STATE OF NORTH CAROLINA IN THE OFFICE OF

ADMINISTRATIVE HEARINGS

COUNTY OF WAKE 21 EDC 05429

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| Student together with her Parent,  Petitioners,  v.  Wake County Board of Education,  Respondent. | **FINAL DECISION** |

**THIS MATTER** was heard before the undersigned Administrative Law Judge Stacey B. Bawtinhimer presiding, on the following dates: August 10-12, 15-19, and 22, 2022 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 all 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 Board of Education violated the IDEA and its implementing regulations, thus significantly impeding Student’s parents’ right to participate in the decisionmaking process regarding the provision of a free appropriate public education to Student, denying Student a free appropriate public education, failing to meet its Child Find obligation to Student, and judgment is ordered, in part, for Petitioners.

**APPEARANCES**

For Petitioners: Stacey M. Gahagan

K. Alice Morrison

Gahagan Paradis, P.L.L.C.

3326 Durham Chapel Hill Boulevard, Suite 210-C

Durham, North Carolina 27707

For Respondent: Sarah M. Saint

James C. Adams, II

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP

230 Elm Street, Suite 1900

Greensboro, North Carolina 27401

**Appearances of Parties’ Representatives**

For Petitioners: Student[[1]](#footnote-2) attended the hearing in-person during Dr. Collett (T vol 1) and Ms. Ragsdale’s (T vol 2) testimony and up to cross examination of her mother’s testimony (T vol 3).

Parent attended the entire hearing

For Respondent: Jill McKenna, LEA Representative

Candance Witherspoon (via Webex August 10 and 11, 2022, remainder in-person)

**WITNESSES**

**Witnesses- Live Testimony**

For Petitioners: Dr. Debra Leach, Ed.D. and BCBA, Expert Witness

Dr. Tess Collett, PhD, Clinical Psychologist and Student’s Evaluating Psychologist, (via WebEx)

Parent, Petitioner and Mother of Student

Kristi Ragsdale, Founder of Private Academy (via WebEx)

For Respondent: Kada Unwin, Student’s Therapist (via Webex)(called out of order)

Math Teacher, Student’s Pre-Calculus Honors Teacher

Physics Teacher, Student’s Physics Honors Teacher

Geography Teacher, Student’s AP Human Geography Teacher

History Teacher, Student’s Honors American History I Teacher

SpEd Teacher, Special Education Teacher at Middle School (currently Assistant Principal at Middle School)

Counselor, Student’s School Counselor

Audrey “Sue” Gamm, Respondent’s Expert Witness (via WebEx)

**Witnesses- Deposition Testimony**

For Petitioners: Student (entire deposition)

Noah Zind, Wilderness Program Director, and Representative (excerpts only)

Sydney Haga, Master’s in Clinical and Mental Health Counseling (excerpts only)

Krista Robbins, Master’s in Community Mental Health (excerpts only)

For Respondent: Student (entire deposition)

Noah Zind, (excerpts only)

Krista Robbins, (excerpts only)

Sydney Haga, (excerpts only)

**Rebuttal Witnesses**

For Petitioners: Debra Leach, Ed.D. and BCBA, Expert Witness

Parent, Petitioner and Mother

**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 (“Stip. Ex.”)**: The Tribunal admitted into evidence Stipulated Exhibits numbers 1-5, 7-9, 10[[2]](#footnote-3), 11, 15, 19-22, 33[[3]](#footnote-4), 34-35, 37-40, 42, 47, 49, 50, 52-55, 57-63, 66-71, 73-76, 78, 79, 81-87, 89-95, 97-106, 108, 110-112, 114, 116[[4]](#footnote-5), 118, 119, 122, 124-127, 129-131, 133-136, 138-145, 146[[5]](#footnote-6), 147-150, 152, 153, 156-163, 165-181, 185-189, 191, 192, 196, 197, 198 (redacted), 199-201, 204, 208, 209, 212-216, 218, 219, 221, 223-225, 228 (# 606-7; 608-10; 624-26; 658-9; 679-712) 229-232, 234, 235, 239, 240, 243, 252, 254, 255, 260, 271-277, 279-286, 289, 290, 294 (#1576-77). 295, 297, 301-302, 306 (# 1638-1655, 1662-1673), 307 (# 1729-1733; 1737-1745, 1753-1760, 1765-1768; 1770-1777), 308 (#1804-1808, 1811-1813, 1816, 1817, 1847, 1856), 310, 312[[6]](#footnote-7), 313-316, 323, 329, and 330-334.

Stipulated Exhibit 198 in its unredacted form was received only as an Offer of Proof for Respondent.

The Tribunal admitted Stipulated Exhibits 327 and 328 for the limited purposes of Respondent’s challenges to Petitioner Parent’s credibility and the standing of Petitioners.

**Officially Noticed Exhibits[[7]](#footnote-8) (“Off. Not. Ex.”):** A, B, and C.

**Petitioners’ Hearing Exhibits (“Pet’s Ex.”)**: Petitioners’ Exhibits numbered 1, 2, 11, 15, 17, 18 (# 185, 187, 188) 19 (#190-197), 20, 22, 38, and 39 were submitted as evidence in support of Petitioners’ case-in-chief.

**Respondent’s Hearing Exhibits** **(“Resp’t Ex.”)**: Respondent’s Exhibits numbered 3 (redacted), 50, 79, 104[[8]](#footnote-9), 116, 144, 145, 150, 156, 159, 160 (redacted), 164-66, 168, 169, 175, 181[[9]](#footnote-10), 183, 187, 188, 196, 198, 204, 212, 220, 224, 232, 247, 250, 251, 256 (#872, 873, 875), 257, 271, 292 (#1054-56, 1060-63, 1069-71, 1081, 1086, 1097-99), 293, 296, 297, 320 (redacted), 340-341 [342[[10]](#footnote-11)], 42, 390, 394, 406, 424, 446, 471, 481 (redacted), and 485 were received into evidence.

Respondent’s Exhibits 202 (#619-622, redacted) and 252 (redacted) were received in evidence for purposes of corroboration of oral testimony. Respondent’s Exhibit 323 and 484 were received as part of Offers of Proof only.

**Admitted Deposition Exhibits** **(“Dep. Ex.”)**: 1, 2, 45, 99, 116-119, 121-125, 129-130, 132-133, 135, 139, 142, 145, 146, 148 (Dr. Little’s hearsay not admitted), 151-154, 155 (Dr. Little Hearsay not admitted), 157, 161-163, and 166-169.

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

As Respondent’s witness the Marketing Teacher’s testimony was stricken from the record due to her perjury, the exhibits admitted during her testimony are no longer part of the record. Thus, Respondent’s Exhibits 181 and 236 and Stipulated Exhibits 116 and 146 were also stricken from the record. Stipulated Exhibit 116 was later readmitted by Stipulation of the Parties entered on January 12, 2023.

**Other Documents and Offers of Proof**

Transcript volumes 1 through 9 were received and have been retained in the official record of this case and cited as T vol \_\_\_, p \_\_\_:[line].

The Parties also agreed to enter the entirety of Student’s deposition transcript into the record of this case. Further, portions of the deposition testimonies of Noah Zind, Krista Robbins, and Sydney Haga along with referenced exhibits were admitted. These transcripts are cited as T of [name], p \_\_\_:[line].

**Note:** The Parties submitted Written Objections to the opposing Parties’ deposition excerpts on 09/19/22 (Pet’s Original); 09/20/22 (Resp’t Original); 09/26/22 (Pet’s Amended); 09/26/22 (Resp’t 1st Amended), and 10/03/22 (Resp’t 2nd Amended). The Orders on Deposition Objection which made written ruling on these objections were entered on September 23, 2022 and October 10, 2022.

The testimony of Marketing Teacher, recorded in Transcript volume 8, pp. 2125-2206, was stricken from the record due to her perjury.

In addition, the Transcripts reference Appendixes A: T vol 7 pp 1863-1878 (re: Stip. Ex. 198); B: T vol 8 pp 2106-2111(re: Resp’t Ex. 484); and C: T vol 9 pp 2398-2425 (re: Resp’t Ex. 484), which were attached to transcripts volumes 7, 8, and 9 as Offers of Proof. These Appendixes and references to exhibits were not considered in this Final Decision but are included in the record for appeal purposes.

**ISSUES**

The Parties identified the issues for hearing as follows:

1. **Issues Concerning “Jurisdictional and Affirmative Defenses”**

a. Whether this Tribunal has subject matter jurisdiction over this contested case?

1. Whether Parent has standing as a Petitioner?
2. Whether either Student or Parent has standing to file an Amended Petition?
3. Whether there is any subject matter jurisdiction over the original or Amended Petition?
4. Whether the one-year statute of limitations bars any of Petitioners’ claims?
5. **Procedural violations**
   * + - 1. “***Child Find Violation Issue”***
6. Whether Respondent had reason to suspect Student was a student with a disability in need of specially designed instruction?
7. Whether Respondent was required to conduct an IDEA Referral Meeting; and, if so, whether Respondent conducted an IDEA Referral Meeting?
8. Whether Respondent was required to evaluate Student in all suspected areas of disabilities under the IDEA; and, if so whether Respondent evaluated Student in all suspected areas of disabilities?
9. Whether Respondent was required to conduct an IDEA Eligibility Meeting; and, if so whether Respondent conducted an Eligibility Meeting?
   * + - 1. ***Petitioners’ - “Prior Written Notice and Procedural Safeguards Issue*”**[[11]](#footnote-12)
10. Whether Respondent was required to issue a Prior Written Notice (“PWN”); and, if so whether Respondent issued a PWN?
    * 1. Whether Respondent was required to provide a *Parent’s Rights Handbook* under the IDEA (“Procedural Safeguards”); and, if so, whether Respondent provided Petitioners a *Parent’s Rights Handbook* under the IDEA?
11. **Substantive Violation - “Eligibility Issue”**
12. If Respondent had reason to suspect or was required to initiate the referral process, whether Student would have met the eligibility criteria and found eligible for an IEP under the IDEA based on the information available or that would have been available through the referral and evaluation process prior to placement at Wilderness Program or Private Academy?
13. **“Appropriateness of Private School Placements” Issue:**
14. Whether Student’s unilateral parental placement at Wilderness Program was appropriate, as defined by IDEA’s implementing regulations and interpreting case law?
15. Whether Student’s unilateral placement at Private Academy was appropriate, as defined by IDEA’s implementing regulations and interpreting case law?
16. Whether Petitioners are entitled to any reimbursement for tuition and related expenses for Wilderness Program or Private Academy’s private school placements and, if so, how much?
17. **“Equitable Considerations” Issue:**
18. Whether the tuition reimbursement request should be reduced or denied based on 20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d)?
19. Whether any exception for the parent’s failure to provide notice is applicable under 20 U.S.C. § 1412(a)(10)(C)(iv); 34 C.F.R. § 300.148(e)?
20. **“Compensatory Services” Issue:**
21. Whether compensatory special education or related services are owed, and if so, how much?

**BURDEN OF PROOF**

Petitioners bear the burden of proof in North Carolina. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The standard of proof is by a preponderance of the evidence. *Id.*; N.C. Gen. Stat. § 150B-34(a). Courts give educators “deference . . . based on the application of expertise and the exercise of judgment by school authorities.” *Endrew F. ex rel. Joseph 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.*

**Deference to Educators**

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. Gen. Stat. § 150B-34(a). Little deference was afforded Respondent’s teaching staff or school counselor because they did not know or understand what “child find” meant or demonstrated any specialized knowledge with respect to the referral or identification of a “child with a disability.” Deference was given to the demonstrated knowledge of SpEd Teacher, Former Special Education Teacher and current Assistant Principal at Middle School. SpEd Teacher understood Respondent’s obligation to rule out the need for an IEP before developing a Section 504 Plan.

**PROCEDURAL BACKGROUND**

1. Petitioners Student and Parent filed a Petition for Contested Case Hearing (“Petition”) on December 21, 2021. The Petition alleged violations of the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”), over which the Office of Administrative Hearings has jurisdiction including identification, evaluation, placement, and the provision of a free and appropriate public education (“FAPE”).
2. The Parties waived resolution and chose to mediate the case on December 23, 2021.
3. On December 22, 2021, the Undersigned issued an Order Setting Hearing and General Pre-Hearing Order scheduling the Due Process Hearing to start on January 31, 2022.
4. Respondent filed a Response and Motion to Dismiss the Petition on January 3, 2022.
5. On January 10, 2022, Petitioners filed a Motion for Leave to Amend the Petition. Respondent submitted its response the following day, January 11, 2022, objecting to Petitioners’ Motion. The Parties participated in a hearing on the Motion to Amend the Petition on January 13, 2022.
6. The Tribunal ordered Petitioners to file a Proposed Amended Petition and the Power of Attorney Student signed before the Petition was filed, which Petitioners filed on January 13, 2022, and January 14, 2022, respectively. Petitioners responded to the Motion to Dismiss on February 7, 2022. On February 8, 2022, the Parties participated in a hearing on the Motion to Dismiss. The Motion to Dismiss was denied on March 7, 2022.
7. Prior to the Motion to Dismiss hearing, the Parties attended the first mediation via video teleconference on January 20, 2022.
8. On January 24, 2022, Respondent filed its Consolidated Objections to the Proposed Amended Petition and Power of Attorney and Reply to the Response to Respondent’s Motion to Extend the Resolution Period and Other Deadlines.
9. At the direction of the Tribunal, Respondent filed its Suggested Supplemental Authority on February 11, 2022, to which Petitioners responded on February 15, 2022.
10. After reviewing the briefings provided by both Parties and oral presentations by them, an Order was issued Denying Respondent’s Motion to Dismiss and Granting Petitioners Leave to Amend the Petition on March 7, 2022.
11. Petitioners filed an Amended Petition on March 25, 2022. Respondent filed its Response to the Amended Petition on April 4, 2022.
12. On March 31, 2022, the Parties filed a Joint Motion for Protective Order. The Tribunal issued the Protective Order on April 4, 2022.
13. The Parties filed a Notice of Mediation and a Motion to Continue Hearing on April 18, 2022. On May 11, 2022, the Parties filed a Second Notice of Mediation and a Motion to Continue Hearing.
14. A second mediation was held in-person on May 31, 2022.
15. The Tribunal ordered the Parties to submit a Consent Scheduling Order by June 3, 2022. On June 3, 2022, the Parties requested an extension of time to enter a Consent Scheduling Order, which the Tribunal granted, giving the Parties until June 10, 2022. Again, on June 10, 2022, the Parties requested a second extension of time to enter a Consent Scheduling Order, which the Tribunal granted, giving the Parties until June 17, 2022. And, again on June 17, 2022, the Parties requested a third extension of time to enter a Consent Scheduling Order, which the Tribunal denied and set the hearing in this matter for August 1-5, 2022.
16. On June 20, 2022, Respondent filed two (2) subpoenas for depositions. The next date, June 21, 2021, Respondent filed six (6) subpoenas for documents or depositions.
17. On June 21, 2022, the Tribunal issued a Notice of Settlement Conference for the Parties to attend. Both Parties consented to the attend the Settlement Conference and it was held on June 30, 2022 with Administrative Law Judge Michael Byrne. The Settlement Conference was unsuccessful.
18. Respondent sent a Notice of Deposition of Parent on June 24, 2022 and amended the notice on June 28, 2022.
19. On June 29, 2022, Respondent noticed the depositions of Father and Student and later on July 1, 2022, Respondent sent an Amended Notice of Deposition of Student. Respondent conducted the deposition of Parent [Mother] on July 6, 2022 and the deposition of Father on July 11, 2022.
20. On July 7, 2022, Respondent filed an additional seven (7) subpoenas.
21. On July 8, 2022, Petitioners filed a Motion for Protective Order seeking relief from the Tribunal related to Respondent taking the deposition of Student which included recommendations on limitations supplied by Student’s therapeutic providers. On August 1, 2022, a Protective Order was issued for Student’s Deposition.
22. Petitioners filed a Motion to Stay Discovery and a Motion to Extend Discovery Deadlines for Depositions on July 11, 2022. Respondent responded to Petitioners’ Motion for Protective Order and Response to Motions to Stay Deposition of Student on July 11, 2022. Petitioners filed a Motion for Leave to file a Reply in support of its Motion for a Protective Order on July 14, 2022, which the Tribunal denied.
23. On July 12, 2022, Respondent filed another Motion to Continue the hearing. Both Parties submitted alternative Proposed Amended Scheduling Orders on July 19, 2022.
24. In anticipation of the hearing, Petitioners filed a Motion to Sequester Witnesses on July 14, 2022. On July 22, 2022, Respondent responded in opposition to Petitioners’ Motion to Sequester witnesses. Petitioners requested Leave to file a Reply to Respondent’s Response in Opposition to the Motion to Sequester witnesses on July 25, 2022. The Tribunal granted this request, and Petitioners filed their Reply on the same day.
25. On July 15, 2022, the Parties participated in a hearing on the Motion for a Protective Order. An Order Granting One Part and Denying the Remainder of Petitioners’ Motion for Protective Order was issued on July 20, 2022.
26. An Amended Scheduling Order was issued on July 20, 2022, after hearing arguments on Respondent’s July 12, 2022 Motion to Continue the Hearing. The Amended Scheduling Order granted Respondent’s Motion to delay the start of the hearing and set the hearing to begin on August 10, 2022, instead of August 1, 2022, and adjusted all other dates in accordance with the delayed start to the hearing.
27. Respondent filed five (5) additional subpoenas for depositions on July 20 and July 21, 2022.
28. Respondent conducted the deposition of Milton Little, M.D.[sic Ph.D.] on July 21, 2022.
29. Respondent filed another Motion to Amend the Amended Scheduling Order on July 21, 2022. On July 25, 2022, Petitioners objected by filing a Response to Motion to Amend Scheduling Order.
30. At Respondent’s request, ten (10) Orders for the Production of Documents from Student’s Providers were issued on July 22, 2022. Respondent subsequently served the Protective Orders on the individual providers.
31. Less than ten days before the hearing start date, on July 26, 2022, Respondent filed a Motion for Summary Judgment Regarding Subject Matter Jurisdiction. Petitioners filed a Notice of Objections to Respondent’s Motion for Summary Judgment on August 1, 2022.
32. On July 26, 2022, one-hundred and thirteen (113) days after filing its Response to the Amended Petition, Respondent filed a Motion to Strike Petitioners’ Amended Petition.
33. Respondent conducted the deposition of Kada Unwin on July 26, 2022.
34. On July 26, 2022, the Parties participated in a WebEx Prehearing Conference.
35. An Order Granting Petitioners’ Motion for Closure of the Hearing and Sequestration of Witnesses; Granting, In Part, and Denying Remainder of Respondent’s Motion to Amend Amended Scheduling Order was issued on July 28, 2022. The Order allowed Respondent to take depositions on August 4–5, 2022.
36. On July 29, 2022, Petitioners filed a Motion to Quash the Subpoena of Father as he had already been deposed.
37. Respondent conducted a 30(b)(6) deposition of Private Academy on August 1, 2022.
38. On August 1, 2022, Respondent filed a Motion to Compel Discovery from Petitioners and a Motion to Compel Deposition of Qionna Tinney Railey, M.D.
39. Respondent filed its another Motion to Continue the Due Process Hearing on August 2, 2022.
40. Respondent conducted the deposition of Student in-person on August 2, 2022.
41. On August 3, 2022, Petitioners filed a Motion to Permit Telephonic or Video testimony of certain witnesses. The same day, the Parties participated in an eight (8) hour Prehearing Conference via WebEx. During the Prehearing Conference, Respondent indicated it had no objection to Petitioners’ request for witnesses to testify remotely and may seek permission for some of Respondent’s witnesses to testify remotely.
42. Respondent conducted the deposition of Sydney Haga remotely on August 4, 2022.
43. Respondent conducted the 30(b)(6) deposition Noah Zind remotely on August 5, 2022.
44. On August 4, 2022, an Order Denying Respondent’s Motion for Summary Judgment as untimely was issued.
45. Also on August 4, 2022, this Tribunal issued an Order Allowing Video or Telephonic Testimony and Allowing Respondent’s Request for Candace Witherspoon to Observe the Hearing.
46. On August 8, 2022, Respondent filed a Withdrawal of its Motion to Compel Dr. Tinney.
47. Also on August 8, 2022, Petitioners filed their Response to Respondent’s Motion to Strike the Amended Complaint.
48. Petitioners filed a Response to Respondent’s Motion to Continue and a Response to Motion to Compel Discovery on August 9, 2022.
49. On August 10, 2022, Respondent filed a Motion in *Limine*.
50. All pending motions were considered on August 10, 2022 before the start of the hearing. Respondent’s Motion to Continue and Motion to Strike were **DENIED *nunc pro tunc*** on August 10, 2023 at approximately 10:30 a.m. T vol 1 pp 8-23. Respondent’s Motion to Compel was taken under advisement in the event that evidence or testimony proffered during the hearing proved that Petitioners intentionally destroyed or otherwise withheld documentation requested in discovery. T vol 1 pp 15:16-20; 23:13-34:11.
51. Because Respondent’s remaining motions were untimely, before further consideration of Respondent’s Motion to Compel and Omnibus Motion in *Limine,* Petitioners were given an opportunity to respond on or before August 22, 2022. 26 NCAC 03 .0115(a). The same day, Petitioners filed a Notice of Objection and Response in Opposition to Respondent’s Motion to Compel and Omnibus Motion in *Limine.* Respondent’s Omnibus Motion in *Limine* was **DENIED.**  After testimony was taken Respondent withdrew parts its Motion to Compel on September 9, 2022. The remaining portion of Respondent’s Motion to Compel was later denied on March 1, 2023.
52. Notably, with respect to discovery, at the request of Respondent, this Tribunal rescheduled the due process hearing and issued an Amended Scheduling Order on July 20, 2022, extending the discovery period to July 29, 2022, and ordering the hearing to begin on August 10, 2022. In addition, Respondent had issued at least seven (7) subpoenas for records to third party providers and conducted nine (9) depositions in this matter. Also, at the request of Respondent, this Tribunal issued ten (10) orders compelling the disclosure of documents by third parties that Respondent contended it was missing.
53. The Parties presented evidence at the due process hearing from August 10-12, 15-19, and 22, 2022. Prior to the hearing, the Parties submitted a Draft Prehearing Order.
54. During the hearing, on August 17, 2022, the Parties filed a Final Proposed Pre-Hearing Order. In the Prehearing Order the Parties stipulated to the issues, forty-eight facts, and the admissibility of any exhibits introduced and/or referenced during the course of any deposition. The Prehearing Order listed eight witnesses for Petitioners, eleven witnesses for Respondent, and five witnesses by deposition. Attached to it were lists labeling 328 stipulated exhibits, 38 Petitioners’ exhibits, and 471 Respondent’s exhibits.
55. On August 24, 2022, Petitioners filed a Motion to Strike Testimonies of Respondent’s Witnesses Geography Teacher, Math Teacher, History Teacher, Physics Teacher, Counselor, Marketing Teacher and Parts of Gamm’s Testimony alleging the witnesses had violated the Tribunal’s July 28, 2022, Sequestration Order. The same day, Respondent filed a Memorandum of Law in Opposition to Petitioners’ Motion to Strike Witnesses’ Testimony.
56. On August 25, 2022, an Order was issued sealing the case as well as a Post Hearing Order with instructions about filing exhibits and the deadlines for Proposed and Final Decisions.
57. On September 7, 2022, Respondent’s filed a Motion to Reconsider Order Declining Request to Admit Testimony of Milton Little, Ph.D. The next day, a notice for Petitioners to respond to the Motion to Reconsider was issued.
58. On September 9, 2022, Respondent filed a Motion to Extend Time to Make Post-Hearing Submissions regarding the deposition transcripts. The Tribunal issued an Order granting the Motion on the same day. Also, that day, the Parties filed their verifications and admitted hearing exhibits.
59. Also, on September 9, 2022, Respondent filed a Partial Withdrawal of its Motion to Compel. Respondent did not withdraw its Motion with respect to discovery of text messages, emails, letters, and other communications between Father, Parent, Student, and Student’s mental health providers. The Undersigned had previously reserved ruling on this Motion and allowed Respondent to question Student and Parent about any missing communications. After review of related testimonies and the documentary evidence, a separate Order on this Motion was issued on March 1, 2023 denying it.
60. On September 14, 2022, the Tribunal issued a Request for Petitioners to Submit Proposed Order Sanctioning Respondent for Multiple Violations of Tribunal’s Sequestration Order.
61. Petitioners filed their response on September 15, 2022 to Respondent’s Motion for Reconsideration of the Tribunal’s decision concerning the deposition testimony of Dr. Milton Little. On September 19, 2022, an Order Denying Respondent's Motions for Reconsideration and to Compel Discovery, and Striking Exhibit D was issued.
62. On September 19, 2022, the Parties filed a Motion to Extend time to file Deposition Objections of Student which was granted. The next day, the Parties filed their Objections and excerpts from the Depositions of Noah Zind, Krista Robbins, and Sydney Haga.
63. On September 21, 2022, Petitioners filed a Motion to Extend Time to Submit a Proposed Order Sanctioning Respondent.
64. On September 21, 2022, the Parties participated in a WebEx Hearing concerning the objections to the deposition transcripts because some objections to form had been waived and one Party was objecting to its own questions.
65. On September 22, 2022, Petitioners filed a Proposed Order Granting Sanctions to Strike Portions of Witness’ Testimony. The same day, Respondent filed a Motion to Submit Comments or Objections to Proposed Order on Motion to Strike Testimony.
66. Orders were issued on September 23, 2022 Allowing Respondent to Submit Alternative Proposed Order but Otherwise Denying Respondent’s Motion; a Post Conference Order Regarding Objections to Depositions, Transcript Formatting; and Order Extending Proposed Final Decision Deadlines.
67. On September 26, 2022, the Parties filed their Objections to the Deposition of Student with the deposition and filed their Amended Objections to the Depositions of Noah Zind, Krista Robbins, and Sydney Haga.
68. An Order was issued on September 27, 2022 for a Joint Stipulation Regarding Deposition Excerpts stating that the Parties shall file a Joint Stipulation as to the exact page and line numbers of each counsel’s examinations of the depositions of Krista Robbins, Noah Zind, and Sydney Haga by October 3, 2022.
69. On September 28, 2022, Respondent file an alternative Proposed Order on Petitioners’ Motion to Strike Testimony for Violation of Order on Sequestration. Petitioners objected on September 30, 2022 to Respondent’s Proposed Order. That same day, Respondent filed a Motion to Reconsider the Order Finding Violation of Order on Sequestration. As a ruling had not been made yet on the sequestration violation, an Order Denying as Premature Respondent’s Motion to Reconsider Finding Violation of Order on Sequestration was issued on October 4, 2022
70. On October 3, 2022, the Parties filed a Joint Stipulation Regarding Deposition Excerpts of the depositions of Krista Robbins, Noah Zind, and Sydney Haga. An Order on Deposition Objections was issued on October 10, 2022 granting and denying the deposition objections.
71. On October 11, 2022, this Tribunal issued an Order Granting in Part and Denying in Part and Granting on Other Grounds, Petitioners’ Motion to Strike Testimonies of Respondent’s Fact and Expert Witnesses. The same day, this Tribunal issued an Amended Post Conference Order.
72. On November 9, 2022, Respondent filed a Motion to Extend Time to Submit Proposed Final Decisions. The following day, the Tribunal issued an Order Extending Time to File Proposed Final Decisions and an Order for Submission of Indexes of Admitted Exhibits.
73. The Parties Proposed Final Decisions were timely filed on November 22, 2022.
74. After reviewing the Proposed Final Decisions, the Undersigned held a WebEx post- hearing conference to discuss various concerns about the Proposed Final Decisions on December 14, 2022. Based on that conference, a Post-Hearing Order was issued the next day instructing the Parties to file certain documents and supplement their Proposed Final Decisions. *See* Post-Hearing Order filed December 15, 2022. The deadline for the supplemental proposed decisions was extended to January 30, 2023 and the Final Decision deadline to February 28, 2023.
75. Pursuant to the instructions in the December 15, 2022 Post-Hearing Order, the Parties Stipulated as to admission of Stipulated Exhibit 116 (01/12/2023); Petitioners filed a Notice of Pronouns (01/09/2023), Written Objection to Respondent’s Ripeness Defense (01/13/2023), Notice of Impact of Subsequently Decided Authority (01/13/2023), and Objection to Respondent’s Request for Judicial Notice (01/20/2023); and Respondent filed Notice of Withdrawal of Exhaustion of Administrative Remedies Defense (01/13/2023) and Request for Judicial Notice (01/13/2023).
76. To avoid confusion in the Final Decision, on January 9, 2023, Petitioner Student consented to the use of she/her pronouns in the decision because all documentary evidence submitted during the hearing on the merits of the case referred to Student in that context even though, during her deposition on August 2, 2023, Student indicated she currently uses the pronouns they/them.
77. On January 13, 2023, Respondent withdrew its exhaustion of administrative remedies defense.
78. On January 30, 2023, the Parties also jointly stipulated to the admission of Stipulated Exhibits 10 and 33 as well as the deletion of Respondent’s Exhibit 342 which was not received into evidence but inadvertently filed in the record by Respondent as an admitted exhibit.
79. The following additional supplemental documents were filed on January 30, 2023: Respondent’s Breakdown of Reimbursement Costs, Respondent’s Chart of Contributions and Interference with Student’s Education Progress, Respondent’s Objections to Petitioners’ Proposed Final Decision, and Petitioners’ Chart of Contributions and Interference with Student’s Educational Progress. On January 31, 2023, Petitioners filed Petitioners’ Breakdown of Reimbursement Costs and Objections to Respondent’s Citations. Additional documents regarding costs were filed on February 1 and 14, 2023.
80. Respondent filed a Request for Judicial [Official] Notice on January 13, 2023 of multiple versions of the *Handbook of Parents’ Rights* and *Policies Governing Services for Children with Disabilities.* These documents were not proffered by either Party during the hearing. Petitioners objected to the Tribunal taking official notice of these documents on January 30, 2023. Official Notice was denied on February 2, 2023. Subsequently on February 24, 2023, the Parties stipulated to official notice of the *Procedural Safeguards: Handbook of Parents’ Rights* (the version effective August 2018 through June 2019) (Exhibit A) and the *Policies Governing Services for Children with Disabilities* (the version effective during 2019-20 school year and as amended August 2020 *i.e*., 2020 SLD *Polices*) (Exhibits B and C). The Parties further stipulated to the admission of Stipulated Exhibit 312 (the 2019-2020 school calendar) for illustrative purposes.
81. With respect to Officially Notice Exhibit A, the NCDPI developed the *Parent Rights & Responsibilities in Special Education: Notice of Procedural Safeguards* (July 2016), known colloquially as the *Handbook on Parents’ Rights* (“*Handbook*”), which is distributed by LEAs to parents of children with disabilities throughout North Carolina. *See* Off. Not. Ex. A (July 2016 ver.). In their Proposed Final Decisions, the Parties reference the *Handbook* and “Procedural Safeguards” interchangeably. However, in this Final Decision, because the *Handbook* does not contain all the procedural safeguard notifications required by the IDEA, such as the “transfer of parents’ rights” provision, Officially Noticed Exhibit A will be referenced as the *Handbook*, not as the “Procedural Safeguards.”
82. In an effort to amicably resolve this case, the Parties were invited to participate in another Settlement Conference with an administrative law judge. They agreed and thereafter on February 24, 2023, Administrative Law Judge Selina Malherbe was appointed to preside over the settlement conference scheduled for March 1, 2023. Like its predecessor, this Settlement Conference was unsuccessful.
83. The Final Decision was issued on March 16, 2023.

**FINDINGS OF FACT**

**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, Stipulated Facts, the Proposed Final Decisions and all supplemental documents filed in the record, 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 judging credibility, including, but not limited to the demeanor of the witnesses, any interests, biases, or prejudices the witnesses may have, the opportunity of the witness to see, hear, know, and remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case including, but not limited to, verbal statements at IEP/504 meetings, IEP/504 meeting minutes, IEP/504 documents, affidavits, and all other competent and admissible evidence.

***Stipulations of Fact***

1. At the start of the hearing in this matter, the Parties agreed to Jurisdictional, Party, Legal, and Factual Stipulations in a proposed Pre-Hearing Order, which was approved and filed in the Office of Administrative Hearings on August 17, 2022. Stipulations are referenced as “Stip. 1,” “Stip. 2,” Stip. 3,” etc. To the extent that the Stipulations are not specifically stated herein, the Stipulations of Fact in the Order on the Pre-Trial Conference as well as other stipulations later filed in the record are incorporated fully herein by reference.

***Prior Orders***

1. Unless specifically contradicted herein, this Final Decision incorporates and reaffirms all evidentiary Findings of Fact and Conclusions of Law contained in previous Orders entered in this litigation.
2. Any determination later stated as a conclusion of law that should have been stated as a finding of fact is incorporated in these Findings of Fact.

## THE PARTIES

### **Parties**

1. Petitioner Student is a resident of the State of North Carolina. Student’s date of birth is XX/XX/XXXX.[[12]](#footnote-13) Stip. 6. Student was eighteen (18) years old when the original petition was filed in this action. At all times relevant to the issues in this case, even though she attended private placements out of state, Student resided with her parents in Wake County, North Carolina (Stip. 10) within the boundaries of School (also referred to as “School”) and the Wake County Public School System (“WCPSS”). Stip. 8. Prior to her unilateral parental placement in private school, Student attended schools within WCPSS from kindergarten through eleventh grades. Stip. 11.
2. Petitioner Parent is Student’s mother and a resident of the State of North Carolina. Stip. 7. Although he is not named as Petitioner in this case, Father is Student’s father. At all times relevant to the issues in this case, Parent and Father resided within the boundaries of School in Raleigh, Wake County, North Carolina and WCPSS. Stip. 8. (Petitioners Parent and Student are collectively referenced as “Petitioners”).
3. Respondent Wake County Board of Education (“Respondent,” the “Board,” or “WCPSS”) is a local educational agency (“LEA”) receiving monies pursuant to the IDEA. Stip. 4.

**WITNESSES**

### **Credibility of Witnesses**

1. Generally, the credibility determinations of the witnesses in this case were based on any inconsistencies in the record and the witnesses’ testimony as well as observations of each witness’ demeanor, voice inflection, tone, hesitation in responding to questions, facial features, body language, as well as any leading nature in the question and the witnesses’ interactions with legal counsel. The transcript of the hearing cannot record these mannerisms of witnesses.
2. Prior to the hearing, the Undersigned indicated in her October 11, 2022, Order how she intended to rule on the credibility of some of Respondent’s witnesses because of their violations of the July 26, 2022 Sequestration Order and Marketing Teacher’s perjury. Marketing Teacher’s testimony and all but one exhibit related to her testimony were stricken from the record.
3. In the October 11, 2022, Order regarding the sequestration violation, the Undersigned advised the Parties of the diminished credibility determinations due to the coaching of Respondent’s witnesses: Geography Teacher, Math Teacher, History Teacher, Physics Teacher, Counselor, and portions of Audrey “Sue” Gamm’s expert testimony.
4. Even though this Final Decision may incorporate language from the Parties’ respective Proposed Final Decisions, credibility determinations were made independently from any proposals submitted by the Parties.
5. This hearing is unique in that the testimonies of four (4) witnesses, including Petitioner Student, by agreement of the Parties, were submitted solely through written transcripts.

**PETITIONERS’ WITNESSES**

1. Petitioners called as fact witnesses Parent; Tess Collett, Ph.D.; and Kristi Ragsdale, as well as one expert witness Debra Leach, Ed.D., BCBA.

**Fact Witnesses:**

***Parent, Mother of Student (Case in chief: T vols 1, 2, 3, & 5; Rebuttal T vol 9)***

1. Parent was credible even though as Student’s mother she has an explicit and implicit bias for Student’s best interest. Parent was forthright during the entirety of her testimony about how Student’s educational and therapeutic journey affected Student and their family. Parent was a working professional who left her employment to provide daily academic and emotional support to Student. At times during her testimony, Parent became noticeably upset and tearful when describing Student’s escalating mental health crisis and her fears for Student’s “life.” Parent sincerely attempted to find the appropriate education in WCPSS and treatment for her daughter.
2. Parent’s personal choice not to disclose Student’s cannabis use, suicidal ideation, and family conflict in her communications with WCPSS staff did not diminish her credibility. Such disclosures were unnecessary as all Student’s mental health professionals agreed that Student’s cannabis use was a “coping mechanism” and her suicidal ideation was a manifestation of Student’s underlying ADHD, anxiety, and severe depression already known to WCPSS. Moreover, substance abuse and family conflict are not disabling conditions under Section 504, the ADA, or the IDEA. Had WCPSS convened an IDEA referral/eligibility meeting during Student’s junior or senior school years, substance abuse and family conflict may have been areas of concern for the IEP team in determining eligibility and in development of the IEP.
3. Respondent asserted that Parent’s testimony was inconsistent with documentation of the reasons Student’s parents placed her at Wilderness Program and Private Academy. Resp’t Pro. Dec. 18, ¶ 7. The documentation and Parent’s testimony indicated that Student’s parents had many intertwined therapeutic and educational reasons for her private school placement. WCPSS did not have to know about all these reasons, because as of August 13, 2021, WCPSS knew that one reason for the parental placement was because the Section 504 Plan did not meet Student’s educational needs.
4. Parent’s testimony conflicted with Respondent’s witness SpEd Teacher with respect to her receipt of the *Parent’s Rights Handbook.* Parent did not remember receiving a *Handbook* at the February 8, 2018 IEP meeting in contrast to SpEd Teacher’s testimony that she was given a copy. T vol 7, pp 1842, 1853. It is understandable that Parent would not remember receipt of a copy of a document in 2018.
5. Most of Parent’s testimony was a recitation of the contents of her emails which are contained in the documentary evidence.

***Tess Collett, Ph.D., Clinical Psychologist and Student’s Evaluating Psychologist (T vol 1)***

1. Petitioners called Tess Collett, Ph.D. who conducted a comprehensive Psychoeducational Evaluation (30 pages) of Student on July 4, 2021, four weeks after the end of the 2020-2021 school year on June 10, 2021. Stip. 44. T vol 1, pp 40:23-41:16; Stip. Ex. 181. Dr. Collett was an independent third party with no stake in the outcome of this contested case.
2. Dr. Collett received her bachelor’s degree from the University of Utah, two separate master’s degrees in both Social Work and Clinical Psychology from Brigham Young University, and her doctorate in Clinical Psychology from Brigham Young University. T vol 1, pp 38:24-39:3. Dr. Collett has eight (8) years of assessment experience. T vol 1, p 39:6-7. Dr. Collett maintains a Clinical Psychology License in Utah as well as an interjurisdictional license allowing her to work in approximately forty (40) states within the United States. T vol 1, p 39:13-17. Dr. Collett had tested many students with anxiety, depression, and ADHD, and who used marijuana. T vol 1, pp 46:11-47:3.
3. Dr. Collett was the only psychologist to evaluate Student’s strengths, weaknesses, and psychological functioning during the relevant time period. Her evaluation was timely as Dr. Collett evaluated Student four weeks after Student’s junior school year on July 4, 2021. Dr. Collett’s Psychoeducational Evaluation was comprehensive and thorough. Stip. Ex. 181. In addition to administering numerous standardized tests, Dr. Collett reviewed all available records; incorporated surveys; behavior rating scales; questionnaires; a mental status examination; clinical interview with Student; and collateral interviews with Krista Robbins Ph.D., Student’s parents, and Milton Little, Ph.D. Stip. Ex. 181, p 0000401. As part of her evaluation Dr. Collett, however, did not speak with anyone at Wake County Schools or Student’s treating mental health providers in North Carolina. Moreover, Petitioners did not provide Respondent a copy of her evaluation prior to filing the contested case.
4. Dr. Collett was credible and knowledgeable about Student’s unique needs and circumstances as evidenced by her Psychological Evaluation of Student and demonstrated from her live testimony. The information gleamed from her clinical and collateral interviews of Student and Parent corroborate Dr. Collett’s testimony, as well as parts of the testimonies of both Petitioners and the expert opinion of Dr. Leach, that Student has had “decreased functioning during the past year and a half at school” caused by Student’s worsening mental status. As a result, Student increased her cannabis use to cope with the manifestation of her ADHD, anxiety, and depression in daily life and at school. Notably, Respondent did not respond with the testimony of a psychologist to contradict Dr. Collett’s findings about Student’s cannabis use as a coping mechanism.
5. Even though during cross examination, Respondent highlighted some of their concerns in Dr. Collett’s report, Respondent otherwise did not contest the validity of the information, recommendations, and results contained within Dr. Collett’s Psychological Evaluation. Even Respondent’s expert, Sue Gamm, who was not a psychologist and not an expert in the area of “educational diagnostics,” could not challenge Dr. Collett’s evaluation results and recommendations. T vol 8 pp 1982:6-7; 1945:25-1946:4, 16-17 (Ms. Gamm admitting not psychologist and not an expert in conducting diagnostic evaluations).
6. Moreover, Dr. Collett was the only witness to formally evaluate Student’s academic and functional needs, required components for eligibility and the development of an IEP.
7. Dr. Collett’s lay witness opinions were rationally based on her perception of Student’s educational and mental functioning as gleamed from multiple sources documented in her Psychoeducation Evaluation. Her lay witness opinions were helpful and given appropriate weight in determining Student’s eligibility and the impact, or lack thereof, of family conflict and/or Student’s cannabis use on Student’s educational and functional status.

***Kristi Ragsdale, Founder of Private Academy (T vol 2)***

1. Kristi Ragsdale (“Ms. Ragsdale”) founded Private Academy in 2010 and currently works in Business Development at Private Academy. T vol 2, p 297:1-12. Ms. Ragsdale has twenty (20) years of experience in social work and residential treatment, parent coaching, program direction, and education as a teacher and in administrative capacities. T vol 2, p 296:12-23. Ms. Ragsdale testified at the hearing, as well as testifying in a deposition as the 30(b)(6) witness on behalf of Eva Carlson. T vol 2, p 356:13-18.
2. The primary purpose of Ms. Ragsdale’s testimony was to explain the programming Student received while at Private Academy. Besides meeting Student upon her intake at Private Academy, Ms. Ragsdale had no direct interactions with Student but did observe Student in her interactions with staff/peers. *See* T vol 2, pp 301:1-7, 322:13-323:9. Ms. Ragsdale’s testimony about Student’s educational programming was consistent with the testimonies of Student, Parent, and Sydney Haga, as well as the Private Academy documentary evidence including Student’s Master Treatment Plan and Final Treatment Plan Review. Stip. Ex. 234. Ms. Ragsdale’s testimony about the educational programming provided to Student while at Private Academy was relevant to the appropriateness of this private school placement.

**Expert Witness:**

***Debra Leach, Ed.D., BCBA (Board Certified Behavior Analysis) (Case in chief -T vol 4;***

***Rebuttal T vol 9)***

1. Petitioners also called one expert witness, Debra Leach, Ed.D., BCBA. Dr. Debra Leach was qualified as an expert in the following areas:

Special education, identification, and eligibility of children with disabilities under the IDEA; procedural requirements of the IDEA for referring and identifying students with disabilities; evaluation of students with disabilities with respect to the implication and interpretation of the evaluation results; specially designed instruction and IEP development; programming development with respect to social, emotional, and behavior goals, executive functioning goals, and accommodations and services for students with disabilities; evidence-based practices with respect to the interaction between social, emotional, executive functioning, and behavior issues and academics for students with disabilities; appropriateness of placement, related services, and service delivery for students with disabilities; compensatory education to remediate any deficits caused by the district’s failure to provide the necessary educational and functional services. T vol 4, pp 835:14-836:18 (areas of expertise); 861:23-862:14 (Tribunal receiving Dr. Leach as an expert)

1. Dr. Leach earned her Bachelor of Education in Exceptional Student Education: Emotional Disturbance and Intellectual Disabilities from the University of Florida in 1995. Pet. Ex. 22, p 326. Dr. Leach earned her Master’s of Education from the University of Florida in Exceptional Student Education: Emotional Disturbance and Intellectual Disabilities in 1996. Pet. Ex. 22, p 326. Dr. Leach earned her doctoral degree from Florida Atlantic University in Exceptional Student Education: Inclusion, Autism Spectrum Disorders, Early Intervention in 2007. Pet. Ex. 22, p 326. Dr. Leach has published three (3) books, three (3) book chapters, and numerous peer reviewed journal articles, all of which focus on special education, primarily for students with autism and behavioral problems. Pet. Ex. 22, pp 328-330. Dr. Leach has presented at over eighty (80) conferences and workshops focusing the provision of special education services with a focus on autism. Pet. Ex. 22, pp 330-338. Dr. Leach has received multiple awards and distinctions over the course of her career. Pet. Ex. 22, p 342.
2. Dr. Leach served as a professor at Winthrop University from 2007-2019 where she taught many education courses focusing on special education. She taught courses such as Introduction to Special Education, Intervention with Exceptional Children, Characteristics of Intellectual Disabilities and ASD, and Professional Ethics in Special Education. Pet. Ex. 22, pp 327-328. Dr. Leach currently serves as consultant to support educators through trainings, observations, recommendations, and coaching. Pet. Ex. 22, p 326. Dr. Leach has served as a consultant in this capacity since 2007. Pet. Ex. 22, p 326.
3. In formulating her expert opinion, Dr. Leach had direct contact with Student and her family and reviewed Student’s educational records including but not limited to the 2018 IEP and 504 documents; communications to/from Student, Parent, Father and school staff; communications from Student’s medical/mental health providers; Dr. Collett’s 2021 evaluation; the 2012 evaluation; and Wilderness Program and Private Academy records as part of gathering information to form the basis of her opinions about Student’s need for specially designed instruction, the appropriateness of Student’s private placements, and her preparation to testify on Student’s behalf. T vol 4 pp 841:9-842:1.
4. Dr. Leach also reviewed the deposition transcripts from Respondent’s depositions of: Student; Dr. Krista Robbins, Student’s therapist at Wilderness Program; Noah Zind, Wilderness Program’s 30(b)(6) deponent; Sydney Haga, Student’s therapist at Private Academy; and Kristi Ragsdale, the Founder of Private Academy and its 30(b)(6) deponent. T vol 4, pp 895:17-896:9; 907:10-908:8. However, Dr. Leach did not speak with anyone from WCPSS or observe Student in an educational setting.
5. Dr. Leach’s expert opinion was based on sufficient facts and was the product of reliable principals and methods. Dr. Leach’s expertise on the procedural requirements of the IDEA for referring and identifying students was not necessary as these are legal interpretations of IDEA statutory requirements. Dr. Leach’s specialized knowledge was persuasive and assisted the trier of fact to understand the evidence and determine the substantive “eligibility” issue, “appropriateness of the private school placements” issue, and “compensatory services” issue.

**Deposition Fact Witnesses**

1. The Parties agreed to admit the full deposition testimony of Student as well as excerpts from the deposition transcripts of Noah Zind, Krista Robbins, and Sydney Haga with referenced exhibits. *See* listings of Petitioners and Respondent’s Excerpts of Zind, Robbins, and Haga’s Depositions filed on 09/20/2022. Respondent deposed Student in-person on August 2, 2022; Sydney Haga virtually on August 4, 2022; Noah Zind virtually on August 5, 2022 as the Rule 30(b)(6) deponent for Wilderness Program; and Krista Robbins virtually on August 5, 2022.
2. Respondent also deposed Milton Little, Ph.D. After failing to call him as a witness during the hearing, Respondent requested that his deposition testimony be admitted in lieu of live testimony. The Undersigned determined the admission of his deposition was inappropriate and has outlined those reasons in a separate Order. *See* September 19, 2022 Order Denying Respondent’s Motions, pp 2-4. That Order is incorporated into this Final Decision. Ultimately, as shown later in this Final Decision, his testimony would have been redundant and irrelevant.
3. Additionally, on October 10, 2022, the Undersigned ruled on objections related to the admissibility of the testimonies and exhibits of the four (4) deponents. Only the admissible testimonies and exhibits of those deponents have been considered in this Final Decision. As only transcripts were submitted, except where the documentary evidence conflicted with the deposition testimonies, the Undersigned was unable to make any credibility determinations.

***Student, Petitioner***

1. Respondent’s Counsel took the deposition of Student in-person on August 2, 2022.
2. The Undersigned found Student’s testimony concerning her conversations with WCPSS’s teachers to be genuine and authentic. She testified about reaching out to her teachers because she “was that miserable that . . . [she] felt like there was no other way.” T of Student p 118:6-15. The Undersigned was impressed by Student’s maturity and candor in answering difficult questions under stressful circumstances about such personal, sensitive topics.
3. Respondent elected not to call the three (3) teachers Student testified in her deposition she spoke to the most about her needs during the 2020-2021 school year despite having listed them on its final witness list. *See* Order on the Final Prehearing Conference, pp 10-11. Instead, Respondent offered no contradictory testimony about what Student told her teachers about her mental health during her junior year. Thus, the Undersigned finds Student’s uncontroverted testimony about these Zoom meetings true and uses it as a basis for finding that Respondent had reasons to suspect Student needed services through the IDEA.

***Noah Zind, Director and Representative of Wilderness Program***

1. Respondent’s Counsel took Noah Zind’s deposition virtually on August 5, 2022. Mr. Zind was presented as the Rule 30(b)(6) deponent for Wilderness Program. T of Zind, p 20:17-22.
2. Mr. Zind received an Associate Degree in Outdoor Education and a Bachelor’s Degree in Secondary Education and Biology. T of Zind, pp 11:25-12:8. Mr. Zind worked as a field instructor at Wilderness Program from 2004-2011 where he cared for and supervised adolescents in the wilderness. T of Zind, p 13:4-19. He then became a field director in 2015 before ultimately being promoted to his current role as program director where he “oversee[s] all departments at Wilderness Program, the whole program.” T of Zind, pp 15:11-21; 16:4-11.
3. Mr. Zind explained the therapeutic and academic services provided to all students at Wilderness Program.

***Krista Robbins, Ph.D.; Student’s Treating Therapist at Wilderness Program***

1. Respondent’s Counsel took Krista Robbins, Ph.D.’s deposition virtually on August 5, 2022. Respondent’s Counsel issued a subpoena for Dr. Robbins’ deposition on July 21, 2022.
2. Dr. Robbins graduated from the University of Nebraska, Lincoln with a degree in Studio Fine Arts and a Bachelor’s Degree in Psychology. T of Robbins, p 12:16-21. Dr. Robbins received her Master’s Degree in Community Mental Health and a Doctorate in Counseling Psychology and Statistical Analysis from the same university in 2018. T of Robbins, pp 12:22-13:6. After graduating in 2018, Dr. Robbins began working as a co-therapist alongside another therapist at Wilderness Program, which she did for one (1) year. T of Robbins, p 15:5-19. Following her year as a co-therapist, she became a primary therapist and, six months prior to her deposition, she became the assistant clinical director at Wilderness Program. T of Robbins, p 16:4-14. Dr. Robbins is a licensed psychologist in Utah. T of Robbins, p 18:21-24.
3. Dr. Robbins was subpoenaed to provide information about her treatment of Student during Student’s time at Wilderness Program. As her treating clinician, Dr. Robbins coordinated Student’s treatment plan and treatment progress. Resp’t Ex. 297 p 0001110. Dr. Robbins provided Student with weekly individual psychotherapy and family intervention as well as group therapy twice weekly. In addition, Student participated with the trained wilderness staff in daily groups. Resp’t Ex. 297 p 0001110.
4. Dr. Robbins was a disinterested third party. Dr. Robbins’ testimony corroborated the testimonies of Student, Parent, Student’s other medical/mental health providers, and the expert witness opinion of Dr. Leach.
5. Her deposition testimony was helpful in understanding Student’s mental health status immediately after completion of Student’s junior year, the interplay of Student’s mental health diagnoses and her substance abuse as well as the reason for Student’s escalating substance abuse during the 2019-2020 and 2020-2021 school years, Student’s progress toward self-regulation while at Wilderness Program, and Student’s future educational placement needs.

***Syndey Haga, Master in Clinical and Mental Health Counseling, Student’s Treating Therapist at Private Academy***

1. Respondent’s Counsel took Sydney Haga’s deposition virtually on August 4, 2022. Respondent’s Counsel issued a subpoena for Ms. Haga’s deposition on July 19, 2022.
2. Ms. Haga received an associate degree from Salt Lake Community College in 2008. She subsequently received a Bachelor’s Degree in Psychology from the University of Utah in 2012 and a Master’s Degree in Clinical and Mental Health Counseling from Westminster College in 2017. T of Haga, pp 13:2-18; 14:21-23. Prior to beginning her master’s program, Ms. Haga worked for a year as a youth mentor at a residential treatment program called Solstice. T of Haga, p 14:7-17. After graduating with her master’s degree, Ms. Haga began working as a counselor and completed forty (40) hours of continuing education every two (2) years to maintain her clinical mental health counseling license. T of Haga, pp 14:24-16:8; 16:19-24. Ms. Haga has focused her continuing education on adolescent treatment, trauma treatment, and dialectical behavioral therapy. T of Haga, p 16:9-14. To obtain her license, Ms. Haga had to pass an exam and complete four thousand (4,000) hours of supervised therapy. T of Haga, p 17:10-16.
3. Ms. Haga was subpoenaed to provide information about her treatment of Student during Student’s time at Private Academy. Ms. Haga was a disinterested third party. Her testimony corroborated the testimonies of Student, Parent, Student’s other medical/mental health providers, and the expert witness opinion of Dr. Leach. Her deposition testimony was also especially helpful to understanding Student’s need for and participation in the therapeutic residential program.

**Credibility of Deponent Witnesses**

1. Because a witness credibility determination cannot be based on a paper deposition transcript, the Undersigned makes no findings as to the credibility of these deposition witnesses unless otherwise contradicted by the documentary evidence or other credible live testimony. Although parts of these deposition testimonies were taken out of context for favorable results by Respondent, none of the deposition testimony was particularly helpful to Respondent’s case, especially Respondent’s argument that Student’s substance abuse was the sole culprit for her academic difficulties.

**RESPONDENT’S WITNESSES**

1. Respondent called one (1) expert witness, Audrey “Sue” Gamm. Respondent also presented the following fact witnesses: Kada Unwin, MSE, LCSW; Geography Teacher; Math Teacher; Physics Teacher; History Teacher; SpEd Teacher; Marketing Teacher; and Counselor. Except for Kada Unwin and SpEd Teacher, all of these fact witnesses were staff at the High School. Respondent also used the deposition testimonies cited above.
2. In general, Student’s 2020-2021 teachers and Counselor did not suspect Student was a child with a disability in need of an IDEA referral. Most likely because during the 2020-2021 school year because of the COVID-19 pandemic, all instruction was virtual with limited or no face-to-face interactions with Student Moreover, Student only attended in-person a few times that school year.
3. Because of the virtual instruction and Student’s work ethic, it is understandable that, without face-to face interactions with Student, her teachers could not know the full extent of her functional deficits as she was able to mask their physical manifestation to a certain degree. Even with that caveat, however, Counselor and these teachers were copied on numerous emails from Student, Parent, and Student’s providers explaining the severity of Student’s disabling conditions and their adverse impact on her educationally.

**Fact Witnesses**

***School Staff***

#### **Counselor, Student’s School Counselor (T vol 9)**

1. Counselor was assigned as Student’s high school guidance counselor at the beginning of her freshman year based on the division of students by last name. T vol 9 pp 2229:11-14; 2249:8-15. He received a Bachelor’s Degree in Communication from UNC-Chapel Hill and his Master’s in Counselor Education from N.C. State University. T vol 9 pp 2227:24-2228:3. Counselor has been a school counselor for twenty-three (23) years and has worked at the High School for the last twenty (20) years. T vol 9 p 2228:8-11.
2. Counselor chaired the May 13, 2019 Section 504 Meeting (Stip. Exs. 212-213), the October 17, 2019 Section 504 Meeting (Stip. Exs. 214-216), and the October 22, 2020 Section 504 Meeting (Stip. Exs. 218-219).
3. According to the teaching staff, Counselor was and has been the “point” person for Student’s Section 504 and IDEA referrals and other students assigned to him. During Student’s junior year, Counselor emailed Student’s teachers and her parents about Student’s Section 504 Plan and revisions of the Plan. Resp’t Exs. 79 (email to all teachers 08/20/2020), 145 (to Parent re: updated Plan and Eligibility 10/22/2020); 150 (to Father from updated 504 Plan 10/28/2020); 156 (to Father & Parent re: 504 Plan 10/29/2020); 204 (Student re: 504 Plan 03/02/2021).

