

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 EDC 00832

■ by and through her parent ■ Petitioner, v. Wake County Board of Education Respondent.	FINAL DECISION
--	------------------------------

THIS MATTER was heard before the undersigned Honorable Stacey B. Bawtinheimer, Administrative Law Judge presiding, on the following dates: August 26-28, August 31, September 2-4, September 16-18, October 18, and October 20, 2020, at the Office of Administrative Hearings in Raleigh, North Carolina. After hearing the evidence presented and considering the written and oral arguments of counsel, the Undersigned is of the opinion that Respondent has denied Petitioner ■ a free and appropriate public education (“FAPE”).

INTRODUCTION AND SUMMARY

Part of this case addresses the difficult and uncomfortable topic of the use of physical restraint and seclusion with a student with significant behavioral concerns. This case is *not* a referendum on the appropriateness of seclusion and restraint generally - State law authorizes the use of restraint and seclusion under certain circumstances, including as part of a behavior plan for a student with an IEP. Rather, the question before this Tribunal in this case is whether the school’s behavior intervention programming for ■ which included the use of restraint and seclusion was appropriate and denied ■ a free and appropriate public education.

Seclusion, time-out, time-in, go to quiet room, go to safe space, and CPI¹ techniques were the various terms WCPSS’ staff used in ■’s IEP and documents to describe to her Parents the implementation of the use of restraint and seclusion as part of ■’s behavior plan. According to State law, the Office of Civil Rights, and the U.S. Department of Education, seclusion is not “time-out” or “time-in”. In addition, seclusion is not simply going to a “quiet room” or a “safe place”. Instead, it is the involuntary confinement of a student in a room from which the student is prevented from leaving.

¹ CPI stands for “Nonviolent Crisis Intervention Program” and teaches restraint as a last resort that may be implemented to provide for safety when an individual is an imminent danger to self or others and when all other attempts to calm escalating behavior have been tried and failed.
<https://www.crisisprevention.com/Blog/Physical-Restraint-Training>.

In [REDACTED]'s case, approximately 24 times² she was confined in an empty, lit closet, with a window in the door. The door was held shut by school staff for varying periods of time up from 10 minutes to 1 hour, 27 minutes. [REDACTED]'s behavior plan did not specify the timeframe or circumstances for which seclusion or restraint could be used. Because [REDACTED]'s behavior plans failed to inform [REDACTED]'s Parents of how the use of seclusion and restraint would be individualized for [REDACTED]'s unique needs, the behavior plans were inappropriate.

Moreover, [REDACTED]'s Parents did not understand how seclusion and restraint were actually being implemented because they were not provided proper notifications of its use by WCPSS staff. Not surprising since WCPSS senior administrators themselves did not understand their reporting responsibilities. WCPSS failed to comply with the North Carolina Department of Public Instruction's Discipline Data Reporting Procedures and from 2017-2019 failed to report any use of restraint or seclusion to the Office of Civil Rights although during that period [REDACTED] alone had been secluded and restrained at least 22 times.

APPEARANCES

For Petitioners: Stacey Gahagan
Elizabeth Horton
The Gahagan Law Firm, PLLC
3326 Durham Chapel Hill Blvd, Suite 210-C
Durham, NC 27707

For Respondent: Stephen G. Rawson
Tharrington Smith, LLP
150 Fayetteville Street, Suite 1800
Raleigh, NC 27602

WITNESSES

For Petitioners: Petitioner [REDACTED] mother of [REDACTED]
[REDACTED] father of [REDACTED]
[REDACTED] Teacher at Private Placement
[REDACTED] Teacher at Private Placement
[REDACTED] Director of Private Placement
[REDACTED] Friend of Petitioners
[REDACTED] Ph.D., LP, HS-P, Psychologist
[REDACTED] M.D., Psychiatrist
[REDACTED] Occupational Therapist
[REDACTED] M.D., Psychiatrist
[REDACTED] MS/CCC/SLP, Expert Witness
[REDACTED] Ed.D., BCBA, Expert Witness
[REDACTED] Ed.D., Ph.D., Expert Witness
Dr. [REDACTED] N.C. Department of Public Instruction

² The exact number of seclusions and restraints is disputed, but both Parties agree that she was secluded at least 22 times.

For Respondent:

[REDACTED] WCPSS Senior Administrator
[REDACTED] EC Teacher
[REDACTED] WCPSS Speech Therapist
[REDACTED] General Education Teacher
[REDACTED] Assistant Principal
[REDACTED] M.Sc., M.D., Expert Witness

EXHIBITS and TRANSCRIPTS

The following exhibits were received into evidence during the course of the hearing:

Stipulated Exhibits: 1-17, 19-30, and 32-39 (hereinafter “Stip. Ex. 1,” “Stip. Ex. 2,” etc.)

Petitioners’ Exhibits: 2-3, 5-7, 9, 11-14, 16-19, 21, 22, 29, 30, 32 (#192, 222), 35 (#285, 293, 294, 311-314, 323, 324, 332, 333, 335, 337, 350, 351, 409, 419, 475, 476, 486, 492, 504, 505, 550, 551) 36, 38, 39, 41-44, 57, 58, 63-66, 68, 71, 76 (#665-666, 670-671, 673, 675-676, 678-679, 685, 687-688, 692-694, 695-696, 713-718, 720, 724-725, 730-731, 743, 745-750, 752-754, 760-762, 765, 770, 773-777, 779, 782-784), 78-82, 88, 89, 92-99, 103-106, and 142 (hereinafter “Pet. Ex. 1,” “Pet. Ex. 2,” etc.)

Respondent’s Exhibits: 2, 6-15, 20-22, 33, 40, and 41 (hereinafter “Resp. Ex. 1,” “Resp. Ex. 6, p. 147,” etc.)

The Tribunal took official notice of the following documents: Petitioners’ Exhibits 107, 108, 122, 135, and 137-141.

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

Transcript volumes 1 through 12 were received on March 2, 12, 16, 17, and 23, 2021, and have been retained in the official record of this case. Transcript volume 10A was received as an Offer of Proof and not considered in the decision of this case.

ISSUES

Issue Upon Reconsideration

At the close of the hearing, the Undersigned opened for reconsideration the prior partial summary judgment order in Respondent’s favor solely with respect to the implementation of the Behavior Intervention Plans during the 2017-18 and 2018-19 school years prior to February 21, 2019. Further evidence was permitted regarding when Petitioners knew or should have known of their claims and whether the one-year statute of limitations barred claims before February 21, 2019, and if there was a denial of FAPE during that period. Additional evidence was taken, and the Undersigned’s renewed determination on the statute of limitations issue for the BIPs is also addressed herein.

1. Whether Petitioners knew or should have known about the implementation of the use of restraint and seclusion in the Behavior Intervention Plans during the 2017-18 and 2018-19 school years prior to February 21, 2019, and if they did not, were these BIPs appropriately implemented?

The Parties identified the issues for hearing in the Pre-Trial Order. Those issues were as follows:

Issues Prior to the May 16, 2019 IEP Meeting

2. Whether the October 18, 2018, IEP³ was implemented during the period from February 21, 2019 to May 15, 2019?
3. Whether the October 18, 2018 BIP was implemented from February 21, 2019 to March 25, 2019?
4. Whether the March 25, 2019 BIP was appropriate and implemented from March 26, 2019 to May 15, 2019?
5. Whether a Functional Behavioral Assessment (“FBA”) should have been conducted prior to January 15, 2020?

Issues with Respect to the May 16, 2019 Annual Review IEP and October 17, 2019 IEP

6. Whether these IEPs were inappropriate because they did not contain any math or reading goals?
7. Whether the functional/behavioral goals and BIP in these IEPs were appropriate?
8. Whether the reduction in articulation speech services and the lack of pragmatic language goals in these IEPs were appropriate?
9. Whether the service delivery in these IEPs was in the least restrictive environment?
10. Whether counseling should have been included as a related service in these IEPs?
11. Whether the IEPs and BIPs were implemented prior to January 27, 2020?
12. Whether the October 17, 2019, IEP Team should have removed seclusion from the BIP?

³ The issues and the timelines do not fit neatly in this case. The October 2018 IEP is the same IEP as the March 2019 IEP except for the duration dates. So technically, the October 2018 IEP was implemented between October 18, 2018 to March 25, 2019 when the IEP was reviewed. The March 2019 IEP was implemented from March 26, 2019 to May 16, 2019 when it was annually reviewed.

Issues Regarding Appropriateness of January 27, 2020 IEP

13. Whether the IEP was inappropriate due to lack of academic goals in reading or math?
14. Whether the behavior goals and BIP were appropriate?
15. Whether the IEP was inappropriate due to lack of pragmatic language goals?
16. Whether service delivery was appropriate?

Issues Regarding Appropriateness of Private School Placement and Equities

17. If the January 2020 IEP and/or BIP was inappropriate, whether the private school placement is appropriate?
18. Are there equities that should be factored into the award of reimbursement for [REDACTED] a parentally placed student in a private school?

Remedies - Compensatory Education and Related Services

19. What if any compensatory education and related services should be awarded for any violations of [REDACTED]'s right to a FAPE?

BURDEN OF PROOF

Petitioners acknowledged that they bear the burden of proof in this contested case. The standard of proof is by a preponderance of the evidence. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); N.C. Gen. Stat. § 150B-34(a). The finder of fact cannot properly act upon the weight of evidence in favor of the one having the onus, unless it overbears, in some degree, the weight upon the other side.

North Carolina statutory law provides that actions of local boards of education are presumed to be correct and “the burden of proof shall be on the complaining party to show the contrary.” N.C. Gen. Stat. § 115C-44(b). “Courts give educators “deference...based on the application of expertise and the exercise of judgment by school authorities.” *Endrew F. ex rel. [REDACTED] F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (2017). “By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement,” and a “reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of [her] circumstances.” *Id.* Due regard in administrative cases is given “to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.” N.C.G.S. § 150B-34(a). While WCPSS’ school staff and administrators demonstrated knowledge with respect to the behavioral needs generally for students with social/emotional deficits, they did not demonstrate specialized knowledge or expertise with respect to [REDACTED]’s significant behavioral deficits.

Ultimately, the Petitioners, being the complaining party, have the burden of proof to show by a preponderance of evidence that Respondent denied [REDACTED] a free appropriate public education.

PROCEDURAL BACKGROUND

1. On February 20, 2020, Petitioners [REDACTED] and [REDACTED] filed a Petition for a Contested Case Hearing in the Office of Administrative Hearings (“OAH”) alleging violations of the Individuals with Disabilities Education Act (“IDEA”) over which the Office of Administrative Hearings has jurisdiction against the WCPSS.

2. On February 26, 2020, the Undersigned issued an Order Setting Hearing and General Pre-Hearing Order scheduling the Due Process Hearing to start on April 6, 2020.

3. On March 6, 2020, Respondent filed its Response to the Petition.

4. On March 11, 2020, Respondent filed a Motion to Continue Hearing. This Tribunal granted the Motion to Continue on March 12, 2020.

5. On March 30, 2020, the Parties filed a Joint Protective Order. On the same day, this Tribunal issued the Protective Order for the production of certain confidential personnel records and information.

6. On April 6, 2020, the Parties filed a Joint Notice of Mediation notifying the Tribunal that mediation would be held on April 13, 2020.

7. On April 21, 2020, the Undersigned issued an Amended Scheduling Order scheduling the Due Process Hearing to start on June 15, 2020. On the same day, this Tribunal issued a Notice of Prehearing Conference for June 5, 2020.

8. On May 1, 2020, Petitioners filed a Motion for Leave to Amend the Petition.

9. On May 4, 2020, this Tribunal granted Petitioners’ Motion for Leave to Amend the Petition.

10. On May 13, 2020, Petitioners filed the Amended Petition. In the Amended Petition, Petitioners alleged:

- a) The WCPSS failed to offer [REDACTED] a FAPE in the least restrictive environment;
- b) The WCPSS failed to employ appropriate placement procedures and predetermined [REDACTED]’s placement, unnecessarily removing [REDACTED] from her nondisabled peers;
- c) The WCPSS failed to develop and implement substantively and procedurally appropriate IEPs;
- d) The WCPSS failed to provide [REDACTED] with the appropriate and necessary related services;

- e) The WCPSS failed to consider providing [REDACTED] with appropriate supplemental aids and services to enable her to be educated with her nondisabled peers in the general education classroom;
- f) The WCPSS failed to comply with the procedural and substantive requirements of the IDEA, significantly impeding [REDACTED]'s parents' participation in the provision of FAPE to [REDACTED] resulting in educational harm to [REDACTED] and causing a loss of educational benefit;
- g) The WCPSS failed to timely and properly evaluate [REDACTED] in conformity with the IDEA to understand [REDACTED]'s present levels of performance and gather information related to [REDACTED]'s disability-related behaviors that were impeding her learning;
- h) The WCPSS failed to provide [REDACTED]'s parents with proper notice of the decisions made regarding the provision of FAPE to [REDACTED] and misrepresented information about [REDACTED]'s educational programming and the use of seclusion and restraint;
- i) The WCPSS failed to utilize research-based interventions with [REDACTED] to address her disability-related behaviors and failed to develop an appropriate BIP for [REDACTED];
- j) The WCPSS inappropriately included seclusion on [REDACTED]'s BIP and inappropriately utilized seclusion and restraint against [REDACTED] as punishment;
- k) The WCPSS failed to follow the requirements set forth in Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act prohibiting discrimination on the basis of a person's disability; and
- l) The WCPSS failed to follow the requirements set forth in the IDEA.

11. On May 14, 2020, this Tribunal issued a Notice of Definite Hearing Date Voided (Due to Amended Petition). This Tribunal then reissued an Order Setting Due Process Hearing to start on June 22, 2020.

12. On May 22, 2020, the Parties filed a Joint Motion to Continue the Due Process Hearing.

13. On May 26, 2020, Respondent filed its Response to Petitioners' Amended Petition.

14. On June 1, 2020, the Parties jointly filed a Motion for Scheduling Order.

15. On June 3, 2020, this Tribunal adopted the Parties' Proposed Scheduling Order Setting Due Process Hearing to start on August 24, 2020.

16. On June 10, 2020, this Tribunal issued an Amended Scheduling Order delaying the due date for dispositive motions until June 26, 2020.

17. That same day, the Parties filed a Joint Motion to Amend the Scheduling Order. On June 25, 2020, this Tribunal issued a Second Amended Scheduling order setting the date for dispositive motions as July 13, 2020.

18. On June 17, 2020, Petitioners filed a Motion to Compel Discovery. Respondent filed its response on June 29, 2020.

19. On July 1, 2020, this Tribunal denied Petitioners' Motion to Compel Discovery.
20. On July 13, 2020, Petitioners filed their Motion for Partial Summary Judgment. Respondent also filed a Motion for Partial Summary Judgment.
21. On July 14, 2020, Petitioners filed a Rule 60 Motion to correct a clerical error. This Motion was granted by the Tribunal on July 15, 2020.
22. On July 28, 2020, Petitioners filed their Response to Respondent's Motion for Partial Summary Judgment.
23. On July 29, 2020, Respondent filed its Response to Petitioners' Motion for Partial Summary Judgment.
24. On July 31, 2020, Petitioners filed a Motion for Leave to File a Reply to Respondent's Response to Petitioners' Motion for Partial Summary Judgment. That same day, this Tribunal denied Petitioners' Motion for Leave to File a Reply.
25. On August 3, 2020, the Parties filed a Second Joint Motion for Consent Protective Order which was adopted by this Tribunal.
26. On August 18, 2020, Petitioners filed a Motion to Sequester Witnesses which was granted at the beginning of the hearing.
27. On August 19, 2020, the Parties filed a Joint Motion to Continue the Due Process Hearing until August 26, 2020. That same day, this Tribunal granted the Parties' Motion to Continue.
28. On August 19, 2020, this Tribunal denied Petitioners' Motion for Partial Summary Judgment and granted Respondent's Motion for Summary Judgment dismissing Petitioners' claims prior to February 21, 2019.
29. On August 19, 2020, Respondent filed a Partial Motion to Dismiss Petitioners' ADA and Section 504 claims which was granted at the start of the hearing on August 26, 2021.
30. Before the hearing on August 26, 2020, Respondent filed a Motion in *Limine* to exclude several of Petitioners' exhibits as well as to prevent testimony on the exhibits. Oral arguments were made that morning by both Parties before the Tribunal, the Undersigned reserved ruling on the Motion since it was not clear how the evaluations would be used. Ultimately, during the testimonies of Petitioners' expert witnesses, the May 20, 2020 Informal Dynamic Social Comm. and Pragmatic Language Assessment and Recommendations (Pet. Ex. 29) and the May 29, 2020 Psychoeducational (Pet. Ex. 30) evaluation were admitted. However, the July 9, 2020 Occupational Therapy Evaluation (Pet. Ex. 31) was excluded,

31. On August 27, 2020, the Parties filed a Final Proposed Pre-Trial Order.
32. The initial hearing in this matter encompassed ten (10) days of hearings, from August 26-28, and 30, and September 2-4, 16-18, 2020.
33. At the close of Petitioners' Case-in-Chief on September 3, 2020, Respondent moved to dismiss portions of Petitioners' case pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. This Tribunal denied Respondent's Motion.
34. During the due process hearing, Petitioners orally made a Motion for Reconsideration regarding the granting of Respondent's Motion for Partial Summary Judgment.
35. On October 5, 2020, this Tribunal granted Petitioners' Motion for Reconsideration and allowed Petitioners to present evidence as to whether the Petitioners knew or should have known about how CPI techniques, restraint, seclusion, and "time-in" were actually used within the BIPs prior to February 20, 2019, and to present evidence on the appropriateness of the restraints and seclusions prior to February 20, 2019, if the statute of limitation is not applicable.
36. The hearing on the reconsideration issue was held on October 18 and 20, 2020.
37. Pursuant to the Post Hearing Order entered on October 20, 2020, the Parties filed their respective exhibits with verifications, exhibits officially noticed, and the stipulated exhibits on October 23, 2020.
38. Volumes 1-6 of the transcripts were received on October 23 and 27, 2020. The remainder of the transcripts were received from March 2 through 23, 2021.
39. Petitioners filed a Motion to Exclude Evidence Exhibits A-X on April 5, 2021 because Respondent had not produced these documents during discovery.
40. After seeking clarification of whether Petitioners had renewed their Motion to Compel these documents and being advised that they had not, Petitioners' Motion to Exclude was denied on April 16, 2021.
41. Both Parties filed their Proposed Final Decisions on May 17, 2021.
42. On June 30, 2021, the Final Decision deadline was extended from July 14, 2021 to July 30, 2021 by Chief Administrative Law Judge Julian Mann.
43. The 5th Grade Report Card, Stipulated Exhibit 33, was inadvertently not filed in the record with the other Stipulated Exhibits and this mistake was corrected on July 22, 2021.
44. During a review of the extensive record, the Parties were asked to provide supplemental information regarding certain evidence and additional legal authority. The Parties responded on July 22, 23, & 27, 2021. Their prompts responses to this request are appreciated.

45. The record thereafter was closed.
46. The Final Decision was issued on July 30, 2021.

RECONSIDERATION OF SUMMARY JUDGMENT ORDER

Were there questions of material fact about whether Petitioners knew or should have known about how CPI techniques, restraint, and seclusion, in the BIPs developed prior to February 20, 2019 were implemented by the Respondent?

Prior to the hearing, the Undersigned granted the Board's partial motion for summary judgment, limiting the time period to be considered from February 21, 2019 through February 20, 2020. That order was based on the facts as presented at the time that Petitioners knew or should have known of the factual basis for their older claims at the time those claims arose, and that Petitioners could not show any exception to the statute of limitations.

During the hearing, certain testimony was presented raising questions of material fact about concerned whether [REDACTED]'s Parents knew or should have known of the issues they now complained about and whether there was evidence to support any of the statutory exceptions to the one-year statute of limitations. The credibility of the EBS teacher, [REDACTED] was a key factor for granting reconsideration. As indicated in the Findings of Fact below, Mr. [REDACTED] credibility was questionable and ultimately undermined much of WCPSS' case.

On October 5, 2020, this Tribunal granted Petitioners' Motion for Reconsideration and allowed the Parties to present any additional evidence as to whether the Petitioners knew or should have known about how CPI techniques, restraint, seclusion, and "time-in" were used prior to February 20, 2019. If the statute of limitation was found not applicable to those claims, the Parties were afforded an opportunity to present evidence on the appropriateness of the implementation of the restraints and seclusions prior to February 20, 2019.

Petitioners presented additional evidence on the issue in two days of supplemental hearings. Respondent presented no further evidence other than entering several exhibits.

A decision on summary judgment does not require findings of fact but the factual findings below are relevant to both the rationale for the reversal of the summary judgment order and the Final Decision.

Having reviewed all the evidence and testimony from the hearing, including the supplemental exhibits and testimony, the Undersigned now addresses the issue on reconsideration.

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, the Undersigned finds that there are questions of material fact as to whether the Petitioners knew or should have known about the use of restraint and seclusion prior to February 20, 2019, and the prior Order Granting Respondent Motion for Partial Summary Judgment on that issue is **REVERSED** and Partial Summary Judgment on that particular issue is **DENIED**.

As claims regarding the implementation of the BIPs prior to February 20, 2019 are now at issue, the Findings will start at the beginning of [REDACTED]'s 3rd grade year at [REDACTED]. Although the appropriateness of the IEPs developed prior to February 20, 2019 are not at issue, facts regarding those IEPs are included as needed for historical purposes only. Also, even though issues regarding the appropriateness of the BIPs developed prior to February 20, 2019 are no longer before this Tribunal, the December 2017 BIP is essentially the same as subsequent BIPs developed prior to the last BIP created in January 2020. As indicated below, the March 2019 and May 2019 BIPs are identical to the December 2017, May 2018, and October 2018 BIPs. The December 2017 BIP is copied into the decision for the implementation issue prior to February 21, 2019, historical purposes, and as reference to the contents of all other BIPs prior to the creation of the January 27, 2020 BIP.

FINDINGS OF FACT

At the start of the hearing in this matter, the Parties agreed to Jurisdictional, Party, and Legal Stipulations and Factual Stipulations in a Proposed Pre-Trial Order, which was approved and filed in the Office of Administrative Hearings on August 27, 2020. To the extent that Stipulations are not specifically stated herein, the Stipulations of Fact in the Order on Pre-Trial are incorporated fully by reference.

Unless specifically contradicted, this Order incorporates and reaffirms all findings of fact and conclusions of law contained in previous Orders entered in this litigation either orally at the hearings or in written format. Such Orders are appealable after issuance of this Final Decision.

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

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

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

SECTION 1: PRELIMINARY MATTERS

Parties

1. [REDACTED] was [REDACTED] years old ([REDACTED]) and in the [REDACTED] grade at the time of the filing of this Petition. Stips. 8 & 10. [REDACTED] is a “child with a disability” as that phrase is defined in IDEA, and she is categorized as Other Health Impaired (“OHI”). Stip. 11.
2. Her mother is [REDACTED] ([REDACTED] [REDACTED]’s father is [REDACTED] ([REDACTED] Stip. 9.
3. [REDACTED] and her Parents are domiciled within the boundaries of the Wake County Public School System (“WCPSS”) System. Stips. 12 & 13.
4. Wake County Schools Board of Education (“WCPSS” or “Respondent”) is the local educational agency responsible for providing [REDACTED] with a free and appropriate public education.

[REDACTED]’s Unique Circumstances

5. The focus of this contested case is the special education programming provided to [REDACTED] a student with unique, individualized educational and functional behavioral needs. As evidenced by her educational record and the testimony of Respondent’s witnesses, [REDACTED]’s unique circumstances were well-known by the school-based IEP team members. [REDACTED]’s unique behavioral, pragmatic language, and academic needs were not met. Instead of developing appropriate IEPs and BIPs to address her unique circumstances, WCPSS relied on a “cookie cutter” behavioral program built into the Elementary Behavior Support (“EBS”) classroom at [REDACTED]

Diagnoses

6. [REDACTED] is a child with average intelligence who has been diagnosed with Other Specified Bipolar and Related Disorder, Other Specified Attention-Deficit/Hyperactivity Disorder, Generalized Anxiety Disorder, Sensory Processing Disorder of her auditory, vestibular, and tactile systems, moderate Pragmatic/Social Language Communication Disorder, moderate articulation disorder, and a Nonverbal Learning Disability.⁴
7. Less than one-half of one-half percent of students (0.25%) in the United States have [REDACTED]’s combination of disabilities. Tr. vol. 6, p. 1127:23-25 (T of Dr. [REDACTED] As explained further below, the IEP and BIPs during the statutory period (and before) did not appropriately address her unusual combination of disorders.

⁴ See Stip Ex. 16 (February 28, 2013 Occupational Therapy Evaluation); Stip. Ex. 17 (April 29, 2014 Speech Language Evaluation); Stip. Ex. 18 (September 20, 2014 Speech Language Evaluation); Stip. Ex. 19 (December 9, 2014 Occupational Therapy Evaluation); Stip. Ex. 20 (December 17, 2014 Psychoeducational Evaluation); Stip. Ex. 21 (December 29, 2014 Speech Language Assessment); Stip. Ex. 22 (April 27, 2017 Psychoeducational Evaluation); Stip. Ex. 23 (May 4, 2017 Psychological Assessment); Stip. Ex. 24 (May 20, 2017 Occupational Therapy Evaluation); Stip. Ex. 25 June 7, 2017 Speech Language Evaluation); Pet. Exs. 29, 30, 92.

Behavioral Issues

8. [REDACTED] has a clear pattern of behaviors and escalation that begins in preservation on her worries, continues to loud talking, and eventually leads to verbal and then physical aggression. Tr. vol. 4, pp. 803:6-804:6 (T of [REDACTED] [REDACTED] use of “regressive speech” was also a sign she was becoming stressed or anxious. Tr. vol. 2, p. 264:12-13 (T of [REDACTED] [REDACTED] reverts to childlike language when distressed. Tr. vol. 1, pp. 88:23-89:11 (T of [REDACTED]

9. Punishing [REDACTED] while she is in this behavioral pattern only exacerbates her escalation. Tr. vol. 4, p. 805:5-7 (T of [REDACTED] Physical activity helps [REDACTED] release excess energy and be better regulated. Tr. vol. 3, pp. 555:18-556:7 (T of [REDACTED]

10. Likewise, [REDACTED] is unable to self-soothe and requires interventions to break her escalation. Tr. vol. 2, p. 281:21-24 (T of [REDACTED] *see also* Pet. Ex. 92 (“unable to self-soothe”); Tr. vol. 4, p. 834:3-4 (T of [REDACTED] Mindfulness techniques and encouragement help mitigate her behaviors. Tr. vol. 4, pp. 658:23-659:6 (T of [REDACTED]

11. [REDACTED] also has sensory issues and becomes overwhelmed when presented with too much visual stimuli. Tr. vol. 3, pp. 510:15-511:2 (T of [REDACTED] Her sensory and communication issues impact her regulation in classroom. Tr. vol. 4, pp. 809:23-810:1 (T of [REDACTED]

12. [REDACTED] has had “behavioral challenges throughout kindergarten, first, and second” grade. Tr. vol. 4, p. 725:5-6. According to a 2017 evaluation conducted by [REDACTED] near the end of [REDACTED] grade, [REDACTED] had “long evidenced emotional and behavioral dysregulation in the school environment.” Stip. Ex. 23, p.143. Related concerns included “passive suicidality” and the “spontaneous nature of her behavioral meltdowns.” *Id.* [REDACTED] was eventually diagnosed with bipolar disorder. Her primary diagnosis is severe anxiety which manifested as externalizing behaviors, including self-criticism, lack of impulse inhibition, and aggression. Tr. vol. 10, pp. 1945:15-1946:12.

13. [REDACTED] had such difficulty that she was placed on a half-day schedule in the spring of [REDACTED] grade. Stip. Ex. 22, p.135. An evaluator described this as [REDACTED] “needing to have a break from the classroom experience” due to the frequency and intensity of behavioral outbursts. Stip. Ex. 24, p.163. Near the end of the year, her [REDACTED] IEP was amended such that she was served for almost the entire school day in a separate setting. Tr. vol. 4, p. 728:12-15; Stip. 15.

14. In the April 2017 psychological evaluation, the Conners-3 T-scores indicated very elevated scores in inattention, hyperactivity, learning problems, defiance/aggression, and peer relations. Pet. Ex. 3, p. 8; Stip. Ex. 23, pp.152-155. The evaluator recommended “[l]ong-term placement in a classroom with significant social-emotional supports and access to one-on-one instruction,” stating that a “BED (behaviorally/emotionally disturbed classroom) setting, in particular, should be considered.” Stip. Ex. 23, p.158.

Pragmatic Language Deficits

15. [REDACTED] had documented pragmatic language deficits prior to her enrollment in [REDACTED]. According to the May 26, 2017 CELF-5 Pragmatic profile teacher report, [REDACTED] scored well below average (3) even though the parental report was average (9). Pet. Ex. 3, p. 7.

16. [REDACTED]'s teacher reported that: “[REDACTED] struggles with understanding non-verbal cues, reading the type and intensity of emotion that people around her are displaying with body language, facial expressions, use of voice, and use of personal space. She is unable to communicate her emotions and feelings in appropriate ways and does not accept corrective feedback as well.” Pet. Ex. 3, p. 7.

17. The BRIEF Index/Scale supported the teacher’s pragmatic profile and found that:

[REDACTED] evidences significant inattention and hyperactivity-impulsivity across home and school settings. She further evidences executive weaknesses including impulsivity, shifting weaknesses, and poor emotional control across settings. Broadened executive weaknesses are additional[ly] observed in the school environment, co-morbid challenges in terms of learning problems, defiance/aggression, peer relationship problems, and anxiety are also strongly suggested.

Pet. Ex. 3, p. 8.

18. Dr. [REDACTED] 2017 psychological evaluation was used by WCPSS to develop [REDACTED]'s IEP and speech services noted [REDACTED]'s pragmatic language deficits. Stip. Ex. 23.

19. While at [REDACTED] [REDACTED] continued to have deficits in pragmatic language and “struggles with understanding nonverbal cues, reading the type and intensity of emotions that people around her are displaying with body language, facial expressions, use of voice, and use of personal space. She is unable to communicate her emotions and feelings in appropriate ways and does not accept corrective feedback well.” Stip. Ex. 25 (incorporated into Pet. Ex. 29 by reference). [REDACTED] had a moderate pragmatic language impairment and articulation disorder which affected all areas of access to education including her nonverbal learning disability. Tr. vol 4, pp. 654:22-656:5 (T of [REDACTED])

20. [REDACTED]'s pragmatic language deficits include a lack of emotional vocabulary, a paucity of words to express internal states, very poor sentence construction at the discourse level, poor ability to link cause and effect in a social scenario, and very delayed or disordered narrative skills. Tr. vol. 4, pp. 657:4-10, 3-24; 659: 18-23 (T of [REDACTED]) [REDACTED]'s language deficits are often the antecedent for behavioral concerns. Tr. vol. 4, p. 717:5-9 (T of [REDACTED])

21. Prior to the January 2020 IEP, none of the IEPs addressed [REDACTED]'s pragmatic language deficits and the IEPs only had speech goals for articulation.

Academics

22. [REDACTED] participated in an educational evaluation in April of 2017 prior to leaving [REDACTED]. Her scores on both intellectual and achievement testing are almost entirely in the average range, with weaknesses in visual-spatial domains and processing speed. Stip. Ex. 22, pp.141-42. Relative weaknesses in reading comprehension and math problem solving were attributed to testing refusal rather than skill deficits. Stip. Ex. 22, p.139.

23. Academically, the evaluator found [REDACTED] “shows strengths in written expression, spelling and sight word reading.” In addition, the evaluator found [REDACTED] had relative strengths in writing and math calculation as well. [REDACTED] had “slightly lower scores on tests of reading comprehension and math problem solving” but the evaluator indicated “these tests were impacted by her refusal to complete items and are not likely a true reflection of her abilities.” Stip. Ex. 22, p. 139.

24. Nevertheless, her broad reading score was 97, which was within the average range. Stip. Ex. 22, p. 142. Her broad math score was 101, which also fell into the average range. The evaluator concluded [REDACTED]s “psychoeducational profile is not indicative of a learning disability.” Stip. Ex. 22, p. 139. [REDACTED]s “overall functioning is within normal limits for her age.” Stip. Ex. 22, p. 139.

25. This psychoeducational evaluation was reviewed by Dr. [REDACTED] and she refers to it in her comprehensive psychological evaluation conducted in April 18 and May 4, 2017. Stip. Ex. 23.

26. In her evaluation, Dr. [REDACTED] stated that:

Results of a recent psychoeducational evaluation indicate an intellectual profile suggestive of a Non-Verbal Learning Disability (NLD) with a large discrepancy between [REDACTED]s verbal abilities and visual-spatial abilities.

...

As is often seen in children with NLD, [REDACTED] evidences variable affect recognition skills in the absence of contextual cues, social impairments, and relative math weaknesses (e.g. difficulty with math word problems).

Stip. Ex. 23, p. 157 (emphasis in original)

27. Dr. [REDACTED] diagnosed a Non-Verbal Learning Disability, Generalized Anxiety Disorder, Other Specified Attention-Deficit/Hyperactivity Disorder, Other Specified Bipolar and Related Disorder. Stip. Ex. 23, pp. 156-57. She recommended ongoing monitoring for an emerging psychotic disorder, Obsessive-Compulsive Disorder, and Autism Spectrum Disorder. Stip. Ex. 23, p. 157. Dr. [REDACTED] made numerous recommendations for supportive services and classroom accommodations for all of [REDACTED]s academic and functional needs including [REDACTED]s non-verbal learning disability. See Stip. Ex. 23, pp. 158-161.

