

STATE OF NORTH CAROLINA

IN THE OFFICE OF ADMINISTRATIVE HEARINGS 20 EDC 00832

COUNTY OF WAKE

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

THIS MATTER was heard before the undersigned Honorable Stacey B. Bawtinhimer, 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 the state of the use of restraint and seclusion as part of the 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 scase, 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. It is behavior plan did not specify the timeframe or circumstances for which seclusion or restraint could be used. Because is behavior plans failed to inform in a Parents of how the use of seclusion and restraint would be individualized for sunique needs, the behavior plans were inappropriate.

Moreover, so 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 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

<u>WITNESSES</u>

For Petitioners:

Petitioner mother of father of

Teacher at Private Placement
Teacher at Private Placement
Director of Private Placement
Friend of Petitioners
, Ph.D., LP, HS-P, Psychologist
M.D., Psychiatrist
Occupational Therapist
M.D., Psychiatrist
MS/CCC/SLP, Expert Witness
Ed.D., BCBA, Expert Witness

Ed.D., Ph.D., Expert Witness 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:

WCPSS Senior Administrator
EC Teacher
WCPSS Speech Therapist
General Education Teacher
Assistant Principal
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 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 a sright 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. 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 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 a free appropriate public education.

PROCEDURAL BACKGROUND

- 1. On February 20, 2020, Petitioners and 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 a FAPE in the least restrictive environment;
 - b) The WCPSS failed to employ appropriate placement procedures and predetermined s placement, unnecessarily removing from her nondisabled peers;
 - c) The WCPSS failed to develop and implement substantively and procedurally appropriate IEPs;
 - d) The WCPSS failed to provide with the appropriate and necessary related services;

- e) The WCPSS failed to consider providing 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 sparents' participation in the provision of FAPE to resulting in educational harm to and causing a loss of educational benefit:
- g) The WCPSS failed to timely and properly evaluate in conformity with the IDEA to understand s present levels of performance and gather information related to s disability-related behaviors that were impeding her learning;
- h) The WCPSS failed to provide sparents with proper notice of the decisions made regarding the provision of FAPE to and misrepresented information about educational programming and the use of seclusion and restraint;
- i) The WCPSS failed to utilize research-based interventions with to address her disability-related behaviors and failed to develop an appropriate BIP for
- j) The WCPSS inappropriately included seclusion on utilized seclusion and restraint against 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
- 1) 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 so 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, so was a key factor for granting reconsideration. As indicated in the Findings of Fact below, Mr. 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 s 3rd grade year at 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.

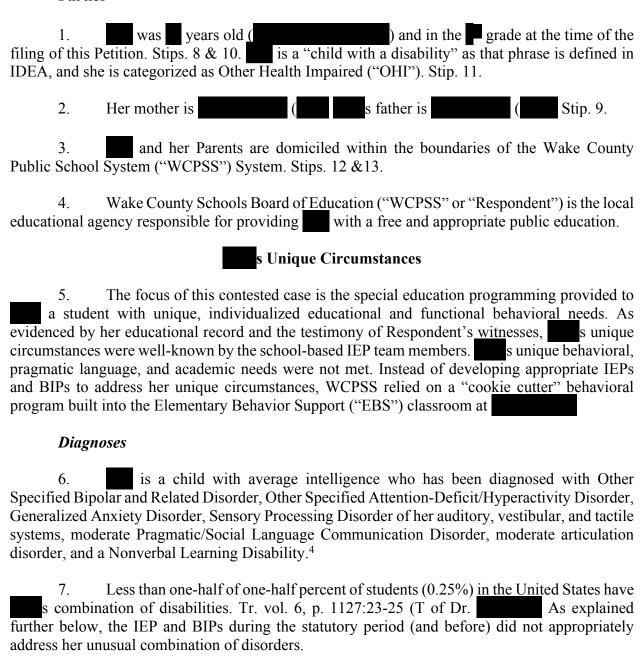
To the extent the Findings of Fact contain conclusions of law or the Conclusions of Law are findings of fact, they should be considered without regard to their given labels.

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:

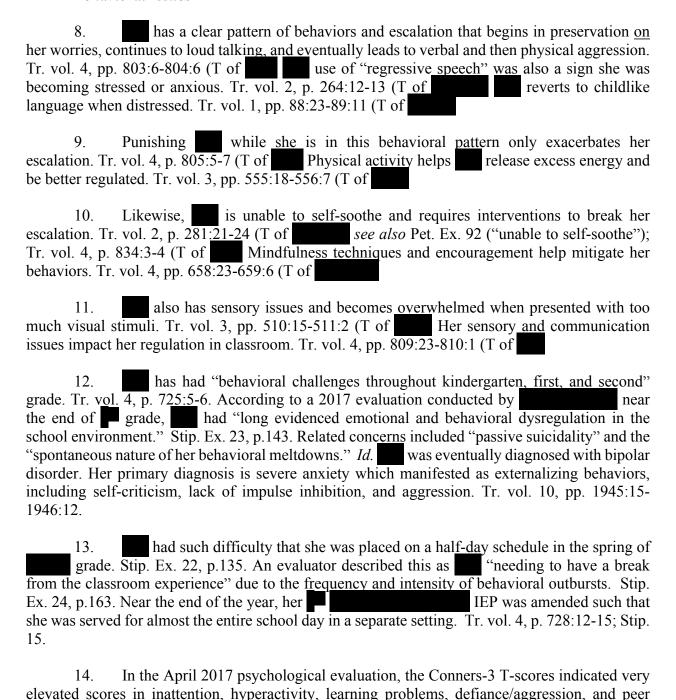
SECTION 1: PRELIMINARY MATTERS

Parties



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.

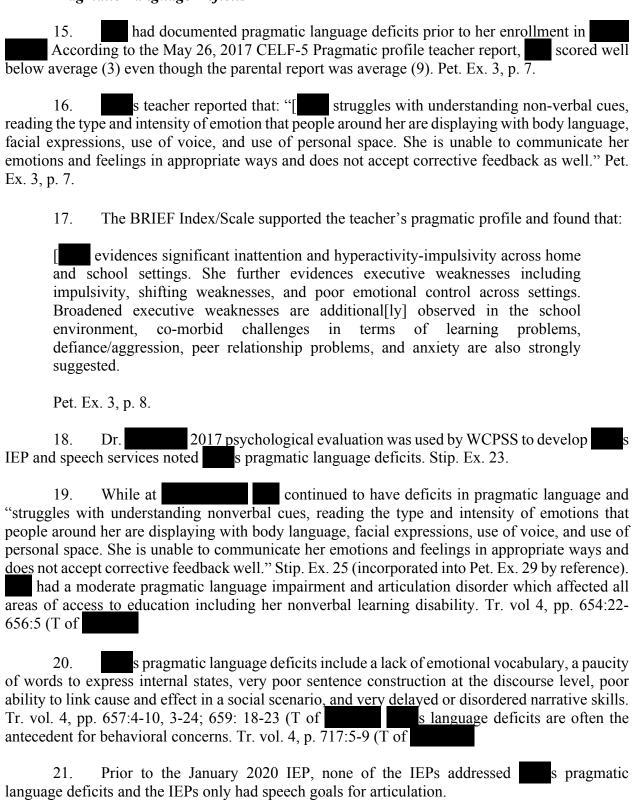
Behavioral Issues



instruction," stating that a "BED (behaviorally/emotionally disturbed classroom) setting, in particular, should be considered." Stip. Ex. 23, p.158.

relations. Pet. Ex. 3, p. 8; Stip. Ex. 23, pp.152-155. The evaluator recommended "[1]ong-term placement in a classroom with significant social-emotional supports and access to one-on-one

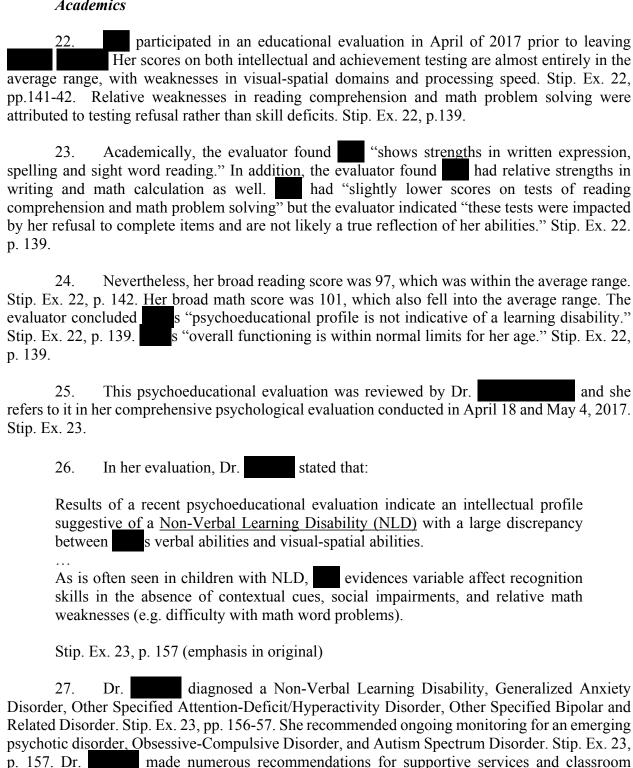
Pragmatic Language Deficits



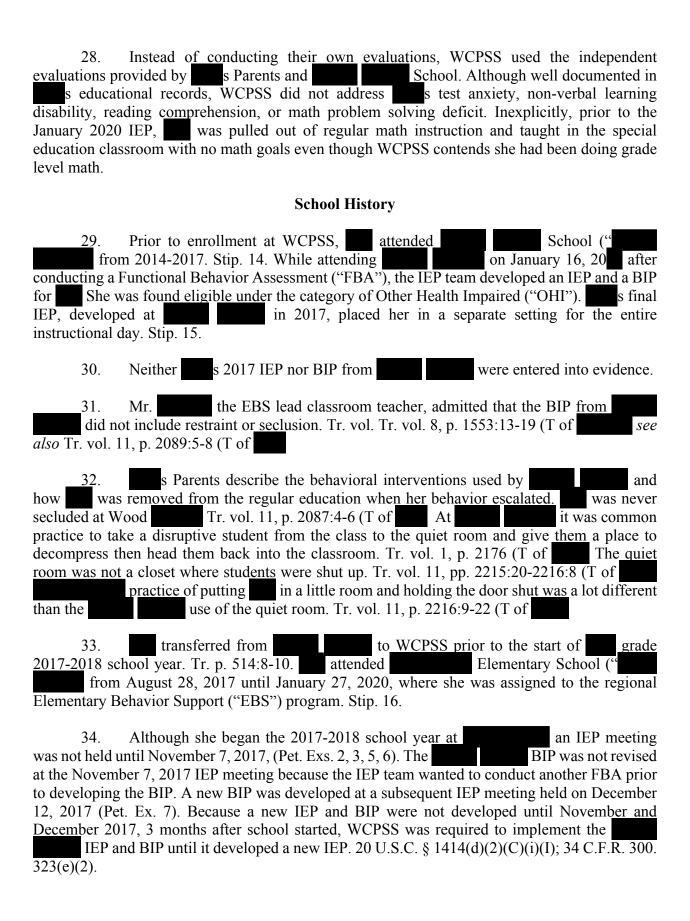


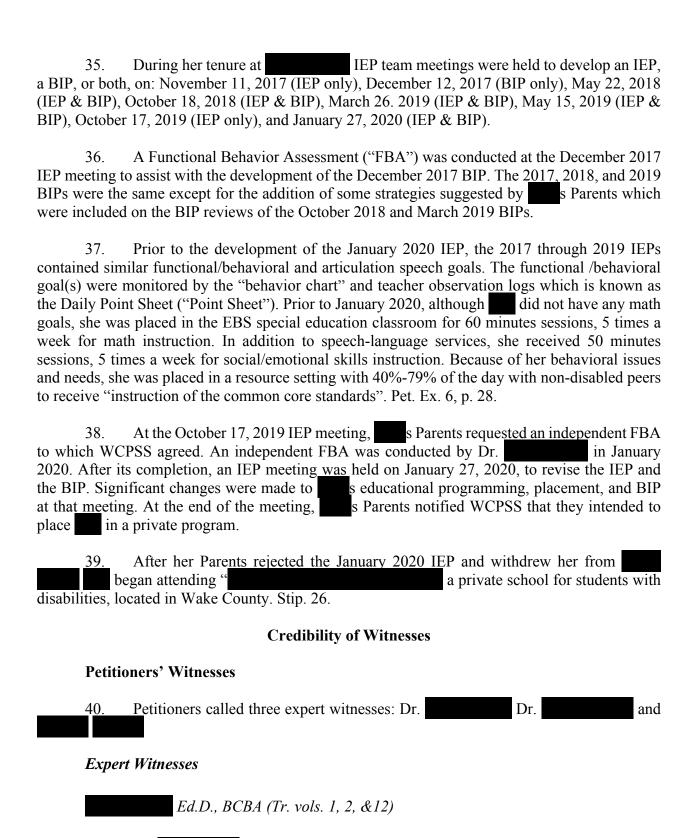
accommodations for all of

learning disability. See Stip. Ex. 23, pp. 158-161.



