FILED
OFFICE OF ADMINISTRATIVE HEARINGS
09/13/2023 1:48 PM

STATE OF NORTH CAROLINA

COUNTY OF CABARRUS

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 EDC 01503

[redacted] by and through her parents [redacted] and [redacted] Petitioner, v. Cabarrus County Board of Education Respondent.	**FINAL DECISION**

THIS MATTER was heard before the undersigned Administrative Law Judge on the following dates: June 19-23, 2023 at the Mecklenburg County Courthouse in Charlotte, North Carolina; June 26, 2023, at the Cabarrus County Schools Board of Education in Concord, North Carolina; and on June 29, 2023, for the presentation of closing arguments via WebEx.

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 enters the following decision.

Appearances

For Petitioners: Stacey M. Gahagan
K. Alice Morrison
Gahagan Paradis, P.L.L.C.
3326 Durham Chapel Hill Boulevard, Suite 210-C
Durham, NC 27707

For Respondent: James G. Middlebrooks
6715 Fairview Rd, Suite C
Charlotte, NC 28210

Witnesses

For Petitioners: Dr. Debra Leach, Ed.D. and BCBA, Expert Witness
Robert McHale, M.D.; expert witness, [redacted] treating therapist
Petitioner [redacted] Father of [redacted]

For Respondent: Angela Fitzwater, Respondent's EC Director
Amy Jewel, Respondent's Director of Student and Family Support

James Williams, [redacted] Principal
Karen Showalter, Counselor
Tonya Murray, Counselor
Michelle Queen, School Psychologist
Petitioner [redacted] Mother of [redacted]

Pretrial Motions

On June 8, 2023, Respondent Cabarrus County Board of Education (hereafter "CCBOE") moved for Partial Summary Judgment Based on Election of Remedies. On June 19, 2023, Petitioner filed her Notice of Objection and Response. CCBOE's motion contended that [redacted] filing of a state complaint with the North Carolina Department of Public Instruction (hereafter "DPI") in September 2022 and her allowing that process to run its course (ending a decision by DPI in CCBOE's favor) was an election of remedies that precluded seeking the same remedy in a due process action before the Office of Administrative Hearings. On June 19, 2023, prior to the start of testimony, counsel presented oral argument, and the Undersigned denied the motion, ruling that the election of remedies doctrine does not apply.

On June 14, 2023, CCS filed a motion asking that one of [redacted] teachers who was on a cruise in Alaska during the week of June 19th be allowed to testify upon her return on June 28th. The Undersigned entered an Order On Video Testimony, denying the motion on the ground that Respondent had objected to a similar earlier motion by Petitioner which motion was denied.

Exhibits

The following exhibits were admitted into evidence:

Stipulated Exhibits: 1-45; 47-51; 54; 61; 63-68.
Petitioner's Exhibits: 8-9; 12-13; 14 (for dates only); 16, 21-22; pages 333-352, 363 of Exhibit 27; 32; 33; 35.
Respondent's Exhibits: 29; 31; 33; 51.

Transcript

Transcript volumes 1 through 7 have been received by OAH and correspond to the following days of the hearing:

Volume 1: June 19, 2023
Volume 2: June 20, 2023
Volume 3: June 21, 2023
Volume 4: June 22, 2023
Volume 5: June 23, 2023
Volume 6: June 26, 2023
Volume 7: June 29, 2023 (Closing Arguments)

Issues

Petitioner framed the issues as follows:

1. Child Find Issues

    a. Whether Respondent violated its Child Find duty when it failed to initiate the IEP referral process in the 2017-18 school year?

    b. Whether Respondent violated its Child Find duty when it failed to initiate the IEP referral process in the 2018-19 school year?

2. Evaluation Issues

    a. Whether Respondent failed to appropriately and timely evaluate [redacted] in all suspected areas of disability in the 2019-20 school year?

    b. Whether Respondent failed to appropriately and timely identify [redacted] as a student with a disability resulting in educational harm in the 2020-21 school year?

    c. Whether Respondent failed to appropriately and timely evaluate [redacted] in the 2021-22 school year?

    d. Whether Respondent failed to appropriately and timely evaluate [redacted] in the 2022-23 school year?

3. IEP Issues

    a. Whether Respondent failed to offer [redacted] a FAPE in the February 10, 2021, March 31, 2022, May 13, 2022, August 29, 2022, October 24, 2022, January 18, 2023, March 20, 2023, and March 29, 2023 IEPs?

        i. Whether Respondent failed to include individualized Present Levels of Performance containing requisite baseline data to appropriately identify all [redacted] areas of need?

        ii. Whether Respondent failed to develop individualized, measurable, appropriately ambitious IEP goals to target all [redacted] areas of need?

        iii. Whether the IEP failed to offer appropriate related services?

        iv. Whether the IEP failed to offer appropriate supplemental aids, services, modifications, and accommodations?

        v. Whether the IEP failed to offer appropriate service delivery in all areas of need, including frequency, quantity, and location of services?

        vi. Whether [redacted] required Extended School Year (ESY) services?

4. Implementation Issue

    a. Whether Respondent failed to implement [redacted] February 10, 2021 IEP?
    b. Whether Respondent failed to implement [redacted] March 31, 2022 IEP?
    c. Whether Respondent failed to implement [redacted] May 13, 2022 IEP?
    d. Whether Respondent failed to implement [redacted] August 29, 2022 IEP?
    e. Whether Respondent failed to implement [redacted] October 24, 2022 IEP?
    f. Whether Respondent failed to implement [redacted] January 18, 2023 IEP?
    g. Whether Respondent failed to implement [redacted] March 20, 2023 IEP?
    h. Whether Respondent failed to implement [redacted] March 29, 2023 IEP?

5. Parental Participation Issue

    a. Whether Respondent impeded [redacted] parents' meaningful participation in determining [redacted] educational programming resulting in educational harm to [redacted] in the 2021-22 school year?

b. Whether Respondent impeded [redacted] parents' meaningful participation in determining [redacted] educational programming resulting in educational harm to [redacted] during the 2022-23 school year?

6. Relief Issue

a. If there were any violations to [redacted] procedural and substantive rights under the IDEA, what relief should be awarded?

b. What additional evaluations, if any, are necessary to understand [redacted] unique needs and develop an appropriate IEP for [redacted]

c. What are the requisite components of [redacted] IEP necessary to offer [redacted] a FAPE for the 2023-24 school year?

i. Whether [redacted] requires wrap-around supports and services and, if so, what wrap-around supports and services?

ii. Whether [redacted] requires a private placement capable of meeting her unique needs and, if so, what criteria are necessary for the private placement? Whether [redacted] requires related services and, if so, what related services?

iii. Whether [redacted] requires ESY and, if so, what ESY is appropriate?

iv. What areas of need must be addressed by appropriately ambitious, measurable IEP goals?

v. What data must be collected to develop appropriate present levels for [redacted] IEP goals?

d. What support or training, if any, is required to assist Respondent in developing measurable, appropriately ambitious IEP goals, collecting data and developing appropriate present levels, understanding the continuum of placements available under the IDEA, and properly evaluating students in all areas of need?

Respondent framed the issues as follows:

A. Whether [redacted] IEPs in the one-year period before the Petition was filed were appropriate;

B. Whether CCS failed to implement [redacted] IEPs in the one-year period before the Petition was filed;

C. Whether CCS denied parental participation in the one-year period before the Petition was filed; and

D. Whether CCS improperly denied ESY services for the summer of 2022.

Prior to the start of the hearing, the parties agreed to the stipulations stated below, and the Undersigned hereby adopts the following:

Jurisdictional, Party, and Legal Stipulations

1. This Tribunal has personal jurisdiction over Petitioner, [redacted] by and through her parents, [redacted] and [redacted] and Respondent, The Cabarrus County Board of Education.

2. The Office of Administrative Hearings has jurisdiction over claims relating to the identification, evaluation, educational placement, or provision of a free appropriate public education ("FAPE") pursuant to Chapters 115C and 150B of the North Carolina General Statutes

and the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §1400 et seq. (2004) and implementing regulations, 34 C.F.R. Part 300; specifically 20 U.S.C. § 1415 and N.C. Gen. Stat. § 115C-109.6(a) control the issues to be reviewed.

3. The IDEA is the federal statute governing education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Part 300.

4. Respondent, The Cabarrus County Board of Education, is a local educational agency ("LEA") receiving monies pursuant to the IDEA.

5. The controlling state law for students with disabilities is N.C. Gen. Stat. Chapter 115C, Article 9.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the exhibits admitted into evidence, and the entire record herein, the Undersigned Administrative Law Judge makes the following Findings of Fact. In making these Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of each witness, including, but not limited to the demeanor of each witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified, whether the testimony of each witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

Petitioner's Witnesses:

1) Dr. Robert McHale (T vol 1)

1. Dr. McHale was received as an expert in "psychiatry, and behavioral sciences, community behavioral health, and long-term psychiatric supports and services." T vol 1 pp 47:21-48:1 and *also see* curricula vitae. Pet. Ex. 32, 532-536. Dr. McHale reviewed [redacted] psychological evaluations from 2017, 2019, and 2020, as well as the letter from Dr. Thakkar, [redacted] prior treating psychiatrist. T vol 1 pp 54:10-55:55:6; Pet. Exs. 8, 9, 12, 13. Dr. McHale met with [redacted] and her family and reviewed [redacted] treatment record, psychological testing, and hospital discharge paperwork as part of gathering information to form the basis of his opinions about [redacted] need for a therapeutic residential school in his preparation to testify on [redacted] behalf. T vol 1, 42:23-43:4 and T vol 1 p 60:17-24.

2. Dr. McHale was the only expert offered and received in the areas of psychiatry, and behavioral sciences, community behavioral health, and long-term psychiatric supports and services. As such, his testimony in these areas is given considerable weight. The Undersigned found Dr. McHale to be credible and knowledgeable about [redacted] unique circumstances and her need for a therapeutic residential placement, and was persuasive to the Undersigned.

2) Dr. Debra Leach (T vol 3)

3. Dr. Leach was received as an expert in special education "eligibility, identification, interpreting evaluations, and programming in special education." T vol 3 pp 368:24-369:2; *also see* curricula vitae, Pet. Ex. 33 p 537.

4. Dr. Leach was the only expert offered and received in the areas of eligibility, identification, interpreting evaluations, and programming in special education. As such, her testimony about these specific areas is given considerable weight. Thus, her testimony that Respondent denied [redacted] a FAPE and a therapeutic residential placement is required to meet [redacted] needs was informative and persuasive to the Undersigned.

5. The Undersigned found Dr. Leach to be credible and knowledgeable about [redacted] unique circumstances, her need for a therapeutic residential placement and all that it encompasses, her eligibility and appropriate category of eligibility.

3) [redacted] (T vol 1)

6. The Undersigned found [redacted] to be credible even though as [redacted] father he has an explicit and implicit bias for [redacted] best interest. The Undersigned observed [redacted] demeanor as he testified on direct examination and was cross examined by opposing counsel. The Undersigned observed [redacted] to be forthright during the entirety of his testimony and found [redacted] testimony told the story of how their adoptive, educational, and therapeutic journeys with [redacted] had affected [redacted] and their family. As [redacted] was a credible witness, his testimony will be given weight throughout the Final Decision.

7. [redacted] commitment and concern for his daughter, [redacted] was evident throughout the hearing, throughout his advocacy for his daughter and her needs, and throughout his sincere testimony. While [redacted] was unable to recall specific dates of specific meetings or conversations, this is understandable as the family's journey to get [redacted] the help she needs has been long and laborious. Yet it was evident to the Undersigned that [redacted] as well as [redacted] have endeavored on this journey with love for [redacted] and a desire to help her receive an education.

Respondent's Witnesses:

8. No expert witness testified on behalf of Respondent.

9. Respondent called the following fact witnesses: Angela Fitzwater, Amy Jewel, James Williams, Karen Showalter, Tonya Murray, Michelle Queen, and Petitioner [redacted]

10. The Undersigned takes note that Respondent did not present even one (1) of [redacted] ninth-grade teachers. Their perspective and insight could have provided valuable information to the Undersigned.

1) Amy Jewell (T vol 6)

11. Amy Jewell is Respondent's Director of Student and Family Support. T vol 6, p 1172:1-6. As part of her job, Ms. Jewell "supervise[s] the school social workers" and the two-day treatment programs at the elementary and middle school levels. T vol 6, p 1172:8-18. Her role in

Respondent's school district is not part of the exceptional children's department. T vol 6, p 1173:8-13.

12. Ms. Jewell explained Respondent has no therapeutic options for high school students. T vol 6, p 1183:19-1184:4 (T of Jewell).

13. Ms. Jewell has never met or evaluated [redacted] T vol 6, p 1173:14-18.

14. Ms. Jewell oversees the "school-based mental health programs, meaning we bring in outside providers to provide treatment in schools with parent permission." T vol 6, p 1172:12-15. On cross-examination, Ms. Jewell agreed "we do not handle any of the financial responsibility." T vol 6, p 1183:11-18. (T of Jewell).

15. The Undersigned will give her testimony appropriate deference as it relates to the resources available within the district.

2) James Williams (T vol 4)

16. James Williams has been the principal of the [redacted] (PLC) for ten (10) years. T vol 4, p 794:10-14. The PLC is one of Respondent's Alternative High Schools. T vol 4, 795:2-3. Mr. Williams interviewed [redacted] before her acceptance to the PLC. T vol 4, p 798:17-799:4 (T of Williams). When she was admitted, [redacted] was the youngest student attending the PLC and "didn't fit in well." T vol 4, p 799:15-24 (T of Williams). Mr. Williams's education, training, or possible experience with students with special needs was not provided.

17. The Undersigned found Mr. Williams's testimony about the multiple restrictions placed on [redacted] during her school attendance to be helpful. His testimony, however, regarding [redacted] progress while attending the PLC was anecdotal and not supported by the evidence in the record. As such, his testimony will be given appropriate weight.

3) Karen Showalter (T vol 6)

18. Karen Showalter has been a school psychologist for fifteen (15) years, ten (10) of which have been in Respondent's schools. T vol 6, p 1185:23-1186:8. She is licensed through the Department of Public Instruction as a school psychologist. T vol 6, p 1185:23-1186-12. Ms. Showalter provided counseling as a related service to [redacted] at the PLC from September through December 2022. T vol 6, p 1186:13-19 (T of Showalter).

19. Ms. Showalter collected data on [redacted] response to the prompt "I have friends." On cross-examination, she was asked whether the data collected was on "the self-perception of a child with autism about whether she has friends." T vol 6, p 1214:13-21 (T of Showalter).

20. The Undersigned noted the change in her facial expression as she perceived the disconnect in her data collection method. She confirmed she did not ask any other students about their perception of whether they had friendships with [redacted] T vol 1214:22-24 (T of Showalter).

21. Ms. Showalter's education, training, or continuing education on working with girls with autism or any of the methodologies she testified to utilizing with [redacted] was not provided. Therefore, the Undersigned does not infer any specialized knowledge or training to Ms. Showalter beyond her experience as a school psychologist. The Undersigned will give her testimony the appropriate weight.

4) Tonya Murray (T vol 4)

22. Tonya Murray is Respondent's lead school psychologist and has been employed by Respondent as a psychologist for three (3) years. T vol 4, p 634:24-635:5 (T of Murray). She has been licensed as a school psychologist through NCDPI since 1996 and has been a Licensed Psychological Associate (LPA) through the North Carolina Psychology Board since 1998. T vol 4, p 636:12-16 (T of Murray). Ms. Murray provided counseling as a related service to [redacted] for "about five months from January until June 1st [2023]." T vol 4, p 639:22-640:117 (T of Murray).

23. Ms. Murray did not provide information concerning specific training or continuing education on working with girls with autism or any of the methodologies she utilized with [redacted] which would have been helpful to the Undersigned in assessing her credibility and knowledge base for her testimony. Petitioners objected to inclusion of testimony regarding various curricula used due to Respondent's failure to provide the documents in discovery. Without documentary evidence or testimony regarding specific training, the Undersigned is not able to determine whether the methodologies or curricula were implemented with fidelity. The Undersigned will give her testimony the appropriate weight.

5) Michelle Queen (T vol 5)

24. Michelle Queen is a school psychologist for Respondent's school district and has been a school psychologist for seventeen (17) years. T vol 5, p 1017:6-9; 1017:21-18-1018:3 (T of Queen). Ms. Queen conducted an evaluation of [redacted] Stip. Ex. 47 (Psychoeducational Report, November 6, 2019). Ms. Queen submitted the referral for [redacted] to attend [redacted]. T vol 5 p 1054:6-8 (T of Queen).

25. Ms. Queen did not provide specific training or continuing education which would have been helpful to the Undersigned in assessing her credibility and knowledge base for her testimony. The Undersigned is not able to infer any specialized knowledge or training to Ms. Queen in addition to her role as a level 2 school psychologist. The Undersigned will give her testimony the appropriate weight.

6) Angela Fitzwater (T vols 5, 6)

26. Angela Fitzwater is Respondent's Exceptional Children's Director, a position she has held since August 2022. T vol 5, 988:1-2; 24-25 (T of Fitzwater). She holds licensure from the State Board of Education in "Exceptional Children's General Curriculum." T vol 5, p 989:2-6 (T of Fitzwater).

27. Ms. Fitzwater first became aware of and involved with [redacted] when Glendora Hagins from DPI contacted her in July 2022. T vol 5, 997:14-25. Ms. Hagins provided information to Ms. Fitzwater about resources available for private residential placements, boarding schools, and places offered in North Carolina. T vol 5, p 998:15-999:3 (T of Fitzwater).

28. Ms. Fitzwater never met, taught, evaluated, or observed [redacted] T vol 6, p 1112:1-8 (T of Fitzwater). Ms. Fitzwater became involved with [redacted] parents, [redacted] and [redacted] because they were seeking help from DPI and advocating for Respondent to meet [redacted] needs. Ms. Fitzwater met with [redacted] parents on August 11, 2022, outside of an IEP meeting, and then only attended the IEP meeting that was not completed on August 30, 2022. T vol 2, p 1012:7-14; T vol 6, p 1103:22-1104:9 & 1107:16-1108:4 (T of Fitzwater).

29. Ms. Fitzwater testified that in August of 2022, [redacted] "services on the continuum" were a "regular level of service." T vol 5, p 1005:2-18.

30. The Undersigned found Ms. Fitzwater to be a kind, good natured administrator. Yet, she was an uninformed witness regarding the continuum of services under the IDEA. T vol 6, p 1122:6-22 (explaining the percentages she referenced for a "continuum" were from the CECAS system but not understanding the IDEA). As such, her testimony concerning the continuum of services under the IDEA is not entitled to deference and will be diminished and given less weight.

7) [redacted] mother (T vols 4, 5)

31. Respondent called Petitioner [redacted] mother, as a witness in its case in chief. The Undersigned understands the high emotions in these cases and observed [redacted] experience physical manifestations of stress and anxiety leading up to and during her testimony. While [redacted] physically struggled to be in the courtroom and testify, the Undersigned observed her to be sincere and forthright answering Respondent's Counsel's questions thoroughly and to the best of her ability. The Undersigned appreciated and notes Respondent's Counsel's appropriate demeanor in examining the witness who was struggling.

32. The Undersigned found [redacted] to be credible even though, as [redacted] mother she has an explicit and implicit bias for [redacted] best interest. The Undersigned observed [redacted] to be forthright during the entirety of her testimony and found [redacted] testimony told the story of their many attempts seeking help from all avenues for [redacted] since they first had concerns brought to their attention by Respondent's staff during [redacted] third grade year.

33. [redacted] worked as a speech language pathologist (SLP) in a different school district until June 12, 2023. T vol 4, p 755:14-16 (T of [redacted] She has worked as an SLP for close to twenty-eight (28) years and attended IEP meetings for students during that time. T vol 4, p 755:25-756:14 (T of [redacted] No evidence was offered of any specialized training [redacted] may have received on the IDEA and its implementing regulations. While [redacted] may be an SLP, she is first and foremost [redacted] mother for purposes of this hearing. She will not be held to a higher standard than other parents in special education due process proceedings.

34. [redacted] commitment to and concern for her daughter were evident throughout the course of the hearing and through the myriad of evidence presented. [redacted] has been searching for answers to help [redacted] for years. *See e.g.,* Pet. Ex. 8 (2017 Psychological Evaluation); Pet. Ex. 9 (2019 Psychological Evaluation); Pet. Ex. 12 (2020 Psychological Testing); Pet. Ex. 13 (2022 Thakkar letter). [redacted] has been pleading for help for [redacted] from Respondent and trying to offer solutions. *See e.g.,* Stip. Ex. 2 (2019 504 Referral); Stip. Ex. 11 (2019 Special Education Referral); and Stip. Ex. 15 (2020 Special Education Referral). As [redacted] was a credible witness, her testimony will be given weight throughout the Final Decision.

FINDINGS OF FACT

1. The student's name is [* * *] ([redacted] She is [redacted] was born on [redacted]. [redacted] father is [* * *] ([redacted] and her mother is [* * *] ([redacted] [redacted] resides with her parents at [* * *], [redacted]. [redacted] currently attends the [redacted] a part of the CCBOE. (Factual Stipulations in Order on the Final Prehearing Conference hereafter cited as "Stip. __"). Stip. 1.

2. The Cabarrus County Board of Education ("CCBOE") is a local educational agency as defined by the Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1401. *See* N.C. Gen. Stat. §115C-5(7a). Stip. 2.

3. [redacted] has been identified as eligible for special education services under IDEA's category of Emotional Disturbance. Stip. 3

4. [redacted] began living with [redacted] and [redacted] as a foster child when she was four (4) years old. They were able to finalize the adoption after [redacted] turned five (5). See Stip. 4.

2017-2018 School Year [redacted] Grade

5. After [redacted] completed the third (3rd) grade, [redacted] and [redacted] paid for a psychological evaluation of [redacted] that was conducted by Mary Willis Page, M.A. in July and August 20[redacted]. The parents provided this evaluation to CCBOE. Stip. 5; Pet. Ex. 8.

6. [redacted] met diagnostic criteria for ADHD, Combined Type, and Oppositional Defiant Disorder. Pet. Ex. 8, p 38. As she had not previously been evaluated, these were new diagnoses for [redacted]

7. In Dr. Leach's expert opinion, the 2017 evaluation was sufficient to warrant an initial evaluation to determine eligibility for [IDEA] services. T vol 3 p 371:8-11 (T of Leach).

8. The parents provided the 2017 evaluation to the school because [redacted] "behaviors obviously needed attention within the school, information for them to know how to best modify her educational needs given these behaviors that were repeated throughout the year." T vol 1p 168:5-8 (T of [redacted] P. Ex. 8.

9. The receipt of this evaluation and the information contained therein triggered Respondent's Child Find obligation. Yet, Respondent did not convene an IEP meeting, did not issue a Prior Written Notice of its decision not to evaluate, and did not provide the parents with the Procedural Safeguards during the 2017-18 school year. (T vol 5 pp 951:18-952:7).

