

BEFORE THE CHIEF INFORMATION OFFICE
STATE OF NORTH CAROLINA
DEPARTMENT OF INFORMATION TECHNOLOGY

Proceeding No. 000-1000A

AMPLIFY EDUCATION, INC.,

Petitioner,

vs.

NORTH CAROLINA DEPARTMENT
OF PUBLIC INSTRUCTION and
IMAGINATION STATION, INC.

Respondents.

Videotaped Deposition of Mark Johnson

(Taken by Petitioner)

Raleigh, North Carolina

Wednesday, December 4, 2019

Reported in Stenotype by
Tina Sarcia-Maxwell

Transcript produced by computer-aided transcription

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ALSO PRESENT: Sandra Thomas, Edward Roche,
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Michael Kirby, Videographer

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VIDEOTAPED DEPOSITION OF MARK

JOHNSON, a witness called on behalf of
Petitioner, before Tina Sarcia-Maxwell,
Notary Public in and for the State of North
Carolina, at the Department of Instruction,
301 N. Wilmington Street, Raleigh, North
Carolina, on Wednesday, December 4, 2019,
commencing at 10:04 a.m.

1 I N D E X

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11 (Exhibits are attached to the transcript.)

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1 THE VIDEOGRAPHER: We are on the
2 record at 10:04 a.m. This is the deposition
3 of Mark Johnson. This deposition is being
4 held at 301 North Wilmington Street in
5 Raleigh, North Carolina, on December 4, 2019.

6 The court reporter is Tina Maxwell.
7 The videographer is Michael Kirby. Will
8 counsel please introduce themselves and whom
9 they represent.

10 MR. ARMBRUSTER: Mitchell Armbruster
11 here on behalf of the petitioner, Amplify
12 Education Inc., Smith Anderson Law Firm of
13 Raleigh.

14 MS. LUCAS: I am Tiffany Lucas with
15 the Attorney General's Office here on behalf
16 of the Department of Public Instruction.

17 MR. SHANAHAN: Kieran Shanahan and
18 Andrew Brown here on behalf of Imagination
19 Station.

20 MR. ARMBRUSTER: Also with me here
21 today is Ed Roche with my firm, and Inna
22 Marmash, general counsel of Amplify.

23 MS. LUCAS: Along with me here today
24 is Ryan Boyce, general counsel at DPI, as
25 well as Philip Thomas, counsel at DPI.

1 MR. SHANAHAN: Sandra Thomas from
2 Imagination Station, my client.

3 THE VIDEOGRAPHER: Court reporter,
4 please swear the witness.

5 Mark Johnson,
6 having first been duly sworn, was
7 examined and testified as follows:

8

9 EXAMINATION

10 BY MR. ARMBRUSTER:

11 Q. Good morning, Mr. Johnson.

12 A. Good morning. Has any other deposition had
13 such an elaborate video recording in this
14 process?

15 MR. SHANAHAN: This is the first --

16 A. What is the reason? I know it is every right
17 for your client, but what is the reason for?

18 Q. I am the one asking questions here today, but
19 you are the superintendent of the Department
20 of Public Instruction, correct?

21 A. I assume since you have a court reporter and
22 you already have this for the record, there
23 are probably other reasons for taping this in
24 such an elaborate manner?

25 Q. This is the only deposition Amplify has

1 noticed, so it is my normal practice to
2 videotape important depositions, and you're
3 an important public official. It is not
4 intended in any improper way to take your
5 video deposition.

6 A. Okay.

7 Q. Mr. Johnson, have you been deposed before?

8 A. No.

9 Q. Let me just quickly go through your
10 background. Where did you go to college?

11 A. Emory University.

12 Q. And what year did you graduate?

13 A. 2006.

14 Q. And then just to run through this, I
15 understand you did Teach For America?

16 A. Yes.

17 Q. Where did you do that?

18 A. Charlotte, North Carolina.

19 Q. Then after that, you decided to go to law
20 school, correct?

21 A. I did attend law school, yes.

22 Q. Where did you attend law school and when did
23 you graduate?

24 A. University of North Carolina at Chapel Hill;
25 I graduated in 2011.

1 Q. And what did you do after you graduated from
2 law school?

3 A. I worked at a law firm in Winston-Salem,
4 North Carolina.

5 Q. What law firm was that?

6 A. At the time it was called Womble Carlyle. I
7 believe now it is Womble Bond.

8 Q. And what was the nature of your practice at
9 Womble?

10 A. I was an associate in the mergers and
11 acquisitions group.

12 Q. So you didn't do any litigation at Womble; is
13 that correct?

14 A. That's correct.

15 Q. And how long were you with Womble?

16 A. Two years -- two or three years.

17 Q. And if I ask you a question, I'm just asking
18 for you to answer to the best of your
19 recollection.

20 A. Thank you.

21 Q. I would understand you may not recall --

22 A. I would have to go back and look at my dates
23 to know the exact time but definitely two or
24 three years.

25 Q. You didn't review your resume with what you

1 did at Womble for the deposition today,

2 correct?

3 A. Correct.

4 Q. And what did you do after you moved on from

5 Womble?

6 A. I worked at a company at Winston-Salem called

7 Inmark.

8 Q. What were you there?

9 A. Corporate counsel.

10 Q. Generally, how long were you at Inmark?

11 A. Three years.

12 Q. And what did you do after Inmark?

13 A. I was elected to be the State Superintendent

14 of Public Instruction for North Carolina.

15 Q. And that you were elected in November of

16 2016, correct?

17 A. Yes.

18 Q. What did you do to prepare for your

19 deposition today?

20 A. Reviewed some materials, such as the response

21 letter, briefly skimmed over it.

22 Q. And "the response letter," do you mean the

23 response letter that you authored to the

24 protest letter?

25 A. Yes, denying Amplify's protest.

1 Q. Were there any particular parts of that
2 response that you reviewed to prepare for
3 your deposition?

4 A. Yes, the first part, not the exhibits. So
5 just the first half, I skimmed.

6 Q. Are there any other documents you reviewed to
7 prepare for your deposition today?

8 A. Yes, the notes from the evaluation panel
9 meetings for RFP-2.

10 Q. Do you recall which notes you reviewed?

11 A. The notes from November and the notes from
12 January.

13 Q. Are there any other documents that you recall
14 reviewing to prepare for your deposition
15 today?

16 A. No.

17 Q. Can you describe generally for me what your
18 involvement was in this procurement that
19 we're here about for this bid protest today?

20 A. Yes. There's legislation in North Carolina
21 that directed the Department of Public
22 Instruction, under my supervision, to launch
23 an RFP in order to select a statewide reading
24 diagnostic, one for the entire state, and
25 that legislation called for me to put

1 together an evaluation panel of employees at
2 the Department of Public Instruction and for
3 them to make a recommendation and for me to
4 make a final decision on what the one reading
5 diagnostic tool would be for the State of
6 North Carolina.

7 Q. What was your general day-to-day involvement?

8 I may ask you about specific
9 documents during this deposition, but were
10 you involved in the procurement daily or what
11 was the extent?

12 A. No, I was not. The extent was anyone who was
13 involved in the procurement. So they have
14 been put on that team and signed the no
15 conflict of interest and signed the
16 confidentiality agreements. I was giving
17 general directions to them on making sure we
18 got the process through in time.

19 So basically, anything that needed
20 my sign-off as State Superintendent would
21 come to me. I would sign off on that, and
22 then I trusted the professionals at the
23 Department of Public Instruction to conduct a
24 fair, unbiased process to provide a
25 recommendation for a reading diagnostic tool.

1 (Exhibit No. 1, Excerpt of 2017

2 Session Law, so marked)

3 Q. Mr. Johnson, you referred to in your
4 testimony legislation that had been passed
5 that underlaid this procurement.

6 What I handed to you and marked as
7 Exhibit 1 is an excerpt from a 2017 session
8 law, and I ask to turn your attention to page
9 3 of this exhibit, which is actually page 86
10 of a very lengthy budget bill.

11 Have you turned to page 3?

12 A. Yes.

13 Q. Do you see where it says "Section 7.27(b)"?

14 A. Yes.

15 Q. Is that the legislation you're referring to
16 that led to this RFP, although it was
17 subsequently amended?

18 A. To the best of my knowledge, yes. This reads
19 like this would be the legislation that
20 started this process.

21 Q. And under Section 7.27(c), do you see where
22 it says "The State Superintendent shall
23 inform and supervise evaluation panel"?

24 A. Yes.

25 Q. What did you do to form the evaluation panel?

1 I know there was a procurement in 2017 that
2 got canceled and one in 2018; so I don't know
3 if your process varied each time, but
4 generally, what did you do to form the
5 evaluation panel?

6 A. We knew it would be important to have a
7 diverse range of expertise from the
8 Department of Public Instruction. We knew it
9 could only be people who worked at the
10 Department of Public Instruction.

11 So I trusted the K3 literacy
12 division to come up with recommendations on
13 who should be on the evaluation panel with
14 the broad spectrum of, obviously, K3 literacy
15 experts but, also, wanting to make sure we
16 had accountability experts on there,
17 technology experts.

18 And, also, we decided that the
19 voting members could only be Department of
20 Public Instruction employees; but we also
21 wanted outside voices in this to make sure we
22 heard from school district leaders on this as
23 well, so we got some outside people to come
24 in.

25 And they could, according to the

1 procurement rules, give input, so I allowed
2 the staff at the Department of Public
3 Instruction to recommend names to me for my
4 approval.

5 Q. In response to that question, just to follow
6 up, the statute says "The evaluation panel
7 shall be composed of persons employed within
8 the Department of Public Instruction."

9 Are you saying there was some
10 interpretation that concluded you could have
11 members on the panel that were not at DPI?

12 A. No, I'm not saying that. I'm saying
13 everything we did for this procurement was
14 run through our procurement division to make
15 sure that we adhered to all the rules as they
16 were applied in this very unique legislation.

17 I believe that the outside people
18 were entirely nonvoting members that were
19 able to give input into this process, and
20 nothing we did would have been done without
21 running it through procurement to make sure
22 it was completely 100 percent within the
23 rules of procurement.

24 Q. And under this statute, the evaluation panel
25 is supposed to select one vendor to provide

1 to you for your approval, correct?

2 A. Where does it say that?

3 Q. I'm looking under 7.27(c). Take all the time
4 you need.

5 A. Yes. "Select one vendor to provide the
6 assessment instrument or instruments," so I
7 don't know how instruments would change that
8 interpretation.

9 Q. Sure. But the superintendent is not part of
10 the team making the recommendation under the
11 statute, correct?

12 A. I don't read it that way, no.

13 Q. So did you understand you were a member of
14 the evaluation panel?

15 A. No. I'm just answering the question you
16 asked. I know what we did during that time,
17 but if you're asking specifically if the
18 superintendent can't be on it, I would
19 question that because it does say "the State
20 Superintendent shall form and supervise."

21 And then it says that "The
22 evaluation panel shall be made of persons
23 employed within the Department of Public
24 Instruction," which would include the State
25 Superintendent.

1 Q. My question is really: Who was the group
2 that made the selection under this statute?
3 Was it the evaluation panel, or was it the
4 evaluation panel and you?

5 MR. SHANAHAN: Object to the form of
6 the question.

7 MS. LUCAS: Same objection.

8 A. When I read this statute and the
9 understanding that we got from procurement
10 was the evaluation panel would evaluate
11 vendors. They would provide a
12 recommendation, and then I would make the
13 final decision on the reading diagnostics
14 tool for the State of North Carolina.

15 Again, it is very important to note
16 this is a very different way of doing a
17 procurement in the State of North Carolina.
18 The General Assembly, for whatever reason,
19 did this by design.

20 Q. For what reason did they do it, if you know?

21 A. I do not know.

22 Q. Have you talked to anyone at the General
23 Assembly why they passed this unique statute?

24 A. No.

25 Q. What was your reaction when you first learned

1 of this statute?

2 A. That we had a lot of work to do in a short
3 amount of time.

4 Q. What is different about this statute than a
5 normal procurement for a reading assessment
6 tool or anything else?

7 A. I really couldn't speak to the specifics of
8 that. I know from the procurement people who
9 have discussed this and we've had a lot of
10 discussions about this particular procurement
11 over the past year, I know this is not
12 normally how procurements are done.

13 It is very unique the way they put
14 it into the law that it shall be a
15 recommendation by this panel, and then I, as
16 State Superintendent, have the decision to
17 make.

18 Q. But your decision is either approve or reject
19 the recommendation; is that correct?

20 A. I don't read the rejection part. It says
21 "With the approval of the State
22 Superintendent."

23 Q. I'm having the same questions you are. You
24 do agree the State Superintendent had to
25 approve a selection of an evaluation panel

1 under this statute?

2 A. Yes.

3 (Exhibit No. 2, 2018 Budget Bill
4 Provision, so marked)

5 Q. Mr. Johnson, I've handed you what's been
6 marked as Exhibit 2, which I'll represent is
7 a 2018 budget bill provision which made some
8 corrections or updates to the Exhibit 1 we
9 just looked at.

10 And I'll have you look at page 2 of
11 this Exhibit 2, which is actually page 30 of
12 the budget bill, and ask you if you see that
13 section marked "Section 7.27(b)"?

14 A. Yes.

15 Q. And do you see that this appears to be almost
16 identical to Exhibit 1 except for a couple of
17 strikeouts and additions?

18 A. Yes.

19 Q. Do you understand why the 2018 legislation
20 had to be passed?

21 A. Yes.

22 Q. Why is that?

23 A. My team and I asked for it. We attempted to
24 conduct a fair and unbiased process which we
25 now refer to as RFP-1. That, unfortunately,

1 had to be canceled, and we did not have
2 enough time to restart an RFP and meet the
3 requirements that were in the law originally.

4 So my team and I went to the General
5 Assembly and explained the situation as to
6 what happened here at the Department of
7 Public Instruction and asked for an
8 extension.

9 Q. I believe Exhibit 1 directed DPI to make an
10 award by March 1, 2018, correct?

11 A. Looking at the track change, that was the
12 part that was stricken through, yes.

13 Q. After you got past March 1, you realized
14 there was insufficient time to start the
15 process or restart the process?

16 A. I don't know the exact dates, but I do
17 remember that the process had started -- it
18 takes a long time to properly start and go
19 through a process like this.

20 Unfortunately, in RFP-1, we very
21 quickly found a very serious problem with the
22 process. And by the time we canceled it and
23 looked at how long it would take to complete
24 a fair process again, we did have concerns
25 that we would not be able to do that within

1 the time frame given by the statute.

2 Q. And talking about what you referred to as
3 RFP-1, we both agree that's not the
4 procurement that the bid protest is on today,
5 correct?

6 A. Correct. There is RFP-1, which was one
7 procurement; it was canceled. There is
8 RFP-2, which was the second procurement; it
9 was canceled. And the bid protest is on the
10 third procurement, which are negotiations
11 guided by DIT.

12 Q. But you agree we're not here about RFP-1 in
13 terms of we're not challenging the decision
14 to cancel a decision of RFP-1, if you know?

15 A. Yes, I don't know.

16 MR. SHANAHAN: Is that a
17 stipulation?

18 MR. ARMBRUSTER: Yes.

19 BY MR. ARMBRUSTER:

20 Q. What do you know about why RFP-1 was
21 canceled? I think you said there were
22 serious issues.

23 A. Yes. It was brought to my attention that one
24 of the business owners -- so one of the two
25 people that are basically the cochairs of the

1 evaluation panel had previous employment and
2 payment ties to one of the vendors, your
3 client Amplify, which she did not disclose
4 when we were preparing for this RFP process,
5 even though she did sign an agreement saying
6 she would have no conflict of interest, which
7 was very concerning, and everyone agreed that
8 that RFP had to be canceled.

9 Q. Who made the recommendation that the RFP-1
10 should be canceled?

11 A. To the best of my recollection -- because,
12 again, I believe this was back in 2017, I do
13 remember working, again, only with people who
14 could know of this information: One was my
15 chief strategy officer, Chloe Gossage; one
16 was my legal counsel, Lindsey Wakely; and the
17 other person was the second business owner,
18 Amy Jablonski.

19 And all of them were in agreement
20 that we definitely had to look into
21 cancelling this RFP because, one, it's just
22 wrong. I mean, it is a conflict of interest,
23 and that's not proper for getting a fair
24 procurement.

25 But, two, if we went forward, no

1 matter who the winner was, we would have a
2 protest from any of the leasors because we
3 had a clear conflict of interest.

4 Q. I agree. Who is the business owner we're
5 referring to, if you know?

6 A. Carla Castine.

7 Q. You mentioned employment and payment ties.
8 What do you mean by "payment ties"?

9 A. I don't know what their relationship was. It
10 was just made very clear at the time that --
11 whether she was doing contract work or she
12 was a permanent employee, I don't know.

13 I just know, immediately before
14 working for DPI, she did something for
15 Amplify and got paid by Amplify for doing
16 that.

17 Q. Do you know what she did for Amplify?

18 A. No.

19 Q. Do you recall if you were told that or not?

20 A. No.

21 Q. Do you know how long she was connected to
22 Amplify?

23 A. No.

24 Q. It was the unanimous agreement of Chloe,
25 Lindsey, and Amy that the cancellation needed

1 to happen, correct?

2 A. Yes, to my understanding.

3 Q. They all met with you together?

4 A. No. Amy Janlonski was not in the room, but
5 this is from Lindsey and Chloe talking with
6 Amy that it just needed to be cancelled.

7 Q. Are you aware of whether DPI has any public
8 records that state in 2018 that's the reason
9 why they were cancelling the procurement?

10 A. I'm aware now, after going through all of the
11 records for this protest before compiling the
12 response letter, that no, I do not believe
13 there's any public record that states that
14 this was the reason for the cancellation.

15 Q. Why is that?

16 A. I don't know. You would have to ask the
17 procurement people at DPI. It was my
18 instruction to cancel this, to do it
19 properly, because we could not go forward
20 with this RFP, and then the procurement
21 people at DPI took it from there.

22 Q. Turning back to Exhibit 2, Mr. Johnson, one
23 of the changes that the legislation made or
24 updates in Section 7.27(c) was to update the
25 date by which DPI had to make an award; is

1 that correct?

2 A. Yes.

3 Q. That date was updated to December 1, 2018; is
4 that correct?

5 A. Yes.

6 (Exhibit No. 3, Session Law, so
7 marked)

8 Q. Mr. Johnson, I've handed you what's been
9 marked as Exhibit 3 to your deposition. Do
10 you recognize this session law?

11 A. Yes.

12 Q. What is this?

13 A. This is an act to require the State Board of
14 Education and local boards of education to
15 develop tools to ensure identification of
16 students with dyslexia and dyscalculia.

17 Q. And do you understand that this was part of
18 the RFP-2 requirements to find a tool that
19 could meet the requirements of this session
20 law?

21 A. Yes.

22 (Exhibit No. 4, RFP-2, so marked)

23 Q. Mr. Johnson, I've handed you what I've marked
24 as Exhibit 4, and I'll represent that this is
25 the RFP that was issued by DPI, RFP-2 in the

1 fall of 2018. Have you seen this document
2 before?

3 A. Yes.

4 Q. Were you involved in preparing Exhibit 4?

5 A. No.

6 Q. To the best of your knowledge, who was
7 involved in preparing this RFP?

8 A. I'm not sure.

9 Q. Have you reviewed Exhibit 4 before today?

10 A. Yes, at some point over the past year.

11 Q. Do you recall any particular provisions you
12 reviewed at the RFP at any point over the
13 past year?

14 A. No.

15 Q. I'm going to have you turn to page 6 of the
16 RFP, Mr. Johnson, and ask you to look at the
17 last paragraph under the introduction
18 section.

19 Do you see where it says "In
20 addition, the State reserves the right to
21 make partial, progressive, or multiple
22 awards." Do you see that?

23 A. Yes.

24 Q. Do you understand why that language is in the
25 RFP?

1 A. No.

2 Q. Do you know whether DPI has the right to make
3 multiple awards or had the right to make
4 multiple awards in this procurement?

5 A. No, I don't know what the special
6 legislation -- I mean, we did just look at
7 it. It does have the word "instruments," but
8 no, I do not know how that would fit into the
9 procurement rules.

10 Q. You weren't involved in drafting this
11 paragraph?

12 A. That's correct.

13 Q. At the bottom of page 6 of Exhibit 4, do you
14 see a "Procurement Schedule"?

15 A. Yes.

16 Q. Do you see where it says "Selection of
17 Finalists" with a "TBD" for the date?

18 Do you understand whether DPI
19 intended to try to comply with the statute to
20 make the award by December 1?

21 A. Absolutely, it was our intention.

22 Q. I'm going to have you turn to page 14 of the
23 RFP, Mr. Johnson. Do you see the Section 4
24 marked "Evaluation Criteria"?

25 A. Yes.

1 Q. Were you involved in the development of the
2 evaluation criteria in RFP?

3 A. No.

4 Q. Do you see where, under Section 4(b), it
5 includes the statement "These criteria are
6 stated in relative order of importance"?

7 A. Yes.

8 Q. Were you involved in the decision-making
9 process that led to the ordering of the
10 criteria?

11 A. No.

12 Q. Do you know who was?

13 A. No.

14 Q. Mr. Johnson, I'll have you turn to page 25 of
15 Exhibit 4. Do you see that page 25 starts
16 with a subtitle of "Table A - Business
17 Specifications"?

18 A. Yes.

19 Q. Were you involved in developing any of the
20 business specifications for RFP-2?

21 A. No.

22 Q. I'm going to have you turn to page 26. Do
23 you see business specification No. 8 relates
24 to dyslexia?

25 A. Yes.

1 Q. You'll see there is a URL link under business
2 spec 8. Does that appear to reference the
3 disclosure statute I asked you about a few
4 moments ago?

5 A. It would appear to. That's why I had
6 hesitation when I was reading it to confirm
7 if that actually went to this.

8 "Describe how the measures align
9 with best practices and adequately and
10 accurately identify indicators of risk for
11 dyslexia in grades K-3 as outlined in NC
12 Session Law 2017."

13 I don't see things outlined in that
14 session law.

15 Q. Do you know what business specification 8
16 means?

17 A. No.

18 Q. Do you think vendors would know what it
19 meant?

20 A. Yes. I think it would have probably been a
21 better written specification if they had not
22 put the "outlined in NC Session Law."

23 Q. What would --

24 A. Just an indicator and screening for risk of
25 dyslexia, I think vendors would absolutely

1 know what that means.

2 Q. Just to clarify, you're saying vendors could
3 understand what spec 8 was talking about or
4 not?

5 A. I can't speculate as to what a vendor would
6 know from this. I can say I would imagine a
7 vendor who has a reading diagnostic tool
8 would know how to screen for dyslexia and if
9 their tool does that.

10 I'm struggling to see the connection
11 between this session law and what's described
12 in this spec 8.

13 Q. Do you understand that the Business
14 Specifications portion of the RFP were
15 mandatory requirements for bidders to bid?

16 A. What do you mean? You mean they had to
17 answer the specification?

18 Q. They had to provide the services required by
19 the business specifications?

20 MR. SHANAHAN: Object to the form of
21 the question.

22 A. I believe that's correct, yes.

23 Q. I may have asked you this: Have you reviewed
24 these business specifications of the RFP
25 before?

1 A. Yes. Ultimately, I believe this required my
2 sign-off, so I would have gone through this;
3 but again, I was very trusting of the people
4 who were putting this together and of their
5 capability and of their willingness to be
6 honest and fair in this process.

7 Q. Do you believe that any of the 31 business
8 specifications were unfair?

9 A. I can't go through them all right now. I
10 will just speak to now having this law in
11 front of me and specification 8, just the
12 conversation we just had, I can see how there
13 is confusion because when you actually read
14 this law, that you put in front of me, I
15 don't see a requirement that this diagnostic
16 has to do the dyslexia screening.

17 Q. But it is true that LEAs under that statute
18 are required to develop tools to ensure
19 identification of students with dyslexia,
20 correct?

21 MR. SHANAHAN: Object. It is the
22 risk of dyslexia. You are misstating the
23 record.

24 A. No, read Section 4: "Prior to the start of
25 the 2017/2018 school year, local boards of

1 education shall review the diagnostic tools
2 and screening instruments used for dyslexia,
3 dyscalculia, or other specified learning
4 disabilities to ensure they are age
5 appropriate and effective and shall determine
6 if additional diagnostic and screening tools
7 are needed."

