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STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF FORSYTH	03 EDC 1637
PARENTS on behalf of their son, **Student** as well as on their own behalf Petitioners, v. **Winston-Salem/Forsyth County Board of Education, a/k/a/ Forsyth County Public Schools,** Respondent.	REDACTED **DECISION**

This contested case was heard before the Honorable Administrative Law Judge James L. Conner, II, on May 10, 2004, at the Stokes County Governmental Center, Danbury, North Carolina; May 11-13, 24-25, June 15, November 3-5, 29-30, 2004 at the Worrell Professional Center, Wake Forest School of Law. Winston-Salem, North Carolina. Petitioner filed Proposed Findings of Fact and Conclusions of Law on February 15, 2005 and Respondent filed its Proposed Findings of Fact and Conclusions of Law on February 18, 2005. On February 15, 2005, Petitioner also filed its Notice of Withdrawal of Petitioner's Independent Educational Evaluation Claim. On April 7, 2005, Respondent filed its Motion Requesting Court Take Judicial Notice and to Strike Testimony. This court entered a responsive Order on April 8, 2005, and on May 5, 2005, both parties filed their Responses. The record was then closed.

APPEARANCES

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An Order on Final Prehearing Conference was filed by the parties with the undersigned on February 10, 2005 and filed *nunc pro tunc* February 11, 2005. Pursuant to that order, Petitioners contend the contested issues are:

1.Whether or not school predetermined that Student did not qualify for ABA services to be provided by Respondent even though they knew or should have known he was autistic and currently receiving private ABA services, thus entitling Petitioners to reimbursement for their privately provided ABA services?

2.Whether Respondent otherwise denied Student a Free Appropriate Public Education ("FAPE.") and therefore entitled Petitioners to reimbursement for privately funded services?

and the Respondent contends that the contested issues are:

1.Whether the Petitioners' failure or refusal for a period of ten months to consent to the additional observations, assessments and evaluations of Student as agreed by the IEP Committee on May 29, 2003 under the provisions of 20 U. S. C. § 1414 (c)(1)(B) is grounds for the denial of the Petitioner's demand for reimbursement of private ABA services?

2.Whether despite the Petitioners' failure or refusal to allow the additional observations, assessments and evaluations referred to above and their refusal to provide any data or information about Student's then current level of performance at the July 31, 2003 IEP Committee Meeting, the IEP approved by the IEP Committee and placement proposed by the IEP Committee on May 31, 2003 were reasonably calculated to provide Student with a free appropriate public education as required by the IDEA, 20 USC § 1400 et. Seq.; Article 9 of Chapter 115C of the NCGS; and The North Carolina Procedures Governing Programs and Services for Children with Disabilities?

3.Whether an intensive home-based Applied Behavior Analysis (ABA) program versus a school-based pre-school program for students with disabilities is the least restrictive appropriate setting for the provision of FAPE to Student?

4.Whether the Office of Administrative Hearings or the local education agency has the authority under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et. seq., and North Carolina Law, N. C. G. S. 115C-106 et. seq.

to determine the appropriate method to achieve the short term and long term goals set forth in a student with disabilities' IEP?

The following witnesses were called to testify by Petitioners:

Not Adverse

Dr. K	Expert in areas of Autism, medical and educational interventions for autism, developmental disabilities and therapeutic treatment of those disabilities
Dr. E, Ph.D.	Expert in the area of developmental disabilities, autism, applied behavior analysis, and education interventions for autism.
Dr. B	Expert in the areas of clinical psychology, Developmental Disabilities and Educational Interventions for Autism
Ms. F	Expert in the area of Speech Language Pathology
Ms. J	Student's Senior Consultant in his home ABA program
Ms. D	Student's consultant-in-training in his home ABA program
Father	Student's Mother
Mother	Student's father
Student	Appeared by video tape

Adverse or Hostile Witnesses

Ms. M	Exceptional Children's Program Specialist, WS/FCS, LEA Representative on IEP Committee.
Ms. R	Staff psychologist, WS/FCS, Member of IEP Committee
Ms. S	Pre-school Speech Pathologist, Member of IEP Committee
Dr. M, Ph. D.	Behavioral Specialist, WS/FCS

The following witnesses were called to testify by Respondent:

SD	Director Exceptional Children's Programs, WS/FCS
Ms. M	Exceptional Children's Program Specialist, WS/FCS, LEA Representative on IEP Committee.
Ms. R	Staff psychologist, WS/FCS, Member of IEP Committee
Ms. S	Pre-school Speech Pathologist, Member of IEP Committee
Dr. M, Ph. D.	Behavioral Specialist, WS/FCS,
Dr. S	Teacher, Pre-school class, ** Elementary
Dr. P	Director of TEACCH, Greensboro
Dr. V	Clinical psychologist

A multitude of exhibits were received into evidence by both parties consisting of: data log books, summary of those log books, Individual Education Programs ("IEPs") and related documents, evaluation data and reports, graphs, articles from trade journals, audio tapes and video tapes.

This Administrative Law Judge, having heard the testimony and received and admitted the evidence of the parties, and upon the greater weight of the evidence, hereby makes the following Findings of Fact and Conclusions of Law. In this decision, endnotes are used to reference the transcripts and footnotes are used to reference anything else.

SUMMARY OF THE CASE

The evidence established that Student was diagnosed as suffering from autism on February 13, 2003 by Dr. K. of Wake Forest University School of Medicine. Counsel for Respondent conceded that Dr. K. is among the most preeminent experts on autism in North Carolina. Shortly after obtaining that diagnosis, Student's family contacted the Respondent, Winston-Salem/Forsyth County Board of Education[i], seeking services for Student. As the referral and evaluation process was taking place, Student's family started a privately funded at home Applied Behavioral Analysis ("ABA") program. By the account of all witnesses, Student made exceptional progress in that home ABA program. Student's parents sought to have him enrolled in the school's ABA program. FCS rejected the parents' requests, gave him an identifying classification that disqualified him from being considered for the School's ABA program and completed IEPs that placed Student in one of its self-contained classes for pre-school children with disabilities.

To its credit, Respondent is one of very few districts in the state that support ABA and home-based programs.[1] Therefore, unlike many cases where the dispute is over the family seeking a program that is not offered by the school district, the dispute in this case is the result of the family seeking to have Student enrolled in the School District's existing ABA program and the School District contending that is not an appropriate program for Student. ABA as an educational intervention program for young children with autism is based on a thorough scientific and peer reviewed study.[ii] Thus, it complies with the best practices criteria of the IDEA.

Because the decision to bar Student from Respondent's ABA program was predetermined for the reasons noted in this decision, and but for the fact that Student's parents were able to provide him privately funded ABA services, it would have resulted in the loss of significant educational opportunity. This procedural violation alone was sufficient to support a decision in favor of Petitioners. In addition, for the reasons noted herein, Petitioners also carried their burden on substantive grounds.

Respondent's contentions for refusing to allow Student into its ABA program evolved as the case developed. Respondent's staff acknowledged the exceptional progress Student made in his ABA program from its inception to the first IEP meeting. However, after the Petitioners filed for due process, Respondent then shifted to contend Student's ABA program was ineffective or even detrimental. This is contrary to the bulk

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[i] Herein referred to as "Forsyth County Schools", the "School District," the "School" or "FCS".

[ii] Pet. Exs. 19, 20, 21, 25, 26.

of the objective evaluations and reports issued for Student. Because this determination is based in part on the credibility of the witnesses and their testimony, it was necessary to reference the credibility or lack thereof of the witnesses.

By failing to enroll Student in its ABA program, Respondent left Petitioners little or no choice but to locate a private provider to provide comparable services. Petitioners did this and are entitled to recover reimbursement for having to fund Student's special education services, which Respondent could have, but refused to provide.

For the reasons noted below, I find and conclude that Petitioners carried the burden of proving the procedural errors in the process of developing Student's IEPs as noted herein were material and resulted in his loss of educational opportunity. Therefore, Student was denied a Free Appropriate Public Education ("FAPE"). Student's home ABA program was and continues to be an appropriate educational program. The identifying classification chosen by Respondent for Student, Developmentally Delayed ("DD") rather than Autistic ("AU"), was inappropriate and factored into his loss of educational opportunity. The program and placement proposed by FCS in its IEPs was and is inappropriate for Student. The Petitioners are therefore entitled to receive reimbursement (from Respondent) for privately funding Student's ABA program through the date of this decision.

ORDER ON MOTION REQUESTING COURT TAKE JUDICIAL NOTICE and to STRIKE TESTIMONY

The court takes official notice of the March 3, 2005 letter of the North Carolina Psychology Board. The motion to strike testimony is DENIED. The findings and concerns of the Board have been taken into account in the Findings of Fact that follow and in the weight accorded the testimony of affected witnesses.

FINDINGS OF FACT

1. Student was born ***, 2000. Because he is a minor, his name and that of his parents are not being used in this publicly available decision.

2. Student was evaluated on February 13, 2003 by Dr. K. and diagnosed with autism.

3. On or about March 5, 2003[iii] Mother contacted the FCS to obtain services for Student through the development of a preschool IEP.

4. On April 14, 2003, Student began an ABA program through ABC of North Carolina, which was privately funded by his parents.

5. Dr. M, Ph.D. was employed by ABC of NC and supervised the ABA program provided to Student from April 2003 through June 2003.

[iii] Pet. Ex 1 p. 17.

6. FCS scheduled an evaluation of Student for May 8, 2003. Ms. R , a school psychologist, took the lead in evaluating Student. Several testing measures were administered to Student. Mother did not refuse any testing measure.

7. School staff prepared a draft IEP on May 8, during and immediately after the evaluative testing. Staff convened an IEP meeting at that time. The mother had not realized this would happen. In addition to Ms. R and the mother, Ms. S and Ms. M of FCS were present.

8. Staff determined during this May 8 meeting that Student was eligible for special education services and classified his area of exceptionality as Developmentally Delayed with Speech/Language as a related service.

9. When she realized that this session was intended to be an IEP meeting, where important decisions would be made about Student's classification and education, Mother asked that the meeting be rescheduled to allow Student'S Father, her husband and Student's father, to attend.

10. However, school staff did convince Mother to sign the PK-DEC 3/Prior Notice Form before leaving. This form confirmed Student's eligibility for special education services and his classification as Developmentally Delayed. Ms. R explained to Mother that Developmentally Delayed (DD) was less stigmatizing as a label than Autistic (AU), and could always be changed.

11. FCS staff observed Student in his home ABA program on May 13, 2003. The IEP team meeting was rescheduled for May 29, 2003.

12. The IEP Team meeting was held on May 29, 2003. Although FCS had a copy of Dr. K.'s report, the School's team members refused to identify Student as autistic without additional evaluations.

13. At the subsequent IEP Team meeting held on July 31, 2003, FCS refused to identify Student as autistic and refused to enroll him in the FCS ABA program.

FCS Criteria for ABA placement

14. In response to Mother's questions about the procedures for ABA home placement publicly funded by FCS, Ms. S faxed her the FCS ABA criteria on July 2, 2003 (hereinafter referred to as "ABA Criteria"). (Pet. Ex. 15.)

15. The ABA criteria contained the following eight-step Process of Determination:

> 1.Parent Request.
>
> 2.Whoever gets request for ABA services needs to contact the Exceptional Children's Director, Preschool Coordinator, Exceptional Children's Finance Manager and designated Program Specialist.

3. Child comes into intake for multi-disciplinary evaluation

A. Review information on child before meeting/other components of district criteria addressed.

B. All information reviewed prior to initial meeting.

C. Review with district administration and/or school attorney.

4. Compare child's information with District's ABA criteria.

5. **Contract approval before meeting** (estimate number of hours for contract)

A. Draft Contract

6. Hold IEP meeting with the minimum of the following people from the district in attendance

Program Specialist/LEA Representative
Preschool Coordinator
Autistic Itinerant Teacher

7. Service delivery must include a three-month trial period of ABA services with ongoing documentation of progress and review of where they are in the ABA curriculum. Itinerant service from a Preschool EC teacher is required for any child receiving ABA services in our school system.

8. After three months hold IEP meeting including the same staff at the initial IEP meeting. During this meeting review child's progress and develop IEP.

(Pet. Ex. 15, p. 1 emphasis added.)

16. In FCS's ABA Criteria, it states that "**home-based ABA services are a small part of the full continuum of services available for children with autism in this system**." (Pet. Ex. 15, p. 2 emphasis added). This statement shows that FCS does consider home-based ABA a placement available for children with autism.

17. The ABA Criteria advises parents that not every child is eligible for full funding of intensive home-based ABA services and that the IEP Team determines the amount and type of services a child needs to meet his or her IEP goals. *Id.*

18. The criteria for eligibility for intensive home-based services are child-based and family/home based. The child-based criteria are:

Chronological age- 3rd birthday to 4th birthday
Documented severity of disability (CARS and GARS scores, **AU label is required**)
Evidence that little progress has been made in a less restrictive environment
Cognitive ability (support for the probability of at least average intellectual ability)
Social interaction skills (extremely limited)
Linguistic functioning level (severely disordered)
Severely limited generalization skills
Child receives comprehensive evaluation with all appropriate discipline annually.

(Pet. Ex. 15, p. 2 emphasis added)

The "Family/Home Criteria" are:

Parental willingness and ability to participate successfully in training and cooperate with School District and contract personnel
Home visits and evaluation by WS/FC school staff
Parent Visit. Observation to designated preschool and home based program
If seizures are suspected, medical evaluation from physician is needed.

(Pet. Ex. 15, p. 2.)

If the IEP Team placed a student in the FCS home-based ABA setting, the IEP Team may approve from 3 hours to 40 hours per week of intensive services and 10 hours of consultation a month. (Pet. Ex. 15, p. 3.)

19. Examples were given in the ABA Criteria for various program options. For example, a child's program might be a gradual increase in ABA in-home services to a maximum determined productive for the child, then a gradual and systematic reduction of ABA in-home services with a parallel increase in supported classroom services; and finally a fading of classroom support as the child succeeds independently. (Pet. Ex. 15, p. 3.)