10. No Prior Written Notice was offered into evidence for the 2017-2018 school year.

11. Respondent had a duty to initiate the referral process under the IDEA, to provide Petitioners with a copy of the Procedural Safeguards and to issue a Prior Written Notice documenting any decision which are required notices under the IDEA and State law.

12. The Parties did not provide *any* referral documents from the 2017-2018 school year while [redacted] was in fourth grade. Respondent received an evaluation, received new diagnoses for [redacted] and did not evaluate [redacted] for services under the IDEA.

13. After [redacted] parents provided the 2017 evaluation to the school, the CCS did not have an IEP meeting in the 2017-18 school year, did not provide a parent's rights handbook, and [redacted] did not know that he could have filed due process regarding the school's actions. T vol 1 p 165:11-21 and p 167:15-20 (T of [redacted] see P Ex 8.

14. The Undersigned finds there was no evidence admitted in the record that the Respondent complied with its Child Find duty in the 2017-2018 school year.

2018-2019 School Year [redacted] Grade

15. [redacted] began her [redacted]-grade year at [redacted] in [redacted] County. She spent the first quarter of the 201[redacted]-201[redacted] school year there. Stip. 6.

16. [redacted] returned to CCS on November 7, 2018, and attended William Irvin Elementary School for the remainder of the 2018-2019 school year. Stip. 7.

February 18, 20[redacted], Section 504 Referral

17. On February 18, 20[redacted], [redacted] parents initiated the referral for a Section 504 Plan, identifying the following reasons for the referral: attention/focus/impulse control, social skills, and anxiety. Stip. Ex. 2, p 3.

18. Respondent convened a Section 504 meeting and documented it had knowledge of [redacted] disabilities through the 2017 psychological evaluation and the parent report on the referral form. Stip. Exs. 2-5.

19. Respondent did not convene an IEP meeting, did not issue a Prior Written Notice of its decision not to evaluate, and did not provide the parents with the Procedural Safeguards. T vol 5 p 952:14-24 (T. of [redacted]

20. Upon receipt of the information in the Section 504 referral, in addition to its knowledge of [redacted] disabilities through the 2017 evaluation, Respondent had a duty to initiate the referral process under the IDEA. Respondent did not do so.

21. Respondent misrepresented to [redacted] and [redacted] that it did not have enough information to find [redacted] eligible for IDEA services in June 2020. Stip. Ex. 17 (*See discussion supra* Part II(B)(5)(b).)

22. Respondent misrepresented that evaluations were "on hold" due to the COVID-19 pandemic in March 2020. Stip. Ex. 14. (*See discussion supra* Part II(B)(5).)

23. If the IEP team had not misrepresented the information about the evaluations being on hold in 2020, then [redacted] would have filed a due process complaint. T vol 5 p 974:15-975:4 (T of [redacted]

24. If the IEP team had not misrepresented its inability to find [redacted] eligible for an IEP during the June 2020 IEP meeting, then [redacted] would have filed a due process complaint. T vol 5 p 975:11-24 & 976:8-16 (T of [redacted]

25. On March 19, 2019, the CCBOE determined [redacted] was eligible under Section 504. The Section 504 team indicated her disability was not temporary, episodic, intermittent, or in remission, and limited the major life activity of concentration. Stip. Ex. 4, pp 8-9.

26. The Section 504 Team noted that it reviewed the following information to make the determination: "Psychological Evaluation, Physician's Report, Home and health history, Parent Information, Work Samples, and Teacher Input." Stip. Ex. 4, p 8.

27. At the eligibility meeting, the Section 504 Team discussed that [redacted] "struggles socially" and demonstrates "internalizing behaviors and comments." The team noted it "can get a release signed to communicate to [doctor] about things being observed at school." Stip. Ex. 5, p 10. There is no evidence that Respondent ever obtained this release.

28. [redacted] 504 Plan only identified two (2) areas of need: preferential seating and completing class work. The 504 Plan provided the following accommodations: "sit student away from distractions when appropriate, check-in with student and have them [sic] repeat directions back to teacher and/or classmate." Stip. Ex. 3, p 5.

29. In the expert opinion of Dr. Leach, the Section 504 Plan was "[n]ot even close to meeting [redacted] documented needs. T vol 3 pp 376:9-25 & 378:2-12 (T of Leach); Stip. Ex. 2 pp 3-4.

30. The Section 504 Eligibility Determination Review further indicates a need to initiate a referral under the IDEA as "the doctor's diagnosis of ADHD and ODD substantiates the need for classroom and/or testing accommodations, and it affects her ability to sustain attention and to complete schoolwork." T vol 3 p 377:18-22 (T of Leach) (referring to Stip. Ex. 4 p 8).

31. In March 2019, to comply with its Child Find duty, the CCBOE should have "proceed[ed] with an evaluation to determine eligibility for an IEP." T vol 3 p 378:13-18 (T of Leach). There was no evidence that the CCS initiated the IDEA referral process during the 2018-19 school year. T vol 3 p 379:13-17 (T of Leach).

32. There was no evidence admitted in the record that Respondent complied with its Child Find duty in the 2018-2019 school year.

2019-2020 School Year [redacted] Grade

33. [redacted] started at [redacted] School, one of Respondent's schools, for sixth grade during the 2019-2020 school year. Stip. 8.

34. [redacted] mother submitted a special education referral on August 28, 2019. Stip. 9.

35. Prior to the start of [redacted] sixth grade year, her parents provided to the IEP team a second private Psychological Evaluation of [redacted] completed by Laura Dunn, MD, and Kim T. Ferguson, Psy.D, of [redacted], issued on July 11, 2019. The IEP team documented the evaluation results in the referral documentation. Stip. Ex. 11 p 20-21.

36. Dr. Ferguson repeated the diagnosis of ADHD, Combined Type and added the diagnosis of Disruptive Dysregulation Mood Disorder with Antisocial Traits based upon the following assessments: Woodcock-Johnson Tests of Achievement-IV; Achenbach Child Behavior Checklist (Parent and Teacher Forms); Copeland System Checklist for ADHD; Achenbach Youth Self-Report for Ages 11-18; Conners' Continuous Performance Test-3 (CPT-3); Piers-Harris Children's Self-Concept Scale-2; Sentence Completion Test; Children's Problems Checklist; Reynolds Children's Manifest Anxiety Scale-2 (RCMAS-2); Children's Depression Inventory-2 (CDI); House-Tree-Person & Kinetic Family Drawings; Roberts Apperception Test-2; and Million Pre-Adolescent Clinical Inventory (M-PACI). Pet. Ex. 9 p 42. On the Woodcock-Johnson Test of Achievement-IV, [redacted] scored in the "Average Range" similar to [redacted]r 2017 evaluation. [redacted] also scored in the "Average" or "Low" range on the CPT-3, with medication. Pet. Ex. 9 p 44. On the Achenbach Child Behavior Checklist Form, [redacted] parent and teacher both rated [redacted] behaviors as "Significant" in Social Problems, Attention Problems, Breaking Rules, Aggressive Behavior, and Externalizes Problems (acts out). Pet. Ex. 9 p 44.

37. Dr. Ferguson highlighted multiple times the discrepancy between how [redacted] presented in the 1:1 examination session, as "submissive, conforming, insecure, and approval seeking," and "her mood and behavior seemed almost over controlled," versus the parent and teacher reports of her behavior. Pet. Ex. 9 pp 41-43.

38. Dr. Ferguson's report recommended an Individualized Education Program (IEP) in the area currently named Emotionally Disabled (ED) as well as a Behavior Intervention Plan (BIP). Pet. Ex. 9 pp 42, 47-48 (recommending a "Specific Behavioral Plan" and may need EC Certification as "Emotionally/Behaviorally Handicapped").

39. Dr. Ferguson explained [redacted] needed "specific behavioral strategies to promote focus" as well as "interventions for academics and organization" and "a separate, structured, specific behavioral plan to address problem behaviors." Pet. Ex. 9 p 47.

40. Dr. Ferguson found that [redacted] has "severe behavioral/emotional issues which need to be addressed with specialized education as provided within an IEP." Pet. Ex. 9 p 48.

September 20, 20[redacted], Initial Referral Meeting

41. The school conducted an initial referral meeting on September 20, 20[redacted]. Stip. 10. On September 20, 2019, [redacted] parents consented for [redacted] to be evaluated as follows: "(2) SRB interventions to address academic/functional skills, (2) SRB interventions to address behavioral/emotion skills", as well as a Social/Developmental History, Observation, Summary of Conference(s) with parents, and Health Screening. Stip. Ex. 9.

42. Despite the information regarding [redacted] multiple diagnoses and Dr. Ferguson's specific recommendation for consideration in the area of Emotionally Disabled (ED), the IEP team only considered one area of suspected disability: Other Health Impairment (OHI). *Compare* Pet. Ex. 9 *with* Stip. Ex. 11, p 24.

43. The IEP team did not consider all suspected areas of disability, such as autism spectrum disorder. T vol 3 pp 384:19-385:7 (T of Leach).

44. The IEP team did not follow Dr. Ferguson's recommendation for a BIP and did not consider conducting a Functional Behavior Assessment (FBA). *Compare* Pet. Ex. 9 *with* Stip. Ex. 9.

45. The Prior Written Notice, dated September 20, 20[redacted], does not identify any sources of relevant information used to make its decision but notes that "[t]he IEP team considered determining eligibility based on data received from parents/outside agencies, this option was rejected due to missing components required to determine eligibility" to include "Progress Monitoring, Social/Developmental History, Observations, Summary of Conferences with Parents, and Health Screening." Stip. Ex. 10, p 17.

46. On the Special Education Referral, the team included assessment information that reported [redacted] "tested on the 4th grade level" in reading. Stip. Ex. 11 pp 19-20. The IEP team also reported the information from the Mary Willis Page psychological evaluation from 2017 and the evaluation by Dr. Ferguson from 2019 reflecting [redacted] average IQ, the significant discrepancy between her Verbal Comprehension (95) and Fluid Reasoning (118), and her diagnoses of ADHD, Oppositional Defiance Disorder, Conduct Disorder, and Disruptive Dysregulation Mood Disorder with Anti-social traits. The team noted that "[a]t the current time, [redacted] only has a 504 Plan for her ADHD diagnosis." Stip. Ex. 11, p 21.

47. On November 6, 2019, two (2) days before the eligibility meeting, Michelle Queen completed a Psycho-educational Report. Stip. Ex. 47. As part of the Social/Developmental History, in addition to her concerns related to [redacted] difficulty following directions, immaturity,

impulsivity, disorganization, low self-esteem, rapid mood changes, and odd fascinations, [redacted] reported [redacted] "does not have any close friends and has a difficult time interacting with peers and younger children." Stip. Ex. 47 p 342.

48. Ms. Queen recommended that [redacted] continue to receive her 504 accommodations. Stip. Ex. 47, pp 344.

49. The Undersigned finds this to be an example of the predetermined decision to find [redacted] ineligible at the IEP meeting to be held two (2) days later.

50. Interestingly, Ms. Queen made additional recommendations for [redacted] which were not addressed by the IEP team in 2019, yet were incorporated four (4) years later in [redacted] IEP such as:

- Contact with the school counselor;
- Using coping strategies learned in counseling such as "identifying signs of stress in her body and using calming strategies to regular her emotion such as taking deep breaths, counting objects using the 5 senses, or thinking of a happy moment"; and
- Developing skills for social situation such a "purposeful thought switching" and using "'I' statements for solving conflicts with peers."

Stip. Ex. 47 p 344.

51. This is evidence to the Undersigned that [redacted] known deficits and needs in 2019—particularly all the needs identified in the 2017 and 2019 comprehensive private evaluations—were ignored by the IEP team, and the evaluations were not appropriately considered.

November 8, 201[redacted] Eligibility Determination

52. The IEP team reconvened on November 8, 201[redacted], to determine [redacted] eligibility and determined that she did not meet the eligibility requirements for special education services in the area of Other Health Impairment. Stip. 11.

53. The Non Eligibility Determination paperwork is not signed by the parents as having received a copy of the Procedural Safeguards. Stip. Ex. 12 p 28.

54. The Prior Written Notice indicates [redacted] was participating in "Tier 2 intervention – Iready [and] Social skills peer group lead [sic] by grade level counselor." [redacted] mother discussed with the team her concerns that "staff is not aware or understanding of [redacted]s needs based on her level of maturity, which is below that of her grade level peers." Her parents informed the team that [redacted] "has a history of transitioning well at the beginning of the year, based on her relationship with the teacher, but she may require an increased level of intervention as the school year progresses." Stip. Ex. 13 p 29.

55. Despite [redacted] parents initiating the special education referral and expressing their ongoing concerns, the IEP team inaccurately documented that there were "no refusals" at the meeting finding [redacted] ineligible. Stip. Ex. 13 p 29.

56. The progressive impact of [redacted] disabilities on her academics as evidenced in the CCS's psychological evaluation showing regression in her levels, challenges with behavior and socialization with peers, and difficulties with focus and attention, and transitions, impacted her academics. (T vol 3 p 387:18-22)

57. In Dr. Leach's expert opinion, [redacted] met eligibility criteria under the IDEA in November 2019 "based on the evaluations that were conducted and her performance in school." T vol 3 pp 387:18-22 & 389:8-10 (T of Leach).

58. After the ineligibility determination, [redacted] was documented for multiple (over 20) behavior incidents that removed her from the classroom or from access to direct instruction from November 15, 2019 to February 5, 2020. (Stip. Ex. 68 pp 458-63.)

59. About 10 or 13 days following the November 2019 IEP meeting where Respondent found [redacted] ineligible under the IDEA, teachers began "bombarding" [redacted] with emails concerning [redacted] behaviors. T vol 4 p 877:12-17 (T of [redacted]

60. At the request of [redacted] parents, a meeting was held with school staff on December 17, 2019. Teachers reported their concerns about [redacted] difficulties with transitions, distractibility, getting "upset when she doesn't get what she wants, usually around technology. [redacted] seems to lack common sense and needs to be told explicitly what to do even with some common routines. [redacted] will say or do odd things." Stip. Ex. 68 p 464-65.

61. At the time of the meeting, [redacted] was failing social studies with a grade of 46. Stip. Ex. 63 p 464.

62. On January 10, 2020, [redacted] was assigned a "peer buddy for hallway transition." She also began weekly check-ins with the school psychologist lasting 10-20 minutes focusing on her tardiness to class and social skills, as well as received instruction on "finishing breakfast and bathroom routines along with adult monitoring and prompting to get to homeroom on time." Stip. Ex. 67 p 427.

63. During the s[redacted]h grade and while she was at school, [redacted] took another child's cell phone at school; opened a YouTube account at school; posted a video on YouTube; and opened a Twitter account. [redacted] reported these incidents to the school, but none of these incidents were documented in [redacted] school record. T vol 4 p 883:9-884:18 (T of [redacted]

64. On February 17, 2020, Ms. Queen received notice that [redacted] "was admitted to [redacted] on February 14, 2020." Stip. Ex. 68 p 440 and Stip. Ex. 67 p 427. The program was both "educational and therapeutic . . . working on her behaviors [and] giving her coping skills." T vol 1 pp 220:20-221:4; 221:23 (T of [redacted]

65. [redacted] parents had her evaluated in 2020 [redacted] was at school . . . [redacted] T vol 1 pp 178:9-179:20 (T of [redacted]

66. [redacted] parents signed a Release of Information for Behavior Health to allow the program to communicate with CCS regarding [redacted] needs. Stip. Ex. 68 pp 446-47. Ms. Queen received the information in Stipulated Exhibit 68 from the Partial hospitalization program. T vol 5 p 1060:6-9 (T of Queen regarding recommendation from partial hospitalization program).

67. The Behavioral Health Assessments paperwork documented the provider's recognition of [redacted] autistic behaviors and "difficulty with reading social cues and understanding social and emotional reciprocity." Stip. Ex. 68 p 443.

68. Dr. Hasan noted [redacted] progress in the smaller classroom setting and contacted her teacher to "look[] into other schooling options." [redacted] was discharged on March 4, 2[redacted]0. Stip. Ex. 68 p 445.

69. [redacted] medical provider, Dr. Hasan, completed a "Return to Learn Plan" that indicated [redacted] needed to go to a "therapeutic setting, if not immediately available then modified school until appropriate placement." Stip. Ex. 68 p 438. *See also* Stip. Ex. 67 p 427.

70. On March 5, 2020, Ms. Queen submitted a referral for [redacted] to attend Day Treatment. Stip. Ex. 68 pp 448-50. Ms. Queen explained the "Return to Learn Plan" indicated [redacted] needed "therapeutic setting, if not immediately available, then modified school until appropriate placement." T vol 5 p 1062:7-11. Ms. Queen referred [redacted] to day treatment because "That is our highest level or any comparable therapeutic setting. We don't have anything higher than that therapeutic-wise or anything equivalent in the schools. We don't have another therapeutic setting. If they had -- this was a -- to the parent, that the parent was supposed to seek a therapeutic setting, I don't know." T vol 5 p 1062:12-18.

71. Respondent considered what it had available locally in the school district and when it did not fit [redacted] needs, Respondent abdicated all responsibility for her education.

72. Ms. Queen did not refer [redacted] for IDEA eligibility. T vol 5 p 1060:10-20 (T of Queen). *See* Stip. Ex. 15, p 39 (Special education referral states source as "parent").

73. On or about March 13, 2020, the governor of North Carolina shut down all North Carolina schools due to the COVID-19 pandemic.

March 20, 2020, Section 504 Meeting

74. The March 20, 2[redacted], Section 504 meeting identified parents' concerns about [redacted] "maturity and disabilities [that] make the traditional classroom setting unfit. Requesting Homebound Services for [redacted] as she waits for a decision for the Day Treatment Program at [redacted]. Parents are also requesting EC services for [redacted] Stip. Ex. 7, p 12.

75. The Section 504 Team identified [redacted] disabilities as "ADHD/ODD/DMDD." The Team updated [redacted] accommodations to: "Preferential seating per teacher's discretion and check-in with student weekly that all assignments are completed and turned in." Stip. Ex. 8, p 13.

76. In the expert opinion of Dr. Leach, the Section 504 Plan developed in March 2020 was not sufficient to meet [redacted] identified needs. T vol 3 p 393:11-14 (T of Leach).

March 20, 2020, IDEA Initial Referral Meeting

77. On the same day as the Section 504 meeting, an IEP team convened virtually on March 20, 2020. Stip. 13. Unlike the 504 team, the IEP team did not document any discussion of [redacted] possible admittance to the day treatment program. Stip. Ex. 14.

78. At this meeting, [redacted] again expressed her concerns regarding age appropriate behaviors that [redacted] exhibits, that not all behaviors are being documented, about emails from school about [redacted] behavior, and her concerns about [redacted] avoidance behaviors and preferring to stay home from school. Stip. Ex. 14 p 37.

79. By March 18, 2020, [redacted] had received four (4) office referrals and had twenty (20) "Minor incidents" documented, as well as eighteen (18) absences. Stip. Ex. 15 p 44; Stip. Ex. 67 p 427.

80. The Undersigned finds that at this initial referral meeting, Respondent was aware of [redacted] behavior and its effect on her education.

81. On the prior written notice, the IEP team identified the following targeted areas of concern: "struggling with time management and arriving late to class . . . [leading] to detention . . . display[ing] immature social skills, behaviors calling out in class, avoiding class, getting out of her seat while testing, [and] leaving class without permission." Stip. Ex. 15 p 49.

82. The IEP team repeated the same assessment, observation, and evaluation information documented from the previous non-eligibility meeting but this time, the IEP team decided to consider [redacted] eligibility in two (2) areas: Other Health Impaired (OHI) and Emotional Disability (ED). Stip. Ex. 15.

83. The IEP team documented that the 90-day timeline for conducting the evaluations, determining eligibility, and developing an IEP was due by May 31, 2020. Stip. Ex. 15 p 51. The IEP team identified the following targeted areas of concern: "struggling with time management and arriving late to class . . . [leading] to detention . . . display[ing] immature social skills, behaviors calling out in class, avoiding class, getting out of her seat while testing, [and] leaving class without permission." Stip. Ex. 15 p 49.

84. The Prior Written Notice from the meeting indicates the IEP team required "more data" to determine [redacted] eligibility for EC services but "rejected gathering additional data for educational, speech screening, vision hearing screen, formal observations due to the current and relevant data provided by [redacted]s parents." Stip. Ex. 14 p 38.

85. The IEP team did not identify what additional data were required to determine her eligibility.

86. This delay was especially problematic due to the district's report that "[a]t this time, all evaluations are on hold due to the Coronavirus, no contact with students." Stip. Ex. 14, p 37.

87. Dr. Leach was not aware of any policies or guidance published by the federal government that extended the timeline for the initial provision of services during the COVID-19 pandemic. T vol 3 pp 394:23-395:1 (T of Leach) (referring to the May 31, 2020, deadline on Stip. Ex. 15 p 51).

88. In Dr. Leach's expert opinion, the school district did not need to conduct another psychological evaluation prior to determining [redacted] eligibility in 2020 because the team had two years of data and teacher observations. T vol 3 p 511:4-7 (T of Leach). The IEP team could have determined [redacted] eligibility based on existing evaluations in March 2020. T vol 3 p 398:12-15; (T of Leach).

89. Dr. Leach opined that the district could have determined eligibility and reconvened to reassess their present levels and goals and placement, but instead delayed her opportunity to receive services and supports. T vol 3 p 511:7-13 (T of Leach).

90. "A speech-language evaluation was the only thing that wasn't available." T vol 3 p 397:2-4 (T of Leach) (referring to the evaluations listed on Stip. Ex. 14). Having reviewed the *Policies*, the Undersigned agrees a speech-language evaluation is not required for OHI and the other required screenings and evaluations were available. *See* NC 1503-2.5(10)(i).

91. The Undersigned finds that as of March 2020, all data needed for the consideration of Other Health Impaired (OHI) were available for the IEP team to make an eligibility determination.

92. The Undersigned finds that the IEP team misrepresented to [redacted] parents in the Prior Written Notice that "eligibility could not be determined by the review of existing data" at the March 2020 meeting. T vol 3 p 398 Stip. Ex. 15 p 50.

93. [redacted] parents secured a private evaluation by Dr. Lynda Johnson on April 16, 2020 who was referred by her psychiatrist, Dr. Thakkar.

94. Dr. Johnson utilized the following evaluation measures: Achenbach Child Behavior Checklist (CBCL), which was completed by [redacted] her math teacher, and [redacted] Million Pre-Adolescent Clinical Inventory (M-PACI); Autism Diagnostic Observation System-2 (ADOS-2);

Social Responsiveness Scale, Second Edition (SRS-2), which was completed by parent and teacher; and Gilliam Asperger Disorder Scale. Pet. Ex. 12 p 58.

95. As stated in her evaluation dated April 16, 202, Dr. Johnson diagnosed [redacted] with ADHD and with Autism Spectrum Disorder (Asperger's syndrome), without a known medical disorder, requiring moderate support, without accompanying intellectual impairment. Pet. Ex. 12 p 57.