28. Instead of conducting their own evaluations, WCPSS used the independent evaluations provided by [REDACTED]'s Parents and [REDACTED] School. Although well documented in [REDACTED]'s educational records, WCPSS did not address [REDACTED]'s test anxiety, non-verbal learning disability, reading comprehension, or math problem solving deficit. Inexplicably, prior to the January 2020 IEP, [REDACTED] was pulled out of regular math instruction and taught in the special education classroom with no math goals even though WCPSS contends she had been doing grade level math.

School History

29. Prior to enrollment at WCPSS, [REDACTED] attended [REDACTED] School ("[REDACTED]") from 2014-2017. Stip. 14. While attending [REDACTED] on January 16, 20[REDACTED] after conducting a Functional Behavior Assessment ("FBA"), the IEP team developed an IEP and a BIP for [REDACTED]. She was found eligible under the category of Other Health Impaired ("OHI"). [REDACTED]'s final IEP, developed at [REDACTED] in 2017, placed her in a separate setting for the entire instructional day. Stip. 15.

30. Neither [REDACTED]'s 2017 IEP nor BIP from [REDACTED] were entered into evidence.

31. Mr. [REDACTED] the EBS lead classroom teacher, admitted that the BIP from [REDACTED] did not include restraint or seclusion. Tr. vol. Tr. vol. 8, p. 1553:13-19 (T of [REDACTED] *see also* Tr. vol. 11, p. 2089:5-8 (T of [REDACTED]

32. [REDACTED]'s Parents describe the behavioral interventions used by [REDACTED] and how [REDACTED] was removed from the regular education when her behavior escalated. [REDACTED] was never secluded at Wood [REDACTED] Tr. vol. 11, p. 2087:4-6 (T of [REDACTED]. At [REDACTED] it was common practice to take a disruptive student from the class to the quiet room and give them a place to decompress then head them back into the classroom. Tr. vol. 1, p. 2176 (T of [REDACTED]. The quiet room was not a closet where students were shut up. Tr. vol. 11, pp. 2215:20-2216:8 (T of [REDACTED]. [REDACTED]'s practice of putting [REDACTED] in a little room and holding the door shut was a lot different than the [REDACTED] use of the quiet room. Tr. vol. 11, p. 2216:9-22 (T of [REDACTED]

33. [REDACTED] transferred from [REDACTED] to WCPSS prior to the start of [REDACTED] grade 2017-2018 school year. Tr. p. 514:8-10. [REDACTED] attended [REDACTED] Elementary School ("[REDACTED]") from August 28, 2017 until January 27, 2020, where she was assigned to the regional Elementary Behavior Support ("EBS") program. Stip. 16.

34. Although she began the 2017-2018 school year at [REDACTED] an IEP meeting was not held until November 7, 2017, (Pet. Exs. 2, 3, 5, 6). The [REDACTED] BIP was not revised at the November 7, 2017 IEP meeting because the IEP team wanted to conduct another FBA prior to developing the BIP. A new BIP was developed at a subsequent IEP meeting held on December 12, 2017 (Pet. Ex. 7). Because a new IEP and BIP were not developed until November and December 2017, 3 months after school started, WCPSS was required to implement the [REDACTED] IEP and BIP until it developed a new IEP. 20 U.S.C. § 1414(d)(2)(C)(i)(I); 34 C.F.R. 300.323(e)(2).

35. During her tenure at [REDACTED] IEP team meetings were held to develop an IEP, a BIP, or both, on: November 11, 2017 (IEP only), December 12, 2017 (BIP only), May 22, 2018 (IEP & BIP), October 18, 2018 (IEP & BIP), March 26, 2019 (IEP & BIP), May 15, 2019 (IEP & BIP), October 17, 2019 (IEP only), and January 27, 2020 (IEP & BIP).

36. A Functional Behavior Assessment (“FBA”) was conducted at the December 2017 IEP meeting to assist with the development of the December 2017 BIP. The 2017, 2018, and 2019 BIPs were the same except for the addition of some strategies suggested by [REDACTED]’s Parents which were included on the BIP reviews of the October 2018 and March 2019 BIPs.

37. Prior to the development of the January 2020 IEP, the 2017 through 2019 IEPs contained similar functional/behavioral and articulation speech goals. The functional /behavioral goal(s) were monitored by the “behavior chart” and teacher observation logs which is known as the Daily Point Sheet (“Point Sheet”). Prior to January 2020, although [REDACTED] did not have any math goals, she was placed in the EBS special education classroom for 60 minutes sessions, 5 times a week for math instruction. In addition to speech-language services, she received 50 minutes sessions, 5 times a week for social/emotional skills instruction. Because of her behavioral issues and needs, she was placed in a resource setting with 40%-79% of the day with non-disabled peers to receive “instruction of the common core standards”. Pet. Ex. 6, p. 28.

38. At the October 17, 2019 IEP meeting, [REDACTED]’s Parents requested an independent FBA to which WCPSS agreed. An independent FBA was conducted by Dr. [REDACTED] in January 2020. After its completion, an IEP meeting was held on January 27, 2020, to revise the IEP and the BIP. Significant changes were made to [REDACTED]’s educational programming, placement, and BIP at that meeting. At the end of the meeting, [REDACTED]’s Parents notified WCPSS that they intended to place [REDACTED] in a private program.

39. After her Parents rejected the January 2020 IEP and withdrew her from [REDACTED] [REDACTED] began attending “[REDACTED]” a private school for students with disabilities, located in Wake County. Stip. 26.

Credibility of Witnesses

Petitioners’ Witnesses

40. Petitioners called three expert witnesses: Dr. [REDACTED] Dr. [REDACTED] and [REDACTED]

Expert Witnesses

[REDACTED] *Ed.D., BCBA (Tr. vols. 1, 2, &12)*

41. Dr. [REDACTED] was qualified as an expert in the areas of behavior assessment and intervention for student behaviors, including Positive Behavior Intervention Systems (“PBIS”); functional behavior assessments (“FBAs”); behavior intervention plans (“BIPs”); co-teaching as it relates to behavior issues and including academic in light of behavioral issues; appropriate use

of paraprofessionals as to behavior issues; IEP development with respect to behaviors goals, accommodations, and services; evidence-based practices with respect to the interaction between academic and behavior issues; and behavior response to intervention (“RTI”); multi-tiered systems of support (“MTSS”) with respect to behavior; progress monitoring as it relates to behavior; and inclusion as behavior impacts academics.

42. Dr. [REDACTED] professional experience includes working as a general education teacher, special education teacher, inclusion specialist, Associate Director for Florida Atlantic University’s Center for Autism and Related Disabilities; teaching courses in the assessment of exceptional children and behavior management at Winthrop University; and working as an educational consultant to assist school districts and independent educational evaluator.

43. Dr. [REDACTED] has presented at multiple conferences and published three (3) books as well as three (3) book chapters on topics including inclusion; seventeen (17) peer-reviewed articles on topics such as multi-tiered systems of support; positive behavior intervention and support; inclusion and understanding ASD. The Undersigned found Dr. [REDACTED] to be credible and knowledgeable about [REDACTED]’s unique circumstances and disability based on her observation of [REDACTED] in different classroom settings in the WCPSS, her evaluation of [REDACTED] for a Functional Behavioral Assessment at the WCPSS, review of [REDACTED]’s educational record, and conversations with [REDACTED] and her parents.

44. Dr. [REDACTED] was the only expert offered in the areas in which she testified. As such, her testimony was both informative and persuasive to the Undersigned as almost all the issues in this hearing were related to her areas of expertise and is given considerable weight throughout this decision.

45. Respondent acknowledged Dr. [REDACTED] expertise in the sense that Respondent paid for Dr. [REDACTED] to conduct the independent FBA of [REDACTED] and adopted many of her recommendations in the January 2020 BIP. Respondent proffered no opposing expert testimony.

[REDACTED] MS/CCC/SLP (Tr. vol. 4)

46. [REDACTED] was qualified as an expert in the areas of pediatric speech pathology, speech-language deficits, and disorders, pragmatic, language deficits and disorders, development of speech and language goals for IEPs, progress monitoring for speech and language goals, and the curriculum of social thinking.

47. Ms. [REDACTED] professional experience includes working as a Speech-Language Pathologist at Brookline Public Schools in Brookline, MA; Clinical Coordinator at Duke University Medical Center, Department of Speech Language Pathology and Audiology; Senior Clinician at a Duke University Medical Center, Department of Speech Language Pathology and Audiology; Educator with North Carolina Health and Human Services Division of Child Development and Early Education; and working private speech-language pathologist.

48. Ms. [REDACTED] conducted a speech-language evaluation of [REDACTED] in May 2020. Ms. [REDACTED] also reviewed [REDACTED]’s educational record, met with [REDACTED]’s parents, met with [REDACTED] and

observed [REDACTED] at her private placement. Furthermore, after evaluating [REDACTED] Ms. [REDACTED] began providing direct speech therapy to [REDACTED]

49. Ms. [REDACTED] was the only expert offered in the areas of pediatric speech pathology, speech-language deficits and disorders, pragmatic language deficits and disorders, development of speech and language goals for IEPs, progress monitoring for speech and language goals, and the curriculum of social thinking. As such, her testimony about speech related services provided to [REDACTED] by Respondent, the appropriateness of IEP speech goals contained in the March 2019, May 2019, October 2019, and January 2020 IEPs was both informative and persuasive to the Undersigned is given appropriate weight.

50. WCPSS Speech Therapist [REDACTED] [REDACTED] was not proffered as an expert witness by Respondent, however, her testimony was given proper deference.

[REDACTED] *Ed.D., Ph.D. (Tr. vols. 6 & 11)*

51. Dr. [REDACTED] was qualified in the areas of: school and community inclusion for students with complex, multiple disabilities; inclusive instruction; supplemental aids and services; teacher training and support related to students with disabilities; collaborative teaming with IEP teams who work with children with complex and multiple disabilities; IEP implementation and development; progress monitoring; educational policy related to students with disabilities; evaluation of students with disabilities with respect to the implications of the evaluation results and interpretation of the evaluation results; positive behavior interventions and supports (PBIS); impact of restraint and seclusion on a student's education including functional, emotional, behavioral, and social skills; appropriateness of placement and service delivery of students with complex and multiple disabilities; and compensatory education or related services that may be needed to remediate any deficits caused by the school's failure to provide legally the necessary educational and functional services.

52. Dr. [REDACTED] has published over thirty (30) books, over fifty (50) chapters, and over two hundred twenty-five (225) peer-reviewed journal articles, all of which focus on educating students with significant disabilities. Dr. [REDACTED] has presented at hundreds of conferences and workshops on developmental disabilities and the core principles of the IDEA.

53. Dr. [REDACTED] had direct contact with [REDACTED] and her family as part of gathering information to form the basis of her opinions about [REDACTED]'s educational programming and her preparation to testify on [REDACTED]'s behalf. Dr. [REDACTED] reviewed [REDACTED]'s educational record. In addition, Dr. [REDACTED] observed [REDACTED] virtually at [REDACTED]

54. The Undersigned found Dr. [REDACTED] to be credible and knowledgeable about [REDACTED]'s unique circumstances and disability based on her review of [REDACTED]'s educational records, evaluations, meeting with [REDACTED] and her parents, and observing [REDACTED] in her private placement. As Dr. [REDACTED] was a credible expert witness, her testimony will be given considerable weight throughout the Final Decision.

55. As Dr. [REDACTED] was the only expert qualified in each area in which she testified, except for Dr. [REDACTED] expertise in positive behavior support, her testimony will be given weight particularly in these areas throughout the Final Decision. Respondent proffered no opposing expert testimony.

Fact Witnesses

56. Petitioners called eleven fact witnesses: [REDACTED] Dr. [REDACTED] Dr. [REDACTED] Dr. [REDACTED], and [REDACTED]

[REDACTED]s Parents (Tr. vol. 3, 4, 5, & 11)

57. [REDACTED]s parents, Petitioners [REDACTED] and [REDACTED] were credible, even though, as [REDACTED]s parents, they have an explicit and implicit bias for the best interests of [REDACTED]. As [REDACTED]s parents were credible witnesses, their testimony will be given weight throughout the Final Decision.

58. Petitioner [REDACTED]s testimony was corroborated by [REDACTED]s educational record, his experience as an employee of WCPSS, and the testimony of other witnesses.

59. Petitioner [REDACTED]s testimony was corroborated by [REDACTED]s educational record and the testimony of other witnesses.

[REDACTED] (Tr. vol. 2)

60. Ms. [REDACTED] witnessed school staff restraining [REDACTED] and carrying her out of the cafeteria at [REDACTED] Elementary on February 21, 2019. Ms. [REDACTED] filmed the encounter using her cellphone.

61. Ms. [REDACTED] worked for the [REDACTED] department as a [REDACTED] and [REDACTED].

62. Ms. [REDACTED] children attended [REDACTED] with [REDACTED] during the relevant time period. Ms. [REDACTED] also spent time with [REDACTED] outside of school due to her friendship with Ms. [REDACTED] daughter. Ms. [REDACTED] was able to accurately identify [REDACTED]s behaviors when she became anxious.

63. Her testimony often contradicted the testimonies of WCPSS' witnesses and their documentation of the incident in the Point Sheet. Where these descriptions of the Cafeteria Incident differ, credence is given to Ms. [REDACTED] version and what is shown on the video.

64. Ms. [REDACTED] was credible regarding her first-hand observations of the restraint at [REDACTED] and her testimony will be given weight in the Final Decision as it relates to these issues.

Dr. [REDACTED] (Tr. vol. 11)

65. Dr. [REDACTED] the designee of the North Carolina Department of Public Instruction, testified regarding reporting requirements for the use of restraint and seclusion in North Carolina schools.

66. Dr. [REDACTED] is the section chief for digital teaching and learning for NC DPI, which includes the program PowerSchool.

67. Dr. [REDACTED] was credible and knowledgeable about the process for reporting seclusion and restraint in PowerSchool based on state and federal regulations. His testimony will be given weight throughout the Final Decision as it relates to the appropriateness of the WCPSS' reporting and recording of [REDACTED]'s restraints and seclusions through PowerSchool.

[REDACTED] [REDACTED] [REDACTED] OTR/L (Tr. vol. 2)

68. [REDACTED] a private occupational therapist, evaluated [REDACTED] in July 2020.

69. Ms. [REDACTED] has worked as an occupational therapist for thirty (30) years and currently works as an occupational therapist at [REDACTED] Therapy, Inc.

70. Ms. [REDACTED] was credible and knowledgeable about [REDACTED]'s sensory needs based on her 2020 evaluation. However, as Ms. [REDACTED] was unable to confirm that she had reviewed [REDACTED]'s 2017 evaluation to know if the same issues were present when [REDACTED] was enrolled in the WCPSS, her 2020 evaluation was not admitted, and her testimony not considered in this Final Decision.

Dr. [REDACTED] [REDACTED], Ph. D., [REDACTED] HS-P (Tr. vol. 2)

71. Dr. [REDACTED] [REDACTED] conducted a psychoeducational evaluation of [REDACTED] on May 29, 2020.

72. Dr. [REDACTED] currently works as a psychologist at [REDACTED] [REDACTED] Psychology. Dr. [REDACTED] reviewed [REDACTED]'s past evaluations, observed [REDACTED] and evaluated her.

73. Dr. [REDACTED] was credible and knowledgeable about [REDACTED]'s unique circumstances and disability. Her testimony will be given weight throughout the Final Decision particularly as it relates to the impact of [REDACTED]'s non-verbal learning disability. This information was corroborated by Dr. [REDACTED] 2017 psychological evaluation (Stip. Ex. 23), which were available and used to develop [REDACTED]'s IEPs and BIPs throughout her tenure in the WCPSS.

Dr. [REDACTED] [REDACTED] M.D. (Tr. vol. 3)

74. Dr. [REDACTED] [REDACTED] a child, and adolescent psychiatrist provided psychiatric counseling to [REDACTED] since November 2019.

75. Dr. [REDACTED] is the medical director and a practicing psychiatrist at 3-C Family Services. Tr. vol. 3, 370:3-8. She also has an adjunctive clinical appointment at Duke University.

76. Dr. [REDACTED] was familiar with [REDACTED]'s unique circumstances and disabilities. Dr. [REDACTED] began providing [REDACTED] with psychiatric therapy more than a year earlier in November 2019. Dr. [REDACTED] was also familiar with the impact of the WCPSS' use of restraint and seclusion on [REDACTED]'s mental health.

77. Dr. [REDACTED] was credible and knowledgeable about [REDACTED]'s unique circumstances and disability. Her testimony will be given weight throughout the Final Decision as it relates to [REDACTED]'s functional and emotional needs, the ongoing impact of the school's behavioral programming, and use of seclusion and restraint on [REDACTED].

Dr. [REDACTED] M.D. (Tr. vol. 2)

78. Dr. [REDACTED] a child, adolescent, and adult psychiatrist, provided psychiatric counseling to [REDACTED] from summer 2017 to October 2019.

79. Dr. [REDACTED] was familiar with [REDACTED]'s unique circumstances and disabilities. Dr. [REDACTED] was also familiar with the impact of the WCPSS' use of restraint and seclusion on [REDACTED]'s mental health.

80. Dr. [REDACTED] was credible and knowledgeable about [REDACTED]'s unique circumstances and disability. Her testimony will be given weight throughout the Final Decision as it relates to [REDACTED]'s functional and emotional needs, the impact of the school's behavioral programming, and use of seclusion and restraint on [REDACTED] during the time she was [REDACTED]'s treating psychiatrist.

[REDACTED] (Tr. vol. 3)

81. [REDACTED] is the owner and director of the [REDACTED] the private school [REDACTED] began attending in [REDACTED]. Ms. [REDACTED] holds an advanced bachelor's degree in psychology as well as a teaching certification and master's degree in special education. She previously taught in the WCPSS.

82. [REDACTED] School ("[REDACTED]" is a K-12 private school for children with disabilities. It provides individualized instruction to address students' academic, behavior, social, and emotional needs.

83. Ms. [REDACTED] testified to having various personal interactions with [REDACTED] while she attended [REDACTED]. Ms. [REDACTED] described [REDACTED] her needs, the impact of the WCPSS' seclusion and restraint on her anxiety, and how [REDACTED] presented in the school environment.

84. Ms. [REDACTED] was credible and knowledgeable about [REDACTED]'s unique circumstances and disability. Her testimony will be given weight as it relates to [REDACTED]'s educational and behavioral needs and to the appropriateness of the private school program.

██████████ (Tr. vol. 3)

85. ██████████ is a teacher at ██████████ who taught ██████████ from February to June 2020 during the 2019-2020 school year. Ms. ██████████ earned her undergraduate degree in adaptive special education from East Carolina University.

86. Ms. ██████████ described ██████████ her needs, and how she presented in the school environment at the private school. Ms. ██████████ also described her interactions with ██████████'s parents and communications with them about ██████████'s needs.

87. Ms. ██████████ was credible and knowledgeable about ██████████'s unique circumstances and disability. Her testimony will be given weight as it relates to ██████████'s educational, emotional, and behavioral needs during the time immediately after she left WCPSS as well as to the appropriateness of the private school program.

██████████ (Tr. vol. 3)

88. ██████████ is a teacher at ██████████ who taught ██████████ during summer school in 2020. Ms. ██████████ has taught special education students for six (6) years.

89. Ms. ██████████ was familiar with ██████████'s unique circumstances and disabilities. Ms. ██████████ described ██████████ her needs, ██████████'s descriptions of her negative experiences in the WCPSS, and how she presented in the summer school environment. Ms. ██████████ also described how ██████████'s parents were very communicative and supportive.

90. Ms. ██████████ was credible and knowledgeable about ██████████'s unique circumstances and disability. Her testimony will be given weight as it relates to ██████████'s educational, emotional, and behavioral needs as well as to the appropriateness of the private program.

Respondent's Witnesses

Expert Witness

██████████ ██████████ M.S., M.D. (Tr. vol. 10)

91. ██████████ ██████████ M.D., a child, adolescent, and adult psychiatrist, testified on behalf of WCPSS. Dr. ██████████ currently works at Family Psychiatry and Psychology Associates. Most of her patients are school-aged children. Dr. ██████████ was qualified as an expert in child and adolescent psychiatry.

92. Dr. ██████████ had no first-hand knowledge of the teaching methods particular to ██████████ which were in the EBS classroom at ██████████

93. While Dr. ██████████ is credible and highly qualified as a psychiatrist, her testimony was based on conversations with Mr. ██████████ therapy notes; and documents from ██████████'s cumulative education record and EC file. She had never met ██████████ did not speak with ██████████'s current

or former treating psychiatrist, did not even review all available neuropsychological evaluations or gather information about the therapies [REDACTED] had received prior to her testimony. The primary purpose of her testimony was to opine that [REDACTED] had been misdiagnosed as bipolar, an issue not before this Tribunal. She also speculated that medication changes could have contributed to the escalation in [REDACTED]'s behaviors. Dr. [REDACTED] testimony will be given appropriate weight in this decision regarding those issues.

Fact Witnesses

94. Respondent called five fact witnesses: [REDACTED] a WCPSS administrator who oversees the county's behavioral programs, and [REDACTED] Staff - [REDACTED]'s EC-EBS teacher; [REDACTED] " [REDACTED] Assistant Principal; [REDACTED]'s regular 5th grade education teacher; and [REDACTED]'s speech therapist.

[REDACTED] [REDACTED]'s EBS Teacher for 3rd, 4th, and 5th grades (Tr. vols. 7&8)

95. [REDACTED] taught [REDACTED] in the EBS classroom with other 3rd, 4th, and 5th graders with behavioral problems. He was [REDACTED]'s EBS teacher for the 3rd and 4th grades as well as half of the 5th grade. Mr. [REDACTED] also taught [REDACTED] regular common core math instruction after she was pulled out of the regular math classroom in November 2017. Mr. [REDACTED] was Respondent's central fact witness and the one primarily responsible for the implementation of the [REDACTED]'s IEPs and BIPs.

96. Mr. [REDACTED] has a B.A. in psychology; and is licensed in EC General curriculum K through 12 and EC science, social studies, and math K through 6. Prior to coming to [REDACTED] Mr. [REDACTED] taught as a teacher assistant and then special education teacher at the [REDACTED] Program, an alternative school from 2009 to 2015. In 2015 when [REDACTED] opened, he moved from the [REDACTED] Program to [REDACTED] to teach in the EBS II classroom, grades 3rd through 5th. His [REDACTED] taught the EBS I classroom which had grades kindergarten through 2nd.

97. Because the EBS program uses restraint on its students, Mr. [REDACTED] must be trained in CPI techniques. Mr. [REDACTED] used CPI techniques and seclusion at both the alternative school and [REDACTED]. As an employee of WCPSS, he is expected to know WCPSS' policy regarding the use of restraint and seclusion and to be familiar with the EBS Best Practices Manual. Mr. [REDACTED] along with other EBS teachers, attend quarterly meetings with [REDACTED] Ms. [REDACTED] is WCPSS' senior administrator for the social behavioral programming team who oversaw the K-12 behavioral programming including the EBS program at [REDACTED].

98. Mr. [REDACTED] interacted directly with Petitioners [REDACTED] [REDACTED] and [REDACTED] before and during [REDACTED]'s enrollment in the WCPSS. Mr. [REDACTED] provided [REDACTED] direct instruction in social skills, replacement behavioral strategies, and math.

99. Mr. [REDACTED] testimony frequently did not align with the documentary evidence in the case, conflicted with his previous testimony, or his recollection of events was unsubstantiated from the record or other testimony. *Compare* Tr. vol. 8, 1578:23-1579:4 (Mr. [REDACTED] testifying [REDACTED] received social skills instruction with all EBS II students) *with* Tr. vol. 8, 1586:19-1587:9 (Mr. [REDACTED] testifying he did not provide social skills materials in discovery) *and* 1619:10-15

(Mr. [REDACTED] testifying he does not have data on when a particular strategy was used with [REDACTED] *compare* Tr. vol. 8, 1633:22-1634:6 (Mr. [REDACTED] testifying in cafeteria incident video [REDACTED] would have jumped in the air but he would not have lifted her) *with* Pet. Ex. 78 (Video of [REDACTED] being restrained and lifted by Mr. [REDACTED] *compare* Tr. vol. 8, 1547:5-12 (Mr. [REDACTED] did not have an individual schedule) *with* Tr. vol. 8, 1549:1-7 (Mr. [REDACTED] testifying he wrote [REDACTED] a personalized schedule). Tr. vol. 8, 1571:11-16, 1572:11-13 (Testifying [REDACTED] was secluded on November 3, 2017, but it was not reported on the Google Form); *compare* Tr. vol. 7, 1485:15-1486:5 (Mr. [REDACTED] testifying he showed [REDACTED]s parents the seclusion room prior to [REDACTED] beginning third grade) *with* Tr. vol. 8, 1534:12-1535:12 (Mr. [REDACTED] equivocating on cross about showing [REDACTED]s parents the seclusion room and saying he was unable to remember when he showed it to them but that it was part of standard procedure).

100. Disturbing is that, based on his training, Mr. [REDACTED] knew that “time-out” is not the same as seclusion. Despite knowing this, the entire time [REDACTED] was in his classroom, he routinely mischaracterized to [REDACTED]s Parents that she was in “time-out”, in the “quiet room” or in the “safe room” when in fact, she was placed in seclusion.

101. For these reasons, as well as his demeanor during his testimony, Mr. [REDACTED] was not credible as a fact witness; nor was his testimony credible regarding [REDACTED]s educational programming, the policies, and practices employed in the WCPSS for students assigned to the EBS program, CPI techniques or when the use of restraint and seclusion is necessary.

102. Mr. [REDACTED] testimony was not bolstered or rehabilitated by WCPSS’ other witnesses from [REDACTED] WCPSS central office, or by its expert witness.

103. Mr. [REDACTED] was admonished twice to answer questions during his cross-examination. *See* Tr. vol. 8, pp. 1555:19-1556:15; 1566:17-1567:11. It was his testimony which caused the Undersigned to reconsider previously dismissed claims. His lack of credibility cast doubt on WCPSS entire case. He is perhaps the only witness in a special education contested case hearing that the Undersigned has questioned his creditability on the record. Tr. vol. 8, p. 1644:305.

104. Except in the few occasions where his testimony was corroborated with documentary evidence, the Undersigned gave it little or no weight.

[REDACTED] “[REDACTED] [REDACTED] Assistant Principal of [REDACTED] (Tr. vol. 8)

105. [REDACTED] “[REDACTED] [REDACTED] is an Assistant Principal at [REDACTED] She received her bachelor’s degree in Psychology from the University of North Carolina – Chapel Hill and her master’s degree in School Administration from North Carolina State University. Ms. [REDACTED] has served a teacher and administrator for fifteen (15) years. She worked as the Assistant Principal of [REDACTED] since 2016. This was her first administrative position.

106. Ms. [REDACTED] participated as the LEA Representative and meeting minute-taker in most of [REDACTED]s IEP meetings since her enrollment at [REDACTED] in August 2017 until [REDACTED]s departure in January 2020.

107. Ms. [REDACTED] testified to observing the EBS classroom several times per week. She also would be called to the EBS classroom to help de-escalate students. However, on cross-examination, Ms. [REDACTED] admitted she had never received any specific training regarding the EBS Program.; does not know where specific EBS procedures for restraint and seclusion come from; does not have a copy of the EBS Best Practices Manual and has not attended EBS trainings.

108. Ms. [REDACTED] lacked understanding regarding when it would be appropriate to physically restrain and seclude a child, thought it would be appropriate to restrain and seclude a child for climbing on a bookcase or for lifting a table.

109. Her testimony was frequently unsupported by the documentary evidence. She testified to the content of Mr. [REDACTED] social skills lessons but had never reviewed Mr. [REDACTED] lesson plans which Mr. [REDACTED] admittedly did not have.

110. At least in one instance, her testimony was contradictory to her prior statements. Ms. [REDACTED] testified that seclusion was not a teaching tool. But, in her email to [REDACTED]s Parents, she stated that: “[t]he utilization of the quiet room is something [Principal [REDACTED]⁵ and I feel is critical to the success of the EBS program as *students are able to learn* to identify the point at which their behaviors are not safe enough to continue being around others.” Pet. Ex. 76, pp. 700-01 (emphasis added). Principal [REDACTED] an agent of WCPSS, did not testify or otherwise deny this statement that the use of seclusion was critical to the success of the EBS program.

111. Although Ms. [REDACTED] was a credible witness, her testimony was not worthy of much deference due to her lack of understanding of both the EBS program, the legally appropriate use and reporting of seclusion and restraint, and the absence of any documentary evidence to support her testimony about Mr. [REDACTED] social skills instruction. Her testimony was given appropriate weight.

[REDACTED] [REDACTED] *5th Grade Reading, Science and Social Studies Teacher (Tr. vol.9)*

112. [REDACTED] [REDACTED] a fifth-grade teacher at [REDACTED] provided [REDACTED] direct instruction during the 2019-2020 school year in reading, science, and social studies until [REDACTED] left in January 2020. Mr. [REDACTED] purportedly collaborated with her on [REDACTED]s math instruction. However, even though Mr. [REDACTED] taught [REDACTED] regular 5th-grade math during that period, he produced no math lesson plans. Ms. [REDACTED] offered no documentary evidence about Mr. [REDACTED] math instruction.

113. Ms. [REDACTED] was a credible witness, and her testimony was given the appropriate weight.

⁵ Principal [REDACTED] “[REDACTED] [REDACTED] is an agent of WCPSS but did not testify to refute this statement. See *Farrell v. Transylvania County Board of Education*, 175 N.C. App. 689 (COA 2006) (finding school administrators like superintendents, principals, assistant principals, EC directors are public officials delegated by the acting on behalf of the school district). [REDACTED] [REDACTED] as a senior administrator for WCPSS is also a public official.

██████████ *Speech-Language Pathologist (Tr. vol. 9)*

114. Ms. ██████████ has served as a speech language pathologist in the WCPSS for nine (9) years. Ms. ██████████ served as ██████████'s speech-language pathologist at ██████████ including providing speech therapy since Fall 2017 on ██████████'s articulation goals.

115. Ms. ██████████ testified she only observed the EBS classroom “maybe a little less than once a month.” Tr. vol. 9, 1793:1-7. Similarly, Ms. ██████████ was unable to identify any specific social skills lessons she saw ██████████ receive in the EBS classroom, but rather generalized what activities or methods would be used to teach social skills. She admitted that she never reviewed Mr. ██████████'s lesson plans for social skills.

116. The primary purpose of Ms. ██████████'s testimony was to justify the lack of pragmatic language goals and the reduction of speech service in the IEPs. Ms. ██████████ was a credible witness and deference was given to her testimony except with respect to ██████████'s need for pragmatic language therapy because, even though she had provided speech therapy to ██████████ since 2017, she had limited information about ██████████'s pragmatic language deficits.

██████████ *Senior Administrator for the Social Behavioral Programming Team
(Tr. vol. 7)*

117. ██████████ is WCPSS' senior administrator for the social behavioral programming team. She oversaw K-12 behavioral programming at the 54 EBS classrooms across 30 schools in the WCPSS including the EBS program at ██████████. Ms. ██████████ did not provide ██████████ any direct instruction; however, she did participate at some of the January 2020 IEP meeting, but she had to leave early.

118. Ms. ██████████ was a credible witness and insightful in her testimony regarding WCPSS' EBS program procedures.

SECTION II: PARENTS' KNOWLEDGE OF THE USE OF RESTRAINT AND SECLUSION PRIOR TO FEBRUARY 21, 2019

119. To understand the proper use of the terminology in this case, a review of the statutory definitions is necessary.

The Use of Seclusion and Restraint

Generally

120. The IDEA does not address the use of seclusion and restraint. The only specific admonition related to behavioral programming is that “in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 20 U.S.C. § 1414(d)(3)(B)(i). It is undisputed that ██████████'s behavior impacted her learning and that of her peers.

121. The North Carolina General Assembly recognized the detrimental impact of restraint and seclusion in 2005 when it passed the “Deborah Greenblatt Act” prohibiting the illegal use of restraint and seclusion on public school students. N.C. Gen. Stat. § 115C-47(45); N.C. Gen. Stat. § 115C-391.1.

122. According to the United States Department of Education, “[r]estraint or seclusion should never be used as punishment or discipline (e.g., placing in seclusion for out-of-seat behavior), as a means of coercion or retaliation, or as a convenience.” *See* Pet. Ex. 122.

123. In 2016, the Office for Civil Rights (“OCR”) issued a *Dear Colleague Letter* outlining how the “use of restraint or seclusion may have a traumatic impact” resulting in a denial of FAPE.⁶ *See* Pet. Ex. 107. When and under what conditions school personnel may seclude a student is dictated by State law and as explained fully later in the Conclusions of Law.

Seclusions of Petitioner [REDACTED] by Respondent Prior to February 21, 2019.

124. The following chart outlines the dates and times of [REDACTED]’s seclusion by Respondent based on Petitioners’ Exhibit 35 (Daily Point Sheets), Petitioners’ Exhibit 43 (Google Form Responses), and Petitioners’ Exhibit 141 (Additional Point Sheets).

