she was originally placed at, Creasy responded: "That placement would have never been accepted had we known she had Down syndrome." Tr. vol. 2, p. 398:1-5.

195. Respondent countered that their actions were not discriminatory or based on the fact Q.C. was a child with Down syndrome and that they did not predetermine placement to exclude Q.C. from Whitaker. Instead, the September and October IEP Teams determined that, based on Q.C.'s academic and behavioral deficits, she had to be segregated to a separate setting. However, during their testimonies, school-based members of the IEP Teams admitted that, but for Q.C.'s behaviors with supplemental aids and supports such as a one-on-one aide, Q.C. could be

educated in the regular education classroom. Tr. vol. 6, pp. 1261:18-1262:25 9 (Kibler); Tr. vol. 6, pp. 1300:13-1301:6 (Creasy); Tr. vol. 5, pp. 981:8-22; 982:18-24; 1046:3-9 (Uldrick); Tr. vol. 7, p. 1452:7-13 (Fisk-Moody).

196. Petitioners bear a heavy burden in proving predetermination of placement. Based on Q.C.'s placement at Knollwood and her April 2015 and March 2016 IEPs, Petitioners have proved that Q.C. was not disruptive and, with appropriate support, could be educated in the regular setting among her nondisabled peers at least as of June 2018. To reconcile this fact with the actions of the IEP Teams and evidence, the Undersigned was tasked with determining if Respondent was able to respond to Petitioners' case with cogent and reasonable explanations for their placement decisions. If not, could predetermination and/or discrimination be the only logical explanations?

The Referral and Evaluation Process Prior to the 2018-2019 School Year

1. The Parent Referral

197. On April 17, 2018, Petitioners contacted Dr. Fisk-Moody by email to introduce themselves and begin a process of meetings and discussion about what appropriate supports and services that Q.C. might need to learn alongside her nondisabled peers at Whitaker. Tr. vol. 2, p. 326:8-21; Pet. Ex. 9, p. 134. In her email, K.C. disclosed to Dr. Fisk-Moody that Q.C. has Down syndrome. Pet. Ex. 9, p. 135. K.C. specifically asked, "[c]ould we develop an IEP with you and your team?" Pet. Ex. 9, p. 134. The Undersigned finds that this request was a parental referral for special education services. Ms. Uldrick was made aware of this April referral, Tr. vol. 5, p. 927:23-25, but did not know anything about Q.C.'s educational background at that time. Tr. vol. 5, p. 931:13-18.

198. Although Ms. Uldrick's email to Amy Synder was not admitted into evidence, Ms. Uldrick testified that soon after the Parent's referral she emailed Amy Snyder, Head EC Process Staff, about beginning the IEP process for Q.C. Tr. vol. 5, p. 929:4-9. By then, Ms. Uldrick knew that Q.C. was a student with Down syndrome. Tr. vol. 5, pp. 929:24-931:18.

199. Later on, May 16th, Petitioners met with Melanie Holtzclaw, EC Case Manager, and EC Teacher Uldrick to tour the facility at Whitaker including Ms. Uldrick's resource room. At that time, Ms. Holtzclaw and Ms. Uldrick communicated with the Parents about a series of tests and evaluations which would have to be conducted. Tr. vol. 2, p. 327:10-19.

2. May 22, 2018 Kindergarten Screening

200. Prior to Q.C.'s Kindergarten Screening on May 22, 2018, Ms. Uldrick reviewed Q.C.'s March 2016 IEP in preparation for the Evaluation/Reevaluation (also known as the "DEC 7") meeting. Tr. vol. 5, pp. 932:17-933:4; *see* Stip. Ex. 16. The service delivery in the March 2016 IEP had been a separate setting. Stip. Ex. 16.

201. On May 22, 2018, Q.C. and her father M.C. attended the Kindergarten Screening which was for all kindergarteners. Tr. vol. 2, pp. 329:21-330:8.

202. Ms. Uldrick's observations of Q.C. during the screening was that Q.C. was "very social," "very happy to be there," knew some of the letters and her sounds," and "had a hard time keeping her on task." Tr. vol. 5, p. 936:2-5. Ms. Uldrick's overall impression of Q.C.'s skills were that she "had some skills and some needs." Tr. vol. 5, p. 936:21-24. However, Ms. Uldrick acknowledged that the Kindergarten Screening does not provide much information about a child's potential in kindergarten as it's "one snapshot of a child." Tr. vol. 5, p. 936:5.

203. After Q.C.'s Kindergarten Screening, Ms. Uldrick asked M.C. to talk further about Q.C. but did not explain that she was inviting M.C. to an IEP meeting. Tr. vol. 2, pp. 329:21-330:8. Ms. Uldrick admitted that she handed M.C. the Invitation to Conference at the May 22, 2018 IEP Meeting ("May 2018 IEP Meeting"). Tr. vol. 5, p. 937:3-21. Because of insufficient notice of the meeting, K.C. could not attend. Tr. vol. 2, p. 330:6-21.

3. May 22, 2018 IEP Meeting

204. On May 22, 2018, the IEP Team convened for a reevaluation IEP meeting ("May 2018 IEP Meeting") but did not develop an IEP at the May 2018 IEP Meeting. Stips. 28 and 31.

205. The following individuals attended the impromptu May 2018 IEP Meeting: Ms. Holtzclaw, LEA Representative; Ms. Uldrick, EC Teacher; Holly Kaczmarek, Regular Education Teacher; and M.C., Q.C.'s Father.[7] Stip. Ex. 19; Stip. 19.

206. The May 2018 IEP Team determined that they would not administer *informal* assessments but rather would administer the following *formal* assessments: physical health, educational, psychological, intellectual assessment, social appraisal, speech/language, motor, adaptive behavior, observations, interventions, and health screening. Stip. 30; Stip. Ex. 20, pp. 83 & 84. The IEP team did not agree to conduct informal or formal behavioral data collection.

207. The important distinction about this evaluation process was that it was a "Reevaluation" not an "Initial Evaluation." The Parties stipulated that the May 2018 IEP Meeting was a Reevaluation IEP Meeting, not an Initial Evaluation Meeting. Stip. 28. Both Parties knew that Q.C.'s March 2016 IEP had expired on March 13, 2017. Stip. 23.

208. At the May 2018 IEP Meeting, Ms. Uldrick and Ms. Holtzclaw explained to M.C. that they wanted to conduct additional testing of Q.C. over the summer "to develop a plan to help Q.C. succeed in kindergarten" and "learn about" Q.C. Tr. vol. 2, pp. 330:12-17, 330:22-331:1. They did not explain that they intended to evaluate Q.C. for eligibility only under the category of Intellectual Disability ("ID") or that she could have remained in the Developmentally Delayed ("DD") category until she turned eight years old or entered the third grade. *Id*. They also did not explain that the evaluation process would not be completed in time for the IEP to be developed before the beginning of the 2018-2019 school year.

209. Respondent did not invite either of Q.C.'s preschool teachers to participate in the May 2018 IEP Meeting or any subsequent IEP meeting. *See* Stip. Ex. 19; Tr. vol. 5, p. 1085:14-17 (Testimony of Fisch); Tr. vol. 4, p. 659:1-3 (Testimony of Chamberlin).

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[7] The DEC 7 inaccurately reported that K.C. attended the meeting. Stip. Ex. 20, p. 75.

210. Even though Respondent had not requested any information from Q.C.'s private preschool program or teachers, Respondent reported in the IEP that there were no grades, district assessments, classroom-based assessments, or classwork available to review at the May 2018 IEP Meeting. Stip. Ex. 20, p. 81.

211. Updated evaluations were definitely needed because Q.C.'s Transdisciplinary Evaluation (Stip. Ex. 35) was completed on February 23, 2015, when Q.C. was 2 years 9 months old and her triennial reevaluation was overdue.[8] Even with the need for the reevaluation, Respondent did not explain why an IEP could not have been developed at the May 2018 IEP with information about Q.C.'s academic and behavioral needs from her preschool program and teachers, then later amended upon completion of the reevaluation.

212. Respondent did attempt to transition Q.C. from her private preschool setting to the public school setting. The Undersigned acknowledges that the IDEA does not contain specific requirements for transition from preschool; however, Respondent's failure to communicate with Q.C.'s preschool teachers about their experiences with Q.C. and recommendations for Q.C.'s transition, Tr. vol. 1, pp. 70:18-71:10, later contributed to Q.C.'s behavioral issues at Whitaker.

4. Psychological Evaluation – July 19, 2018

213. School Psychologist Patsy Barrett conducted a Psychoeducational Evaluation of Q.C. on July 19, 2018 ("Psychological Evaluation"). Stips. 32 & 33. School Psychologist Barrett received the referral on May 22, 2018 (Stip. Ex. 36, p. 196) but she did not complete and type her evaluation report until August 9, 2018 (two and one-half months later). *See* Stip. Ex. 36, p. 196. School Psychologist Barrett signed her report on August 14, 2018. *Id.*

214. The Psychological Evaluation was the only evaluation completed before the first day of school which was August 27, 2018. Stip. 40.

215. The Psychological Evaluation was conducted almost a month before School Psychologist Barrett signed her report. Stip. Ex. 36, p. 193; Stip. Ex. 23, pp. 91 & 92. No explanations were given for the delays in the completion of the Psychological Evaluation and preparation of the evaluation report.

216. School Psychologist Barrett had one of Q.C.'s Parents complete the Vineland Adaptive Rating Scale but otherwise did not interview Q.C.'s Parents or contact her Parents to discuss the evaluation results. Tr. vol. 2, p. 331:8-17 (Testimony of M.C.). Psychologist Barrett did not make any recommendations for specially designed instruction in her report. Stip. Ex. 23; Tr. vol. 1, pp. 78:24-79:11 (Testimony of Dr. Turnbull regarding the cursory nature of Ms. Barrett's psychological report).

217. The Psychological Evaluation reported the following sources of information: Differential Ability Scale, Second Edition (DAS-II); Kaufman Test of Educational Achievement,

[8] A reevaluation of a child identified as developmentally delayed must occur at least once every three years following placement and prior to turning eight years of age, or prior to entering the third grade. NC Policy 1503-2.4; 20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b)(2).

Third Edition (KTEA-III); Vineland Adaptive Behavior Scales (VABS); and the Berry Developmental Test of Visual-Motor Integration (VMI). Stip. 34

218. Although Q.C. was only six years old, had just completed preschool at the time of the evaluation, and presented with a developmental disability, School Psychologist Barrett improperly administered the school-age version of the DAS-II, which was normed for students through 7 years 11 months of age, rather than the preschool battery. *See* Tr. vol. 1, p. 141:3-7 (Testimony of Dr. Turnbull). At the hearing, no school psychologist testified in response to Dr. Turnbull's opinion that the DAS-II was an improper test instrument.

Most significant in this Psychological Evaluation was that on the DAS-II ability rating, Q.C. had an average nonverbal standard score of 101. Stip. 35. Q.C.'s verbal standard score was a 77 and her spatial standard score a 46, which lowered her overall score ability standard score to 68. Stip. 35. The 101 standard score was later incorrectly reported on the September 2018 IEP as a standard score of 53. Stip. Ex. 24, p. 98.

219. School Psychologist Barrett reported that Q.C.'s nonverbal skills reflected "an area of relative strength on tasks that include inductive reasoning and sequential and quantitative reasoning skills." Stip. Ex. 36, p. 194. Also during the evaluation, "Q. [C.] was able to adequately identify and name pictures and solve picture sequence and puzzles." Stip. Ex. 36, p. 194.

220. Later, School Psychologist Barrett did not attend the September 2018 IEP to explain her report, particularly the impact of Q.C.'s average nonverbal IQ score (101), nor did any other person attend who was qualified to interpret the evaluation results. *See* Stip. Ex. 26.

221. Despite her average nonverbal ability, according to her achievement testing, Q.C. had significant deficits in letter and word recognition (SS 68), written expression (SS 40), math computation (SS 47), and math concepts (SS 48). Stip. 36. School Psychologist Barrett observed that Q.C.'s "speech was marked by numerous articulation errors." Stip. Ex. 36, p. 194.

222. Q.C.'s preschool teachers Fisch and Chamberlin[9] and her mother K.C. completed the Vineland Adaptive Behavior Rating Scales ("VABS"). Q.C.'s overall adaptive behavior composites were 73 (preschool teacher) and 75 (parent). Stip. 37. Q.C.'s socialization scores were in the low average range of 86 (preschool teacher) and 84 (parent). Stip. 37.

223. Overall, Q.C. was able to "meet her basic self-care needs [] but continue[d] to need help with brushing her teeth, bathing, dressing, and changing her clothes." Stip. Ex. 36, p. 195. Q.C. still had toileting accidents at night, but there was no report of toileting accidents during the day. Stip. Ex. 36, p. 195. This is consistent with M.C.'s testimony that Q.C. "was proficient at potty training" and this proficiency was also noted on the March 2016 IEP. Tr. vol. 2, pp. 321:22-322:6; Stip. Ex. 16, p. 59.

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[9] The Psychological Evaluation report did not disclose whether Ms. Chamberlin or Ms. Fisch competed the preschool teacher rating scales, however, the Respondent responded in supplemental documentation that both teachers jointly completed he teacher version of the rating scale. *See* Stip. Ex. 36, p. 195 and Resp. Response to Pet. Supp. Doc. p. 15.

224. However, later at Whitaker Q.C.'s toileting skills regressed. Ms. Kibler complained that at Whitaker Q.C. "wet herself" on the playground and made the slide "messy" which required closing that the slide until the custodian cleaned it. Tr. vol. 6, p. 1150:3-7. She also had an accident in the reading corner. Tr. vol. 6, p. 1184:2-10.

225. The Psychological Evaluation report noted that Q.C. achieved a score of 65 on the VMI (Stip. 38) and that Q.C. "continues to have difficulty drawing specific forms or shapes, cutting a straight line with scissors and coloring within the lines." Stip. Ex. 36, p. 195. Q.C.'s visual-motor functioning was at the 1st percentile, "below what is expected for her chronological age and suggests significant delays in fine motor expressive skills." Stip. Ex. 36, p. 196. Based on this information, Respondent's staff should have known that classwork involving fine motor skills would be difficult and frustrating for Q.C.

226. School Psychologist Barrett concluded in her report that:

> Based on these test results, it appears that Q.C. will benefit from *support services* and remediation to improve academic, communication, motor and self-help skills.
>
> This evaluation should be considered as only one aspect of a comprehensive evaluation on Q.C., information should be incorporated with input from teachers, parents, and others who work closely with Q.C. before eligibility determination is made.

Stip. Ex. 36, p. 196 (emphasis added).

227. It is not clear when Respondent's staff reviewed the Psychological Evaluation report. Ms. Holtzclaw[10] appeared to be aware of the evaluation results before the report was signed on August 14, 2018. At the very end of July or the very beginning of August, Ms. Holtzclaw called M.C. to inform him that, based on Q.C.'s test results, even without an IEP, Respondent was placing Q.C. in the Readiness classroom at South Fork Elementary School. Tr. vol. 2, pp. 331:18-333:12; 332:18-333:12, 334:10-12 (Testimony of M.C.). In response, M.C. father explained he did not want Q.C. to attend South Fork; instead, he wanted her to attend Whitaker with her friends and classmates from Knollwood. Tr. vol. 2, p. 333:13-19. This was the first indication that Respondent intended to place Q.C. in the separate setting at South Fork.

5. Q.C.'s Former Preschool Teacher Fisch Hired to be TA at Whitaker

228. During the summer before the start of the 2018-2019 school year, Q.C.'s Parents learned Melissa Fisch, Q.C.'s preschool teacher at Knollwood, had accepted a position to serve as a kindergarten teaching assistant ("TA") at Whitaker for the 2018-19 school year. Tr. vol. 2, p. 336:19-22 (Testimony of M.C.). M.C. sought and received Ms. Fisch's permission to request Q.C.'s placement in the kindergarten class to which Ms. Fisch was assigned. Tr. vol. 2, p. 337:8-16.

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[10] Because Ms. Holtzclaw did not testify and any comments attributed to her are hearsay, the Undersigned is not accepting her statements for the truth of the matter asserted but as to Respondent's motives and intentions with respect to Q.C.'s separate placement.

229. With Ms. Fisch's agreement, M.C. contacted Principal Creasy to request Q.C.'s placement in Ms. Fisch's class. As background for his request, M.C. explained that Q.C. had Down syndrome, was successful at Knollwood in Ms. Fisch's class, and he anticipated the transition for Q.C. would be smoother if she were placed with a teacher who was familiar with her behaviors and the supports that were effective for Q.C. *See* Tr. vol. 2, pp. 337:17-338:11 (Testimony of M.C.).

230. Principal Creasy agreed to consider M.C.'s request, however, she ultimately refused the request citing the importance of a fresh start for Ms. Fisch and the need to ensure Ms. Fisch, a teacher with 21 years of experience, —not Q.C.—successfully transitioned. Tr. vol. 2, pp. 338:12-339:5 (Testimony of M.C.); Tr. vol. 6, pp. 1317:12-1318:2 (Testimony of Principal Creasy).

231. Principal Creasy informed M.C. that she was assigning Q.C. to Ms. Kibler's classroom, a teacher with significant experience teaching students with Down syndrome. Tr. vol. 2, pp. 338:22-24, 339:25-340:5 (Testimony of M.C.). Ms. Kibler had had only taught one student with Down syndrome and that was twenty-three (23) years prior in a private preschool. Tr. vol. 6, p. 1216:8-23 (Testimony of Kibler). This was the first misrepresentation made by Principal Creasy to Petitioners.

232. While class placement is not an issue over which the Undersigned has jurisdiction, the Undersigned finds this to be another decision in which Respondent chose not to provide readily available environmental support to Q.C. as she transitioned into kindergarten. Even if Q.C. only had limited access to Ms. Fisch during difficult periods, this may have been sufficient to redirect her maladaptive behaviors.

6. Behavior Data Collection Before Development of the IEP

233. On August 22, 2018, Melanie Holtzclaw[11] emailed Petitioners with a copy to Ms. Uldrick, "that the IEP meeting would be scheduled *after* Q[.C.] began [school] and that the Whitaker staff wanted to gather *some data* and just see how she does the first couple of weeks to develop an IEP…". Pet. Ex. 11, pp. 140-141 (emphasis added). The email did not explain what type of data the Whitaker staff intended to collect or why such data was important enough to delay the timely development of Q.C.'s IEP.

234. The Parents were not aware of the existence of the Behavior Data Sheets prior to or at the September 2018 IEP Meeting. There were no references to these Behavior Data Sheets in the IEP documentation, especially not in the Reevaluation DEC 3 created at the September 2018 IEP Meeting. *See* Stip. Exs. 23, 24, 25, 26. Although the three classroom observations by other staff members are referenced in the September Reevaluation Form ("DEC 3"), the Behavior Data Sheets were not. Stip. Ex. 23.

235. Because of the significance of the Behavior Data Sheets, the Undersigned needed information from the Parties as to the disclosure of this information. In the Order for Additional

[11] This communication, although hearsay, is used to corroborate that the collection of data was used to delay the timely completion of the IEP not for the truth of the matter asserted.

Supplemental Documentation from the Parties filed on July 30, 2019, the Undersigned asked the Petitioners to:

> indicate in the transcripts or evidentiary documents, including discovery, when the Parents were made aware that Q.C.'s EC Teacher and Regular Education Teacher were tracking Q.C.'s behaviors [Question 1], when Respondent disclosed the existence of the Behavior Tracking Sheets which are Stipulated Exhibit 38 [Question 2], and when Respondent showed or gave copies of the Behavior Tracking Sheets to the Parents or their legal counsel [Question 3].

236. Respondent was asked similar questions:

> With respect to the Behavior Data Sheets (Stip. Ex. 38), Respondent is to indicate in the transcript and evidentiary documents, including discovery, when Respondent advised the Parents that Respondent was keeping daily behavior data [Question 1] in the form of Behavior Data Sheets, not academic data, and when Respondent disclosed the existence of the Behavior Data Sheets [Question 2] and actually showed them or gave them to the Parents or their legal counsel [Question 3].
>
> Order dated July 30, 2019, p. 1.

237. With respect to Questions 1 and 2, according to Petitioners:

> Respondent never made Petitioners aware that Q.C.'s EC teacher and regular education teacher were tracking Q.C.'s behaviors or disclosed the existence of the behavior tracking sheets (i.e., Stipulated Exhibit 38). Tr. vol. 2, p. 362:13-15 (testimony of M.C. that Q.C.'s IEP team did not share any data it had collected on Q.C. during the September 11, 2018 IEP meeting); *see also* Pet. Ex. 58 (Dr. Fisk-Moody's notes from the October 1, 2018 IEP meeting containing no mention that behavior data sheets were reviewed). Ms. Uldrick testified that Q.C.'s IEP team generally discussed Q.C.'s behaviors at each of her IEP meetings but did not testify that the WS/FCS shared behavior data with Q.C.'s parents. Tr. vol. 5, pp. 974:4-15, 1000:8-11, 1023:5-10. Ms. Kibler could not say for sure if she made Q.C.'s parents aware during the September 6, 2018 meeting or the October 1, 2018 IEP meeting that she and Ms. Uldrick were collecting behavior data or if the IEP team shared the behavior tracking sheets with Q.C.'s parents. Tr. vol. 6, pp. 1238:4-9, 1241:19-22.
>
> Pet. Am. Supp. Doc. ¶ 13.

238. With respect to the disclosure of the Behavior Data Sheets, Stip. Ex. 38 (Question 3), Petitioners stated:

> Respondent did not provide copies of the behavior tracking sheets in response to Petitioners' September 24, 2018, school records request. Respondent provided the tracking sheets to Petitioners' counsel on December 12, 2018, in response to Petitioners' first informal discovery request. *Id.* ¶ 14.

239. In response to Question 1, Respondent countered that "Petitioners' assertions are flatly contradicted by the very testimony and evidence they cite." Resp. Response to Pet.'s Supp. p. 9 ("Resp. Response").

240. According to Respondent "Ms. Kibler *explicitly* testified that she informed K.C. at the September 6, 2018 meeting that WS/FCS staff were collecting behavior data on Q.C.," Resp. Response p. 9 (emphasis in original), as evidenced by her testimony below:

> Q. And you don't recall if you thought to mention it when you met with Dr. C. on September the 6th that you were collecting behavior data on Q.C.?
> A. We talked about that. Yes
> **Q. You told her at that point that you were collecting behavior data?**
> **A. Yes. I'm sure we did. Yeah.**
> Q. Did you show her your behavior data?
> A. I believe we did, but I'm not going to promise to it. **But I'm sure we discussed it. I know I discussed it.**
> Q. You know you discussed Q.C.'s behaviors?
> A. Yeah, and that we were trying to figure out – yes.

Resp. Response p. 9 (citing Tr. vol. 6, pp. 1237:25-1238:12) (emphasis in original)

241. However, Respondent neglected to include the first two lines of Ms. Kibler's testimony which started:

> Q. Did you tell the parents that you were collecting behavior data on Q.?
> A. I don't recall. I don't think I met with them – I don't recall.

Tr. vol. 6, p. 1237:21-24.

242. The Undersigned does not find this testimony *explicit.* Initially, Ms. Kibler could not "recall" if she told the Parents that she was collecting behavior data on Q.C. Later when asked about it during the September 6 Parent Conference, while collection of behavior data may have been discussed, Ms. Kibler did not *explicitly* testify that *she* showed K.C. any behavior data. Instead, she testified "I believe *we* did, but I'm not going to promise to it." This Parent Conference was not an official IEP meeting and no minutes were taken of this meeting to corroborate Ms. Kibler's testimony. While Q.C.'s behaviors were discussed, none of Respondent's other participants testified that behavior data was being collected or that Behavior Data Sheets would be used at this meeting.

243. In general, Respondent responded that Petitioners "bear the burden in this case, a lack of evidence pointing one way or the other on an issue means that Petitioners have not carried that burden." Resp. Response p. 10, fn 10. While the Petitioners carry the burden, the IEP Teams were responsible for disclosing relevant information used in their decisionmaking process. All of the school-based members of the September and October IEP Teams, except perhaps for the scribe, had either collected the behavior or knew about it. The purported purpose of the behavior data collection according to EC Teacher Uldrick was to determine Q.C.'s behaviors for the drafting of

the IEP. If such behavior was not discussed at the IEPs, what other purpose did Respondent have for collecting of behavior data and documenting it on Behavior Data Sheets?

244. In response to Question 1, regarding the September 2018 IEP Meeting Respondent responded that:

> The other record citations indicated by Petitioners similarly do not support Petitioners' assertion that they were never informed about the tracking of behavior data. M.C.'s referenced testimony simply asserts that in the specific context of completing the eligibility paperwork at the September 11, 2018 meeting, the IEP team did not share data it had collected on Q.C. Tr. vol. 2, p. 362:13-15 ("Q. **In completing this form**, did the IEP team share any data that it had collected on Q. at this meeting? A. No.") (emphasis added). He was not asked about whether behavioral data was shared at any other time at that meeting or at the October 1, 2018, meeting, and his testimony is silent on that point.

Resp. Response p. 10.

245. With respect to the October 2018 IEP Meeting, in response to Questions 2 and 3, Respondent answered:

> Petitioners note that Dr. Fisk-Moody's notes from that meeting "contain no mention that behavior data sheets were reviewed." Petrs' Am. Supp. Doc. ¶ 13. However, Petitioners pointedly did not reference the actual minutes from that meeting, which clearly indicate that the behavior data was in fact reviewed during the meeting. Stip. Ex. 31, at 147-48 ("Reviewed existing data…Reviewed Behavior – 2 formal writeups – for choking a student and pulling the fire alarm. A current behavior chart is implemented in the classroom – Regular ed and EC small group setting. **Based on behavior chart** student exhibits behaviors of non-compliant refusal behaviors, tantrums, physically aggressive toward peers, overstimulation and transition cause disruption and non-compliance.") (emphasis added).