8 This is a directive to local boards
9 of education to go through this exercise, and
10 I'm just reading the letter of the law.

11 Q. I agree. And this statute was incorporated
12 into business specification 8 of this RFP,
13 correct?

14 A. It was listed, but it says "Describe how the
15 measures align with best practices and
16 adequately and accurately identify indicators
17 of risk for dyslexia in grades K-3 as
18 outlined in NC Session Law 2017."

19 I think we can -- we can both agree
20 this was not a very good specification.

21 Q. If at any time you need take a break, we can
22 take a break. We usually have been trying to
23 go an hour or a little over an hour, but I
24 also know you have other duties that require
25 a brief break.

1 A. Okay.

2 Q. Just let me know if you need a brief break.

3 A. Thank you.

4 (Exhibit No. 5, Confidentiality
5 Agreement, so marked)

6 Q. Mr. Johnson, I've handed you what's been
7 marked as Exhibit 5 to your deposition. Do
8 you recognize this document?

9 A. Yes.

10 Q. What is this document?

11 A. This is the confidentiality agreement that
12 every person who is either on the panel or
13 knew confidential information about this
14 procurement had to sign. I believe, in
15 summary, it states they would not disclose
16 that information that they were not supposed
17 to.

18 Q. Do you know whether anyone from DPI signed
19 this document as well?

20 A. Yes.

21 Q. I see that there's a signature line for the
22 evaluation committee member. Do you see
23 that?

24 A. Yes.

25 Q. I don't see a line for someone as a

1 representative of DPI to sign this agreement.

2 Do you know if a representative on behalf of
3 DPI also signed these contracts?

4 A. Who would that be?

5 Q. I don't know.

6 A. Then I don't know either.

7 Q. Did you sign a confidentiality agreement in
8 connection with this RFP?

9 A. I'm pretty sure I did.

10 (Exhibit No. 6, E-mail, so marked)

11 Q. Mr. Johnson, I've handed you what's I've
12 marked as Exhibit 6 to your deposition, which
13 I'll represent was a document that was
14 produced in discovery in the case from
15 Carolyn Guthrie, a former DPI employee.

16 Have you seen this Exhibit 6 before?

17 A. Yes.

18 Q. When do you first recall seeing this?

19 A. When I got the e-mail.

20 Q. And this appears to be an e-mail from
21 Ms. Guthrie talking to you about the Read to
22 Achieve procurement, correct?

23 A. This is an e-mail from Carolyn Guthrie with a
24 long list of things about Read to Achieve.

25 Q. She may not reference procurement, but I see

1 on paragraph 2 she says -- she's talking
2 about the prior implementation of Read to
3 Achieve. Do you recall that?

4 A. I was very vocal starting -- I don't know
5 when it started, but I had a very public
6 event where I came out publicly and said the
7 implementation of Read to Achieve focused too
8 much on testing and not enough on
9 instruction.

10 And I believe there were also
11 opinion letters in the News and Observer, and
12 I believe that might have triggered
13 Ms. Guthrie to write this because I know she
14 also sent me an e-mail, I believe, with a
15 draft or sent someone an e-mail with a draft
16 of an opinion letter that she wrote in
17 response to criticisms of Read to Achieve.

18 There have been multiple criticisms
19 of Read to Achieve, and I feel Ms. Guthrie
20 feels a lot of ownership of Read to Achieve
21 of the program because she was here when it
22 was implemented, and I believe this is all
23 related to that.

24 Q. Did you respond to Ms. Guthrie's e-mail, if
25 you recall?

1 A. I do not think I did.

2 Q. Now, as the superintendent of the Department
3 of Public Instruction, lots of people are
4 sending you e-mails, correct?

5 A. Yes.

6 Q. Did people send you e-mails about this
7 procurement?

8 A. Not to my knowledge.

9 Q. Did anyone ever not on the evaluation
10 committee talk to you about this procurement
11 while it was in process?

12 A. Not to my knowledge.

13 Q. Was there any procedure put in place, to the
14 best of your knowledge, to wall you off from
15 people trying to communicate with you as a
16 superintendent during the RFP process about
17 the bids?

18 A. Yes. I mean, there were absolutely people
19 that we knew were in a blackout because it
20 was a bid, so we just did not even have
21 conversations; but, also, while it might not
22 have been a written policy, I just didn't
23 talk about the procurement.

24 Q. How did you first become aware of Istation's
25 products?

1 A. Very early when I started my term as State
2 Superintendent, early in 2017, I took a
3 meeting with the CEO of Istation so he could
4 show me their products, the same way I took a
5 meeting with the vendor for Iready, the same
6 way I went to a school to see the vendor for
7 Iready, the same way I took a meeting with
8 NWEA, and the same way I went with a lobbyist
9 and representative from Amplify to a school
10 to see their product in action.

11 Q. So were you aware of Istation's products
12 prior to taking office as superintendent?

13 A. No.

14 Q. Who is the CEO of Istation?

15 A. I believe it is Dick Collins.

16 Q. Was there anyone else that you recall at that
17 meeting with Mr. Collins?

18 A. Yes, their lobbyist, Doug Miskew.

19 Q. This was sometime in early 2017?

20 A. Yes.

21 Q. And what did you talk about at that meeting?

22 A. Istation.

23 Q. What did they say generally about it?

24 A. Generally, the benefits of the program. They
25 showed me a demo and showed me how students

1 would use it and then the reading diagnostic
2 feature that would come with it.

3 Q. Was the meeting similar to the meetings you
4 had with other interested vendors, like NWEA?

5 A. Yes, similar to -- NWEA did not give me a
6 product demonstration; they walked me through
7 what their product does.

8 And then the demonstrations by
9 Curriculum Associates and Amplify were much
10 more in-depth because we actually went to
11 school visits to see it in the classroom,
12 each of their vendors.

13 Q. The demo that Istation gave you, that was in
14 their meeting with them?

15 A. Yes. It was on an iPad, and they went
16 through some of the program.

17 Q. And was that at a school or here at DPI?

18 A. It was right here in this room at DPI.

19 Q. Did you have any meetings or communications
20 with Istation after that meeting that we just
21 talked about with Dick Collins?

22 A. No.

23 Q. Now, I assume you've had communications with
24 them after the award?

25 A. Yes. Thank you for that clarification. Yes,

1 absolutely.

2 Q. Who have you talked to at Istation about this
3 protest, not including discussions with legal
4 counsel involved?

5 A. Dick Collins. I believe the most I have
6 discussed about this protest was after DIT
7 put on their stay of the contract, and I
8 called Dick Collins to see what Istation's
9 take was on the fact that there was a stay
10 put in place before DPI even responded to any
11 complaint.

12 Q. What was Dick's take?

13 A. We agreed that something very improper had
14 happened for the stay to be issued, and I
15 talked to him about how we were going to work
16 to make sure that we didn't let this cause
17 mass confusion across the State of North
18 Carolina for where we had an obligation to
19 meet the Read to Achieve legislation.

20 Q. You understand, as we're sitting here today,
21 that stay order is in place, correct?

22 A. Yes.

23 (Exhibit No. 7, PowerPoint, so
24 marked)

25 Q. Mr. Johnson, I've handed you what I've marked

1 as Exhibit 7 to your deposition. Have you

2 seen this document before?

3 A. Yes.

4 Q. What is this document?

5 A. I believe it is a PowerPoint that was given

6 at the start of RFP-2, and I assume it was

7 given to members of the evaluation panel and

8 potentially nonvoting members who may have

9 been there, would be my assumption.

10 Q. Do you recall when you first saw this

11 PowerPoint?

12 A. Yes.

13 Q. When was that?

14 A. When we were preparing the response letter

15 for Amplify's business owner.

16 Q. After the June 7th award to Istation?

17 A. Correct.

18 Q. To the best of your recollection, you were

19 not in attendance at this meeting?

20 A. I was not in attendance at this meeting.

21 Q. I'll have you turn to page 3 of this

22 proposal. This page 3 is titled Project

23 Background and starts "The purpose of this

24 project." Do you see that?

25 A. Yes.

1 Q. Do you disagree with anything in this

2 statement?

3 A. Yes.

4 Q. What do you disagreement with?

5 A. Again, we're only really scratching the

6 surface here because we've started down this

7 path, but since you pointed out to me the

8 legislation and the specification 8 in the

9 RFP, I look at this and it is underlined, "to

10 satisfy obligations outlined in NC House Bill

11 149 to screen students for dyslexia in grades

12 K, 1, 2, 3." Comparing that to the actual

13 legislation, I don't know exactly know what

14 that means.

15 Q. You would agree with the first clause of page

16 3, would you?

17 A. "The purpose of this project is to pursue a

18 competitive bidding process as enacted in

19 Session Law 2018-5."

20 Yes, if that is the session law that

21 we just looked at, yes.

22 Q. Were you involved at all in the preparation

23 of Exhibit 7?

24 A. No.

25 Q. I'll have you turn to page 6. Page 6 says

1 they had an objective of completing RFP
2 evaluation and selecting the finalist by
3 November 14th. Is that consistent with any
4 recollection you may have about the timeline?

5 A. I have no recollection about the timeline.

6 Q. Turn to the next page, page 7. It talks
7 about the evaluation team being composed of
8 voting members and nonvoting members. Is
9 that generally consistent with your testimony
10 earlier?

11 A. Yes. I do very much remember at the
12 beginning of this process that it was
13 presented to me we would have voting members
14 who had to be members of DPI, but we
15 definitely wanted outside people to have a
16 voice in this, if we had the time to, so we
17 could have nonvoting members who could come
18 in, subject matter experts across the state.

19 Q. Turn to page 8. This appears to be the list
20 of the RFP-2 original evaluation team, the
21 voting members?

22 A. Yes.

23 Q. The next page appears to be the nonvoting
24 members?

25 A. Yes.

1 Q. I see this nonvoting members list does

2 include not nonDPI employees?

3 A. Yes.

4 Q. I'm going to have you turn to page 13.

5 Page 13 has a heading of "General Guidelines

6 for Evaluation" and a subheading of "Public

7 Record." Do you agree the procurement is a

8 public record?

9 A. I don't have enough background in public

10 records to answer that question.

11 Q. The third bullet says "Any member of the

12 public may also request to review all

13 documents relating to the RFP process in

14 compliance with North Carolina's public

15 records law." Do you have any reason to

16 disagree with that statement?

17 A. No, as long as it is in compliance with the

18 public records law. I would imagine that

19 would box in some confidentiality and timing

20 for this process.

21 Q. What do you mean by "timing"?

22 A. Some things I assume would be a public record

23 after the whole process was finished that may

24 not be a public record during the process, or

25 maybe if there's trade secrets from one

1 vendor, those may be trade secrets for a
2 certain amount of time for years, but then
3 they're public records.

4 I do not have enough background on
5 the specifics of public record law to answer
6 that question.

7 Q. Do you know who would handle the questions of
8 public record requests during this RFP
9 process?

10 A. During this RFP process, which was RFP-2
11 which was at the end of 2018, my assumption
12 would be Eric Snyder, he's the attorney for
13 the State Board of Education.

14 Q. How about after the award on June 7th?

15 A. June 7th, I believe the general counsel for
16 DPI was still Jonathan Sink. He left at some
17 time, but again, the back and forth between
18 the State Board and the Department of Public
19 Instruction makes it hard to give you a
20 definitive answer.

21 Sometimes the State Board of
22 Education wants their attorney involved in
23 public records.

24 Q. I think Mr. Sink joined the department in
25 maybe February of 2019; is that correct?

1 A. That sounds right, either late January or
2 early February.

3 Q. Prior to Mr. Sink joining DPI, did you
4 have -- did DPI have separate counsel from
5 the State Board?

6 A. I did. So as the State Superintendent while
7 we were going through another frivolous
8 lawsuit, we had a back and forth between the
9 State Board and myself over who manages the
10 Department of Public Instruction.

11 So at that time, I only had the
12 ability to hire just a handful of people.
13 One of those people was Lindsey Wakely who
14 was my legal counsel, and she reported
15 directly to me. Very few people in the
16 department reported directly to me, and at
17 that time, they had a State Board attorney,
18 Katie Cornetto. She left and went to private
19 practice and was replaced by Eric Snyder.

20 Q. What was the other lawsuit?

21 A. The other lawsuit was one by the State Board
22 of Education against the General Assembly in
23 which the General Assembly shifted authority
24 and responsibilities to the State
25 Superintendent because, quite frankly, if you

1 have one person acting as a CEO of an agency,
2 it works better than 13, 14 people who only
3 come in once a month.

4 Q. So wanted to confirm, it wasn't a bid protest
5 or anything like that?

6 A. No. It was the year-and-a-half dragged out
7 lawsuit by the State Board of Education.

8 Q. I'll have you turn to page 16, Mr. Johnson.
9 Do you recognize page 16 appears to be the
10 evaluation criteria from the RFP I showed you
11 earlier?

12 A. Yes.

13 Q. And turn to the next page, that appears to be
14 another timeline; is that correct?

15 A. Yes.

16 Q. And it appears this timeline is still trying
17 to adhere as best as possible to the
18 December 1, 2018 deadline; is that correct?

19 A. It says "as best possible." Obviously,
20 December 1 was the deadline of the statute.
21 We definitely had some more breathing room
22 because this is something we could announce
23 in early 2019, and I think you already see
24 that being reflected.

25 I'm looking, right now, best and

1 final offer -- I mean, that was already
2 projected to go out to 2014.

3 Q. Did DPI determine at some point that they
4 were permitted, despite the statute, to do an
5 award after December 1, 2018?

6 A. No. It would definitely be my hope we would
7 have an award before December 1, 2018.

8 Q. Did DPI take the position that it still had
9 the authority to make an award after
10 December 1, despite the statute saying you
11 had to do it by December 1?

12 A. Yes. There had to be -- there absolutely had
13 to be an award given so that we had a reading
14 tool in place for the next school year. With
15 RFP being cancelled, we had already run
16 through, I believe, our two extensions with
17 the current vendor, and those were gone.

18 So we had no more extensions left
19 with the incumbent vendor at the time,
20 Amplify. We had to get a new contract in
21 place, whether it be with Amplify, Istation,
22 Curriculum Associates, or NWEA, we had to get
23 this process done, because if we didn't,
24 there would be no reading diagnostic tool for
25 the next school year .

1 Q. I'll have you turn to page 19, Mr. Johnson.

2 A. I've got it, "Individual Proposal
3 Evaluation."

4 Q. You see where it says that evaluation
5 committee members were expected to read the
6 RFP and all addenda, correct?

7 A. Yes.

8 Q. And read each proposal and independently
9 review each?

10 A. Yes.

11 Q. And you'd agree that committee members were
12 not permitted to review materials outside
13 what bidders submitted, correct -- let me
14 strike that.

15 You would agree, Mr. Johnson, that
16 committee members were not permitted to
17 review materials not part of the procurement
18 process?

19 A. I'm not aware of that. If that's a
20 procurement rule, then that's a procurement
21 rule.

22 Q. If a committee member saw articles like in
23 the press saying that Istation or Amplify was
24 great, do you think it would be appropriate
25 for a committee member to rely on those

1 newspaper articles during the procurement
2 process?

3 A. Why would it be inappropriate? If there is a
4 procurement rule that says it is, then it is.
5 I'm not familiar enough with procurement
6 rules. I would imagine these are subject
7 matter experts that were trusting to,
8 hopefully, be fair and unbiased.

9 And so, hopefully, they would
10 actually take that into consideration if they
11 were looking at outside material and weigh it
12 against all the information they have, but I
13 can't say I'm not sure if that is against
14 procurement rules or not.

15 Q. You would defer to whatever the procurement
16 rules say?

17 A. That is correct, yes.

18 (Exhibit No. 8, Meeting Notes, so
19 marked)

20 Q. Mr. Johnson, I've handed you what I've marked
21 as Exhibit 8 to your deposition. Have you
22 seen this document before?

23 A. Yes.

24 Q. What is this document?

25 A. These are meeting notes taken from, I

1 believe, two meetings where the evaluation
2 panel was going over the vendors for the
3 reading diagnostic tool for RFP-2.

4 Q. When you say "two meetings," do you mean the
5 two days listed at the top of page 1?

6 A. I do. I assume it is two days because there
7 are two days listed at the time.

8 Q. Did you attend any of these meetings?

9 A. No.

10 Q. And you see at the bottom of the -- at the
11 top of page 1 where it says "Meeting Purpose:
12 Consensus Meeting to Rank the Proposal
13 Vendors." Do you see that?

14 A. Yes.

15 Q. Do you have any reason to dispute that was
16 the purpose of those meetings?

17 A. No.

18 Q. Have you reviewed this Exhibit 8 document
19 before?

20 A. Yes.

21 Q. When did you review it?

22 A. When preparing the response letter for the
23 denial of Amplify's protest.

24 Q. So after the award on June 7th?

25 A. Yes.

1 Q. I'll have you look at page 1 under Meeting
2 Summary and No. 2 under Meeting Summary. Do
3 you see where it says "Consensus means
4 general agreement and not unanimity"?

5 A. Yes.

6 Q. Do you disagree with that statement as to
7 what consensus means?

8 A. Yes. Based on conversations with DIT, yes.

9 Q. What conversations?

10 A. Throughout this process as things started
11 unfolding and we learned more and more, I had
12 procurement and operations at DPI consult
13 with DIT to make sure that every single step
14 of this process would be done according to
15 procurement rules because DIT ultimately had
16 to approve -- after our process had to
17 approve this contract, and DIT informed that
18 staff that consensus is unanimous.

19 Q. Are you aware of any documentation that
20 documents any such conversations?

21 A. No.

22 Q. When did these communications with DIT
23 happen, to the best of your knowledge?

24 A. I'm not entirely sure. It would be early
25 2019.

1 Q. And how did you come to have this knowledge?

2 A. Conversations with my procurement team.

3 Q. And how did this come up to you?

4 A. As we were going through this process in a
5 series of weeks, I believe more issues
6 started coming up with the RFP-2 that were,
7 when taken into totality, quite concerning.

8 And then I started getting more
9 involved in the process, and with that very
10 odd legislation we've been talking about, I
11 started asking my procurement people what
12 exactly are the next steps.

13 Then the next steps were to have,
14 hopefully, a meeting where a consensus would
15 be voted upon, and I asked what does
16 consensus" mean. So we conferred with DIT,
17 and they advised that consensus is unanimous,
18 so we were looking at that part, and then
19 going to me for approval.

20 Q. Now the legislation doesn't say "consensus,"
21 correct?

22 A. Correct.

23 Q. It just says "The evaluation committee shall
24 make a recommendation," correct?

25 A. Yes.

1 Q. Do you understand what legal basis would
2 require a "unanimous consensus," if that's a
3 phrase?

4 A. Procurement rules by DIT. DIT, this is
5 something that -- quite frankly, if you're
6 just going off the legislation, we could have
7 put an evaluation panel together and had no
8 RFP or just basically stuck to exactly what
9 is listed in the legislation.

10 But there are other rules and
11 procedures that have to be followed for RFPs,
12 and that's something we did with the guidance
13 of DIT, including their guidance that
14 "consensus" means "unanimous," and yes, I
15 would consent that is a mistake in the notes.
16 I believe that was said at the meeting. That
17 is not correct.

18 Q. When you had meetings with leaders at DPI to
19 try to get consensus, do you understand that
20 to mean "unanimity" and "common sense" terms?

21 A. No. I believe this has been something that
22 we questioned DIT as well on, and
23 "consensus," they could never really give us
24 a better definition than unanimous.

25 And the way they described it, which

1 was described to me, was imagine the entire
2 evaluation panel was going to a movie. They
3 all had to go to a movie together. Some of
4 them want to go to a horror movie, like Saw
5 4; another group movie wants to go to
6 something nice, like Toy Story 4. They can
7 only go to one movie.

8 They don't have consensus because
9 you're not going to drag the Toy Story 4
10 people to Saw 4, and you're not going to drag
11 the Saw 4 people to Toy Story 4. And that
12 was exactly what was relayed to us from DIT
13 as to, in this situation, consensus means
14 unanimous.

15 Q. Who relayed that movie analogy to you?

16 A. Kathryn Johnston. She did not use those
17 specific movies; I added those.

18 Q. She used a movie analogy?

19 A. Yes.

20 Q. Is it your understanding that DIT gave a
21 similar movie analogy to Ms. Johnson?

22 A. Yes. She got that from DIT.

23 Q. Do you know who she spoke to at DIT?

24 A. No.

25 Q. Mr. Johnson, Exhibit 8 appears to continue to

1 go through each of the business and other
2 specifications of the RFP, correct?

3 A. Yes.

4 Q. And it appears that for every specification
5 in the RFP this Exhibit 8 records what the
6 evaluation committee thought about each
7 vendor's compliance or noncompliance with
8 those specifications, correct?

9 A. In the notes from a meeting, yes. There is
10 definitely more detailed documents that went
11 along with this.

12 Q. Are you sure? I haven't seen any other
13 detailed documents.

14 A. I believe there is a spreadsheet where
15 committee members actually looked at each
16 ranking and voted.

17 Q. Do you mean a spreadsheet where each
18 committee member reviewed?

19 A. Yes. I think that obviously had more details
20 than these notes would.

21 Q. I'll have you turn to page 30, Mr. Johnson,
22 and do you see there's a table at the top
23 part of the page?

24 A. Yes.

25 Q. And there is a paragraph below that that says

1 "In summary, the team expressed unanimous
2 agreement with the ranking outcome above."
3 Do you see that?

4 A. No. Can you point it out to me?

5 Q. There's a short paragraph right below the
6 table on page 30. Do you see that it starts
7 with "after the team deliberated"?

8 A. Yes. In summary, yes.

9 Q. And the last sentence of that short paragraph
10 says "In summary, the team expressed
11 unanimous agreement with the ranking outcome
12 above." Is that correct?

13 A. Yes.

14 Q. Do you have any basis to dispute that that is
15 an accurate statement of what the committee
16 determined?

17 A. Not to my knowledge. It is a ranking
18 outcome, but again, we've already seen that
19 there are multiple mistakes made in these
20 notes.

21 Q. Can you identify the mistakes that are in
22 these notes to me?

23 A. We just did the one where it says "consensus"
24 means "general agreement" and not unanimity.

25 Q. Are you aware of any documents that exist

1 prior to your response to the protest letter
2 meeting identifying any mistakes in DPI or
3 DIT's procurement record?

4 A. No. But I know of mistakes.

5 Q. Tell me about those mistakes.

6 A. I believe we'll get to it. I'm sure you have
7 the PowerPoint presentation from December of
8 2018.

9 Q. I do have that, and we'll get to that. We'll
10 probably take a break in a minute, but can
11 you identify what mistakes, if any, exist in
12 this November 19th and 20th meeting document
13 aside from your contention that the
14 definition of consensus is incorrect?

15 A. No. I have not gone through this fully.
16 Following ranking was used for each
17 specification, yes, no, maybe. I believe
18 I've laid out very clearly what mistakes were
19 made in the response letter, and I don't know
20 how that correlates with these notes.

21 Q. So in terms of identifying what mistakes DPI
22 believes were made, we can refer to the
23 response of the protest letter to identify
24 those; is that fair?

25 A. Yes, that is fair.

1 MR. ARMBRUSTER: Why don't we take a
2 short break.

3 THE VIDEOGRAPHER: We're off the
4 record at 11:17 a.m.

5 (Recess)

6 THE VIDEOGRAPHER: We're back on the
7 record at 11:37 a.m.

8 (Exhibit No. 9, Presentation, so marked)

9 BY MR. ARMBRUSTER

10 Q. Mr. Johnson, we're back on the record. I've
11 just handed to you what's been marked as
12 Exhibit 9 to your deposition. Do you
13 recognize this document?

14 A. Yes.

15 Q. What is this document?

16 A. This is a presentation that was given to me
17 by Amy Jablonski on December 4th of 2018,
18 talking about the rankings that the
19 evaluation panel was ready to present to me.

20 Q. And I think you referred generally to this
21 document once or twice in your prior
22 testimony, correct?

23 A. Yes, once.

24 Q. If we turn to page 3 of Exhibit 9, that
25 Background section appears to be a reference

1 to the statutes we started your deposition

2 with, correct?

