

For Respondents North Carolina State Board of Education (“SBE”), Textbook Commission (“Commission”), and the Department of Public Instruction (“DPI”) (collectively, “Respondents”):

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ISSUES

1. Whether Petitioner’s bid application for its Glencoe *Math Course 1*, *Math Course 2*, *Math Course 3* and *Accelerated* was properly submitted to and evaluated by Respondents and as such, whether the Respondents violated N.C. Gen. Stat. § 150B-23 through the Textbook Commission’s failure to recommend, and the State Board of Education’s failure to approve, Petitioner McGraw-Hill’s Glencoe middle school math materials and place the materials on the state-approved textbook list.

2. Whether the Textbook Commission violated N.C. Gen. Stat. § 150B-23 in its application of the Reconsideration Process to McGraw-Hill.

EXHIBITS

For Petitioner

- 3 2014 Invitation to Submit Textbooks for Evaluation and Adoption in North Carolina
- 4 letter, Wilsworth of McGraw-Hill to Moore, 4/4/14, with attached bid submission
- 5 correlations of Glencoe middle school textbooks with Common Core State Standards, Mathematics Grade 6
- 6 correlations of Glencoe middle school textbooks with Common Core State Standards, Mathematics Grade 7
- 7 correlations of Glencoe middle school textbooks with Common Core State Standards, Mathematics Grade 8
- 8 correlations of Glencoe middle school textbooks with Common Core State Standards, Mathematics Grades 7 and 8
- 9 Instructional Materials Evaluation Tool for CCSS Alignment in Mathematics Grades 6-8, Bid ID 51, Evaluator Robbin Briley, Glencoe Math Course, Grade 6-8
- 10 memorandum, Brown to 2014 Publishers, 8/1/14, re August 11-12, 2014 Deliberations Meeting

- 11 Textbook Commission Members, 2014
- 13 reconsideration notes, Textbook Commission members, Bid ID#s 51, 52, 53, and 54
- 14 Textbook Commission Deliberations Voting Chart - Mathematics K-12, 2014
- 15 letter, Novey to SBE, 9/2/14, with documents showing textbooks not recommended
- 16 NC Textbook Adoption Process, Frequently Asked Questions
- 18 2014 Invitation to Submit Textbooks for Evaluation and Adoption in North Carolina, K-12 Mathematics, PowerPoint presentation to Textbook Commission, 3/5/13
- 19 *McGraw-Hill School Education, LLC v. NC State Board of Education, et al.*, Order Granting Preliminary Injunction, 1/15/15
- 20 printout from State Board of Education with links to adopted textbooks
- 21 statement from DPI placing Glencoe math textbooks on approved textbook list
- 22 2015 Cost Proposal, Excel Spreadsheet (electronic document)
- 23 e-mail, Bennett to Burke and others, 8/13/14, subject: NC 6-12 Hearing Results
- 24 e-mail exchanges within McGraw-Hill re Textbook Recommended/Not Recommended List, 8/25/14; e-mail, Moore to publishers, 8/18/14, re Textbook Recommended/Not Recommended List
- 35 e-mail string among Bennett, Ryan, Snowwhite, and Silva of McGraw-Hill, 9/15/14 and 9/17/14, re McGraw-Hill Proposal - 2014 Mathematics Education Instructional Materials
- 38A Glencoe Math Course 1 Student Edition, Volume 1
- 38B Glencoe Math Course 1 Student Edition, Volume 2
- 38C Glencoe Math Course 1 Teacher Edition, Volume 1
- 38D Glencoe Math Course 1 Teacher Edition, Volume 2
- 38E Glencoe Math Course 1, Assessment Matters workbook
- 39A Glencoe Math Course 2 Student Edition, Volume 1
- 39B Glencoe Math Course 2 Student Edition, Volume 2
- 39C Glencoe Math Course 2 Teacher Edition, Volume 1

- 39D Glencoe Math Course 2 Teacher Edition, Volume 2
- 39E Glencoe Math Course 2, Assessment Matters workbook
- 40A Glencoe Math Course 3 Student Edition, Volume 1
- 40B Glencoe Math Course 3 Student Edition, Volume 2
- 40C Glencoe Math Course 3 Teacher Edition, Volume 1
- 40D Glencoe Math Course 3 Teacher Edition, Volume 2
- 40E Glencoe Math Course 3, Assessment Matters workbook
- 41 excerpts from deposition of Tara Wilsworth, 4/23/15
- 42 excerpts from deposition of Kim Harvey, 4/23/15, pages 18-21
- 43 memorandum, Brown to Textbook Publishers, 9/5/14, State Board of Education Textbook Recommendations

For Respondents

- 1 North Carolina Bid Proposal Form A, 5/8/09
- 2 North Carolina Textbook Adoption School Price List 2009
- 3 2014 Invitation to Submit Textbooks for Evaluation and Adoption in North Carolina, K-12 Mathematics, PowerPoint presentation to Textbook Commission, 3/5/13
- 4 Form A, North Carolina Bid Proposal, McGraw-Hill Education, 4/5/13
- 5 North Carolina Textbook Adoption School Price List 2013 - CTE
- 6 2014 Invitation to Submit Textbooks for Evaluation and Adoption in North Carolina
- 7 letter, Wilsworth to Moore, 4/4/14, with attached McGraw-Hill bid proposal
- 8 North Carolina Textbook Commission, PowerPoint presentation, 4/28/14
- 9 materials presented to State Board of Education, September 2014
- 10 NC Textbook Adoption Process, Frequently Asked Questions

- 11 e-mails: Moore to publishers, 5/12/14 and Harvey to Bennett, 8/11/14, re Bid ID Number
- 12 e-mail exchange, Textbook Commission legal advice

WITNESSES

For Petitioner

1. Kim Harvey (by live testimony and deposition designations) is the director of strategic services for McGraw-Hill. Ms. Harvey oversees the creation of bids and proposals, grant applications, correlations and the execution of contracts. She has been employed at McGraw-Hill for 23 years.