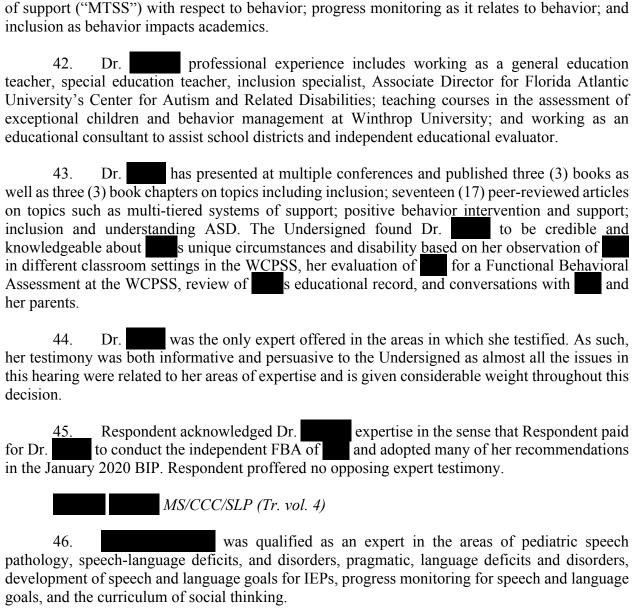
s academic and functional needs including s non-verbal



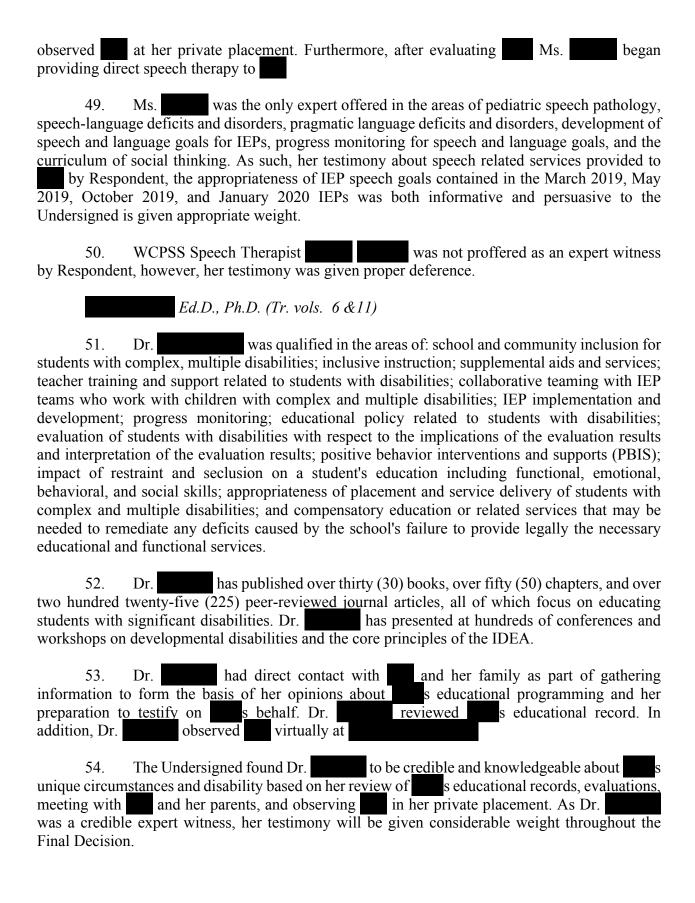


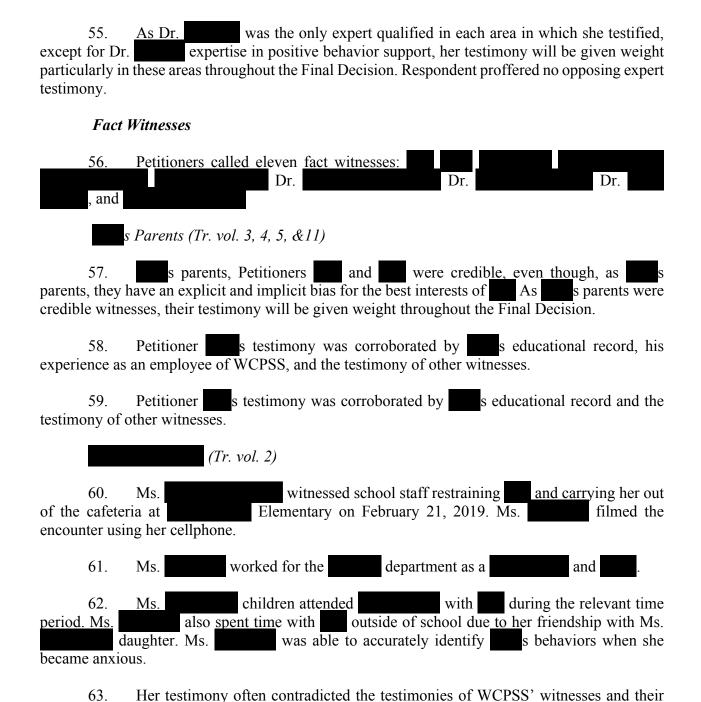
41. Dr. was qualified as an expert in the areas of behavior assessment and intervention for student behaviors, including Positive Behavior Intervention Systems ("PBIS"); functional behavior assessments ("FBAs"); behavior intervention plans ("BIPs"); co-teaching as it relates to behavior issues and including 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.



- 47. Ms. 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. conducted a speech-language evaluation of in May 2020. Ms. also reviewed seducational record, met with sparents, met with and





documentation of the incident in the Point Sheet. Where these descriptions of the Cafeteria Incident

was credible regarding her first-hand observations of the restraint at

and her testimony will be given weight in the Final Decision as it relates to these

differ, credence is given to Ms. version and what is shown on the video.

issues.



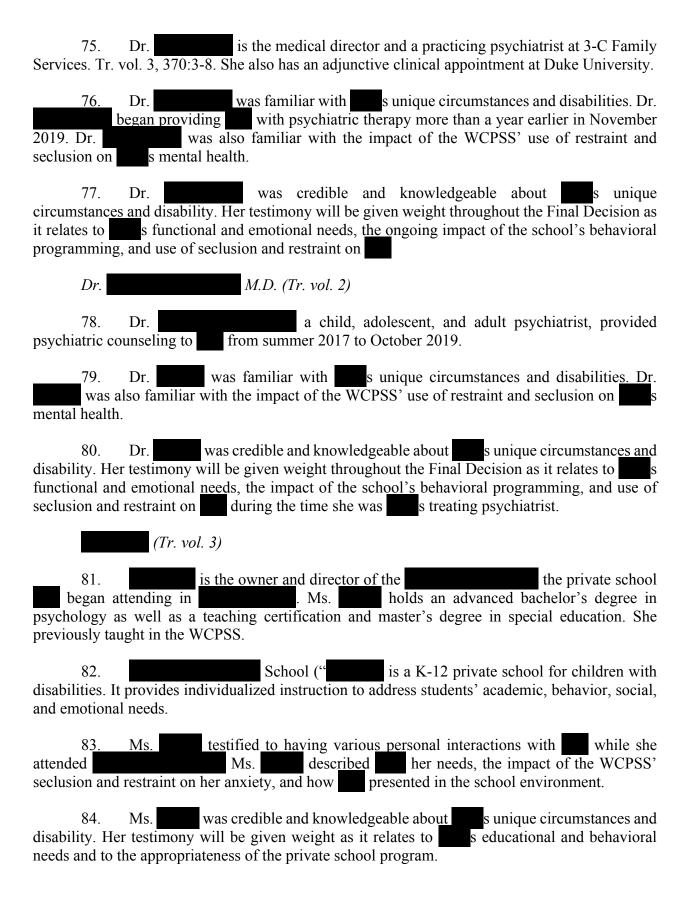
- 65. Dr. the designee of the North Carolina Department of Public Instruction, testified regarding reporting requirements for the use of restraint and seclusion in North Carolina schools.
- 66. Dr. is the section chief for digital teaching and learning for NC DPI, which includes the program PowerSchool.
- 67. Dr. 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 the straints and seclusions through PowerSchool.

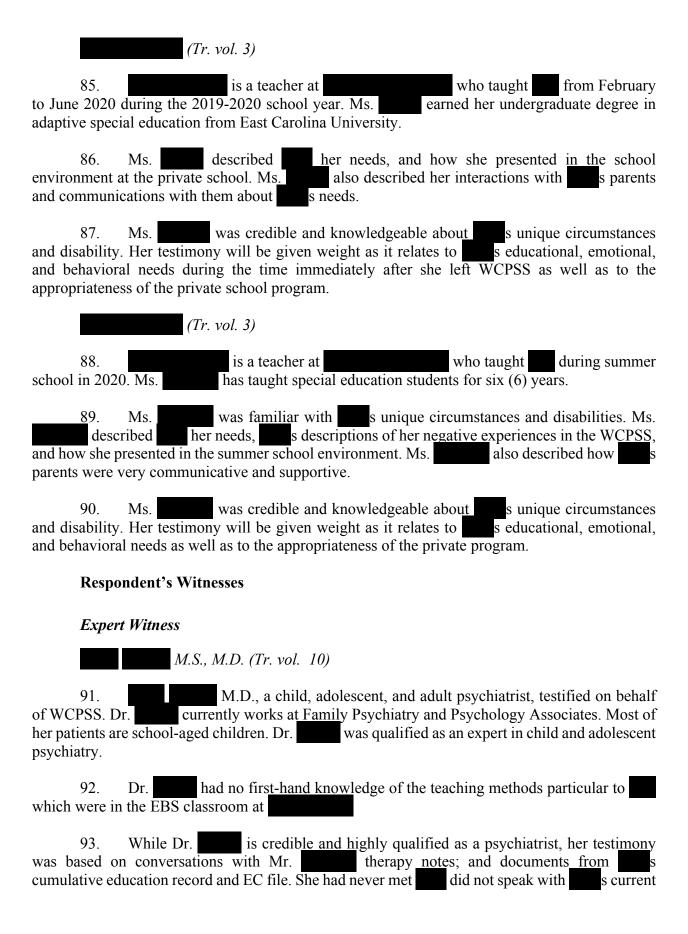


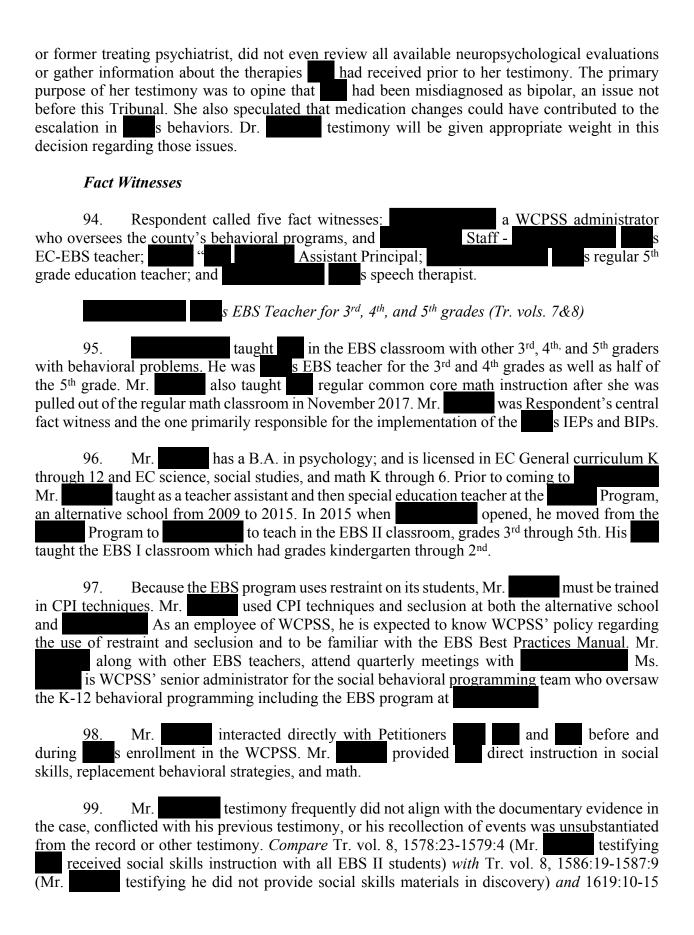
- a private occupational therapist, evaluated in July 2020.
- 69. Ms. has worked as an occupational therapist for thirty (30) years and currently works as an occupational therapist at a contract therapy, Inc.
- 70. Ms. was credible and knowledgeable about seems sensory needs based on her 2020 evaluation. However, as Ms. was unable to confirm that she had reviewed seems 2017 evaluation to know if the same issues were present when was enrolled in the WCPSS, her 2020 evaluation was not admitted, and her testimony not considered in this Final Decision.