3 A. Yes.

4 Q. And turn to the next page. Do you see where

5 it says "Where we are" on that page?

6 A. Yes.

7 Q. And it says "Finalist Selection and

8 Negotiation" with a star beneath it, correct?

9 A. Yes.

10 Q. And then the next page looks like it is a

11 page entitled "Evaluation Ranking," correct?

12 A. Yes.

13 Q. Do you see the leftmost column has the six

14 evaluation criteria I've previously shown

15 you?

16 A. Yes.

17 Q. Do you see where it says at the bottom "The

18 evaluation criteria are stated in the

19 relative of importance," correct?

20 A. I assume so. If that's the order of

21 importance as it is in the RFP, I would agree

22 to that.

23 Q. I'll have you turn the next few pages after

24 this page reflect from lowest to highest

25 order the evaluation rankings of each of the

1 four proposals, correct?

2 A. Yes.

3 Q. Let me have you turn to the page for
4 Istation.

5 A. Okay.

6 Q. Does DPI contend that any of the strengths
7 listed on this page are mistakes?

8 MR. SHANAHAN: Object to the form of
9 the question. We're not here on 30(b)(6).

10 Q. Do you understand that any of the strengths
11 listed for Istation's assessment are
12 mistakes?

13 A. I would point back to the response letter
14 where we detailed the multiple mistakes that
15 we found in this process.

16 Q. So I can rely on what you said in response to
17 the protest letter to determine what mistakes
18 may exist under this list of strengths, if
19 any?

20 A. If any. We can go through. This is talking
21 about the strengths for Istation.

22 Q. If you can look at the strengths for
23 Istation, do you believe that any of these
24 statements are mistakes?

25 A. To the best of my knowledge, I do not believe

1 these are mistakes.

2 Q. What about the list of weaknesses, if you can
3 look at those? Do you believe that any of
4 those listed weaknesses for Istation are
5 mistakes?

6 A. I would absolutely point to the response
7 letter. I know there were multiple mistakes
8 that we found throughout this process, and I
9 am sure you can match things listed in here
10 to mistakes that we found in this process
11 that are detailed in the response letter.

12 Q. So I can rely on the response letter to
13 determine whether DPI took the position or
14 you took the position that any of these
15 weaknesses were mistakes?

16 MR. SHANAHAN: Object to the form of
17 the question.

18 A. Looking at these six, I don't know if all of
19 these would be addressed by the response
20 letter.

21 Let's look at No. 6, for example. I
22 can tell you when I saw this presentation in
23 person I was very concerned with that being
24 listed as a weakness for why this would be
25 ranked second.

1 "Equity of technology in schools may
2 lead to loss of instructional time." Equity
3 of technology is an issue, but it is
4 something through the Read to Achieve program
5 we had the capability to close the gap in
6 equity there, so that is something that
7 definitely gave me pause when I was being
8 presented this specific PowerPoint. I think
9 these others are probably addressed in the
10 response letter.

11 Q. Okay.

12 A. A little troublesome, and I would imagine
13 this is in the response letter. The
14 assessment is not diagnostic in nature, and
15 I, again, don't think that probably is
16 something that was flagged in my mind when
17 seeing this, but going back and looking at
18 what this evaluation panel actually did as
19 part of RFP-2 and seeing how they scored that
20 particular criteria was very concerning.

21 Q. What about the scoring of that particular
22 criteria was very concerning?

23 A. This is all addressed in the response letter,
24 and I would point there for the specifics,
25 but I do clearly remember when we were

1 preparing the response letter in going
2 through these notes this evaluation panel
3 ranked criteria as a yes, maybe, or a no.

4 And they even stated that if it was
5 going to be a "maybe," that someone would go
6 back and investigate as to whether or not it
7 was indeed a "yes" or a "no." Whether or
8 not -- for example, something being
9 diagnostic in nature, no one went back and
10 did that.

11 Instead, they converted the "maybes"
12 to "noes," so I believe -- and I'm only
13 speaking off the top of my head -- and again,
14 this is all in the response letter. I
15 believe this ranking process by this
16 evaluation panel for that particular one
17 diagnostic in nature had a bunch of maybes.

18 I think the majority of the votes
19 were maybes, and instead of actually
20 investigating and going and determining if
21 the answer should be yes or no, the decision
22 was made by this evaluation panel or one of
23 the leaders of it to switch that to noes.

24 Q. Do you know whether they were permitted to do
25 that by DIT rules?

1 A. No. No, I don't know. I don't know if that
2 was even a proper procurement protocol on
3 what they were doing, the yes, maybe, or no
4 vote.

5 Q. I can go back and look at the response at the
6 protest letter, but let me ask you about
7 equity of technology. What is equity of
8 technology?

9 A. You would have to ask Amy Jablonski.

10 Q. You seem to have an understanding what it
11 was. You seem to understand that statement
12 is wrong?

13 A. I would take that as -- equity of technology
14 in schools may lead to loss of instructional
15 time. I imagine that means that there is
16 some schools in the state that don't have
17 enough devices to implement Istation.

18 Being involved in this process even
19 at a high level, you knew that Istation could
20 be on multiple devices, and i-Ready could be
21 on multiple devices, NWEA could be on
22 multiple devices; and Amplify is on one, but
23 they were also working on options for
24 multiple devices.

25 That struck me as a very odd

1 weakness to put in there, and I actually --
2 talking about it, I don't know if anyone has
3 ever done the crosscheck to the notes to see
4 if that was discussed in the notes of the
5 meeting as well or if that is something that
6 somebody added to this presentation that was
7 then given to me.

8 Q. Was it true that there's an equity of
9 technology issue across the state that some
10 schools don't have as much technology as
11 other schools?

12 A. Absolutely.

13 Q. So if a school only had two computers for a
14 classroom, it would take longer to administer
15 an Istation assessment than a school that has
16 a computer for every student, correct?

17 A. We're getting into my policy beliefs around
18 education now. I do not believe this
19 one-to-one technology. You actually only
20 need about four devices per classroom to
21 truly implement a program like Istation or
22 i-Ready or NWEA MAP's assessment and students
23 work in rotations.

24 So all you need are four devices or
25 less, and students who are working on that

1 going through the lesson or the diagnostic
2 get that, but then students rotate to another
3 station where they either work one-on-one
4 with the teacher, they work with pencil or
5 paper, they work with an actual physical
6 book.

7 So, no, I disagree this would be a
8 weakness that would hamper an implementation
9 of a reading diagnostic tool, especially
10 since we had just earlier that year were able
11 to use Read to Achieve funds that were
12 previously not being used by the State Board
13 of Education to purchase a new iPad for every
14 K through 3 reading teacher.

15 We knew, thanks to Read to Achieve,
16 there were at least two iPads in every K
17 through 3 reading class in the State of North
18 Carolina, and that is something we had
19 planned to help teachers get more access to
20 technology, teachers who needed it,
21 especially in low-wealth districts.

22 Q. Now, I hear you saying that you thought that
23 weakness may be incorrect, but are you saying
24 that the experts that were on the evaluation
25 committee couldn't, in good faith, reach that

1 conclusion when they concluded that weakness?

2 A. I don't know. Is that weakness in the notes?

3 Q. I don't know sitting here today. It's in the
4 PowerPoint?

5 A. It's in the PowerPoint, but again, you're
6 seeing what happened in December of 2018. I
7 actually was expecting a pretty cut and dry
8 PowerPoint presentation, and I left with
9 concerns and questions that then started more
10 of a process of looking into what's going on
11 with this evaluation panel.

12 Q. What did you do when you left the meeting?

13 A. I talked with -- I can't tell you exactly
14 who -- I imagine it was Pam Shue, Chloe
15 Gossage, Catherine Johnson, and we haven't
16 gotten to what really gave me a red flag.

17 I actually asked the question from
18 them. If you turn to the next page,
19 Evaluation Ranking ranked first Amplify
20 Education, Inc. You will notice that there
21 are very few weaknesses listed.

22 Q. There is only one?

23 A. There is only one, and that was very
24 disconcerting to me because Amplify would
25 have gone through a fair process and could

1 have won out this outright and fair, but I
2 had just been presented a presentation with
3 multiple weaknesses for multiple vendors, and
4 here come the weaknesses for Amplify, and it
5 is just one.

6 There are many assessment measures
7 that needs to be turned off. It's a typo as
8 well. But if you look -- I already knew
9 about this, and looking back at Exhibit 8,
10 the notes even confirm that this was a
11 weakness that had been brought to my
12 attention that was not listed in this
13 PowerPoint, but it was a serious concern of
14 people during this process.

15 Exhibit 8, page 30, fourth paragraph
16 down, "The issue of using developers in
17 Ukraine for coding should be further
18 discussed with DIT and legal. Further
19 clarification is needed from the vendor
20 including identifying all associated risks."

21 So the irony is not lost on me that
22 it's Ukraine, but there was something going
23 on with IT and coders for Amplify and Ukraine
24 that there was a fear that it broke rules of
25 DIT, and that had to be worked through before

1 we could actually have potentially Amplify be
2 a selected vendor.

3 Q. Has there ever been any determination made
4 that there was a Ukraine issue that required
5 cancellation of the procurement?

6 A. No. Other issues came up before we even got
7 into that.

8 Q. So you're saying the PowerPoint was mistaken
9 by not including a bullet point about
10 something about Ukraine in it?

11 A. I'm saying I was concerned that I had trusted
12 professionals at DPI to do a fair evaluation,
13 and when I was presented with this PowerPoint
14 in 2018, I left with concerns that there was
15 not a fair evaluation done.

16 Q. Why wasn't it fair? Are you saying these DPI
17 employees weren't working in good faith?

18 MR. SHANAHAN: Objection to form.

19 A. I had concerns upon leaving, and I can tell
20 you not my state of mind during this
21 presentation, but my state of mind fast
22 forward a few months later when we're
23 compiling all of the materials to respond to
24 Amplify's protest learning what we learned
25 through all that process, yes, I was

1 extremely concerned about whether or not
2 these DPI employees were actually operating
3 in a truly unbiased and fair manner.

4 And on top of that, I'm sure we'll
5 talk about the leak of confidential
6 information. That came to my attention
7 shortly after this in January, and through
8 the totalitarian of all the circumstances, I
9 had grave concerns about the process in
10 RFP-2.

11 Q. Which members of the evaluation committee
12 were biased?

13 A. I don't need to speculate as to exactly who
14 it was, but I can tell you when you look at
15 all of the evidence compiled in the multiple
16 improper actions that were taken, there's
17 definitely enough to be concerned that we
18 were not having a fair procurement process.

19 Q. So you think that --

20 A. Again, this is coming from the research we
21 did in preparation for the response letter.
22 At this time I just had concerns walking out
23 of there that there were known problems, and
24 we had DPI professionals that were not
25 bringing those problems to the attention when

1 saying they had a ranking of the vendor?

2 Q. What known problems?

3 A. One example was the issue in Ukraine.

4 Q. Where were you reading that from?

5 A. Exhibit 8, page 30. That's the meeting notes
6 from November 19th and November 20th, five
7 down the issues using developers in Ukraine.
8 I only point to this in the exhibit because
9 we, here, have further proof this is
10 something that was being talked about at the
11 time.

12 This was raised to my attention as a
13 concern during this process, but then when
14 I'm given this PowerPoint presentation, I get
15 to the very last slide, and there's only one
16 weakness, and it has a typo in it.

17 Q. So the lack of a reference to Ukraine on that
18 slide didn't stand out to you at the time
19 because you weren't aware?

20 A. It did stand out to me at the time. I was
21 aware of the Ukraine issue at that time. It
22 stood out to me it was not listed on that
23 PowerPoint, and that was after I had the
24 concern -- if we're going to have a weakness
25 for Istation that equity of technology in

1 schools may lead to loss of instructional
2 time, certainly a legal issue with coders in
3 Ukraine should be listed under weakness for
4 Amplify. That needs to be further evaluated.

5 Q. So on page 30 of Exhibit 8, it says "The
6 issue of using developers in Ukraine for
7 coding should be further discussed with DIT
8 and legal." Do you see that?

9 A. Yes.

10 Q. And then it says "Further clarification is
11 needed from the vendor." Do you see that?

12 A. Yes.

13 Q. Was clarification requested of the vendor of
14 that issue?

15 A. I would assume so.

16 Q. So who brought this alleged Ukraine issue to
17 your attention for the first time?

18 A. I believe it was Chloe.

19 Q. When was it brought to your attention?

20 A. Probably late November, possibly early
21 December. I know it was before I received
22 this PowerPoint. It was in passing. It
23 was -- she was letting me know that Amy
24 Jablonski wanted to present the PowerPoint to
25 me with the rankings, and I said, "How's it

1 going?"

2 And I can't remember everything we
3 talked about, but that is definitely
4 something that stuck out as a concerning
5 issue because when you look back at the
6 evaluation panel, there are IT people on
7 there, and they were concerned with this
8 issue.

9 Q. What did Chloe tell you about this Ukraine
10 issue prior to the December 4th presentation?

11 A. All I can recall is that she told me that
12 they used coders in Ukraine and that may be a
13 problem with state law or procurement rules,
14 something with DIT and some kind of security
15 risk protocol that they have certain areas
16 that they don't allow outside coders to make
17 technology for North Carolina.

18 Q. Was there ultimately any resolution of that
19 issue?

20 A. I don't know.

21 Q. So at the end of this December 4th meeting,
22 you were concerned about whether the
23 evaluation process had been fair; is that
24 right?

25 A. That's probably a fair statement. Again, you

1 have to remember this was a year ago, and I
2 now have gone through the entire process of
3 looking into the weeds on this entire RFP-2
4 and everything that was done during RFP-2; so
5 it is hard to really pinpoint back to how I
6 was feeling after this, but I definitely can
7 confirm to you I had concerns after this
8 PowerPoint presentation.

9 Q. Did you share those concerns with
10 Dr. Jablonski?

11 A. No. I shared those concerns with Pam Shue
12 and Chloe Gossage and Catherine Johnson.

13 Q. What did you say to them?

14 A. I do not recall.

15 Q. Do you recall generally what you said to
16 them?

17 A. Generally, I believe that's where I asked if
18 it would be appropriate for me to speak to
19 the evaluation panel, and that is something I
20 want to do after the Christmas holiday,
21 because you have to remember, I have not
22 talked to the evaluation panel at all during
23 this entire process. This is really the
24 first update I had gotten on it, and it was
25 from Amy Jablonski.

1 Q. Let me turn you back to the page on Istation
2 strengths and weaknesses.

3 A. Yes.

4 Q. Do you see weakness No. 4 where it concludes
5 that "Istation is not a reliable screener for
6 dyslexia because it lacks some key measures
7 for dyslexia risk factors like letter-naming
8 fluency." Do you see that?

9 A. Yes.

10 Q. Do you think it was wrong for the panel to
11 conclude that Istation lacks some key
12 measures for dyslexia risk factors?

13 A. With all the knowledge I have now,
14 absolutely, and that is based on being a year
15 out from this recommendation, and that is
16 very well detailed in the response letter to
17 Amplify's bid protest.

18 Q. Let's turn back to Exhibit 8 which is the
19 November meeting notes. I'll have you turn
20 to page 12 of the document. On page 12 near
21 the bottom the committee starts evaluating
22 Istation. It says "Business Specification
23 1." Do you see that?

24 A. Yes.

25 Q. And do you see it says "Consensus Ranking"

1 under business specification 1, "They voted 1
2 no and 10 maybe whether Istation met that
3 specification." Do you see that?

4 A. Yes.

5 Q. Do you contend the committee was in some way
6 bias in making that statement?

7 A. No. It is my belief that somewhere someone
8 in charge of this process did show bias
9 because they took improper actions of
10 switching those 10 maybes to noes.

11 Q. Who did that?

12 A. I do not know.

13 Q. Do you know whether any of the narrative
14 content of this paragraph and response to
15 business specification 1 is a mistake or
16 incorrect?

17 A. I do not know. I was not there.

18 (Exhibit No. 10, E-mail Exchange, so
19 marked)

20 Q. Mr. Johnson, I've handed you what's been
21 marked as Exhibit 10 to your deposition which
22 I'll represent is an e-mail exchange between
23 DPI folks and DIT folks from June 6, 2019.
24 Have you seen this exchange before?

25 A. I'm not entirely sure. I believe I have, but

1 it would just be in passing.

2 Q. I'm going to turn to page 3, and we'll work
3 our way back and ask if you recall
4 information about this.

5 A. Okay.

6 Q. Do you see the first e-mail chronologically
7 appears to be an e-mail from Melinda Williams
8 to Sri at DPI, 11:14 a.m., on June 6th?

9 A. Yes.

10 Q. It appears that the subject title is "RTA
11 Edited Award Recommendation Draft." Do you
12 see that?

13 A. Yes.

14 Q. And do you understand that there was a memo
15 that was generated by DPI to justify the
16 award to Istation?

17 A. Yes, it is being run by DIT.

18 Q. Do you see the e-mail above that where it
19 says "Hi, Melinda"?

20 A. Yes.

21 Q. And it appears that it is from a few minutes
22 later that same day. Do you see where Sri
23 says "We did not evaluate three and four
24 under the same evaluation criteria"? Do you
25 see that?

1 A. Yes.

2 Q. Do you know who vendors 3 and 4 are?

3 A. No.

4 Q. Do you know there are two vendors who did not
5 make it past --

6 A. Yes. I don't know who is 3 and who is 4, but
7 I would imagine that's referring to NWEA and
8 Curriculum Associates.

9 Q. Do you know what this e-mails means by saying
10 "We did not evaluate 3 and 4 under same
11 evaluation criteria"?

12 A. No.

13 Q. Do you see on page 2 there is a question back
14 to Sri "What criteria did you evaluate them
15 under?" Do you see that?

16 A. Yes.

17 Q. And then there is a response from Sri that
18 said "Those listed in the RFP," correct?

19 A. Yes.

20 Q. And turn to page 1 of Exhibit 10. Do you see
21 there is an e-mail from DIT? The second
22 sentence says "The evaluation criteria should
23 be the same for all vendors from the
24 beginning."

25 A. Yes.

1 Q. Do you recall, after me showing you this
2 exhibit, whether you've reviewed this e-mail
3 exchange before?

4 A. I believe -- and I could be mistaken. I
5 believe this was in some of the documents
6 that was part of the public record request,
7 and if I'm mistaken, that is because there
8 were e-mails like this.

9 Q. Do you agree with the statement that the
10 evaluation criteria should be the same from
11 all vendors from the beginning?

12 A. No, I don't know what this refers to. And
13 this is Thursday, June 6th, "After talking
14 with Patty, disregard the previous comments.
15 We will keep the award recommendation listed
16 just for the two vendors; however, I do need
17 to get more detailed information for the two
18 vendors provided. Let's discuss at 1:00.
19 Thanks."

20 So clearly, this was a conversation
21 between procurement people at DPI and NC DIT
22 in formulating the award response.

23 Q. Do you know whether the word "comments"
24 refers to the statement evaluation criteria
25 should be the same for all vendors from the

1 beginning or do you not?

2 A. I do not know. I don't know what this back
3 and forth refers to. I just know that we
4 wanted to make sure that DPI worked very
5 closely with DIT to make sure that all
6 procurement protocols and rules were followed
7 with their guidance, and they were and that's
8 what this final outcome ended with.

9 Q. I'm not asking you about this procurement,
10 but you would agree that statements mistakes
11 are made in procurements, correct?

12 A. Absolutely. I would point you to RFP-1 and
13 RFP-2.

14 (Exhibit No. 11, Form, so marked)

15 Q. Mr. Johnson, I've handed you what I've marked
16 as Exhibit 11. Have you seen this document
17 before?

18 A. I believe so.

19 Q. What is this document?

20 A. This looks like the official form to fill out
21 for cancelling RFP-2.

22 Q. You understand that DPI had to get approval
23 from DIT to cancel RFP-2?

24 A. Absolutely. Very early in January into
25 February when the totalitarian of all the

1 circumstances raised lots of concerns about
2 RFP-2 process and whether or not it actually
3 was fair and the best value for the state, we
4 were working very closely with DIT to make
5 sure we proceeded exactly how we were
6 supposed to.

7 Q. What is the reason that this document says
8 DPI was requesting approval for cancellation?

9 A. I'll just read it. "DPI is requesting to
10 cancel an RFP for the procurement of Read to
11 Achieve Diagnostics Software. Four offers
12 were received on or before the due date
13 specified. All were responsive.

14 "DPI subsequently began their
15 evaluation and discovered that two of the
16 four vendors had significant weaknesses as
17 compared to the specifications issued in the
18 RFP. Neither vendor (Curriculum Associates
19 and NWEA) appeared ready to execute a large,
20 statewide effort.

21 "Both had significant technical
22 limitations and compliance with SOC 2 Type 2
23 was either absent or scheduled to be
24 completed later. The other two vendors that
25 responded appeared capable of satisfying our

1 agency's business needs but are at a
2 disparate price range (so unlike that there
3 is no basis for comparison)." Specifically,
4 the prices are Amplify Education about
5 12 million; Istation, about 3 million.

6 "As a result, DPI believes that
7 continuing with the RFP would serve no
8 valuable purpose, and they would like to
9 cancel. Pursuant to the definition of
10 'Negotiation' in NCAC 6B.0316, DPI intends to
11 conduct negotiations with sources of supply
12 to maximize the state's ability to obtain
13 best value based on the evaluation factors
14 set forth in the solicitation."

15 Q. Thank you. Were you involved at all in the
16 preparation of this document?

17 A. No.

18 Q. This request for cancellation doesn't say
19 anything about a breach of confidentiality,
20 does it?

21 A. No.

22 Q. Why not?

23 A. I do not know. It also doesn't say lack of
24 consensus.

25 Q. It also doesn't say you believe the process

1 was unfair, does it?

2 A. No.

3 Q. In fact, this document says that DPI
4 determined that all four bids were
5 responsive?

6 A. I believe it did.

7 Q. How could DPI conclude all bids were
8 responsive if you thought the whole process
9 was bias?

10 A. Because they were responsive. They responded
11 to the RFP, and they provided enough
12 information to show they could do the work.

13 Q. How do you know that if you thought committee
14 members were bias? How do you know that all
15 bids were responsive?

16 A. I didn't draft this document. I didn't sign
17 this. I didn't see this when it went over.
18 I was in a position where I had concerns from
19 the December 2018 PowerPoint.

20 On top of those concerns, we found
21 out that there was a leak of confidential
22 information to someone outside of the process
23 who has close ties to Amplify.

24 Then on top of that, even with all
25 that going on, I knew we could still try to

1 have a recommendation from this panel, and
2 then we could start working through these
3 issues before I gave my approval, because
4 going back to how this was a very odd
5 legislation, we could go through all this,
6 and I could say "I don't approve." That was
7 an option at my discretion.

8 So I decided we would go through and
9 we would try to come to consensus, but then
10 even when we tried to come to consensus, this
11 evaluation panel didn't come to consensus.
12 So the lack of consensus, the concerns I had
13 from the 2018 PowerPoint, and those concerns
14 being -- sorry for the pun -- amplified by
15 the fact that one of the evaluation panel
16 members was leaking confidential information
17 to someone with close ties to Amplify.

18 All of that together, it was very
19 clear that the proper thing to do, such as
20 with RFP-1 where we knew we were going to
21 have issues, was to cancel.

22 So it was my instruction to
23 procurement and to the evaluation panel,
24 whoever needed to actually put the paperwork
25 together, to make sure that we properly

1 cancelled RFP with guidance from DIT.

2 Q. But you would agree with me that this
3 Exhibit 11 doesn't detail any of these issues
4 you described as serious reasons for
5 cancelling the procurement?

6 A. I absolutely agree with you, they are not
7 listed on this document.

8 Q. Do you know who prepared this document?

9 A. Would it be Andrea?

10 Q. If you know.

11 A. No, I do not know.

12 Q. Do you know who at DPI communicated with DIT
13 about the decision to request approval for
14 cancellation?

15 A. At the very least, I know Catherine Johnson
16 was in communication explaining what was
17 going on with RFP-2, explaining the concerns,
18 explaining the problems and seeking guidance
19 from DIT on what next steps to take because,
20 as with RFP-1, when we found that there were
21 problems, we were able to go to the General
22 Assembly and ask for an extension.