2. Edward Wayne Bennett (by live testimony) is McGraw-Hill's K-12 district manager for the southeast, supporting Georgia, North Carolina, South Carolina and West Virginia. Mr. Bennett is familiar with McGraw-Hill's product, formulations, substance and the procedures for approval in North Carolina. He works directly with the marketing department in formulating how to submit McGraw-Hill's textbook bid application.

3. Andrew Clute (by live testimony) is the Vice President of McGraw-Hill's 6th grade through 12th grade portfolio and is accountable for the profit and loss of McGraw-Hill's product lines for these grades. His primary job is to ensure McGraw-Hill is accurately forecasting and developing products to meet the future needs of the market. Mr. Clute developed the Glencoe middle school math materials as a series.

4. Tara Wilsworth (by deposition designations) is a bids and contracts specialist at McGraw-Hill. She helped prepare McGraw-Hill's bid application. Excerpts from her deposition testimony have been entered into evidence as Petitioner's Exhibit 41.

For Respondents

5. Charles Gaffigan (by live testimony) is a member of the Textbook Commission and oversaw the textbook approval process for the 2014-2015 bid cycle. Mr. Gaffigan is currently employed as the principal at East McDowell Middle School.

6. Daniel Novey, Ed.D. (by live testimony) is the Chair of the Textbook Commission. Mr. Novey is currently employed as the superintendent of schools in Carteret County, North Carolina.

7. Donna Brown (by live testimony) is the director of the Federal Program Monitoring and Support Division at the North Carolina DPI. Her division is responsible for grant administration, implementation of federal and state initiatives as well as facilitating the

Superintendent's Parent Advisory Council and the textbook adoption process. Ms. Brown was in charge of communication and coordination in the development of the 2014 Invitation.

8. Laura Crumpler (by live testimony) is a Special Deputy Attorney General in the Education Section with the North Carolina Department of Justice. Ms. Crumpler's job duties include advising the North Carolina DPI, the SBE, and the various boards and commissions that report to the SBE.

APPLICABLE STATUTES and RULES

(including but not limited to)

N.C. Gen. Stat. § 115C-85 *seq.*; and N.C. Gen. Stat. § 150B-23; 16 N.C.A.C. 6D.0205, .0206, .0207.

PRELIMINARY MATTERS

Petitioner filed with its Petition for Contested Case Hearing a Motion for Temporary Restraining Order and Preliminary Injunction and Request for Expedited Hearing, with accompanying affidavits of Mr. Wayne Bennett, District Sales Manager for McGraw-Hill. Administrative Law Judge ("ALJ") J. Randall May heard arguments on Petitioner's Motion and granted Petitioner's Motion for Preliminary Injunction.

On January 15, 2015, ALJ May issued an Order on Petitioner's Preliminary Injunction Motion. The Order requires Respondents to place McGraw-Hill's Glencoe middle school math materials on the state-approved textbook list pending the outcome of this contested case, subject to a continuing performance bond by McGraw-Hill.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, and exhibits received and admitted into evidence, the Stipulations of Fact in the Pretrial Order, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following Findings of Fact by a preponderance of the evidence. In making these Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in this case.

FINDINGS OF FACT

1. Petitioner McGraw-Hill School Education, LLC ("McGraw-Hill" or "Petitioner") is a foreign limited liability company organized under the laws of Delaware with its North Carolina registered agent located at 176 Mine Lake Court, Suite 100, Raleigh, North Carolina 27615. Its

learning materials are used in more than 13,000 schools and districts. McGraw-Hill submits about 500 textbook bids each year throughout the United States.

2. Respondent North Carolina State Board of Education (“SBE” or “Respondent”) is an administrative organization of the State. The SBE is responsible for the general supervision and administration of this State’s free public school system subject to laws enacted by the General Assembly. The policies developed by the North Carolina State Board of Education set the direction for all aspects of the DPI and local public school organization and operations.

3. Respondent North Carolina Textbook Commission (“Commission” or “Respondent”) is an appointed 23 member commission. The Commission is responsible for evaluating textbooks and recommending to the SBE which textbooks should be included on the state-approved textbook list.

4. Respondent the North Carolina Department of Public Instruction (“DPI” or “Respondent”) is charged with implementing the state's public school laws and SBE’s policies and procedures governing pre-kindergarten through 12th grade public education.

5. North Carolina has an established process for adopting textbooks for use in the public schools. The General Statutes have set forth specific mandates and guidelines for the adoption of textbooks, which adoption is under the general jurisdiction of the State Board of Education.

6. The State Board of Education is charged with adopting standards for each subject taught in the public schools. Textbooks must align with those adopted standards. After a set of standards is adopted for a new subject, the State Board of Education must engage in the selection of textbooks that align with those standards.

7. In North Carolina, publishers are invited to submit materials to be placed on the list of textbooks approved by the SBE.