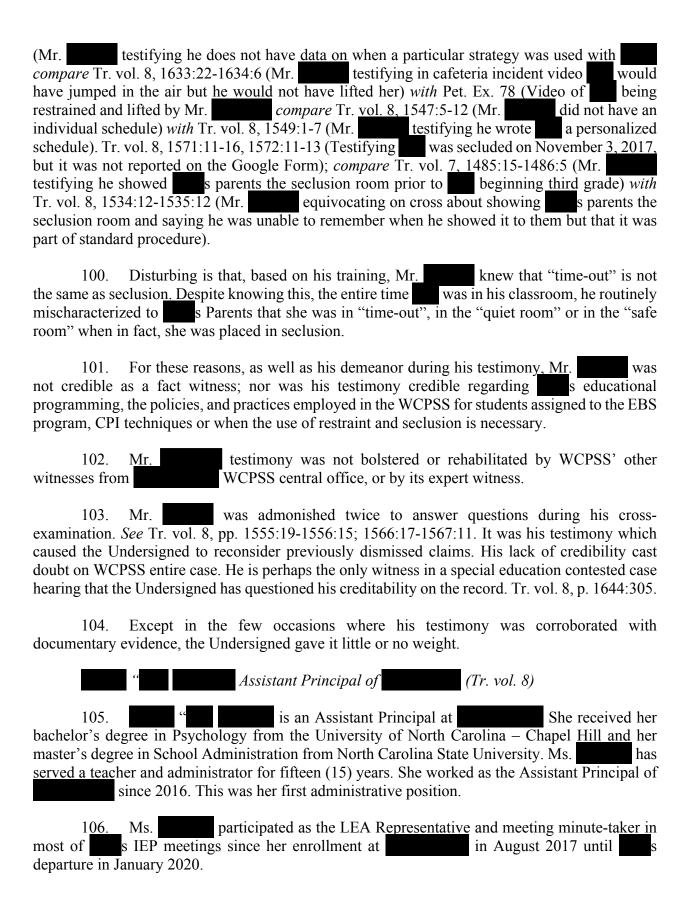
- 71. Dr. conducted a psychoeducational evaluation of on May 29, 2020.
- 72. Dr. currently works as a psychologist at reviewed spast evaluations, observed and evaluated her.
- 73. Dr. was credible and knowledgeable about sunique circumstances and disability. Her testimony will be given weight throughout the Final Decision particularly as it relates to the impact of sun son-verbal learning disability. This information was corroborated by Dr. 2017 psychological evaluation (Stip. Ex. 23), which were available and used to develop s IEPs and BIPs throughout her tenure in the WCPSS.

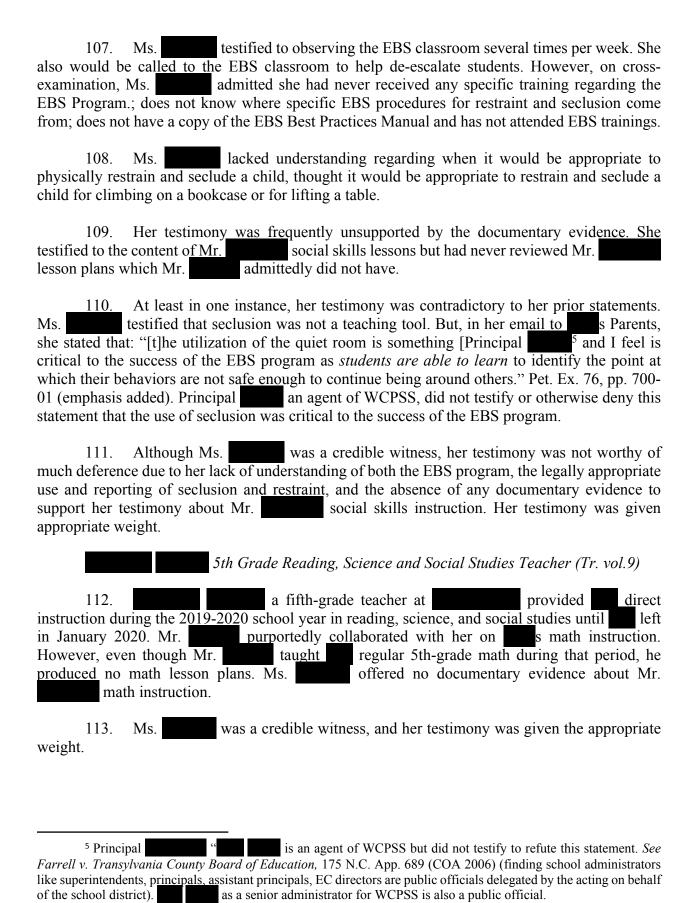
74. Dr. a child, and adolescent psychiatrist provided psychiatric counseling to since November 2019.

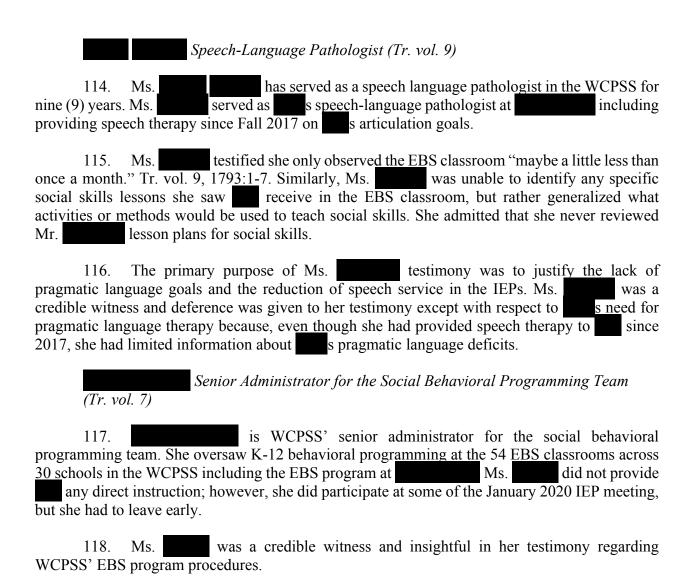












SECTION II: PARENTS' KNOWLEDGE OF THE USE OF RESTRAINT AND SECLUSION PRIOR TO FEBRUARY 21, 2019

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

- 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 by Respondent Prior to February 21, 2019.

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

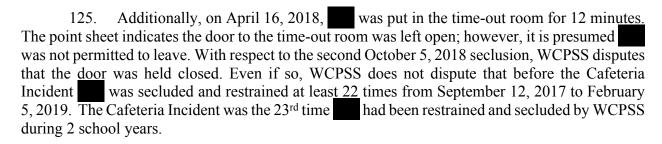
Seclusions – Petitioners' Exhibits 35, 43, and 141				
	Date	Time	Duration	
1.	9/12/2017	2:50 – 3:30 PM*	40 minutes	
2.	9/25/2017	10:45-11:35 AM	50 minutes	
3.	9/25/2017	11:50 AM -12:00 PM	10 minutes	
4.	9/25/2017	2:25-3:15 PM	50 minutes	
5.	10/19/2017	12:55-1:40 PM**	45 minutes	
6.	10/19/2017	1:45-2:45 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

28

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



- 126. Prior to February 21, 2019 and afterwards, in WCPSS' communications to 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".
- 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 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.

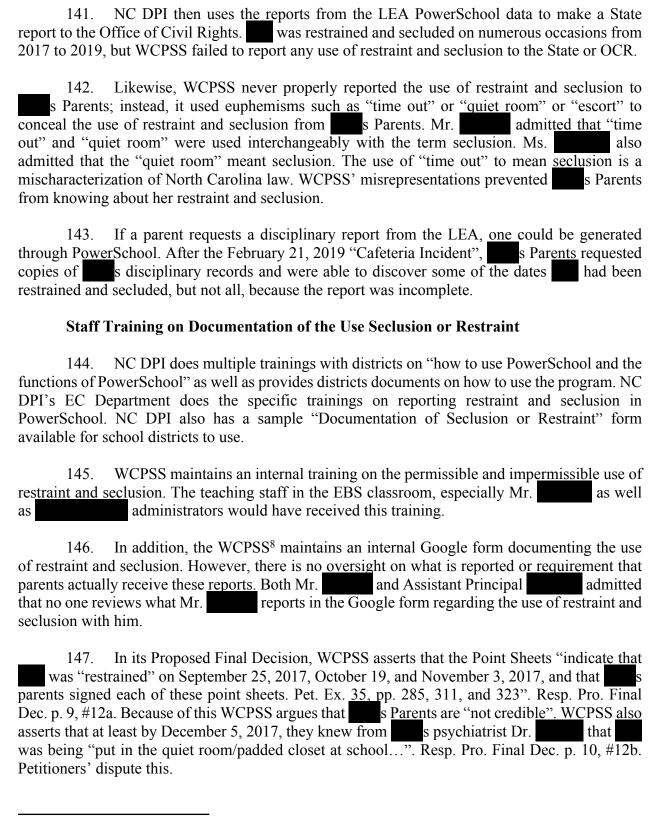
^{***} This seclusion is not noted on the daily point sheet. The Google Form Response notes this seclusion was from 12:25-12:37 PM on 4/16/2018.

^{****} 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 Mr. and Principal 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

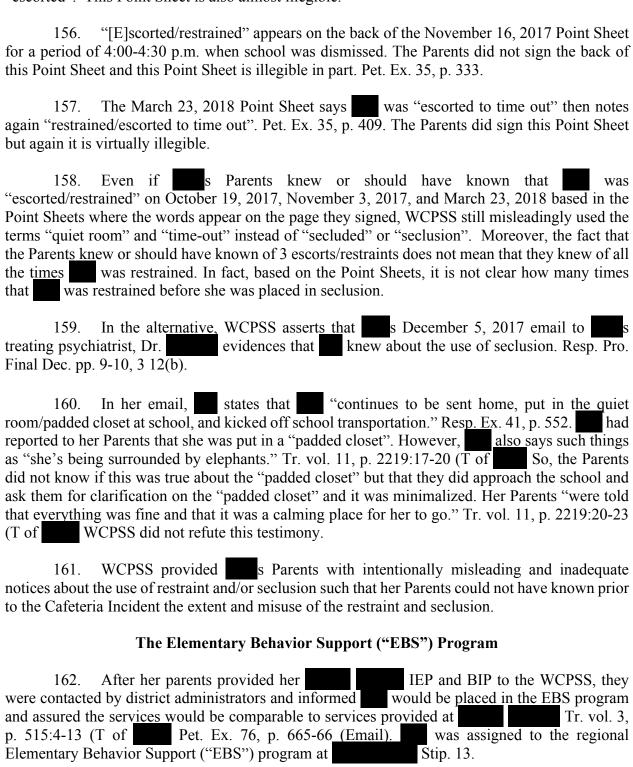
- 134. N. C. Gen. Stat. § 115C-391.1(j) mandates the notice, reporting, and documentation requirements for the use of restraint and seclusion in North Carolina schools.
- 135. State law requires school districts to provide parents a written report of *any* restraint or seclusion within a reasonable period 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. 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. 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. 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.

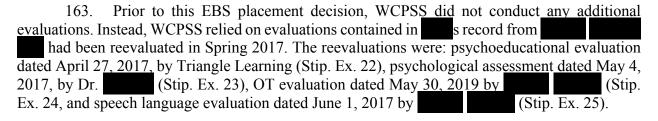


In 2019, the WCPSS was flagged in a Government Accountability Office ("GAO") report entitled "Accuracy of Restraint and Seclusion Data" for reporting zero uses of restraint or seclusion for the 2015-2016 school year. These reports are issued every 2 years. The GOA report for the 2017-2018 school year 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 [second seclusion second se
- 151. The words "restraint" or seclusion do not appear on any of the BIPs, IEPs, IEPs 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. September 25 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 was "escorted". Pet. Ex. 285. A closer review of the September 25, 2017 Point Sheet shows that 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, was "restrained and secluded for being annoying. This Point Sheet did not say that 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, 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 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 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.

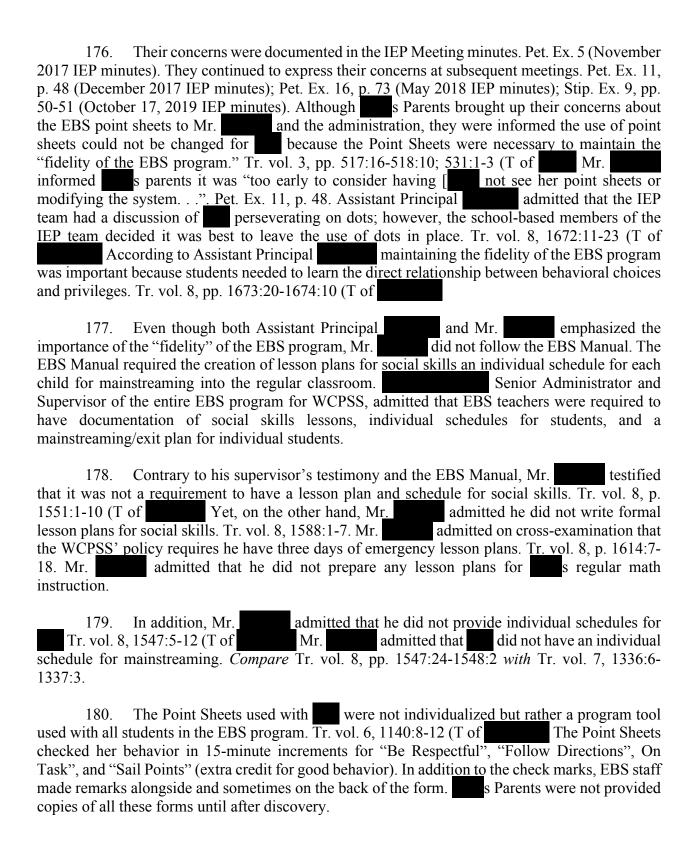




- 164. Although sees behaviors had escalated in Spring 2017 such that she was in a self-contained placement, did not conduct a new FBA. Before its decision to place EBS in the EBS program, WCPSS did not conduct an FBA to determine the appropriateness of that setting.
- s Parents could not determine the 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 services at Tr. vol. 3, pp. 515:24-5126:2 (T of No information was provided to Farents about the EBS program's social skills lessons. Tr. vol. 3, p. 516:3-5 (T of Tr. vol. 4, 814:24-815:2 (T of
- Administrator oversees all the EBS classrooms including 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.

