STATE OF NORTH CAROLINA

IN THE OFFICE OF ADMINISTRATIVE HEARINGS 17 EDC 08781

COUNTY OF WAKE

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

THIS MATTER was heard before the undersigned Administrative Law Judge Stacey B. Bawtinhimer presiding, on the following dates: March 19–23 and 26, 2018, at the Office of Administrative Hearings in Raleigh, North Carolina.

After considering a trial on the merits held on the above-mentioned dates, arguments from counsel for both parties, all documents in support of or in opposition to the parties' motions, all documents in the record including the Proposed Decisions, as well as all stipulations, admissions, and exhibits, the Undersigned concludes that the Wake County Public School System Board of Education ("Respondent" or "WCPSS") did not deny

APPEARANCES

For Petitioners: Stacey Gahagan

Tammy Kom

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Suite 210-C

Durham, NC 27707

For Respondent: Stephen G. Rawson

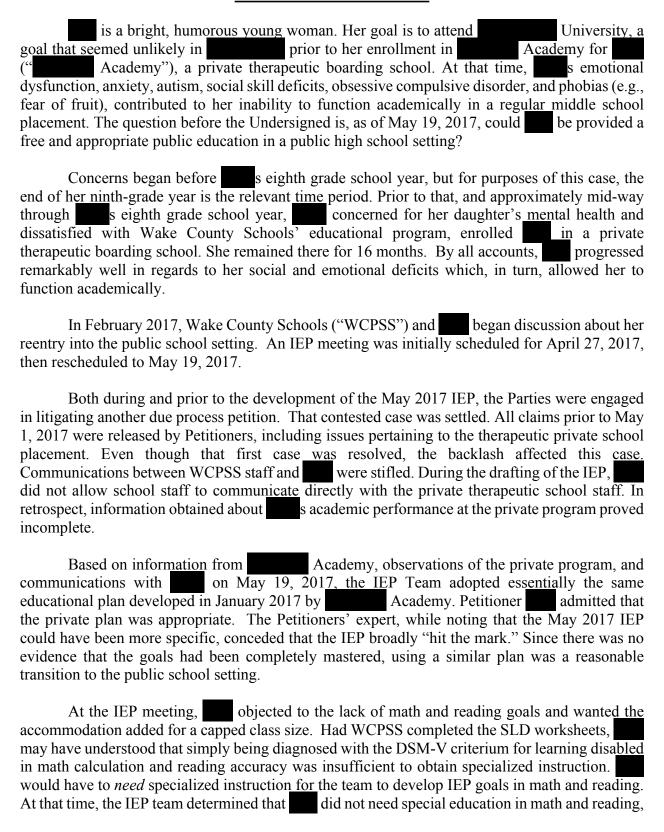
Maura O'Keefe

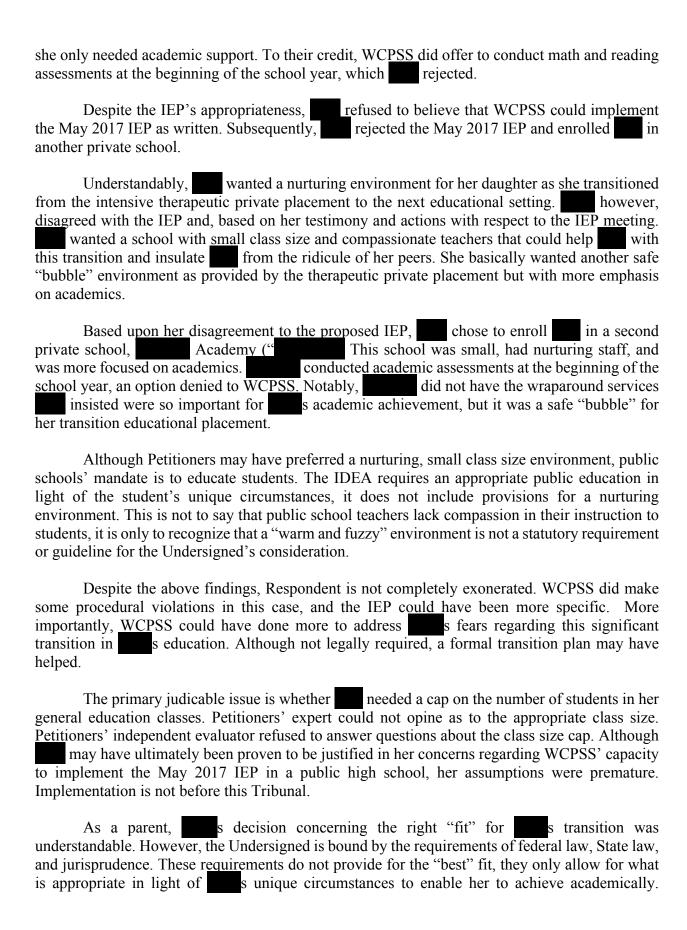
Tharrington Smith, L.L.P.

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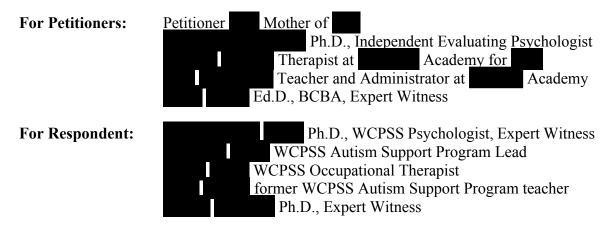
SUMMARY OF DECISION





Respondent made reasonable and cogent explanations for the actions of the IEP Team. Petitioners bore the burden in this case. Based primarily on their own witnesses, Petitioners did not prove by a preponderance of evidence that required a class size cap to succeed academically, or that WCPSS denied a free and appropriate public education. Judgment is rendered for the Respondent on all claims.

WITNESSES



EXHIBITS

The following exhibits were received into evidence during the course of the hearing. The page numbers referenced are the "Bates stamped" numbers.

Stipulated Exhibits: 1-28 (hereinafter "Stip. Ex. 1," "Stip. Ex. 2," etc.).

Petitioners' Exhibits: 1-10, 13, 15 & 17 (both for historical purposes only), 20, 21, 22 (p. 167-170), 23-25, 27-30, 32, 33, 36, 38, 39, & 43 (hereinafter "Pet. Ex. 1," "Pet. Ex. 2," etc.).

Respondent's Exhibits: 5, 6 (p. 147), 15, 16, 18, 20 (hereinafter "Resp. Ex. 1," "Resp. Ex. 6, p. 147," etc.).

Offer of Proof: Petitioners' Exhibit 16.

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

Other Documents

Transcript volumes 1 through 6 were received and have been retained in the official record of this case.

Any documents produced by the parties in discovery, including, but no limited to, IEPs, email correspondence, data sheets, and meeting notes, are self-authenticated. Stip. 91.

All pleadings filed with the Office of Administrative Hearings on the matter associated with Docket No. 17 EDC 08781 are self-authenticated. Stip. 92.

The North Carolina Department of Instruction's *Policies Governing Services for Children with Disabilities* is self-authenticated. Stip. 93.

ISSUES

The parties identified the issues for hearing in the Pre-Trial Order. The Parties also stipulated that *all* claims, including, but not limited to, any reimbursement for the private school placement at Academy prior to May 1, 2017 had been settled and released. Stip. 8. Based on this Stipulation, this Tribunal lacks subject matter jurisdiction over any subsequent claims prior to May 1, 2017, including any compensatory education claims for math and reading remediation, which may have been raised in the prior contested case.

At the close of Petitioners' case-in-chief, Respondent moved pursuant to Rule 41(b) for dismissal of the case. In a written order following Respondent's motion for dismissal under Rule 41(b), the Undersigned dismissed all issues except those specifically articulated as remaining. The dismissed issues included the following: the need for math and/or reading goals; related services, including direct occupational therapy, family and/or individual counseling, and parent training; the appropriateness of all supplementary aids and services with the exception of the accommodation of a class size cap for general education classes; the provision of extended school year services; conducting a Functional Behavioral Assessment or developing a Behavioral Intervention Plan; failure to fully evaluate; SLD eligibility category determination; parental participation except with respect to placement; and, any procedural claims other than predetermination of placement.

The Undersigned defined the remaining issues for hearing were as follows:

- a. Whether the May 19, 2017 IEP was substantively appropriate for based on the present levels of academic and functional performance, the functional and academic goals, exclusion of the accommodation of a cap on the number of students in the regular education classes, the service delivery in the IEP, and the exclusion of a transition plan to support stransition from a private therapeutic boarding school to a public high school;
- b. Whether Respondent violated the procedural requirements of the IDEA by predetermining splacement in the resource setting; and
- c. If Respondent denied a free and appropriate public education, whether the unilateral private placement selected by the parent, was appropriate, and whether the equities favored private tuition and transportation reimbursement to Petitioners.

BURDEN OF PROOF

Petitioners acknowledged, in the Prehearing Order entered on March 19, 2018 that they have 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). North Carolina 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). The Petitioners, being the complaining party, have the burden of proof to show by a preponderance of evidence that Respondent did not provide with the opportunity for a free appropriate public education.

FINDINGS OF FACTS

Stipulations 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 Pretrial Order, which was approved and filed in the Office of Administrative Hearings on March 19, 2018. Stipulations are referenced as "Stip. 1," "Stip. 2," "Stip. 3," etc. The phrase: "It is stipulated that ..." has been removed from each Stipulation. To the extent that Stipulations are not specifically stated herein, the Stipulations of Fact in the Order on Pre-Trial Conference are incorporated fully herein by reference.

Prior Orders

Unless specifically contradicted herein, this Order incorporates and reaffirms all findings of fact and conclusions of law contained in previous Orders entered in this litigation.

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 and prior actions, 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:

Procedural Background

- 1. On December 29, 2017, and and filed a Petition (17 EDC 8781) against the Wake County Board of Education ("Respondent," "Wake County Schools," or "WCPSS") alleging violations of the Individuals with Disabilities in Education Improvement Act ("IDEA").
- 2. On February 12, 2018, the matter was reassigned to the Honorable Stacey B. Bawtinhimer by Chief Administrative Judge Julian Mann, III.
- 3. This is the third due process petition filed by the Petitioners against Wake County Schools. The prior petitions are case file numbers 17 EDC 0953 filed February 9, 2017 ("Petition 1") and 17 EDC 3383 filed May 19, 2017 ("Petition 2").
- 4. With respect to any prior substantive and/or procedural violations arising prior to May 1, 2017 with prior contested cases, the Parties stipulated to the settlement and release of all claims preceding May 1, 2017. Stip. 8. The Parties also stipulated that Petitioners were not seeking reimbursement of Academy in the current case. Stip. 17. Therefore, all claims arising prior to May 1, 2017 had been released by a prior settlement agreement and are outside the jurisdiction of this Tribunal. Stip. 8.
- 5. On July 13, 2018, the Parties were invited to submit written arguments about the Official Notice of the comprehensive release language found in the Settlement Agreement or the modification of Stipulation 8 with respect to that release. *See* Order for Discretionary Supplemental Written Argument or Modified Stipulation 8. No other provisions of the Settlement Agreement were relevant to this case or inquired about by the Undersigned.
- 6. The Petitioners objected to this request as improper and, while the Respondent asked for Official Notice of that comprehensive release language, it will not be cited in this matter. However, the Undersigned does interpret the Parties' release stipulation as a comprehensive release such that any and all claims prior to May 1, 2017 that the Petitioners "knew or should have known about" have been released, including any compensatory education claims for reading and math.
- 7. The hearing in this matter began on March 19, 2018, and ended on March 26, 2018, encompassing six (6) days of hearing.

WITNESSES

PETITIONERS' WITNESSES:

Expert Witness

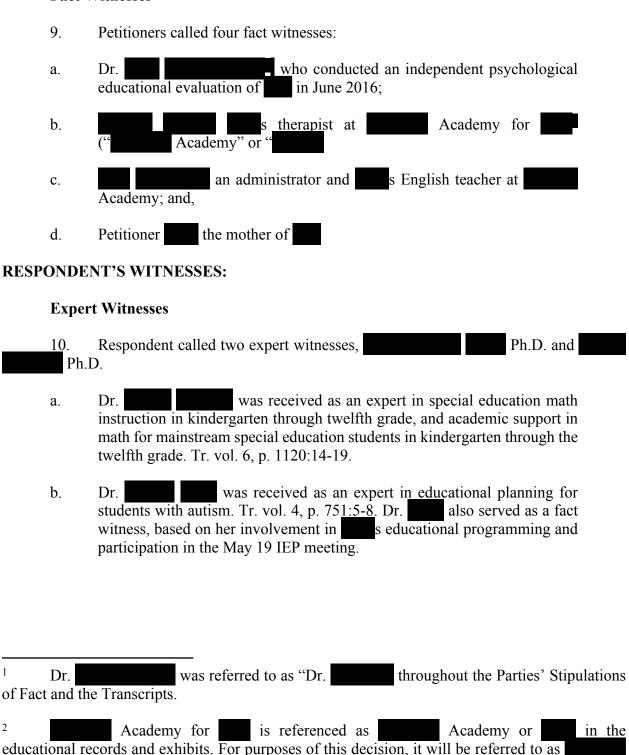
8. Petitioners called one expert witness, E.D., BCBA.

Dr. was received as an expert in inclusive practices for students with autism spectrum disorder; positive behavior intervention supports for students with disabilities; applied behavior analysis; functional behavior assessments and

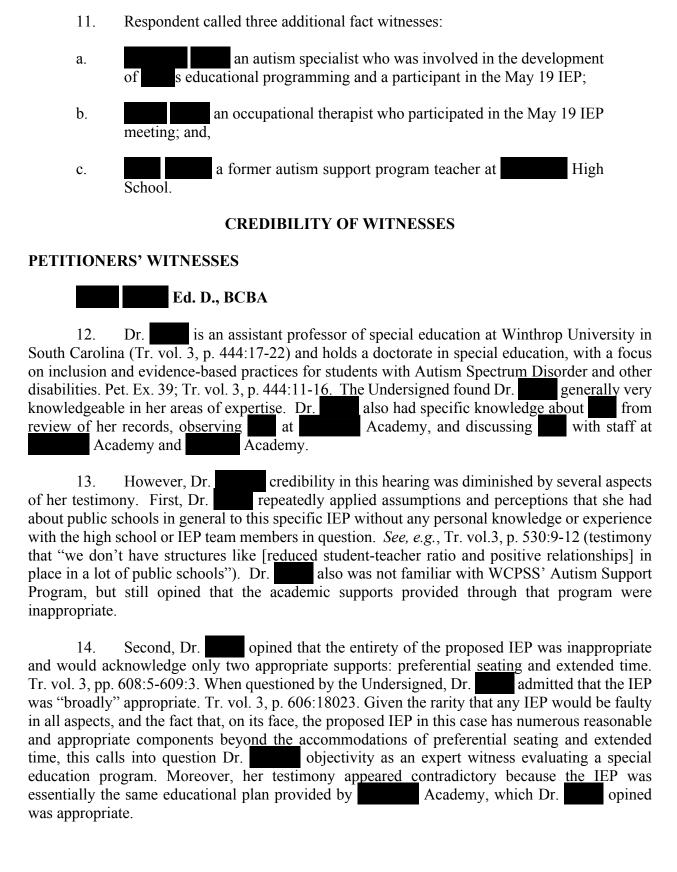
behavior intervention plans; co-teaching; IEP development; progress monitoring; multi-tiered system of support for students with disabilities; and evidence-based practices for students with autism spectrum disorder. Tr. vol. 3, p. 454:4-15.