23 We are not in a place where, as you
24 said, December 1st we were supposed to have
25 an award. We weren't in place to could go

1 back to the General Assembly and ask for an
2 extension for RFP-2, nor did we want to,
3 because, again, we don't know how we would
4 handled the fact that the Amplify contract
5 was expired, and we did not have the ability
6 to extend that contract.

7 The extensions were used up. So we
8 had to come to a place where, through a fair
9 efficient process, we could contract with a
10 reading diagnostic tool vendor; and that was
11 my instruction to Catherine Johnson, to work
12 with DIT to see if there was a way we could
13 have a fair process with an award that we
14 could do as quickly and efficiently and
15 fairly as possible so we could have a tool in
16 place for next school year.

17 Q. At the time of this memo, it appears to be
18 dated late March 2019, correct?

19 A. Yes.

20 Q. So at that point, DPI is actually almost four
21 months after the statutory deadline to select
22 a vendor?

23 A. Yes.

24 Q. You're already violating the statute?

25 A. Yes.

1 Q. Did anyone discuss going to the legislature
2 to make sure an award could be made that
3 would be in accordance with law?

4 MR. SHANAHAN: Object to the form.

5 A. No. Just because you missed a due date in
6 the law doesn't invalidate the law, I would
7 assume, but it is also a requirement by Read
8 to Achieve, the overarching law of Read to
9 Achieve, that you have this reading
10 diagnostic tool in the schools.

11 So to comply to that law, you had to
12 go through this process regardless of if it
13 was late.

14 Q. RFP-1 was cancelled in March of 2018. That
15 was already considered too late to complete a
16 procurement, correct?

17 A. We considered it at the time, yes.

18 Q. So you were cancelling this one in March of
19 2019, but you are saying you had no other
20 option?

21 A. Yes. We were out of expenses with Amplify,
22 which is what we relied on in the first RFP
23 cancelation. The contract for Amplify -- I
24 don't remember if it was 2 years or 3 years,
25 but it was a certain contract time, and then

1 we had two one-year extensions, and we used
2 both those up.

3 We were at a point where we had to
4 go forth with a procurement process in order
5 to give an award so that we could have --
6 whether it be Amplify and nothing changes or
7 whether it being Istation, and we have a new
8 reading diagnostic tool. We had to get a new
9 contract in place for the next school year.

10 Q. Not saying DPI should have done this, but DPI
11 could have approached the legislature for
12 relief just after RFP-1, correct?

13 A. Theoretically possible, but how do you get
14 around the fact that we don't have a contract
15 with any vendor?

16 Q. If the legislature passes a statute allowing
17 an extension. I'm not saying it is going to
18 happen. You did not go to the legislation?

19 A. Yes, because any reasonable person knows that
20 is not going to happen.

21 Q. But this was a unique statute?

22 A. It was a very unique statute, and there was a
23 lot of people in the General Assembly, and
24 then you had to have the signature of the
25 governor.

1 (Exhibit No. 12, Contract Award

2 Recommendation, so marked)

3 Q. Mr. Johnson, I've handed you what I've marked
4 as Exhibit 12 to your deposition. Do you
5 recognize this document?

6 A. Yes.

7 Q. What is this document?

8 A. This is the contract award recommendation
9 that, I assume, went from DPI to DIT.

10 Q. Do you understand this is basically the
11 document documenting DPI's decision to make
12 an award to Istation?

13 A. Yes.

14 Q. Did you review any drafts of this document
15 before responding?

16 A. No.

17 Q. Have you reviewed any drafts of this document
18 in preparing for your deposition or at any
19 time?

20 A. Only at the time I believe this was part of
21 the public record request that came out this
22 summer.

23 Q. So were you involved in drafting this
24 document at all?

25 A. No.

1 Q. Did you have any discussions regarding this
2 contract award recommendation document before
3 it was finalized?

4 A. No.

5 Q. I'll have you turn to page 4 of the document,
6 Mr. Johnson. Do you see "Section 1,
7 Introduction"?

8 A. Yes.

9 Q. It says "The evaluation committee could not
10 reach a consensus." Do you see that?

11 A. Yes.

12 Q. That's not the basis that is reflected in
13 that DIT record for cancellation, correct?

14 A. Correct.

15 Q. This Introduction doesn't say that the RFP-2
16 is cancelled due to any alleged breach of
17 confidentiality, correct?

18 A. Correct.

19 Q. Why wasn't it put in there?

20 A. I don't know.

21 Q. I'll have you look at "Section 2, Evaluation
22 Committee." Do you know how the members of
23 this evaluation committee were selected?

24 A. I believe this was at the recommendation of
25 Pam Shue.

1 Q. How did that happen?

2 A. Amy Jablonski was no longer with the
3 department, so Pam Shue was the business
4 owner.

5 And I believe -- I don't know if Amy
6 Jablonski was replaced for this part or Pam
7 Shue just became the business owner.

8 Q. And did -- do you know, did Ms. Shue select
9 the members of the evaluation committee?

10 A. I'm not entirely sure. I would imagine that
11 again, just like RFP-1 and RFP-2, there was a
12 discussion that occurred amongst procurement
13 and K-3 literacy and accountability as who it
14 would make sense to be on this evaluation
15 panel.

16 Q. Were you consulted about who should be on the
17 evaluation committee?

18 A. I'm sure I was. Just like RFP-1 and RFP-2, I
19 believe it would always come to me for
20 approval.

21 Q. Did you object the proposed conclusion of
22 anybody on the proposed evaluation committee?

23 A. No.

24 Q. Do you recall whether Pam Shue came to you
25 with a list of names, or how did she

1 communicate with you who she thought should
2 be on the evaluation committee?

3 A. I believe it was more of we want to make sure
4 we have someone from testing. So you would
5 see that word "psychometrician," someone from
6 digital learning, Nathan Craver, and, of
7 course, Pam is the early childhood expert.

8 And then it looks like other people
9 would be -- we have attorneys, and it looks
10 like project manager must be procurement.

11 Q. You agree that the evaluation committee is
12 much reduced in size?

13 A. Yes, absolutely.

14 Q. Did you have any discussion with Ms. Shue
15 about whether the evaluation committee should
16 be reduced in size?

17 A. I don't recall, but generally speaking,
18 that's something that I was absolutely fine
19 with -- given that we had to go quickly and
20 efficiently.

21 Q. I understand looking at this the word
22 "decision-maker" on this list of evaluation
23 committee members, those are the voting
24 members, correct?

25 A. That's how I understand it as well.

1 Q. There were four members of the voting
2 evaluation committee?

3 A. Yes.

4 Q. Do you see -- I'm going to have you turn to
5 page 5 of Exhibit 12. Do you see where it
6 says "Section 3, Evaluation Criteria
7 Methodology"?

8 A. Yes.

9 Q. Do you see there is a list of evaluation
10 criteria in order of importance? Do you see
11 that?

12 A. Yes.

13 Q. You would agree that list of evaluation
14 criteria does not match up with the RFP,
15 correct?

16 A. This was a different process and a different
17 procurement. I do agree it is not in the
18 same order.

19 I also know, again, from having
20 prepared the response letter that these were
21 actually unweighted factors. So while there
22 is an order, that order did not come into
23 play.

24 Q. It does say that the criteria below are
25 listed in order of importance, correct?

1 A. Yes.

2 Q. When it says -- cost is listed first. Cost
3 is the most important in order of importance,
4 correct?

5 A. Yes. But again, it wasn't weighted so that
6 didn't come in to play.

7 Q. Well, if someone tells -- strike that.
8 Who made this order of importance?

9 A. I don't know.

10 Q. Are you aware that cost was ordered as No. 4
11 from the original sixth criteria of the RFP?

12 A. I am now with having reviewed all the
13 documents from the beginning of RFP-1 all the
14 way through where we are today.

15 Q. When did you become aware of that?

16 A. Probably when preparing the response letter.

17 Q. To the protest?

18 A. Yes.

19 Q. And the second evaluation criteria in order
20 of importance is vendor financial stability.
21 Do you see that?

22 A. Yes.

23 Q. Do you recall or know that was the sixth of
24 six evaluation criteria in order of
25 importance in the original RFP?

1 A. I know that know, yes.

2 Q. Do you know whether this list, updated list
3 of evaluation criteria, was provided to
4 vendors?

5 MR. SHANAHAN: Object to the form of
6 the question as to "updated."

7 A. I would believe so because I believe the way
8 this process worked is we started with
9 talking to DIT, and we made sure we had
10 complete 100 percent guidance from DIT in
11 setting up this entire negotiation process
12 because we just had to cancel RFP-1 because
13 there was a conflict of interest with Amplify
14 that someone did not report.

15 So we had to cancel this one time,
16 that already had people very worried and
17 concerned about this entire process. Then
18 RFP-2 came along, and we knew all the really
19 bad things that were going on with RFP-2 and
20 were very concerned about that, but we had to
21 cancel that.

22 So absolutely that would raise a lot
23 of concern among not just vendors but local
24 superintendents, schools that knew that there
25 had to be a new tool in place.

1 So we knew a lot of eyes would be on
2 this. We knew we had to do it exactly within
3 procurement guidelines and rules. So we
4 started off, every single action we took we
5 worked with DIT and with their guidance.

6 Q. Because you knew if it was done wrong, it
7 might get thrown out, and you didn't want
8 that to happen?

9 A. If it was done wrong, I would have to cancel
10 it again, just like RFP-2 was done
11 incorrectly and we had to cancel that. We
12 wanted to make sure that this procurement was
13 right on track. We worked very closely with
14 DIT.

15 Those were my instructions, and
16 everything that you see here was something
17 that was run by DIT, and I do believe that
18 there would be some documents that went to
19 vendors. I'm just recalling.

20 I imagine there is a document that
21 went to vendors saying we are opening up
22 negotiations, please respond to these
23 criteria. And the good thing about that is
24 that any vendor that was worried about the
25 previous two RFPs had a completely even shot

1 here to respond, again, whether they wanted
2 it to be exactly the same as it was or
3 whether they look at the new document and
4 respond accordingly. They all had a fair
5 chance and would be involved in a fair
6 process.

7 Q. You agree that vendors would want to know
8 what the evaluation criteria were in order of
9 importance?

10 A. I would assume that is something a vendor
11 would want to know. I do not know exactly,
12 off the top of my head, what went to vendors.

13 Q. Sure. I'm not asking you that.

14 You would agree that if your
15 involvement in RFP were costs were fourth out
16 of the sixth most important factors and
17 became the most important factor, that would
18 be something a vendor would want to know?

19 A. I don't know -- I'd have to look back at the
20 RFP-2. I assume that they were seeing that
21 there was this weighted structure based on
22 RFP-2. I don't know exactly what a vendor
23 sees. I can agree with you that is something
24 a vendor would want to know.

25 I don't know exactly what a vendor

1 receives in an RFP process. I don't know
2 what they receive beyond RFP-1, beyond RFP-2;
3 and now we're in the third iteration of this,
4 and it is in negotiation, and I don't know
5 what they would have received in that.

6 I just know my direction to my
7 procurement team was make sure you work very
8 closely with DIT and work under their
9 guidance to make sure we adhere to all
10 procurement rules, and that's exactly what my
11 team did.

12 Q. Do you remember I showed you the RFP earlier,
13 RFP-2, and we looked at the sixth evaluation
14 criteria, correct?

15 A. Uh-huh.

16 Q. I'll have you turn to page 8. Do you see the
17 bottom line with "Istation" on the left?

18 A. Yes.

19 Q. And on the right, do you see where it says
20 "Solution is not compatible with screen
21 readers or keyboards and will cost extra to
22 ensure compatibility." Did I read that
23 correctly?

24 A. Yes.

25 Q. Do you know what that refers to?

1 A. No.

2 Q. Do you know how much extra it will cost, or
3 do you not know a thing about this issue?

4 A. I don't know anything about this issue. I
5 can tell you you're asking me the details on
6 a contract award recommendation. We started
7 this process over for the third iteration of
8 negotiations.

9 The evaluation panel was put
10 together. The evaluation panel reviewed the
11 criteria. They unanimously selected
12 Istation. They brought that recommendation
13 to me. I approved Istation.

14 We brought that recommendation to
15 the State Board of Education. They
16 unanimously approved that recommendation.

17 Then this is something that, I
18 guess, happens after all that part of the
19 process that was put together by Tymica Dunn.

20 Q. Let's clarify: You weren't involved in
21 drafting this June 7th memo?

22 A. That's correct.

23 Q. So you have no personal knowledge as to that
24 statement I was asking about on page 8?

25 A. Correct.

1 Q. I'll have you turn to page 9. Would you
2 agree that shows that DPI found no concerns
3 with either vendor's financial stability?

4 A. Yes.

5 Q. I'll have you turn to page 11. Do you see
6 "personalized learning strengths" for
7 Amplify? Do you see that portion of page 11?

8 A. Yes.

9 Q. Do you see where it says "Amplify offers a
10 dyslexia component"?

11 A. Yes.

12 Q. Do you understand that's there because the
13 final evaluation committee determined that
14 Istation does not offer a separate dyslexia
15 component?

16 A. I don't know what this means. So "Amplify
17 offers a dyslexia component" means that
18 Amplify offers a dyslexia component.

19 Q. That was determined to be a strength?

20 A. Yes, according to this document.

21 Q. I'll have you turn to the next page, page 12.
22 Do you see the one weakness listed for
23 Istation?

24 A. Yes.

25 Q. That says that "Istation does not have a

1 separate dyslexia component."

2 A. It also says that "Their assessment can be
3 used to screen for dyslexia."

4 Q. I'm just saying -- I'm confirming that the
5 final evaluation committee, according to this
6 document, thought it was a weakness that the
7 vendor did not have a separate dyslexia
8 component at this time?

9 A. According to this document, I agree with
10 that. The vendor was seen as a weakness that
11 they did not have a separate dyslexia
12 component, but it does qualify that their
13 assessment can be used for screening
14 dyslexia.

15 Q. The committee didn't conclude that -- this
16 statement doesn't say Istation can screen for
17 dyslexia. It says "Istation stated it can
18 screen for dyslexia," correct?

19 A. Yes.

20 Q. I'll have you turn to page 13. The second
21 paragraph from the bottom where it says
22 "Istation provided a solution." Do you see
23 that?

24 A. Yes.

25 Q. Do you see that the final award

1 recommendation document states that
2 "Istation's dyslexia component may be missing
3 key measures," correct?

4 A. Yes.

5 Q. And that was the -- this is the final award
6 recommendation memo, correct?

7 A. It is: And I would continue reading that
8 where it says "The service substantially
9 conforms to the requirements specified
10 under," I imagine that's probably the statute
11 we talked about at the very beginning of this
12 deposition, which is the primary obligation
13 of this procurement.

14 Q. Read to Achieve?

15 A. Is that Read to Achieve, or is that the
16 dyslexia?

17 Q. I'll represent to you it is not the dyslexia
18 statute.

19 A. So the service substantially conforms to the
20 requirements of Read to Achieve, and if we go
21 back to the dyslexia statute, as we just
22 pointed out it is not actually required in
23 law that the tool screens for dyslexia.

24 But knowing now what I know from the
25 response letter we crafted, I am confident

1 that Istation does screen for dyslexia. So I
2 had no part in drafting this document, but I
3 had a very intimate part in drafting the
4 response letter to you and your client, and
5 I'm confident that Istation does have that
6 capability.

7 Q. Are you saying that this statement about
8 missing key measures is incorrect?

9 A. No, because they qualify it quite well.

10 While Istation's dyslexia component may be
11 missing key measures, it sounds like in this
12 document they never really went into the
13 investigation because it says "Although
14 Istation stated," it doesn't seem like they
15 went in to investigate:

16 And then it says "may be missing."

17 It sounds like this evaluation panel did not
18 go into a deep investigation of that.

19 MR. ARMBRUSTER: Let's go ahead and
20 take a lunch break.

21 THE VIDEOGRAPHER: We're off the
22 record at 12:35 p.m.

23 (Recess)

24 THE VIDEOGRAPHER: We are back on
25 the record at 1:41 p.m.

1 (Exhibit No. 13, Memorandum, so

2 marked)

3 BY MR. ARMBRUSTER:

4 Q. Mr. Johnson, I've handed you what I've marked

5 as Exhibit 13 to your deposition. Do you

6 recognize this page?

7 A. Yes.

8 Q. What is this page?

9 A. This is the page that we sent out as a cover

10 letter accompanying the public records that

11 were requested by you in the summer.

12 Q. Maybe about 160 pages or something like that?

13 A. That sounds about right.

14 Q. Did you write this memo?

15 A. Yes.

16 Q. In the first paragraph of this memo, you say

17 that "DPI cannot release every detail during

18 the procurement process until the process is

19 complete (i.e., until after the protest is

20 decided)." Do you see that?

21 A. Yes.

22 Q. On what basis did you make that

23 determination?

24 A. Advice from Kathryn who worked with DIT.

25 Q. What information has been withheld from the

1 public head from the procurement process?

2 A. Nothing. Everything has been put forth in
3 the response letter denying Amplify's
4 request.

5 Q. Were there materials not produced with the
6 160-something pages of public records that
7 you know of?

8 A. No, nothing that I would know of, no. I
9 don't have knowledge of that.

10 Q. It says in that first paragraph
11 "Unfortunately, that means the public records
12 released now might not present a full picture
13 of the process." Do you know what that's in
14 reference to?

15 A. Yes.

16 Q. What's that in reference to?

17 A. Exactly what I laid out in the response
18 letter denying Amplify's protest. Everything
19 that we were starting to uncover that started
20 giving us a lot of concern, particularly at
21 this time probably referred to that
22 confidential leak.

23 And as I was going through things in
24 the public records and I for the first time
25 was reading the notes, I for the first time

1 was reading the actual cancellation notices,
2 I was seeing that lack of consensus was not
3 listed, that confidential leak was not
4 listed, that is why I wanted to make sure
5 there will be more that will be presented to
6 the public and to Amplify that will paint a
7 fuller picture.

8 Q. Why wasn't the leak information released with
9 these public records?

10 A. I don't know. I deferred to legal counsel
11 and procurement because there was an ongoing
12 HR investigation around that, and whether or
13 not, I guess, who is responsive to the
14 request would be taken into account. I did
15 not make that determination.

16 Q. Sitting here today, do you know if there are
17 any public records relating to the
18 procurement that have yet to be produced?

19 A. No.

20 (Exhibit No. 14, Response Letter, so
21 marked)

22 Q. Mr. Johnson, do you recognize Exhibit 14 as
23 your response to Amplify's protest letter?

24 A. Yes.

25 Q. And I'll represent to you this has the

1 attachments, but this document I handed you
2 doesn't have that separate documents of
3 exhibits. Okay?

4 A. Understood.

5 Q. I'm going to have you turn to page 8 of this
6 Exhibit 14.

7 Since this has come up, I might as
8 well ask you about this alleged breach of
9 confidentiality. Do you see that section of
10 the discussion on page 8 about that issue?

11 A. Yes.

12 Q. Who is the anonymous whistleblower?

13 A. I don't know.

14 Q. Who does know?

15 A. I don't think anyone knows.

16 Q. How did the department obtain the screenshot?

17 A. To my knowledge, it was a printed piece of
18 paper that was slid under Pam Shue's door.

19 Q. Pam Shue's door where?

20 A. At the Department of Public Instruction. I
21 believe that is how she came into possession
22 of it.

23 Q. What steps has the department taken to
24 determine the identity of the anonymous
25 whistleblower?

1 A. I don't know all the steps. I know an HR
2 investigation was open, and I do believe that
3 in discovery we actually found the genuine
4 copy of the text message, the actual text
5 message itself from the device.

6 Q. What do you mean?

7 A. Discovery through all this process. I
8 believe, I'm under the impression that the
9 actual text message, that we only had a
10 screenshot of what was actually discovered on
11 a device through discovery for this protest.

12 Q. When did Ms. Shue have this screenshot
13 slipped under her door?

14 A. I would imagine late January.

15 Q. Do you know if there are any e-mails
16 discussing this? Because I haven't received
17 any.

18 A. No.

19 Q. The answer is you don't know?

20 A. I do not know if there are any e-mails
21 discussed in this.

22 Q. What did Pam do when the screenshot printout
23 was slipped under her door?

24 A. If I recall correctly, I believe the first
25 thing she did was go to Kathryn. Kathryn is

1 the director or the deputy superintendent of
2 operations, and she is over HR and over
3 procurement, operations.

4 I believe she first took it to
5 Kathryn to seek counsel on where do you go
6 from here when you have information like
7 this.

8 Q. So when you say the word "anonymous" on this
9 page 8, "it is anonymous," it's the position
10 of the department you don't know who provided
11 this document to Pam Shue?

12 A. Yes, the person is not known.

13 Q. What steps have been taken to identify who
14 might be the anonymous whistleblower to find
15 out how they obtained it?

16 A. I'm not familiar with that. I know there is
17 an HR investigation that was conducted.

18 Q. Who is investigating that?

19 A. Kathryn.

20 Q. Do you understand that this screenshot of a
21 text message chain came from Carolyn Guthrie?

22 A. At the time I didn't know who it came from.
23 I know now it came from Carolyn Guthrie
24 because of the discovery efforts in this
25 protest process. At the time they didn't

1 know who it came from.

2 I don't know even if they -- the
3 text message itself, I don't know if they had
4 suspicions. I don't know what they knew.
5 They brought it to my attention, and it just,
6 again, added to the concerns that we had
7 about this RFP-2 process.

8 Q. Who at DPI talked to Ms. Guthrie about the
9 text message exchange?

10 A. I don't know if anyone talked to Carolyn
11 Guthrie about the text message exchange. I
12 know they talked to Abbey because in this
13 text message they were identified by their
14 initials. That lined up with who was in the
15 room at the time of this discussion.

16 And I believe -- off the top of my
17 head, I believe that the text message
18 exchange said that -- the person sending text
19 just got off the phone with someone's
20 initials, and it just lined up it was Abbey
21 Whitford.

22 Q. The initials are AW in the text message?

23 A. I would need to see it in front of me.

24 Q. We'll get to it. You're saying you don't
25 know if DPI ever talked to Ms. Guthrie about

1 this text message exchange?

2 A. I do not know, no.

3 Q. This is the breach of confidentiality that
4 you are using to cancel procurement, correct?

5 A. This is one of the reasons that the RFP-2 was
6 cancelled, and this is -- again, when you
7 added everything together, then you get to a
8 lack of consensus which absolutely was
9 another reason to cancel RFP-2.

10 Everything put together, it clearly
11 was an issue we were not going to get to the
12 best value proposition for the State of North
13 Carolina through this RFP-2 process, all of
14 that added together.

15 So with all that totality of
16 evidence and everything that I had in front
17 of me, I had a decision to make of do I go
18 forward with what is going to be an RFP that
19 will be protested by whoever loses and then
20 have to make a recommendation hopefully -- we
21 still didn't have a recommendation -- and
22 then I make an approval or I don't approve or
23 I pick.

24 Again, we're going back to we were
25 in this area where we're still going off of a

1 very unique piece of legislation. So when we
2 got this evidence that on top of the December
3 2018 PowerPoint and the concerns I had from
4 that, on top of the fact we didn't have a
5 consensus between the evaluation panel to
6 give me a recommendation, now we have
7 evidence that somebody was -- I believe as
8 they described it -- on a marathon call,
9 another marathon call about what was going on
10 with this confidential information.

11 It just was clear to me instead of
12 pushing forward and trying to get to
13 consensus, trying to get recommendation from
14 the evaluation panel, that the best step
15 would be to work with DIT, get their advice
16 on what to do to make sure that we protect
17 the integrity of this entire procurement
18 process and move forward with their advice.

19 Q. You're aware there is not a single public
20 record that reflects that DIT was informed of
21 this breach of confidentiality?

22 A. If there is not a public record, then there
23 is not a public record. I know that
24 conversations were had between DPI and DIT on
25 all of this, and the advice from DIT, I

1 believe, from what I recall was to cancel.

2 Q. Do you think it is important for an agency to
3 document the reasons why they want to cancel
4 a procurement so the public can know?