- and Ms. demonstrates that stime in the general education classroom was predetermined based on the program guidelines rather than similarly individual needs. Before being mainstreamed in the regular classroom, the standard EBS model required 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.
- 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 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 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 Teachers are expected to document what led to a restraint or seclusion and what happened after. Tr. p. 1297:25-1298:4 (T of Parents must be notified whenever seclusion and/or restraint is used. Tr. p. 1299:12-22 (T of
- required to follow the standard EBS program, rather than her Mr. individualized IEP and BIP from He utilized the Behavior Point Sheet and physically restrained and secluded for excessive amounts of time. Mr. admitted the use of EBS point sheets was not an IEP team decision for when she started at WCPSS. Tr. vol. 8, 1533:18-25 (T of He also admitted BIP from did not include the use of restraint or seclusion in it when first started in the EBS program in 2017. Tr. vol. As discussed later in the decision, the Point Sheets were also used 8, p. 1553:13-19 (T of for progress monitoring of s IEP behavior goals even though the personal goals listed on the Point Sheet did not align with s IEP behavior goals.
- 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, 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.

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

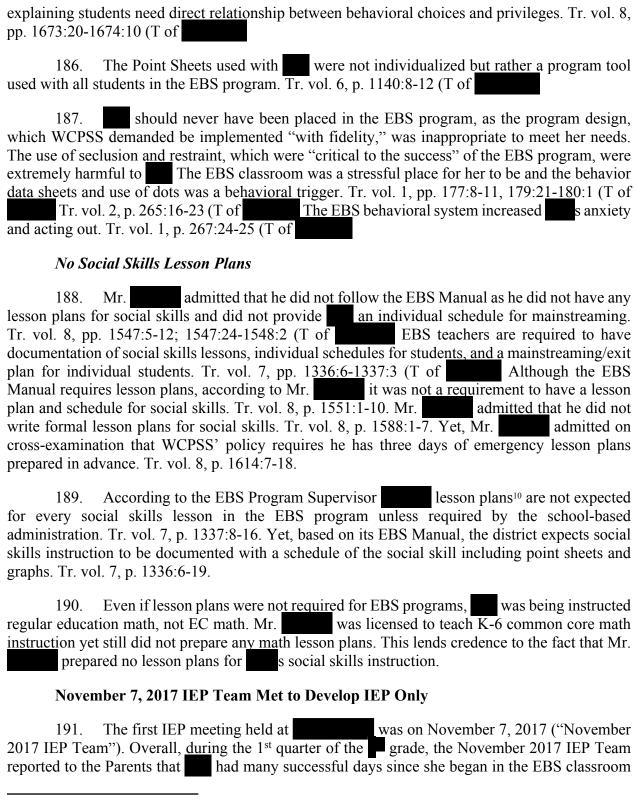


SECTION 3: IMPLEMENTATION OF THE BIPS PRIOR TO FEBRUARY 21, 2019

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 began the 2017-2018 school year with the IEP and BIP from 182. These documents are not in the record. However, Mr. admitted that, although 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 Tr. vol. 8, p. 1553:13-19 (T of was retrained 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 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 exhibiting school refusal, was scared to be in shower or bathroom alone, and expressed to was worried she would go to school and never see her mom again. 185. s Parents brought up their concerns about the Point Sheets on Although and the administration, they were informed the use of the Point multiple occasions to Mr. 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 informed s Parents it was "too early to consider having [not see her point sheets or modifying the system...". Pet. Ex. 11. 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 emphasized the importance of maintaining the fidelity of the EBS program Ms.



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 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, 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, 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. 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 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 as present level of academic achievement and developmental needs. Pet. Ex. 3, p. 9. With respect to as reading comprehension deficits, the November 7, 2017 IEP meeting minutes ("2017 Minutes") reported that Mr. and "noted that [and tended to miss the literal questioning and get the higher-level thinking questions correct. ... [and 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 in the EBS classroom for regular math instruction. So 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, 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

BIP

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

Name:	ID#:	School:
DOB:	Age:	Grade:

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

<u>Step 2:</u> 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 behavior escalates where she is being	trained CPI school staff
unsafe to herself or others	

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 such sharior 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 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.
- The only persons responsible for tracking restraint or seclusion at are Mr. and Mrs. Tr vol. 8, p. 1741:2-4 (T of 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
- 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 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, see a Parents specifically asked Mr. and the IEP team about the "quiet room" but were assured it was a safe, calming space for and that the door was never locked. At the November 2017 IEP meeting, Mr. did not inform as Parents that she had been restrained or secluded. Instead, Mr. informed her Parents that punished for anything in the classroom. WCPSS misrepresented the "quiet room" to see Parents.

41

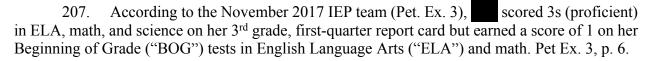
The only logical assumption is, since the IEP team met on December 2017, that the IEP team meant to date the review of the BIP for February 9, 2018, not 2017.

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



- 208. Based on state of 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. 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.
- 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), so some 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. sproficiency 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 3^{rd} grade year, the regular education teacher's comments indicated she was able to "work on the 3^{rd} grade curriculum with some support." Pet. Ex. 58, p.625. It did not indicate that she was proficient in the 3^{rd} grade curriculum.
- 214. Starting sometime near the beginning of 3rd grade, 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 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 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.

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, 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 December 2017 IEPs or BIPs.

GRADE 2018-2019 SCHOOL YEAR

- 225. The next school year, in August 2018, Respondent provided sparents 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, a Parents never received a copy of any such form for any of the incidents of restraint and seclusion.

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. On February 21, 2019, s Parents finally became aware of how restraint and seclusion were actually being implemented after they viewed the video of being restrained and carried out of the cafeteria (the "Cafeteria Incident"). The Cafeteria Incident spurred Parents' inquiry as to how the BIP was actually being implemented. The "Cafeteria Incident" on February 21, 2019. On February 21, 2019, for misbehaving in the classroom, 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, 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 that "she was going to get in trouble kept saying to Ms. for being in the lunchroom because she got a bad marking for the day." Tr. vol. 2, p. 317:7-15 (T of Soon after arrived, an EBS teaching assistant ("TA") came into the cafeteria, and took her lunch box away. The TA then left the cafeteria. started clinging to found and continued to say she was in trouble. A different TA then came in and started Ms. from a close distance. watching Then, three (3) EBS staff members (two TAs and Mr. as well as Principal entered the cafeteria, approached the table where was sitting with Ms. and began moving furniture to surround

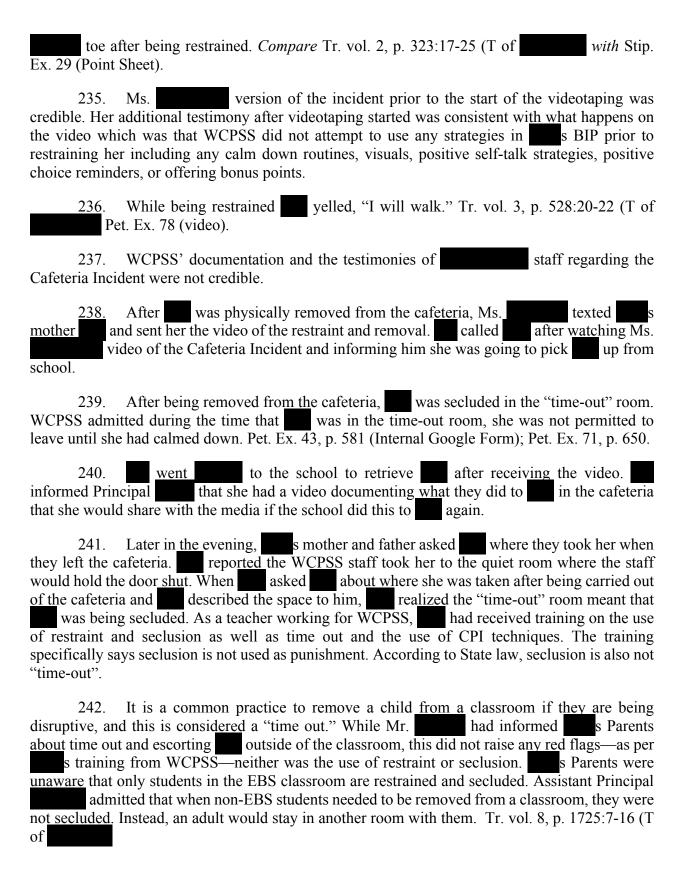
Based on her training from the actions towards made Ms. feel it was "an unsafe area," so she Principal moved her daughters away. Tr. vol. 2, pp. 319: 24-320:1 (T of 232. started telling the group of staff to "Please leave [her] alone" and moved herself between the table and window and crouched in a fetal position. Tr. vol. 2, 319:5-7 (T of While was crunched in the fetal position, Principal grabbed her underneath her arms and informed that she needed to come with her. Although she was was not a danger to herself or others. restrained, 233. began filming the encounter with her cellphone. See Pet. After that, Ms. Ex. 78 (video). Contrary to the documentation in the Daily Point Sheet that Mr. never ran in the cafeteria, never refused to leave the cafeteria, and never after the incident, threw a pen or something small. Compare Tr. vol. 2, pp. 322:24-323 (T of with Stip.

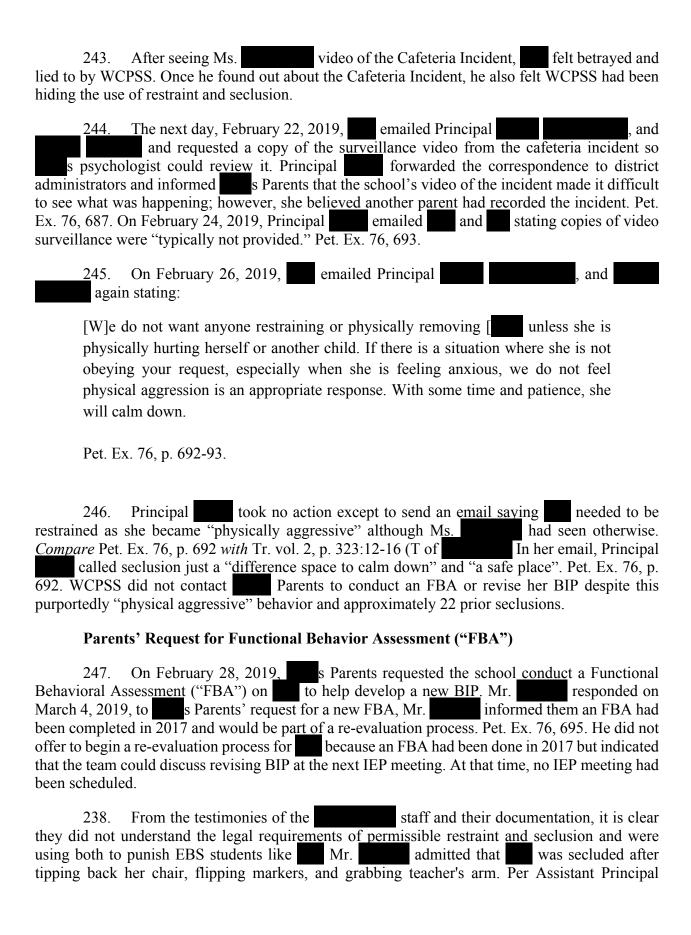
Ex. 29 (Point Sheet documenting incident). did not hit or <u>push staff</u> until after the school staff

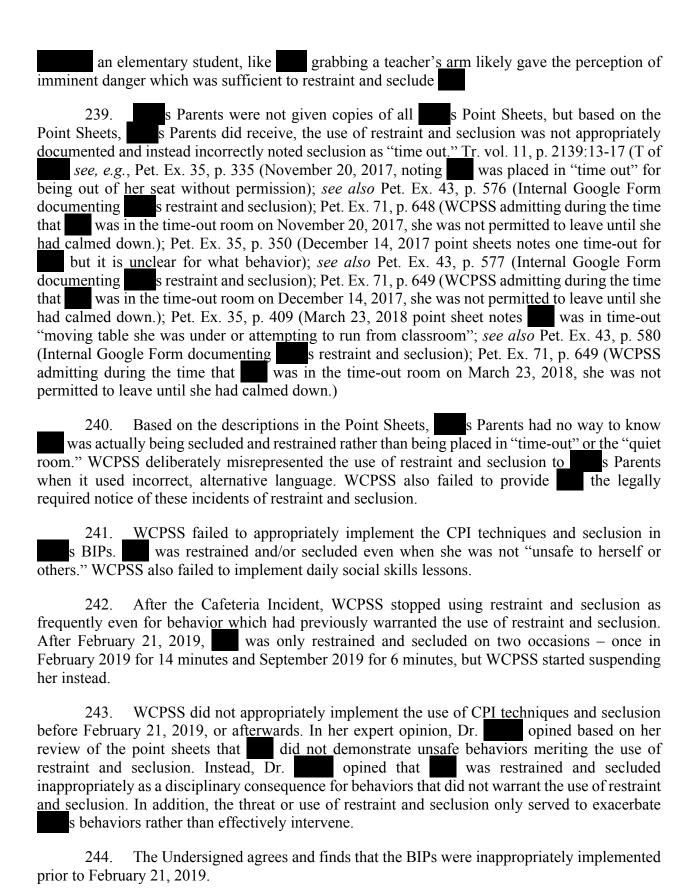
Sheet). In ever kicked staff or students in the cafeteria although she did step on Principal

with Stip. Ex. 29 (Point

"manhandled" her. Compare Tr. vol. 2, p. 323:12-16 (T of







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 "most likely" did not meet the social-emotional goals in the October 2018 IEP. Tr. vol. 8, pp. 1638:5-1639:13 (T of
 - 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

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 is 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, 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, "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. 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 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, 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 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. and Ms. the Undersigned finds that the March 2019 IEP is inappropriate.