96. [redacted] attended the day treatment program at C.C. Griffin [redacted] School from May 25, 2020, to February 8, 2021. Some of her attendance was virtual due to the pandemic. Stip. 18. [redacted] testified as to his understanding that "[t]he day treatment program is part of Cabarrus County at C.C. Griffin." T vol 1 p 258:3-4 (T of [redacted]

June 11, 2020, IEP Meeting

97. The IEP team reconvened on June 11, 2020, to review evaluation results provided by the parents. Stip. 16.

98. Dr. Johnson's private evaluation, dated April 16, 2020, gave [redacted] a diagnosis of Autism Spectrum Disorder which was sufficient to determine [redacted] eligibility for special education. Pet. Ex. 12; T vol 3 p 399:10-20 (T of Leach).

99. The IEP team refused to determine eligibility on the ground that there were "components missing for the categories of Emotional Disability" and "that the new private diagnosis of Autism Spectrum Disorder needed to be further assessed for eligibility consideration." Stip. Ex. 17 p. 53.

100. The IEP team also noted [redacted] had started the Day Treatment Program at C.C. Griffin [redacted] School. Stip. Ex. 17 p 54.

101. The IEP team did not indicate why it could not determine eligibility in the category of OHI at this meeting. See Stip. Ex. 17 p 53.

102. The IEP team had sufficient information to determine [redacted] eligibility under the IDEA. T vol 3 p 402:7-8 (T of Leach).

103. The IEP team misrepresented to [redacted] parents that eligibility could not be determined. Stip. Ex. 17 p 53.

104. [redacted] signed the Consent for Evaluation on June 11, 2020, that was amended to include: Autism Evaluation, Sensory Processing, Motor Screening, Semantics, Adaptive Rating Scales, and Assessment for Autism. Stip. Ex. 16.

105. The Undersigned finds that as of June 2020, all data needed for the consideration of Other Health Impaired (OHI) were available for the team to make an eligibility determination. See NC 1503-2.5(10)(i).

2020-2021 School Year Seventh Grade

106. At the start of [redacted] seventh grade year, she was still attending the day treatment program at C.C. Griffin [redacted] School. *See* Stip. 18.

107. Dr. Leach testified that [redacted] was reported to have met goals at the day treatment program, but she was unable to generalize the skills outside of the actual day treatment program. T vol 3 p 409:9-16 (T of Leach).

108. Ms. Queen completed a psychoeducational evaluation for [redacted] on October 1, 2020. Stip. 19. Ms. Queen conducted the following evaluations of [redacted] to assess her Cognitive Aptitude (Weschler Intelligence Scale for Children – Fifth Edition (WISC-V)), Behavioral/Emotional Functioning (Behavior Assessment System for Children – 3rd Edition – Parent (BASC-3-P) and Teacher (BASC-3-T), Adaptive Behavior Functioning (Adaptive Behavior Assessment System – 3rd Edition (ABAS-III-P) and Teacher (ABASIII-T)) and Autism Characteristics/Functioning (Autism Spectrum Rating Scale – Parent (ASRS-P) and Teacher (ASRS-T)). Stip. Ex. 48 p 345.

109. Ms. Queen recounted the results from the private evaluation conducted on April 16, 2020 by Dr. Johnson, reported a synopsis of the composite scores from the 2017 testing by Mary Willis Page, as well as the testing by Kim Ferguson. *Compare* Stip. Ex. 48 pp 348-49 *with* Pet. Ex. 8 (testing by Page) and Pet. Ex. 9 (testing by Ferguson).

110. The Undersigned finds the information recounted by Ms. Queen from these evaluations sufficiently adequate.

111. Ms. Queen reported "Referral strengths from the IEP team," which Ms. Queen again, only considered to be the school-based members of the IEP team. Stip. Ex. 48 p 349.

112. It is unclear which teachers provided this information from the report, as [redacted] had been in Day Treatment since May 2020.

113. Ms. Queen noted that after the non-eligibility determination in November 2019, [redacted] received four (4) office referrals prior to school closing due to COVID-19, and there were twenty (20) minor incidents reported. Stip. Ex. 48 p 350.

114. The psychoeducational evaluation completed by the CCS "confirmed the same areas of need that were identified in the outside private evaluations." T vol 3 pp 412:21-413:5 (T of Leach) (referring to Stip. Ex. 48).

115. CCBOE reportedly conducted a "Sensory Processing Evaluation" that was based on one (1) observation on January 5, 2021, and "teacher report" while [redacted] was in Day Treatment which determined [redacted] had "no sensory needs." Stip. Ex. 48 p 370.

116. CCBOE conducted a speech-language assessment of [redacted] while she was at Day Treatment in October 2020. The Speech Language Pathologist (SLP), Kathryn Norberg, M.S.Ed., CCC-SLP, concluded [redacted] "presents with receptive and expressive language skills, that include pragmatic and semantic skills, that are within normal limits for her age." Stip. Ex. 49.

117. [redacted] performance on the CCBOE's speech-language evaluation was what Dr. Leach "would expect because students like [redacted] who have very high-functioning communication and language skills they usually come out average on the standardized measures of expressive communication, receptive communication, and pragmatics when it's delivered in a testing situation. Their challenges come in the applied context . . . [and] most standardized assessments aren't able to measure that in an applied context and still be standardized. So her core features of autism aren't coming out in this report that relate to her language and communication and pragmatics challenges." T vol 3 pp 413:24-414:11 (T of Leach).

118. Although Dr. Johnson's report identified [redacted] struggles with reciprocal conversations, taking perspective, and recognizing nonverbal expressions as evidence of her ASD, the SLP did not probe those skills. *See* Stip. Ex. 49 pp. 371-72.

119. The Undersigned questions if the SLP reviewed Dr. Johnson's report prior to her evaluation, as the SLP did not indicate that she had in her evaluation.

February 5, 2021, Start of IEP Eligibility Meeting

120. An IEP team convened for [redacted] on February 5, 2021, but was unable to complete the entire eligibility process and decided to reconvene on February 8, 2021, to complete the IEP. Stip. Ex. 19, p 71.

121. [redacted] expressed that [redacted] would not attend [redacted] School because she needs a program. Stip. Ex. 19 p 71.

February 8, 2021, Conclusion of IEP Eligibility Meeting

122. A [redacted] School IEP team convened on February 8, 2021, to determine [redacted] eligibility. Stip. 20.

123. [redacted] provided her consent for the provision of special education and related services. Stip. Ex. 20.

124. The IEP team noted [redacted] was "making educational progress" in the Day Treatment Program. The IEP team acknowledged [redacted] "long history" of "behavioral and mental health needs," and that [redacted] "requires specially designed instruction to assist with deficits in the areas of behavior, emotional regulation, transition, and conflict resolution . . . to provide the skills necessary to address these deficits through a variety of feedback and opportunities for structured practice." Stip. Ex. 19 p 71.

125. In the opinion of Dr. Leach, both the sensory processing evaluation that was used to deem [redacted] ineligible under the category of Autism under the IDEA and the speech language evaluation were inadequate. Stip. Ex. 48 p 370; Stip. Ex. 49; T vol 3 pp 413:24-414:11 (T of Leach).

126. Dr. Leach disagreed with the IEP's analysis of why [redacted] did not require specially designed instruction due to her autism. T vol 3 p 418:17-22 (T of Leach) (referring to Stip. Ex. 21 p 100). The CCS did not accurately represent the criteria to [redacted] parents. T vol 3 pp 422:22-423:2 (T of Leach).

127. The undersigned finds that the IEP team did not appropriately consider [redacted] outside evaluations when finding her ineligible under the category of Autism.

128. Respondent's rationale for finding [redacted] ineligible due to not showing "the limited expression and sensory that requires specially designed instruction" is not supported by the evidence and is inconsistent with NC 1503-2.5(d)(1)(ii)-(iii).

129. The Prior Written Notice completed at that meeting itemizes the evaluations and screening data reviewed. Stip. Ex. 22.

130. The IEP team reported [redacted] did not "meet eligibility criteria for part b of the Autism worksheet." Stip. Ex. 22 p 108.

131. None of Respondent's witnesses testified to what "part b" of the worksheet was or why [redacted] would not have met eligibility criteria. The Autism worksheet was not entered into evidence.

132. The Undersigned finds that the evidence does not support Respondent's determination that [redacted] did not meet eligibility for Autism.

133. The Prior Written Notice did not provide the parents with an accurate representation of the criteria for receiving specially designed instruction in the category of autism. T vol 3 p 422:22-423:9 (T of Leach).

134. The Undersigned finds that the Prior Written Notice was not sufficient and did not give Petitioners clear notice of the bases for their decision that [redacted] was not eligible under the category of Autism.

135. The IEP team found [redacted] eligible under the category of Emotional Disability and decided that [redacted] "only requires specially designed instruction in the area of social emotional." Stip. 21 & Stip. Ex. 22 p 108.

136. An Individualized Education Program (IEP) was prepared for [redacted] on February 8, 2021. Stip. Ex. 23.

137. The IEP only offered SDI in Social/Emotional Skills for 60 minutes/4 times per week in General Education and 20 minutes/3 times per week in Special Education. Stip. Ex. 23 p 134.

138. The IEP determined [redacted] was not eligible to receive Extended School Year [ESY] services. Stip. Ex. 23 p 139.

139. There was no evidence in the record to support delaying [redacted] eligibility determination until February 2021.

140. This procedural violation resulted in educational harm because [redacted] "did not have an IEP with appropriate goals and accommodations and a specially designed instruction that she needed at that point for multiple years." T vol 3 p 417:7-18 (T of Leach).

141. In her expert opinion, Dr. Leach disagrees with the explanation provided by the school team for why [redacted] did not meet eligibility criteria for autism or OHI. T vol 3 p 424:3-14 (T of Leach).

142. Dr. Leach opined that due to her autism, [redacted] requires specially designed instruction and found no support in the record of the team's decision not to provide specially designed instruction in math. T vol 3 p 419:1-420:8 (T of Leach) (referring to Stip. Ex. 22 p 111).

143. In refusing [redacted] request for homebound, the IEP team discussed other options that could be available for [redacted] however, none of those other options were included in the IEP developed at the meeting. T vol 3 p 421:21-23 (T of Leach) referring to Stip. Ex. 22 p 109)

144. In the expert opinion of Dr. Leach, the IEP developed in February 2021 did not address [KMK's] academic needs, or organizational and study skills, but the IEP only included specially designed instruction in the area of social-emotional. T vol 3 pp 425:22-426:1 (T of Leach). The three (3) goals were not appropriate to meet [redacted] identified needs and were not based on any baseline data. T vol 3 p 426:16-23 (T of Leach). The supplementary aids, services, accommodations, and modifications were not appropriate to meet [redacted] identified needs. T vol 3 pp 427:19-428:5 (T of Leach) (referring to Stip. Ex. 23 p 135). Although the IEP indicated the method of measuring progress on the goals would be "data sheets and anecdotal records," there was no such evidence in the record that these goals had been implemented. T vol 3 p 16-17 (T of Leach).

145. After an IEP meeting on February 8, 2021, [redacted] attended [redacted] School until March 24, 2021. Stips. 21, 22.

146. On March 24, 2021, [redacted] withdrew from Respondent's school district to attend [redacted] Way Camp for Girls for several months. Stips. 22, 23.

2021-2022 School Year Eighth Grade

147. [redacted] began eighth grade being homeschooled by her family from August 2021 through December 2021 at Laurelwood Academy. Stip. 24 and T vol 5, p 921:9-11; 924:10-21 (T of [redacted]

148. Starting the second semester of the 2021-2022 school year, [redacted] participated in a homeschool co-op program that began on January 3, 2022. Stip. 25. [redacted] was suspended and subsequently expelled from the homeschool group. T vol 5 p 929:15-22 (T of [redacted]

149. [redacted] re-enrolled in the Cabarrus County Schools on March 22, 2022. Stip. 25.

150. [redacted] completed her eighth-grade school year at [redacted] School. Stip. Ex. 54.

151. [redacted] was suspended for twenty percent (20%) of the approximately forty-five (45) days [redacted] was enrolled in [redacted] School with nine (9) days of suspension. Stip. Ex. 45 p 331.

152. In addition to the suspensions, Ms. Queen's notes documented 4 "Major" incidents and 9 "Minor" incidents from the Educator's Handbook for tracking discipline. Stip. Ex. 67 pp 426, 428.

153. There is no evidence in the record that Respondent conducted an FBA during this school year.

March 31, 2022, IEP Meeting

154. The Prior Written Notice, dated March 30, 2022, indicated that the IEP team was "working off of the expired IEP and [would] reconvene in May to review current data and discuss transition to high school." Stip. Ex. 24 p 140.

155. On March 31, 2022, [redacted] IEP team convened for an annual review meeting and developed an IEP. Stip. 26.

156. Dr. Leach disagreed with adopting the February 2021 IEP *carte blanche* in March 2022, as it would have been appropriate to "do informal assessments to update present levels and update goals and gather information and update the IEP at that time." T vol 3 p 529:15-17 (T of Leach).

157. The present levels remained identical to the February 2021 IEP, despite the IEP team deciding to remove one of [redacted] goals. Stip. Ex. 24 p 140-41.

158. No updated data were provided; thus, the present levels did not provide any baseline data against which to measure the goals. The IEP team removed the goal for coping skills. Stip. Ex. 25 pp 147-59.

159. The two (2) remaining goals were identical to the previous IEP, as well as the Criterion for Mastery and Method of Measuring Progress ("Data sheets, Anecdotal records"). The "criterion for mastery" confusingly was listed as "(4)". Stip. Ex. 25 p 162. The goals in the March 2022 IEP were not appropriate to meet [redacted] identified needs "[b]ecause they address a couple of simple behaviors, but they do not address her core features of deficit." T vol 3 pp 435:15-25 and 436:24-437:16 (T of Leach).

160. The IEP did not offer any related services. Stip. Ex. 25 p 162.

161. The supplemental aids, services, modifications, and accommodations were identical to the February 2021 IEP and were not appropriate to meet [redacted] needs in March 2022. Stip. Ex. 25 pp 162-64. T vol 3 p 437:18-24 (T of Leach); *compare* Stip. Ex. 26 pp 185-188 *with* Stip. Ex. 23 pp 162-65.

162. The service delivery remained identical to the February 2021 IEP. Stip. Ex. 25 p 162. The IEP team determined [redacted] did not require ESY services. Stip. Ex. 25 p 166.

163. In the expert opinion of Dr. Leach, the March 20, 2022, IEP did not offer [redacted] a FAPE. T vol 3 p 438:21-23 (T of Leach).

164. There was no evidence in the record that [redacted] received specially designed instruction as indicated in the March 2022 IEP. T vol 3 pp 438:24-439:2 (T of Leach).

165. The progress monitoring referenced in the present level did not include "any evidence-based practices that would be utilized to implement the goals [which] would mean no specially designed instruction" was provided to [redacted] on the goals. T vol 3 pp 440:19-441:4 (T of Leach).

166. The only evidence admitted in the hearing regarding implementation of [redacted] March 31, 2022, IEP were on two goals and consisted of a plus (+) or minus (-) for various days over a 5-week period. Pet. Ex. 21. No testimony was provided regarding these sheets as to who collected the data, what criteria were used, or what specially designed instruction [redacted] received on these goals.

167. A Forced-Choice Reinforcement Menu was introduced, dated April 26, 2022. No evidence was presented regarding the use of this Menu by Respondent or how the school personnel utilized the information gleaned from it. T vol 3 p 443:4-6 (T of Leach).

May 13, 2022, IEP Meeting

168. [redacted] IEP team convened on May 13, 2022. Stip. 27.

169. The Prior Written Notice from the March 30, 2022, IEP meeting stated that the IEP team would "reconvene in 4-6 weeks to review data, update present level and goals. Transition to high school will be discussed at that time." Stip. Ex. 24.

170. At the May 13, 2022, meeting the IEP team did not address any of the items listed in the Prior Written Notice. Stip. Ex. 24 p 140. The present levels of performance were repeated for reading, math, organizational study, speech-language, and adaptive behavior. *Compare* Stip. Ex. 23 *with* Stip. Ex. 26; T vol 3 p 440:1-3 (T of Leach).

171. The IEP team documented that it "met to add 8th grade Science EOG and accommodations." Stip. 28.

172. [redacted] parents expressed concerns about [redacted] "being in a traditional classroom setting and behaviors resurfacing" as well as concerns "with her peer interactions . . . age appropriate concepts with her interactions with peers, in particular boys." The IEP team did not address these concerns. Stip. Ex. 26 p 167.

173. The present levels remained identical between the February 2021 and March 2022 IEPs in all areas except Social/Emotional which the IEP team updated. The team noted [redacted] difficult transition back to the "regular public school setting". The team noted improvement in her peer/adult interaction, classroom behavior, except in fourth period where "her engagement with peers and teacher cause her not to meet her IEP goals." Stip. Ex. 26 pp 176- 177.

174. The IEP team updated the present level for social-emotional by "merely repeating previous areas of concern without actual baseline data on specific skills that would get to the root of her problems." T vol 3 p 440:16-18 (T of Leach referring to Stip. Ex. 26 pp 176-77).

175. The IEP goals remained identical to the March 2022 IEP. Stip. Ex. 26 p 185. "This would mean she didn't make progress to [] meet her goals . . .and they continued to not add goals related to her core features of need." T vol 3 p 443:15-19 (T of Leach).

176. [redacted] IEP goals were not appropriate to meet her unique needs. She scored "Not Proficient" in both Reading and Math on her End of Grade tests. Her final grades for eighth (8th) grade were 1-C, 2-Ds, and 1-F. [redacted] also had two (2) discipline referrals for "assaulting a student (pushing and profanity) and a possession of a vape." Stip. Ex. 28 p 193; Stip. Ex. 54.

177. The IEP did not offer any related services, despite noting [redacted] problems with inappropriate conversations and discipline referrals for "inappropriate peer/adult interaction[s]." Stip. Ex. 26 p 185.

178. The supplemental aids, services, modifications, and accommodations remained identical to the February 2021 and March 2022 IEPs, except for additional standardized tests for which [redacted] would receive accommodations. Stip. Ex. 26 pp 185-88.

179. The service delivery remained identical to the February 2021 and March 2022 IEPs. Stip. Ex. 26 p 185.

180. In the expert opinion of Dr. Leach, the May 2022 IEP did not offer [redacted] a FAPE because "the goals are not appropriate, there's no accommodations that are new, and there's no evidence of specially designed instruction." T vol 3 p 444: 11-21 (T of Leach).

181. The IEP team justified removing [redacted] from her nondisabled peers because [redacted] needed "specially designed instruction on teaching of emotional regulation skills in a small group setting." Stip. Ex. 26 p 188.

182. The IEP team deemed [redacted] ineligible to receive ESY services. Stip. Ex. 26 p 190.

183. The only evidence admitted in the hearing regarding implementation of [redacted] May 2022, IEP were on two goals and that consisted of a plus (+) or minus (-) for various days during two (2) weeks. Pet. Ex. 21.

184. [redacted] attended five (5) sessions of eighth (8th) grade Dialectical Behavioral Therapy on March 30, April 26, May 4, May 11, and May 18, 2022. Stip. Ex. 67 p 426.

185. The inappropriateness of the March and May 2022 IEPs is further evidenced by the behavior data "so her behaviors [were]either staying the same or getting worse." T vol 3 p 445:8-10 (T of Leach) (referring to Stip. Ex. 45).

186. On May 23, 2022, Dr. Thakkar, [redacted] treating psychiatrist, wrote a letter recommending a "higher level of care and service such as residential treatment" which was given to the school district. Pet. Ex. 13. T vol 1 p 196:4-18 (T of [redacted]

July 21, 2022, IEP Meeting

187. [redacted] IEP team convened on July 21, 2022 at the parents' request. Stip. Ex. 28. [redacted] had completed the eighth grade when this meeting was held. The Prior Written Notice indicates her school as [redacted] High School and her grade level as ninth grade. Stip 29.

188. The Prior Written Notice documents the purpose of the meeting as follows: "The parents requested an IEP meeting to discuss concerns. The parents are requesting that [redacted] be placed at a residential therapeutic placement because Cabarrus County Schools does not have a therapeutic setting for her." Stip. 30.

189. At the July 2022 IEP meeting, the IEP team "discussed the need for a functional behavior assessment and [recommended] that an IEP team meet at the beginning of the school year to consider opening an evaluation for that reason." Stip. Ex. 28 p 194. There was no mention of Dr. Ferguson's recommendation in 2019 for a behavior intervention plan.

190. The Undersigned finds that even though data could not be collected during the summer, the IEP team should have opened an evaluation to begin the process.

191. The IEP developed at the July 21, 2022, IEP meeting was set to take effect on August 29, 2022. Stip. Ex. 29 p 196.

192. Two (2) of the goals were repeated from [redacted] February 2021, March 2022, and May 2022 IEPs with the identical "criterion for mastery" of four (4) and "Method of Measuring Progress," which were "Data sheets, Anecdotal records." Stip. Ex. 29 p 214.

193. The July 2022 IEP added four (4) additional goals but "[t]here were no baseline data in the present level." Even with the additional goals, the goals were not appropriate to address all of [redacted] identified needs. T vol 3 p 454:9-19 (T of Leach).

194. The IEP team added one (1) thirty (30) minute counseling session to [redacted] IEP. Stip. 33. The IEP team added counseling was "to provide support with peer interactions and relationships." Stip. Ex. 22 p 194.

195. The specially designed instruction was increased in the August 2022 IEP, and an accommodation was added "to allow [redacted] to sit in the site of the teacher, rather than next to the teacher at assemblies" but even with these changes, the IEP was not appropriate to meet [redacted] needs and did not offer a FAPE "[f]or the same reasons as stated previously that they're not addressing her core areas of need." T vol 3 p 456:10-16 (T of Leach).

196. Despite her low grades and discipline issues during her enrollment at [redacted] School, the IEP team determined she was "making adequate progress in her current setting." Stip. Ex. 28 p 194. [redacted] present levels remained identical in all areas as the February 2021, March 2022, and May 2022 IEPs, with the exception of Social/Emotional. Stip. Ex. 29 pp 196-211. According to Dr. Leach, those criteria show "the opposite. She's plummeting." T vol 3 pp 452:24-453:3 (T of Leach). The IEP was updated, however, to include [redacted] discipline referrals and resultant in-school and out-of-school suspensions which is further evidence that [redacted] was not making progress in her current setting. T vol 3 p 454:1-5 (T of Leach); Stip. Ex. 29 p 206.

197. The Undersigned finds that there was no evidence that [redacted] was making any progress.

198. The parents provided a letter from Dr. McHale recommending a residential placement, but the Prior Written Notice does not state that the IEP team discussed the letter. T vol 3 p457:13-16 (T of Leach).