5 A. Yes.

6 Q. But this confidentiality breach does not
7 appear to have been documented anywhere at
8 the time?

9 A. That's correct. I was not in charge of
10 documenting step by step. People came to me.
11 They gave me the update of where we were. I
12 told them to sit with the decision and asked
13 them to work with DIT to properly cancel this
14 RFP.

15 And I agree, I very much wish that
16 the people who had done that had kept better
17 records, and we, again, with the guidance of
18 DIT -- I don't know why DIT and our
19 procurement team would not list more reasons
20 in the cancellation letter they put out. I
21 wish they would have, but again, we went with
22 DIT in making sure that whatever we did was
23 proper protocol.

24 Q. You weren't involved in creating the
25 documents that were sent to DIT, correct?

1 A. Correct.

2 Q. You're not aware whether DPI has ever talked
3 to Carolyn Guthrie about this text message
4 exchange?

5 A. No.

6 Q. I understand the other person or the person
7 that she text messaged with is Anne Evans.
8 Do you know that?

9 A. Only now because what came out in discovery.

10 Q. Do you know whether DPI has talked to Anne
11 Evans to understand if she did anything with
12 the information that was provided to her from
13 Carolyn Guthrie?

14 A. No. I'm not, but it doesn't change the fact
15 that there was confidential information that
16 was leaked to someone who has very close ties
17 to Amplify.

18 Q. What do you mean by that, someone has close
19 ties to Amplify? Did Ms. Guthrie used to
20 work for Amplify?

21 A. Ms. Guthrie used to work here, and she has
22 close ties to Amplify.

23 Q. What do you mean by that?

24 A. Friendly relations with Amplify.

25 Q. Amplify has been providing services to the

1 State for close to 10 years, and she's
2 working K-3 Literacy?

3 A. Yes.

4 Q. Is that what the friendly relationship
5 relations are?

6 A. I would say yes. I would say that's probably
7 where they met. That's probably how it got
8 started.

9 Q. You don't have any evidence that she shared
10 any information with Amplify, correct?

11 A. No, I do not have any evidence of that, but I
12 do have evidence that there was a breach of
13 the confidentiality, and that leaked
14 information went to someone with close ties
15 with Amplify who was not in the procurement
16 process.

17 Q. Does DPI have any evidence that any vendor in
18 this procurement obtained any of this text
19 message information prior to the award date?

20 A. You mean the actual text message or any
21 confidential information -- because there was
22 no confidentiality information in the text
23 message itself. The text message said that
24 there was a marathon phone call about all the
25 problems with RFP-2.

1 Q. Right. It also revealed who voted which way,
2 correct?

3 A. Yes, it does.

4 Q. But do you have any evidence -- let's break
5 it down. Does DPI have any evidence that any
6 vendor involved in this procurement obtained
7 that screenshot prior to the award?

8 A. No, not that I know of. I wouldn't think so.

9 Q. Does DPI have any evidence that any vendor
10 contained any information that was contained
11 in that text message prior to the award?

12 A. No, we have no evidence that information that
13 was leaked to the person outside of DPI did
14 not make it to Amplify.

15 Q. But wouldn't you want to know if it made it
16 to a vendor?

17 A. I would want to know that confidential
18 information on a procurement process that
19 already raised a lot of concerns was leaked
20 outside of this building when people clearly
21 knew you were not to share confidentiality
22 information with anyone.

23 So yes, I would love to know if that
24 information made it to Amplify, but
25 regardless of whether or not it made it to

1 Amplify or another vendor, it made it outside
2 of the building, outside of the confines of
3 the confidentiality that that person agreed
4 to maintain.

5 Now that, on top of the fact that I
6 already had concerns because we had evidence
7 in that PowerPoint that somebody was not
8 listing all the weaknesses, then on top of
9 the fact that we tried to have a
10 recommendation but we couldn't get to
11 consensus, again, everything put together, it
12 was in the best interest to cancel RFP-2 and
13 start the procurement over again.

14 Q. Let's say a committee member told their
15 spouse that in January 8th you came into the
16 meeting and she felt you had directed them
17 how to vote and she told her spouse how they
18 voted, let's say that happened. Is that a
19 breach of the confidentiality agreement?

20 A. I would have to look at the agreement, but I
21 would assume so.

22 Q. Would that conversation with a committee
23 member and their spouse require cancellation
24 of this entire RFP?

25 A. I don't know that alone, but again, given

1 everything that happened -- and when you read
2 the text message, the tone of the text
3 message -- in your scenario, I'm sure the
4 spouse might say, "Oh, well. I don't know
5 what I think about this."

6 In the scenario of this actual text
7 message, I believe it was said something
8 along the lines "I was trying to help lazy
9 ass teachers," so the tone is very important
10 when looking at this text message.

11 Q. Do you ever have informal tone in your text
12 messages?

13 A. I'm sure I do, but I don't call teachers
14 "lazy ass teachers."

15 Q. I mentioned this breach of confidentiality
16 scenario of a committee member talking to
17 their spouse. You would not say that
18 necessarily required a cancellation of this
19 procurement?

20 A. I honestly don't know. I would go to the
21 procurement experts. If I remember
22 correctly, when we were putting together the
23 response letter and looking through
24 everything, I think that if there is any
25 breach of confidentiality no matter how

1 egregious or how small, I think an RFP can be
2 cancelled for that.

3 Q. Do you think it is important for the agency
4 to try to determine whether the breach of
5 confidentiality impacted the fairness of the
6 procurement in some way because you're
7 cancelling a lot of work?

8 A. Absolutely. I would absolutely love to know
9 that, but again, when you put all the
10 evidence together, it definitely seems to
11 point to the fact that it did.

12 It was part of something that was
13 going on with that evaluation panel where
14 there is improper bias, and there was an
15 unfair attempt to benefit Amplify.

16 Q. What is your evidence of improper bias based
17 on the December 4th PowerPoint?

18 A. I'm going back to the response letter. Once
19 we put everything together and saw the full
20 picture, I definitely see there was improper
21 bias and unfairness.

22 Q. How?

23 A. It is all laid out in the response letter.
24 We have it right here in front of us, but you
25 have -- whatever happened in this directive

1 to be yes, no, maybe, and maybes was turned
2 into noes.

3 Q. Why is that unfair?

4 MR. SHANAHAN: Excuse me. Let him
5 finish his answer, please.

6 A. When you have yes, no, maybes, and maybes are
7 immediately turned into noes, when you have
8 an actual process that wants to be fair,
9 would actually go and investigate those
10 maybes and find out that some of maybes were
11 actually yeses.

12 So no, it is not fair that maybes
13 that should have been yeses were turned into
14 noes and actually penalized Istation and NWEA
15 and Curriculum Associates.

16 Q. I mean, the maybe votes weren't turned to no
17 votes for only one proposal but for all
18 proposals, correct?

19 A. Right, except -- if I look back, I believe
20 it's Amplify had the least amount of maybe
21 votes.

22 Q. So is the problem they maybe made this
23 decision to change maybes to noes after they
24 had reviewed the proposals? Is that the
25 problem?

1 A. The problem is there was clearly improper
2 bias, and there is an unfair attempt to give
3 Amplify an edge.

4 And you also can look through the
5 entire response letter we have. The maybes
6 turning to noes is definitely one part of it,
7 and then very concerned about when we went
8 back and looked at what some of these maybes
9 and noes were.

10 These misstatements of fact were on
11 the response letter, page 10. It is quite
12 shocking some of these things that were put
13 out as fact to the evaluation panel to vote
14 on which turned out not to be true.

15 Q. When was the decision made to change maybes
16 to noes if that occurred?

17 A. I have no idea.

18 Q. If that was part of the original plan for
19 scoring, would that be a problem? Would that
20 be bias?

21 A. I don't know. I don't even know if it was
22 within proper procurement rules to do a yes
23 vote, maybe vote, no vote.

24 I do know off the top of my head, I
25 can tell you going back. I remember

1 preparing this response letter I know it was
2 shocking for me to find out that the criteria
3 were weighted in RFP-2 when that was against
4 a procurement rule.

5 So that's an example of something
6 that I found very disturbing. That was later
7 when we were actually preparing the response
8 letter.

9 Q. The December 4th PowerPoint to you doesn't
10 mention to you anything about weighting,
11 correct?

12 A. I don't know off the top of my head. I don't
13 know about -- we do have criteria evaluation.
14 I wouldn't know if that meant weighted or
15 not, like one actually had more weight than
16 the other. So no, it does not appear to be
17 in the PowerPoint from December.

18 Q. Do you know whether or not the word
19 "weighted" appears in the November consensus
20 notes?

21 A. We can look at it. That is going to take a
22 lot longer to read. I just read the first
23 page, and I'm skipping all over the others.
24 I don't know if it is in there. I do believe
25 it was somewhere because otherwise they

1 wouldn't have "weighted."

2 Q. Well, sitting here today, you don't know
3 whether or not the word "weighted" appears
4 anywhere in this Exhibit 8? It either does
5 or doesn't.

6 I'm asking: To the best of your
7 recollection, I'm asking if the word
8 "weighted" appears in here?

9 A. I need an exhibit. I can go get a copy of
10 this.

11 Q. Let's do it now.

12 (Exhibit No. 15, Exhibits, so marked)

13 Q. Mr. Johnson, I handed you what I've marked as
14 Exhibit 15, which are the exhibits to the
15 protest response.

16 A. Yes, I just read the protest response, the
17 part where it talked about the weighted
18 criteria.

19 And I go to Exhibit E as referenced
20 in the first paragraph of page 12, and I've
21 got a team consensus ranking after the
22 consensus meeting agreed to achieve RFP
23 review. I've got a chart where I've got
24 evaluation criteria and that each have a
25 weight.

1 Q. Let me get to that page.

2 A. You're fine. It is not numbered. It is
3 Exhibit E.

4 Q. Exhibit E is a single page, correct?

5 A. Yes.

6 Q. And I see this evaluation criteria, and
7 that's the sixth evaluation criteria from the
8 RFP, correct?

9 A. Correct.

10 Q. I see those weight columns on the right,
11 correct?

12 A. Yes.

13 Q. Where is the map where they use weighting?

14 A. I was not involved in the process. I have
15 this document. This is what was used by the
16 business owners. I do not know how they plug
17 this in to get the rankings that they had.

18 Q. Are you aware that DPI has turned over no
19 documents to show that these weights were
20 actually applied to the proposals?

21 A. No. But I can tell you with this here -- I
22 guess the person we'd have to ask would be
23 Amy Jablonski, but looking at the ranking,
24 taking everything into account, I was under
25 the impression absolutely that weight was

1 given to these criteria.

2 Q. But this Exhibit E, do you see the table at
3 the top of Exhibit E?

4 A. Uh-huh.

5 Q. There is no numbers in here? There is no
6 ranking done?

7 A. I agree. It clearly says it is from the
8 "consensus meeting 11/19-11/20."

9 I would believe that the attorneys
10 at DPI requested all the documents that they
11 would assemble and put them as part of the
12 public records, but I have no knowledge
13 myself under what happened at that meeting
14 and how this document played into the ranking
15 that was put together based on the voting at
16 that meeting.

17 Q. Because this document doesn't show actual
18 rankings of the proposals, correct?

19 A. That's correct, it does not. If there is one
20 that does, I've definitely never seen a copy
21 of that. This existed and we got this from
22 procurement in the process of preparing all
23 these materials.

24 Q. But are you aware there is no document where
25 DPI says that they weighted the criteria in

1 reaching their ordering of the proposals?

2 A. No. I would have to read back through all
3 the notes to confirm that; but if we go
4 through all the notes and it says nothing
5 about weighting, I don't know why this
6 document would exist, and that would be a
7 question that we would have to ask the people
8 who actually ran that evaluation meeting and
9 did the calculation for adding up the votes
10 to put them into the ranking.

11 Q. Do you know whether or not this Exhibit E was
12 included in the public records that you
13 produced behind the cover letter of
14 Exhibit 13?

15 A. No, I do not know whether or not those were
16 produced.

17 Q. For this evidence of bias you have been
18 talking about, can I rely on your bid protest
19 letter and response of exhibits to identify
20 the decisions of the first evaluation
21 committee that you contend were biased?

22 A. Yes. I mean, there may be more in there.

23 Q. You've said that Amplify was -- that the
24 committee was biased in favor of Amplify.
25 You haven't identified specific instances

1 that reveal they were acting in a bias
2 fashion versus trying to act in good faith.

3 A. No. If you look at the misstatements of
4 fact, that is definitely a concern, but let's
5 not muddy the situation here. That's not why
6 this was cancelled.

7 This RFP was cancelled because there
8 were concerns which I was trying to work
9 through. I mean, make no mistake, there were
10 concerns from that December 2018 PowerPoint,
11 but I was trying to work through them, which
12 is why the evaluation panel actually had a
13 meeting to try to come to consensus and give
14 a recommendation.

15 We were trying to work through that,
16 but then there was no consensus from that
17 meeting, so there was no recommendation even
18 given. I believe what came out of that
19 meeting -- and we can look at the notes.

20 I believe what came out was to enter
21 into negotiations with Istation and Amplify.
22 I believe that is what came to me from that
23 meeting.

24 So then trying to work with my team
25 on understanding this very unique legislation

1 on what steps do we take if we now have no
2 consensus, which is normally required by an
3 RFP to have a recommendation.

4 And on top of that, we have this odd
5 recommendation out of this meeting to go into
6 negotiations with both. What is my approval
7 then. According to this legislation, for
8 that, that's when we find out about a serious
9 leak of confidential information.

10 And with all of that put together,
11 it became very clear. Just like with RFP-1,
12 it was very clear from the very first moment
13 we knew what the problem was; it became clear
14 with RFP-2 that the best course of action was
15 to cancel.

16 Now, we did, again, work with DIT to
17 seek their guidance; and with their guidance,
18 just telling them everything that had
19 happened over the past 2 months probably when
20 we talked to them, they agreed, and they
21 walked us through that process.

22 When I tell you about the improper
23 bias that we have discovered and the unfair
24 process of RFP-2, I did not know that until
25 putting together the protest letter in

1 response denying Amplify's protest.

2 That is where all of this came out,
3 where we dug into the different votes
4 between -- Amplify got a whole lot of yeses,
5 the other vendors got a whole bunch of
6 maybes, and for some reason the maybes just
7 turned into noes.

8 Then on top of that, you have all
9 these misstatements of facts. Particularly,
10 we pointed out Istation because that's what
11 this protest is about, Istation and Amplify.
12 You can tell -- we went back with the notes.
13 We went back with the December PowerPoint and
14 actually pulled out some key misstatements of
15 facts that show that, you're right, at best
16 this was someone not doing a fair process
17 because they weren't putting in the work; at
18 worst, this was improper bias to give a
19 benefit to Amplify.

20 Q. Why would one of your members of your
21 hand-selected evaluation committee team want
22 to be bias in favor of one vendor over
23 another versus just serving the children of
24 North Carolina?

25 MR. SHANAHAN: Objection to form.

1 MS. LUCAS: Objection.

2 A. I don't know. I ask myself the same thing.

3 I asked it for RFP-1: Why did a person who

4 knew she had a conflict with Amplify not

5 report that? And with RFP-2, I asked myself:

6 When I look at all these things, what could I

7 have done to actually be more hands on?

8 I trusted these people. I trusted

9 these people to do a fair, unbiased, proper

10 procurement. I'm very happy that we at least

11 were able to get that in the final round.

12 Q. Now, in the first RFP, Carla Castine didn't

13 disclose her prior work with Amplify,

14 correct?

15 A. Correct.

16 Q. In this RFP-2 you're suggesting that the

17 entire evaluation committee is part of some

18 conspiracy to benefit Amplify. Is that what

19 you are saying?

20 MR. SHANAHAN: Objection to form.

21 A. No, that's not what I'm saying.

22 Q. They were bias in favor of Amplify?

23 A. I'm not saying the entire evaluation panel

24 was.

25 I'm saying when you look at the

1 evidence -- and, again, this is not my state
2 of mind in December of 2018. This is not my
3 state of mind in January of 2019. This is
4 not my state of mind in February, March,
5 April, May, June.

6 This is when we were putting
7 together the response letter to Amplify's
8 protest. Uncovering all of the bad deeds
9 that were done in this procurement process,
10 that's when we realized when you put the
11 preponderance of the evidence, this was
12 clearly improper bias and an unfair
13 procedure.

14 I don't know who it was by because,
15 to your point, a lot of these evaluation
16 panel members they were instructed if you
17 don't know vote maybe. That was the
18 instruction. So most of these evaluation
19 panel members probably had nothing to do with
20 this improper bias.

21 But someone made the decision to
22 switch those maybes to noes, and we can go
23 back in the notes -- I don't even know if
24 that was what they were told would happen. I
25 thought they were told the maybes -- I'm

1 pretty sure they were told the maybes would
2 be confirmed.

3 Q. Let's turn to Exhibit 8, which is the
4 consensus meeting notes. I'll have you turn
5 to page 30 of Exhibit 8. It does say that
6 "The team expressed unanimous agreement with
7 that ranking outcome," correct?

8 A. Yes, I believe we went over this earlier.
9 That is what these notes say.

10 Q. Do you understand that the committee members
11 would hold up sticky notes regarding how they
12 viewed each vendor's performance on a
13 specification?

14 A. I only know that now because of the work
15 reviewing that went on in this RFP-2 for the
16 response letter.

17 Q. What would happen to the outcome of the
18 procurement from the original evaluation
19 committee if you counted all the maybes as
20 yeses; do you know?

21 A. I wouldn't do that. I would investigate the
22 maybes to see if they were a yes or no.

23 Q. What if you counted all the maybes only for
24 Istation as yeses, would that change the
25 outcome of the ranking? Do you know?

1 A. I don't know. Maybe it's in the response
2 letter. Maybe we actually did that in the
3 response letter.

4 Q. Sitting here today, you don't know if that's
5 in there?

6 A. No. But then you also have to go and take
7 into account that some of the evaluation
8 panel members voted no based on misstatements
9 of fact.

10 Q. What misstatements of facts?

11 A. It's in the response letter.

12 Q. Just to confirm, I can rely on the response
13 to protest letter to determine what the
14 misstatements are?

15 A. Yes. If you have people making votes on
16 something that's not accurate and they vote
17 no and that should have been a yes, that's
18 not fair either.

19 Q. Has DPI terminated anyone for being allegedly
20 bias in favor of Amplify in this procurement
21 process?

22 A. No.

23 (Exhibit No. 16, Text Message, so
24 marked)

25 Q. Mr. Johnson, I've handed you what's been

1 marked as Exhibit 16. Have you seen this

2 document before?

3 A. Yes.

4 Q. What is this document?

5 A. This looks like what -- this looks like a

6 copy of what was slid under Pam Shue's door.

7 Q. Does this Exhibit A look identical to what's

8 attached to the exhibits of your protest

9 response? I'm looking at Exhibit C to

10 Exhibit 15.

11 A. No. The text message looks the same, but it

12 does look like we -- whoever prepared this

13 image zoomed in on the text message and then

14 redacted any names that could be identified

15 and probably to take out -- there is this

16 side where you have a whole list of other

17 people.

18 Q. So Exhibit C to the protest letter response

19 contains less information on it than

20 Exhibit 16 to your deposition, correct?

21 A. Yes. I would say in the effort to keep out

22 all of these side names it looks like it was

23 zoomed in upon.

24 Q. So which one was the screenshot slipped under

25 Ms. Shue's door?

1 A. I believe this is the document that looked
2 like in its original form.

3 Q. Exhibit 16?

4 A. Yes. The reason, because when I saw it
5 there, is this -- I just remember not really
6 knowing what this -- like these things around
7 the text message are.

8 Q. Exhibit 16, you're saying there appears to be
9 some sort of photograph or something behind
10 it?

11 A. Yes.

12 Q. Maybe a computer screen desktop image?

13 A. It's mountains so I would think -- but there
14 is a weird -- I'm guessing here. It also
15 looks like by the mountains there is like a
16 hand behind it.

17 Q. It is hard to say?

18 A. Yes.

19 Q. Whatever that background image is, it is not
20 included in Exhibit C to the protest letter
21 response?

22 A. Yes.

23 Q. And the protest letter response doesn't
24 include that column on the left of other text
25 conversations?

1 A. That's correct. I think, in the interest of
2 whoever's text messages this was and, also,
3 the identifiable initials and names, the
4 decision was made to redact anyone's name
5 that could be brought into this because it
6 was going to get very public, except I did
7 say they did not have to redact my initials.

8 Q. Who made the redactions on Exhibit C?

9 A. I don't know. DPI's legal department.

10 Q. But you talked to someone about what should
11 be redacted?

12 A. Yes, not giving the guidelines myself staying
13 within the legal parameters of redaction, we
14 should not identify people with this text
15 message considering this was going to be
16 very, very public out of courtesy to Anne and
17 Carla, Anne, Anne, Claudia and Karla, Bobbi,
18 Rebecca and Susan A and Kim and Meri, Bob,
19 Bob, Bobbi, and Meri.

20 Q. Who are those people?

21 A. I don't know.

22 Q. They are not DPI employees?

23 A. I don't know. They could be. They might not
24 be.

25 Q. So let's look at Exhibit 16 which is the

1 unredacted copy. It appears that's a text
2 message exchange from January 8, 2019. Do
3 you see there are some markings, some light
4 gray, that says "1/8/19"?

5 A. Yes.

6 Q. January 8, 2019 is also a day where you visit
7 with the evaluation committee, correct?

8 A. If that's what it says in the notice, then
9 yes.

10 Q. Do you recall there was a meeting in January?

11 A. Oh, yes.

12 Q. The text message says "MJ came into their
13 voting meeting today to basically (without
14 directly coming out and specifying) tell them
15 how to vote! However, the vote did not go
16 his way, so it will be interesting to see how
17 he gets his way on this." Do you see that?

18 A. Yes.

19 Q. And you understand that was information
20 conveyed from Abbey Whitford to Carolyn
21 Guthrie?

22 A. I do now knowing all the evidence put
23 together, yes. That was a -- I know now with
24 all the discovery that has occurred that
25 Abbey Whitford called and/or went to Carolyn

1 Guthrie's house, and this was a text message
2 between Carolyn Guthrie and someone else
3 describing what Abbey Whitford told Carolyn
4 Guthrie.

5 Q. And lower down on the page of Exhibit 16, do
6 you see there's a list of who voted which way
7 "RB, She and RB and Dewey"?

8 A. Yes.

9 Q. Do you see that information?

10 A. I do.

11 Q. And you understand that when that text
12 message identifies those six people as voting
13 for children in their opinion it means they
14 are voting for Amplify, correct?

15 A. I would assume that is what they mean because
16 when you match -- I would assume that's what
17 they mean.

18 I don't know if you can actually,
19 100 percent, jump to that conclusion. I
20 think if you match -- you can match the notes
21 to that vote count, and if that vote count is
22 exactly for Amplify, I think it would be a
23 safe assumption to say that is what she was
24 talking about.

25 Q. And then it says "Pam and Chloe and one of

1 Mark's staff voted for helping teachers."

2 And the best we can understand that, is
3 that's votes for Istation, correct?

4 A. Yes. And they are all my staff, like
5 everybody in that evaluation panel is my
6 staff. So I don't know exactly who is one of
7 Mark's staff. I guess we can go look --

8 Q. Sure, we'll get to that. It appears to
9 reveal the identity of 6-to-3 vote or
10 something like that; is that correct?

11 A. Something close to 6-to-3. Definitely 3
12 voted for helping teachers is how they
13 describe it.

14 Q. I should clarify at the bottom of this page,
15 Exhibit 16, there is something about "Hey
16 thanks! Daniel & I had a great time at the
17 museum." Do you see that?

18 A. Yes.

19 Q. That doesn't seem to be included on Exhibit C
20 to the protest response either, does it?

21 A. I'm pulling it up. If you say no -- yes, it
22 ends in exactly -- and it is not just that is
23 not there. Also, "Hey, hope your visit to
24 the museum was fun and hope Bruce got good
25 news at his doctor's visit. If you are

1 traveling back today, give me a call while
2 you're driving."

3 In my limited experience with public
4 records, I would think that is not
5 responsive, but also, I know I would
6 encourage anyone putting this out very
7 publicly not to talk about Bruce's good news
8 at his doctor's visit.