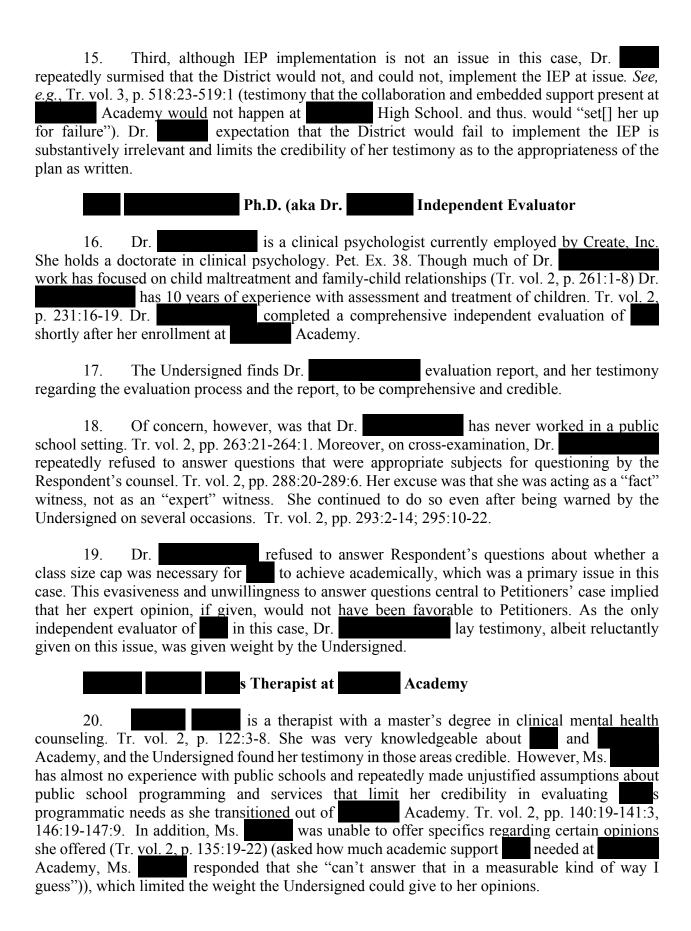
Fact Witnesses

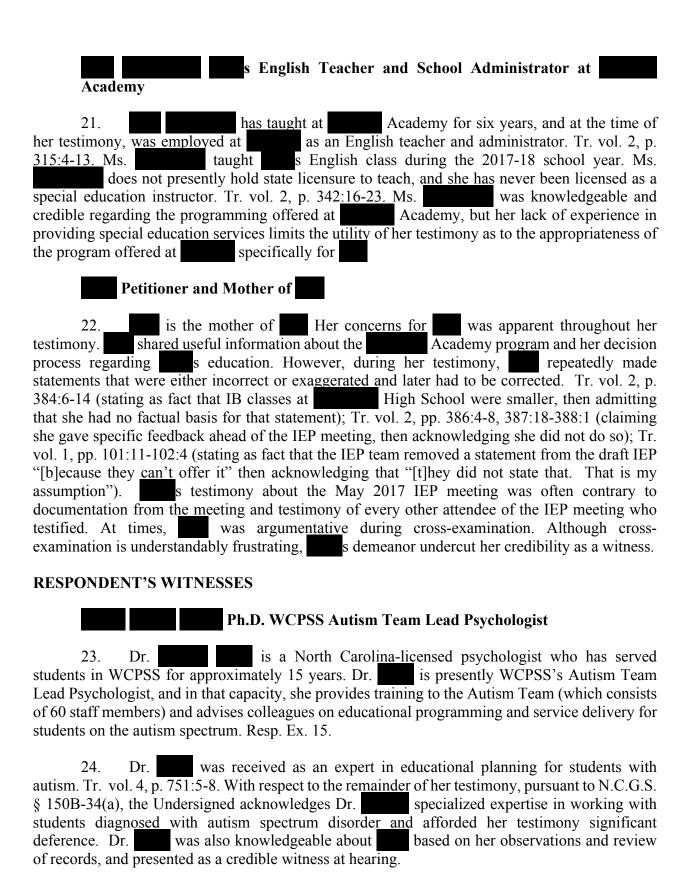
Academy.



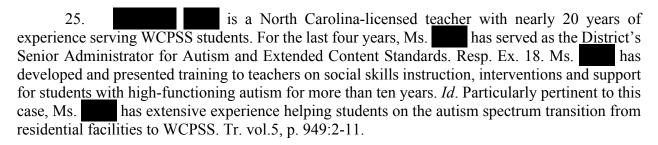
Fact Witnesses











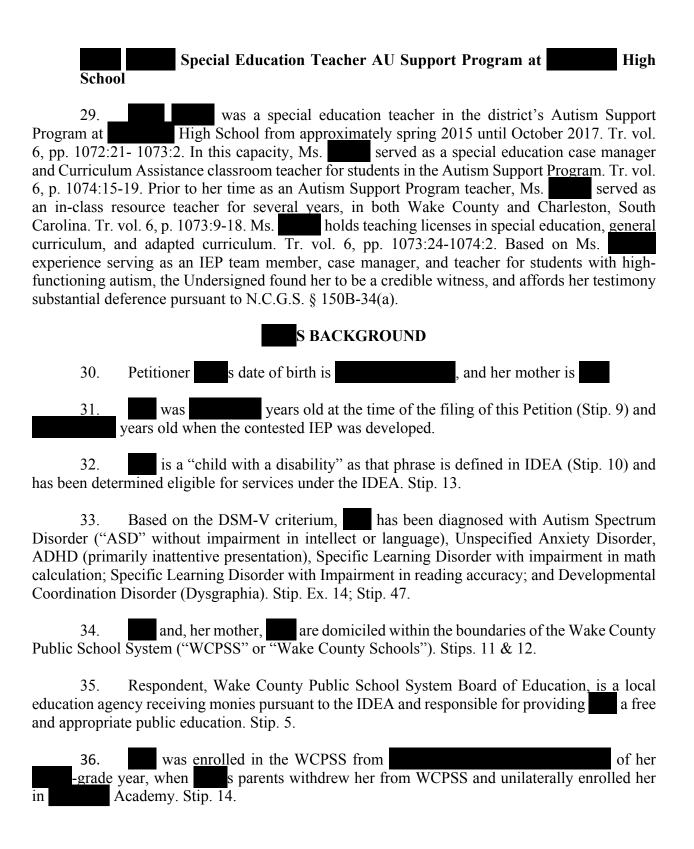
While Ms. was not accepted as an expert witness, pursuant to N.C.G.S. § 150B-34(a), the Undersigned acknowledges her specialized expertise in working with students diagnosed with autism spectrum disorder and afforded her testimony substantial deference. In addition, the Undersigned found Ms. to be a credible witness throughout her testimony, in part, because Ms. was willing to acknowledge when the IEP or WCPSS processes could have been better. Tr. vol. 5, p. 1015:20-23.

Ph.D., Expert Witness

27. Dr. has a master's degree in special education and a doctorate in curriculum and instruction with a focus on mathematics instruction. She holds state licensure in special education with a certification in middle school mathematics (grades 6-9). She is National Board Certified in special education (K-12). She taught special education for ten years at the high school level, including four years in a Curriculum Assistance classroom. She has also trained teachers at all grade levels, published high school curricula, and serves as a consultant to the North Carolina Department of Public Instruction. Tr. vol. 6, pp. 1106:6-1120:13. The Undersigned found Dr.

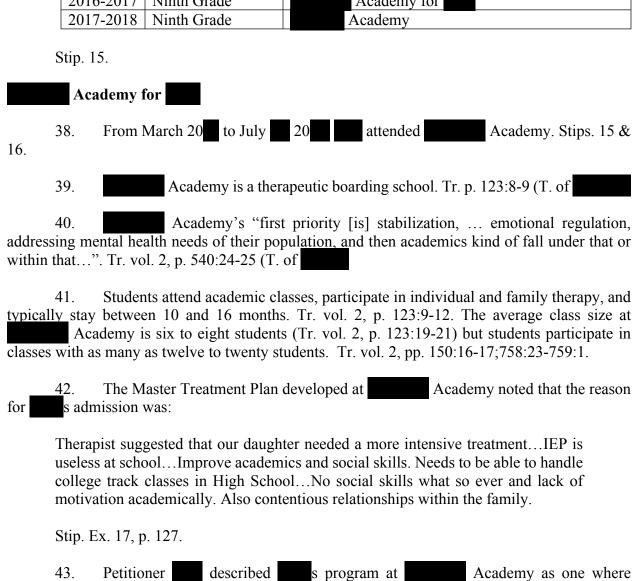
WCPSS Special Education Teacher, Autism Support Program at High School

is a North Carolina-licensed and Nationally Board Certified occupational therapist with nearly 20 years of experience serving public school students. Tr. vol. 5, pp. 1036:12-1038:4. Ms. has served as an occupational therapist for WCPSS for more than 10 years. Tr. vol. 5, p. 1036:1-3. For seven years, Ms. served as the lead occupational therapist for the District, during which time she provided support for all occupational therapists in the District and consulted on IEP development for students in grades kindergarten through twelve. Tr. vol. 5, pp. 1038:13-1039:7. Ms. has experience providing sensory support for high school students and for students transitioning from a private school to the public-school setting. Tr. vol. 5, p. 1039:13-19. The Undersigned acknowledges Ms. expertise identifying and addressing students' sensory needs, found her to be a credible witness, and affords her testimony substantial deference pursuant to § 150B-34(a).



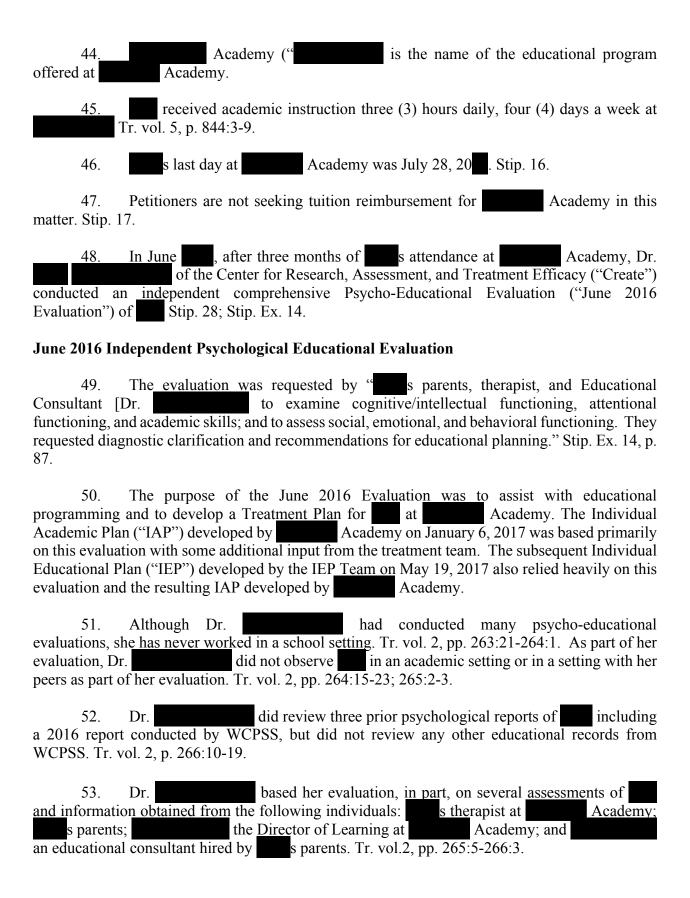
37. attended the following schools as indicated by school year:

2007-2013	Elementary School	Elementary School
2013-2014	Sixth Grade	Middle School
2014-2015	Seventh Grade	Middle School
2015-2016	Eighth Grade	Middle School (until March)
		Academy for (from March)
2016-2017	Ninth Grade	Academy for
2017-2018	Ninth Grade	Academy

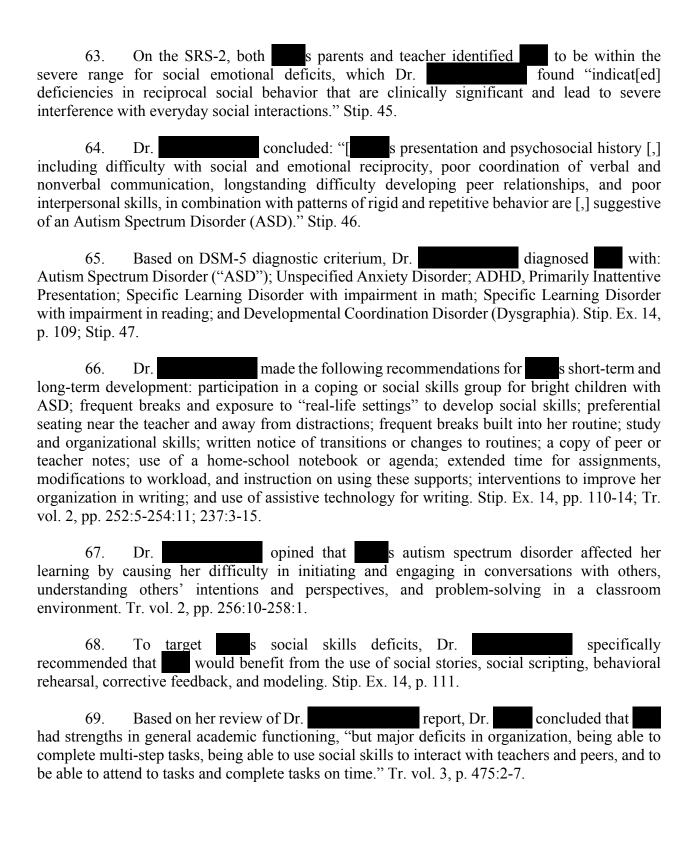


might need to maintain low anxiety levels." Tr. vol. 1, p. 45:2-12. Notably, sizes of only 4-5 students (Tr. vol. 1, p. 45:1-2) which is inconsistent with testimony regarding class sizes.

teachers used a "hands-on instructional" approach, had a strong relationship with students, were familiar with seeds, and could "deal with any coping strategies and things like that that she