Resp. Response p. 10 (referring to Stip. Ex. 31, pp. 147-48).

246. Both the October 2018 IEP Minutes, Stip. Ex. 31, p. 147, and the Prior Written Notice, Stip. Ex. 29, p. 128, referred to discipline records and daily event recording sheets." Stip. Ex. 29, p. 128. The "behavior chart" mentioned in the October 2018 IEP minutes was not part of the hearing exhibits. The minutes indicated that the review of the "behavior chart" occurred after the Parents and their advocates left the October 2018 IEP Meeting. The propriety of the Parents' decision to leave the October 2018 IEP Meeting is discussed later.

247. While the Parents may have been aware of some collection of behavior data, there was no evidence showing that Respondent disclosed to the Parents the actual method of behavior data collection or the existence of Behavior Data Sheets at any time before, during, or after the September 2018 IEP or October 2018 IEP Meetings.

248. Although not part of either IEP Teams' discussions with the Parents, these Behavior Data Sheets featured predominantly in Respondent's case in chief as the reason for the IEP Teams' decisions to place Q.C. in the separate setting. *See* Testimonies of Uldrick, Kibler, and Creasy; *see also*, Resp. Pro. Dec. ¶¶ 122-129, 131, 219, 220, 236, 237.

249. Simply telling the Parents that the school staff was collecting behavior data was not sufficient without full disclosure of the data information as shown on the Behavior Data Sheets. Q.C.'s Parents cannot meaningfully participate in decisionmaking at the IEP Team meetings without having all the relevant information. Especially when the behavior data was extraordinary as shown *infra* on page 47.

The Beginning of the 2018-2019 School Year at Whitaker Elementary School

1. No IEP at the Beginning of 2018-2019 School Year

250. Q.C.'s kindergarten orientation was held the morning of August 23, and the school-wide open house was held that evening. Petitioners were unable to attend either event because of an important, prior family commitment. Tr. vol. 2, pp. 427:18-428:6; 428:23-429:2 (Testimony of M.C.). Petitioners had previously visited Whitaker and toured the facility on May 16, 2018.

251. On August 27, 2018, Q.C. started the 2018-2019 school year enrolled in kindergarten at Whitaker. Stip. 39. Q.C. attended Whitaker from August 27, 2018 to October 1, 2018. Stip. 40.[12]

252. For the 2018-2019 school year, the length of the school day at Whitaker was 390 minutes. Post-Hearing Stip. 1. For the 2018-2019 school year, the amount of instructional time during the school day (i.e. excluding lunch) at Whitaker was 360 minutes. Post-Hearing Stip. 2.

253. It is uncontested that Q.C. did not have an IEP in place when she started school. Regardless of whether this was an initial IEP or annual review IEP, Respondent substantively violated the IDEA by not developing an IEP before the school year started. Respondent purportedly delayed development of the IEP to allow for the collection of data. Yet, the only data collected before the September 2018 IEP Meeting was in the Behavior Data Sheets which were not even disclosed to the Parents or reviewed at the September 2018 IEP Meeting.

254. Respondent offered no other reason for not timely developing Q.C.'s IEP before the school year started; therefore, the Undersigned finds that Respondent failed to provide a cogent or reasonable explanation why Q.C.'s IEP could not be developed in a timely manner.

[12] Stipulation 40 incorrectly stated that the dates are "August 27, 2019 to October 1, 2019," but the actual dates were August 27, 2018 to October 1, 2018. The Parties initialed the correction.

2. Q.C.'s Kindergarten Class

255. Q.C.'s regular education kindergarten teacher at Whitaker was Barbara Kibler. Her special education teacher was Lindsay Uldrick. Stip. 41. Ms. Uldrick had already been involved in the May 2018 IEP Meeting and knew that Q.C. was going to attend Whitaker.

256. Sometime before school started Ms. Kibler was informed by Principal Creasy that "the student that came with Down syndrome" was going to be in her kindergarten class. Tr. vol. 6, p. 1131:5-11. Ms. Kibler understood from Principal Creasy that Q.C. was assigned to her class because she "had more experience with EC children…[and] making modification than most of the other teachers." Tr. vol. 6, p. 1131:5-15 (Testimony of Kibler).

257. Ms. Kibler and her teaching assistant Kimberly Spencer served twenty (20) students, including Q.C., in their kindergarten classroom as of the start of the 2018-2019 school year. Stip. 42. It was not disclosed how many of the other kindergarten students in Ms. Kibler's class were disabled, but to the extent any other student had an IEP, it would have been for services in the regular and/or resource classrooms.

258. Both Q.C.'s teachers had reviewed the Psychological Evaluation report prior to the beginning of the 2018-2019 school year. Tr. vol. 5, p. 941:8-13 (Ms. Uldrick reviewed "middle of August"); Tr. vol. 6, p. 1129:10-18 (Ms. Kibler reviewed "probably the week of August 18th"). Based on their review, both of Q.C.'s teachers should have known that Q.C. had severe fine motor deficits, but they provided no assistive technology, such as spring loaded scissors or other accommodations during instructional activities. Both teachers should also have known that based on the Psychological Evaluation that Q.C. had severe communication deficits and "will benefit from support services." Stip. Ex. 36, p. 196.

3. Speech/Language Evaluation – August 30, 2018

259. On August 29, 2018 and August 30, 2018, Respondent conducted a speech-language evaluation of Q.C. ("Speech/Language Evaluation"). Stip. 43.

260. The Speech/Language Evaluation had not been completed before the beginning of the school year. Stip. Ex. 37. It was completed on August 30, 2018. Stip. 43.

261. Jeanne Brooker conducted the Speech/Language Evaluation. Stip. 44; Stip. Ex. 37. Ms. Brooker failed to interview either one of Q.C.'s Parents and failed to observe Q.C. in the classroom environment in violation of the NC Policies for speech/language evaluations. Tr. vol. 5, pp. 1104:17-19; 1112:7-15. According to the Speech/Language Evaluation, Q.C. had articulation, severe receptive and expressive language deficits. Stip. Ex. 37; Stips. 47-49.

262. Respondent offered no explanation as to why the Speech/Language Evaluation could not have been completed in sufficient time to have an IEP meeting before school started.

4. First Unilateral Removal from Regular Education – 30 Minutes

263. On Q.C.'s third day of kindergarten, without the knowledge or consent of Q.C.'s Parents, Ms. Uldrick began removing Q.C. from her regular education class and providing

instruction to Q.C. in her resource classroom for thirty (30) minutes per day. Tr. vol. 5, p. 1016:15-23 (Testimony of Uldrick); Tr. vol. 2, p. 370:10-14 (Testimony of M.C.).

264. Because Q.C. did not have an IEP in place at that time (although this was a Reevaluation IEP), this removal was technically not a "change in placement," but Respondent did not adequately explain the rationale for this action nor provide academic data at the September 2018 IEP to justify it.

265. At the end of each day, one of Q.C.'s Parents asked Respondent's staff how Q.C. was performing in her kindergarten class. Tr. vol. 3, p. 597:3-11 (Testimony of K.C.). No one from Respondent's staff informed her Parents that Q.C. was struggling during the school day, that Respondent was collecting behavioral data on Q.C., or that Respondent was removing Q.C. from her nondisabled peers during the school day. *Id*.; *see also,* Tr. vol. 2, p. 370:10-14 (Testimony of M.C.).

5. Collection of Behavior Data Started the First Day of School -August 27, 2018

266. On the first day of school, Respondent's staff began collecting data on Q.C.'s behavior. Tr. vol. 6, pp. 1139:3-10; 1147:11-17 (Testimony of Kibler); Stip. Ex. 38, pp. 236 & 237. Ms. Kibler's Behavior Data Sheets were titled "Event Recording Data Sheet," Stip. Ex. 38, pp. 213-237. The title of Ms. Uldrick behavior sheets was "Functional Behavioral Assessment." Stip. Ex. 38, pp. 200-212. They are collectively referred to in this Final Decision as the "Behavior Data Sheets."

267. According to Respondent's Behavior Data Sheets, during the intervening weeks before the September 2018 IEP meeting, Q.C. had significant difficulties transitioning into the public kindergarten classroom. *See* Stip. Ex. 38.

268. Ms. Uldrick admitted during her testimony that she knew, before the start of the school year that based on the present level in the March 2016 IEP, Q.C. struggled with "leaving areas of instruction," and that based on one of her speech goals from that IEP Q.C. struggled with "complying with tasks." Tr. vol. 5, pp. 942:24-943:5. Ms. Uldrick believed that gathering data on those two behaviors would help her determine whether those goals from the outdated IEP would be "relevant for the future IEP," Tr. vol. 5, p. 943:3-5, and would also help her identify when during the day she should serve Q.C. Tr. vol. 5, p. 945:18-22.

269. Significantly, none of the Whitaker staff asked Ms. Fisch about Q.C.'s behaviors and any strategies Ms. Fisch may have used to address these behaviors during the six months she taught Q.C. immediately prior to Q.C.'s enrollment in WS/FCS. Ms. Fisch's information would have been more current and relevant than the March 2016 IEP which was developed over two years ago (28 months). Respondent's failure to use Ms. Fisch as a resource with Q.C.'s behaviors suggests that the Whitaker staff was not interested in helping Q.C. successfully transition into the regular education classroom but rather seeking to justify her removal from her nondisabled peers.

270. The behavior tracking began after the first day of school, because Ms. Uldrick, Ms. Kibler, Principal Creasy, and Assistant Principal Mikesell decided to track Q.C.'s behaviors to see if they would "need [] more help with her or not." Tr. vol. 6, pp. 1140:19-1142:2. School Psychologist Barrett had already advised in her Psychological Evaluation Report that Q.C. would

need "support." School staff and administrators wanted to start tracking her "out of seat or defiant behaviors to see if there were things, we could do to support her…". Tr. vol. 6, p. 1145:9-18. Although the behavior data was supposed to help the September IEP Team find a way to support Q.C., it was not used for that purpose nor were any functional behavior goals developed from this behavior data at the September 2018 IEP Meeting.

271. Ms. Uldrick and Ms. Kibler offered conflicting testimony about when, exactly, they agreed to document behavioral data for Q.C. *See* Stip. Ex. 38, pp. 213-237. Ms. Uldrick recalled that she discussed the data sheets with Ms. Kibler on Friday, August 24, before Q.C.'s first day of school. Tr. vol. 5, pp. 941:19-943:18. Ms. Kibler, however, recalled speaking with Ms. Uldrick about the forms and how to use them after the first day of school on August 27, 2019. Tr. vol. 6, pp. 1141:121142:5, 1145:6-21.

272. Despite this conflicting testimony, Ms. Uldrick prepared the Behavior Data Sheets before school started in anticipation of tracking Q.C.'s behaviors. Ms. Uldrick did not explain why she did not recommend a Functional Behavior Assessment ("FBA") at the May 22, 2018, Initial Evaluation/Reevaluation Meeting since she had gleaned from the March 2016 IEP's present levels and speech goals that Q.C. may have behavioral issues. Neither Ms. Uldrick, Ms. Kibler, nor Principal Creasy explained why, after they met and decided to track Q.C.'s behaviors, no one asked the Parents for permission to conduct an FBA.

273. At the September 2018 IEP Meeting, Petitioners requested an FBA before placement was finalized. Stip. Ex. 26, p. 124. When Respondent declined to conduct the FBA before placing Q.C. in a segregated setting, Respondent still did not disclose the existence of the Behavior Data Sheets to the Parents. Respondent continued collecting the data after the September IEP Meeting even though it was not intended to be FBA data. Tr. vol. 5, p. 944:12-16 (Testimony of Uldrick).

274. Placement was clearly the school based IEP Team members' primary concern at the September 2018 IEP Meeting. Stip. Ex. 26, p. 124 ("Team agreed that [FBA] needs to be done but want[s] to finalize placement next week.").

275. Each Behavior Data Sheet recorded "noncompliant" and "out of seat" behaviors. The forms themselves do not define what constitutes "noncompliant" or "out of seat" behaviors. Moreover, the parameters of the data collection were not disclosed on the form. So, it is unclear if each check mark denotes one out of seat behavior or a series of such behavior. In some instances, the forms indicated as many as 20 behaviors during a 30-minute interval without explaining if this was a continuation of one behavior or a series of separate behaviors. *See* Stip. Ex. 38, pp. 220, 226, 227, 234.

276. Respondent's data of Q.C.'s "noncompliant" and/or "out of her seat" behaviors was overwhelming. From August 27 to September 6 (Parent Conference), from September 6 to September 11 (September 2018 IEP Meeting), and from September 11 to October 1 (October 2018 IEP Meeting) as recorded on Stip. Ex. 38, the data[13] was as follows:

	OUT OF SEAT		**NONCOMPLIANT**		
Date	**Kibler's Class**	**Uldrick's Class**	**Kibler's Class**	**Uldrick's Class**	**Total**
August 27	67 (69)[14]	__	85 (89)	__	152
August 30	27	10	57	13	107
August 31	27	5	26	7	65
September 4	35	8	15	9	67
September 5	15	__	34	__	49
September 6	70	__	77	__	142
Subtotal:	241	23	294	29	587
September 7	45	10	70	16	141
September 10	30	__	97	__	127
September 11	5	5	45	12 (fire alarm)	67
Subtotal:	321	38	506	57	922
September 12	__	15	__	30	45
September 17	15	10	34	16	75
September 18	26	35	50	55	166
September 19	41	14	__	31	91
September 20	24/42[15]	52	__	77	77/171
September 25	__	0	__	7 (strangulation)	7
Totals	427	164	588	273	1383

Noncompliant and Out of Seat Combined With 1:1 in EC Resource Class

September 26	__	3	__	3
September 27	__	6	__	6
Totals		9		9

See Stip. Ex. 38.

[13] The numbers in Respondent's Proposed Final Decision differ from the Undersigned's calculations which are based exclusively on the Behavior Data Sheets in Stipulated Exhibit 38. *Compare* Respondent's Amended Pro. Final Dec. pp. 35-37. Whether using the Respondent's calculations or the Undersigned's, the result is the same – an extraordinary number of maladaptive behaviors.

[14] According to Respondent's witnesses, this date was incorrect on the forms and should have been August 29, 2018.

[15] Appears there are two data sheets for September 20 in Ms. Kibler's Class. *See* Stip. Ex. 38, pp. 213 & 214.

277. Petitioner's expert opined that the Whitaker staff collected data primarily on the frequency of Q.C.'s behaviors in order to justify placing Q.C. in the separate setting. *See, e.g.* Tr. vol. 3, pp. 525:22-526:2 (Testimony of Mr. Overfelt). Data on frequency is often collected to "magnify the behavior" in order to justify a change in placement. Tr. vol. 3, pp. 527:3-11; 553:4-21. Ms. Uldrick admitted that, based on her data collection, she did not always know the antecedents to Q.C.'s behavior, but was always able to tell the time of day and frequency of Q.C.'s behaviors. Tr. vol. 5, pp. 1022:25-1023:4 (Testimony of Uldrick).

278. On September 20, 2018, between 10:00 a.m. to 10:50 a.m. EC Teacher Uldrick documented 20 maladaptive behaviors for every 10-minute segment. Based on her "FBA" Behavior Data Sheet, Q.C. had 100 maladaptive behaviors in 50 minutes averaging more than 1 behavior every 30 seconds. Stip. Ex. 38, p. 203.

279. According to Mr. Overfelt, the behavior data collected by Respondent did not identify the function of Q.C.'s behaviors. Tr. vol. 3, p. 530:11-16. Moreover, the classroom observations of Q.C. did not provide enough information to develop interventions or understand the function of Q.C.'s behaviors. Tr. vol. 3, p. 524:15-20.

280. Upon review of the Behavior Data Sheets, the frequency of the behaviors is readily apparent, but the Undersigned is unable to determine the context of Q.C.'s behaviors.

6. Parent Conference with Whitaker Staff - September 6, 2018

281. At the request of K.C., Ms. Kibler, Ms. Mikesell (the Assistant Principal), and Ms. Spencer ("TA") met on September 6, 2018 ("Parent Conference"), to provide feedback on Q.C.'s first two weeks at school. Tr. vol. 3, p. 597:3-15 (Testimony of K.C.); Tr. vol. 6, p. 1159:22-25 (Testimony of Ms. Kibler).

282. Ms. Kibler started the meeting with a litany of complaints about Q.C. Ms. Kibler started the meeting by saying she spent her lunch period cleaning out Q.C.'s lunch box when the lid on her yogurt container came off. *See, e.g.*, Tr. vol. 3, p. 597:16-21 (Testimony of K.C.). Ms. Kibler shared Q.C. had difficulty with an activity where students had to tear pieces of paper and glue them on to another piece of paper. Tr. vol. 3, pp. 597:24-598:3 (Testimony of K.C.). Ms. Kibler informed K.C. that Q.C. had wasted the stickers that Ms. Kibler had purchased with her own money for the children to create posters bearing each child's name to hang in the hallway. Tr. vol. 3, p. 598:4-15 (Testimony of K.C.); Tr. vol. 6, pp. 1226:24-1227:4; 1232:12-13 (Testimony of Ms. Kibler). Then Ms. Kibler informed K.C. that she was not going to provide more stickers to Q.C. so K.C. went to the hallway after the meeting and took a picture, which was shown to the Undersigned during the hearing, of Q.C.'s coconut tree with just the letter "Q" hanging in the hallway amongst all the other students' completed pictures with their entire names. Tr. vol. 3, pp. 599:21-600:1 (Testimony of K.C.); Tr. vol. 6, pp. 1226:10-14; 1228:9-14 (Testimony of Kibler).

283. Despite Ms. Kibler's derogatory remarks about Q.C. to her mother, at the hearing, Ms. Kibler said she "enjoyed," "liked," and "was glad she [Q.C.] was in my class, honestly." Tr. vol. 6, p. 1154:9-12 (Testimony of Kibler). The Undersigned finds this comment in direct contrast to Ms. Kibler's Behavior Data Sheets and her statements to K.C.

284. K.C. offered strategies for the staff to use with Q.C. to redirect her attention and calm her *See, e.g.,* Tr. vol. 4, pp. 699:24-700:7 (Testimony of K.C. that she suggested school staff use "uh oh" to get Q.C.'s attention and redirect her because Q.C. responds to this at home); Tr. vol. 6, p. 1163:1-8 (Testimony of Ms. Kibler).

285. By the time of the Parent Conference, Q.C.'s teachers had collected six days of behavior data with a combined number of behaviors totaling 587 incidences. *See* Stip. Ex. 38, pp. 226-237; chart *supra* on p. 47. Even though the purpose of the Parent Conference was for K.C. to "see how Q.C. was doing," Respondent did not disclose to K.C. the existence of the Behavior Data Sheets which documented over 500 maladaptive behaviors.

7. Contradictory Testimony About the Behavior Data

286. The testimonies of Respondent's witnesses often contradicted the severity of Q.C.'s behaviors as recorded in the Behavior Data Sheets.

a. *Regular Education Teacher – Ms. Kibler*

287. According to Ms. Kibler, Q.C.'s first day started well, she "came in very happy, very excited to be there as well as the other children…," Tr. vol. 6, p. 1137:13-14, "some of them [the children] she knew from preschool, so she was really excited and ran over to them and they talked to her. And that was really nice." Tr. vol. 6, p. 1138:2-4.

288. "[Q.C.] really enjoyed it [her first morning of school], She – I know that she really liked singing and music. She liked dancing, so that was something I thought would be really helpful for her. She had a hard time just sitting for, you know, a long – she would like to lay down, so I knew that maybe I needed – I let the children sit wherever they want because we really with on self-regulation, so I just kind of mentally noted that maybe she might need more space than the square." Tr. vol. 6, p. 1138:10-18.

289. Initially, at lunch Q.C. was distracted because of the bigger group and didn't understand that you needed to sit and eat your lunch, she wanted to visit with the other children. Tr. vol. 6, p. 1144:15-23. PE/recess was "disconcerting because she would climb up to the top of things and just start leaning, and I [Ms. Kibler] was afraid she would fall. So we kind of made a note to kind of make sure we had somebody near her because the equipment is much larger than preschool equipment….". Tr. vol. 6, pp. 1144:24-1145:4. "During carpet time, [Q.C.] would often lay down. and just totally not intentionally she would just kick her legs up and kick kids and roll into them…" (Tr. vol. 6, p. 1153:8-12) "but that none of these behaviors were intentional." Tr. vol. 6, p. 1153:14-18.

290. Ms. Kibler's impressions of Q.C. after the first week of school was that "[s]he was very ongoing, immature, had some, you know, attention concerns, some behavior concerns. But we really enjoyed her. We liked her. I thought – you know, I was glad she was in my class, honestly." Tr. vol. 6, p. 1154:9-12.

b. *Principal Creasy*

291. Principal Creasy observed Q.C. during the first few weeks of kindergarten and "saw her participating in class…at ease and enjoying things." Tr. vol. 6, p. 1281:9-13. Although during that time, Q.C. needed regular redirection by Ms. Spencer (the class TA), "she was happy and participating." Tr. vol. 6, p. 1281:113-15.

292. After the September IEP Meeting where Principal Creasy decided that Q.C. would be placed in special education 300 minutes a day, Principal Creasy had regular encounters with Q.C. during transitions, in the hallways, in the regular and special education classrooms, the cafeteria, and frequently throughout the school. Tr. vol. 6, p.1286:17-23. At those times, Principal Creasy observed that Q.C. "was happy, moving along with her class, participating in playtime like on the playground." Tr. vol. 6, pp. 1286:24-1287:1 Principal Creasy noted that "in the cafeteria [Q.C. needed] lots of support from the teachers and on the playground" for safety reasons. Tr. vol. 6, p. 1287:2-3.

293. Principal Creasy emphasized that Q.C. required a "regular rotation of support for her in terms of transitions and activities and class work" not that her behavior was disruptive. Tr. vol. 6, p. 1287:17-19.

c. *Dr. Fisk-Moody – EC Program Director*

294. Dr. Fisk-Moody observed Q.C. along with other students in Ms. Uldrick's class sometime between the September and October IEP meetings. When she observed Q.C. in Ms. Uldrick's classroom, Q.C. was "doing her work" on a literacy activity. Tr. vol. 7, pp. 1405:18-1406.

d. *Three Observations by Other School Staff*

295. As part of the Eligibility Reevaluation process, Q.C. was observed three times in her regular classroom by Sue Hester (IF), M. Holtzclaw (EC Case Manager), and Ms. Sowers (School Counselor). *See* Stip. Ex. 55, 56, 57. Each observer completed a Classroom Observation Form which contained a checklist of details about the observation (student observed, learning situation, learning environment) including a checklist of student behavior. One of the student behavior items on this checklist was "disruptive." *See* Stip. Ex. 55, 56, 57.

296. Details from these observations are also documented in the Summary of Evaluation/Eligibility Worksheet Intellectual Disability ("DEC 3-ID") ("Summary of Evaluation"). Stip. Ex. 23, pp. 90-91. In the Summary of Evaluation, Respondent was selective in its documentation of these observations.

297. The first observation by Sue Hester was on August 31, 2018, during free time in the regular education class and the only behavior Ms. Hester observed was that Q.C. "avoids groups." Stip. Ex. 55. According to Ms. Hester, the other children "helped her" and "looked after her." Stip. Ex. 55.

298. Ms. Hester did not check on her observation form that Q.C. was disruptive. *See* Stip. Ex. 55.

299. The second observation was on September 4, 2018, by Ms. Holtzclaw in the regular classroom during language arts/writing instruction. Stip. Ex. 56. Ms. Holtzclaw's observation documented more problem behaviors. She observed that Q.C. "works well by self" but was "constantly out of her seat," "demands excessive attention," "easily distracted," and "does not complete tasks." Stip. Ex. 56. Ms. Holtzclaw also noted that Q.C. was able to "follow directions" even though she had "difficulty getting started" and when a "task [was] too difficult [she] hides under table." Stip. Ex. 56.

300. Ms. Holtzclaw did not check on her observation form that Q.C. was disruptive. *See* Stip. Ex. 56.

301. The third observation by School Counselor Sowers was on September 5, 2019, in the regular classroom during independent work. Stip. Ex. 57. The behaviors noted by Ms. Sowers was "easily distracted, friendly, neat appearance, short attention span, sit quietly and speech problems." Stip. Ex. 57. Notations on the observation form included behaviors such as pulls and twists shirt up and over head, lays down during calendar time, plays with sock and rolls around, sits in teacher's chair, but that she "follows directions when told to get down." Stip. Ex. 57.

302. Counselor Sowers did not check on her observation form that Q.C. was disruptive. *See* Stip. Ex. 57.

303. In the Summary of Evaluation, the observations were listed out of chronological order. The most critical observation, Ms. Holtzclaw's (09/04/2018), was listed first even though it was the second observation. Stip. Ex. 23, p. 90. Ms. Holztclaw's observation listed the more problematic behaviors (constantly out of seat, demands excessive attention, disruptive during instruction, difficulty following directions) than the other two observations. Stip. Ex. 23, p. 90. Ms. Sower's observation (09/05/2018) was reported second on the Summary of Evaluation form. Stip. Ex. 23, p. 91. Instead of listing the behaviors checked by Ms. Sowers (easily distracted, friendly, neat appearance, short attention span, sits quietly, speech problems), only the narrative notes were included in the Summary, part of which were not included in Stip. Ex. 57. The first observation (08/31/2018) was listed last and the Summary does not document that the only behavior observed by Ms. Sowers was "avoids groups," instead the narrative notes were included. Stip. Ex. 23, p. 90. The order of these observations suggests that Respondent was intentionally trying to maximize the extent of Q.C.'s behaviors.

304. The Summary of Evaluation did not disclose that *none* of the three observers observed that Q.C. was "disruptive" in the regular education setting *See* Stip. Exs. 55, 56, 57.

September 11, 2018 IEP Meeting

305. On September 11, 2018, the IEP Team convened for a Reevaluation and Annual Review, not an Initial Eligibility IEP Meeting. Stip. 51; s*ee* Stip. Ex. 23, p. 97 (DEC 3 from the September 11, 2018 IEP meeting showing where "Initial Eligibility" had been crossed out and "Reevaluation" has been checked).