Implementation of March 2019 IEP

- 258. The WCPSS misled sees Parents to believe that was making progress and that no changes to the BIP were needed when there was a decline in the trend line of behaviors. Tr. vol. 1, pp. 172:24-173:4; 174:19-25; Tr. vol. 12, pp. 2243:22-2244:3 (T of
- 259. No progress monitoring for s IEP goals was done except for the Point Sheets describing her maladaptive behaviors. Tr. vol. 6, p. 1142:8-12 (T of 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 in the area of social skills. Tr. vol. 6, p. 1180:14-18 (T of admitted he prepared no lesson plans for math or social skills instruction.
- 261. Assistant Principal, and LEA Representative, admitted that was not meeting her October 2018/March 2019 IEP goals. Tr. vol. 8, p. 1748:19-23 (T of Ms.
 - 262. The March 2019 IEP was not appropriately implemented.

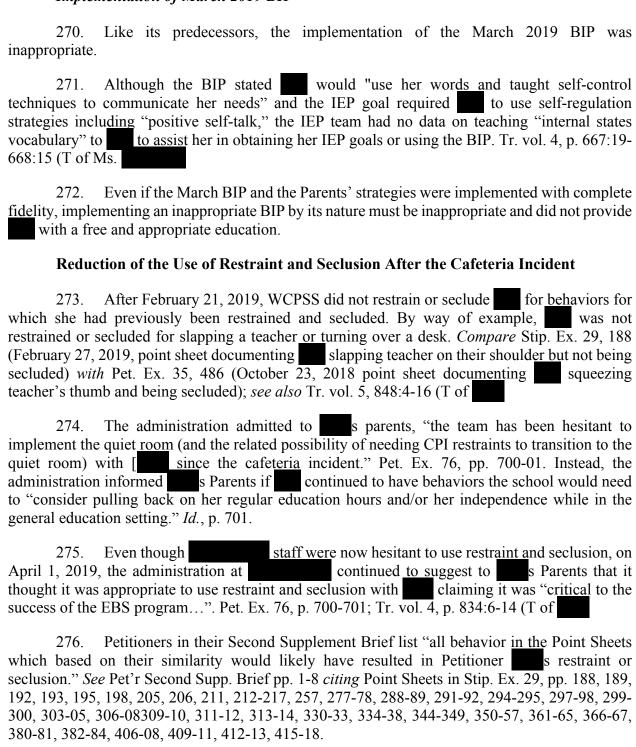
March 26, 2019 BIP

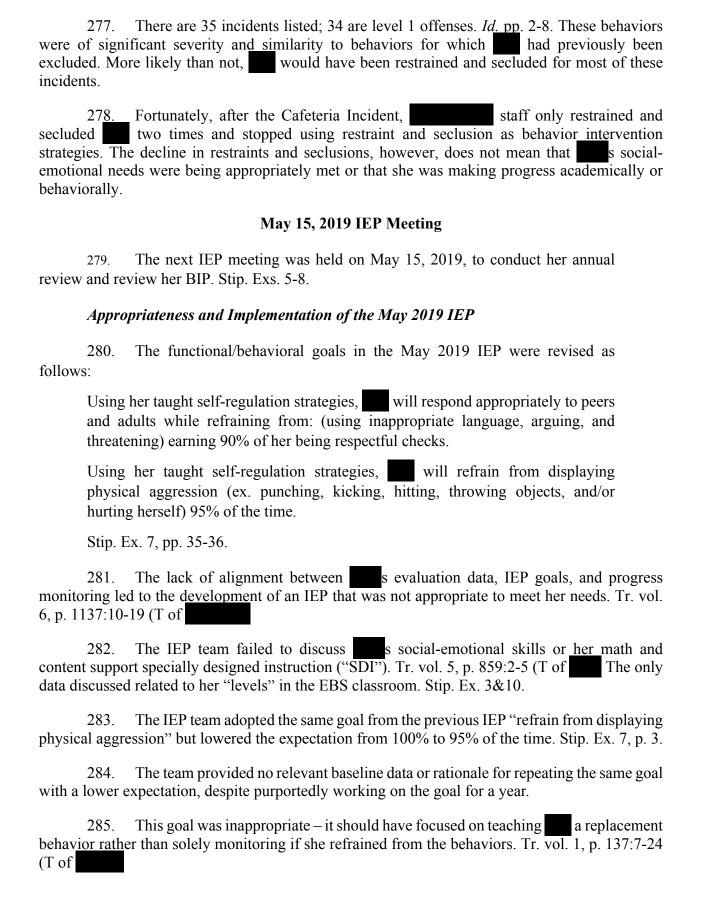
Appropriateness of the March 2019 BIP

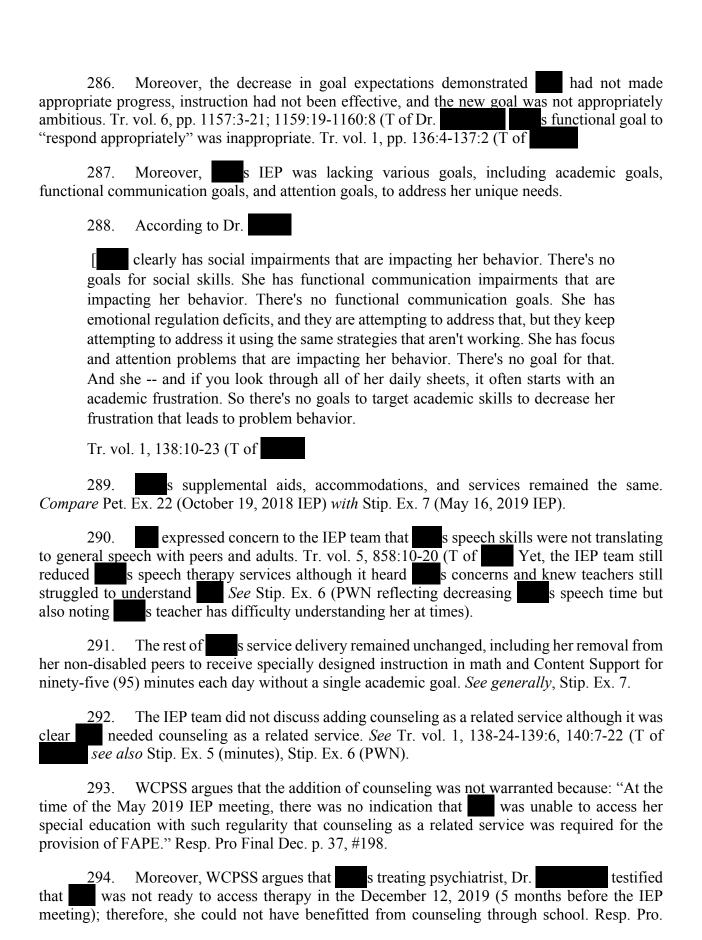
- 263. No FBA was conducted before the review of the March 2019 BIP despite 17 restraints and seclusions the prior school year and 6 or 7 restraints and seclusions prior to the March 2019 IEP meeting. Except for some strategy suggestions from seclusions prior to the remained the same as all the previous BIPs. Like its predecessors, the March 2019 BIP aligned with the EBS program and was not individualized for
- 264. Prior to the March IEP meeting, so Parents had recommended additional support and strategies for managing so 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 so behavior...". Stip. Ex. 4, p. 22. The Parents' strategies were recorded on the BIP Review but not on the BIP itself. Because of this, a 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.

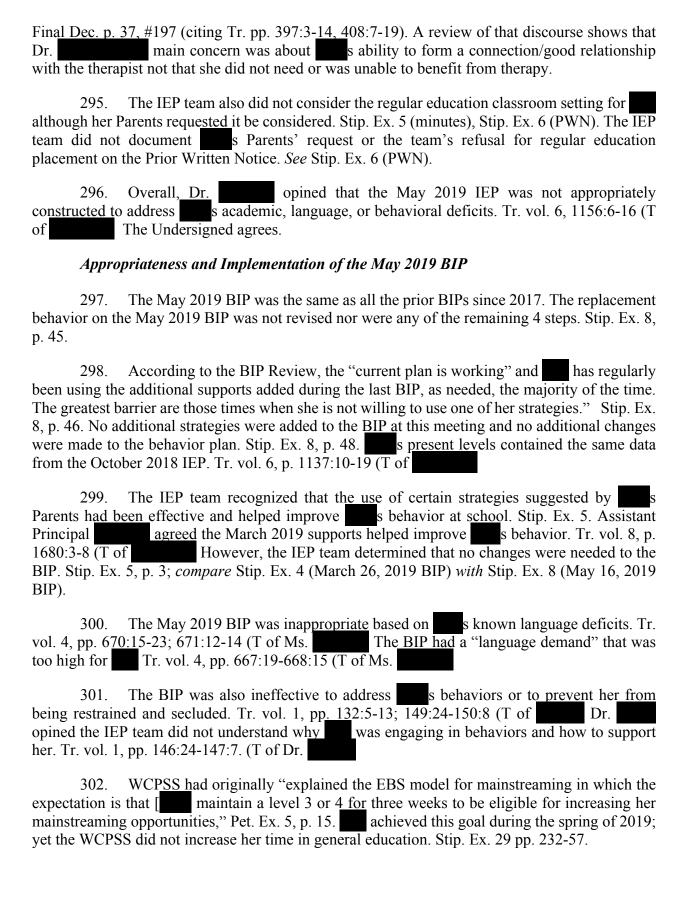
51

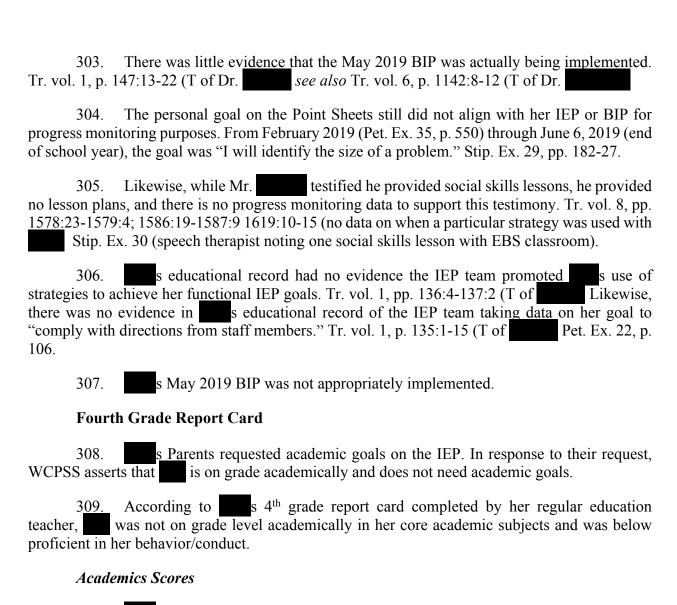
Implementation of March 2019 BIP



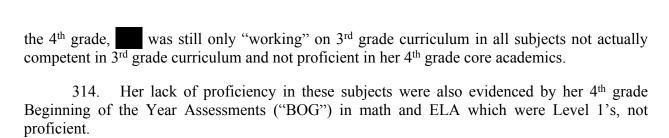








- 310. s 4th grade report card is even more difficult to decipher than her 3rd grade report card because the overall scores for the core subjects of ELA and math are not reported for any of the four quarters. *Compare* Pet. Ex. 58, p. 624 to Stip. Ex. 32, p. 441.
- 311. The overall scores for ELA subcategories 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 that she was "working on 3rd grade curriculum across all school settings." Pet. Ex. 22, p. 104. On her 3rd grade report card, 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