199. The CCBOE refused the parents' request for a therapeutic placement. Stip. 31.

200. At the meeting, [redacted] "shared notes and observations from previous school staff which noted behaviors of concern." The team documented [redacted] "has weekly therapy and has for many years." Stip. Ex. 28 p 193. [redacted] parents expressed their concern that "the traditional high school environment with limited supports will not provide [redacted] with the structure she needs." Stip. Ex. 29 p 196.

201. Despite [redacted] poor grades and discipline history, the IEP team rejected the parents' request indicating "current data supports that [redacted] is making adequate progress in her current setting." According to the Prior Written Notice, the IEP team relied upon [redacted] grades for Quarter 4 and her eighth (8th) grade end-of-grade tests. [redacted] final grades were C, D, D, F and she scored "Not Proficient" in both Reading and Math on her EOGs. Stip. Ex. 28 p 193-194. The Undersigned finds this is not "adequate progress."

202. The IEP team increased the service delivery such that [redacted] would spend almost twenty-five percent (25%) of the school day segregated from her nondisabled peers to work on her Social/Emotional goals, in addition to the specially designed instruction she was to receive in the general education setting. Stip. 34. The IEP team justified this removal as necessary "to address skill and performance deficits in a small group setting." Stip. Ex. 29 p 218.

203. The IEP team determined she was not eligible for ESY. Stip. Ex. 29 p 220.

July and August 2022

204. In July 2022, Glendora Hagins from the North Carolina Department of Instruction provided Ms. Fitzwater, CCS's Exceptional Children's Director, a copy of a Technical Assistance Document entitled: "Serving Students with Disabilities in Private Facilities" (*hereinafter* "DPI Guidance") as well as a list of schools. T vol 6, p 1132:13-14; 1135:7-15 (T of Fitzwater about conversations with Hagins); Pet. Ex. 27.

205. The first page of the DPI Guidance explains: "At times, LEAs must consider whether or not private placement is necessary to provide a free, appropriate public education (FAPE) to a student with a disability." The DPI Guidance outlines various options for identifying appropriate private schools or facilities to determine if they can provide FAPE to the student. Pet. Ex. 27 p 335-38.

206. The DPI Guidance identifies a "Possible Funding Source" utilizing "the reserve fund toward the payment of the excess cost of the placement of a child in a program not operated by the local board of education." The local education agency (LEA) is directed to first utilize:

(1) The state's regular per pupil allocation for school-aged children;
(2) The state's add-on per pupil allocation for exceptional children; plus
(3) The federal per pupil allocation for exceptional children.

207. If these amounts are insufficient to cover the cost of the placement, the reserve fund may be used to pay up to "fifty percent of the total cost of the alternative placement." Pet. Ex. 27 pp 338-39.

208. The DPI Guidance allows funds to be used "only to provide special education and related services costs; residential costs; and extended school year [when deemed appropriate by the IEP team]. . . . Funds must not be used for medical, custodial, or day care services." Pet. Ex. 27 p 339.

209. The DPI Guidance instructs the LEA to "exhaust all possible in-state residential placements before placing a child out-of-state" when a "private residential placement has been determined to be the most appropriate placement for a child with a disability." Pet. Ex. 27 p 339.

210. On August 17, 2022, Dr. McHale wrote a letter recommending [redacted] needed "the structured setting of a therapeutic boarding school to meet her goals of stability and personal growth." T vol 1 p 69:11; Pet. Ex. 27 p 363. Like Dr. Thakkar before, Dr. McHale outlined the

history of previous efforts to address [redacted] mental health needs including psychiatric hospitalizations, partial day hospitalization programs, and outpatient therapy noting "[n]umerous psychotropic medications have been prescribed and various behavioral plans have been attempted and have not yielded positive results." Pet. Ex. 27 p 363.

211. Dr. McHale invited school staff to contact his office for "any additional information." Pet. Ex. 27 p 363.

212. No one from the CCBOE contacted Dr. McHale about his letter. T vol 1 p 71:8-10 (T of McHale).

213. [redacted] and Ms. Fitzwater participated in a meeting in early August 2022 that was not an IEP meeting where they discussed placement because [redacted] parents had brought two (2) letters from providers to the school staff recommending therapeutic boarding school. T vol 6 p 1135:16-1136:4 (T of Fitzwater explaining why she did not contact Dr. McHale after the August 2022 meeting).

214. The Undersigned finds it impossible to comprehend that Ms. Fitzwater genuinely believed when she left this meeting with [redacted] parents that she did not know that they were requesting a therapeutic residential placement, particularly after she was contacted by DPI and provided with information about the process for securing funding from DPI for a private placement.

August 30, 2022, IEP Meeting

215. On August 30, 2022, [redacted] IEP team convened at the parents' request. Stip. 36. The IEP team discussed several options. Stip. 37. [redacted] explained she did not want [redacted] to attend the traditional high school in the district because [redacted] "was subjected to a lot at the [redacted] T vol 5 p 965:16:22 (T of [redacted] Her parents discussed [redacted] was previously in Day Treatment, partial hospitalization, and a [redacted] Camp. Stip. Ex. 30 p 222.

216. The IEP team only discussed "other settings and options in the district for the interim until she starts a residential setting that may support some of the areas the parent is concerned about." The IEP team proposed "an escort in the hallway or classroom area to eat lunch." Stip. Ex. 30 p 223.

217. [redacted] parents requested "homebound to ensure [redacted] remains safe and to provide access to therapeutic services outside of the home until [redacted] is accepted into a residential setting. No one from the district disagreed with [redacted] needs for a residential setting." T vol 3 pp 561:16-562:5 (T of Leach referring to Stip. Ex. 30).

218. IEP team members explained the PLC would offer "a small group setting and . . . counseling sessions/groups and outside therapists [at parent expense] are also an option." According to the social worker at the meeting, [redacted] "could be pulled to help process when she encounters an incident, there are groups offered on campus and the counselor would be available for crisis intervention. The ratio of students to counselor and social worker is lower at the PLC

setting." Furthermore, according to the social worker, the PLC would "provide her interaction with peers to practice skills and provide her support on site." The IEP team suggested that [redacted] attend the [redacted] when the family continued "to petition for residential." T vol 1 p 220:1-7 (T of [redacted] See Stip. Ex. 30 p 223.

219. The IEP team explained the PLC is not an IEP team decision, so even though it purportedly offered services [redacted] needed as a student with a disability under the IDEA, these supplemental aids and services were not included in the IEP. [redacted] parents were "lead to believe there would be some therapeutic component to [PLC]." T vol 1 p 220:7-16 (T of [redacted]

220. The IEP team also discussed Virtual Academy as an option to provide access to the general education curriculum and less daily social interaction with peers." Stip. Ex. 30, p 223. Yet, this too was not an IEP team decision, so this was not added to [redacted] IEP.

221. The evidence in the record is the district saying "this is what we have to offer. They said the closest thing we have to offer to a therapeutic environment is the PLC, which did not meet her needs either." T vol 3 p 450:10-16 (T of Leach).

222. Despite the parents providing a letter from Dr. McHale explaining [redacted] need for a "structured setting of a therapeutic boarding school" and the IEP team's refusal to consider a different placement, the IEP team indicated that "no actions were proposed" on the Prior Written Notice. Stip. Ex. 30 p 224.

223. The Undersigned finds that the Prior Written Notice misrepresents that CCBOE refused to take action when, in fact, the IEP decided not to consider residential therapeutic placement as requested by [redacted] and [redacted]

2022-2023 School Year [redacted] Grade

224. [redacted] was enrolled to begin [redacted] grade at [redacted] [redacted] High School in CCBOE on August 29, 2022, for the 2022-2023 school year. Stip. 35.

225. [redacted] emailed staff at CCBOE letting them know they were willing to have [redacted] try attending the PLC on August 31, 2022. T vol 5 p 967:7-12 (T of [redacted] did not receive a response from anyone until she sent a second email on September 7, 2022. T vol 5 p 968:7-16 (T of [redacted]

226. The PLC is an "alternative learning program." T vol 4 p 809:1-3 (T of Williams). Alternative learning programs must have "[i]dentified strategies that will be used to improve student achievement and behavior," N.C. Gen. Stat. § 115C-105.47A, and prior to referring a student to an alternative learning program, the referring school must "[d]ocument the procedures that were used to identify the student as being at risk of academic failure or as being disruptive or disorderly." N.C. Gen. Stat. § 115C-105.48(a)(1).

227. Mr. Williams described the criteria to attend the PLC as (1) "if the student is academically able to graduate" and (2) "are we able to graduate them in the four-year period."

During the interview process, they "try to determine if the student does want to graduate high school." T vol 4 p 796:11-19 (T of Williams). The PLC "focuses on dropout prevention." Students that attend the PLC "for a variety of reasons are either behind in school . . . have attendance problems . . . don't like high school . . . had social-emotional problems . . . have poor living situations." T vol 4 p 795:6-11 (T of Williams).

228. The PLC has about one hundred (100) spots and "focus[es] on juniors and seniors" but will "enroll tenth graders and ninth graders in some cases." The PLC offers "five classes per semester"; however, students can "actually get more than the ten credits." There are six (6) "full-time teachers" and "one teacher assistant that does electives." T vol 4 p 795:12-25 (T of Williams). According to Mr. Williams, "all the staff is trauma-informed and trained." T vol 4 p 796:1-2 (T of Williams). The PLC is located in "a small building." T vol 4 p 797:9-10 (T of Williams). The academic performance of PLC students is lower than "probably three-quarters of the high schools." T vol 4 p 816:1-9 (T of Williams).

229. [redacted] began attending the [redacted] on September 12, 2022, for her [redacted] grade year. Stip. 39. When [redacted] started at the PLC, she "didn't fit in well. She was trying to create relationships with the students." [redacted] was "the youngest student at the school." "She tried making friends with different groups." Even though the PLC kids know "they're all there for the same reasons" and are generally friendly, [redacted] "wore her welcome out quickly." T vol 4 pp 799:20-800:8 (T of Williams).

230. On September 23, 2022, Dr. Williams emailed [redacted] regarding two (2) separate incidents regarding [redacted] inappropriate interactions with teachers. Stip. Ex. 45 p 330. Mr. Williams explained he does not document all disciplinary referrals in the school and he had not documented a disciplinary incident for [redacted] during the fall of 2022. T vol 4 p 841:13-842:16 (T of Williams).

231. [redacted] was suspended for four (4) days on October 17, 2022, for "Disruption of School Environment/Mutual Sexual Contact." Stip. Ex. 45 p 329.

232. The IEP team did not convene to discuss conducting an FBA, despite the July IEP team's discussion of the need for an FBA and the documented behavior challenges resulting in an out-of-school suspension.

October 17, 2022, IEP Meeting

233. [redacted] IEP team next convened on October 17, 2022. Stip. 40.

234. Mr. Williams testified that "I knew the parents were looking--were –were wanting a different placement for [redacted] that they weren't happy with her at the PLC." T vol 4 p 823:8-18.

235. [redacted] parents communicated their concerns "with the misinformation that they received from [redacted] High School concerning intensive support from a clinical license [sic] professional on campus [at the PLC] to address trauma based goals. . . . The parents indicated that

[redacted] needs intensive services because she has significant needs that the school can not [sic] address." Stip. Ex. 31 p 225.

236. The IEP team at PLC updated the present levels but failed to provide any baseline data against which to measure the goals. The present levels identified areas of need the IEP team failed to address either by not creating goals or by removing goals that were developed in July 2022. Stip. Ex. 32 p 234.

237. By way of example and not limitation, [redacted] teacher, Mr. Smalls, reported when he "redirects [redacted] . . . she will argue with him" and [redacted] "spends a significant amount of time on YouTube." Ms. Dayvalut reported [redacted] "is constantly redirected to complete math assignments and struggles with completing assignments without redirection." Yet, the IEP team removed the goals related to following verbal directions from a teacher to include transitioning off the computer. Compare Stip. 32 (July 2022 IEP goals) with Stip. Ex. 32 p 238 (October 2022 IEP goals).

238. The IEP team removed a goal from [redacted] IEP to "apply learned social problem-solving steps in order to work with peers without incident (arguing) . . . because it [was] not appropriate for the [PLC] environment." Dr. Leach opined that was "ridiculous" as that goal "would be appropriate in any context working with peers." T vol 3 p 464:7-11 (T of Leach).

239. At the time of the October 17, 2022, IEP meeting, [redacted] grades reported for Quarter 1 were one (1) D and four (4) Fs. T vol 3 p 464:7-11 (T of Leach).

240. After the October 17, 2022, IEP meeting, even after the discipline incident the same day and despite noting all the concerns about [redacted] inappropriate use of technology and need for bathroom supervision, there was no evidence in the record the IEP team initiated an FBA. T vol 3 pp 462:24-463:2 (T of Leach) (referring to Stip. Ex. 45 p 329); Stip. Ex. 33.

241. [redacted] was not making educational progress related to her IEP goals or along the continuum of the general education curriculum. T vol 3 p 463:9-18 (T of Leach).

242. The IEP team removed goals from [redacted] IEP even though the present levels continued to indicate a need for specially designed instruction. Stip. Ex. 32, p 238.

243. The IEP team's changes to [redacted] goals identify her increasing struggles at the PLC. By way of example, [redacted] IEP team divided one (1) goal into two (2) to work on refraining from physical aggression as one goal and verbal aggression as a separate goal. Additionally, the IEP team lowered its expectations for [redacted] of completing assignments and identified the need for teacher prompting to stay on task. Compare Stip. 32 (July 2022 IEP goals) with Stip. Ex. 32 p 238 (October 2022 IEP goals).

244. The IEP indicates [redacted] progress on her social-emotional goals will be monitored utilizing data sheets, anecdotal records, student work samples, counselor logs, and running records; however, running records are "used for documenting reading performance." T vol 3 p 464:23-24 (T of Leach).

245. There is no evidence in the record that [redacted] received specially designed instruction from the time she started at the PLC on September 12, 2022, through when the IEP team convened on October 17, 2022. T vol. 3 p 465:3-7 (T of Leach).

246. The IEP team maintained counseling as a related service at one (1) time per week for thirty (30) minutes. Stip. Ex. 32 p 239. The present level in [redacted] IEPs, however, do not contain any baseline information or way to measure these goals. T vol 4 pp 655:12-19 & 717:9-23 (T of Murray). See Stip. Ex. 32 p 239; Stip. Ex. 34 p 253.

247. The supplemental aids, services, modifications, and accommodations were not appropriate or sufficient to address her myriad of needs to allow her to access the general education curriculum as evidenced by her failing grades in all but one (1) class in which she was earning a D. Stip. Ex. 32 p 239-42.

248. Despite [redacted] parents expressing their concerns the school was unable to address her "significant needs", no licensed clinical professional was on the IEP team. The IEP team incorrectly indicated there were "no refusals" at the IEP meeting. The IEP team also rejected increasing [redacted] counseling service time. Stip. Ex. 31 p 227.

249. The IEP team reduced [redacted] specially designed instruction in the special education setting from ninety (90) to thirty (30) minutes per day and completely removed her specially designed instruction from the general education setting. Stip. Ex. 31 p 227. This IEP did not provide [redacted] with ESY services. Stip. Ex. 32 p 244.

250. The counseling goal indicated progress would be measured by a "counselor log" and "log of teacher observation." Stip. Ex. 32 p 238 . The only data entered into evidence was Ms. Showalter's "Summary of Progress" dated January 4, 2023, and her Service Delivery Log. Stip. Ex. 61; Resp't's Ex. 33 (same); Resp't's Ex. 31.

251. The Summary of Progress does not provide "any evidence of specially designed instruction." There is no evidence of generalization of the skills that [redacted] is self-reporting. T vol 3 pp 467:20-468:14 (T of Leach) (referring to Stip. Ex. 61).

252. Of the fifteen (15) weeks [redacted] should have received counseling once a week for thirty (30) minutes, [redacted] received twelve (12) sessions or approximately eighty percent (80%). Resp't's Ex. 31.

253. The Undersigned finds Ms. Showalter met with [redacted] eighty percent (80%) of the sessions indicated in her IEP for the purposes of implementing this portion of her IEP.

254. Ms. Showalter did not identify which strategies [redacted] purportedly used to resolve conflict, and there was no evidence presented regarding the content of the sessions to indicate [redacted] received any specially designed instruction to meet this goal.

255. According to Ms. Showalter's Summary of Progress, [redacted] self-reporting was the basis for determining her progress. Stip. Ex. 61. The Undersigned does not accept [redacted] answers to these questions as evidence of progress.

256. Ms. Showalter's anecdotal note of "multiple school staff report[ing] that [redacted] has shown improvements in her social interactions since the beginning of the school year" is hearsay and unsupported by the evidence in the record; therefore, it will not be considered.

257. The IEP goals were "still not appropriate to meet [redacted] s needs," and the October 24, 2022, IEP did not offer [redacted] a FAPE. T vol 3 p 469:1-6 (T of Leach) (referring to Stip. Ex. 32).

258. Mr. Williams testified concerning an incident in the lunchroom in December in which [redacted] was listed as the victim. There is no documentation of this incident in the record. T vol 4 p 802:16-20 (T of Williams).

259. [redacted] was suspended on February 22, 2023 for possession of marijuana after she was handed marijuana in the bathroom by another student. Stip. Ex. 35 p 265.

State Complaint Process

260. On November 14, 2022, the Office of Exceptional Child (OEC), Department of Public Instruction (DPI), released its Complaint Investigation Final Report in response to [redacted] September 15, 2022, State Complaint. Resp't's Ex. 29.

261. The issues the OCE investigated relate to whether CCS "followed the Policies regarding the provision of [FAPE], specific to the following:

- Development, review, and revision of the student's [IEP], including the BIP, based on the student's social, emotional, and behavioral needs; including educational placement; and
- Implementation of the student's IEP specific to progress monitoring of IEP goals.

Resp't's Ex. 29 p 002.

262. The OCE found that CCBOE is "in compliance with regulations and closed the case." R. Ex. 29 p 001.

263. The Undersigned notes the Policies are not law and have not gone through rulemaking to become enforceable regulations. N. Carolina State Bd. of Educ. v. State, 371 N.C. 149, 163, 814 S.E.2d 54, 63–64 (2018).

264. The OCE's determination is not binding on this Tribunal, particularly when, as here, the factual evidence in the record does not support the findings. 26 NCAC 03.0122(3).

265. The OCE only evaluated the procedural compliance of the CCBOE in meeting three (3) times to review and revise [redacted] IEP and include data from various sources not identified in her IEP as methods of measuring progress—not the substantive issues of denial of FAPE and predetermination that Petitioners raise in this due process hearing.

266. The Undersigned has reviewed the OCE's findings as one (1) piece of evidence regarding procedural compliance; however, the Undersigned has reviewed the allegations in this case and the documentary and testimonial evidence presented to make an independent determination.

January 13, 2023, IEP Meeting

267. [redacted] IEP team convened on January 13, 2023, at parent request. Stip. 41.

268. [redacted] parent expressed concern that [redacted] "placement at PLC is not meeting her needs . . . she is not making adequate progress." [redacted] parent again requested "an intensive therapeutic setting." [redacted] expressed her belief that [redacted] "is being denied FAPE." Stip. Ex. 33 p 245.

269. The IEP team reported [redacted] "is making academic progress" yet her grades indicate the opposite. Compare Stip. Ex. 33 p 245 (reporting a grade of F in PE) with Stip. Ex. 66 (documenting final grades of C, D, D, F for the first semester, which does not include a grade for PE) and Pet. Ex. 16 (documenting a grade of 25 in PE).

270. Dr. Leach opined that there was "no data" to support that [redacted] was making academic and social progress at the PLC as reported in the Prior Written Notice from the January 13, 2023, IEP meeting. T vol 3 pp 470:7-11 & 471:11-13 (T of Leach) (see to Stip. Ex. 33 p 245-246).

271. The IEP team documented in the Prior Written Notice that [redacted] was using "technology inappropriately" such as "using Google at school to view songs (drugs and suicide content related), videos, and Instagram, and on Amazon." Stip. Ex. 33 p 245.

272. There was "no evidence" the IEP team initiated an FBA about these concerns. T vol 3 p 470:12-15 (T of Leach).

273. The further evidence that the IEP was not sufficient to meet [redacted] identified needs was documented in the Prior Written Notice, as the IEP team discussed "collecting [redacted]s Chromebook at the end of each day school [sic]. As well as providing alternate assignments that do not involve a Chromebook to decrease inappropriate use of technology while at school" and creating a plan for "bathroom supervision." [redacted] "stated this further indicates that she is not in the appropriate setting because she cannot perform tasks [sic] like her same age peers." Stip. Ex. 33 p 245-6.

274. The only evidence Respondent offered regarding [redacted] progress on her IEP goals related to her counseling goal. Resp't's Ex. 51.

275. No testimony was offered concerning any progress on any other goal. Stip. Ex. 34 p 253. The present level was identical to the October 2022 present level indicating [redacted] was "not making progress." T vol 3 p 470:25 (T of Leach); compare Stip. Ex. 32 p 234 with Stip. Ex. 34 p 253).

276. Despite all the noted concerns related to [redacted] behavior and her low grades, as a student with average intelligence, the IEP team rejected "modifying her goals due to her current goals are appropriate for [redacted]s current school environment." Stip. Ex. 33 p 246.

277. The IEP team updated the service delivery time with the counselor increasing her weekly meetings from once per week to twice per week. Stip. 42.

278. The expert testimonial evidence was that even with the increased delivery for counseling, the January 18, 2023, IEP did not offer [redacted] a FAPE and [redacted] still required a therapeutic residential school to make educational progress. T vol 3 p 471:14-22 (T of Leach).

279. Notwithstanding all the discussions about supports that could be provided to [redacted] and further restrictions on her computer use and need for bathroom supervision, the IEP team made no changes to the supplemental aids, services, modifications, and accommodations in [redacted] IEP. Stip. Ex. 34 pp 258-61.

280. The parents requested a therapeutic setting which the school district rejected. Stip. 43.

281. [redacted] parents repeated their request to the IEP team for [redacted] "to receive intensive residential therapy, increase work completion, and utilize technology appropriately within the school setting." Stip. Ex. 34.

282. The Prior Written Notice from the January 2023 IEP meeting indicates the EC Case Manager "discussed the data to the team"; however, no data were admitted into evidence to support that [redacted] was "making progress with communication and minimal progress with completing tasks." Stip. Ex. 33 p 245.

283. The IEP team explained the refusal of a therapeutic setting as follows: "The data shows [sic] that [redacted] is making academic and social progress within the school environment. The team was made aware of the inappropriate use of the computer and suggested developing a plan to address those concerns." Stip. Ex. 33 p 246.

284. This explanation is contrary to the information documented by the IEP team regarding her academic progress, or lack thereof, and there were no data provided to support the assertion that [redacted] was making social progress within the school environment.

285. The IEP team documented [redacted] "has done well in day treatment" in the past; yet, the IEP team did not discuss whether [redacted] required day treatment at this meeting. Stip. Ex. 33 p 246.