306. The following individuals attended the September 11, 2018 IEP Meeting: Q.C.'s Parents, M.C. and K.C.; Principal Sharon Creasy, LEA Representative; Barbara Kibler, Regular

Education Teacher; Lindsay Uldrick, Special Education Teacher; Jeanne Brooker, Speech/Language Pathologist; Kim Spencer, Teacher Assistant; and Melanie Holtzclaw, Case Manager. Stip. 52.

307. As noted previously, without parental permission excusing her, School Psychologist Barrett was not invited and did not attend the September 2018 IEP Meeting. Nor, was there any other qualified individual in attendance who could interpret the impact of Q.C.'s average non-verbal IQ on her educational programming.

308. At the time of the meeting, Q.C. had only attended school for 9 1/2 days without any documented supplemental aids, supports, modifications, or accommodations in place. *See* Tr. vol. 2, pp. 430:15-16, 435:4-8 (Testimony of M.C.); *see also,* Tr. vol. 5, pp. 1037:7-18; 1038:1 (Testimony of Uldrick she did not document any of the instructional strategies such as visual schedule, picture cards that she purportedly used with Q.C.). To the extent that supplemental aids and supports, other than preferential seating and modified assignments, were used by teachers Kibler and Uldrick these supports were not documented or incorporated in the September 2018 IEP (or later in the October 2018 IEP).

309. The school-based members of the IEP Team testified that they entered the September 2018 IEP Meeting with "open minds" and "open questions" to discuss with Q.C.'s Parents. According to Principal Creasy, she "didn't know" what Q.C.'s IEP might look like. The team "had some thoughts of strategies and practices, but…we were considering lots of different things. An IEP, you go into it and consider what you have and where you are and what options you have and come up with a plan as a team. That's not something I individually direct. We do that together." Tr. vol. 6, pp. 1282:19-1283:8 (Testimony of Creasy).

310. Ms. Kibler's mind-set going into the meeting was "very open to whatever information we could glean," and was "excited to see how she did with her assessments and to see if there were some things that could support us in helping or some things to really work on…". Tr. vol. 6, pp. 1171:19-1172:1 (Testimony of Kibler).

311. Ms. Uldrick had no opinion prior to the meeting regarding service delivery, placement, or school assignment for Q.C. She knew that Q.C. would require some direct instruction out of the classroom but hadn't determined how much time would be necessary, and she knew that Q.C. would require frequent breaks but otherwise had not identified specific aids, services, or accommodations that might be. Tr. vol. 5, pp. 961:9-963:6 (Testimony of Uldrick).

312. M.C. had a different impression of the "open-mindedness" of the school-based members of the IEP Team. Even though Petitioners were a "few feet from the Educators at Whitaker, the "most frustrating parts about this meeting was that we never felt like we were heard in any meaningful way about our goals that Q.[C.] would be educated in – in [a] regular education." Tr. vol. 2, pp. 347:18-348:2.

313. Even though the school-based IEP Team members testified to their "open mindedness" about Q.C.'s IEP and placement, they did not disclose the existence or contents of their Behavior Data Sheets to the Parents. Despite having Behavior Data Sheets which in which Respondent had documented over 900 maladaptive behaviors (*see* chart *supra* on page 47) before

the September 2018 IEP Meeting, the only specific behaviors discussed at the September 2018 IEP Meeting was the "fire alarm incident" and supervision problems on the playground. Tr. vol. 6, pp. 1173:17-1174:6 (Testimony of Kibler).

1. The "Fire Alarm Incident" Before the September 2018 IEP Meeting

314. At 1:10 p.m., approximately two hours before the September 2018 IEP Meeting, a student pulled the fire alarm in Ms. Kibler's classroom and the entire building had to be evacuated. Stip. Ex. 54, p. 359. Two kindergarten students accused Q.C. of pulling the fire alarm, but no adult actually witnessed her doing it. This was not reported to Q.C.'s Parents or documented as such in the IEP minutes. Tr. vol. 6, pp. 1324:17-24; 1325:5-7 (Testimony of Creasy).

315. Normally when there is a behavior incident, Principal Creasy contacts the student's parents privately about the behavior "so they can all get on the same page." Tr. vol. 6, p. 1284:1-11 (Testimony of Creasy). Such communications are not officially part of an IEP meeting. *Id.* Even though this was not "officially part of the IEP meeting," Principal Creasy, as the LEA Representative, started Q.C.'s IEP meeting by saying "[Q.C.] pulled the fire alarm today and endangered and put at risk the safety of all of my students." Stip. Ex. 26, p. 121; Tr. vol. 2, p. 345:8-15 (Testimony of M.C.). The first line in the September 2018 IEP Minutes corroborated that "[m]eeting started with Mrs. Creasy giving an update regarding concerns w[ith] Q[.C.] in this setting. Q[.C.] pulled a fire alarm today and affected safety at school." Stip. Ex. 26, p. 121.

316. According to M.C., there was no uncertainty about the way this information was presented to them. Q.C.'s Parents were told by Principal Creasy that: "[y]our daughter pulled the fire alarm, and she endangered my students in the school, and she is no longer disrupting only her classmates, but she is disrupting my entire school." Tr. vol. 2, pp. 350:17-350:21 (Testimony of M.C.).

317. Principal Creasy neglected to tell Q.C.'s Parents that no one other than two kindergarten students accused Q.C. of pulling the fire alarm and that it was not witnessed by any adult. During the course of the hearing, Respondent's witnesses admitted no one from the Whitaker staff or any other adult saw who actually pulled the fire alarm. Tr. vol. 6, p. 1173:2-8 (Testimony of Ms. Kibler that students reported seeing Q.C. pull the fire alarm); Tr. vol. 6, pp. 1324:17-1325:21 (Testimony of Ms. Creasy that she concluded it was Q.C. because she saw fingerprints in the dust on the fire alarm and other unspecified students had reported it was Q.C.). Principal Creasy admitted that she did not even know if Q.C. could reach the fire alarm. Tr. vol. 6, p. 1325:5-7.

318. Despite the absence of reliable evidence, the Respondent documented that Q.C. had pulled the fire alarm without ever mentioning there was uncertainty. *See* Stip. Ex. 54 (discipline referral reporting Q.C. pulled alarm); *see also,* Stip. Ex. 38, p. 208 (behavior data collected by Ms. Uldrick reporting Q.C. pulled fire alarm).

319. Principal Creasy believed that the witnesses (2 kindergarten students) were credible. Tr. vol. 6, pp. 1324 – 1325:4. A Discipline Referral Record for a Level III offense was created based on this incident. Stip. Ex. 54, p. 359. The Undersigned questioned Principal Creasy's failure to even question the creditability of two kindergarten students since Q.C. was an easy

scapegoat and why she did not disclose this to the Parents. Principal Creasy's excuse for not telling the Parents that an adult did not witness the act and accusation was based solely on the statement of two kindergarten students, was that "[i]t was not asked of me." Tr. vol. 6, p. 1325:5-13.

320. Although Principal Creasy could have met privately with the Petitioners to discuss the "fire alarm incident" instead of embarrassing them in the presence of the entire IEP Team, she chose to disclose this incident to them at the very beginning of the September 2018 IEP Meeting setting the tone of the meeting. Principal Creasy, who had authorized the behavior data collection, however, on that same day, failed to disclose to the Parents that Whitaker's staff (adults) had collected Behavior Data Sheets documenting over 900 behavior incidents.

2. Parent's Request for a One-on-One Aide at the Beginning of the IEP Meeting

321. After disclosure of the "fire alarm incident," M.C. asked for more supports in the regular education classroom and during transitions, specifically a one-on-one aide. Stip. Ex. 26, p. 121 (IEP Minutes). The Parents expressed their goal of Q.C. being mainstreamed with more assistance in the regular education setting with her typically developing peers. Stip. Ex. 26, p. 121.

322. During their conversations about a one-on-one assistant for Q.C., K.C. passed a Handout that she created which identified Q.C.'s strengths and weaknesses and "what does and doesn't work for Q.C." Tr. vol. 2, p. 346:12-24; *see* Stip. Ex. 58. The school-based members of the IEP Team received the Handout but did not review it or discuss it at the IEP Meeting.

323. Petitioners also explained why the separate setting had not worked for Q.C. in the past. The IEP minutes (Stip. Ex. 26) documented M.C.'s discussions about the difficulties Q.C. had at the Special Children's School and her regression while at that program. Tr. vol. 2, pp. 359:18-360:5.

324. The IEP minutes captured the Parents' Petitioners' vision for Q.C.'s education as:

> -- that Q.[C.] would be educated alongside her nondisabled peers at Whitaker, alongside her neighbors, her friends, and her siblings. And a part of that vision was with the appropriate supports and services that she needed to access the general education curriculum.
>
> Tr. vol 2, p. 365:10-16; *see also,* Pet. Ex. 13; *compared to,* Stip. Ex. 24, p. 99 (IEP documented Parent's vision statement only as: "[c]ontinue to be integrated in a typical classroom and be independent.")

325. The only discussion in response to the Parents' request for a one-on-one aide at the September 2018 IEP Meeting was Principal Creasy's refusal. Principal Creasy told the Parents that she refused their request because one-on-one aides are even difficult for people with significant physical disabilities to get. Tr. vol. 2, p. 368:14-16. As an example, Principal Creasy spoke about a child who needed "in-and-out catherization" who could not get a one-on-one aide. She unilaterally concluded that there were not enough "resources" to provide a one-on-one aide and Q.C. was not going to get one. Tr. vol. 2, p. 368:17-21 (Testimony of M.C.).

326. Resources and staffing appeared to be Principal Creasy's primary concerns, not whether Q.C. could be educated in the least restrictive environment. None of the school-based members of the September 2018 IEP Team contradicted Principal Creasy's statement about the requirements for a one-on-one aide.

327. Because it is incredulous that, as the LEA Representative, Principal Creasy did not know the actual requirements for the provision of a one-on-one aide to a disabled student, the Undersigned finds that Principal Creasy, as an agent of WS/FCS, for the second time misled Q.C.'s Parents.

328. Respondent failed to document the Parent's request for a one-on-one aide and its refusal of their request in the Prior Written Notice, Stip. Ex. 25; but Ms. Brooker documented the request in the meeting minutes. Stip. Ex. 26, p. 121 ("Parent are [sic] hoping to have a one on one assistant as she needs more assistance.") Moreover, the notes taken by Exceptional Children Program Director, Traci Royal, confirmed the Parents requested the one-on-one aide at the September 2018 IEP Meeting and were provided with false information during the meeting about the criteria that must be met for an IEP Team to assign an aide. Pet. Ex. 64, p. 575.

329. Dr. Fisk-Moody did not dispute the accuracy of Ms. Royal's notes or challenge the information contained therein. These notes were also purportedly reviewed by EC Director Sam Dempsey on September 18, 2018, and central staff did not correct this misinformation given to the Parents. Pet. Ex. 64. P. 574. Therefore, the Undersigned accepts that these notes document what can only be construed as the deliberate misrepresentation by Respondent's agents regarding the required criteria for a one-on-one assistant. Parents cannot meaningfully participate in an IEP meeting when they are misled by the school-based IEP Team members.

3. Testimony About the Effectiveness of a One-on-One Assistant

330. Both Q.C.'s teachers and even Principal Creasy admitted that Q.C. benefited from one-on-one assistance.

a. *Regular Education Teacher - Kibler*

331. Ms. Kibler admitted that one-on-one support was effective in the regular classroom. Tr. vol. 6, pp. 1261:18-1262:25. But, Ms. Kibler did not share with the IEP Teams the success that Q.C. had with a one-on-one, Tr. vol. 6, p. 1266:16-20. Ms. Kibler clarified that she didn't share with the IEP team "[b]ecause I think we all were aware, we all knew, you know, who – like Lindsay would come and get her from lunch so she could – you know what I'm saying? It was all observed by all of us in the meeting, so I didn't feel like I needed to bring it up because we'd all seen it and observed it, I guess." Tr. vol. 6, pp. 1266:16-1267:2.

b. *Special Education Teacher - Uldrick*

332. Ms. Uldrick admitted on cross-examination that Q.C. worked well one-on-one but she could not remember if she shared with the September or October IEP Teams that Q.C. was successful with this level of support. Tr. vol. 5, p. 1046:3-9. On redirect, Ms. Uldrick testified that she did not share that with the September IEP Team but did so with the October IEP Team. Tr. vol. 5, p. 1059:9-17. Neither of the IEP Meetings minutes recorded her disclosure of this

information to either of the IEP Teams. *See* Stip. Exs. 26 & 31. Moreover, Q.C.'s Parents left the October 2018 IEP Meeting before the discussion of supplemental aids and services, so even if it was subsequently discussed, they would have been absent during that discussion and it was not documented in the minutes. *See* Stip. Ex. 31.

c. *Principal and LEA Representative - Creasy*

333. Principal Creasy admitted that Q.C. "needed close adult supervision 100 percent of the time, for her safety, for her accessing curriculum or her being on task, all those things." Tr. vol. 6, p. 1299:11-21. With one-on-one guidance and support, Q.C. was able to complete academic activities. Tr. vol. 6, pp. 1300:13 -1301:6 (Testimony of Creasy).

334. Although Principal Creasy acknowledged that Q.C. could function academically and behaviorally with this level of one-on-one support and that Q.C. was able to access the regular education curriculum, at the September 11 IEP Meeting Principal Creasy agreed that the only supplemental aids and services that Q.C. needed were preferential seating and modified assignments. Tr. vol. 6, pp. 1321:10-1322:4, 6-10. According to Principal Creasy even though she was able to make the final decision to increase Q.C.'s service delivery to 300 minutes a day, it was the IEP Team's decision, not hers as the LEA Representative, to give Q.C. a one-on-one aide. Tr. vol. 6, pp. 1322:19-1323:10.

335. As LEA Representative, Principal Creasy is empowered with the provision and supervision the provision of specially designed instruction and necessary resources to Q.C. NC Policy 1503-4.2(a)(4). As with her service delivery decision, Principal Creasy could have overridden the IEP Team's decision and given Q.C. a one-on-one aide.

336. Later, at a meeting with EC Senior Administrator Traci Royal,[16] the Whitaker IEP Team members including Principal Creasy refused to concede putting Q.C. in a lesser restrictive placement with one-on-one support. Pet. Ex. 64, p. 576. If the Whitaker IEP Team conceded to the Parents' placement request, Principal Creasy would have to hire more EC staff to support Q.C. in the general education environment. Pet. Ex. 64, p. 577.

337. Although the IEP Team had evidence Q.C. could learn effectively in her regular education classroom with a one-on-one aide, not a single school-based member of the IEP Teams shared this information at the IEP Meetings. *See, e.g.,* Stip. Ex. 38, p. 207 (behavior data collected by Ms. Uldrick noting Q.C. "will work in 1:1 situation"); Tr. vol. 6, pp. 1300:19-1301:6 (Testimony of Ms. Creasy that Q.C. was able to complete classroom activities when she received "one-on-one guidance"); *id*. at 1262:12-25 (Testimony of Ms. Kibler that Q.C. was able to transition from recess back to class with one-on-one support).

338. The Undersigned finds that Respondent's own witnesses knew that Q.C. could be successful when provided one-on-one support; yet, not a single member of the IEP Teams—other that Q.C.'s Parents—discussed including this support in Q.C.'s IEP. Tr. vol. 6, pp. 1266:16-1267:2

[16] Ms. Royal, although on Respondent's witness list, did not testify at the hearing, however, Principal Creasy did not deny the statements in Ms. Royal's notes of the meeting. Moreover, the information in this document is not being used to establish the truth of the matter asserted, but instead the intentions and motivation of the school staff during the IEP meetings.

(Testimony of Ms. Kibler that she did not share that Q.C. had shown success with transitions with a one-on-one aide because she thought everyone was already aware). This is additional evidence of the IEP Teams' predeterminations that Q.C. could not be successful in a regular education classroom regardless of the supplemental aids and services she was provided.

339. Q.C.'s placement in the regular education classroom with a one-on-one aide continued to be "off the table" at the Resolution Session[17] with EC Director Sam Dempsey after due process was filed. Tr. vol. 2, p. 404:24-405:3 (Testimony of M.C. that their request for one-on-one aide was "off the table" according to Sam Dempsey).

4. Eligibility Determination for Intellectual Disabled-Mild ("ID')

340. After approximately fifty-one minutes of discussing Q.C.'s placement and the rationale for Q.C.'s reassignment to the Readiness classroom at either South Fork or Sherwood Elementary School, the IEP Team finally discussed Q.C.'s eligibility. *See* Stip. Ex. 26, p. 122 (minutes noting the discussion of Q.C.'s eligibility began at 3:36 p.m.); *see also* Tr. vol. 2, pp. 367:23-368:5 (Testimony of M.C.). The Undersigned finds the discussion of Q.C.'s placement prior to even discussing her eligibility—much less developing goals and determining the appropriate amount of service delivery necessary to master those goals—to be compelling evidence of Respondent's predetermination of Q.C.'s placement in the segregated setting.

341. Though the purpose of the meeting was to review the evaluations and the Invitation to Conference indicated an individual who could interpret evaluation results would be in attendance, a school psychologist did not attend the meeting. Stip. Ex. 22; Stip. Ex. 23, p. 97. Instead, EC Teacher Uldrick shared the results of the Psychological Evaluation, even though she was not qualified to interpret the results at the meeting. Ms. Uldrick admitted that her only formal training on "evaluating test results" was from an undergraduate course and she had no training on administering psychological evaluations. *See, e.g.*, Tr. vol. 5, pp. 1007:14-1008:2.

342. After the September 2018 IEP meeting on September 25, 2018, Ms. Uldrick had to email School Psychologist Barrett because she could not answer the school-based IEP Team members' questions "as to the scores and what was required of them from her psychological evaluation…[looking at her nonverbal score as to why it was higher than the others in relation to the spatial." Tr. vol. 5, p. 994:4-15.

343. After the September 2018 IEP Meeting and without the Parents' participation, the school-based IEP Team members got "clarification on the psychological scores" from the EC Central Office on September 27, 2018. Tr. vol. 5, p. 995:5-13 (Testimony of Uldrick).

344. Ms. Kibler, Ms. Uldrick, and Principal Creasy acknowledged that they knew that Q.C. had strong nonverbal skills. Tr. vol. 5, pp. 959:16-960:13 (Testimony of Uldrick); Tr. vol. 6, p. 1263:2-25 (Testimony of Kibler); Tr. vol. 6, p. 1320:9-22 (Testimony of Creasy). The IEP documentation did not indicate if any of them understood the significance of this score on Q.C.'s educational program and potential academic progress. Moreover, Respondent's staff did not explain to Q.C.'s Parents the significance of Q.C.'s evaluation results when making decisions at

[17] Unlike mediation, the conversations at Resolution Meetings are not confidential.

the IEP Meetings. *See, e.g.*, Tr. vol. 2, pp. 343:24-3345:1 (Testimony of M.C.). Most troubling is that EC Teacher Uldrick drafted the IEP goals before the September IEP Meeting without understanding the evaluation results. Tr. vol. 5, p. 1106:19-22.

345. The Undersigned finds that Respondent's failure to include a qualified person to interpret the evaluation results significantly impeded the Parents' (and the IEP Team's) participation in the decisionmaking process of developing the September 2018 IEP.

a. *Continuation of Developmentally Delayed Category Not Considered by IEP Team*

346. The IEP Team found Q.C. eligible for services in the category of Intellectual Disabilities – Mild ("ID-Mild"). Stip. 53. Because Q.C. was less than 8 years old, she was still eligible under the Developmentally Delayed ("DD") category and could have remained in that category until April 24, 2019. *See* Tr. vol. 1, p. 106:1-7 (Testimony of Turnbull); NC Policy 1503-2.5(d)(4)(ii)(B) (eligibility students between the ages of 3 through 7 years). Despite Q.C.'s varied scores on the evaluations, including her average non-verbal abilities, the IEP Team only considered Q.C.'s eligibility in one area - Intellectual Disability ("ID"). Stip. Exs. 23, 25.

347. When the school-based members of the IEP Team decided to change Q.C.'s disability category to Intellectual Disability, they did not explain the significance of this change. Tr. vol. 2, p. 346:4-12 (Testimony of M.C.). According to the Prior Written Notice (Stip. Ex, 25) continuation of DD was refused, but there was no other evidence in the record that DD was even discussed. An Eligibility Determination Worksheet was completed for the ID category but not for the DD category. Stip. Ex. 23 (ID Worksheet).

348. In the Prior Written Notice, the IEP minutes, and through the testimony of Respondent's witnesses, the Undersigned finds that Respondent failed to provide a cogent and reasonable explanation of why the IEP Team did not consider a continuation of the DD category.

b. *Eligibility Process Did Not Comply with NC Policies*

349. The process used by the IEP Team to determine Q.C.'s eligibility did not comply with federal law or the North Carolina Policies.

350. Respondent failed to conduct or report two scientific research-based interventions to address Q.C.'s academic and/or functional skill deficiencies as required by NC Policy 1503-2.5(d)(7)(i)(F). Instead, Respondent perfunctorily noted Q.C. was receiving small group instruction in academic areas and was directly supervised "for activities." Stip. Ex. 23, p. 90. The items listed on the DEC 3 as research-based interventions—small group direction instruction in the small group setting and direct supervision and instruction in the general education setting—are not research-based interventions. Tr. vol. 2, pp. 311:17-312:12 (Testimony of Dr. Turnbull).

351. Although Ms. Uldrick testified that she provided research-based interventions while Q.C. was in her resource room, Tr. vol. 5, p. 972:13-24, the DEC 3 documented that the research-based interventions used to address Q.C.'s academic and functional skill deficiencies were conducted on August 27, 2018, before Ms. Uldrick began pulling Q.C. into her resource room. Stip. Ex. 23, p. 90.

352. As Respondent failed to comply with the procedural requirements to determine eligibility in the category of ID-Mild, and failed to provide any explanation for its decision, the Undersigned finds that the eligibility determination was flawed since it was made without a required IEP Team member who could appropriately interpret the evaluation results and without conducting two research-based interventions.

353. Respondent did not provide a cogent and responsive explanation for failing to comply with eligibility procedures for the category of ID-Mild or for not even considering the continuation of Developmental Delay as Q.C.'s eligibility category. As Q.C. has already turned seven and upon turning 8 years old on April 24, 2020, she will no longer be eligible under the category of Developmental Delay, when the IEP Team reconvenes to determine her eligibility, they will need to consider all the appropriate categories, not just DD or ID.

5. IEP Goals in the September 2018 IEP

354. Without understanding the ramifications of Q.C.'s nonverbal IQ score on her educational programming and academic progress, the September 2018 IEP Team developed the following ten (10) IEP goals:

> When presented numbers to 10, Q.C. will identify in random order 4 out of 5 opportunities.
> When provided numbers 1-10 orally, Q.C. will write numbers 4 out of 5 opportunities.
> When presented with letters orally or in writing, Q.C. will produce the sounds with 80% accuracy.
> Q.C. will use 2 words or longer utterances to answer questions about stories or events (i.e., 'what happened' and 'where is ____') with 80% accuracy, on three consecutive data dates.
> Q.C. will identify pictures or objects by their category (i.e., animal) or function (what do you ride on) with 80% accuracy on three consecutive data dates.
> Q.C. will engage in a 2 exchange conversation, including answering yes/no questions for 3 consecutive data dates.
> Given minimal cues, Q.C. will follow 1-step directions with concepts (i.e., big/little, one/all), with 80% accuracy, on three consecutive data dates.
> Q.C. will produce the phonemes: final p, l, "j", "ng", "sh", "ch", v, initial f, s, s blends, z, r, r blends, vocalic r, voiceless th and voiced th with at least 90% accuracy in conversational speech.
> When requested, Q.C. will write her first name without a guide 4 out of 5 opportunities.
> Without assistance, Q.C. will trace letters 4 out of 5 opportunities.

Stip. 55

355. The specially designed instruction on all ten (10) goals could be provided in the regular education classroom, as Q.C.'s goals were aligned with the standard curriculum for kindergarten in North Carolina. Tr. vol. 1, pp. 121:24-128:7 (Testimony of Dr. Turnbull); Tr. vol. 6, p. 1311:22-15 (Testimony of Creasy that Q.C.'s nondisabled peers were learning the same skills.).

356. Other than the achievement testing, prior to the September 2018 IEP Meeting, Respondent collected no data on Q.C.'s ability to perform the skills identified in the present levels of academic performance for Q.C.'s IEP goals. *See* Tr. vol. 1, p. 121:1-5 (Testimony of Dr. Turnbull). Later at the October 2018 IEP meeting, even though the September 2018 IEP was appropriate according to Respondent, the October IEP Team did collect new academic data for amending Q.C.'s goals. *Compare* Stip. Ex. 24 *to* Stip. Ex. 32.

357. The September 2018 IEP was not appropriately ambitious or sufficiently rigorous for Q.C. in light of her relatively high nonverbal IQ. *See* Tr. vol. 1, pp. 134:4-17; 213:12-21(Testimony of Dr. Turnbull).

358. Based on the evidence and the absence of a qualified person to interpret the psychological evaluation, the Undersigned finds that the academic IEP goals will need to be reviewed and revised with the Parents in attendance so that they can meaningfully participate. Respondent's revisions of the goals at the October 2018 IEP Meeting are invalid as discussed *infra* because Respondent failed to even attempt to convince the Parents to attend the remainder of the meeting after the LEA Representative later decided that the meeting would proceed after the Parents left. NC Policy 1503-4.3(d) (LEA must keep a record of their attempts to convince the parent that parent should attend the meeting).

6. No Behavior Goals Were Developed at the September 2018 IEP Meeting

359. Although Principal Creasy had stated at the September 2018 IEP Meeting that Q.C. was "disruptive" to her class and "disruptive" to the whole school and Respondent had collected significant behavior data including what the EC Teacher labeled "Functional Behavior Assessment," no behavior goals were developed at the September 2018 IEP Meeting.