20. A "successful program" according to the ABA Criteria would "show documented growth and a gradual transition from in-home services to fully classroom –based model by age five." *Id.*

21. Though Extended School Year (ESY) is not automatically granted to a child receiving ABA services; it is "more likely that a child in the first year of the ABA program will receive year-round therapy." (Pet. Ex. 15, p. 3.)

Mother's Testimony

22. Mother is the mother of Student and resides with her family in Forsyth County.

23. Mother testified that after Student was diagnosed with autism by Dr. K, she contacted Dr. M, Ph.D., about ABA services and also contacted the school system to find out when they could start getting help from FCS.[2]

24. Student started ABA services with ABC of NC on April 14, 2003.

25. Ms. Sfrom FCS called on March 5, 2003 and competed the DEC 1/Prior Notice EC Referral Form over the phone with Mother.[3]

26. Mother reviewed the form completed by Ms. Stevens and reworked it because Ms. Stevens had left "a lot of stuff" out from their phone conversation.[4]

27. Mother attended the evaluations on May 8, 2003 and described the evaluation process and Student's behavior. During the evaluation, Student hit Ms. R .[5] Mother also observed "overprompting" by Ms. R during the test administration and what Ms. R marked on the test as vertical and horizontal lines actually completed by Student were squiggles, not lines at all.[6]

28. After the evaluations were completed on May 8, 2003, Mother was told that the FCS staff were ready to develop the IEP.[7]

29. FCS staff explained to Mother that ninety (90%) of the parents have an IEP meeting immediately after the evaluations are completed.[8]

30. When Mother asked them to reschedule the IEP meeting so that her husband could attend, they said that we didn't have to do the IEP but let's talk about how we're going to label him.[9]

31. The school staff asked Mother if they wanted to call him developmentally delayed or autistic and encouraged Mother to choose the DD label even though Mother had told them he was autistic, and they had Dr. K's report and Student's records.[10]

32. Ms. R assured Mother that "the next time when we meet, if you want to change the DD to AU, which is autistic, we can do that," but she didn't tell Mother that there would be significant impediments to getting it changed.[11]

33. Moreover, Mother testified that the FCS staff didn't tell her, she had never seen anything written, nor did she know that she had to ask for ABA services for ABA placement to be considered as an option by the IEP team.[12]

34. Because she did not know that she had to specifically ask for ABA services, she did not, but Mother did ask "is there a school for autistic children in Winston-Salem or Forsyth County or, you know, what is all- what are all the options?"[13]

35. FCS staff advised Mother that she could change the DD label the next time they met if she wanted.[14]

36. Mother was not aware that with the DD label Student would not qualify for ABA placement.[15]

37. FCS staff did not ask for any additional evaluations or observations prior to scheduling the next IEP meeting.[16]

38. During a phone call from Ms. S to schedule the next IEP meeting, Mother asked about ABA services and was told that "[i]f you want ABA, we have to see him again. We have to observe him again." [17]

39. FCS was alerted to the fact that the Petitioners wanted ABA during Mother's phone conversation with Ms. Sin which she stated that "we want to do ABA."[18]

40. At the previous May 8, 2003 IEP meeting FCS had Ms. R , school psychologist, Ms S, speech-language therapist, and Ms. M, teacher, doing the IEP.[19] However, on May 13, 2003, they sent a different group—from the central office—Ms. S, Ms. M and Ms. A, speech pathologist, to observe.[20]

41. At the May 29, 2003 IEP meeting, FCS did not agree that Student was autistic.[21]

42. After the May 29th IEP meeting, the parents asked what did they have to do to get ABA placement. In response, Ms. S faxed them the FCS Criteria for ABA on July 2, 2003.[22]

43. At the subsequent July 31, 2003 IEP meeting, the IEP Team refused to change Student's eligibility to AU as evidenced by the DEC 4(1 of 4) of the July 31, 2003 IEP.[23] (Pet. Ex. 1.)

Student'S Father Testimony

44. Student'S Father did not attend the May 8, 2003 IEP meeting because they were not provided notice that an IEP meeting would follow the evaluations, and because he felt his presence during the evaluations might be problematic.[24]

45. When Student'S Father discussed with Dr. M the rejection of the request for ABA services by the School District's IEP team, Student'S Father noted Dr. M 's exasperation at that time with the denial of the services.[25] Dr. M did not controvert his testimony in this regard.

46. Student'S Father's perspective on the School's approach in this matter was supported by the evidence:

> See, what has been very frustrating for me in this process, we're in an endless Catch-22. If he does anything really well, it's because of some innate ability. It's not because of the wonderful things of the ABA program. And you know what? If he has done those wonderful things, he's so high-functioning. He may not even be autistic. Maybe he's Asperger's. He can handle the classroom. But, on the other hand, if there is anything that we point out is a flaw, he bangs his head, he hits others. "Ah. You know, that ABA program you're in, that's not good. It's not working. You should be in one of our classrooms. It's a weak program." They've got it set up - it's beautiful for the school system because they've got it set up, whatever we do, our child cannot win. That's not fair. That is not right. I feel it's repugnant.[26]

47. He recalled how at the May 29, 2003 IEP meeting, Ms. S told the PARENTs she didn't want to see Student's bad behaviors[27] and at the request of the ALJ located that discussion in the transcript for that IEP meeting.[28] [iv] Those "bad behaviors" would have weighed in favor of providing the ABA services.

48. The school members of the IEP team understood the AU label was a strict criteria that disqualified Student from receiving ABA services. None of them would acknowledge that classification at the July 31, 2003 IEP meeting and Ms. R even responded "I plead the fifth."[29]

49. Student'S Father also testified about the 52 page document on IDEA Part B he reviewed at Respondent's administrative offices after seeing a notice in the newspaper. The document had extensive statistical data and Student'S Father testified regarding that. He also noted there were only three pre-school children listed as autistic and one hundred seventy five as developmentally delayed.[30] However, after the children had aged out of the ABA 3-5 year old age criteria, the report showed that the children with autism jumped to forty nine and the children classified as developmentally delayed dropped to eleven.[31] Though witnesses for Respondent offered an alternative explanation for these statistics, this data generated from Respondent's records does support Petitioners' contention that Respondent failed to label children as autistic in an effort to disqualify them from meeting that criterion for qualifying for its ABA program.

Dr. K

50. Dr. K testified on behalf of the Petitioners. He received his undergraduate degree in chemistry from the University of Florida and his medical degree from the University of Florida in 1980. He completed a pediatric residency at Children's Hospital in Cincinnati and did a developmental disabilities fellowship at the Cincinnati Center for

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[iv] Pet. Ex. 3 p. 8, L. 2.

Developmental Disabilities. He has been employed at Wake Forest University School of Medicine since 1985 as an associate professor of pediatrics.[32] (Pet. Ex. 32.)

51. Dr. K was qualified, without objection, as an expert in autism, medical and educational interventions for autism, and developmental disabilities, and therapeutic treatment thereof. [33]

52. With regard to the "medical" versus "educational" treatment of autism, Dr. K said he considered ABA to be kind of an educational/behavioral type intervention.[34] This directly contradicted Dr. M 's assertion that ABA is a clinical, not educational intervention. This court finds Dr. K's testimony the more learned and the more credible on this point.

53. When asked what the ultimate goal of special education was, Dr. K replied that "special education is part of the process that gets children to adulthood at their highest function level. Their greatest independence level."[35]

54. Student was referred to Dr. K by his pediatrician in late 2002 and Dr. K met with Student and his parents in February 2003 for an initial assessment. The issue at the time was that his development was delayed, his language was atypical, and his behaviors and social development was unusual, and the request was to do a diagnostic assessment and to recommend treatment approaches.[36]

55. Children are diagnosed with autism based on three different categories of functionality according to Dr. K. He described them as social development, atypical language, and behavioral disturbance.[37]

56. Dr. K uses the checklist system found in the Diagnostic and Statistical Manual, Fourth Edition (DSM-IV) to diagnose a child with autism.[38] (Pet. Ex. 8.)

57. Pet. Ex. 12.1 is a summary of Dr. K's evaluation and report to the referring physician regarding Student's office visit of 2/13/03 in which Dr. K diagnosed Student with autism.[39]

58. The evaluation progress was described by Dr. K: he observed Student for two hours; met with the parents; both he and the parents completed a Childhood Autism Rating Scale (CARS).[40]

59. Dr. K was also asked to review FCS's criteria for determining eligibility for intensive home-based ABA services.[41]

60. According to Dr. K, ABA's philosophy is that there is no distinction as far as only severely autistic children are eligible or appropriate for ABA.[42] (Pet. Ex. 15)

61. Moreover, according to Dr. K the FCS criteria that requires "at least average intellectual ability" would arbitrarily and severely limit the pool of children that would be

eligible based on this criteria because it is difficult to tap into the intellectual capacity of autistic children since they have severe language disorder.[43]

62. When asked if Student should be identified as DD or AU, Dr. K opined that it was "more appropriate for the IEP Team to understand that autism is his primary diagnosis than call him DD."[44]

63. Dr. K disagreed with Ms. R 's statement that DD & AU were synonymous and further opined that very different instructional approaches are used for children who have autism vs. DD.[45]

64. In his expert opinion, Dr. K testified that it was "not appropriate to discontinue Student's ABA program based on his progress and switch to a school self-contained EC classroom with 6-12 children suffering from a variety of disabilities."[46]

65. With respect to the Least Restrictive Environment, Dr. K said that the "ultimate goal of ABA is to get that child in the regular education environment"[47] but that a transition period would be required between discontinuing the ABA program and starting a different program.[48]

66. In response to the ALJ's questions about when would it be appropriate to move Student from a home based ABA program to a classroom setting, Dr. K replied that he thought that "ABA has been successful for Student. I don't see any compelling reason to change the basic treatment approach that's being used to encourage his success. I would say, though, that ABA needs to evolve from being a home-based modality to something that's community-based, and ultimately the outcome is to get him in a classroom situation and to be competent in that situation. There are ways to introduce ABA into classroom situations."[49]

67. Dr. K's testimony was highly credible and compelling.

Dr. E, Ph.D.

68. Dr. E, Ph.D. testified on behalf of the Petitioners and was qualified, without objection, as an expert in the fields of Developmental Delays, autism, ABA, and educational interventions for autism.[50]

69. Dr. E received his BA in Experimental Psychology from the University of California in 1974, his Master's in Educational Psychology in 1976, and his Ph.D. in Educational Psychology in 1979. Since 1979, he has been employed as faculty for the University of ** in the areas of severe disabilities and provides teacher training and research in the areas of educating children and youth with autism. Dr. E has published extensively on this topic as evidenced by his CV.[51] (Pet. Ex. 30)

70. Dr. E came to know Student two weeks before his testimony on May 12, 2004 through: observing Student in his home ABA program; observing the proposed classroom

in the public schools; reviewing logs of Student's behaviors before and after starting ABA; reviewing reports by both school staff and medical personnel; reviewing therapy logs; and talking to parents, FCS's EC teacher, and therapists.[52]

71. Dr. E criticized the FCS's criteria for ABA home placement because the very severe autism criterion and average intelligence criterion were "almost in direct contradiction to each other."[53]

72. Despite his extensive background in autism, Dr. E testified that he has "not yet in all my years met a student who would meet those criteria and have at least average intellectual functions."[54]

73. Dr. E was asked his opinion about the appropriateness of the July 31, 2003 IEP. Dr. E stated that the DD label was not appropriate; that the statement Student "does not have behaviors which impede his education or the education of others" was incorrect; that the benchmarks or short-term objectives were not appropriate based on the mastery levels.[55]

74. Dr. E actually observed Dr. S 's classroom and in his expert opinion, that classroom would not have allowed for sufficient drill and rehearsal, and Student would have made substantially less progress than in his ABA program, and his behavior would have had a tremendous effect on the other students."[56]

75. Moreover, Dr. S 's classroom was not appropriate whether consisting of one student or twelve students because of the way the program was designed, and it was for only one-half day.[57]

76. ABA programs like Student's are generally done year round in Dr. E's experience because regression is almost guaranteed if the program is discontinued during the summer months.[58]

77. With autistic children the "area of social interaction is always severely disordered – always" according to Dr. E.[59]

78. When asked by the ALJ about the appropriateness of putting academic skills on hold to deal with behaviors, Dr. E replied that although academic skills were put on hold to work on behaviors in Student"s ABA program, more advanced academic skills were revisited in August/September 2003.[60]

79. Dr. E's testimony was credible and compelling.

Ms. F, Speech Language Pathologist

80. Ms. F is a speech/language pathologist in private practice who testified on behalf of the Petitioners. Ms. F evaluated Student in February 2003 when he was 34 months old.[61] (Pet. Ex. 12.2)

81. Ms. F evaluated Student using the Rosetti Infant-Toddler Language scales and determined that Student functioned on a 9-12 month level in language.[62] Moreover, according to the Goldman-Fristoe Test, Student was "echolalic" which means he repeated words but had no independent spontaneous speech.[63]

82. Student had moderate to severe language deficits with severe delays in both expressive and receptive language.[64]

83. Ms. F recommended speech therapy 2 times a week for 30 minute sessions, and provided that therapy at the parents' expense.[65]

84. Ms. F's testimony corroborated the tutors and other Petitioners' witnesses who testified about Student's behavior problems. According to Ms. F, during the one-on-one therapy sessions, Student's behaviors were problematic; he threw things and hit her.[66]

85. Ms. F faxed her speech-language evaluation to Ms. S, the Intake Coordinator for FCS.[67] (Pet. Ex 12.6)

86. To determine Student's progress in language, Ms. F reevaluated him in February 2004 using the Preschool Language Scale.[68]

87. Student's expressive communication had significantly progressed from a 12-15 month level to a 2 year, 6 month level and his auditory comprehension was at a 2.3 year level according to his reevaluation.[69]

88. The proposed speech goal for his July 31, 2003 IEP was 30 minute sessions of speech three times a week to reach a 30 month level in expressive language. By February 2004, Ms. F's therapy exceeded that goal even though she provided speech and language services in 30 minute sessions only twice per week.[70] (Pet. Ex. 1, DEC 4, 2 of 4)

Ms. D

89. Ms. D was employed by ABC of NC to provide ABA services to Student and had been formerly trained and supervised by Dr. M from November 2002 to June 2003.[71]

90. Ms. D described Student's ABA program as 30-40 hours of therapy a week.[72]

91. With respect to Student's inappropriate behavior, which required time-out as an intervention, there has been a long but steady decline in Student's timeout frequencies.[73] In addition, his inappropriate behaviors have decreased per month and have continued to decrease through the use of the time out intervention.[74]

92. She testified that although Student's behavior had shown significant improvement according to her aggressive behavior graph, he still had 375 incidents in September 2003,

450 incidents in October 2003, and 140-145 incidents in February 2004.[75] (See Pet. Ex. 18, p. 2)

93. I find Ms. Donovan's testimony to be credible, supported by the data and evidence received and corroborated by other credible witnesses' testimony.