Seclusions – Petitioners’ Exhibits 35, 43, and 141			
	Date	Time	Duration
1.	9/12/2017	2:50 – 3:30 PM*	40 minutes
2.	9/25/2017	10:45-11:35 AM	50 minutes
3.	9/25/2017	11:50 AM -12:00 PM	10 minutes
4.	9/25/2017	2:25-3:15 PM	50 minutes
5.	10/19/2017	12:55-1:40 PM**	45 minutes
6.	10/19/2017	1:45-2:45 PM	1 hour
7.	11/13/2017	11:15-11:25 AM	10 minutes
8.	11/13/2017	11:32 AM -12:05 PM	33 minutes
9.	11/13/2017	12:30-1:05 PM	35 minutes
10.	11/16/2017	11:05-11:15 AM	10 minutes
11.	11/16/2017	12:38-12:52 PM	14 minutes
12.	11/16/2017	4:00-4:30 PM	30 minutes
13.	11/20/2017	10:08-10:19 AM	11 minutes
14.	11/20/2017	10:33 AM -12:00 PM	1 hour 27 minutes
15.	11/27/2017	12:40-1:30 PM	50 minutes
16.	12/14/2017	1:32-1:43 PM	11 minutes
17.	3/23/2018	12:55-2:02 PM	1 hour 7 minutes
18.	4/26/2018***	12:25-12:37 PM	12 minutes
19.	9/10/2018****	3:17-3:45 PM	28 minutes
20.	10/5/2018	11:40-11:51 AM	11 minutes

⁶ This letter was provided to the WCPSS on January 11, 2017 in a statewide memorandum from the North Carolina Department of Public Instruction. <https://ec.ncpublicschools.gov/policies/nc-policies-governing-services-for-children-with-disabilities/ncdpi-communication/2016-2017/ec-division-memos/us-doe-updates-0117.pdf/view>

21.	10/5/2018	12:45-12:58 PM	13 minutes
22.	10/23/2018	10:04-10:15 AM	11 minutes
23.	10/31/2018	9:55-10:05 AM	10 minutes
24.	11/19/2018	2:00-2:10 PM	10 minutes
25.	2/5/2019	2:52-3:05 PM	13 minutes

Pet's Supp. Brief pp. 4-5 (filed July 23, 2021)⁷

125. Additionally, on April 16, 2018, [REDACTED] was put in the time-out room for 12 minutes. The point sheet indicates the door to the time-out room was left open; however, it is presumed [REDACTED] was not permitted to leave. With respect to the second October 5, 2018 seclusion, WCPSS disputes that the door was held closed. Even if so, WCPSS does not dispute that before the Cafeteria Incident [REDACTED] was secluded and restrained at least 22 times from September 12, 2017 to February 5, 2019. The Cafeteria Incident was the 23rd time [REDACTED] had been restrained and secluded by WCPSS during 2 school years.

126. Prior to February 21, 2019 and afterwards, in WCPSS' communications to [REDACTED]'s Parents, WCPSS staff used interchangeably for "seclusion" the terms: "quiet room", "time-out", "time-in", "take to quiet room", and "take to the safe space".

127. The term "restraint" was not listed as an intervention in the [REDACTED] BIP or any of the WCPSS' BIPs. However, restraint is a CPI technique, and the use of CPI techniques is included in WCPSS' BIPs developed during the 2017 through 2019 school years. Regardless of its exclusion in [REDACTED]'s BIPs, physical restraint can legally be used on any student but under very limited conditions.

Statutory Definitions of Seclusion, Restraint, Isolation (Time-In), and Time-Out

128. Seclusion, restraint, time-out, and isolation (time-in) are defined by State law.

129. "Physical restraint" is "the use of physical force to restrict the free movement of all or a portion of a student's body." N.C.G.S. § 115C-391.1(b)(8).

130. "Seclusion" is "the confinement of a student alone in an enclosed space from which the student is [p]hysically prevented from leaving by locking hardware or other means [or] [n]ot capable of leaving due to physical or intellectual incapacity." N.C.G.S. § 115C-391.1(b)(10).

⁷ * The Google Form Response notes this seclusion was from 2:50-3:24 PM on 9/12/2017.
 **The Google Form Response notes this seclusion was from 12:53-1:40 PM on 10/19/2017.
 *** This seclusion is not noted on the daily point sheet. The Google Form Response notes this seclusion was from 12:25-12:37 PM on 4/16/2018.
 **** This seclusion is not noted on the daily point sheet. The Google Form Response notes this seclusion was from 3:17-3:45 PM on 9/10/2018.

131. “Isolation” is a behavior management technique in which a student is placed alone in an enclosed space from which the student is not prevented from leaving.” N.C.G.S. § 115C-391.1(b)(5).

132. “Time out” is a behavior management technique in which a student is separated from other students for a limited period of time in a monitored setting.” N.C.G.S. § 115C-391.1(b)(11).

133. The use of restraint and seclusion for behavior management is an integral part of EBS. According to Assistant Principal [REDACTED] Mr. [REDACTED] and Principal [REDACTED] the EBS program could not be implemented with fidelity without the use of seclusion and restraint. However, seclusion and restraint are not behavior management techniques. Only, isolation (time-in) and time-out are behavior management techniques.

Notice Requirements for the Use of Restraint and Seclusion

134. N. C. Gen. Stat. § 115C-391.1(j) mandates the notice, reporting, and documentation requirements for the use of restraint and seclusion in North Carolina schools.

135. State law requires school districts to provide parents a written report of *any* restraint or seclusion within a reasonable period of time but in no event later than 30 days after the incident.

136. When physical restraint results in injury to the student, or when seclusion is used for longer than 10 minutes, the parents must be promptly notified by the end of the workday during which the incident occurred when reasonably possible but in no event later than the end of the following day.

137. Dr. [REDACTED] is the designee of the North Carolina Department of Public Instruction (“NC DPI”) and is the section chief for digital teaching and learning for NC DPI, which includes the program PowerSchool which is used to report the use of restraint or seclusion. Dr. [REDACTED] testified about the reporting requirements for the use of restraint and seclusion in North Carolina schools based on State and federal regulations.

138. The North Carolina Department of Public Instruction requires public schools to report the use of restraint and seclusion. The North Carolina Discipline Data Reporting Procedures outlines how a school is required to document restraint and seclusion under both the federal and state definitions.

139. According to Dr. [REDACTED] PowerSchool is a student information system that includes student demographic and disciplinary information. School districts are required to report certain information into PowerSchool, including the use of restraint and seclusion. Restraint and seclusion specifically show up in the PowerSchool disciplinary module.

140. To report incidents of seclusion and restraint to NC DPIs, an LEA would need to enter the information in PowerSchool, run a report, and verify the report.

141. NC DPI then uses the reports from the LEA PowerSchool data to make a State report to the Office of Civil Rights. [REDACTED] was restrained and secluded on numerous occasions from 2017 to 2019, but WCPSS failed to report any use of restraint and seclusion to the State or OCR.

142. Likewise, WCPSS never properly reported the use of restraint and seclusion to [REDACTED]'s Parents; instead, it used euphemisms such as “time out” or “quiet room” or “escort” to conceal the use of restraint and seclusion from [REDACTED]'s Parents. Mr. [REDACTED] admitted that “time out” and “quiet room” were used interchangeably with the term seclusion. Ms. [REDACTED] also admitted that the “quiet room” meant seclusion. The use of “time out” to mean seclusion is a mischaracterization of North Carolina law. WCPSS’ misrepresentations prevented [REDACTED]'s Parents from knowing about her restraint and seclusion.

143. If a parent requests a disciplinary report from the LEA, one could be generated through PowerSchool. After the February 21, 2019 “Cafeteria Incident”, [REDACTED]'s Parents requested copies of [REDACTED]'s disciplinary records and were able to discover some of the dates [REDACTED] had been restrained and secluded, but not all, because the report was incomplete.

Staff Training on Documentation of the Use Seclusion or Restraint

144. NC DPI does multiple trainings with districts on “how to use PowerSchool and the functions of PowerSchool” as well as provides districts documents on how to use the program. NC DPI’s EC Department does the specific trainings on reporting restraint and seclusion in PowerSchool. NC DPI also has a sample “Documentation of Seclusion or Restraint” form available for school districts to use.

145. WCPSS maintains an internal training on the permissible and impermissible use of restraint and seclusion. The teaching staff in the EBS classroom, especially Mr. [REDACTED] as well as [REDACTED] administrators would have received this training.

146. In addition, the WCPSS⁸ maintains an internal Google form documenting the use of restraint and seclusion. However, there is no oversight on what is reported or requirement that parents actually receive these reports. Both Mr. [REDACTED] and Assistant Principal [REDACTED] admitted that no one reviews what Mr. [REDACTED] reports in the Google form regarding the use of restraint and seclusion with him.

147. In its Proposed Final Decision, WCPSS asserts that the Point Sheets “indicate that [REDACTED] was “restrained” on September 25, 2017, October 19, and November 3, 2017, and that [REDACTED]'s parents signed each of these point sheets. Pet. Ex. 35, pp. 285, 311, and 323”. Resp. Pro. Final Dec. p. 9, #12a. Because of this WCPSS argues that [REDACTED]'s Parents are “not credible”. WCPSS also asserts that at least by December 5, 2017, they knew from [REDACTED]'s psychiatrist Dr. [REDACTED] that [REDACTED] was being “put in the quiet room/padded closet at school...”. Resp. Pro. Final Dec. p. 10, #12b. Petitioners’ dispute this.

⁸ In 2019, the WCPSS was flagged in a Government Accountability Office (“GAO”) report entitled “Accuracy of Restraint and Seclusion Data” for reporting zero uses of restraint or seclusion for the 2015-2016 school year. These reports are issued every 2 years. The GOA report for the 2017-2018 school year was not yet available.

148. For clarification of the record and because the Point Sheets are almost illegible, the Parties were asked to file supplemental briefs on several items including to identify all citations in the Point Sheets and IEPs/BIPs referencing “restraint” and “seclusion.” *See* Petitioners’ and Respondent’s Supplemental Briefs filed on July 23& 27, 2021.

149. It is undisputed that the word “seclusion” was never used on the Point Sheets.

150. All the BIPs, developed prior to February 21, 2019 and until January 2020, stated that staff will use “CPI techniques (use of quiet room/seclusion) if [redacted]’s behavior escalates where she is being unsafe to herself or others.” Pet. Exs. 7, 13, & 18. However, [redacted]’s Parents were never told at an IEP meeting or outside an IEP meeting that [redacted] was actually being secluded for behaviors.

151. The words “restraint” or seclusion do not appear on any of the BIPs, IEPs, IEP meeting minutes, or Prior Written Notices prior to February 21, 2019. *See* Pet. Exs. 5, 11, 21 (minutes); 6, 12, 17, 22 (IEPs); 7, 13, 18 (BIPs), 9, 14, 19 (Prior Written Notices).

152. In its supplemental information, Respondent noted that “multiple Point Sheets reference restraint specifically September 12, 2017, September 25, 2017, October 19, 2017, November 3, 2017, November 16, 2017, and March 23, 2018. [redacted]’s parents signed each of these point sheets. Pet. Ex. pp. 285, 293, 311, 333, 409.” Resp. Add’l Supp. Inform. p. 1.

153. The September 12, 2017 Point Sheet says [redacted] was “escorted”. Pet. Ex. 285. A closer review of the September 25, 2017 Point Sheet shows that [redacted] was “*escorted* to the time-out room” for “repeated questions, told teacher she [the teacher] was being annoying, told another teacher she was mean, refused to take time-in”. Pet. Ex. 35, p. 285. Essentially, [redacted] was restrained and secluded for being annoying. This Point Sheet did not say that [redacted] was “restrained”. Only the back of the Point Sheet says “restrained and escorted to time out.” Pet. Ex. 35, p. 294. The Parents signed only the front of this Point Sheet. Moreover, this Point Sheet is almost illegible.

154. The October 19, 2017, Point Sheet does say “*escorted/restrained*” sent to “time-out”. Pet. Ex. 35, p. 311. This time, [redacted] was off task, flipping markers, tipping back her chair, yelling at teacher, grabbed teacher’s arm., etc. *Id.* It appears from the comments on the backside of the Point Sheet that [redacted] was restrained a second time at 1:25 p.m. because she “began tearing the siding off the wall with exposed nails. Took her to another quiet room.” *Id.* at p. 312. She may have even been restrained a third time because at 1:45 p.m. she was “escorted to time-out” for flipping markers and verbally threatening staff. *Id.* The word “restrain” does appear on this point sheet, although the caveat “escorted” diminishes the effect of its significance. This Point Sheet is also almost illegible.

155. November 3, 2017 was another bad day for [redacted] and she had a number of adverse behaviors including “drawing on herself”, punching a wall”, verbal name calling, threw lunch off desk, threatening to punch her head until she killed herself, left seat without permission, threw chair, and started leaving her area. Pet. Ex. 35, p. 323. According to this Point Sheet, when she started leaving her area, she was “escorted/restrained, and sent to time-out (11:32-12:05)”. *Id.*

Mom came to pick her up early. Again, the term “restrained” does appear on this Point Sheet after “escorted”. This Point Sheet is also almost illegible.

156. “[E]scorted/restrained” appears on the back of the November 16, 2017 Point Sheet for a period of 4:00-4:30 p.m. when school was dismissed. The Parents did not sign the back of this Point Sheet and this Point Sheet is illegible in part. Pet. Ex. 35, p. 333.

157. The March 23, 2018 Point Sheet says ■■■ was “escorted to time out” then notes again “restrained/escorted to time out”. Pet. Ex. 35, p. 409. The Parents did sign this Point Sheet but again it is virtually illegible.

158. Even if ■■■s Parents knew or should have known that ■■■ was “escorted/restrained” on October 19, 2017, November 3, 2017, and March 23, 2018 based in the Point Sheets where the words appear on the page they signed, WCPSS still misleadingly used the terms “quiet room” and “time-out” instead of “secluded” or “seclusion”. Moreover, the fact that the Parents knew or should have known of 3 escorts/restraints does not mean that they knew of all the times ■■■ was restrained. In fact, based on the Point Sheets, it is not clear how many times that ■■■ was restrained before she was placed in seclusion.

159. In the alternative, WCPSS asserts that ■■■s December 5, 2017 email to ■■■s treating psychiatrist, Dr. ■■■ evidences that ■■■ knew about the use of seclusion. Resp. Pro. Final Dec. pp. 9-10, 3 12(b).

160. In her email, ■■■ states that ■■■ “continues to be sent home, put in the quiet room/padded closet at school, and kicked off school transportation.” Resp. Ex. 41, p. 552. ■■■ had reported to her Parents that she was put in a “padded closet”. However, ■■■ also says such things as “she’s being surrounded by elephants.” Tr. vol. 11, p. 2219:17-20 (T of ■■■). So, the Parents did not know if this was true about the “padded closet” but that they did approach the school and ask them for clarification on the “padded closet” and it was minimized. Her Parents “were told that everything was fine and that it was a calming place for her to go.” Tr. vol. 11, p. 2219:20-23 (T of ■■■). WCPSS did not refute this testimony.

161. WCPSS provided ■■■s Parents with intentionally misleading and inadequate notices about the use of restraint and/or seclusion such that her Parents could not have known prior to the Cafeteria Incident the extent and misuse of the restraint and seclusion.

The Elementary Behavior Support (“EBS”) Program

162. After her parents provided her ■■■ IEP and BIP to the WCPSS, they were contacted by district administrators and informed ■■■ would be placed in the EBS program and assured the services would be comparable to services provided at ■■■ Tr. vol. 3, p. 515:4-13 (T of ■■■). Pet. Ex. 76, p. 665-66 (Email). ■■■ was assigned to the regional Elementary Behavior Support (“EBS”) program at ■■■ Stip. 13.

163. Prior to this EBS placement decision, WCPSS did not conduct any additional evaluations. Instead, WCPSS relied on evaluations contained in [REDACTED]'s record from [REDACTED] [REDACTED] had been reevaluated in Spring 2017. The reevaluations were: psychoeducational evaluation dated April 27, 2017, by Triangle Learning (Stip. Ex. 22), psychological assessment dated May 4, 2017, by Dr. [REDACTED] (Stip. Ex. 23), OT evaluation dated May 30, 2019 by [REDACTED] [REDACTED] (Stip. Ex. 24), and speech language evaluation dated June 1, 2017 by [REDACTED] [REDACTED] (Stip. Ex. 25).

164. Although [REDACTED]'s behaviors had escalated in Spring 2017 such that she was in a self-contained placement, [REDACTED] [REDACTED] did not conduct a new FBA. Before its decision to place EBS in the EBS program, WCPSS did not conduct an FBA to determine the appropriateness of that setting.

165. [REDACTED]'s Parents could not determine the appropriateness of the EBS setting because no additional information regarding the EBS program and its behavioral system and social skills lessons was provided to them except that it was "comparable" to [REDACTED]'s services at [REDACTED] [REDACTED] Tr. vol. 3, pp. 515:24-5126:2 (T of [REDACTED] No information was provided to [REDACTED]'s Parents about the EBS program's social skills lessons. Tr. vol. 3, p. 516:3-5 (T of [REDACTED] Tr. vol. 4, 814:24-815:2 (T of [REDACTED]

166. WCPSS maintains 54 EBS classrooms across 30 schools in the county. Senior Administrator [REDACTED] oversees all the EBS classrooms including [REDACTED] These regional programs are designed to support elementary school students with substantial behavioral difficulties to develop the behavioral skills and strategies they need to be successful in a general education setting.

167. While EBS classrooms can vary somewhat from school to school based on student needs, they are expected to generally follow the contours of the district's EBS Best Practices Manual ("EBS Manual"). There is a focus on consistency and on certain systems and structures. However, individual programs are supposed to be flexible to respond to student needs. With the exception that the expectation is the use of visual schedules, social skills instruction, morning meetings, as well as the use of the point-level system. The use of restraint and seclusion is used in the EBS program.

168. The EBS Manual requires social skills lesson plans as well as an individualized schedule for mainstreaming each student. Lesson plans are required by Wake County Policy for all schools in the district including EBS classrooms. WCPSS' teachers are supposed to maintain 3 days' worth of lesson plans in the event of an emergency.

169. The point-level system used in the EBS classroom is a research-based system within the ReEd model. It is based on the setting of specific behavioral expectations, with students' receiving checks throughout the day for meeting those expectations in discrete time periods (15 or 30 minutes) or dots when they do not meet expectations. Those checks and dots then correlate to a percentage score at the end of the day, which puts the student in one of four "levels" that are tied to certain privileges. The purpose of the point-level system is to provide data on how the student is performing as well as to teach the student to self-monitor and reflect on both positive and negative choices.

170. The EBS Manuel, which was not admitted into evidence but known to Mr. [REDACTED] and Ms. [REDACTED] demonstrates that [REDACTED]'s time in the general education classroom was predetermined based on the program guidelines rather than [REDACTED]'s individual needs. Before being mainstreamed in the regular classroom, the standard EBS model required [REDACTED] to receive a "level 3 or 4 for three weeks to be eligible for increasing her mainstreaming opportunities. A student is successful in the self-contained EBS class prior to moving the student to a general education class.

171. Each of the four (4) levels⁹ of the EBS program came with certain "Privileges". For example, Level 4 came with the "privilege" of "leav[ing] class without an adult, attend[ing] mainstream classes and specials, choos[ing] seat at lunch, go[ing] on field trips, and \$0.75 for the school store." Level 3 "privileges" included "leav[ing] class without an adult, attend[ing] mainstream classes and specials, choos[ing] seat at lunch, go[ing] on field trips, and \$0.50 for the school store." However, Level 2 "privileges" meant [REDACTED] had to have an adult escort when leaving class, modified recess silent lunch in cafeteria/classroom, could potentially go on field trips based on behavior, and got \$0.25 for the school store; however, she would not be allowed to mainstream with her non-disabled peers, apparently despite what her IEP mandates. Level 1 meant no privileges. Resp. Ex. 20, p. 42.

172. The EBS program required students show no behaviors for three minutes or until the student was calm in order to be released from seclusion, even though WCPSS staff knew [REDACTED] was unable to self-soothe.

173. Seclusion and restraint are authorized for use within the EBS programs using a standard of "last resort" when there is a safety concern for students or staff. Tr. p. 1298:17-21 (T of [REDACTED] Teachers are expected to document what led to a restraint or seclusion and what happened after. Tr. p. 1297:25-1298:4 (T of [REDACTED] Parents must be notified whenever seclusion and/or restraint is used. Tr. p. 1299:12-22 (T of [REDACTED]

174. Mr. [REDACTED] required [REDACTED] to follow the standard EBS program, rather than her individualized IEP and BIP from [REDACTED] [REDACTED]. He utilized the Behavior Point Sheet and physically restrained and secluded [REDACTED] for excessive amounts of time. Mr. [REDACTED] admitted the use of EBS point sheets was not an IEP team decision for [REDACTED] when she started at WCPSS. Tr. vol. 8, 1533:18-25 (T of [REDACTED] He also admitted [REDACTED] BIP from [REDACTED] [REDACTED] did not include the use of restraint or seclusion in it when [REDACTED] first started in the EBS program in 2017. Tr. vol. 8, p. 1553:13-19 (T of [REDACTED] As discussed later in the decision, the Point Sheets were also used for progress monitoring of [REDACTED]'s IEP behavior goals even though the personal goals listed on the Point Sheet did not align with [REDACTED]'s IEP behavior goals.

175. Once [REDACTED] started in the EBS program, her Parents noticed increasing anxiety regarding the EBS point sheets. Pet. Exs. 5, 11; Tr. vol. 3, p. 517:4-14 (T of [REDACTED] Her parents also noticed a change in her demeanor. Tr. vol. 11, 2089:21-2090:23 (T of [REDACTED] [REDACTED] began exhibiting school refusal, was scared to be in shower or bathroom alone, and expressed to [REDACTED] she was worried she would go to school and never see her mom again.

⁹ The highest level is Level 4, the lowest level is Level 1.

176. Their concerns were documented in the IEP Meeting minutes. Pet. Ex. 5 (November 2017 IEP minutes). They continued to express their concerns at subsequent meetings. Pet. Ex. 11, p. 48 (December 2017 IEP minutes); Pet. Ex. 16, p. 73 (May 2018 IEP minutes); Stip. Ex. 9, pp. 50-51 (October 17, 2019 IEP minutes). Although [REDACTED]'s Parents brought up their concerns about the EBS point sheets to Mr. [REDACTED] and the administration, they were informed the use of point sheets could not be changed for [REDACTED] because the Point Sheets were necessary to maintain the "fidelity of the EBS program." Tr. vol. 3, pp. 517:16-518:10; 531:1-3 (T of [REDACTED] Mr. [REDACTED] informed [REDACTED]'s parents it was "too early to consider having [REDACTED] not see her point sheets or modifying the system. . .". Pet. Ex. 11, p. 48. Assistant Principal [REDACTED] admitted that the IEP team had a discussion of [REDACTED] perseverating on dots; however, the school-based members of the IEP team decided it was best to leave the use of dots in place. Tr. vol. 8, 1672:11-23 (T of [REDACTED] According to Assistant Principal [REDACTED] maintaining the fidelity of the EBS program was important because students needed to learn the direct relationship between behavioral choices and privileges. Tr. vol. 8, pp. 1673:20-1674:10 (T of [REDACTED]

177. Even though both Assistant Principal [REDACTED] and Mr. [REDACTED] emphasized the importance of the "fidelity" of the EBS program, Mr. [REDACTED] did not follow the EBS Manual. The EBS Manual required the creation of lesson plans for social skills an individual schedule for each child for mainstreaming into the regular classroom. [REDACTED] Senior Administrator and Supervisor of the entire EBS program for WCPSS, admitted that EBS teachers were required to have documentation of social skills lessons, individual schedules for students, and a mainstreaming/exit plan for individual students.

178. Contrary to his supervisor's testimony and the EBS Manual, Mr. [REDACTED] testified that it was not a requirement to have a lesson plan and schedule for social skills. Tr. vol. 8, p. 1551:1-10 (T of [REDACTED] Yet, on the other hand, Mr. [REDACTED] admitted he did not write formal lesson plans for social skills. Tr. vol. 8, 1588:1-7. Mr. [REDACTED] admitted on cross-examination that the WCPSS' policy requires he have three days of emergency lesson plans. Tr. vol. 8, p. 1614:7-18. Mr. [REDACTED] admitted that he did not prepare any lesson plans for [REDACTED]'s regular math instruction.

179. In addition, Mr. [REDACTED] admitted that he did not provide individual schedules for [REDACTED] Tr. vol. 8, 1547:5-12 (T of [REDACTED] Mr. [REDACTED] admitted that [REDACTED] did not have an individual schedule for mainstreaming. *Compare* Tr. vol. 8, pp. 1547:24-1548:2 *with* Tr. vol. 7, 1336:6-1337:3.

180. The Point Sheets used with [REDACTED] were not individualized but rather a program tool used with all students in the EBS program. Tr. vol. 6, 1140:8-12 (T of [REDACTED] The Point Sheets checked her behavior in 15-minute increments for "Be Respectful", "Follow Directions", "On Task", and "Sail Points" (extra credit for good behavior). In addition to the check marks, EBS staff made remarks alongside and sometimes on the back of the form. [REDACTED]'s Parents were not provided copies of all these forms until after discovery.

SECTION 3: IMPLEMENTATION OF THE BIPS PRIOR TO FEBRUARY 21, 2019

November 2017, May 2018, and October 2018 IEPs

181. The appropriateness of the November 2017, May 2018, and October 2018 IEPs and BIPs are not at issue. The purpose of listing the goals in the IEP documents is for background information relevant to the implementation of the BIPs in place before February 21, 2019. The BIPs served two purposes. First, the BIP was implemented as a behavior intervention plan, and second, it was used to progress monitor the functional behavior goals in the corresponding IEPs. As a progress monitoring tool, the BIP used the Daily Point Sheets (“Point Sheets”) which contained logs of teachers’ observations. Each use of the BIP will be reviewed in turn.

██████████ Grade - Fall Semester of 2017-2018 School Year

Implementation of the ██████████ BIP Until December 18, 2017 BIP Meeting

182. ██████████ began the 2017-2018 school year with the IEP and BIP from ██████████. These documents are not in the record. However, Mr. ██████████ admitted that, although ██████████ was restrained and secluded prior to the development of the ██████████ first BIP on December 12, 2017, restraint and seclusion was not a behavior intervention strategy in the ██████████ BIP. Tr. vol. 8, p. 1553:13-19 (T of ██████████). ██████████ was restrained and/or secluded 6 times prior to the development of the December 2017 BIP.

Behavior Point Sheets

183. Mr. ██████████ required ██████████ to follow the standard EBS program, rather than her individualized IEP and BIP from ██████████ utilizing a Behavior Point Sheet of checks and dots and physically restraining and secluding ██████████ for excessive amounts of time. He admitted the use of EBS point sheets was not an IEP team decision for ██████████ when she started at WCPSS. Tr. vol. 8, p. 1533:18-25 (T of ██████████).

184. Once ██████████ started in the EBS program, her Parents noticed increasing anxiety regarding the EBS point sheets. Pet. Exs. 5, 11; Tr. vol. 3, p. 517:4-14 (T of ██████████). Her parents also noticed a change in her demeanor. Tr. vol. 11, pp. 2089:21-2090:23 (T of ██████████). ██████████ began exhibiting school refusal, was scared to be in shower or bathroom alone, and expressed to ██████████ she was worried she would go to school and never see her mom again.

185. Although ██████████’s Parents brought up their concerns about the Point Sheets on multiple occasions to Mr. ██████████ and the administration, they were informed the use of the Point Sheets could not be changed for ██████████ in order to maintain the “fidelity of the EBS program.” Tr. vol. 3, pp. 517:16-518:10; 531:1-3 (T of ██████████). Mr. ██████████ informed ██████████’s Parents it was “too early to consider having [██████████] not see her point sheets or modifying the system...”. Pet. Ex. 11. Ms. ██████████ admitted that the IEP team had a discussion of ██████████ perseverating on dots; however, the team decided it was best to leave the use of dots in place. Tr. vol. 8, p. 1672:11-23 (T of ██████████). Ms. ██████████ emphasized the importance of maintaining the fidelity of the EBS program

explaining students need direct relationship between behavioral choices and privileges. Tr. vol. 8, pp. 1673:20-1674:10 (T of [REDACTED])

186. The Point Sheets used with [REDACTED] were not individualized but rather a program tool used with all students in the EBS program. Tr. vol. 6, p. 1140:8-12 (T of [REDACTED])

187. [REDACTED] should never have been placed in the EBS program, as the program design, which WCPSS demanded be implemented “with fidelity,” was inappropriate to meet her needs. The use of seclusion and restraint, which were “critical to the success” of the EBS program, were extremely harmful to [REDACTED]. The EBS classroom was a stressful place for her to be and the behavior data sheets and use of dots was a behavioral trigger. Tr. vol. 1, pp. 177:8-11, 179:21-180:1 (T of [REDACTED]) Tr. vol. 2, p. 265:16-23 (T of [REDACTED]) The EBS behavioral system increased [REDACTED]’s anxiety and acting out. Tr. vol. 1, p. 267:24-25 (T of [REDACTED])

No Social Skills Lesson Plans

188. Mr. [REDACTED] admitted that he did not follow the EBS Manual as he did not have any lesson plans for social skills and did not provide [REDACTED] an individual schedule for mainstreaming. Tr. vol. 8, pp. 1547:5-12; 1547:24-1548:2 (T of [REDACTED]) EBS teachers are required to have documentation of social skills lessons, individual schedules for students, and a mainstreaming/exit plan for individual students. Tr. vol. 7, pp. 1336:6-1337:3 (T of [REDACTED]) Although the EBS Manual requires lesson plans, according to Mr. [REDACTED] it was not a requirement to have a lesson plan and schedule for social skills. Tr. vol. 8, p. 1551:1-10. Mr. [REDACTED] admitted that he did not write formal lesson plans for social skills. Tr. vol. 8, p. 1588:1-7. Yet, Mr. [REDACTED] admitted on cross-examination that WCPSS’ policy requires he has three days of emergency lesson plans prepared in advance. Tr. vol. 8, p. 1614:7-18.

189. According to the EBS Program Supervisor [REDACTED] lesson plans¹⁰ are not expected for every social skills lesson in the EBS program unless required by the school-based administration. Tr. vol. 7, p. 1337:8-16. Yet, based on its EBS Manual, the district expects social skills instruction to be documented with a schedule of the social skill including point sheets and graphs. Tr. vol. 7, p. 1336:6-19.

190. Even if lesson plans were not required for EBS programs, [REDACTED] was being instructed regular education math, not EC math. Mr. [REDACTED] was licensed to teach K-6 common core math instruction yet still did not prepare any math lesson plans. This lends credence to the fact that Mr. [REDACTED] prepared no lesson plans for [REDACTED]’s social skills instruction.

November 7, 2017 IEP Team Met to Develop IEP Only

191. The first IEP meeting held at [REDACTED] was on November 7, 2017 (“November 2017 IEP Team”). Overall, during the 1st quarter of the [REDACTED] grade, the November 2017 IEP Team reported to the Parents that [REDACTED] had many successful days since she began in the EBS classroom

¹⁰ WCPSS Proposed Final Decision interpreted her statement to mean that: “[l]esson plans are not a district requirement for EBS classrooms. That decision for lesson plans is left to individual schools.” Tr. p. 1337:11-16.” Resp. Pro. FD, p. 13, #29. The Undersigned disagrees with this interpretation.

which has “a built-in behavioral system.” Pet. Ex. 3, p. 9. The EBS classroom has “strategies put in place in the classroom,” to assist [REDACTED] with her self-regulation. These strategies include “a visual schedule, a safe place in the classroom that provides sensory support as well as a five-point self-regulation scale as access to speak with the counselor when needed.” Pet. Ex. 3, p. 9.

192. The November 2017 IEP team also reported to the Parents that during the first quarter of the 2017-2018 school year, [REDACTED] earned the highest levels of the behavioral system (levels 3 and 4) on 90% of days. She earned the lowest level (level 1) on 4 days or 10% of the 1st quarter. On the 4 Level 1 days, [REDACTED] punched a peer and grabbed the teacher’s arm. She needed to be escorted to the *time-out room* on a couple of occasions due to unsafe behavior and refusing to report to her assigned area.” Pet. Ex. 3, p. 9 (emphasis added).

193. Mr. [REDACTED] mentioned during the November 2017 IEP meeting “that his room is a safe place” but neither the terms seclusion, time-out, time-in, restraint, or CPI techniques are referenced in the 2017 Minutes. *See* Pet. Ex. 5. No one from WCPSS at the IEP team meeting told the Parents that prior to the November 2017 IEP meeting that [REDACTED] had actually been restrained and secluded 6 times on the following dates for extended periods of time: September 12, 2017 (1 time 40 minutes), September 25, 2017 (3 times for a total of 1 hour, 50 minutes), and October 19, 2017 (2 times for a total of 1 hour 45 minutes). *See* Chart on pp. 28-29.

194. The November 2017 IEP team determined that a reevaluation was needed to determine [REDACTED]’s present level of academic achievement and developmental needs. Pet. Ex. 3, p. 9. With respect to [REDACTED]’s reading comprehension deficits, the November 7, 2017 IEP meeting minutes (“2017 Minutes”) reported that Mr. [REDACTED] “noted that [REDACTED] tended to miss the literal questioning and get the higher-level thinking questions correct. .. [REDACTED] is comprehending at a level just below grade level expectations... Her anxiety may impact her success with these assessments.” Pet. Ex. 5, p. 14.

195. Despite her special education placement in math, test anxiety, and reading comprehension deficits, the IEP team decided to conduct only a Functional Behavioral Assessment (“FBA”) but no formal academic evaluations. *Id.* The November 2017 IEP had one functional/behavior goal, articulation goals, and placed [REDACTED] in the EBS classroom for regular math instruction. [REDACTED]’s Parents did not contest this decision or ask for additional assessment information. Pet. Ex. 3, p. 10.

December 12, 2017 Behavior Intervention Plan (“December 2017 BIP”)

196. Another IEP meeting was held on December 12, 2017 to develop the BIP and review the IEP.

197. According to the Point Sheets, between the November and December IEP meetings, [REDACTED] was restrained and secluded another 9 times on: November 13, 2017 (3 times - total time 1 hour, 30 minutes); November 16, 2017 (3 times- 44 minutes); November 20, 2017 (2 times – 1 hour, 38 minutes); and November 27, 2017 1 time for 1 hour 27 minutes). No changes were made to the IEP except for changes in the duration dates of December 13, 2017 to June 26, 2018. Pet. Ex. 7. After the Functional Behavior Assessment (“FBA”) was completed on December 12, 2017, the IEP team developed the December 2017 BIP. Pet. Exs. 6&7.