Frequently throughout Student’s sophomore year (2019-2020) and especially her junior (2020-2021) school year, Parent, Student, and school staff/administrators communicated directly with Counselor or copied him on emails about Student’s mental health struggles and declining academic performance.[[13]](#footnote-14) He was also copied on communications from Student’s medical/mental health providers about the Student’s mental status and functional needs.[[14]](#footnote-15)

Notably, Counselor was Respondent’s last witness and the most prepped. He had numerous meetings with counsel, WCPSS and School administrators, and the LEA representative before and after the case was filed.[[15]](#footnote-16)

Even if the teachers did not understand their own “child find” obligation, they did understand to forward any concerns to Student’s Counselor. This makes Counselor Respondent’s most pivotal witness. It is, however, difficult to believe much of Counselor’s testimony as proffered by Respondent. For example, how could Counselor, a school counselor with over 23 years of experience, genuinely not understand what “child find” meant; that the IDEA eligibility referral process goes through an entire IEP team not just an Intervention Specialist; and that grades are simply one factor for consideration of IDEA eligibility?

1. Moreover, after receipt of all the communications from Parent, Student, the teachers, and Student’s medical/mental health providers, Counselor testified on direct examination that he still did not suspect Student was a child with a disability as defined by the IDEA, yet, on cross examination, ultimately admitted that Student was referred by her medical/mental health providers and her parents in accordance with Respondent’s Requirements for Parent Referrals for Special Education. Stip. Ex. 323; T vol 9 pp 2334:24-2336:8.
2. Although Counselor admitted on cross-examination what constituted a “parent referral,” he still did not demonstrate understanding of the IDEA referral process. According to him, after he refers a student for an IEP, the Special Programs head “would likely observe the student in the classroom, would probably have a conversation with the parents and the student, look at, you know, look at the records, and determine if an IEP would be appropriate.” T vol 9 p 2245:1-12. Because Counselor did not have specialized knowledge about the IEP referral process, Counselor’s testimony was not entitled to deference.

Based on these concerns and others discussed later in this Final Decision, except for the weight given Counselor’s admissions against interest and testimony corroborated by documentary evidence, Counselor’s testimony was given little weight.

**Student’s Teachers**

#### **Physics Teacher (T vol 7)**

1. Physics Teacher taught Student virtually physics during the 2020-2021 school year. T vol 7 p 1666:16-18. During the 2020-2021 school year because of COVID-19, Physics Teacher did not have much interaction with students during Google meets. T vol 7 p 1668:5-6.
2. Physics Teacher graduated from N.C. State University with a Degree in Science Education with a Concentration on Physics. T vol 7 p 1659:5-6. Physics Teacher taught at another high school for two and a half years and began teaching at the High School in 2017, where he has been teaching ever since. T vol 7 p 1659:7-10.
3. During the 2020-2021 school year, because of Student’s good grades, Physics Teacher did not have any reason to suspect that Student was a “child with a disability” and needed IDEA referral. Physics Teacher speculated about what the term “child find” meant. T vol 7 p 1822:20-1824:3. He did not attend any IEP or 504 meetings for Student. Otherwise, Physics Teacher appeared genuinely fond of Student and to be a competent teacher.

#### **Geography Teacher, AP Human Geography (T vols 5 & 6)**

1. Geography Teacher taught Student virtually AP Human Geography during the 2020-2021 school year. T vol 6 pp 1427:24-1428:2.
2. During the 2020-2021 school year, because of Student’s good grades, Geography Teacher did not have any reason to suspect that Student was a “child with a disability” and needed IDEA referral. Geography Teacher did not know what the term “child find” meant, T vol 6, p 1517:17-21, and did not attend any IEP or 504 meetings for Student. He also appeared genuinely fond of Student and knowledgeable about his interesting course.

#### **History Teacher, American History Honors (T vol 7)**

1. History Teacher taught Student virtually American History Honors during the 2020-2021 school year. T vol 7 p 1735:10-12. Student transferred into her class around October 28, 2020 because she was failing AP US History (“APUSH”). T vol 7 p 1826:4-7.
2. History Teacher was uninformed about the referral processes required under the IDEA. T vol 7 p 1822:17-1823:5.
3. During the 2020-2021 school year, because of Student’s good grades, History Teacher did not have any reason to suspect that Student was a “child with a disability” and needed IDEA referral. History Teacher did not know what the term “child find” meant, T vol 7 pp 1822:20-1823:5. She did not attend any IEP or 504 meetings for Student’s eligibility. Like the other teachers, History Teacher appreciated Student’s hard work ethic and appeared to be a well-qualified teacher.

#### **Math Teacher, Honors Pre-Calculus (T vol 6)**

1. Math Teacher taught Student Honors Pre-Calculus virtually during the 2020-2021 school year. T vol 6 pp 1530:8-15; 1533:5-11. Math Teacher testified she did not remember whether Student turned her camera on during remote instruction. T vol 6 p 1533:15-20.
2. During the 2020-2021 school year, because of Student’s good grades, Math Teacher did not have any reason to suspect that Student was a “child with a disability” and needed IDEA referral. Math Teacher did not know what the term “child find” meant and did not attend any IEP or 504 meetings for Student’s eligibility. T vol 6 p 1606:17-21. Like the other teachers, Math Teacher appreciated Student’s candidness about her disabilities and hard work ethic and Math Teacher appeared to be a competent teacher.

#### **Marketing Teacher; Sports and Entertainment Marketing (T vol 8, stricken, Offer of Proof)**

1. Marketing Teacher taught Student Sports and Entertainment Marketing in her sophomore year and Sports and Entertainment Marketing II Honors in her junior year. Stip. 25 & 34. She was the last of Student’s teachers to testify. Based on the IEP and 504 documents, she did not attend any IEP or 504 meetings for Student
2. In the October 11, 2022, Order the Undersigned struck the entirety of Marketing Teacher’s testimony due to her perjury during the hearing. This act is not a reflection on Marketing Teacher’s teaching ability as she, like all the other teaching staff, genuinely cared about Student’s and was an asset to School.

**Other Witnesses**

#### **SpEd Teacher, Former Special Education Teacher and Current Middle School Assistant Principal (T vol 7)**

1. SpEd Teacher chaired the February 8, 2018 IEP eligibility meeting where Student was found ineligible but was referred for a Section 504 Plan which was completed on February 23, 2018. *See* Stip. Exs. 196-201, 204 (IEP and Section 504 documents). SpEd Teacher did not attend the subsequent 2018 Section 504 meeting and has not been involved in Student’s education since the 2018 IEP meeting. He currently serves in Respondent’s school district as an assistant principal at a middle school. T vol 7 p 1830:13-14.
2. Respondent offered SpEd Teacher to show it had provided Parent a copy of the *Handbook of Parents’ Rights* (“*Handbook”*) during the 2017-2018 academic year. SpEd Teacher explained his “usual practice in providing” the “*Handbook”* which would then be recorded in the meeting minutes. According to him, the IEP meeting could not proceed otherwise. T vol 7 pp 1838:12-1839:14. SpEd Teacher did not personally give Parent a copy of the *Handbook*, but credibly testified that she must have received one as it was WCPSS customary practice. During his testimony, however, the actual *Handbook* was not proffered by Respondent. The version of the *Handbook* available at that time was officially noticed as an exhibit. *See* Off. Not. Ex. A.
3. The Undersigned found SpEd Teacher’s testimony about the *Handbook* irrelevant. Whether Respondent provided Parent a copy of the *Handbook* during a meeting that occurred during the 2017-2018 academic year was not at issue in this hearing. Petitioners are not contesting WCPSS’s adverse eligibility decision at the 2018 IEP meeting.
4. SpEd Teacher’s testimony did, however, accurately explain that IDEA eligibility had to be ruled out before Section 504 eligibility. T vol 7 p 1833:13-16; *see also* Stip. Ex. 204 p 000508 (Section 504 Eligibility Determination Worksheet stating, “Has the need for Special Education been ruled out by an IEP team in Wake County Public School System?”). SpEd Teacher’s credible testimony was given weight were applicable.

#### **Kada Unwin – Student’s Therapist Since 2019 through 2020-2021 School Year and Current Therapist (T vol 6)**

1. Kada Unwin, MSSE, LCSW is a Licensed Clinical Social Worker. Ms. Unwin is Student’s therapist and has been seeing Student as a client since November 2019. Stip. 29; T vol 6, pp 1346:18-21, 1347:3-14, 1348:3-7. However, Ms. Unwin did not serve as Student’s therapist while Student was in Utah for treatment. *See* T vol 6 p 1347:5-9. In the period from 2019 to 2021, Ms. Unwin’s therapy sessions with Student covered topics including parental conflict, substance use, trauma, depression, anxiety, and post-traumatic stress disorder (“PTSD”). *See* T vol 6 pp 1355-1387).
2. Ms. Unwin’s testimony concerning Student’s therapeutic treatment records was candid and helpful in understanding Student’s state of mind throughout the 2019-2020 and 2020-2021 school years. Ms. Unwin began therapy with Student in November 2019 and continued until Student left for wilderness therapy in June 2021. During that time, Ms. Unwin maintained Student had diagnoses of both anxiety and depression. T vol 6 pp 1402:13-1403:11.
3. Ms. Unwin also submitted a letter on Therapeutic Partners letterhead to School on October 16, 2020, indicating she was working with Student and her family “to insure the quickest stabilization process.” Stip. 38; Stip. Ex. 224 p 591. Her letter continues, “we need the help of the school to support her as she continues treatment.” Stip. Ex. 224 p 591*.* Yet, no one contacted Ms. Unwin to gather more information about Student and her treatment or to partner with Ms. Unwin to support Student as she had requested. Stip. 39.
4. Ms. Unwin’s lay witness opinions were rationally based on her perception of Student’s educational and mental functioning as gleamed from her months of therapy with Student and her family. Her lay witness opinions were helpful in understanding the educational impact of Student’s disabling conditions, family conflict, and substance abuse. Ms. Unwin’s testimony also corroborated the testimonies of Student and Parent about the serious decline of Student’s mental health status, Student’s use of cannabis as a coping mechanism, and her need for intensive academic intervention, primarily from her mother, to succeed academically. Overall, Ms. Unwin’s testimony was not helpful to Respondent’s case. Her testimony was given appropriate weight were applicable.

**Expert Witness**

1. Respondent called one expert witness, Audrey Suzanne Gamm.

#### **Audrey “Sue” Gamm, J.D. (T vol 8)**

1. Audrey “Sue” Gamm was qualified as an expert in the following areas:

Procedural requirements of Child Find, special education, referrals, evaluation, identification of students with disabilities, and eligibility determinations: IDEA compliance policies, procedures, and practices; assessment of IDEA compliance issues; the operations and administration of special education and related services departments; compliance with the IDEA’s procedural requirements, which includes but is not limited to referral, eligibility, Child Find (excluding the development of an IEP); the comparison and interplay and need for specially designed instruction versus accommodations; interplay of and differentiation between Section 504 of the Rehabilitation Act of 1973 and the IDEA, including Child Find; considerations and need for specially designed instruction versus accommodation, modifications, and other related services; and reviewing recommendations from evaluations and/or medical providers and whether on the basis of these recommendations the students require specially designed instruction or other educational supports. T vol 8, pp 1959:21-1960:6; 1984:8-14; 1999:17-21; 2001:5-8; 2002:14-21; 2004:9-15; 2009:9-10.

1. Ms. Gamm received a Bachelor of Arts in Regular and Special Education from the University of Illinois with High Honors in 1970 and Juris Doctor from the DePaul College of Law in 1976. Res. Ex. 471 p 1728. Ms. Gamm previously worked with the Office of Civil Rights (“OCR”) as an assistant civil rights attorney. She has since retired and has been since 2003 an independent consultant. T vol 8 p 1967:16-17.
2. Ms. Gamm has dedicated her career to the rights of and services for children with disabilities including from when she was a special education teacher in 1970 (before IDEA was even enacted) through her advocacy at OCR, employment with Chicago Public Schools, and since 2003, as an independent consultant on related issues pertaining to school accountability, racial/ethnic disproportionality, related services as well as special education policy, guidance, and practices.
3. Ms. Gamm has assisted numerous public-school systems with review of their special education policies, procedures, and practices. Resp’t Ex. 471 pp 1729-1732. From 1992-2003, she was employed as Chief Specialized Services Officer and Director of Policy and Compliance of the Special Education and Pupil Support Services with Chicago Public Schools. Resp’t Ex. 471. From 1979-1992, she was employed as Director of the Elementary and Secondary Education Division and Assistant Civil Rights Attorney with the Office of Civil Rights within the U.S. Department of Education. Ms. Gamm has made many presentations (over 60), published many articles (11), and been an expert witness in nine special education cases. Resp’t Ex. 471 pp 1732-1735.
4. Ms. Gamm’s written “Expert Opinions Report” focused on two main topics: WCPSS’s compliance with its “child find” obligation and the noneducational reasons - substance abuse, family discord, and medication management - for Student’s attendance at the private school placements. Resp’t Ex. 485[[16]](#footnote-17) p 1916.
5. In developing her Expert Opinion Report that the Wilderness Program placement was for Student’s mental health treatment and Private Academy placement was “primarily focused on Student’s mental health therapies compared to her education,” Ms. Gamm relied on Student’s parents’ Letter of Concern (summer 2021 letter to Student); Dr. Tinney’s January 5, 2021 and June 1, 2021 notes; Therapist Unwin’s May 14, 2021 note; Private Academy’s Master Treatment Plan; Buke [sic] Little & Associates Adolescent Information Form dated June 3, 2021; Wilderness Program’s records including treatment plan, progress notes, grades, nine biology essays, and Discharge Summary; and Private Academy records including the therapy notes, Master Treatment Plan, grades, and schedule changes. Resp’t Ex. 485.
6. Ms. Gamm’s testimony and Expert Opinion Report was carefully reviewed and considered. Her reliance on grades and failure to acknowledge the educational impact of Student’s functional deficits was taken into account.
7. Most concerning was Ms. Gamm’s failure to reconcile her “child find” opinion with how WCPSS staff failed to hold an eligibility/referral meeting after receipt of three written parent referrals in September/October 2020 with WCPSS’s “Requirements for Parent Referrals.” Moreover, her speculation that: “had Student’s parents shared relevant information about Student’s mental health and supplemental educational support,” “there was a strong likelihood WCBE personnel would have taken appropriate action” was not reliable as an expert opinion. Resp’t Ex. 485 p 1924.
8. The Undersigned, however, agrees with Ms. Gamm that “child find” focus should be on what the school staff “knew” or “had reason to suspect” not what Petitioners failed to disclose. *See* Resp’t Pro. Fin. Dec. p 22 ¶ 22. Viewing the totality of the evidence from the exact same lens as Ms. Gamm, that is what the school staff “knew” or “had reason to suspect,” the Undersigned finds Ms. Gamm’s expert opinion on that issue unpersuasive. While granted, the school staff could not otherwise “see” Student’s functional deficits in the virtual setting, all of them received numerous email communications graphically describing Student’s educational deficits which they did “know” about.
9. Ms. Gamm’s expert opinion was persuasive particularly with respect to the private school placement issue and where applicable was given appropriate weight in this Final Decision.

**STUDENT’S UNIQUE CIRCUMSTANCES**

1. Student’s unique circumstances for IDEA eligibility are based on what WCPSS “knew” or should have “suspected” in the Fall of her eleventh grade. This includes the historic background information; her early diagnosis of ADHD-Combined Type; subsequent diagnoses of major depression and anxiety; her eighth grade IEP referral; 2012 Private Psychoeducational Evaluation; medical and health care providers’ communications; prior Section 504 Plans; tenth and eleventh grade virtual learning due to the COVID-19 pandemic; educational impact of her disabling conditions; information about the manifestations of Student’s disabling conditions in numerous written and verbal communications from Student and Parent; and escalating mental health crisis during in tenth through eleventh grades. WCPSS is not responsible for what was not disclosed to its staff, that is, Student’s cannabis use, post-traumatic stress disorder, family relationship conflict, and her suicidal ideation.

**Student’s Disabling Conditions and Diagnoses**

1. Although Student’s mental health status changed significantly, throughout her educational career with WCPSS, even at her worst, Student’s teachers described her as an “absolutely delightful,” “bright,” “very social student”; “a joy to teach in class”; “excellent student”; “eager to please”; and “performing well.” Stip. Ex. 200 p 000496 (2018 Referral); Stip. Ex. 204 p 000508 (2018 504 documents); Stip. Ex. 212 p 000535 (2019 504 documents).
2. Even Respondent admits “Student was a strong student, a self-starter, highly motivated, a high performer with a strong a work ethic, an incredible athlete, helpful, outgoing, positive, well-mannered, friendly, cooperative, a leader, and maintained strong relationships with peers and adults.” Resp’t Chart of Contributions[[17]](#footnote-18) and Interference with Student’s Educ’l Progress p 1 (filed Jan. 30. 2023).
3. Student cared about her school responsibilities and wanted to do her work. The fact that Student wanted and tried to complete her schoolwork increased her anxiety. Stip. Ex. 214 p 000550 (“anxiety about completing tasks”); Stip. Ex. 218 p 000570 (“great deal of anxiety about completing tasks”).
4. Student was a twice exceptional student; exceptional as both a “gifted” student and a student with a disability. Without visual manifestations of her disabling conditions, because of her hard work ethic and family support, Student might have “flown under the radar.” Due to the virtual learning necessitated by the COVID-19 pandemic during her sophomore and junior school years, but for the graphic descriptions in Parent and Student’s written communications to WCPSS staff, she definitely would have.
5. In addition to the diagnosis of ADHD, combined type, Student has been diagnosed with: Persistent Depressive Disorder (Dysthymia), Moderate, Early Onset; With Intermittent Major Depressive Episode, With Current Episode; With Anxious Distress; Cannabis Use Disorder, Mild/Moderate, in partial remission, in controlled environment; Parent-Child Relational Problem,[[18]](#footnote-19) and Post-Traumatic Stress Disorder due to trauma from sexual assault/rape during the seventh grade. Stip. 12; Stip. Exs. 181, 425; 234 p 000810. As outlined *infra* in this Decision during the review of the Private Academy’s program, ultimately to address Student unique needs and for her to be able to access her education, she required multiple medications for stabilization of her underlying mental health diagnoses as well as intensive therapies and academic interventions.[[19]](#footnote-20)

## Student’s Educational History

1. Student attended schools within Respondent WCPSS’s schools from kindergarten through the eleventh grade. Stip. 11.
2. Student was diagnosed with attention deficit hyperactivity disorder (“ADHD”) combined type when she was eight years old and in second grade. Stip. 12.
3. Student’s parents obtained a private psychoeducational evaluation for Student which was conducted on May 3 and August 12, 2012 (“2012 Psychoeducational Evaluation”) by Cheryl Stallings, Ph.D., of Triangle Psychoeducational Consultants, PLLC. Dr. Stallings generated a report from that evaluation. *See* Stip. Ex. 180; Stip. 15.
4. Student’s parents provided the 2012 Psychoeducational Evaluation report to Respondent WCPSS (Stip. 16), and that report was first referenced on the 504 Eligibility Determination[[20]](#footnote-21) document from the Section 504 meeting held on October 17, 2019. Stip. Ex. 24 p 000550.
5. Respondent WCPSS never evaluated Student for special education services under the IDEA and never provided specially designed instruction for Student under the IDEA. Stips. 13-14.

**Middle School**

**2016-2017 School Year**

1. Sometime during the seventh grade Student was sexually assaulted/raped, by a nonbiological family member who was in the eighth grade. Student disclosed this to her therapist Kada Unwin in December 2019, T vol 6 p 1355:9-11, and with her therapist’s support to her parents in January 2020. Res. Ex. 481 p 0001786. Because of this sexual assault, Student was diagnosed with post-traumatic stress disorder (“PTSD”) and required trauma therapy during her tenth, eleventh, and twelfth grade years. This information was not disclosed to WCPSS staff. But there is no evidence that this affected Student functionally or academically at school during middle school or her ninth, tenth, or eleventh grade years.

**2017-2018 School Year**

1. Student started smoking marijuana recreationally when she was around 14-15 years old. She continued using marijuana and occasionally alcohol through the eleventh grade. This information was not disclosed to WCPSS staff. However, there is no evidence that her marijuana and alcohol use affected her functionally or academically at school during middle school or her ninth grade year. Only until the tenth grade did Student start abusing cannabis especially during the COVID-19 pandemic and continued almost daily use through the eleventh grade (the “COVID Year”).

**8th Grade IDEA Referral**

1. In eighth grade, Student was referred the first time for special education eligibility by Parent on January 12, 2018. WCPSS staff conducted the referral process precisely as required in WCPSS’s Referral Requirements.
2. On January 12, 2018, when Student was 14 years old in the eighth grade at Middle School, Parent wrote to Middle School Counselor, the 8th Grade Counselor, stating:

I am writing you about [Student]. She has ADHD and she has done well since 3rd grade without accommodations in school. We have heard fairly frequently this year from a variety of her teachers about her in attention, off task for the majority of class periods, impulsivity and running out of time on tests and/or assignments…Can we meet about these issues? Do you need anything from my Pediatrician to help facilitate this process. Let me know, thank so much, [Parent and Father].

Stip. Ex. 1.

1. Even though Parent’s email predated the Referral Requirements cited below, Respondent properly treated Parent’s email as a parent request for IDEA eligibility, not merely as a request for Section 504 accommodations, and followed the guidelines for an IDEA referral.
2. Within ten (10) days, in response to Parent’s IDEA referral, the Middle School Counselor forwarded Parent a medical diagnosis form for the doctor to complete and advised that “Special Programs has to be ruled out, so once I get the form, I will give it to SpEd Teacher, the Special Education chair.” *Id.* Shortly thereafter, SpEd Teacher confirmed Parent’s request to evaluate Student for special education. Stip. Ex. 2. In his subsequent email, SpEd Teacher restated that “Special Education must be considered and ruled before a Section 504 can be considered.” Stip. Ex. 2.
3. A special education referral meeting was scheduled for February 8, 2018. Stip. Exs. 3 and 196 (Invitation to Conference). The February 1, 2018, unsigned, faxed[[21]](#footnote-22) Invitation to Conference from SpEd Teacher indicated that: “You are entitled to all the due process parental rights described in the *Handbook on Parents’ Rights.*” Stip. Ex. 196 (Invitation to Conference). Parent originally did not sign the “Parent/Guardian Response to Invitation” on the second page which indicated, “Please keep the *Handbook on Parents’ Rights* that has been sent with this invitation.” Stip. Ex. 196, p 000484 (italics added). At some point, Parent did sign a response to the Invitation but it is not clear how the signed response was forwarded back to SpEd Teacher. Stip. Ex. 197. Parent also initialed the IEP minutes but otherwise did not sign the Prior Written Notice or Referral Form. *See* Stip. Exs. 198-200. These documents referenced the *Handbook* and North Carolina’s one-year statute of limitations for contesting the IEP team’s decision.
4. Parent’s receipt of the *Handbook[[22]](#footnote-23)* is disputed. Parent does not remember receiving a copy of the *Handbook*;whereasSpEd Teacher remembers her being given a copy. Although Student attended the IEP meeting, since she was a minor, she would not have been given a *Handbook. See* Off. Not. Ex. A.
5. An IDEA eligibility referral and meeting was held in-person on September 8, 2018. Stip. Ex. 198 (IEP minutes). SpEd Teacher chaired the meeting. Based solely on the medical form provided by Parent and teachers’ discussions about Student’s grades, the IEP team did not find Student eligible or conduct any evaluations. Stip. Exs. 199[[23]](#footnote-24) (Prior Written Notice) & 198 (Minutes), Stip. Exs. 3 & 4. After the meeting, SpEd Teacher emailed the Middle School Counselor that: “Parents would like to pursue a 504.” Stip. Ex. 4. At that time, Student’s parents “wanted to get her any help that [they] could.” T vol 1 p 157:1 (T of Parent).

**February 23, 2018 - Section 504 Plan Eligibility Meeting [[24]](#footnote-25)**

1. Subsequently, a Section 504 meeting was noticed on February 12, 2018 for the February 23, 2018 Section 504 eligibility consideration. Stip. Ex. 201 Parent signed she would attend the same day. *Id.* The 504 Team determined that Student’s ADHD-Combined type was not intermittent, episodic or in remission and that Student demonstrated learning/classroom performance difficulties related to the diagnosis. Stip. Ex. 204. The Team noted that Student’s ADHD impacts her concentration “towards the end of the school day.” Stip. Ex. 204 p 000508. In addition, the Team noted that Student has been taking ADHD medication since the 2nd or 3rd grade and she “tends to do poorly when not taking medication” in “learning/classroom performance.” Stip. Ex. 204 p 000508.
2. The teachers’ reports, her grades, and EOC/EOG indicated that Student was high functioning. Her teachers described Student as “a joy to teach in class,” “excellent student,” “eager to please,” and “can be overly social sometimes in class.” *Id*. According to the 504 documents, Parent told the team that Student is “up late at night doing homework, needs additional time on EOC/EOG; end of days begins to loose [sic] focus, off tasks in 8th PE for class”; and Student told the team that she “feel[s] like she the last to complete test, feels rushed.” *Id*. Because Student was “receiving accommodations or modifications through informal classroom accommodations,” the team determined that she was not eligible for a 504 Plan. *Id*. p 000506.
3. Attached at the end of the Section 504 Eligibility Determination Worksheet was section entitled “Section 504/ADAAA Student and Parent’s Rights” under Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Amendments Act (ADA) not the IDEA. Stip. Ex. 204, p 510-511.

**June 7, 2018 – Section 504 Addendum Meeting**

1. At the end of eighth grade, the Section 504 Team reconvened on June 7, 2018 to develop an addendum to the prior Section 504 determination. At that time, Student was “getting zeroes” for missing assignments, was a “distraction” to other students, and showing signs of “hyper-attention.” Stip. Ex. 209 p 000531.
2. Parent described the meeting as “traumatic,” with Student crying, and recollected that the teachers at the meeting were dismissive of Student’s needs for accommodations. T vol 1 pp 159:17-160:17 (T of LS); Stip. Ex. 209. Despite her negative impressions, the 504 Team developed a 504 Pan with the following four (4) accommodations:

Alternative Teaching Strategies – Teacher will redirect immediately to deter any inappropriate or distracting behavior. It is not recommended to give [Student] multiple warnings.

Alternative Teaching Strategies -The teacher(s) and [Student] will determine preferential seating based on class distractions. i.e. not seated with friends.

Communication –[Student] will show her teachers her agenda each day to get a signature of assignments written down for what us to be done or what is due.

Organization/Management – At no time should [Student] have a phone out in class during instructional time without teacher recommendation for an assignment. Should [Student] have her phone out in class, the teacher will follow school policy.

Stip. Ex. 208 p 000516

1. Student received no testing accommodations for classroom quizzes/tests, State assessments, or district/local assessments.
2. The same summary of “Section 504/ADAAA Student and Parent’s Rights,” not IDEA rights, was attached to the June 2018 504 Plan. Stip. Ex. 208 pp 000518-519.
3. Her final grades were A’s and one B. Stip. Ex. 192.

**May 13, 2019 - 504 Plan Annual Review**

1. By all accounts, Student had a successful freshman year of high school—both athletically and academically. T vol 1 p 162:4-11 (T of LS).
2. At the end of Student’s ninth grade, an annual review of her Section 504 Plan was held on May 13, 2019. Counselor was the 504 Chair and both Student and Parent attended along with a regular classroom teacher and assistant principal. Stip. Ex. 213. The school staff determined that Student was “performing well but does get districted at times in class.” Stip. Ex. 212 p 000535. The team removed the “Communication” accommodation (see above) and kept the other three accommodations listed in the prior Section 504 Plan. Stip. Ex. 212.
3. Again, Student received no classroom, State, district/local testing accommodations.
4. Her grades were all high A’s. Stip. Ex. 192.
5. The same summary of “Section 504/ADAAA Student and Parent’s Rights,” not IDEA rights, was attached to the June 2018 504 Plan. Stip. Ex. 212 pp 000538-539.

**Tenth Grade Year 2019-2020**

1. During the 2019-2020 school year there were 30 email communications to/from Parent, Student, Student’s teachers, Counselor, and School Principal regarding Student’s educational issues including, but not limited to, issues about the Section 504 Plan, missing assignments, and Student’s mental health status. *See* Final Prehearing Order pp 12-13 (listing of emails); Stip. Exs. 5-35.

**September 2019 Referral Requests**

1. At the beginning of tenth grade, even Student recognized the adverse educational impact of her disabling conditions. On September 16, 2019, Student began advocating to her academic counselor, Counselor, for additional support due to her ADHD. Student explained she was “struggling to adjust this year.” Stip. Ex. 5. Student asked for “special accommodation for testing” explaining, “I get really unfocused sometimes because of my ADHD.” *Id.* Student asked to come and talk with Counselor “about options.” *Id*. Student’s September 16, 2019 email was a “referral request.” She did meet in-person with Counselor, but an IDEA referral was not mentioned as an “option” and Student was not given a copy of the *Handbook* or a Prior Written Notice of Counselor’s unilateral decision that she did not qualify for an IDEA referral.
2. On September 20, 2019, Parent also reached out to Counselor via email because “[Student] was suffering and we needed help.” T vol 1 p 165:15-16; Stip. Ex. 8. Parent explained she “was requesting any help to alleviate her anxiousness . . . she was unable to focus and get assignments in.” T vol 1 p 166:6-8. Parent’s September 20, 2019 email was a “parent referral request.”
3. Counselor promptly responded the same day asking for “something from the doctor we could look at maybe dropping Honors World, Honors Earth, Regular Chemistry or whatever combination works best for Student” Stip. Ex. 8 p 000012. He did not tell her that an IDEA referral might “help” or give Parent a copy of the *Handbook* or Prior Written Notice of his unilateral decision not to initiate an IDEA referral.

**October 2019 Referral Requests**

1. Parent reached out again to Counselor on October 7, 2019, noting medication management issues and Student running out of time due to lack of focus during her AP Environmental Science test. T vol 1 p 168:18-24; Stip. Ex. 8. These were the same issues raised in September 2019. T vol 1 p 166:22-24. On October 7, 2019, Parent wrote:

[Counselor], I hope you are well. [Student] continue to struggle with focus and we are having a hard time regulating her ADHD medication, She has been running out of time on assignment and tests because she cannot focus during class (or at home for that matter). Today, she could not focus during her APES [AP Environmental Science] test. She asked [Teacher] for more time and she said that she could not give her [Student] more time since that was not included in her 504. What are our options when that happens? I can get documentation from our Pediatrician of this continued difficulty. She has shown over the years she can do the work with some accommodation for her ADHD and her psychoeducational testing also show her ability absent the ADHD. Let me know, thanks so much, [Parent].

Stip. Ex. 8 p 000012.

1. This October 7, 2019 email was also a parent referral request but instead of suggesting an IEP eligibility meeting, Counselor replied, “What we can do is review [Student’s] 504 plan and look at possible adding extended time on tests.” Stip. Ex. 201 p 000011. Counselor requested any additional information Parent had from Student’s Pediatrician. Stip. Ex. 8 p 000011. Thereafter, a Section 504 Plan Review Meeting was scheduled not an IDEA referral/eligibility meeting.
2. Before Parent’s October 7, 2019 parent referral, Student began seeing therapist Kim Bovee on September 27, 2019. T vol 1 p 174:16-19; Stip. Ex. 310. Ms. Bovee later referred Student to Kada Unwin and Student began seeing Ms. Unwin in November 2019. Stip. 29. Therapist Unwin was Student’s therapist during her tenth and eleventh school years as well as after Student returned from the private school placement at Private Academy.
3. Prior to Ms. Unwin’s involvement, Ms. Bovee first documented that Student had “stuck thoughts.” Stip. Ex. 310 p 001874. Student’s “stuck thoughts” were unrelated to her substance use and she continued to have “stuck thoughts” from October/November 2019, during the summer months at Wilderness Program (with no access to substances) and throughout the 2021-2022 school year while at Private Academy (again with no access to substances). *See* Stip. Exs. 181 & 274.
4. Student’s “stuck thoughts” felt “really scary,” she “had never felt that way before,” and she “felt really alone.” T of Student p 24:9-12. Before Student went to the private placements, smoking, her phone, and shopping distracted Student from being “stuck in her head.” T of Student p 24:20-25:2. She described it as being “stuck in her head” was “really loud” that it “hurts [physically] to the point …so much going on in my head but I couldn’t get it out. And it was like I was making up my thoughts. It was, it was scary.” T of Student p 44:3-12. Dr. Kirk Simon explained that Student was “very much stuck in her own head responding to internal thought patterns, heightening her emotional reactivity and depression.” Stip. Ex. 274 p 001117.
5. Ms. Bovee’s notes corroborated Parent’s description of Student’s mental status which she reported to the Section 504 Team. Stip. Ex. 310, pp 1871-72 (Student was having “worry and anxiety,” her “mood and affect was anxious,” Student “was biting her nails . . . bleeds,” and “she had a panic attack”).
6. On October 8, 2019, Parent made another parent referral when she wrote to Counselor:

[Counselor], sorry to bother you as we know you are busy with Seniors. Our daughter, [Student] came by to see you yesterday. She has been very overwhelmed with her ADHD, ability to focus this year and sleep at night. To give you some background, at the beginning of the school year, she wanted her ADHD medication decreased because she did not like the way it made her feel so our Pediatrician allowed her to do so. However, she could not focus as well at school so we went back on her normal dose about 2 weeks ago but that hasn’t helped. For example, during tests she is distracted by the people around her and then rushes and needs more time. We experienced this at [the High School] before she went on medication. We really did not see this much at [the Middle School] except she was struggling to get homework assignments home and done when her medication had worn off at night so her 504 accommodations are more focused around that. She has had a few -0- for homework this year that can’t be made up in APES.

We went back to the doctor on Monday of this week (9/16) and he suggested she come talk with you about accommodations and possibly reducing her workload some. I know that she spoke with you yesterday. However, I don’t think she spoke with you options to reduce her work load if any? We had to pick her up early yesterday because she could not stop crying. She seemed better today. I wanted to share this with you and see if we can be kept in the loop Also, to see what we can do for her.

Thanks so much, [Parent and Father] Stip. Ex. 8 p 000012-13

1. Counselor promptly responded and again suggested Student drop to lower-level classes. Stip. Ex. 8 p 12. He also asked for “something from the doctor” before “maybe dropping” to lower courses. Stip. Ex. 8 p 11. He did not initiate the IEP eligibility process or send an Invitation to Conference for an IEP referral meeting. Counselor also did not give Parent a copy of the *Handbook* or Prior Written Notice of his unilateral decision that Student did not qualify for an IDEA referral.
2. In response, Parent forwarded Dr. Munt’s letter to Counselor on October 15, 2019 which states:

Date: October 15, 2019

Regarding: [Student] DOB: XX/XX/XXXX

To Whom It May Concern:

The patient named above has the following diagnosis**: ADHD – combined (ICDM F90.2).** She takes medication daily for focusing in school. This school year she has become overwhelmed, anxious and upset about the amount of schoolwork she needs to accomplish in order to perform well academically. Heretofore she has been a diligent, hard-working student.

I believe should qualify and benefit from accommodations under a Section 504 plan for the school year. Such accommodations would include preferential seating, a separate testing site, extended time on tests if needed, marking in the test booklet on standardized tests instead of being required to use a bubble sheet, extended time on homework if needed or reduced homework, teacher’s notes or copy of class notes from a peer note-taker.

I appreciate the school administrations’ diligence and consideration for this student.

Sincerely,

Robert L. Munt, Jr., MD, FAAP

Stip. Ex. 221 p 000580 (emphasis in original)

1. Even though Dr. Munt did not specifically ask for an IEP, his letter along with Parent’s email was a “parent referral” request. After Counselor received this referral request, he did not initiate the IEP eligibility process or send an Invitation to Conference for an IEP referral meeting. Counselor also did not give Parent a copy of the *Handbook* or Prior Written Notice of his unilateral decision that she did not qualify for an IDEA referral.

**October 17, 2019 Section 504 Eligibility Determination and Plan**

1. Instead, another Section 504 eligibility meeting was held in-person on October 17, 2019. Stip. Ex. 215 p 000556-000560 (504 Eligibility Determination).
2. Student “cried during the meeting.” T vol 1 p 170:21. Her parents “went into detail” about “how depressed” she was and that they were looking for a therapist. T vol 1 pp 170:18-171:3. The 504 Eligibility Determination documented Student’s anxiety but not her depression. Stip. Exs. 214 p 000550; 215 p 000557.
3. At that time, the 504 Team had Dr. Munt’s October 15, 2019 letter and Dr. Stallings’ 2012 Psychoeducational Evaluation.[[25]](#footnote-26) Although Dr. Stallings’ evaluation was used to document Student’s ADHD, the Eligibility Form did not evidence any review of the private evaluation results or that Dr. Stallings’ recommendations for specially designed instruction (*see* Stip. Ex. 180) were considered. Stip. Ex. 215 pp 000556-000557. Dr. Stallings’ evaluation indicated that in second grade, Student may need specially designed instruction as curriculum requirements intensify due to her executive functioning. Despite having this historical information and Dr. Munt’s letter, WCPSS staff did not consider initiating the IDEA eligibility process and conducting a new evaluation to determine Student’s current academic and functional needs. Neither Student or her parents were given copies of the *Handbook* or Prior Written Notice of the team’s unilateral decision that she did not qualify for an IDEA referral.

**2012 Private Psychoeducational Evaluation by Dr. Stallings**

1. Cheryl Stallings, Ph.D., a Nationally Certified School Psychologist, conducted this comprehensive psychoeducational evaluation of Student on May 5 and August 8, 2012 when she was in the second grade. Then, as in October 2019, Student’s parents were concerned about Student’s motivation, organization, inattention, and need for prompts regarding daily task management with school and sports. The testing was to investigate the possible of an attention deficit disorder. Stip. Ex. 180 p 000389. Although outdated at the time of the Section 504 meeting, this 2012 Psychoeducational Evaluation was significant later because it evidenced Student’s historical executive functioning deficits and other functional needs as well as foreshadowed her future need for specially designed instruction.
2. Dr. Stallings tested Student’s intelligence, achievement, executive functioning, and behaviors. *Id.* Cognitively, Student was high average with a full scale score of 110 (75%) but she had a working memory score of 83 (13%) which demonstrated significant weakness. Stip. Ex. 180 pp 000391. Student’s “working memory skills compared to the other WISC-IV Indexes happens in about three percent of the population.” Stip. Ex. 180 p 000392.
3. Student also had a discrepant early reading skills score of 73 (4%) which was later remediated by tutoring provided by Student’s parents. Stip. Ex. 180 p 000393. Student’s attentional ability, executive functions and behavior/emotional functioning scores fell in the low average to below average range for her age. Stip. Ex. 180 p 000395. Student’s teachers reported Student had significant difficulties in with inhibition/impulsivity, working memory, self-monitoring behaviors, and planning/organization and organization of materials. Stip. Ex. 180 p 000395. Student was also at-risk for somatization (stomach problems, complains about pain and health). Stip. Ex. 180 p 000396. According to Dr. Stallings, Student had auditory attention span deficits and difficulty taking in new information effectively and efficiently; she had weaknesses in using semantic, meaningful strategies with verbal information; and needed assistance with memory strategies with verbal information. Stip. Ex. 180 p 000396.
4. Dr. Stallings diagnosed Student with ADHD/Combined Type and made numerous recommendations for educational supports in order for Student to remain successful as curriculum demands increase. Stip. Ex. 180 p 000398.
5. Dr. Stallings recommended the following instructional modifications and accommodations: breaking down information more to reinforce information in smaller condense pieces through the week; pairing auditory instruction with visual reinforcers; monitoring of the homework management skills; breaking down information into manageable chunks; frequent check-ins with teachers; tutoring may be needed for extra drill, practice and reinforcement of academic material to ensure full understanding; preferential setting; teacher monitoring of progress; note taking strategies; pauses during class instruction because of inconsistent working memory and allowing adequate wait time for Student to retrieve information; modification of test formats in multiple-choice, true/false, and matching rather than essay and short answers tests; provision of essay topics in advance; help planning and organization of responses in advance; highlighting or circling in colored ink math computations or book directions; her own textbooks; positive stretch breaks and movement during the day; sports participation as an outlet; a computerized program that helps strengthen working memory such as CogMed; and consideration of possible medication to help manage her ADHD symptoms. Stip. Ex. 180 pp 000398-000399.
6. The recommendations in Dr. Stallings’ 2012 Psychoeducational Evaluation forecasted Student’s educational needs as Student’s curriculum demands increased in middle school and high school. A subsequent 2021 Psychoeducational Evaluation by Tess Collett, Ph.D. (Stip. Ex. 181) echoed many of the same recommendations but, by that time, Student needed more functional and behavioral support then even WCPSS could offer.
7. The 504 Eligibility Determination form did not document any of Dr. Stallings’ recommendations or Student’s executive memory functioning deficits. It did, however, document that at that time, Student was still have difficulty concentrating “toward the end of the school day” because her medication began to wear off. In addition, she “has become increasingly anxious about the amount of school work she needs to complete to be successful in her classes.” Stip. Ex. 215 p 000557. The other 504 documents noted that Student also “feels some anxiety about completing tasks,” “can be overly social sometimes in class,” and “[t]he family is still working to manage medication.” Stip. Ex. 214 pp 000556-000557. The team determined that Student’s ADHD was not intermittent, episodic or in remission and she has learning/classroom performance difficulties because of her diagnosed impairment. Stip. Ex. 214 p 000557.
8. Although an IEP meeting had not been held since 2018, the 504 - Eligibility Determination team answered affirmatively that “the need for special education services [had] been ruled out through the IDEA process.” Stip. Ex. 215 p 000557. By this time, an IDEA eligibility determination IEP meeting should have been held.
9. Inexplicably, the Eligibility Form showed that Student was not eligible under Section 504 either, yet a Section 504 Plan was developed. *Compare* Stip. Ex. 215 p 000557 *to* Stip. Ex. 214 pp 000543-000545. Neither Student nor her parents were given copies of the *Handbook* or a Prior Written Notice explaining how and when the “need for special education services [had] been ruled out through the IDEA process.”
10. Although Counselor, a regular education teacher, Student, and Parent purportedly participated in the Eligibility Determinations for both IDEA and Section 504, none of them signed the Eligibility Form or any of the other 504 documents. Stip. Ex. 214 p 000551; *see also* pp 545, 546, 549, 555. The October 17, 2019 Section 504 Plan contained the same three accommodations as the June 2019 Plan but added the following two more:
    1. Facilities Accessibility - Student will receive preferential seating near the front of the classroom away from distractions. [Which is essentially the same as the existing “Alternative teaching Strategies” in the 504 Plan that the teacher(s) and Student determining preferential seating.]
    2. Classroom and State Test Accommodations: preferential seating, 50% extended time on tests and quizzes, and marking answers in test book.

Stip. Ex. 214, p 543; T vol 1 pp 173:3-5, 173:24-174:2.

1. Although not labeled as such, the same summary of information about Section 504/ADAAA student and parent rights, not IDEA rights, was included in the October 2019 504 Plan. Stip. Ex. 214 pp 000553-554.
2. Despite the Section 504 Plan, Student’s disruptive classroom behaviors continued. On January 23, 2020, a Teacher who had previously noted no evidence of a need for a 504 plan in October, emailed Parent regarding Student’s poor grade on an assignment and disruptive behavior in class such as “mak[ing] elaborate stretches and squeal, ask personal questions to get discussion off topic, interrupt other students, or shout out words like ‘poop’ or ‘fart’ to get attention from classmates.” Stip. Ex. 20 p 000033. The Teacher expressed his concern that if the behavior continued, “she will need to be removed and assigned a disciplinary consequence by the school.” Parent assured the Teacher the behavior would be addressed and explained that Student has ADHD, and they see similar behaviors at home when she does not take her ADHD medicine on the weekends. *Id.*, p 000032.
3. Although this was not a referral request, based on the past referral requests and the Teacher’s complaints, as of January 23, 2020, WCPSS had sufficient information to “suspect” that Student was a child with a disability. At the latest, the 90-day eligibility determination period began at this time but should have begun as early as October 15, 2019. A referral meeting should have been held on or about February 7, 2020. Stip. Ex. 312 (2019-2020 calendar). Using the January 23, 2020 date, the 90-day period would have expired on April 24, 2020 during which time WCPSS should have conducted all necessary evaluations and developed an IEP for Student

# **COVID-19 Pandemic**

1. Concurrent with that 90-day eligibility period, however, was the onslaught of the COVID-19 pandemic which began to shut down schools, private and public facilities nationwide. By March 2020, the COVID-19 pandemic had reached North Carolina.

**March 14, 2020 Emergency School Closures**

1. On March 14, 2020, the Governor of North Carolina issued a State of Emergency and closed all public schools. Stip. Ex. 30. The entire school lockdown lasted a month, from March 14 to April 20, 2020. T vol 1, p 182 (T of Parent). Respondent transitioned to remote learning for the remainder of the 2019-2020 school year due to the ongoing COVID-19 pandemic. Stip. 30.
2. Prior to the lockdown, Student already had “missing assignments or late assignments.” T vol 1 p 183:1-6 (T of Parent). Parent was not receiving notifications of Student’s work that was submitted late. T vol 1 p 183:23 (T of Parent); Stip. Ex. 179 pp 000313-321; Stip. Ex. 186 (Sports & Entertainment Marketing I – winter and spring 2020); Stip. Ex. 187 (Math III – 2019-2020). Student was turning in work late, which “was one of the reasons that [Parent] reached out in the 8th grade and also in the 10th grade.” T vol 3 p 529:14-16 (T of Parent).
3. Parent was unaware Student had been offered to do a recovery plan for Spanish III. T vol 1 p 188:4 (T of Parent); Stip. Ex. 33. However, Respondent was aware of the recovery plan, as Student’s Spanish teacher had notified Principal about it. Stip. Ex. 35. Student’s grade point average and class rank dropped during this time. Resp’t Ex. 485 p 001919.
4. Student continued to deteriorate emotionally and functionally during the Spring semester and her reliance on cannabis as a coping mechanism increased. At that time, Parent was focused on the care of her mother-in-law who was in hospice not on Student’s schoolwork. Student’s paternal grandmother died in May 2020. WCPSS’s focus was also elsewhere. The High School staff were busy transitioning to remote learning and finishing the school year.

162. After the COVID-19 lockdown, the High School’s grading policies changed. All Fall semester grades counted, but the Spring semester grades were based only on completed work up to the third quarter. T vol 9 p 2258:15-23 (T of Counselor). The third quarter ended April 3, 2020. Stip. Ex. 312. The third quarter grade was used for the fourth quarter grade, but students were allowed to complete outstanding assignments, were given the option of potentially raising their grades by 5-10 points and were given a Pass/Fail grade unless the family wanted a numerical grade. T vol 9 pp 1158:24-2259:4 (T of Counselor). Because of the amended grading policy, Student passed the tenth grade with A’s and B’s. WCPSS’s grading policies and coursework expectations changed even more during the 2020-2021 school year, also known as the “COVID Year.” *See, e.g.*, T vol 5 pp 1316:2-3 (T of Geography Teacher), 1318:6-1322:20 (T of Geography Teacher); T vol 6 pp 1500:22-1051:3, 1506:5-9 (T of Geography Teacher); T vol 7 pp 1735:18-1739:8, 1740:11-1741:7 (T of History Teacher).

1. From March 14, 2020 to the end of the 2019-2020 school year on June 12, 2020, none of the School students had access to the general curriculum as instruction had essentially ended. Stip. Ex. 312.
2. The coined phrase “Grace and Flexibility,” or some iteration thereof, became “the COVID Year” panacea during the teacher’s testimonies at the hearing; however, the High School’s own training materials demonstrated the “flexibility” should have been limited to internet connectivity issues. *See* Stip. Ex. 330 at 001993 (stating “Patience and Flexibility”).
3. The 90-day eligibility period expired with no IEP to address Student’s functional needs.
4. Student’s grades were starting to drop but were still lower A’s & high B’s. Stip. Ex. 192 p 000467.

**Eleventh Grade 2020-2021 (the “COVID Year”)**

1. The first day of school for the 2020-2021 school year was August 23, 2020. Stip. 32. All instruction was virtual. *Id.* Student was a junior at the High School during the 2020-2021 academic year. Stip. 31. Student began the 2020-2021 school year with the accommodations in her October 17, 2019 Section 504 Plan.
2. At this time, the Section 504 Plan was not sufficient to meet Student’s academic and functional needs; she needed an IEP instead. By now, WCPSS should have developed an IEP designed to meet Student’s unique needs, allow her to access her education, and prepare her for future education, employment, and independent living. Student’s IEP should have been based on her present levels of academic and functional performance as determined by a comprehensive psychoeducational evaluation. Student’s IEP should have contained academic, behavioral, and functional goals along with related services. But, WCPSS had not initiated the IEP referral/eligibility process during her tenth-grade year and did not during her eleventh-grade year despite even more referrals and parent requests.
3. During the 2020-2021 school year, there were at least 140 email communications to/from Parent, Student, WCPSS teaching staff, Counselor, and school administrators regarding Student’s educational issues including but not limited to the inadequacy of the Section 504 Plan, missing assignments, and Student’s mental health status. *See* Final Prehearing Order pp 13-16, Stip. Exs. 175 (August – 11 emails; September – 37 emails; October - 41 emails; November and December 10 emails; January and February – 7 emails; March 7 emails; April – 15 emails; May -11 emails; and June - 1 email); *see also*, Stip. Ex. 179 (75 pages of additional combined emails re: late work).
4. Prior to starting school, on August 21, 2020, Student notified her teacher, Marketing Teacher, of her challenges with focus explaining it “will probably only be at the beginning because [her] medicine hasn’t kicked in yet.” Stip. Ex. 38. On August 25, 2020, the third day of class, Student notified Geography Teacher she needed to leave class early for her psychiatrist appointment. Stip. Ex. 42.

**Medication Concerns**

1. Medication concerns had been present before the eleventh grade. Since the 8th grade, Respondent knew that Student had been diagnosed with ADHD-Combined Type and was on medication to control it. Stip. 12. The 8th grade Special Education Referral form documented Student was taking Focalin XR for her ADHD. Stip. Ex. 200 p 000495. The Section 504 Eligibility Determination Worksheet from the 8th grade, 2017-2018 school year, evidenced that Student was diagnosed with ADHD-Combined Type which required medication, impaired her concentration “toward the end of the school day,” and impacted her learning/classroom performance because she “tends to do poorly when not taking medication.” Stip. Ex. 204 p 000508; *see also* Stip. Ex. 108 (2018 psychoeducational evaluation stating that Student had significant difficulties with inhibition/impulsivity, planning/organization, and self-monitoring behaviors). Parents reported that Student was “up late at night doing homework, needs additional time on EOC/EOG; end of day begins to loose [sic] focus, off task in 8th PE for class.” Stip. Ex. 20, p 000507. The Worksheet reported that Student’s impairment was not “episodic or in remission.” Stip. Ex. 20, p 000508. Student’s ADHD continued to impact her educationally during her high school years. Stips. Es. 22 & 23 (2018-2019 504 Plan revised), 27 (2019-2020 had 504 Plan); 28 (504 Plan revised on October 17, 2019); 33 (began 2020-2021 year with 504 Plan); 43 (504 Plan revised October 22, 2020).
2. Respondent also knew that Student had been taking medication to control her ADHD since the 2nd or 3rd grade and that the efficacy of her medication impacted her educationally because it “begins to be less effective later in the school day” when she loses “focus” and becomes “off task.” Stip. Ex. 20, p 000506 (8th grade Section 504 document). The efficacy of Student’s ADHD medication had been problematic at the beginning of every school year. Stip. Ex. pp 00011-12 (email from Parent stating, “we are having a hard time regulating her ADHD medication.”); Stip. Ex. 38 p 00063 (email from Student acknowledging medication efficacy differs at the beginning of year); Stip. Ex. 84 (email from Parent identifying medication management issues in 2020).
3. Parent advised school staff and Counselor on September 29, 2020 that they were still trying “to get [Student’s] ADHD medication right” and that her providers had “added a new medication because they think her underlying depression maybe also causing her to be very unfocused.” Stip. Ex. 102 p 000187-88. In addition to ADHD medication efficacy problems at the beginning of every school year, at the beginning of Student’s junior year, Parent advised Respondent that Student had a new diagnosis of depression. *Id.* These medication problems continued throughout the 2020-2021 school year and during most of the 2021-2022 school year until finally resolved after multiple medication trials during Student’s enrollment at Private Academy. Stip. Ex. 274 (psychiatric evaluation and progress notes).
4. Respondent knew that at the beginning of every school year and the end of the school day, Student’s behavioral and functional skills were impacted by the efficacy of her medications. The efficacy and side effects of Student’s medications should have been considerations for the IEP team in developing an IEP for her. *See* Stip. Ex. 200 p 000495 (Health/Medical section on 8th grade Special Education Referral). Student has a right to a free appropriate public education with or without taking medications. Respondent cannot require her “to obtain a prescription for a substance covered by the Controlled Substances Act (21 U.S.C. § 801 *et seq*.) as a condition of attending school, receiving an evaluation, [] or receiving special education services.”[[26]](#footnote-27)
5. Respondent now blames Student’s cannabis use for her medication problems.
6. Although she was eligible for an IEP, Student began her junior year with the Section 504 Plan previously revised on October 17, 2019 (Stip. 33) which included the general accommodations of: redirection for inappropriate or distracting behavior, preferential seating, no use of phone during instructional times without teacher recommendation for an assignment, and classroom/State testing accommodations of: preferential seating, marks in test book (not for online assessments), and 50% extended time. Stip. Ex. 214 p 000543. Except for the extended time on tests, none of the accommodations were applicable to virtual instruction.
7. During Student’s 2020-2021 school year, Student took the following classes:

Sports and Entertainment Marketing II Honors - Marketing Teacher;

AP English Language and Composition – English Teacher;

Pre-Calculus Honors - Math Teacher;

CTE Advanced Studies AAVC Honors - CTE Teacher;

Physics Honors - Physics Teacher;

Spanish IV Honors – Spanish Teacher

AP Human Geography – Geography Teacher.

Stip. 34

1. She initially began her junior year taking AP US History (“APUSH”). After the first quarter, Student transferred into American History I Honors, taught by History Teacher. Student’s grade in AP US History at the end of the first quarter was a 60. Stip. 35
2. Of these eight (8) teachers, five (5) - Marketing Teacher, Math Teacher, Physics Teacher, Geography Teacher, and History Teacher - testified at the hearing.
3. The teachers testified about the “Grace and Flexibility” afforded students during the “COVID Year.”[[27]](#footnote-28) According to them, Student’s grades were earned and reflected her level of achievement and mastery of the material, and the grading policies at School were not changed during the “COVID Year.”[[28]](#footnote-29) Despite testifying to the quality of Student’s work, the validity of her grades, and Student’s mastery of the material, the teachers did not review Student’s underlying grades or work product to prepare for their testimony, despite having access to both. *See, e.g.*, T vol 6 pp 1478:4-1479:7 1486:14-25 (T of Geography Teacher); T vol 7 p 1704:2-5 (T of Physics Teacher); T vol 6 p 1581:6-10 (T of Math Teacher).

**The “COVID Year” Modifications for All Students**

1. During the COVID Year, there were significant modifications of grading, attendance, and testing policies as well as the curriculum at School.