360. The September 2018 IEP Team had sufficient information about Q.C.'s behaviors such that these behaviors could have been addressed through functional goals or by a Behavior Intervention Plan ("BIP").

361. According to the teachers, the purpose this behavior data collection was to identify "trends where we needed some more support in the classroom for her" and see if this was simply "transition" behavior related to her transition to kindergarten. Tr. vol. 6, p. 1141:14-23; Tr. vol. 5, pp. 1023:21-1024:1. The EC Teacher admitted that Q.C.'s typical behaviors, "withdrawn, often go under table, shoes off, compliance," had been identified prior to the September 2018 IEP Meeting, Q.C.'s Tr. vol. 5, p. 947:20-25, and that Q.C.'s "behavior indicated that communication and overstimulation were needs." Tr. vol. 5, pp. 947:20-948:4. According to Ms. Kibler, "transitions were very difficult" for Q.C. Tr. vol. 6, p. 1166:18-19. Q.C.'s teachers did not explain why behavior goals were not developed at the September 2018 IEP Meeting based on their existing knowledge about Q.C.'s behaviors.

362. Respondent's failure to disclose the extraordinary number of behavior incidents (over 900 incidents) to the Parents at the September 2018 IEP Meeting significantly impaired the Parent's meaningful participation at the meeting. All of the other school-based IEP team members, except perhaps for Jeanne Brooker (speech pathologist), were aware or had participated in some degree in the collection of the behavior data. Why the Parents were denied access to the Behavior

Data Sheets is unknown. Nevertheless, the Parents were denied access to this significant information and because of this, they could not meaningfully participate in the decisionmaking process at the September 2018 IEP Meeting.

363. Respondent failed to give a cogent and reasonable explanation as to why the behavior data was not disclosed to Petitioners especially after they asked for a FBA. Since the behavior data was not disclosed at the September 2018 IEP Meeting, used to develop functional IEP goals, or used by the IEP Team to determine if Q.C.'s maladaptive behaviors were "transitional" behaviors or to "discover trends" in Q.C.'s behavior, the only explanation that can be surmised from Respondent's behavior data was that it was improperly used solely to justify Q.C.'s exclusion from the regular education setting.

7. Speech/Language Related Services

364. Petitioners sought reimbursement of their private speech/language therapy but otherwise did not challenge the appropriateness of the speech/language goals or service delivery. Although Petitioners' private speech therapist testified in their case in chief, she was not qualified as an expert witness and did not opine about the appropriateness of the speech/language goals or service delivery of that related service. In fact, Petitioner relied on the speech/language service delivery to justify a PSP and compensatory speech services. Therefore, the Undersigned finds that the speech/language goals and service delivery were appropriate.

8. Private Services Plan ("PSP") for Speech/Language Related Services

365. Petitioners asserted that they are entitled to reimbursement of private speech language services pursuant to a Private Services Plan ("PSP") because Q.C. was entitled to speech/language related services under her 2015, 2016, and September 2018 IEPs. During that entitlement, Q.C. was enrolled in private schools. Stip. 24. Upon and during her enrollment in private preschool, Respondent failed to find her eligible for a PSP even though Q.C.'s 2015, 2016, 2018 IEPs included speech/language related services for twelve, 30-minute sessions per reporting period as a related service. Stip. Ex. 16. No one from WS/FCS contacted Petitioners about Q.C.'s eligibility for a PSP after she left WS/FCS. Tr. vol. 2, p. 32:11-22 (Testimony of M.C.).

366. First, Respondent objected to in Petitioners' claim that Q.C. was entitled to a PSP because it was not specifically included in the Contested Case Petition. Respondent did not dispute the accuracy of these Petitioners' invoices for speech therapy or the appropriateness of the speech/language services during the hearing. After the supplemental documentation was filed, Respondent did contest the transportation costs because it was not proffered in Petitioners' case in chief.

367. In paragraphs 29 and 39 of the Petition, Petitioners stated that they enrolled Q.C. in a private school during the period she was eligible for special education and related services. Pet. ¶¶ 29, 39; pp. 5 & 6.

368. The Petition also stated that "Q.C.'s parents continued to provide for her to receive private speech therapy services to address her documented communication needs." Pet. ¶ 40, p. 6. Q.C. continued to be enrolled in WS/FCS even though her IEP expired in March 2017. Pet. ¶ 46. In Petitioners' Summary of Allegations, Petitioner did not specifically mention the denial of a

Private Services Plan, however, they do assert that "WS/FCS failed to consider or provide Q.C. with adequate related services…including speech/language therapy." Pet. ¶ 9, p. 16. The Petition stated that "WS/FCS failed to consider or provide Q.C. with adequate related services including, but not limited to, speech/language therapy." Pet. ¶ 9, p. 16. Transportation is a related service. 34 C.F.R. §300.34(c)(16).

369. Even though a Private Services Plan was not specifically mentioned in the Petition, the Undersigned finds that the Petition properly pled the denial of speech/language services and transportation while Q.C. was enrolled private preschool and her right to those related service.

370. Q.C.'s Parents provided for Q.C. to receive private speech therapy services while she attended the private preschools. *See, e.g.,* Tr. vol. 2, pp. 320:9; 322:18 (Testimony of M.C.); Pet. Ex. 77 (showing payments made by K.C. for Q.C.'s speech therapy services from November 2017 through January 2019).

371. Respondent found Q.C. eligible for special education services in April 2015 and developed an IEP that included speech therapy as a related service. Stips. 10, 13. The IEP Team again determined she required speech therapy at her March 2016 Annual Review IEP meeting and developed a new IEP that included speech therapy as a related service. Stip. 20. Q.C.'s March 2016 IEP expired on March 13, 2017. Stip. 23. Although Q.C.'s Parents placed her in private schools from September 2016 through June 2018, Respondent never developed a private services plan for Q.C., Stips. 24, 25, 26. Therefore, Q.C.'s Parents provided for Q.C. to receive private speech therapy while she attended private schools. Tr. vol. 2, pp. 320:9, 322:18 (testimony of M.C.); Pet. Ex. 77.

372. Jessica Sizemore, a private speech therapist with Speechcenter, Inc. evaluated Q.C. in October 2017 and recommended Q.C. receive ongoing speech therapy for her severe receptive and expressive language delays. Pet. Ex. 3 (speech language evaluation recommending Q.C. receive speech therapy for thirty (30) minutes twice per week for twelve (12) months).

373. The September 2018 IEP Team, again, determined that Q.C. required speech therapy as a related service. Stip. 57. Petitioners contend that since Respondent has consistently determined Q.C. required speech therapy, and Petitioners have provided speech therapy due to Respondent's failure to develop a PSP, Petitioners are entitled to reimbursement for the cost of private speech therapy and transportation during the private school's academic year as well as the time period covered by Extended School Year when the private school was not in session.

374. According to Petitioners' Exhibit 77, Petitioners paid a total of $3,303.42 for private speech language services from October 4, 2017 to January 1, 2019. Pet. Ex. 77. From June 13, 2018 to August 15, 2018, the Extended School Year period, Petitioners paid eight sessions of speech/language therapy for a total of $560. *See* Pet. Ex. 77 ($800.00 at $100.00 a session minus $240.00 ($30.00 Medcost Discount) = $560.00) *and* Stip. Ex. 59 (school calendar).

375. Petitioners reside at 1836 Buena Vista Road, Winston-Salem, North Carolina. Stip. 6. Although the amount of transportation reimbursement would have been readily determinable based on the number of therapy sessions, the location of Speechcenter, Inc. was not on any of the

admitted exhibits. Speechcenter's address is on Petitioners supplemented exhibits which were not admitted.

376. Respondent objected to the inclusion of transportation costs because although Petitioners requested reimbursement of transportation costs in their Petition, they did not proffer evidence on the transportation costs during their case in chief nor was it included in their Proposed Decision. Respondent contends allowing Petitioners to supplement the record is prejudicial to Respondent. Resp. Response p. 6. The Parents' address was a stipulated fact and the number of speech therapy sessions was in the record. If Petitioners had proffered the Speechcenter's address during their case in chief, the transportation expense could have been easily calculated without supplemental documentation but Petitioners did not. Transportation expenses for the private speech therapy sessions will not be awarded, but Respondent will be responsible for Petitioners' transportation expenses for future compensatory speech therapy.

377. Respondent also argued that, except for child find, the Undersigned lacked jurisdiction to consider the appropriateness of the services provided under a PSP. Due process procedures do not apply any potential dispute regarding the provision of services pursuant to a Private Services Plan. N.C. Policies 1501-6.11(a) states that except for child find, "due process procedures do not apply to disputes than an LEA has failed to meet the requirements for parentally-placed private school children with disabilities, including the provision of services indicated on the child's services plan." *See also* 34 CFR § 300.140(a). Instead, "[c]omplaints that an LEA has failed to meet the requirements of the parentally-placed private school children with disabilities provisions above must be filed under the procedures of the state complaint process." NC Policies 1501-6.11(b).

378. The Undersigned agrees that administrative law judges lack jurisdiction over the services provided pursuant to a PSP. So, while Q.C. may have been eligible for a PSP, the Undersigned could not adjudicate the appropriateness of the speech/language services in the PSP. Moreover, just because Q.C.'s IEPs included the same amount of speech/language services, that does not mean that the PSP would provide the same amount.

379. Respondent admitted that currently during the 2018-2019 school year WS/FCS does provide PSPs for speech/language services for students parentally placed in private schools. Tr. vol. 7, p. 1434:13-22 (Testimony of Fisk-Moody). However, Dr. Fisk-Moody did not know about the prior school years. Tr. vol. 7, pp. 1434:13-1435:3. Petitioners offered no evidence proving that Respondent allocated its PSP resources to speech language therapy during the time they paid for private services.

380. The Undersigned finds that Petitioners failed to prove by a preponderance of the evidence that WS/FCS provided speech/language services in Personal Service Plans during the period time for which they seek reimbursement. Moreover, the Undersigned lacks jurisdiction as to the appropriate amount of speech/language services in Q.C.'s PSP. Therefore, Petitioners are not entitled to reimbursement of the speech/language services or transportation for those services during the school year or ESY because they did not meet their burden of proof on the PSP entitlement issue.

9. Entitlement to Private Speech/Language Services as Compensatory Education

381. In the alternative, Petitioners ask for compensatory speech/language services because WS/FCS failed to provide Q.C. any speech/language services when she reenrolled in WS/FCS. Respondent failed to develop an IEP at the May 2018 IEP Meeting. It is uncontested that the IEPs developed before and after the May 2018 IEP Meeting included the same amount of speech/language related services (12 sessions 30-minutes each reporting period). Excluding the eight sessions during the ESY period, Petitioners paid for fourteen sessions of speech language from May 22, 2018 to January 15, 2019, a total of $980.00 ($1400.00 minus Medcost Discount of $420.00). Pet. Ex. 77 and Stip. Ex. 59.

382. Even if the contested IEPs are found appropriate, WS/FCS' complete failure to deliver speech/language services denied Q.C. a FAPE during the relevant period. As Respondent claims prejudice by the inclusion of the transportation costs and Petitioners appeared to have abandoned this claim during the hearing, the Undersigned will not consider those costs in the reimbursement amount.

383. Because the level of speech/language services has been consistent through all Q.C.'s IEPs, Respondent did not develop the IEP at the May 2018 IEP Meeting, and Q.C. was entitled to speech/language services from May 22, 2018 through the 2018-2019 school year, excluding ESY. As of May 22, 2018, only 3 weeks remained of the fourth quarter. Speech/language services were to be delivered at 12 sessions a quarter and there are 9 weeks in a quarter, Petitioners would be entitled to 3 sessions of speech language for last quarter of the 2017-2018 school year and 48 sessions for the 2018-2019 school year for a total of 51 sessions.

384. The Undersigned finds that, as compensatory speech/language services, Respondent is responsible for reimbursing Petitioner the amount of $980.00 (14 sessions). Of the 51 sessions of speech/language compensatory services, Respondent is also responsible for the provision of 37 compensatory speech/language sessions. The Parties may mutually agree for Respondent to prospectively provide the 37 compensatory speech/language sessions or reimburse Petitioners for 37 sessions previously paid at the $70.00 rate ($100.00 – 30.00 Medcost Discount = $70.00) for a total of $2,590.00.[18]

10. Extended School Year ("ESY") Speech/Language Services

385. Even if Q.C. was entitled to compensatory related services for the school year that does not mean she is entitled to the same related services during the 2017-2018 extended school year. The May IEP Team did not develop an IEP and therefore did not determine Q.C.'s eligibility for Extended School Year ("ESY") services. The September 2018 IEP determined ESY was not needed. Stip. Ex. 24. The October 2018 IEP deferred the ESY determination until May 1, 2020. Stip. Ex. 32, p. 171. Petitioners paid $800.00 for speech/language services during the ESY period. Pet. Ex. 77.

386. Petitioners' private speech therapist Jessica Sizemore testified that Q.C. would regress if speech/language was not continued beyond December of 2018. Tr. vol. 2, p. 495:8-12.

[18] A sum total value amount of $3,570.00 ($980.00 + $2,590.00).

In her October 2017 evaluation, she recommended Q.C. receive ongoing speech therapy for her severe receptive and expressive language delays. Pet. Ex. 3 (speech language evaluation recommending Q.C. receive speech therapy for thirty (30) minutes twice per week for twelve (12) months). Speech Pathologist Sizemore, however, was not asked any questions about regression over the extended school year or what amount of speech/language therapy was necessary to avoid any regression.

387. While, because of her significant speech/language deficits, Q.C. may need speech/language services over the extended school year, Petitioners have not produced sufficient evidence that she actually did require ESY services. Therefore, the Undersigned finds that Petitioners have failed to meet their burden of proof that they are entitled to reimbursement for speech/language services during the summer of the 2017-2018 school year.

11. Other Supplemental Aids and Services

388. Despite all the challenges Respondent reported about Q.C.'s behavior and academics, at the September 2018 IEP Meeting Respondent determined Q.C. only required the following supplemental aids and supports to access the general education curriculum: preferential seating (close proximity to staff) and modified assignments (assignments broken up or chunked in half). Stip. 56.

389. Ms. Uldrick testified that she created: a visual schedule of Q.C.'s morning and afternoon routines, sets of picture cue cards for the teachers (used the first week), and a positive behavior plan. Tr. vol. 5, pp. 952:16, 20-23. Ms. Kibler testified that she used a visual schedule, laminated picture cards, and a behavior plan although her behavior plan was somewhat different than Ms. Kibler's.

390. Respondent did not consider or discuss providing Q.C. with any specially designed instruction in the regular education classroom with supplemental aids and services at Whitaker because all the resources were at South Fork. *See, e.g.*, Tr. vol. 2, pp. 367:23-368:5 (Testimony of M.C. that "there was no discussion about [Q.C.] remaining in the general education classroom. The way that this was presented to us is that if – if there was [sic] any resources to be had, that they were tied with South Fork, that there were no resources for [Q.C.] at Whitaker").

391. In addition to one-on-one support, Q.C.'s teachers used other supplemental aids and support which proved effective for Q.C. These supports were "positive reward methods, modified curriculum, direct instruction program, modeling, and praise…". Tr. vol. 5, p. 982:18-24. Ms. Uldrick could not remember if she told the September IEP Team that Q.C. needed "frequent breaks" along with other these supplemental aids and supports which had proven effective. Tr. vol. 5, p. 1045:9-16. Neither Teachers Uldrick or Kibler could remember if they told the September IEP Team that they were using these supports including visual schedules and picture cards. If this was disclosed to the IEP Team, the IEP Teams at both the September and October IEP Team Meetings did not deem these supports effective enough include in either the September or October IEP.

12. Refusal to Conduct FBA Before Placement Finalized

392. Before finalizing Q.C.'s placement, K.C. requested that Respondent conduct an FBA. *See* Tr. vol. 2, p. 372:2-8 (Testimony of M.C.). The IEP Team agreed that an FBA "needs to be done;" however, the school-based IEP Team members explained that they needed to "finalize placement" before conducting an FBA. *See* Stip. Ex. 26, p. 124; *see also,* Tr. vol. 2, p. 372:9-12 (Testimony of M.C.).

393. Despite refusing the Parents' request for a FBA before placement or developing a BIP, Respondent placed Q.C. in the separate setting primarily because of her behavior problems. *See* Tr. vol. 7, p. 1452:7-13 (Testimony of Dr. Fisk-Moody, speaking as the agent of the Board of Education, that if Q.C. had not exhibited the behavioral problems she had prior to September 11, Respondent could have educated her in the regular education classroom).

394. The Undersigned finds this decision not to conduct an FBA before finalizing placement as further evidence of Respondent's unwillingness to seek additional information to support Q.C. in the regular education setting due to Respondent's predetermination that Q.C. could not be educated in the regular education classroom regardless of the reasons for Q.C.'s maladaptive behaviors.

13. Service Delivery Determination at the September 2018 IEP Meeting

395. Ms. Holtzclaw initially suggested 240 minutes[19] of specially designed instruction, without explanation or even any reference to Q.C.'s goals. The school-based members of the IEP Team did not offer a justification for giving Q.C. 240 or 300 minutes of specially designed instruction. *See* Tr. vol. 2, p. 371:8-10 (Testimony of M.C.). Principal Creasy then unilaterally decided Q.C. needed 300 minutes of specially designed instruction against the expressed wishes of Petitioners for her to be educated alongside her nondisabled peers at Whitaker. *See* Stip. Ex. 26, p. 123 (IEP meeting minutes); *see also* Tr. vol. 2, pp. 370:23-371:2 (Testimony of M.C.).

396. Ultimately at the September 2018 IEP Meeting, the school-based IEP Team members determined Q.C. required the following specially designed instruction in a separate special education classroom for 300 minutes a session, 5 sessions per week. Stip. 57.

397. The school-based members of the IEP Team did not discuss the reasoning behind giving Q.C. 300 minutes of specially designed instruction every single day. Tr. vol. 2, p. 371:8-10. The only explanation given by Principal Creasy at the September 2018 IEP Meeting for increasing Q.C.'s placement to 300 minutes in the separate setting was that she "could not in good conscience as the LRE representative agree to less than 300 minutes…". Tr. vol. 2, p. 464:4-8.

398. Based on this placement decision, Q.C. could not remain at Whitaker Elementary School because Whitaker did not have a separate setting. The separate classroom at South Fork, where Q.C. was ultimately reassigned, was in a trailer behind the school and the students were

[19] For school aged students: separate placement is 39% or less of the day with nondisabled peers; resource placement is 40%-79% of the day with nondisabled peers; and regular placement is 80% or more of the day with nondisabled peers. *See* Stip. Ex. 24, p. 114.

100% segregated from nondisabled peers even for lunch and recess. Stip. Ex. 53, p. 354 description of the Readiness classrooms); Tr. vol. 2, p. 387:8017 (Testimony of M.C.).

399. The "good conscience" of the LEA Representative was not a cogent and responsive explanation for Respondent's placement decision. To the contrary, Respondent's explanation only provided further evidence that Respondent's decision to provide Q.C. with 300 minutes of specially designed instruction every day in the separate setting was not based on Q.C.'s unique needs or even her IEP goals. *See, e.g.,* Tr. vol. 6, p. 1315:4-11 (Testimony of Principal Creasy that Q.C.'s service delivery time was determined by "what the district requires for the core academic areas"); Tr. vol. 7, p. 1442:13-19 (Testimony of Dr. Fisk-Moody that "goals are not the only thing you work on in a separate setting."); Tr. vol. 1, p. 133:2-12 (Testimony of Dr. Turnbull she saw no rationale or justification provided for the service delivery time); *id*. at 194:1-3 (Testimony of Dr. Turnbull it was inappropriate to provide Q.C. with 300 minutes of specially designed instruction in the separate setting).

Period Between September 12, 2018 – October 1, 2018

1. September 13, 2018 - Parents' Letter Disagreeing with Placement Decision

400. The implementation date for the September 11, 2018 IEP was delayed until September 21, 2018, instead of the original start date of September 12, 2018, to allow the Parents to visit self-contained classrooms in other schools. Stip. 54; Stip. Ex. 21 (date 09/12/2018 crossed off on IEP and 09/21/2018 substituted).

401. On September 13, 2018, Q.C.'s Parents sent a letter to Ms. Kibler, Principal Creasy, Dr. Fisk-Moody, and EC Director Dempsey expressing their disagreement with the decision of the school-based members of the September 2018 IEP Team to place Q.C. in the separate setting, reiterating their request that Q.C. be educated with her nondisabled peers with supplemental aids and services, and requesting another IEP meeting. *See* Pet. Ex. 13; *see also,* Tr. vol. 3, p. 602:23-24.

402. There was a disconnect between Principal Creasy's recollection of what the Parents wanted at September 2018 IEP Meeting and what the Parents' actually wanted. Principal Creasy was "surprised" by this letter and thought the Parents agreed with her placement decision of 300 minutes in the separate setting. Tr. vol. 6, p. 1288:3-7. Ms. Kibler was not shocked or "surprised" because she knew that the Parents "didn't want her out of the classroom all day basically … [b]ecause they had said it at the IEP meeting." Tr. vol. 6, p. 1190:10-13. Ms. Uldrick also understood that "[The Parents] wanted a lot of peer modeling for [Q.C.'s] social skills, wanted her goals to be addressed within the classroom, in the regular educational classroom … I understood their concerns." Tr. vol. 5, pp. 976:13-977:11. It appears that only Principal Creasy did not understand the Parents' concerns.

403. The Undersigned finds that, as of the September 2018 IEP Meeting, Respondent knew, or were in denial, about the Parents' desire for Q.C. to be placed in the regular education classroom with her nondisabled peers, not in a segregated setting.

2. September 18, 2018 - Reassignment Requested by EC Case Manager

404. On September 18, 2018, EC Case Manager Melanie Holtzclaw requested that Q.C. be reassigned to South Fork. Stip. Ex. 50. The reassignment was authorized by Dr. Fisk-Moody on September 19, 2018, Stip. Ex. 50. By letter dated September 19, 2018 to Petitioners, Respondent's EC Director Sam Dempsey, notified the Parents that Respondent had reassigned Q.C. to the Readiness Program at South Fork Elementary School effective that same day. Stip. 58.

3. September 21, 2018 - Change in Placement Prior to Implementation of the IEP

405. Although the September 2018 IEP was not scheduled to go into effect until September 21, 2018, the day after the September 2018 IEP Meeting (September 12, 2018) Ms. Uldrick began removing Q.C. from her regular education class to the resource room every day for ninety (90) minutes. *See* Tr. vol. 5, pp. 1019:18-1020:1-2 (Testimony of Ms. Uldrick); *see also,* Tr. vol. 6, pp. 1233:24-1234:4 (Testimony of Ms. Kibler).

406. An IEP meeting was not reconvened before Ms, Uldrick unilaterally changed Q.C.'s placement. No one from Respondent's staff sought permission from Q.C.'s Parents prior to removing Q.C. from her regular education classroom for ninety minutes each day. *See* Tr. vol. 5, p. 1020:3-5 (Testimony of Ms. Uldrick); *see also,* Tr. vol. 6, p. 1234:5-7 (Testimony of Ms. Kibler).

4. September 24, 2018 – Parent Phone Call to Principal Creasy About Placement

407. On the morning of September 24, 2018, K.C. called Principal Creasy to ask if Q.C.'s placement in the separate setting would go into effect on September 25th. Tr. vol. 3, pp. 607:21-608:3 (Testimony of K.C.). Principal Creasy explained Q.C. would spend 300 minutes each day in Ms. Uldrick's resource room and only join Ms. Kibler's regular education class for lunch, specials, and recess. Tr. vol. 3, p. 608:19-24; Pet. Ex. 59, pp. 411-412. K.C. again expressed her disagreement with this placement and asked if Q.C.'s IEP meeting could be scheduled as soon as possible to address Q.C.'s placement. Tr. vol. 3, pp. 608:25-609:5.

5. September 25, 2018 – Implementation of Self-Contained Placement

408. Beginning on September 25, 2018, Q.C. spent 300 minutes per day in Ms. Uldrick's resource room and only had access to her nondisabled peers during lunch, recess, and specials. Tr. vol. 5, pp. 984:15-985:8 (Testimony of Ms. Uldrick).

6. The "Strangulation" Incident

409. The same day Q.C.'s placement was changed, Whitaker staff observed Q.C. in the cafeteria hugging a student around the neck from behind. *See* Tr. vol. 6, pp. 1188:24-1189:7 (Testimony of Ms. Kibler that Q.C. had "gone behind a child to kind of hug his neck"). As the student lost balance, Q.C. hugged him tighter around the neck because she could not support his weight. *id*. (Testimony of Ms. Kibler). Q.C.'s teachers came over and separated Q.C. from the student. *id*.

410. Ms. Mikesell, the Assistant Principal for Whitaker, wrote up the incident as a Level III offense and informed M.C. that "because of the uncertainty" she "going to err on the side of attempted strangulation" and was documenting Q.C.'s actions to be an attempted strangulation. Stip. Ex. 54, p. 357; s*ee* Tr. vol. 2, p. 382:8-11 (Testimony of M.C.) Additionally, Ms. Uldrick reported the incident in her log as Q.C. "strangled a child in lunch" on her Behavior Data Sheet though she herself did not witness the incident. Stip. Ex. 38, p. 202; Tr. vol. 5, p. 990:1-8 (Testimony of Ms. Uldrick).

7. September 28, 2018 - Parents' Visit to South Fork Readiness Classroom

411. On September 28, 2018, Petitioners took a tour of South Fork and visited the Readiness classroom. Stip. 60. The Readiness classroom at South Fork was a self-contained classroom for students with below average cognitive abilities located in a trailer separate from the main school building. *See* Stip. Ex. 53, p. 354 (description of the Readiness classrooms). In addition, the students in the Readiness classroom play on a separate playground from the one used by nondisabled students and eat at a separate lunch table from their nondisabled peers. Tr. vol. 2, p. 387:8-17 (Testimony of M.C.). All of the students in the self-contained Readiness program are disabled kindergarten or first grade students.