198. The December 2017 BIP is copied below:



WAKE COUNTY
PUBLIC SCHOOL SYSTEM

Wake County Public School System

BIP

Behavior Intervention Plan (BIP)
(to be completed after the Functional Behavior Assessment)

Name: [REDACTED] **ID#:** [REDACTED] **School:** [REDACTED]
DOB: [REDACTED] **Age:** [REDACTED] **Grade:** [REDACTED]

Date: 12/12/2017

Step 1: List what we want the student to do instead of the old behavior.(Define the new or replacement behavior.)

When [REDACTED] is feeling overwhelmed (primarily from academic tasks), she will use her words and taught self-control techniques to communicate her needs and accept feedback.

Step 2: List what the teacher/staff will do that is different than what is normally/usually done? How/when will the teacher/staff help the student practice the new behaviors?(Arrange context and intervention strategies. – Positive Behavior Supports)

Context and Intervention Strategies - Positive Behavior Supports - Actions	Person Responsible
daily social skills lessons	classroom staff
a safe place in the classroom with visual supports and calm down routines	classroom staff
positive choice reminders including bonus points for working through frustration	classroom staff
CPI techniques (use of quiet room/seclusion) if [REDACTED] behavior escalates where she is being unsafe to herself or others	trained CPI school staff

Step 3: List rewards/reinforcement.
(Be sure to ask student what he/she would like to earn. Try to include their interests and enthusiasms.)

Rewards/Reinforcements	Person Responsible
Fun Friday	classroom staff
break time choice based on level	classroom staff
earned classroom rewards (ex: pizza party) with charts as needed	classroom staff

Step 4: Consequences.
(Clear concise enforceable related to target behavior.)

Consequences	Person Responsible
time-in	classroom staff
loss of points on behavioral point sheet	classroom staff
level 1 restrictions (quiet lunch in the classroom, adult escort for transitions as needed)	classroom staff

Set time for review of plan (3-6 weeks) on or before: 02/09/2017

199. All subsequent BIPs prior to January 2020 are the same except that the dates above Step 1 were changed.

200. The December 2017 BIP was to be reviewed 3-6 weeks or on or before February 9, 2017 [sic]¹¹ to determine its effectiveness and to revise as needed. Even the review date of “02/09/2017” (which is clearly a typo) is included in the pre-January 2020 BIPs.

201. Other than implementation of the CPI techniques, the “persons responsible” for all the strategies, rewards/reinforcements, and consequences in the December 2017 BIP was by “classroom staff.” The “persons responsible” for the CPI techniques were “trained CPI school staff.”

Behavior Intervention Strategies in All BIPs Prior to January 2020

202. According to the intervention strategies in Step 2 of the 2017 BIP, “CPI techniques (use of quiet room/seclusion) are only to be used “if [redacted]’s behavior escalates where she is being unsafe to herself or others.” Pet. Ex. 7. There is no time limitation for the use of seclusion. Seclusion is not a CPI technique nor is it a behavior management technique. This was the same in all subsequent BIPs before the creation of the January 2020 BIP.

203. The behavior intervention of: “[a] safe place in the classroom with visual supports and calm down routines” is the equivalent of “isolation” or “time-in.” This is a behavioral management technique if used properly, however, there is no time limitation or context for this intervention. While [redacted] was permitted to have time-in in a space within the EBS classroom, most often this “safe place” was not in the EBS classroom but rather in the seclusion room down the hallway.

204. The only persons responsible for tracking restraint or seclusion at [redacted] are Mr. and Mrs. [redacted] Tr vol. 8, p. 1741:2-4 (T of [redacted] The determination of whether to restrain or seclude a student is a subjective “judgment call in determining whether or not there’s imminent – an imminent threat.” Tr. vol. 8, p. 1743:3-18 (T of [redacted]

205. Steps 2 through 4 in the December 2017, 2018, and 2019 BIPs mirrored the strategies used for all students in the EBS classroom and were not individualized for [redacted] The inappropriateness of the March 2019, May 2019, October 2019 BIPs will be addressed separately because only the appropriateness of the implementation of the December 2017 and October 2018¹² BIPs prior to February 21, 2019, is at issue in this section. But, as indicated previously, although some additional strategies were incorporated upon the Parents’ request in the October 2018 and March 2019 BIPs. Otherwise, the March 2019, May 2019, and October 2019 were identical to the December 2017 and October 2018 BIPs.

206. In 2017, [redacted]’s Parents specifically asked Mr. [redacted] and the IEP team about the “quiet room” but were assured it was a safe, calming space for [redacted] and that the door was never locked. At the November 2017 IEP meeting, Mr. [redacted] did not inform [redacted]’s Parents that she had been restrained or secluded. Instead, Mr. [redacted] informed her Parents that [redacted] was never punished for anything in the classroom. WCPSS misrepresented the “quiet room” to [redacted]’s Parents.

¹¹ The only logical assumption is, since the IEP team met on December 2017, that the IEP team meant to date the review of the BIP for February 9, 2018, not 2017.

¹² Implementation of the October 2019 BIP from February 21, 2019 to March 25, 2019 is also at issue but this was within the statutory period.

WCPSS misrepresented the door was never locked when in fact the teachers were holding the door closed which constitutes seclusion by law.

Third Grade Report Card

Academic Scores

207. According to the November 2017 IEP team (Pet. Ex. 3), [REDACTED] scored 3s (proficient) in ELA, math, and science on her 3rd grade, first-quarter report card but earned a score of 1 on her Beginning of Grade (“BOG”) tests in English Language Arts (“ELA”) and math. Pet Ex. 3, p. 6.

208. Based on [REDACTED]’s 3rd grade report card, it is difficult to determine exactly where she scores in her academic subjects throughout the school year because all but 5 of the 50 subcategories in her academic subjects had incomplete quarterly reporting. *See* Pet. Ex. 58, p. 625.

209. [REDACTED]’s overall academic grades in ELA, science, social studies, visual arts, music, and healthful were rated “proficient” with the exception of math which was rated “inconsistently meeting expectations.” Pet. Ex. 58, p.624. Her writing scores were exemplary.

210. [REDACTED]’s overall math score decreased from an initial 3 to a 2 at the end of the 3rd grade. No math scores were reported in the 10 math subcategories. Especially during the 3rd and 4th quarters. In the 3rd quarter, no scores were reported for 7 of the 10 math categories. In the 4th quarter, no scores were reported for 6 of the 10 categories and the 4 reported, 3 were 2’s with only one was a 3. Pet. Ex. 58, p. 624.

211. Reading also declined during the 3rd and 4th quarters. Many subsections of the report card were not even scored. In Reading Literature (Fiction), [REDACTED]’s scores declined from 3 (proficient in the 2nd quarter) to 2’s and a 1 in the 3rd quarter. None of the 4 subcategories in Reading Literature (Fiction) were scored. Pet. Ex. 58, p. 624. [REDACTED]’s proficiency in Reading – information Text (nonfiction) text fluctuated greatly from across all subcategories with no scores in some subcategories. Pet. Ex. 58, p. 624.

212. The Reading – Phonemic Awareness, Phonics & Fluency section had a “3” marked for the 3rd quarter but no scores for the 1st, 2nd, and 4th quarters. Pet. Ex. 58, p. 624.

213. At the end of her 3rd grade year, the regular education teacher’s comments indicated she was able to “work on the 3rd grade curriculum with some support.” Pet. Ex. 58, p.625. It did not indicate that she was proficient in the 3rd grade curriculum.

214. Starting sometime near the beginning of 3rd grade, [REDACTED] was no longer mainstreamed in the regular math classroom and part of her literacy block. Her regular education teacher reported after the 1st quarter that [REDACTED] is “mainstreaming in regular education for some of her Literacy block.” Pet. Ex. 58, p. 625. The regular education teacher progress reports refer to the IEP progress notes for further details in math. Even though [REDACTED] was served in the special education room for math, her IEP did not have an IEP goal for math.

215. Her 3rd grade report card evidenced that during the 3rd and 4th quarter of the 3rd grade, she was not receiving scores for most of her math subcategories. *See* Pet. Ex. 58, p. 625.

216. ■■■ did not start 4th grade with proficiency in 3rd grade curriculum in math or reading. Even though in reading she was scored a “3” overall in reading for the 4th quarter despite having 5 of the 10 subcategories not scored and of the 5 categories that were scored, the scores were two “3’s”, two “2’s”, and one “1”. See Pet. Ex. 58, p. 625. It is not clear how these scores averaged to the proficient level.

Behavior and Conduct Scores

217. ■■■s work habits and conduct report card scores decreased from a “2” in the 1st quarter to “1’s” for the remainder of the school year. Pet. Ex. 58, p. 624. Overall, ■■■s work habits and conduct “did not meet expectations” in the 3rd grade.

Use of BIP and Point Sheets as Progress Monitoring Tools for IEPs

218. The Point Sheets used by the EBS staff, were also progress monitoring tools of the IEPs. However, there is a disconnect between the IEP goals, the BIP, and the Point Sheets used to progress monitor the IEP goals. This problem continued with the progress monitoring in the March, May, and October 2019 IEPs.

November and December 2017 IEPs’ Goals

219. The functional behavior goal for the November 2017 and December 2017 IEPs is:

Using social-emotional regulation strategies (such as positive self-talk, calming routine, and 5 point color coded self regulation [sic] scales, success chart, visual schedules), ■■■ will complete 80% of grade-level classroom work in all subject areas.

[progress monitored by behavior chart]

Pet. Exs. 6, p. 19; 12, p. 52.

May and October 2018 IEPs’ Goals

220. The functional behavior goal for the May and October 2018 IEPs are:

Using social-emotional regulation strategies (such as positive self-talk, calming routine, and 5 point color coded self regulation [sic] scales included at the safe place), ■■■ will work through frustrations and return to the group within 5 minutes.

[progress monitored by behavior chart]

■■■ will comply with directions from staff members (including ignoring peer’s behaviors) with no more than 1 redirection, earning 90% of her following directions checks.

[progress monitored by log of teacher observations]

████ will refrain from displaying physical aggression (ex. punching, kicking, throwing objects) 100% of the time.

[progress monitored by log of teacher observations]

Pet. Exs. 17, pp. 78-79; 22, p. 106-107.

221. The IEP social/behavior goals are not the same as the replacement behavior in the BIPs.

Replacement Behavior in BIP

222. The replacement behavior in the December 2017, May 2018, and October 2018 BIPs is:

When █████ is feeling overwhelmed (primarily from academic tasks), she will use her words and taught self-control techniques to communicate her needs and accept feedback.

Pet. Exs. 7, p. 34; 13, p. 64; 18, p. 90.

223. The replacement behavior in the BIPs is not the same as the functional behavioral goals listed in the corresponding IEPs or the personal goals listed in the Point Sheets.

Personal Goals in Point Sheets

224. The Point Sheet's personal goal from September 2017 to December 2017 was "I will raise my hand if I have a question and I will only ask one time." Pet. Ex. 35, pp. 209-351. From March 2018 through April 2018 was "I will not call or ask if I need to be worried." Pet. Ex. 35, pp. 409, 419. From October 2018 through November 2018, the personal goal was "I will use positive self-talk when I am upset." Pet. Ex. 35, p. 475, 486, 492, & 504. None of these personal goals match the functional behavior goal or replacement behavior in █████'s November or December 2017 IEPs or BIPs.

████ GRADE 2018-2019 SCHOOL YEAR

225. The next school year, in August 2018, Respondent provided █████'s parents a "Welcome Letter" to the EBS program, which indicated a report would be given to her Parents if physical intervention was used with █████.

226. According to the EBS Program "Weekly Cover Sheets," there was either an Orange or Green Physical Restraint/Escort form that needed to be completed for each incident of restraint or seclusion. However, █████'s Parents never received a copy of any such form for any of the incidents of restraint and seclusion.

227. Prior to February 21, 2019, at the December 2017, May 2018, and October 18, 2019, IEP meetings WCPSS had opportunities to clarify to the Parents its use of the terminology it used for restraint and seclusion. But, as evidenced by the IEP meeting minutes, WCPSS staff continued to misuse the terms: quiet room, time-in, time-out, and safe place instead of seclusion. The word “restraint” is never mentioned.

228. On February 21, 2019, [REDACTED]’s Parents finally became aware of how restraint and seclusion were actually being implemented after they viewed the video of [REDACTED] being restrained and carried out of the cafeteria (the “Cafeteria Incident”). The Cafeteria Incident spurred [REDACTED]’s Parents’ inquiry as to how the BIP was actually being implemented.

The “Cafeteria Incident” on February 21, 2019.

229. On February 21, 2019, for misbehaving in the classroom, [REDACTED] received quiet lunch and was not permitted to attend lunch in the cafeteria with her non-disabled peers. When it was time to go to lunch, [REDACTED] did not go to the EBS classroom as she was required to do as part of her punishment. Instead, she went to the cafeteria to sit with her best friend and her best friend’s mother, [REDACTED]. [REDACTED] kept saying to Ms. [REDACTED] that “she was going to get in trouble for being in the lunchroom because she got a bad marking for the day.” Tr. vol. 2, p. 317:7-15 (T of [REDACTED])

230. Soon after [REDACTED] arrived, an EBS teaching assistant (“TA”) came into the cafeteria, found [REDACTED] and took her lunch box away. The TA then left the cafeteria. [REDACTED] started clinging to Ms. [REDACTED] and continued to say she was in trouble. A different TA then came in and started watching [REDACTED] from a close distance.

231. Then, three (3) EBS staff members (two TAs and Mr. [REDACTED] as well as Principal [REDACTED]) entered the cafeteria, approached the table where [REDACTED] was sitting with Ms. [REDACTED] and began moving furniture to surround [REDACTED]. Based on her training from the [REDACTED] department, Principal [REDACTED]’s actions towards [REDACTED] made Ms. [REDACTED] feel it was “an unsafe area,” so she moved her daughters away. Tr. vol. 2, pp. 319: 24-320:1 (T of [REDACTED])

232. [REDACTED] started telling the group of staff to “Please leave [her] alone” and moved herself between the table and window and crouched in a fetal position. Tr. vol. 2, 319:5-7 (T of [REDACTED]). While [REDACTED] was crunched in the fetal position, Principal [REDACTED] grabbed her underneath her arms and informed [REDACTED] that she needed to come with her. Although she was restrained, [REDACTED] was not a danger to herself or others.

233. After that, Ms. [REDACTED] began filming the encounter with her cellphone. *See* Pet. Ex. 78 (video).

234. Contrary to the documentation in the Daily Point Sheet that Mr. [REDACTED] prepared after the incident, [REDACTED] never ran in the cafeteria, never refused to leave the cafeteria, and never threw a pen or something small. *Compare* Tr. vol. 2, pp. 322:24-323 (T of [REDACTED] *with* Stip. Ex. 29 (Point Sheet documenting incident)). [REDACTED] did not hit or push staff until after the school staff “manhandled” her. *Compare* Tr. vol. 2, p. 323:12-16 (T of [REDACTED] *with* Stip. Ex. 29 (Point Sheet)). [REDACTED] never kicked staff or students in the cafeteria although she did step on Principal

█████ toe after being restrained. *Compare* Tr. vol. 2, p. 323:17-25 (T of █████ with Stip. Ex. 29 (Point Sheet)).

235. Ms. █████ version of the incident prior to the start of the videotaping was credible. Her additional testimony after videotaping started was consistent with what happens on the video which was that WCPSS did not attempt to use any strategies in █████'s BIP prior to restraining her including any calm down routines, visuals, positive self-talk strategies, positive choice reminders, or offering bonus points.

236. While being restrained █████ yelled, "I will walk." Tr. vol. 3, p. 528:20-22 (T of █████ Pet. Ex. 78 (video)).

237. WCPSS' documentation and the testimonies of █████ staff regarding the Cafeteria Incident were not credible.

238. After █████ was physically removed from the cafeteria, Ms. █████ texted █████'s mother █████ and sent her the video of the restraint and removal. █████ called █████ after watching Ms. █████ video of the Cafeteria Incident and informing him she was going to pick █████ up from school.

239. After being removed from the cafeteria, █████ was secluded in the "time-out" room. WCPSS admitted during the time that █████ was in the time-out room, she was not permitted to leave until she had calmed down. Pet. Ex. 43, p. 581 (Internal Google Form); Pet. Ex. 71, p. 650.

240. █████ went █████ to the school to retrieve █████ after receiving the video. █████ informed Principal █████ that she had a video documenting what they did to █████ in the cafeteria that she would share with the media if the school did this to █████ again.

241. Later in the evening, █████'s mother and father asked █████ where they took her when they left the cafeteria. █████ reported the WCPSS staff took her to the quiet room where the staff would hold the door shut. When █████ asked █████ about where she was taken after being carried out of the cafeteria and █████ described the space to him, █████ realized the "time-out" room meant that █████ was being secluded. As a teacher working for WCPSS, █████ had received training on the use of restraint and seclusion as well as time out and the use of CPI techniques. The training specifically says seclusion is not used as punishment. According to State law, seclusion is also not "time-out".

242. It is a common practice to remove a child from a classroom if they are being disruptive, and this is considered a "time out." While Mr. █████ had informed █████'s Parents about time out and escorting █████ outside of the classroom, this did not raise any red flags—as per █████'s training from WCPSS—neither was the use of restraint or seclusion. █████'s Parents were unaware that only students in the EBS classroom are restrained and secluded. Assistant Principal █████ admitted that when non-EBS students needed to be removed from a classroom, they were not secluded. Instead, an adult would stay in another room with them. Tr. vol. 8, p. 1725:7-16 (T of █████)

243. After seeing Ms. [REDACTED] video of the Cafeteria Incident, [REDACTED] felt betrayed and lied to by WCPSS. Once he found out about the Cafeteria Incident, he also felt WCPSS had been hiding the use of restraint and seclusion.

244. The next day, February 22, 2019, [REDACTED] emailed Principal [REDACTED] [REDACTED], and [REDACTED] [REDACTED] and requested a copy of the surveillance video from the cafeteria incident so [REDACTED] s psychologist could review it. Principal [REDACTED] forwarded the correspondence to district administrators and informed [REDACTED] s Parents that the school's video of the incident made it difficult to see what was happening; however, she believed another parent had recorded the incident. Pet. Ex. 76, 687. On February 24, 2019, Principal [REDACTED] emailed [REDACTED] and [REDACTED] stating copies of video surveillance were "typically not provided." Pet. Ex. 76, 693.

245. On February 26, 2019, [REDACTED] emailed Principal [REDACTED] [REDACTED], and [REDACTED] [REDACTED] again stating:

[W]e do not want anyone restraining or physically removing [REDACTED] unless she is physically hurting herself or another child. If there is a situation where she is not obeying your request, especially when she is feeling anxious, we do not feel physical aggression is an appropriate response. With some time and patience, she will calm down.

Pet. Ex. 76, p. 692-93.

246. Principal [REDACTED] took no action except to send an email saying [REDACTED] needed to be restrained as she became "physically aggressive" although Ms. [REDACTED] had seen otherwise. *Compare* Pet. Ex. 76, p. 692 with Tr. vol. 2, p. 323:12-16 (T of [REDACTED]). In her email, Principal [REDACTED] called seclusion just a "difference space to calm down" and "a safe place". Pet. Ex. 76, p. 692. WCPSS did not contact [REDACTED] Parents to conduct an FBA or revise her BIP despite this purportedly "physical aggressive" behavior and approximately 22 prior seclusions.

Parents' Request for Functional Behavior Assessment ("FBA")

247. On February 28, 2019, [REDACTED] s Parents requested the school conduct a Functional Behavioral Assessment ("FBA") on [REDACTED] to help develop a new BIP. Mr. [REDACTED] responded on March 4, 2019, to [REDACTED] s Parents' request for a new FBA, Mr. [REDACTED] informed them an FBA had been completed in 2017 and would be part of a re-evaluation process. Pet. Ex. 76, 695. He did not offer to begin a re-evaluation process for [REDACTED] because an FBA had been done in 2017 but indicated that the team could discuss revising BIP at the next IEP meeting. At that time, no IEP meeting had been scheduled.

238. From the testimonies of the [REDACTED] staff and their documentation, it is clear they did not understand the legal requirements of permissible restraint and seclusion and were using both to punish EBS students like [REDACTED] Mr. [REDACTED] admitted that [REDACTED] was secluded after tipping back her chair, flipping markers, and grabbing teacher's arm. Per Assistant Principal

█████ an elementary student, like █████ grabbing a teacher's arm likely gave the perception of imminent danger which was sufficient to restraint and seclude █████

239. █████'s Parents were not given copies of all █████'s Point Sheets, but based on the Point Sheets, █████'s Parents did receive, the use of restraint and seclusion was not appropriately documented and instead incorrectly noted seclusion as "time out." Tr. vol. 11, p. 2139:13-17 (T of █████ see, e.g., Pet. Ex. 35, p. 335 (November 20, 2017, noting █████ was placed in "time out" for being out of her seat without permission); see also Pet. Ex. 43, p. 576 (Internal Google Form documenting █████'s restraint and seclusion); Pet. Ex. 71, p. 648 (WCPSS admitting during the time that █████ was in the time-out room on November 20, 2017, she was not permitted to leave until she had calmed down.); Pet. Ex. 35, p. 350 (December 14, 2017 point sheets notes one time-out for █████ but it is unclear for what behavior); see also Pet. Ex. 43, p. 577 (Internal Google Form documenting █████'s restraint and seclusion); Pet. Ex. 71, p. 649 (WCPSS admitting during the time that █████ was in the time-out room on December 14, 2017, she was not permitted to leave until she had calmed down.); Pet. Ex. 35, p. 409 (March 23, 2018 point sheet notes █████ was in time-out "moving table she was under or attempting to run from classroom"; see also Pet. Ex. 43, p. 580 (Internal Google Form documenting █████'s restraint and seclusion); Pet. Ex. 71, p. 649 (WCPSS admitting during the time that █████ was in the time-out room on March 23, 2018, she was not permitted to leave until she had calmed down.)

240. Based on the descriptions in the Point Sheets, █████'s Parents had no way to know █████ was actually being secluded and restrained rather than being placed in "time-out" or the "quiet room." WCPSS deliberately misrepresented the use of restraint and seclusion to █████'s Parents when it used incorrect, alternative language. WCPSS also failed to provide █████ the legally required notice of these incidents of restraint and seclusion.

241. WCPSS failed to appropriately implement the CPI techniques and seclusion in █████'s BIPs. █████ was restrained and/or secluded even when she was not "unsafe to herself or others." WCPSS also failed to implement daily social skills lessons.

242. After the Cafeteria Incident, WCPSS stopped using restraint and seclusion as frequently even for behavior which had previously warranted the use of restraint and seclusion. After February 21, 2019, █████ was only restrained and secluded on two occasions – once in February 2019 for 14 minutes and September 2019 for 6 minutes, but WCPSS started suspending her instead.

243. WCPSS did not appropriately implement the use of CPI techniques and seclusion before February 21, 2019, or afterwards. In her expert opinion, Dr. █████ opined based on her review of the point sheets that █████ did not demonstrate unsafe behaviors meriting the use of restraint and seclusion. Instead, Dr. █████ opined that █████ was restrained and secluded inappropriately as a disciplinary consequence for behaviors that did not warrant the use of restraint and seclusion. In addition, the threat or use of restraint and seclusion only served to exacerbate █████'s behaviors rather than effectively intervene.

244. The Undersigned agrees and finds that the BIPs were inappropriately implemented prior to February 21, 2019.

SECTION 4: ISSUES AFTER FEBRUARY 21, 2019 BEFORE JANUARY 2020

Implementation of October 18, 2018 IEP and BIP from February 21, 2019 and March 25, 2019.

245. With respect to the analysis of the implementation of the October 2018 BIP, it suffers the same deficits as the BIPs discussed prior in this decision.

246. As to the implementation of the October 2018 IEP, since it is essentially the same as the March 2019 IEP, it suffers the same deficits as that IEP discussed below.

247. New goals were written for the March 2019 IEP but [REDACTED] “most likely” did not meet the social-emotional goals in the October 2018 IEP. Tr. vol. 8, pp. 1638:5-1639:13 (T of [REDACTED])

248. The implementations of the October 2018 IEP and BIP were inappropriate.

Appropriateness of March 2019 IEP/BIP, May 2019 IEP/BIP, and October 2019 IEP

249. The issues regarding the appropriateness of the March 2019 IEP/BIP, May 2019 IEP/BIP, October 2019 IEP are essentially the same. They are the appropriateness of the IEPs specifically the functional/behavior goals, lack of math and reading goals, lack of pragmatic language goals and related speech services, the reduction in articulation speech service, lack of counseling, service delivery, implementation, and whether an FBA should have been completed prior to their development. Minor changes were made to these IEPs and BIPs, otherwise, they were the same as their predecessors.

March 2019 IEP and BIP

March 26, 2019 IEP

Appropriateness of the March 2019 IEP

250. After the Cafeteria Incident, at the Parents’ request, the IEP team finally met a month later, on March 26, 2019, to review and revise [REDACTED]’s IEP and BIP. The appropriateness and implementation of the March 2019 IEP and BIP are at issue.

251. Prior to the March 26, 2019 IEP meeting, [REDACTED] had been restrained at least 22 times for Level 1 offenses. *See* Chart pp. 28-29.

252. According to the present level of academic and functional performance “PLAAFP”) for the functional behavior goal in the March 2019 IEP, “[REDACTED] has continued to make behavioral gains” (Stip. Ex. 3, p. 10). However, the IEP team stated in the BIP review that “[t]he data has indicated an increase in level 1 offenses and an increase in more impulsive behaviors.”

Stip. Ex. 4, p. 22. Despite these purported “gains”, the functional behavior goals remained the same as the May and October 2018 IEPs with the exception that proficiency in the second goal was changed from 100% to 90% and the duration dates were changed to 03/27/2019 to 05/21/2019. See Stip. Ex. 3, pp. 8 & 10.

253. The March 2019 IEP contained no academic goals or pragmatic language goals. [REDACTED] continued to be served in the EBS classroom even though she had no math goals. The functional/behavior goals continued to be monitored by the EBS Point Sheets.

254. WCPSS provided no explanation in the March 2019 IEP documentation (or any prior documentation) as to the justification for placing [REDACTED] in the EBS special education classroom for a 60-minute session, 5 days a week for math instruction.

255. At the January 27, 2020 IEP meeting, [REDACTED]'s math instruction in the special education classroom was discontinued. The explanation in the January 2020 Prior Written Notice was “team rejected having math described in the service delivery as there is no documented need for direct math support.” Stip. Ex. 12, p. 84.

256. The Undersigned agrees with the January 2020 IEP team that there is and was no documented need for direct math support and finds that the service delivery removing [REDACTED] for 60 minutes sessions, 5 times a week for math instruction in the March 2019, May 2019, and October 2019 IEPs was inappropriate.

257. Based on the above and the expert opinions of Drs. [REDACTED] [REDACTED] and Ms. [REDACTED] the Undersigned finds that the March 2019 IEP is inappropriate.

Implementation of March 2019 IEP

258. The WCPSS misled [REDACTED]'s Parents to believe that [REDACTED] was making progress and that no changes to the BIP were needed when there was a decline in the trend line of [REDACTED]'s behaviors. Tr. vol. 1, pp. 172:24-173:4; 174:19-25; Tr. vol. 12, pp. 2243:22-2244:3 (T of [REDACTED])

259. No progress monitoring for [REDACTED]'s IEP goals was done except for the Point Sheets describing her maladaptive behaviors. Tr. vol. 6, p. 1142:8-12 (T of [REDACTED]) The personal goal in the Point Sheets at that time was “I will identify the size of a problem” did not align with the IEP behavior goal or the replacement behavior in the BIP. Stip. Ex. 29, pp. 182-210. The Point Sheets were not appropriate to progress monitor the IEP behavior goal.

260. Likewise, there is no evidence of explicit instruction in social skills and no evidence of progress for [REDACTED] in the area of social skills. Tr. vol. 6, p. 1180:14-18 (T of [REDACTED]) Mr. [REDACTED] admitted he prepared no lesson plans for math or social skills instruction.

261. Assistant Principal, and LEA Representative, [REDACTED] admitted that [REDACTED] was not meeting her October 2018/March 2019 IEP goals. Tr. vol. 8, p. 1748:19-23 (T of Ms. [REDACTED])

262. The March 2019 IEP was not appropriately implemented.

March 26, 2019 BIP

Appropriateness of the March 2019 BIP

263. No FBA was conducted before the review of the March 2019 BIP despite 17 restraints and seclusions the prior school year and 6 or 7 restraints and seclusions prior to the March 2019 IEP meeting. Except for some strategy suggestions from [REDACTED]'s Parents, the BIP remained the same as all the previous BIPs. Like its predecessors, the March 2019 BIP aligned with the EBS program and was not individualized for [REDACTED].

264. Prior to the March IEP meeting, [REDACTED]'s Parents had recommended additional support and strategies for managing [REDACTED]'s behavior. The school-based members of the IEP team reported on the March 2019 BIP that the additional strategies (exercise breaks, “take 5” break, music break, a set of picture cards with non-verbal cues and therapeutic picture) recommended by Mom and Dad, had “already had positive effects on [REDACTED]'s behavior...”. Stip. Ex. 4, p. 22. The Parents’ strategies were recorded on the BIP Review but not on the BIP itself. Because of this, [REDACTED]'s Parents complained that the BIP was not revised. WCPSS asserts that the BIP was amended to add the strategies as evidenced by the listing of the strategies in the BIP review under “Step 4: Changes to Behavior Plan.” Stip. Ex. 4, p. 24.

265. Whether the IEP team meant to amend the BIP with these strategies or not, the face of the March 2019 BIP remained the same as the December 2017, May 2018, and October 2018 BIPs.

266. The BIP document, itself is confusing because it has two components – a Behavior Intervention Plan and a Behavior Intervention Review Plan. The first page of the BIP is the “Behavior Intervention Plan” with Steps 1-4. The following pages of the BIP are labeled the “Behavioral Intervention Plan Review” (the “BIP Review”). Stip. Ex. 4, pp.22-24. Like the BIP, the BIP Review lists 4 steps but they defer from the BIP. The BIP Review Steps are: “Step 1: Review the current plan; Step 2: Are reinforcers and consequences appropriate and consistently applied?; Step 3: List additional supports/strategies needed; Step 4: Changes to Behavior Plan.” Stip. Ex. 4, pp. 22-24.

267. Step 4 of the BIP Review states that on “3/26/19 – added additional strategies/supports: exercise breaks, “take 5” break, music break, a set of picture cards with non-verbal cues and therapeutic picture.” Stip. Ex. 4, p. 24. The additional strategies are further explained in Step 3 of the BIP Review. While the strategies were listed on the BIP Review, they were not added to the intervention strategies listed on Step 2 of the BIP.

268. The March 2019 Prior Written Notice indicated that these additional strategies had been added to the March 2019 because she had “shown an increase in anxiety.” Stip. Ex. 2, p. 4. Even though the Parents asserted that the BIP was not amended to include these additional strategies, there is some documentation in the Point Sheets that these additional strategies were occasionally implemented.

269. There was no explanation, other than sloppy paperwork, as to why the strategies were not added under the intervention strategies listed in Step 2 of the BIP. To implement the BIP, a teacher would have to read the flip side and try to determine which strategies were now applicable. Even if the strategies had been properly placed, the BIP was still inappropriate.

Implementation of March 2019 BIP

270. Like its predecessors, the implementation of the March 2019 BIP was inappropriate.

271. Although the BIP stated [REDACTED] would "use her words and taught self-control techniques to communicate her needs" and the IEP goal required [REDACTED] to use self-regulation strategies including "positive self-talk," the IEP team had no data on teaching "internal states vocabulary" to [REDACTED] to assist her in obtaining her IEP goals or using the BIP. Tr. vol. 4, p. 667:19-668:15 (T of Ms. [REDACTED])

272. Even if the March BIP and the Parents' strategies were implemented with complete fidelity, implementing an inappropriate BIP by its nature must be inappropriate and did not provide [REDACTED] with a free and appropriate education.

Reduction of the Use of Restraint and Seclusion After the Cafeteria Incident

273. After February 21, 2019, WCPSS did not restrain or seclude [REDACTED] for behaviors for which she had previously been restrained and secluded. By way of example, [REDACTED] was not restrained or secluded for slapping a teacher or turning over a desk. *Compare* Stip. Ex. 29, 188 (February 27, 2019, point sheet documenting [REDACTED] slapping teacher on their shoulder but not being secluded) *with* Pet. Ex. 35, 486 (October 23, 2018 point sheet documenting [REDACTED] squeezing teacher's thumb and being secluded); *see also* Tr. vol. 5, 848:4-16 (T of [REDACTED])

274. The administration admitted to [REDACTED]'s parents, "the team has been hesitant to implement the quiet room (and the related possibility of needing CPI restraints to transition to the quiet room) with [REDACTED] since the cafeteria incident." Pet. Ex. 76, pp. 700-01. Instead, the administration informed [REDACTED]'s Parents if [REDACTED] continued to have behaviors the school would need to "consider pulling back on her regular education hours and/or her independence while in the general education setting." *Id.*, p. 701.

275. Even though [REDACTED] staff were now hesitant to use restraint and seclusion, on April 1, 2019, the administration at [REDACTED] continued to suggest to [REDACTED]'s Parents that it thought it was appropriate to use restraint and seclusion with [REDACTED] claiming it was "critical to the success of the EBS program...". Pet. Ex. 76, p. 700-701; Tr. vol. 4, p. 834:6-14 (T of [REDACTED])

276. Petitioners in their Second Supplement Brief list "all behavior in the Point Sheets which based on their similarity would likely have resulted in Petitioner [REDACTED]'s restraint or seclusion." *See* Pet'r Second Supp. Brief pp. 1-8 *citing* Point Sheets in Stip. Ex. 29, pp. 188, 189, 192, 193, 195, 198, 205, 206, 211, 212-217, 257, 277-78, 288-89, 291-92, 294-295, 297-98, 299-300, 303-05, 306-08309-10, 311-12, 313-14, 330-33, 334-38, 344-349, 350-57, 361-65, 366-67, 380-81, 382-84, 406-08, 409-11, 412-13, 415-18.