8. Prior to 2010, the textbook adoption process typically operated off of a five year cycle. Due to lack of funding and implementation of the Common Core curriculum, the cycle has changed; however, as new content standards for particular academic subjects are developed, publishers are usually invited to submit bids for the following year.

9. Common Core is a set of standards and philosophies the goal of which is to instill more rigor into the curriculum in order to drive higher outcomes. The Common Core State Standards in North Carolina are almost a copy of the national version of Common Core.

10. For each bid cycle, an Invitation to Submit Bids, essentially a request for proposals, is distributed to publishers inviting them to submit materials for the academic subject which is up for renewal.

11. The applicable statutes provide for a Textbook Commission to ensure impartiality with regard to textbook selection. Textbook Commission members receive training by members of the

Department of Public Instruction. The State Board of Education defines a comprehensive, detailed process for requesting bids, ensuring that there are no conflicts of interest, ensuring that publishers comply with requirements, adhering to stringent timelines, and providing the most impartial review of textbooks possible.

12. In addition to Textbook Commission members, the Commission appoints Regional Advisory Committee evaluators ("evaluators") who are assigned the task of reviewing in depth each and every textbook that is submitted for bid.

13. The purpose for the textbook adoption process is to “select and adopt for a period to be determined the most advantageous to the State public school system for the exclusive use in the public schools of North Carolina, the basic textbooks or series of books needed for instructional purposes at each instructional level on all subject matter required by law to be taught in elementary and secondary schools of North Carolina.” N.C. Gen. Stat. § 115C-86.

14. The 2014 Invitation to Submit Textbooks for Evaluation and Adoption (the “2014 Invitation”) focused on mathematics, requiring all submissions to be compatible with the goals and objectives of the North Carolina Standard Course of Study in Mathematics. Materials for the Standard Course of Study in Mathematics are required to align with Common Core State Standards for Mathematics (“CCSS-M”) in North Carolina and the Standards for Mathematical Practice. (P. Ex. 3); (Stipulation of the Parties in Pre-Trial Order, 3(a), (b)).

15. As part of the 2014-2015 textbook adoption cycle, on or about February 28, 2014, there was a Textbook Commission planning meeting at which Textbook Commissioners were provided initial training for the upcoming adoption cycle.

16. On or about March 7, 2014, textbook publishers were invited by DPI to submit textbooks/programs on a bid proposal form in response to the 2014 Invitation to Submit Textbooks for Evaluation and Adoption in North Carolina ("Invitation to Submit") developed by the agency and approved by the State Board of Education.

17. The 2014 Invitation was reviewed by the attorneys for the SBE before it was sent to publishers.

18. McGraw-Hill was one of several textbook publishers that received the invitation from DPI. McGraw-Hill is a leading publisher of textbooks in the United States and had participated in multiple textbook selection and adoption cycles in North Carolina in the past.

19. Approval of a publisher’s materials by the SBE is significant. If materials are placed on the state-approved textbook list, Local Education Agencies (“LEAs”) do not pay sales tax or shipping and handling on the purchase, resulting in essentially a 14% discount in price. The SBE and the publisher enter into a standard textbook contract which provides additional benefits to LEAs to incentivize them to purchase the approved textbooks. Some of these benefits include: free teacher editions for each textbook, a guarantee that the textbook will be purchased at its lowest possible price, and digitized instructional material for individual students using digital texts.

20. School districts may purchase materials that are not on the state-approved textbook list but prices for those materials may not be fixed and the school district will not receive the benefits found in the state's contract, such as free digital materials and teacher editions. Further, publishers cannot offer local school districts a lower price for the materials than it offers to school districts in other states due to the Most Favored Nations clause.

21. The Invitation to Submit issued by DPI and sent to McGraw-Hill and other textbook publishers included a page entitled "Tentative Schedule for 2014-2015 Adoption Process." Among other important dates, the page with the tentative schedule set forth that all publishers that would be submitting bids in response to the Invitation to Submit were encouraged to attend a preliminary publishers' meeting. Also included within the Invitation to Submit was a bid proposal sample form (Attachment 5), along with the instruction that "[o]n the Bid Proposal Form (Attachment 5), publishers must designate each specific category, by number and name, for which a bid submission is to be evaluated." (Petitioner's Ex. 3.)

22. On or about March 13, 2014, DPI hosted a preliminary publishers meeting, at which, publishers received additional information and explanation about the 2014-2015 adoption process. Publishers were given the opportunity to ask questions about the process, including about the instructions and information provided in the Invitation to Submit, prior to submitting their bid proposal forms and bid submission samples and correlations. At least one representative from McGraw-Hill attended the preliminary publishers meeting.

23. Following the March 13, 2014 publishers meeting, DPI e-mailed to the textbook publishers, including McGraw-Hill, updated presentation slides from the meeting, a copy of the Invitation to Submit, and a Frequently Asked Questions (FAQ) document. One of the questions in the FAQ document stated: "Publishers may only submit bids in two categories. Does that mean two of the seven program areas?" The answer provided in response was: "K-12 Mathematics is considered to be one category. Publishers may submit bids for any grades/courses for math; however, publishers must list the grade/course for each textbook on the bid form." (Respondents' Ex. 3, 10)

24. McGraw-Hill participated but did not ask DPI about how to submit its bid as a series because it had no questions regarding its intention or how to do so. McGraw-Hill relied on the instructions in the 2014 Invitation. Neither the 2014 Invitation nor the 2014 Frequently Asked Questions document provided any instruction to publishers regarding the ability to, or the format for, bidding materials as a series.