Ms. R , School Psychologist

94. Ms. R testified as an adverse witness for the Petitioners and was recalled by the Respondent in its case-in-chief.

95. Ms. R has been a school psychologist for fifteen (15) years with a specialist degree, taught special education for eight (8) years, has a master's degree in special and elementary education.[76]

96. As a school psychologist with FCS, her job is to test elementary and preschool students.[77]

97. When deciding whether to identify a child as either autistic or developmentally delayed, she prefers to label them with the DD rather AU because it is a broader definition even if they have been diagnosed as autistic.[78]

98. For preschool age children, she conducts her evaluations the same day that the IEP Team meets to develop the IEP, but her evaluation report is completed later and is not available at the time of the IEP Team meeting for the parent to review.[79]

99. Ms. R admitted that FCS does have a home-based ABA program and that autistic students receive ABA services on average for 3 years.[80]

100. Ms. R also admitted that she had reviewed Dr. K's evaluation and diagnosis of autism prior to and during her assessment of May 8, 2003.[81]

101. Dr. K's evaluation and diagnosis was summarized by Ms. R on the DEC 3-the summary of the test results.[82] (See: Pet. Ex. 12.5 and Resp. Ex. 6.)

102. At the time of the May 8, 2003 IEP, Ms. R agreed that she did not need any additional autism testing because she already had three measures of autism scales and a diagnosis of autism.[83] She had enough information to identify him as AU.[84]

103. During her evaluation, Ms. R acknowledged that she "saw him for a very brief snapshot"[85] and that she believed what Mother told her about his behavioral problems at the Montessori School.[86]

104. When asked about the effect of the identification of DD versus AU, Ms. R testified that the "identifier doesn't drive the interventions. The goals drive the interventions."[87]

105. She qualified that response when she was asked specific questions about the criteria for FCS placement in ABA home based services.

When asked:

> Q: Does the identifier of autism ever play a role in determining the child's services?
>
> Ms. R replied:
>
> **A: My understanding is the only time it does is if the ABA is considered.**[88]
>
> Q: and it is your policy that unless the parents specifically ask for ABA services, you don't talk to them about it?
>
> **A: Correct.**[89]

106. Ms. R stated that at the May 8, 2003 evaluation and IEP meeting, no one discussed with her "the ABA services coming from the school at any time."[90]

107. Moreover, Ms. R did not tell Mother that the DD label would disqualify her son for the ABA program.[91]

108. Ms. R further stated that the IEP Team at the May 8, 2003 IEP could not have made an ABA placement because **"we did not have the correct members in that setting for ABA placement. We could not – as the members of the committee, we could not have made that financial commitment."**[92]

109. Only somebody from the Exceptional Children's Department, one of the zone leaders or a compliance specialist could make an ABA placement according to Ms. R .[93]

110. Ms. R elaborated that ABA services are not offered without parental request because "its too restrictive. In my history we have not done that. I can't say never, to my knowledge."[94]

111. Ms. R did note in her report that Student had recently started ABA therapy. (Pet. Ex. 12.3, p. 4)

112. She also admitted that FCS schools could fund Student's ABA program like they do other children with autism.[95]

113. Ms. R's testimony and Petitioners Exhibit 1 corroborate each other and evidence that FCS did know that Student had been diagnosed with autism prior to the May 8, 2003

evaluation and IEP meeting. Moreover, Ms. R documented that Student was receiving ABA therapy in her report.

114. Ms. R's evaluation on May 8, 2003 resulted in a significant overstatement of Student's level of functioning.

115. Ms. R acknowledged that her testing was flawed and none of the Respondent's witnesses indicated to the contrary. She admitted the Vineland was technically incorrectly scored.[96] Ms. R also testified that on the protocols she asked the question but did not record the results.[97] She admitted that there is nothing in the manual that says that this is okay to do.[98]

116. Ms. R corroborated Dr. B's testimony that to get a floor on the Vineland, the manual says you need seven "2" responses.[99] She did not have these scores but stated she placed a pencil mark to do this. The manual does not permit this practice.[100]

117. Ms. R testified that the rule on the Vineland for a ceiling is seven zeros. She admitted she only did six.[101]

Ms. R testified when asked:

> Q.Each time you change a section, you've got to go through the process of establishing a baseline and ceiling, correct?
>
> A.Yes.
>
> Q.**And these are not scored - recorded correctly. Do you agree?**
>
> A.**Correct.** Again, you can see pencil marks or pen marks on the ones that I covered and, for some reason, I didn't record.[102] (Emphasis added)

118. At the 5/8/03 meeting, Ms. F's Rossetti and Goldman-Fristoe assessment conducted on 3/7/03 were referenced.[103] [v]

119. On 5/8/03 Ms. R was "very concerned" when she saw Ms. F's assessment because it did not reflect the child that was presented to her on 5/8/03.[104] She commented, "He made great gains."[105]

120. The evaluation and scoring Ms. R conducted on 5/8/03 was not and is not an appropriate measure of Student's functional abilities. It cannot be used as a baseline to determine Student's progress.

121. Ms. R was not a particularly credible witness. Rather than presenting as a professional, she was combative, defensive, and an advocate for her employer.

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[v] Pet Ex. 1, p. 13.

Ms. S, Speech/Language Pathologist

122. Ms. S is a speech pathologist employed by FCS.[106]

123. Ms. S observed Student on May 13, 2003 to see if he might be a candidate for ABA services through the school system.[107]

124. Although Ms. S admitted that at the May 8, 2003 IEP meeting, the IEP Team was ready to complete Student's IEP without any additional assessments,[108] she testified that as of her observation on May 13, 2003, she "didn't really know what his functional level was" in language and that she wanted more assessments.[109] However, she later admitted that additional assessments were not needed for her to do a proper speech and language evaluation for her job, but were done because they were ordered to be done for this litigation.[110]

125. She acknowledged Student's significant language progress in a year.[111]

126. She reluctantly admitted the AU label was a requisite to receiving ABA services.[112]

Dr. M , Ph.D.

127. Dr. M, Ph.D. testified as an adverse witness for the Petitioners, and an expert witness for the Respondent.

128. Dr. M obtained her undergraduate degree in psychology with honors, from Converse College; her masters and doctorate from West Virginia University in psychology; and is board certified as a behavior analyst as well as licensed to teach special education.[113] (See Resp. Ex. 46) She completed eight months of postdoctoral work at UCLA with Dr. Ivar Lovaas, founder of the Lovaas/ABA program.[114]

129. Dr. M also worked as the Clinical Director of ABC of NC (Applied Behavior Analysis Center of North Carolina) and directly supervised the ABA services provided to Student.

130. Dr. M was fired from ABC of NC.[115]

131. After being fired from ABC of NC in July 2003, she was employed as a behavioral specialist for FCS.[116] Part of her responsibilities is to supervise the ABA programs in FCS and train teachers in the principles of ABA to incorporate into their classrooms.[117]

132. Dr. M was qualified, without objection, as an expert in behavioral analysis, behavioral treatment, and the education of children with autism and the LOVAAS/ABA program.[118]

133. Dr. M testified both on direct and at recall by Respondent that she developed Student's ABA program.[119]

134. When asked by the court "…was the ABA program for Student that you developed for him, in your clinical judgment, needed or not needed...", Dr. M replied "[i]n my clinical judgment it was warranted at that time…"[120]

135. Dr. M admitted that she had no doubts that Student was autistic.[121]

136. She also found it odd that the IEP committee said he was not autistic if they hadn't done any tests for him to be proved autistic or not.[122]

137. Before she was employed at FCS, the FCS requested that Dr. M prepare a report or summary for their use when she had children from the ABC program who were up for consideration for ABA services at FCS. She generated such a report for Student, which was Pet. Ex. 12.4.[123]

138. Dr. M wrote the ABA Report marked as Pet. Ex. 12.4 on the 14th, 15th, 16th of May 2003 based upon her observations of Student in his program from April 12, 2003 through May 14, 2003.[124]

139. **Dr. M reported that Student had responded in an ideal manner to ABA services; that he has tremendous potential; that he had shown remarkable progress; that he was progressing rapidly through the programs**.[125]

140. She also stated that: "[f]rom her experience, here are the four factors that lead to whether the child would do well or not in an ABA program, and Student met all four of these factors and that he showed every indication of responding well to an ABA program."[126]

141. She further stated that: "I basically said that this child has done tremendously well and shows tremendous potential."[127]

142. Her opinion could be summarized using her testimony:

> And basically, you know, Student had made just pretty phenomenal progress in the short period of time that we had worked with him, one of the fastest kids I've ever seen. So from my perspective as a clinician, this is a child who had tremendous potential to benefit from ABA.[128]

143. Generally Dr. M recommended that "you stick with what works."[129]

144. On May 11, 2004, Dr. M testified that she did not think he was almost "done with ABA."[130]

145. Dr. M also reviewed her limited instruction of ABA principles with Dr. S , Student's proposed teacher. She said that she had given Dr. S : limited exposure in that she discussed some of the basic principals, the philosophy and that they sat down for a couple of hours one day and talked about ABA.[131]

146. After having reviewed the July 31, 2003 IEP, Dr. M conceded that " there were a fair number of goals that I thought Student was already doing. . . . Some of his educational readiness goals-I've written the comment, well, he was already doing this at home, and so it was surprising to me that it was included in the IEP."[132]

147. Dr. M also conceded that she knows that it is possible for children with autism to overcome the symptoms of autism so that they become indistinguishable from their non-disabled peers.[133]

148. The court asked Dr. M if the intent of her May 2003 letter was to support "the idea that Student should receive ABA services from the school system"[134] . . . and that it would "have the effect of motivating the school district to put him in an ABA program."[135] The court continued by asking "I just want to make sure that I'm not drawing an incorrect conclusion. **The conclusion I'm drawing from your testimony so far is that as of that date, you felt like his good progress showed that he needed more – to continue in ABA, not to have ABA ended. Am I drawing the right conclusion from what you've said?"[136] Dr. M answered "Yes."**[137]

149. On the issue of Least Restrictive Environment, Dr. M agreed that the concept was consistent with the proposition of temporarily placing a child in a more restrictive environment if that would lead to a future placement in a less restrictive environment, noting: "Well, yes, because that's what the school district does with ABA."[138]

150. These findings emphasize those portions of Dr. M's testimony that were favorable to Petitioners, because the credibility of Dr. M's testimony was compromised. Her near-complete reversal of position on Student's need for ABA services from the school system when she changed employers is very problematic. Her long, rambling, and somewhat combative, defensive answers to questions, even from the court, reduced my confidence in her testimony. Her refusal to answer direct questions directly, and her emotional outbursts during examination also reduced my confidence in her testimony. These factors increase the impact of those portions of her testimony that were favorable to Petitioners, and make Dr. M's testimony in favor of the FCS position considerably less credible than the testimony of the other qualified experts in this case.

151. Dr. M testified at some length about alleged deficiencies in Student"s ABA program after she left the employ of ABC of NC. Her testimony, along with other testimony in the case, did call into question some of the specifics of the program being provided Student. However, there is an important credibility issue here. Dr. M was fired by ABC of NC. When testifying in this case, nearly a year after being discharged, she became so emotional about the discharge that proceedings had to be halted to allow her to regain her composure. Dr. M exhibited in her testimony considerable motivation to show

that the ABC of NC was failing miserably since it fired her, at least with respect to Student's program. All this may be very understandable, but it makes it very hard for a finder of fact to separate the emotionally-driven portions of her testimony from what might be actual fact. This, combined with the other credibility concerns outlined above, causes her testimony regarding the alleged deficiencies in Student's current program to carry little weight.

Ms. J

152. Ms. J testified on behalf of the Petitioners and was employed by ABC of NC as the Senior Consultant responsible for supervising Student's ABA tutors.[139]

153. Ms. J obtained her Master's in special education for persons with profound and severe disabilities from UNC-Charlotte in 2000.[140]

154. Ms. J testified that Student could not function in a preschool program as of June 2003 because his behavior was very severe.[141] Furthermore, it was not safe for him to engage in peer play because he would just hit as a form of greeting.[142]

155. The ALJ finds Ms. J's testimony to be credible, supported by the data and evidence received by the ALJ and corroborated by other credible witnesses' testimony.

Ms. M, E. C. Program Specialist

156. Ms. M was called as an adverse witness by the Petitioners. Ms. M is the one of two elementary Exceptional Children's Program Specialists.[143]

157. As a Program Specialist, Ms. M supervises twenty-one elementary schools serving all disabilities and provides support to parents and school staff.[144]

158. She described herself as:

> I'm the person of first defense. In other words, if one of my teachers has a problem that she wants another person at an IEP meeting, she would call me.[145]

159. Ms. M was called to observe Student at his home on May 13, 2003[146] because there had been a request for ABA services.[147]

160. She acknowledged that at the May 29, 2003 IEP meeting that she told the parents that the self-contained classroom proposed for Student could have six to twelve students in it.[148] (See: Pet. Ex. 3 p. 18 LL. 6-7; Pet. Ex. 2 p. 49 LL. 22-23)

161. When the parents request ABA services, **because it is such a large expenditure**, Ms. M testified that she would speak with her director, SD, to make him aware of any decision and "talk over with him to get another feeling of the importance of my decision."[149] This meeting occurs outside of the IEP meeting context without parents present.[150]

162. Ms. M went on to deny that cost is an issue with providing ABA services and to deny that the purpose of her meeting with Mr. SD is to discuss money or financial impact. Though the court is willing to believe that Ms. M and Mr. SD are not persons motivated primarily by money, nevertheless it defies credulity to suggest that the high cost of ABA services – especially given that the expressed reason for meeting with Mr. SD is that it is a "large expenditure" – plays no role in deciding the criteria for providing such services and therefore in deciding the availability of ABA for Student.