**Attendance Modifications**

1. During remote learning, teachers did not require students to keep their computer cameras on and most did not including Student, although she did occasionally turn her camera on. As evidenced by Student’s “Attendance Record,” attendance was not taken consistently by any of the course teachers but especially not by Student’s Physics (Physics Teacher), Spanish IV (Spanish Teacher), American History (History Teacher), and AP Human Geography (Geography Teacher) teachers. *See* Stip. Ex. 188 pp 000490-494 *but compare* regular “Student Attendance Procedures” Stip. Ex. 330 p 002009. The Sports and Entertainment (Marketing Teacher), AP English (English Teacher), and CTE Advanced Studies (CTE Teacher) teachers did a better job keeping attendance but not for every day. *Id*. There were no penalties for not attending a virtual class. Stip. Ex. 330 p 001993. According to the records, Student missed many classes without penalty. *See* Stip. Ex. 188.

**Grading Modifications**

1. There were no penalties for late work either. T vol 9 p 2286:12-14 (T of Counselor). Teachers were also allowed to give incompletes without the administration’s permission to allow all students the “time to make up any work that they were missing.” T vol 9 p 2286:12-14 (T of Counselor). In addition to Student’s Section 504 Plan accommodations, she, along with other students, was given extended time for work completion without penalty.

**Curriculum Modifications**

1. Significantly during that year, the amount of curriculum was reduced by one third. In a normal year, a high school class was 90 minutes of instruction. During the 2020-2021 school year the class time was shortened from 90 minutes to 55 minutes (Stip. Ex. 330 p 002003) which “changed how material was presented and how long students had to work on it.” T vol 7 p 166:10-21 (T of Physics Teacher) The instructional school day was all virtual and was reduced from a full day to four hours between 8:00 a.m. to 11:55 a.m. Stip. Ex. 330 p 002003. Understandably, because of the class time reduction, teachers had to “cut out some material” because they “could not teach it all.” T vol 6 p 1431:6-7 (T of Geography Teacher). This means that, in addition to the accommodations on her Section 504 Plan, by necessity all Student’s teachers were modifying and exempting her from coursework in their classrooms. Adapting and modifying the content and/or delivery of instruction is “specially designed instruction.”[[29]](#footnote-30) During the COVID Year, all students were essentially receiving special education and accommodations. Yet, still with these interventions, Student’s functional deficits impeded her educationally and she required intensive assistance at home and through her mental health providers to be able to access her education.

**Testing Modifications**

1. All students were also allowed to take tests on days that suited them without penalty, and retake quizzes and tests for higher grades. *See, e.g.*, T vol 6 p 1578:4-6 (T of Math Teacher); T vol 6 pp 1469:24-1471:8 (T of Geography Teacher); T vol 7 p 1697:8-12 (T of Physics Teacher); T vol 7 pp 1781:9-17; 1798:2-5 (T of History Teacher); T vol 6 p 1566:20-22 (T of Math Teacher); T vol 6 pp 1524:8-1525:9 (T of Geography Teacher); T vol 9 p 2246:20-23 (T of Counselor); T vol 7 pp 1740:11-1741:7 (T of History Teacher); T vol 6 pp 1521:15-1522:8 (T of Geography Teacher). Because homework and practice assignments were not supposed to exceed 15% of a student’s academic grade for a marking period (Stip. Ex. 330 p 002017), these grading modifications significantly inflated all students’ grades.
2. Despite attendance, grading, testing, assignment, and curriculum modifications given all students during the COVID Year as well as the accommodations on her Section 504 Plan, without the daily one-on-one assistance provided by Parent, Student still struggled to organize and complete her work.

**Multiple Referral Requests and Parent Referrals During the COVID Year.**

1. WCPSS should have already developed an IEP for Student before the 2020-2021 school year but there is no excuse for them not doing so during the 2020-2021 school year. WCPSS did not have to suspect Student was a child with a disability because WCPSS had many verbal and written referral requests at the beginning of the 2020-2021 school year indicating she was a child with a disability.
2. According to her teachers, however, Student was “typical,” and her conduct and participation were no different than any other student.[[30]](#footnote-31) Her teachers testified that they had no reason to suspect Student might need an IEP because she achieved good grades, performed well, and her performance was consistent throughout the year.[[31]](#footnote-32) Even if Student’s grades were not artificially inflated during the COVID Year, grades are not the sole basis for determining IDEA eligibility. Since instruction was virtual, the school staff could only see her grades not actually see her functional performance.
3. Student’s ability to “do school” did fluctuate at times. During her sophomore and junior years, because of Student’s depression, she had “ups and downs.” T of Student p 89:14-19. In her “‘ups,’ [she] could function and do school. But when [her] downs came, [she] could not . . . do school.” T of Student p 89:17-19. However, during her junior year, “she was really desperate . . . nothing made [her] feel good at all in those states of minds. But [talking to her therapist] kept [her] from like no killing [her]self.” T of Student pp 110:22; 111:1-3; 801:14-15 (describing how her junior year “[she] had fallen off the face of the earth in regards to [her] mental health”). By September 2020, Student was suicidal. T vol 2 p 241:1-7.

**English Teacher, CTE Teacher, and Spanish Teacher Had Reasons to “Suspect”**

1. Student was especially “miserable” during her junior year and told her teachers English Teacher, CTE Teacher, and Spanish Teacher that “[she] was severely depressed.” T of Student pp 113:2; 115:24, 117:5-118:6-12. Work was “extremely difficult,” and she “would spend hours on something and get, like got nowhere. . . . [She] wanted to like feel confident and proud of [her] work. But [she] just, it’s hard to do school stuff when you’re in that state . . ..” T of Student p 114:18-22. Despite this, Student also “didn’t want [her] teachers to think that [she] just didn’t care – which was far from the truth. [She] did, [she] was just unable.” T of Student p 114:10-12.
2. At the beginning the 2020-2021 school year, Student had “personal Zooms” meetings individually with her English Teacher; CTE Teacher; and Spanish Teacher. T of Student p 113:4-20; Stip. 34.
3. During those meetings, she specifically told English Teacher she “wasn’t doing well mentally.” T of Student p 113:21-25. She told English Teacher:

A. I know I talked with her about how I was doing and how I was severely depressed and I couldn’t really, it was hard for me to do anything because I also didn’t want my teachers to think that I just didn’t care -- which was far from the truth. I did, I was just unable.

Q. Unable to do what?

A. School.

Q. Did you not do your work?

A. I tried.

Q. How did it go?

A. It was extremely difficult. And I would spend hours on something and get, like got nowhere. But like I wanted to like feel confident and proud of my work. But I just, it's just hard to do school stuff when you're in that state, just like it's hard to do anything else.

T of Student p 114:8-23.

1. Student told Spanish Teacher:

A. She [Spanish Teacher] said that -- I know she mentioned some, something along the lines that I didn’t seem like I was doing well, that she was willing to work with me and give me extra time with things. And she was just a huge help, and it just like made me feel a little less miserable --

Q. Uh-huh.

A. -- because she really knew what was going on.

Q. What did you tell her about what was going on?

A. I was depressed.

Q. Okay. What else?

A. I don’t know. Like that I was having trouble doing work because, due to my depression and anxiety.

T of Student p 115:12-24

**Student’s Eleventh Grade Teachers Had Reason to “Suspect” Based on Emails**

***August and September 2020 Emails***

1. Also, at the beginning of the 2020-2021 school year, both Student and Parent began notifying school staff in writing about the educational impact of Student’s mental health problems. *See* Stip. Exs. 38 (August 21, 2020 email re: focus issues); 42 (psychiatrist appointment August 25, 2020 email); 47 (“not feeling well recently” needed extension September 7, 2020 email). [[32]](#footnote-33)
2. By early September 2020, Student “just . . . couldn’t engage.” Student began seeing a neuropsychiatrist, as they thought the issue was related to her medication. She “couldn’t get out of bed . . . she lost interest in everything. . . . She couldn’t get in front of the TV screen for school. . . . [Student] started going to the therapist way more . . . she had . . . like 15 zeros . . . she was basically failing her classes. . . . it was devastating. So [Parent] started reaching out to the school for help.” T vol 1 pp 200:18-201:7 (T of Parent).
3. On September 14, 2020, Parent began emailing Student’s teachers and Counselor regarding her struggles and challenges completing work. Parent explained Student “has struggled with her ADHD medication this year and has been real unfocused this 2020 school year in addition to trying to get used to virtual learning and a new schedule” and asking for teachers to “work with us to make up any outstanding work/assignments in your class and to check on her overall progress.” Stip. Ex. 49, pp 84-85 (Spanish Teacher); Stip. Ex. 50 (English Teacher); Stip. Ex. 53 (Math Teacher); Stip. Ex. 54 (Marketing Teacher); Stip. Ex. 57 (APUSH Teacher); Stip. Ex. 58 (CTE Teacher); Stip. Ex. 59 (Physics Teacher); Stip. Ex. 60 (Geography Teacher).
4. Parent additionally informed Counselor “[w]e have also learned that she has some underlying depression and anxiety in addition to the ADHD that we are working on treating” and offered to “get doctors notes if needed as she has been to the doctor about every week lately.” Stip. Ex. 52, p 89. Parent informed Student’s teachers about the reason she was missing school and “offered doctor’s notes as well.” T vol 2 p 233:14 (T of Parent), Stip. Exs. 61-63.
5. “There were a lot of times [Student] missed school” during the fall of 2020 due to her anxiety, depression, and ADHD. “[S]he was seeing her therapist during this time, about three times a week. . . . she was seeing Dr. Dittmer. [Petitioners] were taking to the pediatrician.” T vol 2 p 232:5-9 (T of Parent); Resp’t 481 (Unwin’s therapy notes).
6. Parent explained Student “had lost 20 pounds. She couldn’t eat. She didn’t want to go to lacrosse. We made her go. She would sit in her car and not get out. Just lost interest in all aspects of . . . social education. She loved sports.” T vol 1 p 201:11-15 (T of Parent). Student had always been an “excellent lacrosse player” and “was being recruited” in the summer of 2020 but she was losing interest in her “usual activities.” T vol 1 pp 188:25-189:2 (T of Parent).
7. Parent emailed Counselor and Student’s teachers on September 14, 2020 “[b]ecause we needed help and support at school.” Student “had lots of outstanding work and assignments, zeros. . . . she was failing several classes.” T vol 1 pp 201:24; 202:19-21; Stip. Exs. 49, 50, 52, 53, 55, 57-60; Stip. 37.
8. On September 18, 2020, Parent notified Student’s teachers and Counselor that Student was unable to attend school due to her doctor “increas[ing] her medication for the third time,” which made her sick, and asking for teachers to work with Student to get her quizzes and tests made up Stip. Ex. 61 (Spanish Teacher); Stip. Ex. 62 (APUSH Teacher and Counselor); Stip. Ex. 63 (Math Teacher).
9. On September 22, 2020, Parent emailed APUSH Teacher asking for additional time for Student to complete an assignment as Student had “worked on and off last night until [Parent] made her go to be around 3:00 a.m.” Stip. Ex. 66. Student also messaged APUSH Teacher the same day asking for extra time explaining she was “struggling with [her] ability to focus due to mental health concerns.” Stip. Ex. 67. “There was a lot of times when [Student] would sit in front of the screen for hours on end and not accomplish anything.” T vol 2 p 234:22-25 (T of Parent). Parent informed Student’s teachers of this as well. Stip. Ex. 66.
10. Student had “lots of tutors. She was working weekends . . . she wasn’t going to lacrosse tournaments because we were trying so hard to get her caught up on school.” T vol 2 p 235:4-7 (T of Parent). Student “was sending e-mails to teachers when she was able to . . . a lot of time [Parent] would help her, encourage her to write them. Sometimes [Parent] would help her draft them.” Then Parent “would look at Student’s e-mail[s and] her Google Classroom to see if [Student] actually did it.” T vol 2 p 236:9-15 (T of Parent); Stip. Ex. 67, 69, 70, 75, 81, & 85.
11. Parent stayed “at home with [Student] every day. . . [Parent] rarely left the house. . . [Parent] was there supporting her, trying to get her in front of the computer. [Parent] would help her with school.” When Parent “absolutely had to do work stuff,” her [Parent’s] mother would come from out of town to help. T vol 2 p 237:9-15 (T of Parent).
12. Parent observed Student panic about schoolwork. Parent spoke to Spanish Teacher about Student’s panic over an assignment in Spanish. T vol 2 p 239:14-17; Stip. Ex. 70. Parent also testified there “were several times” Student was unable to take a test when it was assigned as well as times Student would “get on the screen and then she would leave, and . . we would hear from her . . . teachers.” T vol 2 pp 245:25-246:3 (T of Parent); Stip. Ex. 84.
13. On September 23, 2020, English Teacher, who did not testify, emailed Physics Teacher that Student was with her after class: “She was in tears, and I just couldn’t let her go right when class was over.” Stip. Ex. 68. Two (2) days later, Student emailed English Teacher apologizing for missing class and explaining she “was having a difficult start to [her] day. [She] just couldn’t continue with school.” Stip. Ex. 69.
14. On September 25, 2020, Student emailed Physics Teacher apologizing for not being “able to come to class today for the test. I have been struggling with some mental health concerns that have affected my ability to focus and function.” Stip. Ex. 75, p 125.
15. On September 29, 2020, both Student and Parent were emailing Student’s teacher and counselor about Student’s increasing needs. Stip. Ex. 76 (Spanish Teacher). Parent reported “Friday through today [Tuesday, September 29, 2020] have been some of her worst days yet.” Stip. Ex. 76 (Spanish Teacher). Student emailed Geography Teacher, “I have been struggling with my mental health this year. My depression has been kicking my butt. I apologize for not being as active in class and missing assignments.” Stip. Ex. 71.
16. Parent informed Physics Teacher and Math Teacher that Student’s doctors “added a new medication because they think underlying depression maybe also causing her to be very unfocused.” Stip. Ex. 73, p 121 (Physics Teacher); Stip. Ex. 74 (Math Teacher). Parent informed Counselor, “[Father] and I are having a very difficult time even getting her out of bed and in front of the computer right now.” Stip. Ex. 82, p 135.
17. Student was passively suicidal at the time she sent the emails on September 29, 2020. T vol 2 p 241:6-7; 242:5-6; T vol 6, p 1393:21-1394:3 (T of Unwin documenting Student having suicidal thoughts); Stip. Ex. 76, 79, 82. She was using cannabis daily.
18. By late September 2020, the emails from Student and Parent became more specific about her mental health problems. Student emailed her teacher that “I have been struggling with some mental health concerns that have affected my ability to focus and function.” Stip. Ex. 75.
19. There were many similar emails in September 2020. *See* Stip. Exs. 78 (subject “Mental Health”); *see also,* Stips. Ex. 73 (September 29 emails from Parent re: ongoing efforts to get her ADHD medicine right” and “underlying depression may be also causing her to be very unfocused”); 76 (Parent September 29, 2020 email about Friday through today have been some of her worst days yet”) 79 (Parent September 30, 2020 email about “worst week yet as we can barely get her in front of the computer each day. She is really struggling and has been to the doctor almost every week” and request for “help take the pressure off her with her ongoing concentration/mental health concerns”); & 81-83.
20. On September 30, 2020, Parent emailed APUSH Teacher to let her know Student was “still not doing well with her health and concentration issues” and they could “barely get her in front of the computer each day. She is really struggling and has been to the doctor almost every week.” Stip. Ex. 79, p 130. Parent informed APUSH Teacher “[a]t the suggestion of her doctor, we are going to move her out of APUSH at the end of the quarter (and have cancelled the ACT for the foreseeable future) to help take pressure off her with her ongoing concentration/mental health concerns.” *Id.*

**October 2020 Emails**

1. By October 14, 2020, Parent’s emails to Student’s teachers provided even more vivid detail regarding detailing Student’s condition: “[Student] is still not doing well with her mental health and concentration issues. In fact, she may be worse—she is depressed, very unfocused, not sleeping and has lost about 20 pounds.” Stip. Ex. 87, p 141 (Spanish Teacher); Stip. Ex. 89 (CTE Teacher); Stip. Ex. 90, p 149 (APUSH Teacher); Stip. Ex. 91, p 153 (Math Teacher); Stip. Ex. 95, p 168 (English Teacher); Stip. Ex. 97, p 177 (Marketing Teacher); Stip. Ex. 102, p 186 (Physics Teacher).
2. Spanish Teacher responded that she would “like to discuss some options with [Parent]” by phone. Stip. Ex. 87, p 141. Parent spoke with. Spanish Teacher on October 14, 2020, when Spanish Teacher called her at home to discuss Student’s struggles. As Student had Spanish Teacher for a teacher previously, “[Spanish Teacher] knew how much she was struggling. Student had gone to private Zooms with her and also told her that. [Spanish Teacher] said she saw a huge difference in Student She said that the school needed to be doing more. And she said I needed to fight for my daughter.” T vol 2 p 250:10-16 (T of Parent); Stip. Ex. 87. Despite being on Respondent’s witness list, Respondent chose not to call Spanish Teacher to testify regarding her recollection of the conversation.
3. Parent emailed Counselor on October 14, 2020, because Student “needed a lot more educational support. She needed a lot more emotional support . . . we needed help.” T vol 2 p 252:11-13 (T of Parent); Stip. Ex. 92. LS. explained that from their meeting with Ms. Unwin they understood that Student “was suicidal, that she was struggling, that she needed more . . . educational and emotional support.” T vol 2 p 253:5-7 (T of Parent). At the meeting they made “a very basic schedule”: “wake up, . . . eat protein . . . get in front of the computer . . . exercise . . . take break . . . have a snack . . . do something social . . . [which] could even meet meeting with her tutor.” They tried this schedule with Ms. Unwin’s support to “keep her going, keep her functioning.” T vol 2 p 253:10-20 (T of Parent).
4. Parent also emailed English Teacher to confirm if all of the assignments Student was missing were posted in PowerSchool. English Teacher responded the same day, confirming Student was missing all the assignments in the email and more that were not yet posted in Power School. Stip. Ex. 95, p 167. English Teacher suggested Student take an incomplete to have more time to meet “our renegotiated deadlines for the back work.” *Id.* English Teacher also emailed Counselor regarding her suggestion that Student take an incomplete. *Id.*, p 165. Marketing Teacher also suggested Student take an incomplete. Stip. Ex. 97, p 177. Physics Teacher responded that Student “just had simple mistakes that tripped up her answers” on a recent quiz, and he was “willing to give her credit back on those [wrong answers].” Stip. Ex. 102, p 186.
5. Parent provided even more detail to Counselor regarding the feedback from Student’s medical providers: “we are starting a very strict schedule for eating, sleeping, school, social encounters and exercise to see if that will help before changing her medication again or considering more intensive treatment.” Stip. Ex. 92, p 156. Parent further explained Student “does not want to drop out of classes unless we have no other option.” *Id.*
6. Counselor was aware that her parents were starting a very strict regimen for Student before changing her medication again or “considering more intensive treatment.” Stip. Ex. 92 (Parent October 14, 2020 email). Counselor admitted in his email to school staff that “[Student] is really struggling emotionally right now. Her parents had to take her to a therapy session this morning.” Stip. Ex. 93 (October 14, 2020 email).

**October 14, 2020 Parent Referral to Counselor**

220. Although these verbal and written communications constituted referral requests and parent referrals, the most blatant parent referral was Parent’s October 14, 2020 email to Counselor which stated:

[Counselor], we are working so hard to get her in shape this quarter but [Student]’s MDs think we need to have an *emergency meeting to* *boost her 504 or get an IEP in place* because her issues are not going away. She has been diagnosed with a mood disorder (just trying to figure out if Bipolar 2 or just major depression disorder in addition to ADHD). We have another meeting with [Student]’s MDs Friday and early next week. Please let us know when we can arrange an emergency meeting and what we need from her treatment team. Thanks so much, L. and R.

Stip. Ex. 103 p 000191-192 (emphasis added)

1. Even though Parent mentioned that the doctor felt that Student may need to “*get an IEP*,” Counselor understood that this email was not a parent referral for an IEP but merely a request to increase Student’s 504 accommodations. T vol 9 p 2234:2-23.
2. Parent asked, “when we can arrange an emergency meeting and what we need from her treatment team.” *Id.* Counselor first testified that Parent put in writing “that the doctor felt that the student may need an IEP,” which was not a parent referral. T vol 9, p 2334:19-23 (T of Counselor). After reviewing Respondent’s requirement for parent referrals for special education, Stip. Ex. 323, which Counselor testified he “had seen . . . before,” Counselor admitted he had received three (3) documents that constituted parent referrals. T vol 9, pp 2335:5-2336:8 (T of Counselor).
3. When Parent sent the October 14, 2020, email at 5:43 p.m. to Counselor, “we were in crisis. [Student] was in crisis. And we, we needed help And everything that we were doing, she was not getting the educational support that she needed. And what we had in place was not working. And I knew we needed something more. . . . we just couldn’t . . . wait anymore. . . we were just limping along . . . we needed, she needed a lot more, she needed a lot more support.” T vol 2 pp 255:23-226:1.
4. Parent asked about an IEP because she “knew basically that it was more than a 504 and that we needed a lot more than what she had.” T vol 2 p 256:3-4.
5. The following day, October 15, 2020, Counselor provided Parent with a date for the meeting on October 22, 2020, but did not explain what type of meeting would be held. Stip. Ex. 94 p 160.

**October 15, 2020 Email About “In No Position to Handle Academic Work Now”**

1. Again, on October 15, 2020, Parent reported to Counselor that: “I was speaking with [Student’s] care team and we really need some help and support before next Thursday, **She is really in no position to handle academic work right now.** She has been trying to do make up work and she is failing.” Stip. Ex. 94 p 159 (emphasis added). Parent provided several examples of Student’s low grades (e.g., having a 50 in APUSH, scoring a 60 on a make-up quiz in Physics Honors). *Id.*
2. Parent explained both English Teacher and Marketing Teacher had “suggested she take an incomplete to give her more time to make up the work. In English Teacher’s class she has a 56 and has about five -0-s to make up and English Teacher does not want to add more stress.” Stip. Ex. 94, p 160. Counselor assured Parent “[t]he teachers can certainly put in an INC and give [Student] some more time to get caught up and those would never show on any transcript.” *Id.*, p 159. Counselor asked Parent to provide “any new information as far as diagnosis” for the meeting. *Id.*  Importantly, Parent explained Student needed “time and interventions to recover.” *Id.*
3. On October 16, 2020, Parent emailed Counselor with her concerns that APUSH was “unique and impossible for someone who can’t function and focus.” Stip. Ex. 103, p 189. She explained Student has **“NO NOTES”** from APUSH Teacher’s class, where “[t]he overwhelming majority of the grades have been from test and quiz grades where you needed to focus on the reading and be a good notetaker.” *Id.* (emphasis in original). Counselor assured Parent “[n]o one is ever going to see any grades from this year other than the final grades.” *Id.*
4. Parent explained that despite the tutors and working weekends to catch up, when Parent “went to look for [Student]’s notes, she didn’t have any notes from [APUSH]. . . . Not one note.” T vol 2 pp 248:22-249:1 (T of Parent). “[W]e felt like [dropping out of APUSH] was our only option . . . [t]hat was the option that was offered to us.” T vol 2 p 249:8-11 (T of Parent); Stip. Ex. 82. Counselor suggested a second time Student drop classes. Stip. Ex. 92. Parent testified, “[W]e just didn’t understand why she had to keep dropping classes.” T vol 2 p 254:6-7 (T of Parent). “[W]e felt like but for Student’s condition, she could do the work. And we were asking for help.” T vol 3 p 712:16-18 (T of Parent). Counselor acknowledged Petitioners did not want to move from APUSH to a lower level class: “I know that dropping down a level is not what you want to have to do. But I think it will benefit Student in the long run.” Resp’t. Ex. 145.
5. Some teachers had “graciously offered to give [Student] an INC for 1st quarter as she works to get in a better place.” Stip. Ex. 100. CTE Teacher responded that Student was “currently passing [her] class with a 60%,” and she was “giving her extra time to complete what she can up to the 21st. Either way, she will pass for this quarter, so I don’t feel that it is prudent to give her an INC.” Stip. Ex. 101, p 185.
6. Although none of the school staff construed these emails as referral requests or parent referrals for IEP eligibility determination, they did promptly acknowledge and respond to the emails. Stip. Exs. 82 (Counselor September 30, 2020 email to staff acknowledging Student’s “health/concentration concerns” and the need “to take a little pressure off”); 83 (Physics Teacher September 29, 2020 email about meeting with Student to help relieve some of her stress and importance of her mental health); 85 (Geography Teacher September 30, 2020 email about her openness of her mental health concerns, acknowledging that the start of the year has been difficult; and “hop[ing] that things will start to improve for [her]”); 87 ( Spanish Teacher October 14, 2020 email “so sorry to hear that Student is still struggling”); 89 (CTE Teacher October 14, 2020 email noticing a drop in productively with [Student] lately”). Despite their responsive feedback and suggestions, Student’s mental health continued to deteriorate, and Respondent’s staff should not have just “suspected it,” because they actually “knew” it.
7. Student’s teachers admitted to being copied on these emails but not knowing what “child find” meant they deferred to Counselor since he was copied too. *See, e.g.*, T vol 6 p 1606:20-21 (T of Math Teacher that she does not know what Child Find is); T vol 6 p 1517:17-21 (T of Geography Teacher that he does not know what Child Find is); T vol 7 pp 1822:20-1823:6 (T of History Teacher that she does not know what Child Find is); T vol 7 p 1712:20-1713:12 (T of Physics Teacher that he did not report Student’s mental health needs because it was not a “mandated reporting situation” and other teachers and/or Counselor was aware); T vol 6 pp 1590:11-20; 1613:6-19 (T of Math Teacher that counselor as copied on emails therefore she did not notify anyone of Student’s depression); T vol 6 p 1521:2-4 (T of Geography Teacher that he did not notify anyone because Counselor already knew).

**Counselor’s Misunderstanding of IDEA Eligibility Process**

1. Counselor did not refer Student for an IEP because he misunderstood WCPSS’s IDEA referral process. Per his understanding, after he refers a student for an IEP, the Special Programs head “would likely observe the student in the classroom, would probably have a conversation with the parents and the student, look at, you know, look at the records, and determine if an IEP would be appropriate.” T vol 9, p 2245:1-12. Then, according to Counselor, the Special Programs head and the special education teacher, not the IEP team, would unilaterally determine whether Student should be referred for IEP eligibility. T vol 9 p 2245:9-12.
2. Counselor’s description of the IEP process conflicts with SpEd Teacher’s accurate testimony about the IDEA referral process. According to SpEd Teacher, a former special educator, IEP eligibility had to be ruled out before Section 504 eligibility. T vol 7, *see also* Stip. Ex. 204 p 000508 (Section 504 Eligibility Determination Worksheet stating, “Has the need for Special Education been ruled out by an IEP team in Wake County Public School System?”). The Middle School Counselor in her response to Parent’s 2018 parent referral also knew that an IEP eligibility meeting had to happen before developing a Section 504 Plan.

**Student’s Cannabis Use**

1. While waiting for an IEP, Student’s mental status continued to deteriorate, and her cannabis use increased as an effort to cope. Student’s cannabis use did not “cause [her] ADHD, anxiety, and depression.” T vol 4 p 1003:11-12 (T of Leach). “[I]t’s just a behavioral pattern in response to not getting her needs met.” T vol 4 p 1003:15-16. It was also the result of the overarching, unaddressed problems of ADHD, depression, and anxiety that Student and her family were facing without any support from Respondent. *See, e.g.,* T vol 4 pp 902:24-903:8 (T of Leach);T vol 2,p 237:5-15 (T of Parent that she rarely left the house, was home supporting Student, and helped her with school); T of Student p 90:2-17 (Student explaining she and her mom had to “fend for [them]selves” and she would have wanted the school to do “literally anything”).
2. Student’s cannabis use was a “symptom of [her] mental health issues” and she used it as a “crutch” and to “cope.” T of Student p 126:10-12. Cannabis did not impact Student’s ability to do her school work but “sometimes [she] thought if [she] did use it, [she] could focus better.” T of Student p 130:16-21.
3. Dr. Collett explained why Student was using substances. Student’s manner of coping “gets in the way of the core issues that are really going on” which are “the executive functioning, the temperament that puts her at risk for mood depression and anxiety, and the depression and anxiety.” T vol 1 p 93:2-24 (T of Collett); Stip. Ex. 181, pp 425-26. The timeline of presentation is important because substance use “tends to really muddy the picture” of what is the primary problems versus secondary and tertiary factors. T vol 1 p 64:1-18. Prior to Student’s substance use, there is “plenty of documentation” that she had trauma, ADHD, depression, low self-worth, hopelessness, anxiety about making decisions, somatization, high achievement oriented, hardworking, and “push through” personality, and T vol 1 pp 65:3-67:1. The substance use has a “bidirectional relationship” to these underlying difficulties and Student overworking herself which led to the substance abuse. T vol 1 pp 66:23-67:3 (T of Collett).

**October 15, 2020 Email Requesting “Emergency Meeting”**

1. On October 15, 2020, Parent advised the teaching staff that Student was “like a shell of [her] usual self,” had been diagnosed with a mood disorder most likely Bipolar 2 rather than Major Depression, and that “no medication is working (we have changed it 4 times)” since August 26, 2020. Stip. Ex. 95.
2. Parent asked for an “emergency meeting to review her Section 504 Plan to get her some help because this is not going away unfortunately.” Stip. Ex. 95. In response, teacher 504 feedback forms were issued to teachers CTE Teacher and Spanish Teacher immediately. Stip. Exs. 98 & 99.

**October 16, 2020 Counselor Acknowledges Student’s Struggles and**

**“Not in a Good Place”**

1. On October 16, 2020, Counselor acknowledged to Parent that “I know it is tough right now seeing your daughter struggle.” Stip. Ex. 103. That same day, Counselor emailed all Student’s teachers that “[Student] is not in a good place now,” and “as she works to get in a better place,” he asked the teachers “that everyone consider that [referencing an INC] as we work to get [Student] back on her feet.” Stip. Ex. 100 & 108; *see* teacher responses, Stip. Exs. 101 (60 in CTE Teacher’s Apparel class not prudent to give her an INC but will give extra time); 102 (Physics Teacher willing to give her credit for simple mistakes on quiz).

**October 16, 2020 Christine Dittmer, M.D.’s Letter to School Administrators**

1. Also on October 16, 2020, Parent emailed Dr. Dittmer’s letter, Student’s psychiatrist, to school administration, Stip. Ex. 104 (October 16, 2020 11:31 a.m. email to Dean of Students; Intervention Specialist; School Psychologist; and School Counselor). Minutes later, Christine Dittmer, M.D. emailed the same administrators stating, “Please see attached letter regarding [Student]. [Student] and her parents will be meeting with Counselor next Tuesday at noon. Thank you.” Stip. Ex. 106 (11:49 a.m.); Stip. 40.
2. Dr. Dittmer’s letter stated:

[Student] has been under my care since August 2020. She is engaged and compliant with all aspects of her treatment. She is also working in weekly individual therapy and has recently sought added counseling for her mental health.

Today’s school systems face unprecedented challenges, becoming much more aware of the impact of mental health issues. There is a continued push toward prioritizing mental health and schools play a significant role in helping students succeed despite any obstacles.

[Student] needs to make her mental health a priority right now. She feels overwhelmed when considering colleges and career paths. Because of her depression, academic work feels like an enormous burden and she is being asked to perform beyond her capabilities. [Student] has an excellent, long-standing history as a student athlete; but currently, expectations set by school and parents feels unrealistic. This contributes to further anxiety and depression.

[Student] needs to address lack of and dysregulated sleep Without adequate sleep, she is having difficulty regulating emotions. Sleep deprivation increases the risk of experiencing mental health problems, poor grades, car accidents and suicidal thoughts. A lack of sleep also makes it much more difficult to take tests and think critically through problems.

Depression and anxiety are affecting every aspect of [Student]’s life. She has withdrawn from peers and neglects her responsibilities as a student. She is unable to concentrate on her studies, School attendance has been poor, she had reduced self-confidence, and her grades are suffering. This does not accurately reflect [Student]’s long-standing record of academic excellence.

At this time, [Student] needs a *school plan to address academic performance* that will allow her to prioritize mental health treatment, while preserving and excellent academic record that accurately reflects her abilities and work ethic. [Student] and her parents are eager to work with the academic advisors and counselors at School.

Please do not hesitate to contact me for questions or concerns, Thank you

Christine Dittmer, MD, MPD

Stip. Ex. 223 (Dr. Dittmer’s contact information was contained in the letter); Stip. 40 (emphasis added)

1. When Counselor found out that the school administrators knew about Dr. Dittmer’s letter, he emailed them that:

I am not sure how you guys got in the loop on this, but [Student] is having an extremely difficult time. I am meeting next Thursday with mom to review the 504 plan that is already in place and we have talked about relieving some stress schedule wise. I will definiltely [sic] keep you in the loop if the family wants to pursue an IEP The teachers are aware of the struggles [Student] is experiencing.

Stip. Ex. 106

1. Counselor did not tell the school administrators—despite Dr. Dittmer’s letter suggesting a school plan to address academic performance, and even after Parent’s question about an IEP—that he had already predetermined that “he did not feel at the time that an IEP was appropriate for Student” T vol 9 p 2293:12-18.

**October 16, 2020 Kada Unwin, MSW, LCSWA’s Letter**

1. Also on October 16, 2020, Parent emailed Counselor a copy of a letter from Student’s therapist Kada Unwin MSW, LCSWA addressed to School Services which stated:

School Student Services,

[Student] has been under my care since November 2019. She has been engaged and compliant with treatment throughout our time working together.

In August 2020, [Student] had a significant shift in her mental health. Since then I have been meeting with her several times a week to move toward stabilization. [Student] has struggled to complete school work in addition to her struggle to complete basic tasks at home due to this depressive episode.

The stress [Student] experiences to keep up with school may be increasing her symptoms and making it more challenging for treatment to be successful. The entire family and her mental health team are working together to insure the quickest stabilization process we can and we need the help of the school to support her as she continues treatment.

Please work with us in providing accommodations in order for [Student] to be successful in her future and so that this mental health crisis does not further impact the goals she has worked hard toward throughout her academic career.

I am happy to speak further and collaborate if you would like more information or have information you feel could be helpful for me. If so please reach out to [Student]’s parents and we can get a release of information signed.

Thank you for taking the time to read this and for all you do by working in the school system.

Respectfully,

Kada Unwin MSW, LCSWA

Stip. Ex. 224; *see also* Stip. 38 (Unwin provided letter October 16, 2020).

1. Respondent did not contact Dr. Dittmer or Therapist Unwin between October 16, 2020, and the date of the filing of the Petition. Stip. 39 & 41. “[Student] was seeing her therapist during this time, about three times a week. . . . she was seeing Dr. Dittmer. We were taking her to the pediatrician.” T vol 2 p 232:5-9 (T of Parent).
2. Even after these referral requests, Parent continued emailing school staff. On October 19, 2020, Parent emailed Geography Teacher that Student was “having a bad day and will not follow the schedule the doctor set for her to help her mental health. She is sitting at the computer trying to complete your assignment.” Stip. Ex. 110. Parent emailed Math Teacher explaining Student “had one of the worst days yet today unfortunately! She spent a lot of time on your quiz but I am not sure if she finished or maybe she bombed it so she could just lay in her bed.” Stip. Ex. 111. Student also emailed Math Teacher the following day that she “panicked yesterday and could not focus what-so-ever on the quiz.” Stip. Ex. 112.

“**Magic Words” Were Not in Emails or Letters Per Counselor**

1. According to Counselor, nothing from Therapist Unwin’s letter (Stip. E. 224) specifically recommended an IEP or any special education. T vol 9 pp 2293:21-2294:4. Instead, Therapist Unwin simply mentioned “accommodations” which suggested to him that only Student’s Section 504 Plan accommodations needed review.
2. Despite Dr. Dittmer’s letter asking about a “school plan” and Therapist Unwin’s letter along with Parent’s email specifically asking about a “possible IEP,” Counselor “didn’t see a need for an IEP.” T vol 9 pp 2295:20-2296:2 (referring to Stip. Ex. 106 during email exchange with Dean of Students, Psychologist, and Intervention Specialist).
3. Even if Counselor did not believe an IEP referral was necessary because he did not know what “child find” meant or his lack of understanding of the IDEA referral process, the Dean of Students, School Psychologist, and especially Intervention Specialist should have recognized that Dr. Dittmer’s letter constituted a “referral request.” Instead of affirmatively acting on their own “child find” responsibilities, the Dean of Students, School Psychologist, and Intervention Specialist simply allowed Counselor to “keep them in the loop.” Stip. Ex. 106; T vol 9 pp 2293:21-2294:4.
4. According to Counselor’s interpretation of an IEP referral, a “referral request” or “parent referral” has to contain the “magic words” that “they [the family] wanted an IEP.” But even then, the “magic words” did not guarantee an IEP referral. Per Counselor even if the “family had mentioned that they wanted an IEP, [he] probably would have referred to our Intervention team to look at.” T vol 9 p 2295:20-2296:2.
5. When Student was referred in eighth grade, Parent’s 2018 “parent referral” (Stip. Ex. 1) did not contain these “magic words” and was not even as graphic as Dr. Dittmer’s “referral request” (Stip. Ex. 223) in the tenth grade, but WCPSS acknowledged the 2018 “parent referral” as IDEA referral. Stip. Ex. 200. And within ten (10) days, the IDEA referral process was initiated in accordance with WCPSS’s “Requirements for Parent Referral for Special Education.” Stip. Ex. 323 *see also* Invitation to Conference Stip. Ex. 196 (dated 02/02/2018).
6. Even though Dr. Dittmer did not use the word “IEP,” she did say Student needs a “school plan.” Dr. Dittmer’s letter was a “referral request” and contained more than adequate information for WCPSS to “suspect” that Student was a child with a disability. Dr. Dittmer even identified Student’s disabling conditions and their adverse educational effects.
7. On or before October 16, 2020, WCPSS should have initiated the IDEA eligibility determination, conducted evaluations, and developed an IEP for Student Although at this time WCPSS already had sufficient information to determine Student’s eligibility under the categories of Other Health Impaired and Emotional Disturbance, the 90-day deadline for developing the IEP would have been January 15, 2021. Stip. Ex. 316 (2020-2021 school calendar).

**Testimonial Admission These Were Parent Referrals**

1. On cross-examination, Counselor was asked to compare Parent’s October 14, 2020 email asking for an IEP and the letters from Dr. Dittmer and Therapist Unwin to determine if those written communications were “parent referrals.”

Q. You testified in your direct examination that you, to what would indicate that a student with a 504 might need an IEP Do you recall that testimony?

A. Yes.

Q. And you said a decline in grades for an extended period of time or a short period of time, attendance, changes in behavior, engagement in the classroom, and feedback from teachers. Do you recall that?

A. Yes, ma’am.

Q. Okay. Do you understand what constitutes a parent request for a referral for special education?

A. Usually they’re doing that in writing if they want, that they want an IEP

Q. Okay. And Parent put that in writing, didn’t she?

A. Well, she mentioned that the doctor felt that the student may need an IEP

Q. And so it’s your understanding that that’s not a parent referral?

A. That’s right.

Q. I’m going to ask you to look at -- this is Stipulated Exhibit 323, which is already in evidence.

Q. This is a Stipulated document that's in evidence, Counselor. This is the document from the Wake County Public Schools System on the requirements for parent referrals for special education. Do you see that?

A. Yes, ma’am.

Q. Are you familiar with this document?

A. I’ve seen it before, yes.

Q. Do you see what constitutes a parent request?

A. Yes. I do.

Q. Okay. And you would agree that the, a written request from a parent -- again, let me go back -- this is, the document indicates that when the parent has provided in writing they wish to pursue the special education services or they suspect a disability -- do you see that?

A. Yes, ma’am.

Q. And that this obligation is triggered, under the third bullet point, when a document from a third party indicating a concern on a prescription pad, a letterhead from a pediatrician or private provider, daycare, et cetera is received. Do you see that?

A. Yes, ma'am.

T vol 9 pp 2334:2-2335:25

Q. And you received two of those, didn’t you?

A. Yes.

Q. Okay. And then also a written request from a parent or guardian, i.e., an e-mail, note to teacher, et cetera. Do you see that?

A. Yes, ma’am.

Q. And you received that as well, didn’t you?

A. Yes.

T vol 9 p 2336:1-9

**School Referral Process**

1. The referral process at School is troubling and inconsistent with the IDEA. Based on the teachers and Counselor’s testimonies, the referral process at School required multiple steps before an IDEA referral could be made. First, the parent or medical/mental health provider had to use the “magic words” about a “possible IEP” for Student, T vol 9 pp 2295:20-2296:2 not simply say that “the doctor felt that the student may need an IEP.” T vol 9 p 2334:19-23. Second, Parent’s comment that “Student’s MDs think we need to have an emergency meeting to boost her 504 or get an IEP in place because her issues are not going away” was not “any evidence that an IEP referral would be necessary.” T vol 9 p 2334:10-19. Third, Counselor had to have actual “evidence [rather than suspect] that an IEP referral would be necessary.” T vol 9 p 2280:1-19. Fourth, even if Counselor had actual “evidence,” he “[c]ertainly would have taken that information into account but did not feel at the time that an IEP was appropriate for Student” So unilaterally basically he could stop the IDEA referral even if there was evidence that Student was a suspected child with a disability. T vol 9 p 2280:1-11. Finally, only if the ‘family mentioned that they wanted an IEP, [he] probably would have referred it to our Intervention team to look at.” T vol 9 pp 2295:20-2296:2.

**Testimony About Intervention Team Process**

1. The Undersigned asked Counselor for clarification about the Intervention Team process.

BY THE COURT:

Q. You say that the referral goes to the Intervention Team?

A. Yes, ma’am.

Q. Who are the Intervention Team members?

A. It would be a Special Education teacher. And then we have a teacher that's considered an Intervention Coordinator.

And so they would look at the evaluation, do some observations with the student, and then based on that would make a ruling on whether the IEP is appropriate or a 504 Plan.

Q. So the Intervention Team would decide, the schools members of the Intervention Team would decide whether or not to go forward with an IEP or 504 Plan?

A. Yes, ma’am. And that’s an initial, like an initial evaluation.

Q. Like initial screening?

A. Yes, ma’am.

T vol 9 p 2350:3-20

1. This referral process at School is flawed in many ways and violates the mandates of the IDEA including but not limited to: IDEA’s affirmative “child find” mandate for all staff at WCPSS including school administrators; the eligibility evaluation process, Student and Parent’s meaningful participation in the decision-making process as to IDEA eligibility and IEP development; Student and Parent’s rights to prior written notice and procedural safeguards; and ultimately Student right to a free and appropriate education that was “free” to her parents.

**WCPSS “Requirement for Parent Referrals for Special Education” Stip. Ex. 323**

1. WCPSS’s “Requirement for Parent Referrals for Special Education” (“WCPSS Referral Requirements”) provides guidance to WCPSS educators about parent referrals for special education. WCPSS Referral Requirements define a “parent request” and explains what school staff must do in response. Stip. Ex. 323 p 001897.[[33]](#footnote-34)
2. WCPSS Referral Requirements accurately explained how the IDEA referral process is supposed to work. *See* Stip. Ex. 323 pp 001897-001899. Even without these written WCPSS Referral Requirements, in 2018, school staff followed the process after receipt of Parent’s January 12, 2018 written parent referral. Stip. Ex. 1 p 000002. With respect to the 2020 written referrals, none of the school staff, including the school administrators/agents, followed WCPSS Referral Requirements.
3. Notably, based on the WCPSS Referral Requirements, a written request is not even required for an IDEA referral. A parent/guardian can verbally share with school staff their suspicions about a suspected disability. *Id.* When a parent verbalizes his/her concerns, a “school staff member should ask the parent to put their request in writing and *immediately follow-up* with the Principal or Special Education Chair.” Stip. Ex. 323 (emphasis added). If the parent/guardian are unable to put their request in writing, school staff are required to assist the parent/guardian put the request in writing. Stip. Ex. 323. Had this step been used by Counselor, he could have made sure that Parent’s parent referral had the requisite “magic words” necessary to start the IEP eligibility process.
4. Once a written referral is received, the “[p]arent/guardian should receive Prior Written Notice (Invitation to IEP Team Meeting) of the referral meeting within 10 days of the written request.” Stip. Ex. 323;Stip. Exs. 2 (acknowledging written request dated 01/22/2018); 196 & 197 (10-day invitation dated 02/01/2018 to 02/08/2018 IEP meeting). Each time there is a new referral for IDEA eligibility, the parent must be given a copy of the Procedural Safeguards. Then, an IEP team member is supposed to “call the parent/guardian to explain to them what to expect at the referral meeting.” Stip. Ex. 323. Before the referral meeting, any private evaluations should be requested or consent obtained from the parent/guardian to exchange information from the individuals who conducted the evaluation. Stip. Ex. 323 p 001899 *see* Stip. Ex. 2 (confirmation of receipt of evaluation request dated 01/22/2018). The appropriate school evaluator(s) and IEP Team would next review any private evaluations to determine what additional components or evaluations are required for eligibility determination and avoid duplication of evaluations. Stip. Ex. 323 pp 0001897-98. Even if additional information is needed, “*[t]he 90 day timeline continued to be in place and does not stop/restart when the IEP team, needs to reconvene*.” Stip. Ex. 323 p 001899 (italics in original).

***Questions Required to Be Considered at******Referral IEP Meeting***

1. Certain questions must be considered at the referral IEP meeting. They are:

* Does the outside evaluation report or information provide how the diagnosis impacts the student’s education?
* What are the recommendations made by the evaluator?
* What are the functional skills concerns?
* What are the academic skills concerns?
* Are there documented concerns by others?
* If there are additional supports provided to the student (at school or outside of school), what is the intensity?
* Is additional information needed?

Stip. Ex. 323 p 0001899

1. The three October 2020 emailed referral requests answered all these questions with the exception of all the additional outside supports provided to Parent by her parents and whether additional information was needed. Stips. Ex. 223 (psychiatrist weekly therapy and additional counseling added) & 224 (counseling). Parent’s prior emails had already documented most of the outside supports Student had from her family: “lots of tutors,” “working weekends,” Parent’s help drafting emails to teachers, Parent staying at home every day supporting and helping Student with school, Parent trying to get Student in front of the computer, and antidepressant and ADHD medication trials.

***Special Education Eligibility Meeting Process***

1. At the special education eligibility meeting, the IEP team must review the information and determine if the “student (1) meets the eligibility criteria for one or more of the disabling conditions, (2) demonstrates an adverse impact on education and (3) **demonstrates a need for specially designed instruction**.” Stip. Ex. 323 p 0001899 (emphasis in original). If the answer is yes to all three prongs, then the “IEP team would write appropriate IEP goals to address the targeted areas of need.” *Id.* If the student “**is not in need of specially designed instruction**, then the IEP team should recommend the student’s case be reviewed by the school’s 504 team.” *Id.* (emphasis in original). By developing Section 504 Plans for Student, WCPSS admitted to the first two prongs, that Student had a disabling condition(s) that adversely affects a major life activity, i.e. learning. The only remaining prong was whether Student needed specially designed instruction.

***Admission that Curriculum Assistance/Modified Instruction is Specially Designed Instruction***

1. Counselor was asked about what specially designed instruction was available on an IEP but not available as an accommodation in a Section 504 Plan:

Q. And what type of things are available in an IEP that are not available in a 504 Plan as far as your understanding?

A. So a student could potentially have what is called a Curriculum Assistance class, where they would be in a classroom, small, with a small group of students, working with a Special Programs teacher. And then sometimes they may not have a Curriculum Assistance class, they may have like a consultation on occasion with a Special Programs teacher. And then there also could be something called an ICR class, which would be a specially modified instruction within that class.

T vol 9 2240:6-18.

1. Parent and the tutors were essentially providing curriculum assistance to Student during both her ninth and tenth grade school years. Student continued to receive this specially designed assistance while at Wilderness Program and Private Academy.

**October 22, 2020 Section 504 Eligibility Determination[[34]](#footnote-35) and Section 504 Plan**

1. Almost one year before Student turned eighteen (18) on XXXXX XX, 2021, another Section 504 Eligibility Determination was held on October 22, 2020 via video conference. Stip. 43; Stip. Ex. 218 pp 000569-000574. At that meeting, Counselor was Student’s 504 “case manager.” Stip. Ex. 219. The “Suspected/Diagnosed Physical or Mental Impairments” listed on the 504 Eligibility Determination form were ADHA-Combined (Learning /Neurological), Depression (Learning/Neurological), Anxiety Disorder (Learning /Neurological), Stip. Ex. 218 p 000569.
2. The “Evaluation(s) Used to Document Impairment” were listed as: 08/15/2017 ADHD combined; doctor’s report on WCPSS form; 08/12/2018 Triangle Psychoeducation Consultations, PLLC report; and 10/16/2020 Medication reports from Neuropsychiatrist of North Carolina and Therapeutic Partners. Stip. Ex. 218 p 000569.
3. Despite invitations to contact them, WCPSS did not contact Dr. Dittmer or Ms. Unwin between October 16, 2020 and the date of the filing of the Original Petition. Stips. 39 & 41. Prior to the 504 meeting, two of Student’s teachers, Spanish Teacher and CTE Teacher, completed a “504 Teacher Feedback” form. Stip. 42. Spanish Teacher did not attend the 504 meeting. Stip. Ex. 218 p 000571.
4. In addition to this medical information, the Section 504 Team reviewed Student’s attendance records, parent information, report card, teacher input, and classroom grades. *Id.*
5. On the Section 504 Eligibility Plan, Respondent admitted that Student was now diagnosed with worsening anxiety and depression, she was struggling and falling behind in some classes, her anxiety and depression were causing her to withdraw from normal social interactions and athletic activities, and the family was continuing to seek help to manage Student’s health issues. Stip. Ex. 218 pp 000570-000571.
6. Based on these acknowledgements, Respondent admitted that Student had the disabling conditions of Emotional Disturbance and Other Health Impairment and that these disabling conditions were adversely affecting her concentration, learning and academic performance. Stip. Ex. 218 p 000565. The only question remaining for IDEA eligibility is whether Student needed specially designed instruction.
7. Section III of the 504 Eligibility Determination also acknowledged the adverse effects of Student’s disabling conditions but incorrectly states that special education services had been ruled out through the IDEA process. Stip. Ex. 218 p 000570.
8. It is undisputed that WCPSS never evaluated Student for special education services under the IDEA, never provided Student with specially designed instruction under the IDEA, and no IEP meeting was held for Student after the February 2018 meeting. Stip. Exs. 13, 14, & 18.
9. On the actual Section 504 Plan, the “Summary/Highlights of Discussion by the Section 504 Committee” stated:

[Student] is really struggling in the Remote Learning environment. She is missing class more frequently due to a diagnosis of anxiety and depression. This has caused her to fall behind in class which has only made matters worse. Teachers have for the most part been very flexible in allowing [Student] to catch up in class. Teachers have considered an INC for 1st quarter due to [Student]’s struggles. We add the additional diagnoses to the eligibility and added extended time on assignment and copy of teachers’ notes to her accommodations.

Stip. Ex. 218 p 000565.

1. The 504 Plan was amended to add “extended time on assignments and copy of teachers’ notes to her accommodations.” Stip. Ex. 218 p 00056.
2. October 22, 2020 was the end of first quarter. Stip. Ex. 316. Student had A’s and B’s in all courses but a D (60) in APUSH. Stip. Ex. 185.

**Emails After October 22, 2020 Section 504 Meeting**

1. After the October 2020 Section 504 meeting, there were fewer email communications from Petitioners, but their emails still evidenced that “[Student] was not any better” Stip. Ex. 129 (Parent’s November 4, 2020 email to teacher English Teacher); Stip. Ex. 135 (English Teacher January 25, 2020 email to Parent about exemptions from work and changing Student’s grades). Email communications from/to Student, Parent, teachers, Counselor, and Dean of Students about Student’s mental health, missing and late assignment, incompletes, continued through the end of the 2020-2021 school year. *See* Stip. Ex. 119-175 (emails dated 10/26/2021 through June 7, 2021).
2. On October 29, 2020, when Student was transitioning into History Teacher’s Honors History class, History Teacher asked Counselor “if there’s anything I should know about her situation.” Stip. Ex. 122. Counselor responded, “[s]he has been dealing with some mental health issues. Some she dealt with before the epidemic and some now.” *Id.*
3. Student emailed English Teacher on November 2, 2020, asking to turn in an assignment the next day. Stip. Ex. 125. Student turned in the assignment on December 8, 2020. Stip. Ex. 134.
4. On November 3, 2020, Student emailed History Teacher asking for extra time as she “was occupied with [her] mental health struggles over the weekend and today.” Stip. Ex. 126. The following day, November 4, 2020, Parent emailed History Teacher and explained Student was “not any better and we are working on getting her more help and support. . . . She is sitting at her computer for hours on end but is not really accomplishing much of anything.” Stip. Ex. 127. Parent emailed the same information to English Teacher. Stip. Ex. 129; T vol 2 p 273:12 (T of Parent).
5. On November 11, 2020, Student emailed History Teacher and apologized for turning in a late assignment explaining, “I could not focus yesterday.” Stip. Ex. 130. Student emailed again on December 4, 2020, asking for extra time to complete the essay portion of a test to “see if my focus has improved,” as “[e]ssays have always been a struggle for my mind.” Stip. Ex. 133. History Teacher provided 48 additional minutes and noted “[t]hat will have provided a lot of extended time for you.” *Id.*

**Duke CAST Program Substance Abuse Treatment Initial Intake**

1. On November 30, 2020 Student had her intake session with the Duke CAST Program for substance abuse treatment. Resp’t Ex. 169. Her diagnoses were documented as: cannabis use disorder, moderate, dependence (CMS-HCC)–Primary; ADHD unspecified ADHD type, recurrent major depressive disorder, remission status unspecified (CMS-HCC), and anxiety. Resp’t Ex. 169 p 508. Parent reported to the therapist that “difficulties related to current symptoms have been present for months and years, occur occasionally and frequently. Symptoms interfere with school performance, family relationships, peer relationships and psychosocial functioning. Other concerns: history of depression, anxiety, self-harm, ADHD, and concerns associated with traumatic life events [loss of a loved one and history of sexual abuse].” Resp’t Ex. 169 pp 510, 511. Based on the Child Trauma Screening which is a measure of traumatic events and reactions, Student “showed clinical significance for trauma events and reactions” as well as self-injurious behaviors “SIB of cutting and severely biting her nails.” Resp’t Ex. 169 pp 514, 515.
2. After the initial intake for Duke CAST in November 2020, substance abuse therapy was delayed until March 4, 2021 after Parent called about follow up services because, after completion of the initial paperwork, Duke CAST never called them back. Apparently because the intake person was “new”. T vol 2 p 437:8-24; *see also*, Resp’t Ex. 169 p 000517. Thereafter, from March 12, 2021 until June 7, 2021, Student was treated by John Conor O’Neill, Ph.D. virtually during individual and adjunct family therapy weekly as the schedule permitted with weekly drug screening. Resp’t Ex. 169 pp 0000548-564. The drug treatment therapy was unsuccessful.