286. Ms. Murray began providing counseling services to [redacted] in January 2023. Resp't's Ex. 51. Ms. Murray did not provide any of the underlying materials used with [redacted] in response to Petitioners' discovery request; therefore, the Undersigned will not consider her testimony related to the use of particular programs or the references to such programs in Respondent's Exhibit 51, as it would prejudice Petitioners, whose counsel was unable to cross-examine Ms. Murray on her testimony.

287. Ms. Murray explained her data on [redacted] progress from January 13, 2023, through June 1, 2023, "shows 50 percent" but she could not tell the starting point or the base line for the teacher data. T vol 4 p 718:9-19 (T of Muarry). Ms. Murray testified to an IEP progress report completed by Ms. Gilliam, who did not testify, noting [redacted] progress at 49 percent. T vol 4 pp 720:22-721:18 (T of Murray). No IEP progress reports or teacher data were entered into evidence to corroborate this testimony, and no teacher testified.

288. [redacted] only received approximately twenty-eight (28) counseling sessions, including compensatory time documented in the notes, of the forty (40) sessions to which she was entitled under her IEPs from January through June 2023. Compare Resp't's Ex. 51 with Stip. Ex. 65 (2022-23 school calendar documenting twenty-two (22) weeks of school from January 1 – June 9, 2023).

289. Respondent provided no evidence of the implementation of the remainder of [redacted] IEP, particularly the specially designed instruction of five (5) times per week of thirty (30) minutes.

290. By February 28, 2023, [redacted] had a total of fourteen (14) days of out-of-school removals. Stip. Ex. 35 p 265.

291. Although Ms. Murray's log indicates [redacted] parents declined counseling services during her suspension, Ms. Murray never spoke to [redacted] parents to offer the services. Resp't's Ex. 51 p 4; T vol 4 p 668:15-17 (T of Murray).

292. The Undersigned finds that the failure to offer the counseling services to [redacted] during her suspension is a denial of those services.

February 28, 2023, Start of MDR Meeting

293. After [redacted] was suspended for the possession of marijuana on February 22, 2023, her IEP team convened for a manifestation determination review (MDR) meeting. Stip. Ex. 35.

294. The IEP team documented [redacted] did not have a BIP. Stip. Ex. 35 p 265.

295. [redacted] mother requested an FBA, and the IEP team agreed to continue the MDR meeting on a later date. Stip. Ex. 35 p 266.

296. In requesting the FBA, [redacted] noted [redacted] immaturity, seeking out friendships in inappropriate ways, and her willingness to do anything to gain friendships. Stip. Ex. 35 p 266.

297. Dr. Leach agreed with this characterization of [redacted] and explained "the inability to develop and sustain relationships with peers" "is a core feature of autism." T vol 3 pp 473:25-474: 11 (T of Leach).

March 6, 2023, Completion of MDR Meeting

298. The IEP team could not complete the MDR during one meeting, so the team reconvened on March 6, 2023 for a reevaluation.

299. The IEP team reported [redacted] final grades for the first semester as D, C, D, F, F. and had eighteen (18) absences. Stip. Ex. 38 p 276.

300. The MDR team noted that [redacted] has "evidence of behaviors, weakness in emotional regulation, trouble transitioning between locations, and weakness in conflict resolution." Stip. Ex. 36 p 269.

301. As [redacted] parents had repeatedly explained to the IEP teams, [redacted] "is immature and seeks out friendships in inappropriate ways and will do anything to gain friendship." Stip. Ex. 35 p 266. [redacted] reiterated to the IEP team it was [redacted] disabilities that "cause[d] the behavior" and [redacted] teacher confirmed. Stip. Ex. 37 pp 271-72.

302. The MDR team found [redacted] behavior was a manifestation of her disability due to her "multiple disabilities and how they present themselves." Stip. Ex. 37 p 275.

303. Despite a diagnosis of autism and all the evidence of the impact of [redacted] autism on her educational programming, the CCBOE still did not identify her as meeting the eligibility criteria for autism. Dr. Leach opined "[t]hat had the most impact on her educational program than anything else because . . . nobody understood [redacted] There was no clear description of how she was impacted by her multiple disabilities, specifically autism." T vol 3 p 474:19-23 (T of Leach).

304. The IEP team only decided to conduct an FBA and observation and no other evaluations. Stip. Ex. 38 p 283.

305. Although the IEP team reported [redacted] was making progress toward her IEP goals as of March 6, 2023, Stip. Ex. 38 p 282, there was no evidence to support this statement in the record. T vol 3 p 476:5-8, 24 (T of Leach).

306. At the reevaluation meeting, the IEP team documented [redacted] "has made progress towards her IEP goals. However, goals should be updated to reflect [redacted]s current present levels." Stip. Ex. 38 p 282. No evidence was offered of [redacted] progress on her IEP goals.

March 13, 2023, IEP Meeting

307. [redacted] IEP team convened on March 13, 2023, and revised her IEP to include a new start date of March 20, 2023. Stip. Ex. 38.

308. The IEP notes: "Peer conflict has decreased significantly since the beginning of the 2022-23 academic school year." Stip. Ex. 41 p 295. The only data included in the present level appears to be from [redacted] self-reports and ratings from her general education teachers, which were not admitted into evidence.

309. [redacted] counseling goals changed in March 2023 and new goals "were developed through conversations that [Ms. Murray] had with [redacted] about . . . what kinds of goals she felt would be most useful for her." T vol 4 p 670:13-16 (T of Murray). Ms. Murray felt [redacted] "had a lot of insight, and her goals that she came up with were really good" and consistent with what she learned in "an IEP meeting" and "hearing things plus feedback from teachers through the direct behavior rating." T vol 4 p 672:9-15 (T of Murray).

310. The IEP team decreased the number of [redacted] goals. Stip. Ex. 41 pp 298-99.

311. The source of the present levels is not clear. The only school personnel who testified from this meeting was Mr. Williams, and he did not present any testimony regarding the IEP. The new goals are not appropriate, as they do not address all areas of identified need and do not have baseline data. Compare Stip. Ex. 41 p 295 with Stip. Ex. 41 p 298-99.

312. The Undersigned finds it particularly troubling that [redacted] would receive specially designed instruction to "avoid bribes to maintain positive interaction/interpersonal relationships with peers." This is particularly so when the IEP team continues to report [redacted] has friends and is "progressing socially."

313. The IEP indicates that two (2) of the three (3) goals will be addressed through counseling services, which was only offered for thirty (30) minutes twice each week. Stip. Ex. 41 p 299.

314. The supplemental aids, services, modifications, and accommodations remained identical. Stip. Ex. 41 pp 300-02.

315. The service delivery remained identical to the prior IEP. Stip. Ex. 41 p 299.

316. The IEP team again found [redacted] was not eligible for ESY services. Stip. Ex. 41 p 304.

317. At the March 13, 2023, IEP meeting, [redacted] parents requested again that [redacted] "have an appropriate placement where she can have same access to her education environment as non-disabled peers and that addresses her social-emotional needs appropriately." Despite the parents' ongoing request for an appropriate placement, the Prior Written Notice documents the IEP team ignored their input and indicated there were "no refusals" at the meeting but did not record the CCBOE refusal of the parents' request for a change in placement. Stip. Ex. 40 p 287.

318. The Undersigned finds that the Prior Written Notice does not accurately state the decisions made at this IEP meeting.

March 29, 2023, IEP and Safety Plan Meeting

319. [redacted] parents requested to meet on March 29, 2023, "to discuss placement and accommodations" and request a safety plan after [redacted] was attacked at school. Stip. Ex. 44.

320. At this meeting, Dr. Williams explained [redacted] "is usually within 20 feet of an adult, no more than 40 feet from an adult in the PLC setting" and indicated that he didn't "know what more could be put in place at school". [redacted] "stated that is another reason why PLC isn't appropriate" and requested a therapeutic residential placement. Stip. Ex. 44 p 324. Mr. Williams described an incident "a week or two before" the assault on [redacted] when she had "some words" with another student. T vol p 805:5-10 (T of Williams). Mr. Williams "called EMS to make sure she was checked out" after the assault and informed [redacted] "if it was my daughter, I would have the police involved." T vol 4 p 805:14-18 (T of Williams).

321. [redacted] explained the attack on [redacted] was in "retaliation for the marijuana incident" when [redacted] disclosed the names of the other girls involved in the incident to Mr. Williams. T vol 1 pp 225:10-226:5 (T of [redacted]

322. The Undersigned finds that despite the explicit request for residential therapeutic placement, the IEP team documented that there were no refusals by the parents at the meeting.

323. The Undersigned finds that while it may be true that the parents did not refuse any service, any implication that the parents agreed with the placement in the IEP is not correct.

324. The Undersigned notes it would have been a more accurate record of the meeting if the Prior Written Notice had clearly stated the IEP team's decision to address the parent request for a change of placement.

325. The IEP "developed" during this meeting included identical present levels of performance (Stip. Ex. 43 p 312), identical goals (Stip. Ex. 43 pp 315-6), identical related services (Stip. Ex. 43 p 316), and identical service delivery (Stip. Ex. 43 p 316). Again, the IEP team determined [redacted] was not eligible for ESY services. Stip. Ex. 43 p 322.

326. "The team determined that it was appropriate to update [KMK's] accommodations to support her social-emotional deficits and provide supervision for her throughout the school setting." Stip. Ex. 44 p. 326.

327. [redacted] explained [redacted] "continues to contact unknown men and had been on her school computer and on the social media platforms during school hours" resulting in a pending case against "the older man" with whom [redacted] had been communicating at school. T vol 1 p 215:19-24 (T of [redacted]

328. The IEP team updated [redacted] accommodations to include: "In the event that [redacted] must use a computer, teacher/staff member will monitor her computer activity while in use." Stip. Ex. 43 pp 317-20.

329. The Undersigned notes this was the previous accommodation that [redacted] was supposed to be "near teacher with access to visual of student computer screen" at all times (See Stip. Ex. 34 p 258-260), which apparently was either not implemented or unsuccessful as [redacted] was able to spend time on YouTube, watch videos about suicide, and communicate with an older man about meeting him outside of school. Stip. Ex. 43 pp. 317-20.

330. According to Dr. Leach, these supplementary aids and services, accommodations, and modifications were not appropriate to meet [redacted] identified needs, as they did not provide "all that she needed." T vol 3 p 480:7-16 (T of Leach).

331. The IEP team added that [redacted] "will be supervised (eyes on [redacted] when transition [sic] throughout the school environment such as to and from each class and unstructured time to avoid conflict and displaying risk behaviors." Stip. Ex. 43 p. 318.

332. The IEP team determined these changes were necessary "to support her social-emotional deficits and provide supervision for her throughout the school setting." Stip. Ex. 44 p 326.

333. Besides the additions to the supplementary aids and services, the March 29, 2023, IEP remained identical to the IEP from March 20, 2023, and did not meet [redacted] needs or offer her a FAPE. T vol 3 pp 481:1-9 (T of Leach).

334. The Undersigned notes the direct contradiction between the information presented by Respondent regarding [redacted] social progress and absence of conflict and the IEP team's determination that [redacted] required such a restrictive accommodation because of conflict.

335. As recorded in the Prior Written Notice, the parents "continued to reject the IEP" because they "feel the placement is not appropriate." Stip. Ex. 44 p 325.

336. [redacted] parents have requested a variety of therapeutic educational settings from CCS, provided letters from providers with recommendations for [redacted] to participate in a residential therapeutic school, and CCBOE has always responded that it does not offer that type of setting. T vol 5 p 960:16-961:7 (T of [redacted] Instead, "Amy Jewel told me that the [redacted] is the closest thing to a therapeutic setting that Cabarrus County has to offer for high school students. So that's why we were willing to try and based on the other information about the clinically licensed social worker. If that was the last option the County had to offer, we would give it a shot and see if it met [redacted] needs." T vol 5 p 961:8-15 (T of [redacted]

337. The Undersigned takes note that Respondent called Ms. Jewell as a witness on the last day of hearing. She did not refute this testimony and, further, she agreed that CCS does not have a therapeutic setting for high school students. (T vol 6 p 11183:19-1184:4 (T of Jewell).

338. The SEA established procedures for LEAs to obtain funding for a residential placement for [redacted] Pet. Ex. 27.

339. Upon learning of [redacted] challenges from [redacted] the SEA intentionally provided the DPI Guidance to Ms. Fitzwater and information about resources for private residential placements. T vol 5, p 998:15-999:3 (T of Fitzwater).

340. Ms. Fitzwater did not investigate private options for [redacted] did not contact Dr. McHale to find out why he was recommending a residential placement, and did not tell the parents that the CCBOE would be responsible to provide a private placement if it did not have an appropriate placement within the school district. T vol 6 p 1135:12-1136:4; 1137:22-1138:19 (T of Fitzwater).

341. [redacted] report card documents she was failing or barely passing her academic classes. Stip. Ex. 66. The IEP team reported [redacted] grades at the meeting as 1-C, 1-D, 2-Fs. [redacted] was "passing" PE. It is noteworthy that the two (2) Fs were listed as a grade of fifty (50). Stip. Ex. 44 pp 324-25. Respondent documented in [redacted] March 29, 2023 Prior Written Notice that "CCS policy allows grades of 50 to be given to allow students to be successful in courses . . . ." Stip. Ex. 44 p 325.

342. "[T]he School Resource Officer had lunch with [redacted] and witnessed the hostility toward [redacted] but didn't take preemptive action to prevent the incident." Stip. Ex. 44 p325.

343. The Safety Plan required:

- [redacted] will have adult supervision during transitions throughout the school.
- A backup person will be designated at PLC.
- Supervised for [redacted]s trip. 1:1 May 4th 7:30 – 5:00 p.m.
- Cafeteria or unstructured time to sit in close proximity to an adult and/or school
- resource officer.
- Restroom [redacted] will use the nurse's restroom office during the day for restroom breaks.
- Adult monitoring use of the computer for I-ready and testing only. The preferred method is paper and pencil.

Stip. Ex. 42

344. Mr. Williams testified that [redacted] made progress in her social interactions and "[he] [doesn't] see a reason why she wouldn't be successful with us." T vol 4 p 814:6-19.

345. Yet, Mr. Williams also testified [redacted] was isolated from her peers during all unstructured times of the school day and attributed "improvement" to the restrictions he imposed. T vol 4 p 806:11-12 (T of Williams).

346. [redacted] is the only student at the PLC with these multiple restrictions, and the only student at the school with a safety plan. T vol 4 p 839:14-840:10 (T of Williams).

347. The Undersigned finds that the necessity for and extent of this Safety Plan demonstrates how much [redacted] was struggling in her placement at the PLC. It also documents the inappropriateness of her placement and the inappropriateness of her previous goals.

348. The Undersigned finds as fact that the school staff segregating [redacted] for large portions of her day, requiring one-on-one supervision of [redacted] restricting her access to the student bathrooms, and removing her access to all computer learning confirms that the PLC is not an appropriate placement for [redacted] who requires a higher level of services than can be provided at the PLC.

349. The discipline reported in the Revaluation Report, dated March 6, 2023, does not indicate progress. T vol 3 p 476:19; see Stip. Ex. 38 p 282.

350. According to Dr. Leach, her grades and classroom-based assessments do not indicate progress instead "she continues to perform below grade level." She is in "ninth grade" and she is performing "at a grade level six in algebra and seven in geometry, with an overall grade level of seven in math." T vol 3 p 477:4-7 (T of Leach).

351. The final grades do not support [redacted] is making progress. Stip. Ex. 38 p 276.

352. [redacted] was also contacted by the School Resource Officer regarding [redacted] contact with an [redacted]. After [redacted] and [redacted] reported it to the Cabarrus County Sheriff's Department, the police investigated and found the man was [redacted]," which resulted in criminal charges against him. T vol 1 pp 224:14-225:5 (T of [redacted]

353. During [redacted] ninth grade year she has not been invited to friends' homes, she has not invited friends to her house, she does not do activities with anyone after school, and she has not been invited to any birthday parties for friends at school. T vol 5 p 970:11-22 (T of [redacted]

354. [redacted] was admitted to [redacted] Health Services from May 10 – 17, 2023 after she had taken an overdose of her prescription medicine. Pet. Ex. 14 p 65; T vol 1 p 11:17-19 (T of [redacted]

Expert recommendations

1. The Undersigned heard from two (2) expert witnesses who made explicit recommendations about the supports [redacted] requires to make educational progress, which includes both academic and functional progress.

2. Dr. McHale was accepted as an expert in in psychiatry, behavioral sciences, community behavioral health, and long-term psychiatric supports and services. T vol 1 pp 47:21-48:1 and *also see* curricula vitae Pet. Ex. 32, 532-536.

3. Dr. McHale met with [redacted] on May 18, 2023, "after she completed a seven-day stay in [the] hospital for an overdose." T vol 1 p 65:18-19 (T of McHale).

4. Dr. McHale explained the different progressive levels of therapeutic or psychiatric care available to young people with mental health issues in North Carolina. T vol 1 pp 48:5-49:17.

5. Dr. McHale explained [redacted] needs "wraparound services .. for her education to continue … that gives her the best chance of success." T vol 1 pp 68:21-69:1 (T of McHale).

6. Dr. McHale opined that his recommendation regarding a therapeutic boarding school had not changed since he wrote the letter on August 17, 2022. T vol 1 pp 73:23-74:15 (T of McHale).

7. Dr. Leach was accepted as an expert in special education eligibility, identification, interpreting evaluations, and programming in special education. T vol 3 pp 368:24-369:2; also see curricula vitae, Pet. Ex 33, p 537.

8. Dr. Leach opined that [redacted] needs compensatory services because her needs were not met for the past six years. T vol 3 p 364:18-21,482:11-22, 483:3-11, 487:8-21 (T of Leach).

9. Dr. Leach opined that the CCBOE is not able to provide [redacted] with educational programming and an appropriate placement to meet her unique needs. T vol 3 pp 481:24-482:8.

10. [redacted] primary area of eligibility should be Autism. T vol 3 p 486:7 (T of Leach).

11. Dr. Leach recommended the following specially designed instruction that [redacted] needs at a minimum going forward:

> a. explicit instruction of social skills;
> b. peer support strategies;
> c. peer-mediated instruction and intervention;
> d. integrated therapeutic counseling approaches into her academics and emotional regulation strategies integrated throughout her day with support from adults to facilitate that; and
> e. motivational strategies to support her and encourage her in attempting a task that she perceives is difficult or boring.

T vol 3 pp 483:20-484:1, 13-17 (T of Leach).

12. [redacted] needs "individual therapy . . . group therapy . . . [and possibly] speech-language therapy to address her pragmatic deficits." T vol 3 p 486:1-3 (T of Leach).

13. Dr. Leach opined [redacted] needs a "functional behavior assessment . . . a speech-language evaluation that focuses more on the pragmatics in applied settings, a neuropsych evaluation, and a transition assessment because she's coming of age for transition." T vol 3 p 486:10-14 (T of Leach).

14. Dr. Leach recommended compensatory education for "the academic loss that she's had having not been fully assessed and goals related to her academic needs as she's continued to be further and further behind." She also "needs compensatory services to address her lack of social interaction goals and supports that she should have had." As well as for "her executive functioning needs" as "she hasn't had any organizational study skills in there. So, she's so far behind in addressing her needs related to executive functioning and how that's really translated into independent living and the workplace is going to be significant." T vol 3 p 487:8-21 (T of Leach).

15. Dr. Leach opined the IEP team or the district "will require training on understanding autism spectrum disorders . . . in an in-depth way and how those characteristics of autism impact student performance in a school setting . . . followed by evidence-based practices on addressing the core ranges of autism . . . and then the expectation of school teams to integrate therapeutic approaches into the academic setting." T vol 3 pp 487:24-488:6 (T of Leach).

16. Dr. Leach opined [redacted] needs a placement at a "therapeutic boarding school at this point." T vol 3 p 485:17-19 (T of Leach).

17. Dr. Leach explained "it is clear through the record from the beginning, but even more so as time goes on, that her comorbid diagnoses . . . [as] listed in . . . this medical report of ADHD, . . . disruptive mood dysregulation disorder, autism spectrum disorder, anxiety, that she needs wraparound services . . . she cannot have mental health provisions here and educational provisions [t]here." T vol 3 pp 448:23-449:5 (T of Leach) (referring to Pet. Ex. 13).

18. Dr. Leach opined [redacted] "needs integrated services with all of her service providers working in conjunction to address her specific needs associated with her disabilities. Up until this point, the school district has shown that they were not able to do that. They continued to have the same goals. They continue to keep pulling the same IEP team together. They continued to have the same lack of accommodations." T vol 3 pp 449:22-450:5 (T of Leach).

19. [redacted] "needs much more support in regard to developing her social skills, her emotional regulation skills, other executive functioning skills, her academic performance, her motivation, her attention and focus. None of these things have been achieved up until this point." T vol 3 p 450:5-10 (T of Leach).

20. Dr. Leach explained that at therapeutic boarding schools "all of the services are interwoven. So, the teachers use the same therapeutic approaches that the counselors use. The parents are involved in the process. . . . They receive family counseling with their child. The child receives individual therapy. The child receives group therapy. There's extremely small class sizes. . . . the focus is on building community and peer relations. It's not an option for someone to go sit by themselves." T vol 3 p 458:9-19 (T of Leach).

CONCLUSIONS OF LAW

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

Burden of Proof

1. 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).

Deference to Educators

2. 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).

3. "[D]eference is 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*, 580 US. 386, 404 (2017). Therefore, it is a fair expectation that school employees "be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Id.*

4. However, when school employees are unable to do so, or the evidence presented does not support their decisions, they are not entitled to deference. *Gaston v. Dist. of Columbia*, 2019 WL 3557246, *8 (D.D.C. August 5, 2019) (finding the "preponderance of the evidence available at the time showed the [] IEP was not reasonably calculated to enable [the student] to make progress appropriate in light of her circumstances"); *Smith v. Dist. of Columbia*, 2018 WL 4680208, *7 (D.D.C. Sept. 28, 2018).

5. "Nor does the required deference to the opinions of the professional educators somehow relieve the hearing officer or the district court of the obligation to determine as a factual matter whether a given IEP is appropriate. That is, the fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate." *Cnty. Sch. Bd. of Henrico Cnty., Virginia v. Z.P. ex rel. R.P.*, 399 F.3d 298, 307–08 (4th Cir. 2005).

6. The Undersigned afforded appropriate deference to Respondent's school witnesses regarding educational decisions for [redacted] where they "demonstrated knowledge and expertise."

7. Little deference was afforded to witnesses who were not involved in the development of [redacted] IEPs, were not responsible for implementing [redacted] IEPs, or where the documentary evidence did not support their testimony.

I. Statute of Limitations

8. When a school district fails to respond to a parent's request for an evaluation, it effectively refuses to provide the evaluation and is "required to provide [the parent] with a copy of the procedural safeguards when [the parent] made the request, as well as the [prior written

notice] of its refusal to evaluate [the student]." *Charlotte-Mecklenburg Cnty. Bd. of Educ. v. Brady*, 66 F.4th 205, 212 (4th Cir. 2023).