Dr. S, Ed.D.

163. Dr. S received her Educational Doctorate in Curriculum and Instruction in 1992 from the University of South Carolina.

164. Dr. S's training in ABA amounted to reviewing some handouts, having a discussion with Dr. M in which Dr. M gave her an overview of ABA, and monthly oversight visits with Dr. M with regard to an autistic child in her classroom.

165. Dr. S was also aware of the need for the AU label or classification for a child to get a one-on-one classroom aide with ABA training[151], and to get other services.[vi]

166. Dr. S was qualified as an expert in special education.[152]

167. Dr. S expressed her opinion that the home could be the least restrictive environment for a particular child.[153]

168. Dr. S was a very impressive and credible witness. From her testimony and credentials, one would expect her to be an excellent teacher.

169. However, she had observed Student for only about two hours, did not have him in her classroom, has only taught three autistic children over the years[vii], and has not had substantial ABA training. In addition, the school system cannot guarantee this particular teacher for Student. These factors limit the probative value (though not the credibility) of her testimony on the central issues in this case, except as noted above.

Dr. B , Ph.D.

170. Dr. B, Ph.D., testified on behalf of the Petitioners and was qualified as an expert in the fields of Autism, developmental disabilities and educational interventions for Autism.[154]

171. She has a clinical doctorate in psychology. She has done internships in psychodynamic therapies with adults and couples and family, systemic interventions and

[vi] Tr. Vol. III, p. 1730, ll. 11-19.

[vii] Tr. Vol. VIII, p. 1731, ll. 1-11

psychoanalysis. Dr. B trained in most aspects of the field of psychology, including statistics and research.[155]

172. Dr. B completed a series of course work under the instruction of Dr. Ivar Lovaas at UCLA. She was a student of his, initially learning the concepts and procedures of Applied Behavioral Analysis.[156]

173. The Lovaas institute for early intervention is a private clinic that Dr. Lovaas later developed that stemmed from the UCLA Behavioral Treatment of Children.[157] When Dr. B worked there it was still under the supervision of Dr. Lovaas.[158]

174. Between January of 1996 and January of 2003 Dr. B assessed or worked with 500 to 600 Autistic children.[159]

175. Dr. B worked with approximately two hundred children suffering with autism, Asperger's or within the spectrum of Autism since she's been with CARD, i.e., as of March 2003.[160]

176. On direct-examination Dr. B was asked:

> Q: And when an assessment is standardized, what does that mean to you as a psychologist with regard to administration of the tests?
>
> A: That there are specific procedural guidelines that must be adhered to during the administration and the scoring of all instruments. As presented in the manuals that accompany the instruments.[161]

177. Dr. B further testified that the procedures in the manual must be followed to obtain an accurate score.

178. Dr. B explained: "Each instrument has a manual that will describe in detail how each specific subtest or, you know, with the example of the Bayley, with each item that is tested, how it should be presented, how the stimuli should be presented. What the criteria are for a correct score versus what the criteria is for an incorrect score, they are all listed there very specifically.[162] Basal and ceiling rules are also mentioned with respect to stopping points and starting points on the instruments. All of these things are very, very clearly defined for all instruments in the manuals."[163]

179. Dr. B described the basal and ceiling rules as: "basically a basal is the cutoff criteria, wherein a successive or a consecutive number of correct responses need to be achieved, wherein you would assume that skills lower or prior to those skills are assumed to be acquired and known. And then at that point forward, you move ahead and continue to go until the ceiling is achieved, which is the maximum number of incorrect responses are given consecutively, at which point you stop testing in that section an assume that all skills above that area are not acquired and are not had."[164]

180. Dr. B has administered the Vineland "several hundred, perhaps 300 or so" times.[165]

181. She was trained both at the Lovaas Institute for Early Intervention on how to administer and score correctly, as well as in her graduate training.[166]

182. On direct-examination Dr. B was asked about the Vineland Ms. R completed on 5/8/03:

> Q: And in your review of the test protocol exhibit number 6, did the assessor [Ms. R] follow the manual's instruction regarding establishing a basal and a ceiling?
>
> A: No. It appears here that she did not.[167]

Dr. B further testified that in her review, she actually identified that the basal and ceiling rules were not followed in any one domain on the Vineland Ms. R administered on 5/8/03.[168]

183. Dr. B explained the Vineland's basal and ceiling rules: "The basal rules, as I described earlier with respect to starting points, requires seven consecutive responses of 2 scores in order for the basal to be constituted. 2 scores indicate behaviors that are usually present or consistently present; 1 scores are more inconsistent and more 'sometimes' sorts of responses; and the 0 score means it's a behavior that's never observed. **Seven consecutive scores of 2 are required for a basal on every domain of the Vineland.**"[169] "Similarly, the ceiling rule is seven consecutive scores of 0 on each domain for the ceiling to be established and for testing to stop within that domain.[170]

184. On the 5/8/03 Vineland's Communication Domain Ms. R does not have the seven required consecutive scores of 2 for the basal.[171] (Pet. Ex. 12.3.) Ms. R's "first score of 2 begins on item number 21, where it appears that was actually a correction. And again on 24, she made a correction from 1 to 2. Items 21, 22, 23, and 24 were given scores of 2. However, that is only four consecutive scores of 2. There were no scores on any of the items previous to number 21, and the scores of the items following 24 are not 2s. We have a 1 and a 0 following. Therefore, the required seven consecutive scores of 2 were not established on the Communication Domain."[172]

185. When asked about the Daily Living Skills Domain of the 5/8/03 Vineland, Dr. B testified: "We also see here that there are one, two, three, four, five, six consecutive scores of 2, rather than seven. So once again it does not meet the basal criteria that is clearly indicated in the manual."[173]

186. Regarding the Socialization Domain, Dr. B testified: "We see once again in the socialization domain … that … starting with number 15 we do have two consecutive 2s. And then if we jump to number 18, we have one, two, three, four, five consecutive 2s. However, there is a score of 0 on item number 17, which breaks the consecutiveness of it.

And again, this would require that the assessor move backwards and continue with those earlier items until seven consecutive scores of 2 are achieved."[174]

187. When asked about the Motor Skills Domain, Dr. B testified: "We see on page 9, once again, we only have six consecutive responses of 2. It does not meet the required seven… And in fact, the ceiling rule was not applied appropriately here either because the assessor stopped after six consecutive scores of 0, wherein seven is required."[175]

188. Dr. B testified that the raw score would affect the standard score on the Vineland:

> Q: And so in establishing the raw score – which is then converted to a standard score and is age equivalent; is this correct?
>
> A: Right.
>
> **Q: So by not following the basal score, is it your opinion that the raw score is invalid for this portion?**
>
> **A: Yes.**
>
> **Q: And is that supported by the manual?**
>
> **A: Yes.**[176]

189. Dr. B stated, "The raw score is you basically find the child's chronological age in the appendix, which gives you the standard score. And you find for that particular domain what the conversion is from the raw score to the standard score for his chronological age."[177]

190. When asked, "Are the handwritten standard scores and the raw scores on this last page affected by the inaccurate calculation of the raw scores?" Dr. B replied, "**Absolutely … They are all invalid since the raw scores are inaccurate. And all the standard scores and age equivalents are dependent on the accurate administration and scoring of the raw scores. So they too are now invalid**."[178]

191. The validity of the Communication Domain Score on the 5/8/03 Vineland needs to be questioned because "it is quite possible that items prior to the items number 21 could be scored below 2… The way Ms. R scored them assumes that all of those skills are mastered and they are automatically given the score of 2. Therefore, the overall score, the validity of that score should be questioned." Dr. B believed that the score is not valid.[179] "If the basal was established appropriately and correctly, … and the seven consecutive scores of 2 were, in fact, endorsed, then you can assume that the previous items would be given a score of 2. That's how the basal works. **However, since there were only four here, Dr. B testified that it is not valid to assume that any of the skills prior to them should be given the score of 2**."[180] Dr. B contended that Ms. R should

have gone back to items previous to item number 21 and continue to go back until she got seven consecutive scores of 2.[181]

192. Dr. B 's opinion was the same in regard to the raw score in the Daily Living Skills Domain as her opinion about the Communications Domain because everything previous to item number 9 would be assumed to be correct.[182]

193. Dr. B 's opinion was that the calculations of the raw score for the Socialization Domain of the 5/8/03 Vineland were inflated similar to the Communications and Daily Living Skills Domains.[183]

194. Dr. B found similar protocol errors on the Mullen: "I found actually similarly to our previous encounter with the Vineland, that the basal rules were not applied to and these scores were also scored incorrectly."[184]

195. She testified: "The basal requirements for the Mullen required three consecutive endorsements within a subscale. So a subscale constitutes a certain age group here… But it kind of looks to me on the side where we have the month, age group levels, with the arrows indicating 12 months, for example, 14 months and so forth. The three consecutive items that are scored with at least 1 point need to be within starting point levels of those age groups."[185] "If you are not able to achieve a basal in one section, you are supposed to go back to the starting point of the previous section. In order to once again attempt to get three consecutive scores of at least 1."[186]

196. Dr. B could not determine where Ms. R began on the 5/8/03 Mullen assessment.[187]

197. Dr. B testified: "On item 19, for example, there's a score of 1, but it's then followed by a score of 0 and again a 1. So here we don't have the three consecutive. And this would require that the assessor move back to the next lower age group, which would correspond to item number 16. I don't see any scores there."[188] . . . "What it appears to be here is that the assessor moved back to item number 17-B, and there's a score of 3 there and a score of 2 on item number 18. So we do not have three consecutive scores of 1 or higher within an age group here."[189] . . . "If we refer even to the same page on the next section and find 'Motor', the same thing applies… I can refer you to the subheadings of the top scale 4, which says 'receptive language.' Once again, we don't have the three consecutive scores of 1 or above within the required age groups. So this too was scored incorrectly."[190]

198. Dr. B expressed similar critical opinions about the erroneous result in converting the raw scores in the administration and recording of data on the Mullen and the Vineland noting the raw scores were miscalculated and then converted to invalid standard scores.[191]

199. Dr. B found similar protocol errors on the Bayley assessment Ms. R conducted on 5/8/03. "The basal rule for the Bayley is five correct responses within the age group, and

the ceiling rule is three incorrect responses, or you know, scores indicating a lack of ability in those areas."[192]

200. The rules for basal and ceiling on the Bayley "would be in the section of the administration and scoring of the test" in the Assessment Manual.[193]

201. Ms. R's comment written on the Bayley assessment at item number 165 says, "Beyond Ceiling". Dr. B 's opinion was that this comment is not true and "indicates that the person who wrote it is unclear about what the ceiling rules are and where they are achieved."[194]

202. Ms. R's Bayley has "five correct scores in the 32-to-34 month range. In order to score this correctly, once you achieve your basal, you start counting from the item below it, you assume that the items below it, just as in any other standardized exam, do you assume the items below it are items that would be scored with a 1, which would be mastered skills."[195] . . . "So the correct scoring of this would be starting with the amount of 135, which is the item before the group of 32-to-34 month level begins. You would start with a score of 135, you would add 3 points for this page for items number 138, 139, and 142. Which would give us so far a score of 138. We would go on to the next page, where there is one correct score, and we would add that to our current score for a total of 139. And on the following page on item number 165, which is an item prior to our stopping point for this age level, we have another point, which gives us a total of 140 points. Since there were three incorrect or noncorrect scores here, we also do not achieve our ceiling within this age level."[196]

203. "If his true score is 140, then the conversion to the mental age is erroneous and the mental development index is also incorrect."[197]

204. Dr. B found errors in the scoring of the Bayley "in that the way that the raw scores is calculated is that the highest age group wherein five scores of 1 exist is considered your basal. And as we see here, the age group section of 32 to 34 months, which starts with item number 136, and that as you see starts there and continues until you see the hand sign, which indicates stop. And that's on the very last page of the testing protocol. Item number 166. So we have a span of items wherein if five items are scored with a 1, that that particular age group is considered the basal."[198]

205. On cross-examination Dr. B testified, when asked:

> Q: So even though your entire period of assessing Student, if you had heard him speak four-word sentences, you would not give him credit on that item on the test?
>
> A: No, because the idea being it needs to be done within the context of elicitation, in a sort of conversational manner, for that to be scored as correct.[199]

206. The school personnel did not conduct the assessments in this manner. Ms. S said, "What we have to do is look at and say, 'Well, he knows it here, so we know he knows it.' You know, just because he didn't know it – or we'll have to make a judgment. Sometimes they know it in one situation, but they may not be able to generalize it. So sometimes it's hard to know exactly, but we try to just make a judgment based on what we felt we saw and also on your opinion on what he can and can't do." (Pet. Ex. 7, p. 17, LL. 14-22.)

207. Dr. B testified that standardized testing procedures require that no one be in the room other than the assessor and subject. On direct-examination, Dr. B testified when asked:

> Q: Was anybody else in the room with you when you administered your assessments to the student?
>
> A: No. In fact, standardized testing calls for no one else to be present in the room during testing in order for it to be valid.[200]

208. However, Ms. R noted in her Psychological Evaluation Student's mother was in the room during the assessments on 5/8/03. She stated that Student "sat willingly at the table with the examiners and his mother . . . Student sought physical reassurance from his mother." (Pet. Ex. 12.3, p. 3.)