**Spring Semester Junior Year**

1. By January 28, 2021, Parent acknowledged to English Teacher that Student was “definitely better than her lowest point in the Fall but it is day by day.” Stip. Ex. 136. In February 2021, Parent began reaching out again to Student’s teachers explaining Student “has been having a difficult last few weeks with her mental health and concentration issues,” and “we are working very hard to try and improve things at home.” Stip. Ex. 139 (History Teacher); Stip. Ex. 140 (Spanish Teacher); Stip. Ex. 141 (Math Teacher).
2. In March 2021, Student was still turning in late work and missing assignments. Stip. Ex. 142 (late work for math); Stip. Ex. 144 (late work for Physics); Stip. Ex. 145 (missing assignment and quiz in English); Stip. Ex. 146 (missing assignments in Apparel); Stip. Ex. 148 (falling asleep during class due to inability to sleep the night before). She also began earning lower grades on her tests and quizzes. Stip. Ex. 143 (earning a 38 on a quiz); T vol 2 p 293:1-2 (T of L.S) (stating Parent was “not sure what they [Physics Teacher and Student] exactly worked out. But [she did] know [Student’s] grade was significantly better.”).
3. Student still had difficulty with her mental health and concentration throughout the remainder of the Spring semester.[[35]](#footnote-36) This pattern continued in April 2021, including missing extended deadlines. Stip. Ex. 149 (missing assignments in Spanish); Stip. Ex. 150 (missing two extended deadlines on same assignment); Stip. Ex. 156 (late assignment in History); Stip. Ex. 158 (Student asking for extension in Math because she had “not been feeling the best this week so [she has] been slower with [her] work”); Stip. Ex. 163 (requesting extra time in History as her “focus hasn’t been the best recently”).
4. When the students had the option to return to school[[36]](#footnote-37) for in-person instruction in April 2021, Student was unable to do so. Stip. Ex. 152 p 260 (returning home during lunch teary and overwhelmed); Stip. Ex. 153 (Student notifying Math Teacher she “had sort of a breakdown in [her] car during lunch” and “didn’t want to come to class looking like this”); Counselor was aware of Student’s struggles and suggested Parent notify Student’s teachers, which she did. Stip. Ex. 152 (Counselor), Stip. Ex. 156 (History Teacher); Stip. Ex. 157 (English Teacher); Stip. Ex. 159 (CTE Teacher); Stip. Ex. 160 (Geography Teacher); Stip. Ex. 161, p 272 (Physics Teacher); Stip. Ex. 162 (Spanish Teacher). This was not the only time Student left school at lunch when she attempted to attend in-person. T vol 2, p 427:5-6 (T of Parent) (referring to April 23, 2021 email Stip. Ex. 160). Student “only attended three times in-person, but left early she would beg to stay home.” Stip. Ex. 289 p 001547. Except for those 3 times, Student returned back to exclusively to remote learning.
5. In May 2021, Student continued to struggle. Student asked History Teacher for additional time due to her 504 Plan. Stip. Ex. 165 (May 10, 2021 email). Student explained, “I try my best not to have to use it, but I have been staring at my screen for hours not knowing to write for the DBQ . . . My focus hasn’t been good recently, so I should have known not to wait till today to do it.” *Id.* History Teacher refused because Student did not ask in advance of the deadline. *Id.* Student responded she would get the assignment turned in by the end of the day and explained it was “hard to tell whether or not [she would] need it.” *Id.*
6. Student sought “support at the very last minute or after the fact, indicating that she was struggling. So it was counterproductive . . . She was seeking help when it was too late.” Dr. Leach opined that was inappropriate because help after the fact was reactive because she was not “getting proactive support” to help her prepare for and break down assignments, with a special education teacher to meet with and help her get started. T vol 4 p 1033:12-25 (T of Leach).
7. At that point, Parent contacted Counselor and informed him Student was again “sit[ting] in front of [her] computer for hours on end, [she couldn’t] do anything.” T vol 2 p 288:11-20 (T of Parent). On May 10, 2021, Student requested a second extension on an assignment in Physics, which was granted for “half credit.” Stip. Ex. 166 p 277; Stip. Ex. 170 (5/12/2021 email from Parent to Physics Teacher who replied he would “accept[] late work without penalty during this time”). Student asked Math Teacher if there was anything she could do to “make up any points from anything”; Math Teacher responded, “[u]nfortunately, all we have left to improve your grade is the final exam.” Stip. Ex. 173 (May 21, 2021 email).
8. Parent began to reach out to Student’s teachers and Counselor again explaining Student was “struggling,” and “[s]he stares at her screen all night with no focus and wastes hours with no productivity.” Stip. Ex. 167 (email to Geography Teacher with screenshot of missing assignments); Stip. Ex. 168 (email to Physics Teacher with screenshot of missing assignments); Stip. Ex. 169 (email to Counselor advising him to “look in PowerSchool” and see that “she is behind in almost every class again which is greatly adding to her feeling overwhelmed”); Stip. Ex. 171 (Spanish Teacher); Stip. Ex. 172 (email to English Teacher with screenshot of missing assignments). At this point, “we were starting to get in crisis mode. And  . . .we had exams coming up And we were just, again, really struggling.” T vol 2, p 429:11-17 (T of Parent); *see also* Stip. Ex. 169 and T vol 2, p 428:5-12; T vol 3, p 804:4-17 (t of Parent) (Student struggling trying to take her final exams and A.P exams in May 2021).
9. By May 14, 2021, Student was spiraling further into crisis mode mentally and with her substance abuse. Therapist Unwin wrote that Student “needs more support” with sobriety and Student “recognized need for more support.” Resp’t Ex. 481 p 1864. On May 19, 2021, Therapist Unwin met with Student and her family to discuss “option to get [Student] more support around mental health.” Resp’t Ex. 481 p 1865. Therapist Unwin’s last treatment note indicated that “[Student] reports anxiety but is hopeful” about going to treatment. Resp’t Ex. 481 p 1866.
10. On May 27, 2021 Parent “had been in touch with most of [Student’s teachers] over the quarter since in-person instruction started. As you know [Student] had a big dip in her mood and focus with the transition back to school. Her MD changed her medicine including her ADHD medication but it has made her agitated so she is no longer taking it until our next appointment on 6/1/21.” Resp Ex. 247 pp 0000826-0000827.
11. Although Parent and Student intended for Student to be engaged in an internship over the summer, (Resp Ex. 232), that prospect seemed more and more unlikely because Parent believed Student was “getting into crisis mode” again in mid-May 2021, though she did not communicate that to Respondent. T vol 3 pp 797:19-799:15.
12. Student never completed her final project for Spanish Teacher’s class. Student had made approximately “18 versions of her final project . . . And she just couldn’t – she never turned it in. . . . [a]t that point, . . . we needed to get her, more help for her, her depression and her anxiety . . . And I reached out to her to let her know that Student was going to wilderness.” T vol 2 p 431:14-23 (T of Parent). Parent told Spanish Teacher, who she had spoken to in the fall, “because Spanish Teacher was one of the teachers that . . . was supportive of Student and was . . . trying to help her.” T vol 2 p 432:10-16 (T of Parent). Despite not turning in her final project, Student’s final grade in Spanish Teacher’s Spanish IV Honors class was a 92. Resp’t Ex. 293.
13. On May 31, 2021, Ms. Unwin suggested a wilderness program to address Student’s mental health issues and substance abuse. Resp Ex. 292 p 1056.
14. On June 1, 2021, Parent sent Dr. Tinney a letter in advance of Student’s psychiatric appointment Resp. Ex. 292 pp 1055-56. “She has been smoking pot constantly and we cannot control it.” Resp. Ex. 292 p 1056. Parent emphasized, “the depression and anxiety need to be addressed in any program but the overriding issue is substance abuse. Resp Ex. 292 p 1056. Parent concluded, “We are so exhausted, our family and marriage are suffering. We need for her to get help outside our home. . . . We cannot treat [the substance abuse] at home. . . . Should we get in touch with Dr. Milton Little today? We must do something—we have been on this treadmill for a year and it is not getting better especially the substance abuse.” Resp Ex. 292 p 1056.
15. Student saw Dr. Tinney on June 1, 2021 mostly for pharmacologic options and medical management. Stip. Ex. 306, p 1668. Student continued to have compliance issues with taking her Abilify and it made her agitated so Dr. Tinney “start[ed] a cross taper to Effexor,” “continuing to compare Focalin XR vs. Adderall XR and possibly prefers Focalin XR. On the other hand unknown benefit given concurrent substance use.” Stip. Ex. 306 p 001668. Dr. Tinney had previously noted that Student had “[n]ever liked the way she felt on meds.” Stip. Ex. 306 pp 001663, 001650 (“always mentioned that she didn’t like the ADHD meds and how it made her feel”); 001651 (“has complained about her medication over the years . . . and does not like the “way it makes her feel.”).
16. By June 1, 2021, Student had had numerous medication trials of Cymbalta, Klonopin, Remerson, Focalin, Dexedrine, Prozac, and Lexapro. Stip. Ex. 306 p 001671. When she met with Dr. Tinney her current medication regiment was Effexor, Focalin, Adderall, and Abilify. *Id.*
17. The next day, on June 2, 2021, Student had a Duke CAST appointment, at which her urinalysis results showed increased marijuana levels than the previous test on May 26, 2021. Resp Ex. 169, p 561. Dr. O’Neill noted at that appointment, “Parents contacted therapist prior to appointment to discuss wilderness therapy options given ongoing cannabis use.” Resp Ex. 169 p 561; T vol 5 1100:6-11. “[Student] was initially hesitant but later determined wild[er]ness therapy would be in her best interest Therapist reviewed with parents at conclusion and offer[ed] support of this plan as well as IOP options, though parents feel a change in environment is indicated.” Resp Ex. 169, p 561. Student testified that they wanted her to be “somewhere [she] was safe.” T of Student p 121:20-23.
18. On June 2, 2021, Parent reached out to educational consultant, Milton Little, Ph.D., via text message to discuss “getting [Student] some treatment in a Wilderness Program this summer. We met with Dr. Tinney yesterday and suggested we move quickly.” Stip. Ex. 294. The next day on June 3, 2021, Parent, at the urging of Dr. Tinney, retained Milton Little, Ph.D. for placement assistance. Stip. Ex. 294; Stip. Ex. 295. To find placements for Student at both Wilderness Program and Private Academy, Parent contracted with Dr. Little to assist them in finding the placements. T vol 2 p 436:19-20 (T of Parent); Stip. Ex. 295 and 297. Parent paid Dr. Little $4,500.00 to assist her with finding placements for Student T vol 2 pp 471:18-472:3 (T of Parent); Stip. Ex. 297. Dr. Little noted on his billing statement that this therapeutic placement was an “Immediate Need.” Stip. Ex. 295.
19. Parent filled out the intake form for Dr. Little on June 3, 2021. Stip. Ex. 251. Under “Educational History,” Parent commented that Student was “still a good student at School and we hope she can return strong in the fall.” Resp Ex. 251, p 849; *see also id.*, p 850. The reason for the referral was: “Depression, Anxiety, ADHD. She is addicted (mentally) to marijuana as a crutch and helps her cope.” Resp Ex. 251, p 849. The difficulties checked on the form included: “school attention/concentration problems,” “grade dropping or consistently low [Parent noted slight decrease starting in COVID but still good student],” “hyperactive, difficulty being still,” “sadness or depression,” “generalized anxiety,” “body-focused repetitive behaviors,” “isolated socially from peers,” “problems making or keeping friends,” “problems falling asleep, problems sleeping through the night, trouble waking up, fatigue/tiredness during the day, nightmares,” “noncompliant, self-injurious, history of abuse (emotional, physical, sexual) [Parent underlined “sexual”],” “alcohol or drug use,” and “stress from conflict between parents [Parent noted “not sure about her].” Resp. Ex. 251 pp 0000851-852. Dr. Little recommended a wilderness program to “reset [Student’s] brain.” T vol 2 p 437:13-16 (T of Parent).
20. Parent and Father made the decision to send Student to Wilderness Program on June 5, 2021. Stip. Ex. 294. The “Referral Question” was: “Parents, is it anxiety, depression, or ADHD? We have never found the right medication. Parents are wondering about the impact of her marijuana use as well.” Stip. Ex. 289 p 1546 (Dr. Robbins’ notes).
21. On June 6, 2021, Parent emailed Spanish Teacher to inform her “[c]onfidentially, we are leaving on Tuesday for her to go to a therapeutic wilderness program so that she can get more in-depth therapy in the wilderness for her depression and anxiety. She knows that she is going but not as soon as Tuesday.” Stip. Ex. 175.
22. On June 7, 2021, Student’s parents completed the Wilderness Program application. Stip. Ex. 225. The issues identified for Student at Wilderness Program that they needed to address were “Gaining self worth and esteem back. Finding focus on her future again. Not relying on marijuana to ease or numb her circumstances as it does not work and only causes more problems for her mental health.” Stip. Ex. 225, p 594. They also added, “Increase self worth and self esteem; not rely on marijuana to deal with depression and anxiety; it would be nice to see what medication would work to treat depression and anxiety as the marijuana has complicated the picture. What diagnoses is at play ADHD, Depression and/or Anxiety?” Stip. Ex. 225 p 595.
23. Two days before the official end of the 2020-2021 school year, Student arrived at and was enrolled in the Wilderness Program on June 8, 2021. Resp Ex. 256 p 872; Resp Ex. 297.
24. Student’s last exam was on June 1, 2021. Resp Ex. 247 p 0000821. Her final grades were four A’s (92, 91, 94, 94) and two B’s (87, 89). Resp’t Ex. 293.The last day of 2020-2021 school year at School was June 10, 2021. Stip. 44. Student was scheduled to take another course load of four AP and four Honors courses during her senior year – even more rigorous than junior year. Resp Ex. 293. Student never returned to the High School.
25. The last day of school at the High School for the 2020-2021 school year was June 10, 2021. Stip. 44.

**Summer 2021 Between Eleventh and Twelfth Grade**

**Therapeutic Wilderness Program**

1. During the summer of 2021, between Student’s eleventh and twelfth grade years, her parents placed Student at Therapeutic Wilderness Program (“Wilderness Program”). Wilderness Program is an “adolescent treatment program that utilizes the experiential opportunities of a wilderness setting with a clinically focused intervention.” Resp Ex. 297. It is not a substance abuse treatment facility.
2. Wilderness Program supports students, including Student, with depression, anxiety, and executive functioning challenges. T of Zind p 124:20-125:5. Students do schoolwork and earn course credits while attending Wilderness Program. T of Zind p 31:4-25. While at the Wilderness Program, Student “received supports for academic and mental health challenges—specifically, . . . one-on-one support with her academic work, emotional regulations support, [and] peer supports.” T of Leach, vol 4 p 896:5-8.
3. The supports and services provided at Wilderness Program were appropriate for Student to address her mental health crisis, prevent substance abuse, to stabilize her, and “keep her safe”; however, Student did not need to make up course credit because she was not missing any grade credits. *See* Resp. Ex. 293 (Credit Detail Page).
4. Student’s parents placed her at Wilderness Program for many reasons including: her safety, her substance abuse, her medication efficacy, her lack of self-worth, her academic/functional problems, and her social isolation, among others. Regardless of their underlying motive for the placement, Student’s parents were looking for answers about: what diagnoses were really at play, ADHD, Depression, and/or Anxiety; what medications would be effective for treating these diagnoses without marijuana complicating the picture; why Student relied on marijuana to ease or numb her circumstances; and whether Student could come home or needed some other placement? The Wilderness Program placement provided answers to these important questions but also served another important function of corroborating Student and Parent’s accounts of Student’s academic and functional struggles while at School.

**No Access to Marijuana or Alcohol**

1. At Wilderness Program, Student did not have access to marijuana or alcohol and was isolated from her family and friends at home. She continued taking 150 mg Effexor but her ADHD medication was discontinued while she was at Wilderness Program. Stip. Ex. 1818 p 000407.

**Therapy Related Services**

1. Student participated in individual and group therapy while at Wilderness Program. Resp’t Ex. 297. Her primary therapist was Krista Robbins, Ph.D., who was a licensed psychologist. T of Robbins pp 18:21-19:7. During Student’s time at Wilderness Program, Dr. Robbins treated her at least weekly, utilizing interpersonal processing therapy, cognitive behavioral therapy, individual therapy, group therapy, and family systems with Student T of Robbins, p 31:5-18; Dep. Ex. 152. Based on her initial observations and clinical interviews, Student’s depressive symptoms were more severe than Dr. Robbins originally suspected. Dr. Robbins stated the following:

Her depressive symptoms affected her functioning more so where she had a tendency to want to isolate more than I realized. She struggled with interpersonal back and forth and just basic communication on a day-to day basis than I originally assessed. She struggled with identifying her emotions more so, I realized, as time progressed.

And so the goals were put at a level that would be – she would more so be able to reach and that would be more appropriate with her level of functioning.

T of Robbins, p 109:13-23.

1. Student struggled communicating and would say “she was stuck in her head, there was noise in her head.” T vol 2 p 453:12-13 (T of Parent); Stip. Ex. 232 p 756. Student had trouble engaging in group therapy and instead would sit away from the group and speak minimally, even when prompted. T of Robbins, pp 32:11-33:18. Even while in individual therapy, Dr. Robbins had to prompt Student to talk during the sessions, and “[s]he would often just sit there and cry and say she felt very overwhelmed and out of it.” T of Robbins, pp 33:21-34:4.
2. At Wilderness Program, “[i]t became obvious to . . . us and everyone how great her despair was . . . [Student] would share how she was feeling, and . . . that she wanted to go to sleep and not wake up. On one occasion, they had to take her to the hospital because she had eaten berries that she was hoping would be poisonous. . . . she could not do her school work.” T vol 2 pp 451:18-452:1 (T of Parent).
3. Student had a Master Treatment plan, coordinated by Dr. Robbins. Resp’t Ex. 297; T of Robbins p 44:12-21. Student’s Master Treatment plan included the following long-term goals for anxiety and depression, not substance abuse:

[Student] will demonstrate a decrease in depressive behavior and affect, and an increase in ability to deal with anxiety, stress, or frustration using healthy coping skills.

[Student] will begin to face anxiety provoking events or thoughts in her life. She will demonstrate a sense of control over fearful stimuli and show progress in dealing with these issues or events. [Student] will display a reduction of anxiety symptoms.

Dep Ex. 151, p 109-110.

1. In addition to her individual therapy with Dr. Robbins, Student also had group therapy twice a week. Resp’t Ex. 297; T of Robbins p 57:14-16. Another aspect of Wilderness Program was working on the dynamics among Student and her parents. Stip. Ex. 229; Resp’t Ex. 297. Student’s parents had a sixty-minute call with Student’s therapist every week Student was at Wilderness Program, and received assignments and were on a curriculum to help them. Stip. Ex. 231; T of Robbins p 79:10-18; Dep. Ex. 155. Her parents further had parent coaching through Wilderness Program. Dep. Ex. 155. Additionally, Student worked on their relationship with her parents in group therapy. Resp’t Ex. 297.

**Academics**

**2021 Private Psychoeducational Evaluation**

1. Four weeks after Student’s junior school year, while Student was at Wilderness Program and after detox from any substance use, Tess Collett, Ph.D. evaluated Student on July 4, 2021. Stip. Ex. 289. The referral questions Student’s parents had for Dr. Collett’s evaluation were documented as “anxiety, depression, or ADHD, we have never found the right medication, parents are wondering about the impact of her marijuana use as well.” Stip. Ex. 289 p 1936. Parent paid $5,600.00 for Dr. Collett’s evaluation. Pet’s Ex. 15. This evaluation was used by both Wilderness Program and Private Academy in developing Student’s academic and functional programming.
2. Dr. Collett’s Psychoeducational Evaluation was comprehensive and thorough. Stip. Ex. 181. She was Petitioners’ first and most important witness. She has evaluated many adolescents with anxiety, depression, and ADHD, as well as adolescents who used marijuana. T vol 1 pp 46:17-47:3.
3. Dr. Collett was the only psychologist since 2012 to evaluate Student’s strengths, weaknesses, and psychoeducational functioning. Her 2021 Psychoeducational Evaluation supplemented but also reaffirmed many of the previous findings and recommendations contained in Dr. Stalling’s 2012 Psychoeducational Evaluation.
4. Dr. Collett conducted the evaluation on July 4, 2021, after Student had been at Wilderness Program approximately four (4) weeks, which gave “time and allowance for her to detox from cannabis, also giving the staff and therapist time to get to know and observe and work with Student so [Dr. Collett could] have good data from them.” T vol 1 p 140:2-5 (T of Collett); Stip. Ex. 181 p 401.
5. Dr. Collett reviewed Dr. Stallings’s 2012 Psychoeducational Evaluation. Dr. Stallings’ evaluation provided Dr. Collett an “idea of the timeline of presenting concerns, what another clinical professional observed and stated in their report as pertinent information” as well as “cognitive results, executive functioning results,” which was “helpful . . . to look at to then also see whether something is pervasive, consistent over time – if [she’s] seeing something similar” and, if not, “what might the explanation be for that given the information . . . about development and background.” T vol 1 p 47:12-25 (T of Collett).
6. Previous testing is helpful “to see the pervasiveness of a presentation.” For example, in Dr. Stallings’s testing, “Student had a very similar cognitive profile . . . So that made me even more confident in the results and also confident that it’s a pervasive issue, her profile and the difficulties there. And then also seeing kind of some hint of somatization, which is linked to anxiety and depression. . . seeing kind of a timeline of when certain things presented.” T vol 1 p 48:1-11 (T of Collett).
7. Dr. Collett’s evaluation of Student was conducted under “very ideal conditions to get the best possible scores” i.e., “one-on-one situation, where there’s food, where there’s no distractions, there are lots of breaks, and a lot of one-on-one attention—where if [she] see[s] something happening, [she] will stop a task and wait until something is more regulated”. T vol 1, p 119:15-24 (T of Collett).
8. The Undersigned found Dr. Collett’s comprehensive evaluation very informative regarding Student’s needs and found Dr. Collett’s comment—“it’s really difficult to get a clear and accurate picture of someone’s intelligence and academics without also looking at the emotional state that they’re in”—particularly relevant given Respondent’s focus on Student’s grades throughout the hearing rather than her behavioral and functional needs. T vol 1 p 53:11-14 (T of Collett).
9. Dr. Collett diagnosed[[37]](#footnote-38) Student with: Persistent Depressive Disorder (Dysthymia), Moderate, Early Onset; With Intermittent Major Depressive Episodes, With Current Episode; With Anxious Distress; Cannabis Use Disorder, Mild/Moderate, In Partial Remission, In Controlled Environment; Attention-Deficit/Hyperactivity Disorder, Combined Presentation, Moderate. Stip. Ex. 181 p 425.
10. The criteria for Student’s diagnosis of Persistent Depressive Disorder (Dysthymia), Moderate, Early Onset was: “a frequent state of sadness or low mood . . . worthlessness, low self-worth . . . occurring before age 21 . . . one year or more for adolescents.” T vol 1 p 50:5-12 (T of Collett). “[I]ntermittent major depressive episodes mean[s] there’s also major depression happening on top of the baseline of depressive symptoms. . . . [which] was reported by Student [and] by parents. And so there’s moments of more severe depressive symptoms that come and go.” T vol 1 p 50:13-20 (T of Collett).
11. Dr. Collet explained, “Anxious distress is a specifier that you add on to depression when anxiety is present with the depression and there is anxiety about the distress that the depression is causing.” T vol 1 p 50:22-25 (T of Collett). Cannabis Use Disorder, Mild/Moderate “is a disorder of cannabis use that is frequent and that is happening for 12 months or more on a pretty consistent basis. . . [which was] in remission because she’s in a controlled environment . . . where she has no access to those things.” T vol 1 p 51:1-10 (T of Collett).
12. An ADHD diagnosis is “a neurodevelopmental disorder, where inattention and hyperactivity are both present,” which Dr. Collett deemed “moderate” based on “the level of intrusion or distress or difficulty caused by this and the amount of criteria met” T vol 1 p 51:11-17 (T of Collett).
13. Respondent criticized Dr. Collett’s evaluation process because she did not speak with anyone at Wake County Schools. Moreover, Respondent criticized Petitioners for not giving Dr. Collett’s evaluation to WCPSS during Student’s attendance at Wilderness Program or prior to her enrollment at Private Academy. Respondent’s expert Ms. Gamm speculated that, had Petitioners disclosed Dr. Collett’s evaluation prior to filing their contested case petition, “more likely than not that school personnel would have either met to amend Student’s Section 504 Plan or discussed with the parents any need to initiate a special education evaluation to consider whether Student required special education/related services to benefit from her education.” Resp’t Ex. 485 p 0001924. Yet, even if a special education eligibility determination had been held, “[g]iven her high academic performance during the 2019-20 and 2020-21 school years” it still was “not clear to [Ms. Gamm] what additional benefit Student would have received from special education.” Resp’t Ex. 485 p 0001925.
14. Several concerns are raised by Ms. Gamm’s opinions and speculations. First, in preparing her expert opinion, she reviewed all of Student’s educational records which included the 2012 Psychoeducational Evaluation which had previously recommended specially designed instruction. Second, the specially designed instruction recommended by Dr. Collett (and Dr. Stallings) was not for Student’s “additional benefit” but rather necessary to address Student’s unique needs and to enable her to “access the general curriculum.” Without the specially designed instruction and related services provided or paid for by Student’s parents during the time she attended the High School, Student could not have accessed or even “benefited” from her education there. Student could barely function and get out of bed to attend school virtually or in-person.
15. Dr. Collett’s decision not to speak with anyone at Wake County Schools and Petitioners’ decision about disclosure of her evaluation to WCPSS, did not diminish the validity of her evaluation. Moreover, WCPSS had multiple opportunities to conduct its own psychoeducational evaluation during Student’s sophomore and junior years at the High School and after receipt of Father’s notification of the parents’ unilateral private school placement This 2021 Psychoeducational Evaluation captures the entire history of Student’s mental health issues; explains the underlying reasons for Student’s substance abuse; supports Student’s eligibility for special education; and is pivotal in proving the appropriateness of the private school placements. In sum, the 2021 Psychoeducational Evaluation and Dr. Collett’s testimony are the most compelling evidence in this case. Evidence to which Respondent provided no “cogent or rational” opposing response.
16. In addition to administering numerous standardized cognitive, achievement, memory, learning tests, Dr. Collett reviewed all available records; as well as incorporated surveys; behavior rating scales; questionnaires; a mental status examination; clinical interview with Student and conducted collateral interviews with Dr. Robbins, Student’s parents, and Dr. Milton Little. Stip. Ex. 181 p 0000401.
17. A clinical interview of Student was conducted as because “[p]art of diagnosing is learning the amount of stress or distress someone is internally feeling.” T vol 1 p 54:22-23 (T of Collett).
18. Collateral interviews of Dr. Krista Robbins and Dr. Milton Little were also done because “[i]t’s really important to get collateral information to corroborate Student’s story, as well as get Student’s story and other people’s stories and corroborate everyone else’s stories.” T vol 1, p 55:18-21 (T of Collett).
19. Dr. Collett did not speak with anyone from WCPSS in collecting data for her report because she only “reach[es] out to teachers if [she] feel[s] that there is a gap in the knowledge being presented or something that is missing.” T vol 1 pp 104:25-105:2 (T of Collett). As a Clinical Psychologist with a Ph.D, Dr. Collett is trained “to learn about the way the human mind learns, and to learn about these developmental disorders, and how they impact someone at school, and then to learn about Student’s history with school, and to know what these measures indicate, and to know the overlap between ADHD and emotions, and how they play at school, at home, and other places.” T vol 1 pp 122:22-123:5 (T of Collett).
20. If Student’s teachers said they were not seeing any attentional or emotional difficulties, that would not have changed Dr. Collett’s “conceptualization because [she] know[s] already . . . that Student tends to mask those things and to avoid, and that her parents were providing a lot of help at home.” T vol 1 p 105:10-19 (T of Collett).
21. “The abundance of information, the pervasiveness of difficulties, and then [Dr. Collett’s] own experience with [Student]” provided sufficient information about Student’s deficits without the need to talk with the WCPSS teaching staff. T vol 1 pp 105:25-106:4 (T of Collett).
22. The evaluation’s Background Information included information provided by a clinical interview; review of Private Academy records; and supporting interviews with Student’s parents, therapist [Robbins], educational consultant, and Wilderness Program staff. Stip. Ex. 181 p 000403. Reviewed were Student’s developmental, social, and medical history; the family psychiatric history; academic history; substance abuse history; current medication/allergies; previous assessment results (2012 Psychoeducational Evaluation); and previous treatment Stip. Ex. 181 pp 000402-000408.
23. The Background Information “is a really important part of the assessment to determine timeline of presenting concerns, to also corroborate with the research and literature and what we know about timeline and presenting concerns.” T vol 1 p 59:6-9 (T of Collett); Stip. Ex. 181, pp 402-07. The developmental background was “very important” for Dr. Collett’s diagnoses and “understanding of what was present before, what came up after, what are the core issues, and what are the secondary and tertiary issues.” T vol 1 pp 63:21-64:1; 119:25-120:3 (T of Collett).
24. The Family Psychiatric History provided relevant information regarding a “genetic history of ADHD,” “potential modeling of anxiety and potential genetic component of anxiety,” and “[t]here’s some genetic depression in the extended family . . . that are important for [her] to know.” T vol 1 p 60:8-25; Stip. Ex. 181 p 406.
25. The Academic History provided information such as “if there’s ADHD and you have a 504 Plan with certain things available, and it’s still persisting, and there’s not a lot of improvement, that gives [her] an idea of what kind of needs this person has beyond what they’ve been given.” T vol 1 p 61:15-19 (T of Collett); Stip. Ex. 181 p 406.
26. With respect to the Substance Abuse History, Dr. Collett was “really digging in with Student around what her use was about, what the purpose was, kind of where the motivation was coming from.” Student’s substance abuse “very much had to do with coping.” T vol 1 pp 61:25-62:6 (T of Collett); Stip. Ex. 181 p 407.
27. In order to understand Student’s needs, understanding the timeline of Student’s diagnoses was essential. “Student, very much indicated – and there’s plenty of documentation—that executive functioning difficulties were present, the ADHD diagnosis was present early on and notable both at home and in school” with evidence of “difficulty making decisions, some anxiety around making decisions, somatization, which is a common presentation of anxiety especially for kids, especially for people who don’t know how to talk about their emotions.” T vol 1 pp 65:19-66:9 (T of Collett); Stip. Ex. 181 pp 420-25.
28. The objective assessment results included a mental status examination and Rey 15-Item Memory Test (MFIT). Stip. Ex. 181 pp 000408-000409. The cognitive assessments used were the Montreal Cognitive Assessment (MoCA), and Wechsler Adult Intelligence Scale-Fourth Edition (WIAS-IV). Stip. Ex. 181 pp 000409-000411. Student’s memory and learning were assessed using the Wide Range of Assessment of Memory and Learning-Second Edition (WRAML-2). Stip. Ex. 181 pp 000411-000412. The assessments of executive functioning used were Delis-Kaplan Executive Function System (D-KEFS) and Behavior Rating Scale of Executive Functioning-Second Edition (BRIEF 2-PR). Stip. Ex. 181 pp 000412-000414. Achievement was assessed using the Kaufman Test of Educational Achievement, Third Edition (KTEA-3). Stip. Ex. 181 pp 000414-000416. Multiple personality functioning and mental health issues were evaluated using the Minnesota Multiphasic Inventory, Adolescent Edition (MMPI-A), the Rorschach Inkblot Test (Rorschach), the Millon Adolescent Clinical Inventory-Second Edition (MACI-II), the VIA Character Strengths Survey (VIA), the University of Rhode Island Change Assessment Scale (URICA), and a brief sentence completion exercise. Stip. Ex. 181 pp 000414-000419. A substance abuse assessment was conducted using the Adolescent/Adult Substance Questionnaire (ASQ), Substance Abuse Subtle Screening Inventory-Second Edition, Adolescent (SASSI-A2). Stip. Ex. 181 pp 000419-000420.
29. Student’s cognitive scores were similar in nature to her prior scores but may have declined somewhat because of natural plateau and high degree of depressive symptoms at the time of testing.
30. Student’s low working memory was “a significant difference from her other scores.” T vol 1 p 69:14-20 (T of Collett); Stip. Ex. 181 pp 409-10.
31. Student’s deficiency in picture memory was “pervasive,” and “when there’s a lot of complexity visually, she struggle[d] to really see all of it and organize it, take it in in an organized fashion, and . . . therefore, because it’s unorganized, [to] use it, it’s very difficult for her,” which adds “to the chronic overwhelm to the difficulty, the area that she has to work harder to perform and keep up.” T vol 1 p 73:6-16 (T of Collett); Stip. Ex. 181 pp 411-12. There is no “diagnosis that has to do with poor memory,” but Dr. Collett provided recommendations to address this deficit. T vol 1 p 73:17-19.
32. The impact of having a split profile in working memory, “which [Student] had earlier on as well,” is “that [the] internal experiences is very frustrating and difficult for someone and usually you have a lot of chronic overwhelm or distress. . . . also there’s internal frustration” because outside observers “automatically assume that they can keep up with expectations, all the other cognitive expectations” and “they tend to go under the radar and not be given resources.” T vol 1 pp 69:21-70:13 (T of Collett).
33. People, like Student, with low working memory “tend to know that they’re good at things but wonder why they’re struggling to actually perform day in and day out.” T vol 1 p 70:14-16 (T of Collett).
34. “Working memory ha[d] a very pervasive and comprehensive impact of [sic] Student’s academics in general.” Dr. Collett elaborated: “it has to do with . . . her reasoning, higher order thinking, meaning prioritizing, meaning holding information and manipulating it and using it to benefit you to complete a task in an organized way, to stay on top of things to[o] . . . if you’re not attending to something well or if you’re struggling to hold it in and organize it the right way, then later you’re not able to memorize it as well.” T vol 1 pp 70:23-71:7 (T of Collett).
35. “[F]or Student, just managing all of the different expectations of her, staying organized, staying engaged through a longer task” was difficult. While Student could do well on a “quick brief” task, “[w]hen she has a lot of visual complexity in her environment, she d[id] really poorly.” Student had “this area of deficit that’s keeping her back as far as being able to keep up with and manage all the different components of each task, especially complex tasks, and then being able to perform to the best of her ability, unless there’s accommodations or unless she can learn to buffer and compensate for those disabilities.” T vol 1 pp 71:9 –72:1 (T of Collett).
36. “[T]hat internal frustration . . . commonly would put someone at risk for anxiety, depression—because they are constantly overworking and working harder than their peers to keep up And so it naturally leads to depleted resources and also seeing themselves as different or flawed.” T vol 1 p 72:15-22 (T of Collett).
37. While Student was “well able to understand and use both verbal and visual information, with a particular strength in visual processing. She [was] able to process information at a speed similar to her peers but Student demonstrates[d] a lower working memory (Low Average) than her other areas of cognition. This mean[t] she has difficulty holding, organizing and manipulating task-related information.” Stip. Ex. 181 p 000420. “Student present[ed] with varying but overall average to low average immediate memory ability. She show[ed] equal ability in remembering both visual and verbal information. In addition, she excel[ed] in recognition, meaning that after time has passed from information intake, Student [was] very accurate in choosing from multiple choices. She [was] especially adept at remembering rote (or noncontextualized) verbal information such as lists. This was better than her ability to remember contextualized verbal information such as a story.” Stip. Ex. 181 p 000421.
38. During testing, Student had low average to borderline impaired contextualized visual information. “She also demonstrate[d] commission errors: while in search for an answer or memory she comes up with and selects false visual memories. She w[ould] do better in less distracting learning environments with rote visual and verbal information.” Stip. Ex. 818 p 000421. Student performed similarly on the BRIEF conducted by Dr. Collett and the earlier version conducted by Dr. Stallings. For example, “self-monitoring” and “initiating” continued to present challenges. T vol 1 p 75:4-10 (T of Collett); *compare* Stip. Ex. 181 pp 413-14 *with* Stip. Ex. 180 p 395.
39. Executive functioning is important educationally because it impacts “cognitive ability,” “emotions,” “ability to prioritize and organize . . . emotions and then also . . . behaviors leading to impulsivity, difficulty . . . really being aware of the future consequences, that part of that self monitoring, future consequences of your actions.” T vol 1 p 75:11-19 (T of Collett). These executive functioning deficits, combined with Student’s depression, may be “at play with substance use.” T vol 1 p 75:20-24 (T of Collett).
40. Although Respondent attempted to demonstrate Student primarily scored in the “average” range on the assessments Dr. Collett administered, “it would be doing Student a disservice to look at these tests and say . . . she’s fine—when . . . there’s so much data that is abundantly clear that she’s not fine.” T vol 1 p 120:9-12 (T of Collett).
41. Student demonstrated a history of executive functioning difficulties, with a previous diagnosis of ADHD, combined type. She had “impulsivity and lack of forethought around consequences that is above and beyond what would be expected for other adolescents.” Her “poor organization, poor concentration, poor initiation and impulsivity [] caus[ed] difficulties in her academic and social life.” Student “continue[d] to meet criteria for ADHD, combined presentation.” Stip. Ex. 818 p 000421.
42. Dr. Collett explained that: “contrary to popular notions that ADHD is a lack of focus or ability to attend, it is actually a disability of attention regulation. This means that people with ADHD struggle to manage their attention, whether that means they give too little or too much attention” such as Student’s hyperfocusing on academic tasks. Stip. Ex. 818 p 000421
43. “[Student’s] low working memory, low contextualized visual memory and combined presentation of ADHD require[d] compensatory skill increases and accommodations in and outside of school. Structure has proven a benefit to [Student], as have ADHD medications; both of which should be considered moving forward.” Stip. Ex. 818 p 000421. The virtual learning setting necessitated by the COVID-19 pandemic removed the “structure” of the classroom setting.
44. Even though Student ha[d] historically been a “self-starter” and “high performer,” this should not be taken for granted as Student “present[d] with significant attentional difficulties which further impact[ed] her performance when struggling with depressive and anxious symptoms.” Stip. Ex. 818 p 000422.
45. When Student was evaluated by Dr. Collett, “she report[ed] chronic and underlying depressed mood and ‘acting’; or pretending that she felt fine.” Stip. Ex. 818 p 000422 “[She] also present[ed] with symptoms of depression She experience[d] depressed mood, sadness or higher emotionality, fatigue, apathy, low motivation, mental confusion or lack of concentration, worthlessness, irritability and thoughts of death. She was struggle[ing] with high amounts of hopelessness, discontent and daily suicidal ideation with requires continued monitoring and support Her ability to navigate and organize her thoughts [was] further hindered during depressive states. She ruminate[d] and bec[ame] stuck in ineffective thought cycles. Although her parents noticed sharp declines in functioning in the last year and a half, [Student] report[ed] chronic underlying mood difficulties that are less severe but present outside of more severe episodes.” Stip. Ex. 818 p 000422
46. Student’s depression caused “her difficulty seeing herself as normal, seeing herself as . . . competent” and exposes “some of the cracks in her identity and her self-worth,” which impacts her identity. This is often a “problem with people who have these pervasive difficulties because they’re struggling, they’re working harder, they’re out of resources, and there’s a lot of identity development that’s happening in adolescence.” T vol 1 pp 79:23-80:2 (T of Collett).
47. Although she did not see herself as “normal,” Student was “not someone who’s going to complain or she’s not the person who’s going to be in your face asking for help.” Student is someone who “value[s] self-control. And that’s something that she has done in the past very well. . . [which] started to collapse as . . . things weren’t working for her, the accommodations, the therapy, whatever wasn’t working for her enough” and “she’s the type of person who is going to buckle down and keep trying to push through then just burn out and avoid.” T vol 1 pp 80:21-81:5 (T of Collett).
48. Student’s ADHD and depression had a “bidirectional relationship” because her depression “takes even more cognitive resources,” which she was “really working extra hard to maintain and use those resources as efficiently as possible” due to her ADHD. The ADHD makes her “prone to depression and the depression makes everything with ADHD also worse.” T vol 1 p 84:12-19 (T of Collett).
49. In differentiating between cognitive impacts from ADHD and depression, there appeared to be a bidirectional relationship with the two fueling each other. In other words, Student’s cognitive confusion was even more pronounced during depression because of her underlying ADHD. Interventions aimed at both accommodating her ADHD needs as well as helping mitigate and resolve depressive symptoms were necessary for her educational success. Stip. Ex. 181 p 000423.
50. In addition to her ADHD and depression, “[Student] also experience[d] anxiety and distress. These symptoms seem[ed] to be directly correlated with and occurring in tandem with her depression. Much of her distress [was] a result of the cognitive confusion and slowing she experiences due to her severe depression. She struggle[ed] to collect her thoughts and make decisions and feels there is something wrong with her. She met[] criteria for persistent depressive disorder with a current major depressive episode and anxious distress.” Stip. Ex. 181 p 000422.
51. Dr. Collett explained why Student used substances for “coping” and the reasons for her increased risk-seeking behavior as follows:

With the onset of COVID-19, Student has taken a downward turn and struggled to find a sense of homeostasis or contentment in who she is. Her daily academic structure, exercise and sport routines as well as family equilibrium became upset. While experiencing a great deal of distress and mental confusion, she struggles to maintain and access a solid sense of identity. A strong and positive identity is often what dictates an individual’s decision-making and allows them to feel a sense of mastery and self-worth. When identity feels uncertain, one can feel like a failure. When an individual feels discriminated against, distress increases and unpredictability or ineffectiveness ensues. Student has perceived others in her life as not responding positively to her sexual identity and does not yet feel settled in or fully sure of what to do with this component of her identity. She has watched her grades decline, feels overwhelmed and fatigued with the expectations in her life, and feels at odds with friends and family. This would cause anyone to feel unstable about who they are, unsure of themselves and distressed or untethered from supportive relationships.

Without adequate coping methods to respond to her distress, Student resorted to substance abuse, risk-seeking or impulsive behaviors, and avoidance/stagnation. She used alcohol, nicotine and cannabis but mostly abused cannabis. She said she uses cannabis to find symptom relief, used despite negative consequences in family and friend relationships, often sought it out and used more than she intended as well as developed a tolerance. Student often lied to her parents to hide her use and was frequently engaged in activities to secure or use cannabis. She meets criteria for a moderate cannabis use disorder that is in partial remission due to her inability to access the drug while in current treatment Although an important component of her presentation to consider and be monitored, Student’s use is secondary to and resulting from the distress she experiences from her depressive and anxious symptoms. Learning and relying on skills to address her depression will likely decrease her urge to abuse cannabis.

Within the past year and a half, Student has also shown an increase in risk-seeking behaviors and has seemed to make decisions with little concern for the consequences or impact on others. She left long-term relationships to spend time with new people, meet with strangers, and lied or provide limited information about her whereabouts. It is not uncommon for adolescents to engage in risk-seeking behaviors or show limited forethought, especially when trying to distract themselves or find relief from distressing or apathetic states of mind.

It is also a very natural and common response that Student should want to avoid and find relief from her distressing symptoms. Unfortunately, depression and anxiety build off of avoidance and atrophy when addressed through intentional decision making. Student finds it incredibly difficult to make decisions or move forward without certainty. Although she is experiencing much mental fatigue and confusion, it is likely that these emotions are being prolonged and reinforced through inaction or fear of the wrong action.

Stip. Ex. 181 pp 000423.

1. With respect to Student’s patterns of substance abuse, Dr. Collett was concerned about Student’s use of alcohol and nicotine but mostly about her cannabis use which “she has used it to cope for several years with increasing severity.” Stip. Ex. 181 p 000428.
2. According to Dr. Collett, Student’s:

cannabis use also exacerbates and plays on her poor concentration and cognitive symptoms, making it harder for her to organize and use information effectively. Her use of cannabis is also likely increasing her experience of anxiety, as the chemical impact typically increases long-term anxiety. [Student], above others her age, is at high risk for further substance abuse and should be monitored closely. Her substance use is a direct reaction to her other presenting concerns (e.g., ADHD, depression, anxious distress, etc.) and should be a secondary focus in treatment

Stip. Ex. 181 p 000428.

**Student’s Need for Specially Designed Instruction**

1. In order to help Student to access her academics, Dr. Collett recommended that Student:

receive support from an IEP which addresses and accommodates both emotional and attentional difficulties. Her significant diagnoses of depression with anxious distress and ADHD impact her ability to succeed academically. Other components of her cognitive profile should considered when determining supports. Student should be checked in with regularly to ensure she is accessing her resources, as she has a previous history of either not asking for help or be denied help when she has asked . . . [and to] . . .

* Provide access to on-site counselors
* Provide an executive functioning coach who aids [Student] in her organization and planning (it is not advised that parents take on this roll).
* Provide a one-on-one aid or tutor for added support when [Student] is struggling emotionally or mentally.
* Allow for [Student] to work in a quiet and secluded space
* Allow extended deadlines on assignments if needed
* Allow extended time on tests
* Reduce the quantity of homework and focus on quality
* Provide organizational needs and reminders
* Provide visual aids and organized or structured outlines, lists or other more rote information when a task is more complex and contextual.
* Reduce distractions in class and allow preferential seating
* Regular collaboration between [Student’s] clinical treatment team and academic team to update on needs as they change.

Stip. Ex. 181 pp 000428-000429.

1. Dr. Collett recommended an IEP for Student because Student needed “more help” than could be offered through a 504 Plan and “her presenting difficulties . . . need[ed] skill development and specialized skills development” so she could “build her skills that buffer and skills that she needs” with “more specialized, more intensive accommodations or specialized learning or teaching.” T vol 1 p 97:3-18 (T of Collett); Stip. Ex. 181 p 428, ¶ 11.
2. Student “needed help similar to [Dr. Collett’s] recommendations, if not more.” T vol 1 p 130:14-15 (T of Collett); Stip. Ex. 181 pp 425-429.
3. Dr. Leach agreed with Dr. Collett that Student “had a variety of challenges that were impacting her educational performance that would have required goals and accommodations and interventions and supports on a very intensive level to make sure that she could reach her academic potential.” T vol 4 pp 891:23-892:2 (T of Leach). “[S]he needed specially designed instruction to be able to organize herself, to be able to push past her depression and anxiety that was a huge barrier to doing anything academically. . . . [which] was falling on the shoulders of her mother, instead of the professionals that should have been there to support her.” T vol 4 p 892:7-13 T of Leach).
4. Student needed “help to learn skills to buffer [Student’s] deficits” and it would be ineffective to just provide “extra time” because “she’s going to fall back on her difficulties that . . . are not based in time necessarily, they’re based in an innate difficulty to organize, to use her cognitive abilities, to stay focused—and things that need to build compensatory skills to them help someone be able to learn.” T vol 1, p 88:22-89:14 (T of Collett).
5. Dr. Leach also agreed with Dr. Collett’s recommendations. The fact that Student was struggling at Private Academy like she was at the High School “just show[ed] that she does have a persistent mental health challenge that was impacting her educational performance.” T vol 4 p 1028:17-22 (T of Leach). Student has had “great relationships with her teachers . . . she wanted to please them . . .. They were nice to her . . .. She just wasn’t able to perform academically because she only had a couple of accommodations and didn’t have specially designed instruction.” T vol 4, p 1031:25-1032:6 (T of Leach). The High School staff’s support was not “part of an IEP or specially designed instruction that was going to be consistent and required and monitored with outcomes and goals.” Moreover, Student “needed much more than you’re welcome to come to office hours” and extended time. T vol 4 p 1034:8-12 (T of Leach).
6. During cross examination of Dr. Collett, Respondent’s legal counsel highlighted some of their concerns about Dr. Collett’s report, but otherwise did not contest the validity of the information, recommendations, and results contained within Dr. Collett’s Psychological Evaluation.

**The Wilderness Program**

1. Wilderness Program provided academic support to students, including Student, through the specially designed instruction of “one-on-one attention at any time from a staff mentor.” T of Zind p 125:19-126:2. Wilderness Program provided specially designed instruction to students, including Student, on developing time management skills and organizational skills. T of Zind p 126:3-127:19.
2. Student completed academic work which was reviewed and graded by teachers who provided progress reports on the work. T of Zind p 33:13-25. When Student was unable to even initiate an academic task, the field instructors would “provide one-on-one support to help her initiate tasks and then to follow through to completion.” T vol 4 p 898:1-5 (T of Leach).
3. Like her inability to complete her High School class assignments, Student’s depression and anxiety impeded her ability to complete academic work, even though she wanted to do so. T vol 4 p 898:12-20 (T of Leach) (referring to conversations with Student and Dr. Robbins’s deposition testimony). Student was supposed to complete four (4) courses at Wilderness Program: Physical Education, Biology, Psychology, and English. She was only able to complete two (2) and earned an A in Biology and a C- in Psychology. Stip. Ex. 228 p 708. Like when she was at home with Parent assisting her, despite the academic and functional assistance provided at Wilderness Program, Student still “really struggled to complete or engage in any academic work while at Wilderness Program, even with everyday one-on-one support” T of Robbins p 83:17-25.
4. Wilderness Program provided Student with specially designed instruction and one-on-one academic support to address her executive functioning deficits, and related services of group and individual therapy. The integrated program at Wilderness Program was designed to restore, remediate, and rehabilitate Student to improve her functioning and independence, and reduce or eliminate the effects of her illness or disability.
5. Petitioners sought reimbursement of the costs for Student’s stay at Wilderness Program in the total amount of $57,886.79. Pet Ex. 11 pp 1, 2, 3, & 4; Stip. Ex. 228 pp 1-2. They also sought reimbursement of the travel expenses in the amount of $4,126.18. Pet Ex. 17 pp 86-101. *See* Reimbursement Section *infra.*

**Recommendations for 2021-2022 Placement**

1. Dr. Robbins determined Student was ready for discharge from Wilderness Program, as she was developing tools she needed, and wilderness therapy is an effective treatment for ten (10) to fourteen (14) weeks with diminishing returns after that length of time. T of Robbins p 46:16-47:21. Student “had gained all the progress from Wilderness Program that she was going to be able to within that therapeutic context.” T of Robbins p 86:17-87:1.
2. The Discharge Summary contains her recommendations for school supports to implement upon her discharge from Wilderness Program. Dr. Robbins indicated she made these recommendations “because she really struggled to complete or engage in any academic work while at Wilderness Program, even with everyday one-on-one support.” T of Robbins p 83:17-25. Further, Dr. Robbins wanted a school to help Student with her weaknesses, including her depression, anxiety, and difficulty focusing. T of Robbins p 84:1-21.
3. Dr. Robbins recommended:

a residential or therapeutic boarding school setting after Wilderness Program so that she can practice and internalize the tools she learned at Wilderness Program. Returning to her home environment, even with intensive outpatient therapy or school accommodations, would most certainly result in significant regression and a return to her previous level of functioning.

[Student] would benefit from a small, structured setting with clear rules/boundaries and immediate natural consequences. A more supervised environment will encourage a continuation of the experiential and psycho-education strengths she gained at Wilderness Program and also allow parents and professionals to see [Student] respond to new challenges and responsibilities without putting [Student] at undue risk. School accommodations and a more individualized instruction plan will be important for academic success. The school needs to be aware of her previous personal challenges as they create a plan that can support weaknesses and encourage strengths.

Dep. Ex. 157 pp 195-96.

1. Dr. Collett also recommended:

That Student not return home after her treatment at Wilderness Program, but that she transitions to residential treatment center or similarly intensive therapeutic program in order to continue her skill-building and maintain her safety and sobriety. In order to go forward with success, Student must be in an environment and involved in treatment that primarily builds her emotional and psychological skills. This program should also have a family component to repair and build healthy relationships. This program should also provide academic flexibility and specialized instruction and accommodations that fit Student’s needs (described below) and help her continue towards graduation. The program should provide access to regular physical activity and medication management (or frequent collaboration with her home psychiatrist). Although secondary, substance recovery or addressing of substance issues would be beneficial. Student’s change process will take time and consistency to replace current ineffective behaviors of self-perception and emotional coping with more effective patterns. Her patterns will require dedicated time and commitment on her part as well as her support network to build strong and resilient patterns that last.

Ongoing therapy for suicidal ideation, family relationships, sexual identity, sexual trauma, and therapy for reconstruction of her work- and self- view. Regular exercise, healthy eating and a structured sleep schedule will all significantly aid in regulating mood, emotions and energy level for [Student]. Physiology and psychology are highly interconnected and thus sleep, eating and exercise should be a primary focus and area of maintenance throughout her treatment.

Evidence based treatment for generalized depression and anxiety disorders such as Cognitive Behavioral Therapy (CBT) that could be beneficial to Student In particular, Acceptance and Commitment Therapy (ACT), Exposure and Response Prevention as well as Dialectical Behavior Therapy (DBT) should be utilized to address her underlying difficulties. It will be important for [Student] to focus on behavior change (i.e., applying and practicing behaviors) and not become stuck in overthinking or avoidant thinking.

Medication monitoring and adjustment is recommended to help Student stabilize and mitigate some of her distress but, because Student has unfortunately focused on medication as the primary form of relief (or substances) and has thus struggled to engage in behavior or cognitive change, that medication a take a secondary role in her treatment and that she realize the larger and long-lasting impact of engaging in treatment and behavior change.

Stip. Ex. 181 pp 000426-29.

1. Even Student did not “think [she] was in a place to go home” after Wilderness Program. T of Student p 18:15-16. She was “worried about going home” “[b]ecause [she] was so stuck in [her] head . . . [she] had never felt that way before. And it was . . . really scary. [She] couldn’t really describe it to anyone, and [she] felt really alone.” T of Student p 24:6-12. Student felt she “needed more intensive therapy,” for “[m]ainly [her] mood disorder, depression, anxiety, and ADHD.” T of Student p 18:19-23. Student might have needed more therapy for “some substance abuse issues. But [she] didn’t have access to that in wilderness, so that wasn’t really what [she] was going to Eva for.” T of Student pp 18:25-19:2.
2. While Student’s disabilities impeded her ability to access some of the academic instruction offered, the instruction and therapy she received at Wilderness Program stabilized her mental status and allowed her to begin developing the therapeutic skills that would assist her in transitioning to her next placement, where her educational and functional needs could be properly addressed. T vol 4 pp 903:25-904:5 (T of Leach); vol 1 pp 110:5-11; 111:2-19 (T of Collett).
3. From Wilderness Program, Student went directly to Private Academy where she received the educational and mental health supports deemed appropriate by Drs. Robbins, Collett, and Leach.