277. There are 35 incidents listed; 34 are level 1 offenses. *Id.* pp. 2-8. These behaviors were of significant severity and similarity to behaviors for which [REDACTED] had previously been excluded. More likely than not, [REDACTED] would have been restrained and secluded for most of these incidents.

278. Fortunately, after the Cafeteria Incident, [REDACTED] staff only restrained and secluded [REDACTED] two times and stopped using restraint and seclusion as behavior intervention strategies. The decline in restraints and seclusions, however, does not mean that [REDACTED]'s social-emotional needs were being appropriately met or that she was making progress academically or behaviorally.

May 15, 2019 IEP Meeting

279. The next IEP meeting was held on May 15, 2019, to conduct her annual review and review her BIP. Stip. Exs. 5-8.

Appropriateness and Implementation of the May 2019 IEP

280. The functional/behavioral goals in the May 2019 IEP were revised as follows:

Using her taught self-regulation strategies, [REDACTED] will respond appropriately to peers and adults while refraining from: (using inappropriate language, arguing, and threatening) earning 90% of her being respectful checks.

Using her taught self-regulation strategies, [REDACTED] will refrain from displaying physical aggression (ex. punching, kicking, hitting, throwing objects, and/or hurting herself) 95% of the time.

Stip. Ex. 7, pp. 35-36.

281. The lack of alignment between [REDACTED]'s evaluation data, IEP goals, and progress monitoring led to the development of an IEP that was not appropriate to meet her needs. Tr. vol. 6, p. 1137:10-19 (T of [REDACTED])

282. The IEP team failed to discuss [REDACTED]'s social-emotional skills or her math and content support specially designed instruction ("SDI"). Tr. vol. 5, p. 859:2-5 (T of [REDACTED]) The only data discussed related to her "levels" in the EBS classroom. Stip. Ex. 3&10.

283. The IEP team adopted the same goal from the previous IEP "refrain from displaying physical aggression" but lowered the expectation from 100% to 95% of the time. Stip. Ex. 7, p. 3.

284. The team provided no relevant baseline data or rationale for repeating the same goal with a lower expectation, despite purportedly working on the goal for a year.

285. This goal was inappropriate – it should have focused on teaching [REDACTED] a replacement behavior rather than solely monitoring if she refrained from the behaviors. Tr. vol. 1, p. 137:7-24 (T of [REDACTED])

286. Moreover, the decrease in goal expectations demonstrated [REDACTED] had not made appropriate progress, instruction had not been effective, and the new goal was not appropriately ambitious. Tr. vol. 6, pp. 1157:3-21; 1159:19-1160:8 (T of Dr. [REDACTED] [REDACTED]s functional goal to “respond appropriately” was inappropriate. Tr. vol. 1, pp. 136:4-137:2 (T of [REDACTED]

287. Moreover, [REDACTED]s IEP was lacking various goals, including academic goals, functional communication goals, and attention goals, to address her unique needs.

288. According to Dr. [REDACTED]

[REDACTED] clearly has social impairments that are impacting her behavior. There's no goals for social skills. She has functional communication impairments that are impacting her behavior. There's no functional communication goals. She has emotional regulation deficits, and they are attempting to address that, but they keep attempting to address it using the same strategies that aren't working. She has focus and attention problems that are impacting her behavior. There's no goal for that. And she -- and if you look through all of her daily sheets, it often starts with an academic frustration. So there's no goals to target academic skills to decrease her frustration that leads to problem behavior.

Tr. vol. 1, 138:10-23 (T of [REDACTED]

289. [REDACTED]s supplemental aids, accommodations, and services remained the same. *Compare* Pet. Ex. 22 (October 19, 2018 IEP) *with* Stip. Ex. 7 (May 16, 2019 IEP).

290. [REDACTED] expressed concern to the IEP team that [REDACTED]s speech skills were not translating to general speech with peers and adults. Tr. vol. 5, 858:10-20 (T of [REDACTED] Yet, the IEP team still reduced [REDACTED]s speech therapy services although it heard [REDACTED]s concerns and knew teachers still struggled to understand [REDACTED] *See* Stip. Ex. 6 (PWN reflecting decreasing [REDACTED]s speech time but also noting [REDACTED]s teacher has difficulty understanding her at times).

291. The rest of [REDACTED]s service delivery remained unchanged, including her removal from her non-disabled peers to receive specially designed instruction in math and Content Support for ninety-five (95) minutes each day without a single academic goal. *See generally*, Stip. Ex. 7.

292. The IEP team did not discuss adding counseling as a related service although it was clear [REDACTED] needed counseling as a related service. *See* Tr. vol. 1, 138-24-139:6, 140:7-22 (T of [REDACTED] *see also* Stip. Ex. 5 (minutes), Stip. Ex. 6 (PWN).

293. WCPSS argues that the addition of counseling was not warranted because: “At the time of the May 2019 IEP meeting, there was no indication that [REDACTED] was unable to access her special education with such regularity that counseling as a related service was required for the provision of FAPE.” Resp. Pro Final Dec. p. 37, #198.

294. Moreover, WCPSS argues that [REDACTED]s treating psychiatrist, Dr. [REDACTED] testified that [REDACTED] was not ready to access therapy in the December 12, 2019 (5 months before the IEP meeting); therefore, she could not have benefitted from counseling through school. Resp. Pro.

Final Dec. p. 37, #197 (citing Tr. pp. 397:3-14, 408:7-19). A review of that discourse shows that Dr. [REDACTED] main concern was about [REDACTED]s ability to form a connection/good relationship with the therapist not that she did not need or was unable to benefit from therapy.

295. The IEP team also did not consider the regular education classroom setting for [REDACTED] although her Parents requested it be considered. Stip. Ex. 5 (minutes), Stip. Ex. 6 (PWN). The IEP team did not document [REDACTED]s Parents' request or the team's refusal for regular education placement on the Prior Written Notice. *See* Stip. Ex. 6 (PWN).

296. Overall, Dr. [REDACTED] opined that the May 2019 IEP was not appropriately constructed to address [REDACTED]s academic, language, or behavioral deficits. Tr. vol. 6, 1156:6-16 (T of [REDACTED] The Undersigned agrees.

Appropriateness and Implementation of the May 2019 BIP

297. The May 2019 BIP was the same as all the prior BIPs since 2017. The replacement behavior on the May 2019 BIP was not revised nor were any of the remaining 4 steps. Stip. Ex. 8, p. 45.

298. According to the BIP Review, the "current plan is working" and [REDACTED] has regularly been using the additional supports added during the last BIP, as needed, the majority of the time. The greatest barrier are those times when she is not willing to use one of her strategies." Stip. Ex. 8, p. 46. No additional strategies were added to the BIP at this meeting and no additional changes were made to the behavior plan. Stip. Ex. 8, p. 48. [REDACTED]s present levels contained the same data from the October 2018 IEP. Tr. vol. 6, p. 1137:10-19 (T of [REDACTED]

299. The IEP team recognized that the use of certain strategies suggested by [REDACTED]s Parents had been effective and helped improve [REDACTED]s behavior at school. Stip. Ex. 5. Assistant Principal [REDACTED] agreed the March 2019 supports helped improve [REDACTED]s behavior. Tr. vol. 8, p. 1680:3-8 (T of [REDACTED] However, the IEP team determined that no changes were needed to the BIP. Stip. Ex. 5, p. 3; *compare* Stip. Ex. 4 (March 26, 2019 BIP) *with* Stip. Ex. 8 (May 16, 2019 BIP).

300. The May 2019 BIP was inappropriate based on [REDACTED]s known language deficits. Tr. vol. 4, pp. 670:15-23; 671:12-14 (T of Ms. [REDACTED] The BIP had a "language demand" that was too high for [REDACTED] Tr. vol. 4, pp. 667:19-668:15 (T of Ms. [REDACTED]

301. The BIP was also ineffective to address [REDACTED]s behaviors or to prevent her from being restrained and secluded. Tr. vol. 1, pp. 132:5-13; 149:24-150:8 (T of [REDACTED] Dr. [REDACTED] opined the IEP team did not understand why [REDACTED] was engaging in behaviors and how to support her. Tr. vol. 1, pp. 146:24-147:7. (T of Dr. [REDACTED]

302. WCPSS had originally "explained the EBS model for mainstreaming in which the expectation is that [REDACTED] maintain a level 3 or 4 for three weeks to be eligible for increasing her mainstreaming opportunities," Pet. Ex. 5, p. 15. [REDACTED] achieved this goal during the spring of 2019; yet the WCPSS did not increase her time in general education. Stip. Ex. 29 pp. 232-57.

303. There was little evidence that the May 2019 BIP was actually being implemented. Tr. vol. 1, p. 147:13-22 (T of Dr. [REDACTED] *see also* Tr. vol. 6, p. 1142:8-12 (T of Dr. [REDACTED]

304. The personal goal on the Point Sheets still did not align with her IEP or BIP for progress monitoring purposes. From February 2019 (Pet. Ex. 35, p. 550) through June 6, 2019 (end of school year), the goal was “I will identify the size of a problem.” Stip. Ex. 29, pp. 182-27.

305. Likewise, while Mr. [REDACTED] testified he provided social skills lessons, he provided no lesson plans, and there is no progress monitoring data to support this testimony. Tr. vol. 8, pp. 1578:23-1579:4; 1586:19-1587:9 1619:10-15 (no data on when a particular strategy was used with [REDACTED] Stip. Ex. 30 (speech therapist noting one social skills lesson with EBS classroom).

306. [REDACTED]’s educational record had no evidence the IEP team promoted [REDACTED]’s use of strategies to achieve her functional IEP goals. Tr. vol. 1, pp. 136:4-137:2 (T of [REDACTED] Likewise, there was no evidence in [REDACTED]’s educational record of the IEP team taking data on her goal to “comply with directions from staff members.” Tr. vol. 1, p. 135:1-15 (T of [REDACTED] Pet. Ex. 22, p. 106.

307. [REDACTED]’s May 2019 BIP was not appropriately implemented.

Fourth Grade Report Card

308. [REDACTED]’s Parents requested academic goals on the IEP. In response to their request, WCPSS asserts that [REDACTED] is on grade academically and does not need academic goals.

309. According to [REDACTED]’s 4th grade report card completed by her regular education teacher, [REDACTED] was not on grade level academically in her core academic subjects and was below proficient in her behavior/conduct.

Academics Scores

310. [REDACTED]’s 4th grade report card is even more difficult to decipher than her 3rd grade report card because the overall scores for the core subjects of ELA and math are not reported for any of the four quarters. *Compare* Pet. Ex. 58, p. 624 to Stip. Ex. 32, p. 441.

311. The overall scores for ELA subcategories of language, reading, speaking, listening, and writing are suspect because most of the quarterly scores are missing. Only the subsection of “show command of the conventions when writing” in the Language subcategory has scores for all 4 quarters. Stip. Ex. 32, p. 441.

312. Similarly, the math subcategories are missing score entries for many of the quarters, so the 4th quarter scores are unreliable. Stip. Ex. 32, p. 441. This is also true for the science, social studies, visual arts, music, and healthful living quarterly reports. *Id.*

313. At the October 19, 2019 IEP meeting, the IEP team noted that [REDACTED]’s strength was that she was “working on 3rd grade curriculum across all school settings.” Pet. Ex. 22, p. 104. On her 3rd grade report card, [REDACTED] was scored proficient in social studies, visual arts, music, and science, but she was not proficient in the core subjects of ELA and math. At best, half-way through

the 4th grade, ■■■ was still only “working” on 3rd grade curriculum in all subjects not actually competent in 3rd grade curriculum and not proficient in her 4th grade core academics.

314. Her lack of proficiency in these subjects were also evidenced by her 4th grade Beginning of the Year Assessments (“BOG”) in math and ELA which were Level 1’s, not proficient.

315. For all 4 quarters on ■■■s 4th grade report card, her regular teacher commented that ■■■ “is working on all areas of the 4th grade curriculum.” Stip. Ex. 32, p.442. However, while she may have been working on areas in the 4th grade curriculum, based on the teacher’s scoring, ■■■ was not proficient in all areas of 4th grade curriculum, especially not in math and ELA.

316. In its Proposed Decision, WCPSS argues that ■■■s poor performance is because of test anxiety, that ■■■s: “primary academic issue is anxiety rather than ability. Her school record is rife with acknowledgements that anxiety, not lack of understanding or ability, was the barrier to academic performance.” Resp. Pro Final Dec. pp. 30-31, #157.

317. If ■■■s school record was “rife” with testing anxiety, her IEPs should have addressed this issue because her anxiety was impacting her ability to successfully access the general curriculum, but the school-based members of the IEP teams recommend any functional goals to ameliorate ■■■s test anxiety.

Behavior and Conduct Scores

318. ■■■s work habits and conduct scores on her 4th grade report card were “2’s” for the 1st, 2nd, and 4th quarters but had declined to “1’s” in the 3rd quarter. Pet. Ex. 58, p. 624. Overall, ■■■s work habits and conduct “inconsistently met expectations” in the 4th grade.

319. Only the February 2, 2018 IEP Progress Report was entered into evidence for the 2017-2018 school year. Pet. Ex. 44. According to the February 2018 IEP Progress Report, ■■■ had not met her IEP social-emotional goals.

320. For the 2018-2019 school year, two progress reports, in March 2019 and June 2019, were admitted. Resp. Exs. 13 & 14. The March 2019 Progress Report reported that ■■■ was making “inconsistent progress towards mastery” of her social-emotional goals. Resp. Ex. 13. Even though the June 2019 Progress Report reported “consistent progress towards mastery” (Resp. Ex. 14), Mr. ■■■ admitted that ■■■ still did not meet her IEP social-emotional goals. Tr. vol. 8, pp. 1638:2-1638:13 (T of ■■■)

FIFTH GRADE 2019-2020 SCHOOL YEAR

321. Even the EBS program was not being consistently implemented. ■■■ ■■■ staff changed the EBS rules at the beginning of the 2019-2020 school year. When school began, the EBS staff informed ■■■ that she needed to achieve a Level 3 or 4 for thirty (30) consecutive days—not 3 or 4 for three weeks—to be eligible for increasing her mainstreaming opportunities. Tr. vol. 4, p. 751:12-17 (T of ■■■). After twenty-nine (29) consecutive days, on September 25, 2019, after becoming “upset about the possibility of receiving dots on her behavior point sheet,” ■■■ received a Level 1 and was placed in the seclusion room. ■■■s mother was sitting outside waiting to pick

her up. Stip. Ex. 29, p. 279-80. Even though [REDACTED] was ready to pick [REDACTED] up, Mr. [REDACTED] required [REDACTED] remain in seclusion. Tr. vol. 5, pp. 874:3-5;874:3-5 (T of [REDACTED])

322. Not only did WCPSS seclude [REDACTED] that day, WCPSS punished her a second time by suspending her. Pet. Ex. 36.

323. WCPSS had previously told [REDACTED]s parents “[t]he quiet room is never used as a consequence” and the use of the quiet room is “standard practice throughout the EBS programs in the district (including the 3-minute timer once calm before leaving the quiet room).” Pet. Ex. 76, p. 716. However, Dr. [REDACTED] opined based on her review of the EBS point sheets the “consequences” in [REDACTED]s BIP were punitive and would not improve [REDACTED]s behavior. Tr. vol. 1, pp. 130:18-131:5 (T of [REDACTED]) The Undersigned agrees.

324. After this seclusion, [REDACTED]s emotional state rapidly declined. Tr. vol. 5, p. 897:14-17 (T of [REDACTED]) [REDACTED] began having recurring nightmares about being restrained and secluded. Tr. vol. 5, pp. 897:23-898:11 (T of [REDACTED])

325. On October 1, 2019, [REDACTED]s Parents requested the BIP be revised to remove seclusion and restraint and, again, explained that if [REDACTED] is dysregulated mentally, the EBS system of providing dots and punishments will only worsen her behavior. Pet. Ex. 76, p. 720.

326. Also on October 7, 2019, [REDACTED] emailed Mr. [REDACTED] informing him [REDACTED] was still having challenges in reading which were causing maladaptive behaviors. Pet. Ex. 76, p. 743.

October 17, 2019 IEP and BIP Meeting

327. Another IEP meeting was held on October 17, 2019 to review the May 2019 IEP and BIP. Stip. Ex. 9. Other than, changing the IEP’s duration dates to October 18, 2019 to May 14, 2020, and a notation to “see updated data on bip [sic] plan update” no other changes were made to the October 2019 IEP. *See* Stip. Ex. 10, p. 65-74; note on p. 66. The functional/behavior goals remained the same as the May 2019 IEP.

October 17, 2019 IEP

328. At the October 2019 IEP meeting, [REDACTED] asked about [REDACTED]s low reading scores on the mClass. Tr. vol. 5, pp. 854:22-855:7. Rather than develop an IEP goal to address [REDACTED]s deficits, the IEP team informed [REDACTED] that [REDACTED]s scores were low due to her test anxiety. *Id.* Knowing this, WCPSS could have, but did not, implement research-based test-taking anxiety interventions for [REDACTED] Tr. vol. 6, pp. 1123:20-1124:10. (T of [REDACTED])

329. During the meeting, [REDACTED]s Parents shared research on pediatric bipolar disorder and “the possible impact of hallucinations, manic phases, and other symptoms on her behavior.” Stip. Ex. 9, p. 3. [REDACTED]s Parents explained [REDACTED] “worries that she might get dots and is fearful of being secluded and restrained.” Stip. Ex. 9, p. 1.

330. [REDACTED]s Parents asked the team to remove seclusion as a “pre-planned response” from [REDACTED]s BIP as “[s]eclusion is not a strategy.” Stip. Ex. 9, p. 12. They asked [REDACTED] “not [be] put in seclusion unless it is an emergency situation and that if there is an emergency situation, the team

should convene immediately to discuss why the Behavior Intervention Plan is not working to meet her needs which warranted [seclusion].” *Id.*

331. [REDACTED]’s mother twice asked for the “perceived climate of power and control be changed to a climate of intervention and support,” as the current philosophy including the use of seclusion is “not helping [REDACTED] to improve.” *Id.*

332. Like the prior year, the Point Sheets did not align with the IEP or BIP. Initially, the Point Sheets had no personal goals. Stip. Ex. 29, pp. 258-261. Thereafter, from September 3, 2019 through October 23, 2019, the personal goal was “I will put out my best effort at all times.” Stip. Ex. 29, pp. 263-303. Once again, the Point Sheet was not in alignment for monitoring the IEP goals or the replacement behavior in the BIP.

333. [REDACTED]’s mother also “inquired as to whether a more intensive social skills lesson with the school psychologist would better help address her needs.” Stip. Ex. 9, p. 3.

334. [REDACTED]’s father informed the team that [REDACTED] “is losing trust in the school at home, no longer doing homework, and [sic] causing nightmares.” Stip. Ex. 9, p. 3.

335. [REDACTED]’s Parents expressed their concern that “the data that is [sic] being provided is [sic] all about the behavior and the consequences and do not capture the antecedents or triggers.” Stip. Ex. 9, p. 2. [REDACTED]’s parents asked, again, to replace the behavior point sheets. Finally, the IEP team agreed to try and create a new sheet to track the frequency of [REDACTED]’s behaviors. Stip. Ex. 9, p. 2-3.

336. Per her Parents’ request, the EBS staff started using Daily Data Logs which checked the Antecedent, Behavior, and Response (“ABC Form”) during blocks of time. This ABC Form was used from October 25, 2019 through January 15, 2020. Stip. Ex. 29, pp. 306-418. Unlike the Point Sheets, the ABC Form defined the behaviors as follows: “threatening harm” includes threats of harm to self or others; “property destruction” includes ripping paper; “aggression” includes self-injurious behavior, hitting others, grabbing items from others, throwing items, knocking over furniture; and “verbal disruption” included calling out and/or excessive questioning. “Fleeing area” is also listed as behavior but as it is self-explanatory, no definition was given. *See* Stip. Ex. 29, pp. 306-418.

337. At the October 2019 IEP meeting, [REDACTED]’s Parents presented a written request for an independent functional behavior assessment (“FBA”) of [REDACTED]’s behaviors. Stip. Ex. 9, p. 4. After that request, the IEP team decided to “table” the BIP review until October 30, 2019 and did not remove seclusion from [REDACTED]’s BIP. Stip. Ex. 9, p. 54. The IEP team refused to make any changes to the IEP service delivery. *Compare* Stip. Ex. 7 (May 16, 2019 IEP) *with* Stip. Ex. 10 (October 18, 2019 IEP).

338. Dr. [REDACTED] opined that the IEP team’s explanation the BIP could not be changed until FBA was completed did not make sense as the team could have updated the BIP with new strategies at the October meeting. Tr. vol. 1, pp. 154:20-155:4. This excuse does not make sense to the Undersigned because WCPSS previously “updated” the March and October BIPs with new strategies suggested by the Parents.

339. Dr. [REDACTED] [REDACTED]s psychiatrist, agreed with Dr. [REDACTED] expert opinion that the EBS program was harmful to [REDACTED]. Also, that [REDACTED] should never have been placed in the EBS program, as the program design, which WCPSS demanded be implemented “with fidelity,” was inappropriate to meet her needs. The use of seclusion and restraint, which were “critical to the success” of the EBS program, were extremely harmful to [REDACTED]. The EBS classroom was a stressful place for her to be and the behavior data sheets and use of dots were a behavioral trigger for [REDACTED]s maladaptive behaviors, and increased [REDACTED]s anxiety and acting out. Tr. vol. 1, pp. 177:8-11, 179:21-180:1 (T of [REDACTED] Tr. vol. 2, pp. 265:16-23; 267:24-25 (T of [REDACTED]

340. [REDACTED]s functional IEP goals were not sufficiently implemented as she continued to demonstrate the same behavioral challenges. Tr. vol. 1, pp. 147:23-148:2 (T of Dr. [REDACTED]

341. On October 15, 2019, [REDACTED]s father asked for copies of all of [REDACTED]s Point Sheets and suspension notices. Pet. Ex. 76, p. 724-25. He was informed by Mr. [REDACTED] that the request would be passed on to administration because Mr. [REDACTED] was not sure previous suspension information could be accessed. *Id.*

342. WCPSS had not properly documented [REDACTED]s suspensions. *Compare* Pet. Exs. 38 (Incident History showing no results for student incident history) *and* Pet. Ex. 39 ([REDACTED] Incident History reflecting no suspension) *with* Pet. Ex. 36 (September 25, 2019 Notice of Suspension) *and* Stip. Ex. 28 (Suspension History); *see also* Pet. Ex. 76, pp. 730-31 (Email from Ms. [REDACTED] informing [REDACTED]s parents that [REDACTED] had been suspended on October 20, 2017; however, this suspension was not documented in ECATS).

343. On October 28, 2019, [REDACTED]s psychiatrist, Dr. [REDACTED] a letter outlining the adverse consequences of restraint and seclusion on [REDACTED] Pet. Ex. 68. Dr. [REDACTED] documented [REDACTED]s distressing description of the seclusion room WCPSS used as follows:

[REDACTED] describes these interventions as being put in a room connected to the teachers’ lounge where the door is closed. The light to the room does not work but light comes from the lounge. There is nothing in the room. [REDACTED] notes there used to be soft plastic on the walls but when she was distressed, she tore the plastic off.

Pet. Ex. 68.

344. Dr. [REDACTED] explained the negative impact of tracking [REDACTED]s non-compliant behaviors:

Such a plan only serves to escalate problematic encounters in a child such as [REDACTED] [REDACTED]s anxiety and manic tendencies will become unraveled and magnify with the recording of her undesirable behaviors. Her anxiety will increase as she fears continued demerits and thus this will cause more demerits depending on the task.... I understand that such a system is valuable at times; however, it is not working in helping [REDACTED]. It is causing her to become more anxious and untrusting of her teachers/school administrators. She is not seeing school as a safe place but rather a place where she is put in a room for noncompliance. School is becoming a source of trauma.

Pet. Ex. 68; *see also* Tr. vol. 2, 285:1-10 (T of [REDACTED])

345. [REDACTED]'s Parents provided Dr. [REDACTED] letter to the school. Pet. Ex. 76, p. 752-53. Dr. [REDACTED] initially tried to contact the [REDACTED] School counselor, Ms. Dixon. Tr. vol. 2, p. 278:4. However, another school counselor Ms. [REDACTED] called Dr. [REDACTED] back to discuss the impact of seclusion and restraint on [REDACTED] Tr. vol. 2, p. 278:4-21. However, Ms. [REDACTED] did not know [REDACTED] Tr. vol. 2, pp. 279:25-280:3.

346. WCPSS suspended [REDACTED] again, on November 5, 2019. Stip. Ex. 28. The EBS staff continued to threaten [REDACTED] with seclusion and restraint. Stip. Ex. 29, p. 345; *see also* Tr. Vol. 4, p. 621:13-19 (T of [REDACTED]) On November 7, 2019, [REDACTED] emailed the WCPSS offering more positive behavioral strategies to use with [REDACTED] Pet. Ex. 76, p. 754.

347. On November 21, 2019, [REDACTED] emailed her state representative Sydney Batch about the WCPSS' use of seclusion and restraint on [REDACTED] Pet. Ex. 76, pp. 761-62; *see also* Tr. vol. 5, p. 921:7-18 (T of [REDACTED]) [REDACTED]'s email was forwarded to the WCPSS' Board which in turn forwarded [REDACTED]'s email to Karen Hamilton, Cathy Moore, and other administrators requesting they investigate the use of restraint and seclusion. Pet. Ex. 76, pp. 760-61. Ms. Hamilton messaged [REDACTED] [REDACTED] to contact the principal and "dig deeper" into the situation. Pet. Ex. 76, p. 760. Ms. [REDACTED] responded Ms. Moore was involved and they were waiting for an FBA to be completed. *Id.*

348. On December 3, 2019, [REDACTED] witnessed another student being taken to the seclusion room and experienced a panic attack that necessitated her leaving school. Pet. Ex. 76, p. 770; Tr. vol. 5, p. 923:5-23 (T of [REDACTED])

349. On December 9, 2019, [REDACTED]'s Parents met with WCPSS Senior Administrator [REDACTED] and [REDACTED], WCPSS district level behavior support personnel, to share their concerns about the improper restraint and seclusion of their daughter and desire for this to be removed from her BIP. Tr. vol. 3, p. 579:5-7 (T of [REDACTED]) [REDACTED] understood that Ms. [REDACTED] and Mr. [REDACTED] oversaw the EBS Program in some capacity. Tr. vol. 4, p. 580:17-22.

350. [REDACTED]'s Parents were hopeful a district-level meeting would stop the use of restraint and seclusion against [REDACTED] Tr. vol. 5, pp. 923:24-924:14 (T of [REDACTED]) They explained to Ms. [REDACTED] how [REDACTED]'s restraint and seclusion had been minimized and hidden through the use of euphemisms. Tr. vol. 5, p. 925:13-25 (T of [REDACTED])

351. In response, Ms. [REDACTED] informed them that restraint and seclusion were a necessity, and kids in the WCPSS were secluded every week. Transcript of Excerpts from Pet. Exs. 80 & 81, 13:9-10; *see also* Tr. vol. 3, pp. 620:3-7, 13-15; 634:17-19 (T of [REDACTED]) Ms. [REDACTED] informed [REDACTED] and [REDACTED] that restraint and seclusion did not need to be reported unless they were aversive and "day-to-day" seclusions and restraints are not reported." Tr. vol. 5, p. 926:2-6 (T of [REDACTED]) Transcript of Excerpts from Pet. Exs. 80 & 81, 10:17-20.

352. Ms. [REDACTED] falsely informed [REDACTED] and [REDACTED] the WCPSS did not electronically document restraint and seclusions but rather used pen and paper. Transcript of Excerpts from Pet. Exs. 80 & 81, 11:5-7, 13-15 (T of [REDACTED]) Tr. vol. 4, p. 620:15-20 (T of [REDACTED] and Tr. vol. 5, p. 878:13-18 (T of [REDACTED]) Contrary to Dr. [REDACTED] Ms. [REDACTED] testified that the internal Google

Document reporting restraint and seclusion is not provided to parents. Tr. vol 7, p. 1299:15-17 (T of [REDACTED]). However, as shown by the 2018-2019 Google Form (Pet. Ex. 41) and the 2019-2020 Google Form (Pet. Ex. 42), electronic forms are used to document restraint and seclusion. *See also* Pet. Ex. 43 (electronic Google form documentation of [REDACTED]'s restraint and seclusions). Ms. [REDACTED] demonstrated the ongoing and consistent pattern of misrepresentation in the district about the use of restraint and seclusion of students such as [REDACTED]. Tr. vol. 11, p. 2065:6-12 (T of [REDACTED]).

353. After the meeting, December 12, 2019, [REDACTED] shared additional information with Ms. [REDACTED] via email:

the staff at [REDACTED] Elementary tried to convince [REDACTED] that she had not experienced restraint and seclusion at [REDACTED]. They told her the room originally designed as a closet in the teacher's lounge is a place for them to relax and calm down as Time Out. Let me be clear. [REDACTED] was placed in that room alone and the door was held shut by a staff member during the times in question since 2017. That is seclusion. (115-391.1 (b) 10) ANY room where she is alone and prevented from leaving is seclusion.

Pet. Ex. 76, pp. 775-76.

354. On December 20, 2019, [REDACTED] emailed Ms. [REDACTED] again and asked why restraint and seclusion could not be removed from [REDACTED]'s BIP. Pet. Ex. 76, p. 775. Ms. [REDACTED] responded the removal would be an IEP team decision for which an IEP meeting would need to be scheduled. *Id.* [REDACTED] responded she had called an emergency IEP meeting in October 2019 and requested restraint and seclusion be removed from [REDACTED]'s BIP. *Id.* Ms. [REDACTED] again informed [REDACTED] a new IEP meeting would need to be scheduled after the Winter holidays. Pet. Ex. 76, p. 774.

355. After waiting a week and not receiving a reply from Ms. [REDACTED], [REDACTED]'s mother emailed again on December 19, 2019, asking "why restraint and seclusion cannot be removed from [REDACTED]'s BIP now?" Pet. Ex. 76, p. 775. Ms. [REDACTED] responded it is an IEP team decision. *Id.*

SECTION 5: ISSUES PERTAINING TO JANUARY 27, 2020 IEP AND BIP

Independent Functional Behavior Assessment

356. On January 8, 2020, the WCPSS confirmed with [REDACTED]'s parents it had contracted with Dr. [REDACTED] to conduct an FBA with [REDACTED] on January 15, 2020. Pet. Ex. 76, p. 773.

357. On January 14, 2020, [REDACTED]'s mother emailed Mr. [REDACTED] to express her concern that the new behavior sheets are still not tracking the data needed to develop a better IEP and BIP. Pet. Ex. 76, p. 779. Rather, "[t]hey are a similar litany of detailed accounts of [REDACTED]'s maladaptive behavior without investigation or solutions for the underlying problem. No details are given about what strategies are offered, which are accepted, and which are declined so we can develop a better IEP to help the regular ed teachers." *Id.*

358. On January 15, 2020, Deb [REDACTED] Ed.D., BCBA observed [REDACTED] at school and conducted an independent FBA. During Dr. [REDACTED] observation of [REDACTED] she documented that [REDACTED]

said to her teacher, “How can you teach me about respect when you don’t even respect me? You put me in seclusion 24 times.” Stip. Ex. 27, p. 175.

359. Dr. [REDACTED] reported:

[REDACTED] has extreme negative emotions associated with being placed in the seclusion room multiple times during third and fourth grade and one time in fifth grade. She is struggling with these intense emotions daily, and it is negatively impacting the relationships she has with the staff in the EBS classroom. [REDACTED] reported that she gets upset when she sees other kids treated in a mean way by teachers especially when they are put in the seclusion area.

Stip. Ex. 27, p. 176.

360. Dr. [REDACTED] also reported “the target behaviors occur the most often and with the most intensity in the EBS classroom.” Stip. Ex. 27, p. 176. Dr. [REDACTED] suggested the IEP team change [REDACTED]’s placement as “[t]he EBS classroom [was] not serving [REDACTED] well due to her severe aversion to the use of the seclusion room for herself (previously) and for other students (currently).” *Id.*, pp. 179-80.

361. When Dr. [REDACTED] conducted her FBA, she observed in the general education classroom, [REDACTED]’s general education teacher offered appropriate supports and was able to deescalate [REDACTED] so she could continue engaging in instruction. Tr. vol. 1, pp. 87:18-88:6; *see also* Stip. Ex. 27, 174-75 (FBA).

362. Dr. [REDACTED] explained how to meet [REDACTED]’s social skills can and should be met in the general education and that the EBS classroom was not the right setting for [REDACTED] to learn social skills as [REDACTED] did not have a positive relationship with the staff in that classroom nor did she have positive relationships with peers. Stip. Ex. 27, pp. 179-80; *see also* Tr. vol. 1, pp. 143:21-144:7 (T of [REDACTED])

363. Dr. [REDACTED] also recommended [REDACTED] receive math instruction in the general education classroom and pointed out: “[REDACTED] is cognitively capable to do the math, and she has been missing a great deal of grade level instruction by not being in the general education classroom for math.” Stip. Ex. 27, p. 180. Neither [REDACTED]’s special education nor her general education teacher could explain to Dr. [REDACTED] why [REDACTED] was removed from general education for math especially when [REDACTED] was not able to engage in math instruction with her special education teacher due to an increase in behaviors in that setting. Tr. vol. 1, p. 143:2-13 (T of [REDACTED])

January 27, 2020 IEP Meeting

364. Following the completion of Dr. [REDACTED] independent FBA, the IEP team reconvened on January 27, 2020. Prior to the meeting on January 15, 2020, [REDACTED] had stopped attending school and Petitioners had started exploring private school options.

365. Even though [REDACTED]’s Parents were considering private school placement, they had been hopeful WCPSS would have researched [REDACTED]’s needs more and would develop an appropriate

IEP as the family liked [REDACTED] and [REDACTED] had many friends there. Tr. vol. 5, p. 935:9-23 (T of [REDACTED] see also, Tr. vol. 4, p. 621:24-625:6 (T of [REDACTED]

366. [REDACTED]'s IEP team met to review the FBA, complete a reevaluation determination, develop a new BIP, and amend the IEP. Stip. Ex. 11, p. 1.