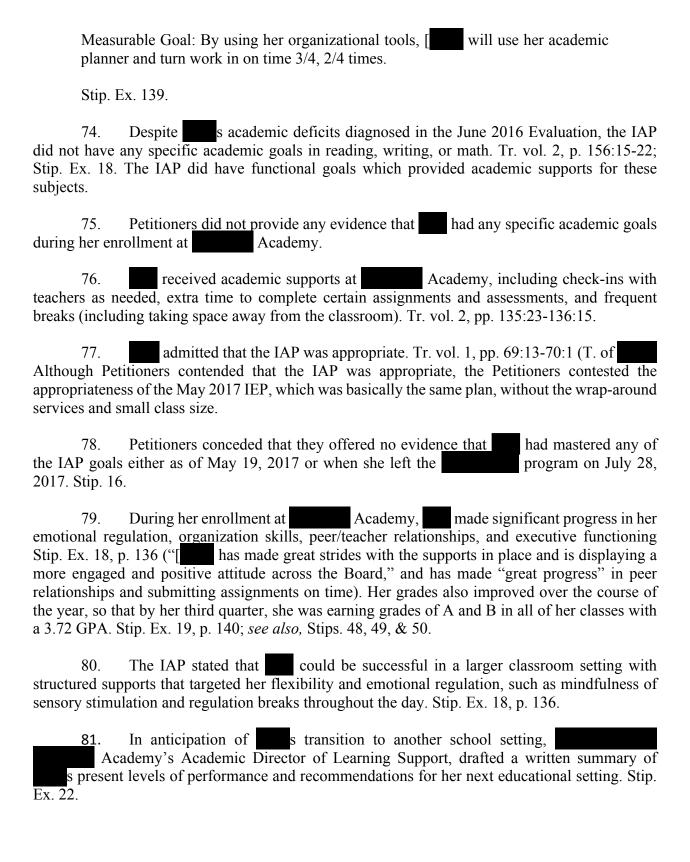


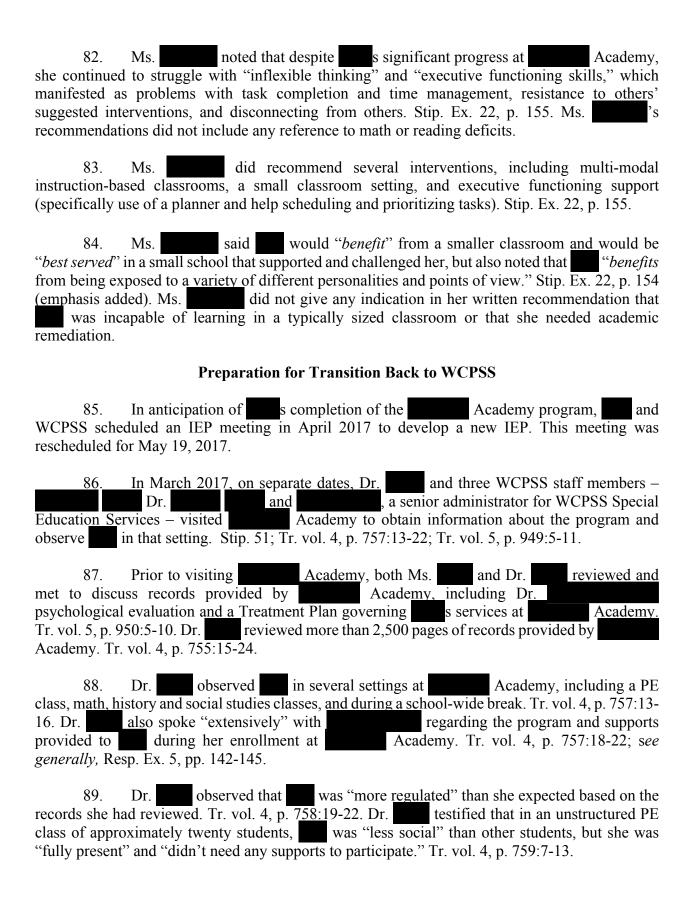
- assessments: WISC-V; D-KEFS Color-Word Inference Test; Trailmaking Test; Rey-Osterrieth Complex Figure Test; Grooved Pegboard Test; CTOPP-2; WJ-IV; Gray Oral Reading Test, Fifth Edition (GORT-5); Minnesota Multiphasic Personality Inventory Adolescent (MMPI-A); Million Adolescent Clinical Inventory (MACI); Sentence Completion Test; Achenbach Youth Self-Report (AYSR); Achenbach Child Behavior Checklist (ACBC); Revised Child Anxiety and Depression Scale (RCADS); Vanderbilt ADHD Diagnostic Parent Rating Scale (VADPRS); Behavior Rating Inventory of Executive Function (BRIEF); Children's Yale-Brown Obsessive Compulsive Scale (CY-BOCS); ADOS-2; SRS-2; Australian Scale for Asperger's Disorder; Autism Diagnostic Observation Schedule Second Edition (ADOS-2) Module 4. Stip. 29.
- 55. Numerous test scores were reported in the Stipulated Facts which are not relevant to the remaining issues; therefore, they will not be reviewed herein. *See* Stips. 30-36.
- 56. Of relevance is that has an average full-scale IQ standard score of 100; all of her academic scores were average except for oral reading accuracy (WJ-V Standard Score ("SS") of 84); math calculation skills (WJ-V Math Calculation subtest SS 70; Math Facts Fluency SS 90; Math Composite SS 80); and phonological memory (CTOPP-2 standard score of 76). Stips. 30, 33, & 35.
- 57. Dr. noted s "reading accuracy scores . . . are significantly below expectations based on her intellectual abilities," and determined "continues to meet criteria for a Specific Learning Disability in Reading." Stip. 37.
- 58. In the area of math, Dr. concluded "[s current weaknesses in math calculation qualify her for diagnosis of Specific Learning Disability in Mathematics." Stip. 38.
- 60. Also of relevance in Dr. testing was that both and her parents endorsed clinical elevations with regard to Internalizing Problems, Total Problems, Withdrawn/Depressed problems, Social Problems, and Attention Problems. Stips. 41 & 42.
- 61. Dr. concluded that significant executive functioning weaknesses for [in the areas of behavioral regulation and metacognition." Stip. 43.
- 62. Similar to WCPSS's January 2016 ADOS-2 evaluation, on the June 2016 ADOS-2, score "fell within the range of scores associated with mild autism spectrum disorder." Stips. 23, 24, 26, & 44.

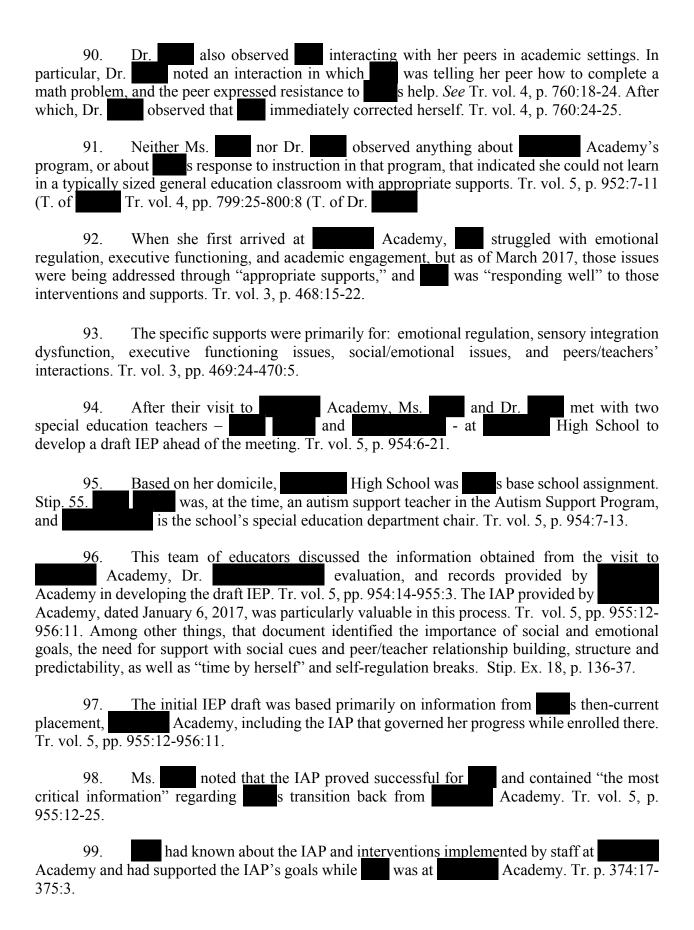


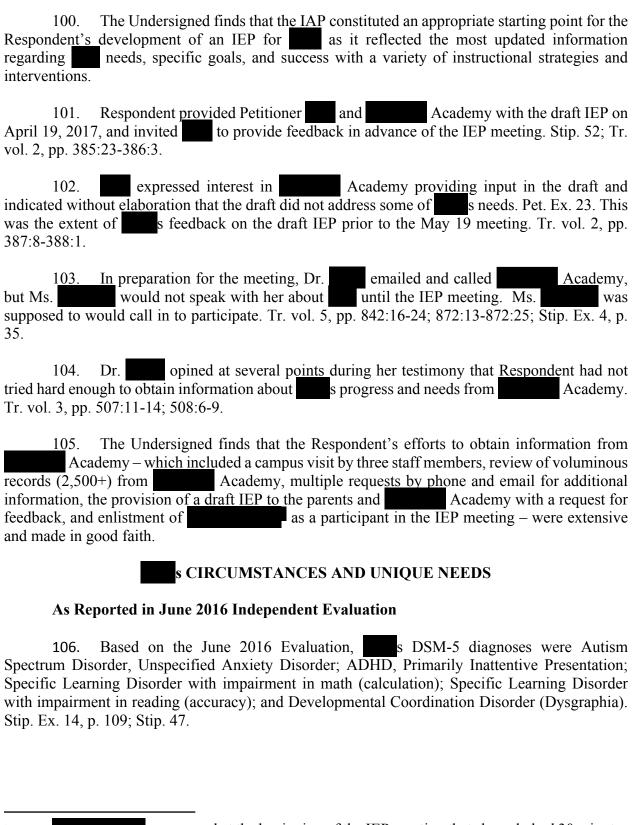
Individualized Academic Plan ("IAP") Developed on January 6, 2017 at Academy

input,	On January 5, 2017, using the June 2016 Psycho-Educational Evaluation and staff staff developed an Individualized Academic Program ("IAP") to address academics, peer interactions, self-regulation, and organizational skills. Stip. Ex. 18, p. 139.
Tr. vol. were h	During approximately 12 months of senrollment, Ms. provided dividual, group, and family therapy sessions for approximately three to four hours a week. 2, p.124:4-11. Ms. selection testified that selections is learning disabilities and "cognitive rigidity" er greatest challenge, as they caused her difficulty in connecting with peers "on a social-nal level" and in accepting others' perspectives. Tr. vol. 2, pp. 125:25-126:9.
	72. The Present Level in the IAP stated:
	has made great strides with the supports in place and is displaying a more engaged and positive attitude across the board. She still exhibits struggles with peer relationships at times and turning completed assignments in on time. However, great progress has been made in these areas. [is maintaining her own organization system that she developed with the [O]ccupational Therapist and showing more and more flexibility and acceptance. She is on par for her grade level expectations in all areas with the exception of turning assignments in on time.
	Stip. 61.
-	73. The IAP included three goals targeting speer interactions, use of emotional ion skills in class, and use of an academic planner and study skills to submit assignments e. Stip. Ex. 18, p. 138-139. The three functional goals were:
	Goal 1: [will practice positive peer interaction with peers during project collaboration 4/4 times.
	Measurable Goal: Using group collaboration assignments, [will work on her social/peer interactions and reading social cues and communication skills 3/4, 2/4 times.
	Goal 2: [will practice sensory regulation strategies to support her focus, attention, and flexibility in class 4/4 times.
	Measurable Goal: Using various emotionally-based regulation coping skills and Occupational Therapy sensory strategies, [will manage sensory awareness to stay in class regulated 3/4, 2/4 times.
	Goal 3: [will use academic planner and study skills to practice organization and turning work in on time at school 4/4 times.

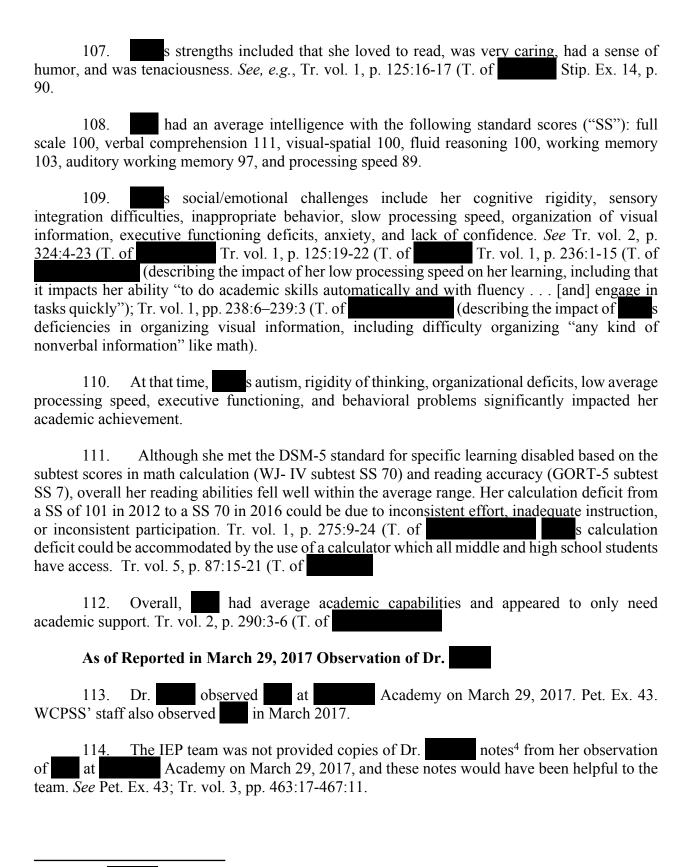




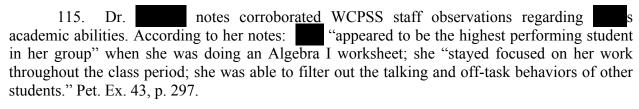




announced at the beginning of the IEP meeting that she only had 30 minutes to participate in the meeting. No explanation was provided as to why Ms. could not attend the entire IEP meeting.



Dr. observation notes were exchanged, approximately one year later on March 5, 2018, in response to Respondent's discovery requests.