25. On or about March 27, 2014, the members of the Textbook Commission attended a meeting at which they were trained on K-12 mathematics content standards by curriculum consultants at DPI. Also, prior to conducting the review and evaluation of textbooks, members of the Textbook Commission also received training on the textbook selection and adoption process including specific training on: the evaluation rubrics to be used in evaluating the textbook materials submitted by publishers for consideration by the Textbook Commission, the legal requirements for being a Textbook Commission member, and the ethics requirements imposed on all State commission or board members.

26. McGraw-Hill's bid application was timely submitted to the Office of Textbook Adoption Services. McGraw-Hill submitted some 105 "bids", including mathematic materials for grades 6, 7 and 8.

27. Following the April 8, 2015 deadline for textbook publishers to submit sealed bid proposals, the bids were opened in the Office of Textbook Adoption Services on April 9, 2014. Ms. Sylvia Moore, a DPI staff member, compiled the information submitted by all of the textbook publishers into a spreadsheet, which she then forwarded to the acting Chair of the Textbook Commission, Charles Gaffigan. Mr. Gaffigan assigned a Bid ID Number to each textbook or set of textbook materials identified by the publishers on the bid proposal forms. Then, after assigning Bid ID Numbers to all of the materials identified on the bid proposal forms, Mr. Gaffigan prepared a comprehensive bid submissions list document, which included information on all of the textbook materials identified on the bid proposal forms submitted by all of the textbook publishers who would be submitting textbook materials to be considered by the Textbook Commission. On May 12, 2014, Ms. Moore distributed the comprehensive bid submissions list with the Bid ID Numbers to the textbook publishers and invited publishers to contact her with any questions.

28. Also, after receiving the spreadsheet from Ms. Moore, Mr. Gaffigan, along with other members of the Textbook Commission, began the process of hiring and assigning evaluators to review textbooks. In hiring evaluators to review textbooks, the Textbook Commission took into account the credentials of the prospective evaluators, the total number of textbooks identified on the bid proposal forms submitted by the textbook publishers, the number of textbooks that had been designated for a particular grade or course as set forth on the bid proposal forms submitted by textbook publishers, as well as the content area expertise of the Textbook Commission members.

29. As part of the 2014-2015 textbook adoption cycle, McGraw Hill responded to the Invitation to Submit by submitting a response that included a bid proposal form which identified multiple dozens of textbooks materials to be considered for adoption by the SBE for use at every grade level, K-12. McGraw-Hill submitted the following materials as corresponding with grades 6 through 8: *Math Course 1*, *Math Course 2*, *Math Course 3* and *Accelerated* (the "Glencoe middle school math materials"). Included in each of these bids were student and teacher editions, as well as digital material. With respect to the Glencoe middle school textbooks identified on the bid proposal form, Petitioner indicated that the "grade level" for each textbook was "6-8".

30. McGraw-Hill purposefully bid its Glencoe middle school math materials as a series by designating the Glencoe middle school math materials as corresponding with grades 6 through 8. It was McGraw-Hill's intent to show that the materials are a series, that they are intended to be implemented as a series, and that the Glencoe middle school math materials met the spirit and intent of the Common Core for grades 6, 7 and 8.

31. The Glencoe middle school math materials were meant to build on each other through what is called a "gradual release methodology" where a topic is introduced at one grade level and then more substance is added to it at a later grade level to meet the standards. Petitioner asserted that building the materials as a series ensures that as the student introduces themselves to new concepts, the student has the same foundation from the previous grades as well as the same

tools, the same digital system, the same look and same feel to make sure he or she is able to accurately comprehend and learn the content as opposed to being reintroduced every time.

32. The 2014 Invitation contains the requirements and instructions for publishers to complete the bid and submit official samples. The 2014 Invitation contains six parameters governing textbook submissions. The sample contract is Form A of the bid proposal. The Invitation does not give guidance to publishers as to a manner to present textbooks for each grade level except the box marked "grade level." The Invitation does not specify that one textbook cannot be submitted as a series. McGraw-Hill specified in its bid that the Glencoe middle school math materials were to be evaluated as a series.

33. Following the submission of its bids, every publisher also submits correlations which indicate how the course materials meet the content standards required by the SBE. McGraw-Hill timely submitted its Glencoe middle school math materials correlations, and these correlations were reviewed by the regional advisory evaluators and the Textbook Commission.

34. Mr. Gaffigan was surprised to learn that McGraw-Hill had designated each of the Glencoe middle school textbooks that it would be submitting for consideration as grade levels 6, 7 and 8 textbooks. Mr. Gaffigan testified at the hearing in this matter that while it was not unprecedented for a publisher to represent that a textbook aligned with the standards for multiple grades (as opposed to a single grade), it was unusual, particularly with respect to middle school math materials. Because of that, Mr. Gaffigan wanted to be sure that McGraw-Hill had, in fact, indicated on the bid proposal form that it submitted that each of the Glencoe middle school textbooks correlated with grades 6, 7, and 8. He confirmed with Sylvia Moore at DPI that McGraw-Hill had indicated on the bid proposal form that each of the Glencoe middle school textbooks correlated with grades "6-8."