**Student’s Substance Abuse**

1. A major question in this case is whether Student’s substance abuse was the primary cause of her academic and functional deficits. Dr. Collett’s evaluation specially addressed that question. One of the main reasons for Dr. Collett’s comprehensive evaluation was: “getting really at the core of what’s going on and guiding treatment as well as resources around treatment so that it’s actually helpful and we’re not treating something or doing something that’s just providing a band-aid or allocating unnecessary resources to something that’s not actually the problem.” T vol 1 p 64:11-19.
2. In Student’s case, Dr. Collett “really wanted to get an idea of what, what was presenting before the substance use was even part of this picture because substance use tends to really muddy the picture for us.” T vol 1 p 65:15-18 (T of Collett) When asking “[W]hat’s going – is it anxiety, is it ADHD, is it depression, what is the impact of substance abuse here[?]” the “timeline was very important when diagnosing because here are certain diagnoses that, by nature, have to be present in childhood to be given as a diagnosis.” T vol 1 p 65:1-5 (T of Collett).
3. Based on her review of the “timeline of what was present, and knowing the literature and knowing the kind of common trajectories,” Dr. Collett concluded that “there’s plenty of documentation that executive functioning difficulties were present, the ADHD diagnosis was present early on and notable both at home and in school.” T vol 1 p 65:19-24. Student’s “early temperament” of ADHD increases some of the risks to develop those disorders present for Student early on . . . anxiety around making decisions, somatization, which is a common presentation of anxiety especially for kids, especially for people who don’t know how to talk about their emotions – a lot of times, it comes out through physical symptoms. And so we’ve got all those things.” T vol 1 pp 65:19-66:9 (T of Collett).
4. In addition, “before the substance use, we also have some trauma that occurred [the sexual assault/rape as a 7th grader], some trauma therapy that occurred [with therapist Unwin], as well as an indication of depression and low self-worth and hopelessness before substance use even occurred.” T vol 1 p 66:10-14. All these factors plus Student’s hardworking, choose to “push through” personality and “her high achievement orientation” and the amount of things she was doing and succeeding such as challenging coursework and varsity sports, paint a “picture” of the “trajectory of someone who is overworking themselves and who has these underlying difficulties going on and then led to burn-out and poor coping, hence, the substance use -- which then has a bidirectional relationship, just making kind of everything worse.” T vol 1 pp 15-67:3. Both the manifestation of Student’s disabling conditions and her substance use increased exponentially during the novel virtual learning environment necessitated by the COVID-19 pandemic.
5. Student admitted that she “would try to do everything that was assigned to [her] because [she] didn’t want to feel like unable. But [she] couldn’t do that” T of Student p 119:1-5. Because she was “severely depressed” “it was hard for [her] to do anything.” Student “didn’t want [her] teachers to think that [she] just didn’t care – which was far from the truth. [she] did, [she] was just unable” to do school work. T of Student p 114:9-14. She tried but “[i]t was extremely difficult.”
6. During her junior year, she “was really desperate” and “nothing made me feel good at all.” T of Student p 110:22-111:1. Student had “fallen off the face of the earth in regards to [her] mental health.” T of Student p 108:14-15. Her mental health treatment and talking to her therapist “kept [her] from like not killing [herself].” T of Student p 111:1-3; 110:22-111:3.
7. Like Dr. Collett’s assessment, Dr. Leach opined that Student’s marijuana use prior to entering Wilderness Program, did not “cause [her] ADHD, anxiety, and depression.” T vol 4 p 1003:11-12 (T of Leach). “It’s just a behavioral pattern in response to not getting her needs met.” T vol 4 p 1003:15-16.
8. Based on her interview with Student, Dr. Leach further opined about the “bidirectional relationship” of Student’s poor coping skills: “academics were everything to her. That was the way she masked everything—if [she] was doing great academically, then [she] was okay. And so when she wasn’t able to do great academically, she started to smoke marijuana.” T vol 4 p 1004:17-23. Dr. Collett testified multiple times that Student’s substance use was “secondary, tertiary”—it was “not the core issue”; therefore, Student did not need a substance abuse treatment center. Instead, the goal of her placements is “to mitigate or protect her sobriety and then treat the core issues that have been there longer and that most likely led to the substance use.” T vol 1 p 96:10-17 (T of Collett). In addition to relapse with substance use, as Ms. Gamm noted they were concerned that “she would relapse and have significant mental health issues if she returned home.” T vol 8 p 2058:4-6 (T of Gamm).
9. Student’s therapist and Dr. Collett noted the issue of sobriety and being “in a place where substance use doesn’t intrude on the process of . . . recovering from the depression and emotional difficulties” she was facing was an important consideration for Student’s need to be in a residential placement after Wilderness Program. Because this manner of coping “gets in the way of the core issues that are really going on.” Dr. Collett identified the core issues as “the executive functioning, the temperament that puts her at risk for mood depression and anxiety, and the depression and anxiety.” T vol 1 p 93:2-24 (T of Collett); Stip. Ex. 181 pp 425-26.
10. Student was never involuntarily committed in a substance abuse treatment center and never went to a residential substance abuse treatment center either voluntarily or involuntarily. T vol 5 pp 1258:11-1259:2 (T of Parent). Respondent did not present evidence that either Wilderness Program or Private Academy were drug treatment facilities.
11. Even Student eventually recognized that marijuana “was just a symptom of [her] mental health issues or that it’s just, using it as a crutch and [she] was using it to cope.” T of Student p 126:9-12. In March 2021, during drug counseling, Student “noted that her increased smoking initially developed as a response to depression when she went off meds last year.” Resp. Ex. 169 p 547. After using, Student would “feel somewhat better for some time [an hour or so] and then just go back to how [she] was feeling” or “sometimes it just made [her] feel more depressed and anxious,” but it did not impact her ability to do school work except thought she “could focus better.” T of Student p 130:8-21.
12. Although there were many inferences made during the hearing by counsel, Respondent presented no expert witnesses to testify whether Student’s marijuana use or alcohol consumption had any impact on her education at any particular time. Had Respondent evaluated Student during the 2020-2021 school year, Respondent may have been able to present a witness with the requisite training and expertise to opine on this topic. Based on Dr. Collett, Robbins, and Leach’s credible lay and expert opinions, Student’s educational deficits while she was at School and during her private placements were caused by her depression, anxiety, ADHD, low working memory, and executive processing dysfunction not her substance abuse.
13. Student has not used alcohol or marijuana since her private school placements (T of Student p 129:16-21) further evidence that substance abuse was Student’s attempt to “cope” with her other significant mental health issues.

**Twelfth Grade 2021-2022**

1. The 2021-2022 school year was Student’s senior year. Stip. 45

***10-Day Parent Notice of Intent to Place at Private School***

1. The next notification Respondent received of Student’s ongoing struggles was on August 13, 2021. That day Student’s Father emailed the High School’s Principal, Counselor, and the Dean of Student Services: “As you know, [Student] has a 504 plan, and we believe the services at School are insufficient to meet her needs. We have therefore been forced to enroll her at Private Academy, a therapeutic boarding school in Utah.” Stip. 46.
2. In response, Principal asked Father “to connect to hear your concerns.” *Id.*, p 294. The Dean of Students and Counselor emailed back wishing Student “the best in her new school” and copied the “data manager and registrar so they are aware she will not be attending School and can be on the lookout for a request for her records from the school in Utah.” Stip. Ex. 177.
3. In the fall of 2021, the Principal, the Dean of Students, and Counselor met. When Counselor was asked about the purpose of the Fall 2021 meeting, after objections from Respondent’s counsel and threat to suspend the hearing (T vol 9 pp 2323:24-2327:16), Counselor admitted that he and the other school staff understood that the “[parents] wanted an IEP as opposed to a 504 Plan.” T vol 9 p 2327:18-21. As agents of WCPSS, the Principal and the Dean of Students could have convened an IEP meeting soon after receipt of Father’s email but did not.
4. Respondent did not contact Parent to schedule an initial referral meeting after Father sent the email on August 13, 2021. T vol 2 p 470:5-6 (T of Parent); Stip. 46. Respondent did not convene a meeting to discuss the referral or evaluation. Stip. Ex. 13; *see also*, T vol 4, pp 905:24-906:1 (T of Leach) (opining should have had “meeting to re-determine if it should conduct an evaluation for special education services). There was no evidence presented that any recipient of Father’s email initiated a referral to determine if Student met IDEA eligibility criteria.

**Appropriateness of Placement at Private Academy Placement**

1. Private Academy in Salt Lake City, Utah is a “very comprehensive residential treatment center for adolescent girls,” T vol 2 p 308:11-12. Private Academy provides its students with individualized therapeutic services and academic services which includes an accredited academic program that will lead to post-secondary education. T vol 2 pp 308:15-23-309:18. Student attended Private Academy from August 19, 2021, to June 15, 2022. Stip. Ex. 9.
2. When Student arrived at Private Academy she was on “suicide watch,” which Private Academy referred to as “at arms,” for approximately the first month. T vol 2 p 480:7-9 (T of Parent).
3. Sydney Haga, CMHC served as her primary therapist T of Haga p 26:24-27:1. Ms. Haga met Student upon her arrival at Private Academy. She described Student as “very low functioning,” meaning Student was “very depressed, flat affect, poor sense of self, struggled to regulating [sic] her emotions, quite disconnected.” T of Haga p 28:25-29:14. Kristi Ragsdale, the founder of Private Academy, also met Student upon her arrival in the summer of 2021. T vol 2 p 297:13-20 (T of Ragsdale). When Student arrived at Private Academy, “her demeanor appeared to be that of nervous, anxious, depressed. Her affect in general was very low.” T vol 2 p 301:8-16 (T of Ragsdale).
4. Upon her arrival at Private Academy, Ms. Haga completed a Clinical Intake Assessment. T of Haga p 31:5-12. Dep Ex. 130. To complete the intake, Ms. Haga interviewed Student and observed her. T of Haga p 31:11-14; Dep. Ex. 130 p 987. Ms. Haga reached out to Dr. Robbins to understand her treatment of Student while she was attending Wilderness Program. T of Haga pp 35:23-36:2. From those early conversations, Ms. Haga understood Student was “very depressed, highly anxious, struggled to identify her emotions, thought process, and to engage with others the world around her.” T of Haga p 36:11-14. Dr. Robbins reported in her initial call with Ms. Haga she was wondering whether Student was experiencing “derealization of thought” where she had trouble understanding her own internal thought processes. T of Haga pp 36:22-37:12. At that time, Student continued to “endorse symptoms of depression and anxiety ranging from mild to severe and reports some feelings of hopelessness about her depression never getting better. . . . She reports some anxiety about her thought-process and could be experiencing some depersonalization, this will continue to be assessed as [she] acclimates to the program.” Dep. Ex. 130 p 991.
5. Parent was unable to have any communication with Student when she first started at Private Academy. The first time Parent recollected being able to talk with Student in-person was when she took her to the doctor in October 2021.
6. In September 2021, for the first time in her life, Student started to have seizures and her parents thought she might have a brain tumor. T vol 2 pp 481:5-11. Except for this emergency situation, normally all communication with Student “went through her Treatment Team,” which held “weekly meetings” and included her therapist, Ms. Haga. T vol 2 pp 496:22-497:6 (T of Parent). “At some point,” Student’s parents were able to “see her on Zoom and talk to her and that was weekly” but this was still controlled by Student’s Treatment Team. Her first home visit was November 19-21, 2021. During that visit and all other visits until her Spring Break visit on April 18-24, 2022, Student had to be supervised at all times by her guardians, she had limited and only preapproved phone use, no shopping, no internet access, no friend visits, a regimented diet and day, as well as completion of daily chores and targeted skills. Stip. Ex. 273 p 0001016 (Nov. 19-21, 2021 visit), 001030 (Dec. 22-26, 2021 visit), 001037 (Feb. 17-21, 2022 visit) 001041 (April 18-24, 2022 visit must let guardians know whereabouts at all times, no phone, no internet etc.). During her stay at Private Academy, Student did not have a cell phone or internet access, except for school purposes. T vol 2 p 496:4-19 (T of Parent).
7. At Private Academy, she was assigned a “Big Sis [a peer mentor] who kind of taught [her] about the program. But it was hard for [her] to just . . . really focus at all when [she] first got there” due to her “depressive state—because it just kept getting worse.” T of Student p 25:15-21. Student “was worried—because [she] was so depressed . . . it was hard for [her] to . . . talk to people . . . just like talk at all.” T of Student p 26:1-3. For about the first month, her therapy focused on “basically just keeping [her] alive.” T of Student p 38:14-19. After a month or two, when Student “was stable” she “could talk to people. [She] wasn’t miserable. [She] didn’t want to . . . kill [herself].” T of Student p 42:14-25. She “could function.” T of Student p 43:7-8. Parent described Student’s progress as “very slow” when Parent and Father “first started seeing her,” and “by the time that she was finished—tremendous—I feel like it saved her life.” T vol 2 p 497:21-24 (T of Parent).
8. When Student arrived at Private Academy, she “couldn’t really do work” due to her depression and had to drop one class. T of Student p 30:3-5. Student spent time in Study Hall getting “caught up on work—because [she] had a lot to do from when [she] first got there, a lot of catching up to do.” T of Student p 30:20-21. Like at the High School, Student was unable to function within an academic classroom. The team at Private Academy recognized this and helped her readjust to the classroom setting. T vol 2 p 309:21-25 (T of Ragsdale). Shortly after Student began attending Private Academy, her English teacher noted the following of her engagement in class:

So far, [Student] hasn’t participated at all in class discussions. She stares off into space or picks at her fingernails. She doesn’t do work or participate unless she is specifically prompted to do so. I wonder if she isn’t comfortable in class yet I would like to see her push herself to participate more.

Stip. Ex. 282 p 1358

1. While at Private Academy, Student lived in a home with up to fifteen (15) other students where they worked on independent living skills such as cleaning, cooking, menu planning, and developed executive functioning skills. Within the home, there were two academic classrooms, and staff were able to work with Student and provide support and coaching within that environment. T vol 2 p 311:4-25 (T of Ragsdale). There was always a four (4) to one (1) ratio of family teachers in the home where Student lived and attended school. T vol 2 p 315:23-316:6 (T of Ragsdale). Student was able to work on deficits in executive functioning and organization throughout her day with supports in place and coaching from the staff. T vol 2 pp 316:7-317:8; 323:13-325:16. (T of Ragsdale).

**Master Treatment Plan**

1. Using the current 2020 Psychoeducational Evaluation as well as input from Student, her treatment team, parents, psychologist from Wilderness Program (Dr. Robbins), Therapist Unwin, and Kirk Simon, M.D., a Master Treatment Plan (“Plan”) was developed soon after Student’s arrival at Private Academy. *See* Stip. Ex. 234; Stip. Ex. 273 (emails re: revisions to Plan)
2. The diagnoses listed in the Plan were:

|  |  |  |
| --- | --- | --- |
| Code System | Code | Description |
| DSM5 | 300.4 (F34.1) | Persistent depressive disorder (dysthymia), Mild, Early Onset; With Intermittent Major Depressive Episodes without current episode |
| DSM5 | 300.02 (F41.1) | Generalized anxiety disorder |
| DSM5 | 314.01 (F90.2) | Attention-deficient/hyperactivity disorder, Combined presentation |
| DSM5 | 304.30 (F12.20) | Cannabis use disorder, Mild/Moderate, in early Remission, in Controlled Environment |
| DSM5 | 305.00 (F10.10) | Alcohol use disorder, Mild, in early remission, in controlled environment |

Stip. Ex. 234 000810

1. The Master Problem List was:

|  |  |  |
| --- | --- | --- |
| Date | # | Problem |
| 9/13/2021 | 1 | Persistent depressive disorder (dysthymia), Mild, Early Onset; With Intermittent Major Depressive Episodes without current episode |
| 9/30/2021 | 2 | Generalized Anxiety Disorder |
| 9/13/2021 | 3 | Attention-Deficit/Hyperactivity Disorder |
| 9/13/2021 | 4 | Poly-Substance Use |
| 9/13/2021 | 5 | Parent-Child Relational Problem |

Stip. Ex. 234 000810

1. The Problems/Goals/Objectives detailed in the Plan follow in the outline below.

**Problem 1**: **Persistent depressive disorder (dysthymia), Mild, Early Onset; With Intermittent Major Depressive Episodes without current episode**

1. Goal 1: “Feeling more confident and socializing more, enjoying things more, things are easier. I look forward to things, I don’t want to die.” [Student] will elevate her mood and show evidence of increased energy levels, activities, and socialization level.
   1. Objective 1: [Student] will learn and implement the following skills, “follow instructions,” accept feedback,” “accept ‘no,’” and “disagree appropriately.” She will demonstrate mastery of these skills by applying them 80% of the time as observed by staff and therapist.
   2. Objective 2: [Student] will learn and implement skills to increase emotional regulation, distress tolerance, mindfulness, and interpersonal effectiveness.
   3. Objective 3: With the aid of educational staff, [Student] will set specific daily, S.M.A.R.T goals for each class period 80% of the time over an 18 week period.
   4. Objective 4: [Student] will respond positively to verbal and non-verbal feedback from educational staff 80% of the time over a time period of 18 weeks.
   5. Objective 5: [Student] will learn and implement the following skills: “display appropriate control,” “seek positive attention,” “accept decisions of authority,” and “express feelings appropriately.” She will display mastery by consistently using skills 80% of the time as observed by staff and clinician.
   6. Objective 6: [Student] will complete a relationship inventory and explore relationship patterns in connection with previous experience and core beliefs.

**Problem 2: Generalized Anxiety Disorder**

1. Goal 1: “Not letting it control me, using it as an advantage to get things done.” [Student] will reduce the overall frequency, intensity, and duration of the anxiety and see an increase in daily functioning.
   1. Objective 1: [Student] will learn and implement calming skills to reduce overall anxiety and manage anxiety symptoms.
   2. Objective 2: [Student] will learn and implement problem solving strategies, assertive communication, and other constructive ways to respond to their anxiety.
   3. Objective 3: [Student] will learn and implement the following focus skills: “self reporting” “communicating honestly,” “follow rules,” and “Setting appropriate boundaries.”
   4. Objective 4: When presented with a problem (non-preferred task, frustrating situation, criticism/correction), [Student] will accurately determine the size of the problem (big problem, little problem) and determine the appropriate emotional response (take a break, talk with teacher, take a deep breath, replace frustration with good thoughts, etc.) and return to task at hand in 4 our of 5 trials as measured by teacher observation.
   5. Objective 5: [Student] will learn and implement the following focus skills: “display leadership,” “peer report,” “be assertive,” and “ask for help” Client will demonstrate mastery as observed by displaying the skills 80% of the time over a two week period as observed by staff.

**Problem 3: Attention-Deficit/Hyperactivity Disorder**

1. Goal 1: “I don’t want to be so reliant on meds, not being so impulsive.” [Student] will achieve a significant increase in compensatory skills for the management of ADHD symptoms.
   1. Objective 1: [Student] will take prescribed mediation as directed by the physician.
   2. Objective 2: [Student] will delay instant gratification in favor of achieving long-term meaningful goals.
   3. Objective 3: [Student] will learn and implement problem solving strategies, assertive communication, and other constructive ways to respond to their anxiety in school.
   4. Objective 4: [Student] will learn and implement the following focus skills: “communicating honestly,” “display appropriate control,” “share attention with others,” and “follow rules.”
   5. Objective 5: [Student] will work on working towards achieving long-term goals through purchasing bonds and delaying gratification of other privileges. She will do this until she reaches her goal of 30 bonds.

**Problem 4: Poly-substance Use**

1. Goal 1: “Stay sober.” [Student] will learn about patterns of addiction and relapse and develop the skills necessary to cope effectively to help sustain long-term recovery.
   1. Objective 1: [Student] will explore motivation for treatment toward making a commitment to change.
   2. Objective 2: [Student] will learn and verbalize increased knowledge of substance use and the process of recovery.
   3. Objective 3: [Student] will complete assignments at an adequate pace, earning 75% or higher in each class by the end of the semester in May.
   4. Objective 4: [Student] will learn and implement the following focus skills: “Maintain Appropriate Boundaries,” “Display Leadership,” “Controlling Impulses,” “Express Appropriate Affection:
   5. Objective 5: [Student] will complete relapse prevention plan to identify and increase likelihood of successful recovery upon transition from program.

**Problem 5: Parent-child relational problem**

1. Goal 1: “Keep working on better communication, healthier things, tolerating differences.” [Student] and her parents will work together to effectively manage conflict and mental health while increasing quality of their relationship.
   1. Objective 1: Parents will learn and implement developmentally appropriate parenting practices that have demonstrated effectiveness.
   2. Objective 2: [Student] and her parents will learn and implement healthy communication skills and participate in weekly family therapy, social calls, and parent visits.
   3. Objective 3: [Student] is to report to parents when she has a seizure and staff are to take notes and observations to report to therapist and communicate it to parents to improve communication and continuation of care. [Student] will also report to parents her compliance with doctor’s request to refrain from activities that could put her at risk, should another seizure occur (i.e. swimming, baths, rock climbing, sitting on high ledges).
   4. Objective 4: [Student] will report to parents about following recommendations to make modifications to workouts that involve using her shoulder, or times where modifications are not possible and she will need to sit out of the activity.

Stip. Ex. 234 pp 000811-000827.

1. Each goal and objective had numerous interventions/accommodations/related services listed which varied depending on the goal/objective but often overlapped. *See* Stip. Ex. 234 pp 000811-000827. The interventions/accommodations/related services are reviewed later *infra.*

**Educational Program**

1. While at Private Academy, Student completed academic coursework through Mount Olympus Preparatory School. *See* T vol 2., p 336:6-20; Stip. Ex. 240. In the Fall Semester of 2021, Student completed Calculus A honors, English 12A honors, US Government honors, Art I A honors, and PE 12 A. Stip. Ex. 240 p 000887. In the Spring Semester of 2022, Student completed Calculus B honors, English 12B honors, Computer Technology, Financial Literacy, Art I B, and PE 12 B. Stip. Ex. 240 p 000888. Student’s academic classes occurred from 9:30 am to 12:00 pm and again from 2:30 pm until 5:00 pm with physical fitness occurring at a different time Sunday through Thursday. T vol 2 p 338:5-25 (T of Ragsdale explaining the schedule) and T of Student p 29:5-20 (explaining the daily academic schedule).
2. Classes were taught within the homes at Private Academy. “[A]t any given time, there was one academic teacher and then one to two behavioral specialists in the classroom. That’s in addition to the academic director who may be in working with the students, additional support tutors, and therapists who often [came in and did] observations in the classroom . . ..” T vol 2 p 313:3-8. (T of Ragsdale). There were not exemptions for Student’s assignments while she was attending Private Academy. T vol 3 pp 558:18-559:4.
3. The educational program at Private Academy was “very important for Student’s future.” T vol 2 p 12-14 (T of Parent). Parent explained the supports Student received were “so intertwined” and provided examples of how Dr. Simon referenced Dr. Collett’s report in explaining to them about Student being “stuck in her head because of her low working memory,” and “he explained the medications that he put her on,” and “when [Student] was ready for that information, . . . it was very important for her to learn how her brain worked . . . to digest that information and to be guided by that.” T vol 2 pp 502:5-503:4 (T of Parent).
4. Additionally, Private Academy “extended her semester when she was ready to the work” and “they would work with her. They would explain to her. They would make a plan to get caught up . . . they made it clear that if she didn’t complete an assignment, she wouldn’t get the honors credit But if she did, that she would . . . And that was very important for her.” T vol 2 p 503:5-15 (T of Parent). The team met several times with Parent and Father to modify the plan based on Student’s needs. T vol 2 p 486:15-24 (T of Parent).

**Specially Designed Instruction**

1. Private Academy had “goal oriented, small classes” and Student’s Honors Calculus teacher “spent a lot of time . . . with the building blocks of Calculus that she was lacking. He would write down in small things, give her extra assignments.” Student “had a person that if she got overwhelmed, they would take her out. If she had an outburst, . . . she could take a minute and . . . get herself together.” T vol 2 p 503:16-24 (T of Parent) They spent time “getting her organized, getting her so she understood what she was supposed to do and how to do and how to get it back.” T vol 2 pp 503:25-504:2 (T of Parent).
2. During her classes, Student was one of six (6) to eight (8) students and was able to receive “immediate corrective feedback.” T vol 2 pp 402:4-403:5 (T of Ragsdale). The academic team and therapeutic teams “consulted weekly on how Student’s therapeutic challenges and difficulties . . . showed up in the academic classroom.” T vol 2 p 339:7-24 (T of Ragsdale). The academic team worked with Student to prioritize her assignments and create a plan to complete her assignments, particularly ones that she was missing due to her inability to fully engage academically when she first arrived due to her mental health. T vol 4 p 1027:10-12, 16-19 (T of Leach).
3. Unlike at the High School, Student was “held accountable for doing all her work. T vol 4 p 1026:14-16 (T of Leach). *See e.g.* Stip. Ex. 282, p 1405 (English weekly academic note explaining Student was catching up on missing work but “still struggling to finish the pieces” of another project); p 1406 (government weekly academic note explaining Student was four assignments behind and “expressed determination to catch up on her work”); p 1414 (government weekly academic note explaining Student was “caught up on her make-up plan”).
4. Instead of her mother helping her or being exempted from assignments, Student developed SMART goals before every class period in her planner (e.g., “take detailed notes or use graphic organizers”). Student explained SMART goals are “Specific Measurable Achievable Retainable Targeted . . . It’s a really specific goal.” T of Student pp 53:17-54:4. Her teachers worked on her goal for completing assignments at an adequate pace. If she was “getting behind, they would establish a make-up plan.” T of Student pp 60:17-61:1.
5. In addition, Student received the following specially designed instruction, interventions, and accommodations for her academic work:
   * + 1. Assistance with Organizational Skills
       2. Assistance with Planning
       3. Assistance with Prioritizing
       4. Break Down Longer Assignments
       5. Check-in with Teacher to Follow Up on Progress
       6. Frequent Reinforcement
       7. Immediate Corrective Feedback
       8. Predictable Structure
       9. Preferential Seating
       10. Study Skills Support
       11. Use of an Academic Planner
       12. Use of Clear Models
       13. Use of Graphic Organizers
       14. Use a variety of answering methods (orally, whiteboard, computer, etc).
       15. Use of Notebooks and Binders
       16. Assistance with Summarizing Information
       17. Small Class Sizes

Stip. Ex. 234 pp 000811-828.

**Related Services**

1. Related services were provided at Private Academy and integrated with her academics. Similar to an IEP, a Master Treatment Plan (“Plan”) was developed with individualized goals and objectives for Student Stip. Ex. 234. The Plan was developed collaboratively by a team working with Student, including her primary therapist, Sydney Haga; the executive director, Kristi Ragsdale; the milieu team; the academic director; other therapists working with Student; and the psychiatrist, all considering Student’s psychological testing, history, and the family concerns and goals. T vol 2 pp 302:24-303:13 (T of Ragsdale); T of Haga pp 99:24-100:6; 104:6-12.
2. Like progress monitoring in an IEP, Student’s team documented her progress on the goals in her Plan in the “review/updated” section and the “explanation of diagnostic changes” section where the treatment team met at least monthly to discuss Student’s progress. T of Haga pp 104:23-105:23; T vol 2 pp 303:13-304:3 (T of Ragsdale); Stip. Ex. 234. Although Private Academy did not keep quantitative data, there are significant qualitative data in the anecdotal records of Student’s progress. T vol 4 pp 1025:21-1026:16 (T of Leach).
3. The Plan identified problems, set forth individualized long-term and short-term goals, and contained the monthly updates for each goal. Stip. Ex. 234 p 810. Even Respondent’s expert witness described the Plan as “very comprehensive.” T vol 8 p 2059:5-6 (T of Gamm).
4. Ms. Haga worked with Student and her parents in family therapy. Ms. Haga worked with them on “communication, understanding the different roles within the family system, how to increase better structure and boundaries and expectations at home conflict management, increasing the quality of their relationship, accountability.” T of Haga p 76:2-7. As Student made progress with her familial relationships while she was at Private Academy, Ms. Haga observed her gain greater confidence and a greater sense of self to enable her to develop and implement the skills taught and to “increase her engagement in the world around her.” T of Haga p 144:3-15. The family therapy was integral to Student’s progress as her parents better understood Student’s disabilities, how to interact with Student when she was “spiraling down,” and how to appropriately support her rather than “trying to be Student’s professional.” T vol 4 pp 909:21-910:13 (T of Leach).
5. Student participated in group therapy and specialty therapy groups, including a substance use group and a trauma group, while attending Private Academy. Ms. Haga did not have Student participate in the specialty groups until it was therapeutically appropriate for Student to begin that work. T of Haga pp 81:16-83:2. Student received the following interventions, accommodations, and related services:

Activity for Daily Living (ADL) 2-4 times per day.

Boundaries Therapy Group 1 time(s) per week.

Cultural and recreational activities 1 time per week.

Art Therapy 60 minute(s) per week.

Sexual Trauma (Speak Now) Therapy Group 1 time(s) per week

Family Meeting Group 1 time(s) per day

Family Therapy (Face-to-face) 1 time(s) per month.

Family Therapy (Telephonic/Skype) 1 time(s) per week.

Group Physical Exercise 1 time(s) per day.

Group Therapy 5 time(s) per week.

Healthy Coping Skills Group 1 time(s) per week.

Individual Therapy 2 time(s) per week.

Life Skill Group 1 time(s) per week.

Milieu Therapy Daily

Process Group Therapy Group 1 time(s) per week.

DBT Therapy Group 1 time(s) per week.

Self Esteem Therapy Group (1) times per week Role Plays

Communication Skills

Motivational Interviewing

CBT Therapy

Recovery Therapy Group 1 time(s) per week.

Substance Abuse Therapy Group 1 time(s) per week.

EMDR Therapy as needed times per week

CORE Parenting Course and Coaching 1 time per week

Vulnerability, conflict resolution, expression of feelings, and anger management therapies

Stip. Ex. 234 pp 000811-828.

**Milieu Team - Integration of Academic and Therapeutic Components**

1. The academic and therapeutic components of Private Academy were completely integrated—the clinical milieu team brought together the two pieces to provide comprehensive programming for Student to allow her to access her education. The wrap around services of the clinical milieu draws out all of the pieces of helping kids with their goals and skills and what happens outside of that, both the academic classroom and the therapeutic component focusing on every single aspect of the individual’s life and helping them gain confidence, decrease suicidality and depression, gain the skills to be able to function, stay alive, and development of executive functioning. The program was very individualized for each student including Student. As students come into Private Academy, the team looks at all of their testing, all of the different backgrounds. Then the team develops a treatment plan and an academic plan based on what their current needs are, their history and their input T vol 2 p 309:2-18 (T of Ragsdale); T vol 4 p 909:2-14 (T of Leach).
2. In addition to the related services provided, Student received specially designed instruction such as “immediate emotional regulation supports” from the family teachers[[38]](#footnote-39) who “would pull her out [of class when she was beginning to get upset] and provide support and coach her and help her get back into the classroom” and assist her to refocus when she became unfocused. This is stark difference from the High School, where Student would simply leave school or leave the virtual classroom when she was unable to “handle being in school.” The specially designed instruction included the use of “skill cards . . . to help her get to a point where she could be more independent.” T vol 4 pp 1028:25-1029:16 (T of Leach).

1. The “family teachers” were like paraprofessionals, who are supervised, and assist in implementing the specially designed instruction. T vol 4 pp 1029:20-1030:2 (T of Leach). The “family teachers” were a critical component to meld the therapeutic and academic pieces of the programming at Private Academy together. “[T]he family teachers, our direct care staff, as the scaffolding that creates that continuity outside of the classroom, outside of the therapy. So all of our direct care staff, who we call family teachers, have a minimum of a bachelor’s degree or extensive experience within residential treatment They all go through 40 hours of extensive pre-service training in what’s called the Teaching Family Model. That Teaching Family Model is approved by the American Psychological Association. It’s the only residential model that, its efficacy is approved for use with adolescents in residential care.” T vol 2 pp 313:14-315:22 (T of Ragsdale).
2. Family teachers would work on skills with students throughout the day – both inside and outside the classroom. T vol 2 pp 313:9-315:22 (T of Ragsdale explaining the role of family teachers). The therapists and staff at Private Academy worked with Student on the goals in her Master Treatment plan through individual therapy, group therapy, and target skills as a few of the methods. T of Haga p 108:17-109:3. Target skills were on “skill cards” where Student could earn positive interactions for correctly implementing a skill and if she incorrectly implemented a skill, staff would “give her a consequence and teach . . . her other ways that she could have utilized the skill . . . more effectively.” T of Haga p 109:4-15. In addition to classroom and therapeutic time to work on Master Treatment plan goals, Student participated in family meetings with peers four (4) days each week to implement and improve the skills she was learning. T of Haga p 110:4-20.
3. Student described the continual support of the family teachers indicating, “they give you interactions for your skills card, they take you on appointments if you need them, . . . they cook for us, talk to us when we need. They’re just a big support.” T of Student p 45:8-12. Throughout her testimony, Student explained many ways the family teachers helped her while she was at Private Academy. *See e.g.* T of Student pp 54:21-55-2 (explaining family teachers helped her with a short-term objective on her Master Treatment plan); T of Student pp 56:3-57:7 (explaining her therapist and family teachers helped her with her calming skills); T of Student p 57:8-24 (explaining family teachers helped her learn and implement problem-solving strategies); T of Student p 150:7-22 (explaining she could leave class with a family teacher if she was overwhelmed and there was always a family teacher in the house).
4. Student had access to her therapist, family teachers, the program director, the Milieu manager, and other therapeutic staff outside of therapy or classroom time. T of Haga pp 144:16-145:8. During those times Student would contact her therapist outside of the scheduled, therapeutic appointments, Student would reach out in-person about general check-ins, topics to cover during therapy, or for a “source of support for whatever was going on for her at that time, that we would then follow-up with in family or individual therapy as needed.” T of Haga pp 145:24-146:6.
5. The Private Academy academic department helped Student “better understand [] how she could manage her ADHD and other mental health in school, her anxiety with school, being able to better develop skills with that.” T of Haga p 139:2-6. Student’s primary therapist worked with her on academic anxiety and collaborated with people in the academic department to coordinate care for Student regarding her anxiety related to academics. T of Haga pp 139:20-141:24. Again, Respondent did not offer any evidence it did or could provide Student with education or assistance in these areas to help her access her education. In fact, Respondent did not even contact Student’s therapist, Ms. Kada Unwin, or psychiatrist, Dr. Christine Dittmer, after they each had sent separate letters to Respondent outlining their concerns. Stips. 38-41; *see* Stip. Exs. 223 and 224.
6. Only in March 2022 did Student’s team at Private Academy begin planning for her graduation and completion of the program. Stip. Ex. 234 p 827. When it was time for Student to leave Private Academy, Ms. Haga contacted Ms. Unwin to coordinate care for Student and share her current level of functioning and continued treatment. T of Haga p 54:5-13. Ms. Haga described Student’s “continued progress, that she entered treatment with . . . a major depressive episode, that she had worked to increase her ability to manage depression, anxiety, a better sense of self, better skills and tools to regulate her emotions, improved family functioning . . . .” T of Haga p 54:14-22. Ms. Haga helped Student plan for her discharge from Private Academy by developing three (3) relapse prevention plans collaboratively with Student These plans addressed depressive episodes, patterns in relationships, and substance abuse. T of Haga pp 84:15-85:3. Dep. Ex. 142. Notably, in Student’s relapse prevention plan for a “depressive episode,” she wrote an early sign was “school feels more hard [sic] than usual.” Dep. Ex. 142 p 995. Student engagement in developing these plans provides further evidence of her “motivat[ion] to thrive.” T vol 4 p 1031:17-19 (T of Leach).
7. Ms. Haga recommended Student enter a transitional young adult program due to Student’s need for “high levels of structure and continued supports.” T of Haga p 55:6-10. Student had made enough progress while attending Private Academy that she no longer needed the intensive level of therapeutic support and structure; yet, her primary therapist believed she still required a middle level of structure. T of Haga p 55:11-21.
8. When Student was ready for discharge from the therapeutic and academic program at Private Academy, the team developed a Discharge Plan for her. Stip. Ex. 235. Student’s discharge summary notes, “Client completed treatment objectives and goals.” Stip. Ex. 235 p 829. The discharge summary also notes the following: “Client was admitted to Wilderness Program after failed levels of care with general outpatient therapy and continued decline in functioning, including school work, insolation [sic], and withdrawal from relationships and previously enjoyed activities.” Stip. Ex. 235 p 829. Further, Student no longer met the criteria for parent-child relational problem at the end of her work at Private Academy. *Id.*
9. It was not therapeutically appropriate for Student to leave and be discharged from Private Academy prior to June 2022. Student’s discharge paperwork from Private Academy showed certain goals on her Master Treatment plan were not completed until her discharge date. Stip. Ex. 235. At the end of Student’s treatment, Ms. Haga indicated Student had made progress noting, “she entered treatment with . . . a major depressive episode, that she had worked to increase her ability to manage depression, anxiety, a better sense of self, better skills and tools to regulate her emotions, improved family functioning, and some recommendations for continued care.” T of Haga p 54:14-22; Stip. Ex. 235 (Discharge Summary).
10. When Student left Private Academy in June 2022, she was more engaged, emerged out of her major depressive episode, understood herself better, had “better tools and skills to regulate her emotions, which then helped her be able to better engage in the world around her, in her relationships, in her family relationships, in her school performance.” T of Haga p 138:8-17. For Student to get to a point of the level of functioning where she was able to engage in the world, relationships, and academics, Private Academy provided her the high structure and the target skills. T of Haga pp 138:18-139:2.
11. While Student continues to need support, she is now “able to accept support and be a key contributor to her own intervention.” T vol 4 p 913:5-9 (T of Leach).
12. Student made educational progress while at Private Academy, completed her coursework, and graduated. T vol 2 p 348:14-19 (T of Ragsdale). She was able to make this educational progress due to the following factors:

So the factors that contributed to her being able to be in the academic classroom were the support of the Milieu Team, the continual support of her medication management, the around-the-clock care, her ability to work in individual therapy and have the individual therapist be able to observe her within the milieu and the academic classroom, the small class size, her accommodations, the sophistication of our Academic Team and their understanding of how to work with kids with depression and anxiety and executive functioning deficits and ADHD, the ability for the continuous coaching and, again, all facets, the, the work around preventing self-harm and suicide, the work around her ability to stay sober and be sober enough to show up in class and not be inhibited by drugs, drugs or alcohol. And so I believe that all of the facets of the program contributed to her ability to complete and be successful and be able to transition out of such, you know, out of a residential environment.

T vol 2 pp 348:23-349:16 (T of Ragsdale).

1. Ms. Gamm’s opinion that Private Academy was inappropriate to meet Student’s needs was unpersuasive to the Undersigned. Ms. Gamm opined if she were looking for a residential placement,

[She] would be looking at the facilities [she is] very familiar with through [her] work with OCR, which are state-approved facilities to implement IEPs for residential placement, which are, have highly-skilled educators and know how to modify, adapt, and delivery highly specialized instruction for children who are having difficulty learning, supplemented by therapy and mental health services and related services.

T vol 8 p 2049:6-13 (T of Gamm).

1. Respectfully, Ms. Gamm last worked with OCR in 1992. Resp’t Ex. 471 p 0001728. State approval of facilities and teacher credentials are only factors in determining appropriateness of a private school placement. Ms. Gamm conflated the standards for public residential placements with those for private school reimbursement. *See, e.g.*, T vol 8 pp 2103:10-24 (testifying teacher licensure is required unless the school or “the state doesn’t require it” and admitting “[u]nder *Carter* it was “probably true” that it was not required for tuition reimbursement—“but with [her] qualification that [she] gave earlier”); 2058:9-12 (discussing the recommendations from Wilderness Program as “not look[ing] like recommendations [she has] seen for students where *a school district would be recommending residential care* to receive an appropriate education *through an IEP*”); 2065:17-24 (discussing but failing to recognize the supports that Student was receiving at Private Academy were specially designed instruction and related services).
2. Ms. Gamm’s expert opinion was also unpersuasive because she focused heavily on Student’s grades and the academic components of her instruction at both Wilderness Program and Private Academy. *See, e.g.,* T vol 8 pp 2022:11-22 (Gamm explaining Student’s grades were high at the High School); 2026:3-15 (Gamm explaining Student did not need specially designed instruction as she “looked at her grades”); 2028:15-25 (Gamm explaining the High School teachers were flexible, and Student’s grades showed she was successful); 2039:7-15 (Gamm explaining Student’s 504 was effective “give her grades”); 2055:11-19 (Gamm explaining the recommendations from Dr. Collett’s report were not needed because “her grades speak for themselves”). When pressed Ms. Gamm ultimately admitted that specially designed instruction is not “just for academic performance. . . . It could be around social-emotional issues that are intrinsically included in that instructional process.” T vol 8 p 2101:18-22. Further, Ms. Gamm acknowledged that specially designed instruction can be provided for functional performance “[t]o the extent that it’s impacting instruction and learning from the teacher.” T vol 8 p 2101:23-25.
3. Ms. Gamm opined that the Section 504 Plan was sufficient to provide Student a FAPE because Student received the same supports at Private Academy that she received at the High School. T vol pp 2061:20-21; 2063:15-17; 2065:7-10 (T of Gamm). Ms. Gamm’s expert opinion is not persuasive because she did not take into account the intensive daily involvement of Parent in supporting Student academically, the numerous privately paid therapists who helped Student just to be able to access school, and the equally relevant COVID Year “Grace and Flexibility” used by School staff during Student’s 10th and 11th grade school years.
4. This chart below compares the two placements and illustrates the significant differences between them as well as the emotional/functional services necessary for Student to access her education during those school years:

**HIGH SCHOOL**   **PRIVATE ACADEMY**

**10th and 11th Grades 12th Grade**

|  |  |
| --- | --- |
| **Section 504 Plan Accommodations:**  Extended time assignments  50% extended time tests/quizzes (11th only)  Redirection for inappropriate/distracting behaviors  Preferential seating  Teacher’s notes upon request (11th only)  No phone use during class  **COVID-19 Modifications For All Students:**  All coursework expectations reduced by 1/3rd  Partial school day 8:00 am - 11:55 am  All virtual instruction (Spring 10th & Fall 11th)  In-person optional but she was unable to access (Spring 11th)  Grades based on 3rd Qtr (10th 4th Qtr only)  Make up assignments only (10th 4th Qtr only)  Ability to improve final grade 5-10 points (10th 4th Qtr only)  No classroom instruction (10th 4th Qtr only)  No mandatory attendance  Absences not affect grades  Exempted assignments not affect grades  Late work not affect grades  Zoom office hours  PowerSchool and email communications  Incompletes erased from transcript  Only final grades shown  Pass/fail grade option  Grading 85% tests, 15% work[[39]](#footnote-40)  Able to transfer to easier class  Able to retake all tests/quizzes  Given credit for incorrect answers[[40]](#footnote-41)  School counselor’s assistance interfacing Parent/Student and teachers  **Related Services:** none from school  **Parent and Family Provided Services:**  Private individual therapy  Family therapy  Psychiatric support & medication management  Collaboration among therapists and family  Daily academic/functional/emotional one-on-one support from Parent  Organizational support from Parent  Private tutoring math and English  Multiple emailed communications with teachers and counselor about coursework/tests | **Master Treatment Plan (“Plan”):**  Plan with individualized goals and objectives for academic, emotional and functional instruction based on a current Psychoeducational Evaluation and Psychiatric Evaluation with the treatment team and parents’ input  Specially designed instruction to meet Student’s academic, emotional and functional needs  Fully in-person instruction & full school day  No reduction of coursework expectations  Held accountable and expected to complete all work  One-on-one assistance  Help with catch up plans for incomplete work  SMART goals developed for every class period  Organization skills support  Skill cards  Time management skills support  Individualized and small group instruction  Small class size  4:1 student to teacher ratio  Peer mentors  Foundational instruction on math deficits  Wrap around mental health and academic services  Clinical Milieu Team  Teacher notes/graphic organizers  No transcript modifications  Dropped one class for Study Hall  Assistance with Planning  Assistance with Prioritizing  Break Down Longer Assignments  Check-in with Teacher to Follow Up on Progress  Frequent Reinforcement  Immediate Corrective Feedback  Predictable Structure  Preferential Seating  Study Skills Support  Use of an Academic Planner  Use of Clear Models  Use of Notebooks and Binders  **Related Services:**  Wrap-around mental health services  Emotional supports during day  24-hour family teachers  Collaboration with teachers & therapists  Activity for Daily Living (ADL) 2-4 times per day.  Boundaries Therapy Group 1/week.  Cultural and recreational activities 1/week.  Art Therapy 60 minutes per week.  Sexual Trauma (Speak Now) Therapy Group 1/week  Family Meeting Group 1/day  Family Therapy (Face-to-face) 1/month.  Family Therapy (Telephonic/Skype) 1/week.  Group Physical Exercise 1/day.  Group Therapy 5 times/week.  Healthy Coping Skills Group 1/week.  Individual Therapy 2/week.  Life Skill Group 1/week.  Milieu Therapy Daily  Process Group Therapy Group 1/week.  DBT Therapy Group 1/week.  Self Esteem Therapy Group 1/week Communication Skills  Motivational Interviewing  CBT Therapy  Recovery Therapy Group 1/week.  Substance Abuse Therapy Group 1/ week.  EMDR Therapy as needed times per week  CORE Parenting Course and Coaching 1/week  Vulnerability, conflict resolution, expression of feelings, and anger management therapies as needed.  **Medical:**  Psychiatric Evaluation  Psychiatrist for medication checks as needed or 1/month  **COVID Modifications:** none |

1. Student needed to go to Private Academy to receive academic and mental health support, with wraparound services due to her intertwined ADHD, anxiety, and depression not merely because of her substance abuse. T vol 4 pp 1024:15-1025:1; 1060:25-1061:5. (T of Leach). Private Academy monitored Student’s progress on her goals and outcomes through weekly meetings and an ongoing collaborative team approach assessing her “overall performance.” T vol 4 p 1059:8-22 (T of Leach). Student needed intensive medication management because of the complexity of her mental health status which could only be provided in a residential setting. T vol 2 pp 314:21-315:22, 348:20-349:16 (T of Ragsdale); T of Haga pp 27:2-28:18. Even in that placement, fine tuning her medication management[[41]](#footnote-42) proved difficult as evidenced by her seizures, a side effect of one of her medications.
2. Private Academy provided Student with special education and related services she needed including, but not limited to, supports from her peers, individual therapy, group therapy, small class sizes, support from family teachers twenty-four (24) hours a day, study hall and evening tutoring to help with her executive functioning needs related to her academics, support with prioritizing her academic work and learning how to focus on the most essential tasks to achieve her outcomes. T vol 4 pp 907:17-908:8 (T of Leach); T vol 2 pp 316:7-317:8; 323:13-325:16. (T of Ragsdale explaining Student worked on executive functioning skills throughout the day at Private Academy); T of Haga p 27:3-21 (explaining Student needed a higher level of care to work on her functioning); Stip. Ex. 234 (Private Academy Master Treatment plan). These supports were necessary for Student to make educational progress. T vol 4 p 908:14 (T of Leach).
3. Prior to enrolling at Wilderness Program, Student had “some semblance of academic compassion[, s]he had mental health providers. But the disjointedness of supports were not meeting [Student]’s needs.” Thus, “it was primarily falling on the shoulders of her mother” to try and support her. T vol 4 p 896:19-25 (T of Leach).
4. Student required the mental health, behavioral, and academic supports her mother was trying to provide with Dr. Tinney, Ms. Unwin, and academic tutors to be “integrated with professionals guiding the implementation of her services,” which was possible at Wilderness Program and Private Academy. T vol 4 p 897:1-3 (T of Leach regarding Wilderness Program).
5. When Student arrived at Wilderness Program, Dr. Robbins developed a Master Treatment plan for her based on her perceived needs at the time. As Dr. Robbins continued to work with Student, she realized many of the original goals were not attainable for Student as “her level of functioning emotionally and socially was more severe than I originally thought when she initially came to Wilderness Program.” T of Robbins pp 108:9-109:10. Student “was completely lost within her own mind, she couldn’t engage with others, she couldn’t engage with therapists, she couldn’t engage with academics.” T vol 4 p 903:18-21 (T of Leach). Student struggled with completing academic assignments as “her swirling thoughts would become overwhelming for her, and it made it difficult for her to complete academic assignments.” T of Robbins p 112:1-15.
6. Respondent never evaluated Student or provided Student with any psychological services; however, the two (2) clinical psychologists that did both recommended a residential placement after Wilderness Program. Depo Ex. 157, p 195-196; Stip. Ex. 181 p 425. Dr. Robbins explained, “[r]eturning to her home environment, even with intensive outpatient therapy or school accommodations, would most certainly result in significant regression and a return to her previous level of functioning.” T of Robbins; Dep Ex. 157 pp 195-196. Student needed “a lot of wrap-around care,” because “her emotional and academic or ADHD difficulties would be addressed not only in the school environment but . . . throughout her day that’s not part of school.” Student needed a therapeutic placement that would provide these “very comprehensive, wrap-around services,” where the teachers and therapists know each other and talk, and it is “collaborative.” T vol 1 pp 95:18-96:7 (T of Collett); Stip. Ex. 181 pp 425-26.
7. Although Dr. Collett’s recommendations may have been able to be implemented in a non-residential school with “[e]xecutive functioning coaches, onsite counselors”; however, Dr. Collett did not believe that would be appropriate to meet Student’s needs. T vol 1 pp 130:21-23; 138:4-8 (T of Collett). However, whether the recommendations could or could not have been implemented in the WCPSS is irrelevant, as Respondent failed to present any evidence that it could provide such supports nor that it offered such supports to Student.
8. Student needed residential treatment as lower levels of care were not working for her, and her mental health and functioning continued to worsen while only receiving the lower levels of care. T of Haga p 27:2-14. Student needed to receive a greater level of structure, to be removed from her environment, to handle her passive suicidal ideation, to access more therapeutic support services, and to eliminate access to substances. T of Haga pp 27:15-28:18.
9. Petitioners incurred reimbursable expenses for Student’s attendance at Private Academy. *See e.g.* Stip. Exs. 284-286; Pet’s Exs. 1-2. Parent paid for Student to attend Private Academy and for her psychiatric care and therapy that she received. T vol 2 pp 498:6; 499:3, 17, 24 (T of Parent); Pet Exs. 1, 2; Stip. Exs. 284-86. Petitioners also incurred reimbursable travel expenses for the time Student was at both Wilderness Program and Private Academy. T vol 2 p 500:15-16 (T of Parent); Pet Ex. 17.
10. Private Academy prepared Student for independent living and further education by holding her accountable for everything she did. They provided the professional support that she needed and equipped her to learn to take care of her own needs, be responsible for her interactions, and “learn[] how to be internally motivated to get her work done without seeking external ways to escape from it” T vol 4 pp 911:14-912:5 (T of Leach). The Undersigned finds Private Academy was an appropriate placement for Student and provided her the specially designed instruction and related services she needed to make academic, functional, and behavioral progress.

**Reimbursement Amounts**

***Private Tutoring in Math, APUSH, and AP English***

1. Parent paid for private tutoring during the 2019-2020 and 2020-2021 school years. Excluding the tutoring amount paid for the 2019-2020 school year, the reimbursement amounts for the 2020-2021 tutoring is $422.10 paid for APUSH/AP English tutoring and $225.00 for math tutoring. Pet. Ex. 19 pp 190-103; T vol 2 p 279:6-11; Pet. Ex. 20 pp 200, 202. Invoices without complete dates or which did not specify the tutoring recipient were excluded from the tutoring reimbursement calculation. The total tutoring reimbursement amount for the 2020-2021 school year is $647.10.

***Private Therapies***

1. There was no evidence of costs introduced by Petitioners during the 2019-2020 or 2020-2021 school years for the related services of Student’s counseling, family counseling and training, psychological services, medical diagnostic service, or other supportive services.

***Independent Psychoeducational Evaluation Conducted by Dr. Collett***

1. Parent paid $5,600.00 for the private evaluation by Dr. Collett. Pet. Ex. 15; T vol 2 p 464:14-21. This was the only evaluation conducted during the relevant time period and was instrumental in confirming Student’s academic and functional needs during the 2020-2021 school year as well as the need and appropriateness of her private school placements. WCPSS admittedly did not conduct any eligibility evaluations before or after the October 2020 Section 504 meeting.
2. Although the invoice does not bear the name of Dr. Tess Collett, Dr. Collett explained the ClearView process for payment of psychological evaluations. T vol 1 pp 42:25-43:5 (T of Collett). Dr. Collett conducted the evaluation, T vol 1 p 41:14- 16, and Parent paid the invoice, T vol 3 p 575:10-13; T vol 2 p 464:13-21 (T of Parent). Furthermore, Respondent did not object to the admissibility of the invoice at hearing or otherwise challenge the authenticity and relevance of the document during cross examination of either Parent or Dr. Collett.
3. Parent properly authenticated the document during her testimony.[[42]](#footnote-43) When specifically asked by the Tribunal if Respondent had any objection to its admission, Respondent’s counsel stated, “I don’t think so, Your Honor,” so Petitioners’ Exhibit 15 (the invoice) was considered received without objection. T vol 2 pp 464:22-465:1
4. Respondent has not contested the “criteria” of the evaluation or the credentials of Dr. Collett. None of Respondent’s witnesses, including its expert witness, challenged the testing results or contents of Dr. Collett’s evaluation except for her recommendations. Even then, Ms. Gamm primarily looked at the list of eleven (11) recommendations she called “accommodations” (Stip. Ex. 181 p 428) but otherwise during her testimony did not opine about anything else in Dr. Collett’s report. *See* T vol 8 pp 2051:15-2055:16.
5. After receipt of the numerous referrals and parent requests, Respondent should have evaluated Student to determine special education eligibility instead of relying on the outdated 2012 Psychoeducational Evaluation, also a private evaluation provided by Student’s parents. Since Respondent failed in its duty to evaluate Student, did not challenge the criteria used in conducting the report or the credentials of Dr. Collett, and did not prove that the cost of the report was unreasonable, the Undersigned finds Petitioners are entitled to reimbursement for the entire cost of Dr. Collett’s private evaluation in the amount of $5,600.00.

***Educational Consultant Fee***

1. Parent paid $4,500.00 for Dr. Milton Little’s educational consultant fees. T vol 2, 472:2-3. While his services were valuable for locating private schools for Student, these consultation fees are not reimbursable as they are not an educational or related service in the IDEA.

**Reimbursement Amounts for Therapeutic Wilderness Program**

***Tuition Reimbursement***

1. Petitioners seek reimbursement of $57,440.00 for the costs of Wilderness Program, $66.79 for a backpack, and $380.00 for a physical exam, a total amount of $57,886.79. Pet. Ex. 11 pp 1, 2, 3, & 4; Stip. Ex. 228 pp 1-2.
2. Petitioners paid some of those costs with funds from Student’s 529 Plan, which was intended for college and had been saved “her whole life.” T vol 2 pp 443:12-20; 463:10-18 (T of Parent); Stip. Ex. 228 pp 606-07; Pet. Ex. 11. Petitioners could only use a portion of Student’s 529 college saving plan to pay for Wilderness Program or for Private Academy, as they were limited to “10,000 dollars a calendar year before college.” T vol 5 pp 1259:24-1260:5 (T of Parent); Resp’t Ex. 256 p 874. Parent paid the remainder of the costs associated with Student’s placement at Wilderness Program. (T vol 2, 13-436:19-437:2, 443:9-17, 463:8-12).
3. Wilderness Program’s daily rate for placement was $615.00 and the total tuition excluding enrollment fees was $44,280.00.[[43]](#footnote-44) T vol 2 pp 463:8-464:2. The one-time enrollment fee was $3,700.00. Of the tuition total $9,460.00 was for psychotherapy sessions. Stip. Ex. 228 p 606-607 ($4,730.00 for individual psychotherapy and $4,730.00 for group psychotherapy). The cost of the physical exam was $380.00, and the backpack was $66.79; these expenses have been deducted for the total amount as they are not reimbursable as educational expenses.
4. Therefore, if Petitioners had received a favorable decision, the total reimbursement amount would be $57,440.00. Student would be entitled to $10,000.00 to replenish her college fund and Parent’s reimbursement portion would be $47,440.00. Pet. Ex. 11 pp 75-78.

***Transportation Expenses***

1. Petitioners incurred $4,126.18 in travel expenses related to Student’s placement at Wilderness Program. This amount includes Student and both her parents’ flights to and from Utah to drop her off in June 2021. Pet. Ex. 17 pp 86-101. Receipts were admitted into evidence for transportation and hotel costs. Pet. Ex. 17;T vol 2 p 500:9-21. Inclusion of the June 2019 rental car expenses of $410.94 appears to be a mistake and this amount was deducted. *See Id.*, p 96. Therefore, the total reimbursable travel expenses would have been $3,715.24. Petitioners did not prevail on this issue; therefore, no reimbursement for related transportation expenses are awarded.

**Reimbursement Amounts for Private Academy**

1. Petitioners are seeking reimbursement for Private Academy in the amount of $131,685.00. Parent paid the costs associated with Student’s placement at Private Academy. T vol 2 pp 471:15-472:3, 498:11-499:17. There is no evidence that Student paid any of the costs associated with Student’s placement at Private Academy. The breakdown of the tuition charge for Private Academy is as follows: 53% for therapy and milieu oversight, 33% for academics, and 14% for room and board. Stip. Ex. 283.

***Tuition and Related Services***

1. The total reimbursable charges are $127,020.00**[[44]](#footnote-45)** of components of which are: $124,395.00 (tuition); $2,000.00 (enrollment fee); and $625.00 initial psychiatric evaluation. Non-reimbursable expenses are: $1,412.50 in psychiatric visits/calls and $540.00 in-personal expenses. Stip. Ex. 284 pp 1-11. Petitioners are entitled to reimbursement of all counseling and therapies integrated in the Eva Carlton program.
2. The medical costs included an initial psychiatric evaluation by Dr. Simon on Student’s admission to Private Academy on September 3, 3021, ten psychiatric phone calls/visits, and monthly medication checks from October 8, 2021 through May 6, 2022 in the amount of $2,162.50. Stip. Ex. 284 pp1523-15227; Pet. Ex. 2 pp 12, 19, 25, 31, & 38. The costs of the initial psychiatric evaluation of $625.00is reimbursable; the costs for psychiatric services in the amount of $1,412.50 awarded are for medical services and are not reimbursable.
3. Tuition reimbursable amounts for Private Academy is $127,020.00.