9. If the district does not provide the parent with the procedural safeguards or the prior written notice, the withholding exception to the statute of limitations applies. *Brady*, 66 F.4th at 212.

10. Simply advising parents that the Parent-Student Handbook is available on the school's website or providing an annual notice letter is insufficient to provide the requisite notice. *Brady*, 66 F.4th at 213 (citing 71 Fed. Reg. 46693 (Aug. 14, 2006) "a 'public agency would not meet its obligation in § 300.504(a) by simply directing a parent to the Web site.'"). "[A] school system cannot make parents 'notice-proof' simply by periodically distributing publications containing the law setting forth the 'right, procedure, and time limit' of a request for a due process hearing." Id. (quoting *C.M. ex rel J.M. v. Bd. of Educ. Of Henderson Cnty.*, 241 F.3d 374, 388 (4th Cir. 2001)).

11. The IDEA establishes a statute of limitations requiring parents to request a due process hearing "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." 20 U.S.C. § 1415(f)(3)(C) (2006).

12. Similarly, North Carolina law provides "the party shall file a petition under subsection (a) of this section that includes the information required under IDEA and that sets forth an alleged violation that occurred not more than one year before the party knew or reasonably should have known about the alleged action that forms the basis of the petition." N.C. Gen. Stat. § 115C-109.6(b).

13. However, the IDEA's 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).

14. Both State and federal law require the LEA to provide parents "a current copy of the 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. The LEA must also provide parents with a Prior Written Notice (PWN) whenever it proposes or refuses "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).

15. Therefore, as Respondent has neither provided [redacted] or [redacted] a Prior Written Notice of its refusal to initiate the referral process or to evaluate [redacted] in the 2017-18 and 2018-19 school years, the statute of limitations does not bar Petitioners' claims.

16. Furthermore, due to Respondent's specific misrepresentations related to its ability to evaluate [redacted] the statute of limitations does not bar Petitioners' claims for failure to timely and appropriately evaluate [redacted]

II. Procedural Violations

17. The Supreme Court held in *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley* that "a court's inquiry" first requires the determination of whether the "[LEA] complied with the procedures set forth in the [IDEA], [a]nd second," whether the "[IEP] developed through the [IDEA's] procedures [is] reasonably calculated to enable the child to receive educational benefits." 458 U.S. 176, 206–07 (1982).

18. A procedural violation is a substantive denial of FAPE when it (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE to the parents' child; or (3) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii).

19. A substantive procedural violation is one that "seriously infringe[s] the parents' opportunity to participate in the IEP formulation process," *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992) (citations omitted), "the enforcement of the IEP," *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1198 (9th Cir. 2017), or causes the child to lose any educational opportunity, *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990); see also *Doug C. v. Hawaii Dep't of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013) (explaining "procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of FAPE.") (emphasis added). But see *R.F. by & through E.F. v. Cecil Cty. Pub. Sch.*, 919 F.3d 237, 248 (4th Cir.), cert. denied, 140 S. Ct. 156 (2019) (internal citations and alterations omitted) (finding no denial of parental participation because the child received more services than what was outlined in her IEP was not denied a FAPE).

20. In the Fourth Circuit, impeding a parents' opportunity to participate in the decision making process is not sufficient alone to create a substantive violation, the procedural violation must cause a deprivation of educational benefits or interfere with the provision of a free appropriate public education. See, e.g., *T.B., Jr. by and through T.B., Sr. v. Prince George's Cnty. Bd. of Educ.*, 897 F.3d 566, 575 (4th Cir. 2018) (upholding the ALJ and deciding "no type or amount of special education services would have helped T.B. achieve a FAPE" despite the district's "inexcusable" child find violation because he "simply does not want to go to school"); *DiBou v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d 185 (4th Cir. 2002) (rejecting a "broad legal rule" that a procedural violation that interfered with a parents' ability to participate in the IEP process constitutes a per se denial of FAPE).

21. "Multiple procedural violations [] may cumulatively result in the denial of a FAPE even if the violations considered individually do not." *L.O. ex rel. K.T. v. N.Y.C. Dep't of Educ.*, 822 F.3d 95, 109 (2d Cir. 2016) (internal quotation marks omitted) (quoting *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 190 (2012)).

22. A school's failure to comply with Child Find may be a procedural violation of the IDEA. *Sch. Bd. of City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 942 (E.D. Va. 2010) (citing *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009) ("A reading of the IDEA 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.")).

23. "When a school district violates its 'child find' obligations and fails to identify a student . . . as a student in need of special education under the IDEA, and provides no specialized instruction to the student to meet the unique needs of his/her disability, the student has been denied a FAPE." *Lauren G. ex rel. Scott G. v. W. Chester Area Sch. Dist.*, 906 F. Supp. 2d 375, 391 (E.D. Pa. 2012) (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) (citing *Forest Grove*, 557 U.S. at 238-39)).

A. Child Find

24. The IDEA imposes the Child Find duty on school districts, requiring school districts to identify, locate and evaluate all children with disabilities within their jurisdictions, regardless of the severity of their disability, and make available a FAPE to those who qualify for services under the IDEA. 20 U.S.C. §§ 1412(a)(3), 1412(a)(1)(A); 34 C.F.R. § 300.111(a). "Congress enacted the IDEA's Child Find provisions to guarantee access to special education." *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F.Supp.2d 918, 949 (W.D. Tex. 2008).

25. The Child Find obligation includes "[c]hildren who are suspected of being a child with a disability. . . and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. § 300.111(c)(1).

26. The Child Find obligation "is a profound responsibility, with the power to change the trajectory of a child's life." *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 625 (3d Cir. 2015). This "Child Find obligation extends to all children who are suspected of having a qualifying disability under IDEA. Id. (citing 34 C.F.R. § 300.111(c)(1); *N.G. v. Dist. Of Columbia,* 556 F. Supp. 2d 11, 25-26 (D.D.C. 2008)).

1) Affirmative Duty

27. Child Find is an affirmative duty triggered "where the state has reason to suspect that the child may have a disability and that special education services may be necessary to address that disability." *Brown*, 769 F.Supp.2d at 941-42 (finding a procedural and substantive violation of Child Find).

28. As Child Find is an affirmative obligation of the school district, a parent is not required to request that the school district identify and evaluate a child. See, e.g., *Bd. of Educ. Wappingers Cent. Sch. Dist. v. M.N. ex rel. J.N.*, 16-CV-09448, at *16 (S.D.N.Y. Oct. 13, 2017) ("It is not a requirement that parents request an evaluation—a district's Child Find obligation is an affirmative one."); *Davis v. Dist. of Columbia*, 244 F. Supp. 3d 27, (D.D.C. 2017) ("This

'affirmative obligation' does not necessarily hinge on parents' flagging issues—though parental concerns are still relevant."); *G.L.*, 802 F.3d at 625 ("[W]here parents neither knew nor reasonably should have known of the special needs of their child *or of the educational system's failure to respond appropriately to those needs*, the other partner in this endeavor—the school district itself—still has its independent duty to identify those needs within a reasonable time period and to work with the parents and the IEP team to expeditiously design and implement an appropriate program of remedial support." (emphasis added)).

2) Reasonable Suspicion

29. The IDEA does not specifically identify when a school district has a "basis of knowledge" for suspecting a child may be a child with a disability outside of the discipline context. U.S.C. § 1415(k)(5)(B) (including when the parent of the child has expressed concern in writing to administrators or teachers that the child is in need of special education or related services).

30. Courts 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) (finding a Child Find violation where the district provided a Section 504 plan, the parents acquiesced to the 504 plan, and the student performed well in his classes after his parents provided significant supervision "due to symptoms of severe depression," academic tutoring, and "countless hours of their own time trying to hold [student] accountable to his assignments"); *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").

31. "[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).

32. This is logical because once a parent requests an IEP or an evaluation, "state and federal laws dictate that certain procedures must be followed." *T.B.*, 897 F.3d at 573 . The first step is initiating the IDEA-eligibility process. 20 U.S.C. § 1414(a)(1)(C).

33. A school district 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. v. Paso Robles Unified Sch. Dist., 822 F.3d 1105, 1119 (9th Cir. 2016).

34. "[P]arents' '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)).

35. "[A]dopting a 504 plan and implementing accommodations does not satisfy a school district's obligations to conduct a special education assessment under the IDEA." N.N., 2022 WL 3109588, at *27; accord *Brady*, 66 F.4th at 212-213. The district's notation on a 504 plan regarding the student's disability and its impact on the student's learning is evidence of a district's notice. *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'").

36. A school district is "not free to disregard its obligation to assess [a student] for special education services once it had reason to believe that [the student] suffered from a disability that impacted her ability to access her education." *N.N.*, 2022 WL 3109588, at *27.

3) Parental Requests

37. The IDEA "does not provide specific requirements regarding the manner in which a request for an initial evaluation of a child suspected of having a disability must be made." *Letter to Sharpless*, 122 LRP 42874 (OSEP Nov. 1, 2022); see 20 U.S.C. § 1414(a)(1)(B); 34 C.F.R. § 300.301(b); N.C. Gen. Stat. § 115C-109.1.

38. "[T]he manner of making such a request [for an evaluation] is not defined in the statute or the implementing regulations . . . [and] 'no magic words are required to request an evaluation.'" *Brady,* 66 F.4th at 212-213; 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").

39. 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"); *R.S. v. Morgan Cnty. Bd. of Educ.*, No. 3:18-CV-80, at *12 (N.D. W. Va. June 18, 2019) (finding the school district's obligation to evaluate was triggered when the parents shared information regarding their child's diagnoses, including ODD, Disruptive Behavior Disorder, and ADHD, though the parents did not explicitly request an evaluation); N.N., 2022 WL 3109588, at *27 (noting the letter from a private provider was sufficient to put the school on notice).

40. 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 Public Schs.*, 111 LRP 72632 (N.M. SEA, May 30, 2011) (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).

4) Duty to Provide the Procedural Safeguards and a Prior Written Notice

41. The IDEA requires the school district to issue a prior written notice whether it "proposes to initiate or change; or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child." 20 U.S.C. § 1415(b)(3).

42. The prior written notice must include specific information including:

> (A) a description of the action proposed or refused by the agency;
> (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
> (C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and*, if this notice is not an initial referral for evaluation*, the means by which a copy of a description of the procedural safeguards can be obtained;
> (D) sources for parents to contact to obtain assistance in understanding he provisions of this subchapter;
> (E) a description of other options considered by the IEP Team and the reason why those options were rejected; and
> (F) a description of the factors that are relevant to the agency's proposal or refusal.

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

43. As the Fourth Circuit has explained, "the IDEA requires school authorities to supply detailed written notice *whenever* they propose or refuse to initiate or change the identification, evaluation, or placement of a child." *C.M.*, 241 F.3d at 381 (citing 20 U.S.C. §§ 1415 (b)(3) and (c)) (emphasis added).

44. "If, however, the public agency does not suspect that the child has a disability and denies the request for an initial evaluation, the public agency must provide written notice to the parents, consistent with Sec. 300.503 (b) and section 615(c)(1) of the Act, which explains, among other things, why the public agency refuses to conduct an initial evaluation and the information that was used as the basis to make that decision." 71 Fed. Reg. 46,636 (2006). The regulations are sufficiently clear that "a public agency may refuse to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child, if the public agency provides written notice . . . [including] situations in which a public agency wishes to deny a parent's request for an initial evaluation . . ." Id.

45. Federal law in this regard is clear; whether parents agree to the refusal or not, local educational agencies must comply with their IDEA responsibility to provide written notice upon their refusal to evaluate a child for special education services. *Richard R.*, 567 F.Supp.2d at 947-48.

46. The Ninth Circuit rejected the argument that a prior written notice is not required when a school district "chose to ignore [the student's] disabilities and take no action, it has not

affirmatively refused to act." *Compton Unified Sch. Dist. v. Addison*, 598 F.3d 1181, 1184 (9th Cir. 2010). The Ninth Circuit explained: "We read statutes as a whole, and avoid statutory interpretations which would produce absurd results. See *United States v. Morton*, 467 U.S. 822, 828, 104 S.Ct. 2769, 81 L.Ed.2d 680 (1984); *Arizona State Bd. for Charter Schools v. United States Dep't of Educ.*, 464 F.3d 1003, 1008 (9th Cir.2006). Id. "It seems equally clear that before the school system could refuse to initiate an evaluation or the provision of a free appropriate public education, it had a duty to give the child's parents a written notice fully informing them of their procedural rights. See 20 U.S.C. § 1415(C) and (D), as implemented in 34 C.F.R. §§ 300.504(a)(2) and 300.505. The school system violated both of these duties." Id.

47. The IDEA requires that "a copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents" at least once annually and on other specified occasions including "upon initial referral or parental request for evaluation" and "upon the first occurrence of the filing of a complaint." 20 U.S.C. § 1415(d)(1)(A) (emphasis added); see also 34 C.F.R. § 300.504(a) (same). "These requirements "are necessary to ensure that parents have information about the due process requirements when they are most likely to need them . . ." 71 Fed. Reg. 46,692 (2006).

48. Both the availability of the notice at the school and online, as well as the bulk mailing of notices at the beginning of the school years, are insufficient to provide a parent notice under the IDEA. 71 Fed. Reg. 46, 693 (Aug. 14, 2006) ("The public agency would not meet its obligation § 300.504(a) by simply directing a parent to the Web site. Rather a public agency must still offer parents a printed copy of the procedural safeguards notice.").

49. 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. *Richard R.*, 567 F. Supp. 2d at 948 (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). Similarly, a school district may not withhold this information when a parent seeks an evaluation for her child who is parentally placed in a private school outside the school district's jurisdiction. *Robertson Cnty. Sch. Sys. v. King*, 99 F.3d 1139 (6th Cir. 1996) (unpublished) (finding "[t]he school system had an affirmative legal duty to inform the [parents] of their rights, but it failed to carry out that duty—and it misinformed [the mother] in telling her 'it's not our child'").

5) Whether Respondent violated its Child Find duty?

School Year 2017-2018

50. Respondent violated its Child Find duty in the 2017-18 school year as Respondent had received at least one (1) parent request to initiate an IDEA referral through the receipt of the private evaluation during the 2017-2018 school year, which it ignored.

51. The statute of limitations does not bar Petitioners' claims concerning Respondent's unilateral decision not to evaluate [redacted] for IDEA eligibility as Respondent never issued a prior

written notice documenting its decision and never provided her parents with the requisite Procedural Safeguards during the 2017-18 school year.

School Year 2018-2019

52. On February 18, 2019, [redacted] parents initiated the referral for a Section 504 Plan. The first page of the referral document indicates a need to initiate a referral under IDEA. Stip. Ex. 2, p 3; T vol 3 p 376:9-25 (T of Leach).

53. Respondent did not convene an IEP meeting to review [redacted] private evaluation during the 2018-2019 school year and did not issue a Prior Written Notice of its unilateral decision not to evaluate [redacted] during the 2018-2019 school year.

54. Respondent violated the IDEA by failing to issue a Prior Written Notice that it was refusing to initiate the referral process and failed to do so during the 2018-2019 school year.

55. Respondent failed to provide Petitioners a copy of the Procedural Safeguards during the 2018-2019 school year.

56. Respondent was required to provide a copy of the Procedural Safeguards upon [redacted] referral for a Section 504 Plan and for the provision of the 2017 private evaluation to the 504 Team.

57. Regardless of whether [redacted] and [redacted] knew Respondent had not evaluated [redacted] the withholding exception to the statute of limitations applies.

58. The statute of limitations does not bar Petitioners' claims concerning Respondent's unilateral decision not to evaluate [redacted] for IDEA eligibility as Respondent never issued a Prior Written Notice documenting its decision and never provided her parents with the requisite Procedural Safeguards during the 2018-2019 school year.

B. Evaluations & Eligibility

59. The evaluation must be sufficiently comprehensive to identify all of the child's special education needs, regardless of whether the needs are commonly linked to the disability category in which the child has been identified. 20 U.S.C. 1414(b)(1)-(3), 1412(a)(6)(B); 34 CFR 300.304.

60. The IDEA mandates the assessment tools and strategies utilized provide relevant information that directly assists persons in determining the educational needs of the child. 20 U.S.C. § 1414(b)(3)(C).

61. An IEP team may not "use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child." 20 U.S.C. § 1414(b)(2)(B).

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

63. "The evaluation requirement 'serves a critical purpose: it allows the child's IEP Team to have a complete picture of the child's functional, developmental, and academic needs, which in turn allows the team to design an individualized and appropriate educational plan tailored to the needs of the individual child.'" *Z.B.*, 888 F.3d at 523 (quoting Timothy O., 822 F.3d at 1119).

64. Any parent-initiated evaluation provided to the IEP team, including an IEE, "***must*** be considered" by the school district "in any decision made with respect to the provision of FAPE to the child." 34 C.F.R. § 300.502 (c)(1) (emphasis added); see also *Letter to Zirkel*, 74 IDER 142 (OSEP May 2, 2019).

65. As part of an evaluation, the IEP team must "review existing evaluation data on the child, *including—evaluations and information provided by the parents of the child*; current classroom-based, local, or State assessments, and classroom-based observations; and observations by teachers and related services providers." 20 U.S.C. § 1414(c)(1)(A) (emphasis added.)

1) Initial Evaluations

66. The initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation. 34 C.F.R. § 300.301(c)(1). "Each public agency must ensure that [a] meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services." 34 C.F.R. § 300.323(c)(1).

67. The Policies combine these timelines and require that "within 90 days of receipt of the referral the initial evaluation will be conducted; eligibility determined; and for an eligible child, the IEP developed, and placement completed." NC 1503-4.4(c)(1).

68. When an IEP team delays in conducting a necessary evaluation, this procedural violation contributes to the denial of FAPE when the IEP developed fails to address all the known issues. *S.S. v. Bd. of Educ. of Hartford Cnty*., 498 F.Supp.3d 761, 781 (D.Md. 2020) (citing *Gerstmyer v. Howard Cnty. Pub. Schs.*, 850 F.Supp.361 (D.Md. 1994)).

2) Reevaluations

69. The IEP team must complete the reevaluation process at least every three years, or more often if a parent requests a reevaluation. 20 U.S.C. § 1415(a)(2)(B)(ii).

70. When a parent requests a reevaluation "to determine the child's educational needs . . . the public agency must either conduct the reevaluation or provide notice to the parents as to why the public agency believes a reevaluation is unnecessary." 71 Fed. Reg. 46,644 (2006).

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

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

3) Appropriateness of Evaluations

73. The failure to conduct an evaluation integral to understanding the student's needs "is a serious procedural violation because it may prevent the IEP team from obtaining necessary information about the student's [identified needs], leading to their being addressed in the IEP inadequately or not at all." *S.S.*, 498 F.Supp.3d at 780 (quoting *R.E.*, 694 F.3d at 190); accord *Z.B.*, 888 F.3d at 524.

74. Applying *Endrew F.*, the court must ask whether the school district "adequately evaluated [the student's] particular needs and offered her an IEP tailored to what it knew or reasonably should have known of her disabilities at the time." *Z.B.*, 888 F.3d at 524 (citing *Endrew F.*, 137 S.Ct. 988, 999 (2017)).

75. "The 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.*, 822 F.3d at 1118-19.

76. Furthermore, "[s]chool districts cannot circumvent that 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.

77. It could be "particularly devastating for children with autism" to not be identified based on informal observations and misinformed opinions of those without the proper training to identify high functioning autism, as "the condition 'can be very subtle' and manifest itself in many different ways." See *Timothy O.*, 833 F.3d at 1122.

78. The failure to consider evaluation data by discounting or minimizing evaluation data results is a violation of the duty to conduct a sufficiently comprehensive evaluation in violation of 34 CFR §§ 300.304-305. *Boulder Valley School District,* 116 LRP 45634 at *7 (CO SEA 2016).

79. Where an IEP team fails to consider the impact of a child's disability on her school functioning from a variety of sources, the district violates 34 C.F.R. § 300.306(c)(1). *Norwayne Local Schs.*, 81 IDELR 288 at *7 (OH SEA 2022).

80. When an evaluator is not thorough in the evaluation process, and the conclusions and recommendations do not address known diagnoses (e.g., autism), the testimony of the evaluator may be discounted and comprehensive independent evaluations are appropriate. *Philadelphia Sch. Dist.*, 123 LRP 17919 at *6-7 (PA SEA 2023).

4) Eligibility and Required Evaluations for OHI

81. 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).

82. When determining a child's eligibility, the IEP team must "(i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and (ii) *Ensure that information obtained from all of these sources is documented and carefully considered*. 34 CFR § 300.306 (emphasis added).

83. There are three (3) categories of disabilities applicable in this case—Emotional Disturbance (ED), Other Health Impairment (OHI), and Autism (AU). 20 U.S.C. § 1401(3). Respondent presented no evidence to contest [redacted] has the following disabilities: ADHD, Oppositional Defiant Disorder, Anxiety, Conduct Disorder, Disruptive Mood Dysregulation Disorder, and Autism.

84. According to the IDEA regulations, Emotional Disturbance (ED) 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:

> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
> (C) Inappropriate types of behavior or feelings under normal circumstances.
> (D) A general pervasive mood of unhappiness or depression.
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.8(c)(4)(i).

85. Other Health Impairment (OHI) means 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—

> i. Is due to chronic or acute health problems such as . . . attention deficit hyperactivity disorder . . . and

ii. Adversely affects a child's educational performance.

34 C.F.R. § 300.8(c)(9).

86. Autism (AU) means:

i. a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.
ii. Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section.
iii. A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph (c)(1)(i) of this section are satisfied.

34 C.F.R. § 300.8(c)(1).

87. The Policies require the following for a determination of eligibility in Autism to be demonstrated currently or by history:

(A) Persistent deficits in social communication and social interaction across multiple contexts, manifested by ALL THREE of the following:
1) Deficits in social-emotional reciprocity
2) Deficits in nonverbal communicative behaviors
3) Deficits in developing, maintaining, and understanding relationships.

AND

(B) Restrictive, repetitive patterns of behavior, interests, or activities, manifested by ONE OR MORE of the following:
1) Stereotyped or repetitive motor movements, use of objects, or speech
2) Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior
3) Highly restricted, fixated interests that are abnormal in intensity or focus
4) Atypical responses to sensory input or atypical interests in sensory aspects of the environment.

AND

(C) Symptoms generally present in the early developmental period but may not manifest until social demands exceed coping capacities or may be masked by learned strategies in later life. A child who manifests the characteristics of autism after age three could be identified as having autism spectrum disorder if the criteria in (A) and (B) are satisfied.

And the disability must:

(A) Have an adverse effect on educational (academic and/or functional) performance, and

(B)Require specially designed instruction.

NC 1503-2.5(d)(1)(ii)-(iii).

88. The IDEA defines related services as "including . . . psychological services . . . counseling services . . . as may be required to assist a child with a disability to benefit from special education . . . ." 20 U.S.C. § 1401(26)(A)

89. Specially Designed Instruction means adapting, as appropriate to the needs of the eligible child under this part, 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 the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3) (2006).