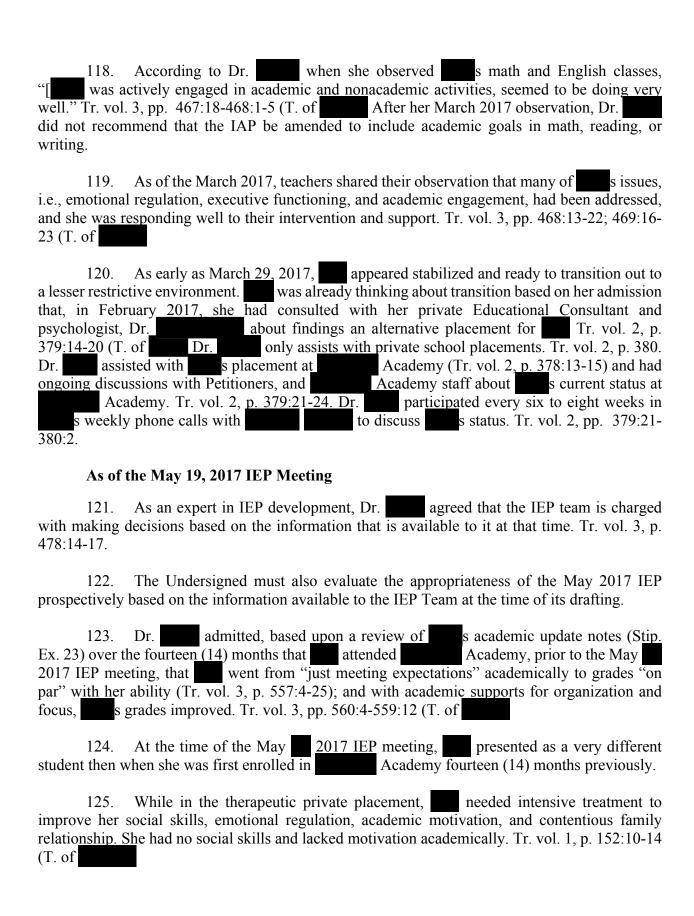
116. In addition, Dr. noted significant progress in emotional regulation, since s admission in March 2016 to the March 2017 observation date. progressed from significantly from:

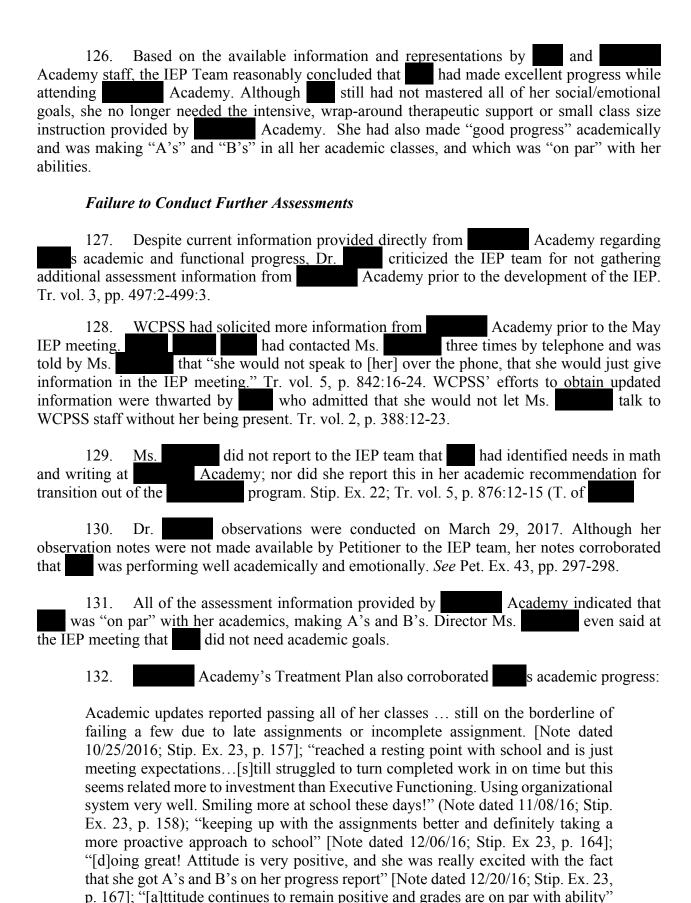
being noncompliance and meltdowns that consisted of shouting out, crying, throwing herself on the floor, and some mild aggression. The meltdowns occurred when she was frustrated with academic demands, annoyed by other students [,] off task behavior in the classroom, when she was asked to do things she didn't want to do, when she wasn't permitted to follow through with her OCD behaviors, and when her phobia of fruit was confronted. She was very rigid and did not adapt well at all to change. She had very bad personal hygiene (was not brushing her teeth, showering, brushing her teeth [sic], or wearing clean clothes). When she first arrived, the family visits were quite negative and could be explosive.

Pet. Ex. 43, p. 298.

is compliance and no longer has meltdowns. She requires only universal supports to meet academic and behavioral expectations and some targeted supports for executive functioning and sensory and emotional regulation. She can effectively communication [sic] and negotiate to get her needs met. She has developed positive relationships with peers and the staff and displays a great deal of happiness throughout the day. She is earning all A's and B's, consistently completes her classwork and homework, asks for extensions for due dates as needs [sic] so she can turn in quality work, and she has developed coping strategies to help her focus, attend, organize and plan, and regulate her emotions. She developed her own organizational system for her academic assignments...is independent with maintaining personal hygiene, her on-site family visits are positive and she transitions well when going home for a visit and returning to school. Her OCD behaviors that were a big issue in the public school (refusal to sit near others, desired [sic] to move furniture around) are no longer issues at She sits near people eating fruit and has gone apple picking with her mom as part of a required therapeutic homework assignment during a home visit. [Pet. Ex. 43, was taught that she cannot control the behavior of others, but she can choose coping strategies to help her deal with situations that make her uncomfortable, anxious, frustrated, or dysregulated.

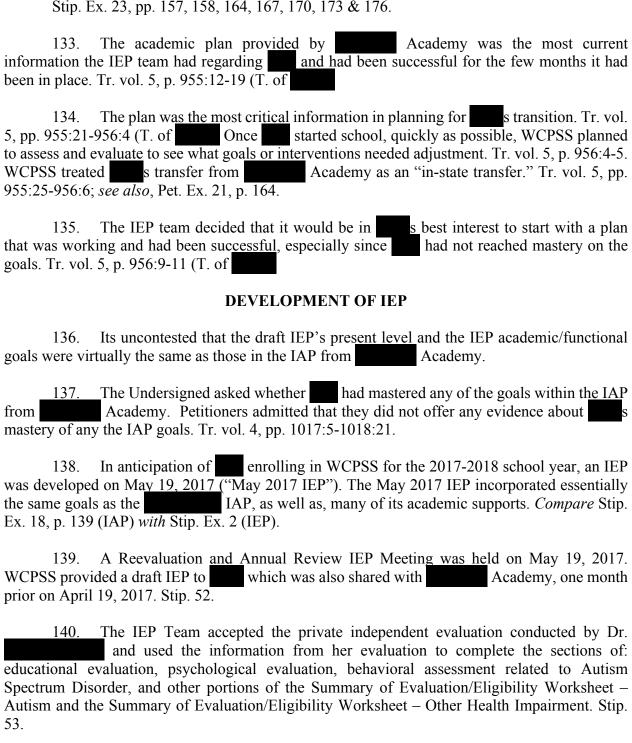
Pet. Ex. 43, p. 299.

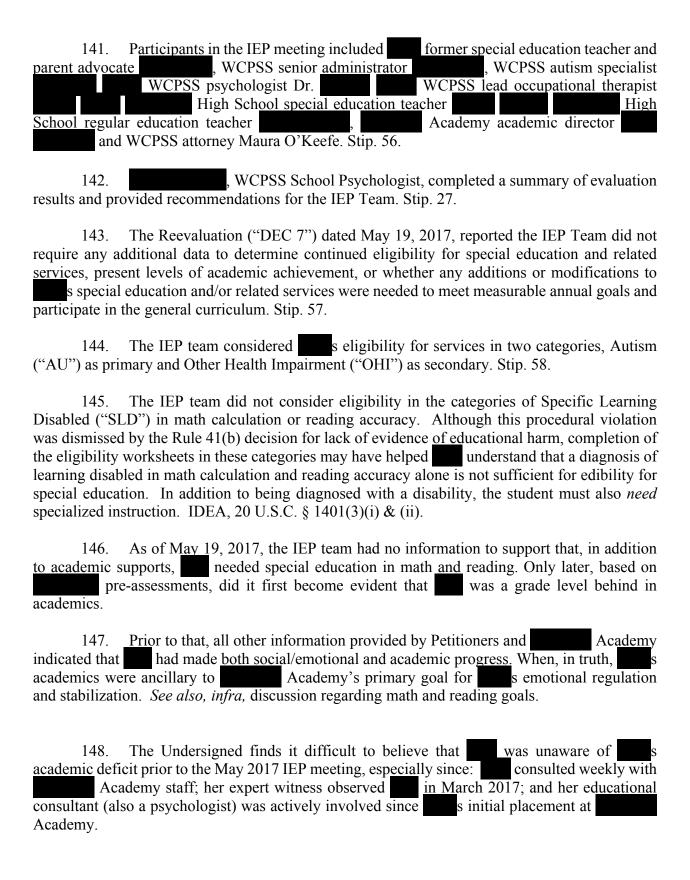




[Note dated 01/31/16; Stip. Ex. 23, p. 170]; [n]o complaints from academic doing well" [Note dated 02/07/17; Stip. Ex. 23, p. 173]; No update on grades or any concerns listed [Note 02/21/17; Stip. Ex. 23, p. 176].

Stip. Ex. 23, pp. 157, 158, 164, 167, 170, 173 & 176.





MAY 19, 2017 IEP

Present Levels of Academic and Functional Performance

Performance ("Pr	ne May 2017 IEP reported the same Present Level of Academic and Functional resent Level") in the area of Social/Emotional Skills and Organizational/Study was in the IAP:		
group set displaying struggles time. How her own o and show	Current level of performance provided by Academy (therapeutic, small group setting): has made great strides with the supports in place and is displaying a more engaged and positive attitude across the board. She still exhibits struggles with peer relationships at times and turning completed assignments in on time. However, great progress has been made in these areas. It is maintaining her own organization system that she developed with the [O]ccupational Therapist and showing more and more flexibility and acceptance. She is on par for her grade level expectations in all areas with the exception of turning assignments in on time.		
Stip. 61.			
150. Th	ne Present Level for written expression for was:		
thoughts provide w	Written expression is an area of need for [She has difficulty getting her thoughts out on paper. She is able to speak about a topic in greater detail than provide written output. She needs prompting to write in complete sentences and use appropriate conventions.		
Stip. 62.			
Function	al and Academic Goals		
	ne May 2017 IEP included the following four functional goals in the area of Skills and Organizational/Study Skills which were based on		
de	even direct instruction and practice, during group interaction [will monstrate positive peer interaction such as, conversational exchanges, pairing conversations, and project collaboration in 3/4 times.		
pe int re	hen presented with a distraction or an unexpected event, (task that she receives as overwhelming, unexpected student behavior, negative teraction with a peer or adult) will use pretaught emotional gulation strategies to support her focus, attention and flexibility in class 4 times.		

c.	[will use her self-selected organizational system, check-ins with
	teacher, and study skills to turn work in on time at school 3 out of 4 times
	per class.

d. Given direct instruction and visual supports, [will identify a variety of emotions and nonverbal and other social cues in peers, staff, and literature in 3 out of 4 events.

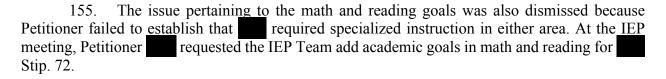
Stip. 63.

- 152. Petitioners' expert testified on direct examination that the IEP was completely inappropriate yet, when queried by the administrative law judge, vacillated in her opinion.
 - 153. Petitioners' expert witness, Dr. was asked by the Undersigned:
 - Q. Was there anything in the May 19, 2017 IEP that you thought was appropriate?
 - A. Honestly, I think that the goals they had there are getting to appropriateness if they could have done one of two things, either make them more specific or break them down into benchmarks. So, I don't think they're off the mark in the –in the broad stroke of what they were trying to address.

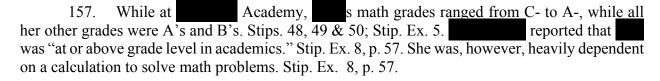
Tr. vol. 3, p. 608:12-17.

Lack of Math and Reading Goals

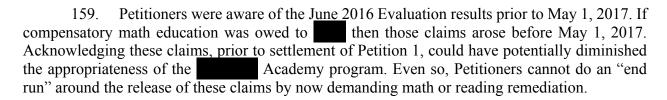
154. The IEP included a new goal for written expression: "[will demonstrate appropriate written conventions (using complete sentences, punctuation) with no more than 2 verbal teacher prompts in 3 out of 4 trials." Stip. 64.



156. Based on the June 2016 Evaluation and representations of Petitioners and Academy, the IEP Team determined that did not require math or reading goals and refused this request. Stip. 73; Stip. Ex. 5 ("Prior Written Notice").



158. Based on the June 2016 Evaluation,	had average math and reading scores			
overall. Her math calculation subtest score was the only discrepant academic area, but that could				
be accommodated by a calculator. "With the exception of turning assignments in on time,"				
was "on par for her grade level expectations in all areas." Stip. Ex. 18, p. 136.				



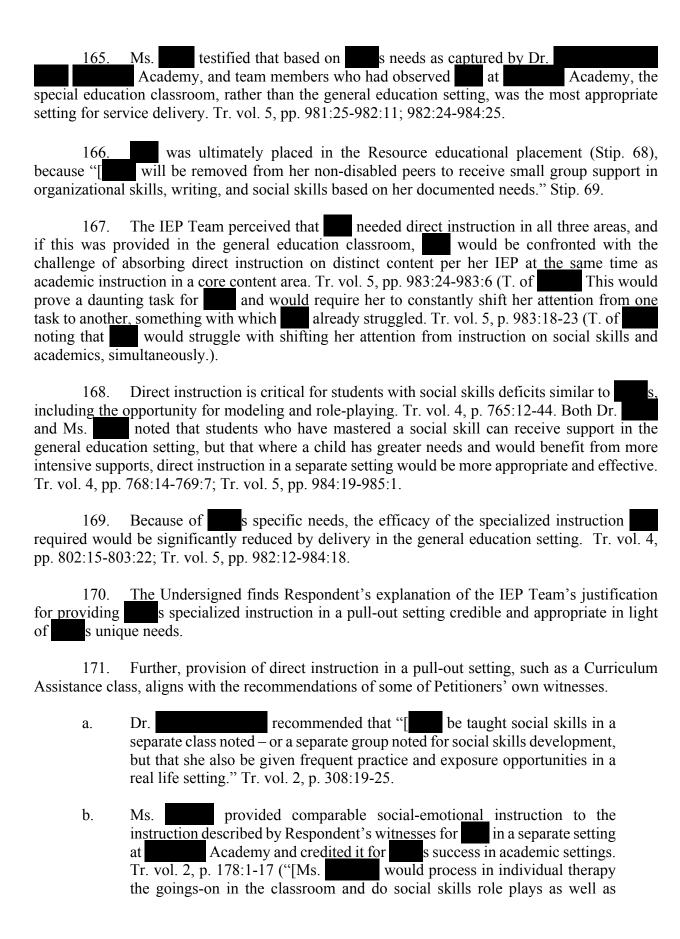
SERVICE DELIVERY

160. The IEP included the following specially designed instruction and related services:

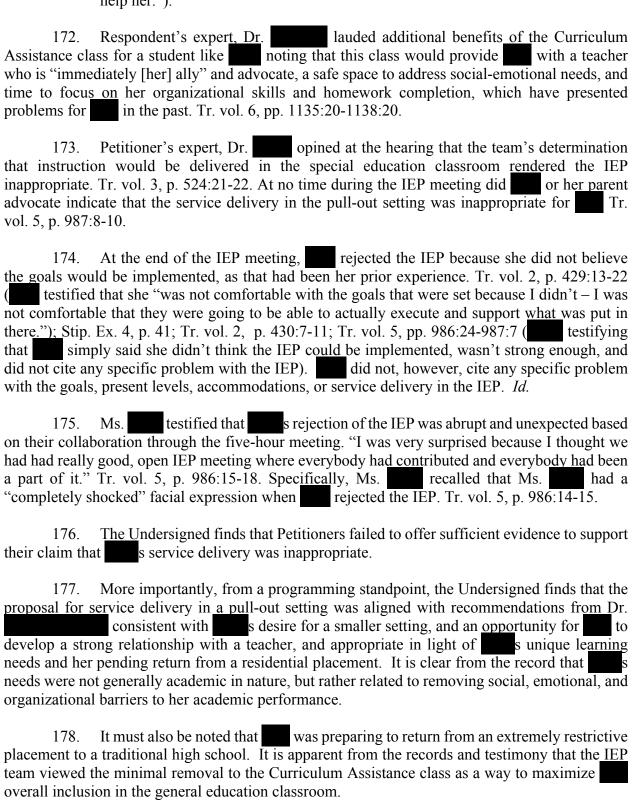
Special Education	Sessions	Session	Location
		Length	
Social/Emotional Skills	5x/week	30 minutes	Special Education
Writing	5x/week	15 minutes	Special Education
Organizational/Study Skills	5x/week	45 minutes	Special Education
Occupational Therapy – RSSD	4x/reporting period	00 minutes	Regular Education

Stip. 66.