35. During the 2014-2015 math textbooks selection and adoption cycle, after confirming that McGraw Hill had indicated on the bid proposal form that the "grade" associated with each Glencoe textbook was "6-8," Mr. Gaffigan assigned bid numbers to each textbook or set of textbooks consistent with the way McGraw-Hill presented the materials on the bid proposal form document that it submitted to DPI. Specifically, Mr. Gaffigan assigned: Bid No. 51 to the materials identified on the bid proposal form as *Course 1* materials; Bid No. 52 to the materials identified on the bid proposal form as *Course 2* materials; Bid No. 53 to the materials identified on the bid proposal form as *Course 3* materials; and Bid No. 54 to the materials identified on the bid proposal form as *Math Accelerate* materials. For each of the textbooks or set of materials identified by McGraw Hill on the bid proposal form and assigned Bid No. 51, 52, 53, or 54, McGraw Hill designated the corresponding grade level for each as "6-8."

36. After it submitted its sealed bid proposal, McGraw-Hill timely submitted its textbook samples and correlations for review by the Textbook Commission and the evaluators. Based upon how McGraw-Hill completed the bid proposal form, it was understood by the agency and reiterated to the members of the Textbook Commission that McGraw-Hill would submit textbook samples for evaluation, all of which it should expect to be evaluated against the standards adopted in North Carolina for math in grades 6, 7, and 8. The correlations submitted by McGraw-Hill for the *Course 1* materials, the *Course 2* materials, and the *Course 3* materials, each identified one specific grade for which the textbook materials were offered. Specifically, the correlation document for *Course 1* referenced grade 6; for

Course 2, grade 7; and for Course 3, grade 8. The correlation document for the *Math Accelerated* materials referenced grades 7 and 8.

37. Following the submission of textbook samples and correlations by McGraw-Hill, on or around July 20, 2014, McGraw-Hill (along with all other submitting textbook publishers) was given the opportunity to present to the Textbook Commission and the evaluators concerning its instructional materials submissions.

38. After the textbook samples and correlations were submitted by McGraw-Hill for review, the evaluators assigned to review the materials were advised that McGraw-Hill indicated on the bid proposal form that each of the textbooks or set of materials associated with Bid ID Numbers 51, 52, 53, and 54 were for grade levels 6, 7, and 8, and as such, the textbook materials should be evaluated against the standards for all three grades.

39. For each textbook or set of materials submitted by the Petitioner under Bid Numbers 51, 52, 53, and 54, Textbook Commission members and evaluators reviewed the materials. The majority found deficiencies and evidence that the materials did not conform to the Standard Course of Study and approved objectives for the specific grades for which it was offered, *i.e.* grades 6, 7, and 8. The evaluators' findings and concerns regarding the materials were documented on the evaluation rubrics.

40. The evaluators and Textbook Commission members discussed the merits and deficiencies of the textbooks that had been submitted for consideration. Evaluators were polled by Mr. Gaffigan concerning whether they would vote to recommend or not recommend for adoption the textbooks they reviewed and evaluated. For all of the textbook materials associated with Bid ID Numbers 51, 52, 53 and 54, the majority of the evaluators voted that they would not recommend the textbook materials for adoption because the materials did not sufficiently align with the standards for the grades for which they were offered, *i.e.*, grades 6, 7, and 8.

41. As follow-up, the evaluators were asked by Textbook Commission members to indicate how they would have voted if McGraw-Hill had indicated on its bid proposal form that the individual course textbook materials were being submitted for a single grade level as opposed to a grade span. With respect to the materials associated with Bid ID No. 51, the evaluators' vote would have been 7-0 in favor of adoption if submitted for grade 6 only. With respect to the materials associated with Bid ID No. 52, the evaluators' vote would have been 5-2 in favor of adoption if submitted for grade 7 only. With respect to the materials associated with Bid ID No. 53, the evaluators' vote would have been 5-0 in favor of adoption if submitted for grade 8 only. And with respect to the materials associated with Bid ID No. 54, the evaluators' vote would have been: 9-0 in favor of adoption if submitted for grade 7 only; 1-8 against adoption if submitted for grade 8 only; and 2-5 against adoption if submitted for grades 7 and 8.

42. Following this discussion and debriefing with the evaluators and after deliberating, the Textbook Commission voted not to recommend the textbook materials associated with Bid Numbers 51, 52, 53, and 54 to the State Board of Education for inclusion on the approved textbooks list.

43. When reviewing a publisher's materials, the Textbook Commission has access to the textbooks themselves, the correlations, the first four columns of the publisher's bid document which contain information on the title, grade level, ISBN and publisher's name, and the evaluations

of each course from the regional advisory evaluators employed by the Textbook Commission. All ancillary materials are to be taken into consideration by the Textbook Commission upon making its decision whether to recommend the titles.

44. When evaluating materials, the evaluators fill out a worksheet addressing what the SBE categorizes as “non-negotiable alignment criteria” and “additional alignment criteria and indicators of quality.” This worksheet is an evaluation tool that was created by Student Achievement Partners and has been modified for North Carolina. It is used by both the regional advisory evaluators and Textbook Commission members to explain what areas are evaluated for whether the materials meet the content-standards. To be placed on the recommended list, all bid submissions must meet all of the non-negotiable criteria at each grade level to be aligned to CCSS-M. To be aligned to the CCSS-M content standards, materials should devote at least 65% and up to approximately 85% of class time to the major work of each grade. (Stipulation of the Parties in Pre-Trial Order, 3(c)). The majority of both sets of the evaluator’s notes on each non-negotiable criteria for McGraw-Hill’s Glencoe middle school math materials, both regional advisory evaluators and Commission members, have a “Y” in the box titled “Meet?”; meaning, that each bid’s materials met the content standards and the requirement to devote at least 65% of class time to the major work of each grade.