***Transportation Expenses for Private Academy***

1. Petitioners sought transportation expenses to/from Private Academy. Pet. Ex. 17. There are some discrepancies in this document which is not reconciled in the record. The July 2021 flights appear on two pages, though they seem to be the same flight, and the Tribunal will not consider that flight. *See* Pet. Ex. 17 p 99. Likewise, the October 2021 flights for Father appear to be in duplicate. *See* Pet. Ex. 17 pp 125–28. Flights for unknown dates or for unknown travelers (Pet. Ex. 17 pp 94, 112–15), and hotels for unknown locations (Pet. Ex. 17 p 129), will not be considered as competent evidence, as no testimony was elicited as to the date or passenger of these flights or the location of this hotel. Inclusion of the June 2019 rental car expenses of $410.94 appears to be a mistake and this amount was deducted. *See* Pet. Ex. 17 p 96.
2. Student’s transportation expenses to attend Private Academy at the beginning and end of 2021-2022 school along with any holidays are reimbursable. Parents’ transportation expenses for taking Student to/from Private Academy are also reimbursable.
3. Petitioners have provided no reimbursement rate for miles used to purchase airfare for Parent’s flight on October 10/11, 2021 (Pet. Ex. 17 p 114) and Student’s flight on June 16, 2022 (Pet. Ex. 17 p p178-84); therefore, only the taxes will be reimbursed for those flights. Reimbursable travel expenses are: $1,007.43 for rental car expenses,[[45]](#footnote-46) $1,292.55 for hotels,[[46]](#footnote-47) and $4,088.40 for airfare[[47]](#footnote-48) for a total of $6,388.38 in transportation related expenses.

**Compensatory Education**

1. When Student prepared to transition from Private Academy, her treatment team recommended she enter a transitional young adult program to continue receiving supportive services and a middle level of structure. T of Haga p 55:6-21. Student and her parents instead decided Student would come home and their family would attempt to provide the structure she needed, while she engaged in outpatient therapy. T of Student pp 83:11-84:9 (explaining she came home with a plan so she could be with her parents).
2. Petitioners only witness that discussed compensatory education was their expert. Dr. Leach who opined Student continued to need supportive services for executive functioning, academic tutoring, and therapeutic supports to generalize the skills she gained at Private Academy. T vol 4 pp 915:6-17; 1031:2-9 (T of Leach). According to Dr. Leach, these services could be provided by a professional like a “life coach” who could “help her organize herself, to prioritize, to develop and maintain a consistent schedule, to maintain her healthy lifestyle of eating healthy and exercise . . . to help her generalize the things that she’s learned from Private Academy.” T vol 4 p 915:6-17 (T of Leach). While Dr. Leach opined Student needed compensatory education, she failed to elaborate on the duration and delivery of such services.

**Standing**

***Student’s Ability to Provide Informed Consent***

1. The evidence in the record documents that Student was struggling with severe depression, unable to function independently, and not making appropriate decisions related to her education while she was enrolled at the High School. *See e.g.*  T of Student pp 88:24-89:2 (Student explaining she and her mom “were emailing teachers constantly”); 90:2-9 (Student explaining she and her “mom had to fend for [them]selves”); T vol 4, pp 1051:15-1056:16 (T of Leach explaining various documents she reviewed in developing her opinion Student was struggling the entire 2020-2021 school year).
2. This continued while Student was at Wilderness Program; she was placed on a heightened level of supervision after she attempted to eat berries she thought were poisonous. T vol 2 p 451:22-452:1 (T of Parent). Student explained she was worried about going home after Wilderness Program because she was “so stuck in her head,” which was “really scary. [She] couldn’t describe it to anyone, and [she] felt really alone.” T of Student p 24:9-12.
3. Even after she arrived at Private Academy , it was very difficult for Student to focus and her depressive state “just kept getting worse”. T of Student p 25:17-21. Student explained she “was worried—because [she] was so depressed . . . it was hard for [her] to like talk to people, yeah, just like talk at all.” T of Student p 26:1-3.
4. Student was placed on suicide watch, which Private Academy refers to as “arm’s length supervision,” on September 1, 2021. Stip. Ex. 239 p 858. Student had to drop a class when she started at Private Academy because she “was really depressed when [she] got there,” T of Student p 30:3-5. Her therapy “focused on getting [her] out of [her] depressive state and keeping [her] alive,” T of Student p 38:11-13. Only after “a month or two” was Student able to start working on other areas of therapy “once [she] was stable.” T of Student p 42:9-17.
5. Student had her first seizure on September 13, 2021, for which she was taken to the hospital. Stip. Ex. 239 pp 000856-863. She had another seizure on September 14, 2021, that rendered her “unresponsive,” and Private Academy staff called 911. Stip. Ex. 239, pp 000864-865. Student had a third seizure on September 25, 2021 and was “foaming and bleeding at the mouth from biting herself,” which resulted in paramedics being called. Stip. Ex. 239 pp 000867-871. Because of the seizures, “[Student] was terrified.” Stip. Ex. 328 p 001978.
6. Since this was an emergency situation, Parent flew out to Utah to take her to the doctors and learn more about what was going on and causing the seizures. *Id*. While talking with the doctors, Student and Parent “realized that Student would be turning eighteen soon and would need to sign documents so her parent could take care of things and keep talking to doctors.” *Id.* Both parents flew out on Student’s first parent weekend right before her birthday with documents so Student could “give them rights to handle everything for [her].” *Id*. pp 001978-001979. “The seizures were scary, and [Student] wanted to make sure [her] parents could handle everything for [her.]” *Id.* p 001979.
7. Because of her seizures and mental status, on October 24, 2021, Student signed a General Power of Attorney (“POA”) and a Health Care Power of Attorney giving both her parents as co-agents “the power to do and perform in a fiduciary capacity” what they “may deem advisable and anything of any character which I might to or perform for myself if personally present and acting, including, but not limited to, the specific powers set forth” in the Power of Attorney. Stip. Ex. 327 p 1971; T vol 5 pp 1188:6-1189:20, 1192:17-21, 1193:3-11; Resp’t Ex. 341; Stip. 6. When Student signed the October 24, 2021 documents, she was minor. She did not turn eighteen until XXXXX XX, 2021 [several days later].
8. Parent and Father flew to Utah only to personally witness her signing the documents on October 24, 2021; it was not an official parent visit. T vol 5 p 1189:21-24. That day, two people from Private Academy also witnessed Student sign both the POA and the Health Care Power of Attorney. Stip. Ex. 328 p 001979. Respondent challenged the validity of the POA because of Student’s minor status and due to the notarization. Father brought the documents back to North Carolina for them to be notarized. A North Carolina notary public notarized both documents on October 25, 2021 but did not witness Student’s signing the documents. T vol 5 pp 1189:25-1192:3.
9. The day after Student signed the POA, she had another seizure. Stip. Ex. 239 p 874-75. Student had yet another seizure on October 26, 2021, and dislocated her shoulder requiring medical treatment. Stip. Ex. 239 pp 000872-873.
10. According to Respondent, “the Private Academy records show that Student was of sound mind and cooperative in the program at Private Academy because during this time she was fully engaged in [her] treatment” and in support Respondent cites three art, group, family therapy notes and a comment from Therapist Haga that Student was “more present and engaged in school [and] . . . more animated and showing her personality more at the time she signed the general power of attorney.” *See* Resp’t Pro. Fin Dec. p 89, ¶ 479 (also citing T of Haga p 138[[48]](#footnote-49) [sic]:17-137:7; Haga Dep. Ex. 148).
11. At that time, Student had not left Private Academy since her enrollment in August 2021 and was not therapeutically ready for a formal “family visit” home. Because of her mental health status, Student required supervision at all times while she was in Private Academy and during the November, December, and February family home visits. *See* Stip. Ex. 255. Student’s visitations and ability to leave the Private Academy facility required the authorization of her treatment team and were highly regulated. T of Haga pp 133:22-134:13. Her parents visited her in Utah for Thanksgiving, November 19-21, 2021. Stip. Ex. 255 p 001016. Her first home visit was December 22-26, 2021. Stip. Ex. 318 p 001979.
12. During her December and February home visits, Student had to be supervised at all times by her parents; she had no phone or internet access, no friend access, and was required to continue working on therapy goals. Stip. Ex. 255 pp 001016-001037. Not until April 18, 2022 was Student allowed freedom to go where she wanted without direct parental supervision and, even then, she was required to notify her parents of her whereabouts at all times. Stip. Ex. 255 p 001041.
13. In January 2022, Student signed a written affidavit attesting to her desire to give her parents the authority to act on her behalf as of October 24, 2021, and that she would have signed a POA again in November or December had she “known there was a problem with the way the documents were signed.” Stip. Ex. 328, ¶¶ 8-11, 13 pp 001978-1979.
14. On February 7, 2022, she signed an Affidavit of Educational Designation giving her parents all rights to act on her behalf educationally without her participation and reaffirmed her October 24, 2021 designation of them as her co-agents. Stip. Ex. 260.

***Handbook* Contained No Notice About the Transfer of Parental Rights**

1. According to Respondent, Petitioners had been provided notice of the transfer of rights provision as they had received the Procedural Safeguards notice from SpEd Teacher in 2018.” Resp’t Pro. Fin. Dec. p 102, ¶ 484 (citing *See* T vol 7 p 1838:12-14; Stip. Ex. 198).
2. While Parent was given a copy of the *Handbook*, there is no evidence that prior to the filing of the Original Petition that Student ever received a copy of the *Handbook*.
3. The 2018 *Handbook* did not contain any notice about the transfer of parental rights. *See* Off. Not. Ex. A.

**CONCLUSIONS OF LAW**

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

**General Legal Framework**

1. This Final Decision incorporates and reaffirms the conclusions of law contained in previous Orders entered in this litigation.
2. To the extent that the foregoing Conclusions of Law contain Findings of Fact or that the Findings of Fact are Conclusions of Law, 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).
3. The Office of Administrative Hearings has jurisdiction over claims relating to the identification, evaluation, educational placement, and provision of a free appropriate public education (“FAPE”). Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Improvement Act (“IDEA”), 20 U.S.C. §§ 1400 *et seq*. and implementing regulations, 34 C.F.R. Part 300 control the issues to be reviewed. Stip. 2.

***Parties***

1. Petitioner Student, as an adult student with a disability, is entitled to all the procedural and substantive rights required by the IDEA. Student resides in Wake County and is entitled to a free and appropriate public education from Wake County Board of Education.
2. Petitioner Parent, the mother of an adult student with a disability, has independent, enforceable rights, which are not limited to certain procedural and reimbursement-related matters as in this case, but also these rights encompass the entitlement to a free and appropriate public education for her daughter and that is “free” of any cost to Parent (Student and Parent collectively “Petitioners”)
3. Respondent, Wake County Board of Education (“WCPSS” or “Respondent”), is a local educational agency (“LEA”), also known as a “public agency,” receiving monies pursuant to the IDEA and is the LEA responsible for providing educational services students residing in Wake County, North Carolina. 20 U.S.C. § 1401(19), Stip. 4. 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*.
4. This Tribunal has personal jurisdiction over Petitioners and Respondent. Stip. 1. They were correctly designated and received proper notice of the hearing. Venue in Wake County, North Carolina was proper.
5. The Individuals with Disabilities Education Improvement Act (“IDEA”) is the federal statute governing the education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Part 300. Stip. 3. The controlling North Carolina law for students with disabilities is N.C. Gen. Stat. § 115C, Article 9. Stip. 5.
6. Unlike many states, North Carolina has few special education regulations.[[49]](#footnote-50) The Department of Public Instruction, Exceptional Children’s Division of the North Carolina State Board of Education (“NCDPI”) has written *Policies Governing Services for Children with Disabilities* (“*Policy Manual*”). *See* Off. Not. Ex. B (March 2018 ver.; Off. Not. Ex. C (2020 Special Learning Disabilities addendum). The policies contained in the *Policy Manual* are nonbinding interpretive statements that merely explain the IDEA and State law provisions. N.C. Gen. Stat. § 150B-2(7a). These policies are not enforceable rules or regulations because they have not been promulgated as rules through the proper rulemaking authority as required. *North Carolina State Bd. of Educ. v. State of North Carolina and the North Carolina Rules Review Commission [of OAH]*, 371 N.C. 149, 163 (2018) (requiring the State Board of Education “to submit its proposed rules to the Commission for review”); 16 NCAC 06K .0102 (documenting the absence of any approved rules governing “Due Process for Exceptional Children Students”); *see also* the North Carolina Administrative Procedure Act, N.C. Gen. Stat. §§ 150B-2(8a); 150B-21.1 through 21.28. Since the North Carolina special education law was enacted, the State Board has been required to adopt rules that ensure the requirements of the IDEA and Article 9 are met. *See* N.C. Gen. Stat. § 115C-107.2(a). These administrative rules are required to provide procedural safeguards for children with disabilities and their parents. N.C. Gen. Stat. § 115C-107.2(b)(8). The State Board has not intentionally neglected it statutory duties but interpreted its rule making requirements differently. Since then, the State Board has been involved in the tedious process of promulgating rules through the North Carolina Rules Review Commission of OAH. Although anticipated soon, as yet none relevant to this case have been approved.
7. North Carolina 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. WCPSS, as a local educational agency, is also “eligible for assistance” if it has in effect policies and procedures that are consistent with those of the State Board. 20 U.S.C. § 1413(a)(a).

***Burden of Proof***

1. Petitioners, being the complaining party, have the burden of proof to show by a preponderance of evidence that Respondent did not provide Student with a free appropriate public education. *See Schaffer ex rel. Schaffer v. Weast,* 546 U.S. 49, 62 (2005); N.C. Gen. Stat. § 150B-34(a). Petitioners further have the burden to prove the appropriateness of the unilateral parental placements at Wilderness Program and Private Academy. Finally, if tuition reimbursement is awarded, Petitioners have the burden of proof in showing that the award should not be reduced or denied, as well as their entitlement to any other remedy.
2. In its Proposed Final Decision, Respondent asserted that the Petitioners were shifting their burden of proof to them. This Tribunal is well aware that Petitioners bear the burden of proof on the FAPE issues. Once Petitioners have met their burden by a preponderance of the evidence, the burden does not shift to Respondent. Instead, Respondent must provide “cogent and rationale explanations” to the Tribunal for its decisions. *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 404 (2017). If Respondent’s explanations are merely “speculation and conjecture” then they are not “cogent and rationale.”

## *Professional Judgment and Due Regard to Educators*

1. “The IDEA rightly ‘recogni[zes] that federal courts cannot run local schools.’” *T.B., Jr. by & through T.B., Sr. v. Prince George’s Cnty. Bd. of Educ.*, 897 F.3d 566, 572 (4th Cir. 2018) (quoting *Hartmann v. Loudoun Cnty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997)). As such, the IDEA “requires great deference to the views of the school system rather than those of even the most well-meaning parents.” *A.B. ex rel. D.B. v. Lawson,* 354 F.3d 315, 328 (4th Cir. 2004); *see also Barnett by Barnett v. Fairfax Cnty. Sch. Bd.*, 927 F.2d 146, 152 (4th Cir. 1991) (“Congress chose to leave the section of educational policy and methods where they traditionally have resided—with state and local school officials.”).
2. In North Carolina administrative contested cases, “due regard must be 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. Gen. Stat. §150B-34(a)[[50]](#footnote-51); *T.B., Jr.*, 897 F.3d at 572 (“ALJs within state and local educational agencies are themselves expected to give appropriate deference to the decisions of professional educators.” (cleaned up)); *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.,* 303 F.3d 523, 532 (4th Cir. 2002) (“We have always been, and we should continue to be, reluctant to second-guess professional educators . . . .”) (internal quotations omitted); *Hartmann,* 118 F.3d at 1001 (“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.”); *Clay T. v. Walton Cnty. Sch. Dist.*, 952 F. Supp. 817, 823 (M.D. Ga. 1997); *see also d. of Educ. of Hendrick Hudson Central Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 189-90 (1982) (stating that “courts must be careful to avoid imposing their view of preferable educational methods upon the States”). “The IDEA thus serves to set standards for the education of children with disabilities without displacing the traditional notion that primary responsibility for education belongs to state and local school boards, educators, parents, and students themselves.” *T.B., Jr.*, 897 F.3d at 572.
3. When disagreements arise between parents and schools over the provision of FAPE, courts give educators “deference . . . based on the application of expertise and the exercise of judgment by school authorities.” *Endrew F.* 580 U.S. at 404. “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.” *Id.* 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. When a school district fails to offer “cogent and responsive explanation” it is not entitled to deference.
4. WCPSS’s teachers had no specialized knowledge about their child find obligations and IDEA eligibility, so they are not entitled to any deference. Moreover, Counselor, who should have had specialized knowledge about the IDEA referral process, failed to demonstrate that he properly understood the process; therefore, he too was not entitled to deference.

## *IDEA and the COVID-19 Pandemic*

1. The IDEA and its implementing regulations have remained in full effect during the COVID-19 pandemic. *See, e.g., Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary, and Secondary Schools While Serving Children with Disabilities,* 76 IDELR 104 at 2 (OSEP/OCR March 21, 2020). “School districts must provide a free and appropriate public education (FAPE) consistent with the need to protect the health and safety of students with disabilities and those individuals providing education, specialized instruction, and related services to these students.”. *Id.*  In fact, the federal government has emphasized, “the IDEA includes no exceptions to implementation for physical school closures caused by pandemics or governmental directives to close schools. [School districts] remain[] responsible under the IDEA for materially implementing IEP’s despite the school closure, even if by alternate methods of delivery”. *Id.* at 3. When a school district provides “educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE.” *Id.*
2. After the third quarter of the 2019-2020 school year, classroom instruction essentially stopped for all students at the High School. Students were allowed to complete unfinished work for potential grade improvement, but otherwise, the fourth quarter and final grades were based on coursework completed through the third quarter. Even though an IEP had not been developed by that time, Student had equal access to the same educational opportunities afforded the general student population during the remainder of the 2019-2020 school year after the COVID-19 closure. That did not, however, relieve WCPSS from timely completion of the eligibility process and the development of an IEP before the forthcoming 2020-2021 school year, the provision of FAPE to Student during virtual instruction in the 2020-2021 school year or thereafter.
3. This case presents a host of claims and issues concerning the education of Petitioner Student, who was an adult when the contested case was filed. At the core of the case are claims arising under the Individuals with Disabilities Education Improvement Act (“IDEA”), 20 U.S.C. §§ 1400 *et seq.,* based on her education in high school. However, a litany of other issues has been raised. Those issues that have become the subject of several motions and numerous briefs but as those issues are jurisdictional and affirmative defenses, they must be addressed first.
4. **Issues Concerning “Jurisdictional and Affirmative Defenses”**
5. **Whether this Tribunal has subject matter jurisdiction over this contested case?**
6. The first issue which must be resolved is whetherthis Tribunal has subject matter jurisdiction over this contested case. Without subject matter jurisdiction none of the other issues can be adjudicated. For multiple reasons, Respondent argues that this Tribunal lacks subject matter jurisdiction over the entirety of this case. Petitioners not surprisingly disagree.
7. “Subject matter jurisdiction . . . is ‘the power to pass on the merits of [a] case.’” *Matter of A.P*., 371 N.C. 14, 17, 812 S.E.2d 840, 842 (2018) (quoting *Boyles v. Boyles*, 308 N.C. 488, 491, 302 S.E.2d 790, 793 (1983)); *see also* 6A Strong’s North Carolina Index 4th: Courts § 8, at 423-27 (2013) (discussing subject matter jurisdiction generally). “The jurisdiction of a court over the subject matter of an action depends upon the authority granted to it by the Constitution and laws of the sovereignty and is fundamental.” *Henderson Cnty. v. Smyth*, 216 N.C. 421, 421, 5 S.E.2d 136, 138 (1939); *Hamer v. Neighborhood Hous.* *Servs. of* Chicago, 138 S. Ct. 13, 17 [(2017)](https://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2043126911&pubNum=0000708&originatingDoc=I722215e074c111edaa59be7e152cdbdf&refType=RP&fi=co_pp_sp_708_17&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)&co_pp_sp_708_17%20) (a “jurisdictional defect is not subject to waiver or forfeiture and may be raised at any time in the court of first instance and on direct appeal.”).
8. By statute, North Carolina confers jurisdiction of IDEA due process hearings to the Office of Administrative Hearings (“OAH”). N.C. Gen. Stat. §§ 115C-109.6(a); 150B-22.1(a). OAH is the only judicial or quasi-judicial body with jurisdiction to hear properly pled IDEA claims. *Id.; see also* Stip. 2. Disagreements between the parent and a public agency regarding the availability of a program appropriate for the child and the question of financial reimbursement, are subject to the due process procedures in 34 C.F.R. §§ 300.504 through 300.520. 34 C.F.R. § 300.148(b).
9. An administrative law judge or court may order reimbursement to parents for private school placement. 20 U.S.C. § 1412(a)(10)(C). Reimbursement to parents of a child with a disability for education of the child parentally enrolled in private schools without consent of or referred by a public agency is dependent on a finding that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment. 20 U.S.C. § 1412(a)(10)(C)(ii).
10. By electing to receive federal monies per the IDEA, WCPSS acknowledges that it is subject to all the provisions of 20 U.S.C. § 1400, *et seq*., including Section 1412(a)(10)(C), which allows reimbursement for the unilateral parental placement of a child with a disability in a private school. Stips. 4 & 7.
11. WCPSSs could have avoided liability for all or some of the private school costs of this case. Prior to her private school enrollment, WCPSS should have found Student eligible as a child with a disability and timely developed an appropriate IEP to address her functional deficits. 20 U.S.C. § 1412(a)(10)(C)(i). After receipt of Father’s notice of private school placement, before Student was enrolled in Private Academy, WCPSS could have convened an eligibility meeting and developed an appropriate IEP for Student. Despite the many opportunities, WCPSS never conducted an eligibility meeting or developed an appropriate IEP for Student However, IDEA does place limitations on the costs of private school reimbursement on equitable grounds in certain situations. 20 U.S.C. § 1412(a)(10)(C)(iii).
    * 1. **Whether Parent has standing as a Petitioner?**
12. Respondent asserts that this Tribunal lacks subject matter jurisdiction because Parent does not have standing as a Petitioner. Parent filed the Original Petition but Student was an adult student at the time. Although Respondent disputes some of the reimbursement amounts, Respondent does not dispute that Parent paid all (but $10,000.00 paid from Student’s college saving plan) of the costs of the private school placements and other related expenses.
13. “If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.” *Woodring v. Swieter*, 180 N.C. App. 362, 366, 637 S.E.2d 269, 274 (2006). “Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter. . . . Standing is a necessary prerequisite to a court’s exercise of subject matter jurisdiction.” *Street v. Smart Corporation*, 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003).
14. Respondent claims that Parent lacks standing on several grounds: the defective Power of Attorney, the transfer of parental rights provision, and no separate parent’s right to tuition reimbursement.

***Power of Attorney Notarization***

1. First, WCPSS asserts that the October 24, 2021 Power of Attorney (“POA”), in which Student granted her parents power to act on her behalf, was invalid because it was not properly notarized.[[51]](#footnote-52) Although the notary notarized Student’s signature without witnessing Student sign the document, the notary did not have to witness Student’s signature. Instead, the notary could have certified Student’s signature based on a verification from a subscribing witness who did personally observe her sign the document. N.C. Gen. Stat. § 10B-3(28). Although Father did see Student sign the POA, he could not verify her signature because he was a beneficiary of the transaction. But, either one of the Private Academy staff who witnessed Student sign both the POA and Health Care Power of Attorney could have verified Student’s signature on the POA; thereby, curing this defect. Stip. Ex. 328 p 001979, ¶ 9. Despite this notarization snafu, it is undisputed that Student’s intent was to designate her parents as her educational representatives.

***Transfer of Parental Rights Provision***

1. Next, Respondent asserts that Parent has no standing to bring any claims, hers or Student’s, because all of Parent’s rights were transferred to Student upon her eighteenth birthday. 20 U.S.C. § 1415(m).  **The “transfer of parental rights” at age of majority provision, in relevant part, states:**

A State that receives amounts from a grant under this subchapter *may* provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law).

20 U.S.C. § 1415 (m)(1) (emphasis added).

1. Like most states[[52]](#footnote-53), North Carolina has adopted a transfer of parent rights provision which provides “when a child with a disability reaches the age of 18, notices required under the IDEA must be provided to both the child and the child’s parent but before all parent rights transfer, and that the LEA must notify both the child and the parents of the transfer of these rights. N.C. Gen. Stat. § 115C-109.2(a).

***Notice of Transfer of Parent Rights***

1. According to Respondent, “[i]n North Carolina, only parents of ***minor*** children have enforceable rights under the IDEA. ‘When a child with a disability reaches the age of 18 . . . [a]ll . . . rights accorded to parents under Part B of the IDEA transfer to the child.’” Resp’t Pro Fin. Dec. p. 108, ¶ 9 (citing NC 1504‑1.21(a)(1)(ii)[[53]](#footnote-54)) (emphasis in original). Without citing legal authority, Respondent also states that: “[t]his occurs automatically with or without notice.” *Id.*
2. Before and when a child with a disability turns 18 in North Carolina, the LEA is *automatically* *required* to provide the student and the parents with notice of the transfer of rights and any other notices required by Section 1415 of the IDEA. 20 U.S.C. § 1415(m)(1)(A&C); N.C. Gen. Stat. § 115C-109.2(a)(3). The IDEA does not require the transfer of parent rights but if a state does, before the rights transfer, the LEA must provide to both the student and the parents a copy of the Procedural Safeguards which notifies the student and the parents about the transfer of rights. 20 U.S.C. § 1415(m)(1)(A-C). State law also requires that the student and parents be notified about the transfer of parent rights provision. N.C. Gen. Stat. § 115C-109.2(a)(1-3).
3. There is no evidence in the record that Respondent ever provided Student or Parent notification of the transfer of parental rights. Prior to the filing of the Original Petition, a copy of the *Handbook of Parents’ Rights* had never been given to Student The copy given to Parent at the 2018 IEP eligibility meeting did not contain any notification about or even reference to the transfer of parental rights. *See* Off. Not. Ex. A (July 2016 ver.). The Prior Written Notice given to Parent at the 2018 eligibility meeting also did not contain any notification about the transfer of parent rights. Whether the version of the *Handbook* given to Petitioners’ counsel after the filing of the contested case contained notification of the transfer of parent rights is unknown. What is known is that once Respondent raised the issue of Parent’s standing, Petitioners took immediate action to correct the caption and amended the petition. Petitioners will not be penalized for Respondent’s dereliction of its notice obligations which were designed to safeguard Petitioners’ rights.

***“Special Rule” For Competent Adult Students Unable To Give Informed Consent***

1. Parent can act as Student’s educational representative on an alternative basis. The IDEA has a “Special Rule” for adult students who have not otherwise been deemed incompetent which states:

If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this subchapter.

20 U.S.C. § 1415 (m)(2).

1. North Carolina has also adopted a similar “Special Rule” requiring the State Board to establish procedures for appointing the parent of the child. N.C. Gen. Stat. § 115C-109.2(b). The North Carolina State Board has not, however, adopted rules for such an appointment. Under the North Carolina Administrative Procedure Act (“APA”), any policies or procedures which directly or substantially affect the procedural or substantive rights of persons, like Parent and Student, who are not employed by the State Board or LEAs must be formally promulgated as rules. N.C. Gen. Stat. § 150B-2(8a)(A). It is clear and unambiguous that Respondent “shall” adopt rules regarding the requirements of the education of North Carolina children with disabilities. N.C. Gen. Stat. § 115C- 107.2 It is well established that “[o]rdinarily, the word ‘must’ and the word ‘shall,’ in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory.” *State v. Watson*, 258 N.C. App. 347, 354, 812 S.E.2d 392, 397, *appeal dismissed,* 371 N.C. 340, 813 S.E.2d 852 (2018); *see also Owen v. UNC-G Physical Plant*, 121 N.C. App. 682, 685, 468 S.E.2d 813, 816 (1996).[[54]](#footnote-55)
2. Instead of adopting a “Special Rule,” the State Bord adopted a “Special Policy. *See Policy Manual*; Off. Not. Ex. B, pp. 100-101; Policy 1504-1.21(b) According to the Special Policy*,* as early as 60 calendar days prior to the student’s eighteenth birthday [Policy 1504-1.21(b)(2(v)], “an educational representative may be appointed” if “two professionals [from these lists[[55]](#footnote-56)] . . . based on a personal examination or interview, certify in writing that the adult student is incapable of providing informed consent and that the student has been informed of this decision.” Policy 1504-1.21(b)(2)(iii)(A); Off. Not. Ex. B p 100.
3. “Incapable of providing informed consent” means one of these three definitions:

that the adult student is unable to: (A) understand the nature, extent and probable consequences of a proposed educational program or option on a continuing or consistent basis; (B) make a rational evaluation of the benefits or disadvantages of a proposed educational decision or program as compared with the benefits or disadvantages of another proposed educational decision or program on a continuing or consistent basis; or (C) communicate such understanding in any meaningful way.

Off. Not. Ex. B p 100; Policy 1504-1.21(b)(2)(iv).

1. If an adult student is determined incapable of providing informed consent, the parent, if available, shall be appointed or another family member, or a surrogate parent. Off. Not. Ex. B p 101; Policy 1504-1.21(b)(2)(iii)(C). The certification must be recertified if the previous certification is challenged, by the adult student or anyone with a bona fide interest in and knowledge of the adult student. However, employees of the LEA may not challenge the certification. Off. Not. Ex. B p 101; Policy 1504-1.21(b)(2)(vii).
2. While this Special Policy is not binding authority, it does provide guidance about the appointment of a parent as the educational representative of a competent adult student such as Student Guidance which supports that Parent was the proper educational representative of Student when the medical and mental health recommendations of two medical doctors, Drs. Tinney and Simon, and two clinical psychologists, Drs. Robbins and Collett, clearly established that Student could not make informed educational decisions such that she needed residential therapeutic placement because of her emotional dysregulation.[[56]](#footnote-57) Student even recognized that she needed her parents to “handle everything” for her. Stip. Ex. 328 p 001979.

***Separate Standing for Parent’s Tuition Reimbursement Claims***

1. The Supreme Court and the Fourth Circuit have not addressed whether a parent has standing to bring a tuition reimbursement claim separate from their adult children’s FAPE claims. For reimbursement of private school tuition, the parent must prevail on finding the LEA did not make FAPE available to the child with a disability. Likewise, if a parent prevails on a FAPE claim, a court may award attorneys’ fees “to a prevailing party who is the parent of a child with a disability.” *See* *Winkelman ex rel Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 526 (2007) (quoting 20 U.S.C. § 1415(i)(3)(B)(i)(l)). In *Winkelman*, the Supreme Court held that a parent’s standing to seek reimbursement of their attorney’s fees was an independent, enforceable right under the IDEA. *Id.* Likewise, even for an adult student, a parent should retain their right to tuition reimbursement because the parent incurs expenses when the “F” in FAPE means that the private school placement was not “free.” *M.G. et al. v. McKnight, et al*,. \_\_\_ F. Supp. 3d \_\_\_, 2023 WL 1070437, at \* 9 (D.C. Md. Jan. 27, 2023).
2. Some district courts have adopted this logic. According to one Virginia federal district court, parents have constitutional and prudential standing to “recover for expenditures that they have made due to improper decisions by the school authorities under the IDEA.” *Bernard v. Sch. Bd. of City of Norfolk*, 58 F. Supp. 2d 669, 674 (E.D. Va. 1999) (citing *Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 370 (1985)); *Doe v. Bd. of Educ. of Baltimore Cnty.*, 165 F.3d 260, 261 (4th Cir. 1998); *Hall v. Vance Cnty. Bd. of Educ.*, 774 F.2d 629, 632 (4th Cir. 1985)). In addition, the federal district courts have held that parents have standing to sue for IDEA violations that occurred before their child’s eighteenth birthday, *Latynski-Rossiter v. D.C.*, 928 F. Supp. 2d 57, 60 (D.D.C. 2013), and even after a child is deceased, *Bernard*, 58 F.Supp.2d at 674-75. While “recovery on their claims requires a determination of the substantive rights of the deceased [or minor] child, that does not mean that they are seeking to vindicate the child’s rights.” *Id.* at 674.
3. To find otherwise would defeat “the principal purpose of the Act” to protect the rights of children with disabilities and their parents and would make it as if reimbursement were never available.” *Burlington*, 471 U.S. at 372; *Forest Grove Sch. Dist. v. T.A.,* 557 U.S. 230, 245 (2009) (explaining that “immunizing a school district’s refusal to find a child eligible for special-education services” by precluding reimbursement of private school tuition “would produce a rule bordering on the irrational”), “[W]ithout parental financing, a student’s IDEA rights may prove illusory.” *Latynski-Rossiter,* 928 F. Supp. 2d at 61. Parents are “within the ‘zone of interests’ that the challenged statute [IDEA] is designed to protect.” *Bernard*, 58 F. Supp. 2d at 674. “The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.” *Burlington*, 471 U.S. at 372. Student was entitled to a FAPE and to preclude Parent’s standing for tuition reimbursement just because Student was 18 instead of 17 negates the purpose of the IDEA that the appropriate education be free of costs to the parent.
4. In other civil rights case, the Supreme Court cautions courts and administrative tribunals to refrain from using “standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits.” *Assoc. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 159, 178 (1970) (Brennan, J., concurring in part and dissenting in part); *see also Griffin v. Dep’t of Lab. Fed. Credit Union*, 912 F.3d 649, 653 (4th Cir. 2019) (“It is important that we do not take a cramped view of standing in civil rights cases, lest we impair the remedial purpose Congress had in mind when enacting civil rights statutes.”). Recently, the district court of South Carolina held that individuals and organizations can have third-party standing in IDEA claims. *South Carolina State Conference of NAACP; Disability Rights South Carolina; & Justice 360, Plaintiffs v. South Carolina Department of Juvenile Justice; & Eden Hendrick, Individually & in her official capacity as Exec. Dir. of the S.C. Dep’t of Juv. Just., Defendants.*, No. CV 0:22-01338-MGL, 2023 WL 1767318, at \*2 (D.S.C. Feb. 2, 2023) (citing *Warth v. Seldin*, 422 U.S. 490, 505 (1975) (individual third-party standing) and *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982) (organization third-party standing)).
5. To establish standing on a federal claim, Parent must demonstrate she has (1) suffered an injury in fact, (2) caused by the challenged conduct of the WCPSS, (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). An injury-in-fact is “an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.” *Id*. at 339. Moreover, “[t]o satisfy standing’s causation requirement, the alleged injury must be ‘fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.’” *Id.* (citing *DiCocco v. Garland*, 52 F.4th 588, 592 (4th Cir. 2022) (internal alterations omitted) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992)). Finally, the redressability prong is satisfied if “it [is] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan*, 504 U.S. at 562 (internal quotation marks omitted)). Parent has had to pay private school tuition because of WCPSS’s failure to provide Student a FAPE and a favorable decision will satisfy her injury in fact. Therefore, based on the three-prong federal court standing analysis, Parent had standing to pursue her separately protected interest.
6. Recently the Fourth Circuit reiterated that parents have “standalone” rights for attorney’s fees and such claims are “analogous” to an IDEA merits review action rather than an independent action. *Sanchez v. Arlington County School Board*, \_\_\_F.4th \_\_\_; 2023 WL 310403 at \*5 (4th Cir. 2023) (reviewing divergence among the majority view of the Sixth, Seventh, and Eights Circuits that the “standalone” fees claim is more analogous to an IDEA merits review action rather than an independent action as held by the Ninth and Eleventh Circuits). In *Sanchez*, the parents alone brought the attorney’s fees claim without joinder of the minor child with disabilities.
7. Similarly, it would be illogical to interpret the transfer of rights at the age of majority to include the transfer of the parental right to reimbursement, as it “would turn the doctrine of standing on its head.” *Latynski-Rossiter*, 928 F. Supp. 2d at 62 (citing *Lujan,* 504 U.S. at 560 n. 1) (noting that the “particularized” harm requirement means that “the injury must affect the plaintiff in a personal and individual way”)). Such an interpretation would allow a child to “sue for financial harms that he or she never incurred; if successful, the child would receive funds that he or she never earned. [The student] has already received a free and appropriate education because [her] parents paid for it.” *Latynski-Rossiter*, 928 F. Supp. 2d at 62. This is inconsistent with the Supreme Court’s holding in *Carter* that the student’s parents, not the adult student, were entitled to reimbursement. *Florence Cnty. Sch. Dist. Four v. Carter By & Through Carter*, 510 U.S. 7, 11 (1983).[[57]](#footnote-58)
8. On the other hand, Respondent asserts that *Latynski-Rossiter* is unpersuasive. Resp’t Pro. Fin. Dec. p. 108, ¶ 10(citing *Doe v. Westport Bd. of Educ.*, No. 3:18-CV-01683 (KAD), 2020 WL 869861, at \*5 (D. Conn. Feb. 21, 2020)). In *Westport,* the Connecticut District Court held where a student turns eighteen prior to the filing of the contested case petition, the adult student must file the action in their own name. The *Westport* case is distinguishable from this case because the district court judge relied on Conn. Gen. Stat. § 10-76d-12(b). To effectuate the transfer, the Connecticut statute requires that notification must be given to the parents before “the transfer of *all other rights* accorded to the parent of such child under the IDEA.” *Westport*, 2020 WL 869861, at \*3 (emphasis in original). Unlike North Carolina, the Connecticut Agencies Regulations have extensive notification requirements for adult students with disabilities and their parents and appointment procedures. *See* Conn. Gen. Stat. § 10-76d(10)(A through D); Conn. Gen. Stat. § 10-94g; and Conn. Gen. Stat. § 10-76h(a)(4).
9. After reviewing the cases cited by Respondent on page 108, paragraph 10 of its Proposed Final Decision, the Undersigned finds these cases distinguishable and unpersuasive. In all these cases, the parent had no separate claims apart from the adult student’s FAPE violations. *See Harris v. Cleveland City Bd. of Educ.*, No. 1:17-CV-00121, 2018 WL 1124961, at \*3 (E.D. Tenn. Mar. 1, 2018) (stating plaintiff mother, acting *pro se* in federal district court, cannot state a § 1983 claim on behalf of her adult son who did not want special education services); *Ravenna Sch. Dist. Bd. of Educ. v. Williams*, No. 5:11CV1596, 2012 WL 3263258, at \*3 (N.D. Ohio Aug. 9, 2012) (finding mother had no standing to challenge school district denial of extended school year services during summer of 2011, for son who turned 18 on August 6, 2010 prior to the school district adverse ESY decision); *Loch v. Bd. of Educ. of Edwardsville Cmty. Sch. Dist. #7*, No. CIV.A.3:06CV17MJR, 2007 WL 2701274, at \*2 (S.D. Ill. Sept. 12, 2007), *aff’d sub nom.*, *Loch v. Edwardsville Sch. Dist. No. 7*, 327 F. App’x 647, 650 (7th Cir. 2009); *Neville v. Dennis*, No. 07-2202-CM-DJW, 2007 WL 2875376, at \*2 (D. Kan. Oct. 3, 2007) (finding mother lacked standing to continue an administrative action for denial of a FAPE to her son after the son turned 18 after the filing of the administrative complaint); *Weyrick v. New Albany-Floyd Cnty. Consol. Sch. Corp.*, No. 4:03-CV-0095-DFH-WGH, 2004 WL 3059793, at \*5 (S.D. Ind. Dec. 23, 2004) (mother lacked standing to bring FAPE claims for adult son but could represent his interests and act on his behalf without herself being named a party because son granted her power of attorney).
10. Respondent’s reliance on footnote two in the Supreme Court’s *Forest Grove Sch. Dist.*, 557 U.S. at 235, n. 2 decision also lacks merit. In its Proposed Final Decision, Respondent only partially recites the footnote as: “[a] parent also may not seek recovery once his child reaches the age of majority, even if that occurs after the alleged IDEA violations occurred or even after the petition is filed.” *Id.* The full footnote reads, “Although it was respondent's parents who initially sought reimbursement, when respondent reached the age of majority in 2003 his parents’ rights under IDEA transferred to him pursuant to Ore. Admin. Rule 581–015–2325(1) (2008).” *Id. at* 235.
11. Like the *Westport* case, the district court in *Forest Grove* relied on the state’s administrative code. Ore. Admin. Rules 581–015–2325, 2330 (2008) required the Forest Grove School Board to notify the student, T.A., and his parents about the transfer of his rights and T.A.’s ability to request a surrogate be appointed to exercise the student’s special education rights. Moreover, the parents in *Forest Grove* had previously acknowledged receipt of a “Notice of Procedural Rights” before filing the petition. *Forest Grove Sch. Dist. v. T.A.*, 640 F. Supp. 2d 1320, 1334–35 (D. Or. 2005), *rev’d and remanded,* 523 F.3d 1078 (9th Cir. 2008), *aff’d,* 557 U.S. 230 (2009). In its footnote, the Supreme Court was merely noting procedurally that T.A.’s parents had been removed as parties to this case before it reached them on appeal. The actual holding in the *Forest Grove* case was that the IDEA did not categorically bar reimbursement of private-education tuition if a child, like Student, had not previously received special education and related services through the public school. *Forest Grove*, 557 U.S. at 247.

***“Person Aggrieved” North Carolina Administrative Procedure Act (“APA”)***

1. Like the standing requirement in federal court, Parent was a “person aggrieved” as defined by the North Carolina Administrative Procedure Act (“APA”). Respondent stipulated that the North Carolina Office of Administrative Hearings has jurisdiction over special education petitions. N.C. Gen. Stat. § 150B-22.1. A “person aggrieved” in this Tribunal is “any person or group of persons of common interest, directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision.” N.C. Gen. Stat. § 150B-2(6). Parent’s property, moneys paid for Student’s private education and other expenses, was directly and substantially affected by the adverse decisions of Respondent. Parent sufficiently alleged in both Petitions that Respondent acted erroneously, failed to use proper procedure, and failed to act as required by the APA. N.C. Gen. Stat. § 150B-23(a). As a “person aggrieved,” Parent has standing in this Tribunal to bring her own claims seeking reimbursement of the costs and expenses she incurred in providing Student an appropriate private education when Respondent failed to offer Student a “free” appropriate public education.
   * 1. **Whether either Student or Parent has standing to file an Amended Petition?**
2. The Parties do not dispute Student had standing to bring her own claims once she turned 18 years old for Respondent’s failure to identify, evaluate, and provide her a FAPE. 20 U.S.C. § 1415(m); N.C. Gen. Stat. § 115C-109.2. Yet, Respondent argues that Student was named improperly in the caption of the Original Petition. Based on this caption misnomer, Respondent contends that the Original Petition is null, the Amended Petition cannot relate back to the null Original Petition, and Student cannot be joined as a party in the Amended Petition. Respondent also argues in the alternative that Student does not have standing because she was not involved in the litigation decision-making process, the matter was not “ripe” for adjudication, and Petitioners did not exhaust their administrative remedies before filing the petitions. Respondent’s arguments fail for multiple reasons as addressed below.

***Caption of Original Petition Argument***

1. With respect to Respondent’s “caption” argument, Respondent argues that the caption of the Original Petition did not properly identify Student as a Petitioner and, therefore, Student was not a Petitioner at the time the Original Petition was filed.
2. The Original Petition identifies the Petitioners as “Student, by and through her parent, Parent” Student is referenced 162 times throughout the Original Petition. Even if the caption was improperly labeled, Respondent cannot genuinely argue that they did not know this case was about Student’s rights under IDEA. The Amended Petition changed the caption to “Student together with her Parent” on April 8, 2021, an Order to Change Caption was issued allowing revision of the caption.
3. Despite any defects in its labeling, the Original Petition gave Respondent more than sufficient notice of the transactions and occurrences involved with Student’s educational programming or lack thereof. This technical matter could have been easily remedied by a Motion to Change Caption and is not grounds for dismissal of Petitioners’ entire contested case.
4. As the Undersigned previously explained in the Order Granting Petitioners’ Motion for Leave to Amend, North Carolina’s pleading standards are consistent with federal law and decisions from other jurisdictions holding that the body of the pleading—not the caption—determines the parties.[[58]](#footnote-59) Both Student and Parent were properly named in the caption and were both proper Parties in both bodies of the Original and Amended Petitions. N.C. R. Civ. P. 10(a).

***Interplay of Rules 15 and 17 of North Carolina’s Rules of Civil Procedure***

1. Moreover, even if Parent lacked the capacity to file the Original Petition, the North Carolina Supreme Court has allowed a party to be added as a plaintiff in similar situations through the analysis of the interplay of Rules 15 and 17 of North Carolina’s Rules of Civil Procedure:

It is at once apparent from the face of Rules 15(c) and 17(a) that they have changed our approach to the problems, respectively, of whether a given pleading relates back to the beginning of the action and how to deal with a claim brought by a party who has no capacity to sue. Whether an amendment to a pleading relates back under Rule 15(c) depends no longer on an analysis of whether it states a new cause of action; it depends, rather, on whether the original pleading gives “notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.”

*Burcl v. N. Carolina Baptist Hosp., Inc.*, 306 N.C. 214, 224, 293 S.E.2d 85, 91 (1982) (*quoting* N.C. R. Civ. P. 15(c)).

1. In accordance with Rule 17(a), the real party in interest in a case is not precluded from being made the plaintiff, even after the statute of limitations has run, “on a claim timely filed by one who lacked the capacity to sue because he was not the real party in interest.” *Id.* at 225, 293 S.E.2d at 91. Rule 17(a) provides “a reasonable time [must be] allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.” N.C. R. Civ. P. 17(a).

Subsection (a) of [Rule 17] deals specifically with what happens when an action is brought by one who is not the real party in interest. Thus Rule 17(a) speaks to a problem very much like, although not identical to, the one we have here, *i.e.*, what happens when an action is brought by a person who has no capacity to sue. Rule 17(a) permits the real party in interest to ratify the action after its commencement and to have the ratification relate back to the commencement.

*Burcl*, 306 N.C. at 230, 293 S.E.2d at 94-95.

1. The decision in *Burcl* is consistent with federal law and cases[[59]](#footnote-60) throughout the country which refused to dismiss cases where the petition or complaint provides notice to the other party and reflects the action is being brought on behalf of another, but the person bringing the lawsuit was not yet duly appointed to do so. Like these cases, the Amended Petition relates back to the original filing.

***Intervening Party Status Under the NC APA***

1. Under the North Carolina APA, even if neither Student nor Parent were original parties in this contested case, either one could have petitioned to become a party by filing a motion to intervene. N.C. Gen. Stat. § 150B-23(d). Any person interested in a contested case may intervene and participate in that proceeding to the extent deemed appropriate by the administrative law judge. *Id.* The motion to intervene must show how the movant may be directly affected by the outcome of the case. 26 NCAC 03 .0117(a). An administrative law judge may allow intervention, unless the intervenor’s interest is adequately represented by one or more parties participating in the case. 26 NCAC 03 .0117(d). In this Tribunal, an intervenor may be allowed to:

(1) file a written brief without acquiring the status of a party;

(2) intervene as a party with all the rights of a party; or

(3) intervene as a party with all the rights of a party but limited to special issues and to the means necessary to present and develop those issues.

26 NCAC 03 .0117(d)

1. Parent’s rights to reimbursement of private tutoring, independent educational evaluations, travel expenses, and private tuition, not just may*,* but will be directly affected by the outcome of this case. Likewise, Student’s right to a FAPE and potential award of compensatory education and related services, not just may, but will be affected. Before intervention is allowed, any party may object to the intervention by stating the reasons for objection. 26 NCAC 03 .0117(b). In its various motions and arguments contesting the Petitioners’ standing in this contested case, Respondent has already objected to the joinder of Student to the Original Petition and Parent’s right to be a party in both the Original and Amended Petitions.
2. Respondent has not been nor would be prejudiced by such intervention. Moreover, even before the Original Petition was filed, based on the Tolling Agreement, Respondent knew of Petitioners’ potential claims. And, after service of the Original and Amended Petitions, Respondent has been able to pursue extensive discovery.
3. Therefore, on this alternative basis, to the extent that Student was not properly named in the Original Petition, Student has properly intervened with all the rights of a party with respect to the substantive issues of eligibility, FAPE, and compensatory education. Likewise, in the alternative, to the extent that Parent was not properly included as a party in this contested case, she has properly intervened with all the rights of a party but limited to the issues pertaining to the private school placement and reimbursement claims.

***IDEA’s Amendment Provision***

1. The IDEA due process provisions were enacted to protect the rights of the disabled child and the parents, not to foreclose them. The IDEA has a generous amendment provision that allows a party to amend the petition by consent of the opposing party or by a grant of permission from the hearing officer. 20 U.S.C. § 1415(c)(2)(E). The only limitation is that the hearing officer cannot grant permission at any time not later than five (5) days before the due process hearing. 20 U.S.C. § 1415(c)(2)(E)(i)(II).
2. Within five (5) business days after service of Respondent’s Motion to Dismiss, Petitioners expediently moved for leave to amend the Original Petition on January 10, 2022. After briefing and oral argument, leave to amend was granted on March 7, 2022. Within fourteen (14) business days, Petitioners filed their Amended Petition on March 25, 2022. The Amended Petition was filed 135 days before the hearing.
3. Prior to the entry of the Order Granting Leave to Amend, Respondent was unable to demonstrate to the Undersigned any prejudice caused by granting the amendment. Likewise, Respondent fails to demonstrate any here.
   * 1. **Respondent’s Other Defenses**

***“Student Was Not Involved in the Decisionmaking Process” Argument***

1. In the alternative and without legal citation, Respondent contends that even if Student were properly named as a party in both Petitions, the lawsuit is null because Student was not involved in the decisionmaking process prior to filing the Original Petition or during stages of the litigation. The Undersigned rejects this argument finding Student delegated, or attempted to delegate, four (4) times in writing the authority to bring these claims to her parents. *See* Resp’t Ex. 340 (Power of Attorney dated October 24, 2021); Stip. Ex. 328 (Affidavit dated January 27, 2022); Stip. Ex. 260 (Affidavit of Educational Designation dated February 7, 2022); Stip. Ex. 327 (POA dated January 27, 2022). Although Student knew little about the lawsuit, she was represented by experienced, competent legal counsel. Moreover, based on her mental health condition at the time, the Undersigned finds and concludes she did not have the ability to provide informed consent with respect to her educational programming or adequately understand the contested case process. 20 U.S.C. § 1415(m)(2).

***Student Residing in Utah During her Senior Year and After She Turned 18***

1. As almost an aside, Respondent argues that “once Student turned eighteen, on XX/XX/XXXX, Student no longer resided, as used in the IDEA, in Wake County, where their parents lived, but in Utah. A school district’s child find obligations under the IDEA only extend to ‘children with disabilities residing in the State.’” Respondent Pro. Fin. Dec. p. 137, ¶ 136 (citing 20 U.S.C. § 1412(a)(3)(A)). WCPSS’s child find obligation extends to children residing in the State includes “children with disabilities [like Student] attending private schools . . ..” 20 U.S.C. § 1412(a)(3)(A). Regardless of the private school location or severity of the child’s disabilities, Respondent is responsible for identifying, locating, and evaluating them. *Id.*
2. Respondent stipulated that it knew on August 13, 2021, before the beginning of the 2021-2022 school year and before Student turned 18, that her parents had enrolled her in Private Academy because Respondent’s 504 Plan and services at School were insufficient to meet her needs. Stip. 46. Even though the private school was located in Utah, Student’s actual residence, before and after she turned 18, was Wake County, North Carolina. Based on the uncontradicted evidence, even though Student attended a private school out of state, Student still resided in Wake County, North Carolina and was entitled to a FAPE.

***Ripeness/Failure to Exhaust Administrative Remedies Defense***

1. Finally, Respondent raises for the first time an affirmative defense of “ripeness/failure to exhaust” administrative remedies as grounds for divesting this Tribunal of subject matter jurisdiction. Resp’t Pro. Fin. Dec. p. 110, ¶¶ 17-20. “Whether a plaintiff has properly exhausted all administrative remedies is a pure question of law ...”. *E.L. ex rel. Lorsson v. Chapel Hill-Carrboro* [*Bd. of Educ.*, 773 F.3d 509, 514 (4th Cir. 2014)](https://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034906589&pubNum=0000506&originatingDoc=I722215e074c111edaa59be7e152cdbdf&refType=RP&fi=co_pp_sp_506_514&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)&co_pp_sp_506_514%20).
2. Respondent posits that, because the parents never raised their concerns about the effectiveness of the October 22, 2020 Section 504 Plan or their desire for an IEP until after the filing of the Petition, long after Student was withdrawn as a student at the High School, Respondent was “not afforded ‘the chance to bring their expertise and judgment to bear on areas of disagreement’” as required by the Supreme Court’s decision in *Endrew F.* Resp’t Pro. Fin. Dec. P110,¶ 19 (citing *Endrew F.*, 580 U.S. 386). Similarly, Respondent contends because Petitioners failed to “complain about the purported inactions of Respondent,” never “made requests for additional services,” or “complaints about the effectiveness or sufficiency of the October 22, 2020 Section 504 Accommodation Plan,” they “failed to exhaust their administrative remedies and this action is not ripe for adjudication.” *Id.* ¶ ¶ 19-20.
3. Respondent’s feigned ignorance of Petitioners’ claims is disingenuous in light of Parent’s request for an IEP, Father’s written notice of private school placement because the Section 504 Plan was inadequate, and admissions by Counselor that school administration knew the parents wanted an IEP. 34 C.F.R. § 300.148(d)(1)(ii); 20 U.S.C. § 1412(a)(10)(C). Prior to, during, and even after that notice of private school placement, Respondent neglected its “chance to bring their expertise and judgment” at an IEP eligibility meeting. Moreover, anytime while Student was enrolled in Private Academy, Respondent could have convened an IEP meeting to discuss eligibility and the parents’ concerns. An “Invitation to Conference,” rather than just an email from the Principal, could potentially have saved Respondent and North Carolina taxpayers thousands of dollars.
4. Respondent failed to raise this affirmative defense in its Responses to either the Original or Amended Petition. Instead, it was raised for the first time in Respondent’s Proposed Final Decision. Because the defense is untimely, the Undersigned is not required to consider it now. N.C. Gen. Stat. § 1A-1, Rules 8(c) and 12(b). Even if Respondent’s defense had been timely, Respondent cites no federal or State law that required Parent to complain or ask for additional services before filing a contested case petition.
5. In conclusion, dismissing Petitioners’ claims on the grounds argued by WCPSS “would be to return to hypertechnical pleading restrictions inimical to just resolution of disputed claims, restrictions which our present rules of pleading were designed to overcome.” *Burcl*, 306 N.C. at 230, 293 S.E*.*2d at 95. The Undersigned declines to return to such restrictions and concludes that the Amended Petition relates back to the Original Petition even if Petitioners were not properly named in the Original Petition.