- 161. In the draft IEP, the IEP Team had proposed providing with daily instruction in social/emotional skills (60 minutes) and organizational/study skills (30 minutes), both in the special education classroom. Stip. Ex. 1, p. 13. As proposed, this would be delivered via a Curriculum Assistance class that would include twelve (12) or fewer students. Tr. vol. 5, p. 976:4-8.
- 162. After discussing spresent levels and needs, modifying and adding to the draft IEP goals, and finalizing accommodations, the IEP Team agreed upon the following service delivery: 30 minutes of social/emotional skills, 45 minutes of organizational/study skills, and 15 minutes of writing. These services were to be delivered in a pull-out setting in the Curriculum Assistance class. Stip. Ex. 2, p. 13-14.
- 163. It should be noted that Petitioners presented no evidence contesting the service delivery *times* selected by the team, only the location of services. Therefore, the Undersigned finds the service delivery times uncontested and appropriate.
- 164. The IEP Team considered the following alternative educational placements: Regular -80% or more of the day with nondisabled peers or Resource -40% 79% of the day with nondisabled peers. Stip. 67.

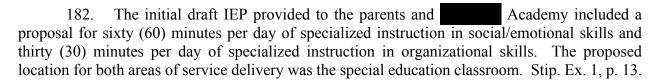


implement intervention strategies that she could utilized in the classroom to help her.").

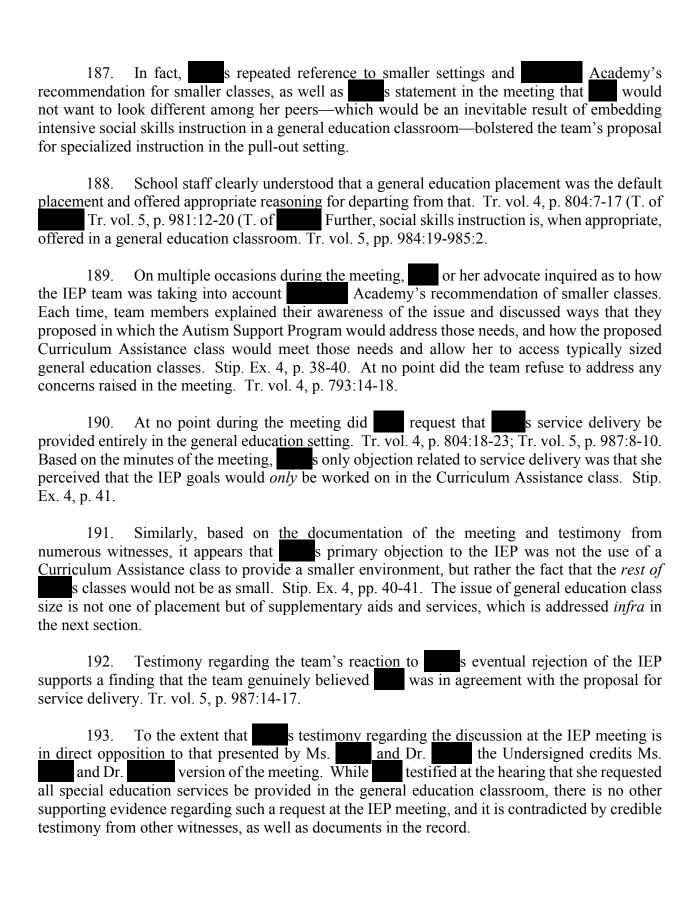


179. The weight of the evidence supports a finding that would not have benefitted from intensive social/emotional skills and organizational skills instruction embedded in the general education setting. Therefore, that specialized instruction in a more restrictive setting for a small portion of stay was appropriate.
PLACEMENT DETERMINATION
180. As noted above, the Undersigned finds that the placement decision reached by the team was appropriate. As a related procedural issue, however, Petitioners have alleged that the IEP team predetermined seducational placement. Predetermination of placement is the only procedural claim that survived the 41(b) Order.

181. The Undersigned further notes that arguments against the provision of special education services in the Curriculum Assistance classroom did not appear to arise until well into the hearing itself, and that this Petition was not presented as an "inclusion case." Tr. vol. 4, pp. 814:4-817:6.



- 183. In the email providing the draft to the parent, specifically stated that "this is a draft and we are happy to consider other options." Pet. Ex. 22, p. 167.
- 184. As reflected in earlier findings, in the month between receiving the draft IEP and the May 19 IEP meeting, neither for a cademy provided any specific feedback on the draft. No objection to the service delivery proposal was raised before or at the IEP meeting.
- 185. During the IEP meeting, the team discussed the service delivery proposal. Stip. Ex. 4, p. 40. Based on the discussions earlier in the meeting regarding s needs, the team decided to modify the service delivery time for social/emotional skills to thirty (30) minutes per day and to increase the organization skills to forty-five (45) minutes per day. Stip. Ex. 2, p. 28-29. In light of the added goal in writing, the team added fifteen (15) minutes of service delivery in writing. Stip. Ex. 2, p. 28-29. Given that the service delivery times changed substantially during the meeting, including introduction of an entirely new area of instruction based on parent request, there can be no credible claim of predetermination on the service delivery times.
- There is no evidence that anyone at the meeting suggested that it would be more appropriate to provide s specialized instruction in the general education setting. At the hearing, team members offered cogent and responsive explanations for why they proposed pull-out services, both in terms of the benefits of the special education classroom and the harms of trying to deliver s specialized instruction in the general education classroom. Tr. vol. 4, pp. 801:10-802:8, 802:15-803:10, 803:15-22 (T. of Tr. vol. 5, pp. 982:24-984:18 (T. of



- 194. The record is clear that had the opportunity to ask questions and raise objections throughout the IEP meeting, and that the team provided cogent and responsive explanations and clarifications. While the final IEP reflects the same educational placement as the draft—though significantly different service delivery—the weight of the evidence supports a finding that there was robust discussion at the meeting regarding how as services would be delivered, and that
- 195. Finally, the Undersigned notes that, when a parent has a month to review a draft IEP and participates in a five- or six-hour IEP meeting without making her objection to the proposed program clear, Petitioner has not established that the team predetermined the result. An IEP team cannot credibly be accused of refusing to consider other options when other options are not proposed.

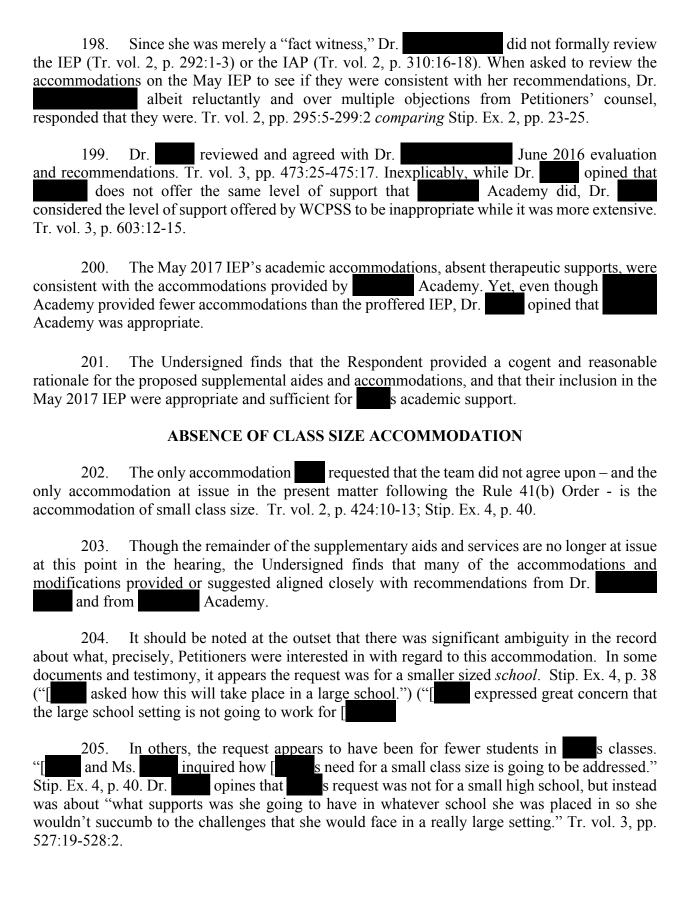
SUPPLEMENTAL AIDES AND ACCOMMODATIONS

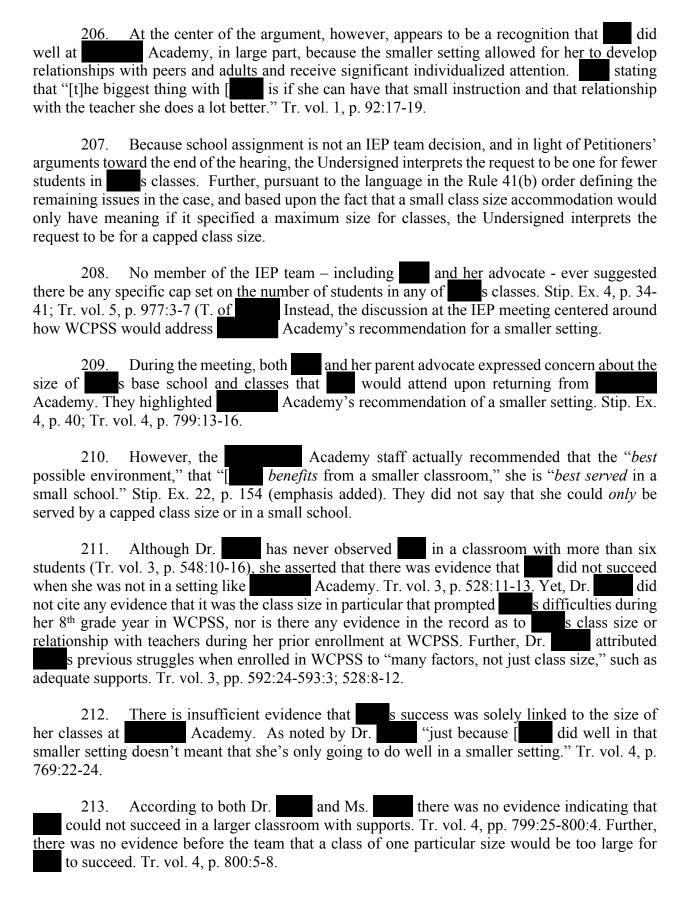
196. The May 2017 IEP included the following supplemental aids, supports, modifications, and accommodations to be utilized during accommodations to be utilized during accommodations.

Class/Activity	Accommodation	Implementation Specification
Assemblies	Preferential seating	should be seated close to teacher in a
		place where external distractions and social
		distractions are minimized
	Other	-break card (take space)
Academic	Modified	Case Manager, student, and classroom teacher
Classes:	assignments	can work together to modify assignments
English		(<u>class</u> work and homework) as needed
Foreign	Preferential seating	should be seated close to teacher in a
Language		place where external distractions and social
Math		distractions are minimized
Social Studies	Scheduled Extended	time and a half for tests, quizzes, or lengthy
	Time – Other	assignments as needed
	Testing in a Separate	15 students or less
	Room – Small Group	
	Other	-copy of teacher notes
		-break card (take space)

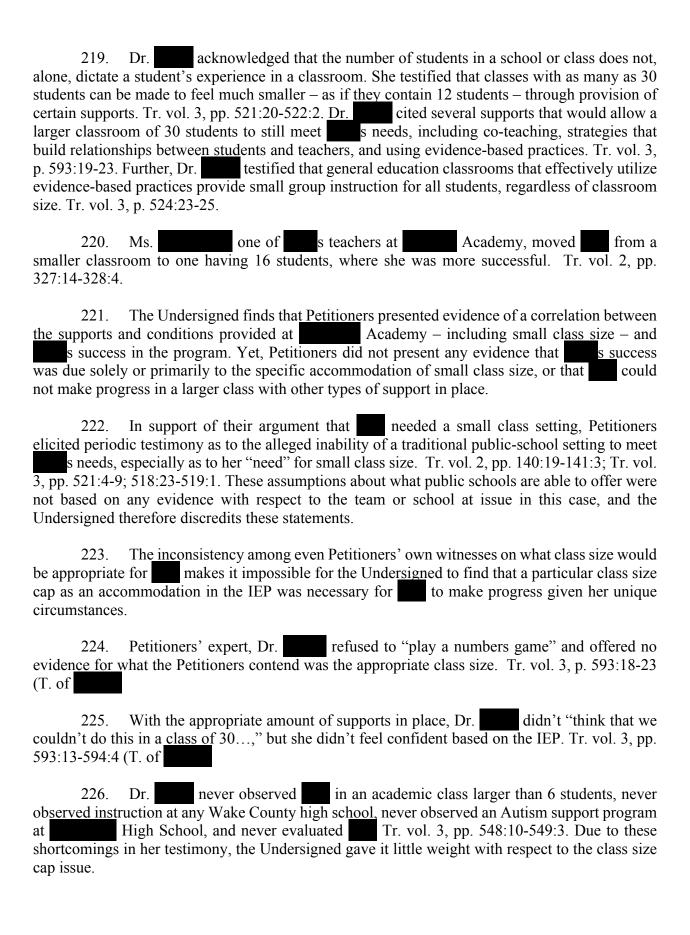
Stip. 65.

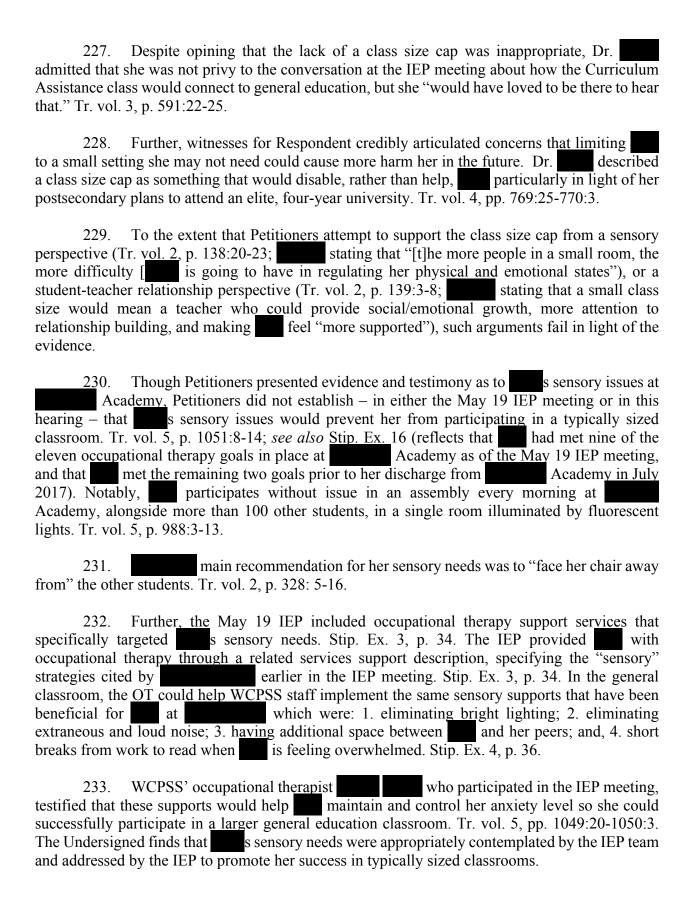
197. Writing also included the same accommodations, except for access to computer instead of "copy of teacher notes," and the addition of graphic organizers, as needed, to organize thoughts. Stip. 65.