45. In addition to the non-negotiable criteria, there are “additional alignment criteria and indicators of quality” which help regional advisory evaluators and Textbook Commission members determine materials that are more closely aligned to the CCSS-M standards. The majority of both sets of evaluators found McGraw-Hill’s Glencoe middle school math materials met the CCSS-M content standards which textbook materials must meet in order to be placed on the state-approved textbook list.

46. As to McGraw-Hill, the Textbook Commission chose to not recommend the Glencoe middle school math materials because they were bid as “6-8” under the column marked “Grade Level.” It felt the individual materials could not be taught across grade levels.

47. All textbook publishers for whom the Textbook Commission voted to non-recommend textbook materials for adoption were notified of the Textbook Commission's decision and given the opportunity to participate in a reconsideration process as set forth in the Invitation to Submit. According to the Invitation to Submit, “[a]t the conclusion of deliberations, each publisher whose submission(s) have not been recommended will have the opportunity to submit additional information that might assist the Textbook Commission in reassessing its recommendation.” (Petitioner's Ex. 10; Respondents' Ex. 3)

48. In order to participate in the Reconsideration Process, publishers must appear at the Textbook Commission’s Deliberations meeting and make a verbal appeal for reconsideration pursuant to the process set forth in the 2014 Invitation. The purpose for the reconsideration is to allow publishers to present additional information that might assist the Textbook Commission in re-assessing its recommendation. McGraw-Hill took all appropriate procedural steps as set forth in the 2014 Invitation for its Glencoe middle school math materials to be reconsidered. (Stipulation of the Parties in Pre-Trial Order, 3(i)).

49. Out of 23 members of the Textbook Commission, 15 members were present for textbook deliberations and the Reconsideration Process. Three resigned from the Textbook Commission before attending the first meeting.

50. McGraw-Hill participated in the reconsideration process with respect to the textbooks and materials associated with Bid ID Numbers 51, 52, 53 and 54, *i.e.*, the Glencoe middle school textbooks at issue in this contested case. For each of those textbooks or set of materials, in the corresponding grade level column on the bid proposal form, McGraw-Hill designated "6-8." Based on guidance provided during training and throughout the process, Textbook Commission members, as a general rule, evaluated the textbook materials with an eye toward determining whether the materials conformed to the standards for the grade levels for which they were submitted as indicated on the bid proposal forms.

51. In casting their votes against recommending the Glencoe middle school textbooks for adoption, several of the Textbook Commission members echoed the comments of the evaluators and remarked in their documentation recording their votes that if the *Course 1* textbook materials had been submitted as grade 6 only, those Textbook Commission members would have recommended it for adoption. Similarly, several of the Textbook Commission members' reports reflect that if the *Course 2* textbook materials had been submitted as grade 7 only, those Textbook Commission members would have recommended it for adoption; and if the *Course 3* textbook materials had been submitted as grade 8 only, those Textbook Commission members would have recommended it for adoption. Finally, the Textbook Commission members' notes reflect that if the *Math Accelerated* textbook materials had been submitted as a grade 7 textbook only, those Textbook Commission members might have recommended it for adoption.

52. Prior to the Textbook Commission hearing presentations from McGraw-Hill as part of the reconsideration process, Textbook Commission members inquired of Mr. Gaffigan whether it was appropriate and permissible for it (the Textbook Commission) to reconsider those materials as if the *Course 1* textbook materials, the *Course 2* textbook materials, the *Course 3* textbook materials, and the *Math Accelerated* textbook materials had been submitted for a single grade only, rather than how they were submitted, which was across a grade span of 6-8. Based on Mr. Gaffigan's experience serving on the Textbook Commission, he believed that the Textbook Commission members should not reconsider the materials in a manner inconsistent with how McGraw-Hill had designated them on the bid proposal form.

53. Though Mr. Gaffigan believed that the Textbook Commission members should not reconsider the materials in a manner inconsistent with how McGraw-Hill bid them, for the benefit of the entire Textbook Commission (especially the new Commission members) he asked DPI staff for guidance on the issue. DPI staff, in accordance with advice of legal counsel, advised the Textbook Commission members that they should consider a publisher's materials based on how the materials were identified on the bid proposal form submitted by the publishers. To do otherwise, DPI staff and legal counsel reasoned, would be to allow a textbook publisher to change its bid at the reconsideration. This advice to take the bid submitted as literal was obtained by Dr. Sarah McManus from the DPI through an e-mail to counsel for Respondents, Laura Crumpler and Katie Cornetto. Ms. Crumpler had not seen McGraw-Hill's initial bid of the Glencoe middle school math materials, the correlations, the textbooks, and the evaluations of the materials.

54. During the reconsideration process, the Textbook Commission stated its position to McGraw-Hill, but nonetheless offered McGraw-Hill the opportunity to present to the Commission any additional information that it wanted the Commission to consider.

55. According to DPI policy as conveyed to publishers, each publisher is allowed time to present additional information to the Textbook Commission during the Reconsideration Process according to the DPI. According to the testimony from McGraw-Hill, McGraw-Hill was given 10 to 30 minutes for the reconsideration of multiple bids ranging from its materials for kindergarten through eighth grade, including its Glencoe middle school math materials.