367. On January 24, 2020, after receiving the Invitation to Conference, [REDACTED]'s Parents emailed Assistant Principal [REDACTED] (copying [REDACTED] [REDACTED] asking: “[w]ill Dr. [REDACTED] will be participating in the meeting to give her input on her FBA?” Pet. Ex. 76, p. 781. Assistant Principal [REDACTED] incorrectly informed them that Dr. [REDACTED] did not participate in IEP meetings. Pet. Ex. 76, p. 782. [REDACTED]'s Parents replied to their understanding that Dr. [REDACTED] actually did participate in IEP meetings to review her report when asked. Pet. Ex. 76, p. 782. Assistant Principal [REDACTED] said she did not know about the district’s agreement with Dr. [REDACTED] “but would reach out to Central Services on Monday.” Pet. Ex. 76, p. 782.

368. The day of the IEP meeting, too late for the Parents to invite Dr. [REDACTED] [REDACTED] [REDACTED] emailed that the “district will not cover the cost for [Dr. [REDACTED] to attend or participate in the meeting as we will have qualified staff available to discuss the results of the FBA.” Pet. Ex. 76, p. 784.

369. Ultimately, school psychologist [REDACTED] reviewed the FBA. The record is devoid of [REDACTED] [REDACTED] qualifications or ability to interpret the FBA. Based on Dr. [REDACTED] expert opinion that the BIP, developed from his interpretation of her FBA was inappropriate.

January 27, 2020 IEP

370. The IEP meeting lasted approximately three and a half hours with [REDACTED]'s Parents actively participating. Tr. vol. 5, p. 938:12-17 (T of [REDACTED] Stip. Ex. 11. The IEP team finally agreed the EBS classroom was a trigger for [REDACTED] and that she should be removed from that setting. Tr. vol. 4, p. 623:2-7 (T of [REDACTED] Tr. vol. 6, p. 939:4-6 (T of [REDACTED] Stip. Ex. 11, p. 78.

Academic Needs Not Reevaluated

371. Even though it had been three (3) years since [REDACTED] was last evaluated, [REDACTED] had failed both EOGs the previous year, was scoring below proficient in mClass, was demonstrating perceptual motor difficulties, and was still struggling with pragmatic language issues, the IEP team failed to consider conducting additional formal evaluations. *Compare* Pet. Ex. 65 (mClass Scores from 2017-2019).

372. The meeting minutes documented [REDACTED]'s concerns about [REDACTED]'s reading comprehension. Stip. Ex. 11, p. 79. Yet, the Prior Written Notice did not include any proposal for evaluations or that evaluations were rejected. Stip. Ex. 12.

373. Dr. [REDACTED] opined the IEP was inappropriate as the IEP team had not done evaluations to determine [REDACTED]'s verbal language abilities or academic abilities in math and reading. Tr. vol. 6, p. 1157:3-21.

374. WCPSS' failure to reevaluate [REDACTED]'s academic skills especially in math and reading comprehension prior to the January 2020 IEP meeting was inappropriate. The January 2020 IEP team did not have sufficient information to determine [REDACTED]'s present levels of academic performance and develop goals in math and reading.

IEP Goals Not Appropriately Ambitious

375. WCPSS discussed [REDACTED] "progress on reading foundational skills" and [REDACTED]'s mother, again, expressed her concern with [REDACTED]'s reading comprehension. Stip. Ex. 11, pp. 1-2, 4. However, the IEP team did not develop any academic goals. Stip. Ex. 13.

376. The team developed two (2) behavior goals and two (2) articulation goals. Stip. Ex. 13. The team did not develop any speech goals to address [REDACTED]'s moderate to severe pragmatic language deficits. *Id.*

377. The two social-emotional skills goals with mastery criteria of 80% were:

[REDACTED] will use positive self-language toward herself and/or peers or teachers.

When [REDACTED] is feeling distressed or frustrated, she will identify and use a calming strategy in order to deescalate and calmly return to her designated area.

Stip. Ex. 13.

378. Dr. [REDACTED] described the first goal as "a move in the right direction" but still not sufficient. Tr. vol. 1, pp. 163:18-164:1 (T of [REDACTED]). The second behavior goal regarding [REDACTED]'s actions when "feeling frustrated" was inappropriate as it was the same version of the goal [REDACTED] had had for two and half years, and [REDACTED] was still not using calming strategies. Tr. vol. 1, p. 164:3-17 (T of [REDACTED]).

379. The IEP was also inappropriate as it did not recognize or develop goals for all [REDACTED]'s communication needs, including addressing her pragmatic language deficits. The Speech Plan of Care only addressed articulation and incorrectly only noted [REDACTED] had an articulation disorder. Stip. Ex. 15. The Speech Plan of Care is inappropriate as it only addressed articulation and phonology not pragmatic language for [REDACTED]. Tr. vol. 4, p. 673:12-17. An IEP without pragmatic language goals is not appropriate for [REDACTED]. Tr. vol. 4, pp. 672:4-6.; 669:2-5 (T of [REDACTED]).

380. The IEP was further inappropriate as it did not develop any goals to address [REDACTED]'s academic deficits. Tr. vol. 6, pp. 1159:19-1160:8 (T of [REDACTED]). The IEP was inappropriate because it lacked any goals for social skills, executive functioning, and emotional regulation. Tr. vol. 1, pp. 164:20-21; 168:18-21 (T of [REDACTED]). Tr. vol. 6, p. 1156:6-16 (T of [REDACTED]).

381. Although Mr. [REDACTED] continued to inform [REDACTED]'s Parents that test anxiety was the cause of her low academic scores, the IEP also failed to create a goal to address [REDACTED]'s test anxiety. Tr. vol. 5, pp. 961:23-962:7 (T of [REDACTED]). Tr. vol. 8, p. 1743:1-9 (T of [REDACTED]). WCPSS could have implemented research-based test-taking anxiety interventions for [REDACTED]. Tr. vol. 6, pp. 1123:20-1124:10 (T of [REDACTED]).

382. Even though [REDACTED] was removed from the EBS classroom for math instruction, the IEP team continued to insist [REDACTED] would be removed from her non-disabled peers to receive specially designed instruction in social-emotional Skills for sixty (60) minutes each day. Stip. Ex. 13, p. 8; *see also* Stip. 11, p. 80. Yet, [REDACTED]'s general education teacher offered appropriate supports during Dr. [REDACTED] observation and was able to deescalate [REDACTED] so she could continue engaging in instruction. Tr. vol. 1, pp. 87:18-88:6 (T of [REDACTED] [REDACTED] should receive social skills with her general education peers. Tr. vol. 1, pp. 143:21-144:7 (T of [REDACTED]

383. [REDACTED]'s Parents expressed their concern that [REDACTED] would be receiving instruction in the EBS classroom, from EBS staff, or that EBS staff may be part of implementing [REDACTED]'s IEP. Stip. 11, p. 78. The IEP team would not commit to who would provide the special education instruction or where [REDACTED] would receive the instruction and indicated it "could be any certified special education staff." *Id.* Instead, [REDACTED]'s Parents were informed that the same EBS staff would be called to deescalate [REDACTED] Tr. vol. 4, p. 623:7-13 (T of [REDACTED]

384. Overall, the January 2020 IEP was inappropriate to serve [REDACTED]'s unique needs. *See* Tr. vol. 4, pp. 669:20-670:6 (T of [REDACTED] Tr. vol. 6, pp. 1143:7-1146:16 (T of [REDACTED]

385. At the end of this IEP meeting, [REDACTED]'s Parents rejected the IEP as it had no pragmatic language goal, did not address [REDACTED]'s unique needs, and would not limit the use of restraint and seclusion on [REDACTED] Tr. vol. 5, pp. 942:6-943:19 (T of [REDACTED] *see also* Tr. vol. 4, p. 625:8-14 (T of [REDACTED]

386. [REDACTED]'s Parents further expressed to the team that "no one has addressed restraint or seclusion and the extreme ongoing mental trauma that this has caused." Stip. Ex. 11, p. 81. They explained that "the promises since September 25 have not been met and it is not safe for her to return as there is too much risk for further mental harm." *Id.*

387. Only *after* [REDACTED]'s Parents expressed concern about [REDACTED] staying in a school with a seclusion room and rejected the IEP did the IEP team began bringing up other in district placements. *See* Stip. Ex. 11, p. 81 *and* Transcript of Excerpts from Pet. Ex. 80 & 81, 5:17-6:5. However, no decision makers from any of the placements were even at the IEP meeting to decide if [REDACTED] could attend. Transcript of Excerpts from Pet. Ex. 80 & 81, 8:11-13 ("[REDACTED]'s CCR placement could be moved back to her base, which is either [REDACTED] or whatever student assignment would be."); Tr. vol. 5, pp. 941:24-942, 940:9-20 (T of [REDACTED] *see also* Tr. vol. 4, p. 633:2-7 (T of [REDACTED] For one placement, the IEP team stated it was capped. Tr. vol. 4, p. 624:13-19 (T of [REDACTED]

388. [REDACTED]'s Parents asked for private school placement, which the district refused. Stip. Ex. 11, p. 81; *see also* Stip. Ex. 12, p. 84 (PWN). [REDACTED]'s Parents advised the IEP team that they rejected the IEP as not providing FAPE and would be enrolling [REDACTED] and seeking private school at district expense. Stip. Ex. 11, p. 81.

Appropriateness of Related Services

389. The IEP team reduced [REDACTED]'s speech services without any evaluations being completed. Stip. Ex. 13. Without reevaluating it was inappropriate to reduce [REDACTED]'s speech services. Tr. vol. 4, p. 669:17-29 (T of [REDACTED] The IEP team wanted to stop direct speech

language services justifying this action by informing [REDACTED]'s Parents [REDACTED] did not want to participate in speech. Tr. vol. 5, pp. 938:20-939:1 (T of [REDACTED] Speech Pathologist recommended stopping direct speech instruction because of [REDACTED]'s emotional state. Pet. Ex. 76, p. 664.

390. According to Speech Pathologist [REDACTED] [REDACTED] [REDACTED] “kind of knew the rules” and had difficulty accessing the taught skills only when she was dysregulated. Tr. vol. 9, 1p. 782:6-10 (T of [REDACTED] Despite this, Ms. [REDACTED] opined Mr. [REDACTED] EBS classroom was the best place to serve [REDACTED] for social skills and pragmatic language, and [REDACTED] did not need the direct service of pragmatic language. Tr. vol. 9, p. 1781:1-5.

391. Ms. [REDACTED] also testified students who needed direct services in pragmatic language needed to be taught using evidence-based types of role modeling and narrative, and that Mr. [REDACTED] did “a lot of those things” with students. Tr. vol. 9, p. 1782:11-16. There was no documentary evidence admitted supporting this testimony regarding Mr. [REDACTED] classroom practices. Ms. [REDACTED] opined [REDACTED] made progress in social language although there is a dearth of evidence in the record including her own therapy notes. Tr. vol. 9, p. 1798:2-8; Stip. Ex. 30.

392. On cross-examination, Ms. [REDACTED] was unable to identify [REDACTED]'s unique needs based on previous evaluations. Tr. vol. 9, p. 1804:3-18; 22-23. Of note, even though Ms. [REDACTED] had been [REDACTED]'s speech pathologist since August 2017, Ms. [REDACTED] did not know [REDACTED] had been diagnosed with a moderate pragmatic language disorder. Tr. vol. 9, p. 1805:16-25. Nor had Ms. [REDACTED] ever evaluated [REDACTED]'s pragmatic language abilities although she noted earlier in testimony when dysregulated, [REDACTED] struggles comprehending what is going on around her and responding appropriately to peers and adults. Tr. vol. 9, pp. 1783:9-13; 1806:1-3.

393. Due to the absence of documentary evidence to support her testimony and her lack of knowledge of [REDACTED]'s pragmatic language needs, the Undersigned found Ms. [REDACTED] was not given deference on the issue of appropriate service delivery for [REDACTED]'s pragmatic language deficits.

394. In the past, the IEP team failed to consider providing [REDACTED] with counseling. Tr. vol. 6, p. 1163:1-14 (T of Dr. [REDACTED] But at this IEP meeting, IEP team included counseling as a related service once each week to support [REDACTED] achieve one of her behavior goals but did not develop any goals specific to counseling. Stip. Ex. 13. Moreover, the counselor who would have served [REDACTED] failed to attend the IEP meeting. Tr. vol. 5, p. 1036:6-8 (T of [REDACTED] Overall, the counseling services in the IEP were inappropriate. Tr. vol. 6, p. 1163:1-14 (T of [REDACTED]

395. The only explanation in the minutes indicated that Ms. [REDACTED] proposed counseling because [REDACTED] was being removed from the EBS classroom to a cross categorical classroom. Stip. Ex. 11, p. 80. WCPSS did not provide a cogent and rationale explanation as to why counseling related services were not provided earlier when, according to WCPSS, [REDACTED]'s behaviors were worse.

The January 2020 BIP

396. When the team revised [REDACTED]'s BIP, it included many of the recommendations in Dr. [REDACTED] FBA. Compare Stip. Ex. 27 (Dr. [REDACTED] FBA) with Stip. Ex. 14 (January 27, 2020 BIP); see also Stip. Ex. 12, p. 83. According to WCPSS, “[t]he IEP team adopted Dr. [REDACTED] proposed BIP almost verbatim.” Resp. Pro. Final Dec. p. 21, #85.

397. The IEP team did incorporate Dr. [REDACTED] “suggestion” for the BIP to include a replacement behavior of teaching [REDACTED] to express her emotions in a calm manner without using offensive language. Stip. Ex. 14, p. 99.

398. [REDACTED]’s review of Dr. [REDACTED] FBA is more nuanced than Respondent insinuates. Simply cutting and pasting one suggestion does not comprehensively address [REDACTED]’s test anxiety, other social skills deficits, physical aggression, and all her dysfunctional behaviors.

399. Dr. [REDACTED] breaks her “suggestion” into multiple parts: the Replacement Behavior, Interventions to Teach the Replacement Behavior, Strategies to Prevent the Occurrence of the Target Behaviors, and a Crisis Plan. Stip. Ex. 27, pp. 178-180.

400. According to Petitioners, in light of the severity of [REDACTED]’s behaviors, the BIP should have included a Crisis Plan. Tr. vol. p. 170:18-20 (T of [REDACTED]). The BIP did incorporate Dr. [REDACTED] Crisis Plan steps, but inappropriately included them as behavior intervention strategies. Stip. Ex. 14, p. 99.

401. In her FBA, Dr. [REDACTED] distinguishes behavior interventions as preventative from the Crisis Plan. The Crisis Plan is not a “preventative” intervention strategy used to teach replacement behaviors. The IEP team comingled the interventions, prevention strategies, and Crisis Plan into one section. *See* Stip. Ex. 14, p. 99.

402. The Crisis Plan is only to be used when [REDACTED]’s behavior “escalates to the point of disrupting the learning of others” not as a preventative intervention. The steps are:

1. Give [REDACTED] *time and space to de-escalate* within continuing to engage with her.
2. If she calms down, approach her and offer a choice of *rejoining the classroom* activities.
3. If she is unable to be redirected to *rejoin the classroom*, give her an errand or helping task to do until she can get to a regulated state.
4. If [REDACTED] does not calm down and continues to yell at others, the individuals she’s yelling at should remove themselves or be removed from her proximity. Then implement steps 1-3.

Stip. Ex. 27, p. 180.

403. “Rejoining the classroom” contemplates prior “removal from the classroom.” The inclusion of the Crisis Plan as an intervention strategy allows school staff to remove [REDACTED] from the classroom as a preventative measure not as a last resort during a crisis.

404. Despite their many deficiencies, the prior BIPs limited the use of CPI techniques (restraints) and seclusion only to times where [REDACTED] was being unsafe to herself or others. The January 2020 BIP would allow seclusion anytime [REDACTED] was “disrupting the learning of others” in the classroom. Potentially, [REDACTED] could be secluded more under the new BIP.

405. The other concern was that the BIP does not specify what behaviors warrant the use of seclusion, what constitutes cessation of the behavior that led to seclusion, and the duration of

the seclusion time. [REDACTED]'s Parents asked whether seclusion would continue to be used for [REDACTED] Stip. Ex. 11, p. 78-79. [REDACTED] responded it would be "used as a last resort." Stip. Ex. 11, p. 79. [REDACTED]'s Parents asked for clarification as to what "last resort" meant; however, the IEP team refused to provide a definition. Stip. Ex. 12, p. 83 (PWN Refusals).

406. [REDACTED]'s Parents were understandably concerned as they had heard that response before when they asked for reassurance from WCPSS about the continued use of seclusion. At the October 17, 2019 IEP meeting, "Mr. [REDACTED] shared that seclusion is always a last resort and that we share a common goal to make sure that that is necessary." Stip. Ex. 9, p. 51 (minutes). The Parents now knew that statement was not true.

407. The BIP was also inappropriate as [REDACTED]'s IEP failed to provide her the language support to meet Step 1 of the BIP. Tr. vol. 4, p. 674:14-21 (T of [REDACTED]) It also failed to contain a functional communication intervention per FBA recommendations as [REDACTED] had functional communication deficits. Tr. vol. 1, p. 108:3-6 (T of [REDACTED])

408. Dr. [REDACTED] the independent evaluator who conducted the FBA, opined that the BIP was inappropriate. As WCPSS proffered no behavioral expert or qualified school personnel to respond to Dr. [REDACTED] expert opinion. WCPSS' staff's decisions regarding the BIP are entitled to no deference because none of them had the requisite knowledge to draft a BIP for [REDACTED] considering her unique circumstances. Therefore, the January 2020 BIP, although better, is still insufficient and inappropriate.

Medication or Misdiagnosis Concerns

409. Through the testimony of their expert witness Dr. [REDACTED] WCPSS suggests that [REDACTED] was misdiagnosed as bipolar or that her medication changes exacerbated her behavior, not the EBS programming. As to the misdiagnosis argument, assuming *arguendo* that [REDACTED] was not properly diagnosed as bipolar, whatever the diagnosis, the IEP and BIP are supposed to address the manifestations of the disabling condition, not the label. In fact, IDEA does not even require that children be classified by their disability for eligibility. 20 U.S.C. § 1412(a)(2)(B).

410. If [REDACTED]'s medication changes impacted her behaviors, then WCPSS is at also fault for not considering that in her educational programming. It is well documented in the IEP documents and [REDACTED]'s educational record, that [REDACTED]'s Parents regularly updated WCPSS staff about [REDACTED]'s medications.

411. At the initial November 2017 IEP meeting, the Parents shared that [REDACTED] was starting a new medication to help with anxiety and will maintain contact with school staff to monitor effects. Pet. Ex. 5, p. 14 (minutes). The medical form was updated at December 2017 IEP meeting. Pet. Ex. 11, p. 47 (minutes). On December 12, 2017, her parents shared that they had recently discovered a heart condition that is being further investigated and that they were unable to try the new medication. Pet. Ex. 11, p. 48 (minutes). At the March 2019 IEP meeting, her Parents shared that they wanted to use behavior data to inform [REDACTED]'s psychologist concerning medication. Stip. Ex. 1, p. 1. [REDACTED] shared at the May 15, 2019, IEP meeting that [REDACTED] was on "prescription strength Omega 3s about four or five weeks ago, which seems to be helping her self-regulation." Stip. Ex. 5, p. 26; *see also* Pet. Second Supp. Brief, pp. 9-11 (Chart of Information Shared).

412. On October 1, 2019, [REDACTED]'s Parents shared that [REDACTED] had made progress with changes in her medication. Pet. Ex. 76, p. 720. At the October 17, 2019 IEP meeting, [REDACTED]'s Parents acknowledged that "[REDACTED] is a complicated case" and that it was even difficult to find a "psychiatrist that was well versed in pediatric bipolar. Stip. Ex. 9, p. 50. [REDACTED]'s Parents shared their research about strategies and approaches that work well with students with pediatric bipolar disorder and that "[REDACTED] is in the midst of medication changes..." Stip. Ex. 9, p. 52. Her parents talked about [REDACTED]'s bipolar disorder and the possible impact of hallucinations, manic phases, and other symptoms on her behavior." Stip. Ex. 9, p. 52.

413. Later on October 28, 2019, Dr. [REDACTED] [REDACTED]'s treating psychiatrist, wrote that she "was concerned that [REDACTED] is becoming traumatized and developing a negative and fear-based relationship with adults while at school. This is psychologically unhealthy and causing my having to consider medicating [REDACTED] to manage the anxiety which is coming from school." Pet. Ex. 68, p. 636.

414. WCPSS acknowledged in its Response to the Amended Petition that during the second quarter of the 2019-2020 academic year, [REDACTED] Staff received information about a "substantial change in [REDACTED]'s medication regimen" which could have coincided with a change in behavioral difficulties. Resp. Response. p. 4, #13, *see also*, Resp. Response. to Amend. Pet. pp. 4-5, #17. No mention of a misdiagnosis was made in WCPSS' Motion for Partial Summary Judgment, the Partial Motion to Dismiss, or its 96-page response to Petitioners' Motion for Partial Summary Judgment.

415. At the January 2020 IEP meeting and at prior meetings, WCPSS was not concerned about the effects of [REDACTED]'s medications which is an important consideration for the development of [REDACTED]'s past and future educational programming. Changes in [REDACTED]'s medication regimen needs to be considered for the future development of [REDACTED]'s IEPs and BIPs because of potential medication side effects and impact on her academically, functionally, and behaviorally.

SECTION 6: PRIVATE SCHOOL PLACEMENT, EQUITIES, AND REMEDIES

Parental-Placement at Private School – [REDACTED] ("[REDACTED])

416. [REDACTED]'s Parents started researching and looking at private schools as "back up" options prior to the January 2020 IEP meeting. Tr. vol. 4, p. 626:4-12 (T of [REDACTED] Tr. vol. 5, pp. 945:1-946:12 (T of [REDACTED] Only [REDACTED] ("[REDACTED] would accept students like [REDACTED] who demonstrated behaviors in the classroom. Tr. vol. 4, p. 626:13-20 (T of [REDACTED] On January 30, 2020, [REDACTED] and [REDACTED] enrolled [REDACTED] at [REDACTED] Pet. Ex. 96 (tuition receipts).

417. WCPSS argues the placement at [REDACTED] is "overly restrictive" and that Petitioners have failed to produce any documentation to prove its appropriateness. Resp. Pro. Final Decision #207, p. 38. WCPSS also asserts that [REDACTED] is inappropriate because [REDACTED] does not have an IEP or BIP, no specially designed instruction in math and reading comprehension, continued use of daily sheets, no counseling related service, no pragmatic speech services, no crisis plan, and "almost" no evidence of progress. *Id.* ## 219-224.

418. WCPSS attributes [REDACTED]'s behavioral progress at the private school “to at least one specific factor - [REDACTED] deliberately taught [REDACTED] below grade level in order to remove academic stressors.” *Id.* #225. In sum, WCPSS argues that the removal of these underlying stressors and triggers was the primary reason for any “immediate success” [REDACTED] experienced at [REDACTED]

419. The “below grade” level argument does not avail WCPSS. A review of [REDACTED]'s 4th and 5th grade report cards from [REDACTED] indicates that [REDACTED] was working below grade level at [REDACTED] in reading and math. To the extent that she entered [REDACTED] from [REDACTED] [REDACTED] on grade level, she regressed over the duration of her sojourn in the EBS classroom.

420. [REDACTED] staff taught [REDACTED] at grade-level math and reading when she did not have grade level skills. Yet, before [REDACTED] enrolled in [REDACTED] her [REDACTED] 4th and 5th grade report cards showed that she was consistently working below grade level in core academics.

421. Upon entry at [REDACTED] [REDACTED] was not performing on grade level. [REDACTED]'s Quarter 3 report card from [REDACTED] indicated [REDACTED] was not performing on grade level in math. Pet. Ex. 88. [REDACTED] was found to have mostly “emerging” skills and making “some progress towards grade level standards” in fourth grade mathematics. *Id.* [REDACTED] was also “progressing consistently toward grade level standards” in half of third grade math skills. *Id.* No fifth-grade math skills had been started. *Id.* On [REDACTED]'s Quarter 4 report card, she demonstrated progress in math although she was still not performing on grade level. Pet. Ex. 89.

422. [REDACTED] had gaps in her academic skills due to WCPSS ineffective educational programming. [REDACTED] appropriately addressed these academic deficits.

423. Even if short on detail and specifics about the private program as Respondent claims, Petitioner did provide evidence through the testimonies of Parents, Dr. [REDACTED] Ms. [REDACTED] and [REDACTED] staff. [REDACTED]'s Parents saw improvement in [REDACTED]'s anxiety as well as behavioral and academic improvement since her enrollment at [REDACTED] Tr. vol. 4, pp. 628:4-629:4 (T of [REDACTED] Tr. vol. 5, pp. 948:2-949:12 (T of [REDACTED]

424. Director [REDACTED] and [REDACTED]'s special education teachers, [REDACTED] and [REDACTED] testified about [REDACTED]'s educational programming and progress at [REDACTED] Director [REDACTED] described how [REDACTED] arrived at [REDACTED] “fragile”, had “difficulty interpreting facial cues”, had “erratic” behavior, and would “of stress over the small things.” Tr. vol. 3, pp. 443:13-20; 444:3-4; 444:21-22.

425. [REDACTED] provided [REDACTED] a caring environment where her anxiety and noncompliance were addressed through positive reinforcement. Tr. vol. 3, p. 443:21-24. [REDACTED]'s behavior “started with an escalated voice” and then verbal perseveration. Tr. vol. 3, pp. 443:25-444:3. De-escalation techniques that worked for [REDACTED] at the private program included whispering to her, using negotiation strategies, and allowing her to speak to her dad on the phone. TR. vol. 3, p. 445:4-10 [REDACTED]'s behavior had improved since arriving at [REDACTED] Tr. vol. 3, p. 445:4-446:7. [REDACTED] progressed academically and behaviorally since attending [REDACTED] and she has “moved in a really positive trajectory. Tr. vol. 3, pp. 448:14-25; 443:13-20 (T of [REDACTED]

426. [REDACTED] taught [REDACTED] from February – June 2020 and was aware of [REDACTED]'s academic and behavioral needs. Tr. vol. 3, pp. 464:16-18; 467:21-468:2. Ms. [REDACTED] has a

bachelor's degree in adaptive special education. Tr. vol. 3, p. 466:2-3. She described [REDACTED]'s math abilities as working on a third grade level and "bridging" into fourth grade standards; how [REDACTED] wanted to make friends but had difficulty choosing socially-accepted behaviors; [REDACTED]'s progress and growing confidence in reading using [REDACTED] strategies; how [REDACTED] entered [REDACTED] nervous and self-deprecating regarding academic assessment but had since become less anxious about incorrect answers or asking for assistance; how [REDACTED] had difficulty with reading comprehension when it involved understanding the author's viewpoint; how using positive praise and rewards with [REDACTED] helped her develop a respectful and positive relationship; how sensory stimulation in the form of light touch would help [REDACTED] focus and express her emotions; and how [REDACTED] perseverates and engages in negative self-talk. Tr. vol. 3, pp. 469:3-6; 469:21-470:5; 474:14-25; 476:9-17; 477:10-22; 478:10-17; 477:23-478:10; 480:25-481:5. [REDACTED] made academic and behavioral progress while under Ms. [REDACTED] tutelage.

427. [REDACTED] taught [REDACTED] during summer school in 2020. Tr. vol. 3, p. 490:21-23. Ms. [REDACTED] has taught special education students for six (6) years. Tr. vol. 3, p. 492:3-8. Ms. [REDACTED] accurately described [REDACTED]'s behavioral needs, her struggles with reading comprehension, and heightened anxiety with math. *See* Tr. vol. 3, pp. 492-499. Ms. [REDACTED] role played 1:1 with [REDACTED] when [REDACTED] was upset and unable to communicate. Tr. vol. 3, pp. 499:23-500:7. Over the summer term, [REDACTED] progressed in her self-regulation skills. Tr. vol. 3, p. 501:2-27.

428. [REDACTED] is an appropriate placement for [REDACTED] because the staff recognizes [REDACTED]'s triggers, prevent behaviors, and allow [REDACTED] to concentrate on learning. Tr. vol. 5, pp. 949:14-950:9 (T of [REDACTED]). Her special teachers at [REDACTED] had good rapport with [REDACTED] gave tangible rewards, intervened when [REDACTED] was on "trajectory of escalation," and helped [REDACTED] complete the lesson successfully. Tr. vol. 6, pp. 1165:20-1167:2 (T of [REDACTED]). Even though [REDACTED] does not provide speech therapy, it is an appropriate placement to address [REDACTED]'s pragmatic language needs in the social skills context. Tr. vol. 4, pp. 664:24-665:5 (T of [REDACTED]).

429. The Undersigned finds that Petitioners have proved by a preponderance of the evidence that [REDACTED] was an appropriate private school program for [REDACTED] and enabled [REDACTED] to make academic and behavioral progress.

Equity Considerations

430. Equity considerations for tuition reimbursement must be addressed because of Petitioners' conduct related to the private school placement.

431. WCPSS argues that [REDACTED]'s Parents' conduct was unreasonable, in that they predetermined enrollment in the private school program prior to [REDACTED]'s withdrawal from [REDACTED]. This predetermination was done before the IEP team considered the independent FBA and was able to propose a new IEP at the January 27, 2020 IEP meeting. Resp. Pro. Final Dec. p. 38-39, ##207-216.

432. Petitioners first contacted the private school [REDACTED] in early December to inquire about enrolling [REDACTED] there. Resp. Ex. 12, p. 22. [REDACTED] attended a one-day visit at [REDACTED] on or about January 17, 2020.

433. On January 20, 2020, Petitioners e-mailed school director [REDACTED] and stated “We would like to enroll her with [REDACTED]. Officially we have to have an IEP meeting this week with [REDACTED] to notify them we are withdrawing. [REDACTED] had mentioned there might be room for [REDACTED] this week? Is there a way we can pay without her being officially enrolled?” Resp. Ex. 12, p. 21.

434. Petitioners explained that [REDACTED] was a “backup plan” and they had not made a final decision. Tr. vol. 4, p. 788:7-10 (T of [REDACTED]). However, Petitioners’ January 20, 2021 email explicitly states their intent “to notify them [WCPSS] we are withdrawing.” Resp. Ex. 12, p.21. Moreover, Petitioners’ next e-mail in the chain, dated January 21, 2020, states that “[w]e have an appointment to write the withdrawal request today. She had told me originally it had to be presented at the end of the IEP meeting.” Resp. Ex. 12, p.22.

435. From a tuition reimbursement perspective, these e-mails are problematic. First, they indicate that Petitioners may have made up their minds to leave WCPSS before the IEP meeting on January 27th, on which the IEP team would consider Dr. [REDACTED] FBA and develop a new IEP and BIP. Second, the e-mails indicate an intentional withholding of this decision from the IEP team to force a sham IEP meeting after which Petitioners could sue for tuition reimbursement. There is no question that, Petitioners were preparing a week ahead of time to withdraw from WCPSS.

436. According to WCPSS, “[t]his is precisely the type of parental conduct that animates the IDEA regulations limiting tuition reimbursement. *See* 34 CFR § 300.148(d) (authorizing denial of tuition reimbursement where parents do not provide ten days’ written notice of their intent to withdraw along with an explanation of their concerns or participate in an IEP meeting to discuss those concerns).” Resp. Pro. Final Dec. p. 39, # 214.

437. The deliberate nature of this process is further evidenced by the fact that [REDACTED]’s last day at WCPSS was January 15—twelve days before the IEP meeting and the *very same day* that Dr. [REDACTED] conducted her FBA. Petitioners’ testimony regarding the reason for stopping sending [REDACTED] to school was their concern about restraint and seclusion—while that concern *may* be valid, [REDACTED] had not been restrained or secluded since September, and [REDACTED]’s statement that [REDACTED] had been “threatened” with seclusion may have been a misreading of the Point Sheet from January 10, 2020, in which a staff member misspoke and then immediately corrected herself while directing [REDACTED] to time-in. Stip. Ex. 29, p. 408.

438. The predetermined nature of the move to private school is also indicated by [REDACTED]’s suddenly starting to tell her teachers at [REDACTED] that she was leaving to go to another school. Stip. Ex. 29, p. 408 ([REDACTED] stating on January 10 that “I’m going to a new school, surprise, I broke the news, I’m going on Thursday, and I’m not coming back.”); p. 410 ([REDACTED] stating on January 13 that “I don’t have to follow rules this isn’t my school. I’m going to a new school anyways. I won’t be here Friday...I’m going to a different school because this school sucks.”).

439. Respondent argues that:

[w]hile Petitioners had and have the right to send [REDACTED] to a private school, they do not have the right to make that decision more than a week before an IEP meeting,

engage in an IEP meeting in which there was no real intent to return to WCPSS, and then seek tuition reimbursement. Petitioners' conduct was unreasonable as described in the federal regulations. That unreasonableness is sufficient to deny any reimbursement claim, irrespective of whether the private school was ultimately shown to be appropriate."

Resp. Pro. Final Dec. pp. 39-40, #217.

440. Respondent has a valid point. But, in balancing the equities, the Undersigned must consider not only the Petitioners' behavior but that of the Respondent.

441. The fact that [REDACTED]'s Parents explored private school options and withdrew her from WCPSS a period before the January 27, 2020 IEP meeting is not demonstrative of "bad faith." Even though at the January 27, 2020 IEP meeting, the Parents were not forthwith about their pre-decision about the private school placement, there is no requirement that the Parents tell the IEP team members before the meeting about their intentions. At that point, [REDACTED] had not been enrolled in the private school.

442. Throughout this saga, WCPSS staff have not been "forthwith" with [REDACTED]'s Parents and at times have been intentionally deceitful. Even days before the January 2020 IEP, when Petitioners asked if Dr. [REDACTED] had been invited to the meeting, WCPSS gave misinformation.