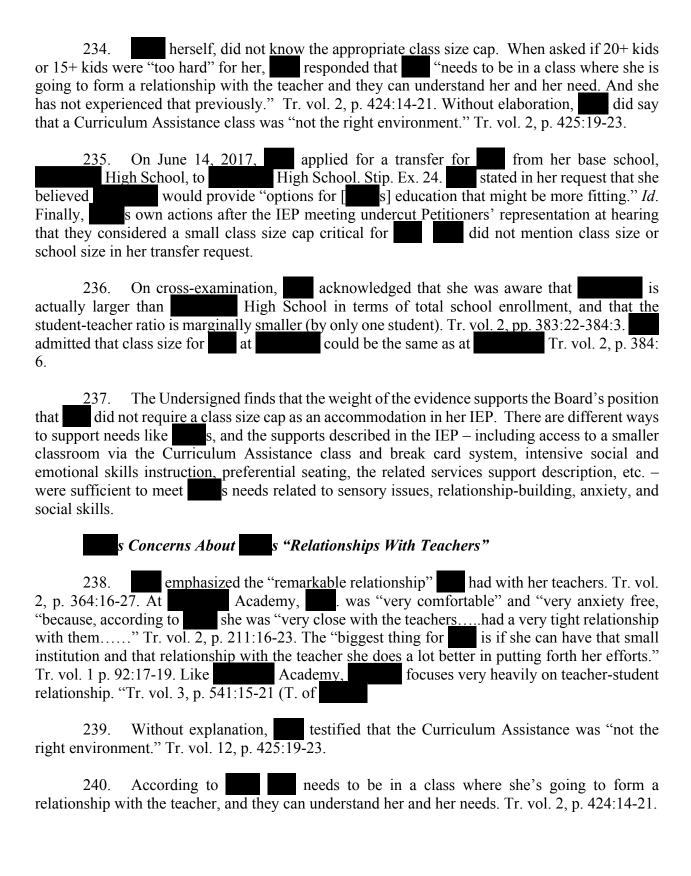


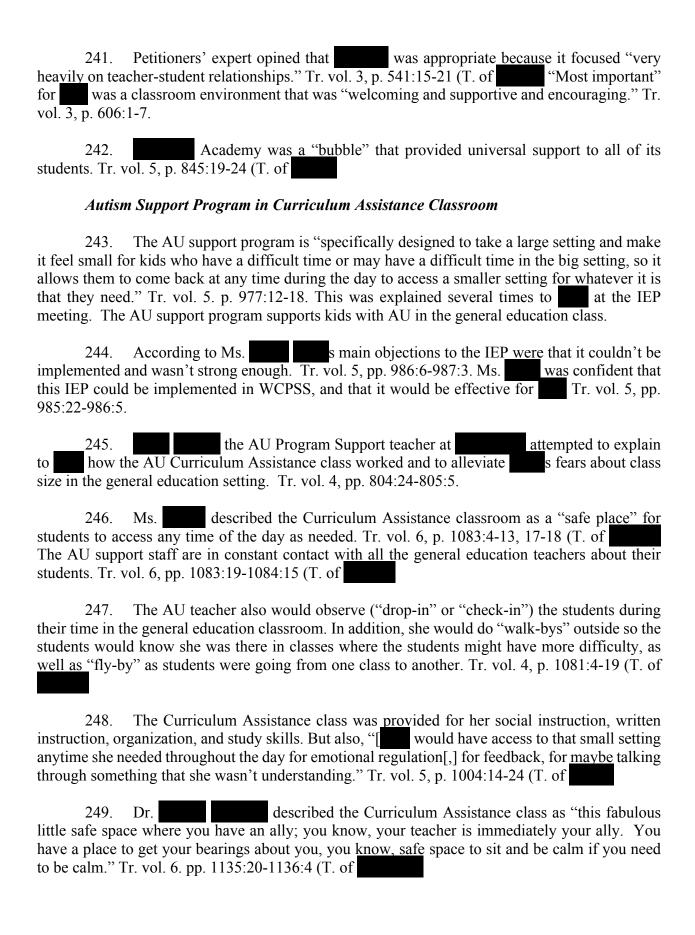


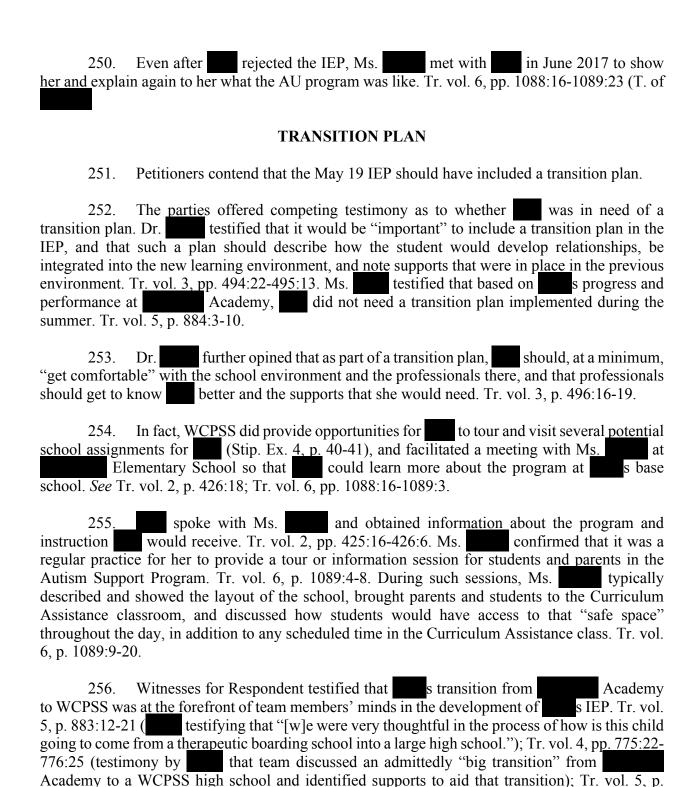
- 214. Petitioners' own witness, Dr. specifically testified that "she's not incapable of learning in a larger classroom environment." Tr. vol. 2, p. 288:1-2 (emphasis added). This is consistent with her 2016 Evaluation in which she wrote that "will likely respond optimally in a smaller classroom," not that she needed a small classroom. Stip. Ex. 14, p. 112 (emphasis added).
- 215. Nonetheless, the IEP Team factored the recommendation for small class size into their development of the IEP. WCPSS staff explained their proposal that would receive her specialized instruction in a smaller setting during her Curriculum Assistance class, among 12 or fewer students, and that she would have access to that small setting at any time during the day that she may need it via the break-card accommodation. Stip. Ex. 4, p. 40 (noting that Curriculum Assistance would provide smaller setting). Ms. explained the autism supports, and that "would have access to that autism support teacher at any time during the day in that classroom if she needed if she needed some time to emotionally regulate or she was becoming overwhelmed by some instruction that was going on and needed [] somebody to process through it with her." Tr. vol. 5, pp. 976:4-8, 17-22; 980:16-25.
- 216. The Autism Support Program at was proposing would receive her services is "specifically designed to take a large setting and make it feel small for kids who have a difficult time or may have a difficult time in the big setting," as it "allows them to come back any time during the day [to the C.A. classroom] to access a smaller setting for whatever it is that they need." Tr. vol. 5, p. 977:9-18. In addition, the team envisioned that the Curriculum Assistance setting would also benefit by helping her develop a strong relationship with a particular teacher, an issue that Petitioners repeatedly cited as crucial for success. Tr. vol. 1, p. 92:17-19.
- 217. At the hearing, Petitioners were unable to offer any consistent testimony about what the parameters of the requested small class size accommodation would be. that a class of more than 15 students would be too large for citing so need to form relationships with teachers who understand her needs and noting that had not experienced that in the past. Tr. vol. 3, p. 424:15-21. Admitted that she did not have any basis for choosing the number 15. Tr. vol. 3, p. 425:1-3. She then declined to specify a class size cap for noting that identifying a class that's "too big" would "depend[] on the class . . . every class is different." Tr. vol. 3, p. 425:4-7.
- Ms. testified that Academy staff had recommended Academy – with a "small classroom size, relationship based a similar environment to multimodal teaching" – because had proven successful at Academy. Tr. vol. 2, p. indicated that she interpreted the term "large classroom" size as consisting 137:20-23. Ms. of 12 students, because that was the largest classroom in which participated at Academy. Tr. vol. 2, p. 170:10-25. However, asked on cross-examination if a class with 13 students would be inappropriately large for Ms. responded: "I can't answer that question. There's a lot more factors besides just simply number of students – the peer culture, the abilities of the teachers. Thirteen, who knows?" Tr. vol. 2, p. 171:16-19.







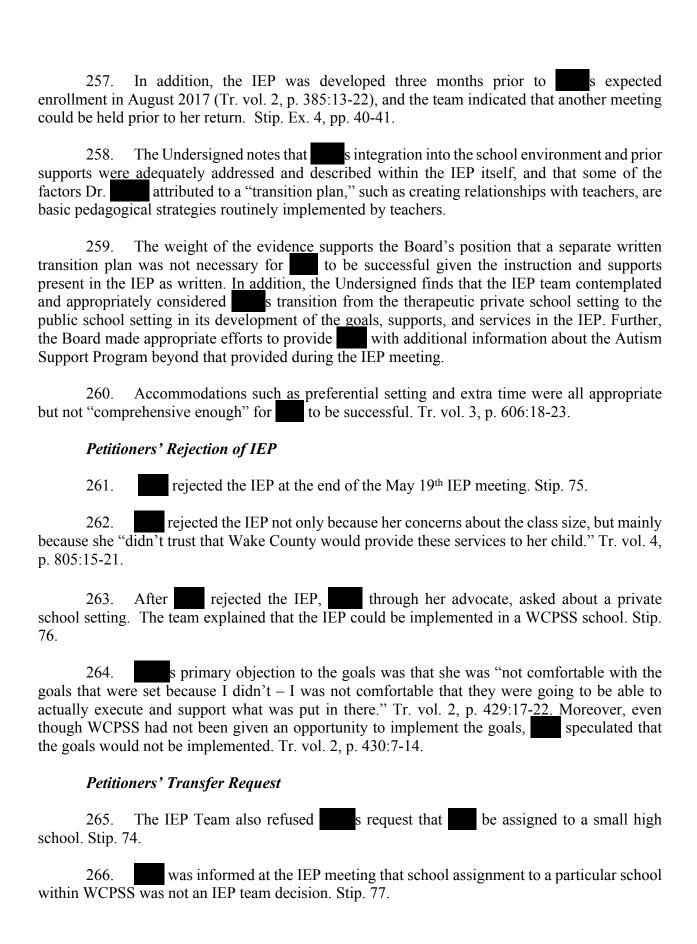


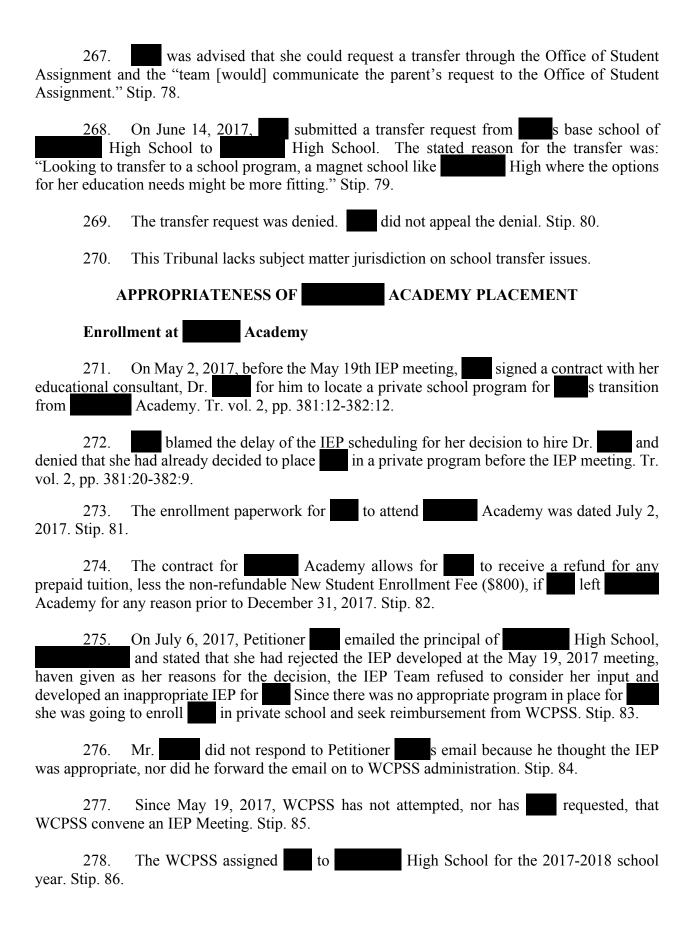


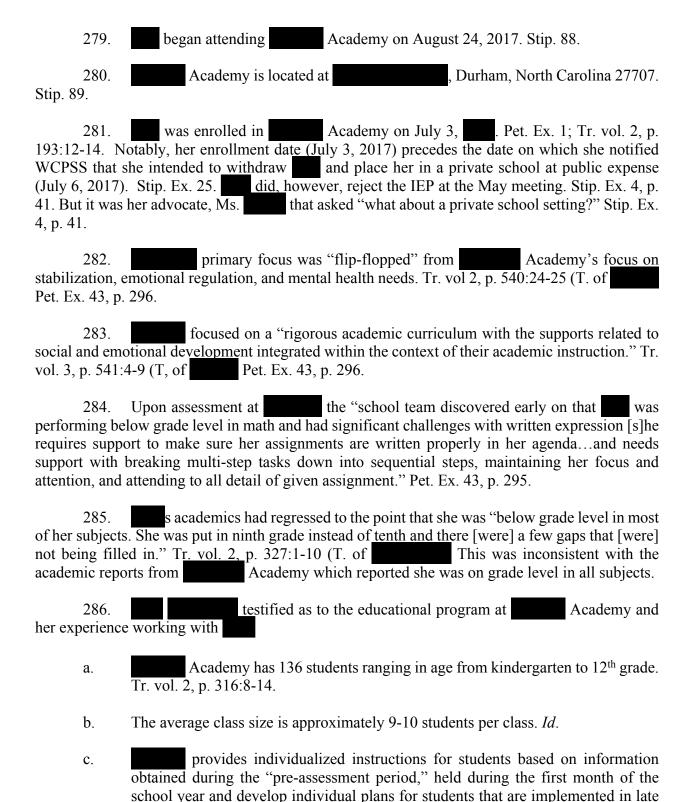
985:1-3 (testifying that "this was going to be a big transition...I think in a transition she needed more support than [services in a general education would provide]"). One specific

accommodation recommended by the team to support the transition – an escort during transitions among classes – was rejected by at the meeting. Tr. vol. 4, p. 776:10-23; Tr. vol. 5, p. 985:13-