209. The court finds Dr. B's testimony regarding the improper administration of the tests by Ms. R credible and compelling. It established that Ms. R's evaluation, scoring and reporting were invalid. Dr. B was a well qualified, experienced, and convincing expert. Neither Ms. R (who was recalled by Respondent to provide additional testimony in Respondent's case in chief) nor any of Respondents experts effectively rebutted Dr. B's testimony establishing the invalidity of Ms. R's tests administrations, evaluation, assessments, scoring and report. That conclusively established this fact. Therefore, Respondent's attempt to show regression or failure to progress by comparing Ms. R's scores to Dr. B's later scores (Resp. Ex. 25) was equally invalid and improper.

Dr. S, Ph.D.

210. Dr. S, Ph.D. was called by the Respondent. She graduated in 1971 from Vassar College with a major in psychology and received her Ph.D. in clinical psychology from UNC-Chapel Hill in 1977.[201] [viii] Dr. V has been in private practice in Chapel Hill since 1986, worked at the Adolescent Addiction Unit at Dorothea Dix Hospital for a number of years, been involved in the NC TEACCH program since 1995, written numerous articles and coauthored two books about the TEACCH program, as well as served in many other advisory/administrative capacities with TEACCH and autism programs.[202]

[viii] Resp. Ex. 80 Dr. V's CV.

211. Dr. V was qualified, without objection, as an expert in clinical psychology and serving autistic children.[203]

212. Dr. V defined autism as: "a developmental disability that has characteristics in three areas: impairment in communication, impairments in social skills; and atypical behaviors of various kinds."[204]

213. When asked how autism is diagnosed, she said that "the diagnosis is made based on developmental history and current information and current observation of the person's skills and behaviors. So there is no laboratory test at this point or no really purely objective measure, although there are some assessments and instruments now that help people take histories and make observations in a more standardized fashion than in the past."[205]

214. Dr. V's testimony focused on reviewing the various methodologies used for educating autistic students and on discrediting the effectiveness of the Lovaas Program.[206]

215. Although Dr. V was highly critical of the effectiveness of the Lovaas Program, she did agree that a recent publication from the National Academy of Sciences found that 50% of the students do well in the Lovaas preschool intervention.[207]

216. On cross-examination, Dr. V was asked:

> Q: Have you suggested to the school district in this case that they cancel their ABA program?
>
> (Objection, overruled)
>
> A: No, **I have no knowledge of the school system's ABA program.**[208]

Dr. V further testified that she had no knowledge and information about Student:

> Q: Is it your opinion that Student should not be in an ABA program.
>
> MR. PUNGER: Objection, Your Honor. She has no knowledge and information about Student. There has been no foundation for it.
>
> THE COURT: Well, I'll let her say that if that's the case. I think she may have already said it, but let's be clear.
>
> A: **I don't know anything about that student**, and that's the first time I've heard the student's name.[209]

218. Dr. V also admitted that she had never recommended that a child be placed in an ABA program.[210]

219. Dr. V acknowledged that intensity of services is an important component of early intervention programs.[211]

220. She agreed with Respondent's counsel that Lovaas or ABA was not the only methodology that could benefit autistic youngsters, but went on to clarify as follows: " . . . and I think there is a lot of evidence and a **broad professional consensus that the old model of** a couple of hours a week of itinerant services or **a couple of hours a day of generic special education is probably not the most effective and the most helpful for young children with autism**."[212]

221. Dr. V then had the following exchange with counsel for FCS:

> Q: And shouldn't the intensity of services be based upon the severity of the need?
>
> A: No, I don't actually think I could agree with that because that would imply that services and resources should be directed towards the people with the more severe handicaps and those with milder handicaps or milder needs don't have needs or maybe would be the last ones served, and I don't think I could really agree with that.

222. The IEP proposed by FCS contained only 2.5 hours per day of services, mostly in a "generic" special education classroom, based in part on FCS's theory that Student's milder autism did not justify more intervention. Though Dr. V was a witness for FCS, her testimony tended to establish that the IEP proposed by FCS was unreasonable and inadequate.

Dr. P, Ph.D.

220. Dr. P has academic degrees as follows: a B.A. in psychology from Rutgers University, Masters Degree and New Jersey Certification in School of Psychology from Montclair State College, and a Ph.D. in school/child clinical psychology at North Texas University.[213] She has worked as a school psychologist in two public schools districts in Texas; worked with autistic children at the Medical university of SC and at Georgetown University; and is currently Clinical Director of the UNC-Chapel Hill Division TEACCH [ix] program.[214] (See: Resp. Ex. 58)

221. She was qualified as an expert in child psychology and as an expert in evaluating and educating autistic children.[215]

222. Dr. P testified about the referral process for TEACCH evaluation services.[216]

[ix] TEACCH stands for Treatment and Education of Autistic and Communication Handicapped Children and Adults.

223. Dr. P agreed that the most natural setting for a three or four-year-old child with autism is the home.[217]

224. Dr. P testified in general about the TEACCH program and autism but she admitted that she had never met Student and had not examined the classroom setting proposed for Student by the FCS.[218]

225. Moreover, Dr. P testified that she did not "know a lot of specific things" about the Lovaas program.[219]

226. When asked if she had ever referred anybody to a Lovaas-type program, Dr. P testified that: "I don't know of any Lovaas programs in my areas, and I would hope that I could offer things to that child that that child could use."[220] She appeared not know that FCS offered such a program to its preschool students.

227. Finally, although Dr. P was qualified as an expert in evaluating autistic students, and was a school psychologist, she was not offered to rebut Dr. B's criticism of Ms. R's administration of the Mullen Scales of Early Learning, Vineland Adaptive Behavior Scale, or Bayley Scales of Infant Development: Second Edition testing protocols or Dr. B's claim that the scores were invalid.[221]

SD, Ph. D.

228. SD is the director of the Exception Children's Programs for the Winston-Salem/Forsyth County Schools and has held that position since the year 2000.[222] He is a well-qualified director, and appeared to be a person of integrity, in general.

229. He is responsible for budgeting for the Exceptional Children's Program and its forty million dollar budget from various revenue streams.[223]

230. Pet. Ex. 15, the Process for Determination and Criteria for Qualifying for ABA Services was developed by someone other than him, prior to his tenure.[224]

231. He along with Ms. M suggested that the strict criteria for qualifying for the School's ABA program and services should be construed as mere guidelines.

Other Findings of Fact

232. Pet. Ex. 15, the Process for Determination and Criteria for Qualifying for ABA Services says, "Therefore, only students who meet these **strict criteria** will receive these services at System expense." (Emphasis added) The only criteria that Student arguably did not meet was: "Documented severity of disability (CARS and GARS scores, **AU label is required**)."

233. Late in the hearing, Respondent's witnesses, SD and Ms. M suggested these were flexible guidelines rather than criteria that must be strictly followed. However, the IEP team applied them strictly.

234. After Ms. R convinced Mother to agree to the DD rather than AU identifying classification at the May 8, 2003 IEP meeting, Student did not meet those strict criteria because he did not have the AU label.

235. At that time Mother agreed to that designation, she was unaware of the School's criteria. Instead, Mother was told that designation could be changed at any time.[225] However, she was also not made aware that it required the consent of the IEP committee.

236. At the May 29, **2003** IEP meeting, which is the first time the IEP team mentioned the criteria to Petitioners, Ms. S notes as the first criteria ". . .**that the child has to be identified under the category of autistic**. . ."[x]

237. Respondent did not agree to change Student's classification from DD to AU until the May 3, **2004** IEP meeting.[xi] Therefore, applying the strict criteria, Student was ineligible to receive ABA services from the School prior to that point in time simply due to the fact that his classification was wrong.

238. In addition, Respondent's staff interpreted the beginning of that criteria: "**Documented severity of disability**" as requiring that the autism be documented as severe rather than merely providing the IEP team with documentation of the severity of the autism on the scale of mild, moderate or severe.

239. Finally, the Documented severity of disability had to be based on **CARS and GARS[xii] scores.**

240. It took almost a full year before Respondent conceded that Student suffered from autism. It asserted that Petitioners hindered its ability to reach this conclusion by refusing to complete the GARS and GADS testing instruments provided to them at the conclusion of the May 29, 2003 IEP meeting.

241. The court rejects this argument. Respondent was provided the diagnosis of autism by Dr. K (who used the CARS to obtain that diagnosis) - - a physician well known

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[x] At that time they had the diagnosis of autism from Dr. K using the CARS and the report from Dr. M, (who currently runs the School's ABA program) noting STUDENT had "responded in an ideal manner" to his home ABA program.

[xi] Pet. Ex. 5 p. 9 DEC 3; Pet. Ex. 7 p. 129, LL. 18-20.

[xii] (CARS) Childhood Autism Rating Scale and (GARS) Gilliam Autism Rating Scale.

to FCS and conceded by FCS to be a foremost authority prior to the May 8, 2003 evaluation conducted by the School's psychologist.

242. By the May 29, 2003 IEP meeting, it also had the report from Dr. M noting that Student was responding in an ideal manner to his private ABA program.

243. By the July 31 IEP meeting, Dr. M was employed by Respondent and she expressed to SD her opinion that Student suffered from autism.

244. Every assessment instrument applied to Student supported a diagnosis of autism.

245. The court finds that strictly limiting the testing instruments to the CARS and GARS and requiring that both be administered in the school setting is an inappropriate requirement. In addition, in refusing to complete the instruments Student's parents were reasonably concerned about FCS motivations, given FCS's inexplicable refusal to acknowledge that Student was autistic and FCS's manipulation of Mother to sign off on the DD label. There was plenty of evidence before FCS to make the determination that Student was autistic.

246. "Documented severity of disability." This requirement of the guidelines can be interpreted in one of two ways. Either it requires that the relative severity simply be documented, or it requires that it be documented that the disability (autism) is severe. While the first interpretation would seem to impose a reasonable requirement (and Student's autism was documented as mild to moderate), the evidence established that Respondent and its staff interpreted this to require documentation that the child was suffering from severe autism. Respondent based its interpretation on the claim that one must establish the child suffered from severe autism to overcome the LRE provision of the IDEA. In essence, it position was that all children suffering from other than severe autism could be educated in a less restrictive environment than its ABA program.

247. The court rejects that because it is an inappropriate criteria. It eliminates the individualized consideration that must take place when deciding the least restrictive environment. It attempts to paint with too broad a brush. Numerous factors must be considered on the LRE decision. For example, a mild or moderately autistic child, such as Student, could have behavior issues (like Student's hitting or throwing objects) that would make education in a less restrictive environment inappropriate until such time as those behavior issues were resolved.

248. The court also finds the severe autism criteria is inappropriate because it is diametrically opposed to the listed criteria of "Cognitive ability (support for the probability of a least average intellectual ability)." Thus, either of theses two criteria would exclude virtually every autistic child from Respondent's ABA program. That, in and of itself, is inappropriate.

249. To overcome this seemingly irreconcilable conflict, Respondent's later witnesses, SD and Ms. M testified that the criteria were not strictly interpreted but were merely

guidelines to follow. That testimony, however, conflicts with both the document itself and the result in this case, where the staff strictly applied the criteria in this case.

250. In the IEP meetings, it was implied that the "severity of disability" criteria meant "severely autistic." [xiii] The credible testimony from Petitioners' expert witnesses at the hearing made it clear that if the child were severely autistic, one would not be able to meet the criteria for "Cognitive ability (support for the probability of at least average intellectual ability)" Dr. E testified:

> I had several concerns about this document. I guess one of the primary ones had to do with the fact that it discusses this in terms of a student who has very severe autism as identified by the CARS and GARS score, and yet talks about, with respect to cognitive ability, support for the probability of at least average intellectual functioning or average intellectual ability - excuse me. Those two issues are almost in direct contradiction to each other.[226]

251. The court further finds it was inappropriate to require the Parent to request ABA services rather than have school members of the IEP team make such suggestion. The first five steps in Respondent's "The ABA Process of Determination"[xiv] preceding the IEP meeting, including "Review with the district administration and/or school attorney," and getting contract approval before the first IEP meeting, establish this process as an improper predetermination process.

252. Reviewing the IEP transcripts in this case[xv] in conjunction with the testimony of Respondent's witnesses, establishes that Respondent had improperly predetermined not to provide Student with ABA services.

253. In the May 29, 2003 IEP meeting, the first criteria referenced by Ms. S was that the child must be classified as autistic.[xvi] Obviously, she was aware he had been classified as DD rather than AU at the earlier meeting. She also referenced each of the other "strict criteria." In that meeting, even though the school had Dr. K's report diagnosing Student as autistic, with the FCS refusal to change the classification from DD to AU, he did not meet the School's strict ABA criteria.

254. In spite of Respondent's contentions that the ABA criteria "were intended only as guidelines, not as written in stone"[227] the actions and statements of the School District's staff at the IEP meetings made it clear that the ABA criteria were strictly enforced as

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[xiii] Pet. Ex. 3 p. 6, LL. 13-17; Pet. Ex. 2 p. 129, L. 23 - p. 130, L. 10.

[xiv] Pet. Ex. 15.

[xv] Pet. Exs. 2, 3 and 7.

[xvi] Pet. Ex. 3, p. 4, L. 25 - p. 5, L. 7.

written. Most of Respondent's witnesses corroborated this fact in their testimony. As noted above, Dr. S was aware of the need for the AU label or classification for a child to get a one-on-one aide with ABA training.[228] Ms. R testified as follows:

> Q.But you don't ever offer ABA services without parental request, right?
>
> A. Correct, because it's too restrictive. In my history we have not done that. I can't say never, to my knowledge.[229]

Dr. M indicated that a request was necessary. She testified that upon hearing that FCS said that Student was not autistic she thought it was odd that FCS had not done any autism tests. Then she asked the PARENTs if they had specifically and formally requested ABA.[230]

In Respondent's case-in-chief, Ms. M provided the following response to Respondent's counsel when he asked her:

> Q.Is a parent request required for a child to receive ABA therapy in the home in this district?
>
> A.Yes.
>
> Q.A parent request is required?
>
> MR. ERICKSON: Asked and answered.
>
> THE COURT: Sustained.
>
> Q.Do we have any children who are receiving ABA services where the parent didn't request it?
>
> A.We have---
>
> MR. ERICKSON: I object. She's already answered the question, Your Honor.
>
> THE WITNESS: A parent request, when I was thinking---
>
> THE COURT: Just a second. Let me just rule on this. Mr. Punger, you do have to go with the answer your witness gives you and are not to argue with her and inform her that you want a different answer by reasking the question.
>
> THE WITNESS: Can I clarify my answer?