90. When determining a child's eligibility, the IEP team must "(i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and (ii) *Ensure that information obtained from all of these sources is documented and carefully considered*." 34 CFR § 300.306 (emphasis added).

91. "[A]cademic 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 *Bd. of Educ. of Hendrick Hudson Central Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 203, n.25 (1982)).

92. The fact a child is able "to achieve academically should have been measured in light of [her] 'considerable intellectual potential.'" *G.D.*, 823 F.Supp.2d at 466 (quoting *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

93. A child's educational problems are not limited to academic deficits, functional/behavioral deficits must be addressed in an IEP. "If the problem prevents a disabled child from receiving educational benefit . . . what should control our decision is not whether the problem itself is 'educational' or 'non-educational,' but whether it needs to be addressed in order for the child to learn." *Rose Tree Media Sch. Dist. v. M.J. by & through M.J.*, No. 18-CV-1063, 2019 WL1062487, at *6 (E.D. Pa. Mar. 6, 2019) (citing *Indep. Sch. Dist. No. 284 v. A.C., by & through her Parent, C.C.*, 258 F.3d 769, 777 (8th Cir. 2001).

94. "[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 performance may still qualify for special education and related services based on social-emotional needs or attention deficits. See *Indep. Sch. Dist.No. 283 v. E.M.D.H.*, 960 F.3d 1073, 1082 (8th Cir. 2020).

95. The Policies require the following required screening and evaluations to determine eligibility under OHI:

> (A) Hearing screening;
> (B) Vision screening;
> (C) Two scientific research-based interventions to address academic and/or behavioral skills deficiencies and documentation of the results of the interventions, including progress monitoring documentation;
> (D) Summary of conference with parents or documentation of attempts to conference with parents;
> (E) Observation across settings, to assess academic and functional skills;
> (F) Social/developmental history;
> (G) Educational evaluation; and
> (H) Medical evaluation.

NC 1503-2.5(10)(i).

> *5) Whether Respondent failed to appropriately and timely evaluate and consider [redacted] eligibility in all suspected areas of disability?*

School Years 2017-2018 and 2018-2019

96. [redacted] met IDEA eligibility criteria in both OHI and ED categories and was in need of specially designed instruction during the 2017-2018 and 2018-2019 school years.

97. Respondent denied [redacted] a FAPE for both the 2017-2018 and 2018-2019 school years.

School Year 2019-2020

98. The IEP team only considered one area of suspected disability: Other Health Impairment (OHI) and did not consider the relevant information is for eligibility as Emotional Disability (ED).

99. The IEP team did not consider all relevant information in determining which areas of eligibility to consider and the Prior Written Notice was deficient.

100. Respondent did not provide the parents with the procedural safeguards at either the September 2019 or the November 2019 IEP meetings.

101. [redacted] met eligibility criteria under the IDEA in November 2019.

102. At another IEP team convened on March 20, 2020, for an initial referral for [redacted] and decided to evaluate her in the areas of OHI and emotional disability (ED) and documented the deadline for developing an IEP for [redacted] if found eligible, was May 31, 2020.

103. The team noted "At this time, all evaluations are on hold due to the Coronavirus, no contact with students." Stip. Ex. 14, p 37.

104. The IDEA and its implementing regulations 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 (Office for Civil Rights (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.").

105. The IEP team that convened on June 11, 2020, misrepresented to the parents that it could not determine [redacted] eligibility at this meeting. Stip. Ex. 17 p 53.

106. As of June 2020, all data needed for the consideration of Other Health Impaired (OHI) were available for the team to make an eligibility determination. See NC 1503-2.5(10)(i).

107. Respondent's failure to timely and appropriately evaluate [redacted] in all suspected areas of disability caused her educational harm during the 2019-2020 school year.

108. As the IEP team misrepresented to the parents that evaluations were on hold and that it could not find [redacted] eligible based on the data it had, the statute of limitations does not apply.

School Year 2020-2021

109. Respondent did not convene an eligibility meeting for [redacted] until February 8, 2021—approximately eleven (11) months after the initial referral meeting. Stip. Ex. 20.

110. Respondent's failure to timely and appropriately evaluate [redacted] in all suspected areas of disability caused her educational harm during the 2020-2021 school year.

School Year 2021-2022

111. Respondent's continued failure to conduct an FBA as recommended in 2019, during the 2021-2022 school year, caused [redacted] educational harm during the 2020-2021 school year.

School Year 2022-2023

112. [redacted] was suspended on October 17, 2022. Yet, Respondent failed to conduct an FBA. Despite numerous incidents throughout the 2022-2023 school year, the IEP team only decided to conduct an FBA after the March 6, 2023 MDR meeting.

113. Respondent's failure to conduct and FBA during the 2022-2023 school year despite numerous incidents caused [redacted] educational harm during the 2022-2023 school year.

114. Respondent's failure to comply with the IDEA's procedural and substantive requirements to evaluate [redacted] and failure to properly consider the data reported by the private evaluators, prevented her IEP teams from having appropriate present levels, goals, and services in her IEP thereby causing her educational harm and denying her a FAPE.

C. Parent Participation

115. "The grammatical structure of IDEA's purpose of protecting 'the rights of children with disabilities and parents of such children,' § 1400(d)(1)(B), would make no sense unless 'rights' refers to the parents' rights as well as the child's. Other provisions confirm this view. See, e.g., § 1415(a)." *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 517 (2007).

116. The parent and other qualified individuals are responsible for determining whether a child is a child with a disability. 20 U.S.C. § 1414(b)(4)(A).

117. When Congress passed the IDEA, it placed great importance in the role of parents in crafting an adequate and individualized education for each disabled student. *Rowley*, 458 U.S. at 205–06.

118. Parents "are expected to be equal participants along with school personnel" at all IEP meetings. *Letter to Gramm*, 17 IDELR 216 (OSERS 1990).

119. "IDEA grants parents independent, enforceable rights. These rights, which are not limited to certain procedural and reimbursement-related matters, encompass the entitlement to a free appropriate public education for the parents' child." Winkelman, 550 US at 533.

1) Meaningful Participation

120. Parents must be afforded the opportunity to participate in IEP meetings. 34 C.F.R. § 300.322(a); N.C. Gen. Stat. § 115C-109.3(a).

121. School districts must consider "information from a variety of sources, including aptitude and achievement tests, *parent input*, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior." 34 C.F.R. § 300.306(c)(1)(i) (emphasis added).

122. The IDEA's procedural requirements are purposefully designed to ensure that parents can meaningfully participate in the process of developing an IEP for their child. See Rowley, 458 U.S. at 205–06 ("It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard."); see also 34 C.F.R. § 300.322(a); N.C. Gen. Stat. § 115C-109.3(a) (guaranteeing the parent the right "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to that child.").

123. "These procedures 'which provide for meaningful parent participation are particularly important,' and signal Congress's 'effort to maximize parental involvement' in each child's education." *Forest Grove Sch. Dist. v. Student*, No. 3:12-CV-01837-AC, 2014 WL 2592654, at *13 (D. Or. June 9, 2014), aff'd, 665 F. App'x 612 (9th Cir. 2016) (citing *Amanda J. ex rel. Annette J.V. Clark County Sch. Dist.*, 267 F.3d 877, 891 (9th Cir. 2001) and *Rowley*, 458 U.S. at 183 n. 6.

124. "Not only will parents fight for what is in their child's best interests, but because they observe their child in a multitude of different situations, they have unique perspective of their child's special needs.'' *Forest Grove*, 2014 WL 2592654, at *13 (citing *Amanda J.*, 267 F.3d at 891).

125. During a meeting, an IEP team's responses to a parent's position "should be meaningful responses that make it clear that the state had an open mind about and actually considered the parents' points. This inquiry is inherently fact-intensive, but should identify those cases where parental participation is meaningful and those cases where it is a mere formality." *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188-89 (11th Cir. 2014).

126. But "the right to provide meaningful input is simply not the right to dictate an outcome ...." Id. (citation omitted). *Boone as next friend of K.A. v. Rankin Cnty. Pub. Sch. Dist.*, No. 3:22-CV-46-KHJ-MTP, 2023 WL 4108210, at *4 (S.D. Miss. May 18, 2023) appeal docketed No. 23-60333 (5th Cir. June 21, 2023).

2) Predetermination

127. Schools should give thought to the development of a student's IEP prior to the IEP meeting; however, "school officials must come to the IEP table with an open mind." *Doyle v.*

Arlington Cnty. Sch. Bd., 806 F.Supp. 1253, 1262 (E.D.Va. 1992), aff'd 39 F.3d 1176 (4th Cir. 1994).

128. Parents are denied their right to meaningfully participate in the development of their child's IEP when a school district predetermines the child's placement prior to an IEP meeting. See, e.g., *Spielberg ex rel. Spielberg v. Henrico Cnty. Public Sch.*, 853 F.3d 256 (4th Cir. 1988) (finding the school district's decision to change a student's placement before the IEP meeting violated the Education for All Handicapped Children Act, the predecessor to the IDEA); *R.L.*, 757 F.3d at 1188 ("Predetermination occurs when the state makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team.").

129. Courts that have found predetermination have done so where there is evidence supporting an inference that the school district determined the student's educational path in advance and did not allow for consideration of alternatives. For instance, in *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004), the court found predetermination where the school district had an unofficial policy of refusing certain types of programs, refused to consider the parents' request for certain programs (in part by prohibiting the parents from asking questions during an IEP meeting), and made its determination based on primarily financial considerations rather than the child's unique needs. In Spielberg, the school district wrote letters stating its intent to change a student's placement before developing an IEP. The court found the district "resolved to educate [the child] at [one school], and then developed an IEP to carry out their decision." 853 F.2d at 259; see also *J.G. ex rel. N.G. v. Kiryas Joel Union Free Sch. Dist*., 777 F.Supp.2d 606, 649 (S.D.N.Y. 2011) (collecting cases).

130. "[A]ny pre-formed opinion the state might have must not obstruct the parents' participation in the planning process. Parental '[p]articipation must be more than a mere form; it must be *meaningful*.' It is not enough that the parents are present and given an opportunity to speak at an IEP meeting." *R.L.*, 757 F.3d at 1188 (quoting Deal 392 F.3d at 858) (emphasis in original).

131. "Predetermination occurs when the [school district] makes educational decisions too early in the planning process, in a way that deprives the parents of meaningful opportunity to fully participate as equal members of the IEP team." *E.R. by E.R. v. Spring Branch Indep. Sch. Dist*., 909 F.3d 754, 769 (5th Cir. 2018).

132. "To avoid a finding of predetermination, there must be evidence the state has an open mind and might possibly be swayed by the parents' opinions and support for the IEP provisions they believe are necessary for their child." *R.L*., 757 F.3d at 1188 (citing *Deal*, 392 F.3d at 858). When the school district "presents one placement option at the meeting and is unwilling to consider other alternatives," its actions violate the IDEA. *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 F. App'x 342 (9th Cir. 2007); see also *R.L.*, 757 F.3d at 1188–90 (finding the school board predetermined the student's placement where it was "clear that 'there was no way that anything [the student's parents] said, or any data [they] produced, could have changed the [Board's] determination of' the appropriate placement").

133. Following the Eleventh Circuit, the hearing officer found that the school district improperly "decided material aspects of the [K.A.'s] educational program without [Boone's] input." *Boone as next friend of K.A. v. Rankin Cnty. Pub. Sch. Dist.,* No. 3:22-CV-46-KHJ-MTP, 2023 WL 4108210, at *5 (S.D. Miss. May 18, 2023) appeal docketed No. 23-60333 (5th Cir. June 21, 2023)(internal citations omitted).

134. The Undersigned finds the IEP team had predetermined prior to the August 30, 2022, IEP meeting and all subsequent IEP meetings it would not consider placement for [redacted] at a therapeutic residential program, would not place her at a therapeutic residential program, and it would only offer [redacted] services she could receive at a high school in the district.

135. Respondent denied meaningful parental participation when the IEP team refused "to evaluate [redacted] for services" and the IEP team did not document the refusal of a therapeutic residential placement which is specifically what the parents requested at the August 30, 2022 meeting.

3) Whether Respondent impeded [redacted] parents' meaningful participation?

136. The totality of the circumstances surrounding [redacted] initial referral for special education services—and throughout the entirety of this record—are replete with examples of delays, ignoring the Petitioners, and incomprehensible decisions that have no basis in the law or data. As a result, the circumstances point to the predetermination by an IEP team to deny [redacted] the special education and related services she needed.

137. The IEP team found [redacted] ineligible for an IEP on November 8, 2019, despite having an evaluation indicating her need for specially designed instruction.

138. The IEP team had sufficient information on November 8, 2019, to find [redacted] eligible for special education services, and by failing to find her eligible, Respondent denied [redacted] a FAPE for the 2019-2020 school year.

139. The IEP team had predetermined it would not find [redacted] eligible for services under the IDEA at the November 8, 2019, IEP meeting.

140. [redacted] IEP team convened on March 20, 2020 and despite having enough information to find [redacted] eligible, the IEP team decided to evaluate [redacted] and falsely told the parents "all evaluations are on hold due to the Coronavirus."

141. On June 11, 2020, [redacted] IEP team made false representations to her parents and predetermined that it would not find [redacted] eligible for services under the IDEA at the June 11, 2020, meeting.

142. The IEP team's predetermination of [redacted] placement in a setting that did not meet her educational needs cause her significant educational harm.

143. [redacted] parents were denied the opportunity to meaningfully participate in [redacted] Education by [redacted] IEP teams failed to document the parents' requests, the refusal of their requests, or the justification of the refusals.

144. Respondent committed numerous procedural violations that significantly impeded [redacted] parents' meaningful participation in the IDEA process, caused educational harm to [redacted] and resulted in a denial of FAPE to [redacted]

III. Substantive Violations

A. Denial of FAPE

145. The IDEA was enacted to "ensure that all children with disabilities have available to them a Free Appropriate Public Education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).

146. A school district is required to offer each student with a disability the opportunity for a FAPE through an Individualized Education Program (IEP) that conforms to the requirements of the IDEA and state standards. 20 U.S.C. § 1412(a)(1)(A); 20 U.S.C. § 1401(9).

147. An IEP is "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with" the IDEA. 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a).

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

149. An IEP must include:

> (I) a statement of the child's present levels of academic achievement and functional performance, including—
>
> > (aa) how the child's disability affects the child's involvement and progress in the general education curriculum; [ ]
>
> (II) a statement of measurable annual goals, including academic and functional goals, designed to—

> (aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
> (bb) meet each of the child's other educational needs that result from the child's disability;
>
> (IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—
>
> (aa) to advance appropriately toward attaining the annual goals;
> (bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and
> (cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;
>
> (V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

20 U.S.C. § 1414(d)(1)(A).

150. "Nevertheless, the educational benefit to which the Act refers and to which an IEP must be geared cannot be a mere modicum or de minimis; rather, an IEP must be 'likely to produce progress, not regression or trivial educational advancement.' In short, the educational benefit that an IEP is designed to achieve must be 'meaningful.'" *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. by Barry F.*, 118 F.3d 245, 248 (5th Cir. 1997).

B. Appropriateness of IEPs

1) Appropriate Present Levels and Identifying Areas of Need

151. The IEP is the "centerpiece" of delivering FAPE for disabled students; it must set out relevant information about the child's present educational performance and needs, establish annual and short-term objectives for improvements in that performance, and describe the specially designed instruction and services to meet the unique needs of the child. *Honig v. Doe*, 484 U.S. 305, 311 (1988) (quoting 20 U.S.C. §§ 1401, 1414(d)).

152. Specifically, the IEP Team must consider "the strengths of the child; the concerns of the parent[] for enhancing the education of [her] child; the results of the . . . most recent

evaluation of the child; and the academic developmental, and functional needs of the child." 20 U.S.C. 1414(d)(3)(A).

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

154. "Because a one-dimensional view of an IEP would afford too narrow a foundation for a determination that the program is reasonably calculated to provide effective results and demonstrable improvement in the various educational and personal skills identified as special needs, a district court's determination that an IEP complies with the Act necessarily involves a host of subsidiary determinations." *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1090 (1st Cir. 1993) (internal citations omitted).

155. "[T]he formal requirements of a free appropriate public education, require that all of a child's special needs must be addressed in the educational plan." *Town of Burlington v. Dep't of Educ. for Com. of Mass.,* 736 F.2d 773, 788 (1st Cir. 1984), aff'd sub nom. *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985).

156. The IEP must include the child's full range of needs "whether they be academic, physical, emotional, or social." *Lenn*, 998 F.2d at 1089; U.S. Dep't of Educ., Notice of Policy Guidance, 57 Fed. Reg. 49, 274 at 49,275 (1992) (stating that an IEP must address "the full range of the child's needs").

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

2) Appropriate Goals and Services

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

159. "The goals may differ, but every child should have the chance to meet challenging objectives." *Enter. City Bd. of Educ. v. S.S.*, No. 1:19-CV-748-ALB, 2020 WL 3129575, at *5 (M.D. Ala. June 12, 2020) (citing *Endrew F.,* 137 S.Ct. at 1000; Endrew F, 290 F. Supp. 3d at 1184 (mere "updates" or "minor or slight increases" in goals are insufficient)).

160. "In short, passing marks and annual grade promotion are important to the EHA, but a child's ability or inability to achieve such marks and progress does not automatically resolve the inquiry where the [FAPE] requirement is concerned, and to the extent that the district court, in dicta, invested passing marks and annual grade advancement with more significance than the Rowley Court, those dicta must yield to the language and logic of the Rowley opinion." *In re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991).

161. "[A] FAPE comprises 'special education and related services'–both 'instruction' tailored to meet a child's 'unique needs' and sufficient 'supportive services' to permit the child to benefit from that instruction." *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 748-49, 197 L. Ed. 2d 46 (2017) (quoting 20 U.S.C. §§ 1401(9), (26), (29)).

3) Placement

162. The IDEA requires children with disabilities be educated "to the maximum extent appropriate" with children who are not disabled, unless the "nature and severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5).

a. Continuum of Placements

163. "Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." 34 C.F.R. § 300.115(a).

164. Alternative placements include "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." 34 C.F.R. § 300.115(b)(1).

165. "If placement in a public or private *residential* program is necessary to provide special education and related services to a child with a disability, the program, including nonmedical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. § 300.104. (emphasis added).

166. Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State. 20 U.S.C. § 1412(a)(10)(B).

167. Children must be educated with their non-disabled peers "to the maximum extent appropriate." 20 U.S. § 1412(a)(5)(A). However, it is the individual needs of the child that determine where the child is placed on the curriculum.

168. "This 'continuum' of alternative placements may include 'placement in a public or private *residential program*,' in the event such a program 'is necessary to provide special education and related services to a child with a disability.'" *M. S. v. Los Angeles Unified Sch. Dist.,* No. 2:15-CV-05819-CAS-MRW, 2019 WL 334564, at *8 (C.D. Cal. Jan. 9,2019), aff'd sub nom. *M. S. by & through R.H. v. Los Angeles Unified Sch. Dist.*, 913 F.3d 1119 (9th Cir. 2019) (quoting 34 C.F.R. § 300.104) (emphasis in original).

169. A school district is "obligated to 'ensure that a continuum of alternative placements [was] available to meet [the student's] needs,' and federal law further mandated that potential placement in a residential treatment center be a part of that continuum." *M.S.*, 2019 WL 334564, at *10 (quoting 34 C.F.R. § 300.115).

170. "The LRE continuum is not a progressive step by step process, wherein you must await failure to move into a more restrictive setting. It is a continuum, not a step ladder. If the Student cannot receive educational benefit from a particular placement, a more restrictive placement should be considered." *Danbury Board of Educ.,* 115 LRP 1631, at *20 (SEA CT January 7, 2014) (internal citations removed).

171. A Board cannot try "to fit the Student into one of their programs rather than addressing the Student's unique needs." The Board witnesses merely "parrot[ing] the same phrase that LRE is a continuum," is meaningless when "their understanding of this was flawed." *Danbury Board of Educ.*, 115 LRP 1631, at *20 (SEA CT January 7, 2014).

172. "If a student's placement does not confer a meaningful benefit to the student and a more restrictive program is likely to provide such a benefit, the student is entitled to be placed in that more restrictive program." Id. (citing *P exl rel Mr. and Mrs. P. v Newington Bd. Of Educ.*, 546 F.3d 111, 122 (2d Cir. 2008)).

173. Respondent's failure to offer [redacted] any alternative placement on the continuum of placements resulted in educational harm and loss of education benefit as Respondent has failed to offer [redacted] a FAPE.

b. Inextricably Intertwined

174. 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.

175. 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.Suppl 136, 141 (D.D.C. 1979)). The Fourth, Sixth, and D.C. Circuits have adopted the "inextricably intertwined" standard set forth by the Third Circuit in *Kruelle*.

176. 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 is the very basis for holding that the services are an essential prerequisite for learning." *Kruelle*, 642 F.2d at 694.

177. The first step in the analysis is whether the student's current IEP offers FAPE and is making educational progress, a residential placement is not required. See, e.g., *Burke Cnty. Bd. Of Educ. v. Denton By and Through Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (finding the district was not responsible for paying for the in-home aides of a disabled child to provide FAPE, as the child had "continued to make educational progress under the Board's in-home school program and without in-home special education and behavior management instruction"); *Shaw v. Weast*, 364 Fed. Appx. 47, 2010 WL 331428 at *6 (4th Cir. 2010) (unpublished) (finding the district's placement at a private day school was appropriate and student made educational progress).

178. However, when the IEP does not offer FAPE, a residential placement may be necessary. *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); *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).

179. The Fourth Circuit also upheld the district court's "stay-put" order of private placement after the parent was unable to continue paying for the unilateral private placement. The Fourth Circuit pointed to the evidence in the record of the student's declining grades, hospitalization, and the district court's conclusion that "the school never seriously considered residential placement for [the student], despite the hearing officer's directive to review all placement options." *Stockton by Stockton v. Barbour Cnty. Bd. of Educ*., 112 F.3d 510, *4 (4th Cir. 1997) (unpublished).

180. The Fourth Circuit noted "[o]ther than the county school psychologist, every expert who examined [the student] concluded that he should be in a residential setting and that returning him to the public school would be harmful" the Court agreed and granted the injunction. Id.

181. Although there are cases analyzing tuition reimbursement and least restrictive environment, the Undersigned is not aware of any cases in the Fourth Circuit identifying specific

factors to consider when determining what necessitates residential placement when the school district cannot meet the student's unique needs and has been unable to locate any cases on point.

182. As courts in the Second, Third, Ninth, and D.C. Circuits have analyzed students requiring therapeutic, residential placements, the Undersigned looked to cases from these Circuits in determining whether [redacted] requires a therapeutic, residential setting to make academic and functional progress.

183. The Second Circuit analyzed a case with similar facts where the student's therapist evaluated her and determined "[the student's] emotional problems could not be dealt with effectively outside a full-time residential treatment program" specifically noting her "opposition and defiance." *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 117 (2d Cir.1997).