412. Dr. Turnbull also visited the South Fork Readiness classroom and her expert testimony corroborated the Parents' conclusions about the inappropriateness of the Readiness program. *See* Tr. vol. 1, pp. 130:6-167 (excluding unsolicited conversations from staff).

413. Q.C.'s Parents' visit to South Fork confirmed their preference that Q.C. attend Whitaker Elementary School and be educated alongside her nondisabled peers. *See* Stip. Ex. 31, p. 138; *see also,* Tr. vol. 2, p. 386:13-16 (Testimony of M.C.).

October 1, 2018 Addendum IEP Meeting

414. At the request of Q.C.'s Parents, the IEP Team convened an Addendum IEP meeting on October 1, 2018 ("October 2018 IEP Meeting"). Stip. 61.

415. In addition to the participants at the September 2018 IEP Meeting, except for Kimberly Spencer (TA), the following additional individuals participated in the October 2018 IEP Meeting: Dr. Trish Fisk-Moody, EC Program Director; Patsy Barrett, School Psychologist; and the Parents' advocates Shanée Howell and Paul Perrotta (by phone). Stip. 62.

416. As at the September 2018 IEP Meeting, Jeanne Brooker also took the minutes for the October 2018 IEP Meeting. Stip. Ex. 31; Tr. vol. 5, p. 1101:3-7 (Testimony of Brooker). Dr. Fisk-Moody also took notes at the October 1, 2018, IEP meeting. Stip. Ex. 51. She took these notes for her own purposes, and not as a formal summary of the meeting. Tr. vol. 7, p. 1407:18-25 (Testimony of Fisk-Moody). Ms. Howell's role at the October 1, 2018, IEP meeting was to serve as a note-taker for the Parents. Her goal was to "write down as much as I could as quickly as I could." Tr. vol. 4, pp. 670:5-9, 675:6-11, 676:8-12 (Testimony of Howell).

1. The Agenda for the IEP Meeting

417. Respondent had prepared an agenda for the order of discussion at the October 2018 IEP Meeting as follows:

1. Introduction of team members
2. Explanation of purpose of meeting
3. Parents' concerns
4. Q.C.'s Day
5. Completion of Re-Eval prep to request OT and FBA
6. Addendum of IEP
7. Adjournment

Stip. Ex. 27.

418. According to Principal Creasy, the agenda was "adjusted" to allow the Parents to discuss their concerns regarding Q.C.'s placement first before reviewing the entirety of the IEP. Stip. Ex. 31 at 140; Tr. vol. 6, p. 1298:3-11 (Testimony of Creasy). The agenda was not "adjusted." The IEP Minutes documented that the IEP Team first discussed items 1 and 2 on the agenda then proceeded to discuss the 3rd item "Parents' concerns" which as Respondent knew was about placement. Stip. Ex. 31, p. 138. Respondent created an agenda anticipating that placement would be discussed prior to the IEP Team's review of the goals.

419. The Parents' highest priority was for Q.C. "to learn alongside her nondisabled peers." Tr. vol. 2, pp. 459:24-460:2. M.C. stated at the meeting that the Parents' main concern was whether "full inclusion for Q.C. was impossible, a shadow was impossible, aids and services were impossible. If – if – a conversation about inclusion at Whitaker was impossible, I did want to know it. It was not – those comments were not acknowledged. There was no discussion that started." Tr. vol. 2, pp. 456:8-14, 391:21-392:2 (Testimony of M.C.).

420. According to the school-based IEP Team members, Petitioners were unreasonable because they only wanted 100% inclusion. *See* Stip. Ex. 52, p. 347 (Dr. Fisk-Moody's notes). Petitioners denied that they simply demanded full inclusion instead they wanted "to start the discussion. And it was a discussion that Ms. Creasy – Ms. Creasy and Dr. Fisk-Moody would not engage with [them] on." Tr. vol. 2, p. 455:5-10 (Testimony of M.C.).

421. M.C. asked Dr. Fisk-Moody, as the highest ranking person in this room, if Q.C. could be educated alongside her nondisabled peers with appropriate aids and services. Dr. Fisk-Moody acknowledged this question by answering with another question. "So what you're asking is can your daughter be educated alongside her nondisabled peers with appropriate supports and services?" Tr. vol. 2, p. 366:15-25. When M.C. responded affirmatively, Dr. Fisk-Moody didn't answer, and the conversation moved on. Tr. vol. 2, p. 367:1-3.

422. At the hearing, when the Undersigned asked Dr. Fisk-Moody the same question, Dr. Fisk-Moody did respond. Dr. Fisk-Moody admitted that, but for Q.C.'s behaviors, with appropriate supplemental aids and services she could be educated alongside her nondisabled peers. Tr. vol. 7, p. 1452:7-13.

423. Even though, Principal Creasy and Dr. Fisk-Moody already knew prior to the October 2018 IEP Meeting that on September 19, 2018 Q.C. had been reassigned to the Readiness Program at South Fork, the school-based members of the IEP Team testified that they entered the meeting without any "preconceived notions" of what the IEP would like and hoped the IEP Team would come to a consensus about the appropriate services for Q.C. Tr. vol. 6, p. 1192:17-21 (Testimony of Kibler) (she "was open to what the experts [the Parents] were bringing in would say and hopefully come to a good consensus together"); Tr. vol. 6, p. 1297:10-23 (Testimony of Creasy) ("I didn't really know what [the IEP] would look like at the end. I was hoping that we would find a balance that would make all parties, you know, more at ease with what was being provided and feel good about that. We felt good about what we were providing and were in hopes that, you know, we could see where we had come so far and what adjustments we might make…I didn't have any preconceived notion of what exactly we would come out of there with."); Tr. vol. 7, pp. 1406:19-1407:8 (Testimony of Fisk-Moody) ("[E]ven though the [Parents'] letter had said, to the best of my memory, that it said [the Parents] wanted only full inclusion[,] I believe in the process that you come back to the table and you have a conversation and come to a consensus. So, I was hoping that's what we could do.").

424. The behavior of the school-based members of the IEP Team at the October 2018 IEP Meeting was inconsistent with their testimonies. Instead of being "open minded" without any "preconceived notions" as they claimed, the school-based members of the IEP Team did not consider whether Q.C. could be successful in her regular education classroom with her nondisabled peers. *See, e.g.*, Pet. Ex. 62, p. 567 (notes of Ms. Howell). Instead, there were "visible eyerolls, disengagement, etc." in response to questions from M.C. *Id.* The attitude of the school staff was "unwelcoming and fairly hostile," and it was "very clear from the beginning that their minds had already been made up as to what was going to happen in the meeting." Tr. vol. 4, p. 674:18-23 (Testimony of Howell). The school-based members of the IEP team ignored M.C.'s comments at the start of the meeting and did not make eye contact with him. Tr. vol. 2, p. 393:6-16 (Testimony of M.C.).

425. The Parents' advocate Ms. Howell described the attitude of the district staff as "unwelcoming and fairly hostile in a defensive way, very clear from the beginning that their minds had already been made up as to what was going to happen in the meeting, and there was just not much flexibility given or very – there was not much openness to the possibility for Q.C." Tr. vol. 4, p. 674:16-23 (Testimony of Howell).

426. The Parents and their advocates attempted to engage the school-based members of the IEP Team in a discussion about how Q.C. could be supported in her regular education classroom. *See* Stip. Ex. 31, p. 139 (meeting minutes reporting Mr. Perrotta discussing the evidence that Q.C. did well in a regular education setting during preschool); *id.* at 142 (meeting minutes reporting M.C. asked for an explanation of why Q.C. was placed in the Separate setting for 300 minutes per day at the September 2018 IEP Meeting); Pet. Ex. 62, p. 567 (Ms. Howell's notes reporting Mr. Perrotta asked "What can we do to meet [Q.C.]'s needs in gen ed starting tomorrow?").

427. The IEP Minutes recorded that the school-based IEP Team members listened to Petitioners and their advocates but did not record the content of any discussions by the IEP Team about how a one-on-one aide could be used for Q.C. to access the regular education classroom.

See Stip. Ex. 31.

428. Before revising and amending the IEP goals, the school-based IEP Team members had already refused to change Q.C.'s placement to the regular education classroom at Whitaker and insisted she remain in the Readiness classroom at South Fork. Tr. vol. 2, p. 396:21-397:1 (Testimony of M.C.); Stip. Ex. 29, p. 129 (Prior Written Notice).

429. Respondent's decision to maintain Q.C.'s placement in the Readiness classroom was primarily due to Q.C.'s behavior. *See, e.g.*, Tr. vol. 7, p. 1452:7-13 (Testimony of Dr. Fisk-Moody that if Q.C. had not exhibited her behavioral problems, WS/FCS could have provided her core instruction in the regular education classroom); Stip. Ex. 31, p. 141 (meeting minutes reporting "Mrs. Mikesell said that: "[Q.C.] was *particularly wild* when she was let out into the classroom")(emphasis added); *id*. at 143 (minutes reporting Ms. Kibler's comment that: [Q.C.] can't do regular tasks independently. She can't do it leaves and goes where she wants, she wants [sic] to go."); *id.* at 145 (minutes reporting Principal Creasy's comment that: "[Q.C.] is by [her]self in free centers and she doesn't follow rules and goes from place to place.").

430. During cross-examination, Dr. Fisk-Moody admitted that Respondent could educate Q.C. in the general education classroom with the appropriate support and services but later seemed to push back from that statement when further questioned. Tr. vol. 7, pp. 1443:14-20 (testified yes); 1444:12-1445:14 (then could not understand the question).

431. When asked for clarification by the Undersigned, she responded as follows:

> Q. If Q.C. had not exhibited the behavioral problems that she had on September 11 and October 1st, could Winston-Salem/Forsyth County Schools provide her CORE instruction in the regular education classroom?
>
> A. With support?
>
> Q. With supplemental aids and support, sure.
>
> A. Yes, ma'am.

Tr. vol. 7, p. 1452:7-13.

432. Respondent's staff repeatedly stated during the IEP Meeting that Q.C. needed adult supervision but did not consider providing Q.C. with a one-on-one aide for any portion of the day. *See, e.g.*, Stip. Ex. 31, p. 143 (meeting minutes reporting "Mrs. Kibler said that [Q.C.] can't do regular tasks independently"); *id*. at 144 (meeting minutes reporting Ms. Kibler implied teacher assistants are busy working with Q.C.); *id.* at 145 (meeting minutes reporting Principal Creasy stated that Q.C. "needs close adult supervision" and Ms. Kibler stated "[Q.C.] needs constant supervision"); Tr. vol. 2, p. 368:6-21 (Testimony of M.C. that Principal Creasy and Ms. Holtzclaw denied his request for a one-on-one aide for Q.C.). Just like the September 2018 IEP Meeting, Respondent, again, failed to document this request for a one-on-one aide or its refusal in the Prior Written Notice. Stip. Ex. 29.

433. Principal Creasy, EC Teacher Uldrick, and Regular Education Teacher Kibler all admitted that Q.C. benefited from one-on-one instruction but that they did not disclose their personal observations of this to the Parents or the other IEP Team members. *See* Findings *supra* pp. 55-57.

434. Respondent placed Q.C. in the separate setting for administrative convenience and to avoid the expense of a one-on-one aide. *See, e.g.*, Stip. Ex. 31, p. 144 (minutes reporting Ms. Kibler's comment that Q.C.'s teacher assistant "has to work with other students too"); *id*. at 145 (minutes reporting Principal Creasy's comment that Q.C. needs "constant supervision" and that "teachers don't get lunch when having to help [Q.C.]"); Tr. vol. 6, pp. 1301:15-1302:1 (Testimony of Principal Creasy that "teachers weren't able to have lunch in the format that we're accustomed to because [Q.C.] needed more direct help" and having teachers provide support to Q.C. "wasn't the way we normally did things.").

2. Principal Creasy's Statement About Q.C. Having Down Syndrome

435. What happened next during the placement discussion at the October 2018 IEP Meeting was the subject of significant dispute between the Parties.

436. When Mr. Perrotta explained Q.C.'s Parents wanted Q.C. to attend Whitaker, Ms. Creasy responded: "[t]hat placement would have never been accepted had we known she had Down syndrome." Tr. vol. 2, p. 398:1-5 (Testimony of M.C.).

437. When both K.C. and M.C. reacted strongly, with K.C. asking "What? What did – what did you say?" Principal Creasy immediately said, "What I meant, I --- we would have never accepted that placement had we known she had a disability." Tr. vol. 2, p. 398:6-9; *see also,* Tr. vol. 4, p. 673:18-20 (Testimony of Ms. Howell that "Ms. Creasy said that they wouldn't have let [Q.C.] in without knowing…she had a disability").

438. K.C. told Principal Creasy that her statement was discrimination. Stip. Ex. 31, p. 146 (meeting minutes); Tr. vol. 2, p. 398:6-15 (Testimony of M.C.).

439. Then, Principal Creasy started backtracking after K.C. said "that's discrimination" and altered her statement to "You know what I mean, you – you – we wouldn't never accepted it had we known what her needs were. We – if we'd known what her needs were based on her IEP." Tr. vol. 2, p. 398:10-15 (Testimony of M.C.).

440. After this heated verbal exchange with Principal Creasy, Petitioners asked for a break. Tr. vol. 2, p. 398:25 (Testimony of M.C.).

441. M.C. asked that Principal Creasy's statement be included in the minutes and the first thing M.C. looked for when the minutes came back to them six days later was for Principal Creasy's statement, but her statement had been altered. Tr. vol. 2, p. 400:18-24. Instead, the meeting minutes indicated that Principal Creasy stated that Q.C.'s "assignment to Whitaker was made w/o [without] knowing Q.C.'s needs, without knowing that there was an IEP that said she needed a separate setting" and "that the school did not have knowledge of the IEP when the placement to Whitaker was made." Stip. Ex. 31, pp. 146-47.

442. At the hearing, Respondent's response to Petitioners' accusation was that Principal Creasy did not make this discriminatory statement because it was not documented in the IEP minutes, Dr. Fisk-Moody's personal notes, or the notes of the Parents' advocate Shanée Howell. Ms. Howell testified that she "was writing down ferociously as everyone was speaking and believed her notes were accurate." Tr. vol. 4, pp. 2-14.

443. None of Respondent's witnesses, in their sworn testimony actually denied, that Principal Creasy made this statement, instead they testified that they could not recall or that the Parents simply misunderstood. Tr. vol. 7, p. 1413:4-9 (Fisk-Moody "they misunderstood something that Ms. Creasy said"); Tr. vol. 5, pp. 1004:20-1005: (Ms. Uldrick could not recall anything except for Principal Creasy saying that "we had been unaware of her needs as in safety and restrooms at the time").

444. Regarding Principal Creasy's statement, Ms. Kibler was asked by Respondent's legal counsel on direct examination if the "statement in the minutes was what she recalled at the IEP meeting," not whether Principal Creasy said that Q.C. would not have been assigned to Whitaker if they knew she had Down syndrome. Tr. vol. 6, pp. 1198:23-1199:3. Ms. Kibler avoided answering whether Principal Creasy mentioned Down syndrome, instead she testified:

> I don't – yes, but I don't – what I think she was saying, well, she talked about they did not know that she had – that there was not IEP in place but that she had had one previously. And she known, or they known that, she may not have been assigned to Whitaker.

Tr. vol. 6, pp. 1198:25-1199:4.

445. Ms. Kibler also did not recall how K.C. responded to Principal Creasy's statement only that K.C. was "very upset and very emotional." Tr. vol. 6, p. 1268:16-20.

446. The only testimony which could definitively rebut Parents' recollections would have been Principal Creasy's as she was the speaker. During Respondent's case in chief, Principal Creasy was not asked by Respondent's legal counsel and did not otherwise, at any time, deny saying this statement about Q.C. and Down syndrome.

447. M.C. testified that based on the purported statements by Principal Creasy, the Parents felt they had no options, and therefore they ended their participation in the meeting and announced they would be withdrawing Q.C. from the District. Tr. vol. 2, pp. 399:2-401:20; 455:15-457:1 (Testimony of M.C.).

448. Their advocate Ms. Howell also thought "[i]t became very clear after [Ms. Creasy's] statement that we were not going to reach a decision that either party felt comfortable with. And the environment continued to grow more tense. So that's when the C.s [the Parents] just stated that they disagreed and there was really no further discussion because it didn't appear that it was moving anywhere." Tr. vol. 4, pp. 673:24-674:7 (Testimony of Howell).

449. The Parents and their advocates conferred privately from 10:18 a.m. to 10:47 a.m. Stip. Ex. 31, p. 147; Stip. 63. At 10:48 a.m., M.C. said that the meeting was adjourned. Then the Parents and their advocates left the meeting. Stip. Ex. 31, p. 147.

450. School Psychologist Barrett also left the meeting around this time. Stip. Ex. 31, p. 147 (IEP minutes note that Barrett left before the IEP Meeting resumed).

451. According to M.C., they "left for one reason, and that was Ms. Creasy's statement about 'we would not have accepted Q.C. at Whitaker had we known that she had Down syndrome,' and then 'had we known she had a disability.' And then the third was 'had we known about her needs.' That was the reason that we left." Tr. vol. 2, pp. 456:18-457:1. "[H]ad [Principal Creasy] not said that, we would not have left." Tr. vol. 2, p. 458:17-18.

452. Petitioners felt like they could overcome "low expectations" for Q.C. but that they could not overcome the school's discrimination of Q.C. because she was a child with Down syndrome. Tr. vol. 2, p. 458:12-18 (Testimony of M.C.).

453. The Undersigned finds both M.C. and K.C. credible about their recollection of Principal Creasy's statement that Q.C. would not have been accepted at Whitaker if they knew she had Down syndrome. Petitioners' immediate and intense reaction to the statement corroborated their testimony. Principal Creasy's failure to rebut their recollection of her statement is further evidence in support of Petitioners' recollection of the content of Principal Creasy's statement.

3. Continuation of the October 2018 IEP Meeting Without the Parents

454. Even though Respondent's IEP Team members convened the October 2018 IEP Meeting at the request of Q.C.'s Parents, they continued the meeting after Q.C.'s Parents left. Stip. 62.

455. Because this situation was "unprecedented," Principal Creasy did not know how to proceed herself so she called EC Director Dempsey and consulted with him and Dr. Fisk-Moody. Tr. vol. 6, pp. 1340:22-1341:16, 1342:6-9 (Testimony of Creasy). After consulting with the EC administrators, Principal Creasy elected to continue the IEP Meeting without the Parents because "adequate notice was given." Tr. vol. 6, p. 1342:6-9; Stip. Ex. 31, p. 147.

456. No member of the IEP Team attempted to stop the Parents from leaving or contact the Parents after they left to inform them that the LEA Representative had decided to continue the IEP Meeting. Tr. vol. 2, pp. 401:24-402:12 (Testimony of M.C.); Tr. vol. 6, p. 1329:12-17 (Testimony of Principal Creasy).

457. There were no documented efforts by the school-based IEP Team members of their attempts to convince the Parents to attend the remainder of the IEP Meeting once Principal Creasy decided to continue the meeting.

458. Petitioners did not learn that the IEP Meeting had continued after they left until they received the minutes from the IEP Meeting in the mail. Tr. vol. 2, p. 402:10-12 (Testimony of M.C.). Dr. Turnbull opined, "[T]o continue the meeting is an indication of an unwavering commitment to moving ahead with the Readiness placement." Tr. vol. 1, pp. 211:24-212:1. Moreover, prior to the October 2018 IEP Meeting on September 19, 2018, Q.C.'s school assignment had already been changed to the Readiness program at South Fork.

459. Prior to the October 2018 IEP Meeting, however, Respondent's staff did collect academic data which had not been done before the September IEP. *See* Stip. Exs. 40, 42-45.

460. According to Principal Creasy the IEP Meeting lasted an additional four hours so the school-based members of the IEP Team could write two new behavior goals and revise the existing ones, Principal Creasy stated that the school-based members of the IEP Team spent a "lot of time looking over the data" and "discussed lots of alternatives." Tr. vol. 6, p. 1341:17-23.

461. Although the October 2018 IEP indicated that regular, resource and separate settings were considered by the school-based members of the IEP Team (Stip. Ex. 32, p. 170); neither the Prior Written Notice nor the minutes documented any discussions of what types and amounts of supplemental services, such as a one-on-one aide, which could have enabled Q.C.'s placement in a lesser restrictive setting. *See* Stip. Exs. 29 & 31.

462. The school-based members of the IEP Team maintained Q.C.'s placement in the separate setting with permission to spend 55 minutes per day in the regular education classroom for Free Choice Centers for socialization, not instructional, purposes. Stip. Ex. 32, pp. 167–69; Stip. Ex. 29, p. 129.

463. During the remaining four hours, the school-based members of the IEP Team updated some of Q.C.'s IEP goals and added two functional behavior goals. The team developed the following new behavior goals in the October 2018 IEP:

a. When given a visual and verbal prompt, Q.C. will comply with directive with no more than 3 prompts.

b. During structured and unstructured activities, Q.C. will interact with peers by taking turns and sharing without becoming physically aggressive 3 out of 5 opportunities with no more than 3 prompts.

Stip. 66

464. Without the input of a qualified person (School Psychologist Barrett had left the IEP Meeting) to interpret the impact of Q.C.'s nonverbal IQ score on her instructional needs, the school-based IEP Team members refined the five academic and speech goals previously developed at the September 2018 IEP Meeting:

a. When presented numbers to 10, Q.C. will identify in random order 4 out of 5 opportunities; *changed to* When presented with four numbers (0-10), Q.C. will identify a given number 3 out of 5 trials;

b. When provided numbers 1-10 orally, Q.C. will write numbers 4 out of 5 opportunities *changed to* When given a set of manipulatives (In the amount of 1-10) Q.C. will count a given set upon request with 3 out of 5 opportunities;

c. When presented with letters orally or in writing, Q.C. will produce the sounds with 80% accuracy *changed to* When presented with four letter choices (uppercase or capital), Q.C. will accurately identify the letter requested 4 out of 5 trials;

d. Q.C. will use 2 words or longer utterances to answer questions about stories or events (i.e., 'what happened' and 'where is ____') with 80% accuracy, on three consecutive data dates *changed to* Q.C. will use 3 words or longer utterances to answer questions about stories or events (i.e., 'what happened' and 'where is ____') with 80% accuracy, on three consecutive data dates;

e. Without assistance, Q.C. will trace letters 4 out of 5 opportunities *changed to* When given lined paper and tracing guides, Q.C. will trace over the letters c, r, o, n, and I legibly on 4 out of 5 trials.

Stips. 55, 66.

463. The duration dates of the revised IEP were from October 12, 2018 to September 10, 2019. Stip. 65.

464. Petitioners did not contest the appropriateness of the speech/language goals or service delivery. Therefore, the Undersigned finds that the related services were appropriate.

465. Moreover, at the October 2018 IEP Meeting, ESY eligibility determination was deferred until May 1, 2019. Stip. Ex. 32, p. 170. Petitioners proffered no evidence this determination deferral was inappropriate.

466. As supplemental aids and supports, the school-based IEP Team members determined that Q.C. needed only preferential seating (close proximity of instruction or staff) and modified assignments (may be shortened by half of a given assignment). Stip. 67. The IEP Team determined Q.C. required the following 245 minutes a day, 5 per week of specially designed instruction and speech/language related services of 12 per reporting period, 30-minute session. Stip. 68.

467. Q.C. had already been reassigned to the Readiness Program, and the school-based IEP Team members maintained her placement in the separate setting. Stip. 69.

468. According to the October 2018 IEP, Q.C.'s setting would be "both" the regular education and special education classrooms for assemblies, field trips, lunch, recess, and specials. Stip. 67. This description was inconsistent with the separate setting at South Fork as it is completely a self-contained classroom set apart in a free standing trailer, with its own separate playground for recess and separate table at lunch. Tr. vol. 2, pp. 312:13-18; 387:4-17. "Free Choice Centers" was the only general education setting where Q.C. would exclusively be in the general education classroom with the only supplemental support of preferential seating in close proximity of instruction or staff. Stip. 67.

469. There was no explanation as to why Q.C. could now attend 55 minutes in the general education setting in the October 2018 IEP but that it was deemed inappropriate in the September 2018 IEP.

470. On October 2, 2018, Petitioners notified Respondent that they were withdrawing Q.C. from Winston-Salem/Forsyth County Schools and enrolling her in a private school for which they would be seeking reimbursement.

471. The Undersigned finds that Respondent's failure to advise Petitioners of their intention to continue the October 2018 IEP Meeting in their absence denied the Parents significant meaningful participation in the decisionmaking process. Moreover, Respondent's failure to have School Psychologist Barrett or another qualified person in attendance at the October 2018 IEP Meeting to interpret the educational impact of Q.C.'s average nonverbal score indicated that Respondent was not genuinely interested in discussing what support that Q.C. would need to participate in the general education setting. Finally, the Undersigned finds that Respondent predetermined Q.C.'s placement in the separate setting without conducting a FBA and considering the supplemental support of a one-on-one aide. Other than speech/language services and ESY, the Undersigned finds that the October 2018 IEP, like the September 2018 IEP, was inappropriate and denied Q.C. a FAPE primarily because Q.C. was not placed in the least restrictive environment.

Validity of Behavior Data Sheets and Disciplinary Referrals

472. In response to Petitioners' evidence that Q.C. could be educated with her nondisabled peers, Respondent relied on its behavior data collection in its Behavior Data Sheets, the fire alarm incident, the strangulation incident, and its witnesses to prove Q.C.'s behaviors were disruptive.