* + 1. **Whether there is any subject matter jurisdiction over the Original or Amended Petition?**

1. Based on the above, this Tribunal has subject matter jurisdiction over both the Original and Amended Petitions.
2. **Whether the one-year statute of limitations bars any of Petitioners’ claims?**
3. As an initial matter, the contention that Petitioners’ claims are time-barred constitutes an affirmative defense which Respondent must prove.  *See Sanchez v. Arlington Cnty. Sch. Bd.*, 563 F. Supp. 3d 484, 487 (E.D. Va. 2021) (citing Goodman v. Praxair, Inc., 494 F.3d 458, 464 (4th Cir. 2007)) (quotation marks and brackets omitted). “The IDEA’s statute of limitations is an affirmative defense rather than a jurisdictional prerequisite.” *M.G. v. N.Y.C. Dep’t of Educ*., 15 F. Supp. 3d 296, 304 (S.D.N.Y. 2014); *see also Wong v. State Dep’t of Educ*., No. 3:16-cv-1873 (VAB), at 13 (D. Conn. 2018) (“[T]he plain language of the IDEA supports recognizing that the expiration of the . . . statute of limitations is an affirmative defense that must be pled and proven and therefore is not jurisdictional.”). Early in this case, Respondent filed a dispositive motion to dismiss based on North Carolina’s one-year statute of limitations. That dispositive motion was denied because the applicable standard of review required that all facts in the Original and Amended Petition be deemed true but that is not so now at the evidentiary hearing stage.
4. Respondent asserts that the one-year statute of limitations barred Petitioners’ claims and that the Tribunal’s lacks subject matter jurisdiction over claims brought prior to either the filing dates of the Original Petition on December 21, 2020 or the Amended Petition on March 25, 2021. For consideration, Respondent suggests two optional one-year time periods, December 21, 2020 through December 21, 2021 and March 25, 2021 through March 25, 2022.
5. North Carolina has an explicit one-year statute of limitations which begins to run once 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). The IDEA’s statute of limitations requires parents request a due process hearing is “within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows.” 20 U.S.C. § 1415(f)(3)(C) (2006).
6. The pertinent question is when Petitioners “knew or should have known (“KOSHK”) about the alleged action that forms the basis of their complaint” and if they filed their due process petition within one year of the KOSHK date. N.C. Gen. Stat. § 115C-109.6(b); 20 U.S.C. § 1415(f)(3)(C); s*ee also G.L. v. Ligonier Valley Sch. Dist. Auth*., 802 F.3d 601, 626 (3d Cir. 2015). The KOSHK date “stems from when parents know or have reason to know of an alleged denial of [FAPE] under the IDEA, not necessarily when the parents became aware that the district acted or failed to act.” *Avila v. Spokane Sch. Dist. 81*, 852 F.3d 936, 944-45 (9th Cir. 2017) (explaining that parents’ awareness of a school district’s evaluation, which determined that the student was not eligible for services under IDEA, did not necessarily mean they knew or had reason to know of the basis of their legal claims). “An IDEA claim accrues ‘when the parents know of the injury or the event that is the basis of their claim.’” *Richards v. Fairfax Cty. Sch. Bd*., 798 F. Supp. 338, 341 (E.D. Va. 1992), *aff’d,* 7 F.3d 225 (4th Cir. 1993) (quoting *Hall v. Knott Cty. Bd. of Educ.*, 941 F.2d 402, 408 (6th Cir. 1991)). The relevant inquiry is whether Petitioners “possess[ed] sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action.” *Nasim v. Warden Md. House of Corr.*, 64 F.3d 951, 955 (4th Cir. 1995); *accord* R*. ex rel. R. v. Fairfax Cnty. Sch. Bd.,* 338 F.3d 325, 332 (4th Cir. 2003) (quoting *Richards*, 798 F.3d at 341).
7. Basically, the statute of limitations beings to run once the date is established when Parent and Student “knew” or “should have known” about their claims. But, even if Parent and Student “knew/should have known” about their claims, the statute of limitations “shall” not apply if there is an exception to the timeline which prevented them from requesting the hearing. 20 U.S.C. 1415((f)((3)(D). In order to decide this issue, a determination must first be made as to when the statute of limitations began to run.
   * 1. **When the Statute of Limitations Began to Run**

***December 21, 2020 through December 21, 2021 KOSHK Date***

1. First, with respect to the Original Petition filed on December 21, 2021, Respondent argues that “unless tolled, the statute of limitations bars all claims brought by Petitioners arising out of events occurring prior to December 21, 2020.” Resp’t Pro. Fin. Dec. p. 112, ¶ 30. If accurate, only claims from December 21, 2020 to December 21, 2021 would remain viable. This would eliminate Petitioners’ strongest child find and eligibility claims, arising from the September and October 2020 emails during the Fall semester of Student’s junior year at the High School.

***March 25, 2021 through March 25, 2022 KOSHK Date***

1. Second, Respondent asserts that Petitioners are entitled to no relief for any claims which occurred one-year prior to the March 25, 2022 filing date of the Amended Petition; therefore, the only claims within the statute of limitations are those with occurred on or after March 25, 2021 until March 25, 2022. Resp’t Pro. Fin. Dec. p. 111, ¶¶ 24-25. If so, this would also significantly reduce Petitioners’ potential remedies. The last school day at the High School for the 2020-2021 school year was June 10, 2021. Stip. 44. The 2021-2022 school year was Student’s senior year. Stip. 45. Student’s father sent the ten-day notice email to High School staff on August 13, 2021 and school started at the High School on August 23, 2021. Stips. 46-47. Therefore, based on Respondent’s reasoning, Petitioners only had viable claims from March 25, 2021 until March 25, 2022. This is approximately a period of 2 ½ months during Student’s junior year (2020-2021) and throughout most of her senior year (2021-2022), when she was enrolled in private school.

***December 21, 2021 through December 21, 2022 KOSHK Date***

1. Neither of Respondent’s time periods is applicable. Looking back one year from the petitions’ filing dates is insufficient for establishing when the statute of limitations began to run. In making both timeline arguments, Respondent failed to establish when Petitioners “knew or should have known” about the actions which would trigger the one-year statute of limitations for Petitioners’ claims during the 2020-2021 or 2021-2022 school years. Petitioners must know: 1. what the adverse decision is, the reasons and options considered as well as and 2. the time period for filing a contested case petition. The only definite date in the record that Petitioners knew about the statute of limitations is the day that Parent signed the Tolling Agreement on October 7, 2021. Initially, the Parties agreed to toll the statute of limitations until November 15, 2021 but that was extended until December 20, 2021. The one-year statute of limitations would have begun to run on October 7, 2021 but was tolled by agreement until December 21, 2021. Petitioners had until December 21, 2022 to file their contested case petition.

***Withholding Exception***

1. Even if Parent and Student knew about the adverse action, both IDEA and North Carolina law toll the statute of limitations under two circumstances. The statute of limitations “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 complaint; or (ii) the local educational agency’s withholding of information from the parent that was required under this subchapter to be provided to the parent.” 20 U.S.C. § 1415(3)(f)(D); *see also* N.C. Gen. Stat. § 115C-109.6(c) (delineating identical exceptions when the statute of limitations shall not apply). When either exception exists, the statute of limitations “shall not apply.” 20 U.S.C. § 1415(3)(f)(D); N.C. Gen. Stat. § 115C-109.6(c).
2. To ensure that parents and adult students are aware of the statutory filing deadline, both State and federal law require the LEA to provide parents “a current copy of the procedural safeguards [“Procedural Safeguards”] . . . upon initial referral or parental request for evaluation.” 20 U.S.C. § 1415(d)(1)(A); 34 C.F.R. § 300.504(a); N.C. Gen. Stat. § 115C-109.1. Respondent must also provide parents with a Prior Written Notice (“PWN”) whenever it proposes orrefuses as in this case “to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.” 34 C.F.R. § 300.503(a); N.C. Gen. Stat. § 115C-109.5(a).
3. Prior to October 7, 2021, Respondent had withheld required information from Petitioners. Based on the evidence, it is undisputed that Respondent never gave Petitioners Prior Written Notices of its refusals to refer Student for IDEA eligibility during the 2019-2020, 2020-2021 and 2021-2022 school years and during that period did not give Petitioners a copy of the *Handbook* until after the Original Petition was filed.
4. The Fourth Circuit Court of Appeals has specifically addressed how the Procedural Safeguards[[60]](#footnote-61) and provision of a Prior Written Notice interface with the statute of limitations for North Carolina special education cases. *See C.M. ex rel. J.M. v. Bd. of Educ. of Henderson Cnty.*, 241 F.3d 374 (4th Cir. 2001) (60-day statute of limitations). Section 150B-23(f) requires WCPSS to provide notice to the aggrieved party of its actions prior to the filing of a contested case petition in the Office of Administrative Hearings. N.C. Gen. Stat § 150B-23(f). “Although § 150B–23(f) does not require notice in a specific form, it does, [], mandate that parents be provided express written notice of the commencement of the limitations period.” *C.M.*, 241 F.3dat 385.
5. Section 150B–23(f) instructs that the time limitations period begins only when aggrieved persons are provided written notice “of the agency decision”; the notice must “set forth the agency action” and inform aggrieved persons of “the right, the procedure, and the time limit to file a contested case petition.” N.C. Gen. Stat. § 150B–23(f). “To satisfy these requirements, the written notice must communicate that the agency has acted and that this action is one that triggers the right to file, within [the applicable statute of limitations], a contested case petition for a due process hearing.” *C.M.,* 241 F.3dat386.
6. The 2018 distribution of the *Handbook of Parent’s Rights* to Parent does not remedy the inadequacies of Respondent’s failure to notify Petitioner that Respondent made subsequent unilateral decisions involving Student’s eligibility. *Id.* at 387. The Fourth Circuit held that “[u]nless parents are informed that an agency decision [by PWN] in their case has triggered the limitations period, simply notifying them of the general right, procedure, and time limitation to request a due process hearing [through the *Handbook of Parent’s Rights*] is worthless.” *Id.* at 388. Statutory protections “are meaningless” for Student and Parent if they do not know of their existence. “So, too, statutory protections are meaningless when those sought to be protected do not know that the limited time for invoking those protections has commenced.” *Id.*
7. The time limitation “commences when notice is given of the agency decision to all persons aggrieved that are known to the agency” in writing, whether by personal delivery, electronic delivery, or through the United States Postal Service. N.C. Gen. Stat. § 150B-23(f)*.* This requirement is similar to the requirement that WCPSS provide a Prior Written Notice of its decisions to Petitioners for the statute of limitations to begin to run. WCPSS did not comply with the North Carolina APA or the IDEA notice requirements.
8. Respondent is required to notify Petitioners of the procedural safeguards to protect Petitioners’ rights. Respondent cannot shirk its notice responsibilities to Student and Parent, then use Petitioners’ ignorance of the transfer of parental rights and the one-year statute of limitations as grounds for dismissal of Petitioners’ contested case.
9. For the above reasons, the one-year statute of limitations does not bar any of Petitioners’ claims. Both the Original and Amended Petitions were timely filed.
10. **Procedural Violations** “***Child Find Violation Issue”* Issue**
11. While it might seem counterintuitive that a bright, hardworking, never previously identified, high school student could be eligible for an IEP, the IDEA and State law recognize that special education needs are not reliant on age or school grade. Instead, a high achieving student like Student can have new or exacerbated mental health diagnoses which impact her learning to the extent that she meets IDEA eligibility for the first time in high school.
12. This is an example of why under the “child find” provision of the IDEA, the State must ensure that all children residing in it who are in need of special education are “identified, located, and evaluated.” 20 U.S.C. § 1412(a)(3)(A). WCPSS is mandated by the IDEA and State law to find and evaluate all students residing in its school district from ages 3 through 21 years which may be eligible for special education. 20 U.S.C. § 1412(a)(1)(A). This child find obligation includes students parentally placed in private schools. 20 U.S.C. § 1412(a)(10)(A)(ii).
13. In North Carolina, all children with disabilities ages 3 years through the end of the school year that the child reaches the age of 22, who have not graduated from high school, and who reside the State are entitled to a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. N.C. Gen. Stat. §§ 115C-106.2(a);115C-107.1(a). Neither IDEA nor North Carolina law rely on Student or Parent to come forward asking for help. Instead, WCPSS has the affirmative duty to find all children with disabilities within its jurisdiction and promptly conduct eligibility determinations.
14. The IDEA does not explain what triggers a school board’s child find obligation but in the disciplinary context for children not yet determined eligible but who may be subject to the protections of the IDEA, a school board is deemed to have “knowledge” that a child is a child with a disability if, “before the behavior that caused the disciplinary action, the parent expressed concern in writing to supervisory or administrative personnel of the [school board], or a teacher of the child, that the child is in need of special education and related services,” or the “parent has requested an evaluation,” or “a teacher of the child or other school personnel has expressed specific concerns about a pattern of behavior.” 20 U.S.C. § 1415(k)(5)(B).
15. In the non-disciplinary context, for violations of “child find,” courts do not require the “basis of knowledge” standard but rather ask if the school district had a “reason to suspect” that the child is a child with a disability. Courts consider the reaction of the school district once it has notice of a likely disability. *See, e.g, Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 793 (5th Cir. 2020) (citing *Krawietz by Parker v. Galveston Indep. Sch. Dist.*, 900 F.3d 673 (5th Cir. 2018)).“A finding of a child find violation turns on three inquiries: (1) the date the child find requirement triggered due to notice of a likely disability; (2) the date the child find duty was ultimately satisfied; and (3) the reasonableness of the delay between these two dates.” *Id.*
16. **Child Find Violations**
    * 1. **Whether Respondent had reason to suspect Student was a student with a disability in need of specially designed instruction?**
17. When a parent requests an evaluation or service under the IDEA, the LEA is deemed to “know” that the eligibility process should start. Courts only analyze whether a district has “reason to suspect” a disability when a parent has not requested an evaluation or services under the IDEA. *See, e.g.*, *Regional Sch. Unit 51 v. Doe*, 920 F. Supp. 2d 168, 205 (D. Me. 2013). This is logical because once a parent requests an IEP or an evaluation, “state and federal laws dictate that certain procedures must be followed” including the timeframe for the eligibility determination *T.B.*, 897 F.3d at 573.
18. Absent a parent request, “[t]he IDEA requires that, if a school district has notice that a child has displayed symptoms of a covered disability, it must assess that child in all areas of that disability using the thorough and reliable procedures specified in the Act.” *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1118-19 (9th Cir. 2016); *Scott v. Dist. of Columbia*, 2006 WL 1102839 at \*8 (D.D.C. Mar. 31, 2006) (finding school district was aware the student had ADHD and was “having some difficulty staying on task, staying focused in the classroom, and completing assignments”).
19. During the 2019-2020 and 2020-2021 school years, Student’s symptoms of Emotional Disturbance and Other Health Impairment were graphically described in emails from Student, Parent, her mental health providers, and even WCPSS staff. But, because of her good grades, all of the WCPSS staff testified that they did not suspect she needed special education. “[T]he threshold for ‘suspicion’ is relatively low, and . . . the inquiry was not whether or not she actually qualified for services, but rather, was whether she should [have been] referred for an evaluation.” *Dep’t of Educ., State of Hawaii v. Cari Rae S.,* 158 F. Supp. 2d 1190, 1195 (D. Haw. 2001) (emphasis in original). WCPSS is “not entitled to ignore plain evidence of [a s]tudent’s disability merely because [the s]tudent had good grades and attendance . . ..” *A.P. v. Pasadena Unified Sch. Dist.*, 2021 WL 810416 \*7 (C.D. Cal. Jan. 26, 2021) (citing *Timothy O.*, 822 F.3d at 1119).
20. Moreover, Student’s “academic progress cannot serve as the sole ‘litmus test’ for eligibility.” *G.D. ex. rel. G.D. v. Wissahickon Sch. Dist.*, 832 F. Supp. 2d 455, 466 (E.D. Pa. 2011) (citing *West Chester Area Sch. Dist. v. Bruce C.*, 194 F. Supp. 2d 417, 421 (E.D. Pa. 2002) (citing *Rowley*, 458 U.S. at 203, n.25). Student’s grades and advancement from grade to grade are not definitive of whether she may special education. *See Endrew F.*, 580 U.S. 386; 20 U.S.C. 1412(a)(1)(a). WCPSS “must ensure that FAPE is available to any child with a disability needing special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.” 34 C.F.R. 300.101(c)(1). The adverse effect of Student’s disabilities on her functional performance as described in the numerous communications were sufficient for WCPSS to suspect that Student may be a child with a disability.
21. WCPSS school staff “cannot circumvent [their] responsibility by way of informal observations, nor can the subjective opinion of a staff member dispel such reported suspicion.” *Timothy O.*, 822 F.3d at 1119. WCPSS school staff do not have to agree that Student needs special education, because a “parents’ ‘informed suspicions’ may trigger a school district’s child find obligation, even where the school district disagrees with those suspicions.” *N.N. v. Mountain View-Los Altos Union High Sch. Dist.*, 20-cv-08010-VKD, 2022 WL 3109588 at \*26 (N.D. Cal. Aug. 4, 2022) (citing *Timothy O.*, 833 F.3d at 1120 (quoting *Pasatiempo by Pasatiempo v. Aizawa*, 103 F.3d 796, 802 (9th Cir. 1996))). Moreover, Counselor did not have authority to unilaterally ignore these referrals.
22. WCPSS staff and administrators received three written referral requests with new diagnoses and medication information from two medical doctors and Student’s longtime therapist. When a school district receives notice of a new diagnosis through a letter from a physician or a private evaluation, the school is on notice of the child’s disabilities and required to initiate the referral process. *See, e.g.*, *T.B.,* 897 F.3d at 573 (upholding the ALJ’s decision finding “the failure of PGCPS to timely respond to the Parents’ requests for evaluation [including providing PGCPS with the results of a private evaluation was] inexcusable”); *N.N.*, 2022 WL 3109588, at \*27 (noting the letter from a private provider was sufficient to put the school on notice). WCPSS had sufficient information from Student’s medical/mental providers to suspect Student may be a child with a disability.
23. After receipt of Dr. Dittmer and Therapist Unwin’s letters, school staff wrote on Student October 2020 504 Plan that her depression diagnosis impacted her learning. Instead of initiating the eligibility process, WCPSS simply revised her 504 Plan. Revising Student’s 504 Plan and implementing accommodations “did not satisfy [WCPSS’s] obligations to conduct a special education assessment under the IDEA.” *N.N.*, 2022 WL 3109588, at \*27 (rejecting the district’s argument that the language on the student’s 504 plan identifying the disability as “anxiety” and stating “anxiety limits learning” was “merely ‘boilerplate’”). WCPSS is “not free to disregard its obligation to assess [Student] for special education services once it had reason to believe that [Student] suffered from a disability that impacted her ability to access her education.” *N.N.*, 2022 WL 3109588, at \*27*.* Yet, WCPSS did disregard its obligation to evaluate Student many times.
24. During the 2019-2020 school year, WCPSS had written referrals beginning in September/October 2019 which should have triggered the eligibility process. Again, during the 2020-2021 school year, while WCPSS teachers and counselor denied “suspecting” Student was in need of special education, they also acknowledged receipt of Parent’s September 14 and October 14, 2020 emails. In these emails, Parent described Student’s academic struggles and mental health issues.
25. In addition, Counselor, along with school administrators, agents of WCPSS, were copied on two letters from Student’s mental health providers describing Student’s declining mental health and functional status. During the COVID school year, over 160 emails were exchanged between Student’s parents and Respondent’s school staff. *See* Order on Prehear. Conf. Ex. E (Respondent’s Exhibit List of Emails). Remarkably, the teachers and counselor denied “suspecting” Student was a child with a disability. Based on WCPSS Referral Requirements, they received multiple written referral request and parent referrals - the September and October 2020 emails from Student and Parent; the two mental health providers’ letters in October 2020; the compilation of the numerous emails during the remainder of the 2020-2021 school year; and Father’s August 13, 2021 email about Student’s private school placement. *Compare Durbrow v. Cobb Cnty. Sch. Dist.*, 887 F.3d 1182, 1192 (11th Cir. 2018) (parents had difficulty identifying the school individual that they requested “help” and “test[ing]” from).
26. In its defense, Respondent argues that Petitioners intentionally hid information about Student’s substance abuse, family discord, and suicidal ideation. Per Respondent, due to Petitioners’ subterfuge, the school staff had insufficient information to trigger its child find obligation. While it is true that Petitioners did not disclose this information, which might have proved useful if Respondent had convened an eligibility meeting, this information was not necessary to trigger Respondent’s child find obligation.
27. Nor did the referrals have to contain certain wording. Counselor did not believe the numerous communications were parent referrals because the sender did not use “magic words” specifically asking for an evaluation or an IEP referral. His belief is inconsistent with WCPSS’s own referral policy and there is no requirement in the IDEA that parents use any “magic words”[[61]](#footnote-62) to trigger the school district’s child find obligation.
28. Even though Counselor was the point person for referrals, he was only “occasionally” involved in IEP meetings. Instead, his primary focus was Section 504 meetings. Thus, it is not surprising that WCPSS school staff did not know that the main purpose of IDEA is to prepare students with special needs for “*further education, employment, and independent living,*” not to just make good grades.  20 U.S.C. § 1400(d) (emphasis added).
29. Also, during the hearing, it became apparent that the school staff and expert had little or no understanding that special education encompasses not just a student’s academic performance but also a student’s functional performance. Student’s functional performance is at issue in this case, not just her academic performance. The plain language of the IDEA requires the IEP team to consider the following when developing an IEP: the strengths of the child; the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and *functional* needs of the child.” 34 C.F.R. § 320.324 (emphasis added).
30. Because school was virtual during the “COVID year,” none of the school staff actually saw Student in the classroom setting for any length of time, except for the brief periods of time when occasionally she turned her camera on to greet school staff and the three times she briefly attended school in the Spring semester. They rarely “heard” Student during class because of the virtual setting. Nor could the staff “see” the one-on-one assistance that Parent and the tutors gave Student behind the scenes. Although school staff could not observe her functional performance, they did read about it in the numerous emails sent by Parent and Student
31. Even though Respondent acknowledges its responsibilities under the IDEA and that private tuition reimbursement may be the consequence of a FAPE denial, Respondent now complains that it is unfair for Petitioners to ask for “hundreds of thousands of dollars” for private school tuition reimbursement. Respondent had many opportunities to reduce its reimbursement liability: 1. during the 2019-2020 school year, 2. during the 2020-2021 school year; 3. after receipt of Father’s August 13, 2021 letter, and 4. even after Student’s enrollment at Private Academy. Respondent’s school administrative and legal counsel met to discuss the August 13, 2021 email but did not convene an IEP referral meeting nor did they request Student’s educational records from Private Academy even though they had a signed release consenting to the release of information. Stip. Ex. 178 (release dated August 19, 2021). Respondent was not required to wait 90 days to complete the eligibility process and develop an IEP. Even if Respondent found Student eligible and developed an appropriate IEP soon after Student’s private school placement, Respondent would have eliminated all or most of Petitioners’ reimbursement claims for Private Academy. *See M.G.*, 2023 WL 1070437 at \*11 (reimbursement awarded for only 5 months of a private residential school because LEA developed appropriate IEP near or at the second half of the school year). In addition, in October and November 2021 when Respondent entered in Tolling Agreement and Extension, Respondent could have convened an IEP referral meeting. Other opportunities arose to resolve this case after the Petitions were filed during the two resolution periods, mediation, and two settlement conferences.
32. Petitioners have proved by more than a preponderance of the evidence that Respondent violated its child find obligations. Not only did Respondent have reason to “suspect” Student may be a child with a disability, at least by the beginning of her junior school year, Respondent had actual knowledge that Student may be a child with a disability and should have referred her for IDEA eligibility determination.

* + 1. **Whether Respondent was required to conduct an IDEA Referral Meeting; and, if so, whether Respondent conducted an IDEA Referral Meeting?**

1. Respondent was required to conduct an IDEA Referral Meeting but did not. Petitioners met their burden of proving that Respondent was required to conduct an IDEA Referral Meeting as it had received multiple communications constituting a parent referral and but failed to initiate the evaluation process. *See generally* 20 U.S.C. § 1414(a) & (b). Respondent’s witnesses, Counselor and SpEd Teacher admitted that once these written referrals were received, Respondent had an affirmative duty to conduct an IDEA referral meeting. Respondent never held a referral meeting during the 2019-2020, 2020-2021 or 2021-2022 school years.
2. Initial evaluations must be conducted to determine eligibility, and this must be done within 60 days of receiving parent consent or if the State establishes a timeline within that timeline. 20 U.S.C. § 1414 (a)(1)(C)(i)(I). If the child is found eligible, the initial EP must be developed within 30 days. 34 C.F.R. § 323(c). Based on the IDEA, the eligibility process and development of the IEP must be concluded within 90-days.[[62]](#footnote-63)
3. The evaluation process must gather relevant *functional*, developmental, and academic information including information provided by the parent to determine if the child is a child with a disability and the content of the child’s IEP including information related to enabling the child to be involved with and progress in the general education curriculum. 20 U.S.C. § 1414(b)(A) (emphasis added). A copy of the evaluation report and the documentation of eligibility must be given to the parent. 20 U.S.C. § 1414(a)(4)(B). The screening of a student by a special education teacher or Intervention Specialist is not an evaluation for eligibility for special education and related services. 20 U.S.C. § 1414(a)(1)(E); 34 C.F.R.§ 300.302.
4. Upon completion of the evaluations, the determination of whether a child is a child with a disability must be made by a team of qualified professionals and the parent of the child—not just Counselor. 20 U.S.C. § 1414(a)(4). WCPSS admittedly did not conduct any evaluations of Student before predetermining she was not eligible.
   * 1. **Whether Respondent was required to evaluate Student in all suspected areas of disabilities under the IDEA; and, if so whether Respondent evaluated Student in all suspected areas of disabilities?**
5. The IDEA requires Respondent to evaluate Student in all suspected areas of disabilities and it is undisputed that Respondent did not conduct any evaluations. 20 U.S.C. 1414(b)(3)(B). After providing notice to the Student and her parents’ and obtaining their consent, Respondent then had an affirmative duty to convene an IDEA referral meeting and proceed to evaluate Student in all suspected areas of disabilities. 20 U.S.C. §§ 1414(a)(1)(D); 1414(b)(3)(B). The purpose of this initial evaluation is to directly assist the eligibility IEP team in determining Student’s educational needs and developing an appropriate IEP. 20 U.S.C. § 1414(b)(3)(C). Respondent admittedly never evaluated Student for special education services under the IDEA. Stip. 13.
6. If no additional data was needed, Respondent was required to give Student and her parents notice of its adverse eligibility determination and the reasons for the determination as well as notify the Parent and Student about the right to request an independent educational evaluation if they disagreed with the determination. 20 U.S.C. § 1414(c)(4(A). Respondent did none of these things.

* + 1. **Whether Respondent was required to conduct an IDEA Eligibility Meeting; and, if so whether Respondent conducted an Eligibility Meeting**?

1. Respondent was required to conduct an IDEA Eligibility Meeting and it is undisputed that Respondent did not conduct an Eligibility Meeting. Petitioners have met their burden in proving that in addition to not evaluating Student, Respondent was required, but did not, conduct an IDEA Eligibility Meeting for Student 20 U.S.C. § 1414(b)(4). No IEP meeting was held for Student after the February 2018 meeting. Stip. 18.
2. During the eligibility IEP team meeting, the IEP team, including Student and her parents, along with other qualified professionals were required to review the existing evaluations results along with evaluations and information provided by the parents and student; current classroom-based, local, or State assessments and classroom-based observations; and observations by teachers and related services providers as applicable. 20 U.S.C. § 1414(c)(1). Based on that information, the IEP team should have determined what, if any, additional data was needed to determine that Student was a child with a disability as defined by Section 1401(3) and her educational needs; her present levels of academic achievement and *functional* performance; and whether the Student needed special education and related services. 20 U.S.C. § 1414(c)(1)(B). Prior to its unilateral decision not to develop an IEP or provide Student with specially designed instruction, WCPSS never considered Student’s need for special education.
3. **Prior Written Notice and Procedural Safeguards Issue**
   * 1. **Whether Respondent was required to issue a Prior Written Notice (“PWN”); and, if so whether Respondent issued a PWN?**
4. Respondent was required to issue a Prior Written Notice (“PWN”) for each of its adverse decisions not to refer Student for an eligibility determination, not to evaluate her for special education eligibility, and not to hold an eligibility determination IEP meeting. A Prior Written Notice (“PWN”) is required whenever Respondent proposes or, as in this case,refuses “to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.” 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); N.C. Gen. Stat. § 115C-109.5(a). The Prior Written Notice should have contained an explanation of the reasons for Respondent’s refusal to refer as well as information about the 1-year deadline for contesting the decision. 20 U.S.C. § 1415(c). Regardless of whether all team members agree to eligibility, WCPSS still must provide notice as it “allows the parent time to fully consider the change and determine if he/she has additional suggestions, concerns, questions, and so forth.” *Letter to Lieberman*, Office of Special Education and Rehabilitative Services (Aug. 15, 2008).
5. It is undisputed that during the 2019-2020, 2020-2021, and 2021-2022 school years Respondent did not issue any Prior Written Notices of its unilateral decisions not to refer Student for IDEA eligibility.
   * 1. **Whether Respondent was required to provide a *Handbook of Parents’ Rights* (“*Handbook*”) under the IDEA (“Procedural Safeguards”); and, if so Respondent provided Petitioners a *Handbook of Parents’ Rights* under the IDEA?**
6. Per the conclusions above in in subsection 1(b), Respondent was required to provide Petitioners with the IDEA Procedural Safeguards at various times during the 2019-2020, 2020-2021 school year and at the beginning of the 2021-2022 school year but failed to do so.
7. On February 8, 2018, Parent received a *Handbook of Parents’ Rights* at the IEP referral meeting but receipt of a *Handbook* in 2018 did not relieve Respondent of its future obligations to provide both Parent and Student with copies of the Procedural Safeguards. In 2018, Student was a minor so she would not have received a *Handbook.* Parent would have received it in her parental capacity.A school district may not abdicate its responsibility to provide the Procedural Safeguards merely because it may have provided them in the past to the parent. *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F.Supp.2d 918, 948 (W.D. Tex. 2008) (finding the district’s provision of the procedural safeguards to the parents on six (6) prior occasions insufficient to meet its duty to give the parent another copy upon request for an initial evaluation). Moreover, distribution of the Section 504/ADAA procedural safeguards[[63]](#footnote-64) at Section 504 meetings is irrelevant to provision of the IDEA Procedural Safeguards.
8. **Procedural Violations**
9. “In matters alleging a procedural violation, the hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (i) impeded the child’s right to a free appropriate public education; (ii) significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents’ child; or (iii) caused a deprivation of educational benefits.” 20 U.S.C. § 1415(f)(3)(E)(ii); N.C. Gen. Stat. § 115C-109.8(a)
10. Based on the Findings of Fact, stipulations, sworn testimony, and other evidence in the record, the Undersigned concludes Respondent committed numerous procedural violations that caused substantive harm to Student These violations significantly impeded both Parent and Student meaningful participation in the IDEA process, caused educational harm to Student, and resulted in a denial of free and appropriate public education to Student In addition, Respondent’s failure to conduct the eligibility determination process substantively violated Student right to a free and appropriate public education.
11. **Substantive Violation - “Eligibility Issue”**
12. For the substantive IDEA eligibility violation, the Parties proposed different issues as follows:

***Respondent’s Statement of Issue:***

* + 1. If Respondent was required to conduct an IDEA Referral Meeting, either due to parent referral or Respondent’s own reasonable suspicion, on any given date (the “Alleged Missed Initiation Date”); and if at an eventual referral meeting a reasonable period after the Alleged Missed Initiation Date, Respondent was required to have decided to evaluate Student – based on the information provided to it – in certain suspected areas of disability; and if so, at the eventual Eligibility Meeting following the evaluations, whether the data collected through the evaluation process of Student’s suspected disabilities would have shown that Student met the eligibility criteria under the IDEA prior to placement at Wilderness Program?
    2. If so, whether Student continued to meet the Eligibility Criteria prior to the placement at Wilderness Program?
    3. Whether Respondent denied Student a free appropriate public education (FAPE) under the IDEA?

***Petitioners’ Statement of Issue:***

* + - * 1. If Respondent had reason to suspect or was required to initiate the referral process, whether Student would have met the eligibility criteria and found eligible for an IEP under the IDEA based on the information available or that would have been available through the referral and evaluation process prior to placement at Wilderness Program or Private Academy?

1. Although the Parties worded the Eligibility Issue differently, it boils down to this – based on the information which would have been available after completion of the evaluation process would Student have met IDEA eligibility and be entitled to an IEP any time before her placement at Wilderness Program and before her placement at Private Academy? The answer to both questions is: Yes.
2. There were numerous “Missed Initiation Dates” during the relevant period. Respondent had sufficient reason to suspect Student was a child with a disability and had referral and parent referral requests during the 2019-2020 school year which were overlooked because of the COVID-19 pandemic. At the earliest, Respondent should have initiated the referral and evaluated Student no later than the end of the 2019-2020 school year. The IEP team should have included Student and her parents along with the requisite school staff, not just the school counselor and the intervention coordinator. 20 U.S.C. § 1414(d)(1)(B). The most recent Psychoeducational Evaluation was from 2012, so the IEP team should have conducted a new Psychoeducational Evaluation for consideration of Student’s eligibility and not just looked at Dr. Munt’s letter and her grades. 20 U.S.C. § 1414(b). At the eligibility meeting, the IEP team would have had to consider the strengths of Student the concerns of her parents, the results of the most recent evaluation, and Student’s academic, developmental, and *functional* *needs*. 20 U.S.C. § 1414 (d)(3)(A).
3. A child is eligible under the IDEA if she has at least one of the thirteen (13) enumerated categories of disabilities and “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8(a)-(b). Special education “means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.” 20 U.S.C. § 1401(29).

Although nothing in the IDEA requires that children be classified by their disability, there are two (2) categories of disabilities applicable in this case—Emotional Disturbance (“ED”) and Other Health Impairment (“OHI”). 20 U.S.C. §§ 1401(3); 1412(a)(3)(B). To be eligible for an IEP, Petitioners must prove three (3) prongs. First, that Student had a disabling condition. Second, that the disability adversely affected her educational performance either academically or functionally. Third, that she needed specially designed instruction to meet her unique needs caused by her disabling condition(s). When considering the need for specially designed instruction, the IEP team must consider the child’s academic, developmental, and functional[[64]](#footnote-65) needs. 20 U.S.C. § 1414(d)(3)(A)(iv) (2004).

1. At the initial IEP meeting and reviewed at least annually thereafter, an IEP is developed by an IEP team which must include the parents and may include the child if appropriate. An IEP is an education plan tailored to a child’s unique needs that is designed by the school district in consultation with the child’s parents after the child is identified as eligible for special-education services. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d). The IEP must include present levels of the child’s academic achievement and *functional performance* including how the child disability affects the child involvement and progress in the general education curriculum as well as a statement of measurable annual goals, including academic and *functional goals*. 20 U.S.C. § 1414(d)(1)(A)(i). In addition, the IEP must include any related services based on peer-reviewed research, supplemental aids and services, needed for the child to advance appropriately in obtaining the goals as well as accommodations in the general classroom. 20 U.S.C. § 1414(d)(1)(A)(i)(IV).
2. Since Student was over 16 years of age, appropriate measurable postsecondary goals related to training, education, employment must have been included in her IEP including transition services. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa&bb). Most significantly, beginning no later than one year before Student reached the age of majority, her IEP must have included a statement that she had been informed that per Section 1415(m) Parent’s rights would transfer to Student when Student turned 18 years old. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(cc).
3. With respect to Student’s need for special education Respondent argues that: 1. Student had no academic deficits as evidenced by her high grades, or 2. if she did, her substance abuse, not her disabilities, caused her academic decline. Addressing Respondent’s first argument, Respondent has already admitted that Student qualified for Section 504 services. In the October 22, 2020 504 Plan, Respondent acknowledged that, despite her high grades, Student had the disabling conditions of ADHD, depression, and anxiety which adversely affected her educationally such that she required Section 504 accommodations to be able to access her education. For Section 504 eligibility, a student must have a physical or mental impairment which substantially limits one or more of the person’s major life activities. Section 504 of the Rehabilitation Act of 1973 (“Section 504”), 29 U.S.C. § 705(20)(B)(i). This means Student met the first 2 prongs for Section 504 eligibility with one or more disabling conditions. *See also* Stip. Ex. 323 p 001899.

***Other Health Impairment (“OHI”)***

1. It is not disputed that Student has ADHD-Combined Type which is a qualifying disability under the category of Other Health Impairment (“OHI”) if it adversely affected her education.  20 U.S.C. § 1401(3)(A)(i); 34 C.F.R. § 300.8(c)(9)(i). The IDEA defines OHI as:

having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

1. Is due to chronic or acute health problems such as . . . attention deficit hyperactivity disorder . . . and
2. Adversely affects a child’s educational performance.
3. C.F.R. § 300.8(c)(9).
4. According to WCPSS, Student’s ADHD did not adversely affect her performance, instead “the concerns Parent and Student raised from September 14-30, 2020 emails, were attributable to medication management concerns only” because “[t]hat was all that was communicated to Respondent.” Resp’t Pro. Fin. Dec. p 44. As stated above, Student qualified for a 504 Plan because her ADHD adversely affected her educationally. Medication management was one, but not the only, concern raised by Petitioners at the beginning of the 2020-2021 school year and prior school years. Even if Student’s medication management was the only concern, the efficacy, or lack thereof, of Student’s medication adversely affected Student’s functional abilities to concentrate, focus, and complete her schoolwork. WCPSS is prohibited from requiring Student to take a controlled substance to control the manifestations of her disabling conditions in order for her to attend school, receive an evaluation, or receive services under the IDEA. 20 U.S.C. § 1412(a)(25); 34 C.F.R. § 300.174. At the beginning of her 2019-2020 school year and repeatedly throughout the 2020-2021 school year, Petitioners complained to both WCPSS’s teaching staff and school counselor about medication efficacy issues yet none of the staff recognized these concerns warranted an eligibility determination.
5. Despite conceding that medication management was an ongoing issue at the beginning several school years, knowing that Student had a new diagnosis of depression, was on new medication at the beginning of the 2020-2021 school year for her depression, and the ineffectiveness of Student’s ADHD medication, Respondent did not even reconvene a Section 504 meeting until after suggested by the Parent. Nor did Respondent initiate an IEP referral to discuss how Student’s mental health and medication status impacted her ability to access the general curriculum.

### ***Emotional Disturbance (ED)***

1. An alternative category offered by Petitioners is Emotional Disturbance (ED). Respondent disputed that Student’s mental health diagnoses met this category too. According to the IDEA regulations, Emotional Disturbance means:

a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:

* + - * 1. An inability to learn that cannot be explained by intellectual, sensory, or health factors.
        2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
        3. Inappropriate types of behavior or feelings under normal circumstances.
        4. A general pervasive mood of unhappiness or depression.
        5. A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.8(c)(4)(i).

1. The Section 504 drafted by WCPSS evidenced that Student’s anxiety and depression adversely affected her educationally. The preponderance of the evidence through Student’s mental health providers and the only qualified expert witness opinion proved that Student’s depression and anxiety disorder met at least one or more of the characteristics of ED and were exhibited over a long period of time and to a marked degree.

***Student’s Need for Specially Designed Instruction***

1. The real dispute is whether Student needed specially designed instruction. Specially designed instruction means “adapting, as appropriate to the needs of an eligible child . . . , the content, methodology, or delivery of instruction – (i) to address the unique needs of the child that result from the child’s disability; and (ii) to ensure access of the child to the general curriculum so that the child can meet in the educational standards with in the jurisdictional of the public agency that apply to all children. 34 C.F.R. § 300.39(b)(3). Special education can include related services such as psychosocial services, therapeutic recreation, counseling services, and medical services for diagnostic or evaluation purposes, 34 C.F.R. § 300.34, as well as supplemental aides, services, and supports in the general classroom. 34 C.F.R. § 300.42.
2. While she attended School, the school staff provided Student *de facto* specially designed instruction through their significant modification of the delivery and methodology of all instruction because of the COVID-19 pandemic not in an attempt to meet Student’s needs. Her mother also provided one on one specially designed instruction and related services to address her functional needs. Only with this combination of modified coursework, grading, instructional adaptation, and related services was Student able to partially access the general curriculum. But this was a poor substitute for Student’s actual needs and not individualized to promote her functional growth.
3. “The essential function of an IEP is to set out a plan for pursuing academic and functional advancement.” *Endrew F.*, 580 U.S. at 399. “A focus on the particular child is at the core of the IDEA. The instruction offered must be speciallydesigned to meet a child’s unique needs through an individualized education program. “[E]ducational benefit is not limited to academic needs but includes the social and emotional needs that affect academic progress, school behavior, and socialization.” *Cnty. of San Diego v. California Special Educ. Hearing Off.*, 93 F.3d 1458, 1467 (9th Cir. 1996). A student with a strong educational performancemay still qualify for special education and related services based on social-emotional needs orattention deficits. *See Indep. Sch. Dist. No. 283 v. E.M.D.H.,* 960 F.3d 1073, 1082 (8th Cir. 2020). Specially designed instruction also includes accommodations that address a child’s unique needs and that ensure access to the general curriculum. 34 C.F.R. § 300.39(b)(3).
4. Undeniably, based upon her academic record and evaluations, Student was a considerate, intelligent, and hard-working young woman. Despite that, WCPSS must still consider all of Student’s “unique circumstances.” *Endrew F.*, 580 U.S. at 404. Just because a student is “bright doesn’t mean [she] doesn’t have a disability” or “need specially designed instruction.” Moreover, just because Student was a junior in high school who has never been found eligible for an IEP, does not mean that she did not need specially designed instruction because of her current unique circumstances. In North Carolina, FAPE is required for all eligible children ages 3 through 21 who have not graduated from high school. N.C. Gen. Stat. § 115C-107.1(a)(1).
5. Respondent counters that Student did not need specially designed instruction because she met academic standards with good grades, she demonstrated capacity to understand course material, no teacher recommended special education, she exhibited no unusual behaviors warranting special education, and she never received special education prior to graduating high school. Resp’t Pro. Fin. Dec. pp. pp. 121-125. On the one hand Respondent denies Student had any educational deficits, but on the other hand Respondent blames Student’s substance abuse for any educational deficits she might have had. Setting aside the substance abuse issue which merits discussion, none of Respondent’s other arguments are persuasive.
6. With respect to Student’s grades, from the onset, both Congress and the Supreme Court have found that passing marks and advancement from grade to grade is only one factor in determining educational benefit. *Rowley*, 458 U.S. at 207, n.28; 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101. With circular reasoning and without further analysis, Respondent assumes that because of her good grades, Student had demonstrated the capacity to understand course material. Respondent does not take into account the one-on-one assistance provided by Parent and the private tutors. Also, teacher recommendation for special education is not required and not surprisingly absent in this case, since none of Student’s teachers even knew what child find meant. Likewise, prior receipt of special education services is not required for future IDEA eligibility.
7. As to Respondent’s argument that Student demonstrated no unusual behaviors warranting special education, Respondent asserts that “[t]he testimony from Respondent’s teachers was consistent that Student struggled no more than, and in fact typically a lot less than her peers, including those without disabilities. Petitioners offered no evidence to the contrary.” Resp’t Pro. Fin. Dec. p. 123, ¶ 77. On the contrary, Petitioners offered substantial evidence that Student had significant functional and social-emotional deficits. Although Respondent’s teachers could not “see” Student’s educational deficits because of the virtual setting, Student and Parent’s emails, as well as those of her providers graphically portrayed the extent of her needs. Student’s inability to perform in both Wilderness Program and Private Academy corroborated that her disabling conditions continued to adversely affect her educationally such that she needed special education and related services simply to be able to access the general curriculum.
8. Ultimately, Respondent blames any educational need on non-disability related concerns of Student’s substance abuse, conflict in the home, and isolation due to the COVID-19 pandemic. Resp’t Pro. Fin. Dec. p 125, ¶ 82. In reverse order, notably, even after in-person learning was an option, Student was unable to tolerate the classroom setting at the High School and initially at the private programs. There was conflict at home, but such conflict was a result of Student’s educational problems and mental health issues. As to Student’s substance use, Student had used marijuana during her freshman and sophomore school years without any educational impact. Her marijuana use did exacerbate during her junior year which, according to the credible evidence provided through her mental health providers, was her attempt to control her intense mood and emotional dysfunction. Respondent is correct though that the isolation necessitated by the COVID-19 pandemic did adversely impact Student and exacerbated her preexisting conditions.
9. However, substance abuse was not the cause of Student’s functional deficits. When substances were eliminated from the academic equation at both Wilderness Program and Private Academy, Student still exhibited the exact same educational struggles at the private schools as she did at the High School. The private schools provided specially designed instruction and related services were necessary for progress towards eliminating her persistent social-emotional and functional deficits. Once Student got control of her underlying emotional status and learned coping skills, she no longer needed substances to deal with her functional deficits and has not since her enrollment at the private programs.
10. Instead of assuming her substance abuse caused her educational deficits, Respondent could have conducted a diagnostic psychiatric or mental health evaluation of Student to determine the underlying reason for her substance abuse. Medical services can be used for diagnostic or evaluation purposes. 34 C.F.R. § 300.34(a); *see also* 34 C.F.R. § 300.34(c)(5) (medical “services can be provided by a licensed physician to determine the child’s medically related disability that results in the child’s need for special education and related services.”); 34 C.F.R. § 300.34(c)(10) (psychological testing and assessments to determine educational and behavioral needs). The Psychiatric Evaluation of Kirk Simon, M.D. corroborated the other mental health providers’ opinions that Student’s cannabis use was a way for her to try to control her intense emotional states. *See* Stip. Ex. 274.
11. Had WCPSS evaluated Student during the 2019-2020 school year or at the beginning of the 2020-2021 school year, based on the information in Student’s record, she would have met the criteria for IDEA eligibility in both the areas of Other Health Impaired and Emotional Disturbance. Even with the COVID delays necessitated during her 2019-2020 school year, Student should have had an annual IEP in place at least by the beginning of the 2020-2021 school year. 20 U.S.C. § 1414(d)(2)(A). The IEP would have included a statement of Student’s academic and *functional needs*; how Student’s disabling condition affected her involvement and progress in the general educational curriculum; statement of measurable annual goals, including academic and *functional goals* to enable her to make progress in the general education curriculum, and a description of how her progress toward mastery of annual goals would be assessed. 20 U.S.C. § 1414(d)(1)(A).
12. Respondent argues that even if Student was eligible in the Fall semester of the 2020-2021 school year, she no longer met eligibility requirements after the Spring semester of that year because of her improved mental status. Whether Student continued to need special education during the remainder of the 2020-2021 and 2021-2022 school years was an IEP team’s decision to be made only after progress monitoring. During the 2020-2021 school year, school staff would have been required to make periodic reports on her progress so that the goals could be modified accordingly or if eligibility should be reconsidered. 20 U.S.C. § 1414(d)(1)(A)(i)(III). The purpose of progress monitoring is to provide the IEP team with accurate data for adjustments to the goals or present levels of academic and functional performances. Through monitoring, the IEP team determines if a student has mastered his/her IEP goals and continued eligibility. Moreover, anytime while Student had an IEP, WCPSS could have evaluated her to determine her continued eligibility but could not unilaterally change eligibility without conducting an evaluation first.[[65]](#footnote-66) 20 U.S.C. § 1414(c)(5)(A). Once Student had an IEP, the IEP team would have decided Student’s continued eligibility. Respondent’s hand-picking of quotes from emails/medical records is not sufficient to prove Student did not need special education the remainder of her junior year. More convincing evidence is that within weeks of her leaving School, a comprehensive Psychoeducational Evaluation proved Student’s continual need for specially designed instruction.
13. The preponderance of the credible evidence from Student’s mental health providers, the testimonies of Parent and Student, Dr. Leach’s expert opinion, and the evidence in the private school records, proved that when at the High School during the 2019-2020 through 2020-2021 school years Student’s episodic anxiety intensified leading to significant depression and greater levels of intense mood dysfunction and emotional reactivity which made academic achievement overwhelming to the point Student became suicidal. *See* Stip. Ex. 274 p 001117. Petitioners also proved by a preponderance of the evidence that Student continued to be a child with a disability eligible for special education and related services through her placement at Wilderness Program. There it was discovered that she was more dysfunctional than first thought which necessitated the Private Academy placement where she continued to need specially designed instruction and related services until her graduation.
14. **“Appropriateness of Private School Placements” Issue:**

***Appropriateness of a Private Placement Generally***

1. “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 [private] program is appropriate.” *Wake Cnty. Bd. of Educ. v. S.K. by and through R.K*., 541 F. Supp. 3d 652, 666 (E.D.N.C. 2021) (*citing* 20 U.S.C. § 1412(a)(10)(c); *Carter*, 510 U.S. at 9-10); *see also Burlington,* 471 U.S. at 370–71; 34 C.F.R. § 300.148(c). “These two findings lie at the heart of the statute.” *M.S. ex. rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 325 (4th Cir. 2009) (citing *Carter v. Florence Cnty. Sch. Dist. Four*, 950 F.2d 156, 163 (4th Cir. 1991) and *Burlington*, 471 U.S. at 369)). Petitioners must first prove WCPSS failed to offer Student a FAPE or they are not entitled to any reimbursement no matter how appropriate the private school placements.
2. WCPSS violated Student’s right to a FAPE because it did not find her eligible for an IEP—the “primary vehicle” for implementing the FAPE entitlement under the IDEA. *Honig v. Doe*, 484 U.S. 305, 311 (1988). Student’s IEP should have been in place at the beginning of the 2020-2021 school year. 20 U.S.C. § 1414(d)(2). “[W]hen a child requires special-education services, a school district’s failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP.” *Forest Grove Sch. Dist.*, 557 U.S. at 238-239.; *Lauren G. ex rel. Scott G. v. W. Chester* *Area Sch. Dist.*, 906 F. Supp. 2d 375, 391 (E.D. Pa. 2012) (citing *Forest Grove*, 557 U.S. at 238-39) (holding the district violated the IDEA’s child find provision when it was aware of the student’s serious emotional disability but found her ineligible for an IEP); *see also* *Leggett v. Dist. of Columbia,* 793 F.3d 59, 72 (D.C. Cir. 2015) (where the private school “was the only placement on the record that could have provided [the child] with an education that met her identified needs” the parents were entitled to reimbursement); *M.G. v. Dist. of Columbia*, 246 F. Supp. 3d 1, 10 (D.C. Cir. 2017) (“because there was no appropriate IEP for the student by the start of the school year the court assessed the appropriateness of the private school placement based on the student’s unique needs identified by the student’s psychologist”).
3. “[W]hen a public school system has defaulted on its obligations under the Act, a private school placement is ‘proper under the Act’ if the education provided by the private school is ‘reasonably calculated to enable the child to receive educational benefits,’ *Rowley*, 458 U.S. at 207; s*ee Tice ex. rel. Tice v. Botetourt Cnty. Sch. Bd.*, 908 F.2d 1200, 1208 (4th Cir. 1990) (standard is whether private placement “was proper to meet the Act’s educational goals”). *Carter*, 950 F.2d at 163; *M.G.*, 246 F. Supp. 3d at 12 (finding the private school was “oriented toward enabling [student] to obtain an education”). A private placement must provide specially designed instruction to meet the child’s unique needs. 20 U.S.C. § 1401(29). The special education and related services provided by the private school meets the IDEA’s remedial purpose when they are “designed to meet [the child’s] unique needs and prepare [the child] for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A).
4. “A preponderance of the evidence standard applies to the question of a placement's appropriateness.” *O.V. v. Durham Pub. Sch. Bd. of Educ.,* No. 1:17CV691, 2021 WL 1430768, at \*59; *see* 20 U.S.C. § 1415(i)(2)(C)(iii). “No one factor is necessarily dispositive in determining whether parents’ unilateral placement is ‘reasonably calculated to enable the child to receive educational benefits.’” *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 364 (2d Cir. 2006)), *rev’d on other grounds*, 694 F.3d 167 (2d Cir. 2012) (quoting *Rowley*, 458 U.S. at 188-89)); *see also S.K.,* 2021 WL 2148660, at \*9 (citing *M.S.*, 553 F.3d at 324) (internal quotation and citation omitted). “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).
5. “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. But “[t]he key consideration is whether the placement is appropriate under the IDEA, not whether it is the least restrictive.” *Q.C.C. v. Dist. of Columbia*, 164 F. Supp. 3d 35, 49 (D.D.C. 2016) (internal citations omitted). “[T]he Act’s preference for mainstreaming was aimed at preventing *schools* from segregating students from the general student body” and was “not meant to restrict *parental* options when the public schools fail to comply with the requirements of the Act.” *Id.* (quoting *Carter*, 950 F.2d at 160).

***Inextricably Intertwined Emotional, Mental Health, and Educational Needs***

1. In addition to the legal rubric above, this case requires a separate determination about the appropriateness of a residential school placement versus a day school placement. School districts are responsible for the costs of a disabled child’s placement in a residential program if the placement “is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.” 34 C.F.R. § 300.104 (authority 20 U.S.C. §§ 1412(a)(1); 1412 (a)(10)(B)).
2. Petitioners asserted that Student needed the wraparound services provided at the residential placement to make educational progress. Respondent counters that Student only needed residential placement to treat her substance abuse. When a student’s social, emotional, medical, mental health, and educational problems are “so intertwined ‘that realistically it is not possible for the court to perform the Solomon-like task of separating them,’” a residential academic program is necessary. *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 694 (3d Cir. 1981) (quoting *North v. Dist. of Columbia Bd. of Educ.*, 471 F. Supp. 136, 141 (D.D.C. 1979)). The Fourth, Sixth, and D.C. Circuits have adopted the “inextricably intertwined” standard set forth in *Kruelle.*
3. A residential placement is necessary “in those situations in which the educational need clearly stems for the same source as the disability, the issues resulting in the overall need for a residential placement may be so intertwined with other needs that they cannot be separated, and the school system is responsible for residential placement.” *North*, 471 F. Supp. at 141. When the “consistency of programming and environment is critical to [the student’s] ability to learn,” there is a necessary “link between the supportive service or educational placement and the child’s learning needs.” *Kruelle*, 642 F.2d at 694. “[T]he unseverability of such needs the very basis for holding that the services are an essential prerequisite for learning.” *Kruelle*, 642 F.2d at 694. Courts must consider the “unique needs” of the student and make a factual determination of whether the “medical, social, or emotional problems that are segregable from the learning process” for the student to make progress when compared with the proposed placement. *See, e.g.,* *Burke Cnty. Bd. of Educ. v. Denton By and Through Denton*, 895 F.2d 973, 980 (4th Cir. 1990) (citing *Kruelle*, 642 F.2d at 692-93).
4. In a case like this when a district has failed to offer an IEP, the analysis of whether a residential program is necessary changes, as there was no alternative placement offered for the parents’ consideration. *See, e.g., Gadsby by Gadsby v. Grasmick*, 109 F.3d 940, 950-51 (1997) (finding there was no IEP in place at the beginning of the school year and analyzing the private school under *Burlington* and *Carter*); *Tice By and Through Tice v. Botetourt Cnty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990) (differentiating its analysis between services provided before and after an IEP was in place as “it is beyond cavil” at the time there was no IEP in place, “[the student] was not receiving a FAPE”). The analysis is the similar when a district has failed to offer a FAPE. *A.K. ex rel J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007) (finding the district’s “offer of an unspecified ‘private day school’ was essentially no offer” and remanding to the district court to determine the appropriateness of the private school).[[66]](#footnote-67)
5. There is no dispute that Respondent did not offer Student an IEP; therefore, like the parents in *Gadsby, Tice, Leggett,* and *Babb*, Student’s parents were faced with two options: the school’s choice of inaction or the choice of a residential program with counseling and educational services, which resulted in Student receiving much needed psychological care combined with daily educational programming. Respondent offered no alternative day program for comparison.
6. Based on the Findings of Fact, the documentary evidence in Student’s mental health records; private school records; the live and deposition testimonies of 2 clinical psychologists; 2 treating therapists; the Psychiatric Evaluation of Kirk Simon, M.D.; the Psychoeducational Evaluation of Tess Collett, Ph.D.; and the expert opinion of Debra Leach, Ed.D., BCBA, Petitioners have proved by more than a preponderance of the evidence that Student’s educational needs were “inextricably intertwined” with her mental health needs. Thus, a residential placement was “necessary” for Student to receive specially designed instruction and related services designed to meet her “unique needs.”