184. The Second Circuit considered a variety of factors, such as when "over the course of three (3) years," a student fails to advance "more than one grade level in any subject," despite having average intelligence, the student is not making appropriate progress in the placement. *Mrs. B.*, 103 F.3d at 1121.

185. Where a child's "history in the public school system" is "marked by very limited academic progress," "serious regression in the year prior," "and nearly all of her grades were unsatisfactory," a residential placement is necessary "to make meaningful progress." *Mrs. B. v. Milford*, 103 F.3d at 1121. "[T]he Act clearly contemplates the need for the support services provided by such programs as residential placements in some circumstances." Id. at 1122.

186. "The fact that a residential placement may be required to alter a child's regressive behavior at home as well as within the classroom, or is required due primarily to emotional problems, does not relieve the state of its obligation to pay for the program under federal law so long as it is necessary to insure [sic] that the child can be properly educated." *Mrs. B.*, 103 F.3d 1122.

187. "[T]he district court properly concluded that even though [the student] was placed in the residential program to deal with her emotional problems and her home-life, the state had to fund the program because it was necessary for [the student] to make educational progress. The evidence shows that [the student]'s behavior was regressing, and that her failure to advance academically was due primarily to her severe emotional problems, which could not be effectively dealt with outside a residential setting. In the face of [the student]'s problems, the state offered no meaningful alternative for her. Accordingly, the defendants were obliged to pay for the entire cost of the residential placement." *Mrs. B*, 103 F.3d 1122.

188. "States may not escape responsibility for the costs properly associated with a residential placement simply by stating that the placement addresses physical, emotional, psychological, or behavioral difficulties rather than or in addition to educational problems." *Vander Malle v. Ambach*, 667 F. Supp. 1015, 1039 (S.D.N.Y. 1987).

189. In a recent case from Connecticut, the hearing officer considered the "highly restrictive program" implemented by the district "to maintain the Student in school safely."

Branford Bd. of Ed., 122 LRP 31722 at *8 (CT SEA 2022). While the restrictions addressed the student's elopement, the student did not make academic progress, and the hearing officer found the educational program did not offer FAPE. Id. at *9.

190. The hearing officer noted "[w]here, as here, FAPE cannot be delivered in a mainstream setting, the Board is required to provide the program in a placement that can educate the student satisfactorily." Id. at *11 (citing *P v. Newington Bd. of Educ*., 546 F.3d 111 (2d Cir. 2008). The hearing officer found the district appropriately reached the "conclusion that the Student requires a small, segregated, highly structured therapeutic school program in order to receive FAPE," and as "the Board does not have such a program it would not be feasible to create one," the hearing officer ordered the district to place the student in an "out of district therapeutic school." *Branford Bd. of Ed.*, 122 LRP 31722 at (CT SEA 2022).

191. "[T]he Third Circuit has acknowledged that residential placement, although not preferred, is required once a court has concluded that it is the 'only realistic option' for a handicapped child's learning improvement." S.*C. ex rel. C.C. v. Deptford Twp. Bd. of Educ.*, 248 F. Supp. 2d 368, 375 (D.N.J. 2003) (quoting *Kruelle*, 642 F.2d at 695).

192. In addition to the traditional factors considered for mainstreaming, the S.C. court considered the following factors particular to the need for a residential placement:

> (1) whether the child was experiencing emotional conditions that fundamentally interfered with the child's ability to learn in local placement;
> (2) whether the child's behavior was so inadequate, or regression was occurring to such a degree, as to fundamentally interfere with the child's ability to learn in a local placement;
> (3) whether, before the dispute arose [between the parents and the local school board], any health or educational professionals actually working with the child concluded that the child needed residential placement;
> (4) whether the child had significant unrealized potential that could only be developed in residential placement;
> (5) whether past experience [with placing the child in a more restrictive environment] indicated a need for residential placement; and
> (6) whether the demand for residential placement was primarily to address educational needs.
>
> *S.C.*, 248 F. Supp. 2d at 378 (quoting *D.B. v. Ocean Township Bd. Of Educ.*, 985 F.Supp. 457, 493–97 (D.N.J. 1997).

193. After considering the multiple factors, the Court found "in order to receive a FAPE, S.C. requires placement in a residential program." *S.C.*, 248 F. Supp. 2d at 380.

194. When considering and weighing the factors, an ALJ does not need to find all factors apply to require a residential placement. In fact, where "[t]he ALJ found that the first D.B. factor was "not specifically applicable" to [the student]'s case," the reviewing Court agreed and upheld the ALJ's decision to place the student at a residential school. *T.R. ex rel. J.R. v. Cherry Hill Twp. Bd. of Educ*., No. CIV. 11-2547 RBK/KMW, 2012 WL 1332631, at *14 (D.N.J. Apr. 17, 2012).

195. Additionally, when analyzing the fourth D.B. factor of "unrealized potential that could only be developed in a residential placement," the Court agreed the factor applied when "No witnesses have indicated that [the student] will not benefit from residential placement . . . . [N]o one has stated that [the student] does not have the ability to learn if his behaviors are stabilized." *T.R.,* 2012 WL 1332631, at *15.

196. The Ninth Circuit affirmed the district court's decision analyzing the tension of financial responsibility between state agencies when a student requires a residential placement in a similar case where the student had "experienced emotional trauma since at least the age of four years old" and was placed in the custody of the Department of Children and Family Services ("DCFS") from the time she was eleven. *M.S.*, 2019 WL 334564, at *3, aff'd sub nom. *M. S. by & through R.H. v. Los Angeles Unified Sch. Dist.*, 913 F.3d 1119 (9th Cir. 2019).

197. The student had multiple hospitalizations, yet her IEP team offered her an IEP with counseling and a general education placement. Id. at *3. DCSF placed the student at a residential school; her IEP team convened and "offered . . . continued placement" at the school located within the residential facility but "did not offer placement in a residential treatment center for educational purposes, though [she] was already in a residential treatment facility . . . pursuant to DCSF's placement." Id. at *4.

198. The court found even when a student is placed in a residential placement by an outside agency for mental health needs, the school district also has an "independent obligation to consider whether [the student] is entitled to a 'residential placement,' pursuant to the IDEA, in light of her *educational needs*." *M. S.*, 2019 WL 334564, at *8 (quoting 34 C.F.R. § 300.115(a) (emphasis in original).

199. "[A]n IEP must be "reasonably calculated to enable [a student] to receive educational benefits." The District cannot establish [the] IEPs met this standard, as both [] IEPs only reflect that [the student] was to be placed in a nonpublic school and failed even to consider whether a residential placement for educational purposes might be appropriate or required." *M.S.*, 2019 WL 334564, at *14.

200. "It may be possible in some situations to ascertain and determine whether the social, emotional, medical, or educational problems are dominant and to assign responsibility for placement and treatment to the agency operating in the area of that problem. In this case, all of these needs are so intimately intertwined that realistically it is not possible for the Court to perform the Solomon-like task of separating them." *North*, 471 F. Supp. at 141. Thus, the Court granted a preliminary injunction and ordered the District to place the student at a "residential academic program with necessary psychiatric, psychological and medical support and supervision." Id.at 142.

201. Petitioners have presented uncontested evidence from two (2) experts that [redacted] requires a therapeutic residential educational placement to make educational progress. Respondent presented no expert testimony to contradict Petitioners' experts. Petitioners presented evidence of [redacted] lack of academic and functional progress in Respondent's school.

202. The documentary evidence does not support Respondent's contention that [redacted] made educational progress, including her Final Report Card for School Year 2022-2023. No IEP progress notes were offered by either party for consideration.

203. Respondent has no therapeutic offerings for high school students.

204. Respondent did not offer [redacted] a therapeutic placement.

205. As [redacted] is a high school student in need of a therapeutic placement, the Undersigned must place her in a therapeutic residential school and order her IEP team to change her placement in her IEP accordingly.

206. Based on all the evidence in the record, the Undersigned concludes that [redacted] educational needs were "inextricably intertwined" with her mental health needs, Respondent did not provide [redacted] a FAPE, and a residential placement is "necessary" for [redacted] to receive specially designed instruction and related services to meet her "unique needs."

c. Duty to Provide Residential Services

207. Under the IDEA, LEAs are required "to provide or pay for any services that are also considered special education or related services . . . that are necessary for ensuring FAPE to students with disabilities within the State, either directly or through contract or other arrangement . . ." 34 C.F.R. § 300.154(b)(1).

208. If Medicaid "fails to provide or pay for the special education and related services described in paragraph (b)(1) of this section, the LEA (or State agency responsible for developing the child's IEP) must provide or pay for these services to the child in a timely manner." 34 C.F.R. § 300.154(b)(2).

209. To ensure the provision of FAPE, an LEA may use its Part B funds to pay for the services needed for the child, when the LEA cannot access the parents' private insurance or public benefits or insurance and the parents would incur a cost for a specific service required. 34 C.F.R. § 154(f).

210. The Fourth Circuit addressed the issue of the allocation of financial responsibility for residential placements in *Gadsby by Gadsby v. Grasmick*, and noted "[t]here is nothing in either the language or structure of the IDEA that limits the district court's authority to award reimbursement costs against the SEA, the LEA, or both in any particular case." 109 F.3d 940, 955 (4th Cir. 1997)

211. In a one-tier state, such as North Carolina, if a hearing officer determines a change of placement is appropriate, that placement is treated as an agreement between the State and the parents for purposes of paragraph (a) of this section. 34 C.F.R. § 300.518(d). Therefore, once a hearing officer enters a decision finding a child needs a residential placement, the residential placement becomes the child's stay-put placement during the pendency of any appeal. 34 C.F.R. § 300.518(a),(d).

212. When a child's stay-put placement is a residential placement, the determination of the allocation of the cost may be to the LEA, the SEA, or both, and "should consider 'the relative responsibility of each agency for the ultimate failure to provide the child with a free appropriate public education." *St. Tammany Parish Sch. Bd. v. State of La*., 142 F.3d 776, 784 (5th Cir. 1998), cert denied 525 U.S. 1036 (1998) (quoting *Gadsby*, 109 F.3d at 955 and requiring the SEA to fund the student's stay-put residential placement).

213. "The law is clear that if the [] LEA is unable or unwilling to serve [the student] the state DOE must do so." *Todd D. by Robert D. v. Andrews*, 933 F.2d 1576, 1583 (11th Cir. 1991) (citing Honig, 484 U.S. at 329).

214. Under 20 U.S.C. § 1414(d)(1), "once an LEA is either unable or unwilling to establish and maintain programs in compliance with IDEA, the SEA is responsible for directly providing the services to disabled children in the area." *Gadsby*, 109 F.3d at 953; see also *Todd D*., 933 F.2d at 1583 (SEA must take responsibility for providing FAPE where disabled student is better served by regional or state facility than local one); *Kruelle*, 642 F.2d at 696-98 (affirming district court's order requiring SEA to provide student with full-time residential program where LEA failed to provide adequate program).

215. While it may be "unfair to hold the SEA liable for reimbursement costs of private school tuition, where the LEA was primarily responsible for the failure," "there may be cases in which it would be unfair to hold the LEA liable for costs, where, for example, there was no appropriate facility within the LEA's jurisdiction for the child and the SEA failed to provide an alternative." *Gadsby*, 109 F.3d at 955.

216. It is also clear from the documentary and testimonial evidence that the LEA did not have any "appropriate facility within its jurisdiction to meet [redacted] needs, and the SEA failed to provide an alternative." *Gadsby*, 109 F.3d at 955.

217. The experts in this case testified [redacted] required a residential placement.

218. Therefore, the Undersigned orders that [redacted] be placed in an appropriate residential facility designed to meet her unique needs, to change her placement accordingly in her IEP, and directs Respondent to follow the procedures prescribed in the DPI Guidance to secure funding to assist in covering the cost of such placement.

4) *Whether Respondent failed to offer [redacted] a FAPE in the February 10, 2021, March 31, 2022, May 13, 2022, August 29, 2022, October 24, 2022, January 18, 2023, March 20, 2023, and March 29, 2023 IEPs?*

219. As outlined in the Findings of Fact, the IEPs developed by Respondent failed to provide [redacted] a FAPE.

220. None of the IEPs addressed all of [redacted] needs or incorporated relevant information from the private evaluations about how to serve her.

221. The documentary evidence demonstrates [redacted] was not making educational progress academically or functionally, further demonstrating the failure of her IEPs to provide FAPE.

222. As permitted under North Carolina Rule of Evidence 704, two experts opined that Respondent denied [redacted] a free appropriate public education.

223. Based on Respondent's failure to initiate the referral process after a parent referral, failure to evaluate [redacted] failure to find [redacted] eligible, failure to develop appropriate goals, failure to address all of [redacted] areas of need, and failure to provide [redacted] specially designed instruction, the Undersigned concludes Respondent denied [redacted] a free appropriate public education.

224. Based on the Findings of Fact, stipulations, sworn testimony, and other evidence in the record, the Undersigned concludes Respondent substantively denied [redacted] a FAPE. The IEPs Respondent developed were not reasonably calculated to enable [redacted] to make progress appropriate in light of her circumstances.

C. Failure to Implement

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

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

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

demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.").

228. "In deciding if [a] failure [to implement the IEP] was material, '[c]ourts . . . have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.'" *Turner v. D.C.*, 952 F. Supp. 2d 31, 40 (D.D.C. 2013) (citing *Wilson v. D.C.*, 770 F.Supp.2d 270,275(D.D.C. 2011)).

229. However, "the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail on a failure-to-implement claim." *Wilson*, 770 F.Supp.2d at 275 (internal citations omitted) (citing *Van Duyn*, 502 F.3d at 822).

230. "Since proof of harm is not required under these circumstances, it follows that a material deviation from the prescribed IEP is per se harmful under IDEA. (See *Van Duyn*, 502 F.3d at 822). The "crucial measure" under the materiality standard is the "proportion of services mandated to those provided" and not the type of harm suffered by the student…." *Holman,* 153 F. Supp. 3d at 393–94.

231. The only evidence Respondent provided for any of [redacted] services under her IEP was evidence concerning the counseling services which showed that only seventy to eighty percent (70-80%) of the services were provided and there was no evidence of specially designed instruction.

232. Petitioners offered uncontradicted testimony that [redacted] IEPs were not implemented.

233. Respondent offered no evidence that any of [redacted] were implemented.

IV. Remedies:

234. "[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.'" *Florence Cnty. Sch. Dist Four v. Carter*, 510 U.S. 7, 15-16 (1993) (quoting 20 U.S.C. § 1415(e)(2)); 20 U.S.C. § 1415(i)(2)(C)(iii).

235. The IDEA confers "'broad discretion' on the court in fashioning an appropriate remedy." M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd., 553 F.3d 315, 325 (4th Cir. 2009) (quoting *Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1996)).

236. "Courts fashioning discretionary equitable relief under [the] IDEA must consider all relevant factors . . . ." *Carter*, 510 U.S. at 16.

237. "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*, 612F.3d 712, 717 (3d Cir. 2010) (citing *Lester H. v. Gilhool*, 916 F.2d 865, 872(3d Cir. 1990)).

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

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

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

241. "[T]he broad equitable power afforded to hearing officers and courts to remedy IDEA violations counsels against a narrow view of compensatory education as necessarily consisting only of an award of future services." *Reg'l Sch. Unit 51 v. Doe*, 920 F. Supp. 2d 168, 209-10 (D. Me. 2013) (awarding compensatory services in the form of reimbursement for private school tuition already paid) (citing *Draper*, 518 F.3d at 1286 ("We do not read the Act as requiring compensatory awards of prospective education to be inferior to awards of reimbursement.... Although it ordinarily has a structural preference for special education in public schools, the Act does not foreclose a compensatory award of placement in a private school."); *Ferren C. v. School Dist. of Philadelphia*, 595 F.Supp.2d 566, 577 (E.D.Pa.2009), aff'd, 612 F.3d 712 (3d Cir.2010) ("Courts have often awarded compensatory education in the form of tuition reimbursement or an injunction requiring school districts to pay for private school tuition or other services. Compensatory education relief has also, however, taken other shapes. Our Court of Appeals discerned nothing in the text or history suggesting that relief under IDEA is limited *in any way* and concluded that Congress expressly contemplated that the courts would fashion remedies not specifically enumerated in IDEA.") (citation and internal punctuation omitted) (emphasis in original).

242. "If a school district fails to satisfy its 'child-find' duty or to offer the student an appropriate IEP, and if that failure affects the child's education, then the district has necessarily denied the student a free appropriate public education." *Boose*, 786 F.3d at 1056. See also *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006) (explaining denying a student FAPE is actionable when the denial affects their "substantial rights.")

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

244. The ALJ must order the residential placement and not delegate that decision at the discretion of the IEP team as "this would give [the district] undue influence over the decision of whether [the student] is to remain at [the district] or be privately placed at [the residential school]

at [district] expense." *M.S. ex rel. J.S. v. Utah Sch. for Deaf & Blind*, 822 F.3d 1128, 1135 (10th Cir. 2016). See also *Bd. of Educ. of Fayette Cty. v. L.M.*, 478 F.3d 307, 317–18 (6th Cir.2007); *Reid,* 401 F.3d at 521, 526–27.

245. The ALJ's order of residential placement thus changes the student's placement. *S.C. by K.G. v. Lincoln Cnty. Sch. Dist.*, 16 F.4th 587, 593 (9th Cir. 2021). The district or the SEA, or a combination thereof, is responsible for funding the placement. Gadsby, 109 F.3d at 955.

246. The Undersigned heard from two (2) expert witnesses who made explicit recommendations about the supports [redacted] requires to make educational progress, which includes both academic and functional progress. Respondent offered no contradictory expert testimony but rather offered testimony it did not have what [redacted] requires available in its schools.

247. Due to Respondent's inability to provide [redacted] with FAPE, and based upon the experts' recommendations, the Undersigned finds [redacted] requires placement at a therapeutic boarding school that includes the following:

a) Wraparound supports and services for her education;
b) Individual and group therapy;
c) Speech language therapy to address pragmatic deficits;
d) Small class sizes; and
e) Parent integration into the treatment process.

248. [redacted] requires specially designed instruction in the minimum of the following areas:

- explicit instruction of social skills;
- peer support strategies;
- peer-mediated instruction and intervention;
- integrated therapeutic counseling approaches into her academics and emotional regulation strategies integrated throughout her day with support from adults to facilitate that; and
- motivational strategies to support her and encourage her in attempting a task that she perceives is difficult or boring.

249. Due to the deficits caused by Respondent's failure to provide [redacted] the necessary educational and functional services, the Undersigned finds [redacted] needs compensatory services to compensate for her academic loss, to address her lack of social interaction goals, to provide executive functioning support to fully develop the skills she needs to manage her study skills, to transition to independent living, and to transition into the workplace.

250. Dr. Leach did not testify to the length of time [redacted] would require this additional support, and Respondent presented no evidence to contradict [redacted] need for these compensatory services. Therefore, the Undersigned determines such services shall be in place for one (1) calendar year from the time [redacted] is discharged from the therapeutic placement.

251. The Undersigned finds [redacted] is entitled to compensatory services in the form of private academic tutoring to be provided at Respondent's expense for up to five (5) hour per week for one (1) calendar year at Respondent's expense.

252. The Undersigned finds [redacted] is entitled to compensatory services in the form of social skills for two (2) hours per week at Respondent's expense.

253. The Undersigned finds [redacted] is entitled to compensatory services in the area of psychological counseling for one (1) hour per week at Respondent's expense.

254. The Undersigned finds [redacted] in also entitled to compensatory services in the form of executive functioning support for one (1) hour per week at Respondent's expense.

255. All relevant factors have been considered in determining the appropriate relief to award Petitioners for Respondent's procedural and substantive violations of [redacted] right to a free appropriate public education.

FINAL DECISION

BASED upon the foregoing **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Petitioners met their burden of proof, by a preponderance of the evidence.

1. Respondent failed to comply with the procedural and substantive requirements of the IDEA resulting in a denial of FAPE to [redacted] and a denial of any participation in the IEP process to [redacted] or her parents.

2. For the 2017-2018 and 2018-2019 school years, Respondent failed to initiate the referral process, evaluate [redacted] convene an IEP meeting, or notify [redacted] parents of its decision not to evaluate [redacted] Respondent failed to issue a Prior Written Notice of its decision not to evaluate [redacted]

3. The IEPs at issue and discussed in this Final Decision did not offer [redacted] a FAPE.

4. [redacted] requires a therapeutic boarding school to meet her education needs and provide her with FAPE. Respondent has no therapeutic placements for high school students. As such, Respondent shall cover all costs of placement for [redacted] at a therapeutic, residential school to meet her needs consistent with the testimony of Petitioners' experts in this matter.

5. Petitioners will submit applications to three (3) therapeutic, residential schools, looking first for schools in North Carolina, consistent with the provisions their experts deemed necessary for [redacted] to make educational progress. Respondent may also provide suggestions for therapeutic schools to Petitioners, looking first for schools in North Carolina, with the therapeutic and educational components identified by the experts.

6. Respondent will pay for the applications to these three (3) schools selected by Petitioners.

7. Upon [redacted] discharge from the residential therapeutic school, [redacted] is entitled to compensatory services to be provided at Respondent's expense:

- in the form of private academic tutoring to be provided for up to five (5) hours per week for one (1) calendar year;
- in the form of social skills for two (2) hours per week for one (1) calendar year;
- in the area of psychological counseling for one (1) hour per week for one (1) calendar year;
- in the form of executive functioning support for one (1) hour per week for one (1) calendar year.

8. The costs of any of these services incurred by Petitioners within one (1) year of the date of her discharge shall be reimbursed to Petitioners within thirty (30) calendar days upon the presentation of documentation for the receipt of such services.

9. Respondent shall undergo training related to the Child Find mandate of the IDEA, IEP development and implementation, appropriate evaluation techniques, IDEA's continuum of placements, private placements for IDEA eligible students, parental participation in the IEP process particularly for students with mental health concerns, autism spectrum disorders and how those characteristics of autism impact student performance in a school setting, evidence-based practices on addressing the core ranges of autism, and the expectation of school teams to integrate therapeutic approaches into the academic setting.

10. Petitioners are the prevailing party.

11. All relevant factors have been considered in determining the appropriate relief to award Petitioners for Respondent's procedural and substantive violations of [redacted] right to a free appropriate public education.

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 13th day of September, 2023.

Selina Malherbe
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

Stacey M Gahagan
Gahagan Paradis, PLLC
sgahagan@ncgplaw.com
Attorney for Petitioner

K. Alice Morrison
Gahagan Paradis, PLLC
amorrison@ncgplaw.com
Attorney for Petitioner

James G Middlebrooks
Middlebrooks Law PLLC
gil@middlebrooksesq.com
Attorney for Respondent

Teresa Silver King
NC Department of Public Instruction
due_process@dpi.nc.gov
Affiliated Agency

This the 13th day of September, 2023.

V Tsuprenko

Viktoriya Tsuprenko
Paralegal
N. C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 984-236-1850