473. The validity and accuracy of the Respondent's Behavior Data Sheets were questionable. While FCDS' ABC Checklist information was itself not perfect, it focused on the behaviors not the frequency of the behaviors. In contrast, Respondent Behavior Data focused almost exclusively on the frequency of the behaviors to the point of exaggeration. Respondent's two Level III Discipline Referrals for Q.C. pulling the fire alarm and strangling another student verge on being inflammatory. The fire alarm disciplinary referral was based entirely on the statements of two kindergarteners. These hearsay statements would be inadmissible in this hearing and the credibility of two 5-year old students should have been questionable to the Whitaker administrators. Moreover, based on Q.C.'s petite size, age, and deficits, it is difficult to comprehend how the Whitaker administrators could have concluded that Q.C. intentionally strangulated another student.

474. Especially worrisome was Respondent's failures to disclose the existence and contents of the Behavior Data Sheets at the September 6 Parent Conference (over 500 incidents), the September 2018 IEP Meeting (over 900 incident), and the October 2018 IEP Meeting (over 1300 incidents).

Forsyth Country Day School ("FCDS")

475. On October 4, 2018, Petitioners applied for Q.C. to attend the Lower School's kindergarten class at Forsyth County Day School ("FCDS"), a private school located at 5501 Shallowford Road, Lewisville, North Carolina, Pet. Ex. 37, at 229; Pet. Ex. 46. Petitioners indicated in their application that Q.C. had been "segregated to special education" and "may possibly need additional support for learning." Pet. Ex. 37, at 232. Based on the information provided in the application, Ms. Clark, Director of the Academic Center, expected that Q.C. would be enrolled in a kindergarten class at FCDS. Tr. vol. 4, p. 790:10-15.

476. As part of the FCDS' application process, Q.C. visited Ms. Sue Ellen Bennet's kindergarten classroom on October 10, 2018, from 8:30 a.m. to 3:00 p.m. Tr. vol. 6, p. 1351:10-15. Prior to this visit, Ms. Bennett did not know anything about Q.C. except that she was a child with Down syndrome. Tr. vol. 6, p. 1349:10-11.

477. Ms. Bennet is a licensed kindergarten through sixth grade teacher with a Spanish endorsement. Tr. vol. 6, p. 1347:8-14. Ms. Bennet had taught kindergarten in New Hanover County schools for twelve years and at FCDS for five years. Tr. vol. 6, pp. 1346:20-1347:5.

478. Like Whitaker's school staff, Ms. Bennet had no experience working with students diagnosed with Down syndrome. Tr. vol. 6, p. 1349:20-21. Unlike Whitaker's staff, she also had no experience working with students with developmental delays or intellectual disabilities. Tr. vol. 6, p. 1349:14-19.

479. Even though Ms. Bennet had no formal training on serving students with Down syndrome or developmental delays, during Q.C.'s short visit in Ms. Bennet's classroom she noticed, during this first encounter, that Q.C. struggled with fine motor skills. Tr. vol. 6, p. 1355:21-23.

480. After spending a few hours with Q.C., Ms. Bennet recognized that Q.C. had a difficult time following instruction after lunch and observed her to be "very tired, and it was hard for her to take redirection at that time." Tr. vol. 6, p. 1356:14-18 Ms. Bennet noted that when fatigued, Q.C. would "shut down" and "was defiant." Tr. vol. 6, pp. 1356:22-1357:7.

481. Ms. Bennet's observations about Q.C.'s school readiness and appropriateness for admission at FCDS were not favorable to Petitioners' case as documented by the Student Visitor Feedback Form she completed for Q.C. Resp. Ex. 3, pp. 44-45; *see also*, Tr. vol. 6, pp. 1353-1355.

482. However, Ms. Bennet did note that during the morning Q.C. made successful transitions and was "quite engaged" blending "very well with the students during the time she was in the Spanish class." Tr. vol. p. 1356:5-13.

483. The behaviors reported by Ms. Bennet during Q.C.'s day in the kindergarten classroom were similar to the behaviors observed by Whitaker staff during Q.C.'s time in kindergarten there. Stip. Ex. 38; Stip. Ex. 56; Tr. vol. 5, pp. 944:2-8; 976:13-977:11 (Testimony of Uldrick); Tr. vol. 6, pp. 1139:3-10; 1144:17-23 (Testimony of Kibler).

484. After Q.C.'s school visit, Ms. Bennet did not recommend that Q.C. attend kindergarten at FCDS even with a shadow and highly trained staff. Resp. Ex. 3, p. 45. She predicted that Q.C. would not be successful at FCDS. Resp. Ex. 3, p. 45.

485. Like the teaching staff and administrators at Winston-Salem/Forsyth County Schools, Ms. Bennet did not think that Q.C. could be educated along with her nondisabled peers in the regular classroom setting, however, Ms. Bennet was willing to admit that she was wrong.

486. After Q.C. started attending FCDS, Ms. Bennet observed Q.C. in her preschool classroom where Q.C. was "doing what the teacher was asking her to do. She was participating with the other children and following instructions for the academic lesson that was being presented to the students in that small group at the time." Tr. vol. 6, pp. 1357:17-1358:2 (Testimony of Bennet).

a. ***Appropriateness of FCDS***

487. Q.C. enrolled at FCDS on November 7, 2018. Her first day of school was November 12, 2018. Stip. 70. Q.C. was enrolled in the Preschool-Four Readiness classroom. Tr. vol. 4, p. 781:7-15 (Testimony of Ms. Clark).

488. FCDS assigned Q.C. to Ms. Kelsey Frazier's class. Stip. 71. Prior to Q.C.'s start at FCDS, Ms. Frazier read scholarly literature about how to teach students with Down syndrome and address their behaviors. Tr. vol. 4, pp. 711:25-712:3 (Testimony of Frazier).

489. Q.C.'s Parents did not want Q.C. to be placed back in preschool, but by the time Q.C. started attending FCDS, she had lost a significant amount of time in kindergarten. Moreover, Q.C. was petite and she fit in physically with the younger students and was able to make good friends. Tr. vol. 3, p. 624:3-15. (Testimony of K.C.); *see also,* Pet. Exs. 50, 52, 53, 54 (videos).

490. Q.C.'s Parents and FCDS decided she would attend FCDS for a half-day initially due to her documented fatigue in the afternoons and their desire to build her stamina and confidence. Tr. vol. 3, p. 625:19-25 (Testimony of K.C.); Tr. vol. 4, p. 781:17-20 (Testimony of Clark). The school day was normally from 8:00 a.m. to 3:00 p.m., but initially Q.C. attended a modified day. For the first few months, Q.C. started at 8:45 a.m. and was picked up after lunch at 1:00 p.m. because she would get tired in the afternoon due to her low core body strength. Tr. vol. 3, pp. 625:14-626:14. Currently, she attends full days. Tr. vol. 3, p. 626:19-20 The IEP Teams at WS/FCS were aware of Q.C.'s fatigue due to her core body strength and could have also offered a modified school day but did not.

491. Before Q.C.'s first day of school, FCDS hired a shadow,[20] Amanda Maki, to provide one-on-one support to Q.C. throughout the day. Tr. vol. 4, pp. 783:15-784:6 (Testimony of Clark). Ms. Maki has a Degree in Psychology and previous experience working for the WS/FCS as a teaching assistant in a Core 1 segregated classroom for students with IEPs. Tr. vol. 4, pp. 814:21-815:15 (Testimony of Maki).

[20] FCDS uses the term "shadow" instead of a "one-on-one aide." The Undersigned uses the terms interchangeably since Ms. Maki's role as a shadow was the same as a one-on-one aide.

492. Prior to working as Q.C.'s shadow, Ms. Maki researched behavior modification strategies for children with disabilities, such as the use of visual cues, maintaining eye contact, use of simple, clear language, and verbal repetition. Tr. vol. 4, pp. 816:18-20 (Testimony of Maki). Q.C.'s Parents gave her IEP goals to Ms. Maki so Ms. Maki could work on them with Q.C. Tr. vol. 3, pp. 624:16-625:5; Pet. Ex. 45.

493. As Q.C.'s shadow, Ms. Maki's role was to assist Q.C. when needed and step back and allow Q.C. to work independently whenever possible. Tr. vol. 4, p. 775:17-20 (Testimony of Clark); Tr. vol. 4, p. 818:9-16 (Testimony of Maki).

494. When Q.C. started at FCDS, her teachers' first goal for Q.C. was for her to have a successful transition into the class. Tr. vol. 4, p. 781:7-15 (Testimony of Clark) *see also* Pet. Ex. 33, p. 134 (progress report narrative describing the initial goals for Q.C.). The Undersigned notes the importance of the steps taken by FCDS to ensure a smooth transition for Q.C. especially in light of the difficulties she had during her transition to WS/FCS.

495. Ms. Maki and Ms. Frazier collected data on Q.C.'s behavioral and academic progress. *See, e.g.*, Pet. Ex. 7 (anecdotal data on Q.C.'s behavior and academic progress); Pet. Ex. 8 (ABC behavior data on Q.C.); Tr. vol. 4, p. 822:3-17 (Testimony of Maki she collected narrative behavior data on Q.C.).

496. Unlike the Behavior Data Sheets collected by Respondent which focused on the frequency of the behaviors, the behavior data collected by Ms. Maki and Ms. Frazier captured the antecedents and consequences to Q.C.'s behavior and provided useful information from which to develop interventions and strategies to address Q.C.'s problem behaviors. *See, e.g.*, Pet. Ex. 8; Tr. vol. 3, pp. 548:12-21, 549:21-24 (Testimony of Overfelt). FCDS's Antecedent-Behavior Consequence Checklist ("ABC Checklists") included the time period, location, activity, antecedents, behavior, consequences, duration, and notes. Pet. Ex. 8, pp. 93-98. Although their data sheets were not perfect, Mr. Overfelt, Petitioners' Board Certified Behavior Analysis ("BCBA"), opined that he "felt like [FCDS staff] were attempting to really gather information to determine the function of [Q.C.]'s behavior and make interventions based on that." Tr. vol. 3, p. 551:10-15.

497. Based on the research they reviewed, and the information garnered from their ABC Checklists, Ms. Maki and Ms. Frazier used a number of interventions and strategies to address Q.C.'s problem behaviors. Ms. Maki used differential reinforcement as a strategy when Q.C. tried to avoid work. Tr. vol. 3, pp. 539:21-540:2. They used a visual schedule, social stories, visual cues, and positive reinforcement. Tr. vol. 3, pp. 545:19-546:3; Tr. vol. 4, pp. 720:15-721:22; Pet. Exs. 41 & 42.

498. When Q.C. got "off-task", Ms. Maki used a strategy called "sit and think" to instruct Q.C. about what's she going to do to get back on task. Tr. vol. 4, p. 824:6-13. Ms. Maki effectively used strategies to assist Q.C. in transitioning back to classroom recess included offering Q.C. the choice to walk inside alone or with Ms. Maki, asking Q.C. to think about what she will do next, and giving Q.C. an item to carry inside. Tr. vol. 4, p. 831:10-25.

499. The interventions provided to Q.C. by Ms. Frazier and Ms. Maki have enabled Q.C. to participate fully in her regular education classroom. According to Ms. Frazier, the visual cues and social stories "greatly help[ed] Q.C. to participate" in class. *See, e.g.*, Tr. vol. 4, p. 722:12-15. When Ms. Maki was out for a week, Q.C. participated along with her classmates to such an extent that Ms. Frazier was able to support Q.C., without her aide, while instructing to the whole class. Tr. vol. 7, p. 723:7-11.

500. FCDS provided Q.C. with supplemental aids, services, supports, accommodations, and modifications that address Q.C.'s unique needs. *See, e.g.*, Tr. vol. 1, p. 188:17-25 (Testimony of Dr. Turnbull that FCDS provided Q.C. assistive technology in the form of a chair to help her sit up during circle time); Tr. vol. 4, p. 726:19-21 (Testimony of Frazier that she provided a chair to Q.C. that enabled her to sit up during circle time); *id*. at 727:13-21 (Testimony of Frazier that she provided Q.C. special scissors that are easier for her to use and she used more tactile approaches with Q.C. when teaching her letters); *id*. at 828:12-19 (Testimony of Maki that she provided Q.C. headphones when needed to "help her deal with noise" in the classroom).

501. Ms. Frazier provided Q.C. with differentiated instruction. *See, e.g.*, Tr. vol. 4, p. 717:4-10 (Testimony of Frazier that when teaching how to "count on," she divided students into groups and gave each group a different activity related to that skill); *id*. at 731:1-6 (Testimony of Ms. Frazier that she sometimes adjusted a lesson to facilitate Q.C.'s ability to access the information); Tr. vol. 1, p. 228:10-15 (Testimony of Dr. Turnbull that FCDS provided Q.C. differentiated instruction for math). When Q.C. was learning to identify letters, Ms. Maki would give Q.C. five letters to choose from rather than all twenty-six so Q.C. could just focus on five letters at a time. Tr. vol. 4, pp. 829:14-830:3.

502. Ms. Maki, Ms. Frazier, and the classroom teaching assistant collaborated in developing strategies to assist Q.C. *See, e.g.*, Tr. vol. 4, p. 726:1 (Testimony of Ms. Frazier that she and Ms. Maki collaborated on a daily basis regarding Q.C.'s education); *id*. at 726:4-8 (Testimony of Ms. Frazier that she and Ms. Maki discussed how to improve Q.C.'s fine motor skills); *id*. at 724:8-15 (Testimony of Ms. Frazier that she and her assistant met with Ms. Maki prior to Q.C.'s enrollment to discuss the classroom dynamics and how to seamlessly transition Q.C. and Ms. Maki to the classroom).

b. *Q.C.'s Behavioral and Academic Progress*

503. Q.C. has made significant behavioral progress at FCDS. *See, e.g.*, Tr. vol. 4, pp. 726:19-727:5 (Testimony of Ms. Frazier that Q.C. no longer needs to use a chair during circle time and can now sit indefinitely); Tr. vol. 4, p. 728:19-23 (Testimony of Ms. Frazier that Q.C. is now able to participate in small group with minimal redirection and transition between activities with fewer visual cues); *id* at 730:12-14 (Testimony of Ms. Frazier that Q.C. is able to sit and stay focused during large group activities and can politely ask for help when she needs it); Tr. vol. 4, pp. 825:24-826:6 (Testimony of Ms. Maki that she rarely has to ask Q.C. to "sit and think" anymore, and she is able to redirect Q.C. much faster than when Q.C. first started at FCDS); Tr. vol. 4, pp. 1357:19-1358:14 (Testimony of Ms. Bennett that she had observed Q.C. in Ms. Frazier's classroom in the previous month, and Q.C. was following instructions and participating in the academic lesson).

504. Q.C. has made academic progress at FCDS. *See, e.g.,* Tr. vol. 4, p. 728:9-15 (Testimony of Ms. Frazier that Q.C. can write her first and last names, identify a letter name and sound if she can see it, sequence stories using visual cues, count with 1:1 correspondence up to 13, identify shapes, and extend patterns); Tr. vol. 4, p. 851:2-15 (Testimony of Ms. Maki that Q.C. has made significant academic progress since starting at FCDS, particularly in her ability to count with 1:1 correspondence, write letters and numbers, and sequencing stories); Tr. vol. 4, p. 837:5-21 (Testimony of Ms. Maki that Q.C. has made progress on all of her IEP goals, including her goal on producing speech sounds).

505. Q.C. has made progress with her social skills at FCDS. *See* Tr. vol. 4, p. 729:1-6 (Testimony of Ms. Frazier that Q.C. could sit at a lunch table and talk with the other students, address them by name, and interact with them); *see also id.* at 850:2-9 (Testimony of Ms. Maki that Q.C. was able to communicate and play with her classmates in a fully interactive way and that she had made a number of friendships with many of her classmates).

506. Q.C. has made progress with her confidence, interacting more with friends, her core body strength much stronger, academically by "leaps and bounds toward, you know, counting, number recognition, letter recognition, putting sounds together." Tr. vol. 3, pp. 633:23-634:15 (Testimony of K.C.). Moreover, her behavior during transitions improved. Tr. vol. 3, p. 635:1-9.

507. Most importantly, Q.C. had access to her nondisabled peers at FCDS during the entire school day. *See, e.g.*, Tr. vol. 4, p. 819:10-12 (Testimony of Ms. Maki that Q.C. receives all of her instruction with her nondisabled peers); *id*. at 824:20-825:6 (Testimony of Ms. Maki that she no longer removed Q.C. from her peers to redirect her); *id*. at 728:19-729:6 (Testimony of Ms. Frazier that Q.C. participated in large and small group activities, sat with her nondisabled peers at lunch, and played with her nondisabled peers at recess).

508. Respondent main criticism of FCDS's program was that "FCDS did not develop a plan for Q.C. to receive instruction among any same-age kindergarten peers…". Resp. Pro. Dec. ¶ 306, p. 69. In contrast to FCDS, at South Fork Q.C. would be placed with kindergarten (6-year old) and first grade (7-year old) students all of which would be disabled. Q.C. was only 6 years old when she enrolled in FCDS and the remaining students in her class were 5 years old. Tr. vol. 4, p. 735:3-13.

509. In balancing the appropriateness of age difference between WS/FCS and FCDS, the Undersigned considered, Q.C.'s academic and functional levels, as well as the fact Q.C. would be exclusively educated with her nondisabled peers, albeit younger students, at FCDS. Because of Q.C.'s unique circumstances, the Undersigned finds that FCDS provided Q.C. appropriate education with appropriate supplemental supports which allowed Q.C. access to her nondisabled peers in the least restrictive environment.

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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 the Conclusions of Law are findings of fact, they should be considered without regard to their given labels.

2. This Final Decision incorporates and reaffirms the Conclusions of Law contained in the previous Orders entered in this contested case.

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). Stip. 2.

4. The Petitioners, Q.C., by and through her parents, K.C. and M.C., and Respondent Winston-Salem/Forsyth County Schools Board of Education are properly before this Tribunal, and this Tribunal has personal jurisdiction, Stip. 1, and subject matter jurisdiction over them.

5. Respondent is a local education agency ("LEA") receiving funds pursuant to the IDEA, Stip. 5, and is the LEA responsible for providing educational services in Forsyth 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 North Carolina Department of Public Instruction. These acts, regulations, and policies require Respondent to provide FAPE for those children in need of special education residing within its jurisdiction.

6. The Petitioners and Respondent named in this action are correctly designated and had been properly noticed of this hearing, Tr. vol. 1, pp. 8:22-9:10, and venue was proper.

7. The Office of Administrative Hearings has jurisdiction over this contested 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 its implementing regulations, 34 C.F.R. §§ 300 and 301. N.C. Gen. Stat. § 115C-109.6(a) controls the issues to be reviewed. Stip. 3.

8. 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. Stip. 4.

9. The controlling State law for students with disabilities is N.C. Gen. Stat. § 115C, Article 9 and the corresponding State regulations. Stip. 6.

10. Under the IDEA, a state is eligible for federal funding if it "provides assurances" to the federal government that it "has in effect policies and procedures that ensure," *inter alia*, "a free appropriate public education ("FAPE") is available to all children with disabilities residing in the state." 20 U.S.C. § 1412. A Local Educational Agency ("LEA") is also "eligible for assistance" if its plan to effect policies and procedures is "consisten[t] with the state." 20 U.S.C. § 1415(a)(1).

11. The professional judgment of teachers and other school staff is a critical factor in the evaluation of 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 by Hartmann v. Loudoun Cty. Bd. Of Educ.,* 118 F.3d 996, 1001 (4th Cir. 1997); *see also, Bd. of Ed. of Hendrick Hudson Central School Dist., Weschester Cty. v. Rowley*, 458 U.S.176, 189-90 (1982), (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." *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 328 (4th Cir. 2004).

12. In accordance with N.C. Gen. Stat. § 150B-34(a) the Undersigned "shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to inferences within the specialized knowledge of the agency." A local board of education is a local educational agency under the IDEA and State law. The Office of Administrative Hearings ("OAH"), OAH has subject matter jurisdiction over this case and the actions of local boards of education as local educational agencies in the special education context pursuant to N.C.G.S. § 115C-109.6.

13. Deference to educator's professional judgment is due only as long as educators "offer a cogent and responsive" explanation for their decisions at some point during the administrative process. *See Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999, 1002 (2017). "We have always been, and we should continue to be, reluctant to second-guess professional educators… [o]nce a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals. Indeed, we should not disturb an IEP simply because we disagree with its content, and we are obliged to defer to educators' decisions as long as an IEP provided the child the basic floor of opportunity that access to special education and related services provides." *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.,* 303 F.3d 523, 527 (4th Cir. 2002) (internal quotations omitted).

Denial of a Free and Appropriate Public Education ("FAPE")

14. A school district is required to offer each student with a disability a FAPE through an Individualized Education Program ("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).

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." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017); *R.F. by and through E.F. v. Cecil County Public Schools*, 919 F.3d 237 (2019) (clarifying the Fourth Circuit's prior *de minimis* standard no longer good law).

16. The focus on the particular child's unique circumstances is "at the core of the IDEA" and the Undersigned's analysis must be grounded in Q.C.'s particular circumstances at the time of the IEP Meetings. *Id. citing Endrew F.,* 137 S.Ct. at 999.

17. For a reviewing court, "the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Endrew F.*, 137 S.C. at 999. Thus, 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. *Bd. of Ed. of Hendrick Hudson Central School Dist., Weschester Cty. v. Rowley*, 458 U.S.176, 189-90 (1982).

18. Once a school has formulated a procedurally proper IEP, a reviewing court should be reluctant to second-guess the judgment of educational professionals, and neither parents nor courts have a right to compel a school district to employ a specific methodology in educating a student. *See Rowley*, 458 U.S. at 206-08.

19. A hearing officer may find a denial of FAPE where the public agency's procedural inadequacies: (1) impeded the child's right to a free appropriate public education; (2) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or (3) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii).

20. The Supreme Court held in *the Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley* that "a court's inquiry" first requires the determination of whether the "[LEA] complied with the procedures set forth in the [IDEA], [a]nd second," whether the "[IEP] developed through the [IDEA's] procedures [is] reasonably calculated to enable the child to receive educational benefits." 458 U.S. 176, 206–07 (1982).

Procedural Violations - Legal Standard

21. The IDEA contains a number of critical, procedural safeguards to provide notice to parents of decisions regarding their children and "an opportunity [for parents] to object to those decisions." *G. ex rel. R.G. v. Fort Bragg Dependent Sch*., 343 F.3d 295, 299 (4th Cir. 2003) (quoting *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.,* 303 F.3d 523, 527 (4th Cir. 2002) (internal citation omitted)). Should the LEA fail in its obligations under the IDEA, parents are afforded the right to file a due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6).

22. "The grammatical structure of IDEA's purpose of protecting 'the rights of children with disabilities and parents of such children,' § 1400(d)(1)(B), would make no sense unless 'rights' refers to the parents' rights as well as the child's. Other provisions confirm this view. *See, e.g.*, § 1415(a)." *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 517 (2007). The Court found: "IDEA grants parents independent, enforceable rights. These rights, which are not limited to certain procedural and reimbursement-related matters, encompass the entitlement to a free appropriate public education for the parents' child." *Id.* at 533 (emphasis added).

23. The IDEA's procedural requirements are purposefully designed to ensure that parents can meaningfully participate in the process of developing an IEP for their child. *See Rowley*, 458 U.S. at 205–06 ("It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.").

24. "[A]n ALJ must answer each of the following in the affirmative to find that a procedural violation of the parental rights provisions of the IDEA constitutes a violation of the IDEA: (1) whether the plaintiffs alleged a procedural violation; (2) whether that violation significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the parents' child; and (3) whether the child did not receive a FAPE as a result." *R.F.,* 919 F. 3d at 249.

25. 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).

26. Only when the court finds that the "procedural violation has resulted in such substantive harm, and thus constituted a denial of [the child's] right to a FAPE, may [it] 'grant such relief as the court determines is appropriate." *Knable ex rel. Knable v. Bexley City School. Dist.*, 238 F.3d 755, 764 (6th Cir., 2001) (citing 20 U.S.C. § 1415(e)(2)).

27. 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.G.S. § 115C-109.6(f). "In matters alleging a procedural violation, the hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (i) impeded the child's right to a free appropriate public education; (ii) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (iii) caused a deprivation of educational benefits." N.C.G.S. § 115C-109.8(a).

28. Respondent committed numerous procedural violations in this case which caused substantive harm to Q.C. and significantly impeded her Parents ability to meaningfully participate in the decisionmaking process for developing her educational program.

FIRST ISSUE:

Whether Respondent failed to comply with the procedural and/or substantive requirements of the IDEA at any time between November 9, 2017 through November 9, 2018, and if so, what appropriate relief should this Tribunal award Petitioners?

29. The first issue is whether Respondent violated the substantive and procedural requirements of the IDEA between November 9, 2017 though November 9, 2018 and if so, what the appropriate remedy would be.

1. Respondent Failed to Develop an IEP Before the Beginning of the 2018-2019 School Year

30. From November 9, 2017 until Q.C. turned six years old on April 24, 2018, Q.C. was enrolled in private schools. At that time, Q.C. might have been entitled to a Private Services Plan ("PSP"), but she was not entitled to an IEP. Q.C.'s entitlement to a PSP is discussed later in these Conclusions.

31. Respondent had allowed Q.C.'s most recent March 2016 IEP to expire on March 13, 2017.

32. Just before her 6th birthday on April 17, 2018, Q.C.'s Parents contacted Dr. Fisk-Moody and asked for an IEP. Subsequently on May 22, 2018, a Reevaluation IEP Meeting was held, but an IEP was not developed before the beginning of the 2018-2019 school year.

33. "At the beginning of each school year, each local educational agency . . . shall have in effect, for each child with a disability in the agency's jurisdiction, an individual education program . . ." 20 U.S.C. § 1414(d)(2)(A); 34 CFR § 300.3232(a); NC Policy 1503-4.4(a).