9 Q. It appears to be someone's personal
10 information unrelated to DPI?

11 A. Yes.

12 Q. Who have you talked to about this screenshot?

13 A. I've talked to a lot of people now, so I
14 couldn't give you a list.

15 Q. Have you talked to Chloe Gossage about it?

16 A. Yes.

17 Q. What have you discussed about it with her?

18 A. How ridiculous this is.

19 Q. Why is it ridiculous?

20 A. You didn't read the whole thing where
21 someone -- "Ass. The sad thing is, he may
22 win his next race because he will talk about
23 how he helped teachers? Well" -- this is
24 another person, and I'm just reading as I
25 think they were texting because they were

1 informal. "Well, that's why he's pushing
2 this. Children can't vote. So we appease
3 lazy ass teachers."

4 Q. The people on this text message are not DPI
5 employees that we know of?

6 A. Exactly.

7 Q. These are just citizens of North Carolina?

8 A. Yes. I did not know who exactly was having
9 this interchange, but I can probably guess
10 that the "marathon call with AW, 1 hour and
11 45 minutes all about RFP, what a mess," I can
12 probably guess whoever was having this text
13 exchange probably was talking the same way on
14 the phone with AW.

15 Q. These are members of the public who may not
16 agree with everything that you are trying to
17 get done or may not like you?

18 A. Yes.

19 Q. That's fine.

20 A. I only know this from later discovery. Anne
21 is someone that worked at DPI. I don't know
22 if this Anne is someone who worked in the K-3
23 Literacy Group, and I don't know if at the
24 time she was still with the K-3 Literacy
25 Group.

1 Q. These appear to be people's private

2 observations about you?

3 A. This appears to, first and foremost, be

4 evidence that there was a person, who signed

5 a confidentiality agreement saying she would

6 not share important confidential information

7 about the procurement process, clearly had an

8 hour and 45-minute call all about the RFP.

9 And if we couldn't assume enough

10 from there that confidential information was

11 shared on the 1 hour and 45-minute call all

12 about the RFP, you at least know there was

13 confidential information shared because she

14 listed the way people voted while not saying

15 what vendor. As you pointed out, you could

16 assume what vendor she was talking about.

17 Q. Right. It seems to be a reasonable

18 assumption to know which vendors she was

19 talking about?

20 A. Yes. Because if you can match that up to the

21 way the vote occurred, but I would not -- let

22 me just state for the court reporter and the

23 record, I would not characterize Amplify or

24 Istation as for children or for teachers or

25 against children or against teachers. I

1 think both tools are very prostudent and very
2 proteacher.

3 Q. These text messages, to be clear for the
4 record, these are the opinions of people that
5 authored those text messages? I'm not saying
6 they are your opinions.

7 A. Correct.

8 (Exhibit No. 17, Map, so marked)

9 Q. Mr. Johnson, I've handed to you what's been
10 marked as 17, which has been produced Carolyn
11 Guthrie. Have you seen this document before
12 in preparing for this deposition?

13 A. No.

14 Q. Do you see at the bottom of this Exhibit 17
15 "ckuthrie-k2268"?

16 A. Yes.

17 Q. Are you familiar with the Find My Phone app
18 on an iPhone?

19 A. Yes.

20 Q. Are you aware that Ms. Guthrie testified at
21 her deposition that this is a screenshot that
22 she took on or about February 19, 2019,
23 showing that there was a device of hers or
24 linked with her devices were inside the DPI
25 building?

1 A. I have been made aware of that by legal
2 counsel as we talked about what some of the
3 updates are with this case.

4 Q. Has DPI done any investigation into the
5 information provided by Carolyn Guthrie about
6 this screenshot?

7 A. No. This is all very recent information.

8 Q. Do you understand that Ms. Guthrie testified
9 that she believes she was surveilled, that
10 her personal text messages were made
11 available or were being accessed by DPI for
12 over 16 months after she retired from DPI?

13 A. No, I have not looked at her testimony, but I
14 will take your word for it, that's what she
15 said.

16 Q. Do you know whether Ms. Guthrie's computer
17 devices were wiped when she retired from DPI
18 on September 1, 2017?

19 A. I have no idea.

20 Q. Do you know whether or not DPI was continuing
21 to access Carolyn Guthrie's personal text
22 messages for over a year and a half after she
23 left DPI?

24 A. I can't speak for DPI. I would say no to the
25 DPI. There's, to my knowledge, no one at DPI

1 monitoring computers for text messages, or

2 however this would happen I have no idea.

3 Q. That's -- Exhibit 17 concerns you if you know

4 Find My Phone app is, right?

5 A. Yes, I know Find My iPhone [sic] -- I use it

6 for my iPhone. That's the only thing I use

7 it for. I do not know in this context what

8 this could mean.

9 Q. If you pulled up your Find My Phone app, if

10 it showed you had a device inside Carolyn

11 Guthrie's house, that would cause you

12 concern, correct?

13 A. Yes.

14 Q. Carolyn Guthrie testified that no one had

15 access to her private text messages. Who

16 would have possibly obtained her text

17 messages?

18 A. I have no idea.

19 Q. You do know she had -- well, DPI has a policy

20 of subsidizing people's personal cell phones

21 if they use it for work, correct?

22 A. Subsidizing the bill?

23 Q. Correct.

24 A. I do not myself do that, but I'm pretty sure

25 that you'll get a stipend for your cell phone

1 bill.

2 Q. And is part of that, are you aware, that DPI
3 employees can install the iMessage app on
4 their DPI devices so they can do work with
5 it?

6 A. No. I don't have an Apple device. I have my
7 own personal iPhone, and I use text messaging
8 on a phone. No, I do not know about using
9 computers for text messaging. I don't do it
10 myself, and I would not do it on a state
11 government property device.

12 Merely speaking only for myself, I
13 know that state government property you enter
14 into a whole world of public records that I
15 don't even want to deal with with my personal
16 stuff.

17 Q. Someone's personal cell phone, they have an
18 expectation of privacy with communications
19 with their family members?

20 A. A personal cell phone, absolutely.

21 Q. You understand that this Exhibit 16 is a
22 screenshot from Carolyn Guthrie's personal
23 text messages?

24 A. Right, text messages. I don't know what that
25 is a screenshot of. We definitely can agree

1 it is text messages, but it is a very odd
2 background, and you're right, it is a sky and
3 mountains.

4 Q. She testified that this is from her phone,
5 her text messages that are on her phone. Do
6 you have any reason to dispute that?

7 A. No. Because we also validated through that
8 discovery that we've seen the actual text
9 message, I believe, from her phone of that
10 interchange.

11 Q. Do you have any knowledge of what this k-2268
12 designation would be on Exhibit 17?

13 A. No.

14 Q. Do you know whether or not that's a DPI
15 designation for a device?

16 A. I don't know. Is it?

17 Q. I don't know either.

18 A. I will say Carolyn Guthrie after retirement
19 still came by DPI. I know that because she's
20 good friends with my scheduler, Susan.

21 So if we're going into conspiracy
22 theories, it is not also farfetched to think
23 also she could have come into this building,
24 taken a screenshot of her phone in this
25 building and is just printing this out for

1 people.

2 Q. She testified under oath that didn't happen?

3 A. Okay. She testified that she --

4 MR. SHANAHAN: Objection. That's a
5 total mischaracterization. She never said
6 one word she came into this building.

7 A. Ms. Guthrie -- you can ask anyone in the K-3
8 Literacy Department -- she did not leave DPI
9 and never visited. She absolutely visited,
10 and she quite often was sitting in the office
11 with my scheduler talking.

12 MR. ARMBRUSTER: Let me clarify to
13 Mr. Shanahan's comments that --

14 MR. SHANAHAN: This is an objection
15 that misstates the record.

16 MR. ARMBRUSTER: If I misstated the
17 record, the statements in her deposition
18 would control over my characterization by
19 myself, agreed.

20 BY MR. ARMBRUSTER

21 Q. Have you reviewed Ms. Guthrie's deposition
22 transcript?

23 A. No. And no, I do not know -- I do not know a
24 lot about Find My Phone, except for the fact
25 that my wife and I use it. I do not know

1 what cguthrie-k2268 would mean.

2 Q. If it was true that DPI was reviewing Carolyn
3 Guthrie's personal text messages for over 16
4 months after she retired from DPI, you'd
5 agree that wrong, correct?

6 A. I'm not going to speculate on that. I can
7 tell you I have never looked at someone's
8 personal text messages on their Apple
9 computer. No one that I know of at DPI has
10 ever done anything like that.

11 I can tell you this odd printout was
12 slid under the door of Pam Shue, and it was
13 another piece of evidence that gave us
14 concern about RFP-2.

15 Q. But you don't know where Exhibit 16, this
16 printout, came from?

17 A. No, I do not.

18 Q. It is Ms. Guthrie who is making comments
19 about appeasing "lazy ass teachers," so it
20 doesn't seem like she would be the person to
21 be slipping it under Pam Shue's doors, does
22 it?

23 A. No. If we could guess who it was, it could
24 have been Anne. Was Anne somebody who worked
25 here?

1 Q. Anne is the person who says "The sad thing he
2 may win his next race because he will talk
3 about how he helped teachers."

4 A. Maybe she was very worried about the "lazy
5 ass teacher" comment. We're getting into
6 speculation.

7 I'm sorry, I don't have the answers
8 on where this came from. I wouldn't
9 necessarily even assume, based on this
10 conversation, that it came from within DPI.

11 All I can tell you, all I know is
12 that a piece of paper that looked like that
13 was put under Pam Shue's door, and it gave us
14 grave concern because while you're right,
15 their opinions are very unfortunate, it's the
16 actual leak of the confidential information
17 that gave us the concern, that just added up
18 on everything else with RFP-2 that was
19 already wrong with that RFP to where we
20 didn't have a consensus so.

21 Here I am faced with a decision that
22 is ultimately mine because of that
23 legislation. Ultimately, the buck stopped
24 with me, and I had to make this decision. I
25 had no consensus with an evaluation panel to

1 give a recommendation. I had concerns from a
2 December 18 PowerPoint, and now I see that
3 one of the evaluation panel members is
4 leaking confidential information in an hour
5 and 45-minute marathon phone call that,
6 apparently, there was another one.

7 So all of this together, I mean,
8 clearly, RFP-2 -- again, while it is
9 unfortunate, it got further than RFP-1. It
10 became very clear, just as RFP-1, we had a
11 problem. It became clear that RFP-2 had a
12 problem, and it needed to be addressed, and
13 we worked with DIT to cancel RFP-2.

14 Q. You would agree it would not be appropriate
15 for a state agency to, without a warrant,
16 view the personal text messages of a private
17 citizen for over 16 months after he retired
18 from that state agency?

19 A. Again, I'm not going to speculate. I don't
20 even want to give credit to that question.

21 Q. Would it be wrong for me to ask to review the
22 last 16 months of your personal text messages
23 with your wife right now?

24 A. It would be wrong. It wouldn't be wrong to
25 ask, but I wouldn't give it to you.

1 Q. Are you aware that government entities may
2 not respect the private spaces of citizens
3 without a warrant under the Fourth Amendment.

4 A. Sounds perfectly -- yes, that sounds like
5 something, like no search and seizure without
6 due process.

7 Q. Are you aware if a government entity obtains
8 information in violation of the Fourth
9 Amendment, they are barred from using that
10 information in court proceedings?

11 MS. LUCAS: I'm going to object --
12 I've let it go on a bit. I'm going to object
13 to this line of questioning.

14 He is not testifying in his capacity
15 as an attorney or criminal lawyer. I think
16 we should move on from this line of
17 questions.

18 Q. You can answer the question.

19 MR. SHANAHAN: I also object, and
20 that is a misstatement of the law because it
21 doesn't apply in civil cases, only criminal
22 cases. How could that possibly calculate to
23 lead to discovery of admissible evidence?

24 MR. ARMBRUSTER: My question, let
25 me --

1 MR. SHANAHAN: Is there a good faith
2 basis that an answer to that question of this
3 witness is going to lead to discovery of
4 admissible evidence?

5 MR. ARMBRUSTER: It is going to lead
6 to discovery of inadmissible evidence.

7 MR. SHANAHAN: Not in a civil case
8 it does not. You are giving a civil case.

9 MR. ARMBRUSTER: We are not going to
10 argue about the law right now.

11 Q. Let me ask the question this way: You are
12 not a criminal lawyer, Mr. Johnson?

13 A. I'm not a criminal lawyer.

14 Q. You're not an expert on the application of
15 the Fourth Amendment?

16 A. I'm not.

17 Q. Who have you discussed at DPI wherein
18 screenshot Exhibit 16 came from?

19 A. Pam Shue, Kathryn Johnston, Chloe Gossage,
20 the legal team, and that's just the people at
21 DPI.

22 Q. Who is investigating it?

23 A. Kathryn Johnston. She's over HR.

24 Q. What is the status of the investigation?

25 A. I don't know.

1 Q. Has DPI looked at the visitation logs around
2 January 9th or 8th of 2019 to determine who
3 entered the building that day?

4 A. I don't know.

5 Q. If you look at this screenshot, do you see on
6 the left side that some of the conversations
7 date from 1/9/19?

8 A. Yes.

9 Q. And then above that there is some that say
10 "4:13 p.m." and "11:46 a.m.," "yesterday"?

11 A. Yes.

12 Q. It looks like the screenshot was taken within
13 a day or two or so of the actual
14 conversation?

15 A. Yes, I can see how that would happen.

16 Q. Now, I understand Abbey Whitford was called
17 into HR on February 19, 2019. How far before
18 that was this slipped under Pam Shue's door?

19 A. I'm not sure.

20 Q. Do you know whether it was more or less than
21 a week or you don't know?

22 A. No, I don't know.

23 MR. ARMBRUSTER: Let's go off and
24 take a break.

25 THE VIDEOGRAPHER: Off the record at

1 2:47 p.m.

2 (Recess)

3 THE VIDEOGRAPHER: We're back on the
4 record at 3:04 p.m.

5 MR. ARMBRUSTER:

6 Q. Mr. Johnson, back on the record. Regarding
7 this Exhibit 16 that was slipped under Pam
8 Shue's door, has DPI made a list of potential
9 people they think may be the source of this
10 Exhibit 16?

11 A. Not that I'm aware of.

12 Q. Has there been any attempt to identify who
13 may be the source of this Exhibit 16?

14 A. Possibly, but I have not been involved in the
15 investigation.

16 (Exhibit No. 18, Meeting Notes, so
17 marked)

18 Q. Mr. Johnson, I've handed you what I've marked
19 as Exhibit 18. Do you recognize those as the
20 evaluation committee notes from the
21 January 8, 2019 meeting?

22 A. Yes.

23 Q. And do you see at the top of the page where
24 it says "Meeting Purpose, Consensus Meeting
25 to recommend finalist for negotiations,"

1 correct?

2 A. Yes.

3 Q. Did you understand that was the purpose of
4 the meeting?

5 A. Yes. Putting myself back in the mindset of
6 January 8th, yes, I was very much hoping that
7 we could get a recommendation out of this
8 meeting.

9 Q. And did you attend any meetings of the
10 evaluation committee prior to this
11 January 8th meeting?

12 A. No.

13 Q. You did attend this January 8th meeting, in
14 part?

15 A. Yes.

16 Q. How long were you at the meeting?

17 A. Less than 10 minutes.

18 Q. Was that at the beginning of the meeting you
19 came in?

20 A. Probably the beginning of the meeting. I
21 believe that probably at the very beginning
22 that there was an explanation that I was
23 going to come in and speak with the group,
24 and yes, after that, the first 10 minutes.

25 Q. Under Agenda Items it says "The agenda for

1 this meeting was to recommend finalist for
2 approval and negotiations." Do you see that?

3 A. Yes.

4 Q. And that sounds consistent with what you
5 thought this meeting was to be about?

6 A. What I hoped, yes.

7 Q. In the first paragraph of the Meeting
8 Summary, it says "The superintendent thanked
9 the evaluation team for their hard work and
10 time spent on this most important RFP." Is
11 that accurate? Did you do that?

12 A. Yes.

13 Q. Then it says "He also mentioned that he had
14 reviewed the proposals over the holidays to
15 get a full understanding of the various
16 offerings." Is that also accurate?

17 A. Yes.

18 Q. How much time did you spend reviewing the
19 proposals over the holidays?

20 A. Not days, probably hours of each. I got the
21 log-in information from procurement, and of
22 course, all this I checked to make sure it
23 was okay and appropriate.

24 And this was after the December
25 PowerPoint presentation, and realizing that

1 this was potentially coming to an end soon,
2 and there could be a recommendation and that
3 I would have to make the final decision. I
4 wanted myself to be familiar with the options
5 that were ranked 1 and 2.

6 Q. So prior to the December 4th meeting, you had
7 not reviewed any of the proposals; is that
8 correct?

9 A. Correct.

10 Q. So is this sometime later in December or
11 beginning of January that you obtained access
12 to the proposals?

13 A. Yes. It was sometime in mid-December, and I
14 used the slow holiday season to take some
15 time to look through them.

16 Q. Did you review all four of the proposals or
17 just some of the proposals?

18 A. No, just Amplify and Istation.

19 Q. Why just those two?

20 A. Based on the PowerPoint, which, again, I did
21 have concerns over, but based on that and the
22 discussions around that, it was told to me
23 that NWEA, i-Ready, and Curriculum Associates
24 just had no way of meeting the
25 specifications. So they weren't going to be

1 able to be the one statewide reading
2 diagnostics.

3 So it was really coming down between
4 Amplify and Istation which they were ranked 1
5 and 2 by that PowerPoint.

6 Q. You never had gone back to see whether the
7 panel was biased against NWEA or Curriculum
8 Associates, have you?

9 A. I believe we did look at that on a glance
10 view with the idea, again, of changing maybe
11 votes to no votes. I think we looked at that
12 calculation to see how that would affect them
13 as well.

14 But clearly, it really came down to
15 Amplify and Istation because it is -- it was
16 verified that NWEA and Curriculum Associates
17 were not ready for that statewide --

18 Q. Who verified that?

19 A. Pritcher (phonetic).

20 Q. When was that?

21 A. I don't know. Through all this process.

22 Q. Prior to your viewing the two proposals over
23 the holidays?

24 A. I believe so, yes. I think that is in some
25 meeting notes also.

1 Q. Turning back to Exhibit 18, the second
2 paragraph of the meeting summary continues
3 "The superintendent discussed his vision of
4 empowering teachers and giving teachers their
5 time back to teach." Is that an accurate
6 statement that you discussed those things?

7 A. Yes.

8 Q. And then the next sentence says "Empowering
9 teachers includes providing teachers the
10 right tools, appropriate professional
11 development and training." Was that included
12 in the content of what you said?

13 A. Yes.

14 Q. The last sentence of that paragraph, "It is
15 important to allow teachers to teach by
16 reducing assessment time." Did you also
17 convey that information?

18 A. Yes, I've been conveying that since I ran for
19 this office.

20 Q. Did you discuss the six RFP criteria at all
21 in your remarks to the board?

22 A. No.

23 Q. Turning to the third paragraph of the meeting
24 summary, it next says "He requested voting
25 members to keep this vision in mind while

1 making recommendations on the vendors for
2 negotiations." Is that also accurate? Is it
3 accurate that you said that?

4 A. There is a part about negotiations. I think
5 whoever is taking the notes might have gotten
6 a little mixed up because, again, you see, by
7 the time we got to the end of this, it turned
8 into, I think, a recommendation to go further
9 with two.

10 I was saying when you are making a
11 recommendation, please keep this in mind, but
12 I did not get into details -- I did not get
13 into details about moving on to negotiations,
14 and I didn't specifically talk about that.

15 I said in your evaluation, in your
16 vote, in your recommendation please keep
17 these things in mind, and, you know, these
18 three sentences are a very condensed version
19 of what I then went on to talk about at a
20 public event in February about professional
21 development for teachers, Read to Achieve,
22 focusing too much on assessing and not on
23 instructing, things we have taken other steps
24 in this department to address.

25 Q. Do these two paragraphs in the meeting

1 summary about what you discuss, do they
2 accurately reflect the high points of your 10
3 minutes?

4 A. Yes.

5 Q. Then if we move on, I guess at that point it
6 suggests that you left the meeting at that
7 point; is that correct?

8 A. I did.

9 Q. It says "To maintain the integrity of the
10 process, he stepped out and requested the
11 voting team members to proceed with the
12 voting." Did you say that, or is that just
13 in the minutes?

14 A. I don't recall if I said that or not. Before
15 I even considered going in and talking to the
16 evaluation panel in this way, I checked with
17 procurement to make sure it would be
18 appropriate. They advised it would be fine
19 as long as I was not present for the vote.

20 Q. Who did you talk to in procurement?

21 A. I don't remember. This probably came from
22 Tymica. I did not talk to her. This was
23 through probably Chloe Gossage and Kathryn
24 Johnston.

25 Q. What information did Chloe and/or Kathryn

1 give you?

2 A. To the best of my recollection, yes, we
3 checked with the procurement. It's fine to
4 go in and address them and thank them and
5 tell them that you also are starting to now
6 become very heavily involved in this, and the
7 next step will be your approval, but then it
8 will be best if you step out for when they do
9 the voting.

10 Q. Did they discuss whether or not it would be
11 appropriate for you to recommend which vendor
12 should be selected?

13 A. No, I didn't ask that question.

14 Q. Do you know whether it would be appropriate?

15 A. No, I don't.

16 Q. You would rely on procurement's rule for
17 that?

18 A. Again, going back to this very weird, unique
19 legislation, I don't think there is anything
20 in there that would prohibit it, but I would
21 rely on procurement rules.

22 Q. And the remainder of the meeting summary
23 reflects that the voting members -- that six
24 members of the voting -- sorry. Let me start
25 that again.

1 The meeting minutes reflect that six
2 members of the evaluation committee
3 recommended voting only with Amplify,
4 correct?

5 MS. LUCAS: Objection. I think you
6 said "voting" and it says "negotiating."

7 MR. ARMBRUSTER: Yes, correct.

8 Q. Third time. The meeting minutes reflect that
9 votes were taken on which vendors to
10 negotiate with, correct?

11 A. Yes.

12 Q. And do you understand that these minutes
13 accurately reflect how those votes went?

14 A. Yes, absolutely. I have no reason to
15 question the vote tally. To the best of my
16 knowledge, this is accurate.

17 Q. The vote tally says that six voting members
18 recommended negotiating with Amplify,
19 correct?

20 A. Yes.

21 Q. And three voting members recommended
22 negotiating with Istation, correct?

23 A. Yes.

24 Q. Only one voting member recommended
25 negotiating with both?

1 A. Yes.

2 Q. When you made your opening remarks to the
3 committee at that meeting, were you aware
4 that one of the primary or one of the many
5 things that Istation talks about its product
6 is that it allows teachers to reduce
7 assessment time that they spend?

8 A. No, not from any investigation of RFP, but I
9 can definitely remember back to -- I'm sure
10 that was something that was said when I first
11 met Dick Collins back in 2017. That was
12 something that Curriculum Associates says and
13 also NWEA says.

14 Also, I mean, it is something that
15 Amplify is working towards as well, and I
16 think even down to the last paragraph of
17 these that there was a -- the team, the six
18 voting members, I guess, talked about with
19 negotiations with Amplify that the assessment
20 measures are reduced to the core measures to
21 actually reduce the amount of time in
22 testing.

23 Q. You're saying, at the bottom of the page,
24 "The committee noted that Amplify's proposal
25 included TRC which is going to take

1 significant teaching time"?

2 A. That is what the notes say, yes. Again, I
3 was not there for it, but including TRC, it
4 says it takes away significant teaching time.

5 Q. And you did review the proposals over the
6 holidays, correct?

7 A. I reviewed the products. I believe I
8 probably had the RFPs, but I would not have
9 read the giant stacks, but I definitely would
10 have glanced through them.

11 Q. Would you be surprised if committee members
12 understood your statement that it was
13 important to allow teachers to teach by
14 reducing assessment time, and it was a
15 telegraphic event that you wanted them to
16 vote for Istation?

17 MR. SHANAHAN: Objection. Lack of
18 foundation.

19 A. Yes, because there were at this time four on
20 the table, and we had actually already, the
21 year before, worked with Amplify to put in
22 measures that actually reduced the amount of
23 time it's been assessing using Amplify.