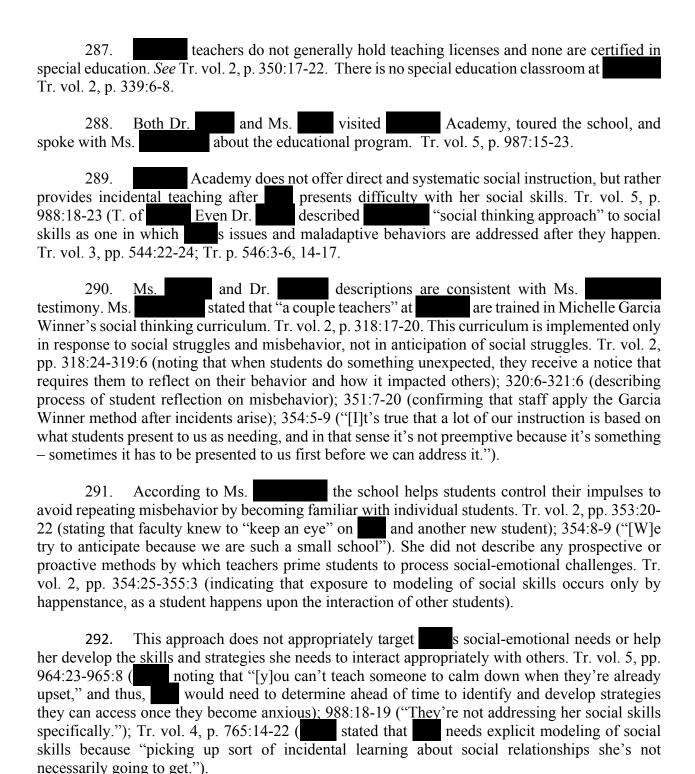
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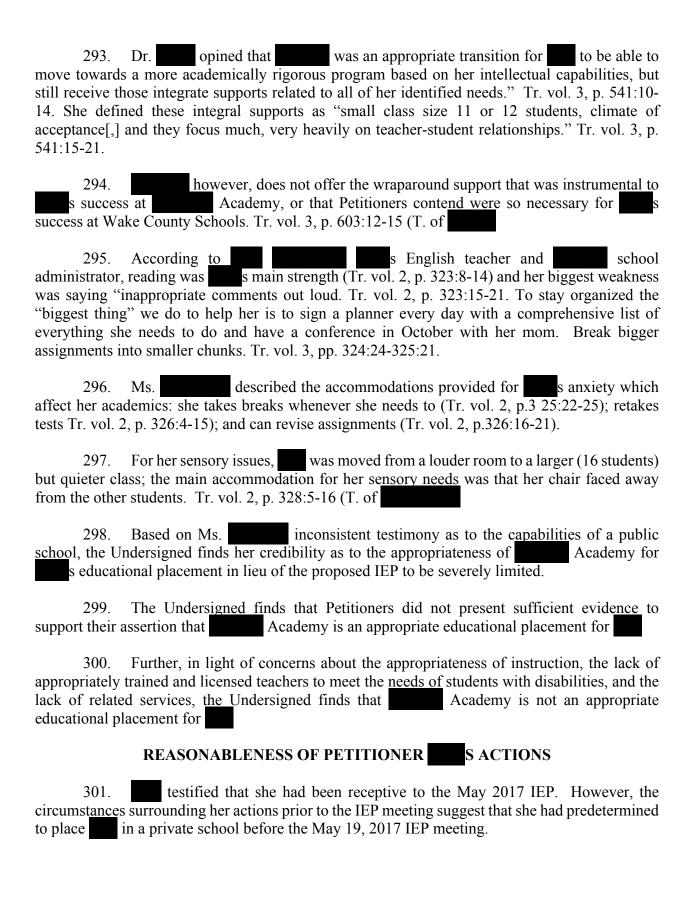


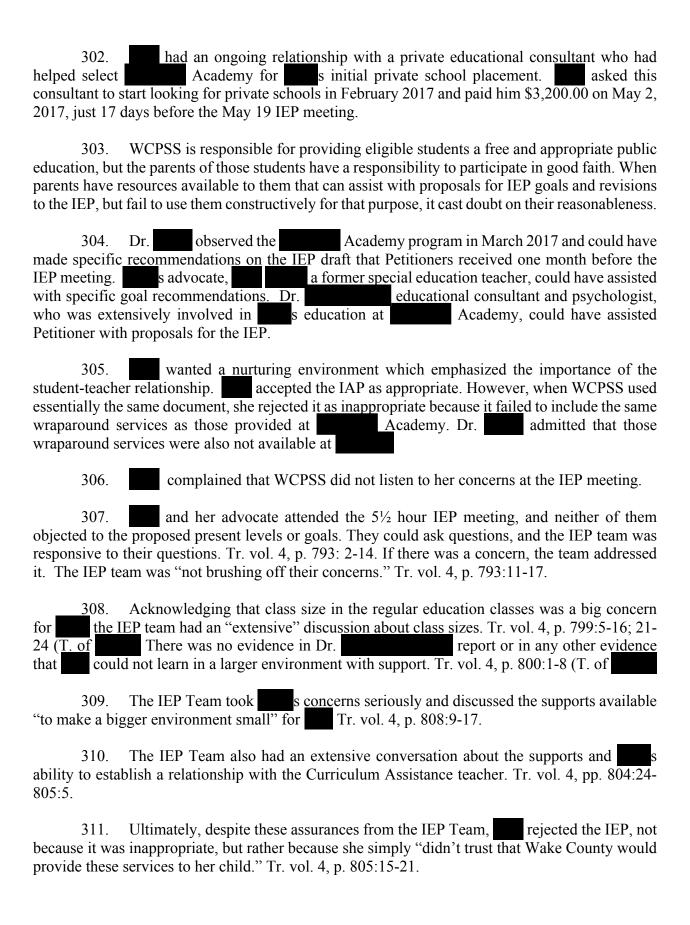




September/early October. Tr. vol. 2, pp. 316:17-318:14.







Based on the above findings of fact, relevant laws and legal precedent, the Undersigned concludes as follows:

CONCLUSIONS OF LAW

- 1. To the extent the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be considered without regard to their given labels
- 2. This Order incorporates and reaffirms the Conclusions of Law contained in the previous Orders entered in this litigation.

Jurisdictional and Legal Stipulations

- 3. The Petitioners, by and through her parent, and Respondent, Wake County Public School System Board of Education, are properly before this Tribunal, and this Tribunal has personal jurisdiction over them. Stip. 1.
- 4. As the party seeking relief, the burden of proof for this action lies with Petitioners. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Stip. 2.
- 5. 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.
- 6. The IDEA is the federal statute governing education of students with disabilities. The federal regulations promulgated under the IDEA are codified at 34 C.F.R. Part 300. Stip. 4.
- 7. The controlling state law for students with disabilities is N.C. Gen. Stat. Chapter 115C, Article 9. Stip. 6.
- 8. As the party requesting the hearing, the burden of proof lies with Petitioners and the standard of proof is by a preponderance of the evidence. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Actions of local boards of education are presumed to be correct; for Petitioners to prevail, their evidence must outweigh the evidence in favor of the Board's decisions. *See* N.C.G.S. 115C-44(b).
- 9. The Petitioners, as the party requesting the hearing, may not raise issues at the hearing that were not raised in the due process petition unless the other party agrees otherwise. 20 U.S.C. § 1415(f)(3)(B); NC 1504-1.12(d). Stip. 7.

- 10. A school district must offer every student with a disability the opportunity for a free appropriate public education ("FAPE") through an Individualized Education Plan ("IEP") that meets the requirements of the IDEA and state standards. 20 U.S.C. § 1412(a)(1)(A). 20 U.S.C. § 1401(9).
- 11. The appropriateness of a student's educational program is decided on a case-by-case basis, in light of the individualized consideration of the unique needs of the child. *See Hendrick Hudson Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).
- 12. "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." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

IEP Appropriateness

- 13. For a reviewing court, "the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Endrew F.*, 137 S.C. at 999. Thus, school districts are not charged with providing the best program, but only a program that is designed to provide the child with an opportunity for a free appropriate public education. *Bd. of Ed. of Hendrick Hudson Central School Dist., Weschester Cty. v. Rowley*, 458 U.S.176, 189-90 (1982).
- 14. An appropriate IEP must do the following: 1. indicate the student's current level of academic achievement and functional performance; 2. describe how the child's disability affects his involvement and progress in the general education curriculum; 3. state annual goals; 4. provide a method for progress monitoring; and 5. identify special education and related services for the student. *Endrew F.*, 137 S.Ct. at 994 (citing 20 U.S.C. § 1414(d)(1)(A)); *M.M. ex rel. D.M. v. Sch. District of Greenville Cnty.*, 303 F.3d 523, 527 (4th Cir. 2002).
- 15. Once a school has formulated a procedurally proper IEP, a reviewing court should be reluctant to second-guess the judgment of educational professionals, and neither parents nor courts have a right to compel a school district to employ a specific methodology in educating a student. *See Rowley*, 458 U.S. at 206-08.
- 16. Instead," courts should defer to educators' determination of IEP appropriateness. *Tice v. Botecourt Cnty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990) (quoting *Rowley*, 458 U.S. at 201).

Present Levels of Academic and Functional Performance

17. Present levels should include "a statement of the child's present levels of academic achievement and functional performance, including…how the child's disability affects the child's involvement in the general education curriculum." 20 U.S.C. § 1414(d)(1)(a).

- 18. Courts have repeatedly held that, where the remainder of the IEP is appropriate to address a student's identified needs, the lack of sufficient detail in a present level is harmless and does not rise to the level of a denial of FAPE. *O'Toole v. Olathe Dist. Schools Unified Sch. Dist. No 233*, 144 F.2d 692, 703-04 (10th Cir. 1998) (finding that inadequate present levels constituted harmless procedural error, largely because "there is no doubt that [student's] parents and her teachers were fully aware of [student's] present levels of educational performance and discussed them in detail in formulating her IEPs"); *G.S. v. New York City Dep't of Educ.*, No. 15-CV-5187 (RA), 2016 WL 5107039, at *7 (S.D.N.Y. Sept. 19, 2016) (inadequate present levels deemed harmless given "fulsome discussion of [the student's] capabilities" during the IEP meeting and because the shortcomings "neither (1) altered the development of the IEP; nor (2) would affect its future implementation.").
- 19. The IDEA does not include a specific requirement for "baseline data." *Lathrop R-II Sch. Dist. v. Gray* 611 F.3d 419, 424–25 (8th Cir. 2010) (overturning district court's conclusion "that IEPs must incorporate 'baseline data' to establish a starting point for each objective," noting that the plaintiff had not "cited any case in which any court has read such an implied requirement into the law."); *see also, Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 612 (6th Cir.2006) (rejecting argument that student was harmed by IEP's lack of "a baseline to measure [his] future progress" where its short term objectives were "capable of measurement" and the student's test results demonstrated that he received educational benefit).

Sufficiency of IEP Goals

- 20. With respect to IEP goals, the IDEA requires that the IEP include:
 - (II) a statement of measurable annual goals, including academic and functional goals, designed to—
 - (aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
 - (bb) meet each of the child's other educational needs that result from the child's disability.

20 U.S.C. § 1414(d)(1)(a).

21. "The goals must be realistic and attainable, yet more than trivial and de minimis." *Bd. of Educ. of Cty. of Kanawha v. Michael M.*, 95 F. Supp. 2d 600, 610 (S.D.W.Va. 2000).

Class Size as an IEP Accommodation

22. A parent or private provider's recommendation that a small class size may help a student with a disability does not render that accommodation necessary for a FAPE. *See Munir v. Pottsville Area Sch. Dist.*, 723 F.3d 423, 434 (3d Cir. 2013) (holding smaller class size was not necessary to ensure student received meaningful educational benefit simply because smaller

classes might have helped student learn more easily); *Dirocco ex re. M.D. v. Board of Educ. of Beacon City School Dist.*, 2013 WL 25959, (S.D.N.Y. Jan. 2, 2013) ("That the size of the integrated classes in which [M.D.] was offered a placement was larger than his parents [and privately hired expert] desired does not mean that the placement was not reasonably calculated to provide educational benefits.") (*quoting M.V. ex re. S.W. v. N.Y.C. Dep't of Educ.*, 869 F.Supp.2d 320, 335) (E.D.N.Y. 2012)).

- 23. To prove that a student requires the accommodation of small class size, a plaintiff must show more than a vague recommendation for small class and low student-teacher ratio. See J.C. v. Katonah-Lewisboro School Dist., 690 Fed.Appx. 53, 54-44 (2d Cir. 2017) (affirming district court's determination that student needed small class as accommodation, based on neurospychologist's specific teacher-ratio recommendation and testimony by another neuropsychologist that a classroom larger than twelve students would be too overwhelming for student to learn); Tamalpais Union High School District v. D.W., 271 F.Supp.3d 1152, 1170 (N.D. Cal. 2017) (rejecting parents' claim that student required classroom with low student-teacher ratio and holding that witness testimony that smaller classes helped student access teacher support did not establish that certain student-teacher ratio was the only method of providing increased teacher support for student). Gellert v. District of Columbia Public Schools, 453 F.Supp.2d 18, 25-26 (D.D.C. 2006) (relying heavily on uncontested expert testimony by treating psychologist who observed student in larger classroom settings and testified to student's significant sensory integration issues, struggle to tune out extraneous noises, difficulty transitioning, and resulting need – not preference – for a class of ten or fewer students) (emphasis added).
- 24. Further, evidence of program accommodations and modifications that affect the alleged impact of a specific classroom size may render a plaintiff's concerns about classroom size moot. *See Cabouli v. Chappaqua Cent. School Dist.*, 202 Fed. Appx. 519, 522 (2d Cir. 2006) (school staff testimony about resources and accommodations offered by school program "specifically minimized plaintiff's concerns about class size and student-teacher ratio").

Transition Plan

- 25. A "transition plan" is not required in an IEP, except in the specific circumstances related to a student's preparations for post-secondary life. 34 CFR 300.320 states:
 - (b) Transition services. Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include—
 - (1) **Appropriate measurable postsecondary goals** based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
 - (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

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34 CFR 300.320 (emphasis added).