34. For an initial referral, the evaluation process and development of the IEP must occur within 90 days of the referral. 34 C.F.R. § 300.323; NC 1503-4.4(c)(1). Q.C.'s Parents requested that Respondent develop an IEP for Q.C. on April 17, 2018. Respondent had ninety (90) days (i.e., July 16, 2018) to complete Q.C.'s evaluations, determine her eligibility, and develop her IEP. Respondent did not even attempt to complete Q.C.'s evaluations until after the 2018-2019 school year started and did not determine her eligibility or develop her IEP until September 11, 2018.

35. Consequently, Q.C. did not have an IEP in place when the school year started, and she did not receive the appropriate supplemental aids and services to allow her to access the general education curriculum.

36. In its documentation, Respondent treated the Parent Referral as a Reevaluation instead of an Initial Evaluation thereby avoiding the 90-day timeframe. The Parties also stipulated that the May 22, 2018 IEP Meeting was a Reevaluation IEP Meeting. Stip. 28. As the Parties

stipulated that the May 2018 IEP Meeting was a reevaluation IEP meeting, Stip. 28, the Undersigned must accept that this was a reevaluation not an initial evaluation, so the 90-day timeframe is not applicable. Even though Respondent was not bound by the 90-day deadline, because of the Parties stipulation that the May 22, 2018 IEP Meeting was a reevaluation meeting, Respondent was not relieved of liability as the IDEA required Respondent to develop an IEP for Q.C. before the 2018-2019 school year began.

37. Whether this was an initial referral or a reevaluation, Respondent's procedural violations of failing to timely complete evaluations and develop an IEP for Q.C. before the beginning of the school year caused Q.C. educational harm. Q.C. was deprived of any academic or functional support in the regular education classroom. This deprivation contributed to her maladaptive behaviors which Respondent ultimately used to justify her placement in a placement which was not least restrictive for her. This procedural violation was not harmless error and led to a denial of FAPE for Q.C.

2. Respondent Failed to Properly Evaluate Q.C.

38. The IDEA mandates the initial evaluation to determine if a child is a child with a disability "must consist of procedures—(I) to determine if the child is a child with a disability . . .; and (II) to determine the educational needs of the child." 20 U.S.C. § 1414(a)(1)(C)(i); 34 C.F.R. § 300.301; NC Policy 1503-2.2.

39. "Evaluations must be conducted, eligibility determined, and for an eligible child, the IEP developed, and placement completed within 90 days of receipt of a written referral." 20 U.S.C. § 1414(a); 13 C.F.R. § 300.301; NC Policy 1503-2.2(c)(1).

40. The evaluation must be sufficiently comprehensive to identify all of the child's special education needs, whether or not commonly linked to the disability category in which the child has been identified. 20 U.S.C. §§ 1414(b)(1)-(3), 1412(a)(6)(B); 34 CFR § 300.304; NC Policy 1503-2.5.

41. The evaluation must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information." 20 U.S.C. § 1414(b); 34 CFR § 300.304; NC Policy 1503-2.5.

42. Prior to finding a child eligible in the category of Intellectual Disability ("ID"), school districts must conduct, among other things, "two scientific research-based interventions to address academic and/or functional skill deficiencies and documentation of the results of the interventions, including progress monitoring documentation;" an interview with the parents; and a social/developmental history. NC Policy 1503-2.5(7)(i).

43. Respondent did not conduct two research-based interventions prior to determine Q.C.'s eligibility as ID-Mild.

44. Respondent argued it provided Q.C. with "small-group instruction" and "direct instruction…for activities," and these constitute research-based interventions. The Undersigned

finds persuasive the testimony of Dr. Turnbull that these strategies do not constitute interventions. Further, no evidence was offered that Respondent conducted or documented progress monitoring of the aforementioned research-based interventions.

45. Q.C. was eligible under the Development Delay ("DD") category from 3 through 7 years of age, NC Policy 1503-2.5(d)(4)(ii)(A), but Respondent did not consider continuation of her eligibility under that category. Had Respondent continued Q.C.'s eligibility under the DD category, research-based interventions would not have been required. *See* NC Policy 1503-2.5(d)(4).

46. The DD eligibility category has two optional subcategories – delayed/atypical development and delayed/atypical behavior. To be eligible under the DD subcategory delayed/atypical development, Q.C. would have to have been between the ages of three through seven and had delayed/atypical development in one of five areas: physical development, cognitive development, communication development, social/emotional development, or adaptive development. NC Policy 1503-2.5(d)(4)(ii)(B). For the subcategory of delayed/atypical behavior, for ages six through seven Q.C. would have to had delayed/atypical behavior patterns and adaptive skills in two or more of the following ways: 1. inability to interact appropriately with adults and peers; 2. inability to cope with normal environment or situational demands; the use of aggression or self-injurious behavior; or 4. the inability to make educational progress due to social/emotional deficits. NC Policy 1503-2.5(d)(4)(ii)(C).

47. Because of Q.C.'s communication deficits and/or adaptive delays, Q.C. would have been eligible for DD under the delay/atypical criteria. She may have also been eligible because of her delayed/atypical behavior patterns and adaptive skills but only one subcategory is required for DD eligibility.

48. For both DD subcategories, the identification is based on informal educational/clinical opinion and appropriate assessment measures. NC Policy 1503-2.5(d)(4)(ii)(B)(b) & (C)(c).

49. Had Respondent timely completed the psychological and speech/language evaluations during the four months between the referral and start of the school year, Q.C. could have been found eligible under DD without any further data collection or assessments.

50. Respondent did not provide a cogent and reasonable explanation as to why the IEP Team did not continue Q.C.'s eligibility under the category of DD or at least consider this eligibility category.

51. The speech/language evaluation also did not conform to the NC Policies. Respondent's Speech Pathologist failed to observe Q.C. across settings to access academic, functional, and behavior skills in violation of NC Policy 1503-2.5(d)(12)(i)(G) and did not conference with Q.C.'s Parents in violation of NC Policy 1503-2.5(d)(12)(i)(H).

52. Despite the violations NC Policies in the speech/language evaluation process, Petitioners did not proffer any evidence that Q.C. suffered a denial of FAPE because of those

violations. Therefore, these procedural violations were harmless error. However, the delay in the completion of the speech/language evaluation substantively affected the timely development of Q.C.'s IEP before the beginning of the 2018-2019 school year and that was not harmless error.

53. Whitaker's Principal and teachers complained that they did not know about the extent of Q.C.'s disabilities before she was assigned to Whitaker. This was not the fault of Petitioners, who requested an IEP four months before the school year started, but rather the result of Respondent's failure to timely complete the evaluations and develop Q.C.'s IEP before the school year started.

54. Even though Respondent's EC Teacher admitted even before the school year began, she needed information to determine if Q.C. continued to have previously identified behaviors, Respondent failed to conduct an informal Functional Behavior Assessment ("FBA"). The EC Teacher did use "Functional Behavior Assessment" data sheets and created other "Event Recording Data Sheets" for the regular education teacher, but Respondent denied this data was part of a FBA.

55. Despite documenting excessive maladaptive behaviors during the evaluation process before the IEP was developed, Respondent failed to provide a reasonable explanation as to why a FBA was not needed. To determine whether Q.C.'s behaviors were manifestations of her disability, the IEP Team must conduct a functional behavioral assessment if a Behavior Intervention Plan ("BIP") has not been developed. 34 C.F.R. § 300.530(f)(1).

56. Although FBA are typically completed after manifestation determinations, 34 C.F.R. § 300.530 (e), nothing precludes the use of a FBA in other contexts when behavior is at issue especially in a situation such as this one where placement was determined based on Q.C.'s behaviors.

57. Moreover, after the Parents requested a FBA at the September 2018 IEP Meeting, the IEP Team admitted that a FBA was necessary yet delayed conducting the FBA until after the placement determination.

58. Although Q.C.'s IEP Team agreed at the September 2018 IEP Meeting that a FBA was needed, Respondent failed to seek her Parents' consent to conduct the FBA prior to removing Q.C. from her nondisabled peers reportedly due to her behavior. This resulted in educational harm to Q.C. as Respondent did not understand the function of Q.C.'s behaviors or attempt to implement any BIP prior to segregating her from her nondisabled peers in a separate setting.

59. The October 2018 IEP Team agreed that a FBA was needed but again refused to conduct one before the placement determination.

60. Respondent's refusal to conduct a FBA prior to its placement decisions at both the September and October IEP Meetings substantively impeded the Parents' right to meaningful participation at both meetings and denied essential information from the Parents as well as all the other IEP Team members.

61. For determining eligibility and educational needs, all information obtained during the evaluation process must be documented and carefully considered by the IEP Team. 34 C.F.R. § 300.306(c)(ii). As part of any reevaluation, the IEP Team must review existing evaluation data including classroom-based observations and observations by teachers. 34 C.F.R. § (a)(1)(ii)&(iii).

62. Respondent's deliberately failed to disclose its informal behavior data collection and the enormity of Q.C.'s behaviors as documented on its Behavior Data Sheets which significantly impeded the Parents meaningful participation in the IEP decisionmaking process. Respondent has offered no explanation, cogent or otherwise, as to why these Behavior Data Sheets were not disclosed to Petitioners until after due process was filed.

63. Based on the Findings of Fact, stipulations, sworn testimony, and other evidence in the record, except as noted about the speech/language evaluation, the Undersigned concludes that Respondent failed to timely and properly evaluate Q.C. in accordance with the IDEA and this was not harmless error. Moreover, Respondent's failure to timely develop an IEP before the beginning of 2018-2019 school year denied Q.C. a FAPE.

3. Failure to Give Appropriate Notice Prior to the May 22, 2018 IEP Meeting

64. Each LEA must ensure that one or both of a child's parents are at each IEP Meeting or an opportunity to participate. 34 C.F.R. § 300.322(a); 20 U.S.C. § 1414(d)(1)(B)(i); NC Policy 1503-4.3(a)&(b).

65. Respondent presented the Invitation to Conference to Q.C.'s Father to sign at the impromptu May 22, 2018 IEP Meeting, thus failing to provide Q.C.'s Parents with appropriate notice of this IEP meeting. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.322(1); NC Policy 1503-4.3(a)(1).

66. Even though the notice was not sufficient to allow K.C. an opportunity to attend the May 2018 IEP Meeting, M.C. was able to attend and given an opportunity to participate. Petitioner failed to prove that this procedural violation denied Q.C. a FAPE. This notice violation was harmless error.

4. Entitlement to Extended School Year Services ("ESY")

64. Extended School Year ("ESY") services "must be provided only if a child's IEP Team determines, on an individual basis…that the services are necessary for the provision of FAPE to the child." 34 C.F.R. § 300.106(a)(2).

65. Under the North Carolina Policies, the IEP Team must determine that extended school year services are necessary for the provision of FAPE to an individual child by considering:

> (i) Whether the student regresses or may regress during extended breaks from instruction and cannot relearn the lost skills within a reasonable time; or

(ii) Whether the benefits a student gains during the regular school year will be significantly jeopardized if he or she is not provided with an educational program during extended breaks from instruction; or

(iii) Whether the student is demonstrating emerging critical skill acquisition ("window of opportunity") that will be lost without the provision of an educational program during extended breaks from instruction.

N.C. Policies 101-2.4(b)(2).

66. Petitioners presented no evidence at the hearing to show that Q.C. met any of the three criteria for ESY, their post-hearing Brief on ESY likewise contained no evidence to establish Q.C.'s entitlement to ESY. Therefore, the Undersigned concludes that Petitioners failed to meet their burden of proof with respect to reimbursement for ESY speech/language therapy.

5. Unauthorized Removal from Regular Education Classroom

67. The LEA must ensure that the parents participate in determining the educational placement of a child with a disability. 20 U.S.C § 1414(e); 34 C.F.R. § 300.116; NC Policy 1501-3.3(a)(1).

68. On Q.C.'s second day of school, prior to the development of Q.C.'s IEP Respondent began removing Q.C. from her nondisabled peers for thirty (30) minutes each day without informing or obtaining permission from Q.C.'s Parents. After Q.C.'s IEP was developed on September 11, 2018, the next day Respondent removed Q.C. from her nondisabled peers for ninety (90) minutes per day without informing or obtaining permission from Q.C.'s Parents.

69. If the IEP developed at the September 2018 IEP Meeting was not an initial IEP but a continuation of an "expired" IEP as Respondent appears to claim, then Respondent had unilaterally changed Q.C.'s placement 30 minutes in the resource room three weeks before the September 2018 IEP Meeting without reconvening the IEP Team with her Parents' participation. Even though, services were offered in the resource classroom, based on this amount of time Q.C. was still placed in a regular education placement.

70. A change in placement without proper notice is a procedural violation. *R.F.*, 919 F.3d at 246. However, Petitioners failed to show how this procedural violation denied Q.C. a FAPE because despite this 30-minute removal, Q.C. was still placed in the regular education setting.

71. After the September 2018 IEP was developed and before its implementation date, Respondent unilaterally changed Q.C.'s placement for 90 minutes a day in the resource room, again without reconvening the IEP Team.

72. The 90-minute removal changed Q.C.'s placement from regular to the resource setting. This change was more troubling because of its timing after the September 2018 IEP Meeting was held. But to the extent that the service delivery in the September 2018 IEP was a separate placement, the resource placement was a less restrictive placement than in the IEP.

73. This may not have denied Q.C. a FAPE for the limited period of the placement change, but it was the second of two covert changes of placement by Respondent which cannot be sanctioned. Otherwise, LEAs could make multiple incremental, unilateral changes of placement without convening IEP meetings with parental participation in direct disregard of the IDEA.

74. As indicated below, Petitioners met their burden of proof that the least restrictive environment for Q.C. was the regular education setting; therefore, the Respondent's unilateral change of placement to the resource setting was not harmless error because it denied her Parents meaningful participation in the decisionmaking process.

6. Failure to Include a Required IEP Team Member at September 2018 IEP Meeting

75. An LEA must ensure that the IEP team includes an individual who can interpret the instructional implications of evaluation results who may be a regular education teacher or someone with special expertise. 34 C.F.R. § 300.321(a)(5); NC Policy 1503-4.2(a)(5).

76. Respondent failed to ensure someone capable of interpreting Q.C.'s psychological evaluation results was present at the September 2018 IEP Meeting. The School Psychologist who conducted the evaluation did not contact the Parents before the meeting to explain the results. Although Respondent identified Ms. Uldrick as the person capable of interpreting the results to the September 2018 IEP Team, the evidence proved that Ms. Uldrick was not capable of interpreting the results.

77. At the October 2018 IEP Team Meeting, Respondent attempted to correct this procedural violation, but the School Psychologist left the meeting around the same time that the Parents did. Afterward, the IEP Team reconvened to revise the academic goals and draft functional goals for the October 2018 IEP.

78. There was no evidence that an alternative qualified person attended the October 2018 IEP Meeting in the Prior Written Notice or the meeting minutes or that the School Psychologist discussed the instructional implications of Q.C.'s average nonverbal IQ score before she left the meeting. Respondent failed to have a qualified individual at the October 2018 IEP Meeting in violation of federal law and NC Policies.

79. This procedural violation caused educational harm to Q.C. as the IEP Teams could not and did not consider the significance of the information in the evaluation as it pertained to the most appropriate placement and supplemental aids and services for Q.C. Consequently, Respondent placed Q.C. in a highly restrictive setting and failed to provide appropriate supplemental aids and services to her. Respondent also significantly impeded the Petitioners participation at the IEP meetings by failing to have staff qualified to explain the psychological evaluation particularly about the gap in nonverbal and verbal IQ scores.

7. Continuation of October 2018 IEP Meeting Without Parents

80. A LEA must take steps to ensure that one or more of the parents of a child with a disability are present at each IEP Team meeting. 34 C.F.R. §300.322(a). Respondent did properly notify Petitioners that they intended to continue the October 2018 IEP Meeting after Petitioners left.

81. The Parents' left the meeting after Principal Creasy discriminatory statements and the meeting appeared to be terminated. Even the LEA Representative was confused about how to proceed so she contacted the EC Director at Central Office who advised her to continue the meeting. Before this communication, the other IEP Team members did not know if the meeting was terminated.

82. When an IEP Team meeting is conducted without a parent in attendance because the LEA is unable to convince the parents that they should attend, the LEA must keep record of its attempts to include the parent. 34 C.F.R. § 300.322(d); NC Policy 1503-4.3(d).

83. The Undersigned agrees with Respondent that parents should not be allowed to unilaterally derail IEP meetings simply because they disagree with the IEP team's decisions. Parents who know that an IEP meeting will continue if they choose to leave early, make their choice knowingly, but that was not the case here. Neither M.C., K.C., nor their advocates knew that the October IEP Meeting would be reconvened and continue in their absence. Even the school-based members of the IEP Team did not know if the meeting would continue until after Principal Creasy spoke with EC administrative staff.

84. The Undersigned finds Respondent did not even attempt to inform Petitioners of Respondent's decision to continue the October 2018 IEP Meeting after Petitioners left. The LEA Representative and Regular Education Teacher both testified they did not try to stop Q.C.'s parents from leaving and did not contact them after they left to let them know they intended to continue the meeting. *See* Tr. vol. 6, p. 1329:15-17 (Testimony of Creasy); Tr. vol. 6, p. 1251:12-14 (Testimony of Kibler).

85. Respondent proceeded with reconvening the October 2018 IEP Meeting after Q.C.'s Parents left without even attempting to notify them of Respondent's intention to continue the meeting in their absence. As a result, Q.C.'s Parents were unable to participate in the development of new goals for Q.C., the determination of what supplemental aids and services Q.C. would receive, the service delivery for Q.C., and Q.C.'s placement. This procedural violation significantly impeded the Parents' meaningful participation and ultimately Q.C.'s right to a FAPE because the IEP team did not consider the supplemental support of a one-on-one aide which ultimately resulted in Q.C.'s inappropriate placement in a more restrictive placement.

8. Private Services Plan ("PSP")

86. Unilaterally placed private school students do not have a right to receive the same services that they would receive if enrolled in public school. 34 C.F.R. § 137(a).

87. The IDEA requires that "a services plan must be developed and implemented for each private school child with a disability who has been designated by the LEA in which the private school is located to receive special education and related services." 34 C.F.R. § 300.132(b); *see* 34 C.F.R. § 300.138(b). A Private Service Plan ("PSP") is "a written statement that describes the special education and related services the LEA will provide to a parentally-placed child with a disability enrolled in a private school who has been designated to receive services." 34 C.F.R. § 300.37. , including the location of the services and any transportation necessary." 34 C.F.R. § 300.37; N.C. Policies 1500-2.31. The LEA must develop, review, and revise the PSP to the same extent as an IEP. 34 C.F.R. § 300.138(b)(2)(ii). the LEA is obligated to provide transportation to and from the child's home and service site for the services it provides pursuant to the PSP. 34 C.F.R. § 300.139(b)(1); N.C. Policies 1501-6.10(b)(1).

88. The LEA must follow the same procedures required for the development of IEPs, including the determination of the need for ESY services. *See generally id*; 34 C.F.R. § 300.106(a)(1)-(2).

89. Q.C.'s March 2016 IEP, which called for her to receive speech therapy as a related service, expired on March 13, 2017. Stip. 23. During the relevant time period in this case, Respondent never discussed, much less developed, a PSP for the provision of speech therapy to Q.C. Therefore, Q.C.'s Parents continued to provide for Q.C. to receive private speech therapy services even after the Parents' April 2018 request to Respondent for an IEP.

90. Based on the Findings of Fact, stipulations, sworn testimony, and other evidence in the record, the Undersigned concludes that Respondent failed to determine Q.C.'s eligibility for a Private Services Plan and offer Q.C. a Private Services Plan from November 9, 2017, through the present, though Q.C. was enrolled in private schools for the 2017-2018 school year and the 2018-2019 school year, beginning in November 2018.

9. Compensatory Speech Therapy Related Services

91. In the alternative, an IEP should have been developed at the May 2018 IEP Meeting which would have provided Q.C. with speech/language therapy as a related service. As of May 22, 2018, Q.C. would have been entitled to speech language services during that period through the remainder of the 2018-2019 school year at twelve 30-minute sessions during each of the reporting periods, excluding ESY.

92. The private speech therapist testified that Q.C. would have regressed over the summer without speech therapy during the Extended School Year ("ESY"). Respondent proffered no conflicting testimony in this regard.

93. As with reimbursement for the costs of Private School, a parent-plaintiff seeking compensatory services must first establish that his child was denied a FAPE. *See G. ex rel R.G. v. Fort Bragg* Dependent Schools, at 309; *see also C.G. ex rel. A.S. v. Five Town Comm. Sch. Dist.*, 513 F.3d 279, 290 (1st Cir. 2008) ("compensatory education is not an automatic entitlement; rather it is a discretionary remedy for nonfeasance or misfeasance in connection with the school

system's obligations under the IDEA.").

94. A parent's interference with services that were or could have been provided by the district should factor into a court's determination of appropriate compensatory services. *See Parents of Student W. v. Puyallup Sch. Dist., No. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994) (holding that "[t]he behavior of Student W's parents is also relevant in fashioning equitable relief," and affirming district court's decision to limit compensatory services due to parents' failure to request services when student re-enrolled in District and their decision to decline offers of summer school instruction).

95. If the parent succeeds in showing that his child has been denied a FAPE, then compensatory services may be appropriate. *Id.* "[C]ompensatory education involves discretionary, prospective relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure of a given period of time to provide a FAPE to a student." *G. ex rel R.G.,* 343 F.3d at 309.

96. Q.C. was entitled to 51 speech therapy sessions during the period WS/FCS failed to provide her a FAPE; therefore, excluding ESY, Petitioners are entitled to compensatory related services of 51 speech therapy sessions from May 22, 2018 to the end of the 2018-2019 school year.

SECOND ISSUE:

Whether Respondent significantly impeded Q.C.'s Parents' meaningful participation in the IEP process by predetermining Q.C.'s placement in the separate setting causing Q.C. educational harm, and if so, what appropriate relief should this Tribunal award Petitioners?

97. The second issue concerns the IEP Teams' placement determinations during the September and October 2018 IEP Meetings. If the school-based members of the IEP Teams predetermined Q.C.'s placement in the separate setting, then this would have denied Petitioners M.C. and K.C.'s meaningful participation in the decisionmaking process for the placement determination.

1. Predetermination of Placement Without Parental Participation

98. An IEP is "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with" the IDEA. 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a). The IDEA requires that parents have meaningful participation in the development of their child's IEP. 34 C.F.R. § 300.322(a); *see also* N.C.G.S. § 115C-109.3(a) (guaranteeing the parent the right "to *participate* in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to that child.") (emphasis added).

99. Meaningful participation occurs where a parent has the opportunity to ask questions, express his or her opinions, and explain disagreements with components of the IEP, *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017) (during the IEP process, parents and staff should have the opportunity to "fully air their respective opinions."); *N.L. ex rel. Mrs. C. v. Knox County Schools*, 315 F.3d 688, 695 (6th Cir. 2003) (rejecting predetermination claim where student's mother did not participate in pre-meeting among educational experts but had "opportunity to ask questions and voice disagreements at the *formal* IEP Team meeting") (emphasis added).

100. Parents are denied their right to meaningfully participate in the development of their child's IEP when a school district predetermines the child's placement prior to an IEP meeting. *See, e.g.*, *Spielberg v. Henrico Cnty. Public Sch.*, 853 F.3d 256 (4th Cir. 1988) (finding the school district's decision to change a student's placement before the IEP meeting violated the Education for All Handicapped Children Act, the predecessor to the IDEA); *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014) ("Predetermination occurs when a state makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team.").

101. School district team members' preparation for an IEP meeting, or entering the meeting with opinions and recommendations, does not constitute predetermination. *Doyle v. Arlington Cnty. Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D.Va. 1992), *aff'd* 39 F.3d 1176 (4th Cir. 1994). "[S]chool officials must come to the IEP table with an open mind. But this does not mean they should come with a blank mind."). Schools should give thought to the development of a student's IEP prior to the IEP meeting. "[W]hile 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* 806 F.Supp. at 1262.

102. "To avoid a finding of predetermination, there must be evidence the state has an open mind and might possibly be swayed by the parents' opinions and support for the IEP provisions they believe are necessary for their child." *R.L.*, 757 F.3d at 1188 (citing *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 858 (6th Cir. 2004)). When the school district "presents one placement option at the meeting and is unwilling to consider alternatives," its actions violate the IDEA. *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 F. App'x 342 (9th Cir. 2007); *see also R.L.*, 757 F.3d at 1188–90 (finding the school board predetermined the student's placement where it was "clear that 'there was no way that anything [the student's parents] said, or any data [they] produced, could have changed the [Board's] determination of' the appropriate placement").

103. Courts that have found predetermination have done so where there is evidence supporting an inference that the school district determined the student's educational path in advance and did not allow for consideration of alternatives. For instance, in *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004), the court found predetermination where the school district had an unofficial policy of refusing certain types of programs, refused to consider the parents' request for certain programs (in part by prohibiting the parents from asking questions during an IEP meeting), and made its determination based on primarily financial considerations rather than the child's unique needs. In *Spielberg ex rel. Spielberg v. Henrico Cty. Pub. Schs*., 853 F.2d 256 (4th Cir. 1988), the school district wrote letters stating its intent to change a student's

placement before developing an IEP. The court found that the district "resolved to educate [the child] at [one school], *and then* developed an IEP to carry out their decision." *Id.* at 259 (emphasis added). *See also J.G. ex rel. N.G. v. Kiryas Joel Union Free Sch. Dist.*, 777 F.Supp.2d 606, 649 (S.D.N.Y. 2011) (collecting cases).

104. Respondent's staff repeatedly said they came to the IEP meetings with "open minds" and ready to discuss the placement options not knowing what the final placement would look like. Respondent's staff may have had "open minds" but they did not engage in any back and forth discussion about what it would take to place Q.C. in the least restrictive environment.