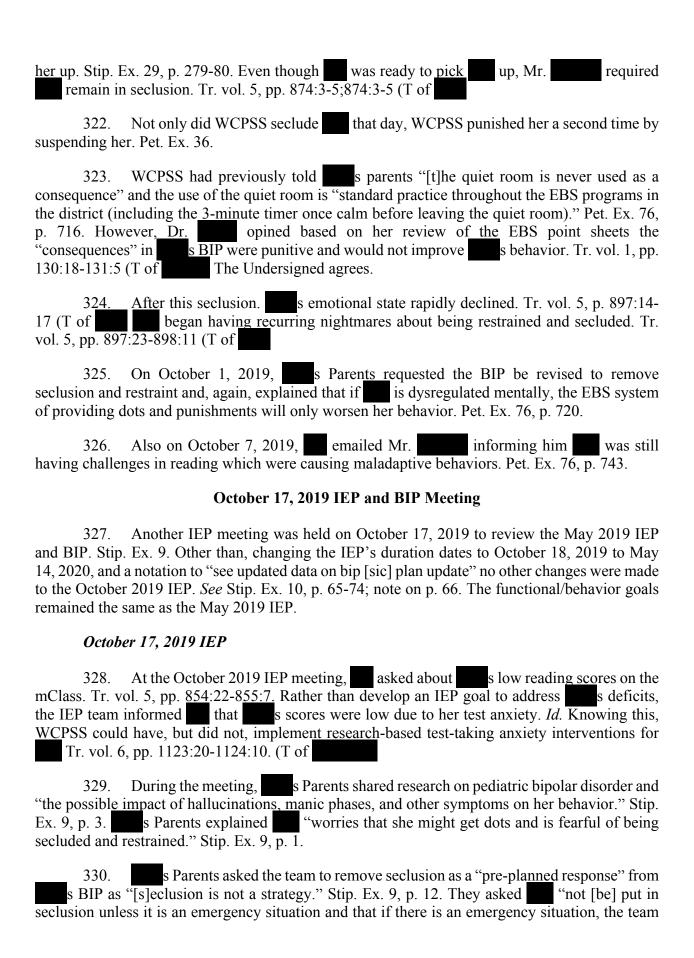
- 315. For all 4 quarters on states 4th grade report card, her regular teacher commented that six working on all areas of the 4th grade curriculum." Stip. Ex. 32, p.442. However, while she may have been working on areas in the 4th grade curriculum, based on the teacher's scoring, was not proficient in all areas of 4th grade curriculum, especially not in math and ELA.
- 316. In its Proposed Decision, WCPSS argues that spoor 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 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 as 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

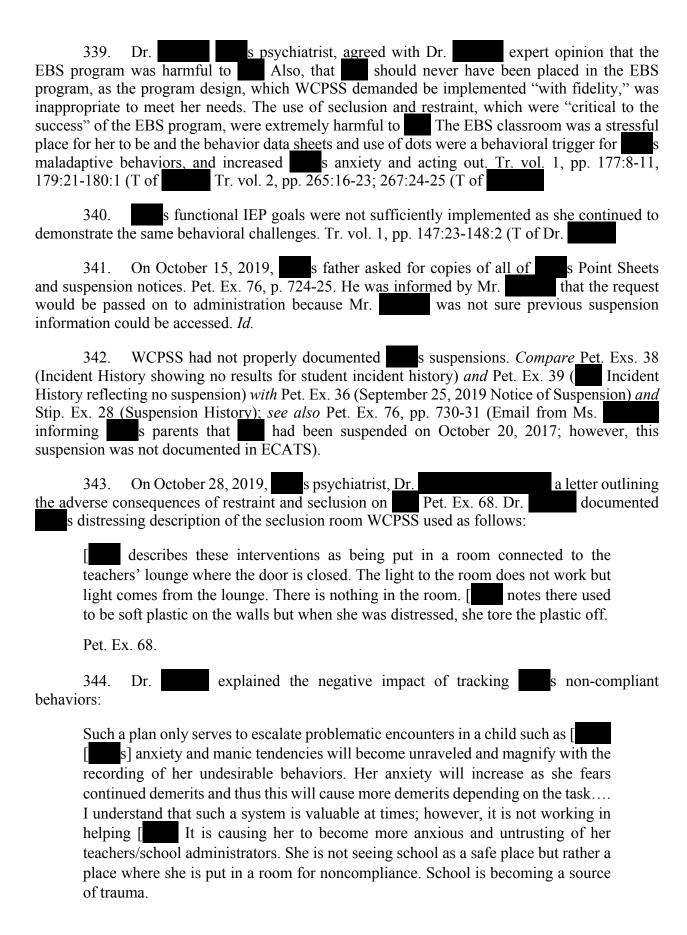
FIFTH GRADE 2019-2020 SCHOOL YEAR

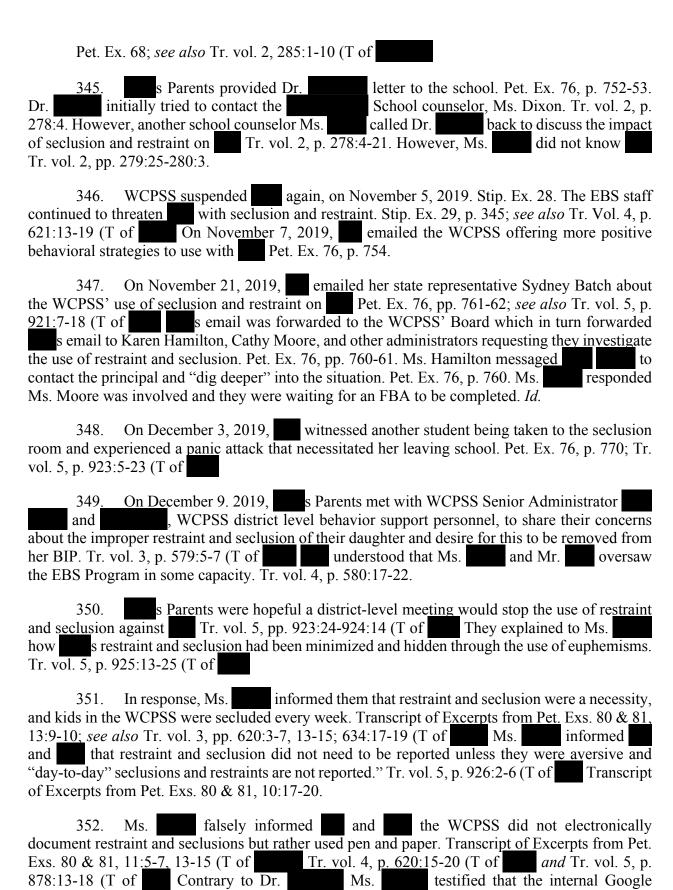
321. Even the EBS program was not being consistently implemented. staff changed the EBS rules at the beginning of the 2019-2020 school year. When school began, the EBS staff informed that she needed to achieve a Level 3 or 4 for thirty (30) consecutive days—not 3 or 4 for three weeks—to be eligible for 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.

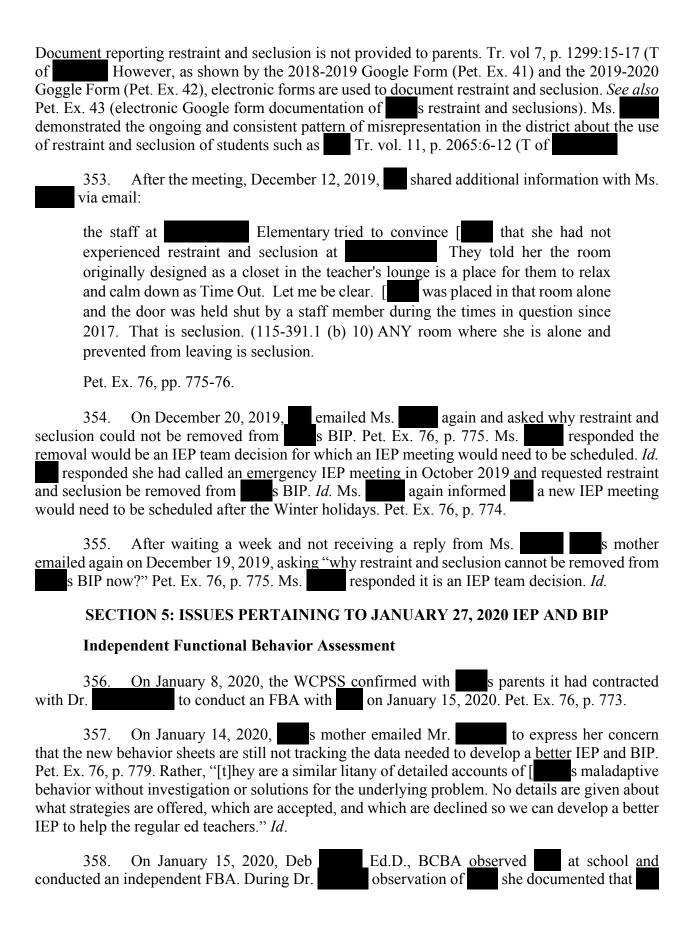


should convene immediately to discuss why the Behavior Intervention Plan is not working to meet her needs which warranted [seclusion]." *Id*.

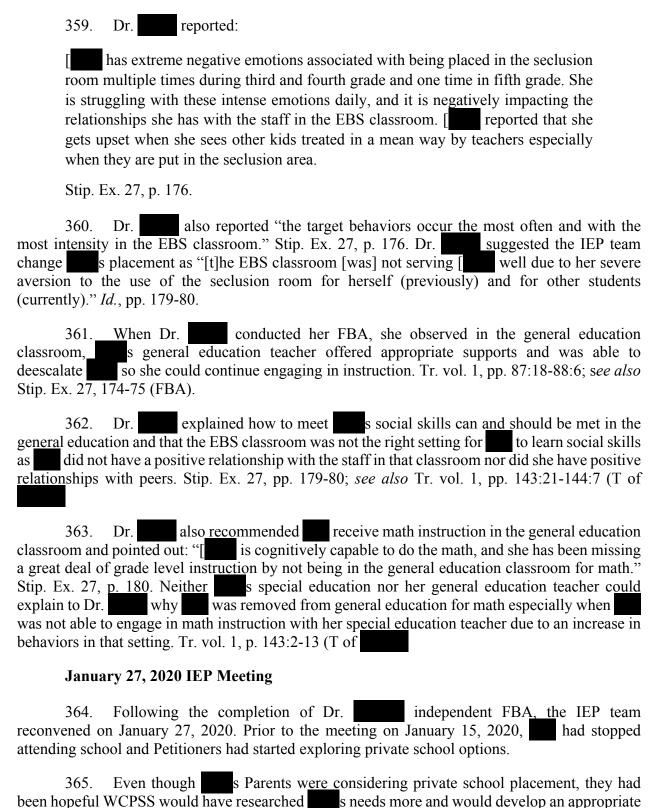
- 331. s mother twice asked for the "perceived climate of power and control be changed to a climate of intervention and support," as the current philosophy including the use of seclusion is "not helping [to improve." *Id.*
- 332. Like the prior year, the Point Sheets did not align with the IEP or BIP. 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.
- 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. s father informed the team that sist losing trust in the school at home, no longer doing homework, and [sic] causing nightmares." Stip. Ex. 9, p. 3.
- 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. It is 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 sections. 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, so Parents presented a written request for an independent functional behavior assessment ("FBA") of so 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 so 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).
- 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.