> THE COURT: However, I want the record to be accurate, and Ms. M, if you feel like you need to explain your answer, you may do so.[231]

Ms. M then proceeded to retract her initial answer and relay a single case involving an autistic child who was provided services when that child's parents were unaware of the School District's ABA program. This supports the contention that the administration can override the strict application if they choose. But that does not rectify the improper approach of excluding autistic students from the School's ABA program based on FCS ABA guidelines and strict criteria.

255. The court relies on standard or common usage of the word strict.

> 1. **Precise; exact: a strict definition**. 2. Complete; absolute: strict loyalty. 3. **Kept within narrowly specific limits:** a strict application of a law. 4. Rigorous in the imposition of discipline: a strict parent. 5. **Exacting in enforcement, observance, or requirement: strict standards**. See synonyms at severe. 6. **Conforming completely to established rule, principle, or condition**: a strict vegetarian. 7. Botany Stiff, narrow, and upright. (Emphasis added).

The American Heritage® Dictionary of the English Language: Fourth Edition.

This is the application used by Student's IEP team members.

It took the PARENT's specific request for ABA services at the May 29, 2003 IEP meeting before they were provided the criteria establishing that Student did not qualify for those services.[232]

256. There was no evidence that suggested Student may have become autistic between his May 2003 and May 2004 IEPs. Thus, the court finds that Student was autistic as of his initial referral to the School and is autistic today.

257. Student should have been qualified for the School's ABA program.

258. The court finds that an ABA program was and is the appropriate and necessary program for Student and that his parents supplied him with such an appropriate and necessary ABA program.

259. The objective evidence of Student's progress in his ABA program is compelling. Respondent's effort to diminish Student's progress through unsupported opinion testimony is simply not credible.

260. The court finds that the FCS had an official policy of predetermining which children received home based ABA services. That policy decision is controlled by its ABA Process of Determination and strict criteria rather than a function of IEP Team determination. Moreover, that it was FCS's policy not to offer home based ABA services

unless the parent requested it and not to discuss the availability of the home based ABA program with parents of autistic children unless they specifically asked for ABA services.

261. The court also finds that the FCS has a policy of labeling preschool age autistic students as Developmentally Delayed (DD) rather than Autistic (AU). The use of the general DD label may have some purposes that are proper, as testified to by FCS witnesses. However, it is improper if FCS's ABA criteria are used which require an AU label for eligibility. That is, in conjunction the two policies have an impermissible effect.

262. FCS predetermined that Student did not qualify for ABA home based services based on the FCS's ABA Criteria without allowing meaningful participation in that decision by Student'S Father and Mother.

263. FCS steadfastly refused to consider ABA home based services for Student despite the impressive results obtained by Student.

264. Moreover, FCS refused to consider the ABA home based services even when its own expert Dr. M reported that Student had made amazing progress in the ABA program and recommended its continuation to the IEP Team.

265. It was clear that no matter how strong the evidence presented by the Petitioners, FCS still would have refused to provide Student with ABA services. This is predetermination denied parental participation in the IEP process and Student an established appropriate educational program.

PROCEDURAL VIOLATIONS

1. The most substantial procedural violation was the FCS predetermination that Student would not be placed in the available ABA program.

2. This resulted in the second procedural violation: the parents being precluded from having any meaningful participation in the IEP meetings, as discussed above.

3. The classification of Student as Developmentally Delayed "DD" rather than Autistic "AU" was a significant procedural violation.

4. Failure to timely supply Prior notices was a procedural violation. Virtually all were provided at the IEP meetings. Again, this further hindered the Petitioners ability participate in the IEP meetings.

5. The failure to properly list purpose of meetings in Prior Notice forms was a procedural violation. Example: the Invitation to Conference/Prior Notice for the May 8, 2003 IEP meeting does not have the line checked for "Develop or change the Individualized Education Program (IEP)." At that meeting, the School District staff attempted to develop and complete an IEP for Student. Ms. R testified that they generally develop IEPs on the same day as the evaluations.[233]

6. Respondent's failure to consider ESY in a timely fashion[xvii] and requiring regression to be suffered prior to offering ESY[xviii] is a procedural violation.

7. Destruction of Student's record (the draft of the May 8, 2003 IEP) without notifying the Petitioners[xix] is a procedural violation.

8. The failure to give proper consideration to Mother's and Student'S Father's concerns and input such as Student's behavior problems, his inability to gain skills in the Montessori program, or his ability to gain skills in his ABA program is a procedural violation.

SUBSTANTIVE VIOLATIONS

While the above noted procedural violations alone are more than sufficient to establish Petitioner's right to recover for having to privately fund Student's ABA program, in the event this matter is appealed and this issue is raised, it is incumbent upon the court to address the substantive violations in the IEP documents. Therefore, the following is a list of some but not all of the more significant substantive problems with the IEPs developed for Student.

1. Checking the "No" box on the IEP form DEC 4 (1 of 4) for: "Does the student have behaviors that impede his/her learning or that of others" when it was understood that he did have such behaviors. Related to this was the failure to establish a behavior intervention plan to address Student's inappropriate behaviors.

2. Establishing Bench Marks or Short Term Objectives ("STOs") that list mastery as low as 3 out of 5 or 60%, which as Dr. E noted was just one step above chance.

3. Establishing Bench Marks or STOs for skills Student had already mastered as was recorded in his ABA data logs, Pet. Ex. 1.

4. Establishing as a means of measuring progress toward annual goals Teacher Observation Checklist and Student Demonstration Logs but failing to have any such list or logs developed. Thus, the IEP fails to have any objective measurement standards.

5. Failing to consider Student's behavior, cognitive and social deficits in balancing the restrictive nature of the ABA program against to potential it provided to allow

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[xvii] *Reusch v. Fountain*, 872 F.Supp. 1421 (D.Md. 1994); Hall *v. Vance County Bd. of Educ.*, 774 F.2d 629, 634 (4th Cir.1985).

[xviii] *MM v. School District of Greenville County*, 303F.3d 523, 538 (4th Cir. 2002); *Reusch, supra*; Hall, *supra*.

[xix] *N.C. Proc. Gov. Chi. wi Disabilities*, .1509 CONFIDENTIALITY AND ACCESS TO RECORDS, Subparagraph H.1.; *see also*: NCGS 115C-114(b).

Student to move to the least restrictive general education population upon completion of the ABA curriculum.

6. Providing Student only a total of 15.5 hours a week of services with 12.5 of that time being in a group setting.

7. Failing to establish that Student was entitled to receive Extended School Year services.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals With Disabilities Education Act (IDEA) (20 U.S.C. Chapter 33) and implementing Regulations. (24 Codes of Federal Regulations Part 300)

2. Respondent is the Local Educational Agency responsible for educating Student and must deliver special education services to him under IDEA and Chapter 115C-106 *et. seq.*

LAW-OVERVIEW
THE PUBLIC POLICY
OF
NORTH CAROLINA

3. A child is deprived of a free appropriate education (FAPE) under two conditions: first, if the school system violates the IDEA's procedural requirements in a way that detrimentally affects the child's education; and second, if the school system develops an IEP that is not reasonably calculated to enable the child to receive meaningful educational benefit.

The public policy of the State of North Carolina regarding special education

4. "The General Assembly of the State of North Carolina hereby declares that the policy of this State is to ensure every child a fair and full opportunity to reach his **full potential** and that no child as defined in this section and in G.S. § 115C-122 shall be excluded from service or education for any reason whatsoever." N.C.G.S. § 115C-106.

5. The policy of this State is to provide a free appropriate public supported education to every child with special needs. N.C.G.S. § 115C-106

6. North Carolina statutory and case law require that special education must ensure that "the child has an opportunity to reach [his] full potential." *G. v. Fort Bragg Dependent Schools*, 343 F.3d 295; 2003 U.S. App. LEXIS 17294, (4th Cir. 2003); citing *In re Conklin*, 946 F.2d 306, 318 (4th Cir. 1991), *Burke County Bd. Of Educ. v. Denton*, 895 F.2d 973, 983 (4th Cir. 1990).

7. The Individuals with Disabilities Education Act (IDEA) creates only a federal minimum and States may structure educational programs that exceed the federal floor. IDEA, 20 U.S.C.A. Secs. 1400 et seq.

8. North Carolina chose to exceed the federal benchmark and measure each child "against his or her own expected performance." *In re Felton* Letter, 23 IDELR 714, 717. (OSEP 1995); *see also: G. v. Fort Bragg Dependent Schools*, 343 F.3d 295; 2003 U.S. App. LEXIS 17294 (4th Cir. 2003).

9. Under the Individuals with Disabilities Act, a handicapped child is deprived of FAPE if either (1) the school system violates the IDEA's procedural requirements and thereby detrimentally impacts the child's education; or (2) drafts an IEP that is not reasonably calculated to enable the child to receive educational benefits. *Board of Education v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 3051, 73 L.Ed. 2d 690 (1982); *Hudson v. Wilson*, 828 F.2d 1059, 1063 (4th Cir. 1987).

10. The analysis suggested by the Supreme Court in *Burlington v. Department of Education* is a two-prong test. The first prong addresses the whether the Respondent committed serious procedural violations or an inappropriate program. In the event that the school system's committed a serious procedural violation, then the equitable considerations for remedies would have been addressed. The Supreme Court has ruled that this court may fashion discretionary equitable relief under the Act and in doing so must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be ordered. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (U.S.1993).

11. Making the placement determination prior to development of the IEP violates federal and state law. *See* 20 U.S.C. § 1414(f); N.C.G.S. 115C-113(c).

Appendix A to 34 C.F.R. Part 300- Notice of Interpretation of the federal regulations implementing the IDEA addresses this very issue:

> Question 14. For a child with a disability receiving special education for the first time, when must an IEP be developed—before or after the child begins to receive special education and related services?
>
> Answer: Section 300.342(b)(1) requires that an IEP be "in effect before special education and related services are provide to an eligible child. The appropriate placement for a particular child with a disability cannot be determined until after decision have been made about the child's needs and the services that the public agency will provide to meet those needs. These decision must be made at the IEP meeting, and it would not be permissible first to place the child and then develop the IEP. Therefore the IEP must be developed before placement.

Appendix A to Part 300, 34 C.F.R., Question 14

12. Each LEA "shall ensure that the parents of each child with a disability are members of any group that makes decision on the educational placement of the child." 20 U.S.C. §1414(f); 34 C.F.R. 300.501 (c).

13. Prior to developing of the May 8, 2003 and July 31, 2003 IEPs, the Respondent had already predetermined not to place Student in the FCS home-based ABA program.

14. The Respondent must ensure that the whole continuum of alternative placements is available to meet Student's needs. 34 C.F.R. 300.551; 20 U.S.C. §1412(a)(5). In determining the placement of Student, the Respondent was required to "ensure that the placement decision was made by a group of persons, **including the parents**, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options." 34 C.F.R. 300.552(a)(1)(emphasis added); 20 U.S.C. §1412(a)(5).

15. Reimbursement is allowed for private placement if the LEA fails to provide appropriate educational services. *School of the Town of Burlington v. Department of Education*, 471 U.S. 359, 105 S.Ct. 1996 (1985); *Rapid City School District 51-4 v. Vahle*, 784 F. Supp. 1364 (D.S.D. 1990) *aff'd* 922 F.2d 476 (8th Cir 1990).

N.C.G.S. §115C-146.1 Part 14, Handicapped Children Ages Three to Five

16. "Preschool handicapped children" means all handicapped children who have reached their third birthday and whose parents have requested services from the public schools, who are not eligible to enroll in public kindergarten, and the term includes autistic children. N.C.G.S. §115C-146.1. "Services shall start no later than the beginning of the school year immediately following the children's third birthday" *Id.*

17. Preschool handicapped children are entitled to an individualized program specifically designed to meet their unique needs for special education and related services at no cost to their parents. N.C.G.S. §115C-146.2.

18. The State Board of Education must adopt rules which include a provision that, where a local educational agency finds that a child is already receiving appropriate services, that local education agency shall continue those services for as long as appropriate. N.C.G.S. §115C-146.4.

19. These rules shall also include a provision that, where a local educational agency finds that appropriate services are available from other public agencies or private organizations, that local educational agency shall contract for those services rather than provide them directly. N.C.G.S. §115C-146.4.

20. Prior to the May 8, 2003 IEP, Student was receiving appropriate services from ABC of NC, Inc. in the form of home-based ABA services.

21. FCS failed to comply with N.C.G.S. §115C-146.4 and should have continued Student's home-based ABA services and could have contracted with ABC of NC, Inc. for same.

Least Restrictive Environment

22. The school system argues that one reason it should not provide a home-based ABA program is that home placement is considered a more restrictive environment than school. The law requires that a child be placed in the Least Restrictive Environment in which the child can learn and progress satisfactorily. Categorizing the home as a very restrictive environment makes sense for school age children. However, as Dr. S conceded, for pre-school children, categorizing the home as the most restrictive environment may not make sense. Public school services are not provided to most of Student's age peers. They are either at home or in privately-funded pre-school programs. Placing Student at home, then, is consistent with the placement of his non-disabled peers and is the least restrictive environment for him.

Reimbursement for Private Educational Expenses

23. Reimbursement of special education expenses under IDEA is appropriate when the reviewing court finds that; (1) the public school's placement was not providing the child with a FAPE; and (2) the parents' alternative placement was proper under IDEA. *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359. 369-70 (1985). In determining whether the public school has provided a FAPE, the court conducts a twofold inquiry: (1) has the State complied with the procedures set forth in IDEA; and (2) is the IEP reasonably calculated to enable the child to receive educational benefits? *Bd. of Educ. of Hendrick Hudson Central Sch. Dist., Weschester County v. Rowley*, 458 U.S. 176, 206-07 (1982). Failure to meet IDEA's procedural requirements is an adequate ground for holding that the public school failed to provide a FAPE. *Hall v.*

Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985).[xx] After deciding that reimbursement is proper upon a finding that the Respondent failed to provide a FAPE based on procedural defects, then it is a matter of determining whether the parents' placement was proper under IDEA. *See Burlington*, 471 U.S. at 369-70.