- 26. The regulations further define transition services:
- (a) Transition services means a coordinated set of activities for a child with a disability that—
 - (1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability **to facilitate the child's movement from school to post-school activities,** including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

 $[\ldots]$

34 CFR 300.43 (emphasis added).

- 27. "The IDEA only requires a 'transition plan' for an impending transition from school to post-school (i.e., adult) activities, not for transfers between schools." *Robert B. ex rel. Bruce B. v. W. Chester Area Sch. Dist.*, No. CIV.A. 04-CV-2069, 2005 WL 2396968, at *8 (E.D. Pa. Sept. 27, 2005) (*citing* 34 C.F.R. § 300.29(a)(1)).
- 28. "[T]here is no requirement in the IDEA for a 'transition plan' when a student moves from one school to another." *E. Z.-L. ex rel. R.L. v. New York City Dep't of Educ.*, 763 F. Supp. 2d 584, 598 (S.D.N.Y. 2011), *aff'd sub nom., R.E. v. New York City Dep't of Educ.*, 694 F.3d 167 (2d Cir. 2012). *See also B.B. ex rel. J.B. v. Hawaii, Dep't of Educ.*, 483 F. Supp. 2d 1042, 1056 (D. Haw. 2006) ("This Court has previously held that while the IDEA requires an IEP to have a statement of needed transition services in some circumstances, the statutory provision of the IDEA specifically addressing transition services does not mandate such services when a transition from private to public school takes place.").
- 29. Even when a student's unique needs suggest that a transition plan should be provided, reviewing tribunals and courts have been reluctant to find a substantive denial of FAPE on that basis. *See Lee's Summit R-VII School District*, 110 LRP 9423 (Mo. SEA 2010) ("While a plan is technically not mandated under IDEA in these circumstances, we recognize a formal transition plan would have provided a great deal of comfort for the Parents Our job, however, is not to write into IDEA what might be beneficial that determination is for legislators[.]"); *In re: Student with a Disability*, 110 LRP 49313 (NY SEA 2010) (noting that "although transition services were not identified on the student's IEP, the hearing record shows that the proposed school would have been responsive in addressing any transition needs related to the student's enrollment at the public school").

30. A parent's decision to decline an offered IEP and enroll a child in private school without providing the school system an opportunity to implement its proposed IEP may render the lack of a transition plan moot. *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762, 766 (8th Cir. 2011).

Predetermination of Placement

- 31. The IDEA requires that parents have meaningful participation in the development of their child's IEP. Meaningful participation occurs where a parent has the opportunity to ask questions, express their opinions, and explain disagreement with components of the IEP. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017) (during the IEP process, parents and staff should have the opportunity to "fully air their respective opinions."); *N.L. ex rel. Mrs. C. v. Knox County Schools*, 315 F.3d 688, 695 (rejecting predetermination claim where student's mother did not participate in pre-meeting among educational experts but had "opportunity to ask questions and voice disagreements at the formal IEP Team meeting").
- 32. An IEP team's decision not to adopt a parent's particular recommendation does not amount to predetermination.

 v. Clifton Bd. of Educ., 587 Fed. Appx. 17, *21 (3rd Cir. Oct. 8, 2014) (unpublished) ([A]lthough the plaintiffs posit that the [school officials] might have been more receptive to their concerns about the District's autism program if those concerns had been supported by the [a District consultant's report], the fact that the District's proposed IEP did not adopt plaintiffs' suggestions does not mean that they were deprived of meaningful participation in the decision-making process regarding [the student].").
- 33. "[S]chool officials must come to the IEP table with an open mind. But this does not mean they should come with a blank mind." *Doyle v. Arlington Cnty. Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D.Va. 1992), *aff'd* 39 F.3d 1176 (4th Cir. 1994).
- 34. Preparation for an IEP meeting does not constitute predetermination. "[S]chool evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions." *M.C.E. v. Bd. of Ed. of Frederick Cnty.*, No. CIV.A. RDB-09-3365, 2011 WL 2709196, at *9 (D. Md. 2011) (unpublished) (quoting *Nack v. Orange City Sch. Dist.*, 454 F.3d 604 (6th Cir. 2006)).
- 35. Schools should give thought to development of a student's IEP prior to the IEP meeting. "[W]hile a school system must not finalize its placement decision before an IEP meeting, it can, and should, have given some thought to that placement." *Doyle*, 806 F.Supp. at 1262.

Professional Judgment and Deference to Educators

36. The professional judgment of teachers and other school staff is a critical 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 v. Loudoun Cnty. Bd. of Ed.*, 118 F.3d 996, 1001. *See also Rowley*, 458 U.S. at 207 (stating that "courts must be careful to avoid imposing their view of preferable educational methods upon the States"). The "IDEA requires great

deference to the views of the school system rather than those of even the most well-meaning parents." *Lawson*, 354 F.3d at 328.

- 37. As long as educators "offer a cogent and responsive explanation" for their decisions at some point during the administrative process, deference is due to their professional judgment. *See Endrew F.*, 137 S. Ct. at 1002.
- 38. In the North Carolina Office of Administrative Hearings, the administrative law judge must decide the case based upon the preponderance of the evidence, giving due regard to the "demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." N.C.G.S. § 150B-34(a).

Appropriateness of Private School Placement

- 39. Petitioners are entitled to reimbursement for their private program only if they are able to show both that the public school system's program denied a FAPE, and that the private program they chose was appropriate. School Co. of the Town of Burlington, Mass. v. Dep't of Educ. of the Commonwealth of Mass., 471 U.S. 359, 370 (1985).
- 40. Although a private school's program is not scrutinized under the statutory requirements of FAPE, parents seeking reimbursement still must show that the private program provided an education otherwise proper under the IDEA. *Florence Cty. Sch. Dist. Four v. Carter by and through Carter*, 510 U.S. 7, 12-13 (1993). A private program is proper under the IDEA where it is "reasonably calculated to enable the child to receive educational benefits." *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F. 3d 315, 324 (4th Cir. 2009).
- 41. Several factors bear on a court's determination as to appropriateness of a private placement under the IDEA, including whether the private program provides the special education services needed by the student, and whether the student progressed behaviorally and/or educationally in the private program. *Berger v. Medina City Sch. Dist.*, 348 F.3d 512, 523 (6th Cir. 2003) (private placement where student enjoyed smaller class size and higher grades deemed inappropriate because none of the special education services needed were provided); *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 488 (4th Cir. 2011) (private placement deemed appropriate under IDEA where autistic student progressed educationally and behaviorally, was learning more, and was no longer engaging in problematic self-stimulating behaviors that occurred in public school).
- 42. Further, reviewing courts must also consider the qualifications of teachers at the private placement and pedagogical methods. *W.C. ex rel. Sue C. v. Cobb Cty. School Dist.*, 407 F.Supp.2d 1351, 1363 (N.D.Ga. 2005) (private placement found inappropriate where student's teachers lacked certification and education methods were untested, unvalidated, and contrary to the program at the student's home, state-funded school).

43. "[P]rogress does not itself demonstrate that a private placement was appropriate. Indeed, even where there is evidence of success, courts should not disturb a state's denial of IDEA reimbursement where, as here, the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not. A unilateral private placement is only appropriate if it provides education instruction specifically designed to meet the unique needs of a handicapped child." *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 115 (2d Cir. 2007) (quotations marks and citations omitted) (emphasis added); *see also W.C. ex. rel Sue C.*, 407 F. Supp. 2d at 1363 ("Whatever behavioral or educational progress a parent may feel her child is achieving at a private placement, however, is not enough to justify requiring the state to reimburse his tuition.").

Reasonableness of Parent's Actions

44. The IDEA provides various scenarios where a reimbursement claim may be reduced or denied. 34 C.F.R. § 300.148(d). First, "[a]t the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense." 34 C.F.R. § 300.148(d)(1)(i). Second, "[a]t least ten (10) business days . . . prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph d(1)(i) of this section." 34 C.F.R. § 300.148(d)(1)(ii). Third, where, "prior to the parents' removal of the child from the public school, the public agency informed the parents . . . of its intent to evaluate the child . . . , but the parents did not make the child available for the evaluation." 34 C.F.R. § 300.148(d)(2). Finally, a reimbursement claim may be reduced or denied "[u]pon a judicial finding of unreasonableness with respect to actions taken by the parents." 34 C.F.R. § 300.148(d)(3).

ISSUES FOR DECISION

Issue 1: Whether the May 19, 2017 IEP was substantively appropriate for based on the present levels of academic and functional performance, the functional and academic goals, exclusion of the accommodation of a cap on the number of students in the regular education classes, the service delivery in the IEP, and the exclusion of a transition plan to support stransition from a private therapeutic boarding school to a public high school.

IEP Present Levels and Goals Were Appropriate

45. Based on Findings 1-150, Conclusions 10-19, 36-38, and other evidence in the record, the present levels of performance in the proposed May 2017 IEP were appropriate. While they certainly could have included additional information, they included the statutorily required information, and there was sufficient information to allow for the writing of appropriate IEP goals. The team was entitled to rely on information from the residential placement in which had been served for the prior fourteen months. Further, there was ample opportunity for revision to

the present levels, and neither the parent, her advocate, nor the representative from the residential placement proposed changes or offered additional information.

- 46. In addition, and in the alternative, any deficiencies in the present level were harmless in light of the appropriateness of the remainder of the IEP, the knowledge of the team that developed the IEP, and the parent's participation in the development of the IEP.
- 47. Based on Findings 1-159, Conclusions 10-21, 36-38, and other evidence in the record, the goals in the proposed May 2017 IEP were appropriate. There is no question that social skills, emotional regulation, and organizational skills are sprimary deficits. The goals targeted identified areas of need that witnesses for both parties described, and did so in a measurable way that was reasonably calculated to allow to make progress in light of her circumstances.

Class Size Cap Was Not a Required Accommodation

48. Based on Findings 1-148, 196-237, Conclusions 22-24, 36-38, and other evidence in the record, the team's refusal of a class size cap as an accommodation in the IEP was appropriate. There was insufficient evidence to show that could not make progress in the general education curriculum without a class size cap, and Petitioners did not offer any consistent evidence of what such a cap might be. Further, the IEP team carefully considered as and Academy's input regarding smaller classes and proposed instruction, accommodations, and a service delivery model that addressed as underlying needs without the need for a class size cap. There is more than one way to address needs like those exhibited by and the school staff's decision, in light of cogent and responsive explanations thereof, is entitled to deference.

Service Delivery Was Appropriate

49. Based on Findings 1-148, 160-179, Conclusions 11-24, 36-37, and other evidence in the record, the proposed service delivery in the May 2017 IEP was appropriate in both amount and location. The proposed times of service delivery were uncontested and are facially reasonable in light of the evidence. Locating those services in the special education classroom was reasonable in light of the significance of services in the special education classroom was reasonable in light of the significance of services in the special education classroom was reasonable in light of the significance of services in the special education and organizational skills, her resistance to supports that made her stick out among her peers as, for example, embedded intensive social skills instruction would, and the importance of providing a safe space and trusted adult which she could access at need. Particularly, in light of services return from an extremely restrictive placement, the provision of some specialized instruction in a pull-out setting in order to maximize the time she could successfully participate in the general education classroom was appropriate.

A Transition Plan Was Not Legally Required

50. Based on Conclusions 25-30, 36-38, there is no legal requirement for a transition plan for a student of sage. Based on Findings 1-148, 251-260, and other evidence in the record, even if such a legal requirement could be implied, the services and supports described in the IEP were sufficient such that a formal transition plan was not required for

51. In addition and in the alternative, in light of the amount of time between the development of the IEP and spossible return to WCPSS, there was ample opportunity for the team to discuss any necessary transition supports, and thus, the lack of a transition plan, even if required, must be considered harmless.
The May 2017 IEP Provided a FAPE
52. Based on the above Findings and Conclusions and other evidence in the record, the Undersigned concludes that the proposed IEP was reasonably calculated to support making appropriate progress in light of her circumstances, and therefore offered her a free and appropriate public education. Petitioners have failed to meet their evidentiary burden to show otherwise.
Issue 2: Whether Respondent violated the procedural requirement of the IDEA by predetermining splacement in the resource setting.
Placement Was Not Predetermined
53. Based on Findings 1-148, 160-195, Conclusions 31-38, and other evidence in the record, Petitioners did not establish by a preponderance of the evidence that the resource setting was predetermined.
54. Moreover, based on the above-referenced Findings of Fact, the weight of the evidence supports the Board's position that was afforded a myriad of opportunities to provide input and feedback on every aspect of setting.
55. With respect to predetermination, the central issue is whether the team was willing to consider other proposals. In the absence of such proposals being made prior to or during the IEP meeting, an IEP team has no opportunity to show its willingness to consider other proposals, and cannot be faulted for adopting the proposal it initially brought to the table.
Issue 3: If Respondent denied a free and appropriate public education, whether the unilateral private placement selected by the parent, Academy, was appropriate and the equities favored private tuition and transportation reimbursement to Petitioners.
56. Because the Undersigned concludes that the Board did not deny decision on this issue is not required.

57. Nonetheless, to the extent conclusions on this issue may be necessary to support review of the final decision, the Undersigned will make certain provisional conclusions on this

issue.

Private School Program Was Not Appropriate

58. Based on Findings 1-148, 271-300, Conclusions 36-43, and other evidence in the record, the program at Academy did not support all of sidentified needs. had substantial identified deficits in social/emotional skills and organizational skills, and offered no intentional, structured plan or program to support those needs, and lacked appropriately trained and licensed staff to comprehensively address those needs. Nor did Petitioners provide evidence of progress in these areas of needs during stime at
59. Based on the above Conclusions of Law and related Findings of Fact, Petitioners have not met their burden of establishing that Academy is an appropriate placement for
Reasonableness of Parent's Actions
60. The Undersigned questions the sufficiency of the Petitioner's notice at the IEP meeting that she intended to place in a private program and seek reimbursement. Although Petitioner rejected the IEP at the May 2017 IEP Meeting, it was her advocate who raised the question about private schools. Petitioner enrolled in before providing written notification to the Principal of High School of Petitioners' intent to seek tuition reimbursement from the WCPSS.
61. Even if the parent's 10-day notice was sufficient, Petitioner appeared to have predetermined placement in a private program before the May 19, 2017 IEP meeting.
62. In February 2017, Petitioner instructed her educational consultant to begin researching private schools for stransitional placement.
63. Petitioners are not ultimately responsible for developing an appropriate IEP. The IEP Team and parent(s) are supposed to be equal participants in the development of the IEP.
complained that she was not afforded that opportunity, but sactions indicate she did not intend to sincerely participate, and instead seemed to have predetermined herself that would transition to another private school placement.
65. In this case, had an expert witness, independent evaluator, educational consultant/psychologist, and former special education teacher, as well as other resources at Academy available to assist with the development of present levels and goals. With these resources at hand, and the draft IEP available a month in advance of the IEP meeting, its seems disingenuous for the Petitioners to claim that was treated as an equal participant.
66. Based on Findings of Fact 210-270, 301-311 and Conclusion of Law 44, had Petitioners prevailed in their case, the Undersigned would have been inclined to reduce private

tuition reimbursement. 34 C.F.R. § 300.148(d)(3).

Other Issues

67. To the extent that this Order does not expressly rule on any other claims raised in the Petition, in the Rule 41(b) Order, or this Final Decision, the Undersigned concludes that Petitioners did not meet their evidentiary burden to establish any right to relief on those claims.

FINAL DECISION

- 1. Petitioners had the burden of proof on all issues pending in this matter.
- 2. Petitioners failed to meet their burden to prove that Respondent failed to offer a free appropriate public education through the May 19, 2017 IEP.
- 3. Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that all of Petitioners' claims are **DISMISSED WITH PREJUDICE.**

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, time lines, 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 31st day of July, 2018.

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:

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This the 31st day of July, 2018.

R Buck

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