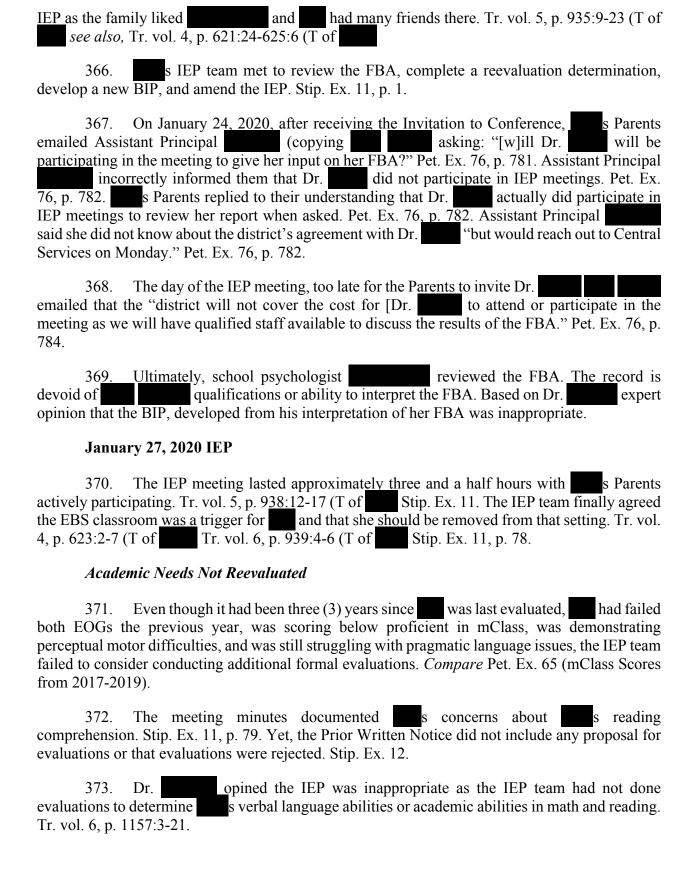


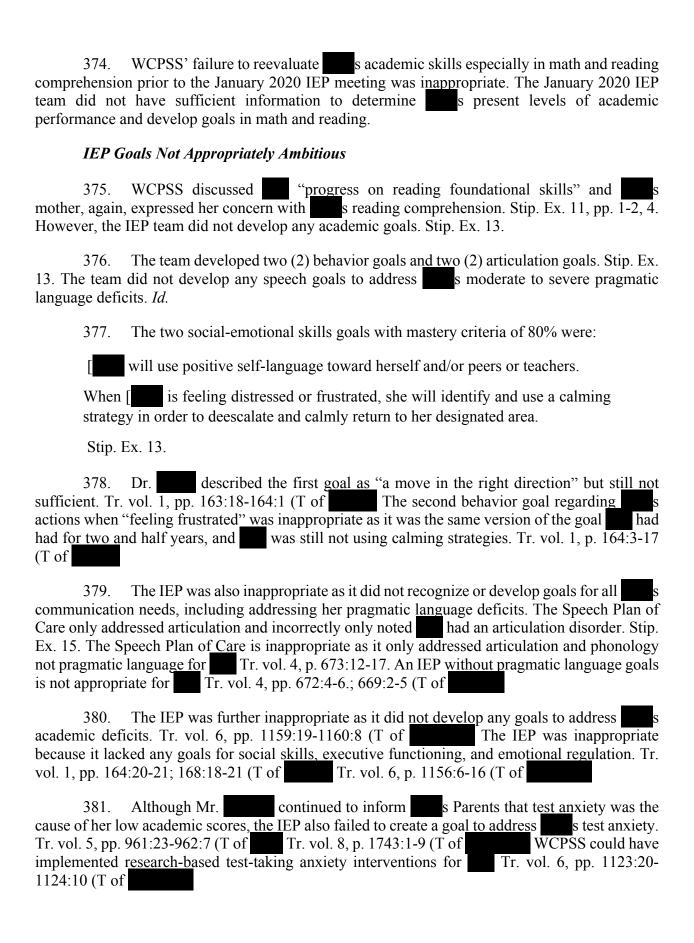


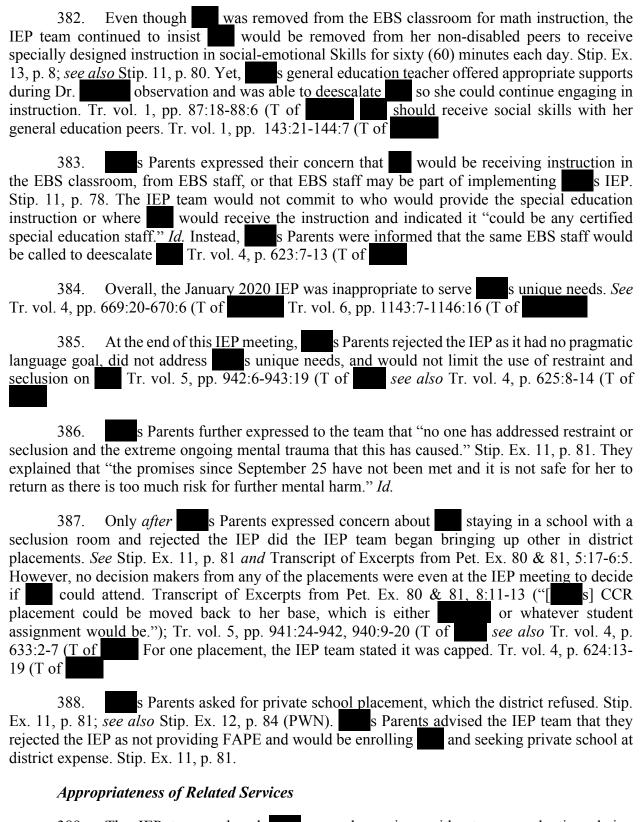


said to her teacher, "How can you teach me about respect when you don't even respect me? You put me in seclusion 24 times." Stip. Ex. 27, p. 175.

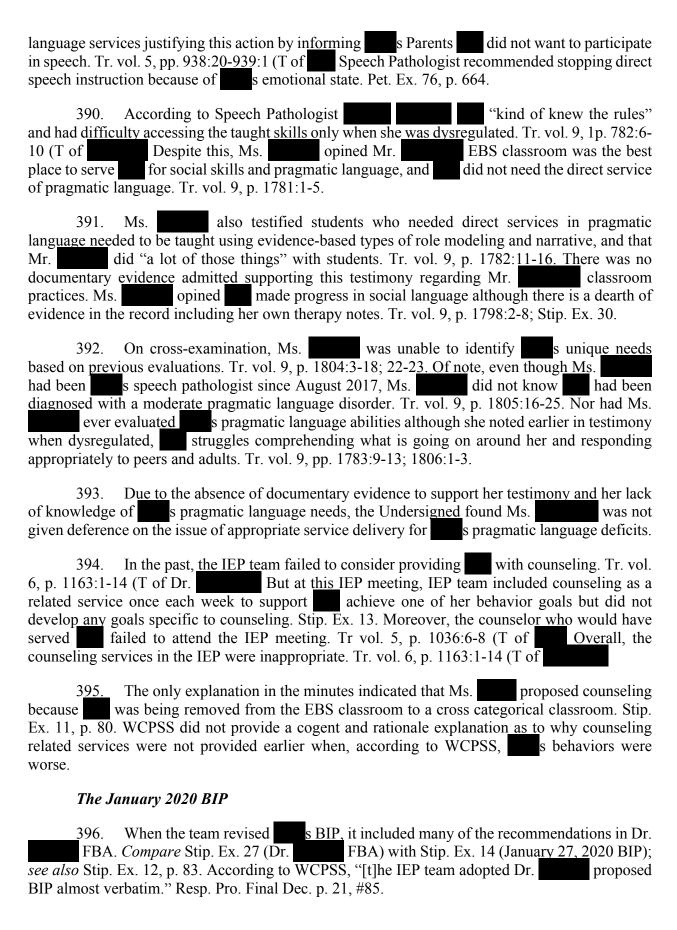


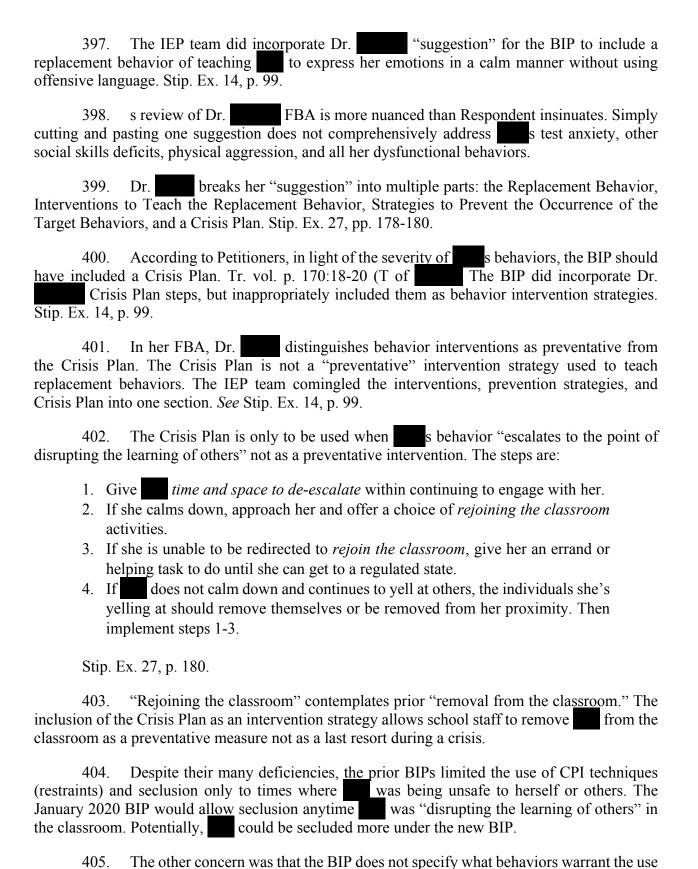




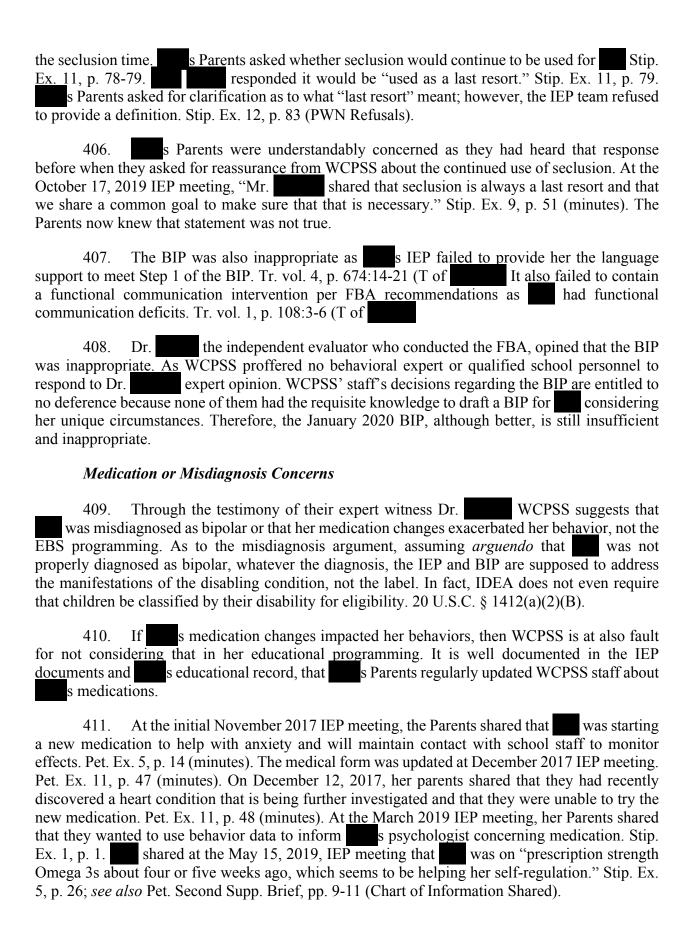


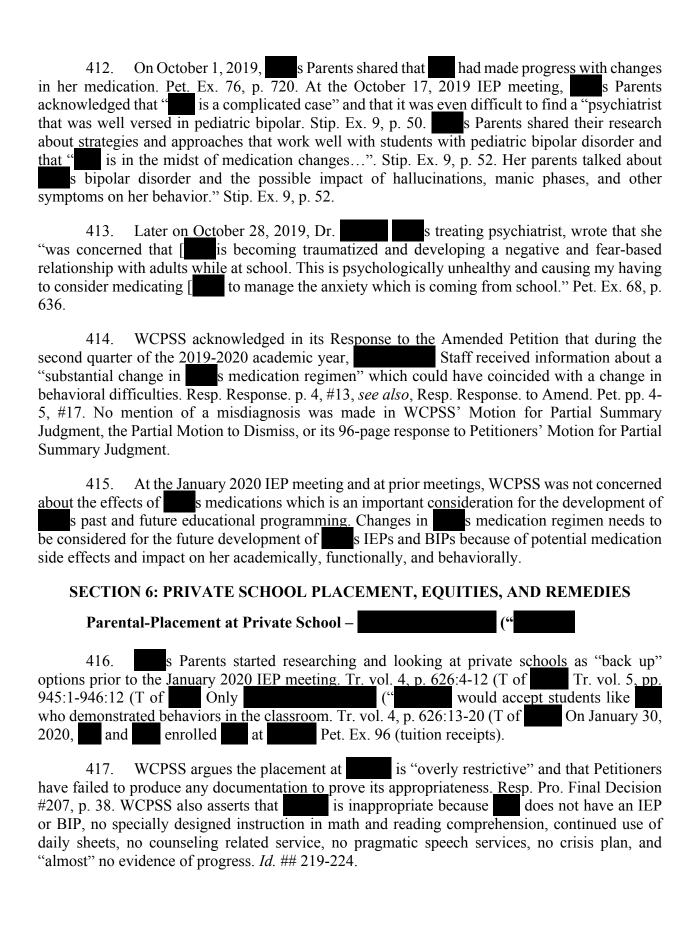
389. The IEP team reduced speech services without any evaluations being completed. Stip. Ex. 13. Without reevaluating it was inappropriate to reduce services. Tr. vol. 4, p. 669:17-29 (T of The IEP team wanted to stop direct speech