24 I mean, quite frankly, at the end of
25 the day, the best tool for the teachers and

1 students of North Carolina had to win this
2 RFP process, and that is ultimately the
3 recommendation I wanted from this evaluation
4 panel, was a fair, honest, proper, unbiased
5 opinion of what the best tool and best value
6 for the State of North Carolina would be.

7 Q. Were the committee members paying attention
8 to your comments at the meeting?

9 A. Yes.

10 Q. Do you have any reason to think that this six
11 members who recommended to negotiate with
12 Amplify only didn't pay attention to your
13 comments but tried to act upon them?

14 A. No, I believe they did try to act upon them.
15 It says that in -- these six voting members
16 in going forward with Amplify's
17 recommendation would also recommend to reduce
18 to the core measures.

19 So I think going in there and
20 sharing with them that we wanted more time
21 for teachers to teach and less time for
22 testing, for these six voting members who
23 negotiated voted to recommend to negotiate
24 with Amplify only, from these notes it seems
25 like that actually did make an impact on

1 them, and that's why they made the suggestion
2 for negotiations to do that.

3 Q. It is also true that a majority of the
4 committee voted to recommend only negotiating
5 with Amplify only?

6 A. Yes. Unfortunately, it wasn't a consensus.

7 Q. So this meeting occurred on January 8, 2019?

8 A. Yes.

9 Q. And that was about a month after the
10 statutory deadline to make an award?

11 A. Yes.

12 Q. Why didn't negotiations commence with one or
13 more of these vendors immediately?

14 A. Because we were in a position looking at the
15 unique legislation of what is the next step.
16 In a normal procurement in order to have an
17 actual recommendation, you need a consensus.
18 This was not a consensus.

19 So the question arose, do we have a
20 recommendation? And the answer became
21 clearly with working with procurement and
22 DIT, no, we do not have the recommendation,
23 so we don't have a recommendation for a
24 reading diagnostic tool, and we don't have a
25 consensus.

1 So do we now go into negotiations?

2 This is the questions we had at the time. Do
3 we now go into negotiations with both Amplify
4 and Istation and see if we can get a
5 recommendation out of that, and then I
6 approve?

7 And while that is going on and we
8 were going back and forth on what is the next
9 step that you take when you don't have a
10 consensus but you need a recommendation,
11 that's when we found out about the leak.

12 And with the leak and with the lack
13 of consensus, and the leak being as egregious
14 as it was, made the decision of all those
15 things put together it was in the best
16 interest of the State to cancel RFP-2 and
17 work with DIT to properly cancel it and seek
18 their advice on how we go about a fair
19 procurement process after that.

20 Q. Do you know if the evaluation committee was
21 reconvened to meet at any time before the
22 cancellation happened after the January 8th
23 meeting?

24 A. No, I don't know. I know they met again, and
25 I believe they were told that it was either

1 cancelled or going to be cancelled.

2 Q. Why didn't you have another meeting to see if
3 they could reach a consensus if that's what
4 you thought was needed?

5 A. That was actually something that we were
6 deliberating on whether or not we should do,
7 but then we found out about the leak of the
8 confidential information. Again, it was not
9 a husband and wife just turning saying how
10 work was in bed that night.

11 It was a serious violation that had
12 we moved forward with RFP-2, regardless of
13 who the winner was in RFP, I have a feeling
14 we would be sitting here doing this exact
15 same thing because the loser would be
16 challenging saying, what in the world
17 happened with RFP-2?

18 So the best course of action after
19 consulting with DIT was, as we did with
20 RFP-1, to cancel RFP-2 and then move into
21 this unique procurement rule where we can
22 enter into negotiations.

23 Q. Well, if DPI did an investigation and found
24 out that the information that was conveyed to
25 Carolyn Guthrie and Anne Evans wasn't shared

1 with anyone, on what basis would someone

2 protest?

3 A. I was not -- I'm not going to go down that
4 road because we had a situation where we had
5 a clear lack of consensus. I already had
6 concerns from the December 2018 PowerPoint
7 slide that was one of the business owners
8 that -- that raised concerns on what was
9 missing and what was in there.

10 And then we don't have a consensus,
11 and then you have to remember -- I keep going
12 back to this because it is very important.
13 In that situation you have to look at
14 everything that was together. The totality
15 of everything that was going on with RFP-2
16 all weighed up against what could ultimately
17 be a successful RFP.

18 So you have the problems with this
19 lack of consensus. You have the problems
20 with the December 2018 PowerPoint
21 presentation, and now you've got an egregious
22 violation of the confidentiality agreement
23 that is so bad it is to the point that
24 someone, some whistleblower wants to make
25 sure that leadership at DPI finds out about

1 it.

2 All those things added together, it
3 is clearly not a situation where you're going
4 to be able to have a fair RFP conclusion that
5 was the best value and in the best interest
6 of the State. So we consulted with DIT, and
7 they helped us through the cancellation
8 process and moving forward into a fair
9 process by which Amplify and Istation each
10 had a fair chance to win this procurement.

11 Q. You have no evidence that there is an
12 anonymous whistleblower?

13 A. I have this printed out text message page
14 that was put under Pam Shue's door.

15 Q. But you have no evidence to suggest whether
16 there was an anonymous whistleblower or if it
17 was someone at DPI surveying Ms. Guthrie; you
18 have no evidence either way?

19 A. You're right, but I do have evidence that
20 there was a breach of confidentiality that
21 has been confirmed thanks to the discovery
22 efforts of this protest.

23 Q. I agree. If you didn't have it put under
24 your door -- Pam Shue's door, you probably
25 would have never known about it, correct?

1 A. Correct. And I would have had a serious
2 problem still with the lack of consensus.

3 But to your point, even though we
4 were in a real crunch, we would have probably
5 gone forward and tried to figure out can we
6 get consensus for a recommendation, what
7 happens if I go into, okay, the
8 recommendation is for both of these vendors,
9 how do I approve who wins.

10 Again, this all goes back to a very
11 unique piece of legislation that said this
12 evaluation panel will recommend to me, and
13 that I am the one who makes the final
14 decision. So with that, we had to make sure
15 we were doing the right steps.

16 Once we found out about this breach
17 of confidentiality, again, with everything
18 taken as a whole, RFP-2 had to be cancelled,
19 just like RFP-1 had to be cancelled. RFP-1
20 was a much more obvious, much more immediate
21 issue that led to the cancellation.

22 RFP-2 had a lot of problems, and so
23 the best solution was to cancel RFP; and
24 again, this was all in consultation with DIT
25 who ultimately was the one who had to approve

1 if this was done properly or not.

2 Q. But DIT's records don't reflect any record of
3 this confidentiality breach?

4 A. That's unfortunate that they don't. My
5 direction to the people in this department
6 was to make sure that we got a fair
7 procurement process, and due to all of these
8 things, lack of consensus, the breach of
9 confidentiality, go and make sure we work
10 with DIT to cancel this properly.

11 I cannot speak to why the multiple
12 reasons weren't listed on whatever the
13 cancellation document was. I did not draft
14 the document, but I know what the multiple
15 reasons were. So whatever reason was on the
16 document, if that's the one that was listed
17 doesn't mean it was the only one.

18 Q. Do you understand that DIT rules require
19 agencies to maintain a procurement file; do
20 you know?

21 A. That sounds like something that makes a lot
22 of sense.

23 (Exhibit No. 19, Documents, so
24 marked)

25 Q. Mr. Johnson, I'll represent to you I handed

1 you Exhibit 19. I'll represent to you this
2 came from the 166 pages of public records
3 that was produced in July of 2019.

4 You made a reference to the fact
5 that there were other documents of the
6 evaluation committee that went through all
7 the specifications. Does that look like what
8 this document is?

9 A. Yes.

10 Q. Do you know why the evaluation committee that
11 was formed after the cancellation didn't
12 create any similar document to determine
13 whether proposals met the specifications of
14 the RFP?

15 A. No.

16 Q. There's been some testimony in this case
17 where Abbey Whitford claims, I believe, that
18 Pam Shue told her and others at DPI that they
19 should block on social media people who don't
20 support the superintendent's agenda. Have
21 you heard anything about that?

22 A. Only because I read Abbey Whitford's
23 deposition record.

24 Q. And do you understand that Ms. Whitford and
25 other some people at DPI had the impression

1 that they were supposed to do that?

2 A. I understand that's her impression. I have
3 no knowledge of that actually happening.

4 Q. Do you know whether or not DPI took any
5 corrective actions to try to correct their
6 impressions?

7 A. No one ever raised those concerns to me or
8 anyone that reports directly to me or
9 reported it to me.

10 Q. Is that not something you heard about before
11 this protest?

12 A. No. The first time I heard about this was
13 reading Abbey Whitford's record, deposition
14 record.

15 Q. And, obviously, as a public service, you want
16 all members of the public to contact DPI even
17 though you do not agree with all of them?

18 A. Absolutely. And I have plenty of public
19 records to show we take it all, and we also
20 respond to a lot of it.

21 Q. Let's go back to Exhibit 12, Mr. Johnson,
22 which is the award recommendation.

23 A. Okay.

24 Q. Let's also look at Exhibit 16 at the same
25 time, which is the text message exchange.

1 A. Okay.

2 Q. On Exhibit 12, let's turn to page 4, the
3 members of the evaluation committee.

4 A. Okay.

5 Q. Now, on Exhibit 16, the list of people who
6 voted for Amplify includes Amy Jablonski, but
7 she doesn't seem to be a member of the final
8 committee, correct?

9 A. She doesn't work here, so definitely not.

10 Q. And Rebecca Belcastro being one of the other
11 six people who voted for Amplify. She
12 doesn't seem to be in the final evaluation
13 committee either, correct?

14 A. We don't need to use this. We can use the --
15 oh, we don't know -- I just realized we
16 didn't know how people voted, and the actual
17 votes are actually anonymous, and this was
18 quite a leak of confidential information,
19 wasn't it? No, I don't know who RB is.

20 Q. The people in the room on January 8th
21 obviously knew who they voted for because
22 Abbey told it to Carolyn Guthrie, correct?

23 A. Yes. We know all that now. It is
24 interesting. I was wondering why you were
25 pointing to the test message to confirm who

1 was on the evaluation panel.

2 Q. On the votes.

3 A. That is because you're going to the votes,
4 and we know the votes because of the leak of
5 confidential information.

6 Q. And these six people listed in the text
7 message -- Amy Jablonski, Rebecca Belcastro,
8 Cindy Dewey, Lynne Loeser, Kristy Day, and
9 Susan Laney -- none of those people are on
10 the final evaluation committee, correct?

11 A. That's correct. And I would want to make
12 sure -- I assume -- I'm just assuming they
13 were also all still employed here at DPI at
14 the time, but I know, for example, Amy
15 Jablonski was no longer employed at DPI, and
16 it doesn't have -- I thought Matt Hawkins
17 took over for Amy Jablonski but maybe he
18 wasn't a voting member.

19 Q. Matt Hawkins was not on the June 7th memo
20 either, which is the exhibit?

21 A. Right. He's a voting member who participated
22 in the January 8th meeting. He's not listed
23 in the confidential information that I
24 thought you didn't want to use as evidence,
25 but I'll allow it.

1 Q. Thank you. The purpose of it being offered
2 for -- so to confirm, the six people who
3 voted for Amplify on January 8th none of
4 those appear on the final evaluation
5 committee according to the June 7th memo?

6 A. Neither is Chloe.

7 Q. Chloe is on the final evaluation committee.
8 She's not voting?

9 A. She's not voting.

10 Q. She's in the same room?

11 A. I don't know if they were together during the
12 actual voting.

13 Q. She was a participant in discussions if she
14 was part of committee you would think,
15 correct?

16 A. Yes. Then I would assume we have other -- I
17 would have to do a crosscheck, but Tymica was
18 there. Julien, I think, was there. Melissa,
19 I don't know if she was added somewhere in
20 this process as well. She was to have an
21 attorney present. And Pam Shue, who helped
22 make this list, was definitely an expert in
23 K-3 Literacy.

24 Q. And Pam Shue is one of the three people who
25 voted for Istation on January 8th, correct?

1 A. Yes, according to the lead confidential
2 information. So I would imagine that lines
3 up, but again, this is not coming from the
4 actual meeting notes.

5 Q. Correct. Do you recall Ms. Whitford talking
6 about it at her deposition confirming who
7 voted for which vendor?

8 A. No. But I will say that if you say what she
9 said in the deposition record lines up to
10 that, I'll accept that.

11 Q. Let me say if I'm misrepresenting anything in
12 her deposition, we would look to see what she
13 said in her deposition, and that's her
14 testimony as to her recollection as to who
15 voted which way. Fair enough?

16 A. Yes. I think just going through this, Nathan
17 Craver is new. I don't know if he was new to
18 the entire process. And Thakur Karkee, he
19 was one of the members who was originally --
20 if you do the math, is he the one -- I don't
21 know who --

22 Q. According to Ms. Whitford's recollection,
23 Mr. Karkee is someone who also voted for
24 Istation?

25 A. Who is the person who voted for both Istation

1 and Amplify?

2 Q. I don't know that based on Ms. Whitford's
3 text message.

4 A. Is that Karkee?

5 Q. I understand -- and I would defer to her
6 deposition -- that Thakur Karkee was one of
7 the three votes for Istation, is my
8 recollection.

9 A. So potentially, I mean, we have three votes.
10 I would imagine that one vote is somebody who
11 is not included in that six of three because
12 it is not an only.

13 Someone voted for Amplify and
14 Istation, and if that was Thakur Karkee, he's
15 a psychometrician, he's on there, too.

16 Q. According to Ms. Whitford's testimony, at
17 least two of the people who voted for
18 Istation -- two out of three who voted only
19 for Istation on January 8th were among the
20 four voting members of the final committee.
21 Do you see that?

22 A. Who is that?

23 Q. Ms. Shue and Mr. Karkee.

24 A. Mr. Karkee also voted for Amplify.

25 Q. I don't know that.

1 A. Somebody did. Somebody voted for Amplify and
2 Istation, and we can go back and ask who that
3 was, but that's an important thing to know
4 because, again, my directive was to make sure
5 we had a fair process.

6 Q. Is it fair -- do you think that the president
7 of Amplify would think it was fair if
8 everyone who voted for Amplify is removed
9 from the evaluation committee but one or more
10 people that voted for Istation are on the
11 evaluation committee?

12 A. Then you have two brand-new people that
13 didn't vote either way, so they are new to
14 the process.

15 Q. Would you think that was fair?

16 A. Yes. Because I strongly believe that we had
17 a fair process finally by the third time at
18 it. We finally had a fair process where
19 people were not putting in improper bias or
20 unfair measures.

21 And to highlight that, I mean, when
22 you talk about decision-makers, you've got
23 two new voting members that were put in, and
24 I'm assuming Thakur was kept because he's a
25 psychometrician, and we don't have many

1 psychometricians, but I would be willing to
2 bet Mr. Karkee could have been the person who
3 voted for Amplify and Istation.

4 Q. Why was everyone who voted for Amplify on the
5 evaluation committee?

6 MR. SHANAHAN: Object to any
7 characterization that --

8 MS. LUCAS: Yes, I object on the
9 same basis. It's not been established that
10 they were removed. It's been established
11 that they were not still on the panel, but as
12 the superintendent testified, some of these
13 folks had left DPI or that's his
14 recollection.

15 A. So Jablonski, I know for sure she was gone,
16 and, quite frankly, this was fair because
17 this was not a continuation of RFP-2.

18 RFP-2 was cancelled. RFP-2 had
19 problems and had a lack of consensus. It had
20 an egregious breach of the confidentiality
21 agreement which we know how people voted
22 because of that egregious breach, and there
23 was a new process.

24 So absolutely if we can do anything,
25 we had to be able to trust the people in

1 charge of this process. I hoped I could do
2 that for RFP-1. I was proven wrong. I hoped
3 I could do it for RFP-2, and I was proven
4 wrong.

5 This final and third iteration, it
6 was very clear this will be a fair process
7 that follows all the proper protocols and
8 rules, and that is exactly what happened.

9 And you have a fair team here, which
10 as we look through this list and Abbey
11 Whitford's recollection, you have two
12 brand-new people. You have one who, when I'm
13 looking at this list of who voted and about
14 Abbey Whitford's recollection, I'm guessing
15 this guy voted for both. So already you've
16 got somebody who's willing to be fair enough
17 to vote for both to go for it, and you've got
18 Pam Shue who is just an absolute expert in
19 this stuff.

20 Q. Pam Shue helped select the members of the
21 final evaluation committee?

22 A. I believe so, yes.

23 Q. Pam Shue is the person who you agree who
24 voted for Istation in January of 2019?

25 A. I will agree that is what this text message

1 says. I do not know that for a fact from
2 these meeting notes, but yes, I think the
3 evidence would all point to Pam Shue most
4 likely voted for Istation.

5 Q. If the evidence showed that two out of the
6 four voting members of the final evaluation
7 committee were two out of the three members
8 who voted for Istation in January of 2019,
9 are you telling me you can't understand why
10 Amplify's president says that looks strange?

11 A. Yes. Because I'm telling you, it was a
12 brand-new process, completely started over
13 from the beginning to go into like -- a new
14 fair process with an evaluation panel that
15 was going to look at everything that Amplify
16 and Istation presented and give a fair,
17 unbiased evaluation.

18 Q. You testified that you thought some of the
19 members of the evaluation committee prior to
20 cancellation were potentially biased,
21 correct?

22 A. Based on everything I know now, yes.

23 Q. How do you know one of those people wasn't
24 Pam Shue?

25 A. Pam Shue hopefully wasn't the one doing all

1 the maybes to know that would have benefitted
2 Amplify.

3 Q. Do you know?

4 A. Just as you can guess that Carolyn Guthrie
5 didn't rat herself out on this text message,
6 I can tell you if using this text message and
7 Abbey Whitford's testimony saying that Pam
8 Shue voted for Istation, I don't think Pam
9 Shue would take actions benefiting Amplify in
10 the RFP-2 process.

11 Q. She could have been bias in favor of a
12 bidder?

13 A. I very much doubt it. There's got to be
14 somebody at DPI that's willing to be fair and
15 unbiased, and I do believe these were the
16 people who, in a fair and unbiased way,
17 actually did a fair evaluation of these two
18 vendors.

19 And when they did a fair evaluation,
20 they came to the conclusion unanimously that
21 Istation was the best value for the State of
22 North Carolina. It satisfied the
23 requirements of the Read to Achieve
24 legislation, and it did so for less of a
25 price than Amplify.

1 Q. What about Thakur Karkee, how do you know
2 he's not one of the bias members of the prior
3 evaluation committee?

4 A. I've said before in this deposition I don't
5 know exactly who the bias members were. So
6 to your point, I guess, I don't know that
7 he's not a bias member, but, again, the bias
8 was in favor of Amplify.

9 So it doesn't really help Amplify's
10 argument saying that I was putting bias
11 people on an evaluation committee if they
12 were in favor of Amplify but then they voted
13 for Istation.

14 Q. How do we know that people in the evaluation
15 committee were only bias in favor of Amplify?

16 A. We know that now based on all of the response
17 done in the response letter that was crafted
18 for you and Amplify based on the facts that
19 misstatements of fact were made.

20 Whether it was intentional or
21 unintentional, the misstatements of facts
22 were made, and certain vendors got noes as
23 result of those misstatements and that
24 benefitted Amplify.

25 And then there was also the maybe

1 situation, where maybes -- instead of
2 actually people going and looking into is
3 this maybe actually a yes, the maybe was
4 converted into a no, and it benefitted
5 Amplify.

6 Q. Did anyone talk to you about whether the
7 evaluation committee should have been
8 composed of all new persons?

9 A. No. We had a discussion about making sure
10 that we had a fair, efficient process because
11 the one thing we haven't talked about yet is
12 the fact that, again, we were not getting a
13 legislative change.

14 We had to get a decision --
15 regardless of whether it was going to be
16 Amplify or Istation, we had to get that
17 decision as quickly as possible to the local
18 school districts so they know what we were
19 using the next school year.

20 With consultation of DIT, what is
21 the most efficient fairest way to do this
22 quickly, that is how we were guided into the
23 negotiation phase, and again, the evaluation
24 panel, the criteria, all of this was done
25 with guidance from DIT.

1 So how much Pam Shue picked the
2 evaluation committee members, she probably
3 consulted with Kathryn Johnston who was
4 consulting with DIT. All I know is I wanted
5 to make sure we had a fair, efficient
6 process, and that's exactly what we got out
7 of the third try.

8 Q. Did anyone examine whether Amplify's maybes
9 and noes were based on misstatements?

10 A. I believe we did. We possibly did before the
11 response letter, but the response letter was
12 a protest by Amplify.

13 I do know, after looking at some of
14 them, Amplify had a lot more yeses than
15 anybody else, which makes sense because these
16 people were more familiar with Amplify. It
17 had a lot more yeses than just maybes.

18 It's where the maybes came in that
19 the maybes weren't figured out. That's
20 something in the record that you can see what
21 the maybes were.

22 Q. Is it inconceivable to you that the yeses for
23 Amplify were because the evaluation committee
24 members legitimately thought they met those
25 requirements?

1 A. What yeses? Please repeat the question.

2 Q. Is it inconceivable to you that Amplify got
3 their yeses because the consensus evaluation
4 committee members were trying hard to do
5 their jobs as state employees?

6 A. No. It is probably how they got their yeses,
7 and then I would ask Amplify why would the
8 state employees not do their jobs as state
9 employees to investigate the maybes. Nobody
10 investigated the maybes.

11 Q. You're saying that the employees, the state
12 employees of your department, were biases in
13 favor of a vendor instead of trying to do the
14 best for the children of North Carolina?

15 A. Yes, there were some, a handful that clearly
16 show -- now, please don't confuse the
17 situation. RFP-2 was cancelled before we
18 knew any of this happened.

19 I had my concerns. Based on Amy
20 Jablonski's work, based on the December 2018
21 PowerPoint, I had my concerns because we
22 couldn't get to a consensus, and that was
23 reason enough right there to cancel it, the
24 consensus.

25 But we were trying to work through

1 that until we found out about the leak and
2 the confidential information that was leaked,
3 as we have just gone over, letting people
4 know exactly, apparently, how people voted,
5 and that was just a little bit of the 1 hour
6 and 45 minute marathon phone call about the
7 confidential information about the RFP.

8 That, all put together, is what
9 required the cancellation of RFP-2 in
10 consultation with DIT and their agreement and
11 their advice on what to do next. Everything
12 we're talking about, the bias, that all
13 became very clear when we were responding to
14 your protest.

15 Q. So you decided there was bias after Amplify
16 filed a big protest letter?

17 A. Through all this investigation, yes. Look, I
18 definitely had my concerns, but we were going
19 to work through that.

20 We mentioned the Ukraine issue.
21 That's something we could have worked through
22 in negotiations with Amplify and actually
23 worked to get to the bottom of.

24 But too many things piled up that
25 made RFP-2 something that was not going to

1 reach the best value for the State of North
2 Carolina. It was in the best interest of the
3 State of North Carolina to cancel RFP-2.

4 And we started that process over.
5 The third procurement process, the
6 negotiations were fair, and we came to an
7 award. And then it was when all of this
8 protest started that we actually went back
9 and dug into all the details of what had
10 happened in the voting for RFP-2.

11 Q. Do you know that this alleged Ukraine issue
12 was raised in the contract negotiations for
13 the 2016 contract and resolved, or do you
14 know anything about that?

15 A. No, I don't.

16 Q. Are you familiar with the concept of a
17 mistrial in a civil jury trial?

18 A. Vaguely, yes.

19 Q. Do you know whether or not after a mistrial,
20 whether after people had voted one way or
21 another could be put on the next jury?

22 A. I don't know.

23 Q. Like, if there was a murder trial and it
24 ended up in a hung jury and four people voted
25 to convict, do you think there could be

1 another jury trial commenced where they only
2 take the people who voted to convict and put
3 them on the jury?

4 A. The good news here is I didn't kill anybody,
5 so I'm not on trial for killing somebody.

6 Q. This is a very important RFP, right?

7 A. Absolutely.

8 Q. And the ability of our children to read in
9 the State of North Carolina is extremely
10 important, correct?

11 A. Which is why I'm happy we had a fair process
12 finally and got the best tool for North
13 Carolina.

14 Q. It is a fair process if only the people who
15 voted after a hung vendor for one vendor are
16 put on the next jury?