24. IDEA provides a civil cause of action for parents who disagree with a decision rendered by an SEA and specifically authorizes the district court to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e). The statute does not explicitly state what remedies are available to parents whose children have been denied a free appropriate public education, nor does the statute specify what entity shall be responsible for actually remedying the violation.

25. In *Burlington*, the Supreme Court held that a district court's authority to "grant such relief as the court determines is appropriate," see 20 U.S.C. § 1415(e), encompasses the authority to order school authorities "to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the [IDEA]."*Burlington*, 471 U.S. at 369. The Court found that the statutory language contained in § 1415(e) confers broad discretion on the district court and noted that IDEA contemplates the possibility that a child would be placed in a private school at public expense where a regular public school could not meet his or her needs and retroactive reimbursement of private placement costs is an available remedy under IDEA. *Id*. at 370; *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

26. When a school district determines where it intends to place a handicapped child and then develops an IEP to carry out its decision, the resulting procedural violation of the IDEA and its regulations is tantamount to a violation of its obligation to provide the student with a free appropriate public education. *Spielberg v. Henrico County Public Schools*, 853 F.2d 256 (4th Circuit 1988). Predetermination of placement "violates the spirit and intent" of the IDEA, which emphasizes parental involvement. *Id*.

27. As found above, the FCS had an official policy of predetermining which children received home based ABA services. That policy decision is controlled by its ABA Process of Determination and strict criteria rather than a function of IEP Team determination. Moreover, that it was FCS's policy not to offer home based ABA services unless the parent requested it and not to discuss the availability of the home based ABA program with parents of autistic children unless they specifically asked for ABA services.

28. The FCS had an official policy of labeling preschool age autistic students as Developmentally Delayed (DD) rather than Autistic (AU) which precluded them from meeting FCS's ABA criteria, which require an AU label for eligibility.

[xx] *See also: Reusch, supra* citing *Hall, supra* for the proposition that "Any student evaluation that uses a single-criterion test to determine an appropriate educational program would violate the Act. 20 U.S.C. § 1412(5) (Supp. 1994); *Hall*, 774 F.2d at 635.

29. FCS predetermined that Student did not qualify for ABA home based services based on the FCS's ABA Criteria without allowing meaningful participation in that decision by Mother and Student'S Father. In addition, FCS steadfastly refused to consider ABA home based services for Student despite the impressive results obtained by Student. Finally, FCS refused to consider the ABA home based services even when its own expert Dr. M testified that Student had made amazing progress in the ABA program and recommended its continuation to the IEP Team.

30. In consideration of the above noted findings and finding that no matter how strong the evidence presented by the Petitioners, FCS still would have refused to provide Student with ABA services, the only logical conclusion is that Respondent's official policy and actions resulted in a predetermination of Student's program and placement. That predetermination denied his parents participation in the IEP process and Student an established appropriate educational program.

31. The Respondent's procedural violations were serious and caused the Student to lose educational opportunity. *See Burke County Bd. of Educ. v. Denton,* 895 F. 2d 973, 982 (4th Cir. 1990)(finding school board's violation of notice requirement did not cause student to lose educational opportunity).

32. The importance of parental participation in the IEP process is evident. See 20 U.S.C. §14-1(a)(20)(inclusion of parents in IEP team); 34 C.F.R. §300.344(a)(3)(same). As the Supreme Court made clear in *Board of Education v. Rowley*:

> 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.

458 U.S. 176, 205-06 (1982).

33. Because FCS predetermined Student's placement, FCS failed to provide Student a free and appropriate public education. It is well settled in the Fourth Circuit that failure to meet IDEA's procedural requirements is an adequate ground for holding that the public school failed to provide a free appropriate public education. *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985)(citing *Rowley*, 458 U.S. at 206, n. 27); *accord, Bd. of Educ. of the County of Cabell v. Dienelt,* 843 F.2d 813, 815 (4th Cir. 1988); *Spielberg v. Henrico County Public Schools,* 853 F.2d 256 (4th Cir. 1988); *Gadsby v. Grasmick,* 109 F.3d 940 (4th Cir. 1997).

34. The uncontested evidence at the hearing from the Petitioners' and Respondent's witnesses was that Student made remarkable progress in the ABA home based program. The ABA home-based program was appropriate. Therefore, since FCS failed to provide Student a FAPE, it must reimburse the Petitioners' for their appropriate private

placement. *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 9-10 (1993); *Burlington*, 471 U.S. 359, 369-70 (1985).

Self-Sufficiency

35. Student has the potential to be indistinguishable from his non-disabled peers. Student is entitled to an educational program which will allow him to reach self-sufficiency.

36. The Supreme Court in *Rowley* recognized that a key concern of and primary justification for the IDEA's predecessor was the desire to foster self-sufficiency in handicapped children. The Court quotes, for example, the following Senate Report excerpt:

> The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.

S. Rep. No. 94-168, at 9 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1433 (quoted in *Rowley*, 458 U.S. at 201 n. 23). The Court also quotes one of the principal Senate sponsors of the legislation stating, "Providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds." *Rowley*, 458 U.S. at 201 n.23 (quoting 121 Cong. Rec. 19492 (1975) (remarks of Sen. Williams)).

37. According to the Sixth Circuit Court of Appeals in a recent decision, the current version of the IDEA provides further support for such sentiments. *Deal v. Hamilton County Bd. of Educ.,* 392 F3d 840, 864 (6th Cir. 2004):

> Congress explicitly found that shortcomings of the previous act, the Education for all Handicapped Children Act of 1975, included low expectations for disabled children and "an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." 20 U.S.C. § 1400(a)(4). Congress has declared that the school personnel who work with disabled children should receive high quality professional development in order to provide such personnel with the skills necessary to "ensure that all disabled children have the skills and knowledge necessary to enable them . . . to be prepared to lead productive, independent, adult lives, to the maximum extent possible." 20 U.S.C. § 1400(a)(5)(E). Indeed, one of the stated purposes of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related

> services designed to meet their unique needs *and prepare them for employment and independent living*." 20 U.S.C. § 1400(d)(1)(A).
>
> At the very least, the intent of Congress appears to have been to require a program providing a meaningful educational benefit towards the goal of self-sufficiency, especially where self-sufficiency is a realistic goal for a particular child.

38. With the continuation of his ABA home-based program, self-sufficiency is a realistic goal for Student. *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 15 (1993) (rejecting argument that excessive cost of reimbursement could excuse school district from reimbursing parents in accord with IDEA's mandate); *see also, Deal, supra*, at 864-865. ("Left to its own devices, a school system is likely to choose the educational option that will help it balance its budget, even if the end result of the system's indifference to a child's individual potential is a greater expense to society as a whole.").

North Carolina's Higher Educational Standard

39. Although the Fourth Circuit has noted that North Carolina has a higher standard of educational benefit than the IDEA,[xxi] the ALJ concludes the application of the NC standard is not necessary to decide that the goal of self-sufficiency is appropriate for Student, or that Respondent's procedural and/or substantive violations resulted in a denial of a FAPE for Student. Judge Silber's thorough analysis of North Carolina's higher educational standard in the local level decision of *In Re G*, 27 IDELR 451 (N.C. LEA December 24, 1997) is instructive, however.

Stay-Put

40. To avoid further unnecessary dispute between Petitioners and Respondent, it is noted that this decision establishes Student's stay put placement as his ABA program provided by ABC of North Carolina, Inc. 34 C.F.R. 300.514(c). While the seminal case on the issue of Stay-Put is *Honig v. Doe*, 484 U.S. 305, 323, 108 S.Ct. 592 (1988), the case of *Board of Educ. of Montgomery County v. Brett Y.*, 25 IDELR 956 (DC Md. 1997), *affd.* No. 97-1936, 25 IDELR 956 (4th Cir. 1998) directly and succinctly resolves the issues which the parties may face following this decision. In *Brett Y*, the district court reversed the local ALJ's decision in favor of the parents but required the school to maintain the child's private school placement as his "pendent or stay put placement" because that became the last agreed upon placement pursuant to the decision of the ALJ.

[xxi] In the recent case of *G. v. Fort Bragg Dependent Schools*, 343 F.3d 295, 303; 2003 U.S. App. LEXIS 17294, (4th Cir. 2003) the Court of Appeals reiterated: Thus, federal law establishes a minimum "baseline" of educational benefits that states must offer students with disabilities. States are free, however, to set a higher standard for provision of educational services to those students, and North Carolina has taken this approach. n12

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -n12 North Carolina General Statutes section 115C-106(a) states that it is the policy of the State of North Carolina . . . to ensure every child a fair and full opportunity to reach his full potential and that no child [with special needs] shall be excluded from service or education for any reason whatsoever. N.C. Gen. Stat. §§ 115C-106(a) (Lexis 1999) (emphasis added). We have interpreted this section as requiring more than the "free appropriate public education" required under federal law. *See In re Conklin*, 946 F.2d 306, 318 (4th Cir. 1991) (stating, with respect to section 115C-106, that "within the State of North Carolina, it has been recognized that state lawmakers have built upon the federal floor created by the EHA [the IDEA's predecessor, under which the federal standard was also a FAPE] and have decided to provide the handicapped children, within the state, with a level of educational services that surpasses the national minimum"); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982-83 (4th Cir. 1990) (stating, in reference to section 115C-106(a), "North Carolina apparently does require more than the EHA").
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**21]

See also: Woods ex rel. T.W. v. New Jersey Dept. of Educ., 20 IDELR 439, No. 93-5123 (3rd Cir. 1993) where the Court wrote:

> The "stay put" provision of IDEA, 20 U.S.C. § 1415(e)(3)[xxii] provides as follows:
>
> > During the pendency of any proceedings conducted pursuant to this section, [i.e., due process hearings, appeals to district courts,] unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . . .
> >
> > In essence, this provision authorizes a statutory injunction that preserves the status quo of a child's current educational placement while due process proceedings or judicial proceedings pursuant to IDEA take place. The provision represents Congress' policy choice that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved. *Id.*

BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, THE UNDERSIGNED MAKES THE FOLLOWING:

DECISION

1. The Respondents shall reimburse the Petitioners for all ABA home-based services and related expenses from May 8, 2003, through the 2003-2004 school-year, and the following extended school-year.

2. That since the ABA home-based placement is the last agreed upon placement, the Respondent shall continue to reimburse the Petitioners for ongoing ABA home-based services until such time as Student is transitioned out of the ABA program under a properly prepared IEP.

3. That the Petitioners have withdrawn their claim for Independent Educational Evaluation reimbursement; therefore, that issue is no longer before the court.

4. The Petitioners are prevailing parties for the purposes of award of attorneys' fees, costs and litigation expenses.

NOTICE

This Decision becomes final unless a party appeals it. In order to appeal this Decision, the person seeking review must file a written notice of appeal with the North Carolina Superintendent of Public Instruction. The written notice of appeal must be filed within thirty (30) days after the person is served with a copy of this Decision. N.C.G.S. 115C-116(h) and (I).

[xxii] Now Section 1415(j).

This the 20th day of June, 2005.

James L. Conner, II
Administrative Law Judge

[1] Tr. Vol. XII, p. 2705 LL. 8-10.

[2] Tr. Vol. IV, p. 897.

[3] Tr. Vol. IV, p. 899, LL. 12-23.

[4] Tr. Vol. IV, p. 899, LL. 12-23.

[5] Tr. Vol. IV, p. 906, LL. 9-14;

[6] Tr. Vol. IV, p. 916, LL. 1-25; p. 917, LL. 11-12.

[7] Tr. Vol. IV, p. 927, LL. 7-25; p. 928, LL. 1-17.

[8] Tr. Vol. IV, p. 928, LL. 5-6.

[9] Tr. Vol. IV, p. 982, LL. 13-23.

[10] Tr. Vol. IV, p. 929, LL. 1-8.

[11] Tr. Vol. IV, p. 929, LL. 9-14.

[12] Tr. Vol. IV, p. 929, LL. 21-25.

[13] Tr. Vol. IV, p. 930, LL. 16-20.

[14] Tr. Vol. IV, p. 930, LL. 10-12.

[15] Tr. Vol. IV, p. 932, LL. 12-16.

[16] Tr. Vol. IV, p. 932, LL. 17-23.

[17] Tr. Vol. IV, p. 933, LL. 1-4.

[18] Tr. Vol. V, p. 1075, LL. 17-25.

[19] Tr. Vol. IV, p. 934, LL. 12-14.

[20] Tr. Vol. IV, p 934, LL. 18-25; p. 935, LL. 1-10.

[21] Tr. Vol. IV, p. 941, LL. 3-4.

[22] Tr. Vol. V, p. 1093, LL. 18-25; p. 1094, LL. 1-3.

[23] Tr. Vol. IV, p. 948, LL. 8-20.

[24] Tr. Vol. V, p. 1239, LL. 8 –23.

[25] Tr. Vol. V, p. 1242, LL. 19-23.

[26] Tr. Vol. V, p. 1244, L. 4 - p. 1245 L. 3.

[27] Tr. Vol. V, p. 1248, LL 3-10.

[28] Tr. Vol. V, p. 1248, LL 12-24.

[29] Tr. Vol. VI, p. 1307, L. 15 - p. 1308 L. 5.

[30] Tr. Vol. VI, p. 1341, LL. 9-15.

[31] Tr. Vol. VI, p. 1342, LL. 16-18.

[32] Tr. Vol. III, p. 506, LL. 21-25; p. 507, LL. 1-6.

[33] Tr. Vol. III, p. 509, LL. 16-24.

[34] Tr. Vol. III, p. 510, LL. 6-9.

[35] Tr. Vol. III, p. 512, LL. 15-17.

[36] Tr. Vol. III, p. 517, LL. 17-25.

[37] Tr. Vol. III, p. 519, LL. 16-25.