56. During its reconsideration, McGraw-Hill representative Mr. Kedrick Lewis explained to the members of the Textbook Commission that as to its Glencoe middle school math materials, *Course 1* corresponded with Grade 6, *Course 2* with Grade 7, *Course 3* with Grade 8 and *Accelerated* with Grades 7 and 8, and that the materials were purposefully bid as a series and not as a grade span.

57. At the conclusion of the presentation to the Textbook Commission, a vote was taken on each set of textbook materials associated with Bid Numbers 51, 52, 53 and 54. A quorum of the Textbook Commission voted 11 to 2 not to recommend the textbook materials bid under Bid Numbers 51, 52, 53, and 54.

58. During the Discovery phase of this contested case, a notebook containing the Textbook Commission members' comments prior to and following McGraw-Hill's reconsideration was provided to Petitioner. Two Textbook Commission members appear to have copied each other's comments as to whether to recommend and reconsider McGraw-Hill's Glencoe middle school math materials. Some comments were incomplete or did not state a reason behind the Textbook Commission member's decision.

59. On or about August 18, 2014, McGraw-Hill was informed its Glencoe middle school math materials were not recommended to the SBE by the Textbook Commission.

60. On or about September 2, 2014, the Textbook Commission compiled a list of recommended textbooks/instructional materials for Mathematics K-12 for adoption by the State Board of Education. Those recommendations were then submitted to the State Board of Education. McGraw-Hill's Glencoe middle school math materials were not on this list

61. At its regularly scheduled meeting in September 2014, the State Board of Education heard a presentation by two Textbook Commission members, Charles Gaffigan and Dr. Dan Novey, concerning the 2014-2015 textbook selection and adoption cycle. At the conclusion of the presentation, the State Board of Education voted to approve the list of textbooks and instructional materials recommended by the Textbook Commission. Textbook publishers were notified in writing of the list of approved materials on or around September 5, 2014.

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in this matter. To the extent the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be so considered without regard to their given labels.

2. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. A court need not make findings as to every fact, which arises from the evidence, and need only find those facts that are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).

3. The Petitioner bears the burden of proof by a greater weight or preponderance of the evidence of showing that the Agency has substantially prejudiced its rights as well as whether the agency acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. See N.C. Gen. Stat. § 150B-23. See also *Surgical Care Affiliates, LLC v. NC. Dep't of Health & Human Servs., Div. of Health Serv. Regulation, Certificate of Need Section*, 762 S.E.2d 468, 474-75 (N.C. Ct. App. 2014), *review denied*, 768 S.E.2d 564 (N.C. 2015).

4. [A]gency action is considered 'arbitrary and capricious' only if it indicates a 'lack of fair and careful consideration' and fails 'to indicate 'any course of reasoning and the exercise of judgment.'" *Watson v. NC. Real Estate Corn'n*, 87 N.C. App. 637, 649, 362 S.E.2d 294, 301 (1987), quoting *State ex rel. Comm'r of Insurance v. North Carolina Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980).

5. An administrative law judge shall decide a contested case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency. N.C. Gen. Stat. § 150B-34.

6. Respondents are entitled to a presumption that they acted in good faith in rendering the decision not to recommend for adoption and not adopting the Glencoe middle school math textbooks for inclusion on the State-approved list. In accordance with *Painter v. Wake County Bd of Ed.*, 217 S.E.2d 650, 288 N.C. 165 (1975), absent evidence to the contrary, it will be presumed that "public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. Every reasonable intentment will be made in support of the presumption."

7. The burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rusher v. Tomlinson*, 119 N.C. App. 458, 465, 459 S.E. 2d 285, 289 (1995), *aff'd*, 343 N.C. 119, 468 S.E.2d 57 (1996);

Comm'r of Ins. V Fire Ins. Rating Bureau, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). "It is more than a scintilla or a permissible inference." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 177 (1982).

8. In weighing evidence which detracts from the agency decision," "[i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand." *Little v. Bd. of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983) (citations omitted).

9. N.C. Gen. Stat. § 115C-85 *et seq.* expressly authorizes the State Board of Education to select and adopt textbooks needed for instructional purposes at each instructional level on all subject matters required by law to be taught in elementary and secondary schools of North Carolina. The State Board of Education is also authorized by statute to make all necessary rules and regulations concerning requests for bids for textbooks to be used in the schools.

10. Textbook publishers were invited by DPI to submit textbooks materials on a bid proposal form in response to the 2014 Invitation to Submit Textbooks for Evaluation and Adoption in North Carolina, which Invitation to Submit had previously been approved by the State Board of Education.

11. Among other requirements, textbook publishers were required to identify all bid submissions that it would be submitting on a bid proposal form and to identify on the bid proposal form, the "grade level" against which the publisher wanted its textbook materials to be evaluated.

12. For all of the Glencoe middle school math materials at issue in this contested case, Petitioner identified the relevant "grade level" as "6-8." Consequently, the textbook materials were considered and evaluated by the evaluators and Textbook Commission members against the standards adopted in North Carolina for math grades 6, 7, and 8.

13. Although McGraw-Hill subsequently submitted correlation documents and samples that more precisely identified the grade levels for which McGraw-Hill intended the Glencoe middle school materials to be evaluated against, because the correlation documents were inconsistent with what McGraw-Hill indicated on its bid proposal form would be the content covered in the Glencoe middle school textbooks, Respondents were within their authority to evaluate the materials based on what McGraw-Hill represented in its bid proposal form that it submitted to DPI by the April 8, 2014 deadline.