17 MS. LUCAS: Objection to form.

18 A. Please repeat the question.

19 Q. You're saying it is a fair process if there
20 is a hung jury where a few people vote for
21 Istation and the majority vote for Amplify,
22 you're saying it's fair if everyone who voted
23 for Amplify is taken off the next jury but
24 some of the people who voted for Istation are
25 put on the next jury?

1 MS. LUCAS: Objection.

2 MR. SHANAHAN: Objection.

3 A. You're getting very caught up in the actual
4 employees who were on the evaluation panel.
5 All that matters that we finally had a fair
6 evaluation that's what happened in the third
7 iteration of this.

8 And, honestly, it probably could
9 have been RB, or Cindy Dewey or Lynne Loeser.
10 We'll never know because now going back and
11 looking at how the ranking happened and how
12 there was bias in the way that there were
13 misstatements of fact, that even these people
14 might have voted on a misstatement of fact
15 that they didn't know and they weren't aware
16 of; and then there were the maybes where
17 these people probably said -- that might have
18 said maybe about Istation, and their maybe,
19 instead of being investigated, turned into a
20 no.

21 So I can't go and compare this to a
22 jury trial. This is a procurement, and it is
23 the obligation of whoever is on the
24 evaluation panel to be fair and impartial,
25 not leak confidential information and not

1 have a conflict of interest.

2 And I can tell you with 100 percent
3 certainty that is exactly what happened in
4 the third iteration of this procurement
5 process.

6 And it didn't happen in RFP-1
7 because we had somebody who had a conflict of
8 interest with Amplify. It didn't happen in
9 RFP-2 because even though we cancelled it for
10 lack of consensus and the breach of
11 confidentiality, we didn't know at the time,
12 but we later found out there actually was
13 bias for Amplify.

14 And now we look at this very fair
15 process and the third negotiations where it
16 just was even, unweighted. Amplify, tell us
17 what it is you do and how much it cost.
18 Istation, tell us what it is what you do and
19 how much it cost, and the decision was made.

20 The recommendation came from the
21 evaluation panel, but again, going back to
22 the legislation, I'm the one who approved
23 this. We never will know what would have
24 happened in RFP-2 because of this leak of
25 confidential information going on a road

1 where we had to cancel RFP-2.

2 But I believe we might have been
3 able to work through some of the issues we
4 thought we were having. I'm glad it came out
5 this way, and I thank you for submitting the
6 protest, so I can respond to it because that
7 is actually how we went in and found all this
8 other stuff that was going on in RFP-2.

9 That's actually where I'm getting
10 this narrative, this explanation of what
11 happened where clearly we don't know who it
12 was, but there clearly was bias in favor of
13 Amplify.

14 Q. Before your deposition today, did you know
15 how the members of the final consensus
16 committee had voted in the January meeting?

17 A. No.

18 Q. So that was new information?

19 A. New information, only from if I read it in
20 Abbey Whitford's deposition record, which I
21 don't recall because I skimmed, and I paid
22 attention to some things more than another,
23 but then only from what I recall.

24 Q. The text message?

25 A. Yes, this, too.

1 Q. Before this deposition or in the last hour,
2 you weren't aware that no one among the
3 people who had voted for Amplify were
4 included in the evaluation committee, but
5 likely some of the people who voted for
6 Istation were part of the final evaluation
7 committee?

8 A. It is fair to say that I had the information.
9 You're the first person to point that out to
10 me, but again, I'll reiterate, separate
11 procurement processes, and you've got two
12 brand-new people that were put on this out of
13 four, so half the people on there were brand
14 new.

15 You have Pam Shue, who absolutely
16 was going to be on there because she's the
17 deputy superintendent of early childhood
18 education, because she's in charge of all
19 this. Thakur Karkee, who I think we're
20 guessing he might have been the person who
21 voted for both.

22 Q. You said you reviewed some of Ms. Whitford's
23 deposition; is that correct?

24 A. Yes.

25 Q. Did you see where she testified that she

1 believed that they were about to reach a
2 consensus to avoid Amplify at the November
3 meetings?

4 A. Yes. I don't recall that word for word, but
5 I remember reading that part.

6 Q. And that she was -- based on her
7 recollection, that the committee was stopped
8 from doing that by Chloe and Sri?

9 A. Yes, that is what she has in her deposition.

10 Q. Did Chloe -- did you ever discuss with Chloe
11 Gossage that Amplify can't win this
12 procurement?

13 A. No.

14 Q. Do you know whether Chloe Gossage ever
15 discussed that with Amy Jablonski?

16 A. No.

17 (Exhibit No. 20, E-mail, so marked)

18 Q. Mr. Johnson, I've handed you what's been
19 marked as Exhibit 20, and there is some
20 redactions on top. That's probably e-mails
21 to me or something, but the key part of this
22 document looks like an e-mail statement that
23 you issued on August 22, 2019. Do you see
24 that?

25 A. Yes.

1 Q. And did you prepare this statement?

2 A. Yes.

3 Q. And this is a statement regarding DIT's grant
4 of a stay of the award to Istation, correct?

5 A. Yes.

6 Q. Turn to the second page of this exhibit. Do
7 you see the paragraph that starts with
8 "today"?

9 A. Yes.

10 Q. And the statement that "DIT lawyers need to
11 understand they're accountable to North
12 Carolina, not the CEO of Amplify," do you see
13 that?

14 A. Yes.

15 Q. Did you author that statement?

16 A. Yes.

17 Q. Do you believe that DIT lawyers are
18 accountable to the CEO of Amplify and not the
19 citizens of the State of North Carolina?

20 A. If you really want to get into this, this was
21 an unbelievable action by DIT. To, without
22 putting any thought into it, issue this stay
23 and send the State of North Carolina and the
24 schools into chaos, as you said, a very
25 important program for the reading skills of

1 our students -- this stay was dated on a
2 Monday; we didn't receive this stay until a
3 Tuesday evening.

4 Q. The next day?

5 A. The next day. And it was actually my
6 counsel, Ryan Boise, who called me and said,
7 "DIT just put a stay on the contract."

8 MS. LUCAS: I'm going to advise you
9 not to reveal client privilege
10 communications.

11 MR. ARMBRUSTER: You can strike it.

12 A. I just tell the truth. It's what I do.

13 MS. LUCAS: So you can respond to
14 any new pending question. I'm directing you
15 not to reveal attorney/client privilege.

16 MR. ARMBRUSTER: I stipulate there
17 is no waiver. He was just revealing actual
18 information that was conveyed to him.

19 MS. LUCAS: I don't think there is a
20 question pending.

21 A. There is. The one lawyer at the time at DIT
22 did not -- from everything we can tell, in
23 trying to actually get in touch with this
24 person after this stay was issued, did not
25 put much thought into this, and honestly, it

1 was a big mistake. It was a big mistake.

2 And this lawyer, from what we can
3 tell because we haven't been able to talk to
4 her since this happened, only looked at what
5 one document that had been provided so far,
6 and that was the document from Amplify.

7 We didn't actually send in a
8 document yet about what this ruling should
9 be. So you have a lawyer who is reading all
10 the facts as Amplify wants you to see them
11 and issuing a stay based on that
12 understanding of facts, which then had a
13 domino effect for the entire State of North
14 Carolina.

15 We already know that your client was
16 hard at work with some of these people to
17 sell discord and discontent around North
18 Carolina around the contract award. So now
19 we have a lot of teachers who are kind of
20 scared of what Istation might be.

21 And then when we have the
22 superintendent -- and we've actually come to
23 agreement with them that we can start
24 implementing this, and we don't have to turn
25 it on full speed and get the metrics until

1 halfway through the year.

2 All of a sudden, during the middle
3 of trainings, after all these trainings have
4 happened over the summer, we get a few
5 sentences from DIT saying it is on hold, and
6 then we can't get any answers from DIT.

7 This was put out after -- we seemed
8 to have open communications with the DIT
9 lawyer. These are people who are separate
10 and apart from the DIT folks that we worked
11 on the procurement with. This is a DIT
12 lawyer, had conversations before this
13 happened, and then this happens, we can't get
14 a phone call returns, e-mail returns, we
15 couldn't get an answer.

16 Q. Who is the DIT lawyer you were referring to?

17 A. I don't know her name.

18 Q. What conversations did you have with her?

19 A. I had no conversations with her.

20 Q. You reference conversations with her. What
21 was that?

22 A. Conversations between legal here at DPI and
23 I.

24 Q. What do you know about those conversations?

25 A. Stop me if I go too far, but I believe there

1 was conversations right after we got the stay
2 of "I think you made a mistake here." I
3 said, "Okay, let's talk tomorrow."

4 Q. Do you understand that it disparages the
5 judicial process to suggest that
6 decision-makers are bias in favor of one
7 party?

8 A. Do you understand that this was really not
9 much of a judicial process?

10 Q. You're a member of the bar?

11 A. Right. And I also know that everybody has to
12 have their fair day in court, that you can't
13 just take Amplify's version of the truth and
14 say oh, this must be what is going on. We
15 have to put a stay in place to keep the
16 status quo.

17 The status quo was Istation
18 trainings were going on, and Istation had
19 already started in year-round schools.
20 Istation was already being used in schools in
21 the State of North Carolina.

22 You should go talk to the lawyer at
23 DIT and see if she knew that. She put the
24 stay on. I shouldn't speculate, but she
25 basically only had one side of the story, and

1 there was Amplify, and she acted on that one
2 side of the story.

3 Q. I know you weren't a litigator, but you
4 understand TROs can be entered without
5 hearing anything from the other side?

6 A. Yes. That happened to me with the State
7 Board, 2016. I don't know about this because
8 this wasn't a TRO.

9 This was a full-on stay that we're
10 still haven't heard anything from. I don't
11 know, somebody needs to call a lawyer at DIT.

12 Q. You are aware from your experience with legal
13 matters that a tribunal can enter orders in
14 some instances without hearing anything from
15 the other side?

16 A. That's not what this was. There was a stay.
17 We should have had our side heard. We -- to
18 my understanding, we had a certain amount of
19 time to be able to be heard, and oddly
20 enough, this came -- again, we received it on
21 a Tuesday evening, even though it is dated on
22 a Monday, and it came, I believe, the week
23 when teachers were in their professional
24 development trainings before school started.

25 Q. Do you know that the stay was granted 17 days

1 after I filed my motion for stay?

2 A. No, I didn't know that. Did anyone have
3 other documents that were in the hands of DIT
4 before they issued this stay?

5 Q. There were some filings, but I ask the
6 questions. I'm not trying to muddy it up.

7 A. I'm not trying to muddy it up either. It is
8 pretty clear DPI never had its chance to have
9 its say on this stay, and we are still under
10 this stay even though the person who's
11 hearing this said he would act quickly.

12 Q. And this procurement -- the outcome of this
13 procurement or this bid process is ultimately
14 DIT's decision, correct?

15 A. This bid protest, yes, that's my
16 understanding.

17 Q. Now, you're not seriously contending --

18 MR. SHANAHAN: You're not waiving
19 your appeal rights, are you?

20 MR. ARMBRUSTER: Not stipulating to
21 that.

22 Q. Now, you're not seriously contending that you
23 believing DIT's lawyers are beholden to
24 Amplify, are you?

25 Throughout this deposition you say

1 everyone is bias in favor of Amplify. Are
2 you really saying DIT is also bias in favor
3 of Amplify? Maybe Amplify has a meritorious
4 protest?

5 A. Why would you not wait to hear DPI's side of
6 the story?

7 Q. Do you have any basis to think that DIT is
8 bias or in favor of any party to this
9 proceeding?

10 A. No. I do believe DIT made a mistake by
11 issuing the stay.

12 Q. So after the stay was granted -- I call it
13 the "side agreement," but there was this
14 Istation worked for free agreement
15 negotiated. How did that come to pass?

16 A. I don't remember exactly. I know I was
17 talking -- after it happened we had the Read
18 to Achieve law that we had to comply with.
19 We needed a reading diagnostic tool for the
20 State of North Carolina.

21 I was having a lot of conversations
22 with State Board members and conversations
23 with the legal team, and then the ideas were
24 floated how can we make sure we don't
25 interrupt the work that's going on in our

1 schools?

2 Multiple ideas were put in place.

3 Ultimately, the one I decided on was Istation

4 agreeing to work for free because either a

5 free procurement, or it is under a certain

6 dollar threshold did not need DIT approval.

7 Q. Did it need State Board approval under a

8 certain threshold?

9 A. No.

10 Q. I think that -- what do you call the

11 agreement?

12 A. The Istation agreement. I don't have a name.

13 Q. I'll call it the "side agreement." That's

14 set to expire soon, correct?

15 A. I believe so.

16 MR. SHANAHAN: I believe it is

17 called the MOA.

18 Q. We'll call it the "MOA." Have there been

19 discussions about extending the MOA because

20 recently the hearing in this matter was

21 continued to the week of January 13th?

22 A. I haven't had those discussions yet with

23 anyone.

24 Q. Do you know whether or not Istation is

25 willing to extend the work-for-free

1 agreement?

2 A. I do not. I believe, based on conversations
3 we had back in August, they would be, but
4 I've not had those conversations, no.

5 MR. ARMBRUSTER: I don't have any
6 further questions. Thank you.

7 MR. SHANAHAN: Can we take a
8 5-minute break?

9 THE VIDEOGRAPHER: We are off the
10 record at 4:10 p.m.

11 (Recess)

12 THE VIDEOGRAPHER: The time is
13 4:27 p.m.

14 EXAMINATION

15 BY MR. SHANAHAN:

16 Q. Superintendent Johnson, my name is Kieran
17 Shanahan. I'm the lawyer for Istation in
18 this matter.

19 First of all, I begin by thanking
20 you and your wife for your public service.
21 It takes courage to run for office and your
22 commitment as a citizen. We thank you for
23 your service.

24 A. Thank you.

25 Q. And, also, I ask you to turn to Exhibit 11.

1 I just have a few questions about it, but
2 you've given us a lot of testimony about the
3 things that you did and the things that you
4 directed to be done.

5 So focusing you in on when you
6 believed -- my word -- hit a bit of a dead
7 end with regard to RFP-2, and so you sought
8 the advice and potential cancellation from
9 DIT, correct?

10 A. Yes.

11 Q. And so looking at Exhibit 11, it appears to
12 be a written confirmation of the request
13 where your department was requesting approval
14 for the cancellation, correct?

15 A. Yes.

16 Q. And I think your testimony earlier was you
17 weren't involved in the preparation of this
18 document or didn't have anything to do with
19 it other than instructing your staff to
20 coordinate a possible cancellation with DIT;
21 is that correct?

22 A. That is correct.

23 Q. Directing your attention a little ways down
24 on this document, it says "The two other (2)
25 vendors that responded capable of satisfying

1 our agency's business needs but are at a
2 disparate price range." Do you see that?

3 A. Yes.

4 Q. Are the two vendors there Istation and
5 Amplify?

6 A. Yes.

7 Q. And at the time that this was submitted, did
8 you agree with that statement that they both
9 satisfied the agency's needs?

10 A. In March, yes, that was my understanding from
11 the work that had been done, that both
12 Amplify and Istation would meet the need.

13 Q. Notwithstanding all the regularities and
14 other things that are of concern to you of
15 your desire to have a good process, you,
16 nonetheless, felt both Amplify and Istation
17 met the requirements?

18 A. Yes.

19 Q. And then there is this little "but" here that
20 says "but are at a disparate price range,"
21 and then "(so unlike that, there is no basis
22 for comparison)." It is so different that it
23 was hard to compare them, correct?

24 Then they list these prices,
25 Amplify, 12 million and change, and Istation,

1 3 million and change. Is that your
2 recollection of what the -- where the numbers
3 were with regard to those two entities?

4 A. I do not recall. So that's -- if that's what
5 it said here, that's what it was.

6 Q. Assuming that was accurate -- and I know that
7 all the questions earlier today seem to focus
8 on other aspects, but is that a disparity
9 such that it wasn't a basis for comparison?
10 Was that something that was a concern for you
11 as well?

12 A. That would be a concern. That might have
13 been something that was brought to my
14 attention; but again, as I said in the
15 earlier testimony, the really big bucks that
16 concern me were the lack of consensus and the
17 leak of the confidential information. This
18 is probably something that came up as more in
19 the weeds procurement issues.

20 Q. And so in the next paragraph there, it says
21 "As a result, DPI believes continuing with
22 the RFP would serve no valuable purpose, and
23 they would like to cancel."

24 That's a true statement of your
25 department's position at the time?

1 A. Yes.

2 Q. And so then there was this notion of doing a
3 negotiation, and specifically, DPI intends to
4 conduct negotiations with sources of supply
5 to maximize the State's ability to obtain
6 best value based on the valuation that is set
7 forth.

8 Does the term "best value" mean
9 anything in particular to you?

10 A. Yes.

11 Q. Did you testify to this as a new procurement?
12 I'm asking, in your mind, in your
13 understanding did best value have any
14 specific meaning?

15 A. I will say, like much of what my testimony
16 has been at that specific time, no, this is
17 something that would have been the
18 procurement people putting this forward, but
19 now that I have gone through the process of
20 looking through everything and putting
21 together the response letter to the protest,
22 the denial of the protest, I do understand
23 what "best value" means.

24 And it is the idea that when a state
25 agency is doing a procurement, like this, for

1 the State of North Carolina, you have to take
2 all the considerations into account,
3 especially when you have more than one vendor
4 that can meet the requirements.

5 So if you have more than one vendor
6 that can meet the requirements, absolutely
7 part of the fact you need to take into
8 account is how much it costs because it is
9 your obligation as a government employee, as
10 someone who is using citizens' tax dollars,
11 to find the best value, the best price which
12 can get the job done.

13 Q. And the committee that was formed, is it a
14 fair characterization of your testimony that
15 you didn't have any hands-on involvement in
16 who the individuals were that made up that
17 committee?

18 A. That's correct.

19 Q. Once the committee was put in place, you did
20 approve it?

21 A. Yes.

22 Q. And then you let the committee go about their
23 work to engage in the process of the best
24 value?

25 A. And that is actually true for RFP-1, RFP-2,

1 and for the third negotiation process that
2 got us to the end result.

3 Q. So at the conclusion of their -- did you
4 attend their meetings, or were you involved
5 in doing that work?

6 A. No.

7 Q. You used the same protocol, stand back and
8 let them do their work?

9 A. The only meeting I ever attended was the one
10 in January of RFP-2.

11 Q. With regard to RFP-3, once the committee came
12 to you, did they come to you with a unanimous
13 recommendation or consensus recommendation?

14 A. It was unanimous.

15 Q. Would "unanimous" encompass the term for
16 "consensus"?

17 A. The "consensus" definition as I understand it
18 from DIT, yes, we had a consensus on a
19 recommendation because it was a unanimous
20 agreement.

21 Q. As the ultimate decision-maker by statute,
22 what, if anything, did you do once you had
23 that consensus?

24 Did you do any looking at
25 or -- like you did at Christmas, you went

1 home and spent some time studying? Anything
2 in particular you did?

3 A. Off the top of my head, the only thing in
4 particular I did was ask Pam Shue or Kathryn
5 Johnston, someone familiar with the process
6 of what were some of the highlights of the
7 back and forth of the evaluation committee.

8 And they said that, you know, in the
9 evaluation committee they did not have a hard
10 time all -- each coming to a conclusion that
11 Istation was a better tool.

12 Q. Did part of the process include sending your
13 recommendation to the State Board?

14 A. That's exactly right. So we had a unanimous
15 agreement for a recommendation and that came
16 to me, and then I approved it, and then
17 importantly we called a special phone call
18 meeting in the State Board of Education
19 because we knew we were very, very tight on
20 time.

21 And we presented the recommendation
22 from the evaluation panel and my approval to
23 the State Board of Education, and they
24 unanimously approved Istation.

25 Q. Did they do that, as you recall, in the phone

1 call or was there a subsequent time -- did
2 they have a period of time they reconvened
3 for a vote?

4 A. They were made aware before the meeting what
5 the meeting was about. They had a chance to
6 ask questions and submit those, which they
7 did, multiple questions. The team answered
8 all those questions.

9 And we had a lengthy conversation in
10 closed session on the phone call in which
11 their questions were answered, and by the
12 end, they were -- all five voted unanimously
13 awarding the contract for Istation.

14 MR. SHANAHAN: Those are all the
15 questions I have, and thank you for your
16 time.

17 MS. LUCAS: I don't have any
18 questions.

19 EXAMINATION

20 BY MR. ARMBRUSTER:

21 Q. Just briefly based on Mr. Shanahan's brief
22 questioning.

23 Have any members of the State Board
24 approached you after the award with concerns
25 about the process or the award?

1 A. No.

2 Q. If the State Board was to vote and recommend
3 that you throw out the award, would you
4 listen to that recommendation?

5 A. I'd have a discussion with the State Board.
6 It is kind of speculating. I don't know
7 exactly what that would be. Again, we're in
8 this weird world where we had this very
9 unique legislation, an evaluation panel to
10 recommend, I approve.

11 And the important reason it was
12 brought to State Board because State Board's
13 policy -- and I don't know exactly what it
14 is, but they're very involved with Read to
15 Achieve.

16 I would have to have that
17 conversation with State Board, but no
18 conversations like that have occurred with
19 the State Board.

20 Q. Mr. Shanahan asked you about Exhibit 11. Do
21 you know what the cost proposal was of NWEA
22 or Curriculum Associates?

23 A. Not off the top of my head, but it might have
24 been --

25 Q. Sure. Sitting here today, do you know?

1 A. No, not off top of my head.

2 MR. ARMBRUSTER: No further
3 questions.

4 MS. LUCAS: No questions.

5 THE VIDEOGRAPHER: This concludes
6 the deposition. We are off the record at
7 4:38 p.m.

8 THE COURT REPORTER: You want the
9 transcript on Wednesday, the 11th day?

10 MR. ARMBRUSTER: Yes.

11 MR. SHANAHAN: Yes.

12 MS. LUCAS: Whatever everyone else
13 is doing, yes.

14 (Whereupon the deposition was
15 concluded at 4:38 p.m.)

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1 REPORTER'S CERTIFICATE

2 I, Tina Sarcia-Maxwell, a Notary
3 Public in and for the State of North
4 Carolina, do hereby certify that there came
5 before me on Wednesday, December 4, 2019, the
6 person hereinbefore named, who was by me duly
7 sworn to testify to the truth and nothing but
8 the truth of their knowledge concerning the
9 matters in controversy in this cause; that
10 the witness was thereupon examined under
11 oath, the examination reduced to typewriting
12 under my direction, and the transcript is a
13 true record of the testimony given by the
14 witness.

15 I further certify that I am neither
16 attorney nor counsel for, nor related to nor
17 employed by any attorney or counsel employed
18 by the parties hereto or financially
19 interested in the action.

20 IN WITNESS WHEREOF, I have hereto set my
21 hand, this 11th day of December, 2019.

22
23 <%21568,Signature%>
24 _____

25 Tina Sarcia-Maxwell, Notary Public

To: Mark Johnson
Re: Signature of Mark Johnson
Date Errata due back at our offices: 1/11/2020

Greetings:

The deponent has reserved the right to read and sign.
Please have the deponent review the deposition
transcript, noting any changes or corrections on the
attached Errata.

Once the Errata is signed by the deponent and notarized,
please mail it to the address below. When the signed
Errata is returned to us, we will seal and forward to the
hiring attorney for filing with the court.

We will also send copies of the Errata to all ordering
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If the signed Errata is not returned by the date
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ERRATA

I, the undersigned, do hereby certify that I have read the transcript of my testimony, and that

___There are no changes

___The following changes are noted:

Pursuant to the governing rules of Civil Procedure, any changes in form or substance which you desire to make to your testimony shall be entered upon the deposition with a statement of the reasons given for making them. To assist you in making any such corrections, please use the form below. If additional pages are necessary, please furnish same and attach.

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22 DEPONENT'S SIGNATURE
Sworn to and subscribed before me this _____ day of
_____, _____.
23 _____
24 NOTARY PUBLIC
25 My commission expires: _____