[38] Tr. Vol. III, p. 521, LL. 1-11.

[39] Tr. Vol. III, p. 522, LL. 3-11.

[40] Tr. Vol. III, pp. 523-26.

[41] Tr. Vol. III, p. 529, LL. 10-25; p. 530, LL. 1-6.

[42] Tr. Vol. III, p. 530, LL. 7-21.

[43] Tr. Vol. III, pp.530-531.

[44] Tr. Vol. III, p. 539, LL. 8-18.

[45] Tr. Vol. III, p. 540, LL. 2-10.

[46] Tr. Vol. III, p. 541, LL. 22-25; p. 542, LL. 1-8.

[47] Tr. Vol. III, p. 543, LL. 18-20.

[48] Tr. Vol. III, p. 544, LL. 11-25.

[49] Tr. Vol. III, p. 590, LL. 1-12.

[50] Tr. Vol. III, p 630, LL. 4-7.

[51] Tr. Vol. III, pp. 627-628.

[52] Tr. Vol. III, p. 639, LL. 4-22.

[53] Tr. Vol. III, p. 640, LL. 15-16.

[54] Tr. Vol. III, p. 640, LL. 21-25.

[55] Tr. Vol. III, pp. 653-655.

[56] Tr. Vol. III, pp. 662-664.

[57] Tr. Vol. III, p. 701, LL. 24-25, p. 702, LL. 1-8.

[58] Tr. Vol. III, p. 669, LL. 12-15.

[59] Tr. Vol. III, p. 690, LL. 23-25.

[60] Tr. Vol. III, p. 707, LL. 6-25; p. 708, LL. 4-25; p. 709. LL. 1-9.

[61] Tr. Vol. IV, p. 857, LL. 19-25.

[62] Tr. Vol. IV, p. 863, LL. 11-21.

[63] Tr. Vol. IV, p. 861, LL. 12-23.

[64] Tr. Vol. IV, p. 865, LL. 18-19; p. 867, LL. 4-6.

[65] Tr. Vol. IV, p. 869, LL. 19-22.

[66] Tr. Vol. IV, p. 867, LL. 23-25.

[67] Tr. Vol. IV, p. 871, LL. 11-12.

[68] Tr. Vol. IV, p. 872, LL. 3-8, 22-25.

[69] Tr. Vol. IV, p. 873, LL. 11-25;p. 875, LL. 2-9.

[70] Tr. Vol. IV, p. 882, LL. 13-25; p. 883, LL. 1-15; p. 884, LL. 1-10.

[71] Tr. Vol. II, pp. 402, LL. 14-25; p. 404, LL. 20-25.

[72] Tr. Vol. II, p. 415, LL. 19-20.

[73] Tr. Vol. II, p. 462, LL. 23-25.

[74] Tr. Vol. II, p. 463, LL. 12-15.

[75] Tr. Vol. III, pp. 718-719.

[76] Tr. Vol. I, p. 62, LL.18-25; p. 63, L. 1-2.

[77] Tr. Vol. I, pp. 65-66.

[78] Tr. Vol. I, p. 68, LL. 12-22.

[79] Tr. Vol. I, p. 71, LL. 4-17.

[80] Tr. Vol. I, p. 74, LL. 13-16.

[81] Tr. Vol. I, p. 83, LL. 23-25; p. 84, LL. 1-7.

[82] Tr. Vol. I, p. 84, LL. 8-10.

[83] Tr. Vol. I, p. 85, LL. 13-17.

[84] Tr. Vol. I, p. 145, LL. 3-5.

[85] Tr. Vol. I, p. 86, LL. 21-23.

[86] Tr. Vol. I, p. 90, LL. 16-18.

[87] Tr. Vol. I, p. 95, LL. 12-13.

[88] Tr. Vol. I, p. 95, LL. 16-19.

[89] Tr. Vol. I, p. 100, LL. 20-23.

[90] Tr. Vol. I, p 106, LL. 19-22.

[91] Tr. Vol. I, p. 144, LL. 10-25.

[92] Tr. Vol. I, p. 180, LL. 19-24.

[93] Tr. Vol. I, p. 181, LL. 2-9.

[94] Tr. Vol. I, p. 228, LL. 2-6.

[95] Tr. Vol. II, p. 256, LL. 6-9.

[96] Tr. Vol. IX, p. 2066, LL. 9-10.

[97] Tr. Vol. IX, p. 2060, LL. 3-5.

[98] Tr. Vol. IX, pp. 2060-2061, LL. 24-1.

[99] Tr. Vol. IX, p. 2064, LL. 16-18.

[100] Tr. Vol. IX, pp. 2064-2065, LL. 25-9.

[101] Tr. Vol. IX, p. 2065, L. 22 - p. 2066, L. 7-8.

[102] Tr. Vol. IX, p. 2066, LL. 25-8.

[103] Tr. Vol. IV, pp. 881-882, LL. 24-4.

[104] Tr. Vol. I, p. 203, LL. 17-19.

[105] Tr. Vol. I, p. 203, LL. 19.

[106] Tr. Vol. II, p. 379, LL. 17-20.

[107] Tr. Vol. II, p. 380, LL. 6-9.

[108] Tr. Vol. II, p. 391, LL. 20-23.

[109] Tr. Vol. II, p. 389, LL. 12-13.

[110] Tr. Vol. VIII, p. 1900, L 22- p. 1901 L 25.

[111] Tr. Vol. VIII, p. 1870.

[112] Tr. Vol. VIII, p. 1898.

[113] Tr. Vol. IX, p. 2111, LL. 9-11; p. 2117, LL. 12-22; p. 2118, LL. 18-19.

[114] Tr. Vol. IX, p. 2117, LL. 12-22.

[115] Tr. Vol. II, p. 341, LL. 15-17.

[116] Tr. Vol. IX, p. 2126, LL. 17-25.

[117] Tr. Vol. II, p. 277, LL. 10-17.

[118] Tr. Vol. IX, p. 2130, LL. 1-5.

[119] Tr. Vol. X, p. 2243, LL. 11-12.

[120] Tr. Vol. II, p. 275, LL. 8-12.

[121] Tr. Vol. II, p. 276, LL. 20-22.

[122] Tr. Vol. II, p. 276, 8-19.

[123] Tr. Vol. II, p. 279, LL. 14-25.

[124] Tr. Vol. II, p. 280, LL. 1-5.

[125] Tr. Vol. II, p. 282, LL. 10-21.

[126] Tr. Vol. II, p. 282, LL. 22-25; p. 282, L. 1.

[127] Tr. Vol. II, p. 283, LL. 4-7.

[128] Tr. Vol. X, p. 2248, LL. 2-7.

[129] Tr. Vol. II, p. 283, LL. 12-15.

[130] Tr. Vol. II, p. 292, LL. 10-12.

[131] Tr. Vol. II, p. 318, LL. 15-17; p. 319, LL. 10-17.

[132] Tr. Vol. II, p. 326, LL. 22-25; p. 327, L. 1.

[133] Tr. Vol. II, p. 331, LL. 19-23.

[134] Tr. Vol. II, p. 348, LL. 19-22.

[135] Tr. Vol. II, p. 349, LL. 12-15.

[136] Tr. Vol. II, p. 350, LL. 1-7.

[137] Tr. Vol. II, p., 350, L. 8.

[138] Tr. Vol. XI, p. 2498 L. 22 - p. 2499 L. 2.

[139] Tr. Vol. IV, p. 748, LL. 1-10.

[140] Tr. Vol. IV, p. 746, LL. 9-18.

[141] Tr. Vol. IV, p. 799, LL. 13-24.

[142] Tr. Vol. IV, p. 788, LL. 12-25.

[143] Tr. Vol. II, p. 354, LL. 23-24.

[144] Tr. Vol. II, p. 355, LL. 2-6.

[145] Tr. Vol. II, p. 355, LL. 11-14.

[146] Tr. Vol. II, p. 362, LL. 17.

[147] Tr. Vol. II, p. 362, LL. 10-15.

[148] Tr. Vol. II, p. 370, LL. l-25; p. 371, LL. 1-2.

[149] Tr. Vol. II, p. 374, LL. 3-16.

[150] Tr. Vol. II, p. 376, LL. 7-11.

[151] Tr. Vol. VIII, p. 1739, LL6-16.

[152] Tr. Vol. VIII p. 1671, LL. 19-20.

[153] Tr. Vol. VIII p. 1744, L. 12 - p. 1745, L. 9.

[154] Tr. Vol. VI, p. 1457, LL. 14-15; p. 1459, 20-24.

[155] Dr. B Depo., pp. 116-117, LL. 22-3.

[156] Dr. B Depo., p. 12, LL. 3-6.

[157] Dr. B Depo., p. 13, LL. 20-23.

[158] Dr. B Depo., pp. 13-14, LL. 24-5.

[159] Dr. B Depo., p. 16, LL. 5-10.

[160] Dr. B Depo., pp. 17-18, LL. 24-2, 8.

[161] Dr. B Depo., p. 66, LL. 3-9.

[162] Dr. B Depo., p. 67, LL. 13-20.

[163] Dr. B Depo., p. 67, LL. 13-24.

[164] Dr. B Depo., p. 68, LL. 3-13.

[165] Dr. B Depo., p. 70, L. 7.

[166] Dr. B Depo., p. 70, LL. 16-18.

[167] Dr. B Depo., p. 73, LL. 19-23.

[168] Dr. B Depo., p. 74, LL. 2-3.

[169] Dr. B Depo., p. 71, LL. 3-12.

[170] Dr. B Depo., p. 71, LL. 14-17.

[171] Dr. B Depo., p. 74, LL. 6-7.

[172] Dr. B Depo., pp. 74-75, LL. 19-6.

[173] Dr. B Depo., p. 77, LL. 13-17.

[174] Dr. B Depo., pp. 77-78, LL. 25-10.

[175] Dr. B Depo., p. 78, LL. 16-23.

[176] Dr. B Depo., pp. 76-77, LL. 25-9.

[177] Dr. B Depo., p. 79, LL. 18-22.

[178] Dr. B Depo., p. 79, LL. 6-15.

[179] Dr. B Depo., p. 75, LL. 10-19.

[180] Dr. B Depo., p. 76, LL. 8-15.

[181] Dr. B Depo., p. 76, LL. 22-24.

[182] Dr. B Depo., p. 77, LL. 18-23.

[183] Dr. B Depo., p. 78, LL. 11-13.

[184] Dr. B Depo., pp. 83-84, LL. 25-2.

[185] Dr. B Depo., p. 84, LL. 4-15.

[186] Dr. B Depo., pp. 84-85, LL. 24-2.

[187] Dr. B Depo., p. 85, LL. 3-4.

[188] Dr. B Depo., p. 85, LL. 5-11.

[189] Dr. B Depo., p. 85, LL. 12-16.

[190] Dr. B Depo., pp. 85-86, LL. 23-5.

[191] Dr. B Depo., p. 86, LL. 6-11.

[192] Dr. B Depo., p. 89, LL. 6-10.

[193] Dr. B Depo., p. 89, LL. 22-25.

[194] Dr. B Depo., p. 88, LL. 3-7.

[195] Dr. B Depo., p. 88, LL. 8-15.

[196] Dr. B Depo., p. 88 L. 8 - p. 89 L. 5.

[197] Dr. B Depo., p. 89, LL. 16-18.

[198] Dr. B Depo., p. 87, LL. 14-25.

[199] Dr. B Depo., p. 125, LL. 8-14.

[200] Dr. B Depo., p. 47, LL. 21-25.

[201] Tr. Vol. VIII, p. 1749, LL. 24-25; p. 1750, LL. 1-2.

[202] Tr. Vol. VIII, p. 1750, LL. 3-25.

[203] Tr. Vol. VIII, p. 1754, LL. 10-23.

[204] Tr. Vol. VIII, p. 1755, LL. 7-12.

[205] Tr. Vol. VIII, p. 1755, LL. 13-21.

[206] Tr. Vol. VIII, pp. 1765-1783.

[207] Tr. Vol. VIII, p. 1788, LL. 16-25; pp. 1789-91.

[208] Tr. Vol. VIII, p. 1792, LL. 23-25; p. 1793, LL. 1-5.

[209] Tr. Vol. VIII, p. 1797, LL. 23-25; p. 1798, LL. 1-7.

[210] Tr. Vol. VIII, p. 1798, LL. 8-10.

[211] Tr. Vol. VIII, p. 1801 LL. 14-16.

[212] Tr. Vol. VIII, p. 1802 LL. 13-18.

[213] Tr. Vol. IX, p. 1932, LL. 11-17.

[214] Tr. Vol. IX, pp. 1932-1933.

[215] Tr. Vol. IX, p. 1936, LL. 17-25; p. 1937, L. 1.

[216] Tr. Vol. IX, pp. 1939-40.

[217] Tr. Vol. IX, p. 1950, LL. 1-22.

[218] Tr. Vol. IX, p. 1955, LL. 10-17.

[219] Tr. Vol. IX, p. 1947, LL. 16-19.

[220] Tr. Vol. IX, p. 1963, LL. 14-16.

[221] Dr. B Depo., pp. 79, LL. 11-15. p. 126, LL. 16-23.

[222] Tr. Vol. XII, p. 2635 LL. 20-24.

[223] TR. Vol. XII, p. 2276 LL. 21-24.

[224] Tr. Vol. XII, p. 2693, L. 23 - p. 2694, L. 1.

[225] Tr. Vol. IV, p. 929, LL. 9-14; p. 930, LL. 10-12.

[226] Tr. Vol. III, p. 640, LL 8-16.

[227] Tr. Vol. VII, p. 1598, LL. 14-15.

[228] Tr. Vol. VII, p. 1739, LL. 6-16.

[229] Tr. Vol. I, p. 228, LL. 2-6.

[230] Tr. Vol. X, p. 2244, LL. 13-22.

[231] Tr. Vol. VII, p. 1604, LL. 21 - p. 1605, L. 13.

[232] Tr. Vol. V, p. 1093, L. 18 - p. 1094, L. 3.

[233] Tr. Vol. I, p. 71, LL. 4-9; p. 135, LL. 15-20.