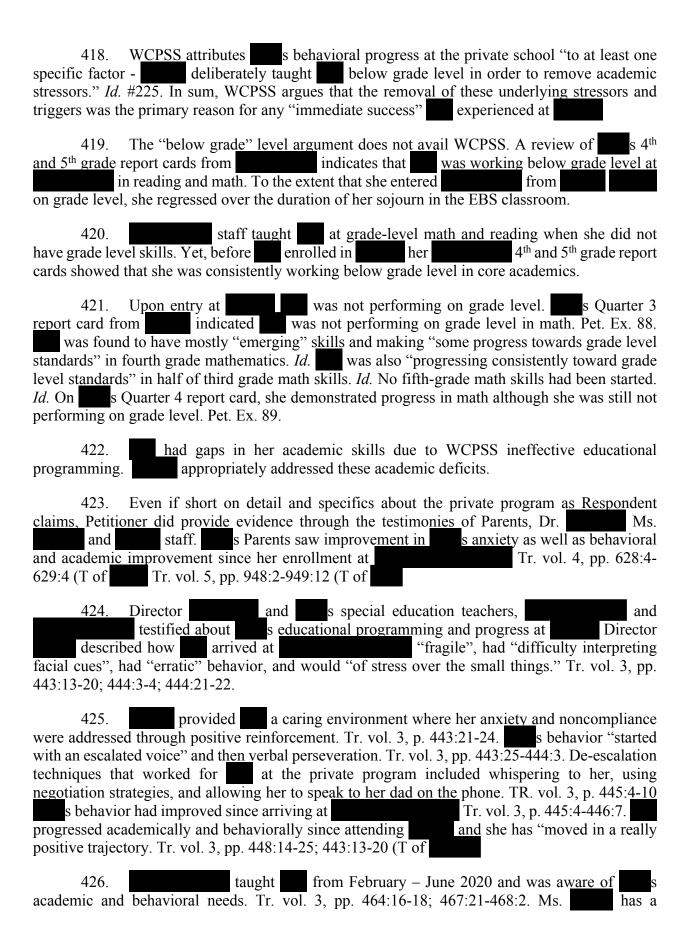


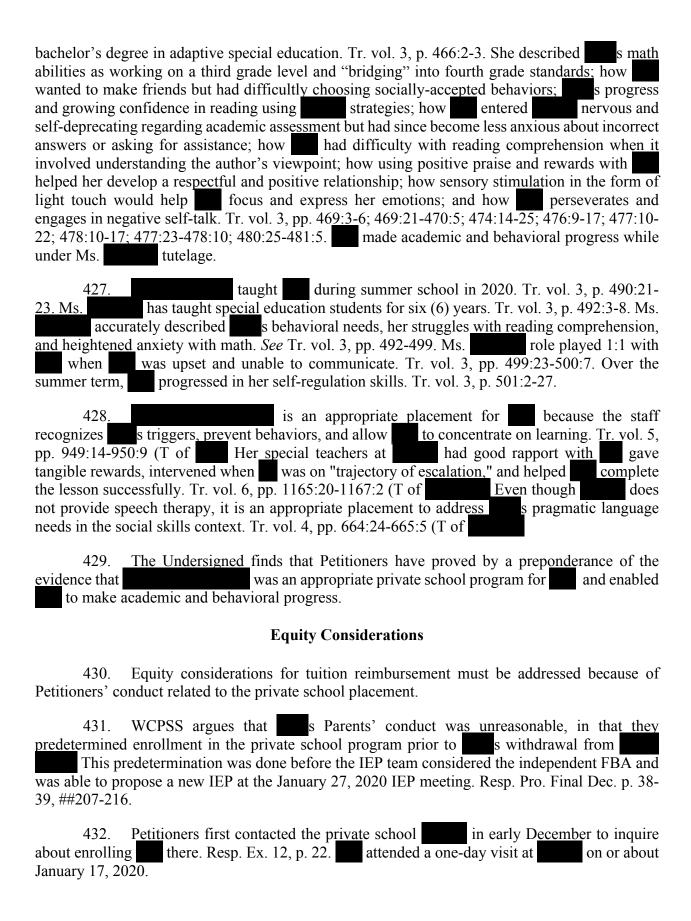


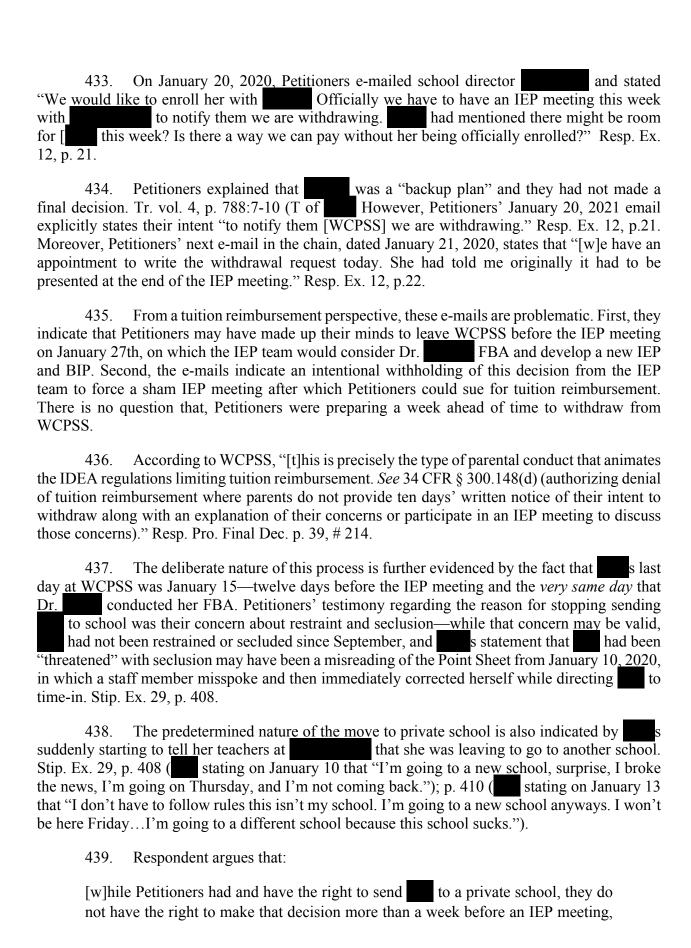
of seclusion, what constitutes cessation of the behavior that led to seclusion, and the duration of





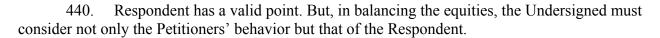






engage in an IEP meeting in which there was no real intent to return to WCPSS, and then seek tuition reimbursement. Petitioners' conduct was unreasonable as described in the federal regulations. That unreasonableness is sufficient to deny any reimbursement claim, irrespective of whether the private school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

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

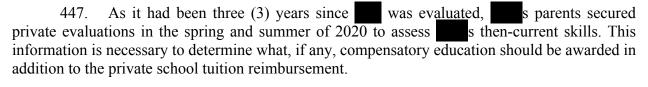


- 441. The fact that Parents explored private school options and withdrew her from WCPSS a period before the January 27, 2020 IEP meeting is not demonstrative of "bad faith." Even though at the January 27, 2020 IEP meeting, the Parents were not forthwith about their predecision about the private school placement, there is no requirement that the Parents tell the IEP team members before the meeting about their intentions. At that point, had not been enrolled in the private school.
- 442. Throughout this saga, WCPSS staff have not been "forthwith" with and at times have been intentionally deceitful. Even days before the January 2020 IEP, when Petitioners asked if Dr. had been invited to the meeting, WCPSS gave misinformation.
- 443. Despite that seems Parents cooperated and actively participated in the IEP meeting; they were not "gaming the system." WCPPS 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 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

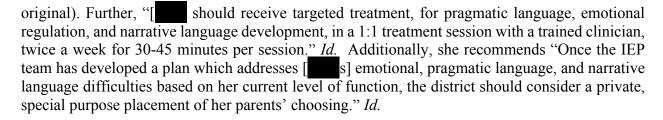
446. As in all contested cases, if compensatory services might be awarded, both Parties are asked to be ready to propose alternative compensatory education recommendations with supporting evidence.

Private Evaluations





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 (Evaluation); 98 (Evaluation)
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 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 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 In addition). 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. See Pet. Ex. 98. 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.
Pragmatic Language Assessment and offered recommendations. Pet. Ex. 29 (Evaluation); Pet. Ex. 97 (Evaluation); was diagnosed as having a moderate impairment in pragmatic language. Pet. Ex. 29. Ms. indicates "[Evaluation] 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 "[Evaluation] would benefit from having close support and a smaller class size, as needed." Id. at 11 (emphasis in



- 455. Petitioners' Speech Pathologist recommended 2 years of speech-language services to remediate 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 believed pragmatic language skills had been addressed in the EBS classroom, she proposed a direct speech services model where received speech services once a week–alternating weeks for push-in and pull-out services. Tr. vol. 9, p. 1788:4-19 (T of
- 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, by and through her parents, and 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 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 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).

- 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 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, separents 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

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 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

82

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 so 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 sufficiently sufficiently
- 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). Endrew 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.

Endrew 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

84

"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 spresent 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).
- 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, s IEP and BIP must be tailored to her unique needs, not the fidelity of the EBS program. The IEP must accurately describe 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 [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 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 adaptions 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,

87

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, bitting, 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, has been removed from the regular education setting for being disruptive. With appropriate specially designed instruction appropriately implemented and supplementary aids and supports, 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 see 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 education needs, whether or not commonly linked to the disability category in which 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 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 [to meet the measurable annual goals set out in the IEP of [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 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

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 "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.* 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
- 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 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 s deficits in pragmatic language and her non-verbal learning disability.
- 86. In addition, the staff at was not adequately trained to deal with the complexity of 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. IEPs failed to contain the necessary related services of counseling and speech-language services for pragmatic language. WCPSS also inappropriately reduced 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 still 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 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

- 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 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 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, substituting "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").
- 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).

 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 harm if she remained in the EBS placement.
- 119. Petitioners proffered expert testimony including streating psychiatrist about the emotional harm that suffered while placed in the EBS classroom because of the seclusions. Respondent's expert, psychiatrist Dr. did not opine whether had post-traumatic stress disorder due to the seclusions or her placement in the EBS classroom. Instead, Dr. stated that Dr. 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.
- None of the experts were asked if would suffer serious emotional harm if she continued in the placement until the January IEP meeting, so the Undersigned is unable to determine if 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, are selected 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 with an appropriate specially designed instruction for her academic, functional/behavioral, and speech-language deficits, is entitled to compensatory education and related services as ordered in this decision.

DECISION ON ISSUES

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

- 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 severity

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 is an appropriate private school placement.

Issue 17: Are there equities that should be factored into the award of reimbursement for 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 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 sight 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 significant right to a FAPE. Respondent's alternative compensatory speech-language was taken into consideration. The compensatory remedies should allow 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 states departure in January 2020. It is report cards and testing scores demonstrate she declined in her academic abilities while at the WCPSS. Stip. Exs. 32&33; Pet. Exs. 63, 64, &

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

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. It 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 a service a week for 45-minute sessions with one session pull-out and the other push-in.

Other Issues

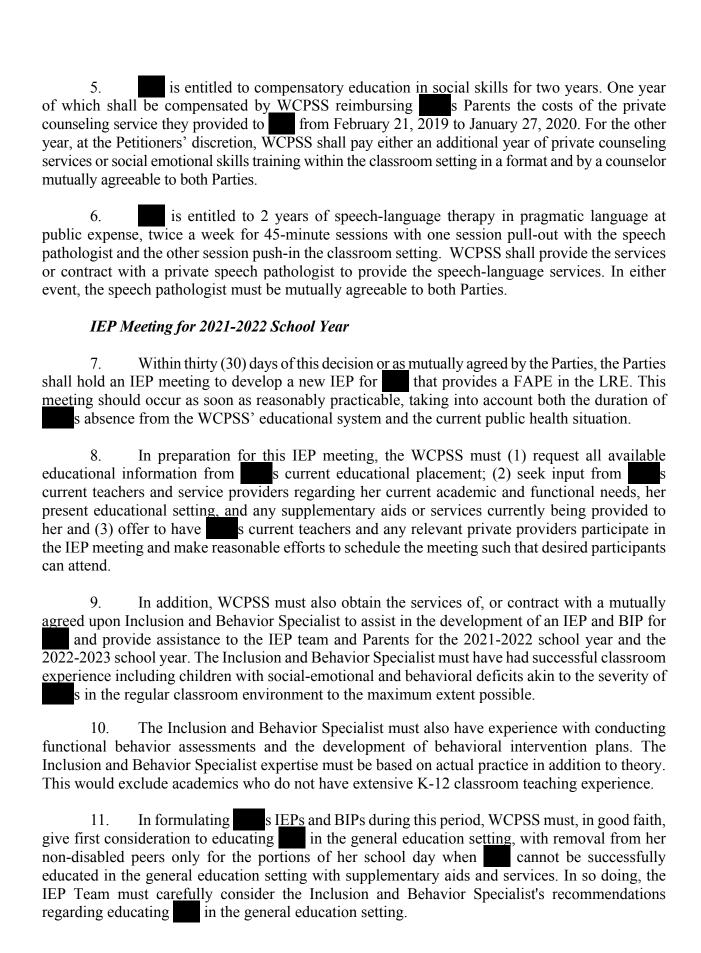
154. To the extent that this Final Decision does not expressly rule on any other claims raised in the Petition, the Undersigned concludes that Petitioners did not meet their evidentiary burden to establish any right to relief on those claims.

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.



- 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 enrolls in a WCPSS school, the Inclusion and Behavior Specialist shall make reasonable efforts to monitor specialist shall provide information to the IEP team and parents to assist them in further refinement and development of specialist shall make reasonable efforts to monitor specialist shall make specialist shall make reasonable efforts to monitor specialist shall provide information to the IEP team and parents to assist them in further refinement and development of specialist shall make reasonable efforts to monitor specialist specialist specialist shall make reasonable efforts to monitor specialist specialis
- 15. Further, if, after development of a new IEP, Petitioners choose to enroll in a WCPSS school, WCPSS must identify any general education teachers who will teach 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 in If any lack of training or experience is identified. WCPSS must ensure that it is steachers receive such training prior to or immediately upon 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

Auch M. Frisht