105. In addition, the actions of Respondent demonstrated it predetermined Q.C.'s placement. Principal Creasy unilaterally decided Q.C. would receive 300 minutes of specially designed instruction every day, ensuring Q.C. would be segregated from her nondisabled peers for the vast majority of her day. At the September 2018 IEP Meeting, Respondent never considered providing any specially designed instruction to Q.C. in her regular education classroom. Whitaker did not have a self-contained, separate setting, but South Fork Elementary School did. Respondent attempted to reassign Q.C. to South Fork over the summer and reassigned her to South Fork before the October 2018 IEP Meeting. The only reason Q.C. would be reassigned to South Fork was because Respondent had predetermined Q.C.'s placement in the separate setting available at South Fork, but not available at Whitaker.

106. Petitioners have proved by a preponderance of the evidence that the school-based members of the IEP Teams did not come to the September 2018 IEP Meeting or the October 2018 IEP Meeting with open minds, and based on the findings of fact, stipulations, sworn testimony, and other evidence in the record, the Undersigned concludes that Respondent predetermined Q.C.'s placement in the separate setting, significantly impeded Q.C.'s Parents' meaningful participation in the IEP decisionmaking process and resulted in a denial of FAPE to Q.C. in the least restrictive environment.

2. The Separate Setting Was Not the Least Restrictive Environment for Q.C.

107. The IEP is the "centerpiece" of delivering FAPE for disabled students; it must set out relevant information about the child's present educational performance and needs, establish annual and short-term objectives for improvements in that performance, and describe the specially designed instruction and services to meet the unique needs of the child. *Honig v. Doe,* 484 U.S. 305, 311 (1988) (quoting 20 U.S.C. §§ 1401, 1414(d)).

108. Specifically, the IEP Team must consider "the strengths of the child; the concerns of the parent[] for enhancing the education of [her] child; the results of the . . . most recent evaluation of the child; and the academic developmental, and functional needs of the child." 20 U.S.C. 1414(d)(3)(A). "The adequacy of a given IEP turns on the unique circumstance of the child for whom it was created." *Endrew F.*, 137 S.Ct. at 1001.

109. In *Endrew F.*, the Supreme Court held that while the students protected under the IDEA may have a broad range of disabilities affecting each child's ability to access the general curriculum, the "substantive obligation" of the school district is the same for all students: "a school

must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S.Ct. at 999; *see also M.C. v. Antelope Valley*, 858 F.3d 1189, 1200 (9th Cir. 2017) (finding in *Endrew F.,* the Supreme Court "provided a more precise standard for evaluating whether a school district has complied substantively with the IDEA").

110. The IDEA clearly articulates a presumption that disabled children will not be segregated from their nondisabled peers and will be educated in the least restrictive environment ("LRE"):

> 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 from the regular educational environment 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); *see* 34 C.F.R. § 300.114(a).

111. The IDEA prefers full integration in the regular classroom, *Endrew F.*, 137 S.Ct. at 999, and emphasizes the integral role of supplemental aids and services to allow disabled students to access the regular classroom, 34 CFR § 300.114(a)(2)(ii). Before denying a child access to a general education classroom, the IDEA requires the LEA to meaningfully consider the provision of appropriate supplementary aids and services needed for a disabled child to participate in the least restrictive environment. 34 C.F.R. § 300.117.

3. Fourth Circuit's Three Pronged Test for the Least Restrictive Environment ("LRE")

112. The Fourth Circuit in *DeVries ex rel DeBlaay 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. *DeVries*, 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")).

113. Mainstreaming is not appropriate for every child. *DeVries*, 882 F. 2d at 878. The proper inquiry is whether a proposed placement is appropriate is whether the child's placement is the setting where the child learns. *Id.*; R.F., 919 F.3d at 246.

114. When adopting the *Roncker* standard, the *DeVries* Court, identified three factors that could defeat the presumption of a general education classroom placement: (1) the disabled child would not benefit from mainstreaming; (2) any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services that could not be feasibly provided in the non-segregated setting; or (3) the disabled child is a disruptive force in the non-segregated setting. *DeVries*, 882 F.2d at 876; *see also Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036,

1048 (5th Cir. 1989) (incorporating a modification of the *Roncker* standard). The child "need not master the general-education curriculum for mainstreaming to remain a viable option"; "[r]ather, the appropriate yardstick is whether the child, with appropriate supplemental aids and services, can make progress toward the IEP's goals in the regular education setting." *L.H. v. Hamilton Cnty. Dep't of Educ.*, 900 F.3d 779, 793 (6th Cir. 2018).

115. The LRE requirement "is defined in terms of the extent to which children with disabilities are educated with children who are *not* disabled." *R.F.*, 919 F.3d at 247 (citing *DeVries* at 878)(emphasis in original). The IDEA's presumption of inclusion can only be overcome, and a more restrictive placement considered if the district presents *evidence* that the student made no academic progress and received *no benefit* from the inclusive placement with his nondisabled peers—despite the district's *substantial efforts* to educate the child in an inclusive setting. *See e.g.*, *Hartmann v. Loudoun Cnty. Bd. of Educ.*, 118 F.3d 996, 999-1000 (4th Cir. 1997)(emphasis added).

116. Respondent admitted that it could have educated Q.C. in her regular education classroom with supplemental aids and supports if she had not exhibited behavioral problems.

117. In *Hartmann*, the Fourth Circuit analyzed Loudon County Schools' documented efforts to include Mark, a child with severe behavioral problems, in the general education classroom. *Hartmann*, 118 F.3d at 999-1000. This analysis was essential to the Court's ultimate holding to support the district's decision to remove Mark from his non-disabled peers for academic instruction and only allow him access to his non-disabled peers during lunch, recess, and specials. *Id.* at 1003.

118. Specifically, the Court noted the willingness and enthusiasm of Mark's teachers and the staff to include him in the general education classroom, which was "fully supported by the record." *Id.* at 1005. In addition to the district's attitude towards including Mark, the district provided the Court with "cogent and responsive evidence" of the sincere efforts it made to overcome the IDEA's presumption of inclusion.

119. The district's documented efforts in *Hartmann* were substantial as they: (1) carefully selected Mark's teacher; (2) hired a full-time aide to assist Mark throughout the day; (3) put Mark in a smaller class with more independent children; (4) Mark's teacher read extensively about autism; (5) both Mark's teacher and full-time aide received training in facilitated communication, a special communication technique; (6) the district provided Mark with five hours per week of speech and language therapy with a qualified specialist; (7) a special education teacher was assigned to provide Mark with three hours of instruction a week and to advise Mark's teacher and aide; (8) the Loudoun County Director of Special Education, personally worked with Mark's IEP team; (9) the district provided in-service training on autism and inclusion of disabled children in the regular classroom; (10) Mark's teacher, full-time aide, and other members of the IEP Team, attended a seminar on inclusion held by the Virginia Council for Administrators of Special Education; (11) Mark's IEP team also received assistance from outside educational consultants; (12) Mark's teacher conferred with additional specialists whose names were provided to her by the Hartmanns and the school; (13) Mark's curriculum was continually modified to ensure that it was properly adapted to his needs and abilities; and (14) Mark's teacher met constantly with Mark's

aide, his speech therapist, the IEP team, and others to work on Mark's program--daily at the beginning of the year and at least twice a week throughout. *Id.* at 999–1000, 1005.

120. The Fourth Circuit deemed Mark's severe behavior issues—and the documented significant, but unsuccessful efforts, made by the school district to address them—noteworthy when deciding to uphold the district's decision to place Mark in a segregated setting. *Id.* at 1004.

121. Unlike the school in *Hartmann*, Respondent's staff made some attempts but not meaningful effort to support Q.C. in the regular setting. Respondent never offered to provide Q.C. with a one-on-one aide and refused to provide one when Q.C.'s Parents requested one. No evidence was presented that Respondent provided in-service training to Q.C.'s teachers on how to include students with Down syndrome in the regular education classroom or on positive behavior support for these students. Respondent did not provide Q.C. with any meaningful supplemental aids and services in her regular education classroom. To the contrary, Respondent began removing Q.C. from her nondisabled peers for part of the day before her IEP was even developed and scheduled to go into effect.

122. Other school programs have been able to successfully integrate Q.C. in the regular classroom. Before Q.C.'s enrollment in WS/FCS, her private preschool was able with minimal accommodations to educate Q.C. with her nondisabled peers. After her enrollment, FCDS was also successful in educating Q.C. in the least restrictive environment with her nondisabled peers.

123. After Q.C.'s attendance at Whitaker, the FCDS staff made similar efforts as the school in *Hartmann*, but unlike that school, FCDS was successful. At FCDS: (1) the teachers conferred with Q.C.'s Parents before school started; (2) the school hired a one-on-one aide; (3) Q.C. started on a modified day, then went full day; (4) the teacher researched scholarly articles about how to teach a student with Down syndrome; (5) the school purchased a 50-page educator manual for *Supporting the Student With Down Syndrome in Your Classroom* (Pet. Ex. 40); (6) the teachers collaborated daily; (7) the teachers modified and differentiated Q.C.'s classwork; (8) behavioral strategies were used, such as visual cues, positive reinforcement, sticker chart, and social stories; (9) assistive technology was provided (spring loaded scissors and back support chair); and, (10) appropriate behavior data was kept on the functions of Q.C.'s behaviors rather than just the frequency of them.

124. When considering a child's placement, "the school 'must consider the whole range of supplemental aids and services, including resource rooms and itinerant instruction,' speech and language therapy, special education training for the regular teacher, behavior modification programs, or any other available aids or services appropriate to the child's particular disabilities. The school must also make efforts to modify the regular education program to accommodate a disabled child." *Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1216 (3d Cir. 1993) (citations omitted) (quoting *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 696 (11th Cir. 1991)).

125. Respondent did not give any meaningful consideration as to how to accommodate Q.C. in her regular education setting. When Petitioners requested an FBA, the school-based members of the team agreed that it was necessary but told Petitioners they needed to finalize Q.C.'s

placement first. When Petitioners requested a one-on-one aide, Respondent denied this request outright, by misrepresenting the requirements for a one-on-one aide and explaining to Petitioners that the WS/FCS simply did not have the resources.

126. There was extensive testimony documenting the myriad of ways that Respondent could have attempted to support and serve Q.C. in the regular education classroom prior to removing her to a segregated setting. However, the Undersigned finds any of the attempts Respondent reportedly made were half-hearted at best, as Respondent had already predetermined that Q.C. would be best served in a segregated setting in the Readiness program.

127. Based on the Findings of Fact, stipulations, sworn testimony, and other evidence in the record, the Undersigned concludes that Petitioner has met their burden of proof by a preponderance of the evidence that Respondent substantively denied Q.C. a FAPE and significantly impeded her Parents' meaningful participation in the decision making by predetermining Q.C.'s placement in the separate setting and by not considering appropriate supplemental aids and accommodations which would have allowed her to be educated in the least restrictive environment.

Appropriateness of Private School Placement

128. Petitioners are entitled to reimbursement for their private program only if they are able to show both that the public school system's program denied Q.C. a FAPE and that the private program they chose was appropriate. *School Co. of the Town of Burlington, Mass. v. Dep't of Educ. of the Commonwealth of Mass.*, 471 U.S. 359, 370 (1985).

129. Although a private school's program is not scrutinized under the statutory requirements of FAPE, parents seeking reimbursement still must show that the private program provided an education otherwise proper under the IDEA. *Florence Cty. Sch. Dist. Four v. Carter by and through Carter*, 510 U.S. 7, 12-13 (1993). A private program is proper under the IDEA where it is "reasonably calculated to enable the child to receive educational benefits." *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F. 3d 315, 324 (4th Cir. 2009).

130. Several factors bear on a court's determination as to appropriateness of a private placement under the IDEA, including whether the student progressed behaviorally and/or educationally in the private program. *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 488 (4th Cir. 2011) (private placement deemed appropriate under IDEA where autistic student progressed educationally and behaviorally, was learning more, and was no longer engaging in problematic self-stimulating behaviors that occurred in public school).

131. A private school is not judged by, nor must it attain, state education standards in order to be deemed appropriate. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 7 (1993). For example, a private placement need not provide certified special education teachers or an IEP for the disabled student. *R.E. v. N.Y. City Dep't of Educ.*, 785 F. Supp. 2d 28, 44 (S.D.N.Y. 2011); *see also Jennifer D. as Parent of Travis D. v. N.Y.C. Dep't of Educ.*, 550 F. Supp. 2d 420 (S.D.N.Y. 2008) (holding that parents presented sufficient evidence of appropriateness of the private placement when several witnesses, including a professional working with the student, explained

why the program met the student's educational needs). A parent's placement is deemed appropriate when it meets the standard of being "reasonably calculated to enable [the student] to receive educational benefits." *Frank G. v. Bd. of Educ. of Hyde Park,* 459 F.3d 356, 364 (2nd Cir. 2006)(finding "no one factor is necessarily dispositive" and courts should take a totality of the circumstances approach when assessing appropriateness).

132. Petitioners are not barred from reimbursement when the private school they choose does not meet the IDEA definition of a FAPE. *See* 20 U.S.C. § 1401(9). When an LEA fails to offer a FAPE and parents choose to unilaterally place their child in a private school, parents must seek appropriateness and not perfection.

133. The Parents' private school placement at FCDS was not perfect in that Q.C. was educated with younger peers, but it was appropriate and allowed Q.C. to be educated in the least restrictive environment with, most importantly, nondisabled students.

134. The Undersigned finds FCDS is reasonably calculated to enable Q.C. to receive educational benefits and she has progressed academically and especially behaviorally while at FCDS. At the time of the hearing, Q.C. had made academic and behavioral progress in her time at FCDS. Although she struggled with these skills when she first started at FCDS, Q.C. is now able to participate in small group activities with minimal redirection, transition between activities with few visual cues, sit indefinitely during circle time, stay focused during large group activities, and politely ask for help when she needs it.

Consideration of Equities

135. The IDEA provides various scenarios where a reimbursement claim may be reduced or denied. 34 C.F.R. § 300.148(d). First, "[a]t the most recent IEP team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense." 34 C.F.R. § 300.148(d)(1)(i). Second, "[a]t least ten (10) business days . . . prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph d(1)(i) of this section." 34 C.F.R. § 300.148(d)(1)(ii). Third, where, "prior to the parents' removal of the child from the public school, the public agency informed the parents . . . of its intent to evaluate the child . . . , but the parents did not make the child available for the evaluation." 34 C.F.R. § 148(d)(2). Finally, a reimbursement claim may be reduced or denied "[u]pon a judicial finding of unreasonableness with respect to actions taken by the parents." 34 C.F.R. § 148(d)(3). The IDEA further provides that tuition reimbursement "must not be reduced or denied for failure to provide the notice if . . . [t]he school prevented the parents from providing the notice." 34 C.F.R. § 300.148(d)(1).

136. Here, the Undersigned finds Q.C.'s Parents gave proper notice to Respondent based on the documentary and testamentary evidence presented during the hearing. Respondent did not challenge that Petitioners satisfied the notice requirement prior to placing Q.C. at FCDS.

137. The Undersigned also finds Q.C.'s Parents acted reasonably. Their behavior following the September 2018 IEP Meeting demonstrated an earnest effort to find common ground with Respondent and resolve their disagreement. Q.C.'s Parents sent a letter to the regular education teacher (Ms. Kibler), the Principal (Ms. Creasy), an Exceptional Children's Program Officer (Dr. Fisk-Moody), and the Chief Program Officer of Exceptional Children's Services (Mr. Dempsey) explaining their disagreement with Q.C.'s placement, which Respondent admitted were reasonable. *See* Tr. vol. 7, pp. 1426:23-1427:17 (Testimony of Dr. Fisk-Moody). When they received a letter from Mr. Dempsey informing them Q.C. was reassigned to South Fork, they tried to contact Mr. Dempsey to seek his help in resolving the matter. *See* Tr. vol. 3, pp. 605:23-606:5 (Testimony of K.C.). Although their preference from the beginning was that Q.C. attend Whitaker, Q.C.'s Parents did not reject a placement at South Fork outright. Rather, they took a tour of the school and spoke with the teacher of the Readiness classroom to gather additional information about the proposed program. They also hired an advocate who contacted Principal Creasy prior to the October 1, 2018 meeting in an attempt to find common ground. *See* Tr. vol. 3, p. 611:7-25 (Testimony of K.C.); Pet. Ex. 60.

138. After the inflammatory comments of Principal Creasy at the October 2018 IEP Meeting, Petitioners' actions were understandable. As a general rule parents should not terminate an IEP meeting simply due to disagreements with other IEP team members. However, based on the specific facts in this case, the Undersigned concludes that Q.C.'s Parents acted reasonably.

139. Respondent argued that Parents unreasonably insisted that Q.C. be mainstreamed 100 % with her non-disabled peers and would not consider any pull-out special education services. At that time, Petitioners' desire for 100% inclusion in a kindergarten class was reasonable as evidenced by Q.C.'s success with 100% inclusion at the private schools. Whether 100% inclusion remains reasonable as Q.C. progresses from grade to grade has yet to be determined.

140. In balancing the equities, Respondent's behaviors, including the misrepresentations made to the Parents by Principal Creasy, failing to even consider a one-on-one aide as a supplemental support, failing to disclose to Petitioners the Behavior Data Sheets, and unwillingness throughout the case to consider a lesser restrictive placement, were unreasonable.

Matters Not Before This Tribunal

141. The above-described issues are the only issues before the Undersigned in this contested case and any others that were not specifically and properly pled in the Petition are not before the Undersigned in this case and will have no part in this Final Decision.

Remedies

142. The IDEA confers "'broad discretion' on the court when fashioning an appropriate remedy." *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 325 (4th Cir. 2009) (quoting *Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1996)).

143. "Courts fashioning discretionary equitable relief under the IDEA must consider all relevant factors . . .." *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 16 (1993).

144. The reimbursement provision of the IDEA prescribes that a school district may be required to fund retroactive direct tuition to a private-school obtained by parents for their child if: (1) the district failed to offer a FAPE; and (2) the program obtained by the parent was appropriate. 20 U.S.C. § 1412(a)(10)(C); *Burlington*, 471 U.S. at 374. When an LEA fails to offer a FAPE and parents choose to unilaterally place their child in a private school, parents must seek appropriateness and not perfection. *R.E. v. N.Y.C. Dept. of Educ.*, 785 F. Supp. 2d 28, 44 (S.D.N.Y. 2011), *aff'd*, 694 F.3d 167 (2d Cir. 2012).

145. Based on the Findings of Fact, stipulations, sworn testimony, and other evidence in the record, the Undersigned concludes Forsyth Country Day School is an appropriate placement for Q.C. and the equities favor the reimbursement of tuition, expenses for the one-on-one shadow, and related tuition costs Petitioners incurred for Q.C. to attend FCDS during the 2018-2019 school year. As Respondent objected to transportation reimbursement and Petitioners appeared to have abandoned this claim during their case in chief, transportation costs for the 2018-2019 school are not reimbursable.

146. The Undersigned further orders that FCDS is the "stay-put" placement and that Q.C. be placed at FCDS until Respondent is able to complete the training ordered below and hire the appropriate staff to implement the remedy outlined below when Q.C.'s returns to receive instruction in the Winston-Salem/Forsyth County Schools. Respondent is to pay for tuition, one-on-one shadow expenses, and related expenses as well as Petitioners' transportation costs as incurred while FCDS is the stay-put placement. While Q.C. remains at FCDS, Respondent shall pay for twelve 30-minute speech language therapy sessions for the equivalent of each a nine-week reporting period during the 2019-2020 school year she remains at FCDS.

147. The Undersigned further orders reimbursement in the amount of $980.00 (14 sessions) to the Petitioners for the expense of private speech therapy services provided by the Parent's private speech pathologist from May 22, 2018 through the end of the 2017-2018 school year, excluding ESY, and for private speech services rendered during the 2018-2019 school year from August 29, 2018 to December 19, 2018. Because Respondent objected and Petitioners abandoned transportation reimbursement for the private speech therapy sessions, transportation expenses are not reimbursable for this period.

148. Petitioners are also entitled to compensatory speech therapy related services for the remainder of the 2018-2019 school year in the amount of 37 sessions. Respondent may elect to provide these services or reimburse Petitioners for 37 private speech therapy sessions in the amount of $2,590.00. *See* FoF ¶ 384.

BASED ON THE FOREGOING, the Undersigned hereby finds proper authoritative support of the Conclusions of Law noted above, and the Undersigned hereby **ORDERS**:

FINAL DECISION

BASED upon the foregoing **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Petitioners met their burden of proof, by a preponderance of the evidence showing:

1. Respondent failed to comply with the procedural and substantive requirements of the IDEA resulting in a denial of FAPE to Q.C. and a denial of meaningful participation in the IEP process to Q.C.'s Parents.

2. Respondent failed to complete timely evaluations of Q.C. to determine Q.C.'s IDEA eligibility such that an IEP could not be developed before the 2018-2019 school year resulting in a denial of FAPE to Q.C.

3. At both the September and October 2018 IEPs, Respondent predetermined Q.C.'s placement in the separate setting which was an inappropriate placement resulting in a denial of meaningful participation in the IEP process to Q.C.'s Parents and a denial of FAPE for Q.C. to be educated in the least restrictive environment.

4. Respondent failed to develop an appropriate IEP for Q.C. at the September 11, 2018 IEP meeting.

5. Respondent extensively revised Q.C.'s IEP on October 1, 2018, without telling Q.C.'s Parents that the IEP meeting was going to continue even if they left the meeting. The Undersigned considered the changes made to this IEP in this contested case, however, the Petitioners were not advised that the IEP Meeting would continue in their absence and were not given an opportunity to participate in the development of this IEP. Moreover, a required member of the IEP Team left the meaning before the development of the goals. A new IEP meeting needs to be held with the Petitioners, school-based IEP Team members, and school psychologist in attendance before Q.C. attends WS/FCS. Even if the revised goals in the October 2018 IEP were appropriate, the placement remained in the separate setting and denied Q.C. a FAPE in the least restrictive environment.

6. Forsyth Country Day School is a placement reasonably calculated to provide educational benefit to Q.C. that supports an award of reimbursement of tuition and the expense for the one-on-one shadow.

7. Until Q.C. transitions back to WS/FCS no later than December 31, 2019, FCDS shall be her "stay-put" placement and Respondent shall pay for the tuition, expense of the one-on-one aide, other tuition related expenses, speech/language therapy, and round-trip daily transportation costs.

8. Petitioners have a right to reimbursement for the private speech therapy services provided to Q.C. from May 22, 2018 through December 19, 2018, excluding private speech therapy during the ESY period and transportation expenses.

9. Petitioners are also entitled to 37 compensatory speech therapy and related transportation expenses, if applicable, for the remainder of the 2018-2019 school year which can be provided by Respondent's speech pathologist or by reimbursement of the private speech services previously paid by Petitioners but not otherwise awarded in this Final Decision.

IT IS HEREBY ORDERED THAT:

1. Respondent shall reimburse Petitioners these expenses incurred as a result of the Respondent's failure to meet the requirements of the IDEA, including tuition expenses at Forsyth Country Day School for the 2018-2019, the cost of Q.C.'s shadow, and the cost of private speech therapy services provided by Ms. Sizemore from May 22, 2018 through December 19, 2018, excluding ESY. For this period, transportation costs are not included as reimbursable expenses.

2. Until the Transition Plan outlined in Paragraph 3, Forsyth Country Day School is Q.C.'s stay-put placement and she shall be placed there at public expense for the 2019-2020 school year for the period of time necessary for the transition to be completed which is anticipated to be no later than December 31, 2019. Respondent shall pay Q.C.'s tuition expenses including the cost of Q.C.'s one-on-one aide, speech therapy services, and transportation expenses while Q.C. remains at Forsyth Country Day School.

3. To transition Q.C. back to Winston-Salem/Forsyth County Schools, Respondent shall contract with a mutually agreeable inclusion specialist, at public expense, to review Q.C.'s records, observe Q.C. in the classroom, conduct teacher/staff/service provider/parents interviews, and make recommendations for supplemental aids/services, the training of staff, the implementation and progress monitoring with data collection, and the supervision of 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 Respondent shall have equal access to inclusion specialist, and the inclusion specialist shall communicate openly with both Respondent and the Parents as equal participants.

4. Upon Q.C.'s return to receive services in the Winston-Salem/Forsyth County Schools, her Parents will have the same school choice options, including Whitaker Elementary School, for school assignment back into the Winston-Salem/Forsyth County School system.

5. No later than December 31, 2019, Respondent shall convene an IEP meeting and invite Q.C.'s current teacher and Shadow to participate in the meeting. The inclusion specialist identified in Paragraph 3 shall be invited to attend the meeting. 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, Q.C.'s educational and social benefits as well as determine her rate of progress and the appropriateness of her placement.

6. Within forty-five days of Q.C.'s attendance in a WS/FCS school, Respondent shall contract with mutually agreeable Board Certified Behavior Analysis ("BCBA"), at public expense, to conduct a Functional Behavior Assessment ("FBA") and supervise the collection of data for the FBA. The Parties shall revise the IEP by adding behavior goals or a Behavior Intervention Plan ("BIP") after completion of the FBA. The Parties may also revise the IEP by mutual agreement during this one year period. Both the inclusion specialist and the BCBA shall attend a second IEP meeting to assist in the development of a BIP and/or behavioral goals.

7. Petitioners are the prevailing party and are entitled to attorneys' fees.

NOTICE OF APPEAL RIGHTS

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. §§ 115C-106.1 et seq.) and particularly N.C.G.S. §§ 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may **appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board** under G.S. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section."

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

IT IS SO ORDERED.

This the 23rd day of August, 2019.

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:

Teresa Silver King
NC Department of Public Instruction
due_process@dpi.nc.gov
Affiliated Agency

Stacey M Gahagan
Gahagan Paradis, PLLC
sgahagan@ncgplaw.com
Andrew Corey Frost
cfrost@ncgplaw.com
Attorney for Petitioner

Attorney for Petitioner

Maura K O'Keefe
Tharrington Smith, LLP
mokeefe@tharringtonsmith.com
David B. Noland
dnoland@tharringtonsmith.com
Attorney for Respondent

This the 23rd day of August, 2019.

Anita M Wright
Paralegal
Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6700
Telephone: 919-431-3000