443. Despite that [REDACTED]'s Parents cooperated and actively participated in the IEP meeting; they were not "gaming the system." WCPSS was given an opportunity to develop an appropriate IEP and BIP at the January 2020 IEP meeting but did not.

444. On the scale of inappropriate behavior over the course of this case, while Petitioners may have not given WCPSS 10-days' notice of their intent to withdraw [REDACTED] to place her in a private school placement, Respondent's misbehavior spanned over a course of three school years.

445. Based on the totality of the circumstances, the equities balance in Petitioners' favor and the private school tuition reimbursement amount will be awarded without reduction.

Compensatory Education

446. As in all contested cases, if compensatory services might be awarded, both Parties are asked to be ready to propose alternative compensatory education recommendations with supporting evidence.

Private Evaluations

447. As it had been three (3) years since [REDACTED] was evaluated, [REDACTED]'s parents secured private evaluations in the spring and summer of 2020 to assess [REDACTED]'s then-current skills. This information is necessary to determine what, if any, compensatory education should be awarded in addition to the private school tuition reimbursement.

448. Dr. [REDACTED] of [REDACTED] Psychology administered the Woodcock-[REDACTED] Tests of Achievement, Fourth Edition (WJ-ACH-IV) to [REDACTED] as well as had [REDACTED]'s parent and

teacher complete the Behavior Assessment System for Children, Third Edition (BASC-3) and Behavior Rating Inventory of Executive Function, 2nd Edition (BRIEF-2). Pet. Ex. 30 (██████████ Evaluation); 98 (██████████ Receipt).

449. In a psychoeducational evaluation completed in May 2020 by ██████████ Psychology, the evaluator noted:

this low average performance [in math] is significantly lower than her previous score on this subtest in 2017 (SS=102) and suggests she has not gained the expected math calculation skills at the same rate as same-aged peers, which can be influenced by various factors including missing instruction, emotional/attentional state at the time of instruction, and ability to practice the skills.

Pet. Ex. 30.

450. Petitioners' expert witnesses opined about the amount of compensatory education services necessary to remediate ██████████'s academic and social-emotional deficits. Respondent offered no alternative compensatory education recommendations.

451. According to Petitioners' expert, Dr. ██████████ ██████████ lost the equivalent of an academic year in instruction while at ██████████ during the relevant period and that ██████████ was entitled to compensatory education services equal to the lost time. Dr. ██████████ agreed that ██████████ required compensatory services in social skills, communication skills, and math. Tr. vol. 1, 183:19-20. Compensatory services in math were needed because ██████████ was not really receiving much math instruction in the EBS classroom. Tr. vol. 1, 182:18-20. ██████████ is entitled to 150 hours of compensatory education in math Tr. vol. 6, 1170:13-22; 1179:24-1171:4, 1144:11-13 (T of ██████████). In addition, ██████████ needs to be compensated for the 105 hours of instructional time she lost due to her removal from general education to receive content support. Tr. vol. 6, p. 1144:14-18 (T of ██████████). The Undersigned finds that 150 hours of compensatory education in math and 105 hours of other core academic content instruction are appropriate.

452. The January 2020 IEP added counseling as a related service to be delivered 20 minutes per session, 1 time per week. Stip. Ex. 13, p. 94. The Undersigned finds that counseling as a related service should have been added on the IEP as a related service at the March 2019 IEP meeting. ██████████'s Parents paid for private counseling. See Pet. Ex. 98. ██████████'s Parents should be reimbursed for one year of counseling service as compensatory social skills instruction and the related service of counseling.

453. Both Parties offered evidence about speech-language compensatory service.

454. Ms. ██████████ ██████████ administered an Informal Dynamic Social Communication and Pragmatic Language Assessment and offered recommendations. Pet. Ex. 29 (██████████ Evaluation); Pet. Ex. 97 (██████████ receipts). ██████████ was diagnosed as having a moderate impairment in pragmatic language. Pet. Ex. 29. Ms. ██████████ indicates "[██████████]'s challenges with pragmatic language impact her ability to understand and use all aspects of language (verbal and non-verbal) to communicate effectively." Pet. Ex. 29. After conducting the evaluation, Ms. ██████████ recommended "[██████████] would benefit from having *close support and a smaller class size, as needed.*" *Id.* at 11 (emphasis in

original). Further, “[REDACTED] should receive targeted treatment, for pragmatic language, emotional regulation, and narrative language development, in a 1:1 treatment session with a trained clinician, twice a week for 30-45 minutes per session.” *Id.* Additionally, she recommends “Once the IEP team has developed a plan which addresses [REDACTED]’s emotional, pragmatic language, and narrative language difficulties based on her current level of function, the district should consider a private, special purpose placement of her parents’ choosing.” *Id.*

455. Petitioners’ Speech Pathologist [REDACTED] recommended 2 years of speech-language services to remediate [REDACTED] so she was able to meet middle school and high school curriculum expectations. Tr. vol. 4, p. 665:10-22. She recommended the compensatory speech language services be provided two times per week for forty-five minutes per session. Tr. vol.4, p. 6:1; *see also* Tr. vol. 9, pp. 1787:22-1788:10.

456. In the alternative, although WCPSS’ Speech Pathologist [REDACTED] believed [REDACTED]’s pragmatic language skills had been addressed in the EBS classroom, she proposed a direct speech services model where [REDACTED] received speech services once a week—alternating weeks for push-in and pull-out services. Tr. vol. 9, p. 1788:4-19 (T of [REDACTED])

457. Based on these recommendations, the Undersigned finds that 2 years, 45 minutes duration per session, 2 sessions a week with one session push-in and the other pull-out is appropriate compensatory speech-language.

CONCLUSIONS OF LAW

Based on the above Findings of Fact, relevant laws, and legal precedent, and by a preponderance of the credible evidence, the Undersigned concludes as follows:

General Legal Framework

1. The Office of Administrative Hearings has jurisdiction over claims relating to the identification, evaluation, educational placement, or provision of a free appropriate public education (“FAPE”) pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §1400 *et seq.* and implementing regulations, 34 C.F.R. Part 300. 20 U.S.C. §1415 and N.C. Gen. Stat. § 115C-109.6(a) control the issues to be reviewed. Stip. 3.

2. To the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they are intended to be considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011). *Warren v. Dep’t of Crime Control*, 221 N.C.App. 376, 377, 726 S.E.2d 920, 923, *disc. rev. den.*, 366 N.C. 408, 735 S.E.2d 175 (2012); *Watlington v Rockingham Co. Department of Social Services*, COA17-1176 (2 October 2018).

3. This Final Decision incorporates and reaffirms the Conclusions of Law contained in the reconsideration Order discussed above and the previous Orders, entered in this contested case.

4. The Petitioners, [REDACTED] by and through her parents, [REDACTED] and [REDACTED] and Respondent Wake County Board of Education are properly before this Tribunal, and this Tribunal has personal jurisdiction over them. Stip. 1.

5. The Petitioners and Respondent named in this action are correctly designated, the parties received proper of the hearing, and venue is proper.

6. Under the IDEA, a state is eligible for federal funding if it “provides assurances” to the federal government that it “has in effect policies and procedures to ensure,” *inter alia*, “a free appropriate public education (“FAPE”) is available to all children with disabilities residing in the state.” 20 U.S.C. § 1412. As a local educational agency (“LEA”), WCPSS is also “eligible for assistance” if its plans to effect policies and procedures are “consisten[t] with the state.” 20 U.S.C. § 1415(a)(1).

7. WCPSS is a local education agency (“LEA”) receiving funds pursuant to the IDEA and is the LEA responsible for providing educational services in Wake County, North Carolina for eligible students like [REDACTED]. The WCPSS is subject to the provisions of applicable federal and State laws and regulations, specifically 20 U.S.C. § 1400 *et seq.*; 34 C.F.R. § 300 *et seq.*; and N.C. Gen. Stat. 115C-106 *et seq.* Stip. 5.

8. The IDEA is the federal statute governing the education of students with disabilities. The federal regulations promulgated under the IDEA are codified at 34 C.F.R. Parts 300 and 301. Stip. 4.

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

Evidentiary Rules In Contested Case Hearings

10. Some evidentiary concerns arose during this proceeding. With respect to the implementation of the IEPs, Respondent argues “Petitioners presented no affirmative evidence that any of these services or accommodations were not provided.” Resp. Pro. Final Dec. p. 29, #144. Essentially, Respondent argues that the “absence of evidence is not evidence of absence.” *Id.* Notably, Petitioners requested this documentation in discovery, but it was not provided by Respondent.

11. The North Carolina Rules of Evidence in Chapter 8C of the General Statutes govern all contested cases in this Tribunal except as otherwise provided in the administrative rules and G.S. 150-29. 26 NCAC 03 .0122. Evidence in a contested case including records and documents must be offered and made a part of the record. N.C. Gen. Stat. § 150B-29(b).” Factual information or evidence not made a part of the record shall not be considered in the determination of the case, except as permitted by G.S. 150B-30 [official notice].” *Id.* The administrative rule regarding evidence in a contested case states:

All evidence to be considered in the case, including all records and documents or a true and accurate copy, shall be offered and made a part of the record in the case.

No other factual information or evidence shall be considered in the determination of the case.

26 NCAC 03.0122(3)

12. Although Respondent's witnesses alluded to math and/or social skills lesson plans, curriculum guides, assessments, all of which were purportedly kept in a data notebook, as well as training materials and other documentary evidence, only the Daily Point Sheets and IEP documents were admitted. To the extent most of this "alluded to" documentary evidence was not made a part of the record, it cannot be considered.

13. The testimony regarding these documents was technically not "stricken" as Petitioners requested, however, the results are the same because it still cannot be "considered." Although Petitioners have the burden of proof, once Petitioners have made their showing, Respondent in its case in chief must respond to the Petitioners' case. The testimonies of Respondent's witnesses about the illusory evidence will be given proper weight and to the extent that no supporting documentary evidence is available for consideration, it will have no weight.

Use of Restraint and Seclusion

14. Before addressing the federal IDEA claims, North Carolina's legal perimeters for the use of restraint and seclusion must be reviewed. This is not to suggest that Petitioners have a private right of action under State law. The statute expressly states that "[n]othing in this section shall be construed to create a private cause of action against any local board of education, its agents or employees, or any institutions of teacher education or their agents or employees." N.C.G.S. § 115C-391.1(k). Instead, the appropriateness of restraint and seclusion within the context of a behavior intervention plan under the IDEA must be examined.

15. As previously discussed *supra* on pp. 29-30 in the Findings, IDEA does not address the use of restraint or seclusion, it does, however, require the IEP team: "in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i).

16. Arguably, IDEA does not allow the IEP team to consider the use of restraint and seclusion in a BIP because neither are "behavioral management techniques," nor are they "other strategies" that proactively "address" disruptive behavior. *See* N.C.G.S. § 115C-391.1(b)(8) &(10). Instead, restraint is physical force used on a student and seclusion is confinement from which the student is prevented from leaving the room. *Id.* As neither Party raised this argument, the Undersigned will not pursue it further either.

17. According to the United States Department of Education, "[r]estraint or seclusion should never be used as punishment or discipline (e.g., placing in seclusion for out-of-seat behavior), as a means of coercion or retaliation, or as a convenience." *See* Pet. Ex. 122. The "repeated use [of restraint and seclusion] for an individual child, multiple uses in the same classroom, or multiple uses by the same individual, should trigger a review and, if appropriate, a revision of the behavioral strategies currently in place to address dangerous behaviors..." Pet. Ex.

122, p. 1311. The repeated use of restraint and seclusion on [REDACTED] in the EBS classroom and by Mr. [REDACTED] should have triggered an FBA then revision of the behavior strategies long before January 2020.

18. N.C. Gen. Stat. § 115C-391.1(e)(1) prescribes when and under what conditions school personnel may seclude a student and N.C. Gen. Stat. § 115C-391.1(j) outlines the notice, reporting, and documentation of the use of restraint and seclusion mandated under State law.

19. “Physical restraint of students by school personnel shall be considered a reasonable use of force when used in the following circumstances:

- a. As reasonably needed to obtain possession of a weapon or other dangerous objects on a person or within the control of a person.
- b. As reasonably needed to maintain order or prevent or break up a fight.
- c. As reasonably needed for self-defense.
- d. As reasonably needed to ensure the safety of any student, school employee, volunteer, or other person present, to teach a skill, to calm or comfort a student, or to prevent self-injurious behavior.
- e. As reasonably needed to escort a student safely from one area to another.
- f. If used as provided for in a student's IEP or Section 504 plan or behavior intervention plan.
- g. As reasonably needed to prevent imminent destruction to school or another person's property.”

N.C. Gen. Stat. § 115C-391.1(c)(1).

20. “Physical restraint shall not be considered a reasonable use of force when used solely as a disciplinary consequence.” N.C. Gen. Stat. § 115C-391.1(c)(3).

21. Seclusion of students by school personnel may be used in the following circumstances:

- a. As reasonably needed to respond to a person in control of a weapon or other dangerous object.
- b. As reasonably needed to maintain order or prevent or break up a fight.
- c. As reasonably needed for self-defense.
- d. As reasonably needed when a student's behavior poses a threat of imminent physical harm to self or others or imminent substantial destruction of school or another person's property.
- e. When used as specified in the student's IEP, Section 504 plan, or behavior intervention plan; and
 - i. The student is monitored while in seclusion by an adult in close proximity who is able to see and hear the student at all times.

- ii. The student is released from seclusion upon cessation of the behaviors that led to the seclusion or as otherwise specified in the student's IEP or Section 504 plan.
- iii. The space in which the student is confined has been approved for such use by the local education agency.
- iv. The space is appropriately lighted.
- v. The space is appropriately ventilated and heated or cooled.
- vi. The space is free of objects that unreasonably expose the student or others to harm.

N.C. Gen. Stat. § 115C-391.1(e).

22. “Isolation is permitted as a behavior management technique provided that:

- (1) The space used for isolation is appropriately lighted, ventilated, and heated or cooled.
- (2) The duration of the isolation is reasonable in light of the purpose of the isolation.
- (3) The student is reasonably monitored while in isolation.
- (4) The isolation space is free of objects that unreasonably expose the student or others to harm.”

N.C. Gen. Stat. § 115C-391.1(f).

23. The statute further states that “[n]othing in this section is intended to prohibit or regulate the use of time-out as defined in this section.” N.C. Gen. Stat. § 115C-391.1(g).

24. “The parent or guardian of the student shall be provided with a written incident report for any incident reported under this section within a reasonable period of time, but in no event later than 30 days after the incident.” N.C. Gen. Stat. § 115C-391.1(j)(4).

25. The written incident report shall include:

- a. The date, time of day, location, duration, and description of the incident and interventions.
- b. The events or events that led up to the incident.
- c. The nature and extent of any injury to the student.
- d. The name of a school employee the parent or guardian can contact regarding the incident.

N.C. Gen. Stat. § 115C-391.1(j)(4)

26. State law further requires the principal or principal’s designee to “promptly notify the student’s parent” of any “seclusion that exceeds 10 minutes or the amount of time specified on a student’s behavior intervention plan” and defines “promptly notify” as “the end of the workday during which the incident occurred when reasonably possible, but in no event later than the end of [the] following workday.” N.C. Gen. Stat. § 115C-391.1(j)(2)-(3).

27. When physical restraint results in injury to the student, or when seclusion is used for longer than 10 minutes, the parents must be notified and receive the following information:

- f. The date, time of day, location, duration, and description of the incident and interventions.
- g. The event or events that led up to the incident.
- h. The nature and extent of any injury to the student.
- i. The name of a school employee the parent or guardian can contact regarding the incident.

N.C. Gen. Stat. § 115C-391.1(j)(4).

28. Most of [REDACTED]'s seclusions exceeded 10 minutes, yet her Parents were not promptly notified. While her Parents were provided Point Sheets which contained some of the requisite information, these were not the correct documents used for this purpose. According to the EBS Program "Weekly Cover Sheets," there was either an Orange or Green Physical Restraint/Escort form that needed to be completed for each incident of restraint or seclusion. Pet. Ex. 32, pp. 132, 222. However, [REDACTED]'s parents never received a copy of any such form despite the more than twenty-two (22) incidents of restraint and seclusion. Tr. vol. 11, pp. 2106:22-24; 2131:10-13 (T of [REDACTED]).

Professional Judgment and Due Regard to Educators

29. The professional judgment of teachers and other school staff is an important factor in evaluating an IEP. "Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment." *Hartmann by Hartmann v. Loudon Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997).

30. A judge may not substitute her "own notions of sound educational policy for those of the school authorities" whose decisions are under scrutiny." *Rowley*, 458 U.S. at 206-07 (stating that "courts must be careful to avoid imposing their view of preferable educational methods upon the States").

31. When disagreements arise between parents and schools over the provision of FAPE, "[b]y the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement." *Endrew F.*, 137 S.Ct. at 1001. Therefore, the Court empowered any reviewing court to "fairly expect" the school district "to be able to offer a *cogent and responsive explanation* for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Id.* (emphasis added).

32. When a school district fails to offer "cogent and responsive explanation" it is not entitled to deference. *Gaston v. Dist. of Columbia*, 2019 WL 3557246 (D.C. August 5, 2019) (finding the "preponderance of the evidence available at the time shows that the [] IEP was not reasonably calculated to enable [the student] to make progress appropriate in light of her

circumstances”); *see also Smith v. Dist. of Columbia*, 2018 WL 4680208 (D.C. Sept. 28, 2018).

Statute of Limitations

33. The IDEA provides the complaint must “set[] forth an alleged violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint” and allows states to establish a distinct statute of limitations “for such a [due process] complaint.” 20 U.S.C. § 1415(b)(6)(B).

34. In North Carolina, “[n]otwithstanding any other law, the party shall file a petition under subsection (a) of this section that includes the information required under IDEA and that sets forth an alleged violation that occurred not more than one year before the party knew or reasonably should have known about the alleged action that forms the basis of the petition.” N.C. Gen. Stat. § 115C-109.6(b).

35. Although the Federal district courts in North Carolina have issued conflicting interpretations of Section 115C-109.6(b), the Office of Administrative Hearings has consistently interpreted Section 115C-109.6(b) as imposing a one-year statute of limitations for filing a claim. *See, e.g., R.S. v. Bd. of Directors of [REDACTED] Sch. Co.*, 1:16-cv-119, at *9 (M.D.N.C. Mar 4, 2019) (noting “neither party has argued that section 115C-109.6(b) is not actually an SOL, despite the fact that the statute does not expressly mention a time-to-file limitation.”); but see *Vlasaty v. Wake Cnty. Pub. Sch. System Bd. of Educ.*, 2018 WL 4515877 at *4 (unpublished) (finding “the statute of limitations for IDEA claims is one year from the date on which the parents knew or should have known about the alleged action that forms the basis for the complaint”).

36. Section 115C-109.6(c) of the North Carolina General Statutes, like the IDEA, provides two exceptions to the one-year statute of limitations:

The one-year restriction in subsection (b) of this section shall not apply to a parent if the parent was prevented from requesting the hearing due to (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the petition, or (ii) the local educational agency's withholding of information from the parent that was required under State or federal law to be provided to the parent.

37. The IDEA’s “limitations period functions in a traditional way, that is, as a filing deadline that runs from the date of reasonable discovery and not as a cap on a child’s remedy for timely-filed claims that happen to date back more than two years before the complaint is filed.” *G.L. v. Ligionier Valley Sch. Dist. Auth.*, 802 F.3d 601, 616 (3d Cir. 2015); *see also Avila v. Spokane Sch. Dist.* 81, 852 F.3d 936, 939–44 (holding the discovery rule (the knew or should have known date), not the occurrence rule (the date of the injury), applies when calculating the statute of limitations).

38. “[A] child’s entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem) nor be

abridged because the district's behavior did not rise to the level of slothfulness or bad faith." *G.L.* at 619 (quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 897 (3d Cir. 1996)).

39. Because WCPSS misrepresented the use of restraint and seclusion and failed to properly notify ██████'s Parents, the one-year statute of limitations does not apply to the implementation of CPI techniques (e.g., restraint) and seclusion in the BIPs before February 21, 2019.

Free and Appropriate Public Education ("FAPE")

40. WCPSS acknowledges that as the recipient of federal IDEA funds (Stip. 5), it is required to provide ██████ an eligible student, with a free and appropriate public education ("FAPE"). 20 U.S.C. § 1412(a)(1).

41. A FAPE, as the [IDEA] defines it, includes both "special education" and "related services." § 1401(9). "Special education" is "specially designed instruction ["SDI"] ... to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child ... to benefit from" that instruction. §§ 1401(26), (29). Speech-language and counseling are related services. 34 C.F.R. § 300.34(c)(2) & (15).

42. WCPSS must provide ██████ a disabled child, with such special education and related services "in conformity with the [child's]" ... IEP. § 1401(9)(D). The IEP is "the centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311 (1988). A comprehensive plan prepared by ██████'s "IEP Team" (which includes teachers, school officials, and the child's parents), an IEP must be drafted in compliance with a detailed set of procedures. § 1414(d) (1)(B). These procedures emphasize collaboration among ██████'s Parents and educators and require careful consideration of ██████'s individual circumstances. § 1414. The IEP is the means by which special education and related services are "tailored to the unique needs" of ██████ *Board of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 181 (1982).

43. Specifically, the IEP Team must consider "the strengths of [██████] the concerns of [her Parents] for enhancing the education of [██████] the results of the . . . most recent evaluation of the child; and the academic developmental, and functional needs [██████] 20 U.S.C. § 1414(d)(3)(A).

44. In *Endrew F.*, the Supreme Court held that while the students protected under the IDEA may have a broad range of disabilities affecting each child's ability to access the general curriculum, the "substantive obligation" of the school district is the same for all students: "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S.Ct. at 999; *see also M.C. v. Antelope Valley*, 858 F.3d 1189, 1200 (9th Cir. 2017) (finding in *Endrew F.*, the Supreme Court "provided a more precise standard for evaluating whether a school district has complied substantively with the IDEA").

45. The IDEA requires an IEP that is "likely to produce progress, *not regression*."

Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 (2d Cir. 1998) (emphasis added).

46. The IDEA requires that every IEP include “a statement of the child's present levels of academic achievement and functional performance,” describe “how the child's disability affects the child's involvement and progress in the general education curriculum,” and set out “measurable annual goals, including academic and functional goals,” along with a “description of how the child's progress toward meeting” those goals will be gauged. §§ 1414(d)(1)(A)(i)(I)-(III). The IEP must also describe the “special education and related services ... that will be provided” so that the child may “advance appropriately toward attaining the annual goals” and, when possible, “be involved in and make progress in the general education curriculum.” § 1414(d)(1)(A)(i)(IV). *Andrew F. ex rel. ██████ F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993–94 (2017) (certain ellipses and brackets in original) (parallel citations omitted).

47. In assessing whether a school provided a FAPE, “courts should endeavor to rely upon objective factors, such as actual educational progress, in order to avoid substituting [their] own notions of sound educational policy for those of the school authorities which [they] review.” *MM ex rel. DM v. School Dist. of Greenville Cnty.*, 303 F.3d 523, 532 (4th Cir. 2002) (internal quotation marks and brackets omitted). Indeed, “it is a longstanding policy in IDEA cases to afford great deference to the judgment of education professionals.” *N.P.*, 711 F. App'x at 717 (internal quotation marks omitted). Viewed from the Supreme Court's perspective:

[t]he [IDEA] vests [school] officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue. By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.

Andrew F., 137 S. Ct. at 1001-02 (citations omitted).

48. To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Id.* 137 S. Ct. at 999. “The ‘reasonably calculated’ qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The [IDEA] contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians.” *Id.* (citation omitted). Further, “[a]ny review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Id.* (emphasis in original).

49. The IEP must aim to enable ██████ to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement not for a child to sit idly in the classroom. 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)–(IV). The progress contemplated by the IEP must be appropriate in light of the child's circumstances. A focus on the particular child is at the core of the IDEA. The instruction offered must be “specially designed” to meet a child's

“unique needs” through an “[i]ndividualized education program.” §§ 1401(29), (14) (emphasis added).

50. An IEP is not a form document. It is constructed only after careful consideration of the [REDACTED]’s present levels of achievement, disability, and potential for growth. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv). As the Supreme Court observed in *Rowley*, the IDEA “requires participating States to educate a wide spectrum of handicapped children,” and “the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.” 458 U.S. at 202. *Rowley* sheds light on what appropriate progress will look like in many cases. There, the Court recognized that the IDEA requires that children with disabilities receive education in the regular classroom “whenever possible.” *Id.* (citing § 1412(a)(5)).

51. When this preference is met, “the system itself monitors the educational progress of the child.” *Id.* at 202–203. “Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material.” *Id.* at 203. Progress through this system is what our society generally means by an “education.” And access to an “education” is what the IDEA promises. *Id.*

52. Accordingly, for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Id.* at 203–204. This guidance is grounded in the statutory definition of a FAPE. One of the components of a FAPE is “special education,” defined as “specially designed instruction ... to meet the unique needs of a child with a disability.” §§ 1401(9), (29).

53. [REDACTED] has average intelligence and, prior to her transfer to WCPSS, was able to complete grade level work and access the regular education curriculum with appropriate supplemental aids and support. WCPSS does not dispute this. *See* Pet. Exs. 5, p. 13; 16, p. 73-74, 21, p. 102; Stip. Ex. 5, p. 25. While the academic scoring on her report cards is suspect, she has been advanced from grade to grade.

54. In order to provide the FAPE required by the IDEA, [REDACTED]’s IEP and BIP must be tailored to her unique needs, not the fidelity of the EBS program. The IEP must accurately describe [REDACTED]’s present level of academic and functional achievement, including explaining “how the [her] disability affects [her] involvement and progress in the general education curriculum.” § 1414(d)(1)(A)(i)(I)(aa). In addition, the IEP must then set out “a statement of measurable annual goals ... designed to ... enable [REDACTED] to be involved in and make progress in the general education curriculum,” along with a description of specialized instruction and services that the child will receive. §§ 1414(d)(1)(A)(i)(II), (IV). The instruction and services must likewise be provided with an eye toward “progress in the general education curriculum.” § 1414(d)(1)(A)(i)(IV)(bb).

Least Restrictive Environment (“LRE”)

55. Under the IDEA, children with disabilities remain entitled to a FAPE in the least restrictive environment (“LRE”). 20 U.S.C. § 1412(a)(1) & (5); *see also Endrew F.*, 137 S. Ct. at 999 (“[T]he IDEA requires that children with disabilities receive education in the regular

classroom ‘whenever possible.’”). This is known as a “mainstreaming requirement,” *DeVries by DeBlaay v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989), the IDEA provides:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. 300.114(a)

56. As such, IEP teams “must give first *consideration* to placement of [REDACTED] in the regular classroom with appropriate aids and services before a more restrictive placement can be considered.” *O.V. v. Durham Public Schools Board of Education*, 2021 WL 1430768 at *17 (E.D.N.C. April 15, 2021) citing *Letter to Cohen*, 25 IDELR 516 (OSEP 1996) (emphasis in original). Further, “[i]n determining whether regular class placement would be appropriate for an individual disabled student, the team must thoroughly consider the full range of supplementary aids and services, in light of the student's abilities and needs, that could be provided to facilitate the student's placement in the regular educational environment.” *Id.*

57. “In sharp contrast to the vagueness provided in the statute as to the meaning of FAPE, the IDEA has a very specific prescription for the educational environment for a child with a disability. Particularly, the IDEA requires a balancing of the need for the provision of a free and appropriate public education with the need for providing such an education in the least restrictive environment.” *TexArkana Sch. Dist.*, 115 LRP 46616 (Arkansas SEA 2015) (citing *Sacramento City Unified Sch. Dist. v. Rachael H.*, 14 F.3d 1398 (9th Cir. 1994); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044-45 (5th Cir. 1989); *Lachman v. Illinois Bd. of Educ.*, 852 F.2d 290, 295 (7th Cir. 1985), *cert. denied*, 488 U.S. 925; *A.M. v. Northwest R1 Sch. Dist.*, 8113 F.2d 158, 162 (8th Cir. 1987), *cert denied*, 484 U. S. 847 (1987)).

58. The IDEA prefers full integration in the regular classroom, *Endrew F.*, 137 S.Ct. at 999, and emphasizes the integral role of supplemental aids and services to allow disabled students to access the regular classroom, 34 CFR § 300.114(a)(2)(ii).

Appropriate Supplementary Aids and Services

59. Before denying a child access to a general education classroom, the IDEA requires the LEA to meaningfully consider the provision of appropriate supplementary aids and services needed for a disabled child to participate. 34 C.F.R. § 300.117. “[A] student with disabilities must be placed ‘in the least restrictive environment that will provide the child with a meaningful educational benefit.’” *H.L. v. Downington Area Sch. Dist.* 624 F. App’x 64, 68 (3d Cir. 2015) (citing *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 556-57 (3d Cir. 2010)).

60. The IDEA defines supplementary aids and services as “aids, services, and other

supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with Section 1412(a)(5) of this title.” 20 U.S.C. § 1401(33).

61. Examples of “supplementary aids and services” include “modifications to the regular class curriculum, assistance of an itinerant teacher with special education training, special education training for the regular teacher, use of computer-assisted devices, provision of note takers, and use of a resource room.” *OSEP Memorandum 95-9* (Nov. 23, 1994); *see also P. ex rel. Mr. P. v. Newington Bd. of Educ.*, 512 F. Supp. 2d 89, 104 (D. Conn. 2007) (identifying the following supplementary aids and services considered by the IEP Team: assistance of two (2) paraprofessionals on a routine basis; co-teaching; program modifications and adaptations to accommodate the student’s needs; modification of the regular curriculum).

62. When considering a child’s placement, “the school ‘must consider the whole range of supplemental aids and services, including resource rooms and itinerant instruction,’ speech and language therapy, special education training for the regular teacher, behavior modification programs, or any other available aids or services appropriate to the child’s particular disabilities. The school must also make efforts to modify the regular education program to accommodate a disabled child.” *Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1216 (3d Cir. 1993) (citations omitted) (quoting *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 696 (11th Cir. 1991)).

63. A child may not be “removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.” 34 C.F.R. § 300.116(e). Nor may a school district rely solely on the following factors when determining a child’s placement: category of disability; severity of disability; configuration of delivery system; availability of educational or related services; availability of space; and administrative convenience; rather, “the student’s IEP forms the basis for the student’s placement decision.” *OSEP Memorandum 95-9* (1994).

64. The Fourth Circuit in *DeVries v. Fairfax County School Board* emphasized that the mainstreaming of children with disabilities is “not only a laudable goal but is also a requirement of the Act” and adopted the *Roncker* standard. *DeVries*, 882 F.2d. at 879 (citing *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) (requiring a court to “determine whether the services which make that placement [at a segregated facility] superior could be feasibly provided in a non-segregated setting”)).

65. When adopting the *Roncker* standard, the *DeVries* Court, identified three factors that could defeat the presumption of a general education classroom placement: (1) the disabled child would not benefit from mainstreaming; (2) any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services that could not be feasibly provided in the non-segregated setting; or (3) the disabled child is a disruptive force in the non-segregated setting. *DeVries*, 882 F.2d at 876; *see also Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989) (incorporating a modification of the *Roncker* standard). The child “need not master the general-education curriculum for mainstreaming to remain a viable option”; “[r]ather, the appropriate yardstick is whether the child, with appropriate supplemental aids and services,

can make progress toward the IEP's goals in the regular education setting.” *L.H. v. Hamilton Cnty. Dep’t of Educ.*, 900 F.3d 779, 793 (6th Cir. 2018).

66. A school district may consider the impact of the student’s behavior on other students when determining if removal from general education is warranted, but courts typically only find in favor of the district only when the student’s behavior is extremely disruptive. *See Hartmann by Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 999 (4th Cir. 1997) (holding non-verbal eleven year old child who regularly “engaged in daily episodes of loud screeching and other disruptive conduct such as hitting, pinching, kicking, biting, and removing his clothing” could be removed from general education after the district had engaged in multiple efforts to educate him in the general education setting, including “carefully select[ing] his teacher, hir[ing] a full-time aide to assist him, and put[ting] him in a smaller class with more independent children,” as well as additional training for staff, consultants brought in to develop the IEP, and continuous modification of his curriculum to “ensure it was properly adapted to his needs.”); *see also A.G. ex rel. S.G. v. Wissahickon Sch. Dist.*, 374 F. App’x 330 (3d Cir. 2010) (finding that a non-verbal, highly distractible teenager who was unable to identify letters or numbers, struggled with dressing, eating, and grasping a pencil and who was not yet toilet trained could not be satisfactorily educated in a classroom even with supplementary aids and services).

67. The Department of Justice (DOJ) found students in a segregated emotional-behavioral program were provided inferior education services. The DOJ advised the schools needed to consider the supplemental aids and services the students required to be integrated into the regular education setting. *Letter to Deal and Olens*, 8 GASLD 99 (DOJ 2015).

68. Because of the manifestations of her disabilities, [REDACTED] has been removed from the regular education setting for being disruptive. With appropriate specially designed instruction appropriately implemented and supplementary aids and supports, [REDACTED] does not have to be removed from the regular education classroom and she can continue to access the general curriculum without disrupting her peers.

Evaluations

69. Prior to the development of the IEP, comprehensive formal and informal evaluations as conducted to determine the student’s academic and functional needs. With this information along with other pertinent information in the student’s educational record, the IEP team develops the IEP and BIP. The IEP team must complete the re-evaluation process at least every three years, or more often if a parent requests a reevaluation. 20 U.S.C. § 1415(a)(2).

70. When [REDACTED]’s Parents requested a reevaluation “to determine the child’s educational needs . . . the public agency must either conduct the reevaluation or provide notice to the parents as to why the public agency believes a reevaluation is unnecessary.” 71 Fed. Reg. 46,644 (2006).