14. With respect to McGraw-Hill's contention that the way the Glencoe middle school textbooks were designated on the bid proposal form was both intentional and correct because the materials are able to be used across grade levels rather than in just one grade, such contention does not answer the question of whether the Respondents acted improperly in evaluating the materials against the standards for math grades 6, 7 and 8. Regardless, for example, of whether an eighth grade math teacher could use the *Course 1* textbook materials in his or her classroom to teach a student that struggles in math, by identifying "6-8" as the grade correlated to the *Course 1* textbook materials on the bid proposal form, McGraw-Hill represented that it would submit a math textbook that aligned with the math standards for grades 6, 7, and 8.

15. With respect to McGraw-Hill's contention that the way the Glencoe middle school textbooks were designated on the bid proposal form was both intentional and correct because the materials were intended to be bid as a "series," meaning the concepts in the textbooks build upon each other sequentially from *Course 1* through *Math Accelerated*, such contention does not answer the question of whether the Respondents acted improperly in evaluating the materials against the standards for math grades 6, 7 and 8. Regardless of whether McGraw-Hill intended to market the *Course 1*, the *Course 2*, the *Course 3* and the *Math Accelerated* textbooks to buyers as a series, by identifying on the bid proposal form "6-8" as the grade levels correlating to the *Course 1*, *Course 2*, *Course 3*, and *Math Accelerated* textbook materials, McGraw-Hill represented that each set of materials that it would submit to the agency for consideration would align with the math standards for grades 6, 7, and 8. Nowhere on the bid proposal form that McGraw Hill submitted did it indicate that McGraw Hill was offering the *Course 1* textbook materials for grade 6 only; the *Course 2* textbook materials for grade 7 only; the *Course 3* textbook materials for grade 8 only; and the *Accelerated Math* textbook materials for grades 7 and 8 only.

16. Substantial evidence was presented at the hearing in this matter that during the reconsideration phase of the textbook adoption process, Petitioner acknowledged that it intended for its *Course 1* textbook materials to be evaluated against the standards for grade 6, for its *Course 2* materials to be evaluated against the standards for grade 7, and its *Course 3* materials to be evaluated against the standards for grade 8, regardless of what was reflected in the bid proposal form it submitted.

17. Substantial evidence exists that even if Petitioner intended to submit the Glencoe middle school textbooks as a "series," and therefore the designation of "6-8" on the bid proposal form was intentional, it was not improper for the evaluators, the Textbook Commission, and the State Board of Education to rely on what McGraw-Hill indicated on the bid proposal form and evaluate each set of materials (*Course 1*, *Course 2*, *Course 3* and *Math Accelerated*) against the standards for grades 6, 7, and 8 as set forth in the bid.

18. While the Respondents might have chosen to allow McGraw-Hill to essentially change its bid during the reconsideration process or afterwards by disregarding how McGraw-Hill designated the Glencoe middle school textbooks on the bid proposal form that it submitted under seal, it was not irrational or unreasonable to decline to do so as a means of promoting the quality and consistency of their decisions, as well as to safeguard the integrity and fairness of the process for all textbook publishers.

19. As previously stated, the Administrative Law Judge shall give due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency. The amount of deference given to an agency's interpretation of the statutes is it charged with administering depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . ." *Good Hope Health Sys., LLC v. N.C. Dep't of Health & Human Servs.*, 189 N.C. App. 534, 544, 659 S.E.2d 456, 463 (2008).

20. The preponderance of the evidence in this case supports the Respondents' explanation of its bid considerations thus concluding that Respondents acted reasonably. Moreover, the preponderance of the evidence supports the conclusion that the Textbook

Commission did not violate N.C. Gen. Stat. § 150B-23 in its application of the Reconsideration Process to McGraw-Hill. In all regards, Respondents' actions in this matter were not arbitrary or capricious; nor did Respondents act erroneously, exceed their authority or jurisdiction, fail to use proper procedure, or fail to act as required by law or rule.

21. The Textbook Commission's decision to non-recommend McGraw-Hill's Glencoe middle school textbooks for adoption and the State Board of Education's decision not to adopt those textbooks do not preclude McGraw-Hill from selling the textbooks to schools and school districts in the State. Schools and school districts are free to purchase materials that are not on the State-approved list.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned enters the following Final Decision based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned holds that Petitioner failed to carry its burden of proof by a greater weight of the evidence that Respondents violated N.C. Gen. Stat. § 150B-23 through the Textbook Commission's failure to recommend, and the State Board of Education's failure to approve, Petitioner McGraw-Hill's Glencoe middle school math materials and place the materials on the state-approved textbook list. Further, Undersigned holds that Petitioner failed to carry its burden of proof by a greater weight of the evidence that the Textbook Commission violated N.C. Gen. Stat. § 150B-23 in its application of the Reconsideration Process to McGraw-Hill. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side. The weight of Petitioner's evidence does not overbear in that degree required by law the weight of evidence of Respondents to the ultimate issues. Respondents' decisions regarding the failure to adopt Petitioner's Glencoe middle school textbooks and ultimately Respondent State Board of Education's decision to not include Petitioner's middle school text books that are the subject of this contested case hearing for inclusion on the State Board of Education's "approved" list is **AFFIRMED**.

NOTICE

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statutes Chapter 150B, Article 4, any party wishing to appeal the Final Decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties.

In conformity with the Office of Administrative Hearings' Rules, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This is the 24th day of November, 2015.

Augustus B. Elkins II
Administrative Law Judge