***Reimbursement for Unilateral Parental Private School Placements Generally***

1. After proving a FAPE violation, for reimbursement to be available, Petitioners must also prove that their unilateral private placement is appropriate to meet the student’s needs. *See M.S.,* 553 F.3d at 324 (quoting *Carter*, 950 F.2d at 163) (holding that like an IEP, a parental placement is appropriate if it is ‘reasonably calculated to enable the child to receive educational benefits’).
2. Parents who “unilaterally change their child’s placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk.” *Carter*, 510 U.S. at 15. School districts that “want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State’s choice. This is IDEA’s mandate, and school officials who conform to it need not worry about reimbursement claims.” *Carter*, 510 U.S. at 15.
3. Congress intended the Act “result in maximum benefits to handicapped children and their families,” S. Rep. No. 168, 94th Cong., 1st Sess. 6, *reprinted in* 1975 U.S. Code Cong. & Admin. New 1425, 1430, therefore, “the Act’s remedial provision . . . is a broad grant of equitable power designed to provide courts maximum flexibility in effectuating the statutory objectives.” *Carter*, 950 F.2d at 164 (quoting *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 919 (1st Cir. 1983)); *see, e.g., Forest Grove,* 557 U.S. at 245 (“A reading of the Act that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress’ acknowledgement of the paramount importance of properly identifying each child eligible for services.”); *Burlington*, 471 U.S. at 369 (“appropriate [relief] must be determined in light of the Act’s broad purpose of providing children with disabilities a FAPE through publicly funded private-school placements when necessary”).
4. “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) (“The test for parents’ private placement is not perfection.”)); *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 129 (2d Cir. 1998) (“likely to produce progress, not regression”). For the time a student does not have an IEP, reimbursement “hinges on whether [the residential placement] was proper to meet the Act’s educational goals.” *Tice*, 908 F.2d at 1208 (remanding to the district court for further factual findings regarding whether the placement was “proper under the Act” but excluding solely medical expenses of psychiatric hospital from reimbursement). In sum, “[a] parental placement is appropriate if ‘the private education services obtained by the parents were appropriate to the child’s needs.’” *Sumter Cnty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 488 (4th Cir. 2011) *citing* *M.S.*, 553 at F.3d at 325.
5. Moreover, Petitioners are not barred from reimbursement where a private school they choose does not meet the IDEA definition of a FAPE. A private placement need not provide certified special education teachers or an IEP for the disabled student or attain state education standards. *Carter*, 510 U.S. at 13-14; *R.E. v. N.Y.C. Dept. of Educ.*, 785 F. Supp. 2d 28, 44 (S.D.N.Y. 2011); *see also* *Jennifer D. as Parent of Travis D. v. N.Y.C. Dep’t of Educ.*, 550 F. Supp. 2d 420 (S.D.N.Y. 2008) (holding that parents presented sufficient evidence of appropriateness of the private placement when several witnesses, including a professional working with the student, explained why the program met the student’s educational needs).
6. “The concept of education under the Act clearly embodies both academic instruction and a broad range of associated services traditionally grouped under the general rubric of ‘treatment.’ Any attempt to distinguish academics from treatment when defining ‘educational placement’ runs counter to the clear language of the Act.” *Babb*, 965 F.2d at 109 (citing to *Tilton v. Jefferson Cnty. Bd. of Educ.*, 705 F.2d 800, 803 (6th Cir. 1983), and remanding to district court to determine “the expenses that are covered under the Act that are to be reimbursed to [the parents]”).
7. Which this legal rubric in mind, the appropriateness of the private school placements must be examined.

**a. Whether Student’s unilateral parental placement at Wilderness Program was appropriate, as defined by IDEA’s implementing regulations and interpreting case law?**

1. The appropriateness of the Wilderness Program placement cannot be considered because Petitioners failed to raise an extended school year (“ESY”) claim in either the Original or Amended Petition and Respondent has not agreed otherwise to allow such a claim. 20 U.S.C. § 1415 (f)(a)(3)(B).
2. ESY are services, provided beyond a normal school year, necessary for the child to receive a FAPE. Burke Cnty. Bd. of Educ. v. Denton, 895 F.2d 973, 980 (4th Cir. 1990); 34 C.F.R. § 300.106(a)(2). Typically, ESY services are provided during the summer months. In this case Student did not need recoupment of course credits. Instead, she needed a summer wilderness placement to “reset her brain” and isolate her from access to substances. While the Wilderness Program was certainly beneficial to Student in many respects, Petitioners failed to raise the issue of ESY in either its Original or Amended Petition. As a result, even though Respondent did not seek dismissal of this claim, the Undersigned is barred from considering claims not raised in the Petitions. 20 U.S.C. § 1415(f)((3)(B); 34 C.F.R. § 300.511; N.C. Gen Stat. § 115C-109.6.
3. As an evidentiary matter, however, the interim Wilderness Program placement proved Student’s underlying educational and executive functioning deficits were caused by her ADHD, depression, anxiety, and low working memory not because of her family conflict or substance abuse. Wilderness Program was the perfect setting for isolating the real causes of Student’s functional deficits. There Student was isolated from any family discourse, unable to access cannabis and alcohol, not on her problematic ADHD medications, without Parent’s daily academic support, and without School teachers’ academic “grace and flexibility.” Yet, still without these educationally obstacles and academic crutches, Student still had “brain fog” and difficulties performing educationally.
4. Wilderness Program was expensive though costing Student $10,000.00 from her 529 college savings fund and her parents $42,793.91 for a total of $52,793.91. But Wilderness Program paid dividends and proved that Student needed an IEP while she was at the High School and, after she left Wilderness Program, a therapeutic program with wrap-around mental health and academic programming. Moreover, Wilderness Program prepared Student to transition to her next placement at Private Academy where Student would receive even more support to achieve long-term goals and practice internalizing the tools she learned at Wilderness Program. Wilderness Program’s value as an ESY service is not recoverable but that loss is overshadowed by Wilderness Program’s real worth - proof that Student was not ready to return to the High School but instead needed a private placement like Private Academy. However, Petitioners cannot meet their burden of proof Wilderness Program was an appropriate private school placement because this issue cannot be considered.

**b. Whether Student’s unilateral placement at Private Academy was appropriate, as defined by IDEA’s implementing regulations and interpreting case law?**

1. As shown in the Findings of Fact *supra*, Private Academy provided Student with specially designed instruction through one-on-one academic support and an extensive Master Treatment Program designed to assist Student develop her academic and functioning skills so she could access the general curriculum and make educational progress. The program at Private Academy addressed Student’s academic, social, and functional needs on a daily basis. Residential placement was necessary because Student’s educational needs were inextricably intertwined with her disabilities.
2. In addition to specially designed instruction, Private Academy provided Student the related services of counseling, parent counseling and training, psychological services, art therapy (recreation), and social work. These services were designed and provided to Student by educators and therapists with the assistance in implementation by the family teachers twenty-four (24) hours each day.
3. The Private Academy placement was reasonably calculated to enable Student to receive educational benefits. While at Private Academy, Student progressed from being suicidal, emotionally dysfunctional, “stuck in her head,” and unable to access the general curriculum without intensive special education and related services back to a mature capable young woman knowledgeable and able to regulate her functional deficits with minimum educational supports.
4. Based on the Findings of Fact, the documentary evidence in Student’s mental health records; private school records; the live and deposition testimonies of 2 clinical psychologists; 2 treating therapists; the Psychiatric Evaluation of Kirk Simon, M.D.; the Psychoeducational Evaluation of Tess Collett, Ph.D.; and the expert opinion of Debra Leach, Ed.D., BCBA, Petitioners have proved by a preponderance of the evidence that Private Academy was an appropriate private school placement.
   * + 1. The IDEA limits reimbursement to expenses for residential placements to those incurred for special education and related services. *Tice,* 908 F.2d at 1208. Therefore, a determination must be made as to which expenses meet the definition of special education and related services to be reimbursable at either placement. The IDEA defines both specially designed instruction and the related services applicable to this case.

***Specially Designed Instruction***

* + - 1. Special education and related services are provided for a child with a disability to receive FAPE and address the child’s academic and functional deficits. 34 C.F.R. § 300.17(d); 71 Fed. Reg. 46,573 (2006); 20 U.S.C. § 1414(d). Special education is “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability” and may be conducted “in the classroom, in the home, . . . and in other settings.” 20 U.S.C. § 1401(29). It includes adaptation of the content, methodology, or delivery of instruction necessary to ensure Student’s access to the general curriculum. 34 C.F.R. § 300.39(b)(3).
      2. Examples of specially designed instruction include direction from a one-on-one educator, specially designed mental health services, extensive clinical interventions by a school district behavior specialist, “persistent teacher oversight, additional time to complete classwork or tests, shortened assignments, discretion to leave the classroom at will, or the option to complete classwork or tests in other rooms or with one-on-one support.” *L.J. v. Pittsburgh Unified District*, 835 F.3d 1168 (9th Cir. 2016).

***Related Services***

* + - 1. Related services include “transportation, and such developmental, corrective, and other supportive services (including . . . psychological services, . . . recreation, including therapeutic recreation, social work services, . . . counseling services, including rehabilitation counseling, and medical services . . . for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education.” 20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a) (identifying parent counseling and training as additional related services).
      2. Counseling services are “services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.” 34 C.F.R. § 300.34(c)(2). Medical services are “services provided by a licensed physician to determine a child’s medically related disability that results in the child’s need for special education and related services.” 34 C.F.R. § 300.34(c)(5). Parent counseling and training includes “assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents acquire the necessary skills that will allow them to support the implementation of their child’s IEP.” 34 C.F.R. § 300.34(c)(8).
      3. Psychological services “includes: (i) Administering psychological and educational tests, and other assessment procedures; (ii) Interpreting assessment results; (iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning; (iv) Consulting with other staff members in planning school programs to meet the special educational needs of children as indicated by psychological tests, interviews, direct observation, and behavioral evaluations; (v) Planning and managing a program of psychological services, including psychological counseling for children and parents; and (vi) Assisting in developing positive behavioral intervention strategies.” 34 C.F.R. § 300.34(c)(10). This may include “strategies to facilitate social-emotional learning.” 71 Fed. Reg. 46,573 (2006).
      4. Social work services in schools “includes . . . group and individual counseling with the child and family; working in partnership with parents and others on those problems in a child’s living situation (home, school, community) that affect the child’s adjustment in school; mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and assisting in developing positive behavioral intervention strategies.” 34 C.F.R. § 300.34(c)(14). The provision of positive behavioral support interventions and counseling is not limited to school psychologists or school social workers, as these may be provided by other qualified personnel consistent with State requirements. 71 Fed. Reg. 46,569, 46,574 (2006).
      5. Recreation “includes – (i) Assessment of leisure function; (ii) Therapeutic recreation services; (iii) Recreation programs in schools and community agencies; and (iv) Leisure education.” 34 C.F.R. § 300.34(c)(11). Recreation may “include services that restore, remediate, or rehabilitate to improve functioning and independence, and reduce or eliminate the effects of illness or disability.” 71 Fed. Reg. 46,574 (2006).

**c. Reimbursement of Private Programs**

* + 1. **Whether Petitioners are entitled to any reimbursement for tuition and related expenses for Wilderness Program or Private Academy’s private school placements and, if so, how much?**

***Reimbursement for Wilderness Program***

1. Petitioners cannot recover reimbursement for tuition and related services for the Wilderness Program private placement.

***Reimbursement for Psychoeducational Evaluation Conducted by Dr. Collett***

1. Petitioners are, however, entitled to reimbursement of Dr. Collett’s July 4, 2020 Psychoeducational Evaluation conducted while Student was at Wilderness Program as an independent educational evaluation.
2. A parent has a right to an independent educational evaluation of a child with a disability at public expense if the parent disagrees with an evaluation obtained by the public agency. 34 C.F.R. 300.502(b)(1). If a public agency defaults on its obligation to evaluate a child to determine the child’s eligibility for special education, and the parent disagrees with the agency’s adverse evaluation decision, 34 C.F.R. 300.502(b) does not preclude a parent’s entitlement to an independent educational evaluation at public expense in this situation. Although Respondent has challenged the cost of the evaluation, it has not otherwise contested the evaluation because it does not meet WCPSS’s criteria for similar evaluations. 34 C.F.R. 300.502(b)(2). Therefore, Parent is entitled to reimbursement of Dr. Collett’s independent evaluation.
3. Even if Parent was not entitled to reimbursement of the independent evaluation, Respondent would still be required to consider it for eligibility purposes if the evaluation met agency criteria. 34 C.F.R. 300.502(c)(1). Prior to its unilateral determination that Student was not eligible for special education, Respondent was required to evaluate Student in all suspected areas of disabilities. The purpose of the initial eligibility evaluation was to assist in the development of her IEP. This included determining Student’s present levels of academic and *functional* performance, assessing cognitive and behavioral factors, establishing progress monitoring procedures, determining accommodations/supports needed in the classroom, the related necessary services, and other special education recommendations. 20 U.S.C. § 1414(b)(2). Dr. Collett’s evaluation was comprehensive and assessed Student in “all areas of suspected disability.” 20 U.S.C. 1414(b)(3)(B). Both Wilderness Program and Private Academy used Dr. Collett’s evaluation extensively in developing Student’s educational programming
4. As Respondent defaulted on its obligation to conduct its own psychoeducational evaluation, reimbursement for Petitioners’ private independent evaluation in the amount of $5,600.00 is appropriate.

***Reimbursement for Private Academy***

1. Private Academy was an appropriate private school placement and Parent is entitled to reimbursement for tuition, room and board, related services, and transportation expenses. Parent is not entitled to reimbursement of Student’s medical expenses except for the initial psychiatric evaluation which is a related medical service for diagnostic purposes. 20 U.S.C. § 1401((26)(A) Although Petitioners are entitled to reimbursement of transportation expenses, they are not entitled to reimbursement of expenses which were not properly documented. Petitioners are entitled to reimbursement in the amount of $127,020.00 for the Private Academy placement.
2. **“Equitable Considerations” Issue:**
3. **Whether the tuition reimbursement request should be reduced or denied based on 20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d)?**
4. The IDEA provides three scenarios where a reimbursement claim may be reduced or denied: (1) a parent fails to give appropriate notice at an IEP Team meeting or at least ten business days prior to removing the students from the public school that the parent rejects the proposed placement and intends to enroll the student in a private school at public expense (the “10-day notice”); (2) if prior to the removal from public school, the LEA informs the parents of its intent to evaluate the child, but the parents do not make the child available for the evaluation; or (3) a judicial finding of unreasonableness with respect to the actions taken by the parents. 34 C.F.R. § 300.148(d).
5. “When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district’s opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education is warranted.” *Forest Grove,* 557 U.S. at 247. Parents’ actions may be considered unreasonable where they refuse to cooperate with the school district in developing an appropriate placement for their child. *See, e.g.*, *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 71–72 (3d Cir. 2010) (finding the equitable considerations weighed against the parents because the parents prevented the school district from timely developing an appropriate IEP by delaying the continuation of the IEP meeting and cancelled an evaluation) *C.G. and B.S. v. Fire Town Cmty. Sch. Dist.*, 513 F.3d 279, 287–89 (1st Cir. 2008) (finding the parents’ actions unreasonable where the parents disrupted and prevented the development of an IEP). It is not unreasonable for a parent to only consider one private placement when “no alternative” beside an inappropriate placement “was ever offered for the parents’ consideration.” *R.L. v. Miami-Dade Cnty Sch. Bd.*, 757 F.3d 1173, 1990-91 (11th Cir. 2014). When a school district fails to listen to the concerns raised by parents and fails to “offer[] for the parents’ consideration” any alternative placement, other than one that is inappropriate, the equities weigh against the school district—not the parents. *Id.*
6. In the present case, Petitioners did not interfere with the evaluation process, as Respondent never—even after multiple Parent requests for an evaluation—attempted to evaluate Student for services under the IDEA. Stip. 13. Thus, this is not a basis for a discretionary reduction or denial of reimbursement. Also, there is no evidence in the record to support Petitioners acted unreasonably. They did not interfere with or somehow delay the IEP process, as Respondent never scheduled an IEP meeting during the relevant period.
7. However, Petitioners did not comply with the 10-business day notice requirement. Father notified Respondent on August 13, 2021, that Student would not be returning to the High School for the 2021-22 school year, and that the Section 504 Plan was insufficient to meet her needs. Stip. 46. This notice did not comply with the 10-day notice requirement as Student enrolled at Private Academy on August 19, 2021. Although the email implied it did not specially indicate Petitioners intended to seek reimbursement for Private Academy, Counselor admitted that school administrators understood by this email that the parents wanted an IEP. Because Petitioners did not give Respondent the requisite 10-day notice and, barring an applicable exception, the Undersigned has discretion to reduce or deny tuition reimbursement for Private Academy.
8. **Whether any exception for the parent’s failure to provide notice is applicable under 20 U.S.C. § 1412(a)(10)(C)(iv); 34 C.F.R. § 300.148(e)?**
9. The hearing officer has discretion to reduce or deny reimbursement for failure to provide the requisite notice unless there is an applicable exception relieving the parents of the notice requirement. The regulations set forth relevant exceptions to the notice procedures, 34 C.F.R. § 300.138(d)(1), that preclude any reduction or denial of reimbursement for the failure to provide notice. 34 C.F.R. § 300.148(e). These exceptions include where (1) the school prevented the parents from providing notice; (2) the parents had not received a copy of the Procedural Safeguards informing them of the notice requirement; or (3) providing notice “would likely result in physical harm to the child.” 34 C.F.R. § 300.148(e)(1&2).
10. The *Handbook* given to Parent in 2018 did contain the notice requirements for private school placement. *See* Off. Not. Ex. A p 23. However, the IDEA and State law require that a copy of the *Handbook* shall be given to the parents one time a year and upon initial referral. 20 U.S.C. § 1415(d)(1)(A); N.C. Gen. Stat § 115C-109.1. A notice given two years prior to WCPSS’s adverse eligibility decisions was too remote to effectuate proper notice. Parent did not even remember receiving a *Handbook* in 2018. Through counsel, Respondent provided Petitioners a copy of the Procedural Safeguards on December 23, 2021, after Petitioners filed the Original Petition. This notice was too late, as it was sent four (4) months after Father’s email about private placement.
11. Because Respondent failed to comply with its own notice requirements, this exception precludes any reduction or denial of reimbursement for Petitioners failure to provide the 10-day notice before Student’s enrollment in the private program.

**c. Whether Respondent’s actions and inactions warrant a balancing of equities against it?**

1. In balancing the equities, the Undersigned has considered Respondent’s inactions and actions. Before the hearing, Respondent violated the procedural requirements of the IDEA resulting a denial of FAPE to Student. Before and during the hearing, Respondent also violated a sequestration order of this Tribunal and Petitioners’ procedural right to effectively “confront, cross-examine” witnesses. As stated in this Tribunal’s Order [[67]](#footnote-68) regarding the sequestration order Respondent’s misconduct, if legally permitted, may be considered in the balancing of the equities.
2. “Any party to a hearing  . . . shall be accorded the right to present evidence and confront, cross-examine, and compel the attendance of witnesses.” 20 U.S.C. § 1415(h)(2). Yet, on multiple occasions during cross examination of Respondent’s witnesses, Respondent’s Counsel interfered with Petitioners’ cross examination of witnesses. *See e.g.* T vol 7, p 1702:15-18 (Respondent’s Counsel objecting during the cross examination of Physics Teacher); T vol 7, p 1785:10-1790:11 (Respondent’s Counsel objecting during the cross examination of History Teacher); T vol 9, p 2326:8-15 (Respondent’s Counsel objecting during the cross examination of Counselor).
3. Also, under the guise of attorney-client privilege, Respondent’s Counsel threatened to “suspend the hearing” and went so far as to advise the Tribunal he was “going to ask Counselor not to answer the question.” *See e.g.* T vol 7, p 1788:6-12 and T vol 9, p 2326:8-15. Since none of the teachers or counselor were members or agents of the Wake County Board of Education, a local governmental agency, Respondent cannot assert privilege to them. Attorney-client privilege can be asserted for principals, assistant principals, exceptional children’s program directors, and other high level school administrators who are public officials acting on behalf of Wake County Board of Education because they “perform discretionary acts requiring personal deliberation, decision, and judgment.” *R.A. v. Johnson*, 36 F.4th 537, 542 (4th Cir. 2022) (*citing* Farrell v. Transylvania Cnty. Bd. of Educ., 175 N.C. App. 689, 695, 625 S.E.2d 128 (2006) and Gunter v. Anders, 114 N.C. App. 61, 67–68, 441 S.E.2d 167 (1994)).
4. Since Respondent’s misconduct does not appear to have harmed Petitioners as they have prevailed on almost all issues and Petitioners have not cited any legal authority for balancing the equities against Respondent for the misconduct, Respondent’s actions and inactions do not warrant a balancing of equities against it.[[68]](#footnote-69)
5. **“Compensatory Services” Issue:**
6. **Whether compensatory special education or related services are owed, and if so, how much?**
7. “[O]nce a court holds that the public placement violated [the] IDEA, it is authorized to ‘grant such relief as the court determines is appropriate.’” *Carter*, 510 U.S. at 15-16 (quoting 20 U.S.C. § 1415(e)(2)); 20 U.S.C. § 1415(i)(2)(C)(iii)). The IDEA confers “‘broad discretion’ on the court in fashioning an appropriate remedy.” *M.S.*, 553 F.3d at 325 (*quoting* *Burlington*, 471 U.S. at 369). “Courts fashioning discretionary equitable relief under [the] IDEA must consider all relevant factors . . ..”  *Carter*, 510 U.S. at 16. “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)).
8. “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. R.G. v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 309 (4th Cir. 2003).
9. Due to the deficits caused by Respondent’s failure to provide Student the necessary academic and functional services, the Undersigned finds Student needed tutoring during her 2020-2021 school year. Because of the inadequacy of some of Petitioners’ documentation, however, the total amount of reimbursable tutoring expenses is reduced to $647.10 for the 2020-2021 school year.
10. With respect to future compensatory education, Petitioners presented insufficient evidence that Student needed future compensatory services. Moreover, prior to Student’s graduation from a secondary school with a regular high school diploma, WCPSS was required to provide Student with a summary of her academic achievement and functional performance which shall include recommendations on how to assist the child in meeting her postsecondary goals. 20 U.S.C. 1414(c)(5)(B)(ii). Instead, the staff at Private Academy made postsecondary recommendations some of which Student declined to follow.
11. During her stay at Private Academy, Student met all her academic and functional goals and after her graduation she was able to make informed decisions about her future education. Not only did the intensive supports at Private Academy “save” Student’s life, but they also enabled her to pursue postsecondary education. As Student did not express any need for compensatory services, the Undersigned will not impose any on her.

**FINAL DECISION**

**BASED** upon the foregoing **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** as follows:

1. Respondent failed to comply with the procedural and substantive requirements of the IDEA resulting in a denial of FAPE to Student and meaningful participation of both Student and Parent in the eligibility process for special education determination and the development of an appropriate IEP for Student

1. Both Parent and Student had standing to file the Original Petition and the Amended Petition. The 2018 *Handbook on Parents’ Rights* did not contain information about the transfer of parental rights information which was supposed to be contained in the Procedural Safeguards.  Neither Parent nor Student were given copies of the Procedural Safeguards during the 2019-2020, 2020- 2021, and 2021-2022 school years and neither were aware about the transfer of parental rights. Even if they were aware, based on the “Special Rule,” Parent properly acted on Student’s behalf because Student was unable to make informed decisions about her educational needs and rights under the IDEA when the Original Petition was filed.

1. During 2019-2020, 2020-2021, and 2021-2022 school years, Respondent also failed to provide Prior Written Notices to Student and Parent each and every time its school staff made unilateral adverse eligibility decisions.

1. Because Respondent failed to provide Parent and Student copies of the Procedural Safeguards and Prior Written Notices, both mandatory notice obligations under the IDEA, the one-year statute of limitations was not triggered until Petitioners knew or should have known about Respondents’ actions. Even then, the withholding exception still tolled the statute of limitations.

1. Parent and Student both had standing to file the Amended Petition despite the transfer of parental rights provision of the IDEA. Respondent failed to notify Parent or Student of the transfer of parental rights before Student’s 18th birthday which occurred prior to the filing of the Original Petition.  Even though Parent’s parental rights had transferred before Parent filed the Original Petition, Parent had standing because: 1. neither Parent and Student were aware of the transfer of parental rights provision; and 2. IDEA’s “Special Rule” permitted Parent  to file on Student’s behalf because Student could not make informed educational decisions when the Original Petition was filed. The Amended Petition relates back to the filing date of the Original Petition.

1. Also, under the North Carolina Administrative Procedure Act, Parent was an “aggrieved party” entitled to separately file the Original Petition on her own behalf to seek reimbursement of expenses she incurred because WCPSS failed to provide Student a “free” appropriate public education at no cost. Student was properly joined as a Party in the Amended Petition.

1. Respondent received many referrals during the 2019-2020 and 2020-2021 school years, but at a minimum, after receipt of the three written referral requests from Parent, Dr. Dittmer, and Therapist Unwin, Respondent was required to, but did not, hold a referral and/or eligibility IEP meeting with the requisite school staff, Student, and her parents to jointly determine whether to evaluate Student for special education eligibility. Respondent unilaterally, without Student’s or her parents’ participation in the decisionmaking process and without issuance of a Prior Written Notices and the Procedural Safeguards, decided not to evaluate Student as a child with a disability. Had Respondent complied with IDEA and State law, the preponderance of the evidence demonstrated that Student would have been eligible for specially designed instruction in the categories of Emotional Disturbance and Other Health Impairment.

1. With respect to reimbursement of the Wilderness Program, the total amount of reimbursable expenses Petitioners would have been entitled to for this placement were: $57,440.00 for tuition and related expenses, transportation expenses of $3,715.24, a total reimbursement amount of $61,155.24.Because Petitioners did not properly plea the issue of extended school year services (“ESY”) in either the Original or Amended Petition, regardless of the appropriateness or reasons for this placement, the Wilderness Program placement is not reimbursable.

1. The Private Academy placement was an appropriate private placement for Student, and she made appropriate social-emotional, academic, and functional progress at this private school placement. There are no equitable reasons to reduce reimbursement of the cost of this placement, however, deductions have been made for medical and personal expenses which are not reimbursable under the IDEA. Petitioners are entitled to the reimbursable costs of the Private Academy private program in the amount of **$**127,020.00 for tuition and related expenses as well as transportation expenses of $6,388.38 for a total of reimbursement amount of $133,408.38.

1. Petitioners are not entitled to reimbursement for the $4,500.00 consultation fees paid to Dr. Milton Little as this is not a related service under the IDEA.

1. Petitioners are entitled to reimbursement for the costs for the private independent Psychoeducational Evaluation conducted by Dr. Collett in the amount of $5,600.00.

1. As compensatory education, Petitioners are entitled to partial reimbursement for the costs of the private tutoring obtained for Student during the 2020-2021 school year in the amount of $647.10.

1. In sum, the total amount of expenses Petitioners could be entitled to reimbursement is $200,810.72. Of that total amount, Petitioners are not entitled to reimbursement of $61,155.24 but are entitled to reimbursement of $139,655.48.

1. The School staff involved in this contested case clearly did not understand their “child find” responsibilities; therefore, these staff members shall undergo training related to the IDEA “child find” mandate as well as the proper procedures for special education eligibility referrals and the development of IEPs particularly for high school students with mental health concerns and functional deficits.

1. Petitioners are the prevailing party on the Jurisdictional and Affirmative Defense Issues; Procedural Violation Issues, Child Find Issue and Prior Written Notice and Procedural Safeguards Issue; Substantive Eligibility Issue; Appropriateness of Private School Placement and Reimbursement of Private Academy Issue; Equitable Considerations Issue; and, in part the Compensatory Education Issue.

1. Respondent is prevailing party for the Reimbursement of Wilderness Program Issue on other grounds than its appropriateness as that issue was not properly before the Tribunal and, in part, the Compensatory Services Issue.

1. Because this case is sealed, prior to official publication of this Final Decision all personally identifiable information of Student or information which could lead to her identity shall be redacted.

**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.

**Any party aggrieved by the findings and decision of a hearing officer may under N.C. Gen. Stat. § 115C-109.6 institute a civil action in State court within thirty (30) days after receipt of the notice of the decision or under 20 U.S.C. § 1415 a civil action in federal court within ninety (90) days after receipt of the notice of the decision.**

Because the Office of Administrative Hearings may be required to file the official record in the contested case with the State or federal court, a copy of the Petition for Judicial Review or Federal Complaint must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely preparation of the record.

Unless appealed to State or federal court, the State Board shall enforce the final decision of the administrative law judge.

**IT IS SO ORDERED.**

This the «Day»day of «Month», «Year».

B

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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Affiliated Agency

This the «Day»day of «Month», «Year».

C

Christine E Cline

Law Clerk

N. C. Office of Administrative Hearings

1711 New Hope Church Road

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Phone: 984-236-1850

1. Petitioner Student used she/her pronouns during her attendance at the High School. All documentary evidence submitted during the hearing on the merits of the case refer to Student using she/her pronouns. On August 2, 2022, Respondent’s Counsel deposed Student and asked what pronouns Student was using, to which Student responded, “they, them.” Dep. of Student 5:2-3. During the hearing in this matter, witnesses used both she/her and they/them to refer to Student. To avoid confusion, Student has graciously consented, via sworn affidavit, that she/her pronouns refer to her in the Final Decision and any other filings. *See* Petitioners’ Notice of Student’s Pronouns and Affidavit of Student filed January 9, 2023. [↑](#footnote-ref-2)
2. Admission of Stip. Ex. 10 stipulated on January 30, 2023. [↑](#footnote-ref-3)
3. Stip. Ex. 33 admitted in T vol 1 p 188:5-8 but inadvertently not filed with the other Stipulated Exhibits. [↑](#footnote-ref-4)
4. Originally stricken from record but reentered by stipulation of the Parties filed on January 12, 2023. [↑](#footnote-ref-5)
5. Stricken from record. [↑](#footnote-ref-6)
6. 2019-2020 school calendar admission stipulated on February 24, 2023 for illustrative purposes only. [↑](#footnote-ref-7)
7. On February 24, 2023, the Parties stipulated to the taking of Official Notice these exhibits which was issued on February 28, 2023. [↑](#footnote-ref-8)
8. Stricken from record. [↑](#footnote-ref-9)
9. Stricken from record. [↑](#footnote-ref-10)
10. On January 30, 2023, Parties stipulated that Respondent’s Ex. 342 was never received into evidence was inadvertently filed by Respondent as an admitted exhibit. [↑](#footnote-ref-11)
11. Respondent’s objection to this issue was overruled as it was raised in both the Original and Amended Petitions. [↑](#footnote-ref-12)
12. Student’s date of birth is significant for the standing issue and is contained in her educational records including the IEP and Section 504 documents. *See* *e.g.* Stip. Exs. 199-218; *and also,* T vol 9 p 2348:6-13 (T of Counselor) (stating Student’s birthday was in PowerSchool records.). [↑](#footnote-ref-13)
13. For 2019-2020 School Year *see* Stip. Exs. 8, 19, 34; for 2020-2021 School Year *see*: Stip. Exs. 40, 52 (same 09/14/2020 email Parent sent to Student’s junior teachers about medication problems, new diagnoses of depression and anxiety, etc. *see* Stip. Exs. 49, 50, 53, 57, 58, 59, & 60), 62, 82, 93 (APUSH Teacher), 94 (10/14/2020 email asking, “what are our options?”; 10/15//2020 email from Parent about Student’s “emergency medical condition” and included same information in emails Parent sent to teachers 90 (APUSH Teacher); 91 (Math Teacher) about “[Student] is still not doing well with health and concentration issues. In fact she may be worse – she is depressed, very unfocused, no sleeping and has lost about 20 pounds.”) 95 (English Teacher), 100 (English Teacher), 101 (CTE Teacher), 103-105, 106 (Counselor 10/16/2020 email to Dean of Students; Intervention Specialist; School Psychologist; that “I am not sure how you guys got in the loop on this, but [Student] is having an extremely difficult time…keep you in the loop if the family want to pursue an IEP. The teachers are aware of the struggles [Student] is experiencing.”); 108 (to teachers), 118 (from Student), 152, 169, 174, 223 (Dr. Dittmer Letter), (2020-2021); *see also* 179 (combined emails). [↑](#footnote-ref-14)
14. Stip. Exs. 19 & 221 (Munt, M.D. 10/15/2019 letter copying Counselor stating, “[Student] has become overwhelmed, anxious and upset…”. and Parent 10/17/2019 email attaching letter); 223 (Dittmer, M.D. Letter stating Student is “working on weekly therapy,” “[b]ecause of her depression, academic work feels like an enormous burden…[d]epression and anxiety are affecting every aspect of [Student’s] life…At this time, [Student] needs a school plan to address academic performance that will allow her to prioritize mental health treatment…”). The letters (Stip. Exs. 221, 223 & 224) from Dr. Munt, Dr. Dittmer, and Therapist Unwin reference Student’s date of birth – XX/XX/XXXX. [↑](#footnote-ref-15)
15. August 8th and 11th group meetings which violated the Sequestration Order, Counselor attended another prep meeting with Respondent and legal counsel on August 21, 2022 in anticipation of his August 22nd testimony. Counselor also met with legal counsel and school staff in the Fall of 2021 as well as the Spring and Summer of 2022. T vol 9 p 2321:18-23. In Fall of 2021, he met with Jill McKenna, Sarah Saint, Dean of Students, and the Principal (T vol 9 p 2321:24-2322:2) and in the Spring of 2022 with Jill McKenna, Sarah Saint, and the Interim Principal. T vol 9 p 2322:3-21. [↑](#footnote-ref-16)
16. Respondent’s Exhibit 484 was disclosed to Petitioners on August 18, 2022, 8 days after the hearing started and was due 5 business days before the beginning of the due process hearing as required by 34 C.F.R. § 300.512(b). T vol 8 pp 2011:5-2017:3. Ms. Gamm was, however, allowed to verbally supplement her expert opinions and the amended report was received as an Offer of Proof. [↑](#footnote-ref-17)
17. *Citing E.g*., Stip. Ex. 180, p 389-90; Stip. Ex. 181; Stip. Ex. 223; Stip. Ex. 225, p 595; Stip. Ex. 234, p 809; Stip. Ex. 329; Resp Ex. 485; T vol 1 p 66:15-22, 119:12- 14, 148:18-23; T vol 3 p 773:8-9; T vol 5 p 1329:5-8, 1329:22-1330:10; T vol 4 p 1367:22-24; T vol 6 p 1467:17-24; *infra.* [↑](#footnote-ref-18)
18. According to Dr. Collett, this is not a “not necessarily a diagnosis” but is something “needing to be addressed in therapy.” T vol 1, p 51:18-23 (T of Collett). [↑](#footnote-ref-19)
19. *See* Stip. Ex. 234 p 000810 (Prozac, Melatonin, Dexmethylphenidate Hydrochloride, Seroquel (evenings & as needed) and Lamictal) and pp 000811-000827 (Master Treatment Plan listing daily, weekly, and monthly therapies and seventeen (17) academic interventions/accommodations). [↑](#footnote-ref-20)
20. The 504 Eligibility Determination incorrectly dated the form as 08/12/2018 instead of 08/12/2012. *Compare* Stip. Ex. 180 p 000389 *to* Stip. Ex. 24 p 000550. [↑](#footnote-ref-21)
21. *See* notation “Fax Generated on 02/01/2018.” Stip. Ex. 196 p 000487. [↑](#footnote-ref-22)
22. On February 24, 2023, the Parties Stipulated to Official Notice of the *Parent Rights & Responsibilities in Special Education – Notice of Procedural Safeguards* (also known as *Handbook on Parents’ Rights)* version effective August 2018 through June 2019. Off. Not. Ex. A. [↑](#footnote-ref-23)
23. Notably all the IEP documents (Stip. Exs. 198-200) and historical grade report (Stip. Ex. 192) reference Student’s date of birth – XX/XX/XXXX. [↑](#footnote-ref-24)
24. All the 504 documents (Stip. Exs. 201, 204, 208, 209, 212-216, 218, and 219) referenced Student’s date of birth – XX/XX/XXXX. [↑](#footnote-ref-25)
25. Stip. Ex. 215 has August 12, 2018 rather than August 12, 2012. Parent testified that the year on the 504 Eligibility Determination was a typo. T vol 1 p 171:7-23. [↑](#footnote-ref-26)
26. 20 U.S.C. § 1412(a)(25). [↑](#footnote-ref-27)
27. *See, e.g.*, T vol 5 pp 1317:10-17; 1317:24-1318:3; 1319:5-15; 1324:18-20; T vol 6 pp 1466:5-7 1482:24-1483:7 1505:5- 8 (T of Geography Teacher mentioning grace and flexibility eight (8) times); T vol 6 pp 1573:11-14; 1607:25-1608:1; 1608:25-1609:1 (T of Math Teacher mentioning grace and flexibility three (3) times); T vol 5 p 1316:2-7 (T of Geography Teacher); T vol 7 pp 1735:18-1737:5 (T of History Teacher); *see also,* T vol 8 p 2028:4-6 15-19 (T of Gamm). [↑](#footnote-ref-28)
28. *See, e.g.*, T vol 6 p 1578:4-6 (T of Math Teacher); T vol 6 p 1469:24-1471:8 (T of Geography Teacher); T vol 7 p 1697:8-12 (T of Physics Teacher); T vol 7 pp 1781:9-17; 1798:2-5 (T of History Teacher); T vol 8 pp 2178:20- 2179:4 (T of Marketing Teacher) (stricken); T vol 6 p 1566:20-22 (T of Math Teacher); T vol 6 pp 1524:8-1525:9 (T of Geography Teacher); T vol 9 p 2246:20-23 (T of Counselor); T vol 8 pp 2137:2-2138:2 (T of Marketing Teacher); T vol 7 pp 1740:11-1741:7 (T of History Teacher); T vol 6 pp 1521:15-1522:8 (T of Geography Teacher). [↑](#footnote-ref-29)
29. 34 C.F.R. § 300.39(b)(3). [↑](#footnote-ref-30)
30. *See, e.g.*, T vol 6 p 1560:10-1561:22; 1537:8-10 (T of Math Teacher); T vol 6 p 1432:9-16 463:14-1464:19 1452:10-1454:19 (T of Geography Teacher); T vol 7 p 1668:7-11 (T of Physics Teacher); T vol 7 p 1749:11-22 (T of History Teacher); T vol 6 *passim* (T of Math Teacher claiming Student was typical at least twenty (20) times); T vol 7 p 1717:19-21 (T of Physics Teacher that struggling with concentration and mood, like Student, was typical). [↑](#footnote-ref-31)
31. *See, e.g.*, T vol 9 p 2330:22-24; 2242:2-7 (T of Counselor); T vol 8 p 2022:20-25 (T of Gamm); T vol 6 pp 1469:19-1471:15 (T of Geography Teacher); T vol 6 pp 1545:25-1546:2 (T of Math Teacher); T vol 7 p 1695:5-23 (T of Physics Teacher); T vol 8 p 2166:18-24 (T of Marketing Teacher); T vol 6 pp 1466:13-1469:9 (T of Geography Teacher). [↑](#footnote-ref-32)
32. *See also* Stip. Ex. 38 (August 21, 2020 email re: focus issues); 42 (psychiatrist appointment August 25, 2020 email); 47 (“not feeling well recently” needed extension September 7, 2020 email); 49 (staff email dated September 14, 2020 acknowledging Student “has had a rough start to the year” and discussions with Student about “her struggles” and need to reset deadlines); 50, 52-54, 57-60 (Parent September 14, 2020 email to all teaching staff about reaching out to Counselor re: Student “real unfocused this 2020 school year,” struggling with her ADHD medication, changed her medication again, and teachers’ responsive acknowledgement); 61-63 (Parent September 18, 2020 emails to counselor and teachers about medication making Student sick and need to “go back to MD”); 66 (Parent September 22, 2020 email about needs time to get her caught up in class; working until 3:00 a.m. on 2 assignments, Parent hoping Student will feel better soon”); 67 (Student September 22, 2020 email “struggling on my ability to focus due to mental health concerns”); 69 (Student September 25, 2020 email “having difficult start to my day” and “just couldn’t continue with school”); and 70 (Student September 29, 2020 email “didn’t think I could mentally do it”). [↑](#footnote-ref-33)
33. This exhibit is dated November 2020, after the September and October 2020 referrals, however, this was a Stipulated Exhibit used by both Parties, without objection as to the date, when counsel were examining and cross examining witnesses. T vol 4, pp 864:18-866:8. The “Referral Requirements” document is also consistent with the child find requirements of federal and State law. *See* 20 U.S.C. § §§ 1412(a)(3)(A); 1413(a)(1) (stating the LEA must have in effect policies in procedures for providing services for children with disabilities). [↑](#footnote-ref-34)
34. The Section 504 Eligibility Determination form also included a description of the student and parent rights under Section 504 but not the ADAAA. *See* Stip. Ex. 218 pp 000572-000573. [↑](#footnote-ref-35)
35. *See* Stip. Ex. 139; Stip. Exs. 140, 141 (February 2021 still struggling); Stip. Exs. 142-150 (March -April still emailing teachers about late work and struggles); Stip. Ex. 152 (April 15, 2021 Student unable to attend in-person learning); Stip. Ex. 153 (April 15, 2021 having a breakdown); Stip. Exs. 156 & 157 (April 18-19, 2021 has difficult last few weeks with transition back to school with her concentration and mood, had to leave school because overwhelmed and teary); Stip. Ex. 158 (April 21 2021 not feeling her best, has been slower with her work); Stip. Exs. 159 through 164 (continued to request extensions); 165 (May 10, 2021 staring at her screen for hours); 167-171 (May 10& 12, 2021 Parent emails to teachers and Counselor that “Student is still struggling” and “Has been struggling since starting back to in-person school…just switched her ADHD medicine…[s]he stares at her screen all night with no focus and wastes hours with no productivity…unable to come in-person” to school); Stip. Ex. 172 (May 18, 2021 Parent email to teacher “struggling with her focus and mood… switched her medication”); Stip. Ex. 174 May 27, 2021 Parent email to Counselor about “dip in mood and focus,” unable to take new ADHD medication because “it has made her agitated,” and request to make up Pre-Calculus exam and AP Human Geo exam); Stip. Ex. 179, pp 00322-00388 (combined emails and Google PowerSchool documentation from August 26, 2020 to May 25, 2021 about late work, quizzes and exam/test reviews). [↑](#footnote-ref-36)
36. After February 12, 2021 of that year, students were initially expected to return in-person and have remote learning for only a few days. *See* Stip. Ex. 314 (remote learning on for 2/24, 3/3 3/24. 4/14. 4/28, 5/13 & 5/26) Ultimately, sometime in April 2021 students were given the option in Spring of returning to in-person, remote, or hybrid learning. [↑](#footnote-ref-37)
37. Dr. Collett’s diagnoses did not include “Parent-Child Relational Problem” because this is “not necessarily a diagnosis” but is something “needing to be addressed in therapy.” T vol 1 p 51:18-23 (T of Collett). [↑](#footnote-ref-38)
38. Ms. Ragsdale testified Private Academy changed the terminology from “family teacher” to “youth mentor” at some point in Student’s stay. T vol 2 p 359:9-16 (T of Ragsdale explaining the change in name). For consistency, the Undersigned will use the term “family teacher”; however, in the transcripts and documents the term “youth mentor” is also used. [↑](#footnote-ref-39)
39. Stip. 331 School Grading Policy. [↑](#footnote-ref-40)
40. Stip. Ex. 102 p 186 (Physics Teacher gave credit back for incorrect answers changed failing grade). [↑](#footnote-ref-41)
41. Stip. Ex. 274 p 001115 (Kirk Simon, M.D.’s Psychiatric Evaluation stating past medications were Focalin XR 30 mg, Adderall 15 mg, Wellnutrin, Prozac, Lexapro 20 mg. Abilify 4 mg, Effexor, Cymbalta, Remerson & Melatonin (sleep), and Klonopin) [↑](#footnote-ref-42)
42. N.C.Gen.Stat. § 8C-1, Rule 901(b)(1). [↑](#footnote-ref-43)
43. Daily rate was $615.00 per day; enrollment length: 72 days (including June 8, 2021 enrollment Fee: $3,700.00; Physical Exam: $380.00; Backpack: $66.79) [↑](#footnote-ref-44)
44. Private Academy required parents to pay $12,500 as a “deposit towards last month’s tuition.” This “deposit” was applied towards the tuition of the last month of Student’s enrollment. Thus, while parents paid $6250 for June, this amount was deduced from the $12,500 deposit and parents received the remainder of the deposit as a refund. [↑](#footnote-ref-45)
45. Pet’r. Ex. 17 pp 96, 100-01, 106-07, 120-21, 123-24. [↑](#footnote-ref-46)
46. Pet’r. Ex. 17 pp 97, 102-04, 108, 110-11. [↑](#footnote-ref-47)
47. Pet’r. Ex. 17 pp 86-95, 98-99, 105, 109, 112, 114, 116-19, 122, 125-28. [↑](#footnote-ref-48)
48. Correct cite is p 137:1-7. [↑](#footnote-ref-49)
49. The few rules for special education in the North Carolina Administrative Code are either not applicable, have expired, or reference repealed State law and incorrect citations to the federal regulations. *See generally* NCAC Title 16, Chapter 6, Subchapter H: 16 NCAC 06H .0101 through.0110 (adopted on July 1, 1986 some amended June 1, 1996, December 1, 1999, or August 1, 2000). [↑](#footnote-ref-50)
50. Respondent asserts that the “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.’” Resp’t Pro. Fin. Dec. p. 115, ¶ 44 (citing N.C.G.S. § 115C-44(b) (emphasis in Pro. Dec.). This presumption applies only in “actions brought in any court against a school board” not in administrative contested case. [↑](#footnote-ref-51)
51. In 2020 during the COVID-19 pandemic, the notary rules were in flux and North Carolina enacted a temporary emergency virtual notary service, which allowed completely remote notarization. N.C. Gen. Stat. § 10B-25; SL 2020-3. This expired on December 31, 2021 after a couple extensions. *See, e.g.*, SL 2020-74; SL 2021-3. Last year, House Bill 776 was passed, which permanently adopted remote notary services. [↑](#footnote-ref-52)
52. Matthew S. Smith & Michael A. Stein, *Transfer of Parental Rights: The Impact of Section 615(M) of The Individuals With Disabilities Education Act*, 13 Drexel L. Rev. 987 (2021).  [↑](#footnote-ref-53)
53. Furthermore, Respondent reliance on NC 1504-1.8(a)(3) requirement that “[a] parent may not file a petition on behalf of a student who has reached the age of majority unless the court has granted guardianship to the parent” is misplaced. Resp’t Pro. Fin. Dec. p. 108, ¶ 9 (citing NC 1504‑1.8(a)(3) which conflicts with NC 1504‑1.21(b) that allows options other than guardianship). Contrary to Respondent’s assertion, court ordered guardianship is not required by the IDEA or North Carolina law in all situations. [↑](#footnote-ref-54)
54. “An administrative rule is not valid unless adopted in accordance with the provisions of Article 2A of the Administrative Procedure Act. N.C. Gen. Stat. § 150B–18.” *Dillingham v. N. Carolina Dep't of Hum. Res*., 132 N.C. App. 704, 710, 513 S.E.2d 823, 827 (1999). [↑](#footnote-ref-55)
55. List one includes: 1. a medical doctor licensed in the state where the doctor practices medicine; 2. physician’s assistant whose certification is countersigned by a supervising physician; or 3. a certified nurse practitioner. List two includes: 1. a medical doctor licensed in the state where the doctor practices medicine; 2. a licensed clinical psychologist; 3. a licensed clinical social worker; 4. an attorney who is qualified to serve as guardian ad litem for adults under NC law; or 5. a court-appointed special advocate for the adult student. The individuals who provide the certification in (iii)(A) of this section may not be employees of the local education agency currently serving the adult student or related by blood or marriage to the adult student. Policy 1504-1.21(b)(2) (A-B); Off. Not. Ex. B p 100. [↑](#footnote-ref-56)
56. *See e.g*. Stip. Ex. 274 (Kirk Simon, M.D. - Psychiatric Evaluation); Stip. Ex. 306 (Qionna Tinney M.D. medical records); Stip. Ex.181 (Tess Collett, Ph.D. Psychoeducational Evaluation); Stip. Ex. 234 (Krista Robbins, Ph.D. Master Treatment Plan); T of Robbins; and T of Haga. [↑](#footnote-ref-57)
57. Notably, Shannon Carter was 22 years old when the case was appealed to the Court of Appeals for the Fourth Circuit. *Carter By & Through Carter v. Florence Cnty. School Dist. Four*, 950 F.2d 156, 158 (4th Cir. 1991). Her parents were not removed as parties from the case even though Shannon had reached the age of majority during the appeal. [↑](#footnote-ref-58)
58. *See, e.g., Gilreath v. N. Carolina ex rel. Cumberland Cty. Bd. of Educ*., No. 5:11-CV-00627-BR, 2012 WL 1219765, at \*4 (E.D.N.C. Apr. 10, 2012) (explaining the naming of the parties in the caption does not determine who is a party); *Watson v. Watson*, 562 S.W.2d 329, 331 n.2 (Mo. 1978) (“the body of the pleading, not the caption, determines the parties necessary to the prosecution of the action”); *Ford Motor Co. v. Versata Software, Inc.*, No. 15-11624, 2018 WL 53581134, at \*1, 3 (E.D. Mich. June 5, 2018) (“Whether to modify a case caption to reflect a party’s name change is ordinarily not a complicated question,” and the court reviewed the “substantive allegations” to determine the proper parties); *Rice v. Hamilton Air Force Base Commissary*, 720 F.2d 1082, 1085 (9th Cir. 1983) (“[A] party may be properly in a case if the allegations in the body of the complaint make it plain that the party is intended [to be a party]”). [↑](#footnote-ref-59)
59. *See, e.g., Estate of Tallman ex rel. Tallman v. City of Gastonia,* 200 N.C. App. 13, 682 S.E.2d 428 (2009) (allowing suit to proceed against defendant when no estate existed at the time Plaintiff filed the complaint finding subject matter jurisdiction existed and Plaintiff’s claims related back to the time of filing once she became administratrix of the estate and ratified the pleading); *Miller v. Jackson Hosp. and Clinic*, 776 So.2d 122 (Ala. 2000) (finding error when lower court dismissed case when Plaintiff incorrectly believed he had authority to file suit against Defendant through a power of attorney and holding the complaint should be amended to allow substitution of the proper party even after the statute of limitations had run as the amendment related back to the original filing); *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 13 (2d Cir. 1997) (finding the lower court should have allowed amendment of the complaint to substitute parties in interest who had standing to pursue the claims rather than dismissing the action); *Mikesic v. Trinity Lutheran Hosp.*, 980 S.W.2d 68, 69-73 (Mo. Ct. App. 1998) (finding Respondent suffered no prejudice by the amended pleading Plaintiff had standing to bring the action as the amended petition related back to the original filing date); *John v. Royal Caribbean Cruises*, No. 07-22766-CIV-JORDAN, 2008 U.S. Dist. LEXIS 141533, at \*3 (S.D. Fla. June 11, 2008) (finding despite an improper caption and invalid power of attorney the Plaintiff had standing to bring suit on behalf of her daughter.) [↑](#footnote-ref-60)
60. Likewise, when a school board fails to give parents proper notice of their administrative rights is one of the three “narrow exceptions” to the exhaustion requirement. *Z.G. by & through C.G. v. Pamlico Cnty. Pub. Sch. Bd. of Educ.*, 744 F. App’x 769, 777 (4th Cir. 2018); *see also*, *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 536 (4th Cir. 2002) [↑](#footnote-ref-61)
61. In making such a request, “magic words . . . are not necessary[.]” *Los Lunas Public Schs.*, 111 LRP 72632 (N.M. SEA, May 30, 2011) (citing 34 CFR § 300.301(b)); *see* *Chichester Sch. Dist*., 114 LRP 24895 (Penn. SEA April 30, 2014) (“While the parent did not use the magic words ‘I request an evaluation’ . . . it is clear that she repeatedly sought the District’s help in addressing Student’s special needs”). Moreover, there is no requirement under the “IDEA . . . that a parent’s request for evaluation be in writing or that a parent use that express term.” *Los Lunas*, 111 LRP 72632, (citing 34 CFR § 300.301(b); 20 U.S.C. § 1445(d)(1)(A)(I)). “Because the responsibility for meeting IDEA’s child find requirements rests with States and LEAs—not with parents—the evaluation referral process must support, and not undermine, the effectiveness of the child find process. *Letter to Sharpless*, 122 LRP 42874 (OSEP Nov. 1, 2022). [↑](#footnote-ref-62)
62. The NC *Policy Manual* also uses a 90-day eligibility period, but it starts from receipt of the written referral. Off. Not. Ex. B p 65 (NC 1503-2.2(c)(1)). [↑](#footnote-ref-63)
63. Although Respondent does not argue this in its Conclusions of Law, its Findings imply that Petitioners should have known about their IDEA procedural safeguards because they received a copy of the “Section 504/ADAAA Rights” at the Section 504 meetings. Respondent notes in its Findings of Fact, that Parent received copies of the “Section 504/ADAAA Rights” at the February 23, 2018 Section 504 meeting “which provided for dispute resolution processes” and included “the right to an impartial hearing.” Resp’t Pro. Fin Dec. pp. 27, ¶ 50; 29, ¶ 60; 51, ¶ 176. The only connection between Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 *et seq*., and the Individuals With Disabilities Improvement Act is that administrative remedies must be exhausted under the IDEA for a Section 504 claim to go forward. This Tribunal has no jurisdiction over any Section 504 or ADAAA claims. N.C. Gen Stat. § 150B-1(e)(5). Notwithstanding the jurisdictional problem, Section 504 is irrelevant in this case because Petitioners made no Section 504 claims in either the Original or Amended Petition. [↑](#footnote-ref-64)
64. The 1997 version of the IDEA did not include consideration of a child “functional needs.” *See* 20 U.S.C. § 1414(d)(3)(A)(i-ii) (1997). Functional needs were added when IDEA was reauthorized in 2004. 20 U.S.C. § 1414(d)(3)(A)(iv) (2004). [↑](#footnote-ref-65)
65. Since Student has graduated with a regular diploma an evaluation is not required but had WCPSS developed an IEP for her, it would have been required to provide her with a summary of the child’s academic achievement and functional performance which should include recommendations on how to assist her in meeting her postsecondary goals. 20 U.S.C. § 1414(c)(5)(B). [↑](#footnote-ref-66)
66. *See also* *A.K. ex. rel. J.K. v. Alexandria City Sch. Bd.*, 544 F. Supp. 2d 487, 495 (E.D.Va. 2008) (determining on remand the residential program was appropriate without analyzing whether the student’s needs were segregable from the learning process); *Colonial Sch. Dist. v. E.G. by and through M.G.*, No. 19-1173, 2020 WL 529906, at \*7 (finding district’s arguments “meritless” that residential program “does not provide education services” was “primarily for medical, behavioral, and mental health treatment”); *Cone v. Randolph Cnty. Schs. Bd. of Educ.*, 657 F. Supp. 2d 667, 680-81 (M.D.N.C. 2009) (finding the IEP did not provide FAPE at the proposed non-residential placement); *Perkiomen Valley Sch. Dist. v. R.B.*, 533 F. Supp. 3d 233, 254 (E.D. Pa. 2021) (finding district’s proposed IEPs did not offer FAPE and finding residential placement appropriate). “[O]nce a court concludes that residential placement is the only realistic option for learning improvement, the question of “least restrictive” is also resolved . . .  If a day school cannot provide an appropriate education it is, by definition, not a possible alternative.” *Kruelle,* 642 F.2d at 695(citing *DeWalt v. Burkholder*, No. 80-0014-A, 3 EHLR 551:500 (E.D.Va. Mar. 13, 1980)). [↑](#footnote-ref-67)
67. The October 11, 2022 Order stated: “Other sanctioning is warranted because Respondent’s misconduct not only violated this Tribunal’s Sequestration Order, but it also violated the Petitioners’ procedural right to due process. As Respondent acknowledged in its Proposed Order, the violation of a sequestration order “undermines the purpose of cross-examination.” Resp’t Pro. Order pp 2-4. The right to “confront and cross-examine witnesses is a delineated procedural safeguard afforded Petitioners under the Individuals with Disabilities Education Improvement Act. IDEA, 20 U.S.C. § 1415(h)(2); 34 C.F.R. § 300.512(a)(2). If Petitioners are awarded tuition reimbursement, Respondent’s misconduct in this regard, if legally permitted, may be considered in the balancing of the equities.” [↑](#footnote-ref-68)
68. The Parties have been made aware of the expectations of this Tribunal regarding similar conduct in the future. [↑](#footnote-ref-69)