71. The evaluation must be sufficiently comprehensive to identify all of [REDACTED]’s special education needs, whether or not commonly linked to the disability category in which [REDACTED] has been identified. 20 U.S.C. 1414(b)(1)-(3), 1412(a)(6)(B); 34 CFR 300.304.

72. The IDEA mandates the “assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of [REDACTED] are provided.” 20 U.S.C. § 1414(b)(3)(C).

73. A district must also examine “[w]hether any additions or modifications to the special education and related services are needed to enable [REDACTED] to meet the measurable annual goals set out in the IEP of [REDACTED] and to participate, as appropriate, in the general education curriculum.” 34 CFR § 300.305 (a)(2)(iii)(iv).

74. “Because an IEP must be tailored to the student’s reasonably known needs at the time it is offered, the underlying evaluation of the student is fundamental to creating an appropriate educational program.” *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018).

75. “The evaluation requirement ‘serves a critical purpose: it allows the child’s IEP Team to have a complete picture of the child’s functional, developmental, and academic needs, which in turn allows the team to design an individualized and appropriate educational plan tailored to the needs of the individual child.’” *Z.B.*, 888 F.3d at 523 (quoting *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1119 (9th Cir. 2016)).

76. The failure to conduct an evaluation integral to understanding the student’s needs “is a serious procedural violation because it may prevent the IEP team from obtaining necessary information about the student’s [identified needs], leading to their being addressed in the IEP inadequately or not at all.” *S.S. v. Bd. of Educ. of Hartford Cnty.*, __ F.Supp.3d ___, 2020 WL 6290664 (Oct. 27, 2020) (quoting *R.E. v. New York City Dept. of Educ.*, 694 F.3d 167, 190 (2d Cir. 2012)); accord *Z.B. v. D.C.*, 888 F.3d 515, 524 (D.C. Cir. 2018).

77. Applying *Endrew F.*, the court must ask whether the school district “adequately evaluated [the student’s] particular needs and offered her an IEP tailored to what it knew or reasonably should have known of her disabilities at the time.” *Z.B.*, 888 F.3d at 524 (citing *Endrew F.*, 137 S.Ct. at 999). The answer in this case is no.

78. WCPSS failed to conduct comprehensive evaluations necessary to identify [REDACTED]’s academic and functional needs before developing her IEPs and BIPs. This impacted both the Parents and the other IEP team members ability to meaningfully participate at the IEP meeting and develop appropriate educational programming for [REDACTED]

Appropriately Ambitious IEP Goals

79. “The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” *Endrew F.*, 137 S.Ct. at 1001. The IEP must give [REDACTED] “the chance to meet challenging objectives” and “[a child’s] educational program must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom.” *See id.* at 1000.

80. “The goals may differ, but every child should have the chance to meet challenging objectives.” *Enter. City Bd. of Educ. v. S.S.*, No. 1:19-CV-748-ALB, 2020 WL 3129575, at *5

(M.D. Ala. June 12, 2020) (*citing* *Endrew F.*, 137 S.Ct. at 1000; *Endrew F. ex rel. [REDACTED] F. v. Douglas Cty Sch. Dist. RE 1*, 290 F. Supp. 3d 1175, 1184 (D. Colo. 2018) (mere “updates” or “minor or slight increases” in goals are insufficient)).

81. School districts must use methods that have proven to be effective with the student based on the student’s unique needs, not necessarily the method with the greatest body of research. 71 Fed. Reg. 46,665 (2006). Even if the EBS program was research-based and worked for other behaviorally challenged students, it was not the appropriate program for [REDACTED]

82. Where an IEP team does not incorporate the evaluative materials and evidence of the student’s needs when drafting an IEP, the IEP is not designed to enable a student to make progress in light of her unique educational needs. *S.B. v. New York City Dept. of Education*, 70 IDELR 221, 117 LRP 41951 (E.D.N.Y. 2017) (ignoring the student’s deficiencies relevant to her education needs outlined in a psychoeducational report when drafting the IEP).

83. The failure to address known deficiencies results in an absence of goals in areas of need and unattainable goals. *Id.*; *see also A.D. v. Creative Minds International Public [REDACTED] School*, 120 LRP 30541 (D.C., August 14, 2020) (*citing Endrew F. v. Douglas Cty. Sch. Dist.*, 290 F. Supp. 3d 1175, 1183-84 (D. Colo. 2018) and concluding the IEP was inappropriate given the students’ needs in math and the absence of math goals in the student’s IEP).

84. When a school “completely ignor[es] the evidence” of a student’s deficit, “and ignor[es] the parent’s request” for the needed support to address the deficit, “the IEP created by [the school district] cannot ‘have reasonably been calculated to enable a child to make progress appropriate in light of the child’s circumstances.’” *Capistrano Unified School District v. S.W.*, 77 IDELR 137, 120 LRP 28361, (C.D. Cal., 2020) (*quoting Endrew F.*, 137 S.Ct. at 1001).

85. WCPSS ignored [REDACTED]’s deficits in pragmatic language and her non-verbal learning disability.

86. In addition, the staff at [REDACTED] was not adequately trained to deal with the complexity of [REDACTED]’s disabilities. The IDEA and federal regulations repeatedly require school districts to provide professional development to enable school staff to use scientifically based instructional practices and behavioral interventions, 20 U.S.C. § 1400(c)(5)(E). Educational agencies must “ensure that all personnel necessary to carry out Part B of the Act are appropriately and adequately prepared.” 34 C.F.R. § 300.207.

Related Services

87. The IDEA defines related services as “transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education.” 34 C.F.R. § 300.34(a). These services include “speech-language pathology and audiology services, psychological services, [and] physical and occupational therapy.” 34 C.F.R. § 300.34(a).

88. Every IEP must contain:

A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—

- (i) To advance appropriately toward attaining the annual goals;
- (ii) To be involved in and make progress in the general education curriculum in accordance with [34 C.F.R. § 300.34(a)(1)], and to participate in extracurricular and other nonacademic activities; and
- iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.

34 C.F.R. § 300.320(a)(4).

89. ██████'s IEPs failed to contain the necessary related services of counseling and speech-language services for pragmatic language. WCPSS also inappropriately reduced ██████'s articulation speech services without reevaluating her needs.

Implementation

90. Under the IDEA, a school district is required to implement all components of a student's IEP. 34 CFR 300.323 (c).

91. The Fourth Circuit held in *Sumter County Sch. Dist. 17 v. Heffernan*, 642 F.3d 478, 484 (4th Cir. 2011), “a material failure to implement an IEP, or, put another way, a failure to implement a material portion of an IEP, violates the IDEA.” See *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (“[A] material failure to implement an IEP violates the IDEA.”); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003) (“[W]e cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit.”); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (“[A] party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.”).

92. “The Supreme Court has described the IEP as “[t]he primary vehicle for implementing the [] congressional goals” identified in IDEA. It follows that a school district's adherence to the prescribed IEP is essential to a child's educational development under IDEA.” *Holman v. D.C.*, 153 F. Supp. 3d 386, 393 (D.D.C. 2016) (citing *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 98 (1988)).

93. However, “the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail on a failure-to-implement claim.” *Wilson v. D.C.*, 770 F.Supp.2d 270, 275 (D.D.C.2011) (internal citations omitted) (*citing Van Duyn*, 502 F.3d at 822). “In deciding if [a] failure [to implement the IEP] was material, ‘[c]ourts ... have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.’” *Turner v. D.C.*, 952 F. Supp. 2d 31, 40 (D.D.C. 2013) (*citing Wilson v. D.C.*, 770 F.Supp.2d 270, 275 (D.D.C. 2011)).

94. “Since proof of harm is not required under these circumstances, it follows that a material deviation from the prescribed IEP is *per se* harmful under IDEA. *See Van Duyn*, 502 F.3d at 822. The “crucial measure” under the materiality standard is the “proportion of services mandated to those provided” and not the type of harm suffered by the student....” *Holman*, 153 F. Supp. 3d at 393–94. “Courts should therefore view deviations from the IEP ‘with a critical eye to ensure that motivations other than those compatible with the statute, such as bureaucratic inertia, are not driving the decision.’” *L.J. by N.N.J. v. Sch. Bd. of Broward Cty.*, 927 F.3d 1203, 1215 (11th Cir. 2019) (*quoting John M. v. Bd. of Ed. of Evanston Township High Sch. Dist.*, 502 F.3d 708, 715(7th Cir. 2007)).

95. WCPSS failed to appropriately implement ██████’s IEPs and BIPs which caused her educational regression and emotional harm.

Remedies

96. The IDEA confers “‘broad discretion’ on the court in fashioning an appropriate remedy.” *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 325 (4th Cir. 2009) (*quoting Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369 (1996)). As the Court in *Burlington* opined, “[I]t seems clear beyond cavil that ‘appropriate’ relief” should avoid an “empty victory,” if a school district has failed to meet its obligation; otherwise, “the child’s right to a free appropriate public education, the parents’ right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete.” *Id.*

97. “Courts fashioning discretionary equitable relief under [the] IDEA must consider all relevant factors . . .”. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 16 (1993).

98. All relevant factors have been considered in determining the appropriate relief to award Petitioners for WCPSS procedural and substantive violations of ██████’s right to a free and appropriate public education.

Private School Tuition Reimbursement

99. The Supreme Court has established a two-part test to determine whether a district is required to reimburse parents for their expenditures for private school: (1) was the IEP proposed by the school district inappropriate; and (2) was the private placement appropriate to meet the child’s needs. *Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 370–71 (1985). The reimbursement provision of the IDEA prescribes that a school district may be required to

reimburse the parents for tuition the parents paid as a result of the school district's failure to meet its obligations. *Id.*

100. Parents who “unilaterally change their child's placement...without the consent of state or local school officials, do so at their own financial risk.” *Florence Cty. Sch. Dist. Four v. Carter By & Through Carter*, 510 U.S. 7, 15 (1993). Parents challenging an IEP are entitled to reimbursement only if the Court “concludes both that the public placement violated IDEA and the private school placement was proper under the Act.” *James M. ex rel. Sherry M. v. Hawai'i*, 803 F. Supp. 2d 1150, 1157 (D. Haw. 2011) (citing *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009)).

101. For reimbursement to be available, Petitioners must prove that their unilateral private placement is appropriate to meet the student's needs. *See M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 324 (4th Cir. 2009) (quoting *Carter v. Florence County Sch. Dist. Four*, 950 F.2d 156, 163 (4th Cir. 1991) (holding that like an IEP, a parental placement is appropriate if it is ‘reasonably calculated to enable the child to receive educational benefits’). “A preponderance of the evidence standard applies to the question of a placement's appropriateness.” *O.V.*, 2021 WL 1430768, at *59.; *see* 20 U.S.C. § 1415(i)(2)(C)(iii).

102. Petitioners seeking reimbursement bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate. *M.S. v. Yonkers Bd. of Educ.*, 231 F.3d 96, 104 (2d Cir. 2000). In doing so, Petitioners are not barred from reimbursement where a private school they choose does not meet the IDEA definition of a FAPE. *See* 20 U.S.C. § 1401(9). When an LEA fails to offer a FAPE and parents choose to unilaterally place their child in a private school, parents must seek appropriateness and not perfection.

Appropriateness of the Private Placement at [REDACTED]

103. A parent's placement is deemed appropriate when it meets the standard of being “reasonably calculated to enable [the student] to receive educational benefits.” *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 364 (2d Cir. 2006) (finding “no one factor is necessarily dispositive” and courts should take a totality of the circumstances approach when assessing appropriateness). A private placement meets this standard if it is “likely to produce progress, not regression.” *Walczak*, 142 F.3d at 130 (internal quotation marks omitted).

104. “The IDEA requires a school district to reimburse a parent of a child with a disability the cost of enrollment in a private school if the school district has failed to offer a FAPE and the program is appropriate.” *Wake Cty. Bd. of Educ. v. S.K. by & through R.K.*, No. 5:19-CV-497-BO, 2021 WL 2148660 at *9 (E.D.N.C. May 26, 2021); *see* 20 U.S.C. § 1412(a)(10)(c); *see also A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 320 (4th Cir. 2004) (“[W]hen a state fails to provide a FAPE, [a] child's parent[s] may remove the child to a private school and then seek tuition reimbursement from the state.”) (internal cites omitted).

105. “To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential.” *O.V. v. Durham Pub. Sch. Bd. of Educ.*, No. 1:17CV691, 2021 WL 1430768 at *58 (citing *Frank*

G. v. Board of Educ. of Hyde Park, 459 F.3d 356, 365 (2d Cir. 2006); *see also id.* ("The test for parents' private placement is not perfection.").

106. "The parent may recover if (1) the proposed IEP was inadequate to offer the child a FAPE and (2) the private education services obtained by the parents were appropriate to the child's needs." *O.V.*, 2021 WL 1430768 at *58 (internal citations omitted).

107. "A private school need not meet the IDEA definition of a FAPE for a parent to obtain reimbursement, and a parental placement is appropriate if it is reasonably calculated to enable the child to receive educational benefits." *S.K.*, 2021 WL 2148660, at *9 (*citing M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 324 (4th Cir. 2009) (internal quotation and citation omitted); *see also Florence Cty. Sch. Dist. Four v. Carter By & Through Carter*, 510 U.S. 7, 9-10 (1993) (holding a private school is not required to meet state standards); *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 488 (4th Cir. 2011) ("A parental placement is appropriate if 'the private education services obtained by the parents were appropriate to the child's needs.'").

108. "In evaluating the appropriateness of a private placement, the Court should consider, *inter alia*, the restrictiveness of the placement, *see, e.g., Sumter Cnty.*, 642 F.3d at 488, as well as the child's actual progress at the private placement, *see M.S.*, 553 F.3d at 327." *O.V.*, 2021 WL 1430768, at *59; *see also L.H. v. Hamilton Cnty. Dep't of Educ.*, 900 F.3d 779, 797-798 (6th Cir. 2018) (concluding that private placement satisfied standard where "[the student] has made some academic progress at [the private school,] ... appears to be doing well behaviorally and socially, and the setting is certainly less restrictive than the [public school's proposed] placement") (emphasis omitted).

109. "The Fourth Circuit has made clear that parental testimony, even if 'not very extensive, and ... short on details and specifics,' can suffice to establish a placement's appropriateness." *O.V.*, 2021 WL 1430768, at *61 (*citing Sumter Cnty.*, 642 F.3d at 489).

110. Petitioners have proved be a preponderance of the evidence that [REDACTED] was an appropriate private school placement and that she received educational benefits in that placement.

Equitable Considerations for Reducing or Denying Tuition Reimbursement

111. The IDEA provides three (3) reasons the cost of reimbursement may be reduced or denied:

- (1) failure to provide notice at the most recent IEP meeting or by providing a letter ten business days prior to removal that parents were rejecting the placement proposed by the district to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense;
- (2) failure to make a child available for an evaluation that was properly noticed prior to the child's removal; or

- (3) a judicial finding of unreasonableness with respect to actions taken by the parents.

20 U.S.C. § 1412(a)(10)(C)(iii).

112. A hearing officer has discretion not to reduce or deny tuition reimbursement for the [REDACTED]s Parents' failure to provide notice as required if compliance with clause (iii)(I) would likely result in serious emotional harm to the child. 20 U.S.C. § 1412(a)(10)(C)(iv)(II)(bb).

113. "[A] finding that parents acted unreasonably may be grounds to reduce or deny a claim for tuition reimbursement." *S.K.*, 2021 WL 2148660, at *10 (holding parent was not unreasonable and there were no grounds to reduce tuition reimbursement); *see* 34 C.F.R. § 300.148(d)(3). However, [REDACTED]s "Parents are permitted to investigate private schools and even enroll their child in private school while still considering the options presented by the school district in good faith, all without losing their ability to seek relief for the school district's failure to provide FAPE." *S.K. v. WCPSS*, 17 EDC 08781, at *19 (NC SEA 2019).

114. It is not unreasonable for parents to sign an enrollment contract for the upcoming year and provide a deposit in order to reserve a spot for the student prior to providing notice if the parents act reasonably and "cooperate with the district 'in its efforts to meet its obligations under the IDEA . . . their pursuit of a private placement is not a basis for denying their request for tuition reimbursement, even assuming . . . the parents never intended to keep the student in public school.'" *In re: Student with a Disability*, 114 LRP 23151 (NY SEA 2014) (quoting *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 840 (2d Cir. 2014)); *see, e.g., A.R. v. New York City Dep't of Educ.*, 2013 WL 5312537 at *9 (S.D.N.Y. Sept. 23, 2013) (rejecting the district's pretention "to have peered into the Plaintiff's mind and ascertained that she 'never seriously considered sending the Student to a public placement'").

115. "Important to the equitable consideration is whether [REDACTED]s Parents] obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA." *C.L.*, 744 F.3d at 840; *see also Warren G. ex rel. Tom G. v. Cumberland Cnty. Sch. Dist.*, 190 F.3d 80, (3d Cir. 1999) (reversing the district court and holding "vigorous advocacy" is not a basis for reducing reimbursement as the parents' conduct obstructed the district from offering an appropriate IEP). [REDACTED]s Parents were not obstructionists, but rather were cooperative with WCPSS' effort to meet its obligations under the IDEA.

116. Rather than "pretend to peer into the [parent's] mind," courts look at the actions of the parents. *A.R.*, 2013 WL 5312537 at *9 (noting the parent's attendance at the IEP meeting and willingness to tour the proposed school); *see also R.K. ex rel. R.K. v. New York City Dep't of Educ.*, 2011 WL 1131492 (E.D.N.Y. 2011) (pointing to the parents' history of working with the district, parents properly communicating their concerns to the district, providing private evaluations to assist the IEP team in developing an appropriate IEP).

117. Courts "decline[] to infer bad faith on the part of the [parent], who sought to educate themselves about various school options and to make arrangements to preserve her options should the [district's] recommended placement prove to be inadequate." *R.K.*, 2011 WL 1131492 at *30.

118. Petitioners' conduct was suggestive that they had predetermined placement in the private school before giving the requisite 10-day notice to Respondent. One exception might avail them relief from the notice requirement, which is that [REDACTED] would likely suffer severe emotional harm if she remained in the EBS placement.

119. Petitioners proffered expert testimony including [REDACTED]'s treating psychiatrist about the emotional harm that [REDACTED] suffered while placed in the EBS classroom because of the seclusions. Respondent's expert, psychiatrist Dr. [REDACTED] did not opine whether [REDACTED] had post-traumatic stress disorder due to the seclusions or her placement in the EBS classroom. Instead, Dr. [REDACTED] stated that Dr. [REDACTED] could not diagnosis post-traumatic stress disorder because only a psychiatrist or therapist could make this diagnosis. Tr. vol. 10, pp. 1949:18-1950:8.

120. None of the experts were asked if [REDACTED] would suffer serious emotional harm if she continued in the placement until the January IEP meeting, so the Undersigned is unable to determine if [REDACTED] would "likely" suffer serious emotional harm in the EBS classroom prior to the January 2020 IEP meeting.

121. Regardless, based on the totality of the circumstances, [REDACTED]'s Parents actively participated and cooperated with WCPSS in the development of the January 2020 IEP and BIP. Had WCPSS complied with its obligations under the IDEA and developed an appropriate IEP and BIP, Petitioners would have no valid claim to tuition reimbursement. Moreover, any misconduct by the Parents' is far outweighed by that of WCPSS; therefore, the tuition reimbursement will not be reduced.

Compensatory Education and Related Services

122. "The relief granted by courts under section 1415(i)(2)(C)(iii) is primarily compensatory education. Compensatory education, however, is not defined within the IDEA and is a judicially created remedy. It is intended as 'a remedy to compensate [the student] for rights the district already denied ... because the School District violated [the] statutory rights while [the student] was still entitled to them.'" *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 717 (3d Cir. 2010) (citing *Lester H. v. Gilhool*, 916 F.2d 865, 872(3d Cir. 1990)).

123. "That equitable authority, this court has held, must include the power to order 'compensatory education'—that is, education services designed to make up for past deficiencies in a child's program. *Boose v. D.C.*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (citing *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 522–23 (D.C.Cir.2005)).

124. "Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student." *G ex rel. RG v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 309 (4th Cir. 2003).

125. "[W]hereas ordinary IEPs need only provide 'some benefit,' compensatory awards must do more—they must *compensate*." *Reid*, 401 F.3d at 525 (*emphasis in original*).

126. Although "ordinary [educational programs] need only provide 'some benefit,'

compensatory awards must do more—they must *compensate*.” *Reid*, 401 F.3d at 525.

127. “Compensatory awards should place children in the position they would have been in but for the violation of the Act.” *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1289 (11th Cir. 2008).

128. Because WCPSS violated the IDEA and failed to provide [REDACTED] with an appropriate specially designed instruction for her academic, functional/behavioral, and speech-language deficits, [REDACTED] is entitled to compensatory education and related services as ordered in this decision.

DECISION ON ISSUES

Statute Of Limitations Issue and Implementation of the BIPs Regarding the Use of Restraint and Seclusion Prior to February 21, 2019

Issue 1: Whether Petitioners knew or should have known about the implementation of the use of restraint and seclusion in the Behavior Intervention Plans during the 2017-18 and 2018-19 school years prior to February 21, 2019, and if they did not, were these BIPs properly implemented?

129. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, the preponderance of the evidence supports Petitioners did not know and could not have known about the inappropriate use of restraint and seclusion prior to February 21, 2019. Moreover, Respondent misrepresented and failed to properly notify Petitioners of the use of restraint and seclusion during that period. Therefore, the one-year statute of limitations is not applicable to those claims.

130. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, Petitioners proved by a preponderance of the evidence that the use of CPI techniques, specifically restraint, and seclusion in the Behavior Intervention Plans during the 2017-18 and 2018-19 school years prior to February 21, 2019, were not appropriately implemented.

Issues Prior to May 16, 2019 IEP Meeting

Issue 2: Whether the October 18, 2018, IEP was implemented during the period from February 21, 2019 to May 15, 2019?

131. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, Petitioners proved by a preponderance of the evidence that the October 18, 2018, IEP was not implemented during the period from February 21, 2019, to May 15, 2019.

Issue 3: Whether the March 25, 2019 BIP was appropriate and implemented from March 26, 2019 to May 15, 2019?

132. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, Petitioners proved by a preponderance of the evidence that the March 25, 2019 BIP was not appropriate and not implemented from March 26, 2019 to May 15, 2019.

Issue 4: Whether a Functional Behavioral Assessment (“FBA”) should have been conducted prior to January 15, 2020?

133. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, including the severity of [REDACTED]'s behaviors, the Petitioners proved by a preponderance of the evidence that a Functional Behavioral Assessment should have been conducted prior to January 15, 2020.

Issues With Respect to May 16, 2019 Annual Review IEP and October 17, 2019 IEP

Issue 5: Whether the May 16, 2019 IEP and October 17, 2019 IEP were inappropriate because they did not contain any math or reading goals?

134. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, Petitioners proved by a preponderance of the evidence that the May 16, 2019 and October 17, 2019 IEPs were inappropriate because they did not contain any math or reading comprehension goals.

Issue 6: Whether the functional/behavioral goals and BIP in the May 16, 2019 IEP and October 17, 2019 IEP were appropriate?

135. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, Petitioners proved by a preponderance of the evidence that the functional/behavioral goals and BIP in the May 16, 2019 and October 17, 2019 IEPs were inappropriate.

Issue 7: Whether the reduction in articulation speech services and the lack of pragmatic language goals in the May 16, 2019 IEP and October 17, 2019 IEP were appropriate?

136. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, Petitioners proved by a preponderance of the evidence that reduction in articulation speech services, without a prior reevaluation, and the lack of pragmatic language goals in the May 16, 2019 and October 17, 2019 IEPs were inappropriate.

Issue 8: Whether the service delivery in the May 16, 2019 IEP and October 17, 2019 IEP was in the least restrictive environment?

137. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, and due, in part, to the lack of any math goal(s), Petitioners proved

by a preponderance of the evidence that service delivery in the May 16, 2019 and October 17, 2019 IEPs was not in the least restrictive environment.

Issue 9: Whether counseling should have been included as a related service in the May 16, 2019 IEP and October 17, 2019 IEP?

138. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, Petitioners proved by a preponderance of the evidence that counseling should have been included as a related service in the May 16, 2019 IEP and October 17, 2019 IEP.

Issue 10: Whether the IEPs and BIPs were implemented prior to January 27, 2020?

139. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, Petitioners proved by a preponderance of the evidence that the March 2019 IEP, May 2019 IEP, and October 2019 IEP and associated BIPs were not appropriately implemented prior to January 27, 2020.

Issue 11: Whether the October 17, 2019, IEP Team should have removed seclusion from the BIP?

140. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, Petitioners proved by a preponderance of the evidence that the October 17, 2019, IEP Team should have removed seclusion from the BIP. In addition, whenever seclusion or restraint is included in an IEP or BIP, the IEP team should specifically define the context in which these strategies are used and the duration of seclusion.

Issues Regarding Appropriateness of January 27, 2020 IEP

Issue 12: Whether the IEP was inappropriate due to lack of academic goals in reading or math?

141. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, Petitioners proved by a preponderance of the evidence that the January 27, 2020, IEP was inappropriate due to lack of academic goals in reading comprehension and math.

Issue 13: Whether the behavior goals and BIP were appropriate?

142. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, Petitioners proved by a preponderance of the evidence that the behavior goals in the January 27, 2020 IEP and the January 27, 2020 BIP were inappropriate.

Issue 14: Whether the IEP was inappropriate due to lack of pragmatic language goals?

143. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, Petitioners proved by a preponderance of the evidence that January 27, 2020 IEP was inappropriate due to lack of pragmatic language goals.

Issue 15: Whether service delivery was appropriate?

144. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, Petitioners proved by a preponderance of the evidence that the service delivery in the January 27, 2020 IEP for social/emotional skills and speech/language was inappropriate.

145. As Petitioners proffered no evidence about the appropriateness of the counseling service delivery, they failed to meet their burden of proof; therefore, the counseling service delivery on the January 2020 IEP was appropriate.

Issues Regarding Appropriateness of Private School Placement and Equities

146. **Issue 16: If the January 2020 IEP and/or BIP was inappropriate, whether the private school placement is appropriate?**

147. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, Petitioners proved by a preponderance of the evidence that [REDACTED] is an appropriate private school placement.

Issue 17: Are there equities that should be factored into the award of reimbursement for [REDACTED] a parentally placed student in a private school?

148. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, equities were considered with respect to the award of reimbursement for [REDACTED] a parentally placed student in a private school.

Remedies: Compensatory Education and Related Services

What if any compensatory education and related services should be awarded for any violations of [REDACTED]'s right to a FAPE?

149. Based on Findings of Fact and Conclusions of Law as well as the evidence in the record and credible testimony, the preponderance of the evidence, the Petitioners proved by a preponderance of the evidence that compensatory education and related services should be awarded for any violations of [REDACTED]'s right to a FAPE. Respondent's alternative compensatory speech-language was taken into consideration. The compensatory remedies should allow [REDACTED] to be placed in the position she would have been in but for the violations of the IDEA.

150. The IEPs were inappropriate and inappropriately implemented from February 21, 2019, until [REDACTED]'s departure in January 2020. [REDACTED]'s report cards and testing scores demonstrate she declined in her academic abilities while at the WCPSS. Stip. Exs. 32&33; Pet. Exs. 63, 64, &

65.

151. As a result, ■■■ lost an academic year during this period and regressed in her core subjects, especially math, and in social/emotional skills instruction. During this period, she also did not receive pragmatic language instruction or counseling.

152. Also, within that period, the BIPs were inappropriate and inappropriately implemented. Moreover, prior to that, the behavior interventions in the BIPs predating February 21, 2019, were inappropriately implemented for approximately 1 ½ years.

153. ■■■ is entitled to receive compensatory academic services of 150 hours of compensatory education in math and 105 hours of other core academic content instruction including reading comprehension. ■■■ is also entitled to compensatory education in social skills training for two years which can include a combination of counseling and reimbursement of counseling already paid for by ■■■s Parents. ■■■ is entitled to 2 years of speech-language therapy in pragmatic language, twice a week for 45-minute sessions with one session pull-out and the other push-in.

Other Issues

154. To the extent that this Final Decision does not expressly rule on any other claims raised in the Petition, the Undersigned concludes that Petitioners did not meet their evidentiary burden to establish any right to relief on those claims.

BASED ON THE FOREGOING, the Undersigned hereby finds proper authoritative support of the Conclusions of Law noted above and it is hereby **ORDERED, ADJUDGED, AND DECREED** that:

1. From February 21, 2019 to January 27, 2020, WCPSS procedurally and substantially violated the IDEA and denied ■■■ a free and appropriate public education by failing to develop appropriate IEPs and BIPs from February 21, 2019 to January 27, 2020.

2. Prior to February 21, 2019, WCPSS procedurally and substantially violated the IDEA and denied ■■■ a free and appropriate public education by failing appropriately implement BIPs in effect during that period.

Private School Reimbursement, Compensatory Education and Related Services

3. Petitioners are entitled to private tuition reimbursement and related costs including transportation.

4. ■■■ is entitled to receive compensatory academic services equal to 150 hours of compensatory education in math and 105 hours of other core academic content instruction. WCPSS shall provide or pay for private compensatory academic services for the equivalent of one year in a format and by an instructor mutually agreeable to both Parties.

5. ■■■ is entitled to compensatory education in social skills for two years. One year of which shall be compensated by WCPSS reimbursing ■■■s Parents the costs of the private counseling service they provided to ■■■ from February 21, 2019 to January 27, 2020. For the other year, at the Petitioners' discretion, WCPSS shall pay either an additional year of private counseling services or social emotional skills training within the classroom setting in a format and by a counselor mutually agreeable to both Parties.

6. ■■■ is entitled to 2 years of speech-language therapy in pragmatic language at public expense, twice a week for 45-minute sessions with one session pull-out with the speech pathologist and the other session push-in the classroom setting. WCPSS shall provide the services or contract with a private speech pathologist to provide the speech-language services. In either event, the speech pathologist must be mutually agreeable to both Parties.

IEP Meeting for 2021-2022 School Year

7. Within thirty (30) days of this decision or as mutually agreed by the Parties, the Parties shall hold an IEP meeting to develop a new IEP for ■■■ that provides a FAPE in the LRE. This meeting should occur as soon as reasonably practicable, taking into account both the duration of ■■■s absence from the WCPSS' educational system and the current public health situation.

8. In preparation for this IEP meeting, the WCPSS must (1) request all available educational information from ■■■s current educational placement; (2) seek input from ■■■s current teachers and service providers regarding her current academic and functional needs, her present educational setting, and any supplementary aids or services currently being provided to her and (3) offer to have ■■■s current teachers and any relevant private providers participate in the IEP meeting and make reasonable efforts to schedule the meeting such that desired participants can attend.

9. In addition, WCPSS must also obtain the services of, or contract with a mutually agreed upon Inclusion and Behavior Specialist to assist in the development of an IEP and BIP for ■■■ and provide assistance to the IEP team and Parents for the 2021-2022 school year and the 2022-2023 school year. The Inclusion and Behavior Specialist must have had successful classroom experience including children with social-emotional and behavioral deficits akin to the severity of ■■■s in the regular classroom environment to the maximum extent possible.

10. The Inclusion and Behavior Specialist must also have experience with conducting functional behavior assessments and the development of behavioral intervention plans. The Inclusion and Behavior Specialist expertise must be based on actual practice in addition to theory. This would exclude academics who do not have extensive K-12 classroom teaching experience.

11. In formulating ■■■s IEPs and BIPs during this period, WCPSS must, in good faith, give first consideration to educating ■■■ in the general education setting, with removal from her non-disabled peers only for the portions of her school day when ■■■ cannot be successfully educated in the general education setting with supplementary aids and services. In so doing, the IEP Team must carefully consider the Inclusion and Behavior Specialist's recommendations regarding educating ■■■ in the general education setting.

12. If the Inclusion and Behavior Specialist recommends additional evaluations and assessments, WCPSS shall promptly conduct these assessments or contract with an outside provider at public expense.

13. If the Inclusion and Behavior Specialist, recommends the use of restraint or seclusion in the BIP, the IEP team must specify in detail when, how, by whom, and the duration of the use of restraint or seclusion. Any use of restraint or seclusion must be documented, and the Parents notified in accordance with State law.

14. If [REDACTED] enrolls in a WCPSS school, the Inclusion and Behavior Specialist shall make reasonable efforts to monitor [REDACTED]'s progress and shall provide information to the IEP team and parents to assist them in further refinement and development of [REDACTED]'s IEP. This could be in the form of a written report and/or in an IEP meeting.

15. Further, if, after development of a new IEP, Petitioners choose to enroll [REDACTED] in a WCPSS school, WCPSS must identify any general education teachers who will teach [REDACTED] core academics as well as any special education teachers, and WCPSS, with input from the Inclusion and Behavior Specialist, must evaluate their training and experience regarding modification of the general curriculum and classwork for students with disabilities like [REDACTED]. If any lack of training or experience is identified, WCPSS must ensure that [REDACTED]'s teachers receive such training prior to or immediately upon [REDACTED]'s enrollment in their classes.

Prevailing Party

16. Petitioners are the prevailing parties and are entitled to attorney's fees and costs.

NOTICE OF APPEAL RIGHTS

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

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 et seq.) and particularly N.C.G.S. §§ 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may **appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board** under G.S. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section."

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

IT IS SO ORDERED.

This the 30th day of July, 2021.



Stacey Bice Bawtinhimer
Administrative Law Judge

CERTIFICATE OF SERVICE

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

Stacey M Gahagan
Gahagan Paradis, PLLC
sgahagan@ncgplaw.com
Elizabeth Ann Horton
ehorton@ncgplaw.com
Attorneys for Petitioner

Stephen Rawson
Tharrington Smith LLP
srawson@tharringtonsmith.com
Attorneys for Respondent

Teresa Silver King
NC Department of Public Instruction
due_process@dpi.nc.gov
Affiliated Agency

This the 30th day of July, 2021.



Anita M Wright
Paralegal
N. C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 984-236-1850